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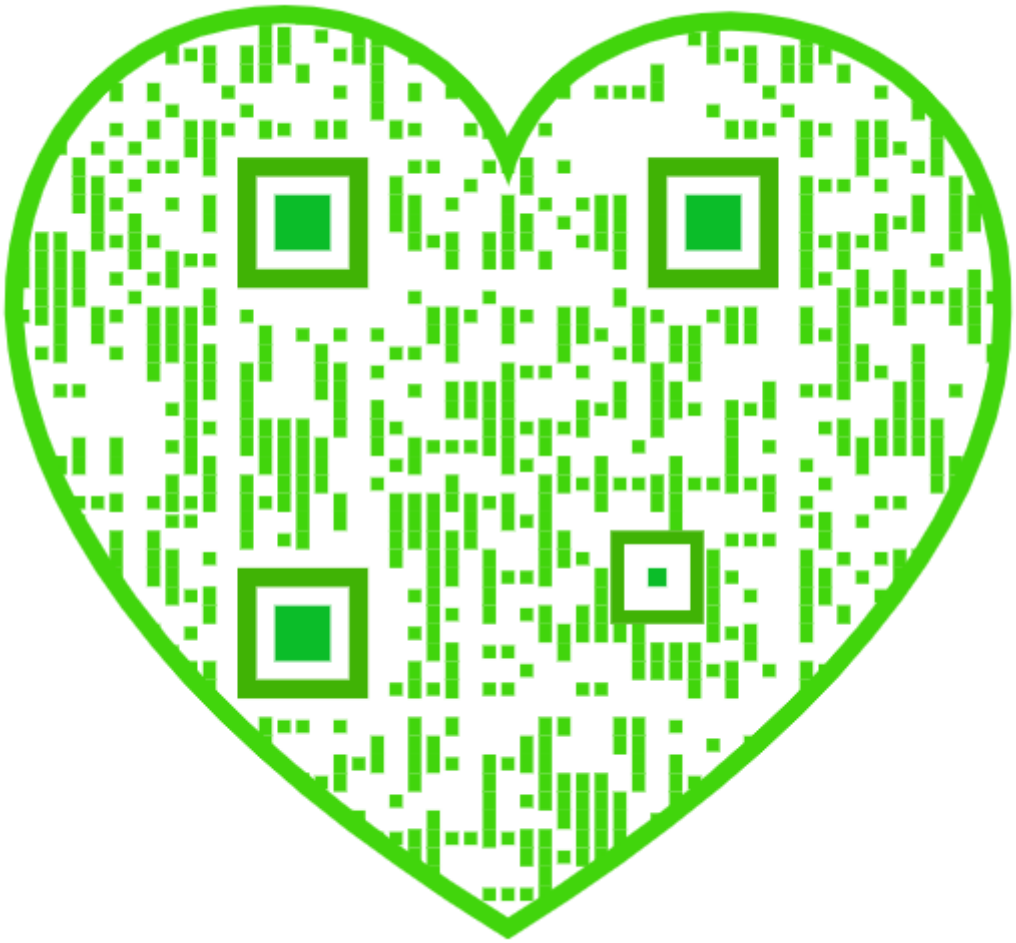

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I. DEFINITION AND CLASSES.

An improvement, or betterment, as it is otherwise known, is an improvement on realty which is more extensive than ordinary repairs, and enhances in a substantial degree the value of the property.[1] Improvements have been divided into three classes: (1) Necessary improvements, or those made to prevent loss or deterioration of the property; (2) beneficial improvements, or those that are not designed to preserve the property, yet enhance its value or rent; (3) voluntary improvements, or those which serve merely for ornament.[2] But when the term "improvements" is used, reference is generally had to those only which are permanent or beneficial.[3]

II. NATURE AND INCIDENTS.

A. Nature and Effect — 1. In General. Improvements for which compensation may be claimed by a *bona fide* occupant of another's property[4] are such only as are made in good faith,[5] and are permanent,[6] and enhance the value

1. See Anderson L. Dict. tit. "Betterment"; Black L. Dict.; Bouvier L. Dict.; Vaughan *v.* Cravens, 1 Head (Tenn.) 108, 73 Am. Dec. 163; U. S. *v.* Budd, 43 Fed. 630; Queen Victoria Niagara Falls Park *v.* Colt, 22 Ont. App. 1.

An "improvement" under the Arkansas land system does not mean a general enhancement of the value of the tract from the occupant's operations. All works which are directed to the creation of homes for families, or which are substantial steps toward bringing lands into cultivation, have, in their results, the specific character of improvements. Simpson *v.* Robinson, 37 Ark. 132.

2. Saunders *v.* Wilson, 19 Tex. 194. See also Jackson *v.* Ludeling, 99 U. S. 513, 25 L. ed. 460.

3. See *infra*, II, A, 1.

4. See *infra*, III.

5. Hunt *v.* Pond, 67 Ga. 578. See *infra*, III, A, 5, b.

6. *Alabama.*— Donehoo *v.* Johnson, 113 Ala. 126, 21 So. 70.

California.— Carpentier *v.* Small, 35 Cal. 346.

Georgia.— Morris *v.* Tinker, 60 Ga. 466.

Illinois.— Cable *v.* Ellis, 120 Ill. 136, 11 N. E. 188.

Kentucky.— Thompson *v.* Buckner, 40 S. W. 915, 19 Ky. L. Rep. 431 (a stand of clover and orchard grass); Leavison *v.* Harris, 14 S. W. 343, 12 Ky. L. Rep. 488.

Louisiana.— George *v.* Delaney, 111 La. 760, 35 So. 894; Baillio *v.* Burney, 3 Rob. 317.

Michigan.— Croskery *v.* Busch, 116 Mich. 288, 74 N. W. 464.

New York.— Woodhull *v.* Rosenthal, 61 N. Y. 382.

Pennsylvania.—Harris *v.* Kelly, 10 Pa. Cas. 185, 13 Atl. 523.

South Dakota.— Parker *v.* Vinson, 11 S. D. 381, 77 N. W. 1023.

Tennessee.— Vaughan *v.* Cravens, 1 Head 108, 73 Am. Dec. 163, where the improvements did not enhance the value of the land.

Texas.— Harkey *v.* Cain, 69 Tex. 146, 6 S. W. 637; Powell *v.* Davis, 19 Tex. 380.

Utah.— Bacon *v.* Thornton, 16 Utah 138, 51 Pac. 153.

Virginia.— Cullop *v.* Leonard, 97 Va. 256, 33 S. E. 611; Effinger *v.* Kenney, 92 Va. 245, 23 S. E. 742.

United States.— Gill *v.* Patten, 10 Fed. Cas. No. 5,428, 1 Cranch C. C. 465; Neff *v.* Pennoyer, 17 Fed. Cas. No. 10,085, 3 Sawy. 495; Stark *v.* Starr, 22 Fed. Cas. No. 13,307, 1 Sawy. 15.

Canada.— Queen Victoria Niagara Falls Park *v.* Colt, 22 Ont. App. 1; Morton *v.* Lewis, 16 U. C. C. P. 485.

See 27 Cent. Dig. tit. "Improvements," § 1. See also EJECTMENT, 15 Cyc. 221.

Permanent improvement defined.— A permanent improvement is something done or put upon the land by the occupant which he cannot remove, either because it has become physically impossible to separate it from the land, or, in contemplation of law, it has been annexed to the soil and become a part of the freehold. Stark *v.* Starr, 22 Fed. Cas. No. 13,307, 1 Sawy. 15.

Particular improvements for which compensation may be claimed.—A sidewalk alongside the property which is necessary or ordered by statute or ordinance (Hentig *v.* Redden, 38 Kan. 496, 16 Pac. 820. But see Stark *v.* Starr, 22 Fed. Cas. No. 13,307, 1 Sawy. 15); a well (Morton *v.* Lewis, 16 U. C. C. P. 485); an apple orchard (Donehoo *v.* Johnson, 113 Ala. 126, 21 So. 70); the erection of a house on the land (Schmidt *v.* Armstrong, 72 Pa. St. 355); the erection of newer and better buildings in the place of old ones (Beers *v.* St. John, 16 Conn. 322; Stevens *v.* Melcher, 152 N. Y. 551, 46 N. E. 965); the erection of fences (Beard *v.* Morancy, 2 La. Ann. 347; Croskery *v.* Busch, 116 Mich. 288, 74 N. W. 464; Morton *v.* Lewis, 16 U. C. C. P. 485. But see Hunt *v.* Pond, 67 Ga. 578; Wood *v.* Krebbs, 33 Gratt. (Va.) 685; Cullop *v.* Leonard, 97 Va. 256, 33 S. E. 611, holding that fences may or may not constitute perma-

of the land for rental purposes or for the other ordinary purposes for which it is used.[7]

2. As Creating Liability For Rents and Profits. Improvements made on property under an honest conviction of ownership do not create a liability for rents and profits due to such improvements.[8]

nent improvements according to their character and purpose. And see Effinger *v.* Kenney, 92 Va. 245, 23 S. E. 742); digging ditches or levees (Beard *v.* Morancy, 2 La. Ann. 347; Jones *v.* Jones, 4 Gill (Md.) 87; Devine *v.* Charles, 71 Mo. App. 210. *Compare* Cullop *v.* Leonard, 97 Va. 256, 33 S. W. 611); an oil well (Phillip *v.* Coast, 130 Pa. St. 572, 18 Atl. 998); clearing land (Beard *v.* Morancy, 2 La. Ann. 347; Pearee *v.* Frantum, 16 La. 414; Croskery *v.* Busch, 116 Mich. 288, 74 N. W. 464. But *compare* Peters *v.* West, 70 Ga. 343; Cullop *v.* Leonard, 97 Va. 256, 33 S. E. 611); clearing brush and removing rocks and stumps from the land (Devine *v.* Charles, 71 Mo. App. 210); raising house and repairing it, rendered necessary because of filling in of adjacent land (Cosgrove *v.* Merz, 19 R. I. 278, 37 Atl. 370); and all valuable improvements not ornamental in their character (Wilson *v.* Williams, 52 Miss. 487). Expense of drainage incurred by way of payment of a drain tax imposed upon the land may be recovered as a part of an occupant's compensation for improvements. Sherman *v.* A. P. Cook Co., 98 Mich. 61, 57 N. W. 23.

Improvements for which compensation cannot be claimed.— Ordinary cultivation or reduction of the soil by use (Hawkins *v.* King, 1 T. B. Mon. (Ky.) 161; Cullop *v.* Leonard, 97 Va. 256, 33 S. E. 611. *Compare* Thompson *v.* Buckner, 40 S. W. 915, 19 Ky. L. Rep. 431, allowing for a stand of clover and meadow-grass as improvements); commercial fertilizer, lime, etc., used on the land (Crummey *v.* Bentley, 114 Ga. 746, 40 S. E. 765; Effinger *v.* Kenney, 92 Va. 245, 23 S. E. 742; Wood *v.* Krebbs, 33 Gratt. (Va.) 685); ordinary repairs to buildings, fences, etc. (Citizens Bank *v.* Miller, 44 La. Ann. 199, 10 So. 779; McKenzie *v.* Bacon, 41 La. Ann. 6, 5 So. 640; Queen Victoria Niagara Falls Park *v.* Colt, 22 Ont. App. 1. *Contra*, Cullop *v.* Leonard, 97 Va. 256, 33 S. E. 611); fences erected for purposes other than improvement (Hunt *v.* Pond, 67 Ga. 578); a church built on the land by popular subscription (Crummey *v.* Bentley, 114 Ga. 746, 40 S. E. 765); money expended in experimenting for profits (Noble *v.* Biddle, 81* Pa. St. 430); disclosure of granite quarry by operations on land (Peabody *v.* Hewett, 52 Me. 33, 83 Am. Dec. 486); improvements which have been destroyed by casualty (Holt *v.* Adams, 121 Ala. 664, 25 So. 716; Nixon *v.* Porter, 38 Miss. 401); or a ferry obtained to be established by the occupying claimant on the land (Fisher *v.* Higgins, 5 T. B. Mon. (Ky.) 140).

In considering the words "valuable and permanent improvements" as used in statutes allowing an evicted occupant to recover therefor, reference must be had to the purposes for which the lands are or may be used. Paequette *v.* Pickness, 19 Wis. 219.

7. *Arkansas.*— Reynolds *v.* Reynolds, 55 Ark. 369, 18 S. W. 377.

California.— Conlan *v.* Sullivan, 110 Cal. 624, 42 Pac. 1081.

Georgia.— Hunt *v.* Pond, 67 Ga. 578; Morris *v.* Tinker, 60 Ga. 466.

Illinois.— Breit *v.* Yeaton, 101 Ill. 242.

Iowa.— Childs *v.* Shower, 18 Iowa 261.

Kentucky.— Clay *v.* Miller, 2 Litt. 279; Leavison *v.* Harris, 14 S. W. 343, 12 Ky. L. Rep. 488, boundary wall out of the true course, thereby damaging the property.

Louisiana.— George *v.* Delaney, 111 La. 760, 35 So. 894; Citizens' Bank *v.* Miller, 44 La. Ann. 199, 10 So. 779.

Michigan.— Petit *v.* Flint, etc., R. Co., 119 Mich. 492, 78 N. W. 554, 75 Am. St. Rep. 417, holding, however, that defendant cannot be denied recovery for improvements on the ground that they are not adapted to the use to which plaintiff asserts it to be his intention to devote the property upon recovering it.

Mississippi.— Nixon *v.* Porter, 38 Miss. 401.

New York.— Woodhull *v.* Rosenthal, 61 N. Y. 382.

North Carolina.— Carolina Cent. R. Co. *v.* McCaskill, 98 N. C. 526, 4 S. E. 468.

Pennsylvania.— Noble *v.* Biddle, 81* Pa. St. 430; Wykoff *v.* Wykoff, 3 Watts & S. 481.

Rhode Island.— Cosgrove *v.* Mertz, (1897) 37 Atl. 704.

Tennessee.— Fisher *v.* Edington, 85 Tenn. 23, 1 S. W. 499.

Texas.— Powell *v.* Davis, 19 Tex. 380.

Utah.— Bacon *v.* Thornton, 16 Utah 138, 51 Pac. 153.

Wisconsin.— Pacquette *v.* Pickness, 19 Wis. 219.

United States.— Neff *v.* Pennoyer, 17 Fed. Cas. No. 10,085, 3 Sawy. 495; Stark *v.* Starr, 22 Fed. Cas. No. 13,307, 1 Sawy. 15. See U. S. *v.* Budd, 43 Fed. 630.

Canada.— Queen Victoria Niagara Falls Park *v.* Colt, 22 Ont. App. 1.

See also cases cited in preceding note; and Ejectment, 15 Cyc. 221.

Unnecessary or merely ornamental improvements should not be allowed for. Whiteledge *v.* Wait, Ky. Dec. 335, 2 Am. Dec. 721.

Structures on railroad right of way.— It has been held that the right of a *bona fide* occupant to recover for buildings and other structures erected on a railroad right of way cannot be defeated on the ground that they are nuisances and not improvements. Rutland R. Co. *v.* Chaffee, 72 Vt. 404, 48 Atl. 700. And see Carolina Cent. R. Co. *v.* McCaskill, 98 N. C. 526, 4 S. E. 468.

8. Scaife *v.* Thomson, 15 S. C. 337. See also *infra*, III, D.

B. Ownership — 1. As Between Occupant and True Owner — a. Improvements Without Owner's Permission — (i) *At Law* — (a) *In General.* At common law, in the absence of a statute, any permanent improvement placed upon the land of another, by one having no interest or title therein, without the owner's consent, *prima facie* becomes a part of the realty and belongs to the owner of the fee, although it was placed thereon by mistake,[9] or with a view of enforcing an adverse right in the land.[10] In some jurisdictions, however, this rule has been changed by statute.[11]

9. *Arkansas.*— Pulaski County *v.* State, 42 Ark. 118.

Connecticut.— Beers *v.* St. John, 16 Conn. 322.

Illinois.— Seiberling *v.* Miller, 207 Ill. 443, 69 N. E. 800 [*affirming* 106 Ill. App. 190]; Williams *v.* Vanderbilt, 145 Ill. 238, 34 N. E. 476, 36 Am. St. Rep. 486, 21 L. R. A. 489; Cable *v.* Ellis, 120 Ill. 136, 11 N. E. 188; Mathes *v.* Dobscheutz, 72 Ill. 438; Dooley *v.* Crist, 25 Ill. 551.

Indiana.— Dutton *v.* Ensley, 21 Ind. App. 46, 51 N. E. 380, 69 Am. St. Rep. 340.

Iowa.— Corwin Dist. Tp. *v.* Moorehead, 45 Iowa 466; Lunquest *v.* Ten Eyck, 40 Iowa 213.

Kentucky.— Barlow *v.* Bell, 1 A. K. Marsh. 246, 10 Am. Dec. 731. But see Darnall *v.* Jones, 72 S. W. 1108, 24 Ky. L. Rep. 2090, holding that where one in good faith, and under belief of title, makes improvements on the land of another, the owner is not entitled to them, whether he seeks a remedy at law or in equity.

Louisiana.— Poche *v.* Theriot, 23 La. Ann. 137; Baldwin *v.* Union Ins. Co., 2 Rob. 137. But see Kibbe *v.* Campbell, 34 La. Ann. 1163, holding that until the owner of the soil elects to keep the improvements the possessor remains the owner thereof.

Maine.— Kingsley *v.* McFarland, 82 Me. 231, 19 Atl. 442, 17 Am. St. Rep. 473; Lapham *v.* Norton, 71 Me. 83; Hinkley, etc., Iron Co. *v.* Black, 70 Me. 473, 35 Am. Rep. 346; Bonney *v.* Foss, 62 Me. 248; Humphreys *v.* Newman, 51 Me. 40; Comings *v.* Stuart, 22 Me. 110.

Massachusetts.— Westgate *v.* Wixon, 128 Mass. 304; Webster *v.* Potter, 105 Mass. 414; Howard *v.* Fessenden, 14 Allen 124; Sudbury First Parish *v.* Jones, 8 Cush. 184; Milton *v.* Colby, 5 Metc. 78; Pierce *v.* Goddard, 22 Pick. 559, 33 Am. Dec. 764; Washburn *v.* Sproat, 16 Mass. 449.

Minnesota.— Brandser *v.* Mjageto, 79 Minn. 457, 82 N. W. 860; Mitchell *v.* Bridgeman, 71 Minn. 360, 74 N. W. 142; Merchants' Nat. Bank *v.* Stanton, 55 Minn. 211, 56 N. W. 821, 43 Am. St. Rep. 491.

Mississippi.— Stillman *v.* Hamer, 7 How. 421.

Nebraska.— Carter *v.* Brown, 35 Nebr. 670, 53 N. W. 580.

New Jersey.— Campbell *v.* Roddy, 44 N. J. Eq. 244, 14 Atl. 279, 6 Am. St. Rep. 889.

New York.— Ritchmyer *v.* Morse, 4 Abb. Dec. 55, 3 Keyes 349, 1 Transcr. App. 355, 5 Abb. Pr. N. S. 44, 37 How. Pr. 338; Smith *v.* Benson, 1 Hill 176.

Ohio.— Preston *v.* Brown, 35 Ohio St. 18.

Pennsylvania.— Harlan *v.* Harlan, 20 Pa. St. 303; Crest *v.* Jack, 3 Watts 238, 27 Am. Dec. 353.

South Carolina.— Lumb *v.* Pinckney, 21 S. C. 471; Caldwell *v.* Eneas, 2 Mill 348, 12 Am. Dec. 681.

Texas.— Bonner *v.* Wiggins, 52 Tex. 125.

Vermont.— Leland *v.* Gassett, 17 Vt. 403.

West Virginia.— Jones *v.* Shufflin, 45 W. Va. 729, 31 S. E. 975, 72 Am. St. Rep. 848.

Wisconsin.— Huebschmann *v.* McHenry, 29 Wis. 655.

Canada.— See Garant *v.* Gagnon, 17 Quebec Super. Ct. 145.

See 27 Cent. Dig. tit. "Improvements," § 2. And see Ejectment, 15 Cyc. 218.

A fence placed upon land by the occupant is part of the realty. Seymour *v.* Watson, 5 Blackf. (Ind.) 555, 36 Am. Dec. 556. See Fences.

Riparian improvements under a statute regulating riparian rights belong to the riparian owner, in front of whose lot they are made. Baltimore *v.* St. Agnes Hospital, 48 Md. 419. See Waters.

The intention of a party at the time he erects a building has been held to fix its character, in the absence of an agreement. If he then intends it to be permanent, it will form a part of the realty. Dooley *v.* Crist, 25 Ill. 551.

Right of forced heirs to improvements.— Under the Indiana statute giving a child's widow the fee in a certain portion of her deceased husband's land, where there are children of the husband by a former marriage, and making such children her forced heirs on her death, such children are entitled to improvements placed on the land by the widow, and the same is true of improvements by a third person in possession under a conveyance by her taken with knowledge of the facts. Bryan *v.* Uland, 101 Ind. 477, 1 N. E. 52.

10. Sudbury First Parish *v.* Jones, 8 Cush. (Mass.) 184; Campbell *v.* Roddy, 44 N. J. Eq. 244, 14 Atl. 279, 6 Am. St. Rep. 889.

11. See Milwaukee, etc., R. Co. *v.* Kellogg, 94 U. S. 469, 24 L. ed. 256, holding that the effect of an Iowa statute, providing that where an occupant of land has color of title thereto and in good faith has made any valuable improvements thereon, and is afterward in a proper action found not to be the rightful owner thereof, he is entitled to payment or credit for the value of his improvements, is to make such occupant practically

(B) *On Adjoining Land.* Where an improvement is made in good faith partly on one's own land and partly on the land of an adjoining owner, without his consent, the latter does not become the owner thereof because it is not entirely on his soil.[12]

(II) *In Equity.* Where, however, the owner has been guilty of some act whereby he has induced or encouraged another to expend money in making improvements on his land, and which would make it a fraud for him to insist upon his legal right, he may be compelled in equity to surrender his title on receiving compensation.[13] But mere silence on the part of the owner will not be sufficient to relieve one who is perfectly acquainted with the rights or has the means of becoming so and yet wilfully insists on spending money in such improvements.[14]

b. Improvements With Owner's Permission. It is now well settled that where an improvement, such as a building, is put upon the land of another, by his permission, under an agreement or understanding that it may be removed at any time, it does not become a part of the real estate, but continues to be personalty, and the property of the person making it; and it is immaterial what is the purpose, size, material, or mode of its construction.[15] And if the improvement is made by the owner's permission, an agreement that it shall remain the property of the person making it is implied in the absence of any other facts or circum-

the owner of his improvements, even though he be not the owner of the land on which they have been made. See also *infra*, III, A, 4.

Under an Arkansas statute the owner of an improvement on land donated by the state is the one who has made it. Worthen *v.* Ratcliffe, 42 Ark. 330; Surginer *v.* Paddock, 31 Ark. 528.

Under the Louisiana statute the owner of the soil has the right to have the buildings removed at the expense of the person who erected them, or to keep them on paying the value of the materials and the price of workmanship; but until this election be made, such works, although subject to the right of acquisition given to the owner of the soil, continue to belong to, and are at the risk of, the party who erected them. Baldwin *v.* Union Ins. Co., 2 Rob. (La.) 133. See also Poche *v.* Theriot, 23 La. Ann. 137.

12. Gordon *v.* Fahrenberg, 26 La. Ann. 366; Matson *v.* Calhoun, 44 Mo. 368; Long *v.* Cude, 75 Tex. 225, 12 S. W. 827. But see Cleveland *v.* Slade, 4 Ohio Dec. (Reprint) 194, 1 Clev. L. Rep. 105, holding that where one erects a building partly on his own land and partly on the property of the person adjoining, without his assent, that portion of the building erected on the adjoining property becomes a part of the soil.

13. Chapman *v.* Chapman, 59 Pa. St. 214; Woods *v.* Wilson, 37 Pa. St. 379; Crest *v.* Jack, 3 Watts (Pa.) 238, 27 Am. Dec. 353; East-India Co. *v.* Vincent, 2 Atk. 83, 26 Eng. Reprint 451. See also *infra*, III, A, 6; and ESTOPPEL, 16 Cyc. 765.

14. Hill *v.* Epley, 31 Pa. St. 331; Knouff *v.* Thompson, 16 Pa. St. 357; Marsh *v.* Weckerly, 13 Pa. St. 252; Crest *v.* Jack, 3 Watts (Pa.) 238, 27 Am. Dec. 353. See also *infra*, III, A, 6; and ESTOPPEL, 16 Cyc. 765.

15. *Connecticut.*— Curtis *v.* Hoyt, 19 Conn. 154, 48 Am. Dec. 149.

Illinois.— Dooley *v.* Crist, 25 Ill. 556.

Iowa.— Fischer *v.* Johnson, 106 Iowa 181, 76 N. W. 658; Mickle *v.* Douglas, 75 Iowa 78, 39 N. W. 198; Melhap *v.* Meinhart, 70 Iowa 685, 28 N. W. 545; Walton *v.* Wray, 54 Iowa 531, 6 N. W. 742; Corwin Dist. Ct. *v.* Moorehead, 43 Iowa 466; Wilgus *v.* Gettings, 21 Iowa 177.

Maine.— Lapham *v.* Norton, 71 Me. 83; Hinkley, etc., Iron Co. *v.* Black, 70 Me. 473, 35 Am. Rep. 346; Pullen *v.* Bell, 40 Me. 314; Fuller *v.* Tabor, 39 Me. 519 (also holding that if made without such permission his subsequent assent that it may remain makes it personalty); Tapley *v.* Smith, 18 Me. 12; Jewett *v.* Partridge, 12 Me. 243, 27 Am. Dec. 173; Osgood *v.* Howard, 6 Me. 452, 20 Am. Dec. 322.

Massachusetts.—Westgate *v.* Wixon, 128 Mass. 304; Webster *v.* Potter, 105 Mass. 414; Howard *v.* Fessenden, 14 Allen 124; Hinckley *v.* Baxter, 13 Allen 139; Curtis *v.* Riddle, 7 Allen 185; Sudbury First Parish *v.* Jones, 8 Cush. 184; Ashmun *v.* Williams, 8 Pick. 402; Doty *v.* Gorham, 5 Pick. 487, 16 Am. Dec. 417; Wells *v.* Banister, 4 Mass. 514.

Minnesota.—Brandser *v.* Mjageto, 79 Minn. 457, 82 N. W. 860; Merchants' Nat. Bank *v.* Stanton, 55 Minn. 211, 56 N. W. 821, 43 Am. St. Rep. 491.

Mississippi.— Stillman *v.* Hamer, 7 How. 421.

New Hampshire.— Dame *v.* Dame, 38 N. H. 429, 75 Am. Dec. 195; Haven *v.* Emery, 33 N. H. 66.

New Jersey.— Campbell *v.* Roddy, 44 N. J. Eq. 244, 14 Atl. 279, 6 Am. St. Rep. 889. See Hartman *v.* Powell, (Ch. 1905) 59 Atl. 628.

New York.— Ombony *v.* Jones, 21 Barb. 520; Godard *v.* Gould, 14 Barb. 662 (machinery); Smith *v.* Benson, 1 Hill 176.

Pennsylvania.— Harlan *v.* Harlan, 20 Pa. St. 303.

stances showing a different intention.[16] But this is not a necessary implication from such permission, and will not be drawn when a different intention is indicated by an express agreement between the parties,[17] or from the interest of the party making the improvement or his relation to the title to the land.[18]

2. As Between Occupant and Third Persons. An actual occupant of lands is entitled to the improvements he has made thereon, as against any one who cannot show a better title.[19] But he cannot claim them as against a *bona fide* purchaser from the owner of the land if he could not have claimed them as against the owner,[20] nor as against a judgment creditor of the owner, of whose judgment he had notice at the time of making the improvements.[21]

C. Right of Removal — 1. In General. If, in accordance with the rules heretofore considered, certain improvements are regarded as personalty or as belonging to the person making them, they may be removed by him;[22] and his right of removal cannot be affected by a recovery of the land by the owner, or his grantee with notice.[23] On the other hand if the improvements, such as buildings, are regarded as part of the realty, they cannot be removed; and if the party making them does remove them he is guilty of a trespass, although they were placed on the land by mistake.[24] It also follows from the above rules that

Vermont.— Leland *v.* Gassett, 17 Vt. 403; Barnes *v.* Barnes, 6 Vt. 388.

See 27 Cent. Dig. tit. "Improvements," § 2. And see, generally, Fixtures, 19 Cyc. 1033.

Corn-cribs resting on stringers, and erected on the land of another under a license to occupy the land for a particular purpose, are personal property. Fischer *v.* Johnson, 106 Iowa 181, 76 N. W. 658.

A sawmill erected on another's land with his consent is personal property and belongs to the builder. Russell *v.* Richards, 11 Me. 371, 26 Am. Dec. 532, 10 Me. 429, 25 Am. Dec. 254.

Infants, however, are incapable of consenting to the making of improvements by a stranger on their real estate, so as to give him or his creditors any interest or claim thereto. Mathes *v.* Dobschuetz, 72 Ill. 438. See, *post,* Infants.

16. Fischer *v.* Johnson, 106 Iowa 181, 76 N. W. 658; Wells *v.* Banister, 4 Mass. 514; Merchants' Nat. Bank *v.* Stanton, 55 Minn. 211, 56 N. W. 821, 43 Am. St. Rep. 491. *Compare,* however, Montgomery County *v.* Bean, 82 S. W. 240, 26 Ky. L. Rep. 568, holding that a house erected on land by a turnpike company under a contract with the owner belongs to the owner of the land upon the reverter of the land to him, if not removed before that time, in the absence of a provision in the contract to the contrary.

Where an executor at the request of another puts improvements on the latter's property under the belief that it belongs to the estate, the value of such improvements may be set up as a charge against the property superior to the claim of such other thereto. Neil *v.* Harris, 121 Ga. 647, 49 S. E. 773.

17. Humphreys *v.* Newman, 51 Me. 40; Howard *v.* Fessenden, 14 Allen (Mass.) 124; Milton *v.* Colby, 5 Metc. (Mass.) 78; Hutchins *v.* Shaw, 6 Cush. (Mass.) 58.

18. Poor *v.* Oakman, 104 Mass. 309; Oakman *v.* Dorchester Mut. F. Ins. Co., 98 Mass. 57; Howard *v.* Fessenden, 14 Allen (Mass.) 124; Murphy *v.* Marland, 8 Cush. (Mass.) 575. As where erected by a reversioner during the intervening term. Cooper *v.* Adams, 6 Cush. (Mass.) 87. See also Mortgages.

19. Adams *v.* Binkley, 4 Colo. 247.

20. Comings *v.* Stuart, 22 Me. 110. And see Dart *v.* Hercules, 57 Ill. 446.

21. Flanary *v.* Kane, 102 Va. 547, 46 S. E. 312, 681. See also Fraudulent Conveyances, 20 Cyc. 368, 396, 641.

22. *California.*— Pennybecker *v.* McDougal, 48 Cal. 160; Collins *v.* Bartlett, 44 Cal. 371.

Illinois.— Dooley *v.* Crist, 25 Ill. 551.

Iowa.— Fischer *v.* Johnson, 106 Iowa 181, 76 N. W. 658.

Mississippi.— Stillman *v.* Hamer, 7 How. 421.

New York.— Smith *v.* Benson, 1 Hill 176.

See also *supra,* II, B, 1, b. And see, generally, Fixtures, 19 Cyc. 1033.

Removal cannot be enjoined. Palfrey *v.* Martin, 3 La. 40.

An improvement that does not enhance the value of the land is personalty and may be removed. Atchison, etc., R. Co. *v.* Morgan, 42 Kan. 23, 21 Pac. 809, 16 Am. St. Rep. 471, 4 L. R. A. 284.

23. Dame *v.* Dame, 38 N. H. 429, 75 Am. Dec. 195.

24. *Connecticut.*— Beers *v.* St. John, 16 Conn. 322.

Illinois.— Dooley *v.* Crist, 25 Ill. 551.

Indiana.— Seymour *v.* Watson, 5 Blackf. 555, 36 Am. Dec. 556, fence.

Maine.— Bonney *v.* Foss, 62 Me. 248.

Massachusetts.— Westgate *v.* Wixon, 123 Mass. 304; Washburn *v.* Sproat, 16 Mass. 449; Sudbury First Parish *v.* Jones, 8 Cush. 184; Milton *v.* Colby, 5 Metc. 78.

Minnesota.—Mitchell *v.* Bridgman, 71 Minn. 360, 72 N. W. 142.

Mississippi.— Stillman *v.* Hamer, 7 How. 421.

South Carolina.— Caldwell *v.* Eneas, 2 Mill 348, 12 Am. Dec. 681.

West Virginia.—Jones *v.* Shufflin, 45 W. Va. 729, 31 S. E. 975, 72 Am. St. Rep. 848

See 27 Cent. Dig. tit. "Improvements," § 3;

one who is a mere trespasser cannot remove improvements made by himself on the land of which he was in wrongful possession.[25]

2. By Agreement. The right of removal may be given by express agreement,[26] or by an agreement implied from circumstances, as from the owner's permission to make them.[27]

3. Of Improvements on Adjoining Land. An occupant who by mistake has made improvements partly on his own land and partly on adjoining land may remove the part so made on adjoining land;[28] and it has been held that the adjoining landowner cannot keep the improvements extending upon his land by paying the costs of construction.[29]

4. Time of Removal — a. In General. If the agreement providing for the removal of improvements fixes the time of removal, it must be complied with in this respect.[30] But where no time is fixed,[31] or where, although it has been fixed, the owner of the land withdraws his consent that they shall remain longer,[32] they may be peaceably removed within a reasonable time. If allowed to remain an unreasonable time, or if the occupant's right to continue them is terminated by his own act, he is liable for damages done by him to the owner of the land in removing them, but not for the value of the improvements.[33]

b. Revocation of Right to Continue Improvement. If the owner of the land conveys his interest to a third person, it operates as a revocation of a license to continue the improvement upon it; but the owner of the improvement will not be affected thereby until notice, actual or constructive, is given to him.[34] And a license to make an improvement cannot be revoked so as to make the owner thereof a trespasser for entering and removing the improvement after the license is revoked.[35]

5. Waiver of Right. A waiver of the right of removal will not be presumed from the mere fact that the owner of the improvement allows it to remain on the land after he had parted with possession.[36]

6. Resisting Removal and Conversion. If, where the person making an improvement has a right to remove it, the owner of the land resists its removal, or otherwise converts it to his own use, he will be liable in trover to the maker of the improvement or his assignee,[37] or an action of replevin will lie for its recov-

and *supra*, II, B, 1, a. See also Fixtures, 19 Cyc. 1033.

A state statute providing for the removal of improvements on lands belonging to the United States applies only to improvements not actually attached to the soil, and is void in so far as it provides for the removal of improvements constituting a part of the realty. Pennybecker *v.* McDougal, 48 Cal. 160; Collins *v.* Bartlett, 44 Cal. 371.

25. Fischer *v.* Johnson, 106 Iowa 181, 76 N. W. 658.

26. Mickle *v.* Douglas, 75 Iowa 78, 39 N. W. 198; Decree *v.* McRee, 83 Miss. 423, 35 So. 940; Dame *v.* Dame, 38 N. H. 429, 75 Am. Dec. 195.

27. Osgood *v.* Howard, 6 Me. 452, 20 Am. Dec. 322; Howard *v.* Fessenden, 14 Allen (Mass.) 124; Hinckley *v.* Baxter, 13 Allen (Mass.) 139; Wells *v.* Banister, 4 Mass. 514. See also *supra*, II, B, 1, b. And see Fixtures, 19 Cyc. 1033.

28. Gordon *v.* Fahrenberg, 26 La. Ann. 366; Matson *v.* Calhoun, 44 Mo. 368; Long *v.* Cude, 75 Tex. 225, 12 S. W. 827, partition fence. But see Cleveland *v.* Slade, 4 Ohio Dec. (Reprint) 194, 1 Clev. L. Rep. 105.

29. Gordon *v.* Fahrenberg, 26 La. Ann. 366.

30. Overton *v.* Williston, 31 Pa. St. 155, holding that the right to remove machinery in a sawmill could not be exercised after the expiration of the time agreed upon.

31. Mickle *v.* Douglas, 75 Iowa 78, 39 N. W. 198; Russell *v.* Richards, 11 Me. 371, 26 Am. Dec. 532, 10 Me. 429, 25 Am. Dec 254; Matson *v.* Calhoun, 44 Mo. 368; Dame *v.* Dame, 38 N. H. 429, 75 Am. Dec. 195.

32. Doty *v.* Gorham, 5 Pick. (Mass.) 487, 16 Am. Dec. 417; Ellis *v.* Paige, 1 Pick. (Mass.) 43; Rising *v.* Stannard, 17 Mass. 282; Dame *v.* Dame, 38 N. H. 429, 75 Am. Dec. 195. See, generally, Fixtures, 19 Cyc. 1033.

33. Dame *v.* Dame, 38 N. H. 429, 75 Am. Dec. 195; Miller *v.* Auburn, etc., R. Co., 6 Hill (N. Y.) 61.

34. Rising *v.* Stannard, 17 Mass. 282; Dame *v.* Dame, 38 N. H. 429, 75 Am. Dec. 195. See, generally, Licenses.

35. Barnes *v.* Barnes, 6 Vt. 388. See, generally, Licenses.

36. Russell *v.* Richards, 11 Me. 371, 26 Am. Dec. 532, holding this to be especially true where the owner makes no objection to its remaining there.

37. *Iowa.*— Mickle *v.* Douglas, 75 Iowa 78, 39 N. W. 198.

ery.[38] But a mere refusal or neglect to deliver it, or to remove it from his premises, upon a demand for that purpose, will not be evidence of a conversion.[39] Likewise if the occupant after eviction enters and removes permanent improvements which he has no right to remove, although made by him, the landowner may maintain replevin therefor.[40]

III. OCCUPANT'S RIGHT TO COMPENSATION.

A. In General — 1. At Common Law. By the rigid rule of the common law, on the principle that a person is under no obligation to pay for unauthorized improvements made on his land, one making such improvements without the owner's knowledge or consent was not entitled to compensation therefor, even though he acted under a *bona fide* belief of ownership.[41] In many jurisdictions, however, this doctrine has been modified, on equitable grounds, by allowing the *bona fide* occupant to set off the value of his permanent improvements, in an action by the owner of the land for rents and profits, to the extent of such rents and profits.[42] This right of set-off is personal to the defendant, and cannot be exercised by the court unless the defendant desires it.[43]

2. Under the Civil Law. Even prior to this it was the rule under the civil law, upon the broad principle of equity that no one ought to enrich himself at the expense of another, that where one made permanent improvements on land in his possession under a *bona fide* belief of ownership he was entitled to full compensation therefor, less a fair compensation for rents and profits during the

Maine.— Hilborne *v.* Brown, 12 Me. 162; Osgood *v.* Howard, 6 Me. 452, 20 Am. Dec. 322.

Mississippi.— Stillman *v.* Hamer, 7 How. 421.

New Hampshire.— Dame *v.* Dame, 38 N. H. 429, 75 Am. Dec. 195.

New York.— Smith *v.* Benson, 1 Hill 176. See Fixtures, 19 Cyc. 1074.

Trover will lie for a sawmill built on another's land with his consent. Russell *v.* Richards, 11 Me. 371, 26 Am. Dec. 532, 10 Me. 429, 25 Am. Dec. 254.

38. Corwin *v.* Moorehead, 43 Iowa 466. See Fixtures, 19 Cyc. 1073.

39. Dame *v.* Dame, 38 N. H. 429, 75 Am. Dec. 195.

40. Huebschmann *v.* McHenry, 29 Wis. 655. See also Fixtures, 19 Cyc. 1073.

41. *Iowa.*— Lunquest *v.* Ten Eyck, 40 Iowa 213; Parsons *v.* Moses, 16 Iowa 440.

Kentucky.— Barlow *v.* Bell, 1 A. K. Marsh. 246, 10 Am. Dec. 731.

Massachusetts.— Russell *v.* Blake, 2 Pick. 505.

Michigan.— See Lemerand *v.* Flint, etc., R. Co., 117 Mich. 309, 75 N. W. 763.

Minnesota.—Wheeler *v.* Merriman, 30 Minn. 372, 15 N. W. 665.

Nebraska.— Carter *v.* Brown, 35 Nebr. 670, 53 N. W. 580.

North Carolina.— See Pitt *v.* Moore, 99 N. C. 85, 5 S. E. 389, 6 Am. St. Rep. 489.

Wisconsin.— Warner *v.* Fountain, 28 Wis. 405.

United States.— Carver *v.* Astor, 4 Pet. 1, 7 L. ed. 761; Green *v.* Biddle, 8 Wheat. 1, 5 L. ed. 547.

See 27 Cent. Dig. tit. "Improvements," § 4; and Ejectment, 15 Cyc. 218.

42. *Alabama.*— Kerr *v.* Nicholas, 88 Ala. 346, 6 So. 698; Lamar *v.* Minter, 13 Ala. 31; Hollinger *v.* Smith, 4 Ala. 367.

Arkansas.— Pulaski County *v.* State, 42 Ark. 118.

Georgia.— Thomas *v.* Malcolm, 39 Ga. 328, 99 Am. Dec. 459.

Indiana.— Wernke *v.* Hazen, 32 Ind. 431.

Iowa.— Parsons *v.* Moses, 16 Iowa 440.

Missouri.— Fenwick *v.* Gill, 38 Mo. 510; Dothage *v.* Stuart, 35 Mo. 251.

Nebraska.— Carter *v.* Brown, 35 Nebr. 670, 53 N. W. 580.

New York.— Jackson *v.* Loomis, 4 Cow. 168, 15 Am. Dec. 347; Murray *v.* Gouverneur, 2 Johns. Cas. 438, 1 Am. Dec. 177; Putnam *v.* Ritchie, 6 Paige 390.

Ohio.— Preston *v.* Brown, 35 Ohio St. 18.

Oregon.— Hatcher *v.* Briggs, 6 Oreg. 31.

Pennsylvania.— Fricke *v.* Safe Deposit, etc., Co., 183 Pa. St. 271, 38 Atl. 601; Putnam *v.* Tyler, 117 Pa. St. 570, 12 Atl. 43; Walker *v.* Humbert, 55 Pa. St. 407; Morrison *v.* Robinson, 31 Pa. St. 456 (holding that in such action defendant may be allowed for improvements made by one whose title he purchased); Muthersbaugh *v.* McCabe, 22 Pa. Super. Ct. 587.

South Carolina.— Harman *v.* Harman, 54 S. C. 100, 31 S. E. 881.

Tennessee.— Avent *v.* Hord, 3 Head 458.

Virginia.— Effinger *v.* Hall, 81 Va. 94.

United States.— Green *v.* Biddle, 8 Wheat. 1, 5 L. ed. 547; Hylton *v.* Brown, 12 Fed. Cas. No. 6,983, 2 Wash. 165.

Canada.— Lindsay *v.* McFarling, Draper (U. C.) 6; Patterson *v.* Reardon, 7 U. C. Q. B. 326.

See 27 Cent. Dig. tit. "Improvements," § 4; and Ejectment, 15 Cyc. 218.

In equity see *infra*, III, A, 3.

43. Carpentier *v.* Gardiner, 29 Cal. 160.

period of his occupancy, before the owner of the property could recover the same.[44]

3. In Equity — a. In Suit by Landowner. Courts of equity, following the civil law rule, held that where an owner of land is required to come into a court of equity to seek relief, as for instance to recover the land or to obtain an accounting for rents and profits, he must make compensation to a *bona fide* occupant for his permanent improvements as a condition to his obtaining the relief sought, on the principle that he who seeks equity must do equity.[45] This right to compensation exists under the principles of equity independent of statutory provisions allowing its assertion in certain actions,[46] although it has been

44. George *v.* Delaney, 111 La. 760, 35 So. 894; Pearce *v.* Frantum, 16 La. 414; Putnam *v.* Ritchie, 6 Paige (N. Y.) 390 [*citing* Inst. Law of Spain 102; Code Napoleon, art. 555; Puffendorf, B, c. 6, § 6; Rutherford Inst. 71; Bell Law of Scot. 130, art. 538]; McCoy *v.* Grandy, 3 Ohio St. 463; Albee *v.* May, 1 Fed. Cas. No. 134, 2 Paine 74; Bright *v.* Boyd, 4 Fed. Cas. No. 1,875, 1 Story 478, 4 Fed. Cas. No. 1,876, 2 Story 605. See Parsons *v.* Moses, 16 Iowa 440, for a review of the above rules.

45. *Alabama.*— Gresham *v.* Ware, 79 Ala. 192; Gordon *v.* Tweedy, 74 Ala. 232, 49 Am. Rep. 813.

Arkansas.— Jones *v.* Johnson, 28 Ark. 211; West *v.* Williams, 15 Ark. 682.

District of Columbia.— Anderson *v.* Reid, 14 App. Cas. 54.

Illinois.— Williams *v.* Vanderbilt, 145 Ill. 238, 34 N. E. 476, 36 Am. St. Rep. 486, 21 L. R. A. 489; Cable *v.* Ellis, 120 Ill. 136, 11 N. E. 188; Ebelmesser *v.* Ebelmesser, 99 Ill. 541.

Indiana.— Troost *v.* Davis, 31 Ind. 34.

Iowa.— Parsons *v.* Moses, 16 Iowa 440.

Kentucky.— Hawkins *v.* Brown, 80 Ky. 186; Sale *v.* Crutchfield, 8 Bush 636; Hall *v.* Brummal, 7 Bush 43; Bell *v.* Barnet, 2 J. J. Marsh. 516; Pugh *v.* Bell, 2 T. B. Mon. 125, 15 Am. Dec. 142; Hawkins *v.* King, 1 T. B. Mon. 161; Parker *v.* Stephens, 3 A. K. Marsh. 197; Whitledge *v.* Wait, Ky. Dec. 335, 2 Am. Dec. 721; Floyd *v.* Mackey, 66 S. W. 518, 23 Ky. L. Rep. 2030.

Maryland.— Evans *v.* Horan, 52 Md. 602; Union Hall Assoc. *v.* Morrison, 39 Md. 281; McLaughlin *v.* Barnum, 31 Md. 425; Tongue *v.* Nutwell, 31 Md. 302; Jones *v.* Jones, 4 Gill 87; Quynn *v.* Staines, 3 Harr. & M. 128.

Minnesota.— Bacon *v.* Cottrell, 13 Minn. 194.

Mississippi.— Cole *v.* Johnson, 53 Miss. 94; Wilie *v.* Brooks, 45 Miss. 542.

Nebraska.— Carter *v.* Brown, 35 Nebr. 670, 53 N. W. 580.

New Jersey.— Foley *v.* Kirk, 33 N. J. Eq. 170; Smith *v.* Drake, 23 N. J. Eq. 302.

New York.— Thomas *v.* Evans, 105 N. Y. 601, 12 N. E. 571, 59 Am. Rep. 519; Miner *v.* Beekman, 50 N. Y. 337.

North Carolina.— Wharton *v.* Moore, 84 N. C. 479, 37 Am. Rep. 627; Winton *v.* Fort, 58 N. C. 251. See Browne *v.* Davis, 109 N. C. 23, 13 S. E. 703; Barker *v.* Owen, 93 N. C. 198.

Ohio.— Bomberger *v.* Turner, 13 Ohio St. 263, 82 Am. Dec. 438.

Oregon.— Hatcher *v.* Briggs, 6 Oreg. 31.

Pennsylvania.— Putnam *v.* Tyler, 117 Pa. St. 570, 12 Atl. 43; Skiles' Appeal, 110 Pa. St. 248, 20 Atl. 722.

South Carolina.— Dellet *v.* Whitner, Cheves Eq. 213; Martin *v.* Evans, 1 Strobh. Eq. 350.

Tennessee.— Howard *v.* Massengale, 13 Lea 577; Aiken *v.* Suttle, 4 Lea 103; Avent *v.* Hord, 3 Head 458; Herring *v.* Pollard, 4 Humphr. 362, 40 Am. Dec. 653; Ridley *v.* McNairy, 2 Humphr. 174; McKinly *v.* Holliday, 10 Yerg. 477; Jones *v.* Perry, 10 Yerg. 59, 30 Am. Dec. 430; Nelson *v.* Allen, 1 Yerg. 360; Townsend *v.* Shipps, Cooke 294.

Texas.— Wood *v.* Cahill, 21 Tex. Civ. App. 38, 50 S. W. 1071; Van Zandt *v.* Brantley, 16 Tex. Civ. App. 420, 42 S. W. 617.

Utah.— Bacon *v.* Thornton, 16 Utah 138, 51 Pac. 153.

Virginia.— Effinger *v.* Hall, 81 Va. 94; Wood *v.* Krebbs, 33 Gratt. 685; Graeme *v.* Cullen, 23 Gratt. 266; Southall *v.* McKeand, 1 Wash. 336.

Wisconsin.— Blodgett *v.* Hitt, 29 Wis. 169.

United States.— Searl *v.* Lake County School Dist. No. 2, 133 U. S. 553, 10 S. Ct. 374, 33 L. ed. 740; Canal Bank *v.* Hudson, 111 U. S. 66, 4 S. Ct. 303, 28 L. ed. 354; Green *v.* Biddle, 8 Wheat. 1, 5 L. ed. 547; Albee *v.* May, 1 Fed. Cas. No. 134, 2 Paine 74; Bright *v.* Boyd, 4 Fed. Cas. No. 1,875, 1 Story 478, 4 Fed. Cas. No. 1,876, 2 Story 605; Kanawha Coal Co. *v.* Kanawha, etc., Coal Co., 14 Fed. Cas. No. 7,606, 7 Blatchf. 391; Utterbach *v.* Binns, 28 Fed. Cas. No. 16,809, 1 McLean 242.

England.— Robinson *v.* Ridley, 6 Madd. 2; Atty.-Gen. *v.* Baliol College, 9 Mod. 407.

Canada.— Stuart *v.* Eaton, 8 L. C. Rep. 113; Lawrence *v.* Stuart, 6 L. C. Rep. 294.

See 27 Cent. Dig. tit. "Improvements," § 4; and Ejectment, 15 Cyc. 218, 219.

The title and right to possession must be determined before equity can allow for improvements. Foley *v.* Kirk, 33 N. J. Eq. 170.

46. Parker *v.* Stephens, 3 A. K. Marsh. (Ky.) 197 (holding that, although an occupant of land, honestly believing it to be his own, but in fact having no record title, is not entitled to compensation for improvements under the occupying claimant law, he is entitled to compensation therefor in equity, accounting at the same time for any deterioration); Long *v.* Cude, 75 Tex. 225, 12 S. W.

held that if no claim is made for rents and profits, no allowance can be made for improvements.[47]

b. In Suit by Occupant. Although there are some cases to the contrary,[48] this doctrine has not generally been extended to giving the occupant the right to recover the value of his improvements after eviction by a direct affirmative suit against the owner of the property, although he made them innocently or through mistake;[49] or to file a cross bill or complaint in the nature of a cross bill to enforce his claim when he is sued at law for possession,[50] unless the owner of the land has been guilty of fraud, or of acquiescence after knowledge of his legal rights,[51] or unless the parties have agreed upon compensation for the improvements.[52]

4. Under Statutory Provisions — a. In General. In many jurisdictions statutes generally known as "betterment acts," or as "occupying claimant laws," have been passed enlarging the rights of *bona fide* possessors with respect to improvements.[53] It is generally the object of these laws to recognize the existence of the equitable right to compensation for improvements and to give a legal remedy for its enforcement where none existed before;[54] and it has been held that as they are in derogation of the common law, they must be strictly construed,[55] and the remedy provided thereby strictly followed.[56] These laws generally follow the civil law rule, and compel the owner of the land to pay to the *bona fide* occupant the amount due for improvements over and above the value of rents and profits during the period of occupancy, as a condition to his recovery

827; Eberling *v.* Deutscher Verein, 72 Tex. 339, 12 S. W. 205; Harrell *v.* Houston, 66 Tex. 278, 17 S. W. 731; Patrick *v.* Reach, 21 Tex. 251; Wood *v.* Cahill, 21 Tex. Civ. App. 38, 50 S. W. 1071; Van Zandt *v.* Brantley, 16 Tex. Civ. App. 420, 42 S. W. 617.

47. Green *v.* Biddle, 8 Wheat. (U. S.) 1, 5 L. ed. 547.

In a suit to avoid the sale of lands, no allowance can be made on account of improvements where there is no claim for rents and profits. Aiken *v.* Suttle, 4 Lea (Tenn.) 103.

48. *Kentucky.*— Thomas *v.* Thomas, 16 B. Mon. 420; James *v.* McKinsey, 4 J. J. Marsh. 625; Parker *v.* Stephens, 3 A. K. Marsh. 197; Barlow *v.* Bell, 1 A. K. Marsh. 246, 10 Am. Dec. 731.

Maryland.— Union Hall Assoc. *v.* Morrison, 39 Md. 281.

Missouri.— Valle *v.* Fleming, 29 Mo. 152, 77 Am. Dec. 557. See Russell *v.* Defrance, 39 Mo. 506.

Oregon.— Hatcher *v.* Briggs, 6 Oreg. 31.

Tennessee.— Herring *v.* Pollard, 4 Humphr. 362, 40 Am. Dec. 653; Ridley *v.* McNairy, 2 Humphr. 174.

Wisconsin.— Blodgett *v.* Hitt, 29 Wis. 169.

United States.— Bright *v.* Boyd, 4 Fed. Cas. No. 1,875, 1 Story 478, 4 Fed. Cas. No. 1,876, 2 Story 605.

49. *Alabama.*— Ellett *v.* Wade, 47 Ala. 456.

District of Columbia.— Anderson *v.* Reid, 14 App. Cas. 54.

Illinois.— Williams *v.* Vanderbilt, 145 Ill. 238, 34 N. E. 476, 36 Am. St. Rep. 486, 21 L. R. A. 489; Ebelmesser *v.* Ebelmesser, 99 Ill. 541.

Mississippi.— Moody *v.* Harper, 38 Miss. 599. See Gaines *v.* Kennedy, 53 Miss. 103.

New York.— Putnam *v.* Ritchie, 6 Paige 390.

Ohio.— Shroll *v.* Klinker, 15 Ohio 152; Winthrop *v.* Huntington, 3 Ohio 327, 17 Am. Dec. 601.

Pennsylvania.— Fricke *v.* Safe Deposit, etc., Co., 183 Pa. St. 271, 38 Atl. 601.

South Carolina.— Dellet *v.* Whitner, Cheves Eq. 213.

Virginia.— Graeme *v.* Cullen, 23 Gratt. 266; Morris *v.* Terrell, 2 Rand. 6.

United States.— Williams *v.* Gibbes, 20 How. 535, 15 L. ed. 1013.

50. Hatcher *v.* Briggs, 6 Oreg. 31.

51. *Alabama.*— Ellett *v.* Wade, 47 Ala. 456.

District of Columbia.— Anderson *v.* Reid, 14 App. Cas. 54.

Maryland.— Union Hall Assoc. *v.* Morrison, 39 Md. 281.

New Jersey.— McKelway *v.* Armour, 10 N. J. Eq. 115, 64 Am. Dec. 445.

New York.— Putnam *v.* Ritchie, 6 Paige 390.

Texas.— See Paris, etc., R. Co. *v.* Greiner, 84 Tex. 443, 19 S. W. 564.

Virginia.— Morris *v.* Terrell, 2 Rand. 6.

52. See Watson *v.* Ketchum, 3 Can. L. T. 37, 2 Ont. 237; Pegley *v.* Woods, 14 Grant Ch. (U. C.) 47.

53. See the statutes of the various states and the cases in the following notes. See also Ejectment, 15 Cyc. 219.

Constitutionality of these acts see Constitutional Law, 8 Cyc. 896.

54. Dothage *v.* Stuart, 35 Mo. 251; Hall *v.* Boatwright, 58 S. C. 544, 36 S. E. 1001, 79 Am. St. Rep. 864; Tumbleston *v.* Rumph, 43 S. C. 275, 21 S. E. 84.

55. McCoy *v.* Grandy, 3 Ohio St. 463; Van Valkenburg *v.* Ruby, 68 Tex. 139, 3 S. W. 746; Hollingsworth *v.* Funkhouser, 85 Va. 448, 8 S. E. 592. See also Ejectment, 15 Cyc. 220.

56. Huebschmann *v.* McHenry, 29 Wis. 655.

of, or entry on, the land;[57] or as a condition to his recovery in a suit against the occupant for removing the improvements.[58]

b. Direct Proceedings by Occupant. In some states these acts give the evicted occupant the right to recover for improvements in a direct affirmative proceeding against the owner, and do not limit the amount of recovery to the value of rents and profits.[59] But the occupying claimant cannot relitigate his title in such action.[60]

c. Time of Recovery. The right of an occupying claimant to recover the

57. *Arkansas.*— White *v.* Stokes, 67 Ark. 184, 53 S. W. 1060; Worthen *v.* Ratcliffe, 42 Ark. 330, holding that the owner of an improvement on donated land has a vested right to be paid therefor.

Connecticut.— Griswold *v.* Bragg, 48 Conn. 577.

Kansas.— Stephens *v.* Ballou, 27 Kan. 594; Claypoole *v.* King, 21 Kan. 602. And see Mercer *v.* Justice, 63 Kan. 225, 65 Pac. 219.

Kentucky.— Counts *v.* Kitchen, 87 Ky. 47, 7 S. W. 538, 9 Ky. L. Rep. 909; Fairbairn *v.* Means, 4 Metc. 323; Wintersmith *v.* Price, 66 S. W. 2, 23 Ky. L. Rep. 2005.

Michigan.— Cleland *v.* Clark, 123 Mich. 179, 81 N. W. 1086, 81 Am. St. Rep. 161; Lemerand *v.* Flint, etc., R. Co., 117 Mich. 309, 75 N. W. 763.

Minnesota.— Hall *v.* Torrens, 32 Minn. 527, 21 N. W. 717; Wheeler *v.* Merriman, 30 Minn. 372, 15 N. W. 665.

Nebraska.— Page *v.* Davis, 26 Nebr. 670, 42 N. W. 875; Dworak *v.* More, 25 Nebr. 735, 41 N. W. 777, 25 Nebr. 741, 41 N. W. 778.

New Hampshire.— A statute in this state that the demandant must pay the value of the improvements before he can have possession seems to countenance neither the idea of a release of an action of trespass, nor a set-off in any way against the mesne profits. Bailey *v.* Hastings, 15 N. H. 525; Withington *v.* Corey, 2 N. H. 115.

North Carolina.— See Barker *v.* Owen, 93 N. C. 198.

Ohio.— Preston *v.* Brown, 35 Ohio St. 18; McCoy *v.* Grandy, 3 Ohio St. 463; Hunt *v.* McMahan, 5 Ohio 132; Dakin *v.* Lecklider, 19 Ohio Cir. Ct. 254, 10 Ohio Cir. Dec. 308.

South Carolina.— Hall *v.* Boatwright, 58 S. C. 544, 36 S. E. 1001, 79 Am. St. Rep. 864; Tumbleston *v.* Rumph, 43 S. C. 275, 21 S. E. 84; Aultman *v.* Utsey, 41 S. C. 304, 19 S. E. 617; Lessly *v.* Bowie, 27 S. C. 193, 3 S. E. 199.

South Dakota.— Wood *v.* Conrad, 2 S. D. 334, 50 N. W. 95.

Tennessee.— McKinley *v.* Holliday, 10 Yerg. 477; Jones *v.* Perry, 10 Yerg. 59, 30 Am. Dec. 430.

Texas.— Long *v.* Cude, 75 Tex. 225, 12 S. W. 827; Van Valkenburg *v.* Ruby, 68 Tex. 139, 3 S. W. 746; Dorn *v.* Dunham, 24 Tex. 366; Saunders *v.* Wilson, 19 Tex. 194; Scott *v.* Mather, 14 Tex. 235.

Vermont.— Brown *v.* Storm, 4 Vt. 37.

Virginia.— Hollingsworth *v.* Funkhouser, 85 Va. 448, 8 S. E. 592; Graeme *v.* Cullen, 23 Gratt. 266.

United States.— Milwaukee, etc., R. Co. *v.* Kellogg, 94 U. S. 469, 24 L. ed. 256; Dunn *v.* Games, 8 Fed. Cas. No. 4,177, 2 McLean 344.

58. Long *v.* Cude, 75 Tex. 225, 12 S. W. 827.

59. *Indiana.*— Wernke *v.* Hazen, 32 Ind. 431; Chesround *v.* Cunningham, 3 Blackf. 82.

Iowa.— Lunquest *v.* Ten Eyck, 40 Iowa 213; Parsons *v.* Moses, 16 Iowa 440; Craton *v.* Wright, 16 Iowa 133; Webster *v.* Stewart, 6 Iowa 401. See Dungan *v.* Von Puhl, 8 Iowa 263.

Missouri.— Cox *v.* McDivit, 125 Mo. 358, 28 S. W. 597; Brown *v.* Baldwin, 121 Mo. 106, 25 S. W. 858; Dothage *v.* Stuart, 35 Mo. 251; Stump *v.* Hornbeck, 15 Mo. App. 367.

Nebraska.— Page *v.* Davis, 26 Nebr. 670, 42 N. W. 875, holding that while the intention of the law is that compensation shall be made for improvements before a writ of restitution will be issued, yet where the application was properly filed, and an amended application made within six months afterward, it will not debar a party from recovering.

North Carolina.— Boyer *v.* Garner, 116 N. C. 125, 21 S. E. 180; Barker *v.* Owen, 93 N. C. 198; Condry *v.* Cheshire, 88 N. C. 375.

South Carolina.— Salinas *v.* Aultman, 45 S. C. 283, 22 S. E. 889; Tumbleston *v.* Rumph, 43 S. C. 275, 21 S. E. 84; Aultman *v.* Utsey, 41 S. C. 304, 19 S. E. 617; McKnight *v.* Cooper, 27 S. C. 92, 2 S. E. 842; Templeton *v.* Lowry, 22 S. C. 389; Godfrey *v.* Fielding, 21 S. C. 313; Garrison *v.* Dougherty, 18 S. C. 486.

Vermont.— Whitney *v.* Richardson, 31 Vt. 300.

West Virginia.— Williamson *v.* Jones, 43 W. Va. 562, 27 S. E. 411, 64 Am. St. Rep. 891, 38 L. R. A. 694.

Wisconsin.— Dorer *v.* Hood, 113 Wis. 607, 88 N. W. 1009; Oberich *v.* Gilman, 31 Wis. 495; Huebschmann *v.* McHenry, 29 Wis. 655; Pacquette *v.* Pickness, 19 Wis. 219.

Settlers on what were known as the Des Moines river lands in Iowa were entitled to the benefits given by the statute to occupying claimants where they had made valuable improvements on lands of which they were afterward adjudged not to be the rightful owners. Litchfield *v.* Johnson, 15 Fed. Cas. No. 8,387, 4 Dill. 551.

60. Brown *v.* Baldwin, 121 Mo. 106, 25 S. W. 858.

value of permanent improvements made under color of title is not governed as to time of recovery by a limitation upon the right of the owner of the land to recover for the value of rents and profits.[61]

d. Validity and Extent of Occupant's Claim. The existence and validity of the occupant's claim under such statutes, although subject to the statute, viewed in the light of the general principles of equity, must be tested by the statute.[62] It is not generally dependent upon the claim for rents and profits or limited to cases where rent is claimed or compensation for the use and occupation is allowed;[63] nor is it dependent upon estoppel of the owner of the fee.[64] It extends to improvements made in good faith before the occupant's color of title commences as well as those made after;[65] and to improvements made by himself and those under whom he claims.[66]

e. Assignment of Claim. The claim of an occupying claimant for improvements, made under color of title, is a subject of sale and transfer, and the assignee takes all the rights of the assignor.[67]

f. Survival of Right to Compensation. A person's statutory right to compensation for improvements put on land survives to his heir or personal representative.[68] Payment therefor may be received by the deceased's administrator in trust for his creditors and heirs.[69]

g. Retroactive Operation of Statutes. It is generally held that the occupying claimant or betterment acts may operate retrospectively without being unconstitutional as impairing contracts or disturbing vested rights.[70] But they cannot affect suits begun before their passage.[71]

5. Essentials to the Right — a. In General. As a general rule in order that one may recover compensation for improvements made on another's land, it is

61. Parsons *v.* Moses, 16 Iowa 440.

62. Craton *v.* Wright, 16 Iowa 133. See also Lunquest *v.* Ten Eyck, 40 Iowa 213; King *v.* Harrington, 18 Mich. 213; Wheeler *v.* Merriman, 30 Minn. 372, 15 N. W. 665; Finch *v.* Strickland, 132 N. C. 103, 43 S. E. 552.

In Kentucky, where one in good faith, and under belief of title, makes improvements on the land of another, he cannot recover therefor under the occupying claimant's statute, if he cannot trace his title back to the commonwealth. Fairbairn *v.* Means, 4 Metc. 323; Darnall *v.* Jones, 72 S. W. 1108, 24 Ky. L. Rep. 2090; Wintersmith *v.* Price, 66 S. W. 2, 23 Ky. L. Rep. 2005. An occupant holding under those claiming under a sheriff's deed is not an occupying claimant within the meaning of the Kentucky statute. Fairbairn *v.* Means, *supra.*

63. Dakin *v.* Lecklider, 19 Ohio Cir. Ct. 254, 10 Ohio Cir. Dec. 308; Dorn *v.* Dunham, 24 Tex. 366; Saunders *v.* Wilson, 19 Tex. 194; Scott *v.* Mather, 14 Tex. 235. But see Aiken *v.* Suttle, 4 Lea (Tenn.) 103; Green *v.* Biddle, 8 Wheat. (U. S.) 1, 5 L. ed. 547.

Under the Illinois statute, the occupying claimant, under a plain, clear, and connected title in law or equity, without actual notice of a paramount title, is exempted from liability for rents and profits, and may recover compensation for permanent improvements made prior to such actual notice. Ross *v.* Irving, 14 Ill. 171.

64. Dakin *v.* Lecklider, 19 Ohio Cir. Ct. 254, 10 Ohio Cir. Dec. 308.

65. Davis *v.* Powell, 13 Ohio 308.

66. Whitney *v.* Richardson, 31 Vt. 300.

In South Carolina, by statute, if the party making the improvements brings a direct action for recovery of compensation therefor, he may recover for improvements made either by himself or by those under whom he claims; but where he seeks to recover such compensation as a defense in an action for the recovery of the land, he can recover only for such improvements as were made by himself. Aultman *v.* Utsey, 41 S. C. 304, 19 S. E. 617; Gadsden *v.* Desportes, 39 S. C. 131, 17 S. E. 706; McKnight *v.* Cooper, 27 S. C. 92, 2 S. E. 842.

67. Parsons *v.* Moses, 16 Iowa 440; Craton *v.* Wright, 16 Iowa 133. See Ejectment, 16 Cyc. 221.

A grantee is an assignee within the meaning of such a statute. Childs *v.* Shower, 18 Iowa 261.

If the assignor could not recover, neither can his assignee. Curd *v.* Harman, 5 Litt. (Ky.) 20; Hart *v.* Bodley, Hard. (Ky.) 98.

68. Surginer *v.* Paddock, 31 Ark. 528; Hamilton *v.* Hamilton, 5 Litt. (Ky.) 28; Stump *v.* Hornbeck, 15 Mo. App. 367. See also Abatement and Revival, 1 Cyc. 47 *et seq.*; Descent and Distribution, 14 Cyc. 102 *et seq.*; Ejectment, 15 Cyc. 220.

69. Surginer *v.* Paddock, 31 Ark. 528.

70. Beard *v.* Dansby, 48 Ark. 183, 2 S. W. 701; Fee *v.* Cowdry, 45 Ark. 410, 55 Am. Rep. 560; Claypoole *v.* King, 21 Kan. 602; Whitney *v.* Richardson, 31 Vt. 300. *Contra,* Boyce *v.* Holmes, 2 Ala. 54. See also Constitutional Law, 8 Cyc. 896.

71. Whitledge *v.* Wait, Ky. Dec. 335, 2 Am. Dec. 721.

necessary that he shall have made such improvements in good faith while in *bona fide* adverse possession of the land under color of title.[72] It is also necessary that the improvements be permanent and beneficial to the owner of the land;[73] and that they be retained by him.[74]

b. Good Faith — (1) *Necessity For Good Faith.* It is generally necessary that the occupant shall have been a possessor in good faith and shall have made the improvements in good faith, believing his title to be a legal one. An occupant who holds in bad faith is not entitled to any compensation for improvements, in the absence of statute allowing it,[75] or of some act of estoppel on the

72. *Alabama.*— Gresham *v.* Ware, 79 Ala. 192.

Arkansas.— White *v.* Stokes, 67 Ark. 184, 53 S. W. 1060.

California.— Love *v.* Shartzer, 31 Cal. 487; Bay *v.* Pope, 18 Cal. 694.

Illinois.— Cable *v.* Ellis, 120 Ill. 136, 11 N. E. 188.

Kentucky.— Barlow *v.* Bell, 1 A. K. Marsh. 246, 10 Am. Dec. 731.

Minnesota.— Wheeler *v.* Merriman, 30 Minn. 372, 15 N. W. 665.

Ohio.— Glick *v.* Gregg, 19 Ohio 57.

South Dakota.— Seymour *v.* Cleveland, 9 S. D. 94, 68 N. W. 171.

Texas.— Elam *v.* Parkhill, 60 Tex. 581.

United States.— Griswold *v.* Bragg, 6 Fed. 342, 19 Blatchf. 94; Field *v.* Columbet, 9 Fed. Cas. No. 4,764, 4 Sawy. 523; Neff *v.* Pennoyer, 17 Fed. Cas. No. 10,085, 3 Sawy. 495; Stark *v.* Starr, 22 Fed. Cas. No. 13,307, 1 Sawy. 15.

See 27 Cent. Dig. tit. "Improvements," § 7; and cases more specifically cited hereafter.

73. See *supra*, II, A, 1.

74. Citizens' Bank *v.* Maureau, 37 La. Ann. 857; Kibbe *v.* Campbell, 34 La. Ann. 1163.

75. *Alabama.*— New Orleans, etc., R. Co. *v.* Jones, 68 Ala. 48; Gunn *v.* Brantley, 21 Ala. 633; Montgomery Branch Bank *v.* Curry, 13 Ala. 304.

Arkansas.— Penrose *v.* Doherty, 70 Ark. 256, 67 S. W. 398; White *v.* Stokes, 67 Ark. 184, 53 S. W. 1060; Beard *v.* Dansby, 48 Ark. 183, 2 S. W. 701.

District of Columbia.— Beckett *v.* Tyler, 3 MacArthur 319.

Illinois.— Breit *v.* Yeaton, 101 Ill. 242; McConnel *v.* Holobush, 11 Ill. 61.

Iowa.— Stinson *v.* Richardson, 44 Iowa 373; Lunquest *v.* Ten Eyck, 40 Iowa 213.

Kentucky.— Myers *v.* Sanders, 8 Dana 65 (trespasser); Bell *v.* Barnet, 2 J. J. Marsh. 516 (holding that such possessor cannot recover for improvements unless they increase the vendible value of the land); Pugh *v.* Bell, 2 T. B. Mon. 125, 15 Am. Dec. 142; Hamilton *v.* Hamilton, 5 Litt. 28 (holding a father liable for improvements made in good faith by a son on land donated to him by his father, and then taken from him); Barlow *v.* Bell, 1 A. K. Marsh. 246, 10 Am. Dec. 731; Patrick *v.* Marshall, 2 Bibb 40, 4 Am. Dec. 670; Wade *v.* Keown, 78 S. W. 900, 25 Ky. L. Rep. 1787; Stamper *v.* Bradley, 53 S. W. 16, 21 Ky. L. Rep. 806. But *compare* Fairbairn *v.* Means, 4 Metc. 323.

Louisiana.— Voiers *v.* Atkins, 113 La. 303, 36 So. 974; Stille *v.* Shull, 41 La. Ann. 816, 6 So. 634; Kibbe *v.* Campbell, 34 La. Ann. 1163; Howard *v.* Zeyer, 18 La. Ann. 407; Cannon *v.* White, 16 La. Ann. 85; Davis *v.* Wilcoxon, 10 La. Ann. 640; Stanbrough *v.* Barnes, 2 La. Ann. 376; Williams *v.* Booker, 12 Rob. 256 (where their value does not exceed that of the fruits and revenues received by him); Lowry *v.* Erwin, 6 Rob. 192, 39 Am. Dec. 556; Baldwin *v.* Union Ins. Co., 2 Rob. 133. See Vicksburg, etc., R. Co. *v.* Elmore, 46 La. Ann. 1237, 15 So. 701. But see Pearce *v.* Frantum, 16 La. 414.

Maryland.— Long *v.* Long, 62 Md. 33; Strike's Case, 1 Bland 57; Gambril *v.* Gambril, 3 Md. Ch. 259.

Michigan.— Miller *v.* Clark, 56 Mich. 337, 23 N. W. 35.

Minnesota.— Wheeler *v.* Merriman, 30 Minn. 372, 15 N. W. 665.

Missouri.— Dothage *v.* Stuart, 35 Mo. 251.

Nebraska.— Carter *v.* Brown, 35 Nebr. 670, 53 N. W. 580.

New Hampshire.— Wendell *v.* Moulton, 26 N. H. 41.

New Jersey.— Baldwin *v.* Richman, 9 N. J. Eq. 394.

New York.— Frear *v.* Hardenbergh, 5 Johns. 272, 4 Am. Dec. 356.

Ohio.— Bomberger *v.* Turner, 13 Ohio St. 263, 82 Am. Dec. 438; Glick *v.* Gregg, 19 Ohio 57.

Pennsylvania.— Morrison *v.* Robinson, 31 Pa. St. 456.

South Carolina.— Tumbleston *v.* Rumph, 43 S. C. 275, 21 S. E. 84.

Tennessee.— Fisher *v.* Edington, 12 Lea 189; McKinly *v.* Holliday, 10 Yerg. 477.

Texas.— House *v.* Stone, 64 Tex. 677; Johnson *v.* Bryan, 62 Tex. 623; Elam *v.* Parkhill, 60 Tex. 581; Pilcher *v.* Kirk, 60 Tex. 162; Nesbitt *v.* Walters, 38 Tex. 576; Eckhardt *v.* Schlecht, 29 Tex. 129; Saunders *v.* Wilson, 19 Tex. 194; Ferguson *v.* Cochran, (Civ. App. 1898) 45 S. W. 30.

Vermont.— Thompson *v.* Gilman, 17 Vt. 109.

Virginia.— Burton *v.* Mill, 78 Va. 468; McKim *v.* Moody, 1 Rand. 58.

Washington.— Brygger *v.* Schweitzer, 5 Wash. 564, 32 Pac. 462, 33 Pac. 338.

West Virginia.— Holsberry *v.* Harris, 56 W. Va. 320, 49 S. E. 404; Dawson *v.* Grow, 29 W. Va. 333, 1 S. E. 564.

Wisconsin.— Hadley *v.* Stewart, 65 Wis. 481, 27 N. W. 340; Thompson *v.* Thompson, 16 Wis. 91; Waterman *v.* Dutton, 6 Wis. 265.

part of the owner of the land,[76] unless the improvements were necessary to protect the property.[77]

(II) *Sufficiency of Good Faith*—(A) *In General.* Good faith, within the meaning of this rule, is an honest belief by the occupant in his right or title and ignorance that any other has or claims a better right or title.[78]

(B) *Mistake as to Boundary or Location.* One making improvements on

Canada.— McGregor *v.* McGregor, 27 Grant Ch. (U. C.) 470; Fawcett *v.* Burwell, 27 Grant Ch. (U. C.) 445; Lane *v.* Deloges, 1 L. C. Jur. 3.

See 27 Cent. Dig. tit. "Improvements," §§ 7, 18; and Ejectment, 15 Cyc. 229.

Compare Nunn *v.* Burger, 76 Ga. 705; Beverly *v.* Burke, 9 Ga. 440, 54 Am. Dec. 351.

The sole test of the right of an evicted occupant to recover for betterments is the fact that he (and those under whom he claims, so far as improvements by them are concerned) purchased, supposing that they thereby obtained a good title in fee, and this right does not depend upon the nature or kind of title which the real owner may have, nor upon his having had a right to the immediate possession at the time the betterments were made, nor upon his negligence in asserting title. Whitney *v.* Richardson, 31 Vt. 300.

The grantee of an occupant of land in bad faith can have no better right than his grantor had to an equitable lien for improvements erected on the land before eviction. Armstrong *v.* Ashley, 22 App. Cas. (D. C.) 368.

76. Dawson *v.* Grow, 29 W. Va. 333, 1 S. E. 564. See *infra*, III, A, 6.

A possessor in bad faith, who has made valuable improvements, is entitled to compensation therefor if the true owner delays without excuse for eight years to attack his possession, during which time the improvements were made. Grider *v.* Driver, 46 Ark. 109.

77. Saunders *v.* Wilson, 19 Tex. 194.

Under the code of Louisiana a possessor in bad faith may nevertheless be compensated for necessary repairs. Cannon *v.* White, 16 La. Ann. 85; Jackson *v.* Ludeling, 99 U. S. 513, 25 L. ed. 460. A possessor in bad faith is entitled upon being dispossessed to the reimbursement of necessary expenses for the preservation of the property and to an adjustment of his claims for constructions and improvements. Voiers *v.* Atkins, 113 La. 303, 36 So. 974; Green *v.* Moore, 44 La. Ann. 855, 11 So. 223.

78. *Alabama.*— Holt *v.* Adams, 121 Ala. 664, 25 So. 716; Gresham *v.* Ware, 79 Ala. 192.

Arkansas.— Teaver *v.* Akin, 47 Ark. 528, 1 S. W. 772.

Louisiana.— Gibson *v.* Hutchins, 12 La. Ann. 545, 68 Am. Dec. 772; Lowry *v.* Erwin, 6 Rob. 192, 39 Am. Dec. 556.

Maryland.— Union Hall Assoc. *v.* Morrison, 39 Md. 281; McLaughlin *v.* Barnum, 31 Md. 425; Jones *v.* Jones, 4 Gill 87.

Massachusetts.— Baggot *v.* Fleming, 10 Cush. 451.

Michigan.— Cleland *v.* Clark, 123 Mich. 179, 81 N. W. 1086, 81 Am. St. Rep. 161; Petit *v.* Flint, etc., R. Co., 119 Mich. 492, 78 N. W. 554, 75 Am. St. Rep. 417; Lemerand *v.* Flint, etc., R. Co., 117 Mich. 309, 75 N. W. 763; Miller *v.* Clark, 56 Mich. 337, 23 N. W. 35.

Mississippi.— Cole *v.* Johnson, 53 Miss. 94.

New Jersey.— Foley *v.* Kirk, 33 N. J. Eq. 170, holding, however, that an occupant cannot recover for improvements where his mistake as to his title is due to his own inexcusable negligence.

North Carolina.— Carolina Cent. R. Co. *v.* McCaskill, 98 N. C. 526, 4 S. E. 468.

Ohio.— Harrison *v.* Castner, 11 Ohio St. 339; Glick *v.* Gregg, 19 Ohio 57.

South Carolina.— Tumbleston *v.* Rumph, 43 S. C. 275, 21 S. E. 84.

South Dakota.— Wood *v.* Conrad, 2 S. D. 334, 50 N. W. 95.

Texas.— Stevenson *v.* Roberts, 25 Tex. Civ. App. 577, 64 S. W. 230; House *v.* Stone, 64 Tex. 677; Elam *v.* Parkhill, 60 Tex. 581; Pilcher *v.* Kirk, 60 Tex. 162.

Virginia.— Effinger *v.* Hall, 81 Va. 94.

West Virginia.— Dawson *v.* Grow, 29 W. Va. 333, 1 S. E. 564, holding that he must have had reasonable grounds to believe his title good at the time he made the improvements.

Wisconsin.— Hadley *v.* Stewart, 65 Wis. 481, 27 N. W. 340.

United States.— Canal Bank *v.* Hudson, 111 U. S. 66, 4 S. Ct. 303, 28 L. ed. 354; Green *v.* Biddle, 8 Wheat. 1, 5 L. ed. 547; Griswold *v.* Bragg, 6 Fed. 342, 19 Blatchf. 94; Bright *v.* Boyd, 4 Fed. Cas. No. 1,875, 1 Story 478, 4 Fed. Cas. No. 1,876, 2 Story 605; Campbell *v.* Brown, 4 Fed. Cas. No. 2,355, 2 Woods 349.

See 27 Cent. Dig. tit. "Improvements," § 7; and Ejectment, 15 Cyc. 229.

A bona fide possessor is one who possesses as owner by virtue of an act sufficient in terms to transfer the property, the defects of which he is ignorant. Green *v.* Moore, 44 La. Ann. 855, 11 So. 223.

A possessor in bad faith is one who possesses as master but who assumes that quality when he well knows that he has no title to the claim or that his title is vicious and defective. Green *v.* Moore, 44 La. Ann. 855, 11 So. 223.

A purchaser from an agent, without authority to sell, cannot recover for improvements made without the knowledge or consent of the principal who repudiates the sale. Topliff *v.* Shadwell, 68 Kan. 317, 74 Pac. 1120. See, generally, Principal and Agent.

One presumed to know that the lands are claimed as mineral lands and as such are not

another's land through a *bona fide* mistake as to boundary or location, after due diligence to ascertain it, acts in good faith and is entitled to compensation for such improvements,[79] especially where the mistake is due to acts or declarations of the adjoining owner,[80] or where, knowing of the mistake, the latter fails to notify the occupant thereof.[81] But the occupant is not entitled to recover for such improvements where he knows the boundary is wrong,[82] where there is a dispute as to its location,[83] or where the mistake is caused by his own negligence.[84]

(c) *Knowledge or Notice of Adverse Claim.* As a general rule, if the occupant has knowledge or notice of an adverse title or claim in another, he is not a possessor in good faith and cannot recover compensation for improvements made thereafter, although he in good faith believes his own title to be the better in point of law.[85] This is true in some jurisdictions where he has only con-

subject to town-site entry cannot recover the value of improvements where the lands were entered by him for a town-site entry. Hawke *v.* Deffebach, 4 Dak. 20, 22 N. W. 480; Pierce *v.* Sparks, 4 Dak. 1, 22 N. W. 491.

79. *Kentucky.*— Clay *v.* Miller, 2 Litt. 279.

Maryland.— Union Hall Assoc. *v.* Morrison, 39 Md. 281.

New Jersey.— McKelway *v.* Armour, 10 N. J. Eq. 115, 64 Am. Dec. 445.

South Dakota.— Pearl Tp. *v.* Thorp, 17 S. D. 288, 96 N. W. 99.

Texas.— Harrell *v.* Houston, 66 Tex. 278, 17 S. W. 731; Thompson *v.* Comstock, 59 Tex. 318; Gatlin *v.* Organ, 57 Tex. 11; Houston *v.* Brown, (1888) 8 S. W. 318; Daugherty *v.* Yates, 13 Tex. Civ. App. 646, 35 S. W. 937.

Wisconsin.— Warner *v.* Fountain, 28 Wis. 405.

Canada.— Special provision is here made for an allowance for improvements to one who has occupied land believing it to be his own, but having been mislaid by an erroneous survey (Plumb *v.* Steinhoff, 2 Ont. 614; Mozier *v.* Keegan, 13 U. C. C. P. 547), although the survey is a private one (Morton *v.* Lewis, 16 U. C. C. P. 485; Hutton *v.* Trotter, 16 U. C. C. P. 367; Campbell *v.* Fergusson, 4 U. C. C. P. 414; Doe *v.* McConnel, 6 U. C. Q. B. O. S. 347).

See 27 Cent. Dig. tit. "Improvements," § 12.

A person occupying lands according to the boundaries designated in his deed will be considered a *bona fide* occupant, and is entitled to recover for improvements made thereon by him, although he was mistaken. Clay *v.* Miller, 2 Litt. (Ky.) 279.

Where the improvement is made partly on the occupant's own land and partly on another's land he is not entitled to compensation therefor but may remove the part resting on such other's land. Gordon *v.* Fahrenberg, 26 La. Ann. 366. And see *supra*, II, C, 3.

80. Coughran *v.* Alderete, (Tex. Civ. App. 1894) 26 S. W. 109.

81. Gatlin *v.* Organ, 57 Tex. 11.

82. Clay *v.* Miller, 2 Litt. (Ky.) 279.

83. Newell *v.* Dunnegan, 1 Ky. L. Rep. 354.

84. Mitchell *v.* Bridgman, 71 Minn. 360, 74 N. W. 142; Shroll *v.* Klinker, 15 Ohio 152; Waldron *v.* Woodcock, 15 Ohio 13; Brown *v.* Bedinger, 72 Tex. 247, 10 S. W. 90; Thompson *v.* Comstock, 59 Tex. 318; Gatlin *v.* Organ, 57 Tex. 11. Mistake in boundary is not foundation for possession in good faith where the party claiming to have made the mistake failed to employ the legal means of information as to his limits after he had notice of an adverse claim to the land. Sartain *v.* Hamilton, 12 Tex. 219, 62 Am. Dec. 524.

85. *Alabama.*— Gresham *v.* Ware, 79 Ala. 192; Gordon *v.* Tweedy, 74 Ala. 232, 49 Am. Rep. 813.

Arkansas.— Shaw *v.* Hill, 46 Ark. 333; Fee *v.* Cowdry, 45 Ark. 410, 55 Am. Rep. 560.

Illinois.— Cable *v.* Ellis, 120 Ill. 136, 11 N. E. 188; Dart *v.* Hercules, 57 Ill. 446.

Kentucky.— Singleton *v.* Jackson, 2 Litt. 208; Scroggs *v.* Taylor, 1 A. K. Marsh. 247; Barlow *v.* Bell, 1 A. K. Marsh. 246, 10 Am. Dec. 731. But see Pugh *v.* Bell, 2 T. B. Mon. 125, 15 Am. Dec. 142, holding that where one in possession with notice of equitable title in another makes improvements, the equitable owner cannot recover without paying the value of improvements, although the improver might not be able to recover therefor had he instituted the action.

Louisiana.— Lawrence *v.* Grout, 12 La. Ann. 835; Anselm *v.* Brashear, 2 La. Ann. 403; Baldwin *v.* Union Ins. Co. 2 Rob. 133; Daquin *v.* Coiron, 8 Mart. N. S. 608.

Maryland.— Linthicum *v.* Thomas, 59 Md. 574; Strike *v.* McDonald, 2 Harr. & G. 191; House *v.* Beatty, 3 Harr. & M. 182.

Massachusetts.— Wales *v.* Coffin, 100 Mass. 177; Baggot *v.* Fleming, 10 Cush. 451.

Michigan.— Lemerand *v.* Flint, etc., R. Co., 117 Mich. 309, 75 N. W. 763.

Minnesota.— Wheeler *v.* Merriman, 30 Minn. 372, 15 N. W. 665.

Mississippi.— Cole *v.* Johnson, 53 Miss. 94.

Missouri.— Brown *v.* Baldwin, 121 Mo. 106, 25 S. W. 858; Dothage *v.* Stuart, 35 Mo. 251.

New Hampshire.— Tripe *v.* Marcy, 39 N. H. 439.

New Jersey.— Baldwin *v.* Richman, 9 N. J. Eq. 394.

New York.— Wood *v.* Wood, 83 N. Y. 575; Woodhull *v.* Rosenthal, 61 N. Y. 382.

North Carolina.— Carolina Cent. R. Co. *v.*

structive notice, as the notice implied by law from the records,[86] or where he has knowledge of facts sufficient to put him upon inquiry as to the adverse claim or title,[87] or has the means of knowledge;[88] although in other jurisdictions it is held otherwise if the occupant had an honest belief in his title at the time he acquired it.[89] There may be cases where, although aware of an adverse claim, the possessor

McCaskill, 98 N. C. 526, 4 S. E. 468; Scott *v.* Battle, 85 N. C. 184, 39 Am. Rep. 694.

Ohio.— Taylor *v.* Foster, 22 Ohio St. 255; Robinson *v.* Ward, 1 Ohio Dec. (Reprint) 252, 5 West. L. J. 465.

Pennsylvania.— Walker *v.* Quigg, 6 Watts 87, 31 Am. Dec. 452, although the owner may have known that the improvements were being made and offered no objection.

South Carolina.— Belton *v.* Briggs, 4 Desauss. Eq. 465; De Brahm *v.* Fenwick, 1 Desauss. Eq. 114.

South Dakota.— Wood *v.* Conrad, 2 S. D. 334, 50 N. W. 95.

Tennessee.— Wilson *v.* Scruggs, 7 Lea 635; McKinly *v.* Holliday, 10 Yerg. 477.

Texas.— Elam *v.* Parkhill, 60 Tex. 581; Thompson *v.* Comstock, 59 Tex. 318; Farris *v.* Gilbert, 50 Tex. 350; Howard *v.* Richeson, 13 Tex. 553.

Vermont.— Rutland R. Co. *v.* Chaffee, 72 Vt. 404, 48 Atl. 700; Kendall *v.* Tracy, 64 Vt. 522, 24 Atl. 1118.

Virginia.— Keister *v.* Cubine, 101 Va. 768, 45 S. E. 285; Effinger *v.* Hall, 81 Va. 94; McKim *v.* Moody, 1 Rand. 58; Southall *v.* McKeand, 1 Wash. 336.

West Virginia.— Yock *v.* Mann, 57 W. Va. 187, 49 S. E. 1019; Haymond *v.* Camden, 48 W. Va. 463, 37 S. E. 642; Bodkin *v.* Arnold, 48 W. Va. 108, 35 S. E. 980; Williamson *v.* Jones, 43 W. Va. 562, 27 S. E. 411, 64 Am. St. Rep. 891, 38 L. R. A. 694; Hall *v.* Hall, 30 W. Va. 779, 5 S. E. 260; Dawson *v.* Grow, 29 W. Va. 333, 1 S. E. 564.

Wisconsin.— Honzik *v.* Delaglise, 65 Wis. 494, 27 N. W. 171, 56 Am. Rep. 634; Thompson *v.* Thompson, 16 Wis. 91. *Compare* Barrett *v.* Stradl, 73 Wis. 385, 41 N. W. 439, 9 Am. St. Rep. 795.

United States.— Steel *v.* St. Louis, etc., Smelting Co., 106 U. S. 447, 1 S. Ct. 389, 27 L. ed. 226; Green *v.* Biddle, 8 Wheat. 1, 5 L. ed. 547; Jones *v.* Steam Stone-Cutter Co., 20 Fed. 477.

England.— Ramsden *v.* Dyson, L. R. 1 H. L. 129, 12 Jur. N. S. 506, 14 Wkly. Rep. 926.

Canada.— Queen Victoria Niagara Falls Park *v.* Colt, 22 Ont. App. 1; Wyoming Corp. *v.* Bell, 24 Grant Ch. (U. C.) 564; Galarneau *v.* Chrétion, 10 Quebec 83.

See 27 Cent. Dig. tit. "Improvements," § 14; and EJECTMENT, 15 Cyc. 230.

An occupant is not entitled to compensation for improvements where he makes them after he has been informed by his attorney that he is not the owner of the land (White *v.* Stokes, 67 Ark. 184, 53 S. W. 1060), where he buys land knowing that it may be forfeited if his vendor fails to pay instalments (Hollis *v.* Smith, 64 Tex. 280), or where, holding the legal title, he knows that another has the equitable estate, and makes improvements which the other forbids, except perhaps out of the rents (Glasscock *v.* Glasscock, 17 Tex. 480).

The "actual notice" of a paramount title required by the Illinois statute is the commencement of a suit for the recovery of the land, or by giving to the adverse possessor a copy of the entry or patent from which the proprietor derives title. Ross *v.* Irving, 14 Ill. 171.

As between adjoining proprietors, possession by one up to a certain line, by improvements, is notice to a purchaser from the other, of the extent of the claim of the former. Houston *v.* Sneed, 15 Tex. 307.

A bona fide purchaser of land, who takes possession after notice of a prior unrecorded deed conveying a better title to another, is not entitled to compensation for his improvements, since his possession is not a possession obtained without fraud within the Ohio statute. Robinson *v.* Ward, 1 Ohio Dec. (Reprint) 252, 5 West. L. J. 465.

86. *District of Columbia.*— Anderson *v.* Reid, 14 App. Cas. 54.

North Carolina.— Justice *v.* Baxter, 93 N. C. 405.

Texas.— Parrish *v.* Jackson, 69 Tex. 614, 7 S. W. 486; Daugherty *v.* Yates, 13 Tex. Civ. App. 646, 35 S. W. 937. *Compare* Cahill *v.* Benson, 19 Tex. Civ. App. 30, 46 S. W. 888.

Virginia.— Effinger *v.* Hall, 81 Va. 94.

West Virginia.— Yock *v.* Mann, 57 W. Va. 187, 49 S. W. 1019; Haymond *v.* Camden, 48 W. Va. 463, 37 S. E. 642; Williamson *v.* Jones, 43 W. Va. 562, 27 S. E. 411, 64 Am. St. Rep. 891, 38 L. R. A. 694; Dawson *v.* Grow, 29 W. Va. 333, 1 S. E. 564; Cain *v.* Cox, 29 W. Va. 258, 1 S. E. 298.

Wisconsin.— Warner *v.* Fountain, 28 Wis. 405.

Where a deed is not entitled to record because not properly acknowledged, one who, after due diligence to ascertain the location of his own land, as separate from the grantee's erected improvements on the latter, without knowledge that the land on which he is building is the property of the grantee, is entitled to the improvements. Daugherty *v.* Yates, 13 Tex. Civ. App. 646, 35 S. W. 937.

87. Hall *v.* Hall, 30 W. Va. 779, 5 S. E. 260.

88. Dawson *v.* Grow, 29 W. Va. 333, 1 S. E. 564.

89. *Arkansas.*— Beard *v.* Dansby, 48 Ark. 183, 2 S. W. 701.

Illinois.— Rawson *v.* Fox, 65 Ill. 200.

Iowa.— Read *v.* Howe, 49 Iowa 65.

Mississippi.— Cole *v.* Johnson, 53 Miss. 94.

Missouri.— Brown *v.* Baldwin, 121 Mo.

may have reasonable and strong grounds to believe such claim to be destitute of any just or legal foundation, and so be a possessor in good faith and as such entitled to compensation for improvements.[90]

(D) *Pendency of Action or Other Proceeding.* An occupant is not entitled to compensation for improvements as made in good faith, where he makes them after, in a proper action, he has been found not to be the owner,[91] or after the commencement of a suit disputing the title,[92] or pending administration of the estate,[93] unless the improvements were necessary to protect the property,[94] or the owner of the land has been guilty of laches.[95]

106, 25 S. W. 858; Pierce *v.* Rollins, 60 Mo. App. 497; Stump *v.* Hornbeck, 15 Mo. App. 367; Hill *v.* Tissier, 15 Mo. App. 209.

Tennessee.— Howard *v.* Massengale, 13 Lea 577.

Vermont.— Rutland R. Co. *v.* Chaffee, 72 Vt. 404, 48 Atl. 700; Whitney *v.* Richardson, 31 Vt. 300.

See 27 Cent. Dig. tit. "Improvements," § 15; and EJECTMENT, 16 Cyc. 231.

90. Tumbleston *v.* Rumph, 43 S. C. 275, 21 S. E. 84; Templeton *v.* Lowery, 22 S. C. 389; Parrish *v.* Jackson, 69 Tex. 614, 7 S. W. 486; Gaither *v.* Haurick, 69 Tex. 92, 6 S. W. 619; Elam *v.* Parkhill, 60 Tex. 581; Hutchins *v.* Bacon, 46 Tex. 408; Dorn *v.* Dunham, 24 Tex. 366; Houston *v.* Sneed, 15 Tex. 307; Sartain *v.* Hamilton, 12 Tex. 219, 62 Am. Dec. 524; Cahill *v.* Benson, 19 Tex. Civ. App. 30, 46 S. W. 888 (holding that a purchaser of land who knows that there is a claim of title in a third person is entitled to recover for improvements thereon, where an attorney of high standing and unquestioned integrity, after careful investigation, advised him that the claim was invalid, and he purchased and made the improvements in reliance thereon); Whitney *v.* Richardson, 31 Vt. 300.

Mere notice of adverse claim does not forbid the conclusion that subsequent improvements were made in good faith. Sartain *v.* Hamilton, 12 Tex. 219, 62 Am. Dec. 524; Griswold *v.* Bragg, 6 Fed. 342, 19 Blatchf. 94.

Title from married woman.— The fact that defendant purchased land, knowing that his vendor held under a deed from a married woman defectively given, is not inconsistent with his good faith in such purchase, and does not preclude him from recovering compensation for his improvements. Hill *v.* Spear, 48 Tex. 583.

91. Craton *v.* Wright, 16 Iowa 133; Bell *v.* Barnet, 2 J. J. Marsh. (Ky.) 516; Norton *v.* Davis, 13 Tex. Civ. App. 90, 35 S. W. 181. See also EJECTMENT, 15 Cyc. 222.

92. *Alabama.*— Gordon *v.* Tweedy, 74 Ala. 232, 49 Am. Rep. 813.

Illinois.— Ross *v.* Irving, 14 Ill. 171.

Indiana.— Richwine *v.* Noblesville Presb. Church, 135 Ind. 80, 34 N. E. 737.

Iowa.— Welles *v.* Newsom, 76 Iowa 81, 40 N. W. 105.

Louisiana.— Brugere *v.* Slidell, 27 La. Ann. 70. But see Daquin *v.* Coiron, 8 Mart. N. S. 608; Packwood *v.* Richardson, 1 Mart. N. S. 405, holding that an occupant is not necessarily in bad faith in making improvements after action has been begun to attack his title.

Massachusetts.— Harris *v.* Marblehead, 10 Gray 40.

Pennsylvania.— Morrison *v.* Robinson, 31 Pa. St. 456.

Texas.— Estell *v.* Cole, 62 Tex. 695.

Virginia.— Keister *v.* Cubine, 101 Va. 768, 45 S. E. 285.

United States.— Campbell *v.* Brown, 4 Fed. Cas. No. 2,355, 2 Woods 349.

Canada.— O'Grady *v.* McCaffrey, 2 Can. L. T. 201, 2 Ont. 309; Hawn *v.* Cashion, 20 Grant Ch. (U. C.) 518.

See 27 Cent. Dig. tit. "Improvements," § 16; and EJECTMENT, 15 Cyc. 221, 222.

In Kentucky it is held that, although the occupant is not equitably entitled to improvements made after the commencement of a suit against him disputing his title, yet so far as he has in good faith in fact enhanced the value of the land to the successful claimant, he is entitled to compensation. Taylor *v.* Whiting, 9 Dana 399; Bell *v.* Barnet, 2 J. J. Marsh. 516; Whitledge *v.* Wait, Ky. Dec. 335, 2 Am. Dec. 721.

Where a party has settled on land the title to which is in litigation, asserting a mere equity under the title of one of the parties, and not under an adverse claim, he is concluded by the decree in that cause, against the party under whom he claims, and is not entitled to any compensation for his improvements. Henderson *v.* Pickett, 4 T. B. Mon. (Ky.) 54, 16 Am. Dec. 130.

The commencement of an action of ejectment does not necessarily negative the idea of good faith in the occupant in thereafter making improvements on the land. Dorer *v.* Hood, 113 Wis. 607, 88 N. W. 1009; Zweitusch *v.* Watkins, 61 Wis. 615, 21 N. W. 821.

93. Heath *v.* Layne, 62 Tex. 686, holding that a purchaser of a decedent's lands from an heir, pending administration, and while they are part of the assets of the estate, is not entitled to be allowed for permanent improvements placed by him on the land.

94. Beard *v.* Morancy, 2 La. Ann. 347 (holding that a possessor in good faith, in case of eviction, is entitled to be paid for necessary improvements made even after judicial demand and judgment of eviction, without which the land could not have been so cultivated as to yield the rents and profits claimed by plaintiff); Hawn *v.* Cashion, 20 Grant Ch. (U. C.) 518.

95. Leeds *v.* Penrose, 44 N. J. Eq. 464, 15 Atl. 261. See *infra*, III, A, 6.

(E) *Reversal of Judgment of Title.* If one enters upon land under a judgment and order for a conveyance thereof and makes permanent improvements he is entitled to compensation therefor upon a reversal of such judgment and order.[96]

c. Possession — (I) *Necessity of Possession.* It is also necessary that the occupant shall have been in *bona fide* possession of the property at the time he made the improvements thereon.[97] This right to compensation does not depend upon the intrinsic goodness of the occupant's title, but upon the good faith of his possession and claim of title.[98] A mere possessor of land not in good faith is presumed to have made any improvements in its condition for his own amelioration and to have received a sufficient reward in the immediate benefit which he reaps from the enhanced production of the soil.[99]

(II) *Character of Possession.* Except where actual possession is required by statute,[1] it is not necessary that the occupant should have actual personal possession, but constructive possession is sufficient.[2] Under some statutes the possession must be adverse for a certain length of time to the holder of the paramount title.[3] And under these statutes if possession is for a less time than that

96. Stephens *v.* Ballou, 25 Kan. 618.

97. *Alabama.*— Gordon *v.* Tweedy, 74 Ala. 232, 49 Am. Rep. 813; Lamar *v.* Minter, 13 Ala. 31.

Arkansas.— Beard *v.* Dansby, 48 Ark. 183, 2 S. W. 701; Shaw *v.* Hill, 46 Ark. 333; Fee *v.* Cowdry, 45 Ark. 410, 55 Am. Rep. 560.

California.— Gunn *v.* Pollock, 6 Cal. 240.

Georgia.— Beverly *v.* Burke, 9 Ga. 440, 54 Am. Dec. 351.

Illinois.— Dart *v.* Hercules, 57 Ill. 446.

Indiana.— Bryan *v.* Uland, 101 Ind. 477, 1 N. E. 52.

Kansas.— Coonradt *v.* Myers, 31 Kan. 30, 2 Pac. 858.

Kentucky.— Harrison *v.* Fleming, 7 T. B. Mon. 537.

Louisiana.— Roberts *v.* Brown, 15 La. Ann. 698; Gibson *v.* Hutchins, 12 La. Ann. 545, 68 Am. Dec. 772; Davis *v.* Wilcoxon, 10 La. Ann. 640; Stanbrough *v.* Barnes, 2 La. Ann. 376. But see Pearce *v.* Frantum, 16 La. 414.

Maryland.— Linthicum *v.* Thomas, 59 Md. 574; McLaughlin *v.* Barnum, 31 Md. 425; Jones *v.* Jones, 4 Gill 87.

Minnesota.— Wheeler *v.* Merriman, 30 Minn. 372, 15 N. W. 665.

Nebraska.— Carter *v.* Brown, 35 Nebr. 670, 53 N. W. 580.

New Hampshire.— Bellows *v.* McCartee, 20 N. H. 515 (possession and improvement for more than six years); Bellows *v.* Copp, 20 N. H. 492.

New Jersey.— Baldwin *v.* Richman, 9 N. J. Eq. 394.

New York.— Wood *v.* Wood, 83 N. Y. 575.

Ohio.— Glick *v.* Gregg, 19 Ohio 57; Robinson *v.* Ward, 1 Ohio Dec. (Reprint) 252, 5 West. L. J. 465.

South Dakota.— Wood *v.* Conrad, 2 S. D. 334, 50 N. W. 95.

Tennessee.— Aiken *v.* Suttle, 4 Lea 103, Jones *v.* Perry, 10 Yerg. 59, 30 Am. Dec. 430.

Texas.— House *v.* Stone, 64 Tex. 677; Elam *v.* Parkhill, 60 Tex. 581; Dorn *v.* Dunham, 24 Tex. 366; Saunders *v.* Wilson, 19 Tex. 194; Houston *v.* Sneed, 15 Tex. 307.

Vermont.— Brown *v.* Storm, 4 Vt. 37.

Virginia.— Effinger *v.* Hall, 81 Va. 94.

West Virginia.— Hall *v.* Hall, 30 W. Va. 779, 5 S. E. 260; Dawson *v.* Grow, 29 W. Va. 333, 1 S. E. 564; Cain *v.* Cox, 29 W. Va. 258, 1 S. E. 298.

United States.— Campbell *v.* Brown, 4 Fed. Cas. No. 2,355, 2 Woods 349.

Canada.— See Nugent *v.* Mitchell, 19 Rev. Lég. 569; Ellice *v.* Courtemanche, 11 L. C. Jur. 325, 17 L. C. Rep. 423; Knowlton *v.* Clark, 9 L. C. Jur. 243; Stuart *v.* Eaton, 8 L. C. Rep. 113.

See 27 Cent. Dig. tit. "Improvements," § 7; and EJECTMENT, 15 Cyc. 224.

Evidence that a claimant cleared several acres of the premises, which were theretofore unimproved, built a brush fence around the clearing, and raised one or more crops thereon, establishes a possession sufficient to entitle him to the benefit of the statute, where he was afterward excluded from the land by the act of the original owner. Croskery *v.* Busch, 116 Mich. 288, 74 N. W. 464.

98. Dorn *v.* Dunham, 24 Tex. 366; Saunders *v.* Wilson, 19 Tex. 194.

99. Gibson *v.* Hutchins, 12 La. Ann. 545, 68 Am. Dec. 772.

1. Coonradt *v.* Myers, 31 Kan. 30, 2 Pac. 858; Page *v.* Finson, 74 Me. 512; Kelley *v.* Kelley, 23 Me. 192; Chapman *v.* Butler, 22 Me. 191; Bass *v.* Dinwiddie, 2 Fed. Cas. No. 1,092, Brunn. Col. Cas. 190, Cooke (Tenn.) 130.

2. Parsons *v.* Moses, 16 Iowa 440; Jones *v.* Merrill, 113 Mich. 433, 71 N. W. 838, 67 Am. St. Rep. 475; Bellows *v.* McCartee, 20 N. H. 515. *Compare* Claussen *v.* Rayburn, 14 Iowa 136.

3. *Alabama.*— Wisdom *v.* Reeves, 110 Ala. 418, 18 So. 13; Turnipseed *v.* Fitzpatrick, 75 Ala. 297.

California.— Hannan *v.* McNickle, 82 Cal. 122, 23 Pac. 271.

Iowa.— Lunquest *v.* Ten Eyck, 40 Iowa 213; Keas *v.* Burns, 23 Iowa 235; Craton

prescribed, it must be either under a color or claim of title which the occupant has reason to believe good.[4]

(III) *Duration of Possession.* Under some statutes, in order that the occupant may be entitled to compensation for improvements or to maintain an action therefor, he must have been in possession of the premises for a prescribed period immediately before his eviction,[5] or before commencement of the action.[6]

d. Color of Title[7] — (I) *Necessity of Color of Title.* It is also necessary that the occupant's possession of the land shall be under color of title, or in some states claim of title, in himself or in those under whom he claims, and which he has reason to believe good;[8] and it makes no difference that the entry on the

v. Wright, 16 Iowa 133; Wiltse *v.* Hurley, 11 Iowa 473.

Maine.— Moore *v.* Moore, 61 Me. 417; Pratt *v.* Churchill, 42 Me. 471; Treat *v.* Strickland, 23 Me. 234.

Massachusetts.— Wales *v.* Coffin, 100 Mass. 177; Baggot *v.* Fleming, 10 Cush. 451; Mason *v.* Richards, 15 Pick. 141. See Bacon *v.* Callender, 6 Mass. 303.

Michigan.— State *v.* Lake St. Clair Fishing, etc., Club, 127 Mich. 580, 87 N. W. 117; Sleight *v.* Roe, 125 Mich. 585, 85 N. W. 10; Wolf *v.* Hooton, 92 Mich. 136, 52 N. W. 459; Paldi *v.* Paldi, 84 Mich. 346, 47 N. W. 510.

See also Ejectment, 15 Cyc. 224.

The possession required is of the same character as will put in operation the statute of limitations except that it must be *bona fide* under color or chain of title. Pickett *v.* Doe, 74 Ala. 122.

Improvements made during a permissive holding cannot be recovered for under such a statute. Wisdom *v.* Reeves, 110 Ala. 418, 18 So. 13.

4. Wales *v.* Coffin, 100 Mass. 177; Baggot *v.* Fleming, 10 Cush. (Mass.) 451; Jones *v.* Merrill, 113 Mich. 433, 71 N. W. 838, 67 Am. St. Rep. 475. See also *infra*, III, A, 5, d; and cases cited in preceding note.

5. Lamar *v.* Minter, 13 Ala. 31; Page *v.* Finson, 74 Me. 512; Baggot *v.* Fleming, 10 Cush. (Mass.) 451.

The term required to support a claim for betterments cannot be made up by adding the estate vested by law in an administrator of an insolvent estate to take the rents and profits to the estate of his grantee under an invalid conveyance. Remick *v.* Butterfield, 31 N. H. 70, 64 Am. Dec. 316. But where the purchaser of land goes into possession of a kiln, which is supposed by both parties to be on the land bought, and leases the land to tenants, the possession of his vendor may be tacked to his own, so as to make out three years of continuous adverse possession next preceding ejectment by the owner of the land, and allow a recovery by him of the value of his improvements on the land. Holt *v.* Adams, 121 Ala. 664, 25 So. 716.

6. Kelley *v.* Kelley, 23 Me. 192; Bellows *v.* McCartee, 20 N. H. 515.

7. See also Ejectment, 15 Cyc. 224–229.

8. *Alabama.*— Gordon *v.* Tweedy, 74 Ala. 232, 49 Am. Rep. 813; Lamar *v.* Minter, 13 Ala. 31.

Arkansas.— Penrose *v.* Doherty, 70 Ark. 256, 67 S. W. 398; Anderson *v.* Williams, 59 Ark. 144, 26 S. W. 818; Beard *v.* Dansby, 48 Ark. 183, 2 S. W. 701; Teaver *v.* Akin, 47 Ark. 528, 1 S. W. 772.

California.— Hannan *v.* McNickle, 82 Cal. 122, 23 Pac. 271; White *v.* Moses, 21 Cal. 34.

Iowa.— Lunquest *v.* Ten Eyck, 40 Iowa 213.

Kentucky.— Smith *v.* Bell, 91 Ky. 655, 25 S. W. 752; Whitledge *v.* Wait, Ky. Dec. 335, 2 Am. Dec. 721, holding that one who obtains a grant for land from the commonwealth is a *bona fide* possessor.

Massachusetts.— Wales *v.* Coffin, 100 Mass. 177; Baggot *v.* Fleming, 10 Cush. 451; Bacon *v.* Callender, 6 Mass. 303.

Minnesota.— Hall *v.* Torrens, 32 Minn. 527, 21 N. W. 717; Wheeler *v.* Merriman, 30 Minn. 372, 15 N. W. 665.

Mississippi.— Mississippi, etc., R. Co. *v.* Devaney, 42 Miss. 555, 2 Am. Rep. 608.

Nebraska.— Carter *v.* Brown, 35 Nebr. 670, 53 N. W. 580; Page *v.* Davis, 26 Nebr. 670, 42 N. W. 875.

New Hampshire.— Rand *v.* Dodge, 17 N. H. 343.

New York.— Barley *v.* Roosa, 13 N. Y. Suppl. 209.

Tennessee.— Fisher *v.* Edington, 12 Lea 189; Aiken *v.* Suttle, 4 Lea 103.

Texas.— House *v.* Stone, 64 Tex. 677; Elam *v.* Parkhill, 60 Tex. 581; Hatchett *v.* Conner, 30 Tex. 104; Eckhardt *v.* Schlecht, 29 Tex. 129.

Virginia.— Effinger *v.* Hall, 81 Va. 94.

United States.— Stark *v.* Starr, 22 Fed. Cas. No. 13,307, 1 Sawy. 15.

Canada.— See Hartley *v.* Maycock, 28 Ont. 508; Munsie *v.* Lindsay, 10 Ont. Pr. 173.

See 27 Cent. Dig. tit. "Improvements," § 13; and Ejectment, 15 Cyc. 224.

In Vermont the sole test of the right to the value conferred by betterments is that they be made by a purchaser of a supposed title in fee. George *v.* Steam Stone Cutter Co., 20 Fed. 478; Amsden *v.* Steam Stone Cutter Co., 20 Fed. 479.

"Color of title in fee" in the Minnesota Gen. St. (1878) c. 75, § 15, means color of title in fee in the occupying claimant himself, or in the person under whom he claims. Hall *v.* Torrens, 32 Minn. 527, 21 N. W. 717.

Mere trespassers.— The statute does not apply to mere trespassers, but there must be either color of title or claim of title. New Orleans, etc., R. Co. *v.* Jones, 68 Ala. 48.

land without color of title is caused by a mistake of law.[9] He cannot recover for the improvements if he was the absolute owner of the property at the time they were made,[10] as it is only where the occupant's title is defective or another has a superior title that the question respecting improvements can arise.[11] But it is not necessary that his title should be entirely void.[12]

(II) *Sufficiency of Color of Title.*[13] To constitute such color of title the occupant must have entered and held possession in good faith under a title, legal or equitable, apparently good in form,[14] although it is not necessary that the title should be a paper one.[15] It may be based upon adverse possession,[16] or upon a written instrument apparently conveying title,[17] such as an invalid tax

The occupant must have held under a title he had reason to believe good, if his possession was for less than six years. Baggot *v.* Fleming, 10 Cush. (Mass.) 451; Wales *v.* Coffin, 100 Mass. 177; Jones *v.* Merrill, 113 Mich. 433, 71 N. W. 838, 67 Am. St. Rep. 475.

9. Schaffner *v.* Schilling, 6 Mo. App. 42 (holding that a widow who, under a mistake of law as to her title to land, erected improvements thereon, when it was in fact the property of her minor children, was not entitled to compensation for the improvements); Williamson *v.* Jones, 43 W. Va. 562, 27 S. E. 411, 64 Am. St. Rep. 891, 38 L. R. A. 694.

10. Brugere *v.* Slidell, 27 La. Ann. 70 (holding that where one purchases property under a decree of confiscation, and puts improvements thereon, he cannot recover therefor from the heirs of the former owner, when they recover the property after his death); Walker *v.* Arnold, 71 Vt. 263, 44 Atl. 351.

11. Dorn *v.* Dunham, 24 Tex. 366; Walker *v.* Arnold, 71 Vt. 263, 44 Atl. 351.

12. Fee *v.* Cowdry, 45 Ark. 410, 55 Am. Rep. 560.

13. **Special statutes requiring particular kind of title or claim** see EJECTMENT, 15 Cyc. 228.

14. Teaver *v.* Akin, 47 Ark. 528, 1 S. W. 772; Newhall *v.* Saddler, 17 Mass. 350 (void decree of court); Thompson *v.* Cragg, 24 Tex. 582; Dorn *v.* Dunham, 24 Tex. 366; Reynolds *v.* Cordery, 20 Fed. Cas. No. 11,729, 4 McLean 159; Stark *v.* Starr, 22 Fed. Cas. No. 13,307, 1 Sawy. 15. See ADVERSE POSSESSION, 1 Cyc. 1082; EJECTMENT, 15 Cyc. 226, 227.

One entering in pursuance of a voidable donation, believing himself the owner, is entitled to compensation for improvements made thereon. White's Succession, 51 La. Ann. 1702, 26 So. 428.

A purchaser at an unauthorized judicial sale may under some circumstances be a purchaser in good faith. French *v.* Grenet, 57 Tex. 273. But see Parsons *v.* Moses, 16 Iowa 440; Lowry *v.* Erwin, 6 Rob. (La.) 192, 39 Am. Dec. 556.

In Kentucky the occupant must trace his title back to a grant from the commonwealth. Proctor *v.* Smith, 8 Bush 81; Fairbairn *v.* Means, 4 Metc. 323; Lewis *v.* Singleton, 2 A. K. Marsh. 214; Clay *v.* Miller, 4 Bibb 461; Whitledge *v.* Wait, Ky. Dec. 335, 2 Am. Dec. 721; Darnall *v.* Jones, 72 S. W. 1108, 24 Ky. L. Rep. 2090; Shiveley *v.* Gilpin, 66 S. W. 763, 23 Ky. L. Rep. 2090; Wintersmith *v.* Price, 66 S. W. 2, 23 Ky. L. Rep. 2005. See Pulliam *v.* Robinson, 1 T. B. Mon. 228. And see EJECTMENT, 15 Cyc. 228.

Expectancy of title to certain property is not such color of title as will give the occupant thereunder a right to compensation for improvements thereon.

Iowa.— Snell *v.* Mechan, 80 Iowa 53, 45 N. W. 398.

Louisiana.— Gibson *v.* Hutchins, 12 La. Ann. 545, 68 Am. Dec. 772.

Minnesota.—Wheeler *v.* Merriman, 30 Minn. 372, 15 N. W. 665.

Mississippi.— Thomas *v.* Thomas, 69 Miss. 564, 13 So. 666.

North Carolina.— Johnson *v.* Armfield, 130 N. C. 575, 41 S. E. 705, holding that a promise made by a landowner, after plaintiff had made improvements on the land, to will it to him, will not support a claim against such owner's estate for betterments.

Texas.— Baker *v.* Millman, 77 Tex. 46, 13 S. W. 618.

Canada.— Foster *v.* Emerson, 5 Grant Ch. (U. C.) 135. *Compare* Hovey *v.* Ferguson, 18 Grant Ch. (U. C.) 498; Biehn *v.* Biehn, 18 Grant Ch. (U. C.) 497.

But *compare* Duckett *v.* Duckett, (Md. 1891) 21 Atl. 323 (holding a son entitled to compensation for improvements made while in possession with his father's consent, in anticipation of a devise, but afterward ousted by the father); Ridley *v.* McNairy, 2 Humphr. (Tenn.) 174.

15. Any species of title which if valid would be a legal one is sufficient. Wendell *v.* Moulton, 26 N. H. 41.

16. Welles *v.* Newsom, 76 Iowa 81, 40 N. W. 105; Page *v.* Finson, 74 Me. 512; Barrett *v.* Stradl, 73 Wis. 385, 41 N. W. 439, 9 Am. St. Rep. 795. See *supra*, III, A, 5, c.

Possession under claim of title in good faith, without color of title, is sufficient in some jurisdictions. Holt *v.* Adams, 121 Ala. 664, 25 So. 716; Turnipseed *v.* Fitzpatrick, 75 Ala. 297; Pendo *v.* Beakey, 15 S. D. 344, 89 N. W. 655. See also EJECTMENT, 15 Cyc. 225.

An entry under a license, and an occupation for more than fifteen years, gives such party a right to be reimbursed for the value of his erections. Pope *v.* Henry, 24 Vt. 560.

17. *Arkansas.*— Beard *v.* Dansby, 48 Ark. 183, 2 S. W. 701.

Illinois.— Brooks *v.* Bruyn, 35 Ill. 392.

title,[18] or a quitclaim deed.[19] But an occupant does not hold under sufficient color or claim of title where he holds under an instrument which is void on its face,[20] or under a bond for title;[21] or where he is merely a tenant for life,[22]

New York.— La Frombois *v.* Jackson, 8 Cow. 589, 18 Am. Dec. 463.

Ohio.— Glick *v.* Gregg, 19 Ohio 57.

South Dakota.— Wood *v.* Conrad, 2 S. D. 334, 50 N. W. 95.

Tennessee.— Garth *v.* Fort, 15 Lea 683, deed from husband of wife's land.

It is sufficient if the occupant has possession under an erroneous patent by the United States (McCastle *v.* Chaney, 28 La. Ann. 720), or under a long lease (Bedell *v.* Shaw, 59 N. Y. 46; Withers *v.* Yeadon, 1 Rich. Eq. (S. C.) 324), or under a deed of a married woman, invalid by reason of non-compliance with the statute (Johnson *v.* Bryan, 62 Tex. 623), or under a deed to himself duly authenticated and recorded, although his grantor does not so claim (Glick *v.* Gregg, 19 Ohio 57. *Contra*, see Beardsley *v.* Chapman, 1 Ohio St. 118). But a deed from one having neither the title nor possession of land is insufficient. Tripp *v.* Fausett, 94 Ga. 330, 21 S. E. 572; Wilkinson *v.* Nichols, 1 T. B. Mon. (Ky.) 36; Miller *v.* Brownson, 50 Tex. 583. See also EJECTMENT, 15 Cyc. 226, 227.

Where the records of a county show a perfect chain of title, the purchaser of land is entitled to improvements under the occupying claimant law, although the original deeds contain material alterations or are forgeries. Montag *v.* Linn, 27 Ill. 328.

18. *Arkansas.*— McCann *v.* Smith, 65 Ark. 305, 45 S. W. 1057 (only for improvements placed on the land after the expiration of the period for redemption); Seger *v.* Spurlock, 59 Ark. 147, 26 S. W. 819 (not entitled to improvements made after a tender by one entitled to redeem); Bender *v.* Bean, 52 Ark. 132, 12 S. W. 180, 241.

Colorado.— Knowles *v.* Martin, 20 Colo. 393, 38 Pac. 467.

Illinois.— Gilbreath *v.* Dilday, 152 Ill. 207, 38 N. E. 572.

Indiana.— Fish *v.* Blasser, 146 Ind. 186, 45 N. E. 63.

Kansas.— Smith *v.* Smith, 15 Kan. 290; Stebbins *v.* Guthrie, 4 Kan. 353, may be under either a tax-sale certificate or a tax deed.

Michigan.— Thomas *v.* Wagner, 131 Mich. 601, 92 N. W. 106; Hoffman *v.* Harrington, 28 Mich. 90.

Minnesota.— McLellan *v.* Omodt, 37 Minn. 157, 33 N. W. 326, holding this to be true only where the occupant enters and makes improvements after the time for redemption has expired.

Nebraska.— Page *v.* Davis, 26 Nebr. 670, 42 N. W. 875.

Pennsylvania.— Lynch *v.* Brudie, 63 Pa. St. 206; Coney *v.* Owen, 6 Watts 435; Gilmore *v.* Thompson, 3 Watts 106. But see Orr *v.* Cunningham, 4 Watts & S. 294; McKee *v.* Lamberton, 2 Watts & S. 107.

South Dakota.— Parker *v.* Vinson, 11 S. D. 381, 77 N. W. 1023.

Texas.— House *v.* Stone, 64 Tex. 677; French *v.* Grenet, 57 Tex. 273; Wofford *v.* McKinna, 23 Tex. 36, 76 Am. Dec. 53; Franklin *v.* Campbell, 5 Tex. Civ. App. 174, 23 S. W. 1003. *Compare* Robson *v.* Osborn, 13 Tex. 298.

Wisconsin.— Under the former statute an occupant under a tax title could not recover for improvements on the title being held void unless the tax described in his deed had been "lawfully assessed" (Oberich *v.* Gilman, 31 Wis. 495); but under the later statute he may recover where the tax deed is held void for reasons going to the groundwork of the tax (Zwietusch *v.* Watkins, 61 Wis. 615, 21 N. W. 821). See Edgerton *v.* Bird, 6 Wis. 527, 70 Am. Dec. 473.

Canada.— Haisley *v.* Somers, 13 Ont. 600; Aston *v.* Innis, 26 Grant Ch. 42; Churcher *v.* Bates, 42 U. C. Q. B. 466. See also Edinburgh L. Assur. Co. *v.* Ferguson, 32 U. C. Q. B. 253.

Claiming both under tax deed and under sheriff's deed.— It has been held that a statute allowing compensation to one claiming title by virtue of a sale for taxes does not apply to one claiming both under a tax deed and under a sheriff's deed by virtue of an execution sale. King *v.* Harrington, 18 Mich. 213.

19. Wheeler *v.* Merriman, 30 Minn. 372, 15 N. W. 665; Griswold *v.* Bragg, 6 Fed. 342. 19 Blatchf. 94. See also McGregor *v.* McGregor, 27 Grant Ch. (U. C.) 470. But see Robinson *v.* Ward, 1 Ohio Dec. (Reprint) 252, 5 West. L. J. 465. *Compare* EJECTMENT 15 Cyc. 226.

20. Lowry *v.* Erwin, 6 Rob. (La.) 192, 39 Am. Dec. 556; House *v.* Stone, 64 Tex. 677; Hatchett *v.* Conner, 30 Tex. 104; Hall *v.* Hall, 30 W. Va. 779, 5 S. E. 260.

21. *Arkansas.*— White *v.* Stokes, 67 Ark. 184, 53 S. W. 1060; Teaver *v.* Akin, 47 Ark. 528, 1 S. W. 772; Felkner *v.* Tighe, 39 Ark. 357, further than as a set-off against the rents and profits.

California.— Kilburn *v.* Ritchie, 2 Cal. 145, 56 Am. Dec. 326.

Illinois.— Rigor *v.* Frye, 62 Ill. 507.

Iowa.— Jones *v.* Graves, 21 Iowa 474.

Maine.— Treat *v.* Strickland, 23 Me. 234; Briggs *v.* Fiske, 17 Me. 420.

South Dakota.— Seymour *v.* Cleveland, 9 S. D. 94, 68 N. W. 171.

But *compare* Krause *v.* Meams, 12 Kan. 335; and EJECTMENT, 15 Cyc. 226, 227.

22. *Iowa.*— Wiltse *v.* Hurley, 11 Iowa 473.

Kentucky.— Henry *v.* Brown, 99 Ky. 13, 34 S. W. 710.

Maine.— Bent *v.* Weeks, 46 Me. 524.

Massachusetts.— Guckian *v.* Riley, 135 Mass. 71.

Canada.— Wilson *v.* Graham, 13 Ont. 661; *Re* Smith, 4 Ont. 518.

An estate in dower under the widow is in-

or at will,[23] or where he is the holder of a merely conditional or determinable estate in the land.[24]

6. Estoppel of True Owner. The right to compensation for improvements may also arise by estoppel, even though the occupant is one not entirely in good faith, where the owner has by his conduct encouraged him to make such improvements or has so conducted himself while they were being made as to make it a fraud in him to take them without paying therefor;[25] and under some circumstances a court of equity will deny him the right to recover the land.[26] Mere silence or acquiescence, however, on the part of the owner will not give rise to such estoppel if he had no knowledge of the fact before or at the time the improvements were made;[27] or if the occupant himself knew at the time of making the improvements that the land belonged to another, and that he had no title to it.[28]

7. Effect of Contract to Purchase on Right to Compensation. An occupant claiming by virtue of possession and improvement may contract to purchase the title without altering the character of his occupancy or his right to compensation for improvements, if the terms of the contract show that the intention was to purchase and sell a title encumbered by such claim.[29] But a claim for improve-

sufficient to uphold a claim for betterments against the reversioner. Maddocks *v.* Jellison, 11 Me. 482.

Widow's right to compensation for improvements made by her before assignment of dower see Dower, 14 Cyc. 962 note 71.

23. Howe *v.* Logwood, 3 A. K. Marsh. (Ky.) 388; Pomeroy *v.* Lambeth, 36 N. C. 65, 36 Am. Dec. 33; State *v.* McMinnville, etc., R. Co., 6 Lea (Tenn.) 369. See, generally, Landlord and Tenant.

24. Pulse *v.* Osborn, 30 Ind. App. 631, 64 N. E. 59 (determinable fee); Walker *v.* Walker, 64 N. H. 55, 5 Atl. 460. See also Estates.

25. *Arkansas.*— Grider *v.* Driver, 46 Ark. 109.

Kentucky.— Dillon *v.* Crook, 11 Bush 321.

Maryland.— Duckett *v.* Duckett, (1891) 21 Atl. 323; Union Hall Assoc. *v.* Morrison, 39 Md. 281; Tongue *v.* Nutwell, 17 Md. 212, 79 Am. Dec. 649.

Minnesota.— Bacon *v.* Cottrell, 13 Minn. 194.

Mississippi.— Wilie *v.* Brooks, 45 Miss. 542.

Missouri.— Allen *v.* Mansfield, 82 Mo. 688.

New Jersey.— McKelway *v.* Armour, 10 N. J. Eq. 115, 64 Am. Dec. 445; Baldwin *v.* Richman, 9 N. J. Eq. 394.

North Carolina.— Hedgepeth *v.* Rose, 95 N. C. 41.

Ohio.— Preston *v.* Brown, 35 Ohio St. 18; Cameron *v.* Holenshade, 1 Cinc. Super. Ct. 83.

Pennsylvania.— Crest *v.* Jack, 3 Watts 238, 27 Am. Dec. 353.

Texas.— Saunders *v.* Wilson, 19 Tex. 201; Coughran *v.* Alderete, (Civ. App. 1894) 26 S. W. 109.

Virginia.— Walker *v.* Beauchler, 27 Gratt. 511; Southall *v.* McKeand, 1 Wash. 336.

Washington.— Charvat *v.* Meyers, 5 Wash. 799, 32 Pac. 726.

West Virginia.— Hall *v.* Hall, 30 W. Va. 779, 5 S. E. 260; Dawson *v.* Grow, 29 W. Va. 333, 1 S. E. 564.

United States.— Steel *v.* St. Louis Smelting, etc., Co., 106 U. S. 447, 27 L. ed. 226; King *v.* Thompson, 9 Pet. 204, 9 L. ed. 102.

See 27 Cent. Dig. tit. "Improvements," § 11; and, generally, Estoppel.

A widow, to whom has been assigned excessive dower, having married again, her husband is entitled to compensation for improvements made on part of the lands assigned to her at the request of the parties seeking to set the assignment aside. Pierson *v.* Hitchner, 25 N. J. Eq. 129.

Where the owner of real estate puts a relative in possession for the purpose of cultivating and improving the same under the promise of a future gift, and the occupier makes improvements on the premises, such occupier is entitled to the full value of the improvements although it exceeds the amount of rents and profits. Ridley *v.* McNairy, 2 Humphr. (Tenn.) 174.

26. Tongue *v.* Nutwell, 17 Md. 212, 79 Am. Dec. 649; Ramsden *v.* Dyson, L. R. 1 H. L. 129, 12 Jur. N. S. 506, 14 Wkly. Rep. 926.

27. Jenkins *v.* Means, 59 Ga. 55; Newell *v.* Dunnegan, 1 Ky. L. Rep. 354; Union Hall Assoc. *v.* Morrison, 39 Md. 281; Hall *v.* Hall, 30 W. Va. 779, 5 S. E. 260, although he is cognizant of the fact after they have been completed and fails to notify the claimant of his title.

28. Hoffman *v.* Smith, 1 Md. 475; Casey *v.* Inloes, 1 Gill (Md.) 430, 39 Am. Dec. 658; Crest *v.* Jack, 3 Watts (Pa.) 238, 27 Am. Dec. 353; Steel *v.* St. Louis Smelting, etc., Co., 106 U. S. 447, 27 L. ed. 226. But see Southall *v.* McKeand, 1 Wash. (Va.) 336, holding that, although the occupant has notice of another's equitable title, if the latter neglects to assert his right for a long time during which valuable improvements are made on the land, the occupant ought not in equity to lose the value of his improvements.

29. Kelley *v.* Kelley, 23 Me. 192.

ments will be considered as abandoned if the occupant enters into a contract of purchase with the true owner which admits that the latter was the owner at the time that the occupant was living upon it.[30]

B. Amount of Recovery — 1. In General. In the absence of a statute to the contrary, the general rule is that the amount which a *bona fide* occupant of lands is entitled to recover for improvements made thereon is not the cost of the improvements to him, but the amount which they enhance the value of the property to the owner,[31] without interest,[32] except on necessary repairs or improvements;[33]

30. Kelley *v.* Kelley, 23 Me. 192.

31. *Florida.*— Glinski *v.* Zawadski, 8 Fla. 405.

Georgia.— Thomas *v.* Malcom, 39 Ga. 328, 99 Am. Dec. 459.

Illinois.— Williams *v.* Vanderbilt, 145 Ill. 238, 34 N. E. 476, 36 Am. St. Rep. 486, 21 L. R. A. 489; Breit *v.* Yeaton, 101 Ill. 242; Ebelmesser *v.* Ebelmesser, 99 Ill. 541.

Iowa.— Welles *v.* Newsom, 76 Iowa 81, 40 N. W. 105; Childs *v.* Showers, 18 Iowa 261.

Kentucky.— Smith *v.* Bell, 91 Ky. 655, 25 S. W. 752 (holding that a possessor without color of title should be credited, in an action against him by the owner for waste and rents, with the value of lasting improvements made by him to the extent that they increased the rental value of the land); Booth *v.* Vanarsdale, 9 Bush 717; Proctor *v.* Smith, 8 Bush 81; Hall *v.* Brummal, 7 Bush 43; Pulliam *v.* Jennings, 5 Bush 433; Thomas *v.* Thomas, 16 B. Mon. 420; James *v.* McKinsey, 4 J. J. Marsh. 625; Bell *v.* Barnet, 2 J. J. Marsh. 516 (holding that where a *bona fide* occupant is charged nothing for the use of his improvements, he is only entitled to their present value or for the actual amelioration); Floyd *v.* Mackey, 66 S. W. 518, 23 Ky. L. Rep. 2030; Bourne *v.* Odam, 32 S. W. 398, 17 Ky. L. Rep. 696.

Louisiana.— Citizens' Bank *v.* Miller, 44 La. Ann. 199, 10 So. 779; Pearce *v.* Frantum, 16 La. 414; Elliott *v.* Labarre, 3 La. 541; Boatner *v.* Vantriss, 2 La. 172.

Maryland.— Long *v.* Long, 62 Md. 33; McLaughlin *v.* Barnum, 31 Md. 425; Jones *v.* Jones, 4 Gill 87.

Michigan.— Cleland *v.* Clark, 123 Mich. 179, 81 N. W. 1086, 81 Am. St. Rep. 161; Sherman *v.* A. P. Cook Co., 98 Mich. 61, 57 N. W. 23.

Mississippi.— Hicks *v.* Blakemen, 74 Miss. 459, 21 So. 7, 21 So. 400; Wilie *v.* Brooks, 45 Miss. 542.

Nebraska.—Lothrop *v.* Michaelson, 44 Nebr. 633, 63 N. W. 28; Fletcher *v.* Brown, 35 Nebr. 660, 53 N. W. 577.

New Hampshire.— Wendell *v.* Moulton, 26 N. H. 41.

New York.— Woodhull *v.* Rosenthal, 61 N. Y. 382.

North Carolina.— Carolina Cent. R. Co. *v.* McCaskill, 98 N. C. 526, 4 S. E. 468; Wetherell *v.* Gorman, 74 N. C. 603.

Ohio.— Davis *v.* Powell, 13 Ohio 308 (holding that the occupant should be allowed for improvements made by him before his title commenced as for those after); Dakin *v.* Lecklider, 19 Ohio Cir. Ct. 254, 10 Ohio Cir. Dec. 308.

South Carolina.— Harman *v.* Harman, 54 S. C. 100, 31 S. E. 881; Gadsden *v.* Desportes, 39 S. C. 131, 17 S. E. 706; Lumb *v.* Pinckney, 21 S. C. 471.

Tennessee.— Smoot *v.* Smoot, 12 Lea 274; Paul *v.* Williams, 12 Lea 215; Fisher *v.* Edington, 12 Lea 189; Aiken *v.* Suttle, 4 Lea 103; Vaughan *v.* Cravens, 1 Head 108, 73 Am. Dec. 163; Dunn *v.* Dunn, (Ch. App. 1899) 51 S. W. 119.

Texas.— Thomas *v.* Quarles, 64 Tex. 491.

Utah.— Bacon *v.* Thornton, 16 Utah 138, 51 Pac. 153; Wasatch Min. Co. *v.* Jennings, 14 Utah 221, 46 Pac. 1106.

Virginia.— Hollingsworth *v.* Funkhouser, 85 Va. 448, 8 S. E. 592.

West Virginia.— Haymond *v.* Camden, 48 W. Va. 463, 37 S. E. 642; Williamson *v.* Jones, 43 W. Va. 562, 27 S. E. 411, 64 Am. St. Rep. 891, 38 L. R. A. 694.

Wisconsin.— Pacquette *v.* Pickness, 19 Wis. 219.

United States.—Young *v.* Mahoning County, 53 Fed. 895; Van Bibber *v.* Williamson, 37 Fed. 756; Stark *v.* Starr, 22 Fed. Cas. No. 13,307, 1 Sawy. 15. And see Jackson *v.* Ludeling, 99 U. S. 513, 25 L. ed. 460, holding that under the Louisiana law an occupant of lands may recover, for improvements made by him, the value of the materials and cost of labor bestowed thereon.

Canada.— Queen Victoria Niagara Falls Park *v.* Colt, 22 Ont. App. 1; Fawcett *v.* Burwell, 27 Grant Ch. (U. C.) 445; Carroll *v.* Robertson, 15 Grant Ch. (U. C.) 173; Pegley *v.* Woods, 14 Grant Ch. (U. C.) 47; Lawrence *v.* Stuart, 6 L. C. Rep. 294.

See 27 Cent. Dig. tit. "Improvements," § 20. And *compare* Ejectment, 15 Cyc. 222.

It is the additional value at the time of judgment of eviction, above that at the time of the loss of possession by the owner. Elliott *v.* Labarre, 3 La. 541.

Under the Arkansas statutes the owner of an improvement on donated land has a vested right to be paid double their value. Worthen *v.* Ratcliffe, 42 Ark. 330.

32. Pugh *v.* Bell, 2 T. B. Mon. (Ky.) 125, 15 Am. Dec. 142; Hadley *v.* Stewart, 65 Wis. 481, 27 N. W. 340. But see Fawcett *v.* Burwell, 27 Grant Ch. (U. C.) 445.

Interest will not be allowed on the value of improvements from the filing of the decree, to *bona fide* possessors in possession and enjoyment of the land. Boykin *v.* Ancrum, 28 S. C. 486, 6 S. E. 305, 13 Am. St. Rep. 698.

33. Jackson *v.* Ludeling, 99 U. S. 513, 25 L. ed. 460, holding that interest will be allowed on the possessor's outlay for necessary repairs to an amount not exceeding the net

and in some jurisdictions not exceeding the rents and profits accruing during his occupancy.[34]

2. Determination of Amount — a. In General. The enhanced value is generally found by deducting from the present value of the land, with the improvements, its estimated present value without the improvements, plus any increase in value from any other causes than such improvements.[35] But only such permanent improvements as enhance the value of the property may be taken into consideration.[36] The mode of determining the value of the improvements or of the enhanced value is regulated by statute in many states.[37]

b. Time of Determination. It is variously held that the enhanced value of the land, or the value of the improvements, shall be estimated at the time of eviction or recovery of the land,[38] at the date of commencement of the action,[39] at the time of trial,[40] or at the time of audit[41] or appraisement.[42] If the owner elects to take the value of the land exclusive of improvements, the date of its valuation may be fixed at the date of entry by the occupant.[43]

C. Who Liable For Compensation. The person directly liable for com-

earnings, or fruits, received from the improvements.

34. Marlow *v.* Adams, 24 Ark. 109; Parsons *v.* Moses, 16 Iowa 440; Dellet *v.* Whitner, Cheves Eq. (S. C.) 213; Aiken *v.* Suttle, 4 Lea (Tenn.) 103; McKinly *v.* Holliday, 10 Yerg. (Tenn.) 477; Jones *v.* Perry, 10 Yerg. (Tenn.) 59, 30 Am. Dec. 430. See Parsons *v.* Moses, 16 Iowa 440. *Contra,* Ewing *v.* Handley, 4 Litt. (Ky.) 346, 14 Am. Dec. 140.

35. Munsie *v.* Lindsay, 10 Ont. Pr. 173 [*modified* in 11 Ont. 520]. See also *supra,* III, B, I.

A forced sale for cash is not a proper method of determining the amount of the enhancement in value. Fawcett *v.* Burwell, 27 Grant Ch. (U. C.) 445.

An auditor, in ascertaining the enhanced value by reason of the meliorations and improvements placed thereon by the occupier, may, as the most reliable and safe method of approximating the truth in such case, take the average of all the opinions expressed by the witnesses examined on the subject; but should not include the opinion of any witness whose testimony, if it stood alone, could not be relied on by the court as the foundation for its decision of the question. Barnum *v.* Barnum, 42 Md. 251. And see Munsie *v.* Lindsay, 11 Ont. 520.

36. Haymond *v.* Camden, 48 W. Va. 463, 37 S. E. 642. See also *supra,* III, B, 1.

Old buildings pulled down, if incapable of repair, are to be valued as old materials only, in estimating permanent improvements. Robinson *v.* Ridley, 6 Madd. 2.

37. For the modes in the different states see the following cases:

Illinois.— Potts *v.* Cullum, 68 Ill. 217; Ross *v.* Irving, 14 Ill. 171.

Iowa.— Dungan *v.* Von Puhl, 8 Iowa 263.

Kentucky.— Counts *v.* Kitchen, 87 Ky. 47, 7 S. W. 538, 9 Ky. L. Rep. 909; Johnson *v.* Doan, 1 Bibb 116.

Mississippi.— The value of improvements should be assessed on a basis coextensive in time with the estimate of rents and profits which they contributed to produce, so as to allow defendant for all his improvements of which plaintiff recovers the benefit. Johnson *v.* Futch, 57 Miss. 73.

North Carolina.— Boyer *v.* Garner, 116 N. C. 125, 21 S. E. 180; Barker *v.* Owen, 93 N. C. 198.

Ohio.— Hunt *v.* McMahan, 5 Ohio 132.

Virginia.—Graeme *v.* Cullen, 23 Gratt. 266.

West Virginia.— Dawson *v.* Grow, 29 W. Va. 333, 1 S. E. 564.

United States.—Leighton *v.* Young, 52 Fed. 439, 3 C. C. A. 176, 18 L. R. A. 266.

Canada.— Stuart *v.* Eaton, 8 L. C. Rep. 113.

A decision on the return of commissioners to value improvements under the occupant laws concludes the parties as to all further claims. Elstton *v.* Bowman, 3 T. B. Mon. (Ky.) 37.

Necessity of notice.— A valuation of improvements under the occupying claimant law is invalid, unless reasonable notice of making it is given the adverse party or his attorney of record, although express provision is made therefor by the statute. Patterson *v.* Prather, 11 Ohio 35.

38. McGill *v.* Kennedy, 11 Ind. 20; Pulliam *v.* Jennings, 5 Bush (Ky.) 433; Pugh *v* Bell, 2 T. B. Mon. (Ky.) 125, 15 Am. Dec. 142; Ewing *v.* Handley, 4 Litt. (Ky.) 346, 14 Am. Dec. 140; Elliott *v.* Labarre, 3 La. 541.

39. Van Bibber *v.* Williamson, 37 Fed. 756.

40. Wendell *v.* Moulton, 26 N. H. 41.

41. Jones *v.* Jones, 4 Gill (Md.) 87, holding that if the property only is recovered, the estimate is to be made at the time of the audit, and so if the rents and profits are charged independently of improvements; but, if they are charged agreeably to the improved value, the estimate is to be made at the original cost.

42. Dungan *v.* Von Puhl, 8 Iowa 263.

43. Leighton *v.* Young, 52 Fed. 439, 3 C. C. A. 176, 18 L. R. A. 266, holding that the statute may fix a uniform date for the valuation of improvements by an occupying claimant in good faith as the date of the occupant's entry upon the land.

pensation for improvements on land is the one who has the right of possession of the land at the time the improvements are placed on it,[44] although he be an infant.[45]

D. Owner's Right to Set Off Rents, Profits, Waste, Etc. As a general rule the owner of the land is entitled to set off against the occupant's claim for improvements a reasonable compensation for rents and profits accruing on the land, exclusive of the improvements,[46] during the period of occupancy,[47] unless the owner of the land has been guilty of some act constituting an estoppel,[48] or the property is not rentable without such improvements.[49] And this rule applies,

44. Stone *v.* Crocker, 19 Pick. (Mass.) 292.

45. Beard *v.* Danshy, 48 Ark. 183, 2 S. W. 701. See, generally, INFANTS.

46. *Illinois.*— Breit *v.* Yeaton, 101 Ill. 242. *Iowa.*— Childs *v.* Shower, 18 Iowa 261; Dungan *v.* Von Puhl, 8 Iowa 263. *Kentucky.*— Smith *v.* Bell, 91 Ky. 655, 25 S. W. 752; Pugh *v.* Bell, 2 T. B. Mon. 125, 15 Am. Dec. 142. But see Bell *v.* Barnet, 2 J. J. Marsh. 516. *Louisiana.*— Kibbe *v.* Campbell, 34 La. Ann. 1163. *Texas.*—Cahill *v.* Benson, 19 Tex. Civ. App. 30, 46 S. W. 888. *West Virginia.*— Williamson *v.* Jones, 43 W. Va. 562, 27 S. E. 411, 64 Am. St. Rep. 891, 38 L. R. A. 694. *Wisconsin.*— Hadley *v.* Stewart, 65 Wis. 481, 27 N. W. 340; Pacquette *v.* Pickness, 19 Wis. 219. *Canada.*— McGregor *v.* McGregor, 5 Ont. 617; Munsie *v.* Lindsay, 10 Ont. Pr. 173 [*modified* in 11 Ont. 520]; Queen Victoria Niagara Falls Park *v.* Colt, 22 Ont. App. 1.

See 27 Cent. Dig. tit. "Improvements," § 22; and EJECTMENT, 15 Cyc. 200 *et seq.*, 223.

In Arkansas an occupant can withhold rents on the improvements made by him only for a time sufficient to compensate him for making them. Teaver *v.* Akin, 47 Ark. 528, 1 S. W. 772; Grider *v.* Driver, 46 Ark. 109.

Where the occupant is allowed to recover for his expenditures in making improvements, the enhanced rental may be set off against them. Bell *v.* Barnet, 2 J. J. Marsh. (Ky.) 516; Jones *v.* Jones, 4 Gill (Md.) 87.

Where the owner is required to pay interest upon the value of the improvements, he is entitled to rent based upon the value of the land and the improvements. Childs *v.* Shower, 18 Iowa 261. See Munsie *v.* Lindsay, 11 Ont. 520.

A possessor in good faith is not bound to account for rents and profits until the property is claimed by the real owner. Lowry *v.* Erwin, 6 Rob. (La.) 192, 39 Am. Dec. 556.

47. *Arkansas.*— Marlow *v.* Adams, 24 Ark. 109. *Illinois.*— Cable *v.* Ellis, 120 Ill. 136, 11 N. E. 188; Breit *v.* Yeaton, 101 Ill. 242. *Iowa.*— Welles *v.* Newsom, 76 Iowa 81, 40 N. W. 105; Parsons *v.* Moses, 16 Iowa 440, holding that when an occupying claimant, against whom judgment has been rendered in an action of right, brings an action to recover for improvements, the owner may be allowed for the claimant's occupation of the premises after the judgment in the action of right. *Kansas.*— Barton *v.* National Land Co., 27 Kan. 634. *Kentucky.*— Proctor *v.* Smith, 8 Bush 81. But see Pugh *v.* Bell, 2 T. B. Mon. 125, 15 Am. Dec. 142 (holding that rent against a *bona fide* occupant should begin from the filing of the bill); Parker *v.* Stephens, 3 A. K. Marsh. 202 (holding that they shall commence from the service of the declaration in the ejectment suit); Whitledge *v.* Wait, Ky. Dec. 335, 2 Am. Dec. 721 (holding the occupant liable for rents and profits from the time he has notice of the adverse claim). *Louisiana.*— Lowry *v.* Erwin, 6 Rob. 192, 39 Am. Dec. 556. But see Stanbrough *v.* Barnes, 2 La. Ann. 376 (holding a possessor in good faith not liable for the fruits and revenues on the land); Greenfield *v.* Manning, 7 La. 56. *Maryland.*— McLaughlin *v.* Barnum, 31 Md. 425; Ridgely *v.* Bond, 18 Md. 433. *Michigan.*— Pierson *v.* Conley, 95 Mich. 619, 55 N. W. 387. *North Carolina.*— Johnson *v.* Armfield, 130 N. C. 575, 41 S. E. 705. *Tennessee.*— Paul *v.* Williams, 12 Lea 215; Ridley *v.* McNairy, 2 Humphr. 174. *United States.*— Jackson *v.* Ludeling, 99 U. S. 513, 25 L. ed. 460. *Canada.*— Queen Victoria Niagara Falls Park *v.* Colt, 22 Ont. App. 1; Hartley *v.* Maycock, 28 Ont. 508; McGregor *v.* McGregor, 27 Grant Ch. (U. C.) 470; McCarthy *v.* Arbuckle, 31 U. C. C. P. 405. But see Knowlton *v.* Clark, 9 L. C. Jur. 243; Nugent *v.* Mitchell, 19 Rev. Lég. 569, holding a *bona fide* possessor not liable for rents, issue, and profits accrued previous to service of process.

See 27 Cent. Dig. tit. "Improvements," § 22.

A son holding by donation from his father, but which donation is void for want of form, owes rent for the land to the succession of the father only from the day judicial demand is made for its return. White's Succession, 51 La. Ann. 1702, 26 So. 428.

48. James *v.* McKinsey, 4 J. J. Marsh. (Ky.) 625, holding that the owner cannot set off rents where the improvements were induced by him.

49. Kibbe *v.* Campbell, 34 La. Ann. 1163; Cahill *v.* Benson, 19 Tex. Civ. App. 30, 46 S. W. 888.

although the period for which rents are charged extends beyond the time within which the rents could have been recovered in a direct action for that purpose.[50] The occupant is also liable for waste and injury to the property;[51] and to a set-off for the costs in a prior suit in which the owner recovered the land,[52] but not for attorney's fees therein.[53]

E. Owner's Right of Election After Judgment. By statute in some jurisdictions the owner of the land after a judgment for its recovery has the right of electing either to keep the property with the improvements on paying to the occupant the enhanced value of the soil, or to take the value of the land in money without improvements, thereupon making a conveyance of the land to the occupant.[54] These statutes, however, do not give to the occupying claimant the option of keeping the land;[55] nor does the right exist in favor of the owner of the land, in the absence of a statute.[56]

50. *Iowa.*— Parsons *v.* Moses, 16 Iowa 440.
Kansas.— Barton *v.* National Land Co., 27 Kan. 634.
Kentucky.— Taylor *v.* Whiting, 9 Dana 399.
North Carolina.— Barker *v.* Owen, 93 N. C. 198.
Wisconsin.— Davis *v.* Louk, 30 Wis. 308.
Canada.— Queen Victoria Niagara Falls Park *v.* Colt, 22 Ont. App. 1.

51. Smith *v.* Bell, 91 Ky. 655, 25 S. W. 752; Proctor *v.* Smith, 8 Bush (Ky.) 81; Bell *v.* Barnet, 2 J. J. Marsh. (Ky.) 516; Parker *v.* Stephens, 3 A. K. Marsh. (Ky.) 197; Darnall *v.* Jones, 72 S. W. 1108, 24 Ky. L. Rep. 2090. See EJECTMENT, 15 Cyc. 223.

52. Davis *v.* Louk, 30 Wis. 308.

53. Smith *v.* Bell, 91 Ky. 655, 25 S. W. 752.

54. *Indiana.*— Chesround *v.* Cunningham, 3 Blackf. 82.
Iowa.— Webster *v.* Stewart, 6 Iowa 401.
Kansas.— Stephens *v.* Ballou, 27 Kan. 594.
Louisiana.— In this state the owner may elect to have the improvements removed at the expense of the one making them, or he may keep them on paying to the improver the value of his materials used and the cost of workmanship. Kibbe *v.* Campbell, 34 La. Ann. 1163; McCastle *v.* Chaney, 28 La. Ann. 720; Wilson *v.* Benjamin, 26 La. Ann. 587; Poche *v.* Theriot, 23 La. Ann. 137; D'Armand *v.* Pullin, 16 La. Ann. 243; Stanbrough *v.* Barnes, 2 La. Ann. 376; Miller *v.* Michoud, 11 Rob. (La.) 225; Baldwin *v.* Union Ins. Co., 2 Rob. (La.) 133; Pearce *v.* Frantum, 16 La. 414; Daquin *v.* Coiron, 8 Mart. N. S. (La.) 608; Labrie *v.* Filiol, 9 Mart. (La.) 348. A verdict charging the owner with buildings at a high estimate, as enhancing the value of the soil, without giving him the option to pay the cost of construction, is bad. Kellam *v.* Rippey, 12 Rob. 44.
Maryland.— Union Hall Assoc. *v.* Morrison, 39 Md. 281.
Michigan.— McKenzie *v.* A. P. Cook Co., 113 Mich. 452, 71 N. W. 868; Miller *v.* Clark, 60 Mich. 162, 26 N. W. 872.
Missouri.— Cox *v.* McDivit, 125 Mo. 358, 28 S. W. 597; Stump *v.* Hornback, 94 Mo. 26, 6 S. W. 356.
Nebraska.— Troxell *v.* Stevens, 57 Nebr. 329, 77 N. W. 781.
New Jersey.— McKelway *v.* Armour, 10 N. J. Eq. 115, 64 Am. Dec. 445.
North Carolina.— Barker *v.* Owen, 93 N. C. 198.
Ohio.— McCoy *v.* Grandy, 3 Ohio St. 463.
South Dakota.— Pearl *v.* Thorp, 17 S. D. 288, 96 N. W. 99.
Virginia.— Graeme *v.* Cullen, 23 Gratt. 266.
United States.— Griswold *v.* Bragg, 48 Fed. 519, 18 Blatchf. 202, 48 Conn. 577; Dunn *v.* Games, 8 Fed. Cas. No. 4,177, 2 McLean 344.
Canada.— Aston *v.* Innis, 26 Grant Ch. (U. C.) 42.
See also EJECTMENT, 15 Cyc. 239; TRESPASS TO TRY TITLE.
After the owner has elected he is bound by his election, and if he elects to pay for the improvements he cannot compel the occupant to take the land with the improvements. Clay *v.* Miller, 2 Litt. (Ky.) 279; Miller *v.* Clark, 60 Mich. 162, 26 N. W. 872.
A writ of possession may issue if the owner after recovery demands the value of the land without the improvements and the occupying claimant does not pay the same within such reasonable time as the court shall allow. Chesround *v.* Cunningham, 3 Blackf. (Ind.) 82.
Election must be by answer where it is made in an action by the occupant for the value of his improvements. Cox *v.* McDivit, 125 Mo. 358, 28 S. W. 597.

55. Stephens *v.* Ballou, 27 Kan. 594; Claypoole *v.* King, 21 Kan. 602; McCoy *v.* Grandy, 3 Ohio St. 463, holding that a statute giving to the occupying claimant, instead of the owner of the land, the option either to take the land and pay its valuation without the improvements, or to take pay for his improvements, is unconstitutional. See also Barker *v.* Owen, 93 N. C. 198.
In Iowa upon the value of the improvements being ascertained, the rightful owner may, by paying the same, take the property. If he does not do so, however, within a reasonable time to be fixed by the court, the occupying claimant may take the same, by paying the appraised value of the land. Webster *v.* Stewart, 6 Iowa 401.

56. Clay *v.* Miller, 2 Litt. (Ky.) 279, holding that in a case not coming within the occupying claimant acts, the owners of the land cannot compel the person from whom he

F. Liens — 1. In General. In the absence of a statute a *bona fide* occupant has no such lien at law as entitles him to be secured the value of his improvements before being compelled by suit to surrender possession to the true owner;[57] but in some jurisdictions a statutory lien exists against the land for a balance due for improvements made by an occupant in good faith,[58] although the land may belong to a purchaser for value without notice,[59] and it has been held that in equity a lien or charge on the land may be decreed for improvements.[60] But an occupant in bad faith has no right to a lien for his improvements;[61] nor can a lien exist in favor of the occupant as against a third possessor in good faith,[62] or for money spent in making improvements.[63]

has recovered it to take the land, with improvements in lieu of a pecuniary compensation for the improvements.

57. Putnam *v.* Tyler, 117 Pa. St. 570, 12 Atl. 43. See Ejectment, 15 Cyc. 224.

58. *Arkansas.*— White *v.* Stokes, 67 Ark. 184, 53 S. W. 1060; Fee *v.* Cowdry, 45 Ark. 410, 55 Am. Rep. 560.

Kansas.— Mercer *v.* Justice, 63 Kan. 225, 65 Pac. 219.

Kentucky.— Wintersmith *v.* Price, 66 S. W. 2, 23 Ky. L. Rep. 2005. But see Hayden *v.* Delay, Litt. Sel. Cas. 278.

Louisiana.— Laizer *v.* Generes, 10 Rob. 178; Pearce *v.* Frantum, 16 La. 423; Fletcher *v.* Cavelier, 10 La. 116.

Mississippi.— Wilie *v.* Brooks, 45 Miss. 542.

North Carolina.— Boyer *v.* Garner, 116 N. C. 125, 21 S. E. 180; Barker *v.* Owen, 93 N. C. 198.

Virginia.— Graeme *v.* Cullen, 23 Gratt. 266.

Wisconsin.— Oberick *v.* Gilman, 31 Wis. 495.

United States.— Jackson *v.* Ludeling, 99 U. S. 513, 25 L. ed. 460; Leighton *v.* Young, 52 Fed. 439, 3 C. C. A. 176, 18 L. R. A. 266.

Canada.— Nugent *v.* Mitchell, 19 Rev. Lég. 569; Queen Victoria Niagara Falls Park *v.* Colt, 22 Ont. App. 1; Gummerson *v.* Banting, 18 Grant Ch. (U. C.) 516; McCarthy *v.* Arbuckle, 29 U. C. C. P. 529; Smith *v.* Gibson, 25 U. C. C. P. 248; Ellice *v.* Courtmanche, 11 L. C. Jur. 325, 17 L. C. Rep. 423; Knowlton *v.* Clark, 9 L. C. Jur. 243; Stuart *v.* Eaton, 8 L. C. Rep. 113; Dufour *v.* Dufour, 10 Montreal Leg. N. 305. But where the crown brings a petitory action, the defendant cannot claim the right to retain possession of the lands in question until payment of the value of his improvements. Thompson *v.* Desmarteau, 6 Montreal Super. Ct. 379.

See 27 Cent. Dig. tit. "Improvements," § 19; and Ejectment, 15 Cyc. 224.

The occupying claimant and the owner of the fee should be regarded as tenants in common in proportion to the value of their respective interests with the sole right of possession in the occupant so long as the joint tenancy continues, where the owner does not pay for the improvements and the occupant does not pay for the land as required by statute and the statute makes no provision for such a contingency. Webster City, etc., R. Co. *v.* Newson, 70 Iowa 355, 30 N. W. 738 (holding also that after the occupant's title has been defeated he may be restrained from making further improvements); Reilly *v.* Ringland, 39 Iowa 106; Childs *v.* Shower, 18 Iowa 261; Dunn *v.* Starkweather, 6 Iowa 466; Leighton *v.* Young, 52 Fed. 439, 3 C. C. A. 176, 18 L. R. A. 266; Griswold *v.* Bragg, 6 Fed. 342, 19 Blatchf. 94.

59. Boyer *v.* Garner, 116 N. C. 125, 21 S. E. 180.

60. *Kentucky.*— Robards *v.* Robards, 85 S. W. 718, 27 Ky. L. Rep. 494; Evans *v.* Page, 26 S. W. 1016, 16 Ky. L. Rep. 177.

Maryland.— Union Hall Assoc. *v.* Morrison, 39 Md. 281.

Ohio.— Preston *v.* Brown, 35 Ohio St. 18.

Oregon.— Hatcher *v.* Briggs, 6 Oreg. 31.

United States.— Bright *v.* Boyd, 4 Fed. Cas. No. 1,875, 1 Story 478, 4 Fed. Cas. No. 1,876, 2 Story 605.

England.— Shine *v.* Gough, 1 Ball & B. 444; Cawdor *v.* Lewis, 1 Y. & Coll. Exch. 427.

See also Ejectment, 15 Cyc. 224.

Improvements made by a wife with her separate means on lands of her husband's father under an inducement that she would be allowed an interest therein will be declared a lien on the land. Dunn *v.* Dunn, (Tenn. Ch. App. 1899) 51 S. W. 119.

A lien cannot be declared upon property where the evidence is insufficient to show that the improvements enhanced its value. Bacon *v.* Thornton, 16 Utah 138, 51 Pac. 153.

One making improvements under an agreement to convey is entitled to a lien therefor only on the portion agreed to be conveyed. Robards *v.* Robards, 85 S. W. 718, 27 Ky. L. Rep. 494.

61. Smith *v.* Bell, 91 Ky. 655, 25 S. W. 752; Payne *v.* Anderson, 35 La. Ann. 977; Mitchell *v.* Bridgman, 71 Minn. 360, 72 N. W. 142; Queen Victoria Niagara Falls Park *v.* Colt, 22 Ont. App. 1; Russell *v.* Romanes, 3 Ont. App. 635; Wyoming Corp. *v.* Bell, 24 Grant Ch. (U. C.) 564; Galarneau *v.* Chrétion, 10 Quebec 83; Lane *v.* Deloges, 1 L. C. Jur. 3. See also *supra*, III, A, 5, b.

62. Harrison *v.* Faulk, 2 La. 92; Hughes *v.* Stallings, 52 Miss. 375. See Harman *v.* Harman, 54 S. C. 100, 31 S. E. 881, holding that one in possession of land at the time it was sold cannot set up against an action by the purchaser a claim against the vendor for services in making improvements, he having no lien therefor.

63. Darling *v.* Darling, 123 Mich. 307, 82 N. W. 48.

2. ENFORCEMENT OF LIEN.[64] In some jurisdictions if the sum adjudged the occupant for improvements is not paid by the owner of the land after he has elected to take the land, an order may be made to sell the land for its payment.[65]

IV. PROCEDURE.

A. Remedies[66] — 1. IN GENERAL. Since under the common law one who had made improvements on the land of another had no right of action upon eviction to recover compensation for such improvements,[67] one who desires to recover thereafter must proceed in the mode directed by statute;[68] in which case all the statutory requirements must be followed,[69] except in the federal courts.[70] But, as such proceeding is remedial in its character, it should be liberally construed in order that an equitable and fair adjustment of the rights of the parties may be had.[71] In the absence of a statute, or in cases to which the statutes do not apply, the occupant's remedy is by way of set off in a suit or action by the owner,[72] or in equity.[73]

64. See also EJECTMENT, 15 Cyc. 239.

65. Troxell *v.* Stevens, 57 Nebr. 329, 77 N. W. 781; Union Hall Assoc. *v.* Morrison, 39 Md. 281; Barker *v.* Owen, 93 N. C. 198.

66. See also EJECTMENT, 15 Cyc. 232 *et seq.*

67. See *supra*, III, A, 1.

68. For the statutory remedies in the various states see the following cases:

Indiana.— Westerfield *v.* Williams, 59 Ind. 221.

Iowa.— Lunquest *v.* Ten Eyck, 40 Iowa 213; Parsons *v.* Moses, 16 Iowa 440; Claussen *v.* Rayburn, 14 Iowa 136; Dunn *v.* Starkweather, 6 Iowa 466; Webster *v.* Stewart, 6 Iowa 401.

Kansas.— Barton *v.* National Land Co., 27 Kan. 634.

Maine.— Chapman *v.* Butler, 22 Me. 191.

Massachusetts.— Russell *v.* Blake, 2 Pick. 505.

Michigan.— Lemerand *v.* Flint, etc., R. Co., 117 Mich. 309, 75 N. W. 763.

Missouri.— Cox *v.* McDivit, 125 Mo. 358, 28 S. W. 597; Henderson *v.* Langley, 76 Mo. 226; Malone *v.* Stretch, 69 Mo. 25; Stump *v.* Hornbeck, 15 Mo. App. 367.

North Carolina.— Boyer *v.* Garner, 116 N. C. 125, 21 S. E. 180; Condry *v.* Cheshire, 88 N. C. 375.

Ohio.— See Hunt *v.* McMahan, 5 Ohio 132.

South Carolina.— Hall *v.* Boatwright, 58 S. C. 544, 36 S. E. 1001, 79 Am. St. Rep. 864; Tumbleston *v.* Rumph, 43 S. C. 275, 21 S. E. 84; Lessly *v.* Bowie, 27 S. C. 193, 3 S. E. 199; Lumb *v.* Pinckney, 21 S. C. 471; Godfrey *v.* Fielding, 21 S. C. 313. In this state if the occupant believes his title to be good at the time of purchase his remedy is by complaint; if, however, he believes it good at the time he makes the improvements his remedy is by answer in the action to recover the land. Tumbleston *v.* Rumph, *supra;* Aultman *v.* Utsey, 41 S. C. 304, 19 S. E. 617.

Vermont.— Brown *v.* Storm, 4 Vt. 37.

Virginia.— Graeme *v.* Cullen, 23 Gratt. 266.

West Virginia.—Dawson *v.* Grow, 29 W. Va. 333, 1 S. E. 564.

Wisconsin.— Oberich *v.* Gilman, 31 Wis. 495.

See 27 Cent. Dig. tit. "Improvements," § 23; and EJECTMENT, 15 Cyc. 232.

Assumpsit cannot be maintained for improvements placed on another's land with his consent, if the improver is not prevented from occupying or removing the same. Tapley *v.* Smith, 18 Me. 12.

69. *Iowa.*— Lunquest *v.* Ten Eyck, 40 Iowa 213; Webster *v.* Stewart, 6 Iowa 401.

Massachusetts.— Russell *v.* Blake, 2 Pick. 505.

Missouri.— Cox *v.* McDivit, 125 Mo. 358, 28 S. W. 597.

Oklahoma.— Province *v.* Lovi, 4 Okla. 672, 47 Pac. 476.

South Carolina.— Godfrey *v.* Fielding, 21 S. C. 313.

Wisconsin.— Huebschmann *v.* McHenry, 29 Wis. 655.

70. Leighton *v.* Young, 52 Fed. 439, 3 C. C. A. 176, 18 L. R. A. 266 (holding that the mode of procedure in the federal court adopted by an occupying claimant to enforce compensation for improvements will not defeat the action because it does not conform strictly to requirements of the state statute if in such statute no distinction is made between legal and equitable rights and modes of proceeding; since the federal courts will enforce the right but will preserve the distinction between law and equity); Hamilton Bank *v.* Dudley, 2 Pet. (U. S.) 492, 7 L. ed. 496.

An injunction suit in a federal court when it has jurisdiction against the execution of a writ of possession is a proper remedy to enforce an occupying claimant's right to compensation for improvements, and it may be instituted at any time before he is dispossessed of the premises after they have been adjudged to the true owner; where the statute provides for the protection of his rights after such judgment. Leighton *v.* Young, 52 Fed. 439, 3 C. C. A. 176, 18 L. R. A. 266.

71. Cox *v.* McDivit, 125 Mo. 358, 28 S. W. 597.

72. See *supra*, III, A, 1, 3.

73. See *supra*, III, A, 3.

2. Accrual of Action. A statutory action to recover for improvements upon land accrues when the occupying claimant is adjudged not to be the rightful owner thereof and recovery of the premises awarded to the owner; or when he has been evicted from the premises.[74]

3. Parties. A statutory action or proceeding, after eviction, for compensation for improvements may be brought by the party making them,[75] or by his heir or personal representative,[76] or assigns,[77] against plaintiff in the original action.[78]

4. Defenses. It is a good defense to an action for compensation for improvements that defendant was merely the agent of plaintiff's assignor,[79] or that the improvements did not benefit the property or enhance its value.[80] But it is no defense that the owner of the land is an infant.[81]

B. Pleading[82] — 1. In General. An occupant's pleading for compensation should set forth the grounds on which the relief is sought, stating the making of the improvements in good faith, and their value as well as the value of the land without them,[83] and should be filed in the prescribed time.[84] But the fact that an occupant neglects to pray for compensation in his answer to a petitory action does not deprive him of his right thereto.[85]

2. Amendments. An amendment not altering the nature of the pleading may be allowed in the discretion of the court.[86]

C. Evidence — 1. Burden of Proof.[87] The burden of proof is on one seeking to recover compensation for improvements to show every fact essential to the right.[88]

74. *Arkansas.*— White *v.* Stokes, 67 Ark. 184, 53 S. W. 1060.
Florida.— Asia *v.* Hiser, 22 Fla. 378.
Indiana.— Fish *v.* Blasser, 146 Ind. 186, 45 N. E. 63; Wernke *v.* Hazen, 32 Ind. 431.
Missouri.— Henderson *v.* Langley, 76 Mo. 226.
New Hampshire.— Miller *v.* Tobie, 41 N. H. 84.
Ohio.— Preston *v.* Brown, 35 Ohio St. 18.
Texas.— Brito *v.* Faver, (Civ. App. 1894) 25 S. W. 445.
Virginia.— Graeme *v.* Cullen, 23 Gratt. 266.

75. See *supra*, III, A, 4, and cases there cited.

76. Womack *v.* Womack, 2 La. Ann. 339. See *supra*, III, A, 4, f.

77. See *supra*, III, A, 4, e.

78. Godfrey *v.* Fielding, 21 S. C. 313, holding that proceeding by complainant under the South Carolina statute must be against plaintiff in the original action as no authority is given for substituting heirs or purchasers.

79. Hart Lumber Co. *v.* Rucker, 20 Wash. 383, 55 Pac. 320.

80. Bacon *v.* Thornton, 16 Utah 138, 51 Pac. 153. See *supra*, III, A, 5, a; III B, 1.

81. Beard *v.* Dansbey, 48 Ark. 183, 2 S. W. 701.

82. See also Ejectment, 15 Cyc. 234.

83. Webster *v.* Stewart, 6 Iowa 401; Lumb *v.* Pinckney, 21 S. C. 471; Powell *v.* Davis, 19 Tex. 380. See also Grasett *v.* Carter, 4 Can. L. T. 491.

84. Garrison *v.* Dougherty, 18 S. C. 486, holding that a complaint not filed until remittitur entered dismissing an appeal is not filed within forty-eight hours after final judgment, as required by the South Carolina statute.

Statements claiming betterments, as permitted by the New Hampshire statute, may, in the discretion of the court, be filed at the second term after the entry of the action, on such terms as the court may impose. Corbett *v.* Norcross, 20 N. H. 366.

The objection to an action for compensation that the occupying claimant exercised his right to recover for improvements under a cross complaint in the main action cannot be made for the first time on appeal. Fish *v.* Blasser, 146 Ind. 186, 45 N. E. 63.

85. Packwood *v.* Richardson, 1 Mart. N. S. (La.) 405.

86. Womack *v.* Womack, 2 La. Ann. 339 (holding that an action for improvements commenced by one as tutrix of minor heirs of the person making the improvements may, on subsequently qualifying as administratrix, amend the petition and claim to recover in that capacity); Tumbleston *v.* Rumph, 43 S. C. 375, 21 S. E. 84; McKnight *v.* Cooper, 27 S. C. 92, 2 S. E. 842 (allowing defendant to amend his answer and allege that at the time both of purchase and of erecting the improvements he believed his title to be good in fee); Pacquette *v.* Pickness, 19 Wis. 219 (holding that defendant in an action for compensation for improvements should be allowed to amend his answer by inserting proper allegations as to the value of the use of the premises, exclusive of improvements.

87. See also Ejectment, 15 Cyc. 235.

88. Hall *v.* Hall, 30 W. Va. 779, 5 S. E. 260.

A grantee occupies no better position in regard to improvements made by his grantor than the latter himself occupied; and to recover for such improvements he must show that his grantor was within the provisions of the statute when he made the improvements. Wheeler *v.* Merriman, 30 Minn. 372, 15 N. W. 665.

He must show that the improvements were permanent;[89] that the value of the land has been enhanced thereby;[90] and that they were made in good faith under a *bona fide* belief of title,[91] or under some mistake concerning his rights,[92] or because he was induced to do so through the fraud or deception of the owner.[93] But if the owner of the land elects to avail himself of the privilege of keeping the improvements by paying the enhanced value of the land by reason thereof,[94] the burden is on him to show the amount of such enhanced value.[95]

2. Admissibility. The general rules governing the admissibility of evidence in civil cases apply to a claim for improvements made on another's land,[96] to show the occupant's good faith,[97] or possession.[98] On the question of value testimony should be admitted to show the value of the improvements, the value of the land without improvements, its value with improvements, and all facts tending to prove what its value would have been if the improvements had never been made.[99] But evidence of the value of improvements irrespective of their effect upon the value of the land is inadmissible.[1]

89. Queen Victoria Niagara Falls Park *v.* Colt, 22 Ont. App. 1. See also *supra*, II, A, 1; III, A, 5, a.

90. Fisher *v.* Edington, 85 Tenn. 23, 1 S. W. 499; Thomas *v.* Quarles, 64 Tex. 491; Bacon *v.* Thornton, 16 Utah 138, 51 Pac. 153; Queen Victoria Niagara Falls Park *v.* Colt, 22 Ont. App. 1. See *supra*, II, A, 1; III, B, 1.

Under the South Carolina statute it is not only incumbent on plaintiff who has been ousted from possession to show the value of his improvements, but he must also present evidence from which the jury can find a special verdict stating the value of the land with the improvements and its value without them. Hall *v.* Boatwright, 58 S. C. 544, 36 S. E. 1001, 79 Am. St. Rep. 864.

91. *Illinois.*— Williams *v.* Vanderbilt, 145 Ill. 238, 34 N. E. 476, 36 Am. St. Rep. 486, 21 L. R. A. 489.

North Carolina.— Carolina Cent. R. Co. *v.* McCaskill, 98 N. C. 526, 4 S. E. 468.

South Dakota.— Wood *v.* Conrad, 2 S. D. 334, 50 N. W. 95.

Texas.— Thompson *v.* Comstock, 59 Tex. 318.

West Virginia.—Dawson *v.* Grow, 29 W. Va. 333, 1 S. E. 564.

Canada.— Queen Victoria Niagara Falls Park *v.* Colt, 22 Ont. App. 1.

See also *supra*, III, A, 5, a, b.

Contra.— Cole *v.* Johnson, 53 Miss. 94; Stark *v.* Starr, 22 Fed. Cas. No. 13,307, 1 Sawy. 15; Dill *v.* Moon, 14 S. C. 338, holding that the court will presume, in the absence of contrary proof, that the title to land under which improvements were made was colorable, and that the improvements were made in good faith.

In Kentucky he must show himself to be the owner of the land by reason of a claim, in law or equity, founded upon a grant from the commonwealth; and in order to do so he must connect himself with the grant by showing that he held the title which it granted. Fairbairn *v.* Means, 4 Metc. 323.

92. Williams *v.* Vanderbilt, 145 Ill. 238, 34 N. E. 476, 36 Am. St. Rep. 486, 21 L. R. A. 489.

93. Williams *v.* Vanderbilt, 145 Ill. 238, 34 N. E. 476, 36 Am. St. Rep. 486, 21 L. R. A. 489; 3 Pomeroy Eq. Jur. § 1241, note 1. See also *supra*, III, A, 6.

An evicted claimant, not a bona fide purchaser, cannot recover compensation for his improvements unless he shows that the owner has been guilty of fraud or gross laches in not notifying him to desist when he knew that the improvements were being made under a mistaken belief in ownership. Hall *v.* Hall, 30 W. Va. 779, 5 S. E. 260.

94. See *supra*, III, E.

95. Rivas *v.* Hunstock, 2 Rob. (La.) 187.

96. McGill *v.* Kennedy, 11 Ind. 20. See Ejectment, 15 Cyc. 235; and, generally, Evidence.

97. Nolan *v.* Moore, (Tex. Civ. App. 1902) 70 S. W. 785 [*reversed* on other grounds in 96 Tex. 341, 72 S. W. 583, 97 Am. St. Rep. 911], holding a power of attorney of a married woman to sell her separate real estate, even if invalid because her husband did not join therein, and a deed from the attorney in fact, admissible as a basis for a claim for improvements made in good faith by the grantees.

Evidence of improvements made in bad faith is properly excluded. Welles *v.* Newsome, 76 Iowa 81, 40 N. W. 105.

The record in a former action establishing that the occupant's title was fraudulent and void is admissible in a subsequent suit for betterments to show that such was the finding of the jury (Thompson *v.* Gilman, 17 Vt. 109); and the occupant, in such case, is not entitled to give in evidence any facts which tend to show that such title was not fraudulent; nor to show that plaintiff in the real action had no title to the premises in question (Thompson *v.* Gilman, *supra*).

98. Lamar *v.* Minter, 13 Ala. 31, holding parol evidence of owner's intention admissible to show adverse possession by the occupant under the Alabama statute.

99. Pacquette *v.* Pickness, 19 Wis. 219.

1. Fletcher *v.* Brown, 35 Nebr. 660, 53 N. W. 577; Fisher *v.* Edington, 85 Tenn. 23, 1 S. W. 499. See also Ejectment, 15 Cyc. 236.

3. Weight and Sufficiency. The general rules governing the weight and sufficiency of evidence in civil cases apply to evidence introduced on an occupant's claim for compensation for improvements.[2]

D. Questions of Law and Fact.[3] Whether or not an occupant has made improvements in good faith while in *bona fide* possession under color of title,[4] the nature of the improvements,[5] and his right of recovery,[6] are questions of fact for the jury. But what constitutes color of title in a particular case is a question of law for the court.[7]

E. Judgment.[8] A judgment rendered upon a trial at which the occupant's right to compensation is in issue is conclusive of that right in a subsequent proceeding,[9] although it is otherwise if such right was not in issue at the former trial.[10] A personal money judgment cannot be rendered in favor of an occupant making improvements.[11]

IMPROVIDENCE. A want of care and foresight in the management of property.[1] (Improvidence: Creation and Operation of Spendthrift Trust, see Trusts.)

IMPRUDENT. A word sometimes used as the equivalent of "neglect."[2]

2. Fletcher *v.* Brown, 35 Nebr. 660, 53 N. W. 577; House *v.* Stone, 64 Tex. 677. See, generally, Evidence.

On an issue of good faith, an occupant's knowledge of facts which, as a matter of law, renders his title defective, is a circumstance to be considered, but is not conclusive. Templeton *v.* Lowry, 22 S. C. 389. A possessor's good faith is not conclusively established by his uncontradicted testimony. Molitor *v.* Robinson, 40 Mich. 200.

Evidence tending merely to show that improvements of some considerable value have been put on the land does not warrant sending the case to the jury nor save a nonsuit. Hall *v.* Boatwright, 58 S. C. 544, 36 S. E. 1001, 79 Am. St. Rep. 864.

Evidence insufficient to show parol permission to improvements see Hartman *v.* Powell, (N. J. Ch. 1905) 59 Atl. 628.

3. See also Ejectment, 15 Cyc. 236.

4. *Georgia.*— Beverly *v.* Burke, 9 Ga. 440, 54 Am. Dec. 351.

Illinois.— Woolward *v.* Blanchard, 16 Ill. 424.

Iowa.— Welles *v.* Newsom, 76 Iowa 81, 40 N. W. 105.

Michigan.— Miller *v.* Clark, 56 Mich. 337, 23 N. W. 35; Molitor *v.* Robinson, 40 Mich. 200.

New Hampshire.— Bellows *v.* Copp, 20 N. H. 492.

North Carolina.— Casey *v.* Cooper, 99 N. C. 395, 6 S. E. 653; Carolina Cent. R. Co. *v.* McCaskill, 98 N. C. 526, 4 S. E. 468.

South Dakota.— Meadows *v.* Osterkamp, 13 S. D. 571, 83 N. W. 624.

Texas.— Louder *v.* Schluter, 78 Tex. 103, 14 S. W. 205, 207; House *v.* Stone, 64 Tex. 677; Thompson *v.* Cragg, 24 Tex. 582; Cahill *v.* Benson, 19 Tex. Civ. App. 30, 46 S. W. 888.

Vermont.— Beckley *v.* Willard, 13 Vt. 533.

United States.— Wright *v.* Mattison, 18 How. 50, 15 L. ed. 280.

Thus it is a question of fact whether a purchaser of land supposed at the time of his purchase that he had a good title in fee (Templeton *v.* Lowry, 22 S. C. 389); whether an occupant of land claimed it as owner, and believed himself to be such when he made improvements thereon (House *v.* Stone, 64 Tex. 677); or whether a possessor had reasonable grounds to believe himself the true owner (Carolina Cent. R. Co. *v.* McCaskill, 98 N. C. 526, 4 S. E. 468; House *v.* Stone, 64 Tex. 677; Hill *v.* Spear, 48 Tex. 583).

5. Thomas *v.* Wagner, 131 Mich. 601, 92 N. W. 106; Morton *v.* Lewis, 16 U. C. C. P. 485.

6. Casey *v.* Cooper, 99 N. C. 395, 6 S. E. 653; Beckley *v.* Willard, 13 Vt. 533, holding that the question cannot be raised by special pleadings which terminate in demurrer.

7. Woodward *v.* Blanchard, 16 Ill. 424; Miller *v.* Clark, 56 Mich. 337, 23 N. W. 35; Wright *v.* Mattison, 18 How. (U. S.) 50, 15 L. ed. 280. See also Adverse Possession, 1 Cyc. 1155.

8. See also Ejectment, 15 Cyc. 237, 238.

9. Casey *v.* Cooper, 99 N. C. 395, 6 S. E. 653. See, generally, Judgments.

10. Templeton *v.* Lowry, 22 S. C. 389.

11. Childs *v.* Shower, 18 Iowa 261 (holding a statute permitting a personal money judgment in favor of the occupying claimant, and a general execution to enforce the same, unconstitutional and invalid); Dungan *v.* Von Puhl, 8 Iowa 263; Malone *v.* Stretch, 69 Mo. 25; Bacon *v.* Thornton, 16 Utah 138, 51 Pac. 153.

1. *In re* Connors, 110 Cal. 408, 412, 42 Pac. 906; Root *v.* Davis, 10 Mont. 228, 246, 25 Pac. 105 [*citing* Coope *v.* Lowerre, 1 Barb. Ch. (N. Y.) 45]; Webster Dict., where it is said: "The symptoms of an improvident temperament would, evidently, be carelessness, indifference, prodigality, wastefulness, or negligence in reference to the care, management, and preservation of property in charge."

2. Lobsenz *v.* Metropolitan St. R. Co., 72 N. Y. App. Div. 181, 182, 76 N. Y. Suppl. 411.

IMPUNITAS CONTINUUM AFFECTUM TRIBUIT DELINQUENTI. A maxim meaning "Impunity offers a continual bait to a delinquent." [3]

IMPUNITAS SEMPER AD DETERIORA INVITAT. A maxim meaning "Impunity always invites to greater crimes." [4]

IMPUNITY. A word which applies to something which may be done without penalty or punishment.[5]

IMPURE MILK. See, generally, FOOD.

IMPURIS MANIBUS NEMO ACCEDAT CURIAM. A maxim meaning "Let no one come to court with unclean hands." [6]

IMPUTABLE CONTRIBUTORY NEGLIGENCE. See MASTER AND SERVANT; NEGLIGENCE, and Cross-References Thereunder.[7]

IMPUTATION OF PAYMENT. See PAYMENT.

IMPUTED NEGLIGENCE. See NEGLIGENCE.

IN.[8] A word denoting presence in place, time, or state; not out.[9] When used with reference to place or situation, within the bounds or limits of;[10] within;[11] surrounded by;[12] inside of.[13] When used with reference to time, a point of time, a period taken as a point;[14] a limit of time; at the expiration of;[15] a course or period of time; within the limits or duration of; during;[16] throughout.[17] The term may be equivalent to AT,[18] *q. v.*; of;[19] on[20]—but not where such construction

3. Bouvier L. Dict.

Applied in Foxley's Case, 5 Coke 109*a*, 109*b*; Vaux's Case, 4 Coke 44*a*, 45*a*, where it is spoken of as a maxim of "law and state."

4. Bouvier L. Dict. [*citing* Foxley's Case, 5 Coke 109*a*].

5. Dillon *v.* Rogers, 36 Tex. 152, 153, where the court said: "[It] comes from the Latin word *impunis*, which is a derivative from the word *pœna*, with the prefix *in*, and means without punishment or penalty."

6. Tayler L. Gloss.

7. See also Smith *v.* New York Cent., etc., R. Co., 4 N. Y. App. Div. 493, 499, 38 N. Y. Suppl. 666.

8. Distinguished from "for" in Maguire *v.* Mobile County, 71 Ala. 401, 421.

Distinguished from "to" in Scales *v.* Masonic Protective Assoc., 70 N. H. 490, 491, 48 Atl. 1084.

9. Worcester Dict. [*quoted* in New York *v.* Second Ave. R. Co., 31 Hun (N. Y.) 241, 245].

10. Lambe *v.* Donaldson Steamship Line, 22 Quebec Super. Ct. 510, 516 [*quoting* Century Dict., and *citing* Bishop St. Cr. No. 216].

11. Lambe *v.* Donaldson Steamship Line, 22 Quebec Super. Ct. 510, 516 [*citing* Century Dict.]; Webster Dict. [*quoted* in Verdine *v.* Olney, 77 Mich. 310, 320, 43 N. W. 975; Patterson *v.* Judge, 17 Wkly. Notes Cas. (Pa.) 127, 128]; Worcester Dict. [*quoted* in New York *v.* Second Ave. R. Co., 31 Hun (N. Y.) 241, 245].

It is not as emphatic as "within" in some senses. Lambe *v.* Donaldson Steamship Line, 22 Quebec Super. Ct. 510, 516.

12. Webster Dict. [*quoted* in New York *v.* Second Ave. R. Co., 31 Hun (N. Y.) 241, 245].

13. Webster Dict. [*quoted* in Verdine *v.* Olney, 77 Mich. 310, 320, 43 N. W. 975; New York *v.* Second Ave. R. Co., 31 Hun (N. Y.) 241, 245; Patterson *v.* Judge, 17 Wkly. Notes Cas. (Pa.) 127, 128].

14. Century Dict. [*quoted* in Ferree *v.* Moquin-Offerman-Hessenbuttel Coal Co., 29 Misc. (N. Y.) 624, 626, 61 N. Y. Suppl. 120].

15. Century Dict. [*cited* in Ferree *v.* Moquin-Offerman-Hessenbuttel Coal Co., 29 Misc. (N. Y.) 624, 626, 61 N. Y. Suppl. 120].

16. Century Dict. [*quoted* in Ferree *v.* Moquin-Offerman-Hessenbuttel Coal Co., 29 Misc. (N. Y.) 624, 626, 61 N. Y. Suppl. 120].

A mortgage payable "in" one year from date can be paid at any time during the year. Patterson *v.* Judge, 17 Wkly. Notes Cas. (Pa.) 127, 128.

"The words 'in one year' . . . must be construed to mean 'within one year.'" Nichols *v.* Nichols, 42 Misc. (N. Y.) 381, 385, 86 N. Y. Suppl. 719.

17. Reynolds *v.* Larkin, 10 Colo. 126, 132, 14 Pac. 114.

18. Old Ladies' Home of Muscatine *v.* Hoffman, 117 Iowa 716, 718, 89 N. W. 1066; Katzenberger *v.* Weaver, 110 Tenn. 620, 75 S. W. 937; Ewing *v.* Winters, 34 W. Va. 23, 28, 11 S. E. 718. *Compare* Hilgers *v.* Quinney, 51 Wis. 62, 71, 8 N. W. 17, where it is said: "[The words 'in' and 'at'] are not synonymous, and may have very different meanings, depending upon their connection, and to give them the same meaning in any case, by construction, might be forcing them arbitrarily out of their natural and generally accepted meaning, and lead at best to mere uncertainty."

Distinguished from "at" or "upon" in Hill *v.* Hill, 5 Gill & J. (Md.) 87, 96.

"At" or "in" with names of cities and towns see 4 Cyc. 365 note 3. See also Old Ladies' Home of Muscatine *v.* Hoffman, 117 Iowa 716, 718, 89 N. W. 1066.

19. Wimbish *v.* Willoughby, 1 Plowd. 73, 76, where it is said: "And so here Coroners in the County . . . may be taken to one Intent, in construing this Word (in) to be (of)."

20. Woods *v.* State, 67 Miss. 575, 576, 7 So. 495.

would be contrary to the context —[21] or upon.[22] Nevertheless following the cardinal rule of interpretation of words and phrases the context[23] of the writing

21. Van Bokkelen *v.* Travelers' Ins. Co., 34 N. Y. App. Div. 399, 401, 54 N. Y. Suppl. 307.

22. Chicago, etc., R. Co. *v.* Dunbar, 100 Ill. 110, 136; Trenor *v.* Jackson, 46 How. Pr. (N. Y.) 389, 393; Roberts' Appeal, 59 Pa. St. 70, 72, 98 Am. Dec. 312; Ewing *v.* Winters, 34 W. a. 23, 28, 11 S. E. 718.

23. See the following phrases: "Additions to alterations in buildings" (*In re* Gaskell, [1894] 1 Ch. 485, 488, 63 L. J. Ch. 243, 70 L. T. Rep. N. S. 554, 8 Reports 67, 42 Wkly. Rep. 219); "alterations in or upon" (Trenor *v.* Jackson, 46 How. Pr. (N. Y.) 389, 393); "by cash in one month" (Spartali *v.* Benecke, 10 C. B. 212, 221, 19 L. J. C. P. 293, 70 E. C. L. 212); "by reason and in consequence of" (Benedict *v.* Union Agricultural Soc., 74 Vt. 91, 103, 52 Atl. 110); "convicted within this State" (U. S. *v.* Barnabo, 24 Fed. Cas. No. 14,522, 14 Blatchf. 74, 75); "due and payable in advance" (Shackell *v.* Chorlton, [1895] 1 Ch. 378, 381, 64 L. J. Ch. 353, 72 L. T. Rep. N. S. 188, 2 Manson 233, 13 Reports 301, 43 Wkly. Rep. 394); "for or in respect to any lands" (People *v.* Clarke, 9 N. Y. 349, 368); "in accordance with" (Norfolk *v.* Norfolk Landmark Pub. Co., 95 Va. 564, 568, 28 S. E. 959); "in accordance with the form" (Thomas *v.* Kelly, 13 App. Cas. 506, 510, 58 L. J. Q. B. 66, 60 L. T. Rep. N. S. 114, 37 Wkly. Rep. 353; Davies *v.* Jenkins, [1900] 1 Q. B. 133, 134; Cochrane *v.* Entwistle, 25 Q. B. D. 116, 119, 59 L. J. Q. B. 418, 62 L. T. Rep. N. S. 852, 38 Wkly. Rep. 587; Hughes *v.* Little, 18 Q. B. D. 32, 35, 56 L. J. Q. B. 96, 55 L. T. Rep. N. S. 476, 35 Wkly. Rep. 36; Blaiberg *v.* Parsons, 17 Q. B. D. 336, 337, 55 L. J. Q. B. 408, 34 Wkly. Rep. 717; *Ex p.* Stanford, 17 Q. B. D. 259, 269, 55 L. J. Q. B. 341, 54 L. T. Rep. N. S. 894, 34 Wkly. Rep. 287, 507; Consolidated Credit, etc., Corp. *v.* Gosney, 16 Q. B. D. 24, 26, 55 L. J. Q. B. 62, 54 L. T. Rep. N. S. 21, 34 Wkly. Rep. 106; Sibley *v.* Higgs, 15 Q. B. D. 619, 620, 54 L. J. Q. B. 525, 33 Wkly. Rep. 748; Hetherington *v.* Groome, 13 Q. B. D. 789, 790, 53 L. J. Q. B. 576, 51 L. T. Rep. N. S. 412, 33 Wkly. Rep. 103; Melville *v.* Stringer, 13 Q. B. D. 392, 398, 53 L. J. Q. B. 482, 50 L. T. Rep. N. S. 774, 32 Wkly. Rep. 890; Davis *v.* Burton, 11 Q. B. D. 537, 541, 52 L. J. Q. B. 636, 32 Wkly. Rep. 423; *In re* Cleaver, 55 L. J. Q. B. 455, 456); "in accordance with the terms" (*In re* Howes, [1892] 2 Q. B. 628, 631, 62 L. J. Q. B. 88, 67 L. T. Rep. N. S. 213, 40 Wkly. Rep. 647); "in actual service" (Leathers *v.* Greenacre, 53 Me. 561, 571); "in addition" (*In re* Daggett, 9 N. Y. Suppl. 652, 654, 2 Connoly Surr. 230; Lee *v.* Pain, 4 Hare 201, 214, 30 Eng. Ch. 201); "in addition as one of the heirs at law of my estate" (Cochran *v.* Elwell, 46 N. J. Eq. 333, 338, 19 Atl. 672); "in addition to" (Com. *v.* Avery, 14 Bush (Ky.) 625, 636, 29 Am. Rep. 429; Walter *v.* McSherry, 21 Mo. 76; Matter of Mulligan, 4 Misc. (N. Y.) 361, 364, 24 N. Y. Suppl. 321, 1 Pow. Surr. 141; Watson *v.* Holton, 115 N. C. 36, 38, 20 S. E. 183; Hart *v.* White, 26 Vt. 260, 264; *In re* McCauley, 123 Wis. 31, 32, 100 N. W. 1031; *In re* Rowe, [1898] 1 Ch. 153, 157); "in advance" (London, etc., Loan, etc., Co. *v.* London, etc., R. Co., [1893] 2 Q. B. 49, 51, 62 L. J. Q. B. 370, 69 L. T. Rep. N. S. 320, 5 Reports 425, 41 Wkly. Rep. 670); "in advance to" (Haigh *v.* Brooks, 10 A. & E. 309, 318, 9 L. J. Q. B. 194, 3 P. & D. 452, 37 E. C. L. 180); "in aid of my personal estate" (*In re* Newmarch, 9 Ch. D. 12, 18, 48 L. J. Ch. 28, 39 L. T. Rep. N. S. 146, 27 Wkly. Rep. 104); "in all civil actions" (Lash *v.* McCormick, 14 Minn. 482, 484); "in all criminal prosecutions" (State *v.* Kline, 109 La. 603, 622, 33 So. 618); "in all the month of May" (Savary *v.* Goe, 21 Fed. Cas. No. 12,388, 3 Wash. 140); "in all things" (Denton *v.* Whitney, 31 Ohio St. 89, 95); "in an action" (Schuster *v.* Rader, 13 Colo. 329, 333, 22 Pac. 505); "in and about" (Rankin *v.* Amazon Ins. Co., (Cal. 1890) 25 Pac. 260, 261, 262; New York *v.* Second Ave. R. Co., 31 Hun (N. Y.) 241, 245; Dean *v.* Brown, 5 B. & C. 335, 337, 11 E. C. L. 487, 2 C. & P. 62, 12 E. C. L. 451, 8 D. & R. 95); "in and for" (Fizell *v.* State, 25 Wis. 364, 367; Reg. *v.* Aldbrough, 13 Q. B. 190, 195, 13 Jur. 322, 18 L. J. M. C. 81, 3 New Sess. Cas. 486, 66 E. C. L. 190; Reg. *v.* Stockton, 7 Q. B. 520, 527, 9 Jur. 532, 14 L. J. M. C. 128, 1 New Sess. Cas. 16, 53 E. C. L. 519; see Reg. *v.* St. George, 3 C. L. R. 550, 4 E. & B. 520, 523, 1 Jur. N. S. 231, 24 L. J. M. C. 49, 3 Wkly. Rep. 170, 82 E. C. L. 519); "in and on" (Niblett *v.* Nashville, 12 Heisk. (Tenn.) 684, 685, 27 Am. Rep. 755); "in and through" (Wetmore *v.* Fiske, 15 R. I. 354, 357, 5 Atl. 375, 10 Atl. 627, 629); "in any case" (*Ex p.* Parsons, 16 Q. B. D. 532, 536, 55 L. J. Q. B. 137, 139, 53 L. T. Rep. N. S. 897, 3 Morr. Bankr. Cas. 36, 34 Wkly. Rep. 329); "in a pleasant manner" (Alabama Great Southern R. Co. *v.* Frazier, 93 Ala. 45, 49, 9 So. 303, 30 Am. St. Rep. 28); "in any one year" (Maguire *v.* Mobile County, 71 Ala. 401, 421); "in any other quality" (Canada Trust, etc., Co. *v.* Gauthier, [1904] A. C. 94, 100); "in any place" (People *v.* St. Clair, 90 N. Y. App. Div. 239, 242, 86 N. Y. Suppl. 77); "in any respect" (Equitable L. Ins. Co. *v.* Hazlewood, 75 Tex. 338, 347, 12 S. W. 621, 16 Am. St. Rep. 893, 7 L. R. A. 217); "in any street" (Chicago, etc., R. Co. *v.* Dunbar, 100 Ill. 110, 136); "in any wise" (Gregory *v.* Kanouse, 11 N. J. L. 62, 63); "in any parcel or package" (Whaite *v.* Lancashire, etc., R. Co., L. R. 9 Exch. 67, 68 note, 70, 43 L. J. Exch. 47, 30 L. T. Rep. N. S. 272, 22 Wkly. Rep. 374); "in apparent good order" (St. Louis, etc., R. Co. *v.* Neel, 56 Ark. 279, 290, 19 S. W. 963; Illinois, etc., R. Co. *v.* Cobb, 72 Ill. 148, 154; Blade *v.* Chicago, etc., R. Co., 10 Wis. 4, 5; The California, 4 Fed. Cas. No. 2,314, 2 Sawy. 12, 15; Seller *v.* The Pacific, 21 Fed. Cas. No. 12,644, Deady 17, 22, 1 Oreg. 409); "in a

in which it appears must always be considered and looked to for the proper determination and ascertainment of the sense in which the word is used.

word" (Clopton *v.* Cozart, 13 Sm. & M. (Miss.) 363, 368); "in barn or in fields" (Trade Ins. Co. *v.* Barracliff, 45 N. J. L. 543, 554, 46 Am. Rep. 792); "in behalf" (Richerson *v.* Sternburg, 65 Ill. 272, 274; Wanner *v.* Emanuel's Church, 174 Pa. St. 466, 471, 34 Atl. 188); "in being" (Phillips *v.* Herron, 55 Ohio St. 478, 490, 45 N. E. 720); "inboard cargo of boat W. S. Alden" (Allen *v.* St. Louis Ins. Co., 46 N. Y. Super. Ct. 175, 180, 181); "in bulk" (State *v.* Smith, 114 Mo. 180, 195, 21 S. W. 493); "in case" (Sims *v.* Conger, 39 Miss. 231, 311, 77 Am. Dec. 671; Gifford *v.* Thorn, 9 N. J. Eq. 702, 729; Roberts' Appeal, 59 Pa. St. 70, 72, 98 Am. Dec. 312; Cole *v.* Sewell, 2 H. L. Cas. 186, 12 Jur. 927, 9 Eng. Reprint 1062); "in case of" (Small *v.* Marburg, 77 Md. 11, 18, 25 Atl. 920; Hill *v.* Hill, 5 Gill & J. (Md.) 87, 96; Katzenberger *v.* Weaver, 110 Tenn. 620, 629, 75 S. W. 937); "in case of . . . death" (Brown *v.* Lippincott, 49 N. J. Eq. 44, 46, 23 Atl. 497; Post *v.* Van Houten, 41 N. J. Eq. 82, 83, 3 Atl. 340; Skipworth *v.* Cabell, 19 Gratt. (Va.) 758, 782; Ewing *v.* Winters, 34 W. Va. 23, 28, 11 S. E. 718); "in case of death" (Lombard Inv. Co. *v.* American Surety Co., 65 Fed. 476, 480; *In re* Potter, L. R. 8 Eq. 52, 54, 39 L. J. Ch. 102, 20 L. T. Rep. N. S. 649); "in case of the decease" (Briggs *v.* Shaw, 9 Allen (Mass.) 516, 517); "in case of the impeachment" (Matter of Munger, 10 N. Y. App. Div. 347, 349, 41 N. Y. Suppl. 882); "in cash" (Ooregum Gold Min. Co. *v.* Roper, [1892] A. C. 125, 142, 61 L. J. Ch. 337, 66 L. T. Rep. N. S. 427, 41 Wkly. Rep. 90; *In re* Harmony, etc., Tin, etc., Min. Co., L. R. 8 Ch. 407, 411, 42 L. J. Ch. 488, 28 L. T. Rep. N. S. 153, 21 Wkly. Rep. 306; *In re* Pen 'Allt Silver Lead Min. Co., L. R. 8 Ch. 270, 273, 42 L. J. Ch. 481, 27 L. T. Rep. N. S. 124, 21 Wkly. Rep. 301; *In re* Johannesburg Hotel Co., [1891] 1 Ch. 119, 127, 60 L. J. Ch. 391, 64 L. T. Rep. N. S. 61, 2 Meg. 409, 39 Wkly. Rep. 260; *In re* Jones, 41 Ch. D. 159, 162, 58 L. J. Ch. 582, 61 L. T. Rep. N. S. 219, 1 Meg. 161, 37 Wkly. Rep. 615; *In re* Land Development Assoc., 39 Ch. D. 259, 270, 57 L. J. Ch. 977, 59 L. T. Rep. N. S. 449, 1 Meg. 69, 36 Wkly. Rep. 818; *In re* Government Security F. Ins. Co., 12 Ch. D. 511, 516, 48 L. J. Ch. 820, 41 L. T. Rep. N. S. 333, 27 Wkly. Rep. 895; Fry *v.* Raggio, 40 Wkly. Rep. 120, 121); "in charge" (Mass. Rev. L. (1902) c. 102, § 80, 875); "in charge of" (Johnson *v.* Des Moines, etc., R. Co., (Iowa 1906) 105 N. W. 509, 510; Turnbridge Wells Local Bd. *v.* Bishopp, 2 C. P. D. 187, 192); "in cities" (State *v.* Metropolitan St. R. Co., 161 Mo. 188, 196, 61 S. W. 603); "in commission" (Greer *v.* U. S., 3 Ct. Cl. 182, 190); "in common" (Hewit *v.* Jewell, 59 Iowa 37, 38, 12 N. W. 738; Grimes *v.* Shirk, 169 Pa. St. 74, 90, 32 Atl. 113; Walker *v.* Dunshee, 38 Pa. St. 430, 439; Chambers *v.* Harrington, 111 U. S. 350, 353, 4 S. Ct. 428, 28 L. ed. 452); "in confinement" (*Ex p.* Trice, 53 Ala. 547, 548); "in conformity with" (Wilkinson *v.* American Iron Mountain Co., 20 Mo. 122, 130; Eason *v.* Miller, 15 S. C. 194, 205); "in connection" (Horne *v.* Hutchins, 71 N. H. 128, 135, 51 Atl. 651); "in connection with" (Gurney *v.* Atlantic, etc., R. Co., 58 N. Y. 358, 371); "in consequence of the intoxication" (Krach *v.* Heilman, 53 Ind. 517, 523); "in consideration" (Martin *v.* Martin, 131 Mass. 547; Goward *v.* Waters, 98 Mass. 596, 598; Potts *v.* Point Pleasant Land Co., 49 N. J. L. 411, 412, 8 Atl. 109 [*citing* 1 Chitty Pl. 322]; Dally *v.* Poolly, 6 Q. B. 494, 497, 51 E. C. L. 493); "in consideration of . . . buying" (Fuller *v.* Schrenk, 58 N. Y. App. Div. 222, 226, 66 N. Y. Suppl. 781); "in consideration thereof" (Paschall *v.* Passmore, 15 Pa. St. 295, 306); "in contemplation of the death" (Matter of Baker, 83 N. Y. App. Div. 530, 533, 82 N. Y. Suppl. 390); "in court" (Madden *v.* Brown, 97 Mass. 148, 150); "in default of issue" (Kay *v.* Scates, 37 Pa. St. 31, 39, 78 Am. Dec. 399); George *v.* Morgan, 16 Pa. St. 95, 107; Tinsley *v.* Jones, 13 Gratt. (Va.) 289, 292); "in depot" (Gulf, etc., R. Co. *v.* Pepperell Mfg. Co., (Tex. Civ. App. 1896) 37 S. W. 965); "in every instance" (State *v.* Kline, 109 La. 603, 622, 33 So. 618); "in the execution of this Act" (Thomas *v.* Stephenson, 2 E. & B. 108, 117, 17 Jur. 597, 22 L. J. Q. B. 258, 1 Wkly. Rep. 325, 75 E. C. L. 107); "in favor of" (Claflin *v.* Commonwealth Ins. Co., 110 U. S. 81, 89, 3 S. Ct. 507, 28 L. ed. 76); "in five years" (Verdine *v.* Olney, 77 Mich. 310, 320, 43 N. W. 975); "in force" (Lewis *v.* Seattle, 28 Wash. 639, 645, 69 Pac. 393); "in fraud of the internal revenue laws" (*In re* Quantity of Tobacco, 20 Fed. Cas. No. 11,500, 5 Ben. 407); "in front" (Torrington *v.* Messenger, 74 Conn. 321, 324, 50 Atl. 873; Merrill *v.* Nelson, 18 Minn. 366; State *v.* Bridges, 24 Wash. 363, 365, 64 Pac. 518; Bedfordshire *v.* Bedford Imp. Com'rs, 7 Exch. 658, 666, 21 L. J. M. C. 224); "in full" (Bard *v.* Wood, 3 Metc. (Mass.) 74, 75; Mason *v.* Tuckerton M. E. Church, 27 N. J. Eq. 47, 51; Krauser *v.* McCurdy, 174 Pa. St. 174, 175, 34 Atl. 518); "in hand paid" (Pitt *v.* Berkshire L. Ins. Co., 100 Mass. 500, 503); "in his office" (Bishop *v.* People, 200 Ill. 33, 38, 65 N. E. 421); "in his official capacity" (People *v.* Hamilton, (Cal. 1893) 32 Pac. 526, 528); "in its stead" (Cruikshank *v.* Cruikshank, 39 Misc. (N. Y.) 401, 406, 80 N. Y. Suppl. 8); "in lieu of" (Bryan *v.* Bryan, 62 Ark. 79, 83, 34 S. W. 260); "in lieu of other taxes" (State *v.* Smyrna Bank, 2 Houst. (Del.) 99, 113, 73 Am. Dec. 699; Britt *v.* Rawlings, 87 Ga. 146, 147, 13 S. E. 336; State *v.* Farmer, 21 Mo. 160, 162; Nelson *v.* Brown, 66 Hun (N. Y.) 311, 316, 20 N. Y. Suppl. 978; Matter of Underhill, 20 N. Y. Suppl. 134, 135, 2 Connoly Surr. 262; Hunter *v.* Memphis, 93 Tenn. 571, 575, 26 S. W. 828; Hickok *v.* Thayer, 49 Vt. 372, 374; York *v.* Railway Officials', etc., Assoc., 51 W. Va. 38, 47, 41 S. E. 227; National Sewing-Mach. Co. *v.* Wilcox, etc., Sewing-Mach. Co., 74 Fed. 557, 559, 20 C. C. A. 654; Tennessee *v.* Bank of Commerce, 53 Fed.

INABILITY. The state of being unable, physically, mentally, or morally; want of ability; lack of power, capacity or means;[24] INCOMPETENCY, *q. v.*; INCAPACITY,[25] *q. v.*

735, 736; Gossler *v.* Goodrich, 10 Fed. Cas. No. 5,631, 3 Cliff. 71, 76); "in my possession" (Kunkel *v.* Macgill, 56 Md. 120, 123; Norris *v.* Thomson, 15 N. J. Eq. 493, 496); "in office" (State *v.* Borowsky, 11 Nev. 119, 124); "in one year" (Nichols *v.* Nichols, 42 Misc. (N. Y.) 381, 385, 86 N. Y. Suppl. 719); "in one year from date" (Patterson *v.* Judge, 17 Wkly. Notes Cas. (Pa.) 127, 128); "in operation" (Allen *v.* Savannah, 9 Ga. 286, 294); "in or about" (Lane *v.* Sewell, 43 L. J. Ch. 378); "in order to compel" (State *v.* Waite, 101 Iowa 377, 379, 70 N. W. 596); "in order to pay any of my debts" (Adams' Estate, 148 Pa. St. 394, 398, 23 Atl. 1072, 24 Atl. 189); "in or upon" (see Barnard *v.* McKenzie, 4 Colo. 251, 253; Trenor *v.* Jackson, 46 How. Pr. (N. Y.) 389, 393); "in payment" (U. S. *v.* Venable, 28 Fed. Cas. No. 16,616, 1 Cranch C. C. 417); "in payment of" (Glenn *v.* Smith, 2 Gill & J. (Md.) 493, 510, 20 Am. Dec. 452); "in pickle" (Hall *v.* Concordia F. Ins. Co., 90 Mich. 403, 411, 51 N. W. 524); "in place" (Williams *v.* Gibson, 84 Ala. 228, 231, 4 So. 350, 5 Am. St. Rep. 368; McDowell *v.* U. S., 74 Fed. 403, 405, 29 C. C. A. 476; Stevens *v.* Williams, 23 Fed. Cas. No. 13,414; Tabor *v.* Dexler, 23 Fed. Cas. No. 13,723); "in places where the communication can be made" (Lancashire Brick, etc., Co. *v.* Lancashire, etc., R. Co., 71 L. J. K. B. 141, 144); "in progress" (Smith *v.* New York, 82 Hun (N. Y.) 570, 572, 31 N. Y. Suppl. 783); "in proportion to its value" (Williamson *v.* Massey, 33 Gratt. (Va.) 237, 242); "in pursuance of" (Steam Boat Rock Independent School-Dist. *v.* Stone, 106 U. S. 183, 187, 1 S. Ct. 84, 27 L. ed. 90; Bates *v.* Independent School Dist., 25 Fed. 192, 194); "in regard to" (State *v.* McKinney, 31 Kan. 570, 580, 3 Pac. 356); "in respect thereof" (Woodruff *v.* Oswego Starch Factory, 70 N. Y. App. Div. 481, 483, 74 N. Y. Suppl. 961); "in service" (Aulick *v.* U. S., 27 Ct. Cl. 109, 112); "in session" (State *v.* Root, 5 N. D. 487, 503, 67 N. W. 590, 57 Am. St. Rep. 568; People *v.* Fancher, 50 N. Y. 288, 291; U. S. *v.* Pitman, 147 U. S. 669, 671, 13 S. Ct. 425, 37 L. ed. 324. See also Com. *v.* Gove, 151 Mass. 392, 24 N. E. 211); "in sight" (Mudsill Min. Co. *v.* Watrous, 61 Fed. 163, 167, 9 C. C. A. 415); "in so doing" (State *v.* Murphy, 35 La. Ann. 622, 623); "in store" (Goodyear *v.* Ogden, 4 Hill (N. Y.) 104, 106); "in ten days after giving notice" (New Jersey Turnpike Co. *v.* Hall, 17 N. J. L. 337, 339); "in that case" (Harris *v.* Smith, 16 Ga. 545, 557); "in the brick building" (Blake *v.* Exchange Mut. Ins. Co., 12 Gray (Mass.) 265, 268); "in the buildings" (Stettauer *v.* Hamlin, 97 Ill. 312, 319); "in the city" (Gibson *v.* Wood, 105 Ky. 740, 742, 49 S. W. 768, 20 Ky. L. Rep. 1547, 43 L. R. A. 699); "in the event" (Wescott *v.* Higgins, 42 N. Y. App. Div. 69, 71, 58 N. Y. Suppl. 938); "in the execution of the act" (Read *v.* Coker, 13 C. B. 850, 863, 1 C. L. R. 746, 17 Jur. 990, 22 L. J. C. P. 201, 1 Wkly. Rep. 413, 76 E. C. L. 848); "in the field" (Sargent *v.* Ludlow, 42 Vt. 726, 729); "in the first degree" (Hocker *v.* Com., 70 S. W. 291, 292, 24 Ky. L. Rep. 936); "in the first instance" (People *v.* McCarthy, 168 N. Y. 549, 552, 61 N. E. 899); "in the hands of" (Swan *v.* Warren, 138 Mass. 11, 14); "in the name, and by authority" (State *v.* Kerr, 3 N. D. 523, 525, 58 N. W. 27); "in their natural state" (7 P. I. Cust. Dec. I. 117); "in the King's peace" (State *v.* Dunkley, 25 N. C. 116, 121); "in the whole" (Hotson *v.* Wetherby, 88 Wis. 324, 330, 60 N. W. 423); "in trust . . . and upon condition" (Sohier *v.* Trinity Church, 109 Mass. 1, 19); "in turn" (Donnell *v.* Amoskeag Mfg. Co., 118 Fed. 10, 13, 55 C. C. A. 178); "in twelve months after the date" (Tipton *v.* Utley, 59 Ill. 25, 27); "in twenty-five years after date" (Allentown School-Dist. *v.* Derr, 115 Pa. St. 439, 441, 9 Atl. 55); "in, upon and through lands of said Uhl" (Uhl *v.* Ohio River R. Co., 51 W. Va. 106, 109, 41 S. E. 340); "in, upon, or about" (Brooke *v.* Warwick, 2 De G. & Sm. 425, 426, 1 Hall & T. 142, 12 Jur. 912, 18 L. J. Ch. 137, 12 L. T. Rep. N. S. 41); "in, upon, or along" (New York, etc., R. Co. *v.* Roll, 32 Misc. (N. Y.) 321, 325, 66 N. Y. Suppl. 748); "in use" (Minneapolis Threshing Mach. Co. *v.* Firemen's Ins. Co., 57 Minn. 35, 36, 58 N. W. 819, 47 Am. St. Rep. 572, 23 L. R. A. 576); "in view of all the circumstances" (Anderson *v.* Union Terminal R. Co., 161 Mo. 411, 428, 61 S. W. 874); "in words and figures as follows, to-wit" (McDonnell *v.* State, 58 Ark. 242, 248, 24 S. W. 105); "in work" (Manss-Bruning Shoe Co. *v.* Prince, 51 W. Va. 510, 511, 41 S. E. 907); "money in the hands of" (Pruitt *v.* Armstrong, 56 Ala. 306, 309); "monies in hand" (Vaisey *v.* Reynolds, 6 L. J. Ch. O. S. 172, 5 Russ. 12, 5 Eng. Ch. 12, 38 Eng. Reprint 931, 29 Rev. Rep. 4); "property in County" (Conley *v.* Chedic, 7 Nev. 336, 337); "rock in place" (Jones *v.* Prospect Mountain Tunnel Co., 21 Nev. 339, 352, 31 Pac. 642; Leadville Co. *v.* Fitzgerald, 15 Fed. Cas. No. 8,158); "running in" (Lambe *v.* Donaldson Steamship Line, 22 Quebec Super. Ct. 510, 516); "sale in bulk" (Fitz Henry *v.* Munter, 33 Wash. 629, 634, 74 Pac. 1003); "sale in gross" (Green *v.* Taylor, 10 Fed. Cas. No. 5,761, 3 Hughes 400, 408); "shoot in any highway" (Woods *v.* State, 67 Miss. 575, 576, 7 So. 495); "sum in gross" (Hawley *v.* James, 16 Wend. (N. Y.) 61, 262); "while in the hands of" (Price *v.* Savings Soc., 64 Conn. 362, 365, 30 Atl. 139, 42 Am. St. Rep. 198); "work . . . in progress" (Boas *v.* New York, 85 Hun (N. Y.) 311, 312, 32 N. Y. Suppl. 967).

24. Century Dict. [*quoted* in People *v.* Fielding, 36 N. Y. App. Div. 401, 412, 55 N. Y. Suppl. 530].

25. Armstrong *v.* Union School Dist. No. 1, 28 Kan. 345, 349; Matter of Munger, 10 N. Y. App. Div. 347, 348, 41 N. Y. Suppl. 882.

IN ACTIS PUBLICIS COLLEGII SIVE CORPORIS ALICUJUS CORPORATI CONSENSUS EST VOLUNTAS MULTORUM AD QUOS RES PERTINET SIMUL JUNCTA. A maxim meaning "In public acts of a college or of any incorporated body the joint will of the majority of those to whom the matter belongs is the consent."[26]

INADEQUATE DAMAGES. See DAMAGES; NEW TRIAL.

INADVERTENCE. A lack of heedfulness or attention;[27] an oversight; an involuntary accident; the effect of inattention.[28] (Inadvertence: As Ground — For New Trial, see CRIMINAL LAW; TRIAL; For Opening or Vacating Judgment, see JUDGMENTS. Homicide by, see HOMICIDE. In Instruction to Jury, see CRIMINAL LAW; TRIAL. Liability For Negligence, see NEGLIGENCE.)

INÆDIFICATUM SOLO CEDIT SOLO. A maxim meaning "Anything built on the ground belongs to the ground."[29]

IN ÆDIFICIIS LAPIS MALO POSITUS NON EST REMOVENDUS. A maxim meaning "A stone badly placed in buildings is not to be removed"[30]

IN ÆQUALI JURE MELIOR EST CONDITIO POSSIDENTIS. A maxim meaning "Where the right is equal, the claim of the party in actual possession shall prevail."[31]

INALIENABLE RIGHTS. Enumerated rights that individuals, acting in their own behalf, cannot disregard or destroy.[32] (See, generally, CONSTITUTIONAL LAW.)

"Inability" is not limited to mere physical inability, but includes any duty of paramount importance, such as sickness in the family of the judge or other contributory cause which prevents his attendance to his official duties. People *v.* Schirmer, 55 Hun (N. Y.) 160, 162, 8 N. Y. Suppl. 76.

"Inability" will not be held to embrace absence. Matter of Munger, 10 N. Y. App. Div. 347, 349, 41 N. Y. Suppl. 882. A temporary absence would clearly not be "inability" or "incapacity." See *In re* Moravian Soc., 26 Beav. 101, 102, 4 Jur. N. S. 703, 6 Wkly. Rep. 851, 53 Eng. Reprint 835.

Does not include pecuniary embarrassment and want of money to pay debts, existing before and at the time of a dismissal from an office. Reg. *v.* Owen, 15 Q. B. 476, 485, 14 Jur. 953, 19 L. J. Q. B. 490, 69 E. C. L. 475.

"In case of inability or misbehaviour" see Reg. *v.* Owen, 15 Q. B. 476, 485, 14 Jur. 953, 19 L. J. Q. B. 490, 69 E. C. L. 475.

"Inability" of a ship to execute or proceed on a service may fairly be taken to mean not only an ability in respect of the tackle and hull of the ship, but also for want of a sufficient crew to navigate her. Beatson *v.* Schank, 3 East 233, 240, 7 Rev. Rep. 436.

"Inability to pay" is a term which is synonymous with "solvency." Walkenshaw *v.* Perzel, 32 How. Pr. (N. Y.) 233, 240.

"Inability to perform the act required."— Maass *v.* La Torre, 6 Abb. Pr. N. S. (N. Y.) 219, 221.

26. Morgan Leg. Max.

27. Webster Dict. [*quoted* in Davis *v.* Steuben School Tp., 19 Ind. App. 694, 50 N. E. 1, 5].

"[In a bankruptcy act] . . . the word 'inadvertence' means the opposite of deliberate election." *In re* Piers, [1898] 1 Q. B. 627, 631 [*citing Ex p.* Clarke, 67 L. T. Rep. N. S. 232, 40 Wkly. Rep. 608].

"Inadvertence and oversight" see Russell *v.* Colyar, 4 Heisk. (Tenn.) 154, 176.

"Inadvertence, or urgent necessity" see Green Mountain Cent. Inst. *v.* Britain, 44 Vt. 13, 15.

"Mistake, inadvertence, surprise, or excusable neglect" see Davis *v.* Steuben School Tp., 19 Ind. App. 694, 50 N. E. 1, 5; Taylor *v.* Pope, 106 N. C. 267, 270, 11 S. E. 257, 19 Am. St. Rep. 530. See also Thompson *v.* Connell, 31 Oreg. 231, 234, 48 Pac. 467, 65 Am. St. Rep. 818.

28. Webster Dict. [*quoted* in Dodge *v.* Ridenour, 62 Cal. 263, 276].

"'Deliberately,' 'inadvertently,' and 'by mistake'" in an instruction to a jury see Behr *v.* Connecticut Mut. L. Ins. Co., 4 Fed. 357, 361, 2 Flipp. 692.

Distinguished from "mistake."—"If North, J., in the case of *In re* Lister, [1892] 2 Ch. 417, 61 L. J. Ch. 721, 67 L. T. Rep. N. S. 180, 40 Wkly. Rep. 589, intended to hold that the words 'inadvertence' and 'mistake' were convertible terms, I cannot agree with him." *In re* Piers, [1898] 1 Q. B. 627, 631, per Smith, L. J., who added that "'inadvertence' . . . points to forgetfulness or accident." See also *In re* Jackson, [1899] 1 Ch. 348, 68 L. J. Ch. 190, 79 L. T. Rep. N. S. 662, 6 Manson 125; *Ex p.* Clarke, 67 L. T. Rep. N. S. 232, 40 Wkly. Rep. 608.

"Inadvertently drawn" see Fishback *v.* Woodford, 1 J. J. Marsh. (Ky.) 84, 87, 19 Am. Dec. 55.

29. Morgan Leg. Max.

30. Morgan Leg. Max.

Applied in Magdalen College Case, 11 Coke 66*b*, 69*a*.

31. Broom Leg. Max.

Applied or explained in Lidgerwood Mfg. Co. *v.* Rogers, 56 N. Y. Super. Ct. 350, 352, 4 N. Y. Suppl. 716; New York Sav. Bank *v.* Frank, 45 N. Y. Super. Ct. 404, 410; Porter *v.* Dunlap, 17 Ohio St. 591, 596; Krumbhaar *v.* Yewdall, 153 Pa. St. 476, 479, 26 Atl. 219; Ryan *v.* Montreal Bank, 14 Ont. App. 533, 547; Merchants' Bank *v.* Morrison, 19 Grant Ch. (U. C.) 1, 9; Street *v.* Commercial Bank, 1 Grant Ch. (U. C.) 169, 188. See also Mont. Codes (1895), 4615.

32. McCullough *v.* Brown, 41 S. C. 220, 266, 19 S. E. 458, 23 L. R. A. 410. See U. S. *v.* Moras, 125 Fed. 322, 326.

IN ALTA PRODITIONE NULLUS POTEST ESSE ACCESSORIUS SED PRINCIPALIS SOLUMMODO. A maxim meaning "In high treason no one can be an accessory, but only principal." [33]

IN ALTERNATIVIS ELECTIO EST DEBITORIS. A maxim meaning "In alternatives the debtor has the election." [34]

IN AMBIGUÂ VOCE LEGIS EA POTIUS ACCIPIENDA EST SIGNIFICATIO QUÆ VITIO CARET, PRÆSERTIM CUM ETIAM VOLUNTAS LEGIS EX HOC COLLIGI POSSIT. A maxim meaning "In an ambiguous expression of law, that signification is to be preferred which is consonant with equity, especially when the spirit of the law can be collected from that." [35]

IN AMBIGUIS CASIBUS SEMPER PRÆSUMITUR PROREGE. A maxim meaning "In doubtful cases the presumption is always in favour of the king." [36]

IN AMBIGUIS ORATIONIBUS MAXIME SENTENTIA SPECTANDA EST EJUS QUI EAS PROTULISSET. A maxim meaning "In ambiguous expressions (i. e., in construing or interpreting ambiguous expressions) the meaning or intention of him who used them is chiefly to be regarded." [37]

IN AMBIGUO SERMONE NON UTRUMQUE DICIMUS SED ID DUNTAXAT QUOD VOLUMUS. A maxim meaning "When the language we use is ambiguous, we do not use it in a double sense, but in the sense in which we mean it." [38]

IN ANGLIÂ NON EST INTERREGNUM. A maxim meaning "In England there is no interregnum." [39]

INAPPRECIABLE. Not appreciable; incapable of being duly valued or estimated. [40]

IN ATROCIORBUS DELICTIS PUNITUR AFFECTUS LICET NON SEQUATUR EFFECTUS. A maxim meaning "In more atrocious crimes the intent is punished, though an effect does not follow." [41]

IN BANCO. In banc or bank, as distinguished from "at nisi prius." [42]

INBOARD. As applied to the cargo of a vessel, a term used in contrast to "outboard." [43] (See CARGO; and, generally, SHIPPING.)

IN BULK. In a mass, loose; not enclosed in separate package or divided in separate parts; in such shape that any desired quantity may be taken or sold; [44] a term which has long been understood in commercial circles as contradistinguished from "package" or "parcel." [45]

IN CAMERÂ. A term applied when the doors of a court are closed and only persons connected with the case are admitted. [46]

INCAPABLE. Without fitness for a definite purpose or work; lacking adequate power; incompetent; inefficient. [47] (See INCAPACITY; INCOMPETENT.)

33. Wharton L. Lex. [*citing* 3 Inst. 138].
34. Wharton L. Lex.
35. Wharton L. Lex. [*citing* Bacon Max. reg. 3; Dig. 1, 3, 19].
36. Wharton L. Lex.
37. Trayner Leg. Max. [*citing* Dig. B. 50, T. 17, § 96].
38. Bouvier L. Dict. [*citing* Dig. 34, 5, 3]. Applied in Hart *v.* Tulk, 2 De G. M. & G. 300, 313, 22 L. J. Ch. 649, 51 Eng. Ch. 300, 42 Eng. Reprint 888.
39. Wharton L. Lex.
40. Webster Int. Dict.
"The word 'inappreciable' or 'unappreciable' is one of a new coinage, not to be found in Johnson's Dictionary or Richardson's." Embrey *v.* Owen, 6 Exch. 353, 367, 15 Jur. 633, 20 L. J. Exch. 212.
41. Wharton L. Lex.
42. Burrill L. Dict. See also State *v.* Rombauer, 104 Mo. 619, 633, 15 S. W. 850, 16 S. W. 502.
43. Allen *v.* St. Louis Ins. Co., 46 N. Y Super. Ct. 175, 181, where the court said: "It does not necessarily mean under deck, but seems to mean a cargo not projecting over the rail of the vessel."
44. Webster Unabr. Dict. [*quoted* in Standard Oil Co. *v.* Com., 82 S. W. 1020, 1022, 26 Ky. L. Rep. 985].
"Laden in bulk" and "stored in bulk" mean "having the cargo loose in the hold, or not inclosed in boxes, bales, or casks." Standard Oil Co. *v.* Com., 82 S. W. 1020, 1022, 26 Ky. L. Rep. 985.
45. Standard Oil Co. *v.* Com., 82 S. W. 1020, 1022, 26 Ky. L. Rep. 985.
"Open bulk."—*In re* Sanders, 52 Fed. 802, 806, 18 L. R. A. 549 [*quoted* in Standard Oil Co. *v.* Com., 82 S. W. 1020, 1022, 26 Ky. L. Rep. 985], where the court said: "What is meant by 'open bulk?' The natural meaning of the word is, 'in the mass; exposed to view; not tied or sealed up.'"
46. Bouvier L. Dict. See also Andrew *v.* Raeburn, L. R. 9 Ch. 522, 31 L. T. Rep. N. S. 73, 22 Wkly. Rep. 564.
47. Webster Int. Dict.

INCAPACITY.[48] The lack of legal qualification; that condition of a person which forbids a given act on his part and makes the act legally inefficacious even if he does it.[49] (Incapacity: To Contract, see ALIENS; BONDS; CONTRACTS; COMMERCIAL PAPER; DEEDS; DRUNKARDS; HUSBAND AND WIFE; INFANTS; INSANE PERSONS; SPENDTHRIFTS. To Make Will, see WILLS.)

IN CAPITALIBUS MINOR EST PŒNA COGITATIONIS MANIFESTÆ QUAM CONATUS EX ACTU DIRECTO, ET MINOR CONATUS QUAM PATRATI FACINORIS, UT SIT PŒNITENTIÆ LOCUS; SED IN PRODITIONE IN TERROREM ALITER STATUTUM EST. A maxim meaning "In capital cases, generally, the punishment of an evident intention is less than of an attempt by a direct act, and the punishment of a direct act less than of the perpetrated deed, that there may be room for repentance; but in the case of treason, for the sake of example and warning, it is otherwise."[50]

IN CAPITALIBUS SUFFICIT GENERALIS MALITIA, CUM FACTO PARIS GRADUS. A maxim meaning "In capital cases general malice, with the fact of an equal degree of guilt, is sufficient."[51]

INCARCERATION. See PRISONS.

IN CASU EXTREMÆ NECESSITATIS OMNIA SUNT COMMUNIA. A maxim meaning "In cases of extreme necessity, everything is in common."[52]

INCAUTE FACTUM PRO NON FACTO HABETUR. A maxim meaning "A thing done unwarily or unadvisedly will be taken as not done."[53]

INCENDIARISM. See ARSON.

INCEPTION. A word meaning initial stage.[54]

INCERTA PRO NULLIS HABENTUR. A maxim meaning "Things uncertain are reckoned as nothing."[55]

INCERTA QUANTITAS VITIAT ACTUM. A maxim meaning "An uncertain quantity vitiates the act."[56]

INCERTUM EX INCERTA PENDENS LEGE REPROBATUR. A maxim meaning "An uncertainty depending upon an uncertainty is reprobated by law."[57]

Used in a statute authorizing the appointment of a conservator of the person and estate see Wickwire's Appeal, 30 Conn. 86.

Distinguished from "incompetent" (*In re* Blinn, 99 Cal. 216, 221, 33 Pac. 841); "absent" (Matter of Munger, 10 N. Y. App. Div. 347, 348, 41 N. Y. Suppl. 882).

"Incapable of acting" see Reg. *v.* White, L. R. 2 Q. B. 557, 562, 8 B. & S. 587, 36 L. J. Q. B. 267, 16 L. T. Rep. N. S. 828, 15 Wkly. Rep. 988; Reg. *v.* Owen, 2 E. & E. 86, 91, 5 Jur. N. S. 764, 28 L. J. Q. B. 316, 7 Wkly. Rep. 566, 105 E. C. L. 85.

"Incapable of manual delivery" see *In re* Flandrow, 84 N. Y. 1, 4.

"Incapable of meeting his engagements" see Drew *v.* Collins, 6 Exch. 670, 686.

"Incapable of working" see Genest *v.* L'Union St. Joseph, 141 Mass. 417, 420, 6 N. E. 390.

"Incapable to act" as applied to officers see Matter of Munger, 10 N. Y. App. Div. 347, 348, 31 N. Y. Suppl. 882. See also *In re* Lemann, 22 Q. B. D. 633, 635, 52 L. J. Ch. 560, 48 L. T. Rep. N. S. 389, 31 Wkly. Rep. 520; Mesnard *v.* Welford, 1 Eq. Rep. 237, 17 Jur. 237, 22 L. J. Ch. 1053, 1 Smale & G. 426, 1 Wkly. Rep. 443; *In re* Watts, 9 Hare 106, 15 Jur. 459, 20 L. J. Ch. 337, 41 Eng. Ch. 106; O'Reilly *v.* Alderson, 8 Hare 101, 104, 32 Eng. Ch. 101; *In re* Harrison, 22 L. J. Ch. 69, 1 Wkly. Rep. 58.

48. "Incapacitated by any law or statute from voting" see Doulon *v.* Halse, 18 Q. B. D. 421, 424, Fox & S. 1, 51 J. P. 183, 56 L. J. Q. B. 41, 56 L. T. Rep. N. S. 340, 35 Wkly. Rep. 502.

"Incapacitated from employment" see Pugh *v.* London, etc., R. Co., [1896] 2 Q. B. 248, 252, 65 L. J. Q. B. 521, 74 L. T. Rep. N. S. 724, 44 Wkly. Rep. 627.

49. Century Dict.

"May sometimes apply to physical as well as mental conditions." Ellicott *v.* Ellicott, 90 Md. 321, 329, 45 Atl. 183, 48 L. R. A. 58.

Means "a personal incapacity."—*In re* Bignold, L. R. 7 Ch. 223, 224, 41 L. J. Ch. 235, 26 L. T. Rep. N. S. 176, 20 Wkly. Rep. 345. See also *In re* Wheeler, [1896] 1 Ch. 315, 65 L. J. Ch. 219, 73 L. T. Rep. N. S. 661, 44 Wkly. Rep. 270.

50. Morgan Leg. Max.

51. Morgan Leg. Max.

52. Wharton L. Lex.

53. Cyclopedic L. Dict.

Applied in Thynne *v.* Stanhope, 1 Add. Eccl. 52, 53.

54. Century Dict. [*quoted* in Oriental Hotel Co. *v.* Griffiths, 88 Tex. 574, 583, 33 S. W. 652, 53 Am. St. Rep. 790, 30 L. R. A. 765]. See Oriental Hotel Co. *v.* Griffiths, 88 Tex. 583, 585, 33 S. W. 652, 53 Am. St. Rep. 790, 30 L. R. A. 765 [*cited* in Sullivan *v.* Briquette, etc., Co., 94 Tex. 541, 545, 63 S. W. 307].

55. Wharton L. Lex.

56. Wharton L. Lex.

57. Morgan Leg. Max.

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CROSS-REFERENCES

For Matters Relating to:
Adultery, see ADULTERY.
Criminal Law in General, see CRIMINAL LAW.
Fornication, see FORNICATION.
Invalidity of Incestuous Marriage, see MARRIAGE.
Rape, see RAPE.

I. DEFINITION.

Incest, where statutes have not modified its meaning, is sexual commerce, either habitual or in a single instance, and either under a form of marriage or without it, between persons too nearly related in consanguinity or affinity to be entitled to intermarry.[1] But since incest was not known to the common law, and

1. Bishop St. Cr. § 727 [*quoted* in State *v.* Brown, 47 Ohio St. 102, 108, 23 N. E. 747, 21 Am. St. Rep. 790]. "When the parties to an act or series of acts of unlawful carnal intercourse are related to each other within the degrees of consanguinity or affinity wherein marriage is prohibited by law, their offense is called incest." Territory *v.* Corbett, 3 Mont. 50, 55 [*quoting* Bishop St. Cr. § 727].

"When the parties by whom it [carnal connection] is done are related to one another within certain degrees of consanguinity or affinity, it becomes incest." Dinkey *v.* Com., 17 Pa. St. 126, 129, 55 Am. Dec. 542.

Other definitions are: "Criminal sexual intercourse between persons related within the degrees wherein marriage is forbidden by the law of the country." Encyclopædic

is therefore a statutory crime, its definition will be found to be as various as the statutes themselves.[2]

II. ORIGIN OF OFFENSE.

Although incest was punishable as an offense in the ecclesiastical courts of England[3] it was not a crime at common law.[4] Incest is, however, very generally defined and punished as a crime by statute in the different jurisdictions in this country.[5]

Dict. [*quoted* in Taylor *v.* State, 110 Ga. 150, 152, 35 S. E. 161].

"Sexual intercourse between persons so nearly related that marriage between them would be unlawful." Standard Dict. [*quoted* in Taylor *v.* State, 110 Ga. 150, 152, 35 S. E. 161].

"Illicit intercourse between persons within the degrees of consanguinity within which marriages are forbidden by law." Daniels *v.* People, 6 Mich. 381, 386.

"The act [illicit carnal connection] . . . between parties sustaining relations to each other within certain degrees of consanguinity or affinity." People *v.* Rouse, 2 Mich. N. P. 209, 210.

"The carnal copulation of a man and woman related to each other in any of the degrees within which marriage is prohibited by law." State *v.* Herges, 55 Minn. 464, 465, 57 N. W. 205.

"The intermarrying or carnal knowledge of persons within the forbidden degrees." Simon *v.* State, 31 Tex. Cr. 186, 201, 20 S. W. 399, 716, 37 Am. St. Rep. 802.

"The sexual commerce of persons related within the degrees wherein marriage is prohibited." State *v.* Glindemann, 34 Wash. 221, 223, 75 Pac. 800, 101 Am. St. Rep. 1001.

Instruction defining offense.— In People *v.* Barnes, 2 Ida. (Hasb.) 161, 162, 9 Pac. 532, an instruction in the following language: "Persons being within the degrees of consanguinity within which marriages by law are declared to be incestuous and void, who shall intermarry with each other, or who shall commit fornication or adultery with each other, are guilty of incest," was held to be correct.

Distinguished from adultery, fornication, and rape.— "The crimes of incest, adultery and fornication . . . differ only as to the persons; while the crime of rape differs from the other crimes against chastity both as to the persons and the manner of the sexual connection, as by force and against the will of the woman." State *v.* Shear, 51 Wis. 460, 462, 8 N. W. 287. See also People *v.* Rouse, 2 Mich. N. P. 209.

An incestuous cohabitation or sexual intercourse is a cohabitation or sexual intercourse between persons related within the degrees of consanguinity within which marriage is prohibited. Territory *v.* Corbett, 3 Mont. 50.

Incestuous marriage.— The term "incestuous" is a proper term to apply to a marriage which is contracted between parties related to each other in the degrees within which such contracts are prohibited by law. Territory *v.* Corbett, 3 Mont. 50. A marriage between persons within the degrees of consanguinity prohibited by statute must necessarily be incestuous, and no use of the precise word "incestuous" in the statute is necessary. State *v.* Herges, 55 Minn. 464, 57 N. W. 205.

An incestuous person is one guilty of incest. Territory *v.* Corbett, 3 Mont. 50.

"'**Incestuous connection,**' according to Worcester, means 'sexual intercourse between persons who, by reason of consanguinity or affinity, cannot lawfully be united;' according to Webster, 'the crime of cohabitation or sexual commerce between persons related within the degrees wherein marriage is prohibited;' and according to the Imperial, 'the crime of cohabitation or sexual commerce between persons related within the degrees wherein marriage is prohibited by the laws of a country.'" Hintz *v.* State, 58 Wis. 493, 497, 17 N. W. 639.

2. People *v.* Stratton, 141 Cal. 604, 75 Pac. 166.

3. Tuberville *v.* State, 4 Tex. 128; Chick *v.* Ramsdale, 1 Curt. Eccl. 34; Burgess *v.* Burgess, 1 Hagg. Cons. 384; Blackmore *v.* Brider, 2 Phillim. 359; Cleaver *v.* Woodridge, 2 Phillim. 362 note.

4. *Illinois.*— Bolen *v.* People, 184 Ill. 338, 56 N. E. 408.

Louisiana.— State *v.* Smith, 30 La. Ann. 846.

Michigan.— People *v.* Burwell, 106 Mich. 27, 63 N. W. 986.

Missouri.— State *v.* Slaughter, 70 Mo. 484.

North Carolina.— State *v.* Keesler, 78 N. C. 469.

Oregon.— State *v.* Jarvis, 20 Oreg. 437, 26 Pac. 302, 23 Am. St. Rep. 141.

Texas.— Tuberville *v.* State, 4 Tex. 128. See 27 Cent. Dig. tit. "Incest," § 1.

5. *California.*— People *v.* Stratton, 141 Cal. 604, 75 Pac. 166.

Idaho.— People *v.* Barnes, 2 Ida. (Hasb.) 161, 9 Pac. 532.

Illinois.— Bolen *v.* People, 184 Ill. 338, 56 N. E. 408.

Iowa.— State *v.* Schaunhurst, 34 Iowa 547.

Michigan.— People *v.* Burwell, 106 Mich. 27, 63 N. W. 986.

Minnesota.— State *v.* Herges, 55 Minn. 464, 57 N. W. 205.

Missouri.— State *v.* Slaughter, 70 Mo. 484.

New York.— People *v.* Lake, 110 N. Y. 61, 17 N. E. 146, 6 Am. St. Rep. 344.

Vermont.— State *v.* Dana, 59 Vt. 614, 10 Atl. 727.

See 27 Cent. Dig. tit. "Incest," § 1.

Failure of statute to define the offense.— In State *v.* Smith, 30 La. Ann. 846, it was held that while the statutes of Louisiana attached a punishment to the crime of in-

III. ELEMENTS OF OFFENSE.

A. In General. The gravamen of the offense is carnal knowledge, unlawful because of consanguinity or affinity; but owing to differences in the various statutes defining incest, the elements thereof are not the same in all jurisdictions.[6]

B. Carnal Knowledge. Carnal knowledge is, as a general rule, a necessary element of the offense.[7] A single act of unlawful sexual intercourse has been held sufficient, however, to establish incest.[8] But incest will not be committed if actual penetration of the private parts of the female is wanting,[9] and indeed it has been held that emission is an essential ingredient of the crime.[10]

C. Intermarriage. By statute in many jurisdictions intermarriage between persons related within the prohibited degrees is declared to be incest,[11] and it has been held under statutes of this character in some jurisdictions that the offense becomes complete upon the intermarriage, and that to sustain a conviction it is unnecessary to establish carnal knowledge.[12] So a statute defining incest to be the intermarrying or carnal knowledge of persons within the forbidden degrees does not require proof of marriage to sustain conviction, provided carnal knowledge is shown.[13]

D. Cohabitation. Cohabitation of persons related within the forbidden degrees is prohibited by the terms of some of the statutes,[14] and the term "cohabitation" in this connection is generally construed in its technical sense as meaning the living together as man and wife.[15]

E. Prohibited Degrees of Relationship — 1. CONSANGUINITY[16] — a. In General. The prohibition against intermarriage or carnal knowledge between per-

cest, nowhere did the law define it, and that while the statutes directed that certain enumerated crimes should be construed by the common law of England, incest was not a common-law crime, and that as incest means a totally different thing in different states and countries, the statutes of Louisiana did not define the crime, and, therefore, defendant could not have been convicted without it. But the crime of incest has been defined by subsequent legislation in Louisiana. State *v.* De Hart, 109 La. 570, 33 So. 605.

Statute authorizing prosecution in court of chancery.—In Atty.-Gen *v.* Broaddus, 6 Munf. (Va.) 116, it was held that a prosecution under the thirteenth section of the Virginia act of 1792, concerning incestuous marriages was a criminal prosecution and that the direction in the statute that such prosecution should be instituted in the high court of chancery was unconstitutional.

6. People *v.* Stratton, 141 Cal. 604, 75 Pac. 166. See also the statutes of the various states.

The elements of incestuous adultery are: marriage of the defendant, the fact of sexual intercourse, and the relation of the parties within the Levitical degrees. Cook *v.* State, 11 Ga. 53, 56 Am. Dec. 410.

7. *California.*— People *v.* Stratton, 141 Cal. 604, 75 Pac. 166.

Idaho.— People *v.* Barnes, 2 Ida. (Hash.) 161, 9 Pac. 532.

Minnesota.—State *v.* Herges, 55 Minn. 464, 57 N. W. 205.

Missouri.— State *v.* Ellis, 11 Mo. App. 588.

Montana.— Territory *v.* Corbett, 3 Mont. 50.

Ohio.— State *v.* Brown, 47 Ohio St. 102, 23 N. E. 747, 21 Am. St. Rep. 790.

Texas.— Simon *v.* State, 31 Tex. Cr. 186, 20 S. W. 399, 716, 37 Am. St. Rep. 802.

See 27 Cent. Dig. tit. "Incest," § 4.

Necessity of carnal knowledge in case of prohibited intermarriage see *infra*, III, C, text and notes 12, 13.

Attempts to commit incest see *infra*, VIII.

8. Mathis *v.* Com., 13 S. W. 360, 11 Ky. L. Rep. 882; State *v.* Brown, 47 Ohio St. 102, 23 N. E. 747, 21 Am. St. Rep. 790; Barnhouse *v.* State, 31 Ohio St. 39; State *v.* Temple, 38 Vt. 37. See also State *v.* Lawrence, 19 Nebr. 307, 27 N. W. 126.

9. State *v.* Glindemann, 34 Wash. 221, 75 Pac. 800, 101 Am. St. Rep. 1001.

10. Noble *v.* State, 22 Ohio St. 541.

11. See the statutes of the various states.

12. State *v.* Schaunhurst, 34 Iowa 547; Hintz *v.* State, 58 Wis. 493, 17 N. W. 639.

13. Simon *v.* State, 31 Tex. Cr. 186, 20 S. W. 399, 716, 37 Am. St. Rep. 802.

14. Chancellor *v.* State, 47 Miss. 278; State *v.* Lawrence, 19 Nebr. 307, 27 N. W. 126; Simon *v.* State, 31 Tex. Cr. 186, 20 S. W. 399, 716, 37 Am. St. Rep. 802.

15. See Simon *v.* State, 31 Tex. Cr. 186, 20 S. W. 399, 716, 37 Am. St. Rep. 802. *Compare* State *v.* Lawrence, 19 Nebr. 307, 27 N. W. 126, holding that the word "cohabit" in a statute reading: "If a father shall rudely and licentiously cohabit with his own daughter," etc., taken in connection with other sections of the statute, did not mean to live together as husband and wife, but to live in the same place and family.

16. **Consanguinity defined.**— Consanguinity means the connection or relation of persons

sons related by consanguinity, unless expressly extended by statute, applies only to those related within the Levitical degrees.[17] The question is, however, very generally regulated by statute.[18] The prohibited degrees have been held to include father and daughter,[19] brother and sister,[20] uncle and niece,[21] and even first cousins.[22]

b. Legitimacy of Relationship. The legitimacy of the relationship between the parties is not essential to the commission of incest.[23]

c. Relationship by Half Blood. The prohibition against intermarriage or carnal knowledge between persons related within the prohibited degree of consanguinity extends to those of the half blood as well as to those of the whole blood.[24]

2. Affinity[25] — a. In General. A statutory prohibition expressly relating to degrees of consanguinity will not by implication extend to degrees of affinity.[26] However the statutes in many jurisdictions expressly extend to relationships by affinity.[27] Accordingly it has been held under statute that sexual intercourse between a stepfather and his stepdaughter,[28] or between a brother-in-law and sister-in-law,[29] is punishable as incest. But affinity within the meaning of statutes against incest does not arise between one of the parties to a marriage and a person related only by affinity to another party.[30] It has been held that the legal

descended from the same stock or common ancestor, and it is either lineal or collateral. Lineal is that which subsists between persons of whom one is descended in a direct line from the other, as between son, father, grandfather, great-grandfather, and so upwards in the direct ascending line; or between son, grandson, great-grandson, and so downwards in the direct descending line. Collateral kindred agree with the lineal in this, that they are descended from the same stock or ancestor, but differ in this, that they do not descend one from the other. State *v.* De Hart, 109 La. 570, 33 So. 605 [*quoting* 2 Blackstone Comm. 202; Black L. Dict.; Bouvier L. Dict.]. See also Consanguinity, 8 Cyc. 582.

17. Cook *v.* State, 11 Ga. 53, 56 Am. Dec. 410.

18. See the statutes of the various states.

19. Com. *v.* Goodhue, 2 Metc. (Mass.) 193; State *v.* Lawrence, 19 Nebr. 307, 27 N. W. 126; Com. *v.* Bruce, 4 Pa. L. J. Rep. 14, 6 Pa. L. J. 236. See also Cook *v.* State, 11 Ga. 53, 56 Am. Dec. 410, holding that a married man who has criminal intercourse with his own daughter is guilty of incestuous adultery, and she being a single woman is guilty of incestuous fornication.

Proof of marriage of father and mother.— In State *v.* Rosewell, 6 Conn. 446, it was held that on an information for incest alleged to have been committed by the prisoner with his legitimate daughter an actual marriage between the prisoner and such daughter's mother must be proved. *Compare* Com. *v.* Bruce, 4 Pa. L. J. Rep. 14, 6 Pa. L. J. 236.

20. State *v.* Schaunhurst, 34 Iowa 547.

21. Harrison *v.* State, 22 Md. 468, 85 Am. Dec. 658; Woods *v.* Woods, 2 Curt. Eccl. 516; Burgess *v.* Burgess, 1 Hagg. Cons. 384.

22. Nations *v.* State, 64 Ark. 467, 43 S. W. 396.

23. *Alabama.* — Baker *v.* State, 30 Ala. 521; Morgan *v.* State, 11 Ala. 289.

Florida.— Brown *v.* State, 42 Fla. 184, 27 So. 869.

Iowa.— State *v.* Schaunhurst, 34 Iowa 547.

Louisiana.— State *v.* De Hart, 109 La. 570, 33 So. 605.

Michigan.— People *v.* Jenness, 5 Mich. 305.

New York.— People *v.* Lake, 110 N. Y. 61, 17 N. E. 146, 6 Am. St. Rep. 344; People *v.* Harriden, 1 Park. Cr. 344.

North Carolina.— State *v.* Laurence, 95 N. C. 659.

Tennessee.— Ewell *v.* State, 6 Yerg. 364, 27 Am. Dec. 480.

Texas.— Clark *v.* State, 39 Tex. Cr. 179, 45 S. W. 576, 73 Am. St. Rep. 918.

England.— Woods *v.* Woods, 2 Curt. Eccl. 516; Blackmore *v.* Brider, 2 Phillim. 359. See 27 Cent. Dig. tit. "Incest," § 3.

24. *Kansas.*— State *v.* Reedy, 44 Kan. 190, 24 Pac. 66.

Louisiana.— State *v.* Guiton, 51 La. Ann. 155, 24 So. 784.

Michigan.— People *v.* Jenness, 5 Mich. 305.

Montana.— Territory *v.* Corbett, 3 Mont. 50.

Tennessee.— Shelly *v.* State, 95 Tenn. 152, 31 S. W. 492, 49 Am. St. Rep. 926.

Texas.— Simon *v.* State, 31 Tex. Cr. 186, 20 S. W. 399, 716, 37 Am. St. Rep. 802.

Vermont.— State *v.* Wyman, 59 Vt. 527, 8 Atl. 900, 59 Am. Rep. 753, holding that the word "brother" in a statute defining incest includes a brother of the half blood. See 27 Cent. Dig. tit. "Incest," § 3.

25. **Affinity defined** see Affinity, 2 Cyc. 38.

26. Chancellor *v.* State, 47 Miss. 278.

27. Stewart *v.* State, 39 Ohio St. 152. See also the statutes of the various states.

28. Taylor *v.* State, 110 Ga. 150, 35 S. E. 161; Norton *v.* State, 106 Ind. 163, 6 N. E. 126; Stanford *v.* State, 42 Tex. Cr. 343, 60 S. W. 253; Freeman *v.* State, 11 Tex. App. 92, 40 Am. Rep. 787. But see Chancellor *v.* State, 47 Miss. 278.

29. Stewart *v.* State, 39 Ohio St. 152. *Contra*, Dukes *v.* Clark, 2 Blackf. (Ind.) 20.

30. Chinn *v.* State, 47 Ohio St. 575, 26 N. E. 896, 11 L. R. A. 630 [*distinguishing*

marriage of the stepfather and the mother must be established before carnal intercourse between the stepfather and a stepdaughter can constitute the offense of incest.[31]

b. Effect of Death or Divorce. It has been held that affinity ceases upon the death of the blood relative through whom the relationship was created.[32] So it has been held that in a prosecution for incest between a stepfather and a stepdaughter, it will be a good defense to show that the sexual intercourse took place after the divorce of the accused from the stepdaughter's mother.[33]

F. Knowledge of Relationship — 1. On Part of Accused. Knowledge on the part of the accused is sometimes made an element of the offense by the express terms of statute.[34] Indeed it has been intimated that knowledge of the relationship between the parties is an essential element of the crime of incest apart from any express statutory provision to that effect.[35] But where the knowledge of the relationship is not incorporated in the statute as a part of the definition of the offense, such knowledge need not be alleged and proved affirmatively.[36] And a statute defining incest is not in violation of the fourteenth amendment of the constitution of the United States because of the omission of the word "knowingly" or any equivalent word or phrase making knowledge of the relationship an element of the crime.[37]

2. On Part of Both Parties. In the absence of statutory provision to the contrary[38] the rule is that knowledge of the relationship on the part of both parties to the incestuous act is not essential to a conviction of one of the parties.[39]

G. Consent of Parties. Sexual intercourse between persons related within the prohibited degrees of consanguinity or affinity, if it takes place with the consent of both parties, constitutes incest.[40] In some jurisdictions it is held that the crimes of rape by forcible ravishment and incest cannot be committed by the same act, but that the crime of incest requires the concurring assent of both parties.[41]

Stewart *v.* State, 39 Ohio St. 152], holding that a husband is not related by affinity to his wife's brother's wife.

31. McGrew *v.* State, 13 Tex. App. 340.

32. *Connecticut.*— Wilson *v.* State, 6 Law Rep. 456.

North Carolina.— State *v.* Shaw, 25 N. C. 532.

Tennessee.— Wilson *v.* State, 100 Tenn. 596, 46 S. W. 451, 66 Am. St. Rep. 789.

Texas.— Johnson *v.* State, 20 Tex. App. 609, 54 Am. Rep. 535.

Vermont.— Blodget *v.* Brinsmaid, 9 Vt. 27.

See 27 Cent. Dig. tit. "Incest," § 4.

Compare Com. *v.* Perryman, 2 Leigh (Va.) 717; Chick *v.* Ramsdale, 1 Curt. Eccl. 34; Blackmore *v.* Brider, 2 Phillim. 359.

33. Stanford *v.* State, 42 Tex. Cr. 343, 60 S. W. 253.

34. Morgan *v.* State, 11 Ala. 289; Baumer *v.* State, 49 Ind. 544, 19 Am. Rep. 691; Griggs *v.* Vickroy, 12 Ind. 549; Lumpkins *v.* Justice, 1 Ind. 557.

35. See State *v.* Ellis, 74 Mo. 385, 41 Am. Rep. 321; Rea *v.* Harrington, 58 Vt. 181, 2 Atl. 475, 56 Am. Rep. 561; State *v.* Pennington, 41 W. Va. 599, 23 S. E. 918. *Compare* State *v.* Dana, 59 Vt. 614, 10 Atl. 727.

36. State *v.* Dana, 59 Vt. 614, 10 Atl. 727; State *v.* Wyman, 59 Vt. 527, 8 Atl. 900, 59 Am. Rep. 753; State *v.* Glindemann, 34 Wash. 221, 75 Pac. 800, 101 Am. St. Rep. 1001; State *v.* McGilvery, 20 Wash. 240, 55 Pac. 115. See also *infra*, V, I.

37. State *v.* Glindemann, 34 Wash. 221, 75 Pac. 800, 101 Am. St. Rep. 1001; *In re* Nelson, 69 Fed. 712.

38. Baumer *v.* State, 49 Ind. 544, 19 Am. Rep. 691.

39. Morgan *v.* State, 11 Ala. 289; State *v.* Ellis, 74 Mo. 385, 41 Am. Rep. 321; State *v.* McGilvery, 20 Wash. 240, 55 Pac. 115.

40. Taylor *v.* State, 110 Ga. 150, 35 S. E. 161.

41. *Massachusetts.*— Com. *v.* Goodhue, 2 Metc. 193.

Michigan.— People *v.* Burwell, 106 Mich. 27, 63 N. W. 986; People *v.* Skutt, 96 Mich. 449, 56 N. W. 11 (holding that the question whether the intercourse took place under such circumstances as to constitute the crime of rape was properly submitted to the jury); De Groat *v.* People, 39 Mich. 124; People *v.* Jenness, 5 Mich. 305. *Compare* People *v.* Rouse, 2 Mich. N. P. 209.

Missouri.— State *v.* Eding, 141 Mo. 281, 42 S. W. 935; State *v.* Ellis, 74 Mo. 385, 41 Am. Rep. 321. *Compare* State *v.* Ellis, 11 Mo. App. 588.

Nebraska.— Yeoman *v.* State, 21 Nebr. 171, 31 N. W. 669.

New York.— People *v.* Harriden, 1 Park. Cr. 344.

Ohio.— Noble *v.* State, 22 Ohio St. 541.

Oregon.— State *v.* Jarvis, 20 Oreg. 437, 26 Pac. 302, 23 Am. St. Rep. 141.

See 27 Cent. Dig. tit. "Incest," § 6.

Rule applied to female under age of consent.— De Groat *v.* People, 39 Mich. 124.

Rape generally see RAPE.

But under the statutes of other jurisdictions it is held that the consent of the female is not necessary to constitute the crime of incest by the male.[42]

H. Age. It is sometimes required by statute that in order to warrant a conviction for incest the parties to the alleged incestuous act must have arrived at a specified age.[43]

IV. DEFENSES.

A. Bad Reputation of Female For Chastity. The bad reputation for chastity of the woman with whom the alleged incest was committed is not a defense to the charge of incest.[44]

B. Specific Acts of Unchastity. Nor is it a defense that the female was guilty of specific acts of unchastity with other men.[45]

C. Voluntary Drunkenness of Accused. So the crime of incest cannot be palliated or excused on the ground of the voluntary drunkenness of the accused.[46]

D. Moral Insanity. Moral insanity or uncontrollable impulse has been held not to be a defense to an indictment for incest.[47]

E. Use of Force. In some jurisdictions the fact that the sexual intercourse was accomplished by force or without the consent of the female is a defense to an indictment for incest, although a different rule obtains in other jurisdictions.[48]

F. Acquittal of Rape as Former Jeopardy. It has been held that an acquittal of rape does not bar a prosecution for incest with the same party, growing out of the same transaction, as the offenses are distinct and each requires a different character of proof.[49] On the other hand it has been held that if on a former trial for rape the state was permitted to prove all acts of intercourse covering the entire period included within the indictment and then elected to stand upon a certain one, defendant, on his subsequent indictment for an act of incest

42. *Alabama.*— Smith *v.* State, 108 Ala. 1, 19 So. 306, 54 Am. St. Rep. 140.

California.— People *v.* Stratton, 141 Cal. 604, 75 Pac. 166; People *v.* Kaiser, 119 Cal. 456, 51 Pac. 702; People *v.* Gleason, 99 Cal. 359, 33 Pac. 1111, 37 Am. St. Rep. 56.

Idaho.— People *v.* Barnes, 2 Ida. (Hasb.) 161, 9 Pac. 532.

Illinois.— David *v.* People, 204 Ill. 479, 68 N. E. 540.

Indiana.— Norton *v.* State, 106 Ind. 163, 6 N. E. 126.

Iowa.— State *v.* Rennick, 127 Iowa 294, 103 N. W. 159; State *v.* Kouhns, 103 Iowa 720, 73 N. W. 353; State *v.* Hurd, 101 Iowa 391, 70 N. W. 613 [*distinguishing* State *v.* Thomas, 53 Iowa 214, 4 N. W. 908; U. S. *v.* Hiler, Morr. 330]; State *v.* Chambers, 87 Iowa 1, 53 N. W. 1090, 43 Am. St. Rep. 349.

Kentucky.— Whittaker *v.* Com., 95 Ky. 632, 27 S. W. 83, 16 Ky. L. Rep. 173.

Texas.— Schoenfeldt *v.* State, 30 Tex. App. 695, 18 S. W. 640; Mercer *v.* State, 17 Tex. App. 452.

Washington.— State *v.* Nugent, 20 Wash. 522, 56 Pac. 25, 72 Am. St. Rep. 133.

See 27 Cent. Dig. tit. "Incest," § 6.

Rule applied to female under age of consent.— People *v.* Kaiser, 119 Cal. 456, 51 Pac. 702; State *v.* Chambers, 87 Iowa 1, 53 N. W. 1090, 43 Am. St. Rep. 349; People *v.* Barnes, 2 Ida. (Hasb.) 161, 9 Pac. 532.

Force insufficient to constitute rape.— In some jurisdictions it is held that in the crime of incest there may be a certain force or power exerted, resulting from the age, relationship, or circumstances of the parties which overcomes the objections of the female, without amounting to the violence which would constitute rape. Raiford *v.* State, 68 Ga. 672; Powers *v.* State, 44 Ga. 209; Porath *v.* State, 90 Wis. 527, 63 N. W. 1061, 48 Am. St. Rep. 954. But if the sexual intercourse was accomplished forcibly and without the consent of the female so as to amount to rape, no conviction can be had for incest. Whidby *v.* State, 121 Ga. 588, 49 S. E. 811; Porath *v.* State, 90 Wis. 527, 63 N. W. 1061, 48 Am. St. Rep. 954.

43. Lumpkins *v.* Justice, 1 Ind. 557; U. S. *v.* Hiler, Morr. (Iowa) 330.

44. Kidwell *v.* State, 63 Ind. 384.

45. *Indiana.*— Kidwell *v.* State, 63 Ind. 384.

Kentucky.— Mathis *v.* Com., 13 S. W. 360, 11 Ky. L. Rep. 882.

Louisiana.— State *v.* De Hart, 109 La. 570, 33 So. 605.

Missouri.— State *v.* Winningham, 124 Mo. 423, 27 S. W. 1107.

Texas.— Richardson *v.* State, 44 Tex. Cr. 211, 70 S. W. 320.

See 27 Cent. Dig. tit. "Incest," § 7.

46. Colee *v.* State, 75 Ind. 511.

47. Schwartz *v.* State, 65 Nebr. 196, 91 N. W. 190.

48. See *supra*, III, G.

49. Stewart *v.* State, 35 Tex. Cr. 174, 32 S. W. 766, 60 Am. St. Rep. 35.

Former jeopardy generally see CRIMINAL LAW, 12 Cyc. 259 *et seq.*

included within the acts proven but not elected, may plead his former acquittal as a bar.[50]

G. Ignorance of Relationship. In some jurisdictions knowledge of the relationship is an element of the offense, and therefore ignorance of such relationship is a defense.[51]

H. Effect of Acquittal of One Party. Under a statute in Indiana making the guilty participation of both parties to the act a necessary ingredient of the crime, it has been held that if one be tried and acquitted, the other must be discharged.[52] In other jurisdictions, however, it is held that the guilt of both parties is not necessary to warrant the conviction of one of the parties, and this although it be conceded that the consent of both parties to the sexual intercourse is necessary to constitute the crime of incest.[53]

I. Intermarriage of Parties. In England under the canon law the intermarriage of the parties has been held not to render the connection any less incestuous.[54] And in this country the rule has been laid down that sexual commerce between persons related within the prohibited degrees is incest, whether they have gone through the form of intermarriage or not.[55] Nor is it material that the marriage was celebrated in a country where it was valid, for a state is not bound upon principles of comity to permit persons to violate its criminal laws, adopted in the interest of decency and good morals, because they have assumed in another state or country where it was lawful, the relation which led to the prohibited act.[56]

J. Conspiracy of Third Persons. A person who commits incest cannot excuse himself by showing a conspiracy on the part of the prosecutrix and third persons to entice him into the incestuous act.[57]

V. INDICTMENT OR INFORMATION.[58]

A. In General. In charging the crime of incest it is generally sufficient for the indictment or information to follow the language of the statute defining the offense.[59] Indeed it has been held to be sufficient if the language of the statute is substantially followed and the facts are stated in such a manner as to enable a person of common understanding to know what is intended.[60]

B. Charging Carnal Knowledge. It has been held not to be necessary to charge carnal knowledge in so many words.[61] In the jurisdictions in which the

50. State *v.* Price, 127 Iowa 301, 103 N. W. 195.

51. See *supra*, III, F, 1.

52. Baumer *v.* State, 49 Ind. 544, 19 Am. Rep. 691.

53. People *v.* Patterson, 102 Cal. 239, 36 Pac. 436; State *v.* Ellis, 74 Mo. 385, 41 Am. Rep. 321.

54. Woods *v.* Woods, 2 Curt. Eccl. 516; Blackmore *v.* Brider, 2 Phillim. 359. See also State *v.* Brown, 47 Ohio St. 102, 23 N. E. 747, 21 Am. St. Rep. 790.

55. State *v.* Brown, 47 Ohio St. 102, 23 N. E. 747, 21 Am. St. Rep. 790.

56. State *v.* Brown, 47 Ohio St. 102, 23 N. E. 747, 21 Am. St. Rep. 790.

57. State *v.* Rennick, 127 Iowa 294, 103 N. W. 159.

58. Indictment or information generally see INDICTMENTS AND INFORMATIONS.

Forms of indictments held sufficient see Baker *v.* State, 30 Ala. 521; State *v.* Ratcliffe, 61 Ark. 62, 31 S. W. 978; People *v.* Stratton, 141 Cal. 604, 75 Pac. 166; People *v.* Kaiser, 119 Cal. 456, 51 Pac. 702; Brown *v.* State, 42 Fla. 184, 27 So. 869; People *v.* Cease, 80 Mich. 576, 45 N. W. 585; Noble *v.* State, 22 Ohio St. 541.

59. Bolen *v.* People, 184 Ill. 338, 56 N. E. 408 (holding that an indictment charging the offense in the language of the statute is sufficient, although inartistically drawn and containing surplusage); Noble *v.* State, 22 Ohio St. 541; State *v.* Pennington, 41 W. Va. 599, 601, 23 S. E. 918 (where it is said: "It is generally sufficient, and it is necessary, to follow the statute defining an offense").

In the warrant upon which the preliminary examination is held a detailed and formal description of the offense is not necessary. State *v.* Reedy, 44 Kan. 190, 24 Pac. 66.

60. People *v.* Patterson, 102 Cal. 239, 36 Pac. 436.

Misspelling.— An indictment for incest is not bad because "incestuous" is spelled "incestous." State *v.* Carville, (Me. 1887) 11 Atl. 601.

61. State *v.* Dana, 59 Vt. 614, 10 Atl. 727, holding that the averment "did commit fornication" is a sufficient averment of carnal knowledge.

concurring assent of both parties is not essential to the crime of incest, it has been held that the indictment need not allege that the parties had carnal knowledge of each other.[62] But in a jurisdiction in which the concurring assent of both parties is required to constitute incest, it has been held that the indictment should allege the act as the joint act of the parties.[63]

C. Description of Act. It has been intimated that the indictment should contain a particular description of the specific act relied upon as constituting the crime of incest.[64]

D. Date of the Act. The rule has been laid down in some jurisdictions that the omission to state in an indictment for incest the date of the commission of the offense[65] or the imperfect statement of the date[66] does not render the indictment invalid. It has been held that an indictment for incest charging its commission on a day certain and on divers other days and times is sufficiently specific as to time and that the *continuando* may be rejected as surplusage.[67] On the other hand it has been held that an indictment for incest which charges the criminal act to have been committed continuously through a specified period of years is to be regarded as charging several distinct offenses and therefore bad for duplicity.[68]

E. Charging Adultery or Fornication. On the principle that the gist of the crime of incest is the act of sexual intercourse between persons within the prohibited degrees of relationship, it has been held that an indictment charging an act of sexual intercourse between persons related within the prohibited degrees is sufficient, although it does not follow the statute by alleging that defendant committed fornication or adultery,[69] or although it alleges the commission of fornication instead of adultery by defendant who was a married man.[70]

F. Charging Intermarriage. So it has been held unnecessary to allege or

The words "incestuous connection" are sufficient to charge sexual intercourse. Hintz *v.* State, 58 Wis. 493, 17 N. W. 639.

62. State *v.* Hurd, 101 Iowa 391, 70 N. W. 613 [*distinguishing* State *v.* Thomas, 53 Iowa 214, 4 N. W. 908]; U. S. *v.* Hiler, Morr. (Iowa) 330]. See also State *v.* Kimble, 104 Iowa 19, 73 N. W. 348 (holding that an indictment is good which charges that defendant did unlawfully and feloniously carnally know and have sexual intercourse with the daughter of his wife); State *v.* Ellis, 11 Mo. App. 588 (holding that an indictment, which charges sexual intercourse between persons related to each other within the prohibited degrees of consanguinity, is not bad for failure to charge that such intercourse was "with each other").

An allegation of carnal intercourse between the parties is not tantamount to an allegation that such intercourse was with the consent of both parties. Tate *v.* State, (Tex. Cr. App. 1903) 77 S. W. 793.

63. State *v.* Jarvis, 20 Oreg. 437, 26 Pac. 302, 23 Am. St. Rep. 141.

64. Martin *v.* State, 58 Ark. 3, 22 S. W. 840.

65. Barnhouse *v.* State, 31 Ohio St. 39.

66. People *v.* Jenness, 5 Mich. 305; Yeoman *v.* State, 21 Nebr. 171, 31 N. W. 669; State *v.* Reynolds, 48 S. C. 384, 26 S. E. 679; State *v.* Pennington, 41 W. Va. 599, 23 S. E. 918.

Effect of statute of limitations.— In West Virginia it has been intimated that where there is a statute of limitations, the date must not be omitted, and that an imperfect statement will be material if it shows that the offense is barred. State *v.* Pennington, 41 W. Va. 599, 23 S. E. 918.

Relative dates of offense and adoption of code.— It has been held that the failure to disclose whether the offense was committed before or after the adoption of the code was immaterial, if the crime was the same under the former law. Baker *v.* State, 30 Ala. 521.

67. Cook *v.* State, 11 Ga. 53, 56 Am. Dec. 410.

68. Barnhouse *v.* State, 31 Ohio St. 39. See also State *v.* Temple, 38 Vt. 37.

69. Brown *v.* State, 42 Fla. 184, 27 So. 869. See also Territory *v.* Corbett, 3 Mont. 50. *Compare* State *v.* Ratcliffe, 61 Ark. 62, 31 S. W. 978; Martin *v.* State, 58 Ark. 3, 22 S. W. 840 (holding that in an indictment for adulterous incest it must be alleged that the accused was a married man at the time of the act in controversy); State *v.* Fritts, 48 Ark. 66, 2 S. W. 256 (holding that a person indicted for the crime of incest committed by fornication cannot be convicted unless it is alleged and found that he was unmarried at the time specified in the indictment).

Sufficient averment of marriage of defendant see State *v.* Ratcliffe, 61 Ark. 62, 31 S. W. 978; Cook *v.* State, 11 Ga. 53, 56 Am. Dec. 410; Lowther *v.* State, 4 Ohio Cir. Ct. 522, 2 Ohio Cir. Dec. 685; Hintz *v.* State, 58 Wis. 493, 17 N. W. 639.

70. People *v.* Cease, 80 Mich. 576, 45 N. W. 585; People *v.* Rouse, 2 Mich. N. P. 209.

negative the fact that the crime was committed by the intermarriage of the parties where the statute applies equally to married and unmarried persons.[71] But where the prohibition of the statute does not extend to intermarriage, the indictment must negative the fact of a legal marriage.[72]

G. Identification of Female. The failure to state the true name of the female in full will not invalidate the indictment, if there is no question as to her identity, she being present at the trial.[73]

H. Charging Relationship. When the relationship between the parties is definitely alleged in the indictment[74] it is unnecessary to allege further the conclusion of law that the parties were within the prohibited degrees of relationship,[75] or that the relationship was by blood or affinity.[76] Nor, if the relationship is alleged and the female is sufficiently identified, is it necessary to state the name of the person or persons through whom the relationship is traced.[77] So an indictment for incest with one's stepdaughter sufficiently describes the relationship of the parties by alleging it to be that of stepfather and stepdaughter, without setting forth the marriage of defendant to the mother or the subsistence of the marriage relation at the time of the commission of the crime.[78]

I. Charging Knowledge of Relationship. It is unnecessary to allege knowledge on the part of the accused of the relationship between the parties[79] unless such knowledge is by statute made a part of the definition of the offense.[80]

J. Charging Incest as Felony. The rule has been laid down that incest being a felony, an indictment failing to aver that the criminal act was "feloniously" done is invalid.[81] On the other hand it has been held that since

71. Brown *v.* State, 42 Fla. 184, 27 So. 869; State *v.* Brown, 47 Ohio St. 102, 23 N. E. 747, 21 Am. St. Rep. 790.

Sufficient allegations of marriage.— An indictment against a man for incest in marrying his half niece is not fatally defective on the ground that it fails to charge affirmatively that there was a marriage where it alleges that the "defendant did unlawfully intermarry." Simon *v.* State, 31 Tex. Cr. 136, 20 S. W. 399, 716, 37 Am. St. Rep. 802.

72. State *v.* Fritts, 48 Ark. 66, 2 S. W. 256.

73. People *v.* Lake, 110 N. Y. 61, 17 N. E. 146, 6 Am. St. Rep. 344, where the indictment gave the name of the female as "Georgiana Towne, commonly known as Georgiana Lake" and her true name in full was "Georgiana Jeanette Lake."

Name by which female is commonly known. — In State *v.* Peterson, 70 Me. 216, it was held that where in a trial of an indictment for incest with "Etta Peterson," proof was offered that the daughter's name was "Mary Etta Peterson" it was proper to instruct that "if defendant committed the crime with his daughter and she is commonly known by the name of Etta Peterson, that is sufficient."

74. *Arkansas.*— State *v.* Ratcliffe, 61 Ark. 62, 31 S. W. 978.

California.— People *v.* Kaiser, 119 Cal. 456, 51 Pac. 702.

Illinois.— Bergen *v.* People, 17 Ill. 426, 65 Am. Dec. 672.

Louisiana.— State *v.* Guiton, 51 La. Ann. 155, 24 So. 784.

Michigan.— Hicks *v.* People, 10 Mich. 395.

Texas.— Waggoner *v.* State, 35 Tex. Cr. 199, 32 S. W. 896.

See 27 Cent. Dig. tit. "Incest," § 9.

Legitimacy of the female and kinship of the whole blood need not be charged. Cook *v.* State, 11 Ga. 53, 56 Am. Dec. 410.

75. Hicks *v.* People, 10 Mich. 395. See also State *v.* Brown, 47 Ohio St. 102, 23 N. E. 747, 21 Am. St. Rep. 790.

76. State *v.* Brown, 47 Ohio St. 102, 23 N. E. 747, 21 Am. St. Rep. 790.

77. State *v.* Pennington, 41 W. Va. 599, 23 S. E. 918. See also State *v.* Brown, 47 Ohio St. 102, 23 N. E. 747, 21 Am. St. Rep. 790.

78. Noble *v.* State, 22 Ohio St. 541.

79. *Alabama.*— Morgan *v.* State, 11 Ala. 289.

California.— People *v.* Koller, 142 Cal. 621, 76 Pac. 500.

Iowa.— State *v.* Rennick, 127 Iowa 294, 103 N. W. 159; State *v.* Kimble, 104 Iowa 19, 73 N. W. 348.

Missouri.— State *v.* Bullinger, 54 Mo. 142.

Texas.— Simon *v.* State, 31 Tex. Cr. 186, 20 S. W. 399, 716, 37 Am. St. Rep. 802.

Vermont.— State *v.* Wyman, 59 Vt. 527, 8 Atl. 900, 59 Am. Rep. 753.

Washington.— State *v.* Glindemann, 34 Wash. 221, 75 Pac. 800, 101 Am. St. Rep. 1001 [*distinguishing* State *v.* McGilvery, 20 Wash. 240, 55 Pac. 115].

West Virginia.— State *v.* Pennington, 41 W. Va. 599, 23 S. E. 918.

See 27 Cent. Dig. tit. "Incest," § 9.

80. Baumer *v.* State, 49 Ind. 544, 19 Am. Rep. 691; Williams *v.* State, 2 Ind. 439, holding that charging that the act was "unlawfully" done is not charging that it was done with knowledge of the relationship.

81. Newman *v.* State, 69 Miss. 393, 10 So. 580.

incest is a statutory offense an indictment need not state that the offense was feloniously committed in the absence of statutory requirement.[82]

K. Charging Attempt to Commit Incest. An information charging an attempt to commit incest is not bad because it does not specifically allege the purpose and intent of the parties to carnally know each other if such intent is the necessary and irresistible inference to be derived from the language employed.[83] So it has been held that an information charging an attempt to commit incest need not negative the presumption that the attempt failed of commission through the volition of the actors, since the mere fact of abandonment would not prevent a conviction.[84]

L. Joint Prosecution of Parties. It is not necessary in charging the crime of incest that the parties shall be jointly indicted,[85] or that both shall be indicted separately.[86]

M. Joinder of Counts For Rape and Incest. As rape and incest are offenses of a kindred nature, it has been held that they may be joined in the same indictment, when they arise out of the same transaction.[87]

N. Election of Offenses. If different counts in an indictment for incest charge incestuous acts upon different days, the state may be compelled to elect upon which count it shall proceed.[88] So it has been held that where a single act of sexual intercourse is charged as committed on a specified date, the time stated is not material and the prosecutor may select as the basis of the prosecution any one act of sexual intercourse which occurred within the jurisdiction of the court prior to the indictment and within the period of the statute of limitations applicable to the offense.[89] But it has been held that when evidence has been introduced tending directly to the proof of one act and for the purpose of procuring a conviction upon it, the state will be deemed to have made an election, and thereafter it will be considered that this act is the one charged, upon which defendant must be found guilty.[90] The proper practice is for the accused to

82. Bolen *v.* People, 184 Ill. 338, 56 N. E. 408.

83. State *v.* McGilvery, 20 Wash. 240, 55 Pac. 115.

84. State *v.* McGilvery, 20 Wash. 240, 55 Pac. 115.

85. People *v.* Patterson, 102 Cal. 239, 36 Pac. 436; Powers *v.* State, 44 Ga. 209; Yeoman *v.* State, 21 Nebr. 171, 31 N. W. 669; Lowther *v.* State, 4 Ohio Cir. Ct. 522, 2 Ohio Cir. Dec. 685.

86. People *v.* Patterson, 102 Cal. 239, 36 Pac. 436; Powers *v.* State, 44 Ga. 209; Lowther *v.* State, 4 Ohio Cir. Ct. 522, 2 Ohio Cir. Dec. 685.

In Indiana, however, under a statute making incest a joint offense it has been held that while one of the parties may be tried separately and convicted and sentenced before the trial of the other, yet the crime must be charged as a joint crime whether the parties are prosecuted in the same indictment or not. Baumer *v.* State, 49 Ind. 544, 19 Am. Rep. 691.

87. State *v.* Kouhns, 103 Iowa 720, 73 N. W. 353; State *v.* Hurd, 101 Iowa 391, 70 N. W. 613; Wiggins *v.* State, (Tex. Cr. App. 1905) 84 S. W. 821; Owens *v.* State, 35 Tex. Cr. 345, 33 S. W. 875. See also Porath *v.* State, 90 Wis. 527, 63 N. W. 1061, 48 Am. St. Rep. 954. *Compare* State *v.* Thomas, 53 Iowa 214, 4 N. W. 908. See also INDICTMENTS AND INFORMATIONS, *post.*

Conviction of incest when charged with rape.— It has been held that one charged with the rape of another related to the former within the prohibited degrees of relationship may be convicted of incest. People *v.* Kaiser, 119 Cal. 456, 51 Pac. 702; Com. *v.* Goodhue, 2 Metc. (Mass.) 193. See also State *v.* Kouhns, 103 Iowa 720, 73 N. W. 353; State *v.* Hurd, 101 Iowa 391, 70 N. W. 613.

88. State *v.* Price, 127 Iowa 301, 103 N. W. 195; State *v.* Lawrence, 19 Nebr. 307, 27 N. W. 126; State *v.* Temple, 38 Vt. 37.

89. State *v.* Hurd, 101 Iowa 391, 70 N. W. 613 (holding that the election may be made at the close of the direct evidence); Smith *v.* Com., 109 Ky. 685, 60 S. W. 531, 22 Ky. L. Rep. 1349; People *v.* Jenness, 5 Mich. 305 (holding that the selection may be made before any evidence is introduced); Yeoman *v.* State, 21 Nebr. 171, 31 N. W. 669. See also State *v.* Reynolds, 48 S. C. 384, 26 S. E. 679.

90. People *v.* Jenness, 5 Mich. 305. See also People *v.* Koller, 142 Cal. 621, 76 Pac. 500. *Compare* State *v.* Hurd, 101 Iowa 391, 70 N. W. 613, holding that on a trial for incest where several acts of incest were shown, extending over a period of eighteen months, it was not an abuse of discretion to refuse to require the prosecution before the close of the direct evidence to elect on which it would rely.

move that the court require an election and the court cannot by an instruction make an election for the prosecuting officer.[91]

VI. EVIDENCE.[92]

A. Admissibility — 1. Prior Acts of Parties. When incest is charged prior acts of sexual intercourse between the same parties or previous familiarities not amounting to actual intercourse are admissible, not as affording proof of a substantial offense in themselves, but as corroborating other evidence of the act charged and as tending to show the relations existing between the parties as bearing upon the probability of the commission of the crime charged.[93] And this rule is applicable to prior acts of intercourse, although a prosecution therefor has been barred by the statute of limitations.[94] But when evidence of prior acts of intercourse is admitted in evidence it is held to be error not to instruct the jury that such evidence is to be considered only as corroborating other evidence of the commission of the crime.[95]

2. Subsequent Acts of Parties. In some jurisdictions acts of familiarity or intercourse subsequent to the time of the alleged offense are inadmissible;[96] but in other jurisdictions the rule is laid down that acts of improper familiarity or illicit intimacy or relations between the parties, subsequent as well as prior to the act charged, are admissible as corroborative evidence, when they tend to show a continuous illicit relationship.[97] Such acts are never admissible, however, as independent subsequent offenses or until the prosecution has selected some particular acts of a certain date, and has elected to rely upon proof of such fact for a conviction.[98]

3. Cruel Treatment of Female. Acts of the accused tending to prove his cruel treatment of the female for the purpose of forcing her to submit to his embraces are admissible.[99] So the denial by the accused to the prosecutrix, his

91. David *v.* People, 204 Ill. 479, 68 N. E. 540.

92. Evidence generally see Criminal Law, 12 Cyc. 379 *et seq.*; Evidence, 16 Cyc. 821 *et seq.*

93. *California.* — People *v.* Stratton, 141 Cal. 604, 75 Pac. 166; People *v.* Patterson, 102 Cal. 239, 36 Pac. 436.

Georgia. — Taylor *v.* State, 110 Ga. 159, 35 S. E. 161.

Indiana. — Lefforge *v.* State, 129 Ind. 551, 29 N. E. 34; State *v.* Markins, 95 Ind. 464, 48 Am. Rep. 733.

Iowa. — State *v.* Hurd, 101 Iowa 391, 70 N. W. 613.

Kentucky. — Smith *v.* Com., 109 Ky. 685, 60 S. W. 531, 22 Ky. L. Rep. 1349; Mathis *v.* Com., 13 S. W. 360, 11 Ky. L. Rep. 882.

Louisiana. — State *v.* De Hart, 109 La. 570, 33 So. 605.

Michigan. — People *v.* Skutt, 96 Mich. 449, 56 N. W. 11; People *v.* Cease, 80 Mich. 576, 45 N. W. 585; People *v.* Jenness, 5 Mich. 305.

North Carolina. — State *v.* Pippin, 88 N. C. 646; State *v.* Kemp, 87 N. C. 538.

Pennsylvania. — Com. *v.* Bell, 166 Pa. St. 405, 31 Atl. 123.

South Carolina. — State *v.* Reynolds, 48 S. C. 384, 26 S. E. 679.

South Dakota. — State *v.* De Masters, 15 S. D. 581, 90 N. W. 852.

Texas. — Burnett *v.* State, 32 Tex. Cr. 86, 22 S. W. 47. *Compare* Wiggins *v.* State, (Cr. App. 1905) 84 S. W. 821, holding that while acts of mere familiarity are admissible, other acts of intercourse are inadmissible.

See 27 Cent. Dig. tit. "Incest," § 11.

Acts prior to passage of statute creating offense. — The admission of evidence of incestuous acts prior to the passage of the statute cannot be taken advantage of after verdict unless objected to at the time of trial. Ewell *v.* State, 6 Yerg. (Tenn.) 364, 27 Am. Dec. 480.

94. Taylor *v.* State, 110 Ga. 150, 35 S. E. 161; State *v.* Pippin, 88 N. C. 646; Com. *v.* Bell, 166 Pa. St. 405, 31 Atl. 123.

95. Smith *v.* Com., 109 Ky. 685, 60 S. W. 531, 22 Ky. L. Rep. 1349.

96. Lovell *v.* State, 12 Ind. 18; Clifton *v.* State, 46 Tex. Cr. 18, 79 S. W. 824 [*disapproving* Burnett *v.* State, 32 Tex. Cr. 86, 22 S. W. 47]; State *v.* De Masters, 15 S. D. 581, 90 N. W. 852.

97. People *v.* Keller, 142 Cal. 621, 76 Pac. 500; Mathis *v.* Com., 13 S. W. 360, 11 Ky. L. Rep. 882.

Acts subsequent to indictment. — The admission of evidence of incestuous acts subsequent to the finding of the indictment cannot be taken advantage of after verdict unless it was objected to at the time of the trial. Ewell *v.* State, 6 Yerg. (Tenn.) 364, 27 Am. Dec. 480.

98. People *v.* Koller, 142 Cal. 621, 76 Pac. 500.

99. People *v.* Burwell, 106 Mich. 27, 63 N. W. 986 (where evidence of this character

daughter, of the privilege of attending church or entertainments, whether regarded as punishment for unwillingness to yield to his demands or as a method of increasing his opportunity for satisfying his illicit passion, is an act in furtherance of an incestuous purpose and admissible in evidence.[1] But conduct of this character on the part of the accused is inadmissible unless its connection with the alleged crime is established.[2]

4. Improper Relations of Accused With Other Women. Evidence of his improper relations with other women, subsequent to the act charged, is not admissible in evidence against the accused.[3]

5. Conduct of Female With Other Men. Evidence of the woman's bad reputation for chastity[4] or specific acts of unchastity with other men[5] is inadmissible in favor of the accused. But where the pregnancy of the woman is established it has been held competent for the woman to testify that she had never had sexual intercourse with any man except the accused.[6]

6. Confessions of Accused.[7] The confession of the accused when not made under duress is admissible in evidence against him.[8] So evidence tending to show acts and declarations of the accused manifesting solicitude as to the pregnancy of the woman and also tending to implicate him as the author of her ruin is admissible against him.[9]

7. Declarations of Female — a. In General. Statements made by the woman with whom the incest was alleged to have been committed are like the declarations of third persons generally not admissible against the accused,[10] unless they form

was admitted for the purpose of determining whether the crime committed was rape or incest); Clements *v.* State, 34 Tex. Cr. 616, 31 S. W. 642.

1. Com. *v.* Bell, 166 Pa. St. 405, 31 Atl. 123.

2. Whidby *v.* State, 121 Ga. 588, 49 S. E. 811; Clifton *v.* State, 46 Tex. Cr. 18, 79 S. W. 824.

Evidence of quarrels with third persons.— In State *v.* Moore, 81 Iowa 578, 47 N. W. 772, it was held that upon a trial under an indictment for the crime of incest committed by a father with his daughter, evidence that defendant had six years previously quarreled with his sons and caused them to leave his house for reasons having no relation to the commission of the crime is irrelevant.

3. Porath *v.* State, 90 Wis. 527, 63 N. W. 1061, 48 Am. St. Rep. 954.

4. Kidwell *v.* State, 63 Ind. 384.

5. *California.*— People *v.* Stratton, 141 Cal. 604, 75 Pac. 166.

Indiana.— Kidwell *v.* State, 63 Ind. 384.

Iowa.— State *v.* Hurd, 101 Iowa 391, 70 N. W. 613.

Kentucky.— Mathis *v.* Com., 13 S. W. 360, 11 Ky. L. Rep. 882.

Louisiana.— State *v.* De Hart, 109 La. 570, 33 So. 605.

Missouri.— State *v.* Winningham, 124 Mo. 423, 27 S. W. 1107.

Texas.— Richardson *v.* State, 44 Tex. Cr. 211, 70 S. W. 320; Kilpatrick *v.* State, 39 Tex. Cr. 10, 44 S. W. 830.

See 27 Cent. Dig. tit. "Incest," § 11.

The woman's testimony that she gave her earnings as a prostitute to the accused, her father, about two years prior to the alleged act was inadmissible, as its evident effect was to prejudice the jury by attempting to show his turpitude of character. People *v.* Benoit, 97 Cal. 249, 31 Pac. 1128.

6. Taylor *v.* State, 110 Ga. 159, 35 S. E. 161.

7. Confessions generally see Criminal Law, 12 Cyc. 459 *et seq.*

8. Mathis *v.* State, 13 S. W. 360, 11 Ky. L. Rep. 882. See also Yeoman *v.* State, 21 Nebr. 171, 31 N. W. 669, holding that it is competent to prove defendant's guilt by his confessions where the *corpus delicti* is sufficiently shown to warrant the submission of the case to the jury.

The acquiescence of defendant in the language or conduct of the prosecutrix cannot be assumed as a concession of the truth thereof unless it clearly appears that the language was heard or the conduct understood by defendant. Sauls *v.* State, 30 Tex. App. 496, 17 S. W. 1066.

9. Taylor *v.* State, 110 Ga. 150, 35 S. E. 161.

10. State *v.* De Masters, 15 S. D. 581, 90 N. W. 852 (holding that on a prosecution for incest, the admission of evidence of statements made in defendant's absence by the woman with whom the crime was charged to have been committed, and who was jointly indicted with him, just after she had given birth to a child, that defendant was the father of the child, and of her confession, in defendant's absence, after she had been arrested for the same crime with which defendant was charged, that she and defendant were guilty of such crime, was reversible error, although the court subsequently instructed the jury not to consider such evidence; Poyner *v.* State, 40 Tex. Cr. 640, 51 S. W. 376; Clark *v.* State, 39 Tex. Cr. 179, 45 S. W. 576, 73 Am. St. Rep. 918.

Where an affidavit in bastardy proceedings in which the prosecutrix charged that the

part of the *res gestæ*,[11] or unless they were made in the presence of the accused and were acquiesced in by him.[12]

b. Dying Declarations. The dying declarations of the woman with whom the alleged incest was committed are not admissible in the evidence against the accused, the general rule being that the admission of dying declarations forms an exception to the law of evidence and is confined to cases of homicide.[13]

8. Declarations of Third Persons.[14] The general rule as to the inadmissibility of the acts and declarations of third persons as being hearsay is applicable in prosecutions for incest.[15]

9. Character of Defendant.[16] It has been held that in a prosecution for incest, evidence may be introduced in defendant's favor to show his general reputation for gentlemanly deportment and moral character.[17]

10. Physical Condition of Female. It has been held competent for medical experts to testify as to the abnormal condition of the private parts of a young girl with whom the offense was alleged to have been committed as shown by an examination subsequent to the commission of the offense.[18] So testimony of a physician that the sexual organs of a girl with whom incest was alleged to have been committed were in the condition of those of a married woman has been held admissible for the purpose of corroborating her testimony as to the frequent acts of intercourse to which she had been subjected.[19] On the other hand testimony of a physician to the effect that he had found the prosecutrix upon examination suffering from some irritation of the vagina caused by some recent violence has been held inadmissible in a prosecution for incest, although it was intimated that it might be admissible in a prosecution for rape.[20] Evidence of the pregnancy of the woman with whom the alleged incest was committed is inadmissible as an independent fact,[21] although evidence thereof may be admitted as inseparably connected with other facts, which, if true, tend strongly to show the act of intercourse in controversy.[22]

11. Evidence of Relationship — a. In General. It has been held under statute that relationship must be established by the production of the extracts from the registers of civil status and that oral evidence is not admissible to prove relationship on a charge of incest where the absence of such record evidence is not shown.[23] But record evidence of relationship is not as a general rule required.[24]

b. Admissions. The admissions of the accused are receivable in evidence

accused was the father of a certain child born to her was introduced in evidence to impeach her testimony on the trial for incest arising out of the same transaction, it was held to be proper to ask her on reëxamination if the affidavit was signed by her voluntarily. Yeoman *v.* State, 21 Nebr. 171, 31 N. W. 669.

11. See Ramsey *v.* State, (Tex. Cr. App. 1901) 63 S. W. 876; Poyner *v.* State, 40 Tex. Cr. 640, 51 S. W. 376.

12. See State *v.* De Masters, 15 S. D. 581, 90 N. W. 852; Sauls *v.* State, 30 Tex. App. 496, 17 S. W. 1066. *Compare* Pryor *v.* State, 40 Tex. Cr. 643, 51 S. W. 375.

13. People *v.* Stison, (Mich. 1905) 103 N. W. 542. See also Criminal Law, 12 Cyc. 432; Homicide, 21 Cyc. 973 *et seq.*

14. Declarations of third persons generally see Criminal Law, 12 Cyc. 432 *et seq.*; Evidence, 16 Cyc. 1192.

15. State *v.* Pruett, 144 Mo. 92, 45 S. W. 1114. See also Simon *v.* State, 31 Tex. Cr. 186, 20 S. W. 399, 716, 37 Am. St. Rep. 802.

16. Evidence of character in criminal cases generally see Criminal Law, 12 Cyc. 412 *et seq.*

17. Poyner *v.* State, 40 Tex. Cr. 640, 51 S. W. 376, (1898) 48 S. W. 516, 47 S. W. 977.

18. Com. *v.* Lynes, 142 Mass. 577, 8 N. E. 408, 56 Am. Rep. 709.

19. People *v.* Stratton, 141 Cal. 604, 75 Pac. 166.

20. State *v.* Jarvis, 20 Oreg. 437, 26 Pac. 302, 23 Am. St. Rep. 141.

21. State *v.* Pruett, 144 Mo. 92, 45 S. W. 1114.

Inadmissibility of testimony of physician as to likeness of child to defendant see Kilpatrick *v.* State, 39 Tex. Cr. 10, 44 S. W. 830.

22. People *v.* Stison, (Mich. 1905) 103 N. W. 542, holding that in a prosecution of defendant for incest with his niece, it being shown that she had gone to a hospital in a distant city under an assumed name and that defendant corresponded with her while denying that he knew where she was, evidence of her pregnancy and the birth of a child, and that defendant sent her money, was admissible.

23. Reg. *v.* Garneau, 4 Can. Cr. Cas. 69.

24. See *infra*, VI, A, 11, b; VI, A, 11, c.

against him to prove the relationship existing between him and the female participant.[25] So when for the purpose of establishing the relationship between the parties it becomes material to prove the marriage of the accused, his admission of the fact is admissible.[26]

c. Reputation and Declarations of Third Persons. In some jurisdictions it has been held that in prosecutions for incest the relationship and pedigree of the parties may be established by general reputation.[27] On the other hand it has been held that pedigree cannot be proven by general reputation in the neighborhood and that while hearsay evidence is admissible to prove pedigree, the rule is limited to declarations made by a deceased relative or member of the family.[28]

12. Evidence of Intermarriage. Under statute it has been held that in a prosecution for an incestuous intermarriage, the register of marriages kept by the officer designated for that purpose is admissible to prove that the marriage took place,[29] and the identity of the persons accused and of the persons named in the marriage record can be established by admissions, identity of names, and by the absence of evidence showing that other persons of the same name did the acts of which the defendants stand charged.[30] So it is held that the marriage may be proved by the witnesses of the ceremony.[31]

13. Testimony of Particular Persons — a. Accomplices. It has been held that in a prosecution for incest an accomplice may be called upon to testify against his accomplice, whether the latter gives his consent or not.[32]

b. Wife Against Husband. It has been held under statute that the wife may be a witness against her husband in a criminal prosecution for incest on the ground that it is a crime against the wife within the meaning of the statute.[33] But in Texas it has been held that the wife cannot testify against the husband in a prosecution of this character.[34]

c. Physicians. It has been held that a physician may testify as to information acquired by him while attending the prosecutrix as his patient, provided she gives her consent to the testimony.[35]

B. Weight and Sufficiency — 1. In General. The general rule of the crimi-

25. *Alabama.*— Morgan *v.* State, 11 Ala. 289.

Florida.— Brown *v.* State, 42 Fla. 184, 27 So. 869.

Georgia.— Cook *v.* State, 11 Ga. 53, 56 Am. Dec. 410.

Iowa.— State *v.* Schaunhurst, 34 Iowa 547.

Michigan.— People *v.* Jenness, 5 Mich. 305.

See 27 Cent. Dig. tit. "Incest," § 11.

26. Bergen *v.* People, 17 Ill. 426, 65 Am. Dec. 672; People *v.* Harriden, 1 Park. Cr. (N. Y.) 344; Woods *v.* Woods, 2 Curt. Eccl. 516. But see State *v.* Roswell, 6 Conn. 446.

27. State *v.* Bullinger, 54 Mo. 142; Ewell *v.* State, 6 Yerg. (Tenn.) 364, 27 Am. Dec. 480.

28. Elder *v.* State, 123 Ala. 35, 26 So. 213.

Instruction as to direct testimony held erroneous.— In Elder *v.* State, 123 Ala. 35, 26 So. 213, it was held that an instruction stating as a conclusion of law that "relationship is a matter that can scarcely be testified to directly in any case" is erroneous.

Declaration as to illegitimacy held inadmissible.— Where a man born in lawful wedlock was indicted for marrying his half niece, declarations of his deceased mother that he was illegitimate, and therefore not of kin to his wife, were held not to be admissible to rebut the family recognition and belief that had existed from his birth, nor the presumption that children born in wedlock are legitimate. Simon *v.* State, 31 Tex. Cr. 186, 20 S. W. 399, 716, 37 Am. St. Rep. 802.

29. State *v.* Schaunhurst, 34 Iowa 547.

30. State *v.* Schaunhurst, 34 Iowa 547.

31. Woods *v.* Woods, 2 Curt. Eccl. 516, holding that the register is not the best evidence of a marriage, being simply a memorandum of the compact entered into by the parties.

32. Brown *v.* State, 42 Fla. 184, 27 So. 869; State *v.* De Hart, 109 La. 570, 33 So. 605; Territory *v.* Corbett, 3 Mont. 50.

The offer of the court to the witness while she was on the stand that if she would testify her case would be dismissed and that she would not be prosecuted was not erroneous, since the court had authority to make the offer, and, if she accepted the terms and testified truthfully, she would be exempted from prosecution under the decisions of Texas. Stanford *v.* State, 42 Tex. Cr. 343, 60 S. W. 253.

33. State *v.* Hurd, 101 Iowa 391, 70 N. W. 613; State *v.* Chambers, 87 Iowa 1, 53 N. W. 1090, 43 Am. St. Rep. 349. See also State *v.* Reynolds, 48 S. C. 384, 26 S. E. 679.

34. Compton *v.* State, 13 Tex. App. 271, 44 Am. Rep. 703.

35. Territory *v.* Corbett, 3 Mont. 50.

nal law requiring proof of the guilt of the accused beyond a reasonable doubt is applicable in prosecutions for incest.[36]

2. Confessions of Accused. The accused cannot be convicted of incest upon his mere confession of guilt made out of court, uncorroborated by facts or circumstances.[37]

3. Corroboration of Testimony of Female[38] — a. In General. The rule has been laid down that apart from statute a conviction may be had in a prosecution for incest upon the uncorroborated testimony of the prosecutrix, although she is an accomplice,[39] the circumstances of her being an accomplice affecting, it has been held, her credibility only.[40] But under statute in other jurisdictions a person indicted for incest cannot be convicted upon the uncorroborated testimony of the prosecutrix if she consented to the incestuous act, since in such case she is regarded as an accomplice,[41] and this it has been held, although the consent of the

36. Bergen *v.* People, 17 Ill. 426, 65 Am. Dec. 672; Sauls *v.* State, 30 Tex. App. 496, 17 S. W. 1066. See also Tuberville *v.* State, 4 Tex. 128.

Reasonable doubt generally see Criminal Law, 12 Cyc. 490 *et seq.*

Evidence held sufficient for submission to jury see State *v.* Eding, 141 Mo. 281, 42 S. W. 935; Yeoman *v.* State, 21 Nebr. 171, 31 N. W. 669.

Facts held insufficient to justify conviction see Jennings *v.* State, (Tex. Cr. App. 1902) 66 S. W. 778; Griffiths *v.* Reed, 1 Hagg. Eccl. 195; Burgess *v.* Burgess, 1 Hagg. Cons. 384.

Circumstances justifying direction by court of verdict of acquittal.— Where several men testified that they had watched defendant's house, and from a high fence had seen him go to bed with a woman they believed to be his daughter, and others swore that it would have been impossible to distinguish between his wife and daughter at that distance, and a girl testified that defendant and his daughter had had connection in the stable; but it was shown that at the time named the stable floor was covered with fresh dung, and that the gate through which witness testified defendant entered was blocked with a log and could not be opened, and it furthermore appeared that the witnesses were instigated by a rejected suitor of the daughter, and that defendant's reputation was good, it was held that the circumstances justified the jury to return a verdict of acquittal. People *v.* Gillet, 2 Edm. Sel. Cas. (N. Y.) 406.

37. Bergen *v.* People, 17 Ill. 426, 65 Am. Dec. 672.

38. **Corroboration of testimony** of accomplices generally see Criminal Law, 12 Cyc. 453 *et seq.*

39. *Florida.*— Brown *v.* State, 42 Fla. 184, 27 So. 869.

Louisiana.— State *v.* De Hart, 109 La. 570, 33 So. 605.

Michigan.— People *v.* Jenness, 5 Mich. 305.

Vermont.— State *v.* Dana, 59 Vt. 614, 10 Atl. 727.

Wisconsin.— Porath *v.* State, 90 Wis. 527, 63 N. W. 1061, 48 Am. St. Rep. 954.

See 27 Cent. Dig. tit. "Incest," § 13.

In Kentucky it has been held that under an indictment for incest alleged to have been committed by defendant with his daughter, the jury were authorized to convict on the testimony of the daughter alone, although she consented to the crime, since her crime was separable from that of the father and she was not an accomplice. Whittaker *v.* Com., 95 Ky. 632, 27 S. W. 83, 16 Ky. L. Rep. 173.

40. State *v.* De Hart, 109 La. 570, 33 So. 605.

41. *California.*— People *v.* Stratton, 141 Cal. 604, 609, 75 Pac. 166, where it is said: "If the prosecutrix, being of the legal age of consent, consents to the incestuous intercourse, unquestionably she is *particeps criminis*, and her testimony, like that of any other accomplice, uncorroborated, is insufficient to uphold a conviction."

Georgia.— Durden *v.* State, 120 Ga. 860, 48 S. E. 315; Yother *v.* State, 120 Ga. 204, 47 S. E. 555; Solomon *v.* State, 113 Ga. 192, 38 S. E. 332.

North Dakota.— State *v.* Kellar, 8 N. D. 563, 80 N. W. 476, 73 Am. St. Rep. 776.

Oregon.— State *v.* Jarvis, 20 Oreg. 437, 26 Pac. 302, 23 Am. St. Rep. 141; State *v.* Jarvis, 18 Oreg. 360, 23 Pac. 251.

Tennessee.— Shelly *v.* State, 95 Tenn. 152, 31 S. W. 492, 49 Am. St. Rep. 926.

Texas.— Tate *v.* State, (Cr. App. 1903) 77 S. W. 793; Ratliff *v.* State, (Cr. App. 1901) 60 S. W. 666; Clark *v.* State, 39 Tex. Cr. 179, 45 S. W. 576, 73 Am. St. Rep. 918; Stewart *v.* State, 35 Tex. Cr. 174, 32 S. W. 766, 60 Am. St. Rep. 35; Schoenfeldt *v.* State, 30 Tex. App. 695, 18 S. W. 640; Blanchett *v.* State, 29 Tex. App. 46, 14 S. W. 392; Dodson *v.* State, 24 Tex. App. 514, 6 S. W. 548; Mercer *v.* State, 17 Tex. App. 452 (holding that the woman was an accomplice where she testified to various acts of illicit intercourse extending over seven or eight years, and that she had never told any one thereof until she was "four months along" and it was shown by other testimony that all this time the community was well settled, and that she had had opportunity to tell other people of the acts complained of, although she also testified that the accused accomplished his desires by force and by fear through threats); Freeman *v.* State, 11 Tex. App. 92, 40 Am. Rep. 787.

See 27 Cent. Dig. tit. "Incest," § 13.

See also Criminal Law, 12 Cyc. 448 note 74.

female may have been reluctantly given.[42] On the other hand it is very generally held that where the prosecutrix is not an accomplice, or in other words if she is a victim of force, or fraud or undue influence, or is too young to be able to give legal assent, so that she does not wilfully or willingly join in the incestuous act, her testimony alone will be sufficient to sustain a conviction of incest,[43] unless the jurisdiction is one in which the crime would under such circumstances constitute rape and not incest.[44] Whether or not the prosecutrix is an accomplice is generally a question of fact for the jury.[45]

b. Extent of Corroboration Necessary. No rule can be laid down as to the precise amount of evidence which is requisite to sustain the testimony of the accomplice,[46] the question whether the evidence is sufficient corroboration being for the jury to determine.[47] It may be stated generally, however, that it is sufficient if it tends to connect defendant with the commission of the offense.[48] But it has been held that the testimony of the prosecutrix need not be corroborated in every item.[49] Such corroboration need not be furnished by direct and

Consent may be inferred in the absence of evidence of force, fraud, threats, or undue influence, from the evidence of the female that the sexual intercourse occurred frequently for several months. Shelly *v.* State, 95 Tenn. 152, 31 S. W. 492, 49 Am. St. Rep. 926. See Mercer *v.* State, 17 Tex. App. 452.

Third persons as accomplices.— Third persons cannot be regarded as accomplices to the crime of incest within the meaning of the statutory rule requiring corroborative evidence unless they are shown in some way to have aided, encouraged, or advised the commission of the offense. Adcock *v.* State, 41 Tex. Cr. 288, 53 S. W. 845.

The court's refusal to instruct in regard to the corroboration of accomplice testimony where the accomplice refuses to testify is not erroneous, since her refusal does not in the least contribute to defendant's conviction. Waggoner *v.* State, 35 Tex. Cr. 199, 32 S. W. 896.

42. Whidby *v.* State, 121 Ga. 588, 49 S. E. 811; Yother *v.* State, 120 Ga. 204, 47 S. E. 555; Clifton *v.* State, 46 Tex. Cr. 18, 79 S. W. 824 (holding the prosecutrix to be an accomplice, although she did not enter into the incestuous act with the same desire, intent, and purpose as the accused); Porath *v.* State, 90 Wis. 527, 63 N. W. 1061, 48 Am. St. Rep. 954.

43. *Alabama.*— Smith *v.* State, 108 Ala. 1, 19 So. 306, 54 Am. St. Rep. 140.

California.— People *v.* Stratton, 141 Cal. 604, 75 Pac. 166.

Iowa.— State *v.* Rennick, 127 Iowa 294, 103 N. W. 159; State *v.* Kouhns, 103 Iowa 720, 73 N. W. 353.

Kentucky.— Mathis *v.* Com., 13 S. W. 360, 11 Ky. L. Rep. 882.

Nebraska.— Schwartz *v.* State, 65 Nebr. 196, 91 N. W. 190.

Texas.— Mullinnix *v.* State, 42 Tex. Cr. 526, 60 S. W. 768, (1894) 26 S. W. 504; Mercer *v.* State, 17 Tex. App. 452.

Wisconsin.— Porath *v.* State, 90 Wis. 527, 63 N. W. 1061, 48 Am. St. Rep. 954.

See 27 Cent. Dig. tit. "Incest," § 13.

See also CRIMINAL LAW, 12 Cyc. 448 note 75.

44. See State *v.* Jarvis, 20 Oreg. 437, 26 Pac. 302, 23 Am. St. Rep. 141.

45. People *v.* Skutt, 96 Mich. 449, 56 N. W. 11; State *v.* Kellar, 8 N. D. 563, 80 N. W. 476, 73 Am. St. Rep. 776; Porath *v.* State, 90 Wis. 527, 63 N. W. 1061, 48 Am. St. Rep. 954.

46. Powers *v.* State, 44 Ga. 209; State *v.* Streeter, 20 Nev. 403, 22 Pac. 758.

47. State *v.* Moore, 81 Iowa 578, 47 N. W. 772; State *v.* Miller, 65 Iowa 60, 21 N. W. 181; State *v.* Streeter, 20 Nev. 403, 22 Pac. 758; State *v.* Kellar, 8 N. D. 563, 80 N. W. 476, 73 Am. St. Rep. 776.

Corroborating evidence held sufficient see People *v.* Kaiser, 119 Cal. 456, 51 Pac. 702; Raiford *v.* State, 68 Ga. 672; Powers *v.* State, 44 Ga. 209; State *v.* Kouhns, 103 Iowa 720, 73 N. W. 353; State *v.* Moore, 81 Iowa 578, 47 N. W. 772; State *v.* Miller, 65 Iowa 60, 21 N. W. 181; State *v.* Kimes, 149 Mo. 459, 51 S. W. 104; State *v.* Eding, 141 Mo. 281, 42 S. W. 935; State *v.* Streeter, 20 Nev. 403, 22 Pac. 758; Bales *v.* State, (Tex. Cr. App. 1898) 44 S. W. 517.

Testimony that the prosecutrix was pregnant and that defendant alone had had opportunity for intercourse with her was sufficient. Taylor *v.* State, 110 Ga. 150, 35 S. E. 161; Jackson *v.* State, 37 Tex. Cr. 612, 40 S. W. 498, (1897) 40 S. W. 998. See also Ceasare *v.* State, (Tex. Cr. App. 1895) 29 S. W. 785; Schoenfeldt *v.* State, 30 Tex. App. 695, 18 S. W. 640. But the mere fact that the woman became pregnant does not so corroborate her testimony to the effect that her stepfather had intercourse with her as to warrant his conviction of incestuous adultery. Taylor *v.* State, 110 Ga. 150, 35 S. E. 161.

48. Solomon *v.* State, 113 Ga. 192, 38 S. E. 332; Taylor *v.* State, 110 Ga. 150, 35 S. E. 161 (holding that when the testimony goes no further than merely to raise a grave suspicion that the accused committed the crime in question it is insufficient); State *v.* Kellar, 8 N. D. 563, 80 N. W. 476, 73 Am. St. Rep. 776; State *v.* Jarvis, 18 Oreg. 360, 23 Pac. 251; Schoenfeldt *v.* State, 30 Tex. App. 695, 18 S. W. 640.

49. Territory *v.* Corbett, 3 Mont. 50.

positive evidence, but circumstances or facts proved or admitted, legitimately tending to show the existence of material facts, will be sufficient, if they satisfy the jury of the truthfulness of the accomplice's story.[50] But the corroboration must come from some source or sources other than the testimony of the accomplice.[51]

4. EVIDENCE TO ESTABLISH RELATIONSHIP. Proof of the relationship within the prohibited degrees must be clear and unequivocal.[52] But it has been held that the name by which the daughter with whom the incest was alleged to have been committed was known is immaterial, if her identity is established beyond dispute.[53]

5. EVIDENCE TO ESTABLISH MARRIAGE.[54] Under statute it has been held that the register of marriages kept by an official designated by law for that purpose is, in the absence of evidence to the contrary, sufficient proof of a marriage between the parties.[55] So it has been held that proof of the performance of the marriage ceremony by an officer authorized to perform it raises a presumption of its legality.[56] Under a statute in Texas it is held that when incest is charged in an indictment alleging intermarriage, proof of cohabitation is sufficient without proof of marriage.[57]

VII. ACCESSARIES.[58]

Under statute in Texas providing that relatives within designated degrees cannot be accessaries, it has been held that defendant's grandmother and brother-in-law cannot be accessaries to the crime of incest committed by him.[59]

VIII. ATTEMPTS TO COMMIT INCEST.[60]

To constitute an attempt to commit incest, something more than mere intention to commit the offense is necessary; there must be a step taken toward the commission of the crime.[61] So a bare solicitation to commit the offense has been held not to constitute an attempt.[62] The rule has been laid down that conceding that the consent of both parties is necessary to constitute the crime of incest, it does not follow that a man may not be guilty of the crime of attempting to commit incest without the consent of the woman.[63] The intent to commit the crime of incest and concurrent overt acts in the use of means adapted to the immediate perpetration and consummation thereof are sufficient to constitute a criminal

50. State *v.* Miller, 65 Iowa 60, 21 N. W. 181; State *v.* Dana, 59 Vt. 614, 10 Atl. 727.

51. Taylor *v.* State, 110 Ga. 150, 35 S. E. 161.

52. Clark *v.* State, 39 Tex. Cr. 179, 45 S. W. 576, 73 Am. St. Rep. 918.

The evidence of relationship was held to be sufficient where it appeared that at the date of the birth of prosecutrix, defendant and her mother were husband and wife, that prosecutrix had always borne defendant's name and lived with him and his wife (her mother) and that the other children of the family, during their testimony for the defendant, always spoke of the prosecutrix in terms showing that they understood the relationship to be that of father and daughter. People *v.* Koller, 142 Cal. 621, 76 Pac. 500. See also Burgess *v.* Burgess, 1 Hagg. Cons. 384.

53. Mathis *v.* Com., 13 S. W. 360, 11 Ky. L. Rep. 882.

54. Marriage generally see MARRIAGE.

55. State *v.* Schaunhurst, 34 Iowa 547.

56. State *v.* McGilvery, 20 Wash. 240, 55 Pac. 115.

57. Simon *v.* State, 31 Tex. Cr. 186, 20 S. W. 399, 716, 37 Am. St. Rep. 802.

Proof of marriage on issue of legitimacy.— Where defendant is specifically charged with having committed incest with his legitimate daughter, the actual marriage of the parents must be proved, and proof of cohabitation and reputation is insufficient for this purpose. State *v.* Roswell, 6 Conn. 446.

58. Accessaries generally see CRIMINAL LAW, 12 Cyc. 190 *et seq.*

59. Adcock *v.* State, 41 Tex. Cr. 288, 53 S. W. 845.

60. Attempts and solicitations generally see CRIMINAL LAW, 12 Cyc. 176 *et seq.*

61. People *v.* Murray, 14 Cal. 159 (holding that declarations by the accused of the determination to contract an incestuous marriage, the elopement with his niece, and a request for a magistrate, did not constitute an attempt to commit incest where no officer was in fact engaged to perform the ceremony); Cox *v.* People, 82 Ill. 191.

62. Cox *v.* People, 82 Ill. 191. See also CRIMINAL LAW, 12 Cyc. 183 note 33.

63. People *v.* Gleason, 99 Cal. 359, 33 Pac. 1111, 37 Am. St. Rep. 56.

Evidence of consent.— Consent of the female in the case of attempted incest may, notwithstanding her testimony in denial, be shown by the surrounding facts and circumstances. State *v.* McGilvery, 20 Wash. 240, 55 Pac. 115.

attempt to commit the crime of incest and the failure of such means to effect the purpose intended will not exculpate him.[64] Moreover it is held that to justify a conviction for an attempt to commit incest it is not essential that the attempt charged should have failed in commission by reason of the intervention of circumstances independent of the will of the accused, and that if the elements of an attempt have existed the subsequent voluntary abandonment thereof cannot avail the accused.[65]

INCH. A measure of length, containing one-twelfth part of a foot; originally supposed equal to three barleycorns.[1] As defined by statute, the one-twelfth of a foot.[2] (See, generally, WEIGHTS AND MEASURES.)

INCHOATE.[3] Imperfect; unfinished; begun, but not completed.[4] (Inchoate: Dower, see DOWER.)

INCIDENT. A thing necessarily depending upon, appertaining to, or following another that is more worthy or principal;[5] something necessarily appertaining to or depending on another, which is termed the principal.[6] (See CONTINGENT; INCIDENTAL.)

INCIDENTAL. CASUAL (*q. v.*), ACCESSARY (*q. v.*), or COLLATERAL (*q. v.*); in other words, something additional;[7] of minor importance, occasional;[8] sometimes subordinate or casual; and often used in the plural, as a noun, to mean minor expenses.[9] (See CONDUCIVE; CONSTRUCTIVE; INCIDENT.)

64. People *v.* Gleason, 99 Cal. 359, 33 Pac. 1111, 37 Am. St. Rep. 56, where the attempt proceeded to the extent of contact of sexual organs, lacking only penetration to consummate the act.

65. State *v.* McGilvery, 20 Wash. 240, 55 Pac. 115.

1. Black L. Dict. See also Schuylkill Nav. Co. *v.* Moore, 2 Whart. (Pa.) 477, 493.

"Inch of water" is a unit of measure of quantity of water, being the quantity which will flow through an orifice one inch square, or a circular orifice one inch in diameter, in a vertical surface, under a stated constant head. Jackson Milling Co. *v.* Chandos, 82 Wis. 438, 448, 52 N. W. 759 [*quoting* Webster Int. Dict.].

2. St. 41 & 42 Vict. c. 49, § 11.

3. "Contingent" distinguished from "inchoate" see 9 Cyc. 72 note 44.

4. Black L. Dict. See also 4 Cyc. 622 note 41.

"Inchoate instrument" is an instrument which has not been registered as required by law. Wilkins *v.* McCorkle, 112 Tenn. 688, 703, 80 S. W. 834.

"Inchoate rights" see 8 Cyc. 895 note 48.

"Inchoate or incomplete title" see 6 Cyc. 1041.

5. Jacob L. Dict. [*quoted* in Cromwell *v.* Phipps, 1 N. Y. Suppl. 276, 278, 6 Dem. Surr. (N. Y.) 60]. To the same effect is Thomas *v.* Harmon, 46 Hun (N. Y.) 75, 77 [*quoting* Burrill L. Dict.]. See also Wright *v.* Austin, 143 Cal. 236, 239, 76 Pac. 1023, 101 Am. St. Rep. 97, 65 L. R. A. 949.

"Incident to all proceedings" see *In re* Chennell, 8 Ch. D. 492, 502, 47 L. J. Ch. 583, 38 L. T. Rep. N. S. 494, 26 Wkly. Rep. 595.

"Incident to the importation" see Maynard *v.* Weeks, 181 Mass. 368, 370, 64 N. E. 78.

"Incident to" a manufacturing process see Haydon *v.* Taylor, 4 B. & S. 519, 525, 33 L. J. M. C. 30, 9 L. T. Rep. N. S. 382, 12 Wkly. Rep. 103, 116 E. C. L. 519.

"Incident to the sale and conveyance" see Doe *v.* Phillipps, 11 A. & E. 796, 3 P. & D. 603, 39 E. C. L. 422.

6. Webster Dict. [*quoted* in Thomas *v.* Harmon, 46 Hun (N. Y.) 75, 77].

7. Webster Dict. [*quoted* in Middleton *v.* Parke, 3 App. Cas. (D. C.) 149, 160].

A thing is deemed to be incidental or appurtenant to land when it is by right used with the land for its benefit, as in the case of a way, or watercourse, or of a passage for light, air, or heat, from or across the land of another. Mount Carmel Fruit Co. *v.* Webster, 140 Cal. 183, 187, 73 Pac. 826; Smith *v.* Denniff, 24 Mont. 20, 23, 60 Pac. 398, 81 Am. St. Rep. 408; Mont. Civ. Code (1895), § 1078. *Compare* State *v.* Southern Pac. Co., 52 La. Ann. 1822, 1827, 28 So. 372.

8. Matter of Waldheimer, 84 N. Y. App. Div. 366, 368, 82 N. Y. Suppl. 916.

9. Century Dict. [*quoted* in People *v.* Coler, 61 N. Y. App. Div. 598, 600, 70 N. Y. Suppl. 755 (*affirmed* in 168 N. Y. 643, 61 N. E. 1132); Matter of Waldheimer, 84 N. Y. App. Div. 366, 368, 82 N. Y. Suppl. 916].

As used in connection with other words see the following phrases: "Incidental dangers" (6 Cyc. 650); "incidental expenses" (Austin Mfg. Co. *v.* Twin Brooks Tp., 16 S. D. 126, 130, 91 N. W. 470; Baltimore *v.* Baltimore, etc., R. Co., 10 Wall. (U. S.) 543, 551, 19 L. ed. 1043; Reclamation Dist. No. 108 *v.* Hagar, 4 Fed. 366, 370, 6 Sawy. 567; U. S. *v.* Smith, 27 Fed. Cas. No. 16,321, 1 Bond 69; Hutchinson *v.* Humbert, 1 Dowl. P. C. N. S. 78, 79, 10 L. J. Exch. 418, 8 M. & W. 638; 11 Cyc. 434); "incidental labor" (Rara Avis Gold, etc., Min. Co. *v.* Bouscher, 9 Colo. 385, 388, 12 Pac. 433); "incidental or conducive" (*In re* Baglan Hall Colliery Co., L. R. 5 Ch. 346, 356, 39 L. J.

INCIDENTIA NOLUNT SEPARARI. A maxim meaning "Incidents may not be separated." [10]

INCIDENTIA REI TACITE SEQUUNTUR. A maxim meaning "The incidents of a thing follow it as matter of course." [11]

INCIPIENT. Beginning; commencing; entering on existence or appearance.[12]

INCIPITUR. A term applied, in English practice, to an entry made upon the roll in an action at law, by giving merely the commencement of the pleadings or other proceedings, instead of entering them in full.[13]

INCITE. To move to action; to stir up; to arouse; to spur on;[14] to ENCOURAGE,[15] *q. v.* (To Incite: To Crime, see CRIMINAL LAW.)

INCIVILE EST, NISI TOTA LEGE PROSPECTA, UNA ALIQUA PARTICULA EJUS PROPOSITA, JUDICARE VEL RESPONDERE. A maxim meaning "It is improper, unless the whole law has been examined, to give judgment or advice upon a view of a single clause of it." [16]

INCIVILE EST, NISI TOTÂ SENTENTIÂ INSPECTÂ, DE ALIQUÂ PARTE JUDICARE. A maxim meaning "It is improper to judge of any part unless the whole sentence be examined." [17]

IN CIVILIBUS MINISTERIUM EXCUSAT, IN CRIMINALIBUS NON ITEM. A maxim meaning "In civil matters agency (or service) excuses, but not so in criminal matters." [18]

IN CIVILIBUS VOLUNTAS PRO FACTO REPUTABITUR. A maxim meaning "In civil cases the will may sometimes be taken for the deed." [19]

IN CLARIS NON EST LOCUS CONJECTURIS. A maxim meaning "Things that are clear (unambiguous) do not admit of conjecture or construction." [20]

INCLINATION DIP. A word used in mining law to designate a dip, as to its inclination from a perpendicular to a horizontal, as so many degrees from the

Ch. 591, 23 L. T. Rep. N. S. 60, 18 Wkly. Rep. 499; *In re* Faure Electric Accumulator Co., 40 Ch. D. 141, 155, 58 L. J. Ch. 48, 59 L. T. Rep. N. S. 918, 1 Meg. 99, 37 Wkly. Rep. 116; Studdert *v.* Grosvenor, 33 Ch. D. 528, 538, 50 J. P. 710, 55 L. J. Ch. 689, 55 L. T. Rep. N. S. 171, 34 Wkly. Rep. 754; London Financial Assoc. *v.* Kelk, 26 Ch. D. 107, 138, 53 L. J. Ch. 1025, 50 L. T. Rep. N. S. 492; Joint Stock Discount Co. *v.* Brown, L. R. 3 Eq. 139, 150; Simpson *v.* Westminster Palace Hotel Co., 2 De G. F. & J. 141, 152, 29 L. J. Ch. 561, 8 Wkly. Rep. 553, 63 Eng. Ch. 110, 45 Eng. Reprint 575; Taunton *v.* Royal Ins. Co., 2 Hen. & M. 135. 141, 10 Jur. N. S. 291, 33 L. J. Ch. 406, 10 L. T. Rep. N. S. 156, 12 Wkly. Rep. 549); "incidental order" (2 Cyc. 546); "incidental or interlocutory appeals" (2 Cyc. 970); "incidental printing" (Goodrich *v.* Moore, 2 Minn. 61, 65, 72 Am. Dec. 74); "incidental printing process" (Hoyle *v.* Oram, 12 C. B. N. S. 124, 138, 8 Jur. N. S. 154, 31 L. J. M. C. 213, 104 E. C. L. 124); "incidental purposes" (State *v.* Wolfrom, 25 Wis. 468, 476); "incidental relief" (3 Cyc. 412 note 16); "incidental to" (Nicollet Nat. Bank *v.* Frisk-Turner Co., 71 Minn. 413, 417, 74 N. W. 160, 70 Am. St. Rep. 334; Crane *v.* City Ins. Co., 3 Fed. 558, 561, 2 Flipp. 576; Lancashire, etc., R. Co. *v.* Gidlow, L. R. 7 H. L. 517, 520, 45 L. J. Exch. 625, 22 L. T. Rep. N. S. 573, 24 Wkly. Rep. 144; Hall *v.* London, etc., R. Co., 15 Q. B. D. 505, 534, 53 L. T. Rep. N. S. 345, 5 R. & Can. Tr. Cas. 28; *Ex p.* Board of Trade, 13 Q. B. D. 492, 496, 53 L. J. Q. B. 563, 1 Morr. Bankr. Cas. 196; *In re* Deighton, [1898] 1 Ch. 458, 463, 67 L. J. Ch. 240, 78 L. T. Rep. N. S. 430, 46 Wkly. Rep. 341; *In re* Smith, [1891] 3 Ch. 65, 67, 60 L. J. Ch. 613, 64 L. T. Rep. N. S. 821, 39 Wkly. Rep. 590; *In re* Stamford, 43 Ch. D. 84, 89, 58 L. J. Ch. 849, 61 L. T. Rep. N. S. 504; Cardigan *v.* Curzon-Howe, 40 Ch. D. 338, 340, 58 L. J. Ch. 177; *In re* Llewellin, 37 Ch. D. 317, 327, 57 L. J. Ch. 316, 58 L. T. Rep. N. S. 152, 36 Wkly. Rep. 347; Sowerby *v.* Great Northern R. Co., 60 L. J. Q. B. 467, 470, 65 L. T. Rep. N. S. 546, 7 R. & Can. Tr. Cas. 156).

Incidental covenants see 11 Cyc. 1081 note 82.

Incidental powers see 11 Cyc. 680 note 86.

10. Morgan Leg. Max.

11. Morgan Leg. Max.

12. Century Dict.

"Incipient founder" see Louisville *v.* Louisville University, 15 B. Mon. (Ky.) 642, 717.

13. Burrill L. Dict. [*citing* 1 Archbold Pr. 177].

14. Webster Dict. [*quoted* in Long *v.* State, 23 Nebr. 33, 45, 36 N. W. 310].

An instruction containing the words "requested, advised, and incited" was held equivalent to the statutory words "aid, abet, or procure." Long *v.* State, 23 Nebr. 33, 45, 36 N. W. 310.

15. See 15 Cyc. 1013.

Incitement of terror see 2 Cyc. 43.

16. Bouvier L. Dict. [*citing* Dig. 1, 3, 4, 24].

17. Wharton L. Lex.

18. Trayner Leg. Max.

19. Morgan Leg. Max.

20. Trayner Leg. Max.

perpendicular or from the horizontal.[21] (See DIP; and, generally, MINES AND MINERALS.)

INCLINED PLANE. A plane which makes an oblique angle with the plane of the horizon; a sloping plane.[22]

INCLOSE.[23] In common parlance, to surround or to include;[24] to surround; to shut in; to confine on all sides;[25] to confine within.[26]

INCLOSURE.[27] As applied to land, a term which signifies land inclosed with some visible and tangible obstruction, such as a fence, hedge, ditch.[28] (Inclosure: In General, see FENCES. Element of Adverse Possession, see ADVERSE POSSESSION. Of Common Lands, see COMMON LANDS. Of Railroads, see RAILROADS. See also CLOSE;[29] INCLOSE.)

INCLUDE.[30] To confine within, to shut up, to hold;[31] to comprise;[32] to

21. King *v.* Amy, etc., Consol. Min. Co., 9 Mont. 543, 565, 24 Pac. 200.

22. Webster Int. Dict. See also Lancashire Brick, etc., Co. *v.* Lancashire, etc., R. Co., 71 L. J. K. B. 141, 144.

23. "Inclose, and include, are words of common derivation, and have several common significations." Campbell *v.* Gilbert, 57 Ala. 569, 571.

"The term 'inclosed' real estate always means real estate which is fenced. It does not refer to that which is embraced within the walls of a house." St. Louis *v.* Babcock, 156 Mo. 154, 157, 56 S. W. 731. It applies to lands separate from common grounds by a fence (Kimball *v.* Carter, 95 Va. 77, 84, 27 S. E. 823, 38 L. R. A. 570 [*quoting* Webster Dict.]); to lands parted off or shut in by a fence, or set off as private property (Kimball *v.* Carter, *supra* [*quoting* Worcester Dict.]). See also Tapsell *v.* Crosskey, 10 L. J. Exch. 188, 189, 7 M. & W. 441.

"Enclosed or cultivated fields" as used in connection with the duty of a railroad company to fence their road see Biggerstaff *v.* St. Louis, etc., R. Co., 60 Mo. 567, 568 [*cited* in Kimball *v.* Carter, 95 Va. 77, 84, 27 S. E. 823, 28 L. R. A. 570].

"Any ground inclosed by a lawful fence" see Smith *v.* Williams, 2 Mont. 195, 201.

"Inclosing; straightening of fences" see *In re* Verney, [1898] 1 Ch. 508, 511, 67 L. J. Ch. 243, 78 L. T. Rep. N. S. 191, 46 Wkly. Rep. 348.

"Enclosing walls" see Tear *v.* Freebody, 4 C. B. N. S. 228, 259, 6 Wkly. Rep. 520, 93 E. C. L. 228.

"To inclose a jury," in Scotch practice, is to shut them up in a room by themselves. Burrill L. Dict. [*citing* Bell Dict.].

24. Fripp *v.* Hasell, 1 Strobh. (S. C.) 173, 176.

25. Webster Dict. [*quoted* in Union Pac. R. Co. *v.* Harris, 28 Kan. 206, 210].

26. Campbell *v.* Gilbert, 57 Ala. 569, 571.

27. That a temporary circus erected on waste land by permission of the owner is not an "enclosure or encroachment" on the waste under a statute see Malvern Hills Conservators *v.* Foley, 4 T. L. R. 672, 673.

28. Porter *v.* Aldrich, 39 Vt. 326, 330 [*quoted* in Kimball *v.* Carter, 95 Va. 77, 84, 27 S. E. 823, 38 L. R. A. 570], where the word is considered in connection with the word "close." See also 2 Cyc. 401 note 60; 8 & 9 Vict. c. 118, § 167.

It applies to a field (Southern Kansas R. Co. *v.* Isaacs, 20 Tex. Civ. App. 466, 467, 49 S. W. 690), to a large fenced pasture as well as a small field (Southern Kansas R. Co. *v.* Isaacs, 20 Tex. Civ. App. 466, 467, 49 S. W. 690).

29. Distinguished from "close" see 7 Cyc. 253 note 19.

30. "Synonyms [of this word are] 'to contain; inclose; comprise; comprehend; embrace; involve.'" Neher *v.* McCook County, 11 S. D. 422, 424, 426, 78 N. W. 998.

The word "embraced" is a synonym of "included." Hibberd *v.* Slack, 84 Fed. 571, 578.

"The word 'include' has two meanings. The first which accords with its etymology, from '*claudere*,' to shut, is 'to confine within; to shut up; to hold,—as, the shell of a nut includes the kernel; a pearl is included in a shell.' Webster's Dictionary. The second, and derivative, meaning, is 'to comprehend; as, a genus the species, the whole a part.'" Hibberd *v.* Slack, 84 Fed. 571, 576, 577. "[The word] has two shades of meaning. It may apply where that which is affected is the only thing included. . . . It is also used to express the idea, that the thing in question constitutes a part only of the contents of some other thing. The latter sense we consider the most usual." Dumas *v.* Boulin, McGloin (La.) 274, 277, 278. According to the context, sometimes the term is used as a word of extension and not of limitation. Reg. *v.* Kershaw, 6 E. & B. 999, 1007, 2 Jur. N. S. 1139, 26 L. J. M. C. 19, 5 Wkly. Rep. 53, 88 E. C. L. 999.

31. Neher *v.* McCook County, 11 S. D. 422, 426, 78 N. W. 998; Hibberd *v.* Slack, 84 Fed. 571, 576, 577.

32. Webster Dict. [*quoted* in Farmers' Nat. Bank *v.* Cook, 32 N. J. L. 347, 351]; *In re* Wells, 42 Ch. D. 646, 657, 58 L. J. Ch. 835, 61 L. T. Rep. N. S. 588, 38 Wkly. Rep. 229. See also Savoy Hotel Co. *v.* London County Council, [1900] 1 Q. B. 665, 64 J. P. 262, 69 L. J. Q. B. 274, 82 L. T. Rep. N. S. 56, 48 Wkly. Rep. 351. See COMPRISED; COMPRISING.

"The words 'shall include' [in statute] are not identical with, or put for, 'shall mean.'" Reg. *v.* Hermann, 4 Q. B. D. 284, 288, 14 Cox C. C. 279, 48 L. J. M. C. 106, 40 L. T. Rep. N. S. 263, 27 Wkly. Rep. 475.

comprehend;[33] or to contain;[34] to attain.[35] (See COMPRISE; EXCLUDE; INCLOSE; INCLUDING.)

INCLUDING.[36] COMPRISING,[37] *q. v.* A term which imports ADDITION (*q. v.*), i. e. indicates something not included.[38] (See INCLOSE; INCLUDE.)

INCLUSIO UNIUS EST EXCLUSIO ALTERIUS.[39] See EXPRESSIO UNIUS EST EXCLUSIO ALTERIUS.

INCLUSIVE. A word used as, or synonymous with, "and" or "with,"[40] "as well as;" "together with;" "along with;" "coupled with;" "in conjunction with;" "also;" "likewise."[41] (See INCLUDE.)

INCOLAS DOMICILIUM FACIT. A maxim meaning "Residence creates domicil."[42] (See DOMICILE.)

INCOMBUSTIBLE. Incapable of being burned or consumed by fire.[43] (See, generally, FIRE INSURANCE.)

INCOME.[44] The gain which accrues from property, labor and busi-

It may be equivalent to "mean and include" when the context so requires. Dilworth *v.* Stamp Com'rs, [1899] A. C. 99, 107, 68 L. J. P. C. 1, 79 L. T. Rep. N. S. 473, 47 Wkly. Rep. 337.

The name "Independent Democratic Party" includes that of "Democratic Party." Matter of Carr, 94 N. Y. App. Div. 493, 497, 88 N. Y. Suppl. 107.

33. Webster Dict. [*quoted* in Farmers' Nat. Bank *v.* Cook, 32 N. J. L. 347, 351]; Hibberd *v.* Slack, 84 Fed. 571, 576, 577.

34. Webster Dict. [*quoted* in Farmers' Nat. Bank *v.* Cook, 32 N. J. L. 347, 351].

35. Neher *v.* McCook County, 11 S. D. 422, 426, 78 N. W. 998, where the phrase is construed in connection with a legacy. See also Brainard *v.* Darling, 132 Mass. 218, 219.

36. Compared with "namely" see 2 Jarman Wills (5th ed.), p. 1090 [*quoted* in Matter of Duncombe, 3 Ont. L. Rep. 510, 513].

37. See 8 Cyc. 497. See also Ramsey *v.* Alexander, 5 Serg. & R. (Pa.) 338, 345; Calhoun *v.* Memphis, etc., R. Co., 4 Fed. Cas. No. 2,309, 2 Flipp. 442; The Little Ann, 15 Fed. Cas. No. 8,397, 1 Paine 40, 43. See COMPRISED.

38. Stroud Jud. Dict. [*quoted* in Matter of Duncombe, 3 Ont. L. Rep. 510, 513].

"'Including' is not a word of limitation, rather is it a word of enlargement, and in ordinary signification implies that something else has been given beyond the general language which precedes it. Neither is it a word of enumeration." Matter of Goetz, 71 N. Y. App. Div. 272, 275, 276, 75 N. Y. Suppl. 750.

"Including" and "consisting of" see Joyce Ins. § 1697.

"Including revised drawings and specifications" see Johnson *v.* Freemann, 160 Pa. St. 317, 326, 28 Atl. 780.

"Including the fees of officers allowed by law" see Cooper *v.* Stinson, 5 Minn. 522.

"Including this policy" see Pylant *v.* Purvis, (Miss. 1906) 40 So. 7, 8.

That "including" may not be equivalent to "moreover" or, "as well as" see U. S. *v.* The Betsey & Charlotte, 4 Cranch (U. S.) 443, 452, 2 L. ed. 673.

"To and including the day of the date" see Monroe *v.* Acworth, 41 N. H. 199, 201.

39. See Bouvier L. Dict.

Applied or explained in Saul *v.* His Creditors, 5 Mart. N. S. (La.) 569, 574, 16 Am. Dec. 212; Sites *v.* Eldredge, 45 N. J. Eq. 632, 638, 18 Atl. 214, 14 Am. St. Rep. 769; Aspinwall *v.* Meyer, 2 Sandf. (N. Y.) 180, 187; Reynolds *v.* Burlington, 52 Vt. 300, 307; Hicks *v.* Clark, 41 Vt. 183, 186; Attwood *v.* Small, 6 Cl. & F. 232, 282, 2 Jur. 200, 226, 246, 7 Eng. Reprint 684.

40. Pepper's Estate, 154 Pa. St. 340, 341, 25 Atl. 1063 [*citing* Roget Thesaurus].

41. Pepper's Estate, 154 Pa. St. 340, 341, 25 Atl. 1063 [*citing* Webster Dict.].

"Five days inclusive" see Brooklyn Trust Co. *v.* Hebron, 51 Conn. 22, 27.

"Inclusive survey" see Stockton *v.* Morris, 39 W. Va. 432, 444, 19 S. E. 351.

42. Bouvier L. Dict.

Applied in Arnold *v.* United Ins. Co., 1 Johns. Cas. (N. Y.) 363, 366.

43. Century Dict.

"Incombustible," within a statute, means wholly incombustible. Payne *v.* Wright, [1892] 1 Q. B. 104, 107, 56 J. P. 120, 61 L. J. M. C. 7, 65 L. T. Rep. N. S. 612, 40 Wkly. Rep. 191.

"Hard and incombustible materials" see Badley *v.* Cuckfield Union Rural Dist. Council, 59 J. P. 582, 64 L. J. Q. B. 571, 573, 72 L. T. Rep. N. S. 775, 15 Reports 461, 43 Wkly. Rep. 663.

The words "fireproof" and "of incombustible materials" are often used in connection with houses that are not absolutely proof against fires, but are intended as referring to houses built of brick, stone, iron, or other material, on the outside, so as to form barriers that will resist the action of ordinary fires. Chimene *v.* Baker, 32 Tex. Civ. App. 520, 522, 75 S. W. 330.

44. Distinguished from "annuity" (see Carr *v.* Bennett, 3 Dem. Surr. (N. Y.) 433, 442; *Ex p.* McComb, 4 Bradf. Surr. (N. Y.) 151, 152; Booth *v.* Ammerman, 4 Bradf. Surr. (N. Y.) 129, 133); "capital" (see Chester *v.* Buffalo Car Mfg. Co., 70 N. Y. App. Div. 443, 456, 75 N. Y. Suppl. 428); "*corpus* of an estate" (see *In re* Little, [1881] W. N. 138); "property" (see Atty.-Gen. *v.* Strange, [1898] 2 Q. B. 39, 43, 67 L. J. Q. B. 629, 78 L. T. Rep. N. S. 516, 46 Wkly. Rep. 663); increase (Spooner *v.* Phillips, 62 Conn. 62, 68, 24 Atl. 524, 16 L. R. A. 461; Smith *v.*

ness;[45] capital[46] or property of any kind;[47] the interest of money or stock in funds, etc.;[48] that which is gained from investments;[49] the balance of gain over loss in

Hooper, 95 Md. 16, 26, 51 Atl. 844, 54 Atl. 95). See also ANNUITIES.

"There is a distinction between 'value' and 'income,' when taken separately and alone. Property may have an annual value without any income." Troy Iron, etc., Factory *v.* Corning, 45 Barb. (N. Y.) 231, 247.

Income as used in connection with divorce proceedings see Bonsor *v.* Bonsor, [1897] P. 77, 80, 66 L. J. P. & Adm. 35, 76 L. T. Rep. N. S. 168, 45 Wkly. Rep. 304; Clinton *v.* Clinton, L. R. 1 P. & D. 215, 217, 14 L. T. Rep. N. S. 257, 14 Wkly. Rep. 545; Moss *v.* Moss, 15 Wkly. Rep. 532.

"There is no difference in principle between the gift of an annuity and the gift of income, with respect to the time when each begins to accrue." *In re* Stanfield, 135 N. Y. 292, 296, 31 N. E. 1013. See also Engel's Estate, 180 Pa. St. 215, 218, 36 Atl. 727; Pearson *v.* Chace, 10 R. I. 455, 456; Wells *v.* Shook, 29 Fed. Cas. No. 17,406.

Pledging income and tolls see 6 Cyc. 987 note 8.

Rights to income from wife's property see 12 Cyc. 1014.

As used in connection with other words see the following phrases: "Clear income" (People *v.* Purdy, 58 Hun (N. Y.) 386, 387, 12 N. Y. Suppl. 307); "deriving an income or profit from their capital or otherwise" (Mundy *v.* Van Hoose, 104 Ga. 292, 300, 30 S. E. 783; People *v.* Niagara County, 4 Hill (N. Y.) 20, 23); "dividends and income" (Smith *v.* Hooper, 95 Md. 16, 21, 51 Atl. 844, 54 Atl. 95); "full income" (McLouth *v.* Hunt, 154 N. Y. 179, 191, 48 N. E. 548, 39 L. R. A. 230); "gains, profits and income" (Thorn *v.* De Breteuil, 86 N. Y. App. Div. 405, 417, 83 N. Y. Suppl. 849; Gray *v.* Darlington, 15 Wall. (U. S.) 63, 65, 21 L. ed. 45); "improvements and income" (Long *v.* Paul, 127 Pa. St. 456, 462, 17 Atl. 988, 14 Am. St. Rep. 862); "income and revenue provided for such year" (Webb City, etc., Waterworks Co. *v.* Carterville, 142 Mo. 101, 116, 43 S. W. 625; Lamar Water, etc., Co. *v.* Lamar, 128 Mo. 188, 223, 26 S. W. 1025, 31 S. W. 756, 32 L. R. A. 157); "income account" (Lowry *v.* Farmer's L. & T. Co., 172 N. Y. 137, 143, 64 N. E. 796); "income arising from the same" (Peck *v.* Whitaker, 103 Pa. St. 297, 308); "income of my real estate" (Reed *v.* Reed, 9 Mass. 372); "income, profits and interest" (Parker *v.* Mason, 8 R. I. 427, 429); "income, rents and use" (*In re* France, 75 Pa. St. 220, 224); "income, revenue and avails" (People *v.* Davenport, 30 Hun (N. Y.) 177, 182); "net income" (Bowen *v.* Peyton, 14 R. I. 257, 258); "produce an income" (Johnson *v.* Perley, 2 N. H. 56, 57, 9 Am. Dec. 35); "producing an income" (Bateman *v.* Faber, 83 L. T. Rep. N. S. 7, 9, 48 Wkly. Rep. 625); "rents, dividends, increase and income" (Brinley *v.* Grou, 50 Conn. 66, 77, 47 Am. Rep. 618; "rents, income and interest" (Earp's Appeal, 28 Pa. St. 368, 373); "rents, issues, profits and income" (Oliver's Estate, 136 Pa. St. 43, 51, 20 Atl. 527, 20 Am. St. Rep. 894, 9 L. R. A. 421); "separate income" (*In re* Malam, [1894] 3 Ch. 578, 587, 63 L. J. Ch. 797, 71 L. T. Rep. N. S. 655, 13 Reports 38); "sufficient income" (Sowards *v.* Taylor, 42 Ill. App. 275, 287); "total income from all sources" (Corke *v.* Campbell, [1896] W. N. 128, 131; McDougal *v.* Sutherland, [1896] W. N. 113, 115); "upon income" (Melcher *v.* Boston, 9 Metc. (Mass.) 73, 77); "use, interest, and income" (Matter of Warren, 11 N. Y. Suppl. 787, 2 Connoly Surr. 411); "weekly income" (1 Cyc. 302); "whole or any part of the income" (*In re* Dickson, 29 Ch. D. 331, 333, 54 L. J. Ch. 510, 52 L. T. Rep. N. S. 707, 33 Wkly. Rep. 511); "wife's income" (Coates' Appeal, 2 Pa. St. 129, 135).

45. McClintock *v.* Dana, 106 Pa. St. 386, 391; Braun's Appeal, 105 Pa. St. 414, 415; Peck *v.* Whitaker, 103 Pa. St. 297, 306; Eley's Appeal, 2 Kulp (Pa.) 467, 469; Bouvier L. Dict. [*quoted* in Bates *v.* Porter, 74 Cal. 224, 245, 15 Pac. 732; Thorn *v.* De Breteuil, 86 N. Y. App. Div. 405, 417, 83 N. Y. Suppl. 849; Matter of Murphy, 80 N. Y. App. Div. 238, 242, 80 N. Y. Suppl. 530; Sims's Appeal, 44 Pa. St. 345, 347; Webster Dict. [*quoted* in Mundy *v.* Van Hoose, 104 Ga. 292, 299, 30 S. E. 783; Remington *v.* Field, 16 R. I. 509, 510, 17 Atl. 551].

Mere advance in value in no sense constitutes "income." Gray *v.* Darlington, 15 Wall. (U. S.) 63, 65, 21 L. ed. 45.

"Income" in a building society rules includes, for instance, repayments by advanced members, moneys borrowed from outsiders, who are commonly called in these societies, depositors, and in fact everything that comes in. *In re* West Riding of Yorkshire Permanent Ben. Bldg. Soc., 43 Ch. D. 407, 415, 59 L. J. Ch. 197, 62 L. T. Rep. N. S. 486, 38 Wkly. Rep. 376.

46. Webster Dict. [*quoted* in Mundy *v.* Van Hoose, 104 Ga. 292, 299, 30 S. E. 783]. See also Remington *v.* Field, 16 R. I. 509, 510, 17 Atl. 551.

Income and accumulations see 14 Cyc. 113.

47. Braun's Appeal, 105 Pa. St. 414, 415.

"The word 'income,' as used by the testator, clearly means all benefit and profit whatsoever coming from the property, whether from use or otherwise." *In re* Turfler, 24 N. Y. Suppl. 91, 94, 1 Pow. Surr. 421.

In a will providing for the conversion of the estate into money and its investment in certain securities, and directing the income to be paid over to the widow and for the benefit of the son, the term "income" is used as a whole, and of course embraces all its parts. *In re* Slocum, 169 N. Y. 153, 158, 159, 62 N. E. 130.

48. Webster Dict. [*quoted* in Mundy *v.* Van Hoose, 104 Ga. 292, 299, 30 S. E. 783].

49. Whittemore *v.* Beekman, 2 Dem. Surr. (N. Y.) 275, 280 [*citing* Abbott L. Dict.; Burrill L. Dict.].

the fiscal year or other period of computation;[50] what is left after paying the expenses of earning income;[51] that which property or a business earns, remaining intact;[52] receipts,[53] especially the annual receipts of a private person or a corporation from property, etc.;[54] produce;[55] profit;[56] the profit of commerce or business;[57] the profit arising from an invested fund for a business or profession and the like;[58]

50. Kingston *v.* Canada L. Assur. Co., 19 Ont. 453, 458.

Income of a bank or trade see Lawless *v.* Sullivan, 6 App. Cas. 373, 379, 381, 50 L. J. P. C. 33, 44 L. T. Rep. N. S. 897, 29 Wkly. Rep. 917 [*quoted* in Kingston *v.* Canada L. Assur. Co., 19 Ont. 453, 457].

Surplus over losses.— "It is true that the income of an individual, a bank, or a government, is the amount it may receive independent of its losses." Pursel *v.* Pursel, 14 N. J. Eq. 514, 521 [*citing* People *v.* Niagara County, 4 Hill (N. Y.) 20].

51. Poland *v.* Lamoille Valley R. Co., 52 Vt. 144, 177.

52. People *v.* Davenport, 30 Hun (N. Y.) 177, 186 [*quoted* in Thorn *v.* De Breteuil, 86 N. Y. App. Div. 405, 416, 83 N. Y. Suppl. 849]. See also *Ex p.* Huggins, 21 Ch. D. 85, 92, 51 L. J. Ch. 935, 47 L. T. Rep. N. S. 659, 30 Wkly. Rep. 878.

"Annual income is annual receipts from property." Betts *v.* Betts, 4 Abb. N. Cas. (N. Y.) 317, 400.

"The income of an estate means nothing more than the profit [which] it will yield, after deducting the charges of management." Andrews *v.* Boyd, 5 Me. 199, 203 [*quoted* in Earl *v.* Rowe, 35 Me. 414, 420, 58 Am. Dec. 714].

Money for sales of property.— A fund resulting from sales of materials, manufactured iron, products from the land, or general personal property of a corporation, all indicating a final winding up of the business of the corporation, can in no sense be called income. Gehr *v.* Mont Alto Iron Co., 174 Pa. St. 430, 433, 34 Atl. 638. See also Vinton's Appeal, 99 Pa. St. 434, 442, 44 Am. Rep. 116.

53. Webster Dict. [*quoted* in Mundy *v.* Van Hoose, 104 Ga. 292, 299, 30 S. E. 783]; Worcester Dict. [*quoted* in Busbey *v.* Russell, 18 Ohio Cir. Ct. 12, 10 Ohio Cir. Dec. 23].

54. Webster Dict. [*quoted* in Mundy *v.* Van Hoose, 104 Ga. 292, 299, 30 S. E. 783].

A term not appropriate to corporations see Kingston *v.* Canada L. Assur. Co., 19 Ont. 453, 457.

55. Worcester Dict. [*quoted* in Busbey *v.* Russell, 18 Ohio Cir. Ct. 12, 10 Ohio Cir. Dec. 23].

"The terms 'income and produce' are very comprehensive." Sohier *v.* Eldredge, 103 Mass. 345, 350.

56. *California.*— Bates *v.* Porter, 74 Cal. 224, 245, 15 Pac. 732 [*quoting* Burrill L. Dict.]; People *v.* San Francisco Sav. Union, 72 Cal. 199, 203, 13 Pac. 498.

Connecticut.— Beers *v.* Narramore, 61 Conn. 13, 24, 22 Atl. 1061.

Maryland.— Smith *v.* Hooper, 95 Md. 16, 27, 51 Atl. 844, 54 Atl. 95 [*citing In re* Armitage, [1893] 3 Ch. 337, 63 L. J. Ch. 110, 69 L. T. Rep. N. S. 619, 7 Reports 290].

New York.— Thorn *v.* De Breteuil, 86 N. Y. App. Div. 405, 416, 83 N. Y. Suppl. 849; Matter of Murphy, 80 N. Y. App. Div. 238, 242, 80 N. Y. Suppl. 530; People *v.* Purdy, 58 Hun 386, 387, 12 N. Y. Suppl. 307; People *v.* Niagara County, 4 Hill 20, 23.

England.—Taxation Com'rs *v.* Antill, [1902] A. C. 422, 427, 71 L. J. P. C. 81, 86 L. T. Rep. N. S. 783. *Compare* Atty.-Gen. *v.* Ostrum, [1904] A. C. 144, 147, 73 L. J. P. C. 11, 89 L. T. Rep. N. S. 509, 20 T. L. R. 64; Lawless *v.* Sullivan, 6 App. Cas. 373, 381, 50 L. J. P. C. 33, 40 L. T. Rep. N. S. 897, 29 Wkly. Rep. 917.

Canada.— Kingston *v.* Canada L. Assur. Co., 19 Ont. 453, 457.

Distinguished from net profits see Lawless *v.* Sullivan, 6 App. Cas. 373, 379, 50 L. J. P. C. 33, 44 L. T. Rep. N. S. 897, 29 Wkly. Rep. 917 [*cited* in Kingston *v.* Canada L. Assur. Co., 19 Ont. 453, 457]. See also Sullivan *v.* Robinson, 17 N. Brunsw. 431.

"Income and profits" and "principal" see Smith *v.* Hooper, 95 Md. 16, 30, 51 Atl. 844, 54 Atl. 95 [*citing* Park's Estate, 173 Pa. St. 190, 33 Atl. 884]. See also Sabbaton *v.* Sabbaton, 76 N. Y. App. Div. 216, 220, 78 N. Y. Suppl. 502.

Surplus profits is said to be income. Thorn *v.* De Breteuil, 86 N. Y. App. Div. 405, 417, 83 N. Y. Suppl. 849.

"The ultimate profit [of business] (if any) represents the year's taxable 'income.'" Kingston *v.* Canada L. Assur. Co., 19 Ont. 453, 458. See also Russell *v.* Town, etc., Bank, 13 App. Cas. 418, 429, 53 J. P. 244, 58 L. J. P. C. 8, 59 L. T. Rep. N. S. 481.

As used in a statute the word is equivalent to the expression "balance of gains and profits." Taxation Com'rs *v.* Antill, [1902] A. C. 422, 427, 71 L. J. P. C. 81, 86 L. T. Rep. N. S. 783.

57. Braun's Appeal, 105 Pa. St. 414, 415; Webster Dict. [*quoted* in Mundy *v.* Van Hoose, 104 Ga. 292, 299, 30 S. E. 783]. See also Thorn *v.* De Breteuil, 86 N. Y. App. Div. 405, 417, 83 N. Y. Suppl. 849; Busbey *v.* Russell, 18 Ohio Cir. Ct. 12, 15, 10 Ohio Cir. Dec. 23.

58. State *v.* McCarty, Wils. (Ind.) 205, 219.

Appropriation of the profits of a company as "income" or "capital" see Bouch *v.* Sproule, 12 App. Cas. 385, 387, 56 L. J. Ch. 1037, 57 L. T. Rep. N. S. 345, 33 Wkly. Rep. 621; *In re* Armitage, [1893] 3 Ch. 337, 345, 63 L. J. Ch. 110, 69 L. T. Rep. N. S. 619, 7 Reports 290; *In re* Alsbury, 45 Ch. D. 237, 253, 60 L. J. Ch. 29, 63 L. T. Rep. N. S. 576, 2 Meg. 346, 39 Wkly. Rep. 136; *Re* Paget, 9 T. L. R. 88, 89.

"The expression 'total income from all sources' [within a statute relative to taxation] . . . certainly means more than income properly so described — it includes more than

rents and profits.[59] Strictly speaking the term means that which comes in, or is received from any business or investment of capital, without reference to the outgoing expenditures;[60] what comes in;[61] all that comes in;[62] that which comes in, not that which comes in less an outgoing;[63] what a person can add to his stock or spend.[64] The word is sometimes used as the equivalent of DIVIDEND,[65] *q. v.* When applied to a sum of money, or money in the public debt, it is equivalent to interest.[66] It applies to the proceeds of professional business,[67]

'profits and gains.'" Tennant *v.* Smith, [1892] A. C. 150, 161, 56 J. P. 596, 61 L. J. P. C. 11, 66 L. T. Rep. N. S. 327.

Income, profits, and accretions see 16 Cyc. 621.

59. Andrews *v.* Boyd, 5 Me. 199, 203. See also People *v.* San Francisco Sav. Union, 72 Cal. 199, 203, 13 Pac. 498 [*citing* Earl *v.* Rowe, 35 Me. 414, 58 Am. Dec. 714; Andrews *v.* Boyd, 5 Me. 202]; Thorn *v.* De Breteuil, 86 N. Y. App. Div. 405, 416, 83 N. Y. Suppl. 849; Woodburn's Estate, 138 Pa. St. 606, 615, 21 Atl. 16, 21 Am. St. Rep. 932; Shoemaker's Appeal, 106 Pa. St. 392, 394; McClintock *v.* Dana, 106 Pa. St. 386, 390; Wentz's Appeal, 106 Pa. St. 301, 307; Eley's Appeal, 103 Pa. St. 300, 307; Peck *v.* Whitaker, 103 Pa. St. 297, 306 [*quoted* in Raynolds *v.* Hanna, 55 Fed. 783, 797].

"'Income, issues and profits' include the rents of the real estate." Lindley's Appeal, 102 Pa. St. 235, 255.

"Money received under the contract, whether called 'royalty' or 'rent,' is clearly 'income or increase' of the estate collected by the executors." Raynolds *v.* Hanna, 55 Fed. 783, 800.

"The word 'income' is applicable to rents as well as to interest derived from an investment." Espenship's Estate, 9 Montg. Co. Rep. (Pa.) 49, 50.

As defined by statute, it means the annual profits or gain arising to any inhabitant from any trade, etc. (New Brunswick Gen. Assessment Act [*quoted* in Lawless *v.* Sullivan, 6 App. Cas. 373, 381, 50 L. J. P. C. 33, 44 L. T. Rep. N. S. 897, 29 Wkly. Rep. 917]); the rents and profits of real property, the interest of money, dividends upon stock, and other produce of personal property (Cal. Civ. Code (1903), § 748; N. D. Rev. Code (1899), § 3322; S. D. Civ. Code (1903), § 238).

60. *California.*— Bates *v.* Porter, 74 Cal. 224, 245, 15 Pac. 732 [*quoting* Burrill L. Dict.]; People *v.* San Francisco Sav. Union, 72 Cal. 199, 203, 13 Pac. 498.

Georgia.— Mundy *v.* Van Hoose, 104 Ga. 292, 299, 30 S. E. 783 [*quoting* Anderson L. Dict.].

New York.— Thorn *v.* De Breteuil, 86 N. Y. App. Div. 405, 416, 83 N. Y. Suppl. 849; Betts *v.* Betts, 4 Abb. N. Cas. 317, 400; People *v.* Niagara County, 4 Hill 20, 23.

Ohio.— Busbey *v.* Russell, 18 Ohio Cir. Ct. 12, 16, 10 Ohio Cir. Dec. 23 [*citing* Anderson L. Dict.].

Canada.— Lawless *v.* Sullivan, 3 Can. Sup. Ct. 117, 141.

"'Income derived,' in ordinary parlance, is understood to mean, not the gross rents, but the rents after deducting all proper outgoings." *In re* Redding, [1897] 1 Ch. 876, 879, 66 L. J. Ch. 460, 76 L. T. Rep. N. S. 339, 45 Wkly. Rep. 457.

61. Jones *v.* Ogle, L. R. 8 Ch. 192, 196, 42 L. J. Ch. 334, 48 L. T. Rep. N. S. 245, 21 Wkly. Rep. 239.

62. *In re* West Riding of Yorkshire Permanent Ben. Bldg. Soc., 43 Ch. D. 407, 415, 59 L. J. Ch. 197, 62 L. T. Rep. N. S. 486, 38 Wkly. Rep. 376.

63. Reg. *v.* Southampton, L. R. 4 H. L. 449, 472, 39 L. J. Q. B. 253, 23 L. T. Rep. N. S. 111, 18 Wkly. Rep. 1171 [*quoted* in Lawless *v.* Sullivan, 3 Can. Sup. Ct. 117, 135].

64. Lawless *v.* Sullivan, 3 Can. Sup. Ct. 117, 155.

65. *Connecticut.*— Mills *v.* Britton, 64 Conn. 4, 23, 29 Atl. 231, 24 L. R. A. 536; Spooner *v.* Phillips, 62 Conn. 62, 86, 24 Atl. 524, 16 L. R. A. 461.

Maryland.— Heighe *v.* Littig, 63 Md. 301, 304, 52 Am. Rep. 510.

Massachusetts.— Reed *v.* Head, 6 Allen 174, 177.

New Hampshire.— Lord *v.* Brooks, 52 N. H. 72, 83.

New York.— Matter of Murphy, 80 N. Y. App. Div. 238, 242, 80 N. Y. Suppl. 530; 14 Cyc. 553 note 19.

"A declared dividend will furnish the measure of tax on income." Burroughs Tax. 161 [*quoted* in Lawless *v.* Sullivan, 3 Can. Sup. Ct. 117, 153 (*citing* Atlantic, etc., Tel. Co. *v.* Com., 66 Pa. St. 57)].

Distinguished from "dividend" see Mills *v.* Britton, 64 Conn. 4, 29 Atl. 231, 24 L. R. A. 536; Spooner *v.* Phillips, 62 Conn. 62, 68, 24 Atl. 524, 16 L. R. A. 461; Smith *v.* Hooper, 95 Md. 16, 26, 51 Atl. 844, 54 Atl. 95.

66. Ogilvie Imperial Dict. [*quoted* in Matter of Murphy, 80 N. Y. App. Div. 238, 242, 80 N. Y. Suppl. 530; Sims' Appeal, 44 Pa. St. 345, 347]. To the same effect is Biddle's Appeal, 99 Pa. St. 278, 282. And *compare* Pearson *v.* Chace, 10 R. I. 455, 457.

67. Webster Dict. [*quoted* in Mundy *v.* Van Hoose, 104 Ga. 292, 299, 30 S. E. 783; Busbey *v.* Russell, 18 Ohio Cir. Ct. 12, 16, 10 Ohio Cir. Dec. 23].

Does not include any part of the prospective and contingent earnings of a professional man in the exercise of his personal skill and knowledge. Holmes *v.* Millage, [1893] 1 Q. B. 551, 559, 57 J. P. 551, 62 L. J. Q. B. 380, 68 L. T. Rep. N. S. 205, 4 Reports 332, 41 Wkly. Rep. 354; *Ex p.* Benwell, 14 Q. B. D. 301, 54 L. J. Q. B. 53, 51 L. T. Rep. N. S. 677, 33 Wkly. Rep. 242 [*citing Ex p.* Huggins, 21 Ch. D. 85, 51 L. J. Ch. 935, 47 L. T. Rep. N. S. 659, 30 Wkly. Rep. 878]. See EARN; EARNINGS.

and may include salary.[68] It may include the earnings or interest on the actual capital and share of a deceased as partner in the firm property while the firm business is carried on after his death, in accordance with the terms of the partnership agreement.[69] The usual and ordinary meaning of the word, when used alone, is "net income;"[70] and, in the ordinary commercial sense, the term may, especially when connected with the word "rent," mean net or clear income.[71] It is also said to mean the gross revenue of an individual, whether it arises from rents of real estate, interest on money loaned, dividends on stocks, or compensation for personal services rendered in any trade, profession, or occupation.[72] The word has been said to be synonymous with emolument;[73] the profit or emolument, the revenue coming in.[74] However, the meaning of the word must generally be determined by the intention of the parties as deduced from the context,[75] the subject-matter of the contract, and the character of the person contracting.[76] It may mean "money," and not the expectation of receiving or the right to receive money at a future time.[77] When applied to the affairs of individuals, it expresses the same idea that revenue does when applied to the affairs of a state or nation.[78] (Income: Bequest, see WILLS. Distinguished From Annuity, see ANNUITIES.

68. White *v.* Koehler, 70 N. J. L. 526, 57 Atl. 124; Webster Dict. [*quoted* in Mundy *v.* Van Hoose, 104 Ga. 292, 299, 30 S. E. 783]. And *compare In re* Ward, [1897] 1 Q. B. 266, 272, 66 L. J. Q. B. 310, 76 L. T. Rep. N. S. 37, 4 Manson 23, 45 Wkly. Rep. 329; *In re* Shine, [1892] 1 Q. B. 522, 531, 61 L. J. Q. B. 253, 66 L. T. Rep. N. S. 146, 9 Morr. Bankr. Cas. 40, 40 Wkly. Rep. 386; *In re* Jones, [1891] 2 Q. B. 231, 232, 60 L. J. Q. B. 751, 64 L. T. Rep. N. S. 804, 8 Morr. Bankr. Cas. 210, 40 Wkly. Rep. 95; *In re* Mirams, [1891] 1 Q. B. 594, 597, 60 L. J. Q. B. 397, 64 L. T. Rep. N. S. 117, 8 Morr. Bankr. Cas. 59, 39 Wkly. Rep. 464; *Re* Brindle, 56 L. T. Rep. N. S. 596, 4 Morr. Bankr. Cas. 104, 35 Wkly. Rep. 596; *Re* Hurrell, 12 T. L. R. 133.

69. *In re* Slocum, 169 N. Y. 153, 158, 159, 62 N. E. 130.

70. Bates *v.* Porter, 74 Cal. 224, 240, 15 Pac. 732. See also Earl *v.* Rowe, 35 Me. 414, 420, 58 Am. Dec. 714; Andrews *v.* Boyd. 5 Me. 199, 201; *Ex p.* McComb, 4 Bradf. Surr. (N. Y.) 151, 152.

71. Thompson's Appeal, 100 Pa. St. 478, 481. See also Opinion of Justices, 5 Metc. (Mass.) 596, 598.

72. Burroughs Tax. [*quoted* in Lawless *v.* Sullivan, 3 Can. Sup. Ct. 117, 136].

Gross earnings and interest, coming in from any source, labor, capital, investment of any sort, or money loaned, are not property, in the sense of the constitution, but are merely income. Waring *v.* Savannah, 60 Ga. 93, 99.

Income of commissioners.—Where commissioners are, by an act of parliament, authorized to receive certain money, and at the same time directed to pay a portion of those moneys to another body of persons, the gross sum received is to be deemed the "income" of the commissioners. Reg. *v.* Southampton, L. R. 4 H. L. 449, 470, 483, 39 L. J. Q. B. 253, 23 L. T. Rep. N. S. 111, 18 Wkly. Rep. 1171.

73. Lawless *v.* Sullivan, 3 Can. Sup. Ct. 117, 141, 146.

Includes the retiring pension of a colonial judge. *Ex p.* Huggins, 21 Ch. D. 85, 93, 51 L. J. Ch. 935, 47 L. T. Rep. N. S. 659, 30 Wkly. Rep. 878.

It will not include a voluntary allowance. *Ex p.* Webber, 18 Q. B. D. 111, 114, 56 L. J. Q. B. 209, 55 L. T. Rep. N. S. 816, 35 Wkly. Rep. 308; *Ex p.* Wicks, 17 Ch. D. 70, 73, 50 L. J. Ch. 620, 44 L. T. Rep. N. S. 836, 29 Wkly. Rep. 525.

As defined by statute it means "the amount of income or emolument derived from any office, place, occupation, profession or employment whatsoever within the Province [of New Brunswick]." St. 12 Vict. c. 37, § 12 [*quoted* in Lawless *v.* Sullivan, 3 Can. Sup. Ct. 117, 143].

74. Richardson Dict. [*quoted* in Lawless *v.* Sullivan, 3 Can. Sup. Ct. 117, 148].

75. Meaning may be determined by context. Thompson's Appeal, 100 Pa. St. 478, 481 [*quoted* in Busbey *v.* Russell, 18 Ohio Cir. Ct. 12, 16, 10 Ohio Cir. Dec. 23]; Miller *v.* Douglass, 42 Tex. 288, 292.

76. Busbey *v.* Russell, 18 Ohio Cir. Ct. 12, 16, 10 Ohio Cir. Dec. 23.

77. Anderson L. Dict. [*citing* Gray *v.* Darlington, 15 Wall. (U. S.) 63, 21 L. ed. 45; U. S. *v.* Schillinger, 27 Fed. Cas. No. 16,228, 14 Blatchf. 71].

"The thing sought to be taxed is not income unless it can be turned into money." Tennant *v.* Smith, [1892] A. C. 150, 157, 56 J. P. 596, 61 L. J. P. C. 11, 66 L. T. Rep. N. S. 327.

"The words 'in the production of his income'—that is, in the production of the income of the taxpayer entitled to the deductions mentioned in the Act—in their natural and ordinary meaning, apply to the income of the taxpayer as a whole." Taxation Com'rs *v.* Teece, [1899] A. C. 254, 258.

78. Bates *v.* Porter, 74 Cal. 224, 239, 15 Pac. 732; People *v.* San Francisco Sav. Union, 72 Cal. 199, 203, 13 Pac. 498; People *v.* Niagara County, 4 Hill (N. Y.) 20, 23; Lawless *v.* Sullivan, 3 Can. Sup. Ct. 117, 141. See also Mundy *v.* Van Hoose, 104 Ga. 292, 299, 30 S. E. 783 [*quoting* Webster Dict.]; Busbey *v.* Russell, 18 Ohio Cir. Ct. 12, 16, 10 Ohio Cir. Dec. 23; Reg. *v.* South-

Of Decedent's Estate — Availability to Pay Debts, see EXECUTORS AND ADMINISTRATORS; Compensation of Executor or Administrator on Income, see EXECUTORS AND ADMINISTRATORS. Right — Of Legatee or Devisee, see WILLS; Of Life-Tenant or Remainder-Man, see ESTATES; To Income on Mortgaged Corporate Property,[79] see CORPORATIONS. Where Property Is Held in Trust, see TRUSTS.[80] Tax,[81] see INTERNAL REVENUE; TAXATION. See also FUND; FUNDS; GAINS.)

INCOME TAX. See INTERNAL REVENUE; TAXATION.

INCOMMODATO HÆC PACTIO, NE DOLUS PRÆSTETUR, RATA NON EST. A maxim meaning "If in a contract for a loan there is inserted a clause that fraud should not be accounted of, such clause is void."[82]

INCOMMODUM NON SOLVIT ARGUMENTUM. A maxim meaning "An inconvenience does not destroy an argument."[83]

INCOMPATIBILITY. The quality or state of being incompatible; INCONSISTENCY, *q. v.*; irreconcilableness.[84] (Incompatibility: Of Offices, see OFFICERS. Of Temper, see DIVORCE.)

INCOMPATIBLE. Legally inconsistent; that cannot be legally united in the same person.[85] (Incompatible: Offices, see OFFICERS.)

INCOMPETENCY.[86] Want of sufficient power, either physical, intellectual, or moral; insufficiency; inadequacy;[87] DISQUALIFICATION, *q. v.*; INABILITY, *q. v.*; INCAPACITY,[88] *q. v.* In the law of evidence, want of competency.[89] (Incompetency. Of Arbitrator, see ARBITRATION AND AWARD. Of Assignee, see ASSIGNMENTS FOR BENEFIT OF CREDITORS; BANKRUPTCY; INSOLVENCY. Of Evidence — In Civil Action, see EVIDENCE; In Criminal Prosecution, see CRIMINAL LAW. Of Executor or Administrator, see EXECUTORS AND ADMINISTRATORS. Of Guardian, see GUARDIAN AND WARD. Of Juror, see JURY. Of Public Officer, see OFFICERS Of Receiver, see RECEIVERS. Of Servant, see MASTER AND SERVANT. Of Trustee, see TRUSTS. Of Witness, see WITNESSES.)

INCOMPETENT.[90] As an adjective, want of ability for the purpose;[91] not adequate, sufficient, FIT (*q. v.*), suitable, or capable;[92] INCAPABLE,[93] *q. v.*; unfit.[94]

ampton, L. R. 4 H. L. 449, 470, 39 L. J. Q. B. 253, 23 L. T. Rep. N. S. 111, 18 Wkly. Rep. 1171.

"Income is often used synonymously with revenue, but income is more generally applied to the 'gain' of private persons." Imperial Dict. [*quoted* in Lawless *v.* Sullivan, 3 Can. Sup. Ct. 117, 148].

"The 'income and revenues' of a railroad company are all the income and revenues of the company, and, necessarily, embrace the 'earnings' of its road." Tompkins *v.* Little Rock, etc., R. Co., 15 Fed. 6, 14.

"The 'revenue' or 'income' of a farm is the sum total which its owner receives from it." People *v.* New York Cent. R. Co., 24 N. Y. 485, 490.

79. Income from or earnings of mortgaged property see 7 Cyc. 117 note 21.

80. Income of life and trust estates see BANKRUPTCY, 5 Cyc. 348.

81. Income tax law of 1864 construed see 8 Cyc. 860 note 56.

82. Bouvier L. Dict. [*citing* Dig. 13, 7, 17].

83. Wharton L. Lex.

84. Webster Int. Dict.

85. Burrill L. Dict.

86. Compared with "unsuitableness." Damarell *v.* Walker, 2 Redf. Surr. (N. Y.) 198, 205.

Distinguished from "negligence" in Baltimore *v.* War, 77 Md. 593, 597, 27 Atl. 85.

87. Webster Dict. [*quoted* in Brand *v.* Godwin, 8 N. Y. Suppl. 339, 340, 9 N. Y. Suppl. 743, 15 Daly 456]. See also Nehrling *v.* State, 112 Wis. 637, 647, 88 N. W. 610; Maitland *v.* Gilbert Paper Co., 97 Wis. 476, 489, 72 N. W. 1124, 65 Am. St. Rep. 137. *Compare* Stephenson *v.* Stephenson, 49 N. C. 472, 473.

Incompetency of a sawyer may arise from mere lack of practice for several years as well as from never having operated a saw. Curran *v.* A. H. Strange Co., 98 Wis. 598, 605, 74 N. W. 377.

88. People *v.* Board of Health, 15 N. Y. App. Div. 272, 275, 44 N. Y. Suppl. 597 [*citing* Century Dict.; Worcester Dict.].

89. Burrill L. Dict. See also 9 Cyc. 186.

90. Not a synonym for "unsatisfactory."— Brand *v.* Godwin, 15 Daly (N. Y.) 456, 463, 8 N. Y. Suppl. 339, 9 N. Y. Suppl. 743.

Distinguished from "inexperienced" in Chicago, etc., R. Co. *v.* Champion, 9 Ind. App. 510, 36 N. E. 221, 228, 37 N. E. 21, 53 Am. St. Rep. 357 [*distinguishing* Louisville, etc., R. Co. *v.* Allen, 78 Ala. 494].

91. Standard Dict. [*cited* in Kliefoth *v.* Northwestern Iron Co., 98 Wis. 495, 499, 74 N. W. 356].

92. Webster Dict. [*cited* in Kliefoth *v.* Northwestern Iron Co., 98 Wis. 495, 499, 74 N. W. 356].

93. *In re* Leonard, 95 Mich. 295, 300, 54 N. W. 1082. *Contra, In re* Blinn, 99 Cal. 216, 221, 33 Pac. 841.

94. Stephenson *v.* Stephenson, 49 N. C. 472, 473.

As a noun, one who is wanting in the requisite qualifications for the business intrusted to him;[95] and, as defined by statute, any person who, though not insane, is, by reason of old age, disease, weakness of mind, or from any other cause, unable, unassisted, to properly manage and take care of himself or his property, and by reason thereof would be likely to be deceived or imposed upon by artful or designing persons.[96] (Incompetent: Evidence, see EVIDENCE. Person — Blind, deaf, or dumb person, see INSANE PERSONS. Drunkard, see DRUNKARDS. Idiot, see INSANE PERSONS. Ignorant person, see INSANE PERSONS. Infant, see INFANTS. Insane person, see INSANE PERSONS. Married woman, see HUSBAND AND WIFE. Spendthrift, see SPENDTHRIFTS. Weak-minded person, see INSANE PERSONS; and see CONTRACTS; DEEDS; WILLS. See also COMPETENT; INCOMPETENCY.)

INCOMPLETENESS. Not finished — not complete; anything imperfect or defective.[1] (See IMPERFECT.)

INCOMPLETE TITLE. See PUBLIC LANDS; VENDOR AND PURCHASER.[2]

IN CONJUNCTIVIS OPORTET UTRAMQUE PARTEM ESSE VERAM. A maxim meaning "In things conjunctive each part ought to be true."[3]

IN CONSIMILI CASU, CONSIMILE DEBET ESSE REMEDIUM. A maxim meaning "In similar cases the remedy should be similar."[4]

INCONSISTENCY. A term which implies opposition; antagonism; repugnance.[5] Sometimes the word is used in the sense of opposed to or contradictory to.[6] (Inconsistency: As Ground of Estoppel, see ESTOPPEL. Of Allegations in Pleading, see PLEADING.)

INCONSISTENT.[7] Not consistent in conception or in fact; wanting coherence or agreement.[8] (See CONSISTENT; INCONSISTENCY.)

IN CONSUETUDINIBUS NON DIUTURNITAS TEMPORIS SED SOLIDITAS RATIONIS EST CONSIDERANDA. A maxim meaning "In customs, not the length of time, but the strength of the reason, should be considered."[9]

INCONTESTABLE. See LIFE INSURANCE.

"Mentally incompetent," as applied to persons, means one whose mind is so affected as to have lost control of itself to such a degree as to deprive the person afflicted of sane and normal action. *In re* Storick, 64 Mich. 685, 689, 31 N. W. 582. "Mentally incompetent to have the charge and management of his property," as used in the statutes authorizing guardianship, means "mental incapability to do so." *In re* Streiff, 119 Wis. 566, 570, 97 N. W. 189, 100 Am. St. Rep. 903.

95. Metropolitan West Side El. R. Co. *v.* Fortin, 203 Ill. 454, 460, 67 N. E. 977.

96. Cal. Civ. Code (1899), § 1767 [*quoted* in *In re* Daniels, 140 Cal. 335, 337, 73 Pac. 1053].

N. Y. Code Civ. Proc. § 2320, provides that after the appointment of a committee "of a person incompetent to manage himself or his affairs, in consequence of lunacy, idiocy, or habitual drunkenness, or imbecility arising from old age or loss of memory and understanding, or other cause," such person shall in subsequent proceedings be designated "an incompetent person." Herzog *v.* Fitzgerald, 74 N. Y. App. Div. 110, 116, 77 N. Y. Suppl. 366.

The term "incompetent" does not include a drunkard generally. Wright *v.* Fisher, 65 Mich. 275, 284, 32 N. W. 605, 8 Am. St. Rep. 886.

1. Atty.-Gen. *v.* Great Western R. Co., 4 Ch. D. 735, 739, 46 L. J. Ch. 192, 35 L. T. Rep. N. S. 921, 25 Wkly. Rep. 330.

2. See also Teddlie *v.* McNeely, 104 La. 603, 606, 29 So. 247 [*citing* Menard *v.* Massey, 8 How. (U. S.) 301, 12 L. ed. 1085].

3. Wharton L. Lex. [*citing* Wingfield Max. 13].

4. Wharton L. Lex.

5. Swan *v.* U. S., 3 Wyo. 151, 153, 9 Pac. 931, comparing this term with the word "repugnance." See also 1 Cyc. 213, 245.

6. O'Dell *v.* State, 120 Ga. 152, 153, 47 S. E. 577.

7. Distinguished from "validity" see Meshmeier *v.* State, 11 Ind. 482, 489.

8. Century Dict.

Things are said to be inconsistent when they are contrary the one to the other, or so that one infers the negation, destruction, or falsity of the other. O'Malley *v.* Luzerne County, 3 Kulp (Pa.) 41, 46 [*citing* Webster Dict.].

"Inconsistent conduct" see People *v.* Wright, 7 N. Y. App. Div. 185, 188, 40 N. Y. Suppl. 285.

Inconsistent decisions see 11 Cyc. 902.

"Inconsistent with the Act" see Tabernacle Permanent Bldg. Soc. *v.* Knight, [1892] A. C. 298, 305, 56 J. P. 709, 62 L. J. Q. B. 50, 67 L. T. Rep. N. S. 483, 41 Wkly. Rep. 207. See also *In re* Knight, 60 L. J. Q. B. 633, 635.

9. Wharton L. Lex. [*citing* Coke Litt. 141].

INCONTINENCY. Want of restraint in regard to sexual indulgence.[10] (See ADULTERY; FORNICATION; INCEST; LEWDNESS; LIBEL AND SLANDER.)

IN CONTRACTIBUS, BENIGNA; IN TESTAMENTIS, BENIGNIOR; IN RESTITUTIONIBUS, BENIGNISSIMA INTERPRETATIO FACIENDA EST. A maxim meaning "In contracts the interpretation is to be liberal; in wills more liberal; in restitutions, most liberal."[11]

IN CONTRACTIBUS TACITE INSUNT QUÆ SUNT MORIS ET CONSUETUDINIS. A maxim meaning "Those things which are of manner and custom are tacitly imported into contracts."[12]

IN CONTRAHENDA VENDITIONE, AMBIGNUM PACTUM CONTRA VENDITOREM INTERPRETANDUM EST. A maxim meaning "In negotiating a sale, an ambiguous agreement is to be interpreted against the seller."[13]

INCONTROVERTIBLE. A word meaning too clear and certain to admit of dispute.[14]

IN CONVENTIONIBUS CONTRAHENTIUM VOLUNTAS POTIUS QUAM VERBA SPECTARI PLACUIT. A maxim meaning "In contracts, the intention of the contracting parties is to be regarded rather than the words in which the contract is expressed."[15]

INCORPORALIA BELLO NON ADQUIRUNTUR. A maxim meaning "Things incorporeal are not acquired by war."[16]

INCORPORATE. See CORPORATIONS.

INCORPORATED. United in one body;[17] set apart for incorporation.[18] (See CORPORATIONS.)

INCORPORATED CITY. See MUNICIPAL CORPORATIONS.

INCORPORATION. See CORPORATIONS; MUNICIPAL CORPORATIONS.

INCORPOREAL. Invisible;[19] not manifest to the senses and conceived only by the understanding, such as the rights of the inheritance, servitudes, and obligations.[20] (Incorporeal: Hereditament, see ESTATES; PROPERTY. Property, see PROPERTY. See also CORPOREAL.)

INCORRIGIBLE. Incapable of being corrected, or reformed.[21] (Incorrigible: Child,[22] see INFANTS; PARENT AND CHILD; REFORMATORIES.)

INCREASE.[23] As a noun, that which is added to the original stock by aug-

10. Lucas *v.* Nichols, 52 N. C. 32, 33. See State *v.* Hewlin, 128 N. C. 571, 572, 37 S. E. 952.

11. Wharton L. Lex. [*citing* Coke Litt. 112].

12. Wharton L. Lex.

Applied in Kilgore *v.* Bulkley, 14 Conn. 362, 391; Moon *v.* Guardians of Poor, 3 Bing. N. Cas. 814, 818, 3 Hodges 206, 6 L. J. C. P. 305, 5 Scott 1, 32 E. C. L. 374; Bannerman *v.* Fullerton, 5 Nova Scotia 200, 210.

13. Bouvier L. Dict. [*citing* Dig. 50, 17, 172; 18, 1, 21].

14. Webster Dict. [*quoted* in McCreary *v.* Skinner, 75 Iowa 411, 413, 39 N. W. 674, where the phrase "natural and incontrovertible" is construed].

15. Trayner Leg. Max.

Applied in Durnford *v.* Patterson, 7 Mart. (La.) 460, 463, 12 Am. Dec. 514; Butler *v.* Potter, 17 Johns. (N. Y.) 145, 150.

16. Bouvier L. Dict.

Applied in Wolff *v.* Oxholm, 6 M. & S. 92, 104, 18 Rev. Rep. 313.

17. Toledo, etc., R. Co. *v.* Cupp, 8 Ind. App. 388, 35 N. E. 703.

"Incorporated enactments" see St. 47 & 48 Vict. c. 12, § 2.

18. State *v.* Cornwall, 35 Minn. 176, 177, 24 N. W. 144.

"Incorporated academy or select school" see Atty.-Gen. *v.* Albion Academy, etc., 52 Wis. 469, 482, 9 N. W. 391.

"Incorporated law society" see 51 & 52 Vict. c. 65, § 4; 23 & 24 Vict. c. 127, § 1.

Incorporated villages and boroughs see 6 Cyc. 1085 note 88.

"Incorporated with the special Act" see Matter of Ellison, 8 De G. M. & G. 62, 68, 2 Jur. N. S. 293, 25 L. J. Ch. 379, 4 Wkly. Rep. 306, 57 Eng. Ch. 48, 44 Eng. Reprint 312.

19. Black *v.* Hepburne, 2 Yeates (Pa.) 331, 333.

20. La. Civ. Code (1900), art. 459, 460 [*quoted* in State *v.* Board of Assessors, 111 La. 982, 992, 36 So. 91].

In the Spanish civil law, incorporeal things are those things which can neither be seen nor touched, and of this kind are all species of rights which the Spanish jurisprudence taught. Sullivan *v.* Richardson, 33 Fla. 1, 14 So. 692.

21. English L. Dict.

"Incorrigible conduct" see State *v.* Schlatterbeck, 39 Ohio St. 268, 270; 11 Cyc. 496 note 14.

22. Incorrigible youths see 8 Cyc. 1093.

23. "The word 'increase,' from 'cresco,' to grow, originally meant growth. It has ac-

mentation or growth; the amount or number added to the original stock, or by which the stock is augmented; produce; profit; interest; progeny; ISSUE, *q. v.*; offspring; growth; increment; increment by generation; commercial or financial increment.[24] As a verb, to ENLARGE,[25] *q. v.*; to augment or to aggravate.[26] (Increase: Of Animal, see ACCESSION; ANIMALS; CHATTEL MORTGAGES. Of Bail, see BAIL. Of Capital Stock, see CORPORATIONS. Of Costs, see COSTS.[27] Of Property — In General, see ACCESSION; Bounded on Waters, see NAVIGABLE WATERS; WATERS.)

IN CRIMINALIBUS NON EST ARGUMENTANDUM A PARI ULTRA CASUM A LEGE DEFINITUM. A maxim meaning "In criminal matters it is not allowed, by argument from analogy, to go beyond the case defined (or limited) by law."[28]

IN CRIMINALIBUS SILENTIUM PÆSENTIS CONSENSUM PRÆSUMIT; IN CIVILIBUS NONNUNQUAM VEL ABSENTIS ET UBI EJUS INTEREST ETIAM IGNORANTIS. A maxim meaning "In criminal cases the silence of a person present presumes consent; in civil cases, sometimes, that of the person absent, and even ignorant when his interest lies, does the same."[29]

IN CRIMINALIBUS SUFFICIT GENERALIS MALITIA INTENTIONIS CUM FACTO PARIS GRADUS. A maxim meaning "In criminal matters, a general malicious intention, with an act of corresponding degree or character, is sufficient (to constitute crime)."[30]

INCRIMINATE.[31] To charge with a crime.[32]

INCRIMINATION. The act of incriminating; CRIMINATION,[33] *q. v.* (Incrimination: Of Self, see CRIMINAL LAW; WITNESSES. See also, generally, CRIMINAL LAW.)

INCROACHMENT. See ENCROACHMENT.

IN CUJUS REI TESTIMONIUM. Literally "In witness or testimony whereof." The initial words of the concluding clause in ancient deeds, constituting one of the formal and orderly parts of the instrument.[34] (See, generally, DEEDS.)

quired other meanings by use, but some are figurative and others, which at first seem not to be growth, upon examination will be seen to be strictly so. When we speak of the 'earth's increase,' meaning the annual crops, it is evident that the word is used figuratively. If we speak of interest on money as increase, we refer to the sum of money at interest which is thereby increased; this is growth. Similarly, when we refer to rents, profits, and other gains as increase, it is the fortune of the owner which thereby is made to grow. When we speak of the increase of a herd of cattle or a flock of sheep, we refer to growth of the herd or flock by addition of new members. The natural increase can only mean the addition of new members by birth." Alferitz *v.* Borgwardt, 126 Cal. 201, 206, 58 Pac. 460.

24. Alferitz *v.* Ingalls, 83 Fed. 964, 974 [*quoting* Century Dict.; Standard Dict.; Webster Dict.]. See also Alferitz *v.* Borgwardt, 126 Cal. 201, 205, 58 Pac. 460, 2 Cyc. 309.

"Increase cost of said house" see Woolley *v.* Friedlander, 67 Hun (N. Y.) 321, 22 N. Y. Suppl. 213.

Increase in value see 1 Cyc. 224.

Increase of amount see 2 Cyc. 463.

"Increase" of a female slave has no broader meaning than children. Carroll *v.* Hancock, 48 N. C. 471, 473.

"Increase of hazard" see Angier *v.* Western Assur. Co., 10 S. D. 82, 87, 71 N. W. 761, 66 Am. St. Rep. 685.

Increase of salary or compensation see Crosman *v.* Nightingill, 1 Nev. 323, 325.

"Increase per annum" see State *v.* Fisher Varnish Co., 43 N. J. L. 151, 153.

Rents, profits, and increase see 14 Cyc. 180.

"The increase thereof" means natural increase. Alferitz *v.* Borgwardt, 126 Cal. 201, 207, 58 Pac. 460.

25. See 15 Cyc. 1050.

"Increase the risk," as used in an insurance policy, construed as meaning an essential increase of the risk. See Crane *v.* City Ins. Co., 3 Fed. 558, 561, 2 Flipp. 576.

26. Mathew *v.* Wabash R. Co., (Mo. 1903) 78 S. W. 271, 272.

"Increasing transportation facilities" see 17 Cyc. 683.

27. Increased costs see 11 Cyc. 145, 236.

28. Trayner Leg. Max.

29. Morgan Leg. Max. [*citing* Lofft Max. 633].

30. Trayner Leg. Max.

31. "An incriminating circumstance is one which tends to show that a crime has been committed, or that some particular person committed it." Davis *v.* State, 51 Nebr. 301, 323, 70 N. W. 984.

32. Davis *v.* State, 51 Nebr. 301, 323, 70 N. W. 984.

33. Webster Int. Dict.

34. Burrill L. Dict. [*citing* Coke Litt. 6*a*]. See also Parks *v.* Hewlett, 9 Leigh (Va.) 511, 514; Cromwell *v.* Tate, 7 Leigh (Va.) 301, 305, 30 Am. Dec. 506; Pearse *v.* Morrice, 2 A. & E. 84, 95, 4 L. J. K. B. 21, 4 N. & M. 48, 29 E. C. L. 59; Davies *v.* Lowndes, 6 M. &

INCULCATE. To impress by pregnant admonitions; to teach and enforce by frequent admonitions; to urge on the mind.[35]

INCULPATE. To impute blame or guilt; to accuse.[36]

INCUMBENT.[37] A person who is in present possession of an office; one who is legally authorized to discharge the duties of an office.[38] (Incumbent: Of Office, see OFFICERS. Of Pastoral Office, see RELIGIOUS SOCIETIES.)

INCUMBER or ENCUMBER. To clog; to impede; to hinder; to obstruct;[39] to impede the motion or action of, as with a burden; to weigh down; to obstruct; to embarrass or perplex;[40] to load with debts.[41] As applied to travel, to put things in the way of it.[42] (See CUMBER; INCUMBRANCE.)

INCUMBRANCE or ENCUMBRANCE. A burdensome and troublesome load;[43] a burden, an obstruction, an impediment;[44] anything that impedes motion or action, or renders it difficult or laborious; clog; impediment; hindrance; check;[45] a word used as synonymous with "obstruction;"[46] a burden or charge upon property; a legal claim or lien upon an estate,[47] which may diminish its value;[48] a claim or lien upon property;[49] a claim, lien, or liability, attached to property;[50] a legal claim on an estate for the discharge of which the estate is liable;[51] a liability resting upon an estate;[52] anything that impairs the use or transfer of property;[53] an embarrassment of an estate or property so that it cannot be disposed of without being subject to it.[54] As applied to an estate in land, it may fairly include whatever charges, burdens, obstructs, or impairs its use, or prevents or impedes its transfer.[55] (Incumbrance: In General, see CHATTEL MORTGAGES;

G. 471, 481, 46 E. C. L. 471; City Bank *v.* Cheney, 15 U. C. Q. B. 400, 413.

35. Webster Dict. [*quoted* in People *v.* New York Produce Exch., 8 Misc. (N. Y.) 552, 554, 27 N. Y. Suppl. 307].

36. Burrill L. Dict.

"Inculpating" see Bennett *v.* State, 102 Ga. 656, 664, 29 N. E. 918.

37. "'Incumbent' commeth from the verbe incumbo, that is, to be diligently resident, *id est, obnixè operam dare*; and when it is written *encumbent*, it is falsely written, for it ought to be *incumbent*." Coke Litt. 119*b*.

38. Black L. Dict.

"Incumbent or minister" see Stewart *v.* West Derby Burial Bd., 34 Ch. D. 314, 336, 56 L. J. Ch. 425, 56 L. T. Rep. N. S. 380, 35 Wkly. Rep. 268; Hornsey Local Bd. *v.* Brewis, 55 J. P. 389, 60 L. J. M. C. 48, 52, 64 L. T. Rep. N. S. 288.

39. Worcester Dict. [*quoted* in Reg. *v.* Justin, 24 Ont. 327, 329].

40. Webster Dict. [*quoted* in Taggart *v.* Newport St. R. Co., 16 R. I. 668, 685, 19 Atl. 326, 7 L. R. A. 205].

41. Webster Dict. [*cited* in Newhall *v.* Union Mut. F. Ins. Co., 52 Me. 180, 181].

42. Taggart *v.* Newport St. R. Co., 16 R. I. 668, 685, 19 Atl. 326, 17 L. R. A. 205.

43. Webster Dict. [*quoted* in Cream City Mirror Plate Co. *v.* Swedish Bldg., etc., Assoc., 74 Ill. App. 362, 365; Willsie *v.* Rapid Valley Horse-Ranch Co., 7 S. D. 114, 121, 63 N. W. 546].

44. Anonymous, 2 Abb. N. Cas. (N. Y.) 56, 63; Anderson L. Dict. [*quoted* in Willsie *v.* Rapid Valley Horse-Ranch Co., 7 S. D. 114, 121, 63 N. W. 546].

45. Webster Dict. [*quoted* in Cream City Mirror Plate Co. *v.* Swedish Bldg., etc., Assoc., 74 Ill. App. 362, 365].

46. Fox *v.* Winona, 23 Minn. 10, 11.

"Incumbrance or obstruction" see Thilemann *v.* New York, 82 N. Y. App. Div. 136, 140, 81 N. Y. Suppl. 773.

47. Webster Dict. [*quoted* in Cream City Mirror Plate Co. *v.* Swedish Bldg., etc., Assoc., 74 Ill. App. 362, 365; Willsie *v.* Rapid Valley Horse-Ranch Co., 7 S. D. 114, 121, 63 N. W. 456]. See also Campbell *v.* Hamilton Mut. Ins. Co., 51 Me. 69, 72 [*quoting* Bouvier L. Dict.]; Redmon *v.* Phœnix F. Ins. Co., 51 Wis. 292, 302, 8 N. W. 226, 37 Am. Rep. 830.

"That the premises are free from all incumbrances" see Harlow *v.* Thomas, 15 Pick. (Mass.) 66, 68.

48. Webster Dict. [*quoted* in Cream City Mirror Plate Co. *v.* Swedish Bldg., etc., Assoc., 74 Ill. App. 362, 365].

"Erections and incumbrances" see Ackerman *v.* True, 31 Misc. (N. Y.) 597, 600, 66 N. Y. Suppl. 140.

49. Fitzgerald *v.* Home Ins. Co., 61 N. Y. App. Div. 350, 356, 70 N. Y. Suppl. 552.

50. Wharton L. Lex. [*quoted* in Jones *v.* Barnett, [1899] 1 Ch. 611, 620, 68 L. J. Ch. 247, 80 L. T. Rep. N. S. 408, 47 Wkly. Rep. 493, per Romer, J.].

51. Webster Dict. [*quoted* in Kelly *v.* Stephens, 39 Ga. 466, 468].

52. Webster Dict. [*quoted* in Campbell *v.* Hamilton Mut. Ins. Co., 51 Me. 69, 72].

53. Anderson L. Dict. [*quoted* in Willsie *v.* Rapid Valley Horse-Ranch Co., 7 S. D. 114, 121, 63 N. W. 456].

54. Bouvier L. Dict. [*quoted* in Kelly *v.* Stephens, 39 Ga. 466, 468; Newhall *v.* Union Mut. F. Ins. Co., 52 Me. 180, 181].

55. Anonymous, 2 Abb. N. Cas. (N. Y.) 56, 63.

"An incumbrance is said to import every right to or interest in the land, which may subsist in another, to the [diminution] of the value of the land, but consistent with the power to pass the fee by a conveyance."

LIENS; MARITIME LIENS; MECHANICS' LIENS; MORTGAGES. Assumption of — On Sale of Chattel, see CHATTEL MORTGAGES; On Sale of Land, see MORTGAGES. Cloud on Title, see QUIETING TITLE. Constituting Breach of Covenant, see COVENANTS. Contracts or Agreements Relating to, see FRAUDS, STATUTE OF. Contract to Remove, Measure of Damages, see DAMAGES. Covenant Against, see COVENANTS. Ground For Estoppel, see ESTOPPEL. Evidence of Value of Property, see EVIDENCE. Execution Against Encumbered Property, see EXECUTIONS. Garnishment of Encumbered Property, see GARNISHMENT. Encumbered Property as Assets, see EXECUTORS AND ADMINISTRATORS. Liabilities of Life-Tenant, see LIFE-ESTATES. Notice to Encumbrancers of Sale of Property of Bankrupt, see BANKRUPTCY. Of or on Insured Property, see INSURANCE. On Estate Held in Common, see TENANCY IN COMMON. On Exempt Property, see EXEMPTIONS. On Franchise, see FRANCHISES. On Highway or Street, see STREETS AND HIGHWAYS; MUNICIPAL CORPORATIONS. On Homestead, see HOMESTEADS. On Land Subject to Dower, see DOWER. On Premises Demised, see LANDLORD AND TENANT. On Property — Devised or Bequeathed, see WILLS; Fraudulently Conveyed, see FRAUDULENT CONVEYANCES; Of Bankrupt, see BANKRUPTCY; Of Decedent in Course of Administration, see EXECUTORS AND ADMINISTRATORS; Of Intestate, see DESCENT AND DISTRIBUTION. On Ward's Land, see GUARDIAN AND WARD. Parol Evidence as to Assumption of, see EVIDENCE. Right of Prior Encumbrancer to Assert Invalidity of Fraudulent Conveyance, see FRAUDULENT CONVEYANCES. Transfer of Property Encumbered to Full Value, as Constituting Fraudulent Conveyance, see FRAUDULENT CONVEYANCES. Validity of Preference to Creditor by Transfer of Encumbered Property in Payment of Encumbrance, see FRAUDULENT CONVEYANCES.)

INCUMBRANCER. One who has an incumbrance or legal claim on an estate,[56] a legal claim against an estate;[57] he who places a charge upon his interest in realty;[58] the person who has actually a charge on land.[59] (See INCUMBER; INCUMBRANCE.)

INCUR.[60] A word used and employed as meaning to become liable for[61] or

Forster *v.* Scott, 136 N. Y. 577, 582, 32 N. E. 976, 18 L. R. A. 543 [*citing* Bouvier L. Dict.; 2 Greenleaf Ev. § 242; 3 Washburn Real Prop. 659, § 14]. To the same effect see Campbell *v.* Hamilton Mut. Ins. Co., 51 Me. 69, 72 [*quoting* Bouvier L. Dict]; Prescott *v.* Trueman, 4 Mass. 627, 629, 3 Am. Dec. 246 [*quoted* in Huyck *v.* Andrews, 113 N. Y. 81, 85, 20 N. E. 581, 10 Am. St. Rep. 432, 3 L. R. A. 789; Farrington *v.* Tourtelott, 39 Fed. 738, 740]; Sessions *v.* Irwin, 8 Nebr. 5, 8; Terry *v.* Westing, 5 N. Y. Suppl. 99, 100 [*citing* 1 Abbott L. Dict.; Bouvier L. Dict.; Rawle Cov. (5th ed.) § 95; 3 Washburn Real Prop. (5th ed.) 491]; Newcomb *v.* Fielder, 24 Ohio St. 463, 466. "[It is] an interest in or chargeable on land, which may subsist in, or in favor of, a third person consistently with a transfer of the fee, but diminishes the value of the estate to the occupant. It is an estate, interest, or right in lands, diminishing their value to the general owner; a paramount right in or weight upon the land, which may lessen its value." Terry *v.* Westing, 5 N. Y. Suppl. 99, 100. See also Mackey *v.* Harmon, 34 Minn. 168, 172, 24 N. W. 702; Forster *v.* Scott, 136 N. Y. 577, 582, 32 N. E. 976, 18 L. R. A. 543.

As defined by statute, the term "incumbrances" includes taxes, assessments, and all liens upon real property. Ariz. Civ. Code (1901), § 729; Cal. Civ. Code (1899), § 1114; Ida. Civ. Code (1901), § 2417; 2 Mont. Civ. Code (1895), § 1520.

56. Warden *v.* Sabins, 36 Kan. 165, 169, 12 Pac. 520; Webster Dict. [*cited* in Newhall *v.* Union Mut. F. Ins. Co., 52 Me. 180, 181; Campbell *v.* Mutual Ins. Co., 51 Me. 69, 72].

57. De Voe *v.* Rundle, 33 Wash. 604, 610, 74 Pac. 836.

"Purchaser, payee, or incumbrancer" see Butcher *v.* Stead, L. R. 7 H. L. 839, 846, 44 L. J. Bankr. 129, 33 L. T. Rep. N. S. 541, 24 Wkly. Rep. 463.

58. Anderson Dict. [*quoted* in Willsie *v.* Rapid Valley Horse-Ranch Co., 7 S. D. 114, 121, 63 N. W. 456].

59. *In re* Strafford, [1896] 1 Ch. 235, 239, 65 L. J. Ch. 124, 73 L. T. Rep. N. S. 586, 44 Wkly. Rep. 259.

As defined by statute, an incumbrancer is "any Person entitled to an Incumbrance, or to require the Payment, Discharge, or Benefit thereof." St. 28 & 29 Vict. c. 101.

60. Compared with and distinguished from "obligation."— "It is an inappropriate word in connection with the word 'obligation,' if the latter word is limited to a case of contract. Men contract debts, they incur liabilities. In the one case they act affirmatively, in the other the liability is incurred or cast upon them by act or operation of law." Crandall *v.* Bryan, 5 Abb. Pr. (N. Y.) 162, 169, 15 How. Pr. 48, 55.

61. Scott *v.* Tyler, 14 Barb. (N. Y.) 202, 205; Webster Dict. [*quoted* in Flanagan *v.* Baltimore, etc., R. Co., 83 Iowa 639, 644, 50 N. W. 60].

subject to;[62] to bring on;[63] to occasion or cause;[64] to run into.[65] Sometimes it is used in the sense of meeting with, of being exposed to, of being liable to.[66]

INCURABLE. Not curable; beyond the power of skill or medicine.[67]

IN CUSTODIA LEGIS. In the custody or keeping of the law.[68] (See CUSTODY OF LAW, and Cross-References Thereunder.)

IND. A well known abbreviation of "Indiana."[69]

INDEBITATUS ASSUMPSIT. See ASSUMPSIT, ACTION OF.

INDEBTED. Being in debt, having incurred a debt;[70] placed in debt; being under obligation; held to payment, or requital; beholden.[71] A word synonymous with "owing";[72] the owing of a sum of money on a contract or agree-

62. Scott *v.* Tyler, 14 Barb. (N. Y.) 202, 205.

"How does one incur a disability? Not by being exposed to that prejudice; not by being so placed that it may chance to befall him, but according to the plain and incontrovertible import of language, by being already in the condition the supposed disability would produce. . . . Neither in legal phrase, nor common parlance, is the word 'incur' used to signify an inchoate or incomplete condition. It has reference to a state of things already passed and fulfilled. To incur a debt, or incur a responsibility, or incur loss, &c., is to have become absolutely liable in that behalf." Princess of Orange, 19 Fed. Cas. No. 11,431.

63. Deyo *v.* Stewart, 4 Den. (N. Y.) 101, 103.

64. Ashe *v.* Young, 68 Tex. 123, 126, 3 S. W. 454.

65. Rajsanji *v.* Masludin, L. R. 14 Indian App. 89, 100.

66. Rajsanji *v.* Masludin, L. R. 14 Indian App. 89, 100.

"Incurred" as used in connection with other words see the following phrases: "Any costs and damages which may be incurred" (Beekman *v.* Van Dolsen, 70 Hun (N. Y.) 288, 294, 24 N. Y. Suppl. 414); "costs incurred" (Reg. *v.* Long, 1 Q. B. 740, 742, 1 G. & D. 367, 6 Jur. 98, 10 L. J. M. C. 124, 41 E. C. L. 755; Sellwood *v.* Mount, 1 Q. B. 726, 735, 1 G. & D. 358, 6 Jur. 78, 10 L. J. M. C. 121, 41 E. C. L. 749); "expenses incurred" (Bournemouth Com'rs *v.* Watts, 14 Q. B. D. 87, 89, 49 J. P. 102, 54 L. J. Q. B. 93, 51 L. T. Rep. N. S. 823, 33 Wkly. Rep. 280; West Ham *v.* Grant, 40 Ch. D. 331, 58 L. J. Ch. 121, 60 L. T. Rep. N. S. 17; Bayley *v.* Wilkinson, 16 C. B. N. S. 161, 192, 10 Jur. N. S. 726, 33 L. J. M. C. 161, 10 L. T. Rep. N. S. 543, 12 Wkly. Rep. 797, 111 E. C. L. 159; Reg. *v.* Kingston, 2 E. & B. 182, 188, 75 E. C. L. 182); "expenses necessarily incurred" (Reg. *v.* Gloucester, 5 Q. B. 862, 871, Dav. & M. 677, 8 Jur. 573, 13 L. J. Q. B. 233, 48 E. C. L. 862); "hereafter to be incurred" (Commercial Bank *v.* Weinberg, 25 N. Y. Suppl. 235, 236); "incurred for the purchase or improvement thereof" (Williams *v.* Jones, 100 Ill. 362, 365); "incurred in any manner" (McNeal *v.* Waco, 89 Tex. 83, 86, 33 S. W. 322; Wade *v.* Travis County, 72 Fed. 985, 988); "incurred in executing" (Leith *v.* Leith Harbour, etc., Com'rs, [1899] A. C. 508, 517, 68 L. J. P. C. 109, 81 L. T. Rep. N. S. 98); "incurred within twelve calendar months" (Reg. *v.* Winster, 14 Q. B. 344, 347, 14 Jur. 744, 19 L. J. M. C. 185, 4 New Sess. Cas. 116, 68 E. C. L. 344); "liability accrued or incurred" (Reg. *v.* Cluer, 67 L. J. Q. B. 36, 37, 77 L. T. Rep. N. S. 439); "right or liability acquired, accrued, or incurred" (Barnes *v.* Eddleston, 1 Ex. D. 102, 104, 45 L. J. M. C. 162, 33 L. T. Rep. N. S. 822).

"All liabilities incurred," according to the context, may mean liabilities to be incurred. Agawam Bank *v.* Strever, 18 N. Y. 502, 510 [*quoted* in Beemer *v.* Packard, 92 Hun (N. Y.) 546, 552, 38 N. Y. Suppl. 1045].

67. Century Dict. See also Chattanooga, etc., R. Co. *v.* Lyon, 89 Ga. 16, 21, 15 S. E. 24, 32 Am. St. Rep. 72, 15 L. R. A. 857; St. Romes *v.* Pore, 10 Mart. (La.) 203, 211.

68. Burrill L. Dict. [*citing* 2 Stephens Comm. 74]. See also Lovine *v.* State, 85 Ind. 576, 578; Marine Nat. Bank *v.* Whiteman Paper Mills, 49 Minn. 133, 139, 51 N. W. 665; Oppenheimer *v.* Marr, 31 Nebr. 811, 813, 48 N. W. 818, 28 Am. St. Rep. 539; *Ex p.* Snodgrass, 43 Tex. Cr. 359, 361, 65 S. W. 1061, 1062; Hagan *v.* Lucas, 10 Pet. (U. S.) 400, 404, 9 L. ed. 470; 17 Cyc. 980; 14 Cyc. 1098; 12 Cyc. 29; 5 Cyc. 344 note 48, 341 note 40; 4 Cyc. 570 note 26.

69. Burroughs *v.* Wilson, 59 Ind. 536, 539. See also 16 Cyc. 875 note 81.

70. Webster Dict. [*quoted* in Sierra County *v.* Dona Ana County, 5 N. M. 190, 194, 21 Pac. 83]; Worcester Dict. [*quoted* in Miller *v.* George, 30 S. C. 526, 529, 9 S. E. 659].

According to the common legal acceptation of the term, it means justly indebted; legally indebted; indebted according to law. Livengood *v.* Shaw, 10 Mo. 273, 276; Kennedy *v.* Morrison, 31 Tex. 207, 218. It means a sum of money which one has contracted to pay to another, whether the day of payment be come or not. Kahn *v.* St. Joseph's Bank, 70 Mo. 262, 268; St. Louis Perpetual Ins. Co. *v.* Goodfellow, 9 Mo. 149, 154. See also Pittsburg, etc., R. Co. *v.* Clarke, 29 Pa. St. 146, 151; Grant *v.* Mechanics' Bank, 15 Serg. & R. (Pa.) 140, 143.

Matured obligation only, however, may be implied. Lum *v.* The Buckeye, 24 Miss. 564, 565; Slutts *v.* Chafee, 48 Wis. 617, 618, 4 N. W. 763; Trowbridge *v.* Sickler, 42 Wis. 417, 420.

71. Chicago, etc., R. Co. *v.* Lundstrom, 16 Nebr. 254, 257, 20 N. W. 198, 49 Am. Rep. 718.

72. Jones *v.* Buzzard, 2 Ark. 415, 447; Lenox *v.* Howland, 3 Cai. (N. Y.) 323; Worcester Dict. [*quoted* in Miller *v.* George, 30 S. C. 526, 529, 9 S. E. 659].

ment;[73] a term applied to a party when he enters into an obligation to pay another.[74] Sometimes it is equivalent to DUE,[75] *q. v.* (See DEBT; INDEBTEDNESS.)

INDEBTEDNESS.[76] The state of being indebted,[77] without regard to the ability or inability of the party to pay the same;[78] the condition of owing money; also the amount owed;[79] something due a person,[80] of which payment is liable to be exacted;[81] the state of being by voluntary obligation, express or implied, under legal liability to pay in the present or at some future time for something already received, or for something yet to be furnished or rendered.[82] It is a word of large meaning,[83] and must be construed in every case in accord with its context.[84] When used in its strict legal significance, the word applies only to a pecuniary obligation arising from a contract, expressed or implied;[85] but given its plainest and most literal signification, it includes every obligation[86] by which one person is bound to pay money, goods, or services to another.[87] As the equivalent to "obligation,"[88] the term may include county warrants and bonds;[89] or the bonds and mortgages of a corporation.[90] As applied to municipal corporations, the term means what the corporation owes,[91] irrespective of the demands it may hold

Used with the preposition "to" before the person to whom the debt is due see Jones *v.* Buzzard, 2 Ark. 415, 447; Bellezzire *v.* Camardella, 95 N. Y. App. Div. 176, 183, 88 N. Y. Suppl. 807; Sewall *v.* Lancaster Bank, 17 Serg. & R. (Pa.) 285, 286; Rogers *v.* Huntingdon Bank, 12 Serg. & R. (Pa.) 77, 78; *In re* Stockton Malleable Iron Co., 2 Ch. D. 101, 104, 45 L. J. Ch. 168.

73. Roelofson *v.* Hatch, 3 Mich. 277, 279.

"Are justly indebted" see Sword *v.* Lenawee Cir. Judge, 71 Mich. 284, 286, 38 N. W. 870.

"Became indebted" see Culbertson *v.* Fulton, 127 Ill. 30, 36, 18 N. E. 781.

74. Scott *v.* Davenport, 34 Iowa 208, 213 [*citing* Webster Dict.].

75. *In re* Stockton Malleable Iron Co., 2 Ch. D. 101, 104, 45 L. J. Ch. 168.

76. **Distinguished** from a "due" (see 14 Cyc. 1108 note 32); from "net wealth" (see Cheyenne County *v.* Bent County, 15 Colo. 320, 326, 25 Pac. 508).

77. Bouvier L. Dict. [*quoted* in Cheyenne County *v.* Bent County, 15 Colo. 320, 325, 25 Pac. 508; Latimer *v.* Veader, 20 N. Y. App. Div. 418, 425, 46 N. Y. Suppl. 823]; Webster Dict. [*quoted* in Davenport *v.* Kleinschmidt, 6 Mont. 502, 536, 13 Pac. 249; Sierra County *v.* Dona Ana County, 5 N. M. 190, 194, 21 Pac. 83]; Worcester Dict. [*quoted* in Powell *v.* Oregonian R. Co., 36 Fed. 726, 730, 13 Sawy. 535, 2 L. R. A. 270].

78. Bouvier L. Dict. [*quoted* in Cheyenne County *v.* Bent County, 15 Colo. 320, 326, 25 Pac. 508; Latimer *v.* Veader, 20 N. Y. App. Div. 418, 425, 46 N. Y. Suppl. 823].

79. Anderson L. Dict. [*quoted* in Cheyenne County *v.* Bent County, 15 Colo. 320, 326, 25 Pac. 508]. See also Matter of Rapid Transit Com'rs, 23 N. Y. App. Div. 472, 485, 49 N. Y. Suppl. 60; and cases cited *infra*, note 85.

80. See 14 Cyc. 1109 note 32.

81. Webster Dict. [*quoted* in Matter of Fay, 6 Misc. (N. Y.) 462, 466, 27 N. Y. Suppl. 910].

82. Spilman *v.* Parkersburg, 35 W. Va. 605, 615, 14 S. E. 279. See also Kahn *v.* St. Joseph Bank, 70 Mo. 262, 268, including debts not due as well as those due.

83. Bell *v.* Mendenhall, 78 Minn. 57, 63, 80 N. W. 843; Merriman *v.* Social Mfg. Co., 12 R. I. 175, 179.

84. Lamar Water, etc., Co. *v.* Lamar, 128 Mo. 188, 223, 26 S. W. 1025, 31 S. W. 756, 32 L. R. A. 157.

85. Latimer *v.* Veader, 20 N. Y. App. Div. 418, 425, 46 N. Y. Suppl. 823. See also Matter of Rapid Transit Com'rs, 23 N. Y. App. Div. 472, 485, 49 N. Y. Suppl. 60.

It is used to denote almost every kind of pecuniary obligation arising on contract (Bell *v.* Mendenhall, 78 Minn. 57, 63, 80 N. W. 843; Merriman *v.* Social Mfg. Co., 12 R. I. 175, 179), and all that is due to a man under any form of obligation or promise (Burrill L. Dict. [*quoted* in Matter of Fay, 6 Misc. (N. Y.) 462, 466, 27 N. Y. Suppl. 910]).

86. Webster Dict. [*quoted* in Swanson *v.* Ottumwa, 118 Iowa 161, 170, 91 N. W. 1048, 59 L. R. A. 620].

It is not to be construed to mean a fixed sum due, but any liability that may have been incurred, either by contract, express or implied, that renders a party a debtor, within the meaning of the law. Mattingly *v.* Wulke, 2 Ill. App. 169, 172. See also French *v.* Burlington, 42 Iowa 614, 617; Commercial Bank *v.* Weinberg, 25 N. Y. Suppl. 235, 236; Spilman *v.* Parkersburg, 35 W. Va. 605, 615, 14 S. E. 279.

87. Matter of Rapid Transit Com'rs, 23 N. Y. App. Div. 472, 485, 49 N. Y. Suppl. 60.

88. Sheehan *v.* Long Island City Treasurer, 11 Misc. (N. Y.) 487, 489, 33 N. Y. Suppl. 428. See also cases cited *supra*, note 77 *et seq.*

89. *In re* Funding of County Indebtedness, 15 Colo. 421, 427, 24 Pac. 877.

90. Rothschild *v.* Rochester, etc., R. Co., 1 Pa. Co. Ct. 620, 624.

91. Jordan *v.* Andrus, 27 Mont. 22, 26, 69 Pac. 118.

According to the context, however, it may mean an agreement of some kind by a municipal corporation to pay money when no suitable provision has been made for the

against others.[92] (Indebtedness: Allegation of in Action of Assumpsit, see ASSUMPSIT, ACTION OF. Arrest For, see ARREST; CONSTITUTIONAL LAW; EXECUTIONS. Attachment Of or For, see ATTACHMENT. Averments as to in Affidavit, see ATTACHMENT. Imprisonment For, see ARREST; CONSTITUTIONAL LAW; EXECUTIONS. Limitation of—Municipal Indebtedness, see COUNTIES; MUNICIPAL CORPORATIONS; TOWNS; State Indebtedness, see STATES. Marshaling Debts and Securities, see MARSHALING ASSETS AND SECURITIES. Mutual, see SET-OFF AND COUNTER-CLAIM. Of Decedent, see DESCENT AND DISTRIBUTION; EXECUTORS AND ADMINISTRATORS. Of Fraudulent Grantor, see FRAUDULENT CONVEYANCES. Of Testator, see WILLS. Subrogation to Rights of Creditor, see SUBROGATION. See, generally, ASSIGNMENTS FOR BENEFIT OF CREDITORS; BANKRUPTCY; CREDITORS' SUITS; DEBT, ACTION OF; FRAUDULENT CONVEYANCES; INSOLVENCY; MARSHALING ASSETS AND SECURITIES; NOVATION. See also DEBT, and Cross-References Thereunder; INDEBTED.)

INDECENCY. An act against good behavior and a just delicacy;[93] that which is unbecoming in language or manners; any action or behavior which is deemed a violation of modesty or an offense to delicacy, as rude or wanton actions, obscene language, and whatever tends to incite a blush in the spectator.[94] (See EXHIBIT; EXPOSE; INDECENT; and, generally, OBSCENITY.)

INDECENT.[95] That which is offensive to modesty and delicacy;[96] immodest,

prompt discharge of the obligation imposed by the agreement. Sackett *v.* New Albany, 88 Ind. 473, 479, 45 Am. Rep. 467 [*quoted* in Brashear *v.* Madison, 142 Ind. 685, 687, 36 N. E. 252, 42 N. E. 349, 33 L. R. A. 474; Quill *v.* Indianapolis, 124 Ind. 292, 300, 23 N. E. 788, 7 L. R. A. 681; Valparaiso *v.* Gardner, 97 Ind. 1, 49 Am. Rep. 416; Beard *v.* Hopkinsville, 95 Ky. 239, 249, 24 S. W. 872, 15 Ky. L. Rep. 756, 44 Am. St. Rep. 222, 23 L. R. A. 402; Davenport *v.* Kleinschmidt, 6 Mont. 502, 539, 13 Pac. 249]. But *compare* Los Angeles *v.* Teed, 112 Cal. 319, 327, 44 Pac. 580; Heinl *v.* Terre Haute, 161 Ind. 44, 49, 66 N. E. 450, 452; Reynolds *v.* Lyon County, 121 Iowa 733, 743, 96 N. W. 1096; Ashland *v.* Culbertson, 103 Ky. 161, 164, 44 S. W. 441, 19 Ky. L. Rep. 1812; Brooke *v.* Philadelphia, 162 Pa. St. 123, 133, 29 Atl. 387, 24 L. R. A. 781.

92. Jordan *v.* Andrus, 27 Mont. 22, 26, 69 Pac. 118.

As used in connection with other words see the following phrases: "Adjustment of indebtedness" (*In re* Sugar Notch Borough, 44 Wkly. Notes Cas. (Pa.) 473, 475); "all indebtedness" (Bell *v.* Mendenhall, 78 Minn. 57, 63, 80 N. W. 843); "all other indebtedness" (Union Cent. L. Ins. Co. *v.* Woods, 11 Ind. App. 335, 37 N. E. 180, 181, 39 N. E. 205; Louisville, etc., R. Co. *v.* Biddell, 112 Ky. 494, 497, 66 S. W. 34, 23 Ky. L. Rep. 1702; 6 Cyc. 1015 note 81); "all the indebtedness . . . now due or to grow due" (Merriman *v.* Social Mfg. Co., 12 R. I. 175, 179); "any indebtedness" (Kankakee *v.* McGrew, 178 Ill. 74, 79, 52 N. E. 893; 4 Cyc. 447 note 64); "any other cause of indebtedness whatever" (Langstaff *v.* Rock, 13 Mo. 579, 582); "bonded indebtedness" (Dawson *v.* Dawson Waterworks Co., 106 Ga. 696, 729, 32 S. E. 907; Council Bluffs *v.* Stewart, 51 Iowa 385, 395, 1 N. W. 628; French *v.* Burlington, 42 Iowa 614, 617); "floating indebtedness" (German Ins. Co. *v.* Manning, 95 Fed. 597, 610); "including existing indebtedness" (Beard *v.* Hopkinsville, 95 Ky. 239, 246, 24 S. W. 872, 15 Ky. L. Rep. 756, 44 Am. St. Rep. 222, 23 L. R. A. 402; Jordan *v.* Andrus, 27 Mont. 22, 25, 69 Pac. 118; State *v.* Helena, 24 Mont. 521, 525, 63 Pac. 99, 81 Am. St. Rep. 453, 55 L. R. A. 336; Stedman *v.* Berlin, 97 Wis. 505, 511, 73 N. W. 57); "including indebtedness" (Chicago *v.* Galpin, 183 Ill. 399, 405, 55 N. E. 731); "incur indebtedness" (McBean *v.* Fresno, 112 Cal. 159, 163, 44 Pac. 358, 53 Am. St. Rep. 191, 31 L. R. A. 794; Bannock County *v.* Bunting, 4 Ida. 156, 163, 37 Pac. 277; Valparaiso *v.* Gardner, 97 Ind. 1, 11, 49 Am. Rep. 416; State *v.* Helena, 24 Mont. 521, 525, 63 Pac. 99, 81 Am. St. Rep. 453, 55 L. R. A. 336; Hoboken Land, etc., Co. *v.* Hoboken, 43 N. J. L. 96, 100); "net indebtedness" (Mass. Rev. L. (1902) 88); "past indebtedness" (6 Cyc. 1013); "outstanding indebtedness" (Bell *v.* Mendenhall, 78 Minn. 57, 65, 80 N. W. 843).

93. Bouvier L. Dict. [*quoted* in McJunkins *v.* State, 10 Ind. 140, 144; Timmons *v.* U. S., 85 Fed. 204, 205, 30 C. C. A. 74]. See also Com. *v.* Sharpless, 2 Serg. & R. (Pa.) 91, 7 Am. Dec. 632; 14 Cyc. 683.

94. Webster Dict. [*quoted* in McJunkins *v.* State, 10 Ind. 140, 144].

95. Indecently.—The word "indecently" has no definite legal meaning, and its meaning depends upon the connection in which it is used. Reg. *v.* Webb, 2 C. & K. 933, 938, 3 Cox C. C. 183, 1 Den. C. C. 338, 13 Jur. 42, 18 L. J. M. C. 39, T. & M. 23, 61 E. C. L. 933.

"Indecently acting" see Nichols *v.* State, 103 Ga. 61, 63, 29 S. E. 431; Taffe *v.* State, 90 Ga. 459, 16 S. E. 204.

"Indecently drunk" see Alexander *v.* Card, 3 R. I. 145, 146.

96. People *v.* Muller, 96 N. Y. 408, 411, 48 Am. Rep. 635 (construing the words "obscene" and "indecent"); U. S. *v.* Brit-

impure;[97] not decent; unfit to be seen or heard;[98] the wanton and unnecessary expression or exposure, in words or pictures, of that which the common sense of decency requires should be kept private or concealed.[99] (Indecent: Assault, see Assault and Battery. Exposure, see Obscenity. Liberties, see Assault and Battery. Publication, see Obscenity; Post-Office. See also Exhibit; Expose; Indecency; Obscenity.)

INDECENT ASSAULT. See Assault and Battery.

INDECENT EXPOSURE. See Obscenity.

INDECENT LIBERTIES. See Assault and Battery.

INDECENT PUBLICATION. See Obscenity; Post-Office.

INDECOROUS. Impolite or a violation of good manners or improper breeding.[1]

INDEFINITE. Not definite; not defined; not precise; vague.[2] (Indefinite: Charity, see Charities.[3] Failure of Issue, see Descent and Distribution; Wills. Imprisonment, see Criminal Law. Punishment, see Criminal Law.)

INDEFINITUM ÆQUIPOLLET UNIVERSALI. A maxim meaning "The undefined is equivalent to the whole."[4]

INDEFINITUM SUPPLET LOCUM UNIVERSALIS. A maxim meaning "The undefined supplies the place of the whole."[5]

INDEMNIFY. To save harmless;[6] to secure against loss,[7] damage, injury, or penalty, or against future loss or damage;[8] to compensate for loss or injury;[9] to make good;[10] to make up for that which is past;[11] to reimburse;[12] to remunerate;[13] a word which may according to the context be equivalent to Indemnity,[14] *q. v.* (See, generally, Indemnity; Principal and Surety.)

ton, 17 Fed. 731, 733. See also Dunlop *v.* U. S., 165 U. S. 486, 500, 17 S. Ct. 375, 41 L. ed. 799.

"For an indecent purpose" see Smith *v.* State, 110 Ga. 292, 35 S. E. 166, construing Ga. Pen. Code, § 725.

97. U. S. *v.* Smith, 11 Fed. 663, 665.

98. U. S. *v.* Bebout, 28 Fed. 522, 524.

99. U. S. *v.* Bennett, 24 Fed. Cas. No. 14,571, 16 Blatchf. 338. *Compare* U. S. *v.* Loftis, 12 Fed. 671, 672, 8 Sawy. 194 [*citing* Worcester Dict.], where it is said: "The term is said to signify more than indelicate and less than immodest — to mean something unfit for the eye or ear."

1. Louisville, etc., R. Co. *v.* Ballard, 85 Ky. 307, 312, 3 S. W. 530, 9 Ky. L. Rep. 7, 7 Am. St. Rep. 600.

2. Century Dict.

3. Indefinite charity see opinion of Frederick S. Wait, Referee, in Matter of Openhym, (July 25, 1904) 31 N. Y. L. J. 1379.

4. Bouvier L. Dict.

Applied in Gamage's Case, 1 Ventr. 368.

5. Bouvier L. Dict.

6. Brentnal *v.* Holmes, 1 Root (Conn.) 291, 293, 1 Am. Dec. 44; Century Dict. [*quoted* in Cousins *v.* Paxton, etc., Co., 122 Iowa 465, 468, 98 N. W. 277]; Webster Dict. [*quoted* in Weller *v.* Eames, 15 Minn. 461, 2 Am. Rep. 150].

"Defend and keep harmless and indemnify" see Rockfeller *v.* Donnelly, 8 Cow. (N. Y.) 623, 653.

7. Century Dict. [*quoted* in Cousins *v.* Paxton, etc., Co., 122 Iowa 465, 468, 98 N. W. 277.

8. Worcester Dict. [*quoted* in Weller *v.* Eames, 15 Minn. 461, 2 Am. Rep. 150].

9. Worcester Dict. [*quoted* in Weller *v.* Eames, 15 Minn. 461, 2 Am. Rep. 150].

10. Century Dict. [*quoted* in Cousins *v.* Paxton, etc., Co., 122 Iowa 465, 468, 98 N. W. 277]; Worcester Dict. [*quoted* in Weller *v.* Eames, 15 Minn. 461, 2 Am. Rep. 150]. See also Frye *v.* Bath Gas, etc., Co., 97 Me. 241, 244, 54 Atl. 395, 49 Am. St. Rep. 500, 59 L. R. A. 444.

11. Webster Dict. [*quoted* in Weller *v.* Eames, 15 Minn. 461, 2 Am. Rep. 150].

12. Century Dict. [*quoted* in Cousins *v.* Paxton, etc., Co., 122 Iowa 465, 468, 98 N. W. 277]; Worcester Dict. [*quoted* in Weller *v.* Eames, 15 Minn. 461, 2 Am. Rep. 150]. See also Frye *v.* Bath Gas, etc., Co., 97 Me. 241, 244, 54 Atl. 395, 94 Am. St. Rep. 500, 59 L. R. A. 444.

13. Worcester Dict. [*quoted* in Weller *v.* Eames, 15 Minn. 461, 2 Am. Rep. 150]. See Cutler *v.* Southern, 1 Saund. 116 note 1.

14. Peck *v.* Wakely, 2 McCord (S. C.) 279, 284.

INDEMNITY

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* Author of a treatise on "The Law of Suretyship."

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I. DEFINITION AND NATURE.

A. Definition. In a broad and general sense indemnity is that which is given to a person to prevent his suffering damage.[1] More specifically it may be defined as the obligation or duty resting on one person to make good any loss or damage another has incurred while acting at his request or for his benefit.[2]

1. Bouvier L. Dict. See also Peck *v.* Wakely, 2 McCord (S. C.) 279, 284, where the following definition is given: "To make sure, to protect from injury, &c."

2. Vandiver *v.* Pollak, 107 Ala. 547, 19 So. 180, 54 Am. St. Rep. 118.

A contract of indemnity is given to a person against his sustaining loss or damage, and cannot properly be called one that insures the thing, it not being possible so to do. Cummings *v.* Cheshire County Mut. F. Ins. Co., 55 N. H. 457.

Indemnity distinguished from loss.— In Rice *v.* National Credit Ins. Co., 164 Mass. 285, 41 N. E. 276, it was held that the word "loss" or "losses" occurring in a bond to indemnify a person against losses in his business was distinguishable from the word "indemnity" also used in the bond in that the former meant the loss sustained by the

B. Of Contractual Origin. Indemnity springs from contract express or implied.[3]

C. Distinguished From Guaranty and Suretyship. Contracts of indemnity are distinguished from those of guaranty and suretyship in that in indemnity contracts the engagement is to make good and save another from loss upon some obligation which he has incurred or is about to incur to a third person, and is not as in guaranty and suretyship a promise to one to whom another is answerable.[4]

D. Distinguished From Contract to Pay. A clear distinction is made also between bonds or contracts conditioned to pay a certain sum of money or to do a certain act and bonds or contracts conditioned to indemnify. A cause of action accrues on a bond or contract to do a certain act as soon as there is a default in performance, whether the obligee or promisee has suffered damage or not, whereas in the case of a bond or contract conditioned to indemnify damage must be shown before the party indemnified is entitled to recover.[5]

E. Original and Not a Collateral Undertaking. The promise in an indemnity contract is an original and not a collateral undertaking.[6]

II. EXPRESS CONTRACTS.

A. Requisites and Validity — 1. FORM OF CONTRACT — a. In General. If the intention to indemnify is reasonably clear it is not necessary that the contract should be drawn in any particular form of words or be technically expressed.[7]

indemnitee in his dealings with customers while the latter referred to the amount for which the indemnitor might be liable under the bond.

Distinguished from compensation see COMPENSATION, 8 Cyc. 402 note 72.

An indemnitor is one who has promised to indemnify another person against loss or liability. Century Dict.

An indemnitee is a person to whom indemnity or a promise to indemnify is given. Century Dict.

3. Vandiver *v.* Pollak, 107 Ala. 547, 19 So. 180, 54 Am. St. Rep. 118. Accordingly where a party to a contract is aware of the injury that may result to him from a compliance with his part of the contract, and yet voluntarily enters into it, he cannot afterward require an indemnifying bond, and if a bond was given at the time of the contract he can require no other even if its amount is insufficient to protect him against loss. Christian *v.* Monette, 12 La. Ann. 635.

Contract to give indemnifying bond see Hall *v.* Stewart, 58 Iowa 681, 12 N. W. 741; Union Pac. R. Co. *v.* Schiff, 74 Fed. 674.

Distinguished from contribution.— Indemnity is distinguished from contribution in that the latter is not contractual but is an equity founded in acknowledged principles of natural justice. Vandiver *v.* Pollak, 107 Ala. 547, 19 So. 180, 54 Am. St. Rep. 118.

4. See GUARANTY, 20 Cyc. 1402 note 31 *et seq.*; PRINCIPAL AND SURETY.

5. Northern Assur. Co. *v.* Borgelt, 67 Nebr. 282, 93 N. W. 226. To the same effect see Henderson-Achert Lith. Co. *v.* John Shillito Co., 64 Ohio St. 236, 60 N. E. 295, 83 Am. St. Rep. 745; Wicker *v.* Hoppock, 6 Wall. (U. S.) 94, 18 L. ed. 752.

Distinguished from promissory note.— In Jenckes *v.* Rice, 119 Iowa 451, 93 N. W. 384, it was held that an instrument which promises to pay a certain sum of money but contains an express condition that it shall be void and non-payable upon the happening of a certain event, and in addition thereto states that it was given to indemnify the promisee against loss, is not a promissory note, but a contract of indemnity, although in a clause of the contract the instrument is spoken of as a note; a promissory note being defined as an unconditional written promise to pay absolutely and at all events a sum certain in money.

6. Anderson *v.* Spence, 72 Ind. 315, 37 Am. Rep. 162; Spencer *v.* McLean, 20 Ind. App. 626, 50 N. E. 769, 67 Am. St. Rep. 271 (holding that an undertaking to pay the obligees upon a fixed basis a certain share of any indebtedness they might have to pay as sureties was an original promise and not a collateral undertaking of suretyship); Manary *v.* Runyon, 43 Oreg. 495, 73 Pac. 1028 (holding that where the president of a corporation orally agreed to reimburse plaintiff for expenses and attorney's fees incurred in certain negotiations between plaintiff and the corporation if a contract was not consummated such promise to reimburse was original and not a promise to pay the debt of the corporation). See also GUARANTY, 20 Cyc. 1402 note 32 *et seq.*

7. Carr *v.* Wyley, 23 Ala. 821 (contract held not void for uncertainty); Brown *v.* Cuozzo, 85 N. Y. Suppl. 759; Brewster *v.* Countryman, 12 Wend. (N. Y.) 446 (holding that where a vendor of property refused to give a written agreement to indemnify a purchaser against adverse claims but said he would "see him out with it," such words constitute an agreement to indemnify).

Contracts construed to be contracts of indemnity see Townsend *v.* Atwater, 5 Day

b. Parol Contracts. As a general rule a contract of indemnity is not within the statute of frauds and need not be in writing.[8]

2. Offer and Acceptance. As in the case of other contracts there must be an offer and acceptance to constitute a binding contract of indemnity.[9] The acceptance will be good and the contract binding even though the indemnitee had knowledge of some irregularities on the part of the third person against whose acts the indemnity was given, in the absence of any showing of fraudulent concealment of the facts.[10]

3. Consideration — a. In General. The general rule requiring a consideration for the support of a contract[11] is applicable to contracts of indemnity.[12] But as in the case of contracts generally, while the consideration may consist of a benefit to promisor or indemnitor,[13] it is not necessary to the binding effect of the promise

(Conn.) 298; Palmyra *v.* Nichols, 91 Me. 17, 39 Atl. 338; Garner *v.* Hudgin, 46 Mo. 399, 2 Am. Rep. 520; Presbury *v.* Fisher, 18 Mo. 50; Maloney *v.* Nelson, 144 N. Y. 182, 39 N. E. 82; Douglass *v.* Clark, 14 Johns. (N. Y.) 177.

Contracts held not to be indemnity contracts see Hawk *v.* Barton, 130 Cal. 654, 63 Pac. 64; Morris *v.* Veach, 111 Ga. 435, 36 S. E. 753; Kirk *v.* Ft. Wayne Gaslight Co., 13 Ind. 56; Salmon Falls Bank *v.* Leyser, 116 Mo. 51, 22 S. W. 504; Kohler *v.* Matlage, 72 N. Y. 259; Ingram *v.* Wilson, 11 Rich. (S. C.) 461; Crofoot *v.* Moore, 4 Vt. 204; Smith *v.* Potter, 3 Wis. 432.

A contract to furnish a bond of indemnity will be treated as a contract of indemnity if the bond is not furnished. Showers *v.* Wadsworth, 81 Cal. 270, 22 Pac. 663.

A contract denominated a note by the parties will be construed to be a contract of indemnity if the entire instrument shows that intent. Jenckes *v.* Rice, 119 Iowa 451, 93 N. W. 384.

8. See Frauds, Statute of, 20 Cyc. 176 note 92 *et seq.*

9. *Kentucky.*— Lucas *v.* Chamberlain, 8 B. Mon. 276, holding that a parol promise to A to indemnify him and B (who is absent) if they will do a certain act is in legal effect a promise to both and if acted upon by A and B will give a right of action to both.

Massachusetts.— Bird *v.* Washburn, 10 Pick. 223.

New York.— Bernard-Beere *v.* Mayer, 66 N. Y. Suppl. 495.

Ohio.— Wise *v.* Miller, 45 Ohio St. 388, 14 N. E. 218.

Oregon.— Manary *v.* Runyon, 43 Oreg. 495, 73 Pac. 1028.

Pennsylvania.— Emerson *v.* Graff, 29 Pa. St. 358; Keyser *v.* Keen, 17 Pa. St. 327; Bauer *v.* Roth, 4 Rawle 83.

Tennessee.— Marshall *v.* Hill, 6 Humphr. 234.

See 27 Cent. Dig. tit. "Indemnity," § 5.

Where a person is at liberty to require cash or securities as indemnity and he voluntarily chooses securities he is bound, although the securities prove of less value than he had expected. Atlantic Trust Co. *v.* Consolidated Electric Storage Co., 49 N. J. Eq. 402, 23 Atl. 934.

Offer and acceptance in contracts generally see Contracts, 9 Cyc. 247 *et seq.*

10. Pardee *v.* Markle, 111 Pa. St. 548, 5 Atl. 36, 56 Am. Rep. 299. See also Marshall *v.* Hill, 6 Humphr. (Tenn.) 234.

Knowledge of facts on part of indemnitor see Hart *v.* Messenger, 46 N. Y. 253.

11. See Contracts, 9 Cyc. 309 *et seq.*

12. Israel *v.* Reynolds, 11 Ill. 218.

The acknowledgment "value received" in a written contract of indemnity imports a consideration. Marshall *v.* Cobleigh, 18 N. H. 485; Lapham *v.* Barrett, 1 Vt. 247.

Indemnity bond executed in pursuance of statute.— In Sterner *v.* Palmer, 34 Pa. St. 131, it was held that where an act provided for the removal of the county seat of justice and that the new county building should be erected by a subscription without taxation on the citizens, a bond executed to indemnify the taxable citizens against the expense to be incurred in the erection of the building was a valid legal obligation, and that since it had a positive law to give it validity the court would not look for a consideration to support it.

Bond to indemnify sureties on executor's bond.— There is a sufficient consideration for an indemnity bond to save harmless the sureties on an executor's bond, in the fact that it is given in a legal proceeding in pursuance of an authorized order of a competent court, and is the means of continuing the executor in charge of the trust. Buffington *v.* Bronson, 61 Ohio St. 231, 56 N. E. 762.

Promise to indemnify as consideration see Contracts, 9 Cyc. 315 note 23.

Indemnity as consideration for commercial paper see Commercial Paper, 7 Cyc. 705 note 77 *et seq.*

13. See cases cited *infra*, this note.

Transfer of property.— South Side Planing Mill Assoc. *v.* Cutler, etc., Lumber Co., 64 Ind. 560; Shattuck *v.* Adams, 136 Mass. 34.

Release of property from foreclosure proceedings.— In Cliff *v.* Dawkins, 138 Ala. 232, 35 So. 41, it was held that the release by plaintiffs of certain property on which they had a mortgage, and which they had seized under process, was a valuable consideration sufficient to support a promise to hold plaintiffs harmless in the sale of the remaining property held by them under their mortgage.

that the promisor should derive any advantage from it, it being sufficient if the promisee has encountered trouble, assumed a burden, or sustained a loss.[14] Incurring liability at the request of another is a sufficient consideration for a promise of indemnity.[15] Moreover a promise by the indemnitee to forego steps for his own protection or to exercise a forbearance which may be of benefit to the indemnitor may constitute a sufficient consideration as well as a promise to do some positive act.[16]

14. White *v.* Baxter, 71 N. Y. 254; Richardson *v.* Gosser, 26 Pa. St. 335, holding that when a vendor who conveys to his vendee by deed of general warranty promises to indemnify him for any improvements he may make upon the premises in the event of the title proving worthless, such promise is not *nudum pactum* but will support an action of assumpsit.

15. *Alabama.*— Bestor *v.* Roberts, 58 Ala. 331.

Iowa.—Seeberger *v.* Wyman, 108 Iowa 527, 79 N. W. 290; Mills *v.* Brown, 11 Iowa 314.

Kentucky.— Lucas *v.* Chamberlain, 8 B. Mon. 276; McLaughlin *v.* Board of Education, 83 S. W. 568, 26 Ky. L. Rep. 1126.

Louisiana.—Conery *v.* Cannon, 26 La. Ann. 123; Lartigue *v.* Baldwin, 5 Mart. 193.

New Jersey.— Warren *v.* Abbett, 65 N. J. L. 99, 46 Atl. 575.

New York.— White *v.* Baxter, 71 N. Y. 254 (promise of indemnity in consideration of refusal of promisee to furnish to third person margin in stock transaction); James *v.* Libby, 44 Misc. 210, 88 N. Y. Suppl. 812 (holding that where the buyer and seller of sausages under a written contract on tendering delivery thereof differed as to the quality of the sausages, and especially as to whether they were too fat to satisfy a particular customer, and thereupon the seller wrote out and handed to the buyer a contract of indemnity for any claim that should be made for too much fat by the customer, there was a sufficient consideration for the contract, in that the buyer waived his objections and accepted the goods); Allaire *v.* Ouland, 2 Johns. Cas. 52.

United States.— Diamond Match Co. *v.* U. S., 31 Fed. 271, 24 Blatchf. 442.

See 27 Cent. Dig. tit. "Indemnity," § 4.

Purchase of land on which judgment may operate as lien.— Where a person promised another that if the latter would purchase a parcel of land the former would save him harmless from a judgment held by a third person in case it was declared a lien on the land, it was a sufficient consideration for the contract. Patton *v.* Mills, 21 Kan. 163.

Indemnity bond given to person in official position.— An indemnity bond given to obtain an accommodation which a commissioner might properly extend but was not legally required to give is not void upon the ground that it was executed *colore officii* or for want of consideration. Diamond Match Co. *v.* U. S., 31 Fed. 271, 24 Blatchf. 442.

Incurring costs of suit.— The rule of the text has been applied where the indemnitee agrees to incur the costs and expenses of a suit (Brooks *v.* Hildreth, 22 Ala. 469; Albro *v.* Merritt, 97 Mass. 517; Wells *v.* Mann, 45 N. Y. 327, 6 Am. Rep. 93); as for instance, where he grants permission to the indemnitor to prosecute or defend a suit in the name of the indemnitee (Inhabitants of Industry *v.* Starks, 65 Me. 167; Goodspeed *v.* Fuller, 46 Me. 141, 71 Am. Dec. 572; Knight *v.* Sawin, 6 Me. 361).

Agreeing to become bail.— Marshall *v.* Cobleigh, 18 N. H. 485. See also Bestor *v.* Roberts, 58 Ala. 331.

Indorsing notes.—Allen *v.* Rundle, 45 Conn. 528; Mills *v.* Brown, 11 Iowa 314; Williams *v.* Hagar, 50 Me. 9; Kent *v.* Lyles, 7 Gill & J. (Md.) 73; Gardner *v.* Webber, 17 Pick. (Mass.) 407; Kempton *v.* Coffin, 12 Pick. (Mass.) 129.

Renewal of note by maker.— Turner *v.* Crigler, 8 Mo. 16.

Incurring liability as surety.— Seeberger *v.* Wyman, 108 Iowa 527, 79 N. W. 290; Lucy *v.* Price, 39 Iowa 26 (suretyship on bond for costs); Barker *v.* Boyd, 71 S. W. 528, 24 Ky. L. Rep. 1389 (suretyship on guardian's bond); Esch *v.* White, 76 Minn. 220, 78 N. W. 1114 (agreement by attorney to protect sureties on appeal-bond). And indemnity taken by one surety inures to the benefit of all jointly bound. Barker *v.* Boyd, 71 S. W. 528, 24 Ky. L. Rep. 1389. But in Gorman *v.* Williams, 117 Iowa 560, 91 N. W. 819, it was held that where a liquor bond was void in its inception because not required by law, a promise of indemnity to a surety thereon is not enforceable.

Purchase of property subject to mechanic's lien.— In Frank *v.* Jenkins, 11 Wash. 611, 40 Pac. 220, it was held that where a vendor of real estate gave a deed with covenants of warranty, a bond given by him to protect the vendee against a mechanic's lien on the property is based on a valid consideration.

Removal of personalty subject to adverse claim.— In Avery *v.* Halsey, 14 Pick. (Mass.) 174, it was held that where one employed to remove personal property claimed by his employer, after learning of an adverse claim, proceeded with the work upon an express promise of indemnity made by one who claimed no interest in the property, the danger thereby incurred was a good consideration for the promise of indemnity.

16. White *v.* Baxter, 71 N. Y. 254; Manary *v.* Runyon, 43 Oreg. 495, 73 Pac. 1028 (promise not to revoke offer to purchase); Oliver *v.* Markes, 1 Head (Tenn.) 536 (promise of indorser of note not to confess judgment and take judgment over against maker).

b. Past Consideration. The general rule that a past consideration, if it imposed no legal obligation at the time it was furnished, will support no promise whatever[17] has been held applicable to contracts of indemnity.[18] On the other hand there are authorities to the effect that a moral obligation founded on previous benefits received by the indemnitor at the hands of the indemnitee will support a contract of indemnity.[19] A formal contract of indemnity will be valid where it is executed in pursuance of a prior understanding at the time the consideration was furnished.[20]

4. Legality of Contract.[21] A contract of indemnity, the manifest object or tendency of which is the compounding of an indictable offense,[22] or the interference with the due course of public justice,[23] is illegal and void. So, as a general rule, a contract to indemnify against liability for publishing a libel,[24] for committing a wilful and malicious trespass,[25] or for illegal acts generally is illegal and void.[26] But in construing a contract of indemnity no presumption will be

17. See Contracts, 9 Cyc. 358 note 90.

18. Bulkley *v.* Landon, 2 Conn. 404 (where the expression "in consideration of your having indorsed" was held to import a past consideration); Jones *v.* Shorter, 1 Ga. 294, 44 Am. Dec. 649 (holding that a promise upon no new consideration to execute a bond of indemnity to a cosurety against loss is void if made after the liability of all the parties to the instrument has been incurred); Peck *v.* Harris, 57 Mo. App. 467 (holding that where land had been conveyed by warranty deed, the purchase of the land did not constitute a consideration for an indemnity bond subsequently given to the grantee to protect him from an encumbrance discovered after the conveyance); Coffin *v.* Lockhart, 71 Hun (N. Y.) 262, 24 N. Y. Suppl. 1025. See also McMillan *v.* Frank, 30 Mont. 61, 75 Pac. 685; Rix *v.* Adams, 9 Vt. 233, 31 Am. Dec. 619. *Compare* Stocking *v.* Sage, 1 Conn. 519.

Recital held no evidence of a past consideration.— In Mulford *v.* Estudillo, 17 Cal. 618, it was held that the mere fact that a bond recited that an agreement had been made does not show that the bond was induced by a past consideration.

Past and continuing consideration distinguished.— Where, eight days after the execution of an administration bond, defendant wrote to a surety on the bond agreeing to indemnify him against loss or injury in consequence of his having become surety, it was held that the consideration was a continuing one and sufficient to sustain the contract of indemnity. Carroll *v.* Nixon, 4 Watts & S. (Pa.) 517. See also Esch *v.* White, 76 Minn. 220, 78 N. W. 1114, 82 Minn. 462, 85 N. W. 238, 718; Gamble *v.* Cuneo, 21 N. Y. App. Div. 413, 47 N. Y. Suppl. 548 [*affirmed* in 162 N. Y. 634, 57 N. E. 1110]; Carman *v.* Noble, 9 Pa. St. 366.

19. Doty *v.* Wilson, 14 Johns. (N. Y.) 378; Suffield *v.* Bruce, 2 Stark. 175, 3 E. C. L. 365, 19 Rev. Rep. 697. See also Stocking *v.* Sage, 1 Conn. 519.

20. Grim *v.* Semple, 39 Iowa 570, holding that a bond to indemnify a surety upon a bond for costs was sustained by a sufficient consideration, although not executed until after the bond for costs, where it appeared that the latter was signed under a promise that the former should be given.

Burden of proof as to prior understanding. — Where a note was signed by a surety on March 29, and a mortgage to indemnify him was made by the principal debtor and wife on April 1, following, it was held that the courts will not presume that there was no consideration for the mortgage and that the execution of the mortgage was not agreed upon at the time the note was signed. Forbes *v.* McCoy, 15 Nebr. 632, 20 N. W. 17.

21. **Illegal contracts** generally see Contracts, 9 Cyc. 465 *et seq.*

22. Thompson *v.* Whitman, 49 N. C. 47.

23. Hinds *v.* Chamberlin, 6 N. H. 225 (contract to indemnify against a criminal prosecution); Bell *v.* Riddell, 2 Ont. 25.

Agreements to indemnify bail see Mayne *v.* Fidelity, etc., Co., 8 Pa. Dist. 711. And see Contracts, 9 Cyc. 504 note 34.

Giving indemnity against consequences of contempt as constituting contempt see Contempt, 9 Cyc. 15 note 52.

24. See Contracts, 9 Cyc. 467 note 45.

25. Coventry *v.* Barton, 17 Johns. (N. Y.) 142, 8 Am. Dec. 376; Pierson *v.* Thompson, 1 Edw. (N. Y.) 212. See also Contracts, 9 Cyc. 467 note 46.

Effect of absence of intention to commit trespass see Moore *v.* Appleton, 26 Ala. 633; Nelson *v.* Cook, 17 Ill. 443; Jacobs *v.* Pollard, 10 Cush. (Mass.) 287, 57 Am. Dec. 105; Coventry *v.* Barton, 17 Johns. (N. Y.) 142, 8 Am. Dec. 376. And see Contracts, 9 Cyc. 467 note 50.

26. Moss *v.* Cohen, 15 Misc. (N. Y.) 108, 36 N. Y. Suppl. 265; Newburgh *v.* Galatian, 4 Cow. (N. Y.) 340; Pierson *v.* Thompson, 1 Edw. (N. Y.) 212; Hayden *v.* Davis, 2 Fed. Cas. No. 6,259, 3 McLean 276. See also Contracts, 9 Cyc. 467 note 47.

Effect of absence of intention to commit illegal act see Contracts, 9 Cyc. 467 note 50.

Acts not illegal see Contracts, 9 Cyc. 504 note 35.

Indemnity against illegal acts already done see Contracts, 9 Cyc. 467 note 47.

Indemnity against breach of official duty see Collier *v.* Windham, 27 Ala. 291, 62 Am. Dec. 767; Prewitt *v.* Garrett, 6 Ala. 128, 41 Am. Dec. 40; Irwin *v.* Mariposa, 22

indulged that a contract contrary to law and public policy was intended.[27] If the illegal act is not the consideration of the contract and is entirely disconnected from it, the contract is valid, although the occasion for making it arose out of the existence of the illegal act.[28] It has been held that the legality of a contract of indemnity which is dependent upon the legality of a transaction in another state to which it relates is to be determined by the law of the latter state.[29]

B. Construction and Operation[30] — **1. In General.** In construing contracts of indemnity the ordinary rules of construction employed in the interpretation of contracts generally are applicable.[31] Indemnity contracts like other

U. C. C. P. 367. And see CONTRACTS, 9 Cyc. 503 note 33.

Where a statute forbids a director of a bank to sign as a surety the bond of its cashier, his obligation to indemnify others against loss to induce them to become sureties is void. Jose *v.* Hewett, 50 Me. 248.

A contract to indemnify common carriers of passengers against loss occurring from injuries to passengers is not invalid as against public policy because it covers losses resulting from its negligence or the negligence of its servants. Trenton Pass. R. Co. *v.* Guarantors Indemnity Liability Co., 60 N. J. L. 246, 37 Atl. 609, 44 L. R. A. 213. To same effect see Kansas City, etc., R. Co. *v.* Southern Railway News Co., 151 Mo. 373, 52 S. W. 205, 74 Am. St. Rep. 545, 45 L. R. A. 380; Seaboard Air Line R. Co. *v.* Main, 132 N. C. 445, 43 S. E. 930. See also CONTRACTS, 9 Cyc. 545 note 45.

Invalidity of agreement of attorney to indemnify client see ATTORNEY AND CLIENT, 4 Cyc. 962 note 84.

27. Babcock *v.* Terry, 97 Mass. 482, holding that an agreement of the owners with the master of a ship to "pay all legal expenses which may arise from his chastisement of the crew" was to be construed as a contract to compensate the master for legal expenses which he might incur in groundless suits and prosecutions against him. See also Irwin *v.* Mariposa, 22 U. C. C. P. 367.

28. Armstrong *v.* Toler, 11 Wheat. (U. S.) 258, 6 L. ed. 468 [*distinguished* in Bierbauer *v.* Wirth, 5 Fed. 336, 10 Biss. 60].

29. Hayden *v.* Davis, 11 Fed. Cas. No. 6,259, 3 McLean 276.

30. Construction of contracts generally see CONTRACTS, 9 Cyc. 577 *et seq.*

31. Gamble *v.* Cuneo, 21 N. Y. App. Div. 413, 47 N. Y. Suppl. 548 [*affirmed* in 162 N. Y. 634, 57 N. E. 1110], where it was said that the rule that a contract of suretyship or indemnity is *strictissimi juris* and is not to be extended beyond the express terms in which it is expressed is not a rule of construction but a rule of application of the contract after the construction of it has been ascertained.

Liabilities within scope of indemnification see Zeigler *v.* David, 23 Ala. 127; Ætna Nat. Bank *v.* Hollister, 55 Conn. 188, 10 Atl. 550; Heaton *v.* Ainley, 108 Iowa 112, 78 N. W. 798; Tama City First Nat. Bank *v.* Schlichting, 40 Iowa 51; Turner *v.* Gill, 105 Ky. 414, 49 S. W. 311, 20 Ky. L. Rep. 1253; Curtis *v.* Banker, 136 Mass. 355; Colby Wringer Co. *v.* Coon, 116 Mich. 208, 74 N. W. 519; Hart *v.* Messenger, 46 N. Y. 253; Grant *v.* Lawrence, 79 Hun (N. Y.) 565, 29 N. Y. Suppl. 901; Ripley *v.* Larmouth, 56 Barb. (N. Y.) 21; Stone *v.* Hooker, 9 Cow. (N. Y.) 154 (holding that an agreement to indemnify against an act which amounts to a trespass operates as an indemnity to the promisee against the acts of all persons whom he may necessarily employ in performing the act and will cover damages obtained against them which the promisee is obliged to pay); Packard *v.* Hill, 7 Cow. (N. Y.) 434 [*affirmed* in 5 Wend. 375] (holding that an agreement to indemnify against lawsuits brought or to be brought includes an arbitration pending at the time of the agreement); Buffington *v.* Bronson, 61 Ohio St. 231, 56 N. E. 762; Gadsden *v.* Gasque, 2 Strobh. (S. C.) 324; Lamb *v.* Harrison, 2 Leigh (Va.) 525; Taylor *v.* North, 79 Wis. 86, 4 N. W. 126; French *v.* Langdon, 76 Wis. 29, 44 N. W. 111; McConihe *v.* McClurg, 18 Wis. 637; Baird *v.* U. S., 5 Ct. Cl. 348. See 27 Cent. Dig. tit. "Indemnity," §§ 10, 11.

Liabilities not within scope of indemnification see Ridgell *v.* Dale, 16 Ala. 36; Hart *v.* Bull, Kirby (Conn.) 396; Hicks *v.* Zion, 58 Ind. 548; Warrum *v.* Derry, 14 Ind. App. 442, 42 N. E. 1123; Gifford *v.* Mohr, 47 Iowa 279; Williams *v.* Hagar, 50 Me. 9; Babcock *v.* Terry, 97 Mass. 482; Trask *v.* Mills, 7 Cush. (Mass.) 552; Willoughby *v.* Middlesex Co., 8 Metc. (Mass.) 296; Chapin *v.* Lapham, 20 Pick. (Mass.) 467; Hall *v.* Chitwood, 106 Mo. App. 568, 81 S. W. 208; Barry *v.* Larabie, 7 Mont. 179, 14 Pac. 699; Wain *v.* Cuthbert, 54 N. J. L. 1, 22 Atl. 1007; Thompson *v.* Williams, Tapp. (Ohio) 2; Oregon R., etc., Co. *v.* Swinburne, 26 Oreg. 262, 37 Pac. 1030; Pierson *v.* Catlin, 18 Vt. 77; Marshall *v.* Vicksburg, 15 Wall. (U. S.) 146, 21 L. ed. 121; Wright *v.* Benson, 6 U. C. Q. B. 131. See 27 Cent. Dig. tit. "Indemnity," §§ 10, 11.

Partnership liabilities covered by contract see Haskell *v.* Moore, 29 Cal. 437; Wood *v.* Lindley, 12 Ind. App. 258, 40 N. E. 283; Bunton *v.* Dunn, 54 Me. 152; Jepson *v.* Hall, 24 Me. 422; Shea *v.* McCauliff, 186 Mass. 569, 72 N. E. 69; Nichols *v.* Prince, 90 Mass. 404; Newburgh Nat. Bank *v.* Bigler, 83 N. Y. 51 [*affirming* 18 Hun 400]; Hodges *v.* Strong, 10 Vt. 247. See 27 Cent. Dig. tit. "Indemnity," § 12.

contracts are to be so expounded as to effectuate the intention of the parties.[32] Thus in ascertaining the intention of the parties, the court must take into consideration not only the language of the contract but the situation of the parties and the circumstances surrounding them at the time the contract was made.[33] Where a doubt arises from any ambiguity or obscurity in the language the court will incline against the party whose words are the matter to be construed.[34] So in determining the meaning of a provision in a contract, the contract must be read in its entirety.[35] The extent of the condition of an indemnity bond may be restrained by the recitals, although the words of the condition import a larger liability than the recitals contemplate.[36] Contracts will not be construed to indemnify a person against his own negligence unless such intention is expressed in unequivocal terms.[37] So no presumption will be indulged that the parties intended to make a contract contrary to law and public policy.[38]

2. Persons For and Against Whom Contract Available. The indemnitee alone, or someone in his right, is entitled to avail himself of the benefit of the contract of indemnity.[39] Thus when several persons are liable for the same debt and one of them covenants that he will indemnify another, the other obligors not parties to the indemnity contract cannot claim any advantage from it.[40] Two or more persons may bind themselves as indemnitors either severally[41] or jointly.[42]

Partnership liabilities not covered by contract see Holmes *v.* Hubbard, 60 N. Y. 183; Lothrop *v.* Blake, 3 Pa. St. 483; Case *v.* Cushman, 3 Watts & S. (Pa.) 544, 39 Am. Dec. 47.

Indemnity against liability of individual not extending to firm indebtedness.— In Donley *v.* Liberty Imp. Bank, 40 Ohio St. 47, it was held that a bond to save harmless "from all loss, damage and expense, by reason of said or any indebtedness incurred by D" does not extend to an indebtedness by a firm of which D is a member. But see Quickel *v.* Henderson, 59 N. C. 286.

Extension of indemnity for indorsement to subsequent renewals.— A contract conditioned to indemnify an indorser of a note from any failure to pay it and against any liability that may fall on him in consequence of his indorsement has been held to extend to a subsequent note given and indorsed by the same parties in renewal of the first note. Sutton *v.* Mulford, 2 Harr. (Del.) 72. See also Boswell *v.* Goodwin, 31 Conn. 74, 81 Am. Dec. 169; Pond *v.* Clarke, 14 Conn. 334. But a bond of indemnity given to an accommodation indorser, conditioned upon the payment of certain notes or a single renewal of them, has been held not to cover second renewals. Moorehead *v.* Duncan, 82 Pa. St. 488.

32. Luddington *v.* Pulver, 6 Wend. (N. Y.) 404.

33. Mitchell *v.* Southern R. Co., 74 S. W. 216, 24 Ky. L. Rep. 2388; Northern Assur. Co. *v.* Borgelt, 67 Nebr. 282, 93 N. W. 226; Gamble *v.* Cuneo, 21 N. Y. App. Div. 413, 47 N. Y. Suppl. 548 [*affirmed* in 162 N. Y. 634, 57 N. E. 1110].

34. Gamble *v.* Cuneo, 21 N. Y. App. Div. 413, 47 N. Y. Suppl. 548; Luddington *v.* Pulver, 6 Wend. (N. Y.) 404.

35. Mitchell *v.* Southern R. Co., 74 S. W. 216, 24 Ky. L. Rep. 2388; Northern Ins. Co. *v.* Borgett, 67 Nebr. 282, 93 N. W. 226.

36. National Mechanics' Banking Assoc. *v.* Conkling, 90 N. Y. 116, 43 Am. Rep. 146; New York *v.* Sexton, 96 N. Y. App. Div. 184, 89 N. Y. Suppl. 190; London Assur. Corp. *v.* Bold, 6 Q. B. 514, 8 Jur. 1118, 14 L. J. Q. B. 50, 51 E. C. L. 514; Hassell *v.* Long, 2 M. & S. 363; Pearsall *v.* Summersett, 4 Taunt. 593. *Compare* Parker *v.* Read, 9 N. H. 121.

37. Indianapolis, etc., R. Co. *v.* Brownenburg, 32 Ind. 199; Mitchell *v.* Southern R. Co., 74 S. W. 216, 24 Ky. L. Rep. 2388.

38. Babcock *v.* Terry, 97 Mass. 482.

39. *Illinois.*—Atchison, etc., R. Co. *v.* Lenz, 35 Ill. App. 330.

Maryland.— Wheeler *v.* Stone, 4 Gill 38.

New Hampshire.—Berry *v.* Gillis, 17 N. H. 9, 43 Am. Dec. 584, holding that a bond of indemnity given by the holder of a note to one of the two joint promisors cannot be availed of in defense by the other promisor, although the obligee has agreed to indemnify him against two joint debts.

New York.— Turk *v.* Ridge, 41 N. Y. 201.

Pennsylvania.— Forgy *v.* Williams, 127 Pa. St. 453, 17 Atl. 1093; O'Hara *v.* Baum, 88 Pa. St. 114; Grubb's Appeal, 66 Pa. St. 117; Cooper *v.* Platt, 39 Pa. St. 528.

Texas.— Taylor *v.* Dunn, 80 Tex. 652, 16 S. W. 732.

See 27 Cent. Dig. tit. "Indemnity," § 8.

40. Wilson *v.* Bowen, 4 J. J. Marsh. (Ky.) 122.

41. Stevens *v.* Hall, 19 N. H. 560.

Liability as to trustee and individual.— In Beekman *v.* Van Dolsen, 70 Hun (N. Y.) 288, 24 N. Y. Suppl. 414, it was held that a guaranty of indemnity with a recital that whereas the guarantors as trustees of the estate and as individuals did make a certain instrument and that therefore "we hold ourselves responsible," etc., binds the guarantors both as trustees and as individuals.

42. Lankford *v.* Broadhead, 17 N. Y. Suppl. 290; Forgy *v.* McWilliams, 127 Pa. St. 453,

So it is held that where persons subject to a joint and several liability are indemnified, the contract of indemnity will, in the absence of contrary provision in the contract, be construed to be joint and several.[43]

3. Defects in Titles, Adverse Claims, Liens, Etc. Indemnity contracts frequently relate to defective titles, adverse claims, liens, etc.[44] An indemnity promise given by vendors of land against disturbances in possession is not broken by the mere existence of an outstanding right; there must be an actual interruption or disturbance in the possession.[45] But where on a sale of land, the grantor gives a bond to make the grantee safe and secure not merely in the possession of the land conveyed, but in the title, the grantee may maintain an action on the bond, upon the failure of title, although he may not be evicted,[46] and although the grantee has conveyed a part of the land by deed of general warranty he may still recover on the indemnity bond to the full extent to which the title is defective.[47] A contract to indemnify and save harmless from all actions to be brought for the recovery of land has been held to extend to actions founded on lawful claims only.[48] In order that a judgment or an award of arbitrators establishing an adverse claim of title may be conclusive against an indemnitor, notice of the claim must be given to him so that he will have an opportunity to make defense.[49]

4. Liability Under Construction Contracts. A class of indemnity contracts on which damages have been frequently recovered are those containing a covenant to indemnify and save harmless from injuries to the person or property growing out of the performance of contracts for the construction of buildings or other improvements and other similar contracts.[50] But to justify a recovery it must be

17 Atl. 1093; McCullis *v.* Thurston, 27 Vt. 596.

43. Hughes *v.* Oregon R., etc., Co., 11 Oreg. 437, 5 Pac. 206.

44. See cases cited *infra*, this note.

Claims, etc., held to be covered by contract of indemnity see Holbrook *v.* Holbrook, 11 Me. 361; Parker *v.* Read, 9 N. H. 121; White *v.* De Villiers, 1 Johns. Cas. (N. Y.) 173, holding that if the indemnity is against a certain mortgage which is an encumbrance on land, it will also be applied against the bond accompanying the mortgage for which the latter is security.

Claims, etc., not within term of contract see Condict *v.* Flower, 106 Ill. 105; Loyd *v.* Marvin, 7 Blackf. (Ind.) 464; Guaranty Sav., etc., Assoc. *v.* Rutan, 6 Ind. App. 83, 33 N. E. 210.

45. Gerrish *v.* Smyth, 10 Allen (Mass.) 303; Boynton *v.* Dalyrmple, 16 Pick. (Mass.) 147; Nash *v.* Palmer, 5 M. & S. 374, 17 Rev. Rep. 364.

46. Anderson *v.* Washabaugh, 43 Pa. St. 115. See also Dickson *v.* Briggs, 12 Ala. 217, where it was held that the covenant was one to remove the outstanding title or satisfy the outstanding encumbrance as the case might be, within a reasonable time, and that if this was not done by the obligor within a reasonable time the obligee might pay the encumbrance or remove the outstanding title and have his action on the bond.

47. Anderson *v.* Washabaugh, 43 Pa. St. 115. See also Frank *v.* Forgotston, 31 Misc. (N. Y.) 17, 65 N. Y. Suppl. 229; Cochran *v.* Selling, 36 Oreg. 333, 59 Pac. 329.

48. Luddington *v.* Pulver, 6 Wend. (N. Y.) 404.

An illegal levy of an attachment on land is not a breach of a contract to save harmless from an attachment. Tufts *v.* Hayes, 31 N. H. 138.

49. Brattle Square Church *v.* Bullard, 2 Metc. (Mass.) 363.

50. *Illinois.*— Chicago, etc., R. Co. *v.* Chicago, 35 Ill. App. 206 [*affirmed* in 134 Ill. 323, 25 N. E. 514], holding that where the city of Chicago granted to defendant railroad by ordinance the privilege to lay certain tracks upon condition that it pay the costs and expenses of a certain viaduct and indemnify the city against all damages growing out of or resulting from the passage of the ordinance, the railroad was liable for the amount of a judgment recovered against the city by property-owners injured by the building of the viaduct.

Missouri.— Wabash R. Co. *v.* Ordelheide, 88 Mo. App. 589.

New York.—New York *v.* Brady, 151 N. Y. 611, 45 N. E. 1122; Charlock *v.* Freel, 50 Hun 395, 3 N. Y. Suppl. 226, holding that one who has contracted to make a sewer in a city and to save the city harmless from all suits arising from negligence regarding the same is liable to a person injured in consequence of such neglect, although the work was to be done under the direction of the city engineer.

Pennsylvania.— Steele *v.* Todd, 158 Pa. St. 515, 27 Atl. 942; Pennsylvania Natural Gas Co. *v.* Cook, 123 Pa. St. 170, 16 Atl. 762.

South Carolina.— Lucas *v.* O'Neale, Riley 30.

United States.— Brown, etc., Co. *v.* Ligon, 92 Fed. 851.

See 27 Cent. Dig. tit. "Indemnity," § 14.

Accident insurance see Accident Insurance, 1 Cyc. 230.

shown that the damage or injury alleged is such as fairly falls within the terms of the contract.[51] So the indemnitor cannot be liable unless the person to be indemnified has become liable.[52] Defendant will not be liable to indemnify for any personal injuries resulting from plaintiff's negligence, or negligence of plaintiff's employees,[53] unless the contract expressly so provides.[54]

5. Scope and Extent of Liability — a. In General. In suits on mere contracts of indemnity the damages should be measured by the loss actually sustained,[55]

Employers' liability insurance see Employers' Liability Insurance, 15 Cyc. 1035.

51. *District of Columbia.*— District of Columbia *v.* Clephane, 2 Mackey 155.

Massachusetts.— Springfield *v.* Boyle, 164 Mass. 591, 42 N. E. 333.

Minnesota.— *In re* Iron Bay Co., 57 Minn. 338, 59 N. W. 346.

New York.— French *v.* Vix, 143 N. Y. 90, 37 N. E. 612 [*affirming* 2 Misc. 312, 21 N. Y. Suppl. 1016]; New York *v.* Brady, 70 Hun 250, 24 N. Y. Suppl. 296; People *v.* Albany, etc., R. Co., 5 Lans. 524, holding that where defendant, a municipal corporation, covenanted to pay "all damages to property caused by the making" of a certain improvement by the state which consisted in admitting a large flow of water into a basin, damages were not recoverable for injuries to property which occurred more than a year after the work had been completed, in consequence of a sudden freshet, caused by the breaking of an ice dam above and the forcing of an unusual quantity of water through the enlarged opening.

Pennsylvania.— Flynn *v.* Philadelphia, 199 Pa. St. 476, 49 Atl. 249; Morton *v.* Union Traction Co., 20 Pa. Super. Ct. 325.

Canada.— See Jones *v.* Walker, 9 U. C. Q. B. 136.

See 27 Cent. Dig. tit. "Indemnity," § 14.

52. French *v.* Vix, 143 N. Y. 90, 37 N. E. 612, where the indemnitee, and as a consequence the indemnitor, was held not to be liable for the careless blasting of a subcontractor or for inevitable damage. See also Taylor *v.* Dunn, 80 Tex. 652, 16 S. W. 732.

53. Manhattan R. Co. *v.* Cornell, 54 Hun (N. Y.) 292, 7 N. Y. Suppl. 557; Morton *v.* Union Traction Co., 20 Pa. Super. Ct. 325; St. Louis Southwestern R. Co. *v.* Arnold, 32 Tex. Civ. App. 272, 74 S. W. 819; San Antonio, etc., R. Co. *v.* Adams, 6 Tex. Civ. App. 102, 24 S. W. 839.

54. Woodbury *v.* Post, 158 Mass. 140, 33 N. E. 86.

55. *Alabama.*— Zeigler *v.* David, 23 Ala. 127.

Illinois.— Curtis *v.* Baugh, 79 Ill. 242.

Iowa.— Gifford *v.* Mohr, 47 Iowa 279.

Louisiana.— St. Louis Southwestern R. Co. *v.* Jacobs, 44 La. Ann. 922, 11 So. 571.

Maine.— See Williams *v.* Hagar, 50 Me. 9. *Compare* Gennings *v.* Norton, 35 Me. 308.

Massachusetts.— Valentine *v.* Wheeler, 122 Mass. 566, 23 Am. Rep. 404; Coombs *v.* Jenkins, 16 Gray 153.

Minnesota.— Mechanics' Sav. Bank *v.* Thompson, 58 Minn. 346, 59 N. W. 1054.

Missouri.— Ewing *v.* Reilly, 34 Mo. 113.

New Hampshire.— Kimball *v.* Cocheco R. Co., 23 N. H. 579.

New York.— Holmes *v.* Weed, 19 Barb. 128.

Pennsylvania.— Bubb *v.* American Bonding, etc., Co., 30 Pittsb. Leg. J. 361. See also Anderson *v.* Washabaugh, 43 Pa. St. 115.

Vermont.— Lincoln *v.* Blanchard, 17 Vt. 464.

Wisconsin.— Pfeil *v.* Higby, 21 Wis. 248, holding that where defendants were bound to pay plaintiff's debt in a foreign country and further agreed to indemnify and save him harmless from all liability, but owing to their default he paid it himself by procuring exchange at current rates, and paying therefor legal tender notes, defendants were liable to plaintiff in the full amount paid for such exchange.

United States.— Wicker *v.* Hoppock, 6 Wall. 94, 18 L. ed. 752, holding that if A, B, and C are sureties and A and B obtain an indemnity bond from defendant and subsequently pay all of the loss, C not paying anything, they cannot recover from defendant the share that C should pay.

See 27 Cent. Dig. tit. "Indemnity," § 16.

Damages accruing after suit brought.— In Spear *v.* Stacy, 26 Vt. 61, it was held that where before suit there was a breach of a contract of indemnity to hold plaintiff harmless for all damages on his contracts to build, assumed by defendant, the damages were to be assessed down to the time of trial, although accruing after suit brought. See also Gennings *v.* Norton, 35 Me. 308. *Compare* Wicker *v.* Hoppock, 6 Wall. (U. S.) 94, 18 L. ed. 752.

Loss arising from groundless suit or invalid claim.— In Newburgh *v.* Galatian, 4 Cow. (N. Y.) 340, it was held that a bond to save harmless and indemnify against the cost and expenses of a certain act extends to costs of defending a groundless suit for the act in which the obligee succeeded. So in Niagara Falls Paper Co. *v.* Lee, 20 N. Y. App. Div. 217, 47 N. Y. Suppl. 1, it was held that where a bond was given to the purchaser of a vessel, indemnifying him "against any damage or loss in consequence of any debt or contract, maritime or otherwise," and the vessel was libeled and detained in consequence of a maritime contract in existence at the time of the purchase, the purchaser could recover on the bond for the delay without showing that the detention was based upon a valid claim. See also Home Ins. Co. *v.* Watson, 59 N. Y. 390. An agreement to save harmless another from any judgment that might be rendered against

unless the amount of recovery is limited by a stipulated penalty or is otherwise fixed by the terms of the contract.[56] The penalty named in the contract limits the liability of the indemnitor, although the contract purports to indemnify the promisee against any loss or damage he may sustain.[57] But although the sum introduced into a penal obligation may fix the maximum amount of recovery, yet where it is evidently a mere indemnity for pecuniary loss, the indemnitee's remedy is confined to the pecuniary loss actually sustained.[58] Where, however, the contract is not a mere contract to indemnify and save harmless, but a contract to save from a legal liability or claim, the legal liability and not the actual damage sustained is the measure of damage.[59]

b. Interest. A person who has been compelled to pay a debt or liability against which he is indemnified may, in the action on the contract of indemnity, recover interest on the amount paid,[60] and this it has been held although no interest

him in a pending suit does not render the indemnitor liable for a sum offered by him in compromise of the suit, where the offer was refused and the suit determined in favor of the indemnitee. Redford *v.* Blythe, 74 Miss. 720, 21 So. 919. If land be sold for part cash and in part for indemnity to the vendor from liability in a certain pending suit, and the suit be decided, contrary to the expectation of both contracting parties, in favor of the indemnitee, he cannot charge the lands sold to the indemnitor with any sum on account of the indemnity. Bedford *v.* Blythe, 74 Miss. 720, 21 So. 919. See also *infra*, II, B, 5, c, note 64.

56. *Iowa.*— Lane *v.* Richards, 119 Iowa 24, 91 N. W. 786.

Kentucky.— Masonic Sav. Bank *v.* Eschman, 37 S. W. 487, 18 Ky. L. Rep. 578.

Massachusetts.— Singer Mfg. Co. *v.* Reynolds, 168 Mass. 588, 47 N. E. 438, 60 Am. St. Rep. 417; Hall *v.* Thayer, 12 Metc. 130; Drury *v.* Fay, 14 Pick. 326; Parker *v.* Thompson, 3 Pick. 429. See also Valentine *v.* Wheeler, 116 Mass. 478.

Michigan.— Stearns *v.* Stearns, 129 Mich. 451, 89 N. W. 41.

Minnesota.— Union Cent. L. Ins. Co. *v.* Prigge, 90 Minn. 370, 96 N. W. 917.

New York.— Gamble *v.* Cuneo, 21 N. Y. App. Div. 413, 47 N. Y. Suppl. 548; Holmes *v.* Weed, 19 Barb. 128; McGee *v.* Roen, 4 Abb. Pr. 8.

Virginia.— Price *v.* Crozier, 101 Va. 644, 44 S. E. 890.

England.— Osborne *v.* Eales, 2 Moore P. C. N. S. 125, 12 Wkly. Rep. 654, 15 Eng. Reprint 849; Warwick *v.* Richardson, 10 M. & W. 284.

Canada.— Raymond *v.* Cooper, 8 U. C. C. P. 388; Hamilton *v.* Davis, 1 U. C. Q. B. 176.

See 27 Cent. Dig. tit. "Indemnity," § 16.

Compare Kimball *v.* Cocheco R. Co., 23 N. H. 579; Gadsden *v.* Gasque, 2 Strobh. (S. C.) 324.

Damages for breaches occurring subsequent to judgment.— Upon a bond of indemnity there can be but one judgment against the same party and that must be for the amount of the penalty with an assessment of damages on the breaches assigned, and if subsequent breaches occur the remedy is by scire facias upon that judgment, the assignment of additional breaches and the assessment of damages upon them. Duffy *v.* Lytle, 5 Watts (Pa.) 120; Adams *v.* Bush, 5 Pittsb. Leg. J. (Pa.) 93.

57. Hall *v.* Stewart, 58 Iowa 681, 12 N. W. 741.

58. Johnson *v.* Coffee, 1 Ashm. (Pa.) 96. See also Jackson *v.* Steffens, (Tex. Civ. App. 1895) 32 S. W. 862.

59. McGee *v.* Roen, 4 Abb. Pr. (N. Y.) 8.

60. *Indiana.*— Keesling *v.* Frazier, 119 Ind. 185, 21 N. E. 552.

Massachusetts.— Curtis *v.* Banker, 136 Mass. 355, bond to indemnify sureties on another bond. See also American Surety Co. *v.* Venner, 183 Mass. 329, 67 N. E. 331.

New Hampshire.— French *v.* Parish, 14 N. H. 496.

New York.— Mott *v.* Hicks, 1 Cow. 513, 13 Am. Dec. 550.

South Carolina.— Sims *v.* Goudelock, 7 Rich. 23.

Virginia.— Lipscomb *v.* Winston, 1 Hen. & M. 453.

Canada.— Spence *v.* Hector, 24 U. C. C. Q. B. 277.

Interest in addition to penalty.— In an action of debt on a bond, in form a bond of indemnity, although in truth a bond for the payment of money only, interest accruing after the breach of the condition of the bond is recoverable as damages beyond the stipulated penalty of the bond, when the sum actually due by the creditor without interest equals the penalty of the bond. Lyon *v.* Clark, 8 N. Y. 148 [*affirming* 1 E. D. Smith 250]. In Griffiths *v.* Hardenbergh, 41 N. Y. 464, it was held that on a contract of indemnity stipulating for a penalty, interest upon its amount from the time of recovery against the indemnitee to the trial in the action by the indemnitee against the indemnitor is recoverable. See also Stafford *v.* Jones, 91 N. C. 189, a mortgage to indemnify one against loss by reason of becoming a surety.

A bond covering whatever loss the obligees may sustain by reason of subscription to stock of a corporation justifies a recovery of the principal and not of interest or profits on the money invested in such stock. Abend *v.* West, 65 Ill. App. 267.

was claimed in the declaration the general rule being that where the law gives interest as a matter of course, a special count for interest is unnecessary.[61]

c. Attorney's Fees and Costs. An indemnitee is entitled to recover legal costs, including reasonable counsel fees which he has been compelled to pay as a result of suits against him, to enforce the liability indemnified against, provided such suits were defended in good faith and with due diligence.[62] Sometimes the contract of indemnity includes attorney's fees and legal costs in express terms[63] and contracts expressly indemnifying a person against the costs and expenses incident to a certain act or arising from a certain claim have been frequently construed to extend to the costs and expenses of defending groundless suits.[64] It has been held that an indemnitor will be liable to an indemnitee for counsel fees

61. Sims *v.* Goudelock, 7 Rich. (S. C.) 23.

62. *Iowa.*— Gifford *v.* Mohr, 47 Iowa 279.

Louisiana.— Kern *v.* Creditors, 49 La. Ann. 886, 22 So. 40.

Maine.— Davis *v.* Smith, 79 Me. 351, 10 Atl. 55. See also Baker *v.* Windham, 13 Me. 74.

Massachusetts.— Curtis *v.* Banker, 136 Mass. 355 (where the indemnitee defeated a recovery for the full amount claimed against him); Clarke *v.* Moies, 11 Gray 133.

Mississippi.— See Meyer *v.* Blakemore, 54 Miss. 570.

Missouri.— Kansas City Hotel Co. *v.* Sauer, 65 Mo. 279.

New Hampshire.— French *v.* Parish, 14 N. H. 496.

New York.— Cassidy *v.* Taylor Brewing, etc., Co., 79 N. Y. App. Div. 242, 79 N. Y. Suppl. 595 (holding that where the title to property sold at an execution sale failed and the judgment creditor had engaged to hold the purchaser harmless, the latter is entitled to a judgment for the amount paid at the sale together with the costs of defending the action relating to the title of the property less the value of any property which he has been permitted to retain); Mott *v.* Hicks, 1 Cow. 513, 13 Am. Dec. 550; Holdgate *v.* Clark, 10 Wend. 215.

South Carolina.— Sims *v.* Goudelock, 7 Rich. 23.

England.— Lloyd *v.* Mostyn, 2 Dowl. P. C. N. S. 476, 6 Jur. 974, 12 L. J. Exch. 1, 10 M. & W. 478; *Re* Wells, 72 L. T. Rep. N. S. 359, 2 Manson 41, 15 Reports 169.

See 27 Cent. Dig. tit. "Indemnity," §§ 15, 17.

Costs occasioned by third persons.— Upon a contract to indemnify against covenants in a lease, the indemnitor is not liable for costs in defending a suit occasioned by third persons and not growing out of the covenants. Richards *v.* Whittle, 16 N. H. 259.

Under an agreement to indemnify for loss sustained by entering into a recognizance for the appearance of a defendant to answer a recognizance, the person indemnified is entitled to recover the amount of the recognizance, and the costs of taking judgment thereon. Keesling *v.* Frazier, 119 Ind. 185, 21 N. E. 552.

When a bond is given to indemnify a person as surety on another bond, the obligor is liable for attorney's fees paid by the obligee in defending an action on the bond on which he was a surety. McKenzie *v.* Underwood, 21 D. C. 126.

A bond by a grantor to indemnify a grantee, and to make him secure in title, obliges the obligor to pay to the obligee the costs he has expended in defending his title, including reasonable counsel fees. Anderson *v.* Washabaugh, 43 Pa. St. 115. *Compare* Bancroft *v.* Abbott, 3 Allen (Mass.) 524.

An express agreement to pay by A to B what the latter had agreed to pay C will not justify a recovery by B against A for costs incurred in defending a suit brought by C. Mattingly *v.* Spalding, 9 Ky. L. Rep. 815; Richards *v.* Whittle, 16 N. H. 259.

Costs unnecessarily and unreasonably incurred have been held not to be covered by a contract of indemnity the terms of which include "all costs, trouble, and expense" on account of certain liabilities. Langford *v.* Broadhead, 17 N. Y. Suppl. 290.

In Kentucky the general rule has been held inapplicable to extraordinary costs, such as attorney's fees, which are held not to be recoverable unless they were incurred at the instance of the indemnitor or were palpably to his advantage. Brandt *v.* Donnelly, 21 S. W. 534, 14 Ky. L. Rep. 819.

63. Merrill *v.* Smith, 12 Ala. 569.

Express provision for penalty and attorney's fees see Singer Mfg. Co. *v.* Reynolds, 168 Mass. 588, 47 N. E. 438, 60 Am. St. Rep. 417. See also Ripley *v.* Mosely, 57 Me. 76.

64. Home Ins. Co. *v.* Watson, 59 N. Y. 390 [*reversing* 1 Hun 643, 4 Thomps. & C. 226 and *following* Chamberlain *v.* Beller, 18 N. Y. 115]; Newburgh *v.* Galatian, 4 Cow. (N. Y.) 340; Chilson *v.* Downer, 27 Vt. 536. *Compare* Bancroft *v.* Abbott, 3 Allen (Mass.) 524, holding that under the particular terms of the contract, the clear intent of the parties was that the grantee was to be kept harmless only from the failure of the grantor to fulfil his covenants in the deed and the establishment of a well founded and lawful claim on the estate by a third person and that the liability was not imposed on the grantor to pay the expenses and costs of any and every suit however groundless.

Claims for personal services not included.— In Beekman *v.* Van Dolsen, 70 Hun (N. Y.) 288, 24 N. Y. Suppl. 414, it was held that an indemnity against costs and damages incurred in ejecting a trespasser from certain

where the employment of counsel was with the knowledge of the indemnitor.[65] But an indemnitee cannot recover against the indemnitor for payment of counsel fees or costs voluntarily made.[66]

6. Accrual of Liability. A distinction has been made, in numerous decisions, between a contract of indemnity against a liability, and a contract to indemnify or save harmless from the consequences (damage or loss) of such liability, it being very generally held that in the former case the cause of action is complete when the liability is established, although payment of the liability or actual damage arising therefrom is not shown;[67] whereas in the latter case no right of action

property does not include claims for personal services of the person indemnified. See also Magruder *v.* McCandlis, 3 Ohio Dec. (Reprint) 269, 5 Wkly. L. Gaz. 188.

65. Berry *v.* Slocomb, 2 La. Ann. 993; Hale *v.* Andrus, 6 Cow. (N. Y.) 225; Robinson *v.* Bakewell, 25 Pa. St. 424.

66. Gennings *v.* Norton, 35 Me. 308 (holding that where a purchaser of land receives a bond of indemnity against an outstanding mortgage and afterward conveys a part of the premises without a warranty and the mortgagee brings separate suits against him and his grantee in an action on the bond he can recover his costs and expenses in the suit against him, but not costs in the suit against his grantee, although he has voluntarily paid them); Whiting *v.* Aldrich, 117 Mass. 582 (holding that a contract to indemnify a person for expenses incurred by the indemnitee will not authorize a recovery against the indemnitor for counsel fees contracted for by the indemnitor and voluntarily paid by the indemnitee); Shroder *v.* Hatz, 47 Pa. St. 528.

67. *Alabama.*— Miller *v.* Garrett, 35 Ala. 96.

California.— Banfield *v.* Marks, 56 Cal. 185.

Iowa.—Seeberger *v.* Wyman, 108 Iowa 527, 79 N. W. 290.

Kentucky.— Wilson *v.* Bowen, 4 J. J. Marsh. 122, holding that a covenant to indemnify against "all suits and damages" is broken *eo instanti* suit is instituted against the covenantee.

Louisiana.— Keane *v.* Goldsmith, 12 La. Ann. 560.

Maryland.— Creamer *v.* Stephenson, 15 Md. 211; Brooke *v.* Macnemara, 1 Harr. & M. 80.

Minnesota.— Bausman *v.* Credit Guarantee Co., 47 Minn. 377, 50 N. W. 496. But see Weller *v.* Eames, 15 Minn. 461, 2 Am. Rep. 150.

Nebraska.— Murray *v.* Porter, 26 Nebr. 288, 41 N. W. 1111.

Nevada.— Jones *v.* Childs, 8 Nev. 121.

New Hampshire.— Colburn *v.* Pomeroy, 44 N. H. 19.

New Jersey.— Jeffers *v.* Johnson, 21 N. J. L. 75.

New York.— Gilbert *v.* Wiman, 1 N. Y. 550, 49 Am. Dec. 359; Beekman *v.* Van Dolsen, 70 Hun 288, 24 N. Y. Suppl. 414; McGee *v.* Roen, 4 Abb. Pr. 8 (holding that a contract to save from alleged liability, or a legal charge, or a suit, claim, or demand, prosecuted or made against the indemnitee gives a right of action without averment of actual damage); Chace *v.* Hinman, 8 Wend. 452, 24 Am. Dec. 39; Aberdeen *v.* Blackmar, 6 Hill 324; Lee *v.* Clark, 1 Hill 56.

North Carolina.— Burroughs *v.* McNeill, 22 N. C. 297.

Ohio.— Pratt *v.* Walworth, 15 Ohio Cir. Ct. 412, 8 Ohio Cir. Dec. 472.

Pennsylvania.— Anderson *v.* Washabaugh, 43 Pa. St. 115 (holding that where on a sale of land the grantor had given a bond to indemnify and make the grantee safe and secure in the title to the land conveyed, an action on the land may be maintained by the grantee on the failure of title, although he may not have been evicted); Stroh *v.* Kimmel, 8 Watts 157; Gardner *v.* Grove, 10 Serg. & R. 137. See also Leber *v.* Kauffelt, 5 Watts & S. 440 (holding that where the condition of the bond of indemnity is "against all claims of A" it is broken whenever a claim is made and the indemnitee is not obliged to wait for an action to be brought against him).

South Carolina.— Bellune *v.* Wallace, 2 Rich. 80; Ramsey *v.* Gervais, 2 Bay 145, 1 Am. Dec. 635. See also Collins *v.* Lemasters, 2 Bailey 141.

Tennessee.— Smith *v.* Eubanks, 9 Yerg. 20; Macey *v.* Childress, 2 Tenn. Ch. 438.

Texas.— Croft *v.* Peck, 64 Tex. 627; Pope *v.* Hays, 19 Tex. 375.

Virginia.— Murrell *v.* Johnson, 1 Hen. & M. 450.

West Virginia.— Bansimer *v.* Fell, 39 W. Va. 448, 19 S. E. 545.

Wisconsin.— Smith *v.* Chicago, etc., R. Co., 18 Wis. 17.

England.— Challoner *v.* Walker, 1 Burr. 574.

See 27 Cent. Dig. tit. "Indemnity," § 21 *et seq.*

Indemnity against judgment.— Ordinarily where a bond of indemnity is given against a judgment, the breach of the covenant takes place immediately upon the rendition of the judgment. New York *v.* Sexton, 96 N. Y. App. Div. 184, 89 N. Y. Suppl. 190. As a general rule, the obligation of a bond of indemnity against a judgment will be enforced against the obligor, whether the judgment was obtained by default or consent, provided no fraud or deceit was practised. Given *v.* Briggs, 1 Cai. (N. Y.) 450. See also New York *v.* Sexton, 96 N. Y. App. Div. 184, 89 N. Y. Suppl. 190. See also Curtis *v.* Banker, 136 Mass. 355; Powell *v.* Boul-

accrues until actual damage or loss has been sustained.[68] If the covenant or promise be to perform some act for plaintiff's benefit, as well as to indemnify

ton, 2 U. C. Q. B. 487. But the condition of the bond must be construed in connection with the recitals of the bond and may be restrained thereby so that a breach will not occur until there has been a trial on the merits. New York *v.* Sexton, 96 N. Y. App. Div. 184, 89 N. Y. Suppl. 190.

Indemnity against debt incurred and indemnity against future debt distinguished.— In Lewis *v.* Crockett, 3 Bibb (Ky.) 196, a distinction was drawn between a covenant or condition to indemnify against a debt or duty already incurred and a covenant or condition to indemnify against a debt or duty which may accrue in the future, it being held that in the former case the covenant or condition is not broken without suit; but in the latter case a mere liability to suit is a breach of the covenant or condition.

68. *Arkansas.*— Carter *v.* Adamson, 21 Ark. 287.

Connecticut.— Monson *v.* Lawrence, 27 Conn. 579; Hart *v.* Bull, Kirby (Conn.) 396, holding that a bond conditioned to save A harmless from all cost, damages, expenses, and trouble on account of his having signed a note for B is not broken by the threat of the holder of the note to sue A, and A's forbearance, in consequence thereof, through fear of an arrest, to go to New York to transact his necessary business.

Florida.— Solary *v.* Webster, 35 Fla. 363, 17 So. 646.

Georgia.— Harvey *v.* Daniel, 36 Ga. 562.

Indiana.— Francis *v.* Porter, 7 Ind. 213.

Iowa.— Jenckes *v.* Rice, 119 Iowa 451, 93 N. W. 384; Wilson *v.* Smith, 23 Iowa 252.

Kansas.— Abeles *v.* Cohen, 8 Kan. 180, holding that the obligee of a bond of indemnity has no cause of action against the obligor which he can set up as a counterclaim or set-off in an action brought by the obligor against the obligee, unless he has sustained some loss covered by the bond or would sustain some loss by reason of a recovery against him in such action.

Maine.— Gennings *v.* Norton, 35 Me. 308 (holding, however, that a liability to loss if attended with inconvenience constitutes a breach); Hussey *v.* Collins, 30 Me. 190.

Maryland.— Gillespie *v.* Creswell, 12 Gill & J. 36.

Massachusetts.—Valentine *v.* Wheeler, 122 Mass. 566, 23 Am. Rep. 404.

Michigan.— Sherman *v.* Spalding, 132 Mich. 249, 93 N. W. 613; Michigan State Bank *v.* Hastings, 1 Dougl. 224, 41 Am. Dec. 549.

Minnesota.— Campbell *v.* Rotering, 42 Minn. 115, 43 N. W. 795, 6 L. R. A. 278.

Mississippi.— Bedford *v.* Blythe, 74 Miss. 720, 21 So. 919; Hoy *v.* Hansborough, Freem. 533.

Nebraska.— Northern Assur. Co. *v.* Borgelt, 67 Nebr. 282, 286, 93 N. W. 226 (where it is said: "If, however, the bond is conditioned to indemnify, damage must be shown before the party indemnified is entitled to recover, so that a cause of action accrues, not from the date of the act which causes damage, but from the time when pecuniary loss ensues therefrom); Gregory *v.* Hartley, 6 Nebr. 356.

Nevada.— Carson Opera House Assoc. *v.* Miller, 16 Nev. 327.

New Hampshire.— Lyman *v.* Lull, 4 N. H. 495.

New Jersey.— Miller *v.* Fries, 66 N. J. L. 377, 49 Atl. 674.

New York.— Slauson *v.* Watkins, 86 N. Y. 597; Maloney *v.* Nelson, 70 Hun 202, 24 N. Y. Suppl. 147; Selover *v.* Harpending, 54 N. Y. Super. Ct. 251; Motley *v.* Flannagan, 16 Misc. 470, 39 N. Y. Suppl. 923; Fayerweather *v.* Willet, 1 Edm. Sel. Cas. 364; Aberdeen *v.* Blackmar, 6 Hill 324.

Oregon.— Cochran *v.* Selling, 36 Oreg. 333, 59 Pac. 329.

Pennsylvania.— Brown *v.* Broodhead, 3 Whart. 89.

United States.— Wicker *v.* Hoppock, 6 Wall. 94, 18 L. ed. 752.

See 27 Cent. Dig. tit. "Indemnity," § 21 *et seq.*

A court of equity cannot compel the performance of a covenant of indemnity in advance of the happening of the event or contingency upon which by its terms it is to be performed. Michigan State Bank *v.* Hastings, 1 Dougl. (Mich.) 224, 41 Am. Dec. 549; Hoy *v.* Hansborough, Freem. (Miss.) 533; Henderson-Achert Litho. Co. *v.* John Shillito Co., 64 Ohio St. 236, 60 N. E. 295, 83 Am. St. Rep. 745; Central Trust Co. *v.* Louisville Trust Co., 100 Fed. 545, 40 C. C. A. 530.

Proof of damage held sufficient.— In Spratlin *v.* Hudspeth, Dudley (Ga.) 155, it was held that in an action on a bond to indemnify a surety on another bond, it is sufficient for plaintiff to show that he has been damnified without showing that the condition of the former bond was broken.

A liability attended with any inconvenience to the obligee has been held to be a damage within the meaning of the condition of a bond of indemnity. Gennings *v.* Norton, 35 Me. 308; Lyman *v.* Lull, 4 N. H. 495.

Contract to protect mortgaged premises against paramount liens.— A contract of indemnity to protect mortgaged premises against paramount liens which would impair the mortgage security bas been held to be broken when the mortgaged premises were sold on a judgment for mechanics' liens paramount to that of the mortgage and the indemnitee was held to be entitled to substantive damages, although the debt secured by the mortgage was not yet due. Mechanics' Sav. Bank *v.* Thompson, 58 Minn. 346, 59 N. W. 1054.

Payment of note with money borrowed from surety.— In Warring *v.* Williams, 8 Pick. (Mass.) 322, it was held that where

and save him harmless from the consequences of non-performance, the neglect to perform the act, being a breach of contract, will give an immediate right of action.[69] This rule has been applied to a contract containing a promise to pay a debt or liability.[70] In some of the earlier cases the courts were governed strictly by precise terms of the instrument, and held that *non damnifactus* could not be pleaded in an action on a bond conditioned for the doing of a certain act, even though it appeared that the bond was given by way of indemnity.[71] But the tendency of the modern authorities is to construe bonds as contracts of indemnity only, and to attach more importance to the general purpose of a bond, as shown by its provisions as a whole, and the interests of the parties in the subject-matter, than to the precise form of words employed.[72] The indemnitee may discharge a claim or demand against him and bring his suit for indemnity without waiting for its legality or validity to be ascertained by legal proceedings, where his liability is clear and a defense to the suit would be unavailing.[73] Nor, it has been held, will a failure to interpose a purely technical defense, although known to the indemnitee, prevent his recovery from the indemnitor.[74] An indemnitee cannot, however, recover from the indemnitor for a payment made gratuitously and in the absence of any legal obligation.[75]

defendant agreed to indemnify plaintiff against a note on which a third person was surety and plaintiff obtained from the surety money with which he paid the note, plaintiff could recover the amount from defendant.

69. Lathrop *v.* Atwood, 21 Conn. 117; Seaver *v.* Young, 16 Vt. 658.

70. *Connecticut.*— Lathrop *v.* Atwood, 21 Conn. 117.

Georgia.— Sapp *v.* Faircloth, 70 Ga. 690.

Illinois.— Pierce *v.* Plumb, 74 Ill. 326; Gage *v.* Lewis, 68 Ill. 604.

Indiana.— Milburn *v.* Milburn, (1895) 40 N. E. 1082; Malott *v.* Goff, 96 Ind. 496; Devol *v.* McIntosh, 23 Ind. 529.

Iowa.— Stout *v.* Folger, 34 Iowa 71, 11 Am. Rep. 138.

Massachusetts.— Shattuck *v.* Adams, 136 Mass. 34; Farnsworth *v.* Boardman, 131 Mass. 115; Clark *v.* Gamwell, 125 Mass. 428; Smith *v.* Pond, 77 Mass. 234.

Michigan.— Stuart *v.* Worden, 42 Mich. 154, 3 N. W. 876; Dye *v.* Mann, 10 Mich. 291.

Missouri.— Salmon Falls Bank *v.* Leyser, 116 Mo. 51, 22 S. W. 504; Ham *v.* Hill, 29 Mo. 275.

Nebraska.— Gregory *v.* Hartley, 6 Nebr. 356. See also Murray *v.* Porter, 26 Nebr. 288, 41 N. W. 1111.

New Jersey.— Bolles *v.* Beach, 22 N. J. L. 680, 53 Am. Dec. 263.

New York.— Newburgh Nat. Bank *v.* Bigler, 83 N. Y. 51; Kohler *v.* Matlage, 72 N. Y. 259; Smart *v.* Smart, 24 Hun 127; Wright *v.* Whiting, 40 Barb. 235; Sinsheimer *v.* Tobias, 53 N. Y. Super. Ct. 508; Lockwood *v.* Nichols, 14 Daly 182; McGee *v.* Roen, 4 Abb. Pr. 8; *In re* Negus, 7 Wend. 499; Churchill *v.* Hunt, 3 Den. 321.

Ohio.— Wilson *v.* Stilwell, 9 Ohio St. 467, 75 Am. Dec. 477.

Vermont.— Hubbard *v.* Billings, 35 Vt. 599; Crofoot *v.* Moore, 4 Vt. 204; St. Albans *v.* Curtis, 1 D. Chipm. 164.

Virginia.— Smith *v.* Burton, 94 Va. 158, 26 S. E. 412.

See 27 Cent. Dig. tit. "Indemnity," § 23.

71. Neville *v.* Williams, 7 Watts (Pa.) 421; American Bldg. Loan, etc., Co. *v.* Booth, 17 R. I. 736, 24 Atl. 779; Holmes *v.* Rhodes, 1 B. & P. 638. See also Northern Assur. Co. *v.* Borgelt, 67 Nebr. 282, 93 N. W. 226.

72. American Bldg., etc., Assoc. *v.* Waleen, 52 Minn. 23, 53 N. W. 867; Northern Assur. Co. *v.* Borgelt, 67 Nebr. 282, 93 N. W. 226. See also Strawbridge *v.* Baltimore, etc., R. Co., 14 Md. 360, 74 Am. Dec. 541.

73. Nixon *v.* Beard, 111 Ind. 137, 12 N. E. 131; Rudd *v.* Hanna, 4 T. B. Mon. (Ky.) 528; Butler *v.* Haynes, 3 N. H. 21; Webb *v.* Pond, 19 Wend. (N. Y.) 423; Andrus *v.* Bealls, 9 Cow. (N. Y.) 693. See also Dickson *v.* Briggs, 12 Ala. 217; Seaboard Air Line R. Co. *v.* Main, 132 N. C. 445, 43 S. E. 930; Leber *v.* Kauffelt, 5 Watts & S. (Pa.) 440. *Compare* Crippen *v.* Thompson, 6 Barb. (N. Y.) 532.

Payment of arrears of rent to prevent distress.— Vechte *v.* Brownell, 8 Paige (N. Y.) 212.

Payment without waiting for execution.— In Creamer *v.* Stephenson, 15 Md. 211, it was held that under a bond to save harmless from litigation, a judgment against the obligee fixes the obligor's liability and the obligee may pay it without waiting for execution.

74. Curtis *v.* Banker, 136 Mass. 355; Griswold *v.* Barker, 57 Vt. 53.

75. *Alabama.*— Belmont Coal, etc., Co. *v.* Smith, 74 Ala. 206.

Arkansas.— Tolleson *v.* Jennings, 60 Ark. 190, 29 S. W. 276.

Kentucky.— Wright *v.* Gardner, 98 Ky. 454, 33 S. W. 622, 35 S. W. 1116, 17 Ky. L. Rep. 1345.

Maine.—Holbrook *v.* Holbrook, 11 Me. 361.

Massachusetts.— Bachellor *v.* Priest, 12 Pick. 399.

Missouri.— Wales *v.* Nelson, 10 Mo. 19.

New York.— New York *v.* Baird, 176 N. Y. 269, 68 N. E. 364 [*reversing* 74 N. Y. App. Div. 238, 77 N. Y. Suppl. 446] (holding

7. Tender by Indemnitor. A tender under a contract to indemnify the promisee completely to be effectual must be a tender of entire relief from liability.[76]

8. Notice to Indemnitor. Unless an express contract of indemnity provides otherwise, it is not necessary in order to maintain an action against the indemnitor to recover for a liability which has been determined in a prior action against the indemnitee, that the indemnitor should have been notified of the suit against the indemnitee.[77] But unless notice is given the first judgment is *prima facie* evidence only of liability and the indemnitor may show that the indemnitee had a good defense which he neglected to set up.[78] Where the indemnitee has paid the liability or sustained the damage contemplated by the contract of indemnity, his right of action is complete and notice of such payment or damage is not a prerequisite to suit against the indemnitor.[79]

9. Performance of Conditions by Indemnitee. A recovery cannot be had by an indemnitee who has not performed a covenant which by the terms of the contract is a condition precedent to any liability on the part of the indemnitor.[80] But a different rule is applicable to an independent covenant on the part of the indem-

that the question whether a settlement was made in good faith was a question for the jury); Beere *v.* Mayer, 61 N. Y. Suppl. 926; Bazen *v.* Roget, 3 Johns. Cas. 87.

United States.— Massey *v.* Schott, 16 Fed. Cas. No. 9,262, Pet. C. C. 132.

Canada.— Hamilton *v.* Davis, 1 U. C. Q. B. 176.

See 27 Cent. Dig. tit. "Indemnity," § 25.

Payment held not voluntary see Spilman *v.* Smith, 15 B. Mon. (Ky.) 123.

76. American Surety Co. *v.* Venner, 183 Mass. 329, 67 N. E. 331.

77. *Connecticut.*— Marcy *v.* Crawford, 16 Conn. 549, 41 Am. Dec. 158.

Illinois.— Forster *v.* Gregory, 107 Ill. App. 437. *Compare* Hill *v.* Oswald, 99 Ill. App. 120.

Massachusetts.— Curtis *v.* Banker, 136 Mass. 355; Chapin *v.* Lapham, 20 Pick. 467; Fish *v.* Dana, 10 Mass. 46.

New Hampshire.— French *v.* Parish, 14 N. H. 496.

New York.— Bridgeport F. & M. Ins. Co. *v.* Wilson, 34 N. Y. 275; Holmes *v.* Weed, 19 Barb. 128; Aberdeen *v.* Blackmar, 6 Hill 324; Lee *v.* Clark, 1 Hill 56.

Oregon.— Carroll *v.* Nodine, 41 Oreg. 412, 69 Pac. 51, 93 Am. St. Rep. 743.

Vermont.— Lincoln *v.* Blanchard, 17 Vt. 464.

England.— Duffield *v.* Scott, 3 T. R. 374.

Canada.— Spence *v.* Hector, 24 U. C. Q. B. 277.

See 27 Cent. Dig. tit. "Indemnity," § 20.

Compare Reynolds *v.* Magness, 24 N. C. 26, holding that plaintiff before bringing suit is bound to give notice of his loss.

Indemnitor jointly sued procuring discontinuance.— In Detroit *v.* Grant, 135 Mich. 626, 98 N. W. 405, it was held that where a contractor for the construction of a city pavement, who executed a contract and bond to save the city harmless from any damage from his negligence, was sued jointly with the city for personal injuries from his negligence, but instead of contesting the suit procured a discontinuance as to himself, it was not necessary that the city serve him with written notice of the pendency of the action in order to fix his liability.

Necessity of notice on implied contract see *infra*, III, E, text and note 17 *et seq.*

78. Bridgeport F. & M. Ins. Co. *v.* Wilson, 34 N. Y. 275; Allen *v.* Gregg, (Pa. 1888) 16 Atl. 46. See also *infra*, IV, I, text and note 77.

79. Ward *v.* Henry, 5 Conn. 595, 13 Am. Dec. 119.

Express waiver of notice see Ætna Nat. Bank *v.* Hollister, 55 Conn. 188, 10 Atl. 550.

80. *Alabama.*— Bestor *v.* Roberts, 58 Ala. 331.

California.— Rogers *v.* Kimball, 121 Cal. 247, 53 Pa. St. 648.

Connecticut.— Winton *v.* Meeker, 25 Conn. 456.

Georgia.— Conn *v.* Jones, 99 Ga. 608, 26 S. E. 761.

Illinois.— Israel *v.* Reynolds, 11 Ill. 218.

Massachusetts.— Warring *v.* Williams, 8 Pick. 322.

Minnesota.— Pioneer Sav., etc., Co. *v.* Freeburg, 59 Minn. 230, 61 N. W. 25.

Missouri.— Donnell Mfg. Co. *v.* Hart, 40 Mo. App. 512.

New York.— Chace *v.* Hinman, 8 Wend. 452, 24 Am. Dec. 39.

Tennessee.— Smith *v.* Eubanks, 9 Yerg. 20.

See 27 Cent. Dig. tit. "Indemnity," § 19.

A bill in equity to compel one bound on a covenant of indemnity to make payment directly to the creditor cannot be maintained where the person indemnified has not performed a covenant which by the express terms of the contract of indemnity is a condition precedent to any liability on the part of the covenantor. O'Connell *v.* New York, etc., R. Co., 187 Mass. 272, 72 N. E. 979.

Payment of premium to obligor.— A bond of indemnity, not stipulating how long it shall remain in force, but providing that so long as it shall remain the obligor shall be paid a premium in advance, does not require the payment of the premium, so as to continue the obligation. Fidelity, etc., Co. *v.* Libby, (Nebr. 1904) 101 N. W. 994.

nitee,[81] and the question whether the covenant is dependent or independent is to be determined by a consideration of the contract in its entirety.[82] The indemnitee must also act in good faith in the performance of the conditions.[83] It has been held that where a proceeding to establish the loss of the indemnitee is rendered impossible or impracticable or facts appear showing that such proceedings would be futile, and the loss can be otherwise established, an action is unnecessary to establish the same unless the parties have by precise language stipulated therefor.[84] Payment or performance of an act not required by the terms of the contract will not justify a recovery.[85]

10. DISCHARGE OF INDEMNITOR. The indemnitor will be discharged for liability if the indemnitee, when sued, fails to set up a defense which would probably have been successful;[86] or if by his action he impairs the right of defense by the indemnitor.[87] And the same rule has been applied where the indemnitee by releasing from responsibility a third person ultimately liable deprived the indemnitor of his proper recourse.[88] So when an indemnified surety voluntarily releases the property of the principal debtor from an execution lien, and as a consequence becomes personally liable for the debt, the indemnitor is exonerated, since the liability assumed by the indemnitee is not a necessary consequence of the original obligation as surety.[89] But the conduct of the indemnitee, in order to oper-

81. Conner *v.* Atwood, 57 Me. 100. See also Kaiser *v.* Johnson, 107 Ga. 659, 34 S. E. 285; Wallace *v.* Leber, 69 N. J. L. 312, 55 Atl. 475; City Trust, etc., Co. *v.* Fidelity, etc., Co., 58 N. Y. App. Div. 18, 68 N. Y. Suppl. 601.

82. Conner *v.* Atwood, 57 Me. 100.

83. Fisher *v.* Saylor, 78 Pa. St. 84, holding that where the vendor agrees to make good to the vendee any loss on a resale and the vendee fraudulently resells for less than he gave he cannot recover.

84. Scott *v.* Conn, 75 N. Y. App. Div. 561, 78 N. Y. Suppl. 274, holding that it is not a condition precedent to an action to recover on a contract of indemnity for the failure of a corporation to perform its contract to the indemnitee that an action should have been commenced and prosecuted to a judgment against the corporation for the breach of contract where it is shown that the corporation was insolvent.

85. Tolleson *v.* Jennings, 60 Ark. 190, 29 S. W. 276, where it was held that as plaintiffs were not required to make any payment on a note under their indorsement, defendants were not liable to them on a bond for a proportionate subscription toward payment of the note. See also Wright *v.* Gardner, 98 Ky. 454, 33 S. W. 622, 35 S. W. 1116, 17 Ky. L. Rep. 1345; Bachellor *v.* Priest, 12 Pick. (Mass.) 399; Bazen *v.* Roget, 3 Johns. Cas. (N. Y.) 87.

86. Thurber *v.* Corbin, 51 Barb. (N. Y.) 215; Bridgeport F. & M. Ins. Co. *v.* Wilson, 7 Bosw. (N. Y.) 427; Lothrop *v.* Blake, 3 Pa. St. 483; Miller *v.* Hottenstein, 1 Woodw. (Pa.) 236. *Compare* Curtis *v.* Banker, 136 Mass. 355, holding that bondsmen of indemnified sureties on another bond are not discharged because the indemnitees failed to interpose a purely technical defense.

87. Stark *v.* Fuller, 42 Pa. St. 320; American Surety Co. *v.* Ballman, 115 Fed. 292, 53 C. C. A. 152 [*affirming* 104 Fed. 634]. See also Security Trust Co. *v.* Robb, 116 Fed. 201.

Interference with right of appeal.— An indemnitor who has been vouched to defend in a suit brought against a surety whom he has agreed to indemnify is entitled, at his own expense and charges, to fully defend such suit and to conduct in good faith the whole litigation from beginning to end. And such litigation includes the right to prosecute an appeal from or a writ of error to an adverse decree or judgment of the court of first interest, and a denial of or interference with this right by the indemnitee will release the indemnitor from liability. Stark *v.* Fuller, 42 Pa. St. 320; Robb *v.* Security Trust Co., 121 Fed. 460, 57 C. C. A. 576; American Surety Co. *v.* Ballman, 104 Fed. 634. See also New York *v.* Baird, 176 N. Y. 269, 68 N. E. 364.

Violation of agreement to allow opportunity for objection to claims.— Persons who were indemnified against certain auctioneers agreed with their indemnitors that they should have full liberty to object to all of the charges which were illegal and defend any action brought upon the charges, and the correctness of the charges having been thereafter admitted by the indemnitees a recovery was had against them on the charges as upon an account stated. It was held that the indemnitees could not recover over against the indemnitors on the ground that they had not given to the latter an opportunity to object and contest the charges as provided for in the agreement. Borgfeldt *v.* O'Neill, 38 Misc. (N. Y.) 498, 77 N. Y. Suppl. 1097 [*affirmed* in 81 N. Y. App. Div. 636, 81 N. Y. Suppl. 1119].

88. Jones *v.* Bacon, 145 N. Y. 446, 40 N. E. 216 [*affirming* 72 Hun 506, 25 N. Y. Suppl. 212].

89. Davidson *v.* Pope, 3 Dana (Ky.) 271, where indemnitor was discharged from all but nominal damages.

ate as a discharge or release of the indemnitor from liability, must have been wrongful and prejudicial to the interests of the indemnitor, as for instance, by enlarging his obligation or increasing his risk.[90] If the indemnitor waives the grounds of discharge he continues liable.[91] A contract of indemnity between persons engaged in a joint enterprise, providing in effect that if in the exercise of his personal judgment the promisee advanced money for which he was not bound, the promisor would indemnify him, is a personal contract and is terminated by the death of the promisee.[92]

11. Right of Indemnitor to Return of Securities. On the fulfilment of this contract the indemnitor is entitled to a return of any securities deposited by him as indemnity.[93] But if securities are held as indemnity against certain liabilities the indemnitor cannot obtain them until the liabilities are fully discharged.[94]

12. Operation of Contract as Estoppel. The general rule that if in making a contract the parties agree upon or assume the existence of a particular fact as the basis of their negotiations they are estopped to deny the fact so long as the contract exists[95] is applicable to contracts of indemnity.[96] But a person not a party to a contract of indemnity and wholly unaffected by its stipulations cannot rely upon it as giving rise to an estoppel.[97]

C. Assignability.[98] A covenant or written promise of indemnity has been held assignable under statute in Indiana.[99] The pledgee of a contract of indemnity held as collateral security for a debt cannot sell or assign a greater interest than he possesses therein unless the contract so provides.[1] In the absence of fraud and conspiracy to hurt the indemnitor, he is not entitled to inquire upon what consideration his contract of indemnity has been assigned to another.[2]

III. Implied Contracts.

A. In General. When an act has been done by plaintiff under the express directions of defendant which occasions an injury to the rights of third persons, defendant will be bound to indemnify plaintiff against the consequences of the

90. Ætna Nat. Bank *v.* Hollister, 55 Conn. 188, 10 Atl. 550; Spilman *v.* Smith, 15 B. Mon. (Ky.) 123; Palmer *v.* Bagg, 56 N. Y. 523; Taylor *v.* Matteson, 86 Wis. 113, 56 N. W. 829.

Taking mortgage as additional security.— A contract by a third person with a surety on a replevin bond in attachment, to guarantee him against loss by reason of his suretyship is not discharged, in the absence of agreement, by such surety taking from his principal a mortgage on property supposed to be sufficient to cover the liability. Meyer *v.* Blakemore, 54 Miss. 570.

91. Fidelity, etc., Co. *v.* Lawler, 64 Minn. 144, 66 N. W. 143; Spaulding *v.* Northumberland, 64 N. H. 153, 6 Atl. 642.

92. Lane *v.* Richards, 119 Iowa 24, 91 N. W. 786.

Death of parties as discharging contracts generally see Contracts, 9 Cyc. 632 note 96 *et seq.*

93. Blackwood *v.* Brown, 34 Mich. 4; Meekins *v.* Sullivan County, 154 Mo. 136, 55 S. W. 145; Cook *v.* Casler, 76 N. Y. App. Div. 279, 78 N. Y. Suppl. 661; Cook *v.* Shull, 35 N. Y. App. Div. 121, 54 N. Y. Suppl. 696; Gove *v.* Lawrence, 6 Lans. (N. Y.) 89; Shea *v.* Fidelity, etc., Co., 39 Misc. (N. Y.) 107, 78 N. Y. Suppl. 892.

An agreement given in receipt of money deposited to indemnify one for becoming bail for another, which stipulated that "if the defendant is present at the time of trial" the deposit is to be returned, is not a general one, to save the bail harmless and if the "defendant" appears at the trial, the bail must return the deposit. Schlarman *v.* Kelley, 74 Vt. 162, 52 Atl. 425.

94. Hannum *v.* Wallace, 4 Humphr. (Tenn.) 143.

95. See Estoppel, 16 Cyc. 719 note 73.

96. Davis *v.* Fearis, 52 Ind. 128; Rudd *v.* Hanna, 4 T. B. Mon. (Ky.) 528 (holding that in an action on a bond to save harmless a surety on a prison-bounds bond, where the covenant sued on admits that the prisoner is then in custody at the suit of his creditors, defendant is estopped, unless he alleges fraud, to plead that the prisoner had escaped before the bond was executed); Pennsylvania Natural Gas Co. *v.* Cook, 123 Pa. St. 170, 16 Atl. 762. See also Whitaker *v.* Salisbury, 15 Pick. (Mass.) 534; Thomas *v.* Brady, 10 Pa. St. 164; McConihe *v.* McClurg, 18 Wis. 637.

97. Hopple *v.* Hipple, 33 Ohio St. 116.

98. **Assignability of contracts** generally see Assignments, 4 Cyc. 20 *et seq.*

99. Fletcher *v.* Piatt, 7 Blackf. (Ind.) 522.

1. Jenckes *v.* Rice, 119 Iowa 451, 93 N. W. 384.

2. Marshall *v.* Cobleigh, 18 N. H. 485.

act, provided such act is not apparently illegal in itself and is done honestly and *bona fide* in compliance with defendant's directions.[3] So a person who has been exposed to liability and compelled to pay damages on account of the negligence or tortious act of another has a right of action against the latter for indemnity,[4] provided plaintiff and defendant are not joint tort-feasors in such sense as to prevent plaintiff from recovering.[5] Thus it is well settled that a municipal corporation which has been compelled to pay a judgment recovered against it for damages sustained by an individual by an obstruction, defect, or excavation in the sidewalk or street of such corporation has an action over against the person who negligently or unlawfully created the defect that caused the injury.[6]

3. Henderson *v.* Levey, 2 Me. 139; King *v.* U. S., 1 Ct. Cl. 38; Dugdale *v.* Lovering, L. R. 10 C. P. 196, 44 L. J. C. P. 197, 32 L. T. Rep. N. S. 155, 23 Wkly. Rep. 391; Betts *v.* Gibbins, 2 A. & E. 57, 4 L. J. K. B. 1, 4 N. & M. 64, 29 E. C. L. 47; Toplis *v.* Grane, 5 Bing. N. Cas. 636, 9 L. J. C. P. 180, 7 Scott 620, 35 E. C. L. 341.

4. *Illinois.*— Pfau *v.* Williamson, 63 Ill. 16.

Iowa.— Chicago, etc., R. Co. *v.* Dunn, 59 Iowa 619, 13 N. W. 722.

Louisiana.— Fitzgerald *v.* Ferguson, 11 La. Ann. 396.

Massachusetts.— Boston Woven Hose, etc., Co. *v.* Kendall, 178 Mass. 232, 59 N. E. 657; Consolidated Hand-Method Lasting-Mach. Co. *v.* Bradley, 17 Mass. 127, 50 N. E. 464, 68 Am. St. Rep. 409; Old Colony R. Co. *v.* Slavens, 148 Mass. 363, 19 N. E. 372, 12 Am. St. Rep. 558; Churchill *v.* Holt, 127 Mass. 165, 34 Am. Rep. 355; Gray *v.* Boston Gaslight Co., 114 Mass. 149, 19 Am. Rep. 324; Proprietors Merrimack River Locks, etc. *v.* Lowell Horse R. Corp., 109 Mass. 221.

Minnesota.— Minneapolis Mill Co. *v.* Wheeler, 31 Minn. 121, 16 N. W. 698.

Missouri.— Schenk *v.* Forrester, 102 Mo. App. 124, 77 S. W. 332.

New Hampshire.— Nashua Iron, etc., Co. *v.* Worcester, etc., R. Co., 62 N. H. 159; Littleton *v.* Richardson, 32 N. H. 59.

New York.— Oceanic Steam Nav. Co. *v.* Compania Transatlantic Espanola, 134 N. Y. 461, 31 N. E. 987, 30 Am. St. Rep. 685 [*reversing* 58 N. Y. Super. Ct. 425, 11 N. Y. Suppl. 728]; Bassett *v.* Spofford, 2 Daly 432.

North Carolina.—March *v.* Wilson, 44 N. C. 143.

Pennsylvania.— Philadelphia Co. *v.* Central Traction Co., 165 Pa. St. 456, 30 Atl. 934; Campbell *v.* Williamson, 1 Phila. 198.

Tennessee.—Robertson *v.* Simmons, 4 Heisk. 135; Maxwell *v.* Louisville, etc., R. Co., 1 Tenn. Ch. 8.

Texas.— Texas, etc., R. Co. *v.* Lynch, 97 Tex. 25, 75 S. W. 486; Texas, etc., R. Co. *v.* Andrews, (Tex. Civ. App. 1904) 80 S. W. 390 (holding that where goods are shipped over connecting lines under a through contract of shipment, the initial carrier being held liable for the damages sustained on the connecting line has a right to a judgment over against the latter); Texas, etc., R. Co. *v.* Randle, 18 Tex. Civ. App. 348, 44 S. W. 603 [*distinguishing* Gulf, etc., R. Co. *v.* Short, (Tex. Civ. App. 1899) 51 S. W. 261].

Vermont.— Ladd *v.* Waterbury, 34 Vt. 426.

England.— Moxham *v.* Grant, 69 L. J. Q. B. 97.

Canada.— Mitchell *v.* Hamilton, 2 Ont. L. Rep. 58; Windsor Fair Grounds, etc., Assoc. *v.* Highland Park Club, 19 Ont. Pr. 130; Payne *v.* Coughell, 17 Ont. Pr. 39.

See 27 Cent. Dig. tit. "Indemnity," § 29.

5. See *infra*, III, F, text and note 20 *et seq.*

6. *Connecticut.*— Norwich *v.* Breed, 30 Conn. 535; Hamden *v.* New Haven, etc., Co., 27 Conn. 158.

Georgia.— Schneider *v.* Augusta, 118 Ga. 610, 45 S. E. 459; Faith *v.* Atlanta, 78 Ga. 779, 4 S. E. 3; Western, etc., R. Co. *v.* Atlanta, 74 Ga. 774.

Illinois.— Gridley *v.* Bloomington, 68 Ill. 47; Severin *v.* Eddy, 52 Ill. 189.

Indiana.— McNaughton *v.* Elkhart, 85 Ind. 384; Catterlin *v.* Frankfort, 79 Ind. 547, 41 Am. Rep. 627; Centerville *v.* Woods, 57 Ind. 192; Wickwire *v.* Angola, 4 Ind. App. 253, 30 N. E. 917.

Maine.— Portland *v.* Atlantic, etc., R. Co., 66 Me. 485.

Maryland.— Chesapeake, etc., Canal Co. *v.* Allegany County Com'rs, 57 Md. 201, 40 Am. Rep. 430.

Massachusetts.— Holyoke *v.* Hadley Water Power Co., 174 Mass. 424, 55 N. E. 889; Woburn *v.* Boston, etc., R. Corp., 109 Mass. 283; Milford *v.* Holbrook, 9 Allen 17, 85 Am. Dec. 735.

Michigan.— Lynch *v.* Hubbard, 101 Mich. 43, 59 N. W. 443; Detroit *v.* Chaffee, 70 Mich. 80, 37 N. W. 882.

Minnesota.— St. Paul *v.* St. Paul City R. Co., (1904) 100 N. W. 472; Wabasha *v.* Southworth, 54 Minn. 79, 55 N. W. 818.

Missouri.— Independence *v.* Missouri Pac. R. Co., 86 Mo. App. 585.

New Hampshire.— Manchester *v.* Quimby, 60 N. H. 10; Littleton *v.* Richardson, 32 N. H. 59.

New Jersey.— Durant *v.* Palmer, 29 N. J. L. 544.

New York.— Rochester *v.* Campbell, 123 N. Y. 405, 25 N. E. 937, 20 Am. St. Rep. 760, 10 L. R. A. 393; Port Jervis *v.* Port Jervis First Nat. Bank, 96 N. Y. 550; Rochester *v.* Montgomery, 72 N. Y. 65; Brooklyn *v.* Brooklyn City R. Co., 47 N. Y. 475, 7 Am. Rep. 469 [*affirming* 57 Barb. 497, 8 Abb. Pr. N. S. 356]; New York *v.* Brady, 81 Hun 440, 30 N. Y. Suppl. 1121; Canandaigua *v.* Foster, 81 Hun 147, 30 N. Y. Suppl. 686; New York *v.* Dimick, 49 Hun 241, 2 N. Y. Suppl. 46 [*af-*

B. Existence of Primary Liability. But to sustain an action of this character it is essential that the original liability of defendant should be established. In other words defendant must have been under a legal liability to do or not to do the thing for which damages were recovered in the first suit.[7] On this principle it has been held that the violation of a city ordinance which requires the owner of property fronting on a street to keep the sidewalk free from snow and ice and prescribes a penalty for such violation does not make such owner liable to the city for damages paid to one who received injuries by reason of the property owner's failure to keep the sidewalk clean.[8]

C. Scope and Extent of Liability. A person who is obliged to defend against the act of another, against whom he has a remedy over, may, if the

firming 20 Abb. N. Cas. 15]; Seneca Falls *v.* Zalinski, 8 Hun 571.

North Carolina.— Raleigh *v.* North Carolina R. Co., 129 N. C. 265, 40 S. E. 2.

Pennsylvania.— Reading *v.* Reiner, 167 Pa. St. 41, 31 Atl. 357; Armstrong County *v.* Clarion County, 66 Pa. St. 218, 5 Am. Rep. 368; Aston Tp. *v.* Chester Creek R. Co., 2 Del. Co. 9.

South Carolina.— Lucas *v.* O'Neale, Riley 30.

Texas.— San Antonio *v.* Smith, 94 Tex. 266, 59 S. W. 1109; Ft. Worth *v.* Allen, 10 Tex. Civ. App. 488, 31 S. W. 235.

Vermont.— Batty *v.* Duxbury, 24 Vt. 155.

United States.— Washington Gaslight Co. *v.* District of Columbia, 161 U. S. 316, 16 S. Ct. 564, 40 L. ed. 712; Chicago *v.* Robbins, 2 Black 418, 17 L. ed. 298 [*approved* in 4 Wall. 657, 18 L. ed. 427].

See 27 Cent. Dig. tit. "Indemnity," § 29.

7. *Connecticut.*— Norwich *v.* Breed, 30 Conn. 535.

Illinois.— Scammon *v.* Chicago, 25 Ill. 424, 79 Am. Dec. 334.

Indiana.— Elkhart *v.* Wickwire, 87 Ind. 77; Dipple *v.* Douglas, 14 Ind. 535.

Louisiana.— Sincer *v.* Bell, 47 La. Ann. 1548, 18 So. 755.

Massachusetts.— Lowell *v.* Glidden, 159 Mass. 317, 34 N. E. 459.

New Hampshire.— Manchester *v.* Warren, 67 N. H. 482, 32 Atl. 763.

New York.— Rochester *v.* Campbell, 123 N. Y. 405, 25 N. E. 937, 20 Am. St. Rep. 760, 10 L. R. A. 393; Buffalo *v.* Holloway, 7 N. Y. 493, 57 Am. Dec. 550 [*affirming* 14 Barb. 101]; New York *v.* Brady, 70 Hun 250, 24 N. Y. Suppl. 296 [*affirmed* in 77 Hun 241, 28 N. Y. Suppl. 324].

Tennessee.— Louisville, etc., R. Co. *v.* Guthrie, 10 Lea 432.

Texas.— Dillingham *v.* Crank, 87 Tex. 104, 27 S. W. 93.

United States.— Chicago *v.* Robbins, 2 Black 418, 17 L. ed. 298 [*approved* in 4 Wall. 657, 18 L. ed. 427].

See 27 Cent. Dig. tit. "Indemnity," § 30.

Where a contractor agrees to erect a building for the owner of a city lot and make a cellar extending under the sidewalk of a public street requiring excavation, and receives full possession of the property and has entire control of the work under the contract which contains no direction as to the manner of guarding the excavation, and the owner is subjected to the payment of damages on account of the negligence of the contractor, the manner in which he leaves such excavation open and exposed so that a person without negligence falls into the excavation and is injured, the contractor will be liable to the owner to make good the damages the latter is compelled to pay on account of such injury. Pfau *v.* Williamson, 63 Ill. 16. But if there is no provision in the contract that the contractor shall have exclusive possession of the lot or that he shall keep the area properly guarded during the progress of the work there is no implied obligation that the contractor shall keep it so guarded; if he has performed his work according to the contract he is not liable over to the owner for damages recovered against the latter for injury resulting from the area being left unguarded. Silvers *v.* Nerdlinger, 30 Ind. 53. See also Scammon *v.* Chicago, 25 Ill. 424, 79 Am. Dec. 334. In an action by a municipality to compel a property-owner to indemnify the city on damages paid by it for an injury resulting from an unguarded area in a sidewalk, it is no defense that the area was built for the owner by an independent contractor, where the injury occurred after the work of the contractor was completed and the control and oversight of the contractor had ceased. Robbins *v.* Chicago, 4 Wall. (U. S.) 657, 18 L. ed. 427.

A purchaser of a lot at a sheriff's sale, who does not appear to have obtained any possession or control of the premises, except such as arises constructively from the delivery and recording of a sheriff's deed, is not responsible to the city, which has paid a judgment for injuries received by one falling into a negligently constructed coal hole in front of such lot three weeks after the issuance of the sheriff's deed, and while the former owner is still in possession. Lincoln *v.* Lincoln First Nat. Bank, 67 Nebr. 401, 93 N. W. 698, 60 L. R. A. 923.

8. Hartford *v.* Talcott, 48 Conn. 525, 40 Am. Rep. 189; Keokuk *v.* Keokuk Independent Dist., 53 Iowa 352, 5 N. W. 503, 36 Am. Rep. 226; St. Louis *v.* Connecticut Mut. L. Ins. Co., 107 Mo. 92, 17 S. W. 637, 28 Am. St. Rep. 402; Fulton *v.* Tucker, 3 Hun (N. Y.) 529. See also Wickwire *v.* Angola, 4 Ind. App. 253, 30 N. E. 917; Rochester *v.* Campbell, 123 N. Y. 405, 25 N. E. 937, 20 Am. St. Rep. 760, 10 L. R. A. 393; Dallas *v.* Meyers, (Tex. Civ. App. 1900) 55 S. W. 742.

[7] [III, C]

indemnitor has notice of the suit and opportunity to defend, hold him liable not only for the amount of damages recovered but for all reasonable and necessary costs and expenses incurred in such defense,[9] including counsel fees.[10] And the same rule is applicable where the person ultimately liable appears and defends the action.[11]

D. Accrual of Liability — 1. In General. The right to sue for indemnity for damages resulting from the negligence, misfeasance, or malfeasance of defendant does not accrue until payment has been made by plaintiff.[12] On the other hand it is held that where plaintiff contracts with defendant to do work for a third person which plaintiff had contracted to do, the liability of plaintiff for damages incurred in consequence of defendant's failure to perform his contract will give rise to a right of action against defendant, although plaintiff has not paid the judgment recovered against him.[13]

2. Necessity of Compulsory Payment. A plaintiff who is liable for injuries caused by the neglect of defendant may adjust and pay the claim therefor and need not wait the result of a suit in order to be entitled to indemnity from defendant.[14] In the event of an adjustment without suit, the amount claimed must be reasonable and just, and payment must have been made in good faith.[15] The party seeking indemnity must have been legally liable to the injured party.[16]

9. Portland *v.* Atlanta, etc., R. Co., 66 Me. 485 (where it also appeared that the suit was defended by the indemnitee at the indemnitor's request); Veazie *v.* Penobscot R. Co., 49 Me. 119; Henderson *v.* Sevey, 2 Me. 139; Westfield *v.* Mayo, 122 Mass. 100, 23 Am. Rep. 292; Brooklyn *v.* Brooklyn City R. Co., 57 Barb. (N. Y.) 497 [*affirmed* in 47 N. Y. 475, 7 Am. Rep. 469]. *Compare* Corsicana *v.* Tobin, 23 Tex. Civ. App. 492, 57 S. W. 319, where plaintiff was held not to be entitled to attorney's fees.

In New Hampshire under a statute providing that the town shall recover the damages and costs they may have been compelled to pay the person sustaining the injury by reason of an encumbrance or obstruction upon a highway does not include the expenses of defending a suit instituted by the persons suffering the injury or the expenses of removing the encumbrance. Littleton *v.* Richardson, 32 N. H. 59.

Recovery of several damages.— In Newbury *v.* Connecticut, etc., R. Co., 25 Vt. 377, it was held that a town is not precluded by one recovery against defendants for damages sustained by their neglect from all future recovery for damages sustained by reason of the same neglect, and hence that a railroad negligently causing a highway to be defective is liable to indemnify a town for what it has been compelled to pay a husband for injury to his wife, although the company had previously paid the town for what it had been compelled to pay the husband for injuries to his carriage occurring at the same time as the injuries inflicted on the wife.

Double damages held not recoverable against indemnitor.— By a statute in Massachusetts making a municipality liable for double damages for injuries received on its highways, it has been held that the municipality can only recover single damages against defendant for his neglect in placing obstructions in the highway. Lowell *v.* Short, 4 Cush. (Mass.) 275; Lowell *v.* Boston, etc., R. Corp., 23 Pick. (Mass.) 24, 34 Am. Dec. 33.

10. Waterbury *v.* Waterbury Traction Co., 74 Conn. 152, 50 Atl. 3.

11. Ottumwa *v.* Parks, 43 Iowa 119, holding, however, that the indemnitor was not liable for the costs of an appeal not taken at his request. See also Henderson *v.* Sevey, 2 Me. 139.

12. Hoppaugh *v.* McGrath, 53 N. J. L. 81, 21 Atl. 106.

13. Power *v.* Munger, 52 Fed. 705, 3 C. C. A. 253. See also Boyd *v.* Robinson, 20 Ont. 404; Mewburn *v.* Mackelcan, 19 Ont. App. 729.

14. *Louisiana.*— Braunan *v.* Hoel, 15 La. Ann. 308, where plaintiff compromised the claim.

Massachusetts.— Swansey *v.* Chace, 16 Gray 303.

Minnesota.— Wabasha *v.* Southworth, 54 Minn. 79, 55 N. W. 818; Minneapolis Mill Co. *v.* Wheeler, 31 Minn. 121, 16 N. W. 698.

New Hampshire.— Hanover *v.* Dewey, 58 N. H. 485, payment made in pursuance of an award made in a voluntary arbitration.

New York.— Button *v.* Kinnetz, 88 Hun 35, 34 N. Y. Suppl. 522.

North Carolina.— Seaboard Air Line R. Co. *v.* Main, 132 N. C. 445, 43 S. E. 930.

The fact that a vessel settled and paid a claim against her for damages by collision without suit does not affect the right of the owners to recover over against the pilot through whose negligence it is alleged the liability occurred. Donald *v.* Guy, 127 Fed. 228.

15. West Boylston *v.* Mason, 102 Mass. 341; Swansey *v.* Chace, 16 Gray (Mass.) 303; New York *v.* Baird, 176 N. Y. 269, 68 N. E. 364; Seaboard Air Line R. Co. *v.* Mason, 132 N. C. 445, 43 S. E. 930.

16. Johnston *v.* Wright, 12 Fla. 478; Fahey *v.* Harvard, 62 Ill. 28.

E. Notice. The liability of the indemnitor does not, as a general rule, depend upon the fact of his receiving notice of the action brought against the indemnitee.[17] The omission to give notice in such case does not go to the right of action, but simply changes the burden of proof and imposes upon the party against whom the judgment was recovered the necessity of again litigating and establishing all of the actionable facts. But the indemnitor is concluded by the judgment if he has notice that the suit was pending and had any opportunity to defend it.[18] Such notice may be implied from his knowledge of the pendency of the suit, and express notice is unnecessary.[19]

F. Joint Tort-Feasors. It is a well established rule of law that there can be no indemnity among tort-feasors.[20] But this rule does not apply to a person seeking indemnity who did not join in the unlawful act, although he may thereby be exposed to liability or to one who did not know and was not presumed to know that his act was unlawful; it must appear that the parties are *in pari delicto* as to each other before plaintiff's recovery will be barred.[21] The burden

If a municipal corporation pays the amount of an award against it for damages resulting from an act for which it is not liable in law, it cannot recover over against the actual wrong-doer, although notice was given the latter to appear and defend the original suit. West Chester *v.* Apple, 35 Pa. St. 284, 78 Am. Dec. 336. See also Fahey *v.* Harvard, 62 Ill. 28.

17. Oceanic Steam Nav. Co. *v.* Campania Transatlantica Espanola, 144 N. Y. 663, 39 N. E. 360; Port Jervis *v.* Port Jervis First Nat. Bank, 96 N. Y. 550. See also *infra*, IV, I, text and note 77.

18. Milford *v.* Holbrook, 9 Allen (Mass.) 17, 85 Am. Dec. 735. See also *infra*, IV, I note 70 *et seq.*

19. Port Jervis *v.* Port Jervis First Nat. Bank, 96 N. Y. 550; Chicago *v.* Robbins, 2 Black (U. S.) 418, 17 L. ed. 298 [*approved* in 4 Wall. 657, 18 L. ed. 427].

20. *Kentucky.*—Trimble *v.* Exchange Bank, 62 S. W. 1027, 23 Ky. L. Rep. 367.

Louisiana.— Meunier *v.* Duperron, 3 Mart. 285.

Massachusetts.— Jacobs *v.* Pollard, 10 Cush. 287, 57 Am. Dec. 105.

New Hampshire.— Boston, etc., R. Co. *v.* Brackett, 71 N. H. 494, 53 Atl. 304 (holding that it is only when the party who is in fault as to the person injured is without fault as to the party whose actual negligence is the cause of the injury that recovery over can be had); Gregg *v.* Page Belting Co., 69 N. H. 247, 46 Atl. 26; Littleton *v.* Richardson, 34 N. H. 179, 66 Am. Dec. 759.

New York.— Prescott *v.* Le Conte, 83 N. Y. App. Div. 482, 82 N. Y. Suppl. 411.

Ohio.— Talmadge *v.* Zanesville, etc., Road Co., 11 Ohio 197.

Pennsylvania. — Gilberton *v.* Schuylkill Traction Co., 22 Pa. Super. Ct. 279.

Texas.— Gulf, etc., R. Co. *v.* Sandifer, 29 Tex. Civ. App. 356, 69 S. W. 461; Ft. Worth, etc., R. Co. *v.* Reese, 29 Tex. Civ. App. 400, 68 S. W. 1019; International, etc., R. Co. *v.* Jones, 26 Tex. Civ. App. 167, 62 S. W. 1075; Gulf, etc., R. Co. *v.* Powell, 25 Tex. Civ. App. 91, 60 S. W. 979 (holding that the fact that a servant's injuries are caused by the concurring negligence of the master and a third person confers no right of action on the master as against such person); San Antonio *v.* Pizzini, (Civ. App. 1900) 58 S. W. 635; Liefert *v.* Galveston, etc., R. Co., (Civ. App. 1900) 57 S. W. 899; Corsicana *v.* Tobin, 23 Tex. Civ. App. 492, 57 S. W. 319; Galveston, etc., R. Co. *v.* Nass, (Civ. App. 1900) 57 S. W. 910 [*affirmed* in 94 Tex. 255, 59 S. W. 870]; Galveston *v.* Gonzales, 6 Tex. Civ. App. 538, 25 S. W. 978; Texas, etc., R. Co. *v.* Doherty, (App. 1890) 15 S. W. 44.

United States.— Omaha Union Stock Yards Co. *v.* Chicago, etc., R. Co., 196 U. S. 217, 25 S. Ct. 226, 49 L. ed. 453; Chicago *v.* Robbins, 2 Black 418, 17 L. ed. 298; Atlanta Consol. St. R. Co. *v.* Southern Bell Tel. Co., 107 Fed. 874.

Canada.— Wilson *v.* Boulter, 18 Ont. Pr. 107.

See 27 Cent. Dig. tit. "Indemnity," § 31.

Contribution between joint tort-feasors see CONTRIBUTION, 9 Cyc. 804, note 82 *et seq.*

21. *Illinois.*— Farwell *v.* Becker, 129 Ill. 261, 21 N. E. 792, 16 Am. St. Rep. 267, 6 L. R. A. 400.

Maryland.— Chesapeake, etc., Canal Co. *v.* Allegany County Com'rs, 57 Md. 201, 40 Am. Rep. 430.

Massachusetts.— Old Colony R. Co. *v.* Slavens, 148 Mass. 363, 19 N. E. 372, 12 Am. St. Rep. 558; Campbell *v.* Somerville, 114 Mass. 334; Jacobs *v.* Pollard, 10 Cush. 287, 57 Am. Dec. 105.

Minnesota.— Minneapolis Mill Co. *v.* Wheeler, 31 Minn. 121, 16 N. W. 698.

New Hampshire.— Littleton *v.* Richardson, 32 N. H. 59.

New York.— Prescott *v.* Le Conte, 83 N. Y. App. Div. 482, 82 N. Y. Suppl. 411 [*affirmed* in 178 N. Y. 585, 70 N. E. 1108; Brooklyn *v.* Brooklyn City R. Co., 47 N. Y. 475, 7 Am. Rep. 469; Canadaigua *v.* Foster, 81 Hun 147, 30 N. Y. Suppl. 686; Geneva *v.* Brush Electric Co., 50 Hun 581, 584, 3 N. Y. Suppl. 595, where it is said: "The cases in which recovery over is permitted in favor of one who has been compelled to respond to the party injured, are exceptions to the general rule and are based upon principles of equity. Such exceptions obtain in two classes of

of proof is on plaintiff to show that the damages in the first recovery were not occasioned by his own neglect.[22]

IV. ACTIONS.[23]

A. Form of Remedy. Contracts of indemnity like other contracts may be the ground of an action *ex contractu*.[24] But an action of debt will not lie on a contract of indemnity against unliquidated damages.[25] So it has been held that

cases: 1st. Where the party claiming indemnity has not been guilty of any fault except technically or constructively, as where an innocent master is held to respond for the tort of his servant acting within the scope of his employment; or, 2d. Where both parties have been in fault, but not in the same fault, towards the party injured, and the fault of the party from whom indemnity is claimed was the primary and efficient cause of the injury."

Texas.— Robertson *v.* Trammell, (Civ. App. 1904) 83 S. W. 258 [writ of error *denied* in 98 Tex. 364, 83 S. W. 1098]; Houston, etc., R. Co. *v.* Williams, (Civ. App. 1895) 31 S. W. 556.

Vermont.— Roxbury *v.* Central Vermont R. Co., 60 Vt. 121, 14 Atl. 92.

United States.— Washington Gaslight Co. *v.* District of Columbia, 161 U. S. 316, 16 S. Ct. 564, 40 L. ed. 712 [*affirming* 20 D. C. 39].

See 27 Cent. Dig. tit. "Indemnity," § 31.

Where the neglect of plaintiff is constructive only the rule that one wrong-doer cannot recover damages from the other does not apply. New York *v.* Dimick, 49 Hun (N. Y.) 241, 2 N. Y. Suppl. 46; Rochester *v.* Montgomery, 9 Hun (N. Y.) 394. To the same effect see Old Colony R. Co. *v.* Slavens, 148 Mass. 363, 19 N. E. 372, 12 Am. St. Rep. 558; Brookville *v.* Arthurs, 130 Pa. St. 501, 18 Atl. 1076. Thus a person who places an obstruction in a highway cannot resist the claim of a municipality to indemnity for damages paid, on the ground that the neglect of the municipality to remove the obstruction contributed to the injury. Waterbury *v.* Waterbury Traction Co., 74 Conn. 152, 50 Atl. 3; Woburn *v.* Boston, etc., R. Co., 109 Mass. 283; Atkinson *v.* Chatham, 26 Ont. App. 521. See also Wickwire *v.* Angora, 4 Ind. App. 253, 30 N. E. 917; Manchester *v.* Quimby, 60 N. H. 10; Port Jervis *v.* Port Jervis First Nat. Bank, 96 N. Y. 550. *Compare* Galveston *v.* Gonzales, 6 Tex. Civ. App. 538, 25 S. W. 978. So where a coal hole was constructed in a sidewalk with the consent of a village and afterward reconstructed without its consent, it was held that the village might recover over for damages paid for injuries received as a result of the improper reconstruction of the coal hole. Canandaigua *v.* Foster, 81 Hun (N. Y.) 147, 30 N. Y. Suppl. 686. But when it appeared that the municipality had affirmatively assented to the maintenance of a pole in the street, in such a position as to amount to a nuisance, it was held that the municipality had no right of action over against the electric company setting up the pole, for damages paid out by the municipality to a person injured by the obstruction in question. Geneva *v.* Brush Electric Co., 50 Hun (N. Y.) 581, 3 N. Y. Suppl. 595 [*affirmed* in 130 N. Y. 670, 29 N. E. 1034].

22. Boston, etc., R. Co. *v.* Sargent, 70 N. H. 299, 47 Atl. 605.

23. Actions generally see ACTIONS.

24. Gordon *v.* Stanley, 108 La. 182, 32 So. 531.

If a note is held as indemnity against the act or default of a third person a suit may be had directly upon it without reference to the special agreement. Wagman *v.* Hoag, 14 Barb. (N. Y.) 232, where it was intimated, however, that the rule would be otherwise where the liability of defendant rested solely upon an agreement collateral in its terms.

Successive recoveries on promise of indemnity.— On a promise by A to pay an indemnity to B against three notes payable in three successive years, if B is obliged to pay as each falls due, he may recover on each payment and one recovery is no bar to the others. Hosford *v.* Foote, 3 Vt. 391.

Action at law and not in equity.— In Hall *v.* Thayer, 12 Metc. (Mass.) 130, it was held that when defendant with a number of other persons as subscribers to a fund to build a church agreed to hold plaintiffs harmless from any liability in the erection of the church, plaintiffs could maintain an action at law against defendant and were not compelled to resort to a bill in equity, with a view of making the other subscribers parties, since the subscribers were not partners in the erection of the church, but merely shareholders, and their promise of indemnity was not joint but several, the proportionate share of each being distinctly divided.

Cross petition against indemnitor in action against indemnitee.— The obligors in a bond given to indemnify a railroad company against liability for damages to property by reason of the location of its road through the streets of a town are not proper parties to an action by the owner of abutting property against the railroad company for damages and a demurrer will lie to a cross petition filed against them in such action by the railroad company. Texas Midland R. Co. *v.* Miers, (Tex. Civ. App. 1896) 37 S. W. 640 [*following* Frey *v.* Ft. Worth, etc., R. Co., 86 Tex. 465, 25 S. W. 609]. *Compare* Ft. Worth *v.* Allen, 10 Tex. Civ. App. 488, 31 S. W. 235, holding that where two wrong-doers made parties defendant are liable to plaintiff but are not *in pari delicto*, defendant secondarily liable is entitled to judgment against the other defendant without being forced to a separate action.

25. Flanagan *v.* Camden Mut. Ins. Co., 25 N. J. L. 506.

an action for money paid will not lie against a person who has engaged to indemnify another against the costs of an action brought against him, but that the declaration should be specially upon the undertaking to indemnify.[26] On the other hand it has been held that where there is an express contract of indemnity and by its terms it contains nothing more than the law would imply, it is optional with plaintiff to declare in general *indebitatus assumpsit* for money paid or upon the general contract.[27]

B. Parties. The indemnitee alone, or someone in his right, can enforce the contract of indemnity.[28] Where two persons are named as indemnitees in a bond and only one is damaged a joint action may be brought for the benefit of the person damaged.[29] If the contract is several one may maintain the action without joining the others.[30] If a party sues alone on a bond of indemnity made to

26. Miller *v.* Munro, 6 U. C. Q. B. O. S. 166.

27. Gibbs *v.* Bryant, 1 Pick. (Mass.) 118; Davis *v.* Smith, 79 Me. 351, 10 Atl. 55; Sanborn *v.* Emerson, 12 N. H. 57.

28. *Colorado.*— Moulton *v.* McLean, 5 Colo. App. 454, 39 Pac. 78.

Indiana.— Derry *v.* Morrison, 8 Ind. App. 50, 34 N. E. 107.

Kentucky.— Price *v.* Rodman, 2 Ky. L. Rep. 213.

New York.— French *v.* Vix, 143 N. Y. 90, 37 N. E. 612.

Pennsylvania.— Knap *v.* Duncan, 8 Wkly. Notes Cas. 514.

Virginia.— Lewis *v.* Adams, 6 Leigh 320.

See 27 Cent. Dig. tit. "Indemnity," § 37.

Compare Moore *v.* Los Angeles Iron, etc., Co., 89 Fed. 73, decided under Cal. Civ. Code, § 2777, declaring that one who indemnifies another "against an act to be done by the latter is liable jointly with the person indemnified, and separately to every person injured by such act."

The assignee of a note given as an indemnity, if the assignment is properly made, may maintain an action thereon. Steere *v.* Trebilcock, 108 Mich. 464, 66 N. W. 342.

Where a purchaser of land takes from the vendee a bond of indemnity against outstanding liens on the land, and the purchaser conveys the land to another, who is compelled to pay the claims which were a lien on the land, such grantee of the purchaser may maintain an action on the indemnity bond. Smith *v.* Peace, 1 Lea (Tenn.) 586.

Right of creditor to sue on bond indemnifying debtor.— Where a contract to indemnify a debtor was made by a third person for whose benefit the debt was incurred, it was held that the principal creditor not being a party to the contract could not sue on it in his own name. Knap *v.* Duncan, 8 Wkly. Notes Cas. (Pa.) 514. *Compare* Pulver *v.* Skinner, 42 Hun (N. Y.) 322. So where an assignee in bankruptcy under an order of court sold real estate of the bankrupt, taking from the purchaser a bond of indemnity conditioned for the payment by the purchaser of outstanding liens and encumbrances on the property and to save the vendor harmless therefrom, it was held that one holding a lien against the property had no right of action upon the bond. Young *v.* Schlosser, 65 Ind. 225. Where a mortgagor conveyed the premises to one who assumed and agreed to pay the encumbrance and save the mortgagor harmless therefrom, and this agreement was assigned by the mortgagor to the holder of the note and mortgage, it was held that since the assignee took all rights held by his assignor he could maintain an action on the agreement in his own name to recover of the grantee the amount of the note. Foster *v.* Atwater, 42 Conn. 244.

Action by assignee of indemnity mortgage see Carper *v.* Munger, 62 Ind. 481.

Action by administrator of indemnitee.— Where the contract of indemnity does not name the indemnitee's executor or administrator, and the indemnitee dies before breach of condition the administrator may maintain an action for a breach happening after his death. Leber *v.* Kauffelt, 5 Watts & S. (Pa.) 440, where it was also held that if one entitled to letters of administration pay a claim against intestate and afterward takes out letters of administration he may maintain an action on a bond of indemnity given to the intestate to indemnify him against the claim thus paid.

Parties defendant.— Creditors secured by a trust assignment, who have filed a bill against the trustee and his surety for an account, are neither necessary nor proper parties defendant to a bill by the surety against the maker of the trust upon an alleged promise of indemnity by him, and this although it be charged that the bill of the creditors was filed at the instance of the maker of the trust or his attorneys, or both, in order to throw the burden of the trustee's default on the surety. Macey *v.* Childress, 2 Tenn. Ch. 438.

29. Bird *v.* Washburn, 10 Pick. (Mass.) 223; Mehaffy *v.* Lytle, 1 Watts (Pa.) 314.

30. Taylor *v.* Coon, 79 Wis. 76, 48 N. W. 123.

Where several persons have been compelled to pay money on a warrant of distress against a town they may bring several actions against the town for reimbursement. Been *v.* Botsford, 3 Day (Conn.) 159.

Suit by one of several cosureties.— A surety on an official bond, who has covenanted to indemnify his cosureties against liability thereon, may be sued on such covenant by one of his cosureties alone, who has paid a part of the amount of the principal's defalcation. Cross *v.* Williams, 72 Mo. 577.

himself and others he must show that he alone received the injury resulting from the breach of the bond.[31]

C. Conditions Precedent to Recovery. A request or demand of the indemnitor to indemnify according to the conditions of the contract is not necessary before suit,[32] and this, it is held, although the promise is to indemnify "on demand," the bringing of suit being regarded as a sufficient demand.[33] In the absence of express agreement it is not a condition precedent to recovery on a contract of indemnity that the indemnitee should first seek reimbursement for the damages sustained from a third person liable to him,[34] and this, it has been held, although the indemnitor might have no remedy over against such third person.[35]

D. Defenses — 1. In General. It is a good defense that plaintiff has not complied with the essential conditions of the contract.[36] The fact that an execution on which money had been paid by an indemnitee was issued in violation of a prior agreement has been held to be no defense in an action by the indemnitee against an indemnitor, provided the indemnitee was not a party to the agreement and did not know of its existence.[37] The fact that a person has received a consideration for assuming the risk of becoming an indorser of paper does not preclude him from resorting to a contract of indemnity for his liability as indorser.[38] In a suit on a bond to indemnify a person against certain notes which he had signed as surety, it is no defense that he is insolvent and cannot be damnified through his liability on the notes.[39] Failure to appear and defend a suit is no defense unless it can be shown that such failure was the result of negligence or that an appearance would have availed defendant.[40] The indemnitee's delay in notifying indemnitor of his liability in a suit on a continuous indemnifying bond will not release the indemnitor unless he can show that the delay was prejudicial.[41] Payment in full of a contractor's claim for work in constructing a pavement for a city, without retaining the amount of a judgment against it for injuries received from the alleged negligence of the contractor, does not operate as a satisfac-

31. Percival *v.* McCoy, 13 Fed. 379, 4 McCrary 418.

32. Lamb *v.* Harrison, 2 Leigh (Va.) 525.

33. Halleck *v.* Moss, 22 Cal. 266.

34. Conery *v.* Cannon, 26 La. Ann. 123; Kempton *v.* Coffin, 12 Pick. (Mass.) 129; Carman *v.* Nobel, 9 Pa. St. 366, holding that in an action by a surety to recover on an agreement to indemnify him, it was immaterial to show that satisfaction could be had from the principal where there had been a recovery against the surety.

Prior resort to securities unnecessary.— In Batchelder *v.* Wendell, 36 N. H. 204, it was held that when obligors agreed to indemnify and secure the obligees against any and all loss or damage growing out of a particular transaction and it was at the same time agreed that certain securities should be taken for the benefit of the obligees, the latter might maintain their bill, without showing that they had attempted to make the securities available.

35. Springfield *v.* Boyle, 164 Mass. 591, 42 N. E. 333, holding that a city, indemnified for giving a license to a society to use a street, can recover from the indemnitor without first attempting to recover from the society, although the indemnitor has no remedy over against the society.

36. See *supra*, II, B, 9, text and note 80 *et seq.*

Matters not required by contract.— In an action on a contract to indemnify a city for damages paid on account of injuries occasioned by a certain society to whom a license had been granted, it was held that the fact that the society using a street did not give a written agreement to a city as required by ordinance was no defense in the absence of an agreement to that effect in the indemnity undertaking. Springfield *v.* Boyle, 164 Mass. 591, 42 N. E. 333.

37. Johnston *v.* Mann, 9 Pa. Super. Ct. 251.

38. Taylor *v.* Matteson, 86 Wis. 113, 56 N. W. 829.

39. Quickel *v.* Henderson, 59 N. C. 286. See also Bauer *v.* Roth, 4 Rawle (Pa.) 83; McNairy *v.* Thompson, 1 Sneed (Tenn.) 141.

40. Doran *v.* Davis, 43 Iowa 86.

Failure to take case to court of last resort. — In Grant *v.* Lawrence, 79 Hun (N. Y.) 565, 29 N. Y. Suppl. 901, it was held that in an action for breach of contract to indemnify plaintiff by reason of the insufficiency of certain patent rights sold by defendant to plaintiff, plaintiff need not show that he caused the litigation in regard to the patents to the court of last resort, where it appeared that theretofore suits involving the same matter had been decided adversely to the position of defendant.

41. Ætna Nat. Bank *v.* Hollister, 55 Conn. 188, 10 Atl. 550.

tion of the contract and bond which he had executed to the city to save it harmless.[42]

2. STATUTE OF LIMITATIONS.[43] The limitation of actions on contracts of indemnity express or implied is regulated by statute in the various jurisdictions.[44] In the case of a mere promise of indemnity the statute of limitations begins to run from the time the promisee actually pays the money, and not from the time he becomes liable for the payment of it.[45] So the right to sue for indemnity for money paid by plaintiff on account of the negligence of defendant does not accrue until payment is made, and therefore the statute of limitations does not begin to run until payment.[46]

E. Pleadings[47] — 1. BY PLAINTIFF. The declaration or petition may set out in full the bond or contract of indemnity.[48] But this is not always required.[49] In a case where a consideration is not implied, the consideration must be averred and proved.[50] A request to the indemnitor to indemnify according to the terms of the contract need not be alleged.[51] Plaintiff must allege that actual damage has been sustained and in what manner and to what extent he has been damnified; a general averment of loss is not sufficient.[52] Where one person or corpora-

42. Detroit *v.* Grant, 135 Mich. 626, 98 N. W. 405.

An equitable plea in an action upon a note that plaintiff had covenanted to pay defendant's debts which had been broken whereby defendant was damnified to an amount equal to the amount of the note was held bad. Griffith *v.* Griffith, 6 Ont. Pr. 172.

43. **Statute of limitations** generally see LIMITATIONS OF ACTIONS.

44. Harrah *v.* Jacobs, 75 Iowa 72, 39 N. W. 187, 1 L. R. A. 152; Joyce *v.* Joyce, 1 Bush (Ky.) 474; Gillespie *v.* Creswell, 12 Gill & J. (Md.) 36; Roosevelt *v.* Mark, 6 Johns. Ch. (N. Y.) 266.

45. Hall *v.* Thayer, 12 Metc. (Mass.) 130. See also Jones *v.* Trimble, 3 Rawle (Pa.) 381; Colvin *v.* Buckle, 11 L. J. Exch. 33, 8 M. & W. 680.

46. Power *v.* Munger, 52 Fed. 705, 3 C. C. A. 253.

47. **Pleading** generally see PLEADING.

48. Hirt *v.* Hahn, 61 Mo. 496.

49. Tarboro Bank *v.* Fidelity, etc., Co., 126 N. C. 320, 35 S. E. 588, 83 Am. St. Rep. 682; Manary *v.* Runyon, 43 Oreg. 495, 73 Pac. 1028; Bull *v.* Allen, 11 Serg. & R. (Pa.) 52.

50. Israel *v.* Reynolds, 11 Ill. 218. See also Bull *v.* Allen, 11 Serg. & R. (Pa.) 52.

51. Lamb *v.* Harrison, 2 Leigh (Va.) 525.

52. *Iowa.*— Jenckes *v.* Rice, 119 Iowa 451, 93 N. W. 384.

New York.— Brown *v.* Pease, 6 N. Y. St. 191; Thomas *v.* Allen, 1 Hill 145; Packard *v.* Hill, 7 Cow. 434, holding that on a promise to indemnify against a recovery of moneys it is a cause of special but not of general demurrer if the declaration avers generally that plaintiff was compelled to pay.

Pennsylvania.— Brown *v.* Brodhead, 3 Whart. 89.

South Dakota.— Cranmer *v.* Dakota Bldg., etc., Assoc., 6 S. D. 341, 61 N. W. 35.

Vermont.— Farnsworth *v.* Nason, Brayt. 192.

Wisconsin.— Taylor *v.* Coon, 79 Wis. 76, 48 N. W. 123 (holding that an indemnity contract was not "an instrument for the payment of money" under the Wisconsin code providing that in an action on an instrument for the payment of money only it shall be sufficient to give a copy of it in his complaint and to state that there is due thereon from the adverse party a specified sum); Lewis *v.* Woolfolk, 2 Pinn. 209, 1 Chandl. 171.

United States.— Coe *v.* Rankin, 5 Fed. Cas. No. 2,943, 5 McLean 354.

See 27 Cent. Dig. tit. "Indemnity," § 42.

The person indemnified.— On a promise to indemnify against expenses incurred by plaintiffs or their agents a declaration that one of plaintiffs as agent of all had been damnified is good on general demurrer. Packard *v.* Hill, 7 Cow. (N. Y.) 434. So in an action on a bond of indemnity, given by one person to two, brought by the two for the use of the one who had been damnified, the declaration is not vitiated by a particular statement of the case or by the conclusion that the refusal of defendant to pay was to the damage of one. Mehaffy *v.* Lytle, 1 Watts (Pa.) 314.

Where an indemnity bond is conditioned for the payment of a debt, as well as the indemnification of plaintiff, it is a sufficient allegation of breach of the bond that the debt became due and was not paid without showing that plaintiff had been actually damnified. Thomas *v.* Allen, 1 Hill (N. Y.) 145 [*overruling* Douglass *v.* Clark, 14 Johns. 177].

Petition held sufficient see Hirt *v.* Hahn, 61 Mo. 496.

In an action by an agent against his principal on an implied promise of indemnity against losses sustained in the execution of the agency, it was held that an allegation in the complaint that defendant had notice of the losses and damages sustained by plaintiff, set forth in the declaration, and failed to pay the same was a sufficient averment of a breach. Moore *v.* Appleton, 26 Ala. 633, 34 Ala. 147, 73 Am. Dec. 448. In an action against a principal for damages

tion has been compelled to pay damages to a third person by reason of an injury caused by the negligence or wrongful act of another in an action for indemnity for such damages the pleadings must contain not only an allegation of defendant's negligence or wrongful act,[53] but an averment of the liability of the party seeking indemnity to the person injured.[54] If the indemnitor promises to pay only at the end of a specified period after notice of loss, the complaint is demurrable if it fails to allege the lapse of the period.[55] In an action on a bond to indemnify against a suit or demand the declaration must show either that the obligors had notice of the action against the obligee and an opportunity to defend it or that the person bringing the suit had a good cause of action on which he recovered or might have recovered against the obligee.[56]

2. By Defendant. In an action on an indemnity contract the proper plea is *non damnificatus*,[57] unless the declaration particularly specifies the breaches.[58] Where there is a breach of any of the conditions of the bond sued on which will release defendant from obligation it is for him to set up the conditions and aver the breach thereof.[59] A plea that the indemnitees had suffered a judgment by default has been held to be defective in not averring that there was a legal defense which they might have made.[60]

F. Evidence.[61] In actions on contracts of indemnity express or implied the general rules governing the admissibility and weight and sufficiency of evidence apply.[62]

recovered in trespass against the agent by the true owner of property taken, the declaration must negative the existence of any knowledge on the part of the agent at the time of the taking that he was committing a trespass, although the onus of proving such notice may be on the principal. Moore *v.* Appleton, 26 Ala. 633.

Sufficient allegations in reply.— Where, in an action on a contract to indemnify plaintiff on failure of a corporation to perform its contract, the indemnitor denied liability on the ground that no suit had been instituted to enforce the contract against the corporation, and that plaintiff's damages had never been ascertained, etc., a reply alleging that plaintiff's failure to institute such proceedings was due to the corporation's insolvency was sufficient. Scott *v.* Conn, 76 N. Y. App. Div. 561, 78 N. Y. Suppl. 274.

53. Cincinnati, etc., R. Co. *v.* Louisville, etc., R. Co., 97 Ky. 128, 30 S. W. 408, 17 Ky. L. Rep. 21.

54. *Connecticut.*— Norwich *v.* Breed, 30 Conn. 535.

Illinois.— Fahey *v.* Harvard, 62 Ill. 28.

Kentucky.— Cincinnati, etc., R. Co. *v.* Louisville, etc., R. Co., 97 Ky. 128, 30 S. W. 408, 17 Ky. L. Rep. 21.

Massachusetts.— Woodbury *v.* Post, 158 Mass. 140, 33 N. E. 86.

New Hampshire.— Littleton *v.* Richardson, 34 N. H. 179, 66 Am. Dec. 759.

See 27 Cent. Dig. tit. "Indemnity," § 42.

Compare New York *v.* Dimick, 49 Hun (N. Y.) 241, 2 N. Y. Suppl. 46, holding that a judgment against a city is sufficient to show that the city had notice sufficient to make it liable so as to make unnecessary the pleading of notice of the defect.

55. California Sav. Bank *v.* American Surety Co., 82 Fed. 866.

56. Fender *v.* Stiles, 31 Ill. 460, where, it appearing from the bond which constituted a portion of the declaration that the first plaintiff ought to have recovered, it was held enough to allege that such recovery was had.

57. Loyd *v.* Marvin, 7 Blackf. (Ind.) 464; Hough *v.* Perkins, 2 How. (Miss.) 724; Douglass *v.* Clark, 14 Johns. (N. Y.) 177; Wicker *v.* Hoppock, 6 Wall. (U. S.) 94, 18 L. ed. 752.

Nil debet is not a good plea. Bauer *v.* Roth, 4 Rawle (Pa.) 83.

Plea of conditions performed.— On a bond merely conditioned for indemnity where a plea of *non damnificatus* would be proper, a plea of conditions performed answers the same purpose. Archer *v.* Archer, 8 Gratt. (Va.) 539; Poling *v.* Maddox, 41 W. Va. 779, 24 S. E. 999.

58. Dime Sav. Inst. *v.* American Surety Co., 68 N. J. L. 440, 53 Atl. 217, holding that where the declaration sets up a bond with condition and specifically assigns breaches *non damnificatus* is not a good plea, but the breaches must be traversed with conclusion to the country. See also Bauer *v.* Roth, 4 Rawle (Pa.) 83. *Compare* Smith *v.* Eubanks, 9 Yerg. (Tenn.) 20; Williams *v.* Wilson, 1 Vt. 266.

59. Fidelity, etc., Co. *v.* Eickhoff, 63 Minn. 170, 65 N. W. 351, 56 Am. St. Rep. 464, 30 L. R. A. 586; Benton *v.* Burbank, 54 N. H. 583; Tarboro Bank *v.* Fidelity, etc., Co., 126 N. C. 320, 35 S. E. 588, 83 Am. St. Rep. 682; Gipson *v.* Williams, (Tex. Civ. App. 1894) 27 S. W. 824.

An equitable plea in an action on a note, that plaintiff had covenanted to pay defendant's debts which he had broken whereby defendant was damnified to an amount equal to the amount of the note was held to be bad. Griffith *v.* Griffith, 6 Ont. Pr. 172.

60. Brown *v.* Murdock, 16 Md. 521. See also Lyman *v.* Lull, 4 N. H. 495.

61. Evidence generally see Evidence, 16 Cyc. 821.

62. See cases cited *infra*, this note.

In an action on a contract of indemnity, express or implied, against the claim of a third person, the record of a judgment recovered by such third person is admissible.[63] A verdict settled without judgment is also admissible to show a recovery.[64] If the contract is uncertain as to the contingencies upon which the indemnity is to be paid, parol evidence is admissible if such evidence is consistent with the terms of the contract.[65] But, if a contract of indemnity contains no direct undertaking to any designated person, an outside party who assumes liability, relying on the instrument, cannot show by parol that it was to indemnify anyone becoming liable.[66]

G. Issues, Proof, and Variance. In suits upon contracts of indemnity the ordinary rules relating to variance between pleading and proof are applicable.[67] Thus in a suit upon a bond of indemnity made to plaintiff and other obligees, plaintiff cannot set up a bond as running to himself alone and give in evidence an instrument made to himself jointly with other obligees.[68]

H. Trial. In actions upon contracts of indemnity the ordinary rules governing the trial of actions *ex contractu* generally are applicable.[69]

Evidence admissible see Guarantee Co. of North America *v.* Mutual Bldg., etc., Assoc., 57 Ill. App. 254 (statement of account); Creamer *v.* Stephenson, 15 Md. 211 (holding that in a suit on a bond to save harmless against anticipated litigation, the obligee could show that it was agreed that the obligor should take care of the suit, as bearing on the fact that the obligee was not negligent in suffering a default); Littleton *v.* Richardson, 34 N. H. 179, 66 Am. Dec. 759 (holding that in an action by a town against one who placed obstructions in a highway, as a result of which a traveler sustained damages which the town was compelled to pay, evidence was admissible on the part of defendant to show that the recovery against the town was had not on account of the obstruction but on account of defects in the road); Lyman *v.* Lull, 4 N. H. 495 (evidence of support in action on bond to save town harmless from support of illegitimate child); New York *v.* Brady, 81 Hun 440, 30 N. Y. Suppl. 1121 (holding that where a city which has had a judgment against it for personal injuries caused by an obstruction left in a street by a contractor sues on the contractor's bond for indemnity, it may show by evidence *aliunde* the record in the action by the person injured that the presence of the obstruction was the subject-matter relied on for a recovery in that action); Lee *v.* Clark, 1 Hill (N. Y.) 56 (recital of contract in bond as primary evidence of execution of contract); Oregon R., etc., Co. *v.* Swinburne, 26 Oreg. 262, 37 Pac. 1030 (written memorandum); Brookville *v.* Arthurs, 130 Pa. St. 501, 18 Atl. 1076 (holding that in an action to recover over damages caused by a defective sidewalk which plaintiff has been compelled to pay, any former agreement made between plaintiff and defendant as to the duty to make repairs, etc., is admissible to show as between them that it was the latter's duty to repair).

Evidence inadmissible see Laing *v.* Hanson, (Tex. Civ. App. 1896) 36 S. W. 116, holding that when a contractor liable to another for damages caused in the performance of his contract by his subcontractor, which the latter has agreed to indemnify him against, being sued for the damages, compromises the suit, without the knowledge or consent of the subcontractor, after the latter has neglected the opportunity offered him to defend, the amount compromised for is no evidence against the subcontractor of the amount of damages for which he is liable, but merely fixes a limit beyond which damages cannot be shown against him.

Sufficiency of evidence see Hart *v.* Messenger, 46 N. Y. 253; Carroll *v.* Nixon, 4 Watts & S. (Pa.) 517.

63. Holbrook *v.* Holbrook, 15 Me. 9; Weld *v.* Nichols, 17 Pick. (Mass.) 538; Carman *v.* Noble, 9 Pa. St. 366; Pierce *v.* Wright, 33 Tex. 631.

64. Lee *v.* Clark, 1 Hill (N. Y.) 56.

65. Prouty *v.* Adams, 141 Cal. 304, 74 Pac. 845.

66. Price *v.* Rodman, 2 Ky. L. Rep. 213.

67. See cases cited *infra*, this note.

Facts held not to constitute a variance see McCarthy *v.* Chicago, 53 Ill. 38; Lee *v.* Wisner, 38 Mich. 82; Drown *v.* Forrest, 63 Vt. 557, 22 Atl. 612, 14 L. R. A. 80.

Facts held to constitute a variance see Allen *v.* De Nyse, 60 N. Y. App. Div. 71, 69 N. Y. Suppl. 662; Smith *v.* Burton, 94 Va. 158, 26 S. E. 412; Kevan *v.* Branch, 1 Gratt. (Va.) 274.

68. Percival *v.* McCoy, 13 Fed. 379, 4 McCrary 418.

69. See cases cited *infra*, this note.

Directing verdict for plaintiff see Dixon *v.* Fridette, 81 Me. 122, 16 Atl. 412; Garvey *v.* Marks, 134 Mo. 1, 34 S. W. 1108, 38 S. W. 79; New York *v.* Brady, 151 N. Y. 611, 45 N. E. 1122.

Instructions held not to be erroneous.— In Bauer *v.* Roth, 4 Rawle (Pa.) 83, it was held that in an action on a bond of indemnity there is no error in charging the jury that they might give plaintiffs the full amount due on the obligation when it was also recommended to the jury that in case they should find for the plaintiffs, they should regulate the amount of damages by the

I. Conclusiveness and Effect of Judgment Against Indemnitee. One who is notified of the pendency of an action and is given an opportunity to defend is concluded as to all questions determined therein which are material to a recovery against him, in an action for indemnity brought by defendant in the original suit.[70] So in a suit to recover the amount of a judgment paid by plaintiff for damages caused by defendant's negligence or wrongful act, defendant is precluded, if he had notice of the former suit, from making a defense which he could have made in the first suit.[71] The verdict and judgment are conclusive on the questions of the existence of the defects causing the damages, the injury to the individual, his freedom from contributory negligence, and the amount of damages,[72] but is not conclusive as to defendant's liability.[73] The person against whom indemnity is sought is not precluded by the judgment from showing that he was under no obligation in the premises and that it was not through his fault that the injury occurred.[74] So it has been held that a judgment against two persons for personal injuries which showed a joint liability and was paid by them in equal proportions is not sufficient alone to authorize a recovery of indemnity by one against the other and does not dispense with proof that the person against whom indemnity was sought was alone guilty of the negligence causing the injuries.[75] It has been held that it is unnecessary that the indemnitor should have notice in writing or even express notice, but that notice may be implied from his knowledge of the pendency of the action or his participation in its defense.[76] The omission to give notice to the indemnitor does not go to the

amount of money paid out by plaintiffs with the interest thereon from the time of payment.

70. *Georgia.*— Napier *v.* Neal, 3 Ga. 298.

Illinois.— McDonald *v.* Lockport, 28 Ill. App. 157; Bloomington *v.* Roush, 13 Ill. App. 239.

Iowa.— Lucy *v.* Price, 39 Iowa 26.

Maine.— Portland *v.* Richardson, 54 Me. 46, 89 Am. Dec. 720; Veazie *v.* Penobscot R. Co., 49 Me. 119; Holbrook *v.* Holbrook, 15 Me. 9; Henderson *v.* Sevey, 2 Me. 139.

Minnesota.— Great Northern R. Co. *v.* Akeley, 88 Minn. 237, 92 N. W. 959; Pioneer Sav., etc., Co. *v.* Bartsch, 51 Minn. 474, 53 N. W. 764, 38 Am. St. Rep. 511.

Montana.— Butte *v.* Cook, 29 Mont. 88, 74 Pac. 67.

Nebraska.— Omaha Gas Co. *v.* Omaha, (1904) 98 N. W. 437.

New Hampshire.— Boston, etc., R. Co. *v.* Brackett, 71 N. H. 494, 53 Atl. 304; Littleton *v.* Richardson, 34 N. H. 179, 66 Am Dec. 759; French *v.* Parish, 14 N. H. 496.

New York.— Port Jervis *v.* Port Jervis First Nat. Bank, 96 N. Y. 550, 557 (where it was said: "In all cases where one stands in the position of indemnitor to others who are also immediately liable to a third party, his liability may be fixed and determined in the action brought against his indemnitee by notice of the pendency of such action, and an opportunity afforded him to defend it"); Troy *v.* Troy, etc., R. Co., 3 Lans. 270 [*affirmed* in 49 N. Y. 657]; Wright *v.* Whiting, 40 Barb. 235; Aberdeen *v.* Blackmar, 6 Hill 324; Lee *v.* Clark, 1 Hill 56; Beers *v.* Pinney, 12 Wend. 309.

Pennsylvania.— Carman *v.* Noble, 9 Pa. St. 366.

United States.— Chicago *v.* Robbins, 2 Black 418, 17 L. ed. 298.

See 27 Cent. Dig. tit. "Indemnity," § 41.

71. *Connecticut.*— Waterbury *v.* Waterbury Traction Co., 74 Conn. 152, 50 Atl. 3.

Maine.— Davis *v.* Smith, 79 Me. 351, 10 Atl. 55.

New Hampshire.— Boston, etc., R. Co. *v.* Sargent, 72 N. H. 455, 57 Atl. 688; Littleton *v.* Richardson, 34 N. H. 179, 66 Am. Dec. 759.

New York.— New York *v.* Brady, 151 N. Y. 611, 45 N. E. 1122.

Texas.— Corsicana *v.* Tobin, 23 Tex. Civ. App. 492, 57 S. W. 319.

Vermont.— Spencer *v.* Dearth, 43 Vt. 98.

See 27 Cent. Dig. tit. "Indemnity," § 41.

Prima facie case of "due notice" see Spokane *v.* Costello, 33 Wash. 98, 74 Pac. 58.

72. *Connecticut.*— Waterbury *v.* Waterbury Traction Co., 74 Conn. 152, 50 Atl. 3.

Illinois.— Pennsylvania Co. *v.* Chicago, etc., R. Co., 44 Ill. App. 132; McDonald *v.* Lockport, 28 Ill. App. 157.

Maine.— Portland *v.* Richardson, 54 Me. 46, 89 Am. Dec. 720.

New York.— New York *v.* Brady, 151 N. Y. 611, 45 N. E. 1122; Troy *v.* Troy, etc., R. Co., 49 N. Y. 657.

Pennsylvania.— Fowler *v.* Jersey Shore, 17 Pa. Super. Ct. 366.

See 27 Cent. Dig. tit. "Indemnity," § 41.

73. Lansing *v.* Detroit, etc., R. Co., 129 Mich. 403, 89 N. W. 54.

74. Chicago *v.* Robbins, 2 Black (U. S.) 418, 17 L. ed. 298 [*approved* in 4 Wall. 657, 18 L. ed. 427].

75. Gulf, etc., R. Co. *v.* Galveston, 83 Tex. 509, 18 S. W. 956.

76. Port Jervis *v.* Port Jervis First Nat. Bank, 96 N. Y. 550; Heiser *v.* Hatch, 86

right of action against him but simply changes the burden of proof and imposes upon the indemnitee the necessity of again litigating and establishing all of the actionable facts.[77] The judgment is also conclusive upon defendants in the first action in their character of plaintiffs, in the second as to the facts therein determined. Hence, if it appears that the judgment in the first action was based upon a finding of fact fatal to the recovery in the second, the action over cannot be maintained.[78] But all questions which were not determined in the first suit are open.[79] When it is not clear from the record upon what ground damages were recovered, parol evidence is admissible to ascertain whether the facts in controversy have been so determined as to settle the rights of the parties in the second suit.[80] Where one is employed under a promise of indemnity to do an act which turns out to be a trespass on another's property and employer and employee are sued, a recovery against the employee alone will not preclude him in a suit by him on the promise of indemnity from showing the facts and the liability of defendant.[81]

INDEMNITY LANDS. See PUBLIC LANDS.

INDENT. As used by English lexicographers, a term which signifies any contract or obligation in writing.[1] In America, a certificate issued by the government, at the close of the Revolutionary war, to the public creditors.[2] (See INDENTURE; and, generally, DEEDS.)

INDENTURE. In its broadest sense, a term which imports a CONVEYANCE,[3] *q. v.* (Indenture: In General, see DEEDS; MORTGAGES; SEALS. Of Apprenticeship, see APPRENTICES. CYROGRAPHUM.)

INDEPENDENT.[4] Not subject to bias or influence;[5] separate and distinct.[6]

N. Y. 614; Brooklyn *v.* Brooklyn City R. Co., 47 N. Y. 475, 7 Am. Rep. 469; Prescott *v.* Le Conte, 83 N. Y. App. Div. 482, 82 N. Y. Suppl. 411; Beers *v.* Pinney, 12 Wend. (N. Y.) 309; Barney *v.* Dewey, 13 Johns. (N. Y.) 224, 7 Am. Dec. 372; Washington Gas Co. *v.* District of Columbia, 161 U. S. 316, 16 S. Ct. 564, 40 L. ed. 712; Chicago *v.* Robbins, 2 Black (U. S.) 418, 17 L. ed. 298.

77. *Georgia.*— Napier *v.* Neal, 3 Ga. 298.

Indiana.— Catterlin *v.* Frankfort, 79 Ind. 547, 41 Am. Rep. 627; Tarm *v.* Shaw, 10 Ind. 469.

Massachusetts.— Boston *v.* Brooks, 187 Mass. 286, 73 N. E. 206; Train *v.* Gold, 5 Pick. 380.

Michigan.— Lee *v.* Wisner, 38 Mich. 82.

Missouri.— Stewart *v.* Thomas, 45 Mo. 42.

Montana.— Butte *v.* Cook, 29 Mont. 88, 74 Pac. 67.

New Hampshire.— French *v.* Parish, 14 N. H. 496.

New York.— Port Jervis *v.* Port Jervis First Nat. Bank, 96 N. Y. 550; Binsse *v.* Wood, 37 N. Y. 526; Bridgeport F. & M. Ins. Co. *v.* Wilson, 34 N. Y. 275; Comstock *v.* Drohan, 8 Hun 373; Chapin *v.* Thompson, 4 Hun 779; Lee *v.* Clark, 1 Hill 56.

Pennsylvania.— Lothrop *v.* Blake, 3 Pa. St. 483.

Texas.— Browne *v.* French, 3 Tex. Civ. App. 445, 22 S. W. 581.

Vermont.— Lincoln *v.* Blanchard, 17 Vt. 464.

See 27 Cent. Dig. tit. "Indemnity," § 41.

78. Boston, etc., R. Co. *v.* Brackett, 71 N. H. 494, 53 Atl. 304; Gregg *v.* Page Belting Co., 69 N. H. 247, 46 Atl. 26.

79. Boston, etc., R. Co. *v.* Brackett, 71 N. H. 494, 53 Atl. 304.

80. Boston, etc., R. Co. *v.* Brackett, 71 N. H. 494, 53 Atl. 304; Littleton *v.* Richardson, 34 N. H. 179, 66 Am. Dec. 759, holding that defendant may show that the recovery was not on account of his negligence but on account of plaintiff's negligence.

81. Ives *v.* Jones, 25 N. C. 538, 40 Am. Dec. 421.

1. U. S. *v.* Irwin, 26 Fed. Cas. No. 15,445, 5 McLean 178, 183.

2. U. S. *v.* Irwin, 26 Fed. Cas. No. 15,445, 5 McLean 178, 183 [*citing* Webster Dict.].

3. Whitney *v.* Richardson, 59 Hun (N. Y.) 601, 602, 13 N. Y. Suppl. 861. See GRANT.

4. "Independent" in ordinary usage is very indefinite. Winebrenner *v.* Colder, 43 Pa. St. 244, 252.

5. Neal *v.* Black, 177 Pa. St. 83, 97, 35 Atl. 561, 34 L. R. A. 707.

"Independent of any other person" means "independent of all mankind." Margetts *v.* Barringer, 7 Sim. 482, 8 Eng. Ch. 482, 58 Eng. Reprint 922.

"Independent of a husband" see Tullett *v.* Armstrong, 1 Beav. 1, 32, 2 Jur. 912, 8 L. J. Ch. 19, 17 Eng. Ch. 1, 48 Eng. Reprint 838.

"Independent officers" are those who are appointed or elected by the legislature or the people, whose duties are fixed and defined by law, and over whose official acts the corporation has no immediate or direct control. Wood M. & S. § 464 [*quoted* in McSorley *v.* St. John, 6 Can. Sup. Ct. 531, 548].

6. People *v.* Parvin, (Cal. 1887) 14 Pac. 783, 785.

The word is sometimes used as synonymous with impartial.[7] (Independent: Contract, see Contracts. Contractor, see Master and Servant; Negligence. Covenant, see Covenants. See Independently.)

INDEPENDENTER SE HABET ASSECURATIO A VIAGGIO NAVIS. A maxim meaning "The voyage insured is an independent or distinct thing from the voyage of the ship."[8]

INDETERMINATE SENTENCE. See Criminal Law.

INDEX. That which points out; that which indicates or manifests;[9] a book containing references, alphabetically arranged, to the contents of a series or collection of volumes; or an addition to a single volume or set of volumes containing such references to its contents.[10] (Index: Subject of Copyright, see Copyright. To Records — In General, see Records. Of Deeds, see Deeds. Of Judgments, see Judgments. Of Mortgages, see Chattel Mortgages; Mortgages. Of Return of Writ of Attachment, see Attachment. To Transcript or Return on Appeal, see Appeal and Error. See also Digest.)

INDEX ANIMI SERMO. A maxim meaning "Speech is the exposition of the mind."[11]

"**Independent reclamation,**" as applied to lands, is a term sometimes used in the sense of "separate and distinct reclamation." People *v.* Parvin, (Cal. 1887) 14 Pac. 783, 785.

"**Independent Democratic Party**" see State *v.* Ramsey County Dist. Ct., 74 Minn. 177, 178, 77 N. W. 28.

"**Independent Republican Party**" see Matter of Smith, 41 Misc. (N. Y.) 501, 504, 85 N. Y. Suppl. 14.

7. Neal *v.* Black, 177 Pa. St. 83, 97, 35 Atl. 561, 34 L. R. A. 707.

8. Bouvier L. Dict. [*citing* 2 Kent. Comm. 318 note].

9. Perkins *v.* Strong, 22 Nebr. 725, 731, 36 N. W. 292; Webster Dict. [*quoted* in Metz *v.* State Bank, 7 Nebr. 165, 172]. See also Chase *v.* Bennett, 58 N. H. 428, 429 [*citing* Curtis *v.* Lyman, 24 Vt. 338, 342, 58 Am. Dec. 174]; Calwell *v.* Prindle, 19 W. Va. 604, 669, distinguishing "indexing" from "docketing."

10. Black L. Dict.

One great object of an index is to render the contents of a book readily accessible. Metz *v.* State Bank, 7 Nebr. 165, 172. See also Perkins *v.* Strong, 22 Nebr. 725, 731, 36 N. W. 292.

11. Wharton L. Lex.

Applied in Maxwell *v.* State, 89 Ala. 150, 161, 7 So. 824.

INDIANS

By Lincoln B. Smith
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CROSS-REFERENCES

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Adverse Possession of Indian Lands, see ADVERSE POSSESSION.

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Maintenance in Conveyance of Land in Possession of an Indian Tribe, see CHAMPERTY AND MAINTENANCE.

Marriage of Indians, see MARRIAGE.

Title to Lands Derived From Indians, see PUBLIC LANDS.

For General Matters Relating to Criminal Law and Criminal Procedure, see CRIMINAL LAW.

I. DEFINITION.

"Indians" is the name given by the European discoverers of America to its aboriginal inhabitants.[1] The term "Indian," when used in a statute without any other limitation, should be held to include members of the aboriginal race, whether now sustaining tribal relations or otherwise.[2]

II. STATUS AND DISABILITIES.

A. Who Are Indians[3]**— 1. By Birth — a. Half Breeds.** The question of the status of half breeds which usually arises in the case of the offspring of a white father and an Indian mother has been the subject of conflicting decisions; the weight of authority is, adopting the common-law rule, that the child follows the condition of the father.[4] But the child of a white citizen and of an Indian

1. Bouvier L. Dict. And see Frazee *v.* Spokane County, 29 Wash. 278, 286, 69 Pac. 779, race of men inhabiting America when found by the Caucasian people.

2. Frazee *v.* Spokane County, 29 Wash. 278, 286, 69 Pac. 779.

3. **Membership in certain tribes.**— The citizenship court created by 32 U. S. St. at L. 646 has exclusive jurisdiction to settle claims to membership in the Choctaw and Chickasaw nations. Dawes *v.* Cundiff, (Indian Terr. 1904) 82 S. W. 228.

4. Keith *v.* U. S., 8 Okla. 446, 58 Pac. 507; U. S. *v.* Higgins, 110 Fed. 609; U. S. *v.* Hadley, 99 Fed. 437; U. S. *v.* Ward, 42 Fed. 320; *Ex p.* Reynolds, 20 Fed. Cas. No. 11,719, 5 Dill. 394. See also Jeffries *v.* Ankeny, 11 Ohio 372. But see Wall *v.* Williams, 11 Ala. 826; Miller *v.* Dawson, Dudley (S. C.) 174.

mother, who is abandoned by his father, is nurtured and reared by the Indian mother in the tribal relation, and is recognized by the tribe as a member of it, falls under an exeeption to the general rule that the offspring follows the status of the father, and becomes a member of the tribe of the mother.[5]

b. Mixed Bloods. The term "mixed bloods," used in treaties and statutes, includes persons of half, or more or less than half, Indian blood, derived either from the father or from the mother. Such persons, if they live with the tribe, are Indians.[6]

2. By Adoption — a. Of Individuals. A tribe of Indians may admit aliens to membership in the tribe,[7] and a person so adopted acquires all the rights and incurs all the obligations of a member of the tribe.[8] He does not, however, lose his status as a citizen of the United States;[9] nor does he become an "Indian" within the meaning of the statutes.[10] The ordinary occasion for adoption is the marriage of one not an Indian to an Indian woman; but such marriage does not of itself make one a member of the tribe.[11]

b. Collective Adoption of Freedmen. The freedmen of the Cherokee nation[12] and of the Choctaw nation[13] have become members of the respective tribes by adoption; but the Chickasaw freedmen have never been adopted by that nation.[14]

Act of congress.— It is provided by act of congress that all children born of a marriage heretofore solemnized between a white man and an Indian woman by blood and not by adoption, where said Indian woman is at this time, or was at the time of her death, recognized by the tribe, shall have the same rights and privileges to the property of the tribe to which the mother belongs, or belonged at the time of her death, by blood, as any other member of the tribe. 30 U. S. St. at L. 90.

Following the rule partus sequitur ventrem, applicable to the offspring of slaves, the illegitimate child of a Choctaw Indian by a colored woman, who was a slave must be regarded as a negro and not an Indian. Alberty *v.* U. S., 162 U. S. 499, 16 S. Ct. 864, 40 L. ed. 1051.

In Canada a person of Indian blood from either parent is of Indian blood, although the mother may have lost her character as an Indian by her marriage. Reg. *v.* Howson, Terr. L. R. 492.

5. Farrell *v.* U. S., 110 Fed. 942, 49 C. C. A. 183; U. S. *v.* Higgigns, 103 Fed. 348; U. S. *v.* Hadley, 99 Fed. 437.

6. Wall *v.* Williams, 11 Ala. 826; Sloan *v.* U. S., 118 Fed. 283; Farrell *v.* U. S., 110 Fed. 942, 49 C. C. A. 183; Sloan *v.* U. S., 95 Fed. 193.

In Indiana, by legislative definition, the word "Indian" includes all persons of Indian descent, recognized as members of any tribe residing in that state, down to those having one-eighth Indian blood. Doe *v.* Avaline, 8 Ind. 6.

The term "mestizo" signifies the issue of a negro and an Indian. Miller *v.* Dawson, Dudley (S. C.) 174.

Youths of Indian, negro, and white blood, but of more than one-half white blood, are whites. Lane *v.* Baker, 12 Ohio 237 [*citing* Jeffries *v.* Ankeny, 11 Ohio 372].

Indians by descent is a term applicable both to those of the full blood, and of mixed white and Indian blood. Campau *v.* Dewey, 9 Mich. 381.

7. Stiff *v.* McLaughlin, 19 Mont. 300, 48 Pac. 232; Delaware Indians *v.* Cherokee Nation, 193 U. S. 127, 24 S. Ct. 342, 48 L. ed. 646 [*affirming* 38 Ct. Cl. 234].

8. Tuten *v.* Byrd, 1 Swan (Tenn.) 108; Tuten *v.* Martin, 3 Yerg. (Tenn.) 452; Morgan *v.* Fowler, 2 Yerg. (Tenn.) 450; Alberty *v.* U. S., 162 U. S. 499, 16 S. Ct. 864, 40 L. ed. 1051; U. S. *v.* Ragsdale, 27 Fed. Cas. No. 16,113, Hempst. 479; U. S. *v.* Rogers, 27 Fed. Cas. No. 16,187, Hempst. 450 [*affirmed* in 4 How. (U. S.) 567, 11 L. ed. 1105]; U. S. *v.* Wirt, 28 Fed. Cas. No. 16,745, 3 Sawy. 161.

9. French *v.* French, (Tenn. Ch. App. 1898) 52 S. W. 517; Roff *v.* Burney, 168 U. S. 218, 18 S. Ct. 60, 42 L. ed. 442 (right to membership may be withdrawn); Raymond *v.* Raymond, 83 Fed. 721, 28 C. C. A. 38.

10. Alberty *v.* U. S., 162 U. S. 499, 16 S. Ct. 864, 40 L. ed. 1051; Westmoreland *v.* U. S., 155 U. S. 545, 15 S. Ct. 243, 29 L. ed. 255; U. S. *v.* Rogers, 4 How. (U. S.) 567, 11 L. ed. 1105 [*affirming* 27 Fed. Cas. No. 16,187, Hempst. 450]; U. S. *v.* Ragsdale, 27 Fed. Cas. No. 16,113, Hempst. 479.

11. Grinter *v.* Kansas Pac. R. Co., 23 Kan. 642; Stiff *v.* McLaughlin, 19 Mont. 300, 48 Pac. 232; Nofire *v.* U. S., 164 U. S. 657, 17 S. Ct. 212, 41 L. ed. 588.

Marriage with an Indian woman, except in the five civilized tribes in the Indian Territory, is declared by act of congress to confer no rights or privileges of membership in an Indian tribe. 25 U. S. St. at L. 392.

12. Alberty *v.* U. S., 162 U. S. 499, 16 S. Ct. 864, 40 L. ed. 1051; Journeycake *v.* Cherokee Nation, 31 Ct. Cl. 140; Whitmire *v.* Cherokee Nation, 30 Ct. Cl. 138.

13. Lucas *v.* U. S., 163 U. S. 612, 16 S. Ct. 1168, 48 L. ed. 282.

14. U. S. *v.* Choctaw Nation, 38 Ct. Cl. 558 [*affirmed* in 193 U. S. 115, 24 S. Ct. 411, 48 L. ed. 640].

Colored persons never held as slaves in the Indian country have no more rights in the Indian country than other citizens of the United States.[15]

B. Personal Rights and Disabilities — 1. Personal Liberty. An Indian is not, by reason of his tribal relations, deprived of personal liberty.[16] He cannot in time of peace be transported from one section of the country to another nor confined to a reservation against his will.[17]

2. Citizenship — a. In General. An Indian is not a citizen of the United States by birth, because not born "subject to the jurisdiction thereof."[18] He cannot make himself a citizen without the consent and coöperation of the government.[19] He may be naturalized, either individually[20] or through collective naturalization effected by treaty or statute.[21]

b. By Allotment of Lands. By statute every Indian born within the territorial limits of the United States to whom an allotment of lands in severalty has been made, or who has voluntarily taken up his residence apart from any Indian tribe and adopted the habits of civilized life, is now declared to be a citizen of the United States.[22] Citizenship acquired by becoming an allottee under such

15. U. S. *v.* Payne, 8 Fed. 883, 2 McCrary 289.

16. U. S. *v.* Crook, 25 Fed. Cas. No. 14,891, 5 Dill. 453.

While keeping the peace, and disobeying no law, the person of an Indian cannot be the subject of arrest or imprisonment by any one except at the peril of the offender. Wiley *v.* Keokuk, 6 Kan. 94.

Habeas corpus.— An Indian is a person, within the meaning of the Habeas Corpus Act, and as such entitled to sue out a writ in the federal courts. *In re* Race Horse, 70 Fed. 598; U. S. *v.* Crook, 25 Fed. Cas. No. 14,891, 5 Dill. 453.

Indians under military guard on a reservation in 1878 were in a position unknown to the law, being neither citizens nor aliens, free nor slave — prisoners of war when there was no war. Conners *v.* U. S., 33 Ct. Cl. 317.

17. U. S. *v.* Crook, 25 Fed. Cas. No. 14,891, 5 Dill. 453. See also Wiley *v.* Manatowah, 6 Kan. 111; Wiley *v.* Keokuk, 6 Kan. 94.

18. Crandall *v.* State, 10 Conn. 339; Crouse *v.* New York, etc., R. Co., 49 Hun (N. Y.) 576, 2 N. Y. Suppl. 453; Elk *v.* Wilkins, 112 U. S. 94, 5 S. Ct. 41, 28 L. ed. 643; U. S. *v.* Osborn, 2 Fed. 58, 6 Sawy. 406; McKay *v.* Campbell, 16 Fed. Cas. No. 8,840, 2 Sawy. 118.

As to citizenship of children of tribal Indians see Citizens, 7 Cyc. 133 *et seq.*

An emancipated slave of a Chickasaw Indian ("Chickasaw freedman"), born in Indian Territory, was not a citizen of the United States. Jackson *v.* U. S., 34 Ct. Cl. 441.

The pueblo or village Indians of New Mexico were citizens of Mexico and became citizens of the United States by the treaty of Guadalupe Hidalgo (9 U. S. St. at L. 922). Territory *v.* Delinquent Tax List, (N. M. 1904) 76 Pac. 307; U. S. *v.* Lucero, 1 N. M. 422.

Every Indian in the Indian Territory is by statute a citizen of the United States. 31 U. S. St. at L. 1447.

An Indian woman married to a citizen of the United States and living apart from her tribe and according to the habits of civilized life is a citizen. Hatch *v.* Ferguson, 57 Fed. 959.

In Massachusetts by statute all Indians within that commonwealth are citizens thereof. Mass. St. (1869) c. 463. See *In re* Coombs, 127 Mass. 278; Danzell *v.* Webquish, 108 Mass. 133.

In New York Indians are citizens of the state. Jackson *v.* Goodell, 20 Johns. 188; Strong *v.* Waterman, 11 Paige 607.

In Ontario Indians are subjects, and the only immunity or disability which they possess relates to property acquired from the tribe, and the sale or purchase of spirituous liquors. An Indian otherwise qualified has an equal right with any other British subject to hold the position of reeve of a municipality. Reg. *v.* White, 5 Ont. Pr. 315.

The Eastern Band of Cherokees in North Carolina are not citizens of the United States, although they are recognized as citizens of that state. U. S. *v.* Boyd, 68 Fed. 577 [*distinguishing* Cherokee Indians *v.* U. S., 117 U. S. 288, 6 S. Ct. 718, 29 L. ed. 880].

19. Elk *v.* Wilkins, 112 U. S. 94, 5 S. Ct. 41, 28 L. ed. 643; Paul *v.* Chilsoquie, 70 Fed. 401; U. S. *v.* Osborn, 2 Fed. 58, 6 Sawy. 406. *Compare* U. S. *v.* Elm, 25 Fed. Cas. No. 15,048; *Ex p.* Kenyon, 14 Fed. Cas. No. 7,720, 5 Dill. 385.

20. 26 U. S. St. at L. 99. And see Scott *v.* Sandford, 19 How. (U. S.) 393, 15 L. ed. 691.

General naturalization law inapplicable.— *In re* Camille, 6 Fed. 256, 6 Sawy. 541.

Stockbridge and Munsee Indians in Wisconsin may be naturalized, under the provisions of U. S. Rev. St. (1878) § 2312 [U. S. Comp. St. (1901) p. 1418].

21. People *v.* Bray, 105 Cal. 344, 38 Pac. 731, 27 L. R. A. 158.

22. 24 U. S. St. at L. 390. And see the following cases:

Idaho.— Carter *v.* Wann, 6 Ida. 556, 57 Pac. 314; Wa-La-Note-Tke-Tynin *v.* Cart, 6 Ida. 85, 53 Pac. 106.

statute is not inconsistent with the continuance of the tribal existence, tribal relations, and tribal affiliations.[23]

3. Right of Suffrage. To entitle an Indian to vote it must be shown that he has become a citizen by virtue of some constitutional or statutory provision, with the terms of which he has complied.[24]

4. Competency as Witnesses and Jurors. Indians are competent to testify, and are entitled to the same credit as white witnesses;[25] and Indians belonging to the five civilized tribes, not citizens of the United States, are competent grand jurors in the courts of the Indian Territory.[26]

5. Validity of Contracts. Contracts made by individual Indians, not prohibited by statute, are valid.[27] A bond voluntarily executed to the United States to secure the performance of a contract made by the obligors with a number of tribal Indians employed by them is a valid obligation.[28]

6. Custody, Care, and Education of Children. The children of Indians are subject to parental authority, and cannot be compelled to attend school without the consent of the parents.[29] The government cannot reclaim a child by habeas

Kansas.— Baldwin *v.* Letson, 6 Kan. App. 11, 49 Pac. 619.

Nebraska.— State *v.* Norris, 37 Nebr. 299, 55 N. W. 1086.

North Dakota.— State *v.* Denoyer, 6 N. D. 586, 72 N. W. 1014.

United States.—Bird *v.* Terry, 129 Fed. 472 [*affirmed* in 129 Fed. 592]; *In re* Celestine, 114 Fed. 551.

23. State *v.* Columbia George, 39 Oreg. 127, 65 Pac. 604; Frazee *v.* Spokane County, 29 Wash. 278, 69 Pac. 779.

24. State *v.* Norris, 37 Nebr. 299, 55 N. W. 1086; State *v.* Frazier, 28 Nebr. 438, 44 N. W. 471; State *v.* Denoyer, 6 N. D. 586, 72 N. W. 1014; Elk *v.* Wilkins, 112 U. S. 94, 5 S. Ct. 41, 28 L. ed. 643 [*distinguishing* U. S. *v.* Elm, 25 Fed. Cas. No. 15,048].

In South Carolina an Indian is not entitled to the elective franchise, under the laws restricting such privilege to white persons. State *v.* York Dist., 1 Bailey (S. C.) 215.

In Wisconsin civilized persons of Indian descent, not members of any tribe, are entitled to vote if possessed of other requisite qualifications. Hilgers *v.* Quinney, 51 Wis. 62, 8 N. W. 17.

In Canada Indian electors resident on an Indian reserve have no right to vote on the question of the repeal of the Canada Temperance Act in the county in which the reserve is situated. *Re* Metcalfe, 17 Ont. 357.

25. Coleman *v.* Doe, 4 Sm. & M. (Miss.) 40; Doe *v.* Newman, 3 Sm. & M. (Miss.) 565; Miller *v.* Dawson, Dudley (S. C.) 174; Shelp *v.* U. S., 81 Fed. 694, 26 C. C. A. 570. *Contra,* Harris *v.* Doe, 4 Blackf. (Ind.) 369.

Belief in supreme Being and future state.— An Indian is a competent witness, where, although having no knowledge of any ceremony among his tribe binding a person to speak the truth, he had a full sense of the obligation to do so, and believed in a supreme Being and a future state of reward or punishment. Reg. *v.* Pah-Mah-Gay, 20 U. C. Q. B. 195.

26. Carter *v.* U. S., 1 Indian Terr. 342, 37 S. W. 204.

In criminal trials, where the accused is a citizen of the United States, none but citizens are competent jurors. 25 U. S. St. at L. 783.

27. *Arkansas.*— Taylor *v.* Drew, 21 Ark. 485; Hicks *v.* Ewhartonah, 21 Ark. 106 [*distinguishing* Clark *v.* Closland, 17 Ark. 43].

Indiana — Ke-tuc-e-mun-guah *v.* McClure, 122 Ind. 541, 23 N. E. 1080, 7 L. R. A. 782; Godfrey *v.* Scott, 70 Ind. 259.

Kansas.— Jones *v.* Eisler, 3 Kan. 134.

Maine.— Murch *v.* Tomer, 21 Me. 535.

Missouri.— Whirlwind *v.* Von der Ahe, 67 Mo. App. 628.

New York.— Onondaga Nation *v.* Thacher, 53 N. Y. App. Div. 561, 65 N. Y. Suppl. 1014 [*affirming* 29 Misc. 428, 61 N. Y. Suppl. 1027].

Washington.— Gho *v.* Julles, 1 Wash. Terr. 325.

United States.— Lowry *v.* Weaver, 15 Fed. Cas. No. 8,584, 4 McLean 82.

See 27 Cent. Dig. tit. "Indians," § 16.

Form of contract.— Contracts with Cherokee Indians, including contracts between two Indians, must be in writing, with two subscribing witnesses, but the probate for registration need not be by both. Colvord *v.* Monroe, 63 N. C. 288; Lovingood *v.* Smith, 52 N. C. 601.

Proof of consideration.— In contracts between Indians, as well as between an Indian and a white man, the consideration must be proven by two credible witnesses. Pack *v.* Pack, 9 Port. (Ala.) 297.

28. U. S. *v.* Pumphrey, 11 App. Cas. (D. C.) 44.

29. Peters *v.* Malin, 111 Fed. 244; *In re* Lelah-puc-ka-chee, 98 Fed. 429.

The marriage of a female Indian releases her from parental control. *In re* Lelah-puc-ka-chee, 98 Fed. 429.

An Indian mother who has surrendered her child to the custody of the officers of a mission school for a term of years cannot reclaim the child until the expiration of that time, where it appears that he was being well cared for and educated. *In re* Can-ah-couqua, 29 Fed. 687.

corpus from one who has taken it from the agency with the approval of the parents.[30]

7. Actions — a. Actions by Indians — (I) *In General.*[31] A tribal Indian, not being a citizen of the United States, may not maintain suit as such in the federal courts;[32] but may sue in such courts when authorized by statute.[33] He may sue in a state or territorial court as may all persons irrespective of race or color.[34] He may maintain ejectment,[35] or an action for the diversion of water on the public domain,[36] or, in the Indian Territory, for the recovery of land belonging to the tribe, where the chief fails to act,[37] or to recover an allotment of land unlawfully denied him,[38] or to redress any wrong committed outside the limits of his reservation against his person or property.[39] In New York a Seneca Indian may bring suit to enforce a decree of the peacemaker's court.[40] An Indian may assign his right of action to a white man.[41] The United States may maintain an action in his behalf for property which has been issued to him by the government.[42] He cannot sue to enforce the operation of a treaty,[43] or to compel a public representative or agent of an Indian nation to pay the debts of his nation.[44]

(II) *Limitations and Laches.* It has been held that a statute of limitations will run against an Indian,[45] and according to a lately decided and well considered case, the fact that a litigant is a tribal Indian is not a complete bar to the defense of laches, although it is to be taken into account in determining the effect of his inaction.[46] Civilized Indians entitled to participate *per capita* in a certain fund of which they have constructive notice are bound to ascertain whether their names are on the pay-roll, if ample time is given them to do so, and when they do nothing and the fund is paid to Indians whose names are on the roll, payment a second time will not be required.[47]

Where a special school is provided for Indian children they have no right to attend other public schools in the same district. Ammons *v.* Charlestown School Dist. No. 5, 7 R. I. 596.

30. U. S. *v.* Imoda, 4 Mont. 38, 1 Pac. 721.

31. For actions by and against tribes see *infra*, II, C, 4.

32. Felix *v.* Patrick, 145 U. S. 317, 12 S. Ct. 862, 36 L. ed. 719; Paul *v.* Chilsoquie, 70 Fed. 401; Karrahoo *v.* Adams, 14 Fed. Cas. No. 7,614, 1 Dill. 344.

33. Brought *v.* Cherokee Nation, 129 Fed. 192, 63 C. C. A. 350; Hargrove *v.* Cherokee Nation, 129 Fed. 186, 63 C. C. A. 276. And see Southern Kansas R. Co. *v.* Briscoe, 144 U. S. 133, 12 S. Ct. 538, 36 L. ed. 377 [*affirming* 40 Fed. 273]; Gowen *v.* Harley, 56 Fed. 973, 6 C. C. A. 190.

34. Ingraham *v.* Ward, 56 Kan. 550, 44 Pac. 14; Wiley *v.* Keokuk, 6 Kan. 94 (action for assault and battery and false imprisonment); Swartzel *v.* Rogers, 3 Kan. 374; Whirlwind *v.* Von der Ahe, 67 Mo. App. 628; Lobdell *v.* Hall, 3 Nev. 507; Onondaga Nation *v.* Thacher, 53 N. Y. App. Div. 561, 65 N. Y. Suppl. 1014 [*affirming* 29 Misc. 428, 61 N. Y. Suppl. 1027]; Jemmerson *v.* Kennedy, 55 Hun (N. Y.) 47, 7 N. Y. Suppl. 296.

Actions by individual Indians are not included in N. Y. Laws (1845), c. 150, § 2, providing that no execution shall issue for costs recovered against the Seneca nation in an action instituted or defended by the attorney appointed for the tribe. Crouse *v.* New York, etc., R. Co., 49 Hun (N. Y.) 576, 2 N. Y. Suppl. 453.

35. Gooding *v.* Watkins, (Indian Terr. 1904) 82 S. W. 913; Price *v.* Cherokee Nation, (Indian Terr. 1904) 82 S. W. 893; Coleman *v.* Doe, 4 Sm. & M. (Miss.) 40.

36. Lobdell *v.* Hall, 3 Nev. 507.

37. 30 U. S. St. at L. 495.

38. 28 U. S. St. at L. 305. And see Hy-Yu-Tse-Mil-Kin *v.* Smith, 194 U. S. 401, 24 S. Ct. 676, 48 L. ed. 1039; Parr *v.* U. S., 132 Fed. 1004; Patawas *v.* U. S., 132 Fed. 893; Sloan *v.* U. S., 95 Fed. 193.

39. Bem-Way-Bin-Ness *v.* Ehelby, 87 Minn. 108, 91 N. W. 291; Y-ta-tah-wah *v.* Rebock, 105 Fed. 257; Felix *v.* Patrick, 36 Fed. 457.

40. Jemeson *v.* Pierce, 102 N. Y. App. Div. 618, 92 N. Y. Suppl. 331.

41. Missouri Pac. R. Co. *v.* Cullers, 81 Tex. 382, 17 S. W. 19, 13 L. R. A. 542.

42. McKnight *v.* U. S., 130 Fed. 659, 65 C. C. A. 37.

43. Cayuga Indians *v.* State, 99 N. Y. 235, 1 N. E. 770.

44. Parks *v.* Ross, 11 How. (U. S.) 362, 13 L. ed. 730.

45. New Orleans, etc., R. Co. *v.* Moye, 39 Miss. 374; Seneca Nation *v.* Christie, 126 N. Y. 122, 27 N. E. 275.

46. Dunbar *v.* Green, 66 Kan. 557, 72 Pac. 243 [*discussing* and *explaining* Felix *v.* Patrick, 145 U. S. 317, 12 S. Ct. 862, 36 L. ed. 719, and *disapproving* Laughton *v.* Nadeau, 75 Fed. 789].

47. Pam-To-Pee *v.* U. S., 36 Ct. Cl. 427 [*affirmed* in 187 U. S. 371, 47 L. ed. 221].

b. Actions Against Indians. Where not prohibited by statute,[48] Indians may be sued on contract.[49]

C. Status of Nations or Tribes — 1. In General — a. Political Status. The Indian nations or tribes are distinct, semi-independent political communities,[50] owing a qualified subjection to the United States.[51] They may be defined as domestic, dependent nations.[52] They are not foreign nations, nor states in the international sense,[53] nor states or territories within the meaning of the constitution.[54] Their relation to the United States resembles that of a ward to his guardian.[55]

b. Powers. So far as is essential to constitute them separate nations, the rights of sovereignty have been conceded to them.[56] They were formerly competent to make treaties,[57] and although that right has been taken from them by

48. Hastings *v.* Farmer, 4 N. Y. 293; Singer Mfg. Co. *v.* Hill, 60 Hun (N. Y.) 347, 15 N. Y. Suppl. 27; Jackson *v.* King, 18 Johns. (N. Y.) 506; Dana *v.* Dana, 14 Johns. (N. Y.) 181; McKinnon *v.* Van Every, 5 Ont. Pr. 284.

49. Daugherty *v.* Bogy, 3 Indian Terr. 197, 53 S. W. 542; Murch *v.* Tomer, 21 Me. 535; Stokes *v.* Rodman, 5 R. I. 405; Bryce *v.* Salt, 11 Ont. Pr. 112.

50. Jones *v.* Meehan, 175 U. S. 1, 20 S. Ct. 1, 44 L. ed. 1; Stephens *v.* Cherokee Nation, 174 U. S. 445, 19 S. Ct. 722, 43 L. ed. 1041; U. S. *v.* Kagama, 118 U. S. 375, 6 S. Ct. 1109, 30 L. ed. 228; Eastern Band Cherokee Indians *v.* U. S., 117 U. S. 288, 6 S. Ct. 718, 29 L. ed. 880; Elk *v.* Wilkins, 112 U. S. 94, 5 S. Ct. 41, 28 L. ed. 643; Holden *v.* Joy, 17 Wall. (U. S.) 211, 21 L. ed. 523; Worcester *v.* Georgia, 6 Pet. (U. S.) 515, 8 L. ed. 483; Cherokee Nation *v.* Georgia, 5 Pet. (U. S.) 1, 8 L. ed. 25.

The pueblo Indians of New Mexico are not Indian tribes within the meaning of U. S. Rev. St. (1878) § 2118. U. S. *v.* Joseph, 94 U. S. 614, 24 L. ed. 295.

The "Old Settlers," or Western Cherokees, are not a governmental body politic, nor have they a corporate existence nor any capacity to act collectively. U. S. *v.* Old Settlers, 148 U. S. 427, 13 S. Ct. 650, 37 L. ed. 509.

The Southwestern tribes of Apaches during the last fifty years have had no definable tribal identity, and have been little more than robber bands. Such bands, however, constitute a political entity, which must be recognized by the courts. Dobbs *v.* U. S., 33 Ct. Cl. 308.

The Alaska Indians are not within the policy of the government by which Indian tribes are treated as free and independent within their respective territories, but are subject to such laws and regulations as the United States may adopt. *In re* Sah Quah, 31 Fed. 327.

The Indians residing in Maine, while they have a partial organization for tenure of property and local affairs, have no separate political organization, and are subject as individuals to the laws of the state. State *v.* Newell, 84 Me. 465, 24 Atl. 943.

In New York the different tribes of Indians within that state are not recognized as independent nations, but as citizens merely, owing allegiance to the state government. Jackson *v.* Goodell, 20 Johns. (N. Y.) 188; Strong *v.* Waterman, 11 Paige (N. Y.) 607.

51. *Ex p.* Reynolds, 20 Fed. Cas. No. 11,719, 5 Dill. 394.

52. Cherokee Nation *v.* Georgia, 5 Pet. (U. S.) 1, 8 L. ed. 25. See also U. S. *v.* Pumphrey, 11 App. Cas. (D. C.) 44.

53. Roche *v.* Washington, 19 Ind. 53, 81 Am. Dec. 376; U. S. *v.* Kagama, 118 U. S. 375, 6 S. Ct. 1109, 30 L. ed. 228; Elk *v.* Wilkins, 112 U. S. 94, 5 S. Ct. 41, 28 L. ed. 643; Cherokee Nation *v.* Georgia, 5 Pet. (U. S.) 1, 8 L. ed. 25; U. S. *v.* Rogers, 27 Fed. Cas. No. 16,187, Hempst. 450; U. S. *v.* Ragsdale, 27 Fed. Cas. No. 16,113, Hempst. 479.

54. Holden *v.* Joy, 17 Wall. (U. S.) 211, 21 L. ed. 523; Cherokee Nation *v.* Southern Kan. R. Co., 33 Fed. 900; *Ex p.* Morgan, 20 Fed. 298.

The Cherokee nation is a territory, within the meaning of Battle Rev. c. 35, § 8, relating to the record of deeds. Whitsett *v.* Forehand, 79 N. C. 230.

55. U. S. *v.* Pumphrey, 11 App. Cas. (D. C.) 44; Jones *v.* Meehan, 175 U. S. 1, 20 S. Ct. 1, 44 L. ed. 1; Stephens *v.* Cherokee Nation, 174 U. S. 445, 19 S. Ct. 722, 43 L. ed. 1041; U. S. *v.* Kagama, 118 U. S. 375, 6 S. Ct. 1109, 30 L. ed. 228; Cherokee Nation *v.* Georgia, 5 Pet. (U. S.) 1, 8 L. ed. 25.

56. U. S. *v.* Shanks, 15 Minn. 369; Worcester *v.* Georgia, 6 Pet. (U. S.) 515, 8 L. ed. 483.

Right of local self-government. — The Indian country is not within the exclusive jurisdiction of the United States, since the Indians have the right of local self-government. Anonymous, 1 Fed. Cas. No. 447, Hempst. 413.

57. Wood *v.* Missouri, etc., R. Co., 11 Kan. 323; Minter *v.* Shirley, 45 Miss. 376; Blackfeather *v.* U. S., 190 U. S. 368, 23 S. Ct. 772, 47 L. ed. 1099; Holden *v.* Joy, 17 Wall. (U. S.) 211, 21 L. ed. 523; Wilson *v.* Wall, 6 Wall. (U. S.) 83, 18 L. ed. 727; Worcester *v.* Georgia, 6 Pet. (U. S.) 515, 8 L. ed. 483; Cherokee Nation *v.* Georgia, 5 Pet. (U. S.) 1, 8 L. ed. 25; Porterfield *v.* Clark, 2 How. (U. S.) 76, 11 L. ed. 185; Leighton *v.* U. S., 29 Ct. Cl. 288. See *infra*, II, D, 1.

congress, the treaties which have been made retain their validity.[58] They may levy war and conclude peace.[59] The several states of the Union and the United States have recognized in Indians a possessory right to the soil, but they have asserted an ultimate title in the land itself by which the Indian tribes are forbidden to sell or transfer it to other nations or peoples, without the consent of this paramount authority.[60]

c. Supervision. They are not amenable to the laws of the state or territory in which they reside.[61] They are, however, subject to the plenary authority of the United States.[62]

2. Change of Tribal Status — a. Expatriation. It is one of the consequences of the imperfect sovereignty of the Indian nations that they cannot alter or suspend their political relation as wards of the United States by removing from its boundaries.[63]

b. Consolidation. Two or more tribes may consolidate and become merged into one,[64] and their action in so doing binds the Indians,[65] and the United States government[66] in dealing with lands, property, and trust funds belonging to the tribe. A tribe may also admit individual members of another tribe into its membership,[67] and Indians so admitted are thereafter bound by the constitution and laws of their adopted tribe.[68]

c. Division. A tribe may also be divided into separate bands by agreement among themselves or by act of the government.[69] The policy of the government has been to accept such subdivisions as were adopted by the

58. U. S. Rev. St. (1878) § 2079. And see Brown *v.* U. S., 32 Ct. Cl. 432.

59. Montoya *v.* U. S., 180 U. S. 261, 21 S. Ct. 358, 45 L. ed. 521 (a formal declaration of war by congress unnecessary); Marks *v.* U. S., 161 U. S. 297, 16 S. Ct. 476, 40 L. ed. 706; Cherokee Nation *v.* Georgia, 5 Pet. (U. S.) 1, 8 L. ed. 25; Scott *v.* U. S., 33 Ct. Cl. 486; Dobbs *v.* U. S., 33 Ct. Cl. 308; Alire's Case, 1 Ct. Cl. 238.

The principles of international law have been applied to hostilities with the Indian tribes so far as to accord to them the rights of belligerents. Love *v.* U. S., 29 Ct. Cl. 332.

When Indians have been allowed to surrender "as prisoners of war to an army in the field," the terms of such surrender characterize all that they did as the inevitable destruction of an Indian war. Scott *v.* U. S., 33 Ct. Cl. 486.

60. U. S. *v.* Kagama, 118 U. S. 375, 6 S. Ct. 1109, 30 L. ed. 228; Holden *v.* Joy, 17 Wall. (U. S.) 211, 21 L. ed. 523; Worcester *v.* Georgia, 6 Pet. (U. S.) 515, 8 L. ed. 483.

61. Worcester *v.* Georgia, 6 Pet. (U. S.) 515, 8 L. ed. 483; Love *v.* Pamplin, 21 Fed. 755.

62. Tuttle *v.* Moore, 3 Indian Terr. 712, 64 S. W. 585; U. S. *v.* Choctaw Nation, 193 U. S. 115, 24 S. Ct. 411, 48 L. ed. 640; Lone Wolf *v.* Hitchcock, 187 U. S. 553, 23 S. Ct. 216, 47 L. ed. 299; Stephens *v.* Cherokee Nation, 174 U. S. 445, 19 S. Ct. 722, 43 L. ed. 1041; U. S. *v.* Kagama, 118 U. S. 375, 6 S. Ct. 1109, 30 L. ed. 228; Kendall's Case, 1 Ct. Cl. 261.

A federal court has authority to issue a writ of habeas corpus, to run in the Indian Territory. *Ex p.* Kenyon, 14 Fed. Cas. No. 7,720, 5 Dill. 385.

63. Lowe *v.* U. S., 37 Ct. Cl. 413.

64. U. S. *v.* Blackfeather, 155 U. S. 218, 15 S. Ct. 63, 39 L. ed. 126; Cherokee Nation *v.* Journeycake, 155 U. S. 196, 15 S. Ct. 55, 39 L. ed. 120.

65. Delaware Indians *v.* Cherokee Nation, 38 Ct. Cl. 234 [*affirmed* in 193 U. S. 127, 24 S. Ct. 342, 48 L. ed. 646]; Whitmire *v.* Cherokee Nation, 30 Ct. Cl. 138.

66. Delaware Indians *v.* Cherokee Nation, 193 U. S. 127, 24 S. Ct. 342, 48 L. ed. 646; Journeycake *v.* Cherokee Nation, 28 Ct. Cl. 281.

67. Delaware Indians *v.* Cherokee Nation, 193 U. S. 127, 24 S. Ct. 342, 48 L. ed. 646; Choctaw Nation *v.* U. S., 179 U. S. 494, 21 S. Ct. 149, 45 L. ed. 291.

68. Delaware Indians *v.* Cherokee Nation, 193 U. S. 127, 24 Ct. Cl. 342, 48 L. ed. 646.

69. Me-shing-go-me-sia *v.* State, 36 Ind. 310; Cherokee Indians *v.* U. S., 117 U. S. 288, 6 S. Ct. 718, 29 L. ed. 880; Allred *v.* U. S., 36 Ct. Cl. 280; Dobbs *v.* U. S., 33 Ct. Cl. 308; McKee *v.* U. S., 33 Ct. Cl. 99; Tully *v.* U. S., 32 Ct. Cl. 1.

Eastern band of Cherokees.— The Cherokee Indians east of the Mississippi do not form a nation. As individuals they severed their connection with the Cherokee nation. Their organization by the Indian office under the name of the Eastern band was for the purpose of facilitating business with the government, and is at most a social organization. Cherokees *v.* U. S., 20 Ct. Cl. 449 [*affirmed* in 117 U. S. 288, 6 S. Ct. 718, 29 L. ed. 880]. But *compare* U. S. *v.* Boyd, 83 Fed. 547, 27 C. C. A. 592, holding that the political departments of the government have recognized the Eastern band of Cherokee Indians as constituting a tribe; at least, as that word is used in the United States constitution.

Indians,[70] and when so recognized by the proper executive officers, the courts are bound by their action.[71]

d. Dissolution. A tribe may cease to exist by the complete withdrawal of its members from tribal relations;[72] but tribal relations are not terminated by the mere lapse of time and the allotment of a portion of the tribal lands in severalty,[73] nor by the emigration of even a majority of the tribe, if the organization remains intact.[74] So long as the tribal organization is recognized by the national government, the fact that the habits and customs of the Indians have been changed by intercourse with the whites does not authorize the courts to disregard the tribal status.[75]

3. Validity and Effect of Indian Laws and Customs — a. In General. Except when prohibited by statute, the Indian laws and customs control in all internal affairs of the tribes.[76] Their laws and proceedings are on the same footing as those of other territories of the United States.[77] The United States courts may not without express authority from congress, inquire into the method by which their laws are adopted;[78] but such courts will not take judicial notice of the Indian laws; they must be pleaded and proven.[79] United States courts are by act of congress prohibited from enforcing, either at law or in equity, any laws of the Indian tribes in the Indian Territory; but where rights have vested under such laws these courts are authorized to enforce those vested rights.[80]

b. Descent and Distribution. The law governing the descent of lands and the distribution of the personal property of an intestate, where the tribal organization is still recognized by the government, is the law of the tribe.[81]

70. Tully *v.* U. S., 32 Ct. Cl. 1.

71. Tully *v.* U. S., 32 Ct. Cl. 1.

72. *In re* Narragansett Indians, 20 R. I. 715, 40 Atl. 347; Morrow *v.* Blevins, 4 Humphr. (Tenn.) 223; Eastern Band Cherokee Indians *v.* U. S., 117 U. S. 288, 6 S. Ct. 718, 29 L. ed. 880; U. S. *v.* Boyd, 83 Fed. 547, 27 C. C. A. 592.

The Indians residing in Maine, whose tribal organization has ceased to exist, are not "Indian tribes," within the treaty-making powers of the federal government. State *v.* Newell, 84 Me. 465, 24 Atl. 943.

73. U. S. *v.* Flournoy Live-Stock, etc., Co., 71 Fed. 576.

74. Me-shing-go-me-sia *v.* State, 36 Ind. 310; Wau-pe-man-qua *v.* Aldrich, 28 Fed. 489.

75. The Kansas Indians, 5 Wall. (U. S.) 737, 18 L. ed. 667; U. S. *v.* Holliday, 3 Wall. (U. S.) 407, 18 L. ed. 182.

76. *Alabama.*— Wall *v.* Williamson, 8 Ala. 48.

Indian Territory.— Rush *v.* Thompson, 2 Indian Terr. 557, 53 S. W. 333.

Mississippi.— Turner *v.* Fish, 28 Miss. 306; Fisher *v.* Allen, 2 How. 611.

Missouri.— Boyer *v.* Dively, 58 Mo. 510.

Tennessee.— Blair *v.* Pathkiller, 2 Yerg. 407; Holland *v.* Pack, Peck 151.

Texas.— Jones *v.* Laney, 2 Tex. 342.

United States.— U. S. *v.* Choctaw Indians, 193 U. S. 115, 24 S. Ct. 411, 48 L. ed. 640; Worcester *v.* Georgia, 6 Pet. 515, 8 L. ed. 483; U. S. *v.* Whaley, 37 Fed. 145, 13 Sawy. 548.

See 27 Cent. Dig. tit. "Indians," § 11.

Transactions outside of tribal territory.— Such laws, however, do not apply to transactions between Indians of the tribe which take place outside the tribal territory. *Ex p.* Kenyon, 14 Fed. Cas. No. 7,720, 5 Dill. 385.

77. Whitsett *v.* Forehand, 79 N. C. 230; U. S. *v.* Cox, 18 How. (U. S.) 100, 15 L. ed. 299.

Necessity for president's approval.— Acts and ordinances of the Creek or Cherokee tribes are not now valid until approved by the president of the United States. 31 U. S. St. at L. 1077. The same provision is made as to the Choctaws and Chickasaws in relation to certain classes of acts only, by the Atoka Agreement of 1898 (30 U. S. St. at L. 512).

Ejectment to recover land and improvements may be maintained under acts of the Cherokee national council. Price *v.* Cherokee Nation, (Indian Terr. 1904) 82 S. W. 893.

78. Delaware Indians *v.* Cherokee Nation, 193 U. S. 127, 24 S. Ct. 342, 48 L. ed. 646.

79. Ricknor *v.* Clabber, (Indian Terr. 1903) 76 S. W. 271; Rowe *v.* Henderson, (Indian Terr. 1903) 76 S. W. 250; Engleman *v.* Cable, (Indian Terr. 1902) 69 S. W. 894; Sass *v.* Thomas, (Indian Terr. 1902) 69 S. W. 893; Kelly *v.* Churchill, (Indian Terr. 1902) 69 S. W. 817; Campbell *v.* Scott, 3 Indian Terr. 462, 58 S. W. 719; O'Brien *v.* Bugbee, 46 Kan. 1, 26 Pac. 428; Hockett *v.* Alston, 110 Fed. 910, 49 C. C. A. 180; Wilson *v.* Owens, 86 Fed. 571, 30 C. C. A. 257. See also Brashear *v.* Williams, 10 Ala. 630.

80. Boudinot *v.* Boudinot, 2 Indian Terr. 107, 48 S. W. 1019.

81. Nivens *v.* Nivens, (Indian Terr. 1903) 76 S. W. 114, 64 S. W. 604; Hannon *v.* Taylor, 57 Kan. 1, 45 Pac. 51; O'Brien *v.* Bugbee, 46 Kan. 1, 26 Pac. 428; Brown *v.* Steele, 23 Kan. 672; Dole *v.* Irish, 2 Barb. (N. Y.) 639; Jones *v.* Meehan, 175 U. S. 1, 20 S. Ct.

c. Taxation by Tribal Government. A tribe has the ordinary powers of taxation over persons and property within its limits.[82] It may require a license before permitting non-citizens to engage in business or in the practice of a profession within its territorial limits.[83]

d. Courts. Except where otherwise provided by statute the tribal courts have exclusive jurisdiction over suits between members of the tribe and over crimes committed by Indians against Indians.[84] The construction of statutes of the tribe is solely within their jurisdiction.[85] Their jurisdiction extends to members of the tribe by adoption.[86] While it does not extend to citizens of the United States, such exemption is waived if not specially pleaded.[87] The judgments of the tribal courts stand on the same footing and are entitled to the same faith and credit as the judgments of territorial courts of the United States,[88] but they may be impeached collaterally on the ground of lack of jurisdiction.[89]

4. Actions By and Against Tribes. It is generally held that an Indian tribe cannot sue or be sued in the courts of the United States or in a state court, except

1, 44 L. ed. 49; Y-ta-tah-wah *v.* Rebock, 105 Fed. 257.

Presumption when no proof of laws of descent.— In the absence of proof that a savage tribe of Indians have laws regulating the descent of property, the presumption arises that the property of a deceased person would belong to the first occupant. Brashear *v.* Williams, 10 Ala. 630.

Laws of Indians not pleaded.— Where, in an action by an heir to recover Indian lands, the complaint alleged that plaintiff was a Quapaw Indian, and the answer contained no allegation that the laws of descent of such nation were different from those of the forum in which the trial was had, it was presumed that they were the same. Ricknor *v.* Clabber, (Indian Terr. 1903) 76 S. W. 271.

Wills under Indian laws.— The will of a Wyandotte Indian, made and allowed in 1853 according to the laws, customs, and usages of the tribe, is valid and binding. Gray *v.* Coffman, 10 Fed. Cas. No. 5,714, 3 Dill. 393. In Canada an Indian, male or female, may dispose of real or personal property by will. Johnson *v.* Jones, 15 Can. L. T. 48, 26 Ont. 109.

Administrators appointed by the Cherokee nation have a right as such to maintain suit in the United States district court. U. S. *v.* Cox, 18 How. (U. S.) 100, 15 L. ed. 299.

82. Maxey *v.* Wright, 3 Indian Terr. 243, 54 S. W. 807; Morris *v.* Hitchcock, 194 U. S. 384, 24 S. Ct. 712, 48 L. ed. 1030.

For taxation of tribal lands see III, A, 6.

For taxation of allotted lands see III, C, 5.

For taxation of personal property see IV, F.

Enforcing collection.— The United States courts in the Indian Territory have no jurisdiction to entertain an action for the collection of taxes imposed by the laws of the Creek nation. Buster *v.* Wright, 135 Fed. 947; Crabtree *v.* Madden, 54 Fed. 426, 4 C. C. A. 408.

83. Zevely *v.* Weimer, (Indian Terr. 1904) 82 S. W. 941; Buster *v.* Wright, 135 Fed. 947.

84. *Ex p.* Tiger, 2 Indian Terr. 41, 47 S. W. 304; Nofire *v.* U. S., 164 U. S. 657, 17 S. Ct. 212, 41 L. ed. 588; Talton *v.* Mayes, 163 U. S. 376, 16 S. Ct. 986, 41 L. ed. 196; Alberty *v.* U. S., 162 U. S. 499, 16 S. Ct. 864, 40 L. ed. 1051; Smith *v.* U. S., 151 U. S. 50, 14 S. Ct. 234, 38 L. ed. 67; *Ex p.* Mayfield, 141 U. S. 107, 11 S. Ct. 939, 35 L. ed. 635; Raymond *v.* Raymond, 83 Fed. 721, 28 C. C. A. 38. See also Crowell *v.* Young, (Indian Terr. 1902) 69 S. W. 829; Boudinot *v.* Boudinot, 2 Indian Terr. 107, 48 S. W. 1019.

For criminal jurisdiction of federal and state courts see IV, D, 2.

Jurisdiction not ousted by naturalization.— Where a Cherokee court in the Indian Territory has acquired jurisdiction of an Indian in a criminal prosecution, such jurisdiction is not divested by the subsequent naturalization of defendant. *Ex p.* Kyle, 67 Fed. 306.

Peacemakers' court.— The jurisdiction of the "peacemakers" of the Seneca nation is limited to one hundred dollars by N. Y. Laws (1847), c. 365, § 8. Jemmerson *v.* Kennedy, 55 Hun (N. Y.) 47, 7 N. Y. Suppl. 296. The supreme court of New York, in an action to enforce a decree in partition rendered by the peacemakers' court, cannot go back of the decree to ascertain the relationship and interests of the parties, which were determined by the decree. Jimeson *v.* Pierce, 102 N. Y. App. Div. 618, 92 N. Y. Suppl. 331.

Tribes of Indians residing in New York have no jurisdiction to try their members for crimes committed within the reservation. Jackson *v.* Goodell, 20 Johns. (N. Y.) 188.

Acts of congress.— On this subject congress has passed several acts. See 23 U. S. St. at L. 385; 25 U. S. St. at L. 783; 26 U. S. St. at L. 96; 30 U. S. St. at L. 518.

85. Talton *v.* Mayes, 163 U. S. 376, 16 S. Ct. 986, 41 L. ed. 196.

86. Nofire *v.* U. S., 164 U. S. 657, 17 S. Ct. 212, 41 L. ed. 588; Alberty *v.* U. S., 162 U. S. 499, 16 S. Ct. 864, 40 L. ed. 1051; Raymond *v.* Raymond, 83 Fed. 721, 28 C. C. A. 38.

87. Mehlin *v.* Ice, 56 Fed. 12, 5 C. C. A. 403.

88. Standley *v.* Roberts, 59 Fed. 836, 8 C. C. A. 305; Mehlin *v.* Ice, 56 Fed. 12, 5 C. C. A. 403.

89. Raymond *v.* Raymond, 1 Indian Terr. 334, 37 S. W. 202.

where authority has been conferred by statute.[90] A tribe must be made a party to any suit pending in the federal court in the Indian Territory in which the property of the tribe is in any way affected by the issues.[91] The United States may, as guardian of such Indians, maintain an action in their behalf.[92] Where authority to sue has been conferred, a tribe may maintain an injunction to restrain the usurpation of official authority,[93] but it cannot maintain an action on a contract made in violation of law;[94] and a suit cannot be brought by individuals in the name of the tribe,[95] nor by a portion of a tribe who have separated therefrom.[96]

5. CONTRACTS. Contracts between Indian tribes and agents or attorneys for services to be performed in reference to claims by such tribes against the United States cannot be enforced unless made in accordance with the requirements of the act of congress, requiring the approval of the secretary of the interior.[97]

D. Treaties — 1. VALIDITY AND EFFECT. A treaty with an Indian tribe has the same dignity and effect as a treaty with a foreign nation.[98] It is a part of the law

90. Engleman *v.* Cable, (Indian Terr. 1902) 69 S. W. 894; Seneca Nation *v.* Christie, 126 N. Y. 122, 27 N. E. 275; Crouse *v.* New York, etc., R. Co., 49 Hun (N. Y.) 576, 2 N. Y. Suppl. 453; Seneca Nation *v.* Hammond, 3 Thomps. & C. (N. Y.) 347; Seneca Nation *v.* John, 16 N. Y. Suppl. 40; Seneca Nation *v.* Tyler, 14 How. Pr. (N. Y.) 109; Strong *v.* Waterman, 11 Paige (N. Y.) 607; *In re* Narragansett Indians, 20 R. I. 715, 40 Atl. 347; Thebo *v.* Choctaw, 66 Fed. 372, 13 C. C. A. 519.

In New York no provision has been made by law for bringing ejectment to recover possession of Indian lands, except in the case of the Senecas, and the Indians have no corporate name by which they can institute such a suit. Montauk *v.* Long Island R. Co., 28 N. Y. App. Div. 470, 51 N. Y. Suppl. 142. Seneca Indians in New York may sue and be sued as provided by state law. Jemmison *v.* Kennedy, 55 Hun 47, 7 N. Y. Suppl. 296; Jackson *v.* Reynolds, 14 Johns. 335.

91. 30 U. S. St. at L. 495. And see Thompson *v.* Morgan, (Indian Terr. 1902) 69 S. W. 920; Casteel *v.* McNeeley, (Indian Terr. 1901) 64 S. W. 594.

The Creek nation is a proper party to a suit by a telephone company to restrain persons from erecting telephones in a town in such nation, where the latter are taking possession of tribal lands in the town without authority. Muskogee Nat. Tel. Co. *v.* Hall, (Indian Terr. 1901) 64 S. W. 600.

92. U. S. *v.* Winans, 73 Fed. 72; U. S. *v.* Boyd, 68 Fed. 577.

93. Seneca Nation *v.* John, 16 N. Y. Suppl. 40.

94. St. Regis Indians *v.* Drum, 19 Johns. (N. Y.) 127.

95. Johnson *v.* Long Island R. Co., 162 N. Y. 462, 56 N. E. 992; Onondaga Nation *v.* Thacher, 29 Misc. (N. Y.) 428, 61 N. Y. Suppl. 1027 [*affirmed* in 53 N. Y. App. Div. 561, 65 N. Y. Suppl. 1014 [*affirmed* in 169 N. Y. 584, 62 N. E. 1098)].

96. People *v.* Land Office, 99 N. Y. 648, 1 N. E. 764; Cayuga Indians *v.* State, 99 N. Y. 235, 1 N. E. 770.

97. Rollins *v.* Cherokee Indians, 87 N. C. 229; *In re* Sanborn, 148 U. S. 222, 13 S. Ct. 577, 37 L. ed. 429; Rollins *v.* U. S., 23 Ct. Cl. 106.

An exception to this rule arises, however, in the case of a specific appropriation for the payment for such services, as in 25 U. S. St. at L. 756. U. S. *v.* Crawford, 47 Fed. 561.

Contracts with attorneys, for services rendered in securing a treaty from the United States, cannot be enforced unless approved by the secretary of the interior and the commissioner of Indian affairs. Hanks *v.* Hendricks, 3 Indian Terr. 415, 58 S. W. 669.

The power of the chief of a tribe to make a contract binding the tribe will be presumed where such authority has not been questioned, and the tribe has accepted the benefit of the contract. Rollins *v.* U. S., 23 Ct. Cl. 106.

98. Wood *v.* Missouri, etc., R. Co., 11 Kan. 323; U. S. *v.* New York Indians, 173 U. S. 464, 19 S. Ct. 487, 43 L. ed. 769; Worcester *v.* Georgia, 6 Pet. (U. S.) 515, 8 L. ed. 483; Turner *v.* American Baptist Missionary Union, 24 Fed. Cas. No. 14,251, 5 McLean 344. And see, generally, TREATIES.

Abrogation by treaty with another government.— The treaty of the Creek nation with the rebel government abrogated the treaty with the United States, and the provisions of a later treaty reaffirming and reassuming all obligations existing under the earlier treaty, do not cover the period when the Creeks were in rebellion. Connor *v.* U. S., 19 Ct. Cl. 675.

Time of taking effect.— Where a treaty provides that it should take effect when ratified by the president and senate, it did not take effect until signed by the president, although it had been previously ratified by the senate and accepted by the Indians. Shepard *v.* Northwestern L. Ins. Co., 40 Fed. 341. By the treaty of July 16, 1862, the tribal relations of the Ottawa Indians were to cease, and they were to become citizens of the United States, in five years. A subsequent treaty, negotiated before, but finally ratified as amended after, the expiration of the five years, related back to the date of negotiation, and was a valid treaty with an Indian

of the land, to be enforced by the courts,[99] and cannot be disregarded by state legislation.[1] By such treaties the Indians may sell or acquire lands.[2] When rights have vested under treaties congress has no power to impair them.[3] A prior treaty may, however, be superseded by an act of congress.[4]

2. CONSTRUCTION. The construction of an Indian treaty belongs to the courts as a matter of law.[5] Its language is construed, not according to the technical meaning of its words to learned lawyers, but in the sense in which they would naturally be understood by the Indians.[6] As between the United States and the Indians, treaties are liberally construed in favor of the Indians;[7] but grants and reservations claimed under such treaties are strictly construed against the grantee or beneficiary.[8] An admission in a treaty as to the limits of the territory occupied by the Indians is not conclusive on those who have previously acquired rights.[9] A treaty declaring a general amnesty of all past offenses against the United States effects a pardon of all offenses against citizens of the United States.[10] And where it specifies offenses against citizens of the Cherokee nation it includes offenses against a white man who had been adopted into that tribe.[11]

3. RATIFICATION. A treaty is valid, even though not formally ratified and proclaimed, where it has been acted upon and recognized by both parties.[12] A proviso added to a treaty by the senate is void if it was not included in the published copy or in the president's proclamation promulgating the treaty, and if there is no evidence of the assent of the president and the Indians thereto.[13] A state or its agent is authorized to enter into a treaty or convention with an Indian tribe within its borders, for the extinguishment of the Indian title to land, pro-

tribe. Wiggan *v.* Conolly, 163 U. S. 56, 16 S. Ct. 914, 41 L. ed. 69.

99. Maiden *v.* Ingersoll, 6 Mich. 373; Fellow *v.* Blacksmith, 19 How. (U. S.) 366, 15 L. ed. 684; Worcester *v.* Georgia, 6 Pet. (U. S.) 515, 8 L. ed. 483; *In re* Race Horse, 70 Fed. 598; Leighton *v.* U. S., 29 Ct. Cl. 288; Kendall's Case, 1 Ct. Cl. 261.

1. People *v.* Land Office Com'rs, 99 N. Y. 648, 1 N. E. 764; Fellows *v.* Denniston, 23 N. Y. 420; Love *v.* Pamplin, 21 Fed. 755.

2. Wood *v.* Missouri, etc., R. Co., 11 Kan. 323; Minter *v.* Shirley, 45 Miss. 376; Holden *v.* Joy, 17 Wall. (U. S.) 211, 21 L. ed. 523; U. S. *v.* Reese, 27 Fed. Cas. No. 16,137, 5 Dill. 405.

3. Holden *v.* Joy, 17 Wall. (U. S.) 211, 21 L. ed. 523; Wilson *v.* Wall, 6 Wall. (U. S.) 83, 18 L. ed. 727; Mann *v.* Wilson, 23 How. (U. S.) 457, 16 L. ed. 584; Mitchel *v.* U. S., 9 Pet. (U. S.) 711, 9 L. ed. 283; U. S. *v.* Reese, 27 Fed. Cas. No. 16,137, 5 Dill. 405. See also Choctaw Nation *v.* U. S., 21 Ct. Cl. 59.

4. Webster *v.* Reid, Morr. (Iowa) 467; Lone Wolf *v.* Hitchcock, 187 U. S. 553, 23 S. Ct. 216, 47 L. ed. 299; Stephens *v.* Cherokee Nation, 174 U. S. 445, 19 S. Ct. 722, 43 L. ed. 1041; Ward *v.* Race Horse, 163 U. S. 504, 16 S. Ct. 1076, 41 L. ed. 244; The Cherokee Tobacco, 11 Wall. (U. S.) 616, 20 L. ed. 227.

5. Harris *v.* Doe, 4 Blackf. (Ind.) 369; Wray *v.* Doe, 10 Sm. & M. (Miss.) 452.

Court cannot inquire into execution.— A court cannot inquire whether a treaty was properly executed, nor whether it was procured by undue influence (Leighton *v.* U. S., 29 Ct. Cl. 288), or by fraud and deception (Lone Wolf *v.* Hitchcock, 187 U. S. 553, 23 S. Ct. 216, 47 L. ed. 299).

Agreement of parties. — Where the language of a treaty as to land is indefinite, and the natural objects called for uncertain, the parties to the treaty may settle the boundaries of the land forming the subject-matter by agreement. Lattimer *v.* Poteet, 14 Pet. (U. S.) 4, 10 L. ed. 328.

6. Jones *v.* Meehan, 175 U. S. 1, 20 S. Ct. 1, 44 L. ed. 49; Choctaw Nation *v.* U. S., 119 U. S. 1, 7 S. Ct. 75, 30 L. ed. 306; *In re* Kansas Indians, 5 Wall. (U. S.) 737, 18 L. ed. 667; Worcester *v.* Georgia, 6 Pet. (U. S.) 515, 8 L. ed. 483.

7. Choctaw Nation *v.* U. S., 119 U. S. 1, 7 S. Ct. 75, 30 L. ed. 306; *In re* Kansas Indians, 5 Wall. (U. S.) 737, 18 L. ed. 667; Worcester *v.* Georgia, 6 Pet. (U. S.) 515, 8 L. ed. 483; Meigs *v.* McClung, 9 Cranch (U. S.) 11, 3 L. ed. 639; Navarre *v.* U. S., 33 Ct. Cl. 235; Langford's Case, 12 Ct. Cl. 338. *Compare* U. S. *v.* Choctaw Nation, 179 U. S. 494, 21 S. Ct. 149, 45 L. ed. 291, holding that the obvious, palpable meaning of the language may not be disregarded because of the dependent character of the Indians; nor because the Indians may have been overreached; nor because the ordinary interpretation of the words will have the result of rendering the government less liberal toward the tribe making the treaty than toward other tribes.

8. Goodfellow *v.* Muckey, 10 Fed. Cas. No. 5,537, 1 McCrary 238.

9. Brooks *v.* Norris, 6 Rob. (La.) 175.

10. Garrison *v.* U. S., 30 Ct. Cl. 272.

11. U. S. *v.* Ragsdale, 27 Fed. Cas. No. 16,113, Hempst. 479.

12. Moore *v.* U. S., 32 Ct. Cl. 593.

13. New York Indians *v.* U. S., 170 U. S. 1, 18 S. Ct. 531, 42 L. ed. 927, Mr. Justice Brown, delivering opinion of the court.

vided it is entered into in the presence of and with the approval of a commissioner of the United States, appointed to attend the same; and such a treaty requires no ratification or proclamation by the federal authorities.[14]

4. Claims Under Treaties. In the adjustment of claims made by Indians or other beneficiaries under treaties or agreements with Indian tribes, the general principles of construction above set forth are observed.[15] Where the government pays out treaty funds without authority it may be held responsible for repayment,[16] but where payment is made to legally constituted representatives of the tribe the United States is not liable for their misappropriation of the funds.[17] Where the parties to a treaty agree upon an arbitrator of claims arising under it, the courts will not review his decisions.[18]

III. Indian Lands.

A. Title and Rights — 1. Nature of Title — a. In General. Indian tribes hold their right to the soil by virtue of aboriginal occupancy and possession.[19] To sustain the title, their use and occupancy must have been actual, not merely desultory or constructive.[20] Their title is a perpetual right of possession and occupancy, the fee remaining in the United States or in the state where the land is situated[21] as

14. Seneca Nation *v.* Christy, 126 N. Y. 122, 27 N. E. 275.

15. Cook *v.* Biddle, 2 Mich. 269; U. S. *v.* Choctaw Nation, 193 U. S. 115, 24 S. Ct. 411, 48 L. ed. 640; U. S. *v.* Blackfeather, 155 U. S. 180, 15 S. Ct. 64, 39 L. ed. 114; U. S. *v.* Old Settlers, 148 U. S. 427, 13 S. Ct. 650, 37 L. ed. 509; Blackfeather *v.* U. S., 28 Ct. Cl. 447; Chickasaw Nation *v.* U. S., 22 Ct. Cl. 222; Choctaw Nation *v.* U. S., 21 Ct. Cl. 59; Navarre *v.* U. S., 33 Ct. Cl. 235 (holding that an agreement to reimburse the members of the tribe for depredations committed upon "stock, timber, or other property" does not extend to losses caused by swindling through false representations). See also Pam-to-pee *v.* U. S., 148 U. S. 691, 13 S. Ct. 742, 37 L. ed. 613; Whitmire *v.* Cherokee Nation, 30 Ct. Cl. 180.

Release of claims by tribe.— The provision in the Creek treaty of 1866 that "the stipulations of this treaty are to be in full settlement of all claims of said Creek nation for damages and losses of every kind growing out of the late rebellion" applies to individual and personal as well as national demands. Connor *v.* U. S., 19 Ct. Cl. 675.

Where a treaty provides for an advance to the Indians for building purposes they are to be charged with the advance, although the United States ultimately received a benefit from the improvements made with the funds. Blackfeather *v.* U. S., 28 Ct. Cl. 447.

Where a treaty recites payment it will be presumed that full payment has been made. Seneca Nation *v.* Christie, 126 N. Y. 122, 27 N. E. 275.

16. Oneida Indians *v.* U. S., 39 Ct. Cl. 116.

17. U. S. *v.* Blackfeather, 155 U. S. 180, 15 S. Ct. 64, 39 L. ed. 114.

18. U. S. *v.* Old Settlers, 148 U. S. 427, 13 S. Ct. 650, 37 L. ed. 509; Chickasaw Nation *v.* U. S., 22 Ct. Cl. 222.

19. Holden *v.* Joy, 17 Wall. (U. S.) 211, 21 L. ed. 523; Worcester *v.* Georgia, 6 Pet. (U. S.) 515, 8 L. ed. 483. And see Reg. *v.* St. Catharine's Milling, etc., Co., 13 Ont. App. 148 [*affirming* 10 Ont. 196].

Neither Spain nor Mexico recognized the primitive title of the Indians. Brooks *v.* Norris, 6 Rob. (La.) 175; Maes *v.* Gillard, 7 Mart. N. S. (La.) 314; Martin *v.* Johnson, 5 Mart. (La.) 655; Reboul *v.* Nero, 5 Mart. (La.) 490; U. S. *v.* Wilson, 1 Black (U. S.) 267, 17 L. ed. 142; Hayt *v.* U. S., 38 Ct. Cl. 455. *Compare* Byrne *v.* Alas, 74 Cal. 628, 16 Pac. 523.

20. Choctaw Nation *v.* U. S., 179 U. S. 494, 21 S. Ct. 149, 45 L. ed. 291.

21. Minter *v.* Shirley, 45 Miss. 376; *In re* Narragansett Indians, 20 R. I. 715, 40 Atl. 347; Spalding *v.* Chandler, 160 U. S. 394, 16 S. Ct. 360, 40 L. ed. 469; Buttz *v.* Northern Pac. R. Co., 119 U. S. 55, 7 S. Ct. 100, 30 L. ed. 330; U. S. *v.* Kagama, 118 U. S. 375, 6 S. Ct. 1109, 30 L. ed. 228; U. S. *v.* Cook, 19 Wall. (U. S.) 591, 22 L. ed. 210; Doe *v.* Wilson, 23 How. (U. S.) 457, 16 L. ed. 584; U. S. *v.* Rogers, 4 How. (U. S.) 567, 11 L. ed. 1105; Mitchel *v.* U. S., 9 Pet. (U. S.) 711, 9 L. ed. 283; Worcester *v.* Georgia, 6 Pet. (U. S.) 515, 8 L. ed. 483; Cherokee Nation *v.* Georgia, 5 Pet. (U. S.) 1, 8 L. ed. 25; Johnson *v.* McIntosh, 8 Wheat. (U. S.) 543, 5 L. ed. 681; Fletcher *v.* Peck, 6 Cranch (U. S.) 87, 3 L. ed. 162; U. S. *v.* Four Bottles of Sour-Mash Whisky, 90 Fed. 720; U. S. *v.* Ragsdale, 27 Fed. Cas. No. 16,113, Hempst. 479; U. S. *v.* Rogers, 27 Fed. Cas. No. 16,187, Hempst. 450; Goodfellow *v.* Mulkey, 10 Fed. Cas. No. 5,537, 1 McCrary 238.

The colonies, on becoming states, succeeded to the rights of the crown to lands within their boundaries, with the exclusive right to extinguish the Indian title by purchase. Seneca Nation *v.* Christie, 126 N. Y. 122, 27 N. E. 275; Ogden *v.* Lee, 6 Hill (N. Y.) 546; Strong *v.* Waterman, 11 Paige (N. Y.) 607.

In New York the tenure of Seneca Indians residing on the Allegany and Cattaraugus

successor to the rights of the European discoverers.[22] The United States, as original proprietor, has power to dispose of public lands even within an Indian reservation without the consent of the Indians.[23]

b. Reservations and Grants to Tribes. Where tribal Indians have been assigned lands and reservations as places of domicile, they have no vested rights therein, but simply a right to occupy at the will of the government.[24] Where they hold by grant, their title does not depend upon aboriginal possession, but its nature and extent are measured by the terms of the grant.[25]

c. Land Grants Conflicting With Indian Title. The United States, or a state holding the fee, may, before a cession by the Indians, convey an unencumbered title in fee simple or a title subject to their right of possession;[26] but such inten-

reservations is defined by the act of May 18, 1845, declaring that they hold and possess such reservations as a distinct community. Seneca Nation *v.* Tyler, 14 How. Pr. 109.

In Canada the Indians have the right of possession; the fee is in the province in which the lands are situate; but the Dominion government retains the exclusive power of legislation over the lands while occupied by Indians. St. Catharines Milling, etc., Co. *v.* Reg., 13 Can. Sup. Ct. 577 [*affirmed* in 14 App. Cas. 46, 58 L. J. P. C. 54, 60 L. T. Rep. N. S. 197]; Reg. *v.* Johnson, 33 Can. L. J. 204; Burke *v.* Cormier, 10 Can. L. T. 382, 30 N. Brunsw. 142; Ontario Min. Co. *v.* Seybold, 31 Ont. 386; Reg. *v.* Johnson, 1 Grant Ch. (U. C.) 409; Reg. *v.* Strong, 1 Grant Ch. (U. C.) 392; Bown *v.* West, 1 U. C. Q. B. O. S. 287.

The pueblo Indians of New Mexico have an indefeasible title to their lands, guaranteed by the treaty of Guadalupe Hidalgo (9 U. S. St. at L. 922). U. S. *v.* Lucero, 1 N. M. 422.

The right of eminent domain over Indian lands is in the United States, even where the Indians hold a fee-simple title by grant or treaty. Cherokee Nation *v.* Southern Kan. R. Co., 33 Fed. 900.

Provisional legislation respecting land within the Indian boundary, to take effect when the Indian title should be extinguished, was not prohibited by the constitution of Tennessee. George *v.* Gamble, 2 Overt. (Tenn.) 170.

22. Breaux *v.* Johns, 4 La. Ann. 141, 50 Am. Dec. 555; Granger *v.* Avery, 64 Me. 292; Penobscot Tribe *v.* Veazie, 58 Me. 402; Holden *v.* Joy, 17 Wall. (U. S.) 211, 21 L. ed. 523; Worcester *v.* Georgia, 6 Pet. (U. S.) 515, 8 L. ed. 483; Johnson *v.* McIntosh, 8 Wheat. (U. S.)543, 5 L. ed. 681.

23. U. S. *v.* Alaska Packers' Assoc., 79 Fed. 152.

24. McMullen *v.* Hodge, 5 Tex. 34; Lone Wolf *v.* Hitchcock, 19 App. Cas. (D. C.) 315 [*affirmed* in 187 U. S. 553, 23 S. Ct. 216, 47 L. ed. 299].

Winnebago reservation lands in Nebraska are held by the United States in trust for the tribe and its members, and they are entitled to the use, benefits, rents, and profits thereof. Lemmon *v.* U. S., 106 Fed. 650, 45 C. C. A. 518.

25. John *v.* Sabattis, 69 Me. 473; U. S. *v.* De la Paz Valdez de Conway, 175 U. S. 60, 20 S. Ct. 13, 44 L. ed. 72.

The title of the Cherokee nation was obtained by grant from the United States, and is a base, qualified, or determinable fee, without the right of reversion, but only the possibility of reversion, in the United States, which in effect puts all the estate in the Indians. U. S. *v.* Old Settlers, 148 U. S. 427, 13 S. Ct. 650, 37 L. ed. 509 [*affirming* 27 Ct. Cl. 1]; Payne *v.* Kansas, etc., R. Co., 46 Fed. 546; Cherokee Nation *v.* Southern Kansas R. Co., 33 Fed. 900; U. S. *v.* Rogers, 23 Fed. 658; U. S. *v.* Reese, 27 Fed. Cas. No. 16,137, 5 Dill. 405.

The Delaware Indians and the Shawnee Indians acquired from the Cherokee nation a right of occupancy for life, with the stipulation that their children thereafter born should be regarded as native Cherokees. They have equal rights with the native Cherokees in all the common property of the Cherokee nation. U. S. *v.* Blackfeather, 155 U. S. 218, 15 S. Ct. 63, 39 L. ed. 126; Cherokee Nation *v.* Journeycake, 155 U. S. 196, 15 S. Ct. 55, 39 L. ed. 120; Delaware Indians *v.* Cherokee Nation, 38 Ct. Cl. 234 [*modified* in 193 U. S. 127, 24 S. Ct. 342, 48 L. ed. 646].

A grant to Mohawk Indians, by the governor of the province of Quebec, under his seal and arms, conveyed no legal estate; not being under the great seal, and there being no grantee capable of holding. Doe *v.* Ramsay, 9 U. C. Q. B. 105.

26. *Arkansas.*— Gaines *v.* Hale, 26 Ark. 168.

Iowa.— Snell *v.* Dubuque, etc., R. Co., 78 Iowa 88, 42 N. W. 588, 80 Iowa 767, 45 N. W. 763]; Dubuque, etc., R. Co. *v.* Des Moines Valley R. Co., 54 Iowa 89, 6 N. W. 157.

Louisiana.— Breaux *v.* Johns, 4 La. Ann. 141, 50 Am. Dec. 555.

New York.— Jackson *v.* Hudson, 3 Johns. 375, 3 Am. Dec. 500.

Virginia.— Marshall *v.* Clark, 4 Call 268.

Wisconsin.— Veeder *v.* Guppy, 3 Wis. 502.

United States.— Lattimer *v.* Poteet, 14 Pet. 4, 10 L. ed. 328; Buttz *v.* Northern Pac. R. Co., 119 U. S. 55, 7 S. Ct. 100, 30 L. ed. 330; Beecher *v.* Wetherby, 95 U. S. 517, 24 L. ed. 440; Marsh *v.* Brooks, 14 How. 513, 14 L. ed. 522; Clark *v.* Smith, 13 Pet. 195, 10 L. ed. 123; California, etc., Land Co. *v.* Worden, 85 Fed. 94. But *compare* Danforth *v.* Wear, 9 Wheat. (U. S.) 673, 6 L. ed. 188.

See 27 Cent. Dig. tit. "Indians," § 25.

But see Montgomery *v.* Doe, 13 Sm. & M.

tion is not to be presumed; and Indian lands are not affected by an act giving the right of preëmption,[27] or a grant in general terms.[28]

d. Rights of Individual Indians in Tribal Lands. All Indian lands were originally communal property.[29] Where land is conveyed to a tribe individual members of the tribe can acquire no vested interest in any specific tract,[30] but they may have a right of perpetual occupancy in lands improved and occupied by them, under the laws of the tribe;[31] and such interest may be transferred to another member of the tribe.[32] A lease of pasture lands made by the Creek council to an Indian conveys a leasehold estate of all lands included within its exterior boundaries; and one taking up a farm therein is a trespasser.[33]

2. Rights Incident to Indian Title — a. Mines and Mining Rights. One who enters a mining claim within an Indian reservation acquires no rights thereby.[34] But where such entry is authorized as to a particular reservation by act of congress such claims as may be entered are thereby segregated from the reservation, and the Indian title is extinguished.[35] Under the Choctaw constitution, any citizen of that nation who discovered a coal mine acquired an exclusive right to all coal within a radius of one mile;[36] and the laws of the Chickasaw nation provided for the formation of corporations to develop coal and other mines, with authority to contract with capitalists to develop and work the mines.[37] Under these provisions leases were made; but congress abrogated existing leases and prohibited all persons from receiving royalties from such mines, and provided

(Miss.) 161; Strother *v.* Cathey, 5 N. C. 162, 3 Am. Dec. 683; Gillespie *v.* Cunningham, 2 Humphr. (Tenn.) 19.

Entries and surveys made on Indian lands prior to their cession are void, and no rights are acquired under such entry. Chinn *v.* Darnell, 5 Fed. Cas. No. 2,684, 4 McLean 440.

27. Gaines *v.* Hale, 26 Ark. 168; Thredgill *v.* Pintard, 12 How. (U. S.) 24, 13 L. ed. 877.

28. Atlantic, etc., R. Co. *v.* Mingus, 165 U. S. 413, 17 S. Ct. 348, 41 L. ed. 770; U. S. *v.* Missouri, etc., R. Co., 26 Fed. Cas. No. 15,786, 1 McCrary 624 [*affirmed* in 92 U. S. 760, 23 L. ed. 645]; U. S. *v.* Leavenworth, etc., R. Co., 26 Fed. Cas. No. 15,582, 1 McCrary 610 [*affirmed* in 92 U. S. 733, 23 L. ed. 634]; Langford's Case, 12 Ct. Cl. 338.

29. Journeycake *v.* Cherokee Nation, 28 Ct. Cl. 281.

30. Tuttle *v.* Moore, 3 Indian Terr. 712, 64 S. W. 585. See also Rush *v.* Thompson, 2 Indian Terr. 557, 53 S. W. 333, individual Indians who purchase town lots segregated from the public domain obtain only the right of occupancy.

Lands apportioned to Indians of the Choctaw and Chickasaw nations are still public lands and not held by allottees in their individual capacity as tenants in common. Dukes *v.* Goodall, (Indian Terr. 1904) 82 S. W. 702.

31. Crowell *v.* Young, (Indian Terr. 1901) 64 S. W. 607 [*modified* in (Indian Terr. 1902) 69 S. W. 829]; James *v.* Smith, 3 Indian Terr. 447, 58 S. W. 714; Payne *v.* Kansas, etc., R. Co., 46 Fed. 546. See also Blacksmith *v.* Fellows, 7 N. Y. 401 [*affirmed* in 19 How. (U. S.) 366, 15 L. ed. 684].

The right of possession is sufficient to support a lease of the portion held. Wilcoxen *v.* Hybarger, 1 Indian Terr. 138, 38 S. W. 669.

Rights of purchaser.— A sale of such land by the Indian occupant to a citizen of the United States passes no title; but the purchaser thereby acquires rights sufficient to maintain ejectment against another Indian who has no claim to the land except that he is a member of the tribe. Williams *v.* Works, (Indian Terr. 1903) 76 S. W. 246; Kelly *v.* Johnson, 1 Indian Terr. 184, 39 S. W. 352.

Limitation upon amount of land held in possession.— Under 32 U. S. St. at L. 643, § 19, it is unlawful for a Chickasaw Indian to hold possession of more than three hundred and twenty acres of land. See Gooding *v.* Watkins, (Indian Terr. 1904) 82 S. W. 913.

The statute of frauds applies to a contract relating to the interest of an Indian possessing lands of the Indian nation. Rowe *v.* Henderson, (Indian Terr. 1903) 76 S. W. 250.

32. Reynolds *v.* Clowdus, (Indian Terr. 1903) 76 S. W. 277; Holford *v.* James, (Indian Terr. 1903) 76 S. W. 261.

No right to sell to a citizen of United States.— A Creek citizen entitled to the possession of Indian lands has no authority to sell to a citizen of the United States the possession or right. Denton *v.* Capital Town Site Co., (Indian Terr. 1904) 82 S. W. 852.

33. Wassom *v.* Willison, 3 Indian Terr. 365, 58 S. W. 574.

34. Kendall *v.* San Juan Silver Min. Co., 144 U. S. 658, 12 S. Ct. 779, 36 L. ed. 583. And see Mines and Minerals.

35. U. S. *v.* Four Bottles Sour-Mash Whisky, 90 Fed. 720.

36. Ansley *v.* Ainsworth, (Indian Terr. 1902) 69 S. W. 884; McCurtain *v.* Grady, 1 Indian Terr. 107, 38 S. W. 65.

37. Laws Chickasaw Nation, pp. 188, 190 And see McBride *v.* Farrington, 131 Fed. 797.

that all coal within the nation should remain the common property of the tribes.[38] Such leases are now expressly prohibited by act of congress.[39] All leases of mineral lands must now be made under regulations promulgated by the secretary of the interior, and the royalties paid into the United States treasury for the benefit of the tribes.[40] In Canada the Indians have no rights to the royal mines and minerals; and the Dominion government can make no stipulation with the Indians which would affect the rights of the province in which the lands are situated.[41]

b. Ferry and Water Rights. Where by treaty a reservation was made of certain rights of ferriage, to be sold and the proceeds paid over to the Indian tribe, the Indians retained equal rights with other persons to a landing at the mouth of a public highway.[42] The Seneca nation can convey the right to use the waters of streams on their lands without consulting the persons owning the right of preëmption to the reservation.[43]

c. Cutting Timber and Hay. Timber standing on lands occupied by Indians cannot be cut by them for the purpose of sale alone; but they may sell timber cut for the purpose of improving the land.[44] The common-law doctrine that the cutting of standing trees is waste does not apply to Indians in the use of a large tract of land within a state, granted to them by the United States.[45] Other persons may not cut timber on Indian lands[46] even when authorized by the Indians.[47] Where a statute empowers the president to authorize the Indians to cut and sell the dead timber on a reservation, the amount which can be removed is limited by the president's order.[48] Where a contract has been made under such law, the

38. 30 U. S. St. at L. 498. And see Ansley *v.* Ainsworth, (Indian Terr. 1902) 69 S. W. 884.

39. 32 U. S. St. at L. 655.

40. Cherokee Nation *v.* Hitchcock, 187 U. S. 294, 23 S. Ct. 115, 47 L. ed. 183; Southwestern Coal Co. *v.* McBride, 185 U. S. 499, 22 S. Ct. 763, 46 L. ed. 1010; Atoka Coal, etc., Co. *v.* Adams, 104 Fed. 471, 43 C. C. A. 651 [*affirming* 3 Indian Terr. 189, 53 S. W. 539].

Accrued royalties due to lessors under valid leases were not affected by these statutes. Southwestern Coal Co. *v.* McBride, 185 U. S. 499, 22 S. Ct. 763, 46 L. ed. 1010; Atoka Coal, etc., Co. *v.* Adams, 104 Fed. 471, 43 C. C. A. 651.

Action by the secretary upon applications for leases under these acts is a matter of administration, cognizable solely by the executive department. Cherokee Nation *v.* Hitchcock, 187 U. S. 294, 23 S. Ct. 115, 47 L. ed. 183.

41. Ontario Min. Co. *v.* Seybold, 31 Ont. 386.

42. Walker *v.* Armstrong, 2 Kan. 198.

43. Wadsworth *v.* Buffalo Hydraulic Assoc., 15 Barb. (N. Y.) 83.

44. Fellows *v.* Lee, 5 Den. (N. Y.) 628; Labadie *v.* U. S., 6 Okla. 400, 51 Pac. 666; U. S. *v.* Cook, 19 Wall. (U. S.) 591, 22 L. ed. 210; U. S. *v.* Pine River Logging, etc., Co., 89 Fed. 907, 32 C. C. A. 406; Fegan *v.* McLean, 29 U. C. Q. B. 202.

The presumption is against the authority of the Indians to cut and sell timber, since they have only a right of occupancy in their lands. Every purchaser from them is charged with notice of this presumption. U. S. *v.* Cook, 19 Wall. (U. S.) 591, 22 L. ed. 210.

The refusal of the interior department to sanction negotiations for the sale of timber by the Eastern Band of Cherokee Indians is conclusive, in the absence of fraud. U. S. *v.* Boyd, 83 Fed. 547, 27 C. C. A. 592.

Oneida Indians in Wisconsin have the right to cut and use timber, and to sell sufficient to support themselves and families. U. S. *v.* Foster, 25 Fed. Cas. No. 15,141, 2 Biss. 377.

45. Wheeler *v.* Me-shing-go-me-sia, 30 Ind. 402.

46. Boies *v.* Blake, 13 Me. 381; Seneca Nation *v.* Hammond, 6 Thomps. & C. (N. Y.) 595; Labadie *v.* U. S., 6 Okla. 400, 51 Pac. 666.

An action for seizing lumber cut on Indian lands, brought against a commissioner of Indian affairs, must be brought within six months from the seizure, not from the sale. Jones *v.* Bain, 12 U. C. Q. B. 550.

47. Seneca Nation *v.* Hammond, 3 Thomps. & C. (N. Y.) 347; Chandler *v.* Edson, 9 Johns. (N. Y.) 362.

48. Pine River Logging, etc., Co. *v.* U. S., 186 U. S. 279, 22 S. Ct. 920, 46 L. ed. 1164; U. S. *v.* Pine River Logging, etc., Co., 89 Fed. 907, 32 C. C. A. 406.

What is dead timber.—"*Dead timber, standing or fallen,*" within the meaning of 25 U. S. St. at L. 673, includes trees which are so vitally injured that a prudent landowner would cut them to preserve their value; it does not include uninjured trees merely because they stand among dead trees. U. S. *v.* Pine River Logging, etc., Co., 89 Fed. 907, 32 C. C. A. 406.

White labor prohibited.—A rule of the commissioner providing that "no white labor shall be employed" in cutting and removing timber will not prevent a white man from recovering an agreed compensation for hauling logs sold to his employer under a contract

government is bound by the acts of its superintendent or agent where his duty required the exercise of judgment and discretion as to what constituted "dead and down" timber,[49] but not where he allows the delivery of an amount in excess of the contract.[50] Payments made for timber received in excess of the amount stated in the contract do not give the purchaser title thereto.[51] A member of the Creek nation who is entitled to cut hay from the common lands may employ a non-citizen for that purpose in consideration of receiving an interest therein.[52] Under a statute prohibiting the removal of hay from the Indian lands, the word "hay" includes hay from grass sown and cultivated, as well as from natural grass.[53]

d. Eminent Domain and Right of Way. The United States may exercise the right of eminent domain in respect to Indian lands,[54] and so may a state having the ultimate property in land within an Indian reservation.[55] There can be no prescriptive right of way over Indian reservations, since a prescription implies a grant and cannot exist where there is no power to grant.[56] An act of congress conferring on the secretary of the interior full authority to grant a right of way to telephone lines in the Indian Territory, and providing that no lines shall be constructed across Indian lands until authority is obtained from such secretary, is not unconstitutional as impairing vested rights as to a company, previously granted by an Indian nation, the exclusive privilege of erecting telephone lines therein, respecting territory not occupied by it and on which it has expended no money.[57]

3. Sale and Lease of Tribal Lands — a. In General. An Indian tribe or nation in the United States has no power of alienation of lands, except to the United States or the state in which the lands are situated, or with the consent of the United States or such state.[58] Nor can the individual members of the tribe convey to a foreigner their interest in lands belonging to the tribe.[59] A white man

approved by the secretary. Citizens' State Bank *v.* Bonnes, 83 Minn. 1, 85 N. W. 718.

49. U. S. *v.* Bonness, 125 Fed. 485, 60 C. C. A. 321.

50. U. S. *v.* Pine River Logging, etc., Co., 89 Fed. 907, 32 C. C. A. 406.

51. Pine River Logging, etc., Co. *v.* U. S., 186 U. S. 279, 22 S. Ct. 920, 46 L. ed. 1164 [*affirming* 105 Fed. 1004, 44 C. C. A. 685]; U. S. *v.* Pine River Logging, etc., Co., 89 Fed. 907, 32 C. C. A. 406.

52. Eddy *v.* Lafayette, 163 U. S. 456, 16 S. Ct. 1082, 41 L. ed. 225 [*affirming* 49 Fed. 807, 1 C. C. A. 441].

53. Reg. *v.* Good, 9 Can. L. T. 396, 17 Ont. 725.

54. Cherokee Nation *v.* Southern Kan. R. Co., 135 U. S. 641, 10 S. Ct. 965, 34 L. ed. 295 [*reversing* on other grounds 33 Fed. 900], right of way for a railroad telegraph and telephone line. And see Eminent Domain, 15 Cyc. 564.

Compensation. — An act of congress authorizing the use of lands in the Indian Territory for toll bridges is not unconstitutional because no provision is made therein for compensation to the owners of the land used, as the ultimate title in all such lands is in the United States. Dukes *v.* McKenna, (Indian Terr. 1902) 69 S. W. 832.

55. France *v.* Erie R. Co., 2 Hun (N. Y.) 513, 5 Thomps. & C. 12; O'Meara *v.* Alleghany Highway Com'rs, 3 Thomps. & C. (N. Y.) 235. And see Eminent Domain, 15 Cyc. 565.

56. Woodworth *v.* Raymond, 51 Conn. 70.

57. Muskogee Nat. Tel. Co. *v.* Hall, (Indian Terr. 1901) 64 S. W. 600.

58. *California.*— Sunol *v.* Hepburn, 1 Cal. 254.

Indian Territory.— Tuttle *v.* Moore, 3 Indian Terr. 712, 64 S. W. 585.

Louisiana.— Martin *v.* Johnson, 5 Mart. 655.

Massachusetts.—Lynn *v.* Nahant, 113 Mass. 433.

New York.— Fellows *v.* Denniston, 23 N. Y. 420; Goodell *v.* Jackson, 20 Johns. 693, 11 Am. Dec. 351.

United States.— Buttz *v.* Northern Pac. R. Co., 119 U. S. 55, 7 S. Ct. 100, 30 L. ed. 330; U. S. *v.* Kagama, 118 U. S. 375, 6 S. Ct. 1109, 30 L. ed. 228; U. S. *v.* Cook, 19 Wall. 591, 22 L. ed. 210; Mann *v.* Wilson, 23 How. 457, 16 L. ed. 584; Mitchel *v.* U. S., 9 Pet. 711, 9 L. ed. 283; Worcester *v.* Georgia, 6 Pet. 515, 8 L. ed. 483; Cherokee Nation *v.* Georgia, 5 Pet. 1, 8 L. ed. 25; Johnson *v.* McIntosh, 8 Wheat. 543, 5 L. ed. 61.

See 27 Cent. Dig. tit. "Indians," § 28.

For cession of lands by treaty see III, B.

Consent of congress.— Chiefs cannot sell tribal lands to individuals, even with the consent of the secretary of the interior; the consent of congress is necessary. Hale *v.* Wilder, 8 Kan. 545.

Contracts for land void.— Contracts made with Indians for their lands are not merely voidable, but void. St. Regis Indians *v.* Drum, 19 Johns. (N. Y.) 127.

59. Hicks *v.* Coleman, 25 Cal. 122, 85 Am. Dec. 103; Denton *v.* Capital Town Site Co.,

cannot acquire any title from Indians by purchase.[60] Leases of tribal lands [61] to others than members of the tribe, made without the consent of the secretary of the interior, are generally void.[62] All leases of agricultural and grazing lands in the Indian Territory were abrogated by act of congress,[63] except where the lessee claimed under an improvement contract or lease, when he was allowed possession

(Indian Terr. 1904) 82 S. W. 852; Goodell *v.* Jackson, 20 Johns. (N. Y.) 693, 11 Am. Dec. 351.

A mortgage of Cherokee lands by a Cherokee to a citizen of the United States is not such a sale as is prohibited by the Cherokee constitution and laws. Crowell *v.* Young, (Indian Terr. 1902) 69 S. W. 829.

60. Turner *v.* Gilliland, (Indian Terr. 1903) 76 S. W. 253; Hockett *v.* Alston, 3 Indian Terr. 432, 58 S. W. 675; Case *v.* Hall, 2 Indian Terr. 8, 46 S. W. 180.

61. See Morris *v.* Hitchcock, 21 App. Cas. (D. C.) 565 [*affirmed* in 194 U. S. 384, 24 S. Ct. 712, 48 L. ed. 1030] (holding that the power of leasing must be exercised in subordination to the laws of the United States looking to the protection of the Indians from intruders on their lands; and subject to the remaining governmental powers of the Indian nation, including the power of taxation); Wassom *v.* Willison, 3 Indian Terr. 365, 58 S. W. 574.

The Tuscarora Indians were authorized to lease their lands, since the grant to them was absolute and unconditional. Sacarusa *v.* King, 4 N. C. 336. The act of 1824, by which the long leases for years made by the Tuscarora Indians were for certain purposes made real estate, had no effect upon the reversions expectant on those terms. Burnett *v.* Thompson, 51 N. C. 210.

Leases by Seneca Indians.— The act of congress (18 U. S. St. at L. 330), validating leases made in violation of existing law by Seneca Indians, superseded the provisions of the treaty made with the Six Nations (7 U. S. St. at L. 44, art. 2), and leases executed and renewed under its authority are valid. Shongo *v.* Miller, 169 N. Y. 586, 62 N. E. 1100.

Leases by Chickasaw Indians for a longer term than one year are void, under the Chickasaw laws. Thomas *v.* Sass, 3 Indian Terr. 545, 64 S. W. 531; Sass *v.* Thomas, 3 Indian Terr. 536, 64 S. W. 528.

A Chickasaw Indian in possession of his prospective allotment has a right to lay out a town and rent lots on such allotment, no political or legal subdivision being created. U. S. *v.* Lewis, (Indian Terr. 1903) 76 S. W. 299.

A lease of Choctaw land, by one white man to another, is valid as between the parties, although the land may be held by the lessor in violation of the law of the Choctaw nation. Walker Trading Co. *v.* Grady Trading Co., 1 Indian Terr. 191, 39 S. W. 354.

Lands "bought and paid for," which may be leased under authority of 26 U. S. St. at L. 794, include all lands which have been purchased by the Indians, either by the payment of money, or by exchange, or by the surrender of possession of other property. Strawberry Valley Cattle Co. *v.* Chipman, 13 Utah 454, 45 Pac. 348.

Grantees of the lessors of Indian lands take the lands subject to the lease. Joines *v.* Robinson, (Indian Terr. 1903) 76 S. W. 107.

Surrender of possession by white lessee.— The act of congress (30 U. S. St. at L. 495), known as the Curtis Act, giving the owner of improvements on a lot in the Indian Territory a preferred right to purchase, did not affect the obligation of a white lessee to surrender possession to the lessor at the termination of the lease. Fraer *v.* Washington, 125 Fed. 280, 60 C. C. A. 194.

Lease from one not a citizen of nation.— An improvement contract or lease from one whose claim to citizenship in the Indian nation had been decided adversely is void; the tenant is not entitled to the value of his improvements, and the lessor cannot maintain an action for the recovery of possession. Casteel *v.* McNeeley, (Indian Terr. 1901) 64 S. W. 594.

The authority of an Indian agent to remove intruders from the Indian country does not extend to the determination of a private controversy regarding the validity of a lease under which a non-citizen has gone into possession of Indian lands. Such contracts are for the consideration of the judicial, not the executive, department. Stephens *v.* Quigley, 126 Fed. 148, 61 C. C. A. 214.

62. *Dakota.*— Uhlig *v.* Garrison, 2 Dak. 71, 2 N. W. 253.

Idaho.— Langford *v.* Monteith, 1 Ida. 612.

Indian Territory.— Turner *v.* Gilliland, (1903) 76 S. W. 253.

Kansas.— Mayes *v.* Cherokee Strip Live Stock Assoc., 58 Kan. 712, 51 Pac. 215. See also Kansas, etc., Land, etc., Co. *v.* Thompson, 57 Kan. 792, 48 Pac. 34.

Missouri.— Cherokee Strip Live Stock Assoc. *v.* Cass Land, etc., Co., 133 Mo. 394, 40 S. W. 107.

New York.— St. Regis Indians *v.* Drum, 19 Johns. 127.

Oklahoma.—Light *v.* Conover, 10 Okla. 732, 63 Pac. 966.

Washington.— Coey *v.* Low, 36 Wash. 10, 77 Pac. 1077.

United States.— U. S. *v.* Hunter, 21 Fed. 615.

Cherokee lands.— Ratification of contract by the secretary of the interior under U. S. Rev. St. (1878) § 2103, is not required in the case of a lease of lands by the Cherokee nation. Cherokee Strip Live Stock Assoc. *v.* Cass Land, etc., Co., 138 Mo. 394, 40 S. W. 107.

63. 30 U. S. St. at L. 504. And see Owens *v.* Eaton, (Indian Terr. 1904) 82 S. W. 746;

long enough to compensate him for the improvements made.[64] The same statute provided, however, that any Indian in possession of such amount of land as would be his reasonable share of the lands of his tribe may use it or rent it until allotment is made.[65] In Canada the right of Indians to alienate their lands is also restricted.[66]

b. Judicial Sales. A sale of tribal lands under execution is void unless specially authorized by act of congress.[67] In the Indian Territory improvements on real estate may be sold, but only to citizens of the tribe in which the property is situated,[68] and only on judgments rendered by the tribal courts.[69]

4. Trespass and Settlement.[70] Settlement upon lands belonging, secured, or granted by treaty to any Indian tribe is prohibited by statute.[71] In the Indian Territory a person not a member of one of the Indian tribes or nations has no right to occupy land except by the consent of one who is a member.[72] A tribe is authorized to bring suit to recover the possession of lands held by one wrongfully claiming to be a member of the tribe,[73] and if the chief of the tribe fails to act, then any member of the tribe may bring suit.[74] In a suit so brought it must appear by the complaint that the chief or governor has failed or refused to bring it.[75]

Swinney *v.* Kelley, (Indian Terr. 1903) 76 S. W. 303.

64. Swinney *v.* Kelley, (Indian Terr. 1903) 76 S. W. 303; Barton *v.* Hulsey, (Indian Terr. 1902) 69 S. W. 868; Casteel *v.* McNeeley, (Indian Terr. 1901) 64 S. W. 594.

65. Hubbard *v.* Chism, (Indian Terr. 1904) 82 S. W. 686; U. S. *v.* Lewis, (Indian Terr. 1903) 76 S. W. 299.

66. See Boucher *v.* Montour, 20 Quebec Super. Ct. 291, holding that the nullity of sales or leases of property on an Indian reserve is only relative and can only be invoked by the Indians; those who have dealt with the Indians cannot avail themselves of it.

The buying or contracting to buy from Indians not merely any lands of which they are in actual possession, but any lands held by the government for their use or benefit, is prohibited by 13 & 14 Vict. c. 74. Reg. *v.* Baby, 12 U. C. Q. B. 346.

A mortgage, made by an Indian living on a reserve, of land in the reserve is void. Black *v.* Kennedy, Manitoba t. Wood 144.

A lease made by a chief as agent for a tribe, his authority and power to so act not appearing, conveyed nothing. Doe *v.* Ramsay, 9 U. C. Q. B. 105.

67. Hastings *v.* Whitmer, 2 Indian Terr. 335, 51 S. W. 967; Pound *v.* Pullen, 3 Yerg. (Tenn.) 338.

68. 26 U. S. St. at L. 95. And see Hampton *v.* Mays, (Indian Terr. 1902) 69 S. W. 1115; Mays *v.* Frieberg, 3 Indian Terr. 774, 49 S. W. 52.

The special execution authorized in mechanic's lien cases by Indian Terr. Annot. St. (1899) § 2884, is not affected by this statute. Springston *v.* Wheeler, 3 Indian Terr. 388, 58 S. W. 658.

69. Hampton *v.* Mays, (Indian Terr. 1902) 69 S. W. 1115; Crowell *v.* Young, (Indian Terr. 1901) 64 S. W. 607.

Indians by blood only are entitled to claim exemption from sale of improvements on judgments of other than Indian courts. Hampton *v.* Mays, (Indian Terr. 1902) 69 S. W. 1115.

70. For removal of trespassers on reservation see *infra*, IV, B, 2.

For prosecution for return after removal see *infra*, IV, C, 6.

71. U. S. Rev. St. (1878) § 2118. And see Uhlig *v.* Garrison, 2 Dak. 71, 2 N. W. 253; Francis *v.* Green, 7 Ida. 668, 65 Pac. 362; Robinson *v.* Caldwell, 67 Fed. 391, 14 C. C. A. 448 [*affirming* 59 Fed. 653].

Cherokee neutral lands.— Under the Cherokee treaty of July 19, 1866, an actual settler upon the "Neutral Lands" could sell his improvements and rights to another, and his grantee could make the required proof. Langdon *v.* Joy, 14 Fed. Cas. No. 8,062, 4 Dill. 391; Stroud *v.* Missouri River, etc., R. Co., 23 Fed. Cas. No. 13,547, 4 Dill. 396.

Injunction will lie to prevent intrusions on Indian lands in New York. Strong *v.* Waterman, 11 Paige (N. Y.) 607.

Extension of the corporate limits of a city by the territorial legislature over a portion of an Indian reservation is valid, where the act does not affect the title of the Indians or their rights of property. King *v.* McAndrews, 104 Fed. 430.

Settlement before Indian title extinguished. — Where proof of settlement and occupancy are accepted by federal land officers the title thereby acquired is valid, although the settlement was made prior to the extinguishment of the Indian title. Mankato *v.* Meagher, 17 Minn. 265; Carson *v.* Smith, 5 Minn. 78, 77 Am. Dec. 539.

72. Holford *v.* James, (Indian Terr. 1903) 76 S. W. 261; Rogers *v.* Hill, 3 Indian Terr. 562, 64 S. W. 536; Hockett *v.* Alston, 3 Indian Terr. 432, 58 S. W. 675; Case *v.* Hall, 2 Indian Terr. 8, 46 S. W. 180.

73. 30 U. S. St. at L. 495.

74. Brought *v.* Cherokee Nation, (Indian Terr. 1902) 69 S. W. 937.

Individual Indians cannot sue as such to recover possession of lands held under a void improvement contract, such right of action being in the sovereign. Casteel *v.* McNeeley, (Indian Terr. 1901) 64 S. W. 594.

75. Brought *v.* Cherokee Nation, (Indian Terr. 1902) 69 S. W. 937; Daniels *v.* Miller,

The suit is based primarily on the right of the tribe, and it may be substituted as plaintiff.[76] The tribal government cannot forfeit improvements made on lands within the nation by a non-citizen.[77]

5. Town Sites. An exception to the general laws relating to lands in the Indian Territory is established by statute[78] in the case of town sites which may be held by white men under lease[79] or sold to them, the proceeds being paid to the Indians.[80] The creation of such cities and towns, and the extinguishment of the Indian title to the land, do not affect the governmental rights of the Indians.[81]

6. Taxation of Tribal Lands. Lands secured to Indians by treaty cannot be taxed for any purpose by the state in which they lie.[82] And where the tribe agrees to sell its lands and give possession at a future date there can be no taxation of the lands prior to the delivery of possession.[83]

B. Cession by Treaties — 1. Cession by Indians to Government — a. In General. By treaties made with Indian tribes, the tribes have conveyed, and the state or general government has acquired, the tribal lands or a portion of them.[84]

b. Conditions. Such treaties may prescribe the terms and conditions upon which the lands are to be conveyed.[85]

(Indian Terr. 1902) 69 S. W. 925; Hargrove *v.* Cherokee Nation, 3 Indian Terr. 478, 58 S. W. 667.

76. Price *v.* Cherokee Nation, (Indian Terr. 1904) 82 S. W. 893; Brought *v.* Cherokee Nation, 129 Fed. 192, 63 C. C. A. 350; Hargrove *v.* Cherokee Nation, 129 Fed. 186, 63 C. C. A. 276.

77. Ansley *v.* McLoud, (Indian Terr. 1904) 82 S. W. 908. But *compare* Donohoo *v.* Howard, (Indian Terr. 1902) 69 S. W. 927.

78. 30 U. S. St. at L. 500, 505, 508.

79. Ellis *v.* Fitzpatrick, 118 Fed. 430, 55 C. C. A. 260 [*affirming* 3 Indian Terr. 656, 64 S. W. 567]. See also Fraer *v.* Washington, (Indian Terr. 1902) 69 S. W. 835 (holding that a lessor to a non-citizen may recover possession in unlawful detainer on tendering the value of the improvements made by the tenant, at the expiration of the term); Tye *v.* Chickasha Town Co., 2 Indian Terr. 113, 48 S. W. 1021.

80. Tuttle *v.* Moore, 3 Indian Terr. 712, 64 S. W. 585.

81. Zevely *v.* Weimer, (Indian Terr. 1904) 82 S. W. 941; Maxey *v.* Wright, 3 Indian Terr. 243, 54 S. W. 807.

82. Allen County *v.* Simons, 129 Ind. 193, 28 N. E. 420, 13 L. R. A. 512; Me-shing-go-me-sia *v.* State, 36 Ind. 310; Fellows *v.* Denniston, 23 N. Y. 420; *In re* New York Indians, 5 Wall. (U. S.) 761, 18 L. ed. 708; New Jersey *v.* Wilson, 7 Cranch (U. S.) 164, 3 L. ed. 303; Wau-pa-man-qua *v.* Aldrich, 28 Fed. 489.

Pueblo Indian lands in New Mexico are taxable, the pueblos not being tribal Indians. Territory *v.* Delinquent Tax List, (N. M. 1904) 76 Pac. 307.

Land in possession of a railroad company under a statute authorizing the company to contract with the Indians for the right of way is taxable. People *v.* Beardsley, 52 Barb. (N. Y.) 105.

83. *In re* New York Indians, 5 Wall. (U. S.) 761, 18 L. ed. 708. See also Missouri River, etc., R. Co. *v.* Morris, 13 Kan. 302.

Full payment before taxation.— Indian lands sold under a deed conditioned to operate as a full conveyance only on receipt of the deferred payments were not subject to taxation prior to full payment. Page *v.* Pierce County, 25 Wash. 6, 64 Pac. 801.

84. Webster *v.* Cooke, 23 Kan. 637; Wood *v.* Missouri, etc., R. Co., 11 Kan. 323; Minter *v.* Shirley, 45 Miss. 376; U. S. *v.* Choctaw, etc., R. Co., 3 Okla. 404, 41 Pac. 729; Lone Wolf *v.* Hitchcock, 187 U. S. 553, 23 S. Ct. 216, 47 C. C. A. 299; Holden *v.* Joy, 17 Wall. (U. S.) 211, 21 L. ed. 523.

Cession of Indian lands in Canada see Ontario *v.* Canada, 25 Can. Supreme Ct. 434 [*affirmed* in [1897] A. C. 199, 66 L. J. P. C. 11, 75 L. T. Rep. N. S. 522]; Ontario Min. Co. *v.* Seyhold, 31 Ont. 386.

A reservation of land in a treaty of cession simply secures to those in whose favor the reservation is made a continuation of the right of occupancy, the ultimate title remaining in the United States. Wheeler *v.* Me-shing-go-me-sia, 30 Ind. 402.

A quitclaim by a tribal council acknowledged by the state and acquiesced in by the tribe is valid. *In re* Narragansett Indians, 20 R. I. 715, 40 Atl. 347.

A quitclaim by the Wichita and affiliated bands cannot be made a condition of a decree for compensation due them on account of surplus lands. U. S. *v.* Choctaw Nation, 179 U. S. 494, 21 S. Ct. 149, 45 L. ed. 291.

85. Wood *v.* Missouri, etc., R. Co., 11 Kan. 323; Love *v.* Pamplin, 21 Fed. 755.

Laws prohibiting sale of liquor may be continued in effect and extended over territory ceded by the provisions of a treaty; and such a stipulation operates *proprio vigore*. U. S. *v.* Lariviere, 93 U. S. 188, 23 L. ed. 846.

Reservation of right to fish and place to camp.— A cession by Chippewa Indians reserving the right to fish and a place for encampment did not extinguish the Indian title to the tract reserved. Spalding *v.* Chandler, 160 U. S. 394, 16 S. Ct. 360, 40 L. ed. 469.

c. Title and Rights Acquired. The title acquired by the government is absolute and extinguishes all rights and interests of the Indians in the lands, unless there is an express reservation in the treaty.[86]

d. Grants to Individuals. A good title to parts of the lands of an Indian tribe may be granted to individuals by a treaty between the United States and the tribe, without an act of congress or a patent from the executive.[87]

2. Cession of Lands to Tribes by Treaty.[88] Under treaties made with the government Indian tribes have at various times secured grants or reservations of land.[89] Where a treaty contains a grant or reservation to Indians it operates as a grant *in præsenti*, and the title vests by operation of the treaty;[90] and a clause authorizing forfeiture on failure of condition can be taken advantage of only by legislative or judicial action.[91] Both parties to the treaty are bound by its recognition of territorial rights,[92] and by the boundaries described and the restrictions imposed by the terms of the treaty.[93]

3. Sale Under Treaty Provisions. Under treaties made with Indians the government has in some instances accepted cessions of land to be sold for the benefit of the tribes making such treaties,[94] and in such case the United States acts simply

86. Choctaw Nation *v.* U. S., 179 U. S. 494, 21 S. Ct. 149, 45 L. ed. 291. See also Penobscot Tribe *v.* Veazie, 58 Me. 402; Strother *v.* Cathey, 5 N. C. 162, 3 Am. Dec. 683.

87. Jones *v.* Meehan, 175 U. S. 1, 20 S. Ct. 1, 44 L. ed. 49; Best *v.* Polk, 18 Wall. (U. S.) 112, 21 L. ed. 805; Holden *v.* Joy, 17 Wall. (U. S.) 211, 21 L. ed. 523; Crews *v.* Burcham, 1 Black (U. S.) 352, 17 L. ed. 91; U. S. *v.* Brooks, 10 How. (U. S.) 442, 13 L. ed. 489; Mitchel *v.* U. S., 9 Pet. (U. S.) 711, 9 L. ed. 283. See also McKeon *v.* Tillotson, 3 Abb. Dec. (N. Y.) 110.

Enforcement of a treaty requiring removal of the Indians from lands ceded by them for the benefit of individuals is a matter for the action of the government. There is no private remedy available to the grantees. Fellow *v.* Blacksmith, 19 How. (U. S.) 366, 15 L. ed. 684.

88. For reservations as residence for tribes see III, A, 1, b.

For control of reservations see IV, B, 1.

89. White *v.* Wright, 83 Minn. 222, 86 N. W. 91; Seneca Nation *v.* Hugaboom, 132 N. Y. 492, 30 N. E. 983; New York Indians *v.* U. S., 170 U. S. 1, 18 S. Ct. 531, 42 L. ed. 927; Holden *v.* Joy, 17 Wall. (U. S.) 211, 21 L. ed. 523; U. S. *v.* Brooks, 10 How. (U. S.) 442, 13 L. ed. 489; Marsh *v.* Brooks, 8 How. (U. S.) 223, 12 L. ed. 1056; Prentice *v.* Stearns, 20 Fed. 819; U. S. *v.* Reese, 27 Fed. Cas. No. 16,137, 5 Dill. 405. See also Choctaw Nation *v.* U. S., 179 U. S. 494, 21 S. Ct. 149, 45 L. ed. 291.

Reservation distinguished from cession.— The reservation of a tract out of lands ceded by Indians to the United States is not a cession and retrocession and does not let in intervening rights. California, etc., Land Co. *v.* Worden, 85 Fed. 94, 87 Fed. 532.

90. Webster *v.* Reid, Morr. (Iowa) 467; Jones *v.* Meehan, 175 U. S. 1, 20 S. Ct. 1, 44 L. ed. 49; U. S. *v.* New York Indians, 173 U. S. 464, 19 S. Ct. 487, 43 L. ed. 769; New York Indians *v.* U. S., 170 U. S. 1, 18 S. Ct. 531, 42 L. ed. 927.

91. New York Indians *v.* U. S., 170 U. S. 1, 18 S. Ct. 531, 42 L. ed. 927.

92. Maiden *v.* Ingersoll, 6 Mich. 373.

93. Jordan *v.* Goldman, 1 Okla. 406, 34 Pac. 371. See also Seneca Nation *v.* Hugaboom, 132 N. Y. 492, 30 N. E. 983.

Mistake in survey.— Indians are entitled to compensation for land excluded from a tract ceded to them by a mistake in surveying and fixing the boundaries. Choctaw Nation *v.* U. S., 119 U. S. 1, 7 S. Ct. 75, 30 L. ed. 306.

A tribe is estopped to claim any lands ceded to them by a treaty which describes boundaries including lands not then within the limits of the United States, where by a subsequent treaty and grant, accepted by them without objection, they have received lands identical with those ceded by the earlier treaty, so far as such lands lay within the limits of the United States. U. S. *v.* Choctaw Nation, 179 U. S. 494, 21 S. Ct. 149, 45 L. ed. 291.

Lands equal in value, but less in acreage, set apart under a treaty with the Chippewa Indians sufficiently fulfilled the conditions of the treaty, and the Indians are not entitled to recover the difference in acreage, under 30 U. S. St. at L. 88. Chippewa Indians *v.* U. S., 34 Ct. Cl. 426.

94. Holden *v.* Joy, 17 Wall. (U. S.) 211, 21 L. ed. 523. See also Choctaw Nation *v.* U. S., 119 U. S. 1, 7 S. Ct. 75, 30 L. ed. 306.

Right of settlers on such lands.— Under the treaty for the sale of the Cherokee neutral lands one who was an actual settler on said lands and had made improvements upon only one half of the quarter section was entitled to buy only that half upon which the improvements had been made. Armsworthy *v.* Missouri River, etc., R. Co., 1 Fed. Cas. No. 550, 5 Dill. 491.

Manner of making sale.— The United States having undertaken by treaty to "expose to public sale to the highest bidder" the lands ceded to them by certain Indians and having disposed of a large part of the same at private sale are guilty of a violation of

as the agent or trustee of the tribe of Indians by which such a cession of land was made.[95]

C. Lands Held by Individual Indians — 1. Allotments and Grants — a. In General. Allotments of tribal lands have been acquired by individual Indians under treaties[96] or by acts of congress.[97] Individual Indians may also acquire rights in state or other lands, by special enactment;[98] and, if they have abandoned their tribal relations, may avail themselves of the homestead laws.[99] Lands belonging to Indians in common, where the tribal organization is extinct, may be partitioned and sold in accordance with the laws of the state where they are situated.[1]

b. Who Entitled to Allotments — (i) *In General.* All members of a tribe by blood, whether full blood, half breeds, or "mixed bloods," are entitled to share in the allotment of the tribal lands.[2]

(ii) *Heads of Indian Families.* Where a treaty provides for reservations

a trust, and the measure of damages for the violation is the difference between the amounts realized and the price fixed by statute for land open to entry and sale. U. S. *v.* Blackfeather, 155 U. S. 180, 15 S. Ct. 64, 39 L. ed. 114 [*reversing* 28 Ct. Cl. 447]. Under the Chickasaw treaty of 1834 the president of the United States was vested with authority to sell certain lands for the benefit of the Chickasaw Indians in the manner which might be prescribed by him. Where the land was sold in a manner not authorized by the instructions of the president the sale was actually void and his approval of such unauthorized sale could not operate by way of estoppel on the rights of the beneficiaries. Harris *v.* McKissack, 34 Miss. 464.

95. McKeon *v.* Tillotson, 3 Abb. Dec. (N. Y.) 110; Chickasaw Nation *v.* U. S., 22 Ct. Cl. 222.

96. Minter *v.* Shirley, 45 Miss. 376; Sutton *v.* Moore, 25 N. C. 66; Doe *v.* Welsh, 10 N. C. 155; Blair *v.* Pathkiller, 2 Yerg. (Tenn.) 407; Stone *v.* U. S., 2 Wall. (U. S.) 525, 17 L. ed. 765.

97. 24 U. S. St. at L. 388; 26 U. S. St. at L. 794. And see Lone Wolf *v.* Hitchcock, 187 U. S. 553, 23 S. Ct. 216, 47 L. ed. 299; Sloan *v.* U. S., 118 Fed. 283; Sloan *v.* U. S., 95 Fed. 193.

Such acts are to be liberally construed to effect their purpose of encouraging the Indians to break up their tribal relations and adopt the habits of civilized life. Sloan *v.* U. S., 118 Fed. 283.

Mineral lands are excepted from allotment to Indians under 27 U. S. St. at L. 62, and prospectors and miners were not required to wait for the proclamation opening the tract before making explorations for minerals, although settlement upon agricultural lands was not permissible until the expiration of the time fixed by the statute. Collins *v.* Bubb, 73 Fed. 735.

98. Jimeson *v.* Pierce, 78 N. Y. App. Div. 9, 79 N. Y. Suppl. 3; Colvord *v.* Monroe, 63 N. C. 288. See also McAlpin *v.* Henshaw, 6 Kan. 176; Jones *v.* Sherman, 56 Miss. 559; Walker *v.* Henshaw, 16 Wall. (U. S.) 436, 21 L. ed. 365.

99. 18 U. S. St. at L. 420 [U. S. Comp. St. (1901) p. 1419]; 23 U. S. St. at L. 96 [U. S. Comp. St. (1901) p. 1420]. And see Frazee *v.* Spokane County, 29 Wash. 278, 69 Pac. 779.

1. Telford *v.* Barney, 1 Greene (Iowa) 575; *In re* Coombs, 127 Mass. 278; Seneca Nation *v.* Lehley, 55 Hun (N. Y.) 83, 8 N. Y. Suppl. 245; Grinnell *v.* MacLean, 16 Hun (N. Y.) 133; Fowler *v.* Scott, 64 Wis. 509, 25 N. W. 716.

2. Campau *v.* Dewey, 9 Mich. 381; Seneca Nation *v.* Lehley, 55 Hun (N. Y.) 83, 8 N. Y. Suppl. 245; Smith *v.* He-yu-tse-milkin, 110 Fed. 60, 119 Fed. 114, 55 C. C. A. 216 [*affirmed* in 194 U. S. 401, 24 S. Ct. 676, 48 L. ed. 1039]; Sloan *v.* U. S., 118 Fed. 283; Sloan *v.* U. S., 95 Fed. 193.

Enrolment.— Prior to 30 U. S. St. at L. 503 and 31 U. S. St. at L. 236, regarding the enrolment of Mississippi Choctaws, such an Indian who had not been on the rolls of the Choctaw nation as a citizen thereof could not hold lands in the Choctaw and Chickasaw nations. Ikard *v.* Minter, (Indian Terr. 1902) 69 S. W. 852.

Designation by chiefs.— When a treaty provides that the parties to receive patents to lands reserved by the treaty shall be designated by the chief, his selection is binding upon the United States. Lownsberry *v.* Rakestraw, 14 Kan. 151; Prentice *v.* Stearns, 20 Fed. 819.

A child of Indian parents, who was not born on lands belonging to the tribe and never resided thereon, whose father is not shown to have been a member of the tribe, and whose mother resides with her husband and children elsewhere, is not entitled to share in the division of the Herring pond tribal lands, under Mass. St. (1869) c. 463, § 3. Danzell *v.* Webquish, 108 Mass. 133.

A release of Indian citizenship by an Indian to the state did not affect his title to lands subsequently acquired as an Indian, under a treaty between his tribe and the United States. Newman *v.* Doe, 4 How. (Miss.) 522.

Subsequent acquirement of membership in tribe.— A person of mixed blood who did not reside on the reservation at the time of the passage of the allotment act, but who came there prior to the time when the tribe gave the consent required to render the act effective, was not entitled to the benefit of the act unless his application for membership

or allotments to the "heads of Indian families,"[3] such designation includes a white man married to an Indian woman.[4] Where allotments are limited to Indians, but the amount to be allotted depends upon whether the allottee is the head of a family, the amount is determined by his status at the time of the allotment, and not at the date of the act.[5]

(III) *Remedy For Denial of Right.* Any person of Indian blood unlawfully excluded from an allotment of land may maintain an action therefor in the circuit court of the United States,[6] and the judgment of such court has the same effect as the allowance of the allotment by the secretary of the interior.[7] The United States is by statute[8] a necessary party to the suit.[9]

c. Location and Patent. Reservees under a treaty take by the treaty, not by patent from the government.[10] The title is complete when the location is made,[11] and relates back to the date of the treaty.[12] A patent thereafter issued confers no new rights,[13] and is void if issued to another than the Indian making the location.[14]

was approved by the tribe. Sloan *v.* U. S., 118 Fed. 283.

3. See Summers *v.* Spybuck, 1 Kan. 394; Newman *v.* Doe, 4 How. (Miss.) 522; Wilson *v.* Wall, 6 Wall. (U. S.) 83, 18 L. ed. 727; Morrisett *v.* U. S., 132 Fed. 891.

An Indian widow, with whom an orphaned grandchild lives, is the head of an Indian family. Rowland *v.* Ladiga, 21 Ala. 9 [*reversed* on other grounds in 2 How. (U. S.) 581, 11 L. ed. 387].

4. Tuten *v.* Martin, 3 Yerg. (Tenn.) 452; Morgan *v.* Fowler, 2 Yerg. (Tenn.) 450; Riley *v.* Elliston, 2 Yerg. (Tenn.) 431. And see Turner *v.* Fish, 28 Miss. 306.

Only the children of the Indian wife are entitled to the estate in remainder in lands in which a life-estate is granted to the head of an Indian family with the reversion in fee simple to his children. His children by a former or subsequent marriage with a white woman take no interest. Tuten *v.* Byrd, 1 Swan (Tenn.) 108.

5. Sloan *v.* U. S., 118 Fed. 283.

6. 28 U. S. St. at L. 305. And see Hy-yu-tse-mil-kin *v.* Smith, 119 Fed. 114, 55 C. C. A. 216 [*affirmed* in 194 U. S. 401, 24 S. Ct. 676, 48 L. ed. 1039].

Heir may maintain suit against widow claiming dower. Patawa *v.* U. S., 132 Fed. 893.

7. Smith *v.* He-yu-tse-mil-kin, 110 Fed. 60; Sloan *v.* U. S., 95 Fed. 193.

8. 31 U. S. St. at L. 760.

9. Parr *v.* U. S., 132 Fed. 1004; Hy-yu-tse-mil-kin *v.* Smith, 119 Fed. 114, 55 C. C. A. 216 [*affirmed* in 194 U. S. 401, 24 S. Ct. 676, 48 L. ed. 1039].

10. Oliver *v.* Forbes, 17 Kan. 113; Lownsberry *v.* Rakestraw, 14 Kan. 151; Hit-tuk-homi *v.* Watts, 7 Sm. & M. (Miss.) 363, 45 Am. Dec. 308; Meehan *v.* Jones, 70 Fed. 453. See also Hartman *v.* Warren, 76 Fed. 157, 22 C. C. A. 30. *Contra,* Neddy *v.* State, 8 Yerg. (Tenn.) 249.

11. *Alabama.*— Johnson *v.* McGehee, 1 Ala. 186; Kennedy *v.* McCartney, 4 Port. 141.

Indiana.— Dequindre *v.* Williams, 31 Ind. 444; Harris *v.* Barnett, 4 Blackf. 369.

Michigan.— Francis *v.* Francis, 136 Mich. 288, 99 N. W. 14; Dewey *v.* Campau, 4 Mich. 565; Stockton *v.* Williams, 1 Dougl. 546; Stockton *v.* Williams, Walk. 120.

Mississippi.— Hardin *v.* Ho-yo-po-nubby, 27 Miss. 567; Wray *v.* Ho-ya-pa-nubby, 10 Sm. & M. 452; Coleman *v.* Tish-ho-mah, 4 Sm. & M. 40; Doe *v.* Newman, 3 Sm. & M. 565; Niles *v.* Anderson, 5 How. 365; Newman *v.* Doe, 4 How. 522; Land *v.* Land, Sm. & M. Ch. 158.

Tennessee.— Jones *v.* Evans, 5 Yerg. 323; McConnell *v.* Mousepaine, 2 Yerg. 438.

Wisconsin.— Ruggles *v.* Marsilliott, 19 Wis. 159.

United States.— Smith *v.* Bonifer, 132 Fed. 889; Best *v.* Polk, 18 Wall. 112, 21 L. ed. 805; U. S. *v.* Brooks, 10 How. 442, 13 L. ed. 489.

See 27 Cent. Dig. tit. "Indians," § 33.

Failure of government agent to do duty.— When an Indian complies with the requirements of the treaty by making his location, or applying for registration, the failure of the agent to do his duty will not deprive the Indian of his right to the land selected. Rowland *v.* Ladiga, 21 Ala. 9; Land *v.* Keirn, 52 Miss. 341; Wray *v.* Ho-ya-pa-nubby, 10 Sm. & M. (Miss.) 452; Coleman *v.* Tish-ho-mah, 4 Sm. & M. (Miss.) 40; Land *v.* Land, Sm. & M. Ch. (Miss.) 158.

The selection must be definite. Prentice *v.* Duluth Storage, etc., Co., 58 Fed. 437, 7 C. C. A. 293.

A mistake in reporting a selection made may be corrected even after the issue of patent; but if the allottee is aware of the mistake and acquiesces in the action taken, his act is virtually a selection of the tract reported. Lownsbery *v.* Rakestraw, 14 Kan. 151.

Recitals in the patent are conclusive as to the identity of the land patented with that selected, at least as to third persons. Mann *v.* Wilson, 23 How. (U. S.) 457, 16 L. ed. 584; Crews *v.* Burcham, 1 Black (U. S.) 352, 17 L. ed. 91.

12. McAffee *v.* Lynch, 26 Miss. 257.

13. Oliver *v.* Forbes, 17 Kan. 113; Stockton *v.* Williams, 1 Dougl. (Mich.) 546.

A patent is evidence that the patentee was one of those entitled and that the land has been duly surveyed and located. Harris *v.* McKissack, 34 Miss. 464.

14. Land *v.* Keirn, 52 Miss. 341; Wray *v.* Doe, 10 Sm. & M. (Miss.) 452; Hit-tuk-

d. Possession and Residence. Actual possession and residence upon the lands reserved is necessary in order to acquire title.[15] The residence of an agent thereon is not sufficient, where the treaty requires residence.[16]

e. Abandonment or Forfeiture. Where a treaty or statute requires residence on the lands located, voluntary removal therefrom without the intention of returning works a forfeiture,[17] and title reverts to the United States without entry or other act on the part of its agents.[18] But a temporary absence does not cause forfeiture,[19] nor does a removal by force.[20]

f. Title and Rights Acquired. The title and rights of an Indian to whom land has been allotted under a treaty depend upon the terms of the treaty and of the patent executed in accordance therewith.[21] A title in fee simple absolute may be vested in him,[22] or a title in fee subject only to conditions subsequent.[23] He may take a vested estate which cannot be taken away or affected by any subsequent action of the executive department of the government, so long as he complies with the conditions,[24] or he may take only a title of occupancy, the fee remaining in the United States.[25] Where an allotment is made under the statute[26] which provides that the United States shall hold the land in trust for twenty-five years, or longer at the option of the president, and then convey the land in fee, the land remains the property of the United States during the trust period;[27] and the Indian's rights as a citizen, acquired by reason of the allotment, are not impaired by the restriction of his power to alienate the land or its proceeds.[28] Under a statute allotting lands to Indians in quantities varying according to the size of the family, and providing that the allotment could be declared abandoned if they failed to occupy it, and forbidding alienation, the children of the wife by a former husband inherited no interest in the lands on her death before that of her husband, since the only right of the husband or wife was the enjoyment of the family right of possession held by the husband for the family.[29] The grant

ho-mi *v.* Watts, 7 Sm. & M. (Miss.) 363, 45 Am. Dec. 308; Stockton *v.* Williams, 1 Dougl. (Mich.) 546; Fowler *v.* Scott, 64 Wis. 509, 25 N. W. 716.

15. Newman *v.* Doe, 4 How. (Miss.) 522; Neddy *v.* State, 8 Yerg. (Tenn.) 249; McConnel *v.* McGee, 7 Yerg. (Tenn.) 63; Tuten *v.* Martin, 3 Yerg. (Tenn.) 452; West *v.* Donoho, 3 Yerg. (Tenn.) 445. *Compare* Belk *v.* Love, 18 N. C. 65.

16. Doe *v.* Newman, 3 Sm. & M. (Miss.) 565.

17. Doe *v.* Newman, 3 Sm. & M. (Miss.) 565; Welch *v.* Trotter, 53 N. C. 197; Grubbs *v.* McClatchy, 2 Yerg. (Tenn.) 432.

Lands allotted to Shawnees by treaty, and afterward abandoned for other lands, did not become a part of the "surplus lands" which were set apart for the absentee Indians by the president. Hale *v.* Wilder, 8 Kan. 545.

18. Corprew *v.* Arthur, 15 Ala. 525; Wells *v.* Thompson, 13 Ala. 793, 48 Am. Dec. 76; Crommelin *v.* Minter, 9 Ala. 594; Kennedy *v.* McCartney, 4 Port. (Ala.) 141.

19. Rowland *v.* Ladiga, 21 Ala. 9 [*reversed* in 2 How. (U. S.) 581, 11 L. ed. 387]; Doe *v.* Newman, 3 Sm. & M. (Miss.) 565; Morgan *v.* Fowler, 2 Yerg. (Tenn.) 450; Grubbs *v.* McClatchy, 2 Yerg. (Tenn.) 432.

20. Land *v.* Keirn, 52 Miss. 341; Coleman *v.* Doe, 4 Sm. & M. (Miss.) 40; Evans *v.* Jones, 8 Yerg. (Tenn.) 461; McIntosh *v.* Cleveland, 7 Yerg. (Tenn.) 46; Jones *v.* Evans, 5 Yerg. (Tenn.) 323; McConnell *v.* Mousepaine, 2 Yerg. (Tenn.) 438.

21. Rose *v.* Griffin, 33 Ala. 717; Jones *v.* Inge, 5 Port. (Ala.) 327; Eu-che-lah *v.* Welsh, 10 N. C. 155; Cornet *v.* Winton, 2 Yerg. (Tenn.) 143; Pka-o-wah-ash-kum *v.* Sorin, 8 Fed. 740, 10 Biss. 293.

The Cherokee treaties of 1817 and 1819 vested an absolute title for life in the Indian reservee; if he had no children, a grant of the fee by the state to him was not void, but vested the entire interest in the grantee. Peck *v.* Carmichael, 9 Yerg. (Tenn.) 325; Neddy *v.* State, 8 Yerg. (Tenn.) 249; Jones *v.* Evans, 5 Yerg. (Tenn.) 323.

Right to proceeds from land.—Where individual Indians have rightfully cut logs on land allotted to them and a government agent seizes and sells them the Indians have a valid claim on the proceeds. Thayer *v.* U. S., 20 Ct. Cl. 137.

22. Summers *v.* Spybuck, 1 Kan. 394; Stockton *v.* Williams, 1 Dougl. (Mich.) 546; Hicks *v.* Butrick, 12 Fed. Cas. No. 6,458, 3 Dill. 413.

23. Ross *v.* Eells, 56 Fed. 855.

24. Bird *v.* Terry, 129 Fed. 472 [*affirmed* in 129 Fed. 592].

25. Grinter *v.* Kansas Pac. R. Co., 23 Kan. 642; Goodfellow *v.* Muckey, 10 Fed. Cas. No. 5,537, 1 McCrary 238.

26. 24 U. S. St. at L. 388.

27. U. S. *v.* Gardner, 133 Fed. 285, 66 C. C. A. 663.

28. Hitchcock *v.* U. S., 22 App. Cas. (D. C.) 275.

29. Bird *v.* Winyer, 24 Wash. 269, 64 Pac. 178.

to the Sac and Fox half breeds in Iowa, by act of congress, was a grant of an absolute estate to them as individuals, to be held as tenants in common.[30]

2. Sale — a. Right to Convey — (i) *In General.* The right of an individual Indian to convey his land depends generally upon statutory and treaty provisions,[31] and where it has been granted to him by treaty or patent, without restriction as to alienation, he may sell it as any other person.[32] But where a treaty, grant, or statute restricts alienation,[33] a deed made in violation of the restriction is void,[34]

30. Haight *v.* Keokuk, 4 Iowa 199; Wright *v.* Marsh, 2 Greene (Iowa) 94; Webster *v.* Reid, Morr. (Iowa) 467.

31. See the following cases:

Kansas.— McGannon *v.* Straightlege, 37 Kan. 87, 14 Pac. 452; Lemert *v.* Barnes, 18 Kan. 9.

Massachusetts.— Pells *v.* Webquish, 129 Mass. 469.

New York.— Murray *v.* Wooden, 17 Wend. 531; Lee *v.* Glover, 8 Cow. 189.

Wisconsin.— Farrington *v.* Wilson, 29 Wis. 383.

United States.— Taylor *v.* Brown, 147 U. S. 640, 13 S. Ct. 549, 37 L. ed. 313.

See 27 Cent. Dig. tit. "Indians," § 37.

Mexican Indians.— Under the constitution and laws of Mexico an Indian was as competent to have, hold, and convey real estate as any other citizen. U. S. *v.* Ritchie, 17 How. (U. S.) 525, 15 L. ed. 236.

In Canada the statute (13 & 14 Vict. c. 74) which prohibits the sale of land by Indians, applies only to lands reserved for their occupation, title to which is still in the crown, and not to lands to which any individual Indian has acquired a title. Totten *v.* Watson, 15 U. C. Q. B. 392. The locatee of Indian lands can assign his interest therein, or in the timber thereon; and actual notice of such an assignment, even if there has been a failure to register as provided by the Indian Act, is sufficient to prevent a subsequent assignee from obtaining priority. Bridge *v.* Johnston, 8 Ont. L. Rep. 196.

A conveyance of allotted land, made by the allottee before his application was acted upon by the president and patent issued, is void, and conveyed no title, either directly or by estoppel, to the grantee. Baldwin *v.* Letson, 6 Kan. App. 11, 49 Pac. 619.

Assignment presumed.— An assignment of a house and lot by an Indian, as permitted by Me. Rev. St. c. 9, § 22, will be presumed from actual and undisturbed possession by the assignee for more than forty years. John *v.* Sebattis, 69 Me. 473.

32. *Alabama.*— Jones *v.* Walker, 47 Ala. 175.

Minnesota.— Dole *v.* Wilson, 20 Minn. 356.

Mississippi.—Anderson *v.* Lewis, Freem. 178.

New York.— Jackson *v.* Sharp, 14 Johns. 472.

North Carolina.— Belk *v.* Love, 18 N. C. 65.

Wisconsin.— Quinney *v.* Denney, 18 Wis. 485.

United States.— Elwood *v.* Flannigan, 104 U. S. 562, 26 L. ed. 842; Crews *v.* Burcham, 1 Black 352, 17 L. ed. 91; Mann *v.* Wilson, 23 How. 457, 16 L. ed. 584.

See 27 Cent. Dig. tit. "Indians," § 37.

Removal of general restrictions.— The omission, in 4 U. S. St. at L. 729, § 12, of the words "any Indian" from the prohibition of purchases and leases "from any Indian nation or tribe of Indians," while the former statutes had prohibited purchases or leases from "any Indian," shows the intention of congress to remove the general restriction upon the alienation by individual Indians of land reserved to them by treaty. Jones *v.* Meehan, 175 U. S. 1, 20 S. Ct. 1, 44 L. ed. 49.

A half breed of the Sac and Fox tribes could convey by deed his interest in the lands in Iowa reserved by treaty. Webster *v.* Reid, 11 How. (U. S.) 437, 13 L. ed. 761.

33. See the following cases:

Alabama.— Pettit *v.* Pettit, 32 Ala. 288; James *v.* Scott, 9 Ala. 579; Rosser *v.* Bradford, 9 Port. 354; Kennedy *v.* McCartney, 4 Port. 141.

Kansas.— Clark *v.* Lord, 20 Kan. 390; Baldwin *v.* Squires, 20 Kan. 280; Campbell *v.* Paramore, 17 Kan. 639; Clark *v.* Libbey, 14 Kan. 435; Pennock *v.* Monroe, 5 Kan. 578.

Minnesota.— Dole *v.* Wilson, 20 Minn. 356.

New York.— Seneca Nation *v.* Lehly, 55 Hun 83, 8 N. Y. Suppl. 245.

Wisconsin.— Quinney *v.* Denney, 18 Wis. 485.

United States.— Crews *v.* Burcham, 1 Black 352, 17 L. ed. 91.

See 27 Cent. Dig. tit. "Indians," § 37.

Unauthorized restriction in patent.— A restriction on alienation in a patent, which is not required by the law under which the title was acquired, is void; and the patentee takes a title in fee simple, without any restriction as to alienation. U. S. *v.* Saunders, 96 Fed. 268.

Computation of time.— Where alienation is restricted for a period of years from the date of the patent, the day of issue of the patent should be included in computing the time. Taylor *v.* Brown, 5 Dak. 335, 40 N. W. 525 [*affirmed* in 147 U. S. 640, 13 S. Ct. 549, 37 L. ed. 313].

Restriction after patent.— The United States may, with the consent of the tribe, add a new restriction to the power of an individual Indian to alienate his allotted land. Wiggan *v.* Conolly, 163 U. S. 56, 16 S. Ct. 914, 41 L. ed. 69.

34. Clark *v.* Akers, 16 Kan. 166; Libby *v.* Clark, 118 U. S. 250, 6 S. Ct. 1045, 30 L. ed. 133.

even though the patent was on its face an absolute conveyance, and did not show that the patentee was an Indian ;[35] and notwithstanding the fact that such Indians have become citizens of the United States.[36]

(II) *Effect of Deed When Alienation Restricted.* A deed by an Indian in contravention of a treaty or grant withholding or restricting the power of alienation is not color of title,[37] and a vendee cannot acquire any right under such deed by adverse possession or estoppel.[38]

b. Mode and Validity of Conveyance. Where a treaty or statute prescribes a particular mode of conveyance, one independent of that mode is forbidden by implication and is void ;[39] the removal of disabilities after the sale does not render it valid.[40] Deeds by Indians, although approved as required by statute or treaty, are open to the same objections as to infancy or coverture as deeds executed by others ;[41]

35. Taylor *v.* Brown, 5 Dak. 335, 40 N. W. 525 [*affirmed* in 147 U. S. 640, 13 S. Ct. 549, 37 L. ed. 313]; Laughton *v.* Nadeau, 75 Fed. 789.

36. U. S. *v.* Flournoy Live-Stock, etc., Co., 71 Fed. 576; Pilgrim *v.* Beck, 69 Fed. 895; U. S. *v.* Flournoy Live-Stock, etc., Co., 69 Fed. 886; Beck *v.* Flournoy Live-Stock, etc., Co., 65 Fed. 30, 12 C. C. A. 497; Smythe *v.* Henry, 41 Fed. 705.

Right of way across allotted lands.— Where Indians have become citizens under a treaty, and their lands have been allotted in severalty, with a prohibition of alienation except by lease for not longer than two years, and the territory in which such lands lie has since been admitted into the Union as a state, the United States has no power to prevent the building of a railway across such allotted lands with the consent and approval of the Indian grantees. Ross *v.* Eells, 56 Fed. 855.

37. Sunol *v.* Hepburn, 1 Cal. 254; Taylor *v.* Brown, 5 Dak. 335, 40 N. W. 525; Smythe *v.* Henry, 41 Fed. 705. *Contra,* Murphy *v.* Nelson, (S. D. 1905) 102 N. W. 691.

An innocent and bona fide purchaser for a valuable consideration from one who held by deed from a Pottawatomie Indian had color of title within the intent of Kan. Laws (1874), c. 79, § 3, and acquired absolute title after undisturbed possession under such purchase for three years. Forbes *v.* Higginbotham, 44 Kan. 94, 24 Pac. 348.

38. O'Brien *v.* Bugbee, 46 Kan. 1, 26 Pac. 428; Sheldon *v.* Donohoe, 40 Kan. 346, 19 Pac. 901; Jackson *v.* Porter, 13 Fed. Cas. No. 7,143, 1 Paine 457.

Adverse possession of land situated in Mississippi, for the statutory time, bars the interest of a Chickasaw Indian therein. New Orleans, etc., R. Co. *v.* Moye, 39 Miss. 374.

39. *Alabama.*— Haden *v.* Ware, 15 Ala. 149; Fipps *v.* McGehee, 5 Port. 413; Clarlitko *v.* Elliott, 5 Port. 403; Herring *v.* McElderry, 5 Port. 161.

Massachusetts.— Brown *v.* Wenham, 10 Metc. 495.

Michigan.— Raymond *v.* Shawboose, 34 Mich. 142.

Mississippi.— Doe *v.* Partier, 12 Sm. & M. 425. See also Pointer *v.* Trotter, 10 Sm. & M. 537. But see Niles *v.* Anderson, 5 How. 365, holding that such a deed passes an equitable title.

New York.— Jackson *v.* Wood, 7 Johns. 290.

United States.— Pickering *v.* Lomax, 145 U. S. 310, 12 S. Ct. 860, 36 L. ed. 716 [*affirming* 120 Ill. 289, 11 N. E. 175]; Briggs *v.* Sample, 43 Fed. 102, 10 L. R. A. 132.

See 27 Cent. Dig tit. "Indians," § 38.

The United States cannot proceed in equity to annul such a void deed, in the absence of a law forfeiting the grant in case of alienation. U. S. *v.* Saunders, 96 Fed. 268.

State laws.— The laws of a state regarding the mode of alienation of lands have no application to lands granted by treaty to Indians with a prohibition of the right to convey except with the approval of the secretary of the interior. Mungosah *v.* Steinbrook, 16 Fed. Cas. No. 9,924, 3 Dill. 418.

The recording of a deed which is void for want of compliance with the requirements restricting alienation is notice to a second grantee; and if the president has subsequently approved the first deed, a grantee under a second deed takes no title, although it also is approved. Lomax *v.* Pickering, 173 U. S. 26, 19 S. Ct. 416, 43 L. ed. 601 [*affirming* 165 Ill. 431, 46 N. E. 238].

Dedication.— An Indian under disability to convey his lands without the consent of the secretary of the interior cannot make a valid dedication of a portion of such lands for a public highway, nor can any dedication be presumed against him. State *v.* O'Laughlin, 19 Kan. 504.

Sale to another Indian.— The approval of an Indian agent is not necessary, where the sale is by one Indian to another Indian of the same tribe, under Me. Rev. St. c. 9, § 22. John *v.* Sabattis, 69 Me. 473.

In Massachusetts the prohibition by statute of conveyances applies only to land in which the aboriginal title by occupancy has never been extinguished. Clark *v.* Williams, 19 Pick. 499.

40. Lewis *v.* Love, 1 Ala. 335; Stevens *v.* Smith, 2 Kan. 243.

41. Wiggin *v.* King, 35 Kan. 410, 11 Pac. 140; Gillett *v.* Stanley, 1 Hill (N. Y.) 121; Terry *v.* Sicade, 37 Wash. 249, 79 Pac. 789; Wiggan *v.* Conolly, 163 U. S. 56, 16 S. Ct. 914, 41 L. ed. 69; Laughton *v.* Nadeau, 75 Fed. 789. See also Frederick *v.* Gray, 12 Kan. 518.

and they must conform in other respects to the requirements necessary to a valid deed.[42]

c. Approval of Officer. Where the approval of the secretary of the interior or other officer is required to a conveyance,[43] it is a condition subsequent, and if given at any time after the date of the conveyance it is retroactive in effect and validates the original contract and intermediate conveyances.[44] When it is once given the power of the officer is exhausted; the permission or approval cannot be revoked;[45] the Indian title is extinguished, and the land may thenceforth be conveyed as other lands.[46]

3. Leases. The validity of leases executed by Indians depends generally upon statutory or treaty provisions,[47] and where alienation is prohibited, leases made by the Indians are void;[48] a state legislature has no power to authorize such leases.[49] When leases are made in accordance with law, and with the approval of the proper officer, the lessee acquires a vested right, and the lease cannot be canceled or annulled by congress or the executive.[50]

4. Descent and Distribution. Lands reserved to individual Indians by treaty descend according to the laws of the state.[51] But where the tribal organization

42. Dillingham *v.* Brown, 38 Ala. 311; Tarver *v.* Smith, 38 Ala. 135; Long *v.* McDougald, 23 Ala. 413; Prentice *v.* Stearns, 20 Fed. 819.

43. See Doe *v.* Long, 29 Ala. 376; Harris *v.* Doe, 3 Ind. 494; Niles *v.* Anderson, 5 How. (Miss.) 365; Anderson *v.* Lewis, Freem. (Miss.) 178; Jackson *v.* Hill, 5 Wend. (N. Y.) 532; Jackson *v.* Brown, 15 Johns. (N. Y.) 264.

Fraud in securing approval.— A conveyance will be held void in a court of chancery, where the approval of the proper officer was obtained by fraud. Anderson *v.* Lewis, Freem. (Miss.) 178; Richardville *v.* Thorp, 28 Fed. 52.

Approval cannot be attacked collaterally. Jones *v.* Inge, 5 Port. (Ala.) 327.

44. *Alabama.*— Nolen *v.* Gwyn, 16 Ala. 725.

Indiana.— Steeple *v.* Downing, 60 Ind. 478; Ashley *v.* Eberts, 22 Ind. 55.

Kansas.— Campbell *v.* Kansas Town Co., 69 Kan. 314, 76 Pac. 839.

Mississippi.— Anderson *v.* Lewis, Freem. 178.

United States.— Lykins *v.* McGrath, 184 U. S. 169, 22 S. Ct. 450, 46 L. ed. 485; Lomax *v.* Pickering, 173 U. S. 26, 19 S. Ct. 416, 43 L. ed. 601 [*affirming* 165 Ill. 431, 46 N. E. 238]; Pickering *v.* Lomax, 145 U. S. 310, 12 S. Ct. 860, 36 L. ed. 716 [*reversing* 120 Ill. 289, 11 N. E. 175].

See 27 Cent. Dig. tit. "Indians," § 39.

45. Godfrey *v.* Beardsley, 10 Fed. Cas. No. 5,497, 2 McLean 412.

Approval given to a void and inoperative deed does not preclude the officer from afterward giving his approval to a valid deed from the same grantor for the same land. Jackson *v.* Brown, 15 Johns. (N. Y.) 264.

46. Ingraham *v.* Ward, 56 Kan. 550, 44 Pac. 14; Blauw *v.* Love, 9 Kan. App. 55, 57 Pac. 258; Dagenett *v.* Jenks, 7 Kan. App. 499, 54 Pac. 135.

47. See Lewis *v.* Love, 1 Ala. 335; Moore *v.* Girten, (Indian Terr. 1904) 82 S. W. 848; Joines *v.* Robinson, (Indian Terr. 1903) 76 S. W. 107; Pickering *v.* Lomax, 145 U. S. 310, 12 S. Ct. 860, 36 L. ed. 716 [*affirming* 120 Ill. 289, 11 N. E. 175]; Indian Land, etc., Co. *v.* Schoenfelt, (Indian Terr. 1904) 79 S. W. 134.

Validity of leases by Seneca Indians in New York see 18 U. S. St. at L. 330; Buffalo, etc., R. Co. *v.* Lavery, 75 Hun (N. Y.) 396, 27 N. Y. Suppl. 443; Sheehan *v.* Mayer, 41 Hun (N. Y.) 609; Baker *v.* Johns, 38 Hun (N. Y.) 625; Ryan *v.* Knorr, 19 Hun (N. Y.) 540; Wait *v.* Jameson, 15 Abb. N. Cas. (N. Y.) 382.

48. *Alabama.*— Kennedy *v.* McCartney, 4 Port. 141.

Kansas.— Burkhalter *v.* Nuzum, 9 Kan. App. 885, 61 Pac. 310.

Ohio.— Chaffee *v.* Garrett, 6 Ohio 421.

South Dakota.— Reservation State Bank *v.* Holst, 17 S. D. 240, 95 N. W. 931, 70 L. R. A. 799.

United States.— Pilgrim *v.* Beck, 69 Fed. 895; U. S. *v.* Flournoy Live-Stock, etc., Co., 69 Fed. 886; Beck *v.* Flournoy Live-Stock, etc., Co., 65 Fed. 30, 12 C. C. A. 497.

See 27 Cent. Dig. tit. "Indians," § 45.

Right to crops when lease void.— Crops grown on allotted lands, although the lease of such lands was void, cannot be recovered from the lessee having them in possession. Burkhalter *v.* Nuzum, 9 Kan. App. 885, 61 Pac. 310. A lessee, who was not in possession of crops grown by his sublessee at the time when they were taken by the allottee's heirs on the ground that the original lease was void, cannot maintain an action for their recovery. Coey *v.* Low, 36 Wash. 10, 77 Pac. 1077.

49. Buffalo, etc., R. Co. *v.* Lavery, 75 Hun (N. Y.) 396, 27 N. Y. Suppl. 443.

50. Mosgrove *v.* Harper, 33 Oreg. 252, 54 Pac. 187; Jones *v.* Meehan, 175 U. S. 1, 20 S. Ct. 1, 44 L. ed. 49.

51. Ingraham *v.* Ward, 56 Kan. 550, 44 Pac. 14; McCullagh *v.* Allen, 10 Kan. 150; Brown *v.* Belmarde, 3 Kan. 41; Edde *v.* Pashpah-o, 4 Kan. App. 115, 48 Pac. 884; McCauley *v.* Tyndall, (Nebr. 1903) 94 N. W.

is still recognized by the government, inheritance is, as has been already stated, controlled by the laws, usages, and customs of the tribe.[52] Land held in trust for an Indian, to whom a patent has not been issued, does not descend to his heirs, but remains a part of the tribal property;[53] except where the law provides that on the death of the original allottee a patent shall be issued in his name, in which case the title passes at once to his heirs.[54]

5. Exemption From Taxation and Judicial Sale. Lands held in severalty by individual Indians under restrictions regarding alienation are not taxable by the state.[55] But lands held in fee simple, without restriction as to alienation, are not exempt from state taxation;[56] nor are any Indian lands after the title has passed from the Indian to a citizen.[57] Lands exempt from "levy, sale, or forfeiture" by the terms of the treaty or statute under which they are granted cannot be sold for unpaid taxes[58] nor to enforce payment for improvements placed upon the land by another.[59] Such exemption is a personal privilege, and does not pass with the land to a grantee of the Indian.[60] Mere restrictions upon alienation, however, do not exempt land from sale under execution.[61] By act of congress

813; Porter *v.* Parker, (Nebr. 1903) 94 N. W. 123; Kalyton *v.* Kalyton, 45 Oreg. 116, 78 Pac. 332, (1903) 74 Pac. 491; Non-shepo *v.* Wa-win-ta, 37 Oreg. 213, 62 Pac. 15, 82 Am. St. Rep. 749; McBean *v.* McBean, 37 Oreg. 195, 61 Pac. 418; Lowry *v.* Weaver, 15 Fed. Cas. No. 8,584, 4 McLean 82.

Dower.— In New York the widow of an Indian is entitled to dower in the lands of her deceased husband, held by him in severalty. Jimeson *v.* Pierce, 78 N. Y. App. Div. 9, 79 N. Y. Suppl. 3.

Descent in the Indian Territory of lands allotted in severalty is governed by the laws of Kansas, and the word "children," in such laws relating to heirs of the half blood, should be construed as meaning "kindred," so that a half brother inherits, to the exclusion of uncles and cousins. Finley *v.* Abner, 129 Fed. 734, 64 C. C. A. 262 [*affirming* (Indian Terr. 1902) 69 S. W. 911].

The decision of the secretary of the interior as to the heirship of the Indian grantors in a deed is not conclusive on the federal courts. Richardville *v.* Thorp, 28 Fed. 52.

52. See *supra*, II, C, 3, b.

53. Sloan *v.* U. S., 118 Fed. 283. See also U. S. *v.* Zane, (Indian Terr. 1902) 69 S. W. 842.

54. Briggs *v.* McClain, 43 Kan. 653, 23 Pac. 1045.

55. *Kansas.*— Parker *v.* Winsor, 5 Kan. 362. But *compare* Miama County *v.* Wanzop-pe-che, 3 Kan. 364; Blue Jacket *v.* Johnson County, 3 Kan. 299.

Michigan.— Auditor-Gen. *v.* Williams, 94 Mich. 180, 53 N. W. 1097.

Washington.— Frazee *v.* Spokane County, 29 Wash. 278, 69 Pac. 779.

Wisconsin.— Farrington *v.* Wilson, 29 Wis. 383.

United States.— U. S. *v.* Rickert, 188 U. S. 432, 23 S. Ct. 478, 47 L. ed. 532; Fellows *v.* Denniston, 5 Wall. 761, 18 L. ed. 708; Kansas Indians *v.* U. S., 5 Wall. 737, 18 L. ed. 667.

See 27 Cent. Dig. tit. "Indians," § 54.

A conditional sale, by which no patent is to be issued until the conditions are fulfilled, and with forfeiture for non-fulfilment, does not render the lands taxable by the state. Douglas County *v.* Union Pac. R. Co., 5 Kan. 615.

Permanent improvements on lands held in trust for Indian allottees cannot be taxed by the state as personal property; and the United States may maintain a suit in equity to restrain the collection of such a tax. U. S. *v.* Rickert, 188 U. S. 432, 23 S. Ct. 478, 47 L. ed. 532.

56. State *v.* Miami County, 63 Ind. 497; Hilgers *v.* Quinney, 51 Wis. 62, 8 N. W. 17; Pennock *v.* Franklin County, 103 U. S. 44, 26 L. ed. 367. See also Frederickson *v.* Fowler, 5 Blackf. (Ind.) 409.

An Indian who has become a citizen of the United States is not exempt from taxation on lands under the act of July 13, 1787, art. 3, providing that the lands and property of Indians "shall never be taken from them without their consent." Miami County *v.* Godfrey, 27 Ind. App. 610, 60 N. E. 177.

57. Miami County *v.* Brackenridge, 12 Kan. 114; McMahon *v.* Welsh, 11 Kan. 280; Peck *v.* Miami County, 19 Fed. Cas. No. 10,891, 4 Dill. 370.

In Canada Indian land surrendered to the crown and sold to an individual is taxable; the statutory exemption applies only to Indian lands reserved for their use. Church *v.* Fenton, 28 U. C. C. P. 384.

58. Fellows *v.* Denniston, 5 Wall. (U. S.) 761, 18 L. ed. 708; Kansas Indians *v.* U. S., 5 Wall. (U. S.) 737, 18 L. ed. 667.

A void sale by a sheriff, of lands not subject to such sale for a period of years, cannot be made valid by a subsequent treaty, nor by the approval of the secretary of the interior. Frederick *v.* Gray, 12 Kan. 518.

59. Maynes *v.* Veale, 20 Kan. 374.

60. Jones *v.* Walker, 47 Ala. 175; Rosser *v.* Bradford, 9 Port. (Ala.) 354.

Possession under Indian title.— Sale may be made under execution, of the interest of one in possession of land located by a Creek Indian under treaty, before issue of patent or approval of sale by the reservee. Rains *v.* Ware, 10 Ala. 623.

61. Taylor *v.* Vandegrift, 126 Ind. 325, 25 N. E. 548; Saffarans *v.* Terry, 12 Sm.

improvements upon the public domain owned by Indians by blood cannot be reached or put into the hands of a receiver to pay judgments against them.[62]

6. Indian Scrip. Where scrip is issued to Indians in exchange for lands ceded by them, the provisions of the statute or treaty under which it is issued must be followed in the location of land with such scrip.[63] Where, however, location is restricted by the statute to "unoccupied lands"[64] a valid location may be made upon occupied land with the consent of the occupant.[65] After a location is made in conformity to law, the holder acquires a vested right, and a patent subsequently issued to another is void.[66] Even though scrip issued in lieu of lands is not assignable,[67] the land entered on such strip is alienable as soon as located;[68] and the holder of the scrip may give a valid power of attorney for the location of the land,[69] for the erection of improvements upon it,[70] and for its conveyance.[71] Actual possession or occupancy by the holder of the scrip is not necessary.[72]

IV. Government of Indians and Indian Country.

A. Indian Country Defined. Many statutory regulations regarding Indians are applicable only in the "Indian country," and considerable difficulty has been experienced by the courts in defining and applying that term. It was defined by an early act of congress,[73] but that definition was omitted from the United States Revised Statutes.[74] It has been held, however, that the omitted section may be referred to for the purpose of ascertaining the meaning of the term.[75] It now applies to all the country to which the Indian title has not been extinguished, within the limits of the United States, even when not within a reservation expressly set apart for the exclusive occupancy of Indians,[76] excluding, however,

& M. (Miss.) 690; Love *v.* Pamplin, 21 Fed. 755. See also Lowry *v.* Weaver, 15 Fed. Cas. No. 8,584, 4 McLean 82.

62. Daugherty *v.* Bogy, 3 Indian Terr. 197, 53 S. W. 542. And see *In re* Grayson, 3 Indian Terr. 497, 61 S. W. 984.

63. Parker *v.* Duff, 47 Cal. 554; Fee *v.* Brown, 17 Colo. 510, 30 Pac. 340.

The decision of the land officers upon the location of such scrip is final. Monette *v.* Cratt, 7 Minn. 234.

Land withdrawn from sale for the purpose of an Indian reservation is not subject to location with Indian scrip. Sharon *v.* Woodrick, 18 Minn. 354.

64. U. S. *v.* Chapman, 25 Fed. Cas. No. 14,785, 5 Sawy. 528.

65. Thompson *v.* Myrick, 20 Minn. 205.

66. Midway County *v.* Eaton, 79 Minn. 442, 82 N. W. 861, 1118.

67. Felix *v.* Patrick, 145 U. S. 317, 12 S. Ct. 862, 36 L. ed. 719 [*affirming* 36 Fed. 457].

68. Coursolle *v.* Weyerhauser, 69 Minn. 328, 72 N. W. 697; Sharpe *v.* Rogers, 12 Minn. 174.

69. Buffalo Land, etc., Co. *v.* Strong, 91 Minn. 84, 97 N. W. 575; U. S. *v.* Chapman, 25 Fed. Cas. No. 14,785, 5 Sawy. 528. But see Dole *v.* Wilson, 20 Minn. 356; Fee *v.* Brown, 162 U. S. 602, 16 S. Ct. 875, 40 L. ed. 1083 [*affirming* 17 Colo. 510, 30 Pac. 340].

70. Midway County *v.* Eaton, 183 U. S. 602, 619, 22 S. Ct. 261, 46 L. ed. 347 [*affirming* 79 Minn. 442, 82 N. W. 861, 1118].

71. Buffalo Land, etc., Co. *v.* Strong, 91 Minn. 84, 97 N. W. 575; Dole *v.* Wilson, 20 Minn. 356; Thompson *v.* Myrick, 20 Minn. 205; Gilbert *v.* Thompson, 14 Minn. 544; Midway County *v.* Eaton, 183 U. S. 602, 619, 22 S. Ct. 261, 46 L. ed. 347 [*affirming* 79 Minn. 442, 82 N. W. 861, 1118].

72. Sharpe *v.* Rogers, 12 Minn. 174; Midway County *v.* Eaton, 183 U. S. 602, 619, 22 S. Ct. 261, 46 L. ed. 347 [*affirming* 79 Minn. 442, 82 N. W. 861, 1118].

73. "All that part of the United States west of the Mississippi, and not within the states of Missouri and Louisiana, or the territory of Arkansas, and, also, that part of the United States east of the Mississippi river, and not within any state to which the Indian title has not been extinguished" was declared to be Indian country. 4 U. S. St. at L. 729.

74. U. S. *v.* Le Bris, 121 U. S. 278, 7 S. Ct. 894, 30 L. ed. 946; *Ex p.* Kan-gi-shun-ca, 109 U. S. 556, 3 S. Ct. 396, 27 L. ed. 1030; Palcher *v.* U. S., 11 Fed. 47, 3 McCrary 510.

75. U. S. *v.* Le Bris, 121 U. S. 278, 7 S. Ct. 894, 30 L. ed. 946; *Ex p.* Kan-gi-shun-ca, 109 U. S. 556, 3 S. Ct. 396, 27 L. ed. 1030.

76. *Ex p.* Kan-gi-shun-ca, 109 U. S. 556, 3 S. Ct. 396, 27 L. ed. 1030; Bates *v.* Clark, 95 U. S. 204, 24 L. ed. 471; U. S. *v.* Seveloff, 27 Fed. Cas. No. 16,252, 2 Sawy. 311. And see *In re* Forty-Three Cases Cognac Brandy, 14 Fed. 539, 4 McCrary 616. *Compare* U. S. *v.* Four Bottles Sour-Mash Whisky, 90 Fed. 720; U. S. *v.* Forty-Eight Pounds Rising Star Tea, 38 Fed. 400 [*affirming* 35 Fed. 403].

Country inhabited or occupied by Indians. — "An Indian country is a portion of territory subject to an Indian title, inhabited by Indians. A mere solitude, or a country without Indians, could hardly be considered an

any territory embraced within the exterior geographical limits of a state, not excepted from its jurisdiction by treaty or by statute, at the time of its admission into the Union, but saving, even in respect to territory not thus excepted and actually in the exclusive occupancy of Indians, the authority of congress over it, under the constitutional power to regulate commerce with the Indian tribes, and under any treaty made in pursuance of it.[77] It of course includes reservations set apart for Indian tribes by treaty, executive order, or act of congress.[78]

B. Regulation of Intercourse With Indians — 1. Authority Over Reservations and Trade With Indians — a. In General. Under the power to regulate commerce with the Indian tribes[79] congress may prohibit all intercourse with them except under license,[80] and may extend over them all laws within the constitutional limits of municipal legislation.[81] This power is not limited by state

Indian country, even if their title, which is merely possessory, could survive the absolute absence of its beneficiaries." U. S. *v.* Certain Property, 1 Ariz. 31, 39, 25 Pac. 517. "Indian country" is the term used to designate the "territory occupied and set apart for Indian tribes, and owned exclusively by them, and wholly within the exclusive jurisdiction of congress." U. S. *v.* Cohn, 2 Indian Terr. 474, 491, 52 S. W. 38.

Land ceases to be Indian country as soon as the Indians part with their title, without any further action by congress. U. S. *v.* Certain Property, 1 Ariz. 31, 25 Pac. 517; Clark *v.* Bates, 1 Dak. 42, 46 N. W. 510; U. S. *v.* Payne, 8 Fed. 883, 2 McCrary 289.

School lands sold by a state to which they were granted by act of congress, and in possession of the state's grantee, are not within the definition, although within the exterior limits of an Indian reservation. U. S. *v.* Thomas, 47 Fed. 488.

In the territory derived from Mexico there was no Indian title to be extinguished; hence no Indian country except that set apart for reservations. Hayt *v.* U. S., 38 Ct. Cl. 455.

77. *Ex p.* Kan-gi-shun-ca, 109 U. S. 556, 3 S. Ct. 396, 27 L. ed. 1030; Langford *v.* Monteith, 102 U. S. 145, 26 L. ed. 53.

Particular states and territories. — Colorado (U. S. *v.* McBratney, 104 U. S. 621, 26 L. ed. 869), Kansas (McCracken *v.* Todd, 1 Kan. 148; U. S. *v.* Ward, 28 Fed. Cas. No. 16,639, Woolw. 17), Louisiana (State *v.* Chiqui, 49 La. Ann. 131, 21 So. 513), Nevada, New Mexico, Utah (U. S. *v.* Leathers, 26 Fed. Cas. No. 15,581, 6 Sawy. 17; Hayt *v.* U. S., 38 Ct. Cl. 455; Pino *v.* U. S., 38 Ct. Cl. 64), and Oregon (U. S. *v.* Tom, 1 Oreg. 26), are not Indian country; but Montana Territory (U. S. *v.* 196 Buffalo Robes, 1 Mont. 489; U. S. *v.* Partello, 48 Fed. 670) and Washington Territory (Fowler *v.* U. S., 1 Wash. Terr. 3) were Indian country before their admission into the Union. The act of congress extending to Alaska a part of the statute known as the "Indian Intercourse Laws" and relating principally to the introduction of the liquor traffic among the Indians, is to be construed to make this territory Indian country only to the extent of the prohibited commerce (*In re* Sah Quah, 31 Fed. 327; Kie *v.* U. S., 27 Fed. 351; U. S. *v.* Kie, 26 Fed. Cas. No. 15,528*a*; U. S. *v.* Seveloff, 27 Fed. Cas. No. 16,252, 2 Sawy. 311; Waters *v.* Campbell, 29 Fed. Cas. No. 17,264, 4 Sawy. 121).

78. *Dakota.* — U. S. *v.* Knowlton, 3 Dak. 58, 13 N. W. 573.

Minnesota. — U. S. *v.* Shanks, 15 Minn. 369.

New Mexico. — U. S. *v.* Monte, 3 N. M. 126, 3 Pac. 45.

Oklahoma. — *In re* Ingram, 12 Okla. 54, 69 Pac. 868.

United States. — U. S. *v.* Le Bris, 121 U. S. 278, 7 S. Ct. 894, 30 L. ed. 946; U. S. *v.* Lariviere, 93 U. S. 188, 23 L. ed. 846; Eells *v.* Ross, 64 Fed. 417, 12 C. C. A. 205; Benson *v.* U. S., 44 Fed. 178; U. S. *v.* Barnhart, 22 Fed. 285, 10 Sawy. 491; U. S. *v.* Martin, 14 Fed. 817, 8 Sawy. 473; U. S. *v.* Bridleman, 7 Fed. 894, 7 Sawy. 243; U. S. *v.* Berry, 4 Fed. 779, 2 McCrary 58; U. S. *v.* Leathers, 26 Fed. Cas. No. 15,581, 6 Sawy. 17. And see Gibson *v.* Anderson, 131 Fed. 39, 65 C. C. A. 277; U. S. *v.* Payne, 8 Fed. 883. *Compare* Truscott *v.* Hurlbut Land, etc., Co., 73 Fed. 60, 19 C. C. A. 374.

An Indian reservation is a part of the public domain set apart by a proper authority for the use and occupation of a tribe or tribes of Indians. It may be set apart by an act of congress, by treaty, or by executive order; but it seems that a reservation cannot be established by custom or prescription. The fact that a particular tribe or band of Indians has for a long time occupied a particular tract of country does not constitute such tract an Indian reservation. Forty-Three Cases of Cognac Brandy, 14 Fed. 539, 4 McCrary 616.

79. See Commerce, 7 Cyc. 411.

80. Worcester *v.* Georgia, 6 Pet. (U. S.) 515, 8 L. ed. 483; U. S. *v.* Cisna, 25 Fed. Cas. No. 14,795, 1 McLean 254.

A license to trade with the Indians is a personal privilege and cannot be transferred. U. S. *v.* 196 Buffalo Robes, 1 Mont. 489.

A sale of such license is void and does not constitute a valuable consideration for a note. Hobbie *v.* Zaepffel, 17 Nebr. 536, 23 N. W. 514.

A licensed trader may take a partner, and both may sell goods under the license. Dunn *v.* Carter, 30 Kan. 294, 1 Pac. 66.

81. U. S. *v.* Tobacco Factory, 28 Fed. Cas. No. 16,528, 1 Dill. 264 [*affirmed* in 11 Wall. 616, 20 L. ed. 227].

lines or governments, but may be exercised wherever Indian tribes exist.[82] Such power and duty does not cease when the Indians become citizens of the United States,[83] when they become electors under state laws,[84] or when their lands are allotted in severalty.[85]

b. Power of State Government. A state or territory has the power to incorporate Indian lands into political divisions;[86] and, where such lands are not expressly reserved from the jurisdiction of the state, may extend its laws over persons therein not belonging to an Indian tribe.[87]

2. Removal of Trespassers[88] — a. In General. The secretary of the interior acting through Indian agents has authority to remove all persons found on an Indian reservation contrary to law,[89] even where the lands have been allotted in severalty;[90] and his action in so doing cannot be reviewed by the courts.[91] The

The president may make such regulations as he may think fit for carrying into effect the provisions of any statute relating to Indian affairs. Adams *v.* Freeman, (Okla. 1897) 50 Pac. 135.

82. Adams *v.* Freeman, (Okla. 1897) 50 Pac. 135; U. S. *v.* Lariviere, 93 U. S. 188, 23 L. ed. 846; U. S. *v.* Holliday, 3 Wall. (U. S.) 407, 18 L. ed. 182; U. S. *v.* Boyd, 83 Fed. 547, 27 C. C. A. 592; U. S. *v.* Barnhart, 22 Fed. 285, 10 Sawy. 491; U. S. *v.* Bridleman, 7 Fed. 894, 7 Sawy. 243; U. S. *v.* Cisna, 25 Fed. Cas. No. 14,795, 1 McLean 254.

83. U. S. *v.* Mullin, 71 Fed. 682.

84. U. S. *v.* Holliday, 3 Wall. (U. S.) 407, 18 L. ed. 182.

85. U. S. *v.* Flournoy Live-Stock, etc., Co., 71 Fed. 576.

Not dependent upon title to land.— The right of control in the general government arises from its relation to all tribal Indians, as such, and does not depend on the title to the land upon which they reside. Peters *v.* Malin, 111 Fed. 244.

86. Stevens *v.* Thatcher, 91 Me. 70, 39 Atl. 282.

Polling places.— The state of Nebraska has jurisdiction over the Omaha and Winnebago Indian reservations for the purpose of establishing polling places therein. State *v.* Norris, 37 Nebr. 299, 55 N. W. 1086.

87. Webster *v.* Reid, Morr. (Iowa) 467; Millar *v.* State, 2 Kan. 174; Bishop *v.* Barton, 2 Hun (N. Y.) 436, 5 Thomps. & C. 6; Gay *v.* Thomas, 5 Okla. 1, 46 Pac. 578.

88. Canada statute as to trespassers see McLean *v.* McIsaac, 6 Can. L. T. 453, 18 Nova Scotia 304; Vanvleck *v.* Stewart, 19 U. C. Q. B. 489; Little *v.* Keating, 6 U. C. Q. B. O. S. 265.

Summary removal under New York statute see People *v.* Dibble, 16 N. Y. 203 [*affirming* 18 Barb. 412]; People *v.* Soper, 7 N. Y. 428.

89. *Ex p.* Carter, (Indian Terr. 1903) 76 S. W. 102; George *v.* Greenwood, 11 La. Ann. 299; Eells *v.* Ross, 64 Fed. 417, 12 C. C. A. 205; U. S. *v.* Crook, 25 Fed. Cas. No. 14,891, 5 Dill. 453; U. S. *v.* Sturgeon, 27 Fed. Cas. No. 16,413, 6 Sawy. 29.

The right to exclude white men from the Creek nation was not affected by the act of congress authorizing the creation of cities and towns. Maxey *v.* Wright, 3 Indian Terr. 243, 54 S. W. 807.

A trespasser claiming possession under a void lease of lands belonging to a minor, the lease having been made without an order of the court, may be removed from the Indian Territory. Indian Land, etc., Co. *v.* Shoenfelt, (Indian Terr. 1904) 79 S. W. 134.

A licensed trader who had sold out his business and abandoned his post and was avoiding his creditors was properly ousted from the agency with his property. Echols *v.* Tate, 53 Ark. 12, 13 S. W. 253.

Property may be removed, where removal of the owner will not abate the nuisance; as in the case of grazing cattle, which might be controlled by agents who are members of the tribe or otherwise entitled to remain in the Indian country. Morris *v.* Hitchcock, 21 App. Cas. (D. C.) 565 [*affirmed* in 194 U. S. 384, 24 S. Ct. 712, 48 L. ed. 1030].

An agent has no authority to pass on the validity of a lease and order one in possession to be evicted from the land, without his removal from the Indian country. Stephens *v.* Quigley, 126 Fed. 148, 61 C. C. A. 214 [*affirming* 3 Indian Terr. 265, 54 S. W. 814]; La Chapelle *v.* Bubb, 62 Fed. 545.

Damages for removal see Schewson *v.* U. S., 31 Ct. Cl. 192.

Penalty for returning after removal.— Any person removed from the Indian country who thereafter returns to it is liable to a penalty of one thousand dollars. U. S. Rev. St. (1878) § 2148. And see U. S. *v.* Baker, (Indian Terr. 1903) 76 S. W. 103. According to some of the decisions this penalty is enforceable by indictment as well as by a civil action. U. S. *v.* Stocking, 87 Fed. 857; U. S. *v.* Howard, 17 Fed. 638, 9 Sawy. 155; U. S. *v.* Sturgeon, 27 Fed. Cas. No. 16,413, 6 Sawy. 29. *Contra*, U. S. *v.* Baker, (Indian Terr. 1903) 76 S. W. 103; *In re* Seagraves, 4 Okla. 422, 48 Pac. 272; U. S. *v.* Payne, 22 Fed. 426.

In an action to recover the penalty it must be shown that the settlement was unlawful or wrongful, and that the land belonged to the Indians by a treaty with the United States. U. S. *v.* Lucero, 1 N. M. 422.

90. U. S. *v.* Mullin, 71 Fed. 682.

91. Echols *v.* Tate, 53 Ark. 12, 13 S. W. 253; Zevely *v.* Weimer, (Indian Terr. 1904) 82 S. W. 941; Adams *v.* Freeman, (Okla. 1897) 50 Pac. 135; Martin *v.* Mott, 12 Wheat. (U. S.) 19, 6 L. ed. 537.

government may invoke the aid of the courts to effect such removals and to enjoin further violations of the law.[92]

b. To Enforce Collection of a Tax. The remedy for non-payment of a tax imposed by an Indian nation is the removal of the offender or his property from the tribal limits by the secretary of the interior;[93] and where a person is not subject to removal, the secretary may, through the agent or a tax-collector of the Indian nation, close the place of business of such persons.[94]

c. Grazing Cattle. Driving or otherwise conveying horses, mules, or cattle,[95] to range and feed on land belonging to any Indian or Indian tribe, without the consent of the tribe, is forbidden by statute, under a penalty of one dollar for each animal,[96] and the secretary of the interior is empowered to remove such intruders and their property by force.[97]

3. Right to Hunt and Fish. Where Indians are by treaty given the right to hunt and fish on their reservation, the state game laws do not apply to them;[98] but where the reservation has been included within the limits of a state formed since the treaty, without reserving the rights of the Indians, such laws may be enforced.[99]

4. Personal Property. Personal property owned by Indians in the Indian Territory can be reached by a creditor's suit.[1] In a controversy respecting such property the law of the nation will prevail, and where that is not pleaded or proven, the law of the forum.[2] Where personal property is vested in the tribe, a transfer by an individual Indian is invalid.[3] In Canada the movable property and effects of Indians on their reservations are exempt from seizure.[4]

C. Officers of Indian Affairs[5]—1. In General. The action of the commis-

92. U. S. *v.* Flournoy Live-Stock, etc., Co., 71 Fed. 576.

93. Morris *v.* Hitchcock, 21 App. Cas. (D. C.) 565 [*affirmed* in 194 U. S. 384, 24 S. Ct. 712, 48 L. ed. 1030; Maxey *v.* Wright, 3 Indian Terr. 243, 54 S. W. 807.

In the Indian Territory such power was taken away, as to persons in the lawful possession of a lot of land in a town or city, by 32 U. S. St. at L. 245. Buster *v.* Wright, (Indian Terr. 1902) 69 S. W. 882.

94. Buster *v.* Wright, (Indian Terr. 1904) 82 S. W. 855 [*affirmed* in 135 Fed. 947].

95. U. S. *v.* Mattock, 26 Fed. Cas. No. 15,744, 2 Sawy. 148, including sheep.

96. U. S. Rev. St. (1878) § 2117. And see Forsythe *v.* U. S., 3 Indian Terr. 599, 64 S. W. 548; U. S. *v.* Loving, 34 Fed. 715.

Who may bring action.— An action to enforce the penalty may be brought by any member of the tribe (Forsythe *v.* U. S., 3 Indian Terr. 599, 64 S. W. 548), the United States not being a necessary party (Forsythe *v.* U. S., 3 Indian Terr. 599, 64 S. W. 548).

Consent of Indians.— An occupation of Indian lands for grazing purposes only, with the consent of the Indians and in recognition of their title, is not forbidden. U. S. *v.* Hunter, 4 Mackey (D. C.) 531.

It is lawful to drive cattle into the Indian country for delivery to an Indian under a contract to purchase. Morris *v.* Cohn, 55 Ark. 401, 17 S. W. 342, 18 S. W. 384.

97. Morris *v.* Hitchcock, 21 App. Cas. (D. C.) 565 [*affirmed* in 194 U. S. 384, 24 S. Ct. 712, 48 L. ed. 1030].

98. State *v.* Cooney, 77 Minn. 518, 80 N. W. 696; *In re* Lincoln, 129 Fed. 247; *In re* Blackbird, 109 Fed. 139; U. S. *v.* Winans, 73 Fed. 72. And see *In re* Race Horse, 70 Fed. 598.

Bering sea fisheries.— The treaty with the Makah Indians secures to the Indians only an equality of rights with citizens of the United States, and they are not specially privileged to catch fur seal in Bering sea. U. S. *v.* The James G. Swan, 50 Fed. 108.

The treaty with the Yakima Indians secures to them the right to all the fisheries they had theretofore enjoyed; and a settler upon land abutting upon such a fishery takes subject to the rights of the Indians. U. S. *v.* Taylor, 3 Wash. Terr. 88, 13 Pac. 333.

99. Ward *v.* Race Horse, 163 U. S. 504, 16 S. Ct. 1076, 41 L. ed. 244. And see State *v.* Newell, 84 Me. 465, 24 Atl. 943; People *v.* Pierce, 18 Misc. (N. Y.) 83, 41 N. Y. Suppl. 858, 11 N. Y. Cr. 325; U. S. *v.* Alaska Packers' Assoc., 79 Fed. 152.

1. Daugherty *v.* Bogy, 3 Indian Terr. 197, 53 S. W. 542.

2. Davison *v.* Gibson, 56 Fed. 443, 5 C. C. A. 543. And see Pyeatt *v.* Powell, 51 Fed. 551, 2 C. C. A. 367.

3. Seneca Nation *v.* Hammond, 3 Thomps. & C. (N. Y.) 347.

4. Bussières *v.* Bastien, 17 Quebec Super. Ct. 189.

5. **Indian superintendencies were not abolished** by the mere force of 17 U. S. St. at L. 463, which took effect only by the action of the president; and the payment of a superintendent's salary to a certain date is *prima facie* evidence that his office was not abolished until that time. U. S. *v.* Wirt, 28 Fed. Cas. No. 16,745, 3 Sawy. 161.

Payment for supplies.— A subagent has no legal authority to draw bills of exchange

sioner of Indian affairs is presumed to be the action of the president,[6] and where the commissioner ratifies and approves the action of an agent, either before or after it takes effect, his acts are valid and binding on the government.[7] But the government may repudiate the agent's action on the ground of fraud.[8]

2. Compensation and Expenses. The compensation of an Indian agent commences when he actually begins work for the government.[9] He is entitled to an allowance in addition to his fixed salary for such services or expenditures as are authorized by the general usage of the department.[10] A statute fixing his salary is modified by subsequent appropriation acts setting apart a less sum.[11]

3. Official Bonds.[12] A bond may be required of an Indian agent in a larger sum than that specified by statute, by order of the executive.[13] The sureties on his bond are liable for money received by the agent, either for the United States or for the Indians under his charge, and misappropriated by him;[14] and for unauthorized disbursements by him,[15] except where such disbursements have

for supplies. Fremont *v.* U. S., 2 Ct. Cl. 461.

Liability for acts of Indians.— An Indian superintendent is not personally liable for torts of Indians unless he has directed or sanctioned their acts. Huebschman *v.* Baker, 7 Wis. 542.

Agent for sale of lands.— An agent for disposing of Indian lands on the Grand river in Canada does not come under the designation of a district agent of the commissioner of crown lands, so as to entitle purchasers holding his certificate to the benefit of the provisions in the Land Sale Acts. Young *v.* Scobie, 10 U. C. Q. B. 372.

Order of agent.— The written order of an Indian agent acting under instructions from the interior department is a legal writ or process within the meaning of U. S. Rev. St. (1878) § 5398 [U. S. Comp. St. (1901) p. 3655]; and a member of the Indian police, although not an officer of the United States, is among the "other persons" who may be authorized under that statute to serve such writ. U. S. *v.* Mullin, 71 Fed. 682.

New York land commissioners.— The concurrence of the governor is necessary to the validity of a measure initiated by the commissioners of the land-office under N. Y. Laws (1839), c. 58, and N. Y. Laws (1841), c. 234. People *v.* Land Office Com'rs, 99 N. Y. 648, 1 N. E. 764.

In Canada an Indian agent, or a superintendent and commissioner of Indian affairs, is *ex officio* a justice of the peace. Reg. *v.* Pah-Cah-Pah-Ne-Cappi, 17 Can. L. T. 306; Hunter *v.* Gilkison, 7 Ont. 735.

6. Belt's Case, 15 Ct. Cl. 92.

7. U. S. *v.* Patrick, 73 Fed. 800, 20 C. C. A. 11; McClure *v.* U. S., 19 Ct. Cl. 173; Belt *v.* U. S., 15 Ct. Cl. 92.

8. Raymond *v.* Shawboose, 34 Mich. 142.

9. U. S. *v.* Roberts, 10 Fed. 540.

An Indian agent appointed during a recess of the senate, and not confirmed at the next session, could not claim compensation for his services subsequent to the adjournment. Romero *v.* U. S., 24 Ct. Cl. 331.

10. U. S. *v.* Duval, 25 Fed. Cas. No. 15,015, Gilp. 356.

Traveling expenses of agents required to travel include board while actually in transit, but do not include board while engaged in inspecting stations. U. S. *v.* Smith, 35 Fed. 490.

Expenditures for benefit of Indians.— The United States is not chargeable with expenditures made by an agent for the benefit of the Indians on land reserved and held by them. U. S. *v.* Duval, 25 Fed. Cas. No. 15,015, Gilp. 356.

A military officer acting as Indian agent was not entitled under 4 U. S. St. at L. 729, to a commission on the amount of money disbursed by him in such capacity. Minis *v.* U. S., 15 Pet. (U. S.) 423, 10 L. ed. 791.

Authority to incur expense.— Where the statute requires an expenditure by an Indian agent to be authorized by the secretary of the interior, an authorization by the commissioner of Indian affairs is sufficient. U. S. *v.* Odeneal, 10 Fed. 616, 7 Sawy. 451.

11. Belknap *v.* U. S., 150 U. S. 588, 14 S. Ct. 183, 37 L. ed. 1191 [*affirming* 24 Ct. Cl. 433]; Smith *v.* U. S., 37 Ct. Cl. 119. And see Dyer *v.* U. S., 20 Ct. Cl. 166.

12. See, generally, Officers.

13. U. S. *v.* Humason, 26 Fed. Cas. No. 15,420, 5 Sawy. 537.

14. U. S. *v.* Fidelity Trust Co., 121 Fed. 766, 58 C. C. A. 42. And see U. S. *v.* Allen, 36 Fed. 174; U. S. *v.* Smith, 35 Fed. 490.

Liability for money on hand.— Sureties on a bond given on the renewal of an appointment are liable for money received during the first term and remaining unexpended at the time of the second appointment. Bruce *v.* U. S., 17 How. (U. S.) 437, 15 L. ed. 129.

A bond given by one as agent for certain Indians does not apply to money received by him while acting as agent for other Indians under orders from the commissioner of Indian affairs. U. S. *v.* Barnhart, 17 Fed. 579, 9 Sawy. 159.

The mere failure to file a receipt with his accounts, for money actually disbursed by an agent for the benefit of the government, is not enough to charge his bondsmen. U. S. *v.* McClane, 74 Fed. 153.

15. U. S. *v.* Sinnott, 26 Fed. 84.

Where an agent paid the bills of a physician at the agency, under the sanction of a custom of the department of many years' standing, he was entitled to credit in his

been made in good faith.[16] They are liable also for property not accounted for.[17]

D. Criminal Prosecutions[18] — **1. Criminal Offenses — a. In General.** Decisions with respect to criminal offenses generally, when committed in the Indian country, or by or against Indians, are given in the accompanying note.[19]

accounts. U. S. *v.* Patrick, 73 Fed. 800, 20 C. C. A. 11.

Advertising for bids for supplies by a superintendent, under a general order addressed to a predecessor in office, is a lawful expenditure of public money. U. S. *v.* Odeneal, 10 Fed. 616, 7 Sawy. 451.

An agent paying freight on goods required by reason of a sudden emergency is entitled to be reimbursed. U. S. *v.* Stowe, 19 Fed. 807.

Payment for similar purchases.— The obligation of the government to pay for purchases made by an Indian agent may be inferred from the action of congress subsequently providing payment for similar purchases. Fremont *v.* U. S., 2 Ct. Cl. 461.

16. U. S. *v.* McClane, 74 Fed. 153; U. S. *v.* Roberts, 10 Fed. 540.

17. U. S. *v.* Young, 44 Fed. 168. *Compare* U. S. *v.* Sinnott, 26 Fed. 84.

Technical failure to account.— The failure of an Indian agent, through clerical errors, to account for property does not justify a recovery of the value thereof, where it is shown that the property actually remains at the agency. Nominal damages only can be recovered. U. S. *v.* McClane, 74 Fed. 153; U. S. *v.* Patrick, 73 Fed. 800, 20 C. C. A. 11; U. S. *v.* Young, 44 Fed. 168.

The burden of proof of the amount of loss is on the United States. U. S. *v.* Young, 44 Fed. 168.

Failure to account for property cannot be proven, in an action against bondsmen, upon an allegation of failure to account for moneys received. U. S. *v.* McClane, 74 Fed. 153.

Evidence.— A treasury transcript, showing the value of property unaccounted for, is not admissible as evidence under U. S. Rev. St. (1878) § 886 [U. S. Comp. St. (1901) p. 670]. U. S. *v.* Smith, 35 Fed. 490.

18. As to power of congress to define and punish crimes committed by or against Indians see Commerce, 7 Cyc. 418, 425.

19. Adultery is a crime under the laws of the United States when committed on an Indian reservation. Goodson *v.* U. S., 7 Okla. 117, 54 Pac. 423. It is included in the term "misdemeanor," as used in the rules promulgated by the secretary of the interior on Dec. 2, 1882, for the government of Indians on the Umatilla and other reservations. U. S. *v.* Clapox, 35 Fed. 575, 13 Sawy. 349.

Cutting timber.— The Cherokee lands are not "lands of the United States" within the meaning of U. S. Rev. St. (1878) § 5388 [U. S. Comp. St. (1901) p. 3649], providing a penalty for cutting timber on such lands. U. S. *v.* Reese, 27 Fed. Cas. No. 16,137, 5 Dill. 405.

Forgery.— An Indian may be convicted for forging and presenting an order for intoxicating liquors, although it is against the law to sell them to Indians. People *v.* James, 110 Cal. 155, 42 Pac. 479.

Homicide.— Murder is punishable by death under the laws of the United States (U. S. Rev. St. (1878) §§ 2145, 5339; U. S. *v.* Martin, 14 Fed. 817, 8 Sawy. 473); and this law includes the murder of one Indian by another, since the passage of 23 U. S. St. at L. 385, and the provision of that statute was not repealed by 29 U. S. St. at L. 487 (Good Shot *v.* U. S., 104 Fed. 257, 43 C. C. A. 525). A pagan Indian who, believing in an evil spirit in human shape called a Wendigo, shot and killed another Indian under the impression that he was the Wendigo, was properly convicted of manslaughter. Reg. *v.* Machekequonabe, 28 Ont. 309. An assault with intent to kill, by an Indian upon an Indian, on a reservation in a state, is indictable under U. S. Rev. St. (1878) § 5346 [U. S. Comp. St. (1901) p. 3631], since the passage of 23 U. S. St. at L. 385 (U. S. *v.* Logan, 105 Fed. 240); but it was not prior to that statute (U. S. *v.* Terrel, 28 Fed. Cas. No. 16,453, Hempst. 422). When such an assault is committed by an Indian upon a white person, or *vice versa*, it is not necessary under U. S. Rev. St. (1878) § 2142, to show malice (Jennings *v.* U. S., 2 Indian Terr. 670, 53 S. W. 456); and this statute does not require that the act would be murder if death had ensued (*Ex p.* Brown, 40 Fed. 81).

Larceny and receiving stolen goods.— Larceny, committed on an Indian reservation, is punishable under the laws of the United States, and by the federal courts. Oats *v.* U. S., 1 Indian Terr. 152, 38 S. W. 673; *In re* Ingram, 12 Okla. 54, 69 Pac. 868; U. S. *v.* Ewing, 47 Fed. 809; U. S. *v.* Bridleman, 7 Fed. 894, 7 Sawy. 243; Anonymous, 1 Fed. Cas. No. 447, Hempst. 413. In Canada an Indian cannot be indicted for larceny for cutting and removing wood from land on the reservation. Recourse must be had to the summary proceedings provided by the Indian Act (Can. Rev. St. c. 43). Reg. *v.* Johnson, 8 Can. L. T. 334. The United States statute U. S. Rev. St. (1878) § 5357 [U. S. Comp. St. 1901) p. 3639] defining the offense of receiving stolen goods and prescribing its punishment is in force in the Indian Territory. Bise *v.* U. S., (Indian Terr. 1904) 82 S. W. 921.

Rape, by an Indian man upon an Indian woman, punishable by death under U. S. Rev. St. (1878) § 5345 [U. S. Comp. St. (1901) p. 3630] and 23 U. S. St. at L. 385, is made punishable by imprisonment at the discretion of the court by U. S. Rev. St. (1878) § 5325 [U. S. Comp. St. (1901) p. 3620]. Assault

b. Selling or Furnishing Liquor — (I) *In General.* Selling or furnishing intoxicating liquors to Indians is a criminal offense by act of congress,[20] and by statutory enactment in some of the states and territories of the Union[21] and in Canada.[22] Under such statutes an Indian, as well as any other person, is chargeable with the commission of this crime.[23]

(II) *What Indians Protected.* It has been held that under the various statutes on the subject are included Indians to whom allotments of land have been made, so long as the title thereto is held in trust by the government;[24] every Indian under the charge of a superintendent or agent,[25] wherever he may be;[26] and all Indians, including mixed bloods, over whom the government exercises guardianship.[27]

with intent to commit rape, committed by an Indian man upon an Indian woman, both residing on a reservation, is not cognizable as a crime by any statute of the United States, and the federal courts have no jurisdiction. U. S. *v.* King, 81 Fed. 625.

Robbery, committed in the Indian country, was not punishable as such under U. S. Rev. St. (1878) § 2145. Anonymous, 1 Fed. Cas. No. 447, Hempst. 413. Under 25 U. S. St. at L. 787, a conviction of assault with intent to rob may be had, although the robbery is actually accomplished. The crime is not merged into the crime of robbery, for the reason that the United States statutes do not provide any punishment for the crime of robbery in the Indian country. Axhelm *v.* U. S., 9 Okla. 321, 60 Pac. 98.

Using a deadly weapon in resisting an Indian agent who was making a search for spirituous liquors on the reservation is not an offense under U. S. Rev. St. (1878) § 5447 [U. S. Comp. St. (1901) p. 3678]. Mackey *v.* Miller, 126 Fed. 161, 62 C. C. A. 139.

In the Indian Territory a person may be indicted and punished for an offense not defined by statute, but which exists by the common law. Carter *v.* U. S., 1 Indian Terr. 342, 37 S. W. 204.

In Canada it is a misdemeanor to rent lands from an Indian. Reg. *v.* Hagar, 7 U. C. C. P. 380.

20. U. S. Rev. St. (1878) § 2139, 27 U. S. St. at L. 260, 29 U. S. St. at L. 506. And see U. S. *v.* Cohn, 2 Indian Terr. 474, 52 S. W. 38; U. S. *v.* Lariviere, 93 U. S. 188, 23 L. ed. 846; U. S. *v.* Warwick, 51 Fed. 280; *In re* McDonough, 49 Fed. 360; Waters *v.* Campbell, 29 Fed. Cas. No. 17,264, 4 Sawy. 121; U. S. *v.* Shaw-Mux, 27 Fed. Cas. No. 16,268, 2 Sawy. 364.

Grade of offense and punishment see Bruguier *v.* U. S., 1 Dak. 5, 46 N. W. 502; Fowler *v.* U. S., 1 Wash. Terr. 3.

A person arrested by military officers for violation of the statute forbidding the introduction into and sale of liquors in the Indian country is not a military prisoner, and must be delivered to the civil authorities for trial within five days, or discharged. *In re* Carr, 5 Fed. Cas. No. 2,432, 3 Sawy. 316; Waters *v.* Campbell, 29 Fed. Cas. No. 17,265, 5 Sawy. 17.

21. See People *v.* Bray, 105 Cal. 344, 38 Pac. 731, 27 L. R. A. 158; Territory *v.* Guyott, 9 Mont. 46, 22 Pac. 134; Tate *v.* State, 58 Nebr. 296, 78 N. W. 494; Territory *v.* Coleman, 1 Oreg. 191, 75 Am. Dec. 554.

22. See Reg. *v.* Murdock, 4 Can. Cr. Cas. 82; Reg. *v.* McAulay, 7 Can. L. T. 344, 14 Ont. 643 (holding that a husband may be convicted and punished for the sale of liquor to Indians by his wife); Reg. *v.* Duquette, 1 Can. L. T. 702, 9 Ont. Pr. 29; *Re* Metcalfe, 17 Ont. 357; Reg. *v.* MacKenzie, 6 Ont. 165, holding that a conviction under the Indian Act (1880) for giving intoxicating liquor to an Indian is invalid unless it is shown that the liquor was not used under the sanction of a medical man or minister of religion.

The penalty may be imprisonment and fine, or either; but not a fine with imprisonment in default of payment, except where the offense is selling liquor to Indians on board a vessel. *Ex p.* Goodine, 7 Can. L. T. 22; Reg. *v.* MacKenzie, 4 Can. L. T. 343, 6 Ont. 165.

23. U. S. *v.* Tom, 1 Oreg. 26; U. S. *v.* Miller, 105 Fed. 944; U. S. *v.* Shaw-Mux, 27 Fed. Cas. No. 16,268, 2 Sawy. 364.

24. Farrell *v.* U. S., 110 Fed. 942, 49 C. C. A. 183. And see U. S. *v.* Kopp, 110 Fed. 160.

25. Territory *v.* Guyott, 9 Mont. 46, 22 Pac. 134; Renfrow *v.* U. S., 3 Okla. 161, 41 Pac. 88; U. S. *v.* Hurshman, 53 Fed. 543; U. S. *v.* Osborn, 2 Fed. 58, 6 Sawy. 406.

Actual control by the agent is not essential if the Indian belongs to the tribe over which the agent has charge. U. S. *v.* Holliday, 3 Wall. (U. S.) 407, 18 L. ed. 182; U. S. *v.* Earl, 17 Fed. 75, 9 Sawy. 79; U. S. *v.* Osborn, 2 Fed. 58, 6 Sawy. 406; U. S. *v.* Flynn, 25 Fed. Cas. No. 15,124, 1 Dill. 451.

Indians born in Oregon are *prima facie* members of some Oregon tribe and are therefore under the charge of the superintendent of Indian affairs in Oregon. U. S. *v.* Wirt, 28 Fed. Cas. No. 16,745, 3 Sawy. 161.

In Canada to support a conviction before an Indian agent, for selling liquor to Indians, it must appear that they were Indians over whom that agent had jurisdiction. Reg. *v.* McAulay, 7 Can. L. T. 344, 14 Ont. 643.

26. U. S. *v.* Burdick, 1 Dak. 142, 46 N. W. 571; U. S. *v.* Holliday, 3 Wall. (U. S.) 407, 18 L. ed. 182; U. S. *v.* Miller, 105 Fed. 944; U. S. *v.* Earl, 17 Fed. 75, 9 Sawy. 79; U. S. *v.* Osborn, 2 Fed. 58, 6 Sawy. 406; U. S. *v.* Shaw-Mux, 27 Fed. Cas. No. 16,268, 2 Sawy. 364.

27. 29 U. S. St. at L. 506. And see U. S. *v.* Miller, 105 Fed. 944.

(III) *Intent and Knowledge.* Under an indictment for selling liquor to an Indian it is not necessary to prove criminal intent.[28] And a claim that defendant did not know that the person to whom he sold was an Indian is no defense.[29]

c. Introducing Liquor Into the Indian Country — (I) *In General.* Introducing liquor into the Indian country is prohibited by act of congress, and is subject to the same penalties applicable to the crime of selling or giving liquor to an Indian.[30] The transportation of liquors as an article of commerce across a reservation is not a violation of the statute.[31]

(II) *Seizures and Forfeiture.* Where liquor is introduced into the Indian country in violation of law, the liquor itself, the instruments or means used in conveying it thither, and the goods found in company with the liquors, are subject to seizure and forfeiture.[32] The seizure can be made only when the liquors are found in the Indian country.[33]

2. Criminal Jurisdiction — a. In General. Up to the year 1885 crimes committed in the Indian country were within the exclusive jurisdiction of the United States courts, except crimes committed by one Indian against the person or property of another, which were punishable solely by the laws of the tribes.[34] The

Indian students at Carlisle school are included in its provisions. U. S. *v.* Belt, 128 Fed. 168.

28. U. S. *v.* Miller, 105 Fed. 944; U. S. *v.* Leathers, 26 Fed. Cas. No. 15,581, 6 Sawy. 17.

29. U. S. *v.* Stofello, (Ariz. 1904) 76 Pac. 611.

In Canada it is a good defense if the seller did not know and had no means of knowing that a half-breed to whom he sold shared in the Indian treaty payments and was therefore within the meaning of the Indian act. Reg. *v.* Mellon, 5 Terr. L. R. 301.

30. See U. S. *v.* Stephens, 12 Fed. 52, 8 Sawy. 116; *In re* Carr, 5 Fed. Cas. No. 2,432, 3 Sawy. 316, statute extends to Alaska. And see *supra*, IV, D, 1, b, (I).

Beer.— Prior to the passage of 27 U. S. St. at L. 260, the statute did not prohibit the introduction of beer. Sarlls *v.* U. S., 152 U. S. 570, 14 S. Ct. 720, 38 L. ed. 556; *In re* McDonough, 49 Fed. 360.

Ordering whisky to be shipped to the Indian country by a wholesale dealer is not a violation of the statute. U. S. *v.* Stephens, 12 Fed. 52, 8 Sawy. 116.

Payment of the internal revenue tax as a retail liquor-dealer does not relieve one from the penalty imposed by the statute. U. S. *v.* Forty-Three Gallons of Whisky, 108 U. S. 491, 2 S. Ct. 906, 27 L. ed. 803; U. S. *v.* Ellis, 51 Fed. 808.

31. U. S. *v.* Carr, 2 Mont. 234; U. S. *v.* Four Bottles Sour-Mash Whisky, 90 Fed. 720; U. S. *v.* Twenty-Nine Gallons of Whisky, 45 Fed. 847.

32. U. S. Rev. St. (1878) § 2140. And see U. S. *v.* Lucero, 1 N. M. 422; American Fur Co. *v.* U. S., 2 Pet. (U. S.) 358, 7 L. ed. 450; U. S. *v.* Twenty-Nine Gallons of Whisky, 45 Fed. 847.

Teams used in conveying liquor into an Indian reservation may be rightfully seized, although the property of another than the one so using them. Webb *v.* Nickerson, 11 Oreg. 382, 4 Pac. 1126.

33. U. S. *v.* Certain Property, 1 Ariz. 31, 25 Pac. 517; American Fur Co. *v.* U. S., 2 Pet. (U. S.) 358, 7 L. ed. 450; Palcher *v.* U. S., 11 Fed. 47, 3 McCrary 510.

A military officer seizing liquors supposed to be in the Indian country when they are not is liable as a trespasser. Bates *v.* Clark, 95 U. S. 204, 24 L. ed. 471.

Who may make.— A seizure must be made by an officer named in the statute, and no other. U. S. *v.* The Cora, 1 Dak. 1, 46 N. W. 503.

34. 1 U. S. St. at L. 469; 2 U. S. St. at L. 139; 4 U. S. St. at L. 729; U. S. Rev. St. (1878) §§ 2145, 2146. And see U. S. *v.* Monte, 3 N. M. 126, 3 Pac. 45; *Ex p.* Kan-gi-shun-ca, 109 U. S. 556, 3 S. Ct. 396, 27 L. ed. 1030; U. S. *v.* Rogers, 4 How. (U. S.) 567, 11 L. ed. 1105; U. S. *v.* Barnhart, 22 Fed. 285, 10 Sawy. 491; U. S. *v.* Cha-To-Kah-Na-Pe-Sha, 25 Fed. Cas. No. 14,789*a*, Hempst. 27; U. S. *v.* Sanders, 27 Fed. Cas. No. 16,220, Hempst. 483.

The United States court for Arkansas had no jurisdiction to hear, try, and punish offenses committed in the Indian country west of Arkansas until the passage of 5 U. S. St. at L. 680. U. S. *v.* Alberty, 24 Fed. Cas. No. 14,426, Hempst. 444; U. S. *v.* Ivy, 26 Fed. Cas. No. 15,451, Hempst. 562; U. S. *v.* Starr, 27 Fed. Cas. No. 16,379, Hempst. 469. An indictment pending in the United States court for the eastern district of Arkansas for an offense committed in the Indian country could be tried in that court after the passage of the act of congress dividing the district, and giving jurisdiction over the Indian country to the western division. U. S. *v.* Dawson, 15 How. (U. S.) 467, 14 L. ed. 775.

The revocation of an executive order creating a reservation does not affect the jurisdiction of the United States court to try an indictment found after the revocation for a murder committed before. U. S. *v.* Knowlton, 3 Dak. 58, 13 N. W. 573; U. S. *v.* Brave Bear, 3 Dak. 34, 13 N. W. 565.

As to criminal jurisdiction of tribal courts see II, C, 3, d.

state courts had no jurisdiction.[35] By a statute enacted in that year jurisdiction over murder, manslaughter, rape, assault with intent to kill, arson, burglary, and larceny when committed by an Indian, was vested in the United States and territorial courts.[36]

b. On Reservations in a State — (I) *OVER INDIANS.* A state has no jurisdiction over crimes committed by Indians within a reservation, such jurisdiction being in the United States or the tribal courts.[37]

(II) *OVER PERSONS NOT INDIANS.* Crimes committed by white persons on a reservation within a state, except where jurisdiction over such reservation has been expressly reserved to the United States courts upon admission of the state to the Union, are within the exclusive jurisdiction of the state courts.[38] If the jurisdiction of the United States is so reserved by any treaty or statute, the United States courts have exclusive jurisdiction.[39]

c. In a State, Not on a Reservation. The state courts have exclusive jurisdiction over crimes committed by tribal or other Indians within the state and outside the limits of any Indian reservation.[40]

d. In a Territory — (I) *OVER INDIANS.* An Indian charged with the com-

35. Pickett *v.* U. S., 1 Ida. 523; State *v.* McKenney, 18 Nev. 182, 2 Pac. 171.

36. 23 U. S. St. at L. 385. And see U. S. *v.* Ward, 42 Fed. 320.

Want of notice to defendant of the enactment of this statute is no defense to an indictment under its provisions. U. S. *v.* Whaley, 37 Fed. 145, 13 Sawy. 548.

37. U. S. Rev. St. (1878) §§ 2145, 2146; 23 U. S. St. at L. 385. And see State *v.* Campbell, 53 Minn. 354, 55 N. W. 553, 21 L. R. A. 169; *Ex p.* Cross, 20 Nebr. 417, 30 N. W. 428; U. S. *v.* Thomas, 151 U. S. 577, 14 S. Ct. 426, 38 L. ed. 276; U. S. *v.* Kagama, 118 U. S. 375, 6 S. Ct. 1109, 30 L. ed. 228; *In re* Lincoln, 129 Fed. 247; Peters *v.* Malin, 111 Fed. 244; *In re* Blackbird, 109 Fed. 139; U. S. *v.* Logan, 105 Fed. 240; U. S. *v.* King, 81 Fed. 625. But see State *v.* Foreman, 8 Yerg. (Tenn.) 256; State *v.* Doxtater, 47 Wis. 278, 2 N. W. 439; State *v.* Harris, 47 Wis. 298, 2 N. W. 543.

Tribal Indians.— Only tribal Indians are within the acts of congress and state courts are not thereby deprived of jurisdiction over crimes committed by Indians who either have never sustained or have severed all tribal relations. People *v.* Turner, 85 Cal. 432, 24 Pac. 857; People *v.* Ketchum, 73 Cal. 635, 15 Pac. 353; Jackson *v.* Goodell, 20 Johns. (N. Y.) 188; *In re* Peters, 2 Johns. Cas. (N. Y.) 344; State *v.* Smokalem, 37 Wash. 91, 79 Pac. 603; State *v.* Howard, 33 Wash. 250, 74 Pac. 382; State *v.* Williams, 13 Wash. 335, 43 Pac. 15. Indians living in the tribal relation are not subject, in their internal social relations, either to the laws of the states or of the United States. U. S. *v.* Barnaby, 51 Fed. 20. Citizenship of an Indian allottee conferred by congress is not inconsistent with the status of a tribal Indian, and the state courts cannot punish crimes committed by one such Indian against another. State *v.* Columbia George, 39 Oreg. 127, 65 Pac. 604.

38. *Alabama.*— Caldwell *v.* State, 1 Stew. & P. 327.

Georgia.— State *v.* Tassels, Dudley 229.

Kansas.— State *v.* O'Laughlin, 29 Kan. 20; McCracken *v.* Todd, 1 Kan. 148.

Minnesota.— State *v.* Campbell, 53 Minn. 354, 55 N. W. 553, 21 L. R. A. 169.

Nebraska.— Marion *v.* State, 16 Nebr. 349, 20 N. W. 289, 20 Nebr. 233, 29 N. W. 911, 57 Am. Rep. 825; Painter *v.* Ives, 4 Nebr. 122.

United States.— Draper *v.* U. S., 164 U. S. 240, 17 S. Ct. 107, 41 L. ed. 419; U. S. *v.* McBratney, 104 U. S. 621, 26 L. ed. 869; U. S. *v.* Hadley, 99 Fed. 437.

See 27 Cent. Dig. tit. "Indians," § 64.

Reservations created within a state, after its admission, are nevertheless within the jurisdiction of the state courts as to crimes committed by white persons. *Ex p.* Sloan, 22 Fed. Cas. No. 12,944, 4 Sawy. 330.

An allottee under 24 U. S. St. at L. 388 is subject to the jurisdiction of the state courts, even for an offense committed against an Indian on a reservation. *In re* Now-gezhuck, 69 Kan. 410, 76 Pac. 877; U. S. *v.* Kiya, 126 Fed. 879.

39. U. S. *v.* Partello, 48 Fed. 670; U. S. *v.* Bridleman, 7 Fed. 894, 7 Sawy. 243.

An allottee on the Umatilla reservation in Oregon, charged with murder on such reservation, could be tried only in the federal courts. State *v.* Columbia George, 39 Oreg. 127, 65 Pac. 604; U. S. *v.* Logan, 105 Fed. 240.

40. *Colorado.*— Pablo *v.* People, 23 Colo. 134, 46 Pac. 636, 37 L. R. A. 636.

Kansas.— Rubideaux *v.* Vallie, 12 Kan. 28; Hunt *v.* State, 4 Kan. 60.

Montana.— State *v.* Little Whirlwind, 22 Mont. 425, 56 Pac. 820; State *v.* Spotted Hawk, 22 Mont. 33, 55 Pac. 1026.

North Carolina.— State *v.* Ta-cha-na-tah, 64 N. C. 614.

Washington.— State *v.* Williams, 13 Wash. 335, 43 Pac. 15.

United States.— *In re* Wolf, 27 Fed. 606; U. S. *v.* Sa-coo-da-cot, 27 Fed. Cas. No. 16,212, 1 Abb. 377, 1 Dill. 271. And see U. S. *v.* Kiya, 126 Fed. 879, rape committed by an Indian residing on allotted land.

mission of any offense specified in the act of March 3, 1885,[41] must be tried in the territorial courts and under territorial laws.[42] It is improper to try him before the district court of the territory while sitting as a United States court.[43] In regard to offenses not named in that act, and punishable under the laws of the United States, the federal courts have exclusive jurisdiction.[44]

(II) *Over Persons Not Indians.* The United States courts in a territory have exclusive jurisdiction over all crimes punishable by the laws of the United States, when committed by persons other than Indians, on an Indian reservation.[45] Territorial laws which attempt to punish acts made criminal by the laws of the United States have no force within an Indian reservation.[46]

3. Procedure — a. In General. The rules of the common law govern as to procedure in criminal cases arising in the Indian country, except where other provision is made by statute.[47]

b. Warrant. An officer at an Indian agency has no authority to arrest a resident on such reservation without a warrant, on a charge of misdemeanor not committed in his presence.[48]

c. Indictment or Information[49] — (I) *In General.* Where jurisdiction over offenses by one Indian against another is reserved to the tribal courts, an indictment in a federal court must aver that either defendant or the party injured was not an Indian.[50] An information filed in the state court of a county containing within its limits a part or the whole of an Indian reservation, against a person described as an Indian, need not in order to confer jurisdiction, aver either that such person does not sustain tribal relations or that the offense was not committed within the limits of such reservation.[51] Under the constitution of the Creek nation, requiring the prosecuting attorney to indict all offenders, the finding of an indictment by a grand jury is not necessary.[52]

(II) *Under Liquor Laws.*[53] In an indictment for the sale of liquor to

41. 23 U. S. St. at L. 385. For list of crimes see *supra*, IV, D, 2, a.

42. Goodson *v.* U. S., 7 Okla. 117, 54 Pac. 423; *Ex p.* Captain Jack, 130 U. S. 353, 9 S. Ct. 546, 32 L. ed. 976; *Ex p.* Gon-shay-ee, 130 U. S. 343, 9 S. Ct. 542, 32 L. ed. 973.

43. *Ex p.* Captain Jack, 130 U. S. 353, 9 S. Ct. 546, 32 L. ed. 976; *Ex p.* Gon-shay-ee, 130 U. S. 343, 9 S. Ct. 542, 32 L. ed. 973.

44. Welty *v.* U. S., 14 Okla. 7, 76 Pac. 121; Goodson *v.* U. S., 7 Okla. 117, 54 Pac. 423.

45. U. S. Rev. St. (1878) § 2145. And see McCall *v.* U. S., 1 Dak. 320, 46 N. W. 608; Welty *v.* U. S., 14 Okla. 7, 76 Pac. 121; Herd *v.* U. S., 13 Okla. 512, 75 Pac. 291; *In re* Ingram, (Okla. 1902) 69 Pac. 868; Ellis *v.* U. S., 11 Okla. 653, 69 Pac. 787; Barclay *v.* U. S., 11 Okla. 503, 69 Pac. 798; Goodson *v.* U. S., 7 Okla. 117, 54 Pac. 423; *Ex p.* Wilson, 140 U. S. 575, 11 S. Ct. 870, 35 L. ed. 513.

Cherokee outlet.— Prior to the organization of Oklahoma territory, jurisdiction of a murder committed in the Cherokee outlet was in the United States district court of Kansas, under the act of 22 U. S. St. at L. 400. U. S. *v.* Soule, 30 Fed. 918. But since the organization of Oklahoma territory that part of the outlet not included therein, but which was attached for judicial purposes to a judicial district of the territory, continued to be Indian country; and the offense of horse-stealing committed therein was within the jurisdiction of the district court, sitting as a court of the United States. U. S. *v.* Pridgeon, 153 U. S. 48, 14 S. Ct. 746, 38 L. ed. 631.

46. Goodson *v.* U. S., 7 Okla. 117, 54 Pac. 423.

47. See Goodson *v.* U. S., 7 Okla. 117, 54 Pac. 423; Shapoonmash *v.* U. S., 1 Wash. Terr. 188; Palmer *v.* U. S., 1 Wash. Terr. 5.

48. John Bad Elk *v.* U. S., 177 U. S. 529, 20 S. Ct. 729, 44 L. ed. 874.

49. **Sufficiency of allegation of venue** see Beebe *v.* U. S., 2 Dak. 292, 11 N. W. 505; U. S. *v.* Ewing, 47 Fed. 809.

50. Lucas *v.* U. S., 163 U. S. 612, 16 S. Ct. 1168, 48 L. ed. 282; Wheeler *v.* U. S., 159 U. S. 523, 16 S. Ct. 93, 40 L. ed. 244; Westmoreland *v.* U. S., 155 U. S. 545, 15 S. Ct. 243, 39 L. ed. 255. But see Herd *v.* U. S., 13 Okla. 512, 75 Pac. 291.

51. State *v.* Williams, 13 Wash. 335, 43 Pac. 15. And see State *v.* Spotted Hawk, 22 Mont. 33, 55 Pac. 1026.

52. *Ex p.* Tiger, 2 Indian Terr. 41, 47 S. W. 304.

53. **Sufficiency of allegations** see Laurent *v.* State, 1 Kan. 313.

Variance.— Under 29 U. S. St. at L. 506, where an indictment alleged that the Indian to whom the liquor was sold was a ward of the government, and the proof showed also that he was an Indian to whom an allotment of land had been made, there was no variance. Mulligan *v.* U. S., 120 Fed. 98, 56 C. C. A. 50.

Names of witnesses.— On an indictment

Indians it is not necessary to name the Indians to whom the liquor was sold.[54] An indictment charging that defendant "did give and sell" intoxicating liquors to an Indian,[55] or did introduce into the Indian country certain "ardent spirits, ale, beer, wine and intoxicating liquors"[56] is not bad as stating two offenses.

d. Bail. The giving and forfeiture of bail in the Indian Territory is governed by the provisions of the Arkansas statute,[57] and the United States statute relating thereto[58] has no force therein.[59]

e. Venue. To entitle an Indian to a change of venue under the act of congress[60] his citizenship in the tribe must be shown.[61]

f. Burden of Proof. Where the jurisdiction depends upon the status of one of the parties, his status is a question of fact for the jury, and the burden of proof is on the government.[62]

g. Appeal.[63] In the prosecution of an Indian for crime, the jurisdiction of the state courts can be challenged for the first time on appeal.[64]

E. Civil Jurisdiction of State and Territorial Courts. State courts have jurisdiction over controversies respecting lands lying within the state and belonging to or claimed by Indians,[65] other than tribal lands.[66] They have jurisdiction generally over actions on contracts made with Indians[67] and actions sounding in tort.[68] The property of a tribal Indian on a reservation does not, on his death, become subject to the state laws of distribution, but descends in accordance with the custom of the tribe; and the state courts have no jurisdiction to appoint an administrator.[69] Nor have they jurisdiction to appoint a guardian for minor children on a reservation.[70]

F. Taxation[71] **— 1. Of Indians.** Although Indians maintaining tribal rela-

for selling liquor to Indians in Alaska, the accused has the right to have indorsed on the indictment only the witnesses examined before the grand jury, this being the provision of the Oregon statute made applicable by the act of congress. Shelp *v.* U. S., 81 Fed. 694, 26 C. C. A. 570.

54. People *v.* Faust, 113 Cal. 172, 45 Pac. 261; State *v.* Jackson, 4 Blackf. (Ind.) 49; Foerster *v.* U. S., 116 Fed. 860, 54 C. C. A. 210; U. S. *v.* Warwick, 51 Fed. 280.

55. Bruguier *v.* U. S., 1 Dak. 5, 46 N. W. 502; Reg. *v.* Monaghan, 34 Can. L. J. 55, 18 Can. L. T. Occ. Notes 45.

56. Parris *v.* U. S., 1 Indian Terr. 43, 35 S. W. 243.

57. 28 U. S. St. at L. 696.

58. U. S. Rev. St. (1878) § 1014 [U. S. Comp. St. (1901) p. 716].

59. Simon *v.* U. S., (Indian Terr. 1903) 76 S. W. 280.

60. 30 U. S. St. at L. 511.

61. Bruner *v.* U. S., (Indian Terr. 1903) 76 S. W. 244.

62. State *v.* Howard, 33 Wash. 250, 74 Pac. 382; Lucas *v.* U. S., 163 U. S. 612, 16 S. Ct. 1168, 48 L. ed. 282; Smith *v.* U. S., 151 U. S. 50, 14 S. Ct. 243, 38 L. ed. 67.

63. **In Canada,** where notice of appeal has been given and security provided within thirty days, it is sufficient to save the appeal, under the Indian Act (Can. Rev. St. c. 43, § 108). Reg. *v.* McGauley, 7 Can. L. T. 395.

64. State *v.* Howard, 33 Wash. 250, 74 Pac. 382.

65. Wright *v.* Marsh, 2 Greene (Iowa) 94; Telford *v.* Barney, 1 Greene (Iowa) 575; Bem-Way-Bin-Ness *v.* Eshelby, 87 Minn. 108, 91 N. W. 291; Bird *v.* Winyer, 24 Wash. 269, 64 Pac. 178.

66. *Ex p.* Forbes, 9 Fed. Cas. No. 4,921, 1 Dill. 363.

67. Brashear *v.* Williams, 10 Ala. 630; Stevenson *v.* Christie, 64 Ark. 72, 42 S. W. 418; Hicks *v.* Ewhartonah, 21 Ark. 106; Stacy *v.* La Belle, 99 Wis. 520, 75 N. W. 60, 67 Am. St. Rep. 879, 41 L. R. A. 419.

Jurisdiction of white persons or their property when residing on a reservation.— Where a treaty provides that the reservation shall never be made a part of any state or territory, the district courts of a territory have no jurisdiction over white persons thereon. Langford *v.* Monteith, 102 U. S. 145, 26 L. ed. 53; Harkness *v.* Hyde, 98 U. S. 476, 25 L. ed. 237. A state has jurisdiction over the property of a white man residing on a reservation with the consent of a tribe, and the entry by an officer to levy an execution is not prohibited by the provision in the enabling act that all Indian lands in the state "shall remain under the absolute jurisdiction and control of the congress of the United States." Stiff *v.* McLaughlin, 19 Mont. 300, 48 Pac. 232.

68. Bates *v.* Printup, 31 Misc. (N. Y.) 17, 64 N. Y. Suppl. 561.

69. U. S. *v.* Shanks, 15 Minn. 369; U. S. *v.* Payne, 27 Fed. Cas. No. 16,014, 4 Dill. 387. And see *supra*, II, C, 3, b. But *compare* Brashear *v.* Williams, 10 Ala. 630; Reed *v.* Brasher, 9 Port. (Ala.) 438.

70. Peters *v.* Malin, 111 Fed. 244; *In re* Lelah-puc-ka-chee, 98 Fed. 429. But see Farrington *v.* Wilson, 29 Wis. 383.

71. **For taxation by Indian tribes or nations** see *supra*, II, C, 3, c; IV, B, 2, b.

tions within the Indian country cannot be taxed by a state,[72] yet where a reservation within a state has been extinguished and the Indians have taken allotments of land in fee simple and become citizens, their personal property is subject to taxation.[73] A state cannot, however, tax personal property furnished to Indian allottees by the government to enable them to maintain themselves while the title to their allotments is held in trust by the United States, nor can it tax improvements on allotted lands so held.[74]

2. Of Other Persons. Unless a reservation is expressly excepted from the jurisdiction of a state when admitted, or of a territory when organized, the property of all persons within the limits of the reservation, except that of Indians, is subject to taxation by the state or territory.[75]

V. INDIAN DEPREDATIONS.

A. Jurisdiction and Liability — 1. In General — a. Jurisdiction. The United States court of claims has jurisdiction over claims against the United States and Indian tribes for depredations committed by members of the tribe upon the property of citizens of the United States.[76] The statute is jurisdictional only, and does not create new liability.[77] Jurisdiction as to depredations committed by others upon the property of certain members of the Pottawatomie nation of Indians is conferred by statute upon the United States court of claims, and under this statute are included depredations by other Indians as well as by whites.[78]

b. Basis of Liability. The liability of the tribe and of the United States for depredations committed by Indians depends upon statutes prior to the jurisdictional act.[79] Such liability may, however, be assumed under a treaty by a tribe to which the statutes would otherwise not apply.[80]

For taxation of tribal lands see *supra*, III, A, 6.

72. State *v.* Ross, 7 Yerg. (Tenn.) 74; Fellows *v.* Deniston, 5 Wall. (U. S.) 761, 18 L. ed. 708; *In re* Kansas Indians, 5 Wall. (U. S.) 737, 18 L. ed. 667; U. S. *v.* Higgins, 103 Fed. 348.

73. Keoknk *v.* Ulam, 4 Okla. 5, 38 Pac. 1080.

74. U. S. *v.* Rickert, 188 U. S. 432, 23 S. Ct. 478, 47 L. ed. 532.

75. Wagoner *v.* Evans, 170 U. S. 588, 18 S. Ct. 730, 42 L. ed. 1154 [*affirming* 5 Okla. 31, 46 Pac. 1117]; Thomas *v.* Gay, 169 U. S. 264, 18 S. Ct. 340, 42 L. ed. 740 [*affirming* 7 Okla. 184, 54 Pac. 444]; Maricopa, etc., R. Co. *v.* Arizona, 156 U. S. 347, 15 S. Ct. 391, 39 L. ed. 447; Utah, etc., R. Co. *v.* Fisher, 116 U. S. 28, 6 S. Ct. 246, 29 L. ed. 542; Truscott *v.* Hurlbut Land, etc., Co., 73 Fed. 60, 19 C. C. A. 374.

Taxation for particular purposes.—The territorial legislature may tax property on a reservation for territorial and court funds, and exempt the same property from taxation for country purposes. Pryor *v.* Bryan, 11 Okla. 357, 66 Pac. 348.

Licensed trader.— Cattle and horses belonging to a licensed Indian trader, kept on an Indian reservation, are not exempt from state taxation, even if kept there with the consent of the Indians. Cosier *v.* McMillan, 22 Mont. 484, 56 Pac. 965; Noble *v.* Amoretti, 11 Wyo. 230, 71 Pac. 879; Moore *v.* Beason, 7 Wyo. 292, 51 Pac. 875. *Contra*, Foster *v.* Blue Earth County, 7 Minn. 140.

76. 26 U. S. St. at L. 851. See Vincent *v.* U. S., 39 Ct. Cl. 456. And see Courts, 11 Cyc. 971, 978.

Construction of statute.—This statute must be strictly construed, both as being in derogation of the sovereignty of the United States and as enforcing an obligation of the wards of the nation. Marks *v.* U. S., 161 U. S. 297, 16 S. Ct. 476, 40 L. ed. 706; Leighton *v.* U. S., 161 U. S. 291, 18 S. Ct. 495, 40 L. ed. 703; Wilson *v.* U. S., 38 Ct. Cl. 6. It was not, however, the intention of congress to impose technical defenses, but rather that the claims should be considered on their merits. Brown *v.* U. S., 32 Ct. Cl. 432. The claims are not gratuities, but legal demands. McKinzie *v.* U. S., 34 Ct. Cl. 278.

77. Brown *v.* U. S., 32 Ct. Cl. 432; Welch *v.* U. S., 32 Ct. Cl. 106; Love *v.* U. S., 29 Ct. Cl. 332.

78. U. S. *v.* Navarre, 173 U. S. 77, 19 S. Ct. 326, 43 L. ed. 620.

79. 12 U. S. St. at L. 120; U. S. Rev. St. (1878) § 2156. And see Corralitos Stock Co. *v.* U. S., 178 U. S. 280, 20 S. Ct. 941, 44 L. ed. 1069 [*affirming* 33 Ct. Cl. 342]; Welch *v.* U. S., 32 Ct. Cl. 106; Garrison *v.* U. S., 30 Ct. Cl. 272.

80. Pino *v.* U. S., 38 Ct. Cl. 64; De Baca *v.* U. S., 37 Ct. Cl. 482.

A treaty obligation to cease all hostilities against the United States is not an obligation to pay for damage by individual depredators. Leighton *v.* U. S., 29 Ct. Cl. 288.

Delivery of offender as substitute for indemnity.— The making of treaties with thirteen of the principal tribes in 1867–1868, whereby the election was given them to sur-

c. Amnesty. A general amnesty declared in a treaty bars the prosecution of a claim for a prior depredation committed by members of the tribe.[81]

2. Nature of Depredations — a. In General. A depredation, within the meaning of the statute, is a voluntary and wilful act; and where there was neither malice nor gross negligence on the part of the Indians causing the damage there can be no recovery.[82] The term "depredation" involves one or more of the following conditions: Force, trespass, violence, a physical taking by force, or destruction.[83] No remedy is afforded for the conversion of property not in the legal possession of the owner or his agent;[84] nor for the acts of Indians done under the direction of an officer of the United States.[85]

b. Property Losses Only. The statute contemplates indemnity only for property taken or destroyed. It does not include compensation for consequential damages,[86] or for personal injuries.[87]

3. Place of Depredation. The offense must have been committed within the territorial limits of the United States,[88] and, if within the Indian country, upon the property of one who was lawfully there.[89]

4. Limitations. All limitations prescribed by previous statutes are waived. Claims must be filed within three years from the date of the statute; but no claim is to be considered which accrued after the date of the passage of the act.[90] A claim accruing prior to July 1, 1865, is barred, unless it has been presented, with evidence to support it, before the date of the jurisdictional act.[91]

B. Parties — 1. Claimants — a. In General. The Indian Depredation Act authorizes an action by, and judgment for, the owner of property taken or destroyed.[92]

render the wrong-doer or to reimburse the injured party, was intended to be the institution of a new policy; but that policy was never instituted in fact. The wrong-doer was never demanded as provided by the treaty, and no tribe ever offered or refused to surrender one. Therefore it must be inferred that that provision of the treaties has been abandoned by both parties, and it is not necessary to show that a demand was made upon the tribe, in order to establish liability. U. S. *v.* Hood, 172 U. S. 641, 19 S. Ct. 882, 43 L. ed. 1181; U. S. *v.* Kemp, 169 U. S. 733, 18 S. Ct. 948, 42 L. ed. 1215; Brown *v.* U. S., 32 Ct. Cl. 432.

81. Garrison *v.* U. S., 30 Ct. Cl. 272.

82. Davidson *v.* U. S., 34 Ct. Cl. 169; Jaeger *v.* U. S., 33 Ct. Cl. 214, 29 Ct. Cl. 172.

83. Ayres *v.* U. S., 35 Ct. Cl. 26.

Delivery of goods under duress.— Where the chief of a large body of Indians demanded possession of certain supplies from a few whites, the transfer will be deemed to have been made under duress, and to constitute a depredation. McKinzie *v.* U. S., 34 Ct. Cl. 278.

84. Ayres *v.* U. S., 35 Ct. Cl. 26.

85. Wilson *v.* U. S., 38 Ct. Cl. 6; Davidson *v.* U. S., 34 Ct. Cl. 169.

86. Davidson *v.* U. S., 34 Ct. Cl. 169; Swope *v.* U. S., 33 Ct. Cl. 223; Price *v.* U. S., 33 Ct. Cl. 106; Brice *v.* U. S., 32 Ct. Cl. 23.

87. Swope *v.* U. S., 33 Ct. Cl. 223; Friend *v.* U. S., 29 Ct. Cl. 425.

88. Corralitos Co. *v.* U. S., 178 U. S. 280, 20 S. Ct. 941, 44 L. ed. 1069 [*affirming* 33 Ct. Cl. 342].

The Kickapoo Indians were liable for depredations committed by them in the United States while they were temporarily residing in Mexico. Lowe *v.* U. S., 37 Ct. Cl. 413.

89. McCoy *v.* U. S., 38 Ct. Cl. 163; Welch *v.* U. S., 32 Ct. Cl. 106.

Established trail.— One who is traveling with his property over a lawfully established trail through the Indian Territory is entitled to recover for a depredation committed upon his property. U. S. *v.* Andrews, 179 U. S. 96, 21 S. Ct. 46, 45 L. ed. 103; Merchant *v.* U. S., 35 Ct. Cl. 403.

Where a person occupies the public domain and builds thereon with material obtained therefrom, he will not be regarded as a trespasser; and he may recover for such improvements if destroyed by Indians, but not for the value of the material. Osborn *v.* U. S., 33 Ct. Cl. 304.

90. 26 U. S. St. at L. 852. And see Tryon *v.* U. S., 32 Ct. Cl. 425.

91. Nesbitt *v.* U. S., 186 U. S. 153, 22 S. Ct. 805, 46 L. ed. 1100; Weston *v.* U. S., 29 Ct. Cl. 420. And see Barrow *v.* U. S., 30 Ct. Cl. 54.

Evidence as to claim and presentation.— Where a claim was presented to an Indian agent or subagent it was his duty to report it to his superior officer, and to submit the claim to the Indians in council. Where no records of his office can be found, the court will consider other evidence of presentation. Stevens *v.* U. S., 34 Ct. Cl. 244. The claimant's own sworn declaration filed in the interior department is not sufficient to take the case out of the bar of the statute; nor the signatures of attesting witnesses who do not state that they know the facts; nor the hearsay affidavit of one witness. Nesbitt *v.* U. S., 186 U. S. 153, 22 S. Ct. 805, 46 L. ed. 1100; Butler *v.* U. S., 38 Ct. Cl. 167; Weston *v.* U. S., 29 Ct. Cl. 420.

92. De Jaramillo *v.* U. S., 37 Ct. Cl. 208, holding that where a contract *in partido*

b. Citizenship. The claimant must have been a citizen of the United States at the time of the depredation.[93] The primary declaration of intention to become a citizen is not sufficient, although naturalization was afterward completed.[94]

c. Partners. The interests of partners are separable under the statute, and a partner who was a citizen may maintain suit for his interest, although the other partners were aliens.[95] Where suit is brought for the same property by a surviving partner and the heirs of the deceased partner, the surviving partner is entitled to recover for the whole amount.[96]

d. New Parties by Amendment. When an action arising from the loss of partnership property has been erroneously brought by one partner in his own name, the other partners may come in by amendment, although the time for filing new claims has expired.[97] A claim "presented to the court by petition" as required by statute, within the jurisdictional period, by an attorney in ignorance of the death of the party in whose favor the claim existed, is not a cause pending and cannot be used as a basis for reviving the case in the name of the administrator after the expiration of the jurisdictional period. The common-law rule that a suit begun in the name of a dead man is a nullity is applicable to cases under the Indian Depredation Act.[98] Where an Indian depredation suit was instituted in due time by the children of a deceased owner, they being the parties really in interest, but not authorized by the law of the state in which they resided, to maintain an action, the administrator of the estate may be substituted, at their consent, as party plaintiff, after the jurisdictional period has expired.[99]

2. Defendants — a. Indians — (i) *In General.* The Indian tribe, members of which are charged with the commission of a depredation, is a necessary party to the suit.[1] Where, however, the tribe is unknown, suit may be maintained against the United States alone.[2] Where there is no tribal organization there is no liability under the statute.[3]

(ii) *Band, Tribe, or Nation* — (A) *In General.* The suit is to be brought against the "band, tribe or nation"[4] to which the depredating Indians belonged.

in New Mexico provided that at the end of five years double the number of cattle delivered should be returned, the title passed and the party in possession was the owner within the meaning of the statute.

93. Contzen *v.* U. S., 179 U. S. 191, 45 L. ed. 148 [*affirming* 33 Ct. Cl. 475]; Yerke *v.* U. S., 173 U. S. 439, 19 S. Ct. 441, 43 L. ed. 760; Johnson *v.* U. S., 160 U. S. 546, 16 S. Ct. 377, 40 L. ed. 529 [*affirming* 29 Ct. Cl. 1]; Valk *v.* U. S., 29 Ct. Cl. 62 [*affirmed* in 168 U. S. 703, 18 S. Ct. 949, 42 L. ed. 1211].

A corporation organized under the laws of a state is a citizen of the United States within the meaning of the statute. U. S. *v.* Northwestern Express, etc., Co., 164 U. S. 686, 17 S. Ct. 206, 41 L. ed. 599.

Squaw man.— One who marries an Indian woman and is domiciled, with his property, among the Indians, cannot recover for a depredation committed upon his property. Janis *v.* U. S., 32 Ct. Cl. 407.

Citizenship acquired under the act admitting Nebraska into the Union does not relate back to the date of the enabling act. Hosford *v.* U. S., 29 Ct. Cl. 42.

94. Yerke *v.* U. S., 173 U. S. 439, 19 S. Ct. 441, 43 L. ed. 760; Johnson *v.* U. S., 160 U. S. 546, 16 S. Ct. 377, 40 L. ed. 529 [*affirming* 29 Ct. Cl. 1].

95. Rhine *v.* U. S., 173 U. S. 439, 19 S. Ct. 441, 43 L. ed. 760; Johnson *v.* U. S., 160 U. S. 546, 16 S. Ct. 377, 40 L. ed. 529 [*affirming* 29 Ct. Cl. 1].

96. McKinzie *v.* U. S., 34 Ct. Cl. 278. And see Labadie *v.* U. S., 33 Ct. Cl. 476.

97. Garcia *v.* U. S., 37 Ct. Cl. 243.

98. Gallegos *v.* U. S., 39 Ct. Cl. 86.

99. Davenport *v.* U. S., 31 Ct. Cl. 430.

1. U. S. *v.* Martinez, 195 U. S. 469, 25 S. Ct. 80, 49 L. ed. 282; Dobbs *v.* U. S., 33 Ct. Cl. 308; Woolverton *v.* U. S., 29 Ct. Cl. 107.

Service upon defendant Indians is unnecessary.— They are in court through the service of the petition upon the attorney-general. Jaeger *v.* U. S., 27 Ct. Cl. 278.

2. Gorham *v.* U. S., 29 Ct. Cl. 97 [*affirmed* in 165 U. S. 316, 17 S. Ct. 382, 41 L. ed. 729].

3. Bell *v.* U. S., 39 Ct. Cl. 350.

4. Nation, tribe, and band distinguished.— The word "nation," as applied to Indians, indicates little more than a large tribe or a group of affiliated tribes possessing a common government, language, or racial origin. By a "tribe" we understand a body of Indians of the same or a similar race, united in a community under one leadership or government, and inhabiting a particular, although sometimes ill-defined, territory. A "band" is a company of Indians not necessarily, although often, of the same race or tribe, but united under the same leadership in a common design. How large a company must be to constitute a band it is unnecessary to decide. It may be doubtful whether it requires more than independence of ac-

In construing this provision the court will recognize such subdivisions of Indians as are indicated by treaty,[5] by act of congress,[6] by executive recognition,[7] or as have been adopted by the Indians themselves.[8] If a suit is commenced against a tribe, all the separate bands composing that tribe are in court, and judgment may be rendered against the particular band responsible for the depredation, or against the tribe, if the particular band to which the depredators belonged cannot be identified.[9]

(B) *Amity* — (1) IN GENERAL. The court is without jurisdiction, and there can be no recovery under the statute, unless the band, tribe, or nation to which the depredators belonged was in amity with the United States at the date of the depredation.[10] An engagement by treaty to pay for depredations committed by members of the tribe does not extend to acts of war committed with the sanction of the tribe.[11]

(2) WHAT CONSTITUTES. The presumption of amity arising from the existence of a treaty, or its continued recognition by the officers of Indian affairs, is not conclusive upon the court.[12] The inquiry is whether the tribe was in a state of actual peace with the United States.[13] Actual engagements with troops of the United States are not necessary.[14] The fact that a band or tribe is engaged in general hostilities with settlers is sufficient to establish a state of war.[15] The

tion, continuity of existence, a common leadership, and concert of action. Montoya *v.* U. S., 180 U. S. 261, 21 S. Ct. 358, 45 L. ed. 521.

A "band" may be composed of Indians of different tribes. Allred *v.* U. S., 36 Ct. Cl. 280; Herring *v.* U. S., 32 Ct. Cl. 536; Montoya *v.* U. S., 32 Ct. Cl. 349 [*affirmed* in 180 U. S. 261, 21 S. Ct. 358, 45 L. ed. 521].

Bands which may be sued see Scott *v.* U. S., 33 Ct. Cl. 486; Conners *v.* U. S., 33 Ct. Cl. 317 [*affirmed* in 180 U. S. 271, 21 S. Ct. 362, 45 L. ed. 525]; McKee *v.* U. S., 33 Ct. Cl. 99; Herring *v.* U. S., 32 Ct. Cl. 536; Montoya *v.* U. S., 32 Ct. Cl. 349 [*affirmed* in 180 U. S. 261, 21 S. Ct. 358, 45 L. ed. 521]; Woolverton *v.* U. S., 29 Ct. Cl. 107.

5. McKee *v.* U. S., 33 Ct. Cl. 99; Tully *v.* U. S., 32 Ct. Cl. 1; Graham *v.* U. S., 30 Ct. Cl. 318; Woolverton *v.* U. S., 29 Ct. Cl. 107.

6. Graham *v.* U. S., 30 Ct. Cl. 318; Leighton *v.* U. S., 29 Ct. Cl. 288.

7. Tully *v.* U. S., 32 Ct. Cl. 1.

8. Scott *v.* U. S., 33 Ct. Cl. 486; Herring *v.* U. S., 32 Ct. Cl. 536; Montoya *v.* U. S., 32 Ct. Cl. 349; Tully *v.* U. S., 32 Ct. Cl. 1.

9. Tully *v.* U. S., 32 Ct. Cl. 1; Graham *v.* U. S., 30 Ct. Cl. 318.

10. Montoya *v.* U. S., 180 U. S. 261, 21 S. Ct. 358, 45 L. ed. 521; Leighton *v.* U. S., 161 U. S. 291, 16 S. Ct. 495, 40 L. ed. 703 [*affirming* 29 Ct. Cl. 288]; Dobbs *v.* U. S., 33 Ct. Cl. 308; Salois *v.* U. S., 32 Ct. Cl. 68; Tully *v.* U. S., 32 Ct. Cl. 1; Cox *v.* U. S., 29 Ct. Cl. 349; Ross *v.* U. S., 29 Ct. Cl. 176; Marks *v.* U. S., 28 Ct. Cl. 147. And see Valk *v.* U. S., 29 Ct. Cl. 62 [*affirmed* in 168 U. S. 703, 18 S. Ct. 949, 42 L. ed. 1211].

11. Leighton *v.* U. S., 161 U. S. 291, 16 S. Ct. 495, 40 L. ed. 703 [*affirming* 29 Ct. Cl. 288]; Litchfield *v.* U. S., 33 Ct. Cl. 203.

To avoid liability, however, it must be shown that the taking or destruction of property was in the exercise of a belligerent's right to wage war. Love *v.* U. S., 29 Ct. Cl. 332.

12. Marks *v.* U. S., 161 U. S. 297, 16 S. Ct. 476, 40 L. ed. 706 [*affirming* 28 Ct. Cl. 147]; Leighton *v.* U. S., 161 U. S. 291, 16 S. Ct. 495, 40 L. ed. 703 [*affirming* 29 Ct. Cl. 288]; Valk *v.* U. S., 29 Ct. Cl. 62 [*affirmed* in 168 U. S. 703, 18 S. Ct. 949, 42 L. ed. 1211].

Executive or legislative recognition of amity.— The court is concluded by the recognition of a state of amity by the legislative or executive departments of the government, but such recognition to be conclusive must have been contemporaneous. Salois *v.* U. S., 33 Ct. Cl. 326; Conners *v.* U. S., 33 Ct. Cl. 317.

13. Marks *v.* U. S., 161 U. S. 297, 16 S. Ct. 476, 40 L. ed. 706.

The extermination of a band of Indians by the military authorities on the ground that they were escaping prisoners of war refutes the supposition of a preëxisting condition of amity. Conners *v.* U. S., 33 Ct. Cl. 317.

Although escaping from their reservations, Indians are in amity where they make no hostile demonstration; but where their acts are those of a retreating enemy they are not in amity. Dobbs *v.* U. S., 33 Ct. Cl. 308.

14. Allred *v.* U. S., 36 Ct. Cl. 280; Luke *v.* U. S., 35 Ct. Cl. 15; Painter *v.* U. S., 33 Ct. Cl. 114.

15. Montoya *v.* U. S., 180 U. S. 261, 21 S. Ct. 358, 45 L. ed. 521; Marks *v.* U. S., 161 U. S. 297, 16 S. Ct. 476, 40 L. ed. 706.

Engagements with organized settlers.— A band carrying on predatory warfare with the inhabitants of a territory for a series of years, during which battles are fought between the band and organized military forces of the inhabitants, is not in amity with the United States. Herring *v.* U. S., 32 Ct. Cl. 536.

Where every man on one side is ready to kill any man on the other side, and military operations take the place of peaceful intercourse, it is war. Dobbs *v.* U. S., 33 Ct. Cl. 308.

cause or occasion of carrying on hostilities is immaterial as to the question of amity.[16]

(3) Beginning and Termination of Hostilities. No formal declaration is necessary to mark the beginning of an Indian war. It is sufficient that hostilities exist.[17] Amity is restored from the date of any authorized and observed agreement to cease hostilities, although the formal treaty may be of later date.[18]

(4) Liability For Hostile Bands. A tribe in amity with the United States is not responsible for depredations committed by a distinct band previously a part of that tribe, which is at war with the United States;[19] nor for depredations committed by individual members of the tribe who have affiliated with another band or tribe which is at war.[20] But a band which is in amity is liable for depredations committed by its members, although another band of the same tribe be at war.[21]

(iii) *New Parties by Amendment.* A tribe of Indians not named in the the petition cannot be substituted as defendants by amendment after the expiration of the time for filing new petitions; and a petition naming the wrong tribe, or one naming no tribe, must be dismissed if the tribe is known.[22]

b. The United States. The liability of the United States was rescinded by statute in 1859,[23] but was reassumed in certain cases by the jurisdictional act.[24] The United States is solely liable only where the tribe to which the depredating Indians belonged is unknown.[25]

C. Allowed Claims —1. In General. In the case of claims which had been allowed by the secretary of the interior, but not paid, prior to the passage of the jurisdictional act, the claimant is entitled, with the consent of both parties, to a judgment for the amount allowed. The court determines no question applicable to the original controversy, but simply enters judgment upon the award of the secretary.[26]

16. Leighton *v.* U. S., 161 U. S. 291, 16 S. Ct. 495, 40 L. ed. 703; Luke *v.* U. S., 35 Ct. Cl. 15; Painter *v.* U. S., 33 Ct. Cl. 114.

Plunder and robbery.— The fact that the paramount purpose of the band was plunder and robbery and not hostility does not establish a condition of amity. Allred *v.* U. S., 36 Ct. Cl. 280.

17. Marks *v.* U. S., 28 Ct. Cl. 147.

An attack on a military train by Indians does not in itself necessarily imply war, but, taken in connection with prior declarations and subsequent hostile acts, it is sufficient to fix the time when the war began. Carter *v.* U. S., 31 Ct. Cl. 441.

18. Valencia *v.* U. S., 31 Ct. Cl. 388.

On the day of the treaty, although there may have been a collision between the troops and the Indians, the tribe must be held to have been in amity. Ashbaugh *v.* U. S., 35 Ct. Cl. 554.

Separate treaties with bands.—Where treaties of peace were made with several different bands, the whole constituting the Sioux nation, the relation of amity began with each band on the day the treaty was signed by that band; and the amity of the Sioux nation dates from the day when the last treaty was signed. Litchfield *v.* U. S., 33 Ct. Cl. 203.

19. Conners *v.* U. S., 180 U. S. 271, 21 S. Ct. 362, 45 L. ed. 525 [*affirming* 33 Ct. Cl. 317]; Scott *v.* U. S., 33 Ct. Cl. 486; Dobbs *v.* U. S., 33 Ct. Cl. 308; Tully *v.* U. S., 32 Ct. Cl. 1; Woolverton *v.* U. S., 29 Ct. Cl. 107.

Geronimo's band of Apaches in 1886, although consisting of but few men, was recognized by the government as a military entity capable of surrendering as prisoners of war. It constituted a hostile band and there can be no recovery for depredations committed by its members. Scott *v.* U. S., 33 Ct. Cl. 486.

A band of disaffected Indians from different tribes, confederated for the purpose of hostility against the United States without the consent of their respective tribes, and maintaining that status for several years, constituted a band within the meaning of the statute, and there can be no recovery for depredations committed by its members while the hostility continued. Montoya *v.* U. S., 32 Ct. Cl. 349.

20. Conners *v.* U. S., 180 U. S. 271, 21 S. Ct. 362, 45 L. ed. 525 [*affirming* 33 Ct. Cl. 317]; Montoya *v.* U. S., 180 U. S. 261, 21 S. Ct. 358, 45 L. ed. 521 [*affirming* 32 Ct. Cl. 349].

21. Salois *v.* U. S., 33 Ct. Cl. 326.

22. U. S. *v.* Martinez, 195 U. S. 469, 25 S. Ct. 80, 49 L. ed. 282.

23. 11 U. S. St. at L. 388. And see Love *v.* U. S., 29 Ct. Cl. 332.

24. 26 U. S. St. at L. 851. And see Love *v.* U. S., 29 Ct. Cl. 332; Woolverton *v.* U. S., 29 Ct. Cl. 107.

25. U. S. *v.* Martinez, 195 U. S. 469, 25 S. Ct. 80, 49 L. ed. 282; U. S. *v.* Gorham, 165 U. S. 316, 17 S. Ct. 382, 41 L. ed. 729 [*affirming* 29 Ct. Cl. 97]; Garrison *v.* U. S., 30 Ct. Cl. 272; Woolverton *v.* U. S., 29 Ct. Cl. 107.

26. Price *v.* U. S., 33 Ct. Cl. 106; Hyne *v.* U. S., 27 Ct. Cl. 113.

2. Basis of Allowance. An allowance upon which judgment can be rendered under this provision of the statute must have been made by the secretary under the provisions of the act of 1885,[27] and his jurisdiction under that act extended only to cases in which the tribe was liable under a treaty.[28] Such liability arises only from an express undertaking to pay for depredations; a general stipulation to keep the peace did not authorize the secretary to make awards.[29]

3. Effect of Reopening. If either party elects to reopen the award, the whole case is thereby reopened, and must be tried *de novo*.[30] The party electing to reopen assumes the burden of proof.[31]

D. Evidence — 1. In General. The claimant must establish his case by competent and sufficient evidence. If the attorney-general fails to plead, the claimant is not entitled to judgment by default.[32] *Ex parte* affidavits filed with the claim in the interior department are competent evidence under the statute, but they are received with caution and are entitled to little weight.[33] Where the claimant has delayed for a long period before filing his claim, the court will not

Effect of allowance.— The allowance by the secretary has not the sanctity of a judicial finding, binding upon the rights of the parties. Its only effect is that where made with authority it may be made, by the consent of both parties, the basis of a judgment. Crow *v.* U. S., 32 Ct. Cl. 16.

When the claimant has accepted payment of the amount allowed by the secretary, although it was less than the amount claimed, he cannot maintain suit in the court of claims for the remainder. Brice *v.* U. S., 32 Ct. Cl. 23.

Reopening claim.— When defendants have not signified their election whether they will reopen the case, a motion for judgment on the secretary's award is premature. Mitchell *v.* U. S., 27 Ct. Cl. 316. When both parties have elected not to reopen and submitted the case to the court, it will not be remanded for the purpose of argument. Wynn *v.* U. S., 29 Ct. Cl. 15.

Jurisdiction cannot be conferred by consent, and the attorney-general's election not to reopen does not estop him from moving for a new trial on grounds going to the jurisdiction of the court. McCollum *v.* U. S., 33 Ct. Cl. 469.

27. 23 U. S. St. at L. 376. And see Hegwer *v.* U. S., 30 Ct. Cl. 405.

What constitutes allowance.— A claim allowed under a prior statute, but subsequently reëxamined and allowed under the statutes referred to in the jurisdictional act, is an allowed case. And a claim allowed on the merits, but disallowed because barred, is also an allowed case within the meaning of the law. Mitchell *v.* U. S., 27 Ct. Cl. 316. The transmission of a list of cases, after the passage of the act (March 3, 1885), which had been allowed prior to that date, without reëxamination, was not an allowance under that statute. Buchanan *v.* U. S., 28 Ct. Cl. 127. Where the secretary refers a case to congress without recommendation, the case is not an "allowed" one within the meaning of the statute. Hegwer *v.* U. S., 30 Ct. Cl. 405.

Consequential damages.—The secretary had no power under this statute to allow a claim for consequential damages. Brice *v.* U. S., 32 Ct. Cl. 23.

28. Moore *v.* U. S., 32 Ct. Cl. 593; Crow *v.* U. S., 32 Ct. Cl. 16; Labadi *v.* U. S., 31 Ct. Cl. 205.

Where a tribe was not identified, the secretary could make no allowance. Price *v.* U. S., 28 Ct. Cl. 422.

29. Crow *v.* U. S., 32 Ct. Cl. 16; Mares *v.* U. S., 29 Ct. Cl. 197.

Where an award was made against two tribes, and the secretary had jurisdiction as to one but not as to the other, judgment will be rendered against the former. Crow *v.* U. S., 32 Ct. Cl. 16.

30. Leighton *v.* U. S., 161 U. S. 291, 16 S. Ct. 495, 40 L. ed. 703 [*affirming* 29 Ct. Cl. 288]; Cox *v.* U. S., 29 Ct. Cl. 349.

Defendants may demur to the petition, or file a plea of set-off, without electing to reopen. Price *v.* U. S., 33 Ct. Cl. 106; Labadie *v.* U. S., 32 Ct. Cl. 368, 31 Ct. Cl. 436.

31. Montoya *v.* U. S., 32 Ct. Cl. 71; Cox *v.* U. S., 29 Ct. Cl. 349.

New evidence not necessary.— The statute does not imply that the party assuming the burden of proof must introduce new and additional evidence. Sufficient proof may be found in the record. But the court will not lightly disturb the award of the secretary; and will not take up conflicting evidence which was before the secretary and from it draw conclusions different from those reached by him. Price *v.* U. S., 33 Ct. Cl. 106; Montoya *v.* U. S., 32 Ct. Cl. 71; Woolverton *v.* U. S., 29 Ct. Cl. 107.

When the allowance was made without authority, defendants are not required to reopen the case and assume the burden of proof. Labadie *v.* U. S., 31 Ct. Cl. 205; Mares *v.* U. S., 29 Ct. Cl. 197.

32. King *v.* U. S., 31 Ct. Cl. 304.

The examination of the claimant under oath at the instance of the attorney-general, as provided by U. S. Rev. St. (1878) § 1080 [U. S. Comp. St. (1901) p. 743] is applicable to Indian depredation cases. Truitt *v.* U. S., 30 Ct. Cl. 19.

33. Jones *v.* U. S., 35 Ct. Cl. 36.

render judgment on the unsupported testimony of the parties in interest, nor on the testimony of one witness.[34]

2. OFFICIAL DOCUMENTS. The court of claims may examine official documents on file in any of the departments of the government, or the courts, to determine whether a tribe of Indians was in amity with the United States.[35]

E. Pleadings and Judgment—1. JURISDICTIONAL FACTS. The jurisdictional facts of citizenship of the claimant and amity of defendant Indians are put in issue by a general traverse.[36] If either party asks for a severance of issues, these jurisdictional facts must be first tried and determined.[37]

2. TIME FOR PLEADING. If the attorney-general fails to file a plea within the sixty days prescribed by the statute, it is within the discretion of the court to allow him to file it afterward.[38]

3. JUDGMENT. Where a judgment has been entered against a nation or tribe of Indians, and it appears that the depredation was chargeable to a band, a subdivision of that tribe or nation, the judgment will not be disturbed, but an additional finding will be entered, for the guidance of the executive departments.[39] Where the government recovers a judgment on its counter-claim, the court will not deduct the amount from the judgment rendered against the Indian tribe, but will certify both judgments.[40]

F. New Trial. The statutory provision, authorizing the court to grant a motion for new trial, made by the attorney-general under certain circumstances, within two years after the final disposition of a case, is applicable to Indian depredation claims.[41]

G. Attorney's Fees. There must be a judicial finding and judgment upon the question of attorney's fees in every case. An attorney cannot waive the allowance of fees by the court, unless he waives all compensation from his client.[42] Contracts for attorney's fees made before the passage of the jurisdictional act, in excess of the amount awarded by the court, are void.[43]

INDIA RUBBER. A generic name for gums having the qualities of caoutchouc.[1]

INDICATE. To show;[2] to tend to show.[3]

INDICAVIT. A writ of prohibition, granted a person who is sued in the spiritual court.[4] (See PROHIBITION.)

34. Gossett *v.* U. S., 31 Ct. Cl. 325; King *v.* U. S., 31 Ct. Cl. 304; Stone *v.* U. S., 29 Ct. Cl. 111 [*affirmed* in 164 U. S. 380, 17 S. Ct. 71, 41 L. ed. 477].

35. Collier *v.* U. S., 173 U. S. 79, 19 S. Ct. 330, 43 L. ed. 621.

36. Gamel *v.* U. S., 31 Ct. Cl. 321.

37. Gamel *v.* U. S., 31 Ct. Cl. 321.

38. Labadie *v.* U. S., 31 Ct. Cl. 436.

39. Valencia *v.* U. S., 31 Ct. Cl. 388; Graham *v.* U. S., 30 Ct. Cl. 318.

40. Labadie *v.* U. S., 33 Ct. Cl. 476.

41. U. S. Rev. St. (1878) § 1088 [U. S. Comp. St. (1901) p. 745]; McCollum *v.* U. S., 33 Ct. Cl. 469.

42. Tanner *v.* U. S., 32 Ct. Cl. 192.

Only attorneys who actually appeared in the case can be considered in allowing fees. The court can take no notice of assignees or creditors. Where successive attorneys have appeared at different times, fees will be apportioned. Beddo *v.* U. S., 28 Ct. Cl. 69.

Contracts for fees.—The parties cannot regulate the fees by contract. In fixing the fees under the statute, the court will apportion them according to the actual services performed and their value to the claimant, disregarding contracts. Redfield *v.* U. S., 27 Ct. Cl. 473.

43. Ball *v.* Halsell, 161 U. S. 72, 16 S. Ct. 554, 40 L. ed. 622.

1. Goodyear *v.* Mullee, 10 Fed. Cas. No. 5,579, 3 Fish. Pat. Cas. 420. See also Junge *v.* Hedden, 146 U. S. 233, 238, 13 S. Ct. 88, 36 L. ed. 953.

2. White *v.* State, 111 Ala. 92, 97, 21 So. 330. *Compare*, however, Coyle *v.* Com., 104 Pa. St. 117, 133, where it is said: "Although the words 'show' and 'indicate' are sometimes interchangeable in popular use, they are not always so. The present ordinary use of the words discloses a difference in signification and that difference is perhaps more recognizable, when these terms are applied to the law, or to medical science. 'To show' is to make apparent or clear by evidence, to prove, whilst an 'indication' may be merely a symptom, that which points to, or gives direction to the mind."

3. State *v.* Loveless, 17 Nev. 424, 426, 50 Pac. 1080.

4. Fitzherbert Nat. Brev. p. 70 [*quoted* in State *v.* Christ Church Parish, Mill (S. C.) 55, 63, 12 Am. Dec. 596].

INDICTMENTS AND INFORMATIONS

By Wm. Lawrence Clark* and Donald J. Kiser†

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I. NECESSITY FOR AND FORMS OF ACCUSATION.*

A. In General — 1. NECESSITY FOR FORMAL ACCUSATION. There can be no conviction or punishment for a crime without a formal and sufficient accusation. In the absence thereof a court acquires no jurisdiction whatever, and if it assumes jurisdiction, a trial and conviction are a nullity.[1] The accusation must charge an offense;[2] it must charge the particular offense for which the accused is tried and convicted;[3] and it must be made in the particular form and mode required by law.[4] This is true, not only at common law,[5] but also under constitutional or statutory provisions in all jurisdictions.[6]

2. CONSTITUTIONAL AND STATUTORY PROVISIONS — a. In General. In most jurisdictions, if not in all, a formal accusation, or an accusation in a particular mode or form, is expressly required by constitutional or statutory provisions, or by both, and these provisions must of course be followed.[7] The constitution of the United States declares that "in all criminal prosecutions, the accused shall enjoy the right

1. *Arkansas.*— Mott *v.* State, 29 Ark. 147.
California.— Terrill *v.* Santa Clara County Super. Ct., (1899) 60 Pac. 38, 516.
Idaho.— People *v.* Du Rell, 1 Ida. 44.
Illinois.— Gould *v.* People, 89 Ill. 216.
Indiana.— Riggs *v.* State, 104 Ind. 261, 3 N. E. 886.
Kentucky.— Com. *v.* Adams, 92 Ky. 134, 17 S. W. 276, 13 Ky. L. Rep. 440.
Massachusetts.— Com. *v.* Mahar, 16 Pick. 120.
New York.— People *v.* Campbell, 4 Park. Cr. 386.
North Carolina.— State *v.* Queen, 91 N. C. 659.
South Carolina.— State *v.* Ray, Rice 1, 33 Am. Dec. 90.
Texas.— Hewitt *v.* State, 25 Tex. 722.
Virginia.— Com. *v.* Barrett, 9 Leigh 665; Mackaboy *v.* Com., 2 Va. Cas. 268.
United States.— *Ex p.* Bain, 121 U. S. 1, 7 S. Ct. 781, 30 L. ed. 849.
England.— *Ex p.* Hopkins, 17 Cox C. C. 444, 56 J. P. 262, 61 L. J. Q. B. 240, 66 L. T. Rep. N. S. 53.
See 27 Cent. Dig. tit. "Indictment and Information," § 1 *et seq.* And see CRIMINAL LAW, 12 Cyc. 221.

2. People *v.* Campbell, 4 Park. Cr. (N. Y.) 386; Bradlaugh *v.* Reg., 3 Q. B. D. 607, 14 Cox C. C. 68, 38 L. T. Rep. N. S. 118, 26 Wkly. Rep. 410; *Ex p.* Hopkins, 17 Cox C. C. 444, 56 J. P. 262, 61 L. J. Q. B. 240, 66 L. T. Rep. N. S. 53, holding a conviction bad, where the accusation did not in terms show an offense, although the meaning was understood by the accused and the charge was in a form used time out of mind in the court in which it was made. See also *infra*, V *et seq.*

3. Com. *v.* Adams, 92 Ky. 134, 17 S. W. 276, 13 Ky. L. Rep. 440; State *v.* Queen, 91 N. C. 659. See *infra*, XI, C.
Conviction of offense included in charge see *infra*, XII.

4. See *infra*, I, A, 2; I, B.

5. 4 Blackstone Comm. 301 *et seq.* See also Mackaboy *v.* Com., 2 Va. Cas. 268; *Ex p.* Hopkins, 17 Cox C. C. 444, 56 J. P. 262, 61 L. J. Q. B. 240, 66 L. T. Rep. N. S. 53.

6. See *infra*, I, A, 2; I, B.

7. *Arkansas.*— Mott *v.* State, 29 Ark. 147; Eason *v.* State, 11 Ark. 481.
Florida.— English *v.* State, 31 Fla. 340, 12 So. 689.
Illinois.— Gould *v.* People, 89 Ill. 216.
Indiana.— Butler *v.* State, 113 Ind. 5, 14 N. E. 247; Allstodt *v.* State, 49 Ind. 233.
Missouri.— State *v.* Shortell, 93 Mo. 123, 5 S. W. 691; State *v.* Sebecca, 76 Mo. 55; State *v.* Huddleston, 75 Mo. 667.
Montana.— *In re* Durbon, 10 Mont. 147, 25 Pac. 442.
New Jersey.— State *v.* Quigg, 13 N. J. L. 293.
New York.— People *v.* Campbell, 4 Park. Cr. 386.
Texas.— Prewitt *v.* State, (Cr. App. 1896) 34 S. W. 924; Garza *v.* State, 11 Tex. App. 410; Deon *v.* State, 3 Tex. App. 435.
Virginia.— Mackaboy *v.* Com., 2 Va. Cas. 268.
United States.— *Ex p.* Bain, 121 U. S. 1, 7 S. Ct. 781, 30 L. ed. 849; U. S. *v.* Rounsavel, 27 Fed. Cas. No. 16,199, 2 Cranch C. C. 133.
See 27 Cent. Dig. tit. "Indictment and Information," § 1 *et seq.*
An "accusation in writing" required by statute is essential. State *v.* Quigg, 13 N. J. L. 293.
Necessity for particular forms of accusation see *infra*, I, B.

* Sections I-IV by Wm. Lawrence Clark.

to . . . be informed of the nature and cause of the accusation,"[8] and there are similar provisions in the state constitutions.[9] There are also provisions in both the federal and state constitutions against depriving any person of life, liberty, or property without due process of law.[10] Under these provisions the respective legislatures can neither dispense altogether with the necessity for a formal accusation, nor, by prescribing a particular form or undertaking to do away with the necessity for particular allegations, render sufficient an accusation which fails to charge the offense for which the accused is tried or fails to set it forth with such certainty as is reasonably necessary to inform him of the nature and cause of the accusation.[11] In many jurisdictions the constitution also provides that offenses, or offenses of a particular grade or class, shall be prosecuted by a particular form of accusation, and in such cases a prosecution in any other mode, even with legislative sanction, is a nullity.[12] Subject to these restrictions, however, it is within the power of the legislature to prescribe the mode and form of accusation in criminal cases, although in doing so it may depart from the mode or form prescribed by the common law.[13]

b. Retrospective Laws. Constitutional and statutory provisions prescribing or changing the mode of prosecution in criminal cases apply to crimes committed

8. U. S. Const. Amendm. 6.

9. See the various state constitutions.

10. Due process of law see CONSTITUTIONAL LAW, 8 Cyc. 1087, 1089, 1090.

11. *Indiana.*— Riggs *v.* State, 104 Ind. 261, 3 N. E. 886; McLaughlin *v.* State, 45 Ind. 338.

Iowa.— Santo *v.* State, 2 Iowa 165, 63 Am. Dec. 487.

Maine.— State *v.* Mace, 76 Me. 64; State *v.* Learned, 47 Me. 426.

Massachusetts.— Com. *v.* Harrington, 130 Mass. 35; Jones *v.* Robbins, 8 Gray 329.

Mississippi.—Blumenberg *v.* State, 55 Miss. 528; Newcomb *v.* State, 37 Miss. 383; Murphy *v.* State, 24 Miss. 590, 28 Miss. 637.

Missouri.— State *v.* Fleming, 117 Mo. 377, 22 S. W. 1024; State *v.* Terry, 109 Mo. 601, 19 S. W. 206; State *v.* Reynolds, 106 Mo. 146, 17 S. W. 322; State *v.* Meyers, 99 Mo. 107, 12 S. W. 516.

New Hampshire.— State *v.* Ray, 63 N. H. 406, 56 Am. Rep. 529.

New Jersey.— State *v.* Startup, 39 N. J. L. 432.

New York.— People *v.* Stark, 136 N. Y. 538, 32 N. E. 1046; People *v.* Dumar, 106 N. Y. 502, 13 N. E. 325.

Ohio.— Williams *v.* State, 35 Ohio St. 175.

Texas.— Hewitt *v.* State, 25 Tex. 722.

Vermont.— State *v.* Comstock, 27 Vt. 553.

See also *infra*, V, A, 2, 3.

12. *Arkansas.*— Mott *v.* State, 29 Ark. 147; Eason *v.* State, 11 Ark. 481.

Montana.— State *v.* Kingsly, 10 Mont. 537, 26 Pac. 1066.

New Jersey.— State *v.* Startup, 39 N. J. L. 423.

New York.— People *v.* Campbell, 4 Park. Cr. 386.

Ohio.— U. S. *v.* Campbell, Tapp. 61.

Texas.— Hewitt *v.* State, 25 Tex. 722.

See 27 Cent. Dig. tit. "Indictment and Information," § 4 *et seq.* And see *infra*, I, B.

13. *Alabama.*— Witt *v.* State, 130 Ala. 129, 30 So. 473; Noles *v.* State, 24 Ala. 672.

California.— People *v.* Campbell, 59 Cal. 243, 43 Am. Rep. 257.

Colorado.— *In re* Dolph, 17 Colo. 35, 28 Pac. 470; *In re* Creation of New Counties, 9 Colo. 624, 21 Pac. 472.

Florida.— English *v.* State, 31 Fla. 340, 12 So. 689.

Illinois.— Morton *v.* People, 47 Ill. 468.

Louisiana.— State *v.* Noble, 20 La. Ann. 325; State *v.* Gutierrez, 15 La. Ann. 190.

Maine.—State *v.* Corson, 59 Me. 137; State *v.* Learned, 47 Me. 426.

Maryland.— *In re* Glenn, 54 Md. 572.

Mississippi.— Newcomb *v.* State, 37 Miss. 383.

Missouri.— State *v.* Morgan, 112 Mo. 202, 20 S. W. 456; State *v.* Berlin, 42 Mo. 572; State *v.* Ebert, 40 Mo. 186; State *v.* Cowan, 29 Mo. 330.

Montana.— State *v.* Stickney, 29 Mont. 523, 75 Pac. 201; State *v.* Geddes, 22 Mont. 68, 55 Pac. 919.

North Carolina.— State *v.* Thornton, 136 N. C. 610, 48 S. E. 602.

Ohio.— Williams *v.* State, 35 Ohio St. 175; Wolf *v.* State, 19 Ohio St. 248.

Oregon.— State *v.* Guglielmo, (1905) 79 Pac. 577, 80 Pac. 103.

Pennsylvania.— Cathcart *v.* Com., 37 Pa. St. 108.

Rhode Island.— State *v.* Beswick, 13 R. I. 211, 43 Am. Rep. 26.

Vermont.— State *v.* Leach, 77 Vt. 166, 59 Atl. 168; State *v.* Hodgson, 66 Vt. 134, 28 Atl. 1089; State *v.* Comstock, 27 Vt. 553.

Wisconsin.— *In re* Bergin, 31 Wis. 383; Rowan *v.* State, 30 Wis. 129, 11 Am. Rep. 559.

Wyoming.— *In re* Boulter, 5 Wyo. 329, 40 Pac. 520; *In re* Wright, 3 Wyo. 478, 27 Pac. 565, 31 Am. St. Rep. 94, 13 L. R. A. 748.

See 27 Cent. Dig. tit. "Indictment and Information," § 4 *et seq.* And see *infra*, I, B, 2, e, (II), (B); V, A, 2, 3.

before their adoption or enactment, if such appears to be the intention, and if such a construction does not violate the prohibition of the federal constitution against *ex post facto* laws; but not otherwise.[14]

c. **Whether Constitutional Provisions Are Self-Executing.** Constitutional provisions requiring or authorizing a particular form or mode of accusation in criminal prosecutions are usually self-executing.[15] Sometimes, however, such provisions cannot become operative until a statute has been enacted to carry them into effect.[16]

3. **Consent, Waiver, and Estoppel.** According to the weight of authority, the absence of an accusation in the form prescribed by the constitution or statute cannot be cured, so as to confer jurisdiction and validate a conviction, by consent, waiver, or estoppel on the part of the accused, or by stipulation on the part of his counsel.[17]

4. **Prosecution in Moot Form.** A defendant cannot frame the indictment or other accusation under which the prosecution is had and thus present questions for determination in moot form.[18]

B. Particular Forms of Accusation — 1. In General. The particular forms or modes of accusation now recognized are: (1) Indictment or presentment by a grand jury;[19] (2) information by the public prosecutor on behalf of the state;[20] (3) complaint or affidavit by a private individual;[21] and (4) coroner's inquisition.[22] Formerly there were certain other modes of accusation which are now obsolete.[23]

14. People *v.* Campbell, 59 Cal. 243, 43 Am. Rep. 257; State *v.* Kyle, 166 Mo. 287, 65 S. W. 763, 56 L. R. A. 115; State *v.* Kingsly, 10 Mont. 537, 26 Pac. 1066; State *v.* Richardson, 47 S. C. 166, 25 S. E. 220, 35 L. R. A. 238; *In re* Wright, 3 Wyo. 478, 27 Pac. 565, 31 Am. St. Rep. 94, 13 L. R. A. 748. See Constitutional Law, 8 Cyc. 1033, and cases there cited.

15. State *v.* Kyle, 166 Mo. 287, 65 S. W. 763, 56 L. R. A. 115 (constitutional provision that no person shall be prosecuted for a felony or misdemeanor otherwise than by indictment or information, which shall be concurrent remedies); Davis *v.* Burke, 179 U. S. 399, 21 S. Ct. 210, 45 L. ed. 399 (provision for prosecution on an information by the public prosecutor after examination and commitment by a magistrate). See also Constitutional Law, 8 Cyc. 756.

16. *In re* Durbon, 10 Mont. 147, 25 Pac. 442; State *v.* Ah Jim, 9 Mont. 167, 23 Pac. 76, both holding that Mont. Const. art. 3, § 8, providing that all criminal actions shall be prosecuted by information after examination and commitment by a magistrate, or after leave granted by the court, or by indictment, was not self-executing in so far as it authorized prosecution by information, but could become operative only after the enactment by the legislature of a statute defining the details affecting the exercise, jurisdiction, and limitations of the procedure, and the rights and pleadings of the state and the accused, so as to enable the courts to carry the provision into effect; and that, in the absence of such a statute, a conviction of a felony on a prosecution by information was void.

17. *California.*— People *v.* Granice, 50 Cal. 447.

Indiana.— See State *v.* Burnett, 119 Ind. 392, 21 N. E. 972.

Kentucky.— Com. *v.* Adams, 92 Ky. 134, 17 S. W. 276, 13 Ky. L. Rep. 440.

Mississippi.— Newcomb *v.* State, 37 Miss. 383.

New Hampshire.— Batchelder *v.* Currier, 45 N. H. 460.

New York.— People *v.* Campbell, 4 Park. Cr. 386, 387, holding a conviction a nullity for want of jurisdiction, where the law required the offense to be prosecuted by indictment, and it was attempted to remedy a fatal defect in the indictment by a stipulation that the case should be tried as if the omitted allegation had been inserted; the court saying: "This court cannot acquire jurisdiction to try an offence by consent, nor can its jurisdiction over an offence be changed by consent so as to embrace any other than that presented by the grand jury, where the action of that body is requisite."

North Carolina.— State *v.* Queen, 91 N. C. 659, holding that one indicted for burglary with intent to commit murder cannot, by consenting to a mistrial and pleading guilty of larceny, be adjudged guilty of larceny.

Tennessee.— Rice *v.* State, 3 Heisk. 215. But see McGinnis *v.* State, 9 Humphr. (Tenn.) 43, 49 Am. Dec. 697.

See also *infra*, I, B, 2, f; and Criminal Law, 12 Cyc. 222.

Contra.— Lavery *v.* Com., 101 Pa. St. 560; State *v.* Faile, 43 S. C. 52, 20 S. E. 798. But see Mills *v.* Com., 13 Pa. St. 627.

Consent to amendment of indictment see *infra*, X, A, 2, a, (III).

18. State *v.* Peel Splint Coal Co., 36 W. Va. 802, 15 S. E. 1000, 17 L. R. A. 385.

19. See *infra*, I, B, 2.

20. See *infra*, I, B, 3.

21. See *infra*, II, B, 4.

22. See *infra*, I, B, 5.

23. **Verdict in civil action.**— Thus at one time there were certain instances in which

2. INDICTMENT AND PRESENTMENT — a. Definition and Nature of Indictment. An indictment is a written accusation of a crime drawn up by the public prosecuting attorney and submitted to the grand jury, and by them found and presented upon oath or affirmation as a true bill.[24] In some states it is substantially so defined by statute.[25] The term, however, is sometimes used in a broader sense, and so as to include other accusations.[26]

a person could be put upon his trial on the verdict of a jury in a civil action, as upon an indictment; as on the verdict in a civil action for taking and carrying away goods, where the jury found that they were taken and carried away feloniously, so that the act constituted larceny; and on a verdict in an action for libel or slander in charging plaintiff with a criminal offense, where defendant pleaded the truth in justification and the jury found the plea to be true. 1 Chitty Cr. L. 164, 165; 2 Hale P. C. 150, 151; 2 Hawkins P. C. c. 25, § 6; Cook *v.* Field, 3 Esp. 133, 6 Rev. Rep. 822; Rex *v.* Jolliffe, 4 T. R. 285.

24. 4 Blackstone Comm. 302; 1 Chitty Cr. L. 162; 2 Hawkins P. C. c. 25, § 1. And see the following cases:

Alabama.— Mose *v.* State, 35 Ala. 421, 425; Ganaway *v.* State, 22 Ala. 772, 777.

Arkansas.— State *v.* Whitlock, 41 Ark. 403, 406; State *v.* Cox, 8 Ark. 436, 442.

California.— *In re* Grosbois, 109 Cal. 445, 42 Pac. 444; People *v.* Tinder, 19 Cal. 539, 81 Am. Dec. 77.

Colorado.— Arapahoe County *v.* Graham, 4 Colo. 201, 202.

Connecticut.— Goddard *v.* State, 12 Conn. 448, 452.

Indiana.— Vanderkarr *v.* State, 51 Ind. 91, 93.

Missouri.— State *v.* Carr, 142 Mo. 607, 610, 44 S. W. 776; *Ex p.* Slater, 72 Mo. 102, 106; State *v.* Grady, 12 Mo. App. 361, 363.

Nevada.— State *v.* Chamberlain, 6 Nev. 257, 260; State *v.* Millain, 3 Nev. 409, 439.

New York.— Mack *v.* People, 82 N. Y. 235, 237; People *v.* Quigg, 59 N. Y. 83, 86; People *v.* Dorthy, 20 N. Y. App. Div. 308, 320, 46 N. Y. Suppl. 970; People *v.* Restenblatt, 1 Abb. Pr. 268, 269.

North Carolina.—State *v.* Morris, 104 N. C. 837, 10 S. E. 454; State *v.* Walker, 32 N. C. 234, 236; State *v.* Tomlinson, 25 N. C. 32, 33; State *v.* Christmas, 20 N. C. 545.

Ohio.— Wolf *v.* State, 19 Ohio St. 248, 255; Lasure *v.* State, 19 Ohio St. 43, 50; Lougee *v.* State, 11 Ohio 68, 71.

South Carolina.—State *v.* Clayton, 11 Rich. 581, 591; State *v.* Collins, 1 McCord 355, 357; State *v.* Ray, Rice 1, 33 Am. Dec. 90.

Tennessee.— Campbell *v.* State, 9 Yerg. 333, 335, 30 Am. Dec. 417.

Texas.— Vanvickle *v.* State, 22 Tex. App. 625, 627, 2 S. W. 642; Williams *v.* State, 12 Tex. App. 395, 399.

Vermont.— *In re* Durant, 60 Vt. 176, 180, 12 Atl. 650; Lincoln *v.* Smith, 27 Vt. 328, 360.

Virginia.— Com. *v.* Christian, 7 Gratt. 631.

West Virginia.— State *v.* Schnelle, 24 W. Va. 767, 774.

United States.— Grin *v.* Shine, 187 U. S. 181, 192, 23 S. Ct. 98, 47 L. ed. 130.

Derivation.— Lord Coke says: "Indictment cometh of the French word *enditer*, and signifieth in law an accusation found upon an inquest of twelve or more upon their oath." 2 Coke Litt. 126*b* [*quoted* in Mose *v.* State, 35 Ala. 421, 425]. See also State *v.* Tomlinson, 25 N. C. 32, 33; Bouvier L. Dict. [*quoted* in Williams *v.* State, 12 Tex. App. 395, 398], where it is said: "This word, indictment, is said to be derived from the old French word *inditer*, which signifies to indicate; to show, or point out. Its object is to indicate the offense charged against the accused."

"Before the grand jury have found the accusation to be true, it is merely a bill," and not an indictment. 1 Chitty Cr. L. 163. And see Arapahoe County *v.* Graham, 4 Colo. 201 (holding that since an indictment is not strictly speaking so called until it has been found a true bill, the provision made in a statute for fees to the district attorney for drawing each "indictment" could not be held to include compensation for drawing bills ignored by the grand jury); State *v.* Tomlinson, 25 N. C. 32; State *v.* Ray, Rice (S. C.) 1, 4, 33 Am. Dec. 90 [*citing* 2 Hawkins P. C. c. 25, § 1].

25. Thus in New York an indictment is defined by statute as "an accusation in writing, presented by a grand jury to a competent court, charging a person with a crime." Code Cr. Proc. § 254. See People *v.* Dumar, 106 N. Y. 502, 509, 13 N. E. 325; Jones *v.* People, 101 N. Y. App. Div. 55, 92 N. Y. Suppl. 275; People *v.* Flaherty, 79 Hun (N. Y.) 48, 50, 29 N. Y. Suppl. 641; People *v.* Stark, 59 Hun (N. Y.) 51, 58, 12 N. Y. Suppl. 688. There are similar statutes in Iowa (Norris' House *v.* State, 3 Greene 513, 517), Kentucky (Blyew *v.* Com., 91 Ky. 200, 15 S. W. 356, 12 Ky. L. Rep. 742), Texas (Hewitt *v.* State, 25 Tex. 722, 726; Vanvickle *v.* State, 22 Tex. App. 625, 2 S. W. 642; Williams *v.* State, 12 Tex. App. 395), and other states.

26. A coroner's inquisition was held to be an "indictment" within the meaning of 24 & 25 Vict. c. 100, § 6, declaring it unnecessary, in an indictment for murder or manslaughter, to set forth the manner in which or the means by which the death was caused. Reg. *v.* Ingham, 5 B. & S. 257, 9 Cox C. C. 508, 10 Jur. N. S. 968, 33 L. J. Q. B. 183, 10 L. T. Rep. N. S. 456, 12 Wkly. Rep. 793, 117 E. C. L. 257.

"Indictment" and "information."— "Indictment" is sometimes used for "information," as in the act of South Carolina of December, 1866 (13 S. C. St. 493), providing

b. Definition and Nature of Presentment. A presentment is the notice taken by a grand jury of an offense from their own knowledge or observation, or of their own motion on information from others, without any bill of indictment having been submitted to them by the public prosecutor.[27] A presentment is regarded, in the practice at common law and under some of the statutes, as nothing more than instructions by the grand jury to the public prosecutor for framing a bill of indictment, which, being prepared by him, is submitted to them and found a true bill.[28] The presentment, merged in the indictment, ceases and becomes extinct, and the indictment becomes the basis of the prosecution.[29] It has been held that the public prosecutor, who is the representative of the sovereign or state, and whose concurrence and coöperation in the prosecution is required, is not bound to submit a bill of indictment, and if he declines to do so the presentment ceases to exist for any purpose.[30] In some of the cases, however, it has been held that a prosecution may be based on the presentment, without any indictment or information; and this is or has been the rule in some states by statute.[31] On the other hand statutes sometimes expressly provide the contrary

that "no presentment of a grand jury shall be necessary in any case" in the district court, "but it shall be the duty of the Attorney-General and solicitors, after enquiring into the facts of each case, to prepare bills of indictment and present the same . . . to the District Judge for his examination, who shall order the same to be docketed for trial, if in his judgment the prosecution thereof be advisable." State *v.* Starling, 15 Rich. (S. C.) 120, 122, holding that the words "bills of indictment" meant "information."

The word "indicted" in U. S. Rev. St. (1878) § 1032 [U. S. Comp. St. (1901) p. 722], authorizing the court to enter a plea of not guilty when defendant stands mute includes a prosecution by information. U. S. *v.* Borger, 7 Fed. 193, 19 Blatchf. 249.

The words "subject to indictment" in a statute declaring that any person violating its provisions shall be subject to indictment do not exclude prosecution by information authorized by a general statute. See *infra*, I, B, 3, b, (II), text and note 97.

"Prosecution" and "indictment" are sometimes used as synonymous. Com. *v.* Haas, 57 Pa. St. 443, in a statute limiting the time for commencing prosecutions.

Libel or slander.— Although a prosecution before a justice of the peace is not in a technical sense an indictment, yet the term "indictment" is used in ordinary conversation and often in judicial opinions to denote any criminal prosecution; and therefore in an action for libel in which it was alleged that defendant had published that plaintiff was under "indictment" for malfeasance in office as justice of the peace, it was held that the allegation was sustained by proof that he had been prosecuted and convicted before a justice of the peace for not paying over an assault and battery fine collected by him as justice, which conviction was afterward affirmed at circuit. Bailey *v.* Kalamazoo Pub. Co., 40 Mich. 251.

27. 4 Blackstone Comm. 301; 1 Chitty Cr. L. 163; 2 Hawkins P. C. c. 25, § 1. And see the following cases:

Arkansas.— State *v.* Whitlock, 41 Ark. 403, 406; State *v.* Cox, 8 Ark. 436, 442.

California.— *In re* Grosbois, 109 Cal. 445, 42 Pac. 444.

Florida.— Collins *v.* State, 13 Fla. 651, 663.

Georgia.— *Ex p.* Chauvin, T. U. P. Charlt. 14.

Nevada.— State *v.* Millain, 3 Nev. 409, 439.

New York.— Mack *v.* People, 82 N. Y. 235, 237; Jones *v.* People, 101 N. Y. App. Div. 55, 92 N. Y. Suppl. 275.

North Carolina.—State *v.* Morris, 104 N. C. 837, 10 S. E. 454; Lewis *v.* Wake County, 74 N. C. 194, 197.

Pennsylvania.— Com. *v.* Green, 126 Pa. St. 531, 17 Atl. 878, 12 Am. St. Rep. 894.

Virginia.— Com. *v.* Christian, 7 Gratt. 631.

United States.— *In re* Charge to Grand Jury, 30 Fed. Cas. No. 18,255, 2 Sawy. 667.

28. Collins *v.* State, 13 Fla. 651; *Ex p.* Chauvin, T. U. P. Charlt. (Ga.) 14; State *v.* Cain, 8 N. C. 352; Com. *v.* Christian, 7 Gratt. (Va.) 631; *In re* Charge to Grand Jury, 30 Fed. Cas. No. 18,255, 2 Sawy. 667; 4 Blackstone Comm. 302; 1 Chitty Cr. L. 163. And see State *v.* Cox, 8 Ark. 436; Jones *v.* People, 101 N. Y. App. Div. 55, 92 N. Y. Suppl. 275; Matter of Gardiner, 31 Misc. (N. Y.) 364, 64 N. Y. Suppl. 760. See also GRAND JURIES, 20 Cyc. 1335, 1336. It was held in Georgia that an indictment founded on a presentment of the grand jury need not be sent again before them for their action upon it. Nunn *v.* State, 1 Ga. 243.

29. Com. *v.* Christian, 7 Gratt. (Va.) 631. See U. S. *v.* Hill, 26 Fed. Cas. No. 15,364, 1 Brock. 156.

30. Com. *v.* Christian, 7 Gratt. (Va.) 631; U. S. *v.* Hill, 26 Fed. Cas. No. 15,364, 1 Brock. 156.

31. State *v.* Hunter, 5 Humphr. (Tenn.) 597; Smith *v.* State, 1 Humphr. (Tenn.) 396; Com. *v.* Towles, 5 Leigh (Va.) 743; Com. *v.* Maddox, 2 Va. Cas. 19.

In Georgia, under the code, all special presentments by the grand jury, charging defendants with violations of the penal laws,

and require that in case of a presentment the prosecuting attorney must prepare a bill, and that it must be found by the grand jury to be a true bill.[32]

c. **When Indictment Will Lie.**[33] At common law an indictment will lie for all treasons, felonies, and misdemeanors.[34] An indictment will also lie for any offense created by statute, whether a felony or merely a misdemeanor,[35] unless the statute points out some other mode of prosecution or proceeding.[36] If a statute pro-

are required to be treated as indictments, and it is provided that the public prosecutor need not frame bills of indictment on such presentments, but may arraign and try defendants on the presentments in like manner as if they were bills of indictment. Code, § 931. This section in effect does away with the distinction between indictments and presentments. Groves *v.* State, 73 Ga. 205; Conner *v.* State, 25 Ga. 515, 71 Am. Dec. 184. The form is the same whether the jury indict or present. Foster *v.* State, 41 Ga. 582. Although an indictment is founded on a presentment, it is sufficient if the jury be impaneled on the indictment alone. Conner *v.* State, 25 Ga. 515, 71 Am. Dec. 184. When an offense is tried upon an indictment founded upon a special presentment of the grand jury, it is not indispensably necessary that the presentment should be read to the jury as a part of the proof in the case. Hatcher *v.* State, 23 Ga. 307. The word "indictment" marked on the special presentment of a grand jury does not change its character as a presentment, and it may be given in evidence as a presentment on the trial of the cause. Ivey *v.* State, 23 Ga. 576.

In New York see Jones *v.* People, 101 N. Y. App. Div. 55, 92 N. Y. Suppl. 275.

32. State *v.* Cain, 8 N. C. 352, holding, under a statute declaring that no person should be arrested or charged before any court on a presentment made by a grand jury before the attorney acting for the state should prepare a bill, and the bill should be found by the grand jury to be a true bill, that where a bill was found by the same grand jury which made the presentment upon the testimony of some of their own body not sworn in court as witnesses, such proceeding was in opposition to the statute, and the indictment should be quashed.

33. Whether a prohibited act is made a crime see CRIMINAL LAW, 12 Cyc. 141, 142.

Indictment to recover damages for death by wrongful act see DEATH, 13 Cyc. 346.

34. 2 Hawkins P. C. c. 25, § 4.

35. 1 Chitty Cr. L. 162. And see the following cases:

California.— *Ex p.* McCarthy, 53 Cal. 412.

Connecticut.—State *v.* Bishop, 7 Conn. 181.

Louisiana.— State *v.* Williams, 7 Rob. 252.

Maryland.— Keller *v.* State, 11 Md. 525, 69 Am. Dec. 226.

Missouri.— State *v.* Bittinger, 55 Mo. 596.

New York.— People *v.* Brown, 16 Wend. 561; People *v.* Stevens, 13 Wend. 341.

South Carolina.— State *v.* Helgen, 1 Speers 310; State *v.* Meyer, 1 Speers 305.

Texas.— Phillips *v.* State, 19 Tex. 158.

Where a statute prohibits an act under a certain penalty, although no mention is made of indictment, a person offending may be indicted and fined to the amount of the penalty, if no other mode of proceeding is prescribed. 1 Chitty Cr. L. 162. And see State *v.* Bishop, 7 Conn. 181; State *v.* Helgen, 1 Speers (S. C.) 310; State *v.* Meyer, 1 Speers (S. C.) 305; and other cases cited *supra*, this note. But if the prohibited act is not made a crime an indictment will not lie. Swan *v.* State, 29 Ga. 616; and CRIMINAL LAW, 12 Cyc. 141, 142.

36. *Connecticut.*— State *v.* Bishop, 7 Conn. 181, holding, however, that where an act not criminal before is prohibited by a substantive clause in a statute, although a special remedy is given in another section, an indictment will lie on the prohibitory clause.

Missouri.— State *v.* Bittinger, 55 Mo. 596; State *v.* Stewart, 47 Mo. 382; State *v.* Corwin, 4 Mo. 609; Journey *v.* State, 1 Mo. 428.

New York.— People *v.* Hislop, 77 N. Y. 331.

Pennsylvania.— Com. *v.* Naylor, 34 Pa. St. 86, violation of Sunday law.

South Carolina.— State *v.* Helgen, 1 Speers 310; State *v.* Meyer, 1 Speers 305; State *v.* Mathews, 2 Brev. 82.

Tennessee.— State *v.* Maze, 6 Humphr. 17.

Texas.— Phillips *v.* State, 19 Tex. 158.

United States.— U. S. *v.* Willis, 28 Fed. Cas. No. 16,728, 1 Cranch C. C. 511.

England.— Rex *v.* Robinson, 2 Burr. 799, 2 Ld. Ken. 513; Rex *v.* Buck, 1 Str. 679; 1 Chitty Cr. L. 162, 163.

Information or complaint.— Where a statute creating an offense points out an information or complaint before a magistrate as the mode of punishment, an indictment will not lie. 1 Chitty Cr. L. 162. See *infra*, this section, text and note 40.

"Bill, plaint, or information."— Under a statute providing for recovery of a fine by "bill, plaint, or information," it has been held that an indictment to recover the same will not lie. State *v.* Corwin, 4 Mo. 609; Journey *v.* State, 1 Mo. 428; State *v.* Mathews, 2 Brev. (S. C.) 82. The contrary was held in State *v.* Helfrid, 2 Nott & M. (S. C.) 233, 10 Am. Dec. 591, on the ground that the word "bill" included a bill of indictment.

Action of debt.— If a statute prescribes a penalty or forfeiture to be recovered by an action of debt, an indictment will not lie. 1 Chitty Cr. L. 162. And see State *v.* Maze, 6 Humphr. (Tenn.) 17. But where a statute declares that persons guilty of certain offenses shall be liable to "all the penalties" imposed by a previous statute, which provides both for a pecuniary penalty and also for indictment, an indictment will lie against persons guilty of offenses under the later

hibits a matter of public grievance or commands a matter of public convenience, all acts or omissions contrary to the prohibition or command, being misdemeanors at common law, are the subject of an indictment, if the statute specifies no other mode of proceeding.[37] If the statute specifies a mode of proceeding other than by indictment, then, if the matter was already an indictable offense at common law, and the statute does not expressly or by necessary implication exclude indictment, the statutory remedy is merely cumulative.[38] Usually an indictment will lie even though an information is also permitted;[39] but sometimes the statutes require certain offenses to be prosecuted by information, or in some other special mode, and an indictment therefor will not lie.[40] In many jurisdictions prosecutions for misdemeanor may either be by indictment or information;[41] and in some jurisdictions the same is true of felonies.[42] The fact that an indictment is found for an offense for which a presentment would lie does not render the indictment bad.[43]

d. When Presentment Will Lie.[44] In some states grand jurors are by statute expressly empowered to make presentments of offenses which are within their own knowledge or observation or are of public notoriety and injurious to the entire community;[45] and in some states they have such power, as at common law, independently of any statute.[46] In other states they have no power to present

statute. Hodgman *v.* People, 4 Den. (N. Y.) 235.

37. Keller *v.* State, 11 Md. 525, 69 Am. Dec. 226; People *v.* Brown, 16 Wend. (N. Y.) 561; Reg. *v.* Hall, L. R. 1 Q. B. 632, 7 B. & S. 642, 12 Jur. N. S. 892, 35 L. J. M. C. 251.

38. Rex *v.* Robinson, 2 Burr. 799, 2 Ld. Ken. 513.

39. *California.*— People *v.* Prather, 134 Cal. 436, 66 Pac. 589, 863; People *v.* Whelan, 117 Cal. 559, 49 Pac. 583; *Ex p.* McCarthy, 53 Cal. 412.

Iowa.— State *v.* Schilling, 14 Iowa 455.

Missouri.— State *v.* Cartee, 48 Mo. 481.

New York.— Hodgman *v.* People, 4 Den. 235.

South Carolina.— State *v.* Helgen, 1 Speers 310; State *v.* Meyer, 1 Speers 305.

See 27 Cent. Dig. tit. "Indictment and Information," § 25.

Where a demurrer to an information is sustained, and the court orders a new information to be filed, defendant may thereafter be prosecuted by indictment. People *v.* Prather, 134 Cal. 436, 66 Pac. 589, 863; People *v.* Whelan, 117 Cal. 559, 49 Pac. 583.

40. *Indiana.*— State *v.* Hailstock, 2 Blackf. 257, common assault.

Iowa.— State *v.* Shawbeck, 7 Iowa 322 (sale of intoxicating liquors); Walters *v.* State, 5 Iowa 507 (minor misdemeanor).

Kansas.— Guy *v.* State, 1 Kan. 448, assault and battery.

Missouri.— State *v.* Ebert, 40 Mo. 186 (gaming); Williams *v.* State, 4 Mo. 480 (minor misdemeanors); State *v.* Ledford, 3 Mo. 102 (common assault).

Pennsylvania.— Com. *v.* Naylor, 34 Pa. St. 86, violation of Sunday law.

Tennessee.— State *v.* Maze, 6 Humphr. 17.

See 27 Cent. Dig. tit. "Indictment and Information," § 26.

Violation of municipal ordinance not indictable.— Com. *v.* Rawson, 183 Mass. 491, 67 N. E. 605; Finnical *v.* Cadiz, 61 Ohio St. 494, 56 N. E. 200. See, generally, MUNICIPAL CORPORATIONS.

41. *Indiana.*— Miller *v.* State, 144 Ind. 401, 44 N. E. 440; Douglass *v.* State, 72 Ind. 385.

Kentucky.— Com. *v.* Watkins, 3 Bibb 21.

Louisiana.— State *v.* Stewart, 47 La. Ann. 410, 16 So. 945; State *v.* Ross, 14 La. Ann. 364.

Massachusetts.— Com. *v.* Waterborough, 5 Mass. 257.

Texas.— Haines *v.* State, 7 Tex. App. 30, keeping open liquor shop on election day.

United States.— *Ex p.* Wilson, 114 U. S. 417, 5 S. Ct. 935, 29 L. ed. 89; U. S. *v.* Mann, 26 Fed. Cas. No. 15,717, 1 Gall. 3.

See 27 Cent. Dig. tit. "Indictment and Information," § 24.

42. State *v.* Miller, 43 Nebr. 860, 62 N. W. 238; Miller *v.* State, 29 Nebr. 437, 45 N. W. 451; Haines *v.* State, 7 Tex. App. 30.

43. Overshiner *v.* Com., 2 B. Mon. (Ky.) 344.

44. Definition and nature of presentment see *supra*, I, B, 2, b.

45. *Georgia.*— *In re* Lester, 77 Ga. 143; Groves *v.* State, 73 Ga. 205 [*overruling* Hawkins *v.* State, 54 Ga. 653].

Louisiana.— State *v.* Richard, 50 La. Ann. 210, 23 So. 331.

Missouri.— State *v.* Terry, 30 Mo. 368.

New York.— See Jones *v.* People, 101 N. Y. App. Div. 55, 92 N. Y. Suppl. 275.

Tennessee.— State *v.* Lewis, 87 Tenn. 119, 9 S. W. 427; State *v.* Lee, 87 Tenn. 114, 9 S. W. 425; Smith *v.* State, 1 Humphr. 396.

See also GRAND JURIES, 20 Cyc. 1335.

Misconduct of public officers is by statute in some states made the subject of presentments by the grand jury. State *v.* Seawell, 64 Ala. 225; Chatham County *v.* Gandry, 120 Ga. 121, 47 S. E. 634; Groves *v.* State, 73 Ga. 205 [*overruling* Hawkins *v.* State, 54 Ga. 653]; Jones *v.* People, 101 N. Y. App. Div. 55, 92 N. Y. Suppl. 275. *Compare* GRAND JURIES, 20 Cyc. 1336.

46. *Maryland.*— Blaney *v.* State, 74 Md. 153, 21 Atl. 547.

Massachusetts.—Com. *v.* Hayden, 163 Mass. 453, 40 N. E. 846, 47 Am. St. Rep. 468, 28

for a crime except by indictment.[47] In some jurisdictions, as has been seen, but not in all, a presentment is not only allowed, but is given the same effect as an indictment, so that the accused may be arraigned and tried thereon, without any indictment being preferred and found.[48]

e. When Indictment or Presentment Is Necessary — (i) *At Common Law.* At common law all offenses above the grade of misdemeanor must be prosecuted by indictment, for it was the policy of the common law that no man should be put upon his trial for felony, for which the punishment was death, until the necessity therefor should first be determined by a grand jury on oath.[49] But in the case of misdemeanors an information would lie and an indictment was not necessary.[50]

(ii) *Statutory and Constitutional Provisions* — (a) *In General.* In some jurisdictions by statute, as at common law,[51] all felonies must be prosecuted by indictment,[52] while misdemeanors may be prosecuted either by indictment or by information.[53] Some of the statutes, however, have departed more or less from the common law, as by requiring misdemeanors to be prosecuted by indictment under certain circumstances;[54] by requiring all criminal offenses or all

L. R. A. 318; Com. *v.* Woodward, 157 Mass. 516, 32 N. E. 939, 34 Am. St. Rep. 302.

Missouri.— State *v.* Terry, 30 Mo. 368, perjury before the grand jury.

North Carolina.— State *v.* Wilcox, 104 N. C. 847, 10 S. E. 453; Lewis *v.* Wake County, 74 N. C. 194.

Pennsylvania.— Com. *v.* Green, 126 Pa. St. 531, 17 Atl. 878, 12 Am. St. Rep. 894 (the grand jury may act upon and make presentment only of such offenses as are of public notoriety and within their own knowledge, such as nuisances, seditions, etc., or such as are given to them in charge by the court or by the district attorney, but in no other cases without a previous examination of the accused before a magistrate); McCullough *v.* Com., 67 Pa. St. 30.

Virginia.— Com. *v.* Towles, 5 Leigh 743; Com. *v.* Maddox, 2 Va. Cas. 19.

See also Grand Juries, 20 Cyc. 1336.

47. *In re* Grosbois, 109 Cal. 445, 42 Pac. 444 (holding that the grand jury has no authority to make a presentment as a mode of charging a person with a public offense, the provisions of the penal code respecting presentments, properly adopted under the former constitution, having been abrogated by the constitution of 1879); Rector *v.* Smith, 11 Iowa 302. See also Collins *v.* State, 13 Fla. 651; Com. *v.* Watkins, 3 Bibb (Ky.) 21.

48. See *supra*, I, B, 2, b.

49. State *v.* Kyle, 166 Mo. 287, 65 S. W. 763, 56 L. R. A. 115; Com. *v.* Barrett, 9 Leigh (Va.) 665; *Ex p.* Wilson, 114 U. S. 417, 5 S. Ct. 935, 29 L. ed. 89; 4 Blackstone Comm. 310; 1 Chitty Cr. L. 844; 2 Hale P. C. 151; 2 Hawkins P. C. c. 26, § 3. See also Matthews *v.* Com., 18 Gratt. (Va.) 989.

50. See the cases cited in the preceding note. See also Com. *v.* Waterborough, 5 Mass. 257; State *v.* Dyer, 67 Vt. 690, 32 Atl. 814; and *infra*, I, B, 3, b, (I).

51. See *supra*, I, B, 2, e, (I).

52. Matthews *v.* Com., 18 Gratt. (Va.) 989; Com. *v.* Barrett, 9 Leigh (Va.) 665.

53. Territory *v.* Cutinola, 4 N. M. 160, 14 Pac. 809. In Missouri by the act of 1877 provision was made for the prosecution of misdemeanors by indictment or information as concurrent remedies. Acts (1877), p. 354. See State *v.* Bennett, 102 Mo. 356, 14 S. W. 865, 10 L. R. A. 717.

Repeal of statute.— N. M. Comp. Laws (1884), § 881, making it a misdemeanor for the proprietor or superintendent of a public house where liquor is sold to permit games of cards, dice, etc., to be played on his premises, and section 884, providing for the prosecution of such offenses by indictment, are general and not special statutes, and section 2490, enacted subsequently, authorizing the prosecution of all misdemeanors by information, repeals so much of section 884 as is repugnant to its provisions, so that the offense created by section 881 may be prosecuted by information. Territory *v.* Cutinola, 4 N. M. 160, 14 Pac. 809.

54. The Greater New York charter requires misdemeanors to be prosecuted by indictment where a justice of the supreme court certifies to the reasonableness of so prosecuting them. N. Y. Laws (1891), c. 466, § 1406. An application under this provision for a certificate of the reasonableness of a prosecution by indictment, being addressed to the discretion of the court, should set forth facts from which the reasonableness of so prosecuting the charge can be determined. People *v.* Levy, 24 Misc. (N. Y.) 469, 53 N. Y. Suppl. 643, 13 N. Y. Cr. 269. It has been held that a prosecution by indictment will not be ordered on the ground of a conflict of evidence, involving the credibility of witnesses. People *v.* Levy, *supra*. But as Liquor Tax Law, § 34, subd. 3 (Laws (1896), p. 76, c. 112), provides that if there shall be two convictions of the clerks, agents, etc., of a holder of a liquor tax certificate, for violation of the act, the certificate shall be forfeited and the principal deprived of all rights thereunder, and other punishments and penalties may attend such forfeiture, a second prosecution of an agent should be by indictment. People *v.* Hoenig, 86 N. Y. Suppl. 673; People *v.*

indictable offenses, whether felonies or misdemeanors, to be prosecuted by indictment;[55] by requiring prosecution of misdemeanors by information under certain circumstances or in certain courts;[56] by allowing any offense, whether a felony or misdemeanor, to be prosecuted either by indictment or by information;[57] or by allowing prosecution by information as well as indictment in the case of felonies as well as misdemeanors, with certain exceptions or under certain circumstances.[58]

(B) *Constitutional Provisions.* In many jurisdictions an indictment or pre-

Gantz, 41 Misc. (N. Y.) 542, 85 N. Y. Suppl. 79.

55. State *v.* Benson, 38 Ind. 60. *Compare* as to the present statute in Indiana *infra*, note 58.

The words "shall be indicted" do not exclude informations.— In Illinois it was held that the act of July 1, 1893, providing that a husband who shall be guilty of all or any one of the misdemeanors specified in the act "shall be indicted and tried," does not exclude prosecution by information under Ill. Rev. St. c. 37, § 7, providing that county courts shall have concurrent jurisdiction with circuit courts in all criminal offenses and misdemeanors, where the punishment is not imprisonment in the penitentiary or death, and section 117, providing that all offenses cognizable in the county courts shall be prosecuted by information. Cornshock *v.* People, 56 Ill. App. 467.

On appeal from justice of the peace.— The provision of the North Carolina statute that "in all cases of appeal" from a justice's judgment "the trial shall be anew" (N. C. Code, § 900), and the statutory provision that no person shall "put on trial before any court but on indictment" (N. C. Code, § 1175), do not require an indictment on appeal from a justice of the peace, as the provision in section 1175 is subject to the constitutional provision defining the jurisdiction of justices of the peace. State *v.* Quick, 72 N. C. 241.

56. See Cornshock *v.* People, 56 Ill. App. 467, in the county courts. As to this case see *supra*, note 55.

57. People *v.* Nolan, 144 Cal. 75, 77 Pac. 774; *In re* Maxwell, 19 Utah 495, 57 Pac. 412; State *v.* Croney, 31 Wash. 122, 71 Pac. 783. This is so in Wisconsin. See Wis. St. (1898) § 4648. Wis. Laws (1889), c. 140, amending Wis. Rev. St. § 2545, and providing that grand jurors shall be summoned to attend each term of the circuit court, unless the judge shall make an order directing them not to be summoned, does not purport to nor does it affect the provisions of law authorizing prosecutions by information, so as to make a prosecution by information illegal on the ground that, although no order was made by the judge that a grand jury should not be summoned, none was summoned, and no indictment preferred against the accused. Baker *v.* State, 80 Wis. 416, 50 N. W. 518.

In Washington, where all crimes may be prosecuted either by indictment or by information, the statute (2 Ballinger Annot. Codes and St. § 6813) which provides that "the grand jury shall inquire into the cases of parties in custody or under bail, charged with commission of offenses . . . and duly returned by a committing magistrate, or upon a complaint . . . presented by the prosecuting attorney, or under the instructions of the court," does not apply to a case where one is in custody under an information. State *v.* Croney, 31 Wash. 122, 124, 71 Pac. 783.

As to constitutional limitations and the validity of statutes see *infra*, I, B, 2, e, (II), (B), (C).

58. **In Connecticut** the statute allows prosecution by information of all crimes, including felonies, not punishable by death or imprisonment for life. See Romero *v.* State, 60 Conn. 92, 22 Atl. 496 (holding that, under such a statute, assault with intent to murder, which by statute is punishable by imprisonment for not less than ten years, may be prosecuted by information, since the latter statute, although it fixes no maximum limit, does not authorize a sentence for life); State *v.* Danforth, 3 Conn. 112. And see *infra*, I, B, 2, e, (II), (B), text and note 70.

In Vermont it is provided that no person shall be held to answer in court for an alleged crime or offense, unless upon indictment by a grand jury, except in proceedings before a justice and when a prosecution by information is authorized by law. St. (1894) c. 93, p. 368. But it is also provided that state's attorneys may prosecute by information all crimes, except those which are punishable by death or by imprisonment in the state prison for more than twenty years. Laws (1898), No. 46. See State *v.* Leach, 77 Vt. 166, 59 Atl. 168, holding that statutory rape may be prosecuted by information. Prior to this amendment of 1898 the limitation was seven instead of twenty years. St. (1894) c. 94, p. 368. See State *v.* Dyer, 67 Vt. 690, 32 Atl. 814 (holding that conspiracy, being a misdemeanor at common law, might be prosecuted by information); State *v.* Magoon, 61 Vt. 45, 17 Atl. 729 (holding that grand larceny for which the court might impose imprisonment for ten years could not be prosecuted by information); State *v.* Haley, 52 Vt. 476.

In Indiana all public offenses except treason or murder may be prosecuted by information based upon affidavit in certain cases specified in the statute. See Rev. St. (1897) § 1771; and *infra*, IV, A, 2, b, (V), (VI).

Possible punishment the test.— Where a statute requires indictment for offenses punishable by imprisonment for a certain period,

sentment by a grand jury is expressly required in the case of certain crimes by constitutional provision, and in such cases a prosecution in any other mode, even under legislative sanction, is unauthorized and an absolute nullity for want of jurisdiction.[59] Such is the case under the declaration in the constitution of the United States that "no person shall be held to answer for a capital, or otherwise infamous crime,[60] unless on a presentment or indictment of a Grand Jury, except in

the punishment which may be imposed and not that which is imposed in particular cases is the test. State *v.* Magoon, 61 Vt. 45, 17 Atl. 729. See *infra*, I, B, 2, e, (II), (C).

59. *Arkansas.*— Lewis *v.* State, 21 Ark. 209; Eason *v.* State, 11 Ark. 481.

Florida.— English *v.* State, 31 Fla. 340, 12 So. 689.

Massachusetts. — Com. *v.* Horregan, 127 Mass. 450; Nolan's Case, 122 Mass. 330; Jones *v.* Robbins, 8 Gray 329.

Missouri.— State *v.* Kyle, 166 Mo. 287, 65 S. W. 763, 56 L. R. A. 115; State *v.* Stewart, 47 Mo. 382.

New York.— People *v.* Campbell, 4 Park. Cr. 386.

Texas.— Hewitt *v.* State, 25 Tex. 722; Lott *v.* State, 18 Tex. App. 627.

Washington.— McCarty *v.* State, 1 Wash. 377, 25 Pac. 299, 22 Am. St. Rep. 152.

United States.— *Ex p.* Bain, 121 U. S. 1, 7 S. Ct. 781, 30 L. ed. 849; Mackin *v.* U. S., 117 U. S. 348, 6 S. Ct. 777, 29 L. ed. 909; *Ex p.* Wilson, 114 U. S. 417, 5 S. Ct. 935, 29 L. ed. 89.

See 27 Cent. Dig. tit. "Indictment and Information," § 4 *et seq.*; and other cases cited in the notes following.

Effect with respect to finding and form of indictment.— A constitutional provision that no person shall be held to answer certain offenses unless upon a presentment or indictment must be construed with reference to the common-law meaning of the term "indictment;" and, while the legislature may dispense with mere matters of form, the substance of a good common-law indictment must be preserved. Mott *v.* State, 29 Ark. 147. See also English *v.* State, 31 Fla. 340, 12 So. 689; Hewitt *v.* State, 25 Tex. 722. The terms "presentment" and "indictment," in such provision, necessarily presuppose and include the action of a grand jury. Eason *v.* State, 11 Ark. 481; State *v.* Cox, 8 Ark. 436. And they require that an indictment shall be based on competent evidence and not on hearsay or other incompetent evidence. Royce *v.* Territory, 5 Okla. 61, 47 Pac. 1083. *Compare infra*, II, E, 3. The grand jury must be a legal one, or the indictment will be a nullity and will confer no jurisdiction. Lott *v.* State, 18 Tex. App. 627, holding that it must be composed of twelve men and no other number, greater or less. See also Wells *v.* State, 21 Tex. App. 594, 2 S. W. 806; Rainey *v.* State, 19 Tex. App. 479; *Ex p.* Swain, 19 Tex. App. 323; Williams *v.* State, 19 Tex. App. 265; Smith *v.* State, 19 Tex. App. 95; McNeese *v.* State, 19 Tex. App. 48. See also People *v.* Scannell, 37 Misc. (N. Y.) 345, 75 N. Y. Suppl. 500; and *infra*, II, A, 3. Such provision has been held to require indictment by a common-law grand jury. English *v.* State, 31 Fla. 340, 12 So. 689.

Effect as to amendment see *infra*, X, A.

Juvenile court acts are void as unconstitutional in so far as they give jurisdiction without indictment of offenses by children which are within a constitutional provision requiring prosecution by indictment. Com. *v.* Horregan, 127 Mass. 450; Nolan's Case, 122 Mass. 330; Jones *v.* Robbins, 8 Gray (Mass.) 329; Mansfield's Case, 22 Pa. Super. Ct. 224.

Suspension of privileges for rebellion.—The Minnesota act of Feb. 14, 1862, suspending the privilege to all persons aiding in the rebellion against the United States, of prosecuting and defending actions and judicial proceedings in the state (Laws (1862), c. 11), in so far as it was applicable to citizens of Minnesota, was held to be in violation of the constitutional provision that no person shall be held to answer for a criminal offense unless on presentment of a grand jury. Jackson *v.* Butler, 3 Minn. 117; McFarland *v.* Butler, 8 Minn. 116; Keough *v.* McNitt, 7 Minn. 30; Wilcox *v.* Davis, 7 Minn. 23; Davis *v.* Pierse, 7 Minn. 13, 82 Am. Dec. 65.

Validity of statute as to venue.— A statute declaring that one committing burglary and larceny in one county may be indicted, tried, and convicted in the county to which he has carried the stolen property does not contravene a constitutional provision that no person shall be held to answer for a capital or infamous crime, unless on presentment or indictment of the grand jury. Mack *v.* People, 82 N. Y. 235. See also CRIMINAL LAW, 12 Cyc. 231.

Repeal of constitutional provision.— In Arkansas it was held that the fourteenth section of the Bill of Rights, which declares that no man shall be put to answer any criminal charge but by presentment, indictment, etc., was not expressly or by legal implication repealed *pro tanto* by the amendment to the constitution of 1846, which empowered the legislature to confer upon justices of the peace jurisdiction of assaults and batteries, etc. This amendment did not confer upon justices of the peace jurisdiction of these offenses, but only empowered the legislature to do so by law; and whenever such jurisdiction is conferred, it must be done in accordance with the fourteenth section of the Bill of Rights. Eason *v.* State, 11 Ark. 481 [*overruling*, on this point, State *v.* Cox, 8 Ark. 436].

60. What are infamous crimes within the meaning of this provision see *infra*, I, B, 2, e, (II), (C).

cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger." [61] This provision applies to prosecutions in the federal courts [62] and in the territories [63] and the District of Columbia;[64] but it does not apply to prosecutions by the states,[65] and therefore it does not prevent a

61. U. S. Const. Amendm. 5. See Mackin *v.* U. S., 117 U. S. 348, 6 S. Ct. 777, 29 L. ed. 909; *Ex p.* Wilson, 114 U. S. 417, 5 S. Ct. 935, 29 L. ed. 89; U. S. *v.* Wong Dep Ken, 57 Fed. 206.

Cherokee nation.— The powers of local government exercised by the Cherokee nation are local powers, not created by the constitution, and hence are not operated upon by the provision thereof requiring a presentment by a grand jury in the case of a capital or otherwise infamous crime. Talton *v.* Mayes, 163 U. S. 376, 16 S. Ct. 986, 41 L. ed. 196.

The confiscation acts of congress of Aug. 6, 1861, and July 17, 1862, were an exercise of the war power of the government, and not an exercise of its municipal power, and were not in conflict with such constitutional provision. Page *v.* U. S., 11 Wall. (U. S.) 268, 20 L. ed. 135.

Courts-martial.— U. S. Rev. St. (1878) § 1361, providing that prisoners under confinement in military prisons, undergoing sentences of courts-martial, shall be liable to trial and punishment by courts-martial for offenses committed during said confinement is not in conflict with such constitutional provision. *Ex p.* Wildman, 29 Fed. Cas. No. 17,653*a*.

62. See the cases in the preceding note.

63. *Alaska.*— U. S. *v.* Powers, 1 Alaska 180.

Arizona.— Territory *v.* Blomberg, 2 Ariz. 204, 11 Pac. 671.

Montana.— Territory *v.* Farnsworth, 5 Mont. 303, 5 Pac. 869. And see State *v.* Kingsly, 10 Mont. 537, 26 Pac. 1066.

Oklahoma.— Royce *v.* Territory, 5 Okla. 61, 47 Pac. 1083.

Washington.— McCarty *v.* State, 1 Wash. 377, 25 Pac. 299, 22 Am. St. Rep. 152 (holding that a person charged with an infamous crime committed prior to the admission of a state into the Union is entitled to the United States constitutional guaranty of presentment or indictment by a grand jury, and cannot be prosecuted under an information authorized by the state constitution and statutes. *Compare*, however, CONSTITUTIONAL LAW, 8 Cyc. 1033); Fowler *v.* U. S., 1 Wash. Terr. 3.

In the Indian Territory see Williams *v.* U. S., 4 Indian Terr. 204, 69 S. W. 849.

Porto Rico.— A criminal prosecution for an infamous crime against the United States cannot be commenced in the district court of the United States for the district of Porto Rico except on presentment or indictment of a grand jury, in view of the provision of act of congress of April 12, 1900, c. 191 (31 U. S. St. at L. 84, § 34) that such court shall proceed in the same manner as a federal circuit court. Crowley *v.* U. S., 194 U. S. 461, 24 S. Ct. 731, 48 L. ed. 1075.

64. See Matter of Fry, 3 Mackey (D. C.) 135.

65. *Alabama.*— Thompson *v.* State, 25 Ala. 41; Noles *v.* States, 24 Ala. 672.

California.— People *v.* Nolan, 144 Cal. 75, 77 Pac. 774; Kalloch *v.* San Francisco Super. Ct., 56 Cal. 229.

Illinois.— Parris *v.* People, 76 Ill. 274.

Indiana.— State *v.* Boswell, 104 Ind. 541, 4 N. E. 675.

Iowa.— State *v.* Wells, 46 Iowa 662.

Kansas.— State *v.* Barnett, 3 Kan. 250, 87 Am. Dec. 471.

Kentucky.— Jane *v.* Com., 3 Metc. 18.

Louisiana.— State *v.* Anderson, 30 La. Ann. 557; State *v.* Jackson, 21 La. Ann. 574; Territory *v.* Hattick, 2 Mart. 87.

Massachusetts.— Jones *v.* Robbins, 8 Gray 329.

Michigan.— Turner *v.* People, 33 Mich. 363.

Missouri.— State *v.* Rudolph, 187 Mo. 67, 85 S. W. 584; State *v.* Jones, 168 Mo. 398, 68 S. W. 566.

Nebraska.— Hawkins *v.* State, 60 Nebr. 380, 83 N. W. 198; Bollen *v.* State, 51 Nebr. 581, 71 N. W. 444 [*affirmed* in 176 U. S. 83, 20 S. Ct. 287, 44 L. ed. 382].

New York.— People *v.* Scannell, 37 Misc. 345, 75 N. Y. Suppl. 500, 16 N. Y. Cr. 321; Jackson *v.* Wood, 2 Cow. 819 note.

Ohio.— Prescott *v.* State, 19 Ohio St. 184, 2 Am. Rep. 388.

Oregon.— State *v.* Guglielmo, (1905) 79 Pac. 577, 80 Pac. 103.

South Carolina.— State *v.* Shumpert, 1 S. C. 85.

Texas.— Pitner *v.* State, 23 Tex. App. 366, 5 S. W. 210.

Vermont.— State *v.* Noakes, 70 Vt. 247, 40 Atl. 249; State *v.* Keyes, 8 Vt. 57, 30 Am. Dec. 450.

Virginia.— Matthews *v.* Com., 18 Gratt. 989.

Washington.— State *v.* Baldwin, 15 Wash. 15, 45 Pac. 650; State *v.* Nordstrom, 7 Wash. 506, 35 Pac. 382; *In re* Rafferty, 1 Wash. 382, 25 Pac. 465.

Wisconsin.— Rowan *v.* State, 30 Wis. 129, 11 Am. Rep. 559.

United States.— Bollen *v.* Nebraska, 176 U. S. 83, 20 S. Ct. 287, 44 L. ed. 382 [*affirming* 51 Nebr. 581, 71 N. W. 44]; McNulty *v.* California, 149 U. S. 645, 13 S. Ct. 959, 37 L. ed. 882; Hurtado *v.* California, 110 U. S. 516, 4 S. Ct. 111, 292, 28 L. ed. 232; Twitchell *v.* Pennsylvania, 7 Wall. 321, 19 L. ed. 223; William *v.* Hert, 110 Fed. 166.

See 27 Cent. Dig. tit. "Indictment and Information." § 5 *et seq.*

The provision of some of the state constitutions that "the constitution of the United States is the supreme law of the land," relates only to matters wherein the general

state from authorizing prosecutions, even for capital felonies, by information instead of indictment.[66] Some of the state constitutions, however, have or have had a similar provision,[67] or else require an indictment or presentment, and thus preclude informations and the like, in the case of a capital crime or other felony,[68] or of a crime punishable by death,[69] or by death or imprisonment for life.[70] In some states an indictment or presentment is required by the constitution for every criminal offense except those petty misdemeanors cognizable by justices of the peace, or in every case in which an indictment will lie.[71] When there is no

government assumes to control the states, and does not make the fifth amendment of the federal constitution a part of the state constitution, so as to prevent the state from providing for prosecutions by information instead of indictment. People *v.* Nolan, 144 Cal. 75, 77 L. ed. 774; *In re* Rafferty, 1 Wash. 382, 25 Pac. 465.

Enabling acts of congress.— Since the requirement of the fifth amendment of the federal constitution that certain criminal prosecutions be begun by indictment of the grand jury do not apply to prosecutions for crimes against state laws, the constitution of Washington permitting prosecutions to be begun by information does not contravene the enabling act of congress, which provides that the state constitution shall not be repugnant to the federal constitution. State *v.* Nordstrom, 7 Wash. 506, 35 Pac. 382. The admission of Nebraska into the Union "upon an original footing with the original states in all respects whatsoever," by the act of congress of Feb. 9, 1867, although made subject to the condition that the people adopt the constitution of the United States, did not make the said fifth amendment of that constitution applicable to procedure in the courts of the state. Bolln *v.* Nebraska, 176 U. S. 83, 20 S. Ct. 287, 44 L. ed. 382 [*affirming* 51 Nebr. 581, 71 N. W. 444].

66. See the cases cited in the preceding note.

67. *Florida.*— *Ex p.* Bell, 19 Fla. 608; King *v.* State, 17 Fla. 183.

Maine.— Butler *v.* Wentworth, 84 Me. 25, 24 Atl. 456, 17 L. R. A. 764.

Nevada.— State *v.* Chamberlain, 6 Nev. 257; State *v.* Millain, 3 Nev. 409.

New York.— Mack *v.* People, 82 N. Y. 235; People *v.* Cox, 67 N. Y. App. Div. 344, 73 N. Y. Suppl. 774; People *v.* Fisher, 20 Barb. 652, 11 How. Pr. 554, 2 Park. Cr. 402; People *v.* Scannell, 37 Misc. 345, 75 N. Y. Suppl. 500; People *v.* Campbell, 4 Park. Cr. 386.

Ohio.— Wolf *v.* State, 19 Ohio St. 248; Lasure *v.* State, 19 Ohio St. 43.

Rhode Island.— State *v.* Nolan, 15 R. I. 529, 10 Atl. 481.

68. *In re* Creation of New Counties, 9 Colo. 624, 21 Pac. 472; English *v.* State, 31 Fla. 340, 12 So. 689 (requires a common-law grand jury); State *v.* Terry, 109 Mo. 601, 19 S. W. 206; *Ex p.* Slater, 72 Mo. 102; State *v.* Grady, 12 Mo. App. 361; Vanvickle *v.* State, 22 Tex. App. 625, 2 S. W. 642; Rainey *v.* State, 19 Tex. App. 479; Lott *v.* State, 18 Tex. App. 627.

69. In Louisiana the prosecution of all but capital offenses may be on information. State *v.* Woods, 31 La. Ann. 267; State *v.* Newton, 30 La. Ann. 1253; State *v.* Anderson, 30 La. Ann. 557; State *v.* Maxwell, 28 La. Ann. 361.

70. Such is the provision in the constitution of Connecticut. Conn. Const. art. 1, § 9. This provision, however, does not prevent prosecution without indictment for a common-law offense punishable by imprisonment, for at common law imprisonment for life cannot be imposed. State *v.* Danforth, 3 Conn. 112. It does not prevent prosecution by information or complaint of a charge of assault with intent to murder, for which the statute authorizes imprisonment for not less than ten years without fixing any maximum limit, as such a statute does not authorize a sentence for life. Romero *v.* State, 60 Conn. 92, 22 Atl. 496. A sentence for a term of years is not in law the equivalent of a sentence for life, even though it may be practically such. Romero *v.* State, *supra.*

71. *Arkansas.*— St. Louis, etc., R. Co. *v.* State, 56 Ark. 166, 19 S. W. 572; Haskins *v.* State, 47 Ark. 243, 1 S. W. 242; Lewis *v.* State, 21 Ark. 209, holding that a statute providing that city justices should have jurisdiction to hear and determine prosecutions for selling spirituous liquors on Sunday without indictment was unconstitutional and void. Assaults, affrays, and batteries are "criminal charges," within such a provision. Eason *v.* State, 11 Ark. 481; Durr *v.* Howard, 6 Ark. 461; Rector *v.* State, 6 Ark. 187.

Michigan.— Slaughter *v.* People, 2 Dougl. 334 note, holding that keeping a house of ill-fame was a criminal offense, within the meaning of Const. art. 1, § 11, which declared that no person should be held to answer for a criminal offense unless on presentment of a grand jury.

Minnesota.— State *v.* West, 42 Minn. 147, 43 N. W. 845.

New Jersey.—State *v.* Anderson, 40 N. J. L. 224 (holding unconstitutional a statute authorizing prosecution by a city court, without an indictment for the offense of keeping a disorderly house); State *v.* Powell, 7 N. J. L. 244.

North Carolina.— State *v.* Barker, 107 N. C. 913, 12 S. E. 115, 10 L. R. A. 50; State *v.* Crook, 91 N. C. 536; State *v.* Simons, 68 N. C. 378; State *v.* Moss, 47 N. C. 66.

Ohio.— U. S. *v.* Campbell, Tapp. 29; U. S. *v.* Campbell, 6 Hall L. J. 113.

Pennsylvania.— Lavery *v.* Com., 101 Pa. St. 560; Mansfield's Case, 22 Pa. Super. Ct. 224.

special constitutional provision like those above referred to requiring indictment or presentment, or if the case does not fall within the provision, misdemeanors and even felonies, including such as are capital, may be prosecuted, if authorized by statute, or at common law in the case of misdemeanors, by information or complaint and without the intervention of a grand jury;[72] and such a mode of

South Carolina.— State *v.* Mitchell, 1 Bay 267.

See 27 Cent. Dig. tit. "Indictment and Information," § 21.

"Indictable offense." — It was held in Missouri that the words "indictable offense" in a former constitutional provision that no person can for an indictable offense be proceeded against criminally by information embrace felonies only, and that prosecutions for misdemeanors might be by information. State *v.* Berlin, 42 Mo. 572; State *v.* Ebert, 40 Mo. 186 (gaming); State *v.* Cowan, 29 Mo. 330; State *v.* Ledford, 3 Mo. 102. And so in Kentucky it was held that a similar constitutional provision applied only to offenses which were indictable at common law, and not to misdemeanors created by statute. Com. *v.* Avery, 14 Bush (Ky.) 625, 29 Am. Rep. 429; Williamson *v.* Com., 4 B. Mon. (Ky.) 146; Lowry *v.* Com., 36 S. W. 1117, 18 Ky. L. Rep. 481. *Compare*, however, Mansfield's Case, 22 Pa. Super. Ct. 224.

Recovery of penalty; act not criminal.— The provision of the Arkansas constitution that no person shall be held to answer a criminal offense unless on the presentment or indictment of a grand jury is not applicable to the recovery of the "penalty" imposed on a railroad company by Mansfield Dig. § 5478 (Act July 23, 1868, § 34), for failure to give signals before crossing highways, as the statute does not make such omission a crime. St. Louis, etc., R. Co. *v.* State, 56 Ark. 166, 19 S. W. 572.

Removal of an officer on a charge of crime has been held to be within such a provision. Haskins *v.* State, 47 Ark. 243, 1 S. W. 242. See, generally, OFFICERS.

Violations of municipal ordinances, where they are not made criminal by any statute, may be prosecuted without indictment or presentment notwithstanding a constitutional prohibition against prosecutions on any criminal charge or for any criminal offense except by indictment or presentment. *Ex p.* Slattery, 3 Ark. 484, use of obscene language punishable by fine under a municipal ordinance. But in Minnesota it was held that violations of municipal ordinances punishable by fine or imprisonment are criminal offenses, within the meaning of Const. art. 1, § 7, providing that no person shall be held to answer for a criminal offense unless on the presentment or indictment of a grand jury, except in cases cognizable by justices of the peace, where the punishment does not exceed a certain limit. State *v.* West, 42 Minn. 147, 43 N. W. 845. See, generally, MUNICIPAL CORPORATIONS.

72. *Alabama.*— Witt *v.* State, 130 Ala. 129, 30 So. 473; Frost *v.* State, 124 Ala. 71, 27 So. 550.

Alaska.— U. S. *v.* Powers, 1 Alaska 180.

California.— People *v.* Nolan, 144 Cal. 75, 77 Pac. 774; People *v.* Ebanks, 120 Cal. 626, 52 Pac. 1078; People *v.* Campbell, 59 Cal. 243, 43 Am. Rep. 257; Kalloch *v.* San Francisco Super. Ct., 56 Cal. 299.

Colorado.— Nesbit *v.* People, 19 Colo. 441, 36 Pac. 221; Jordan *v.* People, 19 Colo. 417, 36 Pac. 218; *In re* Dolph, 17 Colo. 35, 28 Pac. 470; Chase *v.* People, 2 Colo. 509.

District of Columbia.— Matter of Fry, 3 Mackey 135; U. S. *v.* Cross, 1 MacArthur 149.

Florida.— *Ex p.* Morris, 45 Fla. 157, 34 So. 89; *Ex p.* Bell, 19 Fla. 608; King *v.* State, 17 Fla. 183.

Georgia.— Wright *v.* Davis, 120 Ga. 670, 48 S. E. 170; Green *v.* State, 119 Ga. 120, 45 S. E. 990; Daughtry *v.* State, 115 Ga. 819, 42 S. E. 248; Welborne *v.* Donaldson, 115 Ga. 563, 41 S. E. 999; Turner *v.* State, 114 Ga. 421, 40 S. E. 308; Gordon *v.* State, 102 Ga. 673, 29 S. E. 444; Darden *v.* State, 74 Ga. 842; Smith *v.* State, 63 Ga. 168.

Indiana.— Webber *v.* Harding, 155 Ind. 408, 58 N. E. 533; State *v.* Boswell, 104 Ind. 541, 4 N. E. 675; Fox *v.* State, 76 Ind. 243; Sturn *v.* State, 74 Ind. 278; Jones *v.* State, 74 Ind. 249; Heanley *v.* State, 74 Ind. 99; Byrne *v.* State, 47 Ind. 120.

Kansas.— State *v.* Barnett, 3 Kan. 250, 87 Am. Dec. 471.

Louisiana.— State *v.* Woods, 31 La. Ann. 267; State *v.* Anderson, 30 La. Ann. 557; State *v.* Maxwell, 28 La. Ann. 361.

Maine.— State *v.* Cram, 84 Me. 271, 24 Atl. 853; State *v.* Craig, 80 Me. 85, 13 Atl. 129.

Maryland.— *In re* Glenn, 54 Md. 572.

Massachusetts.— Com. *v.* Waterborough, 5 Mass. 257; Com. *v.* Bowden, Thatch. Cr. Cas. 9. *Compare* Jones *v.* Robbins, 8 Gray 329, cited in the note following.

Missouri.— State *v.* Rudolph, 187 Mo. 67, 85 S. W. 584; State *v.* Kyle, 166 Mo. 287, 65 S. W. 763, 56 L. R. A. 115; State *v.* Ebert, 40 Mo. 186; State *v.* Ledford, 3 Mo. 102. But see State *v.* Stein, 2 Mo. 67.

Montana.— Territory *v.* Farnsworth, 5 Mont. 303, 5 Pac. 869.

Nebraska.— Hawkins *v.* State, 60 Nebr. 280, 83 N. W. 198; Bolln *v.* State, 51 Nebr. 581, 71 N. W. 444 [*affirmed* in 176 U. S. 83, 20 S. Ct. 287, 44 L. ed. 382].

New York.— People *v.* Fisher, 20 Barb. 652, 11 How. Pr. 554, 2 Park. Cr. 402.

North Carolina.— State *v.* Thornton, 136 N. C. 610, 48 S. E. 602; State *v.* Quick, 72 N. C. 241.

Oregon.— State *v.* Guglielmo, (1905) 79 Pac. 577, 80 Pac. 103; State *v.* Tucker, 36 Oreg. 291, 61 Pac. 894, 51 L. R. A. 246.

prosecution is not in violation of the constitutional provision that no person shall be deprived of life, liberty, or property without due process of law,[73] or a provision giving the accused the right to be informed of the charge against him and to a copy of the indictment.[74] Whether a constitutional provision applies to a particular offense depends upon the punishment which may be imposed — the possible punishment, and not upon the punishment which is imposed in the particular case.[75]

(c) *What Are "Infamous Crimes."* Although there has been some conflict of opinion on the question, it is now practically settled that the punishment by which an offense may be visited, rather than the nature of the act itself, determines whether it is an "infamous" crime within the meaning of a constitutional provision requiring indictment, and that the term includes any crime which may be punished by death or by imprisonment in a state prison, either with or without hard labor.[76] It is the possible punishment and not the punishment actually

South Carolina. — State *v.* Starling, 15 Rich. 120.

South Dakota. — State *v.* Ayers, 8 S. D. 517, 67 N. W. 611, holding that Laws (1895), c. 64, authorizing the several courts of the state "to hear, try and determine prosecutions upon information, for crimes, misdemeanors and offenses" theretofore triable on indictment only, is within Const. art. 6, § 10, which provides that "the grand jury may be modified or abolished by law."

Texas. — State *v.* Corbit, 42 Tex. 88; Clepper *v.* State, 4 Tex. 242; Reddick *v.* State, 4 Tex. App. 32.

Utah. — State *v.* Imlay, 21 Utah 156, 61 Pac. 557, holding that prosecution by information instead of by indictment of a felony less than murder, if otherwise properly conducted, is legal under the constitution and laws of this state. And see *In re* Maxwell, 19 Utah 495, 57 Pac. 412.

Vermont. — State *v.* Leach, 77 Vt. 166, 59 Atl. 168 (statutory rape); State *v.* Noakes, 70 Vt. 247, 40 Atl. 249.

Washington. — State *v.* Croney, 31 Wash. 122, 71 Pac. 783; State *v.* Baldwin, 15 Wash. 15, 45 Pac. 650; State *v.* Nordstrom, 7 Wash. 506, 35 Pac. 382.

Wisconsin. — *In re* Bergin, 31 Wis. 383; Rowan *v.* State, 30 Wis. 129, 11 Am. Rep. 559.

Wyoming. — *In re* Boutler, 5 Wyo. 329, 40 Pac. 520 (holding that under Const. art. 1, § 9, authorizing the legislature to "change, regulate, or abolish" the grand jury system, the grand jury system may be continued in use concurrently with the information method of procedure); *In re* Wright, 3 Wyo. 478, 27 Pac. 565, 31 Am. St. Rep. 94, 13 L. R. A. 748.

United States. — Maxwell *v.* Dow, 176 U. S. 581, 20 S. Ct. 448, 494, 44 L. ed. 597; Hodgson *v.* Vermont, 168 U. S. 262, 18 S. Ct. 80, 42 L. ed. 461; McNulty *v.* California, 149 U. S. 645, 13 S. Ct. 959, 37 L. ed. 882; Caldwell *v.* Texas, 137 U. S. 692, 11 S. Ct. 224, 34 L. ed. 816; Hurtado *v.* California, 110 U. S. 516, 4 S. Ct. 111, 292, 28 L. ed. 232; Williams *v.* Hert, 110 Fed. 166; *In re* Humason, 46 Fed. 388; U. S. *v.* Maxwell, 26 Fed. Cas. No. 15,750, 3 Dill. 275; U. S. *v.* Shepard, 27 Fed. Cas. No. 16,273, 1 Abb. 431; U. S. *v.* Waller, 28 Fed. Cas. No. 16,634, 1 Sawy. 701.

See 27 Cent. Dig. tit. "Indictment and Information," § 4 *et seq.*

Local and special laws. — The Indiana act of March 29, 1879 (Acts (1879), p. 143), in relation to prosecutions of felonies by affidavit and information, is neither local nor special, within the sense and meaning of the constitution, but is of general and uniform application. Fox *v.* State, 76 Ind. 243; Heanley *v.* State, 74 Ind. 99.

Contempt. — Where a person assaults the attorney of the commonwealth in open court when he is engaged in the trial of a cause, the fact that such assault is a crime by statute does not prevent the court from proceeding against him by rule for contempt; and he is not entitled to be prosecuted by indictment by the grand jury. Arnold *v.* Com., 80 Ky. 300, 44 Am. Rep. 480.

73. See the cases cited in the preceding note; and CONSTITUTIONAL LAW, 8 Cyc. 1090.

Contra. — The contrary was held in Massachusetts in the case of felonies. Jones *v.* Robbins, 8 Gray (Mass.) 329.

74. *In re* Glenn, 54 Md. 572.

75. Romero *v.* State, 60 Conn. 92, 22 Atl. 496; Butler *v.* Wentworth, 84 Me. 25, 24 Atl. 456, 17 L. R. A. 764; State *v.* Magoon, 61 Vt. 45, 17 Atl. 729; *In re* Claasen, 140 U. S. 200, 11 S. Ct. 735, 35 L. ed. 409; *Ex p.* Wilson, 114 U. S. 417, 5 S. Ct. 935, 29 L. ed. 89; U. S. *v.* Johannesen, 35 Fed. 411; U. S. *v.* Ebner, 25 Fed. Cas. No. 15,020, 4 Biss. 117. And see *infra*, I, B, 2, e, (II), (C).

76. *Alaska.* — U. S. *v.* Powers, 1 Alaska 180.

Arizona. — Territory *v.* Blomberg, 2 Ariz. 204, 11 Pac. 671.

District of Columbia. — Matter of Fry, 3 Mackey 135.

Maine. — Butler *v.* Wentworth, 84 Me. 25, 24 Atl. 456, 17 L. R. A. 764, illegal transportation of intoxicating liquors.

Massachusetts. — Jones *v.* Robbins, 8 Gray 329.

New Mexico. — U. S. *v.* Fuller, 3 N. M. 367, 9 Pac. 597, larceny.

Washington. — Fowler *v.* U. S., 1 Wash. Terr. 3.

inflicted that determines whether a crime is infamous, so as to require indictment.[77] Ordinarily mere misdemeanors, not being so punishable, are not infamous crimes, and may be prosecuted by information.[78] Some of the constitutions expressly except petit larceny.[79]

f. Election and Waiver. As has been seen, the weight of authority is to the effect that when the constitution requires that an offense shall be prosecuted by

United States.— *In re* Claasen, 140 U. S. 200, 11 S. Ct. 735, 35 L. ed. 409; U. S. *v.* De Walt, 128 U. S. 393, 9 S. Ct. 111, 32 L. ed. 485 (embezzlement and false entries by national bank officer); *Ex p.* Bain, 121 U. S. 1, 7 S. Ct. 781, 30 L. ed. 849; Mackin *v.* U. S., 117 U. S. 348, 6 S. Ct. 777, 29 L. ed. 909 (conspiracy to commit an offense against the United States); U. S. *v.* Petit, 114 U. S. 429, 5 S. Ct. 1190, 29 L. ed. 93; *Ex p.* Wilson, 114 U. S. 417, 5 S. Ct. 935, 29 L. ed. 89 (passing counterfeit money); U. S. *v.* Wong Dep Ken, 57 Fed. 206; U. S. *v.* Smith, 40 Fed. 755; *Ex p.* Brown, 40 Fed. 81 (assault with intent to kill); *Ex p.* McClusky, 40 Fed. 71 (larceny); U. S. *v.* Johannesen, 35 Fed. 411 (violation of internal revenue laws); U. S. *v.* Tod, 25 Fed. 815; U. S. *v.* Butler, 25 Fed. Cas. No. 14,701, 4 Hughes 512 (conspiring to injure or intimidate citizens of the United States in the exercise of their civil rights, in violation of U. S. Rev. St. (1878) § 5508 [U. S. Comp. St. (1901) p. 3712]); U. S. *v.* Ebner, 25 Fed. Cas. No. 15,020, 4 Biss. 117; U. S. *v.* Hade, 26 Fed. Cas. No. 15,274. An offense punishable by imprisonment for more than one year is an infamous crime, and cannot be prosecuted by information; U. S. Rev. St. (1878) § 5541 [U. S. Comp. St. (1901) p. 3721], providing, in case of a sentence for a longer period than one year, the court may order it to be executed in any state jail or penitentiary within the district or state. U. S. *v.* Cobb, 43 Fed. 570.

See 27 Cent. Dig. tit. "Indictment and Information," §§ 7, 10 *et seq.*; and CRIMINAL LAW, 12 Cyc. 135.

Contra.— In some of the cases the courts in construing the constitutional provision have adopted the old common-law test for determining whether a crime is infamous, and have held that the term includes all crimes which involve moral turpitude and render a person convicted thereof incompetent as a witness, and only such crimes. U. S. *v.* Reilley, 20 Fed. 46 (embezzlement); U. S. *v.* Field, 16 Fed. 778, 21 Blatchf. 330; *In re* Wilson, 18 Fed. 33; U. S. *v.* Burgess, 9 Fed. 896, 3 McCrary 278 (conspiracy to make counterfeit coin); U. S. *v.* Wynn, 9 Fed. 886, 3 McCrary 266 (holding that no crime was infamous, within the meaning of article five of the amendments to the federal constitution, unless expressly made infamous or declared a felony by an act of congress, and therefore that stealing from the mails was not an infamous crime); U. S. *v.* Yates, 6 Fed. 861 (passing counterfeit coin); U. S. *v.* Baugh, 1 Fed. 784, 4 Hughes 501 (embezzlement from the mails). See also Williams *v.* U. S., 4 Indian Terr. 204, 69 S. W. 849. And see CRIMINAL LAW, 12 Cyc. 135.

Either with or without hard labor.— *In re* Claasen, 140 U. S. 200, 11 S. Ct. 735, 35 L. ed. 409; U. S. *v.* De Walt, 128 U. S. 393, 9 S. Ct. 111, 32 L. ed. 485; Mackin *v.* U. S., 117 U. S. 348, 6 S. Ct. 777, 29 L. ed. 909; U. S. *v.* Smith, 40 Fed. 755.

"Infamous crime" is not synonymous with "felony" except where every offense which may be punished by death or imprisonment in the state prison is declared or held to be a felony. See Jones *v.* Robbins, 8 Gray (Mass.) 329; and CRIMINAL LAW, 12 Cyc. 131, 132.

77. Butler *v.* Wentworth, 84 Me. 25, 24 Atl. 456, 17 L. R. A. 764; *In re* Claasen, 140 U. S. 200, 11 S. Ct. 735, 35 L. ed. 409; *Ex p.* Wilson, 114 U. S. 417, 5 S. Ct. 935, 29 L. ed. 89; U. S. *v.* Johannesen, 35 Fed. 411; U. S. *v.* Ebner, 25 Fed. Cas. No. 15,020, 4 Biss. 117. See also *supra*, I, B, 2, e, (II), (n); and CRIMINAL LAW, 12 Cyc. 132, 133.

Grade of crime dependent upon evidence.— But in State *v.* Cram, 84 Me. 271, 24 Atl. 853, it is held that a complaint before a municipal court charging an assault and battery does not necessarily allege the commission of an infamous crime, which should be prosecuted by indictment, although the punishment under the statute may be by imprisonment in the state prison for five years, or by a mere nominal fine, or confinement in jail for a day, the grade of the offense being determinable rather from the evidence than from the allegations of the complaint.

78. *Alaska.*— U. S. *v.* Powers, 1 Alaska 180, unlawful sale of intoxicating liquors.

District of Columbia.— Matter of Fry, 3 Mackey 135 (petit larceny and the receiving of stolen goods of less than thirty-five dollars in value); U. S. *v.* Cross, 1 MacArthur 149 (petit larceny).

Florida.— King *v.* State, 17 Fla. 183, unlawfully keeping a saloon. See also *Ex p.* Bell, 19 Fla. 608, petit larceny.

Maine.— State *v.* Craig, 80 Me. 85, 13 Atl. 129.

Massachusetts.— Com. *v.* Bowden, Thach. Cr. Cas. 9.

Montana.—Territory *v.* Farnsworth, 5 Mont. 303, 5 Pac. 869.

Rhode Island.— State *v.* Nolan, 15 R. I. 529, 10 Atl. 481, unlawful sale of intoxicating liquors.

United States.— U. S. *v.* Cobb, 43 Fed. 570; U. S. *v.* Ebert, 25 Fed. Cas. No. 15,019; U. S. *v.* Waller, 28 Fed. Cas. No. 16,634, 1 Sawy. 701.

79. See *Ex p.* Bell, 19 Fla. 608. But see Williams *v.* U. S., 4 Indian Terr. 204, 69 S. W. 849.

indictment, an indictment is essential to the jurisdiction of the court and cannot be waived by the accused.[80] In the absence of such a provision, the legislature may give the accused the right to elect whether he will be prosecuted by indictment or by some other form of accusation, and in some jurisdictions such a statute exists,[81] as for example in Georgia[82] and New Jersey.[83]

3. INFORMATION[84] — a. Definition and Nature. An information is a written accusation of crime preferred by the district attorney or other public prosecuting officer without the intervention of the grand jury.[85] The practice of filing infor-

80. See *supra*, I, A, 3.

81. See the notes following.

Denial of right by statute.— In the absence of a constitutional limitation the legislature may provide that the accused shall have no right to demand an indictment. Thus in Georgia statutes providing that in cases within the jurisdiction of certain city courts the accused shall not have the right to demand an indictment are constitutional as relating to misdemeanors. See Green *v.* State, 119 Ga. 120, 45 S. E. 990; Daughtry *v.* State, 115 Ga. 819, 42 S. E. 248; Turner *v.* State, 114 Ga. 421, 40 S. E. 308; Gordon *v.* State, 102 Ga. 673, 29 S. E. 444. See *supra*, I, B, 2, e, (II), (B).

82. County courts.— Thus in this state it is provided in substance that when a misdemeanor case is called for trial in the county court, the judge shall ask defendant whether he demands an indictment or presentment by the grand jury, and if he shall, in a writing signed by him, demand indictment or presentment, the fact shall be recorded, and he shall be committed or bound over to the next superior court, to which the case shall be transferred. Ga. Code (1895), § 751. When an indictment is not demanded in the county court the judge is required to frame a written accusation based upon the affidavit charging defendant. Ga. Code (1895), § 753. See Cunningham *v.* State, 80 Ga. 4, 5 S. E. 251. An indictment may be demanded by defendant in a criminal case in any county court. Johns *v.* State, 68 Ga. 293.

City courts.— There are also provisions allowing the accused to demand an indictment when arraigned for misdemeanor in a city court, and providing for a trial on accusation based on affidavit, where he waives an indictment. Ga. Code (1895), §§ 783–785. See Butler *v.* State, 97 Ga. 404, 23 S. E. 822. On the other hand it is provided that in certain city courts the accused shall not have the right to demand an indictment. See the cases referred to *supra*, note 81.

Waiver of indictment and withdrawal thereof.— The county court may proceed to try the prisoner for a misdemeanor on written accusation based upon affidavit, unless the prisoner in writing demands indictment by a grand jury. No express waiver of indictment is necessary. Smith *v.* State, 63 Ga. 168. And where a prisoner waives his right to an indictment, but demands a jury to try him on accusation, and his waiver is recorded, a jury drawn, and at the trial term a motion to continue made and overruled, it is too late to withdraw his waiver. McConnell *v.* State, 67 Ga. 633. And a person who waives indictment and is convicted by the county court of a misdemeanor, but on certiorari to the superior court obtains a reversal, cannot, on return of the case to the county court, withdraw his waiver of indictment, since thereby he would divest the county court of jurisdiction for the time being. Brown *v.* State, 89 Ga. 340, 15 S. E. 462. When, on being arraigned on an accusation in a city court, accused waives indictment by the grand jury, he cannot thereafter, in that court, withdraw the waiver. Butler *v.* State, 97 Ga. 404, 23 S. E. 822.

The accusation and affidavit.— By the county court act above referred to, when indictment and trial by jury are waived, and the trial is by the county judge, the same affidavit on which the warrant issued may be the basis of accusation. The accusation is to be specific and particular, but the affidavit need not be more so than is necessary to uphold a warrant. Dickson *v.* State, 62 Ga. 583. A valid affidavit, however, is essential; and if the affidavit be void, objection to it may be taken after conviction and sentence. In such case the whole trial is a nullity, and the conviction should be set aside by the superior court on certiorari. Scroggins *v.* State, 55 Ga. 380. An affidavit neither attested by an officer authorized to administer oaths, nor purporting to be sworn to in open court, is void as the basis of a criminal proceeding. Scroggins *v.* State, *supra*.

83. Edwards *v.* State, 45 N. J. L. 419, holding that one who has waived in writing his right to be prosecuted by indictment, as provided by N. J. Laws (1867), p. 463, cannot retract the waiver after he has pleaded to the accusation.

84. Filing and formal requisites of information see *infra*, IV, A.

85. 4 Blackstone Comm. 308, 309. And see State *v.* Whitlock, 41 Ark. 403; Goddard *v.* State, 12 Conn. 448; State *v.* Kyle, 166 Mo. 287, 65 S. W. 763, 56 L. R. A. 115; State *v.* Starling, 15 Rich. (S. C.) 120; Lincoln *v.* Smith, 27 Vt. 328.

"A criminal information is an accusation in the nature of an indictment, from which it differs only in being presented by a competent public officer on his oath of office, instead of a grand jury on their oath." State *v.* Whitlock, 41 Ark. 403, 406.

By statute in Texas an information is defined to be a written statement filed and presented on behalf of the state by the district attorney accusing defendant of an offense

mations for the prosecution of misdemeanors existed at common law and may be traced to the earliest period.[86]

b. When Information Will Lie — (I) *At Common Law.* At common law an information will lie for any misdemeanor, but not for a felony.[87]

(II) *Under Constitutional and Statutory Provisions.*[88] As has been seen, in many jurisdictions there are constitutional provisions which prevent prosecutions by information for capital or otherwise infamous crimes, or for felonies, or for crimes subject to a certain punishment, and in some states there are such provisions preventing prosecution by information for any crime, whether a felony or a misdemeanor, except certain petty offenses cognizable by justices of the peace or police magistrates;[89] but if there is no constitutional provision in the way, the legislature may authorize any crime to be prosecuted by information.[90] In all jurisdictions the subject is now regulated by statute. Under some statutes an information will lie, as at common law, for misdemeanors but not for felonies.[91] Under others it will lie for misdemeanors and also for felonies not capital,[92] or not punishable by death or imprisonment for life[93] or for a certain term of years.[94] Under others it will lie for any offense, whether a felony or a misdemeanor,[95] or

which is by law subject to be prosecuted in that way. Code Cr. Proc. art. 402. See State *v.* Corbit, 42 Tex. 88.

An affidavit or complaint of a private individual is not an "information" within the meaning of a constitutional provision or statute requiring prosecution by information or indictment. State *v.* Kyle, 166 Mo. 287, 65 S. W. 763, 56 L. R. A. 115; State *v.* Kelm, 79 Mo. 515. See *infra*, I, B, 3, c, text and note 3.

A complaint by a tithing-man to a justice of the peace for a breach of the Sabbath was held not to be an "information" within a provision relating to trial by jury. Goddard *v.* State, 12 Conn. 448.

The term "indictment" in a statute is sometimes used to denote or include an information. See *supra*, I, B, 2, a, text and note 26.

86. See 4 Blackstone Comm. 309; 1 Chitty Cr. L. 843; 2 Hawkins P. C. c. 25, § 85. And see State *v.* Starling, 15 Rich. (S. C.) 120.

87. *Arkansas.*— State *v.* Whitlock, 41 Ark. 403.

Connecticut.— Goddard *v.* State, 12 Conn. 448.

Georgia.— Gordon *v.* State, 102 Ga. 673, 29 S. E. 444.

Massachusetts.— Com. *v.* Waterborough, 5 Mass. 257.

Missouri.— State *v.* Kyle, 166 Mo. 287, 65 S. W. 763, 56 L. R. A. 115.

New Hampshire.— State *v.* Concord, 20 N. H. 295.

New Mexico.— Territory *v.* Cutinola, 4 N. M. 160, 14 Pac. 809.

South Carolina.— State *v.* Starling, 15 Rich. 120.

Virginia.— Matthews *v.* Com., 18 Gratt. 989.

England.— 4 Blackstone Comm. 308, 310; 2 Hale P. C. 151.

See also *supra*, I, B, 2, e, (I).

It is a general rule that all public misdemeanors which may be prosecuted by indictment may be prosecuted by information in behalf of the commonwealth, unless the prosecution be restrained by the statute to indictment. Com. *v.* Waterborough, 5 Mass. 257.

88. **Whether constitutional provision is self-executing** see *supra*, I, A, 2, c.

89. See *supra*, I, B, 2, e, (II), (B).

90. See *supra*, I, B, 2, e, (II), (B), text and note 72.

"Bill of indictment" in a statute has been held to mean an information. State *v.* Starling, 15 Rich. (S. C.) 120. See *supra*, I, B, 2, a, text and note 26.

91. *Alaska.*—U. S. *v.* Powers, 1 Alaska 180.

Florida.— King *v.* State, 17 Fla. 183.

Georgia.— Gordon *v.* State, 102 Ga. 673, 29 S. E. 444.

Iowa.— Santo *v.* State, 2 Iowa 165, 63 Am. Dec. 487.

Montana.—Territory *v.* Farnsworth, 5 Mont. 303, 5 Pac. 869.

Texas.— State *v.* Corbit, 42 Tex. 88; Haines *v.* State, 7 Tex. App. 30.

Virginia.— Matthews *v.* Com., 18 Gratt. 989; Com. *v.* Barrett, 9 Leigh 665.

United States.— *Ex p.* Wilson, 114 U. S. 417, 5 S. Ct. 935, 29 L. ed. 89.

See also *supra*, I, B, 2, e, (II).

92. State *v.* Stewart, 47 La. Ann. 410, 16 So. 945; State *v.* Cole, 38 La. Ann. 843; State *v.* Woods, 31 La. Ann. 267; State *v.* Newton, 30 La. Ann. 1253. See also *supra*, I, B, 2, e, (II).

93. State *v.* Keena, 64 Conn. 212, 29 Atl. 470; Romero *v.* State, 60 Conn. 92, 22 Atl. 496. See also *supra*, I, B, 2, e, (II).

94. State *v.* Leach, 77 Vt. 166, 59 Atl. 168 (not punishable by death or imprisonment for more than twenty years); State *v.* Dyer, 67 Vt. 690, 32 Atl. 814. See *supra*, I, B, 2, e, (II).

95. *California.*— People *v.* Nolan, 144 Cal. 75, 77 Pac. 774; People *v.* Ebanks, 120 Cal. 626, 52 Pac. 1078; People *v.* Giancoli, 74 Cal. 642, 16 Pac. 510; People *v.* Campbell, 59 Cal. 243, 43 Am. Rep. 257; Kalloch *v.* San Francisco Super. Ct., 56 Cal. 229. One convicted of murder on an information cannot maintain the invalidity of such information on the ground that at the time of

for any offense except treason or murder.[96] The fact that a statute provides that any person violating its provisions shall be "subject to indictment" does not necessarily exclude prosecution by information.[97]

(III) *ELECTION BY STATE.* Where a statute authorizes prosecutions either by indictment or information, the state may choose either mode,[98] but cannot prosecute by both at the same time.[99]

c. When Information Is Necessary. In some jurisdictions the constitution or statutes provide that, except in the case of certain petty misdemeanors,[1] all offenses must be prosecuted criminally by indictment or information, so that an information is necessary in the absence of an indictment.[2] By the weight of authority such a provision contemplates an information in the common-law sense of the term, that is, an accusation preferred, as at common law, by the public prosecutor, and is not satisfied by the complaint or affidavit of a private individual.[3]

the filing thereof the grand jury was in session, as the two modes of procedure (by indictment and by information) are concurrent. People *v.* Ebanks, *supra.*

Colorado.— Nesbit *v.* People, 19 Colo. 441, 36 Pac. 221; Jordan *v.* People, 19 Colo. 417, 36 Pac. 218; *In re* Dolph, 17 Colo, 35, 28 Pac. 470.

Missouri.— Since the constitution of 1900, an indictment or information is necessary for felony or misdemeanor and are concurrent remedies in either case. See State *v.* Rudolph, 187 Mo. 67, 85 S. W. 584; State *v.* Kyle, 166 Mo. 287, 65 S. W. 763, 56 L. R. A. 115.

Nebraska.— Hawkins *v.* State, 60 Nebr. 380, 83 N. W. 198; Bolln *v.* State, 51 Nebr. 581, 71 N. W. 444 [*affirmed* in 176 U. S. 83, 20 S. Ct. 287, 44 L. ed. 382]; State *v.* Miller, 43 Nebr. 860, 62 N. W. 238; Miller *v.* State, 29 Nebr. 437, 45 N. W. 451.

Oregon.— State *v.* Guglielmo, (1905) 79 Pac. 577, 80 Pac. 103.

South Dakota.— State *v.* Ayers, 8 S. D. 517, 67 N. W. 611.

Washington.— State *v.* Croney, 31 Wash. 122, 71 Pac. 783; State *v.* Gleason, 15 Wash. 509, 46 Pac. 1043; State *v.* Baldwin, 15 Wash. 15, 45 Pac. 650; State *v.* Nordstrom, 7 Wash. 506, 35 Pac. 382.

Wisconsin.— Baker *v.* State, 80 Wis. 416, 50 N. W. 518; State *v.* Sloan, 65 Wis. 647, 27 N. W. 616; Rowan *v.* State, 30 Wis. 129, 11 Am. Rep. 559.

Wyoming.— *In re* Boulter, 5 Wyo. 329, 40 Pac. 520; *In re* Wright, 3 Wyo. 478, 27 Pac. 565, 31 Am. St. Rep. 94, 13 L. R. A. 748.

United States.— Davis *v.* Burke, 179 U. S. 399, 21 S. Ct. 210, 45 L. ed. 249; Vincent *v.* California, 149 U. S. 648, 13 S. Ct. 960, 37 L. ed. 884; McNulty *v.* California, 149 U. S. 645, 13 S. Ct. 959, 37 L. ed. 882; Hurtado *v.* California, 110 U. S. 516, 4 S. Ct. 111, 292, 28 L. ed. 232.

See also *supra*, I, B, 2, e, (II).

96. Miller *v.* State, 144 Ind. 401, 43 N. E. 440; Kennegar *v.* State, 120 Ind. 176, 21 N. E. 917. Under earlier statutes in Indiana see Douglass *v.* State, 72 Ind. 385; Moniger *v.* State, 48 Ind. 383; Levy *v.* State, 6 Ind. 281; Lindville *v.* State, 3 Ind. 580.

97. Miller *v.* State, 144 Ind. 401, 43 N. E. 440, holding that there is no conflict between Rev. St. (1894) § 8728, providing that any warehouseman violating section 8726 forbidding disposition of stored goods without the written consent of the holder of the warehouse receipt, shall be "subject to indictment," and section 1748, providing that all public offenses except treason and murder may, in certain cases, be prosecuted by affidavit and information, and that a prosecution of a warehouseman for violating the act may be had on affidavit and information.

98. State *v.* Stewart, 47 La. Ann. 410, 16 So. 945; State *v.* Ross, 14 La. Ann. 364.

99. State *v.* Ross, 14 La. Ann. 364.

1. See *infra*, I, B, 4, b.

2. *Illinois.*— Gould *v.* People, 89 Ill. 216.

Indiana.— Butler *v.* State, 113 Ind. 5, 14 N. E. 247; State *v.* First, 82 Ind. 81; Allstodt *v.* State, 49 Ind. 233; Jackson *v.* State, 48 Ind. 251; Byrne *v.* State, 47 Ind. 120.

Missouri.— State *v.* Kyle, 166 Mo. 287, 65 S. W. 763, 56 L. R. A. 115; State *v.* Shortell, 93 Mo. 123, 5 S. W. 691; State *v.* Thompson, 81 Mo. 163; State *v.* Kelm, 79 Mo. 515; State *v.* Sebecca, 76 Mo. 55; State *v.* Rockwell, 18 Mo. App. 395.

Texas.— Clepper *v.* State, 4 Tex. 242; Faulkner *v.* State, (Cr. App. 1902) 66 S. W. 787; Prewitt *v.* State, (Cr. App. 1896) 34 S. W. 924; Garza *v.* State, 11 Tex. App. 410; Deon *v.* State, 3 Tex. App. 435.

United States.— Davis *v.* Burke, 179 U. S. 399, 21 S. Ct. 210, 45 L. ed. 249.

Complaint before justice.— A defendant entering into a recognizance to appear at the circuit court, under Ind. Rev. St. § 1636, which provides that in a criminal proceeding before a justice, "if he find that the punishment he is authorized to assess is not adequate to the offense, he shall hold such person to bail for his appearance before the proper court," is simply required to appear before the court named to answer such charge as may be preferred against him; and such defendant must be tried by indictment or information as in an original proceeding in the circuit court, and cannot be tried on the complaint filed with the justice. Butler *v.* State, 113 Ind. 5, 14 N. E. 247.

3. State *v.* Kyle, 166 Mo. 287, 65 S. W. 763, 56 L. R. A. 115; State *v.* Shortell, 93 Mo. 123, 5 S. W. 691; State *v.* Russell, 88 Mo. 648; State *v.* Thompson, 81 Mo. 163;

An indictment will lie, although a statute authorizes an information unless prosecution by indictment is excluded, as is sometimes the case.[4]

4. Complaint or Affidavit[5] — a. Definition and Nature. A complaint or affidavit, as distinguished from an information, is a written accusation of crime made by a private individual, or by an officer other than the public prosecutor.[6]

b. When Complaint or Affidavit Will Lie. In most jurisdictions a complaint or affidavit is the proper form of accusation for the prosecution of petty misdemeanors or violations of municipal ordinances before justices of the peace and similar magistrates;[7] but it will not lie for a felony, nor as a rule for misdemeanors in the higher courts of criminal jurisdiction.[8] Sometimes, however, by statute, such a mode of prosecution is authorized for misdemeanors under certain circumstances even in the higher courts.[9] But, as has been seen, in many states constitutional or statutory provisions require all offenses, except petty misdemeanors cognizable by justices of the peace, to be prosecuted by indictment or information, and in such case a complaint or affidavit by a mere private individual will not lie.[10] On appeal from a conviction before a justice of the peace or like

State *v.* Briscoe, 80 Mo. 643; State *v.* Kelm, 79 Mo. 515; State *v.* Sebecca, 76 Mo. 55; State *v.* Huddleston, 75 Mo. 667; State *v.* Ransberger, 42 Mo. App. 466 [*affirmed* in 106 Mo. 135, 17 S. W. 290]; State *v.* Rockwell, 18 Mo. App. 395; and other cases in the preceding note. *Compare* Clepper *v.* State, 4 Tex. 242, holding that the provision of the Bill of Rights, § 8, that "no person shall be holden to answer for any criminal charge but on indictment or on information," etc., has reference to no particular kind of information, and that under such provision one can be prosecuted under any form of pleading that the legislature may prescribe that informs the accused of the nature of the offense of which he is charged.

4. See *supra*, I, B, 2, c.

5. **Complaint or affidavit for warrant or preliminary examination** see CRIMINAL LAW, 12 Cyc. 290 *et seq.*

6. Goddard *v.* State, 12 Conn. 448; Com. *v.* Davis, 11 Pick. (Mass.) 432; Lincoln *v.* Smith, 27 Vt. 328. See CRIMINAL LAW, 12 Cyc. 290, 323.

"Complaint" or "affidavit" not an "information."— A complaint for a breach of Sabbath exhibited by a tithing-man to a justice of the peace was held not to be an information within the provision of the constitution of Connecticut relating to trial by jury. Goddard *v.* State, 12 Conn. 448. See also Lincoln *v.* Smith, 27 Vt. 328. And a complaint or affidavit by a private individual is not an "information" within the meaning of a constitutional provision requiring prosecutions to be by indictment or information. State *v.* Shortell, 93 Mo. 123, 5 S. W. 691; State *v.* Kelm, 79 Mo. 515; State *v.* Sebecca, 76 Mo. 55. See also *supra*, I, B, 3, c.

7. Monroe *v.* Meuer, 35 La. Ann. 1192; State *v.* Noble, 20 La. Ann. 325; State *v.* Gutierrez, 15 La. Ann. 190; New Orleans *v.* Costello, 14 La. Ann. 37; State *v.* Gleason, 15 Wash. 509, 46 Pac. 1043. See CRIMINAL LAW, 12 Cyc. 323.

8. State *v.* Sebecca, 76 Mo. 55; Garza *v.* State, 11 Tex. App. 410; and *supra*, I, B, 3, c

9. See Webber *v.* Harding, 155 Ind. 408, 58 N. E. 533.

In Alabama, under the provision of the constitution authorizing the general assembly to pass laws dispensing with a grand jury in cases of misdemeanors (Const. art. 1, § 9), the general assembly has full power, under an act to regulate the trial of misdemeanors in a particular county, to provide that, where a prosecution for misdemeanors is begun by affidavit in a county court, upon demand for a trial by jury the case shall be be transferred to the circuit court, and there be tried on the complaint as made by the affidavit, and without action by a grand jury; and under such an act so regulating the trial of misdemeanors it is no objection to a trial by jury in the circuit court that an indictment was not preferred against defendant. Witt *v.* State, 130 Ala. 129, 30 So. 473. And since the constitution does not forbid the legislature from dispensing with indictments in cases of misdemeanors, a trial for carrying a concealed weapon may be legally had in the city court of Talladega, without indictment under Acts (1894–1895), p. 1222, giving that court jurisdiction of "all prosecutions for misdemeanors which may be instituted or commenced in said court by complaint and warrant." Frost *v.* State, 124 Ala. 71, 27 So. 550.

10. State *v.* Shortell, 93 Mo. 123, 5 S. W. 691; State *v.* Russell, 88 Mo. 648; State *v.* Thompson, 81 Mo. 163; State *v.* Briscoe, 80 Mo. 643; State *v.* Kelm, 79 Mo. 515; State *v.* Sebecca, 76 Mo. 55; State *v.* Rockwell, 18 Mo. App. 395; Faulkner *v.* State, (Tex. Cr. App. 1902) 66 S. W. 787; Prewitt *v.* State, (Tex. Cr. App. 1896) 34 S. W. 924; Garza *v.* State, 11 Tex. App. 410; Deon *v.* State, 3 Tex. App. 435. See also *supra*, I, B, 3, c. But it has been held in Colorado that under Const. art. 2, § 8, providing that "no person shall, for a felony, be proceeded against criminally, otherwise than by indictment," and that "in all other cases offenses shall be prosecuted criminally by indictment or information," the legislature may provide for prosecuting misdemeanors before justices of the peace upon

officer, a trial *de novo* is usually had on the original complaint, affidavit, or warrant.[11]

c. When Complaint or Affidavit Is Necessary. As a rule in prosecutions before justices of the peace and the like a complaint or affidavit is essential.[12] And sometimes under particular statutes it is the only proper form of accusation for certain prosecutions, so that an indictment will not lie.[13]

5. Coroner's Inquisition. At common law a coroner's inquisition charging one with homicide had the same effect as an indictment, and the accused could be arraigned and tried thereon.[14] In the United States, however, this mode of prosecution is not now recognized; but after the inquest and return an indictment must be found or information filed, according to the practice in the particular jurisdiction.[15]

II. Finding, Return, Filing, and Record of Indictment or Presentment.

A. Jurisdiction — 1. In General. In order that an indictment or presentment may be valid the grand jury must of course have jurisdiction.[16] As a general rule its jurisdiction is coextensive with that of the court in which it is impaneled and for which it is to make inquiry.[17] Therefore, to render an indictment or presentment valid, the court in which the grand jury is acting must have jurisdiction;[18] and this includes jurisdiction of the offense, both with respect to territorial limits and with respect to the character of the offense.[19] If the court had no jurisdiction,

sworn complaint or other information. *In re* Creation of New Counties, 9 Colo. 624, 21 Pac. 472.

11. *Ex p.* Morris, 45 Fla. 157, 34 So. 89; State *v.* Koonce, 108 N. C. 752, 12 S. E. 1032; State *v.* Quick, 72 N. C. 241. See Criminal Law, 12 Cyc. 340.

12. See Criminal Law, 12 Cyc. 323.

13. See State *v.* Ledford, 3 Mo. 102; and *supra*, I, B, 2, c.

In Massachusetts, under Rev. Laws, c. 25, § 23, providing that towns, except as otherwise provided, may affix penalties for breaches of by-laws, not exceeding twenty-five dollars for one offense, which shall inure to the town, and section 73, declaring that, unless otherwise provided, the town treasurer shall prosecute for all fines and forfeitures inuring to the town, prosecutions for violation of a town by-law forbidding any one person to keep more than five swine within the limits of the town can only be maintained on complaint of the town treasurer, and not by indictment. Com. *v.* Rawson, 183 Mass. 491, 67 N. E. 605.

In Ohio, under Rev. St. § 1827, providing that the mayor of the village may inquire into a complaint against persons accused of violating village ordinances and either discharge them or recognize them to the court of common pleas, cases sent to the court of common pleas should be tried in that court on the affidavit filed before the mayor, an indictment not being proper. Finnical *v.* Cadiz, 61 Ohio St. 494, 56 N. E. 200.

14. 4 Blackstone Comm. 302; Reg. *v.* Ingham, 5 B. & S. 257, 9 Cox C. C. 508, 10 Jur. N. S. 968, 33 L. J. Q. B. 183, 10 L. T. Rep. N. S. 456, 12 Wkly. Rep. 793, 117 E. C. L. 257; Reg. *v.* Ellis, 2 C. & K. 470, 61 E. C. L. 470.

15. *Ex p.* Anderson, 55 Ark. 527, 18 S. W. 856; State *v.* Powell, 7 N. J. L. 244; People *v.* Budge, 4 Park. Cr. (N. Y.) 519. See Coroners, 9 Cyc. 980, 993.

16. See the cases cited in the notes following.

17. See Grand Juries, 20 Cyc. 1334.

18. Shepherd *v.* State, 64 Ind. 43; State *v.* Henning, 33 Ind. 189; People *v.* Knatt, 156 N. Y. 302, 50 N. E. 835; Post *v.* U. S., 161 U. S. 583, 16 S. Ct. 611, 40 L. ed. 816; U. S. *v.* Hill, 26 Fed. Cas. No. 15,364, 1 Brock. 156; U. S. *v.* Reed, 27 Fed. Cas. No. 16,134, 2 Blatchf. 435; Rex *v.* Jones, 6 C. & P. 137, 25 E. C. L. 360. See Criminal Law, 12 Cyc. 196; and Grand Juries, 20 Cyc. 1334.

If a court having no criminal jurisdiction summons and impanels a grand jury, it is not a legal body and indictments found by it are void. State *v.* Doherty, 60 Me. 504.

19. *Arkansas.*— State *v.* Kirkpatrick, 32 Ark. 117.

Indiana.— State *v.* Henning, 33 Ind. 189.

Iowa.— Keitler *v.* State, 4 Greene 291.

Maine.— State *v.* Jackson, 32 Me. 40.

Montana.— Territory *v.* Corbett, 3 Mont. 50.

New York.— People *v.* McCarthy, 168 N. Y. 549, 61 N. E. 899 [*affirming* 59 N. Y. App. Div. 231, 69 N. Y. Suppl. 513]; People *v.* Knatt, 156 N. Y. 302, 50 N. E. 835; People *v.* Dimick, 107 N. Y. 13, 14 N. E. 178.

Pennsylvania.— Com. *v.* Smith, 23 Pa. Co. Ct. 491.

United States.— Post *v.* U. S., 161 U. S. 583, 16 S. Ct. 611, 40 L. ed. 816; Fries' Case, 9 Fed. Cas. No. 5,126, 3 Dall. (Pa.) 515, 1 L. ed. 701; U. S. *v.* Hill, 26 Fed. Cas. No. 15,364, 1 Brock. 156.

England.— Rex *v.* Jones, 6 C. & P. 137, 25 E. C. L. 360.

See Criminal Law, 12 Cyc. 196; and Grand Juries, 20 Cyc. 1334.

the indictment is a nullity and the objection may be raised at any time, even after conviction by motion in arrest.[20] In the absence of a statute to the contrary, the grand jury may indict for an offense committed after they were impaneled.[21]

2. Organization and Constitution of Court. It is also necessary to the validity of an indictment that the court shall be legally organized and constituted, for otherwise there is no jurisdiction;[22] at least unless the court is one *de facto*.[23]

3. Organization and Constitution of Grand Jury. It is also necessary, as a general rule, provided objection is properly raised, that the grand jury by which the indictment was found shall have been legally organized and constituted.[24] At

Special grand juries see Grand Juries, 20 Cyc. 1337.

Jurisdiction in justice of the peace.— An indictment will be quashed where the justice before whom defendant was charged had jurisdiction and the law required him to impose sentence. Com. *v.* Smith, 23 Pa. Co. Ct. 491.

Locality of offense.— There is no jurisdiction and the indictment is a nullity, where the offense was committed in another county or district, or otherwise beyond the territorial jurisdiction of the court and the grand jury.

Alabama.— Hughes *v.* State, 35 Ala. 351.

Arkansas.— Rogers *v.* State, 15 Ark. 71.

Indiana.— Beal *v.* State, 15 Ind. 378.

Iowa.— Keitler *v.* State, 4 Greene 291.

Missouri.— State *v.* Smiley, 98 Mo. 605, 12 S. W. 247; *Ex p.* Slater, 72 Mo. 102. And see *In re* McDonald, 19 Mo. App. 370.

Utah.— People *v.* Green, 1 Utah 11.

United States.— Post *v.* U. S., 161 U. S. 583, 16 S. Ct. 611, 40 L. ed. 816 (under the act of congress of July 12, 1894, requiring the prosecution of offenses arising in the district of Minnesota to be had in the division of the district in which such offenses were committed); Logan *v.* U. S., 144 U. S. 263, 12 S. Ct. 617, 36 L. ed. 429; U. S. *v.* Dixon, 44 Fed. 401; U. S. *v.* Hill, 26 Fed. Cas. No. 15,364, 1 Brock. 156; U. S. *v.* Reed, 27 Fed. Cas. No. 16,134, 2 Blatchf. 435; U. S. *v.* Tallman, 28 Fed. Cas. No. 16,429, 10 Blatchf. 21. See also Fries' Case, 9 Fed. Cas. No. 5,126, 3 Dall. (Pa.) 515, 1 L. ed. 701.

England.— Rex *v.* Jones, 6 C. & P. 137, 25 E. C. L. 360.

See also Criminal Law, 12 Cyc. 207 *et seq.*; and Grand Juries, 20 Cyc. 1334.

Statute applied to crime committed before enactment.— Post *v.* U. S., 161 U. S. 583, 16 S. Ct. 611, 40 L. ed. 816.

If a new county is created out of a part of the territory of an old one, with its organization to be effected at a future time, the grand jury of the proper court of the old county has jurisdiction to find indictments for offenses committed in the territory of the new county during the interval. People *v.* McGuire, 32 Cal. 140.

After change of venue see *infra*, II, I, 3.

Offenses against the United States only are not indictable in a state court. State *v.* Kirkpatrick, 32 Ark. 117. And see Criminal Law, 12 Cyc. 205 *et seq.*

20. Shepherd *v.* State, 64 Ind. 43; People *v.* Knatt, 156 N. Y. 302, 50 N. E. 835; and other cases cited in the preceding note.

21. People *v.* Beaty, 14 Cal. 566.

Offense committed after commencement of term see *infra*, II, C, 1.

22. Cook *v.* State, 7 Blackf. (Ind.) 165 (absence of president of court); *In re* Davis, 62 Kan. 231, 61 Pac. 809; State *v.* Shuford, 128 N. C. 588, 38 S. E. 808 (judge appointed before the act creating the district took effect); Jackson *v.* Com., 13 Gratt. (Va.) 795 (less than required number of judges present). See also Davis *v.* State, 46 Ala. 80; McRae *v.* State, 71 Ga. 96; Com. *v.* Hardy, 2 Mass. 303. And see Courts, 11 Cyc. 702 *et seq.* *Compare* Com. *v.* Bannon, 97 Mass. 214, holding that the finding of the grand jury was not invalid because of the temporary absence of the judge during their deliberations.

Term of court see *infra*, II, C, 1.

Demurrer.— That the court at the time an indictment was framed was illegally held, because it had not been adjourned and convened according to law, is not a matter which can be taken advantage of by demurrer, but must be by plea properly verified, the indictment being regular on its face. McRae *v.* State, 71 Ga. 96. See *infra*, IX, C.

23. Jenkins *v.* State, 93 Ga. 1, 18 S. E. 992; State *v.* Harris, 47 La. Ann. 386, 17 So. 129; Coyle *v.* Com., 104 Pa. St. 117; Brewer *v.* State, 6 Lea (Tenn.) 198. See Courts, 11 Cyc. 724.

24. *Alabama.*— Hall *v.* State, 134 Ala. 90, 32 So. 750; Peters *v.* State, 98 Ala. 38, 13 So. 334; Nixon *v.* State, 68 Ala. 535; Benson *v.* State, 68 Ala. 513; Billingslea *v.* State, 68 Ala. 486; Phillips *v.* State, 68 Ala. 469; Oliver *v.* State, 66 Ala. 8; Weston *v.* State, 63 Ala. 155; Berry *v.* State, 63 Ala. 126; Parmer *v.* State, 41 Ala. 416; State *v.* Middleton, 5 Port. 484.

Arkansas.— Wilburn *v.* State, 21 Ark. 198.

Connecticut.— State *v.* Hamlin, 47 Conn. 95, 36 Am. Rep. 54.

Florida.— Kitrol *v.* State, 9 Fla. 9, holding that incompetency of one grand juror renders an indictment void, if exception thereto is properly taken by the accused.

Georgia.— Reich *v.* State, 53 Ga. 73, 21 Am. Rep. 265.

Indiana.— Mershon *v.* State, 51 Ind. 14; Hardin *v.* State, 22 Ind. 347; Barger *v.* State, 6 Blackf. 188; State *v.* Conner, 5 Blackf. 325.

Iowa.— State *v.* Bowman, 73 Iowa 110, 34 N. W. 767 (holding that after the judge

common law, and generally under the statutes, they must consist of the number required by law, neither more nor less;[25] and they must be sworn or affirmed.[26] There are some defects and irregularities in the organization of the grand jury, however, which, it has been held, will not invalidate an indictment,[27] or which are required to be taken advantage of, if at all, at a particular preliminary stage

has informed the grand jurors that they need not appear at the next term unless again summoned, he is not authorized, on the third day of the next term, without any summons or other notice to the jurors to appear, to impanel a grand jury by calling talesmen to take the place of such of the regular panel as are absent, and that an indictment found by such a grand jury should be quashed); State *v.* Ostrander, 18 Iowa 435.

Louisiana.— State *v.* Smith, 31 La. Ann. 406.

Maine.— State *v.* Flemming, 66 Me. 142, 22 Am. Rep. 552; State *v.* Doherty, 60 Me. 504; State *v.* Lightbody, 38 Me. 200; State *v.* Symonds, 36 Me. 128.

Maryland.— State *v.* Vincent, 91 Md. 718, 47 Atl. 1036, 52 L. R. A. 83; Avirett *v.* State, 76 Md. 510, 25 Atl. 676, 987; Clare *v.* State, 30 Md. 163.

Michigan.— Thayer *v.* People, 2 Dougl. 417.

Mississippi.— Miller *v.* State, 33 Miss. 356, 69 Am. Dec. 351; Portis *v.* State, 23 Miss. 578; Baker *v.* State, 23 Miss. 243; Barney *v.* State, 12 Sm. & M. 68; Rawls *v.* State, 8 Sm. & M. 599.

Nevada.— State *v.* McNamara, 3 Nev. 70.

New Jersey.—State *v.* Rockafellow, 6 N. J. L. 332.

New York.— People *v.* Duff, 1 N. Y. Cr. 307. And see People *v.* Scannell, 37 Misc. 345, 75 N. Y. Suppl. 500, 16 N. Y. Cr. 321.

North Carolina.— State *v.* Durham Fertilizer Co., 111 N. C. 658, 16 S. E. 231; State *v.* Sharp, 110 N. C. 604, 14 S. E. 504; State *v.* Haywood, 73 N. C. 437.

Ohio.— Huling *v.* State, 17 Ohio St. 583; Doyle *v.* State, 17 Ohio 222.

Pennsylvania.— Com. *v.* Leisenring, 2 Pearson 466.

Rhode Island.— State *v.* Davis, 12 R. I. 492, 34 Am. Rep. 704.

Tennessee.— State *v.* Tilly, 8 Baxt. 381; State *v.* Duncan, 7 Yerg. 271. See State *v.* Baker, 4 Humphr. 12.

Texas.— Martin *v.* State, 22 Tex. 214; Stanley *v.* State, 16 Tex. 557; State *v.* Foster, 9 Tex. 65; State *v.* Jacobs, 6 Tex. 99; Lewis *v.* State, 42 Tex. Cr. 278, 59 S. W. 1116 (race discrimination in formation of grand jury); Wells *v.* State, 21 Tex. App. 594, 2 S. W. 806; Lott *v.* State, 18 Tex. App. 627.

Vermont.— State *v.* Ward, 60 Vt. 142, 14 Atl. 187.

Virginia.— Com. *v.* St. Clair, 1 Gratt. 556; Com. *v.* Long, 2 Va. Cas. 318; Com. *v.* Cherry, 2 Va. Cas. 20.

Wisconsin.— State *v.* Cole, 17 Wis. 674; Newman *v.* State, 14 Wis. 393.

United States.— Crowley *v.* U. S., 194 U. S. 461, 24 S. Ct. 731, 48 L. ed. 1075; U. S. *v.* Jones, 31 Fed. 725; U. S. *v.* Antz, 16 Fed. 19, 4 Woods 174; U. S. *v.* Hammond, 26 Fed. Cas. No. 15,294, 2 Woods 197.

See 27 Cent. Dig. tit. "Indictment and Information," § 55; and GRAND JURIES, 20 Cyc. 1291.

Record see *infra*, II, F, 3, c.

25. *Alabama.*— Berry *v.* State, 63 Ala. 126.

Florida.— English *v.* State, 31 Fla. 340, 12 So. 689.

Maine.— State *v.* Symonds, 36 Me. 128.

Maryland.— State *v.* Vincent, 91 Md. 718, 47 Atl. 1036, 52 L. R. A. 83.

Michigan.— People *v.* Thompson, 122 Mich. 411, 81 N. W. 344.

Mississippi.— Miller *v.* State, 33 Miss. 356, 69 Am. Dec. 351.

Nevada.— State *v.* Hartley, 22 Nev. 342, 40 Pac. 372, 28 L. R. A. 33.

North Carolina.—State *v.* Barker, 107 N. C. 913, 12 S. E. 115, 10 L. R. A. 50.

Ohio.— Doyle *v.* State, 17 Ohio 222.

Pennsylvania.— Com. *v.* Leisenring, 2 Pearson 466.

Texas.— Ogle *v.* State, 43 Tex. Cr. 219, 63 S. W. 1009, 96 Am. St. Rep. 860; Wells *v.* State, 21 Tex. App. 594, 2 S. W. 806; Rainey *v.* State, 19 Tex. App. 479; *Ex p.* Swain, 19 Tex. App. 323; Williams *v.* State, 19 Tex. App. 265; Smith *v.* State, 19 Tex. App. 95; McNeese *v.* State, 19 Tex. App. 48; Lott *v.* State, 18 Tex. App. 627.

See also GRAND JURIES, 20 Cyc. 1317, 1318.

26. *Alabama.*— Roe *v.* State, (1887) 2 So. 459. *Compare* Roe *v.* State, 82 Ala. 68, 3 So. 2.

Georgia.— Ridling *v.* State, 56 Ga. 601.

Illinois.— Allen *v.* People, 77 Ill. 484.

Louisiana.— State *v.* Furco, 51 La. Ann. 1082, 25 So. 951.

Mississippi.— Foster *v.* State, 31 Miss. 421; Abram *v.* State, 25 Miss. 589.

Missouri.— State *v.* Sanders, 158 Mo. 610, 59 S. W. 993, 81 Am. St. Rep. 330.

New Jersey.— State *v.* Fox, 9 N. J. L. 244.

Tennessee.— See State *v.* Baker, 4 Humphr. 12.

See GRAND JURIES, 10 Cyc. 1319, 1320.

Record see *infra*, II, F, 3, c.

27. *Alabama.*—Stoneking *v.* State, 118 Ala. 68, 24 So. 47; Murphy *v.* State, 86 Ala. 45, 5 So. 432; Billingslea *v.* State, 68 Ala. 486; Phillips *v.* State, 68 Ala. 469; Cross *v.* State, 63 Ala. 40; Boule *v.* State, 51 Ala. 18.

Indiana.— Dorman *v.* State, 56 Ind. 454; Sater *v.* State, 56 Ind. 378.

Iowa.— State *v.* Brandt, 41 Iowa 593.

Kansas.— In this state a statute provides that no plea in abatement shall be taken to any grand jury duly charged and sworn for any irregularity in their selection which does not amount to corruption. State *v.* Donaldson, 43 Kan. 431, 23 Pac. 650; State *v.* Skinner, 34 Kan. 256, 8 Pac. 420.

or in a particular manner.[28] Regularity and legality in the organization and constitution of the grand jury is generally presumed in support of an indictment in the absence of a showing in the record to the contrary.[29]

4. Arrest and Custody of Defendant. In the absence of a statutory provision to the contrary, a grand jury has the power to indict or present for a crime whether the accused has been arrested and is in custody or not, jurisdiction not being in any way dependent upon his arrest or custody.[30] Sometimes, however, a statute makes the apprehension of the accused a ground of jurisdiction.[31] The validity of an indictment is not affected by the fact that the accused was illegally arrested or that his custody is illegal.[32]

5. Preliminary Examination and Commitment or Binding Over. In the absence of a statute to the contrary, an indictment may be found and presented without a prior preliminary examination and commitment or binding over of the accused,[33]

Maryland.— State *v.* Keating, 85 Md. 188, 36 Atl. 840.

Massachusetts.— Com. *v.* Krathofski, 171 Mass. 459, 50 N. E. 1040; Com. *v.* Colton, 11 Gray 1, no objection that the grand jury was not impaneled on the first day of the term as the indictment recites.

New York.— Dolan *v.* People, 64 N. Y. 485 [*affirming* 6 Hun 232], that the commissioner of jurors was prevented by duress from attending upon and supervising the grand jury.

Tennessee.— Epperson *v.* State, 5 Lea 291.

Texas.— Owens *v.* State, 25 Tex. App. 552, 8 S. W. 658; Mahl *v.* State, 1 Tex. App. 127.

West Virginia.— State *v.* Martin, 38 W. Va. 568, 18 S. E. 748.

See 27 Cent. Dig. tit. "Indictment and Information," § 55. See also Grand Juries, 20 Cyc. 1291.

Defects and irregularities in: Selection and drawing see Grand Juries, 20 Cyc. 1305 *et seq.* Summoning see Grand Juries, 20 Cyc. 1311 *et seq.* Impaneling see Grand Juries, 20 Cyc. 1315. Appointment of foreman see Grand Juries, 20 Cyc. 1319.

Disqualification see Grand Juries, 20 Cyc. 1296 *et seq.*

Effect of disqualification of jurors see Grand Juries, 20 Cyc. 1303.

28. Nixon *v.* State, 68 Ala. 535; Gitchell *v.* People, 146 Ill. 175, 33 N. E. 757, 37 Am. St. Rep. 147 (holding that as a general rule a defendant who pleads to an indictment is deemed to admit its genuineness as a record, and, after he has been convicted, cannot object to the constitution of the grand jury); State *v.* Watson, 31 La. Ann. 379.

Mode of raising objections: Challenges see Grand Juries, 20 Cyc. 1325, 1328. Demurrer see *infra*, IX, C. Motion for new trial see Criminal Law, 12 Cyc. 704. Motion in arrest of judgment see Criminal Law, 12 Cyc. 764. Motion to quash see *infra*, IX, B. Plea in abatement see Criminal Law, 12 Cyc. 355, 358. Plea to the jurisdiction see Criminal Law, 12 Cyc. 354.

29. Wilson *v.* People, 3 Colo. 325; Tarrance *v.* State, 43 Fla. 446, 30 So. 685; Bruen *v.* People, 206 Ill. 417, 69 N. E. 24; State *v.* Hartman, 10 Iowa 589; Chase *v.* State, 46 Miss. 683. See also Grand Juries, 20 Cyc. 1303, 1311.

30. Com. *v.* Wetherhold, 2 Pa. L. J. Rep. 476, 4 Pa. L. J. 265; State *v.* Bullock, 54 S. C. 300, 32 S. E. 424; State *v.* Bowman, 43 S. C. 108, 20 S. E. 1010; U. S. *v.* Kilpatrick, 16 Fed. 765. And see *infra*, II, A, 5.

31. See State *v.* Jackson, 32 Me. 40; State *v.* Corson, 12 Mo. 404. Thus statutes authorizing an indictment for an offense, such as bigamy for example, in a county other than that in which it was committed sometimes requires the apprehension of the accused in the county as a condition of jurisdiction. State *v.* Sweetsir, 53 Me. 438; State *v.* Fitzgerald, 75 Mo. 571; State *v.* Griswold, 53 Mo. 181; Collins *v.* People, 1 Hun (N. Y.) 610. When the apprehension of an offender is made a ground of jurisdiction such apprehension must have occurred prior to the finding of the indictment, and must be alleged in the indictment. State *v.* Fitzgerald, 75 Mo. 571; State *v.* Griswold, 53 Mo. 181; Houser *v.* People, 46 Barb. (N. Y.) 33; Reg. *v.* Whiley, 1 C. & K. 150, 2 Moody C. C. 186, 47 E. C. L. 150; Rex *v.* Fraser, 1 Moody C. C. 407. See also Bigamy, 5 Cyc. 696; Criminal Law, 12 Cyc. 220.

32. State *v.* Brooks, 92 Mo. 542, 5 S. W. 257, 330; State *v.* Chyo Chiagk, 92 Mo. 395, 4 S. W. 704; People *v.* Rowe, Sheld. (N. Y.) 581, 4 Park. Cr. 253; State *v.* Brewster, 7 Vt. 118; U. S. *v.* Lawrence, 26 Fed. Cas. No. 15,573, 13 Blatchf. 295. See Criminal Law, 12 Cyc. 220.

33. *Arkansas.*— See *Ex p.* Anderson, 55 Ark. 527, 18 S. W. 856.

California.— People *v.* Goldenson, 76 Cal. 328, 19 Pac. 161.

Idaho.— State *v.* Schieler, 4 Ida. 120, 37 Pac. 272.

Kentucky.— Osborn *v.* Com., 20 S. W. 223, 14 Ky. L. Rep. 246.

Louisiana.— State *v.* Bunger, 14 La. Ann. 461.

Maryland.— Blaney *v.* State, 74 Md. 153, 21 Atl. 547.

New Hampshire.— State *v.* Webster, 39 N. H. 96.

New York.— People *v.* McCarthy, 168 N. Y. 549, 61 N. E. 899 [*affirming* 59 N. Y. App. Div. 231, 69 N. Y. Suppl. 513]; People *v.* Diamond, 72 N. Y. App. Div. 281, 76 N. Y. Suppl. 57; People *v.* Horton, 4 Park. Cr. 222; French *v.* People, 3 Park. Cr. 114; People *v.* Hyler, 2 Park. Cr. 566.

or pending and before the termination of a preliminary examination,[34] or examination by a coroner,[35] or even after the discharge of the accused on a preliminary examination.[36] Sometimes, however, a statute or the practice requires a preliminary examination and commitment or binding over to authorize an indictment in a particular court or under particular circumstances.[37] In such case the indictment must be for substantially the same offense as that for which the accused was examined and committed or bound over, or for an offense included therein.[38] But the fact that the information or return on which an indictment is founded does not contain as full and specific a statement of the offense as the indictment is not ground for quashing the indictment.[39] Defendant may waive his right to

Ohio.— Kendle *v.* Tarbell, 24 Ohio St. 196; Harper *v.* State, 7 Ohio St. 73.

South Carolina.— State *v.* Brown, 62 S. C. 374, 40 S. E. 776; State *v.* Bullock, 54 S. C. 300, 32 S. E. 424; State *v.* Bowman, 43 S. C. 108, 20 S. E. 1010.

Virginia.— Jones *v.* Com., 86 Va. 661, 10 S. E. 1005.

West Virginia.— State *v.* Mooney, 49 W. Va. 712, 39 S. E. 657.

United States.— Goldsby *v.* U. S., 160 U. S. 70, 16 S. Ct. 216, 40 L. ed. 343; U. S. *v.* Kilpatrick, 16 Fed. 765; U. S. *v.* Fuers, 25 Fed. Cas. No. 15,174.

See 27 Cent. Dig. tit. "Indictment and Information," § 32.

34. Osborn *v.* Com., 20 S. W. 223, 14 Ky. L. Rep. 246; People *v.* Molineux, 26 Misc. (N. Y.) 589, 57 N. Y. Suppl. 643; People *v.* Heffernan, 5 Park. Cr. (N. Y.) 393; People *v.* Horton, 4 Park. Cr. (N. Y.) 222. And see State *v.* Recorder, 42 La. Ann. 1091, 8 So. 279, 10 L. R. A. 137. *Compare* Matter of Gessner, 53 How. Pr. (N. Y.) 515; People *v.* Drury, 2 Edm. Sel. Cas. (N. Y.) 351; and GRAND JURIES, 20 Cyc. 1334 note 42.

35. People *v.* Molineux, 26 Misc. (N. Y.) 589, 57 N. Y. Suppl. 643; People *v.* Hyler, 2 Park. Cr. (N. Y.) 566.

36. State *v.* Helvin, 65 Iowa 289, 21 N. W. 645. And see Osborn *v.* Com., 20 S. W. 223, 14 Ky. L. Rep. 246; State *v.* Recorder, 42 La. Ann. 1091, 8 So. 279, 10 L. R. A. 137. But see Com. *v.* Jadwin, 1 C. Pl. (Pa.) 133, 2 L. T. N. S. 13.

37. See State *v.* Jackson, 32 Me. 40; State *v.* Stevens, 36 N. H. 59; Butler *v.* Com., 81 Va. 159; Scott *v.* Com., 14 Gratt. (Va.) 687; Page *v.* Com., 9 Leigh (Va.) 683; Anonymous, 1 Va. Cas. 144; State *v.* Strauder, 8 W. Va. 686. But *compare* Jackson *v.* Com., 23 Gratt. (Va.) 919; Chahoon *v.* Com., 20 Gratt. (Va.) 733; Shelly *v.* Com., 19 Gratt. (Va.) 653; Com. *v.* Blakeley, 1 Va. Cas. 129.

In Pennsylvania a bill of indictment may be sent to the grand jury by the district attorney with the sanction of the court without a previous preliminary hearing and commitment or binding over; but the sanction of the court is necessary, and should not be given except in the case of pressing and adequate necessity. Com. *v.* Green, 126 Pa. St. 531, 17 Atl. 878, 12 Am. St. Rep. 894; Rowand *v.* Com., 82 Pa. St. 405; Brown *v.* Com., 76 Pa. St. 319; McCullough *v.* Com., 67 Pa. St. 30; Com. *v.* Taylor, 12 Pa. Co. Ct. 326; Com. *v.* Hughes, 11 Pa. Co. Ct. 470; Com. *v.* Reynolds, 2 Kulp 345; Com. *v.* Wetherhold, 2 Pa. L. J. Rep. 476, 4 Pa. L. J. 265; Com. *v.* English, 11 Phila. (Pa.) 439. A count in an indictment not founded upon an information or hearing before a magistrate or binding over will be quashed upon motion. Com. *v.* Moss, 24 Pa. Co. Ct. 221. Where a return is made by a constable to the court of quarter sessions under the act of April 3, 1872 (Pamphl. Laws 843) setting forth that a person has sold liquor in violation of law, a preliminary examination or information is not necessary before the finding of an indictment. Davidson *v.* Com., 4 Pa. Cas. 98, 6 Atl. 770.

In Canada "anyone who is bound over to prosecute any person, whether committed for trial or not, may prefer a bill of indictment for the charge on which the accused has been committed, or in respect of which the prosecutor is so bound over, or for any charge founded upon the facts or evidence disclosed on the depositions taken before the justice." Can. Cr. Code (1892), § 642. See Reg. *v.* Patterson, 2 Can. Cr. Cas. 339. *Compare* Reg. *v.* Howes, 5 Manitoba 339.

Joint indictment see *infra*, II, A, 7.

38. Scott *v.* Com., 14 Gratt. (Va.) 687; Clere *v.* Com., 3 Gratt. (Va.) 615; Mowhray *v.* Com., 11 Leigh (Va.) 643; Page *v.* Com., 9 Leigh (Va.) 683. It has been held, however, that the fact that the indictment charges a simple assault and battery, while the complaint in the police court, on which the preliminary hearing was had and on which defendant was committed or bound over, charged an aggravated assault, is not a fatal variance. State *v.* Bean, 36 N. H. 122; State *v.* Stevens, 36 N. H. 59. And where defendant was sent on by the examining court to be tried for embezzling the goods of A, it was held that he might be indicted for embezzling the goods of B, the embezzlement being of the same goods for which he was examined by the examining court. Com. *v.* Adcock, 8 Gratt. (Va.) 661. See also Mabry *v.* Com., 2 Va. Cas. 396; Derieux *v.* Com., 2 Va. Cas. 379; Halkem *v.* Com., 2 Va. Cas. 4. And see the cases cited in the note following.

A mistake of a justice in the date of the warrant of commitment, or of the warrant summoning the justices, is no ground for quashing the indictment. Com. *v.* Murray, 2 Va. Cas. 504.

39. Com. *v.* Carson, 166 Pa. St. 179, 30 Atl. 985. After an information has been made

a preliminary examination, or he may waive his right to object on the ground that there has been no sufficient examination, by failure to raise the objection by motion to quash or plea in abatement.[40]

6. Pendency of Habeas Corpus Proceedings. The fact that when an indictment is found in a court of competent jurisdiction proceedings are pending in another court for the discharge of the accused on a writ of habeas corpus is not ground either for quashing the indictment or for arresting judgment after a conviction.[41]

7. Joint Indictments. An indictment against two may be good as to one, although void as to the other for want of jurisdiction.[42]

B. Leave of Court or Prosecuting Attorney. At common law a private person could appear as prosecutor before the grand jury and prefer an accusation against another,[43] and such practice has to some extent obtained in the United States.[44] At the present time, however, in most jurisdictions, accusations cannot be preferred before the grand jury by a private individual;[45] but, except where the grand jury are authorized to make presentments without any bill of indictment being preferred,[46] bills of indictment can be submitted to them only by the public prosecutor, variously termed the attorney-general, district attorney, etc.[47] In some jurisdictions, under particular circumstances, leave or sanction of the

for seduction under promise of marriage, the indictment therefor may include a count for fornication and bastardy, although no information had been made for that offense. Nicholson *v.* Com., 91 Pa. St. 390, 96 Pa. St. 503. See also Com. *v.* Mock, 23 Pa. Super. Ct. 51 (common nuisance on public highway); Com. *v.* Gouger, 21 Pa. Super. Ct. 217; Com. *v.* March, 1 Pa. Co. Ct. 81; Com. *v.* Morton, 12 Phila. (Pa.) 595; Com. *v.* Leisenring, 11 Phila. (Pa.) 389; Com. *v.* Wohlgemuth, 9 Phila. (Pa.) 582; Com. *v.* Meads, 14 York Leg. Rec. (Pa.) 130. But it has been held that a commitment on an affidavit charging defendant with conspiring with certain persons named to commit election frauds will not support an indictment charging him with conspiring with "unknown persons" for such purpose (Com. *v.* Hunter, 2 Pa. Dist. 707, 13 Pa. Co. Ct. 573); and that an indictment charging defendant with arson, which is a felony, should be quashed where it appears that the original information was against defendant and another for conspiracy, which is a misdemeanor, as the indictment should charge the same or a similar offense to that charged in the information (Com. *v.* Edwards, 5 Kulp (Pa.) 192). For other cases of fatal variance see Com. *v.* Morningstar, 2 Pa. Dist. 41, 12 Pa. Co. Ct. 34 (offer of rebate of premium on insurance policy); Com. *v.* Moister, 3 Pa. Co. Ct. 539 (embezzlement and mutilation of books); Com. *v.* Porter, 10 Phila. (Pa.) 217; Com. *v.* Miller, 14 York Leg. Rec. (Pa.) 112.

40. Campbell *v.* Com., 2 Va. Cas. 314; Angel *v.* Com., 2 Va. Cas. 231; Com. *v.* Cohen, 2 Va. Cas. 158; State *v.* Stewart, 7 W. Va. 731, 23 Am. Rep. 623. See Criminal Law, 12 Cyc. 306.

41. Clark *v.* Com., 123 Pa. St. 555, 16 Atl. 795.

42. State *v.* Jackson, 32 Me. 40, where there was no jurisdiction as to one defendant because he had not been committed or bound over, but the other defendant had.

43. 1 Chitty Cr. L. 1, 305, 316. And see Rex *v.* Wood, 3 B. & Ad. 657, 23 E. C. L. 290; Reg. *v.* Gurney, 11 Cox C. C. 414.

44. See Bedford *v.* State, 2 Swan (Tenn.) 72; and *infra*, II, D.

45. McCullough *v.* Com., 67 Pa. St. 30.

46. Oglesby *v.* State, 121 Ga. 602, 49 S. E. 706; Kerby *v.* Long, 116 Ga. 187, 42 S. E. 386; Blaney *v.* State, 74 Md. 153, 21 Atl. 547; Com. *v.* Woodward, 157 Mass. 516, 32 N. E. 939, 34 Am. St. Rep. 302; Ward *v.* State, 2 Mo. 120, 22 Am. Dec. 449; State *v.* Wilcox, 104 N. C. 847, 10 S. E. 453; Lewis *v.* Wake County, 74 N. C. 194; State *v.* Lewis, 87 Tenn. 119, 9 S. W. 427; State *v.* Lee, 87 Tenn. 114, 9 S. W. 425. See *supra*, I, B, 2, b, d; and Grand Juries, 20 Cyc. 1335.

In Pennsylvania, except where there has been a previous complaint or information and examination before a magistrate the grand jury can only act upon and present offenses of public notoriety, and such as are within their own knowledge, such as are given them in charge by the court, and such as are sent up to them by the district attorney. Com. *v.* Green, 126 Pa. St. 531, 17 Atl. 878, 12 Am. St. Rep. 894; McCullough *v.* Com., 67 Pa. St. 30. So where a grand jury made presentment of a defendant for keeping a hawdy-house, acting upon the testimony of certain witnesses examined before them upon an indictment for an assault and battery preferred against another defendant, it was held that an indictment preferred thereon by the district attorney, even with leave of court, and returned a true bill, would be quashed. Com. *v.* Green, *supra*. Charges not presented before the committing magistrate or on presentment cannot be included in an indictment without the official sanction of the prosecuting attorney. Com. *v.* Simons, 6 Phila. 167. See also *supra*, II, A, 5; and Grand Juries, 20 Cyc. 1335.

47. Lewis *v.* Wake County, 74 N. C. 194; Com. *v.* Simons, 6 Phila. (Pa.) 167; State *v.* Bowman, 43 S. C. 108, 20 S. E. 1010.

court is required;[48] but ordinarily this is not necessary.[49] Leave of court on resubmission of a charge to the grand jury is elsewhere considered.[50]

C. Term of Court and Time of Finding and Filing — 1. Term of Court. An indictment found by a grand jury at a term of court held at a time unauthorized by law, or at a term at which no grand jury is authorized, is a nullity, and so are all proceedings thereon.[51] The term of court for which a grand jury is to be summoned and organized and the duration of its existence for the purpose of finding indictments are regulated by statute.[52] Generally a grand jury may be organized and an indictment found and presented at any regular term of a court having jurisdiction,[53] and at any time during the term,[54] or at a special term,[55] or

48. See Lawless *v.* State, 4 Lea (Tenn.) 173.

In Pennsylvania bills of indictment can be sent before the grand jury only by leave of the court or with its subsequent sanction unless there has been a previous information or complaint and preliminary hearing before a magistrate. Rowand *v.* Com., 82 Pa. St. 405; Brown *v.* Com., 76 Pa. St. 319 (sanction of court presumed in the absence of evidence to the contrary); Com. *v.* Brown, 23 Pa. Super. Ct. 470; Com. *v.* Sheppard, 20 Pa. Super. Ct. 417; Com. *v.* Pfaff, 5 Pa. Dist. 59, 17 Pa. Co. Ct. 302; Com. *v.* Shubel, 4 Pa. Co. Ct. 12; Com. *v.* Moister, 3 Pa. Co. Ct. 539. If the court refuses to quash, this is ordinarily equivalent to giving its sanction. If the court sustains the motion to quash, this is tantamount to refusing its approval of the action of the district attorney. Com. *v.* Brown, *supra*. A prosecution against a county commissioner for being concerned in public contracts may be instituted by the court, of its own motion, directing the grand jury to investigate the matter, and, after a presentment by them, directing the district attorney to submit an indictment. Com. *v.* Hurd, 177 Pa. St. 481, 35 Atl. 682. An indictment may be presented to the grand jury in pursuance of an order of court, made on petition of the district attorney and private counsel of the prosecutor, and without notice to defendant. Com. *v.* Kaufman, 9 Pa. Super. Ct. 310.

In Tennessee, under Code, § 5097, subs. 9, authorizing the filing of an indictment upon an order of the court to be made when it appears to the court that an indictable offense has been committed, an indictment so filed is not objectionable because the court did not, previous to issuing the order, examine witnesses, and take proof formally in regard to the facts. Lawless *v.* State, 4 Lea 173. An order to file a bill of indictment *ex officio* need not recite the grounds upon which it is made. It is sufficient where it appears to the court that the person has committed the offense, and the order need not state upon whom it was committed. State *v.* Kitrell, 7 Baxt. 167. See also Bennett *v.* State, 8 Humphr. (Tenn.) 118; Simpson *v.* State, 4 Humphr. (Tenn.) 456. See also *infra*, II, D, 2, d.

Previous presentment not necessary.— The court may order an indictment to be sent to the grand jury without a previous presentment for the same offense. U. S. *v.* Madden, 26 Fed. Cas. No. 15,705, 1 Cranch C. C. 45; U. S. *v.* Thompkins, 28 Fed. Cas. No. 16,483, 2 Cranch C. C. 46.

49. People *v.* Warren, 109 N. Y. 615, 15 N. E. 880; State *v.* Bullock, 54 S. C. 300, 32 S. E. 424; State *v.* Bowman, 43 S. C. 108, 20 S. E. 1010. See also U. S. *v.* Thompkins, 28 Fed. Cas. No. 16,483, 2 Cranch C. C. 46.

50. See *infra*, II, E, 7.

51. Davis *v.* State, 46 Ala. 80; State *v.* Brown, 127 N. C. 562, 37 S. E. 330. See also Courts, 11 Cyc. 728.

52. See Grand Juries, 20 Cyc. 1316.

Term of service and sessions of grand jury see Grand Juries, 20 Cyc. 1332.

Grand jury returned and impaneled for one year.— People *v.* Leonard, 106 Cal. 302, 39 Pac. 617; *In re* Gannon, 69 Cal. 541, 11 Pac. 240; State *v.* Graff, 97 Iowa 568, 66 N. W. 779; Com. *v.* Rich, 14 Gray (Mass.) 335.

Until discharged by the court.— State *v.* Bennett, 45 La. Ann. 54, 12 So. 306.

De facto grand jury where a legal grand jury for a certain term continues into another term see State *v.* Noyes, 87 Wis. 340, 58 N. W. 386, 41 Am. St. Rep. 45, 27 L. R. A. 776.

Grand jury to serve at more than one court. — Com. *v.* Read, Thach. Cr. Cas. (Mass.) 180.

53. Com. *v.* Hardy, 2 Mass. 303; Cyphers *v.* People, 31 N. Y. 373 [*affirming* 5 Park. Cr. 666]. See State *v.* McEvoy, 9 S. C. 208.

54. Harper *v.* State, 42 Ind. 405; State *v.* Winebrenner, 67 Iowa 230, 25 N. W. 146; State *v.* Reid, 20 Iowa 413; Com. *v.* Bannon, 97 Mass. 214; Traviss *v.* Com., 106 Pa. St. 597. See also Ring *v.* State, 96 Ga. 295, 22 S. E. 526; and Grand Juries, 20 Cyc. 1332, 1333.

Resummoning to attend at same term.— Long *v.* State, 46 Ind. 582; Ulmer *v.* State, 14 Ind. 52; State *v.* Reid, 20 Iowa 413.

Temporary adjournments.—It has been held that a grand jury when properly organized is not dissolved or affected by temporary adjournments or recesses of the court, and that it may find indictments during such temporary adjournments or recesses. Nealon *v.* People, 39 Ill. App. 481; Com. *v.* Bannon, 97 Mass. 214; People *v.* Sheriff, 11 N. Y. Civ. Proc. 172. See also Grand Juries, 20 Cyc. 1333.

55. *Alabama.*— Bales *v.* State, 63 Ala. 30; Aaron *v.* State, 39 Ala. 684; Harrington *v.* State, 36 Ala. 236.

Arkansas.— The validity of an indictment found at a special term ordered to be held for the trial of the person indicted cannot be

an adjourned term.[56] An indictment may be found for an offense committed after commencement of the term.[57] Where a term of court is ordered by constitutional authority and a grand jury is regularly drawn, the fact that in appointing such term the law was not strictly complied with will not vitiate a conviction under an indictment found at such term.[58] Statutes providing for organization of the grand jury on the first day of the term have been held directory, so that an indictment is not rendered invalid by failure to conform thereto.[59] It has been held that where the accused is held to bail to answer at the next session, an indictment found before the commencement of the next session should be quashed on motion, unless defendant has waived his right to make the motion or been guilty of laches.[60]

2. During Vacation. In the absence of a statute an indictment found or presented in vacation or by a grand jury convened in vacation will be quashed on motion or plea in abatement.[61] Sometimes, however, the judge is authorized by statute under special circumstances to draw a grand jury in vacation.[62]

3. Within Certain Time After Commitment or Binding Over. Provision is sometimes made by statute for the discharge of a prisoner or the dismissal of the prosecution, if an indictment is not found against him at the next term of the court at which he is held to answer,[63] or before the end of the second term at which he is

attacked on the ground that, had the case been tried at such term, it would have interfered with the regular term. Hamilton *v.* State, 62 Ark. 543, 36 S. W. 1054.

California.— People *v.* Carabin, 14 Cal. 438.

Illinois.— Gardner *v.* People, 4 Ill. 83.

Iowa.— State *v.* Nash, 7 Iowa 347; Sharp *v.* State, 2 Iowa 454.

Mississippi.— Young *v.* State, 2 How. 865.

Missouri.— Mary *v.* State, 5 Mo. 71.

New York.— People *v.* McKane, 80 Hun 322, 30 N. Y. Suppl. 95.

South Carolina.— State *v.* Cardoza, 11 S. C. 195.

Wisconsin.— Oshoga *v.* State, 3 Pinn. 56, 3 Chandl. 57.

See 27 Cent. Dig. tit. "Indictment and Information," § 36 *et seq.*; and Grand Juries, 20 Cyc. 1316.

Compare Wilson *v.* State, 1 Blackf. (Ind.) 428.

Where a grand jury is unauthorized at a special or extra term no indictment can be found. Thus under N. C. Acts (1899), c. 593, providing an extra term of the superior court, without a grand jury, at which only cases against incarcerated defendants should be tried, it was held proper to quash an indictment returned by a grand jury at such term, charging defendant, who was in jail, with carrying a concealed weapon, since there could be no legal grand jury, and the extra term could only try criminal cases where indictments had already been found. State *v.* Brown, 127 N. C. 562, 37 S. E. 330.

56. *Georgia.*—Holman *v.* State, 79 Ga. 155, 4 S. E 8; Sims *v.* State, 51 Ga. 495. See also Ring *v.* State, 96 Ga. 295, 22 S. E. 526.

Indiana.— Ulmer *v.* State, 14 Ind. 52.

Iowa.— Sharp *v.* State, 2 Iowa 454.

Minnesota.— State *v.* Peterson, 61 Minn. 73, 63 N. W. 171, 28 L. R. A. 324; State *v.* Davis, 22 Minn. 423.

Missouri.— State *v.* Sweeney, 68 Mo. 96; State *v.* Pate, 67 Mo. 488; State *v.* Barnes, 20 Mo. 413.

Nebraska.— Smith *v.* State, 4 Nebr. 277.

Pennsylvania.— Com. *v.* Smith, 16 Pa. Co. Ct. 568.

See also Grand Juries, 20 Cyc. 1316.

57. People *v.* Beatty, 14 Cal. 566; Com. *v.* Gee, 6 Cush. (Mass.) 174; Allen *v.* State, 5 Wis. 329.

58. People *v.* Youngs, 151 N. Y. 210, 45 N. E. 460; State *v.* Lewis, 107 N. C. 967, 12 S. E. 457, 13 S. E. 247, 11 L. R. A. 105; State *v.* Thomas, 61 Ohio St. 444, 56 N. E. 276, 48 L. R. A. 459.

59. Hughes *v.* State, 54 Ind. 95; State *v.* Dillard, 35 La. Ann. 1049; State *v.* Davis, 14 La. Ann. 678. It is no objection that the grand jury was not impaneled on the first day of the term as the indictment recites. Com. *v.* Colton, 11 Gray (Mass.) 1.

60. Com. *v.* Haggerty, 3 Brewst. (Pa.) 285.

61. Miller *v.* State, 69 Ind. 284 (holding that an objection that the judge had no power to convene may properly be raised by challenge or plea in abatement, but if not so raised, it is waived); State *v.* Corbit, 42 Tex. 88, 90 (where it is said that "a presentation by indictment must be made during the session of the court, since there can be no grand jury at any other time").

62. Holman *v.* State, 79 Ga. 155, 4 S. E. 8. See Grand Juries, 20 Cyc. 1317 note 43.

63. *California.*— *Ex p.* Bull, 42 Cal. 196.

Kentucky.— Sutton *v.* Com., 97 Ky. 308, 30 S. W. 661, 17 Ky. L. Rep. 184.

Nebraska.— *Ex p.* Two Calf, 11 Nebr. 221, 9 N. W. 44.

Nevada.— *Ex p.* Job, 17 Nev. 184, 30 Pac. 699; State *v.* Lambert, 9 Nev. 321.

Ohio.— See State *v.* Lott, 5 Ohio S. & C. Pl. Dec. 600, 5 Ohio N. P. 469.

Texas.— Bennett *v.* State, 27 Tex. 701.

In Nebraska, by statute, where no informa-

held to answer,[64] unless good cause to the contrary is shown.[65] The object of such a provision is to protect persons from imprisonment on insufficient cause, and it does not render invalid an indictment found at a subsequent term.[66] In the absence of a statute, a person may be indicted at a later term than the one following his arrest and commitment or binding over, and he is not entitled to a discharge because he has not been indicted at the first term.[67]

D. Prosecutor or Informer and Indorsement — 1. Necessity For Prosecutor or Informer. In England criminal prosecutions were generally instituted by private persons, although in the name of the king and conducted by counsel employed by them;[68] and the prosecutor was required to enter into a recognizance to pay costs if the court should so direct.[69] In this country prosecutions are usually instituted by the public prosecuting officer;[70] but private prosecutors may make complaints for the purpose of starting prosecutions;[71] and sometimes, by statute, prosecutions for certain misdemeanors cannot be instituted except by

tion or indictment is filed against one charged with the commission of a crime during the term at which he was held to answer, his further detention is unlawful and he is entitled to be discharged. Cerny *v.* State, 62 Nebr. 626, 87 N. W. 336; Leisenberg *v.* State, 60 Nebr. 628, 84 N. W. 6; State *v.* Miller, 43 Nebr. 860, 62 N. W. 238. And see *Ex p.* Two Calf, 11 Nebr. 221, 9 N. W. 44. But it is held that if, at a subsequent term, an information is filed and defendant pleads not guilty, the court has jurisdiction to try the issue raised. Cerny *v.* State, *supra*; Leisenberg *v.* State, *supra*.

64. Glover *v.* Com., 86 Va. 382, 10 S. E. 420; Waller *v.* Com., 84 Va. 492, 5 S. E. 364; Jones *v.* Com., 19 Gratt. (Va.) 478. Where defendant is committed for trial during a term of court, that term is not to be counted as one of the two terms at which the statute provides that he must be indicted. Glover *v.* Com., *supra* [*overruling* Hall *v.* Com., 78 Va. 678]. It is a sufficient reason under this statute for refusing to discharge a prisoner that he has been indicted at every term of court, although for a different crime from that for which he is finally tried. Waller *v.* Com., *supra*.

65. *Ex p.* Bull, 42 Cal. 196; *Ex p.* Job, 17 Nev. 184, 30 Pac. 699. The facts constituting good cause are in a great measure left to the discretion of the court, but the mere recommendation of a grand jury that the accused be held to answer before another grand jury is not of itself sufficient cause for his detention. *Ex p.* Bull, *supra*.

66. State *v.* Lambert, 9 Nev. 321. Where, before indictment found, the accused moves for his discharge on the ground that two terms have elapsed without any indictment and the motion is improperly overruled, his remedy is by habeas corpus and not by writ of error after conviction, and after final judgment application for discharge on writ of habeas corpus will be too late. Glover *v.* Com., 86 Va. 382, 10 S. E. 420.

67. *Alabama.* — See Young *v.* State, 131 Ala. 51, 31 So. 373, referred to *infra*, this note.

Illinois.— People *v.* Hessing, 28 Ill. 410, holding that a person held to answer for a crime is not entitled to be discharged merely because a term of court has passed and the grand jury has not found an indictment against him, but it must further appear that the grand jury investigated his case.

Mississippi.— *Ex p.* Jefferson, 62 Miss. 223, to the same effect as the Illinois case cited above.

Nevada.— State *v.* Lambert, 9 Nev. 321.

Virginia.— Glover *v.* Com., 86 Va. 382, 10 S. E. 420.

United States.— U. S. *v.* Bates, 24 Fed. Cas. No. 14,544.

But *compare In re* Esselborn, 8 Fed. 904, 20 Blatchf. 1. And see Sutton *v.* Com., 97 Ky. 308, 30 S. W. 661, 17 Ky. L. Rep. 184, holding that failure of a grand jury to find an indictment was equivalent to refusal to do so under a statute entitling the accused to discharge from custody if the grand jury, upon investigation, should refuse to find an indictment.

Mittimus becoming functus officio.— Where a person charged with a felony is under confinement on a mittimus issued by a justice of the peace in default of bail, and no indictment is preferred against him by the grand jury at the next term of court, and no continuance is entered on the records of the court, the prosecution is discontinued and the mittimus becomes *functus officio*, and the accused is entitled to a discharge, notwithstanding a continuance entered on the docket of the grand jury. State *v.* Graham, 136 Ala. 134, 33 So. 826; *Ex p.* Stearnes, 104 Ala. 93, 16 So. 122. This rule, however, does not apply if the court, no indictment having been found, enters an order continuing the case for further investigation by a grand jury, and in such case the accused may be held and indicted by a subsequent grand jury. Young *v.* State, 131 Ala. 51, 31 So. 373.

Effect of negative finding or refusal to find see *infra*, II, E, 6.

68. 1 Chitty Cr. L. 1, 305, 316. And see Rex *v.* Wood, 3 B. & Ad. 657, 23 E. C. L. 290; Reg. *v.* Gurney, 11 Cox C. C. 414.

69. 1 Chitty Cr. L. 305.

70. See McCullough *v.* Com., 67 Pa. St. 30; and *supra*, II, B, 1.

Necessity for public prosecutor or attorney see *infra*, II, D, 3.

71. See Criminal Law, 12 Cyc. 290, 292.

the private individual particularly injured,[72] or private prosecutors are made liable for costs under certain circumstances and their names are required to be indorsed on the indictment.[73] An informer or private prosecutor is not necessary to an indictment except in so far as one may be required by statute.[74]

2. Indorsement of Name of Prosecutor or Informer — a. In General. In the absence of a statutory requirement the name of the prosecutor or informer need not be indorsed on the indictment;[75] but, as stated above, statutes sometimes provide that the name of the prosecutor shall be written or indorsed on the indictment, in order that he may be held liable for costs if it appears that there was no probable cause for instituting the prosecution.[76]

b. In What Cases Necessary. The statutes vary as to the offenses for which such an indorsement is required.[77] As a rule such a statute does not prevent the public prosecuting attorney from preferring an indictment on his own motion or after a presentment by the grand jury, or in such case require the name of a

72. Thus an Alabama statute (Code (1896), § 5055), making it a misdemeanor to take an animal or vehicle for temporary use without authority, provides that no prosecution shall be commenced or indictment found except on complaint of the owner or person having control of the animal or vehicle. See Blackman *v.* State, 98 Ala. 77, 13 So. 316; Bellinger *v.* State, 92 Ala. 86, 9 So. 399; Ashworth *v.* State, 63 Ala. 120.

73. See *infra*, II, D, 2, and cases there cited.

74. Blackman *v.* State, 98 Ala. 77, 13 So. 316; Molett *v.* State, 33 Ala. 408; Williamson *v.* State, 16 Ala. 431. And see *infra*, II, D, 2.

75. Com. *v.* Patterson, 2 Metc. (Ky.) 374 (holding that after the adoption of the criminal code in 1854 a prosecutor was not necessary to an indictment for assault and battery, as the code impliedly repealed the statutes previously in force on the subject); State *v.* Rogers, 37 Mo. 367; State *v.* Bean, 21 Mo. 267; Tenorio *v.* Territory, 1 N. M. 279. The fact that one half the fine goes to the prosecutor or informer does not necessitate that the indictment should name him, since, in the absence of suit by an informer, the state can proceed and recover it all. State *v.* Smith, 64 Me. 423. And in an indictment found after the period limited for commencing prosecutions for the benefit in part or wholly of the prosecutor, it is not necessary that any prosecutor should be named. State *v.* Robinson, 29 N. H. 274.

76. As to the construction and application of such statutes see the following cases:

Alabama.— Blackman *v.* State, 98 Ala. 77, 13 So. 316; State *v.* Hughes, 1 Ala. 655.

Arkansas.— State *v.* Stanford, 20 Ark. 145; State *v.* Brown, 10 Ark. 104.

Florida.— Towle *v.* State, 3 Fla. 202.

Kentucky.— Com. *v.* Gore, 3 Dana 474; Com. *v.* Hutcheson, 1 Bibb 355.

Mississippi.— Kirk *v.* State, 13 Sm. & M. 406; Peter *v.* State, 3 How. 433; Cody *v.* State, 3 How. 27.

Missouri.— State *v.* Joiner, 19 Mo. 224; State *v.* Hurt, 7 Mo. 321; State *v.* McCourtney, 6 Mo. 649.

Pennsylvania.— Com. *v.* Jackson, 13 Lanc. Bar 59; Matter of Citizens' Memorial Assoc., 8 Phila. 478.

Tennessee.— Medaris *v.* State, 10 Yerg. 239.

Virginia.— Thompson *v.* Com., 88 Va. 45, 13 S. E. 304.

United States.— U. S. *v.* Carr, 25 Fed. Cas. No. 14,729, 2 Cranch C. C. 439; U. S. *v.* Helriggle, 26 Fed. Cas. No. 15,344, 3 Cranch C. C. 179; U. S. *v.* Jamesson, 26 Fed. Cas. No. 15,466, 1 Cranch C. C. 62; U. S. *v.* Mundell, 27 Fed. Cas. No. 15,834, 1 Hughes 415, 6 Call (Va.) 245; U. S. *v.* Sandford, 27 Fed. Cas. No. 16,221, 1 Cranch C. C. 323; U. S. *v.* Shackelford, 27 Fed. Cas. No. 16,261, 3 Cranch C. C. 287.

See 27 Cent. Dig. tit. "Indictment and Information," § 43 *et seq.*

Liability of prosecutor for costs see Costs, 11 Cyc. 270.

77. All offenses other than those excepted. — Some of the statutes require indorsement of a prosecutor on an indictment for every offense unless otherwise provided. Thus in Tennessee it is declared in Code (1896), § 7058, that "no district attorney shall prefer a bill of indictment to the grand jury without a prosecutor marked thereon, unless otherwise expressly provided by law." Section 7059 then expressly excepts certain cases. The statute has been applied to larceny (Wattingham *v.* State, 5 Sneed (Tenn.) 64; Medaris *v.* State, 10 Yerg. (Tenn.) 239), and to bigamy (State *v.* Tankersly, 6 Lea (Tenn.) 582). The statute excepts, among other cases, "a charge of violating the laws against tippling" (subd. 15), and retailing on Sunday is within this exception. Neideiser *v.* State, 6 Baxt. (Tenn.) 499.

Misdemeanors.—Other statutes require such indorsement in every case of misdemeanor, if there is a prosecutor. Under such a statute of course the indorsement is not required on an indictment for felony. Thompson *v.* Com., 88 Va. 45, 13 S. E. 304, robbery.

"Any trespass or misdemeanor." — Other statutes require such an indorsement in the case of "any trespass or misdemeanor." This not only includes a trespass, such as an assault and battery (Allen *v.* Com., 2 Bibb (Ky.) 210; Com. *v.* Hutcheson, 1 Bibb (Ky.)

private prosecutor to be indorsed on the indictment;[78] but it requires such indorsement when there is a private prosecutor;[79] and some statutes require a prosecutor in certain cases by providing that an indictment shall not be preferred without a prosecutor marked thereon.[80]

c. Effect of Omission. It has been held that some of these provisions were mandatory and that a failure to comply therewith rendered the indictment bad on motion to quash, plea in abatement, or other timely objection;[81] and in some cases, although not in others, the indictment has been held bad even on motion

355; U. S. *v.* Helriggle, 26 Fed. Cas. No. 15,344, 3 Cranch C. C. 179; U. S. *v.* Shackelford, 27 Fed. Cas. No. 16,261, 3 Cranch C. C. 287), but also other misdemeanors, such as keeping a bawdy-house (U. S. *v.* Rawlinson, 27 Fed. Cas. No. 16,123, 1 Cranch C. C. 83), or the unlawful sale of intoxicating liquors (U. S. *v.* Carr, 25 Fed. Cas. No. 14,729, 2 Cranch C. C. 439).

"Any trespass against the person or property of another, not amounting to felony." — Other statutes require such an indorsement on an indictment for "any trespass against the person or property of another, not amounting to felony." This includes an assault and battery (State *v.* McCourtney, 6 Mo. 649); and it has been held to apply to petit larceny (State *v.* Hurt, 7 Mo. 321), and to riot, where a trespass upon the person or property of another is charged (McWaters *v.* State, 10 Mo. 167; State *v.* McCourtney, *supra*. But see, as *contra*, Com. *v.* Bybee, 5 Dana (Ky.) 219). Such a statute does not apply to an indictment for felony (State *v.* Sears, 86 Mo. 169; State *v.* Rogers, 37 Mo. 367), even though, under such an indictment, defendant may be convicted of an offense which is merely a misdemeanor (State *v.* Sears, *supra*, indictment for felonious assault). Nor does it apply to indictments for misdemeanors not involving a trespass, such as keeping a hawdy-house (State *v.* Bean, 21 Mo. 267), passing counterfeit coin in violation of a statute (Gahe *v.* State, 6 Ark. 540), carrying concealed weapons (State *v.* Stanford, 20 Ark. 145, although the prosecutor or informer was entitled to half the fine), or disturbing the peace of a family in the night-time by loud noises merely (State *v.* Moles, 9 Mo. 694); or for misdemeanors not involving a trespass on the person or property of another person, as in the case of an indictment for maiming, heating, and torturing defendant's own animal (State *v.* Goss, 74 Mo. 592); and it has been held that it does not apply to a trespass on public property (State *v.* Brown, 10 Ark. 104; State *v.* Roberts, 11 Mo. 510, trespass on school lands), or to high misdemeanors, such as cutting, stabbing, etc., with malice (Hayden *v.* Com., 10 B. Mon. (Ky.) 125), or to official misconduct or oppression, as by maliciously issuing a warrant of arrest (State *v.* Allen, 22 Mo. 318).

"Assault, battery, or any other trespass." — Other statutes require such indorsement on an indictment for "assault, battery, or any other trespass." It has been held that horse-stealing is not a trespass within the meaning of such a statute. U. S. *v.* Flanakin, 25 Fed. Cas. No. 15,119*a*, Hempst. 30.

Cases expressly excepted by statute. — State *v.* Gossage, 2 Swan (Tenn.) 263; Bedford *v.* State, 2 Swan (Tenn.) 72, selling spirituous liquors to slave.

78. Rex *v.* Lukens, 1 Dall. (Pa.) 5, 1 L. ed. 13; Com. *v.* Jackson, 13 Lanc. Bar (Pa.) 59; Matter of Citizens' Memorial Assoc., 8 Phila. (Pa.) 478; State *v.* McCann, Meigs (Tenn.) 91; Wortham *v.* Com., 5 Rand. (Va.) 669; U. S. *v.* Dulany, 25 Fed. Cas. No. 14,999, 1 Cranch C. C. 510; U. S. *v.* Jamesson, 26 Fed. Cas. No. 15,466, 1 Cranch C. C. 62; U. S. *v.* Lloyd, 26 Fed. Cas. No. 15,616, 4 Cranch C. C. 467; U. S. *v.* Mundell, 27 Fed. Cas. No. 15,834, 1 Hughes 415, 6 Call (Va.) 245; U. S. *v.* Sandford, 27 Fed. Cas. No. 16,221, 1 Cranch C. C. 323, holding therefore that a general demurrer would not lie for omission of the name of a prosecutor.

79. Com. *v.* Gore, 3 Dana (Ky.) 474; Cody *v.* State, 3 How. (Miss.) 27; U. S. *v.* Helriggle, 26 Fed. Cas. No. 15,344, 3 Cranch C. C. 179; U. S. *v.* Hollinsberry, 26 Fed. Cas. No. 15,380, 3 Cranch C. C. 645; U. S. *v.* Lloyd, 26 Fed. Cas. No. 15,616, 4 Cranch C. C. 467; U. S. *v.* Shackelford, 27 Fed. Cas. No. 16,261, 3 Cranch C. C. 287; and other cases cited *supra*, note 76, and in the notes following.

80. See Medaris *v.* State, 10 Yerg. (Tenn.) 239.

81. *Florida.*— Towle *v.* State, 3 Fla. 202.

Kentucky.— Com. *v.* Gore, 3 Dana 474; Allen *v.* Com., 2 Bibb 210; Com. *v.* Hutcheson, 1 Bibb 355, motion at any time before the jury retire.

Mississippi.— Moore *v.* State, 13 Sm. & M. 259; Peter *v.* State, 3 How. 433; Cody *v.* State, 3 How. 27.

Missouri.— State *v.* Joiner, 19 Mo. 224; State *v.* McCourtney, 6 Mo. 649.

Tennessee.— State *v.* Tankersley, 6 Lea 582; Medaris *v.* State, 10 Yerg. 239; Moyers *v.* State, 11 Humphr. 40.

United States.— U. S. *v.* Helriggle, 26 Fed. Cas. No. 15,344, 3 Cranch C. C. 179; U. S. *v.* Hollinsberry, 26 Fed. Cas. No. 15,380, 3 Cranch C. C. 645; U. S. *v.* Lloyd, 26 Fed. Cas. No. 15,616, 4 Cranch C. C. 467.

See 27 Cent. Dig. tit. "Indictment and Information," § 43 *et seq.*

Security for costs.— Omission of a proper indorsement of the name of the prosecutor is not cured by security for the costs required of and given by him. Com. *v.* Gore, 3 Dana (Ky.) 474.

in arrest or on writ of error or appeal.[82] Others have been regarded as merely directory, so that non-compliance therewith does not affect the validity of the indictment.[83]

d. Indictment Preferred by Order of Court. The statute sometimes dispenses with a prosecutor and permits the prosecuting attorney to prefer an indictment without one upon an order of the court to file an indictment, which may be made when it appears to the court that an indictable offense has been committed and that no one will be prosecutor.[84]

e. Sufficiency of Indorsement. The indorsement of the prosecutor on the indictment must be sufficient to show that the person indorsed was intended as the prosecutor,[85] or it must be sufficient to bring the case within an exception to the rule requiring such indorsement;[86] but no particular form of words is

82. Kirk *v.* State, 13 Sm. & M. (Miss.) 406; Moore *v.* State, 13 Sm. & M. (Miss.) 259; Peter *v.* State, 3 How. (Miss.) 433; Cody *v.* State, 3 How. (Miss.) 27; McWaters *v.* State, 10 Mo. 167; Wattingham *v.* State, 5 Sneed (Tenn.) 64; Medaris *v.* State, 10 Yerg. (Tenn.) 239, 240 (where it is said: "Here is the entire omission of a matter which the statute declares to be essential to the validity of the indictment, and it may be taken advantage of at any time"); State *v.* Vance, 1 Overt. (Tenn.) 481. It is now otherwise in Tennessee by statute. See *infra*, this note.

Contra.— Vezain *v.* People, 40 Ill. 397; U. S. *v.* Jamesson, 26 Fed. Cas. No. 15,466, 1 Cranch C. C. 62; U. S. *v.* Lloyd, 26 Fed. Cas. No. 15,615, 4 Cranch C. C. 464. And *contra*, by express statutory provision see Parham *v.* State, 10 Lea (Tenn.) 498; Rodes *v.* State, 10 Lea (Tenn.) 414; State *v.* Tankersly, 6 Lea (Tenn.) 582; Dove *v.* State, 3 Heisk. (Tenn.) 348.

83. Hubbard *v.* State, 72 Ala. 164; Ashworth *v.* State, 63 Ala. 120; State *v.* Hughes, 1 Ala. 655; Porterfield *v.* Com., 91 Va. 801, 22 S. E. 352; Com. *v.* Dever, 10 Leigh (Va.) 685.

84. Tenn. Code (1896), § 7059, subd. 9. See Parham *v.* State, 10 Lea (Tenn.) 498; Rodes *v.* State, 10 Lea (Tenn.) 414; Lawless *v.* State, 4 Lea (Tenn.) 173.

Discretion of court.— "The power thus conferred upon the trial courts is in its very nature discretionary, and not subject ordinarily to revision." Rodes *v.* State, 10 Lea (Tenn.) 414, 416. And see Lawless *v.* State, 4 Lea (Tenn.) 173.

How facts must appear to the court.— Although the statute requires that it shall appear to the court that an offense has been committed, it is not necessary that the facts shall appear by the examination of witnesses in open court, nor by proof formally taken. Thus it is sufficient if the court acts upon its own knowledge or upon the fact that an indictment has been found against defendant at a previous term. Lawless *v.* State, 4 Lea (Tenn.) 173, holding a plea in abatement bad.

What the order of court must show.— The order need not show cause; that is, that it has been made to appear to the court that an offense has been committed or that no one will be prosecutor, but this will be presumed. State *v.* Kittrell, 7 Baxt. (Tenn.) 167; Bennett *v.* State, 8 Humphr. (Tenn.) 118; Simpson *v.* State, 4 Humphr. (Tenn.) 456. Nor need the order name the person upon whom the offense has been committed. State *v.* Kittrell, *supra*.

Time of making order and time of objection.— Under the statute of Tennessee providing that after a trial on the merits judgment shall not be arrested or reversed "because the attorney general or clerk or grand jury omitted to mark a prosecutor on the indictment" (Code (1896), § 7217), defendant cannot, after a trial on the merits, object that an indictment without a prosecutor marked thereon was found before the order of the court directing prosecution without a prosecutor by the attorney-general *ex officio*. Rodes *v.* State, 10 Lea (Tenn.) 414. And see Parham *v.* State, 10 Lea (Tenn.) 498; Dove *v.* State, 3 Heisk. (Tenn.) 348. Indeed it seems that it is immaterial whether the order is made before or after the indictment is found. Parham *v.* State, *supra*; Rodes *v.* State, *supra*.

85. Medaris *v.* State, 10 Yerg. (Tenn.) 239, holding insufficient the fact that a name was indorsed on the indictment in the place where the name was usually marked, with a black line under it, and then again indorsed with others as witnesses sent to the grand jury, there being nothing further to show that the first indorsement was intended as the prosecutor. See also State *v.* Denton, 14 Ark. 343, holding that the indorsement that "this indictment is preferred upon the testimony of the party injured, who was summoned on presentation, and by order of the grand jury," was not a compliance with the statute requiring the indorsement of a prosecutor; and also that it did not imply that the indictment was preferred on the information of any of the grand jury.

86. Under a statute requiring indictments to be indorsed with the name of the prosecutor, unless found on testimony sworn to and sent to the grand jury by order of the court, at the request of the prosecuting attorney, or the grand jury, an indorsement, "Found on the testimony of witnesses, sworn and sent to the grand jury by order of the court," was held not sufficient to put on defendant the onus of showing that the indict-

necessary.[87] When required by the statute, however, the indorsement must give, not only the name, but also the title or profession and the residence of the prosecutor,[88] unless the provision is regarded as merely directory.[89] The indorsement is generally required to be written at the foot of the indictment,[90] but this is not essential; it may be elsewhere, either on the face or back.[91]

f. Time of Indorsement. The indorsement should be made before the indictment is sent to the grand jury,[92] or before it is returned by them,[93] according to the requirement of the statute. It cannot be made after verdict,[94] or even pending a motion to quash or dismiss or a plea in abatement.[95]

g. Who Are or May Be Prosecutors. A "prosecutor" within the meaning of the statutes under consideration is the person who appears as such, and not merely one who makes a complaint and appears as a witness before the grand jury.[96]

ment was not so found. State *v.* Elliott, 1 Ohio Dec. (Reprint) 572, 10 West. L. J. 409.

Coroner's inquest.— In Tennessee where an indictment was marked "no prosecutor necessary," evidently because there was a coroner's inquest and verdict, in which case the statute (Code (1896), § 7059, subd. 2) dispenses with the necessity for a prosecutor, it was held that the indictment was good, whether the inquest was valid or invalid, since if valid, no prosecutor was necessary, and if invalid, the omission to mark a prosecutor was cured by section 7217 (former section 5242), providing that after plea and trial on the merits omission to mark a prosecutor on the indictment shall be no ground for a new trial, arrest of judgment or reversal. Dove *v.* State, 3 Heisk. (Tenn.) 348.

87. McGuire *v.* State, 6 Baxt. (Tenn.) 621; Com. *v.* Dove, 2 Va. Cas. 29. An indorsement, "By the information of James Baker . . . endorsed as prosecutor at his request," has been held sufficient. Haught *v.* Com., 2 Va. Cas. 3. The fact that the abbreviation "pros." was used after the prosecutor's name, instead of "prosecutor," is not ground for motion in arrest of judgment. McGuire *v.* State, 6 Baxt. (Tenn.) 621. The statement, indorsed on an indictment that it was found on the testimony of several persons, naming them, whose property was not injured, and signed by the prosecuting attorney, was held a substantial compliance with the statute requiring that the name of the prosecutor should be indorsed on the indictment, or that the names of the witnesses upon whose testimony it was found, other than the party injured, should be stated, and that a statement of the fact should be made at the end of the indictment. State *v.* Scott, 25 Ark. 107. So, where the name of a person preceded by the words "good for costs," was found indorsed on an indictment for a misdemeanor when presented to the court as a true bill by the grand jury, it was held not error to overrule a motion to quash such indictment on the ground that the person whose name was indorsed did not affirmatively appear to have been the prosecuting witness, as the name so indorsed would be presumed to be that of such witness. Munson *v.* State, 20 Ohio St. 232.

88. Com. *v.* Gore, 3 Dana (Ky.) 474.

89. Com. *v.* Dever, 10 Leigh (Va.) 685, holding that the omission to write the title or profession of the prosecutor at the foot of an information or indictment was no ground of exception either by motion to quash or plea in abatement.

90. See Allen *v.* Com., 2 Bibb (Ky.) 210; Haught *v.* Com., 2 Va. Cas. 3.

91. Williams *v.* State, 9 Mo. 270.

92. Allen *v.* Com., 2 Bibb (Ky.) 210; Com. *v.* Hutcheson, 1 Bibb (Ky.) 355; Moore *v.* State, 13 Sm. & M. (Miss.) 259; Moyers *v.* State, 11 Humphr. (Tenn.) 40; U. S. *v.* Shackelford, 27 Fed. Cas. No. 16,261, 3 Cranch C. C. 287.

93. McWaters *v.* State, 10 Mo. 167; State *v.* McCourtney, 6 Mo. 649.

94. Moore *v.* State, 13 Sm. & M. (Miss.) 259.

95. Allen *v.* Com., 2 Bibb (Ky.) 210; State *v.* McCourtney, 6 Mo. 649; Moyers *v.* State, 11 Humphr. (Tenn.) 40. See also State *v.* Hodson, 74 N. C. 151, after indictment found and *nolle prosequi* entered.

96. A "prosecutor," within the meaning of the Alabama statute (Code (1896), § 5040) providing that "if a prosecutor appears, his name must be indorsed by the foreman on the indictment; and if no prosecutor appears, the words 'no prosecutor' must be indorsed thereon," is one who appears before the grand jury and has his name entered as prosecutor, and undertakes the prosecution of a particular case, and the term does not include one who merely complains and makes known to the grand jury that an offense has been committed and asks that the complaint be investigated. Blackman *v.* State, 98 Ala. 77, 13 So. 316, holding therefore that Ala. Code (1896), § 5055, which makes it a misdemeanor to take an animal or vehicle for temporary use without authority, and provides that no prosecution shall be commenced or indictment found except on complaint of the owner or person having control, does not require such person to become a "prosecutor," within the meaning of section 5040, so that his name must appear on the indictment to give it validity. See Ashworth *v.* State, 63 Ala. 120.

Governor.—In an early North Carolina case it was held that the prosecuting officer had a discretionary power to indorse the gover-

A person cannot be made an indorser or prosecutor without his consent.[97] One who is summoned by the grand jury to appear and testify, or who is otherwise compelled to become an informer or prosecuting witness, does not thereby become a prosecutor;[98] and even the voluntary appearance of a person as a witness before the grand jury does not necessarily make him the prosecutor.[99] The prosecutor must generally be a person competent to become liable for the costs and for damages in case of false imprisonment or malicious prosecution; and if the person marked on an indictment as prosecutor is incompetent, it is the same as if no prosecutor at all were indorsed.[1] Except as stated above, and subject to any special statutory restrictions, any person may become a prosecutor.[2]

h. Death of Prosecutor. Where the name of the prosecutor is indorsed on the indictment, his death will not render the indictment invalid on plea in abatement.[3]

3. Necessity For Public Prosecutor or Attorney. In some jurisdictions, but not in all, it is essential to the validity of an indictment or presentment that there shall be a public prosecutor or attorney, who shall prefer or approve the same.[4]

nor as prosecutor on indictments whenever he should think the public interest required it. State *v.* English, 5 N. C. 435.

97. Com. *v.* Hutcheson, 1 Bibb (Ky.) 355; State *v.* Crosset, 81 N. C. 579; State *v.* Hodson, 74 N. C. 151. But to constitute a person assaulted the prosecutor of an indictment for the assault, it is not necessary that he should give directions to the solicitor-general to prepare the indictment or authorize him in express terms to put his name on the back of it; but it is sufficient if it is done with his consent, or without any disclaimer on his part, and he furnishes the testimony in part on which the indictment is found. Parr *v.* State, 74 Ga. 406.

98. Com. *v.* Hutcheson, 1 Bibb (Ky.) 355; Wortham *v.* Com., 5 Rand. (Va.) 669. See Com. *v.* Jackson, 13 Lanc. Bar (Pa.) 59.

99. See Blackman *v.* State, 98 Ala. 77, 13 So. 316; State *v.* Bailey, 21 Me. 62; State *v.* Lupton, 63 N. C. 483.

1. State *v.* Tankersly, 6 Lea (Tenn.) 582; Wattingham *v.* State, 5 Sneed (Tenn.) 64; Moyers *v.* State, 11 Humphr. (Tenn.) 40.

Husband and wife.— In the absence of a statute, a husband is not a competent prosecutor on an indictment against his wife, and if his name is indorsed as such, it is the same as if no prosecutor were indorsed. State *v.* Tankersly, 6 Lea (Tenn.) 582, indictment for bigamy.

An infant has been held competent as a prosecutor, since he may become liable for costs and in damages for torts. State *v.* Dillon, 1 Head (Tenn.) 389; Beasley *v.* State, 2 Yerg. (Tenn.) 481.

Married women.— In the absence of a statute, however, it has been held that a married woman is not liable for costs nor amenable to defendant for false imprisonment or malicious prosecution, and therefore that she is not competent to become a prosecutor. Wattingham *v.* State, 5 Sneed (Tenn.) 64; Moyers *v.* State, 11 Humphr. (Tenn.) 40. But the rule may be otherwise under statutes rendering married women liable. See State *v.* Shaw, 45 Mo. App. 383.

Husband or father.— In Arkansas it has been held that, although the statute contemplates that the name of the injured party shall be indorsed on the indictment as prosecutor in trespass, yet, where the injured party is an infant or a married woman, the purpose of the statute is better answered by permitting the name of the father or husband to be indorsed as prosecutor, and that such course is authorized. State *v.* Harrison, 19 Ark. 565.

Foreman of grand jury.— Indorsement of the name of the foreman of the grand jury as prosecutor has been held sufficient. King *v.* State, 5 How. (Miss.) 730.

2. Allgood *v.* State, 87 Ga. 668, 13 S. E. 569; Com. *v.* Barr, 25 Pa. Super. Ct. 609 (husband as informer against wife's paramour for adultery); 1 Chitty Cr. L. 1, 2. It is not required that the person who makes the information to set the machinery of the law in motion should be the prosecutor marked on the indictment, or be a witness sworn for the commonwealth on the trial. Com. *v.* Barr, 25 Pa. Super. Ct. 609.

Successive indictments.— It is no cause for quashing an indictment that the prosecutor in a former indictment for the same offense was not the same as the prosecutor in the pending indictment. Allgood *v.* State, 87 Ga. 668, 13 S. E. 569.

3. Com. *v.* Cunningham, 5 Litt. (Ky.) 292; State *v.* Loftis, 3 Head (Tenn.) 500.

4. See the statutes of the various states. And see *supra*, II, B; *infra*, III, F, 2.

Federal courts.— No power is conferred by statute or usage on the courts of the United States to recognize a suit, civil or criminal, as legally before them in the name of the United States, unless it is instituted and prosecuted by a district attorney legally appointed and commissioned conformably to the statute. U. S. *v.* McAvoy, 26 Fed. Cas. No. 15,654, 4 Blatchf. 418, 18 How. Pr. (N. Y.) 380.

In Georgia, under Code, § 4504, there need not be a public prosecutor to justify the grand jury in finding a valid presentment against an ordinary malfeasance in office. Groves *v.* State, 73 Ga. 205.

E. Finding of Grand Jury[5] — **1. In General.** It is of course essential to an indictment that it shall appear on the record that it was found by the grand jury to be a true bill,[6] for which, at common law and under constitutional or statutory provisions in most states, a concurrence of at least twelve jurors is necessary.[7]

2. Limitation of Grand Jury by Bill of Indictment Submitted — a. In General. The general rule is that when a bill of indictment is submitted to the grand jury, their power to find as to the charge is limited by the bill as submitted, so that they must either find a true bill or not a true bill.[8]

b. Finding Specially, Conditionally, or Partially. It follows that when a bill of indictment is submitted to the grand jury they cannot find specially or conditionally, or find a true bill as to part of the charge and not a true bill as to the residue.[9]

5. Charge and instructions of court see Grand Juries, 20 Cyc. 1320, 1340, 1355.

Misconduct of jurors see Grand Juries, 20 Cyc. 1351.

Presence in grand jury room of attorneys for prosecution, presiding judge, officers, stenographers, or strangers see Grand Juries, 20 Cyc. 1338–1341.

Presence of accused see Grand Juries, 20 Cyc. 1337.

Secrecy as to proceedings see Grand Juries, 20 Cyc. 1351.

Affidavits and testimony of grand jurors and others see Grand Juries, 20 Cyc. 1352.

6. Laurent *v.* State, 1 Kan. 313; Gunkle *v.* State, 6 Baxt. (Tenn.) 625; U. S. *v.* Levally, 36 Fed. 687. Where the foreman of the grand jury wrote his name in blank across the back of a bill of indictment, under the proper date, without more, and no finding by the grand jury was either reduced to writing or publicly announced in court, it was held that after plea of not guilty, trial, and conviction, judgment must be arrested for want of a finding. U. S. *v.* Levally, *supra*. The evidence required to show the finding of an indictment is the indorsement thereof as "A true bill" and its signature by the foreman. Laurent *v.* State, 1 Kan. 313. A recital in the record that the grand jury came into open court and presented the following presentments, among which was included an indictment containing nothing to show that it was found a true bill, is insufficient. Gunkle *v.* State, *supra*.

Sufficient showing as to finding.— The indorsement on an indictment properly filed of the words "A true bill," signed by the foreman, is sufficient evidence that it was "found" by the grand jury. State *v.* Beebe, 17 Minn. 241; State *v.* McCartey, 17 Minn. 76. The indorsement on an indictment by its foreman, its return to court, and the addition of the prosecutor's name by order of court, are sufficient evidence that the indictment was found by the grand jury on the testimony of the witnesses whose names were indorsed by the district attorney, and who were fully sworn. Com. *v.* Rovnianek, 12 Pa. Super. Ct. 86. See also *infra*, III, G, 1.

7. Nash *v.* State, 73 Ark. 399, 84 S. W. 497; State *v.* Symonds, 36 Me. 128; Low's Case, 4 Me. 439, 16 Am. Dec. 271; Clyncard's Case, Cro. Eliz. 654. See Grand Juries, 20 Cyc. 1351.

Showing as to concurrence.— The evidence generally required to show the concurrence of the requisite number of the grand jury in the finding of an indictment is the indorsement thereof as "A true bill," and the signature of the foreman; and this is sufficient. Laurent *v.* State, 1 Kan. 313; Turns *v.* Com., 6 Metc. (Mass.) 224. It has also been said that the presentation of an indictment to the court by the grand jury is evidence of the fact that twelve grand jurors voted for it. Nash *v.* State, 73 Ark. 399, 84 S. W. 497. But the contrary may be proved, provided it is proved otherwise than by the testimony of a grand juror. Nash *v.* State, *supra*. See Grand Juries, 20 Cyc. 1355.

8. State *v.* Ewing, 127 N. C. 555, 37 S. E. 332; State *v.* Cowan, 1 Head (Tenn.) 280; 1 Chitty Cr. L. 322; and authorities cited in the note following.

9. *North Carolina.*— State *v.* Ewing, 127 N. C. 555, 37 S. E. 332.

Pennsylvania.— Com. *v.* Gressly, 12 Lanc. Bar 52.

South Carolina.— State *v.* Creighton, 1 Nott & M. 256; State *v.* Wilburne, 2 Brev. 296.

Tennessee.— State *v.* Cowan, 1 Head 280; State *v.* Wilhite, 11 Humphr. 602.

England.— Rex *v.* Cary, 3 Bulstr. 206; Rex *v.* Ford, Yelv. 99; 2 Hale P. C. 162; 2 Hawkins P. C. c. 25, § 2.

See 27 Cent. Dig. tit. "Indictment and Information," § 61.

Illustrations.— Thus where a bill of indictment was preferred for forcible entry and detainer in a single count, and the grand jury indorsed it not a true bill as to the forcible entry and a true bill as to the detainer, it was held that there was no indictment at all; that a new bill should have been preferred for the forcible detainer only. Rex *v.* Ford, Yelv. 99. And on a bill for assault and rioting in one count the grand jury cannot find a true bill as to an assault and no bill as to the rioting. State *v.* Creighton, 1 Nott & M. (S. C.) 256. The same is true of a bill charging murder and the finding of a true bill for manslaughter only. State *v.* Cowan, 1 Head (Tenn.) 280. N. C. Acts (1893), c. 85, §§ 1–3, providing that the offenses mentioned therein shall be deemed murder in the

c. Several Counts. This rule does not prevent the grand jury from finding a true bill as to one or more counts of a bill of indictment, and not a true bill as to other counts, for each count is a separate and complete charge.[10]

d. Several Defendants. And where a bill of indictment is preferred against several defendants it may be found a true bill as to one or more, and not a true bill as to the others.[11]

3. Evidence[12] — a. In General. In some jurisdictions it is held that the court cannot go behind the action of the grand jury to inquire as to what evidence they had or did not have when considering a bill of indictment;[13] but in other jurisdictions it is held that if it is shown that an indictment was found entirely upon illegal evidence, it will be quashed upon a plea in abatement.[14] And so it has been held where an indictment is found without any evidence at all, as where no witnesses are examined, or the evidence which was before the grand jury is wholly inadequate proof of the offense charged,[15] except in cases where a

first degree, and all other kinds of murder deemed of the second degree, but that the form of indictment shall remain unchanged, and the jury before whom the offender is tried shall determine the degree, refer to the petit, and not the grand jury; and where an indictment in one count charged murder, the grand jury had no authority to return "A true bill for murder in the second degree." State *v.* Ewing, 127 N. C. 555, 37 S. E. 332.

The rule does not apply, it has been held, to an indictment for breaking into a house in the daytime and stealing money therefrom, indorsed by the grand jury, "An indictment for larceny. A true bill." Hall's Case, 3 Gratt. (Va.) 593.

10. State *v.* Ewing, 127 N. C. 555, 37 S. E. 332; State *v.* Cowan, 1 Head (Tenn.) 280; Rex *v.* Field, Cowp. 325, holding that where a bill of indictment charged riot in one count and assault in another, it could be ignored as to the charge of riot and found a true bill as to the charge of assault.

11. State *v.* Aucoin, 50 La. Ann. 49, 23 So. 104, holding that where an indictment was preferred against three under the title, "The State v. M. C. et als.," and the grand jury found and indorsed thereon "Not found" as to two, and "A true bill" as to the third, there was no variance.

12. **Witnesses and evidence before grand jury** see GRAND JURIES, 20 Cyc. 1342–1350.

Witnesses for the accused see GRAND JURIES, 20 Cyc. 1337.

13. *Connecticut.*— State *v.* Fasset, 16 Conn. 457.

Florida.— Mercer *v.* State, 40 Fla. 216, 24 So. 154, 74 Am. St. Rep. 135.

Indiana.— State *v.* Comer, 157 Ind. 611, 62 N. E. 452; Creek *v.* State, 24 Ind. 151.

Iowa.— State *v.* Smith, 74 Iowa 580, 38 N. W. 492; State *v.* Fowler, 52 Iowa 103, 2 N. W. 983.

Kentucky.— State *v.* Fowler, 2 Ky. L. Rep. 150.

Mississippi.— Smith *v.* State, 61 Miss. 754.

New Jersey.— State *v.* Dayton, 23 N. J. L. 49, 53 Am. Dec. 270.

Ohio.— Turk *v.* State, 7 Ohio, Pt. II, 240.

South Carolina.— State *v.* Boyd, 2 Hill 288, 27 Am. Dec. 376.

Texas.— Cotton *v.* State, 43 Tex. 169; Morrison *v.* State, 41 Tex. 516; Clark *v.* State, (Cr. App. 1897) 43 S. W. 522; Terry *v.* State, 15 Tex. App. 66.

Utah.— U. S. *v.* Cutler, 5 Utah 608, 19 Pac. 145.

United States.— U. S. *v.* Smith, 27 Fed. Cas. No. 16,341*a*, 3 Wheel. Cr. (N. Y.) 100.

See also GRAND JURIES, 20 Cyc. 1347, 1349.

14. *Alabama.*— Sparrenberger *v.* State, 53 Ala. 481, 25 Am. Rep. 643.

Illinois.— Boone *v.* People, 148 Ill. 440, 36 N. E. 99.

Michigan.— People *v.* Lauder, 82 Mich. 109, 46 N. W. 956.

Nevada.— State *v.* Logan, 1 Nev. 509.

New York.— People *v.* Molineux, 27 Misc. 79, 58 N. Y. Suppl. 155; and other cases cited under GRAND JURIES, 20 Cyc. 1347 note 22.

North Carolina.— State *v.* Lanier, 90 N. C. 714.

Oklahoma.— Royce *v.* Territory, 5 Okla. 61, 47 Pac. 1083, hearsay evidence.

Pennsylvania.— Com. *v.* McComb, 157 Pa. St. 611, 27 Atl. 794; Com. *v.* Green, 126 Pa. St. 531, 17 Atl. 878, 12 Am. St. Rep. 894; Com. *v.* Wilson, 9 Pa. Co. Ct. 24.

United States.— U. S. *v.* Farrington, 5 Fed. 343.

See also GRAND JURIES, 20 Cyc. 1347, 1348.

Witness not examined on the bill. — In State *v.* Robinson, 2 Lea (Tenn.) 114, an indictment for larceny was quashed where it was found from the testimony of a witness who was summoned before the grand jury to testify as to offenses of which they had inquisitorial powers and who, upon his examination, testified as to a felony, upon which testimony the indictment was afterward drawn and found, as the indictment should be drawn and the witnesses examined thereon.

Failure to swear witnesses and form of oath see GRAND JURIES, 20 Cyc. 1344, 1345.

Mode of examining witnesses see GRAND JURIES, 20 Cyc. 1346.

15. Sparrenberger *v.* State, 53 Ala. 481, 25 Am. Rep. 643; State *v.* Grady, 12 Mo. App. 361 [*affirmed* in 84 Mo. 220]; People *v.* Brickner, 15 N. Y. Suppl. 528; People *v.* Price, 2 N. Y. Suppl. 414 (holding that an indictment which alleges a prior conviction will be set aside, if there was no testimony before

presentment is properly made by the grand jury on their own knowledge or observation, or their own testimony.[16] But if there was any legal evidence before the grand jury, the court will not inquire into its sufficiency; nor will it quash the indictment in such a case because some illegal evidence was also received.[17] In some states it is held that if the accused is compelled to testify before the grand jury in violation of his constitutional privilege the indictment will be quashed,[18] but others hold that this is no ground for quashing if there was other and legal evidence before the grand jury.[19]

b. Finding on Evidence Before Committing Magistrate. Sometimes by statute an indictment may be found by the grand jury upon the minutes of the evidence given by witnesses before the committing magistrate,[20] provided the minutes of such testimony are sufficiently authenticated as required by the statute.[21]

4. Presumption as to Regularity of Proceedings. When an indictment is duly returned as a true bill, properly indorsed and with the signature of the foreman, the presumption is that it was regularly found, on legal and sufficient evidence, with due deliberation, and by the concurrence of the requisite number of jurors, and that the proceedings of the grand jury were otherwise regular and legal.[22]

5. Conclusiveness of Finding or Record. As a general rule the finding of the grand jury must stand as made by them and cannot be added to, varied,

the grand jury identifying the accused as the person previously convicted); People *v.* Restenhlatt, 1 Abb. Pr. (N. Y.) 268; People *v.* Briggs, 60 How. Pr. (N. Y.) 17; People *v.* Hulbut, 4 Den. (N. Y.) 133, 47 Am. Dec. 244; People *v.* Hyler, 2 Park. Cr. (N. Y.) 570; State *v.* Ivey, 100 N. C. 539, 5 S. E. 407; State *v.* Lanier, 90 N. C. 714; State *v.* Cain, 8 N. C. 352. See also Grand Juries, 20 Cyc. 1349.

Second indictment see *infra*, II, I, 4.

16. Com. *v.* Hayden, 163 Mass. 453, 40 N. E. 846, 47 Am. St. Rep. 468, 28 L. R. A. 318; Com. *v.* Woodward, 157 Mass. 516, 32 N. E. 939, 34 Am. St. Rep. 302. See Grand Juries, 20 Cyc. 1335, 1343.

17. *Alabama.*— Hall *v.* State, 134 Ala. 90, 32 So. 750; Bryant *v.* State, 79 Ala. 282; Washington *v.* State, 63 Ala. 189; Sparrenberger *v.* State, 53 Ala. 481, 25 Am. Rep. 643. And see Jones *v.* State, 81 Ala. 79, 1 So. 32.

Connecticut.— State *v.* Fasset, 16 Conn. 457.

Iowa.— State *v.* Tucker, 20 Iowa 508.

Kentucky.— McIntire *v.* Com., (1887) 4 S. W. 1.

Michigan.— People *v.* Lauder, 82 Mich. 109, 46 N. W. 956.

Mississippi.— Smith *v.* State, 61 Miss. 754.

Nevada.— State *v.* Logan, 1 Nev. 509.

New York.— Hope *v.* People, 83 N. Y. 418, 38 Am. Rep. 460; People *v.* Strong, 1 Abb. Pr. N. S. 244; People *v.* Hulbut, 4 Den. 133, 47 Am. Dec. 244.

Tennessee.— Bloomer *v.* State, 3 Sneed 66.

See also Grand Juries, 20 Cyc. 1347, 1349.

18. Boone *v.* People, 148 Ill. 440, 36 N. E. 99; State *v.* Gardner, 88 Minn. 130, 92 N. W. 529; State *v.* Hawks, 56 Minn. 129, 57 N. W. 455; State *v.* Froiseth, 16 Minn. 296; People *v.* Haines, 1 N. Y. Suppl. 55; People *v.* Singer, 18 Abb. N. Cas. (N. Y.) 96, 5 N. Y. Cr. 1. See also Grand Juries, 20 Cyc. 1348. *Contra*, State *v.* Comer, 157 Ind. 611, 62 N. E. 452; Mencheca *v.* State, (Tex. Cr. App. 1894) 28 S. W. 203.

Waiver of privilege.— The protection of the constitutional provision may always be waived by the accused, and his examination therefore is no ground for objection if he testified voluntarily. See Grand Juries, 20 Cyc. 1348.

Presumption, where there are two defendants, that each was examined as a witness only against the other and not against himself see State *v.* Frizell, 111 N. C. 722, 16 S. E. 409.

19. See People *v.* Lauder, 82 Mich. 109, 46 N. W. 956; U. S. *v.* Brown, 24 Fed. Cas. No. 14,671, 1 Sawy. 531.

20. State *v.* Marshall, 105 Iowa 38, 74 N. W. 763; State *v.* Wise, 83 Iowa 596, 50 N. W. 59.

21. Where minutes of testimony were taken in shorthand in a proceeding before a committing magistrate, and a transcribed copy thereof made by the reporter, who was not sworn to correctly take the testimony, nor to the correctness of the transcribed copy, and such copy was certified and returned to the clerk of the court by the magistrate, it was held that an indictment might be founded upon such copy, under Iowa Code (1873), § 4241, requiring the examining magistrate to write out, or cause to be written out, the substance of the testimony taken before him, but not requiring that the magistrate's minutes shall be verified by his oath, or signed by the witnesses, nor that the person taking the testimony shall be sworn. State *v.* Wise, 83 Iowa 596, 50 N. W. 59.

22. *Arkansas.*— Nash *v.* State, 73 Ark. 399, 84 S. W. 497, that twelve jurors concurred.

Florida.— English *v.* State, 31 Fla. 356, 12 So. 689, concurrence of twelve jurors.

Indiana.— Creek *v.* State, 24 Ind. 151 (that twelve jurors concurred); Shattuck *v.* State, 11 Ind. 473, that the advice and acts of the prosecuting attorney and his assistants in the grand jury room, and the acts of the

impeached, or explained by extrinsic evidence.[23] Defendant cannot show that the offense for which he is on trial was not that which the grand jury had in contemplation when they found the indictment.[24] It may be shown, however, that the indictment was indorsed a true bill by mistake.[25] Some of the courts have held that an indictment returned duly indorsed a true bill, with the signature of the foreman, is conclusive evidence that it was found on competent and sufficient evidence,[26] and that the requisite number of jurors concurred in the finding,[27] but other cases are to the contrary.[28] It may be shown, in the absence of a statute to the contrary, that the grand jury was not legally organized or constituted.[29]

6. Effect of Negative Finding. In the absence of a statute,[30] the fact that a grand jury has refused or failed to find a bill of indictment does not prevent the submission and finding of another bill for the same offense by the same or another grand jury.[31] As a rule, however, defendant is entitled to be discharged from

jury, were in accordance with their respective rights under the law.

Iowa.— State *v.* Marshall, 105 Iowa 38, 74 N. W. 763, that the evidence of witnesses whose names were indorsed on the indictment and the minutes of their testimony before the committing magistrate returned therewith as provided by statute (see *supra*, II, E, 3, b) were properly before the grand jury.

Mississippi.— King *v.* State, 5 How. 730, that the witnesses were sworn.

North Carolina.— State *v.* Lanier, 90 N. C. 714, that there was competent and sufficient evidence.

Tennessee.— Gilman *v.* State, 1 Humphr. 59, that a witness was sworn.

United States.— U. S. *v.* Wilson, 28 Fed. Cas. No. 16,737, 6 McLean 604, that the finding was on legal and sufficient evidence and by the concurrence of twelve jurors.

Sufficiency of evidence to rebut presumption.— Where twelve of the grand jury are required to return an indictment, and the party accused claims that the indictment against him was returned by a less number, his proof must be sufficiently clear and satisfactory to control the strong presumption arising from the certificate of the foreman to the truth of the bill. Low's Case, 4 Me. 439, 16 Am. Dec. 271.

23. State *v.* Brownlee, 84 Iowa 473, 51 N. W. 25 (holding that where an indictment charged that defendant verbally threatened to shoot the prosecuting witness, a written concession filed in the case by the county attorney, admitting that the threats charged in the indictment were not made in the presence of the prosecuting witness, could not be considered by the court, since it was incompetent to add to or explain the indictment by a paper which was no part of it, and which was not provided for by law); People *v.* Hulbut, 4 Den. (N. Y.) 133, 47 Am. Dec. 244. The deliberations of a grand jury cannot be inquired into by examination of the district attorney and attending officers or other persons to show that the jury hesitated or refused to act on a bill returned as true. Com. *v.* Twitchell, 1 Brewst. (Pa.) 551.

24. State *v.* Schmidt, 34 Kan. 399, 8 Pac. 867; State *v.* Skinner, 34 Kan. 256, 8 Pac. 420.

25. State *v.* Horton, 63 N. C. 595, holding that if an indictment is indorsed "A true bill" by mistake of the clerk of the grand jury, the finding having really been "Not a true bill," defendant may show that fact either upon a motion to quash or upon a plea in abatement; and, upon the fact appearing to be so, defendant will be entitled to a discharge.

26. State *v.* Fasset, 16 Conn. 457; Smith *v.* State, 61 Miss. 754; State *v.* Dayton, 23 N. J. L. 49, 53 Am. Dec. 270; Turk *v.* State, 7 Ohio, Pt. II, 240; State *v.* Boyd, 2 Hill (S. C.) 288, 27 Am. Dec. 376; and *supra*, II, E, 3, a.

27. Creek *v.* State, 24 Ind. 151.

28. Thus it is held in many states that it may be shown by evidence other than the testimony of the grand jurors themselves that the indictment was found on no evidence or illegal evidence (Sparrenberger *v.* State, 53 Ala. 481, 25 Am. Rep. 643; State *v.* Lanier, 90 N. C. 714; Noyce *v.* Territory, 5 Okla. 61, 47 Pac. 1083; U. S. *v.* Farrington, 5 Fed. 343; and *supra*, II, E, 3, a); or that the requisite number of jurors did not concur (Nash *v.* State, 73 Ark. 399, 84 S. W. 497; State *v.* Symonds, 36 Me. 128; Low's Case, 4 Me. 439, 16 Am. Dec. 271; and *supra*, II, E, 1).

29. Com. *v.* Leisenring, 2 Pearson (Pa.) 466, holding that on a motion to quash an indictment it may be shown that more than the lawful number of persons served on the grand jury, although the irregularity does not appear of record. And see the cases cited *supra*, II, A, 3.

30. In Georgia two returns of "No bill" by grand juries, on the same charge or accusation, is a bar to any future prosecution for the same offense, either under the same or another name, unless such returns have been procured by the fraudulent conduct of the person charged, on proof of which, or of newly discovered evidence, the judge may allow a third bill to be presented, found and prosecuted. Code, § 930. But this does not contemplate that the person charged is entitled to a judgment of acquittal or to a discharge from the offense charged. Christmas *v.* State, 53 Ga. 81.

31. *Georgia.*— Christmas *v.* State, 53 Ga. 81.

custody in the absence of a showing of cause for holding him for another grand jury;[32] and, as has been seen, defendant is sometimes entitled to be discharged from custody because of failure to find an indictment against him at the next term or the next two terms after his commitment or binding over.[33]

7. Reconsideration and Resubmission — a. Reconsideration. After presenting an indictment, the grand jury cannot reconsider and withdraw it.[34] And after returning a bill "Not a true bill" they cannot reconsider it and return "A true bill."[35] But the mere vote of a grand jury not to find an indictment does not prevent it from reconsidering its decision before reporting to the court and finding a true bill, even without hearing any new evidence.[36]

b. Resubmission. In the absence of a statute to the contrary, a charge of crime may be resubmitted to the same or a subsequent grand jury after a bill of indictment has been ignored,[37] or after an indictment has been held bad or quashed on demurrer, motion, or plea.[38] After a bill of indictment has been returned "not a true bill," the same bill cannot be resubmitted and returned "a true bill," but a new bill must be submitted.[39] But it has been held that even after plea and over the objection of defendant an indictment may be resubmitted to the same grand jury for a material amendment.[40]

c. Leave of Court. It has been held, even in the absence of a statute, that where a bill of indictment has been ignored or returned "Not a true bill" by the grand jury, the prosecuting attorney cannot submit another indictment for the same offense without leave of court,[41] which will not be granted unless adequate cause is shown.[42] In some states such a rule is prescribed by express statutory

Iowa.— State *v.* Collis, 73 Iowa 542, 35 N. W. 625.

Missouri.— State *v.* Green, 111 Mo. 585, 20 S. W. 304.

Nevada.— *Ex p.* Job, 17 Nev. 184, 30 Pac. 699, where four successive grand juries failed to find an indictment.

New Jersey.— See Potter *v.* Casterline, 41 N. J. L. 22.

North Carolina.— State *v.* Harris, 91 N. C. 656; State *v.* Brown, 81 N. C. 568.

United States.— U. S. *v.* Martin, 50 Fed. 918.

England.— 4 Blackstone Comm. 305.

See 27 Cent. Dig. tit. "Indictment and Information," §§ 58, 59. And see the other cases cited *infra*, II, E, 7.

32. U. S. *v.* Elliott, 25 Fed. Cas. No. 15,045, 1 Hayw. & H. 232; 3 Blackstone Comm. 305; and cases cited *infra*, II, E, 7.

33. See *supra*, II, C, 3.

34. Fields *v.* State, 121 Ala. 16, 25 So. 726.

35. State *v.* Brown, 81 N. C. 568.

36. U. S. *v.* Simmons, 46 Fed. 65. See also People *v.* Chautauqua County, 11 N. Y. Civ. Proc. 172.

37. See *supra*, II, E, 6.

38. Weston *v.* State, 63 Ala. 155; *Ex p.* Job, 17 Nev. 184, 30 Pac. 699; and cases cited *infra*, II, E, 7, c.

In Arkansas, under Sandels & H. Dig. § 2060, providing that a dismissal of the charge does not prevent it being again submitted to another grand jury on the order of the court, and section 2061 providing that, unless an indictment be found at the term of the court next after the submission of the charge to the grand jury, defendant shall be discharged from custody or exonerated from bail, unless, for cause shown, the court shall otherwise direct, and section 2249 providing that if, during the trial, the court shall be of opinion that the facts proved constitute an offense of a higher nature than that charged, it may direct the trial to be suspended till the case can be resubmitted to the grand jury, and may order defendant to be committed, or admit him to bail to answer any new indictment which may be found against him for the higher offense, it is held that, where one is charged before the grand jury with murder in the first degree, and they find an indictment for murder in the second degree, although the facts warrant one in the first degree, the court can, before trial, suspend proceeding under such indictment, and order the case submitted to another grand jury, in the meantime committing defendant without bail. *Ex p.* Johnson, 71 Ark. 47, 70 S. W. 467.

Former jeopardy see Criminal Law, 12 Cyc. 265.

39. State *v.* Brown, 81 N. C. 568; 4 Blackstone Comm. 305.

40. Lawless *v.* State, 4 Lea (Tenn.) 173.

Amendments see *infra*, X, A.

41. Rowand *v.* Com., 82 Pa. St. 405, holding that when a defendant has been once discharged on a return of "Ignoramus," a new bill sent up without a fresh hearing and without leave of court should be promptly quashed, in the absence of affirmative proof that the course taken was required to meet some grave emergency or provide for some urgent public need.

42. Com. *v.* Whitaker, 25 Pa. Co. Ct. 42; Com. *v.* Allen, 14 Pa. Co. Ct. 546, holding that where an indictment is ignored by the grand jury, and there is no proof that it was

provision,[43] but the statute only applies to a subsequent bill of indictment for the same offense.[44] So it has been held that where an indictment is fatally defective, another bill for the same offense cannot be found without the authority of the court,[45] although it has been held otherwise where no proceeding barring further prosecution has been had on the first indictment.[46]

d. Evidence. Some courts have held that on resubmission to the same grand jury, they may find a new indictment without again examining the witnesses.[47]

by mistake, the court will refuse to resubmit the matter to another grand jury. See also Com. *v.* Charters, 20 Pa. Super. Ct. 599. The court will not, after an indictment has been ignored by one grand jury, send it to another, on the motion of private counsel for the prosecution, in the absence of allegations of irregularity, oversight, mistake, or fraud. Com. *v.* Priestly, 10 Pa. Dist. 217, 24 Pa. Co. Ct. 543.

43. State *v.* Collis, 73 Iowa 542, 35 N. W. 625; Sutton *v.* Com., 97 Ky. 308, 30 S. W. 661, 17 Ky. L. Rep. 184; People *v.* Warren, 109 N. Y. 615, 15 N. E. 880; People *v.* Clements, 5 N. Y. Cr. 288.

In New York, where the statute expressly authorizes the court to permit a charge which has been dismissed by the grand jury to be again submitted to another grand jury, the power "should be sparingly and discriminatingly used"; and it has been held that it will not be exercised on the affidavit of the district attorney that he is of the opinion that the grand jury misunderstood the law, and that if the charges are resubmitted an indictment may be found, without giving any facts on which such opinion is based. People *v.* Neidhart, 35 Misc. 191, 71 N. Y. Suppl. 591, 15 N. Y. Cr. 475.

Finding by grand jury on its own motion. — Iowa Code, § 4290, providing that the dismissal of a charge against a person by a grand jury "does not prevent the same from being again submitted to a grand jury as often as the court may direct, but, without such direction, it cannot again be submitted," does not forbid the grand jury from finding an indictment on their own motion on a charge once dismissed, but not resubmitted by the court. State *v.* Collis, 73 Iowa 542, 35 N. W. 625. See also State *v.* Reinhart, 26 Oreg. 466, 38 Pac. 822. But see Sutton *v.* Com., 97 Ky. 308, 30 S. W. 661, 17 Ky. L. Rep. 184.

Order of resubmission.— A resubmission of an indictment "to the same or another grand jury" is sufficiently definite and certain, in view of Nev. Comp. Laws, § 1818, making it the duty of the district court to direct the attention of the grand jury to all offenses against the laws. *Ex p.* Job, 17 Nev. 184, 30 Pac. 699.

Time of motion to dismiss and waiver of objection.— Where a statute provided that a person committed or held to bail for the grand jury should be discharged if the first grand jury should refuse to find an indictment against him, and provided that dismissal of a charge should not prevent its being again submitted to a grand jury as often as the court might direct, but further provided that it should not be resubmitted without such direction of the court, it was held that where the first grand jury failed to find an indictment, and the case was again submitted to a subsequent grand jury without the direction of the court and an indictment was found, the indictment was properly dismissed as to one of the defendants who moved to dismiss before pleading to the indictment, but that a motion made by the other defendant for the first time after there had been a trial and failure of the jury to agree came too late and was properly overruled. Sutton *v.* Com., 97 Ky. 308, 30 S. W. 661, 17 Ky. L. Rep. 184.

44. People *v.* Warren, 109 N. Y. 615, 15 N. E. 880, holding that where, during the life of a person assaulted, the grand jury, upon the case being presented to them, failed to find an indictment against the assailant, an indictment for manslaughter found after the person assaulted had died from the injuries was not bad because found without leave of court, as provided in Code Cr. Proc. § 270, providing that a charge once dismissed by a grand jury cannot again be submitted without direction of the court.

45. Com. *v.* Sargent, Thach. Cr. Cas. (Mass.) 116, where, after a trial had commenced, it was discovered that the indictment was not signed by the foreman of the grand jury, and it was held that the grand jury could not find another bill against the same persons for the same offense without the authority of the court.

Second resubmission.— When a case has been resubmitted to a grand jury by direction of the court on sustaining a demurrer to an indictment, the operative power of the direction ceases, and the case cannot be afterward submitted to another grand jury by virtue of that direction. Where, in such case, a new indictment is found under the first resubmission, and the case is subsequently resubmitted to another grand jury without direction of the court, and another indictment found for the same offense, such latter indictment will be quashed. People *v.* Clements, 5 N. Y. Cr. 288.

46. State *v.* Reinhart, 26 Oreg. 466, 38 Pac. 822, holding that if a pending indictment returned by the grand jury is defective, they may return a new indictment for the same offense without the submission of the case to them by the court, unless some proceeding has been had on the first indictment which bars further prosecution. See also Perkins *v.* State, 66 Ala. 457; Stuart *v.* Com., 28 Gratt. (Va.) 950.

47. McIntire *v.* Com., (Ky. 1887) 4 S. W. 1.

Other courts, however, have held that even where the case is resubmitted to the same grand jury, witnesses must be reëxamined.[48]

F. Return, Filing, and Record — 1. Return or Presentment. The finding by the grand jury of a true bill and an indorsement thereon to such effect are not alone sufficient to render it valid as an indictment; but it is further necessary that the bill shall be presented or returned by the grand jury in open court,[49] and as a general rule this must appear from the record.[50] The return or presentation should be made by the grand jury.[51] A finding of the grand jury on a bill of indictment presented by them is sufficiently returned and published, although it is not read in open court, where it is handed to the clerk in open court and properly indorsed or an entry made by him on the record.[52]

2. Filing and Indorsement Thereof — a. In General. Where an indictment is returned or presented by the grand jury in open court, it must generally be filed as part of the record.[53] But in the absence of a statute, it is not necessary that the clerk shall file the indictment in open court, or that the act of marking it filed shall be done in open court.[54] It has also been held that where an indictment is returned into open court by the grand jury and becomes a part of the record, its validity is not affected by the omission of the clerk to place his file-mark thereon,[55] or by a mistake in the date of his indorsement of the filing or

48. State *v.* Ivey, 100 N. C. 539, 5 S. E. 407.

49. *Alabama.*— Mose *v.* State, 35 Ala. 421.
Arkansas.— Holcomb *v.* State, 31 Ark. 427.
Colorado.— Thornell *v.* People, 11 Colo. 305, 17 Pac. 904.
Florida.— Goodson *v.* State, 29 Fla. 511, 10 So. 738, 30 Am. St. Rep. 135; Johnson *v.* State, 24 Fla. 162, 4 So. 535; Collins *v.* State, 13 Fla. 651.
Georgia.— Bowen *v.* State, 81 Ga. 482, 8 S. E. 736.
Illinois.— Yundt *v.* People, 65 Ill. 372; Gardner *v.* People, 20 Ill. 430; Rainey *v.* People, 8 Ill. 71.
Indiana.— Waterman *v.* State, 116 Ind. 51, 18 N. E. 63; Heacock *v.* State, 42 Ind. 393; Jackson *v.* State, 21 Ind. 79.
Kansas.— Laurent *v.* State, 1 Kan. 313.
Louisiana.— State *v.* Pitts, 39 La. Ann. 914, 3 So. 118; State *v.* Mason, 32 La. Ann. 1018; State *v.* Onnmacht, 10 La. Ann. 198.
Missouri.— State *v.* Vincent, 91 Mo. 662, 4 S. W. 430.
New Hampshire.— State *v.* Squire, 10 N. H. 558.
North Carolina.— State *v.* Bordeaux, 93 N. C. 560; State *v.* Cox, 28 N. C. 440.
Tennessee.— Chappel *v.* State, 8 Yerg. 166.
United States.— U. S. *v.* Butler, 25 Fed. Cas. No. 14,700, 1 Hughes 457.
See 27 Cent. Dig. tit. "Indictment and Information," §§ 62, 68; and cases cited *infra*, II, F, 3, a.
"'An indictment is found . . . when it is duly presented by the grand jury in open court, and there received and filed.'" N. Y. Code Cr. Proc. § 144. See People *v.* Oishei, 20 Misc. (N. Y.) 164, 165, 45 N. Y. Suppl. 49, 12 N. Y. Cr. 362.

50. Record showing presentment or return see *infra*, II, F, 3, a.
Presumption see *infra*, II, F, 3, a, (II), (B).

51. The grand jury as a body should return their indictments. They should not be carried into court by the foreman alone. State *v.* Bordeaux, 93 N. C. 560. But it has been held that where the record shows that an indictment was presented by the grand jury in open court and filed, although the law requires it to be presented by the foreman, it will make no difference if handed in by some other member of the body in their presence, the defect, if it be one, being too technical to be regarded. Laurent *v.* State, 1 Kan. 313.
The solicitor-general, district attorney, or other prosecuting officer has no authority to return into court an indictment or presentment of the grand jury. Bowen *v.* State, 81 Ga. 482, 8 S. E. 736.
Indictment brought in by bailiff.— It has been held, however, that an indictment is not bad because brought into court by the bailiff of the grand jury, and entered on the minutes when none of the grand jurors were present, where it does not appear that the bailiff was not the duly qualified officer of the grand jury. Danforth *v.* State, 75 Ga. 614, 58 Am. Rep. 480.

52. U. S. *v.* Butler, 25 Fed. Cas. No. 14,700, 1 Hughes 457.

53. Engleman *v.* State, 2 Ind. 91, 52 Am. Dec. 494; Stanford *v.* State, 76 Miss. 257, 24 So. 536, and cases in the notes following. See also *infra*, II, F, 3, a. In New York, however, it was held that the statute requiring the filing of an indictment is directory, and the omission to file does not, it seems, avoid the indictment; but if otherwise, an averment that it was filed with the clerk of the county is equivalent to an averment that it was filed in the court of general sessions. Dawson *v.* People, 25 N. Y. 399.

54. Willey *v.* State, 46 Ind. 363.

55. *Alabama.*— Stanley *v.* State, 88 Ala. 154, 7 So. 273, holding that Code, § 4386, requiring an indictment to be indorsed, dated, and signed by the clerk, is directory merely. Under Acts (1888–1889), p. 631, establishing

otherwise;[56] and in such cases therefore it has been held that the court may afterward allow the file-mark to be placed thereon, or omission of the date or other omissions to be supplied, *nunc pro tunc*,[57] and that the clerk may amend the signature to the file-mark.[58] Under some of the statutes, however, the rule is otherwise.[59]

b. Filing Away and Reinstatement of Indictment. Where the accused has not been apprehended and is not before the court, it is permissible for the court to file away an indictment and reinstate it upon the docket upon the subsequent arrest of the accused; but this is not permissible where the accused is before the court and objects to the order, as it would violate his constitutional right to a speedy trial.[60]

a criminal court in Pike county, and providing that all pending indictments for misdemeanors be transferred, that all indictments preferred by the grand jury be returned by the clerk of the circuit court to the criminal court, that process thereon be issued by the clerk of the latter court, that the clerk of the circuit court shall be *ex officio* clerk of the criminal court, and vesting in the latter exclusive jurisdiction of such cases, it was held that an objection that did not appear that an indictment was filed in the criminal court was untenable, since the act *ex vi termini* conferred jurisdiction on the criminal court, and the failure to indorse on the indictment its filing in that court was immaterial clerical error. Spear *v.* State, 120 Ala. 351, 25 So. 46.

California.— People *v.* Blackwell, 27 Cal. 65.

Florida.— Pittman *v.* State, 25 Fla. 648, 6 So. 437, omission not ground for arrest of judgment.

Illinois.— Kirkham *v.* People, 170 Ill. 9, 48 N. E. 465.

Indiana.— Engleman *v.* State, 2 Ind. 91, 52 Am. Dec. 494, holding that when an indictment is delivered to the clerk of the court, and is received by him to be kept with the papers in the case, it is to be considered as filed.

Iowa.— State *v.* Jolly, 7 Iowa 15.

Kentucky.— Com. *v.* Stegala, 8 Ky. L. Rep. 142.

Texas.— Reynolds *v.* State, 11 Tex. 120.

Vermont.— State *v.* Bartlett, 11 Vt. 650, holding that a statute requiring the clerk to make a minute of "the true day, month, and year," when presented in court, upon all informations and indictments, did not require that the name of the month should appear in the minute, if, from the records of the whole term, there was no doubt at what time the minute was made.

See 27 Cent. Dig. tit. "Indictment and Information," §§ 63, 64; and cases in the notes following.

Indorsement on transfer of indictment.— An indictment found in the possession of the proper officer would not be invalidated because not indorsed by himself as clerk of one court to himself as clerk of another court. People *v.* Thompson, 4 Cal. 238.

Statute.— Iowa Code, § 2916, forbids the quashing of an indictment for non-compliance with section 2914, relating to the indorsement and filing of an indictment. State *v.* Jolly, 7 Iowa 15.

Failure to fill in date of finding or return not fatal.— State *v.* McGuire, 87 Iowa 142, 54 N. W. 202; State *v.* Clark, 18 Mo. 432.

56. Terrell *v.* State, 41 Tex. 463. And see State *v.* Jackson, 106 La. 189, 30 So. 309.

57. *Alabama.*— Hicks *v.* State, 123 Ala. 15, 26 So. 337; Franklin *v.* State, 28 Ala. 9.

Arkansas.— West *v.* State, 71 Ark. 144, 71 S. W. 483; James *v.* State, 41 Ark. 451; State *v.* Gowen, 12 Ark. 62.

Illinois.— Kirkham *v.* People, 170 Ill. 9, 48 N. E. 465, holding therefore that it was not error to allow the file-mark to be placed thereon after verdict.

Kentucky.— Pence *v.* Com., 95 Ky. 618, 26 S. W. 810, 16 Ky. L. Rep. 148, holding that the clerk's omission, when an indictment is returned, to indorse it "Filed," may be supplied at the trial on motion of the district attorney, without swearing the clerk or attorney to the fact and date of its return, in the absence of testimony to the contrary.

Missouri.— State *v.* Clark, 18 Mo. 432, at subsequent term.

Texas.— Caldwell *v.* State, 5 Tex. 18 (after commencement of trial); Cauthern *v.* State, (Cr. App. 1901) 65 S. W. 96; Rippey *v.* State, 29 Tex. App. 37, 14 S. W. 448; De Olles *v.* State, 20 Tex. App. 145.

See 27 Cent. Dig. tit. "Indictment and Information," §§ 63, 64.

Amendment of record and subsequent entries see *infra*, II, F, 3, f.

58. Scrivener *v.* State, 44 Tex. Cr. 232, 70 S. W. 214.

59. Stanford *v.* State, 76 Miss. 257, 24 So. 536, holding that under Code (1892), § 1346, making the "marking" of the indictment "Filed," dating it, and signing of the entries on it by the clerk the exclusive legal evidence of its finding and presentment, an indictment not so marked at the term at which it was found should be quashed.

60. Jones *v.* Com., 114 Ky. 599, 71 S. W. 643, 24 Ky. L. Rep. 1434; Gross *v.* Com., 82 S. W. 618, 26 Ky. L. Rep. 870. And see Com. *v.* Bottoms, 105 Ky. 222, 48 S. W. 974, 20 Ky. L. Rep. 1159; Ashlock *v.* Com., 7 B. Mon. (Ky.) 44.

Discontinuance see CRIMINAL LAW, 12 Cyc. 378.

3. Record[61] — a. Showing as to Finding, Presentment or Return, and Filing — (I) *Necessity in General.* By the weight of authority, it is essential to the validity of an indictment and the proceedings thereon that it shall in some manner appear affirmatively from the record that it was found by the grand jury to be a true bill,[62] that it was presented or returned by them as such in open court,[63] and that it was filed as a part of the records of the court.[64]

(II) *Sufficiency* — (A) *As to Finding.* That an indictment properly appearing in the record was found a true bill by the grand jury is sufficiently shown by an indorsement thereon to that effect signed by the foreman;[65] but, in the absence of a statute, such an indorsement has been held unnecessary where the order book or minutes of the court contain an entry of the finding.[66] The filing of an indictment together with an entry on the order book or minutes of the court showing its return are sufficient, without copying out the indictment on

Right to speedy trial see CRIMINAL LAW, 12 Cyc. 498.

61. **Caption** see *infra*, III, B.

62. Clark *v.* State, 1 Ind. 253 (holding that if the record states only that it was presented that defendant, etc., but does not state that the indictment was found by the grand jury of the proper county, the indictment is bad, and may be quashed on motion, or judgment arrested); State *v.* Muzingo, Meigs (Tenn.) 112; Bennett *v.* State, 8 Humphr. (Tenn.) 118; Simmons *v.* Com., 89 Va. 156, 15 S. E. 386; State *v.* Gilmore, 9 W. Va. 641. And see the cases cited *infra*, II, F, 3, a, (II). But see People *v.* Lee, 2 Utah 441.

63. *Alabama.*— Mose *v.* State, 35 Ala. 421.

Arkansas.— Felker *v.* State, 54 Ark. 489, 16 S. W. 663; Chancellor *v.* State, 33 Ark. 815; Holcomb *v.* State, 31 Ark. 427; McKenzie *v.* State, 24 Ark. 636.

Colorado.— Thornell *v.* People, 11 Colo. 305, 17 Pac. 904.

Florida.— Goodson *v.* State, 29 Fla. 511, 10 So. 738, 30 Am. St. Rep. 135; Johnson *v.* State, 24 Fla. 162, 4 So. 535; Collins *v.* State, 13 Fla. 651.

Georgia.— Bowen *v.* State, 81 Ga. 482, 8 S. E. 736.

Illinois.— Yundt *v.* People, 65 Ill. 372; Aylesworth *v.* People, 65 Ill. 301; Sattler *v.* People, 59 Ill. 68; Kelly *v.* People, 39 Ill. 157; Gardner *v.* People, 20 Ill. 430; Rainey *v.* People, 8 Ill. 71.

Indiana.— Waterman *v.* State, 116 Ind. 51, 18 N. E. 63; Heacock *v.* State, 42 Ind. 393; Jackson *v.* State, 21 Ind. 79; Springer *v.* State, 19 Ind. 180; Conner *v.* State, 18 Ind. 428, 19 Ind. 98; Adams *v.* State, 11 Ind. 304.

Louisiana.— State *v.* Pitts, 39 La. Ann. 914, 3 So. 118; State *v.* Sandoz, 37 La. Ann. 376; State *v.* Shields, 33 La. Ann. 991.

Mississippi.— Pond *v.* State, 47 Miss. 39; Jenkins *v.* State, 30 Miss. 408.

Missouri.— State *v.* Vincent, 91 Mo. 662, 4 S. W. 430.

Tennessee.— State *v.* Herron, 86 Tenn. 442, 7 S. W. 37; Brown *v.* State, 7 Humphr. 155; Fletcher *v.* State, 6 Humphr. 249; Calhoun *v.* State, 4 Humphr. 477; Henry *v.* State, 4 Humphr. 270; State *v.* Muzingo, Meigs 112; Blevins *v.* State, Meigs 82; Chappel *v.* State, 8 Yerg. 166.

Texas.— Hardy *v.* State, 1 Tex. App. 556.

Virginia.— Simmons *v.* Com., 89 Va. 156, 15 S. E. 386; Com. *v.* Cawood, 2 Va. Cas. 527.

West Virginia.— State *v.* Gilmore, 9 W. Va. 641.

See 27 Cent. Dig. tit. "Indictment and Information," §§ 68, 69. See also cases cited *supra*, II, F, 1; *infra*, II, F, 3, a, (II), (B); and CRIMINAL LAW, 12 Cyc. 835.

Contra.— People *v.* Lee, 2 Utah 441, in the absence of a statutory requirement.

64. Pond *v.* State, 47 Miss. 39; State *v.* Brown, 81 N. C. 568; Com. *v.* Cawood, 2 Va. Cas. 527; State *v.* Heaton, 23 W. Va. 773; State *v.* Gilmore, 9 W. Va. 641, holding that the recording of the finding of the grand jury is the only legal proof of the finding of an indictment, and is therefore essential. *Compare*, however, State *v.* Hogan, 31 Mo. 340, holding that it was not sufficient cause for quashing an indictment that the record did not show that the bill was filed, nor on what day it was filed.

65. Lanckton *v.* U. S., 18 App. Cas. (D. C.) 348; State *v.* McCartey, 17 Minn. 76; Bennett *v.* State, 8 Humphr. (Tenn.) 118. Where an indictment is returned by the grand jury "A true bill," and sets forth in apt language the crime charged, the record need not show, independently of such indictment, that an indictment was presented against defendant, and that it was returned "A true bill," and set forth the offense charged. State *v.* O'Brien, 18 R. I. 105, 25 Atl. 910.

66. Price *v.* Com., 21 Gratt. (Va.) 846. See also Beard *v.* State, 57 Ind. 8 (holding that failure of the record in a criminal case, which had been taken on a change of venue to another county, to show that the indictment had been indorsed "A true bill," by the foreman of the grand jury in the county where it was found, was not ground for a motion to quash); Willey *v.* State, 46 Ind. 363; Townsend *v.* State, 2 Blackf. (Ind.) 151 (holding that a conviction would not be reversed because the record did not show that the indictment was indorsed "A true bill" by the foreman of the grand jury).

the minutes,[67] unless there is a statutory requirement to the contrary; and even where there is such a requirement, it has been held that the object is merely to preserve a copy of the indictment and avoid the difficulty consequent upon loss or destruction of the original, and that failure to comply with the statute does not affect the validity of the original or of proceedings thereon.[68] The indorsement "A true bill" and signature of the foreman need not be copied on the order book or minutes of the court, where it appears on the indictment itself and the indictment is a part of the record, even where a statute requires the indictment to be copied in the record.[69] And where the record affirmatively shows that the indictment was returned into court, indorsed and filed, as required by the statute, mistakes in the indorsement do not necessarily affect its validity.[70] It need not appear of record that witnesses were examined by the grand jury or that the indictment was found on sworn testimony.[71]

(B) *As to Presentment or Return and Filing.* In some states it has been held that the fact of return or presentment of an indictment in open court must appear from an entry on the order book or minutes of the court,[72] and

67. Simmons *v.* Com., 89 Va. 156, 15 S. E. 386; Com. *v.* Tiernan, 4 Gratt. (Va.) 545; Com. *v.* Cawood, 2 Va. Cas. 527; and cases cited *infra*, II, F, 3, (I), (B).

68. Porter *v.* State, 17 Ind. 415 (holding therefore that where the trial is had upon the original indictment, it is not necessary that the record should show that the indictment has been recorded, compared with the original, and certified, etc., by the judge, as required by statute); Glasgow *v.* State, 9 Baxt. (Tenn.) 485 (holding that an omission to spread the indictment on the record, as required by law, does not affect the rights of the accused, as the object of the law is to provide against the consequences of loss or destruction of the original indictment). Failure of the clerk to record an indictment at length as required by Ind. Rev. St. (1897) § 1764, does not prejudice a defendant who is tried on the indictment actually returned by the grand jury, and such failure is not even ground for motion to quash the indictment. Ransbottom *v.* State, 144 Ind. 250, 43 N. E. 218; Heath *v.* State, 101 Ind. 512.

69. State *v.* Clay, 45 La. Ann. 269, 12 So. 307; State *v.* Rideau, 45 La. Ann. 268, 12 So. 307; State *v.* Bennett, 45 La. Ann. 54, 12 So. 306; State *v.* Guilford, 49 N. C. 83; State *v.* Herron, 86 Tenn. 442, 7 S. W. 37; Brown *v.* State, 7 Humphr. (Tenn.) 155.

70. Jackson *v.* State, 74 Ala. 26, variance in spelling of the foreman's name, as copied in the indorsements, where the names were *idem sonans*.

Mistake as to county.— An indictment, found by the grand jury of the proper county and presented to the proper court of that county, will not be set aside because it bore an indorsement that it had been found in another county. State *v.* Smouse, 50 Iowa 43.

71. U. S. *v.* Murphy, MacArthur & M. (D. C.) 375, 48 Am. Rep. 754; King *v.* State, 5 How. (Miss.) 730; State *v.* Harwood, 60 N. C. 226; Gilman *v.* State, 1 Humphr. (Tenn.) 59. And see GRAND JURIES, 20 Cyc. 1345.

72. *Arkansas.*— Felker *v.* State, 54 Ark. 489, 16 S. W. 663; McKenzie *v.* State, 24 Ark. 636; Green *v.* State, 19 Ark. 178.

Illinois.— Sattler *v.* People, 59 Ill. 68; Gardner *v.* People, 20 Ill. 430.

Indiana.— Jackson *v.* State, 21 Ind. 79; Springer *v.* State, 19 Ind. 180; Adams *v.* State, 11 Ind. 304. But *compare* Heath *v.* State, 101 Ind. 512.

Tennessee.— Henry *v.* State, 4 Humphr. 270; Blevins *v.* State, Meigs 82; Chappel *v.* State, 8 Yerg. 166.

Virginia.— Simmons *v.* Com., 89 Va. 156, 15 S. E. 386; Com. *v.* McKinney, 8 Gratt. 589; Com. *v.* Cawood, 2 Va. Cas. 527.

West Virginia.— State *v.* Gilmore, 9 W. Va. 641.

See 27 Cent. Dig. tit. "Indictment and Information," §§ 68–70.

By express statute.— English *v.* State, (Tex. App. 1892) 18 S. W. 678; Walker *v.* State, 7 Tex. App. 52; Hardy *v.* State, 1 Tex. App. 556.

The minutes of the judge, which he is not required by law to keep but keeps for his own convenience only, have not the force and effect of a record, and it is not sufficient that they show the indictment to have been returned. Sattler *v.* People, 59 Ill. 68.

Presentment and indictment distinguished. — A presentment becomes a part of the record of the court by being returned into court by the jury, and filed by the clerk, without any memorandum upon the minutes of the court of these facts; and this, because it is signed by all the grand jurors. An indictment, however, being signed only by the foreman, must, to be valid, appear by the record to have been returned into open court "A true bill." State *v.* Muzingo, Meigs (Tenn.) 112.

Return after resubmission.— When an indictment is withdrawn by leave of the court and recommitted to the grand jury by whom it was found and returned, when it is returned into court again, the record must show the fact. State *v.* Davidson, 2 Coldw. (Tenn.) 184.

that the mere indorsement by the clerk on an indictment or entry in the record, that it was filed in open court does not satisfy the requirement,[73] unless there is a statute to such effect.[74] Other courts have held that if it otherwise appears that an indictment was properly indorsed, returned and filed, it is no objection that its return was not entered on the minutes of the court;[75] and that, if it appears that an indictment found by the grand jury was properly indorsed and filed, it will be presumed to have been properly presented or returned to the court.[76] No particular form of indorsement or entry on the record is necessary unless required by statute,[77] and if it is evident from the indorsement or record that the law has

73. Felker *v.* State, 54 Ark. 489, 16 S. W. 663; Miller *v.* State, 40 Ark. 488; Halbrook *v.* State, 34 Ark. 511; Chancellor *v.* State, 33 Ark. 815; Holcomb *v.* State, 31 Ark. 427; McKenzie *v.* State, 24 Ark. 636; Green *v.* State, 19 Ark. 178; Kelly *v.* People, 39 Ill. 157; Adams *v.* State, 11 Ind. 304.

An entry in the record that an indictment was "filed" without more is not sufficient to show that it was returned in open court by a grand jury. Kelly *v.* People, 39 Ill. 157.

74. In Mississippi the act of Feb. 6, 1878, providing that the filing of an indictment by the clerk shall "be evidence of the proper and legal return into court of such indictment," renders it unnecessary to have any entry made on the minutes of its return. Cook *v.* State, 57 Miss. 654. See also Smith *v.* State, 58 Miss. 867. Under Mo. Rev. St. (1889) § 4092, providing that indictments by a grand jury "shall be presented by their foreman, in their presence, to the court, and shall be there filed and remain as records of such court," and section 4099, providing that, unless defendant is in custody or on bail, the indictment shall not be open to inspection, "nor shall it be docketed or entered upon the minutes or records of the court until the defendant therein shall have been arrested," it was held that where an indictment is signed by the prosecuting attorney, and is indorsed "A true bill," and "Filed" (with date of filing) by the foreman of the grand jury and the clerk of the court respectively, but no record entry is made that defendant was in custody or on bail, there is a sufficient record that the indictment was duly returned and presented in open court, although the clerk made no separate minutes of the filing. State *v.* Lord, 118 Mo. 1, 23 S. W. 764.

75. Mose *v.* State, 35 Ala. 421; Chelsey *v.* State, 121 Ga. 340, 49 S. E. 258, holding that failure to make an entry was an irregularity which was cured by the testimony of the bailiff and his clerk. See also Wrocklege *v.* State, 1 Iowa 167.

76. *Alabama.*— McKee *v.* State, 82 Ala. 32, 2 So. 451; Mose *v.* State, 35 Ala. 421.

California.— It will be presumed that an indictment was presented by the foreman of the grand jury and in their presence, where the record shows nothing to the contrary, although the fact is not indorsed on the indictment. People *v.* Blackwell, 27 Cal. 65.

Florida.— Westcott *v.* State, 31 Fla. 458, 12 So. 846, holding that an indictment properly signed and indorsed as required by statute, and marked "Filed in open court," by the clerk, is sufficient to show that it was properly returned into court.

Iowa.— State *v.* Jolly, 7 Iowa 15; State *v.* Axt, 6 Iowa 511; Herring *v.* State, 1 Iowa 205; Wrocklege *v.* State, 1 Iowa 167.

Kansas.— State *v.* Crilly, 69 Kan. 802, 77 Pac. 701; State *v.* Jones, 2 Kan. App. 1, 42 Pac. 392.

Louisiana.— State *v.* Mason, 32 La. Ann. 1018, holding that proof that an indictment was indorsed "A true bill," and was signed by the foreman, and that "the court ordered the finding to be recorded," raises a presumption that the indictment was duly presented in open court, as the rule *omnia rite acta praesumuntur* applies. See also State *v.* Onmacht, 10 La. Ann. 198.

Minnesota.— State *v.* Beebe, 17 Minn. 241.

Mississippi.— Cooper *v.* State, 59 Miss. 267.

Missouri.— State *v.* Lord, 118 Mo. 1, 23 S. W. 764; State *v.* Grate, 68 Mo. 22.

North Carolina.— State *v.* Weaver, 104 N. C. 758, 10 S. E. 486.

See 27 Cent. Dig. tit. "Indictment and Information," §§ 68–70. And see CRIMINAL LAW, 12 Cyc. 835, 836.

Affidavits.— It has been held that the fact that an indictment was presented and filed after the adjournment of the court cannot be established by affidavits. State *v.* Gibbs, 39 Iowa 318.

77. **Record or indorsement held sufficient** see the following cases:

Alabama.— Parnell *v.* State, 129 Ala. 6, 29 So. 860; McKee *v.* State, 82 Ala. 32, 2 So. 451; McCuller *v.* State, 49 Ala. 39; Mose *v.* State, 35 Ala. 421. And see Wesley *v.* State, 52 Ala. 182.

Arkansas.— Robinson *v.* State, 33 Ark. 180, holding that the fact that the record in a criminal case fails to show that the indictment was returned into court by the foreman of the grand jury, "in the presence of" the other grand jurors, is not ground for reversing a judgment of conviction, where it appears from the record that the indictment was in fact returned into court by the grand jury through the foreman.

District of Columbia.— Lanckton *v.* U. S., 18 App. Cas. 348.

Florida.— Oliver *v.* State, 38 Fla. 46, 20 So. 803; Johnson *v.* State, 24 Fla. 162, 4 So. 535. See also Peeples *v.* State, 46 Fla. 101, 35 So. 223; Westcott *v.* State, 31 Fla. 458, 12 So. 846.

Illinois.— Kelly *v.* People, 132 Ill. 363,

been complied with as to the return and filing of an indictment, inartificial use of language in expressing the facts will not vitiate the indictment.[78] The date of the return need not appear otherwise than from the date of filing.[79] Where the record otherwise shows compliance with the law in the return and filing of an indictment mere clerical errors in the record will not be fatal.[80]

(c) *Indictments Against Several.* Where an indictment is against several persons the record may be insufficient against one or more, but this does not necessarily render it insufficient against the others.[81]

24 N. E. 56; Fitzpatrick *v.* People, 98 Ill. 269.

Indiana.— A recital in the record that the grand jury come into open court and present an indictment, followed by an indictment, is sufficient to show its due return. Heath *v.* State, 101 Ind. 512. See also Mathis *v.* State, 94 Ind. 562; Reeves *v.* State, 84 Ind. 116; Clare *v.* State, 68 Ind. 17; Beavers *v.* State, 58 Ind. 530; Wall *v.* State, 23 Ind. 150.

Iowa.— State *v.* Shepard, 10 Iowa 126; State *v.* Jolly, 7 Iowa 15; State *v.* Axt, 6 Iowa 511; Dixon *v.* State, 4 Greene 381.

Kansas.— Millar *v.* State, 2 Kan. 174; State *v.* Jones, 2 Kan. App. 1, 42 Pac. 392.

Kentucky.— Patterson *v.* Com., 86 Ky. 313, 5 S. W. 765, 9 Ky. L. Rep. 481; Pearce *v.* Com., 8 S. W. 893, 10 Ky. L. Rep. 178.

Mississippi.— Nichols *v.* State, 46 Miss. 284; Lee *v.* State, 45 Miss. 114; Josephine *v.* State, 39 Miss. 613. Where it appeared from the record that a foreman was appointed, and the indictment was returned signed by him, and the caption stated that the grand jury returned the hill into court by their foreman, there was sufficient to show that the bill was returned by the authority of the grand jury. Greeson *v.* State, 5 How. 33. Although by statute an indictment must be in fact presented in open court by the foreman of the grand jury, in presence of at least twelve of their number, yet the circumstances of this presentation need not be indorsed on the indictment. Fitzcox *v.* State, 52 Miss. 923.

Missouri.— State *v.* Bell, 159 Mo. 479, 60 S. W. 1102; State *v.* Lord, 118 Mo. 1, 23 S. W. 764; State *v.* Vincent, 91 Mo. 662, 4 S. W. 430; State *v.* Freeze, 30 Mo. App. 347.

North Carolina.— State *v.* Ledford, 133 N. C. 714, 45 S. E. 944; State *v.* Gainus, 86 N. C. 632.

Pennsylvania.— Hopkins *v.* Com., 50 Pa. St. 9, 88 Am. Dec. 518.

Tennessee.— Maples *v.* State, 3 Heisk. 408; Bennett *v.* State, 8 Humphr. 118; Fletcher *v.* State, 6 Humphr. 249; Calhoun *v.* State, 4 Humphr. 477.

Virginia.— Hodges *v.* Com., 89 Va. 265, 15 S. E. 513. A record entry in the hustings court, ordering an indictment filed in such court to be certified to the police justice for trial, is a sufficient record of the presentment of the indictment. Watts *v.* Com., 99 Va. 872, 39 S. E. 706.

See 27 Cent. Dig. tit. "Indictment and Information," §§ 68–70.

In open court.— A recital in the record that the grand jury returned into "open" court an indictment shows that the court was in session when it was returned. State *v.* Cunningham, 130 Mo. 507, 32 S. W. 970. But such a recital is not necessary. The entry of record of the return of the indictment into court is sufficient, without showing it was into "open" court. Maples *v.* State, 3 Heisk. (Tenn.) 408.

By whom indorsed.— The indorsements required by law to be made on an indictment may be made by a person who is neither the clerk of the court nor a deputy, if made under the directions and in the presence of the clerk. Jackson *v.* State, 55 Miss. 530.

78. Nichols *v.* State, 46 Miss. 284.

79. See Cooper *v.* State, 59 Miss. 267; State *v.* Clark, 18 Mo. 432. Where an indorsement on an indictment stated that it was presented to the court "at the May term thereof, 189—," and filed by the clerk "this 8th day of May, A. D. 1891," it was held that the failure to fill in the date of the finding did not vitiate the indictment; the presumption being that it was found at the term at which it was filed. State *v.* McGuire, 87 Iowa 142, 54 N. W. 202.

80. Williams *v.* State, 55 Ga. 391, holding that if it appears from the minutes of the court that a bill of indictment was found in the present year, an entry at the conclusion of the bill giving it date in a future year will be disregarded. See also State *v.* Jackson, 106 La. 189, 30 So. 309, where an indictment was indorsed as received and filed "January 24th, 901."

Time of return and discharge of grand jury.— Where the minutes of court show the return of bills of indictment and their presentation to the court before the discharge of the grand jury, it is immaterial that the clerk entered the fact that the judge had directed the discharge of the jury before he entered the title of the cases against those indicted. State *v.* Starr, 52 La. Ann. 610, 26 So. 998.

81. Com. *v.* McKinney, 8 Gratt. (Va.) 589.

Omission of name or misnomer.— Where an indictment was found against A and B, but the clerk, in making a minute of the finding, accidentally omitted the name of B, it was held that the record could not be amended at a subsequent term, and that the indictment as to B must be quashed, but that the record was sufficient as against A. Drake's Case, 6 Gratt. (Va.) 665. See to the same effect Blevins *v.* State, Meigs

(D) *Identification of Indictment.* It is essential of course that the record shall in some way identify the indictments found and returned by the grand jury,[82] unless there is some statutory provision to the contrary.[83]

(E) *Time of Objection.* If the record fails to show that the indictment was returned or presented by the grand jury in open court the objection may be raised, not only by motion to quash,[84] but also, in most jurisdictions, by motion in arrest of judgment[85] or on writ of error or appeal.[86] Elsewhere it has been held that an objection that an indictment copied into the record, properly signed and indorsed, was not presented by the grand jury in open court must be made in the trial court, where the record is made up and can be made to speak the truth, and that it is too late to urge such objection for the first time in the appellate court.[87]

b. Showing as to Court. The record must in some way show the court in which the indictment was found, so as to show jurisdiction.[88] This usually and properly appears from the caption of the indictment.[89] The record should also show that the court was in session when the indictment was found.[90]

(Tenn.) 82; State *v.* Compton, 13 W. Va. 852. So where an indictment against three persons was returned indorsed a true bill, but the finding as entered on the order book varied from the indictment as to the name of one of defendants, it was quashed as to him, but held good as to the others. Com. *v.* McKinney, 8 Gratt. (Va.) 589. On the other hand, however, it has been held that if it appears, from the whole tenor of the proceedings, that an indictment against several persons, therein charged jointly with an offense, properly indorsed as against "A. and als.," was presented in open court by the grand jury, the fact that, in his minutes of the day, the clerk erroneously copied the title so as to make it read as against "A" only, cannot vitiate the proceedings. State *v.* Banks, 40 La. Ann. 736, 5 So. 18. And under Mo. Rev. St. (1899) § 2519, expressly forbidding the clerk of the court in which an indictment for felony or misdemeanor is found from making any entry on the minutes or records of the court in reference to such indictment when defendant is not in actual confinement or under recognizance, it was held that an indictment cannot be held invalid because of the failure of the record entry thereof by the clerk on its presentation by the grand jury to show that it was against two defendants, especially when the indictment shows on its face that it is against both of them, and the record shows its number, and, as properly amended *nunc pro tunc,* that it was filed on the day of its presentation. State *v.* Bell, 159 Mo. 479, 60 S. W. 1102.

82. Springer *v.* State, 19 Ind. 180; Cornwell *v.* State, 53 Miss. 385; English *v.* State, (Tex. App. 1892) 18 S. W. 678. Where the record stated that on Nov. 4, 1853, "it being a day of the October term of the court," the grand jury returned an indictment against the accused for the murder of deceased, and the indictment on which the accused was tried purported to have been found at the November term, 1853, it was held that the identity of the indictments did not sufficiently appear. Hague *v.* State, 34 Miss. 616. And where a caption said, "The foregoing bills of indictments are true bills," without its appearing upon the record that the indictment which they set out was one of them, the omission was held fatal. Cruiser *v.* State, 18 N. J. L. 206.

Sufficient identification.— The fact that a general minute entry and indorsements on an indictment correspond in number, date of filing, and the name of the foreman of the grand jury is sufficient to identify the indictment. Cannon *v.* State, 57 Miss. 147. And where the record recites that the grand jury came into "open court and returned the following indictment," giving its number and setting it out, it sufficiently identifies the indictment. Willey *v.* State, 46 Ind. 363. Where the record shows that an indictment was returned by the grand jury, and the proceedings appear to be founded on such indictment, it is immaterial that the number of the case as stated on the indictment is different from that stated elsewhere in the record. Mergentheim *v.* State, 107 Ind. 567, 8 N. E. 568.

83. Shropshire *v.* State, 12 Ark. 190.

84. Felker *v.* State, 54 Ark. 489, 16 S. W. 663; Heacock *v.* State, 42 Ind. 393.

85. Sattler *v.* People, 59 Ill. 68; Kelly *v.* People, 39 Ill. 157; Gardner *v.* People, 20 Ill. 430; Adams *v.* State, 11 Ind. 304.

86. *Arkansas.*— Chancellor *v.* State, 33 Ark. 815; Holcomb *v.* State, 31 Ark. 427.

Illinois.— Yundt *v.* People, 65 Ill. 372; Rainey *v.* People, 8 Ill. 71.

Indiana.— Jackson *v.* State, 21 Ind. 79.

Louisiana.— State *v.* Pitts, 39 La. Ann. 914, 3 So. 118; State *v.* Sandoz, 37 La. Ann. 376.

Mississippi.— Pond *v.* State, 47 Miss. 39.

Virginia.— Simmons *v.* Com., 89 Va. 156, 15 S. E. 386.

87. Westcott *v.* State, 31 Fla. 458, 12 So. 846; Bass *v.* State, 17 Fla. 685; Gallaher *v.* State, 17 Fla. 370. See also CRIMINAL LAW, 12 Cyc. 811, 835.

88. State *v.* Sutton, 5 N. C. 281; State *v.* Williams, 2 McCord (S. C.) 301. And see *supra,* II, A, 1, 2.

89. See *infra,* II, B, 3, a.

90. See *supra,* II, C. But where the record

c. Showing as to Grand Jury.[91] The decisions are conflicting as to what the record must show with respect to the grand jury. It has been held that it must in some way show the names of the grand jurors,[92] that the indictment was found by at least twelve jurors,[93] and in the absence of a statute, that the grand jury were duly impaneled and sworn.[94] The record need not affirmatively show that

shows that the court was in session the day the indictment was found, which was one day after the time fixed by law for its opening, it is not necessary that a formal order opening court be shown. Wells *v.* State, (Ark. 1891), 16 S. W. 577.

91. See also GRAND JURIES, 20 Cyc. 1291.

Record on appeal or writ of error see CRIMINAL LAW, 12 Cyc. 835.

92. Stone *v.* State, 30 Ind. 115; State *v.* Norton, 23 N. J. L. 33; Mahan *v.* State, 10 Ohio 232; U. S. *v.* Insurgents, 26 Fed. Cas. No. 15,443, 2 Dall. (Pa.) 335, 1 L. ed. 404; 1 Chitty Cr. L. 333.

Clerical errors.— Where the minutes of the court show that the grand jury was regularly formed, and that certain errors in the names of grand jurors as they appear in the record were clerical errors, made by the clerk in transcribing the names of jurors regularly drawn and summoned by the sheriff, as shown by his return, such errors do not affect the validity of an indictment returned by such grand jury. Germolgez *v.* State, 99 Ala. 216, 13 So. 517. See also State *v.* Mahan, 12 Tex. 283.

The omission of the name of one of the grand jurors from the list of those shown by the record to have been "duly impaneled, sworn, and charged according to law" is cured by Ala. Code, § 4445, providing, among other things, that "no objection can be taken to an indictment on the ground that any member of the grand jury was not legally qualified, or that the grand jurors were not legally drawn or summoned, or on any other ground going to the formation of the grand jury, except that the jurors were not drawn in the presence of officers designated by law." Tanner *v.* State, 92 Ala. 1, 9 So. 613.

93. 1 Chitty Cr. L. 333. See GRAND JURIES, 20 Cyc. 1351.

94. Parmer *v.* State, 41 Ala. 416; Bailey *v.* State, 39 Ind. 438; Conner *v.* State, 18 Ind. 428, 19 Ind. 98; Foster *v.* State, 31 Miss. 421 (holding that a mere statement in the bill of indictment that the grand jury were sworn to inquire for the body of the county, without any averment in the record that they were so sworn, was not sufficient); Abram *v.* State, 25 Miss. 589; Cody *v.* State, 3 How. (Miss.) 27.

Contra.— State *v.* Watson, 31 La. Ann. 379; State *v.* Guglielmo, (Oreg. 1905) 79 Pac. 577, 80 Pac. 103, under a statute. It was decided in accordance with the text in Roe *v.* State, (Ala. 1887) 2 So. 459, where it was held that a grand jury was not legally organized, and that an indictment was invalid, where the record showed that the foreman was not sworn, and that this was shown where the record recited that W. B., "one of said persons, was by the court appointed foreman of said grand jury, after which each of the other persons so selected as grand jurors was duly sworn." The opinion above cited was afterward withdrawn, and another opinion filed holding that the defect in the record was rendered not fatal by a special statutory provision. See Roe *v.* State, 82 Ala. 68, 3 So. 2.

Sufficiency of record.— Where the record states that the grand jurors were duly sworn, it will be presumed that the legal oath was administered. Brown *v.* State, 10 Ark. 607; Pierce *v.* State, 12 Tex. 210; Russell *v.* State, 10 Tex. 288; Arthur *v.* State, 3 Tex. 403. And if it appears from the record that the grand jury were sworn, it will be presumed that they were "then and there" sworn Woodsides *v.* State, 2 How. (Miss.) 655. Where the record states at what court, at what term, and in what county the grand jury were impaneled and sworn, there is a sufficient statement of the venue, although the words "then and there" are not used before the word "sworn." Greeson *v.* State, 5 How. (Miss.) 33. While it should be shown in the record that the indictment was found by a grand jury which was duly impaneled and sworn, it need not be shown by an entry made by the clerk and entered on the minutes of the court at the beginning of the term, when the grand jury is impaneled and sworn, but if the fact is made to appear anywhere in the record, it will be sufficient. Bailey *v.* State, 39 Ind. 438, holding that where an indictment recited the style of the court, the name of the county and state, the time and place of the session of the court, the names of the parties, and that the grand jurors were of the proper county, good and lawful men, duly and legally impaneled, charged, and sworn to inquire, etc., and the accompanying record, upon a change of venue, recited that such indictment was returned into open court, the record was sufficient. Where the record shows that the grand jury returned the indictment into open court, and the indictment itself states that the grand jury was duly impaneled, sworn, and charged, the impaneling of the grand jury is sufficiently shown. Powers *v.* State, 87 Ind. 144. See also Stout *v.* State, 93 Ind. 150; Lovell *v.* State, 45 Ind. 550; Howell *v.* State, 4 Ind. App. 148, 30 N. E. 714.

Clerical errors.— Where the record of the impaneling of the grand jury stated that the jurors "were sworn a grand jury of inquest upon the body of Mineral county," it was held that the word "upon," being clearly a clerical error, should be read "for," and that the indictment might be upheld as showing on its face that it was found by the grand jurors for Mineral county. State *v.* Gilmore, 9 W. Va. 641.

the grand jurors were qualified, but this will be presumed unless the contrary appears from the record or evidence.[95] And it has been held that the record need not affirmatively show the appointment of a foreman,[96] or the selection or drawing and summoning of the grand jury,[97] or the award of process to summon them.[98]

d. Statement as to Offense Charged. Sometimes, by statute, the record is required to specify the offense charged;[99] but even when this is so, it need not contain every element of the offense,[1] and mere clerical errors will not necessarily be fatal.[2] In the absence of a statute omission to state the offense charged in the entry on the minutes is not fatal, even if necessary at all;[3] nor is a misnomer of the offense fatal.[4]

e. Aider and Variance Between Portions of Record. An omission or defect in one part of the record of an indictment may be supplied or aided by other parts, as the record is to be taken as a whole.[5] Where there is a variance as to

95. Stone *v.* State, 30 Ind. 115; Weinzorpflin *v.* State, 7 Blackf. (Ind.) 186. The fact that the record does not recite that the court performed its imperative legal duty to ascertain whether the grand jurors, shown to have been impaneled and charged, possessed the statutory qualifications, does not render an indictment found by such grand jury invalid. James *v.* State, 53 Ala. 380. See also GRAND JURIES, 20 Cyc. 1303.

96. People *v.* Roberts, 6 Cal. 214; Yates *v.* People, 38 Ill. 527; McGregg *v.* State, 4 Blackf. (Ind.) 101; State *v.* Gouge, 12 Lea (Tenn.) 132. A statement in the record that a person was sworn as foreman implies his appointment as such by the court. Woodsides *v.* State, 2 How. (Miss.) 655; Byrd *v.* State, 1 How. (Miss.) 247.

97. State *v.* Carney, 20 Iowa 82; State *v.* Howard, 10 Iowa 101. But see State *v.* Conner, 5 Blackf. (Ind.) 325. To sustain an indictment it is not necessary that the record should show the mode in which the jurors for the term were drawn. This sufficiently appears from the venire, which is presumed legal. Collier *v.* State, 2 Stew. (Ala.) 388. And, where it appears from the record that the indictment was found and returned into court by a grand jury, and was treated by the prisoner in the court below as a valid indictment, so found and returned, the judgment cannot be reversed because the record fails to show that the grand jury was regularly selected and summoned. Shaw *v.* State, 18 Ala. 547.

98. Curtis *v.* Com., 87 Va. 589, 13 S. E. 73.

99. In Texas, previous to the amendment of 1876, Code Cr. Proc. art. 389, provided that the fact of the presentment of an indictment should be entered on the minutes of the court, "noting briefly the style of the criminal action and the offense charged," and it was held that an entry describing the offense as "A. to kill" was not sufficient. Denton *v.* State, 3 Tex. App. 635. This is no longer necessary in this state. See the cases cited *infra*, note 3.

1. Tefft *v.* Com., 8 Leigh (Va.) 721 (holding that the record of the finding of an indictment for retailing ardent spirits without a license, which stated that the grand jury presented an indictment against A for "retailing liquors," a true bill, was sufficient); State *v.* Geyer, 44 W. Va. 649, 29 S. E. 1020 (holding that the record of an indictment, in these words: "An indictment against Charles Gibson and Dana Geyer for obtaining property by false pretense. No. 1. A true bill. H. F. Jones, Foreman," was sufficient, although the language used did not contain every element of the offense charged). See also State *v.* Fitzpatrick, 8 W. Va. 707; Crookham *v.* State, 5 W. Va. 510.

2. Where an entry in the record stating that the grand jury "returned into Court and among other things, presented an indictment against Thomas Nutter for felonious assault and battery," a true bill, and the words "presented an indictment against" were stricken out by the clerk with the intention of interlining them, which he failed to do, but the words were legible, it was held a sufficient entry of a finding for assault with felonious intent to commit murder. Com. *v.* Nutter, 8 Gratt. (Va.) 699.

3. Goodwyn *v.* State, 4 Sm. & M. (Miss.) 520 (holding that, in the entry on the minutes of the court that an indictment had been found against A B, an omission to state the offense charged was not error, especially where the defect was supplied by a subsequent part of the record); State *v.* Cook, Riley (S. C.) 234 (holding that it was no ground for quashing an indictment that there was no specification of any offense on the docket).

In Texas the entry of a presentment of the court need not show what offense was charged in the indictment. Tellison *v.* State, 35 Tex. Cr. 388, 33 S. W. 1082; Steele *v.* State, 19 Tex. App. 425; Spear *v.* State, 16 Tex. App. 98; Hasley *v.* State, 14 Tex. App. 217.

4. Since the clerk is not required to enter upon his minutes the name of the offense charged against an accused, the fact that he misnames the offense on his minute book cannot vitiate the indictment. Rowlett *v.* State, 23 Tex. App. 191, 4 S. W. 582.

5. Com. *v.* Stone, 3 Gray (Mass.) 453.

Illustrations.— Thus where an indictment showed that it was indorsed "A true bill," and signed by the foreman of the grand jury, it was held that a demurrer to it on the ground that the record did not show that it was so indorsed and signed was properly

an essential matter between different parts of the record, that part which by statute is made evidence of the fact will control.[6]

f. Amendments and Subsequent Entries. Where the record fails in a particular part to show a necessary fact as to the selection, drawing, summoning, impaneling, or organization of the grand jury,[7] or as to the finding, presentment, or return, or filing of the indictment,[8] it may be amended by a *nunc pro tunc* entry by order of the court, if sufficient facts otherwise appear on the record to support the order of amendment,[9] and if, according to some of the cases, defendant is present in court when the amendment is made, but not otherwise.[10] The amendment must be in fact made.[11] It has been held in some states, however,

overruled, since the indictment was itself a part of the record. Pickerel *v.* Com., 30 S. W. 617, 17 Ky. L. Rep. 120. And an indictment which purports in its caption to have been found on the first day of the term, but charges an offense of a later date, may be shown, by reference to the clerk's certificate indorsed thereon, to have been actually returned into court after this date. Com. *v.* Stone, 3 Gray (Mass.) 453. The record entry of presentments is admissible to show the true date of an indictment. It was so held where it charged the offense to have been committed August 18, and the clerk's indorsement represented it to have been filed on that date, but the record entry showed it was returned August 19. Kennedy *v.* State, 11 Tex. App. 73.

Omission to record finding.— But where a bill of indictment was found by the grand jury, and indorsed "A true bill" by the foreman, and brought into court, it was held that an omission to record the finding, as required by statute, could not be supplied by a paper purporting to be an indictment with an indorsement "A true bill" signed by the person who was foreman of the grand jury at that time. Com. *v.* Cawood, 2 Va. Cas. 527. Nor can such omission be supplied by a recital in the record that defendant stands indicted, or by his arraignment, or by his plea of not guilty. Com. *v.* Cawood, *supra*.

Mistake in record.— So where an indictment against J M was indorsed by the grand jury as a true bill against T M, and so entered on the record, it was held that it could not be amended to conform to the indictment. Com. *v.* McKinney, 8 Gratt. (Va.) 589. See also Drake's Case, 6 Gratt. (Va.) 665.

The indorsement on an indictment may constitute part of the records of the court. People *v.* Myers, 2 Hun (N. Y.) 6.

6. Holland *v.* State, 60 Miss. 939, holding that the legal evidence of the date when an indictment marked "Filed" was found and presented was the date of the entry signed by the clerk, as provided by Code, § 3006; and that such entry controlled an averment in the indictment that it was presented on a different date.

A variance between the christian name of a grand juror as signed to an indictment and as given in the entry upon the record, setting forth and showing the impaneling of the grand jury, cannot be made available as the subject-matter of a plea in abatement to the indictment. State *v.* Wills, 11 Humphr. (Tenn.) 222.

7. Tervin *v.* State, 37 Fla. 396, 20 So. 551.

8. *Arkansas.*— Green *v.* State, 19 Ark. 178.

Florida.— Johnson *v.* State, 24 Fla. 162, 4 So. 535.

Illinois.— Gore *v.* People, 162 Ill. 259, 44 N. E. 500.

Indiana.— Waterman *v.* State, 116 Ind. 51, 18 N. E. 63; Long *v.* State, 56 Ind. 133; Bodkin *v.* State, 20 Ind. 281; State *v.* Pearce, 14 Ind. 426; Courtney *v.* State, 5 Ind. App. 356, 32 N. E. 335.

Missouri.— State *v.* Bell, 159 Mo. 479, 60 S. W. 1102; State *v.* Clark, 18 Mo. 432.

Tennessee.— State *v.* Willis, 3 Head 157.

Texas.— Moore *v.* State, 46 Tex. Cr. 520, 81 S. W. 48; Boren *v.* State, 32 Tex. Cr. 637, 25 S. W. 775; Tyson *v.* State, 14 Tex. App. 388; Townsend *v.* State, 5 Tex. App. 574.

Vermont.— See State *v.* Butler, 17 Vt. 145.

See 27 Cent. Dig. tit. "Indictment and Information," § 75.

In **Texas** it is held that Rev. St. (1895) art. 1120, requiring that all proceedings of the district court shall be read and corrected and signed in open court by the judge, prevents an entry by the clerk or the signing by the judge after the adjournment of the court. Moore *v.* State, 46 Tex. Civ. App. 520, 81 S. W. 48.

9. Collier *v.* Com., 110 Ky. 516, 62 S. W. 4, 22 Ky. L. Rep. 1929. Where the record shows that the grand jury, as a body, made a report, and returned into open court certain indictments, which were properly indorsed as true bills and filed and placed on the docket, and that the indictment in the case at issue was properly indorsed and filed, and placed on the docket with other cases returned at the same time, the facts of record are sufficient to authorize the court to amend the record so as to show the return of the indictment in such case into open court by the grand jury in a body. Gore *v.* People, 162 Ill. 259, 44 N. E. 500.

10. Felker *v.* State, 54 Ark. 489, 16 S. W. 663; Green *v.* State, 19 Ark. 178, amendment to show return.

11. Where on motion of defendant, made on retrial, to set aside an indictment for theft because its presentment in open court did not appear on the minutes of the court as required by law, the state introduced testimony of the clerk and the foreman, and moved to amend, and the motion was granted,

that where a statute requires the finding of the grand jury to be recorded, and the clerk omits to do so, or omits the name of one of several defendants or enters it erroneously, the omission or mistake cannot be cured by amendment at a subsequent term.[12] And statutes sometimes provide that no entry of an indictment found shall be made at the term at which the same is found, unless defendant is in actual custody, or on bail or recognizance to answer such offense, but such entry may be made on the minutes of the court at any time after the appearance of defendant.[13]

G. Return and Filing of Evidence or List of Witnesses.[14] In the absence of a statute the grand jury are not required to return into court the evidence on which they have found an indictment or a list of the witnesses, but sometimes a statute requires this to be done, and renders non-compliance therewith ground for motion to set aside the indictment.[15] But it has been held that a person indicted by a grand jury has no such personal interest in a compliance by the foreman with a statute requiring him to return to the court a list of all witnesses sworn before the grand jury during the term as will cause a non-compliance with the statute to affect his rights under the indictment.[16]

H. Loss or Destruction of Indictment — 1. New Indictment. When an indictment is lost or destroyed after it has been duly found and returned or presented in court, there can be no question but that the court may on motion of the prosecuting officer order a new bill to be sent to the grand jury.[17]

but no amendment of the minutes was in fact made, it was held that notwithstanding defendant's plea of not guilty and the other proceedings, the conviction at the second trial could not stand. Cox *v.* State, 7 Tex. App. 495.

The proper mode of amending a record in regard to an indictment would be by an order at the time when the amendment is made, and not by erasing and altering an order entered on the minutes of the previous term of the court. Rhodes *v.* State, 29 Tex. 188.

12. Com. *v.* McKinney, 8 Gratt. (Va.) 589; Drake's Case, 6 Gratt. (Va.) 665. See also Bowen *v.* State, 81 Ga. 482, 8 S. E. 736; Cornwell *v.* State, 53 Miss. 385.

13. See Cook *v.* State, 57 Miss. 654. Under such a statute it has been held that where a person indicted is in custody or on bail when the indictment is returned, and the court makes an insufficient entry, it cannot at the next term amend the entry, so as to cure its defect. Cornwell *v.* State, 53 Miss. 385. But where the court has the right to make an original entry at a term subsequent to that at which the indictment is found, an invalid entry made at a preceding term may be ignored, and the correct entry made at a succeeding term will be good as an original entry. Cornwell *v.* State, *supra*.

14. Indorsement of names of witnesses see *infra*, III, G, 5.

15. Under the Iowa statute see State *v.* Hasty, 121 Iowa 507, 96 N. W. 1115 (holding that Code, § 5276 *et seq.*, requiring a motion to set aside an indictment to be sustained when the minutes of the evidence of the witnesses examined are not returned therewith, includes witnesses whose testimony was taken in shorthand and subsequently extended and filed by the committing magistrate; but that defendant cannot complain of the omission from the return of evidence having no bearing on the trial against him); State *v.* Turner, 114 Iowa 426, 87 N. W. 287 (holding that the fact that the transcript of the evidence of the examination before the committing magistrate, instead of a minute thereof made by the clerk of the grand jury, was returned with the indictment, is not prejudicial to defendant); State *v.* Doss, 110 Iowa 713, 80 N. W. 1069 (holding that the statute does not require that the minutes of the testimony of each witness and each exhibit returned with the indictment be separately marked "Filed" by the clerk, but one indorsement, so made as to indicate all papers to which it refers, is sufficient); State *v.* Wrand, 108 Iowa 73, 78 N. W. 788; State *v.* Hurd, 101 Iowa 391, 70 N. W. 613 (holding that the statute does not require the return of documentary evidence, or require such minutes to be returned in the handwriting of the grand jury's clerk); State *v.* Briggs, 68 Iowa 416, 27 N. W. 358; State *v.* Little, 42 Iowa 51; State *v.* Guisenhause, 20 Iowa 227. The statute does not require return of the testimony which is immaterial (State *v.* Lewis, 96 Iowa 286, 65 N. W. 295), or testimony which did not contribute to the finding of the indictment although it is material (State *v.* Miller, 95 Iowa 368, 64 N. W. 288).

16. Hathaway *v.* State, 32 Fla. 56, 13 So. 592. And see State *v.* Wilkinson, 76 Me. 317.

17. Ganaway *v.* State, 22 Ala. 772; Rosenberger *v.* Com., 118 Pa. St. 77, 11 Atl. 782; Com. *v.* Freeman, 1 Pa. Co. Ct. 392.

New indictment as a new prosecution.—But it has been held that an indictment lost or destroyed cannot be supplied, in the absence of a statute, by a subsequent indictment found by a different grand jury, and that the only effect of such proceeding is the institu-

2. Substitution of Copy. According to the weight of authority, however, a new indictment is not necessary; but the court may, even though the judge has no personal recollection, allow the substitution of a copy made from the records or clearly proved by affidavits or otherwise to be an exact copy. It has been so held, not only under statutes expressly providing therefor,[18] but also independently of such a statute or under a statute providing generally for the reëstablishment of lost or destroyed papers, records, files, proceedings, etc.[19] The rule also applies where an indictment has become unintelligible by mutilation or obliteration.[20] The copy must be clearly shown to be correct,[21] and there must be a

tion of a new prosecution, in which the limitation will run up to the time the new indictment is returned into court. Com. *v.* Keger, 1 Duv. (Ky.) 240. A contrary rule is sometimes prescribed by statute. State *v.* Elliott, 14 Tex. 423.

18. *Arkansas.*— Miller *v.* State, 40 Ark. 488.

Louisiana.— State *v.* Heard, 49 La. Ann. 375, 21 So. 632.

Mississippi.— McGuire *v.* State, 76 Miss. 504, 25 So. 495.

Oklahoma.— Harmon *v.* Territory, 5 Okla. 368, 49 Pac. 55, 9 Okla. 313, 60 Pac. 115.

Tennessee.— Epperson *v.* State, 5 Lea 291; Currey *v.* State, 7 Baxt. 154; Boyd *v.* State, 6 Coldw. 1.

Texas.— State *v.* Ivy, 33 Tex. 646 (holding that under a statute providing that, where an indictment has been mutilated or obliterated, another indictment shall be substituted, on the written statement of the district or county attorney that it is substantially the same as the one mutilated, the court cannot refuse to allow such substitution when application has been made therefor by the district attorney); Bowers *v.* State, 45 Tex. Cr. 185, 75 S. W. 299; Carter *v.* State, 41 Tex. Cr. 608, 58 S. W. 80; Watson *v.* State, (Cr. App. 1899) 50 S. W. 340; Withers *v.* State, 21 Tex. App. 210, 17 S. W. 725; Strong *v.* State, 18 Tex. App. 19; Schultz *v.* State, 15 Tex. App. 258, 49 Am. Rep. 194.

See 27 Cent. Dig. tit. "Indictment and Information," §§ 78–80.

Statute is constitutional. Withers *v.* State, 21 Tex. App. 210, 17 S. W. 725; Schultz *v.* State, 15 Tex. App. 258, 49 Am. Rep. 194.

Loss, destruction, or mutilation necessary. —Under a statute providing that an indictment may be substituted where the original has been lost, mutilated, or obliterated, a substitution is unauthorized where the original indictment in a case is on file in the court of appeals, where it was sent on a former appeal for inspection of the court to the knowledge of the parties, by whom it could be obtained by taking proper steps. Shehane *v.* State, 13 Tex. App. 533.

19. *Florida.*— Roberson *v.* State, 45 Fla. 94, 34 So. 294.

Georgia.— Branson *v.* State, 99 Ga. 194, 23 S. E. 404; Hughes *v.* State, 76 Ga. 39.

Iowa.— State *v.* Shank, 79 Iowa 47, 44 N. W. 241 (holding also that where a copy of an indictment was substituted for the lost original after the jury had been impaneled and sworn, an objection that the jury were sworn to try the case upon the indictment, as returned by the grand jury, and that, as it was not in existence, the court had no jurisdiction to impanel the jury, was without merit, as the substituted copy is of the same effect as the original); State *v.* Stevisiger, 61 Iowa 623, 16 N. W. 746; State *v.* Rivers, 58 Iowa 102, 12 N. W. 117, 43 Am. Rep. 112.

Kansas.— Millar *v.* State, 2 Kan. 174.

Kentucky.— Com. *v.* Keger, 1 Duv. 240.

Mississippi.— Helm *v.* State, 67 Miss. 562, 7 So. 487.

Missouri.— State *v.* Simpson, 67 Mo. 647; State *v.* Paul, 87 Mo. App. 47.

Pennsylvania.— Com. *v.* Becker, 14 Pa. Super. Ct. 430.

Tennessee.— State *v.* Gardner, 13 Lea 134, 49 Am. Rep. 660 [*overruling* State *v.* Harrison, 10 Yerg. 542]; Epperson *v.* State, 5 Lea 291.

Texas.— State *v.* Adams, 17 Tex. 232.

See 27 Cent. Dig. tit. "Indictment and Information," § 78 *et seq.*

Contra.— In Alabama and Virginia it has been held that when an indictment is lost or destroyed, it cannot, at least in the absence of a statute, be substituted on proof of a copy, but the proper course is to submit a new bill of indictment. Ganaway *v.* State, 22 Ala. 772; Bradshaw *v.* Com., 16 Gratt. (Va.) 507, 86 Am. Dec. 722.

20. State *v.* Ivy, 33 Tex. 646, under a statute.

Restoring original.— But an indictment torn into three pieces, which may be so united without the omission of any material word as to restore it substantially to the form in which it was presented in court by the grand jury, is sufficient as a basis for further legal proceedings. Com. *v.* Roland, 97 Mass. 598.

21. Roberson *v.* State, 45 Fla. 94, 34 So. 294; State *v.* Thomas, 97 Iowa 396, 66 N. W. 743 (holding the evidence insufficient to show that a substitute was a substantial copy); State *v.* Simpson, 67 Mo. 647; Rogers *v.* State, 11 Tex. App. 608. Where the copy of an indictment cannot be certified by the clerk of the court to be a true copy because of the loss of the original, but the evidence, which is not controverted, shows that the paper presented is in fact a true copy, this will be sufficient. State *v.* Stevisiger, 61 Iowa 623, 16 N. W. 746. And it has been held that where an indictment is lost, and another

regular motion for substitution and an order substituting and identifying the copy.[22] A person cannot be put upon trial on a lost or destroyed indictment of which there is no record.[23]

3. Loss or Destruction After Trial or Plea. According to the weight of authority the court has power to order the substitution of a copy of an indictment which is lost or destroyed after a trial thereon or after arraignment and plea.[24]

4. Discovery After Substitution or New Indictment. Where a paper has been by a proper order of court established as a copy of a lost indictment or presentment, the copy, until such order has been set aside, stands in lieu of the original. If such order is not revoked, the mere finding of a paper purporting to be the lost original cannot in any manner affect the legal status of the case.[25] On the other hand it has been held that there is no error in substituting an indictment, and then allowing the trial to proceed on the original indictment after it is found, where there has been no order substituting the indictment, and the original has been found pending the substitution.[26] Where an indictment has been found against a party and has been lost or not accounted for, and another is found against him for the same offense, it is immaterial upon which one he is tried.[27] It has been further held that where during the progress of a trial the original indictment

substituted, and defendant confesses to the correctness of the copy, he cannot complain on appeal that no evidence was offered as to the copy. Watson *v.* State, (Tex. Cr. App. 1899) 50 S. W. 340.

Contest.— Under a statute providing that when an indictment or information has been lost, etc., the state's attorney may suggest the fact, and another pleading may be substituted on his statement that it is substantially the same, the allowance of the substitution is a judicial act, and the accused has the right to contest it, and cannot be relegated to a motion to quash the substituted papers. Bowers *v.* State, 45 Tex. Cr. 185, 75 S. W. 299.

Presumption.—Where the record of a court having power to substitute a copy for a lost indictment states that the indictment is lost or mislaid, and that the instrument substituted is a copy thereof, it will be presumed that such facts were established by proper and sufficient proof. Com. *v.* Becker, 14 Pa. Super. Ct. 430.

Indorsements.— Where defendant has been tried on a copy of an indictment which was established in lieu of the lost original, after conviction it is no ground for a motion in arrest of judgment that the copy had on it no indorsement of "True bill," or other finding by the grand jury, as such defect does not affect the merits of the case. Hughes *v.* State, 76 Ga. 39.

22. Strong *v.* State, 18 Tex. App. 19; Rogers *v.* State, 11 Tex. App. 608; Beardall *v.* State, 9 Tex. App. 262; Turner *v.* State, 7 Tex. App. 596; Clampitt *v.* State, 3 Tex. App. 638. But *compare* Epperson *v.* State, 5 Lea (Tenn.) 291. Under Tex. Code Cr. Proc. art. 470, providing that when an indictment is lost, mislaid, etc., the county attorney may suggest the fact to the court, and the same shall be entered on the court's minutes, and another indictment may then be substituted on the written statement of the county attorney that it is substantially the same as the original, it was held that a mere certificate of the county attorney that the substituted writing is substantially the same as the original, accompanied by the written consent of defendant's attorneys to regard it as a properly substituted indictment, does not show a valid substitution under the act, since to constitute such substitution the record must show a formal motion for permission to substitute, accompanied by a copy of the indictment, an order of the court substituting the new indictment for the original, and the proper certificate of the county attorney that the substituted indictment is substantially the same as the original. Carter *v.* State, 41 Tex. Cr. 608, 58 S. W. 80. Where an indictment was lost, and the district attorney asked permission to substitute a copy, presenting an instrument to the court which he stated was a substantial copy, an order of the court directing the clerk to file the substituted indictment, followed by the filing thereof by the clerk, was held sufficient as an order of substitution. Magee *v.* State, 14 Tex. App. 366.

23. Buckner *v.* State, 56 Ind. 210, holding also that defendant in a criminal prosecution cannot be put upon trial on a *nunc pro tunc* entry, made by the order of the court, showing the return into court by the grand jury of an indictment against defendant and that it has been destroyed.

24. Bradford *v.* State, 54 Ala. 230; State *v.* Stevisiger, 61 Iowa 623, 16 N. W. 746; State *v.* Rivers, 58 Iowa 102, 12 N. W. 117, 43 Am. Rep. 112; Mount *v.* State, 14 Ohio 295, 45 Am. Dec. 542; Schultz *v.* State, 15 Tex. App. 258, 49 Am. Rep. 194. *Contra*, Bradshaw *v.* Com., 16 Gratt. (Va.) 507, 86 Am. Dec. 722.

25. Branson *v.* State, 99 Ga. 194, 24 S. E. 404.

26. Owens *v.* State, 46 Tex. Cr. 14, 79 S. W. 575.

27. Rosenberger *v.* Com., 118 Pa. St. 77, 11 Atl. 782.

on which defendant has been arraigned is lost, and another indictment, identical with it, is returned by the same grand jury then in session, and substituted, and afterward the original, being found again, is handed to the jury on its retirement, there is no error.[28]

I. Successive Indictments[29] — **1. Effect as to Subsequent Indictment.** A grand jury may find a valid indictment notwithstanding the fact that another indictment is pending against the accused for the same offense, and the pendency of the other indictment, where there has been no conviction or jeopardy thereon, is not ground for a plea either in abatement or in bar of the second indictment, or for motion in arrest of judgment thereon,[30] although as a rule the accused can be tried or put in jeopardy only on one.[31] It has been so held even though defendant has been arraigned and a plea of not guilty entered on the first indictment,[32] or although he has been tried thereon, where the jury have failed to agree,[33] or where a verdict of guilty has been set aside or judgment arrested on his motion,[34] or although a change of venue has been taken to another court.[35] And it is also well settled that the fact that an indictment is pending does not prevent the finding of another indictment for the same act as constituting another or a higher or less offense.[36] The court may, however, in its discretion, quash one

28. Helm *v.* State, 67 Miss. 562, 7 So. 487.

29. Resubmission and reconsideration see *supra*, II, E, 7.

30. *Alabama.*— Bell *v.* State, 115 Ala. 25, 22 So. 526; White *v.* State, 86 Ala. 69, 5 So. 674.

Arkansas.— Hudspeth *v.* State, 50 Ark. 534, 9 S. W. 1; Dobson *v.* State, (1891) 17 S. W. 3.

Colorado.— Mason *v.* People, 2 Colo. 373.

Connecticut.— State *v.* Keena, 64 Conn. 212, 29 Atl. 470.

District of Columbia.— U. S. *v.* Neverson, 1 Mackey 152.

Florida.— Knight *v.* State, 42 Fla. 546, 28 So. 759; Smith *v.* State, 42 Fla. 236, 27 So. 868; Eldridge *v.* State, 27 Fla. 162, 9 So. 448.

Georgia.— Irwin *v.* State, 117 Ga. 706, 45 S. E. 48; Williams *v.* State, 57 Ga. 478.

Illinois.— Gannon *v.* People, 127 Ill. 507, 21 N. E. 525, 11 Am. St. Rep. 147.

Indiana.— Hardin *v.* State, 22 Ind. 347; Dutton *v.* State, 5 Ind. 533.

Kansas.— State *v.* McKinney, 31 Kan. 570, 3 Pac. 356.

Massachusetts.— Com. *v.* Cody, 165 Mass. 133, 42 N. E. 575; Com. *v.* Berry, 5 Gray 93; Com. *v.* Murphy, 11 Cush. 472; Com. *v.* Hill, 11 Cush. 137; Com. *v.* Drew, 3 Cush. 279.

Minnesota.— State *v.* Gut, 13 Minn. 341.

Missouri.— State *v.* Goddard, 162 Mo. 198, 62 S. W. 697; State *v.* Vincent, 91 Mo. 662, 4 S. W. 430; State *v.* Arnold, (1886) 2 S. W. 269; State *v.* Eaton, 75 Mo. 586.

Nebraska.— Bartley *v.* State, 53 Nebr. 310, 73 N. W. 744.

Nevada.— State *v.* Lambert, 9 Nev. 321.

New York.— People *v.* Ferris, 1 Abb. Pr. N. S. 193; People *v.* Fisher, 14 Wend. 9, 28 Am. Dec. 501.

North Carolina.— State *v.* Hastings, 86 N. C. 596; State *v.* Dixon, 78 N. C. 558.

Ohio.— O'Meara *v.* State, 17 Ohio St. 515.

Pennsylvania.— Com. *v.* Clemmer, 190 Pa. St. 202, 42 Atl. 675; Rosenberger *v.* Com., 118 Pa. St. 77, 11 Atl. 782.

South Dakota.— State *v.* Security Bank, 2 S. D. 538, 51 N. W. 337.

Texas.— Carter *v.* State, 44 Tex. Cr. 312, 70 S. W. 971; Bonner *v.* State, 29 Tex. App. 223, 15 S. W. 821; Bailey *v.* State, 11 Tex. App. 140.

Virginia.— Stuart *v.* Com., 28 Gratt. 950.

See 27 Cent. Dig. tit. "Indictment and Information," § 83 *et seq.*

Compare, however, Clinton *v.* State, 6 Baxt. (Tenn.) 507, holding that since a person charged with crime can be required to answer only one indictment for the same offense, when a second indictment against the same party for the same offense is had, the second must show that some disposition has been made of the first by *nolle prosequi* or otherwise; and it must clearly appear in the record in every such case upon which indictment the conviction was had. See also Anderson *v.* State, 3 Heisk. (Tenn.) 86.

Successive informations see *infra*, IV, A, 4.

31. See *infra*, II, I, 6.

32. U. S. *v.* Neverson, 1 Mackey (D. C.) 152; Irwin *v.* State, 117 Ga. 706, 45 S. E. 48; Com. *v.* Dunham, Thach. Cr. Cas. (Mass.) 513; People *v.* Ferris, 1 Abb. Pr. N. S. (N. Y.) 193 (where part of the jury had been called); People *v.* Fisher, 14 Wend. (N. Y.) 9, 28 Am. Dec. 501.

33. Blyew *v.* Com., 91 Ky. 200, 15 S. W. 356, 12 Ky. L. Rep. 742.

34. Gannon *v.* People, 127 Ill. 507, 21 N. E. 525, 11 Am. St. Rep. 147.

35. See *infra*, II, I, 3.

36. Nash *v.* State, 73 Ark. 399, 84 S. W. 497 (manslaughter and murder); *Ex p.* Johnson, 71 Ark. 47, 70 S. W. 467 (murder in different degrees); Carter *v.* State, 44 Tex. Cr. 312, 70 S. W. 971 (aggravated assault and assault with intent to rape); U. S. *v.* Herbert, 26 Fed. Cas. No. 15,354, 5 Cranch C. C. 87 (assault and battery and assault and battery with intent to kill).

of two pending indictments for the same offense, whenever justice requires this in order to prevent prejudice to the defendant.[37]

2. Effect as to First Indictment — a. In General. In the absence of a statute, where two indictments are pending against a person for the same offense, the second does not supersede or abate the first, and the state may elect on which it will prosecute;[38] but defendant cannot be tried on both, and if the state elects to proceed on the second the court may in its discretion quash the first.[39]

b. Under Statutory Provisions. It is sometimes expressly provided by statute that if two indictments are pending against a person for the same offense, or for the same matter, although charged as different offenses,[40] the indictment first found shall be deemed to be suspended or superseded by the second and shall be quashed.[41] Such a statute does not affect the validity of the second indictment, but on the contrary recognizes its validity.[42] Nor does the second indictment *ipso facto* supersede and quash the first, but it merely suspends the same and renders it liable to be quashed;[43] and therefore if the second is quashed by the court the first is revived.[44] The second indictment, to supersede the first, must be a valid indictment.[45]

37. State *v.* Michel, 111 La. 434, 35 So. 629.

38. People *v.* Monroe Oyer & Terminer Ct., 20 Wend. (N. Y.) 108; Stuart *v.* Com., 28 Gratt. (Va.) 950; U. S. *v.* Maloney, 26 Fed. Cas. No. 15,713*a*.

39. State *v.* Michel, 111 La. 434, 35 So. 629. See *supra*, II, I, 1, text and note 37. But it has been held that a defendant who has been twice indicted for the same crime, but who has never been arraigned under the first indictment and has never pleaded to it, has no right to have it quashed before going to trial under the second indictment. U. S. *v.* Maloney, 26 Fed. Cas. No. 15,713*a*.

40. This statute only applies when the two indictments are for the same offense or matter; and it does not apply therefore where they are so diverse that the same evidence will not sustain both, and when each sets out an offense differing in all its elements from that charged in the other, although both indictments relate to the same transaction. State *v.* Hall, 50 Ark. 28, 6 S. W. 20 (indictment for carrying a weapon and indictment for murder); Ball *v.* State, 48 Ark. 94, 2 S. W. 462 (indictment against school directors for the forgery of an indorsement on a school warrant and uttering the same, and an indictment for mutilation of the directors' record); Austin *v.* State, 12 Mo. 393; People *v.* Branshy, 32 N. Y. 525 (assault and battery and rape); People *v.* Rynders, 12 Wend. (N. Y.) 425. See also *infra*, II, I, 5.

41. Sandels & H. Dig. (Ark.) § 2099; Mo. Rev. St. (1899) § 2522. See Dobson *v.* State, (Ark. 1891) 17 S. W. 3; Hudspeth *v.* State, 50 Ark. 534, 9 S. W. 1; State *v.* Melvin, 166 Mo. 565, 66 S. W. 534; State *v.* Eaton, 75 Mo. 586; State *v.* Cheek, 63 Mo. 364; Austin *v.* State, 12 Mo. 393; People *v.* Bransby, 32 N. Y. 525.

42. Hudspeth *v.* State, 50 Ark. 534, 9 S. W. 1; State *v.* Melvin, 166 Mo. 565, 66 S. W. 534; State *v.* Daugherty, 106 Mo. 182, 17 S. W. 303; State *v.* Anderson, 96 Mo. 241, 9 S. W. 636; State *v.* Vincent, 91 Mo. 662, 4 S. W. 430; State *v.* Arnold, (Mo. 1886) 2 S. W. 269; State *v.* Eaton, 75 Mo. 586 [*overruling* State *v.* Webb, 74 Mo. 333; State *v.* Smith, 71 Mo. 45] (holding therefore that it was no ground for plea to a second indictment that the first was still pending and had not been quashed); Austin *v.* State, 12 Mo. 393; People *v.* Fisher, 14 Wend. (N. Y.) 9, 28 Am. Dec. 501.

43. State *v.* Melvin, 166 Mo. 565, 66 S. W. 534 [*overruling dictum* to the contrary in State *v.* Daugherty, 106 Mo. 182, 17 S. W. 303]; State *v.* Eaton, 75 Mo. 586; State *v.* Smith, 71 Mo. 45; People *v.* Branshy, 32 N. Y. 525; People *v.* Barry, 10 Abb. Pr. (N. Y.) 225, 4 Park. Cr. 657; People *v.* Monroe Oyer & Terminer Ct., 20 Wend. (N. Y.) 108; People *v.* Fisher, 14 Wend. (N. Y.) 9, 28 Am. Dec. 501.

Waiver.— It has been held therefore that defendant may waive the benefit of the statute and that he does so by pleading guilty on the first indictment. People *v.* Barry, 10 Abb. Pr. (N. Y.) 225, 4 Park. Cr. 657. It has also been held that after a conviction an indictment will not be quashed on the ground that, during the pendency of the trial, a second indictment for the same offense was found by the grand jury. People *v.* Monroe Oyer & Terminer Ct., 20 Wend. (N. Y.) 108.

44. State *v.* Melvin, 166 Mo. 565, 66 S. W. 534.

45. People *v.* Mosier, 73 N. Y. App. Div. 5, 76 N. Y. Suppl. 65.

Second indictment void; reinstatement of first.— Where defendant was indicted for rape at the trial term of the supreme court and the indictment was sent to the county court, and thereafter, while the grand jury was still in session, what purported to be another indictment was presented against defendant for the same offense, and this was sent to the county court, and thereupon the county court made an order directing that the first indictment be superseded by the later one, but it afterward appeared that the later indictment was void because no

3. After Change of Venue. A new indictment may be found and the defendant arraigned thereon, notwithstanding a change of venue has been taken on the first indictment to another county, where the first indictment is quashed or dismissed.[46] It has also been held that, if authorized by statute, a new indictment may be found in the county to which the venue has been changed;[47] but elsewhere it has been held that such a statute violates the constitutional requirement of indictment on the ground that the constitution contemplates a common-law indictment, which can be found only in the county in which the offense was committed.[48]

4. Procedure by Grand Jury as to Second Indictment. In some cases it has been held that where an indictment is quashed or dismissed the same grand jury can properly find and return a new indictment without reëxamining witnesses,[49] while in other cases this has been denied.[50] A grand jury, however, cannot properly find a new indictment merely on the fact of a former finding of a true bill by another grand jury.[51] When an indictment has been quashed the grand jury may find a new indictment without another binding over.[52]

5. Indictments For Different Offenses; Splitting Offenses. Several indictments may be found and prosecuted for different offenses, although they relate to the same transaction,[53] except in so far as this may be prevented by the doc-

vote had been taken by the grand jury as to whether it should be found, it was held that the county court had power thereupon to order the first indictment reinstated. People *v.* Mosier, 73 N. Y. App. Div. 5, 76 N. Y. Suppl. 65.

46. State *v.* Goddard, 162 Mo. 198, 62 S. W. 697; State *v.* Billings, 140 Mo. 193, 41 S. W. 778; State *v.* Patterson, 73 Mo. 695.

47. Parker *v.* Com., 12 Bush (Ky.) 191 (holding such a statute constitutional); Jennings *v.* Com., 16 S. W. 348, 13 Ky. L. Rep. 79.

Variance from prior indictment.— On a change of venue a new indictment found by the grand jury of the county to which removal is made, which in one count charges the murder of deceased and in another a conspiracy to murder him and two others, does not prejudicially vary from the first indictment, quashed under Ky. Gen. St. c. 12, art. 4, § 7, authorizing such proceedings, which charges the same murder, but charges a conspiracy to murder deceased only, since the murder of deceased is the crime charged. Jennings *v.* Com., 16 S. W. 348, 13 Ky. L. Rep. 79.

48. *Ex p.* Slater, 72 Mo. 102.

49. *Florida.*— Mercer *v.* State, 40 Fla. 216, 24 So. 154, 74 Am. St. Rep. 135.

Iowa.— State *v.* Clapper, 59 Iowa 279, 13 N. W. 294.

Kentucky.— McIntire *v.* Com., (1887) 4 S. W. 1.

Massachusetts.— Com. *v.* Clune, 162 Mass. 206, 38 N. E. 435 (holding also that the second indictment is good, although some of the grand jurors present at the finding of the original indictment are absent, and some of those present at the finding of the second indictment were absent at the finding of the first); Com. *v.* Woods, 10 Gray 477.

Minnesota.— State *v.* Peterson, 61 Minn. 73, 63 N. W. 171, 28 L. R. A. 324.

Ohio.— Whiting *v.* State, 48 Ohio St. 220, 27 N. E. 96, holding that having returned an indictment to the clerk while the court was not in session, the grand jury may, without again examining the witnesses, present a second indictment for the same offense, although the first has not been *nolle prosequied.*

Oregon.— See State *v.* Reinhart, 26 Oreg. 466, 38 Pac. 822.

See 27 Cent. Dig. tit. "Indictment and Information," § 87.

50. State *v.* Ivey, 100 N. C. 539, 5 S. E. 407, holding that after an indictment returned by a grand jury has been quashed for informality a second indictment for the same offense returned by them without further examination of witnesses should be quashed on motion, as it is not good as a new bill, and cannot be deemed an additional count to the first indictment. So it has been held that where an indictment is found by the same grand jury that made a presentment upon the testimony of some of their own body, not sworn in court as witnesses, the indictment must be quashed. State *v.* Cain, 8 N. C. 352. See also Com. *v.* McComb, 157 Pa. St. 611, 27 Atl. 794; Com. *v.* Green, 126 Pa. St. 531, 17 Atl. 878, 12 Am. St. Rep. 894.

51. Sparrenberger *v.* State, 53 Ala. 481, 25 Am. Rep. 643; State *v.* Grady, 12 Mo. App. 361 [*affirmed* in 84 Mo. 220].

52. Com. *v.* Wescott, 4 C. Pl. (Pa.) 58.

53. State *v.* Hall, 50 Ark. 28, 6 S. W. 20 (indictments for carrying a weapon and for murder); Ball *v.* State, 48 Ark. 94, 2 S. W. 462 (indictments against a school director for forgery of an indorsement on a school warrant and uttering the same and for mutilation of the directors' record); State *v.* Michel, 111 La. 434, 35 So. 629 (holding that where one indictment charged accused with an attempt to commit a crime, and the other with having committed the crime, the offenses were not similar, and a motion to quash on the ground of two indictments for

trine of merger of offenses[54] But a single offense cannot be split so as to support several indictments and prosecutions therefor, as in the case of separate indictments for the stealing of several articles at the same time and as part of the same transaction,[55] or for uttering several forged papers at the same time,[56] or the sale of several lottery tickets to the same person at the same time,[57] or possessing two counterfeit plates at the same time,[58] or for resisting legal process and assault,[59] and in other like cases.[60]

6. TRIAL UPON SEVERAL INDICTMENTS AND CONSOLIDATION.[61] As a rule a defendant cannot be tried upon two separate indictments for the same offense at the same time, but the state must elect upon which it will prosecute.[62] In some jurisdictions, however, provision is made by statute for the consolidation of indictments for offenses which could have been joined in the same indictment.[63] And independently of any statute it has been held that two or more indictments charging the same offense in different ways may be treated as if they were separate counts of one indictment.[64]

7. SUBSEQUENT INDICTMENT BECAUSE OF INVALIDITY OR NOLLE PROSEQUI OF PRIOR ONE. Where an indictment is fatally defective or otherwise invalid, a second

the same crime was properly denied); People *v.* Bransby, 32 N. Y. 525 (indictments for assault and battery and for rape); People *v.* Rynders, 12 Wend. (N. Y.) 425 (indictments for forging a check on a bank in the name of A B and for personating A B and thereby obtaining money). But the practice of finding two or more indictments for different degrees of the same offense, or for different offenses founded on the same matter, has been disapproved of. People *v.* Van Horne, 8 Barb. (N. Y.) 158.

Former jeopardy see CRIMINAL LAW, 12 Cyc. 281 *et seq.*

54. Merger of offenses see CRIMINAL LAW, 12 Cyc. 133.

55. Foster *v.* State, 88 Ala. 182, 7 So. 185; State *v.* Clark, 32 Ark. 231; Jackson *v.* State, 14 Ind. 327; Fisher *v.* Com., 1 Bush (Ky.) 211, 89 Am. Dec. 620. See CRIMINAL LAW, 12 Cyc. 289.

56. State *v.* Benham, 7 Conn. 414; State *v.* Moore, 86 Minn. 422, 90 N. W. 787, 61 L. R. A. 819. See CRIMINAL LAW, 12 Cyc. 289.

Forgery.— Two offenses cannot be created out of the same criminal act by charging the defendant in one count with having forged a national bank note, and in another count with having forged the signatures to the same note. Logan *v.* U. S., 123 Fed. 291, 59 C. C. A. 476.

57. Fontaine *v.* State, 6 Baxt. (Tenn.) 514.

58. U. S. *v.* Miner, 26 Fed. Cas. No. 15,780, 11 Blatchf. 511.

59. State *v.* Johnson, 12 Ala. 840, 46 Am. Dec. 205.

60. Former jeopardy see CRIMINAL LAW, 12 Cyc. 281 *et seq.*, 289.

61. See also CRIMINAL LAW, 12 Cyc. 504.

62. Clinton *v.* State, 6 Baxt. (Tenn.) 507; Bonner *v.* State, 29 Tex. App. 223, 15 S. W. 821; Stuart *v.* Com., 28 Gratt. (Va.) 950. See also McClellan *v.* State, 32 Ark. 609; U. S. *v.* Neverson, 1 Mackey (D. C.) 152; Com. *v.* Dunham, Thach. Cr. Cas. (Mass.) 513. *Compare* U. S. *v.* Herbert, 26 Fed. Cas. No. 15,354, 5 Cranch C. C. 87.

Consent.— It is improper to try a defendant on two indictments at once even when he consents. McClellan *v.* State, 32 Ark. 609.

Former jeopardy see CRIMINAL LAW, 12 Cyc. 259 *et seq.*

63. Thus U. S. Rev. St. (1878) § 1024 [U. S. Comp. St. (1901) p. 720], provides that where two or more indictments are found for several charges against any person for the same act or transaction, or for two or more acts or transactions of the same class of crimes or offenses, which may be properly joined, the court may order them to be consolidated. See U. S. *v.* Folsom, 7 N. M. 532, 38 Pac. 70; Williams *v.* U. S., 168 U. S. 382, 18 S. Ct. 92, 42 L. ed. 509; McElrcy *v.* U. S., 164 U. S. 76, 17 S. Ct. 31, 41 L. ed. 355; Logan *v.* U. S., 144 U. S. 263, 12 S. Ct. 617, 36 L. ed. 429; Turner *v.* U. S., 66 Fed. 280, 13 C. C. A. 436; U. S. *v.* Durkee, 25 Fed. Cas. No. 15,008. There is a similar provision in Colorado. See Short *v.* People, 27 Colo. 175, 60 Pac. 350; Packer *v.* People, 26 Colo. 306, 57 Pac. 1087; Chesnut *v.* People, 21 Colo. 512, 42 Pac. 656; Parker *v.* People, 13 Colo. 155, 21 Pac. 1120, 4 L. R. A. 803; White *v.* People, 8 Colo. App. 289, 45 Pac. 539; Cummins *v.* People, 4 Colo. App. 71, 34 Pac. 734. Such a statute does not authorize the consolidation of indictments for distinct felonies not provable by the same evidence and not resulting from the same series of acts. McElroy *v.* U. S., 164 U. S. 76, 17 S. Ct. 31, 41 L. ed. 355. See also White *v.* People, 8 Colo. App. 289, 45 Pac. 539; Cummins *v.* People, 4 Colo. App. 71, 34 Pac. 734.

Offenses which may be joined see *infra*, VII, B.

64. State *v.* Lee, 114 N. C. 844, 19 S. E. 375; State *v.* Brown, 95 N. C. 675; State *v.* McNeill, 93 N. C. 552; State *v.* Watts, 82 N. C. 656; State *v.* Johnson, 50 N. C. 221; Withers *v.* Com., 5 Serg. & R. (Pa.) 59.

indictment may be found and presented either before the first is quashed or dismissed or a *nolle prosequi* is entered,[65] or afterward,[66] subject of course to any special statutory regulations.[67] And a second indictment may be presented after the first has been nolled, although the first was not defective and defendant did not consent to its dismissal.[68]

65. Perkins *v.* State, 66 Ala. 457; State *v.* Lee, 114 N. C. 844, 19 S. E. 375; Smith *v.* Com., 104 Pa. St. 339.

66. *Georgia.*— Jones *v.* State, 115 Ga. 814, 42 S. E. 271; Lascelles *v.* State, 90 Ga. 347, 16 S. E. 945, 35 Am. St. Rep. 216; Bird *v.* State, 53 Ga. 602.

Indiana.— Hughes *v.* State, 54 Ind. 95.

Kentucky.— Wilson *v.* Com., 3 Bush 105.

New York.— People *v.* Scannell, 36 Misc. 40, 72 N. Y. Suppl. 449.

North Carolina.— State *v.* Lee, 114 N. C. 844, 19 S. E. 375; State *v.* Cooper, 104 N. C. 890, 10 S. E. 510; State *v.* McNeill, 10 N. C. 183.

South Carolina.— State *v.* Thomas, 8 Rich. 295.

Tennessee.— Zachary *v.* State, 7 Baxt. 1.

See 27 Cent. Dig. tit. "Indictment and Information," § 86. See also CRIMINAL LAW, 12 Cyc. 265, 268, 374.

67. In **Alabama**, under Code (1896), § 4918, authorizing the court, where a demurrer to a first indictment is sustained, and defendant will not consent to an amendment, to "order another indictment to be preferred at the same or at a subsequent term," the court has the power to change an order that another indictment be returned at the next term to one that another indictment be returned during the present term, defendant being present when the change is made. Cunningham *v.* State, 117 Ala. 59, 23 So. 693.

In **California**, under Pen. Code, § 1008, declaring that, if a demurrer to an information or indictment is allowed, the judgment is final, and a bar to another prosecution, unless the court directs the case to be submitted to "another grand jury," instead of, as prior to 1880, "the same or another grand jury," it is held that the words were omitted *ex industria*, and that a submission to the same grand jury is error. Terrill *v.* Santa Clara County Super. Ct., (1899) 60 Pac. 38, (1900) 60 Pac. 516.

In **Iowa**, under Code, § 5331, providing that, where demurrers to indictments are sustained on other grounds than those which are a legal defense or bar to the indictment, the court may order the cause resubmitted to a grand jury, and defendant held in custody, and any bail given to remain in force, a judgment, entered on a defective indictment, that the cause be resubmitted to a grand jury, that the petit jury be discharged, and that defendant recover his costs, not being a final judgment, does not discharge defendant, nor exonerate his bail. State *v.* Evans, 111 Iowa 80, 82 N. W. 429.

In **Kentucky**, under Cr. Code, § 170, providing in effect that if a demurrer be sustained to an indictment on any other grounds than that it contains matter which is a legal defense or bar, "the case may be submitted to another grand jury, and an order to that effect may be made by the court on the record, whereupon the defendant shall be held in custody or on bail," etc., — where a demurrer is sustained because of failure of the indictment to charge facts essential to a good indictment, it is in the discretion of the court whether it will submit the case to another grand jury, as it is provided merely that the court "may" do so; and that discretion is not abused by the refusal to so submit an indictment for perjury, where the alleged false testimony was not necessarily material in determining defendant's guilt or innocence of the charge on which he was being tried when the testimony was given. Com. *v.* Swanger, 108 Ky. 579, 57 S. W. 10, 22 Ky. L. Rep. 276. Under such provision, however, an indictment for maiming, alleging that defendant did "bite of," instead of "bite off," the ear of one R, should be resubmitted to the grand jury on a demurrer being sustained thereto for such mistake. Com. *v.* Shelby, 38 S. W. 490, 18 Ky. L. Rep. 781. The refusal of the court, after sustaining a demurrer to an indictment, to submit the case to another grand jury then in session, where defendant was not put in jeopardy, is not a bar to an investigation of the charge by another grand jury. Com. *v.* Swanger, *supra*.

In **New York** Code Cr. Proc. § 326, providing that if a demurrer to an indictment be allowed, the judgment is final and bars another prosecution, unless the court, believing that the objection may be obviated by a new indictment, directs a resubmission to the grand jury, controls only in cases of indictments remaining uncanceled and of record, and does not apply to an indictment which has been superseded and quashed on the finding of a second indictment under N. Y. Rev. St. pt. 4, c. 2, tit. 4, art. 2, § 42, still in force, providing that if two indictments for the same offense are pending against a person, the indictment first found shall be superseded by the second, and shall be quashed; and therefore, under the latter provision, a grand jury has the power, even pending a demurrer to an indictment found by it, to find a second indictment against the same defendant on the same evidence, which second indictment will supersede the first. People *v.* Bissert, 71 N. Y. App. Div. 118, 75 N. Y. Suppl. 630 [*affirmed* without opinion in 172 N. Y. 643, 65 N. E. 1120].

68. Bird *v.* State, 53 Ga. 602. Under Ga. Code, § 4649, which provides that a *nolle prosequi* may be entered by the solicitor-general in any criminal case, with the consent of the court, after an examination of the

J. Second Trial on Same Indictment. The fact that there has been a trial on an indictment does not render it *functus officio*, so as to prevent a second trial after a conviction has been set aside,[69] or a trial for an offense included in the charge after an acquittal of the higher offense charged.[70]

III. FORMAL REQUISITES OF INDICTMENT.

A. In General. An indictment must, in some states by express statutory provision, be in writing;[71] but it may be partly in handwriting and partly printed or typewritten or wholly typewritten or printed, for the words "writing" and "written" include printing and typewriting.[72] Perhaps, however, an indictment written with a lead pencil would not be tolerated because of the liability to erasure and obliteration.[73] Words, figures, or other marks or matter appearing on a bill of indictment but forming no part of it are mere surplusage and will not affect its validity.[74] The fact that an indictment has been accidentally cut or torn into several pieces does not invalidate it, if no material words are destroyed and it is legible.[75]

B. Caption — 1. In General. The caption of an indictment is merely a formal statement of the proceedings, describing the court in or before which the indictment was found, the time when and the place where it was found, and the grand jurors by whom it was found, and is no part of the indictment itself.[76]

case in open court, the consent of the court is conclusive on the validity of a *nolle prosequi* which the court has allowed the solicitor-general to enter before putting accused on trial; and the latter, when arraigned on an indictment subsequently found and returned by the grand jury for the same offense, cannot, by plea in abatement or motion to quash, draw in question the rightful disposition of the former bill by *nolle prosequi*. Lascelles *v.* State, 90 Ga. 347, 16 S. E. 945, 35 Am. St. Rep. 216.

69. State *v.* Smith, 49 La. Ann. 1515, 22 So. 882, 62 Am. St. Rep. 680, holding that where, on a trial for murder, the accused was convicted of manslaughter, and the conviction was set aside, he might be tried for manslaughter on the same indictment. See also State *v.* West, 45 La. Ann. 928, 13 So. 173; State *v.* Dunn, 41 La. Ann. 610, 6 So. 176; State *v.* Byrd, 31 La. Ann. 419; State *v.* Hornsby, 8 Rob. (La.) 583, 41 Am. Dec. 314; and CRIMINAL LAW, 12 Cyc. 277–279.

70. Turner *v.* State, 41 Tex. Cr. 329, 54 S. W. 579, holding that a prosecution for manslaughter may be maintained on an indictment under which the accused has been previously tried and acquitted of murder, as said indictment has not become *functus officio*. *Compare* CRIMINAL LAW, 12 Cyc. 280, 283, 284.

71. O'Bryan *v.* State, 27 Tex. App. 339, 11 S. W. 443. And see *supra*, I, B, 2, a.

Several papers.— An indictment is not objectionable on the ground that it consisted of two papers, pinned together and returned as one bill, where it contains two charges, designated, respectively, as "First Count" and "Second Count." State *v.* Robbins, 123 N. C. 730, 31 S. E. 669, 68 Am. St. Rep. 841. See also *infra*, V, S.

72. May *v.* State, 14 Ohio 461, 45 Am. Dec. 548; O'Bryan *v.* State, 27 Tex. App. 339, 11 S. W. 443.

73. May *v.* State, 14 Ohio 461, 45 Am. Dec. 548, holding, however, that a letter added to a word in an indictment in pencil mark before the indictment was found by the grand jury did not vitiate the indictment.

74. State *v.* Johnson, 37 Minn. 493, 35 N. W. 373 (date and place of finding of indictment appearing at the end after the conclusion "against the peace and dignity of the state"); Owens *v.* State, 25 Tex. App. 552, 8 S. W. 658 (holding that an indictment was not invalidated by the words, "Empire print. Encourage home industry, and your money will circulate among the people," printed at the top, being the business card or advertisement of the person by whom the printed form was printed); West *v.* State, 6 Tex. App. 485 (to the same effect).

Copy or original.— A memorandum on the back of an indictment purporting to have been found in the district court and certified to the county court, reading: "Certified copy of indictment. Class No. 2." — but unsigned and unauthenticated, does not show the indictment to be a copy instead of the original. Baker *v.* State, 28 Tex. App. 5, 11 S. W. 676.

75. Com. *v.* Roland, 97 Mass. 598.

76. *Alabama.*— Goodloe *v.* State, 60 Ala. 93; Overton *v.* State, 60 Ala. 73; Noles *v.* State, 24 Ala. 672; Reeves *v.* State, 20 Ala. 33; Rose *v.* State, Minor 28.

Delaware.— State *v.* Smith, 2 Harr. 532.

Illinois.— George *v.* People, 167 Ill. 447, 47 N. E. 741; Duncan *v.* People, 2 Ill. 456.

Louisiana.— State *v.* Kennedy, 8 Rob. 590.

Maine.— State *v.* Conley, 39 Me. 78.

Missouri.— Kirk *v.* State, 6 Mo. 469.

New Hampshire.— State *v.* Gary, 36 N. H. 359.

New Jersey.— State *v.* Jones, 11 N. J. L. 289.

New York.— People *v.* Bennett, 37 N. Y. 117, 93 Am. Dec. 551; People *v.* Myers, 2

Its purpose is to show, for the use of a superior or appellate court to which the indictment may be removed, the authority by which it was found.[77] The practice in some jurisdictions, as at common law, is for the clerk to make up the caption from the records of the court after the indictment has been found and returned, and when it is taken or sent to a superior or appellate court;[78] but in some states each bill of indictment is framed with its own special caption before it is submitted to the grand jury.[79] It has been said that the record of an indictment would not be perfect without a caption, and would not be admissible in evidence, as it would not show by what authority the indictment was found;[80] but on the other hand it has been held that the omission of a caption will not render an indictment bad if the omission can be supplied from other parts of the record;[81] and in other cases a caption has been held unnecessary.[82] But a caption should accompany every indictment removed into a superior court.[83] In the indictment itself, however, it has been held that the caption may be entirely omitted.[84]

2. Defects in or Omission of Caption; Aider by Indictment or Record. Since the caption is no part of the indictment itself defects in a caption will not invalidate an indictment which is otherwise good and sufficient,[85] and a variance between the caption and the indictment itself as to the offense charged will not

Hun 6; People *v.* Jewett, 3 Wend. 314. See People *v.* Castleton, 13 Abb. Pr. N. S. 431, 44 How. Pr. 238.

North Carolina.— State *v.* Sprinkle, 65 N. C. 463; State *v.* Brickell, 8 N. C. 354.

Rhode Island.— State *v.* Mowry, 21 R. I. 376, 43 Atl. 871.

South Carolina.— State *v.* Williams, 2 McCord 301.

Tennessee.— Mitchell *v.* State, 8 Yerg. 514; McClure *v.* State, 1 Yerg. 260; State *v.* Hunter, Peck 166.

Texas.— English *v.* State, 4 Tex. 125; Winn *v.* State, 5 Tex. App. 621.

Vermont.— State *v.* Nixon, 18 Vt. 70, 46 Am. Dec. 135; State *v.* Gilbert, 13 Vt. 647.

Wisconsin.— State *v.* Gaffrey, 3 Pinn. 369, 4 Chandl. 163; State *v.* McCarty, 2 Pinn. 513, 2 Chandl. 199, 54 Am. Dec. 150.

United States.— U. S. *v.* Bornemann, 35 Fed. 824, 13 Sawy. 359.

England.— 1 Chitty Cr. L. 326; 1 East P. C. 113.

See 27 Cent. Dig. tit. "Indictment and Information," § 93 *et seq.*

77. 1 Chitty Cr. L. 326. And see State *v.* Kennedy, 8 Rob. (La.) 590; Com. *v.* James, 1 Pick. (Mass.) 375; People *v.* Bennett, 37 N. Y. 117, 93 Am. Dec. 551, 4 Transcr. App. 32, 4 Abb. Pr. N. S. 89; Tipton *v.* State, Peck (Tenn.) 308.

78. 1 Chitty Cr. L. 326. And see State *v.* Kennedy, 8 Rob. (La.) 590; People *v.* Myers, 2 Hun (N. Y.) 6.

79. See Com. *v.* Edwards, 4 Gray (Mass.) 1.

80. Cooke *v.* Maxwell, 2 Stark. 183, 19 Rev. Rep. 700, 3 E. C. L. 368. And see Goodloe *v.* State, 60 Ala. 93; Thomas *v.* State, 5 How. (Miss.) 20.

81. See *infra*, III, B, 2.

82. Thus in certain states it has been held that no caption is necessary where the same court before which an indictment is found must try it (State *v.* Marion, 15 La. Ann. 495; State *v.* Lyons, 3 La. Ann. 154; State *v.* Kennedy, 8 Rob. (La.) 590), so long as the indictment remains in the same court in which it was found (Wagner *v.* People, 4 Abb. Dec. (N. Y.) 509); where the indictment is removed from a superior to an inferior court (Loomis *v.* People, 19 Hun (N. Y.) 601); where the court sits by authority of a public law and is not acting under a special commission (State *v.* Haddock, 9 N. C. 462; State *v.* Brickell, 8 N. C. 354; State *v.* Wasden, 4 N. C. 596).

83. People *v.* Castleton, 13 Abb. Pr. N. S. (N. Y.) 431, 44 How. Pr. 238; People *v.* Guernsey, 3 Johns. Cas. (N. Y.) 265; Tipton *v.* State, Peck (Tenn.) 308.

84. State *v.* Nixon, 18 Vt. 70, 46 Am. Dec. 135.

85. *Illinois.*— George *v.* People, 167 Ill. 447, 47 N. E. 741.

Iowa.— Hampton *v.* U. S., Morr. 489.

Maine.— State *v.* Robinson, 85 Me. 147, 26 Atl. 1092.

Massachusetts.— Com. *v.* Brown, 116 Mass. 339.

Minnesota.— State *v.* Howard, 66 Minn. 309, 68 N. W. 1096, 61 Am. St. Rep. 403, 34 L. R. A. 178.

New York.— People *v.* Peck, 96 N. Y. 650; Niles *v.* People, 4 Hall L. J. 507.

North Carolina.— State *v.* Sprinkle, 65 N. C. 463, misrecital of name of county in caption no ground for arrest of judgment.

Pennsylvania.— Com. *v.* Shaffner, 2 Pearson 450.

Texas.— English *v.* State, 4 Tex. 125.

Wisconsin.— State *v.* Gaffrey, 3 Pinn. 369, 4 Chandl. 163, defective caption no ground for arrest of judgment.

United States.— U. S. *v.* Bornemann, 35 Fed. 824, 13 Sawy. 359.

See 27 Cent. Dig. tit. "Indictment and Information," §§ 94½, 95.

An unnecessary written caption does not invalidate an indictment. Winn *v.* State, 5 Tex. App. 621.

affect the validity of the indictment, but in such case the language of the indictment will control.[86] Nor will omissions or misrecitals in the caption, even in material matters, render the record fatally defective, where the omission or misrecital is supplied or corrected by the indictment itself, or other parts of the record, for it is well settled that omissions and defects in the caption of an indictment, either in the description of the court, or in the statement of the time of finding the indictment, or in any other respect, may be supplied or corrected by other parts of the record, including the certificate of the clerk on the back of the indictment.[87] It has even been held that the entire omission of a caption may be supplied by the minutes of the clerk on the bill and the general records of the term.[88] On the other hand if the caption of an indictment fails to show some matter which is essential, and the omission is not cured by any other part of the record, the defect is fatal and the indictment or a conviction thereunder cannot be sustained.[89] In any case, however, only reasonable certainty is required;[90] and where the essential matters are set out with sufficient certainty to a common intent, legal niceties will be disregarded.[91] Matter which may be rejected as mere surplusage will not render a caption defective.[92] Defects which might otherwise be fatal are in many jurisdictions rendered immaterial by statutes providing that no indictment shall be deemed invalid for any defect in form which does not prejudice the substantial rights of defendant on the merits;[93] and generally defects and omissions in a caption may be cured by amendment.[94]

3. What the Caption Should Show[95] — a. Title, Description, and Jurisdiction of Court — (i) *In General.* The caption, when one is necessary,[96] should set forth with reasonable certainty the court in which the indictment was found and presented, so as to show jurisdiction, and an omission or defect in this respect

86. Williams *v.* State, 47 Ark. 230, 1 S. W. 149; Howard *v.* State, 67 Ind. 401; State *v.* Howard, 66 Minn. 309, 68 N. W. 1096, 61 Am. St. Rep. 403, 34 L. R. A. 178.

87. *Alabama.*— Bonner *v.* State, 55 Ala. 242; Harrison *v.* State, 55 Ala. 239.

Illinois.— George *v.* People, 167 Ill. 447, 47 N. E. 741.

Maine.— State *v.* Robinson, 85 Me. 147, 26 Atl. 1092.

Massachusetts.— Com. *v.* Brown, 116 Mass. 339; Com. *v.* Hines, 101 Mass. 33; Com. *v.* Mullen, 13 Allen 551; Com. *v.* Colton, 11 Gray 1; Com. *v.* Stone, 3 Gray 453.

Missouri.— State *v.* Craft, 164 Mo. 631, 65 S. W. 280.

New Jersey.— State *v.* Jones, 9 N. J. L. 357, 17 Am. Dec. 483.

North Carolina.— State *v.* Lane, 26 N. C. 113; State *v.* Brickell, 8 N. C. 354.

Pennsylvania.— Com. *v.* Bell, Add. 156, 1 Am. Dec. 298.

Texas.— Golden *v.* State, 32 Tex. 737.

Vermont.— State *v.* Gilbert, 13 Vt. 647.

Virginia.— Tefft *v.* Com., 8 Leigh 721; Burgess *v.* Com., 2 Va. Cas. 483; Haught *v.* Com., 2 Va. Cas. 3.

United States.— U. S. *v.* Bornemann, 35 Fed. 824, 3 Sawy. 359.

See 27 Cent. Dig. tit. "Indictment and Information," § 93 *et seq.*

88. State *v.* Gilbert, 13 Vt. 647. See also State *v.* Wasden, 4 N. C. 596.

89. Goodloe *v.* State, 60 Ala. 93; Thomas *v.* State, 5 How. (Miss.) 20; State *v.* Zule, 10 N. J. L. 348; Com. *v.* Mackin, 9 Phila. (Pa.) 593; and other cases cited *infra*, III, B, 3.

90. State *v.* Gary, 36 N. H. 359; Tenorio *v.* Territory, 1 N. M. 279.

91. State *v.* Brisbane, 2 Bay (S. C.) 451.

92. *Idaho.*— Pickett *v.* U. S., 1 Ida. 523.

Minnesota.— State *v.* Munch, 22 Minn. 67.

Texas.— Osborne *v.* State, 24 Tex. App. 398, 6 S. W. 536.

West Virginia.— State *v.* Gilmore, 9 W. Va. 641.

United States.— Jackson *v.* U. S., 102 Fed. 473, 42 C. C. A. 452.

93. *Missouri.*— State *v.* Craft, 164 Mo. 631, 65 S. W. 280.

New York.— People *v.* Haren, 35 Misc. 590, 72 N. Y. Suppl. 205.

South Dakota.— State *v.* Brennan, 2 S. D. 384, 50 N. W. 625.

Texas.— Walker *v.* State, 7 Tex. App. 52.

United States.— Bram *v.* U. S., 168 U. S. 532, 18 S. Ct. 183, 42 L. ed. 568; Caha *v.* U. S., 152 U. S. 211, 14 S. Ct. 513, 38 L. ed. 415; Jackson *v.* U. S., 102 Fed. 473, 42 C. C. A. 452.

94. See *infra*, III, B, 5.

95. Forms of caption held sufficient see State *v.* Conley, 39 Me. 78; Com. *v.* Fisher, 7 Gray (Mass.) 492; Com. *v.* James, 1 Pick. (Mass.) 375; State *v.* Berrian, 22 N. J. L. 679; Benedict *v.* State, 12 Wis. 313.

In federal courts.— Caha *v.* U. S., 152 U. S. 211, 14 S. Ct. 513, 38 L. ed. 415.

In territorial courts.— Tenorio *v.* Territory, 1 N. Y. 279; and cases in notes following.

96. See *supra*, III, B, 1.

will be fatal,[97] unless it is supplied or corrected by other parts of the record,[98] or cured by amendment,[99] or by a statute rendering defects in an indictment immaterial where they do not prejudice the substantial rights of defendant on the merits.[1] The omission of the word "court" in the clause showing in what court the indictment was presented is no ground for exception,[2] and the same has been held true of other purely formal defects.[3] Nor will the caption be bad by reason of

97. *Alabama.*— Goodloe *v.* State, 60 Ala. 93.

Massachusetts.— Com. *v.* James, 1 Pick. 375.

Mississippi.— Thomas *v.* State, 5 How. 20.

New Hampshire.— State *v.* Gary, 36 N. H. 359.

New Jersey.— Berrian *v.* State, 22 N. J. L. 9; State *v.* Price, 11 N. J. L. 203.

New Mexico.—Tenorio *v.* Territory, 1 N. M. 279.

North Carolina.— State *v.* Sutton, 5 N. C. 281. But *compare* State *v.* Jeffreys, 1 N. C. 441.

Pennsylvania.— Com. *v.* Mackin, 9 Phila. 593, omission of the words "of the peace" after the words "quarter sessions."

South Carolina.— State *v.* Williams, 2 McCord 301.

Tennessee.— Dean *v.* State, Mart. & Y. 127.

Texas.— Mathews *v.* State, 44 Tex. 376; Walker *v.* State, 7 Tex. App. 52. But an indictment need not show on its face in which of the two district courts of a county it was presented. Sargent *v.* State, 35 Tex. Cr. 325, 33 S. W. 364.

Virginia.— Burgess *v.* Com., 2 Va. Cas. 483; Taylor *v.* Com., 2 Va. Cas. 94.

Wisconsin.—Benedict *v.* State, 12 Wis. 313; Mau-zau-mau-ne-kah *v.* U. S., 1 Pinn. 124, 39 Am. Dec. 279.

England.— 2 Hale P. C. 166; 2 Hawkins P. C. c. 25, §§ 16, 17, 118–120.

See 27 Cent. Dig. tit. "Indictment and Information," § 98 *et seq.*

Captions held sufficient see People *v.* Connor, 17 Cal. 354; People *v.* Beatty, 14 Cal. 566; State *v.* Conley, 39 Me. 78; Com. *v.* Fisher, 7 Gray (Mass.) 492; Com. *v.* James, 1 Pick. (Mass.) 375; State *v.* Berrian, 22 N. J. L. 679; State *v.* Price, 11 N. J. L. 203; State *v.* Jeffreys, 1 N. C. 441; Benedict *v.* State, 12 Wis. 313. See 27 Cent. Dig. tit. "Indictment and Information," § 98 *et seq.*

Sufficient caption in federal courts see Caha *v.* U. S., 152 U. S. 211, 14 S. Ct. 513, 38 L. ed. 415.

Sufficient captions in territorial courts see Pickett *v.* U. S., 1 Ida. 523; Territory *v.* Claypool, 11 N. M. 568, 71 Pac. 463. *Compare* U. S. *v.* Upham, 2 Mont. 170; Mau-zau-mau-ne-kah *v.* U. S., 1 Pinn. (Wis.) 124, 39 Am. Dec. 279. While territorial district courts are not circuit and district courts of the United States, they exercise the combined functions thereof in cases arising under federal laws; and an indictment preferred thereunder is not defective because its caption recites that the district court, to which it is returned, has and exercises the jurisdiction of a United States circuit and district court. U. S. *v.* Beebe, 2 Dak. 292, 11 N. W. 505. See also U. S. *v.* Spaulding, 3 Dak. 85, 13 N. W. 357, 538.

98. *Kentucky.*— Mitchell *v.* Com., 106 Ky. 602, 51 S. W. 17, 21 Ky. L. Rep. 222. And see Spradlin *v.* Com., 7 Ky. L. Rep. 529.

Louisiana.— State *v.* Daniels, 49 La. Ann. 954, 22 So. 415; State *v.* Kennedy, 8 Rob. 590. And see State *v.* Marion, 15 La. Ann. 495.

Massachusetts.— Com. *v.* Mullen, 13 Allen 551.

Missouri.— State *v.* Craft, 164 Mo. 631, 65 S. W. 280; State *v.* Daniels, 66 Mo. 192, holding that an indictment which is sufficient in form and substance, and which is returned to a court of whose existence judicial notice can be taken, is not invalidated by the fact that it names in the caption a court which has no existence. See also State *v.* Meinhart, 73 Mo. 562; Kirk *v.* State, 6 Mo. 469.

New York.— People *v.* Peck, 2 N. Y. Cr. 314 [*affirmed* in 96 N. Y. 650], holding that an indictment need not necessarily contain a statement of the court in which it is found and presented, if it appears that it is found in the proper court, and that no prejudice can result to the accused.

Pennsylvania.— Com. *v.* Shaffner, 2 Pearson 450.

Texas.— Walker *v.* State, 7 Tex. App. 52.

Virginia.— If the caption of an indictment set forth the county it is sufficient, without entitling it of the court. Burgess *v.* Com., 2 Va. Cas. 483; Taylor *v.* Com., 2 Va. Cas. 94. See *supra*, III, B, 2.

99. Com. *v.* Ruane, 1 C. Pl. (Pa.) 41; Com. *v.* Burgin, 5 Leg. Gaz. (Pa.) 258; Mathews *v.* State, 44 Tex. 376. See *infra*, III, B, 5.

1. Caha *v.* U. S., 152 U. S. 211, 14 S. Ct. 513, 38 L. ed. 415. Under Mo. Rev. St. (1889) § 2535, providing that no indictment shall be deemed invalid for any defect which does not prejudice the substantial rights of defendant on the merits, an indictment is not fatally defective because it does not state on its face the particular court in which it is found. State *v.* Craft, 164 Mo. 631, 65 S. W. 280. An indictment is not demurrable, in that it speaks of the supreme court "of" the county of R, instead of "in" the county of R, as the error will be deemed an imperfection in form, not prejudicing the substantial rights of defendant under N. Y. Code Cr. Proc. § 285. People *v.* Haren, 35 Misc. (N. Y.) 590, 72 N. Y. Suppl. 205. See also *supra;* III, B, 2; and *infra*, XV.

2. Com. *v.* Mullen, 13 Allen (Mass.) 551; Hauck *v.* State, 1 Tex. App. 357; Long *v.* State, 1 Tex. App. 466.

3. Mitchell *v.* Com., 106 Ky. 602, 51 S. W.

surplusage.[4] It is not necessary to set forth the foundation of the court's authority or the facts which give it jurisdiction, where it is exercised in the course of ordinary jurisdiction and the court is one of general criminal jurisdiction,[5] although it seems otherwise where the indictment is found in a special court.[6]

(II) *NAME AND DESCRIPTION OF JUDGES.* It has been held that, in addition to the description of the court, the caption must name the judges or justices, or so many of them as the law requires to constitute the court, and allude to the rest by the words "and others their fellows";[7] but in other jurisdictions it has been held that this is no longer necessary.[8] If the record elsewhere shows who were the judges, it is immaterial that they do not appear in the caption;[9] and mere clerical errors in describing the judges or formal inaccuracies which cannot prejudice the accused will be disregarded.[10] It is not necessary to show their appointment.[11]

b. Place of Holding Court and Finding of Indictment. The caption should show the place at which the court was held and the indictment found, including the name of the county or district, and, in the case of city courts, of the city, in order that it may appear that the court was properly held and that the place is within the limits of the jurisdiction of the court and the grand jury;[12] but

17, 21 Ky. L. Rep. 222; Com. *v.* Mullen, 13 Allen (Mass.) 551; State *v.* Gilmore, 9 W. Va. 641.

Federal courts see Caha *v.* U. S., 152 U. S. 211, 14 S. Ct. 513, 38 L. ed. 415. The grand jury which found an indictment being impaneled in the district court, and having returned the indictment in that court, and all the proceedings thereafter being had therein, an order remitting the indictment from the circuit to the district court was neither necessary nor proper, notwithstanding it was entitled "In the Circuit Court," as that is merely a formal imperfection, not necessarily prejudicial to accused, nor having the effect to return it to that court, or vitiating the same. Ledbetter *v.* U. S., 108 Fed. 52, 47 C. C. A. 191.

Territorial courts.— A caption describing the indictment as found in the United States district court of the territory of Montana was irregular, as that was not the proper title of any court; but it was held that the error did not necessarily vitiate the indictment. U. S. *v.* Upham, 2 Mont. 170. See also Jackson *v.* U. S., 102 Fed. 473, 42 C. C. A. 452, holding that the entitling of an indictment returned in the district of Alaska, "In the District Court of the United States for the District of Alaska," although inaccurate, was merely a clerical or technical error, which did not vitiate the indictment, either upon general principles, or under the statute of Oregon in force in the territory.

4. Pickett *v.* U. S., 1 Ida. 523 (holding that where, upon an indictment for murder, the venue was laid "in the district court of the United States of America for the First judicial district of Idaho Territory," it was properly laid, as the words "United States of America" were mere surplusage); State *v.* Munch, 22 Minn. 67 (holding that the number of the judicial district is no part of the title of the district court, and if wrongly stated in an indictment may be rejected as surplusage); State *v.* Gilmore, 9 W. Va. 641 (holding that the insertion of the word "court" after the word "county," in the caption of an indictment, making it read "Fourth Judicial Circuit, Mineral County Court, in the Circuit Court of Mineral County," will be treated as mere surplusage).

5. State *v.* McCarty, 2 Pinn. (Wis.) 513, 2 Chandl. 199, 54 Am. Dec. 150; Rex *v.* Royce, 4 Burr. 2073; Rex *v.* Gilbert, 1 Salk. 200; 2 Hawkins P. C. c. 25, § 125.

6. State *v.* Williams, 2 McCord (S. C.) 301; 1 Chitty Cr. L. 329; Foster Cr. L. 3.

7. 1 Chitty Cr. L. 331; 2 Hale P. C. 116; 2 Hawkins P. C. c. 25, § 124. And see Goodloe *v.* State, 60 Ala. 93; Thomas *v.* State, 5 How. (Miss.) 20; State *v.* Price, 11 N. J. L. 203; State *v.* Zule, 10 N. J. L. 348.

Caption held sufficient in this respect see Berrian *v.* State, 22 N. J. L. 9; State *v.* Price, 11 N. J. L. 203.

8. State *v.* Folke, 2 La. Ann. 744; Com. *v.* Stone, 3 Gray (Mass.) 453; Tenorio *v.* Territory, 1 N. M. 279; People *v.* Wilson, 109 N. Y. 345, 16 N. E. 540.

9. State *v.* Bell, Add. (Pa.) 156, 1 Am. Dec. 298.

10. It is not a valid objection to an indictment for a capital offense that in its caption one of the justices of the peace before whom it was found is described as "in and for the county of ——," whereas justices are town officers. People *v.* Thurston, 2 Park. Cr. (N. Y.) 49.

11. Rex *v.* Royce, 4 Burr. 2073.

12. *Alabama.*— Goodloe *v.* State, 60 Ala. 93; Bonner *v.* State, 55 Ala. 242; Harrison *v.* State, 55 Ala. 239.

Arkansas.— Helt *v.* State, 52 Ark. 279, 12 S. W. 566.

Maine.— State *v.* Conley, 39 Me. 78.

Massachusetts.— Com. *v.* Fisher, 7 Gray 492; Com. *v.* James, 1 Pick. 375.

Mississippi.— Lusk *v.* State, 64 Miss. 845, 2 So. 256; Thomas *v.* State, 5 How. 20.

New Hampshire.— State *v.* Gary, 36 N. H. 359.

New Mexico.—Tenorio *v.* Territory, 1 N. M. 279.

omissions or defects in this respect in the caption may be supplied or corrected by other parts of the record,[13] or cured by verdict[14] or amendment.[15] The name of the county may be inserted in the margin and referred to in the body of the caption as "the county aforesaid,"[16] and it has been held sufficient if the name of the county appears in the body of the indictment.[17] In some jurisdictions the caption must show the particular place in the county where the court was held,[18] but in others this is not necessary where the caption shows that it was held in the county.[19] The omission of the name of the state is not fatal.[20] Mere

South Carolina.— State *v.* Williams, 2 McCord 301.

Tennessee.—Grandison *v.* State, 2 Humphr. 451; Dean *v.* State, Mart. & Y. 127; Tipton *v.* State, Peck 308; State *v.* Hunter, Peck 166.

Virginia.— Burgess *v.* Com., 2 Va. Cas. 483; Taylor *v.* Com., 2 Va. Cas. 94.

England.— 2 Hale P. C. 166; 2 Hawkins P. C. c. 25, § 128.

See 27 Cent. Dig. tit. "Indictment and Information," § 102 *et seq.*

But *compare* People *v.* Wilson, 109 N. Y. 345, 16 N. E. 540.

Captions held sufficient in this respect see Helt *v.* State, 52 Ark. 279, 12 S. W. 566; Territory *v.* Pratt, 6 Dak. 483, 43 N. W. 711; State *v.* Conley, 39 Me. 78; Com. *v.* Fisher, 7 Gray (Mass.) 492; State *v.* Stokely, 16 Minn. 282; State *v.* Buralli, (Nev. 1903) 71 Pac. 532; Territory *v.* Claypool, 11 N. M. 568, 71 Pac. 463; Melton *v.* State, 3 Humphr. (Tenn.) 389; Giebel *v.* State, 28 Tex. App. 151, 12 S. W. 591; Benedict *v.* State, 12 Wis. 313. See 27 Cent. Dig. tit. "Indictment and Information," § 102 *et seq.* The "C. Circuit Court," in the caption of an indictment, will be taken to mean "the circuit court of C. county." State *v.* Meinhart, 73 Mo. 562. And it was held that the fact that the caption did not state that the town of Washington, in which the court was held, was within the county of Washington, for which the court was held and the jury summoned, was immaterial. State *v.* Bell, Add. (Pa.) 156, 1 Am. Dec. 298.

Counties attached for judicial purposes.— State *v.* Stokely, 16 Minn. 282. The entitling of an indictment as in a county to which another is attached for judicial purposes, instead of in both counties, is a mere formal defect, not prejudicing any substantial rights of defendant, and is no ground for setting it aside. State *v.* McCartey, 17 Minn. 76.

13. Bonner *v.* State, 55 Ala. 242; Harrison *v.* State, 55 Ala. 239; Harrington *v.* State, 36 Ala. 236; Johnson *v.* Com., 15 S. W. 662, 12 Ky. L. Rep. 835; State *v.* Buralli, (Nev. 1903) 71 Pac. 532; People *v.* Wilson, 109 N. Y. 345, 16 N. E. 540; State *v.* Lane, 26 N. C. 113; State *v.* Moore, 24 S. C. 150, 58 Am. Rep. 241. See 27 Cent. Dig. tit. "Indictment and Information," § 102 *et seq.*

Presumption.— Where the caption to an indictment showed that the court was opened on the first day of the term, by the clerk, at the time and place prescribed by law, and adjourned by him from day to day until the appearance of the judge, it was presumed that the court was held on each day at the same place. Smith *v.* State, 9 Humphr. (Tenn.) 9. And where an indictment recited that it was found by the grand jury of Lincoln county at the August term, 1888, of the Lincoln circuit court, without specifying in which of the two districts it was found, it was presumed to have been returned by a grand jury legally impaneled in the Star City district, it appearing from the term at which it was found and the clerk's indorsement thereon that it was returned at a time when that district of the court could alone have been legally in session, and proof showing that the offense was committed and defendant tried and convicted there. Helt *v.* State, 52 Ark. 279, 12 S. W. 566.

14. State *v.* Sprinkle, 65 N. C. 463, holding that a misrecital of the county in the caption of an indictment is no ground for an arrest of judgment. See *infra*, XIV.

15. See *infra*, III, B, 5.

16. 2 Hale P. C. 165, 166. See also State *v.* Lane, 26 N. C. 113; State *v.* Moore, 24 S. C. 150, 58 Am. Rep. 241.

It need not appear in the margin, if it appears in the body of the caption. 1 Chitty Cr. L. 327.

17. Kilgore *v.* State, 73 Ark. 280, 83 S. W. 928; State *v.* Lane, 26 N. C. 113; Tefft *v.* Com., 8 Leigh (Va.) 721.

18. Lusk *v.* State, 64 Miss. 845, 2 So. 256 (holding that an indictment which fails to show in the caption or record the particular place in the county where the court in which the indictment was found was held will be quashed); Sam *v.* State, 13 Sm. & M. (Miss.) 189; Carpenter *v.* State, 4 How. (Miss.) 163, 34 Am. Dec. 116; Bob *v.* State, 7 Humphr. (Tenn.) 129. A caption stating that the proceedings took place "in the circuit court of Harrison County at a regular term thereof, begun and held at the court house," etc., sufficiently shows the house in which the term was held. Seal *v.* State, 13 Sm. & M. (Miss.) 286. See also Kelly *v.* State, 3 Sm. & M. (Miss.) 518. And where a statute directed the courts to be held at "Conwayborough," and an indictment alleged that the bill was found at "Horry Court House," both names meaning the same place, the latter was regarded as the more precise term, and it was held that they were equivalent, and that the bill was good. State *v.* Thayer, 4 Strobh. (S. C.) 286.

19. State *v.* Shanks, Tapp. (Ohio) 13.

20. State *v.* Lane, 26 N. C. 113. See also Com. *v.* Fisher, 7 Gray (Mass.) 492.

surplusage will not render the caption defective;[21] and where the place is set out with certainty to a common intent, legal niceties will be disregarded.[22]

c. Term or Time of Holding Court and Finding of Indictment. The caption should also specify the time, including the year and day, when the indictment is presented, and it has been held that if it states no time or states an uncertain, future, or impossible day, or merely gives the day of the week, or states the time with repugnancy, the omission or defect is fatal,[23] unless it is supplied or aided, as it may be, by other parts of the record,[24] or cured by amendment.[25]

d. Showing as to Grand Jury and Finding or Presentment. The names of the jurors need not be specified in the caption, although they must appear somewhere on the record.[26] The caption should state that the jurors are "of the county afore-

21. State *v.* Munch, 22 Minn. 67. See *supra*, III, B, 2, text and note 92.

22. State *v.* Brisbane, 2 Bay (S. C.) 451.

23. *Alabama.*— Goodloe *v.* State, 60 Ala. 93.

California.— People *v.* Beatty, 14 Cal. 566.

Massachusetts.— Com. *v.* Gee, 6 Cush. 174.

New Hampshire.— State *v.* Wentworth, 37 N. H. 196; State *v.* Gary, 36 N. H. 359.

New Mexico.—Tenorio *v.* Territory, 1 N. M. 279.

South Carolina.— State *v.* Williams, 2 McCord 301.

Tennessee.— Tipton *v.* State, Peck 308.

England.— Rex *v.* Roysted, 1 Ld. Ken. 255; Rex *v.* Fearnley, 1 Leach C. C. 425, 1 T. R. 316; Rex *v.* Warre, 1 Str. 698; 2 Hawkins P. C. c. 25, § 127.

See 27 Cent. Dig. tit. "Indictment and Information," § 805 *et seq.*

Compare State *v.* Mowry, 21 R. I. 376, 43 Atl. 871, holding that an indictment is good, although it charges the commission of the crime at a date subsequent to the finding of the indictment as stated in its caption, since the latter is no part of the indictment.

Certainty to a common intent is all that is required, and legal niceties will be disregarded. State *v.* Brisbane, 2 Bay (S. C.) 451. And see State *v.* Gary, 36 N. H. 359.

Figures.— An indictment is not vitiated by the fact that the term or time at which it was found is stated in the caption in figures instead of in words. Johnson *v.* State, 29 N. J. L. 453; Barnes *v.* State, 5 Yerg. (Tenn.) 186; Smith *v.* State, Peck (Tenn.) 165.

Captions held sufficient in this respect see Seal *v.* State, 13 Sm. & M. (Miss.) 286; State *v.* Meinhart, 73 Mo. 562; State *v.* Sweeney, 68 Mo. 96; Barnes *v.* State, 5 Yerg. (Tenn.) 186; Hudson *v.* State, 40 Tex. 12; Wright *v.* State, 35 Tex. Cr. 367, 33 S. W. 973; Benedict *v.* State, 12 Wis. 313. The term of the court is sufficiently stated in the indictment when the day is given on which the indictment is found. People *v.* Beatty, 14 Cal. 566. An indictment purporting in the caption to have been found at the superior court holden on a certain day, which is the first day of the term, is good, although in fact found on a subsequent day of the same term. Com. *v.* Hamilton, 15 Gray (Mass.) 480. And an indictment is not void merely because it purports to have been found at a term of court held on Monday, July 4, under a law requiring the court to begin and hold a term on the first Monday of every month. Com. *v.* Chamberlain, 107 Mass. 209.

24. *Alabama.*— Gater *v.* State, 141 Ala. 10, 37 So. 692.

Georgia.— Nixon *v.* State, 121 Ga. 144, 48 S. E. 966. See also Williams *v.* State, 55 Ga. 391.

Louisiana.—State *v.* Granville, 34 La. Ann. 1088; State *v.* Folke, 2 La. Ann. 744; State *v.* McFarlane, 1 Mart. 220.

Maine.— State *v.* Robinson, 85 Me. 147, 26 Atl. 1092, holding that an erroneous date in the caption of an indictment is harmless, when the clerk's certificate shows that it was properly returned and filed.

Massachusetts.— Com. *v.* Brown, 116 Mass. 339 (erroneous date in caption); Com. *v.* Smith, 108 Mass. 486; Com. *v.* Hines, 101 Mass. 33 (omission of time of finding); Com. *v.* Stone, 3 Gray 453 (holding that an indictment purporting in its caption to have been found on the first day of the term, but which charges an offense on a later day, may be shown by reference to the clerk's certificate indorsed thereon to have been actually returned into court after such date).

Missouri.— Kirk *v.* State, 6 Mo. 469.

New York.— People *v.* Wilson, 109 N. Y. 345, 16 N. E. 540.

Tennessee.— Firby *v.* State, 3 Baxt. 358.

Virginia.— Burgess *v.* Com., 2 Va. Cas. 483; Haught *v.* Com., 2 Va. Cas. 3.

United States.— U. S. *v.* Clark, 125 Fed. 92.

See 27 Cent. Dig. tit. "Indictment and Information," § 105 *et seq.*; and *supra*, III, B, 2.

Variance.— A mistake in the caption of an indictment in regard to the time it was presented does not vitiate the indictment, since the caption is not a part thereof. George *v.* People, 167 Ill. 447, 47 N. E. 741. Where an indictment is entitled as to the March term, 1832, and the caption of the record shows that the court under which it was found sat in April, the judgment will not be arrested for such variance. Mitchell *v.* State, 8 Yerg. (Tenn.) 514.

25. U. S. *v.* Clark, 125 Fed. 92; and *infra*, III, B, 5.

26. *Alabama.*— Goodloe *v.* State, 60 Ala. 93.

Indiana.— Epps *v.* State, 102 Ind. 539, 1 N. E. 491; Stone *v.* State, 30 Ind. 115.

said," or by some other means state that they are of the county or were drawn and impaneled for the county for which they are inquiring;[27] but it has been held that it need not be stated in express terms that the grand jurors were summoned and returned as such,[28] and it need not be stated by whom or by what authority they were summoned,[29] or even that they were summoned or impaneled.[30] It was formerly regarded as necessary to describe the grand jurors as "then and there sworn and charged to inquire for our said lord, the King, and the body of the said county,"[31] but this is no longer necessary if it otherwise appears that

Louisiana.— State *v.* Marion, 15 La. Ann. 495.

New Jersey.— State *v.* Dayton, 23 N. J. L. 49, 53 Am. Dec. 270; State *v.* Norton, 23 N. J. L. 33.

New York.— People *v.* Wilson, 109 N. Y. 345, 16 N. E. 540; People *v.* Haynes, 55 Barb. 450, 38 How. Pr. 369; McGarry *v.* People, 2 Lans. 227.

Ohio — Mahan *v.* State, 10 Ohio 232.

South Carolina.— State *v.* Cook, Riley 234. *Compare* State *v.* Williams, 2 McCord 301.

United States.— U. S. *v.* Insurgents, 26 Fed. Cas. No. 15,443, 2 Dall. 335.

England.— 1 Chitty Cr. L. 333.

Compare Thomas *v.* State, 5 How. (Miss.) 20.

Sufficiency of naming.— An indictment is not demurrable because it gives the initials only, and not the full christian names, of some of the grand jurors, or because the names of the grand jurors were not inserted in it by the jurors themselves, but were all in the same handwriting. Minor *v.* State, 63 Ga. 318.

27. *Georgia.*— Stevens *v.* State, 76 Ga. 96.

Mississippi.— Woodsides *v.* State, 2 How. 655; Byrd *v.* State, 1 How. 163.

New Mexico.— Leonardo *v.* Territory, 1 N. M. 291.

Tennessee.— Cornwell *v.* State, Mart. & Y. 147; Tipton *v.* State, Peck 308.

England.— Lewson *v.* Redleston, Cro. Eliz. 677; 2 Hale P. C. 167; 2 Hawkins P. C. c. 25, §§ 16, 126.

See 27 Cent. Dig. tit. "Indictment and Information," § 109 *et seq.*; and cases cited *infra*, this note.

Captions held sufficient see State *v.* Bartholomew, 69 N. J. L. 169, 54 Atl. 231; Leonardo *v.* Territory, 1 N. M. 291; Tenorio *v.* Territory, 1 N. M. 279; Keith *v.* Territory, 8 Okla. 307, 57 Pac. 834; Ferguson *v.* State, 6 Tex. App. 504; West *v.* State, 6 Tex. App. 485; Benedict *v.* State, 12 Wis. 313. *Compare* People *v.* Fish, 4 Park. Cr. (N. Y.) 206. The caption of an indictment in the words, "the grand jurors of the state of Mississippi, impaneled and sworn in and for the county of Warren," etc., states with sufficient certainty that such jurors were of the county of Warren. Byrd *v.* State, 1 How. (Miss.) 163. See also Woodsides *v.* State, 2 How. (Miss.) 655. The heading of an indictment, "Georgia, Liberty County," sufficiently shows for what county the grand jurors who found the indictment were chosen, selected, and sworn. Stevens *v.* State, 76 Ga. 96. An indictment purporting to have been found by the grand jury of F county, which states that the alleged crime was committed at a certain town in said F county, sufficiently shows that the grand jury had jurisdiction of the offense. People *v.* Rockhill, 74 Hun (N. Y.) 241, 26 N. Y. Suppl. 222. The omission of the words "body of the county," in an indictment the caption of which recites that the grand jury were sworn and charged, "inquiring in and for the county of," etc., is not an informality which prejudices defendant or vitiates the indictment. Fizell *v.* State, 25 Wis. 364.

Alaska.— The designation of the grand jurors in an indictment found in the district court for the district of Alaska as "the grand jurors of the United States of America, selected, impaneled, sworn, and charged within and for the district of Alaska," is not a substantial error which vitiates the indictment; and under the code of Oregon (Hill Annot. Laws, § 1280) also, such defect must be disregarded as not tending to the prejudice of the substantial rights of defendant on the merits. Jackson *v.* U. S., 102 Fed. 473, 42 C. C. A. 452.

Mere clerical errors are not fatal. Williams *v.* State, 3 Heisk. (Tenn.) 376, substitution of the word "impounded" for "impaneled."

Defects in this respect may be cured by a statute providing that no motion in arrest of judgment or writ of error shall be sustained for any matter not affecting the real merits of the offense charged in the indictment. Kruger *v.* State, 1 Nebr. 365, holding that the omission of the word "chosen" in using the form, "the grand jurors chosen, selected, and sworn in and for the county," etc., prescribed by Nebr. Cr. Code, § 166, for the caption of an indictment was immaterial.

Attendance on court.— An indictment is not bad for its omission to state that the grand jury was attending the court. State *v.* Williams, 49 W. Va. 220, 38 S. E. 495.

28. State *v.* Jones, 9 N. J. L. 357, 17 Am. Dec. 483.

29. State *v.* Price, 11 N. J. L. 203. And see Berrian *v.* State, 22 N. J. L. 9.

30. Berrian *v.* State, 22 N. J. L. 9. See also Harrington *v.* State, 36 Ala. 236; Jones *v.* Territory, 4 Okla. 45, 43 Pac. 1072. An indictment need not state when the grand jury was impaneled, and where such date is imperfectly given it will be considered surplusage and disregarded. State *v.* Miller, 6 Ind. App. 653, 34 N. E. 27.

31. Bell *v.* People, 2 Ill. 397; People *v.* Guernsey, 3 Johns. Cas. (N. Y.) 265; 2 Hale P. C. 167.

they were sworn.[32] It is not necessary to state the qualifications of the jurors otherwise than by describing them as "good and lawful men," for these words include every qualification required by law for grand jurors.[33] It has even been held that such a description of the jurors, although usual, is unnecessary.[34] The caption or some other part of the record should show that there were the number of jurors required by law;[35] but the caption need not show that twelve jurors concurred in finding the indictment, if this appears elsewhere on the record.[36] Either the caption or the commencement of an indictment must show that the grand jury were sworn and that it was found upon oath, or upon oath and affirmation, where some of the jurors were affirmed,[37] unless the omission is supplied

32. 1 Chitty Cr. L. 334. See People *v.* Bennett, 37 N. Y. 117, 93 Am. Dec. 551, 4 Transcr. App. 32, 4 Abb. Pr. N. S. 89.

33. *Alabama.*— Collier *v.* State, 2 Stew. 388.

Indiana.— Mathis *v.* State, 94 Ind. 562; Willey *v.* State, 46 Ind. 363; Beauchamp *v.* State, 6 Blackf. 299; Jerry *v.* State, 1 Blackf. 395.

New Jersey.— State *v.* Price, 11 N. J. L. 203.

North Carolina.— State *v.* Glasgow, 1 N. C. 38, 2 Am. Dec. 629.

Tennessee.— Cornwell *v.* State, Mart. & Y. 147; Bonds *v.* State, Mart. & Y. 143, 17 Am. Dec. 795.

Texas.— Ferguson *v.* State, 6 Tex. App. 504; West *v.* State, 6 Tex. App. 485.

Wisconsin.— Benedict *v.* State, 12 Wis. 313; State *v.* McCarty, 2 Pinn. 513, 2 Chandl. 199, 54 Am. Dec. 150.

See 27 Cent. Dig. tit. "Indictment and Information," § 109 *et seq.*

34. Weinzorpflin *v.* State, 7 Blackf. (Ind.) 186; State *v.* Yancey, 1 Treadw. (S. C.) 237; 1 Chitty Cr. L. 333. See also Cornelius *v.* State, 12 Ark. 782. But see to the contrary Oily's Case, Cro. Jac. 635; 2 Hale P. C. 167. And see Grandison *v.* State, 2 Humphr. (Tenn.) 451, holding that a caption to a record which does not state that a grand jury was impaneled is defective, and the judgment must be arrested. Omission of such a statement has been held a defect of form within a statute requiring demurrer or motion to quash. Engeman *v.* State, 54 N. J. L. 247, 23 Atl. 676.

Captions held sufficient.— Seal *v.* State, 13 Sm. & M. (Miss.) 286. A statement in a caption that the grand jurors were "balloted for, elected, tried, and sworn" was held a satisfactory statement that the jury was composed of qualified men. Turner *v.* State, 9 Humphr. (Tenn.) 119. And it has been held that the declaration in an indictment that the grand jurors have been "duly summoned, impaneled, and sworn" is sufficient to show, on the face of the indictment, that they were the lawful jurors, duly qualified to serve as grand jurors in the district court in which the indictment was presented. Keith *v.* Territory, 8 Okla. 307, 57 Pac. 834.

35. Thus it has been held that a caption declaring that it was found by "the grand jurors of the state of Wisconsin, to wit, 12 good and lawful men," the statute of the state requiring that there shall be not more than twenty-three nor less than sixteen persons sworn on any grand jury was bad; and that the indictment would not support a conviction. Fitzgerald *v.* State, 4 Wis. 395.

36. Turns *v.* Com., 6 Metc. (Mass.) 224; People *v.* Bennett, 37 N. Y. 117, 93 Am. Dec. 551, 4 Transcr. App. 32, 4 Abb. Pr. N. S. 89; Young *v.* State, 6 Ohio 435; Clyncard's Case, Cro. Eliz. 654; Rex *v.* Darley, 4 East 175; 2 Hale P. C. 167; 2 Hawkins P. C. c. 25, §§ 16, 126. It has been held that where the records of the court disclose that a grand jury appeared in open court, and their foreman, in their presence, presented to the court a true bill properly indorsed, it sufficiently appears that the indictment was found by the concurrence of at least twelve jurors, as by statute required. Watts *v.* Territory, 1 Wash. Terr. 409; McAllister *v.* Territory, 1 Wash. Terr. 360. And in the federal courts an objection that an indictment fails to recite that it was found by the concurrence of twelve jurors is immaterial under U. S. Rev. St. (1878) § 1025 [U. S. Comp. St. (1901) p. 720], where the record shows that at a term of the district court the grand jurors of the United States came into open court and through their foreman presented the bill of indictment, with the indorsement "a true bill" followed by the signature of the foreman. Caha *v.* U. S., 152 U. S. 211, 14 S. Ct. 513, 38 L. ed. 415.

37. *Alabama.*— Roe *v.* State, (1887) 2 So. 459. *Compare* Roe *v.* State, 82 Ala. 68, 3 So. 2, referred to *infra*, note 39.

Illinois.— See Duncan *v.* People, 2 Ill. 456.

New York.— People *v.* Castleton, 13 Abb. Pr. N. S. 431, 44 How. Pr. 238; People *v.* Guernsey, 3 Johns. Cas. 265.

Tennessee.— Tipton *v.* State, Peck 308; State *v.* Hunter, Peck 166; State *v.* Fields, Peck 140.

Texas.— Where the record recites that A B was appointed foreman of the grand jury for the term, "who, being called, comes and is sworn to discharge the duties of foreman of the grand jury, and now come the other members of the grand jury, who take a like oath," it sufficiently appears that the grand jury were sworn according to law. Pierce *v.* State, 12 Tex. 210.

Utah.— Where the indictment recites only that the grand jury were sworn to inquire into crimes, it is fatally defective, as the statute provides that they shall be "sworn to present indictments by the agreement of at

by other parts of the record,[38] or unless it is cured by statute.[39] It has also been held that where some of the jurors were affirmed instead of sworn, the record must show that this was authorized, as that they alleged that they had conscientious scruples against taking an oath;[40] but the weight of authority is to the contrary.[41] Omissions and defects in any of the above respects may like other omissions and defects be cured by amendment.[42]

e. Title of Cause or Names of Parties.[43] An indictment must, in many states under express statutory or constitutional provision, show by its title or by proper recitals in the caption or elsewhere that the prosecution is in the name and by the authority of the state, the commonwealth, or the people of the state, according to the practice in the particular jurisdiction;[44] but omissions or defects in

least twelve of their number." Territory *v.* Woolsey, 3 Utah 470, 24 Pac. 765.

England.— Rex *v.* Evans, 1 Keb. 329; Roy *v.* Yarton, Sid. 140; 2 Hale P. C. 167; 2 Hawkins P. C. c. 25, § 126.

See 27 Cent. Dig. tit. "Indictment and Information," § 110 *et seq.*

But *compare* Bram *v.* U. S., 168 U. S. 532, 18 S. Ct. 183, 42 L. ed. 568, holding that the fact that an indictment recited that it was presented "upon the oath" of the grand jurors, when in fact it was presented upon the oath of all but one, who affirmed instead of making oath, was a merely formal defect, without prejudice, and cured by the provisions of U. S. Rev. St. (1878) § 1025 [U. S. Comp. St. (1901) p. 720].

Presumption.— In some cases, however, it has been held that if the caption omits to state that the grand jury in a superior court was sworn it will be presumed that they were sworn. Melton *v.* State, 3 Humphr. (Tenn.) 389; State *v.* Long, 1 Humphr. (Tenn.) 386; McClure *v.* State, 1 Yerg. (Tenn.) 206. See also State *v.* Guglielmo, (Oreg. 1905) 79 Pac. 577, 80 Pac. 103; Hart *v.* State, (Tex. Cr. App. 1898) 44 S. W. 1105.

Omission of the words "then and there," before the words "sworn and charged," has been held not material. Beauchamp *v.* State, 6 Blackf. (Ind.) 290. But to the contrary see People *v.* Guernsey, 3 Johns. Cas. (N. Y.) 265, holding their omission fatal on motion in arrest of judgment.

Commencement see *infra*, III, C, 4.

38. It need not appear in the caption that the jury were sworn, if such fact appears in the body of the indictment returned by them. State *v.* Long, 1 Humphr. (Tenn.) 386. See also McBean *v.* State, 3 Heisk. (Tenn.) 20; State *v.* Davidson, 2 Coldw. (Tenn.) 184; Melton *v.* State, 3 Humphr. (Tenn.) 389; McClure *v.* State, 1 Yerg. (Tenn.) 206.

39. Roe *v.* State, 82 Ala. 68, 3 So. 2.

40. State *v.* Fox, 9 N. J. L. 244; State *v.* Harris, 7 N. J. L. 361.

Defect of form.— But it has been held that such an omission is a defect of form, which, under a statute, is waived if the objection is not raised by demurrer or motion to quash. Engeman *v.* State, 54 N. J. L. 247, 23 Atl. 676.

41. Com. *v.* Fisher, 7 Gray (Mass.) 492; Bram *v.* U. S., 168 U. S. 532, 18 S. Ct. 183, 42 L. ed. 568; Mulcahy *v.* Reg., L. R. 3 H. L. 306.

42. State *v.* Norton, 23 N. J. L. 33; State *v.* Creight, 1 Brev. (S. C.) 169, 2 Am. Dec. 656; and *infra*, III, B, 5. In some states the statement in an indictment that the presentment of the jury is "upon their oaths" is held to be a part of the caption, so that, if it has been omitted, it may be inserted even after conviction. State *v.* Creight, *supra*. Elsewhere, however, this is regarded as part of the commencement of the indictment. See *infra*, III, C, 1, 4.

43. Indictment to recover penalties see PENALTIES.

44. *Florida.*— Savage *v.* State, 18 Fla. 909; *Ex p.* Nightingale, 12 Fla. 272.

Georgia.— Horne *v.* State, 37 Ga. 80, 92 Am. Dec. 49.

Illinois.— Whitesides *v.* People, 1 Ill. 21.

Indiana.— Cronkhite *v.* State, 11 Ind. 307.

Iowa.— An indictment alleging the presentment to be made "in behalf of said state of Iowa," the caption being "State of Iowa, M. county," shows that the prosecution is conducted "in the name and by the authority of the state," according to Const. art. 5, § 6. Baurose *v.* State, 1 Iowa 374; Wrocklege *v.* State, 1 Iowa 167.

Kentucky.— An indictment in the name of the commonwealth, and concluding against its peace and dignity, although it does not express that it is found by the authority of the commonwealth, is sufficient. Allen *v.* Com., 2 Bibb 210.

Missouri.— State *v.* Cutter, 65 Mo. 503 (holding bad an indictment purporting to be found by "the grand jurors of the county of Wayne, in the state of Missouri," as the constitution requires all prosecutions to be conducted in the name of the state); State *v.* Foster, 61 Mo. 549 ("State of Mo.," instead of "State of Missouri," is sufficient).

New York.— Phelps *v.* People, 72 N. Y. 334, holding sufficient the words "the State of New York," instead of "the people of the State of New York."

North Dakota.— When an indictment is properly entitled "State of North Dakota *v.* A. B.," and shows on its face that it was properly presented by "the grand jury of the state of North Dakota in and for the county of G.," it sufficiently appears that the prosecution is in the name, and by authority, of the state of North Dakota. State *v.* Kerr, 3 N. D. 523, 58 N. W. 27.

South Carolina.— An indictment beginning

this respect may be supplied or cured by other parts of the record,[45] and the omission of such a recital or defects therein, even when required by the constitution or by statute, is a defect of form within a statute requiring exceptions for defect of form to be made before trial.[46] It is usual to set out the names of the parties in a formal title, and this is sometimes required by statute;[47] but the omission of a formal title is not fatal if the names of the parties sufficiently appear elsewhere in the indictment or record,[48] and a statute requiring the title of the cause to be set out has been held merely directory.[49]

f. Description or Statement of Offense. The caption of an indictment need not state or describe the offense charged, and if it does so any misstatement therein or variance from the indictment will be immaterial.[50]

4. Separate Counts. The caption of an indictment is equally applicable to each one of several counts,[51] and need not be repeated in each count.[52] And where the first count is quashed or held bad on demurrer, or the prosecution elects to proceed on the second or a later count only, the caption still remains as to the other counts.[53]

5. Amendment of Caption. As the caption is no part of the indictment itself, but merely a ministerial act to make up the record of the court, it may be amended at any time, even after conviction, so as to cure omissions or defects therein by making it conform to the other records of the term.[54]

"South Carolina," instead of "The state of South Carolina," and concluding "against the peace and dignity of the said state," is good. State *v.* Anthony, 1 McCord 285.

South Dakota.— State *v.* Thompson, 4 S. D. 95, 55 N. W. 725.

See 27 Cent. Dig. tit. "Indictment and Information," §§ 115, 116; and *infra*, III, C, 3.

Separate counts see *infra*, III, B, 4.

45. *Arkansas.*— Holt *v.* State, 47 Ark. 196, 1 S. W. 61.

Florida.— Savage *v.* State, 18 Fla. 909.

Indiana.— Crutz *v.* State, 4 Ind. 385.

Louisiana.— State *v.* Russell, 2 La. Ann. 604; State *v.* Moore, 8 Rob. 518.

Mississippi.— Greeson *v.* State, 5 How. 33.

Missouri.— State *v.* Blakely, 83 Mo. 359.

South Dakota.— State *v.* Thompson, 4 S. D. 95, 55 N. W. 725.

Texas.— Drummond *v.* Republic, 2 Tex. 156.

Wisconsin.— See State *v.* Delue, 2 Pinn. 204, 1 Chandl. 166, holding that it is not necessary, either in the caption or in the body of the indictment, to allege that it is found or presented under the authority of the state, provided it be alleged in it that the crime charged to have been committed is "against the peace and dignity of the state of Wisconsin," and that the grand jury making the presentment were impaneled and sworn to inquire for the body of the county wherein the indictment is found; that county being within the state.

See 27 Cent. Dig. tit. "Indictment and Information," §§ 115, 116.

46. Horne *v.* State, 37 Ga. 80, 92 Am. Dec. 49; State *v.* Foster, 61 Mo. 549. But see to the contrary Saine *v.* State, 14 Tex. App. 144.

47. See People *v.* Walters, 1 Ida. 271.

48. Dukes *v.* State, 11 Ind. 557, 71 Am. Dec. 370; Cronkhite *v.* State, 11 Ind. 307; People *v.* Peck, 2 N. Y. Cr. 314 [*affirmed* in 96 N. Y. 650]. See also State *v.* McIntire, 59 Iowa 264, 13 N. W. 286, 59 Iowa 267, 13 N. W. 287. The caption of an indictment need not contain the name of the person indicted. State *v.* Parks, 61 N. J. L. 438, 39 Atl. 1023.

49. People *v.* Walters, 1 Ida. 271.

50. Williams *v.* State, 47 Ark. 230, 1 S. W. 149; Howard *v.* State, 67 Ind. 401; State *v.* Howard, 66 Minn. 309, 68 N. W. 1096, 61 Am. St. Rep. 403, 34 L. R. A. 178. See also Cronkhite *v.* State, 11 Ind. 307; State *v.* McIntire, 59 Iowa 264, 13 N. W. 286, 59 Iowa 267, 13 N. W. 287.

51. Pairo *v.* State, 49 Ala. 25; Greenwood *v.* Com., 11 S. W. 811, 11 Ky. L. Rep. 220; Davis *v.* State, 19 Ohio St. 270; West *v.* State, 27 Tex. App. 472, 11 S. W. 482. *Compare* Huffman *v.* Com., 6 Rand. (Va.) 685.

52. Overton *v.* State, 60 Ala. 73; Reeves *v.* State, 20 Ala. 33; State *v.* Lennon, 8 Rob. (La.) 543; Davis *v.* State, 19 Ohio St. 270 (holding that where it appears from the caption of an indictment that the prosecution is carried on "in the name and by the authority of the state," etc., it need not be again so averred in the successive counts of the indictment); Anderson *v.* State, 39 Tex. Cr. 34, 44 S. W. 824; Dancy *v.* State, 35 Tex. Cr. 615, 34 S. W. 113, 938 (holding that the court in which the indictment is presented need not appear in each count).

53. Pairo *v.* State, 49 Ala. 25; Duncan *v.* People, 2 Ill. 456; Greenwood *v.* Com., 11 S. W. 811, 11 Ky. L. Rep. 220; West *v.* State, 27 Tex. App. 472, 11 S. W. 482.

54. *Indiana.*— State *v.* Moore, 1 Ind. 548; Moody *v.* State, 7 Blackf. 424.

Louisiana.— State *v.* Humphries, 35 La. Ann. 966.

Massachusetts.— Com. *v.* Smith, 108 Mass. 486; Com. *v.* James, 1 Pick. 375.

6. Aider of Indictment by Caption. Although the caption is no part of the indictment, yet, where it is prefixed to the bill when submitted to the grand jury and considered by them, the indictment proper may refer to it for the name of the county, just as it may refer to the county in the margin;[55] and so in other respects the caption may aid the indictment proper.[56]

C. Commencement — 1. In General. The commencement is that part of the indictment which immediately precedes the statement of the offense, and its object is to show the county for which the grand jury are inquiring and from which they have been summoned, and the fact that they present the indictment upon oath or affirmation.[57] An indictment is not vitiated by mere clerical or

New Hampshire.— State *v.* Jenkins, 64 N. H. 375, 10 Atl. 699; State *v.* Blaisdell, 49 N. H. 81.

New Jersey.— State *v.* Useful Manufactures' Soc., 42 N. J. L. 504. The caption to an indictment may be amended after it has been removed into the supreme court by certiorari, and the amendment may be made upon proper evidence of the facts and entries on the minutes of the oyer and terminer, or the certiorari may be returned to that court and the amendment made there. State *v.* Jones, 9 N. J. L. 357, 17 Am. Dec. 483, 9 N. J. L. 2.

Ohio.— Smith *v.* State, 4 Ohio Dec. (Reprint) 48, Clev. L. Rec. 62.

Pennsylvania.— A caption may be amended, and the indictment certified *nunc pro tunc*, after trial, conviction, sentence, and writ of error. Brown *v.* Com., 78 Pa. St. 122. See also Com. *v.* Ruane, 1 C. Pl. 41; Com. *v.* Burgin, 5 Leg. Gaz. 258; Com. *v.* Bechtol, 1 Hall L. J. 414, 4 Pa. L. J. Rep. 306; Com. *v.* Miller, 14 York Leg. Rec. 112.

South Carolina.— State *v.* Moore, 24 S. C. 150, 58 Am. Rep. 241; Vandyke *v.* Dare, 1 Bailey 65; State *v.* Williams, 2 McCord 301; State *v.* Creight, 1 Brev. 169, 2 Am. Dec. 656.

Tennessee.— Dean *v.* State, Mart. & Y. 127.

Texas.— James *v.* State, 44 Tex. 314; Jackson *v.* State, 11 Tex. 261; Bosshard *v.* State, 25 Tex. Suppl. 207; Reys *v.* State, (Civ. App. 1903) 77 S. W. 213, 76 S. W. 457; Murphy *v.* State, 36 Tex. Cr. 24, 35 S. W. 174; Grayson *v.* State, 35 Tex. Cr. 629, 34 S. W. 961; Murphey *v.* State, 29 Tex. App. 507, 16 S. W. 417; Osborne *v.* State, 24 Tex. App. 398, 6 S. W. 536; Banks *v.* State, 7 Tex. App. 591; Sharp *v.* State, 6 Tex. App. 650. But *compare* State *v.* Davidson, 36 Tex. 325, holding that an indictment purporting to have been found in February, 1870, charging a crime in November, 1870, was not amendable to show that it was in fact found in 1871, as that was matter of substance.

Vermont.— State *v.* Gilbert, 13 Vt. 647.

Virginia.— Burgess *v.* Com., 2 Va. Cas. 483; Taylor *v.* Com., 2 Va. Cas. 94.

Wisconsin.— State *v.* Emmett, 23 Wis. 632; Allen *v.* State, 5 Wis. 329. See State *v.* McCarty, 2 Pinn. 513, 54 Am. Dec. 150, 2 Chandl. 199.

United States.— U. S. *v.* Thompson, 28 Fed. Cas. No. 16,490, 6 McLean 56.

England.— Rex *v.* Darley, 4 East 175; Rex *v.* Hayes, 2 Ld. Raym. 1518, 2 Str. 843; Philips *v.* Smith, 1 Str. 136; 1 Chitty Cr. L. 335.

See 27 Cent. Dig. tit. "Indictment and Information," § 510.

Record caption and special caption.— The record caption may be referred to to supply a defect in the name of the county in the special caption or heading of any particular indictment. Overton *v.* State, 60 Ala. 73.

55. Com. *v.* Fisher, 7 Gray (Mass.) 492; Com. *v.* Edwards, 4 Gray (Mass.) 1.

56. Noles *v.* State, 24 Ala. 672 (holding that the caption of an indictment, showing when, where, and by whom the court was held, and who were elected and sworn as grand jurors, may be looked to, in aid of the indictment, as a part of the record); Anderson *v.* State, 104 Ind. 467, 4 N. E. 63, 5 N. E. 711; State *v.* Buralli, (Nev. 1903) 71 Pac. 532 (defective description of the grand jury in the body of an indictment may be cured by the title and preamble); U. S. *v.* Boyden, 24 Fed. Cas. No. 14,632, 1 Lowell 266 (holding that the caption of an indictment may be referred to to show that the United States mentioned in the body of the indictment are the United States of America). See also Robinson *v.* Com., 88 Va. 900, 14 S. E. 627.

57. State *v.* Vincent, 91 Mo. 662, 4 S. W. 430; People *v.* Bennett, 37 N. Y. 117, 93 Am. Dec. 551; State *v.* Nixon, 18 Vt. 70, 46 Am. Dec. 135.

A proper form of commencement is: "State of ——, County of ——, to wit. The jurors for the state of ——, in and for the body of the county of —— (or for the state and county aforesaid), upon their oath (or oath and affirmation) present," etc. See State *v.* Vincent, 91 Mo. 662, 4 S. W. 430; People *v.* Bennett, 37 N. Y. 117, 93 Am. Dec. 551.

Forms of commencement held sufficient see State *v.* Kiger, 4 Ind. 621; Wise *v.* State, 2 Kan. 419, 85 Am. Dec. 595; Com. *v.* Fisher, 7 Gray (Mass.) 492; Com. *v.* Johnson, Thach. Cr. Cas. (Mass.) 284; State *v.* Hinckley, 4 Minn. 345; State *v.* Vincent, 91 Mo. 662, 4 S. W. 430; State *v.* England, 19 Mo. 386; People *v.* Bennett, 37 N. Y. 117, 93 Am. Dec. 551; People *v.* Reavey, 38 Hun (N. Y.) 418; People *v.* Peck, 2 N. Y. Cr. 314 [*affirmed* in 96 N. Y. 650]; Mackey *v.* State, 3 Ohio St. 362; Bell *v.* State, (Tex. Cr. App. 1892) 20 S. W. 362; State *v.* Nixon, 18 Vt. 70, 46 Am. Dec. 135; Tefft *v.* Com., 8 Leigh (Va.) 721.

grammatical errors in the commencement,[53] by mere surplusage,[59] by omissions or defects which are supplied or cured by other parts of the indictment or record,[60] or by amendment.[61]

2. VENUE. The commencement should state the county from which the grand jury has come and for which they are inquiring;[62] but it is sufficient if the county appears in the margin, or in the body of the caption, and the commencement refers to and incorporates it by use of the words "the county aforesaid,"[63] or, it seems, if the county from which they were summoned and for which they are inquiring elsewhere appears in the record.[64]

3. BY AUTHORITY OF THE STATE. It is usual to set forth the state in the commencement, either by stating it or by reference to the margin or caption as "the state aforesaid," so as to show that the indictment is found by the authority of the state;[65] but it has been held that a failure to do so does not render the indictment bad, if it otherwise appears that the prosecution is in the name and by authority of the state.[66] In Texas the constitution requires all prosecutions to be carried on "in the name and by authority of The State of Texas," and the

See 27 Cent. Dig. tit. "Indictment and Information," § 117 *et seq.*

58. State *v.* Brady, 14 Vt. 353, omission of the word "for," making the commencement read: "The jurors within and the body of the county," etc. See also Perkins *v.* State, 50 Ala. 154, "grand jury of said court," instead of "said county."

59. Bell *v.* Com., 8 Gratt. (Va.) 600, holding that a statement in the commencement of an indictment of the name of the court and the term at which the indictment was found, not being essential to the indictment, error therein will not invalidate the indictment.

60. State *v.* Brooks, 94 Mo. 121, 7 S. W. 24, holding that omission to follow the usual form, which reads, "The grand jury for the state of Missouri, summoned from the county of T., duly impaneled," etc., is not fatal if it appears from the record that the indictment was preferred by a lawful grand jury, in and to a court of competent jurisdiction.

61. State *v.* Moore, 1 Ind. 548, holding that an indictment for extortion commencing "The grand jurors of the county of W. upon their —— present," may be amended on motion by inserting the word "oath." See also *infra*, X, A.

62. Carpenter *v.* State, 4 How. (Miss.) 163, 34 Am. Dec. 116; State *v.* Vincent, 91 Mo. 662, 4 S. W. 430; State *v.* Hilton, 41 Tex. 565; Davis *v.* State, 6 Tex. App. 133.

Commencements held sufficient see Wise *v.* State, 2 Kan. 419, 85 Am. Dec. 595; Com. *v.* Kelly, 123 Mass. 417; Jeffries *v.* Com., 12 Allen (Mass.) 145; Com. *v.* Edwards, 4 Gray (Mass.) 1; Mackey *v.* State, 3 Ohio St. 362; Vanvickle *v.* State, 22 Tex. App. 625, 2 S. W. 642; Scales *v.* State, 7 Tex. App. 361; Coker *v.* State, 7 Tex. App. 83.

Territories.— An indictment which described the grand jury which found it only as "the grand jury of the people of the United States in the territory of Utah" was held fatally defective under the act of Jan. 21, 1853, which required that the grand jurors should be residents of the county for which they were summoned. Territory *v.* Woolsey, 3 Utah 470, 24 Pac. 765.

In Louisiana a mistake in an indictment as to the parish for which the grand jury was impaneled and sworn is not a ground upon which to quash. State *v.* Marion, 15 La. Ann. 495.

63. Lawson *v.* State, 20 Ala. 65, 56 Am. Dec. 182; Zumhoff *v.* State, 4 Greene (Iowa) 526; Com. *v.* Quin, 5 Gray (Mass.) 478; 2 Hale P. C. 165.

64. Morgan *v.* State, 19 Ala. 556, holding that when it is alleged, in the commencement of an indictment, that "the grand jurors for the state of Alabama upon their oaths present," etc., and the name of the proper county is stated in the caption, the proceedings are sufficiently certain, although it is not averred in the indictment that such grand jurors were selected, impaneled, sworn, and charged to inquire for the body of the county. See also State *v.* Kiger, 4 Ind. 621; Guy *v.* State, 1 Kan. 448; Com. *v.* Kelly, 123 Mass. 417; Jeffries *v.* Com., 12 Allen (Mass.) 145; Williams *v.* State, 30 Tex. 404.

"Court" for "county."— An indictment which on its face purported to have been found by the "grand jury of said court," instead of "said county," was held not demurrable on that account, where the caption showed that the grand jury was properly organized. Perkins *v.* State, 50 Ala. 154.

65. See *supra*, III, B, 3, e, and cases there cited.

66. Greeson *v.* State, 5 How. (Miss.) 33; Woodsides *v.* State, 2 How. (Miss.) 655; State *v.* Lane, 26 N. C. 113; State *v.* Kerr, 3 N. D. 523, 58 N. W. 27; State *v.* Devine, 6 Wash. 587, 34 Pac. 154. See *supra*, III, B, 3, e, and cases there cited. It is not necessary, in the absence of express constitutional or statutory requirement, that an indictment shall state that it is presented by the grand jury "in the name and by the authority of the state." Holt *v.* State, 47 Ark. 196, 1 S. W. 61.

The name of the state alone, without the words "State of" is sufficient. See State *v.* Anthony, 1 McCord (S. C.) 285.

statute provides that indictments must commence, "In the name and by the authority of the State of Texas," and there are similar provisions in other states.[67]

4. Averments as to Grand Jury. The commencement of an indictment as distinguished from the caption and record need not give the names or number of the grand jurors,[68] or recite that they were summoned, impaneled, and sworn to inquire of crimes committed in the county, or that twelve concurred in the finding.[69] And it is sufficient to use the word "jurors" instead of "grand jurors."[70]

5. Presentment or Accusation. The fact of presentment must be expressed by the use of the word "present" or some other appropriate word showing that the grand jury charge defendant,[71] and it must be expressed in the present tense.[72] And by the weight of authority a commencement will be fatally defective if it fails to recite that it is presented upon oath, or upon oath and affirmation.[73] It has

67. Compliance with this requirement is essential. Therefore an indictment beginning with the words, "In the name and authority of the state of Texas," instead of the words, "In the name and by authority of the state of Texas," as required by the constitution, has been held fatally defective. Brown *v.* State, 46 Tex. Cr. 572, 81 S. W. 718. See also Scroggins *v.* State, 36 Tex. Cr. 117, 35 S. W. 968; Owens *v.* State, 25 Tex. App. 552, 8 S. W. 658; Jefferson *v.* State, 24 Tex. App. 535, 7 S. W. 244; Thompson *v.* State, 15 Tex. App. 168; Thompson *v.* State, 15 Tex. App. 39; Saine *v.* State, 14 Tex. App. 144. Failure to use the article "the" before "authority," being in accordance with the constitution, is proper, although it is used in the statute. Weaver *v.* State, (Tex. Cr. App. 1903) 76 S. W. 564. And see Brown *v.* State, (Tex. Cr. App. 1903) 77 S. W. 12. The constitutional provision is not violated by the fact that the business advertisement or card of the printers of the blank form on which the indictment is drawn appears at the head of the indictment. West *v.* State, 6 Tex. App. 485. And see Owens *v.* State, 25 Tex. App. 552, 8 S. W. 658.

In Louisiana the fact that an indictment complying with the provision of Const. art. 86, that "all prosecutions shall be carried on in the name and by the authority of the state of Louisiana, and conclude 'against the peace and dignity of the same,'" is preceded by "State of Louisiana, Parish of Natchitoches, December Term, A. D. 1894," does not render it repugnant to said provision. State *v.* Valsin, 47 La. Ann. 115, 16 So. 768.

A city charter providing that prosecutions for assaults and affrays shall be commenced in the name of the city, is in violation of Wis. Const. art. 7, § 7, requiring that all criminal prosecutions shall be carried on in the name of the state. State *v.* Bartlett, 35 Wis. 287. As to violations of ordinances see Municipal Corporations.

68. *Alabama.*— State *v.* Murphy, 9 Port. 487.

Maine.— State *v.* McAllister, 26 Me. 374 [*citing* 1 Saund. 248 note].

Massachusetts.— Com. *v.* Johnson, Thach. Cr. Cas. 284.

Missouri.— State *v.* Vincent, 91 Mo. 662, 4 S. W. 430; State *v.* England, 19 Mo. 386.

New York.— People *v.* Bennett, 37 N. Y. 117, 93 Am. Dec. 551; People *v.* Haynes, 55 Barb. 450, 38 How. Pr. 369.

Ohio.— Young *v.* State, 6 Ohio 435.

South Carolina.— State *v.* Cook, Riley 234.

United States.— U. S. *v.* Crawford, 25 Fed. Cas. No. 14,890.

69. Harrington *v.* State, 36 Ala. 236; Morgan *v.* State, 19 Ala. 556; State *v.* England, 19 Mo. 386; Hurley *v.* State, 6 Ohio 399; Jones *v.* Territory, 4 Okla. 45, 43 Pac. 1072, U. S. *v.* Laws, 26 Fed. Cas. No. 15,579, 2 Low. 115. But *compare* Carpenter *v.* State, 4 How. (Miss.) 163, 34 Am. Dec. 116; Territory *v.* Sevailles, 1 N. M. 119. An indictment reciting that the grand jurors were "impaneled, sworn, and charged" need not state when and where they were so impaneled, etc. Vaughn *v.* State, 4 Mo. 530. And the omission of the words "then and there," before the words "duly summoned, impaneled, tried, sworn, and charged, inquiring in and for the county," in an indictment, is held immaterial. Fizell *v.* State, 25 Wis. 364. The recital in an indictment that the grand jury was "duly elected, tried, impaneled, and sworn," warrants the presumption that the oath taken was the oath prescribed by the code. Thomason *v.* State, 2 Tex. App. 550.

Special grand jury.— Since the caption, although no part of an indictment, is a part of the record on appeal, and may be looked to in ascertaining whether the inferior court had jurisdiction, it is immaterial that an indictment, drawn at a special grand jury term, fails to show on its face that it was drawn by a special grand jury, when that fact appears in the caption. Robinson *v.* Com., 88 Va. 900, 14 S. E. 627.

70. State *v.* Pearce, 14 Fla. 153; Com. *v.* Edwards, 4 Gray (Mass.) 1; People *v.* Bennett, 37 N. Y. 117, 93 Am. Dec. 551. An indictment for murder on the high seas is not defective because it states that it is found by "the jurors of the United States of America," instead of saying "grand jurors." U. S. *v.* Williams, 28 Fed. Cas. No. 16,707, 1 Cliff. 5.

71. Vanvickle *v.* State, 22 Tex. App. 625, 2 S. W. 642. But see State *v.* Freeman, 21 Mo. 481.

72. 1 Chitty Cr. L. 202.

73. *Illinois.*— Curtis *v.* People, 1 Ill. 256.

been held, however, that a defect in this respect in the commencement may be cured by amendment.[74]

6. Separate Counts. Although when there are several counts in an indictment each count is in effect a separate indictment,[75] it is not necessary to repeat the commencement verbatim in each count, but it is sufficient for the other counts, instead of repetition, to commence thus: "The jurors aforesaid, upon their oath (or oath and affirmation) further present that," etc.[76] That the indictment is presented upon oath, or oath and affirmation, must appear in each count, either by direct recital or by reference to a preceding count.[77]

D. Charge or Body of Indictment. After the commencement comes the charge or statement, or, as it is sometimes called, the body of the indictment, in which it is alleged that the accused, naming him, committed the offense, describing it, with proper averments as to time and place. This part of the indictment is treated at length in subsequent sections.[78] The body of an indictment need not set forth or allege matters which are not necessary to the charge but belong to the caption or record, as the names of the grand jurors,[79] their selection, summoning, or organization, etc.,[80] where the session of the court or grand jury was held,[81] that the indictment was properly found and returned into court,[82] and the like.[83]

Maine.— State *v.* McAllister, 26 Me. 374 [*citing* Oily's Case, Cro. Jac. 635; Chitty Cr. L. 202].

Missouri.— State *v.* Sanders, 158 Mo. 610, 59 S. W. 993; State *v.* Fergeron, 152 Mo. 92, 53 S. W. 427; State *v.* Wagner, 118 Mo. 626, 24 S. W. 219. *Compare* State *v.* Craig, 79 Mo. App. 412.

Virginia.— Huffman *v.* Com., 6 Rand. 685.

England.— Heydon's Case, 4 Coke 41*a*.

See 27 Cent. Dig. tit. "Indictment and Information," § 120.

Contra.— Jane *v.* Com., 3 Metc. (Ky.) 18; Chevarrio *v.* State, 17 Tex. App. 390.

Sufficient showing of oath.— It has been held that an indictment which declares that the jurors, being "duly summoned, and then and there impaneled, sworn, etc. . . . do present," etc., without adding the words "upon their oaths," sufficiently avers that the presentation is upon oath. Byam *v.* State, 17 Wis. 145. See also Potsdamer *v.* State, 17 Fla. 895; State *v.* Smith, 26 La. Ann. 62; Huffman *v.* Com., 6 Rand (Va.) 685.

Use of "oaths," instead of "oath," will not render an indictment defective. Either word will do. Jerry *v.* State, 1 Blackf. (Ind.) 395; Com. *v.* Sholes, 13 Allen (Mass.) 554; State *v.* Dayton, 23 N. J. L. 49, 53 Am. Dec. 270; State *v.* Morris Canal, etc., Co., 22 N. J. L. 537; People *v.* Bennett, 37 N. Y. 117, 93 Am. Dec. 551. See also Wagner *v.* People, 54 Barb. (N. Y.) 367.

The words "on their oath" are equivalent to the words "on their several oaths," and are sufficient. Com. *v.* Johnson, Thach. Cr. Cas. (Mass.) 284.

Affirmation.— In some cases it is held that where an indictment purports to be on the affirmation of some of the grand jurors, it must appear that they were persons entitled by law to take affirmations in lieu of oaths, or the indictment will be fatally defective. State *v.* Harris, 7 N. J. L. 361. See also State *v.* Fox, 9 N. J. L. 244. But elsewhere it is held that an indictment purporting to be presented by the grand jurors "upon their oath and affirmation" need not state the reasons why any of the jurors affirmed instead of being sworn. Com. *v.* Fisher, 7 Gray (Mass.) 492. *Compare supra*, III, B, 3, d.

Separate counts see *infra*, III, C, 6.

74. State *v.* Moore, 1 Ind. 548, referred to *supra*, III, C, 1, note 61.

75. See *infra*, VII, B.

76. State *v.* Vincent, 91 Mo. 662, 4 S. W. 430. And see State *v.* Wagner, 118 Mo. 626, 24 S. W. 219. The words, "the jurors aforesaid, on their oath aforesaid, do further present," in an indictment, should be used only in indictments containing several counts to introduce a new count. State *v.* Fraker, 149 Mo. 143, 49 S. W. 1017.

77. State *v.* McAllister, 26 Me. 374 (holding insufficient an averment that "the jurors aforesaid, for the state aforesaid, do further present," as this does not show that they present on oath); State *v.* Fergerson, 152 Mo. 92, 53 S. W. 427; State *v.* Wagner, 118 Mo. 626, 24 S. W. 219. But see Huffman *v.* Com., 6 Rand. (Va.) 685.

78. See *infra*, V *et seq.*

79. State *v.* Murphy, 9 Port. (Ala.) 487; People *v.* Haynes, 55 Barb. (N. Y.) 450; State *v.* Cook, Riley (S. C.) 234; U. S. *v.* Crawford, 25 Fed. Cas. No. 14,890, 1 N. Y. Leg. Obs. 388.

80. Harrington *v.* State, 36 Ala. 236; State *v.* Murphy, 9 Port. (Ala.) 487; State *v.* Miller, 6 Ind. App. 653, 34 N. E. 27; Jones *v.* Territory, 4 Okla. 45, 43 Pac. 1072; U. S. *v.* Laws, 26 Fed. Cas. No. 15,579, 2 Lowell 115.

81. Harrington *v.* State, 36 Ala. 236.

82. Harrington *v.* State, 36 Ala. 236; U. S. *v.* Laws, 26 Fed. Cas. No. 15,579, 2 Lowell 115.

83. State *v.* Marion, 15 La. Ann. 495 (description and jurisdiction of court); Robinson *v.* Com., 88 Va. 900, 14 S. E. 627 (jurisdiction of court and grand jury); Com.

And if what properly belongs to the caption or record only is inserted in the body of an indictment, it may be rejected as surplusage.[84]

E. Conclusion of Indictment — 1. Against the Peace of the State — a. At Common Law. At common law and in the absence of a statute to the contrary, every indictment, whether at common law or under a statute, except for mere non-feasance,[85] must, after charging the offense, allege by a formal conclusion that it was "against the peace of the state," or "of the commonwealth," or "of the people of the state," or "of the United States," etc., according to the practice in the particular jurisdiction. This is absolutely essential at common law.[86] In England the conclusion was "against the peace of the king."[87] It is usual to use the words "against the peace and dignity of the state," etc., but the latter term is not essential.[88] The words "against the peace," omitting "of the state," etc., have been held insufficient.[89] When the state is named in the caption or commencement, it is sufficient to conclude "against the peace of the state," without again naming it.[90]

b. Constitutional and Statutory Provisions.[91] In some jurisdictions a formal conclusion is expressly required and the form thereof prescribed by constitutional or statutory provision, and at least a substantial compliance with the requirement is essential.[92] In some of the cases a strict compliance seems to have been required,

v. Miller, 1 Va. Cas. 310 (preliminary examination required by statute).

84. Rose *v.* State, Minor (Ala.) 28.

85. Reg. *v.* Wyat, 1 Salk. 380 (neglect of duty by constable); 1 Chitty Cr. L. 246. See also State *v.* Morris Canal, etc., Co., 22 N. J. L. 537, failure to keep bridge in repair.

86. *Arkansas.*— State *v.* Cadle, 19 Ark. 613.

Maine.— State *v.* Soule, 20 Me. 19; Damon's Case, 6 Me. 148.

New Hampshire.— State *v.* Kean, 10 N. H. 347, 34 Am. Dec. 162.

North Carolina.— State *v.* Evans, 27 N. C. 603.

Pennsylvania.— Rogers *v.* Com., 5 Serg. & R. 463.

South Carolina.— State *v.* Washington, 1 Bay 120, 1 Am. Dec. 601.

Virginia.— Com. *v.* Carney, 4 Gratt. 546.

United States.— U. S. *v.* Boling, 24 Fed. Cas. No. 14,621, 4 Cranch C. C. 579; U. S. *v.* Crittenden, 25 Fed. Cas. No. 14,890*a*, Hempst. 61; U. S. *v.* Lemmons, 26 Fed. Cas. No. 15,591*a*, Hempst. 62. *Compare*, however, Frisbie *v.* U. S., 157 U. S. 160, 15 S. Ct. 586, 35 L. ed. 657, referred to *infra*, III, E, 6, note 38.

England.— Holme's Case, Cro. Car. 377; Palfrey's Case, Cro. Jac. 527; Rex *v.* Cook, R. & R. 131; Reg. *v.* Langley, 3 Salk. 190; 1 Chitty Cr. L. 246; 2 Hale P. C. 188; 2 Hawkins P. C. c. 25, § 92.

See 27 Cent. Dig. tit. "Indictment and Information," § 122 *et seq.*

87. See the English authorities cited in the preceding note.

88. Com. *v.* Caldwell, 14 Mass. 330; 1 Chitty Cr. L. 247, 248; 2 Hale P. C. 188; 2 Hawkins P. C. c. 25, § 94; 2 Rolle Abr. 82.

89. Damon's Case, 6 Me. 148; 1 Chitty Cr. L. 247; 2 Hale P. C. 188. But *compare* Com. *v.* Caldwell, 14 Mass. 330.

90. Atwell *v.* State, 63 Ala. 61; Com. *v.* Young, 7 B. Mon. (Ky.) 1. An indictment commencing with the words "The state of Mississippi," and concluding "against the peace and dignity of the same," is sufficient. State *v.* Johnson, Walk. (Miss.) 392.

91. Statutes curing omissions and defects see *infra*, III, E, 6.

92. *Alabama.*— Smith *v.* State, 139 Ala. 115, 36 So. 727; Atwell *v.* State, 63 Ala. 61; Washington *v.* State, 53 Ala. 29.

Arkansas.— Williams *v.* State, 47 Ark. 230, 1 S. W. 149; State *v.* Cadle, 19 Ark. 613; Anderson *v.* State, 5 Ark. 444. And see Buzzard *v.* State, 20 Ark. 106.

Georgia.— Pen. Code, § 929, providing that every indictment shall conclude with the phrase, "contrary to the laws of said state, the good order, peace, and dignity thereof," is mandatory, notwithstanding the section also provides that every indictment shall be deemed sufficiently technical and correct which states the offense in the terms of the Code, or so plainly that the nature of the offense charged may be easily understood by the jury. Hardin *v.* State, 106 Ga. 384, 32 S. E. 365, 71 Am. St. Rep. 269.

Illinois.— Kirkham *v.* People, 170 Ill. 9, 48 N. E. 465; Zarresseller *v.* People, 17 Ill. 101.

Louisiana.— State *v.* Thomas, 30 La. Ann. 301; State *v.* McCoy, 29 La. Ann. 593; State *v.* Nunn, 29 La. Ann. 589.

Maryland.— State *v.* Dycer, 85 Md. 246, 36 Atl. 763.

Missouri.— State *v.* Stacy, 103 Mo. 11, 15 S. W. 147; State *v.* Schloss, 93 Mo. 361, 6 S. W. 244; State *v.* Hays, 78 Mo. 600; State *v.* Pemberton, 30 Mo. 376; State *v.* Lopez, 19 Mo. 254; State *v.* Clevenger, 25 Mo. App. 655.

New Hampshire.— State *v.* Kean, 10 N. H. 347, 34 Am. Dec. 162.

New York.— People *v.* Enoch, 13 Wend. 159, 27 Am. Dec. 197.

but the better opinion is that a variance from the constitutional or statutory form in immaterial particulars will not be fatal.[93] A conclusion of an indictment following the form prescribed by statute is sufficient if no constitutional provision is violated.[94] The words, "contrary to the laws of said state, the good order, peace, and dignity thereof," appearing at the conclusion of an indictment, although apparently, in their grammatical connection, referring to a preceding statement therein not relating to the commission of the act constituting the offense charged, will be held to apply to that act.[95]

Ohio.— Olendorf *v.* State, 64 Ohio St. 118, 59 N. E. 892.

Pennsylvania.— Rogers *v.* Com., 5 Serg. & R. 463. *Compare* Com. *v.* Paxton, 14 Phila. 665.

South Carolina.— State *v.* Powers, 59 S. C. 200, 37 S. E. 690; State *v.* Mason, 54 S. C. 240, 32 S. E. 357; State *v.* Robinson, 27 S. C. 615, 4 S. E. 570; State *v.* Strickland, 10 S. C. 191; State *v.* Anthony, 1 McCord 285; State *v.* Washington, 1 Bay 120, 1 Am. Dec. 601.

Tennessee.— Rice *v.* State, 3 Heisk. 215.

Texas.— State *v.* Pratt, 44 Tex. 93; State *v.* Sims, 43 Tex. 521; State *v.* Durst, 7 Tex. 74; Bird *v.* State, 37 Tex. Cr. 408, 35 S. W. 382; Haun *v.* State, 13 Tex. App. 383, 44 Am. Rep. 706; Cox *v.* State, 8 Tex. App. 254, 39 Am. Rep. 746; Holden *v.* State, 1 Tex. App. 225.

Vermont.— State *v.* Soragan, 40 Vt. 450; State *v.* Phelps, 11 Vt. 116, 34 Am. Dec. 672.

Virginia.— Brown *v.* Com., 86 Va. 466, 10 S. E. 745; Thompson *v.* Com., 20 Gratt. 724; Com. *v.* Carney, 4 Gratt. 546.

West Virginia.— State *v.* McClung, 35 W. Va. 280, 13 S. E. 654; State *v.* Allen, 8 W. Va. 680; Lemons *v.* State, 4 W. Va. 755, 6 Am. Rep. 293.

Wisconsin.— Nichols *v.* State, 35 Wis. 308; Williams *v.* State, 27 Wis. 402.

See 27 Cent. Dig. tit. "Indictment and Information," § 122 *et seq.*

93. See Buzzard *v.* State, 20 Ark. 106; State *v.* Cadle, 19 Ark. 613; Anderson *v.* State, 5 Ark. 444; Zarresseller *v.* People, 17 Ill. 101; State *v.* Kean, 10 N. H. 347, 34 Am. Dec. 162; Bird *v.* State, 37 Tex. Cr. 408, 35 S. W. 382; Cox *v.* State, 8 Tex. App. 254, 34 Am. Rep. 746. Thus it has been held sufficient to conclude "against the peace and dignity of our said state," instead of the constitutional or statutory words "against the peace and dignity of the state" (State *v.* Kean, 10 N. H. 347, 34 Am. Dec. 162); "against the peace and dignity of the state (or commonwealth) of —— (naming the state), instead of "against the peace and dignity of the same," or "of the state," or "of the commonwealth" (Washington *v.* State, 53 Ala. 29; State *v.* Johnson, 35 La. Ann. 842; State *v.* Schloss, 93 Mo. 361, 6 S. W. 244; State *v.* Hays, 78 Mo. 600; State *v.* Waters, 1 Mo. App. 7; Rogers *v.* Com., 5 Serg. & R. (Pa.) 463; State *v.* Hill, 19 S. C. 435; State *v.* Pratt, 44 Tex. 93; Brown *v.* Com., 86 Va. 466, 10 S. E. 745; State *v.* Allen, 8 W. Va. 680); "against the peace and dignity of the people of the state of ——" (naming the state), instead of "against the peace and dignity of the state of ——" (Anderson *v.* State, 5 Ark. 444), or instead of "against the peace and dignity of the same people of the state of ——," omitting the word "same" (Kirkham *v.* People, 170 Ill. 9, 48 N. E. 465; Zarresseller *v.* People, 17 Ill. 101); "against the peace and dignity of the same state aforesaid," instead of "against the peace and dignity of the state" (State *v.* Powers, 59 S. C. 200, 37 S. E. 690; State *v.* Mason, 54 S. C. 240, 32 S. E. 357; State *v.* Robinson, 27 S. C. 615, 4 S. E. 570; State *v.* Washington, 1 Bay (S. C.) 120, 1 Am. Dec. 601); or against the peace and dignity of this state," instead of "the said state" (State *v.* Yancey, 1 Treadw. (S. C.) 237). On the other hand it has been held insufficient to conclude "ainst," instead of "against," the peace and dignity of the state (Bird *v.* State, 37 Tex. Cr. 408, 35 S. W. 382), "against the peace and dignity of the statute," instead of "state" (State *v.* Lopez, 19 Mo. 254; Cox *v.* State, 8 Tex. App. 254, 34 Am. Rep. 746), "to the great damage of the said L. C. P. [the prosecutor] against the peace of the state, the government and dignity of the same," instead of "against the peace and dignity of the same" (Com. *v.* Jackson, 1 Grant (Pa.) 262); or "against the peace and dignity of the state of W. Virginia," instead of "West Virginia" (Lemons *v.* State, 4 W. Va. 755, 6 Am. Rep. 293). It has been held that an indictment which concludes with the phrase, "against the peace and dignity of the state," is not vitiated by any words following that phrase, if they form no part of it. Rowlett *v.* State, 23 Tex. App. 191, 4 S. W. 582. See also State *v.* Johnson, 37 Minn. 493, 35 N. W. 373. But it was held that an indictment concluding "against the peace and dignity of the state, this the third day of November, 1882," was a violation of the constitutional provision that indictments conclude "against the peace and dignity of the state." Haun *v.* State, 13 Tex. App. 383, 44 Am. Rep. 706 [*approved* but *distinguished* in Rowlett *v.* State, *supra*]. The words, "against the peace and dignity of the same" in an indictment may follow the averments necessary to make the indictment complete, and precede recitals as to previous proceedings in the case, made in order to take the offense out of the statute of limitations. State *v.* Thomas, 30 La. Ann. 301.

See 27 Cent. Dig. tit. "Indictment and Information," § 125.

94. Camp *v.* State, 25 Ga. 689.

95. Jones *v.* State, 115 Ga. 814, 42 S. W. 271.

c. Against What Sovereignty. One who commits an offense indictable either at common law or by statute offends against the peace of that government which exercises jurisdiction for the time being over the place where the offense is committed, and the conclusion therefore must be against the peace of that government.[96]

2. Against the Form of the Statute — a. In General. Every indictment on a statute, in addition to the conclusion "against the peace of the state,"[97] must also conclude against the statute — *contra formam statuti* — by the words "against the form of the statute in such case made and provided," or other words to that effect, to show that it is based upon a statute,[98] or it will be fatally defective as an indictment on the statute,[99] unless, as is now the case in some jurisdictions,

96. Damon's Case, 6 Me. 148 (holding bad an indictment in Maine, after it had become a state for an offense committed when its territory was a part of Massachusetts, because it concluded against the peace of Maine, instead of Massachusetts); Rex *v.* Lookup, 3 Burr. 190 (where an indictment in England for an offense committed in the reign of a previous sovereign was held fatally defective because it concluded against the peace of the reigning sovereign). See also Reg. *v.* Lane, 2 Ld. Raym. 1034, 3 Salk. 190, 1 Chitty Cr. L. 247; 2 Hale P. C. 188; 2 Hawkins P. C. c. 25, § 95.

Offense committed before admission of state into the Union.— Where an indictment found after Colorado became a state for a murder committed before concluded "against the peace and dignity of the people of the state of Colorado," it was held not objectionable, on the ground that no rights of the people are forfeited by the transition from a territorial to a state government. Packer *v.* People, 8 Colo. 361, 8 Pac. 564.

State or United States.— An indictment for violating a state statute prohibiting counterfeiting properly charges the offense to have been committed against the sovereignty of the people of the state instead of against the sovereignty of the United States. Harlan *v.* People, 1 Dougl. (Mich.) 207.

Alaska.— The conclusion of an indictment returned in the district court for the district of Alaska, "against the peace and dignity of the United States," is proper; the only laws in force in the territory, and which an accused can be charged with violating, being those provided by the congress of the United States. Jackson *v.* U. S., 102 Fed. 473, 42 C. C. A. 452.

97. See *supra*, III, E, 1.

98. The office of the conclusion *contra formam statuti* is to show the court that the action is founded on a statute and not on the common law. Crain *v.* State, 2 Yerg. (Tenn.) 390; and other cases in the note following.

99. *Indiana.*— Fuller *v.* State, 1 Blackf. 63.

Kentucky.— McCullough *v.* Com., Hard. 95.

Maine.— State *v.* Soule, 20 Me. 19.

Maryland.— State *v.* Evans, 7 Gill & J. 290.

Massachusetts.— Com. *v.* Cooley, 10 Pick. 37; Com. *v.* Gay, 5 Pick. 44; Com. *v.* Worcester, 3 Pick. 462; Com. *v.* Stockbridge, 11 Mass. 279; Com. *v.* Springfield, 7 Mass. 9; Com. *v.* Northampton, 2 Mass. 116.

New Hampshire.— Stevens *v.* Dimond, 6 N. H. 330.

New York.— People *v.* Enoch, 13 Wend. 159, 27 Am. Dec. 197; People *v.* Cook, 2 Park. Cr. 12; Hughes' Case, 4 City Hall Rec. 132.

North Carolina.— State *v.* Foy, 82 N. C. 679; State *v.* Lawrence, 81 N. C. 522; State *v.* Dill, 75 N. C. 257; State *v.* Minton, 61 N. C. 196; State *v.* Jim, 7 N. C. 3; State *v.* Dick, 6 N. C. 388.

Pennsylvania.— Warner *v.* Com., 1 Pa. St. 154, 44 Am. Dec. 114; Com. *v.* Searle, 2 Binn. 332, 4 Am. Dec. 446; Chapman *v.* Com., 5 Whart. 427, 34 Am. Dec. 565.

South Carolina.— State *v.* McKettrick, 14 S. C. 346; State *v.* Gray, 14 Rich. 174; State *v.* Ripley, 2 Brev. 300.

Tennessee.— Crain *v.* State, 2 Yerg. 390; State *v.* Humphreys, 1 Overt. 307.

Vermont.— State *v.* Soragan, 40 Vt. 450.

United States.— U. S. *v.* Andrews, 24 Fed. Cas. No. 14,455, 2 Paine 451.

England.— Reg. *v.* Poole, 19 Q. B. D. 602, 683, 16 Cox C. C. 323, 52 J. P. 84, 56 L. J. M. C. 131, 57 L. T. Rep. N. S. 485, 36 Wkly. Rep. 239 (holding that an indictment against a corporation, which in the absence of a statute was not liable to be indicted, for nonrepair of a highway, was bad unless it concluded "against the form of the statute," and that the objection was fatal even after verdict); Wells *v.* Iggulden, 3 B. & C. 186, 5 D. & R. 13, 10 E. C. L. 93; Rex *v.* Pearson, 5 C. & P. 121, 24 E. C. L. 483; Rex *v.* Winter, 13 East 258; Reg. *v.* Harman, 2 Ld. Raym. 1104; Reg. *v.* Radcliffe, 2 Lew. C. C. 57, 2 Moody C. C. 68; Rex *v.* Clerk, 1 Salk. 370; 1 Chitty Cr. L. 290; 1 Hale P. C. 172, 189, 192; 2 Hawkins P. C. c. 25, § 118, where it is said in substance that judgment by statute shall never be given on an indictment at common law, as every indictment which doth not conclude *contra formam statuti* shall be taken to be; and therefore, if an indictment do not conclude *contra formam statuti*, and the offense indicted be only prohibited by statute, and not by common law, it is wholly insufficient, and no judgment at all can be given upon it.

See 27 Cent. Dig. tit. "Indictment and Information," § 126 *et seq.*

Non-feasance.— An indictment against a municipal corporation for not keeping the streets in repair properly concludes as at common law, as its liability is not created by its charter, but exists upon general principles

such a conclusion is rendered unnecessary or its omission declared immaterial by statute.[1] In the absence of a statute dispensing therewith such a conclusion is necessary where the offense is created solely by statute and does not exist at common law;[2] where the statute repeals the common law either expressly or impliedly by revising the whole subject;[3] where an act which was an offense at common law is by statute raised to a higher nature or grade of crime, as where a common-law misdemeanor is made a felony, or the offense is otherwise changed by statute;[4] or where an increased punishment is prescribed by statute for a common-law offense, accompanied by certain circumstances of aggravation.[5] The rule does not apply, however, where a statute merely changes or prescribes punishment for a common-law offense without enlarging or changing the offense;

of the common law. State *v.* Murfreesboro, 11 Humphr. (Tenn.) 217. But when, by statute, the duty of building and keeping in repair a public bridge is imposed on any person or corporation, such person or corporation is liable to indictment at common law for the neglect of such duty, and the conclusion of the indictment, *contra formam statuti*, is good in such case, as the neglect is a violation of a statute, although the indictment is by common law. State *v.* Morris Canal, etc., Co., 22 N. J. L. 537. See also Reg. *v.* Poole, 19 Q. B. D. 602, 683, 16 Cox C. C. 323, 52 J. P. 84, 56 L. J. M. C. 131, 57 L. T. Rep. N. S. 485, 36 Wkly. Rep. 239 (non-repair of highway); Reg. *v.* Wyat, 1 Salk. 380 (neglect of duty by constable). But an indictment for mere non-feasance need not conclude "against the peace of the state." See *supra*, III, E, 1, a, text and note 85.

In an indictment against an accessary, it is not necessary that the charge against the principal shall conclude "against the form of the statute." State *v.* Russell, 33 La. Ann. 135. See also State *v.* Hopper, 71 Mo. 425; State *v.* Posey, 4 Strobh. (S. C.) 103.

Violations of municipal ordinances see MUNICIPAL CORPORATIONS.

1. *Arkansas.*— State *v.* Culbreath, 71 Ark. 80, 71 S. W. 254; State *v.* Cadle, 19 Ark. 613; Brown *v.* State, 13 Ark. 96.

Iowa.— State *v.* Stroud, 99 Iowa 16, 68 N. W. 450.

Kentucky.— Com. *v.* Kennedy, 15 B. Mon. 531; Kitchen *v.* Com., 14 Ky. L. Rep. 764.

Maine.— State *v.* Dorr, 82 Me. 341, 19 Atl. 861.

Minnesota.— See State *v.* Gill, 89 Minn. 502, 95 N. W. 449.

Mississippi.— Smith *v.* State, 58 Miss. 867.

England.— The conclusion to a count *contra formam statuti* is now, by 14 & 15 Vict. c. 100, § 24, no longer necessary. Castro *v.* Reg., 6 App. Cas. 229, 14 Cox C. C. 546, 45 J. P. 452, 50 L. J. Q. B. 497, 44 L. T. Rep. N. S. 350, 29 Wkly. Rep. 669.

Canada.— Reg. *v.* Doyle, 2 Can. Cr. Cas. 335.

See 27 Cent. Dig. tit. "Indictment and Information," § 126 *et seq.*

2. State *v.* Evans, 7 Gill & J. (Md.) 290; Com. *v.* Springfield, 7 Mass. 9; Com. *v.* Northampton, 2 Mass. 116; People *v.* Enoch, 13 Wend. (N. Y.) 159, 27 Am. Dec. 197; State *v.* Foy, 82 N. C. 679 (larceny of standing crops); State *v.* Dill, 75 N. C. 257 (larceny of chose in action); Warner *v.* Com., 1 Pa. St. 154, 44 Am. Dec. 114; Chapman *v.* Com., 5 Whart. (Pa.) 427, 34 Am. Dec. 565 (arson in burning a building which is not the subject of arson at common law); Rex *v.* Pearson, 5 C. & P. 121, 24 E. C. L. 483; Rex *v.* Clerk, 1 Salk. 370; 1 Chitty Cr. L. 290; 1 Hale P. C. 172, 189, 192; 2 Hawkins P. C. c. 23, § 99, c. 25, § 116; and other cases cited *supra*, note 1.

3. Com. *v.* Dennis, 105 Mass. 162; Com. *v.* Ayer, 3 Cush. (Mass.) 150; Com. *v.* Cooley, 10 Pick. (Mass.) 37; State *v.* Gray, 14 Rich. (S. C.) 174; State *v.* Ripley, 2 Brev. (S. C.) 300.

4. *Arkansas.*— Anderson *v.* State, 5 Ark. 444.

Maine.— State *v.* Soule, 20 Me. 19.

Maryland.— State *v.* Evans, 7 Gill & J. 290.

Mississippi.— State *v.* Johnson, Walk. 392.

New Hampshire.— State *v.* Gove, 34 N. H. 510; State *v.* Kean, 10 N. H. 347, 34 Am. Dec. 162.

New York.— People *v.* Enoch, 13 Wend. 159, 27 Am. Dec. 197.

North Carolina.— State *v.* Lawrence, 81 N. C. 522; State *v.* McDonald, 73 N. C. 346; State *v.* Ratts, 63 N. C. 503; State *v.* Jim, 7 N. C. 3; State *v.* Dick, 6 N. C. 388, holding that as rape was a felony at common law, but by Statute of Westminster the punishment was mitigated, and by Statute of Westminster II, it was again made a felony, an indictment for rape must conclude "against the form of the statute."

South Carolina.— State *v.* McKettrick, 14 S. C. 346; State *v.* Wright, 4 McCord 358; State *v.* Ripley, 2 Brev. 300.

Tennessee.— State *v.* Humphreys, 1 Overt. 307.

England.— Rex *v.* Pim, R. & R. 316; 1 Chitty Cr. L. 290; 2 Hale P. C. 189; 2 Hawkins P. C. c. 25, § 116.

See 27 Cent. Dig. tit. "Indictment and Information," § 127.

5. People *v.* Enoch, 13 Wend. (N. Y.) 159, 27 Am. Dec. 197; State *v.* McKettrick, 14 S. C. 346; Reg. *v.* Nelmes, 6 C. & P. 347, 25 E. C. L. 467; 1 Chitty Cr. L. 29. But *compare* Reg. *v.* Blea, 8 C. & P. 735, 34 E. C. L. 991.

but in such case the indictment may be based either upon the common law,[6] or upon the statute.[7] Nor is a conclusion against the statute necessary where it merely takes away a benefit or privilege from a common-law offense,[8] or, it seems, where a common-law offense committed abroad is made punishable here,[9] or where a statute merely changes a rule of evidence as to a common-law offense.[10] And where a statute defining and punishing an offense is merely affirmative or declaratory of the common law, an indictment may be based either upon the statute or upon the common law.[11] An unnecessary conclusion against the statute may be rejected as surplusage.[12]

b. Sufficiency of Conclusion. The exact words "against the form of the statute," etc., although usual, are not necessary, but the words used must be their equivalent.[13] The indictment need not recite the particular statute on which it is founded, but the general conclusion "against the form of the statute" is suffi-

6. *Alabama.*— State *v.* Stedman, 7 Port. 495.

Maryland.— State *v.* Evans, 7 Gill & J. 290; Davis *v.* State, 3 Harr. & J. 154.

Minnesota.— State *v.* Coon, 18 Minn. 518; O'Connell *v.* State, 6 Minn. 279.

Nevada.— State *v.* Harris, 12 Nev. 414.

North Carolina.— State *v.* Lawrence, 81 N. C. 522; State *v.* McDonald, 73 N. C. 346; State *v.* Ratts, 63 N. C. 503.

Pennsylvania.— Russell *v.* Com., 7 Serg. & R. 489; White *v.* Com., 6 Binn. 179, 6 Am. Dec. 443; Com. *v.* Searle, 2 Binn. 332, 4 Am. Dec. 446.

Vermont.— State *v.* Burt, 25 Vt. 373.

Virginia.— Chiles *v.* Com., 2 Va. Cas. 260.

United States.— U. S. *v.* Norris, 27 Fed. Cas. No. 15,899, 1 Cranch C. C. 411.

England.— Williams *v.* Reg., 7 Q. B. 250, 1 Cox C. C. 179, 10 Jur. 155, 14 L. J. M. C. 164, 53 E. C. L. 250; Reg. *v.* Blea, 8 C. & P. 735, 34 E. C. L. 991; Reg. *v.* Rushworth, 1 Moody C. C. 404; Rex *v.* Chatburn, 1 Moody C. C. 403; Rex *v.* Berry, 1 M. & Rob. 463. But *compare* 2 Hale P. C. 190; 2 Rolle Abr. 82.

See 27 Cent. Dig. tit. "Indictment and Information," § 127.

7. Davis *v.* State, 3 Harr. & J. (Md.) 154; State *v.* Hoyle, 28 N. C. 1; Reg. *v.* Bethell, 6 Mod. 17.

8. Rex *v.* Dickenson, 1 Saund. 135 and note 3; 1 Chitty Cr. L. 290; 2 Hale P. C. 190; 1 Starkie Cr. Pl. 229.

9. Rex *v.* Sawyer, 2 C. & K. 101, R. & R. 294, 61 E. C. L. 101; Reg. *v.* Serva, 2 C. & K. 53, 1 Cox C. C. 292, 1 Den. C. C. 104, 61 E. C. L. 53.

10. 1 Chitty Cr. L. 290, 291; 2 Hale P. C. 190, 288; 2 Hawkins P. C. c. 43, § 43.

11. *Indiana.*— Hudson *v.* State, 1 Blackf. 317; Fuller *v.* State, 1 Blackf. 63.

Maryland.— State *v.* Evans, 7 Gill & J. 290.

Minnesota.— State *v.* Coon, 18 Minn. 518; O'Connell *v.* State, 6 Minn. 279.

Missouri.— State *v.* Corwin, 4 Mo. 609.

Nevada.— State *v.* Harris, 12 Nev. 414.

New York.— People *v.* Enoch, 13 Wend. 159, 27 Am. Dec. 197.

North Carolina.— State *v.* Loftin, 19 N. C. 31; State *v.* Reed, 9 N. C. 454; State *v.* Jim, 7 N. C. 3. But *compare* State *v.* Boon, 1 N. C. 103. In an indictment for murder, where the assault is alleged to have been committed in some county in the state, and the death to have occurred in another state, it is not necessary that the indictment should conclude "against the form of the statute." State *v.* Dunkley, 25 N. C. 116.

Pennsylvania.— Warner *v.* Com., 1 Pa. St. 154, 44 Am. Dec. 114.

South Carolina.— State *v.* Coleman, 8 S. C. 237; State *v.* Posey, 4 Strobh. 103.

Virginia.— Chiles *v.* Com., 2 Va. Cas. 260.

England.— Jones' Case, 2 East P. C. 576; 1 Chitty Cr. L. 291; 2 Hale P. C. 189. It is an offense at common law to obstruct the execution of powers granted by statute, and an indictment for such offense need not, and ought not, to conclude *contra formam statuti.* Rex *v.* Smith, Dougl. (3d ed.) 441.

See 27 Cent. Dig. tit. "Indictment and Information," § 127.

12. See *infra*, III, E, 5.

13. Com. *v.* Stockbridge, 11 Mass. 279; State *v.* Holly, 2 Bay (S. C.) 262; U. S. *v.* Smith, 27 Fed. Cas. No. 16,338, 2 Mason 143; Lee *v.* Clarke, 2 East 333. It has been held sufficient to use the words "against the peace and the statute" (Com. *v.* Caldwell, 14 Mass. 330); "contrary to the statute" (State *v.* Toadvine, 1 Brev. (S. C.) 16; State *v.* Newton, 42 Vt. 537); "contrary to the form of the act of assembly in such case made and provided" (Slymer *v.* State, 62 Md. 237; State *v.* Tribatt, 32 N. C. 151); or "contrary to the true intent and meaning of the act of the congress of the United States in such case made and provided" (U. S. *v.* Smith, 27 Fed. Cas. No. 16,338, 2 Mason 143). But it has been held that it is not sufficient to conclude "against the law in such case provided" (Com. *v.* Stockbridge, *supra*), or "contrary to law" (State *v.* Lowder, 85 N. C. 564; State *v.* Luther, 77 N. C. 492), or "in contempt of the laws of the United States of America," without referring to the statute (U. S. *v.* Andrews, 24 Fed. Cas. No. 14,455, 2 Paine 451). But *compare* Hudson *v.* State, 1 Blackf. (Ind.) 317; Fuller *v.* State, 1 Blackf. (Ind.) 63.

British and provincial statutes see State *v.* Turnage, 2 Nott & M. (S. C.) 158; State *v.* Sanford, 1 Nott & M. (S. C.) 512; State *v.* Holly, 2 Bay (S. C.) 262, 1 Brev. 35.

cient.[14] An indictment concluding "contrary to the form of the statute in such cases made and provided" must be intended to mean the statute of the state, for the criminal statutes of no other government are cognizable, properly speaking, by the courts of a state.[15]

c. **Plural or Singular.** It has been held that where an offense is prohibited by several independent statutes, an indictment therefor must conclude in the plural — *contra formam statutorum* — "against the form of the statutes," etc.;[16] but the better opinion now is that a conclusion in the singular will not be fatal.[17] It has also been held that where an offense is created by one statute and the punishment prescribed or fixed by another, an indictment should conclude in the plural;[18] but other authorities are to the contrary;[19] and a conclusion in the plural is not necessary where the statute creating the offense is merely amended, regulated, or altered in parts thereof which do not relate to the offense or its punishment,[20] or where a statute is made perpetual or adopted and continued by

14. *Iowa.*— Zumhoff *v.* State, 4 Greene 526.

Maryland.— Slymer *v.* State, 62 Md. 237.

Massachusetts.— Com. *v.* Hoye, 11 Gray 462; Com. *v.* Colton, 11 Gray 1; Com. *v.* Griffin, 21 Pick. 523.

United States.—U. S. *v.* Nickerson, 17 How. 204, 15 L. ed. 219.

England.— Vander Plunken *v.* Griffith, Cro. Eliz. 236; Farr *v.* East, Cro. Eliz. 186; Rex *v.* Sutton, 4 M. & S. 532; Reg. *v.* Pugh, 6 Mod. 140; 2 Hale P. C. 172; 2 Hawkins P. C. c. 25, § 100.

15. State *v.* Karn, 16 La. Ann. 183.

16. Francisco *v.* State, 1 Ind. 179; Tevis *v.* State, 8 Blackf. (Ind.) 303; State *v.* Hunter, 8 Blackf. (Ind.) 212; State *v.* Cassel, 2 Harr. & G. (Md.) 407; State *v.* Muse, 20 N. C. 463; State *v.* Pool, 13 N. C. 202; State *v.* Jim, 7 N. C. 3; Petchet *v.* Woolston, Aleyn K. B. 47; Rex *v.* Cox, 2 Bulstr. 258; Broughton *v.* Moore, Cro. Jac. 142; Dormer's Case, 2 Leon. 5. *Compare* State *v.* Hoyle, 28 N. C. 1. It has been held that where one statute creates an offense, imposes a penalty, and gives an action to recover it, and another statute makes the offense indictable, an indictment for the offense should conclude against the "form of the statutes." State *v.* Pool, 13 N. C. 202. But see to the contrary Rex *v.* Pim, R. & R. 316.

17. State *v.* Dayton, 23 N. J. L. 49, 53 Am. Dec. 270; State *v.* Berry, 9 N. J. L. 374; People *v.* Walbridge, 6 Cow. (N. Y.) 512; State *v.* Wilbor, 1 R. I. 199, 36 Am. Dec. 245; U. S. *v.* Pirates, 5 Wheat. (U. S.) 184, 5 L. ed. 64; Kenrick *v.* U. S., 14 Fed. Cas. No. 7,713, 1 Gall. 268; Rex *v.* Collins, 2 Leach C. C. 963; Horthbury *v.* Levingham, Sid. 348; 1 Chitty Cr. L. 291; 1 Hale P. C. 173; 2 Hawkins P. C. c. 25, § 117. A conclusion of an indictment "against the form of the statute" (in the singular) is sufficient in all cases where the offense is distinctly within more than one independent statute. U. S. *v.* Gibert, 25 Fed. Cas. No. 15,204, 2 Sumn. 19. Although there are two statutes defining an offense, where the prosecution is founded on one of them only, the indictment may conclude in the singular. People *v.* Walbridge, 6 Cow. (N. Y.) 512. And where an indictment, founded upon two chapters of the statutes of the same year, concluded "against the form of the statute," it was held sufficient, on the ground that all the acts passed at the same session of the legislature were to be considered but one statute. State *v.* Bell, 25 N. C. 506.

18. King *v.* State, 2 Ind. 523; State *v.* Moses, 7 Blackf. (Ind.) 244; Morrison *v.* Witham, 10 Me. 421; State *v.* Cassel, 2 Harr. & G. (Md.) 407; Kane *v.* People, 8 Wend. (N. Y.) 203; Reg. *v.* Adams, C. & M. 299, 41 E. C. L. 167 (holding that where a statute declares an offense and awards a punishment, and by a subsequent act the punishment is altered, the indictment for such offense should conclude against the form of the statutes); Broughton *v.* Moore, Cro. Jac. 142; Dormer's Case, 2 Leon. 5; 2 Hale P. C. 175. *Compare* Bennett *v.* State, 3 Ind. 167; Strong *v.* State, 1 Blackf. (Ind.) 193.

Different sections of statute.— Where the offense and penalty are declared by the same statute, although in different sections, and the indictment is founded on the same statute, there is no necessity that it should refer to another, or conclude against the form of the statutes. Crawford *v.* State, 2 Ind. 132.

19. Butman's Case, 8 Me. 113 (holding that where one statute creates an offense and inflicts the penalty, and a subsequent statute imposes another and further penalty, an indictment for the offense may conclude *contra formam statuti*); State *v.* Robbins, 1 Strobh. (S. C.) 355 (holding that it is of little consequence, where a statute imposes a new penalty for an offense punishable by a former statute, whether the indictment concludes "contrary to the form of the statute," or "of the statutes"); U. S. *v.* Gibert, 25 Fed. Cas. No. 15,204, 2 Sumn. 19; Parker *v.* Webb, 3 Lev. 61; 1 Chitty Cr. L. 292; 2 Hawkins P. C. c. 25, § 117.

20. Kane *v.* People, 8 Wend. (N. Y.) 203. And see King *v.* State, 2 Ind. 523 (where one statute continues a former one in part, or explains what was doubtful, or regulates its operation); Morrison *v.* Witham, 10 Me. 421 (where an offense is created and the penalty given in the same statute, although there may be other statutes qualifying the mode of proceeding upon the former); State *v.*

a later statute.[21] According to some authorities, where an indictment is founded on a single statute, a conclusion in the plural is fatal;[22] but the weight of authority is to the contrary.[23]

3. Other Special Conclusions. It is not necessary, although it was formerly customary, for an indictment to conclude "to the great damage of" the person injured by the crime, or "to the evil example of all others," or "to the great displeasure of Almighty God."[24] Nor need an indictment for libeling a judge conclude "to the great scandal and disgrace of the administration of justice," etc.[25] As is elsewhere shown, special conclusions are in some jurisdictions necessary in indictments for murder,[26] for perjury,[27] for nuisances,[28] and perhaps for some other offenses.[29] The conclusion of an indictment need not restate the time or place of the commission of the offense.[30]

4. Separate Counts. By the weight of authority, where an indictment contains several counts, each count, being a separate charge, must have a proper conclusion, and the conclusion of one count cannot supply the omission of a conclusion in another.[31] In some states, however, the rule is otherwise.[32] Where

Berry, 9 N. J. L. 374 (where the second statute with reference to an offense simply abridges or limits the discretion of the court with respect to the fine or imprisonment, but in no wise attaches the penalty or punishment to the offense); State *v.* Abernathy, 44 N. C. 428 (where a statute defines an offense, makes it indictable, and prescribes the punishment, although it contains a reference to a former statute, giving a penalty to a common informer for the same act); Dingley *v.* Moor, Cro. Eliz. 750; Pinkney *v.* Rutland County, 2 Saund. 374, 377 note 12; Rex *v.* Dickenson, 1 Saund. 135 and note 3. And see Rex *v.* Pim, R. & R. 316.

21. State *v.* Berry, 9 N. J. L. 374; Rex *v.* Morgan, 2 Str. 1066, 1 Saund. 135 note *d*.

22. State *v.* Sandy, 25 N. C. 570 (even on motion in arrest of judgment); Andrews *v.* Lewknor Hundred, Cro. Jac. 187, Yelv. 116; 2 Hawkins P. C. c. 25, § 117. See also State *v.* Cassel, 2 Harr. & G. (Md.) 407; State *v.* Abernathy, 44 N. C. 428; State *v.* Cheatwood, 2 Hill (S. C.) 450.

23. Carter *v.* State, 2 Ind. 617; Com. *v.* Hitchings, 5 Gray (Mass.) 482; Com. *v.* Hooper, 5 Pick. (Mass.) 42; State *v.* Townley, 18 N. J. L. 311; Kenrick *v.* U. S., 14 Fed. Cas. No. 7,713, 1 Gall. 268; U. S. *v.* Gibert, 25 Fed. Cas. No. 15,204, 2 Sumn. 19; U. S. *v.* Trout, 28 Fed. Cas. No. 16,542, 4 Biss. 105; 2 Hale P. C. 173.

Under a statute providing that no indictment shall be quashed because of any defect in the indictment unless such defect is misleading, etc., it is immaterial that an indictment concludes against the form of the "statutes," where it should properly conclude against the form of the "statute." Michael *v.* State, 40 Fla. 265, 23 So. 944.

24. Rex *v.* Cooper, 2 Str. 1246; 1 Chitty Cr. L. 245.

25. Richardson *v.* State, 66 Md. 205, 7 Atl. 43. See also Libel and Slander.

26. See Homicide, 21 Cyc. 858.

27. See Perjury.

28. See Common Scold, 8 Cyc. 393; and, generally, Nuisances.

29. See the various special titles.

30. State *v.* Hudspeth, 150 Mo. 12, 51 S. W. 483.

31. *Arkansas.*— Williams *v.* State, 47 Ark. 230, 1 S. W. 149; State *v.* Hazle, 20 Ark. 156; State *v.* Cadle, 19 Ark. 613.

Illinois.— See Kirkham *v.* People, 170 Ill. 9, 48 N. E. 465.

Maine.— State *v.* Soule, 20 Me. 19.

Mississippi.— State *v.* Johnson, Walk. 392.

Missouri.— State *v.* Wade, (Mo. 1898) 47 S. W. 1070; State *v.* Clevenger, 25 Mo. App. 655.

South Carolina.— State *v.* Strickland, 10 S. C. 191.

Vermont.— See State *v.* Amidon, 58 Vt. 524, 2 Atl. 154.

Virginia.— Early *v.* Com., 86 Va. 921, 11 S. E. 795; Thompson *v.* Com., 20 Gratt. 724; Com. *v.* Carney, 4 Gratt. 546.

West Virginia.— State *v.* McClung, 35 W. Va. 280, 13 S. E. 654.

See 27 Cent. Dig. tit. "Indictment and Information," § 124.

Introduction of a charge against accessaries after an allegation possessing the requisite particularity and formality as to the principal in his commission of the offense does not cause the indictment to consist of two counts, and hence it is not necessary to conclude the charge as to the principal "against the peace," etc. State *v.* Hopper, 71 Mo. 425. See also State *v.* Russell, 33 La. Ann. 135; State *v.* Posey, 4 Strobh. (S. C.) 103.

Where an attempt to state the offense in separate counts has failed, the indictment cannot be held bad for the reason that the portions which it was alleged the pleader intended to make separate counts did not conclude contrary to the peace and dignity, etc. State *v.* Hendrickson, 165 Mo. 262, 65 S. W. 550.

32. *Alabama.*— McGuire *v.* State, 37 Ala. 161.

Louisiana.—State *v.* Thompson, 51 La. Ann. 1089, 25 So. 954; State *v.* Scott, 48 La. Ann. 293, 19 So. 141; State *v.* Travis, 39 La. Ann. 356, 1 So. 817.

Ohio.— Olendorf *v.* State, 64 Ohio St. 118, 59 N. E. 892.

the statutes permit a count for a statutory offense, as receiving, etc., to be joined with one for an offense at common law, as larceny, it is not fatal to the indictment that each does not conclude "against the form of the statute," etc.[33]

5. Rejection of Surplusage. When an indictment improperly or unnecessarily concludes against the form of the statute and may be sustained at common law, such conclusion may be rejected and disregarded as mere surplusage, and judgment be given as at common law.[34] So also in the case of a necessary conclusion, words which are mere surplusage may be disregarded and will not render bad an indictment having a proper conclusion without them.[35]

6. Statutes Curing Omissions or Defects in Conclusion. In some jurisdictions it is provided by statute that no indictment shall be held insufficient for want of a proper conclusion,[36] or a particular conclusion;[37] and omission of a formal conclusion "against the peace" or "against the statute" has been held to be

Pennsylvania.— Com. *v.* Paxton, 14 Phila. 665.

Tennessee.— Rice *v.* State, 3 Heisk. 215.

Texas.— Stebbins *v.* State, 31 Tex. Cr. 294, 20 S. W. 552.

Wisconsin.— Nichols *v.* State, 35 Wis. 308.

See 27 Cent. Dig. tit. "Indictment and Information," § 124.

33. State *v.* Beatty, 61 N. C. 52.

34. *Arkansas.*— Vanderworker *v.* State, 13 Ark. 700.

Connecticut.— Southworth *v.* State, 5 Conn. 325; Knowles *v.* State, 3 Day 103.

Idaho.— People *v.* Buchanan, 1 Ida. 681.

Indiana.— Fuller *v.* State, 1 Blackf. 63.

Kentucky.— Gregory *v.* Com., 2 Dana 417.

Maryland.— Davis *v.* State, 3 Harr. & J. 154.

Massachusetts.—Com. *v.* Reynolds, 14 Gray 87, 74 Am. Dec. 665; Com. *v.* Hoxey, 16 Mass. 385.

Minnesota.— State *v.* Crummey, 17 Minn. 72.

Missouri.— State *v.* Boll, 59 Mo. 321.

New Hampshire.— State *v.* Straw, 42 N. H. 393; State *v.* Gove, 34 N. H. 510; State *v.* Buchman, 8 N. H. 203, 29 Am. Dec. 646.

New Jersey.— Cruiser *v.* State, 18 N. J. L. 206.

New York.— People *v.* Conger, 1 Wheel. Cr. 148.

North Carolina.— State *v.* Harris, 106 N. C. 682, 11 S. E. 377; State *v.* Bryson, 79 N. C. 651.

Pennsylvania.— Com. *v.* Bell, Add. 156, 1 Am. Dec. 298; Respublica *v.* Newell, 3 Yeates 407, 2 Am. Dec. 381; Com. *v.* Kay, 14 Pa. Super. Ct. 376.

South Carolina.— State *v.* White, 15 S. C. 381; State *v.* Kennerly, 10 Rich. 152; State *v.* Wimberly, 3 McCord 190.

Tennessee.— Haslip *v.* State, 4 Hayw. 273.

Vermont.— State *v.* Burt, 25 Vt. 373; State *v.* Phelps, 11 Vt. 116, 34 Am. Dec. 672; State *v.* McLeran, 1 Aik. 311.

England.— Reg. *v.* Wigg, 2 Ld. Raym. 1163; Rex *v.* Mathews, 2 Leach C. C. 664, Nolan 202, 5 T. R. 162; Reg. *v.* Wyat, 1 Salk. 380; Rex *v.* Harris, 4 T. R. 202, 2 Rev. Rep. 358; 1 Chitty Cr. L. 290; 2 Hale P. C. 190; 2 Hawkins P. C. c. 25, § 115.

See 27 Cent. Dig. tit. "Indictment and Information," § 128.

Included common-law offense.— Where an indictment concludes contrary to the act of assembly, defendant may be convicted of a common-law offense included in that charged. Haslip *v.* State, 4 Hayw. (Tenn.) 273.

35. Washington *v.* State, 53 Ala. 29; Anderson *v.* State, 5 Ark. 444; Zarresseller *v.* People, 17 Ill. 101; State *v.* Hays, 78 Mo. 600; State *v.* Keau, 10 N. H. 347, 34 Am. Dec. 162; State *v.* Robinson, 27 S. C. 615, 4 S. E. 570; State *v.* Pratt, 44 Tex. 93; Rowlett *v.* State, 23 Tex. App. 191, 4 S. W. 582. Where the constitution requires that all indictments shall conclude "against the peace and dignity of the state," the clause "contrary to the form of the statute in such cases made and provided" added to such conclusion may be disregarded as surplusage and will not render the indictment bad. State *v.* Schloss, 93 Mo. 361, 6 S. W. 244; State *v.* Waters, 1 Mo. App. 7; State *v.* Reakey, 1 Mo. App. 3. Where an indictment for perjury was a substantial copy of the form prescribed by N. C. Acts (1889), c. 83, it was held that it was not vitiated by the addition of the formal conclusion "against the form of the statute in such case made and provided, and against the peace and dignity of the state," since while such conclusion was not necessary, its use was mere surplusage. State *v.* Peters, 107 N. C. 876, 12 S. E. 74. Putting the date when and the place where found at the end of an indictment after the words "against the peace and dignity of the state of Minnesota" does not vitiate it, as such date and place are surplusage. State *v.* Johnson, 37 Minn. 493, 35 N. W. 373. See also cases and illustrations *supra*, III, E, 1, b, 2, b, c.

36. Hall *v.* State, 8 Ind. 439; State *v.* Schilling, 14 Iowa 455. Mass. Pub. St. c. 213, § 16, providing that no indictment shall be quashed because not concluding against the peace of the commonwealth, or against the statute, etc., if the omission does not tend to prejudice defendant, is not in violation of article 12 of the Bill of Rights, which provides that no subject shall be held to answer for any crime or offense until the same is fully and plainly, substantially and formally, described to him. Com. *v.* Freelove, 150 Mass. 66, 22 N. E. 435.

37. State *v.* Cadle, 19 Ark. 613 (against the statute); State *v.* Dorr, 82 Me. 341, 19

within a statute providing that no indictment shall be deemed insufficient by reason of any defect in matter of form only, which shall not tend to the prejudice of defendant, and other statutes to the same effect.[38] On the other hand, as has been seen, the constitution of some states expressly requires a formal conclusion, so that a statute cannot cure its omission.[39]

7. Amendment. It has been held that the conclusion of an indictment against the peace of the state, or against the form of the statute, being matter of form, is within the rule of law or statutes allowing amendments,[40] so that omissions thereof or defects therein may be cured by amendment.[41]

F. Signatures — 1. By Foreman or Members of Grand Jury. By the weight of authority, in the absence of a statute, it is not necessary that an indictment or presentment shall be signed either by all the grand jurors or by the foreman.[42] In some jurisdictions, however, the signature of the foreman is expressly required by statute and is essential to the validity of an indictment.[43] In other jurisdictions, although required by statute, its omission is not fatal.[44] When the foreman's signature is necessary, it is immaterial, in the absence of special provision to the contrary, on what part of the bill it appears.[45] The foreman's signature is sufficient, although he uses initials only for his christian name,[46] and although his signature is not followed by the word "foreman," if it can be ascertained from the records that he was foreman.[47] An indictment may be signed by a foreman appointed by the court *pro tempore* in the absence of the first foreman.[48]

2. By Public Prosecutor — a. In General. Although the signature of the

Atl. 861 (against the statute). See *supra*, III, E, 2, a.

38. Frisbie *v.* U. S., 157 U. S. 160, 15 S. Ct. 586, 39 L. ed. 657, holding that failure of an indictment to conclude contrary to the statute and against the peace and dignity of the United States is within U. S. Rev. St. (1878) § 1025, providing that no indictment shall be deemed insufficient by reason of any "defect or imperfection in matter of form only, which shall not tend to the prejudice of the defendant." See also Shiver *v.* State, 41 Fla. 630, 27 So. 36; Michael *v.* State, 40 Fla. 265, 23 So. 944; Camp *v.* State, 25 Ga. 689; Com. *v.* Kennedy, 15 B. Mon. (Ky.) 531; State *v.* Kirkham, 104 N. C. 911, 10 S. E. 312 [*overruling* State *v.* Joyner, 81 N. C. 534]; State *v.* Parker, 81 N. C. 531; Com. *v.* Paxton, 14 Phila. (Pa.) 665; Chiles *v.* Com., 2 Va. Cas. 260.

39. See *supra*, III, E, 1, b.

40. **Amendment of indictments** see *infra*, X, A.

41. Cain *v.* State, 4 Blackf. (Ind.) 512; Com. *v.* Hoxey, 16 Mass. 385; State *v.* Minford, 64 N. J. L. 518, 45 Atl. 817; State *v.* Amidon, 58 Vt. 524, 2 Atl. 154.

42. State *v.* Mace, 86 N. C. 668; State *v.* Cox, 28 N. C. 440; State *v.* Creighton, 1 Nott & M. (S. C.) 256; State *v.* Hill, 48 W. Va. 132, 35 S. E. 831. But see Com. *v.* Read, Thach. Cr. Cas. (Mass.) 180; Com. *v.* Sargent, Thach. Cr. Cas. (Mass.) 116; State *v.* Squire, 10 N. H. 558; Com. *v.* Dieffenbaugh, 3 Pa. Co. Ct. 299.

Indorsement a "true bill" with signature of foreman see *infra*, III, G, 1.

43. Blume *v.* State, 154 Ind. 343, 56 N. E. 771; Overshiner *v.* Com., 2 B. Mon. (Ky.) 344. See also *infra*, III, G, 1.

44. State *v.* Flores, 33 Tex. 444; State *v.* Powell, 24 Tex. 135; Pinson *v.* State, 23 Tex. 579; Watson *v.* State, (Tex. Cr. App. 1899) 50 S. W. 340; Witherspoon *v.* State, 39 Tex. Cr. 65, 44 S. W. 164, 1096; Robinson *v.* State, 24 Tex. App. 4, 5 S. W. 509; Weaver *v.* State, 19 Tex. App. 547, 53 Am. Rep. 389; Jones *v.* State, 10 Tex. App. 552; Campbell *v.* State, 8 Tex. App. 84. See also O'Connell *v.* Reg., 11 Cl. & F. 155, 8 Eng. Reprint 1061; Reg. *v.* Buchanan, 12 Manitoba 190; Reg. *v.* Townsend, 28 Nova Scotia 468.

Unauthorized signing. — Under such a statute exceptions do not lie to an indictment because someone else signed the foreman's name. State *v.* Flores, 33 Tex. 444; State *v.* Powell, 24 Tex. 135; Witherspoon *v.* State, 39 Tex. Cr. 65, 44 S. W. 164, 1096.

Erasure and substitution. — And an indictment is not invalidated by the fact that one name written thereon as foreman has been erased and another substituted. Watson *v.* State, (Tex. Cr. App. 1899) 50 S. W. 340.

45. Blume *v.* State, 154 Ind. 343, 56 N. E. 771; Overshiner *v.* Com., 2 B. Mon. (Ky.) 344. See also State *v.* Lewis, 5 Ohio S. & C. Pl. Dec. 552, 7 Ohio N. P. 533.

Surplusage. — Where the signature of the foreman of the grand jury to an indictment is placed just before the conclusion, "against the peace and dignity of the state," such signature is mere surplusage, and a motion in arrest of judgment based thereon is properly overruled. Adams *v.* State, (Tex. App. 1890) 13 S. W. 1009.

46. State *v.* Taggart, 38 Me. 298; Com. *v.* Gleason, 110 Mass. 66; Easterling *v.* State, 35 Miss. 210. See also *infra*, III, G, 1.

47. Com. *v.* Read, Thach. Cr. Cas. (Mass.) 180; Com. *v.* Ferguson, 8 Pa. Dist. 120. And see *infra*, III, G, 1, b.

48. Com. *v.* Noonan, 15 Phila. (Pa.) 372.

public prosecutor is usually attached to an indictment, it forms no part of it, and in the absence of a statute is in no manner essential to its validity;[49] and if it be signed by any one without authority, the signature is mere surplusage and cannot vitiate it.[50] Nor is the signature of the public prosecutor necessary to a special presentment, unless required by statute.[51] Statutes, however, sometimes expressly require that bills of indictment shall be signed by the public prosecutor, and the omission of his signature is ground for demurrer on motion to quash.[52] Under other statutes, although his signature is required, its omission does not affect the validity of an indictment.[53] Omission of the public prosecutor's signature is not fatal under a statute providing that no indictment shall be deemed invalid for any defect or imperfection which does not tend to prejudice the substantial rights of defendant upon the merits.[54]

b. Sufficiency of Signature — (i) *IN GENERAL.* The public prosecutor need not himself attach his signature to an indictment, but it is sufficient if it be done by another under his express directions or by his express authority.[55] And it has been held sufficient if the signature appears in print on the indictment,[56] or in typewriting.[57] Signing the surname in full and the christian name by its initials is sufficient.[58] The word "Attest," written before the prosecuting attorney's signature to an indictment is surplusage, and without effect.[59] The want of the public prosecutor's official signature to an indictment is not cured by his signature to an indorsement thereon.[60]

(ii) *ADDITION OF OFFICIAL TITLE.* When the public prosecutor is required to sign an indictment, he must sign it officially;[61] but signatures have repeatedly been held sufficient notwithstanding the omission or erroneous designation of the

49. *Alabama.*— Prince *v.* State, 140 Ala. 158, 37 So. 171; Joyner *v.* State, 78 Ala. 448; Cross *v.* State, 78 Ala. 430; Holley *v.* State, 75 Ala. 14; Harrall *v.* State, 26 Ala. 52; Swallow *v.* State, 22 Ala. 20; Ward *v.* State, 22 Ala. 16.

Arkansas.— Watkins *v.* State, 37 Ark. 370; Anderson *v.* State, 5 Ark. 444.

Idaho.— People *v.* Butler, 1 Ida. 231.

Kentucky.—Sims *v.* Com., 13 S. W. 1079, 12 Ky. L. Rep. 215.

Louisiana.—State *v.* Williams, 107 La. 789, 32 So. 172.

Maine.— State *v.* Reed, 67 Me. 127.

Massachusetts.— Com. *v.* Stone, 105 Mass. 469.

Mississippi.— Keithler *v.* State, 10 Sm. & M. 192.

Missouri.— State *v.* Murphy, 47 Mo. 274; Thomas *v.* State, 6 Mo. 457.

North Carolina.— State *v.* Mace, 86 N. C. 668; State *v.* Vincent, 4 N. C. 105.

Ohio.— Jones *v.* State, 14 Ohio Cir. Ct. 35, 7 Ohio Cir. Dec. 305.

South Carolina.— State *v.* Coleman, 8 S. C. 237.

Texas.— Eppes *v.* State, 10 Tex. 474.

Virginia.— Brown *v.* Com., 86 Va. 466, 10 S. E. 745.

United States.— U. S. *v.* McAvoy, 26 Fed. Cas. No. 15,654, 4 Blatchf. 418, 18 How. Pr. (N. Y.) 380.

See 27 Cent. Dig. tit. "Indictment and Information," § 133.

But *compare* State *v.* Lockett, 3 Heisk. (Tenn.) 274; Hite *v.* State, 9 Yerg. (Tenn.) 198; Foute *v.* State, 3 Hayw. (Tenn.) 98.

50. State *v.* Mace, 86 N. C. 668. See also State *v.* Kovolosky, 92 Iowa 498, 61 N. W. 223; Sims *v.* Com., 13 S. W. 1079, 12 Ky. L. Rep. 215; State *v.* Coleman, 8 S. C. 237.

51. Newman *v.* State, 101 Ga. 534, 28 S. E. 1005.

52. Heacock *v.* State, 42 Ind. 393; State *v.* Bruce, 77 Mo. 193; Com. *v.* Brown, 23 Pa. Super. Ct. 470.

53. State *v.* Kovolosky, 92 Iowa 498, 61 N. W. 223; State *v.* Wilmoth, 63 Iowa 380, 19 N. W. 249; State *v.* Ruby, 61 Iowa 86, 15 N. W. 848.

54. Jones *v.* State, 14 Ohio Cir. Ct. 35, 7 Ohio Cir. Dec. 305. See also Caha *v.* U. S., 152 U. S. 211, 14 S. Ct. 513, 38 L. ed. 415, holding that under U. S. Rev. St. (1878) § 1025 [U. S. Comp. St. (1901) p. 720], an objection that an indictment was signed by the assistant district attorney, instead of the district attorney himself, was immaterial.

55. Newman *v.* State, 101 Ga. 534, 28 S. E. 1005; Com. *v.* Brown, 23 Pa. Super. Ct. 470.

56. Hamilton *v.* State, 103 Ind. 96, 2 N. E. 299, 53 Am. Rep. 491.

57. Miller *v.* State, 36 Tex. Cr. 47, 35 S. W. 391.

58. Vanderkarr *v.* State, 51 Ind. 91.

59. State *v.* Hilsabeck, 132 Mo. 348, 34 S. W. 38.

60. State *v.* Lockett, 3 Heisk. (Tenn.) 274.

61. Where a bill of indictment was required to be signed by the attorney-general, and was signed by an officer styling himself solicitor-general, it was held invalid, there being no such officer as solicitor-general in the state. Teas *v.* State, 7 Humphr. (Tenn.) 174.

county or district,[62] and notwithstanding the signature was followed by an erroneous designation of the prosecutor's official title.[63]

(III) *BY DEPUTY, PRO TEMPORE, OR SPECIAL OFFICER.* An indictment is not invalid because signed by a duly appointed deputy solicitor or public prosecutor,[64] or by a public prosecutor *pro tempore* or special prosecutor properly appointed under a statute.[65]

(IV) *SEPARATE COUNTS.* Where an indictment contains several counts, each count need not be signed by the prosecuting officer.[66]

3. AMENDMENT. The omission of the public prosecutor's signature from an indictment or defects in the signature, being in mere matter of form, may be cured at any time by amendment.[67] It has been held, however, that when an indictment is returned into court without the signature of the foreman of the

62. *California.*— People *v.* Ashnauer, 47 Cal. 98.

Kansas.—State *v.* Tannahill, 4 Kan. 117.

Massachusetts.— Com. *v.* Beaman, 8 Gray 497.

Nevada.— State *v.* Salge, 2 Nev. 321.

Tennessee.— State *v.* Evans, 8 Humphr. 110; State *v.* Brown, 8 Humphr. 89.

See 27 Cent. Dig. tit. "Indictment and Information," § 136.

63. *Indiana.*— Baldwin *v.* State, 12 Ind. 383, "A. B., Prosecuting Attorney," instead of "A. B., District Attorney."

Kansas.— Craft *v.* State, 3 Kan. 450.

Missouri.— State *v.* Kinney, 81 Mo. 101.

Nevada.— State *v.* Salge, 2 Nev. 321.

Tennessee.— State *v.* Myers, 85 Tenn. 203, 5 S. W. 377; Greenfield *v.* State, 7 Baxt. 18.

See 27 Cent. Dig. tit. "Indictment and Information," § 136.

64. Cross *v.* State, 78 Ala. 430; Taylor *v.* State, 113 Ind. 471, 16 N. E. 183; Stout *v.* State, 93 Ind. 150. See State *v.* Farrar, 41 N. H. 53. That an indictment in the federal courts was signed by an assistant district attorney, instead of the district attorney himself, is immaterial under U. S. Rev. St. (1878) § 1025 [U. S. Comp. St. (1901) p. 720]. Cahan *v.* U. S., 152 U. S. 211, 14 S. Ct. 513, 38 L. ed. 415.

In Tennessee, as the constitution contains no provision authorizing a district attorney-general to appoint an assistant, it is held that such an assistant, appointed under Acts (1897), c. 24, authorizing certain district attorney-generals to appoint assistants, has no power to sign an indictment, except in the presence and by the special direction of the district attorney-general. State *v.* Amos, 101 Tenn. 350, 47 S. W. 410.

65. *Georgia.*— Williams *v.* State, 69 Ga. 11.

Indiana.— Choen *v.* State, 85 Ind. 209.

Louisiana.— State *v.* Vance, 32 La. Ann. 1177.

Missouri.— State *v.* Moxley, 102 Mo. 374, 14 S. W. 969, 15 S. W. 556; State *v.* Swinney, 25 Mo. App. 347.

Montana.— Territory *v.* Harding, 6 Mont. 323, 12 Pac. 750.

Pennsylvania.— Com. *v.* McHale, 79 Pa. St. 397, 39 Am. Rep. 808.

Texas.— State *v.* Johnson, 12 Tex. 231; Reynolds *v.* State, 11 Tex. 120.

Utah.— People *v.* Lyman, 2 Utah 30.

See 27 Cent. Dig. tit. "Indictment and Information," § 134.

Compare Hite *v.* State, 9 Yerg. (Tenn.) 198 (holding that before a court can appoint an attorney *pro tempore*, the record must show that the regular attorney is absent; and if the record does not show it, the indictment or count signed by the attorney *pro tempore* is a nullity); Foute *v.* State, 3 Hayw. (Tenn.) 98.

Attorney-general.— In Kansas, whenever required by the governor to appear and prosecute criminal proceedings in any county, under Gen. St. (1901) § 7271, the attorney-general becomes prosecuting attorney of that county in those proceedings, and as such may sign indictments presented by the grand jury, required to be signed by the prosecuting attorney, by Gen. St. (1901) § 5540. State *v.* Campbell, 70 Kan. 899, 79 Pac. 1133; State *v.* Bowles, 70 Kan. 821, 79 Pac. 726, 69 L. R. A. 176. The district court of any county is obliged to take judicial notice of an executive order on the attorney-general to appear and prosecute criminal proceedings therein, and such authority need not be expressed on the face of an indictment which he signs. State *v.* Campbell, *supra*; State *v.* Bowles, *supra*. An assistant attorney-general appointed under Gen. St. (1901) § 2476, has authority to sign an indictment charging unlawful sale of intoxicating liquor, and such signature will be as effective as that of the county attorney. State *v.* Crilly, 69 Kan. 802, 77 Pac. 701.

Presumption.— The indictment being signed and preferred by the attorney-general, it will be presumed, in the absence of anything to the contrary, that an attorney-general *pro tempore* who conducted the trial was properly appointed. Isham *v.* State, 1 Sneed (Tenn.) 111. And where an indictment is signed, "A. B., District Attorney *pro tem.*," and the court below has recognized the official authority of the person who acted as district attorney, it will be presumed by the supreme court, in the absence of proof to the contrary, that such person was duly appointed so to act. Pierce *v.* State, 12 Tex. 210; Eppes *v.* State, 10 Tex. 474.

66. See State *v.* McLane, 4 La. Ann. 435.

67. State *v.* Crenshaw, 45 La. Ann. 496, 12 So. 628; Com. *v.* Lenox, 3 Brewst. (Pa.) 249.

grand jury, it cannot afterward be amended in this respect without recommitment to the grand jury,[68] although the contrary has also been held.[69]

G. Indorsements — 1. "A True Bill" and Signature Thereto — a. Necessity — (i) *In the Absence of a Statute.* At common law after the grand jury considered the evidence in support of a bill of indictment submitted to them, they either threw out or ignored the bill or found it a true bill, in the latter case indorsing it with the words "A true bill," and if they ignored it, with the words "Not a true bill" or "Not found." Formerly the Latin words "*billa vera*" and "*ignoramus*" were used. At common law such indorsement was essential to the validity of an indictment.[70] In the United States some of the courts have followed the common-law rule and held that this indorsement is necessary, even in the absence of a statute,[71] and that the signature of the foreman without the indorsement "A true bill" is insufficient.[72] In other jurisdictions it has been held, in the absence of a statute, that such an indorsement, although advisable in practice, is not essential, as the finding of the indictment is sufficiently shown by its return into court and the record thereof,[73] or that the signature of the foreman without the indorsement "A true bill" is sufficient.[74] In some jurisdictions it has been held that the signature of the foreman of the grand jury is necessary, even in the absence of a statute;[75] but the weight of authority is to the contrary.[76]

68. State *v.* Squire, 10 N. H. 558. *Compare infra*, III, G, 1, d.

69. Bassham *v.* State, 38 Tex. 622, holding that a paper purporting to be an indictment, but not signed by the foreman of the grand jury impaneled at the term of its filing, may properly be signed by him at a subsequent term.

70. Rex *v.* Ford, Yelv. 99, where it is said that "the indorsement is parcel of the indictment and the perfection of it," and "the indorsement touches it principally, for it is the life of it."

71. Nomaque *v.* People, 1 Ill. 145, 12 Am. Dec. 157; Webster's Case, 5 Me. 432; State *v.* McBroom, 127 N. C. 528, 37 S. E. 193; Gunkle *v.* State, 6 Baxt. (Tenn.) 625. See also State *v.* Squire, 10 N. H. 558.

72. Webster's Case, 5 Me. 432; State *v.* McBroom, 127 N. C. 528, 37 S. E. 193.

73. *California.*— People *v.* Lawrence, 21 Cal. 368.

Georgia.— McGuffie *v.* State, 17 Ga. 497.

Iowa.— Wau-kon-chaw-neek-kaw *v.* U. S., Morr. 332.

Massachusetts.— Com. *v.* Smyth, 11 Cush. 473.

New Hampshire.— State *v.* Freeman, 13 N. H. 488.

New Jersey.—State *v.* Magrath, 44 N. J. L. 227.

North Carolina.— State *v.* Cox, 28 N. C. 440.

South Carolina.— State *v.* Creighton, 1 Nott & M. 256.

Virginia.— White *v.* Com., 29 Gratt. 824 (where the indorsement was "A true gun"); Price *v.* Com., 21 Gratt. 846. But *compare* Bradshaw *v.* Com., 16 Gratt. 507, 86 Am. Dec. 722.

West Virginia.— State *v.* Thacker Coal, etc., Co., 49 W. Va. 140, 38 S. E. 539; State *v.* Hill, 48 W. Va. 132, 35 S. E. 831.

United States.— Frisbie *v.* U. S., 157 U. S. 160, 15 S. Ct. 586, 39 L. ed. 657.

See 27 Cent. Dig. tit. "Indictment and Information," § 139.

The omission is a defect in matter of form, and so within a statute providing that no indictment shall be deemed insufficient by reason of any defect or imperfection in matter of form only, which shall not tend to the prejudice of defendant. Frisbie *v.* U. S., 157 U. S. 160, 15 S. Ct. 586, 39 L. ed. 657. *Contra*, State *v.* McBroom, 127 N. C. 528, 37 S. E. 193, holding that N. C. Code, § 1183, providing that every indictment or information shall be sufficient if it express the charge in a plain, intelligible, and explicit manner, and the same shall not be quashed, nor judgment thereon stayed, by reason of any informality, if sufficient matter appears to enable the court to proceed to judgment, does not cure an indictment returned by a grand jury containing an indorsement which does not indicate that the indictment was returned as "A true bill."

74. Com. *v.* Smyth, 11 Cush. (Mass.) 473; State *v.* Freeman, 13 N. H. 488.

75. State *v.* Squire, 10 N. H. 558; Com. *v.* Dieffenbaugh, 3 Pa. Co. Ct. 299. See also Nomaque *v.* People, 1 Ill. 145, 12 Am. Dec. 157; Com. *v.* Read, Thach. Cr. Cas. (Mass.) 180; Com. *v.* Sargent, Thach. Cr. Cas. (Mass.) 116; State *v.* Freeman, 13 N. H. 488.

76. *Georgia.* — McGuffie *v.* State, 17 Ga. 497.

Iowa.— Wau-kon-chaw-neek-kaw *v.* U. S., Morr. 332.

Kentucky.— Com. *v.* Ripperdon, Litt. Sel. Cas. 194.

North Carolina.— State *v.* Cox, 28 N. C. 440; State *v.* Calhoon, 18 N. C. 374.

South Carolina.— State *v.* Creighton, 1 Nott & M. 256.

Virginia.— Price *v.* Com., 21 Gratt. 846.

West Virginia.— State *v.* Thacker Coal, etc., Co., 49 W. Va. 140, 38 S. E. 539; State *v.* Hill, 48 W. Va. 132, 35 S. E. 831.

(II) *UNDER STATUTORY PROVISIONS.* In some states the indorsement "A true bill," or both such indorsement and the signature of the foreman of the grand jury, are expressly required by statute, and omission thereof will render an indictment fatally defective on demurrer or motion to quash, or in some states even on motion in arrest of judgment or writ of error.[77] Under a statute requiring both the indorsement "A true bill" and the signature of the foreman, the latter without the former,[78] or the former without the latter,[79] is insufficient. Where the statute merely requires the indorsement "A true bill," such indorsement is essential, but the signature of the foreman thereto is not.[80] In some of the cases a statute requiring the indorsement "A true bill" or the signature of the foreman, or both, have been held to be merely directory, so that its omission is not fatal.[81]

b. Sufficiency. Where by the common law or by statute the indorsement "A true bill" and the signature of the foreman are required, it is clearly sufficient if an indictment is indorsed "A true bill" and this indorsement is immediately followed by the signature of the foreman;[82] but a variance from these words will not be fatal, if they are followed in substance,[83] and it is immaterial, in the absence of express provision in the statute, on what part of the indictment the indorse-

77. *Colorado.*— Arapahoe County *v.* Graham, 4 Colo. 201.

Florida.— Alden *v.* State, 18 Fla. 187.

Illinois.— Gardner *v.* People, 4 Ill. 83 (holding that it is necessary that the foreman of the grand jury should indorse each indictment "A true bill," and sign his name as foreman; but it is not necessary that the name should be copied into the indictment); Goodman *v.* People, 90 Ill. App. 533.

Indiana.— Denton *v.* State, 155 Ind. 307, 58 N. E. 74; State *v.* Buntin, 123 Ind. 124, 23 N. E. 1140; Strange *v.* State, 110 Ind. 354, 11 N. E. 357; Cooper *v.* State, 79 Ind. 206; Johnson *v.* State, 23 Ind. 32.

Kentucky.— Oliver *v.* Com., 95 Ky. 372, 25 S. W. 600, 15 Ky. L. Rep. 662; Lewis *v.* Com., 48 S. W. 977, 20 Ky. L. Rep. 1104; Com. *v.* Louisville, etc., R. Co., 32 S. W. 164, 17 Ky. L. Rep. 563; Com. *v.* Louisville, etc., R. Co., 32 S. W. 132, 136, 17 Ky. L. Rep. 562; Sims *v.* Com., 13 S. W. 1079, 12 Ky. L. Rep. 215.

Louisiana.— State *v.* Logan, 104 La. 254, 28 So. 912; State *v.* Morrison, 30 La. Ann. 817.

Missouri.— State *v.* Burgess, 24 Mo. 381, 69 Am. Dec. 433; State *v.* Mertens, 14 Mo. 94; State *v.* Runzi, 105 Mo. App. 319, 80 S. W. 36.

Tennessee.— Bird *v.* State, 103 Tenn. 343, 52 S. W. 1076.

See 27 Cent. Dig. tit. "Indictment and Information," § 139 *et seq.*

Time of objection see *infra*, III, G, 1, c.

Amendment see *infra*, III, G, 1, d.

On change of venue it is sufficient if the original indictment, which is part of the record, shows an indorsement "A true bill" with the signature of the foreman, and the fact that the transcript does not show this is not ground for motion to quash. Beard *v.* State, 57 Ind. 8.

78. State *v.* Buntin, 123 Ind. 124, 23 N. E. 1140; and other cases cited *supra*, note 77.

79. Strange *v.* State, 110 Ind. 354, 11 N. E. 357; Heacock *v.* State, 42 Ind. 393, and other cases cited *supra*, note 77.

80. Com. *v.* Walters, 6 Dana (Ky.) 290.

81. Wau-kon-chaw-neek-kaw *v.* U. S., Morr. (Iowa) 332. See also State *v.* Calhoon, 18 N. C. 374.

82. An indorsement on an indictment in the following language: "A true bill. Foreman of the Grand Jury, James T. Stafford," is a sufficient compliance with the statute requiring the indorsement of the foreman of the grand jury upon indictments. Goodman *v.* People, 90 Ill. App. 533. And the indorsement "A true bill," signed by the foreman of the grand jury, is a sufficient certifying of the same, under a statute requiring the foreman of the grand jury to certify under his hand that the indictment is a true bill. McDonald *v.* State, 8 Mo. 283; Spratt *v.* State, 8 Mo. 247. See also McKee *v.* State, 82 Ala. 32, 2 So. 451; Wesley *v.* State, 52 Ala. 182; State *v.* Jolly, 7 Iowa 15; People *v.* Peck, 2 N. Y. Cr. 314 [*affirmed* in 96 N. Y. 650].

83. Dixon *v.* State, 4 Greene (Iowa) 381. Thus it has been held sufficient where the indorsement was "True bill," omitting the letter "A" (Martin *v.* State, 30 Nebr. 507, 46 N. W. 621; State *v.* Elkins, Meigs (Tenn.) 109; State *v.* Davidson, 12 Vt. 300); "A thru bill" (State *v.* Williams, 47 La. Ann. 1609, 18 So. 647); or "A bill," omitting the word "true" (Sparks *v.* Com., 9 Pa. St. 354); and perhaps "True" alone would suffice (State *v.* Elkins, Meigs (Tenn.) 109). But where an indictment contained the indorsement: "Those marked 'X' sworn by the undersigned foreman and examined before the grand jury, and this bill found, W., Foreman Grand Jury," it was held that judgment should be arrested, as such indorsement failed to show that the grand jury returned the indictment as "A true bill," according to the immemorial practice in the state. State *v.* McBroom, 127 N. C. 528, 37 S. E. 193.

ment[84] or the signature[85] appears, or that the signature does not immediately follow the indorsement.[86] The foreman need not write the indorsement, but may sign one printed in the indictment or written thereon by the prosecuting attorney when the bill is prepared.[87] The signature must be that of the foreman;[88] but it may be that of a foreman appointed *pro tempore*,[89] and a variance between his name as signed and the name of the foreman in the record or in the indictment will not be fatal if the person signing was foreman.[90] It is sufficient if the foreman signs by making his mark,[91] or if his name is written in his presence and by his direction by the clerk of the grand jury,[92] and if he uses initials or the usual abbreviations for his christian name or names.[93] The indorsement and signature

84. Parker *v.* State, 125 Ala. 86, 27 So. 780; Blume *v.* State, 154 Ind. 343, 56 N. E. 771; State *v.* Jones, 2 Kan. App. 1, 42 Pac. 392 (at the foot of the indictment immediately following the last count therein); State *v.* Howell, 34 Mo. App. 86 (at the foot of the indictment); Burgess *v.* Com., 2 Va. Cas. 483 (on a separate sheet enveloping the indictment sufficient after verdict); State *v.* Hill, 48 W. Va. 132, 35 S. E. 831.

85. Blume *v.* State, 154 Ind. 343, 56 N. E. 771; Overshiner *v.* Com., 2 B. Mon. (Ky.) 344; State *v.* Hogan, 31 Mo. 340.

86. State *v.* Bowman, 103 Ind. 69, 2 N. E. 289 (signature preceding the words "A true bill," instead of being on the line with the word "foreman"); State *v.* Hogan, 31 Mo. 340 (sufficient where the words indorsed on an indictment: "A true bill, ———, Foreman of the Jury," were printed, and the name of the foreman was appended to the words descriptive of his office, instead of preceding them).

87. Tilly *v.* State, 21 Fla. 242; State *v.* Duncan, 8 Rob. (La.) 562; State *v.* Elliott, 98 Mo. 150, 11 S. W. 566; State *v.* Hogan, 31 Mo. 340; State *v.* Williamson, 7 Ohio Dec. (Reprint) 618, 4 Cinc. L. Bul. 279. The words "A true bill," as well as the capacity of the foreman, may be indorsed on an indictment by any person, under the direction of the grand jury. It is only necessary that the finding be signed by the foreman. State *v.* Duncan, *supra*.

88. See the cases cited in the notes following.

89. White *v.* State, 93 Ga. 47, 19 S. E. 49; Com. *v.* Noonan, 15 Phila. (Pa.) 372; State *v.* Collins, 6 Baxt. (Tenn.) 151, holding also that it is no objection to an indictment that it is indorsed "A true bill" by one of the jury as "special foreman of the grand jury," when his appointment as such *pro tempore* appears of record, although the record fails to show the absence of the regular foreman, or that he was excused or discharged, as this will be presumed in the absence of proof to the contrary.

90. Taylor *v.* State, 121 Ga. 362, 49 S. E. 317 (holding that where an indictment was indorsed "true bill," and signed by B as foreman of the grand jury, and in the body of the indictment the names of the grand jurors were stated, B's name being among the number, but the word "foreman" was written opposite the name of another juror, the difference in the designation of foreman in the indorsement and the body of the indictment constituted no reason for quashing the indictment); Mohler *v.* People, 24 Ill. 26 (holding that where the indorsement "true bill" is signed by a person as foreman, and the record shows that another person was appointed as foreman of the grand jury, the presumption would be that the person so appointed had been discharged and the one signing the indorsement appointed in his stead); Deitz *v.* State, 123 Ind. 85, 23 N. E. 1086 (the presumption is that the recital in the record is the mistake of the clerk). See also State *v.* Armstrong, 167 Mo. 257, 66 S. W. 961; State *v.* Calhoon, 18 N. C. 374; Geiger *v.* State, 25 Ohio Cir. Ct. 742; Green *v.* State, 88 Tenn. 614, 14 S. W. 430.

Foreman directed not to take part.— Under the Iowa statute providing that an indictment cannot be found without the concurrence of four jurors when the grand jury is composed of five members; nor without the concurrence of five jurors when the grand jury is composed of seven members, and that every indictment must be indorsed "A true bill," and the indorsement must be signed by the foreman of the grand jury, it was held that the foreman of a grand jury might sign an indorsement on an indictment, although he had been previously directed by the court not to take any part in the proceedings when the charge against defendant was being investigated. State *v.* Lightfoot, 107 Iowa 344, 78 N. W. 41.

91. State *v.* Tinney, 26 La. Ann. 460.

92. Benson *v.* State, 68 Ala. 544.

93. *Alabama.*— Germolgez *v.* State, 99 Ala. 216, 13 So. 517.

Georgia.— Studstill *v.* State, 7 Ga. 2.

Indiana.— Anderson *v.* State, 26 Ind. 89; Wassels *v.* State, 26 Ind. 30; Zimmerman *v.* State, 4 Ind. App. 583, 31 N. E. 550.

Iowa.— State *v.* Groome, 10 Iowa 308.

Louisiana.— State *v.* Granville, 34 La. Ann. 1088; State *v.* Folke, 2 La. Ann. 744.

Maine.— State *v.* Taggart, 38 Me. 298.

Massachusetts.— Com. *v.* Gleason, 110 Mass. 66.

Mississippi.— Easterling *v.* State, 35 Miss. 210.

North Carolina.— State *v.* Collins, 14 N. C. 117.

See 27 Cent. Dig. tit. "Indictment and Information," § 142.

are not insufficient because the word "Foreman" after the signature is not followed by the words "of the grand jury,"[94] or because it is misspelled,[95] or even because it is omitted altogether, for the records may be examined to ascertain who was foreman.[96] Anything else added, by way of description of the offense, to the indorsement of "A true bill," on an indictment signed by the foreman of the grand jury, is to be regarded as surplusage, and its falsity will not vitiate the indictment.[97]

c. Time of Objection. When it is required, either by statute or by recognition of the common-law rule, that an indictment shall be indorsed "A true bill" and signed by the foreman of the grand jury, the omission of the indorsement must in some jurisdictions be objected to before trial by motion to quash or demurrer; the objection is waived by pleading to the indictment and cannot be afterward raised by motion in arrest of judgment, or on writ of error or appeal.[98] In other cases the defect has been held fatal even on motion in arrest or writ of error or appeal.[99]

d. Amendment. It has been held that defects in the indorsement "A true bill" are defects in mere matter of form and amendable.[1] It has also been held that the signature of the foreman may be supplied by amendment;[2] but there is at least one decision to the contrary.[3]

e. Effect. The indorsement "A true bill" with the signature of the foreman is evidence that the indictment was found by a legal grand jury,[4] and that the requisite number concurred in the finding.[5] The indorsement "A true bill" on an indictment charging in different counts two persons with a crime applies to both defendants.[6]

2. Statement of Offense. In the absence of a statutory provision to the contrary, it is not necessary that the name or nature of the offense charged be indorsed on the indictment, and if it is so indorsed and there is a mistake therein or variance from the offense charged, the indorsement is no part of the indictment and may be rejected as surplusage.[7]

94. Washington *v.* State, 21 Fla. 328; McGuffie *v.* State, 17 Ga. 497; State *v.* Valere, 39 La. Ann. 1060, 3 So. 186; People *v.* Peck, 2 N. Y. Cr. 314 [*affirmed* in 96 N. Y. 650]; U. S. *v.* Plumer, 27 Fed. Cas. No. 16,056, 3 Cliff. 28.

95. State *v.* Karn, 16 La. Ann. 183, "fourman."

96. State *v.* Bowman, 103 Ind. 69, 2 N. E. 289; Beard *v.* State, 57 Ind. 8; State *v.* Sopher, 35 La. Ann. 975; Com. *v.* Read, Thach. Cr. Cas. (Mass.) 180; State *v.* Chandler, 9 N. C. 439; Whiting *v.* State, 48 Ohio St. 220, 27 N. E. 96; Com. *v.* Ferguson, 8 Pa. Dist. 120; State *v.* Brown, 31 Vt. 602.

97. State *v.* Heaton, 23 W. Va. 773.

98. *Arkansas.*— State *v.* Agnew, 52 Ark. 275, 12 S. W. 563.

California.— People *v.* Johnston, 48 Cal. 549; People *v.* Lawrence, 21 Cal. 368.

Georgia.— McGuffie *v.* State, 17 Ga. 497.

Iowa.— Wau-kon-chaw-neek-kaw *v.* U. S., Morr. 332.

Kentucky.— Patterson *v.* Com., 86 Ky. 313, 5 S. W. 765, 9 Ky. L. Rep. 481.

Minnesota.— State *v.* Shippey, 10 Minn. 223, 88 Am. Dec. 70.

Missouri.— State *v.* Hays, 78 Mo. 600; State *v.* Harris, 73 Mo. 287; State *v.* Murphy, 47 Mo. 274; State *v.* Mertens, 14 Mo. 94. And see State *v.* Runzi, 105 Mo. App. 319, 80 S. W. 36.

New Hampshire.— State *v.* Keyes, Smith 135.

United States.— Frisbie *v.* U. S., 157 U. S. 160, 15 S. Ct. 586, 39 L. ed. 657.

99. Gardner *v.* People, 4 Ill. 83 (holding, however, that if the record or writ of error shows indorsement "a true bill," it will be presumed that it was signed by the foreman in the absence of evidence to the contrary, the statute not requiring the signature of the foreman to be copied in the record); Nomaque *v.* People, 1 Ill. 145, 12 Am. Dec. 157; Webster's Case, 5 Me. 432; State *v.* McBroom, 127 N. C. 528, 37 S. E. 193. And see the other cases cited *supra*, III, G, 1, a.

1. State *v.* Williams, 47 La. Ann. 1609, 18 So. 647.

2. Bassham *v.* State, 38 Tex. 622. See also Com. *v.* Ferguson, 8 Pa. Dist. 120, holding that the word "Foreman" after the signature on an indictment may properly be supplied by amendment.

3. State *v.* Squire, 10 N. H. 558.

4. Dutell *v.* State, 4 Greene (Iowa) 125; Harriman *v.* State, 2 Greene (Iowa) 270; Turns *v.* Com., 6 Metc. (Mass.) 224.

5. Turns *v.* Com., 6 Metc. (Mass.) 224; State *v.* McNeill, 93 N. C. 552.

6. Thurmond *v.* State, 55 Ga. 598.

7. *Florida.*— Cherry *v.* State, 6 Fla. 679. See Holton *v.* State, 2 Fla. 476.

3. Title of Cause and Name of Accused. In the absence of a statute it is not necessary that the style or title of the cause or the name of defendant shall be indorsed on an indictment, and if it is indorsed it may be rejected as surplusage so that errors therein will be immaterial.[8]

4. Presentment. An indorsement by the grand jury on an indictment as founded upon "presentment" is not erroneous because not founded on their own knowledge, but on testimony heard by them.[9]

5. Names of Witnesses. It is not necessary at common law that the names of the witnesses examined before the grand jury shall be indorsed or otherwise appear on the indictment,[10] but this is sometimes required by statute.[11] As a general rule it is held that these statutes are merely directory, and that a failure to comply with them will not render an indictment invalid;[12] but in some states the statute is held mandatory,[13] or else it expressly provides that if not complied with

Illinois.— Collins *v.* People, 39 Ill. 233. And see Humpeler *v.* People, 92 Ill. 400.

Kentucky.— Com. *v.* English, 6 Bush 431.

Louisiana.— State *v.* De Hart, 109 La. 570, 33 So. 605; State *v.* Valere, 39 La. Ann. 1060, 3 So. 186; State *v.* Russell, 33 La. Ann. 135 [*overruling* to this extent State *v.* Morrison, 30 La. Ann. 817]; State *v.* Mason, 32 La. Ann. 1018; State *v.* McGinnis, 12 La. Ann. 743; State *v.* Rohfrischt, 12 La. Ann. 382; State *v.* Smith, 5 La. Ann. 340.

Virginia.— Thompson *v.* Com., 20 Gratt. 724.

West Virginia.— State *v.* Heaton, 23 W. Va. 773; State *v.* Fitzpatrick, 8 W. Va. 707.

See 27 Cent. Dig. tit. "Indictment and Information," § 140.

8. State *v.* Marion, 14 Mont. 458, 36 Pac. 1044. See People *v.* Page, 116 Cal. 386, 48 Pac. 326. But where another name than that of defendant was not only indorsed on the indictment, but also noted on the record of the return of the indictment, a motion to quash was granted. Com. *v.* McKinney, 8 Gratt. (Va.) 589. See *supra*. II, F, 3, a, (II). The omission of a letter in defendant's name, as indorsed on the back of the bill, is not ground for arrest of judgment, where he is properly named in the body of the indictment. State *v.* Duestoe, 1 Bay (S. C.) 377. When defendant's name appears correctly in the indictment, but in the indorsement there is a variance, the indorsement may be corrected at any time to conform to the indictment. State *v.* Anderson, 45 La. Ann. 651, 12 So. 737.

Name of defendant when a witness before the grand jury see *infra*, III, G, 5.

9. Com. *v.* Hurd, 177 Pa. St. 481, 35 Atl. 682.

10. Fisher *v.* U. S., 1 Okla. 252, 31 Pac. 195. *Compare* State *v.* Mitchell, 1 Bay (S. C.) 267.

11. See the cases in the notes following. And see Criminal Law, 12 Cyc. 513–515.

In Iowa the minutes of the evidence returned with the indictment and duly filed are made the test by which to determine whether the names of all the witnesses examined before the grand jury are indorsed on the indictment; and affidavits by grand jurors or other witnesses cannot be received to contradict the record. State *v.* Miller, 95 Iowa 368, 64 N. W. 288; State *v.* Little, 42 Iowa 51.

Sufficiency of indorsement see Criminal Law, 12 Cyc. 514.

12. *Arkansas.*— State *v.* Johnson, 33 Ark. 174.

Florida.— Hathaway *v.* State, 32 Fla. 56, 13 So. 592.

North Carolina.— State *v.* Hollingsworth, 100 N. C. 535, 6 S. E. 417; State *v.* Hines, 84 N. C. 810.

Texas.— Steele *v.* State, 1 Tex. 142.

Virginia.— Shelton *v.* Com., 89 Va. 450, 16 S. E. 355; Com. *v.* Williams, 5 Gratt. 702.

West Virginia.— State *v.* Shores, 31 W. Va. 491, 7 S. E. 413, 13 Am. St. Rep. 875; State *v.* Enoch, 26 W. Va. 253.

See 27 Cent. Dig. tit. "Indictment and Information," § 141. See also Criminal Law, 12 Cyc. 513.

Initials of foreman.— And so it has been held of a statute requiring the foreman of the grand jury to put his initials opposite the names of the witnesses on the back of a bill of indictment. O'Connell *v.* Reg., 11 Cl. & F. 155, 8 Eng. Reprint 1061; Reg. *v.* Buchanan, 12 Manitoba 190; Reg. *v.* Townsend, 28 Nova Scotia 468.

13. Andrews *v.* People, 117 Ill. 195, 7 N. E. 265; McKinney *v.* People, 7 Ill. 540, 43 Am. Dec. 65; Sutton *v.* Com., 97 Ky. 308, 30 S. W. 661, 17 Ky. L. Rep. 184; State *v.* Roy, 83 Mo. 268 [*overruling*, in so far as they are to the contrary, State *v.* Patterson, 73 Mo. 695; State *v.* Nugent, 71 Mo. 136]. See also Criminal Law, 12 Cyc. 515.

Oversight.— It has been held that the indictment will not be quashed where the name of only one of a number of witnesses has been omitted from oversight. Com. *v.* Glass, 107 Ky. 160, 53 S. W. 18, 21 Ky. L. Rep. 819.

Sufficiency of naming.— That a witness who was examined before the grand jury was designated in the indorsement of the indictment as "Dr." F, instead of giving his first name, is not sufficient ground for quashing the indictment, where it appears that both defendant and his counsel knew who was intended to be designated, and that defendant was not misled thereby nor prejudiced. State *v.* Phelps, 5 S. D. 480, 59 N. W. 471.

Signature of clerk.— An indictment will not be quashed because the indorsement on

the indictment shall be set aside.[14] The objection, it has been held, must be raised by motion to quash and not by demurrer,[15] and must be made before pleading and going to trial or it will be too late.[16] It has been held that it is not necessary to indorse the name of a person who is called by the grand jury, but who refuses to testify,[17] or whose testimony is immaterial,[18] or whose testimony does not contribute to the finding although it is material,[19] or the name of the accused although he testified before the grand jury;[20] and mere surplusage may be disregarded.[21] The names of the witnesses need not be written by the foreman or by any member of the grand jury.[22] It is no objection to an indictment that the prosecutor indorsed additional names of witnesses on the indictment after it was returned into court.[23] An indictment presented without the name of witnesses indorsed may properly, by order of court, be returned to the grand jury to supply the omission, and entered on the following day.[24]

IV. FILING AND FORMAL REQUISITES OF INFORMATION OR COMPLAINT.

A. Informations — 1. IN GENERAL. An information, as has been seen, is a written accusation of crime preferred by the public prosecuting officer, and will lie at common law for any misdemeanor, and by statute in some states even for felonies.[25]

2. FILING OF INFORMATIONS — a. In England. At common law in England there were two kinds of information for crime, one of which was filed by the attorney or solicitor general, and the other by the masters of the crown office upon the complaint or relation of a private subject. The former were generally for offenses more immediately against the king or the public safety, but could be filed also for offenses more particularly against individuals, and the latter were, aside from indictment, the usual mode of proceeding for misdemeanors against individuals.[26] Formerly both of these informations could be filed without leave

its back, stating that "the witnesses were sworn and sent to the grand jury," is not signed by the clerk. Bennett *v.* State, 2 Yerg. (Tenn.) 472.

14. People *v.* Crowey, 56 Cal. 36 (holding, however, that where the name of a witness, as given by him to the grand jury and indorsed on the indictment, was F D, but his true name was G D, the court properly refused to set aside the indictment); State *v.* Lewis, 96 Iowa 286, 65 N. W. 295; State *v.* Stevens, 1 S. D. 480, 47 N. W. 546.

15. Com. *v.* Brewer, 113 Ky. 217, 67 S. W. 994, 24 Ky. L. Rep. 72.

16. Sutton *v.* Com., 97 Ky. 308, 30 S. W. 661, 17 Ky. L. Rep. 184. See also State *v.* Nugent, 71 Mo. 136, as explained in State *v.* Roy, 83 Mo. 268; and CRIMINAL LAW, 12 Cyc. 515.

17. Gilmore *v.* People, 87 Ill. App. 128.

18. State *v.* Lewis, 96 Iowa 286, 65 N. W. 295; State *v.* Little, 42 Iowa 51; Com. *v.* Glass, 107 Ky. 160, 53 S. W. 18, 21 Ky. L. Rep. 819.

19. State *v.* Miller, 95 Iowa 368, 64 N. W. 288.

20. People *v.* Page, 116 Cal. 386, 48 Pac. 326.

21. Andrews *v.* People, 117 Ill. 195, 7 N. E. 265, holding that where the indictment was indorsed with the names of five witnesses, below which appeared the recital: "For other witnesses, see Off. Cosgrave and Palmer," the indorsement was sufficient, and the recital harmless as surplusage.

Fictitious name.— The fact that the name of one of two prosecuting witnesses on the back of an indictment is fictitious does not invalidate it. State *v.* McChesney, 16 Mo. App. 259 [*reversed* on other grounds in 90 Mo. 120, 1 S. W. 841].

22. Bartley *v.* People, 156 Ill. 234, 40 N. E. 831, holding that Rev. St. (1893) c. 78, § 17, which makes it the duty of the foreman of the grand jury to indorse each true bill as such, signing his name thereto as foreman, and also requires him to "note thereon the names of the witnesses upon whose evidence the same shall have been found," is sufficiently complied with when a true bill is indorsed by the foreman, and the names of the witnesses are written thereon by the prosecuting attorney.

23. Germolgez *v.* State, 99 Ala. 216, 13 So. 517.

24. State *v.* McNamara, 100 Mo. 100, 13 S. W. 938. See also State *v.* Roy, 83 Mo. 268. State *v.* Patterson, 73 Mo. 695; and CRIMINAL LAW, 12 Cyc. 513.

25. See *supra*, I, B, 3, a.

26. See State *v.* Keena, 64 Conn. 212, 29 Atl. 470; State *v.* Kyle, 166 Mo. 287, 65 S. W. 763, 56 L. R. A. 115; Territory *v.* Cutinola, 4 N. M. 160, 14 Pac. 809; Rex *v.* Wilkes, 4 Burr. 2527; Rex *v.* Phillips, 4 Burr. 2089; Rex *v.* Philipps, 3 Burr. 1564; 4 Blackstone Comm. 308, 309 (where it is said that this mode of prosecution is as ancient as the common law itself); 1 Chitty Cr. L. 166, 845; 2 Hawkins P. C. c. 26, § 1.

of court and without further oath or affidavit than the oath of office of the officer preferring it;[27] but by an English statute old enough to be a part of our common law if applicable to our conditions, it was provided that informations by masters of the crown office could only be filed by leave of court, and that they must be supported by the affidavit of the person at whose suit they were preferred.[28] Informations by the attorney or solicitor general could still be filed without leave of court and without affidavit or verification.[29]

b. In the United States — (I) *IN GENERAL.* In the United States the right of the prosecuting attorney to file informations has been recognized as at common law,[30] but the practice is now very generally regulated by statute. A constitutional provision requiring prosecution by "information" means the information of the common law preferred in England by the attorney or solicitor general without leave of court, and upon his own allegation and without his oath, which right in the United States is vested in the prosecuting attorneys by virtue of their office;[31] and the legislature cannot authorize any other information.[32]

(II) *AUTHORITY TO FILE.* An information may and must be preferred by the county attorney, district attorney, or other public prosecuting officer who has with us succeeded to the powers and duties of the attorney or solicitor general in England,[33] and it must show on its face that it was so preferred;[34] but an information may in a proper case be filed by a deputy or assistant prosecuting attorney,[35]

27. State *v.* Dover, 9 N. H. 468; 4 Blackstone Comm. 312; 1 Chitty Cr. L. 845.

28. St. 4 & 5 Wm. & M. c. 18.

29. State *v.* Dever, 9 N. H. 468; 4 Blackstone Comm. 312; 1 Chitty Cr. L. 845.

30. State *v.* Keena, 64 Conn. 212, 29 Atl. 470; Com. *v.* Waterborough, 5 Mass. 257; State *v.* Pohl, 170 Mo. 422, 70 S. W. 695; State *v.* Kyle, 166 Mo. 287, 65 S. W. 763, 56 L. R. A. 115; State *v.* Ulrich, 96 Mo. App. 689, 70 S. W. 933; State *v.* Ransberger, 42 Mo. App. 466 [*affirmed* in 106 Mo. 135, 17 S. W. 290]; State *v.* Dover, 9 N. H. 468; Territory *v.* Cutinola, 4 N. M. 160, 14 Pac. 809.

31. State *v.* Pohl, 170 Mo. 422, 70 S. W. 695; State *v.* Kyle, 166 Mo. 287, 65 S. W. 763, 56 L. R. A. 115; State *v.* Russell, 88 Mo. 648; State *v.* Ulrich, 96 Mo. App. 689, 70 S. W. 933; State *v.* Ransberger, 42 Mo. App. 466 [*affirmed* in 106 Mo. 135, 17 S. W. 290].

32. State *v.* Russell, 88 Mo. 648; State *v.* Briscoe, 80 Mo. 643; State *v.* Kelm, 79 Mo. 515; State *v.* Sebecca, 76 Mo. 55; State *v.* Ransberger, 42 Mo. App. 466 [*affirmed* in 106 Mo. 135, 17 S. W. 290].

33. *Alabama.*— State *v.* Moore, 19 Ala. 514.

Connecticut.—State *v.* Keena, 64 Conn. 212, 29 Atl. 470.

Florida.— King *v.* State, 17 Fla. 183.

Kansas.— State *v.* Gleason, 32 Kan. 245, 4 Pac. 363; Jackson *v.* State, 4 Kan. 150.

Louisiana.— State *v.* Cole, 38 La. Ann. 843.

Missouri.— State *v.* Anderson, 84 Mo. 524; State *v.* Thompson, 81 Mo. 163; State *v.* Kelm, 79 Mo. 515; State *v.* Ransberger, 42 Mo. App. 466 [*affirmed* in 106 Mo. 135, 17 S. W. 290]; *Ex p.* Thomas, 10 Mo. App. 24.

Nebraska.— Richards *v.* State, 22 Nebr. 145, 34 N. W. 346.

New Hampshire.— State *v.* Dover, 9 N. H. 468.

New Mexico.— Territory *v.* Cutinola, 4 N. M. 160, 14 Pac. 809.

Texas.— State *v.* Southern Pac. R. Co., 24 Tex. 80; Thompson *v.* State, 15 Tex. App. 39; Prophit *v.* State, 12 Tex. App. 233.

United States.— U. S. *v.* Tureaud, 20 Fed. 621.

See 27 Cent. Dig. tit. "Indictment and Information," § 144 *et seq.*

34. See *infra*, IV, A, 5.

35. People *v.* Griner, 124 Cal. 19, 56 Pac. 625; People *v.* Turner, 85 Cal. 432, 24 Pac. 857; State *v.* Ryder, 36 La. Ann. 294 (regardless of the presence or absence or disability by sickness of his superior); People *v.* Twombley, 62 Mich. 278, 28 N. W. 837 (in case of the absence, disability, or sickness of his superior); State *v.* Bennett, 102 Mo. 356, 14 S. W. 865, 10 L. R. A. 717; State *v.* Ittner, 100 Mo. App. 276, 73 S. W. 289; State *v.* Weeks, 88 Mo. App. 263; State *v.* Daly, 49 Mo. App. 184; State *v.* Hynes, 39 Mo. App. 569; State *v.* Ingalls, 59 N. H. 88 (by solicitor of the county in the absence of the attorney-general); Hammond *v.* State, 3 Wash. 171, 28 Pac. 334. La. Acts (1880), No. 96, providing that "it shall be the duty of the district attorney and assistant district attorney to conduct the prosecution of all criminal cases," etc., does not import that the former must be present when an information is prepared, signed, and filed by the latter. State *v.* Ryder, 36 La. Ann. 294. An information reciting that it was presented by the "Deputy Co. Atty." sufficiently designates the "assistant" county attorney. Wilkins *v.* State, 33 Tex. Cr. 320, 26 S. W. 409.

It will be presumed that an information filed by an assistant prosecuting attorney was filed by a proper official and that he was duly appointed by the prosecuting attorney alone, under Mo. Rev. St. (1899) § 4975, in the absence of anything in the record to the contrary. State *v.* Weeks, 88 Mo. App. 263. See also State *v.* Fitzporter, 17 Mo. App. 271.

or *de facto* assistant,[36] or by one who has been duly appointed special prosecuting attorney or prosecuting attorney *pro tem.*[37] And it has been held that an information filed by another may be adopted by the prosecuting attorney, and that the fact that he appears and prosecutes is proof of his adoption.[38]

(III) *LEAVE OF COURT.* It has generally been held that the kind of information in use with us is that which in England was filed by the attorney or solicitor general,[39] whose powers are here exercised by the various prosecuting attorneys, and that leave of court therefore is not necessary unless expressly required by statute.[40] In some states, however, leave or consent of court is now required by statute,[41] unless there has been a preliminary examination and commitment.[42] After the court has granted leave to file an information such leave cannot be revoked,[43] except in extreme cases.[44] An information need not show on its face

Signature see *infra*, IV, A, 5, f.

36. People *v.* Turner, 85 Cal. 432, 24 Pac. 857, *de facto* assistant district attorney appointed by the board of supervisors instead of by the district attorney.

37. Williams *v.* People, 26 Colo. 272, 57 Pac. 701; Lasley *v.* District of Columbia, 14 App. Cas. (D. C.) 407; State *v.* Robacker, 31 La. Ann. 651. But under Kan. Gen. St. (1897) c. 102, § 84, providing that informations may be filed by the prosecuting attorney of the proper county, and chapter 89, section 6, directing that, in the absence or disability of both the county attorney and his deputy, any court before whom it is his duty to appear may appoint an attorney to act as county attorney, where the prosecuting attorney is present in court at the time of an order appointing a private person to prosecute the action, and it does not appear that the prosecuting attorney is unable to prosecute the action, the district court is without power to authorize such private person to sign and file an information against defendant and to conduct the prosecution. State *v.* Brown, 63 Kan. 262, 65 Pac. 213.

38. State *v.* Boogher, 8 Mo. App. 600, 7 Mo. App. 573.

39. See *supra*, IV, A, 2, a.

40. *Alabama.*— State *v.* Moore, 19 Ala. 514.

Connecticut.—State *v.* Keena, 64 Conn. 212, 29 Atl. 470.

Florida.— King *v.* State, 17 Fla. 183.

Illinois.— Gallagher *v.* People, 120 Ill. 179, 11 N. E. 335 [*affirming* 29 Ill. App. 397].

Louisiana.— State *v.* Cole, 38 La. Ann. 843.

Missouri.— State *v.* Jones, 168 Mo. 398, 68 S. W. 566; State *v.* Kyle, 166 Mo. 287, 65 S. W. 763, 56 L. R. A. 115; State *v.* Kelm, 79 Mo. 515; State *v.* Ransberger, 42 Mo. App. 466 [*affirmed* in 106 Mo. 135, 17 S. W. 290].

Nebraska.— Sharp *v.* State, 61 Nebr. 187, 85 N. W. 38.

New Hampshire.— State *v.* Dover, 9 N. H. 468.

New Mexico.— Territory *v.* Cutinola, 4 N. M. 160, 14 Pac. 809.

Contra.— U. S. *v.* Smith, 40 Fed. 755; U. S. *v.* Maxwell, 26 Fed. Cas. No. 15,750, 3 Dill. 275.

41. Walker *v.* People, 22 Colo. 415, 45 Pac. 388; State *v.* Cole, 38 La. Ann. 843; State *v.* De Serrant, 33 La. Ann. 979; State *v.* Smith, 12 Mont. 378, 30 Pac. 679; Bishop *v.* Com., 13 Gratt. (Va.) 785. Under Ill. Rev. St. p. 343, § 182, which provides that, when an information for an offense cognizable in the county court shall be presented by any person other than the state's attorney or attorney-general, the county judge shall indorse thereon that there is probable cause for filing the same, where an information against one for selling liquor to habitual drunkards is filed by the state's attorney, accompanied by the affidavit of a third person as to the facts, the accompanying affidavit does not make the information that of the third party, so as to require the judge to indorse it as provided in the statute. Gallagher *v.* People, 129 Ill. 179, 11 N. E. 335.

Discretion of court.— Even where a statute authorized prosecution by information "with the consent of the court first obtained," it was held in Louisiana that the court had no right to refuse leave to the district attorney to file an information "except in extreme cases, not likely to occur" (State *v.* Cole, 38 La. Ann. 843), and therefore that the court could not withhold its consent on the ground that the statute under which the prosecution was instituted was unconstitutional (State *v.* Judge Tenth Judicial Dist., 33 La. Ann. 1222). Elsewhere it has been held that leave to file an information without a previous examination of the accused before a committing magistrate should not be granted as of course, but rests in the sound discretion of the court on a proper showing. State *v.* Martin, 29 Mont. 273, 74 Pac. 725.

Application for leave.— An application for leave to file an information without a previous examination before a committing magistrate need not set forth the facts, it being sufficient that reasons satisfactory to the district court were presented, without regard to the manner of the presentation. State *v.* Martin, 29 Mont. 273, 74 Pac. 725.

42. Walker *v.* People, 22 Colo. 415, 45 Pac. 388; State *v.* Spotted Hawk, 22 Mont. 33, 55 Pac. 1026; State *v.* Bowser, 21 Mont. 133, 53 Pac. 179; State *v.* Brett, 16 Mont. 360, 40 Pac. 873.

43. State *v.* Ross, 14 La. Ann. 364.

44. State *v.* Cain, 16 Mont. 561, 41 Pac. 709; State *v.* Brett, 16 Mont. 360, 40 Pac. 873.

that it was filed with leave of court, but it is sufficient if this appears on the record.[45] And an order granting leave need not be in writing or entered at the time it is made.[46]

(iv) *Jurisdiction of Court.* An information, to have any validity, must of course be preferred in a court having jurisdiction of the offense and of prosecutions by this mode,[47] and in some states by statute this must affirmatively appear on the face of the information.[48]

(v) *Arrest and Custody of Accused.* In the absence of a statute it is not necessary to authorize the filing of an information that the accused shall be in custody or on bail;[49] but this is sometimes required by statute in certain cases or in particular courts, and it is then necessary;[50] and the offense charged in the information must be substantially the same as that for which the accused is in custody or on bail.[51] In such case the fact that the arrest of the accused was illegal does not affect the right to file an information.[52] The fact that defendant was arrested on a complaint before the information was filed is no ground for quashing the information.[53] Indeed this is sometimes required by statute.[54]

(vi) *When Grand Jury Is in Session.* In the absence of a statute the authority of the prosecuting attorney to file an information is not affected by the fact that the grand jury is in session so that a bill of indictment might be preferred;[55] but it is otherwise in some states by statute in certain cases.[56]

(vii) *After or Pending Indictment.* It has been held that it is no objec-

45. See *infra*, IV, A, 5, e.

46. State *v.* Bowser, 21 Mont. 133, 53 Pac. 179.

47. Harrison *v.* State, 17 Ind. 422; Justice *v.* State, 17 Ind. 56; McCarty *v.* State, 16 Ind. 310; Bowen *v.* State, 28 Tex. App. 498, 13 S. W. 787.

Conditions required to confer jurisdiction see *infra*, IV, A, 2, b, (v)–(ix).

48. See *infra*, IV, A, 5, b.

49. La. Act (1880) No. 35, authorizing the district attorney to file informations in the office of the clerk of the district court, when not in session, in all cases where the penalty is not imprisonment at hard labor or death, and making it the duty of the sheriff to notify the district attorney of all persons charged with such offenses who are under arrest, does not limit the district attorney's authority to file informations against those only whom the sheriff holds in custody. State *v.* Jackson, 45 La. Ann. 975, 978, 13 So. 342, 343.

50. Rowland *v.* State, 126 Ind. 517, 26 N. E. 485; State *v.* Henderson, 74 Ind. 23; Burroughs *v.* State, 72 Ind. 334; Lindsey *v.* State, 72 Ind. 39; Cobb *v.* State, 27 Ind. 133; Harrison *v.* State, 17 Ind. 422; Justice *v.* State, 17 Ind. 56; McCarty *v.* State, 16 Ind. 310. See also *infra*, IV, A, 2, b, (x), text and notes 69–73.

Showing of jurisdictional fact in the information see *infra*, IV, A, 5, e.

51. Davis *v.* State, 69 Ind. 130; Cobb *v.* State, 27 Ind. 133; Walker *v.* State, 23 Ind. 61; Broadhurst *v.* State, 21 Ind. 333; Roberts *v.* State, 19 Ind. 180; Kreigh *v.* State, 17 Ind. 495; Justice *v.* State, 17 Ind. 56.

52. The right to file an information when defendant is in actual custody, as authorized by Ind. Rev. St. (1897) § 1771, is not affected by the fact that the affidavit or information on which he was originally arrested was defective or irregular. Rowland *v.* State, 126 Ind. 517, 26 N. E. 485.

53. Evans *v.* State, 36 Tex. Cr. 32, 35 S. W. 169.

54. See *infra*, IV, A, 2, b, (x).

55. State *v.* Cole, 38 La. Ann. 843.

56. In Indiana the statute provides that there may be a prosecution by information: "*First.* Whenever any person is in custody, or on bail, on a charge of felony or misdemeanor, except treason and murder, and the Court is in session, and the grand jury is not in session or has been discharged. *Second.* Whenever an indictment, presented by any grand jury, has been quashed, and the grand jury for the term when such indictment is quashed is not in session or has been discharged. . . . *Fourth.* Whenever a public offense has been committed, and the party charged with the offense is not already under indictment therefor, and the Court is in session, and the grand jury has been discharged for the term." Ind. St. (1897) § 1771. See Kennegar *v.* State, 120 Ind. 176, 21 N. E. 917; Elder *v.* State, 96 Ind. 162; Iter *v.* State, 74 Ind. 188; State *v.* Henderson, 74 Ind. 23; Burroughs *v.* State, 72 Ind. 334; Lindsey *v.* State, 72 Ind. 39; Davis *v.* State, 69 Ind. 130. If the court has acquired jurisdiction by affidavit and information when the grand jury was not in session, it is not deprived of jurisdiction by the subsequent meeting of the grand jury without finding an indictment. Elder *v.* State, *supra*. When a prosecution has been commenced in vacation and defendant has recognized to the next term, he can be tried on information at such term before the impaneling of the grand jury. Kennegar *v.* State, *supra*.

In Washington the code contains provisions substantially like those in Indiana above referred to. 2 Ballinger Codes & St. § 6802. See State *v.* Lewis, 31 Wash. 515, 72 Pac.

tion to an information that it was filed pending an indictment for the same offense.[57] In some jurisdictions, however, it is otherwise by statute.[58] An information may be filed at common law, or in some states by express statutory authority, after an indictment has been quashed,[59] or after a *nolle prosequi* has been entered,[60] or where a conviction has been reversed on appeal because of a defect in an indictment.[61]

(VIII) *AFTER FAILURE OF GRAND JURY TO FIND INDICTMENT.* An information may be filed, in the absence of a statute to the contrary, although the grand jury have investigated the case and refused or failed to find an indictment;[62] but under some statutes the rule is otherwise.[63]

(IX) *CONSENT OF ACCUSED AND ELECTION.* Statutes sometimes require the consent of the accused to authorize prosecution by information for particular offenses or in particular courts;[64] and in such case the offense charged in the information must be substantially the same as that on which the accused has submitted to the jurisdiction.[65] But consent of or election by the accused is not necessary when not required by statute.[66]

(X) *PRELIMINARY PROCEEDINGS*—(A) *Preliminary Examination and Commitment or Binding Over.*[67] In the absence of a statute a preliminary examination and a commitment or binding over by a magistrate is not necessary before the filing of an information.[68] In some states, however, a preliminary examination

121; State *v.* Boyce, 24 Wash. 514, 64 Pac. 719; State *v.* Nelson, 13 Wash. 523, 43 Pac. 637; State *v.* Munson, 7 Wash. 239, 34 Pac. 932; State *v.* Anderson, 5 Wash. 350, 31 Pac. 969.

Showing of jurisdictional facts in the information see *infra*, IV, A, 5, e.

57. State *v.* McKinney, 31 Kan. 570, 3 Pac. 356; State *v.* Stewart, 47 La. Ann. 410, 16 So. 945.

58. Jones *v.* State, 18 Ind. 179.

Effect of information pending trial on indictment.— On the trial of one indicted for a crime, where the prosecuting attorney, believing that there has been a variance, interrupts the trial, and draws an information, on which defendant is arraigned, but refuses to plead, and the original action is proceeded with, a plea in the original action of another action pending, based on the preparation of the information and defendant's arraignment thereon, is properly overruled, since he has not been placed in jeopardy under the information. Hasse *v.* State, 8 Ind. App. 488, 36 N. E. 54.

59. Iter *v.* State, 74 Ind. 188; Alderman *v.* State, 24 Nebr. 97, 38 N. W. 36; U. S. *v.* Nagle, 27 Fed. Cas. No. 15,852, 17 Blatchf. 258. It has been held that a statute authorizing an information for felony to be filed "when an indictment has been found by the grand jury, and has been quashed" (Ind. Acts (1879), p. 143), means "when an indictment has been found by the grand jury for the felony on a charge of which the accused is in custody." Iter *v.* State, 74 Ind. 188. See also Fox *v.* State, 76 Ind. 243.

Grand jury in session.— But sometimes the statute allows an information in such case only where the grand jury for the term at which the indictment is quashed is not in session or has been discharged. Dye *v.* State, 130 Ind. 87, 29 N. E. 771. See also *supra*, IV, A, 2, b, (VI).

60. Dye *v.* State, 130 Ind. 87, 29 N. E. 771; Reg. *v.* Mitchel, 3 Cox C. C. 93.

Provided, under the Indiana statute, the court is in session and the grand jury has been discharged. Dye *v.* State, 130 Ind. 87, 29 N. E. 771.

61. Ind. St. (1897) § 1771.

62. *Ex p.* Moan, 65 Cal. 216, 3 Pac. 644; State *v.* Ross, 14 La. Ann. 364; State *v.* Whipple, 57 Vt. 637. It is no bar to an information for manslaughter that the grand jury has before its filing ignored an indictment for murder for the same homicide. State *v.* Vincent, 36 La. Ann. 770.

63. State *v.* Boswell, 104 Ind. 541, 4 N. E. 675; Richards *v.* State, 22 Nebr. 145, 34 N. W. 346.

64. Cobb *v.* State, 27 Ind. 133; Smith *v.* State, 19 Ind. 227.

Showing of fact of consent in the information see *infra*, IV, A, 5, e.

65. Cobb *v.* State, 27 Ind. 133; Justice *v.* State, 17 Ind. 56.

66. A statute authorizing the prosecution of felonies by affidavit and information, when the accused is in custody and no grand jury is in session, where an indictment has been found and quashed, or where a conviction has been reversed for defects in the indictment, and providing that any person accused of felony shall have the right to demand that he be prosecuted without delay by affidavit and information, does not make the demand or consent of the accused a prerequisite to a prosecution by affidavit and information, but merely gives him the right to have the prosecution conducted in such manner if he so elects. Sturm *v.* State, 74 Ind. 278; Jones *v.* State, 74 Ind. 249; Heanley *v.* State, 74 Ind. 99.

67. See also CRIMINAL LAW, 12 Cyc. 304–321.

68. *Colorado.*— Holt *v.* People, 23 Colo. 1, 45 Pac. 374.

and a commitment or binding over or finding of probable cause by a magistrate are required by statute,[69] unless the accused is a fugitive from justice,[70] or waives an examination,[71] or, in some states, unless the information is filed by order or

Louisiana.— State *v.* Anderson, 30 La. Ann. 557.

Montana.— State *v.* Brett, 16 Mont. 360, 40 Pac. 873.

New Hampshire.— State *v.* Dover, 9 N. H. 468.

Oklahoma.— Territory *v.* Stroud, 6 Okla. 106, 50 Pac. 265.

Wyoming.— State *v.* Krohne, 4 Wyo. 347, 34 Pac. 3.

Contra.— U. S. *v.* Moller, 26 Fed. Cas. No. 15,794, 16 Blatchf. 65.

69. *California.*— People *v.* McCurdy, 68 Cal. 576, 10 Pac. 207; People *v.* Shubrick, 57 Cal. 565; Kalloch *v.* San Francisco Super. Ct., 56 Cal. 229.

Delaware.— State *v.* Moore, 2 Pennew. 299, 46 Atl. 669.

Idaho.— *In re* Knudtson, 10 Ida. 676, 79 Pac. 641; *In re* Jay, 10 Ida. 540, 79 Pac. 202; State *v.* Farris, 5 Ida. 666, 51 Pac. 772. A prosecuting attorney has no right to file an information against any one, where the depositions at the preliminary examination fail to disclose any reasonable or probable cause for believing defendant guilty of an offense, unless defendant has waived examination. *In re* Knudtson, *supra.*

Kansas.— State *v.* Goetz, 65 Kan. 125, 69 Pac. 187; State *v.* Woods, 49 Kan. 237, 30 Pac. 520; State *v.* Geer, 48 Kan. 752, 30 Pac. 236; *In re* Eddy, 40 Kan. 592, 20 Pac. 283; State *v.* Finley, 6 Kan. 366. A preliminary examination under Cr. Code, art. 5, which does not result in a finding by the examining magistrate that there is probable cause to believe the person guilty of the offense charged, will not authorize the county attorney to file an information against such accused, or the court to try such information when the same is attacked by a plea in abatement. State *v.* Goetz, *supra.*

Michigan.— People *v.* Wright, 89 Mich. 70, 50 N. W. 792; People *v.* Evans, 72 Mich. 367, 40 N. W. 473; People *v.* Dowdigan, 67 Mich. 95, 38 N. W. 920; Stuart *v.* People, 42 Mich. 255, 3 N. W. 863; O'Hara *v.* People, 41 Mich. 623, 3 N. W. 161; Sneed *v.* People, 38 Mich. 248; Byrnes *v.* People, 37 Mich. 515; Turner *v.* People, 33 Mich. 363; Hamilton *v.* People, 29 Mich. 173; People *v.* Jones, 24 Mich. 215; Morrissey *v.* People, 11 Mich. 327; Washburn *v.* People, 10 Mich. 372. Where complaint is made and a warrant issued for an offense, and the examining magistrate certifies that it appears to him that the said offense so charged has been committed, and that there is probable cause to believe the accused to have been guilty of the commission thereof, it is sufficient to authorize the prosecuting attorney to file an information. Brown *v.* People, 39 Mich. 37.

Montana.— State *v.* Brett, 16 Mont. 360, 40 Pac. 873.

Nebraska.— Miller *v.* State, 29 Nebr. 437, 45 N. W. 451.

Washington.— State *v.* Lewis, 31 Wash. 515, 72 Pac. 121; State *v.* Boyce, 24 Wash. 514, 64 Pac. 719; State *v.* Anderson, 5 Wash. 350, 31 Pac. 969.

Wisconsin.— Brown *v.* State, 91 Wis. 245, 64 N. W. 749; State *v.* Leicham, 41 Wis. 565.

Wyoming.— State *v.* Boulter, 5 Wyo. 236, 39 Pac. 883.

See 27 Cent. Dig. tit. "Indictment and Information," § 152; and CRIMINAL LAW, 12 Cyc. 305.

Indorsement of order of commitment on depositions.— The making of an order of commitment, and its entry on the docket of the magistrate, are sufficient to constitute a legal commitment, which will support an information, although such order is not indorsed on the depositions returned into court by the magistrate. People *v.* Tarbox, 115 Cal. 57, 46 Pac. 896.

Loss of complaint; second examination see *infra,* note 74.

Showing fact of examination and commitment in the information see *infra,* IV, A, 5, e.

70. State *v.* Woods, 49 Kan. 237, 30 Pac. 520; *In re* Eddy, 40 Kan. 592, 20 Pac. 283; State *v.* Finley, 6 Kan. 366; People *v.* Kuhn, 67 Mich. 463, 35 N. W. 88; Miller *v.* State, 29 Nebr. 437, 45 N. W. 451. See also CRIMINAL LAW, 12 Cyc. 305.

71. State *v.* Farris, 5 Ida. 666, 51 Pac. 772; State *v.* Clark, 4 Ida. 7, 35 Pac. 710; State *v.* Geer, 48 Kan. 752, 30 Pac. 236; Jennings *v.* State, 13 Kan. 80; State *v.* Finley, 6 Kan. 366; Stuart *v.* People, 42 Mich. 255, 3 N. W. 863; Sneed *v.* People, 38 Mich. 248; State *v.* McCaffery, 16 Mont. 33, 40 Pac. 63.

Contra.— In some states the preliminary examination and commitment required by the statute cannot be waived by the accused. Kalloch *v.* San Francisco Super. Ct., 56 Cal. 229.

Waiver of preliminary examination see also CRIMINAL LAW, 12 Cyc. 306, 307.

Information varying from complaint.— Waiver of examination on a complaint charging an offense is not a waiver of an examination on the charge of a different offense contained in an information subsequently filed. Brown *v.* State, 91 Wis. 245, 64 N. W. 749, where the complaint on which the examination was waived charged perjury in the county court on Oct. 7, 1892, and the information charged perjury in the circuit court on Dec. 16, 1892.

Waiver by plea.— It is generally held that if defendant pleads to the merits instead of moving to quash the information or pleading in abatement, he waives the objection that there was no preliminary examination or that it was for any reason not such an examination as he was entitled to. State *v.* Collins, 4 Ida. 184, 38 Pac. 38; State *v.* Clark, 4 Ida.

leave of the court.[72] When a preliminary examination and commitment are required to authorize the filing of an information, an information cannot be filed until after the examination and commitment.[73] As a rule the information must be for the same offense for which the accused was examined and committed or held, or for the offense stated in the commitment or disclosed by the depositions taken and returned by the magistrate, or by the evidence,[74] or charged by the complaint and warrant where a preliminary examination has been waived by the

7, 35 Pac. 710; Jennings *v.* State, 13 Kan. 90; State *v.* McCaffery, 16 Mont. 33, 40 Pac. 63; Cowan *v.* State, 22 Nebr. 519, 35 N. W. 405. See also CRIMINAL LAW, 12 Cyc. 307.

72. State *v.* Finley, 6 Kan. 366; State *v.* Spotted Hawk, 22 Mont. 33, 55 Pac. 1026; State *v.* Bowser, 21 Mont. 133, 53 Pac. 179; State *v.* Brett, 16 Mont. 360, 40 Pac. 873.

73. People *v.* McCurdy, 68 Cal. 576, 10 Pac. 207, holding, however, that where the order of commitment is filed on the same day as the information, it will be presumed, in the absence of proof to the contrary, that the information was filed subsequent to the commitment. A judgment of conviction will not be reversed because of an order denying a motion to set aside the information on the ground that it was filed before the record of the preliminary examination or order of commitment had been filed, where the order of commitment had been in fact made and entered of record by the magistrate. People *v.* Tarbox, 115 Cal. 57, 46 Pac. 896. Under Howell Annot. St. (Mich.) §§ 9470, 9471, which require a justice, before whom a person charged with crime is brought for examination, to hold him to answer when he is of the opinion that an offense has been committed and that there is probable cause to believe the accused guilty thereof, the decision of justice on these points is a judicial determination, necessary to the jurisdiction of the circuit court; and an information filed in the circuit court, before any return has been made showing such a decision by a justice, should be quashed, even though a proper return is made pending the motion to quash. People *v.* Evans, 72 Mich. 367, 40 N. W. 473.

74. *California.*— In this state the code provides that where one is examined and committed, the magistrate shall indorse on the depositions taken and returned by him an order that "the offense in the within depositions mentioned (or any offense, according to the fact, stating generally the nature thereof), has been committed," and that the district attorney shall file an information "charging the defendant with such offense." Pen. Code, §§ 809, 872. The district attorney is not confined to charging the offense designated by the magistrate, but may charge the offense disclosed by the depositions. People *v.* Vierra, 67 Cal. 231, 7 Pac. 640. Where the testimony before the magistrate tends to support a theory of murder, the determination of the district attorney to charge that offense is conclusive, so far as the validity of the information is concerned, although the magistrate's commitment was for manslaughter. People *v.* Giancoli, 74 Cal. 642, 16 Pac. 510. An information, however, cannot be filed for a different offense than that set forth in the complaint or in the depositions. People *v.* Howard, 111 Cal. 655, 44 Pac. 342; People *v.* Christian, 101 Cal. 471, 35 Pac. 1043 (variance as to person assaulted); People *v.* Wallace, 94 Cal. 497, 29 Pac. 950 (larceny); People *v.* Parker, 91 Cal. 91, 27 Pac. 537 (burglary). *Compare* People *v.* Staples, 91 Cal. 23, 27 Pac. 523.

Kansas.— State *v.* Jarrett, 46 Kan. 754, 27 Pac. 146; State *v.* Reedy, 44 Kan. 190, 24 Pac. 66; Redmond *v.* State, 12 Kan. 172.

Michigan.— Yaner *v.* People, 34 Mich. 286; People *v.* Jones, 24 Mich. 215. The information need not be wholly based upon the facts stated in the complaint and warrant, but the offense may be described as it is disclosed by the facts appearing upon the preliminary examination. People *v.* Karste, 132 Mich. 455, 93 N. W. 1081; People *v.* Bird, 126 Mich. 631, 86 N. W. 127; People *v.* Pichette, 111 Mich. 461, 69 N. W. 739; People *v.* Russell, 110 Mich. 46, 67 N. W. 1099; Brown *v.* People, 39 Mich. 37. The information may fix a different date than that alleged in the complaint (People *v.* Russell, *supra*; People *v.* Whitney, 105 Mich. 622, 63 N. W. 765; People *v.* Flock, 100 Mich. 512, 59 N. W. 237), and it may set out facts relating to the offense, brought out on examination, which were not set out in the complaint. (People *v.* Oscar, 105 Mich. 704, 63 N. W. 971). It is not fatal that the offense charged in an information varies from that charged in the complaint and warrant before the magistrate before whom the preliminary examination was had, so long as it relates to the same transaction. People *v.* Bechtel, 80 Mich. 623, 633, 45 N. W. 582, 585. Where there has been an examination before a magistrate on a complaint and a warrant charging a larceny of goods, and the accused is held for trial, the information may contain a count for receiving stolen goods. Brown *v.* People, *supra*.

Nebraska.— Alderman *v.* State, 24 Nebr. 97, 38 N. W. 36.

Washington.— An information need not charge the same crime as that named in commitment. State *v.* Myers, 8 Wash. 177, 35 Pac. 580, 756.

Wisconsin.— In this state the statute authorizes the district attorney, after an examination for a criminal offense resulting in the commitment of the accused or holding him to bail, "to file an information setting forth the crime committed according to the facts ascertained on such examination and from the written testimony taken thereon, whether it be the same offense charged in the complaint on which the examination was had or not." Wis. St. (1898) § 4653. Under

accused;[75] but if the offense is substantially the same it is sufficient.[76] It has been held that, since an information cannot go beyond the charge made in the complaint and to which the accused has been held to answer, where a complaint

this statute the information filed by the district attorney against one who has been thus committed or held to bail need not be for the offense charged in the complaint before the magistrate, but may be for any offense shown to have been committed by the accused by the testimony taken on the examination; and the district attorney is not bound by the opinion, or even the adjudication, of the magistrate as to what crime has been committed, but may exhibit an information as for felony if, in his opinion, the testimony so taken proves the accused guilty thereof, although the magistrate may have found him guilty of a misdemeanor only. State *v.* Leicham, 41 Wis. 565. Under said section and section 4650, providing that an information may join counts for different offenses when the same could be joined in an indictment, an information may join counts for incest and rape, when the complaint charges incest, and the evidence shows that the crime was committed with force. Porath *v.* State, 90 Wis. 527, 63 N. W. 1061, 48 Am. St. Rep. 954.

Wyoming.— The prosecuting attorney can proceed by information only for the offense designated by the magistrate who holds the examination. State *v.* Boulter, 5 Wyo. 236, 39 Pac. 883.

See 27 Cent. Dig. tit. "Indictment and Information," §§ 321, 322.

Loss of complaint or warrant.— Where a complaint filed by a committing magistrate has been lost, it is not necessary to hold another preliminary examination before an information can be filed, especially where defendant waived a preliminary examination. *In re* Jay, 10 Ida. 540, 79 Pac. 202. If the complaint and warrant on which the preliminary examination and commitment were based are lost the state may prove their contents. People *v.* Coffman, 59 Mich. 1, 26 N. W. 207.

Second preliminary examination.— A plea in abatement grounded on the fact that defendant had two preliminary examinations, and that on the first he was held for a lower grade of crime than upon the one which is the basis of the information filed against him, is demurrable, as the fact that he was held on such lower grade of crime did not entitle him to immunity from prosecution for the higher. Thompson *v.* State, 61 Nebr. 210, 85 N. W. 62, 87 Am. St. Rep. 453.

75. State *v.* Jarrett, 46 Kan. 754, 27 Pac. 146; People *v.* Handley, 93 Mich. 46, 52 N. W. 1032.

Amended information.— Where defendant, waiving examination, is bound over to the circuit court, and is informed against under Howell Annot. St. Mich. § 9123, for the burning of a dwelling-house, following the complaint, the information cannot afterward be amended so as to charge him with burning a building other than a dwelling-house, under section 9127, which is a different crime, and subject to a different penalty. People *v.* Handley, 93 Mich. 46, 52 N. W. 1032.

76. *California.*— People *v.* Price, 143 Cal. 351, 77 Pac. 73 (burglary); People *v.* Smith, 112 Cal. 333, 44 Pac. 663 (larceny).

Connecticut.— State *v.* Pritchard, 35 Conn. 319.

Kansas.— State *v.* Reedy, 44 Kan. 190, 24 Pac. 66; State *v.* Spencer, 43 Kan. 114, 23 Pac. 159; State *v.* Spaulding, 24 Kan. 1.

Michigan.— People *v.* Bird, 126 Mich. 631, 86 N. W. 127; People *v.* Oscar, 105 Mich. 704, 63 N. W. 971; People *v.* Bechtel, 80 Mich. 623, 633, 45 N. W. 582, 585; People *v.* Haley, 48 Mich. 495, 12 N. W. 671; Brown *v.* People, 39 Mich. 37.

Nebraska.— Van Syoc *v.* State, (1903) 96 N. W. 266; Mills *v.* State, 53 Nebr. 263, 73 N. W. 761; Hockenberger *v.* State, 49 Nebr. 706, 68 N. W. 1037; Cowan *v.* State, 22 Nebr. 519, 35 N. W. 405.

See 27 Cent. Dig. tit. "Indictment and Information," §§ 321, 322.

Illustrations.— Where defendant was complained of for embezzlement as city clerk, an information may be filed charging him as "officer," as "officer, agent, clerk, servant, and employé," as "agent, clerk, and servant," etc. State *v.* Spaulding, 24 Kan. 1. Where a complaint before a magistrate charged defendant with fraudulently procuring money by mortgaging property to which he had no claim or title, while the information filed in the district court charged him with fraudulently procuring money by mortgaging certain specific property of which he fraudulently claimed title, it was held that the charges were substantially the same, and a plea of want of preliminary examination would not avail. Cowan *v.* State, 22 Nebr. 519, 35 N. W. 405. Where a preliminary examination was had on a warrant charging an assault upon "—— Bert," and the information filed charged an assault on "Joseph Burt," it was held that a plea in abatement, because defendant had had no preliminary examination, was properly overruled. State *v.* Johnson, 70 Kan. 861, 79 Pac. 732. And where defendant was committed by a magistrate for stealing sheep owned jointly by ten individuals, while the information filed in the district court alleged a several ownership in six of the same ten men, it was held that the variance was not fatal, it appearing from the statements in the commitment and those in the information that both were intended to describe the same offense. State *v.* McKee, 17 Utah 370, 53 Pac. 733.

If the identity of the offense is preserved, the statement of it in the information may be varied from that of the complaint. Mills *v.* State, 53 Nebr. 263, 73 N. W. 761.

That an offense was committed jointly need not appear from the return of the examining

fails to charge any offense, no valid information can be based upon it.[77] But it has been generally held that the validity of an information filed after a preliminary examination and commitment is not affected by defects in the complaint filed in the magistrate's court or the warrant issued thereon.[78]

(B) *Complaint, Affidavit, or Warrant.*[79] At common law an information can be filed by the attorney-general or by the prosecuting officer having his powers without any affidavit or complaint.[80] Under statutes, however, an affidavit or sworn complaint is sometimes required as a condition precedent to the right to file an information, and a valid and sufficient affidavit or complaint is essential to its validity.[81] And it has also been held that an affidavit or sworn complaint is necessary under a constitutional provision against the seizure of any person with-

magistrate to give the right to file an information as for a joint offense. Stuart *v.* People, 42 Mich. 255, 3 N. W. 863.

Included offenses.— A charge of manslaughter is included in a charge of murder, and therefore a count for manslaughter in committing an abortion may be added in an information for murder, where defendant has had an examination for murder before a justice of the peace. People *v.* Sessions, 58 Mich. 594, 26 N. W. 291.

Several counts.— Where a person charged with a crime is bound over to the superior court by a lower court upon a complaint filed in such lower court, the attorney for the state may file a new information charging the offense in several counts, and with various descriptions adapted to the proof as he finds it. State *v.* Pritchard, 35 Conn. 319. A motion to quash an entire information for want of a preliminary examination as to a part only of the counts cannot be granted. It should be confined to counts plainly specified. Hamilton *v.* People, 29 Mich. 173.

77. People *v.* Howard, 111 Cal. 655, 44 Pac. 342.

78. People *v.* Dolan, 96 Cal. 315, 31 Pac. 107; State *v.* Stoffel, 48 Kan. 364, 29 Pac. 685; State *v.* Reedy, 44 Kan. 190, 24 Pac. 66; State *v.* Longton, 35 Kan. 375, 11 Pac. 163; Redmond *v.* State, 12 Kan. 172; People *v.* Haley, 48 Mich. 495, 12 N. W. 671; People *v.* Dowd, 44 Mich. 488, 7 N. W. 71; Alderman *v.* State, 24 Nebr. 97, 38 N. W. 36. It is not ground for abatement of an information that the complaint filed in the justice's court, on which in part the information was based, was verified on information and belief merely, and that the justice issued the warrant thereunder without calling witnesses in support of the charge. State *v.* Carey, 56 Kan. 84, 42 Pac. 371.

79. Verification of information see *infra*, IV, A, 5, h.

80. State *v.* Anderson, 30 La. Ann. 557; Territory *v.* Cutinola, 4 N. M. 160, 14 Pac. 809; Hammond *v.* State, 3 Wash. 171, 28 Pac. 334. See also *infra*, IV, A, 5, h.

81. *Colorado.*— Walker *v.* People, 22 Colo. 415, 45 Pac. 388.

Indiana.— Stifel *v.* State, 163 Ind. 628, 72 N. E. 600; Swiney *v.* State, 119 Ind. 478, 21 N. E. 1102; Engle *v.* State, 97 Ind. 122; Brunson *v.* State, 97 Ind. 95; Strader *v.* State, 92 Ind. 376; State *v.* Beebe, 83 Ind. 171; State *v.* Cuppy, 50 Ind. 291; Luther *v.* State, 27 Ind. 47; Carpenter *v.* State, 14 Ind. 109; State *v.* Downs, 7 Ind. 237; Baramore *v.* State, 4 Ind. 524.

Missouri.— An affidavit is necessary in this state, unless the information is verified by the prosecuting attorney or some person competent to testify as a witness in the case. State *v.* Decker, 185 Mo. 182, 83 S. W. 1082; State *v.* Nave, 185 Mo. 125, 84 S. W. 1; State *v.* Hannigan, 182 Mo. 15, 81 S. W. 406; State *v.* Sheridan, 182 Mo. 13, 81 S. W. 410; State *v.* Schnettler, 181 Mo. 173, 79 S. W. 1123; State *v.* Bonner, 178 Mo. 424, 77 S. W. 463; State *v.* Jacobs, 100 Mo. App. 52, 72 S. W. 482. See also State *v.* Hocker, 68 Mo. App. 415; State *v.* Sweeney, 56 Mo. App. 409; State *v.* White, 55 Mo. App. 356; State *v.* Harris, 30 Mo. App. 82; State *v.* Shaw, 26 Mo. App. 383.

Ohio.— Weisbrodt *v.* State, 50 Ohio St. 192, 33 N. E. 603; Schmeltz *v.* State, 8 Ohio Cir. Ct. 82, 4 Ohio Cir. Dec. 287.

Texas.— Johnson *v.* State, (Cr. App. 1905) 85 S. W. 274, 1198; Tompkins *v.* State, (Cr. App. 1903) 77 S. W. 800; Hanson *v.* State, (Cr. App. 1901) 61 S. W. 120; Robinson *v.* State, (Cr. App. 1898) 44 S. W. 845; Dominguez *v.* State, 37 Tex. Cr. 425, 35 S. W. 973; White *v.* State, (Cr. App. 1896) 35 S. W. 391; Kinley *v.* State, 29 Tex. App. 532, 16 S. W. 339; Wilson *v.* State, 27 Tex. App. 47, 10 S. W. 749, 11 Am. St. Rep. 180; Robinson *v.* State, 25 Tex. App. 111, 7 S. W. 531; Wadgymar *v.* State, 21 Tex. App. 457, 2 S. W. 768; Casey *v.* State, 5 Tex. App. 462; Dishongh *v.* State, 4 Tex. App. 158; Turner *v.* State, 3 Tex. App. 551; Deon *v.* State, 3 Tex. App. 435; Thornberry *v.* State, 3 Tex. App. 36; Daniels *v.* State, 2 Tex. App. 353; Davis *v.* State, 2 Tex. App. 184. A complaint of which a justice of the peace has no jurisdiction except to take it or sit as an examining court is properly used in the county court as a predicate for an information, on being transferred thereto from the justice of the peace. Mitchell *v.* State, 46 Tex. Cr. 258, 79 S. W. 26.

Virginia.— An information must be filed upon a presentment or indictment by a grand jury, or upon the sworn complaint of a competent witness, or it is insufficient. Wilson *v.* Com., 87 Va. 94, 12 S. E. 108.

United States.— Johnston *v.* U. S., 87 Fed.

out probable cause supported by oath or affirmation, unless the information itself is under oath or affirmation.[82] The information must be for the same offense as that charged in the affidavit or complaint on which it is based,[83] and against the same person;[84] but if the offense is substantially the same it is sufficient, and an immaterial variance will not be fatal.[85] The affidavit or complaint must on its

187, 30 C. C. A. 612; U. S. *v.* Strickland, 25 Fed. 469; U. S. *v.* Tureaud, 20 Fed. 621.

See 27 Cent. Dig. tit. "Indictment and Information," § 163 *et seq.*

A sufficient complaint is not vitiated by a bad information and will support a new information in case a defective one is dismissed. See *infra*, IV, A, 4, text and note 24.

82. Thornberry *v.* State, 3 Tex. App. 36; U. S. *v.* Tureaud, 20 Fed. 621. See *infra*, IV, A, 5, h.

83. Dyer *v.* State, 85 Ind. 525; Mount *v.* State, 7 Ind. 654; State *v.* Fuser, 75 Mo. App. 263; Galt *v.* Elder, 47 Mo. App. 164 (unlawful sale of intoxicating liquors); State *v.* Cornell, 45 Mo. App. 94 (exhibiting weapons); State *v.* Emberton, 45 Mo. App. 56 (unlawful sale of intoxicating liquor); Hanson *v.* State, (Tex. Cr. App. 1901) 61 S. W. 120 (assault and false imprisonment); Taylor *v.* State, (Tex. Cr. App. 1899) 50 S. W. 1015; Landrum *v.* State, 37 Tex. Cr. 666, 40 S. W. 737 (shooting into church; variance as to church); Kinley *v.* State, 29 Tex. App. 532, 16 S. W. 339 (complaint charging felony of assault with intent to murder, and information charging misdemeanor of aggravated assault); Robinson *v.* State, 25 Tex. App. 111, 7 S. W. 531 (aggravated assault by adult male on person of female); Parsons *v.* State, 9 Tex. App. 204 (assault and attempt to shoot); Calvert *v.* State, 8 Tex. App. 538 (variance as to ownership of land in an information for cutting timber); Johnson *v.* State, 4 Tex. App. 594 (ownership and possession of property stolen); Ferguson *v.* State, 4 Tex. App. 156 (variance as to weapon in prosecution for aggravated assault); Davis *v.* State, 2 Tex. App. 184 (where an information for aggravated assault and battery was based upon an affidavit for asault with intent to murder).

Date of offense.— Informations have been held invalid because of a material variance from the affidavit or complaint as to the date of the offense. Dyer *v.* State, 83 Ind. 525 (December and January); Taylor *v.* State, (Tex. Cr. App. 1899) 50 S. W. 1015 (November 1 and 7); Little *v.* State, (Tex. App. 1892) 19 S. W. 332; Baumgartner *v.* State, 23 Tex. App. 335, 5 S. W. 113 (November 6 and 16); Huff *v.* State, 23 Tex. App. 291, 4 S. W. 890; Hefner *v.* State, 16 Tex. App. 573 (where the complaint stated the date of the offense as "one thousand eight hundred eight four," and the information as "March 30, 1884"); Swink *v.* State, 7 Tex. App. 73; Hawthorne *v.* State, 6 Tex. App. 562 (October 11 and 14); Williamson *v.* State, 5 Tex. App. 485 (May 1 and 7); Brewer *v.* State, 5 Tex. App. 248 (where the information charged an offense as having been committed in the year "one thousand and seventy-eight"); Collins *v.* State, 5 Tex. App. 37 (where the affidavit charged an offense as committed in the year of our Lord 187–, and the information based thereon as committed in 1877); Hoerr *v.* State, 4 Tex. App. 75 (where the affidavit averred larceny to have been committed "on or about the 1st day of September, A. D. 1877," and the information alleged that the offense was committed "on the 1st day of August, 1877"). *Contra*, Shelton *v.* State, 27 Tex. App. 443, 11 S. W. 457, 11 Am. St. Rep. 200, holding the variance immaterial where the complaint charged the offense on January 16 and the information on January 11. *Compare* cases referred to *infra*, note 85. Where an information purporting to be founded on a complaint describes an offense committed after the day of the filing of the complaint it is invalid. State *v.* Fuser, 75 Mo. App. 263. Variance between an information and the complaint on which it is founded as to the date of the offense is not only fatal to the information, but cannot be amended. Little *v.* State, (Tex. App. 1892) 19 S. W. 332; Hawthorne *v.* State, 6 Tex. App. 562.

84. Mount *v.* State, 7 Ind. 654; Riddle *v.* State, (Tex. Cr. App. 1894) 25 S. W. 21 (holding that a complaint against "one Abe," without further description, was no basis for an information against "one Abe Riddle"); Juniper *v.* State, 27 Tex. App. 478, 11 S. W. 483 (where an information charged "Frederick Juniper," and the complaint charged "John Juniper"); McDevro *v.* State, 23 Tex. App. 429, 5 S. W. 133 (where the complaint alleged the surname of the accused to be McDevro, and the information alleged it as McDero). But an information against "Daniel Harrison," upon an affidavit designating him as "Daniel Harrison, alias Bud Harrison," was held not to be a fatal variance. Harrison *v.* State, 6 Tex. App. 256. And an information against "Louis Girous" is supported by an affidavit against "Lewis Geroux." Girous *v.* State, 29 Ind. 93.

85. *Georgia.*— Murphy *v.* State, 119 Ga. 300, 46 S. E. 450.

Indiana.— Smith *v.* State, 145 Ind. 176, 42 N. E. 1019 (perjury); Stefani *v.* State, 124 Ind. 3, 24 N. E. 254 (perjury); Girous *v.* State, 29 Ind. 93 (name of woman in rape; "Sarah Tougaw" and "Sarah F. Tugaw"); Mount *v.* State, 7 Ind. 654 (holding in a prosecution for gaming that the information need not follow the affidavit in the manner in which it set forth the particular facts which constituted the offense).

Missouri.— State *v.* Nave, 185 Mo. 125, 84 S. W. 1 (where the affidavit charged that defendant shot and hit the prosecuting witness with a shotgun loaded with powder and

face show the commission of the offense and must charge the offense with sufficient certainty;[86] and it must otherwise comply with the law with respect to

leaden balls, and the information charged that defendant did shoot and wound the prosecuting witness with a certain double-barreled shotgun loaded with powder and leaden balls); State *v.* Hunter, 181 Mo. 316, 80 S. W. 955 (where an information charging one person with perjury was based on an affidavit which charged the accused and another jointly).

Ohio.— Miller *v.* State, 3 Ohio St. 475 (sale of intoxicating liquors); Gates *v.* State, 3 Ohio St. 293 (assault and battery); Schmeltz *v.* State, 8 Ohio Cir. Ct. 82, 4 Ohio Cir. Dec. 287 (sale of intoxicating liquors); Krowenstrot *v.* State, 15 Ohio Cir. Ct. 73, 8 Ohio Cir. Dec. 119.

Texas.— Luna *v.* State, (Cr. App. 1902) 70 S. W. 89 (variance in the name "Colster" and "Colsten" in a complaint and information); Huizar *v.* State, (Cr. App. 1901) 63 S. W. 329 (aggravated assault on female); Baker *v.* State, (Cr. App. 1896) 35 S. W. 666 (complaint alleging "that defendant did unlawfully keep and exhibit, for the purpose of gaming, a gaming table and bank," and an information charging that he "did unlawfully exhibit, for the purpose of gaming, a gaming table and bank"); Hardy *v.* State, (App. 1890) 13 S. W. 1008 (name of prosecuting witness); Roberson *v.* State, 15 Tex. App. 317 (name of person assaulted); Cole *v.* State, 11 Tex. App. 67 (aggravated assault); Strickland *v.* State, 7 Tex. App. 34 (aggravated assault).

See 27 Cent. Dig. tit. "Indictment and Information," § 321 *et seq.*

Grades of offense.— An affidavit charging an offense may be used as the basis of an information charging a lower grade of the same offense. State *v.* Washington, 78 Mo. App. 659.

Date of offense.— Where an affidavit alleged that defendant lived in open fornication from October 20, 1858, to Sept. 25, 1859, and the information based thereon alleged the time to be from Sept. 20, 1858, to Oct. 25, 1859, it was held that, whatever the effect might have been on motion to quash, the information was good on motion in arrest. State *v.* Record, 16 Ind. 111. And there is no variance where a complaint alleges an offense to have been committed on a certain date, and the information alleges it to have been committed on or about the same date (Whitley *v.* State, (Tex. Cr. App. 1900) 56 S. W. 69), and *vice versa* (Drye *v.* State, (Tex. Cr. App. 1900) 55 S. W. 65). *Compare* the cases of fatal variance cited *supra*, note 83.

Venue.— Where an affidavit charged that the offense described was committed in the county of Lucas, Ohio, but afterward the prosecuting attorney of the police court of Toledo filed an information in which he charged that the offense was committed in the city of Toledo, it was held that the police court had jurisdiction. Krowenstrot *v.* State, 15 Ohio Cir. Ct. 73, 8 Ohio Cir. Dec. 119.

Amended affidavit and information.— There is no variance between the charge in an affidavit before a justice of receiving stolen goods knowing them to be stolen and an amended affidavit and information in the circuit court charging, in the first count, that defendant received stolen goods, and, in the second, the larceny of the goods. Kennegar *v.* State, 120 Ind. 176, 21 N. E. 917.

86. State *v.* Burnett, 119 Ind. 392, 21 N. E. 972 (false pretenses); Engle *v.* State, 97 Ind. 122 (sale of liquor to habitual drunkard); Brunson *v.* State, 97 Ind. 95 (affidavit for frecing one under legal arrest, not charging force or knowledge); Strader *v.* State, 92 Ind. 376 (referred to *infra*, this note); State *v.* Beebe, 83 Ind. 171; State *v.* Cuppy, 50 Ind. 291 (affidavit failing to negative exceptions in statute); Luther *v.* State, 27 Ind. 47; State *v.* Gartrell, 14 Ind. 280; State *v.* Downs, 7 Ind. 237 (sale of intoxicating liquors); State *v.* White, 55 Mo. App. 356; State *v.* Cornell, 45 Mo. App. 94 (failure of affidavit for exhibiting a weapon to allege, as in the information, that it was exhibited in any one's presence); Robinson *v.* State, 25 Tex. App. 111, 7 S. W. 531 (complaint for aggravated assault on a female failing to allege, as in the information, that defendant was an adult male). An affidavit, to authorize an information, must conform substantially to the language of the statute alleged to be violated. It must plainly distinguish the offense. U. S. *v.* Strickland, 25 Fed. 469.

An agreement between the prosecuting attorney and counsel for the accused as to what objection is made to an affidavit cannot be regarded on motion to quash for insufficiency. State *v.* Burnett, 119 Ind. 392, 21 N. E. 972.

Certainty.— In Indiana it has been held that the affidavit required as the basis of an information must charge the offense with the same certainty as an indictment. Strader *v.* State, 92 Ind. 376 (holding therefore that an affidavit for an information for rape, charging that defendant at, etc., "upon one A., a female child, . . . did then and there unlawfully, feloniously and forcibly make a violent assault upon her, the said A., then and there, unlawfully and feloniously did ravish and carnally know," was fatally defective in having no connectives between the clauses); State *v.* Beebe, 83 Ind. 171; and other Indiana cases cited *supra*, this note. Elsewhere it is held that while the affidavit need not be as formal and definite as the information, it must state the elements of the offense. State *v.* Cornell, 45 Mo. App. 94. And in Georgia the affidavit on which an accusation is based need not minutely describe the offense, but may charge it generally, and the accusation based thereon may charge a specific criminal act included

form;[87] but it is not insufficient as the basis of an information merely because it is ungrammatical.[88] Under some statutes it has been held that the affidavit as well as the information[89] must state the jurisdictional facts or existence of the conditions authorizing prosecution by information and affidavit.[90] The affidavit or complaint must be made by a competent person,[91] and must be properly verified.[92]

within the offense named. Murphy *v.* State, 119 Ga. 300, 46 S. E. 450; Brown *v.* State, 109 Ga. 570, 34 S. E. 1031; Dickson *v.* State, 62 Ga. 583.

Several counts.— An affidavit on which an accusation is founded may charge two misdemeanors of the same class as committed by the same person, and the accusation founded thereon may consist of two counts, each charging one of the offenses set forth in the affidavit; and the prosecutor will not be compelled to elect between these counts at the trial, where it appears from the evidence that both of them relate to the same transaction. Hathcock *v.* State, 88 Ga. 91, 13 S. E. 959.

87. **Venue.**— The affidavit or complaint, as well as the information, must correctly lay the venue, and if it fails to do so the defect is not cured by a correct statement of the venue in the information. State *v.* Beebe, 83 Ind. 171 (it must in some manner name with certainty the county and state in which the offense was committed); Rice *v.* State, 15 Ind. App. 427, 44 N. E. 319; Smith *v.* State, 3 Tex. App. 549. But an affidavit sufficiently lays the venue where the county and state appear in the caption, and in the body of the affidavit it is charged that the offense was committed "at said county" or "in the county aforesaid." Hawkins *v.* State, 136 Ind. 630, 36 N. E. 419. The venue need not be repeated to every material allegation in the affidavit. Thayer *v.* State, 11 Ind. 287.

Joinder of counts.— Under the Indiana statute providing that a felony or misdemeanor may be charged in separate counts in the indictment or information to have been committed by different means, the affidavit on which the information is based in a prosecution for producing an abortion causing the woman's death, commenced by affidavit and information, may contain counts alleging that the abortion was committed by different methods. Diehl *v.* State, 157 Ind. 549, 62 N. E. 51.

Title and commencement.— The affidavit or complaint need not, as required in an indictment or information, contain the title of the cause and name of the court. Hawkins *v.* State, 136 Ind. 630, 36 N. E. 419. See also White *v.* State, 28 Nebr. 341, 44 N. W. 443. Nor need it begin, as required by the constitution or statute for an indictment or information, "In the name and by the authority of the state," etc. Johnson *v.* State, 31 Tex. Cr. 464, 20 S. W. 980.

88. Dickson *v.* State, 62 Ga. 583.

89. **Showing jurisdictional facts in the information** see *infra*, IV, A, 5, e.

90. As that defendant is in custody and the grand jury is not in session. State *v.* Henderson, 74 Ind. 23; Burroughs *v.* State, 72 Ind. 334; Lindsey *v.* State, 72 Ind. 39; Davis *v.* State, 69 Ind. 130. *Compare infra*, IV, A, 5, e.

91. Stifel *v.* State, 163 Ind. 628, 72 N. E. 600; Thomas *v.* State, 14 Tex. App. 70; Daniels *v.* State, 2 Tex. App. 353. And see Rex *v.* Willett, 6 T. R. 294. The complaint supporting an information need not be made by an officer. Lindley *v.* State, (Tex. Cr. App. 1898) 44 S. W. 165.

"Credible person."— The statutory provision that an information must be founded on the affidavit of some "credible person" means at least that the affiant must be a competent witness; hence a husband cannot make the affidavit on which to found a prosecution of his wife for adultery. Thomas *v.* State, 14 Tex. App. 70.

Actual knowledge of facts see *infra*, this section, text and note 94.

The county attorney cannot, on "information and belief," make the necessary affidavit to support an information for assault on another person; although it seems that where the attorney was the only witness he may himself make the affidavit. Daniels *v.* State, 2 Tex. App. 353.

Insufficiency of evidence.— An information filed in a court of record, signed by the prosecuting attorney, and supported by the affidavit of a competent witness, as required by statute, cannot be impeached by showing that it is based on insufficient evidence. State *v.* Pitts, 70 Mo. App. 446.

Statement of competency.— Although in a prosecution by information the statute may require the affidavit to be in positive terms and not upon information or belief, and that the affidavit shall be made by some person competent to testify as a witness in the case, he need not state his competency in the affidavit. State *v.* Downing, 22 Mo. App. 504.

92. Swiney *v.* State, 119 Ind. 478, 21 N. E. 1102 (holding an affidavit not sworn to bad on motion to quash); Cantwell *v.* State, 27 Ind. 505; State *v.* Lewis, 70 Mo. App. 40; Johnson *v.* State, (Tex. Cr. App. 1905) 85 S. W. 274, 1198; Dishongh *v.* State, 4 Tex. App. 158.

Objection.— An information which is verified in different parts by different persons cannot be attacked for insufficiency of verification, without specifically assigning the cause of insufficiency. Hawkins *v.* State, 126 Ind. 294, 26 N. E. 43.

Authority to administer oath.— The officer or person before whom the affidavit was verified must have had authority to administer the oath. Thomas *v.* State, 37 Tex. Cr. 142, 38 S. W. 1011, holding that a complaint sworn to before the county attorney of one county

In some states it may be verified upon information and belief,[93] but in others the verification must be positive and by one who has actual knowledge of the facts.[94] The name of the affiant need not be set out in the body or commencement of the affidavit or complaint;[95] and if it is so set out it may be rejected as surplusage, so that the validity of the affidavit or complaint will not be affected by a variance between the name set out and that signed.[96] The affidavit or complaint must be filed, as required by the statute, and either before or at the time of filing the information.[97] Where a preliminary affidavit is required verification of the information

cannot be used as the basis of an information in another county. See also Johnson *v.* State, (Tex. Cr. App. 1905) 85 S. W. 274, 1198, holding that a city attorney is not authorized to take an affidavit to a complaint for use before any other court than the corporation court.

The jurat must be authenticated by the official signature of the officer before whom the affidavit or complaint was verified. Neiman *v.* State, 29 Tex. App. 360, 16 S. W. 253 (holding that a jurat signed "Win Greer, J. P." was insufficient); Robertson *v.* State, 25 Tex. App. 529, 8 S. W. 659 (illegible pen and ink scrawl following signature not sufficient to designate official signature); Micau *v.* State, (Tex. App. 1892) 19 S. W. 762; Dishongh *v.* State, 4 Tex. App. 158; Morris *v.* State, 2 Tex. App. 502. However, in Brooster *v.* State, 15 Ind. 190, objection that the signature to the jurat was not followed by the designation of the signer's office was not sustained, where it otherwise appeared that he was an officer authorized to administer oaths. See also Hawkins *v.* State, 136 Ind. 630, 36 N. E. 419 (holding the letters "J. P." suffieient to designate the signer's office as justice of the peace); Mountjoy *v.* State, 78 Ind. 172; Hipes *v.* State, 73 Ind. 39 (both holding that where the word "clerk" follows the signature to the jurat it is sufficient, as courts take judicial notice of the names and signatures of their officers, and that it would be presumed that the signer was the clerk of the court); Buell *v.* State, 72 Ind. 523 (to substantially the same effect).

See 27 Cent. Dig. tit. "Indictment and Information," § 165.

Seal.— The seal of the court or clerk need not be attached to the jurat of an affidavit sworn to before the clerk (Qualter *v.* State, 120 Ind. 92, 22 N. E. 100; Mountjoy *v.* State, 78 Ind. 172) or before the judge (Rosenstein *v.* State, 9 Ind. App. 290, 36 N. E. 652, police judge); but under a statute providing that "no notary shall be authorized to act until he shall have procured a seal," and that "all notarial acts not attested by such seal shall be void," an information based on an affidavit to which the seal of the notary before whom it was verified is not attached, should be quashed, and the error in overruling the motion to quash is not cured by permitting the notary thereafter to attach the seal. Miller *v.* State, 122 Ind. 355, 24 N. E. 156.

A clerical error in the jurat as to the day or month on or in which the affidavit or complaint was made will not vitiate the same or the information based thereon. Noble *v.* People, 23 Colo. 9, 45 Pac. 376; Allen *v.* State, (Tex. App. 1890) 13 S. W. 998.

The jurat may be amended at the proper time by the officer who administered the oath, but not after verdict. Neiman *v.* State, 29 Tex. App. 360, 16 S. W. 253.

Verification of information see *infra*, IV, A, 5, h.

93. Toops *v.* State, 92 Ind. 13; Franklin *v.* State, 85 Ind. 99; Deveny *v.* State, 47 Ind. 208; State *v.* Buxton, 31 Ind. 67; State *v.* Ellison, 14 Ind. 380; Pope *v.* Cincinnati, 3 Ohio Cir. Ct. 497, 2 Ohio Cir. Dec. 285. See also *infra*, IV, A, 5, h.

"Reason to believe" instead of belief.— A complaint on which an information is based is insufficient, where it states merely that complainant has good reason to believe the facts alleged, instead of that he believes. Tompkins *v.* State, (Tex. Cr. App. 1903) 77 S. W. 800.

94. Holt *v.* People, 23 Colo. 1, 45 Pac. 374 (holding, however, that under a statute providing that, if a preliminary examination has not been held, the district attorney may, by leave of court, and upon affidavit of any person who has knowledge of the commission of an offense and who is a competent witness to testify in the case, file an information setting forth the offense, it is not necessary that the person making the affidavit of probable cause should have been an eyewitness of the offense, or should have actual knowledge thereof based on personal observation); State *v.* Luman, 2 Mo. App. Rep. 1337; State *v.* Davidson, 46 Mo. App. 9; State *v.* Harris, 30 Mo. App. 82; State *v.* Downing, 22 Mo. App. 504; Johnston *v.* U. S., 87 Fed. 187, 30 C. C. A. 612; U. S. *v.* Polite, 35 Fed. 58; U. S. *v.* Tureaud, 20 Fed. 621. *Compare* as to verification of information, *infra*, IV, A, 5, h.

Showing want of personal knowledge.— It has been held, however, under the Colorado statute above referred to, that an information charging a crime cannot be attacked on the ground that it appears on trial that the person who made the affidavit supporting it did not have personal knowledge of the commission of the offense. Overland Cotton Mill Co. *v.* People, 32 Colo. 263, 75 Pac. 924, 105 Am. St. Rep. 74; Barr *v.* People, 30 Colo. 522, 71 Pac. 392. See also *infra*, IV, A, 5, h.

95. Beller *v.* State, 90 Ind. 448; State *v.* Bunnell, 81 Ind. 315; Malz *v.* State, 36 Tex. Cr. 447, 34 S. W. 267, 37 S. W. 748; Upton *v.* State, 33 Tex. Cr. 231, 26 S. W. 197.

96. Malz *v.* State, 36 Tex. Cr. 447, 34 S. W. 267, 37 S. W. 748.

97. State *v.* De Long, 88 Ind. 312; State *v.* Coleman, 186 Mo. 151, 84 S. W. 978, 69

itself only will not suffice;[98] but under the express provisions of some statutes an affidavit is not necessary where the information itself is verified by the prosecuting attorney or some competent witness.[99] If the accused is in custody it is immaterial that no warrant issued on the affidavit used as foundation for the accusation.[1]

(c) *Presentment of Grand Jury.* In Virginia where informations may be based upon a presentment of a grand jury, a presentment, to be a proper foundation for an information, must contain every matter necessary to render the act imputed to defendant unlawful, and the supposed offense must be described with at least reasonable certainty.[2]

(d) *Coroner's Inquisition.* Where a preliminary examination and commitment are required by statute, and under the laws of the state coroners are not committing magistrates, the inquisition of a coroner's jury is not a sufficient basis for an information.[3]

(xi) *Filing and Record.* While an information must be filed,[4] it need not be filed in open court, but may be filed in the clerk's office.[5] In the absence of a mandatory statute the validity of the filing of an information or of proceedings thereon is not affected by failure to enter the filing on the order book or on the

L. R. A. 381, and other cases cited *infra*, this note. But it has been held that refusal of the court to quash an information on the ground that there was nothing in the case to show that any complaint was filed at the filing of the information will be sustained, where the complaint was filed on the day of trial by order of the court, and, for aught that appears, it was among the papers of the case, and was perhaps attached to the information. Castleman *v.* State, (Tex. Cr. App. 1898) 43 S. W. 994.

Filing with information.— It is generally held that it is sufficient if the affidavit or complaint be filed at the same time as the information. Noble *v.* People, 23 Colo. 9, 45 Pac. 376 (presumed that affidavit filed on the same day as the information was filed with it); Walker *v.* People, 22 Colo. 415, 45 Pac. 388 (affidavit attached to the information is sufficient); State *v.* Lauderman, 89 Ind. 600; State *v.* De Long, 88 Ind. 312; Castleman *v.* State, (Tex. Cr. App. 1898) 43 S. W. 994. If an information and its supporting affidavit be attached to each other, or if both be written on the same sheet of paper, and the clerk's file-mark be put upon the outside fold, it is a substantial compliance with the statutory requirement that the affidavit "shall be filed with the information." Schott *v.* State, 7 Tex. App. 616.

Error in date of jurat.— Where it appears that the affidavit was filed on the same day as the information, it will be presumed that it was filed with it, although the jurat is dated the day following. Noble *v.* People, 23 Colo. 9, 45 Pac. 376. See also as to clerical errors in the date of the jurat *supra*, note 92.

Amended information and affidavit.—Where an amended information and amended affidavit were filed at the same time before a justice, the amended information will be presumed to have succeeded the amended affidavit on which its context shows it was based. State *v.* Adams, 80 Mo. App. 293.

Filing.— Depositing the affidavit with the clerk of the proper court is a sufficient filing under a statute requiring affidavits in support of informations to be filed therewith. State *v.* Coleman, 186 Mo. 151, 84 S. W. 978, 69 L. R. A. 381.

Indorsement of filing.— The fact that an affidavit found among the papers in a case, and upon which the information presented by the county attorney is apparently based, does not bear the indorsement of filing by the clerk is not ground for quashing the information. State *v.* Elliott, 41 Tex. 224. Where the information alleges that it is based on an affidavit "herewith filed," the affidavit itself need not bear the clerk's file-mark. Goss *v.* State, (Tex. Cr. App. 1897) 40 S. W. 263.

98. Carpenter *v.* State, 14 Ind. 109.

99. State *v.* Decker, 185 Mo. 182, 83 S. W. 1082; State *v.* Nave, 185 Mo. 125, 84 S. W. 1; State *v.* Jacobs, 100 Mo. App. 52, 72 S. W. 482; State *v.* Hocker, 68 Mo. App. 415; State *v.* Sweeney, 56 Mo. App. 409; and other Missouri cases cited *supra*, note 81. Where an information is verified by the prosecuting attorney, based on a complaint made by the prosecuting witness, it is valid, regardless of any affidavit that may have been made, and therefore notwithstanding insufficiency of the affidavit or the fact that it charges a different offense from that charged in the information. State *v.* Nave, 185 Mo. 125, 84 S. W. 1.

1. Brown *v.* State, 109 Ga. 570, 34 S. E. 1031.

2. Bishop *v.* Com., 13 Gratt. (Va.) 785.

3. *In re* Sly, 9 Ida. 779, 76 Pac. 766.

4. See the cases in the notes following. And see *infra*, IV, A, 2, b, (xiii).

5. State *v.* Duggins, 146 Ind. 427, 45 N. E. 603 (in term-time); Stefani *v.* State, 124 Ind. 3, 24 N. E. 254; State *v.* Kyle, 166 Mo. 287, 65 S. W. 763, 56 L. R. A. 115; State *v.* Corbit, 42 Tex. 88; Rasberry *v.* State, 1 Tex. App. 664. *Compare*, however, Sims *v.* State, 26 Fla. 97, 7 So. 374.

In vacation see *infra*, IV, A, 2, b, (xii), (b).

minutes or docket of the court,[6] or, where the filing otherwise appears, by failure of the clerk to make the formal indorsement of filing.[7]

(XII) *TIME OF FILING* — (A) *In General.* In the absence of a statute an information may be filed at any time;[8] but in some jurisdictions statutes require that informations generally, or informations for particular offenses, as felonies, shall be filed at a particular time, or within a certain time after commitment or binding over.[9]

(B) *In Vacation.* In the absence of a statute to the contrary, informations may be properly filed with the clerk of court in vacation,[10] and statutes sometimes

6. State *v.* Duggins, 146 Ind. 427, 45 N. E. 603 (where proper filing was shown by file-marks of the clerk on the back); State *v.* Matthews, 129 Ind. 281, 28 N. E. 703 (to the same effect); State *v.* Hockaday, 98 Mo. 590, 12 S. W. 246; State *v.* Plummer, 55 Mo. App. 288; State *v.* Derkum, 27 Mo. App. 628. A minute on an information, "Filed Oct. 15, 1883," under the official signature of the clerk, is sufficient. State *v.* Brainerd, 57 Vt. 369.

7. State *v.* Lewis, 49 La. Ann. 1207, 22 So. 327 (holding that where an information was presented and received in open court, and the accused was arraigned thereunder, the minutes of court showing the same, it was in effect and in law a filing, even though the clerk neglected to make the formal indorsement of filing thereon, and prescription was interrupted); State *v.* Plummer, 55 Mo. App. 288.

8. That an information was not filed at the first term after defendant's arrest is not ground for quashing it. State *v.* Baird, 10 Kan. 58. The Michigan statutes do not forbid the filing of an information at the same term in which complaint is made, and there is nothing to prevent filing it as soon as convenient, unless, where respondent has given bail, there may be some question as to the time when his sureties must produce him. People *v.* Haley, 48 Mich. 495, 12 N. W. 671. Although defendant has been examined for an offense before the police court, and has been bound over for his appearance for trial at the next term of the recorder's court, an information may be filed against him at the term of the recorder's court which had commenced when the complaint was made and examination had. People *v.* Mason, 63 Mich. 510, 30 N. W. 103.

9. **In California** the code provides that the district attorney shall file an information within thirty days after the examination and commitment of defendant (Pen. Code, § 809); and that if not filed within that time, the court, unless good cause to the contrary is shown, must order the prosecution dismissed (Pen. Code, § 1382). This provision is mandatory and the court has no discretion where no good cause for the delay is shown (People *v.* Morino, 85 Cal. 515, 24 Pac. 892), and the burden of showing good cause for delay is on the prosecution (People *v.* Wickham, 113 Cal. 283, 48 Pac. 123; People *v.* Morino, *supra*). It is not good cause that the committing magistrate failed to file the papers with the clerk of court within said time, since the information might have been filed before a return of such papers. People *v.* Wickham, *supra*. *Compare* People *v.* Ah Sing, 95 Cal. 657, 30 Pac. 797. The statute does not apply to the filing of a new information after the sustaining of a demurrer to the original one. People *v.* Lee Look, 143 Cal. 216, 76 Pac. 1028.

In Montana the statute provides that when defendant has been examined and committed or admitted to bail, as provided by law, or upon leave of court, the county attorney must, within thirty days after the delivery of the complaint, warrant, and testimony to the proper district court, or after such leave, file in such court an information, etc. Pen. Code, § 1730. Under this statute an information can be filed at any time within thirty days after the grant of leave therefor, independently of the time when the examination took place. State *v.* Smith, 12 Mont. 378, 30 Pac. 679. Under other provisions in this state the objection that an information was not filed at the proper time must be raised by motion to dismiss, which must be made before demurrer or plea, and the objection is waived, therefore, if it is not made until motion in arrest of judgment. State *v.* Smith, *supra*.

In Nebraska, under Cr. Code, § 389, where no information or indictment is filed against a defendant charged with the commission of a crime during the term at which he is held to answer, his detention is unlawful, and he is entitled to be discharged, and it makes no difference that such term adjourned on the day following that upon which the preliminary examination was held. Leisenberg *v.* State, 60 Nebr. 628, 84 N. W. 6. See also State *v.* Miller, 43 Nebr. 860, 62 N. W. 238; *Ex p.* Two Calf, 11 Nebr. 221, 9 N. W. 44. But if at a subsequent term of the court an information is filed and defendant pleads not guilty, the court has power to try the issue raised; and, after verdict of conviction has been rendered, it is not error to deny a motion in arrest of judgment. Leisenberg *v.* State, *supra*. And see Cerny *v.* State, 62 Nebr. 626, 87 N. W. 336.

Term-time and vacation see *infra*, IV, A, 2, b, (XII), (B).

10. State *v.* Kyle, 166 Mo. 287, 65 S. W. 763, 56 L. R. A. 115; State *v.* Corbit, 42 Tex. 88; Rasberry *v.* State, 1 Tex. App. 664.

In Florida, if an information is filed by the prosecuting attorney in vacation, the law does not authorize the clerk to issue a warrant thereon for the arrest of the accused or

expressly sanction and provide for filing them in vacation;[11] but by statute in some states they are required to be filed during term-time or when the court is in session, and under such a statute they cannot be filed in vacation.[12]

(XIII) *NECESSITY FOR FILING OF INFORMATION.* Where by the constitution or by statute an information is required, the official information of the prosecuting attorney is necessary, and the prosecution cannot proceed upon the affidavit of a private individual required and made for the purpose of the information.[13]

3. LOSS OR DESTRUCTION.[14] The court has power to permit any part of the record or files to be supplied in case of loss or destruction, and, when an original information has been lost from the files or destroyed, the state's attorney may properly supply a copy, and defendant may be tried thereon,[15] or, under some statutes, another information may be filed in the place of the one lost or destroyed.[16]

give the judge in vacation power to fix bail, or authorize the sheriff to detain the accused in custody. Sims *v.* State, 26 Fla. 97, 7 So. 374.

11. In Illinois, in counties where the offices of county judge and probate judge are vested in one person, a filing of an information with the county clerk during a probate term, or with the judge at such term, is a filing in vacation within the sanction of the statute. Burns *v.* People, 45 Ill. App. 70.

In Kansas, by express provision, informations may be filed during term-time or in vacation in any court having jurisdiction of the offense. See *In re* Eddy, 40 Kan. 592, 20 Pac. 283. Under the former statute informations could be filed during term-time or within twenty days preceding the term except in the case of informations against fugitives from justice, which could be filed with the clerk in vacation. State *v.* Babbitt, 32 Kan. 253, 4 Pac. 367.

In Louisiana the district attorney is authorized to file an information in the office of the clerk of the district court when the court is not in session in all cases where the penalty is not imprisonment at hard labor or death; and his duty in filing such informations is not limited to those held in custody of the sheriff. State *v.* Jackson, 45 La. Ann. 975, 13 So. 342.

In Missouri the statute provides that informations shall be filed by the "prosecuting attorney as informant during term time, or with the clerk in vacation, of the court having jurisdiction," etc. (Rev. St. (1899) § 2477), and that a warrant issued on filing an information in term-time shall be made returnable forthwith, or if issued in vacation, it shall be made returnable at the next term (section 2484). The words "in vacation," as used in both sections, have reference to vacation between one term of court and another. State *v.* Derkum, 27 Mo. App. 628.

12. In Indiana, where the statute authorizes a prosecution by affidavit and information where the accused is in jail or on bail and the court is "in session," and the grand jury is not or has been discharged, no jurisdiction is conferred over a prosecution by affidavit and information filed during vacation, and after-acquired jurisdiction cannot be made to relate back and cure the defect. Hoover *v.* State, 110 Ind. 349, 11 N. E. 434. This statute, however, does not mean that the court must be actually open for the transaction of business, or require an information, like an indictment, to be filed in open court, but the word "session" is equivalent to the word "term," and an information may therefore be filed with the clerk at any time during the term of court, whether the court is actually open for the transaction of business or not. Masterson *v.* State, 144 Ind. 240, 43 N. E. 138; Stefani *v.* State, 124 Ind. 3, 24 N. E. 254.

In Nebraska Laws (1885), c. 108, requires that all informations shall be filed during term, in the court having jurisdiction of the offense specified therein. The statute is mandatory, and an information upon which the accused is to be tried for felony is void if filed in vacation. *In re* Vogland, 48 Nebr. 37, 66 N. W. 1028.

Leave of court see *supra*, IV, A, 2, b, (III).

13. *Illinois.*— Gould *v.* People, 89 Ill. 216.

Indiana.— Butler *v.* State, 113 Ind. 5, 14 N. E. 247; State *v.* First, 82 Ind. 81, affidavit may be quashed if no information is filed.

Kansas.— Jackson *v.* State, 4 Kan. 150.

Missouri.— State *v.* Sebecca, 76 Mo. 55; State *v.* Huddleston, 75 Mo. 667.

Texas.— Prewitt *v.* State, (Cr. App. 1896) 34 S. W. 924; Thompson *v.* State, 15 Tex. App. 39; Prophit *v.* State, 12 Tex. App. 233; Casey *v.* State, 5 Tex. App. 462; Deon *v.* State, 3 Tex. App. 435.

14. Loss or destruction of: Indictments see *supra*, II, H. Complaints see *infra*, IV, B, 5. Preliminary complaint or warrant see *supra*, IV, A, 2, b, (X), (A), note 74.

15. Long *v.* People, 135 Ill. 435, 25 N. E. 851, 10 L. R. A. 48 [*affirming* 34 Ill. App. 481]; State *v.* Thomas, 39 La. Ann. 318, 1 So. 922 (by statute); Korth *v.* State, 46 Nebr. 631, 65 N. W. 792 (substitution of another transcript of the record of the proceedings at the preliminary examination and of a copy of the information).

16. Under the Indiana statute (Burn Rev. St. (1901) § 1746) providing that, in

4. Successive Informations. In the absence of a statute the validity of an information is not affected by the fact that another information is pending against the accused for the same offense,[17] and so long as defendant has not been put in jeopardy,[18] a new information may be filed where a former information is withdrawn as defective,[19] or where it has been quashed or dismissed on motion or demurrer because defective,[20] or because of want or insufficiency of a preliminary examination or proper return by the magistrate,[21] or after arrest of judgment or reversal on appeal because the first information was bad,[22] or after a mistrial.[23] If the preliminary examination or the affidavit, complaint, or other papers on which the former information was based are sufficient, they may be used as the basis of the new information.[24] It is not proper practice to file

case of the loss of an information, the prosecuting attorney may file another, and the prosecution shall proceed, and trial be had without delay from that cause, it is not necessary that an information filed in place of one lost shall be a copy of the first information. Goodman *v.* State, 161 Ind. 629, 69 N. E. 442. So also in Kansas (Cr. Code, § 118); and this in all cases where the original has been duly and legally filed and has afterward been lost or destroyed, although no preliminary examination may have been had in the case, and although no copy of the original information may have been preserved (State *v.* Plowman, 28 Kan. 569).

In Texas when an information has been lost, mislaid, mutilated, or obliterated, the district attorney may suggest the fact to the court, and in such case another information may be substituted upon his written statement that it is substantially the same. Code Cr. Proc. art. 470. The only remedy in a case of mutilation of the complaint or information by the fraudulent alteration of the date of the offense alleged in either, or otherwise, is by the substitution of the complaint and information, as provided by the statute. Huff *v.* State, 23 Tex. App. 291, 4 S. W. 890. See also Perez *v.* State, 10 Tex. App. 327, destruction of line of information. Proceedings on a substituted information, without a motion by the prosecuting attorney alleging the loss of the information, and seeking permission to substitute the same, are irregular and invalid. Reed *v.* State, 42 Tex. Cr. 572, 61 S. W. 925. Where a copy of an information is substituted for the lost original, but by inadvertence of the county attorney is indorsed with a different number from that by which the cause was docketed, and the substituted information is objected to by defendant on that ground, the court, on the motion of the county attorney, or on its own motion, should correct such number. Stiff *v.* State, 21 Tex. App. 255, 17 S. W. 726.

17. Kalloch *v.* San Francisco Super. Ct., 56 Cal. 229; State *v.* Keena, 64 Conn. 212, 29 Atl. 470; State *v.* McKinney, 31 Kan. 570, 3 Pac. 356; State *v.* Pyscher, 179 Mo. 140, 77 S. W. 836; State *v.* Vinso, 171 Mo. 576, 71 S. W. 1034; Roby *v.* State, 61 Nebr. 218, 85 N. W. 61.

Pendency of another indictment and successive indictments see *supra*, II, I.

Pendency of a complaint in a justice's court is no ground for plea to the jurisdiction of the county court on a later complaint and information for the same offense. Vaughn *v.* State, 32 Tex. Cr. 407, 24 S. W. 26.

18. **Former jeopardy** see Criminal Law, 12 Cyc. 259.

19. Taylor *v.* State, 32 Ind. 153; State *v.* Reilly, 108 Iowa 735, 78 N. W. 680; State *v.* Vinso, 171 Mo. 576, 71 S. W. 1034; State *v.* McCray, 74 Mo. 303; Fortenberry *v.* State, (Tex. Cr. App. 1903) 72 S. W. 593; State *v.* Hansen, 10 Wash. 235, 38 Pac. 1023; State *v.* Gile, 8 Wash. 12, 35 Pac. 417.

An information is quashed and abandoned by the filing of a new information. State *v.* Hoffman, 70 Mo. App. 271.

Amendment of informations see *infra*, X, B.

20. People *v.* Lee Look, 143 Cal. 216, 76 Pac. 1028; *In re* Pierce, 8 Ida. 183, 67 Pac. 316; Goode *v.* State, 2 Tex. App. 520 (holding that the fact that two informations charging the same offense have already been dismissed for insufficiency is no ground for dismissing a third one, which is sufficient); State *v.* Williams, 13 Wash. 335, 43 Pac. 15; State *v.* Hansen, 10 Wash. 235, 38 Pac. 1023.

"Amended information."— A new information filed after the sustaining of a demurrer to the original information is not invalidated by the fact that it is styled an "**amended information.**" People *v.* Lee Look, 143 Cal. 216, 76 Pac. 1028. See also Fortenberry *v.* State, (Tex. Cr. App. 1903) 72 S. W. 593.

21. People *v.* Lane, 101 Cal. 513, 36 Pac. 16; Kalloch *v.* San Francisco Super. Ct., 56 Cal. 229.

22. Taylor *v.* State, 32 Ind. 153; Wood *v.* State, 27 Tex. App. 538, 11 S. W. 525; Smith *v.* State, 25 Tex. App. 454, 8 S. W. 645; Orr *v.* State, 25 Tex. App. 453, 8 S. W. 644; State *v.* Riley, 36 Wash. 441, 78 Pac. 1001, holding that the court may, prior to the entry of final judgment, set aside a verdict of guilty for insufficiency of the information, and allow a new information to be substituted, although it has previously adjudged the information sufficient.

23. State *v.* Pyscher, 179 Mo. 140, 77 S. W. 836.

24. People *v.* Lane, 101 Cal. 513, 36 Pac. 16 (holding that where an information charging defendant with murder was dismissed because the justice failed to make a proper indorsement of the commitment on the complaint, and the court ordered the papers sent

informations in duplicate, for there cannot be two informations properly on file in any case.[25]

5. Formal Requisites of Information — a. In General. In the absence of a statute prescribing the form of an information, it is governed by the common law. It is in its structure similar to an indictment except in so far as the difference in their nature renders particular matters necessary or unnecessary.[26] An information must clearly purport on its face to be made or preferred by the prosecuting officer,[27] but it need not disclose the source of his knowledge of the crime or its perpetrator,[28] or state that he informs under his official oath.[29] The word "information" need not be contained in the body of the pleading.[30] An information, like an indictment, may be in several counts.[31] In some states the form of an information is prescribed by statute, and if such form is sufficient to meet constitutional requirements,[32] it is always sufficient to follow the statute.[33]

to the justice for indorsement, it was proper to permit a second information to be filed after the return of the papers by the justice properly indorsed); People *v.* Kilvington, (Cal. 1894) 36 Pac. 13; Mentor *v.* People, 30 Mich. 91; Smith *v.* State, 25 Tex. App. 454, 8 S. W. 645; Orr *v.* State, 25 Tex. App. 453, 8 S. W. 644; Johnson *v.* State, 19 Tex. App. 545; Goode *v.* State, 2 Tex. App. 520; State *v.* Williams, 13 Wash. 335, 43 Pac. 15.

25. A prosecuting officer who adopts this practice, said Judge Cooley, "must be prepared to support his case upon either. It certainly cannot rest with him, at any particular stage of the case, to say which shall and which shall not constitute the record." Rice *v.* State, 15 Mich. 9.

26. King *v.* State, 17 Fla. 183, 186.

27. Jackson *v.* State, 4 Kan. 127; Johnson *v.* State, 17 Tex. App. 230; Thompson *v.* State, 15 Tex. App. 39; Prophit *v.* State, 12 Tex. App. 233. An information so phrased as to convey the idea that the county attorney does not make it, but refers the court to the affidavit for substantiation of its statements, is bad. Prophit *v.* State, *supra*. *Compare* Arbuthnot *v.* State, 38 Tex. Cr. 509, 34 S. W. 269, 43 S. W. 1024, holding an information sufficient. If this sufficiently appears, however, objections because of mere clerical errors or informality will not avail on motion in arrest of judgment or appeal, even if they would be available at an earlier stage. Billings *v.* State, 107 Ind. 54, 6 N. E. 914, 7 N. E. 763, 57 Am. Rep. 77, holding that the use of the word "affiant," instead of the words "prosecuting attorney," in the body of the information, where the context shows that the error was a clerical one, is not such an error as will render an information fatally defective on a motion in arrest of judgment. See also Sturm *v.* State, 74 Ind. 278; Fisher *v.* State, 2 Ind. App. 365, 28 N. E. 565; State *v.* Looker, 54 Kan. 227, 38 Pac. 288; Caskey *v.* State, (Tex. Cr. App. 1899) 50 S. W. 703, holding that the fact that the second count of an information does not appear to have been presented by the county attorney, but by the county, the word "attorney" having been omitted, is not fatal thereto; the omission not appearing in the first count thereof.

Effect of erroneous indorsement "a true bill" by foreman of grand jury see *infra*, IV, A, 5, g, note 69.

Omission of name of prosecuting attorney. — It has been held that it is not necessary that an information shall contain the name of the state's attorney in the body of it. State *v.* Pratt, 54 Vt. 484. See also Mimms *v.* State, 46 Tex. Cr. 339, 81 S. W. 965; Adams *v.* State, (Tex. Cr. App. 1904) 81 S. W. 963. And even if this be regarded as necessary, the failure of an information to give the name of the prosecuting attorney at the beginning of the second and third counts is not a substantial objection, where his name is properly given in the first count. State *v.* Looker, 54 Kan. 227, 38 Pac. 288.

Mistake as to name of prosecuting attorney. — Where an information stated in the body thereof that "B., county attorney, makes information," but was signed by C as county attorney, and the record showed that C prosecuted and was recognized as county attorney, it was held not necessary to quash the information under the statute requiring presentation to be by the county attorney. Adams *v.* State, (Tex. Cr. App. 1904) 81 S. W. 963. See also Mimms *v.* State, 46 Tex. Cr. 339, 81 S. W. 965.

28. It is enough that it affirms that a certain crime has been committed, and that a certain person committed it. State *v.* Ransberger, 106 Mo. 135, 17 S. W. 290 [*affirming* 42 Mo. App. 466].

29. State *v.* Sickle, Brayt. (Vt.) 132.

30. People *v.* Baker, 100 Cal. 188, 34 Pac. 649, 38 Am. St. Rep. 276.

31. Knox *v.* State, 164 Ind. 226, 73 N. E. 255. See also State *v.* Pritchard, 35 Conn. 319; Hathcock *v.* State, 88 Ga. 91, 13 S. E. 959; Diehl *v.* State, 157 Ind. 549, 62 N. E. 51; and *infra*, VII, B.

32. See *supra*, I, A, 2, a.

33. State *v.* Stickney, 29 Mont. 523, 75 Pac. 201; State *v.* Hodgson, 66 Vt. 134, 28 Atl. 1089. See also *supra*, I, A, 2, a.

In Georgia, under Code, § 753 (former section 299), "the requisites of the accusation are only that it shall be in the name of the state and signed by the prosecutor, and that it shall distinctly set forth the nature of the offense charged, the time and place of its commission, the person by whom committed,

On the other hand failure to follow the statutory form in immaterial particulars will not be fatal.[34] An information or a conviction thereon will not be invalidated by unauthorized erasures which are unprejudical.[35]

b. Caption or Title and Commencement.[36] The title, caption, or commencement of an information, sometimes by express statutory provision, should state the names of the parties — the state and the accused — the county, the court, and the date of the information;[37] but it is generally held that technical defects in this respect not affecting the substantial rights of the accused will not be fatal;[38] and an information will not be vitiated by surplusage.[39] An information, like an indictment,[40] must by its caption or commencement show that, as required by constitutional or statutory provisions, the prosecution is conducted in the name and by authority of the state, or the people of the state, or in most jurisdictions it will be fatally defective.[41]

and the fact that it is based upon an affidavit, referring thereto." Smith *v.* State, 63 Ga. 168. An accusation under the county court act may declare that the "state of Georgia charges," etc., and need not employ the formula that the "prosecutor, in the name and behalf of the citizens of Georgia, charges," etc. Dickson *v.* State, 62 Ga. 583.

34. People *v.* Biggins, 65 Cal. 564, 4 Pac. 570.

35. People *v.* Carroll, 92 Cal. 568, 28 Pac. 600, where, after an information against defendants "and J. M." was withdrawn against the latter, someone connected with the court, after arraignment and before trial, erased the words "and J. M." by drawing a black line through them, and it was held that while the act of erasing was unauthorized, yet, as it did not prejudice defendants, it was not ground for reversal.

36. Informations for violation of city ordinances see MUNICIPAL CORPORATIONS.

37. See People *v.* Biggins, 65 Cal. 564, 4 Pac. 570; Bowen *v.* State, 28 Tex. App. 498, 13 S. W. 787.

District of Columbia.— An information under Act Cong. March 3, 1893, relating to the sale of liquors in the District of Columbia, is properly filed in the name of the District. Dempsey *v.* District of Columbia, 1 App. Cas. (D. C.) 63.

38. It is not an error fatal to the jurisdiction of the court that, in the recital of venue in the information, the characters "ss" were omitted from the allegation as to venue. Seay *v.* Shrader, (Nebr. 1903) 95 N. W. 690.

Defect in the title of an information is not ground for quashing it. Malone *v.* State, 14 Ind. 219. See also State *v.* Mathis, 21 Ind. 277.

Omission of title and name of court.— An affidavit and information which do not contain the title of the cause and the name of the court as required by Ind. Rev. St. (1894) § 1800, are cured by section 1825 which provides that no information shall be deemed invalid for "any defect or imperfection which does not tend to the prejudice of the substantial rights of the defendant upon the merits." Rivers *v.* State, 144 Ind. 16, 42 N. E. 1021. Omission to state in the caption of an information the name of the court in which it is filed is merely a defect in form, and cannot be assigned as error on appeal. State *v.* Brennan, 2 S. D. 384, 50 N. W. 625. In Texas, however, it is held an indispensable requirement that an information shall affirmatively show on its face that it is presented in a court having jurisdiction of the offense, as required by statute. Bowen *v.* State, 28 Tex. App. 498, 13 S. W. 787.

Misnomer of term of court.— Where the record proper shows that an information was filed in open court during a term, the clerical error of misnaming the particular term at which it was filed, in the caption of the information, constitutes no ground for reversing a judgment of conviction thereon. Williams *v.* State, 42 Fla. 205, 27 So. 898.

Misnomer of court.— An information stating that it was presented to the "count court," instead of the "county court," is not defective, since the county court is the only court where an information can be filed. Whitley *v.* State, (Tex. Cr. App. 1900) 56 S. W. 69. Mistake in describing the superior court of the county as the superior court of the state is of no avail to defendant. State *v.* Costello, 29 Wash. 366, 69 Pac. 1099.

Name of county.— Where the information designates by what district attorney it is filed, the omission in the title of the action of the name of the county is not a fatal error, as it does not affect the substantial rights of defendant. People *v.* Biggins, 65 Cal. 564, 4 Pac. 570. The statement in the caption of the title of the court to which the information is presented is sufficient, without naming the county. State *v.* Mathis, 21 Ind. 277.

39. State *v.* Smouse, 49 Iowa 634; State *v.* Murphy, 49 Mo. App. 270.

40. See as to indictments *supra*, III, B, 3, e; III, C, 3.

41. Chesshire *v.* People, 116 Ill. 493, 6 N. E. 486; Gould *v.* People, 89 Ill. 216; Parris *v.* People, 76 Ill. 274; State *v.* Hazledahl, 2 N. D. 521, 52 N. W. 315, 16 L. R. A. 150; Saine *v.* State, 14 Tex. App. 144, holding an information fatally defective in departing from the constitutional requirement by omitting the words "of Texas" after the commencement, "In the name and by the authority of the state." It has been held, however, that where, in the caption of an information,

c. Body or Charge. The charge or body of an information is like that of an indictment and its sufficiency is determined by the same rules.[42] An information must charge the offense with the same certainty as is necessary to an indictment.[43] It must contain all the substantial requirements of an indictment at common law.[44] No offense is charged by an information which, without itself alleging the inculpatory act, refers to the "affidavit which is herewith filed and shows" the commission of the act by the accused.[45]

d. Conclusion. In some states an information, like an indictment,[46] must conclude "against the peace of the state," etc.,[47] and "against the form of the statute," etc.;[48] but in other states a formal conclusion is held to be unnecessary or its omission is cured by statute.[49] In some states each count of an information must have a proper conclusion,[50] but in others it is sufficient if there is a proper conclusion at the end of the information.[51] An information for murder must have the proper special conclusion necessary in an indictment, except that it must be on the oath of the prosecutor instead of the grand jury.[52]

the case is entitled the "State of Washington" against the defendants, naming them, it sufficiently appears that the prosecution is in the name of the state. State *v.* Devine, 6 Wash. 587, 34 Pac. 154. And in Indiana it has been held that it is no ground of objection that an information does not contain a specific allegation that the prosecution is carried on in the name of the state, if this otherwise appears. Snodgrass *v.* State, 13 Ind. 292. And see Cronkhite *v.* State, 11 Ind. 307. So, under Nebr. Const. art. 6, § 24, requiring that all process shall run in the name of the state of Nebraska, and the prosecution shall be conducted in the name of the state of Nebraska, an information filed in the district court with a caption of "The State of Nebraska," and prosecuted in the name of the state of Nebraska, is sufficient. Alderman *v.* State, 24 Nebr. 97, 38 N. W. 36.

Surplusage.— Where an information runs in the name of the county, as well as the state, the former will be treated as surplusage. State *v.* Murphy, 49 Mo. App. 270.

42. Sovine *v.* State, 85 Ind. 576; Lindsey *v.* State, 72 Ind. 39; State *v.* Miles, 4 Ind. 577; Merwin *v.* People, 26 Mich. 298, 12 Am. Rep. 314; Kern *v.* State, 7 Ohio St. 411; State *v.* Elliott, 41 Tex. 224.

43. Parris *v.* People, 76 Ill. 274; Avery *v.* People, 11 Ill. App. 332; State *v.* Beebe, 83 Ind. 171; Dillingham *v.* State, 5 Ohio St. 280. And see *infra*, V *et seq.*

44. Mount *v.* State, 7 Ind. 654; State *v.* Miles, 4 Ind. 577; and other cases cited in the notes preceding.

45. Brown *v.* State, 11 Tex. App. 451.

46. See as to the conclusion of indictments *supra*, III, E.

47. People *v.* Fowler, 88 Cal. 136, 25 Pac. 1110 (misplacing of the concluding words of the information after instead of before a charge of prior conviction is immaterial); People *v.* Biggins, 65 Cal. 564, 4 Pac. 570 (following statute sufficient); Holt *v.* People, 23 Colo. 1, 45 Pac. 374 (sufficient to conclude "against the peace and dignity of the same people of the state of Colorado," instead of "against the peace and dignity of the same," as in the constitution); Chesshire *v.* People, 116 Ill. 493, 6 N. E. 486; Gould *v.* People, 89 Ill. 216; Parris *v.* People, 76 Ill. 274; State *v.* Hinton, 49 La. Ann. 1354, 22 So. 617 (the conclusion against the peace and dignity of the state, although following the allegation negativing prescription, will be deemed to refer to the body of the information); State *v.* Ulrich, 96 Mo. App. 689, 70 S. W. 933; Wilson *v.* State, 38 Tex. 548; Wright *v.* State, 37 Tex. Cr. 3, 35 S. W. 150, 38 S. W. 811; Wood *v.* State, 27 Tex. App. 538, 11 S. W. 525; Thompson *v.* State, 15 Tex. App. 39, 168 (departure from constitution by omitting "the" before "state" is fatal). The objection that the concluding phrase of the counts of an information, "against the peace and dignity of the state of Montana," etc., modifies only the last sentence preceding such words in each count, is untenable. State *v.* Stickney, 29 Mont. 523, 75 Pac. 201. See also People *v.* Biggins, 65 Cal. 564, 4 Pac. 570.

A constitutional provision that all prosecutions shall be carried on in the name and by the authority of the state or people of the state, and shall conclude against the peace and dignity of the same, applies to informations as well as indictments. Chesshire *v.* People, 116 Ill. 493, 6 N. E. 486; and other cases above cited. *Contra*, Nichols *v.* State, 35 Wis. 308, where the constitution merely required that all "indictments" should so conclude.

Informations for violation of ordinances see MUNICIPAL CORPORATIONS.

48. People *v.* Biggins, 65 Cal. 564, 4 Pac. 570, following statute sufficient.

49. Snodgrass *v.* State, 13 Ind. 292; Edwards *v.* People, 39 Mich. 760; Bolln *v.* State, 51 Nebr. 581, 71 N. W. 444; State *v.* Hellekson, 13 S. D. 242, 83 N. W. 254; Murphy *v.* State, 108 Wis. 111, 83 N. W. 1112; Nichols *v.* State, 35 Wis. 308.

50. State *v.* Ulrich, 96 Mo. App. 689, 70 S. W. 933. See *supra*, III, E, 4.

51. State *v.* Scott, 48 La. Ann. 293, 19 So. 141; Alexander *v.* State, 27 Tex. App. 533, 11 S. W. 628. See also Bolln *v.* State, 51 Nebr. 581, 71 N. W. 444; and *infra*, III, E, 4.

52. State *v.* Dawson, 187 Mo. 60, 85 S. W. 526. And see HOMICIDE, 21 Cyc. 858.

e. Statement of Jurisdictional Facts. In most jurisdictions it is held that it is not necessary that an information shall allege or show on its face the existence of the conditions or prerequisites necessary to authorize prosecution by information,[53] as, for example, that the court is in session,[54] that the grand jury is not in session or has been discharged,[55] that the information is filed by leave of court,[56] that it is based upon a proper affidavit or complaint,[57] that it is made by a credible resident,[58] or that there has been a preliminary examination and commitment or finding of probable cause, or the existence of causes rendering the same necessary.[59]

f. Signatures. It is generally essential to the validity of an information that the same be signed by the proper prosecuting attorney.[60] And it has been held that where he fails to sign before the commencement of the trial the defect can-

53. *California.*— People *v.* Shubrick, 57 Cal. 565.

Indiana.— Blake *v.* State, 18 Ind. App. 280, 47 N. E. 942. And see, as to this state, *infra*, this note.

Kansas.— State *v.* Geer, 48 Kan. 752, 30 Pac. 236; State *v.* Finley, 6 Kan. 366.

Louisiana.— State *v.* De Serrant, 33 La. Ann. 979.

Michigan.— Washburn *v.* People, 10 Mich. 372.

Montana.— State *v.* Spotted Hawk, 22 Mont. 33, 55 Pac. 1026.

Ohio.— Weisbrodt *v.* State, 50 Ohio St. 192, 33 N. E. 603.

Washington.— State *v.* Melvern, 32 Wash. 7, 72 Pac. 489; State *v.* Munson, 7 Wash. 239, 34 Pac. 932; State *v.* Anderson, 5 Wash. 350, 31 Pac. 969.

Wisconsin.— Peterson *v.* State, 45 Wis. 535.

United States.— U. S. *v.* Moller, 26 Fed. Cas. No. 15,794, 16 Blatchf. 65.

In **Indiana** it was formerly necessary for an information to allege the existence of the statutory conditions or prerequisites necessary to authorize prosecution by affidavit and information. Fox *v.* State, 76 Ind. 243; Sturm *v.* State, 74 Ind. 278; Iter *v.* State, 74 Ind. 188; State *v.* Henderson, 74 Ind. 23; Burroughs *v.* State, 72 Ind. 334; Lindsey *v.* State, 72 Ind. 39; Davis *v.* State, 69 Ind. 130; Hunter *v.* State, 29 Ind. 80; Cobb *v.* State, 27 Ind. 133; Newcome *v.* State, 27 Ind. 10; Walker *v.* State, 23 Ind. 61; Broadhurst *v.* State, 21 Ind. 333; Dougherty *v.* State, 20 Ind. 442; Wilson *v.* State, 20 Ind. 384; Mitchell *v.* State, 19 Ind. 381; Smith *v.* State, 19 Ind. 227; Smith *v.* State, 19 Ind. 197; Roberts *v.* State, 19 Ind. 180; Parker *v.* State, 18 Ind. 424; Alford *v.* State, 18 Ind. 407; Jones *v.* State, 18 Ind. 179; Gorden *v.* State, 18 Ind. 152; Kreigh *v.* State, 17 Ind. 495; Harrison *v.* State, 17 Ind. 422; Justice *v.* State, 17 Ind. 56; McCarty *v.* State, 16 Ind. 310. But this is no longer necessary since the adoption of Ind. Rev. St. (1881) § 1733, prescribing the form of information and dispensing with such allegations. Stifel *v.* State, 163 Ind. 628, 72 N. E. 600; State *v.* Duggins, 146 Ind. 427, 45 N. E. 603; Nichols *v.* State, 127 Ind. 406, 26 N. E. 839; Powers *v.* State, 87 Ind. 97; Hodge *v.* State, 85 Ind. 561; State *v.* Frain, 82 Ind. 532; Blake *v.* State, 18 Ind. App. 280, 47 N. E. 942.

54. State *v.* Duggins, 146 Ind. 427, 45 N. E. 603; Hodge *v.* State, 85 Ind. 561.

55. State *v.* Duggins, 146 Ind. 427, 45 N. E. 603; Hodge *v.* State, 85 Ind. 561; State *v.* Lewis, 31 Wash. 515, 72 Pac. 121; State *v.* Boyce, 24 Wash. 514, 64 Pac. 719; State *v.* Anderson, 5 Wash. 350, 31 Pac. 969.

56. State *v.* De Serrant, 33 La. Ann. 979; State *v.* Spotted Hawk, 22 Mont. 33, 55 Pac. 1026. Leave of court first obtained sufficiently appears from an entry on the record that the information is "ordered" to be filed by the court (State *v.* Robacker, 31 La. Ann. 651), or that the district attorney "with leave of the court" filed the information (State *v.* Cox, 33 La. Ann. 1056).

57. Stifel *v.* State, 163 Ind. 628, 72 N. E. 600; Blake *v.* State, 18 Ind. App. 280, 47 N. E. 942; Weisbrodt *v.* State, 50 Ohio St. 192, 33 N. E. 603. *Contra*, State *v.* Schnettler, 181 Mo. 173, 79 S. W. 1123. Where an affidavit filed with an information before a justice was made by one H, and the information recited that it was on the affidavit of H and another, it was held that the variance was not such as to warrant the quashing of the information. State *v.* Moore, 67 Mo. App. 320.

58. Weir *v.* Allen, 47 Iowa 482.

59. *California.*— People *v.* Shubrick, 57 Cal. 565.

Delaware.— State *v.* Moore, 2 Pennew. 299, 46 Atl. 669.

Idaho.— State *v.* Farris, 5 Ida. 666, 51 Pac. 772.

Kansas.— State *v.* Geer, 48 Kan. 752, 30 Pac. 236; State *v.* Finley, 6 Kan. 366; State *v.* Barnett, 3 Kan. 250, 87 Am. Dec. 471.

Michigan.— Washburn *v.* People, 10 Mich. 372.

Washington.— State *v.* Lewis, 31 Wash. 515, 72 Pac. 121; State *v.* Boyce, 24 Wash. 514, 64 Pac. 719; State *v.* Anderson, 5 Wash. 350, 31 Pac. 969.

United States.— U. S. *v.* Moller, 26 Fed. Cas. No. 15,794, 16 Blatchf. 65.

60. Jackson *v.* State, 4 Kan. 150; State *v.* Beddo, 22 Utah 432, 63 Pac. 96. See also *supra*, IV, A, 5, a.

In **Texas**, however, want of the official signature of the county or district attorney is not a fatal defect, where it otherwise appears that the information was made by him, although the code requires such signature, as it further provides that exception

not be cured by subsequently signing *nunc pro tunc*.[61] An information may be signed by an assistant or deputy prosecuting attorney, if authorized, in the name of the prosecuting attorney,[62] or, where he presents the information, in his own name as assistant or deputy,[63] or by a duly appointed special or *pro tempore* prosecuting attorney.[64] Where an information contains several counts it is sufficient to sign at the end without signing each count.[65] An information need not be signed by the individual on whose complaint it is preferred by the public prosecutor.[66]

g. Indorsements. In the absence of a statute the name of the prosecuting witness or other witnesses for the state need not be indorsed on an information;[67] but in some states this is required by statute in order that the witnesses

to the form of an information shall not go to the signature of the attorney representing the state. Jones *v.* State, 30 Tex. App. 426, 17 S. W. 1080; Rasberry *v.* State, 1 Tex. App. 664. See also Arbuthnot *v.* State, 38 Tex. Cr. 509, 34 S. W. 269, 43 S. W. 1024.

Subscription or signing held sufficient see People *v.* Ebanks, 117 Cal. 652, 49 Pac. 1049, 40 L. R. A. 269; State *v.* Brock, 186 Mo. 457, 85 S. W. 595, 105 Am. St. Rep. 625. That the attorney filing an information used the initials of his given name does not affect its validity. State *v.* Kyle, 166 Mo. 287, 65 S. W. 763, 56 L. R. A. 115. A motion to quash an information in a criminal case on the ground that the "prosecuting attorney" signed it as "county attorney" is properly denied. State *v.* McGann, 8 Ida. 40, 66 Pac. 823. It is immaterial that the officer signs himself "district attorney prosecutor," instead of "district attorney." Malone *v.* State, 14 Ind. 219. An information signed and filed by the proper prosecuting officer, who describes himself therein as "prosecuting attorney," and not as "county attorney," is sufficient, if so in other respects. State *v.* Nulf, 15 Kan. 404.

Variance between the name signed and the name set out in the beginning of the information is not necessarily fatal. Williams *v.* State, 44 Tex. Cr. 235, 70 S. W. 213.

Printed signature.— It has been held that an objection that the information contains the signature of the prosecuting attorney in printed type, instead of being written, is one which relates merely to a matter of form and is amendable. District of Columbia *v.* Washington Gas Light Co., 3 Mackey (D. C.) 343.

61. Jackson *v.* State, 4 Kan. 150. *Compare*, however, Cooper *v.* State, 63 Ga. 515.

62. People *v.* Griner, 124 Cal. 19, 56 Pac. 625; People *v.* Etting, 99 Cal. 577, 34 Pac. 237; People *v.* Darr, 61 Cal. 554; Hammond *v.* State, 3 Wash. 171, 28 Pac. 334; U. S. *v.* Nagle, 27 Fed. Cas. No. 15,852, 17 Blatchf. 258.

63. *California.*— People *v.* Turner, 85 Cal. 432, 24 Pac. 857.

Colorado.— Williams *v.* People, 26 Colo. 272, 57 Pac. 701.

Indiana.— Stout *v.* State, 93 Ind. 150, a case of indictment, but equally applicable to informations.

Louisiana.— State *v.* Ryder, 36 La. Ann. 294; State *v.* Faulkner, 32 La. Ann. 725.

Michigan.— People *v.* Twombley, 62 Mich. 278, 28 N. W. 837.

Missouri.— State *v.* Ittner, 100 Mo. App. 276, 73 S. W. 289; State *v.* Hayes, 16 Mo. App. 560; State *v.* Higgins, 16 Mo. App. 559. *Compare* Browne's Appeal, 69 Mo. App. 159.

New Hampshire.— State *v.* Ingalls, 59 N. H. 88 (by solicitor in the absence of the attorney-general); State *v.* Daniels, 44 N. H. 383 (the same).

Washington.— State *v.* Riddell, 33 Wash. 324, 74 Pac. 477.

See also *supra*, IV, A, 2, b, (II).

Signature by a de facto assistant attorney has been held good. People *v.* Turner, 85 Cal. 432, 24 Pac. 857.

Presumption.— Where an information is signed by the assistant district attorney, the court will presume that the statutory reasons for the substitution of the assistant existed. State *v.* Faulkner, 32 La. Ann. 725. See also *supra*, IV, A, 2, b, (II).

64. Williams *v.* People, 26 Colo. 272, 57 Pac. 701; State *v.* Robacker, 31 La. Ann. 651. See also *supra*, IV, A, 2, b, (II).

65. State *v.* McLane, 4 La. Ann. 435 (even though there are several sheets); State *v.* Paddock, 24 Vt. 312 (where the information contained one hundred counts, each having a distinct caption, but all the pages were connected together); Chase *v.* State, 50 Wis. 510, 7 N. W. 376.

66. U. S. *v.* Hoskins, 5 Mackey (D. C.) 478.

67. People *v.* Sherman, (Cal. 1893) 32 Pac. 879; State *v.* Flowers, 56 Mo. App. 502; Bartlett *v.* State, 28 Ohio St. 669; U. S. *v.* Shepard, 27 Fed. Cas. No. 16,273, 1 Abb. 431.

Statute relating to indictments.— A statute requiring indorsement of the names of witnesses before the grand jury on indictments (as to which see *supra*, III, G, 5) does not apply to informations. People *v.* Sherman, (Cal. 1893) 32 Pac. 879; Bartlett *v.* State, 28 Ohio St. 669.

Federal courts.— It is not necessary to the validity of an information in a federal court that the names of witnesses for the prosecution should be indorsed thereon, even though a state statute makes such provision, as criminal proceedings in federal courts are not governed by state laws, except as provided in

may be called at the trial.[68] Unnecessary indorsements on an information will not invalidate it.[69]

h. Verification. At common law an information could be filed by the attorney or solicitor general simply on his oath of office and without verification,[70] and it has been held therefore in this country, that verification of an information by the prosecuting attorney is unnecessary unless required by statute.[71] It is sometimes required by statute, however, that an information either be verified by the prosecuting attorney or supported by the affidavit of some witness, and in such case compliance with the statute is essential.[72] And it has been held that a prosecution under an information not supported by the oath or affirmation of any person is in violation of a constitutional prohibition against the seizure of any person without probable cause supported by oath or affirmation.[73] But an information by the prosecuting officer need not be verified unless required by statute, if it is based upon an affidavit or complaint on oath by a private person,[74]

the constitution or acts of congress. U. S. *v.* Shepard, 27 Fed. Cas. No. 16,273, 1 Abb. 431.

68. See CRIMINAL LAW, 12 Cyc. 513.

69. The indorsement on an information of the words "rape and incest," in connection with the word "information," is not ground for reversal, where such words aptly summarized the facts stated in the information, and where no objection thereto was made below. Fager *v.* State, 49 Nebr. 439, 68 N. W. 611.

Erroneous indorsement as indictment.— An information presented at the request of the grand jury, and indorsed "A true bill" by the foreman, does not thereby become an indictment. Texas, etc., R. Co. *v.* State, 41 Ark. 488.

70. See *supra*, IV, A, 2, a.

71. *Illinois.*— Long *v.* People, 135 Ill. 435, 25 N. E. 851, 10 L. R. A. 48; Gallagher *v.* People, 120 Ill. 179, 11 N. E. 335; Obermark *v.* People, 24 Ill. App. 259.

Louisiana.— State *v.* Anderson, 30 La. Ann. 557.

Michigan.— People *v.* Graney, 91 Mich. 646, 52 N. W. 66.

Missouri.— State *v.* Pohl, 170 Mo. 422, 70 S. W. 695; State *v.* White, 55 Mo. App. 356; State *v.* Ramsey, 52 Mo. App. 668; State *v.* Haley, 52 Mo. App. 520; State *v.* Buck, 43 Mo. App. 443; State *v.* Ransberger, 42 Mo. App. 466 [*affirmed* in 106 Mo. 135, 17 S. W. 290]; State *v.* Parker, 39 Mo. App. 116; State *v.* Fletchall, 31 Mo. App. 296.

Montana.— State *v.* Brantly, 20 Mont. 173, 50 Pac. 410.

New Hampshire.— State *v.* Dover, 9 N. H. 468.

New Mexico.— Territory *v.* Cutinola, 4 N. M. 160, 14 Pac. 809.

Ohio.— O'Brien *v.* Cleveland, 4 Ohio Dec. (Reprint) 189, 1 Clev. L. Rep. 100.

Oregon.— State *v.* Guglielmo, (1905) 79 Pac. 577, 80 Pac. 103.

South Carolina.— *In re* Jager, 29 S. C. 438, 7 S. E. 605.

Washington.— Hammond *v.* State, 3 Wash. 171, 28 Pac. 334.

See 27 Cent. Dig. tit. "Indictment and Information," § 163 *et seq.*

In Illinois, under Rev St. c. 37, § 117, which provides for the filing of informations by the state's attorney or the attorney-general or some other person, and requires a certification only in the latter case, an information made in the name of the state's attorney, and presented by him, but verified by the affidavit of a third person, is an information by the state's attorney and requires no further verification. Long *v.* People, 135 Ill. 435, 25 N. E. 851, 10 L. R. A. 48. The affidavit of a private person accompanying an information filed by the prosecuting attorney is no part of the information and cannot be considered to establish that the information is that of the affiant so as to require verification. Long *v.* People, *supra.*

72. See Noble *v.* People, 23 Colo. 9, 45 Pac. 376; State *v.* Peak, 66 Kan. 701, 72 Pac. 237; State *v.* Spencer, 43 Kan. 119, 23 Pac. 159; State *v.* York, 7 Kan. App. 291, 53 Pac. 838; State *v.* Decker, 185 Mo. 182, 83 S. W. 1082; State *v.* Hannigan, 182 Mo. 15, 81 S. W. 406; State *v.* Sheridan, 182 Mo. 13, 81 S. W. 410; State *v.* Bonner, 178 Mo. 424, 77 S. W. 463; State *v.* Balch, 178 Mo. 392, 77 S. W. 547; State *v.* Armstrong, 106 Mo. 395, 16 S. W. 604, 27 Am. St. Rep. 361, 13 L. R. A. 419; State *v.* Bennett, 102 Mo. 356, 14 S. W. 865, 10 L. R. A. 717; State *v.* Hayward, 83 Mo. 299; State *v.* Calfer, (Mo. 1887) 4 S. W. 418; State *v.* Runzi, (App. 1904) 80 S. W. 36; State *v.* Bragg, 63 Mo. App. 22; State *v.* Sayman, 61 Mo. App. 244; State *v.* O'Connor, 58 Mo. App. 457.

"Prosecuting" and "county" attorney.— Under Nebr. Cr. Code, §§ 579, 580, providing that all informations shall be filed and verified by the oath of the prosecuting attorney of the proper county, an information verified by the oath of the county attorney for the county is sufficient, since the words "prosecuting attorney" in such sections mean county attorney. Trimble *v.* State, 61 Nebr. 604, 85 N. W. 844. See also Bush *v.* State, 62 Nebr. 128, 86 N. W. 1062.

73. Lustig *v.* People, 18 Colo. 217, 32 Pac. 275; State *v.* Gleason, 32 Kan. 245, 4 Pac. 363; Eichenlaub *v.* State, 36 Ohio St. 140; Thornberry *v.* State, 3 Tex. App. 36; State *v.* Boulter, 5 Wyo. 236, 39 Pac. 883. See also CRIMINAL LAW, 12 Cyc. 291.

74. White *v.* People, 8 Colo. App. 289, 45 Pac. 539; U. S. *v.* Polite, 35 Fed. 58.

or on a preliminary examination and commitment by a magistrate after arrest on an affidavit or sworn complaint.[75] And if an information is sworn to positively by some person, it is not necessary for the prosecuting attorney to also verify it.[76] When an information is required to be verified it must be sworn to before an officer authorized to administer the oath,[77] and that it was sworn to must appear from a proper jurat signed officially by the officer.[78] It is very generally held, even when verification of an information is required, that the prosecuting attorney may verify on information and belief;[79] but when the verification is by a private person it must be positive and by one having actual knowledge of the facts.[80] An information may in a proper case be verified by a deputy, assistant,

75. U. S. *v.* Polite, 35 Fed. 58.

76. State *v.* Brooks, 33 Kan. 708, 7 Pac. 591; State *v.* Davidson, 44 Mo. App. 513.

77. People *v.* Burns, 121 Cal. 529, 53 Pac. 1096 (clerk of police court has authority); Trimble *v.* State, 61 Nebr. 604, 85 N. W. 844 (clerk of district court has authority).

78. Scott *v.* State, 9 Tex. App. 434. An accusation commencing "W. on oath presents," and duly "subscribed and sworn to before" the clerk, is "verified by oath," as required by statute. Woods *v.* Varnum, 85 Cal. 639, 24 Pac. 843.

By prosecuting attorney.— An affidavit that affiant is the prosecuting attorney in and for the county, that he knows the contents of the foregoing information, and that the same are true, when subscribed and sworn to before the clerk of court, sufficiently verifies the information. State *v.* Regan, 8 Wash. 506, 36 Pac. 472. Under Mo. Laws (1901), pp. 138, 139, requiring an information to be signed by the prosecuting attorney and verified by his oath or by the oath of some person competent to testify as a witness in the case, an information signed by the prosecuting attorney, and in which the clerk of the court certifies that the prosecuting attorney makes oath that the facts stated are true, is a substantial compliance with the statute State *v.* Hicks, 178 Mo. 433, 77 S. W. 539.

Jurat.— A jurat to the verification of an information signed by "J. C. Jeffers, Clerk," is sufficient, as the court takes judicial notice of its clerk. Trimble *v.* State, 61 Nebr. 604, 85 N. W. 844. See also *supra*, IV, A, 2, b, (x), (B). The signature of the clerk of the court is not insufficient because he uses initials for his christian name (Rice *v.* People, 15 Mich. 9), or because of clerical errors in the designation of his official character (State *v.* Derkum, 27 Mo. App. 628, "circuit court" instead of "circuit clerk"). Where the jurat attached to the verification of an information stated that the same was "sworn to and subscribed in my presence," it was held that the omission by the certifying officer of the words "before me" after the words "sworn to" in the jurat was not a fatal objection to the information. State *v.* Smith, 38 Kan. 194, 16 Pac. 254.

The fact that a deputy clerk of court signs the jurat to the verification of an information in the name of the clerk by himself as deputy does not render the information insufficient. State *v.* White, 12 Wash. 417, 41 Pac. 182.

Seal.— Omission of the seal of the court or clerk from the jurat is not fatal. State *v.* Foulk, 57 Kan. 255, 45 Pac. 603; State *v.* Pfenninger, 76 Mo. App. 313; Gustavenson *v.* State, 10 Wyo. 300, 68 Pac. 1006. See *supra*, IV, A, 2, b, (x), (B).

79. *Colorado.*— Brown *v.* People, 20 Colo. 161, 36 Pac. 1040; White *v.* People, 8 Colo. App. 289, 45 Pac. 539.

Kansas.— State *v.* Moseli, 49 Kan. 142, 30 Pac. 189; State *v.* Stoffel, 48 Kan. 364, 29 Pac. 685; State *v.* Druitt, 42 Kan. 469, 22 Pac. 697; State *v.* Whisner, 35 Kan. 271, 10 Pac. 852; State *v.* Nulf, 15 Kan. 404; State *v.* Montgomery, 8 Kan. 351; State *v.* Cropper, 4 Kan. App. 245, 45 Pac. 131.

Michigan.— Mentor *v.* People, 30 Mich. 91; Washburn *v.* People, 10 Mich. 372.

Missouri.— State *v.* Gregory, 178 Mo. 48, 76 S. W. 970; State *v.* Jones, 168 Mo. 398, 68 S. W. 566; State *v.* Armstrong, 106 Mo. 395, 16 S. W. 604, 27 Am. St. Rep. 361, 13 L. R. A. 419; State *v.* Ransberger, 106 Mo. 135, 17 S. W. 290 [*affirming* 42 Mo. App. 466]; State *v.* Bennett, 102 Mo. 356, 14 S. W. 865, 10 L. R. A. 717; State *v.* Storts, (1886) 1 S. W. 288; State *v.* Hayward, 83 Mo. 299; State *v.* Hunt, 106 Mo. App. 326, 80 S. W. 279; State *v.* Blands, 101 Mo. App. 618, 74 S. W. 3; State *v.* Feagan, 70 Mo. App. 406; State *v.* Graham, 46 Mo. App. 527; State *v.* Buck, 43 Mo. App. 443; State *v.* Kaub, 19 Mo. App. 149; State *v.* Pruett, 1 Mo. App. Rep. 356.

Montana.— State *v.* Shafer, 26 Mont. 11, 66 Pac. 463.

Nebraska.— Sharp *v.* State, 61 Nebr. 187, 85 N. W. 38.

North Dakota.— State *v.* Hasledahl, 2 N. D. 521, 52 N. W. 315, 16 L. R. A. 150.

South Dakota.— State *v.* Donaldson, 12 S. D. 259, 81 N. W. 299.

See 27 Cent. Dig. tit. "Indictment and Information," § 167. And *compare supra*, IV, A, 2, b, (x), (B).

80. State *v.* Hayward, 83 Mo. 299; State *v.* Storts, (Mo. 1886) 1 S. W. 288. See also *supra*, IV, A, 2, b, (x), (B). *Compare*, under the special law applicable to the St. Louis court of criminal correction, State *v.* Bach, 25 Mo. App. 554. An affidavit that the facts stated in an information are true and correct is a positive verification of the information, and sufficient to sustain a warrant issued thereon. State *v.* Watson, 6 Kan. App. 897, 50 Pac. 959. The fact that an information charging an offense was verified positively by a private person, and on information and belief by the county attorney, does not weaken the charge, nor operate to the prejudice of the

or *pro tempore* prosecuting attorney.[81] An information by the prosecuting attorney will not be invalidated by an unnecessary verification by the prosecuting witness.[82] When an information is amended it need not necessarily be again verified.[83] Failure to verify an information may be corrected at any time before trial.[84]

B. Complaint — 1. In General. Complaints by a private person or officer other than the prosecuting attorney, as distinguished from an information, are ordinarily used only for the purpose of procuring an arrest and preliminary proceedings before a magistrate,[85] or in summary prosecutions before a magistrate or police court;[86] but they are sometimes used under statutes in prosecutions in other courts.[87] Such a complaint in charging the offense is governed by substantially the same rules as an indictment or information, and must charge the offense with the same certainty.[88] A grand juror's complaint must show on its face that it is properly addressed by him and under his oath of office.[89] A caption is not necessary to a complaint if the court and the venue otherwise sufficiently appear.[90]

2. Conclusion.[91] In some states a complaint must conclude like an indictment "against the peace and dignity of the state,"[92] and "against the form of the statute," etc.;[93] but elsewhere this is not necessary.[94]

3. Signature.[95] A complaint must be properly signed or subscribed by the complainant as required by the statute.[96]

defendant; neither does it make the information subject to a motion to quash for indefiniteness. State *v.* Gill, 63 Kan. 382, 65 Pac. 682. The fact that the testimony discloses that the party who verified an information did not have personal knowledge of the guilt of the accused does not impair the sufficiency of the verification or information, since its statements cannot be thus attacked by extraneous evidence. Bergdahl *v.* People, 27 Colo. 302, 61 Pac. 228.

Presumption.— Where an information is verified by the oath of a private person, it will be presumed, in the absence of anything to the contrary, that he has actual knowledge of the facts stated therein. State *v.* Lund, 51 Kan. 1, 32 Pac. 657.

81. State *v.* Bennett, 102 Mo. 356, 14 S. W. 865, 10 L. R. A. 717; Hammond *v.* State, 3 Wash. 171, 28 Pac. 334. See also *supra*, IV, A, 2, b, (II), 5, f. *Compare* State *v.* Guglielmo, (Oreg. 1905) 79 Pac. 577, 80 Pac. 103. The omission of the word "deputy," in the affidavit to the information, as descriptive of the officer prosecuting was immaterial. Hammond *v.* State, *supra*.

82. State *v.* Shanks, 98 Mo. App. 138, 71 S. W. 1065; State *v.* Zeppenfeld, 12 Mo. App. 574.

83. An information for burglary can be amended at the trial as to the spelling of one word without being again verified. State *v.* Bugg, 66 Kan. 668, 72 Pac. 236. And where an information to which the prosecutrix had already sworn was amended in her presence, it was held unnecessary to swear to it anew. State *v.* Nash, 51 S. C. 319, 28 S. E. 946. An amended information will not be quashed because not positively verified, where the original information is so verified, the arrest being therefore legal. State *v.* Engborg, 63 Kan. 853, 66 Pac. 1007.

84. State *v.* Schnettler, 181 Mo. 173, 79 S. W. 1123.

85. See Criminal Law, 12 Cyc. 291, 340.

86. See Criminal Law, 12 Cyc. 323.

87. See *supra*, I, B, 4.

88. State *v.* Carpenter, 60 Conn. 97, 22 Atl. 497; Com. *v.* Bartley, 138 Mass. 181; Com. *v.* Hutton, 5 Gray (Mass.) 89, 66 Am. Dec. 352; Com. *v.* Randall, 4 Gray (Mass.) 36; Com. *v.* Penniman, 8 Metc. (Mass.) 519; State *v.* Fiske, 18 R. I. 416, 28 Atl. 348. See also Criminal Law, 12 Cyc. 324.

The venue must be stated. Com. *v.* Carroll, 145 Mass. 403, 14 N. E. 618; Com. *v.* Barnard, 6 Gray (Mass.) 488; Com. *v.* Cummings, 6 Gray (Mass.) 487. *Compare* Com. *v.* Gillon, 2 Allen (Mass.) 502, offenses near county line. See also Criminal Law, 12 Cyc. 324.

Date.— Where the date is omitted in a complaint which alleges that on a certain day, "and on divers other days and times between that day and the day of making this complaint," an offense was committed, it is nevertheless good if the time appears by the certificate of its reception and the jurat. Com. *v.* Blake, 12 Allen (Mass.) 188.

Surplusage and immaterial clerical errors will not invalidate a complaint. Com. *v.* Randall, 4 Gray (Mass.) 36; Com. *v.* Penniman, 8 Metc. (Mass.) 519.

89. See State *v.* Davis, 52 Vt. 376, holding a complaint sufficient, although the grand juror's name did not appear in the body of the complaint.

90. Com. *v.* Quin, 5 Gray (Mass.) 478.

91. **Complaint for nuisance** see Nuisances.

92. Simpson *v.* State, 111 Ala. 6, 20 So. 572; State *v.* Soragan, 40 Vt. 450. See also State *v.* Morgan, 79 Miss. 659, 31 So. 338.

93. State *v.* Bacon, 40 Vt. 456; State *v.* Soragan, 40 Vt. 450.

94. See State *v.* Gill, 89 Minn. 502, 95 N. W. 449; and Criminal Law, 12 Cyc. 326.

95. See also as to signature of complaint Criminal Law, 12 Cyc. 325.

96. A complaint for larceny, signed by the

4. Verification or Accompanying Affidavit. It is also necessary that a complaint shall be properly verified or accompanied by an affidavit as required by the statute;[97] and the verification must be before an officer authorized to administer the oath, and be shown by a proper jurat or certificate over the signature of the officer.[98]

5. Loss or Destruction. Where, in a prosecution by complaint, the complaint is lost, it may be supplied, under a statute providing that all kinds of lost records may be replaced by substitutes, even if the statute as to lost criminal accusations relates only to supplying lost indictments and informations.[99]

complainant below the description of the goods stolen and above the charge of larceny, is not "subscribed by the complainant" as required by Mass. Rev. St. c. 135, § 2, which provides that the magistrate must reduce the complaint to writing and cause the same to be subscribed by the complainant. Com. *v.* Barhight, 9 Gray (Mass.) 113, where Chief Justice Shaw said: "It is not certain that this complaint was reduced to writing before it was sworn to. It cannot be ascertained that this signature was made for the purpose of authenticating the whole complaint. . . . Such looseness and carelessness in instituting criminal proceedings are not to be encouraged."

Signing by mark.— A complaint signed by the complainant's mark, and certified by the magistrate to whom it is addressed as "taken and sworn to" on a certain day, is sufficiently certified without an attesting witness to the mark. Com. *v.* Sullivan, 14 Gray (Mass.) 97, where it is said: "This mode of having an attesting witness to a signature of a party by making his mark, to insure greater certainty of proof of the execution, if the same should be controverted, is a very usual and proper one. But it by no means follows that the signature is not valid without such attesting witness, although the proof may not so easily be made of the signature. And in reference to complaints to a justice of the peace, presented by the complainant personally, and accompanied by taking the usual oath to the complaint before such justice, that the same is true, there can be no such necessity. The party virtually acknowledges the complaint as duly signed by him. This must clearly obviate all necessity of further proof to the signature."

Idem sonans.— That an accusation appears to have been made by "Gittings," and is signed by "Giddans," is immaterial, it appearing that the names refer to the same person, as such names are *idem sonans*. Woody *v.* State, 113 Ga. 927, 39 S. E. 297. See, generally, Names.

97. If a positive charge, verified by the complainant's oath according to the best of his knowledge and belief, is made in the complaint before a magistrate, it will be sufficient. State *v.* Hobbs, 39 Me. 212. See, generally, Criminal Law, 12 Cyc. 325.

Verification on information and belief.— Where the verification to a complaint in a criminal case is made on information and belief, it is not sufficient to authorize a court to put the defendant on trial for the offense charged therein; but such complaint should be sworn to positively; or the facts on which the warrant should issue be presented to the court by affidavit or by competent evidence. Mulkins *v.* U. S., 10 Okla. 288, 61 Pac. 925. See also *supra*, IV, A, 2, b, (x), (b), 5, h. *Compare* Criminal Law, 12 Cyc. 326.

Filing depositions.—N. D. Rev. Code, § 7601, requiring that where a state's attorney makes complaint of violations of the prohibition law, verified on information and belief, he must file with the magistrate the depositions of some witness on which such information is based, is sufficiently complied with where such deposition is attached to the complaint when handed to the magistrate, and the complaint is marked, "Filed," although the deposition is not. State *v.* Rozum, 8 N. D. 548, 80 N. W. 477.

98. Com. *v.* Bennett, 7 Allen (Mass.) 533; Com. *v.* Wallace, 14 Gray (Mass.) 382. See Criminal Law, 12 Cyc. 325. A complaint to a police court for an unlawful sale of intoxicating liquors, signed by the complainant, and certified as subscribed and sworn to before the justice, is properly subscribed and sworn to. Com. *v.* Dillane, 11 Gray (Mass.) 67. A certificate of a magistrate that the complaint was "taken and sworn before me" is sufficient against the objection that it should be "taken and sworn to," etc. Com. *v.* Bennett, 7 Allen (Mass.) 533. A certificate, signed as clerk by one who is actually clerk of a police court, that "the aforesaid complainant made oath to the truth of the foregoing complaint before said court," sufficiently shows that the complaint in question, purporting to be made by "John H. Newton," and signed "J. H. Newton," was signed and sworn to by "John H. Newton," within the commonwealth. Com. *v.* Quin, 5 Gray (Mass.) 478. A complaint made by "Samuel W. Richardson, city marshall of Cambridge," signed "S. W. Richardson," and certified by the judge or justice to whom it is addressed, to have been "received and sworn to before said court," sufficiently shows that it was signed and sworn to by the complainant. Com. *v.* Wallace, 14 Gray (Mass.) 382.

99. Bradburn *v.* State, 43 Tex. Cr. 309, 65 S. W. 519.

Lost indictments see *supra*, II, H.

Lost informations see *supra*, IV, A, 3.

Loss of preliminary complaint or warrant see *supra*, IV, A, 2, b, (x), (a), note 74.

V. THE ACCUSATION OR STATEMENT OF THE OFFENSE.*

A. Constitutional and Statutory Provisions — 1. IN GENERAL. Under the constitution of the United States[1] and by like provisions in the constitutions of the various states, the accused is entitled to be informed of the nature and cause of the accusation against him.[2] These provisions, being based on the presumption of innocence, require such certainty in indictments and informations as will enable an innocent man to prepare for trial;[3] but no greater particularity of allegation than may be of service to the accused in understanding the charge and preparing his defense;[4] and while all the elements of, or facts necessary to, the crime charged must be fully and clearly set out,[5] it is not necessary to allege matters in the nature of evidence,[6] or to set out the means by which the crime is accomplished, unless the act is one which may be criminal or otherwise, according to the circumstances under which it is done.[7]

2. POWER OF THE LEGISLATURES. It is within the power of the legislatures under such a constitutional provision to prescribe the form of the indictment or information,[8] and such form may omit averments regarded as necessary at common law;[9] but the legislature, while it may simplify the form of an indictment

1. U. S. Const. Amendm. 6.

The federal constitution is not a restriction on the states in this respect. Noles *v.* State, 24 Ala. 672 [*followed* in Billingslea *v.* State, 68 Ala. 486; Aiken *v.* State, 35 Ala. 399]; Jane *v.* Com., 3 Metc. (Ky.) 18; State *v.* Keyes, 8 Vt. 57, 30 Am. Dec. 450.

2. *Alabama.*— The accused has a right to demand the nature and cause of the accusation. Bill of Rights, § 10. See Noles *v.* State, 24 Ala. 672.

Kentucky.— Const. Ky. art. 13, § 12; Conner *v.* Com., 13 Bush 714.

Maine.— "No person shall be held to answer, until the accusatien against him is formally, fully and precisely set forth, that he may know of what he is accused, and be prepared to meet the exact charge against him." Const. art. 2, § 6, cl. 2; State *v.* Verrill, 54 Me. 408; State *v.* Learned, 47 Me. 426.

Massachusetts.— "No subject shall be held to answer for any crime or offense until the same is fully and plainly substantially and formally described to him." Bill of Rights, art. 12; Com. *v.* Phillips, 16 Pick. 211.

Mississippi.— Const. art. 1, § 10; Newcomb *v.* State, 37 Miss. 383; Norris *v.* State, 33 Miss. 373.

Ohio.— Bill of Rights, § 10; Groenland *v.* State, 6 Ohio S. & C. Pl. Dec. 313, 4 Ohio N. P. 122.

Tennessee.— Const. art. 1, § 9; Sizemore *v.* State, 3 Head 26.

3. Chapman *v.* People, 39 Mich. 357; People *v.* Olmstead, 30 Mich. 431; Moline *v.* State, 67 Nebr. 164, 93 N. W. 228.

4. State *v.* Doran, 99 Me. 329, 59 Atl. 440, 105 Am. St. Rep. 278; Com. *v.* Robertson, 162 Mass. 90, 38 N. E. 25; Norris *v.* State, 33 Miss. 373.

5. State *v.* Verrill, 54 Me. 408.

6. Newcomb *v.* State, 37 Miss. 383, holding that the means, mode, or circumstance of the commission of the crime of murder is not embraced in the nature and cause of the accusation in the sense in which the phrase is used in the constitution.

Description of the "confidence game" may be dispensed with. Morton *v.* People, 47 Ill. 468.

Matters going to the extent of the penalty it has been held need not be averred in a complaint under a liquor law. State *v.* Comstock, 27 Vt. 553.

7. *Maine.*— State *v.* Verrill, 54 Me. 408.

New Jersey.— Graves *v.* State, 45 N. J. L. 347, 46 Am. Rep. 778.

Ohio.— Wolf *v.* State, 19 Ohio St. 248.

Pennsylvania.— Goersen *v.* Com., 99 Pa. St. 388; Cathcart *v.* Com., 37 Pa. St. 108.

Texas.— Caldwell *v.* State, 28 Tex. App. 566, 14 S. W. 122.

Vermont.— State *v.* Noakes, 70 Vt. 247, 40 Atl. 249.

Wisconsin.— Rewan *v.* State, 30 Wis. 129, 11 Am. Rep. 559.

See 27 Cent. Dig. tit. "Indictment and Information," § 175.

Manner and means of homicide see HOMICIDE, 21 Cyc. 841.

8. Billingslea *v.* State, 68 Ala. 486; Newcomb *v.* State, 37 Miss. 383; Sizemore *v.* State, 3 Head (Tenn.) 26; State *v.* Comstock, 27 Vt. 553.

9. Jones *v.* State, 136 Ala. 118, 34 So. 236 (holding that a form of indictment for the sale of liquor without a license was sufficient, although it did not provide for an allegation of the person to whom the sale was made); Schwartz *v.* State, 37 Ala. 460; Noles *v.* State, 24 Ala. 672 [*followed* in Aikin *v.* State, 35 Ala. 399; Billingslea *v.* State, 68 Ala. 486] (holding that the legislature may prescribe a form of indictment which shall be valid for murder in the first degree as well as for murder in the second degree, leaving it to the jury to find the degree and fix the punishment within the

* Sections V-XV by Donald J. Kiser.

or information, cannot dispense with the necessity of placing therein a distinct presentation of the offense containing allegations of all its essential elements.[10] The constitutional right of the accused to demand the nature and cause of the accusation is not infringed by statutes providing that accessaries may be indicted as principals;[11] dispensing with an allegation of time when it is not of the essence of the offense;[12] or obviating the necessity of laying a venue;[13] of negativing a statutory exception,[14] or of making a particular description of certain kinds of property.[15] And it has been held that the legislature may provide that it shall be unnecessary to specify the person whom it was intended to defraud in averring an intent to defraud.[16] Where a particular offense, such as homicide, is divided into degrees which are defined by statute, the indictment may follow the general form without specifying the elements which fix the particular degree, and still fulfil the requirement of informing defendant of the nature and cause of the accusation.[17] But the legislature cannot provide that if, on the trial of an indictment for a specific offense, it is found that the offense has not been committed, but that another has, a conviction may be had for the offense proved,[18] or that a person indicted for an offense consisting of one state of facts may be tried and convicted under that indictment of an offense consisting of a different state of facts.[19] In some cases the courts have intimated that an indictment in the statutory form cannot be held to infringe the constitutional privilege of the

restrictions prescribed by the code); State *v.* Millain, 3 Nev. 409.

10. *Arkansas.*— Mott *v.* State, 29 Ark. 147, holding that the omission of "feloniously" in charging arson was fatal.

Florida.— Brass *v.* State, 45 Fla. 1, 34 So. 307.

Maine.— State *v.* Mace, 76 Me. 64; State *v.* Verrill, 54 Me. 408; State *v.* Learned, 47 Me. 426.

Mississippi.— Murphy *v.* State, 24 Miss. 590 [*approved* in Murphy *v.* State, 28 Miss. 637].

Nevada.— State *v.* O'Flaherty, 7 Nev. 153.

Ohio.— Lougee *v.* State, 11 Ohio 68.

Texas.— Hewitt *v.* State, 25 Tex. 722; State *v.* Horan, 25 Tex. Suppl. 271; Caldwell *v.* State, 28 Tex. App. 566, 14 S. W. 122; Insall *v.* State, 14 Tex. App. 145; Allen *v.* State, 13 Tex. App. 281; Young *v.* State, 12 Tex. App. 614; Brinster *v.* State, 12 Tex. App. 612; Hodges *v.* State, 12 Tex. App. 554; Rodriguez *v.* State, 12 Tex. App. 552; Williams *v.* State, 12 Tex. App. 395.

See 27 Cent. Dig. tit. "Indictment and Information," §§ 175, 176.

But *compare* Sizemore *v.* State, 3 Head (Tenn.) 26, holding that a statute obviating the necessity of averring in indictments for having possession of counterfeit money that the party charged intended to pass such money was constitutional.

A provision that, in indictments for conspiracy to commit a felony, it shall not be necessary to name the particular felony, is unconstitutional. Miller *v.* State, 79 Ind. 198; Scudder *v.* State, 62 Ind. 13; State *v.* McKinstry, 50 Ind. 465; Landringham *v.* State, 49 Ind. 186.

Constitutionality of statutes dispensing with description of false pretense in indictments for false pretenses see FALSE PRETENSES, 19 Cyc. 422 note 8.

11. State *v.* Geddes, 22 Mont. 68, 55 Pac. 919; State *v.* Steeves, 29 Oreg. 85, 43 Pac. 947. *Contra*, State *v.* Gifford, 19 Wash. 464, 53 Pac. 709 [*overruling* State *v.* Duncan, 7 Wash. 336, 35 Pac. 117, 38 Am. St. Rep. 888].

Retroactive operation.— Although the statute removes the distinction between principals and accessaries, an indictment for a crime committed before its enactment must specify whether the accused is charged as a principal or accessary. Josephine *v.* State, 39 Miss. 613.

Variance between allegations and proof see *infra*, XI, C, 5, c.

12. Thompson *v.* State, 25 Ala. 41; People *v.* Kelly, 6 Cal. 210; Ketline *v.* State, 59 N. J. L. 468, 36 Atl. 1033.

13. Noles *v.* State, 24 Ala. 672; State *v.* Quartemus, 3 Heisk. (Tenn.) 65.

14. Hirschfelder *v.* State, 19 Ala. 534; State *v.* Beswick, 13 R. I. 211, 43 Am. Rep. 26.

15. Riggs *v.* State, 104 Ind. 261, 3 N. E. 886.

Money, bank-bills, notes, etc., may be by statute made describable simply as money without the specification of any particular coin, note, bill, or currency. Randall *v.* State, 132 Ind. 539, 32 N. E. 305; Riggs *v.* State, 104 Ind. 261, 3 N. E. 886; Com. *v.* Bennett, 118 Mass. 443; People *v.* Hanaw, 107 Mich. 337, 65 N. W. 231; Brown *v.* People, 29 Mich. 232.

16. Turpin *v.* State, 19 Ohio St. 540.

17. Graves *v.* State, 45 N. J. L. 203 [*affirmed* in 45 N. J. L. 347, 46 Am. Rep. 778]; State *v.* Cole, 132 N. C. 1069, 44 S. E. 391. See HOMICIDE, 21 Cyc. 854.

18. State *v.* Harmon, 106 Mo. 635, 18 S. W. 128, holding that a statute allowing a person indicted for larceny to be convicted of embezzlement on proof thereof, and *vice versa*, was unconstitutional.

19. Conner *v.* Com., 13 Bush (Ky.) 714.

accused to be informed of the nature of the charge when the accused is entitled to secure a specification of the particular acts relied on by the government through a bill of particulars.[20]

3. Modifications of Common-Law Rules. The essentials of an indictment or information are in many states prescribed by statute, and, subject to constitutional restrictions on the power of the legislatures,[21] it is by the tests afforded by such statutes rather than by the rules of the common law that its sufficiency is to be determined.[22] These statutes have removed much of the nicety of technical pleading and the indictment is made little more than a simple statement of the offense, couched in ordinary language and with due regard for the rights of the accused.[23] But they do not change the requirement that the indictment must, as at common law, contain every averment that is necessary to inform defendant of the particular circumstances of the charge against him.[24] The federal cases abundantly illustrate how the courts of the United States, in construing statutes

20. Com. *v.* Bennett, 118 Mass. 443; People *v.* Hanaw, 107 Mich. 337, 65 N. W. 231; State *v.* Hodgson, 66 Vt. 134, 28 Atl. 1089.

21. See *supra*, V, A, 1, 2.

22. *California.*— People *v.* Murphy, 39 Cal. 52 (holding that an indictment is sufficient if it is certain as to the person and the offense charged, and states all the acts necessary to constitute a complete offense); People *v.* Dick, 37 Cal. 277; People *v.* Ah Woo, 28 Cal. 205; People *v.* King, 27 Cal. 507, 87 Am. Dec. 95; People *v.* Ah Sing, 19 Cal. 598.

Georgia.— Studstill *v.* State, 7 Ga. 2.

Indiana.— State *v.* Record, 56 Ind. 107; Dillon *v.* State, 9 Ind. 408.

Kansas.— State *v.* White, 14 Kan. 538; Smith *v.* State, 1 Kan. 365 (holding that under the Kansas statutes indictments are divested of all artificial and technical construction, and that their language is to be given its natural and ordinary meaning); Madden *v.* State, 1 Kan. 340.

Kentucky.— Com. *v.* Patterson, 2 Metc. 374.

New York.—People *v.* Wheeler, 66 N. Y. App. Div. 187, 73 N. Y. Suppl. 130 [*reversed* on other grounds in 169 N. Y. 487, 62 N. E. 572].

Utah.— People *v.* Kern, 8 Utah 268, 30 Pac. 988.

See 27 Cent. Dig. tit. "Indictment and Information, §§ 177–179.

Such statutes are remedial and should be construed so as to avoid the inconvenience formerly existing and advance the remedy provided by the legislature. Com. *v.* Hill, 2 Pearson (Pa.) 432.

Certainty to a certain extent in every particular is no longer requisite in Texas (State *v.* Miller, 34 Tex. 535), although prior to the enactment of the criminal code the common-law system of pleading prevailed in Texas in its entire strictness (State *v.* Odum, 11 Tex. 12).

23. Com. *v.* Wilson, 1 Chest. Co. Rep. (Pa.) 538; U. S. *v.* Howard, 132 Fed. 325.

Illustrations of statutory standards see the following cases:

Arkansas.— Dixon *v.* State, 29 Ark. 165, holding a statement of the facts necessary to constitute the offense, in ordinary and concise language and in such a manner as to enable a person of common understanding to know what is intended, is all that is required.

Georgia.— Stephen *v.* State, 11 Ga. 225.

Iowa.— State *v.* Watrous, 13 Iowa 489.

Kentucky.— Jane *v.* Com., 3 Metc. 18; Paynter *v.* Com., 55 S. W. 687, 21 Ky. L. Rep. 1562, holding that if the indictment sets forth the offense with such certainty as to apprise defendant of the nature of the accusation upon which he is to be tried, and to constitute a bar to any subsequent proceeding for the same offense, it is sufficiently specific.

Louisiana.— State *v.* Petrie, 25 La. Ann. 386.

North Dakota.— State *v.* Climie, 12 N. D. 33, 94 N. W. 574.

Oklahoma.— Heatley *v.* Territory, (1904) 78 Pac. 79.

Tennessee.— Foster *v.* State, 6 Lea 213.

Texas.— McConnell *v.* State, 22 Tex. App. 354, 3 S. W. 699, 58 Am. Rep. 647.

See 27 Cent. Dig. tit. "Indictment and Information," § 178.

24. *Arkansas.*— Clary *v.* State, 33 Ark. 561; Edwards *v.* State, 27 Ark. 493; Thompson *v.* State, 26 Ark. 323.

California.— People *v.* Dolan, 9 Cal. 576; People *v.* Lloyd, 9 Cal. 54; People *v.* Cox, 9 Cal. 32; People *v.* Wallace, 9 Cal. 30; People *v.* Aro, 6 Cal. 207, 65 Am. Dec. 503.

Kentucky.— Rhodus *v.* Com., 2 Duv. 159.

Louisiana.— State *v.* Heas, 10 La. Ann. 195; State *v.* Kennedy, 8 Rob. 590.

Michigan.— People *v.* Olmstead, 30 Mich. 431.

Missouri.— State *v.* Reakey, 62 Mo. 40 [*affirming* 1 Mo. App. 3].

New York.— People *v.* Gregg, 59 Hun 107, 13 N. Y. Suppl. 114, holding that the failure of the indictment to state definitely the act constituting an alleged crime is a defect of substance, and not excusable under a provision that an insufficiency of form shall not affect the proceedings.

Texas.— White *v.* State, 11 Tex. App. 476.

See 27 Cent. Dig. tit. "Indictment and Information," § 178.

relating to criminal procedure, strictly adhere to the rules of substance and certainty, but liberally discard niceties of form only and requirements that are not material to the right of defendant to be informed of the nature of the offense, and to be enabled to plead the judgment in bar of a second prosecution.[25] In the case of statutory misdemeanors it is frequently stated that less certainty is required than in the case of felonies.[26] By statute it is sometimes provided that where an act is criminal both by statute and at common law, the indictment may follow either the statutory or the common-law form;[27] or that an indictment good at common law for a common-law offense is sufficient under the statutes.[28] But such statutes do not apply in a case where the offense is a misdemeanor at common law and is made a felony by statute.[29] The fact that a statute specifies a description of an offense which shall be regarded as sufficient does not demand that such description be followed without deviation,[30] and a code provision that an indictment may be substantially in a given form does not require a strict adherence to that form.[31]

B. Language, Spelling, and Clerical Requirements — 1. Composition in General. Under the statutes now generally adopted, providing that it is necessary only that the indictment shall contain a clear and concise statement of the offense, and that formal defects are not fatal, indictments which sufficiently make the averments required by statute are sufficient, although clumsily and inartistically drawn.[32] While the better rule in preparing indictments and informations is to follow approved precedents when it can be done, they are not necessarily

25. See U. S. *v.* Howard, 132 Fed. 325.

26. Taylor *v.* State, 6 Humphr. (Tenn.) 285; Martin *v.* State, 6 Humphr. (Tenn.) 204; Thompson *v.* State, 5 Humphr. (Tenn.) 138; Sanderlin *v.* State, 2 Humphr. (Tenn.) 315; U. S. *v.* Schimer, 27 Fed. Cas. No. 16,229, 5 Biss. 195, holding that an indictment for a statutory misdemeanor need not charge the offense with the particularity of time, place, and circumstances required for a felony or common-law offense, as defendant has a remedy by application for a rule for specifications and particulars.

A substantial statement of the offense in a complaint or indictment for a misdemeanor, or certainty to a common intent, is all that is required (Gallagher *v.* State, 26 Wis. 423; Ford *v.* State, 3 Pinn. (Wis.) 449, 4 Chandl. 148), or a substantial pursuit of the statutory description of the offense (Bilbro *v.* State, 7 Humphr. (Tenn.) 534).

27. Bowler *v.* State, 41 Misc. 570.

Sufficiency of indictment based on statute as indictment at common law see *infra*, V, H, 8, e.

28. Sparks *v.* State, 59 Ala. 82.

29. Wile *v.* State, 60 Miss. 260; Bowler *v.* State, 41 Miss. 570.

30. Estes *v.* State, 10 Tex. 300.

31. Lacefield *v.* State, 34 Ark. 275, 36 Am. Rep. 8; People *v.* O'Brien, 64 Cal. 53, 28 Pac. 59, holding that the fact that the concluding phrase, "contrary to the form, force, and effect of the statute," etc., was misplaced and inserted after an allegation of a previous conviction of a similar offense, instead of before, and following the charge of the offense, was immaterial.

32. *Indiana.*— Heath *v.* State, 101 Ind. 512; McMillen *v.* State, 60 Ind. 216.

Kansas.— Madden *v.* State, 1 Kan. 340.

Kentucky.— Com. *v.* Schatzman, 82 S. W. 238, 26 Ky. L. Rep. 508; Paducah, etc., R. Co. *v.* Com., 80 Ky. 147, 3 Ky. L. Rep. 650.

Maine.— State *v.* Dunning, 83 Me. 178, 22 Atl. 109.

Maryland.— Deckard *v.* State, 38 Md. 186.

Missouri.— State *v.* Coulter, 46 Mo. 564.

Montana.— State *v.* Bloor, 20 Mont. 574, 52 Pac. 611.

South Carolina.— State *v.* Prater, 59 S. C. 271, 37 S. E. 933.

Texas.— Dawson *v.* State, 33 Tex. 491; Richardson *v.* State, 2 Tex. App. 322.

United States.— U. S. *v.* Jackson, 2 Fed. 502.

Canada.— Reg. *v.* Weir, 3 Can. Cr. Cas. 102.

See 27 Cent. Dig. tit. "Indictment and Information," § 202.

An unmeaning accumulation of words, such as occurs in an indictment charging the theft of certain property from the possession of the owner "without his consent, intent to deprive him, the owner, of the value of the same, and to appropriate the same to the use himself, the said" is insufficient. Sparks *v.* State, 35 Tex. 349.

Selection of words and expressions.— "It is not necessary that the words or terms used in framing indictments should be always such as have been adopted and approved by the best authors and lexicographers; it is sufficient if they have received from common use a fixed, precise, and definite meaning, and according to such meaning import clearly what is sufficient to make out the charge, and to render it certain." Kennedy *v.* People, 39 N. Y. 245 (holding that the word "alias" has been incorporated into the English language as equivalent to "otherwise called"); McLaughlin *v.* Com., 4 Rawle (Pa.) 464, 465 (holding it not bad to describe stolen notes as "on" instead of "of" a certain bank).

defective because they fail to do so, and if they contain all the necessary averments they will be held good.[33]

2. Use of English Language. In England it was at one time necessary that the indictment should be entirely in Latin,[34] but this rule having been abolished by statute[35] before the general adoption of the English common law in the United States has apparently never obtained therein. Under the constitutions of the various states, or by statutes therein, it is frequently provided that indictments shall be in English;[36] but this rule does not exclude the use of terms which have become literally English by adoption.[37] An indictment is not invalidated as not wholly in the English language by reason of the fact that from the omission of letters in a word it becomes a word of a foreign language.[38] Where it becomes necessary to set out an instrument in a foreign language, there should also be a translation thereof or statement of its meaning so that the accused may know what is intended.[39]

3. Abbreviations, Numerals, and Symbols. Arabic numerals may be employed in indictments to express numbers[40] or dates,[41] as may all well defined and well understood abbreviations,[42] such as the dollar sign,[43] the character "&,"[44] or the letters "A. D."[45] But the better practice is to avoid abbreviations.[46] Abbreviations of words employed by men of science or in the arts will not answer without full explanation of their meaning in ordinary language.[47] The use of an abbrevia-

33. State *v.* Privitt, 175 Mo. 207, 72 S. W. 457.

Effect of continued use of form.— Where a form of indictment for assault with intent to kill has been in use for years, and has received frequent judicial approval, nothing short of an apparent danger that it might operate to the prejudice of the accused would justify a disturbance of the settled practice in drafting such indictments. Davis *v.* U. S., 16 App. Cas. (D. C.) 442.

34. 2 Hawkins P. C. 239; 36 Edw. III, c. 15.

35. 6 Geo. II, c. 6; 4 Geo. II, c. 26.

36. See People *v.* Ah Sum, 92 Cal. 648, 29 Pac. 680.

37. State *v.* Gilbert, 13 Vt. 647 (holding that the expression "*Anno Domini*" might be employed); State *v.* Hodgeden, 3 Vt. 481 (holding that the initials "A.D." were sufficient); Rex *v.* Harris, 7 C. & P. 416, 32 E. C. L. 684 (holding that the word "guilder" is sufficiently an English word to justify its use in an indictment as a translation of the Polish word "zlotych," which is also called a guilder and a florin).

38. State *v.* Hornsby, 8 Rob. (La.) 554, 41 Am. Dec. 305, use of the word "extravasion" in place of the word "extravasation" in the description of the cause of death in homicide. But see State *v.* Mitchell, 25 Mo. 420, holding that "congration" written for "congregation" was neither an abbreviation nor a word known to the English language, and was bad.

39. People *v.* Ah Sum, 92 Cal. 648, 28 Pac. 680, holding that an indictment for selling a lottery ticket which contained merely a photographic reproduction of the ticket, which was in Chinese characters, without any allegation of its contents or translation, was insufficient.

Setting out copies of instruments in general see *infra*, V, K.

40. Winfield *v.* State, 3 Greene (Iowa) 339; Kelly *v.* State, 3 Sm. & M. (Miss.) 518.

41. *Iowa.*— State *v.* McPherson, 114 Iowa 492, 87 N. W. 421.

Massachusetts.— Com. *v.* Hagarman, 10 Allen 401.

Mississippi.— Kelly *v.* State, 3 Sm. & M. 518.

New Jersey.— Johnson *v.* State, 29 N. J. L. 453.

Tennessee.— Barnes *v.* State, 5 Yerg. 186; Smith *v.* State, Peck 165.

Texas.— Earl *v.* State, 33 Tex. Cr. 570, 28 S. W. 469.

Vermont.— State *v.* Hodgeden, 3 Vt. 481.

Virginia.— Lazier *v.* Com., 10 Gratt. 708.

See 27 Cent. Dig. tit. "Indictment and Information," § 207.

Numerals in expressing time of offense see *infra*, V, F, 2, e.

42. State *v.* Kean, 10 N. H. 347, 34 Am. Dec. 162, holding that where surnames with a prefix to them are ordinarily written with an abbreviation, the names thus written in an indictment are sufficient.

43. Earl *v.* State, 33 Tex. Cr. 570, 28 S. W. 469.

44. Pickens *v.* State, 58 Ala. 364; State *v.* McPherson, 114 Iowa 492, 87 N. W. 421; Com. *v.* Clark, 4 Cush. (Mass.) 596; Malton *v.* State, 29 Tex. App. 527, 16 S. W. 423; Brown *v.* State, 16 Tex. App. 245.

45. Com. *v.* Hagarman, 10 Allen (Mass.) 401; Com. *v.* Clark, 4 Cush. (Mass.) 596; State *v.* Hodgeden, 3 Vt. 481, holding that such letters are a part of the English language.

46. Com. *v.* Desmarteau, 16 Gray (Mass.) 1; Earl *v.* State, 33 Tex. Cr. 570, 28 S. W. 469; Brown *v.* State, 16 Tex. App. 245.

47. State *v.* Jericho, 40 Vt. 121, 94 Am. Dec. 387 (holding that an indictment in which the usual mathematical signs (°)

tion may not be ground for a motion in arrest of judgment, although fatal perhaps on a motion to quash.[48]

4. ERASURES AND INTERLINEATIONS. If an indictment is conveniently legible it is not bad simply because it contains interlineations.[49] Interlineations which it is apparent were made before the indictment was presented by the grand jury do not vitiate it,[50] and in the absence of anything apparent on the face of the indictment, or shown extrinsically, which tends to prove that interlineations have been made subsequent to the finding of the indictment, it will be presumed that they were made before or at the time of such finding;[51] and the same is true of erasures;[52] but the insertion of a material word after the finding of the indictment renders it fatally defective,[53] and the indictment does not import such absolute verity that it cannot be shown by the accused that the alteration was in fact made after the indictment was found and the grand jury was discharged.[54] Pencil memoranda, however, made on the indictment without an intention to alter will not, it seems, vitiate it.[55] When an alteration in an indictment comes to the knowledge of either party, it is the duty of such party to bring it to the attention of the court promptly, and at the earliest opportunity at which it can be done;[56] but although a defendant does not move promptly, the court does not thereby acquire jurisdiction to try him for any crime other than such as was charged in the indictment when it was filed by the grand jury.[57] It has been held that, although interlineations may have furnished a proper ground for a motion to the discretion of the court for quashing an indictment, they are not sufficient ground for arresting judgment;[58] and that an alteration in the description of defendant, made when he is arraigned, is not ground for motion in arrest of judgment.[59]

and (′) were used in place of the words "degrees" and "minutes" was bad on demurrer); U. S. *v.* Reichert, 32 Fed. 142, 12 Sawy. 643 (holding abbreviations as used in describing government subdivisions of land were not sufficient).

48. Com. *v.* Desmarteau, 16 Gray (Mass.) 1, holding that the use of the abbreviation "sd." for "said" in an indictment is no ground for arresting judgment.

49. Cook *v.* State, 119 Ga. 108, 46 S. E. 64 (holding that an interlineation in a different ink and handwriting of another name in lieu of the given name of the person alleged to have been murdered, which was crossed out, would not support a demurrer on the ground that the person alleged to have been murdered was not sufficiently identified); French *v.* State, 12 Ind. 670, 74 Am. Dec. 229; Rex *v.* Davis, 7 C. & P. 319, 32 E. C. L. 634 (holding that if an indictment has an interlineation and has a caret at the proper place where the interlined words are to come in, the court will take notice of the caret, and read the indictment correctly).

Construction of interlineations see *infra*, V, D, 1, text and note 37.

50. Clemmons *v.* State, 43 Fla. 200, 30 So. 699; Cook *v.* State, 119 Ga. 108, 46 S. E. 64; Jones *v.* State, 99 Ga. 46, 25 S. E. 617.

51. Cook *v.* State, 119 Ga. 108, 46 S. E. 64; French *v.* State, 12 Ind. 670, 74 Am. Dec. 229; State *v.* Florez, 5 La. Ann. 429.

52. Clemmons *v.* State, 43 Fla. 200, 30 So. 699; Jones *v.* State, 99 Ga. 46, 25 S. E. 617; Jacobs *v.* State, 42 Tex. Cr. 353, 59 S. W. 1111, holding that the fact that one word in writing the year in an indictment was wrong and was blotted out, and the correct word written over it, is not sufficient to authorize the court to quash the indictment on the ground that it alleges an impossible date.

53. State *v.* Vest, 21 W. Va. 796, holding that the insertion of the word "feloniously" was such an interlineation.

54. State *v.* Vest, 21 W. Va. 796.

55. Bostock *v.* State, 61 Ga. 635, holding that pencil memoranda inserted in blanks by the prosecuting attorney for his own guidance after the indictment has left the grand jury are not ground for arrest of judgment where there was no intention to alter the indictment and the insertions are ordered by the court to be erased before the taking of evidence.

56. People *v.* Granice, 50 Cal. 447.

57. People *v.* Granice, 50 Cal. 447 (holding that where an indictment for manslaughter was by interpolation altered to a charge of murder, and defendant, after being informed of such interpolation, pleaded not guilty, he was still entitled to prove the interpolations on the trial); State *v.* Vest, 21 W. Va. 796.

58. Com. *v.* Desmarteau, 16 Gray (Mass.) 1.

59. State *v.* Turner, 25 La. Ann. 573, holding that the erasure of the name "Albert," and the interlineation of that of "John" in the description of accused is not a good ground in arrest of judgment. But see Myatt *v.* State, 31 Tex. Cr. 523, 21 S. W. 456, holding that an alteration in the name of accused made by the clerk of the court to which the indictment was returned was a nullity and did not affect the indictment.

5. Errors in Writing, Spelling, and Composition. If the sense of an indictment is clear, nice or technical exceptions are not to be favorably regarded;[60] and therefore verbal inaccuracies,[61] or clerical errors which are explained and corrected by necessary intendment from other parts of the indictment,[62] or errors in spelling which do not obscure the sense,[63] are not fatal. The same rule applies to errors

60. State *v.* Halida, 28 W. Va. 499.

61. Jay *v.* State, 69 Ind. 158 (indictment for injuring a toll gate alleging that it was erected on a division of a certain gravel-road "company," and not on a division of a gravel road); State *v.* Ford, 38 La. Ann. 797; State *v.* Morgan, 35 La. Ann. 293; State *v.* Halida, 28 W. Va. 499.

Illustrations.— Use of the word "statue" instead of "statute" (State *v.* Coleman, 8 S. C. 237); use of "and" for "an" (Martin *v.* State, 40 Tex. 19); use of "defendant" instead of "defendants" (Evans *v.* State, 58 Ark. 47, 22 S. W. 1026); and use of "avocation" for "vocation" in an indictment charging keeping of a disorderly house (Peters *v.* State, (Tex. Cr. App. 1893) 23 S. W. 683).

62. *Indiana.*— Billings *v.* State, 107 Ind. 54, 6 N. E. 914, 7 N. E. 763, 57 Am. Rep. 77.

Iowa.— State *v.* Thompson, 19 Iowa 299.

Michigan.— People *v.* Duford, 66 Mich. 90, 33 N. W. 28, information charging that the accused "was" wilfully, maliciously, and feloniously set fire to, with intent then and there to burn, etc., instead of "did."

Mississippi.— Greeson *v.* State, 5 How. 33, where property was laid in the indictment as the property of Richard, but was afterward recited as the property of Robert.

Missouri.— State *v.* Eaton, 75 Mo. 586 (where an indictment for murder charged the wounding to have occurred August 30, and that the wounded man languished until September 1, on which day of August in the same year he died); State *v.* Rogers, 37 Mo. 367.

Texas.— Chessley *v.* State, (Cr. App. 1903) 74 S. W. 548; Freeman *v.* State, 44 Tex. Cr. 496, 72 S. W. 1001, singular instead of plural.

Vermont.— State *v.* Brady, 14 Vt. 353.

Virginia.— Ailstock's Case, 3 Gratt. 650, where an indictment for murder stated that the wound was inflicted on November 7, and that deceased languished until November 8 in the year aforesaid, and then said, "on which 8th day of May, in the year aforesaid, the deceased died."

England.— Rex *v.* Dowlin, 5 T. R. 311.

See 27 Cent. Dig. tit. "Indictment and Information," §§ 209–214.

The substitution of the name of deceased for that of accused in an indictment for homicide, whereby it is made to appear that deceased killed himself, is fatal. State *v.* Edwards, 70 Mo. 480. But *compare* State *v.* Craighead, 32 Mo. 561, holding that an error in an indictment for assault, by which it appeared that the life of the accused instead of the person assaulted was endangered, was cured by statute as a clerical error not prejudicial to defendant.

63. Lefler *v.* State, 122 Ind. 206, 23 N. E. 154; State *v.* Hedge, 6 Ind. 330; State *v.* Hornsby, 8 Rob. (La.) 554, 41 Am. Dec. 305; State *v.* Halida, 28 W. Va. 499; Reg. *v.* Weir, 3 Can. Cr. Cas. 102.

Illustrations.— "Fraudlent" instead of "fraudulent" (State *v.* Earp, 41 Tex. 487); "fraudelently" instead of "fraudulently" (Bell *v.* State, 139 Ala. 124, 35 So. 1021); "frausulently" instead of "fraudulently" (St. Louis *v.* State, (Tex. Cr. App. 1900) 59 S. W. 889); "affect" instead of "effect" (Smith *v.* Territory, 14 Okla. 162, 77 Pac. 187); "Tebruary" instead of "February" (Witten *v.* State, 4 Tex. App. 70); "undertood" instead of "understood" (Rex *v.* Beach, 1 Cowp. 229, 1 Leach C. C. 134, 158); "receivd" instead of "received" (Rex *v.* Hart, 1 Cowp. 229, 1 Dougl. 193, 2 East P. C. 978, 1 Leach C. C. 172); "gol" instead of "gold" (Grant *v.* State, 55 Ala. 201); "on" instead of "one" (Barner *v.* State, (Tex. Cr. App. 1892) 20 S. W. 559); "too" instead of "two" (State *v.* Hedge, 6 Ind. 330); "incestous" instead of "incestuous" (State *v.* Carville, (Me. 1887) 11 Atl. 601); "eigh" instead of "eight" in statement of date (State *v.* Coleman, 8 S. C. 237); "eiget" instead of "eight" (Somerville *v.* State, 6 Tex. App. 433); "tenty" instead of "twenty" (Allen *v.* State, (Tex. Cr. App. 1894) 28 S. W. 474); "Chickopee" instead of "Chicopee" (Com. *v.* Desmarteau, 16 Gray (Mass.) 1); "sive" instead of "sieve" (State *v.* Molier, 12 N. C. 263); "aganist" instead of "against" (Hudson *v.* State, 10 Tex. App. 215); "gilding" instead of "gelding" (Thomas *v.* State, 2 Tex. App. 293); "Pittis" instead of "Pettis," and "Janury" instead of "January" (Hutto *v.* State, 7 Tex. App. 44); "mair" instead of "mare" (State *v.* Myers, 85 Tenn. 203, 5 S. W. 377); "inhabitance" instead of "inhabitants" (Keller *v.* State, 25 Tex. App. 325, 8 S. W. 275); "dring" instead of "drink;" "spiritous" instead of "spirituous" (Brumley *v.* State, 11 Tex. App. 114); "spiritual" instead of "spirituous" (State *v.* Clark, 3 Ind. 451); "shorting" instead of "shooting" (Francis *v.* State, (Tex. Cr. App. 1902) 70 S. W. 751); "larger" instead of "lager" (State *v.* Colly, 69 Mo. App. 444); "assalt" instead of "assault" (State *v.* Crane, 4 Wis. 400); statute in such "cash" instead of "case" (State *v.* Given, 32 La. Ann. 782); "stael" instead of "steal" (State *v.* Lockwood, 58 Vt. 378, 3 Atl. 539); "stal" instead of "steal" (Wills *v.* State, 4 Blackf. (Ind.) 457); "fourman" instead of "foreman" (State *v.* Karn, 16 La. Ann. 183); "guilts" instead of "gilts" in larceny of hogs (State *v.* Lucas, 147 Mo. 70, 47 S. W. 1067).

in grammar.[64] But where an essential word is so misspelled as to be meaningless, the indictment is bad.[65] Bad punctuation will not vitiate an indictment;[66] nor will chirography where it is possible to ascertain the words used and the meaning of the sentences.[67]

6. Omissions. The omission of a word which is not descriptive of the offense and which does not affect the plain meaning of the indictment is not fatal;[68] but words which denote an integral part of the offense, if omitted, cannot be supplied by intendment,[69] such as the word "did" or its equivalent in charging the

64. *Alabama.*— Grant *v.* State, 55 Ala. 201; Pond *v.* State, 55 Ala. 196.

Iowa.— State *v.* Pennell, 56 Iowa 29, 8 N. W. 68.

Massachusetts.— Com. *v.* Call, 21 Pick. 515.

Montana.— State *v.* Bloor, 20 Mont. 574, 52 Pac. 611.

Pennsylvania.— Perdue *v.* Com., 96 Pa. St. 311.

South Carolina.— State *v.* Wimberly, 3 McCord 190.

Texas.— Funderburk *v.* State, (Cr. App. 1901) 61 S. W. 393; Gay *v.* State, 2 Tex. App. 127.

England.— Reg. *v.* Stokes, 1 Den. C. C. 307.

Canada.— Reg. *v.* Weir, 3 Can. Cr. Cas. 102.

See 27 Cent. Dig. tit. "Indictment and Information," § 213.

Use of verbs in the wrong tense is not necessarily fatal. People *v.* Haagen, 139 Cal. 115, 72 Pac. 836.

The use of a pronoun of the wrong gender to denote the person whose property was taken is not fatal after verdict where there was no surprise. State *v.* Willis, 16 Mo. App. 553.

Error in relation of pronouns.— Use of plural instead of singular (Jackson *v.* State, 88 Ga. 784, 15 S. E. 677; Snow *v.* State, 6 Tex. App. 284); or singular instead of plural pronouns (Dickson *v.* State, 62 Ga. 583; State *v.* Parks, 61 N. J. L. 438, 39 Atl. 1023; Hollins *v.* State, (Tex. Cr. App. 1902) 69 S. W. 594) is not fatal. And see Goodson *v.* State, 32 Tex. 121, holding that in an indictment for the theft of two animals, the singular pronoun "it" was properly used in referring to them in charging the intent, since it was the property in the animals and not the animals themselves that was referred to.

Use of singular instead of plural verb.— State *v.* Lee Ping Bow, 10 Oreg. 27.

65. Wood *v.* State, 50 Ala. 144.

Illustrations.— "Maice" instead of "malice" (Wood *v.* State, 50 Ala. 144, the soundness of this decision, however, is questioned in Grant *v.* State, 55 Ala. 201); "farther" instead of "father" (State *v.* Caspary, 11 Rich. (S. C.) 356); "brest" instead of "breast" (Anonymous, 3 N. C. 140; State *v.* Carter, 1 N. C. 210); "appriate" instead of "appropriate" (Jones *v.* State, 25 Tex. App. 621, 8 S. W. 801, 8 Am. St. Rep. 449); "larcey" instead of "larceny" (People *v.* St. Clair, 56 Cal. 406, 55 Cal. 524); "possion" instead of "possession" (Evans *v.* State, 34 Tex. Cr. 110, 29 S. W. 266. But see State *v.* Williamson, 43 Tex. 500, holding such indictment good as against a motion in arrest). The omission of "ing" from dwelling in an indictment for burglary is fatal, being a matter of substance. Parker *v.* State, 114 Ala. 690, 22 So. 791.

66. Ward *v.* State, 50 Ala. 120.

67. Pierce *v.* State, 75 Ind. 199; State *v.* Morris, 43 Tex. 372; Irvin *v.* State, 7 Tex. App. 109 (resemblance of "kill" to "rill" not fatal); Hutto *v.* State, 7 Tex. App. 44 (wrong dot over a letter, possibly the result of accident); Witten *v.* State, 4 Tex. App. 70; State *v.* Halida, 28 W. Va. 499. And see Dodson *v.* State, (Tex. Cr. App. 1902) 66 S. W. 1098, holding that where the complaint was against George Dodson, the information was not insufficient because the letter "D" was not completely made, owing to failure of the ink to trace a portion of it.

Interpretation.— In determining what letter a character is intended to represent, a complaint or affidavit in the same handwriting and forming a part of the information may be looked to. Irvin *v.* State, 7 Tex. App. 109.

68. State *v.* Washington, 13 S. C. 453, so holding in regard to the omission of the word "wound" after words evidently describing it.

Other illustrations.— Omission of "attorney" in the expression "county attorney" in a presenting portion of a count (Caskey *v.* State, (Tex. Cr. App. 1899) 50 S. W. 703); "and" in a continuando "from said last mentioned day to the day of making this complaint" (Com. *v.* Butler, 1 Allen (Mass.) 4); "his" before the word "hands" in a charge of shooting with a gun which defendant "in both hands" held, etc. (Ward *v.* State, 8 Blackf. (Ind.) 101); "of" before the name of the person in the expression "to the disturbance and common nuisance of" (State *v.* Rhodes, 2 Ind. 321), or before the name of the owner of stolen property (Abernathy *v.* State, 78 Ala. 411), or before the name of a railroad company on whose track obstructions were placed (Stanfield *v.* State, 43 Tex. Cr. 10, 62 S. W. 917); "said" before the repetition of property alleged to have been misrepresented (State *v.* Burke, 108 N. C. 750, 12 S. E. 1000); "with" before name of the instrument with which a murder was committed (Shay *v.* People, 22 N. Y. 317. *Contra*, State *v.* Rector, 126 Mo. 328, 23 S. W. 1074, on an indictment for assault).

69. State *v.* Raymond, 54 Mo. App. 425; State *v.* Adams, 3 N. C. 21 (holding that where there were two distinct charges in the indictment as to the cause of death, and

act.[70] But it has been held that even the word "did" may be supplied by intendment in prosecutions for misdemeanor.[71] In indictments for misdemeanors merely, such intendment is often resorted to, the strictness and rigor applied in the construction of indictments for felonies not being applied uniformly to indictments for mere misdemeanors.[72]

C. General Rules of Pleading — 1. Directness and Positiveness. In indictments and informations every fact necessary to constitute the crime charged must be directly and positively alleged.[73] Nothing can be charged by implication or intendment,[74] nor is it sufficient to change any material matter by way of

it was not alleged that decedent came to this death by both modes, there should be a relative); State *v.* Huston, 12 Tex. 245.

Other illustrations.— Omission of "to" from the expression intent to kill and murder (Jones *v.* State, 21 Tex. App. 349, 17 S. W. 424); omission of "at" in an indictment for gaming at a public house (State *v.* Huston, 12 Tex. 245); omission of "of" in the expression "from the possession of" in an indictment for theft (Riley *v.* State, 27 Tex. App. 606, 11 S. W. 642).

70. *Louisiana.*— State *v.* Graham, 49 La. Ann. 1524, 22 So. 807.

Mississippi.— Cook *v.* State, 72 Miss. 517, 17 So. 228.

South Carolina.— State *v.* Halder, 2 McCord 377, 13 Am. Dec. 738, holding that the omission to insert the word "did" before the words "feloniously utter and publish, dispose and pass," was fatal in arrest of judgment.

Texas.— Edmondson *v.* State, 41 Tex. 496; State *v.* Daugherty, 30 Tex. 360; State *v.* Hutchinson, 26 Tex. 111; Barfield *v.* State, (Cr. App. 1898) 45 S. W. 1015; Menasco *v.* State, (App. 1889) 11 S. W. 898; Jester *v.* State, 26 Tex. App. 369, 9 S. W. 616; Moore *v.* State, 7 Tex. App. 42; Ewing *v.* State, 1 Tex. App. 362.

Virginia.— State *v.* Leach, 27 Vt. 317.

See 27 Cent. Dig. tit. "Indictment and Information," § 204.

Necessity of positive allegation that offense was committed see *infra*, V, C, 1.

71. State *v.* Edwards, 19 Mo. 674; State *v.* Whitney, 15 Vt. 298.

72. State *v.* Edwards, 19 Mo. 674.

73. *Indiana.*— State *v.* Longley, 10 Ind. 482.

Maine.— State *v.* Paul, 69 Me. 215, holding that an indictment for fraud in representing that a tract of land was well wooded, well timbered, and possessed a valuable growth of hard and soft wood, when in fact it was not well wooded, nor well timbered, and had not a valuable growth, etc., is not direct enough, since the parties might differ as to what constituted a well wooded piece of land, or a valuable growth, etc.

Mississippi.— Breeland *v.* State, 79 Miss. 527, 31 So. 104.

South Carolina.— State *v.* Perry, 2 Bailey 17.

Texas.— State *v.* Smith, 25 Tex. Suppl. 64.

Vermont.— State *v.* Walworth, 58 Vt. 502, 3 Atl. 543 (holding that an allegation that defendant, a sheriff, "falsely and corruptly made his return," was bad as a charge of making a false return, since it did not charge that the return was false); State *v.* La Bore, 26 Vt. 765.

United States.— U. S. *v.* Post, 113 Fed. 852.

See 27 Cent. Dig. tit. "Indictment and Information," § 192.

A statement that an affidavit shows to the court that defendant did the acts complained of is fatally defective. Allen *v.* State, 13 Tex. App. 28; Prophit *v.* State, 12 Tex. App. 233; Thomas *v.* State, 12 Tex. App. 227; Brown *v.* State, 11 Tex. App. 451; Hunt *v.* State, 9 Tex. App. 404. But *compare* Hilliard *v.* State, 17 Tex. App. 210; Warren *v.* State, 17 Tex. App. 207, both holding that an indictment is not vitiated if the offense is directly charged, because it states parenthetically "as shown by the complaint of A."

Repetition of direct accusation.— Where an indictment for false swearing in one count alleges at the outset that the "grand jury present and that accused did," etc., and the following minor allegations are connected by "then and there" and by "and," it is not necessary that it should charge in relation to each minor allegation that "the grand jurors do further say," etc. Campbell *v.* State, 43 Tex. Cr. 602, 68 S. W. 513.

The language used must be unequivocal. State *v.* Locke, 35 Ind. 419; State *v.* Charles, 18 La. Ann. 720, holding that a charge in an indictment that defendant "did lie in wait and shoot with a dangerous weapon with intent to commit the crime of murder upon "A B," is equivocal, and subject to two different interpretations, and void for uncertainty.

Ambiguity may be cured by the context if it is sufficiently shown in what sense the phrase or word was intended to be used. State *v.* Halida, 28 W. Va. 499; Rex *v.* Stevens, 5 East 244, 1 Smith K. B. 437.

Use of a videlicet does not render essential matter pleaded thereunder uncertain. State *v.* Grimes, 50 Minn. 123, 52 N. W. 275.

74. *Alabama.*— State *v.* Seay, 3 Stew. 123, 20 Am. Dec. 66.

Arkansas.— Gage *v.* State, 67 Ark. 308, 55 S. W. 165; State *v.* Ellis, 43 Ark. 93.

District of Columbia.— Tyner *v.* U. S., 23 App. Cas. 324.

Iowa.— State *v.* Gallaugher, 123 Iowa 378, 98 N. W. 906; State *v.* Jamison, 110 Iowa 337, 81 N. W. 594; State *v.* Clark, 80 Iowa 517, 45 N. W. 910; State *v.* Potter, 28 Iowa 554.

argument,[75] conclusion,[76] or recital,[77] nor as based on suspicion;[78] nor can the offense be charged on information and belief.[79] There are circumstances, how-

Maine.— State *v.* Paul, 69 Me. 215.

Missouri.— State *v.* Thierauf, 167 Mo. 429, 67 S. W. 292; State *v.* Hagan, 164 Mo. 654, 65 S. W. 249; State *v.* Phelan, 159 Mo. 122, 60 S. W. 71; State *v.* Patterson, 159 Mo. 98, 59 S. W. 1104; State *v.* Evans, 128 Mo. 406, 31 S. W. 34; State *v.* Rector, 126 Mo. 328, 23 S. W. 1074; State *v.* Gassard, 103 Mo. App. 143, 77 S. W. 473.

Montana.— State *v.* Keerl, 29 Mont. 508, 75 Pac. 362, 101 Am. St. Rep. 579.

Nebraska.— Moline *v.* State, 67 Nebr. 164, 93 N. W. 228; O'Connor *v.* State, 46 Nebr. 157, 64 N. W. 719; State *v.* Hughes, 38 Nebr. 366, 56 N. W. 982; Smith *v.* State, 21 Nebr. 552, 32 N. W. 594.

New York.— People *v.* Kane, 161 N. Y. 380, 55 N. E. 946, 14 N. Y. Cr. 295.

South Carolina.— State *v.* Henderson, 1 Rich. 179; State *v.* Halder, 2 McCord 377, 13 Am. Dec. 738, holding that the omission of the positive averment that the prisoner "did" the act is not supplied by the concluding averment of the *scienter*, and is fatal.

Texas.— State *v.* Powell, 28 Tex. 626; Juaraqui *v.* State, 28 Tex. 625; Gray *v.* State, 7 Tex. App. 10.

Vermont.— State *v.* Collins, 62 Vt. 195, 19 Atl. 368; State *v.* Freeman, 15 Vt. 723, holding that where an indictment, in describing a certain term of court, averred that it was held before a judge named, it was insufficient without further averments of the facts authorizing such judge mentioned to sit individually.

Virginia.— Old *v.* Com., 18 Gratt. 915.

United States.— U. S. *v.* Post, 113 Fed. 852; U. S. *v.* Ford, 34 Fed. 26.

England.— Reg. *v.* Pelham, 8 Q. B. 959, 2 Cox C. C. 17, 10 Jur. 659, 15 L. J. M. C. 105, 55 E. C. L. 957; Fitzwilliams' Case, Cro. Jac. 19.

See 27 Cent. Dig. tit. "Indictment and Information," § 192.

Other statements of this rule.— An indictment ought to be certain to every intent, and without any intendment to the contrary (State *v.* Hand, 6 Ark. 165; Com. *v.* Miller, 2 Pars. Eq. Cas. (Pa.) 480; Long's Case, Cro. Eliz. 489); must possess that degree of certainty which is sufficient to exclude every other intendment (Riggs *v.* State, 26 Miss. 51); certainty to a common intent (State *v.* Messenger, 63 Ohio St. 398, 59 N. E. 105; U. S. *v.* Fero, 18 Fed. 901); certainty to a reasonable extent (State *v.* Nutwell, 1 Gill (Md.) 54); reasonable certainty (Keller *v.* State, 51 Ind. 111); ought to have the same certainty as a declaration, for all the rules that apply to civil pleadings are applicable to criminal accusations (State *v.* Hand, 6 Ark. 165; State *v.* McCormack, 2 Ind. 305; Sherban *v.* Com., 8 Watts (Pa.) 212, 34 Am. Dec. 460; Rex *v.* Greep, Comb. 459; Rex *v.* Lawley, 2 Str. 904). *Compare* Noble *v.* State, 59 Ala. 73, holding that while this latter statement is to a certain degree correct, it is nevertheless customary to require a stricter adherence to established rules in the case of criminal pleadings.

75. Wabash, etc., R. Co. *v.* People, 12 Ill. App. 448; People *v.* Logan, 1 Nev. 110; State *v.* Haven, 59 Vt. 399, 9 Atl. 841 (holding that an indictment which alleged that the person to whom stock was issued did not own, nor have standing in his name, and was not entitled to, any share or shares of the stock, was an argumentative way of saying that he did not own and was not entitled to the shares assigned to him, and was therefore bad); Vaux's Case, 4 Coke 44*a*; Reg. *v.* Collingwood, 6 Mod. 288; Rex *v.* Knight, 1 Salk. 375.

An indictment for murder, which, after describing the mode of the commission of the crime, charges the killing by the words, "and so the jurors say," did kill and murder is not bad for argumentativeness. Com. *v.* Desmarteau, 16 Gray (Mass.) 1. See HOMICIDE, 21 Cyc. 847.

76. State *v.* Keerl, 29 Mont. 508, 75 Pac. 362, 10 Am. St. Rep. 579, holding that averments concluding an information for murder, "and so the said [defendant] did kill and murder the said [deceased]," do not cure or aid a defective allegation of the cause of death. See HOMICIDE, 21 Cyc. 833.

77. *California.*— People *v.* Ennis, 137 Cal. 263, 70 Pac. 84; People *v.* Piggott, 126 Cal. 509, 59 Pac. 31.

Illinois.— Wabash, etc., R. Co. *v.* People, 12 Ill. App. 448.

Indiana.— State *v.* Trueblood, 25 Ind. App. 437, 57 N. E. 975.

Minnesota.— State *v.* Nelson, 79 Minn. 388, 82 N. W. 650, holding that an indictment which alleges that defendant is accused of having committed an offense (stating it), but which does not directly charge that defendant committed the offense, is insufficient.

Mississippi.— Shanks *v.* State, 51 Miss. 464, holding that a charge that A B, assessor, etc., was not equivalent to a charge that A B was the assessor of a certain county.

England.— Rex *v.* Crowhust, 2 Ld. Raym. 1363; Rex *v.* Whitehead, 1 Salk. 371.

"Whereas" does not necessarily indicate a recital if it is used in a sense synonymous with "when in fact," or "while the contrary," etc., as shown by the context. People *v.* Ennis, 137 Cal. 263, 70 Pac. 84; People *v.* Fitzgerald, 92 Mich. 328, 52 N. W. 726.

Matter of inducement may be stated by way of recital. Reg. *v.* Goddard, 2 Ld. Raym. 920.

78. Parris *v.* People, 76 Ill. 274, holding that it is not sufficient for an information to charge that the accused is believed to be guilty, or that the prosecutor has reason to suspect his guilt.

79. Vannatta *v.* State, 31 Ind. 210; Sothman *v.* State, 66 Nebr. 302, 92 N. W. 303. And *compare* Com. *v.* Phillips, 16 Pick. (Mass.) 211.

ever, under which an allegation may be direct, although in a qualified form.[80] And indictments may be sufficient, although they contain expressions in the participial form;[81] and it has been stated that the use of a verb is not necessary in all cases, and that an adjective form of expression which expresses in plain and positive terms the necessary charges is sufficient.[82]

2. CERTAINTY AND PARTICULARITY. The indictment should contain such a specification of acts and descriptive circumstances as will on its face fix and determine the identity of the offense[83] with such particularity as to enable the accused to know exactly what he has to meet,[84] and avail himself of a conviction or acquittal as a bar to a further prosecution arising out of the same facts.[85] Such certainty

80. Com. *v.* Twitchell, 4 Cush. (Mass.) 74, holding that in an indictment for setting up a public exhibition it was sufficient to allege that the exhibition "purported to be" a certain performance.

81. *California.*— People *v.* Ennis, 137 Cal. 263, 70 Pac. 84.

Maine.— State *v.* Dunning, 83 Me. 178, 22 Atl. 109.

Missouri.— State *v.* Manley, 107 Mo. 364, 17 S. W. 800.

Montana.— State *v.* Bloor, 20 Mont. 574, 52 Pac. 611.

New Hampshire.— See State *v.* Roberts, 52 N. H. 492.

Vermont.— State *v.* Hooker, 17 Vt. 658.

United States.— Pooler *v.* U. S., 127 Fed. 509.

82. Chase *v.* State, (Tex. Cr. App. 1894) 28 S. W. 952, holding that an indictment for perjury was sufficient, although it was not directly stated that the statement as to which perjury was charged "was" false. See, generally, PERJURY.

83. Wingard *v.* State, 13 Ga. 396; State *v.* Albin, 50 Mo. 419; State *v.* Dougherty, 4 Oreg. 200; U. S. *v.* Burns, 54 Fed. 351.

An indictment applicable to two offenses which are different and definite offenses, and which does not specify which, is bad. State *v.* Messenger, 58 N. H. 348 (indictment containing in one count so much of the language of two sections of a statute as to leave it uncertain which of two different crimes of the same nature was charged); Rex *v.* Marshall, 1 Moody C. C. 158.

The true test of the sufficiency of an indictment is not whether it might possibly have been made more certain, but whether it sufficiently apprised defendant of what he must be prepared to meet; and in case any other proceedings should be taken against him for a similar offense, whether the record shows with accuracy to what extent he might plead a former acquittal or conviction. Peters *v.* U. S., 94 Fed. 127, 36 C. C. A. 105.

Sufficiency to support plea of former acquittal see CRIMINAL LAW, 12 Cyc. 264.

84. *Georgia.*— Wingard *v.* State, 13 Ga. 396.

Indiana.— Markle *v.* State, 3 Ind. 535.

Kentucky.— White *v.* Com., 9 Bush 178; Mount *v.* Com., 1 Duv. 90; Com. *v.* Perrigo, 3 Metc. 5; Com. *v.* Magowan, 1 Metc. 368, 71 Am. Dec. 480; Com. *v.* McAtee, 8 Dana 28; Sulzer *v.* Com., 4 Ky. L. Rep. 365.

Maryland.— Harne *v.* State, 39 Md. 552.

Massachusetts.— Com. *v.* Terry, 114 Mass. 263.

Missouri.— State *v.* McGinnis, 126 Mo. 564, 29 S. W. 842; State *v.* Rochforde, 52 Mo. 199.

Nebraska.— Moline *v.* State, 67 Nebr. 164, 93 N. W. 228.

New Hampshire.— State *v.* Messenger, 58 N. H. 348; State *v.* Gary, 36 N. H. 359; State *v.* Smith, 20 N. H. 399.

Oregon.— State *v.* Dougherty, 4 Oreg. 200.

Pennsylvania.— Com. *v.* Johnson, 3 Pa. Dist. 222, 13 Pa. Co. Ct. 543, holding that an indictment which charges defendant with tearing down "a constable's notice, advertising certain property for sale," is too indefinite and uncertain.

Rhode Island.— State *v.* Pirlot, 19 R. I. 695, 36 Atl. 715.

South Carolina.— State *v.* Shirer, 20 S. C. 392; State *v.* Washington, 13 S. C. 453; State *v.* Schroder, 3 Hill 63.

Texas.— State *v.* Schwartz, 25 Tex. 764, indictment for selling to a slave without the written consent of his master, which set forth neither the name of the slave nor that of the master.

Virginia.— Bishop *v.* Com., 13 Gratt. 785, indictment for playing cards at or near a certain meeting-house, where it did not allege that the meeting-house was a public place at the time of such playing.

Wisconsin.— Fink *v.* Milwaukee, 17 Wis. 26.

United States.— U. S. *v.* Cruikshank, 92 U. S. 542, 23 L. ed. 588 (indictment charging a conspiracy to prevent the enjoyment by certain citizens of "every, each, all, and singular" the rights granted them by the constitution, but failing to specify the particular right or rights interfered with); Miller *v.* U. S., 133 Fed. 337, 66 C. C. A. 399; Haynes *v.* U. S., 101 Fed. 817, 42 C. C. A. 34; U. S. *v.* Burns, 54 Fed. 351.

Canada.— Rex *v.* Beckwith, 7 Can. Cr. Cas. 450.

See 27 Cent. Dig. tit. "Indictment and Information," § 193.

85. *Kentucky.*— White *v.* Com., 9 Bush 178; Mount *v.* Com., 1 Duv. 90; Com. *v.* Perrigo, 3 Metc. 5; Com. *v.* Magowan, 1 Metc. 368, 71 Am. Dec. 480; Com. *v.* McAtee, 8 Dana 28; Sulzer *v.* Com., 4 Ky. L. Rep. 365.

Maryland.— State *v.* Nutwell, 1 Gill 54.

Pennsylvania.— Com. *v.* Miller, 2 Pars. Eq. Cas. 480.

South Carolina.— State *v.* Shirer, 20 S. C.

is also required that the court, on an inspection of the indictment, may determine that an offense has been committed,[86] and may confine the evidence on the trial to the issues presented,[87] and in case of conviction may determine what punishment should be imposed,[88] and that a reviewing court may determine from the record whether or not error has been committed.[89] The omission of a material averment in an indictment cannot be supplied by an instruction,[90] or by the proof,[91] or by the finding by the jury of a fact not alleged.[92] Whatever is indispensably necessary to be proved to warrant a conviction must as a general rule be alleged.[93]

3. DISJUNCTIVE AND ALTERNATIVE ALLEGATIONS. An indictment or information must not charge a party disjunctively or alternatively in such manner as to leave it uncertain what is relied on as the accusation against him;[94] but where terms

392; State *v.* Washington, 13 S. C. 453; State *v.* Schroder, 3 Hill 63.

United States.— Peters *v.* U. S., 94 Fed. 127, 36 C. C. A. 105; U. S. *v.* Burns, 54 Fed. 351.

See 27 Cent. Dig. tit. "Indictment and Information," § 193.

The certainty need not be such as to dispense with further proof of identity of the offense when the judgment is pleaded in bar. State *v.* Elmore, 44 Tex. 102; Phillips *v.* State, 29 Tex. 226; Cochran *v.* State, 26 Tex. 678; Horan *v.* State, 24 Tex. 161; Prior *v.* State, 4 Tex. 383.

86. *Kentucky.*— Pike *v.* Com., 2 Duv. 89, indictment simply charging defendant with unlawfully exhibiting a theatrical performance, without stating any facts to show whether it was a common-law or statutory offense.

North Carolina.— State *v.* Brown, 7 N. C. 224.

Oregon.— State *v.* Dougherty, 4 Oreg. 200.

Pennsylvania.— Com. *v.* Huber, 13 Lanc. Bar 139.

South Carolina.— State *v.* Wimberly, 3 McCord 190.

United States.— Miller *v.* U. S., 133 Fed. 337, 66 C. C. A. 399; U. S. *v.* Burns, 54 Fed. 351.

See 27 Cent. Dig. tit. "Indictment and Information," § 193.

87. Wingard *v.* State, 13 Ga. 396; Keller *v.* State, 51 Ind. 111.

88. *Georgia.*— Wingard *v.* State, 13 Ga. 396.

Indiana.— Vogel *v.* State, 31 Ind. 64, holding that an information which is so uncertain that, upon a plea of guilty, the court cannot know what punishment it may affix, is bad on motion in arrest of judgment.

Maryland.— State *v.* Nutwell, 1 Gill 54.

Massachusetts.— Com. *v.* Maxwell, 2 Pick. 139, holding that where a punishment was inflicted for each person entertained, an indictment alleging that an innkeeper entertained divers inhabitants of the town on the Lord's day was uncertain.

New Hampshire.— State *v.* Gary, 36 N. H. 359.

South Carolina.— State *v.* Shirer, 20 S. C. 392; State *v.* Washington, 13 S. C. 453; State *v.* Schroder, 3 Hill 63.

United States.— U. S. *v.* Burns, 54 Fed. 351.

See 27 Cent. Dig. tit. "Indictment and Information," § 193.

But *compare* State *v.* Comstock, 27 Vt. 553, holding that an indictment in the statutory form for the sale of intoxicating liquors was not bad, although perhaps open to the objection at common law that it did not inform the court what penalty to impose.

89. Wingard *v.* State, 13 Ga. 396; State *v.* Gary, 36 N. H. 359.

90. State *v.* Hesseltine, 130 Mo. 468, 32 S. W. 983.

91. People *v.* Webb, 127 Mich. 29, 86 N. W. 406.

92. State *v.* McCormick, 27 Iowa 402; Jewell *v.* Territory, 4 Okla. 53, 43 Pac. 1075.

93. State *v.* Wilson, 2 Mill (S. C.) 135, holding that in an indictment for swindling, an averment of the scienter must be averred.

94. *Alabama.*— Horton *v.* State, 53 Ala. 488.

Kentucky.— Com. *v.* Perrigo, 3 Metc. 5.

Massachusetts.— Com. *v.* Grey, 2 Gray 501, 61 Am. Rep. 476.

New Hampshire.— State *v.* Gary, 36 N. H. 359.

New York.— People *v.* Schatz, 50 N. Y. App. Div. 544, 64 N. Y. Suppl. 127, 15 N. Y. Cr. 38; People *v.* Gilkinson, 4 Park. Cr. 26.

North Carolina.—State *v.* Harper, 64 N. C. 129.

Tennessee.— Robeson *v.* State, 3 Heisk. 266.

Wisconsin.— Clifford *v.* State, 29 Wis. 327.

England.— *Ex p.* Pain, 5 B. & C. 251, 11 E. C. L. 450; Rex *v.* Sadler, 2 Chit. 519, 18 E. C. L. 766; Rex *v.* North, 6 D. & R. 143, 28 Rev. Rep. 538, 16 E. C. L. 258; Rex *v.* Flint, Lee t. Hardw. 370; Rex *v.* Stocker, 1 Salk. 342, 371; Rex *v.* Stoughton, 2 Str. 900; Rex *v.* Morley, 1 Y. & J. 221.

See 27 Cent. Dig. tit. "Indictment and Information," § 195.

Illustrations.— Charge of sale of spirituous or intoxicating liquor (Grantham *v.* State, 89 Ga. 121, 14 S. E. 892; Com. *v.* Grey, 2 Gray (Mass.) 501, 61 Am. Dec. 476; Cunningham *v.* State, 5 W. Va. 508. *Contra*, Thomas *v.* Com., 90 Va. 92, 17 S. E. 788; Morgan *v.* Com., 7 Gratt. (Va.) 592); that accused did "burn or cause to be burned" (People *v.* Hood, 6 Cal. 236); did burn a

laid in the alternative are synonymous, the indictment is good;[95] and where a statute, in defining an offense, uses the word "or" in the sense of "to wit," that is, in explanation of what precedes, making it signify the same thing, the indictment may follow the words of the statute.[96] An indictment is not vitiated by an alternative statement in matter which may be rejected as surplusage,[97] or which is not connected with the charge or definition of the offense,[98] or is merely in aggravation;[99] and use of the disjunctive "or" is proper in pleading negative averments.[1] It is sometimes provided by statute that offenses of the same character and subject to the same punishment may be charged in the same count in the alternative.[2] But offenses of the same character which are not subject to the

"certain house or out-house" (Whiteside *v.* State, 4 Coldw. (Tenn.) 175), "barn or stable" (Horton *v.* State, 60 Ala. 72); "did take . . . or cause to be taken" (State *v.* O'Bannon, 1 Bailey (S. C.) 144); did carry a "belt, or pocket pistol, or revolver" (Handaman *v.* State, 3 Heisk. (Tenn.) 134 note; State *v.* Green, 3 Heisk. (Tenn.) 131); did cut and stab a named person with a knife, "or some other like instrument" (Henderson *v.* State, 113 Ga. 1148, 39 S. E. 446). See also Wein *v.* State, 14 Mo. 125, holding that an indictment for stealing five red cows, five black cows, and five white cows of the value of fifteen dollars each, is not open to the objection that the offense is charged in the alternative.

When the alternative is not misleading the charge may be held good. Sublett *v.* Com., 35 S. W. 543, 18 Ky. L. Rep. 100 (holding that although the statutes provide different punishments for arson and barn-burning, an indictment charging defendant with "arson or barn-burning" was in substantial compliance with the criminal code, requiring an indictment to be direct and certain as to the offense charged); State *v.* Van Doran, 109 N. C. 864, 14 S. E. 32. And see U. S. *v.* Potter, 27 Fed. Cas. No. 16,077, 6 McLean 182, holding that it is not charging an offense in the alternative where the language describes the same offense, as "cutting, or procuring to be cut."

95. Henderson *v.* State, 113 Ga. 1148, 39 S. E. 446; State *v.* Snyder, 182 Mo. 462, 82 S. W. 12; State *v.* Gilbert, 13 Vt. 647, holding that a charge of stealing a mare "of a brown or bay color" was sufficient.

Other illustrations.— "Steers" and "working cattle" are of the same meaning (Wessels *v.* Kansas, McCahon (Kan.) 100); as are the expressions "play" and "roll" (Cobb *v.* State, 45 Ga. 11); "store" and "shop" (Barth *v.* State, 18 Conn. 432); "violent" and "tumultuous" (Bonneville *v.* State, 53 Wis. 680, 11 N. W. 427); perjury "on the trial of the cause" and "issue" (State *v.* Bishop, 1 D. Chipm. (Vt.) 120). But "wines," "spirituous liquors," and "other intoxicating beverage" are not synonymous (Smith *v.* State, 19 Conn. 493); nor are "trunk" and "chest" (Potter *v.* State, 39 Tex. 388).

Alleging exceptions in statute of limitations see *infra*, V, E, 8, b, text and note 79.

96. Blemer *v.* People, 76 Ill. 265; Brown *v.* Com., 8 Mass. 59; Clifford *v.* State, 29 Wis. 327.

97. See *infra*, V, T, 1, c.

98. *Alabama.*— Barnett *v.* State, 54 Ala. 579, holding that an indictment describing defendants as "being members or partners of a private company or corporation," etc., is not demurrable for charging them disjunctively as members of a corporation or partnership, where the offense charged is of the same degree, whatever their degree of business relationship to each other.

Arkansas.— See State *v.* Hester, 48 Ark. 40, 2 S. W. 339.

Georgia.— Henderson *v.* State, 113 Ga. 1148, 39 S. E. 446.

Indiana.— State *v.* Callahan, 124 Ind. 364, 24 N. E. 732, holding that the fact that two reasons, connected by a disjunctive, are given why an instrument is not set out verbatim in the indictment is not a material defect.

Missouri.— State *v.* Flint, 62 Mo. 393.

South Carolina.— State *v.* Lark, 64 S. C. 350, 42 S. E. 175, indictment charging defendant with committing a homicide by striking in the head "with a stone or iron hammer."

Texas.— Gaines *v.* State, 46 Tex. Cr. 212, 78 S. W. 1076, holding that a complaint charging "Bill (or W. H.) Gaines" with gambling, taken in connection with an information charging that "W. H. G." committed the offense, was not bad as being in the alternative.

See 27 Cent. Dig. tit. "Indictment and Information," § 197.

99. Scott *v.* Com., 6 Serg. & R. (Pa.) 224.

1. State *v.* Carver, 12 R. I. 285, holding that this was a proper connective in enumerating classes of persons authorized to sell intoxicating liquors and excluding defendant therefrom.

2. Sims *v.* State, 135 Ala. 61, 33 So. 162 (sustaining a charge that defendant "did unlawfully sell, give away, or otherwise dispose of . . . other intoxicating liquors); Smith *v.* Warrior, 99 Ala. 481, 12 So. 418 (sale of "vinous or malt liquors"); Russell *v.* State, 71 Ala. 348 (that defendant "did buy, sell, receive, barter, or dispose of" seed cotton "after the hour of sunset"); Murphy *v.* State, 55 Ala. 252 (indictment for resisting process charging that the process was issued by a separate person "as a justice of the peace . . . or a notary public"); Nixon *v.* State, 55 Ala. 120 (that defendant "did sell, remove, or conceal"

same punishment cannot be so charged,[3] nor can the distinct offenses be charged conjunctively.[4] Under such statutes each disjunctive phrase of the charge must contain sufficient averments to justify a conviction.[5] Other statutes permit an offense which may have been committed in different modes or by different means to be alleged in the alternative, but even in such a case it is not necessary to use an alternative form of expression in charging the offense in different forms;[6] and such a statute does not permit the charging of different offenses in the alternative.[7]

4. Repugnancy. Repugnancy in a material matter is fatal to an indictment or information.[8] This is true of repugnancy as to place or time.[9] And an indict-

mortgaged property); Johnson *v.* State, 35 Ala. 370 (indictment for "forging or counterfeiting").

3. Barber *v.* State, 34 Ala. 213, holding that charges, under one of which a conviction might be had for aiding to conceal a stolen horse, and under the other of which, for receiving or buying a stolen horse, could not be laid in the alternative in the same count.

4. Burgess *v.* State, 44 Ala. 190. See also *infra*, VII, A.

5. Watson *v.* State, 140 Ala. 134, 37 So. 225; Pickett *v.* State, 60 Ala. 77; Noble *v.* State, 59 Ala. 73; Raisler *v.* State, 55 Ala. 64; Horton *v.* State, 53 Ala. 488; Johnson *v.* State, 32 Ala. 583.

6. State *v.* Watrous, 13 Iowa 489. See also Com. *v.* Lowe, 116 Ky. 335, 76 S. W. 119, 25 Ky. L. Rep. 534.

Joinder of alternative phases of same offense in same count see *infra*, VII, A, 5.

7. Handaman *v.* State, 3 Heisk. (Tenn.) 134 note.

8. *Florida.*— Butler *v.* State, 25 Fla. 347, 6 So. 67.

Massachusetts.— Com. *v.* Lawless, 101 Mass. 32.

New Hampshire.— State *v.* Canney, 19 N. H. 135.

New York.— People *v.* Wise, 3 N. Y. Cr. 303.

North Carolina.— State *v.* Hendricks, 1 N. C. 445.

England.— Reg. *v.* Harris, 1 Den. C. C. 461; Rex *v.* Gilchrist, 3 Leach C. C. 753; Rex *v.* Reading, 2 Leach C. C. 672.

See 27 Cent. Dig. tit. "Indictment and Information," § 200.

Repugnancy in description of wound in homicide see Homicide, 21 Cyc. 846.

Allegations showing offense not within the statute relied on are fatal. State *v.* Mahan, 2 Ala. 340.

Other examples of repugnancy.— An indictment which states that one of the accused did "assist and abet" the killing and murdering, and then charges that he was "accessory before the fact to the killing and murdering," is fatally inconsistent, since he could not be both present and absent. State *v.* Sales, 30 La. Ann. 916. A charge that defendant "wilfully" and with "culpable negligence" killed deceased is inconsistent (State *v.* Lockwood, 119 Mo. 463, 24 S. W. 1015); and the same is true of an allegation of a fraudulent issue of a certificate of the ownership of one thousand shares of stock "in bank," and "of the following tenor" (State *v.* Haven, 59 Vt. 399, 9 Atl. 841); and of an indictment which lays the commission of a felony at a day later than the compounding thereof, although the compounding is stated to have been afterward (State *v.* Dandy, 1 Brev. (S. C.) 395); and of a charge of embezzling and stealing by one and the same act (McCann *v.* U. S., 2 Wyo. 274).

Expressions held consistent.— "Bank notes, usually known and described as greenbacks" (State *v.* Hockenberry, 30 Iowa 504); description of a writing sent by mail inclosed in an envelope, as a "letter and communication" (Larison *v.* State, 49 N. J. L. 256, 9 Atl. 700, 60 Am. St. Rep. 606); charge that defendant did "remove and destroy" a certain fence (Phillips *v.* State, 29 Tex. 226); uttering a "false, forged, and counterfeited bank note" (Mackey *v.* State, 3 Ohio St. 362; Stoughton *v.* State, 2 Ohio St. 562 [*overruling* Kirby *v.* State, 1 Ohio St. 185]); charging the corrupt acceptance of a bribe for a vote for "a question which was and might be, by law, brought before" defendant as state senator (State *v.* Smalls, 11 S. C. 262); charging one with perjury in swearing, in July, that he had witnessed a transaction in October of the same year (State *v.* McKennan, Harp. (S. C.) 302). A charge in an indictment for perjury before a grand jury that a certain fact had been "developed" before the grand jury and that it had "become material" to the issue to ascertain defendant's knowledge of such fact is not repugnant on the theory that the fact having been "developed" it ceased to be an issue before the grand jury. State *v.* Faulkner, 175 Mo. 546, 75 S. W. 116. And the fact that a more complete description of an officer is given in one portion of an indictment than in another is not a repugnancy. Waters *v.* State, 30 Tex. App. 284, 17 S. W. 411.

Repugnancy resulting from clerical error see *supra*, V, B, 5 text and note 62.

Indictments for cruelty to animals see Animals, 2 Cyc. 347.

9. State *v.* Hand, 6 Ark. 165; State *v.* Austin, 113 Mo. 538, 21 S. W. 31 (holding bad an indictment from which it appeared that at the time a larceny was committed defendant was imprisoned in a penitentiary); Jane *v.* State, 3 Mo. 61; State *v.* Hardwick, 2 Mo. 226; Hickman *v.* State, 44 Tex. Cr. 533, 72 S. W. 587; U. S. *v.* Dow, 25 Fed. Cas. No. 14,990, Taney 34 (holding that the

ment is bad which alleges the name of a person to be to the jurors unknown, and subsequently states the name of such person.[10] But an indictment is not repugnant because an act is alleged to have been committed in an improbable but not in a physically impossible manner.[11] In those cases in which a repugnant allegation may be rejected as surplusage, the repugnancy is not material.[12] Under the statutes of some states repugnancy is not fatal when sufficient matter is alleged to indicate the crime and person charged.[13] In those states in which the distinction between principals and accessaries before the fact has been abolished, an indictment of an accessary may, without repugnance, charge the fact to have been committed by him.[14]

5. Use of Technical Expressions.[15] At common law certain technical terms were essential to the statement of certain offenses in an indictment, as in murder, the word "murdered"; in rape, the word "ravished"; in larceny, the words "feloniously took and carried away," and no other words were regarded as equivalent.[16] Under statutory modifications of the common-law rules, however, the use of many technical expressions formerly regarded as essential has become unnecessary;[17] for instance, in some jurisdictions the term "murder" may be omitted in charging murder,[18] or "maim" in charging mayhem,[19] and the use of the expression *vi et armis* is now regarded as unnecessary,[20] especially where the forcible nature of the act is indicated by other expressions.[21]

6. Videlicet and Scilicet. A general expression may be restricted and con-

introduction of a repugnant place by the phrase "then and there" was fatal).

10. Jones *v.* State, 63 Ala. 27, holding that an indictment against "Douglas Jones, alias Dug Jones, whose true Christian name is to the grand jurors unknown" was bad. But *compare* Taylor *v.* State, 100 Ala. 68, 14 So. 875, holding that an indictment charging an offense against Matt Taylor, "whose Christian name is . . . otherwise unknown," is not bad for repugnance, since the statement that such other name is unknown is unnecessary.

Stating that the name of the person is supposed to be as given in an indictment is not repugnant to an allegation that the name is unknown. Reese *v.* State, 90 Ala. 624, 8 So. 818.

11. Evans *v.* State, 58 Ark. 47, 22 S. W. 1026 (holding an indictment charging two defendants with having held only one gun, with which it was alleged a murder was committed, sufficient); Coates *v.* People, 72 Ill. 303 (indictment which charged that three persons, named, with a stick of wood which each severally had and held in their several right hands, inflicted a mortal wound, causing death). See also State *v.* McDonald, 67 Mo. 13, holding that an indictment for an assault with intent to kill, alleging that the offense was committed with three weapons, a pair of tongs, a hammer, and an ax handle, was not bad as charging an impossibility.

12. See *infra*, V, T, 1, d.

13. State *v.* Boss, 74 Ind. 80 (indictment not bad for repugnancy between the title and the body of the indictment as to the name of the accused); State *v.* Taylor, 126 Mo. 531, 29 S. W. 598 (indictment for murder not invalid because it alleged that a revolver loaded with one leaden bullet inflicted two mortal wounds); State *v.* Anderson, 98 Mo. 461, 11 S. W. 981; Robertson *v.* Com., (Va. 1894) 20 S. E. 362.

14. State *v.* Stacy, 103 Mo. 11, 15 S. W. 147, holding that an indictment charging that one defendant shot and killed deceased, and that the other advised and assisted him to do the act, and which concluded by alleging that both killed and murdered deceased, was good.

15. "Feloniously" see *infra*, V, H, 7.

Construction of technical words see *infra*, V, D, 1.

16. See Lambertson *v.* People, 5 Park. Cr. (N. Y.) 200.

In particular offenses see particular title such as Burglary, 6 Cyc. 199 *et seq.*; Homicide, 21 Cyc. 833 *et seq.*; Larceny; Rape, etc.

17. Necessity for technical expressions in charging specific crimes see Burglary, 6 Cyc. 199 *et seq.*; Homicide, 21 Cyc. 833 *et seq.*; Larceny; and other special titles.

18. Anderson *v.* State, 5 Ark. 444; Caldwell *v.* State, 28 Tex. App. 566, 14 S. W. 122. See Homicide, 21 Cyc. 858.

19. Guest *v.* State, 19 Ark. 405. See Mayhem.

20. State *v.* Harris, 106 N. C. 682, 11 S. E. 377; State *v.* Duncan, 28 N. C. 236; State *v.* Moses, 13 N. C. 452; Rex *v.* Burke, 7 T. R. 4.

In indictment for bigamy see Bigamy, 5 Cyc. 698.

21. State *v.* Pratt, 54 Vt. 484 (holding that "wilfully" or "maliciously" implies force); State *v.* Hanley, 47 Vt. 290; Brackett *v.* State, 2 Tyler (Vt.) 152 (holding that the word "felony" sufficiently implies *vi et armis*); Rex *v.* Wind, 2 Str. 834 (holding that the expression *vi et armis* was implied in an indictment for a riot in the words *riotose ceperunt fregerent et prostraverunt*).

fined to a precise and definite fact by a description under a *videlicet* or *scilicet*.[22] Matter which is not essential in its nature may be laid under a *videlicet*, in which case it need not be proved as alleged;[23] but essential matters, although laid under a *videlicet*, are to be regarded as positive, precise, and traversable.[24]

7. MATTERS OF INDUCEMENT.[25] It is not necessary to describe matters of inducement with the degree of minuteness and particularity which is requisite in setting out the material allegations which constitute and give character to the offense charged,[26] and such facts need not be directly charged, but it is sufficient that they be necessarily implied from the matter alleged.[27]

D. Rules of Construction — 1. IN GENERAL. Except in particular cases where precise technical expressions are required to be used, words employed in indictments or informations may be such as are in ordinary use and should be given the construction which they ordinarily receive;[28] and it is sometimes provided by statute that words are to be construed according to their common acceptation, except where they are otherwise specifically defined by law.[29] When technical words are used they must be taken to have been intended to have their technical meaning,[30] and a description found in an indictment or information which uses common-law phrases and references is to be given its common-law interpretation;[31] but words of common use will be construed according to their common acceptation, although under certain circumstances they have a technical, legal meaning, unless the context is such as to show that the technical use was intended.[32] Since an indictment is to be construed *fortius contra proferentem*,[33] the language used must necessarily import the offense charged, and if susceptible of a different interpretation the indictment is bad.[34] The language of a statute,

22. Com. *v.* Hart, 10 Gray (Mass.) 465.

23. State *v.* Heck, 23 Minn. 549; State *v.* Haney, 8 N. C. 460; Rex *v.* Hart, 1 Cowp. 412, 1 Dougl. 193, 2 East P. C. 978, 1 Leach C. C. 172; Rex *v.* May, 1 Leach C. C. 227.

24. State *v.* Grimes, 50 Minn. 123, 52 N. W. 275; Ryalls *v.* Reg., 11 Q. B. 781, 18 L. J. M. C. 69, 13 Jur. 259, 3 Cox C. C. 254, 63 E. C. L. 781; Reg. *v.* Scott, 7 Cox C. C. 164, Dears. & B. 47, 2 Jur. N. S. 1096, 25 L. J. M. C. 128, 4 Wkly. Rep. 777.

25. See LIBEL AND SLANDER; PERJURY; and other special titles.

26. State *v.* Mayberry, 48 Me. 218; Com. *v.* Reynolds, 14 Gray (Mass.) 87, 74 Am. Dec. 665; Rex *v.* Wade, 1 B. & Ad. 861, 8 L. J. M. C. O. S. 113, 20 E. C. L. 721; Reg. *v.* Bidwell, 2 Cox C. C. 298; Reg. *v.* Wyatt, 2 Ld. Raym. 1189; Rex *v.* Sainsbury, Nolan 8, 4 T. R. 451, 2 Rev. Rep. 433. And see Rex *v.* Soper, 3 B. & C. 857, 5 D. & R. 669, 10 E. C. L. 386.

27. Mason *v.* State, 55 Ark. 529, 18 S. W. 827.

28. *Alabama.*— Franklin *v.* State, 52 Ala. 414, holding that an allegation in an indictment for false pretenses, that defendant falsely pretended that "he had one small black mule," was rightly construed as alleging a pretense of ownership.

Indiana.— State *v.* Day, 52 Ind. 483.

Nebraska.— Smith *v.* State, (1904) 100 N. W. 806.

New Hampshire.—State *v.* Pratt, 14 N. H. 456.

Ohio.— State *v.* Messenger, 63 Ohio St. 398, 59 N. E. 105, holding that "a three-inch tire" was understood to mean a tire three inches in width.

Texas.— See Perry *v.* State, 44 Tex. 473, holding that where the question was not raised on the trial an indictment charging the murder of "Isaac Thomas Freedman" would be considered as charging the murder of Isaac Thomas, freedman.

England.— Rex *v.* Stevens, 5 East 244, 1 Smith K. B. 437.

See 27 Cent. Dig. tit. "Indictment and Information," § 310.

The title of a public statute may properly be used in an indictment to denote the law embodied in the statute as modified by its amendments and supplements. State *v.* Cooney, (N. J. Sup. 1905) 60 Atl. 60.

29. People *v.* Littlefield, 5 Cal. 355; Smith *v.* State, 1 Kan. 365.

30. U. S. *v.* Claflin, 25 Fed. Cas. No. 14,798, 13 Blatchf. 178.

31. Chapman *v.* People, 39 Mich. 357.

32. State *v.* Parker, 43 N. H. 83; U. S. *v.* Howard, 132 Fed. 325.

33. Com. *v.* G. W. Taylor Co., 43 S. W. 399, 19 Ky. L. Rep. 1334 [*citing* Com. *v.* T. J. Megibben Co., 101 Ky. 195, 40 S. W. 694, 19 Ky. L. Rep. 291; Tully *v.* Com., 13 Bush (Ky.) 142; Newport News, etc., Co. *v.* Com., 14 Ky. L. Rep. 197].

On appeal where the indictment has received a construction upon the trial at the instance of the prosecuting officer and over the objection of the accused, the prosecution cannot urge a different construction. State *v.* Mattison, (N. D. 1904) 100 N. W. 1091.

34. People *v.* Williams, 35 Cal. 671; State *v.* McIntyre, 19 Minn. 93; State *v.* Parker, 43 N. H. 83, holding that where the words used in an indictment to describe an offense are commonly used in a sense which does

when employed in an indictment, should be construed as the statute has been.[35] Words clearly capable of different meanings should be so construed as to avoid repugnancy.[36] Interlined words will be read so as to make sense, without regard to the position in which the caret is placed.[37] A relative or word of construction, such as "there" or "said," is to be referred to the nearest antecedent,[38] unless the sense is obviously to the contrary.[39]

2. Reference to Caption. The caption or commencement of the indictment cannot be referred to for the purpose of making more certain any of the essential averments relating to the accusation.[40]

3. Reference to Affidavit or Complaint. An information, although founded upon an affidavit or complaint,[41] must be sufficient in itself, and if on its face it is substantially defective, the defect cannot be remedied by reference to the affidavit or complaint;[42] but the complaint or affidavit may be resorted to as an aid in deciphering the handwriting of the information.[43]

E. Necessity and Propriety of Particular Averments in General — 1. Jurisdiction. While it must appear from the indictment or information that the court in which it is found or filed has jurisdiction of the offense,[44] when the offense comes within the general jurisdiction of the court, it is not necessary to exclude by descriptive terms every possible exemption of defendant from that jurisdiction.[45] In indictments in the federal courts, where the offense is not clearly within the federal jurisdiction, every fact essential to such jurisdiction must be clearly and distinctly averred.[46] In a case of concurrent jurisdiction of the

not necessarily import an offense, and they are used without any qualification, the indictment will be bad, although the same words, in a more strict and techical sense, may describe a criminal act.

35. People *v.* White, 34 Cal. 183.

36. Rex *v.* Stevens, 5 East 244, 1 Smith K. B. 437, stating, however, that in order to support the indictment, a term cannot be given a meaning against common use.

The word "until" may be given an inclusive meaning to support an indictment which alleges that defendant held a certain office "until" a certain date, and "whilst" holding such office and "on" such date, he did, etc. Rex *v.* Stevens, 5 East 244, 1 Smith K. B. 437.

37. State *v.* Daniels, 44 N. H. 383.

As to erasures and interlineations see *supra*, V, B, 4.

38. Sampson *v.* Com., 5 Watts & S. (Pa.) 385, holding that where a count in an indictment referred to "said felony and arson," and there had been two preceding counts, each mentioning a distinct arson, the count was not uncertain, since "said" would be held to relate to the arson specified in the count immediately preceding.

Repetition of time and place see *infra*, V, F, 3.

Repetition of name of accused see *infra*, V, G, 14.

39. Miller *v.* State, 107 Ind. 152, 7 N. E. 898; Wilkinson *v.* State, 10 Ind. 372; Com. *v.* Call, 21 Pick. (Mass.) 515 (holding that the pronoun "them" should be referred to that antecedent to which the tenor of the instrument and the principles of law require it should relate, whether exactly according to the rules of syntax or not); Rex *v.* Wright, 1 A. & E. 434, 2 L. J. Exch. 370, 3 N. & M. 892, 28 E. C. L. 214; Guier's Case, 1 Dyer 46*b*.

The obvious purpose of the pleader should have influence in the collocation of the sentences, and a term used may be referred to that antecedent which accords with the general tenor of the proceeding, whether it conforms to strict grammatical rules or not. State *v.* Beasom, 40 N. H. 367.

40. U. S. *v.* Howard, 132 Fed. 325.

Aider of statement of venue see *infra*, V, F, 1, b, (IX).

41. See *supra*, IV, A, 2, b, (X), (B).

42. Keiser *v.* State, 78 Ind. 430 (failure to name accused); Smith *v.* State, 25 Tex. App. 454, 8 S. W. 645 (failure to allege venue); Orr *v.* State, 25 Tex. App. 453, 8 S. W. 644; Williams *v.* State, 19 Tex. App. 409 (averment of ownership of property); Kennedy *v.* State, 22 Tex. App. 693, 3 S. W. 480 (failure to allege the date of the offense prior to the filing of the information).

43. Irvin *v.* State, 7 Tex. App. 109.

44. Houser *v.* People, 46 Barb. (N. Y.) 33. And see *infra*, V, F, 1, b, (I), text and notes 96–98.

45. State *v.* Moore, 82 N. C. 659 (holding that an indictment for an affray need not allege that the offense was committed more than six months before the finding of the indictment, and that no justice has taken jurisdiction of the offense); U. S. *v.* Demarchi, 25 Fed. Cas. No. 14,944, 5 Blatchf. 84 (holding that the possible foreign nationality of a vessel need not be negatived where the federal court may entertain jurisdiction of a crime committed thereon without regard to the national character of the vessel).

A negative of the jurisdiction of the federal courts need not be contained in an indictment found in a state court. People *v.* Collins, 105 Cal. 504, 39 Pac. 16.

46. U. S. *v.* Morrissey, 32 Fed. 147, holding that an indictment for receiving illegal

courts of either of two counties for an offense committed near the boundary line between them, it is not necessary, in an indictment in one county, to aver that no prosecution of accused for the crime charged has been instituted in the other.[47]

2. Name of Offense. The statutes of some states provide that the name of the offense shall be stated in the accusatory part of the indictment or information.[48] Under such statutes, where the offense has no specific name, a brief general description should be given;[49] and where it is required that the indictment shall state both the accusation of the crime and the facts whereby it was committed, a substantial variance between the crime charged and the facts has been held fatal.[50] Generally, however, indictments or informations for statutory offenses, although they give an erroneous appellation,[51] or fail to give any appellation to the offense,[52] if the facts constituting the offense as defined by the statute are sufficiently stated are good.[53]

3. Character or Grade of Offense. It is not necessary to allege that the offense is a felony or a misdemeanor,[54] or to state the degree charged.[55]

ballots in a state where the names of all candidates voted for, including candidates for representatives in congress, were required to be on the same ballot, should affirmatively charge that the illegal ballot contained the name of a candidate for congress.

47. State *v.* Niers, 87 Iowa 723, 54 N. W. 1076.

48. Com. *v.* Slaughter, 12 Ky. L. Rep. 893.

49. Knoxville Nursery Co. *v.* Com., 108 Ky. 6, 55 S. W. 691, 21 Ky. L. Rep. 1483; Com. *v.* Schatzman, 82 S. W. 238, 26 Ky. L. Rep. 508; Com. *v.* Scroggin, 60 S. W. 528, 22 Ky. L. Rep. 1338; Daviess Gravel Road Co. *v.* Com., 14 Ky. L. Rep. 812.

Error in the statement may be cured by a description in the body of the indictment. Scott *v.* Com., 7 Ky. L. Rep. 369.

50. People *v.* Maxon, 57 Hun (N. Y.) 367, 10 N. Y. Suppl. 593; State *v.* Smythe, 33 Tex. 546, holding that an indictment charging a county clerk with demanding "fees greater than were or are allowed by law," and then by way of specification alleging that the fees were for certain orders for which no fees are allowed by law, was properly quashed, as the specified acts constituted a different offense from that charged. And see People *v.* Dumar, 106 N. Y. 502, 13 N. E. 325; People *v.* Parker, 69 Hun (N. Y.) 130, 23 N. Y. Suppl. 704. *Contra*, People *v.* Sullivan, 4 N. Y. Cr. 193, holding that the name of the crime in an indictment is a mere matter of form, which may or may not be stated, and if stated incorrectly, it does not vitiate or control the character of the crime as against specific allegations of fact in the indictment.

51. *Arizona.*— Brady *v.* Territory, (1900) 60 Pac. 698.

Arkansas.— State *v.* Culbreath, 71 Ark. 80, 71 S. W. 254. See also Watson *v.* State, 29 Ark. 299, holding that an information describing the offense as compounding a felony, but in which the facts stated constitute bribery, is in reality a charge of bribery, and a finding of guilty of the former offense is erroneous and should be set aside.

California.— People *v.* Beatty, 14 Cal. 566.

Georgia.— Camp *v.* State, 25 Ga. 689, holding that an indictment stating facts constituting murder, but charging manslaughter, is defective in form merely, and that judgment thereon will not be arrested.

Iowa.— State *v.* Gillett, 92 Iowa 527, 61 N. W. 169; State *v.* Davis, 41 Iowa 311 (holding that where an offense is designated in an indictment as manslaughter, but the statement of facts defines the crime of murder, defendant may be put upon his trial for the latter offense); State *v.* Chartrand, 36 Iowa 691; State *v.* Shaw, 35 Iowa 575.

Kentucky.— Com. *v.* Smith, 6 Bush 263; Com. *v.* Sherman, 6 Ky. L. Rep. 656.

Minnesota.— State *v.* Munch, 22 Minn. 67; State *v.* Coon, 18 Minn. 518; State *v.* Garvey, 11 Minn. 154; State *v.* Hinckley, 4 Minn. 345.

Nevada.— State *v.* Anderson, 3 Nev. 254.

United States.— U. S. *v.* Lehman, 39 Fed. 768; U. S. *v.* Elliot, 25 Fed. Cas. No. 15,044, 3 Mason 156.

See 27 Cent. Dig. tit. "Indictment and Information," § 180.

52. *Arkansas.*— Guest *v.* State, 19 Ark. 405.

Georgia.— O'Halloran *v.* State, 31 Ga. 206, not necessary to charge the offense as a misdemeanor where it is described.

Iowa.— State *v.* Baldy, 17 Iowa 39; State *v.* Hessenkamp, 17 Iowa 25.

Nevada.— State *v.* Rigg, 10 Nev. 284; State *v.* Johnson, 9 Nev. 175.

Texas.— Massie *v.* State, 5 Tex. App. 81.

United States.— U. S. *v.* Wood, 44 Fed. 753.

See 27 Cent. Dig. tit. "Indictment and Information," § 180.

53. People *v.* Phipps, 39 Cal. 326; State *v.* Howard, 66 Minn. 309, 68 N. W. 1096, 61 Am. St. Rep. 403, 34 L. R. A. 178.

54. People *v.* War, 20 Cal. 117 (holding that under a statutory form making it proper to precede the statement of the acts constituting the offense by a statement of the crime, giving it its legal appellation, such as murder, arson, or the like, as designating it as felony or misdemeanor, it was not necessary that the offense be called a felony or a misdemeanor); O'Halloran *v.* State, 31 Ga. 206.

55. State *v.* Absence, 4 Port. (Ala.) 397; People *v.* Shaver, 107 Mich. 562, 65 N. W.

4. Matters of Judicial Notice. As a rule matters of which the court must or will take judicial notice need not be stated.[56] Upon this fact is founded the rule that it is not necessary to set out a statute upon which an indictment for a statutory offense is based.[57] But the fact that the court will take judicial notice of certain matters essential to the proof of the offense will not render it unnecessary to aver such matter, if necessary to its description in order to advise the accused of the charge which he must be prepared to meet.[58]

5. Matters of Conclusion or Implication. Facts and not conclusions must be averred in an indictment,[59] but matters of necessary inference or conclusion from

538; State *v.* Eno, 8 Minn. 220; State *v.* Dumphey, 4 Minn. 438; State *v.* La Croix, 8 S. D. 369, 66 N. W. 944. See also Burglary, 6 Cyc. 222; Homicide, 21 Cyc. 646; and other special titles.

56. State *v.* Warren, 57 Mo. App. 502 (that a public road and highway is a public place); Owen *v.* State, 5 Sneed (Tenn.) 493; Damron *v.* State, (Tex. Cr. App. 1894) 27 S. W. 7 (that a horse is corporeal personal property).

Nature and value of currency and specie.— The court will take judicial notice of the commercial value of United States currency (Gady *v.* State, 83 Ala. 51, 3 So. 429); that "greenbacks" are United States currency of face value (Duvall *v.* State, 63 Ala. 12); and that gold money of "American coinage" is current coin of the realm (Grant *v.* State, 55 Ala. 201).

Ownership of public property.— The court will take judicial notice that the county jails in the state are the property of the several counties in which they are located. Sands *v.* State, 80 Ala. 201; Lockett *v.* State, 63 Ala. 5.

Geographical and political facts.— The court will notice the county in which towns created by law are located (Com. *v.* Springfield, 7 Mass. 9; Vanderwerker *v.* People, 5 Wend. (N. Y.) 530); that a river is in a certain county (Acton *v.* State, 80 Md. 547, 31 Atl. 419); that an incorporated city is in a particular county (Schilling *v.* Territory, 2 Wash. Terr. 283, 50 Pac. 926); that counties are in the same judicial district (Mischer *v.* State, 41 Tex. Cr. 212, 53 S. W. 627, 96 Am. St. Rep. 780). But the court cannot take judicial notice that a city is of the certain grade or class to which only a specific statute is applicable. Massa *v.* State, 3 Ohio Cir. Ct. 9, 2 Ohio Cir. Dec. 6 [*reversing* 9 Ohio Dec. (Reprint) 772, 17 Cinc. L. Bul. 175].

Public statutes.— In an indictment under Act April 5, 1866, c. 24, § 2 (14 U. S. St. at L. 12), which provides that when an offense shall be committed in any place which has been ceded to the United States, which offense is not punished by the law of the United States, such offense shall be punished according to the law of the state in which such place is situated, etc., it is not necessary to aver that the offense is not punishable by any law of congress, and is punishable by the state laws. U. S. *v.* Wright, 28 Fed. Cas. No. 16,774. And an indictment for denial of equal rights to a negro need not aver that white persons possess the rights denied where they are conferred by statute. U. S. *v.* Rhodes, 27 Fed. Cas. No. 16,151, 1 Abb. 28.

Municipal ordinances must be pleaded in the absence of statutory provisions.

Colorado.— Garland *v.* Denver, 11 Colo. 534, 19 Pac. 460.

Indiana.— Green *v.* Indianapolis, 22 Ind. 192. And see Wagner *v.* Garrett, 118 Ind. 114, 20 N. E. 706.

Iowa.— State *v.* Olinger, 109 Iowa 669, 80 N. W. 1060.

Minnesota.— Winona *v.* Burke, 23 Minn. 254.

Montana.— Miles City *v.* Kern, 12 Mont. 119, 29 Pac. 720.

Departmental and executive regulations.— Regulations made by the president and by heads of departments under authority granted by congress will be judicially noticed. Wilkins *v.* U. S., 96 Fed. 837, 37 C. C. A. 588.

What will be judicially noticed see, generally, Evidence, 16 Cyc. 849 *et seq.*

57. See *infra*, V, H, 8, b.

58. People *v.* Bates, 61 N. Y. App. Div. 559, 71 N. Y. Suppl. 123, 15 N. Y. Cr. 469, holding that, although the court might perhaps take judicial notice of the fact that the electors of a certain town had voted not to issue certificates to sell liquor, it was nevertheless necessary to allege whether an illegal sale of liquor in a certain town was through a sale without a certificate, or through selling in a prohibited manner, or to prohibited persons, or during prohibited times, or, if the electors had voted to limit the persons to whom, or the purposes for which, a certificate might be given, by selling in violation of their determination, as declared by that vote.

59. *Arkansas.*— State *v.* Graham, 38 Ark. 519.

Illinois.— Rank *v.* People, 80 Ill. App. 40, holding that an averment that defendant threatened to accuse a person of a misdemeanor was an averment of a mere conclusion of law.

Indiana.— State *v.* Record, 56 Ind. 107 (holding that in an indictment against a clerk of a circuit court for failure to pay over fines and fees collected by him, an allegation that such funds are "due and owing to the state of Indiana" cannot supply necessary allegations as to when such funds were collected); Butler *v.* State, 17 Ind. 450 (averment of duty to keep a bridge in repair); State *v.* Trueblood, 25 Ind. App. 437, 57 N. E. 975 (allegation that an allowance was made to a county auditor, "such allowance being illegal and unwarranted").

the facts averred need not be alleged;[60] nor, where the facts are alleged, is it necessary to aver the conclusions of law resulting therefrom.[61]

6. Matters of Evidence. Matters of evidence, as distinguished from the facts essential to the description of the offense, need not be averred.[62] But the unnecessary insertion of evidentiary matters does not vitiate an indictment.[63]

7. Matters of Defense. The prosecution is not bound to anticipate defenses and aver facts rendering them unavailing,[64] or negative every conceivable fact

Kentucky.— Com. *v.* Clark, 4 Ky. L. Rep. 622, that a prisoner was "lawfully" in custody without a presentation of the facts.

Missouri.— State *v.* Meysenburg, 171 Mo. 1, 71 S. W. 229.

Nebraska.—Lamb *v.* State, (1903) 95 N. W. 1050, holding that an information which, after charging larceny in the usual form, alleges that defendant procured the thief to commit the crime is not demurrable as stating a mere legal conclusion.

New Hampshire.— State *v.* Fitts, 44 N. H. 621.

New York.— People *v.* Weston, Sheld. 555 (indictment against a constable for failure to execute a warrant issued by a justice of the peace); People *v.* Cooper, 3 N. Y. Cr. 117 (allegation that a person assaulted was in the execution of a lawful process or mandate).

Texas.— Lasindo *v.* State, 2 Tex. App. 59, charge that the accused was "guilty of the offense of keeping" a disorderly house, instead of "did keep," etc.

See 27 Cent. Dig. tit. "Indictment and Information," § 185.

60. *Alabama.*— Anthony *v.* State, 29 Ala. 27, holding that an allegation of an actual poisoning necessarily implied that the substance employed was a poison.

Massachusetts.—Com. *v.* Caldwell, 14 Mass. 330, holding that an allegation that a certain person was a tithingman involved an allegation that he was sworn.

Michigan.— Evans *v.* People, 12 Mich. 27.

Nevada.— State *v.* Derst, 10 Nev. 443.

New York.— People *v.* Bennett, 37 N. Y. 117, 93 Am. Dec. 551, 4 Transcr. App. 32, 4 Abb. Pr. N. S. 89.

North Carolina.— State *v.* Ballard, 6 N. C. 186.

England.— Holloway *v.* Reg., 17 Q. B. 317, 2 Den. C. C. 287, 15 Jur. 825, 79 E. C. L. 317; Rex *v.* Tilley, 2 Leach C. C. 759.

See 27 Cent. Dig. tit. "Indictment and Information," § 184.

61. *Alabama.*— State *v.* Absence, 4 Port. 397.

Arkansas.— Ball *v.* State, 48 Ark. 94, 2 S. W. 462.

Massachusetts.— Com. *v.* Goulding, 135 Mass. 552; Com. *v.* Lavonsair, 132 Mass. 1; Wells *v.* Com., 12 Gray 326.

New Mexico.— Territory *v.* O'Donnell, 4 N. M. 66, 12 Pac. 743.

Virginia.— Leftwich *v.* Com., 20 Gratt. 716.

England.— Rex *v.* Smith, 2 B. & P. 127, 1 East P. C. 183, R. & R. 5; Rex *v.* Healey, 1 Moody C. C. 1, holding that where the letting of a lodging was averred to have been by the owner's wife, it was sufficient, although in law it amounted to a letting by the husband and owner.

See 27 Cent. Dig. tit. "Indictment and Information," § 186.

62. *Indiana.*— State *v.* McCormack, 2 Ind. 305.

Kentucky.— Miller *v.* Com., 13 Bush 731.

Louisiana.— State *v.* Patterson, 14 La. Ann. 46.

Massachusetts.— Com. *v.* Johnson, 175 Mass. 152, 55 N. E. 804, holding that an indictment charging one with perjury for having falsely sworn when on trial for larceny that he was never before arrested, convicted, or sentenced for crime, need not set forth that when he was interrogated on those subjects a copy of a previous conviction had been offered in evidence, or was in possession of the prosecuting officer.

Mississippi.— Breeland *v.* State, 79 Miss. 527, 31 So. 104, holding that an indictment based on a statute making it a felony for any person, by placards or other writing, or verbally, to attempt, by threats, direct or implied, to intimidate another into an abandonment of his home or employment, need not state whether the threats were verbal or in writing, or whether direct or implied.

Missouri.— State *v.* Meysenburg, 171 Mo. 1, 71 S. W. 229, an indictment for receiving a bribe.

New York.— Tully *v.* People, 67 N. Y. 15; Tuttle *v.* People, 36 N. Y. 431.

United States.— U. S. *v.* O'Sullivan, 27 Fed. Cas. No. 15,974.

See 27 Cent. Dig. tit. "Indictment and Information," § 187.

63. State *v.* Broughton, 71 Miss. 90, 13 So. 885.

Effect of surplusage in general, see *infra*, V, T.

64. *California.*— People *v.* Wessel, 98 Cal. 352, 33 Pac. 216, physical capacity to commit rape.

Indiana.— Payne *v.* State, 74 Ind. 203.

Iowa.— State *v.* Niers, 87 Iowa 723, 54 N. W. 1076.

Massachusetts.— Com. *v.* Hart, 11 Cush. 130.

Missouri.— Tracy *v.* State, 3 Mo. 3, holding that in an indictment under an act to impose a tax on vendors of merchandise, it is not necessary to charge that the articles were sold by retail to avoid constitutional questions as to the power of a state to tax sales in original packages.

North Carolina.— State *v.* Pender, 83 N. C. 651.

Pennsylvania.— Com. *v.* Diffenbaugh, 5 Lanc. L. Rev. 346.

that may change the character of the offense;[65] but the conclusions to which the accused is entitled under the presumption of innocence should be excluded.[66] A mitigating as distinguished from a differentiating circumstance need not be alleged.[67] So if murder is charged and the killing is excusable or justifiable it must be brought out by way of defense and need not be negatived.[68] Matter which is necessary to show the commission of the offense must be averred, although negative in form.[69]

8. Matters in Avoidance of Bar of Statute of Limitations[70] — a. Necessity of Averments. By the federal courts,[71] and by the courts of several of the states, it is held that it is not necessary to anticipate a defense of the statute of limitation and negative it by setting forth facts which avoid the statute;[72] but the more general rule is that the true date of the offense must be averred and the facts set forth which avoid the operation of the bar of the statute.[73] Some cases have held

Texas.— State *v.* Rupe, 41 Tex. 33; State *v.* Collins, 38 Tex. 189.

United States.— U. S. *v.* Stevens, 27 Fed. Cas. No. 16,394, 4 Wash. 547, holding that an indictment for an offense committed on an American vessel in a foreign port need not aver that defendant had not been tried in a foreign tribunal.

England.— Rex *v.* Baxter, 2 Leach C. C. 660, 5 T. R. 84.

See 27 Cent. Dig. tit. "Indictment and Information," § 188.

65. State *v.* Shoemaker, 4 Ind. 100; State *v.* Gooch, 7 Blackf. (Ind.) 468 (holding that an indictment against an unmarried man for living in open and notorious fornication with a woman need not aver that she is unmarried); Reg. *v.* Jameson, [1896] 2 Q. B. 425, 18 Cox C. C. 392, 60 J. P. 662, 65 L. J. M. C. 218, 75 L. T. Rep. N. S. 77.

Averment that alteration of cattle brand was without authority of law see Animals, 2 Cyc. 328.

66. Mears *v.* Com., 2 Grant (Pa.) 385, holding that an indictment for rape must aver that the act was against the will of the prosecutrix.

67. That a homicide was committed "in the heat of passion" is a mitigating circumstance merely, so that a failure to allege it in an indictment for manslaughter does not prejudice defendant. State *v.* Matakovich, 59 Minn. 514, 61 N. W. 677. See Homicide, 21 Cyc. 858, text and note 60.

68. Jordan *v.* State, 22 Ga. 545 (holding that an indictment for whipping a slave to death need not charge that the killing did not occur while the slave was in a state of insurrection, nor by accident in inflicting moderate correction); Com. *v.* Hersey, 2 Allen (Mass.) 173. See also Homicide, 21 Cyc. 850.

69. Com. *v.* Hart, 11 Cush. (Mass.) 130.

Negativing powers under corporate charters.— Where a corporation is indicted for an act which it has under its charter power to perform in a certain manner, it must be alleged that the charter or statutory authorization has been exceeded. State *v.* Webb's River Imp. Co., 97 Me. 559, 55 Atl. 495; State *v.* Godfrey, 24 Me. 232, 41 Am. Dec. 382.

70. Averring time within period of limitations see *infra*, V, F, 2, d.

71. U. S. *v.* Cook, 17 Wall. (U. S.) 168, 21 L. ed. 538; U. S. *v.* White, 28 Fed. Cas. No. 16,677, 5 Cranch C. C. 116, holding that, although there was no averment to such effect in the indictment, the prosecution might prove that defendant fled from justice where under the general issue defendant had introduced evidence of limitations. *Contra*, U. S. *v.* Watkins, 28 Fed. Cas. No. 16,649, 3 Cranch C. C. 441.

Courts martial.— See *In re* Davison, 21 Fed. 618, holding that in offenses against the army regulations the statute of limitations was a matter of defense and that a court martial was not without jurisdiction from the fact that it appeared that the offense had been commited outside of the statutory period.

72. Packer *v.* People, 26 Colo. 306, 57 Pac. 1087; Thompson *v.* State, 54 Miss. 740; People *v.* Durrin, 2 N. Y. Cr. 328. And *compare* People *v.* Van Santvoord, 9 Cow. (N. Y.) 655.

73. *California.*— People *v.* Miller, 12 Cal. 291.

Illinois.— Lamkin *v.* People, 94 Ill. 501; Garrison *v.* People, 87 Ill. 96; Church *v.* People, 10 Ill. App. 222.

Indiana.— Hatwood *v.* State, 18 Ind. 492; Ulmer *v.* State, 14 Ind. 52.

Kentucky.— Com. *v.* T. J. Megibben Co., 101 Ky. 195, 40 S. W. 694, 19 Ky. L. Rep. 291; Newport News, etc., Co. *v.* Com., 14 Ky. L. Rep. 196.

Louisiana.— State *v.* Hinton, 49 La. Ann. 1354, 22 So. 617; State *v.* Davis, 44 La. Ann. 972, 11 So. 580; State *v.* Joseph, 40 La. Ann. 5, 3 So. 405; State *v.* Victor, 36 La. Ann. 978; State *v.* Forrest, 23 La. Ann. 433; State *v.* Bryan, 19 La. Ann. 435; State *v.* Peirce, 19 La. Ann. 90; State *v.* Bilbo, 19 La. Ann. 76; State *v.* Freeman, 17 La. Ann. 69; State *v.* Foster, 7 La. Ann. 256.

Missouri.— State *v.* Snyder, 182 Mo. 462, 82 S. W. 12.

Texas.— Hickman *v.* State, 44 Tex. Cr. 533, 72 S. W. 587.

England.— Rex *v.* Fisher, 2 Str. 865; Rex *v.* Fearnley, 1 T. R. 316.

See 27 Cent. Dig. tit. "Indictment and Information," § 189.

that the offense may be laid within the statute and proved outside of it, together with the exception;[74] or that where the statute does not impose an absolute bar, the offense may be laid outside the period and it may be proved without averment that defendant was within an exception.[75]

b. Sufficiency of Averments. In averring the facts which cause the particular case to fall within a statutory exception, it is not necessary to follow the words of the statute.[76] It is necessary to allege the facts as to a former indictment, its dismissal and the re-reference of the prosecution to a grand jury in order that the indictment may show that it is a continuation of the former prosecution.[77] Where concealment of the offense is relied on to toll the statute, it is necessary that the specific acts constituting the concealment shall be stated.[78] Where the words of the statute describing the exception are synonymous, they may be alleged in the alternative.[79] The exception may be averred in a count separate from the charging count.[80]

9. Matters Within Knowledge of Accused. Where the particular facts are peculiarly within the knowledge of the accused, it has been held that the offense may be averred generally.[81]

74. State *v.* English, 2 Mo. 182 (holding that where an indictment has been quashed, and the period within which a prosecution should be commenced has elapsed, the second indictment may lay the offense on a day within the time limited by law for the prosecution thereof, and the state may show on the trial the facts which except such prosecution from the operation of the statute of limitations); Blackman *v.* Com., 124 Pa. St. 578, 17 Atl. 194; Com. *v.* Blackburn, 3 Pa. Co. Ct. 464.

75. Newport News, etc., Co. *v.* Com., 14 Ky. L. Rep. 196.

76. State *v.* Hinton, 49 La. Ann. 1354, 22 So. 617, holding that an allegation that the offense has "just" come to the knowledge of an officer with authority to prosecute is sufficient.

Sufficiency of miscellaneous averments.— An indictment stating that, after the commission of the offense and before the finding of the indictment, defendant absented himself from the state and so continued for a certain time, sufficiently avers the exception to the statute of limitations. People *v.* Montejo, 18 Cal. 38. And it is sufficient, to negative prescription, to aver that the crime was never made known to any officer of the state of Louisiana, qualified and authorized to direct a prosecution. State *v.* Wren, 48 La. Ann. 803, 19 So. 745; State *v.* Strong, 39 La. Ann. 1081, 3 So. 266. But an information averring that accused, "within the space of six months last past," committed a specific offense is insufficient to show that the offense was committed within a period of six months before the laying of the information. Rex *v.* Breen, 8 Can. Cr. Cas. 146; Rex *v.* Boutilier, 8 Can. Cr. Cas. 82.

77. Com. *v.* T. J. Megibben Co., 101 Ky. 198, 40 S. W. 694, 19 Ky. L. Rep. 291; Combs *v.* Com., 84 S. W. 753, 27 Ky. L. Rep. 273; Com. *v.* G. W. Taylor Co., 43 S. W. 399, 19 Ky. L. Rep. 1334; Newport News, etc., Co. *v.* Com., 14 Ky. L. Rep. 196 [*approving* Tully *v.* Com., 13 Bush (Ky.) 154]. Where the date alleged is within the period of limitations, however, the facts showing the indictment to be a continuation of former proceedings need not be averred. Com. *v.* C. B. Cook Co., 102 Ky. 288, 43 S. W. 400, 19 Ky. L. Rep. 1336. See also Rouse *v.* State, 44 Fla. 148, 32 So. 784, holding that where a prior information before a justice is relied on, it must be shown that the information in issue is based on or connected with such prior prosecution. See also Criminal Law, 12 Cyc. 258.

The proceedings had under the first indictment need not be set out. State *v.* Duclos, 35 Mo. 237 [*overruling* State *v.* English, 2 Mo. 182, which held that such proceedings must be stated with all the certainty required in charging the offense].

78. Colvin *v.* State, 127 Ind. 403, 26 N. E. 888 (holding that there must be an averment as to how long accused remained concealed); Randolph *v.* State, 14 Ind. 232; Jones *v.* State, 14 Ind. 120 (averment merely that accused "did conceal the fact" of the crime aforesaid not sufficient). But see State *v.* Rook, 61 Kan. 382, 59 Pac. 653, 49 L. R. A. 186, holding that an information which contains an averment that "ever since the commission of the offense herein charged, the defendant has continuously so concealed himself that process could not be served upon him" contains a sufficient averment of concealment.

79. State *v.* Snyder, 182 Mo. 462, 82 S. W. 12, holding that it was proper to allege that defendant since a certain time had not been "an inhabitant of or usually resident within the state of Missouri."

Alternative allegations see *supra*, V, C, 3.

80. Rosenberger *v.* Com., 118 Pa. St. 77, 11 Atl. 782.

81. State *v.* McCormack, 2 Ind. 305, holding that an indictment against a justice of the peace for failing to return a list of fines assessed by him need not contain the names of the persons against whom the fines were assessed. See also Rex *v.* Holland, 5 T. R. 607; 2 Hawkins P. C. c. 25, § 112.

10. Matters Unknown to Grand Jurors. Facts not vital to the accusation and constituting merely matter of description may be stated in an indictment as unknown to the grand jury if such is the case.[82] So when the names of third persons are unknown to the grand jury, it may be so alleged in the indictment.[83] Under the same rule it is sufficient to describe the subject of larceny with the certainty made possible by the knowledge possessed by the grand jury.[84] So also the mode and means by which a homicide was committed may be alleged to be unknown.[85] But a statement of inability to give a more particular description is essential.[86] Where the expression "to the grand jury unknown" is omitted after the first reference to third persons in the indictment, it has been held that the defect may be supplied by the use of the words in a subsequent portion of the indictment.[87] If a name subsequently become known to the prosecutor, defendant may secure information by a motion for a bill of particulars.[88]

F. Averments of Place and Time — 1. Allegations of Place[89] — a. In General. It is in general necessary to state the place at which every issuable and triable fact mentioned in the indictment or information occurred, in order that it may appear to have been within the jurisdiction of the court,[90] unless the necessity for such averment has been removed by a statute, as is the case in many states, which dispenses with the allegation and requires merely proof of venue on the trial,[91]

Burden of proof of matters peculiarly within knowledge of accused see Criminal Law, 12 Cyc. 381.

82. People *v.* Bogart, 36 Cal. 245; Lang *v.* State, 42 Fla. 595, 28 So. 856; Haskins *v.* People, 16 N. Y. 344; People *v.* Taylor, 3 Den. (N. Y.) 91; U. S. *v.* La Coste, 26 Fed. Cas. No. 15,548, 2 Mason 129, holding that an indictment of a person for engaging in the slave trade, which alleged that he, "as master, for some other person, the name whereof being to the jurors yet unknown," etc., was sufficient.

83. See *infra*, V, I, 1.

84. *Alabama.*— Leonard *v.* State, 115 Ala. 80, 22 So. 564; Grant *v.* State, 55 Ala. 201; Du Bois *v.* State, 50 Ala. 139.

California.— People *v.* Bogart, 36 Cal. 245.

Florida.— Lang *v.* State, 42 Fla. 595, 28 So. 856; Porter *v.* State, 26 Fla. 56, 7 So. 145.

Indiana.— McQueen *v.* State, 82 Ind. 72.

Massachusetts.— Com. *v.* Grimes, 10 Gray 470, 71 Am. Dec. 666; Com. *v.* Sawtelle, 11 Cush. 142.

Michigan.— Merwin *v.* People, 26 Mich. 298, 12 Am. Rep. 314.

Minnesota.— State *v.* Taunt, 16 Minn. 109.

Montana.— Territory *v.* Bell, 5 Mont. 562, 6 Pac. 60.

New York.— Haskins *v.* People, 16 N. Y. 344.

South Carolina.— State *v.* Shirer, 20 S. C. 392.

See, generally, Larceny.

85. People *v.* Cronin, 34 Cal. 191. See Homicide, 21 Cyc. 843.

86. State *v.* Taunt, 16 Minn. 109; State *v.* Hinckley, 4 Minn. 345; Territory *v.* Shipley, 4 Mont. 468, 2 Pac. 313.

Sufficiency of averment that owner of animal was unknown see Animals, 2 Cyc. 366.

87. State *v.* Grant, 86 Iowa 216, 53 N. W. 120.

88. U. S. *v.* Scott, 74 Fed. 213.

Bill of particulars generally see *infra*, V, U.

89. Repugnancy see *supra*, V, C, 4, text and note 9.

90. *California.*— People *v.* Craig, 59 Cal. 370; People *v.* O'Neil, 48 Cal. 257.

Florida.— Connor *v.* State, 29 Fla. 455, 10 So. 891, 30 Am. St. Rep. 126.

Kansas.— State *v.* Hinkle, 27 Kan. 308.

Kentucky.— Kennedy *v.* Com., 3 Bibb 490.

Missouri.— State *v.* Welker, 14 Mo. 398. And see later Missouri cases cited *infra*, V, F, 3, g, (I).

Nebraska.— McCoy *v.* State, 22 Nebr. 418, 35 N. W. 202.

New Hampshire.— State *v.* Cotton, 24 N. H. 143.

New Jersey.— Halsey *v.* State, 4 N. J. L. 324.

New York.— Crichton *v.* People, 6 Park. Cr. 363.

Texas.— Field *v.* State, 34 Tex. 39; State *v.* Johnson, 32 Tex. 96; Searcy *v.* State, 4 Tex. 450; Jack *v.* State, 3 Tex. App. 72.

Vermont.— State *v.* Bacon, 7 Vt. 219.

West Virginia.—State *v.* Hobbs, 37 W. Va. 812, 17 S. E. 380.

England.— Reg. *v.* O'Connor, 5 Q. B. 16, Dav. & M. 761, 7 Jur. 719, 13 L. J. M. C. 33, 48 E. C. L. 16.

See 27 Cent. Dig. tit. "Indictment and Information," § 230.

It is as essential in an information as in an indictment that a proper venue be laid. People *v.* Higgins, 15 Ill. 100; and other cases cited *supra*, this note.

An indictment of an accessary must lay the venue of the accessorial act according to the fact. State *v.* Ellison, 49 W. Va. 70, 38 S. E. 574.

An averment that the act was done within the jurisdiction of the court, without a statement of the place, is not sufficient. Early *v.* Com., 93 Va. 765, 24 S. E. 936.

91. Toole *v.* State, 89 Ala. 131, 8 So. 95 (holding that an indictment in a court of limited jurisdiction need not show that the

or which provides that the indictment cannot be quashed or judgment stayed for want of a statement of the venue if the court, from the indictment or statement of venue in the margin, appears to have had jurisdiction.[92] Place need not be averred with regard to qualifying or limiting averments, the purpose of which is to show that the object acted upon was a proper subject of complaint, unless place is essential and would be susceptible of question if not averred.[93]

b. Sufficiency of Statement — (I) *IN GENERAL.* Place must be charged in an indictment with such clearness and certainty as to afford full notice of the charge and enable the accused to make his defense with reasonable knowledge and ability,[94] and to plead the judgment rendered upon the indictment in bar of any second indictment for the same offense.[95] Place must also be alleged with such certainty that it may be seen that the court has jurisdiction of the charge.[96] The common-law rules as to particularity of venue do not apply to offenses upon the high seas, since it was never possible that a jury should be drawn from the vicinity of the offense,[97] and it is sufficient, in the federal courts, to allege that an offense was committed on board an American vessel on the high seas within the jurisdiction of the court and the admiralty and maritime jurisdiction of the United States, and not within the jurisdiction of any particular state of the Union, without more specific averment of locality.[98]

(II) *STATUTORY PROVISIONS.* Under the statutes of some states technical exactness of language is not required, but it is sufficient if it be understood from the allegation that the offense was committed within the jurisdiction of the court.[99] Where a form of allegation of venue is indicated by statute, the indictment is sufficient if the statute is followed.[1] An indictment is bad which lays the juris-

offense was committed in the portion of the county subject to its jurisdiction); Sparks *v.* State, 59 Ala. 82; State *v.* Ackerman, 51 La. Ann. 1213, 26 So. 80 (holding that an information need not state the place of the doing of an antecedent act on which the offense is made to depend, where proof as to the place is unnecessary); State *v.* Wilson, 11 La. Ann. 163 (holding that the omission of the words "then and there" from the closing charge of an indictment was not ground for arresting judgment); Com. *v.* Rogers, 181 Mass. 184, 63 N. E. 421; State *v.* Quartemus, 3 Heisk. (Tenn.) 65; State *v.* Donaldson, 3 Heisk. (Tenn.) 48; Williams *v.* State, 3 Heisk. (Tenn.) 37; Wickham *v.* State, 7 Coldw. (Tenn.) 525.

As to common-law rule see State *v.* Egan, 10 La. Ann. 698; State *v.* Kennedy, 8 Rob. (La.) 590.

92. Wedge *v.* State, 12 Md. 232; People *v.* Schultz, 85 Mich. 114, 48 N. W. 293; Stahl *v.* State, 11 Ohio Cir. Ct. 23, 5 Ohio Cir. Dec. 29.

93. State *v.* Cook, 38 Vt. 437, holding that an indictment for the wrongful enlistment of men, which charged that defendant at a certain place did enlist a certain "person in this state" was sufficient without averring that he was "a person then in this state."

94. State *v.* Cotton, 24 N. H. 143; U. S. *v.* Burns, 54 Fed. 351, prosecution for obstructing a navigable stream.

95. State *v.* Cotton, 24 N. H. 143.

96. Territory *v.* Doe, 1 Ariz. 507, 25 Pac. 472 (holding that an averment that the offense was committed "near Town of Arizona City, in said county of Yuma, and territory of Arizona" left it uncertain whether the offense was committed within the territory); State *v.* Landry, 85 Me. 95, 25 Atl. 998; State *v.* Bushey, 84 Me. 459, 29 Atl. 940 (indictment for illegal transportation of intoxicating liquors from one county to another).

97. U. S. *v.* Gibert, 21 Fed. Cas. No. 12,204, 2 Sumn. 19.

98. St. Clair *v.* U. S., 154 U. S. 134, 14 S. Ct. 1002, 38 L. ed. 936; U. S. *v.* Gibert, 21 Fed. Cas. No. 12,204, 2 Sumn. 19.

99. State *v.* Jacobs, 75 Iowa 247, 39 N. E. 293 (holding that an indictment which averred that a certain building "is" situated within the county was a sufficient averment that an offense previously committed in the building was committed within the county); State *v.* Buralli, (Nev. 1903) 71 Pac. 532; People *v.* Horton, 62 Hun (N. Y.) 610, 17 N. Y. Suppl. 1 (holding an indictment insufficient, under such a statute, which failed to aver any place as to the act constituting the crime, although venue was laid as to other acts); Flohr *v.* Territory, 14 Okla. 477, 78 Pac. 565.

1. State *v.* Winstrand, 37 Iowa 110.

An immaterial variance from the form prescribed by statute is not fatal. State *v.* Lillard, 59 Iowa 479, 13 N. W. 637, holding that the use of the word "aforesaid" instead of "as aforesaid," after the repetition of the word "county" did not prevent the state from being sufficiently designated by reference.

A direct averment that the offense was within the jurisdiction is not necessary where the court is of general jurisdiction and the offense is charged to have been committed

diction in two vennes, one outside of the jurisdiction of the court, and leaves it uncertain in which jurisdiction it is intended to charge that the offense was committed.[2] Certainty to a reasonable extent is sufficient in allegations of place;[3] and such allegations may be aided by the necessary implications from other facts alleged,[4] or by matters of which the court will take judicial notice,[5] and will not be vitiated by matter which may be regarded as surplusage.[6] Repugnancy as to venue will vitiate the indictment.[7]

(III) *AVERMENTS AS TO STATE.* It is usually held unnecessary to mention the state in which the offense was committed,[8] such fact being regarded as supplied by other averments of the indictment from which the state appears,[9] or else as being matter of which the court will take judicial notice.[10]

(IV) *AVERMENTS AS TO COUNTY OR PARISH.* The indictment must state the county in which the offense occurred,[11] or the parish, in those jurisdictions in

in the proper county. Drummond *v.* Republic, 2 Tex. 156.

The use of "at" instead of "in," stating the offense to have been committed "at" a certain county is not fatal (Graham *v.* State, 1 Ark. 171; People *v.* Lafuente, 6 Cal. 202; State *v.* Nolan, 8 Rob. (La.) 513), especially on a motion in arrest of judgment (Augustine *v.* State, 20 Tex. 450).

2. U. S. *v.* Marx, 122 Fed. 964.

3. State *v.* Schreiber, 98 Ind. 186; State *v.* Libby, 78 Me. 546, 7 Atl. 394; Philadelphia, etc., R. Co. *v.* State, 20 Md. 157, holding that where a nuisance was alleged to be such toward the citizens of a certain county, and no other county was laid in the indictment, no presumption would arise that the offense was committed in any other county.

4. Williams *v.* State, 23 Tex. 264; Johnson *v.* State, (Tex. Cr. App. 1893) 21 S. W. 929 (holding that an indictment which charges that defendant, in the county of M and state of Texas, was then and there the owner and manager of a theatre, dance house, etc., where acts forbidden by the statute were "then and there" done, sufficiently charges that the offense was committed within the county of M); People *v.* Rogerson, 4 Utah 231, 7 Pac. 255, 410.

5. *Alabama.*— Reeves *v.* State, 20 Ala. 33.

Dakota.— U. S. *v.* Beebe, 2 Dak. 292, 11 N. W. 505, holding that a federal court will take judicial notice that a certain Indian that counties are in the same judicial district.

Maryland.— Acton *v.* State, 80 Md. 547, 31 Atl. 419, that a river is in a county named.

Missouri.— State *v.* Warren, 57 Mo. App. 502, that a public road and highway is a public place.

Texas.— Mischer *v.* State, 41 Tex. Cr. 212, 53 S. W. 627, 96 Am. St. Rep. 780, that counties are in the same judicial district.

United States.— U. S. *v.* Ewing, 47 Fed. 809.

Where the county is improperly described or omitted, the venue may be fixed by a reference to a named town, which, the court will take judicial notice, is in the proper county. Com. *v.* Springfield, 7 Mass. 9; State *v.* Buralli, (Nev. 1903) 71 Pac. 532; Vanderwerker *v.* People, 5 Wend. (N. Y.) 530; People *v.* Breese, 7 Cow. (N. Y.) 429; Schilling *v.* Territory, 2 Wash. Terr. 283, 5 Pac. 926. See also Com. *v.* Barnard, 6 Gray (Mass.) 488. See, however, Com. *v.* Wheeler, 162 Mass. 429, 38 N. E. 1115, in which it was held that the court would not take judicial notice, in order to remove an uncertainty as to the county in which the offense was committed, that the town of Westminster was located in one of two counties named, there being no averment that Westminster was a town or place.

Matter of judicial notice generally see *supra*, V, E, 4.

6. State *v.* Harden, 1 Brev. (S. C.) 47, holding that where an indictment charged the offense to have been committed "in Pendleton county, in the district aforesaid," there being at that time no such territorial division as Pendleton county, but the venue was correctly stated in the margin "Pendleton district," the words "in Pendleton county" might be rejected as surplusage, and the words "district aforesaid" referred to the venue stated in the margin.

Surplusage see *infra*, V, T.

7. Connor *v.* State, 29 Fla. 455, 10 So. 891, 30 Am. St. Rep. 126; Cain *v.* State, 18 Tex. 391. See *supra*, V, C, 4.

8. State *v.* Wentworth, 37 N. H. 196 (sufficient to set forth the town and county); State *v.* Glasgow, 1 N. C. 176, 2 Am. Dec. 629; Foster *v.* State, 19 Ohio St. 415.

9. State *v.* Walter, 14 Kan. 375 (holding that the state may be omitted where the conclusion is "against the peace and dignity of the state of Kansas"); State *v.* Lane, 26 N. C. 113.

The caption may be resorted to for the purpose of showing that the county named is within the state. Hanrahan *v.* People, 91 Ill. 142; Anderson *v.* State, 104 Ind. 467, 4 N. E. 63, 5 N. E. 711.

10. State *v.* Jordan, 12 Tex. 205; Satterwhite *v.* State, 6 Tex. App. 609. And see State *v.* Lane, 26 N. C. 113.

11. McKinnie *v.* State, 44 Fla. 143, 32 So. 786; Robinson *v.* State, 20 Fla. 804; Cook *v.* State, 20 Fla. 802; Evans *v.* State, 17 Fla. 192; Guston *v.* People, 61 Barb. (N. Y.) 35, 4 Lans. 487. And see cases cited *supra*, V, F, 1, a.

which such term is equivalent to county.[12] In the federal courts, since the fact that an offense against the statutes of the United States was committed in a particular county is not essential to their jurisdiction, it is not in such cases necessary to aver the particular county, but it is sufficient to allege the district and state.[13] In some cases it has been held unnecessary to state the county where a more particular local description has been given,[14] as where the town is alleged;[15] but in such case it must be judicially known that the entire town lies in one county.[16]

(v) *AFTER ORGANIZATION OF NEW COUNTY OR CHANGE OF BOUNDARIES.* Where, after commission of the offense, and before the finding of the indictment, the place at which it was committed is incorporated into a new county, or becomes a portion of a different county through a change in the boundaries, it is proper to charge the offense as committed at such place with the further description that it is in the county in which the indictment is found.[17] Where an unorganized county is attached to an organized county for judicial purposes, the venue of the offense committed in the unorganized county should be there laid.[18]

(vi) *MINOR DESCRIPTIONS WITHIN COUNTY OR PARISH.* Where the place is alleged for the purpose of establishing venue merely, a statement of the county or parish is sufficient,[19] unless the territorial jurisdiction of the court is not as

The judicial district is not a sufficiently definite designation where it is composed of several counties, each of which contain separate jurisdictional limits within their boundaries. Territory *v.* Freeman, McCahon (Kan.) 56.

Unorganized counties.— Where the offense occurs in an unorganized county which is attached to another for judicial purposes, the place must be alleged in the county where the offense occurred. Miles *v.* State, 23 Tex. App. 410, 5 S. W. 250 (holding that an indictment charging that the offense was committed in the county where the trial was had was not supported by proof that it occurred in an unorganized county); Prendez *v.* State, 7 Tex. App. 587 (holding that a charge that the offense occurred in one unorganized county was not supported by proof that it occurred in another).

12. State *v.* Nolan, 8 Rob. (La.) 513.

13. Considine *v.* U. S., 112 Fed. 342, 50 C. C. A. 272; U. S. *v.* Wilson, 28 Fed. Cas. No. 16,730, Baldw. 78.

Indictments for treason form an exception to the rule stated in the text, it being necessary to lay an overt act with particularity as to means, place, and circumstance. U. S. *v.* Wilson, 28 Fed. Cas. No. 16,736, Baldw. 78. See, generally, TREASON.

14. Pusey *v.* Com., 8 Ky. L. Rep. 538, holding that an indictment in the Louisville city court, for an offense of which the court had jurisdiction within the limits of the city, was sufficient without stating the county in which the offense was committed, it being alleged that it was committed in the city.

15. State *v.* Simpson, 91 Me. 33, 39 Atl. 287; People *v.* Breese, 7 Cow. (N. Y.) 429. An indictment alleging that defendants kept a common nuisance in a designated town contains a sufficient averment of place. Com. *v.* Gallagher, 1 Allen (Mass.) 592; Com. *v.* Welsh, 1 Allen (Mass.) 1.

16. Com. *v.* Springfield, 7 Mass. 9 (holding that this principle is applicable only to indictments for misdemeanors and felony not capital, but that in capital cases the offense must be laid as in a certain county); Vanderwerker *v.* People, 5 Wend. (N. Y.) 530; Rex *v.* Burridge, 3 P. Wms. 439, 24 Eng. Reprint 1133.

17. McElroy *v.* State, 13 Ark. 708; Jordan *v.* State, 22 Ga. 545; State *v.* Jackson, 39 Me. 291. But see State *v.* Jones, 8 N. J. L. 307, holding that the court would take judicial notice of the time of organization of a county and quash an indictment laying an offense therein prior to such organization.

Separate counts laying venue alternatively. — If the act creating a new county from a portion of an old one provides that a court in the old county shall have jurisdiction of offenses committed in the new, there is no repugnancy between various counts of an indictment, although they charge the offense in different counts to have been committed in the two counties severally. State *v.* Johnson, 50 N. C. 221.

18. Chivarrio *v.* State, 15 Tex. App. 330.

19. *Louisiana.*— State *v.* Nolan, 8 Rob. 513.

Minnesota.— O'Connell *v.* State, 6 Minn. 279.

Mississippi.— Handy *v.* State, 63 Miss. 207, 56 Am. St. Rep. 803.

New York.— Wood *v.* People, 1 Hun 381, 3 Thomps. & C. 506; People *v.* Buddensieck, 4 N. Y. Cr. 230 [*affirmed* in 103 N. Y. 487, 9 N. E. 44, 57 Am. Rep. 766, 5 N. Y. Cr. 69].

South Carolina.— State *v.* Moore, 24 S. C. 150, 58 Am. Rep. 241, holding that the omission to name the courthouse was not a fatal defect.

South Dakota.— State *v.* Donaldson, 12 S. D. 259, 81 N. W. 299, holding that in a prosecution for keeping a saloon open on Sunday, a particular description of the premises was unnecessary, the city, county, and state being alleged.

Texas.— State *v.* Odum, 11 Tex. 12.

See 27 Cent. Dig. tit. "Indictment and Information," § 232.

extensive as the county or parish, in which case the fact must be shown to be within the jurisdiction;[20] but when the place is essential to the description of the offense, it must be stated with such certainty as to make it appear that the offense has been committed.[21] In these cases, although the description is unnecessarily minute, it must be proved as laid.[22] During the period when the jury was drawn from the immediate neighborhood, it was necessary in England to add to the statement of the county the addition of the parish, vill, chapelry, or the like;[23] but under the present rule it is unnecessary, since the jurors come from the body of the county.[24] A place within a county which is unincorporated, but which has a name and limits known and recognized by the people of the county, may be described by such name.[25] It is not necessary that the town shall be stated if the place mentioned is equally specific.[26]

(VII) *LOCATION OF BUILDINGS.* It may be presumed, in the absence of express statement, that buildings are located at the place named in the indictment by way of venue, and a description of the place, although material, need not be repeated.[27] The usual form by which the situation of a building is referred to a place already described is by the use of the phrase "there situated."[28]

(VIII) *CONFLICTING AND CONCURRENT JURISDICTIONS* — (A) *State and Federal Courts.* An indictment in a state court of general jurisdiction need not negative the jurisdiction of the federal courts or aver that the offense was not committed in a portion of the county over which the federal courts have exclusive jurisdiction,[29] and the same rule applies to offenses within the general jurisdiction of

20. People *v.* Ah Ung, (Cal. 1891) 28 Pac. 272; People *v.* Wong Wang, 92 Cal. 277, 28 Pac. 270; McBride *v.* State, 10 Humphr. (Tenn.) 615. See Com. *v.* Richards, 1 Va. Cas. 1, holding that a failure to aver that the offense was committed within the jurisdiction of the court within the district for which the court was held was fatal in arrest of judgment, although the county was alleged.

21. State *v.* Hogan, 31 Mo. 340 (holding that the highway must be stated in a prosecution for shooting at a mark on a public highway); State *v.* Cotton, 24 N. H. 143; State *v.* Sneed, 16 Lea (Tenn.) 450, 1 S. W. 282 (holding an indictment for nuisance, alleging generally an offense to have been committed in the county where it is found, "in the near neighborhood of divers public streets," sufficient without any more particular designation of the precise locality); State *v.* Nixon, 18 Vt. 70, 46 Am. Dec. 135. And see Scribner *v.* State, 12 Tex. App. 173, holding that prior to the passage of a statute making it sufficient to allege that an act was done in a public place when it was an offense only when committed in a public place, an indictment must allege facts showing the place to have been public. *Compare* State *v.* Shaw, 35 Iowa 575, holding that where an indictment is against the keeper of a disorderly house, and not against the house, it is sufficient to charge the offense as committed within the county. See also ARSON, 3 Cyc. 997, 998; BURGLARY, 6 Cyc. 204, 209; DISORDERLY HOUSES, 14 Cyc. 496; and other special titles.

Where a statute creating an offense extends only to a particular locality or a territorial division less than the county over which the court has jurisdiction, the name or description of such division and the fact that the offense was committed therein must be set forth. Seifried *v.* Com., 101 Pa. St. 200; Com. *v.* Lambrecht, 3 Pa. Co. Ct. 323, 18 Phila. 505; Com. *v.* Keenan, 10 Phila. (Pa.) 194.

22. Rex *v.* Owen, Car. C. L. 309, 1 Moody C. C. 118. Variance as to place see *infra*, XI, C, 3.

23. Reg. *v.* Brookes, C. & M. 543, 544, 41 E. C. L. 296. See also Reg. *v.* Howell, 9 C. & P. 437, 38 E. C. L. 259; Reg. *v.* St. John, 9 C. & P. 40, 38 E. C. L. 36; Rex *v.* Perkins, 4 C. & P. 363, 19 E. C. L. 555.

24. Reg. *v.* Gompertz, 9 Jur. 401, 14 L. J. M. C. 118.

25. State *v.* Wagner, 61 Me. 178, holding that an allegation that the crime was committed at an "island called 'Smutty Nose' in the county of York" lays the venue sufficiently, although the island is unnamed in any statute of the state, and is known only to the neighborhood.

26. State *v.* Roberts, 26 Me. 263.

27. People *v.* Wooley, 44 Cal. 494 (holding that an indictment for arson, stating that defendant was in the county and state at the time of the burning was sufficient, although it did not locate the dwelling in any county); Com. *v.* Crowther, 117 Mass. 116; Com. *v.* Lamb, 1 Gray (Mass.) 493; State *v.* Hopkins, 5 R. I. 53; Rex *v.* Napper, 1 Moody C. C. 44. See also ARSON, 3 Cyc. 998; BURGLARY, 6 Cyc. 209.

28. Rex *v.* Napper, 1 Moody C. C. 44, holding, however, that an indictment which alleged that defendant "in the dwelling-house of . . then and there being, then and there did," etc., was sufficient. See also ARSON, 3 Cyc. 998; BURGLARY, 6 Cyc. 209; and other special titles.

29. People *v.* Collins, (Cal. 1895) 39 Pac. 16; State *v.* Tully, (Mont. 1904) 78 Pac.

the federal courts, in which case possible exemptions of defendant from such jurisdiction need not be anticipated;[30] but if a federal court has jurisdiction only if the offense is committed outside the jurisdiction of any state, it must be averred that the offense was so committed.[31]

(B) *Offenses Near Boundary Lines.* In cases of offenses on or near the boundary lines between counties, concurrent jurisdiction is frequently conferred by statute upon the courts of either county, in which case an indictment in one county may aver the offense to have been committed in the other, but within the statutory distance from the line.[32]

(C) *Offenses Begun in One County and Consummated in Another.* In those cases in which acts going to make up the complete offense are performed in different counties, it would appear to be the better rule to lay the venue of the facts as they actually were committed,[33] otherwise where the offense is regarded as complete in the county in which the indictment is found, in which case it may be so laid. Of this character are indictments for the bringing into the county of goods stolen in another county.[34]

(D) *Offenses on Vessels or Railroad Trains.* By statute it is sometimes provided that offenses upon vessels or railroad trains may be charged as having been committed in any county through which the vessel or train passes.[35] Where an extraterritorial jurisdiction is conferred upon the courts of the counties of a state with regard to offenses committed on vessels or railroad trains, the indictment must set out the facts upon which such jurisdiction is invoked.[36]

(IX) *REFERENCE TO CAPTION, MARGIN, OR COMMENCEMENT.* Where the venue has been well laid in the margin, it is regarded as sufficient to refer to it in the body of the indictment by such words as "in the county aforesaid" or "then and there,"[37] and the same is true when the county has been mentioned in the

760; State *v.* Spotted Hawk, (Mont. 1899) 55 Pac. 1026; State *v.* Carlson, (Oreg. 1900) 62 Pac. 1016.

30. U. S. *v.* Demarchi, 25 Fed. Cas. No. 14,944, 5 Blatchf. 84, holding that where an offense on the high seas is of such character that the court can entertain the case, although the vessel has no national character, the possible foreign nationality of the vessel need not be negatived.

31. U. S. *v.* Jackalow, 1 Black (U. S.) 484, 17 L. ed. 225; U. S. *v.* Anderson, 24 Fed. Cas. No. 14,448, 17 Blatchf. 238; U. S. *v.* Davis, 25 Fed. Cas. No. 14,930, 5 Mason 356, under other statutes it must be alleged that the place was within the sole and exclusive jurisdiction of the United States. As to the sufficiency of an indictment in this respect see U. S. *v.* Plumer, 27 Fed. Cas. No. 16,056, 3 Cliff. 28.

32. State *v.* Robinson, 14 Minn. 447; People *v.* Davis, 56 N. Y. 95. And see State *v.* Niers, 87 Iowa 723, 54 N. W. 1076. See also State *v.* Pugsley, 75 Iowa 742, 38 N. W. 498, holding that an indictment charging an offense to have been committed in one county when in fact it was committed in another, but within the statutory distance from the line, sufficient, since the error did not affect any substantial rights of defendant.

It is insufficient, however, to aver that the offense was committed within such distance "as near as the grand jury knew and can state." State *v.* Daily, 113 Iowa 362, 85 N. W. 629.

33. Connor *v.* State, 29 Fla. 455, 10 So. 891, 30 Am. St. Rep. 126, false pretenses made in one county and property obtained in another.

34. People *v.* Mellon, 40 Cal. 648; State *v.* Brown, 8 Nev. 208. See Haskins *v.* People, 16 N. Y. 344. *Compare* Morrissey *v.* People, 11 Mich. 327, in which the court were equally divided upon the question of whether, under the statute, defendant might be charged in the ordinary form as for a larceny committed within the state. See, generally, LARCENY.

35. See the statutes of the various states. And see State *v.* Timmens, 4 Minn. 325.

36. People *v.* Dougherty, 7 Cal. 395.

For the sufficiency of an information for burglarious entry of a railroad car see People *v.* Webber, 133 Cal. 623, 66 Pac. 38.

Inconsistent averments.— Where, in certain counts of an indictment and in the caption, the venue is laid in a specific county, and in other counts it is laid on "a moving railway train which, in the course of its voyage," passed through such county, the descriptions as to place are not inconsistent. State *v.* Beaucleigh, 92 Mo. 490, 84 S. W. 666.

37. *Illinois.*— Hanrahan *v.* People, 91 Ill. 142.

Indiana.— State *v.* Slocum, 8 Blackf. 315.

Maine.— State *v.* Conley, 39 Me. 78.

Missouri.— State *v.* Ames, 10 Mo. 743.

New Hampshire.— State *v.* Wentworth, 37 N. H. 196; State *v.* Cotton, 24 N. H. 143.

North Carolina.— State *v.* Tolever, 27 N. C. 452.

See 27 Cent. Dig. tit. "Indictment and Information," § 241.

commencement[38] or in the caption.[39] In such cases, however, appropriate words of reference must be employed.[40] By statute it is in some states provided that the venue stated in the margin is to be taken as the venue for all facts stated in the body of the indictment.[41] Such a statute, however, merely establishes a *prima facie* venue in the absence of other allegations.[42]

2. Allegations of Time[43] — a. In General. Where the common-law rule has not been altered by statute, it is necessary to charge the offense as having been committed on a day certain;[44] but except where the time is of the essence of the

38. State *v.* Reid, 20 Iowa 413; Barnes *v.* State, 5 Yerg. (Tenn.) 186.

39. *Arkansas.*—State *v.* Hunn, 34 Ark. 321.

District of Columbia.— U. S. *v.* Schneider, 21 D. C. 381.

Georgia.— Eaves *v.* State, 113 Ga. 749, 39 S. E. 318.

Indiana.— Rivers *v.* State, 144 Ind. 16, 42 N. E. 1021; Evarts *v.* State, 48 Ind. 422.

Iowa.— State *v.* Salts, 77 Iowa 193, 39 N. W. 167, 41 N. W. 620.

Kansas.— State *v.* Muntz, 3 Kan. 383.

Louisiana.— State *v.* Crittenden, 38 La. Ann. 448.

Massachusetts.— Com. *v.* McKenney, 14 Gray 1; Com. *v.* Edwards, 4 Gray 1.

Nebraska.— Dunn *v.* State, 58 Nebr. 807, 79 N. W. 719; Bartley *v.* State, 53 Nebr. 310, 73 N. W. 744.

North Carolina.— State *v.* Bell, 25 N. C. 506.

South Carolina.— State *v.* Assmann, 46 S. C. 554, 24 S. E. 673.

Tennessee.— State *v.* Shull, 3 Head 42; Dean *v.* State, Mart. & Y. 127.

Texas.— Strickland *v.* State, 7 Tex. App. 34.

Virginia.— Wright *v.* Com., 82 Va. 183.

Wisconsin.— State *v.* S. A. L., 77 Wis. 467, 46 N. W. 498.

See 27 Cent. Dig. tit. "Indictment and Information," § 240.

40. Territory *v.* Nugent, 1 Mart. (La.) 169; State *v.* Conley, 39 Me. 78; Reg. *v.* O'Connor, 5 Q. B. 16, Dav. & M. 761, 7 Jur. 719, 13 L. J. M. C. 33, 48 E. C. L. 16; Rex *v.* Burridge, 3 P. Wms. 439, 24 Eng. Reprint 1133. But *compare* Sanderlin *v.* State, 2 Humphr. (Tenn.) 315, holding that in an indictment for misdemeanor the omission of the word "aforesaid" was not fatal where the county had been twice referred to previously as "the county aforesaid."

"Aforesaid" is sufficient. Thomas *v.* State, 71 Ga. 44; Long *v.* State, 56 Ind. 133 (in "said county"); Evarts *v.* State, 48 Ind. 422; State *v.* Alsop, 4 Ind. 141; Hasse *v.* State, 8 Ind. App. 488, 36 N. E. 54; Armstrong *v.* Com., 29 S. W. 342, 15 Ky. L. Rep. 494; Little *v.* Com. 15 Ky. L. Rep. 239; Farrell *v.* Com., 7 Ky. L. Rep. 675 (holding that where an indictment for murder stated that defendant, before the finding of the indictment, "in the county aforesaid," did kill, etc., the words "in the county aforesaid" relate to the place of killing, and not to the place of the finding of the indictment); State *v.* Ames, 10 Mo. 743; Leach *v.* State, 46 Tex. Cr. 507, 81 S. W. 733.

"Then and there" is a sufficient reference. State *v.* Slocum, 8 Blackf. (Ind.) 315; Hampton *v.* U. S., Morr. (Iowa) 489; State *v.* Cotton, 24 N. H. 143. *Contra*, Kennedy *v.* Com., 3 Bibb (Ky.) 490. And see State *v.* Brown, 12 Minn. 490, holding that where no place or county has been referred to, except as a description of the court or of the grand jury, or as a description of the office held by defendant, the use of the words "then and there" is not equivalent to the expression "in the county aforesaid."

"There" is sufficient. State *v.* Tolever, 27 N. C. 452.

41. State *v.* Brown, 159 Mo. 646, 60 S. W. 1064; State *v.* Fraker, 148 Mo. 143, 49 S. W. 1017; State *v.* Beaucleigh, 92 Mo. 490, 4 S. W. 666; State *v.* Dawson, 90 Mo. 149, 1 S. W. 827; State *v.* Keel, 54 Mo. 182; State *v.* Simon, 50 Mo. 370; State *v.* Arnold, (Mo. 1886) 2 S. W. 269; State *v.* De Lay, 30 Mo. App. 357. And see Caldwell *v.* State, 49 Ala. 34.

Previous to such statute in Missouri, the rule was otherwise (State *v.* Cook, 1 Mo. 547), although it was held that where the county was stated in the margin it might be referred to by name as "the county aforesaid" (McDonald *v.* State, 8 Mo. 283), and that where the county was stated in the margin it was sufficient to lay the venue in the body as at "the township of St. Louis" only (State *v.* Palmer, 4 Mo. 453).

42. State *v.* Fraker, 148 Mo. 143, 49 S. W. 1017.

43. Repugnancy see *supra*, V, C, 4, text and note 9.

44. *Alabama.*— Roberts *v.* State, 19 Ala. 526 [*disapproving* State *v.* Lassley, 7 Port. 526]; State *v.* Beckwith, 1 Stew. 318, 18 Am. Dec. 46.

Georgia.— Braddy *v.* State, 102 Ga. 568, 27 S. E. 670.

Maine.— State *v.* Withee, 87 Me. 462, 32 Atl. 1013; State *v.* Beaton, 79 Me. 314, 9 Atl. 728; State *v.* Fenlason, 79 Me. 117, 8 Atl. 459; State *v.* Hanson, 39 Me. 337.

Missouri.— Erwen *v.* State, 13 Mo. 307. But see later cases cited *infra* this section, holding omission of time immaterial under a statute.

New Hampshire.— State *v.* Pratt, 14 N. H. 456.

North Carolina.— State *v.* Roach, 3 N. C. 352.

South Carolina.— State *v.* Brown, 24 S. C. 224.

Texas.— State *v.* Eubanks, 41 Tex. 291; State *v.* Johnson, 32 Tex. 96; State *v.*

offense itself, it is sufficient to lay it on any day previous to the finding of the indictment, and during the period within which the offense may be prosecuted.[45] In the federal courts a failure to state the particular day on which the offense was committed is regarded as a defect in form merely, if time is not of the essence of the offense, and hence not material under the statute providing that no indictment shall be held insufficient for formal defects.[46] The line of attendant circumstances imposing criminality should be laid as of the time of the offense and not of the time of the finding of the indictment.[47] When the time becomes material, either as constituting an element of the crime or as affording to the accused a bar to the proceeding, it must be accurately stated, and a variance between the allegations and the proof is fatal.[48] So an act prohibited by statute on certain days only must be charged as having been committed on one of such days.[49] Where an act is by statute made criminal if committed within a certain period, it is sufficient that the date alleged appears to be within such period, although there is no specific averment of such fact.[50] Where time is to be proved by record, as on an indictment for perjury, the date must be truly laid, and a variance will be fatal.[51] However, in perjury, where the charge is not based on a record or other writing, and the statement alleged to have been false would have constituted perjury whether made on the date laid or on the date proven, the allegation of time is immaterial.[52]

b. Statutory Provisions. By the statutes of some states it is provided that no indictment shall be deemed invalid or otherwise affected by omission to state the time at which the offense was committed, unless time is of the essence of the offense. Under such statutes an entire omission of a statement is not fatal.[53] Other statutes, variously worded, agree in effect that an indictment shall be regarded as sufficient if it shows the offense to have been committed prior to its

Slack, 30 Tex. 354; Vallegas *v.* State, (Cr. App. 1902) 66 S. W. 769; Barnes *v.* State, 42 Tex. Cr. 297, 59 S. W. 882, 96 Am. St. Rep. 801.

Vermont.— State *v.* G. S., 1 Tyler 295, 4 Am. Dec. 724.

See 27 Cent. Dig. tit. "Indictment and Information," § 244.

45. *Alabama.*— McDade *v.* State, 20 Ala. 81; Shelton *v.* State, 1 Stew. & P. 208.

Kentucky.— Com. *v.* Alfred, 4 Dana 496.

Mississippi.— Oliver *v.* State, 5 How. 14.

New Jersey.— State *v.* Lyon, 45 N. J. L. 272.

New York.— People *v.* Van Santvoord, 9 Cow. 655.

Pennsylvania.— Com. *v.* Bennett, 1 Pittsb. 261.

United States.— Hardy *v.* U. S., 186 U. S. 224, 22 S. Ct. 889, 46 L. ed. 1137; Hume *v.* U. S., 118 Fed. 689, 55 C. C. A. 407; U. S. *v.* Matthews, 68 Fed. 880 [*affirmed* in 161 U. S. 500, 16 S. Ct. 640, 40 L. ed. 786]; U. S. *v.* Potter, 56 Fed. 83.

See 27 Cent. Dig. tit. "Indictment and Information," § 245.

46. Ledbetter *v.* U. S., 170 U. S. 606, 18 S. Ct. 774, 42 L. ed. 1162; U. S. *v.* Howard, 132 Fed. 325; U. S. *v.* Conrad, 59 Fed. 458. *Compare* U. S. *v.* Jackson, 2 Fed. 502.

47. Sikes *v.* State, 67 Ala. 77.

48. Dreyer *v.* People, 176 Ill. 590, 52 N. E. 372 (holding that the rule that a date need not be shown as laid would not aid an indictment against a municipal officer for failure to account for funds when, at the time laid, he was under no duty to account); State *v.* Caverly, 51 N. H. 446. Variance as to time see *infra*, XI, C, 4.

49. State *v.* Land, 42 Ind. 311, holding an allegation that offense was "on or about" a certain day insufficient.

Sale of intoxicating liquors on Sundays and holidays see, generally, INTOXICATING LIQUORS.

Offenses against Sunday Laws see, generally, SUNDAY.

50. State *v.* Norton, 45 Vt. 258.

An allegation that an offense was committed in the "night-time" is sufficient where night-time is defined by statute. Com. *v.* Williams, 2 Cush. (Mass.) 582.

Allegation of night-time in burglary see BURGLARY, 6 Cyc. 203.

51. Rhodes *v.* Com., 78 Va. 692; U. S. *v.* Bowman, 24 Fed. Cas. No. 14,631, 2 Wash. 328; U. S. *v.* McNeal, 26 Fed. Cas. No. 15,700, 1 Gall. 387. See PERJURY.

52. State *v.* Perry, 117 Iowa 463, 91 N. W. 765. See PERJURY.

53. Armstrong *v.* State, 145 Ind. 609, 43 N. E. 866; Fleming *v.* State, 136 Ind. 149, 36 N. E. 154; Myers *v.* State, 121 Ind. 15, 22 N. E. 781; State *v.* Patterson, 116 Ind. 45, 10 N. E. 289, 18 N. E. 270; State *v.* McDonald, 106 Ind. 233, 6 N. E. 607; State *v.* Sammons, 95 Ind. 22; State *v.* Ackerman, 51 La. Ann. 1213, 26 So. 80; State *v.* Wilcoxen, 38 Mo. 370; State *v.* Stumbo, 26 Mo. 306; State *v.* Peters, 107 N. C. 876, 12 S. E. 74.

Constitutionality of such statutes see *supra*, V, A, 2.

The English statute 14 & 15 Vict. c. 100,

finding.[54] Under such statutes some time must be alleged,[55] although some courts hold it sufficient to state the year only,[56] or to charge generally that the offense was committed before the return of the indictment.[57] Under such statutes it is also decided that an imperfect statement of time will not vitiate an indictment.[58]

c. Showing Offense Prior to Indictment. It must appear from the indictment that the offense was committed prior to its finding.[59] But a formal statement that the offense was committed prior to the finding of the indictment is not necessary where the language used imports such fact.[60] There are some cases holding

§ 24, is as broad as that stated in the text, but it seems the practice to state the time. See 6 Cox Cr. Cas. Appendix i, xcviii.

54. See the statutes of the various states and the following cases: State *v.* Hoover, 31 Ark. 676 ("on or about" a certain date sufficient); People *v.* Kelly, 6 Cal. 210 (sufficient to state the year); Cokely *v.* State, 4 Iowa 477 ("on or about" a certain day sufficient); State *v.* Davis, 6 Baxt. (Tenn.) 605.

55. State *v.* Davis, 6 Baxt. (Tenn.) 605.

A statute providing that the precise time need not be stated does not remove the necessity of stating a day, but merely makes it unnecessary to prove the date as laid. Clark *v.* State, 34 Ind. 436.

56. People *v.* Kelly, 6 Cal. 210; State *v.* Barnett, 3 Kan. 250, 87 Am. Dec. 471 (sufficient to show offense within statute of limitations); State *v.* Parker, 5 Lea (Tenn.) 568; State *v.* Wade, 7 Baxt. (Tenn.) 22 (holding that the leaving of blanks in the statement of the date will not cause the indictment to be considered defective, unless the dates so left blank are such as permit of the interpretation that the offense was committed subsequent to the finding); State *v.* Gibbs, 6 Baxt. (Tenn.) 238; State *v.* Gottfreedson, 24 Wash. 398, 64 Pac. 523 (sufficient if the offense is shown to be within the statute of limitations). But *compare* King *v.* State, 3 Heisk. (Tenn.) 148.

57. McGuire *v.* State, 37 Ala. 161; Molett *v.* State, 33 Ala. 408; Thompson *v.* State, 25 Ala. 41 (holding that it is sufficient to charge generally that the offense was committed before the finding of the indictment); Paynter *v.* Com., 55 S. W. 687, 21 Ky. L. Rep. 1562; King *v.* State, 3 Heisk. (Tenn.) 148.

58. *Arkansas.*— Conrand *v.* State, 65 Ark. 559, 47 S. W. 628, so holding with regard to allegation of date subsequent.

California.— People *v.* Cuff, 122 Cal. 589, 55 Pac. 407, false date not fatal where defendant is not prejudiced.

Indiana.— Shell *v.* State, 148 Ind. 50, 47 N. E. 144 ("on or about" a certain date); Fleming *v.* State, 136 Ind. 149, 36 N. E. 154 ("on the —— day of ———, 189—"); State *v.* Patterson, 116 Ind. 45, 10 N. E. 289, 18 N. E. 270 (repugnant allegations will not vitiate an indictment); State *v.* Sammons, 95 Ind. 22 (A. D. 188— not fatal); State *v.* Thrift, 30 Ind. 211 ("April term of the Hendricks Circuit Court, in the year 1867"). But see Murphy *v.* State, 106 Ind. 96, 5 N. E. 767, 55 Am. Rep. 722, 107 Ind. 598, 600, 8 N. E. 158, 176, holding that an indictment which states an impossible date is bad on motion to quash.

Kentucky.— Williams *v.* Com., 18 S. W. 1024, 13 Ky. L. Rep. 893 (laying date subsequent to date of indictment cured by use of verbs in past tense); Vowells *v.* Com., 84 Ky. 52 (blank day of a certain month imports a finding before the day the indictment was found); Com. *v.* Miller, 79 Ky. 451 (use of past tense shows that crime was committed prior to indictment, although date laid is that of the finding).

Mississippi.— Holland *v.* State, 60 Miss. 939.

Missouri.— State *v.* Crawford, 99 Mo. 74, 12 S. W. 354 (allegation of day subsequent not fatal); State *v.* McDaniel, 94 Mo. 301, 7 S. W. 634.

Montana.— State *v.* Thompson, 10 Mont. 549, 27 Pac. 349.

Virginia.— Arrington *v.* Com., 87 Va. 96, 12 S. E. 224, 10 L. R. A. 242, illegal sale of intoxicating liquors "between the 13th day of September, 1889, and the 12th day of September, 1890."

Washington.— State *v.* Williams, 13 Wash. 335, 43 Pac. 15.

See 27 Cent. Dig. tit. "Indictment and Information," § 255.

59. Joel *v.* State, 28 Tex. 642 (holding bad an indictment which alleged an offense to be committed on the same day the indictment was returned and filed in court, although from the fact that the date given was upon a Sunday it was evident that there was a clerical error, since the indictment could not have been filed on that day); Goddard *v.* State, 14 Tex. App. 566; Williams *v.* State, 12 Tex. App. 226; Long *v.* State, (Tex. Cr. App. 1892) 20 S. W. 576; Andrews *v.* State, (Tex. App. 1890) 14 S. W. 1014 (holding an indictment charging an offense as committed the day it was filed insufficient); Nelson *v.* State, 1 Tex. App. 556; Kennedy *v.* State, 22 Tex. Cr. 693, 3 S. W. 480. *Compare* State *v.* Parker, 5 Lea (Tenn.) 568.

"Heretofore, on the," etc. (naming a date) is sufficient. Scott *v.* State, (Tex. Cr. App. 1900) 56 S. W. 61; Wilson *v.* State, 15 Tex. App. 150.

On an indictment for nuisance it was held that it was not necessary that the specific date of finding the indictment be laid. State *v.* Bowes, 20 R. I. 310, 38 Atl. 948.

60. People *v.* Miller, 137 Cal. 642, 70 Pac. 735 (holding that an averment that an offense was committed on or about a certain day would not be construed as subject to the interpretation that it charged an offense committed after the finding of the indictment);

that where the laying of a date after the finding of the indictment is apparently a clerical error it may be rejected, and the defect is not fatal,[61] or that the defect is cured by a specific allegation that the offense was committed prior to the finding of the indictment.[62] Where a day certain is laid before the finding of the indictment, a later date may be rejected as surplusage.[63]

d. Showing Offense Within Period of Limitations. Where the time within which an offense may be prosecuted is limited by statute, the time of the act averred in the indictment should appear to be within such limit;[64] but where, from the date of the filing of the indictment and from the date on which the offense was alleged to have been committed, it is apparent that the indictment was found within the period of limitations, the formal statement may be dispensed with.[65] If the indictment avers two dates, one of which is so remote as to be barred by the statute of limitations, it is defective.[66]

e. Certainty and Sufficiency of Allegation — (i) *In General.* The usual rule that certainty to a common intent is sufficient is applicable to the allegation of the date in indictments.[67] An averment that the offense was committed in the

People *v.* Lafuente, 6 Cal. 202; Gratz *v.* Com., 96 Ky. 162, 28 S. W. 159, 16 Ky. L. Rep. 465; State *v.* O'Connor, 11 Nev. 416.

The use of the past tense may be regarded as indicating that the offense was committed before the finding of the indictment. Bell *v.* State, 75 Ala. 25; Vowells *v.* Com., 84 Ky. 52; Com. *v.* Miller, 79 Ky. 451, 3 Ky. L. Rep. 231; Williams *v.* Com., 18 S. W. 1024, 13 Ky. L. Rep. 893; Price *v.* Com., 4 Ky. L. Rep. 618; State *v.* Pratt, 14 N. H. 456; State *v.* Emmett, 23 Wis. 632.

61. State *v.* Patterson, 116 Ind. 45, 10 N. E. 289, 18 N. E. 270; State *v.* McDaniel, 94 Mo. 301, 7 S. W. 634; State *v.* Burnett, 81 Mo. 119; Stevenson *v.* State, 5 Baxt. (Tenn.) 681, holding that an indictment found Feb. 5, 1876, charging the offense to have been committed "heretofore, to wit, the 22d of February, 1876," is good.

62. Jones *v.* Com., 1 Bush (Ky.) 34, 89 Am. Dec. 605. See also Paynter *v.* Com., 55 S. W. 687, 21 Ky. L. Rep. 1562, and cases cited *supra*, note 57.

63. State *v.* Woodman, 10 N. C. 384.

64. *California.*— People *v.* Miller, 12 Cal. 291.

Georgia.— Tipton *v.* State, 119 Ga. 304, 46 S. E. 436.

Indiana.— State *v.* Rust, 8 Blackf. 195.

Kentucky.— Tatum *v.* Com., 59 S. W. 32, 22 Ky. L. Rep. 927 (holding "within twelve months last past, and on the —— day of ——, 189—," sufficient); Com. *v.* G. W. Taylor Co., 43 S. W. 399, 19 Ky. L. Rep. 1334 (holding that an indictment returned Nov. 14, 1896, charging that defendant maintained a nuisance "on the —— day of May, 1895 . . . and divers others days theretofore and thereafter, to wit, at least 300, before and after said date," insufficient).

Missouri.— State *v.* Magrath, 19 Mo. 678.

New Hampshire.— State *v.* Ingalls, 59 N. H. 88; State *v.* Havey, 58 N. H. 377.

Pennsylvania.— Com. *v.* Bartilson, 85 Pa. St. 482.

Tennessee.— State *v.* Shaw, 113 Tenn. 536, 82 S. W. 480.

Texas.— Reed *v.* State, (App. 1890) 13 S. W. 865 (holding that "on or about the 8th day of December, one thousand eight hundred and nine," was substantially defective); Blake *v.* State, 3 Tex. App. 149 (holding A D "one thousand eight and seventy-five" insufficient to show that the offense was not barred).

West Virginia.— State *v.* Bruce, 26 W. Va. 153.

See 27 Cent. Dig. tit. "Indictment and Information," § 247.

Contra.— Molett *v.* State, 33 Ala. 408, under a statute making the statement of date immaterial.

Averring facts in avoidance of bar see *supra*, V, E, 8.

A blank in the statement of the year is fatal where there is no allegation that the offense was within the period of limitations. Louisville, etc., R. Co. *v.* Com., 14 Ky. L. Rep. 400; People *v.* Gregory, 30 Mich. 371.

Omission of the day and month is fatal where it does not appear that the offense is not barred (State *v.* Beckwith, 1 Stew. (Ala.) 318, 18 Am. Dec. 46; Coleman *v.* State, (Tex. Cr. App. 1901) 62 S. W. 753; Barnes *v.* State, 42 Tex. Cr. 297, 59 S. W. 882, 96 Am. St. Rep. 801); but it is otherwise where such fact is apparent (State *v.* Brooks, 33 Kan. 708, 7 Pac. 591; State *v.* Thompson, 26 W. Va. 149; U. S. *v.* Conrad, 59 Fed. 458).

65. Com. *v.* C. B. Cook Co., 102 Ky. 288, 43 S. W. 400, 19 Ky. L. Rep. 1336; Stamper *v.* Com., 102 Ky. 33, 42 S. W. 915, 19 Ky. L. Rep. 1014.

66. Combs *v.* Com., 84 S. W. 753, 27 Ky. L. Rep. 273; Harwell *v.* State, (Tex. Cr. App. 1901) 65 S. W. 520, "on or about the 1st day of March, one thousand eight hundred and ninety, A. D. 1900."

67. Rawson *v.* State, 19 Conn. 292; Com. *v.* Clark, 4 Cush. (Mass.) 596 (letters "A. D.," followed by words expressing the year, a sufficient statement of the year); Com. *v.* Griffin, 3 Cush. (Mass.) 523 (allegation that an act was done on a "day of September now past," insufficient as not stating a year); State *v.* Munch, 22 Minn. 67

Christian era, or the insertion of the letters A D is no longer regarded as essential.[68] And the year need not be written out, but may be stated in arabic figures.[69]

(II) "*On or About.*" At common law, since it was held necessary to allege the offense to have been committed on a day certain, an allegation that an offense was committed "on or about" a certain day was regarded as insufficient.[70] But under the statutes now generally prevalent rendering a statement of the precise time of the offense immaterial, save where the time is an ingredient of the offense, together with statutes providing that the indictment shall not be held invalid for formal defects, it is usually sufficient to state that the offense was committed on or about a particular day,[71] some of the cases holding that the words "or about" may be rejected as surplusage,[72] even in the absence of statute.[73] Where the day is essential to the description of the offense, however,

(omission of the word "year" immaterial). And see Wingard *v.* State, 13 Ga. 396; Simmons *v.* Com., 1 Rawle (Pa.) 142 (apparently holding an averment laying the crime on the "first March," instead of "the first day of March," sufficient); Broome *v.* Reg., 12 Q. B. 834, 3 Cox C. C. 49, 12 Jur. 538, 17 L. J. M. C. 152, 64 E. C. L. 834 (holding that omission of the words "of the reign" was not fatal). See 27 Cent. Dig. tit. "Indictment and Information," § 245.

Time may be laid under a scilicet. State *v.* Murphy, 55 Vt. 547, holding that "heretofore, to wit, on the 17th day of September, A. D. 1881," was sufficient. See *supra*, V, C, 6.

68. *Georgia.*— Hall *v.* State, 3 Ga. 18.

Indiana.— Engleman *v.* State, 2 Ind. 91, 52 Am. Dec. 494.

Kentucky.— Com. *v.* Traylor, 45 S. W. 356, 450, 20 Ky. L. Rep. 97.

Maine.— State *v.* Bartlett, 47 Me. 388.

Massachusetts.— Com. *v.* Sullivan, 14 Gray 97; Com. *v.* Doran, 14 Gray 37. But see Com. *v.* McLoon, 5 Gray 91, 66 Am. Dec. 354, holding that the letters A D must be prefixed where the year is written in figures.

Mississippi.— Smith *v.* State, 58 Miss. 867.

North Carolina.— State *v.* Lane, 26 N. C. 113.

Vermont.— State *v.* Clark, 44 Vt. 636.

United States.— Peters *v.* U. S., 94 Fed. 127, 36 C. C. A. 105.

See 27 Cent. Dig. tit. "Indictment and Information," § 248.

Contra.— Whitesides *v.* People, 1 Ill. 21.

69. *Alabama.*— State *v.* Raiford, 7 Port. 101.

Connecticut.— Rawson *v.* State, 19 Conn. 292.

Iowa.— Winfield *v.* State, 3 Greene 339; State *v.* Seamons, 1 Greene 418.

Maine.— State *v.* Reed, 35 Me. 489, 58 Am. Dec. 727.

Tennessee.— See Barnes *v.* State, 5 Yerg. 186.

Vermont.— State *v.* Hodgeden, 3 Vt. 481.

United States.— Peters *v.* U. S., 94 Fed. 127, 36 C. C. A. 105.

See 27 Cent. Dig. tit. "Indictment and Information," § 208.

Special statutory provisions relaxing the common-law strictness of pleading are frequently made the basis of this rule, the English authorities being to the contrary, as based on 4 Geo. II, c. 26; 6 Geo. II, c. 14.

Indiana.— Hizer *v.* State, 12 Ind. 330; Hampton *v.* State, 8 Ind. 336. *Contra*, prior to 2 Rev. St. (1852) p. 368, § 51. State *v.* Voshall, 4 Ind. 589; Finch *v.* State, 6 Blackf. 533.

Louisiana.— State *v.* Egan, 10 La. Ann. 698.

New Jersey.— Johnson *v.* State, 26 N. J. L. 313. *Contra*, prior to Act April 3, 1855. Berrian *v.* State, 22 N. J. L. 9.

North Carolina.— State *v.* Dickens, 2 N. C. 406.

Virginia.— Cady *v.* Com., 10 Gratt. 776; Lazier *v.* Com., 10 Gratt. 708.

70. *Maine.*— State *v.* Baker, 34 Me. 52.

New Mexico.— Territory *v.* Armijo, 7 N. M. 571, 37 Pac. 1117.

Ohio.— Barnhouse *v.* State, 31 Ohio St. 39.

Vermont.— State *v.* O'Keefe, 41 Vt. 691.

United States.— U. S. *v.* Crittenden, 25 Fed. Cas. No. 14,890*a*, Hempst. 61; U. S. *v.* Winslow, 28 Fed. Cas. No. 16,742, 3 Sawy. 337.

71. *Arkansas.*— Pruitt *v.* State, (1889) 11 S. W. 822.

California.— People *v.* Miller, 137 Cal. 642, 70 Pac. 735; People *v.* Littlefield, 5 Cal. 355.

Iowa.— State *v.* Perry, 117 Iowa 463, 91 N. W. 765; Cokely *v.* State, 4 Iowa 477.

Montana.— State *v.* Thompson, 10 Mont. 549, 27 Pac. 349.

Nebraska.— Rema *v.* State, 52 Nebr. 375, 72 N. W. 474.

Texas.— State *v.* Hill, 35 Tex. 348; State *v.* McMickle, 34 Tex. 676; State *v.* Elliot, 34 Tex. 148; Johnson *v.* State, 1 Tex. App. 118.

Washington.— State *v.* Williams, 13 Wash. 335, 43 Pac. 15.

Wyoming.— Gustavenson *v.* State, 10 Wyo. 300, 68 Pac. 1006.

United States.— U. S. *v.* McKinley, 127 Fed. 168 [*not following* U. S. *v.* Winslow, 28 Fed. Cas. No. 16,742, 3 Sawy. 337].

See 27 Cent. Dig. tit. "Indictment and Information," § 252.

72. State *v.* Hoover, 31 Ark. 676; State *v.* Harp, 31 Kan. 496, 3 Pac. 432.

73. State *v.* Tuller, 34 Conn. 280; Rawson *v.* State, 19 Conn. 292; Farrell *v.* State, 45 Ind. 371; Hizer *v.* State, 12 Ind. 330; Hardebeck *v.* State, 10 Ind. 459; Hampton *v.* State, 8 Ind. 336; State *v.* McCarthy, 44 La.

such a statement is insufficient, and the indictment must allege the day directly.[74]

(III) *IMPOSSIBLE OR FUTURE DATES.* Where the date is laid on an impossible day the indictment is, in the absence of a statute to the contrary, insufficient;[75] and under this rule an indictment laying the offense on a future day is fatally defective.[76] The indictment will not, however, be vitiated if the date may be rejected as surplusage.[77]

(IV) *REFERENCE TO OTHER PORTIONS OF INDICTMENT.*[78] An uncertainty as to date may be removed under certain circumstances by reference to other parts of the indictment;[79] and it has even been held that the omission of a year may be supplied by reference to the caption.[80]

(V) *SUCCESSIVE INDICTMENTS.*[81] A new indictment preferred after the quashing of another must contain an averment of time which would have been sufficient in the original.[82]

Ann. 323, 10 So. 673. *Contra,* State *v.* Baker, 34 Me. 52.

74. Ruge *v.* State, 62 Ind. 388, holding that an indictment for selling liquor on a legal holiday, July 4, alleging that the sale was made "on or about" the fourth day of July, etc., was not sufficiently certain.

75. *Indiana.*— Murphy *v.* State, 106 Ind 96, 5 N. E. 767, 55 Am. Rep. 722, 107 Ind. 598, 600, 8 N. E. 158, 176.

Maine.— State *v.* O'Donnell, 81 Me. 271, 17 Atl. 66, holding that a date thirteen years before the commonwealth became a state and more than forty years before the enactment of a statute creating the offense was a practically impossible date.

Mississippi.— Serpentine *v.* State, 1 How. 256, holding "A. D. one thousand and thirty-three" impossible.

Missouri.— Markley *v.* State, 10 Mo. 291, holding that "one thousand, eighteen hundred and forty-six" is an impossible date.

North Carolina.— State *v.* Sexton, 10 N. C. 184, 14 Am. Dec. 584.

Clerical errors rendering date impossible have frequently been held fatal. McCoy *v.* State, 43 Tex. Cr. 606, 68 S. W. 686 ("on or about the 10th day of May, A. D., one thousand nine and one, and anterior to the presentment of this indictment," etc.); Robles *v.* State, 5 Tex. App. 346 ("one thousand, eight thousand, eight hundred and seventy-four"); State *v.* G. S., 1 Tyler (Vt.) 295, 4 Am. Dec. 724 (holding use of words "Anno Domini, one thousand eight" could not be held to mean A. D. 1800). But see Morris *v.* State, (Tex. Cr. App. 1904) 83 S. W. 1126 [*distinguishing* McCoy *v.* State, 43 Tex. Cr. 606, 68 S. W. 686], holding that an indictment alleging the offense to have been committed on or about "the 22d day of October, one thousand nine hundred three," sufficiently alleged the date, since the date, if transposed into figures, would be 1903) · Wood *v.* State, (Tex. Cr. App. 1899) 51 S. W. 235 (holding that an allegation in an indictment that the offense was committed in "one thousand eight hundred and nine seven" was sufficient to show its commission in 1897). But see cases cited *supra,* note 61.

76. *Iowa.*— State *v.* Smith, 88 Iowa 178, 55 N. W. 198.

New Hampshire.— State *v.* Ingalls, 59 N. H. 88; State *v.* Pratt, 14 N. H. 456.

North Carolina.— State *v.* Woodman, 10 N. C. 384; State *v.* Sexton, 10 N. C. 184, 14 Am. Dec. 584.

Pennsylvania.— Com. *v.* McKee, Add. 33.

Texas.— State *v.* Davidson, 36 Tex. 325; Hall *v.* State, (Cr. App. 1897) 38 S. W. 996; McJunkins *v.* State, (Cr. App. 1897) 38 S. W. 994; Lee *v.* State, 22 Tex. App. 547, 3 S. W. 89; Shoefercater *v.* State, 5 Tex. App. 207; York *v.* State, 3 Tex. App. 15.

Vermont.— State *v.* Litch, 33 Vt. 67. See also People *v.* Moody, 69 Cal. 184, 10 Pac. 392.

Contra.— Jones *v.* State, 55 Ga. 625; McMath *v.* State, 55 Ga. 303; Conner *v.* State, 25 Ga. 515, 71 Am. Dec. 184.

A clerical error in the caption, making it appear that the offense, the date of which is correctly laid in the body of the indictment, was committed subsequent to the finding thereof is not fatal. State *v.* Mowry, 21 R. I. 376, 43 Atl. 871.

77. State *v.* John, 124 Iowa 230, 100 N. W. 193. And *compare* State *v.* Brooks, 85 Iowa 366, 52 N. W. 240.

78. Reference from one count to another see *infra,* V, S, 4.

79. State *v.* Schultz, 57 Ind. 19 (holding that where a date has been properly stated in an indictment, the words "then and there," in the charging part, sufficiently show the time of the commission of the offense); State *v.* Paine, 1 Ind. 163 (year mentioned in the commencement of the indictment might be referred to in the body); Com. *v.* Crawford, 9 Gray (Mass.) 128; Gill *v.* People, 3 Hun (N. Y.) 187, 5 Thomps. & C. 308. But see Com. *v.* Hutton, 5 Gray (Mass.) 89, 66 Am. Dec. 352, holding that the omission of the year in a complaint could not be supplied by reference to a date in its verification.

80. State *v.* Haddock, 9 N. C. 461; Jacobs *v.* Com., 5 Serg. & R. (Pa.) 315. *Contra,* State *v.* Hopkins, 7 Blackf. (Ind.) 494.

81. Reference to original indictment as tolling statute of limitations see *supra,* V, E, 8.

82. McIntyre *v.* State, 55 Ala. 167.

(VI) *INDICTMENTS OF ACCESSARIES.* On an indictment of an accessary the time of commission of the offense by his principal must be laid with the same certainty as in the indictment of the principal.[83]

f. Continuing Offenses. Where the offense consists of a succession or continuation of acts not limited to any particular day, it is proper to allege it as having been committed on a certain day named, and on divers days and times between such day and the day of finding the indictment, or any other specific subsequent day prior thereto;[84] but the period within which the acts are charged to have been committed must be precisely limited by the indictment[85] and the evidence confined to such period.[86] Although a *continuando* is employed, the offense must be charged as of a particular date,[87] except where the act cannot be logically and correctly described as having been done on some particular day or on some continuous days.[88] If the *continuando* is improperly laid, the indictment is not invalidated for that reason, where a day certain is alleged, and the *continuando* may be rejected as surplusage.[89]

g. Allegations Where Recent Statutes Define or Alter the Offense. Where the prohibiting statute was recent, it was, at common law, usual to allege expressly that the offense was committed after the making of the statute; but where the statute was ancient it was not usual, and apparently in no case necessary.[90] Where, however, within the period of limitations prescribed for an offense, its definition or punishment is changed by statute, the time of commission

83. People *v.* Thrall, 50 Cal. 415, indictment alleging commission of crime at a later date than the finding of the indictment.

84. Our House No. 2 *v.* State, 4 Greene (Iowa) 172; South *v.* Com., 79 Ky. 493; State *v.* Cofren, 48 Me. 364; Com. *v.* Chisholm, 103 Mass. 213; Com. *v.* Donnelly, 14 Gray (Mass.) 86 note; Com. *v.* Kingman, 14 Gray (Mass.) 85; Com. *v.* Langley, 14 Gray (Mass.) 21; Com. *v.* Snow, 14 Gray (Mass.) 20; Com. *v.* Keefe, 9 Gray (Mass.) 290 [*distinguishing* Com. *v.* Adams, 4 Gray 27]; Com. *v.* Wood, 4 Gray (Mass.) 11; Com. *v.* Elwell, 1 Gray (Mass.) 463; Com. *v.* Tower, 8 Metc. (Mass.) 527; Com. *v.* Odlin, 23 Pick. (Mass.) 275; Com. *v.* Pray, 13 Pick. (Mass.) 359.

Distilling oil without a license.— U. S. *v.* Trobe, 28 Fed. Cas. No. 16,541.

Particular offenses see DISORDERLY HOUSES, 14 Cyc. 496; INTOXICATING LIQUORS; NUISANCES; and other special titles.

85. Com. *v.* Gardner, 7 Gray (Mass.) 494 (holding that a charge that defendant was a common seller of intoxicating liquors on a day specified, "and on divers days since," was insufficient to admit proof of acts on other than the day specified); Com. *v.* Adams, 4 Gray (Mass.) 27 (holding from a day named "to the day of the finding, presentment, and filing of this indictment," fatally indefinite, since the finding, presentment, and filing might not be upon the same day). And see Com. *v.* Sullivan, 5 Allen (Mass.) 511.

86. Com. *v.* Briggs, 11 Metc. (Mass.) 573. See *infra*, XI, C, 4, text and note 76.

87. State *v.* O'Donnell, 81 Me. 271, 17 Atl. 66; State *v.* Small, 80 Me. 452, 14 Atl. 942; Shorey *v.* Chandler, 80 Me. 409, 15 Atl. 223; State *v.* Beaton, 79 Me. 314, 9 Atl. 728 (holding "on sundry and divers days and times between the twenty-third day of September, A. D. 1885, and the thirtieth day of September, A. D. 1885" fatally defective); Wells *v.* Com., 12 Gray (Mass.) 326. See also Collins *v.* State, 58 Ind. 5.

88. State *v.* Auburn, 86 Me. 276, 29 Atl. 1075, holding that where the offense charged against a city is neglect to open a way within a fixed time, as required by law, the indictment is sufficient, if it avers that the offense was committed by continuous neglect during the whole period within which it was to be opened. See also People *v.* Buddensieck, 4 N. Y. Cr. 230 [*affirmed* in 103 N. Y. 487, 9 N. E. 44, 57 Am. Rep. 766, 5 N. Y. Cr. 69]. *Compare* Cowley *v.* People, 83 N. Y. 464, 38 Am. Rep. 464, holding that where the offense is made up of a continuity of acts, or of omissions, neither of which may be sufficient by itself to constitute the offense, an indictment is good which avers the offense on a given day and is sustained by evidence of repeated and continuous acts or neglects connected in operation, the result of which is the act forbidden by law.

89. *Georgia.*— Cook *v.* State, 11 Ga. 53, 56 Am. Dec. 410.

Massachusetts.— Com. *v.* Gardner, 7 Gray 494; Com. *v.* Bryden, 9 Metc. 137; Com. *v.* Pray, 13 Pick. 359.

New Hampshire.— State *v.* Nichols, 58 N. H. 41.

New York.— People *v.* Adams, 17 Wend. 475.

Pennsylvania.— Com. *v.* Dingman, 26 Pa. Super. Ct. 615.

Vermont.— State *v.* Munger, 15 Vt. 290.

United States.— U. S. *v.* La Coste, 26 Fed. Cas. No. 15,548, 2 Mason 129.

England.— Rex *v.* Dixon, 10 Mod. 335.

Compare Com. *v.* Illinois Cent. R. Co., 82 S. W. 381, 26 Ky. L. Rep. 672.

90. State *v.* Sam, 13 N. C. 567; State *v.* Chandler, 9 N. C. 439; State *v.* Ballard, 6 N. C. 186.

of the acts charged becomes of the essence of the offense and must be averred, although a statute may provide that where not of the essence an averment of time is immaterial';[91] and the same rule applies where there are two statutes in effect in reference to the same offense, the later of which changes the nature of the offense or its punishment.[92] In the case of offenses laid with a *continuando*, the indictment is not invalidated by the fact that during the period laid the statute on which the indictment is based has been repealed or altered, since the time laid during which the statute relied on was not in effect may be disregarded;[93] and the same rule applies where the offense is laid as beginning before the taking effect of the statute punishing it.[94] But a specific date alleged must not be prior to the taking effect of the statute on which the indictment is based,[95] even where, by statute, the omission of the date or an imperfect statement thereof is immaterial.[96]

3. Repetition of Place and Time — a. Necessity — (1) *In General.* In indictments for serious offenses, particularly those which at common law are felonies, the averments of time and place must be repeated to every issuable and triable fact,[97] but the same nicety is not required in indictments for minor offenses.[98] If time and place are formally laid to all the acts charged to have been done, the averment need not, however, be repeated to the effect of such acts,[99] or the conclusions drawn therefrom;[1] nor need time be averred with regard to qualifying or limiting averments, the purpose of which is to show that the object acted upon was a proper subject of complaint, unless time is essential and would be susceptible of question if not averred.[2] In case certainty results from the grammatical construction of the language employed, making possible no other construction, it

91. Dentler *v.* State, 112 Ala. 70, 20 So. 592 [*citing* and *explaining* Bibb *v.* State, 83 Ala. 84, 3 So. 711]; McDowell *v.* State, 61 Ala. 172; McIntyre *v.* State, 55 Ala. 167; McGuire *v.* State, 37 Ala. 161; State *v.* Massey, 97 N. C. 465, 2 S. E. 445; Bolton *v.* State, 5 Coldw. (Tenn.) 650 (holding that it must appear with certainty whether an offense was committed before or after an act increasing the punishment); Cool *v.* Com., 94 Va. 799, 26 S. E. 411. See also Lyon *v.* State, 61 Ala. 224 [*following* McDowell *v.* State, 61 Ala. 172].

92. State *v.* Wise, 66 N. C. 120; Cool *v.* Com., 94 Va. 799, 26 S. E. 411.

93. State *v.* Dorr, 82 Me. 212, 19 Atl. 171; State *v.* Pillsbury, 47 Me. 449; Territory *v.* Ashby, 2 Mont. 89.

94. State *v.* Way, 5 Nebr. 283; Nichols' Case, 7 Gratt. (Va.) 589. *Contra*, Collins *v.* State, 58 Ind. 5.

95. Com. *v.* Aultwise, 58 S. W. 369, 22 Ky. L. Rep. 511.

96. Hodnett *v.* State, 66 Miss. 26, 5 So. 518.

Where the statute merely confers jurisdiction by making the offense triable in the particular county in which the indictment is found, it is not material that the date laid is before the time mentioned in the statute if the offense was in fact after such time. Rex *v.* Treharne, 1 Moody C. C. 298.

97. *Alabama.*— Roberts *v.* State, 19 Ala. 526.

Indiana.— State *v.* Williams, 4 Ind. 234, 58 Am. Dec. 627.

Louisiana.— State *v.* Kennedy, 8 Rob. 590.

Missouri.— State *v.* Welkin, 14 Mo. 398.

New Jersey.— State *v.* Dayton, 23 N. J. L. 49, 53 Am. Dec. 270.

New York.— Crichton *v.* People, 1 Abb. Dec. 467, 1 Keyes 341, 6 Park. Cr. 363.

Vermont.— State *v.* Bacon, 7 Vt. 219.

England.— Rex *v.* Haynes, 4 M. & S. 214; Rex *v.* Hollond, 5 T. R. 607.

But *compare* Com. *v.* Barker, 12 Cush. (Mass.) 186 (holding that on an indictment for murder "then and there" need not be repeated as to the striking of the mortal blow when the time and place have once been well laid); State *v.* Cherry, 7 N. C. 7 (to the same effect under a statute requiring only that an indictment shall contain a plain, intelligible, and explicit statement of the charge).

In conspiracy time and place need be laid only as to the fact of the combination. Clary *v.* Com., 4 Pa. St. 210. See Conspiracy, 8 Cyc. 671.

98. State *v.* Willis, 78 Me. 70, 2 Atl. 848; Com. *v.* Langley, 14 Gray (Mass.) 21; Com. *v.* Bugbee, 4 Gray (Mass.) 206 (indictment for felonious assault); State *v.* Doyle, 15 R. I. 527, 9 Atl. 900. See also Com. *v.* Keyon, 1 Allen (Mass.) 6.

The day and place named in the beginning may be held to refer to the ensuing acts in indictments for misdemeanor. State *v.* Harris, 106 N. C. 682, 11 S. E. 377 (holding under the statute that the allegation in each count of an indictment that the alleged crime was committed "in said county of Granville" applies to the whole allegation in such count); Stout *v.* Com., 11 Serg. & R. (Pa.) 177; State *v.* Hopkins, 5 R. I. 53.

99. State *v.* Bailey, 21 Mo. 484; State *v.* Freeman, 21 Mo. 481.

1. State *v.* Willis, 78 Me. 70, 2 Atl. 848; State *v.* Johnson, Walk. (Miss.) 392.

2. State *v.* Cook, 38 Vt. 437.

is not necessary again to aver time and place;[3] nor perhaps if the fact appears from the context.[4]

(II) *STATUTORY PROVISIONS.* In many jurisdictions it is provided that time and place, when once laid, need not be repeated.[5]

b. Sufficiency — (I) *IN GENERAL.* Certainty to a common intent is sufficient in a repetition of time and place,[6] it being in general sufficient to employ the expression "then and there,"[7] or to refer to a time or place mentioned as "said"[8] or "aforesaid,"[9] or to a time as "then."[10] In some cases it is sufficient to employ the conjunction "and,"[11] although the earlier authorities are to the contrary,[12] and the safer practice is to employ the phrase "then and there," although in some cases equivalent expressions have been used.[13]

3. Bobel *v.* People, 173 Ill. 19, 50 N. E. 322, 64 Am. St. Rep. 64 (holding that when time and place are alleged in adverbial clauses relating to the verb charging the offense, the repetition of "then and there," before such verb, is unnecessary); State *v.* Capers, 6 La. Ann. 267; Turns *v.* Com., 6 Metc. (Mass.) 224; State *v.* Dayton, 23 N. J. L. 49, 53 Am. Dec. 270 (holding that in averring, in an indictment for perjury, that the officer had authority to administer an oath, it is not necessary to aver that he "then and there" had authority, if time and place had been mentioned in stating the act of taking the oath before him).

4. State *v.* Blackwell, 3 Ind. 529, holding that in a charge that defendant broke and entered a certain close and took a poplar tree, which tree was of the value, etc., it need not be alleged that the tree was "then and there" of the value, etc.

5. See the statutes of the various states. See also Turpin *v.* State, 80 Ind. 148; State *v.* Cherry, 3 N. C. 7.

6. State *v.* Neddo, 92 Me. 71, 42 Atl. 253; Crichton *v.* People, 1 Abb. Dec. (N. Y.) 467, 1 Keyes 341, 6 Park. Cr. 363.

7. *Illinois.*— Palmer *v.* People, 138 Ill. 356, 28 N. E. 130, 32 Am. St. Rep. 146.

Indiana.— Davidson *v.* State, 135 Ind. 254, 34 N. E. 972; State *v.* Shulty, 57 Ind. 19.

Louisiana.— State *v.* Kennedy, 8 Rob. 590.

Maine.— State *v.* Hurley, 71 Me. 354.

Massachusetts.— Com. *v.* Butterick, 100 Mass. 12; Turns *v.* Com., 6 Metc. 224.

New Hampshire.— State *v.* Cotton, 24 N. H. 143.

North Carolina.— State *v.* Witherow, 7 N. C. 153.

South Carolina.— State *v.* Blakeney, 33 S. C. 111, 11 S. E. 637.

England.— Heydon's Case, 4 Coke 41*a*.

"Then and there" need not be employed conjunctively, but may be used separately in the same sentence. State *v.* Thibodaux, 49 La. Ann. 15, 21 So. 127.

Reference to mere matters of description of the person accused is not sufficient to lay the venue. State *v.* Watts, 43 W. Va. 182, 27 S. E. 302, holding, however, that an indictment by which the grand jurors of a certain county charged that defendant, "a practicing physician, in said county," on a certain date, for the purpose of aiding one S, "a licensed druggist doing business as such in said county," in the unlawful sale of spirituous liquors, "did unlawfully give," etc., sufficiently lays the venue, as the words "in said county," first quoted, must be regarded as used for that purpose, and not as descriptive of the person.

8. State *v.* Baker, 50 Me. 45 (holding that where a city has been described as located in a certain county, a reference thereto in laying the offense as the "said" city is sufficient); Moss *v.* State, (Tex. Cr. 1904) 83 S. W. 829.

9. *California.*— People *v.* Baker, 100 Cal. 188, 34 Pac. 649, 38 Am. St. Rep. 276.

Missouri.— State *v.* Vincent, 91 Mo. 662, 4 S. W. 430, "city aforesaid" sufficient.

South Carolina.— State *v.* Coleman, 8 S. C. 237, holding that the expression need not be "year last aforesaid."

South Dakota.— State *v.* Taylor, 7 S. D. 533, 64 N. W. 548.

England.— Rex *v.* Richards, 1 M. & Rob. 177, holding that in an indictment alleging a dwelling-house to be "situate at the parish aforesaid," the parish last mentioned must be intended.

10. When a venue is laid to the principal act and it is charged that the aiders and abetters were "then" present, it is sufficient. State *v.* Taylor, 21 Mo. 477.

Where time has not been previously stated in the indictment, the word "then" is without meaning and cannot have the effect of fixing the date when the offense was committed. Edwards *v.* Com., 19 Pick. (Mass.) 124; State *v.* Slack, 30 Tex. 354.

11. Smith *v.* State, 36 Tex. Cr. 442, 37 S. W. 743, holding that "then and there" need not be repeated in the charge as to intent, where the charge as to intent was coupled with the charge as to the act by the conjunction "and."

12. State *v.* Kennedy, 8 Rob. (La.) 590 (holding "and" insufficient to connect the time and place laid to the mortal stroke with the fact of death); Buckler's Case, Dyer 69*a*.

13. Lester *v.* State, 9 Mo. 666.

Illustrations.— "Instantly" is not equivalent to "then and there" (State *v.* Lakey, 65 Mo. 217; Lester *v.* State, 9 Mo. 666; Reg. *v.* Brownlow, 11 A. & E. 119, 8 Dowl. P. C. 157, 4 Jur. 103, 9 L. J. M. C. 15, 3 P. & D. 52, 39 E. C. L. 87); nor is "immediately" (Rex *v.* Francis, 2 East P. C. 708, 2 Str.

(II) *Acts to Be Charged as Simultaneous.* In case the acts charged must be alleged to have been done simultaneously, the words "then and there" must be employed instead of repeating the time and place.[14]

(III) *Effect of Double Antecedents.* If two times or places have been previously mentioned, and afterward a part only is laid "then and there," the indictment is defective because it is uncertain to which it refers,[15] the rule being equally applicable in case uncertainty results as to place[16] or time[17] alone; and in case "aforesaid" or "said" is used as an expression of reference instead of "then and there."[18] But the mere fact that two times[19] or two places[20] have been mentioned will not invalidate the indictment where the reference must obviously refer to but one of them.

G. Description of the Person Accused[21] — 1. In General. The indictment or information must describe the accused by his true name, if known,[22] including his christian name,[23] in the absence of a statute dispensing with the necessity;[24] and it must be directly charged that the person named committed the offense,[25] although in some jurisdictions it is held that the formal charge need not be in the commencement of the indictment or information where the allegations point out accused with due certainty as the party committing the offense.[26]

2. Name by Which Defendant Is Commonly Known. A description of defend-

1015); or "being" (Bridges' Case, Cro. Jac. 639; Rex *v.* Ward, 2 Ld. Raym. 1461. *Contra*, Rex *v.* Boyall, 2 Burr. 832).

14. Rex *v.* Williams, 2 Leach C. C. 597. And see State *v.* Hurley, 71 Me. 354; Com. *v.* Goldstein, 114 Mass. 272; Com. *v.* Butterick, 100 Mass. 12.

A precise statement of time must precede the averment, to which "then and there" may refer. Edwards *v.* Com., 19 Pick. (Mass.) 124.

15. State *v.* Jackson, 39 Me. 291 (holding that when, in an indictment, two distinct times and places have been mentioned, at and in which the substantive offense has been committed, and reference is afterward made to the time and place by the words "then and there," the allegation will be deemed defective, but not so if one of the places is named only as the residence of the party); Com. *v.* Wheeler, 162 Mass. 429, 38 N. E. 1115; State *v.* McCracken, 20 Mo. 411; Jane *v.* State, 3 Mo. 61; State *v.* Hardwick, 2 Mo. 226. See also Rex *v.* Moor Critchell, 2 East 65; Reg. *v.* Gunn, 11 Mod. 66; Reg. *v.* Rhodes, 2 Ld. Raym. 886; Rex *v.* Kilderby, 1 Saund. 308.

16. Connor *v.* State, 29 Fla. 455, 10 So. 891, 30 Am. St. Rep. 126.

17. State *v.* Hayes, 24 Mo. 358.

18. State *v.* McCracken, 20 Mo. 411; Wingfield's Case, Cro. Eliz. 739, holding day and place "aforesaid" uncertain when two times had been mentioned.

Where two counties are mentioned, a reference to the county aforesaid is bad. Cain *v.* State, 18 Tex. 391; Bell *v.* Com., 8 Gratt. (Va.) 600.

19. Woodsides *v.* State, 2 How. (Miss.) 655; State *v.* Ferry, 61 Vt. 624, 18 Atl. 716.

20. State *v.* Jackson, 39 Me. 291; Jeffries *v.* Com., 12 Allen (Mass.) 145; Com. *v.* Williams, 149 Pa. St. 54, 24 Atl. 158.

21. See also Names.

Repugnancy see *supra*, V, C, 4, text and note 10.

22. *Alabama.*— Washington *v.* State, 68 Ala. 85, holding that Code, § 4786, which requires an indictment to be certain as to the person charged, is a mere affirmation of the common law, which did not permit any uncertainty in this respect.

Indiana.— Enwright *v.* State, 58 Ind. 567; Campbell *v.* State, 10 Ind. 420.

Missouri.— State *v.* Stern, 4 Mo. App. 385.

Texas.— Minchen *v.* State, (Cr. App. 1892) 20 S. W. 712.

Virginia.— Com. *v.* Snider, 2 Leigh 744.

England.— Rex *v.* Shakespeare, 10 East 83.

See 27 Cent. Dig. tit. "Indictment and Information," § 273.

On indictment for breach of duty imposed on many persons, such as that of keeping a highway in repair, it was held sufficient to charge them generally, as "the inhabitants of" a certain town. Hawkins P. C. II, c. 25, § 78; 3 Bacon Abr. G, 2, p. 557.

Idem sonans see Names.

23. Turner *v.* People, 40 Ill. App. 17; Burton *v.* State, 75 Ind. 477, "Ben" may be presumed to be a full christian name.

24. See the statutes of the various states. See also Com. *v.* Kelcher, 3 Metc. (Ky.) 484, holding that under a statute providing that an error in the name of defendant shall not vitiate the indictment, the omission of the christian name of defendant is not fatal.

25. State *v.* Hand, 6 Ark. 165; Com. *v.* Briggance, 3 Ky. L. Rep. 623 (holding that where the names of two defendants appeared in the caption of an indictment, but only one of them was charged with breaking the peace by fighting with the other, and it was stated in the body of the indictment that the other joined in committing the acts as alleged, the charge was not sufficiently direct and certain); State *v.* Whitaker, 160 Mo. 59, 60 S. W. 1068; State *v.* Phelps, 65 N. C. 450. See *supra*, V, C, 1, 2.

26. Curtley *v.* State, 42 Tex. Cr. 227, 59 S. W. 44; State *v.* Maldonado, 21 Wash. 653, 59 Pac. 489.

ant by the name by which he is commonly and generally known is sufficient,[27] although it may be a nickname;[28] and a person may be indicted under his ordinary name, although it be alleged that his true name is unknown.[29] A christian name employed need not be the first, if it be the one selected by accused as that by which he will be known.[30]

3. MIDDLE NAMES.[31] Since the law knows of but one christian name, the improper insertion or omission of middle names[32] or initials of other names[33] may be disregarded.[34] The same theory has led to an indictment being held bad which set out merely the middle name.[35]

4. INITIALS. The common-law rule was that the use of initials, instead of the full christian name of defendant, was insufficient,[36] unless the accused had no other name;[37] but this rule is now departed from,[38] and especially where statutes provide for the correction of misnomer, the question has become immaterial in many jurisdictions,[39] although in some jurisdictions it must be averred that the christian name is to the jurors unknown.[40]

5. USE OF ALIAS. Where there is doubt as to which of two names is the one by which the accused is usually designated, they may be laid under an alias *dictus*, this rule applying to christian as well as surnames.[41] The incorrectness

27. *Alabama.*— Rufus *v.* State, 117 Ala. 131, 23 So. 144; Washington *v.* State, 68 Ala. 85.

Georgia.— Wiggins *v.* State, 80 Ga. 468, 5 S. E. 503.

Louisiana.— State *v.* Pierre, 39 La. Ann. 915, 3 So. 60.

Pennsylvania.— Alexander *v.* Com., 105 Pa. St. 1, as where a foreigner has assented to an English version of his name.

Tennessee.— Lewis *v.* State, 1 Head 329.

See 27 Cent. Dig. tit. "Indictment and Information," § 218.

28. Wilson *v.* State, 69 Ga. 224. And see Com. *v.* Ford, 12 Ky. L. Rep. 507.

29. De Olles *v.* State, 20 Tex. App. 145.

30. U. S. *v.* Winter, 28 Fed. Cas. No. 16,743, 13 Blatchf. 276.

31. See, generally, NAMES.

32. Pace *v.* State, 69 Ala. 231, 44 Am. Rep. 513; State *v.* Black, 12 Mo. App. 531; State *v.* Hughes, 1 Swan (Tenn.) 261. And see Rex *v.* Newman, 1 Ld. Raym. 562. *Contra*, Com. *v.* Perkins, 1 Pick. (Mass.) 388.

33. *Alabama.*— Edmundson *v.* State, 17 Ala. 179, 52 Am. Dec. 169.

Arkansas.— State *v.* Smith, 12 Ark. 622, 56 Am. Dec. 287.

Georgia.— Veal *v.* State, 116 Ga. 589, 42 S. E. 705; Timberlake *v.* State, 100 Ga. 66, 27 S. E. 158.

Iowa.— State *v.* Bowman, 78 Iowa 519, 43 N. W. 302.

Texas.— State *v.* Manning, 14 Tex. 402, transposition of middle initials.

See 27 Cent. Dig. tit. "Indictment and Information," § 219.

34. See also NAMES.

35. State *v.* Martin, 10 Mo. 391. *Contra*, People *v.* Kelly, 6 Cal. 210.

36. Gardner *v.* State, 4 Ind. 632. And see Smith *v.* State, 8 Ohio 294.

37. Charleston *v.* King, 4 McCord (S. C.) 487; Reg. *v.* Dale, 17 Q. B. 64, 15 Jur. 657, 20 L. J. M. C. 240, 5 Eng. L. & Eq. 360, 79 E. C. L. 64.

38. Eaves *v.* State, 113 Ga. 749, 39 S. E. 318; State *v.* Appleton, 70 Kan. 217, 78 Pac. 445.

39. State *v.* Webster, 30 Ark. 166; State *v.* Johnson, 93 Mo. 317, 6 S. W. 77.

40. Hewlett *v.* State, 135 Ala. 59, 33 So. 662; O'Brien *v.* State, 91 Ala. 25, 8 So. 560; Gerrish *v.* State, 53 Ala. 476 (holding that proof that defendant is well known by the initials only of his christian name does not render valid an indictment so designating him); Diggs *v.* State, 49 Ala. 311; U. S. *v.* Upham, 43 Fed. 68.

41. Haley *v.* State, 63 Ala. 89; Lee *v.* State, 55 Ala. 259; Leslie *v.* State, (Tex. Cr. App. 1898) 47 S. W. 367, holding it sufficient to give defendant's name in an indictment as "Leslie *alias* Stoval." But see *dictum* in People *v.* Maroney, 109 Cal. 277, 41 Pac. 1097, apparently holding that the use of numerous aliases may be prejudicial to defendant where the indictment is read to the jury, and should not be the custom where statutes do away with the materiality of misnomer. This case, however, held that defendant was not prejudiced by the reading of an indictment which charged his former convictions under various names, although the convictions were admitted. See also Rex *v.* Newman, 1 Ld. Raym. 562, holding an indictment of Elizabeth Newman, alias Judith Hancock, bad on the ground that a woman could not have two christian names.

The christian name need not be repeated before an alias surname. Viberg *v.* State, 138 Ala. 100, 35 So. 53, 100 Am. St. Rep. 22.

A plea in abatement that defendant had no alias is bad. Noblin *v.* State, 100 Ala. 13, 14 So. 767.

Construction of alias.— Where, in an indictment, the name of accused is given, followed by "alias" and another name, "alias" stands for "alias *dictus*," and indicates, not that the person referred to bears both names, but that he is called by one or the other. Ferguson *v.* State, 134 Ala. 63, 32 So. 760, 92 Am. St. Rep. 17.

of the alias is not material,[42] and the addition of other names under an alias will not render the indictment uncertain.[43]

6. Where Name Is Unknown. In case either the surname or the christian name of the accused is to the grand jury unknown, such fact should be stated and a fictitious name supplied.[44] In such case it should appear that the name could not have been discovered by the use of reasonable diligence,[45] and some matter of description by which accused may be identified must be averred,[46] showing that the grand jurors are able to identify the person whom they are indicting.[47] This rule, however, does not apply under some statutes where only the given name is averred to be unknown.[48] A name cannot be charged both as known and unknown.[49]

7. Additions and Descriptions. Where an offense may be committed by persons of a certain description only, defendant must be shown to have been of that description at the time of the act;[50] otherwise matter of description is unnecessary.[51] The accused need not be distinguished from other persons of a similar name.[52] While the "statute of additions,"[53] requiring the addition to be given defendant of his estate, degree, or mystery, is held by some authorities to have been adopted as a part of our common law,[54] in most jurisdictions, however, it has been abrogated or is not regarded,[55] although similar statutes have been in force in several states.[56] Where this or similar statutes are in force the degree or mystery must be stated as of the time of the indictment.[57] Where an addition is unnecessarily employed, it is held that it must be proved as laid.[58]

8. Residence. The residence of accused need not be stated save in cases where it is necessary in order to show the jurisdiction of the court in which the indictment is found.[59]

42. Barnesciotta *v.* People, 10 Hun (N. Y.) 137.

43. State *v.* Howard, 30 Mont. 518, 77 Pac. 50.

44. Jones *v.* State, 11 Ind. 357; Levy *v.* State, 6 Ind. 281; Morgan *v.* State, (Tex. Cr. App. 1903) 73 S. W. 968.

45. Geiger *v.* State, 5 Iowa 484. See also Brewer *v.* State, 18 Tex. App. 456. Variance between allegations and proof see *supra*, XI, C, 11.

46. Geiger *v.* State, 5 Iowa 484; Rex *v.* ——, R. & R. 363.

47. U. S. *v.* Doe, 127 Fed. 982.

48. Skinner *v.* State, 30 Ala. 524.

In Texas this is not the rule where merely the given name is unknown, and descriptive matter may be omitted. Wilkins *v.* State, 35 Tex. Cr. 631, 34 S. W. 958. The rule under earlier statutes was different. State *v.* Vandeveer, 21 Tex. 335; Beaumont *v.* Dallas, 34 Tex. Cr. 68, 29 S. W. 157; Victor *v.* State, 15 Tex. App. 90. See also Persqual *v.* State, (App. 1888) 8 S. W. 477; Pancho *v.* State, 25 Tex. App. 402, 8 S. W. 476; Brewer *v.* State, 18 Tex. App. 456. But *compare* Ben *v.* State, 9 Tex. App. 107; Harris *v.* State, 2 Tex. App. 102; Coney *v.* State, 2 Tex. App. 62.

49. As Douglas Jones alias Dug Jones, whose true christian name is to this grand jury unknown. Jones *v.* State, 63 Ala. 27.

50. U. S. *v.* McCormick, 28 Fed. Cas. No. 16,663, 1 Cranch C. C. 593. And see Jeffries *v.* State, 39 Ala. 655, holding that an indictment of a person as a "freedman" was sufficiently descriptive of the status of the accused, and that it need not be averred that the crime was committed before or after the accused was freed.

51. Com. *v.* Scott, 10 Gratt. (Va.) 749.

52. Steinberger *v.* State, 35 Tex. Cr. 492, 34 S. W. 617, as where a father and son bear the same name.

"Junior" need not be added. Com. *v.* Perkins, 1 Pick. (Mass.) 388. And see Rowlett *v.* Com., 3 Ky. L. Rep. 694, holding that an indictment for the murder by a woman of her stepchild, of the same name as the accused, was not insufficient for uncertainty where the accused was indicted with her husband, and wherever the crime was charged she and her husband were combined as actors in the crime.

53. 1 Hen. V, c. 5, A. D. 1413.

54. State *v.* Bishop, 15 Me. 122; Com. *v.* France, 2 Brewst. (Pa.) 568; Com. *v.* Watrous, Lack. Leg. Rec. (Pa.) 431, 1 L. T. N. S. 153. But see State *v.* Nelson, 29 Me. 329, as to effect of a later statute requiring a misstatement or omission to be prejudicial to be fatal.

55. Lanckton *v.* U. S., 18 App. Cas. (D. C.) 348; State *v.* McDowell, 6 Blackf. (Ind.) 49; State *v.* Newmans, 4 N. C. 171.

56. Com. *v.* Rucker, 14 B. Mon. (Ky.) 228; State *v.* Hughes, 2 Harr. & M. (Md.) 479; Com. *v.* Sims, 2 Va. Cas. 374; Haught *v.* Com., 2 Va. Cas. 3. *Compare* Hammond *v.* State, 14 Md. 135.

57. State *v.* Bishop, 15 Me. 122 (holding that styling defendant a "lottery vender," when his proper addition was "broker," was ground for abatement); Rex *v.* Checkets, 6 M. & S. 88.

58. State *v.* Daly, 14 R. I. 510; Rex *v.* Deeley, 4 C. & P. 579, 1 Moody C. C. 303, 19 E. C. L. 658.

59. Morgan *v.* State, 19 Ala. 556; State *v.* Daniels, 49 La. Ann. 954, 22 So. 415; Com. *v.* Taylor, 113 Mass. 1.

9. Municipal Corporations. A municipal corporation may be indicted in its own name, and not in that of its inhabitants,[60] or it may be indicted in the name of its officers as such.[61]

10. Public Officers. In indictments of public officers, as such, for malfeasance, the territorial division over which their authority extends should be so described as to distinguish them from others of like kind.[62] Members of a public board indicted for misdemeanor in office may be described as a board, although the entire membership thereof is not indicted.[63]

11. Private Corporations.[64] An indictment against a corporation should be against it in its corporate name.[65] A distinct and positive averment of its existence is generally all that is necessary, and it is not necessary to state the time and place of its becoming a corporation.[66]

12. Partners. Members of partnership should be indicted as individuals,[67] but they may be described as members of a partnership.[68]

13. Joint Defendants.[69] In the indictment of persons jointly, their names should be so separated by the use of the conjunction "and," or a similar connective, as to remove all uncertainty as to the individual names;[70] but the use of a comma may supply the omission of a connective.[71]

14. Errors in Repetition of Name. Variance in the name of defendant, as stated in other parts of the indictment, is immaterial where the name is correctly stated at the beginning of the charge and the identity of defendant meant is certain.[72]

Sufficiency of averment.— Where defendant kept a store in S where he was to be found during business hours, but lived with his family in B in the state of Maine, it was held that he was properly described as of S. State *v.* Moore, 14 N. H. 451.

60. Com. *v.* Dedham, 16 Mass. 141. See, generally, Municipal Corporations.

Change of the name of a town pending proceedings is not ground to quash an indictment. Com. *v.* Phillipsburg, 10 Mass. 78.

61. Com. *v.* Bredin, 165 Pa. St. 224, 30 Atl. 921, holding that an indictment against B, burgess, and K and others, councilmen, of the borough of L, for maintaining a nuisance, is an indictment against them in their official capacity, and not as individuals.

62. State *v.* Daniels, (Kan. 1902) 70 Pac. 635 (holding that in an information against a sheriff for misdemeanor in office, an allegation that he was a sheriff, without stating of what county, was not sufficient); Com. *v.* Brown, 23 Pa. Super. Ct. 470. See, generally, Officers.

63. Com. *v.* Ferguson, 8 Pa. Dist. 120.

64. See, generally, Corporations, 10 Cyc. 1231.

65. Reg. *v.* Birmingham, etc., R. Co., 3 Q. B. 223, 43 E. C. L. 708, 9 C. & P. 469, 38 E. C. L. 278, 2 G. & D. 236, 6 Jur. 804, 3 R. & Can. Cas. 148.

66. State *v.* Vermont Cent. R. Co., 28 Vt. 583.

67. Peterson *v.* State, 32 Tex. 477. See, generally, Partnership. Effect of indictment of partnership as individual charge see *infra*, V, M, text and note 68.

68. Barnett *v.* State, 54 Ala. 579.

69. **Joinder of defendants** see *infra*, VI.

Form of indictment generally see *infra*, V, M.

70. State *v.* Toney, 13 Tex. 74.

Use of alias.— Where the record shows the indictment of F, alias L, alias A, and an arraignment of F and L, the conviction of L cannot be sustained. State *v.* Leonard, 7 Mo. App. 571.

71. Hash *v.* Com., 88 Va. 172, 13 S. E. 398.

72. *Arkansas.*— Phillips *v.* State, 35 Ark. 384. *Compare* State *v.* Hand, 6 Ark. 165, 42 Am. Dec. 689, holding that the name of defendant should be repeated to every distinct allegation, but that it will suffice to mention it once as the nominative case in one continuing sentence.

California.— People *v.* Oliveria, 127 Cal. 376, 59 Pac. 772; People *v.* Monteith, 73 Cal. 7, 14 Pac. 373.

Indiana.— Drake *v.* State, 145 Ind. 210, 41 N. E. 799, 44 N. E. 188; O'Connor *v.* State, 97 Ind. 104; Kennedy *v.* State, 62 Ind. 136; West *v.* State, 48 Ind. 483; Dukes *v.* State, 11 Ind. 557.

Massachusetts.— Com. *v.* Robinson, 165 Mass. 426, 43 N. E. 121; Com. *v.* Hagarman, 10 Allen 401.

Tennessee.— State *v.* Brown, 3 Heisk. 1, holding that an indictment is not invalidated by an omission to repeat defendant's name in the clause, "the said, then and there having," etc.

Texas.— Musquez *v.* State, 41 Tex. 226; Bartley *v.* State, (Cr. App. 1904) 83 S. W. 190; Chessley *v.* State, (Cr. App. 1903) 74 S. W. 548; Eddison *v.* State, (Cr. App. 1903) 73 S. W. 397; Ford *v.* State, (Cr. App. 1899) 54 S. W. 761; Wampler *v.* State, 28 Tex. App. 352, 13 S. W. 144; Mayo *v.* State, 7 Tex. App. 342. But see Kinney *v.* State, 21 Tex. App. 348, 17 S. W. 423, holding that an indictment, in one part of which defendant's name is stated as "Kinney," and in another part as "McKinney," is fatally defective.

England.— Rex *v.* Morris, 1 Leach C. C. 127.

Repetition of alias.— An indictment against

H. The Gist or Substance of the Offense — **1. Necessity of Specific Statement.** From the rules of particularity and certainty already noted,[73] the indictment or information must state specifically all the facts and circumstances necessary to constitute the offense charged.[74] It is not sufficient to charge generally that defendant committed a certain offense.[75] For example, a charge of corruption in office,[76] or of extortion,[77] must state the facts in which the corruption or extortion consists. From this rule it follows that defendant cannot be charged generally with having committed a felony[78] or misdemeanor[79] without a statement of the facts and circumstances. The omission of material matter in the description of an offense cannot be supplied by a charge that the act was committed "contrary to law,"[80] or "unlawfully,"[81] or "against the peace," etc.[82] In case an offense is defined by generic terms, the species must be stated in the indictment.[83]

2. Manner and Means. The particular manner or means employed in the perpetration of the offense need not be averred,[84] unless it is the manner in which[85] or the means by which the act is done that imposes criminality,[86] or unless the means must be averred in order that it may be seen which of two or more distinct offenses is charged.[87]

3. Offenses Composed of Multiplicity of Acts. Where the charge is of a complicated nature composed of a number of minute acts, or where the offense includes a continuation of acts, it is unnecessary to set them out in the indictment.[88]

A M, which in the beginning alleges that defendant, under a certain alias, committed the crime charged, is sufficient, although in succeeding statements the alias is omitted, but defendant is described as "the said A. M." Moree *v.* State, (Tex. Cr. App. 1904) 83 S. W. 1117.

73. See *supra*, V, C.

74. *California.*— People *v.* Murphy, 39 Cal. 52.

Kentucky.— Twelve Mile Turnpike Co. *v.* Com., 4 Ky. L. Rep. 369.

Maine.— State *v.* Philbrick, 31 Me. 401.

Maryland.— State *v.* Hodges, 55 Md. 127.

Texas.— Click *v.* State, 3 Tex. 282; Gray *v.* State, 7 Tex. App. 10.

See 27 Cent. Dig. tit. "Indictment and Information," § 267.

Minute detail need not be employed. People *v.* Saviers, 14 Cal. 29; State *v.* Finley, 6 Kan. 366; Smith *v.* State, 35 Tex. 738, holding that in an indictment for theft the peculiar circumstances and facts of the case need not be set out.

75. Lamberton *v.* State, 11 Ohio 282 (resisting an officer); Walton *v.* State, 12 Tex. App. 117 (vagrancy).

76. State *v.* Zachary, 44 N. C. 432.

77. State *v.* Fields, Mart. & Y. (Tenn.) 137.

78. Johnson *v.* State, 36 Ark. 242; Lacefield *v.* State, 34 Ark. 275, 36 Am. Rep. 8. *Compare* People *v.* Beatty, 14 Cal. 566, which intimates that it is sufficient under the statute of that state to designate the offense as a felony without a more specific name. But see People *v.* Page, 1 Ida. 102, in which, although the point was not raised by an exception, the court says that it is gross error to charge that defendant was guilty of a felony instead of naming the real offense.

79. Hall *v.* State, 3 Ga. 18; Com. *v.* Castleman, 8 Ky. L. Rep. 608.

80. Bishop *v.* Com., 13 Gratt. (Va.) 785, holding that such terms serve to preclude all legal cause of excuse for the act imputed, but never to enlarge or extend the force and effect of the terms employed to describe the offense so as to make the act unlawful when it is not so by the description itself.

81. Lamberton *v.* State, 11 Ohio 282; State *v.* Owen, 4 Ohio S. & C. Pl. Dec. 163, 3 Ohio N. P. 181.

82. State *v.* Hodges, 55 Md. 127.

83. U. S. *v.* Burns, 54 Fed. 351, holding that an indictment for the obstruction of a navigable stream must be particular as to the means whereby the obstruction was caused.

84. State *v.* Ames, 64 Me. 386 (holding that in an indictment for endeavoring to persuade a witness not to attend a trial, the persuasive means used need not be averred); State *v.* Verrill, 54 Me. 408; U. S. *v.* Wentworth, 11 Fed. 52; U. S. *v.* Ballard, 24 Fed. Cas. No. 14,506.

85. State *v.* Finch, 2 Ohio Dec. (Reprint) 431, 3 West. L. Month. 82, holding that an indictment for assault under the Ohio statute must employ the phrase "in a menacing manner."

86. State *v.* Potter, 28 Iowa 554 (holding that an indictment for a conspiracy to defeat the enforcement of a law in a certain county, "with money, and other unlawful means," is insufficient in failing to state in what manner money was intended to be used, and to specify the other unlawful means); State *v.* Roberts, 34 Me. 320; Com. *v.* Shedd, 7 Cush. (Mass.) 514; Com. *v.* Eastman, 1 Cush. (Mass.) 189, 48 Am. Dec. 596.

Particular offenses see Homicide, 21 Cyc. 646; and other special titles.

Averment of illegal means in conspiracy see Conspiracy, 8 Cyc. 667.

87. Territory *v.* Carland, 6 Mont. 14, 9 Pac. 578.

88. *Alabama.*— Sterne *v.* State, 20 Ala. 43, hawking and peddling without a license.

4. Acts Criminal by Reason of Special Circumstances. When the act as to which the offense is predicated is not in itself unlawful, but becomes so by reason of other facts connected with it, such facts must be alleged.[89] So when a statute enacts that any one of a certain class of persons who shall do or omit a certain act, under certain circumstances, shall be guilty of a crime, the indictment must describe the person indicted as one of that class and aver that he did or omitted the act under the circumstances making it criminal.[90] Where an indictment is based upon violation of a duty imposed against common right, it is necessary to state specifically the facts upon which such duty arises, unless it is imposed by a law or circumstances of which the court will take judicial notice.[91] For example, where a corporation is indicted for failure to maintain a ferry, it must be shown how defendant, under its charter, became subject to the duty.[92]

5. Knowledge, Notice, and Request — a. Necessity of Averment of Knowledge. Where a particular knowledge is essential to the commission of an offense, it must be averred that accused had such knowledge,[93] unless the statement of the act itself necessarily implies a knowledge of its illegality.[94] So where knowledge

Massachusetts.— Com. *v.* Pray, 13 Pick. 359, selling liquor without a license.

Missouri.— State *v.* Van Wye, 136 Mo. 227, 37 S. W. 938, 58 Am. St. Rep. 627, disseminating paper devoted to scandals. But see State *v.* Bennett, (1889) 11 S. W. 264, holding that an information charging that defendant, at divers times between certain dates, "did enter upon and exercise and continue the exercise and practice of the business, avocation, or profession of a private detective," without a license, without stating any facts to show in what way he acted as such, is fatally defective.

New Hampshire.— State *v.* Dowers, 45 N. H. 543 (common night-walker); State *v.* Prescott, 33 N. H. 212 (keeping gaming-house).

United States.— U. S. *v.* Simmons, 96 U. S. 360, 24 L. ed. 819 (illicit distilling); U. S. *v.* Ford, 34 Fed. 26; U. S. *v.* Gooding, 12 Wheat. 460, 6 L. ed. 693 (fitting out slave vessel); U. S. *v.* Howard, 26 Fed. Cas. No. 15,402, 1 Sawy. 507 (business of liquor dealer without a license).

England.— Rex *v.* Higginson, 2 Burr. 1232, keeping disorderly house.

See 27 Cent. Dig. tit. "Indictment and Information," § 267.

But *compare* Com. *v.* Miller, 2 Pars. Eq. Cas. (Pa.) 480 (holding an indictment for election frauds in altering tally lists not within the rule); State *v.* Johnson, 1 D. Chipm. (Vt.) 129 (holding that an information for being a common cheat, etc., is not sufficient, without charging the particular acts)

89. Cearfoss *v.* State, 42 Md. 403; Com. *v.* Beerbrower, 3 Pa. L. J. Rep. 404, 5 Pa. L. J. 426; Com. *v.* Clark, 2 Ashm. (Pa.) 405; Pearce *v.* State, 1 Sneed (Tenn.) 63, 60 Am. Dec. 135.

An indictment for refusal to obey a subpœna must show the authority under which it was issued. U. S. *v.* Cover, 46 Fed. 284.

In indictments for official misconduct, the holding of the office should be specifically charged. Shanks *v.* State, 51 Miss. 464.

90. State *v.* Sloan, 67 N. C. 357.

91. State *v.* Middlesex, etc., Traction Co., (N. J. Sup. 1901) 50 Atl. 354; State *v.* Haddonfield, etc., Turnpike Co., 65 N. J. L. 97, 46 Atl. 700; State *v.* New Jersey Turnpike Co., 16 N. J. L. 222; State *v.* Hageman, 13 N. J. L. 314; Rex *v.* Great Broughton, 5 Burr. 2700 (to the same effect); Rex *v.* Hollond, 5 T. R. 607; Rex *v.* Penderryn, 2 T. R. 513 (presentment to charge part of a parish only with the repairs of a road).

92. State *v.* Wilmington, etc., R. Co., 44 N. C. 234.

Indictments of corporations for neglect of charter duties see Corporations, 10 Cyc. 1225.

93. *Alabama.*— Stein *v.* State, 37 Ala. 123, holding that an indictment of one who had contracted to furnish water to a city, for furnishing unwholesome and poisonous water, must aver that the water was furnished with knowledge of its quality.

Arkansas.— See State *v.* Graham, 38 Ark. 519.

Kentucky.— Com. *v.* Stout, 7 B. Mon. 247.

Ohio.— Birney *v.* State, 8 Ohio 230; Anderson *v.* State, 7 Ohio, Pt. II, 250, holding that an indictment for aiding the utterance of a false certificate of deposit must aver that accused knew its falsity.

Virginia.— Com. *v.* Israel, 4 Leigh 675.

England.— Rex *v.* Bunce, Andr. 162; Rex *v.* Rushworth, R. & R. 235, 2 E. C. L. 153, uttering forged instrument.

See 27 Cent. Dig. tit. "Indictment and Information," § 259.

94. *Illinois.*— Eells *v.* People, 5 Ill. 498; Chambers *v.* People, 5 Ill. 351, both holding that in an indictment for "harboring and secreting" a slave it was unnecessary to allege a scienter, as the words "harbor" and "secrete" implied an intention to defraud the owner, which was the essence of the offense.

Kentucky.— Com. *v.* Stout, 7 B. Mon. 247.

Ohio.— State *v.* Carson, 2 Ohio Dec. (Reprint) 81, 1 West. L. Month. 333. *Compare* Birney *v.* State, 8 Ohio 230.

South Carolina.— State *v.* Brown, 2 Speers 129.

is part of a statutory description of an offense it must be alleged,[95] although it is otherwise when a statute prohibits generally and is silent as to knowledge,[96] or where the gist of the offense is neglect or carelessness.[97] Under these rules guilty knowledge must be averred in indictments for uttering forged instruments,[98] or obtaining property under false pretenses,[99] or illegal voting,[1] or, in some jurisdictions, but not in all, sale of liquor to minors,[2] or obstructing an officer,[3] or sale of unwholesome food,[4] and many similar offenses,[5] unless, under the particular statute, lack of knowledge on the part of defendant is no defense.[6] When a man commits an offense, and in pursuing his criminal purpose does that which constitutes another and different offense, it seems that it is not necessary to aver a guilty knowledge as to the resulting offense.[7]

b. Sufficiency of Averment of Knowledge. The word "knowingly"[8] or equivalent words clearly showing that defendant knew the facts constituting the

Vermont.— State *v.* Carpenter, 20 Vt. 9.

United States.— U. S. *v.* Jolly, 37 Fed. 108 [*distinguishing* U. S. *v.* Carll, 105 U. S. 611, 26 L. ed. 1135]; U. S. *v.* Schuler, 27 Fed. Cas. No. 16,234, 6 McLean 28.

See 27 Cent. Dig. tit. "Indictment and Information," § 259.

95. *Alabama.*— Davis *v.* State, 68 Ala. 58, 44 Am. Rep. 128.

California.— People *v.* Smith, 103 Cal. 563, 37 Pac. 516; People *v.* Mitchell, 92 Cal. 590, 28 Pac. 597.

Indiana.— Powers *v.* State, 87 Ind. 97.

Massachusetts.— Com. *v.* Boynton, 12 Cush. 499.

Mississippi.— Gates *v.* State, 71 Miss. 874, 16 So. 342.

Ohio.— Rich *v.* State, 8 Ohio 111; Gatewood *v.* State, 4 Ohio 386; Jacoby *v.* State, 6 Ohio Dec. (Reprint) 705, 7 Am. L. Rec. 477, 3 Cinc. L. Bul. 1145; State *v.* Carson, 2 Ohio Dec. (Reprint) 81, 1 West. L. Month. 333.

Virginia.— Bailey *v.* Com., 78 Va. 19.

United States.— U. S. *v.* Carll, 105 U. S. 611, 26 L. ed. 1135 (uttering counterfeit bank-note); U. S. *v.* Watkinds, 6 Fed. 152, 7 Sawy. 85.

England.— Reg. *v.* Philpotts, 1 C. & K. 112, 47 E. C. L. 112; Rex *v.* Jakes, 8 T. R. 536, 5 Rev. Rep. 445.

See 27 Cent. Dig. tit. "Indictment and Information," § 259.

Contra.— Robeson *v.* State, 3 Heisk. (Tenn.) 266, holding that under a statute prohibiting intermarriage of whites and negroes and imposing a penalty for knowingly violating its provisions, an indictment need not aver that the act charged was done knowingly, that being a matter of proof.

96. *Massachusetts.*— Com. *v.* Raymond, 97 Mass. 567.

Ohio.— Haas *v.* State, 2 Ohio S. & C. Pl. Dec. 177, 1 Ohio N. P. 248 [*distinguishing* Birney *v.* State, 8 Ohio 230], holding that in a prosecution for selling adulterated food, defendant's knowledge or intent in making the sale is matter of defense and need not be set out in the indictment.

South Carolina.— State *v.* Thomas, 3 Strobh. 269.

Texas.— State *v.* West, 10 Tex. 553.

United States.— U. S. *v.* Malone, 9 Fed. 897, 20 Blatchf. 137; U. S. *v.* Smith, 27 Fed. Cas. No. 16,338, 2 Mason 143.

See 27 Cent. Dig. tit. "Indictment and Information," § 259.

97. Stein *v.* State, 37 Ala. 123.

98. People *v.* Smith, 103 Cal. 563, 37 Pac. 516; People *v.* Mitchell, 92 Cal. 590, 28 Pac. 597; Powers *v.* State, 87 Ind. 97; Gates *v.* State, 71 Miss. 874, 16 So. 342; U. S. *v.* Carll, 105 U. S. 611, 26 L. ed. 1135. See FORGERY, 19 Cyc. 1409.

99. People *v.* Behee, 90 Mich. 356, 51 N. W. 515. See FALSE PRETENSES, 19 Cyc. 436.

1. U. S. *v.* Watkinds, 6 Fed. 152, 7 Sawy. 85. See ELECTIONS, 15 Cyc. 453.

2. Aultfather *v.* State, 4 Ohio St. 467; Miller *v.* State, 3 Ohio St. 475. See, generally, INTOXICATING LIQUORS.

3. *Massachusetts.*— Com. *v.* Kirby, 2 Cush. 577. But *compare* Com. *v.* Caldwell, 14 Mass. 330, holding that knowledge need not be averred in an indictment for refusal to answer a tithingman on the Lord's day.

Missouri.— State *v.* Hilton, 26 Mo. 199.

Rhode Island.— State *v.* Maloney, 12 R. I. 251.

Texas.— Horan *v.* State, 7 Tex. App. 183.

Vermont.— State *v.* Downer, 8 Vt. 424, 30 Am. Dec. 482.

United States.— U. S. *v.* Tinklepaugh, 28 Fed. Cas. No. 16,526, 3 Blatchf. 425.

See, generally, OBSTRUCTING JUSTICE.

4. Schmidt *v.* State, 78 Ind. 41; Com. *v.* Boynton, 12 Cush. (Mass.) 499. See FOOD, 19 Cyc. 1100.

5. Davis *v.* State, 68 Ala. 58, 44 Am. Rep. 128 (transporting cotton at night); Jacoby *v.* State, 6 Ohio Dec. (Reprint) 705, 7 Am. L. Rec. 477, 3 Cinc. L. Bul. 1145 (sending a false or fraudulent telegram).

6. See CRIMINAL LAW, 12 Cyc. 158.

7. Com. *v.* Elwell, 2 Metc. (Mass.) 190, 35 Am. Dec. 398, holding that an indictment of an unmarried man for adultery need not aver that he knew the woman with whom the offense was committed was married.

Knowledge of age of female as determining whether act is punishable as rape see RAPE.

Knowledge as element of negligent homicide see HOMICIDE, 21 Cyc. 840, text and note 72.

8. Com. *v.* Kirby, 2 Cush. (Mass.) 577.

gist of the offense form a sufficient averment of knowledge;[9] but the averment must be clearly referable to the facts as to which knowledge is essential.[10]

c. Necessity of Averring Notice and Request or Demand. In those cases in which the violation of a duty based upon notice is the gist of the offense, the giving of the notice must be averred.[11] The same rule applies where a request or demand is necessary to raise the duty.[12] Where a public officer is charged with breach of a duty arising from certain facts which, from his position, he will be presumed to know, it is not necessary to aver notice of such facts.[13]

6. INTENT — a. Necessity of Allegation of Intent. Although an evil or malicious mind or will is necessary to the commission of most offenses, it is not necessary in all cases to aver a guilty intent as a substantive part of the crime in giving its technical description in an indictment or information.[14] In those cases in which the act necessarily includes the intent, it is sufficient to aver the act in apt and technical terms and the intent will be inferred.[15] But where the common law or statute makes a particular intention essential, or there is an attempt, not accomplished, to do a criminal act, and the evil intent only can be punished, it is then necessary to allege the intent with directness and precision,[16] although there are cases in which an attempt to commit a wilful and malicious crime imports *ex vi termini* an intent to commit that crime.[17] A specific intent which is made part of the offense by the statute creating it must be charged;[18] as where the intent

9. Com. *v.* Hulbert, 12 Metc. (Mass.) 446 (holding that an indictment that defendant "designedly and unlawfully did falsely pretend," was good without the word "knowingly"); Rex *v.* Lawley, 2 Str. 904.

Other illustrations.— An averment that defendant "secretly" kept counterfeiting instruments. Sutton *v.* State, 9 Ohio 133. "Well knowing that the said horses had been feloniously taken and carried away" alleges knowledge of a larceny in an indictment for receipt of stolen goods. Huggins *v.* State, 41 Ala. 393. "Advisedly" is equivalent to "knowingly" (Rex *v.* Fuller, 1 B. & P. 180); although "unlawfully" or "feloniously" is not (Com. *v.* Taylor, 96 Ky. 394, 29 S. W. 138, 16 Ky. L. Rep. 482); nor is "willingly" equivalent to "wittingly" (Harrington *v.* State, 54 Miss. 490).

10. Com. *v.* Merriam, 7 Allen (Mass.) 356 (knowingly received stolen goods not sufficient); Com. *v.* Boynton, 12 Cush. (Mass.) 499 (charge that defendant did knowingly sell unwholesome meat not equivalent to a charge that he sold meat knowing it to be unwholesome); U. S. *v.* Nathan, 61 Fed. 936; U. S. *v.* Clark, 37 Fed. 106 (both holding that where an indictment charges that defendant "knowingly deposited in the post office the obscene matter," the word "knowingly" qualifies the whole act charged, and it is not necessary to allege that he knew the matter to be obscene). And see Reg. *v.* Larkin, 2 C. L. R. 775, 6 Cox C. C. 377, Dears. C. C. 365, 18 Jur. 539, 23 L. J. M. C. 125, 2 Wkly. Rep. 496, holding that an error in laying the scienter to the owner instead of the recipient of stolen property was not amendable after verdict.

11. State *v.* Lemay, 13 Ark. 405 (neglect to remove an obstruction in a highway after notice); Crouther's Case, Cro. Eliz. 654.

12. State *v.* Munch, 22 Minn. 67 (holding that an indictment under the statute making it embezzlement for a public officer to refuse to pay over to a successor public moneys on demand was defective where it failed to allege such demand); Rex *v.* Kingston, 8 East 41, 9 Rev. Rep. 373; Rex *v.* Fearnley, 1 T. R. 316. And see Reg. *v.* Crossley, 10 A. & E. 132, 3 Jur. 675, 8 L. J. M. C. 81, 2 P. & D. 319, 37 E. C. L. 91.

Necessity of demand in embezzlement see EMBEZZLEMENT, 15 Cyc. 521, 522.

13. Rex *v.* Hollond, 5 T. R. 607.

14. Stein *v.* State, 37 Ala. 123; Com. *v.* Hersey, 2 Allen (Mass.) 173; Rex *v.* Philipps, 6 East 464, 2 Smith K. B. 550, 8 Rev. Rep. 511. *Contra*, U. S. *v.* Alaska Packers' Assoc., 1 Alaska 217.

15. People *v.* Butler, 1 Ida. 231; Com. *v.* Hersey, 2 Allen (Mass.) 173; Tomkins *v.* State, 33 Tex. 228; Rex *v.* Philipps, 6 East 464, 2 Smith K. B. 550, 8 Rev. Rep. 511.

16. Com. *v.* Hersey, 2 Allen (Mass.) 173.

17. Com. *v.* McLaughlin, 105 Mass. 460.

18. *Alabama.*— Davis *v.* State, 68 Ala. 58, 44 Am. Rep. 128.

Arkansas.— State *v.* Eldridge, 12 Ark. 608; Gahe *v.* State, 6 Ark. 519.

Illinois.— McCutcheon *v.* People, 69 Ill. 601.

Michigan.— Wilson *v.* People, 24 Mich. 410.

Minnesota.— State *v.* Ullman, 5 Minn. 13.

New Hampshire.— State *v.* Gove, 34 N. H. 510.

New York.— People *v.* Lohman, 2 Barb. 216; People *v.* Enoch, 13 Wend. 159, 27 Am. Dec. 197.

Tennessee.— Vaughn *v.* State, 3 Coldw. 102.

Texas.— Johnson *v.* State, 1 Tex. App. 146.

United States.— U. S. *v.* Jackson, 25 Fed. 548. And see U. S. *v.* Jackson, 2 Fed. 502.

See 27 Cent. Dig. tit. "Indictment and Information," § 256.

with which an act is done brings it within a statute punishing as a felony that which at common law was but a misdemeanor,[19] or where an act is criminal only if done with a particular intent.[20] So where the act forbidden by a statute is not necessarily criminal, and there are no express words in the statute making it so, there must be a charge in the indictment that it was committed with an evil intent or wilfully.[21] As a rule, if the statute creating the offense is silent concerning the intent, no intent need be alleged.[22] In indictments of principals in the second degree or accessaries before the fact in case of crimes requiring a specific intent, it is necessary to ascribe that intent to the acts of the principal in the second degree or accessary in aiding, abetting, inciting, etc.[23]

b. Wilful or Malicious Nature of Act. In all cases of felony in which malice is the gist of the offense, the malice must be averred in the indictment.[24] This is the case whether the offense exist at common law, or be one of statutory creation,[25] and it is not necessary that the malicious intent be made an essential ingredient in the constitution of an offense created by statute by the express words of the act.[26]

c. Sufficiency of Allegations of Intent. It is sufficient to state in general and appropriate words the intent essential to the existence of the particular crime charged.[27] Where the intent is described in a statute by different terms, stated disjunctively, the indictment may employ them all conjunctively.[28] In charging an intent to defraud, it is not necessary to set out the evidentiary facts going to prove the intent by which the fraud was to be effected.[29] The word "wilfully" is not of necessity inserted in the accusatory part of the indictment.[30] Statutes frequently employ such words as "wilfully" or "maliciously" as descriptive of the offense, in which case such words must be employed in the indictment,[31] or words of equivalent import.[32] It has been held that words which

19. State *v.* Elborn, 27 Md. 483.

20. State *v.* Freeman, 6 Blackf. (Ind.) 248; State *v.* Malloy, 34 N. J. L. 410.

21. Harrington *v.* State, 54 Miss. 490; State *v.* Startup, 39 N. J. L. 423.

22. *Colorado.*— Harding *v.* People, 10 Colo. 387, 15 Pac. 727.

Idaho.— State *v.* Keller, 8 Ida. 699, 70 Pac. 1051.

Illinois.— Bolan *v.* People, 184 Ill. 338, 56 N. E. 408; McCutcheon *v.* People, 69 Ill. 601.

New York.— People *v.* Webster, 17 Misc. 410, 40 N. Y. Suppl. 1135, 11 N. Y. Cr. 340.

Rhode Island.— State *v.* Smith, 17 R. I. 371, 22 Atl. 282.

See 27 Cent. Dig. tit. "Indictment and Information," § 256.

23. Com. *v.* Adams, 127 Mass. 15; State *v.* Scran, 28 N. J. L. 519 (holding that an indictment which charged that defendant did feloniously, etc., incite, move, etc., the convicted person to the commission of said felony, etc., is defective in not alleging any guilty knowledge or any intent to defraud on the part of defendant); Williams *v.* State, 42 Tex. 392. But see Hotelling *v.* State, 3 Ohio Cir. Ct. 630, 2 Ohio Cir. Dec. 366. See CRIMINAL LAW, 12 Cyc. 189, 191.

24. U. S. *v.* Gideon, 1 Minn. 292; Maxwell *v.* State, 68 Miss. 339, 8 So. 546; Sarah *v.* State, 28 Miss. 267, 61 Am. Dec. 544; Jesse *v.* State, 28 Miss. 100; Boyd *v.* State, 2 Humphr. (Tenn.) 39; Minton's Case, 2 East P. C. 1021. See ARSON, 3 Cyc. 995; HOMICIDE, 21 Cyc. 852; MALICIOUS MISCHIEF; and like special titles.

25. Sarah *v.* State, 28 Miss. 267, 61 Am. Dec. 544; and other cases cited in the preceding note.

26. Sarah *v.* State, 28 Miss. 267, 61 Am. Dec. 544.

27. Garmire *v.* State, 104 Ind. 444, 4 N. E. 54; State *v.* Miller, 98 Ind. 70.

Indictments for particular offenses see ARSON, 3 Cyc. 995; BURGLARY, 6 Cyc. 216; HOMICIDE, 21 Cyc. 849; and other special titles.

Prosecution for driving cattle from range see ANIMALS, 2 Cyc. 356.

28. People *v.* Ah Woo, 28 Cal. 205.

29. State *v.* Beach, 147 Ind. 74, 43 N. E. 949, 46 N. E. 145, 36 L. R. A. 179 (holding that under a statute making it an offense to do an act "fraudulently," an indictment charging the offense in the language of the statute is sufficient, without setting out the facts constituting the fraud); McCarty *v.* U. S., 101 Fed. 113, 41 C. C. A. 242 (counterfeiting); U. S. *v.* Ulrici, 28 Fed. Cas. No. 16,594, 3 Dill. 532.

Indictments for particular offenses see FALSE PRETENSES, 19 Cyc. 436; FORGERY, 19 Cyc. 1395; and other special titles.

30. Toler *v.* Com., 94 Ky. 529, 23 S. W. 347, 15 Ky. L. Rep. 292, holding that it was sufficient where "wilfully" was used as to the mode of committing the offense. *Compare* People *v.* Turner, 122 Cal. 679, 55 Pac. 685.

31. State *v.* Gove, 34 N. H. 510.

32. Harrington *v.* State, 54 Miss. 490, holding, however, that charging the offense to have been done "willingly," under a statute punishing it if done "wittingly," did not convey substantially the same meaning.

import an exercise of the will will take the place of the word "wilfully."[33] As a general rule the lack of consent of the person injured need not be averred.[34]

7. Felonious or Otherwise Unlawful Nature of Act — a. Necessity of Charging Act to Have Been Felonious. In general, in all indictments for felonies, the criminal act must be alleged to have been feloniously done,[35] unless the necessity has been removed by statute.[36] This is true, although the act was not a felony at common law, and is made so by statute,[37] unless by statute it is provided that the common-law form of indictment may be retained.[38] In some states it is now held that the term "felony," having lost its ancient English signification and acquired the meaning of a crime punishable by death or imprisonment in a state prison, the reason for the rule requiring the use of the word "feloniously" has

Sufficiency of equivalents.— "Feloniously and unlawfully," or "feloniously, unlawfully, and wilfully" are not equivalent to "wilfully and maliciously" (State *v.* Gove, 34 N. H. 510); nor "unlawfully" to "wilfully" (State *v.* Hussey, 60 Me. 410, 11 Am. Rep. 206; Morrow *v.* State, 10 Humphr. (Tenn.) 120); nor "feloniously and unlawfully" to "wilfully" (State *v.* Delue, 2 Pinn. (Wis.) 204, 1 Chandl. 166); nor "wilfully" to "maliciously" (Herrold *v.* Com., 6 S. W. 121, 9 Ky. L. Rep. 677); nor "unlawfully and injuriously" to "fraudulently" (Duff *v.* Com., 92 Va. 769, 23 S. E. 643). Maliciously is included by "unlawfully, wilfully, purposely, and feloniously." Whitman *v.* State, 17 Nebr. 224, 22 N. W. 459.

33. Flint *v.* Com., 81 Ky. 186, 23 S. W. 346, 5 Ky. L. Rep. 51 (holding that the words "unlawfully, feloniously, and maliciously, with intent to kill" were sufficient); Young *v.* Com., 12 Bush (Ky.) 243; Aikeman *v.* Com., 18 S. W. 937, 13 Ky. L. Rep. 894 (both holding that "feloniously" includes "maliciously and unlawfully"); State *v.* Robbins, 66 Me. 324; Funderburk *v.* State, 75 Miss. 20, 21 So. 658 (both holding that "maliciously" includes "wilfully"). But see Barthelow *v.* State, 26 Tex. 175, holding that "did unlawfully, voluntarily and unjustly permit," was not equivalent to "wilfully permit."

34. Com. *v.* Curley, 3 Ky. L. Rep. 331, indictment for cutting and carrying away timber.

Particular offenses see Larceny; Rape; Robbery; and other special titles.

35. *Arkansas.*— Edwards *v.* State, 25 Ark. 444; Milan *v.* State, 24 Ark. 346.

Delaware.— State *v.* Brister, Houst. Cr. Cas. 150.

Indiana.— Sovine *v.* State, 85 Ind. 576.

Kentucky.— Hall *v.* Com., 26 S. W. 8, 15 Ky. L. Rep. 856.

Mississippi.— Bowler *v.* State, 41 Miss. 570.

Missouri.— State *v.* Doyle, 107 Mo. 36, 17 S. W. 751; State *v.* Feaster, 25 Mo. 324; State *v.* Gilbert, 24 Mo. 380; Jane *v.* State, 3 Mo. 61.

North Carolina.— State *v.* Taylor, 131 N. C. 711, 42 S. E. 539; State *v.* Wilson, 116 N. C. 979, 21 S. E. 692; State *v.* Skidmore, 109 N. C. 795, 14 S. E. 63; State *v.* Rucker, 68 N. C. 211; State *v.* Purdie, 67 N. C. 25; State *v.* Jesse, 19 N. C. 297.

Pennsylvania.— Respublica *v.* Honeyman, 2 Dall. 228, 1 L. ed. 359.

Rhode Island.— State *v.* Murphy, 17 R. I. 698, 24 Atl. 473, 16 L. R. A. 550, holding that in the absence of any statutory provision as to what constitutes a felony or as to the form of an indictment, the word "feloniously" must be used in all cases where the offense charged was a felony at common law.

Texas.— State *v.* Small, 31 Tex. 184; Cain *v.* State, 18 Tex. 387.

Virginia.— Randall *v.* Com., 24 Gratt. 644.

West Virginia.— State *v.* Whitt, 39 W. Va. 468, 19 S. E. 873.

England.— Reg. *v.* Gray, 9 Cox C. C. 417, 10 Jur. N. S. 160, L. & C. 365, 33 L. J. M. C. 78, 9 L. T. Rep. N. S. 733, 12 Wkly. Rep. 350.

See 27 Cent. Dig. tit. "Indictment and Information," § 262.

Prosecution for abduction see Abduction, 1 Cyc. 155 note 83.

36. Com. *v.* Sholes, 13 Allen (Mass.) 554; Com. *v.* Jackson, 15 Gray (Mass.) 187, both applying the Massachusetts statute providing that no indictment shall be quashed or deemed invalid by reason of the omission of the word "felony," "felonious," or "feloniously."

37. *Arkansas.*— Nelson *v.* State, 32 Ark. 192.

Mississippi.— Wile *v.* State, 60 Miss. 260.

Missouri.— State *v.* Clayton, 100 Mo. 516, 13 S. W. 819, 18 Am. St. Rep. 565; State *v.* Deffenbacher, 51 Mo. 26; State *v.* Terry, 30 Mo. 368; State *v.* Williams, 30 Mo. 364; State *v.* Murdock, 9 Mo. 739.

North Carolina.— State *v.* Shaw, 117 N. C. 764, 23 S. E. 246.

Tennessee.— Nevills *v.* State, 7 Coldw. 78.

See 27 Cent. Dig. tit. "Indictment and Information," § 263.

Contra.— The use of the word "feloniously" is required in Louisiana only when it is used in the statute to describe the crime, or the statute refers to a common-law offense by name only and its use was essential to a proper description of the offense at common law. State *v.* Matlock, 48 La. Ann. 663, 19 So. 669.

38. Butler *v.* State, 22 Ala. 43; Beasley *v.* State, 18 Ala. 535 (providing indictment may follow the common law); Peck *v.* State, 2 Humphr. (Tenn.) 78.

ceased, and with it the necessity of such employment;[39] and it has been said that where, under the statute defining an offense, felonious intent is made no part of the crime, but the crime is complete without it and depends upon another and different criminal intent, it is not necessary to aver that the act was feloniously done.[40] In some jurisdictions it is held under statutes abolishing technicality of criminal pleading that "feloniously" need not be employed in an indictment where it is omitted from the statutory definition of the offense.[41] In others it is held still necessary wherever the offense is a felony.[42] An indictment of an accessary to a felony must allege that he "feloniously" aided and abetted,[43] and in charging a conspiracy to commit a felony, the word "feloniously" must be employed to characterize the intended act.[44] "Feloniously" need not be laid to matters of proof which may be omitted from the indictment[45] or to matter of aggravation.[46]

b. Necessity of Charging That Act Was Unlawful. Unlawfulness, when an essential element of the definition of the offense, must be averred either expressly or by the use of such terms or such a statement of facts as conclusively imply it;[47] but where the term is not contained in the definition of a statutory offense, it need not be employed in an indictment.[48]

c. Sufficiency of Averment. The word "feloniously" alone is regarded as sufficient to express a felonious intent and must be employed,[49] although "with

39. State *v.* Felch, 58 N. H. 1. And see Northington *v.* State, 14 Lea (Tenn.) 424 [*disapproving* Williams *v.* State, 8 Humphr. (Tenn.) 585].

40. Bannon *v.* U. S., 156 U. S. 464, 15 S. Ct. 467, 39 L. ed. 494; U. S. *v.* Staats, 8 How. (U. S.) 41, 12 L. ed. 979. And see to the same effect State *v.* Eldridge, 12 Ark. 608. *Compare*, however, later Arkansas cases cited *supra*, notes 35, 37.

41. *California.*— People *v.* Olivera, 7 Cal. 403; People *v.* Parsons, 6 Cal. 487.

Colorado.— Cohen *v.* People, 7 Colo. 274, 3 Pac. 385.

Iowa.— State *v.* Griffin, 79 Iowa 568, 44 N. W. 813. *Compare* State *v.* Hutchinson, 95 Iowa 566, 64 N. W. 610.

Kentucky.— Jane *v.* Com., 3 Metc. 18; Collier *v.* Com., 62 S. W. 4, 22 Ky. L. Rep. 1929.

Louisiana.— State *v.* Grandison, 49 La. Ann. 1012, 22 So. 308; State *v.* Benjamin, 7 La. Ann. 47.

Minnesota.— State *v.* Garvey, 11 Minn. 154.

Nebraska.— Reno *v.* State, (1903) 95 N. W. 1042; Richards *v.* State, 65 Nebr. 808, 91 N. W. 878; Wagner *v.* State, 43 Nebr. 1, 61 N. W. 85.

Oregon.— O'Kelly *v.* Territory, 1 Oreg. 51.

South Carolina.— State *v.* Allen, 56 S. C. 495, 35 S. E. 204.

Washington.— Watts *v.* Territory, 1 Wash. Terr. 409, homicide.

See 27 Cent. Dig. tit. "Indictment and Information," § 262.

The rule does not extend to common-law crimes which the statute does not define, but of which it simply fixes the punishment (Ervington *v.* People, 181 Ill. 408, 54 N. E. 981; Curtis *v.* People, 1 Ill. 256; Kaelin *v.* Com., 84 Ky. 354, 1 S. W. 594, 8 Ky. L. Rep. 293 (murder); Stroud *v.* Com., 19 S. W. 976, 14 Ky. L. Rep. 179, murder); but is confined to offenses created by statute (Bolen *v.* People, 184 Ill. 338, 56 N. E. 408). And *compare* Quigley *v.* People, 3 Ill. 301.

42. Mott *v.* State, 29 Ark. 147; State *v.* Roper, 88 N. C. 656; State *v.* Murphy, 17 R. I. 698, 24 Atl. 473, 16 L. R. A. 550.

43. State *v.* Hang Tong, 115 Mo. 389, 22 S. W. 381.

44. Scudder *v.* State, 62 Ind. 13, holding that an indictment charging a conspiracy to burglarize with intent to steal is not sufficient where the word "feloniously" is not used to qualify the word "steal."

45. State *v.* Doyle, 107 Mo. 36, 17 S. W. 751 [*distinguishing* State *v.* Feaster, 25 Mo. 324, and State *v.* Davis, 29 Mo. 391], so holding with regard to the means with which an assault was made. But see Respublica *v.* Honeyman, 2 Dall. (Pa.) 228, 1 L. ed. 359, holding that in an indictment for murder it was not sufficient to allege that the assault was felonious without applying the word to the kicking, striking, etc., which were the efficient cause of death.

46. Stout *v.* Com., 11 Serg. & R. (Pa.) 177, holding that the omission of the word "feloniously" does not vitiate an indictment for assault with intent to rape.

47. Sims *v.* State, 135 Ala. 61, 33 So. 162; Henry *v.* State, 33 Ala. 389 (holding that an indictment charging that a slave killed a white person "intentionally, but without malice," was not good, although the code dispensed with the averment of "presumptions of law"); State *v.* Hodges, 55 Md. 127.

48. State *v.* Murphy, 43 Ark. 178; Capps *v.* State, 4 Iowa 502; U. S. *v.* Thompson, 28 Fed. Cas. No. 16,490, 6 McLean 56.

49. Edwards *v.* State, 25 Ark. 444; and other cases cited *supra*, V, H, 7, a. *Compare* Fairlee *v.* People, 11 Ill. 1; State *v.* Buford, 52 La. Ann. 539, 26 So. 991.

intent to commit a felony" has been held equivalent to "feloniously."[50] The word must be laid to the act constituting the gravamen of the offense.[51] It has been held that "feloniously," used to characterize an assault, cannot be referred to the crime intended to be committed.[52] "Unlawfully" is included by "feloniously"[53] or by "injuriously and wrongfully,"[54] and has been held to be equivalent to "without authority of law."[55]

d. Effect of Charging Misdemeanor as a Felony. The more general rule now is that the insertion of the word "feloniously" in a charge of a misdemeanor is harmless,[56] although the indictment is held bad in some jurisdictions.[57]

8. Statutory Offenses — a. General Rules. When the elements of an offense are the same by common law and by statute, the indictment may as a general rule follow either;[58] but whichever form is adopted, it must comply with the tests applicable thereto.[59] A common-law indictment, to support a statutory offense, however, must describe the elements of the statutory offense.[60] An indictment which is good under one statute is not demurrable, although the prosecution elects to proceed under another statute under which the indictment is not good.[61] An indictment may be sustained if charging an offense under any existing statute, although it was the intention of the prosecutor to prefer an indictment under

50. Dillard *v.* State, 3 Heisk. (Tenn.) 260.

51. State *v.* Turley, 142 Mo. 403, 44 S. W. 267 (holding that an indictment alleging that defendant, with intent to defraud, did feloniously make certain false pretenses, was not sufficient, as failing to allege that defendant feloniously intended to defraud); State *v.* Brown, 8 Nev. 208 (holding that it must appear that where stolen property has been brought within the county, the bringing of it therein was felonious).

52. State *v.* Scott, 72 N. C. 461.

53. Franklin *v.* State, 108 Ind. 47, 8 N. E. 695. But see State *v.* Boggs, 4 Pennew. (Del.) 95, 53 Atl. 360, holding that an indictment under a statute providing that any person who shall lawfully and wilfully break and enter the dwelling-house of another, etc., shall be deemed guilty of a misdemeanor, which alleged that the breaking was felonious, but failed to allege that it was "unlawfully or wilfully" done, was fatally defective. An indictment for an assault with intent, etc., must use, in describing the crime intended, the word "unlawfully," which enters into the statutory description, or some other equivalent word, such as "feloniously." Greer *v.* State, 50 Ind. 267, 19 Am. Rep. 709.

54. State *v.* Vermont Cent. R. Co., 27 Vt. 103.

55. Schley *v.* State, 48 Fla. 53, 37 So. 518

56. *Indiana.* — State *v.* Sparks, 78 Ind. 166.

Massachusetts. — Com. *v.* Philpot, 130 Mass. 59; Com. *v.* Squire, 1 Metc. 258 [*overruling* Com. *v.* Newell, 7 Mass. 245].

Minnesota. — State *v.* Crummey, 17 Minn. 72; State *v.* Hogard, 12 Minn. 293.

New York. — Lohman *v.* People, 1 N. Y. 379, 49 Am. Dec. 340 [*affirming* 2 Barb. 216].

North Carolina. — State *v.* Edwards, 90 N. C. 710; State *v.* Staton, 88 N. C. 654; State *v.* Watts, 82 N. C. 656; State *v.* Slagle, 82 N. C. 653; State *v.* Upchurch, 31 N. C. 454.

Ohio. — Hess *v.* State, 5 Ohio 5, 22 Am. Dec. 767.

South Carolina. — State *v.* Wimberly, 3 McCord 190.

See 27 Cent. Dig. tit. "Indictment and Information," § 265.

57. State *v.* Darrah, 1 Houst. Cr. Cas. (Del.) 112; Black *v.* State, 2 Md. 376; State *v.* Wheeler, 3 Vt. 344, 23 Am. Dec. 212; Rex *v.* Cross, 1 Ld. Raym. 711; Rex *v.* Westbeer, 2 Str. 1133. See *contra*, Holmes' Case, Cro. Car. 376; Leeser's Case, Cro. Jac. 497; Scofield's Case, 2 East P. C. 1028.

58. Shotwell *v.* State, 43 Ark. 345; Roberts *v.* State, 21 Ark. 183; Sutcliffe *v.* State, 18 Ohio 469, 51 Am. Dec. 459; Evans *v.* State, 25 Tex. Suppl. 303; Jennings *v.* State, 7 Tex. App. 350.

Where the statute determines the degree. — A specification in the statute of cases which shall be deemed murder in the first degree, and the introduction of new definitions or divisions does not necessarily require a change in the form of indictment, and a conviction under a common-law indictment of murder in the first degree may be had in any case where the offense proved is brought within either of the statutory divisions. People *v.* Conroy, 97 N. Y. 62; Cox *v.* People, 80 N. Y. 500; Kennedy *v.* People, 39 N. Y. 245; Fitzgerrold *v.* People, 37 N. Y. 413; People *v.* White, 22 Wend. (N. Y.) 167; People *v.* Enoch, 13 Wend. (N. Y.) 159, 27 Am. Dec. 197. See also Homicide, 21 Cyc. 854.

59. Nichols *v.* State, 46 Miss. 284.

60. Johnson *v.* People, 113 Ill. 99; Jennings *v.* State, 7 Tex. App. 350, holding that a common-law indictment for manslaughter is not sufficient under a statute defining the offense as "voluntary homicide, committed under the immediate influence of sudden passion arising from an adequate cause, but neither justified nor excused by law."

61. Com. *v.* Carter, 14 Ky. L. Rep. 301.

another statute.[62] It makes no difference under what particular section of a statute the indictment may have been drawn, nor are the infirmities of such section or of the indictment thereunder material, provided the indictment be good under some other section of the statute which is valid.[63] The fact that the circumstances under which a particular offense is committed render it punishable under a statute applicable to other offenses does not render it necessary to charge the crime as committed under such statute;[64] and it is sometimes provided by the statute defining an offense that, when the facts constituting the offense defined also constitute an offense under other statutes, they shall be punishable under such other statutes.[65]

b. Reference to and Recital of Statute — (I) *NECESSITY.* An indictment for an offense created by a general statute need not state specifically, by particular reference thereto, the statute violated by the acts alleged to be a crime.[66] A private statute, however, must be recited.[67] Where the statute contains several provisions, the violation of any one of which is an offense, the facts should be so stated in the indictment as to make it apparent which provision is relied

62. Williams *v.* U. S., 168 U. S. 382, 18 S. Ct. 92, 42 L. ed. 509, holding that an indorsement, on the margin of an indictment, of a citation of a statute, is not a part of the indictment itself, and does not make it an indictment under that statute alone. But *compare* U. S. *v.* Goodwin, 20 Fed. 237, holding that if the law supposed to govern the offense is set out in the indictment and the grand jury present it to the court as their finding, it cannot be rejected if erroneous, because it was the ground of their action.

63. State *v.* Vandenburg, 159 Mo. 230, 60 S. W. 79, holding that the fact that an indictment was drawn under an unconstitutional section of a statute did not render it invalid, where it constituted a good indictment under another section of the statute.

64. People *v.* Campbell, 127 Cal. 278, 59 Pac. 593.

65. Scott *v.* State, 40 Tex. Cr. 105, 48 S. W. 523; Witherspoon *v.* State, (Tex. Cr. App. 1896) 37 S. W. 433; Sims *v.* State, 21 Tex. App. 649, 1 S. W. 465; Hirshfield *v.* State, 11 Tex. App. 207, construing a statute defining swindling.

66. *Georgia.*— Knight *v.* State, 88 Ga. 590, 15 S. E. 457; Crabb *v.* State, 88 Ga. 584, 15 S. E. 455.

Iowa.— State *v.* Allen, 32 Iowa 248.

Kentucky.— Powers *v.* Com., 90 Ky. 167, 13 S. W. 450, 11 Ky. L. Rep. 964.

Maryland.— Rawlings *v.* State, 2 Md. 201.

Massachusetts.— Com. *v.* Donovan, 170 Mass. 228, 49 N. E. 104; Com. *v.* Hoye, 11 Gray 462.

North Carolina.— State *v.* Wallace, 94 N. C. 827; State *v.* Cobb, 18 N. C. 115.

Pennsylvania.— Com. *v.* Ruane, 1 C. Pl. 41.

Rhode Island.— State *v.* Flanagan, 25 R. I. 369, 55 Atl. 876.

South Carolina.— State *v.* Butler, 3 McCord 383.

United States.— U. S. *v.* Goodwin, 20 Fed. 237.

See 27 Cent. Dig. tit. "Indictment and Information," § 284.

Amendment of the statute during the time for which the offense is laid will not make it necessary to allege the particular statute under which a conviction is sought, where the amendment relates merely to punishment and procedure. State *v.* Reyelts, 74 Iowa 499, 38 N. W. 377.

67. *Alabama.*— Carson *v.* State, 69 Ala. 235.

Indiana.— See Levy *v.* State, 6 Ind. 281.

Maryland.— Rawlings *v.* State, 2 Md. 201.

North Carolina.— State *v.* Heaton, 77 N. C. 505 (holding that where an indictment is brought under a private statute, it is sufficient if that statute be set forth by chapter and date and its material provisions are incorporated); State *v.* Cobb, 18 N. C. 115.

Pennsylvania.— Com. *v.* Huntsinger, 35 Pittsb. Leg. J. 364.

See 27 Cent. Dig. tit. "Indictment and Information," § 284.

What are private statutes.— While the distinction between public and private statutes in this regard is not well defined, a private statute is, it seems, one which relates to a breach of public duty, punishable by an indictment according to the general law, but which imposes the duty in that particular instance on the individuals charged by law against common right, and confined in its operation to particular persons and places. State *v.* Cobb, 18 N. C. 115, holding an act making it an indictable offense to fell timber in the channel of a particular creek in a particular county is a public law. The mere fact that the statute appears in, and as a section of, a private one, does not make it private. It is well settled that one part of the statute may be private, while another part may be public and general, or local. It not infrequently happens that public statutes contain provisions of a private nature, and *vice versa.* State *v.* Wallace, 94 N. C. 827, holding that an act prohibiting the sale of liquor within a certain distance of a locality named in the act is a public local statute, and need not be specially averred in an indictment under the act. A statute which forbids any person to sell or give away intoxicating liquors within a certain county is a public statute, although of local application, and need not be specially pleaded in an indictment. Powers *v.* Com., 90 Ky. 167, 13 S. W. 450, 11 Ky. L. Rep. 964. And see, generally, STATUTES.

on.[68] The date of the taking effect of the statute need not be averred in order to show that the offense was committed before its enactment.[69]

(II) *SUFFICIENCY.* It is not necessary to employ the technical designation of the legislature in referring to its enactments.[70] A reference to a section of the statute will be construed as meaning the section then in force.[71]

(III) *EFFECT OF MISRECITAL.* A misrecital of a statute may be rejected as surplusage where the conclusion is generally as "contrary to the statute in such case made and provided,"[72] although a material variance has been held fatal where the conclusion is "contrary to the form of the said statute."[73] And where reference to a statute is made for the purpose of supplying a description of the offense, an error in the reference is fatal.[74] The misrecital must be material.[75] Where the title of a public statute is misrecited so as to make it meaningless, the defect is fatal.[76]

c. Sufficiency of Statement — (I) *NECESSITY OF STATING ESSENTIALS.* An indictment for an offense created by statute must be framed upon the statute, and this fact must distinctly appear upon the face of the indictment itself; and in order that it shall so appear, the pleader must either charge the offense in the language of the act, or specifically set forth the facts constituting the same.[77] The general rule is that the charge must be so laid in the indictment as to bring the case precisely within the description of the offense as given in the statute, alleging distinctly all the essential requisites that constitute it.[78] Such facts must be

68. People *v.* Martin, 52 Cal. 201 (holding an indictment under a statute declaring it a felony for a person to take up an animal on "land or possessory claim other than his own, for the purpose of taking advantage of any of the provisions of this act," fatally defective for not stating what particular provision the accused intended to violate); People *v.* Jones, 49 Mich. 591, 14 N. W. 573; State *v.* Leavitt, 63 N. H. 381 (holding an indictment bad which failed to show on which of two sections of the liquor law imposing different penalties it was founded); State *v.* Messenger, 58 N. H. 348; State *v.* Sherburne, 58 N. H. 159; Campbell *v.* Schofield, 29 Leg. Int. (Pa.) 325; Com. *v.* Fox, 10 Phila. (Pa.) 204.

69. Com. *v.* Keefe, 7 Gray (Mass.) 332; People *v.* Reed, 47 Barb. (N. Y.) 235; State *v.* Chandler, 9 N. C. 439; Reg. *v.* Westley, Bell C. C. 193, 8 Cox C. C. 344, 5 Jur. N. S. 1362, 29 L. J. M. C. 35, 8 Wkly. Rep. 63.

Averment of time in case of recent statute see *supra*, V, F, 2, g.

70. Block *v.* State, 66 Ala. 493, describing the statute as an act of "the legislature of Alabama," instead of using the technical designation of that body, "the general assembly."

71. Oshe *v.* State, 37 Ohio St. 494.

72. Rawlings *v.* State, 2 Md. 201; Mayer *v.* State, 64 N. J. L. 323, 45 Atl. 624; State *v.* Butler, 3 McCord (S. C.) 383. But see U. S. *v.* Goodwin, 20 Fed. 237.

73. Rawlings *v.* State, 2 Md. 201. And see 4 Coke 48; Rex *v.* Hill, Cro. Car. 232; Rex *v.* Dickenson, 1 Saund. 134; Rex *v.* Marsack, 6 T. R. 771.

74. Com. *v.* Washburn, 128 Mass. 421.

75. People *v.* Reed, 47 Barb. (N. Y.) 235; People *v.* Walbridge, 6 Cow. (N. Y.) 512; Harris *v.* State, 3 Lea (Tenn.) 324; Reg. *v.* Westley, Bell C. C. 193, 8 Cox C. C. 344, 5 Jur. N. S. 1362, 29 L. J. M. C. 35, 8 Wkly. Rep. 63 [*disapproving* Boyce *v.* Whitaker, 1 Dougl. (3d ed.) 94; Beck *v.* Beverly, 11 M. & W. 845; Rex *v.* Marsack, 6 T. R. 671].

76. Com. *v.* Anonymous, 6 Gray (Mass.) 489, holding that the use of the word "spiritious" in place of "spirituous" and of "intoxitating" in place of "intoxicating" in averring the title of a statute against the sale of intoxicating liquors was fatal. But see Com. *v.* Burke, 15 Gray (Mass.) 408.

77. Johnson *v.* People, 113 Ill. 99; State *v.* Pratt, 54 Vt. 484, holding that an indictment so far lacking adherence to statutory terms that the court cannot see on which of two statutes it was drawn is bad.

78. *Alabama.*— Smith *v.* State, 63 Ala. 55; Eubanks *v.* State, 17 Ala. 181.

Arkansas.— State *v.* Eldridge, 12 Ark. 608.

Connecticut.— Morse *v.* State, 6 Conn. 9; Knowles *v.* State, 3 Day 103.

Florida.— Stevens *v.* State, 18 Fla. 903; Snowden *v.* State, 17 Fla. 386; Humphreys *v.* State, 17 Fla. 381; Groner *v.* State, 6 Fla. 39.

Georgia.— Conyers *v.* State, 50 Ga. 103, 15 Am. Rep. 686.

Indiana.— State *v.* Trueblood, 25 Ind. App. 437, 57 N. E. 975.

Kansas.— State *v.* Decker, 52 Kan. 193, 34 Pac. 780.

Kentucky.— Com. *v.* Macuboy, 3 Dana 70.

Louisiana.— State *v.* Stiles, 5 La. Ann. 324.

Maine.— State *v.* Casey, 45 Me. 435; State *v.* McKenzie, 42 Me. 392.

Maryland.— Kearney *v.* State, 48 Md. 16; State *v.* Elborn, 27 Md. 483.

Massachusetts.— Brown *v.* Com., 8 Mass. 59.

Mississippi.— Lewis *v.* State, 49 Miss. 354; Williams *v.* State, 42 Miss. 328; Scott *v.*

alleged that, if proven, defendant cannot be innocent.[79] Either the letter or the substance of the statute must be followed,[80] and nothing is to be left to implication or intendment[81] or to conclusion.[82] The want of direct averments of material facts cannot be supplied by argument or inference,[83] nor by the conclusion "contrary to the form of the statute."[84]

(II) *NECESSITY OF EMPLOYING LANGUAGE OF STATUTE.* Either the letter or the substance of the statute defining the offense must be followed,[85] it being held in some cases that the precise words of the statute must be employed,[86] and it is usually the better practice to do so.[87] In many cases, however, the use of

State, 31 Miss. 473; Riggs *v.* State, 26 Miss. 51; Ike *v.* State, 23 Miss. 525; Anthony *v.* State, 13 Sm. & M. 263.

Missouri.— State *v.* Hesseltine, 130 Mo. 468, 32 S. W. 983; State *v.* Gabriel, 88 Mo. 631; State *v.* Emerich, 87 Mo. 110; State *v.* Ross, 25 Mo. 426; State *v.* Helm, 6 Mo. 263.

Nevada.— People *v.* Logan, 1 Nev. 110.

New York.— People *v.* Webster, 17 Misc. 410, 40 N. Y. Suppl. 1135, 11 N. Y. Cr. 340; People *v.* Allen, 5 Den. 76; People *v.* Stockham, 1 Park. Cr. 424.

North Dakota.— State *v.* Climie, 12 N. D. 33, 94 N. W. 574.

Pennsylvania.— Hamilton *v.* Com., 3 Penr. & W. 142; Respublica *v.* Tryer, 3 Yeates 451.

South Carolina.— State *v.* Coleman, 17 S. C. 473; State *v.* Foster, 3 McCord 442.

Tennessee.— Hall *v.* State, 3 Coldw. 125. See also Sword *v.* State, 5 Humphr. 102.

Texas.— Thomas *v.* State, 42 Tex. 235; Bush *v.* Republic, 1 Tex. 455.

Vermont.— State *v.* Walworth, 58 Vt. 502, 3 Atl. 543.

Virginia.— Boyd *v.* Com., 77 Va. 52; Com. *v.* Hampton, 3 Gratt. 590.

England.— 2 Hawkins P. C. c. 25, § 119.

See 27 Cent. Dig. tit. "Indictment and Information," § 286.

The offense must not be misdescribed or anything essential to its description omitted. Chapman *v.* People, 39 Mich. 357; Merwin *v.* People, 26 Mich. 298, 12 Am. Rep. 314; Enders *v.* People, 20 Mich. 233.

Information.— It is only required that the information should give a concise and legal description of the offense charged, and that it should contain the same certainty as an indictment. The description of the charge must include every ingredient required by the statute to constitute the offense. As in an indictment, the statement of the offense may be in the words of the enactment describing it or declaring the transaction charged to be an indictable offense. Reg. *v.* France, 1 Can. Cr. Cas. 321.

Negativing ownership or consent in indictment for driving cattle from range (see ANIMALS, 2 Cyc. 356); in indictment for altering brand (see ANIMALS, 2 Cyc. 328).

79. *Rhode Island.*— State *v.* Melville, 11 R. I. 417.

Tennessee.— State *v.* Jones, 2 Yerg. 22.

Virginia.— Boyd *v.* Com., 77 Va. 52; Com. *v.* Young, 15 Gratt. 664.

West Virginia.— State *v.* Riffe, 10 W. Va. 794.

United States.— Stettinius *v.* U. S., 22 Fed. Cas. No. 13,387, 5 Cranch C. C. 573.

80. See *infra*, V, H, 8, c, (II).

81. *Arkansas.*— State *v.* Eldridge, 12 Ark. 608.

Florida.— Snowden *v.* State, 17 Fla. 386.

Iowa.— State *v.* Morse, 1 Greene 503.

Maryland.— Kearney *v.* State, 48 Md. 16.

South Carolina.— State *v.* O'Bannon, 1 Bailey 144.

Tennessee.— Kit *v.* State, 11 Humphr. 167.

Texas.— State *v.* Goldman, 44 Tex. 104.

See 27 Cent. Dig. tit. "Indictment and Information," §§ 286, 286½. And see *supra*, V, C, 2.

82. State *v.* Daggs, 106 Mo. 160, 17 S. W. 306, holding that an allegation that a purchaser of property disposed of it without "paying" therefor states a mere conclusion and is not sufficient to support a prosecution under a statute punishing persons secreting or disposing of property of which they have obtained the possession with an intention not to pay therefor. See also *supra*, V, C, 1, text and note 73.

83. State *v.* Morse, 1 Greene (Iowa) 503; U. S. *v.* Dickey, Morr. (Iowa) 412; U. S. *v.* Clark, 25 Fed. Cas. No. 14,804, 1 Gall. 497. See *supra*, V, C, 1, text and note 75.

84. State *v.* Stroud, 99 Iowa 16, 68 N. W. 450; State *v.* Casey, 45 Me. 435; State *v.* Helm, 6 Mo. 263; Redfield *v.* State, 24 Tex. 133.

85. *Alabama.*— Skains *v.* State, 21 Ala. 218.

Iowa.— State *v.* Seamons, 1 Greene 418.

Louisiana.— State *v.* Butman, 15 La. Ann. 166; State *v.* Hood, 6 La. Ann. 179.

Maryland.— Kearney *v.* State, 48 Md. 16.

Missouri.— State *v.* Rosenblatt, 185 Mo. 114, 83 S. W. 975.

North Carolina.— State *v.* Rose, 90 N. C. 712.

Ohio.— State *v.* Finch, 2 Ohio Dec. (Reprint) 431, 3 West. L. Month. 82.

United States.— Dewees' Case, 7 Fed. Cas. No. 3,848, Chase 531.

See 27 Cent. Dig. tit. "Indictment and Information," § 286½; and other cases cited in the following notes.

86. State *v.* Brown, 4 Port. (Ala.) 410; Com. *v.* Turner, 8 Bush (Ky.) 1; Francis *v.* State, 21 Tex. 280; Howel *v.* Com., 5 Gratt. (Va.) 664.

87. *Alabama.*— Holly *v.* State, 54 Ala. 238; Sparrenberger *v.* State, 53 Ala. 481, 25 Am. Rep. 643.

Texas.— State *v.* Powell, 28 Tex. 626; Juaraqui *v.* State, 28 Tex. 625; State *v.* Moreland, 27 Tex. 726; Barthelow *v.* State, 26 Tex. 175; Francis *v.* State, 21 Tex. 280.

words equivalent to the statutory words is sufficient,[88] or of words which are of more extensive signification than, or inclusive of, the statutory terms,[89] or which are of similar import,[90] or of the same meaning[91] in their common acceptation,[92]

Utah.— State *v.* Delvecchio, 25 Utah 18, 69 Pac. 58.

Virginia.— Dull *v.* Com., 25 Gratt. 965; Com. *v.* Young, 15 Gratt. 664.

West Virginia.— State *v.* Riffe, 10 W. Va. 794.

See 27 Cent. Dig. tit. "Indictment and Information," § 290.

88. *Alabama.*— Holly *v.* State, 54 Ala. 238; Sparrenberger *v.* State, 53 Ala. 481, 25 Am. Rep. 643.

Florida.— Humphreys *v.* State, 17 Fla. 381.

Indiana.— State *v.* Wright, 52 Ind. 307.

Kansas.— State *v.* Beverlin, 30 Kan. 611, 2 Pac. 630.

Louisiana.— State *v.* Hayes, 105 La. 352, 29 So. 937; State *v.* Guiton, 51 La. Ann. 155, 24 So. 784; State *v.* McDaniel, 45 La. Ann. 686, 12 So. 751.

Mississippi.— Woods *v.* State, 67 Miss. 575, 7 So. 495.

Nebraska.— Smith *v.* State, (1904) 100 N. W. 806; Peterson *v.* State, 64 Nebr. 875, 90 N. W. 964.

New Hampshire.— State *v.* Gove, 34 N. H. 510.

New Jersey.— State *v.* Hickman, 8 N. J. L. 299.

New York.— Eckhardt *v.* People, 83 N. Y. 462, 38 Am. Rep. 462 [*affirming* 22 Hun 525]. But *compare* People *v.* Van Pelt, 4 How. Pr. 36, holding that an indictment for sale of intoxicating liquors at retail was not sufficient under a statute punishing the sale of liquors in quantities less than five gallons.

Texas.— State *v.* Powell, 28 Tex. 626; Juaraqui *v.* State, 28 Tex. 625; State *v.* Morcland, 27 Tex. 726; Barthelow *v.* State, 26 Tex. 175; Francis *v.* State, 21 Tex. 280; Jones *v.* State, 12 Tex. App. 424.

Utah.— State *v.* Delvecchio, 25 Utah 18, 69 Pac. 58.

Virginia.— Dull *v.* Com., 25 Gratt. 965; Com. *v.* Young, 15 Gratt. 664.

West Virginia.— State *v.* Riffe, 10 W. Va. 794.

United States.— U. S. *v.* Nunnemacher, 27 Fed. Cas. No. 15,903, 7 Biss. 129.

Canada.— Reg. *v.* Weir, 3 Can. Cr. Cas. 102.

See 27 Cent. Dig. tit. "Indictment and Information," § 291.

Expressions held equivalent.— "Without just cause or excuse," and "without a good and sufficient excuse" (Giles *v.* State, 88 Ala. 230, 7 So. 271); "transport or remove" and "transport or move" (Davis *v.* State, 68 Ala. 58, 44 Am. Rep. 128); "portion and part" (Holly *v.* State, 54 Ala. 238); "in" and "on" upon an indictment for shooting on the highway (Woods *v.* State, 67 Miss. 575, 7 So. 495); "store" and "shop" (State *v.* Moore, 38 La. Ann. 66; State *v.* Smith, 5 La. Ann. 340); "notes of the bank" and "bank-notes" (State *v.* Vanderlip, 4 La. Ann. 444); "bank-bill" and "bank-note" (Munson *v.* State, 4 Greene (Iowa) 483); "store-room" and "house" (McGaffey *v.* State, 4 Tex. 156); "at nine o'clock in the night" and "between the setting and rising of the sun" (State *v.* Padgett, 18 S. C. 317); "without the consent of the owner or his agent" and "without a license from competent authority" (State *v.* Marlett, 26 Ind. 198); "in execution and pursuance of," and "to effect the object of" (U. S. *v.* Nunnemacher, 27 Fed. Cas. No. 15,903, 7 Biss. 129); "a woman with child" and a "pregnant woman" (Eckhardt *v.* People, 83 N. Y. 462, 38 Am. Rep. 462 [*affirming* 22 Hun (N. Y.) 525]); "unlawfully and wantonly" and "wilfully" (State *v.* Pennington, 3 Head (Tenn.) 119); "currency of the United States" and "United States currency" (Dull *v.* Com., 25 Gratt. (Va.) 965.

Expressions held not equivalent.— "Intent to deprive of use and benefit" and "intent to deprive of value" (Jones *v.* State, 12 Tex. App. 424); "unlawfully" and "wilfully" (Com. *v.* Turner, 8 Bush (Ky.) 1); "in the field" and "from the field" (State *v.* Shuler, 19 S. C. 140); "furnish" and "convey" (Francis *v.* State, 21 Tex. 280); "father" and "parent" (Lantznester *v.* State, 19 Tex. App. 320); "shop" and "store" (Sparrenberger *v.* State, 53 Ala. 481, 25 Am. Rep. 643).

89. *Louisiana.*— State *v.* Brown, 41 La. Ann. 345, 6 So. 541.

Maine.— State *v.* Lynch, 88 Me. 195, 33 Atl. 978; State *v.* Hussey, 60 Me. 410, 11 Am. Rep. 206.

New York.— People *v.* Enoch, 13 Wend. 159, 27 Am. Dec. 197.

Texas.— State *v.* Wupperman, 13 Tex. 33.

Utah.— State *v.* Williamson, 22 Utah 248, 62 Pac. 1022, 83 Am. St. Rep. 780.

See 27 Cent. Dig. tit. "Indictment and Information," § 291.

Examples of inclusive expressions.— "Wantonly" includes "wilfully" (State *v.* Brown, 41 La. Ann. 345, 6 So. 541); "feloniously" includes "wilfully" (State *v.* McDaniel, 45 La. Ann. 686, 12 So. 751); "destroy" includes "disable" (Tully *v.* People, 67 N. Y. 15); "property" includes "corporeal personal property" (Sansbury *v.* State, 4 Tex. App. 99); "clerk" of a bank not equivalent to "officer, agent, or servant" (Budd *v.* State, 3 Humphr. (Tenn.) 483, 39 Am. Dec. 189); "deadly" includes "dangerous" (State *v.* Lynch, 88 Me. 195, 33 Atl. 978).

90. Com. *v.* Scroggin, 60 S. W. 528, 22 Ky. L. Rep. 1338; State *v.* Hereford, 13 Mo. 3; People *v.* Logan, 1 Nev. 110.

91. Com. *v.* Hurt, 10 Ky. L. Rep. 773.

By statute this is the rule in Alabama. Giles *v.* State, 88 Ala. 230, 7 So. 271.

92. *Alabama.*— Worrell *v.* State, 12 Ala. 732.

or which substantially follow the statutory words,[93] or state them with substantial accuracy and certainty to a reasonable intendment.[94] So too it has been held that all the words of the statute need not be employed,[95] that additional words may be inserted,[96] or that a specific instead of a generic term may be used.[97] Where the words of the statute are peculiarly descriptive of the nature of the offense,[98] or have a technical meaning at common law, they should be followed, being the only terms to express, in apt and legal language, the nature and character of the crime.[99] But where the statute defines an offense without the use of technical terms employed at common law, it is not necessary that such technical terms be employed in the indictment.[1]

(III) *WHERE STATUTE EMPLOYS DISJUNCTIVE LANGUAGE.* Where a statute makes punishable various acts and mentions them disjunctively, an indictment charging the commission of two or more of such acts in one count must charge them conjunctively,[2] unless the words of the statute when so employed are

California.— People *v.* Girr, 53 Cal. 629; People *v.* Potter, 35 Cal. 110.

Iowa.— State *v.* Middleton, 11 Iowa 246; Nash *v.* State, 2 Greene 286; Buckley *v.* State, 2 Greene 162.

Kansas.— State *v.* McGaffin, 36 Kan. 315, 13 Pac. 560; State *v.* White, 14 Kan. 538.

Louisiana.— State *v.* Eames, 39 La. Ann. 986, 3 So. 93; State *v.* Vanderlip, 4 La. Ann. 444.

Maine.— State *v.* Robbins, 66 Me. 324.

Missouri.— State *v.* Watson, 65 Mo. 115; State *v.* De Lay, 30 Mo. App. 357.

Montana.— Territory *v.* Corbett, 3 Mont. 50.

Vermont.— State *v.* Abbott, 20 Vt. 537.

See 27 Cent. Dig. tit. "Indictment and Information," § 291.

93. *Florida.*— Schley *v.* State, 48 Fla. 53, 37 So. 518.

Indiana.— Semon *v.* State, 158 Ind. 55, 62 N. E. 625; Atkinson *v.* State, 33 Ind. App. 8, 70 N. E. 560.

Iowa.— Fouts *v.* State, 4 Greene 500; Munson *v.* State, 4 Greene 483; Reddan *v.* State, 4 Greene 137; State *v.* Chambers, 2 Greene 308; Nash *v.* State, 2 Greene 286; Buckley *v.* State, 2 Greene 162; State *v.* Morse, 1 Greene 503.

Kansas.— State *v.* McGaffin, 36 Kan. 315, 13 Pac. 560.

Louisiana.— State *v.* Vanderlip, 4 La. Ann. 444.

Missouri.— State *v.* Ragan, 22 Mo. 459; State *v.* Fleetwood, 16 Mo. 448; State *v.* West, 21 Mo. App. 309.

New York.— Pickett *v.* People, 8 Hun 83; Frazer *v.* People, 54 Barb. 306.

Ohio.— Poage *v.* State, 3 Ohio St. 229.

Oklahoma.— Smith *v.* Territory, 11 Okla. 656, 69 Pac. 803.

Rhode Island.— State *v.* Flanagan, 25 R. I. 369, 55 Atl. 876.

South Carolina.— State *v.* Hallback, 40 S. C. 298, 18 S. E. 919; State *v.* Vill, 2 Brev. 262.

Tennessee.— State *v.* Pennington, 3 Head 119. But see Budd *v.* State, 3 Humphr. 483, 39 Am. Dec. 189, holding that it may be questioned whether such rule is applicable where the statute affects persons as connected with specific offices or employments.

See 27 Cent. Dig. tit. "Indictment and Information," § 291.

94. State *v.* Bullock, 13 Ala. 413; State *v.* Little, 1 Vt. 331; U. S. *v.* Bachelder, 24 Fed. Cas. No. 14,490, 2 Gall. 15.

95. Thompson *v.* Com., 5 Ky. L. Rep. 610, holding that an indictment charging defendant with "maliciously shooting with intent to kill" was not defective for omitting the words "at another," although those words were used in the statute.

Matter not part of the description of the offense may be omitted. Dye *v.* Com., 7 Gratt. (Va.) 662.

96. State *v.* Robbins, 66 Me. 324 (holding that an indictment for a statutory offense is not vitiated by the use of the word "unlawfully" in charging the offense, although such word forms no part of the statute); State *v.* Cheatwood, 2 Hill (S. C.) 459 (holding that the use of "did kill and murder" instead of "did murder" was not fatal).

97. State *v.* Lange, 22 Tex. 591, holding that "steer" might be used instead of "neat cattle."

98. *Alabama.*— State *v.* Stedman, 7 Port. 495.

Massachusetts.— Com. *v.* Boyer, 7 Allen 306; Com. *v.* Morse, 2 Mass. 128.

Michigan.— People *v.* Kent, 1 Dougl. 42.

Pennsylvania.— Hamilton *v.* Gallagher, 4 Yeates 202.

England.— Rex *v.* Pemberton, 2 Burr. 1035; Rex *v.* Airey, 2 East 30, 2 East P. C. 831.

See 27 Cent. Dig. tit. "Indictment and Information," § 289.

99. *Arkansas.*— State *v.* Eldridge, 12 Ark. 608.

Connecticut.— State *v.* Nichols, 8 Conn. 496.

Tennessee.— Chick *v.* State, 7 Humphr. 161, holding that "mayhem" must be employed.

Texas.— Drummond *v.* Republic, 2 Tex. 156.

Virginia.— Dull *v.* Com., 25 Gratt. 965.

1. Guest *v.* State, 19 Ark. 405, holding that it was not necessary to employ the word "maimed."

2. *Arkansas.*— Thompson *v.* State, 37 Ark. 408.

repugnant[3] or synonymous.[4] In some cases, however, it is stated that the better rule is that the use of the disjunctive is fatal only where uncertainty results, and not where one term is used as explaining or illustrating the other, or where the language of the statute makes either an attempt or procurement of an act, or the act itself in the alternative, indictable.[5]

(IV) *SUFFICIENCY OF STATUTORY LANGUAGE WITHOUT ADDED AVERMENTS* — (A) *In General.* Although the rule is frequently stated to be that it is sufficient to charge a statutory offense in the language of the statute creating it,[6] such rule is accurate only in those cases in which the statute defines and describes the

California.— People *v.* Tomlinson, 35 Cal. 503.

Kansas.— State *v.* Seeger, 65 Kan. 711, 70 Pac. 599.

Louisiana.— State *v.* Philbin, 38 La. Ann. 964; State *v.* Price, 37 La. Ann. 215.

Missouri.— State *v.* Fairgrieve, 29 Mo. App. 641.

New Hampshire.— State *v.* Naramore, 58 N. H. 273.

New Jersey.— State *v.* Drake, 30 N. J. L. 422.

New York.— Milligan's Case, 6 City Hall Rec. 69.

North Carolina.— State *v.* Harper, 64 N. C. 129.

Oklahoma.— Slover *v.* Territory, 5 Okla. 506, 49 Pac. 1009.

Oregon.— State *v.* Bergman, 6 Oreg. 341; State *v.* Carr, 6 Oreg. 133.

Rhode Island.— State *v.* Colwell, 3 R. I. 284.

Texas.— Venturio *v.* State, 37 Tex. Cr. 653, 40 S. W. 974; Davis *v.* State, 23 Tex. App. 637, 5 S. W. 149; Copping *v.* State, 7 Tex. App. 61; Berliner *v.* State, 6 Tex. App. 181; Tompkins *v.* State, 4 Tex. App. 161; Hart *v.* State, 2 Tex. App. 39. And see Lancaster *v.* State, 43 Tex. 519; Phillips *v.* State, 29 Tex. 226.

Wisconsin.— Clifford *v.* State, 29 Wis. 327.

United States.— See Stockslager *v.* U. S., 116 Fed. 590, 54 C. C. A. 46.

See 27 Cent. Dig. tit. "Indictment and Information," § 195.

Prosecution for abduction see ABDUCTION, 1 Cyc. 157 note 96.

3. State *v.* Pittman, 76 Mo. 56; State *v.* Flint, 62 Mo. 393; State *v.* McCollum, 44 Mo. 343; State *v.* Fitzsimmons, 30 Mo. 236.

4. People *v.* Tomlinson, 35 Cal. 503; State *v.* Moore, 61 Mo. 276; State *v.* Ellis, 4 Mo. 474; State *v.* Brookhouse, 10 Wash. 87, 38 Pac. 862. See also *supra*, V, C, 3.

5. State *v.* Van Doran, 109 N. C. 864, 14 S. E. 32; U. S. *v.* Potter, 27 Fed. Cas. No. 16,077, 6 McLean 182.

Joinder of alternative phases of same statutory offense in single count see *infra*, VII, A, 5.

Effect of disjunctive statements in general see *supra*, V, C, 3.

6. *Alabama.*— State *v.* Briley, 8 Port. 472.

California.— People *v.* White, 34 Cal. 183; People *v.* Saviers, 14 Cal. 29.

Indiana.— Malone *v.* State, 14 Ind. 219.

Iowa.— State *v.* Chambers, 2 Greene 308.

Maryland.— Stevens *v.* State, 89 Md. 669, 43 Atl. 929; Dickhaut *v.* State, 85 Md. 451, 37 Atl. 21, 60 Am. St. Rep. 332, 36 L. R. A. 765; Gibson *v.* State, 54 Md. 447.

Missouri.— State *v.* Anderson, 81 Mo. 78; State *v.* Tissing, 74 Mo. 72; State *v.* Lackland, 12 Mo. 278; Simmons *v.* State, 12 Mo. 268, 49 Am. Dec. 131; Spratt *v.* State, 8 Mo. 247; State *v.* Mitchell, 6 Mo. 147; State *v.* Smith, 24 Mo. App. 413; State *v.* Higgins, 16 Mo. App. 559.

Nebraska.— Chapman *v.* State, 61 Nebr. 888, 86 N. W. 907.

New York.— People *v.* Corbalis, 86 N. Y. App. Div. 531, 83 N. Y. Suppl. 782; People *v.* Kelley, 3 N. Y. Cr. 272.

Ohio.—State *v.* Shumann, 8 Ohio Dec. (Reprint) 373, 7 Cinc. L. Bul. 240.

South Carolina.— State *v.* Thomas, 3 Strobh. 269; State *v.* Williams, 2 Strobh. 474; State *v.* Brown, 2 Speers 129; State *v.* La Creux, 1 McMull. 488.

Tennessee.— State *v.* Odam, 2 Lea 220.

Texas.— State *v.* Ward, 9 Tex. 370; State *v.* Ake, 9 Tex. 322.

See 27 Cent. Dig. tit. "Indictment and Information," § 292.

Where the offense is a misdemeanor it is generally sufficient, in an indictment, to describe it in the words of the statute.

Arkansas.— State *v.* Snyder, 41 Ark. 226; State *v.* Witt, 39 Ark. 216; State *v.* Moser, 33 Ark. 140.

Indian Territory.— Stancliff *v.* U. S., (1904) 82 S. W. 882.

New Hampshire.— State *v.* Rust, 35 N. H. 438.

New York.— People *v.* West, 106 N. Y. 293, 12 N. E. 610, 60 Am. Rep. 452; People *v.* Taylor, 3 Den. 91.

United States.— U. S. *v.* Quinn, 27 Fed. Cas. No. 16,110, 8 Blatchf. 48.

Information.— People *v.* Knowlton, 122 Cal. 357, 55 Pac. 141; People *v.* Frigerio, 107 Cal. 151, 40 Pac. 107; People *v.* Marseiler, 70 Cal. 98, 11 Pac. 503; State *v.* Keogh, 13 La. Ann. 243; State *v.* Burr, 81 Mo. 108; Bartley *v.* State, 53 Nebr. 310, 73 N. W. 744.

Statutory provisions in some states make an indictment which states the offense in the language of the statute, or so plainly that its nature may easily be understood, sufficient. Robbins *v.* State, 119 Ga. 570, 46 S. E. 834; Thomas *v.* State, 69 Ga. 747; Hines *v.* State, 26 Ga. 614; Sharp *v.* State, 17 Ga. 290; Hester *v.* State, 17 Ga. 130; Ricks *v.* State, 16 Ga. 600; Sweeney *v.* State, 16 Ga. 467; Cook *v.* State, 11 Ga. 53, 56 Am. Dec. 410; Camp *v.* State, 3 Ga. 417; Bolen *v.* People, 184 Ill. 338, 56 N. E. 408;

offense, and is better stated with such qualification.[7] The words of the statute must fully, directly, and expressly, without any uncertainty or ambiguity, set

Fuller *v.* People, 92 Ill. 182; Allen *v.* People, 82 Ill. 610; Plummer *v.* People, 74 Ill. 361; Warriner *v.* People, 74 Ill. 346; McCutcheon *v.* People, 69 Ill. 601 (holding that such rule will be applied, although the statute defining the crime was adopted from another state in which a different rule was followed); Mohler *v.* People, 24 Ill. 26; Chambers *v.* People, 5 Ill. 361; O'Donnell *v.* People, 110 Ill. App. 250 [*affirmed* in Gallagher *v.* People, 211 Ill. 158, 71 N. E. 842]; Crane *v.* People, 65 Ill. App. 492; Ward *v.* People, 23 Ill. App. 510; People *v.* Quinn, 18 N. Y. Suppl. 569; Com. *v.* Beatty, 15 Pa. Super. Ct. 5; Com. *v.* Ruane, 1 C. Pl. (Pa.) 41; Com. *v.* Havens, 6 Pa. Co. Ct. 545; Com. *v.* Rosenberg, 1 Pa. Co. Ct. 273; Com. *v.* Maher, 16 Phila. (Pa.) 451; Com. *v.* Mouat, 14 Phila. (Pa.) 366.

7. *Alabama.*— Grattan *v.* State, 71 Ala. 344; White *v.* State, 44 Ala. 409; Murrell *v.* State, 44 Ala. 367; Mason *v.* State, 42 Ala. 543; Lodano *v.* State, 25 Ala. 64; Clark *v.* State, 19 Ala. 552; Batre *v.* State, 18 Ala. 119; State *v.* Click, 2 Ala. 26; State *v.* Duncan, 9 Port. 260.

Arkansas.— Glass *v.* State, 45 Ark. 173; State *v.* Graham, 38 Ark. 519; State *v.* Collins, 19 Ark. 587; Medlock *v.* State, 18 Ark. 363.

California.—People *v.* Martin, 32 Cal. 91; People *v.* Murray, 10 Cal. 309; People *v.* Dolan, 9 Cal. 576; People *v.* Parsons, 6 Cal. 487.

Connecticut.— State *v.* Cady, 47 Conn. 44.

Georgia.— State *v.* Calvin, R. M. Charlt. 151.

Illinois.— Gallagher *v.* People, 211 Ill. 158, 71 N. E. 842 [*affirming* 110 Ill. App. 250]; Brennan *v.* People, 113 Ill. App. 361; Williams *v.* People, 67 Ill. App. 344.

Indiana.— Benham *v.* State, 116 Ind. 112, 18 N. E. 454; Payne *v.* State, 74 Ind. 203; Shinn *v.* State, 68 Ind. 423; Malone *v.* State, 14 Ind. 219; State *v.* Noel, 5 Blackf. 548; State *v.* Bougher, 3 Blackf. 307.

Iowa.— State *v.* Beebe, 115 Iowa 128, 88 N. W. 358; State *v.* Reilly, 108 Iowa 735, 78 N. W. 680; State *v.* Bauguess, 106 Iowa 107, 76 N. W. 508; State *v.* Porter, 105 Iowa 677, 75 N. W. 519; State *v.* Smith, 46 Iowa 670; Our House No. 2 *v.* State, 4 Greene 172; Romp *v.* State, 3 Greene 276.

Kansas.— State *v.* Seely, 65 Kan. 185, 69 Pac. 163; State *v.* Beherlin, 30 Kan. 611, 2 Pac. 630; State *v.* Patterson, 6 Kan. App. 677, 50 Pac. 65.

Kentucky.— Collier *v.* Com., 110 Ky. 516, 62 S. W. 4, 22 Ky. L. Rep. 1929; Com. *v.* Grinstead, 108 Ky. 59, 55 S. W. 720, 21 Ky. L. Rep. 1444, 57 S. W. 471, 21 Ky. L. Rep. 377; Com. *v.* Chesapeake, etc., R. Co., 101 Ky. 159, 40 S. W. 250, 19 Ky. L. Rep. 329; Sellers *v.* Com., 13 Bush 331; Davis *v.* Com., 13 Bush 318; Com. *v.* Tanner, 5 Bush 316; Paynter *v.* Com., 55 S. W. 687, 21 Ky. L. Rep. 1562.

Louisiana.— State *v.* Sonier, 107 La. 794, 32 So. 175; State *v.* Desroche, 47 La. Ann. 651, 17 So. 209; State *v.* Philbin, 38 La. Ann. 964.

Maine.— State *v.* Doran, 99 Me. 329, 59 Atl. 440, 105 Am. St. Rep. 278; State *v.* Snowman, 94 Me. 99, 46 Atl. 815, 80 Am. St. Rep. 380, 50 L. R. A. 544.

Massachusetts.— Com. *v.* Malloy, 119 Mass. 347.

Michigan.— Rice *v.* People, 15 Mich. 9.

Missouri.— State *v.* Kentner, 178 Mo. 487, 77 S. W. 522; State *v.* Dooley, 121 Mo. 591, 26 S. W. 558; State *v.* Davis, 70 Mo. 467; State *v.* Phelan, 65 Mo. 547; State *v.* Presbury, 13 Mo. 342; State *v.* Stocker, 80 Mo. App. 354; State *v.* Ragsdale, 59 Mo. App. 590.

Nebraska.— Peterson *v.* State, 64 Nebr. 875, 90 N. W. 964; Leisenberg *v.* State, 60 Nebr. 628, 84 N. W. 6.

New Hampshire.— State *v.* King, 67 N. H. 219, 34 Atl. 461; State *v.* Keneston, 59 N. H. 36; State *v.* Goulding, 44 N. H. 284; State *v.* Blaisdell, 33 N. H. 388.

New Jersey.— State *v.* Halsted, 39 N. J. L. 402.

New York.— Phelps *v.* People, 72 N. Y. 334.

North Carolina.— State *v.* Stanton, 23 N. C. 424.

Ohio.— Groenland *v.* State, 6 Ohio S. & C. Pl. Dec. 313, 4 Ohio N. P. 122.

South Carolina.— State *v.* Raines, 3 McCord 533.

Tennessee.— Harrison *v.* State, 2 Coldw. 232; State *v.* Ladd, 2 Swan 226.

Texas.— Longley *v.* State, 43 Tex. 490; State *v.* Billingsley, 43 Tex. 93; Smith *v.* State, 34 Tex. 612; Kindred *v.* State, 33 Tex. 67; State *v.* Deitz, 30 Tex. 511; Shelton *v.* State, 30 Tex. 431; Rhodes *v.* State, 29 Tex. 188; State *v.* Warren, 13 Tex. 45; Welsh *v.* State, 11 Tex. 368; State *v.* West, 10 Tex. 553; Gray *v.* State, 7 Tex. App. 10; Carr *v.* State, 5 Tex. App. 153; Hart *v.* State, 2 Tex. App. 39.

Utah.— State *v.* Williamson, 22 Utah 248, 62 Pac. 1022, 83 Am. St. Rep. 768.

Vermont.— State *v.* Daley, 41 Vt. 564; State *v.* Cook, 38 Vt. 437.

West Virginia.— State *v.* Boggess, 36 W. Va. 713, 15 S. E. 423; State *v.* Riffe, 10 W. Va. 794.

Wyoming.— *In re* McDonald, 4 Wyo. 150, 33 Pac. 18.

United States.— U. S. *v.* Ballard, 118 Fed. 757; Haynes *v.* U. S., 101 Fed. 718, 42 C. C. A. 34; U. S. *v.* Armstrong, 24 Fed. Cas. No. 14,468, 5 Phila. (Pa.) 273; U. S. *v.* Ballard, 24 Fed. Cas. No. 14,506; U. S. *v.* La Coste, 26 Fed. Cas. No. 15,548, 2 Mason 129; U. S. *v.* O'Sullivan, 27 Fed. Cas. No. 15,974; U. S. *v.* White, 28 Fed. Cas. No. 16,674.

See 27 Cent. Dig. tit. "Indictment and Information," § 292.

forth all the elements necessary to constitute the offense intended to be punished,[8] and must state all the material facts and circumstances embraced in the definition of the offense.[9] Ingredients which do not enter into the statutory definition must be added.[10] In case a material error occurs in the language of the statute as published, an indictment is not sufficient which follows the published statute.[11]

(B) *Identification of Offense.* The same certainty is required in indictments on statutes as at common law,[12] and where the statute does not define the act or acts constituting the offense so as to give to the offender information of the nature and cause of the accusation, other averments conveying such information must be added,[13]

8. *Alabama.*— Grattan *v.* State, 71 Ala. 344; Carter *v.* State, 55 Ala. 181; Turnipseed *v.* State, 6 Ala. 664; State *v.* Brown, 4 Port. 410.

Minnesota.— State *v.* Comfort, 22 Minn. 271.

New Hampshire.— State *v.* Goulding, 44 N. H. 284.

New Jersey.— State *v.* Bartholomew, 69 N. J. L. 160, 54 Atl. 231; State *v.* Startup, 39 N. J. L. 423; State *v.* Thatcher, 35 N. J. L. 445.

Pennsylvania.— Com. *v.* Miller, 2 Pars. Eq. Cas. 480.

Texas.— Dunlap *v.* State, 40 Tex. Cr. 590, 51 S. W. 392; Kerry *v.* State, 17 Tex. App. 178, 50 Am. Rep. 122; Hoskey *v.* State, 9 Tex. App. 202; Bigby *v.* State, 5 Tex. App. 101.

United States.— Evans *v.* U. S., 153 U. S. 584, 14 S. Ct. 934, 38 L. ed. 830 (holding this the rule even in case of misdemeanor); U. S. *v.* Carll, 105 U. S. 611, 26 L. ed. 1135; U. S. *v.* Marx, 122 Fed. 964; Peters *v.* U. S., 94 Fed. 127, 36 C. C. A. 105. The fact that the statute in question, read in the light of the common law, and of other statutes on the like matter, enables the court to infer the intent of the legislature, does not dispense with the necessity of alleging in the indictment all the facts necessary to bring the case within that intent. U. S. *v.* Carll, *supra* [*citing* Com. *v.* Filburn, 119 Mass. 297; Com. *v.* Bean, 14 Gray (Mass.) 52, 11 Cush. (Mass.) 414; U. S. *v.* Simmons, 96 U. S. 360, 24 L. ed. 819; U. S. *v.* Cruikshank, 92 U. S. 542, 23 L. ed. 588].

See 27 Cent. Dig. tit. "Indictment and Information," § 293.

9. State *v.* Campbell, 29 Tex. 44, 94 Am. Dec. 251; Kerry *v.* State, 17 Tex. App. 178, 50 Am. Rep. 122; White *v.* State, 3 Tex. App. 605; Evans *v.* U. S., 153 U. S. 584, 14 S. Ct. 934, 38 L. ed. 830; U. S. *v.* Hess, 124 U. S. 483, 8 S. Ct. 571, 31 L. ed. 516; U. S. *v.* Brazeau, 78 Fed. 464. If an indictment for a statutory offense, by following the language of the statute, charges expressly, or by necessary implication, every fact necessary to constitute the offense, it is sufficient. Com. *v.* Stout, 7 B. Mon. (Ky.) 247; Harrington *v.* State, 54 Miss. 490; Helfrick *v.* Com., 29 Gratt. (Va.) 844.

10. State *v.* McDowell, 1 Pennew. (Del.) 2, 39 Atl. 454; State *v.* Faucett, 15 Tex. 584 (holding that an indictment for marking and branding a horse, "not being his own property, and without the consent of the owner," etc., must aver the ownership of the branded animal; an indictment following the language of the statute not being sufficient); Antle *v.* State, 6 Tex. App. 202.

11. State *v.* Marshall, 14 Ala. 411, holding that where in a statute punishing an offense of assault with intent to murder, the word "intent" was printed "attempt" an indictment following such language was insufficient to charge the requisite intent.

12. Batre *v.* State, 18 Ala. 119; Com. *v.* Miller, 2 Pars. Eq. Cas. (Pa.) 480. See *supra*, V, C, 2.

13. *Alabama.*— Anthony *v.* State, 29 Ala. 27.

Arkansas.— State *v.* Graham, 38 Ark. 519; Moffatt *v.* State, 11 Ark. 169.

Connecticut.— State *v.* Jackson, 39 Conn. 229.

Illinois.— Johnson *v.* People, 113 Ill. 99.

Indiana.— Bowles *v.* State, 13 Ind. 427.

Kentucky.— Com. *v.* Cook, 13 B. Mon. 149.

Maine.— State *v.* Symonds, 57 Me. 148, holding that an indictment for illegal voting for state officers, based on a disqualification by reason of desertion from the United States army, must specifically set forth the crime of desertion.

Mississippi.— Kliffield *v.* State, 4 How. 304, holding that an indictment for the violation of the whole of a particular statute without specifications is insufficient.

Missouri.— State *v.* Krueger, 134 Mo. 262, 35 S. W. 604.

New Hampshire.— State *v.* Pierce, 43 N. H. 273.

New Jersey.— State *v.* Schmid, 57 N. J. L. 625, 31 Atl. 280.

New York.— People *v.* Kane, 61 N. Y. Suppl. 632, 14 N. Y. Cr. 316; People *v.* Taylor, 3 Den. 91.

North Carolina.— State *v.* Farmer, 104 N. C. 887, 10 S. E. 563 (indictment against a physician for giving a false and fraudulent prescription for liquors); State *v.* Credle, 91 N. C. 640; State *v.* Hill, 79 N. C. 657.

Ohio.— Lamberton *v.* State, 11 Ohio 282, resisting officer.

Oregon.— State *v.* Perham, 4 Oreg. 188; State *v.* Packard, 4 Oreg. 157.

Pennsylvania.— Com. *v.* Dennis, 1 Pa. Co. Ct. 278.

Tennessee.— Cornell *v.* State, 7 Baxt. 520.

Vermont.— State *v.* Higgins, 53 Vt. 191.

West Virginia.— State *v.* Mitchell, 47 W. Va. 789, 35 S. E. 845.

even when the offense is not capital.[14] The indictment must also be framed with such certainty that a judgment may be pleaded in bar to any subsequent prosecution for the same offense.[15] So, where a statute is elliptical and the true intent must be ascertained from a consideration of the other portions thereof, or other statutes, the indictment must allege the crime according to the true intent of the statute.[16]

(c) *Statement of Manner, Means, and Other Circumstances.* Particulars as to manner or means, place or circumstance, need not in general be added to the statutory definition,[17] except as necessary to distinguish one instance from another,[18] and in certain other cases where the rule of strict certainty has been applied when the common law furnishes a close and appropriate analogy.[19] The language of the statute cannot be followed with regard to offenses analogous to common-law libel, in which the substance of the words or writing must be set out.[20] Such are the cases of false pretense when pretenses are required to be set out;[21] or of sending threatening letters where the letters must be set out,[22] or embezzlement, in which it is usual to allege the species, number, and value of the articles embezzled.[23] Such averments as to time, place, person, and other circumstances as are necessary to identify the particular transaction are of course necessary.[24]

(d) *Where Statute Merely Prescribes Punishment.* Where a statute merely declares the punishment of an offense known at common law and does not employ any descriptive terms, the indictment must be framed in accordance

United States.— Evans *v.* U. S., 153 U. S. 584, 14 S. Ct. 934, 38 L. ed. 830 (so holding in case of a misdemeanor); U. S. *v.* Hess, 124 U. S. 483, 8 S. Ct. 571, 31 L. ed. 516; U. S. *v.* Simmons, 96 U. S. 360, 24 L. ed. 819; U. S. *v.* Cruikshank, 92 U. S. 542, 23 L. ed. 588; U. S. *v.* Gooding, 12 Wheat. 460, 6 L. ed. 693; U. S. *v.* Staton, 27 Fed. Cas. No. 16,382, 2 Flipp. 319.

England.— Reg. *v.* Stroulger, 17 Q. B. D. 327, 16 Cox C. C. 85, 51 J. P. 278, 55 L. J. M. C. 137, 55 L. T. Rep. N. S. 122, 34 Wkly. Rep. 719; Reg. *v.* Norton, 16 Cox C. C. 59; Hawkins P. C. c. 25, § 113.

Canada.— Rex *v.* Beckwith, 7 Can. Cr. Cas. 450.

See 27 Cent. Dig. tit. "Indictment and Information," § 293.

14. U. S. *v.* Scott, 27 Fed. Cas. No. 16,241, 4 Biss. 29; and other cases cited in the preceding note.

15. *Arkansas.*— Glass *v.* State, 45 Ark. 173; Moffatt *v.* State, 11 Ark. 169.

Kentucky.— Com. *v.* Cook, 13 B. Mon. 149; Paynter *v.* Com., 55 S. W. 687, 21 Ky. L. Rep. 1562.

Missouri.— State *v.* Brown, 8 Mo. 210.

New Hampshire.— State *v.* Peirce, 43 N. H. 273.

New York.— People *v.* Taylor, 3 Den. 91.

Texas.— Portwood *v.* State, 29 Tex. 47, 94 Am. Dec. 258.

United States.— U. S. *v.* Simmons, 96 U. S. 360, 24 L. ed. 819.

See 27 Cent. Dig. tit. "Indictment and Information," § 293.

Where a statute creates an offense composed of different ingredients, and in the same statute makes each one of those constituents a distinct offense, it is necessary, in defining and making out the offense in a charge, that the particular constituent or constituents relied on be specified with sufficient accuracy to enable defendant to meet the charge and raise it as a bar to a subsequent prosecution. State *v.* Williams, 14 Tex. 98.

16. Bell *v.* State, 10 Ark. 536; People *v.* Wilber, 4 Park. Cr. (N. Y.) 19; Kerry *v.* State, 17 Tex. App. 178, 50 Am. Rep. 122; U. S. *v.* Reed, 27 Fed. Cas. No. 16,136, 1 Lowell 232.

17. *Kentucky.*— Paynter *v.* Com., 55 S. W. 687, 21 Ky. L. Rep. 1562.

Louisiana.— State *v.* Tisdale, 39 La. Ann. 476, 2 So. 406; State *v.* Maas, 37 La. Ann. 292.

North Carolina.— State *v.* George, 93 N. C. 567.

South Carolina.— State *v.* Blease, 1 McMull. 472; State *v.* Cantrell, 2 Hill 389.

United States.— U. S. *v.* Wilson, 28 Fed. Cas. No. 16,730, Baldw. 78.

The rule is that while in framing an indictment on a statute, all the circumstances which constitute the definition of the offense in the statute itself, so as to bring the accused precisely within it, must be stated, yet no other description of the thing in which the offense was committed is necessary to be stated than that contained in the statute itself unless necessary to fix the grade of the offense. Phelps *v.* People, 72 N. Y. 334.

18. Updegraff *v.* Com., 6 Serg. & R. (Pa.) 5.

19. Moffatt *v.* State, 11 Ark. 169; U. S. *v.* Gooding, 12 Wheat. (U. S.) 460, 6 L. ed. 693.

20. Melton *v.* State, 12 Tex. App. 552; Lagrone *v.* State, 12 Tex. App. 426.

21. See FALSE PRETENSES, 19 Cyc. 423.

22. See, generally, THREATS.

23. State *v.* Stimson, 24 N. J. L. 9. See EMBEZZLEMENT, 15 Cyc. 514 *et seq.*

24. People *v.* Thompson, 4 Cal. 238; People *v.* West, 106 N. Y. 293, 12 N. E. 610, 60 Am. Rep. 452; People *v.* Webster, 17 Misc. (N. Y.) 410, 40 N. Y. Suppl. 1135, 11 N. Y.

with common-law forms;[25] and where a statute neither creates an offense nor increases its penalties, but divides a common-law offense into degrees and diminishes the punishment, an indictment in the common-law form is sufficient without the addition of the circumstances which determine the degree.[26]

(E) *Where Statute Employs Technical or Generic Terms.* Where technical terms or legal conclusions are used, there should be a specification of the facts to inform the accused of the charge which he must meet;[27] and where the definition of the offense includes generic terms the indictment must state the species.[28] Where a general term used is succeeded by words more precise and definite, the indictment must charge the offense in the more particular words,[29] and the same is true when the general term follows the particular terms,[30] although when the offense is prohibited in general terms in one portion of the statute, and in another portion, entirely distinct, the acts of which the offense consists are specified, it is not necessary that anything but the general description should be set out in an indictment.[31] It is not necessary to explain the meaning of words used in the statute.[32]

(F) *Where Statutory Language May Include Innocent Acts.* It is not sufficient to charge an offense in the language of the statute alone, where by its generality it may embrace acts which it was not the intent of the statute to punish.[33] If the statute is confined to certain classes of persons or to acts done at some particular time or place, the indictment must show that the party indicted, and the time and place when the alleged criminal acts were perpetrated, were such as to bring the supposed offense directly within the statute.[34] And where a statute makes various classes of persons subject to its provisions, the indictment should aver the facts showing in which class defendant lies.[35] But it is not necessary to describe particular classes of persons further than in the terms of the statute.[36]

Cr. 340; People *v.* Taylor, 3 Den. (N. Y.) 91.

25. State *v.* Briley, 8 Port. (Ala.) 472; State *v.* Stedman, 7 Port. (Ala.) 495; State *v.* Absence, 4 Port. (Ala.) 397; State *v.* Flint, 33 La. Ann. 1288 (holding that the omission of the word "feloniously" from an indictment for forgery was fatal); U. S. *v.* Crosby, 25 Fed. Cas. No. 14,893, 1 Hughes 448.

26. Davis *v.* State, 39 Md. 355, holding that premeditation need not be averred in an indictment for murder. See HOMICIDE, 21 Cyc. 646.

27. State *v.* Bierce, 27 Conn. 319 (holding, however, that "seduced" is sufficient without further description); Jesse *v.* State, 28 Miss. 100; U. S. *v.* Scott, 74 Fed. 213 (holding, however, that the expression, "being concerned in," is not a legal term or conclusion which needs a specification of facts for completeness of description; but is a colloquial expression, equivalent to "being engaged in," or "taking part in," and sufficiently informs the accused of what the government intends to prove).

28. State *v.* Credle, 91 N. C. 640; McFain *v.* State, 41 Tex. 385; State *v.* West, 10 Tex. 553; Burch *v.* Republic, 1 Tex. 608; Boyd *v.* Com., 77 Va. 52; U. S. *v.* Hess, 124 U. S. 483, 8 S. Ct. 571, 31 L. ed. 516; U. S. *v.* Lancaster, 26 Fed. Cas. No. 15,556, 2 McLean 431. See also LARCENY. *Compare* State *v.* Priebnow, 14 Nebr. 484, 16 N. W. 907, holding that under a statute which makes it a crime to cut down or injure "any fruit, ornamental, shade, or other tree," the property of another, to a certain amount in value, an indictment which charges that the trees were "ornamental and shade trees," without specifying the particular kind, is sufficient.

29. Horton *v.* State, 53 Ala. 488; Bush *v.* State, 18 Ala. 415; State *v.* Railford, 7 Port. (Ala.) 101; State *v.* Plunket, 2 Stew. (Ala.) 11; Bell *v.* State, 10 Ark. 536.

30. Danner *v.* State, 54 Ala. 127, 25 Am. Rep. 662; Johnson *v.* State, 32 Ala. 583.

31. State *v.* Collins, 48 Me. 217; State *v.* Casey, 45 Me. 435.

32. Sterne *v.* State, 20 Ala. 43, holding that, where engaging in the business of hawking and peddling without a license was punishable, the indictment need not set out the facts constituting hawking and peddling.

33. *Connecticut.*— State *v.* Bierce, 27 Conn. 319.

Florida.— King *v.* State, 42 Fla. 260, 28 So. 206.

Indiana.— Schmidt *v.* State, 78 Ind. 41; Bates *v.* State, 31 Ind. 72.

New Hampshire.— State *v.* Goulding, 44 N. H. 284.

Oregon.— State *v.* Perham, 4 Oreg. 188; State *v.* Packard, 4 Oreg. 157.

United States.— U. S. *v.* Pond, 27 Fed. Cas. No. 16,067, 2 Curt. 265.

See 27 Cent. Dig. tit. "Indictment and Information," § 293.

34. People *v.* Allen, 5 Den. (N. Y.) 76.

35. Walton *v.* State, 12 Tex. App. 117.

36. Com. *v.* Shissler, 7 Pa. Dist. 344, hold-

(G) *Where Statutory Language Is Indirect or States Conclusion.* Where a charge in the language of the statute charges a mere legal conclusion,[37] or where it connects the accused with the crime by mere inference or argument,[38] a more particular statement of the facts is necessary.

(H) *Presumption in Favor of Sufficiency of Statutory Language.* Since as a general rule a description of the offense in the words of the statute defining it is sufficient, it has sometimes been held that the duty rests upon defendant to show that from the obvious intention of the legislature or known principles of law the particular case forms an exception to the general rule.[39]

d. Exceptions and Provisos in Statute — (I) *NECESSITY OF NEGATIVING EXCEPTIONS.* It is necessary to negative an exception or proviso contained in a statute defining an offense where it forms a portion of the description of the offense, so that the ingredients thereof cannot be accurately and definitely stated if the exception is omitted.[40] Where, however, the exception or proviso is separable from the description and is not an ingredient thereof, it need not be noticed in the accusation, being a matter of defense.[41] As the rule is frequently

ing that the simple use of the word "broker" is a sufficient description of an offender to bring him within a statute making certain acts by bankers, brokers, etc., misdemeanors.

37. State *v.* Graham, 38 Ark. 519; State *v.* Meysenburg, 171 Mo. 1, 71 S. W. 229.

38. State *v.* McMillan, 69 Vt. 105, 37 Atl. 278.

39. *Arkansas.*— Lemon *v.* State, 19 Ark. 171.

Connecticut.— State *v.* Lockbaum, 38 Conn. 400; Whiting *v.* State, 14 Conn. 487, 36 Am. Dec. 499.

Maryland.— Parkinson *v.* State, 14 Md. 184, 74 Am. Dec. 522.

Mississippi.— Riley *v.* State, 43 Miss. 397.

New Hampshire.— State *v.* Abbott, 31 N. H. 434.

United States.— U. S. *v.* Henry, 26 Fed. Cas. No. 15,350, 3 Ben. 29.

40. *Illinois.*— Beasley *v.* People, 89 Ill. 571.

Kentucky.— Com. *v.* Kenner, 11 B. Mon. 1.

Maryland.— Gibson *v.* State, 54 Md. 447; Bode *v.* State, 7 Gill 326.

Minnesota.— State *v.* McIntyre, 19 Minn. 93.

Missouri.— State *v.* Meek, 70 Mo. 355, 35 Am. Rep. 427; State *v.* Hunter, 5 Mo. 360.

New Hampshire.— State *v.* Fuller, 33 N. H. 259.

New Jersey.— State *v.* Startup, 39 N. J. L. 423, indictment against ministerial officer for violation of a public duty imposed upon him by statute.

Ohio.— Kowenstrot *v.* State, 6 Ohio S. & C. Pl. Dec. 467, 4 Ohio N. P. 257.

Oklahoma.— Parker *v.* Territory, 9 Okla. 109, 59 Pac. 9.

Rhode Island.— State *v.* Mahoney, 24 R. I. 338, 53 Atl. 124.

South Carolina.— State *v.* May, 1 Brev. 160.

Texas.— Salter *v.* State, 44 Tex. Cr. 591, 73 S. W. 395.

Utah.— State *v.* Williamson, 22 Utah 248, 62 Pac. 1022, 83 Am. St. Rep. 780.

United States.— U. S. *v.* Cook, 17 Wall. 168, 21 L. ed. 538.

England.— Rex *v.* Palmer, 1 Leach C. C. 120; Rex *v.* Jukes, 8 T. R. 536, 5 Rev. Rep. 445.

Canada.— Reg. *v.* Strauss, 1 Can. Cr. Cas. 103; Reg. *v.* Nunn, 10 Ont. Pr. 395.

See 27 Cent. Dig. tit. "Indictment and Information," § 295 *et seq.*

Where the statute includes two or more classes which will be affected thereby — such as physicians who remove into the state to practice after the passage of an act to regulate the same, and persons who were residing in the state and practising under a former act — in such cases the information must show on its face that the accused does not belong to either class. Gee Wo *v.* State, 36 Nebr. 241, 54 N. W. 513.

Negative words constituting a part of the description of an offense must be used in the indictment. U. S. *v.* McCormick, 28 Fed. Cas. No. 16,663, 1 Cranch C. C. 593.

What are exceptions.— The word "except" is not necessary to constitute an exception within the rule. The words "unless," "other than," "not being," "not having," etc., have the same legal effect and require the same form of pleading. Com. *v.* Hart, 11 Cush. (Mass.) 130. "Unless" is sufficient to create an exception. State *v.* McIntyre, 19 Minn. 93.

Indictments for injury to animals see ANIMALS, 2 Cyc. 430.

Statute punishing abortion see ABORTION, 1 Cyc. 180.

41. *California.*— People *v.* Nugent, 4 Cal. 341, holding that a bare negative qualification need never be averred, but must be relied on as matter of defense in the progress of the trial.

Colorado.— Harding *v.* People, 10 Colo. 387, 15 Pac. 727.

Dakota.— Territory *v.* Scott, 2 Dak. 212, 6 N. W. 435.

Kansas.— Kansas City *v.* Garnier, 57 Kan. 412, 46 Pac. 707.

Maryland.— Gibson *v.* State, 54 Md. 447.

Missouri.— State *v.* O'Brien, 74 Mo. 549; State *v.* Elam, 21 Mo. App. 290.

Nebraska.— O'Connor *v.* State, 46 Nebr.

stated, an exception in the enacting clause must be pleaded; but an exception in a subsequent clause or statute is matter of defense to be shown by the accused.[42]

157, 64 N. W. 157; Gee Wo *v.* State, 36 Nebr. 241, 54 N. W. 513.

New Hampshire.— State *v.* Wade, 34 N. H. 495.

Ohio.— Hale *v.* State, 58 Ohio St. 676, 51 N. E. 154 (holding that where the effect of an exception is merely to except specified acts or persons from the operation of the general prohibitory words of the statute, a negative averment as to the exception is unnecessary); Billigheimer *v.* State, 32 Ohio St. 435; Becker *v.* State, 8 Ohio St. 391; Hirn *v.* State, 1 Ohio St. 15; Geiger *v.* State, 5 Ohio Cir. Ct. 283, 3 Ohio Cir. Dec. 141.

Oklahoma.— Garver *v.* Territory, 5 Okla. 342, 49 Pac. 470.

Rhode Island.— State *v.* Gallagher, 20 R. I. 266, 38 Atl. 655.

Texas.— Mosely *v.* State, 18 Tex. App. 311.

United States.— U. S. *v.* Cook, 17 Wall. 168, 21 L. ed. 538; Shelp *v.* U. S., 81 Fed. 694, 26 C. C. A. 570 (so holding in an indictment for selling liquor contrary to an act forbidding the "importation, manufacture, and sale of intoxicating liquors, . . . except for medicinal, mechanical, and scientific purposes"); U. S. *v.* Cook, 36 Fed. 896, 13 Sawy. 495.

Requisites of preliminary information see Com. *v.* Campbell, 22 Pa. Super. Ct. 98.

An information need not negative the exceptions of a statute which are not descriptive of the offense. Sofield *v.* State, 61 Nebr. 600, 85 N. W. 840.

See 27 Cent. Dig. tit. "Indictment and Information," § 295 *et seq.*

Exceptions after general words of prohibition need not be negatived. State *v.* Powers, 25 Conn. 48; State *v.* Miller, 24 Conn. 522; State *v.* Knowles, 90 Md. 646, 45 Atl. 877, 49 L. R. A. 695; Kiefer *v.* State, 87 Md. 562, 40 Atl. 377; Stearns *v.* State, 81 Md. 341, 32 Atl. 282; Rex *v.* Pemberton, 2 Burr. 1035.

42. *Arkansas.*— Bone *v.* State, 18 Ark. 109.

Georgia.— Elkins *v.* State, 13 Ga. 435.

Illinois.— Metzker *v.* People, 14 Ill. 101; Lequat *v.* People, 11 Ill. 330; Williams *v.* People, 20 Ill. App. 92.

Indiana.— Russell *v.* State, 50 Ind. 174; Lemon *v.* State, 4 Ind. 603; Brutton *v.* State, 4 Ind. 601.

Iowa.— State *v.* Van Vliet, 92 Iowa 476, 61 N. W. 241; State *v.* Beneke, 9 Iowa 203.

Louisiana.— State *v.* Lyons, 3 La. Ann. 154.

Maine.— State *v.* Gurney, 37 Me. 149.

Massachusetts.— Com. *v.* Hart, 11 Cush. 130; Com. *v.* Maxwell, 2 Pick. 139.

Michigan.— People *v.* Phippin, 70 Mich. 6, 37 N. W. 888.

Mississippi.— Kline *v.* State, 44 Miss. 317.

New Hampshire.— State *v.* McGlynn, 34 N. H. 422.

New Jersey.— State *v.* Price, 71 N. J. L. 249, 58 Atl. 1015; Mayer *v.* State, 64 N. J. L. 323, 45 Atl. 624.

Pennsylvania.— Com. *v.* Shelly, 2 Kulp 300.

Tennessee.— Villines *v.* State, 96 Tenn. 141, 33 S. W. 922 [*distinguishing* Matthews *v.* State, 2 Yerg. 233].

United States.— U. S. *v.* Nelson, 29 Fed. 202; U. S. *v.* Moore, 11 Fed. 248.

See 27 Cent. Dig. tit. "Indictment and Information," § 295 *et seq.*

Exceptions in enacting clause must be negatived. *Alabama.*— Blackman *v.* State, 98 Ala. 77, 13 So. 316; Davis *v.* State, 39 Ala. 521.

Arkansas.— Brittin *v.* State, 10 Ark. 299.

Illinois.— Williams *v.* People, 20 Ill. App. 92.

Indiana.— Schneider *v.* State, 8 Ind. 410; Peterson *v.* State, 7 Ind. 560.

Kentucky.— Com. *v.* Hildreth, 33 S. W. 838, 17 Ky. L. Rep. 1124; Com. *v.* Slaughter, 12 Ky. L. Rep. 893.

Maine.— Hinckley *v.* Penobscot, 42 Me. 89; State *v.* Keen, 34 Me. 500.

Maryland.— Kellenbeck *v.* State, 10 Md. 431, 69 Am. Dec. 166; Rawlings *v.* State, 2 Md. 201.

Massachusetts.— Com. *v.* Thurlow, 24 Pick. 374.

Missouri.— State *v.* Raymond, 54 Mo. App. 425.

New Hampshire.—State *v.* Abbott, 31 N. H. 434.

New Jersey.— State *v.* Marks, 65 N. J. L. 84, 46 Atl. 757.

North Carolina.— State *v.* Bloodworth, 94 N. C. 918; State *v.* Heaton, 81 N. C. 542; State *v.* Tomlinson, 77 N. C. 528; State *v.* Norman, 13 N. C. 222.

South Carolina.— State *v.* Reynolds, 2 Nott & M. 365.

Tennessee.— State *v.* Staley, 3 Lea 565; Worley *v.* State, 11 Humphr. 172.

Vermont.— State *v.* Barker, 18 Vt. 195.

Virginia.— Com. *v.* Hill, 5 Gratt. 682.

Wisconsin.— Byrne *v.* State, 12 Wis. 519.

England.— Rex *v.* Jarvis, 1 East 643 note.

See 27 Cent. Dig. tit. "Indictment and Information," § 295 *et seq.*

Exceptions in subsequent clauses or statutes need not be negatived. *Alabama.*— Bell *v.* State, 104 Ala. 79, 15 So. 557; Bellinger *v.* State, 92 Ala. 86, 9 So. 399; Grattan *v.* State, 71 Ala. 344; Carson *v.* State, 69 Ala. 235; Clark *v.* State, 19 Ala. 552.

Arkansas.— State *v.* Kansas City, etc., R. Co., 54 Ark. 546, 16 S. W. 567; State *v.* Bailey, 43 Ark. 150; Wilson *v.* State, 35 Ark. 414; Wilson *v.* State, 33 Ark. 557, 34 Am. Rep. 52; Matthews *v.* State, 24 Ark. 484; Shover *v.* State, 10 Ark. 259.

Indiana.— Alexander *v.* State, 48 Ind. 394; Colson *r.* State, 7 Blackf. 590; Bouser *v.* State, Smith 408.

Iowa.— State *v.* Williams, 20 Iowa 98; State *r.* Beneke, 9 Iowa 203; Romp *v.* State, 3 Greene 276.

But this is not an accurate statement, since the rule is to be determined, not by the position of the exception or proviso, but by its nature as constituting an element of the description of the offense.[43] An exception in a subsequent section or statute may be so clearly connected with the description contained in a preceding section that it must be negatived;[44] and conversely, matter in the enacting clause may be so independent of the description that it will form a matter of defense.[45] While it has been held that a reference from the enacting clause to a clause containing the proviso will demand that the latter be negatived,[46] such rule has not been generally followed and a reference will not render it imperative to negative a proviso not a portion of the description.[47] A proviso which withdraws a case from the operation of the statute need not be negatived.[48] Where there are several species of the same general crime with varying circumstances of aggravation and subject to a gradation of punishments, it is not necessary to negative such circumstances.[49]

Kansas.— State *v.* Thompson, 2 Kan. 432.

Kentucky.— Com. *v.* McClanahan, 2 Metc. 8; Com. *v.* Benge, 13 Ky. L. Rep. 591; Com. *v.* Smithers, 8 Ky. L. Rep. 612.

Maine.— State *v.* Boyington, 56 Me. 512; State *v.* Godfrey, 24 Me. 232, 41 Am. Dec. 382.

Maryland.— Barbar *v.* State, 50 Md. 161; Rawlings *v.* State, 2 Md. 201.

Massachusetts.— Com. *v.* Fitchburg R. Co., 10 Allen 189.

Missouri.— State *v.* Cox, 32 Mo. 566; State *v.* Shiflett, 20 Mo. 415, 64 Am. Dec. 190; State *v.* Buford, 10 Mo. 703; Vaughn *v.* State, 4 Mo. 530; State *v.* Ellis, 4 Mo. 474; State *v.* Barr, 30 Mo. App. 498.

New Hampshire.— State *v.* Cassady, 52 N. H. 500; State *v.* Shaw, 35 N. H. 217.

New Jersey.— Mayer *v.* State, 63 N. J. L. 35, 42 Atl. 772.

North Carolina.—State *v.* Harris, 119 N. C. 811, 26 S. E. 148; State *v.* Downs, 116 N. C. 1064, 21 S. E. 689; State *v.* George, 93 N. C. 567; State *v.* Heaton, 81 N. C. 542; State *v.* Whitehurst, 70 N. C. 85.

Pennsylvania.— Com. *v.* Wickert, 6 Pa. Dist. 387, 19 Pa. Co. Ct. 251.

Texas.— Williams *v.* State, 37 Tex. Cr. 238, 39 S. W. 664.

United States.— U. S. *v.* Schimer, 27 Fed. Cas. No. 16,229, 5 Biss. 195.

See 27 Cent. Dig. tit. "Indictment and Information," § 295 *et seq.*

43. State *v.* Ah Chew, 16 Nev. 50, 40 Am. Rep. 488; State *v.* Rush, 13 R. I. 198; State *v.* O'Donnell, 10 R. I. 472; State *v.* Abbey, 29 Vt. 60, 67 Am. Dec. 754.

44. U. S. *v.* Cook, 17 Wall. (U. S.) 168, 21 L. ed. 538.

45. State *v.* Dry Fork R. Co., 50 W. Va. 235, 40 S. E. 447; U. S. *v.* Cook, 17 Wall. (U. S.) 168, 21 L. ed. 538. As a rule an exception by which certain particulars are withdrawn from the operation of the enacting clause of a statute, defining a crime concerning a class or species, constitutes no part of the definition of such crime, whether placed near to or remote from such enacting clause, and an indictment charging a person with the violation of such statute need not negative such exception. Nelson *v.* U. S., 30 Fed. 112.

46. Com. *v.* Hart, 11 Cush. (Mass.) 130; Com. *v.* Shelly, 2 Kulp (Pa.) 300 (holding that where the enacting clause of a statute declares certain acts to be an offense, "except as hereinafter excepted," and the exceptions are introduced in a separate section, they are nevertheless a part of the enacting clause, and should be negatived in an indictment under the statute); Rex *v.* Pratten, 6 T. R. 559.

47. State *v.* Doepke, 68 Mo. 208, 30 Am. Rep. 785; State *v.* O'Gorman, 68 Mo. 179 (so holding under a statute making it a misdemeanor for a clerk of court to fail to file a statement of fees, except cases as set forth in a prior section); State *v.* Abbey, 29 Vt. 60, 67 Am. Dec. 754. Where the enacting clause of a statute merely refers, without otherwise stating it, to an exception in a subsequent section, the exception need not be negatived in an indictment unless necessary to a complete definition of the offense. Com. *v.* Jennings, 121 Mass. 47, 23 Am. Rep. 249 [*overruling* Com. *v.* Hart, 11 Cush. (Mass.) 130, which *distinguished* Rex *v.* Pratten, 6 T. R. 559].

48. *Georgia.*— Kitchens *v.* State, 116 Ga. 847, 43 S. E. 256 [*distinguishing* Conyers *v.* State, 50 Ga. 103, 15 Am. Rep. 686].

Illinois.— Williams *v.* People, 20 Ill. App. 92.

Iowa.— State *v.* Curley, 33 Iowa 359; State *v.* Stapp, 29 Iowa 551.

Missouri.— State *v.* O'Brien, 74 Mo. 549.

North Carolina.— State *v.* Norman, 13 N. C. 222, holding in an indictment for bigamy it was not necessary to aver that a former marriage was then valid and subsisting.

England.— Rex *v.* Pemberton, 1 W. Bl. 230.

See 27 Cent. Dig. tit. "Indictment and Information," § 295 *et seq.*

49. Kellenbeck *v.* State, 10 Md. 431, 69 Am. Dec. 166 (holding, however, that an indictment for burning a building "not parcel of any dwelling-house" must negative the exception, since it is included in the enacting part of the statute); People *v.* Pierce, 11 Hun (N. Y.) 633 (holding that the rule as to negativing exceptions applies only to cases where the existence of the ex-

(II) *Sufficiency of Negation.* As a rule any words which exclude the exception with certainty are sufficient;[50] but where the negative is unnecessarily particular, the state is concluded by it if it fails to specifically negative all the exceptions.[51] An express negation is not necessary where the charge preferred, from its nature, conclusively imports a negation.[52] Where exceptions are enumerated disjunctively in the statute, they should not be charged conjunctively in case the effect will be to alter the statutory description of the offense.[53] An exception containing an affirmative limited by a negative may be negatived by placing the word "not" before it, although the result is apparently a double negative.[54]

e. Validity of Indictment Upon Statute as Indictment at Common Law. It may be regarded as well settled that an indictment which describes an offense punishable at common law only may be regarded, if otherwise sufficient, as a valid indictment for the offense at common law, although it concludes "against the form of the statute."[55] The conclusion may be rejected as surplusage.[56] This rule cannot of course apply to indictments for acts made punishable specially by statute and for which an indictment at common law no longer lies.[57] An

ception relieves the act of its criminality); State *v.* Ambler, 56 Vt. 672 (holding that an indictment under the statute providing punishment for burning buildings other than dwelling-houses need not negative the exception in regard to dwelling-houses). See also Com. *v.* Reynolds, 122 Mass. 454; Com. *v.* Hamilton, 15 Gray (Mass.) 480; Larned *v.* Com., 12 Metc. (Mass.) 240; Devoe *v.* Com., 3 Metc. (Mass.) 316; Com. *v.* Squire, 1 Metc. (Mass.) 258.

50. *Indiana.*— State *v.* Shoemaker, 4 Ind. 100, holding that an indictment for the sale of liquor to a minor was sufficient where it averred a sale without the assent of the minor's parent, omitting the words "or guardian."

Maine.— State *v.* Keen, 34 Me. 500.

Maryland.— Wright *v.* State, 88 Md. 436, 41 Atl. 795.

Massachusetts.— Com. *v.* Wilson, 11 Cush. 412. And see Com. *v.* Conant, 6 Gray 482; Com. *v.* La Fontaine, 3 Gray 479.

Missouri.— State *v.* Sutton, 25 Mo. 300; Neales *v.* State, 10 Mo. 498 (holding that where several statutes authorize license to exercise a particular trade, an indictment for a breach of one must negative a right under the others); State *v.* Raymond, 54 Mo. App. 425.

Rhode Island.— State *v.* Walsh, 14 R. I. 507, holding an averment negativing an exception sufficient, although made by reference to the statute specifying the exception without setting it out.

Vermont.— State *v.* Munger, 15 Vt. 290.

See 27 Cent. Dig. tit. "Indictment and Information," § 298.

51. State *v.* Pitzer, 23 Kan. 250 (holding that where, in an indictment for selling liquor without a license, it was attempted to negative the forms of license by name instead of generally, the omission of one form was fatal); State *v.* Pittman, 10 Kan. 593. *Compare* State *v.* Sommers, 3 Vt. 156, holding that in an indictment for selling liquor without a license, it was necessary to negative a license of any sort and not sufficient to negative merely an innkeeper's license.

52. Knoxville Nursery Co. *v.* Com., 108 Ky. 6, 55 S. W. 691, 21 Ky. L. Rep. 1483 (holding that an averment that defendant "did unlawfully carry on its business of selling fruit trees and delivering them to various parties in Crittenden county" is sufficient to negative an exclusion of foreign insurance companies); State *v.* Price, 12 Gill & J. (Md.) 260, 37 Am. Dec. 81.

53. Com. *v.* Hadcraft, 6 Bush (Ky.) 91, holding that under a statute punishing the sale of liquor to an infant "without the written consent or request" of the parent, etc., it was not proper to allege a sale "without the written consent and request."

54. State *v.* Damon, 97 Me. 323, 54 Atl. 845.

55. *Massachusetts.*— Com. *v.* Boynton, 2 Mass. 77.

New Hampshire.— State *v.* Gove, 34 N. H. 510; State *v.* Buckman, 8 N. H. 203, 29 Am. Dec. 646.

New York.— Syracuse, etc., Plank Road Co. *v.* People, 66 Barb. 25.

Tennessee.— Haslip *v.* State, 4 Hayw. 273.

United States.— U. S. *v.* Clark, 25 Fed. Cas. No. 14,804, 1 Gall. 497.

England.— Cholmley's Case, Cro. Car. 464; Eden's Case, Cro. Eliz. 697; Penhallo's Case, Cro. Eliz. 231; Reg. *v.* Wigg, 2 Ld. Raym. 1163, 2 Salk. 460; Rex *v.* Mathews, 2 Leach C. C. 664, 5 T. R. 162.

See 27 Cent. Dig. tit. "Indictment and Information," § 299.

Contra.— Paris *v.* People, 27 Ill. 74.

56. *Connecticut.*— Southworth *v.* State, 5 Conn. 325.

Kentucky.— Gregory *v.* Com., 2 Dana 417.

Maryland.— Davis *v.* State, 3 Harr. & J. 154.

Massachusetts.— Com. *v.* Hoxey, 16 Mass. 385.

Vermont.— State *v.* Phelps, 11 Vt. 116, 34 Am. Dec. 672.

See 27 Cent. Dig. tit. "Indictment and Information," § 299. And see *supra*, III, E, 5.

57. State *v.* Gove, 34 N. H. 510.

indictment as at common law may be valid, although the punishment is inflicted under a statute.[58] It has been held that an indictment which is not a sufficient description of a felony cannot be supported as an indictment for a misdemeanor.[59]

I. Descriptions of Persons Other Than Accused — 1. Natural Persons.[60] The indictment must insert the christian name and surname of the party injured, or of any other party whose name is necessary to the identification of the offense,[61] unless the necessity is removed by statute.[62] If they are unknown to the grand jury such fact must be stated, in which case the insertion is excused.[63] Under

58. *Indiana.*— Jerry *v.* State, 1 Blackf. 395; Fuller *v.* State, 1 Blackf. 63.

Mississippi.— McCann *v.* State, 13 Sm. & M. 471.

New York.— People *v.* Enoch, 13 Wend. 159, 27 Am. Dec. 197.

Pennsylvania.— Com. *v.* Gable, 7 Serg. & R. 423; White *v.* Com., 6 Binn. 179, 6 Am. Dec. 443; Com. *v.* Searle, 2 Binn. 332, 4 Am. Dec. 446.

South Carolina.— See State *v.* Raines, 3 McCord 533.

Tennessee.— Mitchell *v.* State, 8 Yerg, 514.

Virginia.— Vance *v.* Com., 2 Va. Cas. 162.

59. Com. *v.* Newell, 7 Mass. 245; Rex *v.* Cross, 1 Ld. Raym. 711, 3 Salk. 193.

60. See also Names.

Repugnancy see *supra*, V, C, 4, text and note 10.

61. *Alabama.*— Crittenden *v.* State, 134 Ala. 145, 32 So. 273; Russell *v.* State, 71 Ala. 348; Grattan *v.* State, 71 Ala. 344.

Illinois.— Willis *v.* People, 2 Ill. 399.

Indiana.— State *v.* Irvin, 5 Blackf. 343 (holding insufficient an indictment which alleged that defendant unlawfully won of several persons, naming them, "and others"); State *v.* Stucky, 2 Blackf. 289 (holding an indictment bad which alleged a sale of intoxicating liquors to "divers persons"). See also Black *v.* State, 57 Ind. 109, holding that where the name of a party assaulted was spelled in four different ways in the indictment and the proof established it in a manner different from any of such ways, the indictment was bad.

Iowa.— State *v.* Bitman, 13 Iowa 485.

Louisiana.— State *v.* Griffin, 48 La. Ann. 1409, 20 So. 905.

Missouri.— State *v.* Grisham, 90 Mo. 163, 2 S. W. 223, indictment for embezzlement of a chattel mortgage, which did not allege by whom the chattel mortgage was delivered to defendant.

New York.— People *v.* Fish, Sheld. 537.

Texas.— Daugherty *v.* State, 41 Tex. Cr. 661, 56 S. W. 620.

England.— Reg. *v.* Frost, 3 C. L. R. 665, 6 Cox C. C. 526, Dears. C. C. 474, 1 Jur. N. S. 407, 24 L. J. M. C. 116.

See 27 Cent. Dig. tit. "Indictment and Information," § 273 *et seq.*

But *compare* Boyd *v.* State, 7 Coldw. (Tenn.) 69 (holding that an indictment was sufficient which alleged the killing of "one William ——, man of color," since the court would not take judicial notice that every man of necessity had two names, in view of the fact that many persons of color never had or acquired any surname); Martin *v.* State, 6 Humphr. (Tenn.) 264 (holding that where defendant was charged with a misdemeanor in selling spirituous liquors to a slave, a description of the slave by ownership was sufficient, without alleging his name).

Necessity of stating name of owner of property injured see *infra*, V, J.

Surname of father.— Where the owner of a horse stolen was averred to be "J G" and it appeared that his real name was "J G B," "G" being his father's name and "B" his mother's name which he had assumed, and he was not commonly known by either "G" or "B" but by his christian name, it was held that the indictment was sufficient. Young *v.* State, 30 Tex. App. 308, 17 S. W. 413.

Where the name is not essential to the description of the offense, it need not be alleged. Com. *v.* Lampton, 4 Bibb (Ky.) 261 (indictment for permitting gaming); State *v.* Cooney, (N. J. Sup. 1905) 60 Atl. 60; State *v.* Considine, 16 Wash. 358, 47 Pac. 755 (information for violation of the law against employing females in a saloon).

Married women.— An indictment for bigamy need not allege the maiden name of defendant's first wife. Hutchins *v.* State, 28 Ind. 34.

Marriage after the offense does not prevent an indictment being laid in the maiden name of the woman injured. Rutherford *v.* State, 13 Tex. App. 92; Turner's Case [*cited* in Rex *v.* Vandercomb, 2 Leach C. C. 816, 829].

62. Davis *v.* Com., 99 Va. 838, 38 S. E. 191, holding that under a statute providing that where an intention to injure, defraud, or cheat is required to constitute an offense, an indictment is sufficient which alleges the intent generally, and that it shall not be necessary to name the person intended to be injured, an indictment for poisoning a well, alleging an attempt to injure B "and other persons" is not defective by reason of the addition of the latter clause.

63. *Alabama.*— Cheek *v.* State, 38 Ala. 227; Bryant *v.* State, 36 Ala. 270.

Arkansas.— Cameron *v.* State, 13 Ark. 712; Reed *v.* State, 16 Ark. 499.

Colorado.— Hamilton *v.* People, 24 Colo. 301, 51 Pac. 425.

Indiana.— Brooster *v.* State, 15 Ind. 190 (holding a mere allegation that the name was unknown sufficient); State *v.* Irvin, 5 Blackf. 343.

this rule, when the name of the principal is unknown to the grand jurors, it may be so alleged in an indictment of an accessary.[64] But an allegation that a person is to the jurors unknown is insufficient where, from the nature of the related facts, they could not be stated without such knowledge.[65] Christian names must be given as well as surnames,[66] although the general rule now is that the use of initials to indicate them is sufficient,[67] especially where the party is well known thereby.[68] Where a child, by reason of its infancy, has no name, such fact should be alleged or the absence of a name otherwise accounted for.[69] Since the middle

Massachusetts.— Com. *v.* Sherman, 13 Allen 248; Com. *v.* Stoddard, 9 Allen 280; Com. *v.* Thompson, 2 Cush. 551.

Mississippi.— Grogan *v.* State, 63 Miss. 147.

Nebraska.— Sofield *v.* State, 61 Nebr. 600, 85 N. W. 840.

New York.— White *v.* People, 32 N. Y. 465 [*affirming* 55 Barb. 606].

Pennsylvania.— Com. *v.* Kaas, 3 Brewst. 422.

Texas.— State *v.* Elmore, 44 Tex. 102; State *v.* Snow, 41 Tex. 596; State *v.* Haws, 41 Tex. 161; Brewer *v.* State, 18 Tex. App. 457; Rutherford *v.* State, 13 Tex. App. 92; Jorasco *v.* State, 6 Tex. App. 238; Ranch *v.* State, 5 Tex. App. 363; Taylor *v.* State, 5 Tex. App. 1; Williams *v.* State, 3 Tex. App. 123.

United States.— U. S. *v.* Scott, 74 Fed. 213; U. S. *v.* Davis, 25 Fed. Cas. No. 14,924, 4 Cranch C. C. 333, holding that an indictment was sufficient which alleged that an assault was on a person unknown, without alleging that he was to the jurors unknown.

Canada.— Reg. *v.* Blackie, 1 Nova Scotia Dec. 383.

See 27 Cent. Dig. tit. "Indictment and Information," § 273 *et seq.*

Illustrations.— This rule applies to owners of stolen property (State *v.* McIntire, 59 Iowa 267, 13 N. W. 287; Reed *v.* State, 32 Tex. Cr. 139, 22 S. W. 403; Taylor *v.* State, 5 Tex. App. 1; Culberson *v.* State, 2 Tex. App. 324); or of a freight car broken and entered (State *v.* McIntire, 59 Iowa 264, 13 N. W. 286); to the person on whom is made an attempt at larceny from the person (State *v.* Wilson, 30 Conn. 500); to the owner of a colt unlawfully branded (State *v.* Haws, 41 Tex. 161); to a woman with whom adultery is committed (State *v.* Ean, 90 Iowa 534, 58 N. W. 898; Com. *v.* Tompson, 2 Cush. (Mass.) 551); to a person assaulted (State *v.* Elmore, 44 Tex. 102, holding that an indictment charging an assault on "one, a freedman, whose name is to the grand jurors unknown," is sufficient); and to the subject of a homicide (Williams *v.* State, 3 Tex. App. 123).

64. Com. *v.* Kaas, 3 Brewst. (Pa.) 422; Dugger *v.* State, 27 Tex. App. 95, 10 S. W. 763, holding that a statute requiring a reasonably accurate description of the accused to be given where his name was unknown did not require a description of the principals in an indictment of an accomplice.

65. Hill *v.* State, 78 Ala. 1, holding that an allegation in an indictment for the sale or removal of property on which existed a lien created by law, that the name of the holder of the lien was unknown, was insufficient.

66. Johnson *v.* State, 59 Ala. 37; Willis *v.* People, 2 Ill. 399; Farmer *v.* State, (Tex. Cr. App. 1894) 28 S. W. 197.

67. *Arkansas.*— State *v.* Seely, 30 Ark. 162.

Kansas.— State *v.* Flack, 48 Kan. 146, 29 Pac. 571.

Louisiana.— State *v.* Prince, 42 La. Ann. 817, 8 So. 591.

Maine.— State *v.* Cameron, 86 Me. 196, 29 Atl. 984.

Missouri.— State *v.* Sweeney, 56 Mo. App. 409.

North Carolina.— State *v.* Brite, 73 N. C. 26.

South Carolina.— State *v.* Anderson, 3 Rich. 172.

Texas.— State *v.* Black, 31 Tex. 560.

Virginia.— Brown *v.* Com., 86 Va. 466, 10 S. E. 745.

See 27 Cent. Dig. tit. "Indictment and Information," § 275.

68. Lyon *v.* State, 61 Ala. 224; Vandermark *v.* People, 47 Ill. 122; State *v.* Henderson, 68 N. C. 348, holding that where, in an indictment for murder, the assault was charged to have been made on one "N. S. Jarrett," and in subsequent parts of the indictment he was described as "Nimrod S. Jarrett," there was no variance.

69. Triggs *v.* State, (Tex. Cr. App. 1899) 53 S. W. 104; Reg. *v.* Waters, 2 C. & K. 864, 3 Cox C. C. 300, 1 Den. C. C. 356, 13 Jur. 133, 18 L. J. M. C. 53, T. & M. 57, 61 E. C. L. 864, holding that a description of an infant as not named was sufficient.

An illegitimate child has no name until acquired by reputation (Reg. *v.* Willis, 1 C. & K. 722, 1 Cox C. C. 136, 1 Den. C. C. 80, 47 E. C. L. 722; Rex *v.* Smith, 6 C. & P. 151, 1 Moody C. C. 402, 25 E. C. L. 368; Reg. *v.* Hogg, 2 M. & Rob. 380, holding that in an indictment for the murder of a bastard child the absence of a name is sufficiently accounted for by the child being described as "lately before born of the body of J. H."); and until he has so acquired it is not properly described by his mother's name (Rex *v.* Stroud, 1 C. & K. 187, 2 Moody C. C. 270, 47 E. C. L. 187; Reg. *v.* Scarborough, 3 Cox C. C. 72, holding the evidence of reputation sufficient to present a question for the jury; Rex *v.* Waters, 7 C. & P. 250, 1 Moody C. C. 457, 32 E. C. L. 597; Rex *v.* Clark, R. & R. 266).

name of a person is not a part of his name,[70] an error in stating it is not material,[71] nor is a failure to state it.[72] The name by which a person is usually and commonly known is sufficient,[73] and in case he is as well known by one name as another he may be described by either.[74] At common law certainty to a common intent in description of persons other than accused was sufficient.[75] Words of description need not be added to the name of the person where they are not material to the statement of the offense.[76] An error in the statement of the name

70. Edmundson *v.* State, 17 Ala. 179, 52 Am. Dec. 169; State *v.* Martin, 10 Mo. 391, holding that an indictment which charged defendant by his middle name only was insufficient. And see Reg. *v.* James, 2 Cox C. C. 227, holding that property stolen described in an indictment as belonging to J H S, whereas, in fact, the name was H J S, was improperly described. See, generally, NAMES.

71. Edmundson *v.* State, 17 Ala. 179, 52 Am. Dec. 169; People *v.* Lockwood, 6 Cal. 205; Langdon *v.* People, 133 Ill. 382, 24 N. E. 874; Tucker *v.* People, 122 Ill. 583, 13 N. E. 809; Miller *v.* People, 39 Ill. 457; Choen *v.* State, 52 Ind. 347, 21 Am. Rep. 179. But see Com. *v.* Shearman, 11 Cush. (Mass.) 546; Price *v.* State, 19 Ohio 423, both holding that where a middle initial is alleged it must be proved as laid.

72. State *v.* Williams 20 Iowa 98; State *v.* Feeny, 13 R. I. 623. *Contra*, Com. *v.* Perkins, 1 Pick. (Mass.) 388. And *compare* Com. *v.* Hall, 3 Pick. (Mass.) 262.

73. *Alabama.*— State *v.* Glaze, 9 Ala. 283.

California.— People *v.* Woods, 65 Cal. 121, 3 Pac. 466; People *v.* Leong Quong, 60 Cal. 107; People *v.* Freeland, 6 Cal. 96.

Florida.— Pyke *v.* State, (1904) 36 So. 577.

Georgia.— Jones *v.* State, 65 Ga. 147.

Massachusetts.— Com. *v.* Trainor, 123 Mass. 414; Com. *v.* Desmarteau, 16 Gray 1.

Mississippi.— McBeth *v.* State, 50 Miss. 81.

New York.— Cowley *v.* People, 21 Hun 415, 8 Abb. N. Cas. 1; Walters *v.* People, 6 Park. Cr. 15 [*affirmed* in 32 N. Y. 147].

North Carolina.— State *v.* Davis, 109 N. C. 780, 14 S. E. 55; State *v.* Johnson, 67 N. C. 55; State *v.* Angel, 29 N. C. 27.

Tennessee.— State *v.* France, 1 Overt. 434.

Texas.— Bell *v.* State, 25 Tex. 574; Slaughter *v.* State, (Cr. App. 1893) 21 S. W. 247; Rye *v.* State, 8 Tex. App. 163.

England.— Reg. *v.* Gregory, 8 Q. B. 508, 1 Cox C. C. 263, 10 Jur. 387, 15 L. J. M. C. 38, 2 New Sess. Cas. 229, 55 E. C. L. 508; Rex *v.* Williams, 7 C. & P. 298, 32 E. C. L. 623; Rex *v.* ——, 6 C. & P. 408, 25 E. C. L. 498; Rex *v.* Berriman, 5 C. & P. 601, 24 E. C. L. 729; Rex *v.* Norton, R. & R. 380. And see Reg. *v.* Smith, 1 Cox C. C. 248, holding a description by a baptismal name insufficient where the person was confirmed and commonly known by another. But *compare* Reg. *v.* Lippiatt, 1 Cox C. C. 56.

See 27 Cent. Dig. tit. "Indictment and Information," § 273 *et seq.*

74. Whittington *v.* State, 121 Ga. 193, 48 S. E. 948; Jones *v.* State, 63 Ga. 456; State *v.* Bundy, 64 Me. 507; Cotton *v.* State, 4 Tex. 260; Stokes *v.* State, 46 Tex. Cr. 357, 81 S. W. 1213 (a wife who is sometimes known by her husband's name is properly described by that name in the indictment, although she is not commonly known by that name); Taylor *v.* Com., 20 Gratt. (Va.) 825.

Alias.— The name of a person murdered may be averred under an alias. Kennedy *v.* People, 39 N. Y. 245.

75. Durham *v.* People, 5 Ill. 172, 39 Am. Dec. 407; State *v.* Anderson, 3 Rich. (S. C.) 172; State *v.* Crank, 2 Bailey (S. C.) 66, 23 Am. Dec. 117; Cotton *v.* State, 4 Tex. 260; Henry *v.* State, 7 Tex. App. 388; Rex *v.* Lovell, 2 East P. C. 990, 1 Leach C. C. 282.

76. *Illinois.*— Durham *v.* People, 5 Ill. 172, 39 Am. Dec. 407.

Indiana.— Allen *v.* State, 52 Ind. 486 [*followed* in Geraghty *v.* State, 110 Ind. 103, 11 N. E. 11], holding that where the affix "Jr." or "Sr." is employed, it need not be proved.

Maine.— State *v.* Grant, 22 Me. 171, holding that the affix "Jr." need not be employed.

Massachusetts.— Com. *v.* Parmenter, 101 Mass. 211 (description of William Read, Jr., as "William Read the second of that name"); Com. *v.* East Boston Ferry Co., 13 Allen 589 (description of an administrator as "J. V., otherwise called J. V. the younger of that name").

South Carolina.— State *v.* Young, 7 Rich. 1.

England.— Rex *v.* Deeley, 4 C. & P. 579, 1 Moody C. C. 303, 19 E. C. L. 658, holding, however, that where a woman was unnecessarily described as a widow, a misdescription in this regard was fatal.

The statute of additions extends only to the party indicted. Com. *v.* Varney, 10 Cush. (Mass.) 402; Rex *v.* Sulls, 2 Leach C. C. 1005.

Necessity of stating addition of accused see *supra*, V, G, 7.

Where there are two persons of the same name residing in the same town, such as father and son, and the latter employs the addition of "junior" to his name, such addition should be used to distinguish him from his father, and in its absence it will be presumed that the father is intended. State *v.* Vittum, 9 N. H. 519; Rex *v.* Bailey, 7 C. & P. 264, 32 E. C. L. 604. But *compare* Rex *v.* Peace, 3 B. & Ald. 579, 5 E. C. L. 334, holding that an indictment for an assault

of the person injured is by statute in some states rendered immaterial when the indictment is otherwise sufficient to identify the act.[77] When the name of a person injured has been once correctly stated, an error in its subsequent repetition is usually regarded as immaterial,[78] particularly where, by the use of the connectives "said" or "aforesaid," it is evident that the same name is intended.[79]

2. Corporations, Associations, Partnerships, Etc. Where the name is that of a corporation, partnership, joint stock company, or other association of individuals, such fact should be stated;[80] and in the case of partnerships or joint owners, the rule at common law is that the names of the individual partners or owners should be set out.[81] By statute this rule is altered in some jurisdictions, and the name of a partnership is sufficient without the names of its members.[82] In describing a corporation a statement of the name by which it is commonly known is usually regarded as sufficient.[83] At common law there is some conflict as to whether,

on E was sufficient, although there were two persons of that name, mother and daughter, and the assault was on the daughter.

Description of persons of title or rank.— Reg. *v.* Keys, 2 Cox C. C. 225; Reg. *v.* Pitts, 8 C. & P. 771, 34 E. C. L. 1013; Rex *v.* Ogilvie, 2 C. & P. 230, 12 E. C. L. 542; Rex *v.* Caley, 5 Jur. 709; Rex *v.* Graham, 2 Leach C. C. 619.

77. People *v.* McNealy, 17 Cal. 332; State *v.* Congrove, 109 Iowa 66, 80 N. W. 227; State *v.* Porter, 97 Iowa 450, 66 N. W. 745; State *v.* Hall, 97 Iowa 400, 66 N. W. 725; State *v.* Shinner, 76 Iowa 147, 40 N. W. 144; State *v.* Emmons, 72 Iowa 265, 33 N. W. 672; State *v.* McCunniff, 70 Iowa 217, 30 N. W. 489; State *v.* Vincent, 16 S. D. 62, 91 N. W. 347.

If the name is essential to the description of the offense, such a statute does not apply. State *v.* Blakeley, 83 Minn. 432, 86 N. W. 419 [*approving* State *v.* Boylson, 3 Minn. 438, and *distinguishing* State *v.* Grimes, 50 Minn. 123, 52 N. W. 275; State *v.* Ruhnke, 27 Minn. 309, 7 N. W. 264].

78. Means *v.* State, 99 Ga. 205, 25 S. E. 682; Greeson *v.* State, 5 How. (Miss.) 33; State *v.* Upton, 12 N. C. 513; Cotton *v.* State, 4 Tex. 260; Wells *v.* State, 4 Tex. App. 20; Catlett *v.* State, (Tex. Cr. App. 1901) 61 S. W. 485; Hall *v.* State, 32 Tex. Cr. 594, 25 S. W. 292.

Where the misnomer occurs in surplusage, it is immaterial. State *v.* White, 15 S. C. 381.

79. *Kentucky.*— Wilkey *v.* Com., 104 Ky. 325, 47 S. W. 219, 20 Ky. L. Rep. 578; Alford *v.* Com., 84 Ky. 623, 2 S. W. 234, 8 Ky. L. Rep. 550.

Maine.— State *v.* Pike, 65 Me. 111.

Massachusetts.—Com. *v.* Hunt, 4 Pick. 252. And see Com. *v.* Sullivan, 6 Gray 477.

Missouri.— State *v.* Wall, 39 Mo. 532. See also State *v.* Dickerson, 24 Mo. 365.

New York.— Phelps *v.* People, 72 N. Y. 365 [*affirming* 6 Hun 428].

South Carolina.— State *v.* Coppenburg, 2 Strobh. 273.

England.— Reg. *v.* Crespin, 11 Q. B. 913, 12 Jur. 433, 17 L. J. M. C. 128, 63 E. C. L. 913.

80. Emmonds *v.* State, 87 Ala. 12, 6 So. 54; People *v.* Bogart, 36 Cal. 245; State *v.* Suppe, 60 Kan. 566, 57 Pac. 106; Nasets *v.* State, (Tex. Cr. App. 1895) 32 S. W. 698, holding that an indictment for defrauding the "First National Bank of G." is fatally defective unless it states whether such bank is an individual, a corporation, a copartnership, or a joint stock company. See *contra*, Noakes *v.* People, 25 N. Y. 380, 5 Park. Cr. 291, holding the words "Meriden Cutlery Company" a sufficient designation of the body, partnership, or persons whom it was the intent to defraud.

81. *Alabama.*— Graves *v.* State, 63 Ala. 134.

California.— People *v.* Bogart, 36 Cal. 245. And see People *v.* Schwartz, 32 Cal. 160. *Contra*, People *v.* Ah Sing, 19 Cal. 598, holding that an indictment for larceny, stating the ownership to be in a firm, giving the firm-name only, is sufficient.

Illinois.— Staaden *v.* People, 82 Ill. 432, 25 Am. Rep. 333; Wallace *v.* People, 63 Ill. 451.

Indiana.— Hogg *v.* State, 3 Blackf. 326.

Massachusetts.— Com. *v.* Trimmer, 1 Mass. 476.

South Carolina.— State *v.* Owens, 10 Rich. 169.

Vermont.— State *v.* Mead, 27 Vt. 722.

See 27 Cent. Dig. tit. "Indictment and Information," § 277.

82. State *v.* Williams, 103 Ind. 235, 2 N. E. 585, holding it sufficient to charge that false representations were made to a partnership described by its firm-name. And see State *v.* Suppe, 60 Kan. 566, 57 Pac. 106.

83. State *v.* Rollo, 3 Pennew. (Del.) 421, 54 Atl. 683; Rogers *v.* State, 90 Ga. 463, 16 S. E. 205; People *v.* Ferguson, 119 Mich. 373, 78 N. W. 334, holding that under a statute providing that no indictment shall be insufficient because any person mentioned therein is designated by a descriptive appellation, and that the word "person" may be applied to corporations, an information averring title to property to be in a certain church "society" was sufficient, although the corporate name omitted the word "society." *Contra*, Com. *v.* Pope, 12 Cush. (Mass.) 272, holding that a description of the "Boston, etc., Railroad Corporation" as the "Boston, etc., Railroad Company" was fatal. *Compare* Jackson *v.* State, 72 Ga. 28, holding

when a corporate name is pleaded, the fact of incorporation must be averred. Some cases hold it unnecessary;[84] but the better rule apparently is that it should be averred,[85] although it need not be averred whether incorporation was under a general or special act.[86] And where the insertion of the corporation's name is material only as a portion of the identification of the *res* affected, it is not necessary to make any allegation of the legality or regularity of the corporate organization.[87] Proof of a corporation *de facto* will support an averment of corporate existence.[88]

J. Description and Ownership of Property — 1. Real Property. In charging those offenses which must be committed with relation to real property, it is necessary to describe the property with such particularity that it may be identified, and that it may be seen from the face of the charge that it is the subject of the offense.[89] Certainty to a common intent is necessary.[90] In many cases no greater particularity is required in the description of real property than the statement of the town in which it is located. This has been held to be sufficient in indictments for keeping or maintaining as a nuisance a particular building,[91] or for an attempt to destroy a dam.[92] So in an indictment for obstructing a way,[93] or in an indictment for not repairing a highway,[94] it is not necessary to set out the termini of such highway or ways.

2. Personal Property — a. In General. A description of personal property must be given whenever the particular kind, quantity, number, or value of the property enters into the nature of the offense,[95] or where the property must be

that since the court will take judicial notice of the names of corporations chartered by the legislature, a misnomer is fatal on demurrer or motion to quash.

84. State *v.* Rollo, 3 Pennew. (Del.) 421, 54 Atl. 683; State *v.* Shields, 89 Mo. 259, 1 S. W. 336; Territory *v.* Garcia, (N. M. 1904) 75 Pac. 34; Owen *v.* State, 5 Sneed (Tenn.) 493. And see Burke *v.* State, 34 Ohio St. 79.

Where the name imports incorporation, such fact will be presumed. Johnson *v.* State, 65 Ind. 204; Fisher *v.* State, 40 N. J. L. 169; State *v.* Weller, 20 N. J. L. 521.

85. Emmonds *v.* State, 87 Ala. 12, 6 So. 54; People *v.* Schwartz, 32 Cal. 160 (holding that a mere averment of the company name amounts in a legal sense to an entire absence of an averment of the party intended to be injured); Cohen *v.* People, 5 Park. Cr. (N. Y.) 330; Nasets *v.* State, (Tex. Cr. App. 1895) 32 S. W. 698; Thurmond *v.* State, 30 Tex. App. 539, 17 S. W. 1098; White *v.* State, 24 Tex. App. 231, 5 S. W. 857, 5 Am. St. Rep. 879; Martin *v.* State, (Tex. App. 1887) 5 S. W. 859. And see People *v.* Bogert, 36 Cal. 245; People *v.* Wilber, 4 Park. Cr. (N. Y.) 19; Stallings *v.* State, 29 Tex. App. 220, 15 S. W. 716.

Allegation of incorporation of bank in indictment for counterfeiting see Counterfeiting, 11 Cyc. 313; in indictment for larceny of bank-notes see Larceny.

86. State *v.* Loomis, 27 Minn. 521, 8 N. W. 758.

87. Duncan *v.* State, 29 Fla. 439, 10 So. 815 (holding that in an indictment for the burning of a bridge owned by a corporation, it was not necessary to allege the due organization and existence of the corporation under the laws of any nation, state, or territory); People *v.* Jackson, 8 Barb. (N. Y.) 637. And *compare* McLaughlin *v.* Com., 4 Rawle (Pa.) 464; Webb *v.* State, 39 Tex. Cr. 534, 47 S. W. 356 [*distinguishing* Nasets *v.* State, (Tex. Cr. App. 1895) 32 S. W. 698; White *v.* State, 24 Tex. App. 231, 5 S. W. 857, 5 Am. St. Rep. 879] (holding that an indictment for forging a note naming a bank as payee need not state whether the bank was incorporated); Brown *v.* State, (Tex. Cr. App. 1898) 43 S. W. 986.

88. People *v.* Schwartz, 32 Cal. 160.

89. Com. *v.* Brown, 15 Gray (Mass.) 189; State *v.* Gaffrey, 3 Pinn. (Wis.) 369, 4 Chandl. 163.

Where an indictment is found against a house, as is sometimes the case under dram-shop and similar acts, the description must be sufficiently specific to point out with reasonable certainty the house indicted, so that it can be proceeded against to final judgment and seizure without uncertainty as to its location. Norris' House *v.* State, 3 Greene (Iowa) 513.

Particular offenses see Arson, 3 Cyc. 997; Burglary, 6 Cyc. 204; and other special titles.

Description of range in indictment for driving cattle from range see Animals, 2 Cyc. 355.

90. Com. *v.* Brown, 15 Gray (Mass.) 189; State *v.* Malloy, 34 N. J. L. 410.

91. Com. *v.* Logan, 12 Gray (Mass.) 136; Com. *v.* Gallagher, 1 Allen (Mass.) 592; Com. *v.* Welsh, 1 Allen (Mass.) 1.

92. Com. *v.* Tolman, 149 Mass. 229, 21 N. E. 377, 14 Am. St. Rep. 414, 3 L. R. A. 747.

93. Com. *v.* Hall, 15 Mass. 240.

94. Com. *v.* Newbury, 2 Pick. (Mass.) 51.

95. People *v.* Higbie, 66 Barb. (N. Y.) 131.

described in order to inform the accused of the particular offense with which he is charged.[96] Such certainty only is required as the nature and circumstances of the case will permit;[97] and while the description must be certain as to a common intent,[98] it need not be minute,[99] especially where minuteness might be impossible and might occasion a fatal variance between the allegations and the proofs,[1] in which case it may be stated that a more particular description than that given is not in the power of the grand jurors.[2] Under this rule coin or bank-notes may be generally described,[3] it being especially so provided by statute in some jurisdictions.[4] The description should be that which is commonly used.[5] A mere mechanical mixture should be described by the names of its ingredients;[6] but not so, it seems, of a mixture which is commonly known by an individual name.[7]

b. Value, Number, and Amount. The value of property must be stated where it forms an element of the offense.[8] Where articles are of different kinds, their value should be alleged separately, otherwise a conviction cannot be had on failure of proof as to any article.[9] But the value may be alleged collectively where the articles are all of one kind.[10] Money being in itself a measure of value, it is not necessary to add to its description an averment of its value.[11]

3 Ownership. As an element of the identification and definition of the offense, it is usually necessary to name the owner of the property affected.[12]

Particular offenses see EMBEZZLEMENT, 15 Cyc. 514; LARCENY; ROBBERY; and other specific titles.

Of animal in prosecution for driving from range see ANIMALS, 2 Cyc. 355.

Of estray in indictment for taking up see ANIMALS, 2 Cyc. 366.

96. State *v.* Dawes, 75 Me. 51; Com. *v.* Strangford, 112 Mass. 289 (holding that the description must be such as to identify the offense, to inform defendant of the charge, to inform the court of what sentence to pass, and to support a plea of former jeopardy); Merwin *v.* People, 26 Mich. 298, 12 Am. Rep. 314; Dunbar *v.* U. S., 156 U. S. 185, 15 S. Ct. 325, 39 L. ed. 390.

97. Com. *v.* Strangford, 112 Mass. 289; Dunbar *v.* U. S., 156 U. S. 185, 15 S. Ct. 325, 39 L. ed. 390, holding that any words of description which make clear to the common understanding the articles in respect to which the offense is alleged are sufficient.

98. State *v.* Dawes, 75 Me. 51.

99. Dunbar *v.* U. S., 156 U. S. 185, 15 S. Ct. 325, 39 L. ed. 390, holding that it is no valid objection to an indictment that the description of the property in respect to which the offense is charged to have been committed is broad enough to include more than one specific article.

1. People *v.* Berman, (Cal. 1885) 7 Pac. 3; People *v.* Platt, 67 Cal. 21, 7 Pac. 1 (holding that an allegation in an indictment for perjury in having sworn to a false inventory on insolvency that defendant "willfully concealed a large amount of property, consisting among other things of diamonds, watches, jewelry, money, and other personal effects belonging to him and to his estate" was sufficient); State *v.* Asherry, 37 La. Ann. 124.

2. Com. *v.* Strangford, 112 Mass. 289.

3. *Massachusetts.*— Com. *v.* Grimes, 10 Gray 470, 71 Am. Dec. 668.

New Jersey.— State *v.* Barr, 61 N. J. L 131, 32 Atl. 817.

Tennessee.— Graham *v.* State, 5 Humphr. 40.

Texas.— Malcolmson *v.* State, 25 Tex. App. 267, 8 S. W. 468.

United States.— U. S. *v.* Bornemann, 36 Fed. 257.

Particular offenses see EMBEZZLEMENT, 15 Cyc. 515; LARCENY; FALSE PRETENSES; ROBBERY; and like special titles.

4. State *v.* Feazell, 132 Mo. 176, 33 S. W. 788. And see Lewis *v.* State, 28 Tex. App. 140, 12 S. W. 736.

5. Pfister *v.* State, 84 Ala. 432, 4 So. 395; Rex *v.* Mansfield, C. & M. 140, 5 Jur. 661, 41 E. C. L. 81.

6. Reg. *v.* Bond, 1 Den. C. C. 517, 3 C. & K. 337, 4 Cox C. C. 231, 14 Jur. 390, 19 L. J. M. C. 138, 4 New Sess. Cas. 143, T. & M. 242.

7. Reg. *v.* Bond, 3 C. & K. 337, 4 Cox C. C. 231, 1 Den. C. C. 517, 14 Jur. 390, 19 L. J. M. C. 138, 4 New Sess. Cas. 143, T. & M. 242.

8. Merwin *v.* People, 26 Mich. 298, 12 Am. Rep. 314.

Particular offenses see EMBEZZLEMENT, 15 Cyc. 516; LARCENY; and other like special titles.

9. Com. *v.* Cahill, 12 Allen (Mass.) 540: Hope *v.* Com., 9 Metc. (Mass.) 134; Rex *v.* Forsyth, R. & R. 204.

10. Com. *v.* O'Connell, 12 Allen (Mass.) 451.

11. Carr *v.* State, 104 Ala. 4, 16 So. 150; Oliver *v.* State, 37 Ala. 134; Kruse *v.* People, 84 Ill. App. 620; State *v.* Howe, 27 Oreg. 138, 44 Pac. 672.

12. Washington *v.* State, 72 Ala. 272; Johnson *v.* State, 59 Ala. 37; Willis *v.* People, 2 Ill. 399; State *v.* Ellis, 119 Mo. 437, 24 S. W. 1017, holding an inferential averment insufficient.

Where the owner is deceased the ownership of personal property should be laid in his representative and not his estate.[13] By statute it is sometimes rendered proper to lay a married woman's property in herself or her husband.[14]

K. Description of Written or Printed Matter — 1. Necessity of Setting Out Exact Words. Where a writing is of the gist of the offense, it must be set out verbatim,[15] and it is not sufficient to state merely its effect.[16] This is the case in common-law indictments for forgery,[17] threatening letters,[18] libel,[19] counterfeiting,[20] and other offenses the gist of which consists of the writing. But where the writing is regarded merely as an incident which enhances the punishment,[21] or is relied on as proof or evidence of the fact charged, and not as in itself constituting the offense,[22] it may be described in a general manner and need not be so set out. So where a writing is employed as part of a false pretense, it need not be set out unless a legal description is given it in the indictment, the correctness of which it is essential for the court to decide.[23] In some cases, although the writing is of the substance of the offense, it need not be set out *in hæc verba*, as where it is too obscene to be placed upon the records;[24] or where, as may be the case in forgery, the forged instrument has been destroyed or has remained in the possession of the accused, or for other good reasons cannot be produced.[25] In these cases the matters in excuse must be averred in the indictment.[26] The ques-

Allegations of ownership in specific offenses see Arson, 3 Cyc. 1000; Burglary, 6 Cyc. 209; Larceny; and other like special titles.

Naming owner of estray in indictment for taking up see Animals, 2 Cyc. 366.

Sufficiency of description see *supra*, V, I.

13. People *v.* Hall, 19 Cal. 425.

Under the civil law as existing in Louisiana it is sufficient to lay ownership in the succession itself, and not in the administrator or executor. State *v.* Brown, 32 La. Ann. 1020.

14. Hames *v.* State, 46 Tex. Cr. 562, 81 S. W. 708.

15. Whitney *v.* State, 10 Ind. 404 (lottery ticket should be specifically described); Brown *v.* Com., 2 Va. Cas. 516.

16. U. S. *v.* Watson, 17 Fed. 145.

17. See Forgery, 19 Cyc. 1397.

18. See Threats.

19. See Libel and Slander.

20. See Counterfeiting, 11 Cyc. 313.

21. U. S. *v.* Keen, 26 Fed. Cas. No. 15,510, 1 McLean 429, indictment for stealing a letter containing a bank-note and draft from the mails may describe the draft according to its effect.

22. People *v.* Warner, 5 Wend. (N. Y.) 271 (perjury); Brown *v.* Com., 2 Va. Cas. 516 (holding that an indictment for sending a challenge in the form of a letter to fight a duel need not set out the words of the letter nor the substance thereof). See also Perjury.

23. Reg *v.* Coulson, 4 Cox C. C. 227, 1 Den. C. C. 592, 14 Jur. 557, 19 L. J. M. C. 182, T. & M. 332, where the pretense was that a certain printed paper was a valid note, it was not necessary to set out the paper.

24. *Illinois.*— McNair *v.* People, 89 Ill. 441.

Massachusetts.— Com. *v.* Tarbox, 1 Cush. 66; Com. *v.* Holmes, 17 Mass. 336.

Michigan.— People *v.* Girardin, 1 Mich. 90.

Missouri.— State *v.* Van Wye, 136 Mo. 227, 37 S. W. 938, 58 Am. St. Rep. 627.

New York.— People *v.* Kaufman, 14 N. Y. App. Div. 305, 43 N. Y. Suppl. 1046, 12 N. Y. Cr. 263.

Pennsylvania.— See Com. *v.* Sharpless, 2 Serg. & R. 91, 7 Am. Dec. 632.

Rhode Island.— State *v.* Smith, 17 R. I. 371, 22 Atl. 282.

Vermont.— State *v.* Brown, 27 Vt. 619.

United States.— U. S. *v.* Bennett, 24 Fed. Cas. No. 14,571, 16 Blatchf. 338.

See 27 Cent. Dig. tit. "Indictment and Information," § 283. See, generally, Libel and Slander; Obscenity; Post-Office.

The English rule was formerly different and required the setting out of the matter *in hæc verba* (Bradlaugh *v.* Reg., 3 Q. B. D. 607, 4 Cox C. C. 68, 38 L. T. Rep. N. S. 118, 26 Wkly. Rep. 410 [*reversing* 2 Q. B. D. 569, 46 L. J. M. C. 286]); but it is now changed by statute, Act 43 Vict. 24; Act 15 Vict. 4 (*Ex p.* Collins, 9 N. S. Wales L. Rep. 497).

25. Munson *v.* State, 79 Ind. 541; People *v.* Badgley, 16 Wend. (N. Y.) 53; People *v.* Kingsley, 2 Cow. (N. Y.) 522, 14 Am. Dec. 520; Hooper *v.* State, 8 Humphr. (Tenn.) 93. See Forgery, 19 Cyc. 1399.

26. Thomas *v.* State, 103 Ind. 419, 2 N. E. 808 (holding that it was a sufficient excuse for not setting out the letter verbatim in its entirety that portions of the writing had become illegible); Whitney *v.* State, 10 Ind. 404; Com. *v.* Houghton, 8 Mass. 107; People *v.* Kingsley, 2 Cow. (N. Y.) 522, 14 Am. Dec. 520; and other cases cited in the preceding notes. See also Forgery, 19 Cyc. 1399.

This is a rule of pleading and not of evidence, and does not prevent proof that an instrument has been destroyed, although described with particularity in the indictment. State *v.* Potts, 9 N. J. L. 26, 17 Am. Dec. 449.

tion of what is fit to be set out in the record is within the discretion of the trial court.[27] Where the indictment is on a lost or destroyed instrument, it is necessary that the substance be set out.[28]

2. Averments Introductory to Description. Where it becomes necessary to set out an exact copy of an instrument, the copy should be introduced by words importing that it is such.[29]

3. Sufficiency of Description or Incorporation. Only that part of the writing in which lies the offense need be set out, unless the residue is essential to the true sense.[30] Matters which do not form a part of an instrument need not be set out,[31] such as indorsements,[32] revenue stamps,[33] marginal letters and marks used to render forgery more difficult,[34] or ornamentations.[35] It has been held sufficient, at least as against demurrer, that the writing be attached to the indictment as an exhibit instead of being set out in the body thereof.[36] The meaning of misspelled words in the matter set out may be explained by innuendos.[37] Where such fact is otherwise sufficiently apparent, it is, it seems, unnecessary to allege that an instrument is under seal.[38]

4. Writings in Foreign Language. Where the writing is in a foreign language its tenor should be set out in English, and it is not sufficient to incorporate it in the indictment untranslated.[39]

5. Errors in Description. Where an instrument is described with unnecessary particularity, the proof must correspond to the allegations.[40] So, although it may be unnecessary to set an instrument out *in hæc verba*, yet if the pleader

That excuses are alleged in the disjunctive will not cause the quashing of the indictment for repugnancy in case the statute provides that repugnancy shall not be fatal in case the offense and person accused are sufficiently identified. State *v.* Callahan, 124 Ind. 364, 24 N. E. 732.

27. Dunlap *v.* U. S., 165 U. S. 486, 17 S. Ct. 375, 41 L. ed. 799.

28. Wallace *v.* People, 27 Ill. 45; Munson *v.* State, 79 Ind. 541.

29. Com. *v.* Tarbox, 1 Cush. (Mass.) 66, holding that an indictment for publishing an obscene paper alleging that the paper was of the purport and effect following was insufficient as not containing an allegation that it was *in hæc verba*, although one of the original printed papers was attached to the indictment in place of inserting a copy.

Sufficiency of allegation.— The words "in substance and to the effect following" do not require a verbatim recital (People *v.* Warner, 5 Wend. (N. Y.) 271); nor do the words "in manner and form following" (Rex *v.* May, 1 Dougl. (3d ed.) 193, 1 Leach 227), nor "following effect" (Rex *v.* Bear, 2 Salk. 417). A description that an instrument purports a particular fact means that what is stated as the purport appears on the face of the instrument. Downing *v.* State, 4 Mo. 572, holding that where a note is described as purporting that a certain sum would be paid the holder, the indictment was not supported by proof of a note payable to bearer, although the legal effect was the same.

30. Langdale *v.* People, 100 Ill. 263; Com. *v.* Harmon, 2 Gray (Mass.) 289; Hess *v.* State, 5 Ohio 5, 22 Am. Dec. 767; Rex *v.* Bear, 2 Salk. 417.

31. Langdale *v.* People, 100 Ill. 263.

32. Miller *v.* People, 52 N. Y. 304, 11 Am. Rep. 706; Hess *v.* State, 5 Ohio 5, 22 Am. Dec. 567; Perkins *v.* Com., 7 Gratt. (Va.) 651, 56 Am. Dec. 123.

33. Miller *v.* People, 52 N. Y. 304, 11 Am. Rep. 706.

34. People *v.* Franklin, 3 Johns. Cas. (N. Y.) 299.

35. State *v.* Robinson, 16 N. J. L. 507.

36. State *v.* Williams, 32 Minn. 537, 21 N. W. 746.

37. Colter *v.* State, 40 Tex. Cr. 165, 49 S. W. 379.

38. Webster *v.* People, 92 N. Y. 422, holding that where an indictment does not allege that a deed therein described and set out was under seal, but the attesting clause of the deed as set forth in the indictment so states, this, together with the statement that the writing is a deed, sufficiently shows the sealing.

39. People *v.* Ah Sum, 92 Cal. 648, 28 Pac. 680 (holding that in an indictment for perjury in connection with a charge of sale of Chinese lottery tickets, it was insufficient to set out a photographic copy of the ticket); Rex *v.* Goldstern, 3 B. & B. 201, 7 Moore C. P. 1, 10 Price 88, R. & R. 473, 7 E. C. L. 685. And *compare* State *v.* Marlier, 46 Mo. App. 233, holding that where a slander was in a foreign tongue, the words should be charged as spoken, and in the tongue spoken, and then followed by a proper translation.

40. U. S. *v.* Keen, 26 Fed. Cas. No. 15,510, 1 McLean 429, holding that where a draft was described as drawn by "Joseph" J, a draft signed by "Jos." J was not admissible in evidence, since the name Joseph must be regarded as matter of description and could not be held to be a mere attempt to state the legal effect of the instrument.

attempts to do so he must do so correctly.[41] The earlier cases apply the rule of requiring the instrument to be exactly set out with great strictness,[42] but the more modern rule is that a slight variance in setting out a written instrument according to its tenor is not fatal.[43] So where the omission or addition of a letter does not change the word so as to make it another word, the variance is not material.[44] If a count in an indictment for perjury undertakes to set out continuously the substance and effect of what defendant swore when examined as a witness, it is necessary, in support of this count, to prove that in substance and effect he swore the whole of that which is thus set out as his evidence, although the count contains several distinct assignments of perjury.[45]

L. Aggravated Offenses — 1. Statement of Offense. In charging those offenses which become offenses of greater degree or subject to a greater punishment by reason of having been committed under aggravating circumstances or with particular intent, it is necessary first to charge the minor offense with its appropriate description, and then allege the matter of aggravation.[46]

2. Aggravation by Former Offenses or Convictions — a. Necessity of Alleging Former Conviction. Where, in case of repeated convictions for similar offenses, the statute imposes an additional penalty, an indictment for a subsequent offense must allege the prior convictions, since such convictions, although they merely affect the punishment, are regarded as a portion of the description of the offense.[47] Hence when there are two or more counts in an indictment charging similar offenses and a conviction is had on each, the additional punishment cannot be assessed as to the offenses described in the subsequent counts, as if the conviction on the first count was a previous conviction.[48] But where the punishment for

41. Langdale *v.* People, 100 Ill. 263; People *v.* Warner, 5 Wend. (N. Y.) 271.

Variance between indictment and proof see *infra*, XI, C. 10.

42. State *v.* Street, 1 N. C. 158, 1 Am. Dec. 589.

43. State *v.* Jay, 34 N. J. L. 368, an indictment for libel.

44. Rex *v.* Beach, 1 Cowp. 229, 1 Leach C. C. 158; Reg. *v.* Drake, 2 Salk. 660.

Abbreviations.— A limited number of abbreviations not contained in the original may be used provided the words meant are clearly indicated; but this does not authorize numerous abbreviations, especially when the meaning of many of them is conjectural. State *v.* Jay, 34 N. J. L. 368.

45. Rex *v.* Leefe, 2 Campb. 134, 11 Rev. Rep. 683. See, generally, Perjury.

46. Adell *v.* State, 34 Ind. 543, holding that an indictment for an aggravated assault must describe the assault according to its statutory definition.

47. *Georgia.*— McWhorter *v.* State, 118 Ga. 55, 44 S. E. 873.

Kentucky.— Stewart *v.* Com., 2 Ky. L. Rep. 386.

Massachusetts.— Com. *v.* Walker, 163 Mass. 226, 39 N. E. 1014; Garvey *v.* Com., 8 Gray 382; Tuttle *v.* Com., 2 Gray 505.

New Hampshire.— State *v.* Adams, 64 N. H. 440, 13 Atl. 785.

New York.— People *v.* Powers, 6 N. Y. 50; People *v.* Bosworth, 64 Hun 72, 19 N. Y. Suppl. 114; People *v.* Price, 2 N. Y. Suppl. 414, 6 N. Y. Cr. 141; People *v.* Youngs, 1 Cai. 37, holding such averment necessary as determining the number of challenges to jurors allowed defendant, and also as fixing jurisdiction. *Compare* Johnson *v.* People, 65 Barb. 342.

Ohio.— Blackburn *v.* State, 50 Ohio St. 428, 36 N. E. 18; Larney *v.* Cleveland, 34 Ohio St. 599.

Pennsylvania.— Rauch *v.* Com., 78 Pa. St. 490.

Texas.— Long *v.* State, 36 Tex. 6.

See 27 Cent. Dig. tit. "Indictment and Information," § 301 *et seq.*

Contra.— State *v.* Hudson, 32 La. Ann. 1052 (holding that previous convictions should not be charged in the indictment, but that a proceeding should be taken against defendant before sentence to show cause why the fact of such previous conviction should not be brought to the knowledge of the court to enable it to exercise its peremptory powers of imposing an additional sentence); State *v.* Smith, 8 Rich. (S. C.) 460.

Constitutional requirements that crimes shall be fully and plainly described to the accused render invalid a statute making it unnecessary to allege previous convictions on which the extent of the punishment depends (Com. *v.* Harrington, 130 Mass. 35); but such provisions do not render it necessary to set forth the record of a former conviction with particularity (Com. *v.* Holley, 3 Gray (Mass.) 458).

Where a former conviction is charged in one count only of an indictment, a conviction upon any of the other counts in which the prior conviction is not referred to will not authorize the imposition of the additional punishment. Watson *v.* People, 134 Ill. 374, 25 N. E. 567.

48. State *v.* Leis, 11 Iowa 416; Tuttle *v.* Com., 2 Gray (Mass.) 505.

the second offense does not exceed that which may be legally imposed for a first conviction, allegation and proof that defendant has previously been convicted or sentenced would be prejudicial to him and need not be made.[49] Where the prosecution is for the first offense, such fact need not be stated.[50]

b. Form and Sufficiency of Allegation — (i) *In General.* It is necessary that the allegations bring the accused clearly within the intent of the statute prescribing the additional punishment.[51] So, if such is a statutory element, it must appear that the offense was committed after a prior conviction.[52] Where the statute merely imposes an increased punishment on a second conviction of felony, it is not necessary to charge the particular offense on which the first conviction was based.[53] After setting up the prior convictions, it is not necessary to also allege the conclusion of law that defendant was a habitual criminal.[54]

(ii) *Record of Prior Conviction.* At common law it was necessary to recite the record of the first conviction and to show that it was a conviction by judgment;[55] but this rule is now modified by the statutes of the various states, and it is generally unnecessary to set forth the record with particularity,[56] although there must be such a statement of the record as to enable the accused to find it and to prepare for a trial of the question whether he is the convict,[57] and the sentences should be set forth with such exactness as to show that they bring the con-

Conviction as a common thief may, however, under the Massachusetts statute be had on an indictment charging three distinct larcenies. Bushman *v.* Com., 138 Mass. 507.

49. McWhorter *v.* State, 118 Ga. 55, 44 S. E. 873, holding that after conviction if it is sought to show that the maximum penalty must be inflicted, the court may satisfy itself by an inspection of the previous record, act on its own knowledge, or hear evidence to satisfy itself as to the identity of the person.

50. State *v.* Burgett, 22 Ark. 323; Kilbourn *v.* State, 9 Conn. 560.

51. People *v.* Ellsworth, 68 Mich. 496, 36 N. W. 236 (holding that where the statute provides that the additional punishment shall be imposed where the convict has been twice before sentenced, it is necessary that the indictment aver the fact of sentence, and it is not sufficient that it state merely that accused has been convicted); Kinney *v.* State, (Tex. Cr. App. 1905) 84 S. W. 590; Kinney *v.* State, 45 Tex. Cr. 500, 78 S. W. 226, 79 S. W. 570 (not sufficient to allege in the indictment that defendant has been convicted for the same offense, but it should be alleged that he was convicted for a similar offense).

As to sufficiency of averments under particular statutes see the following cases:

Iowa.— State *v.* Zimmerman, 83 Iowa 118, 49 N. W. 71, liquor nuisance.

Maine.— State *v.* Dorr, 82 Me. 341, 19 Atl. 861 (holding that an allegation that defendant was convicted of a like offense in 1088 is insufficient, as an allegation of prior conviction, as it alleges an impossibility); State *v.* Conwell, 80 Me. 80, 13 Atl. 49.

Missouri.— State *v.* Loehr, 93 Mo. 103, 5 S. W. 696, larceny.

Vermont.— State *v.* Davis, 52 Vt. 376, allegation that on May 31 defendant was "once before" convicted is supported by proof of a conviction on May 31.

England.— Rex *v.* Lines, [1902] 1 K. B. 199, 20 Cox C. C. 142, 66 J. P. 24, 71 L. J. K. B. 125, 85 L. T. Rep. N. S. 790, 50 Wkly. Rep. 303, poaching.

See 27 Cent. Dig. tit. "Indictment and Information," § 304 *et seq.*

Alias may be used to describe defendant where former convictions have been under different names. People *v.* Maroney, 109 Cal. 277, 41 Pac. 1097.

Conclusion against the peace and dignity of the state is not necessary to a specification of a former conviction of felony, although the constitution provides that all indictments shall so conclude. Boggs *v.* Com., 5 S. W. 307, 8 Ky. L. Rep. 342.

52. People *v.* Butler, 3 Cow. (N. Y.) 347; Long *v.* State, 36 Tex. 6; Rand *v.* Com., 9 Gratt. (Va.) 738.

A specific averment is unnecessary where it appears from the dates given. Brown *v.* Com., 61 S. W. 4, 22 Ky. L. Rep. 1582.

53. Whorton *v.* Com., 7 Ky. L. Rep. 826.

54. Sturtevant *v.* Com., 158 Mass. 598, 33 N. E. 648.

55. U. S. *v.* Thompson, 28 Fed. Cas. No. 16,485, 4 Cranch C. C. 335; 1 Hale P. C. 686.

56. State *v.* Wentworth, 65 Me. 234, 20 Am. Rep. 688; State *v.* Robinson, 39 Me. 150; State *v.* Adams, 64 N. H. 440, 13 Atl. 785, holding that it is enough to set out the court, time, offense, and fact of conviction on a plea of guilty. And see State *v.* Wyman, 80 Me. 117, 13 Atl. 47; State *v.* Lashus, 79 Me. 504, 11 Atl. 180; State *v.* Gorham, 65 Me. 270; Wilde *v.* Com., 2 Metc. (Mass.) 408.

57. Wilde *v.* Com., 2 Metc. (Mass.) 408; State *v.* Small, 64 N. H. 491, 14 Atl. 727, holding an averment giving no information of the time, court, or county in which the judgment was rendered insufficient.

The date and occasion of the prior conviction should be set out. People *v.* Buck, 109

vict within the provision for additional punishment.[58] It is not necessary to set forth the particular facts showing the jurisdiction of the court at which the prior conviction was had.[59]

(III) *DISCHARGE AFTER SERVICE OF SENTENCE.* Where the discharge of the accused after his prior conviction, either by pardon or the expiration of his sentence, is made material by the statute imposing the increased punishment for a subsequent conviction, it is necessary to aver a discharge in one of such manners.[60]

3. EFFECT OF DEFECTIVE ALLEGATION OF MATTERS IN AGGRAVATION. Where a count contains a full and precise charge of the lesser offense, a defect as to matter alleged in aggravation affords no ground for quashing the indictment or arresting judgment thereon.[61] So the insufficiency of an allegation of a prior offense does not vitiate the indictment as to the main offense.[62] But it has been held that an indictment filed with the intent of charging a third offense, but insufficient as to one of the prior offenses, could not be used to support a conviction or sentence as of a second offense.[63]

M. Joint Indictments. Where defendants are indicted together for a joint offense, it need not be alleged in terms that they acted together,[64] nor that they acted severally.[65] After a joint charge, counts containing individual charges need

Mich. 687, 67 N. W. 982; Blackburn *v.* State, 50 Ohio St. 428, 36 N. E. 18; Rand *v.* Com., 9 Gratt. (Va.) 738.

58. Wilde *v.* Com., 2 Metc. (Mass.) 408.

59. State *v.* Thornton, 63 N. H. 114; People *v.* Powers, 6 N. Y. 50; People *v.* Golden, 3 Park. Cr. (N. Y.) 330. *Contra*, People *v.* Cook, 2 Park. Cr. (N. Y.) 12.

60. Evans *v.* Com., 3 Metc. (Mass.) 453 (holding that under a statute which imposed additional punishment on convicts who had been discharged from former sentences "in due course of law," it was sufficient to aver that the convict had been discharged from a former sentence "in consequence of a pardon"); State *v.* Austin, 113 Mo. 538, 21 S. W. 31 (holding the mere averment that defendant "complied with his sentence" insufficient); Gibson *v.* People, 5 Hun (N. Y.) 542 [*distinguishing* Wood *v.* People, 53 N. Y. 511]; Stevens *v.* People, 1 Hill (N. Y.) 261.

61. Com. *v.* Kennedy, 131 Mass. 584; Com. *v.* Hathaway, 14 Gray (Mass.) 392; Com. *v.* Kirby, 2 Cush. (Mass.) 577; Com. *v.* Fischblatt, 4 Metc. (Mass.) 354; State *v.* Hailey, 2 Strobh. (S. C.) 73; Johnson *v.* State, 26 Tex. 117 (holding that an ineffectual attempt to charge an assault on an officer in the lawful discharge of his duties will not vitiate the indictment as for a simple assault); Lacy *v.* State, 15 Wis. 13 (omission in arson to charge dwelling to have been occupied).

Where a nolle prosequi is entered after verdict as to the matter in aggravation, it would seem that judgment will not therefore be arrested, if an offense formally and sufficiently charged remains after the matter in aggravation is stricken out. Com. *v.* Briggs, 7 Pick. (Mass.) 177, holding, however, that where *nolle prosequi* was entered as to a charge of a former conviction, a new trial should be granted, since the allegation of the former conviction as to which no evidence was offered was prejudicial to defendant on the ground that it led the jury to find defendant guilty upon a less degree of proof than would otherwise have been required.

62. Myers *v.* State, 92 Ind. 390; State *v.* Dorr, 82 Me. 341, 19 Atl. 861. But see Palmer *v.* People, 5 Hill (N. Y.) 427, holding that where an indictment described a larceny as a second offense, alleging a prior conviction of forgery, the prisoner may notwithstanding be convicted of larceny as a first offense.

63. People *v.* Ellsworth, 68 Mich. 496, 36 N. W. 236.

64. Richards *v.* State, 76 Miss. 268, 24 So. 536 [*overruling* Strawhern *v.* State, 37 Miss. 422]; Ball *v.* State, 67 Miss. 358, 7 So. 353; People *v.* Jefferey, 82 Hun (N. Y.) 409, 31 N. Y. Suppl. 267 (holding that an allegation that defendants made false and fraudulent representations was to be deemed an allegation that each of them made such representations, and was sufficient as to each); Loggins *v.* State, 32 Tex. Cr. 358, 24 S. W. 408; Bell *v.* State, 1 Tex. App. 598.

A charge that defendants jointly and severally threatened to take the life of another is not defective, the words jointly and severally being surplusage. Gay *v.* State, 3 Tex. App. 168.

Partnership relation need not be alleged. State *v.* Gay, 10 Mo. 440; Janks *v.* State, 29 Tex. App. 233, 15 S. W. 815.

Indictments for gaming in Texas must, however, allege that defendants acted together, or else that they are charged with separate offenses. State *v.* Catchings, 43 Tex. 654; State *v.* Homan, 41 Tex. 155; Herron *v.* State, 36 Tex. 285; Galbreath *v.* State, 36 Tex. 200; State *v.* Roderica, 35 Tex. 507; Parker *v.* State, 26 Tex. 204; Lewellen *v.* State, 18 Tex. 538.

65. State *v.* Johnson, 37 Minn. 493, 35 N. W. 373.

not be inserted,[66] and if inserted, they may be rejected as surplusage to prevent the indictment being regarded as containing a misjoinder.[67] In case a partnership is indicted as such, the charge may be regarded as against the partners individually.[68] If the offense may have been committed by one of defendants singly, it is not necessary to allege which of them committed the actual criminal act,[69] and the correctness of the allegation, if made, is not material.[70] In case more than one must participate in an act to render it criminal, the requisite number of defendants must be named in the indictment or an excuse alleged for the failure to do so.[71] Of this nature is an indictment for riot.[72] As in the case of indictments of defendants severally, a grammatical or clerical error will not vitiate the indictment where it does not obscure the sense.[73] In averring intent, malice, etc., it is sufficient to employ the pronoun "their," with reference to defendants, in the manner in which the pronoun is employed in an indictment of an individual.[74]

N. Indictments of Principals in the Second Degree. Principals in the second degree need not be indicted jointly, nor with the principal in the first degree;[75] but it is proper to join those present aiding and abetting a felony with the principal in the first degree and charge them as actual perpetrators, or as aiders and abetters;[76] and an indictment describing the acts of principals of both classes properly concludes with a charge against both of having committed the principal offense,[77] although defendants may be charged with different degrees of the offense.[78] The manner in which the principal in the second degree aided and

Description of accused see *supra*, V, G, 13.

66. State *v.* Bradley, 9 Rich. (S. C.) 168.

67. State *v.* Harris, 106 N. C. 682, 11 S. E. 377.

68. State *v.* Powell, 3 Lea (Tenn.) 164.

Description of partnership see *supra*, V, G, 12.

69. Hamilton *v.* People, 113 Ill. 34, 55 Am. Rep. 396; State *v.* Zeibart, 40 Iowa 169; State *v.* Payton, 90 Mo. 220, 2 S. W. 394 (sustaining for this reason a charge that defendants shot a person, although but one wound was received by him); State *v.* Blan, 69 Mo. 318; State *v.* Dalton, 27 Mo. 14; Lindsay *v.* State, 24 Ohio Cir. Ct. 1; Jones *v.* State, 14 Ohio Cir. Ct. 35, 7 Ohio Cir. Dec. 305; St. Clair *v.* U. S., 154 U. S. 134, 14 S. Ct. 1002, 38 L. ed. 936 (where defendants were charged jointly with a murder by striking, beating, and drowning). See also Plain *v.* State, 60 Ga. 284, holding that an indictment charging several with an assault with intent to murder by means of the throwing of rocks, etc., would be construed to mean that each threw with his own hands, or by the hands of others under such circumstances as would make the act of each the act of all. *Contra*, Com. *v.* Patrick, 80 Ky. 605, 4 Ky. L. Rep. 660, holding that where two persons were charged with having shot another with a pistol, the indictment was fatally defective in not charging who did the shooting.

Where a joint assault is charged to have been made with a single weapon, such as a knife, it has been held that the indictment is sufficient as against an objection that it describes an impossibility. State *v.* Dalton, 27 Mo. 13 [not *following* State *v.* Gray, 21 Mo. 492]; State *v.* Grimes, 29 Mo. App. 470, holding that the error, if any, was cured by the statute relating to formal defects.

The particular weapon employed by defendant need not be alleged where several persons are charged with having jointly made an assault with divers weapons. State *v.* Farley, 14 Ind. 23; Warfield *v.* State, 35 Tex. 736.

Repugnancy of statement see *supra*, V, C, 4.

70. State *v.* Dalton, 27 Mo. 13; State *v.* Fley, 2 Brev. (S. C.) 338, 4 Am. Dec. 583, murder.

71. State *v.* O'Donald, 1 McCord (S. C.) 532, 10 Am. Dec. 691.

72. State *v.* O'Donald, 1 McCord (S. C.) 532, 10 Am. Dec. 691, holding that an indictment charging two defendants with riot, with "divers other persons, to wit, to the number of five," was bad on arrest of judgment. See, generally, RIOT.

73. Com. *v.* Colton, 11 Gray (Mass.) 1 (holding that a charge that two persons "was a common seller of intoxicating liquors" was sufficient after a *nolle prosequi* as to one); Woods *v.* State, 81 Miss. 164, 32 So. 998; Holt *v.* State, 39 Tex. Cr. 282, 45 S. W. 1016, 46 S. W. 829. See, generally, *supra*, V, B, 5.

74. State *v.* Johnson, 104 La. 417, 29 So. 24, 81 Am. St. Rep. 139.

75. U. S. *v.* Hunter, 26 Fed. Cas. No. 15,425, 1 Cranch C. C. 446.

76. Millen *v.* State, 60 Ga. 620 (holding that it was sufficient to charge both principals with the offense, and then allege that one perpetrated the offense and that the other was present aiding and abetting); State *v.* White, 7 La. Ann. 531.

77. State *v.* Fley, 2 Brev. (S. C.) 338, 4 Am. Dec. 583. And see Heydon's Case, 4 Coke 41*a*.

78. Rex *v.* Cary, 3 Bulstr. 206, as where the aider and abetter of a mortal blow is ac-

abetted need not be set forth,[79] and where indicted with the principals in the first degree, the acts constituting the crime need not be repeated.[80] But in case the indictment attempts to set forth the specific acts done by each of defendants, such facts must be sufficient to show their guilt, or the indictment must be held bad as to them.[81] In case an act is such that it may be committed by but one person, it has been held erroneous to charge two defendants as principals without designating which is charged as having committed the act, and which with having aided and abetted it.[82] An ambiguity in the laying of time and place to the abetting and aiding may be cured by the apparent sense of the indictment.[83] Where, by statute, the distinction between principals in the first and second degree is abolished, an indictment of a principal in the second degree need not aver any facts other than those requisite to an indictment of the principal in the first degree.[84] An error in the charge as against the principals in the second degree cannot be availed of by the principal in the first degree.[85]

O. Indictments of Accessaries Before the Fact — 1. In General. An indictment of one as accessary before the fact is, as in the case of other indictments,[86] good under the modern statutes of criminal procedure, if sufficiently certain to notify defendant and the court of the nature of the crime charged, and to enable defendant to plead the judgment in bar of the subsequent prosecution.[87] In the absence of statute authorizing a contrary procedure, an accessary must be indicted as such, whether he is indicted with the principal felon or separately.[88] All the material averments of an indictment against the principal must be embodied in the indictment of an accessary before the fact,[89] and the same par-

tuated by malice while the giver of the blow is not they may be charged respectively with murder and manslaughter. See also Mackalley's Case, 9 Coke 61*b*. And see Homicide, 21 Cyc. 646.

79. State *v.* White, 7 La. Ann. 53; Williams *v.* State, 42 Tex. 392; Davis *v.* State, 3 Tex. App. 91; Rex *v.* Towle, R. & R. 233.

80. Everett *v.* State, 33 Fla. 661, 15 So. 543.

An unnecessary statement is not a matter of which the accused may complain. Drury *v.* Territory, 9 Okla. 398, 60 Pac. 101.

Averments of motive or intent.— Where defendants are charged as feloniously present aiding and abetting in the commission of a felony, the same motive or intent is imputed to them as is charged with respect to the principal in the first degree. State *v.* Rabon, 4 Rich. (S. C.) 260, holding the averment sufficient, although the indictment did not also charge that the principals in the second degree were wilfully and of their malice aforethought present, aiding, etc., in the murder.

81. Williams *v.* State, 43 Tex. 382; Davis *v.* State, 3 Tex. App. 91.

Failure to allege knowledge of the unlawful intent of the principal is fatal in such case. Williams *v.* State, 42 Tex. 392.

82. Com. *v.* Patrick, 80 Ky. 605, 4 Ky. L. Rep. 660, shooting with intent to kill.

83. State *v.* Fley, 2 Brev. (S. C.) 338, 4 Am. Dec. 583.

In an indictment for murder the felony may be charged to have been committed by the principals in the second degree, as upon the date of the striking of the mortal blow, although death did not occur until a later date. Reg. *v.* O'Brian, 2 C. & K. 115, 1 Cox C. C. 126, 1 Den. C. C. 9, 61 E. C. L. 115.

84. Noble *v.* People, 23 Colo. 9, 45 Pac. 376; Drury *v.* Terr., 9 Okla. 398, 60 Pac. 101; *In re* Roberts, 24 Fed. 132. See also Usselton *v.* People, 149 Ill. 612, 36 N. E. 952; Fixmer *v.* People, 153 Ill. 123, 38 N. E. 667; Baxter *v.* People, 8 Ill. 368.

Sufficiency of charge.— Under a statute defining an accessary during the fact as a person who stands by without interfering or giving such help as may be in his power to prevent a criminal offense from being committed, an indictment against such an accessary must show that it was in his power to do, without placing himself in danger. Farrell *v.* People, 8 Colo. App. 524, 46 Pac. 841.

85. State *v.* Davis, 29 Mo. 391.

86. See *supra*, V, A, 2.

87. Givens *v.* State, 103 Tenn. 648, 55 S. W. 1107, holding an indictment sufficient which charged that defendant induced another to kill deceased by shooting her "whereby of the wounds and effect thereof" she died, although there was no direct allegation that the murder was the result of the previous procurement by defendant.

88. Hatchett *v.* Com., 75 Va. 925; Thornton *v.* Com., 24 Gratt. (Va.) 657; State *v.* Roberts, 50 W. Va. 422, 40 S. E. 484; State *v.* Lilly, 47 W. Va. 496, 35 S. E. 837.

89. People *v.* Crenshaw, 46 Cal. 65, holding that a charge against a person as accessary to murder should contain an averment of the death of the person assaulted. And see Hollister *v.* Com., 60 Pa. St. 103, holding that an indictment for inciting another to commit burglary in a place where,

ticularity is required.[90] The commission of the offense by the principal must be alleged,[91] and his name must be stated where known;[92] but if unknown it is sufficient that such fact be alleged.[93] It is not necessary to set out the conviction of the principal.[94] The use of the word "accessary" is not necessary.[95] It would seem that in the same indictment a person cannot be charged as accessary both before and after the fact;[96] such a charge being, in case different punishments are provided, a charge of distinct offenses.[97] The charges against the principal and the accessary may be included in the same count, the offense by the principal being first stated and then the charge against the accessary.[98] Although the distinction between principals and accessaries before the fact is retained, an indictment is not vitiated by a conclusion charging an accessary before the fact as having committed the principal offense, in case the punishment is the same and the facts showing him to have been an accessary are set out.[99]

2. Under Statutes Abolishing Distinctions. In many jurisdictions the distinctions between principals and accessaries before the fact have been abolished by statute, and where such statutes exist, an accessary before the fact may be indicted as if he were a principal[1] without setting out the facts by which he aided and

under the law, burglary could not be committed, was bad.

90. Com. *v.* Kaas, 3 Brewst. (Pa.) 422; Com. *v.* Dudley, 6 Leigh (Va.) 613.

Averment of intent.— In an indictment of an accessary before the fact, where intent has been properly charged as to the principals, it is a sufficient averment as to the accessaries that they be charged with having wilfully and feloniously advised and encouraged the principals to commit the crime "in manner and form as aforesaid." Jones *v.* State, 58 Ark. 390, 24 S. W. 1073, holding such reference sufficient to incorporate the technical words as to murder "with malice aforethought, and with premeditation and deliberation."

91. Ulmer *v.* State, 14 Ind. 52.

An ambiguous expression in the indictment charging defendant with having conspired to procure a murder, and that the murder was done by someone who was counseled and procured by him to do the act, will not render the indictment bad where the meaning is plain to a person of ordinary intelligence. Powers *v.* Com., 110 Ky. 386, 61 S. W. 735, 63 S. W. 976, 22 Ky. L. Rep. 1807, 53 L. R. A. 245.

After the conviction of the principal, it is not necessary to aver that the principal committed the felony; but it is sufficient, at common law, to recite the record of the conviction. State *v.* Ricker, 29 Me. 84. See also Rex *v.* Baldwin, 3 Campb. 265.

92. U. S. *v.* Simmons, 96 U. S. 360, 24 L. ed. 819. See also State *v.* Houston, 19 Mo. 211 (holding an indictment against A for inciting B to murder, fatally defective where by mistake it was charged that defendant incited himself); Rex *v.* Walker, 3 Campb. 264 (where an acquittal was directed of a defendant indicted as accessary to larceny by a person unknown where the principal had been before the grand jury).

93. Com. *v.* Glover, 111 Mass. 395; Com. *v.* Kaas, 3 Brewst. (Pa.) 422; U. S. *v.* Simmons, 96 U. S. 360, 24 L. ed. 819.

94. State *v.* Crank, 2 Bailey (S. C.) 66, 23 Am. Dec. 117; State *v.* Sims, 2 Bailey (S. C.) 29; State *v.* Simmons, 1 Brev. (S. C.) 6.

By statute in some states the guilt of an accessary before the fact is to be alleged as if he alone had been concerned, followed by an averment of the acts done by the procurer which constitute him an accessary before the fact. State *v.* Ricker, 29 Me. 84.

95. State *v.* Ricker, 29 Me. 84; Rex *v.* Burridge, 3 P. Wms. 439, 24 Eng. Reprint 1133.

96. State *v.* Butler, 17 Vt. 145, holding, however, that where the portion charging defendant as an accessary after the fact was defective, it might be treated as surplusage and disregarded.

97. State *v.* Hinkle, 33 Oreg. 93, 54 Pac. 155, basing the decision also on the ground that the same evidence would not tend to prove the two charges, and that a conviction or acquittal as principal could not be interposed as a bar to a prosecution as an accessary after the fact.

98. Com. *v.* Glover, 111 Mass. 395 (holding that the use of the phrase "contrary to the form of the statute" in the statement of the acts of the principal did not cause the indictment to contain two counts, one against the accessary before the fact and the other against the principal); U. S. *v.* Berry, 96 Fed. 842 (to the same effect). See also Crook *v.* State, 27 Tex. App. 198, 11 S. W. 444, for an example of an invalid charge against the accessaries to murder construed to constitute but a single count.

99. Stricklin *v.* Com., 83 Ky. 566, 7 Ky. L. Rep. 627 [*distinguishing* Able *v.* Com., 5 Bush (Ky.) 698].

1. *California.*— People *v.* Nolan, 144 Cal. 75, 77 Pac. 774; People *v.* Rozelle, 78 Cal. 84, 20 Pac. 36; People *v.* Outeveras, 48 Cal. 19; People *v.* Schwartz, 32 Cal. 160, holding, however, that the better practice sanctioned the statement of the actual facts.

Illinois.— Spies *v.* People, 122 Ill. 1, 12 N. E. 865, 17 N. E. 898, 3 Am. St. Rep. 320; Dempsey *v.* People, 47 Ill. 323; Brennan *v.*

abetted,[2] or advised and procured[3] the commission of the crime. In some cases the statutes particularly provide that an accessary before the fact may or shall be indicted as a principal;[4] but even, in the absence of such a provision, in case the distinctions between principals and accessaries have been abolished, the indictment, it has been held, may properly be drawn as against a principal.[5] The effect of these statutes is to place felonies in the status at common law occupied only by treasons and misdemeanors,[6] in which case accessaries before the fact were not recognized, but persons aiding and abetting or advising and procuring were punished as principals.[7] Under statutes of the kind just considered it is usually held that the indictment may allege the matter according to the fact or charge the accessary as principal.[8] Whichever of such methods is adopted, the accessary before the fact may be convicted without alleging or proving the prior conviction of the principal.[9] An indictment charging an accessary before the fact as a principal should be as full, specific, and complete as if the charge were against the principal;[10] and in case the charge against the accessary is in a single count of an indictment containing other counts, nothing needed should be embraced by words

People, 15 Ill. 511; Baxter *v.* People, 8 Ill. 368.

Iowa.— State *v.* Hessian, 58 Iowa 68, 12 N. W. 77.

New York.— People *v.* Bliven, 112 N. Y. 79, 19 N. E. 638, 8 Am. St. Rep. 701 [*distinguishing* People *v.* Dumar, 106 N. Y. 502, 13 N. E. 325].

North Dakota.— State *v.* Kent, 4 N. D. 577, 62 N. W. 631, 27 L. R. A. 686.

Oklahoma.— Pearce *v.* Territory, 11 Okla. 438, 68 Pac. 504.

Pennsylvania.— Com. *v.* Hughes, 11 Phila. 430.

South Dakota.— State *v.* Phelps, 5 S. D. 480, 59 N. W. 471.

Washington.— State *v.* Golden, 11 Wash. 422, 39 Pac. 646.

England.— Reg. *v.* Manning, 2 C. & K. 887, 1 Den. C. C. 467, 13 Jur. 962, 19 L. J. M. C. 1, T. & M. 155, 61 E. C. L. 887.

See 27 Cent. Dig. tit. "Indictment and Information," §§ 227, 228.

Contra.— Williams *v.* State, 41 Ark. 173; Smith *v.* State, 37 Ark. 274.

2. People *v.* Outeveras, 48 Cal. 19 [*overruling*, so far as in conflict, People *v.* Campbell, 40 Cal. 129; People *v.* Trim, 39 Cal. 75]; State *v.* Chapman, 6 Nev. 320; People *v.* Seldner, 62 N. Y. App. Div. 357, 71 N. Y. Suppl. 35; People *v.* Batterson, 50 Hun (N. Y.) 44, 2 N. Y. Suppl. 376, 6 N. Y. Cr. 173. *Contra*, State *v.* Gifford, 19 Wash. 464, 53 Pac. 709 [*overruling* State *v.* Duncan, 7 Wash. 336, 35 Pac. 117, 38 Am. St. Rep. 888 (larceny)], and holding that to charge an accessary before the fact to rape as a principal without setting out the facts of aiding, etc., violated the constitutional right of accused to be informed of the nature of the accusation against him. *Compare* State *v.* Golden, 11 Wash. 422, 39 Pac. 646.

Where the aiding and abetting constitutes the substantive offense under the statute the acts must be set out. Shannon *v.* People, 5 Mich. 71, so holding with regard to one indicted as accessary to abandonment of a child, accused not sustaining any of the relationships to the child in which the statute provided the abandonment should be punishable. See also Soby *v.* People, 31 Ill. App. 242.

3. People *v.* Bliven, 112 N. Y. 79, 19 N. E. 638, 8 Am. St. Rep. 701.

4. See State *v.* Chapman, 6 Nev. 320; Com. *v.* Hughes, 11 Phila. (Pa.) 430; State *v.* Phelps, 5 S. D. 480, 59 N. W. 471.

5. People *v.* Bliven, 112 N. Y. 79, 19 N. E. 638, 8 Am. St. Rep. 701.

6. People *v.* Bliven, 112 N. Y. 79, 19 N. E. 638, 8 Am. St. Rep. 701.

7. See CRIMINAL LAW, 12 Cyc. 183. See also Ward *v.* People, 6 Hill (N. Y.) 144; U. S. *v.* Burr, 25 Fed. Cas. No. 14,692, 4 Cranch 455; Reg. *v.* Clayton, 1 C. & K. 128, 47 E. C. L. 128; Reg. *v.* Greenwood, 5 Cox C. C. 521, 2 Den. C. C. 453, 16 Jur. 390, 21 L. J. M. C. 127, 9 Eng. L. & Eq. 535.

8. *Idaho.*— Territory *v.* Guthrie, 2 Ida. (Hasb.) 432, 17 Pac. 39, holding that if a charge as accessary was error, it did not affect a substantial right of defendant within the meaning of a statute preventing a reversal for defects not affecting such rights.

Kansas.— State *v.* Clark, 60 Kan. 450, 56 Pac. 767.

Minnesota.— State *v.* Brigg, 84 Minn. 357, 87 N. W. 935.

Missouri.— State *v.* Schuckmann, 133 Mo. 111, 33 S. W. 35, 34 S. W. 842; State *v.* Payton, 90 Mo. 220, 2 S. W. 394; State *v.* Anderson, 89 Mo. 312, 1 S. W. 135.

New York.— People *v.* Peckens, 153 N. Y. 576, 47 N. E. 883.

Pennsylvania.— Brandt *v.* Com., 94 Pa. St. 290; Com. *v.* Bradley, 16 Pa. Super. Ct. 561.

See 27 Cent. Dig. tit. "Indictment and Information," § 227.

In Illinois it is held that when the facts are set out the indictment must conclude as for a commission of the principal felony. Usselton *v.* People, 149 Ill. 612, 36 N. E. 952; Coates *v.* People, 72 Ill. 303; Baxter *v.* People, 8 Ill. 368.

9. Brandt *v.* Com., 94 Pa. St. 290; Com. *v.* Bradley, 16 Pa. Super. Ct. 561; Com. *v.* Kelly, 10 Lanc. Bar (Pa.) 107.

10. Territory *v.* Conley, 2 Wyo. 331.

of reference to the preceding count.[11] The circumstances of the offense may be described as they actually occurred, as in the case of indictments of accessaries at or before the fact. But the conclusion should be for the actual offense of which the principal is charged.[12] If defendant is not charged, in general terms, as a principal, but it is attempted to allege the facts showing that he aided and abetted, or encouraged and advised, the perpetration of the crime by another, such facts must be stated as would formerly have constituted defendant an accessary.[13] If the pleader is doubtful as to whether the accessary was present aiding and abetting or was absent, both of such modes should be alleged.[14]

P. Indictments of Accessaries After the Fact. In an indictment charging a person with being an accessary after the fact to a felony, it must be alleged that a felony was committed by the principal, and the facts constituting such felony must be alleged with the same certainty as if the principal alone were indicted;[15] and after such allegation knowledge of the principal offense on the part of the accused must be averred.[16] Such averment may be by reference to the count in which the principal offense is charged.[17] In stating the facts showing that defendant was an accessary after the fact, the statutory definition of such accessaries may be followed.[18] Exceptions to such definition should be negatived,[19] but not such as are contained in separate sections of the statute.[20] The more general rule is that it is sufficient to state merely that the accused did aid, etc., the principal offender without setting forth the particular acts or alleging the character of the aid rendered.[21] The time and place at which the aid was rendered must, however, be shown.[22]

Q. Indictments For Attempts.[23] Although it has been said that an indictment for an attempt need not set forth the attempt with as much exactness as would be required in an indictment for the commission of the offense,[24] such is not a general rule.[25] Both the criminal intent[26] and an overt act adapted and intended to effectuate the purpose must be specifically alleged and proved,[27]

11. Territory *v.* Conley, 2 Wyo. 331.

12. Territory *v.* Conley, 2 Wyo. 331 [*citing* Baxter *v.* People, 8 Ill. 368].

13. People *v.* Rozelle, 78 Cal. 84, 20 Pac. 36.

14. People *v.* Schwartz, 32 Cal. 160.

15. Tully *v.* Com., 11 Bush (Ky.) 154, holding that such statements are indispensable, whether the indictment is joint or several, or in a proceeding at common law or under a statute, and although by statute a separate indictment against an accessary was permitted. See State *v.* King, 88 Minn. 175, 92 N. W. 965, holding an indictment sufficient.

16. Street *v.* State, 39 Tex. Cr. 134, 45 S. W. 577.

17. State *v.* Neddo, 92 Me. 71, 42 Atl. 253.

18. State *v.* Neddo, 92 Me. 71, 42 Atl. 253 (holding a charge that defendant harbored, etc., the principal felon, "with intent that he [the said felon] may escape detection, arrest, trial or punishment," sufficient); Blakely *v.* State, 24 Tex. App. 616, 7 S. W. 233, 5 Am. St. Rep. 912.

19. State *v.* Butler, 17 Vt. 145.

Sufficiency of negation of exceptions.— An averment that accused, "not standing in the relation of husband or wife, parent or child, to the" principal, etc., is a sufficient averment that accused did not stand in such relation at the time stated immediately preceding such averment. State *v.* Neddo, 92 Me. 71, 42 Atl. 253.

20. State *v.* Smith, 24 Tex. 285.

21. State *v.* Neddo, 92 Me. 71, 42 Atl. 253; Dent *v.* State, 43 Tex. Cr. 126, 65 S. W. 627; Woods *v.* State, (Tex. Cr. App. 1900) 60 S. W. 244; Gann *v.* State, (Tex. Cr. App. 1900) 57 S. W. 837 [*disapproving* Street *v.* State, 39 Tex. Cr. 134, 45 S. W. 577].

22. State *v.* Burbage, 51 S. C. 284, 28 S. E. 937, notwithstanding a statute providing that an accessary after the fact may be indicted and punished in any court having jurisdiction of the principal felon, either in the county where such person became an accessary or where the principal felony was committed.

23. Attempts to commit particular offenses see ARSON, 3 Cyc. 1003; BURGLARY, 6 Cyc. 225; HOMICIDE, 21 Cyc. 646; and other special titles.

24. Hayes *v.* State, 15 Lea (Tenn.) 64; State *v.* Montgomery, 7 Baxt. (Tenn.) 160.

In larceny, it has been held, the description need not be as particular in an indictment for an attempt as for a completed offense. State *v.* Hughes, 76 Mo. 323; Hayes *v.* State, 15 Lea (Tenn.) 64.

25. State *v.* Wilson, 30 Conn. 500.

26. State *v.* Wilson, 30 Conn. 500; Com. *v.* McLaughlin, 105 Mass. 460, holding that an indictment charging an attempt "unlawfully, wilfully and maliciously" to do a criminal act charges an unlawful intent.

27. *Connecticut.*— State *v.* Wilson, 30 Conn. 500.

together with facts showing the particular crime attempted.[28] This rule is, however, departed from in many cases based upon statutes punishing attempts, in which case it is held sufficient to follow the language of the statute without an averment of the particular manner in which the attempt was made.[29] It is not necessary to allege that the act attempted was prohibited by law if, from the face of the indictment, such fact appears.[30] An indictment charging a completed offense is usually regarded as sufficient to sustain a conviction for an attempt.[31]

R. Indictments For Solicitation. In some jurisdictions solicitation to commit an offense is regarded as an attempt and indictable as such, while in others the solicitation must be indicted as a distinct offense.[32] Where a solicitation is indictable as such, it has been held that it need not be alleged that the solicitation was successful.[33] On indictment of a solicitation as an attempt, the particular manner in which the attempt was made need not be pointed out by the indictment;[34] but the solicitation must be alleged as an overt act.[35] An indictment for an offense may combine in one count the acts which accused did himself toward the commission of the crime and his solicitations of another to aid in the crime, and the state cannot be compelled to elect.[36]

S. Construction and Form of Separate Counts[37] **— 1. In General.** Where several counts are employed in the indictment to describe the same transaction in different ways, each count should charge defendant as if he had committed a distinct offense,[38] the counts being regarded as separate indictments.[39] For this reason defects in some of the counts in an indictment will not affect the validity of the others,[40] and any repugnancy between two counts may be removed

Illinois.— Thompson *v.* People, 96 Ill. 158.

Kansas.— State *v.* Frazier, 53 Kan. 87, 36 Pac. 58, 42 Am. St. Rep. 274.

Maine.— State *v.* Doran, 99 Me. 329, 59 Atl. 440, 105 Am. St. Rep. 278.

Massachusetts.— Com. *v.* Peaslee, 177 Mass. 267, 59 N. E. 55.

Pennsylvania.— Com. *v.* J——, 21 Pa. Co. Ct. 625.

Virginia.— Hicks *v.* Com., 86 Va. 223, 9 S. E. 1024, 19 Am. St. Rep. 891; Com. *v.* Clark, 6 Gratt. 675.

United States.— U. S. *v.* Ford, 34 Fed. 26.

See 27 Cent. Dig. tit. "Indictment and Information," § 308.

Sufficiency of allegation of overt act.— An indictment for attempt to rob, charging that defendants went to a dwelling-house armed with a pistol and ax, broke down the door, fired the pistol into the house and "demanded of said Milburn the said money or they would kill him" is sufficient. State *v.* Montgomery, 109 Mo. 645, 19 S. W. 221, 32 Am. St. Rep. 684. An indictment for attempt to poison must specifically allege that the substance employed in the attempt was a deadly poison. Anthony *v.* State, 29 Ala. 27.

28. State *v.* Doran, 99 Me. 329, 59 Atl. 440, 105 Am. St. Rep. 278; People *v.* Kane, 161 N. Y. 380, 55 N. E. 946, 14 N. Y. Cr. 295 [*affirming* 43 N. Y. App. Div. 472, 61 N. Y. Suppl. 195, 632].

29. Jackson *v.* State, 91 Ala. 55, 8 So. 773, 24 Am. Rep. 860; Lewis *v.* State, 35 Ala. 380 [*distinguishing* Anthony *v.* State, 29 Ala. 27]; People *v.* Bush, 4 Hill (N. Y.) 133; State *v.* Montgomery, 7 Baxt. (Tenn.) 161; State *v.* Evans, 27 Utah 12, 73 Pac. 1047.

30. Com. *v.* Flynn, 3 Cush. (Mass.) 529.

31. People *v.* Webb, 127 Mich. 29, 86 N. W. 406.

Conviction of included offenses see *infra*, XII.

32. See Criminal Law, 12 Cyc. 182, 183.

33. Rivers *v.* State, 97 Ala. 72, 12 So. 434 (perjury); State *v.* Bowers, 35 S. C. 262, 14 S. E. 488, 28 Am. St. Rep. 847, 15 L. R. A. 199. And see Rex *v.* Higgins, 2 East 5 [*distinguishing* Reg. *v.* Collingwood, 6 Mod. 288, 3 Salk. 42], an indictment for solicitation to commit a crime need not aver any act done in pursuance of the solicitation.

Sufficiency of indictment for solicitation to commit arson.— Com. *v.* Flagg, 135 Mass. 545.

Subornation of perjury see Perjury.

34. People *v.* Bush, 4 Hill (N. Y.) 133.

35. Com. *v.* Peaslee, 177 Mass. 267, 59 N. E. 55, solicitation to commit arson. *Compare* McDermott *v.* People, 5 Park. Cr. (N. Y.) 102.

36. State *v.* Hayes, 78 Mo. 307.

37. **Propriety of joinder of counts** see *infra*, VII, B.

Election between counts see *infra*, VIII, B.

38. Mershon *v.* State, 51 Ind. 14; State *v.* Wagner, 118 Mo. 626, 24 S. W. 219; State *v.* Stacy, 103 Mo. 11, 15 S. W. 147; Com. *v.* Myers, 22 Lanc. L. Rev. (Pa.) 55; Com. *v.* Hess, 22 Lanc. L. Rev. (Pa.) 53. And see Young *v.* Rex, 2 East P. C. 833, 2 Leach C. C. 568, 3 T. R. 98, 1 Rev. Rep. 660.

39. Boren *v.* State, 23 Tex. App. 28, 4 S. W. 463; Latham *v.* Reg, 5 B. & S. 635, 9 Cox C. C. 516, 10 Jur. N. S. 1145, 33 L. J. M. C. 197, 10 L. T. Rep. N. S. 571, 12 Wkly. Rep. 908, 117 E. C. L. 635.

40. State *v.* Hadlock, 43 Me. 282; Pryor *v.* Com., (Va. 1897) 26 S. E. 864.

by a *nolle prosequi* as to one.[41] Failure to charge as a distinct offense, however, is regarded as a defect in form not vitiating the indictment under statutes providing that formal defects may be disregarded,[42] and while the offense should be described as if the count were a distinct indictment, it should not be charged that the offense itself is distinct and separate from those described in the other counts.[43]

2. Introduction, Conclusion, and Connection of Separate Counts. As has been seen, each count should allege that it is presented upon the oath of the grand jurors, and is properly introduced with the statement that the "jury, upon their oath, do further present;"[44] but indictments have been sustained, although two counts were inartistically run together in one sentence without such punctuation as would indicate the end of one and the beginning of the other.[45] The use of the words "against the peace," etc., or "against the form of the statute," or as it is called, the "*contra formam*" clause, does not itself convert a recital into a separate count;[46] nor does the fact that a paragraph begins, "and the jurors, etc., on their oath aforesaid do further present," where facts sufficient to constitute a complete charge have not been averred.[47] The caption and venue need not be repeated in each count.[48] In some states the words "against the peace and dignity," etc., need not be repeated in the conclusion of each count if the whole indictment so concludes,[49] and each count of an indictment or information need not be signed by the prosecuting officer.[50] It is not necessary that the counts be numbered,[51] nor need they be upon the same sheet of paper,[52] and when prepared on separate leaves, they need not be fastened together.[53]

3. Aider by Other Portions of the Indictment. Each count must be a complete charge of crime in itself,[54] and must contain a complete description of the

Reference of general verdict to good count in indictment see Criminal Law, 12 Cyc. 694.

41. Chester *v.* State, 23 Tex. App. 577, 5 S. W. 125, repugnancy as to date of forged instrument.

42. State *v.* Doyle, 15 R. I. 527, 9 Atl. 900.

43. State *v.* Rust, 35 N. H. 438.

44. State *v.* McAllister, 26 Me. 374; State *v.* Wagner, 118 Mo. 626, 24 S. W. 219. See *supra*, III, C, 6.

45. State *v.* Dalton, 106 Mo. 463, 17 S. W. 700. And *compare* State *v.* Thompson, 51 La. Ann. 1089, 25 So. 954.

46. Com. *v.* Walker, 163 Mass. 226, 39 N. E. 1014; Com. *v.* Chiovaro, 129 Mass. 489; Com. *v.* Glover, 111 Mass. 395.

47. Com. *v.* Walker, 163 Mass. 226, 39 N. E. 1014; Com. *v.* Chiovaro, 129 Mass. 489; State *v.* Stacy, 103 Mo. 11, 15 S. W. 147 (holding that for this reason it was not fatal to an indictment that the phrase "against the peace and dignity of the state" did not conclude the matter alleged before the introduction of the words "do further present"); Rex *v.* Haynes, 4 M. & S. 221.

48. State *v.* Lennon, 8 Rob. (La.) 543; Davis *v.* State, 19 Ohio St. 270; Dancey *v.* State, 35 Tex. Cr. 615, 34 S. W. 113, 938 (holding that a statute stating the requisite forms for the beginning and concluding parts of indictments and informations does not refer to the separate counts thereon, and the first count can be looked to to supply an allegation in a subsequent count as to the court in which it was presented). See *supra*, III, B, 4.

49. Com. *v.* Paxton, 14 Phila. (Pa.) 665; Rice *v.* State, 3 Heisk. (Tenn.) 215. See *supra*, III, E, 4.

50. See *supra*, III, F, 2, b, (IV); IV, A, 5, f.

51. State *v.* Dow, 73 Iowa 587, 35 N. W. 651, holding sufficient an indictment where the counts were separated merely by a blank space.

Where two series of counts bear the same numbers, a judgment referring to the counts by numbers will be taken as referring to the counts in the order in which they appear in the indictment, without reference to the numbers given to them therein. Teerney *v.* People, 81 Ill. 411.

52. State *v.* Lennon, 8 Rob. (La.) 543, where the second sheet was indorsed "second count."

Separate counts are sufficiently identified as one proceeding by being fastened together by a wafer. State *v.* McLane, 4 La. Ann. 437; State *v.* McLane, 4 La. Ann. 435.

53. State *v.* Lennon, 8 Rob. (La.) 543.

54. State *v.* Stacy, 103 Mo. 11, 15 S. W. 147; State *v.* Phelps, 65 N. C. 450; Long *v.* State, 43 Tex. 467, holding, however, that an indictment charging the fraudulent driving of cattle from their accustomed range, followed by a charge of theft, but in such charge not describing the cattle taken, will not be considered as a separate count, but only as a summation of the preceding acts into one charge.

Introduction of a charge against accessaries after an allegation possessing the requisite particularity and formality as to the principal in his commission of the offense does not cause the indictment to consist of two counts. State *v.* Hopper, 71 Mo. 425.

offense,[55] since in the absence of express reference, one count is not aided by others.[56]

4. Reference From One Count to Another — a. Propriety. One count may refer to another to save unnecessary repetition.[57] Thus an averment of the impaneling and oath of the grand jury,[58] or an averment of time and place,[59] may be supplied by reference to preceding counts. The same is true of an allegation of the value[60] or ownership[61] of goods stolen.[62]

b. Necessity. In order that one count of an indictment may be aided by another, there must be an express reference thereto.[63]

c. Sufficiency. Reference must be made with such definiteness and specificness that the matter referred to is clearly and accurately incorporated in the count;[64] hence qualities and adjuncts averred to belong to a subject in one count of an indictment, if separable from it, are not sufficiently alleged in a subsequent count merely introducing the subject by reference as the same subject "before mentioned,"[65] or "said,"[66] and the same insufficiency results in such a case

55. Keech *v.* State, 15 Fla. 591; State *v.* Wagner, 118 Mo. 626, 24 S. W. 219; Reg. *v.* Weir, 3 Can. Cr. Cas. 499.

Description of persons.— Where the age or condition of a person is material to the description of the offense, a second count must repeat such description; otherwise it is sufficient, to identify the person as the same person, that the same name be used. Boren *v.* State, 23 Tex. App. 28, 4 S. W. 463.

56. *California.*— People *v.* Smith, 103 Cal. 563, 37 Pac. 516.

Indiana.— State *v.* Longley, 10 Ind. 482.

South Carolina.— State *v.* Johnson, 45 S. C. 483, 23 S. E. 619.

Texas.— Powell *v.* State, 42 Tex. Cr. 12, 57 S. W. 95, holding that the omission of defendant's name in the second count of an indictment containing two separate counts cannot be supplied by reference to the first. *Compare* Boren *v.* State, 23 Tex. App. 28, 4 S. W. 463, stating that, where the count is not sufficient on its face, preceding counts may be looked to for auxiliary allegations to supply its defects.

Virginia.— Jones *v.* Com., 86 Va. 950, 12 S. E. 950, holding that an allegation in the first count of an indictment for malicious shooting, as to the county where the offense was committed, does not render valid the second count, which contains no averment as to place.

57. *Maine.*— State *v.* Nelson, 29 Me. 329.

New York.—People *v.* Danihy, 63 Hun 579, 18 N. Y. Suppl. 467; People *v.* Graves, 5 Park. Cr. 134.

Pennsylvania.— Com. *v.* Meads, 14 York Leg. Rec. 132.

Tennessee.— State *v.* Lea, 1 Coldw. 175.

Texas.— Morgan *v.* State, 31 Tex. Cr. 1, 18 S. W. 647, holding that where the first count of an indictment charged stealing, and the second receiving stolen cattle, and the date when and the county where the theft was committed were properly alleged in the first count, they need not be repeated in the second count.

United States.— U. S. *v.* McKinley, 127 Fed. 166; U. S. *v.* Peters, 87 Fed. 984; U. S. *v.* Hendric, 26 Fed. Cas. No. 15,346, 2 Sawy. 476.

England.— See Reg. *v.* Waverton, 17 Q. B. 562, 2 Den. C. C. 340, 16 Jur. 16, 21 L. J. M. C. 7, 79 E. C. L. 562.

See 27 Cent. Dig. tit. "Indictment and Information," § 270 *et seq.*

Compare, however, Keech *v.* State, 15 Fla. 591, holding that a count in an indictment of one as accessary to murder could not refer to the murder as described in a preceding count as "in manner and form aforesaid."

Reference, if improper, is a merely formal defect which is cured by statute. U. S. *v.* Jolly, 37 Fed. 108.

58. State *v.* Vincent, 91 Mo. 662, 4 S. W. 430. See *supra,* III, B, 3, d.

59. *Illinois.*— Noe *v.* People, 39 Ill. 96.

Indiana.— Redman *v.* State, 1 Blackf. 429.

Louisiana.— State *v.* Hertzog, 41 La. Ann. 775, 6 So. 622.

Massachusetts.— Com. *v.* Goodwin, 122 Mass. 19.

Nebraska.— Bartley *v.* State, 53 Nebr. 310, 73 N. W. 744; Fisk *v.* State, 9 Nebr. 62, 2 N. W. 381.

Ohio.— Evans *v.* State, 24 Ohio St. 208.

Texas.— Boggs *v.* State, (Cr. App. 1894) 25 S. W. 770.

See 27 Cent. Dig. tit. "Indictment and Information," § 270 *et seq.*

60. Redman *v.* State, 1 Blackf. (Ind.) 429.

61. State *v.* Nelson, 29 Me. 329.

62. See, generally, Larceny.

63. People *v.* Smith, 103 Cal. 563, 37 Pac. 516; State *v.* McAllister, 26 Me. 374; State *v.* Soule, 20 Me. 19; State *v.* Lee, 1 Coldw. (Tenn.) 175; Jones *v.* Com., 86 Va. 950, 12 S. E. 950. And *compare* State *v.* Longley, 10 Ind. 482.

64. State *v.* Ackerman, 51 La. Ann. 1209, 26 So. 84; State *v.* McAllister, 26 Me. 374; State *v.* Bruce, 26 W. Va. 153 (holding that the use of the words "then and there" was insufficient to supply an averment of time and place); State *v.* Lyon, 17 Wis. 237.

65. Reg. *v.* Waverton, 17 Q. B. 562, 2 Den. C. C. 340, 16 Jur. 16, 21 L. J. M. C. 7, 79 E. C. L. 562.

66. Reg. *v.* Martin, 9 C. & P. 215, 2 Moody C. C. 123, 38 E. C. L. 135, holding that the "said E. R." was not sufficient to bring into the count a description of E R as between

from the use of "aforesaid"[67] as a connective expression in a second count of the indictment.

d. Effect of Insufficiency or Abandonment of Count Referred to. The count referred to may, without vitiating the count from which reference is made, be abandoned at the trial,[68] or a *nolle prosequi* entered thereto,[69] or it may be insufficient,[70] or the prisoner may be acquitted thereon.[71]

T. Surplusage — 1. Effect — a. In General. The fact that an indictment contains immaterial and unnecessary matter will not render it bad where such matter may be rejected as surplusage,[72] the rule being that if, after the rejection of surplusage, enough remains to constitute a valid charge of the offense, the indictment will be sustained.[73] In larceny, where there is but one count alleging the taking of several articles, and portions of the count are invalid by reason of failure to allege the value of the articles, such portions may be rejected and the

the ages of ten and twelve. But see Com. *v.* Ault, 10 Pa. Super. Ct. 651, holding that when the first count of an indictment properly charges the larceny of specific chattels, alleging the value and ownership thereof, and the second count charges the felonious receiving of "the said" chattels, enumerating them, the words "the said" refer to the first count, and the allegations as to ownership and value set forth in that count are to be read into the second count. And *compare* Peters *v.* U. S., 94 Fed. 127, 36 C. C. A. 105, reference to defendant as "being then and there the cashier of said association."

67. State *v.* Fields, 70 Kan. 391, 78 Pac. 833 ("aforesaid neat cattle" did not carry allegations of number, sex, age, color, and brands); State *v.* Wagner, 118 Mo. 626, 24 S. W. 219; State *v.* Lyon, 17 Wis. 237 ("aforesaid" goods and chattels does not carry an allegation as to value).

Manner and form aforesaid is insufficient to incorporate descriptive averments with regard to a murder contained in a first count of the indictment in the second count thereof. Keech *v.* State, 15 Fla. 591; State *v.* Wade, 147 Mo. 73, 47 S. W. 1070.

68. *Indiana.*— State *v.* Dufour, 63 Ind. 567.

Missouri.— State *v.* Knock, 142 Mo. 515, 44 S. W. 235.

Nebraska.— Bartley *v.* State, 53 Nebr. 310, 73 N. W. 744.

New York.— People *v.* McLaughlin, 150 N. Y. 365, 44 N. E. 1017 [*affirming* 2 N. Y. App. Div. 419, 37 N. Y. Suppl. 1005].

Pennsylvania. — Com. *v.* Hill, 2 Pearson 432.

Texas.— Boles *v.* State, 13 Tex. App. 650.

69. State *v.* Gaston, 96 Iowa 505, 65 N. W. 415; Wills *v.* State, 8 Mo. 52; State *v.* Lea, 1 Coldw. (Tenn.) 175.

70. Com. *v.* Ault, 10 Pa. Super. Ct. 651; Com. *v.* Kaas, 3 Brewst. (Pa.) 422; Com. *v.* Miller, 2 Pars. Eq. Cas. (Pa.) 480; Crain *v.* U. S., 162 U. S. 625, 16 S. Ct. 952, 40 L. ed. 1097; Blitz *v.* U. S., 153 U. S. 308, 14 S. Ct. 924, 38 L. ed. 725.

71. Com. *v.* Clapp, 16 Gray (Mass.) 237.

72. *Alabama.*— Aaron *v.* State, 39 Ala. 75.

Indiana. — Feigel *v.* State, 85 Ind. 580; Barnett *v.* State, 22 Ind. App. 599, 54 N. E. 414.

Kentucky.— Travis *v.* Com., 96 Ky. 77, 27 S. W. 863; Olive *v.* Com., 5 Bush 376; Spencer *v.* Com., 12 Ky. L. Rep. 605.

Louisiana. — State *v.* Crittenden, 38 La. Ann. 448.

Maryland.— Rawlings *v.* State, 2 Md. 201.

Massachusetts.—Com. *v.* East Boston Ferry Co., 13 Allen 589.

Missouri.— State *v.* Taylor, 117 Mo. 181, 22 S. W. 1103.

Nevada.— State *v.* Pierce, 8 Nev. 291.

New York. — People *v.* White, 22 Wend. 167 [*affirmed* in 24 Wend. 520], holding that an averment of premeditation might be stricken out of a common-law indictment for murder without vitiating it.

Pennsylvania. — Clary *v.* Com., 4 Pa. St. 210; Com. *v.* Casey, 14 Pa. Co. Ct. 389; Com. *v.* Leisenring, 11 Phila. 392.

Texas.— State *v.* Elliott, 14 Tex. 423; Rocha *v.* State, 43 Tex. Cr. 169, 63 S. W. 1018; Hampton *v.* State, 5 Tex. App. 463.

Washington.—State *v.* Kyle, 14 Wash. 550, 45 Pac. 147.

West Virginia.— State *v.* Hall, 26 W. Va. 236.

United States.— U. S. *v.* Howard, 26 Fed. Cas. No. 15,403, 3 Sumn. 12.

See 27 Cent. Dig. tit. "Indictment and Information," § 311 *et seq.*

In indictments for cruelty to animals see ANIMALS, 2 Cyc. 348.

73. *Indiana.*— Musgrave *v.* State, 133 Ind. 297, 32 N. E. 885.

Massachusetts.— Com. *v.* Stevenson, 127 Mass. 446; Com. *v.* Parmenter, 121 Mass. 354.

Missouri.— State *v.* Inks, 135 Mo. 678, 37 S. W. 942; State *v.* Flanders, 118 Mo. 227, 23 S. W. 1086; State *v.* Meyers, 99 Mo. 107, 12 S. W. 516; State *v.* Murphy, 102 Mo. App. 680, 77 S. W. 157.

Nebraska.— Blodgett *v.* State, 50 Nebr. 121, 69 N. W. 751.

Texas.— Clark *v.* State, 41 Tex. Cr. 641, 56 S. W. 621; Peterson *v.* State, 25 Tex. App. 70, 7 S. W. 530; Burke *v.* State, 5 Tex. App. 74.

See 27 Cent. Dig. tit. "Indictment and Information," § 311 *et seq.*

indictment sustained as to the residue.[74] An indictment is not vitiated by tautology or repetition,[75] and unless an indictment is so prolific as to prejudice a defendant in making his defense, the prolixity cannot be urged as a defect.[76] An entire count in an indictment may be rejected as surplusage where the indictment is complete without it.[77] Statutory provisions that no indictment shall be deemed invalid for any surplusage or repugnant allegation, if sufficient is alleged to indicate the crime and person charged, are common;[78] but such statutes do not authorize the rejection of portions of an indictment in such a way as to alter its meaning and render it sufficient.[79]

b. Matter Rendering Indictment Uncertain. In some instances an indictment may be made good by rejecting as insensible and useless such words as obstruct its sense,[80] if it is not contradictory.[81] So objection cannot be made to an indictment on the ground of the insufficiency or uncertainty of allegations which may be rejected as surplusage.[82] For example, where an indictment charges a specific sale of intoxicating liquors sufficiently, and then avers sales to "divers other persons," such latter allegation may be rejected.[83]

c. Disjunctive Statements. An indictment will not be held bad, as in the disjunctive or alternative, where the alternative statement may be rejected as surplusage.[84]

d. Repugnant Statements. In case repugnant and inconsistent averments may be stricken out as surplusage, the indictment is not vitiated thereby.[85] So an indictment is not vitiated by repugnancy in non-traversable matter laid after a

74. State *v.* Vanderlip, 4 La. Ann. 444. See, generally, LARCENY.

75. Lodano *v.* State, 25 Ala. 64; Downs *v.* State, 60 Ark. 521, 31 S. W. 149; State *v.* Furney, 41 Kan. 115, 21 Pac. 213, 13 Am. St. Rep. 262.

76. McNamee *v.* People, 31 Mich. 473; State *v.* Kendall, 38 Nebr. 817, 57 N. W. 525; People *v.* Laurence, 137 N. Y. 517, 33 N. E. 547; State *v.* Bellville, 7 Baxt. (Tenn.) 548, holding that disregard of a statutory requirement that the offense be stated "without prolixity or repetition," is not fatal to the indictment if, on rejection of surplus words, the offense is sufficiently charged.

77. People *v.* Ah Hop, 1 Ida. 698.

78. Musgrave *v.* State, 133 Ind. 297, 32 N. E. 885; State *v.* White, 129 Ind. 153, 28 N. E. 425; State *v.* Kendall, 38 Nebr. 817, 57 N. W. 525; Lazier *v.* Com., 10 Gratt. (Va.) 708.

79. Littell *v.* State, 133 Ind. 577, 33 N. E. 417.

80. Com. *v.* Wright, 166 Mass. 174, 44 N. E. 129; Com. *v.* Penniman, 8 Metc. (Mass.) 519; Turns *v.* Com., 6 Metc. (Mass.) 224; State *v.* Lee Ping Bow, 10 Oreg. 27 (holding that in an indictment charging stealing "from and on the person," the words "and on" may be rejected as surplusage); Rex *v.* Redman, 2 Leach C. C. 536.

81. People *v.* Lohman, 2 Barb. (N. Y.) 216.

82. Snell *v.* State, 29 Ill. App. 470; State *v.* Ansaleme, 15 Iowa 44; Com. *v.* East Boston Ferry Co., 13 Allen (Mass.) 589; Com. *v.* Bolkom, 3 Pick. (Mass.) 281, holding that the words "other unlawful games" might be rejected from an indictment for allowing persons "to play at cards and other unlawful games."

83. Burchard *v.* State, 2 Oreg. 78; Com. *v.* Goldsmith, 12 Phila. (Pa.) 632; State *v.* Jeffcoat, 54 S. C. 196, 32 S. E. 298; State *v.* Cassety, 1 Rich. (S. C.) 90.

84. *Connecticut.*— State *v.* Corrigan, 24 Conn. 286, holding that an indictment charging that defendant "by himself, or by his agent" sold certain intoxicating liquors was not bad.

Georgia.— Henderson *v.* State, 113 Ga. 1148, 39 S. E. 446.

Indiana.— McGregor *v.* State, 16 Ind. 9.

New York.— People *v.* Gilkinson, 4 Park. Cr. 26, negativing statutory exceptions in the disjunctive.

West Virginia.— State *v.* Newsom, 13 W. Va. 859.

85. *Alabama.*— Taylor *v.* State, 100 Ala. 68, 14 So. 875, laying name as both known and unknown.

Indiana.— Watson *v.* State, 111 Ind. 599, 12 N. E. 1008; Trout *v.* State, 111 Ind. 499, 12 N. E. 1005; Myers *v.* State, 101 Ind. 379; Dias *v.* State, 7 Blackf. 20, 39 Am. Dec. 448.

Iowa.— State *v.* Freeman, 8 Iowa 428, 71 Am. Dec. 317.

Kentucky.— Richey *v.* Com., 81 Ky. 524.

Massachusetts.— Com. *v.* Pray, 13 Pick. 359, inconsistent statement of venue.

Missouri.— State *v.* Flint, 62 Mo. 393.

Pennsylvania.— Com. *v.* Bell, Add. 156, 1 Am. Dec. 298; Respublica *v.* Shryber, 1 Dall. 68, 1 L. ed. 40.

England.— Rex *v.* Gill, R. & R. 320, statement of time.

See 27 Cent. Dig. tit. "Indictment and Information," §§ 201, 313.

Repugnancy in stating middle name of defendant not fatal.— Eddison *v.* State, (Tex. Cr. App. 1903) 73 S. W. 397; Albert *v.* State, (Tex. Cr. App. 1903) 72 S. W. 846. See *supra*, V, G, 3.

scilicet.[86] Under the same rule the term "feloniously" used in charging a misdemeanor may be rejected as surplusage;[87] or a conclusion *contra formam statuti*, where a common-law and not a statutory offense is described.[88] A description of the manner in which an offense was committed, which shows that in fact there was no offense, cannot, however, be rejected to sustain a good general charge.[89]

e. Duplicitous Statements.[90] Where averments which tend to render an indictment duplicitous may be rejected as surplusage, they will be so rejected in order to prevent the indictment from being held defective.[91]

2. Matter Which Is Surplusage[92] **— a. In General.** Matter which may be omitted from the indictment without injury to the sense or detriment to the material averments may in general be regarded as surplusage.[93] For example a *continuando* may be rejected as surplusage where the offense is not a continuing one, and without the *continuando* clause the indictment is otherwise sufficient;[94] and so of an express allegation of an assault where an assault is necessarily implied in the charge.[95] The same theory may permit disregard of a misnomer in an immaterial portion of the indictment,[96] or matter merely in aggravation,[97] or of

86. State *v.* Haney, 8 N. C. 460.

87. Com. *v.* Philpot, 130 Mass. 59; Com. *v.* Squire, 1 Metc. (Mass.) 258; State *v.* Crummey, 17 Minn. 72. See *supra*, V, H, 7, d.

88. See *supra*, III, E, 5.

89. Raymond *v.* People, 9 Ill. App. 344.

90. Duplicity see *infra*, VII, A.

91. *Indiana.*— Smith *v.* State, 85 Ind. 553.

Massachusetts.— Com. *v.* Brown, 14 Gray 419.

Michigan.— Turner *v.* Muskegon County Cir. Judge, 95 Mich. 1, 54 N. E. 705.

Mississippi.— Green *v.* State, 23 Miss. 509.

New Hampshire.— State *v.* Noyes, 30 N. H. 279.

New York.— Polinsky *v.* People, 73 N. Y. 65 [*affirming* 11 Hun 390]; Dawson *v.* People, 25 N. Y. 399.

Washington.— State *v.* Kyle, 14 Wash. 550, 45 Pac. 147.

See 27 Cent. Dig. tit. "Indictment and Information," § 313.

Illustrations.— Averments indicating robbery may be rejected from an indictment for riot (State *v.* Tom Louey, 11 Oreg. 326, 8 Pac. 353); averments indicating gambling from an indictment for vagrancy (State *v.* Boatright, 61 Mo. App. 469); averments of burglary from an indictment for assault with intent to murder (Hammons *v.* State, 29 Tex. App. 445, 16 S. W. 99); averments of shooting with intent to kill from an indictment for shooting into an occupied house (State *v.* Minau, 37 La. Ann. 526); averments of embezzlement from an indictment for larceny (Com. *v.* Simpson, 9 Metc. (Mass.) 138); or an averment of "intent to kill" from an indictment for highway robbery (U. S. *v.* Larkin, 26 Fed. Cas. No. 15,561, 4 Cranch C. C. 617).

92. See also *supra*, V, T, 1, a–e.

93. *Alabama.*— Henderson *v.* State, 105 Ala. 82, 16 So. 931 (value of the house in an indictment for arson in burning a cotton house containing cotton); McGehee *v.* State, 52 Ala. 224 (averment in an indictment for murder, an averment that defendant was "a freedman").

Arkansas.— State *v.* Porter, 38 Ark. 637.

Connecticut.— State *v.* Corrigan, 24 Conn. 286.

Maine.— State *v.* Mayberry, 48 Me. 218; State *v.* Noble, 15 Me. 476.

Maryland.— Rawlings *v.* State, 2 Md. 201.

Massachusetts.— Com. *v.* Walker, 163 Mass. 226, 39 N. E. 1014; Com. *v.* Chiovaro, 129 Mass. 489; Com. *v.* Pray, 13 Pick. 359.

Mississippi.— Green *v.* State, 23 Miss. 509.

Missouri.— State *v.* Walker, 167 Mo. 366, 67 S. W. 228; State *v.* Wall, 39 Mo. 532; State *v.* Hamilton, 7 Mo. 300.

Nebraska.— Hurlburt *v.* State, 52 Nebr. 428, 72 N. W. 471.

New Hampshire.— State *v.* Webster, 39 N. H. 96; State *v.* Bailey, 31 N. H. 521.

New Jersey.— State *v.* Kern, 51 N. J. L. 259, 17 Atl. 114.

New York.— Crichton *v.* People, 1 Abb. Dec. 467, 1 Keyes 341, 6 Park. Cr. 363.

Ohio.— State *v.* Decker, 1 Ohio Dec. (Reprint) 527, 10 West. L. J. 328.

Pennsylvania.— Clary *v.* Com., 4 Pa. St. 210; Com. *v.* Bell, Add. 156, 1 Am. Dec. 298; Respublica *v.* Shryber, 1 Dall. 68, 1 L. ed. 40.

South Carolina.— State *v.* Coppenburg, 2 Strobh. 273.

Texas.— Gordon *v.* State, 2 Tex. App. 154.

United States.— U. S. *v.* Howard, 26 Fed. Cas. No. 15,403, 3 Sumn. 12.

See 27 Cent. Dig. tit. "Indictment and Information," § 312.

94. Eggart *v.* State, 40 Fla. 527, 25 So. 144.

95. State *v.* Crittenden, 38 La. Ann. 448.

96. *Massachusetts.*— Com. *v.* Hunt, 4 Pick. 252.

New Hampshire.— State *v.* Bailey, 31 N. H. 521.

Texas.— Mayo *v.* State, 7 Tex. App. 342.

United States.— U. S. *v.* Howard, 26 Fed. Cas. No. 15,403, 3 Sumn. 12.

England.— Rex *v.* Morris, 1 Leach C. C. 127.

See 27 Cent. Dig. tit. "Indictment and Information," § 312 *et seq.*

97. State *v.* Staples, 45 Me. 320 (allegation that a glass of liquor sold was "the second glass" sold by defendant to the same

words obviously without meaning,[98] or of an unnecessarily specific allegation of venue.[99] In case two offenses are of such a nature that they may be charged together, and the averments are sufficient to sustain a conviction for one, but not for the other, the allegations peculiar to the latter may be rejected as surplusage.[1] Of this nature are indictments combining allegations of burglary and larceny.[2] The allegations as to the offense as to which conviction is had must of course be sufficient.[3]

b. Unnecessary Matter of Description. Allegations which, although unnecessary, are descriptive of the identity of that which is legally essential to the charge cannot be rejected as surplusage.[4] So when the color or brand of an animal stolen is unnecessarily stated, it cannot be rejected as surplusage.[5] But there are apparent exceptions to this rule, as where the term "goods and chattels" has been rejected in an indictment describing bank-notes erroneously as "goods and chattels" instead of "property."[6] Allegations of value are not usually regarded as descriptive of identity.[7]

c. Matter Extrinsic to Definition of Statutory Offense. Where the indictment charges all the elements essential to an offense under a statute, other matter unnecessarily added may be rejected as surplusage.[8] A faulty description of the

person on the same day); State *v.* Smith, 32 Me. 369, 54 Am. Dec. 578 (allegation that deceased was quick with child in murder).

98. Travis *v.* Com., 96 Ky. 77, 27 S. W. 863, 16 Ky. L. Rep. 253 (the words "of Kentucky," a description of money as "lawful currency of the United States of Kentucky"); Tifft *v.* State, 23 Miss. 567; Rivers *v.* State, 10 Tex. App. 177.

A word which has no common acceptation and is for that reason useless in connection with the charge may be rejected as surplusage. People *v.* Flores, 64 Cal. 426, 1 Pac. 498, such as *accommodatum* in charging possession of certain property as "bailee *accommodatum*."

99. State *v.* Nelson, 65 N. J. L. 500, 47 Atl. 500 (indictment for taking oysters in certain prohibited waters); U. S. *v.* Smith, 27 Fed. Cas. No. 16,322, 2 Bond 323.

1. State *v.* Morrison, 24 N. C. 9 (holding that upon a general conviction on an indictment charging a rescue and an assault and battery, judgment might be pronounced as for assault and battery, if the averment as to rescue was uncertain); Rex *v.* Jones, 2 B. & Ad. 611, 9 L. J. M. C. O. S. 98, 22 E. C. L. 256.

2. State *v.* McCoy, 12 Mo. App. 589; State *v.* McClung, 35 W. Va. 280, 13 S. E. 654; State *v.* Reece, 27 W. Va. 375.

3. People *v.* Laurence, 66 Hun (N. Y.) 574, 21 N. Y. Suppl. 818.

4. *California.*— People *v.* Ross, 134 Cal. 256, 66 Pac. 229; People *v.* Myers, 20 Cal. 76.

Georgia.— Fulford *v.* State, 50 Ga. 591.

Illinois.— Raymond *v.* People, 9 Ill. App. 344.

Indiana.— Lewis *v.* State, 113 Ind. 59, 14 N. E. 892.

Maine.— State *v.* Noble, 15 Me. 476.

Massachusetts.— Com. *v.* Atwood, 11 Mass. 93.

New York.— Alkenbrack *v.* People, 1 Den. 80.

Tennessee.— Hite *v.* State, 9 Yerg. 357.

Texas.— Hill *v.* State, 41 Tex. 253; Mayo *v.* State, 7 Tex. App. 342; Gordon *v.* State, 2 Tex. App. 154; Rose *v.* State, 1 Tex. App. 400; Warrington *v.* State, 1 Tex. App. 168.

Vermont.— State *v.* Freeman, 15 Vt. 723, holding that where an allegation in an indictment was that a certain court was begun and holden by a certain judge named, the name of the judge could not be regarded as surplusage in order to aid the averment, which was defective in not stating the facts which allowed such judge named to sit individually.

United States.— U. S. *v.* Howard, 26 Fed. Cas. No. 15,403, 3 Sumn. 12.

See 27 Cent. Dig. tit. "Indictment and Information," § 312.

5. Ranjel *v.* State, 1 Tex. App. 461 (brand set out in an indictment for theft as descriptive of an animal stolen); State *v.* Gilbert, 13 Vt. 647. See, generally, LARCENY.

6. Eastman *v.* Com., 4 Gray (Mass.) 416; Turner *v.* State, 1 Ohio St. 422; Com. *v.* Moseley, 2 Va. Cas. 154. See LARCENY.

7. Com. *v.* Garland, 3 Metc. (Ky.) 478. See LARCENY.

8. *Colorado.*— Kollenberger *v.* People, 9 Colo. 233, 11 Pac. 101, the same being living animals in an indictment for larceny of calves.

Florida.— Hodge *v.* State, 26 Fla. 11, 7 So. 593, "feloniously, wilfully, of his malice aforethought," in indictment for murder.

Illinois.— Snell *v.* People, 29 Ill. App. 470.

Kentucky.— Spencer *v.* Com., 12 Ky. L. Rep. 605.

Louisiana.— State *v.* Jackson, 106 La. 189, 30 So. 309.

Massachusetts.— Com. *v.* Dyer, 128 Mass. 70; Com. *v.* Arnold, 4 Pick. 251, holding that the words "the game of" might be rejected from the expression "at the game of cards," the statute prohibiting playing "at cards."

Missouri.— State *v.* Morse, 55 Mo. App. 332.

Nevada.— State *v.* Johnson, 9 Nev. 175,

particular statute on which the indictment is based may be rejected as surplusage if all the essential features of the offense are charged without such statement.[9]

d. Contradictory Averments. A material allegation which is sensible and consistent in the place where it occurs, and is not repugnant to any antecedent matter, cannot be rejected as surplusage for the reason that there is, in a subsequent portion of the indictment, an inconsistent allegation which cannot be rejected.[10]

U. Bill of Particulars. Where the charges of a valid indictment are nevertheless so general in their nature that they do not fully advise the accused of the specific acts with which he is charged, so that he may properly prepare his defense, the court has power to order a bill of particulars to be furnished him.[11] In some states, however, the practise of allowing bills of particulars in criminal

holding that where the statute denounced the offense of assault with intent to kill, and there was no statute punishing assaults with intent to murder, an indictment charging an assault with intent to "kill and murder," was good, as the words "and murder" might be rejected as surplusage.

New York.— People *v.* Rynders, 12 Wend. 425. See also People *v.* Lohman, 2 Barb. 216.

Pennsylvania.— Clary *v.* Com., 4 Pa. St. 210.

Tennessee.— Harris *v.* State, 14 Lea 485.

Texas.— Rocha *v.* State, 43 Tex. Cr. 169, 63 S. W. 1018.

Wisconsin.— State *v.* Welch, 37 Wis. 196.

Canada.— Rex *v.* Coote, 8 Can. Cr. Cas. 199.

See 27 Cent. Dig. tit. "Indictment and Information," § 311 *et seq.*

9. State *v.* Hatch, 94 Me. 58, 46 Atl. 796; Rawlings *v.* State, 2 Md. 201, holding that a mistake in reciting a proviso which it was not necessary to negative was not fatal.

Indictment upon repealed statute.— Where the indictment sufficiently states a charge under the general law, the fact that it refers to a statute which has been repealed is not fatal (Com. *v.* Peto, 136 Mass. 155); nor is the fact that it is apparently drawn in accordance with a repealed statute (State *v.* Murphy, 102 Mo. App. 680, 77 S. W. 157). *Contra*, U. S. *v.* Goodwin, 20 Fed. 237, holding that where it was apparent that the grand jury had acted upon a statute that had been repealed, allegations with reference thereto could not be rejected as surplusage to permit judgment to be rendered under a statute enacted in its stead.

10. Dias *v.* State, 7 Blackf. (Ind.) 20, 39 Am. Dec. 448; U. S. *v.* Dow, 25 Fed. Cas. No. 14,990, Taney 34; Rex *v.* Stevens, 5 East 244, 1 Smith K. B. 437.

11. *Florida.*— Mathis *v.* State, 45 Fla. 46, 34 So. 287; Thalheim *v.* State, 38 Fla. 169, 20 So. 938, embezzlement.

Illinois.— Kelly *v.* People, 192 Ill. 119, 61 N. E. 425, 85 Am. St. Rep. 323; Towne *v.* People, 89 Ill. App. 258 (conspiracy); Gilmore *v.* People, 87 Ill. App. 128 (conspiracy).

Kansas.— State *v.* Conley, 1 Kan. App. 124, 41 Pac. 980, sale of intoxicating liquors.

Louisiana.— New Orleans *v.* Chappuis, 105 La. 179, 29 So. 721.

Massachusetts.—Com. *v.* Wood, 4 Gray 11; Com. *v.* Giles, 1 Gray 466; Com. *v.* Snelling, 15 Pick. 321; Com. *v.* Davis, 11 Pick. 432, barratry.

Michigan.— People *v.* Davis, 52 Mich. 569, 18 N. W. 362 (adultery); People *v.* McKinney, 10 Mich. 54.

New York.— People *v.* Bellows, 2 N. Y. Cr. 12, embezzlement.

Ohio.— State *v.* Langan, 31 Cinc. L. Bul. 33, embezzlement.

Pennsylvania.—Goersen *v.* Com., 99 Pa. St. 388; Williams *v.* Com., 91 Pa. St. 493; Com. *v.* New Bethlehem Borough, 15 Pa. Super. Ct. 158; Com. *v.* Gennerette, 10 Pa. Super. Ct. 598; Com. *v.* Havens, 6 Pa. Co. Ct. 545; Com. *v.* Rosenberg, 1 Pa. Co. Ct. 273; Com. *v.* Wilson, 1 Chest. Co. Rep. 538; Com. *v.* Maize, 7 Leg. Gaz. 199, 1 Leg. Rec. 14, 4 Luz. Leg. Reg. 171.

Rhode Island.— State *v.* Tracey, 12 R. I. 216, nuisance.

Vermont.— State *v.* Rowe, 43 Vt. 265; State *v.* Freeman, 27 Vt. 523.

United States.— Kirby *v.* U. S., 174 U. S. 47, 19 S. Ct. 574, 43 L. ed. 890 (receipt of stolen property); U. S. *v.* Brooks, 44 Fed. 749 (embezzlement); U. S. *v.* Bennett, 24 Fed. Cas. No. 14,571, 16 Blatchf. 338 (mailing obscene publication).

England.— Rex *v.* Curwood, 3 A. & E. 815, 5 N. & M. 369, 1 Hurl. & W. 310, 30 E. C. L. 370 (nuisance); Reg. *v.* Rycroft, 6 Cox C. C. 76 (conspiracy to defraud); Rex *v.* Hamilton, 7 C. & P. 448, 32 E. C. L. 701 (conspiracy to defraud); Rex *v.* Bootyman, 5 C. & P. 300, 24 E. C. L. 576 (embezzlement); Reg. *v.* Flower, 7 Dowl. P. C. 665, 3 Jur. 558.

There must be a showing that the bill of particulars is necessary for the proper administration of justice. Eatman *v.* State, (Fla. 1904) 37 So. 576.

Cases in which a bill of particulars was properly denied.— *Alabama.*— Jones *v.* State, 136 Ala. 118, 34 So. 236, sale of intoxicating liquors.

Delaware.— State *v.* McDaniel, 4 Pennew. 96, 54 Atl. 1056, indictment of sheriff for defrauding county.

Illinois.— Gallagher *v.* People, 211 Ill. 158, 71 N. E. 842; Du Bois *v.* People, 200 Ill. 157, 65 N. E. 658, 93 Am. St. Rep. 183, confidence game.

Kansas.— State *v.* Reno, 41 Kan. 674, 21 Pac. 803, sale of intoxicating liquors.

Michigan.— People *v.* McKinney, 10 Mich.

cases is not recognized.[12] A bill of particulars will not supply the omission of an essential averment in the indictment,[13] although it may remove an objection upon the ground of uncertainty.[14] A motion for such bill must be made before plea to the merits;[15] it should be in writing,[16] verified by affidavit,[17] and should specifically point out all the particulars desired.[18] The granting or refusal of such a motion rests within the discretion of the court to be exercised with reference to the circumstances of the particular case,[19] and the ruling of the trial judge upon the motion will not be disturbed by an appellate court where such discretion has not been abused.[20] Where a bill of particulars is granted, the state should be required to furnish one as definite as it has the means of doing;[21] but the state is not bound to furnish a specification of the evidence which it will produce.[22] The determination of whether the bill is sufficient rests within the discretion of the trial court.[23] The bill not being a part of the record is not subject to demurrer.[24] Hence an indictment good upon its face is not rendered demurrable[25] or subject to a motion to quash[26] thereby. After the filing of the bill of particulars the

54, embezzlement where the prosecuting officer stated that he would confine himself to the charges investigated in the preliminary examination.

New Jersey.—State *v.* Hatfield, 66 N. J. L. 443, 49 Atl. 515 [*affirmed* in 67 N. J. L. 354, 51 Atl. 1109], embezzlement where the defense was the right to retain the moneys under a contract of agency.

New York.— People *v.* Jaehne, 4 N. Y. Cr. 161, bribery.

North Carolina.— State *v.* Howard, 129 N. C. 584, 40 S. E. 71, conspiracy where particulars were afforded by counts in the indictment which were *nolle prossed.*

Pennsylvania.— Com. *v.* Eagan, 190 Pa. St. 10, 42 Atl. 374 (where prisoner and counsel were present at the preliminary hearing); Com. *v.* McClure, 1 Pa. Co. Ct. 182 (obstructing office as justice of the peace); Com. *v.* Tanner, 7 Northam. Co. Rep. 74.

Washington.— State *v.* Lewis, 31 Wash. 75, 71 Pac. 778.

Wisconsin.— Secor *v.* State, 118 Wis. 621, 95 N. W. 942.

United States.— Dunlop *v.* U. S., 165 U. S. 486, 17 S. Ct. 375, 41 L. ed. 799, mailing obscene matter.

12. People *v.* Alviso, 55 Cal. 230; U. S. *v.* Ross, Morr. (Iowa) 164; State *v.* Quinn, 40 Mo. App. 627. See also State *v.* Williams, 14 Tex. 98.

13. State *v.* Van Pelt, 136 N. C. 633, 49 S. E. 177, 68 L. R. A. 760; U. S. *v.* Bayaud, 16 Fed. 376, 21 Blatchf. 287. See also U. S. *v.* Tubbs, 94 Fed. 356, mailing prohibited matter.

14. U. S. *v.* Bayaud, 16 Fed. 376, 21 Blatchf. 287.

15. Mathis *v.* State, 45 Fla. 46, 34 So. 287.

16. State *v.* McDaniel, 4 Pennew. (Del.) 96, 54 Atl. 1056.

17. Mathis *v.* State, 45 Fla. 46, 34 So. 287; Reg. *v.* Stapylton, 8 Cox C. C. 69, 6 Wkly. Rep. 60, conspiracy to defraud.

18. State *v.* McDaniel, 4 Pennew. (Del.) 96, 54 Atl. 1056; Mathis *v.* State, 45 Fla. 46, 34 So. 287; State *v.* Reno, 41 Kan. 674, 21 Pac. 803.

19. *Florida.*— Brass *v.* State, 45 Fla. 1, 34 So. 307.

Idaho.— State *v.* Rathbone, 8 Ida. 161, 67 Pac. 186.

Illinois.— Gallagher *v.* People, 211 Ill. 158, 71 N. E. 842; Du Bois *v.* People, 200 Ill. 157, 65 N. E. 658, 93 Am. St. Rep. 183.

Kansas.— State *v.* Snyder, 8 Kan. App. 686, 57 Pac. 135.

Pennsylvania.— Com. *v.* Shoener, 25 Pa. Super. Ct. 526.

20. *Florida.*— Mathis *v.* State, 45 Fla. 46, 34 So. 287.

Illinois.— Sullivan *v.* People, 108 Ill. App. 328.

Kansas.— State *v.* Lindgrove, 1 Kan. App. 51, 41 Pac. 688.

Massachusetts.— Com. *v.* Wood, 4 Gray 11.

Michigan.— People *v.* Remus, 135 Mich. 629, 98 N. W. 397, 100 N. W. 403.

United States.— Dunlop *v.* U. S., 165 U. S. 486, 17 S. Ct. 375, 41 L. ed. 799.

21. State *v.* Davis, 52 Vt. 376, holding a bill of particulars in an indictment for the sale of intoxicating liquors insufficient where it merely furnished the names of the witnesses. See also Com. *v.* Morton, 9 Lanc. Bar (Pa.) 79, 6 Luz. Leg. Reg. 207; Com. *v.* Crane, 1 Leg. Rec. (Pa.) 134.

22. Com. *v.* Buccieri, 153 Pa. St. 535, 26 Atl. 228; Com. *v.* Zuern, 16 Pa. Super. Ct. 588.

23. State *v.* Hill, 13 R. I. 314; State *v.* Wooley, 59 Vt. 357, 10 Atl. 84 (liquor selling); State *v.* Davis, 52 Vt. 376; State *v.* Bacon, 41 Vt. 526, 98 Am. Dec. 616.

A reference to a paper filed in another court is not sufficient. Thalheim *v.* State, 38 Fla. 169, 20 So. 938.

24. Jules *v.* State, 85 Md. 305, 36 Atl. 1027; Com. *v.* Davis, 11 Pick. (Mass.) 432; Dunlop *v.* U. S., 165 U. S. 486, 17 S. Ct. 375, 41 L. ed. 799. See, however, U. S. *v.* Adams Express Co., 119 Fed. 240, holding that where a demurrer is directed against both the indictment and the bill of particulars, it may be so considered in order to avoid a useless trial of the indictment.

25. State *v.* Dix, 33 Wash. 405, 74 Pac. 570; Dunlop *v.* U. S., 165 U. S. 486, 17 S. Ct. 375, 41 L. ed. 799.

26. Com. *v.* Bartilson, 85 Pa. St. 482.

state is confined in its proof to the items therein set ont.[27] A bill of particulars may be amended upon notice being given of the application.[28]

VI. JOINDER OF PARTIES.

A. In General. Save in the case of those offenses which cannot be committed singly,[29] parties jointly concerned in the same offense may be indicted jointly or separately.[30] Separate indictments for the same offense need not allege that the offense was joint.[31]

B. Statutory Provisions. Statutes requiring the finding of but one indictment against two or more persons jointly concerned in the same offense are not construed to prevent the bringing of separate indictments when good reason exists.[32]

C. Necessity of Joint Indictments. There are some offenses which cannot be committed by one person, and hence cannot be made the basis of an individual indictment.[33] But as a general rule in the prosecution of a single crime the state may charge the perpetrators severally or jointly.[34]

D. Propriety of Joint Indictments — 1. IN GENERAL. The rule is well settled that several may be jointly indicted for offenses arising wholly out of the same joint act or omission.[35] Of this nature are indictments for larceny[36] and many other offenses which may be committed by persons acting in concert.[37] But where the offense charged does not wholly arise from the joint act of all the

27. *Illinois.*— McDonald *v.* People, 126 Ill. 150, 18 N. E. 817, 9 Am. St. Rep. 547. See also O'Leary *v.* People, 88 Ill. App. 60, holding that the effect of a stipulation that the second count of an indictment should stand as a bill of particulars to the first count was practically to eliminate the first count and leave the case to stand on the second.

Massachusetts.— Com. *v.* Giles, 1 Gray 466; Com. *v.* Snelling, 15 Pick. 321.

North Carolina.— State *v.* Van Pelt, 136 N. C. 633, 49 S. E. 177, 68 L. R. A. 766.

Pennsylvania.— Williams *v.* Com., 91 Pa. St. 493; Com. *v.* Maize, 7 Leg. Gaz. 199, 1 Leg. Rec. 14, 4 Luz. Leg. Reg. 171; Com. *v.* Crane, 1 Leg. Rec. 134.

United States.— U. S. *v.* Adams Express Co., 119 Fed. 240.

28. See *infra*, X, E.

29. See *infra*, VI, C.

30. *Kentucky.*— Shelbyville, etc., R. Co. *v.* Com., 9 Ky. L. Rep. 244.

Michigan.— People *v.* Lange, 56 Mich. 549, 23 N. W. 217.

Missouri.— State *v.* Gay, 10 Mo. 440.

New Hampshire.— State *v.* Nowell, 60 N. H. 199.

Pennsylvania.— Com. *v.* Casey, 14 Pa. Co. Ct. 389.

See 27 Cent. Dig. tit. "Indictment and Information," § 327.

Form of joint indictment see *supra*, V, M.

31. U. S. *v.* Holland, 26 Fed. Cas. No. 15,377, 3 Cranch C. C. 254.

32. State *v.* Steptoe, 65 Mo. 640 [*affirming* 1 Mo. App. 19]; State *v.* Morehead, 17 Mo. App. 328; State *v.* Davis, 2 Sneed (Tenn.) 275, holding such a statute merely directory and for the purpose of decreasing costs.

33. State *v.* Fox, 15 Vt. 22, violation of statute as to exhibitions by theatrical companies.

Particular offenses see CONSPIRACY, 8 Cyc. 659; RIOT; UNLAWFUL ASSEMBLY.

A person may be indicted singly for an affray where the indictment includes a charge of assault and battery. State *v.* Wilson, 61 N. C. 237. And see State *v.* Allen, 11 N. C. 356.

34. People *v.* Plyler, 121 Cal. 160, 53 Pac. 553, mayhem.

Principals in the second degree.— Where several persons are concerned in an offense, it is not necessary that they should be indicted jointly, or with a *simul cum*, in order to make those liable who were only present and abetting. U. S. *v.* Hunter, 26 Fed. Cas. No. 15,425, 1 Cranch C. C. 446. See also *supra*, V, N, I.

35. Volmer *v.* State, 34 Ark. 487; Com. *v.* Miller, 2 Pars. Eq. Cas. (Pa.) 480.

36. State *v.* Adam, 105 La. 737, 30 So. 101.

37. *Indiana.*— State *v.* Windstandley, 151 Ind. 316, 51 N. E. 92, holding that two who signed a false affidavit, one certificate of oath being attached, could be indicted together for perjury.

Massachusetts.— Com. *v.* Weatherhead, 110 Mass. 175 (unlawful fishing at the same time from the same boat); Com. *v.* Elwell, 2 Metc. 190, 35 Am. Dec. 398 (adultery); Com. *v.* Hyde, Thach. Cr. Cas. 19 (keeping gaming-house).

Missouri.— State *v.* Lehman, 182 Mo. 424, 81 S. W. 1118, 103 Am. St. Rep. 670, 66 L. R. A. 490 [*distinguishing* McGehee *v.* State, 58 Ala. 360; State *v.* Wainwright, 60 Ark. 280, 29 S. W. 981; State *v.* Ames, 91 Minn. 365, 98 N. W. 190; State *v.* Hall, 97 N. C. 474, 1 S. E. 683; Com. *v.* Miller, 2 Pars. Eq. Cas. (Pa.) 480; U. S. *v.* Kazinski, 26 Fed. Cas. No. 15,508, 2 Sprague 7] (agreement by municipal assemblymen to vote together with corrupt motives); State *v.* Pres-

defendants, but from such act joined with some particular act or omission of each defendant, without which it can be no offense, the indictment must charge them severally.[38]

2. Offenses Which Cannot Be Committed Jointly. Where an offense is of its nature several and distinct to such a degree that it cannot be committed by two or more jointly, it of course follows that there can be no joinder of defendants in the same indictment.[39] This rule does not, however, prevent the joinder of principals in the first and second degree in those cases in which the actual criminal act must be done by a single individual.[40]

3. Different and Distinct Offenses. Defendants who merely commit similar crimes and not the same crime cannot as a rule be joined in the same indictment.[41] There should be no joinder in the absence of concert of action or common design,[42] although in some cases it is held that several offenders may be charged with different offenses of the same or kindred nature in separate counts

hury, 13 Mo. 342 (violation of act against illegal banking); State *v.* Gay, 10 Mo. 440 (keeping a ferry without license).

New Hampshire.— State *v.* Forcier, 65 N. H. 42, 17 Atl. 577, retailing drugs without license.

New York.— People *v.* Coombs, 36 N. Y. App. Div. 284, 55 N. Y. Suppl. 276, presentation by the two coroners of a county of a joint claim for services in holding inquests, which has attached to it several statements of the inquests held by each, which statements contain fraudulent items.

Ohio.— Hess *v.* State, 5 Ohio 5, 22 Am. Dec. 767, joint possession of counterfeit notes.

Tennessee.— Fowler *v.* State, 3 Heisk. 154, assault and battery.

United States.— U. S. *v.* McGinnis, 26 Fed. Cas. No. 15,678, 1 Abb. 120, signature by two persons, in their partnership name, of a false return to an assessor of internal revenue.

England.— Rex *v.* Benfield, 2 Burr. 980 (singing libelous song); Young *v.* Rex, 2 East P. C. 833, 2 Leach C. C. 568, 3 T. R. 98, 1 Rev. Rep. 660 (false pretenses); Reg. *v.* Atkinson, 2 Ld. Raym. 1248, 1 Salk. 382 (extortion).

See 27 Cent. Dig. tit. "Indictment and Information," § 327.

Sale of liquor without license.— Com. *v.* Sloan, 4 Cush. (Mass.) 52; Com. *v.* Tower, 8 Metc. (Mass.) 527; State *v.* Edwards, 60 Mo. 490 [*disapproving* Vaughn *v.* State, 4 Mo. 530]; Com. *v.* Harris, 7 Gratt. (Va.) 600.

Owner and lessee of disorderly house.— People *v.* Erwin, 4 Den. (N. Y.) 129.

Different means may be employed in the joint act. Shaw *v.* State, 18 Ala. 547, sustaining an indictment charging an assault with intent to murder, one defendant using a knife, the other a gun.

Corporation and individuals.— An indictment for libel containing two counts, one against a corporation, and the other against two individuals, may be sustained where the matter alleged is the same in both counts. State *v.* Atchison, 3 Lea (Tenn.) 729, 31 Am. Rep. 663.

38. Com. *v.* Miller, 2 Pars. Eq. Cas. (Pa.) 480.

39. *Alabama.*— Cox *v.* State, 76 Ala. 66, use of abusive or obscene language.

Arkansas.— State *v.* Wainwright, 60 Ark. 280, 29 S. W. 981 (failing to work on a public road); State *v.* Lancaster, 36 Ark. 55 (violent or profane language and threats).

Missouri.— Vaughn *v.* State, 4 Mo. 530 [*disapproved* in State *v.* Edwards, 60 Mo. 490], carrying on the business of auctioneers without license.

North Carolina.— State *v.* Deaton, 92 N. C. 788, intoxication.

Tennessee.— State *v.* Roulstone, 3 Sneed 107, obscenity.

United States.— U. S. *v.* Kazinski, 26 Fed. Cas. No. 15,508, 2 Sprague 7.

England.— Young *v.* Rex, 2 East P. C. 833, 3 T. R. 98, 1 Rev. Rep. 660 (perjury); Rex *v.* Philips, 2 Str. 921 [*citing* Reg. *v.* Hodson, common scolds] (perjury).

See 27 Cent. Dig. tit. "Indictment and Information," § 331.

40. Dennis *v.* State, 5 Ark. 230 (rape); State *v.* Comstock, 46 Iowa 265 (rape); Foster *v.* State, 1 Ohio Cir. Ct. 467, 1 Ohio Cir. Dec. 261 (sodomy).

Burglary and larceny.— Com. *v.* Darling, 129 Mass. 112; Rex *v.* Butterworth, R. & R. 387.

41. *Alabama.*—Townsend *v.* State, 137 Ala. 91, 34 So. 382; McGehee *v.* State, 58 Ala. 360; Lindsey *v.* State, 48 Ala. 169; Elliot *v.* State, 26 Ala. 78.

Missouri.— State *v.* Bridges, 24 Mo. 353.

North Carolina.— State *v.* Hall, 97 N. C. 474, 1 S. E. 683, holding that an indictment charging two distinct boards of officers sustaining distinct relations to a municipal government, with distinct offenses, could not be maintained.

Pennsylvania.— See Com. *v.* Ziert, 5 Lanc. L. Rev. 138.

England.— See Reg. *v.* Devett, 8 C. & P. 639, 34 E. C. L. 936.

See 27 Cent. Dig. tit. "Indictment and Information," § 332.

42. State *v.* Edwards, 60 Mo. 490 (holding, however, that where it appeared that defendants so jointly indicted were guilty of acts which would have sustained a conviction against them upon separate indictments, the supreme court would not interfere with a

of the same indictment,[43] or even in the same count in case the charge is indicated to be several as to each, by the use of some such word as "severally" or "separately."[44]

4. Joinder of Principals and Accessaries, or Principals in the Second Degree.[45] A charge against a principal and an accessary before the fact may be included in the same indictment[46] and in the same count.[47] The same rules are applicable to the joinder of principals in the first and second degrees.[48] In misdemeanors, although there are in law no accessaries, the actual perpetrator and those aiding and abetting him may be charged together in the same count.[49] In any case the accessary cannot complain of a joinder if he is awarded a separate trial.[50]

5. Joinder of Husband and Wife.[51] Husband and wife may be joined in the same indictment.[52]

judgment against them under a statute providing that defects or imperfections in the indictment are to be regarded as immaterial, unless to the prejudice of the substantial rights of defendant upon the merits); State *v.* Nichols, 12 Rich. (S. C.) 672.

43. Redman *v.* State, 1 Blackf. (Ind.) 429 (sustaining an indictment charging a defendant in one count with larceny, and, in another, another defendant with receiving stolen goods); Com. *v.* Mullen, 150 Mass. 394, 23 N. E. 51; Com. *v.* Gillespie, 7 Serg. & R. (Pa.) 469, 10 Am. Dec. 475; Reg. *v.* Cox, [1898] 1 Q. B. 179, 18 Cox C. C. 672, 67 L. J. Q. B. 293, 77 L. T. Rep. N. S. 534; Rex *v.* Kingston, 8 East 41, 9 Rev. Rep. 373 (holding such joinder not ground for demurrer, but that the indictment might be quashed in the discretion of the court). And see U. S. *v.* Dietrich, 126 Fed. 664, holding, however, that two persons could not, in a single count, be charged, one with agreeing to receive a bribe as a member of congress, and the other with agreeing to give it.

Larceny and receipt of stolen goods.— Redman *v.* State, 1 Blackf. (Ind.) 429; Com. *v.* Mullen, 150 Mass. 394, 23 N. E. 51; Com. *v.* Darling, 129 Mass. 112; Com. *v.* Adams, 7 Gray (Mass.) 43; State *v.* Woodard, 38 S. C. 353, 17 S. E. 135; Vaden *v.* State, (Tex. Cr. App. 1894) 25 S. W. 777. *Contra,* People *v.* Hawkins, 34 Cal. 181.

44. State *v.* Lonon, 19 Ark. 577; Johnson *v.* State, 13 Ark. 684 (betting at faro); State *v.* McDowell, Dudley (S. C.) 346 (keeping disorderly house); Lewellen *v.* State, 18 Tex. 538. But see Com. *v.* McChord, 2 Dana (Ky.) 242, holding that in case where the indictment plainly imports a several charge against each defendant, the omission of such words is not material.

It is discretionary with the court to quash such an indictment. State *v.* Lonon, 19 Ark. 577; State *v.* Nail, 19 Ark. 563; State *v.* McDowell, Dudley (S. C.) 346.

45. **Form and sufficiency of indictment** see *supra,* V, N, O.

46. *California.*— People *v.* Cryder, 6 Cal. 23.

Georgia.— Loyd *v.* State, 45 Ga. 57.

Idaho.— Territory *v.* Guthrie, 2 Ida. (Hasb.) 432, 17 Pac. 39, holding that such a joinder may be permitted, although the statutes require an indictment to charge but one offense.

Maine.— State *v.* Carver, 49 Me. 588, 77 Am. Dec. 275.

Massachusetts.— Com. *v.* Devine, 155 Mass. 224, 29 N. E. 515.

Montana.— State *v.* King, 9 Mont. 445, 24 Pac. 265.

Ohio.— Hartshorn *v.* State, 29 Ohio St. 635, so holding, although the statute provided that the aiding, abetting, or procuring of the commission of a crime was a distinct offense.

United States.— U. S. *v.* Berry, 96 Fed. 842.

See 27 Cent. Dig. tit. "Indictment and Information," § 333.

47. Bishop *v.* State, 118 Ga. 799, 45 S. E. 614; Bulloch *v.* State, 10 Ga. 47, 54 Am. Dec. 369; State *v.* Atkinson, 40 S. C. 363, 18 S. E. 1021, 42 Am. St. Rep. 877, 41 S. C. 551, 19 S. E. 691; Hawley *v.* Com., 75 Va. 847.

48. *Alabama.*— State *v.* Pile, 5 Ala. 72.

Georgia.— Bishop *v.* State, 118 Ga. 799, 45 S. E. 614.

Kentucky.— Hatfield *v.* Com., 55 S. W. 679, 21 Ky. L. Rep. 1461; Deatley *v.* Com., 29 S. W. 741, 31 S. W. 722, 16 Ky. L. Rep. 893.

Massachusetts.— Pettes *v.* Com., 126 Mass. 242.

England.— Young *v.* Rex, 2 East P. C. 833, 2 Leach C. C. 568, 3 T. R. 98, 1 Rev. Rep. 660; Coal Heavers' Case, 1 Leach C. C. 76. See also Rex *v.* Taylor, 1 Leach C. C. 398.

See 27 Cent. Dig. tit. "Indictment and Information," § 333.

Where it is unknown which defendant actually committed the crime, the indictment may so charge. Jackson *v.* Com., 100 Ky. 239, 38 S. W. 422, 1091, 18 Ky. L. Rep. 795; Howard *v.* Com., 61 S. W. 756, 22 Ky. L. Rep. 1845; Tudor *v.* Com., 43 S. W. 187, 19 Ky. L. Rep. 1039.

49. State *v.* Ruby, 68 Me. 543.

50. Com. *v.* Bradley, 16 Pa. Super. Ct. 561, holding that the indictment of the accessary with the principal, but in a separate count, was not ground for quashing the indictment or arresting the judgment, since the counts were to be considered as several indictments.

51. **Criminal responsibility of married women** see Husband and Wife, 21 Cyc. 1353.

52. *Massachusetts.*— Com. *v.* Tryon, 99 Mass. 442 (liquor nuisance); Com. *v.* Murphy, 2 Gray 510 (selling liquor).

E. Operation and Effect of Joint Indictments. An indictment, although joint in form, is regarded as a several charge against each defendant,[53] save in those cases where the agency of two or more is of the essence of the offense,[54] and all or part may be convicted or acquitted,[55] or the several defendants may be convicted of different degrees of the offense if its nature permits.[56] In case no joint offense is established, the prosecution may be compelled to elect as to which defendant it will proceed.[57] An improper joinder may be cured by a *nolle prosequi* as to all but one defendant, in which case the indictment will stand as to him as if it had been a separate indictment.[58]

VII. JOINDER OF OFFENSES.

A. In the Same Count — 1. In General. An indictment or information must not in the same count charge defendant with the commission of two or more distinct and substantive offenses, and in case it does so it is bad for duplicity,[59]

Missouri.— State *v.* Bentz, 11 Mo. 27, bawdy-house.

New York.— Goldstein *v.* People, 82 N. Y. 231.

Virginia.— Com. *v.* Ray, 1 Va. Cas. 262, assault and battery.

England.— Rex *v.* Dixon, 10 Mod. 335 (keeping gaming-house); Reg. *v.* Williams, 10 Mod. 63, 1 Salk. 384 (bawdy-house). See also Reg. *v.* Cohen, 11 Cox C. C. 99, 18 L. T. Rep. N. S. 489, 16 Wkly. Rep. 941 (larceny).

53. *Connecticut.*— State *v.* Wadsworth, 30 Conn. 55.

Indiana.— State *v.* Winstandley, 151 Ind. 316, 51 N. E. 92, holding that where two defendants joined in a false affidavit for a continuance, signing it together, being sworn together, and one certificate of oath being attached, an indictment charging both with perjury is not joint only, but joint and several.

Kentucky.— Shelbyville, etc., R. Co. *v.* Com., 9 Ky. L. Rep. 244, an indictment not vitiated by a charge against a defendant who was not guilty. See also Weatherford *v.* Com., 10 Bush 196, holding that judgment would not be arrested on the ground that the offense charged could not be jointly committed if the sole defendant convicted was properly charged.

Massachusetts.— Com. *v.* Brown, 12 Gray 135; Com. *v.* Griffin, 3 Cush 523. And see Com. *v.* Colton, 11 Gray 1.

New Jersey.— State *v.* Mills, 39 N. J. L. 587.

Rhode Island.— State *v.* O'Brien, 18 R. I. 105, 25 Atl. 910.

Tennessee.— Brown *v.* State, 5 Yerg. 367.

United States.— U. S. *v.* Davenport, 25 Fed. Cas. No. 14,920, Deady 264.

54. See *supra*, VI, C.

55. See CRIMINAL LAW, 12 Cyc. 692.

56. Mask *v.* State, 32 Miss. 406; Klein *v.* People, 31 N. Y. 229; Shouse *v.* Com., 5 Pa. St. 83; Rex *v.* Butterworth, R. & R. 387.

57. Rex *v.* Lynn, 1 C. & P. 527, 12 E. C. L. 303, obstruction of highway.

58. Com. *v.* Casey, 14 Pa. Co. Ct. 389.

59. *Alabama.*— Burgess *v.* State, 44 Ala. 190, malicious mischief.

Florida.— McGahagin *v.* State, 17 Fla. 665.

Indiana.— State *v.* Weil, 89 Ind. 286; Knopf *v.* State, 84 Ind. 316; State *v.* Shields, 8 Blackf. 151.

Kentucky.— Com. *v.* Powell, 8 Bush 7.

Maine.— State *v.* Smith, 61 Me. 386; State *v.* Burgess, 40 Me. 592; State *v.* Palmer, 35 Me. 9.

Massachusetts.— Com. *v.* Symonds, 2 Mass. 163.

Minnesota.— State *v.* Coon, 14 Minn. 456.

Mississippi.— Breeland *v.* State, 79 Miss. 527, 31 So. 104; Miller *v.* State, 5 How. 250.

Missouri.— State *v.* Fox, 148 Mo. 517, 50 S. W. 98; State *v.* Boyd, 108 Mo. App. 518, 84 S. W. 191.

New Hampshire.— State *v.* Gorham, 55 N. H. 152; State *v.* Smith, 20 N. H. 399; State *v.* Nelson, 8 N. H. 163.

New York.— People *v.* Wright, 9 Wend. 193; Reed *v.* People, 1 Park. Cr. 481.

Pennsylvania.— Com. *v.* Hall, 23 Pa. Super. Ct. 104; Com. *v.* Wilkes-Barre, 1 Kulp 487; Com. *v.* Gallagher, 3 Lanc. L. Rev. 157.

South Carolina.— State *v.* Howe, 1 Rich. 260.

Tennessee.— State *v.* Ferriss, 3 Lea 700.

Texas.— Fisher *v.* State, 33 Tex. 792; Nicholas *v.* State, 23 Tex. App. 317, 5 S. W. 239; Tucker *v.* State, 6 Tex. App. 251; Weathersby *v.* State, 1 Tex. App. 643 [*citing* State *v.* Dorsett, 21 Tex. 656]. See, however, Gage *v.* State, 9 Tex. App. 259, holding in effect that this rule is not applicable to misdemeanors.

Canada.— Reg. *v.* Blackie, 1 Nova Scotia Dec. 383.

See 27 Cent. Dig. tit. "Indictment and Information," §§ 334, 335.

Illustrations.— For example an indictment is bad which charges gaming, and keeping a public place or house used as a place for gaming (State *v.* Howe, 1 Rich. (S. C.) 260); selling spirituous liquors on Sunday and giving spirituous liquors on Sunday (Com. *v.* Fleece, 5 Ky. L. Rep. 429); a sheriff with refusing to execute process and with making a false return (State *v.* Walworth, 58 Vt. 502, 3 Atl. 543); taking a female under eighteen, without her father's

if the offenses are either inherently repugnant, or so distinct that they cannot be construed as different stages in one transaction, or involve different punishments.[60] A substantive offense is one which is complete of itself and is not dependent upon another.[61] An involved or complicated statement of facts constituting but one offense will not, however, invalidate the indictment;[62] nor will the unnecessary repetition of the same substantive charge in different forms,[63] or in a more direct manner,[64] or matter merely in amplification of the charge,[65] or synonymous terms,[66] nor a description of one place in different manners.[67] So also a count is not rendered bad by matters merely in aggravation.[68] In some

consent, for the purpose of prostitution "and" concubinage (State *v.* Goodwin, 33 Kan. 538, 6 Pac. 899); behaving rudely in a meeting-house and interrupting public worship (Com. *v.* Symonds, 2 Mass. 163); assault with intent to maim, and assault with intent to kill (State *v.* Leavitt, 87 Me. 72, 32 Atl. 787); stabbing with intent to commit murder, and also the inflicting with a dangerous weapon of a wound less than mayhem (State *v.* Johns, 32 La. Ann. 812); theft of a horse and theft of property of the value of twenty dollars (Hickman *v.* State, 22 Tex. App. 441, 2 S. W. 640; Heineman *v.* State, 22 Tex. App. 44, 2 S. W. 619); two fraudulent dispositions of mortgaged personalty (Wood *v.* State, (Tex. Cr. App. 1905) 84 S. W. 1058); destroying another's real property, and also pulling down a fence and injuring vegetables (Ellis *v.* Com., 78 Ky. 130); two distinct nuisances (State *v.* Wester, 67 Kan. 810, 74 Pac. 239; Chute *v.* State, 19 Minn. 271); two distinct statutory breakings (Hawkins *v.* Com., 70 S. W. 640, 24 Ky. L. Rep. 1034; State *v.* Huffman, 136 Mo. 58, 37 S. W. 797); a common-law nuisance and a violation of a regulation of a board of health (Reed *v.* People, 1 Park. Cr. (N. Y.) 481); distinct offenses against election laws (State *v.* Brown, (Miss. 1900) 28 So. 752); a riot and an assault (State *v.* McCormick, 1 Ohio Dec. (Reprint) 572, 10 West. L. J. 408); taking part in auditing and payment of fraudulent claim against a county and presenting such a claim for audit and payment (People *v.* Stock, 21 Misc. (N. Y.) 147, 47 N. Y. Suppl. 94, 12 N. Y. Cr. 420); or grand larceny in the first degree, by taking property of the value of more than five hundred dollars in any manner whatever; and grand larceny in the second degree, by taking property of any value from the person of another (People *v.* Frazier, 36 Misc. (N. Y.) 280, 73 N. Y. Suppl. 446).

60. Schulze *v.* State, (Tex. Cr. App. 1900) 56 S. W. 918; U. S. *v.* Nunnemacher, 27 Fed. Cas. No. 15,903, 7 Biss. 129.

61. Mills *v.* State, 52 Ind. 187; State *v.* Smith, 61 Me. 386.

62. Ortega *v.* Territory, (Ariz. 1902) 68 Pac. 544; Surber *v.* State, 99 Ind. 71; People *v.* Wicks, 11 N. Y. App. Div. 539, 42 N. Y. Suppl. 630; State *v.* Edmondson, 43 Tex. 162. And see Com. *v.* Tiernan, 4 Gratt. (Va.) 545, sustaining an indictment charging that defendant "did unlawfully gamble by playing at a game of cards, and then and there unlawfully did bet and wager on the sides and hands of those that then and there did play."

63. *California.*—People *v.* Montejo, 18 Cal. 38, holding that an indictment charging that defendant did receive and buy stolen property did not charge two offenses.

Connecticut.— State *v.* Teahan, 50 Conn. 92, count charging "selling and exchanging" intoxicating liquors.

Louisiana.— State *v.* Buford, 52 La. Ann. 539, 26 So. 991 (count for stabbing with intent to kill which charged defendant with "stabbing Alce Mazerac with intent to murder," and with "cutting and thrusting with intent to murder"); State *v.* Bogan, 2 La. Ann. 838; State *v.* Fant, 2 La. Ann. 837 (did sell, give, and deliver in payment intoxicating liquors).

Massachusetts.— Com. *v.* Farren, 9 Allen 489 (allegation that defendant sold "adulterated milk, to which a large quantity, that is to say, four quarts, of water had been added") Com. *v.* Brown, 14 Gray 419.

Missouri.— State *v.* Jones, 106 Mo. 302, 17 S. W. 366, indictment charging that defendant set fire to and burned a certain barn.

64. Traylor *v.* State, 101 Ind. 65, holding that an indictment charging the procuring an abortion, and closing "in manner and form and by the means aforesaid, did then and there . . . kill and murder her, the said Anna Poe," was not bad for duplicity as charging also involuntary manslaughter.

65. State *v.* June, 62 Kan. 866, 61 Pac. 804; Van Syoc *v.* State, (Nebr. 1903) 96 N. W. 266.

66. People *v.* McLaughlin, 33 Misc. (N. Y.) 691, 68 N. Y. Suppl. 1108, 15 N. Y. Cr. 302, sustaining an indictment for libel which alleged that the libel was published in a "circular and handbill," since in the ordinary use of terms "circular" and "handbill" are synonymous. See also Saylor *v.* Com., 57 S. W. 614, 22 Ky. L. Rep. 472, indictment burning of a "barn and stable."

67. Rawson *v.* State, 19 Conn. 292 (sustaining an allegation that defendant kept a "house, store, and shop" for the purpose, etc.); Conley *v.* State, 5 W. Va. 522 (sustaining an indictment for a sale of liquor at defendant's "storehouse and dwelling house," as meaning a sale at one place which was both a storehouse and a dwelling).

68. State *v.* Dearborn, 54 Me. 442 (charge that defendant assaulted a deputy sheriff and hindered him in the performance of his official duties); State *v.* Brown, 8 Humphr.

cases it has been held that where two distinct offenses are charged to have resulted from one act, the indictment may be sustained.[69] The rule that distinct misdemeanors may be charged in separate counts of an indictment[70] has in some instances been relied on by the courts to sustain indictments charging such misdemeanors in the same count where they were of the same nature and description;[71] but the authority of such cases as establishing a general rule may be well doubted. A felony and a misdemeanor cannot be charged in the same count.[72]

2. STATUTORY PROVISIONS. By statute it is sometimes provided that offenses may be joined in one count.[73] In some states it is provided that where several offenses are of the same character and subject to the same punishment, defendant may be charged with either in the same count in the alternative;[74] but under such a statute separate offenses cannot be charged conjunctively.[75]

3. DISTINCT FACTS CONSTITUTING SINGLE OFFENSE. If the facts charged constitute but a single offense, the indictment is not duplicitous;[76] hence acts of omission or commission which form component parts of or represent preliminary stages of a single transaction may be charged together,[77] and the same is true of acts enter-

(Tenn.) 89; Beaumont *v.* State, 1 Tex. App. 533, 28 Am. Rep. 424 (indictment for arson charging that the house, when burned, contained a little child, which was seriously injured by the fire, where a statute empowered juries to increase the punishment for arson when bodily injury less than death should ensue from the offense).

69. State *v.* Young, 104 La. 201, 28 So. 984; State *v.* Romus, 48 La. Ann. 581, 19 So. 669.

70. See *infra*, VII, B, 6, b.

71. Storrs *v.* State, 3 Mo. 9; Edge *v.* Com., 7 Pa. St. 275 (holding that a neglect by supervisors of roads both to open and repair roads may be charged in one count of an indictment against them, even if the offenses be considered distinct); State *v.* Callicutt, 1 Lea (Tenn.) 714; State *v.* Irvine, 3 Heisk. (Tenn.) 155 [*distinguishing* Greenlow *v.* State, 4 Humphr. (Tenn.) 25]; State *v.* Jopling, 10 Humphr. (Tenn.) 418; Gage *v.* State, 9 Tex. App. 259. *Compare* Greenlow *v.* State, 4 Humphr. (Tenn.) 25.

72. Com. *v.* Wood, 17 Pa. Co. Ct. 249 (embezzlement and larceny); McKinney *v.* State, (Tex. Cr. App. 1902) 68 S. W. 176; Samuels *v.* State, (Tex. Cr. App. 1895) 29 S. W. 1079; U. S. *v.* Sharp, 29 Fed. Cas. No. 16,265, Pet. C. C. 131.

Aiding escape of prisoner charged with a felony, and aiding the escape of one charged with a misdemeanor, where made respectively a felony and a misdemeanor, cannot be charged together; hence a count that defendant aided in the escape of a person who was at the time under arrest for both a felony and a misdemeanor is bad for duplicity. State *v.* Harrison, 62 Mo. App. 112. *Contra*, Oleson *v.* State, 20 Wis. 58, holding that where aiding both criminals to escape was but one act, but one offense was committed, and on conviction defendant would be liable only to the greater punishment.

73. Miller *v.* Com., 79 S. W. 250, 25 Ky. L. Rep. 1931.

74. Thomas *v.* State, 111 Ala. 51, 20 So. 617. See *supra*, V, C, 3.

75. Thomas *v.* State, 111 Ala. 51, 20 So. 617; Burgess *v.* State, 44 Ala. 190, both holding that where the malicious killing of two animals was charged conjunctively, a conviction could not be had on evidence showing that each was killed at a separate time.

76. *Indiana.*— Todd *v.* State, 31 Ind. 514.

Michigan.— People *v.* Paquin, 74 Mich. 34, 41 N. W. 852, the sale of liquors without paying the tax, and engaging in the business without having the receipt and notice posted up.

Mississippi.— Clue *v.* State, 78 Miss. 661, 29 So. 516, 84 Am. St. Rep. 643, burning of a cotton-house and certain bales of cotton contained therein.

Missouri.— State *v.* Palmer, 4 Mo. 453; State *v.* Ragsdale, 59 Mo. App. 590.

Ohio.— Watson *v.* State, 39 Ohio St. 123, attempt to influence a person both as a member of the legislature and as a member of a committee of such body.

Vermont.— State *v.* Matthews, 42 Vt. 542.

See 27 Cent. Dig. tit. "Indictment and Information," § 337 *et seq.*

77. *Alabama.*— State *v.* Whitted, 3 Ala. 102.

California.—People *v.* Eagan, 116 Cal. 287, 48 Pac. 120.

Colorado.— Adams *v.* People, 25 Colo. 532, 55 Pac. 806.

Indiana.— Stout *v.* State, 93 Ind. 150.

Kentucky.— Taylor *v.* Com., 75 S. W. 244, 25 Ky. L. Rep. 374; Com. *v.* Yarnell, 68 S. W. 136, 24 Ky. L. Rep. 144; Com. *v.* Crowell, 60 S. W. 179, 22 Ky. L. Rep. 1182 (unlawfully renting houses to be used as bawdy-houses); Perry *v.* Com., 5 Ky. L. Rep. 611, 6 Ky. L. Rep. 134 (suffering games of chance in defendant's house and on his premises, on which both money and property were bet, lost, and won).

Massachusetts.— Com. *v.* Dolan, 121 Mass. 374; Com. *v.* Curran, 119 Mass. 206.

Missouri.— State *v.* Van Zant, 71 Mo. 541; State *v.* Ames, 10 Mo. 743, keeping of a faro bank, and inducing persons to play therewith for money.

New York.— People *v.* Harris, 4 Silv. Sup.

ing into a single and continuous transaction.[78] So, although the deposit of a single letter concerning a lottery in the mails is a distinct offense, the deposit of numerous letters at about the same time, and constituting a single transaction, may be charged in one count.[79] As analogous to cases of conspiracy, in which it is held that an indictment is not double, although it is alleged that the conspiracy was to commit two or more specific offenses,[80] it has been held that an indictment against a police officer for failure to suppress disorderly houses within his district is not duplicitous by reason of the fact that it is alleged that he failed to suppress numerous houses;[81] or that in amplification of the charge it is further alleged that he failed to arrest the keepers of such houses or to arrest the inmates as vagrants.[82] So also a public officer may be charged with having accepted a single fund formed from joint contributions of persons seeking protection from criminal prosecution.[83]

4. SAME OFFENSE IN OR BY DISTINCT WAYS OR MEANS. Where a single offense may be committed by several means or in several ways, it may be charged in a single count to have been so committed, if the ways or means are not repugnant;[84] and by statute it is sometimes provided that the different means may be

531, 7 N. Y. Suppl. 773; People *v.* Kane, 61 N. Y. Suppl. 632, 14 N. Y. Cr. 316.

South Carolina.— State *v.* Smalls, 11 S. C. 262, indictment for bribery alleging that defendant corruptly accepted a gift and gratuity and a promise to make a gift.

Texas.— Segars *v.* State, 35 Tex. Cr. 45, 31 S. W. 370, keeping a place for the sale of intoxicating liquors and sale of intoxicating liquor to a certain person at such place.

Utah.— People *v.* Hill, 3 Utah 334, 3 Pac. 75.

Vermont.— State *v.* Morton, 27 Vt. 310, 65 Am. Dec. 201.

United States.— Kellogg *v.* U. S., 126 Fed. 323, 61 C. C. A. 229.

See 27 Cent. Dig. tit. "Indictment and Information," § 337 *et seq.*

Indictments for keeping disorderly houses may aver all of the various acts which may be established in order to show the character of the house. State *v.* Toombs, 79 Iowa 741, 45 N. W. 300; State *v.* Spurbeck, 44 Iowa 667; Com. *v.* Kimball, 7 Gray (Mass.) 328; People *v.* Hatter, 22 N. Y. Suppl. 688; People *v.* Carey, 4 Park. Cr. (N. Y.) 238.

An unlawful sale and an offer of sale may be charged together. Barnes *v.* State, 20 Conn. 232; Com. *v.* Eaton, 15 Pick. (Mass.) 273. See, generally, INTOXICATING LIQUORS.

Acts showing commission of liquor nuisance may be charged together. State *v.* Winebrenner, 67 Iowa 230, 25 N. W. 146; State *v.* Dean, 44 Iowa 648; State *v.* Lang, 63 Me. 215; Com. *v.* Foss, 14 Gray (Mass.) 50. See, generally, INTOXICATING LIQUORS.

78. *Alabama.*— Beasley *v.* State, 59 Ala. 20, obtaining goods from one person by a false pretense twice repeated on different days.

Arkansas.— Bennett *v.* State, 62 Ark. 516, 36 S. W. 947, forgery of a deed and acknowledgment thereof.

Connecticut.— State *v.* Falk, 66 Conn. 250, 33 Atl. 913.

Indiana.— Keefer *v.* State, 4 Ind. 246, receiving and concealing a stolen article.

Kansas.— State *v.* Kornstett, 62 Kan. 221, 61 Pac. 805.

Kentucky.— Com. *v.* Duff, 87 Ky. 586, 9 S. W. 816, 10 Ky. L. Rep. 617, making up a poll-book by false entries of one or more votes, or of votes for one or more candidates.

Maine.— State *v.* Cates, 99 Me. 68, 58 Atl. 238.

Michigan.— People *v.* Sharp, 53 Mich. 523, 19 N. W. 168.

New York.— People *v.* Altman, 147 N. Y. 473, 42 N. E. 180 [*affirming* 86 Hun 568, 33 N. Y. Suppl. 905] (forging a check, and, with intent to defraud, offering another the check in payment for goods); Rosekrans *v.* People, 3 Hun 287, 5 Thomps. & C. 467 (forging several papers necessary to the proving and collecting of a single claim against a county).

Virginia.— Sprouse *v.* Com., 81 Va. 374, forgery of a check and of the indorsement thereon.

Washington.— State *v.* Newton, 29 Wash. 373, 70 Pac. 31, sustaining an indictment alleging that on a certain day defendant falsely made an instrument, indorsed his name on the back thereof, and "then and there" did utter and publish it as true.

United States.— U. S. *v.* Armstrong, 24 Fed. Cas. No. 14,468, 5 Phila. (Pa.) 273, charge that defendant caused to be transmitted to and presented at the pension office, forged papers, etc.

See 27 Cent. Dig. tit. "Indictment and Information," § 337 *et seq.*

79. U. S. *v.* Patty, 2 Fed. 664, 9 Biss. 429.

80. Hamilton *v.* People, 24 Colo. 301, 51 Pac. 425. See CONSPIRACY, 8 Cyc. 660.

81. State *v.* Boyd, 108 Mo. App. 518, 84 S. W. 191; People *v.* Herlihy, 66 N. Y. App. Div. 534, 73 N. Y. Suppl. 236.

82. State *v.* Boyd, 108 Mo. App. 518, 84 S. W. 191.

83. State *v.* Ames, 91 Minn. 365, 98 N. W. 190.

84. *Georgia.*— Lampkin *v.* State, 87 Ga. 516, 13 S. E. 523, robbery by force and robbery by intimidation.

Maine.— State *v.* Willis, 78 Me. 70, 2 Atl. 848 (charge that defendant was engaged in "a lottery, scheme or device of chance," or

charged in the same count in the alternative when the offense is one which may have been committed by different means.[85]

5. Alternative Phases of Same Statutory Offense. It is a well settled rule of criminal pleading that when an offense against a criminal statute may be committed in one or more of several ways, the indictment may, in a single count, charge its commission in any or all of the ways specified in the statute.[86] So where a penal statute mentions several acts disjunctively and prescribes that each shall constitute the same offense and be subject to the same punishment, an indictment may charge any or all of such acts conjunctively as constituting a single offense.[87] Or as the same rule is frequently stated, where a statute makes either

that he "was concerned in a lottery, by printing and circulating an advertisement of it, and also in other ways"); State *v.* Haskell, 76 Me. 399 (charge that defendant "did cruelly torment, torture, maim, beat, and wound his horse, and deprive said horse of necessary sustenance").

Massachusetts.— Com. *v.* Brown, 14 Gray 419.

New Jersey.— State *v.* Middlesex, etc., Traction Co., 67 N. J. L. 14, 50 Atl. 354.

New York.— Read *v.* People, 86 N. Y. 381 (the unlawful selling, etc., "to and for" C a lottery ticket); People *v.* Davis, 56 N. Y. 95.

Texas.— Steele *v.* State, 46 Tex. Cr. 337, 81 S. W. 962, indictment for theft from the person.

Utah.— State *v.* Carrington, 15 Utah 480, 50 Pac. 526, indictment for murder containing allegations concerning an abortion and miscarriage and the instruments and drugs used to produce the miscarriage.

United States.— U. S. *v.* Gordon, 22 Fed. 250, conspiracy to defraud the government out of certain lands.

See 27 Cent. Dig. tit. "Indictment and Information," § 350 *et seq.*

Other illustrations.— Where a murder may have been committed by two different means, its commission by both means may be charged in one count of the information, and proof of either one will sustain the allegation (State *v.* Hewes, 60 Kan. 765, 57 Pac. 959); so an indictment may charge that the death of the deceased was caused by defendant's beating and starving her, and by hanging her with a rope (Medina *v.* State, (Tex. Cr. App. 1899) 49 S. W. 380); or that accused killed deceased by striking him with a hand ax and some hard instrument, a better description of which was unknown to the grand jurors, and by drowning deceased and placing him in water (Hughes *v.* State, (Tex. Cr. App. 1900) 60 S. W. 562), or that shooting with a pistol and with a shotgun caused death (State *v.* Kirby, 62 Kan. 436, 63 Pac. 752). See also Homicide, 21 Cyc. 843.

The means alleged must not be inconsistent. People *v.* Kane, 43 N. Y. App. Div. 472, 61 N. Y. Suppl. 195, 632, 14 N. Y. Cr. 305 [*affirmed* in 161 N. Y. 380, 55 N. E. 946].

In indictment for abortion see Abortion, 1 Cyc. 180.

85. State *v.* Ailey, 3 Heisk. (Tenn.) 8, holding that under such a statute a single count may charge that defendant did slit, cut off, and bite off the ear of another.

86. *Colorado.*— Howard *v.* People, 27 Colo. 396, 61 Pac. 595.

Kentucky.— Com. *v.* Yarnell, 68 S. W. 136, 24 Ky. L. Rep. 144.

Maine.— State *v.* Cates, 99 Me. 68, 58 Atl. 238.

Massachusetts.— Com. *v.* Coleman, 184 Mass. 198, 68 N. E. 220; Com. *v.* Ferry, 146 Mass. 203, 15 N. E. 484.

Ohio.— Hale *v.* State, 58 Ohio St. 676, 51 N. E. 154.

Texas.— Young *v.* State, (Cr. App. 1901) 60 S. W. 767.

See 27 Cent. Dig. tit. "Indictment and Information," § 351.

Receiving stolen goods.— Where by statute the buying, receiving, and aiding in the concealment of stolen goods is but one offense, although it may be committed in three modes, it is no reason for arrest of judgment that the commission of the three forms of the offense is charged in the same count. State *v.* Nelson, 29 Me. 329.

87. *Alabama.*— Swallow *v.* State, 22 Ala. 20; Ward *v.* State, 22 Ala. 16 (betting and being concerned in betting at a faro bank); Mooney *v.* State, 8 Ala. 328.

Arkansas.— Grant *v.* State, 70 Ark. 290, 67 S. W. 397; Keoun *v.* State, 64 Ark. 231, 41 S. W. 808; Davis *v.* State, 50 Ark. 17, 6 S. W. 388; Thompson *v.* State, 37 Ark. 408; Slicker *v.* State, 13 Ark. 397.

California.— People *v.* Gosset, 93 Cal. 641, 29 Pac. 246.

Colorado.— Rowe *v.* People, 26 Colo. 542, 59 Pac. 57.

Florida.— Bradley *v.* State, 20 Fla. 738.

Georgia.— Kemp *v.* State, 120 Ga. 157, 47 S. E. 548; Cody *v.* State, 118 Ga. 784, 45 S. E. 622; Heath *v.* State, 91 Ga. 126, 16 S. E. 657.

Illinois.— Blemer *v.* People, 76 Ill. 265.

Indiana.— Wilson *v.* State, 156 Ind. 417, 59 N. E. 1041; Ferris *v.* State, 156 Ind. 224, 59 N. E. 475; Rosenberger *v.* State, 154 Ind. 425, 56 N. E. 914; State *v.* Fidler, 148 Ind. 221, 47 N. E. 464; Hobbs *v.* State, 133 Ind. 404, 32 N. E. 1019, 18 L. R. A. 774; State *v.* Stout, 112 Ind. 245, 13 N. E. 715; Kreamer *v.* State, 106 Ind. 192, 6 N. E. 341; Fahnestock *v.* State, 102 Ind. 156, 1 N. E. 372; Crawford *v.* State, 33 Ind. 304; State *v.* Alsop, 4 Ind. 141; State *v.* Ryman, 2 Ind. 370; Dormer *v.* State, 2 Ind. 308;

of two or more distinct acts connected with the same general offense and subject to the same measure and kind of punishment, indictable separately and as distinct crimes when each shall have been committed by different persons and at different times, they may, when committed by the same person and at the same time, be coupled in one count as together constituting but one offense;[88] and this is true,

State *v.* Ringer, 6 Blackf. 109; Lipschitz *v.* State, 33 Ind. App. 648, 72 N. E. 145.

Indian Territory.— Stancliff *v.* U. S., (1904) 82 S. W. 882.

Iowa.— State *v.* Beebe, 115 Iowa 128, 88 N. W. 358; State *v.* Finney, 99 Iowa 43, 68 N. W. 568; State *v.* Feuerhaken, 96 Iowa 299, 65 N. W. 299; State *v.* Lewis, 96 Iowa 286, 65 N. W. 295; State *v.* Phipps, 95 Iowa 491, 64 N. W. 411; State *v.* Hockenberry, 11 Iowa 269; State *v.* Cooster, 10 Iowa 453; State *v.* Barrett, 8 Iowa 536.

Kentucky.— Jones *v.* Com., 104 Ky. 468, 47 S. W. 328, 20 Ky. L. Rep. 651; Johnson *v.* Com., 90 Ky. 488, 14 S. W. 492, 12 Ky. L. Rep. 442; Com. *v.* Searls, 3 Ky. L. Rep. 394.

Louisiana.— State *v.* Behan, 113 La. 754, 37 So. 714; State *v.* Richards, 33 La. Ann. 1294; State *v.* Flint, 33 La. Ann. 1288; State *v.* Adam, 31 La. Ann. 717; State *v.* Markham, 15 La. Ann. 498; State *v.* Fuller, 14 La. Ann. 667; State *v.* Banton, 4 La. Ann. 31; State *v.* Bogan, 2 La. Ann. 838; State *v.* Fant, 2 La. Ann. 837.

Massachusetts.— Com. *v.* Curtis, 9 Allen 266; Com. *v.* Hall, 4 Allen 305; Stevens *v.* Com., 6 Metc. 241.

Michigan.— People *v.* Clarke, 105 Mich. 169, 62 N. W. 1117.

Mississippi.— Lea *v.* State, 64 Miss. 201, 1 So. 51. *Compare* Miller *v.* State, 5 How. 250.

Missouri.— State *v.* Montgomery, 109 Mo. 645, 19 S. W. 221, 32 Am. St. Rep. 684; State *v.* Findley, 77 Mo. 338; State *v.* Bregard, 76 Mo. 322; State *v.* Pittman, 76 Mo. 56; State *v.* Nations, 75 Mo. 53; State *v.* Connelly, 73 Mo. 235; State *v.* Fancher, 71 Mo. 460; State *v.* Pate, 67 Mo. 488; State *v.* Flint, 62 Mo. 393; State *v.* Murphy, 47 Mo. 274; State *v.* McCollum, 44 Mo. 343; State *v.* Fitzsimmons, 30 Mo. 236; State *v.* Myers, 20 Mo. 211; State *v.* Fletcher, 18 Mo. 425; State *v.* Kesslering, 12 Mo. 565; Storrs *v.* State, 3 Mo. 9; State *v.* Schleuter, 110 Mo. App. 7, 83 S. W. 1012; State *v.* Freeze, 30 Mo. App. 347.

Montana.— State *v.* McGinnis, 14 Mont. 462, 36 Pac. 1046; State *v.* Marion, 14 Mont. 458, 36 Pac. 1014.

New Hampshire.— State *v.* Hastings, 53 N. H. 452; State *v.* Perkins, 42 N. H. 464.

New Jersey.— State *v.* Bartholomew, 69 N. J. L. 160, 54 Atl. 231.

New York.— Bork *v.* People, 91 N. Y. 5; People *v.* Corbalis, 86 N. Y. App. Div. 531, 83 N. Y. Suppl. 782; People *v.* Kane, 43 N. Y. App. Div. 472, 61 N. Y. Suppl. 195, 632, 14 N. Y. Cr. 316.

North Carolina.— State *v.* Wynne, 118 N. C. 1206, 24 S. E. 216.

North Dakota.— State *v.* Kerr, 3 N. D. 523, 58 N. W. 27.

Ohio.— Hale *v.* State, 58 Ohio St. 676, 51 N. E. 154; State *v.* Conner, 30 Ohio St. 405; State *v.* Bauer, 1 Ohio S. & C. Pl. Dec. 199, 1 Ohio N. P. 103.

Oregon.— Cranor *v.* Albany, 43 Oreg. 144, 71 Pac. 1042; State *v.* Dale, 8 Oreg. 229.

Rhode Island.— State *v.* Murphy, 17 R. I. 698, 24 Atl. 473, 16 L. R. A. 550; State *v.* Brady, 16 R. I. 51, 12 Atl. 238; State *v.* Nolan, 15 R. I. 529, 10 Atl. 481.

South Carolina.— State *v.* Beckroge, 49 S. C. 484, 27 S. E. 658; State *v.* Posey, 7 Rich. 484; State *v.* Helgen, 1 Speers 310; State *v.* Meyer, 1 Speers 305.

South Dakota.— State *v.* Donaldson, 12 S. D. 259, 81 N. W. 299.

Tennessee.— Wilcox *v.* State, 3 Heisk. 110.

Texas.— Lancaster *v.* State, 43 Tex. 519; Phillips *v.* State, 29 Tex. 226; Prendergast *v.* State, (Cr. App. 1899) 57 S. W. 850; Schirmacher *v.* State, (Cr. App. 1898) 45 S. W. 802; Allphin *v.* State, (Cr. App. 1895) 33 S. W. 223; Willis *v.* State, 34 Tex. Cr. 148, 29 S. W. 787; Thomas *v.* State, (Cr. App. 1894) 26 S. W. 724; Comer *v.* State, 26 Tex. App. 509, 10 S. W. 106.

Vermont.— State *v.* Brown, 36 Vt. 560; State *v.* Vermont Cent. R. Co., 28 Vt. 583; State *v.* Woodward, 25 Vt. 616.

Virginia.— Ratcliffe *v.* Com., 5 Gratt. 657.

Wisconsin.— Boldt *v.* State, 72 Wis. 7, 38 N. W. 177, (1888) 35 N. W. 935; Clifford *v.* State, 29 Wis. 327; State *v.* Bielby, 21 Wis. 204.

United States.— U. S. *v.* Hall, 26 Fed. Cas. No. 15,282.

England.— Reg. *v.* Bowen, 1 C. & K. 501, 1 Cox C. C. 88, 1 Den. C. C. 22, 47 E. C. L. 501.

See 27 Cent. Dig. tit. "Indictment and Information," § 351.

88. *California.*— People *v.* De la Guerra, 31 Cal. 459.

Indiana.— Mergentheim *v.* State, 107 Ind. 567, 8 N. E. 568; Fahnestock *v.* State, 102 Ind. 156, 1 N. E. 372.

Kansas.— State *v.* Dunn, 66 Kan. 483, 71 Pac. 811; State *v.* Meade, 56 Kan. 690, 44 Pac. 619; State *v.* Gluck, 49 Kan. 533, 31 Pac. 690; State *v.* Schweiter, 27 Kan. 499 (a selling and bartering of intoxicating liquors); State *v.* Tulip, 9 Kan. App. 454, 60 Pac. 659.

New York.— Boland *v.* People, 25 Hun 423, charge that defendant, an inspector of elections, did wilfully make, certify, and deliver to the officer entitled to receive it a false statement and certificate of the votes received.

Pennsylvania.— Com. *v.* Mentzer, 162 Pa. St. 646, 29 Atl. 720 (conversion and failure to pay over public funds); Com. *v.* Miller, 107 Pa. St. 276; Com. *v.* Hall, 23 Pa. Super.

although a disjunctive particle is not employed in the statute, but a conjunction is used which is disjunctive in sense.[89] But the rule does not apply if repugnancy results from charging the acts conjunctively,[90] or where each act enumerated in the statute is complete in itself and punishable by a distinct and specified penalty, the penalty for one act not being applicable to all the acts mentioned in the statute;[91] or where the acts are distinct and are performed at different times.[92]

6. SAME ACT WITH DIFFERENT MOTIVES OR INTENTS. In the case of substantive acts which are made unlawful when done from particular motives or with particular intents, it is not duplicity to charge the single substantive act in combination with more than one of the expletives which give it character;[93] but where the difference in motive or intent causes the act to become punishable in a greater or less degree, this rule is not applicable.[94] So where a statute makes the degrees of

Ct. 104; Com. *v.* Hafer, 22 Pa. Super. Ct. 107; Com. *v.* Sober, 15 Pa. Super. Ct. 520; Com. *v.* Kolb, 13 Pa. Super. Ct. 347.

Texas.— Beaumont *v.* State, 1 Tex. App. 533, 28 Am. Rep. 424, charge in an indictment for arson that the burned building contained a child who was severely injured by the fire.

Virginia.— Morganstern *v.* Com., 94 Va. 787, 26 S. E. 402.

Wisconsin.— Byrne *v.* State, 12 Wis. 519.

United States.— U. S. *v.* Fero, 18 Fed. 901; U. S. *v.* Nunnemacher, 27 Fed. Cas. No. 15,903, 7 Biss. 129; U. S. *v.* Sander, 27 Fed. Cas. No. 16,219, 6 McLean 598.

See 27 Cent. Dig. tit. "Indictment and Information," § 351.

Keeping or offering for sale and selling of intoxicating liquors (State *v.* Burns, 44 Conn. 149; State *v.* Baughman, 20 Iowa 497; State *v.* Becker, 20 Iowa 438), or adulterated milk, etc. (Com. *v.* Tobias, 141 Mass. 129, 6 N. E. 217; Com. *v.* Nichols, 10 Allen (Mass.) 199; People *v.* Burns, 53 Hun (N. Y.) 274, 6 N. Y. Suppl. 611, 7 N. Y. Cr. 92).

Keeping building for gaming and permitting use for gaming.— Davis *v.* State, 100 Ind. 154; Crawford *v.* State, 33 Ind. 304. See GAMING, 20 Cyc. 902.

Setting up and keeping gaming-table.— Vowells *v.* Com., 84 Ky. 52, 8 Ky. L. Rep. 74; Hinkle *v.* Com., 4 Dana (Ky.) 518; Com. *v.* Carson, 6 Phila. (Pa.) 381. See GAMING, 20 Cyc. 902.

89. State *v.* Myers, 10 Iowa 448, so holding when the conjunction "and" was employed, and sustaining an indictment charging counterfeiting, and also the having in possession of counterfeit coin with intent to utter, etc.

90. State *v.* Adams, 179 Mo. 334, 78 S. W. 588 (taking away a female under the age of eighteen years from any person having legal charge of her person, either for the purpose of prostitution or concubinage); State *v.* Flint, 62 Mo. 393 (holding that a charge of secreting and making away with public money is inconsistent with a charge of investing it in property); U. S. *v.* Thomas, 69 Fed. 588 [*distinguishing* U. S. *v.* Fero, 18 Fed. 901] (aiding in buying or receiving articles of value stolen or embezzled from the mail). *Compare* State *v.* Manley, 107 Mo. 364, 17 S. W. 800, holding that an indictment charging that defendant "did unlawfully and feloniously make way with, secrete and convert to his own use," etc., charges but a single offense of conversion of public moneys, as the words used are not inconsistent with one another.

91. State *v.* Smith, 61 Me. 386, holding that Rev. St. c. 27, § 20, prohibiting peddlers from "carrying for sale, or offering for sale . . . or obtaining orders for the sale or delivery of any spirituous, intoxicating or fermented liquors," creates distinct offenses, not joinable in the same count. And see State *v.* Palmer, 32 La. Ann. 565; State *v.* Beach, 25 Mo. App. 554.

92. People *v.* Cooper, 53 Cal. 647 (so holding with regard to a joinder of a charge against an officer of a corporation concurring in the making of a false statement and in the publishing of a false statement); State *v.* Chapman, 94 Iowa 67, 62 N. W. 659 (holding that, under a statute defining the offense of liquor nuisance as consisting in using for the prohibited purposes "a building, erection or place," an indictment for liquor nuisance charging the use of "a building, erection, place, and railroad car," charges two offenses).

93. *Alabama.*— Turnipseed *v.* State, 6 Ala. 664, charging infliction of "cruel and unusual" punishment on a slave.

Maine.— State *v.* Burgess, 40 Me. 592, charging that defendant did "maliciously and wantonly" break down a dam.

Massachusetts.— Com. *v.* Igo, 158 Mass. 199, 33 N. E. 339.

Oklahoma.— Flohr *v.* Territory, 14 Okla. 477, 78 Pac. 565, allegation in grand larceny that the property was taken by fraud and stealth.

Virginia.— Angel *v.* Com., 2 Va. Cas. 231, mayhem.

Washington.— State *v.* Townsend, 7 Wash. 462, 35 Pac. 367, indictment under a statute punishing an assault with a deadly weapon, with an intent to inflict bodily injury, where no considerable provocation appears, "or" where the circumstances of the assault show a wilful, malignant, and abandoned heart.

94. State *v.* Dorsett, 21 Tex. 656, negligent permission of the escape of a convict and wilful permission of such escape.

an offense distinct crimes having different grades of punishment, they cannot be united in a single count.[95]

7. Single Act Affecting Different Persons or Property — a. Offenses Against Different Individuals. A single act or transaction in violation of law may as a general rule be charged in one count as a single offense, although the act involves several similar violations of law with respect to several different persons.[96] Thus, when committed in the same act, larcenies from different individuals may be joined,[97] or robberies of several persons at the same time and place,[98] or the reception of stolen goods belonging to different owners,[99] or a libel concerning several persons uttered by one publication,[1] or a slander,[2] or the publication of several obscene songs.[3] So too the killing of more than one person resulting from the same felonious act may be averred in a single count,[4] or a threat

95. Woodford *v.* People, 3 Hun (N. Y.) 310, 5 Thomps. & C. 539 [*affirmed* in 62 N. Y. 117, 20 Am. Rep. 464] (so holding with regard to arson, in which the statute defining the first degree required the presence of a human being in the dwelling-house at the time of the burning, and in defining the third degree omitted such element); Griffin *v.* State, 109 Tenn. 17, 70 S. W. 61 (taking female for "purpose of prostitution and concubinage).

96. U. S. *v.* Scott, 74 Fed. 213. And see Taylor *v.* Com., 75 S. W. 244, 25 Ky. L. Rep. 374.

Burning of number of buildings see Arson, 9 Cyc. 997.

97. *District of Columbia.*— Hoiles *v.* U. S., 3 MacArthur 370, 36 Am. Rep. 106.

Georgia.— Lowe *v.* State, 57 Ga. 171.

Iowa.— State *v.* Larson, 85 Iowa 659, 52 N. W. 539.

Kentucky.— Nichols *v.* Com., 78 Ky. 180.

Maryland.— State *v.* Warren, 77 Md. 121, 26 Atl. 500, 39 Am. St. Rep. 401.

Massachusetts. — Bushman *v.* Com., 138 Mass. 507; Com. *v.* Sullivan, 104 Mass. 552.

Michigan. — People *v.* Johnson, 81 Mich. 573, 45 N. W. 1119.

Missouri.— State *v.* Morphin, 37 Mo. 373; State *v.* Daniels, 32 Mo. 558; Lorton *v.* State, 7 Mo. 55, 37 Am. Dec. 179.

Montana.— State *v.* Mjelde, 29 Mont. 490, 75 Pac. 87.

Nevada.— State *v.* Douglas, 26 Nev. 196, 65 Pac. 802, 99 Am. St. Rep. 688. See also State *v.* Lambert, 9 Nev. 321.

New Hampshire. — State *v.* Merrill, 44 N. H. 624.

Ohio. — State *v.* Hennessey, 23 Ohio St. 339, 13 Am. Rep. 253; State *v.* Smith, 10 Ohio Dec. (Reprint) 682, 23 Cinc. L. Bul. 85.

Pennsylvania.— Fulmer *v.* Com., 97 Pa. St. 503.

South Carolina.— State *v.* Holland, 5 Rich. 512; State *v.* Thurston, 2 McMull. 382.

Texas.— Wilson *v.* State, 45 Tex. 76, 23 Am. Rep. 602; Hudson *v.* State, 9 Tex. App. 151, 35 Am. Rep. 732; Addison *v.* State, 3 Tex. App. 40.

Vermont.— State *v.* Newton, 42 Vt. 537.

Virginia.— Alexander *v.* Com., 90 Va. 809, 20 S. E. 782.

Washington.— Territory *v.* Heywood, 2 Wash. Terr. 180, 2 Pac. 189.

United States.— U. S. *v.* Beerman, 24 Fed. Cas. No. 14,560, 5 Cranch C. C. 412.

England. — Reg. *v.* Bleasdale, 2 C. & K. 765, 61 E. C. L. 765.

See 27 Cent. Dig. tit. "Indictment and Information," § 393.

Contra.— Morton *v.* State, 1 Lea (Tenn.) 498, holding that a count charging the stealing of the property of O, and also that of C, is fatally defective in averring two separate and distinct offenses.

The larcenies must be at the same place and time (Nichols *v.* Com., 78 Ky. 180, holding that stealing two parcels of poultry from places two hundred yards apart, although on the same night, constitutes two separate offenses), and it should so appear from the indictment (State *v.* Bliss, 27 Wash. 463, 68 Pac. 87); but the use of the phrase "then and there" may be sufficient for this purpose (Furnace *v.* State, 153 Ind. 93, 54 N. E. 441 [*distinguishing* and *overruling* in part Joslyn *v.* State, 128 Ind. 160, 27 N. E. 492, 25 Am. St. Rep. 425].

Driving cattle from range.— Where by one act several cattle belonging to different persons were driven from their accustomed range, it is not necessary that the act be divided into several charges. Long *v.* State, 43 Tex. 467.

98. Clark *v.* State, 28 Tex. App. 189, 12 S. W. 729, 19 Am. St. Rep. 817; Reg. *v.* Giddins, C. & M. 634, 41 E. C. L. 344. *Compare In re* Allison, 13 Colo. 525, 22 Pac. 820, 16 Am. St. Rep. 224, 10 L. R. A. 790, holding that robberies of different individual passengers in a stage constitute distinct offenses, although committed at the same place and in rapid succession.

99. State *v.* Nelson, 29 Me. 329 (holding that in its discretion the court might limit the number so as not to embarrass accused); Com. *v.* Ault, 10 Pa. Super. Ct. 651.

1. Tracy *v.* Com., 87 Ky. 578, 9 S. W. 822, 10 Ky. L. Rep. 611; Rex *v.* Jenour, 7 Mod. 400.

2. Wallace *v.* State, (Tex. Cr. App. 1899) 49 S. W. 395.

3. Rex *v.* Benfield, 2 Burr. 980.

4. *Alabama.*— Ben *v.* State, 22 Ala. 9, 58 Am. Dec. 234.

Indiana.— See Clem *v.* State, 42 Ind. 420, 13 Am. Rep. 369.

Louisiana.— State *v.* Batson, 108 La. 479, 32 So. 478.

to kill,[5] or an assault upon several at the same time,[6] or a breach of the peace,[7] or an attempt to kidnap.[8] But it has been held that the malicious wounding of two persons should not be charged in one indictment, although the wounding may have been contemporaneous;[9] and the killing of two persons as distinct transactions cannot be joined in one count.[10] These rules are not altered by a statute providing that in case of several charges against any person for the same act or transaction, or for two or more acts or transactions connected together, or for two or more acts or transactions for the same class of crimes or offenses which may be properly joined, the whole may be joined in one indictment in separate counts instead of several indictments.[11] So a defendant may, under a statute punishing the solicitation of contributions for political purposes from public employees, in one count be charged with either receiving or soliciting contributions from more persons than one.[12]

b. Offenses Involving Distinct Articles of Property. The indictment may allege without duplicity a single act affecting more than one article of property.[13] Thus two animals may be alleged to have been injured,[14] or the cutting of trees on distinct tracts of land if, in point of time and circumstances, done as a single act,[15] may be charged in one count. Under this principle larceny of several articles at one time and place may be charged in one count,[16] and likewise taking of several articles in robbery,[17] or the embezzlement of distinct articles[18] of the property of several owners.[19] But in one count defendant cannot be charged with having

Mississippi.— Wilkinson *v.* State, 77 Miss. 705, 27 So. 639.

Tennessee.— Forrest *v.* State, 13 Lea 103; Kannon *v.* State, 10 Lea 386; Womack *v.* State, 7 Coldw. 508.

Texas.— Chivarrio *v.* State, 15 Tex. App. 330; Rucker *v.* State, 7 Tex. App. 549.

Wisconsin.— Cornell *v.* State, 104 Wis. 527, 80 N. W. 745.

See 27 Cent. Dig. tit. "Indictment and Information," § 392.

Contra.— People *v.* Alibez, 49 Cal. 452.

5. State *v.* O'Mally, 48 Iowa 501.

6. *Iowa.*— State *v.* McClintock, 8 Iowa 203.

Kansas.— State *v.* Johnson, 70 Kan. 861, 79 Pac. 732.

Massachusetts.— Com. *v.* O'Brien, 107 Mass. 208; Com. *v.* McLaughlin, 12 Cush. 615.

Michigan.— People *v.* Ellsworth, 90 Mich. 442, 51 N. W. 531.

Missouri.— State *v.* Rambo, 95 Mo. 462, 8 S. W. 365.

New York.— People *v.* Rockhill, 74 Hun 241, 26 N. Y. Suppl. 222.

Rhode Island.— Kenney *v.* State, 5 R. I. 385.

Tennessee.— Fowler *v.* State, 3 Heisk. 154.

Texas.— State *v.* Bradley, 34 Tex. 95; Scott *v.* State, 46 Tex. Cr. 305, 81 S. W. 950.

See 27 Cent. Dig. tit. "Indictment and Information," § 392; and ASSAULT AND BATTERY, 3 Cyc. 1037.

Contra.—Rex *v.* Clendon, 2 Ld. Raym. 1572, 2 Str. 870. This case was, however, in Rex *v.* Benfield, 2 Burr. 980, a case of libel, said not to be the law.

7. State *v.* Moore, 67 Mo. App. 320.

8. People *v.* Milne, 60 Cal. 71.

9. Campbell *v.* Com., 3 Ky. L. Rep. 625.

10. Womack *v.* State, 7 Coldw. (Tenn.) 508.

11. U. S. *v.* Scott, 74 Fed. 213.

12. U. S. *v.* Scott, 74 Fed. 213.

13. Possession of more than one counterfeit see COUNTERFEITING, 11 Cyc. 316.

Burning of separate buildings see ARSON, 9 Cyc. 997.

14. Busby *v.* State, 77 Ala. 66 (holding that, although an interval of possibly three minutes intervened between two shots fired by defendant at mules trespassing in his corn-field, they constituted one offense); Hayworth *v.* State, 14 Ind. 590 (sustaining an information for maliciously killing two horses, the one by poisoning and the other by stabbing).

Indictment for injury to animals see ANIMALS, 2 Cyc. 433.

15. State *v.* Paul, 81 Iowa 596, 47 N. W. 773.

16. *Louisiana.*— State *v.* Faulkner, 32 La. Ann. 725.

Missouri.— State *v.* Wagner, 118 Mo. 626, 24 S. W. 219; State *v.* Daniels, 32 Mo. 558.

Nevada.— State *v.* Ward, 19 Nev. 297, 10 Pac. 133.

New Hampshire.— State *v.* Snyder, 50 N. H. 150.

Oregon.— State *v.* McCormack, 8 Oreg. 236.

South Carolina.— State *v.* Johnson, 3 Hill 1.

Tennessee.—State *v.* Williams, 10 Humphr. 101.

Vermont.— State *v.* Cameron, 40 Vt. 555; State *v.* Nutting, 16 Vt. 261.

See 27 Cent. Dig. tit. "Indictment and Information," § 393.

17. Lisle *v.* Com., 82 Ky. 250, 6 Ky. L. Rep. 229; Thompson *v.* State, 35 Tex. Cr. 511, 34 S. W. 629.

18. State *v.* Pierce, 77 Iowa 245, 42 N. W. 181.

19. People *v.* De la Guerra, 31 Cal. 416,

received different articles of stolen property from different individuals.[20] The larceny,[21] or embezzlement,[22] or robbery[23] of different articles may be charged, although a different punishment follows the taking of them severally. Where larceny is a continuing transaction there may be several distinct asportations, but they may be joined in one count for the final carrying away.[24]

8. Offense Composed of Continuous Acts. In those cases in which the offense is of a continuing nature and properly laid under a *continuando*,[25] it may be so laid without being duplicitous.[26] Thus a series of embezzlements may be charged where the separate offenses form steps in a continuing and systematic plan of peculation.[27] So where an offense consists in keeping a gaming-house, and not in each separate act of gaming committed therein, an indictment is not double which charges the keeping of a house upon a certain day and alleges several distinct acts of gaming before and after the day stated.[28] But a series of acts cannot be charged together in one count of an indictment where each of such acts constitutes a distinct offense.[29] So if an offense is not continuing in its nature and is laid upon successive days, the averments as to successive days cannot be rejected if constituting complete charges of distinct crimes.[30] An exception to this rule exists in some cases of indictments for a sale of intoxicating liquors, in which it has been held that where a sale constituting a distinct offense is sufficiently charged, allegations of other sales do not invalidate the indictment;[31] and in some states sales to several at one time and place in violation of liquor laws may be charged in the same count.[32]

9. Offenses Including Other Offenses. An indictment is not double because it charges several related acts, all of which enter into and constitute a single

sustaining an indictment against a tax-collector for embezzlement, which alleged the receiving certain moneys due the county and certain moneys due the state, and charged the embezzlement of the sum total.

20. Kilrow *v.* Com., 89 Pa. St. 480.

21. Waters *v.* People, 104 Ill. 544; Kelly *v.* State, 7 Baxt. (Tenn.) 323.

22. Coats *v.* People, 4 Park. Cr. (N. Y.) 662.

23. Lisle *v.* Com., 82 Ky. 250, 6 Ky. L. Rep. 229.

24. State *v.* Martin, 82 N. C. 672.

25. See *supra*, V, F, 2, f.

26. *Connecticut.*— State *v.* Bosworth, 54 Conn. 1, 4 Atl. 248.

Iowa.— Zumhoff *v.* State, 4 Greene 526.

Kentucky.— Central R., etc., Co. *v.* Com., 104 Ky. 726, 47 S. W. 877, 20 Ky. L. Rep. 927.

Maine.— State *v.* Churchill, 25 Me. 306; State *v.* Stinton, 17 Me. 154.

Massachusetts.— Com. *v.* Dunn, 111 Mass. 426; Com. *v.* Woods, 9 Gray 131.

Pennsylvania.— Com. *v.* Price, 3 Pa. Co. Ct. 175, 4 Kulp 289.

See 27 Cent. Dig. tit. "Indictment and Information," § 336.

27. Jackson *v.* State, 76 Ga. 551; State *v.* Dix, 33 Wash. 405, 74 Pac. 570. And see Willis *v.* State, 134 Ala. 429, 33 So. 226.

28. State *v.* Prescott, 33 N. H. 212. See Gaming, 20 Cyc. 873.

29. *Iowa.*— State *v.* Jamison, 110 Iowa 337, 81 N. W. 594, 90 N. W. 622, employment of false weights with intent to defraud.

Nebraska.— State *v.* Dennison, 60 Nebr. 192, 82 N. W. 628, charge that on a certain date, and on divers days between that and a subsequent date, defendant did publicly and privately open and carry on a lottery.

Ohio.— Barnhouse *v.* State, 31 Ohio St. 39, incest.

Texas.— Scales *v.* State, 46 Tex. Cr. 296, 81 S. W. 947, 66 L. R. A. 730, charge that defendant on a certain date, and each succeeding day thereafter, for one year, carried on the business of dealing in futures.

Vermont.— State *v.* Temple, 38 Vt. 37, incest.

United States.— U. S. *v.* Patty, 2 Fed. 664, 9 Biss. 429, depositing in the mail circulars concerning a lottery.

See 27 Cent. Dig. tit. "Indictment and Information," § 336.

30. People *v.* Hamilton, 107 Mich. 87, 59 N. W. 401; U. S. *v.* Patty, 2 Fed. 664, 9 Biss. 429.

31. *Iowa.*— State *v.* King, 37 Iowa 462.

Minnesota.— State *v.* Kobe, 26 Minn. 148, 1 N. W. 1054.

Missouri.— State *v.* Findley, 77 Mo. 338.

New York.— Osgood *v.* People, 39 N. Y. 449; People *v.* Adams, 17 Wend. 475.

South Dakota.— State *v.* Boughner, 5 S. D. 461, 59 N. W. 736.

United States.— Endleman *v.* U. S., 86 Fed. 456, 30 C. C. A. 186, so holding under the Oregon criminal code, in force in Alaska, which dispenses with technicalities in pleading.

See 27 Cent. Dig. tit. "Indictment and Information," § 336.

Contra.— Yost *v.* Com., 6 Ky. L. Rep. 110.

32. State *v.* Atkins, 40 Mo. App. 344; State *v.* Anderson, 3 Rich. (S. C.) 172; Peer's Case, 5 Gratt. (Va.) 674. See, generally, Intoxicating Liquors.

offense, although such acts may in themselves constitute distinct offenses.[33] An indictment for an assault is not rendered double by reason of the fact that the assault is described with additional incidents of aggravation, such as a battery, or an allegation that it was with a dangerous weapon or an intent to commit a great bodily injury;[34] but the common-law offense of assault and battery cannot be charged with a statutory aggravated assault when not an element of the statutory offense.[35] In the case of crimes in the commission of which an assault is involved, both the assault and completed crime may be charged.[36] There are some instances in which two crimes are of the same nature and so connected that when both are committed they must constitute but one legal offense, in which case both may be charged in the same count.[37] Of this nature are indictments for burglary, which offense includes both the breaking and entering with intent to commit a felony, and the actual felony, such as larceny,[38] arson,[39] rape,[40] or an assault.[41] So in indictments for robbery, the assault and putting in fear may be alleged in connection with the taking and stealing of the property.[42]

10. Conspiracy and Overt Act. As a general rule an indictment for conspiracy to commit a crime is not regarded as duplicitous because the overt act is alleged as well as the acts constituting the conspiracy.[43]

11. Charging Act in Conjunction With Accessorial Acts. It is proper to charge defendant with both having done and having caused or procured to be done

33. *California.*— People *v.* Ah Own, 39 Cal. 604, indictment charging an assault and battery only as an incident in a forcible and unlawful arrest and abduction, for which the indictment is drawn.

Kansas.— State *v.* Emmons, 45 Kan. 397, 26 Pac. 679; State *v.* Hodges, 45 Kan. 389, 26 Pac. 676, both holding that in one count an actual embezzlement, and also that defendant made way with the same property and secreted it with intent to embezzle and convert it to his own use, might be charged.

Kentucky.— Miller *v.* Com., 13 Bush 731; Peacock Distillery Co. *v.* Com., 78 S. W. 893, 25 Ky. L. Rep. 1778, indictment for suffering and committing a common nuisance, also charging the statutory offense of poisoning or polluting a stream.

Louisiana.— State *v.* Palmer, 32 La. Ann. 565. See also State *v.* Edmunds, 49 La. Ann. 271, 21 So. 266.

Massachusetts.— Com. *v.* Holmes, 165 Mass. 457, 43 N. E. 189; Com. *v.* Thompson, 116 Mass. 346.

New Hampshire.— State *v.* Gorham, 55 N. H. 152; State *v.* Webster, 39 N. H. 96.

New Jersey.— Farrell *v.* State, 54 N. J. L. 416, 24 Atl. 723 (assaults with force and arms and a carnal abuse); Francisco *v.* State, 24 N. J. L. 30 (assault and battery and false imprisonment).

Tennessee.— Cornell *v.* State, 7 Baxt. 520.

Texas.— State *v.* Randle, 41 Tex. 292; Prendergast *v.* State, 41 Tex. Cr. 358, 57 S. W. 850, both holding that the establishment of a lottery and the disposing of property by means of such lottery might be joined.

Wisconsin.— McKinney *v.* State, 25 Wis. 378.

United States.— U. S. *v.* Hansee, 79 Fed. 303.

See 27 Cent. Dig. tit. "Indictment and Information," § 375 *et seq.*

Setting up and promoting lottery.— Com. *v.* Harris, 13 Allen (Mass.) 534; Com. *v.* Twitchell, 4 Cush. (Mass.) 74.

Sale and offer for sale of lottery tickets (Com. *v.* Eaton, 15 Pick. (Mass.) 273; Com. *v.* Johnson, Thach. Cr. Cas. (Mass.) 284), of adulterated milk (Com. *v.* Nichols, 10 Allen (Mass.) 199), or of an imitation of butter (Com. *v.* Kolb, 13 Pa. Super. Ct. 347).

Charging death of woman in indictment for abortion see Abortion, 1 Cyc. 180.

34. Siebert *v.* State, 95 Ind. 471; State *v.* Hendricks, 38 La. Ann. 682; Akin *v.* State, (Tex. 1889) 12 S. W. 1101; State *v.* Michel, 20 Wash. 162, 54 Pac. 995; State *v.* McCormick, 20 Wash. 94, 54 Pac. 764. See Assault and Battery, 3 Cyc. 1036.

35. State *v.* Marcks, 3 N. D. 532, 58 N. W. 25.

36. State *v.* Farley, 14 Ind. 23. See Homicide, 21 Cyc. 646; Mayhem; Rape; and the like special titles.

37. State *v.* Climie, 12 N. D. 33, 94 N. W. 574.

38. Com. *v.* Carson, 166 Pa. St. 179, 30 Atl. 985. See Burglary, 6 Cyc. 222–224.

39. State *v.* Ely, 35 La. Ann. 895; Com. *v.* Harney, 10 Metc. (Mass.) 422.

40. State *v.* Ryan, 15 Oreg. 572, 16 Pac. 417.

41. State *v.* Phipps, 95 Iowa 487, 64 N. W. 410 (holding that an indictment for burglary, under Code, § 3891, charging that defendant broke and entered with intent to commit an assault, and that after having entered he committed the assault, is not bad for duplicity); Smith *v.* State, 57 Miss. 822.

42. State *v.* Devine, 51 La. Ann. 1296, 26 So. 105; State *v.* Gorham, 55 N. H. 152; McTigue *v.* State, 4 Baxt. (Tenn.) 313. See, generally, Robbery.

43. See Conspiracy, 8 Cyc. 660.

the act as to which the offense is predicated, where the doing or causing or procuring it to be done is by the statute defining the crime made an offense of equal degree;[44] or where, in contemplation of the law, the doing and the causing or procuring are regarded as but different modes of committing the same offense.[45] But where the doing and the causing or procuring are separate and distinct offenses, they cannot be charged together in the same count without duplicity.[46] So on the principle that both acts are but different modes of proceeding in the commission of the same offense, it has been held proper to charge the promotion of a lottery and the aiding in its promotion,[47] keeping and assisting in keeping a nuisance,[48] or forging and wittingly assenting to forgery.[49]

12. Offenses by Persons in Representative Capacities. A defendant may without duplicity be charged to have committed an offense while acting in a representative capacity;[50] but where offenses committed by a person in varying representative capacities are distinct, he cannot be charged in the same count with having committed an offense in two capacities.[51]

13. Offenses Incidentally or Insufficiently Averred. Since to constitute duplicity two or more offenses must be sufficiently described, additional allegations which merely tend to show the commission of distinct offenses, but are not sufficient in themselves to constitute a charge thereof, will not invalidate the indictment;[52] the generally accepted rule being that they may be rejected as

44. *California.*— People *v.* Gusti, 113 Cal. 177, 45 Pac. 263.

New Jersey.— State *v.* Price, 11 N. J. L. 203.

New York.— People *v.* Martin, 77 N. Y. App. Div. 396, 79 N. Y. Suppl. 340, perjury.

Virginia.— Rasnick *v.* Com., 2 Va. Cas. 356.

United States.— U. S. *v.* Janes, 74 Fed. 545; U. S. *v.* Hull, 14 Fed. 324, 4 McCrary 272.

See 27 Cent. Dig. tit. "Indictment and Information," §§ 372, 373.

45. *Alabama.*— Ben *v.* State, 22 Ala. 9, 58 Am. Dec. 234.

Arizona.— Qualey *v.* Territory, (1902) 68 Pac. 546.

Indiana.— Boswell *v.* State, 8 Ind. 499; State *v.* Slocum, 8 Blackf. 315; State *v.* Kuns, 5 Blackf. 314.

Louisiana.— State *v.* Behan, 113 La. 754, 37 So. 714.

Missouri.— State *v.* Hayes, 78 Mo. 307, holding that an indictment for an attempt to commit arson may combine in one count acts done by defendant himself and those which he solicited another to do in making the same attempt. And see State *v.* Maupin, 57 Mo. 205.

New York.— La Beau *v.* People, 33 How. Pr. 66, 6 Park. Cr. 371 [*affirmed* in 34 N. Y. 223].

Pennsylvania.— Com. *v.* Schoenhutt, 3 Phila. 20.

South Carolina.— State *v.* Houseal, 2 Brev. 219.

Vermont.— State *v.* Morton, 27 Vt. 310, 66 Am. Dec. 201.

United States.— Crain *v.* U. S., 162 U. S. 625, 16 S. Ct. 952, 40 L. ed. 1097.

See 27 Cent. Dig. tit. "Indictment and Information," §§ 372, 373.

46. State *v.* Haven, 59 Vt. 399, 9 Atl. 841, holding an indictment duplicitous which charged defendant with having signed a false certificate of stock with the intent that it be issued and used, and with having caused it to be issued and used. See also People *v.* Sebring, 14 Misc. (N. Y.) 31, 35 N. Y. Suppl. 237.

In indictment for abortion see Abortion, 1 Cyc. 180.

47. Miller *v.* Com., 13 Bush (Ky.) 731.

48. State *v.* Bush, 70 Kan. 739, 79 Pac. 657.

49. State *v.* Morgan, 19 N. C. 348.

50. State *v.* Lewis, 31 Wash. 515, 72 Pac. 121, charge that defendant, on a certain day, as attorney of a certain administratrix, converted to his own use a specified sum of money intrusted to him by the administratrix.

51. Hutchinson *v.* Com., 82 Pa. St. 472, holding that an indictment charging embezzlement as "trustees and agents," and as "trustees, agents, and bailees" was duplicitous. See, however, State *v.* Lillie, 21 Kan. 728, holding that it was proper to charge defendant with embezzlement as "agent, servant, employe, and bailee," the offense as bailee including that by servants, etc.

52. *Indiana.*— Herron *v.* State, 17 Ind. App. 161, 46 N. E. 540.

Iowa.— State *v.* Edmunds, 127 Iowa 333, 101 N. W. 431; State *v.* Osborne, 96 Iowa 281, 65 N. W. 159 (indictment for robbery charging assault with intent to kill by reason of the unnecessary particularity of language charging the force, or violence, or putting in fear, where such language was not actually sufficient to charge the second offense); State *v.* McClintock, 8 Iowa 203.

Kansas.— State *v.* Appleby, 66 Kan. 351, 71 Pac. 847.

Kentucky.— Com. *v.* Powell, 8 Bush 7; Jackson *v.* Com., 17 S. W. 215, 13 Ky. L. Rep. 393.

surplusage.[53] But where separate offenses are sufficiently charged, none of them can be rejected as surplusage in order to support the charge as of another.[54] It follows of course that where acts charged constitute no offense, they do not render the indictment duplicitous.[55] Under the same rule, matter which is merely explanatory,[56] or amounts to mere conclusions,[57] or alleged by way of

Louisiana.— State *v.* Desroche, 47 La. Ann. 651, 17 So. 209.

Maine.— State *v.* Haskell, 76 Me. 399; State *v.* Payson, 37 Me. 361; State *v.* Palmer, 35 Me. 9.

Massachusetts.— Com. *v.* Ballou, 124 Mass. 26; Com. *v.* Hart, 10 Gray 465; Com. *v.* Wilcox, 1 Cush. 503; Com. *v.* Stowell, 9 Metc. 569. And see Com. *v.* Tuck, 20 Pick. 356.

Minnesota.— State *v.* Grimes, 50 Minn. 123, 52 N. W. 275; State *v.* Henn, 39 Minn. 464, 40 N. W. 564.

Missouri.— State *v.* Knock, 142 Mo. 515, 44 S. W. 235.

Nebraska.— State *v.* Ball, 27 Nebr. 601, 43 N. W. 398.

New Jersey.— State *v.* Middlesex, etc., Traction Co., 67 N. J. L. 14, 50 Atl. 354.

New York.— Polinsky *v.* People, 73 N. Y. 65; Dawson *v.* People, 25 N. Y. 399; People *v.* Kane, 43 N. Y. App. Div. 472, 61 N. Y. Suppl. 195, 632, 14 N. Y. Cr. 316; Rosekrans *v.* People, 3 Hun 287, 5 Thomps. & C. 467.

Pennsylvania.— Hutchison *v.* Com., 82 Pa. St. 472; Jillard *v.* Com., 26 Pa. St. 169.

Texas.— Crow *v.* State, 41 Tex. 468.

United States.— U. S. *v.* Patty, 2 Fed. 664, 9 Biss. 429.

Canada.— Reg. *v.* McKenzie 2 Manitoba 168.

See 27 Cent. Dig. tit. "Indictment and Information," § 395 *et seq.*

53. *Arkansas.*— State *v.* Bledsoe, 47 Ark. 233, 1 S. W. 149; State *v.* Horn, 19 Ark. 578.

Indiana.— Smith *v.* State, 85 Ind. 553; Eagan *v.* State, 53 Ind. 162; State *v.* Hutzell, 53 Ind. 160; Leary *v.* State, 39 Ind. 360.

Iowa.— State *v.* Hull, 83 Iowa 112, 48 N. W. 917; State *v.* King, 81 Iowa 587, 47 N. W. 775 [*distinguishing* State *v.* Brandt, 41 Iowa 593].

Kentucky.— Miller *v.* Com., 77 S. W. 682, 25 Ky. L. Rep. 1236.

Massachusetts.— Com. *v.* Stowell, 9 Metc. 569; Com. *v.* Simpson, 9 Metc. 138; Com. *v.* Arnold, 4 Pick. 251; Com. *v.* Bolkom, 3 Pick. 281.

Minnesota.— State *v.* Comings, 54 Minn. 359, 56 N. W. 50. And see State *v.* Feldman, 80 Minn. 314, 83 N. W. 182.

Mississippi.— Stone *v.* State, (1890) 7 So. 500.

Missouri.— State *v.* Flanders, 118 Mo. 227, 23 So. 1086; State *v.* Manley, 107 Mo. 364, 17 S. W. 800.

New Hampshire.— State *v.* Rollins, 55 N. H. 101.

New Mexico.— Territory *v.* Copely, 1 N. M. 571.

New York.— People *v.* Casey, 72 N. Y. 393.

North Carolina.— State *v.* Darden, 117 N. C. 697, 23 S. E. 106; State *v.* Harris, 106 N. C. 682, 11 S. E. 377; State *v.* Green, 92 N. C. 779; State *v.* Lanier, 89 N. C. 517.

Oklahoma.— Gatliff *v.* Territory, 2 Okla. 523, 37 Pac. 809.

Oregon.— State *v.* Humphreys, (1902) 70 Pac. 824; Burchard *v.* State, 2 Oreg. 78.

Pennsylvania.— Com. *v.* Frey, 50 Pa. St. 245.

Texas.— State *v.* Coffey, 41 Tex. 46; Stuart *v.* State, (Cr. App. 1901) 60 S. W. 554; Griffin *v.* State, (Cr. App. 1892) 20 S. W. 552; Holden *v.* State, 18 Tex. App. 91.

Virginia.— Derieux *v.* Com., 2 Va. Cas. 379.

West Virginia.— State *v.* Gould, 26 W. Va. 258.

See 27 Cent. Dig. tit. "Indictment and Information," § 395 *et seq.*

Continuando.— An indictment alleging that on a day certain defendant kept an ordinary without a license is not vitiated by an addition that he continued to keep to another subsequent day, the *continuando* being surplusage. Burner *v.* Com., 13 Gratt. (Va.) 778.

54. *Indiana.*— State *v.* Weil, 89 Ind. 286.

Maine.— State *v.* Palmer, 35 Me. 9.

Massachusetts.— Com. *v.* Atwood, 11 Mass. 93.

North Dakota.— State *v.* Mattison, (1904) 100 N. W. 1091.

United States.— U. S. *v.* Patty, 2 Fed. 664, 9 Biss. 429.

See 27 Cent. Dig. tit. "Indictment and Information," § 395 *et seq.*

55. *Arkansas.*—State *v.* Frederick, 45 Ark. 347, 55 Am. Rep. 555.

California.— People *v.* Harrold, 84 Cal. 567, 24 Pac. 106.

Indiana.— Pinney *v.* State, 156 Ind. 167, 59 N. E. 383; Steel *v.* State, 26 Ind. 92.

Oregon.— State *v.* Durphy, 43 Oreg. 79, 71 Pac. 63.

Pennsylvania.— Hutchison *v.* Com., 82 Pa. St. 472.

Texas.— Saddler *v.* Republic, Dall. 610.

See 27 Cent. Dig. tit. "Indictment and Information," § 397.

56. State *v.* Hester, 48 Ark. 40, 2 S. W. 399 (indictment charging defendants with playing a game of "hazard or skill" known as "craps"); Com. *v.* Hulbert, 12 Metc. (Mass.) 446 (indictment for false pretenses, alleging that the cheating was accomplished by means of passing a counterfeit bill); Com. *v.* Bargar, 2 L. T. N. S. (Pa.) 161; Thompson *v.* State, 30 Tex. 356.

57. State *v.* Wilson, 143 Mo. 334, 44 S. W. 722; State *v.* Gilmore, 110 Mo. 1, 19 S. W. 218 (indictment for embezzlement); State *v.* Adams, 108 Mo. 208, 18 S. W. 1000.

description or inducement,[58] or which is merely indicative of the manner in which the offense was committed,[59] does not create duplicity. The same is true of averments incidentally describing an offense for which a conviction is not sought,[60] and which is not charged.[61] Hence an indictment will not be regarded as charging two similar statutory offenses where words are used which unmistakably designate the charge as for one of them, and which would have to be rejected were the charge held to be of the other.[62] So the fact that one offense is named in the indictment and another described is not duplicity.[63] But the fact that but a single offense is named will not remedy the fact that the indictment actually charges two offenses.[64]

14. Averments of Former Convictions. An allegation of a prior conviction, made for the purpose of increasing the penalty which may be imposed, does not render the indictment duplicitous, since defendant is not to be tried on such former charges.[65]

15. Construction of Count. In determining whether an indictment is duplicitous, an averment will be construed according to the context.[66] An indictment will not be made duplicitous through punctuation,[67] or a purely clerical error.[68]

16. Compelling Statement of Charge in Separate Counts. There seems to be authority authorizing a motion to compel the prosecution to separately state in separate counts all offenses which have been charged together in a single count of an indictment.[69]

B. Joinder in Different Counts — 1. In General. While, subject to few if any exceptions, distinct offenses cannot be set out in the same count of an indictment without rendering it bad for duplicity[70] or repugnancy,[71] much latitude is

58. State *v.* Scott, 78 Minn. 311, 81 N. W. 3; Thompson *v.* State, 105 Tenn. 177, 58 S. W. 213, 80 Am. St. Rep. 875, 51 L. R. A. 883. And see Douthitt *v.* State, (Tex. Cr. App. 1901) 61 S. W. 404.

59. *Kentucky.*— Barnes *v.* Com., 101 Ky. 556, 41 S. W. 772, 19 Ky. L. Rep. 803 (indictment charging forgery of a bank check and signature); Com. *v.* T. J. Megibben Co., 101 Ky. 195, 40 S. W. 694, 19 Ky. L. Rep. 291 (indictment for a nuisance in keeping cattle-pens); Collins *v.* Com., 70 S. W. 187, 24 Ky. L. Rep. 884.

Louisiana.— State *v.* Collins, 33 La. Ann. 152.

Nebraska.— Moline *v.* State, (1904) 100 N. W. 810.

New Hampshire.— State *v.* Hardy, 47 N. H. 538.

Vermont.— State *v.* Ferry, 61 Vt. 624, 18 Atl. 451.

See 27 Cent. Dig. tit. "Indictment and Information," § 395 *et seq.*

In defining murder in the commission of another felony the allegation of the facts indicating the particular felony engaged in does not create duplicity. Dolan *v.* People, 64 N. Y. 485 [*affirming* 6 Hun 493]; Jackson *v.* State, 39 Ohio St. 37; Blair *v.* State, 5 Ohio Cir. Ct. 496, 3 Ohio Cir. Dec. 242.

60. U. S. *v.* Davis, 103 Fed. 457.

61. Jackson *v.* Com., 17 S. W. 215, 13 Ky. L. Rep. 393; People *v.* Klipfel, 160 N. Y. 371, 54 N. E. 788, 14 N. Y. Cr. 169; State *v.* Belyea, 9 N. D. 353, 83 N. W. 1; State *v.* Smith, 24 Tex. 285, an allegation that defendant attempted to protect the principal from arrest, and concealed him, does not amount to a charge of an attempt to resist an officer so as to render the indictment bad for duplicity.

62. State *v.* Franks, 64 Iowa 39, 19 N. W. 832.

63. People *v.* Cuddihi, 54 Cal. 53, holding that where an indictment recites that defendant is accused of "assault with intent to murder," and then proceeds to state facts showing that defendant administered poison with intent to kill, it is not duplicitous, since the mere name "assault," etc., is not a charge of an offense.

64. Messer *v.* Com., 80 S. W. 489, 26 Ky. L. Rep. 40 [*overruling* Rawlins *v.* Com., 7 Ky. L. Rep. 595].

65. People *v.* Boyle, 64 Cal. 153, 28 Pac. 232; State *v.* Moore, 121 Mo. 514, 26 S. W. 345, 42 Am. St. Rep. 542; Reg. *v.* Clark, 3 C. & K. 367, 6 Cox C. C. 210, Dears. C. C. 198, 17 Jur. 582, 22 L. J. M. C. 135, 1 Wkly. Rep. 439.

66. U. S. *v.* Corbin, 11 Fed. 238.

67. State *v.* Wood, 112 Iowa 411, 84 N. W. 520.

68. State *v.* Phillips, 118 Iowa 660, 92 N. W. 876.

69. State *v.* Lund, 49 Kan. 209, 30 Pac. 518, holding that where an information charged in one count an illegal sale of intoxicating liquors, and also the keeping of a place where persons were permitted to resort for the purpose of drinking intoxicating liquors, it was error to refuse a motion to require the state to set out the charge in separate counts, one for selling liquor unlawfully, and the other for keeping a common nuisance.

70. See *supra*, VII, A.

71. See *supra*, V, C, 4.

permitted the pleader in setting out the same offense in different ways,[72] or the same transaction as different offenses[73] in separate counts of the same indictment to meet the possible proof.[74] In such case the necessary repugnancy between the separate counts is not an objection to the indictment.[75] By statute in some states it is provided that different offenses and degrees of the same offense may be joined in one information in all cases where the same might be joined by different counts in the same indictment.[76] There may be a misjoinder of counts, although some of the counts are defective.[77] This rule, however, would not prevail where the part supposed to produce the duplicity or misjoinder is mere surplusage.[78]

2. Different Descriptions of Same Offense — a. In General. It is proper to charge in various counts of an indictment the same offense as committed in various ways in order to meet the evidence which may possibly be adduced at the trial;[79] and a provision to such effect is frequently made in statutes which require the indictment to charge but a single offense.[80] An indictment so framed to meet the evidence may be sustained as against an objection made in any form, and whether the statute does or does not permit more than one offense to be charged in the indictment,[81] and the state will not be compelled to elect between the various counts before proceeding to trial,[82] nor will the indictment be

72. See *infra*, VII, B, 2.

73. See *infra*, VII, B, 3.

74. Kuehn *v.* State, (Tex. Cr. App. 1902) 69 S. W. 526.

That defendant is a competent witness on some counts and not on others will not prevent a joinder of counts which is otherwise proper. Reg. *v.* Wilde, 59 J. P. 296.

Indictment for abortion see Abortion, 1 Cyc. 182.

75. State *v.* Mallon, 75 Mo. 355; State *v.* Surles, 117 N. C. 720, 23 S. E. 324; Com. *v.* Shissler, 7 Pa. Dist. 344; Dawson *v.* State, (Tex. Cr. App. 1900) 55 S. W. 49.

Statutory crimes which may be coexistent may be charged in separate counts without repugnancy. State *v.* Thompson, 13 La. Ann. 515; State *v.* Johnson, 50 N. C. 221.

76. See Porath *v.* State, 90 Wis. 527, 63 N. W. 1061, 48 Am. St. Rep. 954. And see the statutes of the various states.

77. U. S. *v.* Scott, 27 Fed. Cas. No. 16,241, 4 Biss. 29.

78. U. S. *v.* Scott, 27 Fed. Cas. No. 16,241, 4 Biss. 29.

79. *Alabama.*— Mayo *v.* State, 30 Ala. 32.

Arkansas.— Howard *v.* State, 34 Ark. 433.

Indiana.— Engleman *v.* State, 2 Ind. 91, 52 Am. Dec. 494.

Iowa.— State *v.* Trusty, 122 Iowa 82, 97 N. W. 989; State *v.* Brannan, 50 Iowa 372; State *v.* McPherson, 9 Iowa 53.

Kansas.— State *v.* O'Kane, 23 Kan. 244.

Missouri.— State *v.* Gilmore, 110 Mo. 1, 18 S. W. 218; State *v.* Price, 3 Mo. App. 586.

Nebraska.— Hill *v.* State, 42 Nebr. 503, 60 N. W. 916; Furst *v.* State, 31 Nebr. 403, 97 N. W. 1116, both joining counts charging a malicious killing, and a killing in attempt to rob.

New York.— People *v.* Moore, 26 Misc. 168, 56 N. Y. Suppl. 802 (counts charging a robbery while armed, by aid of an accomplice, and by an assault); Nelson *v.* People, 5 Park. Cr. 39 [*affirmed* in 23 N. Y. 293].

North Carolina.— State *v.* Howard, 129 N. C. 584, 40 S. E. 71; State *v.* Barber, 113 N. C. 711, 18 S. E. 515.

Pennsylvania.— Douglas *v.* Com., 2 Rawle 262; Com. *v.* Leisenring, 11 Phila. 389.

South Carolina.— State *v.* Priester, Cheves 103.

Texas.— Kuehn *v.* State, (Cr. App. 1902) 69 S. W. 526; Floyd *v.* State, (Cr. App. 1902) 68 S. W. 690; Willis *v.* State, (Cr. App. 1900) 55 S. W. 829 (charging in one count a burglary at night and in another burglary in the daytime); Moore *v.* State, (Cr. App. 1897) 40 S. W. 287 (abortion with instruments and with drugs); Shubert *v.* State, 20 Tex. App. 320; Mathews *v.* State, 10 Tex. App. 279; Dill *v.* State, 1 Tex. App. 278.

United States.— U. S. *v.* Howell, 65 Fed. 402, holding that an indictment for the possession of counterfeit money might allege in separate counts the possession of different denominations of coin.

See 27 Cent. Dig. tit. "Indictment and Information," § 403 *et seq.*

80. See the statutes of the various states. And see Territory *v.* Duffield, 1 Ariz. 58, 25 Pac. 476 (holding that under such a statute a count for resisting an officer, and one for assault on him, without reference to his official character, cannot be joined); State *v.* Brewer, 33 Ark. 176 (holding that affray and assault and battery could not be joined, although a conviction for assault and battery might be had on a count for affray); State *v.* Baldwin, 79 Iowa 714, 45 N. W. 297; State *v.* Elsham, 70 Iowa 531, 31 N. W. 66 (holding that larceny at night and in daytime may be charged together).

81. State *v.* Malim, 14 Nev. 288; State *v.* Nelson, 11 Nev. 334; People *v.* Rose, 52 Hun (N. Y.) 33, 4 N. Y. Suppl. 787; State *v.* Eason, 70 N. C. 88.

82. *Alabama.*— Upshur *v.* State, 100 Ala. 2, 14 So. 541; Butler *v.* State, 91 Ala. 87, 9 So. 191.

Arkansas.— Henry *v.* State, 71 Ark. 574,

quashed.[83] For example a murder may be charged in separate counts to have been committed with different instruments,[84] or by different wounds,[85] or methods.[86] So an election will not be compelled when in separate counts a burglarious entry with intent to commit different felonies is charged,[87] or a conspiracy to accuse of distinct felonies,[88] or shooting with different intents,[89] or assault with intent to commit distinct degrees of murder.[90]

b. Different Places and Times. The separate counts should not charge the offense as committed in different jurisdictions, such as in different counties.[91] Upon the theory that the state is not confined to the exact date alleged in the indictment, it has been held that different counts may charge the offense to have been committed on distinct dates;[92] and upon the theory that each count is to be

76 S. W. 1071; State *v.* Bailey, 62 Ark. 489, 36 S. W. 690.

Delaware.— State *v.* Manluff, Houst. Cr. Cas. 208.

Florida.— Darby *v.* State, 41 Fla. 274, 26 So. 315; Murray *v.* State, 25 Fla. 528, 6 So. 498.

Georgia.— Stewart *v.* State, 58 Ga. 577.

Indiana.— Wall *v.* State, 51 Ind. 453; Miller *v.* State, 51 Ind. 405; Mershon *v.* State, 51 Ind. 14; Joy *v.* State, 14 Ind. 139; Engleman *v.* State, 2 Ind. 91, 52 Am. Dec. 494; McGregg *v.* State, 4 Blackf. 101.

Iowa.— State *v.* House, 55 Iowa 466, 8 N. W. 307; State *v.* McPherson, 9 Iowa 53.

Missouri.— State *v.* Schmidt, 137 Mo. 266, 38 S. W. 938; State *v.* Houx, 109 Mo. 654, 19 S. W. 35, 32 Am. St. Rep. 686; State *v.* Mallon, 75 Mo. 355; State *v.* Pitts, 58 Mo. 556; State *v.* Davis, 29 Mo. 391; State *v.* Porter, 26 Mo. 201.

Nebraska.— Bartley *v.* State, 53 Nebr. 310, 73 N. W. 744; Hurlburt *v.* State, 52 Nebr. 428, 72 N. W. 471.

New Hampshire.— State *v.* Canterbury, 28 N. H. 195.

New York.— People *v.* Wright, 136 N. Y. 625, 32 N. E. 629; Armstrong *v.* People, 70 N. Y. 38; Cook *v.* People, 2 Thomps. & C. 404 (holding that seduction may be charged in separate counts to have been accomplished on different dates); People *v.* Moore, 26 Misc. 168, 56 N. Y. Suppl. 802; People *v.* Austin, 2 Edm. Sel. Cas. 54, 1 Park. Cr. 154; Kane *v.* People, 8 Wend. 203; Nelson *v.* People, 5 Park. Cr. 39 [*affirmed* in 23 N. Y. 293].

North Carolina.— State *v.* Howard, 129 N. C. 584, 40 S. E. 71; State *v.* Phillips, 104 N. C. 786, 10 S. E. 463.

Ohio.— Cottell *v.* State, 12 Ohio Cir. Ct. 467, 5 Ohio Cir. Dec. 472; State *v.* Franzreb, 11 Ohio Dec. (Reprint) 775, 20 Cinc. L. Bul. 129.

Texas.— Bynum *v.* State, (Cr. App. 1903) 72 S. W. 844; Willis *v.* State, (Cr. App. 1900) 55 S. W. 829; Moore *v.* State, 37 Tex. Cr. 552, 40 S. W. 287. See also Greenwood *v.* State, (Cr. App. 1898) 44 S. W. 177; Dill *v.* State, 35 Tex. Cr. 240, 33 S. W. 126, 60 Am. St. Rep. 37; Thompson *v.* State, 32 Tex. Cr. 265, 22 S. W. 979; Gonzales *v.* State, 12 Tex. App. 657 (charging burglary to have been committed in daytime and at night); Mathews *v.* State, 10 Tex. App. 279; Gonzales *v.* State, 5 Tex. App. 584.

Virginia.— Hausenfluck *v.* Com., 85 Va. 702, 8 S. E. 683.

West Virginia.— State *v.* Halida, 28 W. Va. 499.

Wisconsin.— State *v.* Leicham, 41 Wis. 565.

83. Engleman *v.* State, 2 Ind. 91, 52 Am. Dec. 494; State *v.* McPherson, 9 Iowa 53; State *v.* Harris, 106 N. C. 682, 11 S. E. 377; State *v.* Parish, 104 N. C. 679, 10 S. E. 459; State *v.* Morrison, 85 N. C. 561; State *v.* Reel, 80 N. C. 442.

84. Gantling *v.* State, 40 Fla. 237, 23 So. 857; Hughes *v.* State, (Tex. Cr. App. 1900) 60 S. W. 562; Dill *v.* State, 1 Tex. App. 278.

85. State *v.* Lanahan, 144 Mo. 31, 45 S. W. 1090.

86. U. S. *v.* Neverson, 1 Mackey (D. C.) 152; Joy *v.* State, 14 Ind. 139; Furst *v.* State, 31 Nebr. 403, 47 N. W. 1116; Lanergan *v.* People, 39 N. Y. 39, 6 Transcr. App. 84, 5 Abb. Pr. N. S. 113, 6 Park. Cr. 209 [*reversing* 50 Barb. 266, 34 How. Pr. 390]. See HOMICIDE, 21 Cyc. 843.

87. State *v.* Manluff, Houst. Cr. Cas. (Del.) 208.

88. People *v.* Dyer, 79 Mich. 480, 44 N. W. 937.

89. Candy *v.* State, 8 Nebr. 482, 1 N. W. 454.

90. Lawless *v.* State, 4 Lea (Tenn.) 173.

91. State *v.* Johnson, 50 N. C. 221, holding, however, that where there had been a recent change in the boundaries of certain counties and for the purpose of trial of capital felonies one county remained within the jurisdiction of the courts of the other, the objection was not fatal. But see State *v.* Smouse, 50 Iowa 43, holding that the charge of a distinct crime committed in a county outside the one in which the trial was had might be rejected as surplusage. See also McKenzie *v.* State, 32 Tex. Cr. 568, 25 S. W. 426, 40 Am. St. Rep. 795; Reg. *v.* Jones, 11 Cox C. C. 393, holding that when an indictment contains counts for offenses within the admiralty jurisdiction, and others for offenses on the high seas, the prosecution need not elect as to which set of counts they will proceed upon.

92. Robinson *v.* State, 34 Tex. Cr. 71, 29 S. W. 40, 53 Am. St. Rep. 701 (larceny); Shuman *v.* State, 34 Tex. Cr. 69, 29 S. W. 160.

Offenses which may be committed between the same parties but once may be charged in

regarded as charging a distinct and substantive offense, and any question as to its sufficiency is to be determined by its averments alone, the same holding is made.[93]

c. Charging Defendant as Principal and as Principal in the Second Degree or Accessary. At common law, under the rule that an accessary could not be tried without his consent until the conviction of the principal, it would seem that a joinder of counts charging defendant separately as principal and as accessary would be improper;[94] but under the statutes now generally prevalent, which have abolished the distinction between accessaries before the fact and principals with regard to the grade of the offense and the punishment, it is proper to charge defendant in separate counts both as principal and as an accessary before the fact,[95] or as principal in the first and in the second degree,[96] or, it has also been held, as accessary after the fact;[97] such an indictment being regarded as charging the same offense in different ways;[98] and for that reason the prosecution will not be compelled to elect upon which count it will proceed to trial;[99] nor is the indictment demurrable.[1] So also it is permissible, where defendants are tried jointly upon the same indictment, to charge them in separate counts alternative as principals and as accessaries before the fact;[2] or as principals in the second degree.[3] But when, by statute, the distinction is preserved between the principal and those

separate counts to have been committed at different times. Hausenfluck *v.* Com., 85 Va. 702, 8 S. E. 683, seduction. But see Cook *v.* People, 2 Thomps. & C. (N. Y.) 404, holding in seduction, where two distinct dates were alleged, the state, although it could not be compelled to elect, would not be allowed to prove the later act after proof of the first.

93. Griffin *v.* State, 18 Ohio St. 438, murder.

94. State *v.* Hamlin, 47 Conn. 95, 36 Am. Rep. 54.

95. *Arkansas.*— Gill *v.* State, 59 Ark. 422, 27 S. W. 598.

California.— People *v.* Shepardson, 48 Cal. 189; People *v.* Valencia, 43 Cal. 552; People *v.* Davidson, 5 Cal. 133.

Kentucky.— Angel *v.* Com., 18 S. W. 849, 14 Ky. L. Rep. 10.

Missouri.— State *v.* Rollins, 186 Mo. 501, 85 S. W. 516.

Vermont.— State *v.* Marsh, 70 Vt. 288, 40 Atl. 836.

Wisconsin.— See State *v.* Cameron, 2 Pinn. 490, 2 Chandl. 172.

United States.— U. S. *v.* Burns, 24 Fed. Cas. No. 14,691, 5 McLean 23, holding that it is not a misjoinder to add to counts charging the making of false coin a count for aiding and assisting in making such coins, and one for procuring them to be made, the crimes being embraced in the same section of the statute.

See 27 Cent. Dig. tit. "Indictment and Information," § 411.

96. Williams *v.* State, 69 Ga. 11; Puckell *v.* Com., 17 S. W. 335, 13 Ky. L. Rep. 466; State *v.* Cook, 20 La. Ann. 145; Rex *v.* Folkes, 1 Moody C. C. 354.

97. State *v.* Burbage, 51 S C. 284, 28 S. E. 937.

98. *Arkansas.*— Gill *v.* State, 59 Ark. 422, 27 S. W. 598; Corley *v.* State, 50 Ark. 305, 7 S. W. 255; Lay *v.* State, 42 Ark. 105.

Kentucky.— Sanderson *v.* Com., 12 S. W. 136, 11 Ky. L. Rep. 341.

Missouri.— State *v.* Testerman, 68 Mo. 408.

South Carolina.— State *v.* Norton, 28 S. C. 572, 6 S. E. 820.

Tennessee.— Mitchell *v.* State, 5 Coldw. 53.

See 27 Cent. Dig. tit. "Indictment and Information," §§ 411, 446.

99. *Arkansas.*— Gill *v.* State, 59 Ark. 422, 27 S. W. 598; Corley *v.* State, 50 Ark. 305, 7 S. W. 255.

Georgia.— Williams *v.* State, 69 Ga. 11; Stewart *v.* State, 58 Ga. 577.

Kentucky.— Puckett *v.* Com., 17 S. W. 335, 13 Ky. L. Rep. 466.

Louisiana.— State *v.* Ardoin, 49 La. Ann. 1145, 22 So. 620, 62 Am. St. Rep. 678; State *v.* Cook, 20 La. Ann. 145.

Missouri.— State *v.* Rollins, 186 Mo. 501, 85 S. W. 516; State *v.* Testerman, 68 Mo. 408; State *v.* Miller, 67 Mo. 604.

New Hampshire.— State *v.* Sawtelle, 66 N. H. 488, 32 Atl. 831.

Ohio.— Hotelling *v.* State, 3 Ohio Cir. Ct. 630, 2 Ohio Cir. Dec. 366.

South Carolina.— State *v.* Norton, 28 S. C. 572, 6 S. E. 820.

Texas.— Armstrong *v.* State, 28 Tex. App. 526, 13 S. W. 864.

See 27 Cent. Dig. tit. "Indictment and Information," § 446.

1. Gill *v.* State, 59 Ark. 422, 27 S. W. 598.

2. People *v.* Valencia, 43 Cal. 552; State *v.* Hamlin, 47 Conn. 95, 36 Am. Rep. 54; Howard *v.* Com., 96 Ky. 19, 27 S. W. 854, 16 Ky. L. Rep. 201 (sustaining an indictment charging defendants in the relation of principal and accessary to each other and as accessaries to a third person); Cupp *v.* Com., 87 Ky. 35, 7 S. W. 405, 9 Ky. L. Rep. 877; Thompson *v.* Com., 1 Metc. (Ky.) 13; Collins *v.* Com., 70 S. W. 187, 24 Ky. L. Rep. 884; Puckett *v.* Com., 17 S. W. 335, 13 Ky. L. Rep. 466. And see State *v.* Rollins, 186 Mo. 501, 85 S. W. 516.

3. Thompson *v.* Com., 1 Metc. (Ky.) 13; Angel *v.* Com., 18 S. W. 849, 14 Ky. L. Rep. 10.

who are accomplices to a crime, and they are regarded as guilty of separate offenses, the state may be compelled to elect as to which charge it will proceed, in case evidence would be admissible upon the count charging defendant as accomplice which would be inadmissible against him as principal.[4] So also under a statute making the burning or causing to be burned of a building punishable as arson, it has been held that the joinder of both charges in separate counts is improper.[5] A defendant cannot be charged as a principal and as accessary after the fact when the charges are for distinct degrees of an offense and require different proof.[6]

d. Different Descriptions of Third Persons. As a general rule the names of third persons affected by the criminal act or otherwise entering into its description may be stated differently to meet contingencies of the proof.[7] Thus it is proper to allege the name of a person murdered differently in separate counts.[8] Different ownerships may be laid to property stolen,[9] where the time and place are the same and the property such that it might have been taken at the same time.[10] The same rule applies in embezzlement[11] or arson,[12] or to the persons to whom false representations are made.[13] So also the possession of goods stolen may be variously laid.[14] In such case the state will not be compelled to elect as to the particular count upon which it will proceed to trial.[15] On a demurrer for the purpose of compelling an election, the state should make a showing that but one offense is intended to be charged.[16]

e. Necessity of Showing Relationship of Counts. It is proper that various counts charging the same transaction in different forms should be apparently for distinct offenses,[17] and for this purpose, and to obviate the technical objection of

4. Simms *v.* State, 10 Tex. App. 131.

5. Wendell *v.* State, 46 Nebr. 823, 65 N. W. 884.

6. Reg. *v.* Brannon, 14 Cox C. C. 394.

7. Knehn *v.* State, (Tex. Cr. App. 1902) 69 S. W. 526, holding that an indictment for bigamy might, in different counts, charge the name of the wife of defendant at the time of his bigamous marriage differently.

8. People *v.* Johnson, 2 Wheel. Cr. (N. Y.) 361; State *v.* Smith, 24 W. Va. 814.

9. *California.*— People *v.* Connor, 17 Cal. 354.

Florida.— Kennedy *v.* State, 31 Fla. 428, 12 So. 858, so holding under a statute providing that a misjoinder of offenses shall not vitiate the indictment unless misleading or embarrassing to the accused or exposing him to danger of a second prosecution for the same offense.

Indiana.— Cooper *v.* State, 79 Ind. 206.

Maryland.— State *v.* McNally, 55 Md. 559.

New York.— See Cox *v.* People, 19 Hun 430 [*affirmed* in 80 N. Y. 500].

Pennsylvania.— Com. *v.* Dobbins, 2 Pars. Eq. Cas. 380.

Tennessee.— Cash *v.* State, 10 Humphr. 111.

Texas.— Dawson *v.* State, (Cr. App. 1900) 55 S. W. 49; Pisano *v.* State, 34 Tex. Cr. 63, 29 S. W. 42.

See 27 Cent. Dig. tit. "Indictment and Information," § 407.

Owner may be described by name and as unknown. McLaughlin *v.* State, (Tex. Cr. App. 1896) 34 S. W. 280; Irving *v.* State, 8 Tex. App. 46.

10. Bell *v.* State, 42 Ind. 335.

11. Myers *v.* State, 4 Ohio Cir. Ct. 570, 2 Ohio Cir. Dec. 712.

12. People *v.* Fanshawe, 65 Hun (N. Y.) 77, 19 N. Y. Suppl. 865, 8 N. Y. Cr. 326 [*affirmed* in 137 N. Y. 68, 32 N. E. 1102].

13. Oliver *v.* State, 37 Ala. 134 (holding that in one count they may be alleged to have been made to a firm and in others to the individual members of the firm; State *v.* Franzreb, 11 Ohio Dec. (Reprint) 775, 29 Cinc. L. Bul. 129. And see Darby *v.* State, 41 Fla. 274, 26 So. 315 (holding that the name of the person intended to be defrauded by alteration of a county warrant might be variously stated); Clarke *v.* State, 32 Ind. 67; Casily *v.* State, 32 Ind. 62.

14. Shuman *v.* State, 34 Tex. Cr. 69, 29 S. W. 160.

15. State *v.* Nelson, 11 Nev. 334 (laying property subject of robbery in driver of stage-coach and in owner of coach); State *v.* Franzreb, 11 Ohio Dec. (Reprint) 775, 29 Cinc. L. Bul. 129 (holding that property of an association may be charged to have been obtained by false pretense from the association and from its treasurer); Smith *v.* State, 34 Tex. Cr. 123, 29 S. W. 774 (laying ownership of horse stolen in name of general and of special owner); Dowdy *v.* Com., 9 Gratt. (Va.) 727, 60 Am. Dec. 314 (ownership of stolen goods laid in different persons).

16. State *v.* Jourdan, 32 Ark. 203, ownership laid in various persons on indictment for larceny.

17. *Indiana.*— See Reed *v.* State, 147 Ind. 41, 46 N. E. 135; McCollough *v.* State, 132 Ind. 427, 31 N. E. 1116.

New Jersey.— Hunter *v.* State, 40 N. J. L. 495; Donnelly *v.* State, 26 N. J. L. 463.

New York.— Kane *v.* People, 8 Wend. 203.

duplicity, it is usual to insert the word "other" before the subject of the offense in a second count,[18] but it is not indispensably necessary,[19] particularly where defects of form are by statute made immaterial;[20] and it is held that where the counts do not necessarily appear to be for the same offense, they will not be construed to be so in the absence of any necessity therefor.[21] Where, however, statutes require the indictment to state but one offense, but permit the same offense to be stated in different forms in separate counts, it should be apparent from the face of the indictment that the averments of the separate counts are descriptive of the same transaction;[22] and it has been held that an indictment apparently charging distinct offenses is demurrable.[23] For this purpose it is usually necessary to employ "said," "aforesaid," or similar relatives to connect the identifying facts of the succeeding counts with those first stated;[24] but the use of such connectives is not in all cases necessary where it is evident from the general structure of the indictment that the same offense is intended.[25]

3. CHARGING SAME TRANSACTION AS DIFFERENT OFFENSES — a. In General. Separate counts of an indictment may charge the same transaction as constituting different offenses,[26] and if the counts in fact relate to the same transaction the indict-

Virginia.— Smith *v.* Com., 21 Gratt. 809; Lazier *v.* Com., 10 Gratt. 708.

Wisconsin.— Newman *v.* State, 14 Wis. 393.

England.— Campbell *v.* Reg., 11 Q. B. 799, 2 Cox C. C. 463, 12 Jur. 117, 17 L. J. M. C. 89, 2 New Sess. Cas. 297, 63 E. C. L. 799.

See 27 Cent. Dig. tit. "Indictment and Information," § 240.

Where there is nothing to indicate that the offense charged in separate counts is different and the same evidence is admissible, an election may be required or a demurrer sustained. State *v.* Van Haltschuherr, 72 Iowa 541, 34 N. W. 323.

18. Lazier *v.* Com., 10 Gratt. (Va.) 708.

19. State *v.* Rust, 35 N. H. 438; State *v.* Brady, 16 R. I. 51, 12 Atl. 238; State *v.* Doyle, 15 R. I. 527, 9 Atl. 900; Lazier *v.* Com., 10 Gratt. (Va.) 708; Newman *v.* State, 14 Wis. 393.

20. State *v.* Brady, 16 R. I. 51, 12 Atl. 238. And see State *v.* Rust, 35 N. H. 438.

21. Bushman *v.* Com., 138 Mass. 507; Newman *v.* State, 14 Wis. 393. And see Campbell *v.* Reg., 11 Q. B. 799, 2 Cox C. C. 463, 12 Jur. 117, 17 L. J. M. C. 89, 2 New Sess. Cas. 297, 63 E. C. L. 799.

22. People *v.* Garcia, 58 Cal. 102.

Under the Massachusetts statute, where counts appear to be for different offenses, an averment that the different counts are different descriptions of the same act is required (St. (1861) § 181); but the statute does not make such averment necessary in the case merely of slight verbal changes in description of the property stolen or injured, provided the substantial identity is not affected (Com. *v.* Allen, 128 Mass. 46, 35 Am. Rep. 356); nor does the statute restrict the right of the pleader to set out the same offense by different descriptions in several counts (Com. *v.* Rogers, 181 Mass. 184, 63 N. E. 421; Com. *v.* Thompson, 159 Mass. 56, 33 N. E. 1111; Com. *v.* Jacobs, 152 Mass. 276, 25 N. E. 463; Com. *v.* Ismahl, 134 Mass. 201; Com. *v.* Andrews, 132 Mass. 263; Com. *v.* Adams, 127 Mass. 15; Com. *v.* Cain, 102 Mass. 487; Com. *v.* O'Connell, 12 Allen (Mass.) 451; Com. *v.* Gillon, 2 Allen (Mass.) 505).

23. State *v.* Rhea, 38 Ark. 555; Territory *v.* Poulier, 8 Mont. 146, 19 Pac. 594.

24. People *v.* Thompson, 28 Cal. 214; State *v.* Malim, 14 Nev. 288 [*distinguishing* People *v.* Shotwell, 27 Cal. 394], holding, however, that identity of time, place, names of persons, and description of property was *prima facie* evidence that the counts referred to the same offense.

25. State *v.* Malim, 14 Nev. 288; State *v.* Chapman, 6 Nev. 320. And see State *v.* Rapley, 60 Ark. 13, 28 S. W. 508; Dunn *v.* State, 58 Nebr. 807, 79 N. W. 719.

26. *Alabama.*— Crittenden *v.* State, 134 Ala. 145, 32 So. 273.

Arkansas.— Baker *v.* State, 4 Ark. 56.

Iowa.— State *v.* Trusty, 122 Iowa 82, 97 N. W. 989, carnal knowledge of child under age of consent and of idiot.

Louisiana.— State *v.* Scott, 48 La. Ann. 293, 19 So. 141, entering a dwelling with intent to kill and the stabbing of a person therein.

Michigan.— People *v.* Sweeney, 55 Mich. 586, 22 N. W. 50.

Nebraska.— Blodgett *v.* State, 50 Nebr. 121, 69 N. W. 751, malpractice against an attorney and contempt proceedings.

New Hampshire.— State *v.* Lincoln, 49 N. H. 464.

Pennsylvania.— Com. *v.* Carson, 166 Pa. St. 179, 30 Atl. 985; Com. *v.* Schoen, 25 Pa. Super. Ct. 211.

South Carolina.— State *v.* Scott, 15 S. C. 434.

Texas.— Flynn *v.* State, (Cr. App. 1904) 83 S. W. 206 (theft from the person and theft of property over the value of fifty dollars); Bratt *v.* State, (Cr. App. 1897) 41 S. W. 624 (theft of cattle, receiving stolen cattle, and altering the brand on stolen cattle); Mathews *v.* State, 10 Tex. App. 279 (robbery and theft).

Vermont.— State *v.* Ward, 61 Vt. 153, 17

ment will not be quashed,[27] nor will an election be compelled;[28] although in case

Atl. 483, burning a shed and barns and same act with intent to burn dwelling.

England.— Reg. *v.* Trueman, 8 C. & P. 727, 34 E. C. L. 986 (arson of houses of different owners); Rex *v.* Thomas' Case, 2 East P. C. 934.

Rape and incest cannot be charged together as a compound offense under a statute requiring the indictment to state but a single offense except when in the same transaction more than one offense has been committed (State *v.* Thomas, 53 Iowa 214, 4 N. W. 908; Wiggins *v.* State, (Tex. Cr. App. 1905) 84 S. W. 821), but otherwise the joinder is permissible (Porath *v.* State, 90 Wis. 527, 63 N. W. 1061, 48 Am. St. Rep. 954).

Rape and carnal knowledge of female under age of consent may be joined.

Alabama.— Grimes *v.* State, 105 Ala. 86, 17 So. 184; Beason *v.* State, 72 Ala. 191.

Colorado.— Bigcraft *v.* People, 30 Colo. 298, 70 Pac. 417.

Missouri.— State *v.* Houx, 109 Mo. 654, 19 S. W. 35, 32 Am. St. Rep. 686.

Tennessee.— Wright *v.* State, 4 Humphr. 194. *Contra*, State *v.* Cherry, 1 Swan 160, under a statute making the punishments and offenses entirely distinct.

Wisconsin.— Jackson *v.* State, 91 Wis. 253, 64 N. W. 838.

Under the New York code of criminal procedure it is provided that where acts complained of constitute different crimes, such crimes may be charged in separate counts in one indictment. See People *v.* Kelley, 3 N. Y. Cr. 272. This provision does not change the common-law rules as to the joinder of counts, save where its language clearly so requires (People *v.* Wilson, 151 N. Y. 403, 45 N. E. 862; People *v.* Adler, 140 N. Y. 331, 35 N. E. 644; People *v.* Palmer, 109 N. Y. 110, 16 N. E. 529, 4 Am. St. Rep. 423); hence the common-law rule permitting burglary, larceny, and receiving stolen goods to be joined still obtains (People *v.* Wilson, *supra* [*overruling* People *v.* Kerns, 7 N. Y. App. Div. 535, 40 N. Y. Suppl. 243]). The crimes may be of different grades and call for different punishment. Hawker *v.* People, 75 N. Y. 487; People *v.* Trainor, 57 N. Y. App. Div. 422, 68 N. Y. Suppl. 263, 15 N. Y. Cr. 333 (holding that the offense of keeping a room for the purpose of gambling and that of allowing a room to be used for gambling purposes might be joined, although the first was a misdemeanor and the second a felony); People *v.* Emerson, 53 Hun 437, 6 N. Y. Suppl. 274. As charging the same act as different offenses, an indictment may charge conspiracy and coercion under different sections of the code (People *v.* Lenhart, 4 N. Y. Cr. 317); or murder by means unknown and in attempted rape (People *v.* Wright, 136 N. Y. 625, 32 N. E. 629); or conspiracy to commit murder and the consummated murder (People *v.* Thorn, 21 Misc. 130, 47 N. Y. Suppl. 46, 12 N. Y. Cr. 236); or perjury in oral testimony in a certain proceeding and in an affidavit in the same proceeding (Harris *v.* People, 6 Thomps. & C. 206); or grand larceny in different manners and by different means (People *v.* Rice, 13 N. Y. Suppl. 161); as by means of false pretenses and by drawing money by means of a draft to which defendant knew he was not entitled (People *v.* Dimick, 107 N. Y. 13, 14 N. E. 178 [*affirming* 41 Hun 616]); or larceny and robbery (People *v.* Rose, 52 Hun 33, 42 N. Y. Suppl. 787; People *v.* Callahan, 29 Hun 580); or burglary in the first degree and robbery from the person (Taylor *v.* People, 12 Hun 212); or seduction under promise of marriage and enticing for purposes of prostitution (People *v.* Crotty, 9 N. Y. Suppl. 937); or having played dice for money and for liquor at the same time and place (People *v.* O'Malley, 52 N. Y. App. Div. 46, 64 N. Y. Suppl. 843, 15 N. Y. Cr. 52); or selling liquor and offering and exposing it for sale on Sunday (People *v.* Haren, 35 Misc. 590, 72 N. Y. Suppl. 205). But it is improper to charge illegal sales of intoxicating liquors to different persons, at different times, although at the same place. People *v.* Harmon, 49 Hun 558, 2 N. Y. Suppl. 421, 6 N. Y. Cr. 169; People *v.* O'Connell, 46 Hun 358, 10 N. Y. Suppl. 250, 7 N. Y. Cr. 345. Under the statute abolishing the forms of criminal pleadings, the indictment may still charge the same crime in different forms in several counts. People *v.* Rugg, 98 N. Y. 537; People *v.* Menken, 36 Hun 90.

27. State *v.* Lincoln, 49 N. H. 464.

28. *Alabama.*— Howard *v.* State, 108 Ala. 571, 18 So. 813; Tanner *v.* State, 92 Ala. 1, 9 So. 613; Wooster *v.* State, 55 Ala. 217.

Georgia.— Hathcock *v.* State, 88 Ga. 91, 13 S. E. 959.

Illinois.— Andrews *v.* People, 117 Ill. 195, 7 N. W. 265.

Indiana.— Knox *v.* State, 164 Ind. 226, 73 N. E. 255; Griffith *v.* State, 36 Ind. 406; McGregor *v.* State, 16 Ind. 9.

Maryland.— State *v.* Bell, 27 Md. 675, 92 Am. Dec. 658.

Massachusetts.— Com. *v.* Ismahl, 134 Mass. 201.

Michigan.— People *v.* McDowell, 63 Mich. 229, 30 N. W. 68; People *v.* Sweeney, 55 Mich. 586, 22 N. W. 50; Van Sickle *v.* People, 29 Mich. 61; People *v.* McKinney, 10 Mich. 54.

New Hampshire.— State *v.* Lincoln, 49 N. H. 464.

Pennsylvania.— Com. *v.* Fry, 5 Lanc. L. Rev. 75.

Tennessee.— Foute *v.* State, 15 Lea 712, false pretense and passing false paper.

Texas.— Thompson *v.* State, 33 Tex. Cr. 472, 26 S. W. 987 (rape and carnal knowledge of woman mentally diseased); Masterson *v.* State, 20 Tex. App. 574 (theft and theft from person); Waddell *v.* State, 1 Tex. App. 720.

Utah.— State *v.* Spencer, 15 Utah 149, 49 Pac. 302.

Wisconsin.— Jackson *v.* State, 91 Wis. 253,

it develops at any time during the trial that the prosecution is in fact establishing different transactions, the court may at any time compel an election or quash the indictment.[29] Under this rule a count for stealing and a count for receiving stolen goods may be joined when they relate to the same goods,[30] such joinder being in some states specially sanctioned by statute,[31] or burglary and larceny may be joined;[32] but where an indictment charges counterfeiting and uttering it has been held that an election should be compelled.[33] So also an offense included in another[34] or incidental thereto[35] may be charged in conjunction with it. The same act may be alleged to have been actuated by different intents.[36] So in an indictment for burglary it may be charged that the breaking and entering was with intent to commit distinct felonies, such as larceny and murder.[37] When the procedure prescribed by statute concerning a particular offense shows that the prosecution is to be single, a joinder of other offenses is improper.[38] When it is

64 N. W. 838; Porath *v.* State, 90 Wis. 527, 63 N. W. 1061, 48 Am. St. Rep. 954.

England.— Reg. *v.* Davis, 3 F. & F. 19.

See 27 Cent. Dig. tit. "Indictment and Information," § 444.

Federal courts.— This common-law rule is substantially embodied in the statutes of the United States. Davis *v.* U. S., 18 App. Cas. (D. C.) 468; Ingraham *v.* U. S., 155 U. S. 434, 15 S. Ct. 148, 39 L. ed. 213; Pointer *v.* U. S., 151 U. S. 396, 14 S. Ct. 410, 38 L. ed. 208 (holding that an election would not be compelled where defendant was charged with two murders alleged to have been committed on the same day and at the same place); Terry *v.* U. S., 120 Fed. 483, 56 C. C. A. 633; *Ex p.* Peters, 12 Fed. 461, 2 McCrary 403.

29. State *v.* Lincoln, 49 N. H. 464.

30. *Alabama.*— Orr *v.* State, 107 Ala. 35, 18 So. 142.

Georgia.— Johnson *v.* State, 61 Ga. 212; State *v.* Hogan, R. M. Charlt. 474.

Illinois.— Andrews *v.* People, 117 Ill. 195, 7 N. E. 265; Bennett *v.* People, 96 Ill. 602.

Indiana.— Goodman *v.* State, 141 Ind. 35, 39 N. E. 939; Kennegar *v.* State, 120 Ind. 176, 21 N. E. 917; Gandolpho *v.* State, 33 Ind. 439; Maynard *v.* State, 14 Ind. 427; Keefer *v.* State, 4 Ind. 246; Redman *v.* State, 1 Blackf. 429.

Kansas.— State *v.* Blakesley, 43 Kan. 250, 23 Pac. 570.

Louisiana.— State *v.* Laque, 37 La. Ann. 853; State *v.* Moultrie, 33 La. Ann. 1146; State *v.* McLane, 4 La. Ann. 435; State *v.* Crosby, 4 La. Ann. 434.

Maine.— State *v.* Stimpson, 45 Me. 608.

Missouri.— State *v.* Richmond, 186 Mo. 71, 84 S. W. 880; State *v.* Sutton, 64 Mo. 107; State *v.* Daubert, 42 Mo. 242; State *v.* Gray, 37 Mo. 463.

New York.— People *v.* Baker, 3 Hill 159.

North Carolina.— State *v.* Baker, 70 N. C. 530; State *v.* Speight, 69 N. C. 72. See also State *v.* Bailey, 73 N. C. 70; State *v.* Brite, 73 N. C. 26.

South Carolina.— State *v.* Posey, 7 Rich. 484; State *v.* Boise, 1 McMull. 189.

Tennessee.— Ayrs *v.* State, 5 Coldw. 26; Hampton *v.* State, 8 Humphr. 69, 47 Am. Dec. 599.

Texas.— Bynum *v.* State, (Cr. App. 1903) 72 S. W. 844; Houston *v.* State, (Cr. App. 1898) 47 S. W. 48; Sisk *v.* State, (Cr. App. 1897) 42 S. W. 985; Womack *v.* State, (Cr. App. 1894) 25 S. W. 772.

Virginia.— Dowdy *v.* Com., 9 Gratt. 727, 60 Am. Dec. 314.

United States.— U. S. *v.* Prior, 27 Fed. Cas. No. 16,092, 5 Cranch C. C. 37.

England.— Reg. *v.* Beeton, 2 C. & K. 960, 3 Cox C. C. 451, 1 Den. C. C. 414, T. & M. 87, 13 Jur. 394, 18 L. J. M. C. 117, 4 New Sess. Cas. 60, 61 E. C. L. 960.

See 27 Cent. Dig. tit. "Indictment and Information," § 416.

31. *Kentucky.*— Upton *v.* Com., 19 S. W. 744, 14 Ky. L. Rep. 165; Sanderson *v.* Com., 12 S. W. 136, 11 Ky. L. Rep. 341.

Missouri.— State *v.* Sutton, 64 Mo. 107.

North Carolina.— State *v.* Jones, 82 N. C. 685; State *v.* Lawrence, 81 N. C. 522.

Ohio.— Whiting *v.* State, 48 Ohio St. 220, 27 N. E. 96, holding an express averment that the property was the same unnecessary

Pennsylvania.— Com. *v.* Stahl, 1 Pa. Super. Ct. 496, 38 Wkly. Notes Cas. 339.

See 27 Cent. Dig. tit. "Indictment and Information," § 416.

32. See BURGLARY, 6 Cyc. 224.

33. Burges *v.* State, 81 Miss. 482, 33 So. 449. See also Quin's Case, 6 City Hall Rec. (N. Y.) 63.

34. Com. *v.* Shutte, 130 Pa. St. 272, 18 Atl. 635, 17 Am. St. Rep. 773, larceny as bailee and robbery.

35. Com. *v.* Lewis, 140 Pa. St. 561, 21 Atl. 501 (assault and battery, assault with intent to ravish, and statutory rape and bastardy); Com. *v.* Burk, 2 Pa. Co. Ct. 12 (bastardy and adultery).

36. Carleton *v.* State, 100 Ala. 130, 14 So. 472 (assault with intent to rob, and assault with intent to murder); Green *v.* State, 17 Fla. 669 (assaults with intent to commit distinct felonies); Candy *v.* State, 8 Nebr. 482, 1 N. W. 454 (shooting with intent to kill and with intent to wound); Nelson *v.* People, 23 N. Y. 293 (assault with intent to injure, maim, or kill).

Charging burglary and intended felony see BURGLARY, 6 Cyc. 222.

37. State *v.* Conway, 35 La. Ann. 350 [*citing* State *v.* Johnson, 34 La. Ann. 48; State *v.* Depass, 31 La. Ann. 487]. See BURGLARY, 6 Cyc. 224.

38. Com. *v.* Cronin, 16 Phila. (Pa.) 500.

provided by statute that specific offenses may be charged together it is of course unnecessary that the state elect when the offenses relate to the same transaction.[39]

b. Different Degrees of Same Offense. Where the different counts relate to the same transaction, the offense may be charged to have been committed in different ways for the purpose of meeting the evidence that may be adduced,[40] although the offenses are of different grades and call for different punishments.[41] So the different degrees of assault, as defined by statute, may be united in separate counts, provided they are charged to have been the result of the same act.[42] The fact that by statute homicide has been divided into degrees does not prevent the joinder in the same indictment of the common-law counts for murder.[43] At common law an objection to an indictment upon the ground of a misjoinder of charges of distinct degrees of the same offense cannot be made by demurrer or motion in arrest of judgment, but may be raised only by a motion to quash or to compel an election.[44]

c. Completed Offense and Attempt. A completed offense and an assault with intent to commit such offense may be charged in separate counts when relating to one transaction,[45] and an election cannot be compelled.[46]

d. Conspiracy and Overt Act. A conspiracy and an overt act committed in pursuance of such conspiracy may as a general rule be joined,[47] especially where both are misdemeanors.[48]

39. State *v.* Turner, 63 Mo. 436 (burglary and larceny); State *v.* Morrison, 85 N. C. 561; Whiting *v.* State, 48 Ohio St. 220, 27 N. E. 96.

40. Hawker *v.* People, 75 N. Y. 487.

41. *Alabama.*— Henry *v.* State, 33 Ala. 389, murder and manslaughter.

Colorado.— Kelly *v.* People, 17 Colo. 130, 29 Pac. 805, murder and manslaughter.

Massachusetts.— Com. *v.* McLaughlin, 12 Cush. 615, holding that a count for common assault may be joined with a count for a felonious assault.

Michigan.— People *v.* McDowell, 63 Mich. 229, 30 N. W. 68 (murder and manslaughter); People *v.* Sweeney, 55 Mich. 586, 22 N. W. 50.

Nebraska.— Baldwin *v.* State, 12 Nebr. 61, 10 N. W. 463.

New York.— People *v.* McCarthy, 110 N. Y. 309, 18 N. E. 128 (manslaughter in the first degree and in the second degree); Hawker *v.* People, 75 N. Y. 487; People *v.* Satterlee, 5 Hun 167 (rape and assault with intent to rape).

United States.— U. S. *v.* Dickinson, 25 Fed. Cas. No. 14,958, 2 McLean 325.

See 27 Cent. Dig. tit. "Indictment and Information," § 408.

Statutes providing for conviction of a less degree upon indictment for an offense of different degrees, where the jury find defendant not guilty of the offense charged but guilty of an inferior degree, confer the right to charge different degrees of the same offense in the same indictment. People *v.* Adams, 72 N. Y. App. Div. 166, 76 N. Y. Suppl. 361; Brantley *v.* State, 13 Sm. & M. (Miss.) 468 (assault and battery with intent to murder, and assault and battery).

42. State *v.* Bradley, 34 Tex. 95.

43. Cox *v.* People, 19 Hun (N. Y.) 430 [*affirmed* in 80 N. Y. 500]. See HOMICIDE, 21 Cyc. 654.

44. Brantley *v.* State, 13 Sm. & M. (Miss.) 468.

45. People *v.* Satterlee, 5 Hun (N. Y.) 167.

Rape and assault with intent to rape.

California.— People *v.* Tyler, 35 Cal. 553.

Georgia.— Stephen *v.* State, 11 Ga. 225.

Maryland.— State *v.* Sutton, 4 Gill 494; Burk *v.* State, 2 Harr. & J. 426.

Nebraska.— Garrison *v.* People, 6 Nebr. 274.

New Jersey.— Cook *v.* State, 24 N. J. L. 843.

New York.— People *v.* Satterlee, 5 Hun 167.

Pennsylvania.— Harman *v.* Com., 12 Serg. & R. 69.

Robbery and assault with intent to rob.— McGregg *v.* State, 4 Blackf. (Ind.) 101. *Contra*, Rex *v.* Gough, 1 M. & Rob. 71.

46. Stephen *v.* State, 11 Ga. 225; Garrison *v.* People, 6 Nebr. 274.

47. *Iowa.*— State *v.* Potts, 78 Iowa 656, 43 N. W. 534, 5 L. R. A. 814. *Compare* State *v.* Kennedy, 63 Iowa 197, 18 N. W. 885, holding that an indictment was bad which charged a conspiracy to commit a crime and also the commission of the crime.

Michigan.— People *v.* Summers, 115 Mich. 537, 73 N. W. 818.

Texas.— Dill *v.* State, 35 Tex. Cr. 240, 33 S. W. 126, 60 Am. St. Rep. 37, holding that under Code Cr. Proc. art. 433, providing that an indictment may contain several counts charging the same "offense," a count for burglary and conspiracy to commit the burglary may be joined.

Virginia.— Anthony *v.* Com., 88 Va. 847, 14 S. E. 834.

United States.— *Ex p.* Joyce, 13 Fed. Cas. No. 7,556.

See 27 Cent. Dig. tit. "Indictment and Information," § 410; and CONSPIRACY, 8 Cyc. 660.

48. Thomas *v.* People, 113 Ill. 531.

4. Charging Common-Law and Statutory Offense. Where offenses are of the same character and spring from the same transaction they may be joined, although one is a common-law and the other a statutory offense.[49]

5. Offenses For Which Punishment Is Different. At common law there can in general be no joinder of counts upon which the legal judgment or punishment is materially different;[50] and in case of such a joinder the indictment is demurrable,[51] or a judgment thereon will be arrested,[52] at least unless the verdict specifies the offense of which defendant is convicted;[53] or but one count is sufficient to charge an offense, in which case the verdict may be referred to the good counts.[54]

6. Distinct Offenses — a. Felonies. While at common law there can be no joinder of separate and distinct felonies in the same indictment,[55] such a joinder does not render the indictment bad as a matter of law,[56] or furnish a ground for demurrer,[57] arrest of judgment,[58] or writ of error.[59] The rule now generally accepted is that, subject in most instances to the discretion of the trial court to compel an election, separate felonies of the same general nature may be charged in separate counts of the same indictment[60] in case they are triable in the same

49. *Alabama.*— Wooster *v.* State, 55 Ala. 217, common-law offense of keeping a bawdy-house and statutory offense of being a common prostitute or keeping a house of prostitution.

Michigan.— People *v.* Sweeney, 55 Mich. 586, 22 N. W. 50.

North Carolina.— State *v.* Lawrence, 81 N. C. 522.

Pennsylvania.— Hollister *v.* Com., 60 Pa. St. 103; Com. *v.* Sylvester, Brightly 331, 4 Pa. L. J. Rep. 31, 6 Pa. L. J. 283, the court may impose a separate punishment for each.

South Carolina.— State *v.* Posey, 7 Rich. 484 (two counts for receiving stolen goods, one under the statute and the other at common law); State *v.* Thompson, 2 Strobh. 12, 47 Am. Dec. 588; State *v.* Williams, 2 McCord 301.

Compare Marler *v.* Com., 24 S. W. 608, 15 Ky. L. Rep. 557.

50. State *v.* Montague, 2 McCord (S. C.) 257; U. S. *v.* Scott, 27 Fed. Cas. No. 16,241, 4 Biss. 29, holding that counts charging a conspiracy between the prisoner and other persons, and a count charging a murder committed by him alone, could not be joined.

Joinder of felony and misdemeanor see *infra*, VII, B, 6, c.

51. Adams *v.* State, 55 Ala. 143.

52. James *v.* State, 104 Ala. 20, 16 So. 94.

53. James *v.* State, 104 Ala. 20, 16 So. 94.

54. James *v.* State, 104 Ala. 20, 16 So. 94. See *infra*, XIV, C; and Criminal Law, 12 Cyc. 694.

55. U. S. *v.* Nye, 4 Fed. 888 [*citing* U. S. *v.* O'Callahan, 27 Fed. Cas. No. 15,910, 6 McLean 596].

56. *Maryland.*— See State *v.* Blakeney, 96 Md. 711, 54 Atl. 614; State *v.* McNally, 55 Md. 559.

Mississippi.— Strawhern *v.* State, 37 Miss. 422.

Utah.— U. S. *v.* West, 7 Utah 437, 27 Pac. 84.

United States.— Pointer *v.* U. S., 151 U. S. 396, 14 S. Ct. 410, 38 L. ed. 208.

England.— Reg. *v.* Heywood, 9 Cox C. C. 479, L. & C. 451, 33 L. J. M. C. 133, 10 L. T. Rep. N. S. 464, 12 Wkly. Rep. 764.

57. Miller *v.* State, 45 Ala. 24; Com. *v.* Gouger, 21 Pa. Super. Ct. 217; Dalton *v.* State, 4 Tex. App. 333; State *v.* Shores, 31 W. Va. 491, 7 S. E. 413, 13 Am. St. Rep. 875.

58. *Maine.*— State *v.* Nelson, 29 Me. 329.

Mississippi.— Teat *v.* State, 53 Miss. 439, 24 Am. Rep. 708.

North Carolina.— State *v.* King, 84 N. C. 737; State *v.* Reel, 80 N. C. 442.

Texas.— Dalton *v.* State, 4 Tex. App. 333.

United States.— Pointer *v.* U. S., 151 U. S. 396, 14 S. Ct. 410, 38 L. ed. 208.

England.— Rex *v.* Ferguson, 6 Cox C. C. 454, Dears. C. C. 427, 1 Jur. N. S. 73, 24 L. J. M. C. 61, 3 Wkly. Rep. 178; Young *v.* Rex, 2 East P. C. 833, 2 Leach C. C. 568, 3 T. R. 98, 1 Rev. Rep. 660. And see Rex *v.* Towle, 2 Marsh. 466.

59. Com. *v.* Shoener, 25 Pa. Super. Ct. 526; Dalton *v.* State, 4 Tex. App. 333.

60. *Alabama.*— Nevill *v.* State, 133 Ala. 99, 32 So. 596; Washington *v.* State, 68 Ala. 85 (holding that there is no misjoinder in an indictment which charges defendant in one count, with burning a "cotton house containing cotton," and in another charges the burning of a cotton-house, since both were arson in the second degree); Quinn *v.* State, 49 Ala. 353; Cawley *v.* State, 37 Ala. 152; Johnson *v.* State, 29 Ala. 62, 65 Am. Dec. 383; State *v.* Hinton, 6 Ala. 864.

Arkansas.— Baker *v.* State, 4 Ark. 56.

Georgia.— Lascelles *v.* State, 90 Ga. 347, 16 S. E. 945, 35 Am. St. Rep. 216; Williams *v.* State, 72 Ga. 180, assault with intent to kill and pointing a pistol at another.

Illinois.— Looney *v.* People, 81 Ill. App. 370.

Indiana.— Merrick *v.* State, 63 Ind. 327; Weinzorpflin *v.* State, 7 Blackf. 186.

Kansas.— State *v.* Emmons, 45 Kan. 397, 26 Pac. 679; State *v.* Hodges, 45 Kan. 389, 26 Pac. 676.

Louisiana.— State *v.* Jones, 52 La. Ann. 211, 26 So. 782; State *v.* Thompson, 51 La. Ann. 1089, 25 So. 954; State *v.* Wren, 48

manner and punishable similarly.[61] If of the same nature a joinder is permitted, although the offenses differ in degree.[62] It is proper to join offenses which are established by the same evidence,[63] or which grow out of the same transaction.[64] For example, counts for larceny and embezzlement,[65] or larceny and false pre-

La. Ann. 803, 19 So. 745 (larceny of hogs and alteration of the marks of other hogs with intent to steal the same); State *v.* Prince, 42 La. Ann. 817, 8 So. 591; State *v.* Green, 37 La. Ann. 382; State *v.* Gilkie, 35 La. Ann. 53; State *v.* Sheppard, 33 La. Ann. 1216 (severing of certain property from the soil of the owner, and the stealing of the same); State *v.* Depass, 31 La. Ann. 487; State *v.* Crosby, 4 La. Ann. 434.

Maine.— State *v.* Frazier, 79 Me. 95, 8 Atl. 347; State *v.* Nelson, 29 Me. 329.

Massachusetts.— Com. *v.* Brown, 121 Mass. 69; Com. *v.* Costello, 120 Mass. 358.

Missouri.— Frasier *v.* State, 5 Mo. 536; State *v.* Nitch, 79 Mo. App. 99, statutory offenses of destroying buildings and of cutting timber from lands of another.

Nebraska.— Martin *v.* State, 30 Nebr. 507, 46 N. W. 621.

New York.— People *v.* Baker, 3 Hill 159.

Ohio.— Bailey *v.* State, 4 Ohio St. 440.

Pennsylvania.— Com. *v.* Wilkes Barre, 1 Kulp 487.

South Carolina.— State *v.* Bouknight, 55 S. C. 353, 33 S. E. 451, 74 Am. St. Rep. 751.

Tennessee.— Tucker *v.* State, 8 Lea 633 (abduction for concubinage and for prostitution); Mitchell *v.* State, 5 Coldw. 53; Ayrs *v.* State, 5 Coldw. 26; Cash *v.* State, 10 Humphr. 111 (although the felonies were committed at different times); Hampton *v.* State, 8 Humphr. 69, 47 Am. Dec. 599.

Texas.— McLeod *v.* State, (Cr. App. 1903) 75 S. W. 522 (indictment assigning various statements as perjury); Owens *v.* State, 35 Tex. Cr. 345, 33 S. W. 875 (rape and incest); Welhousen *v.* State, 30 Tex. App. 623, 18 S. W. 300; Mason *v.* State, 29 Tex. App. 24, 14 S. W. 71 (kidnapping and abducting female for prostitution); Reagan *v.* State, 28 Tex. App. 227, 12 S. W. 601, 19 Am. St. Rep. 833 (attempt to rape and assault with intent to rape); Irving *v.* State, 8 Tex. App. 46; Barnwell *v.* State, 1 Tex. App. 745.

Wisconsin.— Jackson *v.* State, 91 Wis. 253, 64 N. W. 838; Martin *v.* State, 79 Wis. 165, 48 N. W. 119.

United States.— Gardes *v.* U. S., 87 Fed. 172, 30 C. C. A. 596; U. S. *v.* O'Callahan, 27 Fed. Cas. No. 15,910, 6 McLean 596; U. S. *v.* Peterson, 27 Fed. Cas. No. 16,037, 1 Woodb. & M. 305.

See 27 Cent. Dig. tit. "Indictment and Information," § 419 *et seq.*

Different phases of the same statutory offense may be charged in separate counts. State *v.* Abrahams, 6 Iowa 117, 71 Am. Dec. 399; State *v.* Edmunds, 49 La. Ann. 271, 21 So. 266.

61. *Alabama.*— Lowe *v.* State, 134 Ala. 154, 32 So. 273.

Arkansas.— Baker *v.* State, 4 Ark. 56, maiming and shooting with intent to kill.

Louisiana.— State *v.* Stelly, 48 La. Ann. 1478, 21 So. 89.

Missouri.— State *v.* Porter, 26 Mo. 201.

South Carolina.— State *v.* Tidwell, 5 Strobh. 1, counts under two different sections of a statute, one for abduction and the other for abduction and marriage.

Tennessee.— Tucker *v.* State, 8 Lea 633.

Virginia.— Lazier *v.* Com., 10 Gratt. 708.

See 27 Cent. Dig. tit. "Indictment and Information," § 420.

62. *Alabama.*— Henry *v.* State, 33 Ala. 389, murder and manslaughter.

Georgia.— Williams *v.* State, 72 Ga. 180.

Maine.— State *v.* Hood, 51 Me. 363.

Ohio.— Barton *v.* State, 18 Ohio 221.

Tennessee.— Foute *v.* State, 15 Lea 712 (obtaining money by false pretense and passing forged paper); Lawless *v.* State, 4 Lea 173 (murder in the first degree, assault with intent to commit murder in the second degree, and assault with intent to commit manslaughter).

Texas.— Waddell *v.* State, 1 Tex. App. 720.

Canada.— Theal *v.* Reg., 7 Can. Sup. Ct. 397, murder and manslaughter.

See 27 Cent. Dig. tit. "Indictment and Information," § 408.

63. State *v.* Bailey, 50 Ohio St. 636, 36 N. E. 233, embezzlement of goods received as agent and embezzlement of money produced from their sale.

64. *Louisiana.*— State *v.* Cook, 42 La. Ann. 85, 7 So. 64; State *v.* McDonald, 39 La. Ann. 959, 3 So. 92 ("assault with an intent to commit murder," and "inflicting a wound less than mayhem"); State *v.* Pierre, 38 La. Ann. 91 (putting out of an eye with a club, and assault with intent to commit murder with a club).

North Carolina — State *v.* March, 46 N. C. 526.

South Carolina.— State *v.* Woodard, 38 S. C. 353, 17 S. E. 135.

United States.— U. S. *v.* Wentworth, 11 Fed. 52.

England.— Rex *v.* Young, Peake Add. Cas. 228.

65. *Alabama.*— Mayo *v.* State, 30 Ala. 32.

Illinois.— Murphy *v.* People, 104 Ill. 528, holding the indictment to charge the same felony in different form.

Missouri.— State *v.* Porter, 26 Mo. 201, under a statute particularly authorizing such a joinder.

New Jersey.— Stephens *v.* State, 53 N. J. L. 245, 21 Atl. 1038.

New York.— Coats *v.* People, 4 Park. Cr. 662.

United States.— U. S. *v.* Jones, 69 Fed. 973.

Contra.— People *v.* De Coursey, 61 Cal. 134, under a statute requiring the indictment to charge but one offense.

tenses,[66] or riot and assault and battery,[67] or a felonious taking and a felonious conversion[68] may be joined. In case, however, felonies of a distinct nature which do not arise from the same transaction are joined, an election must as a general rule be compelled,[69] or the indictment quashed.[70] The compelling of an election between felonies of the same general nature rests within the sound discretion of the trial court,[71] under the special circumstances of the case in which the question arises.[72] An election should be ordered when it is apparent that defendant will be embarrassed in his defense by the joinder of counts;[73] and where it may be seen from the indictment or from the evidence that an attempt is being made to prosecute for distinct felonies not arising from the same transaction, the court should compel an election upon its own motion.[74] An election should not be

66. Com. *v.* March, 1 Pa. Co. Ct. 81; Anthony *v.* Com., 88 Va. 847, 14 S. E. 834, where both offenses were larceny under the statute.

67. U. S. *v.* McFarlane, 26 Fed. Cas. No. 15,675, 1 Cranch C. C. 163.

68. People *v.* Bogart, 36 Cal. 245.

69. *Arkansas.*— State *v.* Lancaster, 36 Ark. 55.

Illinois.— Kotter *v.* People, 150 Ill. 441, 37 N. E. 932 (where a person in three counts was charged with forging three distinct names); West *v.* People, 137 Ill. 189, 27 N. E. 34, 34 N. E. 254.

Iowa.— State *v.* Fidment, 35 Iowa 541.

Louisiana.— State *v.* Cazeau, 8 La. Ann. 109.

Michigan.— People *v.* Aikin, 66 Mich. 460, 33 N. W. 821, 11 Am. St. Rep. 512, holding that a conviction should be set aside where the trial was had upon an information containing two counts charging defendant with criminal abortion as defined by statute and an additional count charging manslaughter at common law committed upon a day subsequent to the time mentioned in the former counts.

Mississippi.—Burges *v.* State, 81 Miss. 482, 33 So. 499 (making counterfeit coin and uttering counterfeit coin); Hill *v.* State, 72 Miss. 527, 17 So. 375.

Texas.— McKenzie *v.* State, 32 Tex. Cr. 568, 25 S. W. 426, 40 Am. St. Rep. 795. See also Fisher *v.* State, 33 Tex. 792.

United States.— U. S. *v.* Nye, 4 Fed. 888 [*citing* U. S. *v.* O'Callahan, 27 Fed. Cas. No. 15,910, 6 McLean 596]; U. S. *v.* Bickford, 24 Fed. Cas. No. 14,591, 4 Blatchf. 337.

England.— Reg. *v.* Ward, 10 Cox C. C. 42; Reg. *v.* Bassett, 1 Cox C. C. 51; Reg. *v.* Barry, 4 F. & F. 389.

See 27 Cent. Dig. tit. "Indictment and Information," § 422.

70. Mayo *v.* State, 30 Ala. 32; State *v.* Rees, 76 Miss. 435, 22 So. 829.

71. People *v.* Baker, 3 Hill (N. Y.) 159; U. S. *v.* Bromley, 4 Utah 498, 11 Pac. 619; U. S. *v.* Groesbeck, 4 Utah 487, 11 Pac. 542; Pointer *v.* U. S., 151 U. S. 396, 14 S. Ct. 410, 38 L. ed. 208, holding that two charges of murder committed on the same day, in the same county and district, and with the same kind of instrument, might be joined. See *infra*, VIII, B, 3.

72. Pointer *v.* U. S., 151 U. S. 346, 14 S. Ct. 410, 38 L. ed. 208.

73. *Massachusetts.*— Benson *v.* Com., 158 Mass. 164, 33 N. E. 384.

Michigan.— People *v.* Sweeney, 55 Mich. 586, 22 N. W. 50.

New York.— People *v.* Johnson, 2 Wheel. Cr. 361.

North Carolina.— State *v.* Reel, 80 N. C. 442. And see State *v.* Farmer, 104 N. C. 887, 10 S. E. 563.

Vermont.— State *v.* Darling, 77 Vt. 67, 58 Atl. 974.

United States.— Pointer *v.* U. S., 151 U. S. 396, 14 S. Ct. 410, 38 L. ed. 208.

Prejudice as to selection of jury.— A defendant cannot be said to be prejudiced by the joinder of distinct offenses in the same indictment, where, by the joinder, he becomes entitled to the greatest number of challenges to jurors permitted under the statutes, and to a greater number than he would be entitled to if he were charged merely with the crime of which he is convicted. People *v.* Sweeney, 55 Mich. 586, 22 N. W. 50.

74. State *v.* Woodard, 38 S. C. 353, 17 S. E. 135; State *v.* Scott, 15 S. C. 434; State *v.* Nelson, 14 Rich. (S. C.) 169, 94 Am. Dec. 130.

The Massachusetts rule, however, is that charges of distinct substantive acts, although felonious, may be joined in case they are of the same general description, and the mode of trial and the nature of the punishment is the same (Com. *v.* Rogers, 181 Mass. 184, 63 N. E. 421; Benson *v.* Com., 158 Mass. 164, 35 N. E. 384; Com. *v.* Follansbee, 155 Mass. 274, 29 N. E. 471; Com. *v.* Devine, 153 Mass. 224, 29 N. E. 515; Com. *v.* Mullen, 150 Mass. 394, 23 N. E. 51 (accessary before the fact to burglary and receiving stolen goods); Com. *v.* Costello, 120 Mass. 358; Com. *v.* Malone, 114 Mass. 295; Com. *v.* Sullivan, 104 Mass. 552 (larceny); Com. *v.* Clark, 14 Gray 367; Com. *v.* Hills, 10 Cush. 530; Carlton *v.* Com., 5 Metc. 532); and it is competent for the court, when there is danger that defendant will be embarrassed by the multiplicity of the charges against him, to direct the prosecution to proceed upon one count or set of counts only (Com. *v.* Sullivan, *supra*; Com. *v.* Cain, 102 Mass. 487; Josslyn *v.* Com., 6 Metc. 236; Booth *v.* Com., 5 Metc. 535; Carlton *v.* Com., *supra*); and in case a general verdict is rendered upon counts charging distinct offenses, and no inquiry is made of the jury as to the

compelled in a case in which it is apparent that it will be difficult for the state to decide as to which of the counts it will be able to establish.[75] In some cases, upon grounds similar to those in which an election will be compelled, it has been held that the indictment may be quashed.[76]

b. Misdemeanors. At common law several distinct offenses may be joined by different counts in an indictment where they are misdemeanors in grade,[77] as where they are of the same nature and require similar punishments,[78] or are parts of the same act,[79] and the state will not be compelled to elect,[80] but may have a judgment upon the counts supported by the evidence.[81] In such case the indict-

counts upon which they found their verdict, the general verdict of guilty will apply to each count (Benson *v.* Com., 158 Mass. 164, 33 N. E. 384; Com. *v.* Carey, 103 Mass. 214).

Effect of general verdict upon indictments joining several counts generally see CRIMINAL LAW, 12 Cyc. 692–695.

75. Smith *v.* State, 8 Lea (Tenn.) 386.

76. *Indiana.*— State *v.* Smith, 8 Blackf. 489; Weinzorpflin *v.* State, 7 Blackf. 186.

Maryland.— State *v.* McNally, 55 Md. 559.

Michigan.— People *v.* McKinney, 10 Mich. 54.

Mississippi.— Sarah *v.* State, 28 Miss. 267, 61 Am. Dec. 544.

Ohio.— Myers *v.* State, 4 Ohio Cir. Ct. 570, 2 Ohio Cir. Dec. 712.

United States.— Pointer *v.* U. S., 151 U. S. 396, 14 S. Ct. 410, 38 L. ed. 208.

77. *Georgia.*— Hathcock *v.* State, 88 Ga. 91, 13 S. E. 959.

Kansas.— State *v.* Chandler, 31 Kan. 201, 1 Pac. 787.

Massachusetts.— Com. *v.* Dillane, 11 Gray 67.

Missouri.— State *v.* Kihby, 7 Mo. 317.

North Carolina.— State *v.* Slagle, 82 N. C. 653.

Pennsylvania.— Com. *v.* Schoen, 25 Pa. Super. Ct. 211; Com. *v.* Liebtreu, 1 Pearson 107; Com. *v.* Bargar, 2 L. T. N. S. 161.

Texas.— Floyd *v.* State, (Cr. App. 1902) 68 S. W. 690; Alexander *v.* State, 27 Tex. App. 533, 11 S. W. 628; Barnwell *v.* State, 1 Tex. App. 745; Waddell *v.* State, 1 Tex. App. 720.

United States.— U. S. *v.* Porter, 27 Fed. Cas. No. 16,072, 2 Cranch C. C. 60.

See 27 Cent. Dig. tit. "Indictment and Information," § 423 *et seq.*

Under the statutes of the United States the same rule obtains. U. S. *v.* Nye, 4 Fed. 888 [*citing* U. S. *v.* O'Callahan, 27 Fed. Cas. No. 15,910, 6 McLean 696].

78. *Alabama.*— Wooster *v.* State, 55 Ala. 217 [*overruling* Norvell *v.* State, 50 Ala. 174].

Arkansas.— Orr *v.* State, 18 Ark. 540.

Maryland.— State *v.* Blakeney, 96 Md. 711, 54 Atl. 614.

Michigan.— People *v.* Rohrer, 100 Mich. 126, 58 N. W. 661; People *v.* Keefer, 97 Mich. 15, 56 N. W. 105.

North Carolina.— State *v.* Morgan, 133 N. C. 743, 45 S. E. 1033; State *v.* Slagle, 82 N. C. 653.

Pennsylvania.— Com. *v.* Schoen, 25 Pa. Super. Ct. 211; Com. *v.* Shissler, 7 Pa. Dist. 341; Com. *v.* Bass, 4 Kulp 76.

Tennessee.— Tillery *v.* State, 10 Lea 35, selling liquors within four miles of an incorporated school, and selling without having taken the oath not to adulterate.

Texas.— Weathersby *v.* State, 1 Tex. App. 643.

Virginia.— Mitchell *v.* Com., 93 Va. 775, 20 S. E. 892.

See 27 Cent. Dig. tit. "Indictment and Information," § 423.

79. Com. *v.* Gouger, 21 Pa. Super. Ct. 217; Com. *v.* Shissler, 9 Phila. (Pa.) 587.

80. *Alabama.*— Taylor *v.* State, 100 Ala. 68, 14 So. 875.

Connecticut.— State *v.* Tucker, 75 Conn. 201, 52 Atl. 741.

Kansas.— State *v.* Skinner, 34 Kan. 256, 8 Pac. 420.

Missouri.— State *v.* Pigg, 85 Mo. App. 399; State *v.* Boyer, 70 Mo. App. 156.

Nebraska.— Little *v.* State, 60 Nebr. 749, 84 N. W. 248, 51 L. R. A. 717; McArthur *v.* State, 60 Nebr. 390, 83 N. W. 196.

New York.— People *v.* White, 55 Barb. 606 [*affirmed* in 32 N. Y. 465]; People *v.* Costello, 1 Den. 83; Kane *v.* People, 8 Wend. 203.

Pennsylvania.— Com. *v.* Manson, 2 Ashm. 31; Com. *v.* Fry, 5 Lanc. L. Rev. 75.

South Carolina.— State *v.* Sheppard, 54 S. C. 178, 32 S. E. 146.

Texas.— Daniels *v.* State, (Cr. App. 1903) 77 S. W. 215; Massey *v.* State, (Cr. App. 1901) 65 S. W. 911; Newsom *v.* State, (Cr. App. 1900) 57 S. W. 670; Timon *v.* State, 34 Tex. Cr. 363, 30 S. W. 808; Stebbins *v.* State, 31 Tex. Cr. 294, 20 S. W. 552; Gage *v.* State, 9 Tex. App. 259.

Virginia.— Mitchell *v.* Com., 93 Va. 775, 20 S. E. 892; Dowdy *v.* Com., 9 Gratt. 727, 60 Am. Dec. 314.

United States.— U. S. *v.* Devlin, 25 Fed. Cas. No. 14,953, 6 Blatchf. 71.

England.— Rex *v.* Jones, 2 Campb. 131, 11 Rev. Rep. 680.

See 27 Cent. Dig. tit. "Indictment and Information," § 447.

81. Burrell *v.* State, 25 Nebr. 581, 41 N. W. 399; Herod *v.* State, (Tex. Cr. App. 1900) 56 S. W. 59.

Continuing offenses.— Under statutes punishing the keeping of disorderly houses it is sometimes made proper to charge each day for which a conviction is sought in a separate count and a conviction may be had on such counts as are established by the evi-

ment will not be quashed,[82] or a demurrer sustained.[83] This rule has been held applicable, although different punishments attach to the offenses.[84] But in some decisions it is held that where distinct misdemeanors in no wise connected are joined an election may be compelled.[85] The rule that an election will not be compelled where several misdemeanors are joined does not apply to a case where both offenses and defendants are joined, and in case there is no evidence tending to connect one of the defendants with certain of the charges, he is entitled to require an election.[86]

c. Felonies and Misdemeanors. In some jurisdictions it has been held that a felony cannot be joined with a misdemeanor,[87] the rule arising from a practice which forbids a conviction for a misdemeanor on an indictment for felony;[88] or from the reason that it might embarrass defendant in the selection of a jury.[89] In such jurisdictions the indictment is demurrable[90] or is bad on a motion in arrest of judgment.[91] But in those states where there can be a conviction for a misdemeanor upon an indictment for felony, cognate offenses of the different characters may in some instances be joined,[92] as where the charges relate to the same transaction,[93] except where the offenses are repugnant in their nature and the trial and

dence. Hall *v.* State, 32 Tex. Cr. 474, 24 S. W. 407.

82. *Missouri.*— State *v.* Boyer, 70 Mo. App. 156.

Pennsylvania.— Com. *v.* Meads, 14 York Leg. Rec. 130.

South Carolina.— State *v.* Beckroge, 49 S. C. 484, 27 S. E. 658.

Wisconsin.— State *v.* Gummer, 22 Wis. 441.

United States.— U. S. *v.* Belvin, 46 Fed. 381, holding that hindering voters at an election is a misdemeanor only; and charges for hindering, and for conspiring to hinder, at the same time and place, may be joined in the same indictment.

83. Covy *v.* State, 4 Port. (Ala.) 186; State *v.* Slagle, 82 N. C. 653.

84. Swanson *v.* State, 120 Ala. 376, 25 So. 213; Wooster *v.* State, 55 Ala. 217 [*overruling* Norvell *v.* State, 50 Ala. 174]. *Compare* Stone *v.* State, 20 N. J. L. 404, holding that indictments for misdemeanors may contain several counts for different offenses, provided the judgments to be given for the offenses are not necessarily different in character and that it is not a misjoinder because the punishment for one of the offenses is positive, and for the other discretionary.

85. Bass *v.* State, 63 Ala. 108; State *v.* Moore, 2 Pennew. (Del.) 299, 46 Atl. 669; State *v.* Blakeney, 96 Md. 711, 54 Atl. 614; People *v.* Rohrer, 100 Mich. 126, 58 N. W. 661; People *v.* McKinney, 10 Mich. 54.

86. People *v.* Costello, 1 Den. (N. Y.) 83; Reg. *v.* Murphy, 8 C. & P. 297, 34 E. C. L. 744. And see Reg. *v.* Braun, 9 Cox C. C. 284, where an indictment contained counts charging various misdemeanors, amongst them counts for conspiracy, and there being evidence to go to the jury upon the conspiracy only, the prosecution was made to elect upon which count the case should be left to the jury.

87. Doyle *v.* State, 77 Ga. 513; Hilderbrand *v.* State, 5 Mo. 548; State *v.* Freels, 3 Humphr. (Tenn.) 228.

88. State *v.* Lincoln, 49 N. H. 464.

After a general verdict of guilty a judgment will be arrested where the indictment charges a felony and a misdemeanor. James *v.* State, 104 Ala. 20, 16 So. 94.

89. Davis *v.* State, 57 Ga. 66.

90. James *v.* State, 104 Ala. 20, 16 So. 94. And see Broughton *v.* State, 105 Ala. 103, 16 So. 912; Gilbert *v.* State, 65 Ga. 449; Davis *v.* State, 57 Ga. 66.

91. James *v.* State, 104 Ala. 20, 16 So. 94.

92. *Arkansas.*— State *v.* Cryer, 20 Ark. 64.

Illinois.— Herman *v.* People, 131 Ill. 594, 22 N. E. 471, 9 L. R. A. 182 [*distinguishing* Beasley *v.* People, 89 Ill. 571; Lyons *v.* People, 68 Ill. 271].

Maryland.— State *v.* Sutton, 4 Gill 494; Burk *v.* State, 2 Harr. & J. 426.

Massachusetts.— Com. *v.* McLaughlin, 12 Cush. 615.

New Hampshire.— State *v.* Lincoln, 49 N. H. 464.

Ohio.— Barton *v.* State, 18 Ohio 221, holding that the larceny of horses might be joined in the same indictment with the larceny of other property.

Rhode Island.— State *v.* Fitzsimon, 18 R. I. 236, 27 Atl. 446, 49 Am. St. Rep. 766, holding burglary and assault with intent to commit rape not cognate offenses.

See 27 Cent. Dig. tit. "Indictment and Information," § 424.

93. *Arkansas.*— State *v.* Cryer, 20 Ark. 64.

Illinois.— George *v.* People, 167 Ill. 447, 47 N. E. 741.

Louisiana.— State *v.* Cazeau, 8 La. Ann. 109.

Maryland.— Stevens *v.* State, 66 Md. 202, 7 Atl. 254; State *v.* Bell, 27 Md. 675, 92 Am. Dec. 658.

Massachusetts.—Com. *v.* Costello, 120 Mass. 358; Com. *v.* McLaughlin, 12 Cush. 612.

New Hampshire.— State *v.* Lincoln, 49 N. H. 464.

New York.— Hawker *v.* People, 75 N. Y. 487; People *v.* Trainor, 57 N. Y. App. Div. 422, 68 N. Y. Suppl. 263, 15 N. Y. Cr. 333.

Pennsylvania.— Staeger *v.* Com., 103 Pa.

judgment so incongruous as to tend to deprive defendant of some legal advantage.[94]

d. Statutory Provisions. In some cases provision is made for the joinder of specific offenses by statute.[95] It is also frequently provided by statute that in case defendant is acquitted of a portion of the offenses charged and convicted of the rest, judgment and sentence may be imposed as to such offense as shall appear to have been substantially charged by the portion of the indictment as to which a conviction was had.[96] Under such statutes counts for related offenses may be joined,[97] or several counts which are required to meet the evidence as it may be adduced.[98] The common-law rule as to joinder of offenses is practically embodied in the statute of the United States providing that whenever there are several charges against a person or persons for the same act or transaction, or for two or more acts or transactions connected together, or for two or more acts or transactions of the same class of crimes or offenses, which may be properly joined, the whole may be joined in one indictment.[99] The phrase "may be properly joined," however, does not continue the common-law rules as to what offenses may be joined, but vests in the trial court a discretion as to what joinders may be permitted without depriving accused of a fair and impartial trial.[1] Under statutes requiring the indictment to charge but a single offense a demurrer may be sustained for a misjoinder,[2] and such is sometimes made the only proper method of attack.[3] A misjoinder cannot be objected to as a mere matter of form under statutes providing that indictments shall not be affected by imperfection in form unless they prejudice defendant.[4] In some jurisdictions it is provided that a mis-

St. 469; Hunter *v.* Com., 79 Pa. St. 503, 21 Am. Dec. 83; Henwood *v.* Com., 52 Pa. St. 424; Harman *v.* Com., 12 Serg. & R. 69. See also Com. *v.* Werbine, 12 Lanc. Bar 75; Com. *v.* Bargar, 2 L. T. N. S. 161; Com. *v.* Cart, 2 Pittsb. 495.

South Carolina.— State *v.* Strickland, 10 S. C. 191; State *v.* Nelson, 14 Rich. 169, 94 Am. Dec. 130; State *v.* Boise, 1 McMull. 189.

Vermont.— State *v.* Stewart, 59 Vt. 273, 9 Atl. 559, 59 Am. Rep. 710.

United States.— U. S. *v.* Spintz, 18 Fed. 377, so holding under U. S. Rev. St. (1878) § 1024 [U. S. Comp. St. (1901) p. 720].

England.— Reg. *v.* Ferguson, 6 Cox C. C. 454, Dears. C. C. 427, 1 Jur. N. S. 73, 24 L. J. M. C. 61, 3 Wkly. Rep. 178.

See 27 Cent. Dig. tit. "Indictment and Information," § 424.

94. Hunter *v.* Com., 79 Pa. St. 503, 21 Am. Rep. 83 (holding that if a count for felony is joined with one for misdemeanor for the purpose of excluding defendant as a witness, under a statute permitting one charged with an offense not above a misdemeanor to testify, the court trying the case has power to prevent the law from being abused); Stevick *v.* Com., 78 Pa. St. 460; Henwood *v.* Com., 52 Pa. St. 424; Com. *v.* Jackson, Thach. Cr. Cas. (Mass.) 277.

95. See the statutes of the various states. And see Ravenscraft *v.* Com., 7 Ky. L. Rep. 826 (robbery and burglary); Rose *v.* Com., 3 Ky. L. Rep. 693 (separate injuries to the person); State *v.* Hawkins, 5 N. J. L. J. 56 (any number of embezzlements committed in six months).

96. Com. *v.* Dean, 109 Mass. 349; Com. *v.* Drum, 19 Pick. (Mass.) 479; Porath *v.* State, 90 Wis. 527, 63 N. W. 1061, 48 Am. St. Rep. 954.

97. Porath *v.* State, 90 Wis. 527, 63 N. W. 1061, 48 Am. St. Rep. 954, rape and incest.

98. Porath *v.* State, 90 Wis. 527, 63 N. W. 1061, 48 Am. St. Rep. 954.

99. Ingraham *v.* U. S., 155 U. S. 434, 15 S. Ct. 148, 39 L. ed. 213; McGregor *v.* U. S., 134 Fed. 187; U. S. *v.* Eastman, 132 Fed. 551; U. S. *v.* Bennett, 24 Fed. Cas. No. 14,572, 17 Blatchf. 357; U. S. *v.* Bickford, 24 Fed. Cas. No. 14,591, 4 Blatchf. 337; U. S. *v.* O'Callahan, 27 Fed. Cas. No. 15,910, 6 McLean 596 (holding that the offenses of passing counterfeit coin at different times and on different occasions may be joined in the same indictment); U. S. *v.* Scott, 27 Fed. Cas. No. 16,241, 4 Biss. 29 [*citing* Smith *v.* State, 8 Blackf. (Ind.) 489; Weinzorpflin *v.* State, 7 Blackf. (Ind.) 186].

1. U. S. *v.* West, 7 Utah 437, 27 Pac. 84; Pointer *v.* U. S., 151 U. S. 396, 14 S. Ct. 410, 38 L. ed. 208; Dolan *v.* U. S., 133 Fed. 440.

2. See the statutes of the various states. And see People *v.* Williams, 133 Cal. 165, 65 Pac. 323; People *v.* De Coursey, 61 Cal. 134 (larceny and embezzlement); People *v.* Taggart, 43 Cal. 81.

Election may be compelled on demurrer. State *v.* Morris, 45 Ark. 62 (exhibiting a gambling device and knowingly permitting it to be exhibited); State *v.* Lancaster, 36 Ark. 55 (misdemeanor); State *v.* Jourdan, 32 Ark. 203.

3. People *v.* Upton, 38 Hun (N. Y.) 107 (holding that under the New York code the objection must be taken by demurrer and could not be raised at the trial or on a motion in arrest); U. S. *v.* West, 7 Utah 437, 27 Pac. 84.

4. U. S. *v.* Nye, 4 Fed. 888 [*citing* U. S. *v.* O'Callahan, 27 Fed. Cas. No. 15,910, 6 McLean 596].

joinder of offenses shall not be cause for quashing the indictment, arrest of judgment, or granting a new trial, unless the accused has been embarrassed in his defense or will be exposed to a substantial danger of a second prosecution.[5] Under a statute providing that a motion in arrest of judgment may be made upon any ground which would be good on exception to an indictment or information for any substantial defect therein, it is proper to raise an objection to an indictment on the ground of misjoinder of counts by a motion in arrest.[6]

7. EFFECT OF ACQUITTAL AS TO SUPERFLUOUS COUNTS. A misjoinder of counts is cured by an acquittal as to all but one.[7]

VIII. ELECTION.

A. Between Offenses Charged in Same Count. Duplicity in an indictment may be cured, where the offenses charged are similar and the only objection to their joinder is the embarrassment which will be caused the accused in his defense, by an election by the prosecution to proceed on one charge only and entering a *nolle prosequi* as to the others.[8]

B. Between Counts — 1. IN GENERAL. As a general rule an indictment is not, as a matter of law, invalid because of a misjoinder of counts, and is therefore not subject to demurrer or arrest of judgment, nor is the objection available on writ of error.[9] The usual effect of a misjoinder is merely to render the indictment or the objectionable portions thereof subject to quashal upon a timely motion,[10] or to authorize the court in its discretion to compel the state to elect as to which charge it will rely upon.[11] Where a statute provides that in charging certain offenses, distinct offenses to a certain number, if committed within a prescribed limit of time, may be joined in the same indictment, an indictment which joins more than the statutory number of specific offenses is not for that reason invalid, but a *nolle prosequi* may be entered as to the additional offenses over the statutory number.[12]

2. TIME FOR ELECTION. In some of the state courts a motion to compel an election is too late when made after plea,[13] but in the federal courts it may be made at any time before the conclusion of the trial.[14] According to the weight of authority, where distinct and separate felonies of the same character, punishable in the same manner, and to be established by the same evidence, are charged

5. Long *v.* State, 42 Fla. 509, 28 So. 775 (holding that counts might be joined charging wilful trespass in carrying away property which was part of the realty, and charging the same taking as larceny); Green *v.* State, 17 Fla. 669 (holding that in different counts an assault with intent to murder and intent to rob might be charged).

6. Weathersby *v.* State, 1 Tex. App. 643.

7. Com. *v.* Adams, 127 Mass. 15 [*citing* Com. *v.* Holmes, 103 Mass. 440; Com. *v.* Packard, 5 Gray (Mass.) 101].

8. *Massachusetts.*— Com. *v.* Holmes, 119 Mass. 195; Com. *v.* Tuck, 20 Pick. 356.

Minnesota.— State *v.* Henn, 39 Minn. 464, 40 N. W. 564.

Missouri.— State *v.* Armstrong, 106 Mo. 395, 16 S. W. 604, 27 Am. St. Rep. 361, 13 L. R. A. 419.

Nebraska.— Aiken *v.* State, 41 Nebr. 263, 59 N. W. 888.

North Carolina.— State *v.* Cooper, 101 N. C. 684, 8 S. E. 134.

Compare Messer *v.* Com., 80 S. W. 489, 26 Ky. L. Rep. 40.

Contra.— Thomas *v.* State, 111 Ala. 51, 20 So. 617.

9. See *supra*, VII, B.

10. U. S. *v.* Nye, 4 Fed. 888 [*citing* U. S. *v.* O'Callahan, 27 Fed. Cas. No. 15,910, 6 McLean 596]. See *supra*, VII, B, 6.

11. State *v.* Jones, 5 Ala. 666; State *v.* Lockwood, 58 Vt. 378, 3 Atl. 539 (holding that a motion to quash an indictment, because distinct offenses are charged in different counts of an indictment, should be overruled); Reg. *v.* Holman, 9 Cox C. C. 201, 8 Jur. N. S. 1082, L. & C. 177, 6 L. T. Rep. N. S. 474, 10 Wkly. Rep. 718. See *supra*, VII, B, 6.

Prosecution for abortion see ABORTION, 1 Cyc. 194.

12. U. S. *v.* Nye, 4 Fed. 888 [*citing* U. S. *v.* O'Callahan, 27 Fed. Cas. No. 15,910, 6 McLean 596].

13. State *v.* Jacob, 10 La. Ann. 141; Cannon *v.* State, 75 Miss. 364, 22 So. 827; Hemingway *v.* State, 68 Miss. 371, 8 So. 317; George *v.* State, 39 Miss. 570. And see Massey *v.* State, (Tex. Cr. App. 1901) 65 S. W. 911, holding that a request for an election between two counts of an indictment comes too late after conviction.

14. Pointer *v.* U. S., 151 U. S. 396, 14 S. Ct. 410, 38 L. ed. 208, holding that the motion might be made after a plea of not guilty.

together, the court may in its discretion refuse to compel an election before the introduction of evidence by the state, but may reserve its decision until the close of the state's evidence and before the accused is placed upon his defense.[15]

3. Discretion of Trial Court. The granting or refusal of a motion to compel the prosecution to elect as to which of several counts it will proceed is within the sound discretion of the trial court,[16] and the ruling thereon will not be reviewed, except in a clear case of abuse of such discretion.[17] Hence the refusal is not the subject of exceptions,[18] nor a ground for a writ of error,[19] or for a motion for a new trial.[20] If from the inspection of the entire record it is apparent that no prejudice resulted to the accused, the refusal of an election which might properly have been granted is no ground for reversal,[21] and conversely where the state has not been prejudiced by having been compelled to elect, such compulsion is no ground for reversal in those jurisdictions in which the state has an appeal.[22]

15. *Georgia.*— Gilbert *v.* State, 65 Ga. 449.
Nebraska.— Blair *v.* State, (1904) 101 N. W. 17; Bartley *v.* State, 53 Nebr. 310, 73 N. W. 744; Korth *v.* State, 46 Nebr. 631, 65 N. W. 792.
New York.— People *v.* Flaherty, 27 N. Y. App. Div. 535, 50 N. Y. Suppl. 574.
Texas.— Dalton *v.* State, 4 Tex. App. 333 [*distinguishing* Lunn *v.* State, 44 Tex. 85, which held that election should be required before defendant offers his evidence and after the prosecution has examined its witnesses far enough to identify the transactions to which the testimony relates, without going into details].
Vermont.— State *v.* Smith, 22 Vt. 74.

16. *California.*— People *v.* Shotwell, 27 Cal. 394.
Colorado.— Roberts *v.* People, 11 Colo. 213, 17 Pac. 637.
District of Columbia.— U. S. *v.* McBride, 7 Mackey 371.
Maine.— State *v.* Nelson, 29 Me. 329.
South Carolina.— State *v.* Bouknight, 55 S. C. 353, 33 S. E. 451, 74 Am. St. Rep. 751.
England.— Reg. *v.* Trueman, 8 C. & P. 727, 34 E. C. L. 986.
See 27 Cent. Dig. tit. "Indictment and Information," §§ 449–453.
Same charge in different ways to meet evidence.— *Colorado.*— Bigcraft *v.* People, 30 Colo. 298, 70 Pac. 417.
Florida.— Eggart *v.* State, 40 Fla. 527, 25 So. 144.
Indiana.— Snyder *v.* State, 59 Ind. 105.
Maine.— State *v.* Flye, 26 Me. 312.
Missouri.— State *v.* Schmidt, 137 Mo. 266, 38 S. W. 938.
New York.— Nelson *v.* People, 23 N. Y. 293.
North Carolina.— State *v.* Barber, 113 N. C. 711, 18 S. E. 515.
South Carolina.— State *v.* Sheppard, 54 S. C. 178, 32 S. E. 146.
Vermont.— State *v.* Smith, 72 Vt. 366, 48 Atl. 647.
Different means of commission of same offense.— People *v.* Willson, 109 N. Y. 345, 16 N. E. 540; People *v.* Johnson, 2 Wheel. Cr. (N. Y.) 361; Pierce *v.* U. S., 160 U. S. 355, 16 S. Ct. 321, 40 L. ed. 454.
Same act as different offenses.— McCollough *v.* State, 132 Ind. 427, 31 N. E. 1116; Short *v.* State, 63 Ind. 376; Johnson *v.* State, 26 Ga. 611; State *v.* Daubert, 42 Mo. 242.
Different degrees of same offense.— People *v.* Reavey, 38 Hun (N. Y.) 418.
Distinct felonies.— *Indiana.*— Weinzorpflin *v.* State, 7 Blackf. 186.
Massachusetts.— Com. *v.* Sullivan, 104 Mass. 552.
Mississippi.— George *v.* State, 39 Miss. 570; Sarah *v.* State, 28 Miss. 267, 61 Am. Dec. 544.
New York.— Cook *v.* People, 2 Thomps. & C. 404.
Tennessee.— Wright *v.* State, 4 Humphr. 194.
United States.— Pointer *v.* U. S., 151 U. S. 396, 14 S. Ct. 410, 38 L. ed. 208.
England.— Reg. *v.* Hinley, 1 Cox C. C. 12, 2 M. & Rob. 524; Reg. *v.* Trueman, 8 C. & P. 727, 34 E. C. L. 986.
Distinct misdemeanors.— State *v.* Blakeeney, 96 Md. 711, 54 Atl. 614; Com. *v.* Davenport, 2 Allen (Mass.) 299; Strawhern *v.* State, 37 Miss. 422; State *v.* Darling, 77 Vt. 67, 58 Atl. 974.

17. *Indiana.*— Myers *v.* State, 92 Ind. 390; Dantz *v.* State, 87 Ind. 398; Beaty *v.* State, 82 Ind. 228; State *v.* Dufour, 63 Ind. 567.
Maryland.— State *v.* McNally, 55 Md. 559.
Missouri.— State *v.* Daubert, 42 Mo. 242; State *v.* Leonard, 22 Mo. 449; State *v.* Jackson, 17 Mo. 544, 59 Am. Dec. 281.
New York.— Cook *v.* People, 2 Thomps. & C. 404.
North Carolina.— State *v.* Barber, 113 N. C. 711, 18 S. E. 515.
Ohio.— Bailey *v.* State, 4 Ohio St. 440.
See 27 Cent. Dig. tit. "Indictment and Information," §§ 449–453.

18. State *v.* Hood, 51 Me. 363; Com. *v.* Smith, 162 Mass. 508, 39 N. E. 111; Com. *v.* Pratt, 137 Mass. 98; Com. *v.* State, 77 Mass. 60; People *v.* McCarthy, 110 N. Y. 309, 18 N. E. 128; People *v.* Davis, 56 N. Y. 95; State *v.* Maloney, 12 R. I. 251.

19. State *v.* Bell, 27 Md. 675, 92 Am. Dec. 658; George *v.* State, 39 Miss. 570.

20. State *v.* Hazard, 2 R. I. 474, 60 Am. Dec. 96, stealing and receiving goods.

21. Burges *v.* State, 81 Miss. 482, 33 So. 499; Cannon *v.* State, 75 Miss. 364, 22 So. 827.

22. State *v.* Dufour, 63 Ind. 567.

4. Sufficiency of Election. A formal election is not in all cases requisite[23] and its place may be supplied by a charge of the court withdrawing the objectionable counts from the consideration of the jury,[24] at least so far as to prevent a motion in arrest of judgment on the ground of misjoinder.[25] A misjoinder of counts is cured by the entry of a *nolle prosequi* before trial, where no evidence is offered to establish the improper counts, although the instructions do not direct the attention of the jury to the fact of such entry.[26] So also a misjoinder of counts may be cured by the entry of a *nolle prosequi* before the jury is impaneled, and while such is not directly speaking an amendment of the indictment, it has the effect, for the purposes of trial, of placing defendant in the position he would have occupied had the indictment contained only the proper counts.[27]

5. Effect of Election. The mere finding of an indictment which improperly charges distinct offenses does not prejudice defendant, and any defect is cured by dismissing the counts which are wrongfully joined before the introduction of evidence.[28] So where before the determination of a demurrer upon the ground of a misjoinder, the state elects to proceed as to but a single charge, the indictment will not be dismissed.[29] The election withdraws the objectionable count from the indictment[30] in the same manner as if a *nolle prosequi* had been entered with regard thereto or as if it had been quashed.[31] Where an included offense is charged in a separate count from the graver offense, an election to proceed to trial on the greater charge has been held to preclude a conviction for the minor offense.[32] Where a defendant is found guilty of an included offense and obtains a new trial, the court's refusal to place him upon trial for the graver offense does not have the effect of quashing the indictment as to the graver offense, although the state is erroneously required merely to proceed to trial for the lesser offense.[33]

C. Between Transactions Developed by the Evidence — 1. In General. In the case of offenses in which the precise time is not a material averment in the indictment, where on the trial the commission of two similar offenses at different times is developed, the state may elect as to which it will seek a conviction.[34] In those cases in which defendant is entitled to require an election, such requirement must be by motion, and the purposes of an election cannot be obtained by objections to evidence.[35] Defendant cannot compel an election for the state by

23. State *v.* Lewis, 31 Wash. 75, 71 Pac. 778, holding that where an information for larceny alleged that defendant was both agent and attorney of the prosecuting witness and in response to a motion to elect whether it would rely on the relation of principal and agent or of attorney and client, the state announced that it elected to rely on the relation of principal and agent, it was a sufficient compliance with the motion.

24. Martin *v.* State, (Tex. Cr. App. 1904) 83 S. W. 390; Parks *v.* State, 46 Tex. Cr. 100, 79 S. W. 301 (holding that such submission amounts to a dismissal of the other counts charging the same offense, so that upon a subsequent trial it is error to submit the case on such counts); Moore *v.* State, 37 Tex. Cr. 552, 40 S. W. 287; Smith *v* State, 34 Tex. Cr. 123, 29 S. W. 774; Parks *v.* State, 29 Tex. App. 597, 16 S. W. 532; Dalton *v.* State, 4 Tex. App. 333.

25. Weathersby *v.* State, 1 Tex. App. 643 [*citing* Fisher *v.* State, 33 Tex. 792].

26. Heller *v.* People, 2 Colo. App. 459, 31 Pac. 773.

27. Com. *v.* Cain, 102 Mass. 487, where a motion to quash was overruled.

28. State *v.* Buck, 59 Iowa 382, 13 N. W. 342.

29. Stamper *v.* Com., 102 Ky. 33, 42 S. W. 915, 19 Ky. L. Rep. 1014; Slagel *v.* Com., 81 Ky. 485, 5 Ky. L. Rep. 545; Com. *v.* Reinecke Coal Min. Co., 79 S. W. 287, 25 Ky. L. Rep. 2027.

30. State *v.* McDonald, (Kan. 1898) 52 Pac. 453; Ellis *v.* Com., 3 Ky. L. Rep. 251; People *v.* Rice, 103 Mich. 350, 61 N. W. 540, holding that an objection for a misjoinder could not be made where the state elected before submission of the case to the jury.

31. Mills *v.* State, 52 Ind. 187; Joy *v.* State, 14 Ind. 139; Com. *v.* Bass, 4 Kulp (Pa.) 76; State *v.* Smalley, 50 Vt. 736.

32. Com. *v.* Bass, 4 Kulp (Pa.) 76, holding, however, that it would not be presumed that the lesser offense charged was in fact a constituent part of the graver offense in order to support a plea of former jeopardy.

33. Mills *v.* State, 52 Ind. 187.

34. State *v.* Johnson, 23 Minn. 569.

35. State *v.* Chicago, etc., R. Co., 77 Iowa 442, 42 N. W. 365, 4 L. R. A. 298; State *v.* Crimmins, 31 Kan. 376, 2 Pac. 574; Bradshaw *v.* State, 32 Tex. Cr. 381, 23 S. W. 892.

seeking an instruction confining the evidence to be considered to that bearing upon a particular transaction.[36]

2. Necessity For Election — a. In General. When one offense is charged and the evidence tends to show that more than one has been committed within the period of limitations prior to the presentation of the indictment, the state must elect upon which it will rely for a conviction,[37] although the charges are only misdemeanors.[38] Since, while the different acts may be proper as evidence in aid of the particular charge in the indictment, defendant is entitled to know which specific act is relied on for a conviction in order that he may properly meet the charge, and in order that a conviction shall not be a matter of choice between offenses.[39] But the principle of election is applicable only where there is evidence of separate and distinct transactions.[40] Where the evidence is directed to one particular class of offenses under a statute and no other is admitted, there need be no election.[41]

b. Connected Facts Forming Single Transaction. Where separate acts shown by the evidence are so related as to constitute but one entire transaction, there need be no election.[42]

36. Sullivan *v.* State, 68 Ala. 525.

37. *Alabama.*— Black *v.* State, 83 Ala. 81, 3 So. 814, 3 Am. St. Rep. 691.

Illinois.— Goodhue *v.* People, 94 Ill. 37, embezzlement.

Iowa.— State *v.* King, 117 Iowa 484, 91 N. W. 768; State *v.* Hurd, 101 Iowa 391, 70 N. W. 613; State *v.* Brown, 58 Iowa 298, 12 N. W. 318, holding that where defendants being jointly indicted for rape, it appeared that one act was committed by one defendant in the absence of the other, and that another act was committed subsequently in another place by the other defendant, without assistance, there were two distinct offenses, and that the prosecution should elect as to the one on which they would proceed.

Kentucky.— Smith *v.* Com., 109 Ky. 685, 60 S. W. 531, 22 Ky. L. Rep. 1349.

Michigan.— People *v.* Jenness, 5 Mich. 305.

Tennessee.— Womack *v.* State, 7 Coldw. 508.

Texas.— Scott *v.* State, 46 Tex. Cr. 305, 81 S. W. 950; Batchelor *v.* State, 41 Tex. Cr. 501, 55 S. W. 491, 96 Am. St. Rep. 791.

38. Scruggs *v.* State, 111 Ala. 60, 20 So. 642; Nuckols *v.* State, 109 Ala. 2, 19 So. 504; Bainbridge *v.* State, 30 Ohio St. 264; State *v.* Hutchings, 24 S. C. 142; Larned *v.* State, 41 Tex. Cr. 509, 55 S. W. 826; Batchelor *v.* State, 41 Tex. Cr. 501, 55 S. W. 491, 96 Am. St. Rep. 791.

On proof of several sales of intoxicating liquors, one offense only being charged, the state may be compelled to elect.

Indiana.— Lebkovitz *v.* State, 113 Ind. 26, 14 N. E. 363, 597; Long *v.* State, 56 Ind. 182, 26 Am. Rep. 19.

Kansas.— State *v.* Lund, 49 Kan. 663, 31 Pac. 309; State *v.* Lund, 49 Kan. 209, 30 Pac. 518; State *v.* Crimmins, 31 Kan. 376, 2 Pac. 574.

New York.— Osgood *v.* People, 39 N. Y. 449, holding that where a count in an indictment alleged the unlawful sale of several kinds of intoxicating liquors it was within the discretion of the court to compel the district attorney to elect as to the kind of liquor sold, upon which he would rest his case.

Ohio.— Stockwell *v.* State, 27 Ohio St. 563.

South Dakota.— State *v.* Boughner, 7 S. D. 103, 63 N. W. 542; State *v.* Valentine, 7 S. D. 98, 63 N. W. 541.

Tennessee.— Murphy *v.* State, 9 Lea 373.

West Virginia.— State *v.* Chisnell, 36 W. Va. 659, 15 S. E. 412.

Wisconsin.— See Boldt *v.* State, 72 Wis. 7, 38 N. W. 177.

Contra.— State *v.* Heinze, 45 Mo. App. 403.

39. People *v.* Williams, 133 Cal. 165, 65 Pac. 323; State *v.* King, 117 Iowa 484, 91 N. W. 768; State *v.* Hurd, 101 Iowa 391, 70 N. W. 613; Sisk *v.* State, (Tex. Cr. App. 1897) 42 S. W. 985; Hamilton *v.* State, 36 Tex. Cr. 372, 37 S. W. 431. See also cases cited *supra*, note 35, and *infra*, note 51.

40. Black *v.* State, 83 Ala. 81, 3 So. 814, 3 Am. St. Rep. 691 (holding that where the owner of stolen property was averred to be unknown and the state attempted to prove but one act of stealing it could not be compelled to elect between evidence of ownership in two persons); Smith *v.* State, 52 Ala. 384 (holding that an election would not be compelled where the testimony of different witnesses related to a single act of gaming at one place, although it gave such place the characteristics of more than one of the places at which gaming was prohibited).

41. Leonard *v.* People, 81 Ill. 308.

42. *Alabama.*— Ellis *v.* State, 105 Ala. 72, 17 So. 119; Busby *v.* State, 77 Ala. 66; Williams *v.* State, 77 Ala. 53; Beasley *v.* State, 59 Ala. 20 (obtaining goods from one person by the same false pretense twice repeated on different days constitutes only one transaction, and is not a case for election); Johnson *v.* State, 35 Ala. 363.

Minnesota.— State *v.* Mueller, 38 Minn. 497, 38 N. W. 691.

North Carolina.— State *v.* Bishop, 98 N. C. 773, 4 S. E. 357.

Rhode Island.— State *v.* Fitzsimon, 18 R. I. 236, 27 Atl. 446, 49 Am. St. Rep. 766.

c. Various Manners and Means. Where the same criminal act is involved, the state is not bound to elect on proof of its commission in different manners[43] or by different means.[44]

d. Continuing Offenses. Where an offense is continuous in its nature, evidence with regard to its commission at different times within the general charge does not demand an election.[45] An election, however, cannot be avoided by the fact that an offense not continuing is charged as continuing.[46]

e. Series of Related But Individually Complete Offenses. Where distinct criminal acts form a series which is readily susceptible of proof, while proof of any particular act might be difficult, it is held that the state need not elect.[47] For example, an election need not be made to rely on a particular embezzlement from a series committed by a person in a confidential relation.[48]

3. Time For Election — a. In General. Some conflict exists as to when an election should be compelled, some authorities holding that it should be as soon as the evidence of distinct offenses is developed,[49] and others that the court may in its sound discretion permit proof of several offenses;[50] but the authorities agree that an election will be required before defendant is required to introduce his proof.[51]

b. Necessity For Identification of Distinct Transactions. A motion to elect cannot be sustained until the evidence has developed the existence of distinct offenses,[52] and under some authorities it must be sufficient to identify them;[53] and it seems that if the evidence is not sufficient to cause a danger of conviction of another offense not charged to appear, an election need not be required.[54]

4. Sufficiency of Election — a. By Introduction of Proof. When evidence has been introduced tending directly to the proof of one act and for the purpose

Wisconsin.— Hanscom *v.* State, 93 Wis. 273, 67 N. W. 419.

43. Elam *v.* State, 26 Ala. 48; Sharp *v.* State, 15 Tex. App. 171 (rape by force and by threats); Gonzales *v.* State, 5 Tex. App. 584 (murder by shooting, striking, and burning).

44. Williams *v.* State, 59 Ga. 400 (holding that upon an indictment against three persons for assault with intent to murder, which charged that one was armed with an ax, another with a knife, and the third with a stick, and that they all struck the person assaulted, the state could not be compelled to elect with which weapon it would insist the crime to have been committed); Moore *v.* State, 37 Tex. Cr. 552, 40 S. W. 287.

45. Etress *v.* State, 88 Ala. 191, 7 So. 49 (holding that in a prosecution for carrying concealed weapons, evidence of possession and concealment at different times covered by one continuous act did not require an election); Owens *v.* State, 74 Ala. 401 (trespass after warning); Com. *v.* Sullivan, 146 Mass. 142, 15 N. E. 491 (setting up and promoting lottery); People *v.* Elmer, 109 Mich. 493, 67 N. W. 550 (pretending to tell fortunes). But see Com. *v.* Foley, 99 Mass. 499; Com. *v.* Elwell, 1 Gray (Mass.) 463, both holding that the state is confined to the time sufficiently laid in the indictment.

46. State *v.* Jamison, 110 Iowa 337, 81 N. W. 594.

47. State *v.* Higgins, 121 Iowa 19, 95 N. W. 244, adultery. And see Memmler *v.* State, 75 Ga. 576, indictment charging defendant with whipping, beating, and cruelly maltreating his wife.

48. Willis *v.* State, 134 Ala. 429, 33 So. 226; Jackson *v.* State, 76 Ga. 551; Ker *v.* People, 110 Ill. 627, 51 Am. Rep. 706 [*distinguishing* Goodbue *v.* People, 94 Ill. 37; Kribs *v.* People, 82 Ill. 425]. See also Campbell *v.* State, 35 Ohio St. 70; Gravatt *v.* State, 25 Ohio St. 162.

49. Lunn *v.* State, 44 Tex. 85. See also cases cited *infra*, VII, C, 4, *a*, text and note 55.

50. *Kansas.*— State *v.* Schweiter, 27 Kan. 499.

Massachusetts.— Com. *v.* Barnes, 138 Mass. 511; Com. *v.* Bennett, 118 Mass. 443.

South Carolina.— State *v.* Sims, 3 Strobh. 137.

Vermont.— State *v.* Croteau, 23 Vt. 14, 54 Am. Dec. 90; State *v.* Smith, 22 Vt. 74.

West Virginia.— State *v.* Chiswell, 36 W. Va. 659, 15 S. E. 412.

51. State *v.* Gaunts, 60 Kan. 660, 57 Pac. 503; State *v.* Crimmins, 31 Kan. 376, 2 Pac. 574; State *v.* Schweiter, 27 Kan. 499; Lunn *v.* State, 44 Tex. 85; State *v.* Croteau, 23 Vt. 14, 54 Am. Dec. 90; State *v.* Smith, 22 Vt. 74.

52. Squires *v.* State, 3 Ind. App. 114, 28 N. E. 708.

53. Peacher *v.* State, 61 Ala. 22; Lunn *v.* State, 44 Tex. 85, holding, however, that an election should be made before the state goes into details.

54. Sanders *v.* State, 88 Ga. 254, 14 S. E. 570; State *v.* Kerr, 3 N. D. 523, 58 N. W. 27; Tabor *v.* State, 34 Tex. Cr. 631, 31 S. W. 662, 53 Am. St. Rep. 726. *Contra*, Nickel *v.* State, 6 Ohio Cir. Ct. 601, 3 Ohio Cir. Dec. 605.

of procuring a conviction upon it, an election is regarded as made.[55] The first act as to which the prosecution introduces evidence will be presumed to be that to which the indictment refers;[56] and if the prosecutor wishes to introduce evidence of other offenses, he should frame the indictment accordingly.[57] After such election, evidence of other offenses is held inadmissible,[58] except in those cases which are exceptions to the usual rule requiring the evidence to be confined to the offense charged in the indictment.[59] The state will not be held to have elected by reason of an unintentional introduction of evidence as to a distinct transaction, as where a witness mistakes the matters as to which he is being questioned.[60] Where the state has attempted to identify a transaction by a witness and failed, it is not precluded from identifying a different transaction by another witness.[61] The prosecutor is entitled to some latitude in his preliminary examination of a witness to determine the act to which the witness refers; but if, after the transaction has been identified, the prosecutor pursues the inquiry to bring out the details of the transaction, he must be held to have elected.[62] A prosecutor may by a qualification in his opening statement prevent the introduction of evidence as to an attempt from constituting an election to try the accused for that, and not the completed offense.[63] Inadmissible evidence will not demand an election, although admitted without objection.[64]

b. Formal Election. The election should be such as to definitely fix the transaction relied on,[65] but its sufficiency to some extent at least is discretionary with the trial court.[66] It is enough that it be as definite as is possible from the evidence where, from the information, the evidence, and the election, defendant is informed as to the transaction.[67]

5. Effect of Election. An election once made cannot be retracted and other

55. *Alabama.*— Sullivan *v.* State, 68 Ala. 525; McPherson *v.* State, 54 Ala. 221.

California.— People *v.* Williams, 133 Cal. 165, 65 Pac. 323.

Connecticut.— State *v.* Bates, 10 Conn. 372, having given evidence of one act of adultery the state will not be allowed to prove others.

Indiana.— Richardson *v.* State, 63 Ind. 192.

Michigan.— People *v.* Clark, 33 Mich. 112; People *v.* Jenness, 5 Mich. 305.

Wyoming.— Fields *v.* Territory, 1 Wyo. 78.

Contra.— State *v.* Heinze, 45 Mo. App. 403.

Merely circumstantial evidence of slight weight in itself does not amount to an election. Com. *v.* Hills, 10 Cush. (Mass.) 530.

56. Elam *v.* State, 26 Ala. 48.

57. Elam *v.* State, 26 Ala. 48.

58. *Indiana.*— Richardson *v.* State, 63 Ind. 192.

New York.— People *v.* Hopson, 1 Den. 574.

Rhode Island.— State *v.* Nagle, 14 R. I. 331.

Vermont.— State *v.* Croteau, 23 Vt. 14, 54 Am. Dec. 90; State *v.* Smith, 22 Vt. 74, both holding the rule stated in the text to be discretionary with the trial court.

West Virginia.— State *v.* Chisnell, 36 W. Va. 659, 15 S. E. 412.

And see cases cited *supra*, note 55. See, however, cases cited *supra*, notes 50, 51.

59. See Criminal Law, 12 Cyc. 405.

60. Clark *v.* State, 47 N. J. L. 556, 4 Atl. 327, holding that the state has the privilege, as soon as the distinctness of the matter in the mind of the witness is apparent, to abandon the transaction to which he is testifying and prove that alleged in the indictment. But where it becomes obvious that the state is intentionally adopting this course of procedure for the purpose of prejudicing defendant by showing a tendency to commit crime, the court should hold the state to the first offense which it attempts to prove.

61. State *v.* Czarnikow, 20 Ark. 160.

62. Jackson *v.* State, 95 Ala. 17, 10 So. 657; Hughes *v.* State, 35 Ala. 351; State *v.* Brunker, 46 Conn. 327.

63. Chenowith *v.* Com., 7 Ky. L. Rep. 827, as where the prosecutor states that he will rely upon a previous attempt to burn property as tending to connect a defendant with its final burning.

64. Kidder *v.* State, 58 Ind. 68, so holding, under an indictment charging a disturbance of a religious body on a certain date when met for business purposes, with regard to evidence of a prior disturbance of a meeting for purposes of worship.

65. State *v.* Moulton, 52 Kan. 69, 34 Pac. 412; State *v.* Lund, 49 Kan. 663, 31 Pac. 309; State *v.* Guettler, 34 Kan. 582, 9 Pac. 200; State *v.* O'Connell, 31 Kan. 383, 2 Pac. 579; State *v.* Saxton, 2 Kan. App. 13, 41 Pac. 1113.

66. State *v.* Crimmins, 31 Kan. 376, 2 Pac. 574.

67. State *v.* Crimmins, 31 Kan. 376, 2 Pac. 574, holding it sufficient that defendant was informed with respect to the person to whom liquor was sold, the place where sold, the time when — although the time was not fixed definitely — and that the liquor was whisky.

acts proved,[68] and would seem to be binding upon the state in a second trial on the same indictment.[69] An election to proceed as to an act committed on a certain date, which is further identified by certain specific circumstances, will not prevent the state from relying on the act identified by such circumstances, although the evidence discloses that it did not take place upon the elected date.[70] Where a single count in an indictment charges both an offense and an included offense, there being no necessity for an election, an attempted election is a nullity, and in case the state elects to go to trial upon the graver offense, a conviction of the lesser offense is not precluded.[71]

D. Between Indictments. Where separate indictments are found for distinct offenses the prosecution cannot be compelled to elect between them,[72] but the practice of drawing several indictments for the same offense is to be disapproved[73] and the state may be compelled to elect on which it will proceed, and an acquittal directed as to the others.[74] Where the prosecution elects to proceed upon one indictment it is equivalent to an acquittal upon the rest.[75] In case indictments charge different offenses, the state will not be permitted to substitute one for the other.[76]

IX. OBJECTIONS TO INDICTMENT OR INFORMATION; MOTION TO QUASH AND DEMURRER.

A. In General — 1. Form of Objection. Some forms or modes of raising objections to indictments and informations have been treated elsewhere.[77] It is proposed here to treat chiefly of objection by demurrer or motion to quash or set aside. An objection to the sufficiency of an indictment cannot as a general rule be made by objection to the reception of evidence thereon at the trial,[78] but must

68. *Alabama.*— Sullivan *v.* State, 68 Ala. 525; Smith *v.* State, 52 Ala. 384.

Georgia.— Tompkins *v.* State, 17 Ga. 356.

Indiana.— Richardson *v.* State, 63 Ind. 192.

Kansas.— Hutchinson *v.* Holland, 52 Kan. 596, 35 Pac. 221; State *v.* Falk, 46 Kan. 498, 26 Pac. 1023.

Michigan.— People *v.* Jenness, 5 Mich. 305.

69. Elam *v.* State, 26 Ala. 48. *Contra,* State *v.* Peak, 9 Kan. App. 436, 58 Pac. 1034. And see State *v.* Coulter, 40 Kan. 87, 19 Pac. 368.

70. Com. *v.* O'Connor, 107 Mass. 219.

71. Mills *v.* State, 52 Ind. 187.

72. Rex *v.* Handley, 5 C. & P. 565, 24 E. C. L. 710.

73. People *v.* Van Horne, 8 Barb. (N. Y.) 158.

Successive indictments see *supra,* II, I.

74. State *v.* McNeill, 93 N. C. 552; U. S. *v.* Rumsey, 27 Fed. Cas. No. 16,207; Rex *v.* Smith, 3 C. & P. 412, 14 E. C. L. 637 (where the same offense was charged in one indictment capitally and in the other as a misdemeanor); Reg. *v.* Brettel, C. & M. 609, 41 E. C. L. 331 (holding that where two pigs belonging to the same person were stolen at the same time and the prisoner was tried and convicted for the stealing of one of them that a subsequent prosecution for the stealing of the other could not be proceeded with); Rex *v.* Doran, 2 Leach C. C. 608; Rex *v.* Britton, 1 M. & Rob. 297. But see U. S. *v.* Goddard, 25 Fed. Cas. No. 15,220, 4 Cranch C. C. 444 (in which where six indictments were found for stealing six cows belonging to different persons and in each it was averred that the cows were stolen at the same time and place, it was held that none of the indictments would be quashed upon the ground that they were all for one and the same offense). *Contra,* Bailey *v.* State, 11 Tex. App. 140.

75. State *v.* McNeill, 93 N. C. 552.

76. State *v.* Welbon, 66 Ark. 510, 51 S. W. 829.

Consolidation of indictments see Criminal Law, 12 Cyc. 504.

77. Pleas raising objections see Criminal Law, 12 Cyc. 344.

Motion for new trial see Criminal Law, 12 Cyc. 704.

Motions in arrest of judgment see Criminal Law, 12 Cyc. 756.

Appeal and writ of error see Criminal Law, 12 Cyc. 792.

Certiorari see Criminal Law, 12 Cyc. 794.

78. State *v.* Henn, 39 Minn. 464, 40 N. W. 564; State *v.* Gregory, 178 Mo. 48, 76 S. W. 970; State *v.* Duncan, 116 Mo. 288, 22 S. W. 699; State *v.* Raymond, 86 Mo. App. 537; U. S. *v.* Harris, 45 Fed. 414.

On the ground that an offense is not charged. — State *v.* Ashe, 44 Kan. 84, 24 Pac. 72; State *v.* Jessup, 42 Kan. 422, 22 Pac. 627; Rice *v.* State, 3 Kan. 141 (holding, however, that there might be an exception if it were apparent that judgment in the indictment must be arrested); State *v.* Risley, 72 Mo. 609. But see State *v.* Kimble, 104 Iowa 19, 73 N. W. 348 (holding that under a statute authorizing the court to discharge the jury, where it appears that the facts charged in the indictment do not constitute an offense, the court might take such action when the

be made before trial by motion to quash or set aside,[79] or demurrer,[80] or after trial by a motion in arrest of judgment,[81] the rule of practice permitted in civil cases in some states not being applicable.[82] A motion to make more definite and certain is not usually recognized as an appropriate mode of attack upon an indictment,[83] nor can redundant matter be reached by a motion to strike.[84]

2. Statutory Provisions. Under the modern statutes of criminal procedure it is usually provided that objections to the indictment upon the ground of formal defects must be made at a certain time and in a certain manner, and that if not so made, they cannot afterward be insisted upon,[85] and the enactment of such statutes is within the power of the state legislatures.[86] The statutes variously provide that such objections must be urged before plea,[87] before the jury is sworn,[88] or before going to trial,[89] which is equivalent to before pleading to the

defect was pointed out by objection to evidence); Niven's Case, 5 City Hall Rec. (N. Y.) 79.

Insufficient description of stolen property.— Roberts *v.* State, 83 Ga. 369, 9 S. E. 675. See, however, Shafer *v.* State, 74 Ind. 90.

Filing of information before preliminary examination.— State *v.* McCaffery, 16 Mont. 33, 40 Pac. 63.

That action was begun by unauthorized person.— State *v.* Brecht, 41 Minn. 50, 42 N. W. 602, adultery.

79. See *infra*, IX, B.

80. See *infra*, IX, C.

81. See Criminal Law, 12 Cyc. 760.

82. State *v.* Risley, 72 Mo. 609.

83. State *v.* Bogardus, 36 Wash. 297, 78 Pac. 942.

Motion for bill of particulars see *supra*, V, U.

84. Gallaher *v.* State, 101 Ind. 411; Blodgett *v.* State, 50 Nebr. 121, 69 N. W. 751.

85. See the statutes of the various states. And see the cases cited *infra*, notes 87–97.

Before change of venue.— Under a statute providing that the venue shall not be changed until after all motions, special pleas, and exceptions have been filed and acted on by the court, and if overruled a plea of not guilty entered, all questions not affecting the substance of the charge must be made before an application for a change of venue. Caldwell *v.* State, 41 Tex. 86.

Provisions for cure of defects and objections see *infra*, XV.

86. Com. *v.* Walton, 11 Allen (Mass.) 238. See Constitutional Law, 8 Cyc. 1087.

87. *California.*— People *v.* Lawrence, 21 Cal. 368, an indictment not signed by the foreman and indorsed "a true bill" may be set aside only on motion before demurrer or plea.

Illinois.— Vezain *v.* People, 40 Ill. 397 (absence of indorsement of the prosecutor's name); Nichols *v.* People, 40 Ill. 395 (want of a venue in the body of the indictment); Gnykowski *v.* People, 2 Ill. 476.

Massachusetts.— Com. *v.* Chiovaro, 129 Mass. 489.

Missouri.— State *v.* Murphy, 47 Mo. 274, want of certificate of the foreman of the grand jury.

Texas.— Coates *v.* State, 2 Tex. App. 16; Alderson *v.* State, 2 Tex. App. 10.

88. *California.*— People *v.* Matuszewski, 138 Cal. 533, 71 Pac. 701, holding that in the absence of a demurrer, the averments of an indictment charging a former conviction would be held sufficient.

Louisiana.—State *v.* Crenshaw, 45 La. Ann. 496, 12 So. 628 (omission of signature of district attorney); State *v.* Thomas, 30 La. Ann. 600 (insufficient description of stolen property); State *v.* Shay, 30 La. Ann. 114; State *v.* Durbin, 22 La. Ann. 162; State *v.* Bougreaus, 14 La. Ann. 88; State *v.* Wilson, 11 La. Ann. 163.

New Jersey.— State *v.* Shuster, 63 N. J. L. 355, 46 Atl. 1101 [*affirming* 62 N. J. L. 521, 41 Atl. 701]; Larison *v.* State, 49 N. J. L. 256, 9 Atl. 700, 60 Am. Rep. 606; Noyes *v.* State, 41 N. J. L. 418 (objection on the ground of duplicity); State *v.* Lynch, 7 N. J. L. J. 153.

Pennsylvania.— Gorman *v.* Com., 124 Pa. St. 536, 17 Atl. 26; Com. *v.* Jessup, 63 Pa. St. 34 (failure of indictment to charge that liquor unlawfully sold was for use as a beverage, cured by plea of guilty); Com. *v.* Frey, 50 Pa. St. 245; Com. *v.* Newcomer, 49 Pa. St. 478; Phillips *v.* Com., 44 Pa. St. 197; Com. *v.* Kelly, 10 Lanc. Bar 107; Com. *v.* Paxton, 14 Phila. 665; Com. *v.* Krussler, 12 Phila. 628 (indictment charging in one count that the ownership was in a person individually and in another count that the ownership was in such person and another jointly); Com. *v.* Hughes, 11 Phila. 430.

Wyoming.— Wilbur *v.* Territory, 3 Wyo. 268, 21 Pac. 698, defect in indictment for larceny as a bailee in that it alleged neither the facts constituting the bailment or the character thereof, could not be urged after a plea of not guilty.

Matters not available on motion to quash. — Mass. St. (1864) c. 250, § 2, providing that any objection to an indictment for any formal defect apparent on its face shall be taken by demurrer or motion to quash, assigning specifically the objections relied on, before the jury are sworn, does not apply to an indictment consisting of a single count, which duly charges an offense against defendant, but contains a defective allegation of an aggravation of the offense. Com. *v.* Kennedy, 131 Mass. 584.

89. Hill *v.* State, 41 Ga. 484; Long *v.* State, 38 Ga. 491 (objection that indictment failed to state residence of defendant); Forrester *v.* State, 34 Ga. 107 (blank left in in-

merits.[90] So also that certain objections must be raised by demurrer,[91] by motion to quash,[92] or by exceptions.[93] But a statute which provides that defects apparent upon the face of the indictment must be taken advantage of by demurrer or motion to quash is to be construed as applying to formal defects only.[94] Under other statutes formal defects not affecting the substantial rights of defendant cannot be urged at any time.[95] A statute providing that no indictment shall be deemed invalid for want of any averment not necessary to be proved will not, however, permit the omission of an essential averment which the state is not bound to prove in the first instance, but which is to be taken as true unless disproved.[96] In the absence of a statute it seems that formal defects may be urged at any time in case they arise from failure to comply with statutes enacted for the benefit of the accused.[97]

B. Motion to Quash or Set Aside — 1. Nature and Scope of Motion in General. As a general rule an indictment which charges the higher offenses, such as treason[98] or common-law felonies,[99] or other crimes which immediately affect the

dictment for the name of county for which grand jury were sworn); Wise *v.* State, 24 Ga. 31; Conolly *v.* People, 4 Ill. 474; Com. *v.* Lane, 157 Mass. 462, 32 N. E. 655 (indictment for subornation of perjury not charging that defendant acted corruptly); Com. *v.* O'Connell, 94 Mass. 451 (description of bank-bills stolen as a quantity instead of divers and sundry).

90. Winship *v.* People, 51 Ill. 296.

91. *Maryland.*— State *v.* Edlavitch, 77 Md. 144, 26 Atl. 406, holding under a statute providing that an indictment shall not be quashed for any matter which might have been ground for demurrer, that a motion to quash is not available for any ground which could be reached by demurrer.

Mississippi.— Gates *v.* State, 71 Miss. 874, 16 So. 342, defects on face of indictment.

New York.— People *v.* Upton, 38 Hun 107 (formal objections appearing on face of indictment); People *v.* Carr, 3 N. Y. Cr. 578 (insufficient description).

Oregon.— State *v.* Bloodsworth, 25 Oreg. 83, 34 Pac. 1023 (insufficient description of paper which was the subject of false representations); State *v.* Bruce, 5 Oreg. 68, 20 Am. Rep. 734.

Washington.— State *v.* Bogardus, 36 Wash. 297, 78 Pac. 942.

See *infra*, IX, C, 4, b.

92. Bartlett *v.* State, 28 Ohio St. 669. See *infra*, IX, B, 7, b.

93. Dodd *v.* State, 10 Tex. App. 370, holding that under the criminal code (art. 420, subd. 2, 3) objections to an indictment on account of erasures or interlineations can be urged only by exceptions to the form if made after presentation; but if made by the grand jury, under subdivision 7, a plea in abatement is not allowable.

94. Merwin *v.* People, 26 Mich. 298, 12 Am. Rep. 314, holding that it might be urged on appeal that an information for larceny failed to specify the particular kind of property taken and its value.

95. *Indiana.*— Greenley *v.* State, 60 Ind. 141. See Knight *v.* State, 84 Ind. 73, manner in which the indictment was signed by the prosecuting attorney.

Iowa.— State *v.* Gurlock, 14 Iowa 444.

Kentucky.— Com. *v.* Magowan, 1 Metc. 368, 71 Am. Dec. 480.

Ohio.— Blaney *v.* State, 17 Ohio Cir. Ct. 486, 9 Ohio Cir. Dec. 616.

Virginia.— Lawrence *v.* Com., 86 Va. 573, 10 S. E. 840.

Illustrations.— Under such statutes an indictment will not be held bad for misspelling (Smith *v.* Territory, 14 Okla. 162, 77 Pac. 187); or merely clerical errors, such as "count" instead of "county" (State *v.* Evans, 69 N. C. 40); "intention" instead of "intent" (State *v.* Tom, 47 N. C. 414); against the "force" instead of "form" of the statute (State *v.* Davis, 80 N. C. 384); omission of "wound" (State *v.* Rinehart, 75 N. C. 58); in a "manner" instead of "matter" (People *v.* Hitchcock, 104 Cal. 482, 38 Pac. 198); or for grammatical errors (State *v.* Turlington, 102 Mo. 642, 15 S. W. 141; Hume *v.* U. S., 118 Fed. 689, 55 C. C. A. 407). Omission of "did" or an equivalent in the charge has been held fatal, however (Cook *v.* State, 72 Miss. 517, 17 So. 228. *Contra,* People *v.* Haagen, (Cal. 1903) 72 Pac. 836); but "further swears" instead of "further shows" as introductory to a count is not fatal (Fisher *v.* State, 2 Ind. App. 365, 28 N. E. 565); nor is the omission of "to" in a charge of maintaining a building to keep intoxicating liquors (State *v.* Caffrey, 94 Iowa 65, 62 N. W. 664). See also *supra*, V, B, 5, 6.

96. State *v.* Meek, 70 Mo. 355, 35 Am. Rep. 427.

97. Medaris *v.* State, 10 Yerg. (Tenn.) 239 (holding that a failure to indorse the name of the prosecutor upon the indictment might be urged by motion to quash); State *v.* Vance, 1 Overt. (Tenn.) 481 (or by motion for discharge after plea).

98. Rex *v.* Lynch, [1903] 1 K. B. 444, 67 J. P. 41, 72 L. J. K. B. 167, 88 L. T. Rep. N. S. 26, 51 Wkly. Rep. 619; Sheare's Trial, 27 How. St. Tr. 255; Cranburne's Trial, 13 How. St. Tr. 222.

99. People *v.* Walters, 5 Park. Cr. (N. Y.) 661 (murder); State *v.* Caldwell, 112 N. C. 854, 16 S. E. 1010; State *v.* Skidmore, 109 N. C. 795, 14 S. E. 63. See also U. S. *v.* Kilpatrick, 16 Fed. 765.

public at large,[1] such as nuisance,[2] selling by false weights,[3] riot or unlawful assembly,[4] or perjury,[5] will not be quashed, but defendant will be put to his remedy by demurrer or by motion in arrest of judgment or writ of error,[6] unless the plainest grounds exist,[7] as where no judgment could be rendered on the indictment,[8] or the court has no jurisdiction,[9] or no indictable offense is charged,[10] or where other remedies are inadequate.[11] In some jurisdictions the statutes as to criminal procedure provide for no motion to quash but provide for a motion to set aside the indictment for stated grounds which has practically the same effect.[12] A motion may be entertained to set aside a presentment in the same manner as if it were an indictment.[13] An indictment or presentment will not be quashed or set aside after a *nolle prosequi* has been entered to it.[14]

2. Discretion of Court. A motion to quash an indictment is ordinarily addressed to the discretion of the court,[15] the accused not being entitled to demand a quashal as a matter of right.[16] A refusal to grant the motion is for this reason not usually assignable as error,[17] although in some states, the motion being regarded

1. Rex *v.* Sutton, 4 Burr. 2116; and other cases in the notes following.
2. Rex *v.* Sutton, 4 Burr. 2116.
3. Rex *v.* Crookes, 3 Burr. 1841.
4. Rex *v.* Johnson, 1 Wils. C. P. 325.
5. State *v.* Flowers, 109 N. C. 841, 13 S. E. 718; State *v.* Colbert, 75 N. C. 368; Com. *v.* Litton, 6 Gratt. (Va.) 691.
6. People *v.* Walters, 5 Park. Cr. (N. Y.) 661; State *v.* Skidmore, 109 N. C. 795, 14 S. E. 63; State *v.* Colbert, 75 N. C. 368.
7. *New Jersey.*— State *v.* Ham, 65 N. J. L. 464, 47 Atl. 508; Proctor *v.* State, 55 N. J. L. 472, 26 Atl. 804.
New York.— People *v.* Davis, 56 N. Y. 95; People *v.* Eckford, 7 Cow. 535.
North Carolina.— State *v.* Smith, 5 N. C. 213.
Ohio.— *Ex p.* Bushnell, 8 Ohio St. 599.
Pennsylvania.— Respublica *v.* Cleaver, 4 Yeates 69; Com. *v.* Haggerty, 3 Brewst. 285.
Virginia.— Bell *v.* Com., 8 Gratt. 600.
United States.— U. S. *v.* Wardell 49 Fed. 914; U. S. *v.* Dustin, 25 Fed. Cas. No. 15,011, 2 Bond 332.
England.— Reg. *v.* Heane, 4 B. & S. 947, 9 Cox C. C. 433, 10 Jur. N. S. 724, 33 L. J. M. C. 115, 9 L. T. Rep. N. S. 719, 12 Wkly. Rep. 417, 116 E. C. L. 947.
8. *Massachusetts.*— Com. *v.* Eastman, 1 Cush. 189, 48 Am. Dec. 596.
New Hampshire.— State *v.* Robinson, 29 N. H. 274, where indictment discloses that prosecution is barred by limitations.
New Jersey.— State *v.* Beard, 25 N. J. L. 384; State *v.* Dayton, 23 N. J. L. 49, 53 Am. Dec. 270.
New York.— People *v.* Walters, 5 Park. Cr. 661.
Pennsylvania.— Com. *v.* Pavitt, 2 Del. Co. 16.
United States.— U. S. *v.* Dustin, 25 Fed. Cas. No. 15,011, 2 Bond 332; U. S. *v.* O'Sullivan, 27 Fed. Cas. No. 15,974.
9. Bell *v.* Com., 8 Gratt. (Va.) 600; Reg. *v.* Heane, 4 B. & S. 947, 9 Cox C. C. 433, 10 Jur. N. S. 724, 33 L. J. M. C. 115, 9 L. T. Rep. N. S. 719, 12 Wkly. Rep. 417, 116 E. C. L. 947.
10. State *v.* Robinson, 29 N. H. 274; Huff *v.* Com., 14 Gratt. (Va.) 648; Bell *v.* Com., 8 Gratt. (Va.) 600; U. S. *v.* Wardell, 49 Fed. 914; Rex *v.* MacDonald, 3 Burr. 1645.
11. U. S. *v.* Kilpatrick, 16 Fed. 765.
12. See the statutes of the various states. See also Stanley *v.* U. S., 1 Okla. 336, 33 Pac. 1025.
13. Matter of Gardiner, 31 Misc. (N. Y.) 364, 64 N. Y. Suppl. 760, 14 N. Y. Cr. 519.
14. U. S. *v.* Hill, 26 Fed. Cas. No. 15,364, 1 Brock. 156.
15. *Maine.*— State *v.* Barnes, 29 Me. 561; State *v.* Stuart, 23 Me. 111.
Missouri.— State *v.* Wishon, 15 Mo. 503.
New Jersey.— Proctor *v.* State, 55 N. J. L. 472, 26 Atl. 804; State *v.* Hageman, 13 N. J. L. 314.
New York.—People *v.* Eckford, 7 Cow. 535; People *v.* Walters, 5 Park. Cr. 661.
Pennsylvania.— Respublica *v.* Cleaver, 4 Yeates 69.
Rhode Island.— State *v.* Watson, 20 R. I. 354, 39 Atl. 193, 78 Am. St. Rep. 871; State *v.* McCarty, 4 R. I. 82.
South Carolina.— State *v.* Sheppard, 54 S. C. 178, 32 S. E. 146.
Texas.— Click *v.* State, 3 Tex. 282.
Virginia.— Com. *v.* McCaul, 1 Va. Cas. 271.
United States.— U. S. *v.* O'Sullivan, 27 Fed. Cas. No. 15,974; U. S. *v.* Stowell, 27 Fed. Cas. No. 16,409, 2 Curt. 153.
England.— Rex *v.* Sutton, 4 Burr. 2116; Rex *v.* Johnston, 1 Wils. C. P. 325.
See 27 Cent. Dig. tit. "Indictment and Information," § 471.
Although another judge sent the indictment to the grand jury, a judge of the same court may order it quashed for reasons which, had they been disclosed, would have prevented its being sent in the first instance. Com. *v.* Green, 126 Pa. St. 531, 17 Atl. 878, 12 Am. St. Rep. 894.
16. State *v.* Dayton, 23 N. J. L. 49, 53 Am. Dec. 270; People *v.* Davis, 56 N. Y. 95.
17. State *v.* Lynn, 3 Pennew. (Del.) 316, 51 Atl. 878; State *v.* Patterson, 159 Mo. 98, 59 S. W. 1104; State *v.* Black, (N. J. Sup. 1890) 20 Atl. 255 [*affirmed* in 53 N. J. L. 462, 23 Atl. 1081]; Durland *v.* U. S., 161 U. S. 306, 16 S. Ct. 508, 40 L. ed. 709.

as in the nature of a general demurrer, it is held that the action thereon may be reviewed, although resting in the sound discretion of the trial court.[18] The state in some jurisdictions has an appeal from an order of quashal.[19]

3. Necessity of Custody or Appearance of Accused. It has been held that a motion to quash cannot, in the absence of statute, be heard when defendant is not in custody,[20] or after forfeiture of his recognizance.[21] Nor can an indictment be set aside on special appearance.[22]

4. On Motion of Prosecution or of Court. Under the English practice it was held that in some cases an indictment might be quashed on motion of the prosecution as well as of accused,[23] as where it was fatally defective,[24] or where two indictments were pending for the same offense.[25] So where an indictment was clearly bad the court might on its own motion refuse to try it.[26]

5. Time For Motion — a. In General. Ordinarily a motion to quash must be made before arraignment[27] or plea.[28] The court may, however, permit a plea to be withdrawn to allow a motion,[29] in its discretion,[30] a withdrawal in some jurisdictions being held necessary,[31] although in others the motion may be made without

Certiorari will not lie to review the action of the court of quarter sessions in quashing an indictment over which it had jurisdiction. Reg. *v.* Wilson, 6 Q. B. 620, 8 Jur. 1009, 14 L. J. M. C. 3, 1 New Sess. Cas. 427, 51 E. C. L. 620.

18. Nichols *v.* State, 46 Miss. 284; Com. *v.* Hall, 23 Pa. Super. Ct. 104; Com. *v.* New Bethlehem Borough, 15 Pa. Super. Ct. 158.

Review of discretion in general see Criminal Law, 12 Cyc. 869.

19. See Criminal Law, 12 Cyc. 805.

20. U. S. *v.* Taylor, 28 Fed. Cas. No. 16,437, 4 Cranch C. C. 731. *Contra*, State *v.* Morris, Houst. Cr. Cas. (Del.) 124.

When an absent defendant may be tried, as under a statute giving such right in case the offense is punishable by fine only, in case a bond is given for payment of the fine, he may move to quash after giving such a bond. Luther *v.* State, 27 Ind. 47.

21. Com. *v.* Haggerty, 3 Brewst. (Pa.) 285; Anonymous, 1 Salk. 380. And see State *v.* Marion, 15 La. Ann. 495.

22. People *v.* Equitable Gas-Light Co., 5 N. Y. Suppl. 19, 6 N. Y. Cr. 189.

23. Reg. *v.* Stowell, 1 Dowl. P. C. N. S. 320, 5 Jur. 1010. See also cases cited in the notes following.

24. Rex *v.* Wynn, 2 East 226.

After plea the indictment will not be quashed before another indictment is found. Rex *v.* Wynn, 2 East 226.

After judgment on demurrer the indictment cannot he so quashed. Reg. *v.* Smith, 2 M. & Rob. 109.

25. Rex *v.* Glenn, 3 B. & Ald. 373, 5 E. C. L. 219.

The court may impose terms, such as payment of costs (Rex *v.* Webb, 3 Burr. 1468, 1 W. Bl. 460; Reg. *v.* Dunn, 1 C. & K. 730, 47 E. C. L. 730), or that the name of the prosecutor be disclosed and the substituted indictment shall stand in the same situation as the first (Rex *v.* Glenn, 3 B. & Ald. 373, 5 E. C. L. 219).

Will not be quashed merely on affidavit that both refer to same transaction. Reg. *v.* Stockley, 3 Q. B. 238, 2 G. & D. 728, 11 L. J. M. C. 105, 43 E. C. L. 715.

26. Rex *v.* Tremearne, 11 B. & C. 761, 10 E. C. L. 670, 5 D. & R. 413, 16 E. C. L. 240, 3 L. J. K. B. O. S. 57, R. & M. 147, 21 E. C. L. 721; Reg. *v.* Rigby, 8 C. & P. 770, 34 E. C. L. 1012; Rex *v.* Abraham, 1 M. & Rob. 7.

27. State *v.* Pryor, 53 Kan. 657, 37 Pac. 169.

Court rules requiring a motion to quash to be filed before the first Monday of the next regular term, subsequent to the one at which the indictment was found, must be complied with, although counsel for the defense were not retained until shortly before such Monday. Com. *v.* Levy, 17 Lanc. L. Rev. (Pa.) 103.

28. *Georgia.*— Thomasson *v.* State, 22 Ga. 499.

Maine.— State *v.* Burlingham, 15 Me. 104.

New York.— People *v.* Walters, 5 Park. Cr. 661.

Pennsylvania.—Com. *v.* Haggerty, 3 Brewst. 285, so holding, although prisoner's counsel had before the plea was entered of record ordered it withdrawn.

South Carolina.— State *v.* Boyd, 56 S. C. 382, 34 S. E. 661, disqualification of grand juror.

England.— Reg. *v.* Heywood, 9 Cox C. C. 479, L. & C. 451, 33 L. J. M. C. 133, 10 L. T. Rep. N. S. 464, 12 Wkly. Rep. 764. And see Reg. *v.* Chapple, 17 Cox C. C. 455, 56 J. P. 360, 66 L. T. Rep. N. S. 124.

See 27 Cent. Dig. tit. "Indictment and Information," § 473.

29. State *v.* Hale, 44 Iowa 96 (motion to dismiss); *In re* Nicholls, 5 N. J. L. 539; State *v.* Riffe, 10 W. Va. 794. See Criminal Law, 12 Cyc. 351.

After a mistrial it is too late to withdraw a plea. State *v.* Lichliter, 95 Mo. 402, 8 S. W. 720.

30. Com. *v.* Eagan, 190 Pa. St. 10, 42 Atl. 374. See Criminal Law, 12 Cyc. 351.

31. McKevitt *v.* People, 208 Ill. 460, 70 N. E. 693.

withdrawal.[32] Where, however, with the consent of the court, a motion to quash is filed after plea, the plea is not thereby withdrawn.[33] For certain grounds, however, a motion to quash may be entertained at any time before verdict;[34] as where a lack of jurisdiction is apparent,[35] or grounds are urged which would be sufficient in arrest of judgment,[36] such as that the indictment does not charge facts sufficient to constitute a crime.[37] A motion comes too late after verdict,[38] and after plea and judgment the ruling upon the motion is not subject to exceptions.[39]

b. Statutory Provisions. Under the statutes of criminal procedure it is frequently provided that a motion to dismiss or set aside must be made before plea or demurrer,[40] or before arraignment,[41] or in the case of formal and apparent defects, before the jury is sworn.[42] The court may, however, permit a plea to

32. State *v.* Hegeman, 2 Pennew. (Del.) 143, 44 Atl. 623; Norris' House *v.* State, 3 Greene (Iowa) 513 (motion to dismiss for objection to grand jury); Richards *v.* Com., 81 Va. 110. And see Com. *v.* Chapman, 11 Cush. (Mass.) 422 (where the motion was made before the jury was impaneled); State *v.* Reeves, 97 Mo. 668, 10 S. W. 841, 10 Am. St. Rep. 349.

33. State *v.* Reeves, 97 Mo. 668, 10 S. W. 841, 10 Am. St. Rep. 349. See also State *v.* Bishop, 22 Mo. App. 435.

34. State *v.* Sheppard, 97 N. C. 401, 1 S. E. 879; State *v.* Jones, 88 N. C. 671; State *v.* Eason, 70 N. C. 88. See also Reg. *v.* Howes, 5 Manitoba 339.

35. State *v.* Benthall, 82 N. C. 664; Reg. *v.* Heane, 4 B. & S. 947, 9 Cox C. C. 433, 10 Jur. N. S. 724, 33 L. J. M. C. 115, 9 L. T. Rep. N. S. 719, 12 Wkly. Rep. 417, 116 E. C. L. 947.

36. People *v.* Judson, 11 Daly (N. Y.) 1.

37. People *v.* Winner, 80 Hun (N. Y.) 130, 30 N. Y. Suppl. 54.

38. State *v.* Barbee, 93 N. C. 498; State *v.* Jarvis, 63 N. C. 556.

39. State *v.* Barnes, 29 Me. 561.

40. *Alabama.*— Oakley *v.* State, 135 Ala. 15, 33 So. 23; Johnson *v.* State, 134 Ala. 54, 32 So. 724; Davis *v.* State, 131 Ala. 10, 31 So. 569; Moorer *v.* State, 115 Ala. 119, 22 So. 592, holding that a statute providing the time before which a plea in abatement should be made could not be avoided by making the plea in the guise of a motion to quash.

California.— People *v.* Stacey, 34 Cal. 307; People *v.* King, 28 Cal. 265.

Georgia.— Horne *v.* State, 37 Ga. 80, 92 Am. Dec. 49.

Idaho.— State *v.* Collins, 4 Ida. 184, 38 Pac. 38; State *v.* Clark, 4 Ida. 7, 35 Pac. 710.

Iowa.— State *v.* Tyler, 122 Iowa 125, 97 N. W. 983.

Kentucky.— Moore *v.* Com., 35 S. W. 283, 18 Ky. L. Rep. 129.

Nevada.— State *v.* Hamilton, 13 Nev. 386.

Ohio.— State *v.* Messinger, 63 Ohio St. 398, 59 N. E. 105; Corthell *v.* State, 11 Ohio Cir. Ct. 570, 5 Ohio Cir. Dec. 123.

See 27 Cent. Dig. tit. "Indictment and Information," § 473.

On transfer of cause.— A motion to dismiss on the ground that the record contains no entry of the presentment of the indictment made after the case was transferred to the county court, where it was called for trial, is in time, and should be granted, and the case returned to the district court for the amendment of the record at the succeeding term. Moore *v.* State, 46 Tex. Cr. 520, 81 S. W. 48.

On a second trial.— Defendant, if he desires to move to quash, must ask leave to withdraw a plea made at the first trial. State *v.* McCaffery, 16 Mont. 33, 40 Pac. 63.

Where a plea is entered by the court upon defendant remaining mute on arraignment, defendant cannot thereafter move to quash. Trimble *v.* State, 61 Nebr. 604, 85 N. W. 844.

41. *California.*— People *v.* Bawden, 90 Cal. 195, 27 Pac. 204.

Indiana.— Epps *v.* State, 102 Ind. 539, 1 N. E. 491.

Kentucky.— Com. *v.* Pritchett, 11 Bush 277; Com. *v.* Smith, 10 Bush 476.

Minnesota.— State *v.* Dick, 47 Minn. 375, 50 N. W. 362 (withdrawal of plea permitted for another purpose will not allow objections to the grand jury to be raised); State *v.* Schumm, 47 Minn. 373, 50 N. W. 362 (defects in the organization of grand jury must be then made unless the court for good cause postpone the hearing).

Oregon.— State *v.* Smith, 33 Oreg. 483, 55 Pac. 534.

See 27 Cent. Dig. tit. "Indictment and Information," § 373.

Where defendant has taken time to answer on arraignment, he may under the Oregon statutes move to set aside the indictment upon the day allowed him after arraignment. State *v.* Pool, 20 Oreg. 150, 25 Pac. 375.

Under the Louisiana statute objections to the grand jury must be made before trial. State *v.* Starr, 52 La. Ann. 610, 26 So. 998. See also as to practice under former statutes State *v.* Robertson, 50 La. Ann. 1101, 24 So. 138; State *v.* Hebert, 50 La. Ann. 401, 23 So. 300; State *v.* Dartez, 50 La. Ann. 322, 23 So. 334; State *v.* Sterling, 41 La. Ann. 679, 6 So. 583.

42. Com. *v.* Schaffner, 146 Mass. 512, 16 N. E. 280; Com. *v.* Fitchburg R. Co., 126 Mass. 472 (although the motion is made before the impaneling of the jury for a new trial of the case, the former verdict having been set aside); Shuster *v.* State, 69 N. J. L.

be withdrawn and the motion made.[43] Failure to discover the grounds in time to move in proper course may in some cases authorize the motion to be made later;[44] but defendant must have exercised reasonable diligence to ascertain the facts.[45]

6. Form and Sufficiency of Motion. A motion to quash must specify distinctly the defects in the indictment.[46] A motion based upon a misnomer should state defendant's true name.[47] In some cases an oral motion may be made.[48]

7. Grounds — a. In General. As a general rule a motion to quash must be founded on defects which would render a judgment against defendant on the indictment erroneous.[49] Only such propositions may be considered as raise clear points of law.[50] The motion cannot be upon grounds invading the province of the jury.[51] In case no irregularity is shown the court possesses no discretionary power to quash.[52] At common law quashing was frequently refused where objec-

521, 41 Atl. 701; Com. *v.* Frey, 50 Pa. St. 245; Reg. *v.* Lepine, 4 Can. Cr. Cas. 145 (holding that a motion on the ground that the indictment was not based on the depositions taken at the preliminary inquiry might be made after a plea of not guilty, if the jury had not been sworn).

It is discretionary to permit after plea an exception to the qualification of a grand juror, although the statute requires such exceptions to be made before the jury is sworn. State *v.* Gardner, 104 N. C. 739, 10 S. E. 146.

Delay may forfeit right, although the motion is made before the jury is sworn; as where the motion is not made until a continuance and at a second term. Com. *v.* Windish, 176 Pa. St. 167, 34 Atl. 1019.

43. State *v.* Collyer, 17 Nev 275, 30 Pac. 891, as where the court is of the opinion that there is merit in the motion.

44. State *v.* Strickland, 41 La. Ann. 513, 6 So. 471.

Defects and irregularities in drawing grand jury.— State *v.* Clavery, 43 La. Ann. 1133, 10 So. 203; State *v.* Taylor, 43 La. Ann. 1131, 10 So. 203 (both holding, though Acts (1877), No. 44, § 11, require a motion to quash an indictment for irregularities in drawing the grand jury to be made on the first day of the term, that it does not require it to be then made if impossible, as where the indictment is not presented until after the first day of the term; and, in such case, the motion is seasonably made if made at the same term); State *v.* Mims, 42 La. Ann. 944, 8 So. 471; State *v.* Oliver, 42 La. Ann. 943, 8 So. 471; State *v.* Hinson, 42 La. Ann. 941, 8 So. 471; State *v.* Strickland, 41 La. Ann. 513, 6 So. 471. But see State *v.* Leftwich, 46 La. Ann. 1194, 15 So. 411.

45. Moorer *v.* State, 115 Ala. 119, 22 So. 592.

Knowledge of the counsel of accused is imputed to the accused (State *v.* Wyatt, 50 La. Ann. 1301, 24 So. 335); and it must be shown that neither accused nor his counsel knew of the fact set up in the motion when the plea was filed (State *v.* Wyatt, *supra*: State *v.* Robertson, 50 La. Ann. 1101, 24 So. 138).

46. State *v.* Maurer, 7 Iowa 406; Edgar *v.* State, 96 Tenn. 690, 36 S. W. 379. *Contra*, State *v.* McDaniel, 4 Pennew. (Del.) 96, 54 Atl. 1056 (holding that a general motion need not specify the grounds); Davis *v.* State, 69 Ind. 130 (holding that it was not necessary to point out defects in the affidavit on which an information was based).

Filing of a formal statement of grounds of motion may be compelled. *In re* Davis, 7 Fed. Cas. No. 3,621*a*, Chase 1, treason.

That facts do not constitute an offense has been held a sufficient statement. State *v.* Weeks, 77 Mo. 496 [*overruling* State *v.* Poston, 63 Mo. 521; State *v.* Berry, 62 Mo. 595; State *v.* Webb, 37 Mo. 366; State *v.* Van Houten, 37 Mo. 357]. *Contra*, State *v.* Maurer, 7 Iowa 406.

A motion on the ground of duplicity must point out wherein more than one offense is charged. State *v.* Spence, 87 Mo. App. 577.

Under statutes substantially embodying the text, a general statement is held insufficient (Com. *v.* Langley, 169 Mass. 89, 47 N. E. 511; State *v.* Marshall, 47 Mo. 378; State *v.* Murphy, 47 Mo. 274); such as that the indictment is "uncertain, indefinite, and insufficient" (Com. *v.* Jenks, 138 Mass. 484); or that it is "fatally defective" (Com. *v.* Intoxicating Liquors, 105 Mass. 176).

47. State *v.* Carahin, 33 Tex. 697; Eddison *v.* State, (Tex. Cr. App. 1903) 73 S. W. 397.

Proper addition should be stated. Com. *v.* Murphy, 12 Pa. Co. Ct. 131; Rex *v.* Thomas, 3 D. & R. 621, 2 L. J. K. B. O. S. 41, 16 E. C. L. 179.

On plea of misnomer generally see Criminal Law, 12 Cyc. 359.

48. Gilmore *v.* State, 118 Ga. 299, 45 S. E. 226.

49. U. S. *v.* Pond, 27 Fed. Cas. No. 16,067, 2 Curt. 265, holding that a defect which was pleadable only in abatement and was cured by pleading over, such as the want of an addition or a wrong addition, was not ground for quashing.

50. U. S. *v.* Grunberg, 131 Fed. 137.

51. State *v.* Prater, 59 S. C. 271, 37 S. E. 933, holding that after the evidence was in, an indictment for sale of liquor could not be quashed because defendants were charged with joint sales, and the evidence showed separate sales only.

52. Com. *v.* New Bethlehem, 15 Pa. Super. Ct. 158.

tions were tenable on demurrer.[53] Under statutes of some states grounds which at common law should have been presented by demurrer are made grounds for quashing.[54]

b. Restriction by Statutory Provisions. In many jurisdictions the specific grounds upon which a motion to quash may be urged are enumerated by statute, and are held to be exclusive of all others.[55] Such statutes, however, where the question has been presented are held not to be exclusive of other constitutional grounds,[56] and not to curtail the power of the court to prevent oppression or prosecution.[57] So where a defendant has had no prior opportunity of raising the objection, he may notwithstanding such a statute move to quash because of race discrimination in the selection of grand jurors,[58] and likewise the courts may set aside an indictment found without evidence or upon illegal evidence.[59]

c. Matters Not Apparent on Face of Record. The rule as generally stated is that an indictment or information will not be quashed for matters not apparent on its face or shown by the record,[60] a motion to quash being regarded as partak-

53. Reg. *v.* Taylor, 9 Dowl. P. C. 600, 5 Jur. 679.

54. State *v.* Young, 30 S. C. 399, 9 S. E. 355, so holding under a statute providing that every defect apparent on the face of the indictment might be taken advantage of by demurrer or motion to quash.

55. *California.*—People *v.* Schmidt, 64 Cal. 260, 30 Pac. 814.

Iowa.— State *v.* Baughman, 111 Iowa 71, 82 N. W. 452.

North Dakota.— State *v.* Tough, 12 N. D. 425, 96 N. W. 1025.

Texas. — Johnson *v.* State, 22 Tex. App. 206, 2 S. W. 609.

Canada.— Reg. *v.* Toronto R. Co., 4 Can. Cr. Cas. 4.

The New York code of criminal procedure enumerates certain grounds and provides that for them and no other the indictment may be set aside. This provision is held to exclude all but constitutional grounds other than those mentioned (People *v.* Glen, 173 N. Y. 395, 66 N. E. 112 [*affirming* 64 N. Y. App. Div. 167, 71 N. Y. Suppl. 893]; People *v.* Bills, 44 Misc. 348, 89 N. Y. Suppl. 1091; People *v.* Connor, 31 Misc. 668, 66 N. Y. Suppl. 126; People *v.* Willis, 23 Misc. 568, 52 N. Y. Suppl. 808). In some of the lower courts, however, a discretionary power of dismissal for other grounds was held to be conferred by section 671 allowing the court to order a dismissal on its own motion in the furtherance of justice (People *v.* Spolasco, 33 Misc. 530, 68 N. Y. Suppl. 924, 15 N. Y. Cr. 293; People *v.* Stern, 33 Misc. 455, 68 N. Y. Suppl. 732, 15 N. Y. Cr. 295; People *v.* Thomas, 32 Misc. 170, 66 N. Y. Suppl. 191, 8 N. Y. Annot. Cas. 36, 15 N. Y. Cr. 81; Matter of Gardiner, 31 Misc. 364, 64 N. Y. Suppl. 760, 14 N. Y. Cr. 519; People *v.* Vaughan, 19 Misc. 298, 44 N. Y. Suppl. 959, 11 N. Y. Cr. 388), some opinions limiting this discretionary power to constitutional grounds (People *v.* Winant, 24 Misc. 361, 53 N. Y. Suppl. 695. And see People *v.* Willis, 23 Misc. 568, 52 N. Y. Suppl. 808). Before the addition of the words "and no other" to the statutory enumeration by amendment it was held not exclusive (People *v.* Price, 2 N. Y. Suppl. 414, 6 N. Y. Cr. 141; People *v.* Clements, 5 N. Y. Cr. 288).

Summoning and impaneling of grand jury see *infra*, IX, B, 7, g.

56. Carter *v.* State, 39 Tex. Cr. 345, 46 S. W. 236, 48 S. W. 508.

57. People *v.* Glen, 173 N. Y. 395, 66 N. E. 112 [*affirming* 64 N. Y. App. Div. 167, 71 N. Y. Suppl. 893]. And see Palmore *v.* State, 29 Ark. 248, holding that a statute prohibiting exceptions to the rulings of inferior courts in refusing to set aside an indictment for a defect in the formation of the grand jury is unconstitutional, since while the legislature may prescribe the time and manner of determining objections to the qualifications of jurors, it cannot take away the right of objecting.

58. See *infra*, IX, B, 7, g, (II).

59. People *v.* Glen, 173 N. Y. 395, 66 N. E. 112 [*citing* and *reviewing* People *v.* Rutherford, 47 N. Y. App. Div. 209, 62 N. Y. Suppl. 224; People *v.* Scannell, 37 Misc. (N. Y.) 345, 75 N. Y. Suppl. 500; People *v.* Montgomery, 36 Misc. (N. Y.) 326, 73 N. Y. Suppl. 535; People *v.* Thomas, 32 Misc. (N. Y.) 170, 66 N. Y. Suppl. 191; People *v.* O'Connor, 31 Misc. (N. Y.) 668, 66 N. Y. Suppl. 126; People *v.* Molineaux, 27 Misc. (N. Y.) 79, 58 N. Y. Suppl. 155; People *v.* Winant, 24 Misc. (N. Y.) 361, 53 N. Y. Suppl. 695; People *v.* Willis, 23 Misc. (N. Y.) 568, 52 N. Y. Suppl. 808; People *v.* Vaughan, 19 Misc. (N. Y.) 298, 42 N. Y. Suppl. 959; People *v.* Brickner, 15 N. Y. Suppl. 528, 8 N. Y. Cr. 217; People *v.* Clark, 14 N. Y. Suppl. 642, 8 N. Y. Cr. 169, 179; People *v.* Moore, 65 How. Pr. (N. Y.) 177]. See *infra*, IX, B, 7, i.

60. *California.*— People *v.* More, 68 Cal. 500, 9 Pac. 461, holding that an information which was good on its face and regularly filed, could not be set aside on the ground that the offense was not committed in the county alleged.

Connecticut.— Wickwire *v.* State, 19 Conn. 477.

Florida.— Broward *v.* State, 9 Fla. 422.

Indiana.— Willey *v.* State, 46 Ind. 363.

Massachusetts. — Com. *v.* Hayden, 163

ing of the nature of a demurrer in this respect.[61] There are, however, certain well recognized exceptions to this rule which permit matters going to the summoning or qualifications of the grand jurors,[62] or to irregularities in their proceedings and deliberations,[63] or to the illegality or insufficiency of the proof upon which they have acted,[64] to be raised by a motion of this nature.

d. Former Jeopardy. Former jeopardy furnishes no ground for quashing an indictment, but must be urged by special plea.[65]

e. Quashing or Pendency of Other Indictments. An information will not be quashed because an indictment previously found for the same offense has been quashed for insufficiency.[66] In case two indictments are pending for the same offense, it has been held that the first will be quashed.[67]

f. Irregularities in Preliminary Examination or Proceedings. In the absence of a statute, defects in the information or complaint upon which the committing magistrate acted are not, after indictment found, ground for a motion to quash.[68]

Mass. 453, 40 N. E. 846, 47 Am. St. Rep. 468, 28 L. R. A. 318.

New Jersey.— State *v.* Zeigler, 46 N. J. L. 307 (holding that whether certain city ordinances were in force was a question of fact, which could not be considered); State *v.* Rickey, 9 N. J. L. 293.

Pennsylvania.—McCullough *v.* Com., 67 Pa. St. 30; Com. *v.* Church, 1 Pa. St. 105, 44 Am. Dec. 112; Com. *v.* Meads, 14 York Leg. Rec. 130.

Rhode Island.— State *v.* Collins, 24 R. I. 242, 52 Atl. 990 (holding that a complaint in a criminal case will not be quashed because of disqualification of the judge); State *v.* Watson, 20 R. I. 354, 39 Atl. 193, 78 Am. St. Rep. 871.

Vermont.— State *v.* Ward, 60 Vt. 142, 14 Atl. 187.

United States.— U. S. *v.* Brown, 24 Fed. Cas. No. 14,671, 1 Sawy. 531.

England.— Reg. *v.* Burnby, 5 Q. B. 348, Dav. & M. 362, 8 Jur. 240, 13 L. J. M. C. 29, 48 E. C. L. 348.

See 27 Cent. Dig. tit. "Indictment and Information," § 480.

61. State *v.* Rickey, 9 N. J. L. 293.

62. See *infra*, IX, B, 7, g.

63. Com. *v.* Bradney, 126 Pa. St. 199, 17 Atl. 600. See *infra*, IX, B, 7, h.

64. See *infra*, IX, B, 7, i. And see Com. *v.* Bartilson, 85 Pa. St. 482, holding, however, that the insufficiency of a bill of particulars was not ground.

65. Johnson *v.* State, 134 Ala. 54, 32 So. 724.

Plea of former jeopardy see CRIMINAL LAW, 12 Cyc. 363.

66. U. S. *v.* Nagle, 27 Fed. Cas. No. 15,852, 17 Blatchf. 258.

67. State *v.* Welbon, 66 Ark. 510, 51 S. W. 829 (under a statute making the rule stated in the text mandatory and holding that the test of whether indictments were for the same offense was the similarity of evidence to establish each); State *v.* Hall, 50 Ark. 28, 6 S. W. 20; People *v.* Farrell, 20 Misc. (N. Y.) 213, 45 N. Y. Suppl. 911. *Contra*, State *v.* Barkman, 7 Ark. 387 (holding that pendency of another indictment must be urged by plea, although a statute provided it should be ground for quashing the first indictment found); State *v.* Whitmore, 5 Ark. 247. And see Rex *v.* Chamberlain, 6 C. & P. 93, 25 E. C. L. 338.

Where a first indictment has been withdrawn on the close of arguments upon a demurrer, the fact that no order has been entered disposing of the demurrer as required by statute will not demand the quashing of the second indictment in the absence of any showing of prejudice. State *v.* Ford, 16 S. D. 228, 92 N. W. 18.

Election between indictments see *supra*, VIII, D.

68. Com. *v.* Brennan, 193 Pa. St. 567, 44 Atl. 498 (indictment not found upon an information sworn to and subscribed before committing magistrate); Com. *v.* Dingman, 26 Pa. Super. Ct. 615 (holding that while a prisoner may raise questions as to the legality of his arrest on a proceeding to be discharged from custody, he cannot, after giving bail to answer the charge, urge such question by motion to quash the indictment). *Contra*, Com. *v.* Clement, 8 Pa. Dist. 705. And see Com. *v.* McCaul, 1 Va. Cas. 271, holding that an indictment might be quashed where it could not be determined from the record of the preliminary examination for what offense accused was remanded. See also CRIMINAL LAW, 12 Cyc. 320.

The legality of an arrest may be inquired into in the federal courts. U. S. *v.* Shepard, 27 Fed. Cas. No. 16,273, 1 Abb. 431, holding also that it may be urged that there was no showing on oath or affirmation to support the warrant.

In case the proceeding is by information, although a statute may require a legal commitment as a basis therefor, the information cannot be set aside for informalities or irregularities which do not deprive defendant of any substantial right. People *v.* Lee Look, 143 Cal. 216, 76 Pac. 1028 (so holding, although the complaint failed to charge an offense); People *v.* Rodrigo, 69 Cal. 601, 11 Pac. 481 (so holding with regard to an omission by the district attorney or magistrate to ask the profession or business of the witness); State *v.* McGann, 8 Ida. 40, 66 Pac. 823 (where the deposition of a witness at a preliminary examination did not state his occupation and place of residence); Alderman

As a general rule it is not necessary that an information show on its face the reason why the proceeding has not been by indictment,[69] or aver that a preliminary examination as required by a particular statute was had.[70]

g. Irregularities in Composition and Organization of Grand Jury — (i) *In General.* In general a mere irregularity or informality in the procedure with regard to drawing, summoning, and impaneling of the grand jury, by which an indictment is found, is not ground for quashing it unless prejudice is shown to have been occasioned to the substantial rights of the accused.[71] Where, however, the irregularity is such that the grand jury acquires no legal existence, the indictment may be quashed,[72] as where the grand jury is organized under an unconstitutional statute.[73] Objections to the grand jury not enumerated among the specific grounds for a motion to quash prescribed by statute cannot be urged,[74]

v. State, 24 Nebr. 97, 38 N. W. 36 (holding that on an information charging a felony, the form and validity of the complaint on which a preliminary examination was had would not be inquired into, the crime alleged being the same). And see State *v.* Collins, 8 Kan. App. 398, 57 Pac. 38.

An information filed without a preliminary examination as required by statute cannot, in some states, be attacked by a motion to quash. State *v.* Sunnafrank, 64 Kan. 886, 67 Pac. 1103; State *v.* Finley, 6 Kan. 336. *Contra,* State *v.* Farris, 5 Ida. 666, 51 Pac. 772, holding that a motion supported by an affidavit wherein defendant stated positively that he had not had a preliminary examination must be allowed unless there was a showing rebutting such affidavit.

Where the information is based on the complaint it will be quashed in case the complaint is defective. State *v.* Whitaker, 75 Mo. App. 184.

Under the Canadian criminal code an indictment may be quashed where the evidence is not taken in the presence of the accused at the preliminary inquiry. Reg. *v.* Lepine, 4 Can. Cr. Cas. 145. Failure of the clerk to send to the grand jury the depositions taken on the preliminary inquiry as required by the code is not ground for motion to quash. Rex *v.* Turpin, 8 Can. Cr. Cas. 59. An indictment may be quashed where the judge did not make an order authorizing it until after it was actually found. Rex *v.* Beckwith, 7 Can. Cr. Cas. 450.

69. Wright *v.* State, 144 Ind. 210, 43 N. E. 10, that the grand jury was not in session or had been discharged.

70. State *v.* Farris, 5 Ida. 666, 51 Pac. 772, holding, however, that it is the better practice to insert such an averment.

71. *California.* — People *v.* Goldenson, 76 Cal. 328, 19 Pac. 161.

Georgia.— Roby *v.* State, 74 Ga. 812.

Illinois.— McElhanon *v.* People, 92 Ill. 369, erasure by sheriff of one name from the venire and substitution of another.

Louisiana.— State *v.* Gee, 104 La. 247, 28 So. 879, failure to publish names of grand jurors as required by law, where name omitted from list was that of a grand juror who had been excused for illness and did not serve.

Michigan.— People *v.* Lauder, 82 Mich. 109, 46 N. W. 956.

New Jersey.— Black *v.* State, 53 N. J. L. 462, 23 Atl. 1081; State *v.* Black, (Sup. 1890) 20 Atl. 255, error in name of one of a special panel served on defendant.

New York.— People *v.* Harriot, 3 Park. Cr. 112, jury list of two hundred and ninety-nine instead of three hundred as required by law.

North Carolina. — State *v.* Daniels, 134 N. C. 641, 46 S. E. 743, failure to make payment of taxes a condition to place on jury list, the members of the grand jury being in fact duly qualified.

Ohio.— Blaney *v.* State, 17 Ohio Cir. Ct. 486, 9 Ohio Cir. Dec. 616.

Pennsylvania. — Com. *v.* Smith, 4 Pa. Super. Ct. 1.

Tennessee. — State *v.* Dines, 10 Humphr. 512, variance between venire and name signed to indictment.

Texas.— Pierce *v.* State, 12 Tex. 210, informal venire.

United States.— U. S. *v.* Tallman, 28 Fed. Cas. No. 16,429, 10 Blatchf. 21.

See 27 Cent. Dig. tit. "Indictment and Information," § 481.

Irregularity must amount to corruption. State *v.* Ansaleme, 15 Iowa 44 (failure to follow statute in authentication of jury list); State *v.* Johnson, 6 Kan. App. 119, 50 Pac. 907 (statutory); U. S. *v.* Reed, 27 Fed. Cas. No. 16,134, 2 Blatchf. 435.

Findings of de facto jury are sufficient. People *v.* Morgan, 133 Mich. 550, 95 N. W. 542; People *v.* Reigel, 120 Mich. 78, 78 N. W. 1017.

Must be urged by plea.— Tervin *v.* State, 37 Fla. 396, 20 So. 551; Gladden *v.* State, 13 Fla. 623; State *v.* Haywood, 73 N. C. 437; State *v.* Seaborn, 15 N. C. 305.

72. *In re* Nicholls, 5 N. J. L. 539, as where the indictment is found by a grand jury summoned without process.

Failure to swear grand jurors is ground. Rex *v.* Belanger, 6 Can. Cr. Cas. 295.

73. State *v.* Lawrence, 12 Oreg. 297, 7 Pac. 116. *Contra,* People *v.* Petrea, 92 N. Y. 128; People *v.* Fitzpatrick, 30 Hun (N. Y.) 493, 66 How. Pr. 14. See, however, People *v.* Duff, 65 How. Pr. (N. Y.) 365.

That grand jury was drawn under such statute must be shown. Newell *v.* State, 115 Ala. 54, 22 So. 572.

74. *Alabama.*— Kitt *v.* State, 117 Ala. 213, 23 So. 485.

and likewise where the grounds for challenge to an individual juror or to the array of the grand jury are fixed by statute, a challenge cannot be sustained, although placed in the form of a motion to quash.[75] By statute it is frequently provided that a defendant who has been held to answer prior to the finding of an indictment cannot by motion to quash urge objections which would have furnished ground for a challenge to individual grand jurors or to the array,[76] although defendant was imprisoned at the time of the finding of the indictment.[77] It has been held that the irregularities must appear on the face of the record,[78] statutes sometimes so providing.[79]

(II) *DISCRIMINATION IN SELECTION.* Discrimination as to color in the selection of grand jurors is, in a case where defendant has had no prior opportunity to raise the objection, ground for quashing an indictment, although not so provided by a statute specifying the particular grounds for quashing.[80]

(III) *DISQUALIFICATION.* There is no harmony between the decisions as to whether the disqualification of an individual grand juror is ground for a motion to quash.[81] It is so regarded in some jurisdictions,[82] especially where defendants have had no opportunity to challenge,[83] decisions to this effect being some-

California.— People *v.* Colby, 54 Cal. 37; People *v.* Hunter, 54 Cal. 65, both holding that objections to the selection, summoning, or impaneling of the grand jury could not be urged.

Iowa.— State *v.* Phillips, (1902) 89 N. W. 1092, 119 Iowa 652, 94 N. W. 229, 67 L. R. A. 292 (indictment cannot be set aside because defendant had no opportunity to challenge grand jurors individually); State *v.* Fitzgerald, 63 Iowa 268, 19 N. W. 202.

Nevada.— State *v.* Simas, 25 Nev. 432, 62 Pac. 242.

Oklahoma.— Shivers *v.* Territory, 13 Okla. 466, 74 Pac. 899 (holding that under a statute providing that the indictment may be set aside where not found, indorsed, presented, or filed as prescribed by statute, it could not be urged that the grand jury was not properly formed); Stanley *v.* U. S., 1 Okla. 336, 33 Pac. 1025.

75. People *v.* Southwell, 46 Cal. 141; People *v.* Thompson, 122 Mich. 411, 81 N. W. 344; People *v.* Reigel, 120 Mich. 78, 78 N. W. 1017; State *v.* Hudspeth, 150 Mo. 12, 51 S. W. 483. See also People *v.* Salsbury, 134 Mich. 537, 96 N. W. 936; Johnson *v.* State, 33 Tex. 570.

76. See the statutes of the various states. And see People *v.* Colmere, 23 Cal. 631; People *v.* Freeland, 6 Cal. 96; Blanton *v.* State, 1 Wash. 265, 24 Pac. 439.

An indictment found by a jury called for a term to which defendant was not bound over may be quashed in case defendant had no opportunity to challenge the grand jury. Territory *v.* Ingersoll, 3 Mont. 454.

77. State *v.* Hoyt, 13 Minn. 132 (especially where defendant's counsel was in court at the time the grand jury was impaneled and sworn); State *v.* Hinckley, 4 Minn. 345; Maher *v.* State, 3 Minn. 444.

78. Tarrance *v.* State, 43 Fla. 446, 30 So. 685 [*affirmed* in 188 U. S. 519, 23 S. Ct. 402, 47 L. ed. 572]; Sullivan *v.* People, 108 Ill. App. 328 (holding a record sufficient which showed an order "that a grand jury be drawn, summoned, selected and impaneled in the manner provided by law"). See *supra*, IX, B, 7, c.

79. Cook *v.* Territory, 3 Wyo. 110, 4 Pac. 887.

80. Castleberry *v.* State, 69 Ark. 346, 63 S. W. 670, 86 Am. St. Rep. 197; Smith *v.* State, 42 Tex. Cr. 220, 58 S. W. 97; Carter *v.* State, 177 U. S. 442, 20 S. Ct. 687, 44 L. ed. 839 [*reversing* 39 Tex. Cr. 345, 46 S. W. 236, 48 S. W. 508, in which in an opinion on rehearing the right to quash was conceded].

Sufficiency of evidence as to discrimination see Thompson *v.* State, 45 Tex. Cr. 190, 74 S. W. 914; Jackson *v.* State, (Tex. Cr. App. 1902) 71 S. W. 280; Tarrance *v.* Florida, 188 U. S. 519, 23 S. Ct. 402, 47 L. ed. 572 [*affirming* 43 Fla. 446, 30 So. 685].

Admissibility of evidence as to discrimination see Smith *v.* State, 44 Tex. Cr. 90, 69 S. W. 151.

81. People *v.* Scannell, 37 Misc. (N. Y.) 345, 75 N. Y. Suppl. 500, 16 N. Y. Cr. 321.

82. *Alabama.*— Couch *v.* State, 63 Ala. 163, where jurors were summoned from the bystanders instead of from the county at large.

Kentucky.— Raganthall *v.* Com., 14 Bush 457; Com. *v.* State, 10 Bush 476.

Louisiana.— State *v.* Rowland, 36 La. Ann. 193, may be made at any time before plea.

Maryland.— Clare *v.* State, 30 Md. 163.

Virginia.— Whitehead *v.* Com., 19 Gratt. 640, as where the venire failed to require jurors to be summoned whose residence was remote from the place of the offense.

Wisconsin.— State *v.* Cole, 17 Wis. 674; Lask *v.* U. S., 1 Pinn. 77.

United States.— U. S. *v.* Gale, 109 U. S. 65, 3 S. Ct. 1, 27 L. ed. 857.

83. People *v.* Travers, 88 Cal. 233, 22 Pac. 88; Com. *v.* Craig, 19 Pa. Super. Ct. 81, holding that when an objection to a grand juror was known, or might, by the exercise of reasonable diligence, have been known and have been interposed by the challenge, a refusal to quash the indictment for that cause was not reversible error.

times based on express statutes.[84] In other jurisdictions a contrary rule prevails,[85] frequently by reason of express statutory provision.[86]

(IV) *PRESUMPTION OF REGULARITY.* Regularity of the proceedings is presumed,[87] and the indorsement of an indictment, "a true bill," is evidence that it was duly found by a legal grand jury;[88] but such indorsement may be overcome by the records of the court.[89]

h. Proceedings and Deliberations of Grand Jury — (I) *IN GENERAL.* Matters which go to the proceedings of the grand jury and which contradict the record, and if true are provable only by the testimony of the grand jurors, while in many states they cannot be set up by a plea in abatement,[90] may in some cases, where manifest and undeniable wrong has been done, be set up by a suggestion to the court in the nature of a motion to quash,[91] as where a requisite number of the grand jurors have not concurred in the finding of the indictment.[92] In case the grand jury have been guilty of misconduct, the court may in its discretion quash an indictment.[93] An indictment will not be quashed for the failure of the grand jury to observe directory provisions of the statutes,[94] or for error in the general charge of the court.[95]

(II) *PRESENCE OR ADVICE OF UNAUTHORIZED PERSON.* Where the proceedings before the grand jury are conducted by[96] or the indictment is found on the advice of[97] an unauthorized person it may be set aside. At common law, the presence of any person other than the witness undergoing examination, and the attorney for the state during the proceedings of the grand jury, is ground for quashing.[98] In

84. See Com. *v.* Smith, 10 Bush (Ky.) 476; State *v.* Peoples, 131 N. C. 784, 42 S. E. 814, holding that a motion to quash was the proper remedy where negroes had been excluded solely on the ground of color from a grand jury indicting a negro. See, however, Slagel *v.* Com., 81 Ky. 485; Com. *v.* Pritchett, 11 Bush (Ky.) 277, both holding that the fact that grand jurors acted who might have availed themselves of a personal exemption from duty was not a ground for quashal. *Compare* GRAND JURIES, 20 Cyc. 1304, 1305.

85. Baker *v.* State, 58 Ark. 513, 25 S. W. 603 (although a statute provides that one held to answer a criminal charge may object to the competency of grand jurors before they are sworn); People *v.* Scannell, 37 Misc. (N. Y.) 345, 75 N. Y. Suppl. 500, 16 N. Y. Cr. 321.

Where prejudice is not shown, defendant cannot have the indictment quashed because he has not had an opportunity to challenge. Nash *v.* State, 73 Ark. 399, 84 S. W. 497.

86. *Illinois.* — Davison *v.* People, 90 Ill. 221, where a juror was a resident of another state.

Indiana.— Mathes *v.* State, 94 Ind. 562; State *v.* Taylor, 8 Blackf. 178.

New Jersey.—State *v.* Hoffman, 70 N. J. L. 629, 57 Atl. 263, where a grand juror was older than permitted by statute.

New Mexico.— Territory *v.* Leyba, (1897) 47 Pac. 718.

South Carolina.— State *v.* Boyd, 56 S. C. 382, 34 S. E. 661.

Texas.— Cubine *v.* State, 45 Tex. Cr. 108, 73 S. W. 39; Lienburger *v.* State, (Cr. App. 1893) 21 S. W. 603; Doss *v.* State, 28 Tex. App. 506, 13 S. W. 788 [*overruling* Woods *v.* State, 26 Tex. App. 490, 10 S. W. 108]. See also State *v.* Foster, 9 Tex. 65, in which prior to the statute it was held that the objection to be available must be apparent on the face of the indictment.

87. State *v.* Wingate, 4 Ind. 193.

88. Dutell *v.* State, 4 Greene (Iowa) 125. And see Manion *v.* People, 29 Ill. App. 532, as to evidence sufficient to overcome such presumption.

89. Dutell *v.* State, 4 Greene (Iowa) 125, as where it appears that the jury list was compared and corrected by the judge of the county court and deputy sheriff, instead of by the judge and sheriff as provided by the code.

90. See CRIMINAL LAW, 12 Cyc. 359.

91. Com. *v.* Bradney, 126 Pa. St. 199, 17 Atl. 600; U. S. *v.* Terry, 39 Fed. 355.

92. Low's Case, 4 Me. 439, 16 Am. Dec. 271; People *v.* Shattuck, 6 Abb. N. Cas. (N. Y.) 33.

93. State *v.* Dayton, 23 N. J. L. 49, 53 Am. Dec. 270.

Intoxication of a juror is not ground. Allen *v.* State, 61 Miss. 627.

94. Com. *v.* Edwards, 4 Gray (Mass.) 1, failure of foreman to return list of all witnesses sworn.

95. State *v.* White, 37 La. Ann. 172.

96. U. S. *v.* Rosenthal, 121 Fed. 862, where the proceedings were by a special assistant to the attorney-general.

97. *In re* Gardiner, 31 Misc. (N. Y.) 364, 64 N. Y. Suppl. 760, 14 N. Y. Cr. 519, holding under a statute providing that advice may be asked only of a judge or the district attorney, that a presentment on advice of a witness in response to a question by a grand juror should be set aside.

Sufficiency of showing on affidavits see People *v.* Bradner, 44 Hun (N. Y.) 233.

98. Welch *v.* State, 68 Miss. 341, 8 So. 673 (where an attorney for the prosecution of a defendant procured himself to be summoned as a witness before the grand jury and ad-

some states an assistant to the prosecuting attorney may be present in his stead.[99] It would seem in the absence of statute that the prosecuting attorney may have been present while the indictment was found in case he did not attempt to influence the finding.[1]

i. Illegality or Insufficiency of Evidence Before Grand Jury — (i) *In General.* The court will not as a general rule on a motion to quash review the character of the evidence upon which the indictment was found,[2] or consider its sufficiency.[3] So an indictment will not be quashed for the reason that the grand jury received improper evidence,[4] or examined incompetent witnesses,[5] such as the wife of defendant,[6] where other evidence was received, or witnesses examined. The sole witness, it has been held, may have been incompetent where incompetency of witnesses is not a statutory ground of quashing.[7] In extreme cases, however, where the furtherance of justice demands it, the court may review even the character and sufficiency of the evidence,[8] and where an indictment is found without lawful evidence it will be quashed.[9]

dressed them, urging the finding of an indictment); U. S. *v.* Edgerton, 80 Fed. 374 (where an expert witness remained in the jury room while another witness was being examined and put questions to him).

The district attorney may be present during, and assist in, the examination of witnesses. State *v.* Adams, 40 La. Ann. 745, 5 So. 30.

Presence of stenographer.— Where by statute an indictment is not regarded as vitiated by errors which do not prejudice the substantial rights of defendant, it has been held that the presence of a stenographer in the grand jury room is no ground for quashing the indictment in the absence of a showing of prejudice. Courtney *v.* State, 5 Ind. App. 356, 32 N. E. 335.

99. Cross *v.* State, 78 Ala. 430 (where a deputy solicitor, without otherwise interfering, was before the grand jury during the investigation of the cause, drafted the indictment, and submitted it to them); Raymond *v.* People, 2 Colo. App. 329, 30 Pac. 504. And see Blevins *v.* State, 68 Ala. 92; Bennett *v.* State, 62 Ark. 516, 36 S. W. 947.

1. Com. *v.* Bradney, 126 Pa. St. 199, 17 Atl. 600.

Under Texas statute his presence is ground for setting aside the indictment. Stuart *v.* State, 35 Tex. Cr. 440, 34 S. W. 118.

Secrecy of proceedings of grand jury see Grand Jury, 20 Cyc. 1291.

2. Mercer *v.* State, 40 Fla. 216, 24 So. 154, 74 Am. St. Rep. 135; State *v.* Boyd, 2 Hill (S. C.) 288, 27 Am. Dec. 376; McGregor *v.* U. S., 134 Fed. 187.

3. *Alabama.*— Carl *v.* State, 125 Ala. 89, 28 So. 505; Agee *v.* State, 117 Ala. 169, 23 So. 486; Jones *v.* State, 81 Ala. 79, 1 So. 32; Washington *v.* State, 63 Ala. 189; Sparrenberger *v.* State, 53 Ala. 481, 25 Am. Rep. 643.

Florida.— Mercer *v.* State, 40 Fla. 216, 24 So. 154, 74 Am. St. Rep. 135, holding that it could not be urged against a second indictment found after dismissal of a first that it was found without the reëxamination of the witnesses or introduction of new evidence.

Iowa.— State *v.* Morris, 36 Iowa 272, so holding, although the minutes of the evidence did not show sufficient facts to justify the finding.

Louisiana.—State *v.* Chandler, 45 La. Ann. 49, 12 So. 315.

New York.— Hope *v.* People, 83 N. Y. 418, 38 Am. Rep. 460; People *v.* Strong, 1 Abb. Pr. N. S. 244.

Texas.— Kingsbury *v.* State, 37 Tex. Cr. 259, 39 S. W. 365.

See 27 Cent. Dig. tit. "Indictment and Information," § 483.

4. State *v.* Logan, 1 Nev. 509; Wadley *v.* Com., 98 Va. 803, 35 S. E. 452.

5. State *v.* De Groate, 122 Iowa 661, 98 N. W. 495; State *v.* Tucker, 20 Iowa 508 (holding that the presence of the incompetent witness while testifying did not constitute the presence of a person other than the grand jurors and not authorized or permitted by law); State *v.* Logan, 1 Nev. 509; State *v.* Fellows, 3 N. C. 340 (holding, however, that where the sole evidence was incompetent the indictment would be quashed). And see People *v.* Sexton, 42 Misc. (N. Y.) 312, 86 N. Y. Suppl. 517.

6. *Iowa.*— State *v.* Brown, (1905) 102 N. W. 799; State *v.* De Groate, 122 Iowa 661, 98 N. W. 495; State *v.* Tucker, 20 Iowa 508, wife of joint defendant.

Mississippi.— Hammond *v.* State, 74 Miss. 214, 21 So. 149.

Missouri.— State *v.* Shreve, 137 Mo. 1, 38 S. W. 548.

North Carolina.—State *v.* Coates, 130 N. C. 701, 41 S. E. 706.

Texas.— Dockery *v.* State, 35 Tex. Cr. 487, 34 S. W. 281.

Contra.— People *v.* Moore, 65 How. Pr. (N. Y.) 177; People *v.* Briggs, 60 How. Pr. (N. Y.) 17.

7. U. S. *v.* Cutler, 5 Utah 608, 19 Pac. 145.

8. McGregor *v.* U. S., 134 Fed. 187; U. S. *v.* Farrington, 5 Fed. 343, holding that where it may be seen that the finding of the grand jury is based upon such insufficient or incompetent evidence as to indicate that it resulted from prejudice, or was found in wilful disregard of the rights of the accused, the indictment may be quashed.

9. State *v.* Cole, 145 Mo. 672, 47 S. W. 895; People *v.* Restenblatt, 1 Abb. Pr. (N. Y.)

(II) *Examination of Accused.* An indictment will be quashed where defendant was called to testify before the grand jury as to the matter from which it resulted, without knowing or being informed that his own conduct was under investigation,[10] and although such is not a statutory ground for quashing the indictment.[11] But where defendant has been advised of his right to decline to answer upon the ground of self-incrimination it has been held that his voluntary testimony is not ground for quashing.[12]

j. Insufficiency of Accusation — (I) *In General.* An indictment may be quashed where on its face it charges no indictable offense,[13] as where the time laid discloses that when the offense was committed no statute inflicting a penalty was in force,[14] or where the indictment is founded on an unconstitutional statute.[15]

268; People *v.* Moore, 65 How. Pr. (N. Y.) 177; Royce *v.* Territory, 5 Okla. 61, 47 Pac. 1083. *Contra,* State *v.* Dayton, 23 N. J. L. 49, 53 Am. Dec. 270.

An indictment founded on unsworn testimony may be quashed. State *v.* Ivey, 100 N. C. 539, 5 S. E. 407; Com. *v.* Price, 3 Pa. Co. Ct. 175, 4 Kulp (Pa.) 289, as where a witness whose name had not been placed on the bill by the district attorney was called, sworn (there being no authority to administer the oath) and allowed to testify before the grand jury.

Under the New York code of criminal procedure it is now settled that an indictment may be quashed where the grand jury has acted without evidence or upon illegal and incompetent testimony (People *v.* Glen, 173 N. Y. 395, 66 N. E. 112 [*affirming* 64 N. Y. App. Div. 167, 71 N. Y. Suppl. 893]; People *v.* Bills, 44 Misc. 348, 89 N. Y. Suppl. 1091; People *v.* Harmon, 34 Misc. 211, 69 N. Y. Suppl. 511, 15 N. Y. Cr. 360). Prior to these decisions there had been a conflict of authority, some decisions denying the power of the court to dismiss on other than the express statutory grounds (People *v.* Rutherford, 47 N. Y. App. Div. 209, 62 N. Y. Suppl. 224; People *v.* Scannell, 37 Misc. 345, 75 N. Y. Suppl. 500; People *v.* Montgomery, 36 Misc. 326, 73 N. Y. Suppl. 535; People *v.* O'Connor, 31 Misc. 668, 66 N. Y. Suppl. 126; People *v.* Winant, 24 Misc. 361, 53 N. Y. Suppl. 695; People *v.* Willis, 23 Misc. 568, 52 N. Y. Suppl. 808), while others held the contrary (People *v.* Stern, 33 Misc. 455, 68 N. Y. Suppl. 732, 15 N. Y. Cr. 295; People *v.* Thomas, 32 Misc. 170, 66 N. Y. Suppl. 191; Matter of Gardiner, 31 Misc. 364, 64 N. Y. Suppl. 760, 14 N. Y. Cr. 519; People *v.* Molineux, 27 Misc. 79, 58 N. Y. Suppl. 155; People *v.* Vaughan, 19 Misc. 289, 58 N. Y. Suppl. 959; People *v.* Edwards, 25 N. Y. Suppl. 480; People *v.* Brickner, 15 N. Y. Suppl. 528, 8 N. Y. Cr. 217; People *v.* Clark, 14 N. Y. Suppl. 642, 8 N. Y. Cr. 169, 179; People *v.* Price, 2 N. Y. Suppl. 414, 6 N. Y. Cr. 141; People *v.* Moore, 65 How. Pr. 177).

If the legal evidence will warrant conviction the indictment will not be dismissed, although illegal evidence was received. People *v.* Winant, 24 Misc. (N. Y.) 361, 53 N. Y. Suppl. 695.

Denial of habeas corpus sought on ground of want of evidence before a committing magistrate establishes sufficiency of evidence to justify indictment. People *v.* Martin, 87 N. Y. App. Div. 487, 84 N. Y. Suppl. 823.

Proof of insufficiency of evidence may be made by the prosecuting attorney but not by grand juror. State *v.* Cole, 145 Mo. 672, 47 S. W. 895.

10. Boone *v.* People, 148 Ill. 440, 36 N. E. 99; People *v.* Singer, 5 N. Y. Cr. 1; U. S. *v.* Edgerton, 80 Fed. 374.

Although defendant's name is not indorsed upon the indictment it may be quashed. State *v.* Gardner, 88 Minn. 130, 92 N. W. 529.

That defendant was subpœnaed before the grand jury, where he refused to testify as to matters which he thought would incriminate him and voluntarily answered such questions as would not, in his judgment, show or tend to show that he had committed a criminal offense, is not sufficient to warrant the quashing of the indictment. People *v.* Hummell, 96 N. Y. Suppl. 878.

Where the prosecuting attorney directed the grand jury not to regard the evidence of accused, it will, in the absence of proof, be assumed that the instruction was obeyed and that there was sufficient evidence aside from defendant's to authorize the finding of the indictment. People *v.* Hummell, 96 N. Y. Suppl. 878.

11. People *v.* Haines, 1 N. Y. Suppl. 55, 6 N. Y. Cr. 100. *Contra,* Spearman *v.* State, 34 Tex. Cr. 279, 30 S. W. 229; Mencheca *v.* State, (Tex. Cr. App. 1894) 28 S. W. 203.

12. State *v.* Donelon, 45 La. Ann. 744, 12 So. 922.

13. Com. *v.* Clark, 6 Gratt. (Va.) 675; U. S. *v.* Kuhl, 85 Fed. 624; Reg. *v.* Hall, 17 Cox C. C. 278, 60 L. J. M. C. 124, 64 L. T. Rep. N. S. 394.

An indictment against a corporation for a nuisance cannot be quashed upon the ground that it does not disclose an offense for which the corporation may be liable, but the only remedy is by demurrer. Reg. *v.* Toronto R. Co., 4 Can. Cr. Cas. 4, holding that the common-law rule had not been altered by the Canadian criminal code.

Failure to substantially follow the language of the statute may be ground for quashing, although the statute provides that no indictment shall be quashed, if an indictable offense is clearly charged therein. State *v.* Morse, 1 Greene (Iowa) 503.

14. People *v.* Williams, 1 Ida. 85.

15. State *v.* Robinson, 19 Tex. 478.

It is disputed whether an indictment may be quashed because from its face it appears to be barred by the statute of limitations; some courts holding that it will not be,[16] while others hold the contrary.[17] In many states, as already noted, statutes provide that an indictment shall not be vitiated for defects of form merely.[18] Under such statutes an indictment will not be quashed for formal errors in the caption,[19] or commencement,[20] or conclusion;[21] but where a statute expressly requires the observance of a form a failure to do so is ground for quashing.[22] Clerical errors which do not obscure the meaning of the indictment do not in general vitiate it,[23] hence they are not ground for a motion to quash.[24] An indictment may be quashed for the omission of the christian name of the accused,[25] for a failure to lay the venue[26] or to indorse the names of the witnesses examined before the grand jury,[27] for want of a prosecutor required by statute,[28] for an insufficient charge of an intent,[29] for omission of the word "felonious" in the description of a felony[30] or lack of a verification as required by statute in case of an information,[31] or for an amendment made without authority.[32] An indictment for robbery will not be quashed for the reason that

16. State *v.* Howard, 15 Rich. (S. C.) 274; U. S. *v.* Cook, 17 Wall. (U. S.) 168, 21 L. ed. 538; U. S. *v.* White, 28 Fed. Cas. No. 16,675, 5 Cranch C. C. 38.

17. *Florida.*— Rouse *v.* State, 45 Fla. 148, 32 So. 784.

Illinois.— Lamkin *v.* People, 94 Ill. 501; Church *v.* People, 10 Ill. App. 222.

Louisiana.— State *v.* Bilbo, 19 La. Ann. 76.

New Hampshire.— State *v.* Robinson, 29 N. H. 274.

Pennsylvania. — Com. *v.* Owens, 3 Kulp 230.

See also cases cited *supra*, V, E, 8.

18. See Madden *v.* State, 1 Kan. 340. And see *supra*, V, A, 2.

19. State *v.* Hickman, 8 N. J. L. 299, so holding where the grand jury presented "that the bills thereunto annexed" were true bills instead of individually, "that this bill is a true bill" or in the usual form "that the grand jury presented as follows."

20. Wesley *v.* State, 65 Ga. 731, so holding where it was stated that the grand jurors were "sworn, chosen and selected," instead of "selected, chosen and sworn."

21. Shiver *v.* State, 41 Fla. 630, 27 So. 36, holding under a statute providing that defects in form are not ground for quashing unless the indictment is misleading to the accused, that the omission of the allegations "contrary to the form of the statute" or "against the peace and dignity of the State" is not material.

22. Thomas *v.* State, 18 Tex. App. 213.

23. See *supra*, V, B, 5.

24. State *v.* Shaw, 58 N. H. 74; McGee *v.* State, (Tex. Cr. App. 1898) 46 S. W. 930.

Variance as to name of foreman.— One name appearing in the signature of the indictment and another in the list of jurors is not ground for quashing. Taylor *v.* State, 121 Ga. 362, 49 S. E. 317; White *v.* State, 93 Ga. 47, 19 S. E. 49, holding an indictment sufficient where it appeared on its face that a certain grand juror served as "foreman *pro tem*" and an indorsement "a true bill" was signed by him.

25. Gardner *v.* State, 4 Ind. 632, where no matter in excuse is alleged.

26. Searcy *v.* State, 4 Tex. 450.

27. Com. *v.* Brewer, 113 Ky. 217, 67 S. W. 994, 24 Ky. L. Rep. 72, holding that the objection must be made by motion to quash and not by demurrer. *Contra*, State *v.* Johnson, 33 Ark. 174, holding, however, that on application the court may require a list to be furnished the accused.

Omission of a single witness is not ground for quashing, where from oversight or from the fact that he is not regarded as material. Com. *v.* Glass, 107 Ky. 160, 53 S. W. 18, 21 Ky. L. Rep. 819.

28. Com. *v.* Hutcheson, 1 Bibb (Ky.) 355, holding that a motion to dismiss for want of a prosecutor, as required by statute to be written at the foot of every bill of indictment for any trespass or misdemeanor, may be made at any time before the jury retires.

29. Searles *v.* State, 6 Ohio Cir. Ct. 331, 3 Ohio Cir. Dec. 478, holding that it was ground for demurrer only where no intent was charged.

30. Sovine *v.* State, 85 Ind. 576. But see State *v.* Caldwell, 112 N. C. 854, 16 S. E. 1010; State *v.* Skidmore, 109 N. C. 795, 14 S. E. 63, both holding that the motion should be overruled and defendant held in order that the state may have an opportunity to procure a new bill.

31. State *v.* McGee, 181 Mo. 312, 80 S. W. 899; State *v.* Runzi, 105 Mo. App. 319, 80 S. W. 36.

Informality in signature of information.— Under a statute providing that the indictment shall not be invalid for defects which do not mislead defendant or prejudice his substantial rights, the fact that the prosecuting attorney does not place his full name in the body of an information or sign it to the information is not ground for quashing. State *v.* Brock, 186 Mo. 457, 85 S. W. 595, 105 Am. St. Rep. 625.

32. Watts *v.* State, 99 Md. 30, 57 Atl. 542, as where an amendment is made under leave of the court, but without the consent of the grand jury.

the description of the money claimed to have been taken was included with the description of many pieces of money of other kinds so that it is impossible for defendant to tell what money he is charged with taking.[33] Variance between an indictment or information and the preliminary complaint cannot be reached by a motion to quash.[34] Under the statutes in some states certain defects must be urged by demurrer only.[35]

(II) *Duplicity and Misjoinder.* An objection to the indictment for duplicity,[36] or misjoinder of offenses,[37] is properly taken by a motion to quash, the ruling on such motion being subject to principles already examined.[38]

(III) *Insufficiency of Part of Indictment.* A motion to quash going to the entire indictment will be overruled where it contains a valid and sufficient charge after the defective matter is rejected.[39] On a motion directed to the entire indictment it will not be quashed if it contains one good count,[40] or when it contains a good charge.[41]

8. Hearing and Evidence on Motion to Quash. To entitle a defendant to be heard upon a motion to set aside the indictment, he must bring himself clearly within the provisions of statutes prescribing the procedure in such cases.[42] For the purpose of a motion to quash the facts stated in an indictment or information

33. McKevitt *v.* People, 208 Ill. 460, 70 N. E. 693.

34. Whitner *v.* State, 46 Nebr. 144, 64 N. W. 704, holding that objection should be made by a plea in abatement.

35. See *supra*, IX, A, 2.

36. State *v.* Weil, 89 Ind. 286; Knopf *v.* State, 84 Ind. 316 [*reviewing* and *distinguishing* Lohman *v.* State, 81 Ind. 15; State *v.* Cummins, 78 Ind. 251; State *v.* Wickey, 54 Ind. 438; Eagan *v.* State, 53 Ind. 162; Deveny *v.* State, 47 Ind. 208; Shafer *v.* State, 26 Ind. 191; Simons *v.* State, 25 Ind. 331; Hayworth *v.* State, 14 Ind. 590, and *approving* State *v.* Shields, 8 Blackf. (Ind.) 151]; Herron *v.* State, 17 Ind. App. 161, 46 S. E. 540; Com. *v.* Wilkes-Barre, 1 Kulp (Pa.) 487; Com. *v.* Bargar, 2 L. T. N. S. (Pa.) 161. But see Dickinson *v.* State, 70 Ind. 247.

37. Kotter *v.* People, 150 Ill. 441, 37 N. E. 932; Hamilton *v.* People, 29 Mich. 173; Strawhern *v.* State, 37 Miss. 422; Brantley *v.* State, 13 Sm. & M. (Miss.) 468; Rex *v.* Kingston, 8 East 41, 9 Rev. Rep. 373. But see People *v.* New York County Ct. Gen. Sess., 13 Hun (N. Y.) 395; U. S. *v.* Harman, 38 Fed. 827.

38. See *supra*, VII.

39. Good *v.* State, 61 Ind. 69; Pickett *v.* State, 10 Tex. App. 290.

40. *Alabama.*— State *v.* Coleman, 5 Port. 32.

Florida.— Sigsbee *v.* State, 43 Fla. 524, 30 So. 816.

Illinois.— Thomas *v.* People, 113 Ill. 531.

Indiana.— Bryant *v.* State, 106 Ind. 549, 7 N. E. 217; Dantz *v.* State, 87 Ind. 398; Jarrell *v.* State, 58 Ind. 293; Dukes *v.* State, 11 Ind. 557, 71 Am. Dec. 370; State *v.* Staker, 3 Ind. 570.

Kansas.— State *v.* Elliott, 62 Kan. 869, 64 Pac. 1116.

Louisiana.— State *v.* Laqué, 37 La. Ann. 853.

Maryland.— Watts *v.* State, 99 Md. 30, 57 Atl. 542.

Massachusetts.— Com. *v.* Lapham, 156 Mass. 480, 31 N. E. 638; Com. *v.* Pratt, 137 Mass. 98; Com. *v.* Hawkins, 3 Gray 463.

Michigan.— Hamilton *v.* People, 29 Mich. 173, information.

Missouri.— State *v.* Wishon, 15 Mo. 503; State *v.* Rector, 11 Mo. 28.

Nebraska.— Blodgett *v.* State, 50 Nebr. 121, 69 N. W. 751.

New Jersey.— State *v.* Startup, 39 N. J. L. 423.

North Carolina.— State *v.* Mangum, 116 N. C. 998, 21 S. E. 189, so holding where two indictments were treated as one with two counts and the motion was refused where one of the indictments was good.

Pennsylvania.— Com. *v.* Gouger, 21 Pa. Super. Ct. 217.

Texas.— State *v.* Rutherford, 13 Tex. 24.

Virginia.— Com. *v.* Litton, 6 Gratt. 691.

West Virginia.— State *v.* Cartright, 20 W. Va. 32.

United States.— U. S. *v.* Dustin, 25 Fed. Cas. No. 15,011, 2 Bond 332.

See 27 Cent. Dig. tit. "Indictment and Information," § 487.

41. McGuire *v.* State, 50 Ind. 284; Greer *v.* State, 50 Ind. 267, 19 Am. Rep. 709 (both holding that an indictment containing a valid charge of an assault and battery, and a bad charge of an intent to commit another offense, is good on a motion to quash); State *v.* Archer, 34 Tex. 646; Nelson *v.* State, 2 Tex. App. 227.

42. Hodge *v.* Territory, 12 Okla. 108, 69 Pac. 1077.

Under the Oklahoma statute an application must be filed in a court of record in the county, alleging that the applicant is indicted in the district court, naming it, must set out a copy of the motion to set aside the indictment, and must contain an averment that defendant is acting in good faith, and a prayer for an order to examine witnesses. Hodge *v.* Territory, 12 Okla. 108, 69 Pac. 1077: Keith *v.* Territory, 8 Okla. 307, 57 Pac. 834.

must be taken as true,[43] and the grounds assigned for quashing, if not established by the record, must be sustained by distinct evidence introduced or offered by the accused,[44] the accused being entitled to introduce such evidence if his motion is sufficient in law,[45] and having the burden of proof.[46] The state need not file a written admission or denial of the motion.[47] The motion may be heard upon affidavits,[48] or, where there is no conflict, upon an agreed statement of facts.[49] Material allegations of the indictment cannot, however, be contradicted by affidavits.[50] The sufficiency of the affidavits is a question of law.[51] Unless controverted they are to be taken as true.[52] A provision of the statutes postponing hearing on the motion for a certain time after it is filed may be waived by the state and the accused cannot object to an immediate hearing.[53] A decision upon the motion is waived by going to trial on other issues.[54]

43. People *v.* Williams, 1 Ida. 85.

44. *Alabama.*— Edson *v.* State, 134 Ala. 50, 32 So. 308.

Arizona.— Parker *v.* Territory, (1898) 52 Pac. 861.

California.— People *v.* Travers, 88 Cal. 233. 26 Pac. 88; People *v.* Smith, 79 Cal. 554, 21 Pac. 952.

Florida.— Tarrance *v.* State, 43 Fla. 446, 30 So. 685 [*affirmed* in 188 U. S. 519, 23 S. Ct. 402, 47 L. ed. 572].

Georgia.— O'Shields *v.* State, 92 Ga. 472, 17 S. E. 845, lack of evidence before grand jury.

Idaho.— State *v.* Hardy, 3 Ida. 478, 42 Pac. 507.

Louisiana.— State *v.* Hall, 109 La. 290, 33 So. 318.

Maine.— State *v.* Nutting, 39 Me. 359.

Massachusetts.—Com. *v.* Holmes, 157 Mass. 233, 32 N. E. 6, 34 Am. St. Rep. 270.

South Carolina.— State *v.* Brownfield, 60 S. C. 509, 39 S. E. 2.

Texas.— Adkins *v.* State, (Cr. App. 1901) 65 S. W. 924; Smith *v.* State, 42 Tex. Cr. 220, 58 S. W. 97. See also Rahm *v.* State, 30 Tex. App. 310, 17 S. W. 416, 28 Am. Rep. 911.

United States.— Smith *v.* Mississippi, 162 U. S. 592, 16 S. Ct. 900, 40 L. ed. 1082.

See 27 Cent. Dig. tit. "Indictment and Information," § 475.

Sufficiency of evidence that an alteration was made after the indictment was filed is to be determined by the court. State *v.* Hathhorn, 166 Mo. 229, 65 S. W. 756. And *compare* Com. *v.* Davis, 11 Gray (Mass.) 4.

Verification of the motion "to the best of the knowledge and belief" of the accused will not entitle him, in the absence of other evidence, to insist that the facts stated in the motion be taken as true. Tarrance *v.* Florida, 188 U. S. 519, 23 S. Ct. 402, 47 L. ed. 572 [*affirming* 43 Fla. 446, 30 So. 685, and *distinguishing* Carter *v.* Texas, 177 U. S. 442, 20 S. Ct. 687, 44 L. ed. 839]; Smith *v.* Mississippi, 162 U. S. 592, 16 S. Ct. 900, 40 L. ed. 1082 [*affirming* (Miss. 1895) 18 So. 116].

45. Castleberry *v.* State, 69 Ark. 346, 63 S. W. 670, ground of discrimination in selection of grand jury.

46. People *v.* Beach, 122 Cal. 37, 54 Pac. 369 (that there was no legal commitment); Whitney *v.* State, 43 Tex. Cr. 197, 63 S. W. 879 (discrimination against negroes in formation of grand jury).

47. Peckham *v.* People, 32 Colo. 140, 75 Pac. 422; State *v.* Joseph, 45 La. Ann. 903, 12 So. 934.

48. Neal *v.* Delaware, 103 U. S. 370, 26 L. ed. 567; U. S. *v.* Coolidge, 25 Fed. Cas. No. 14,858, 2 Gall. 364.

Sufficiency of affidavit.—An affidavit which states that affiant was "present in and about" the deliberations of the grand jury is not sufficient to establish that the grand jury acted on insufficient or incompetent evidence (Radford *v.* U. S., 129 Fed. 49, 63 C. C. A. 491); nor is an affidavit which simply states inferences drawn by the affiant (People *v.* Martin, 87 N. Y. App. Div. 487, 84 N. Y. Suppl. 823). An averment that an information is not predicated upon an affidavit will be construed as meaning that no such affidavit had been filed. State *v.* Schnettler, 181 Mo. 173, 79 S. W. 1123. An affidavit on information and belief that no evidence was introduced before the grand jury as to a particular fact is sufficient to require the district attorney to prove the contrary (People *v.* Price, 2 N. Y. Suppl. 414, 6 N. Y. Cr. 141); it has been held that the same is true of an averment of the introduction of incompetent testimony (People *v.* Briggs, 60 How. Pr. (N. Y.) 17. *Contra*, People *v.* Molineux, 36 Misc. (N. Y.) 435, 73 N. Y. Suppl. 806; People *v.* Sebring, 14 Misc. (N. Y.) 31, 35 N. Y. Suppl. 237).

Evidence given by defendant before the grand jury need not be set out in an affidavit seeking to quash an indictment against him upon the ground that he was compelled to be a witness against himself. State *v.* Gardner, 88 Minn. 130, 92 N. W. 529.

49. U. S. *v.* Tallman, 28 Fed. Cas. No. 16,429, 10 Blatchf. 21.

50. People *v.* Clews, 57 How. Pr. (N. Y.) 245.

51. State *v.* Gardner, 88 Minn. 130, 92 N. W. 529.

52. State *v.* Gardner, 88 Minn. 130, 92 N. W. 529.

53. State *v.* Underwood, 76 Mo. 630.

Refusal to suspend the hearing to permit the calling of witness is not fatal where defendants entered in the hearing without suggestion that they were not prepared. Com. *v.* Craig, 19 Pa. Super. Ct. 81.

54. Ayrs *v.* State, 5 Coldw. (Tenn.) 26.

9. Order or Judgment. Upon quashing or setting aside of an indictment or information, if it is apparent that an offense has been committed, the action of the court should be without prejudice to a subsequent accusation, and the prisoner may be remanded to custody,[55] or held to bail,[56] to answer to a new indictment or information.[57] By statute in some jurisdictions, however, the discharge of the prisoner is necessary, although he may be immediately rearrested upon the same charge.[58]

10. Quashing of Part. According to the prevailing rule, an improper or defective charge[59] or count[60] in an indictment may be quashed without vitiating the remainder;[61] and a joint indictment may be quashed as to part of the defendants.[62]

C. Demurrer — 1. Nature and Scope in General. The office of the demurrer is to present objections to the indictment as insufficient in law because of defects in substance or of form,[63] or, under particular statutes, defects in substance only.[64] It cannot be used to present questions of fact.[65]

2. Time For Demurrer. A demurrer in the regular order precedes arraignment,[66] and should be made before plea;[67] but in the discretion of the court a plea may be allowed to be withdrawn for the purpose of entering a demurrer,[68] although not for the purpose of making a merely formal objection.[69]

55. People *v.* Vaughan, 19 Misc. (N. Y.) 298, 42 N. Y. Suppl. 959, 11 N. Y. Cr. 388; State *v.* Hewlin, 128 N. C. 571, 37 S. E. 952; U. S. *v.* Dustin, 25 Fed. Cas. No. 15,011, 2 Bond 332; U. S. *v.* Town Maker, 28 Fed. Cas. No. 16,533*a*, Hempst. 299.

56. *In re* Smith, 4 Colo. 532 (holding that the quashed indictment remained as a sworn accusation); State *v.* Griffice, 74 N. C. 316. It is discretionary with the court to discharge defendant or hold him in jail, but where the insufficiency of the indictment appears on the trial, he should not direct a verdict for defendant. State *v.* Kendall, 38 Nebr. 817, 57 N. W. 525.

57. Mentor *v.* People, 30 Mich. 91. And see the cases cited in the preceding notes.

An order of resubmission is not necessary to the validity of a new indictment, although a statute provides that the court may discharge the prisoner or direct the case to be resubmitted to the grand jury. People *v.* Breen, 130 Cal. 72, 62 Pac. 408; Alderman *v.* State, 24 Nebr. 97, 38 N. W. 36, holding under the statutes of the state that after an indictment has been quashed an information may be filed charging the same offense without the defects contained in the indictment.

58. Whitesides *v.* State, 44 Tex. Cr. 410, 71 S. W. 969; Turner *v.* State, 21 Tex. App. 198, 18 S. W. 96.

59. Good *v.* State, 61 Ind. 69; Pickett *v.* State, 10 Tex. App. 290.

60. State *v.* Woodward, 21 Mo. 265; Com. *v.* Gouger, 21 Pa. Super. Ct. 217; Jones *v.* State, 6 Humphr. (Tenn.) 435; State *v.* Rutherford, 13 Tex. 24; King *v.* State, 10 Tex. 281.

61. *Contra*, Rose *v.* State, Minor (Ala.) 28; Rex *v.* Withers, 4 Cox C. C. 17.

62. Sutton *v.* Com., 97 Ky. 308, 30 S. W. 661, 17 Ky. L. Rep. 184 (holding also that other defendants might waive their rights by pleading); Coats *v.* People, 4 Park. Cr. (N. Y.) 662; State *v.* Compton, 13 W. Va. 852.

Where the indictment is insufficient as to all it may be quashed as to all on the motion of part. People *v.* Eckford, 7 Cow. (N. Y.) 535.

63. U. S. *v.* Kilpatrick, 16 Fed. 765.

64. Davis *v.* State, 32 Ohio St. 24.

65. State *v.* Bench, 68 Mo. 78 (adoption of township organization law by county); Com. *v.* Dieffenbaugh, 5 Lanc. L. Rev. (Pa.) 346; State *v.* Switzer, 63 Vt. 604, 22 Atl. 724, 75 Am. St. Rep. 789 (whether false pretenses are sufficient to mislead).

Knowledge of person making the affidavit on which an information is based cannot be questioned. Vickers *v.* People, 31 Colo. 491, 73 Pac. 845.

66. Epps *v.* State, 102 Ind. 539, 1 N. E. 491.

A nunc pro tunc order filing and overruling a demurrer to an indictment cannot be entered where there is nothing in the record upon which to base it. Collier *v.* Com., 110 Ky. 516, 62 S. W. 4, 22 Ky. L. Rep. 1929.

67. Com. *v.* Ramsey, 1 Brewst. (Pa.) 422, holding that the rule was not changed by a statute providing that objections should be taken by demurrer or motion to quash before the jury is sworn. *Contra*, Ellis *v.* Com., 78 Ky. 130; Stroud *v.* Com., 19 S. W. 976, 14 Ky. L. Rep. 179.

Motion for a verdict on account of a defect in an indictment, being in effect a demurrer, must be made in writing before plea. Jordan *v.* State, 22 Ga. 545.

68. Reg. *v.* Purchase, C. & M. 617, 41 E. C. L. 335, as in a case where a prisoner has pleaded to an indictment for felony in the absence of his counsel. But see Com. *v.* Chapman, 11 Cush. (Mass.) 422, holding that, although the prisoner would not be allowed to withdraw a plea of not guilty made in the absence of counsel, the objections might be heard on a motion to quash. See also Criminal Law, 12 Cyc. 350, 351.

69. Reg. *v.* Brown, 3 Cox C. C. 127; Reg. *v.* Odgers, 2 M. & Rob. 479.

3. Form and Requisites. Oral demurrers were permitted at common law;[70] but under statutes requiring written pleadings, demurrers must be in writing.[71] A single demurrer must not be interposed to several indictments.[72] In criminal procedure the distinction between general and special demurrers and their application to matters of substance and form as existing in civil pleading is not recognized,[73] but the specific objections to the indictment must in all cases be pointed out.[74]

4. Grounds For Demurrer — a. In General. Only such matters as are apparent upon the face of the indictment or record,[75] or of which judicial notice is taken,[76] may be urged by demurrer. A demurrer may be sustained for lack of jurisdiction apparent from the record,[77] or for the unconstitutionality of a statute upon which the indictment is based.[78] It would seem, however, that a question merely

70. Swan's Case, Fost. 104.

71. Sims *v.* State, 110 Ga. 290, 34 S. E. 1020; McGarr *v.* State, 75 Ga. 155; Sanders *v.* State, 60 Ga. 126; Hill *v.* State, 41 Ga. 484.

72. State *v.* Bartholomew, 69 N. J. L. 160, 54 Atl. 231.

73. Reg. *v.* Brown, 3 Cox C. C. 127.

Special demurrers properly so called are not generally recognized. U. S. *v.* French, 57 Fed. 382, holding that while a special demurrer will not be entertained, a paper filed as such may be retained as an assignment of causes under the general demurrer.

74. *Georgia.*— Wells *v.* State, 118 Ga. 556, 45 S. E. 443 (must indicate offenses when on ground of misjoinder); Jones *v.* State, 115 Ga. 814, 42 S. E. 271; Hancock *v.* State, 114 Ga. 439, 40 S. E. 317; Tucker *v.* State, 114 Ga. 61, 39 S. E. 926.

Iowa.— State *v.* Groome, 10 Iowa 308, statutory.

Missouri.— State *v.* Belew, 79 Mo. 584, holding a ground, "because the indictment is absurd," frivolous.

Nevada.— State *v.* Roderigas, 7 Nev. 328, objections to grand jury cannot be urged where demurrer is on ground that facts charged do not constitute an offense.

Oklahoma.— Flohr *v.* Territory, 14 Okla. 477, 78 Pac. 565.

Utah.— People *v.* Hill, 3 Utah 334, 3 Pac. 75.

United States.— U. S. *v.* Patterson, 59 Fed. 280.

See 27 Cent. Dig. tit. "Indictment and Information," § 495.

That indictment is insufficient in law is too general an objection under a statute requiring the grounds to be distinctly stated. Benham *v.* State, 1 Iowa 542. State *v.* Schoolfield, 29 Tex. 501.

An argumentative averment may be good as against a general demurrer. State *v.* Harrington, 9 Nev. 91; State *v.* Harkins, 7 Nev. 377.

75. *Arkansas.*— Bass *v.* State, 29 Ark. 142.

Georgia.— McRea *v.* State, 71 Ga. 96 (holding that it could not be urged that the term of court at which the indictment was found had not been adjourned and convened according to law); Jackson *v.* State, 64 Ga. 344.

Kentucky.— Com. *v.* Smith, 27 S. W. 810, 16 Ky. L. Rep. 276.

Maryland.— Watts *v.* State, 99 Md. 30, 57 Atl. 542; Wright *v.* State, 88 Md. 436, 41 Atl. 795.

Missouri.— State *v.* Brown, 181 Mo. 192, 79 S. W. 1111, holding that the affidavit not being a part of the information a failure to verify the affidavit could not be reached by demurrer.

Rhode Island.— State *v.* Snell, 21 R. I. 232, 42 Atl. 869, validity of statute.

United States.— U. S. *v.* Peuschel, 116 Fed. 642, objection that it is within the exclusive jurisdiction of the land department to determine questions of fact involved in the trial of an indictment for conspiracy to defraud the United States by an illegal entry of public lands.

See 27 Cent. Dig. tit. "Indictment and Information," § 490.

Failure to aver preliminary hearing as justifying the proceedings by information is not a ground for demurrer, where such averment is not required by statute. U. S. *v.* Moller, 26 Fed. Cas. No. 15,794, 16 Blatchf. 65.

Imposition of a penalty in a civil action is not ground for demurrer. U. S. *v.* Moller, 26 Fed. Cas. No. 15,794, 16 Blatchf. 65.

Defects in the copy of the information with which defendant is furnished cannot be urged. People *v.* Owens, 132 Cal. 469, 64 Pac. 770.

76. U. S. *v.* Morrison, 109 Fed. 891.

77. People *v.* Craig, 59 Cal. 370; Rex *v.* Fearnley, 1 T. R. 316. *Contra*, People *v.* Knatt, 156 N. Y. 302, 50 N. E. 835, holding that under the code the objection that the court in which an indictment was found had no jurisdiction by reason of the exclusive jurisdiction of the court of special sessions could not be raised by demurrer.

The fact of legal commitment, the illegality not being apparent from the face of the indictment, cannot be questioned where a statute provides that lack of jurisdiction must be so apparent. People *v.* McConnell, 82 Cal. 620, 23 Pac. 40.

78. Foote *v.* State, 59 Md. 264; Cowman *v.* State, 12 Md. 250; State *v.* Bateman, 10 Ohio S. & C. Pl. Dec. 68, 7 Ohio N. P. 487.

Under statutes providing for certification of constitutional questions to the supreme court they cannot be considered on demurrer. State *v.* Martin, 23 R. I. 143, 49 Atl. 497.

When a part of a statute is constitutional a general demurrer on such ground cannot be sustained. New Orleans *v.* Collins, 52 La. Ann. 973, 27 So. 532.

of statutory construction cannot be determined upon demurrer but must be otherwise urged.[79]

b. Statutory Provisions. The specific grounds for demurrer are frequently enumerated by the statutes of criminal procedure and in such case others cannot as a general rule be urged.[80]

c. Irregularities in Composition or Proceedings of Grand Jury. As a general rule questions affecting the legality or regularity of the organization of the grand jury finding the indictment cannot be raised by demurrer.[81] Demurrer will not lie for disqualification of a grand juror.[82] A demurrer may, however, lie in some cases where the illegality appears from the face of the indictment.[83]

d. Bar of Prosecution by Statute of Limitations. The statute of limitations must be urged under the general issue or special pleas as the practice may be in the particular jurisdiction,[84] and cannot as a general rule be taken advantage of by demurrer, although the indictment discloses on its face that it is barred.[85] In some jurisdictions, however, the objection is available on demurrer.[86]

e. Sufficiency of Accusation — (i) *IN GENERAL.* An insufficient description of the offense may be ground for demurrer,[87] even though, in the case of a statutory offense, the language of the statute has been followed.[88] Where the facts stated constitute a crime, although not that attempted to be charged, a demurrer

79. Com. *v.* Lillard, 9 S. W. 710, 10 Ky. L. Rep. 561, holding that the question of whether a statute submitting the question of permission of sale of intoxicating liquors in a certain district in a certain county referred to a civil or a school district could not be raised by demurrer.

80. People *v.* Garcia, (Cal. 1899) 59 Pac. 576 (indefiniteness); People *v.* Schmidt, 64 Cal. 260, 30 Pac. 814; State *v.* Shwartz, 25 Tex. 764, holding that since the code prescribes the exceptions, and those only, which will be entertained, whether of form or of substance, an exception to an indictment for "uncertainty," not being one of those specified, is irregular, the prescribed exception for such cases being "that the offense is not set forth in plain and intelligible words."

Finding, filing, indorsement, etc., of indictment are not ground for demurrer. Price *v.* State, 71 Ark. 180, 71 S. W. 948 (defect in filing may be corrected by order *nunc pro tunc* or other motion); State *v.* Brandon, 28 Ark. 410; State *v.* Harris, 12 Nev. 414.

81. Williams *v.* State, 60 Ga. 88; State *v.* Hart, 29 Iowa 268; Patswald *v.* U. S., 5 Okla. 351, 49 Pac. 57; Fisher *v.* U. S., 1 Okla. 252, 31 Pac. 195; State *v.* Fitzhugh, 2 Oreg. 227.

Attack upon grand jury by motion to quash indictment see *supra*, IX, B, 7, g. By plea in abatement see CRIMINAL LAW, 12 Cyc. 358 *et seq.* By motion in arrest of judgment see CRIMINAL LAW, 12 Cyc. 764, 765.

82. Cooper *v.* State, 106 Ga. 119, 32 S. E. 23.

83. State *v.* Vincent, 91 Md. 718, 47 Atl. 1036, 52 L. R. A. 83.

84. See CRIMINAL LAW, 12 Cyc. 362.

85. *Arkansas.*— State *v.* Reed, 45 Ark. 333; Gill *v.* State, 38 Ark. 524; Scoggins *v.* State, 32 Ark. 205.

Iowa.— State *v.* Hussey, 7 Iowa 409.

Mississippi.— Thompson *v.* State, 54 Miss. 740.

New York.— People *v.* Durrin, 2 N. Y. Cr. 328.

United States.—U. S. *v.* Cook, 17 Wall. 168, 21 L. ed. 538, so holding when the statute contains exceptions.

See 27 Cent. Dig. tit. "Indictment and Information," § 492.

Necessity of allegations avoiding bar of limitations see *supra*, V, E, 8.

86. *California.*— People *v.* Ayhens, 85 Cal. 86, 24 Pac. 635, so holding under a statute which provides for a demurrer when the indictment discloses a legal bar to the prosecution.

Georgia.— Hansford *v.* State, 54 Ga. 55.

Kentucky.— Williams *v.* Com., 37 S. W. 839, 18 Ky. L. Rep. 667.

Louisiana.— State *v.* Bryan, 19 La. Ann. 435.

United States.— U. S. *v.* Watkins, 28 Fed. Cas. No. 16,649, 3 Cranch C. C. 441; U. S. *v.* White, 28 Fed. Cas. No. 16,678, 5 Cranch. C. C. 368, holding that an objection that it appeared on the face of the indictment that the offense was committed outside the period of limitations might be raised by general demurrer.

87. State *v.* Stimson, 24 N. J. L. 9.

That the facts stated do not constitute a crime is a statutory ground of demurrer. People *v.* Wiechers, 94 N. Y. App. Div. 19, 87 N. Y. Suppl. 897.

Sufficiency of accusation in general see *supra*, V.

88. State *v.* Stimson, 4 N. J. L. 9; Com. *v.* Miller, 2 Pars. Eq. Cas. (Pa.) 480; Com. *v.* Mulholland, 6 Phila. (Pa.) 280, so holding when an indictment following the language of the statute was uncertain, although by statute it is provided that an indictment shall be good which substantially follows the language of the act of the assembly prohibiting the crime.

Sufficiency of following language of statute see *supra*, V, H, 8, c, (IV).

will not be sustained.[89] Where sufficient facts are stated to constitute the crime, defendant, if he believes that he will be prejudiced through lack of knowledge of the particular facts upon which the prosecution will rely, should demand a bill of particulars;[90] and he cannot demur.[91] Under some statutes objection to the indictment for indefiniteness must be taken by motion to quash.[92] An indictment is not demurrable for a misnomer,[93] for use of a particular form of expression,[94] or for repugnancy between counts;[95] but may be for the statement of an impossible time,[96] or for an insufficient description of a person described as of name unknown.[97]

(II) *DUPLICITY AND MISJOINDER.* As already noted, a misjoinder of counts does not, save in a few exceptional cases, render an indictment bad as a matter of law, and it is in the absence of statute not a ground for demurrer.[98] Duplicity, on the contrary, must in general be taken advantage of by demurrer.[99] By statute, however, in some jurisdictions, it is provided that the objection that two offenses are charged in an indictment must be raised by demurrer,[1] and such provision applies also to duplicity.[2]

(III) *INSUFFICIENCY OF PART OF INDICTMENT.* When an indictment is good without the part objected to, a demurrer will not be sustained.[3] A demurrer to the whole of an indictment containing more than one count cannot be sustained in case it contains one good count.[4]

5. HEARING AND DETERMINATION. Upon demurrer the court will examine the entire record in order to determine whether a judgment thereon would be warranted.[5] A demurrer admits the truth of all facts which are sufficiently

89. People *v.* Cooper, 3 N. Y. Cr. 117, failure to allege matters of aggravation but a good charge of a lower degree.

90. See *supra*, V, U.

91. People *v.* Corbalis, 86 N. Y. App. Div. 531, 83 N. Y. Suppl. 782. See also People *v.* Stedeker, 175 N. Y. 57, 67 N. E. 132; Tilton *v.* Beecher, 59 N. Y. 176, 17 Am. Rep. 337.

92. State *v.* Messenger, 63 Ohio St. 398, 59 N. E. 105.

93. Com. *v.* Demain, Brightly (Pa.) 441, 3 Pa. L. J. Rep. 487, 6 Pa. L. J. 29. And see Wiggins *v.* State, 80 Ga. 468, 5 S. E. 503.

Omission of addition is not ground for demurrer. Reg. *v.* Hunt, 3 Cox C. C. 215.

Plea of misnomer see CRIMINAL LAW, 12 Cyc. 359.

94. State *v.* Vasalo, 120 Cal. 168, 52 Pac. 305.

95. State *v.* Scampini, 77 Vt. 92, 59 Atl. 201. See *supra*, V, C, 4.

96. Harris *v.* State, 58 Ga. 332, day subsequent.

97. U. S. *v.* Doe, 127 Fed. 982.

98. See *supra*, VII, B, 6. See also Hamilton *v.* People, 29 Mich. 173; Com. *v.* Demain, Brightly (Pa.) 441, 3 Pa. L. J. Rep. 487, 6 Pa. L. J. 29; State *v.* Fee, 19 Wis. 562; Rex *v.* Kingston, 8 East 41, 9 Rev. Rep. 373.

99. Kilbourn *v.* State, 9 Conn. 560.

General demurrer is not in the federal courts a proper means of reaching duplicity. Pooler *v.* U. S., 127 Fed. 509, 62 C. C. A. 305.

1. See the statutes of the various states. And see People *v.* Clement, (Cal. 1894) 35 Pac. 1022; People *v.* Quvise, 56 Cal. 396; People *v.* Weaver, 47 Cal. 106; People *v.* Taggart. 43 Cal. 81; People *v.* McCarthy, 110 N. Y. 309, 18 N. E. 128.

Election as preventing sustaining of demurrer see *supra*, VIII, B, 5.

2. *California.*— People *v.* Connor, 17 Cal. 354.

Kentucky.— Johnson *v.* Com., 90 Ky. 488, 14 S. W. 492, 12 Ky. L. Rep. 442; Moore *v.* Com., 35 S. W. 283, 18 Ky. L. Rep. 129.

Minnesota.— State *v.* Briggs, 84 Minn. 357, 87 N. W. 935.

Mississippi.— Clue *v.* State, 78 Miss. 661, 29 So. 516, 84 Am. St. Rep. 643.

Nevada.— State *v.* Johnson, 9 Nev. 175.

New York.— People *v.* Klipfel, 160 N. Y. 371, 54 N. E. 788, 14 N. Y. Cr. 169; People *v.* Tower, 135 N. Y. 457, 32 N. E. 145 [*affirming* 17 N. Y. Suppl. 395].

3. People *v.* Percz, 87 Cal. 122, 25 Pac. 262; State *v.* Hinckley, 4 Minn. 345.

4. *Alabama.*— Cheatham *v.* State, 59 Ala. 40; Turner *v.* State, 40 Ala. 21; Ingram *v.* State, 39 Ala. 247, 84 Am. Dec. 782; State *v.* Coleman, 5 Port. 32.

Arkansas.— State *v.* Mathis, 3 Ark. 84.

California.— People *v.* Lapique, (1901) 67 Pac. 14, 136 Cal. 503, 69 Pac. 226.

District of Columbia.— Miller *v.* U. S., 6 App. Cas. 6.

Georgia.— Gibson *v.* State, 79 Ga. 344, 5 S. E. 76.

Maine.— State *v.* Miles, 89 Me. 142, 36 Atl. 70.

Maryland.— Wheeler *v.* State, 42 Md. 563.

Mississippi.— Gates *v.* State, 71 Miss. 874, 16 So. 342.

New York.— Kane *v.* People, 3 Wend. 363.

Pennsylvania.— Com. *v.* Miller, 2 Pars. Eq. Cas. 480.

Virginia.— Hendricks *v.* Com., 75 Va. 934.

West Virginia.— State *v.* McClung, 35 W. Va. 280, 13 S. E. 654.

See 27 Cent. Dig. tit. "Indictment and Information," § 494.

5. Rex *v.* Fearnley, 1 Leach C. C. 475.

pleaded,[6] but not allegations of their legal effect;[7] nor does it admit facts insufficiently pleaded.[8] Evidence will not be heard for the purpose of allowing the prosecution to amend.[9] Stipulations made between counsel that the indictment shall be regarded as containing certain omitted allegations will not be considered.[10] Where the indictment is bad on its face, the prosecution should, instead of joining in demurrer, apply for an order to quash or for leave to enter a *nolle prosequi*.[11] It is within the discretion of the court to permit defendant to withdraw his demurrer and plead at any time before judgment upon the demurrer;[12] but it has been held that, as a condition for leave to withdraw the demurrer, defendant may be required to waive his right to move in arrest for any matter apparent on the indictment.[13]

6. Order or Judgment — a. In General. Upon determination of the demurrer the court should give judgment either allowing or disallowing it.[14]

b. Where Demurrer Is Overruled. In the case of misdemeanors, a judgment overruling a demurrer operates as a conviction,[15] and defendant cannot as a matter of right plead over,[16] unless, as is sometimes the case, a statute so provides,[17] although in some jurisdictions a similar ruling has been made in the absence of statute.[18] It is within the discretion of the court, however, to allow defendant to plead over.[19] It seems likewise that the right to plead over as a matter of right does not exist even in the case of felony;[20] but it is discretionary with the court to allow defendant to plead over,[21] and such plea is ordinarily allowed.[22] Where at the time of demurring the prosecution consents that the accused may afterward plead over, he may do so as a matter of right either in felonies or misdemeanors.[23]

6. Com. *v.* Button, 10 Ky. L. Rep. 815 (holding that it will be assumed that the offense was committed at the time charged although there was then no law in force under which defendant could have been punished); People *v.* Schmidt, 19 Misc. (N. Y.) 458, 44 N. Y. Suppl. 607 (averment that defendants acted jointly); State *v.* Avery, 44 Vt. 629.

Use of a protestando to avoid an admission is unavailing, its purpose being to preserve the liberty of disputing the fact in other proceedings. State *v.* Beasom, 40 N. H. 367.

7. Com. *v.* Trimmer, 84 Pa. St. 65.

8. Com. *v.* Trimmer, 84 Pa. St. 65.

9. Com. *v.* Kaas, 3 Brewst. (Pa.) 422.

10. People *v.* Campbell, 4 Park. Cr. (N. Y.) 386. See *supra*, I, A, 3.

11. Kilrow *v.* Com., 89 Pa. St. 480.

12. Com. *v.* Foggy, 6 Leigh (Va.) 638; U. S. *v.* Watkins, 28 Fed. Cas. No. 16,649, 3 Cranch C. C. 441; Reg. *v.* Smith, 4 Cox C. C. 42.

13. U. S. *v.* Watkins, 28 Fed. Cas. No. 16,649, 3 Cranch C. C. 441.

14. People *v.* Biggins, 65 Cal. 564, 4 Pac. 570, holding that under a statute requiring an order to be entered on the minutes, it was sufficient to show that the demurrer was disposed of, that an order was entered allowing the prosecution to confess that the demurrer was well taken, followed by a direction that the district attorney file another information.

15. State *v.* Norton, 89 Me. 290, 36 Atl. 394; State *v.* Merrill, 37 Me. 329; State *v.* Shaw, 8 Humphr. (Tenn.) 32; Bennett *v.* State, 2 Yerg. (Tenn.) 472 (the rule in Tennessee is now altered by statute, and defendant must be permitted as a matter of right to plead over. Acts (1871), c. 27, § 2); Com. *v.* Foggy, 6 Leigh (Va.) 638; Rex *v.* Gibson, 8 East 107 (holding that final judgment should be awarded).

16. McCuen *v.* State, 19 Ark. 630; Wickwire *v.* State, 19 Conn. 477; State *v.* Passaic County Agricultural Soc., 54 N. J. L. 260, 23 Atl. 680.

17. See State *v.* Koerner, 51 Mo. 174; Maeder *v.* State, 11 Mo. 363; Ross *v.* State, 9 Mo. 696; Thomas *v.* State, 6 Mo. 457, so holding under a statute requiring a plea of not guilty to be entered in all cases in which defendant does not confess the indictment to be true. But *compare* McCuen *v.* State, 19 Ark. 630, holding that such a statute does not alter the common-law rule.

18. State *v.* Polk, 91 N. C. 652; Com. *v.* Rogers, 1 Del. Co. (Pa.) 517.

19. McCuen *v.* State, 19 Ark. 630.

20. Reg. *v.* Faderman, 3 C. & K. 359, 4 Cox C. C. 361, 1 Den. C. C. 565, 14 Jur. 377, 19 L. J. M. C. 147, 4 New Sess. Cas. 161, T. & M. 286, holding that a plea of not guilty might be allowed in cases where the demurrer was in abatement, but not where, as in a general demurrer, it contained a confession.

21. State *v.* Wilkins, 17 Vt. 151; Reg. *v.* Odgers, 2 M. & Rob. 479.

22. Rex *v.* Serva, 2 C. & K. 53, 1 Cox C. C. 292, 1 Den. C. C. 104, 61 E. C. L. 53; Reg. *v.* Purchase, C. & M. 617, 41 E. C. L. 335; Reg. *v.* Hendy, 4 Cox C. C. 243. *Contra*, Reg. *v.* Duffy, 4 Cox C. C. 24.

Both a demurrer and a plea, it seems, may be allowed to be interposed at the same time. Reg. *v.* Adams, C. & M. 299, 41 E. C. L. 167; Reg. *v.* Phelps, C. & M. 180, 2 Moody C. C. 240, 41 E. C. L. 103. But see Reg. *v.* Mitchel, 3 Cox C. C. 1.

23. State *v.* Dresser, 54 Me. 569.

It has been held that after an order has been entered overruling a demurrer, the court may permit the order to be set aside, and allow the state to confess the demurrer and file a new information.[24]

c. Where Demurrer Is Sustained. At common law, when a demurrer was sustained on the ground that the facts charged did not constitute a crime, defendant was discharged;[25] but when the demurrer was sustained merely for insufficiency in form, the prisoner was held until a new indictment could be prepared.[26] By statute it is sometimes provided that, upon allowing a demurrer, the court may hold defendant to answer a new indictment.[27] In such case the allowance of an amendment or the direction for resubmission must be by matter of record made at the time when the demurrer is allowed.[28] The striking of a portion of an indictment on sustaining a demurrer is not regarded as an amendment.[29]

7. Effect of Failure to Demur. Matters which are made grounds for demurrer, it is frequently provided by statute, are to be regarded as waived if not so presented.[30]

X. Amendments.

A. Of Indictments[31] — **1. By or With Consent of Grand Jury.** Where an indictment as returned by the grand jury is defective, it is generally competent for them, at the same term of court at which it was returned, to come into court and amend the same, at least in matters of form, or, it seems, even of substance;[32]

24. People *v.* Biggins, (Cal. 1884) 3 Pac. 853, so holding under the penal code.

25. State *v.* Dresser, 54 Me. 569; Rex *v.* Haddock, Andr. 137; Lyon's Case, 2 East P. C. 933, 2 Leach C. C. 681.

26. Rex *v.* Haddock, Andr. 137.

27. See the statutes of the various states and cases cited *infra*, this note.

Submission to another grand jury is necessary under the California code. Terrill *v.* Santa Clara Super. Ct., (Cal. 1899) 60 Pac. 38, 516.

Under the Washington statutes the prisoner may be discharged only when the indictment or information contains matter which is a legal defense or bar to the action. That the facts stated do not constitute an offense is not a ground. State *v.* Bodeckar, 11 Wash. 417, 39 Pac. 645.

28. State *v.* Comfort, 22 Minn. 271, holding that it was regularly made as a part of the order or judgment of allowance.

When the indictment is good in part, the court may nevertheless quash it on demurrer and hold defendant to answer a new one. Rogers *v.* State, 126 Ala. 40, 28 So. 619.

Where the prosecution dismisses the indictment before determination of the demurrer, an order of court is not necessary to authorize the case to be submitted to the same or another grand jury. State *v.* Peterson, 61 Minn. 73, 63 N. W. 171, 28 L. R. A. 324.

Form of order.— Under a statute providing that when defendant is so held an entry of record must be made setting forth the facts, it is sufficient that the facts be set forth with certainty to a common intent. Rogers *v.* State, 126 Ala. 40, 28 So. 619. Any language which shows that the court gave a direction to resubmit the case is sufficient. Johnson *v.* Territory, 5 Okla. 695, 50 Pac. 90. holding that a direction that defendant be held under bond to await the action of the grand jury was sufficient.

29. State *v.* McKiernan, 17 Nev. 224, 30 Pac. 831.

30. *California.*— People *v.* Swenson, 49 Cal. 388 (failure to state circumstances of offense); People *v.* Burgess, 35 Cal. 115 (two offenses); People *v.* Jim Ti, 32 Cal. 60 (insufficient description of stolen property); People *v.* Garnett, 29 Cal. 622 (charge of two offenses).

Kentucky.— Lightfoot *v.* Com., 80 Ky. 516, 4 Ky. L. Rep. 463.

Maryland.— Cowman *v.* State, 12 Md. 250; Kellenbeck *v.* State, 10 Md. 431, 69 Am. Dec. 166, omission of "maliciously."

Nevada.— State *v.* Derst, 10 Nev. 443; State *v.* Harrington, 9 Nev. 91, formal defect.

New York.— People *v.* Goslin, 67 N. Y. App. Div. 16, 73 N. Y. Suppl. 520 [*affirmed* in 171 N. Y. 627, 63 N. E. 1120].

Oregon.— State *v.* Doty, 5 Oreg. 491; State *v.* Bruce, 5 Oreg. 68, 20 Am. Rep. 734.

See 27 Cent. Dig. tit. "Indictment and Information," § 501.

Defects of substance are not waived. People *v.* Ross, 103 Cal. 425, 37 Pac. 379; People *v.* Nelson, 58 Cal. 104, failure to specify felony charged.

Under the English practice matters which are cured by pleading over must be taken advantage of by demurrer. Reg. *v.* Fenwick, 2 C. & K. 915, 4 Cox C. C. 139, 61 E. C. L. 915 (mistake in the year of the queen's reign in which the offense is stated to have occurred); Reg. *v.* Law, 2 M. & Rob. 197 (failure to conclude *contra formam*).

31. **Of caption of indictment** see *supra*, III, B, 5.

Of record see *supra*, II, F, 3, f.

Of conclusion see *supra*, III, E, 7.

As to signatures see *supra*, III, F, 3.

As to indorsements see *supra*, III, G.

32. People *v.* Rodley, 131 Cal. 240, 63 Pac. 351 (altering indictment for perjury); Gar-

or at common law the court may amend in matters of form with the consent of the grand jury,[33] or in some states the indictment may be recommitted to the grand jury for amendment and return, either in matters of substance or of form,[34] if it is recommitted at the same term and to the same grand jury, but not otherwise;[35] and if defendant has not already been arraigned upon and pleaded to the indictment.[36]

2. By Court or Prosecuting Officer — a. In the Absence of a Statute — (i) *In Matters of Substance.* At common law an indictment, being the finding of a grand jury upon oath and depending upon this fact, among others, for its validity, cannot be amended by the court or the prosecuting officer in any matter of substance without the concurrence of the grand jury which presented it;[37] and the rule applies to misdemeanors as well as to felonies.[38] *A fortiori* there can be

vin *v.* State, 52 Miss. 207 (where the word "dollars" was inserted in an indictment for larceny).

33. State *v.* Jefcoat, 20 S. C. 383. See also Cain *v.* State, 4 Blackf. (Ind.) 512; Hawthorn *v.* State, 56 Md. 530; Sparks *v.* Com., 9 Pa. St. 354. At common law "it is the common practice for the grand jury to consent at the time they are sworn, that the court shall amend matters of form, altering no matter of substance; and mere informalities may, therefore, be amended by the court before the commencement of the trial." 1 Chitty Cr. L. 297. And see Starkie Cr. Pl. 287.

34. Lawless *v.* State, 4 Lea (Tenn.) 173; State *v.* Davidson, 2 Coldw. (Tenn.) 184; McKinley *v.* State, 8 Humphr. (Tenn.) 72. *Contra,* State *v.* Springer, 43 Ark. 91 (holding that an indictment, after it has been once filed, cannot be withdrawn for amendment. But *compare* State *v.* Withrow, 47 Ark. 551, 2 S. W. 184); Com. *v.* Kaas, 3 Brewst. (Pa.) 422 (holding that the court will not refer an indictment back to the grand jury to make an amendment in matter of substance). Upon an application to recommit an indictment to the grand jury for amendment, it is not necessary to mention the proposed amendment, and a return of the indictment by the grand jury in open court, with an indorsement on the back, signed by the foreman, showing the amendments made in the indictment, and with the usual indorsement as a true bill of the amended indictment, is good. Lawless *v.* State, *supra.*

Return.— When an indictment is recommitted to the grand jury for amendment, it must be returned into court after the amendment, and the record must show such fact. McKinley *v.* State, 8 Humphr. (Tenn.) 72; State *v.* Davidson, 2 Coldw. (Tenn.) 184.

35. There is no authority for withdrawing an indictment at a term of the court subsequent to that at which it has been found and recommitting it to a different grand jury for amendment by the addition of new counts or otherwise. State *v.* Davidson, 2 Coldw. (Tenn.) 184. And see Unger *v.* State, 42 Miss. 642.

36. See People *v.* Rodley, 131 Cal. 240, 63 Pac. 351.

37. *Florida.* — Dickson *v.* State, 20 Fla. 800.

Illinois.— Patrick *v.* People, 132 Ill. 529, 24 N. E. 619.

Indiana.— Finch *v.* State, 6 Blackf. 533.

Kentucky.— Com. *v.* Adams, 92 Ky. 134, 17 S. W. 276, 13 Ky. L. Rep. 440.

Louisiana.— State *v.* Terrebonne, 45 La. Ann. 25, 12 So. 315.

Maryland.— Watts *v.* State, 99 Md. 30, 57 Atl. 542.

Massachusetts.— Com. *v.* Mahar, 16 Pick. 120; Com. *v.* Phillipsburg, 10 Mass. 78.

Minnesota.— State *v.* Armstrong, 4 Minn. 335.

Mississippi.— McGuire *v.* State, 35 Miss. 366, 72 Am. Dec. 124.

Nevada.— State *v.* Chamberlain, 6 Nev. 257.

New Hampshire.— State *v.* Lyon, 47 N. H. 416; State *v.* Squire, 10 N. H. 558.

New Jersey.— State *v.* Startup, 39 N. J. L. 423.

New York.— People *v.* Frank, 88 N. Y. App. Div. 294, 85 N. Y. Suppl. 55; People *v.* Campbell, 4 Park. Cr. 386.

North Carolina.— State *v.* Jones, 101 N. C. 719, 8 S. E. 147; State *v.* Sexton, 10 N. C. 184, 14 Am. Dec. 584.

Pennsylvania.— Com. *v.* Kaas, 3 Brewst. 422.

Rhode Island.— State *v.* McCarthy, 17 R. I. 370, 22 Atl. 282.

Tennessee.— State *v.* Hughes, 1 Swan 261; McKinley *v.* State, 8 Humphr. 72.

Texas.— Sanders *v.* State, 26 Tex. 119; Calvin *v.* State, 25 Tex. 789; Clement *v.* State, 22 Tex. App. 23, 2 S. W. 379; Drummond *v.* State, 4 Tex. App. 150.

Virginia.— Com. *v.* Buzzard, 5 Gratt. 694.

Wisconsin.— State *v.* McCarty, 2 Pinn. 513, 2 Chandl. 199, 54 Am. Dec. 150.

United States.— *Ex p.* Bain, 121 U. S. 1, 7 S. Ct. 781, 30 L. ed. 849.

England.— Rex *v.* Wilkes, 4 Burr. 2527; 1 Chitty Cr. L. 297, 298; 2 Hawkins P. C. c. 25, § 99.

Canada.— Reg. *v.* Cameron, 2 Can. Cr. Cas. 173; Reg. *v.* Weir, 9 Quebec Q. B. 253.

See 27 Cent. Dig. tit. "Indictment and Information," § 505 *et seq.*

38. Patrick *v.* People, 132 Ill. 529, 24 N. E. 619; Com. *v.* Phillipsburg, 10 Mass. 78; Kline *v.* State, 44 Miss. 317; McGuire *v.* State, 35 Miss. 366, 72 Am. Dec. 124; Com. *v.* Buzzard, 5 Gratt. (Va.) 694; and other cases in the preceding note.

no such amendment where the constitution requires an indictment by a grand jury.[39]

(II) *IN MATTERS OF FORM.* It was the practice at common law for the grand jury to consent at the time they were sworn that the court might amend matters of form, altering no matter of substance, and mere informalities could be amended by the court at any time before trial, or perhaps during the trial.[40] In the United States therefore some of the courts have held, even in the absence of a statute, that it is competent for the court to amend an indictment in matters of form.[41] Other courts have held the contrary.[42]

(III) *CONSENT OF DEFENDANT OR COUNSEL.* It has been held in some jurisdictions that an indictment cannot be amended in matter of substance even with defendant's consent or by stipulation of counsel, particularly where the constitution requires an indictment, and that in such case defendant cannot be estopped by such consent or stipulation;[43] but other cases are to the contrary.[44]

b. Under Statutory Provisions — (I) *IN GENERAL.* In most jurisdictions statutes have been enacted allowing indictments to be amended by the court in matters of form, where the amendment is such that it cannot prejudice defendant, or specifically allowing amendments to cure mistakes in the statement of time or place, names and description of persons, description of property, statements of ownership, and the like, if the defendant cannot be prejudiced thereby in his defense on the merits.[45]

(II) *CONSTITUTIONALITY OF STATUTES.* Where such a form of accusation is required by the constitution, the legislature cannot authorize the court to amend an indictment in matter of substance, for as amended it would not be the finding of the grand jury.[46] And the legislature cannot authorize the amendment of an

39. *Kentucky.*— Com. *v.* Adams, 92 Ky. 134, 17 S. W. 276, 13 Ky. L. Rep. 440.

Massachusetts.— Com. *v.* Mahar, 16 Pick. 120.

Nevada.— State *v.* Chamberlain, 6 Nev. 257.

New York.— People *v.* Campbell, 4 Park. Cr. 386.

United States.— *Ex p.* Bain, 121 U. S. 1, 7 S. Ct. 781, 30 L. ed. 849.

And see the other cases cited *supra*, note 37; and *infra*, X, A, 1, c, 2, b.

40. 1 Chitty Cr. L. 297, 298. See *supra*, X, A, 1.

41. Cain *v.* State, 4 Blackf. (Ind.) 512; State *v.* Wilson, 11 La. Ann. 163; Hawthorn *v.* State, 56 Md. 530; McKinley *v.* State, 8 Humphr. (Tenn.) 72.

42. State *v.* Squire, 10 N. H. 558; and other cases cited *supra*, note 37.

43. Com. *v.* Adams, 92 Ky. 134, 17 S. W. 276, 13 Ky. L. Rep. 440; Com. *v.* Mahar, 16 Pick. (Mass.) 120; People *v.* Campbell, 4 Park. Cr. (N. Y.) 386.

44. McCorkle *v.* State, 14 Ind. 39; State *v.* Cody, 119 N. C. 908, 26 S. W. 252, 56 Am. St. Rep. 692; State *v.* Faile, 43 S. C. 52, 20 S. E. 798. But see State *v.* Jones, 101 N. C. 719, 8 S. E. 147. *Compare supra*, I, A, 3.

45. See the statutes of the various states. And see the following cases:

Alabama.— Reynolds *v.* State, 92 Ala. 44, 9 So. 398; Johnson *v.* State, 46 Ala. 212; Gregory *v.* State, 46 Ala. 151.

Florida.— Burroughs *v.* State, 17 Fla. 643.

Louisiana.— State *v.* Ware, 44 La. Ann. 954, 11 So. 579; State *v.* Dominique, 39 La. Ann. 323, 1 So. 665.

Massachusetts.— Com. *v.* Holley, 3 Gray 458.

Mississippi.— Knight *v.* State, 64 Miss. 802, 2 So. 252; Peebles *v.* State, 55 Miss. 434; Garvin *v.* State, 52 Miss. 207.

New Jersey.— Larison *v.* State, 49 N. J. L. 256, 9 Atl. 700, 60 Am. Rep. 606.

New York.— People *v.* Johnson, 104 N. Y. 213, 10 N. E. 690; People *v.* Herman, 45 Hun 175; People *v.* Richards, 44 Hun 278.

Pennsylvania.— Rosenberger *v.* Com., 118 Pa. St. 77, 11 Atl. 782; Myers *v.* Com., 79 Pa. St. 308; Rough *v.* Com., 78 Pa. St. 495.

Texas.— State *v.* Manning, 14 Tex. 402; Drummond *v.* State, 4 Tex. App. 150.

Vermont.— State *v.* Casavant, 64 Vt. 405, 23 Atl. 636.

Virginia.— Shiflet *v.* Com., 90 Va. 386, 18 S. E. 838.

Wisconsin.— Baker *v.* State, 88 Wis. 140, 59 N. W. 570; Rasmussen *v.* State, 63 Wis. 1, 22 N. W. 835.

England.— Reg. *v.* Vincent, 3 C. & K. 246, 5 Cox C. C. 537, 2 Den. C. C. 464, 16 Jur. 457, 21 L. J. M. C. 109; Reg. *v.* Marks, 10 Cox C. C. 367; Reg. *v.* Pritchard, 8 Cox C. C. 461, 7 Jur. N. S. 557, L. & C. 34, 30 L. J. M. C. 169, 4 L. T. Rep. N. S. 340, 9 Wkly. Rep. 579; Reg. *v.* Fullarton, 6 Cox C. C. 194.

See 27 Cent. Dig. tit. "Indictment and Information," § 505 *et seq.*; and cases cited *infra*, X, D.

46. State *v.* Armstrong, 4 Minn. 335; State *v.* Ham, (N. J. Sup. 1905) 60 Atl. 41; State *v.* Twining, 71 N. J. L. 388, 58 Atl. 1098;

indictment during the trial in matter of substance where, as is the case in most states, if not in all, the constitution guarantees to persons accused the right, before they can be called upon to answer, to be fully and substantially informed of the nature and cause of the accusation, either by an express provision to this effect or impliedly by the provision requiring due process of law.[47] The legislature, however, may authorize amendments at any time in mere matters of form where defendant will not be prejudiced thereby.[48] On this ground the courts have sustained statutes authorizing amendments to correct a mistake in the name of the accused;[49] and some courts, but not all, have sustained statutes allowing amendments with respect to the names of third persons or the ownership of property,[50] averments of time,[51] and the like.[52]

(III) *CONSENT OF DEFENDANT.* In Alabama, and it may be in other states, the statute allows amendment of indictments with defendant's consent as to his name and in certain other particulars, and no amendment can be allowed without his consent, even in an immaterial matter.[53] Generally, however, the statutes permitting amendments do not require defendant's consent.[54]

(IV) *TIME OF AMENDMENT.* As has been seen, the legislature cannot constitutionally authorize an amendment in matter of substance after arraignment and plea, but may authorize amendment in matter of form at any time before judgment.[55] Under some statutes particular amendments cannot be made after verdict,[56]

State *v.* Startup, 39 N. J. L. 423; People *v.* Campbell, 4 Park. Cr. (N. Y.) 386; Calvin *v.* State, 25 Tex. 789. And see *supra*, I, A, 2; I, B, 2, e, (II), (B).

47. *Indiana.*— McLaughlin *v.* State, 45 Ind. 338.

Massachusetts.— See Com. *v.* Harrington, 130 Mass. 35.

New Jersey.— State *v.* Startup, 39 N. J. L. 423.

New York.— People *v.* Campbell, 4 Park. Cr. 386.

Rhode Island.— State *v.* McCarthy, 17 R. I. 370, 22 Atl. 282.

Texas.— Calvin *v.* State, 25 Tex. 789; Sharp *v.* State, 6 Tex. App. 650; Drummond *v.* State, 4 Tex. App. 150.

What is matter of substance see *infra*, X, D.

48. *California.*— People *v.* Kelly, 6 Cal. 210.

Louisiana.— State *v.* Hanks, 39 La. Ann. 234, 1 So. 458.

Massachusetts.— Com. *v.* Holley, 3 Gray 458.

Mississippi.— Peebles *v.* State, 55 Miss. 434; Miller *v.* State, 53 Miss. 403; Garvin *v.* State, 52 Miss. 207.

Missouri.— State *v.* Schricker, 29 Mo. 265.

New Jersey.— Hubbard *v.* State, 62 N. J. L. 628, 43 Atl. 699.

Ohio.— Lasure *v.* State, 19 Ohio St. 43.

Pennsylvania.— Rough *v.* Com., 78 Pa. St. 495.

Texas.— State *v.* Manning, 14 Tex. 402.

Vermont.— State *v.* Nulty, 57 Vt. 543.

What is matter of form see *infra*, X, D.

49. People *v.* Kelly, 6 Cal. 210; State *v.* Schricker, 29 Mo. 265; Hubbard *v.* State, 62 N. J. L. 628, 43 Atl. 699; Lasure *v.* State, 19 Ohio St. 43; State *v.* Manning, 14 Tex. 402; and other cases cited *infra*, X, D, 2.

50. *Louisiana.*— State *v.* Hanks, 39 La. Ann. 234, 1 So. 458.

Mississippi.— Miller *v.* State, 68 Miss. 221, 8 So. 273; Peebles *v.* State, 55 Miss. 434; Miller *v.* State, 53 Miss. 403; Murrah *v.* State, 51 Miss. 652.

New York.— People *v.* Hagan, 14 N. Y. Suppl. 233.

Pennsylvania.— Rough *v.* Com., 78 Pa. St. 495.

Vermont.— State *v.* Casavant, 64 Vt. 405, 23 Atl. 636.

Wisconsin.— Baker *v.* State, 88 Wis. 140, 59 N. W. 570; Rasmussen *v.* State, 63 Wis. 1, 22 N. W. 835; State *v.* Jenkins, 60 Wis. 599, 19 N. W. 406.

See also cases cited *infra*, X, D, 3.

51. Myers *v.* Com., 79 Pa. St. 308. *Contra*, Drummond *v.* State, 4 Tex. App. 150. And see *infra*, X, D, 4.

52. See *infra*, X, D.

53. Shiff *v.* State, 84 Ala. 454, 4 So. 419; Johnson *v.* State, 46 Ala. 212; Gregory *v.* State, 46 Ala. 151. See also Reynolds *v.* State, 92 Ala. 44, 9 So. 398; Ross *v.* State, 55 Ala. 177.

The record must affirmatively show defendant's consent. Shiff *v.* State, 84 Ala. 454, 4 So. 419.

54. See the cases cited *supra*, X, A, 2, b, (I); and *infra*, X, D.

Consent to unauthorized amendment see *supra*, X, A, 2, a, (III).

55. See *supra*, X, A, 2, b, (II).

56. State *v.* Joseph, 40 La. Ann. 5, 3 So. 409.

In England amendments may be made even after the counsel for the prisoner has addressed the jury and closed his case (Reg. *v.* Fullarton, 6 Cox C. C. 194 [*overruling* Reg. *v.* Rymes, 3 C. & K. 326]), but they cannot be made after verdict (Reg. *v.* Oliver, 13 Cox C. C. 588, 36 L. T. Rep. N. S. 114, 25 Wkly. Rep. 323; Reg. *v.* Larkin, 2 C. L. R. 775, 6 Cox C. C. 377, Dears. C. C. 365, 18 Jur. 539, 23 L. J. M. C. 125, 2 Wkly. Rep.

after the case has gone to the jury,[57] or after announcement of ready for trial by both parties.[58] And under some statutes particular amendments cannot be made until after the jury has been sworn.[59]

(v) *Discretion of Court.* The allowance of amendments is under some statutes within the discretion of the court.[60]

(vi) *Necessity For Amendment.* Under a statute authorizing the amendment of indictments to conform to the proofs, where unprejudicial to the accused, the order of the court does not work the amendment; but there must be a manual change of the indictment, and where this is not done the conviction will be set aside.[61]

3. Effect of Amendment. When an authorized amendment of an indictment is made the indictment afterward exists only as amended.[62] If an unauthorized amendment is made by the court by alteration of the indictment, it vitiates the whole indictment,[63] unless it is immaterial and does not change the legal effect of the indictment;[64] but an indictment is not vitiated or affected by an unauthorized addition or change by the clerk of the court.[65]

B. Of Information[66] — **1. In the Absence of Statute.** Even in the absence of a statute, informations, not being found upon the oath of a grand jury, but filed by the public prosecutor, may be amended either in matter of form or substance by leave of court at any time before trial, even after motion to quash, demurrer, or plea;[67] and the rule applies to informations for felonies under stat-

496), or after the case has gone to the jury (Reg. *v.* Frost, 3 C. L. R. 665, 6 Cox C. C. 526, Dears. C. C. 474, 1 Jur. N. S. 406, 24 L. J. M. C. 116, 3 Wkly. Rep. 401).

57. State *v.* Joseph, 40 La. Ann. 5, 3 So. 405, holding that where one is indicted, and convicted of a lesser offense, and judgment is arrested because on the face of the indictment a prosecution for such lesser offense is barred by prescription, the case cannot be remanded to enable the prosecuting officer to amend by averring facts showing a suspension of prescription.

58. Osborne *v.* State, 23 Tex. App. 431, 5 S. W. 251.

59. Thus Md. Code Pub. Gen. Laws, art. 27, § 284, providing for the amendment of an indictment when the name of any person other than defendant has been erroneously set forth therein, so as to correspond with the proof, only authorizes such an amendment after the jury has been sworn, and does not render valid an amendment before that time made by the state's attorney with leave of the court. Watts *v.* State, 99 Md. 30, 57 Atl. 542.

60. Reg. *v.* Frost, 3 C. L. R. 665, 6 Cox C. C. 526, Dears. C. C. 474, 1 Jur. N. S. 406, 24 L. J. M. C. 116, 3 Wkly. Rep. 401. Where the case has not been inquired into before a magistrate, but the bill has been merely found by the grand jury, the court will not go out of its way to assist the prosecution by amending the indictment and inserting certain names, on objection taken that the charges therein set out are not specified with sufficient particularity. Reg. *v.* O'Callaghan, 14 Cox C. C. 499.

61. Miller *v.* State, 53 Miss. 403; Robins *v.* State, 9 Tex. App. 666; Cox *v.* State, 7 Tex. App. 495.

62. Reg. *v.* Webster, 9 Cox C. C. 13, 7 Jur. N. S. 1208, L. & C. 77, 31 L. J. M. C. 17, 5 L. T. Rep. N. S. 327, 10 Wkly. Rep. 20 (holding that when an indictment is amended at the trial the court of appeal cannot consider it as it originally stood, but only in its amended form); Reg. *v.* Pritchard, 8 Cox C. C. 461, 7 Jur. N. S. 557, L. & C. 34, 30 L. J. M. C. 169, 4 L. T. Rep. N. S. 340, 9 Wkly. Rep. 579.

63. Calvin *v.* State, 25 Tex. 789, holding that, as no alteration can be made in a material respect in an indictment after it is found, even by the court, such an alteration of one count is fatal to the whole indictment, although the other counts remain unaltered.

64. Hammond *v.* State, 14 Md. 135.

65. Myatt *v.* State, 31 Tex. Cr. 523, 21 S. W. 256, holding that where defendant had been indicted under the name of "John Myatt," and the clerk of the court to which the indictment was certified substituted defendant's right name, "Marion Myatt," such substitution, being a nullity, did not affect the indictment as originally found.

66. Successive informations see *infra*, IV, A, 4.

New affidavit or verification on amendment see *infra*, IV, A, 2, b, (x), B, 5, h.

67. *Alabama.*— Tatum *v.* State, 66 Ala. 465 (amendment of date of offense after plea of statute of limitations); Thomas *v.* State, 58 Ala. 365.

Connecticut.— State *v.* Stebbins, 29 Conn. 463, 79 Am. Dec. 223; State *v.* Rowley, 12 Conn. 101.

Delaware.— State *v.* Moore, 2 Pennew. 299, 46 Atl. 669.

Illinois.— Daxanbeklar *v.* People, 93 Ill. App. 553, after quashing.

Indiana.— Miles *v.* State, 5 Ind. 215.

Iowa.— State *v.* Reilly, 108 Iowa 735, 78 N. W. 680; State *v.* Butcher, 79 Iowa 110, 44 N. W. 239; State *v.* Doe, 50 Iowa 541 (after sustaining of demurrer by the district court on appeal from a justice of the peace); State

utes allowing such mode of prosecution, although at common law prosecution by information was limited to misdemeanors.[68] But an information cannot be amended in matter of substance after trial and verdict,[69] or, by the weight of authority, even during the trial.[70]

2. Under Statutory Provisions — a. In General. In some jurisdictions in which informations are used provision is expressly made by statute for their amendment, the statutes varying more or less in the different states.[71] In several states it is provided in substance that an information may be amended, either in substance or form, in some states by leave of court and in others without such leave, at any time before plea, or in some states before trial.[72] And in a number of states by statute an information may be amended on the trial as to all matters of form, or of form and variance, at the discretion of the court, where it can be done without prejudice to the substantial rights of defendant.[73] In Indiana an

v. Merchant, 38 Iowa 375 (before trial *de novo* in the district court on appeal from a justice of the peace).

Kentucky.— Com. *v.* Rodes, 1 Dana 595.

Louisiana.— State *v.* Terrebonne, 45 La. Ann. 25, 12 So. 315.

Nebraska.— State *v.* Kendall, 38 Neor. 817, 57 N. W. 525.

New Hampshire.— State *v.* Weare, 38 N. H. 314.

South Carolina.— State *v.* Washington, 15 Rich. 39.

Vermont.— State *v.* Barrell, 75 Vt. 202, 54 Atl. 183, 98 Am. St. Rep. 813; State *v.* Hubbard, 71 Vt. 405, 45 Atl. 751; State *v.* White, 64 Vt. 372, 24 Atl. 250.

Virginia.— Com. *v.* Lodge, 6 Gratt. 699; Com. *v.* Williamson, 4 Gratt. 554.

Wisconsin.— Secor *v.* State, 118 Wis. 621, 95 N. W. 942.

United States.— U. S. *v.* Evans, 25 Fed. Cas. No. 15,063, 1 Cranch C. C. 55; U. S. *v.* Shuck, 27 Fed. Cas. No. 16,285, 1 Cranch C. C. 56; Virginia *v.* Smith, 28 Fed. Cas. No. 16,965, 1 Cranch C. C. 22.

England.— Rex *v.* Wilkes, 4 Burr. 2527; Anonymous, 1 Salk. 50; Rex *v.* Harris, 1 Salk. 47; Rex *v.* Charlesworth, 2 Str. 871; Rex *v.* Nixon, 1 Str. 185; Rex *v.* Holland, 4 T. R. 457; 1 Chitty Cr. L. 298.

See 27 Cent. Dig. tit. "Indictment and Information," § 516 *et seq.*

Lord Mansfield said: "There is a great difference between amending indictments and amending informations. Indictments are found upon the oaths of a jury, and ought only to be amended by themselves; but informations are as declarations in the King's suit. An officer of the crown has the right of framing them originally, and may, with leave, amend, in like manner as any plaintiff may do. If the amendment can give occasion to a new defence, the defendant has leave to change his plea." Rex *v.* Wilkes, 4 Burr. 2527, 2569.

68. Secor *v.* State, 118 Wis. 621, 95 N. W. 942.

69. State *v.* Butcher, 79 Iowa 110, 44 N. W. 239; Turner *v.* Muskegon Cir. Judge, 88 Mich. 359, 50 N. W. 310.

70. People *v.* Moody, 69 Cal. 184, 10 Pac. 392; People *v.* Clement, (Cal. 1894) 35 Pac. 1022; District of Columbia *v.* Herlihy, 1 MacArthur (D. C.) 466; Conley *v.* State, 83 Ga. 496, 10 S. E. 123; Bickford *v.* People, 39 Mich. 209; Byrnes *v.* People, 37 Mich. 515. *Contra*, State *v.* Stebbins, 29 Conn. 463, 79 Am. Dec. 223, holding that an amendment is allowable even after a trial has commenced, reasonable delay being granted, if requested by defendant.

71. See the statutes of the various states.

72. State *v.* Johnson, 70 Kan. 861, 79 Pac. 732; State *v.* Engborn, 63 Kan. 853, 66 Pac. 1007; State *v.* McDonald, 57 Kan. 537, 46 Pac. 966; State *v.* Spendlove, 47 Kan. 160, 28 Pac. 994; State *v.* McLain, 43 Kan. 439, 23 Pac. 651; State *v.* Gould, 40 Kan. 258, 19 Pac. 739; State *v.* Scott, 1 Kan. App. 748, 42 Pac. 264; State *v.* Coleman, 186 Mo. 151, 84 S. W. 978, 69 L. R. A. 381; State *v.* Pyscher, 179 Mo. 140, 77 S. W. 836 (allowing amended information after a mistrial and before a new trial); State *v.* Broeder, 90 Mo. App. 156; State *v.* Nash, 51 S. C. 319, 28 S. E. 946.

73. *Kansas.*— State *v.* Coover, 69 Kan. 382, 76 Pac. 845; State *v.* Schaben, 69 Kan. 421, 76 Pac. 823; State *v.* Bugg, 66 Kan. 668, 72 Pac. 236; State *v.* McDonald, 57 Kan. 537, 46 Pac. 966; State *v.* Spencer, 43 Kan. 114, 23 Pac. 159; State *v.* Coggins, (App. 1900) 62 Pac. 247.

Louisiana.— State *v.* Bright, 105 La. 341, 29 So. 903; State *v.* Perkins, 49 La. Ann. 310, 21 So. 839; State *v.* Curtis, 44 La. Ann. 320, 10 So. 784; State *v.* Finn, 31 La. Ann. 408; State *v.* Snow, 30 La. Ann. 401.

Michigan.— People *v.* Roat, 117 Mich. 578, 76 N. W. 91; People *v.* Brown, 110 Mich. 168, 67 N. W. 226; People *v.* Sullivan, 83 Mich. 355, 47 N. W. 220; People *v.* McCullough, 81 Mich. 25, 45 N. W. 515; People *v.* Price, 74 Mich. 37, 41 N. W. 853; People *v.* Mott, 34 Mich. 80.

Missouri.— State *v.* Rollins, 186 Mo. 501, 85 S. W. 516; State *v.* McCray, 74 Mo. 303; State *v.* Krull, 5 Mo. App. 589.

Montana.— State *v.* Oliver, 20 Mont. 318, 50 Pac. 1018.

Wisconsin.— Meehan *v.* State, 119 Wis. 621, 97 N. W. 173; Baker *v.* State, 88 Wis. 140, 59 N. W. 570; State *v.* Jenkins, 60 Wis. 599, 19 N. W. 406.

See 27 Cent. Dig. tit. "Indictment and Information," § 516 *et seq.*

information and the affidavit on which it is based may be amended in substance or form at any time before plea, the affidavit, when amended, being sworn to; and the information may be amended at any time before or on the trial to conform to the affidavit.[74] In Texas an information may be amended by leave of court in any matter of form at any time before an announcement by both parties of ready for trial on the merits, but not afterward, and no matter of substance can be amended.[75]

b. Constitutionality of Statutes. In view of the constitutional provisions guaranteeing to persons accused of crime the right, before they can be called upon to answer, to be informed fully and substantially of the nature and cause of the accusation,[76] the legislature cannot authorize an information to be amended during the trial in matter of substance,[77] any more than it could authorize such amendment of indictments.[78] But it may authorize amendments at any time in mere matter of form,[79] and may authorize amendments before trial either in substance or form.[80]

3. Discretion of Court. It is generally within the discretion of the trial court whether it will permit an information to be amended, and its exercise of such discretion will not be interfered with in the absence of abuse.[81] Leave to amend should be denied if the prosecution has become barred by the statute of limitations,[82] or, it has been held, where the amendment is for the purpose of adding charges,[83] or where the complaint before the magistrate or the presentment on which the information is based does not charge a crime,[84] or where the amendment charges a graver crime with a heavier penalty.[85]

4. Who May Amend. As a rule amendments of informations are made and must be made by the prosecuting attorney;[86] but authorized amendments may be made, with the permission of the court, by an assistant prosecuting attorney in the absence of his superior,[87] or by the successor in office of the prosecuting attorney who filed the information.[88] An amendment may be directed by the court of its own motion.[89]

5. Notice and Hearing of Motion to Amend. On motion to amend an information defendant is entitled to notice and an opportunity to be heard, and an amendment without this is erroneous.[90]

Matter of substance and form distinguished see *infra*, X, D.

74. Under this statute where an affidavit before a justice charges the receiving of stolen goods, knowing them to be stolen, it is proper to allow an amendment of the affidavit and information in the circuit court charging in the first count that defendant received stolen goods, and in the second the larceny of the goods. Kennegar *v.* State, 120 Ind. 176, 21 N. E. 917. But information can be amended in matter of substance only when there is an affidavit on file which is substantially sufficient. State *v.* Wise, 7 Ind. 645.

75. Tex. Pen. Code, art. 587, 588. See Fortenherry *v.* State, (Tex. Cr. App. 1903) 72 S. W. 593; Wilkerson *v.* State, (Tex. Cr. App. 1898) 45 S. W. 805; Brown *v.* State, 11 Tex. App. 451. Under this statute a variance between a complaint and the information cannot be amended after the state's evidence is in. Williams *v.* State, 34 Tex. Cr. 100, 29 S. W. 472.

76. See *supra*, X, A, 2, b, (II).

77. State *v.* Van Cleve, 5 Wash. 642, 32 Pac. 461.

78. See *supra*, X, A, 2, b, (II).

79. State *v.* Oliver, 20 Mont. 318, 50 Pac. 1018; State *v.* Nulty, 57 Vt. 543. And see cases cited *supra*, X, A, 2, b, (II), text and notes 48–52.

80. See cases cited *supra*, X, B, 2, b.

81. State *v.* Rowley, 12 Conn. 101; State *v.* Terrebonne, 45 La. Ann. 25, 12 So. 315; State *v.* Pyscher, 179 Mo. 140, 77 S. W. 836. But see State *v.* Merchant, 38 Iowa 375.

82. State *v.* Rowley, 12 Conn. 101.

83. Com. *v.* Rodes, 1 Dana (Ky.) 595.

84. State *v.* Dennison, 60 Nebr. 157, 82 N. W. 383; Com. *v.* Williamson, 4 Gratt. (Va.) 554.

85. State *v.* Cavanaugh, 52 La. Ann. 1251, 27 So. 704.

86. See the cases cited *supra*, X, B, 1, 2.

87. People *v.* Henssler, 48 Mich. 49, 11 N. W. 804.

88. State *v.* Barrell, 75 Vt. 202, 54 Atl. 183, 98 Am. St. Rep. 823; State *v.* Meacham, 67 Vt. 707, 32 Atl. 494. The oath of office taken by a state's attorney is for the faithful performance of his duties, and is not an oath to the truth of the allegations set forth in an information filed by him, so as to be a bar to an amendment of such information by his successor in office. State *v.* Barrell, *supra*.

89. State *v.* Jenkins, 60 Wis. 599, 19 N. W. 406.

90. State *v.* Bragg, 63 Mo. App. 22, holding

6. After Change of Venue. An information cannot be amended in the county in which a criminal case is pending after a change of venue has been granted, but the amended information must be filed in the original county.[91]

7. Necessity For Amendment. It has been held that when an information is defective and amendable, the amendment must be actually made.[92]

8. Effect of Amendment. When an amended information is filed the original information is thereby quashed and abandoned.[93] When an information is amended in matters of substance after arraignment and plea, there must be a new arraignment and plea.[94] An amendment cannot be relied upon as error where it is immaterial and the legal effect of the information is not in any way changed.[95]

C. Of Complaint or Affidavit.[96] Complaints and affidavits treated as complaints, like informations, may be amended by leave of court before trial in matters of form or substance,[97] or during trial, or even in the appellate court, in matter of form,[98] but not in matter of substance.[99] A complaint under oath cannot be amended in matter of substance in an appellate court,[1] except, in some jurisdictions, where there is a trial *de novo*.[2]

D. Matters Amendable; Form and Substance Distinguished — 1. In General. In applying the principles set forth and statutes referred to in the preceding subdivisions with reference to matters of substance and form, there has been some conflict of opinion as to what are to be regarded as amendments in matter of substance as distinguished from mere matter of form. It is perhaps safe to say, however, on the one hand, that the power of amendment extends to formal matters which are not essential to the charge and mere clerical errors, etc., where defendant cannot be misled or prejudiced;[3] but on the other hand any

that an amendment of an information by the insertion of a verification as to the date of filing, without notice to defendant and opportunity to be heard, is erroneous.

91. State *v.* Bartlett, 170 Mo. 658, 71 S. W. 148, 59 L. R. A. 756.

92. Sovine *v.* State, 85 Ind. 576, holding that failure to aver that acts constituting grand larceny were "feloniously" done may be cured by amendment; but on motion to quash the supreme court will not treat the information as having been amended. But *compare* State *v.* Patterson, 66 Kan. 447, 71 Pac. 860 (holding that where the court has ordered certain irrelevant matter in an information disregarded, it is not absolutely necessary that it should be obliterated from the information, or that the information should be redrafted, where the precise effect of the order is shown by the record); State *v.* Pipes, 65 Kan. 543, 70 Pac. 363 (holding that where defendant alleges that his name is other than that used in the information against him, and declares his real name, and the court orders it to be substituted in all further proceedings, it is not essential that the information should be amended with respect to the name.

93. State *v.* Hoffman, 70 Mo. App. 271.

94. People *v.* Moody, 69 Cal. 184, 10 Pac. 392 (where it was held error to try the accused without a new arraignment and plea on an information amended by changing the date of the offense); People *v.* Clement, (Cal. 1894) 35 Pac. 1022.

95. State *v.* McKee, 17 Utah 370, 53 Pac. 733. In an information against a person for keeping his saloon open after legal hours, contrary to a statute, it is not necessary to aver that the place kept open was not a drug store, and that the accused is not a druggist, and it is not error therefore to permit at the trial an amendment to the information alleging these facts. People *v.* Sullivan, 83 Mich. 355, 47 N. W. 220.

96. Amendment of complaints, affidavits, warrants, etc., in inferior courts see Criminal Law, 12 Cyc. 296, 326, 341.

97. State *v.* Batchelder, 6 Vt. 479, town grand juror's complaint.

98. *Alabama.*— Simpson *v.* State, 111 Ala. 6, 20 So. 572.

Illinois.— Truitt *v.* People, 88 Ill. 518.

Rhode Island.— Kenney *v.* State, 5 R. I. 385.

Vermont.— State *v.* Sutton, 65 Vt. 439, 26 Atl. 66; State *v.* Freeman, 59 Vt. 661, 10 Atl. 752.

Wisconsin.— Fetkenhauer *v.* State, 112 Wis. 491, 88 N. W. 294; Keehn *v.* Stein, 72 Wis. 196, 39 N. W. 361.

99. See Conley *v.* State, 83 Ga. 496, 10 S. E. 123; State *v.* Runnals, 49 N. H. 498; State *v.* Dolby, 49 N. H. 483, 6 Am. Dec. 588.

1. State *v.* Wheeler, 64 Vt. 569, 25 Atl. 434; State *v.* Kennedy, 36 Vt. 563.

2. See Criminal Law, 12 Cyc. 341.

3. *Connecticut.*— State *v.* Stebbins, 29 Conn. 463, 79 Am. Dec. 223.

Kansas.— State *v.* Schaben, 69 Kan. 421, 76 Pac. 823; State *v.* Gould, 40 Kan. 258, 19 Pac. 739.

Louisiana.— State *v.* Curtis, 44 La. Ann. 320, 10 So. 784.

Maryland.— Hawthorn *v.* State, 56 Md. 530.

Michigan.— People *v.* Roat, 117 Mich. 578,

omission or misstatement which prevents an indictment or information from showing on its face that an offense has been committed, or from showing what offense it is intended to charge, is a defect in matter of substance which cannot be cured by amendment at the trial, or, in the case of an indictment, by the court at any time, where an indictment is necessary.[4] And an indictment or information cannot be amended at the trial so as to change the identity of the offense,[5] or so as to include or add another offense.[6] An indictment will not be amended by striking out the word "feloniously" and thereby converting a charge of felony into a misdemeanor,[7] or by inserting the word "feloniously," where it is essential to the charge.[8] The test as to whether a defendant is prejudiced by the amendment of an indictment has been said to be whether a defense under the indictment as it originally stood would be equally available after the amendment is made, and whether any evidence defendant might have would be equally applicable to the indictment in the one form as in the other.[9]

2. Name or Description of Accused. It has been held that the name or description[10] of the accused is so far matter of form that an indictment or information may be amended after plea or on the trial with respect thereto if permitted by statute;[11] but in the absence of a statute it has been held that an

76 N. W. 91; Turner *v.* Muskegon Cir. Judge, 88 Mich. 359, 50 N. W. 310.

Canada.— Bell *v.* Parent, 7 Can. Cr. Cas. 465, mistake in number of city ordinance alleged to have been violated.

See 27 Cent. Dig. tit. "Indictment and Information," § 502. And see cases cited *supra*, X, A, 2, b, (I); X, B, 1, 2; *infra*, X, D, 2–5.

4. *Indiana.*— See McLaughlin *v.* State, 45 Ind. 338.

Kentucky.— Com. *v.* Adams, 92 Ky. 134, 17 S. W. 276, 13 Ky. L. Rep. 440, change from charge of forgery to charge of obtaining goods by false pretenses.

Maine.— State *v.* Learned, 47 Me. 426.

Massachusetts.— See Com. *v.* Harrington, 130 Mass. 35.

Michigan.— People *v.* McCullough, 81 Mich. 25, 45 N. W. 515; Bickford *v.* People, 39 Mich. 209; Byrnes *v.* People, 37 Mich. 515.

Minnesota.— State *v.* Armstrong, 4 Minn. 335.

Mississippi.— Kline *v.* State, 44 Miss. 317, cannot add words "not being a druggist or apothecary" in an indictment for violating the Sunday law, so as to negative an exception in the statute.

New Jersey.— State *v.* Twining, 71 N. J. L. 388, 58 Atl. 1098; State *v.* Startup, 39 N. J. L. 423.

New York.— People *v.* Trank, 88 N. Y. App. Div. 294, 85 N. Y. Suppl. 55 (cannot change averment as to age of child in indictment for abandonment); People *v.* Campbell, 4 Park. Cr. 386 (supplying averments necessary to charge offense).

Pennsylvania.— Com. *v.* Kaas, 3 Brewst. 422, cannot amend indictment for burglary so as to allege that the offense was committed in the night-time.

Rhode Island.— State *v.* McCarthy, 17 R. I. 370, 22 Atl. 282.

Texas.— Calvin *v.* State, 25 Tex. 789; Clement *v.* State, 22 Tex. App. 23, 2 S. W. 379; Bates *v.* State, 12 Tex. App. 26; Brown *v.* State, 11 Tex. App. 451 (holding that no offense is charged in an information which, without itself alleging the inculpatory act, refers to the affidavit as showing the commission of the act by the accused, and such defect cannot be cured by amendment); Edwards *v.* State, 10 Tex. App. 25.

United States.— U. S. *v.* Morrissey, 32 Fed. 147.

England.— Reg. *v.* Larkin, 2 C. L. R. 775, 6 Cox C. C. 377, Dears. C. C. 365, 18 Jur. 539, 23 L. J. M. C. 125, 2 Wkly. Rep. 496 (indictment for receiving stolen goods); Reg. *v.* James, 12 Cox C. C. 127 (adding "with intent to defraud" in an indictment for false pretenses); Reg. *v.* Bailey, 6 Cox C. C. 29 (changing allegation as to false pretenses).

Canada.— Reg. *v.* Weir, 3 Can. Cr. Cas. 499; Reg. *v.* Cameron, 2 Can. Cr. Cas. 173, omission of necessary allegations in an indictment for libel.

See 27 Cent. Dig. tit. "Indictment and Information," § 502 *et seq.*

5. Blumenberg *v.* State, 55 Miss. 528. See also Com. *v.* Adams, 92 Ky. 134, 17 S. W. 276, 13 Ky. L. Rep. 440.

An information cannot be amended by filing a substituted information charging an offense different from the one charged in the original information. State *v.* Jenkins, 92 Mo. App. 439; State *v.* Emberton, 45 Mo. App. 56.

6. Com. *v.* Rodes, 1 Dana (Ky.) 595; Turner *v.* Muskegon Cir. Judge, 88 Mich. 359, 50 N. W. 310.

7. Reg. *v.* Wright, 2 F. & F. 320.

8. State *v.* Durbin, 20 La. Ann. 408, indictment for robbery.

9. Reg. *v.* Weir, 3 Can. Cr. Cas. 262. See also State *v.* Schaben, 69 Kan. 421, 76 Pac. 823; State *v.* Snow, 30 La. Ann. 401; U. S. *v.* Morrissey, 32 Fed. 147; Reg. *v.* Sutton, 13 Cox C. C. 648.

10. Reg. *v.* Orchard, 8 C. & P. 565, 34 E. C. L. 894, referred to in the note following.

11. *California.*— People *v.* Kelly, 6 Cal. 210.

indictment cannot be amended by the court by changing the name of the accused.[12]

3. Names or Description of Third Persons. In many cases under statutory provisions amendments of indictments, informations, or complaints have been allowed, as being in matter of form, changing or adding the name or description of a third person, as the name or description of the owner or possessor of property in a charge of larceny, embezzlement, false pretenses, etc.,[13] of the owner or occu-

Colorado.— Harris *v.* People, 21 Colo. 95, 39 Pac. 1084.

Florida.— Burroughs *v.* State, 17 Fla. 643.

Kansas.— State *v.* Pipes, 65 Kan. 543, 70 Pac. 363; State *v.* McDonald, 57 Kan. 537, 46 Pac. 966; State *v.* McLain, 43 Kan. 439, 23 Pac. 651.

Kentucky.— Com. *v.* Jenkins, 114 Ky. 62, 72 S. W. 363, 24 Ky. L. Rep. 1881; Louis *v.* Com., 16 Ky. L. Rep. 284.

Louisiana.— State *v.* Matthews, 111 La. 962, 36 So. 48; State *v.* Buchanan, 35 La. Ann. 89.

Mississippi.— Orr *v.* State, 81 Miss. 130, 32 So. 998.

Missouri.— State *v.* Johnson, 93 Mo. 317, 6 S. W. 77; State *v.* Schricker, 29 Mo. 265; State *v.* Krull, 5 Mo. App. 589.

New Jersey.— Hubbard *v.* State, 62 N. J. L. 628, 43 Atl. 699.

Ohio.— Lasure *v.* State, 19 Ohio St. 43.

South Carolina.— State *v.* Washington, 15 Rich. 39.

Texas.— State *v.* Manning, 14 Tex. 402; Fortenberry *v.* State, 44 Tex. Cr. 535, 72 S. W. 588; Sinclair *v.* State, 34 Tex. Cr. 453, 30 S. W. 1070; Wilson *v.* State, 6 Tex. App. 154; Morris *v.* State, 4 Tex. App. 589; Bassett *v.* State, 4 Tex. App. 41. *Compare* Myatt *v.* State, 31 Tex. Cr. 523, 21 S. W. 256. Code Cr. Proc. art. 549, authorizing the correction of an indictment by inserting defendant's name therein as suggested by himself, and by changing the style of the cause so as to give the true name, authorizes a correction of the name wherever it occurs, and not merely in the formal parts of the indictment. Colter *v.* State, 41 Tex. Cr. 78, 51 S. W. 945. It is not proper for the court, on suggestion of the county attorney, to amend a complaint and information in regard to defendant's name. The statutory provisions which authorize such amendments have reference to cases in which defendant suggests that his name is misstated. If he makes no such suggestion, the cause proceeds as though his name were truly alleged, and the misnomer is no defense. Patillo *v.* State, 3 Tex. App. 442.

Vermont.— State *v.* Murphy, 55 Vt. 547.

Virginia.— Shiflett *v.* Com., 90 Va. 386, 18 S. E. 838.

England.— Reg. *v.* Orchard, 8 C. & P. 565, 34 E. C. L. 894, holding that where a woman charged with the murder of her husband was described as "A., the wife of J. O.," etc., the indictment could be amended by striking out the word "wife" and inserting the word "widow."

See 27 Cent. Dig. tit. "Indictment and Information," § 514.

In Alabama, by statute, defendant's consent is necessary, and his consent must affirmatively appear from the record. Shiff *v.* State, 84 Ala. 454, 4 So. 419.

Inserting name in body of information.— Where an information charging in one count the crime of burglary and grand larceny, and containing in its caption and body the name of defendant, was amended after the jury had been impaneled and sworn, by inserting elsewhere in the body thereof the name of defendant, where it had by a clerical error been omitted therefrom, it was held that such amendment went to the form, and not to the substance, of the information, and was authorized by Kan. Cr. Code, § 72. State *v.* Coover, 69 Kan. 382, 76 Pac. 845.

A blank in the indictment for the given name of defendant may be filled after trial begun, where accused has been arraigned by his full name, which appears on the back of the indictment. State *v.* Matthews, 111 La. 962, 36 So. 48. Where the name of the accused has been omitted in one of the blanks, the information may be amended at the trial on such terms as will work him no injustice. State *v.* Krull, 5 Mo. App. 589.

12. McGuire *v.* State, 35 Miss. 366, 72 Am. Dec. 124; State *v.* Hughes, 1 Swan (Tenn.) 261; Com. *v.* Buzzard, 5 Gratt. (Va.) 694.

13. *Alabama.*— Ross *v.* State, 55 Ala. 177, with defendant's consent, this being required by the statute.

Connecticut.— State *v.* Stebbins, 29 Conn. 463, 79 Am. Dec. 223, name of railroad company.

Louisiana.— State *v.* Bright, 105 La. 341, 29 So. 903 (changing ownership from wife to husband); State *v.* Satterwhite, 52 La. Ann. 499, 26 So. 1006; State *v.* Ware, 44 La. Ann. 954, 11 So. 579; State *v.* Dominique, 39 La. Ann. 323, 1 So. 665; State *v.* Hanks, 39 La. Ann. 234, 1 So. 458; State *v.* Christian, 30 La. Ann. 367 (two amendments allowed); State *v.* Holmes, 23 La. Ann. 604.

Michigan.— People *v.* Hilderbrand, 71 Mich. 313, 38 N. W. 919.

Mississippi.— Peebles *v.* State, 55 Miss. 434; Garvin *v.* State, 52 Miss. 207; Murrah *v.* State, 51 Miss. 675 (name of owner in indictment for unlawfully marking an animal); Haywood *v.* State, 47 Miss. 1. *Compare* Unger *v.* State, 42 Miss. 642, 649.

Montana.— State *v.* Oliver, 20 Mont. 318, 50 Pac. 1018.

New York.— People *v.* Dunn, 53 Hun 381, 6 N. Y. Suppl. 805, 7 N. Y. Cr. 173; People *v.* Herman, 45 Hun 175.

Pennsylvania.— Rosenberger *v.* Com., 118 Pa. St. 77, 11 Atl. 782 (change from joint

pant of premises or property in a charge of burglary, arson, and the like;[14] of the thief in a charge of receiving stolen goods;[15] of the payee of a check in a charge of forgery or uttering;[16] of the woman in an indictment or information for seduction,[17] adultery or fornication,[18] bigamy,[19] or abortion or attempt to commit abortion;[20] of the person killed in an indictment for murder;[21] of the person assaulted in a charge of assault and battery,[22] or assault with intent to kill and murder;[23] of the purchaser in a charge of illegally selling intoxicating liquors;[24] and in other like cases.[25] Other cases, however, are to the contrary, particularly in the absence of express statutory provision.[26] And even where it is permitted by statute to change the name of third persons, this can be

to individual ownership); Com. *v.* Livingston, 5 Pa. Dist. 666, 18 Pa. Co. Ct. 236; Com. *v.* O'Brien, 2 Brewst. 566 (holding that an indictment for larceny may be amended by striking out the name of the alleged owner of the stolen goods and inserting the words "of some person unknown").

Vermont.— State *v.* Casavant, 64 Vt. 405, 23 Atl. 636.

Wisconsin.— Fetkenhauer *v.* State, 112 Wis. 491, 88 N. W. 294; Golonbieski *v.* State, 101 Wis. 333, 77 N. W. 189; Baker *v.* State, 88 Wis. 140, 59 N. W. 570.

England.— Reg. *v.* Vincent, 3 C. & K. 246, 5 Cox C. C. 537, 2 Den. C. C. 464, 16 Jur. 457, 21 L. J. M. C. 109; Reg. *v.* Marks, 10 Cox C. C. 367; Reg. *v.* Pritchard, 8 Cox C. C. 461, 7 Jur. N. S. 557, L. & C. 34, 30 L. J. M. C. 169, 4 L. T. Rep. N. S. 340, 9 Wkly. Rep. 579. But see Reg. *v.* Ward, 7 Cox C. C. 421.

See 27 Cent. Dig. tit. "Indictment and Information," §§ 514, 520.

14. Simpson *v.* State, 111 Ala. 6, 20 So. 572 (arson); State *v.* Satterwhite, 52 La. Ann. 499, 26 So. 1006 (owner of property stolen in an indictment for burglary); People *v.* Richards, 44 Hun (N. Y.) 278 (burglary); People *v.* Hagan, 14 N. Y. Suppl. 233 (burglary); Reg. *v.* Frost, 3 C. L. R. 665, 6 Cox C. C. 526, Dears. C. C. 474, 1 Jur. N. S. 406, 24 L. J. M. C. 116, 3 Wkly. Rep. 401 (occupancy of land in an indictment for assaulting game-keeper); Reg. *v.* Sutton, 13 Cox C. C. 648 (variance as to the occupation of land in an indictment for night poaching).

15. State *v.* Jenkins, 60 Wis. 599, 19 N. W. 406.

16. People *v.* Brown, 110 Mich. 168, 67 N. W. 1112.

17. People *v.* Johnson, 104 N. Y. 213, 10 N. E. 690 [*affirming* 4 N. Y. Cr. 591].

18. State *v.* Arnold, 50 Vt. 731.

19. Reg. *v.* Deeley, 4 C. & P. 579, 1 Moody C. C. 303, 19 E. C. L. 658, where an indictment was held amendable to correct an erroneous description of the second wife as E C, widow, when she was in fact not a widow and had never been represented or reputed to be so.

20. Reg. *v.* Titley, 14 Cox C. C. 502, where, on objection before plea to the first count of the indictment that the words "a certain woman" were too vague, the judge allowed the prosecution to amend by inserting the words "a woman to the jurors unknown" instead of the words objected to.

21. State *v.* Peterson, 41 La. Ann. 85, 6 So. 527; Miller *v.* State, 68 Miss. 221, 8 So. 273.

22. Rasmussen *v.* State, 63 Wis. 1, 22 N. W. 835.

23. Miller *v.* State, 53 Miss. 403; Reg. *v.* Welton, 9 Cox C. C. 297.

24. Rough *v.* Com., 78 Pa. St. 495. And see Rocco *v.* State, 37 Miss. 357, holding that an indictment, charging an unlawful sale of liquor to A B, "and to divers other persons to the grand jurors unknown," was properly amended by striking out the quoted words. *Compare* Blumenberg *v.* State, 55 Miss. 528, referred to *infra*, note 27; McLaughlin *v.* State, 45 Ind. 338, referred to *infra*, note 26.

25. Receipt of deposit by bankrupt or insolvent.— The amendment of an indictment charging a bankrupt with receiving, with knowledge of insolvency, a deposit described as the money of one T., by the addition of the words "and of another person, being a partner and joint owner with him," is not an abuse of discretion. Com. *v.* Hazlett, 14 Pa. Super. Ct. 352.

Violation of election laws.— When an information is filed charging defendant with influencing certain persons to register, the state will be permitted, without terms, to amend the information by inserting the names of the persons alleged to have been influenced. State *v.* Moore, 2 Pennew. (Del.) 299, 46 Atl. 669.

26. *Maryland.*— Watts *v.* State, 99 Md. 30, 57 Atl. 542, holding that the name of the deceased — his christian as well as surname — in an indictment for murder is, at common law, a matter of substance, which cannot be changed without the consent of the grand jury.

Massachusetts.— Com. *v.* Mahar, 16 Pick. 120, name of owner of house in an indictment for arson.

New Hampshire.— State *v.* Lyon, 47 N. H. 416, name of owner of goods in an indictment for larceny.

Rhode Island.— State *v.* McCarthy, 17 R. I. 370, 22 Atl. 282, name of owner of house in an indictment for burglary.

Washington.— State *v.* Van Cleve, 5 Wash. 642, 32 Pac. 461, name of owner of property in an information for larceny.

See also as sustaining this view McLaughlin *v.* State, 45 Ind. 338, name of person to whom sold in charge of illegally selling liquor.

done only to correct a mistake in charging the offense, and not to change the offense.[27]

4. Time and Place. In some states amendments have been sustained under statutory provisions, as being in matter of form, adding or changing the time of the alleged offense, where the time is not of the essence of the offense;[28] but elsewhere decisions are to the contrary.[29] Although the contrary has been held, according to the weight of authority a statement of the county in which the crime was committed is matter of substance which cannot be changed or supplied by amendment of an indictment,[30] or, during the trial, of an information or other like accusation;[31] and the same has been held in other cases in which the statement or description of place is material,[32] although amendments have been

27. Blumenberg *v.* State, 55 Miss. 528, where it was held improper to amend an indictment for selling spirituous liquor by changing the name of the person to whom it is charged the liquor was sold, from "J. T. M." to "A. T. M.," they being different persons, although the proof may show that the accused had sold liquor to the latter, if it also appears that it was for the sale of liquor to "J. T. M.," and not to "A. T. M.," that the grand jury presented the indictment. "Identity of name," said the court, "is not essential but identity of the offense and of the person is." See also State *v.* Taylor, 49 La. Ann. 319, 21 So. 516 (holding that an indictment cannot be amended by substituting, for the name of the person alleged to have been assaulted, the name of another who was with him at the time); State *v.* Morgan, 35 La. Ann. 1139 (holding that Rev. St. art. 1047, allowing an amendment of a name before trial, where "not material to the merits of the case" nor prejudicial to the defense, does not authorize, in a rape case, the substitution of a different name for the woman with the object of substituting another person). But *compare* Rough *v.* Com., 78 Pa. St. 495.

28. *Iowa.*— State *v.* Brooks, 85 Iowa 366, 52 N. W. 240, correcting impossible date in an indictment after plea, where the proper date appeared elsewhere in the indictment.

Kansas.— State *v.* Oliver, 55 Kan. 711, 41 Pac. 954 (information); State *v.* Cooper, 31 Kan. 505, 3 Pac. 429 (information).

Louisiana.— State *v.* Hardaway, 50 La. Ann. 1345, 24 So. 320 (indictment); State *v.* Hamilton, 48 La. Ann. 1566, 21 So. 232 (indictment); State *v.* Pierre, 39 La. Ann. 915, 3 So. 60 (indictment); State *v.* Fontenette, 38 La. Ann. 61 (holding that under Rev. St. §§ 1063, 1064, authorizing immediate amendment of an indictment having "a defect apparent on its face," or "stating the time imperfectly," where the blank for the year is unfilled, the proper year may be inserted, even after the evidence is closed).

Michigan.— People *v.* Hamilton, 76 Mich. 212, 42 N. W. 1131, information for murder.

New Jersey.— Ketline *v.* State, 58 N. J. L. 462, 37 Atl. 133, filling blank in indictment for date of offense.

New York.— People *v.* Jackson, 111 N. Y. 362, 6 N. Y. Cr. 393, 19 N. E. 54 (indictment for murder); People *v.* Willis, 23 Misc. 568, 52 N. Y. Suppl. 808.

Pennsylvania.— Myers *v.* Com., 79 Pa. St. 308, holding that under a statute allowing an amendment "in the name or description of anything," the time laid in an indictment for homicide may be changed after a jury has been impaneled.

South Carolina.— State *v.* May, 45 S. C. 509, 23 S. E. 513, filling blank in indictment for murder.

Virginia.— State *v.* Hubbard, 71 Vt. 405, 45 Atl. 751, information for selling and keeping liquor. But it has been held that an indictment for the sale of liquor, which does not state the year in which such sale was made, and which alleges a former conviction in a certain year, without naming the month and day, cannot be amended after appeal to the supreme court. State *v.* Kennedy, 36 Vt. 563.

29. Dickson *v.* State, 20 Fla. 800; State *v.* O'Donnell, 81 Me. 271, 17 Atl. 66; Com. *v.* Seymour, 2 Brewst. (Pa.) 567; State *v.* Davidson, 36 Tex. 325; Sanders *v.* State, 26 Tex. 119; Calvin *v.* State, 25 Tex. 789; Huff *v.* State, 23 Tex. App. 291, 4 S. W. 890; Clement *v.* State, 22 Tex. App. 23, 2 S. W. 379; Ogle *v.* State, (Tex. App. 1886) 2 S. W. 380; Goddard *v.* State, 14 Tex. App. 566; Drummond *v.* State, 4 Tex. App. 150 [*overruling* State *v.* Elliot, 34 Tex. 148].

30. State *v.* Armstrong, 4 Minn. 335; State *v.* Chamberlain, 6 Nev. 257; Collins *v.* State, 6 Tex. App. 647. *Contra*, Com. *v.* Leigh, 15 Phila. (Pa.) 376.

31. Conley *v.* State, 83 Ga. 496, 10 S. E. 123.

32. State *v.* Ham, (N. J. Sup. 1905) 60 Atl. 41 (holding that under Pamphl. Laws (1898), p. 878, § 34, declaring that when there is a variance between the indictment and evidence in the name of any county, city, township, or other place, the court may, if it considers such variance not material, order the indictment to be amended, an indictment for the illegal sale of liquor in a certain township cannot be amended so as to allege that the sale was in a different place, such amendment affecting an essential element of the crime); Reg. *v.* ——, 6 Cox C. C. 391 (holding that where an indictment for concealing the birth of a child alleged the concealment to have been in and among a certain heap of carrots, and the evi-

allowed to cure misdescriptions or misstatements of place,[33] and immaterial and unnecessary amendments cannot be relied upon as error.[34]

5. Other Amendments. Amendments have also been allowed under statutes, although subject to conflict of opinion in some of the cases mentioned, to correct a mere mistake in the allegation of a former conviction in an indictment or information for a second offense,[35] although not to supply an entire omission of such an allegation;[36] to charge the offense more specifically;[37] to correct or make more specific allegations in indictments for perjury,[38] false pretenses,[39] forgery or uttering,[40] libel,[41] shooting with a dangerous weapon,[42] exhibiting a deadly weapon,[43] and other offenses;[44] to change or make more specific the description of property in an indictment or information for larceny, embezzlement, false pretenses, and like offenses, where the accused cannot be prejudiced thereby,[45] or the description

dence was that the body was laid upon the heap but behind it, so that it was hidden from the passers-by by the upper part of the heap, an amendment was not within the provision of 14 & 15 Vict. c. 100).

33. State *v.* Sterns, 28 Kan. 154 (holding that where an indictment charged a sale of liquor to have taken place in a certain house, describing it by name, in a certain city, and the evidence supported such charge, and there was no claim that there were two houses of that name in the city, an amendment striking out of the description the lot and block numbers, description of the land on which the house stood was properly allowed); Com. *v.* Lambrecht, 3 Pa. Co. Ct. 323, 18 Phila. 505 (holding that where an indictment under an act regulating the drainage of houses was defective in failing to aver the locality of the house as to which defendant was charged with violating the regulations, the defect was amendable); Reg. *v.* Sturge, 3 E. & B. 734, 18 Jur. 1052, 23 L. J. M. C. 172, 2 Wkly. Rep. 477, 77 E. C. L. 734 (holding that where an indictment was for obstructing a footway leading from A to G, and the evidence showed that the footway was for half a mile from its commencement, as described in the indictment, a carriage-way, and the obstruction was in the part beyond, this was a misdescription which ought to be amended under 14 & 15 Vict. c. 100, § 1).

34. Thus where an information alleging the crime to have been committed in S township was by permission of the court amended so as to allege the commission in T township, in the same county, under Howell Annot. St. Mich. § 9537, it was held that, while the amendment was not necessary, there was no error in allowing it; the court taking judicial cognizance of the division into townships, and its jurisdiction being coextensive with the body of the county. People *v.* Waller, 70 Mich. 237, 38 N. W. 261.

35. Com. *v.* Holley, 3 Gray (Mass.) 458. See also State *v.* Nulty, 57 Vt. 543.

36. See Com. *v.* Harrington, 130 Mass. 35.

37. People *v.* McCullough, 81 Mich. 25, 45 N. W. 515; People *v.* Price, 74 Mich. 37, 41 N. W. 853; and other cases in the notes following.

38. Reg. *v.* Western, L. R. 1 C. C. 122, 11 Cox C. C. 93, 37 L. J. M. C. 81, 18 L. T. Rep. N. S. 299, 16 Wkly. Rep. 730; Reg. *v.* Tymms, 11 Cox C. C. 645; Reg. *v.* Neville, 6 Cox C. C. 69; Reg. *v.* Willcox, 37 Wkly. Rep. 686.

39. An indictment for false pretense in representing that there was in store "a large quantity of beans, to wit, 2680 bushels of beans," may be amended to conform to the evidence by striking out "a large quantity of beans, to wit." Reg. *v.* Patterson, 2 Can. Cr. Cas. 339.

40. State *v.* Sullivan, 35 La. Ann. 844 (correcting writing of instrument); State *v.* Snow, 30 La. Ann. 401 (as to date of bill forged); People *v.* Bennett, 122 Mich. 281, 81 N. W. 117 (showing that signature given in English was in German); People *v.* Brown, 110 Mich. 168, 67 N. W. 1112 (to correct name of payee of check); State *v.* Donovan, 75 Vt. 308, 55 Atl. 611 (to cure variances not prejudicial to defendant).

41. People *v.* Clegg, 57 Hun (N. Y.) 591, 10 N. Y. Suppl. 675, holding that on the trial of an indictment for libel, which omits, by mistake, three words of the published libel, which is set out in the indictment, the indictment may be amended by the insertion of the words to conform to the proof, under Code Cr. Proc. § 293, providing that the court may allow such amendment, if defendant cannot be prejudiced in his defense on the merits.

42. State *v.* Finn, 31 La. Ann. 408, substituting "gun" for "pistol" in an information.

43. Gamblin *v.* State, 45 Miss. 658, holding that the omission of the word "manner" after the words "undue, angry, and threatening," in an indictment for exhibiting a deadly weapon, is a formal defect, and therefore subject to amendment.

44. It has been said that under a statute authorizing an amendment to an indictment to cure formal defects, the court may amend by permitting the use of words which legally import an offense that has been charged originally with sufficient clearness to be understood by a jury. Com. *v.* Harris, 3 Leg. Gaz. (Pa.) 306, Leg. Gaz. Rep. 455.

45. State *v.* Jacobs, 50 La. Ann. 447, 23 So. 608 (holding that under Rev. St. § 1047, permitting an amendment under some circumstances when there is a variance between the indictment and the proof, an indictment for the larceny of one hale of cotton in the

of premises in an indictment or information for arson or burglary and the like;[46] to insert the word "unlawfully" in an information;[47] to correct an information charging an offense but which uses recitals proper to an indictment instead of those proper to an information;[48] to change the description of an act of parliament in an indictment;[49] to strike out mere surplusage;[50] to change the date of presentation of an information;[51] to correct or supply the verification of an information or complaint;[52] or to cure informality in the affidavit on which an information is based by filing a new one.[53] But as has been seen, amendments to supply or change an allegation which is necessary to show that any or what offense has been committed is not allowable as a mere formal amendment.[54]

E. Of Bill of Particulars. A bill of particulars in a criminal prosecution[55] may be amended,[56] if sufficient notice is given, but not otherwise.[57]

XI. ISSUES, PROOF, AND VARIANCE.

A. Matters to Be Proved — 1. In General. Material allegations of the indictment must be proved.[1] Matter which is not charged in the indictment

lint may be amended during the trial to conform to testimony that the cotton was in the seed); State *v.* Perkins, 49 La. Ann. 310, 21 So. 839 (larceny); State *v.* Carter, (La. 1890) 9 So. 128 (an indictment charging the larceny of "one lot of clothing, valued at one dollar and fifty cents," may be amended so as to read "one lot of clothing, consisting of one pair of woolen pantaloons and one plaited bosom shirt"); State *v.* Johnson, 29 La. Ann. 717; People *v.* Price, 74 Mich. 37, 41 N. W. 853 (inserting in an information for stealing "one yoke of cattle" a separate description of each steer, where the evidence only tends to connect defendant with the larceny of one of the steers, and the court instructs the jury that if they are not satisfied that there was a larceny of both oxen, but are satisfied that defendant took one, they may find him guilty of the larceny of the one); People *v.* Mott, 34 Mich. 80 (description of note in an information for procuring the signature thereto by false pretenses); Meehan *v.* State, 119 Wis. 621, 97 N. W. 173 (amendment of an information for assault with a dangerous weapon with intent to rob, by describing a watch of which the information alleged robbery as a gold watch, instead of a silver watch); Secor *v.* State, 118 Wis. 621, 95 N. W. 942 (description of money in an indictment for embezzlement); Baker *v.* State, 88 Wis. 140, 59 N. W. 570 (changing description of money in an information for larceny from thirty-nine thousand one hundred and sixty dollars, the property of A, to forty thousand six hundred and eighty dollars, the property of A and B); Reg. *v.* Gumble, L. R. 2 C. C. 1, 12 Cox C. C. 248, 42 L. J. M. C. 7, 27 L. T. Rep. N. S. 692, 21 Wkly. Rep. 299 (larceny). *Contra*, People *v.* Poucher, 30 Hun (N. Y.) 576, holding that Code, § 293, authorizing the amendment of indictments in cases of variance, does not authorize an amendment of an indictment charging the stealing of gold and silver coin to the value of eighty dollars, changing it so as to show that forty-five dollars in currency was stolen. See also People *v.* Campbell, 4 Park. Cr. (N. Y.) 386.

46. State *v.* Satterwhite, 52 La. Ann. 499, 26 So. 1006, change of description of premises from "dwelling" to "store" in an indictment for burglary or larceny.

47. State *v.* Engborg, 63 Kan. 853, 66 Pac. 1007.

48. State *v.* Curtis, 44 La. Ann. 320, 10 So. 784.

49. Reg. *v.* Westley, Bell C. C. 193, 8 Cox C. C. 244, 5 Jur. N. S. 1362, 29 L. J. M. C. 35, 8 Wkly. Rep. 63.

50. Hawthorn *v.* State, 56 Md. 530. Where an information under a statute making it larceny to alter the brand of an animal with intent to steal it, after stating facts constituting the offense, added in the same count a formal charge of larceny, manifestly referring to the same act, and defendants moved to quash on the ground that two felonies were charged in one count, and the court struck out the language peculiar to ordinary larceny and overruled the motion, it was held that defendants were not injured. State *v.* Schaben, 69 Kan. 421, 76 Pac. 823.

51. Wilkerson *v.* State, (Tex. Cr. App. 1898) 45 S. W. 805.

52. State *v.* Gould, 40 Kan. 258, 19 Pac. 739 (slight amendment to verification of information); State *v.* Scott, 1 Kan. App. 748, 42 Pac. 264 (inserting positive verification in addition to the verification of the county attorney); People *v.* Roat, 117 Mich. 578, 76 N. W. 91 (permitting the clerk to sign the jurat of an information where his failure to do so earlier was a clerical omission; State *v.* Rollins, 186 Mo. 501, 85 S. W. 516 (permitting the prosecuting attorney to properly verify an information); State *v.* Freeman, 59 Vt. 661, 10 Atl. 752 (supplying the certificate of oath to a complaint or information).

53. State *v.* McCray, 74 Mo. 303.

54. See *supra*, X, D, 1; and illustrations there given in the notes.

55. Bill of particulars see *supra*, V, U.

56. Jules *v.* State, 85 Md. 305, 36 Atl. 1027; Com. *v.* Crane, 1 Leg. Rec. (Pa.) 134.

57. Com. *v.* Crane, 1 Leg. Rec. (Pa.) 134.

1. State *v.* Porter, 38 Ark. 637.

need not be proved or considered.[2] The prosecution is not bound to prove negative averments,[3] and where an indictment contains allegations suited merely to negative a defense which is expected, such allegations need not be proved.[4] Where the specific acts constituting an offense are set forth in the statute punishing it, it is sufficient to prove such acts without proving additional facts.[5]

2. Place of Offense. An averment of venue is material and must be proved,[6] but where it is unnecessarily particular, it need not be proved precisely as laid.[7]

3. Time of Offense. In all cases the state is bound to establish some time at which the offense was committed;[8] with reference to which all the essentials of the offense must be established.[9] Such date must be shown to have been within the period of limitations,[10] and before the finding of the indictment,[11] but it need not be proved as laid.[12] Where the basis of an indictment is neglect, the continuance of such neglect need not be proved as laid in the indictment where the continuance is not essential to the charge.[13]

4. Description of Accused. Matter descriptive of the identity of the accused, although unnecessarily alleged, must be proved.[14]

5. Description of Third Persons. The name of the person injured must be proved,[15] but matters merely descriptive of persons other than the accused which can be rejected without affecting the indictment need not be.[16] By statute it is sometimes provided that the prosecution is not bound to prove a fact of incorporation mentioned in an indictment unless placed in issue by plea.[17]

6. Description of Property. As a general rule matter alleged in identification of property must be proved as alleged, although the description is unnecessarily specific.[18] So if the indictment state the name of the owner of property although

2. Cowen *v.* People, 14 Ill. 348.

3. Hinckley *v.* Penobscot, 42 Me. 89, defendant has the burden of showing that his case is within a statutory exception.

4. State *v.* Bangor, 30 Me. 341.

5. O'Leary *v.* People, 88 Ill. App. 270 [*affirmed* in 188 Ill. 226, 58 N. E. 939].

6. *California.*— People *v.* Bevans, 52 Cal. 470.

Illinois.— Rice *v.* People, 38 Ill. 435; Ferkel *v.* People, 16 Ill. App. 310.

Kentucky.— Bailey *v.* Com., 71 S. W. 632, 24 Ky. L. Rep. 1419.

Oklahoma.— Filson *v.* Territory, 11 Okla. 351, 67 Pac. 473.

Pennsylvania.— Philadelphia *v.* Mintzer, 2 Phila. 43.

Texas.— Vance *v.* State, 32 Tex. 396; Searcy *v.* State, 4 Tex. 450.

Virginia.— Morgan *v.* Com., 90 Va. 80, 21 S. E. 826.

West Virginia.— State *v.* Hobbs, 37 W. Va. 812, 17 S. E. 380.

See 27 Cent. Dig. tit. "Indictment and Information," § 528.

Sufficiency of proof see Criminal Law, 12 Cyc. 494.

7. U. S. *v.* Kershaw, 5 Utah 618, 19 Pac. 194.

8. State *v.* Greenspan, 70 Mo. App. 468.

9. People *v.* Shannon, 87 N. Y. App. Div. 32, 83 N. Y. Suppl. 1061, 17 N. Y. Cr. 532.

10. Givens *v.* State, 105 Ga. 843, 32 S. E. 341.

11. Minhinnett *v.* State, 106 Ga. 141, 32 S. E. 19; St. Joseph *v.* Dienger, 165 Mo. 95, 65 S. W. 223; Arcia *v.* State, 28 Tex. App. 198, 12 S. W. 599; Kincaid *v.* State, 8 Tex. App. 465.

12. See *infra*, XI, C, 4.

13. Louisville, etc., R. Co. *v.* Com., 37 S. W. 63, 18 Ky. L. Rep. 483.

14. John *v.* State, 24 Miss. 569, holding that where on an indictment of a slave, the name of the owner of the slave was set out in the indictment, it must be proved, although not in a precise manner.

Variance see *infra*, XI, C, 5.

15. Davis *v.* People, 19 Ill. 74, holding that a failure of proof of the christian name of a person killed is fatal. See also Redding *v.* State, (Tex. Cr. App. 1902) 66 S. W. 1105.

Variance see *infra*, XI, C, 7.

16. *Illinois.*— Durham *v.* People, 5 Ill. 172, 39 Am. Dec. 407, partnership name where it is alleged that certain persons are partners under a certain name.

Iowa.— State *v.* Ean, 89 Iowa 534, 58 N. W. 898, that woman in adultery was more than eighteen.

Massachusetts.— Com. *v.* Lewis 1 Metc. 151, averment that a woman was the wife of a certain man.

South Carolina.— State *v.* Perrin, 1 Treadw. 446, description of a person libeled as an only daughter of a certain person.

Vermont.— State *v.* Burt, 25 Vt. 373, description of a person assaulted as a constable and collector and as impeded in his office.

See 27 Cent. Dig. tit. "Indictment and Information," § 532.

17. Willis *v.* State, 134 Ala. 429, 33 So. 226, holding that such a statute was applicable only to procedure and hence applied to trials for crimes committed before its passage.

18. Morgan *v.* State, 61 Ind. 447 (make of revolver); Gray *v.* State, 11 Tex. App. 411.

Variance see *infra*, XI, C, 8.

unnecessarily it must be proved as laid.[19] Allegations of weight, magnitude, number, and value are generally, but not always, exceptions to this rule.[20] So sums of money need not be proved as laid unless they form part of the description of a written instrument, or the exact sum is of the essence of the offense.[21]

7. Matters Alleged to Be Unknown to Grand Jury. Where there is an averment that a person or matter is unknown to the grand jury, if nothing appears to the contrary, the truth of such allegation is presumed and need not be proved.[22] So it is held that an allegation that a more particular description of property stolen is unknown is not traversable.[23] In some states, however, such an allegation is regarded as traversed by a plea of not guilty and must be sustained.[24] Where matters unknown are attempted to be described for the purpose of identification, the descriptive matter should be proved.[25]

Brand on cattle.— Coleman *v.* State, 21 Tex. App. 520, 2 S. W. 859; Allen *v.* State, 8 Tex. App. 360; Sweat *v.* State, 4 Tex. App. 617.

Color and sex of animal.— State *v.* Jackson, 30 Me. 29; Turner *v.* State, 3 Heisk. (Tenn.) 452.

Age of animal.— Coleman *v.* State, 21 Tex. App. 520, 2 S. W. 859.

Money.— Lewis *v.* State, 113 Ind. 59, 14 N. E. 892 (holding that, although a statute provided that a general description as "money" was sufficient, a specific description must be proved); Hamilton *v.* State, 60 Ind. 193, 28 Am. Rep. 653; State *v.* Smith, 31 Mo. 120; Coffelt *v.* State, 27 Tex. App. 608, 11 S. W. 639, 11 Am. St. Rep. 205; Childers *v.* State, 16 Tex. App. 524. *Contra*, Tracey *v.* State, 46 Nebr. 361, 64 N. W. 1069, under a statute providing that it shall not be necessary to describe the character of money. And see Pomeroy *v.* Com., 2 Va. Cas. 342, holding that where an indictment for stealing bank-notes recites that the notes purport on their face to be bank-notes of, and issued by, banks chartered, etc., the latter part of the allegation may be rejected as surplus, rendering it unnecessary to give proof of the charters of the banks.

19. State *v.* Weeks, 30 Me. 182 (malicious destruction); Com. *v.* Wade, 17 Pick. (Mass.) 395; Collier *v.* State, 4 Tex. App. 12; Rose *v.* State, 1 Tex. App. 400 (although a statute provides that the indictment need not allege ownership).

Variance see *infra*, XI, C, 9.

The existence of a corporation in which property is laid must be established. Cohen *v.* People, 5 Park. Cr. (N. Y.) 330.

20. Morgan *v.* State, 61 Ind. 447; Com. *v.* Garland, 3 Metc. (Ky.) 478; Com. *v.* Donovan, 170 Mass. 228, 49 N. E. 104, holding that where a value was alleged to notes given as a bribe, it was necessary to prove only that the notes were of some value.

21. Parsons *v.* State, 2 Ind. 499.

22. Com. *v.* Thornton, 14 Gray (Mass.) 41; Reeves *v.* Territory, 10 Okla. 194, 61 Pac. 828; Harris *v.* State, 37 Tex. Cr. 441, 36 S. W. 88; Coffin *v.* U. S., 156 U. S. 432, 15 S. Ct. 394, 39 L. ed. 481.

Variance between allegation and proof see *infra*, XI, C, 11.

The christian name of defendant need not be proved to have been unknown. Kelley *v.* State, 25 Ark. 392; Wilcox *v.* State, 35 Tex. Cr. 631, 34 S. W. 958, holding that where the full name of defendant was by some means made known to the court and was admitted by defendant to be his name, it need not be shown that the name was unknown to the grand jury at the time the indictment was returned. *Contra*, Stone *v.* State, 30 Ind. 115.

Under a statute providing that variance may be disregarded unless found by the trial court to be material to the merits of the case, or prejudicial to defendant, a failure to establish the fact that names were unknown to the grand jury is not important. State *v.* St. Clair, 6 Ida. 109, 53 Pac. 1; Guthrie *v.* State, 16 Nebr. 667, 21 N. W. 455.

Presumption arising from averment.— The jury may consider the allegation in the indictment together with any other evidence tending to determine whether the grand jury did or did not know the cause of death as alleged in an indictment for murder. Com. *v.* Coy, 157 Mass. 200, 32 N. E. 4.

Where evidence is excluded on defendant's objection, he cannot object on appeal that it was not established that the grand jury could not have ascertained the name of the person deceased which was alleged to be unknown. Trumble *v.* Territory, 3 Wyo. 280, 21 Pac. 1081, 6 L. R. A. 384.

23. State *v.* Taunt, 16 Minn. 109.

24. Reed *v.* State, 16 Ark. 499; Cameron *v.* State, 13 Ark. 712; State *v.* Stowe, 132 Mo. 199, 33 S. W. 799.

In Texas the rule is that an allegation that ownership is unknown is material and the proof must show the fact, and if the evidence suggests that by the use of reasonable diligence the ownership might have been ascertained, the allegation will not be supported. Grant *v.* State, (Tex. Cr. App. 1896) 36 S. W. 264; Logan *v.* State, 36 Tex. Cr. 1, 34 S. W. 925; Swink *v.* State, 32 Tex. Cr. 530, 24 S. W. 893; Sharp *v.* State, 29 Tex. App. 211, 15 S. W. 176; Mixon *v.* State, 28 Tex. App. 347, 13 S. W. 143; Williamson *v.* State, 13 Tex. App. 514. In case the evidence shows at the trial that the property had no known owner, it is unnecessary to establish diligence. McCarty *v.* State, 36 Tex. Cr. 135, 35 S. W. 994. A similar rule applies to the name of a person murdered. Rye *v.* State, 8 Tex. App. 153.

25. Reed *v.* State, 16 Ark. 499.

8. Surplusage and Unnecessary Averments. The general rule is that all descriptive averments in the indictment, although unnecessarily particular, must be proved as laid,[26] although it is stated that in the case of such averments the same strictness of proof is not required as in the proof of the material facts,[27] except where they concern a record, a written agreement, or perhaps an express contract.[28] This general rule is limited by another rule which provides that if matter may be omitted entirely without affecting the charge against the prisoner, it may be considered as surplusage and disregarded,[29] especially where the particular allegation is pleaded under a videlicet.[30] Under a statute providing that an indictment shall not be held insufficient by reason of any surplusage, it has been held that surplusage in the description of property need not be proved.[31]

26. *Georgia.*— Shrouder *v.* State, 121 Ga. 615, 49 S. E. 702.

Indiana.— Wilkinson *v.* State, 10 Ind. 372.

Iowa.— State *v.* Newland, 7 Iowa 242, 71 Am. Dec. 444.

Kentucky.— Com. *v.* Magowan, 1 Metc. 368, 71 Am. Dec. 480; Clark *v.* Com., 16 B. Mon. 206; Louisville, etc., R. Co. *v.* Com., 13 Ky. L. Rep. 925; Com. *v.* Holland, 7 Ky. L. Rep. 299.

Massachusetts.— Com. *v.* King, 9 Cush. 284, person by whom goods were stolen in indictment for receiving.

Mississippi.— Dick *v.* State, 30 Miss. 631.

New Hampshire.— State *v.* Sherburne, 59 N. H. 99 (holding that on an indictment for resisting a sheriff it must be proved that he was "legally appointed and duly qualified"); State *v.* Bailey, 31 N. H. 521; State *v.* Copp, 15 N. H. 212.

North Carolina.— State *v.* Ammons, 7 N. C. 123, record of cause in which perjury was committed.

Ohio.— Pringle *v.* State, 1 Ohio Dec. (Reprint) 283, 7 West. L. J. 67.

Texas.— Evans *v.* State, Cr. App. (1897) 40 S. W. 988; Butts *v.* State, (Cr. App. 1905) 84 S. W. 586 (holding in a prosecution for impersonating an officer, an averment that defendant pretended to be J R J must be proved); Lancaster *v.* State, 9 Tex. App. 393; Massie *v.* State, 5 Tex. App. 81 (unnecessarily minute description of oath in perjury); McGee *v.* State, 4 Tex. App. 625; Meuly *v.* State, 3 Tex. App. 382; Courtney *v.* State, 3 Tex. App. 257.

United States.— U. S. *v.* Brown, 24 Fed. Cas. No. 14,666, 3 McLean 233; U. S. *v.* Keen, 26 Fed. Cas. No. 15,510, 1 McLean 429; U. S. *v.* Porter, 27 Fed. Cas. No. 16,074, Brunn. Col. Cas. 54, 3 Day (Conn.) 283.

See 27 Cent. Dig. tit. "Indictment and Information," § 531.

Definition.— A descriptive averment is one which describes, defines, qualifies, or limits a matter material to be charged. State *v.* Langley, 34 N. H. 529.

The state in which a corporation is chartered is not descriptive matter in an indictment for larceny from the corporation. State *v.* Winder, 22 R. I. 177, 46 Atl. 1046.

An allegation of incorporation of the academy must be proved, although not essential to an indictment for the sale of liquor within a certain distance from any academy, etc. Blackwell *v.* State, 36 Ark. 178.

27. Murphy *v.* State, 28 Miss. 637.

28. John *v.* State, 24 Miss. 569.

29. *Georgia.*— Hall *v.* State, 120 Ga. 142, 47 S. E. 519.

Illinois.— Sutton *v.* People, 145 Ill. 279, 34 N. E. 420 (holding that an averment that a person accused of rape was more than fourteen need not be proved); Durham *v.* People, 5 Ill. 172, 39 Am. Dec. 407.

New Hampshire.— State *v.* Bailey, 31 N. H. 521; State *v.* Lord, 16 N. H. 357 (holding that the gist of the offense of overflowing a highway by means of a dam not being in the erection of the dam, the place alleged as its location need not be proved as laid); State *v.* Copp, 15 N. H. 212.

Tennessee.— State *v.* Brown, 8 Humphr. 89.

Texas.— Sublett *v.* State, 9 Tex. 53; Wilson *v.* State, 5 Tex. 21; Prior *v.* State, 4 Tex. 383; Finney *v.* State, 29 Tex. App. 184, 15 S. W. 175 (holding that an allegation that defendant acted "together with" another in the commission of an offense did not prevent proof that he acted alone); Smith *v.* State, 7 Tex. App. 382.

United States.— U. S. *v.* Vickery, 28 Fed. Cas. No. 16,619, 1 Harr. & J. (Md.) 427.

See 27 Cent. Dig. tit. "Indictment and Information," § 531.

Intent.— Where an act is made an offense by statute, without reference to the intent, a charge in an indictment that it was wilfully done is surplusage, and the intent need not be proved. State *v.* Southern R. Co., 122 N. C. 1052, 30 S. E. 133, 41 L. R. A. 246. *Compare* Wilkinson *v.* State, 10 Ind. 372, holding that if intent to defraud a particular person is averred in an indictment for passing a counterfeit, such intent must be proved.

Conspiracy.— Where an indictment charged defendant with conspiring with two others to commit a crime, it was held sufficient to prove that defendant conspired with one of the two others mentioned. Woodworth *v.* State, 20 Tex. App. 375.

Ownership of the vessel on which an offense is alleged to have been committed while in a forign port is not material. U. S. *v.* Howard, 26 Fed. Cas. No. 15,403, 3 Sumn. 12.

30. Sinclair *v.* District of Columbia, 20 App. Cas. (D. C.) 344.

31. State *v.* Boomer, 103 Iowa 106, 72 N. W. 424.

9. Sufficiency of Proof of Part of Charge. It is in general sufficient to prove so much of the indictment as shows that defendant has committed a substantive crime therein specified.[32] So, where the offense charged involves the wrongful taking of property, it is not necessary to prove the taking of all the property alleged in the indictment,[33] and where a crime is charged to have been committed by various means proof of any one of such means is sufficient.[34] If the indictment is drawn under a statute which makes several acts mentioned in the alternative, or a single act done with either of several motives or intents punishable, it is sufficient if the proof establishes one of such acts or intents, although several are charged conjunctively in the indictment.[35] Where the indictment contains more than one count, it is sufficient if the evidence establishes either count.[36] When two distinct offenses are properly joined in the same indictment,[37] it is sufficient to support a conviction that either be established.[38]

B. Evidence Admissible Under Pleadings[39]**— 1. In General.** Everything which is necessary to be proved must as a general rule be averred;[40] and evidence as to matters which are not sufficiently pleaded cannot be submitted to the jury.[41] So where it is necessary to prove agency, there must be an averment of the relation.[42] It has been held that a joint charge of felony necessarily involves a conspiracy rendering proof thereof admissible without a formal allega-

32. Durham *v.* State, 1 Blackf. (Ind.) 33; State *v.* Burgess, 40 Me. 592; Harris *v.* People, 64 N. Y. 148 (holding that where perjury in regard to several matters was alleged, it was sufficient to prove a portion of them); Rex *v.* Middlehurst, 1 Burr. 399; Rex *v.* Williams, 2 Campb. 646, 11 Rev. Rep. 781; Rex *v.* Hunt, 2 Campb. 583.

On a charge of assaulting two persons, it is sufficient to prove an assault upon one. Com. *v.* O'Brien, 107 Mass. 208. But *compare* Kannon *v.* State, 10 Lea (Tenn.) 386, holding that a verdict finding defendant guilty of murder in the first degree of two persons cannot be sustained as to either of such persons when not sustained as to one of them.

33. *Georgia.*— Lowe *v.* State, 57 Ga. 171.

Massachusetts.— Com. *v.* Sessions, 169 Mass. 329, 47 N. E. 1034 (false pretenses); Com. *v.* O'Connell, 12 Allen 451 (larceny of bank-notes amounting in the aggregate to a certain sum).

Mississippi.— Swinney *v.* State, 8 Sm. & M. 576.

North Carolina.— State *v.* Martin, 82 N. C. 672.

South Carolina.— State *v.* Johnson, 3 Hill 1.

Texas.— Maloney *v.* State, (Cr. App. 1898) 45 S. W. 718; Alderson *v.* State, 2 Tex. App. 10.

See 27 Cent. Dig. tit. "Indictment and Information," § 534.

34. Com. *v.* Brown, 14 Gray (Mass.) 419.

35. *Alabama.*— McElhaney *v.* State, 24 Ala. 71.

Georgia.— Brazil *v.* State, 117 Ga. 32, 43 S. E. 460.

Iowa.— State *v.* Harris, 11 Iowa 414; State *v.* Cooster, 10 Iowa 453; State *v.* Myers, 10 Iowa 448.

Kansas.— State *v.* Gluck, 49 Kan. 533, 31 Pac. 690; State *v.* Schweiter, 27 Kan. 499.

Maine.— State *v.* Burgess, 40 Me. 592.

Massachusetts.— Com. *v.* Kimball, 7 Gray 328.

Missouri.— State *v.* Murphy, 47 Mo. 274; State *v.* McCollum, 44 Mo. 343.

New York.— Bork *v.* People, 91 N. Y. 5; People *v.* Davis, 56 N. Y. 95.

North Carolina.— State *v.* Locklear, 44 N. C. 205.

Virginia.— Angel *v.* Com., 2 Va. Cas. 231.

United States.— U. S. *v.* Ballard, 118 Fed. 757; U. S. *v.* Hall, 26 Fed. Cas. No. 15,282.

See 27 Cent. Dig. tit. "Indictment and Information," § 534.

Contra.— State *v.* Vermont Cent. R. Co., 28 Vt. 583.

36. Spies *v.* People, 122 Ill. 1, 12 N. E. 865, 17 N. E. 898, 3 Am. St. Rep. 320, as where one count charges a person as accessary to a known principal and another count as accessary to an unknown principal.

37. See *supra*, VII, A, 5; VII, B, 6.

38. Cornell *v.* State, 7 Baxt. (Tenn.) 520. And see Com. *v.* Lehr, 2 Pa. Co. Ct. 341, 18 Phila. (Pa.) 485.

39. **Relevancy of evidence** in general see Criminal Law, 12 Cyc. 390.

40. Beasley *v.* State, 39 Tex. Cr. 688, 47 S. W. 991.

41. People *v.* Garnett, 129 Cal. 364, 61 Pac. 1114, holding that where it was not alleged that a person concealed was charged with felony, evidence that defendant harbored and protected such person could not be submitted to the jury.

Although a count would be insufficient upon arrest of judgment evidence may nevertheless be given to support it. U. S. *v.* Crandell, 25 Fed. Cas. No. 14,885, 4 Cranch C. C. 683.

42. Beasley *v.* State, 39 Tex. Cr. 688, 47 S. W. 991, holding that an allegation that a forged instrument purported to be "the act of one J. C. Pray. Agt." was insufficient to admit proof that P was agent. But see Com. *v.* Bagley, 7 Pick. (Mass.) 279, holding

tion.[48] The flight of accused may be shown in order to establish that he is not entitled to the benefit of the statute of limitations, although such flight is not alleged.[44] Evidence is admissible to establish any part of the charge.[45] Where the state has furnished a bill of particulars, it is limited to the facts stated therein.[46]

2. PROOF OF OTHER OFFENSES. Subject to certain general exceptions, evidence of other offenses than that charged in the indictment is inadmissible.[47] Under this rule where place is a general element in an offense, the proof must be confined to the place alleged.[48] Evidence as to the time of the offense may be admissible, although not in conformity with the date alleged;[49] but the state will not be permitted to prove two offenses, one on the date charged in the indictment and one on another date;[50] nor can the offense be shown to have been committed after the finding of the indictment.[51]

3. INDICTMENTS IN SEVERAL COUNTS. Where several offenses are properly joined in the same indictment in separate counts, evidence of all of the offenses so charged may be introduced.[52] Evidence properly admissible under one count of an indictment may be introduced, although inadmissible under the other counts.[53] But where the state has elected to proceed on a portion of the counts only, evidence which is admissible only under counts which have been abandoned cannot be received.[54]

C. Variance Between Allegations and Proof — 1. IN GENERAL. Variance is defined to be a disagreement between the averments of the indictment and the proof in some matter which is legally essential to the charge.[55] As a general rule a variance in a material matter is fatal and entitles defendant to an acquittal,[56] unless the objection may be and is cured by statute.[57] The fact, however, that more is proved by the state than is necessary will not constitute a variance where

that on an indictment for extortion, it was rightly charged that the extortion was from a particular person, although money was paid by another as his agent.

Sales to agent.— Where a sale is made to persons with notice that they are buying for others, the sale should be alleged to have been made to the employers; but where a sale is made to an agent without notice of the agency, it may be alleged to have been made to the agent. Com. *v.* Remby, 2 Gray (Mass.) 508; Com. *v.* Kimball, 7 Metc. (Mass.) 308.

43. State *v.* Ford, 37 La. Ann. 423.

Proof of conspiracy see CRIMINAL LAW, 12 Cyc. 392.

44. U. S. *v.* White, 28 Fed. Cas. No. 16,676, 5 Cranch C. C. 73; U. S. *v.* White, 28 Fed. Cas. No. 16,677, 5 Cranch C. C. 116.

Evidence of flight in general see CRIMINAL LAW, 12 Cyc. 395.

45. State *v.* Morse, 66 Mo. App. 303, holding that where defendant was charged with having destroyed a fence surrounding land located in two sections, it might be proved that the fence was destroyed in either or both of such sections.

46. See *supra*, V, U.

47. See CRIMINAL LAW, 12 Cyc. 412. See also Hoyt *v.* State, 50 Ga. 313, holding that under a general charge of fraudulent conversion by a bailee, it is not competent for the prosecution to prove that the accused had reported to the bailor special payments as having been made to particular persons in the performance of his duty as bailee, and that such payments were not in fact made to the amounts so reported or that there were no such persons as those to whom the payments were reported to have been made.

48. State *v.* Lashus, 67 Me. 564, holding that a nuisance could not be shown to have been maintained at a place other than that charged.

Variance see *infra*, XI, C, 3.

49. See *infra*, XI, C, 4.

50. Fisher *v.* State, 33 Tex. 792 (holding that where a theft of certain articles on a particular day was alleged, proof was not admissible that some of the articles were stolen on the day charged and the remainder on a previous day); Rex *v.* Hurst, 5 Can. Cr. Cas. 338.

Election between offenses disclosed by the evidence see *supra*, VIII, C.

51. Smithers *v.* Com., 12 Ky. L. Rep. 636.

Where an indictment is dismissed and the case again referred to the grand jury, the new indictment will be regarded as of the date of the first, for the purpose of determining the admissibility of evidence. Smithers *v.* Com., 12 Ky. L. Rep. 636.

52. Ketchingman *v.* State, 6 Wis. 426.

53. Vincent *v.* State, (Tex. Cr. App. 1900) 55 S. W. 819.

54. Quinn *v.* Com., 7 Pa. Cas. 417, 11 Atl. 531.

55. Smith *v.* State, 7 Tex. App. 382.

56. State *v.* Crogan, 8 Iowa 523; State *v.* Ray, 92 N. C. 810; Cronin *v.* State, 30 Tex. App. 278, 17 S. W. 410; Rhodes *v.* Com., 78 Va. 692; and other cases more specifically cited under the sections following.

57. See *infra*, XI, C, 2.

the proof relates merely to matters of description.[58] And where the evidence corresponds with one of several counts there is no variance, although it does not correspond with other counts.[59]

2. STATUTORY PROVISIONS. By statute it is now frequently provided that variance with regard to matters of description shall not be ground for an acquittal unless material to the merits of the case or prejudicial to defendant.[60]

3. PLACE OF OFFENSE. Where place is laid in an indictment not as descriptive of the offense but for the purpose of establishing jurisdiction, variance is not material if the place established is within the jurisdiction.[61] When place is alleged as matter of local description, however, it must be proved as laid;[62] as where the offense may be committed only within a particular territorial division less than a county,[63] or where the judgment must operate upon a particular thing,[64] as in the case of indictments for the abatement of a nuisance,[65] or for forcible entry and detainer.[66] Where the place is known both by the name alleged and by another name there is no variance.[67]

4. TIME OF OFFENSE. Save in those cases in which time is of the essence of the offense,[68] the prosecution is not confined in its evidence to the precise date laid in the indictment, but may prove the offense to have been committed upon any day prior to the finding of the indictment and within the period of limitations.[69]

58. Dunham *v.* State, 9 Tex. App. 330.

59. Bonner *v.* State, 97 Ala. 47, 12 So. 408.

60. See Oats *v.* State, 153 Ind. 436, 75 N. E. 226; Goldsberry *v.* State, 66 Nebr. 312, 92 N. W. 906 (holding that it was not material where a horse was described as a bay with two white hind feet that the proof showed that he was a brown with one hind foot white); Mulrooney *v.* State, 26 Ohio St. 326 (holding it not ground for acquittal that property stolen is alleged to have been that of two persons and proved to have belonged to one).

61. *Indiana.*— Carlisle *v.* State, 32 Ind. 55.

Maine.— State *v.* Godfrey, 12 Me. 361.

Massachusetts.— Com. *v.* Creed, 8 Gray 387; Com. *v.* Tolliver, 8 Gray 386, 69 Am. Dec. 252.

Pennsylvania.— Heikes *v.* Com., 26 Pa. St. 513.

South Carolina.— State *v.* Colclough, 31 S. C. 156, 9 S. E. 811.

United States.— U. S. *v.* Stevens, 27 Fed. Cas. No. 16,394, 4 Wash. 547, where an offense was averred to have been committed on the high seas and proved to have been committed in port.

See 27 Cent. Dig. tit. "Indictment and Information," § 544.

Necessity and sufficiency of proof of venue see CRIMINAL LAW, 12 Cyc. 494.

62. State *v.* Crogan, 8 Iowa 523; Com. *v.* Riggs, 14 Gray (Mass.) 376, 77 Am. Dec. 333 (holding, however, that there was no variance between an allegation of larceny from a shop and proof that it was from a store); People *v.* Slater, 5 Hill (N. Y.) 401; Carny's Case, 3 City Hall Rec. (N. Y.) 44.

63. See *supra*, V, F, 1, b, (VI).

64. See *supra*, V, F, 1, b, (VII).

65. State *v.* Verden, 24 Iowa 126; State *v.* Nugent, 51 Kan. 297, 32 Pac. 1123; State *v.* Bain, 43 Kan. 638, 23 Pac. 1007, all of which are liquor nuisance cases. *Contra*, Johnson *v.* State, 13 Ind. App. 299, 41 N. E. 550, holding that a variance in the name of the particular addition to a town in which a disorderly house was located was not material. See, generally, NUISANCE.

66. See FORCIBLE ENTRY AND DETAINER, 19 Cyc. 1119.

67. Com. *v.* Intoxicating Liquors, 113 Mass. 208 (variance between the official name of a street and that by which it was commonly known and charged where it was shown that the street was as well known by one name as the other); State *v.* Patterson, 98 N. C. 666, 4 S. E. 540 (where a church was described in an indictment and in a statute as "Rocky Knoll" and it was proved that the church was generally known as "Rocky Ridge," and there was but one church known by either name); Bossert *v.* State, Wright (Ohio) 113 (where a stream was described as "the middle fork of the Beaver" and it was proved that it was also called "the middle fork of the Little Beaver").

68. See *supra*, V, F, 2, e, (I).

69. *Arkansas.*— Cohen *v.* State, 32 Ark. 226; Scoggins *v.* State, 32 Ark. 205; Medlock *v.* State, 18 Ark. 363.

Connecticut.— State *v.* Munson, 40 Conn. 475.

Delaware.— State *v.* Freedman, 3 Pennew. 403, 53 Atl. 356.

Florida.— Chandler *v.* State, 25 Fla. 728, 6 So. 768.

Georgia.— Reynolds *v.* State, 114 Ga. 265, 40 S. E. 234; Bryant *v.* State, 97 Ga. 103, 25 S. E. 450; Clarke *v.* State, 90 Ga. 448, 16 S. E. 96; Fisher *v.* State, 73 Ga. 595; McBryde *v.* State, 34 Ga. 202; Dacy *v.* State, 17 Ga. 439; Wingard *v.* State, 13 Ga. 396; Cook *v.* State, 11 Ga. 53, 56 Am. Dec. 410.

Illinois.— Tomlinson *v.* People, 102 Ill. App. 542.

Indiana.— Hubbard *v.* State, 7 Ind. 160.

In those cases, however, in which time is essential, it must be proved as laid;[70] as where, defendant having been tried for another and similar offense within the period of limitations, proof of the exact date is necessary to show that he is not being again tried for the same offense;[71] or where the date is necessary to enable the court to impose the proper sentence,[72] as in the case of recent alterations of the statutes punishing the offense.[73] Where the time alleged is to be proved by record, any variance is fatal.[74] At common law it was held that, where an offense consisted of a series of acts, a day certain must be alleged, and time being material, no evidence of the commission of the acts on other days was admissible.[75] When such an offense was laid under a *continuando*, the evidence was confined to the period alleged,[76] although the indictment might be supported by proof of the offense during any part thereof.[77] According to later cases,

Iowa.— State *v.* Bell, 49 Iowa 440.

Kansas.— State *v.* Gill, 63 Kan. 382, 65 Pac. 682.

Kentucky.— Smith *v.* Com., 109 Ky. 685, 60 S. W. 531, 22 Ky. L. Rep. 1349; Shipp *v.* Com., 101 Ky. 518, 41 S. W. 856, 19 Ky. L. Rep. 634; Com. *v.* Alfred, 4 Dana 496.

Louisiana.— State *v.* Polite, 33 La. Ann. 1016; State *v.* Walters, 16 La. Ann. 400; State *v.* Agudo, 5 La. Ann. 185.

Maine.— State *v.* Baker, 34 Me. 52.

Massachusetts.— Com. *v.* Brown, 167 Mass. 144, 45 N. E. 1; Com. *v.* Irwin, 107 Mass. 401; Com. *v.* Dacey, 107 Mass. 206; Com. *v.* Varney, 10 Cush. 402; Com. *v.* Bray nard, Thach. Cr. Cas. 146.

Michigan.— Turner *v.* People, 33 Mich. 363.

Minnesota.— State *v.* New, 22 Minn. 76.

Mississippi.— De Marco *v.* State, 59 Miss. 355; McCarty *v.* State, 37 Miss. 411; Miller *v.* State, 33 Miss. 356, 69 Am. Dec. 351; Oliver *v.* State, 5 How. 14.

Missouri.— State *v.* Hughes, 82 Mo. 86; State *v.* Magrath, 19 Mo. 678.

Nebraska.— Hans *v.* State, 50 Nebr. 150, 69 N. W. 838.

New Hampshire.— State *v.* Havey, 58 N. H. 377.

New York.— People *v.* Emerson, 53 Hun 437, 6 N. Y. Suppl. 274, 7 N. Y. Cr. 97.

North Carolina.— State *v.* Newsom, 47 N. C. 173.

Oregon.— State *v.* Eggleston, 45 Oreg. 346, 77 Pac. 738.

Pennsylvania.— Com. *v.* Powell, 23 Pa. Super. Ct. 370; Com. *v.* Miller, 6 Pa. Super. Ct. 35.

South Carolina.— State *v.* Anderson, 59 S. C. 229, 37 S. E. 820; State *v.* Howard, 32 S. C. 91, 10 S. E. 831; State *v.* Branham, 13 S. C. 389; State *v.* Porter, 10 Rich. 145.

Texas.— Haynes *v.* State, (Cr. App. 1900) 56 S. W. 923; Herchenbach *v.* State, 34 Tex. Cr. 122, 29 S. W. 470; Crass *v.* State, 30 Tex. App. 480, 17 S. W. 1096; Lucas *v.* State, 27 Tex. App. 322, 11 S. W. 443.

United States.— Hume *v.* U. S., 118 Fed. 689, 55 C. C. A. 407; Dixon *v.* Washington, 7 Fed. Cas. No. 3,935, 4 Cranch C. C. 114; Johnson *v.* U. S., 13 Fed. Cas. No. 7,418, 3 McLean 89; U. S. *v.* Blaisdell. 24 Fed. Cas. No. 14,608, 3 Ben. 132.

See 27 Cent. Dig. tit. "Indictment and Information," § 548.

For example a variance of two years (Barfield *v.* State, 41 Tex. Cr. 19, 51 S. W. 908) or of three years (State *v.* Hardaway, 50 La. Ann. 1345, 24 So. 320) or of seven years (State *v.* Reynolds, 48 S. C. 384, 26 S. E. 679) has been held immaterial, as has proof that an offense was committed on the fifth Sunday in September when there were but four Sundays in the month, the evidence being reconciled to an averment that the date was Sunday, September 5 (Alexander *v.* State, 40 Fla. 213, 23 So. 536).

Overt act.— On an indictment for conspiracy the overt act need not be proved as laid. U. S. *v.* Graff, 26 Fed. Cas. No. 15,244, 14 Blatchf. 381.

A date alleged under a videlicet need not be proved as laid. McDade *v.* State, 20 Ala. 81. See *supra*, V, C, 6.

Identity of the offense with that intended by the prosecutor in making his affidavit to the information will be presumed. State *v.* Gill, 63 Kan. 382, 65 Pac. 682.

Pendency of other similar indictments does not alter the rule stated in the text. Hancock *v.* State, 114 Ga. 439, 40 S. E. 317.

70. Greene *v.* State, 79 Ind. 537; Lehritter *v.* State, 42 Ind. 383, holding that on the prosecution for the sale of liquor on Sunday, it is not sufficient to establish the day of the month and not the year.

71. State *v.* Wilson, 39 Mo. App. 184.

72. Whatley *v.* State, 46 Fla. 145, 35 So. 80.

73. Whatley *v.* State, 46 Fla. 145, 35 So. 80; Com. *v.* Maloney, 112 Mass. 283.

74. Rhodes *v.* Com., 78 Va. 692.

75. State *v.* Small, 80 Me. 452, 14 Atl. 942; Com. *v.* Traverse, 11 Allen (Mass.) 260; Com. *v.* Sullivan, 5 Allen (Mass.) 511; Com. *v.* Gardner, 7 Gray (Mass.) 494; Com. *v.* Elwell, 1 Gray (Mass.) 463.

76. State *v.* Small, 80 Me. 452, 14 Atl. 942; State *v.* Cofren, 48 Me. 364; Com. *v.* Dunster, 145 Mass. 101, 13 N. E. 350; Com. *v.* Chisholm, 103 Mass. 213; Com. *v.* Briggs, 11 Metc. (Mass.) 573; Fleming *v.* State, 28 Tex. App. 234, 12 S. W. 605.

77. McCullough *v.* State, 63 Ala. 75 (indictment of a road overseer for neglect of duty); State *v.* Small, 80 Me. 452, 14 Atl. 942; Com. *v.* Connors, 116 Mass. 35; Com. *v.* Walton, 11 Allen (Mass.) 238; Com. *v.*

however, the state is not confined in its proof by the *continuando* but may prove any time within the period of limitations and before finding of the indictment.[78]

5. The Person Accused — a. In General. A misnomer of defendant in an indictment must be taken advantage of by plea in abatement and cannot be made a ground of objection after plea.[79] Where a variance develops from the evidence, it may be shown that defendant was commonly called and as well known by the name in the indictment or information as by the true name;[80] but a verdict cannot be entered against a defendant other than the one described in the indictment or information unless the record discloses that by amendment after plea of misnomer or otherwise, the name has been changed to conform to that in the verdict.[81] Although matters descriptive of the person of the accused have been alleged unnecessarily, they must be proved as laid.[82] Documentary evidence referring to defendant by his initials is admissible to support an averment charging him by his name in full.[83] Where a person is indicted under an alias it is not necessary to prove that he was known and called by both of the names;[84] and such an indictment is supported by proof that defendant acted in the matter charged under a name different from his own.[85]

b. Joint Defendants. Where an indictment charges two or more defendants with an offense jointly, they cannot be convicted upon proof of the commission of separate offenses by each, although the offenses are of the same nature;[86] but in case two are indicted for a crime which might have been committed by either alone, the jury may find one guilty and acquit the other.[87] So upon a joint indictment for receiving stolen goods, proof may be offered of the receipt of goods by the different defendants at different times and one defendant may be convicted alone.[88] In case of a joint charge of an offense aggravated by former convictions, it is not necessary to prove that the former convictions were joint,

Wood, 4 Gray (Mass.) 11; State *v.* Nagle, 14 R. I. 331.

78. Howard *v.* People, 27 Colo. 396, 61 Pac. 595; Carter *v.* U. S., 1 Indian Terr. 342, 37 S. W. 204, holding that in an indictment for a nuisance the *continuando* may be treated as surplusage under a statute providing that the time stated in an indictment shall not be regarded as material except when time is a material ingredient in the offense.

79. Burns *v.* People, 28 Colo. 84, 62 Pac. 840. And see Criminal Law, 12 Cyc. 359.

80. Com. *v.* Seeley, 167 Mass. 163, 45 N. E. 91.

81. Burns *v.* People, 28 Colo. 84, 62 Pac. 840; Clements *v.* State, 21 Tex. App. 258, 17 S. W. 156.

Conformity of verdict to indictment see Criminal Law, 12 Cyc. 691.

82. Com. *v.* Holland, 7 Ky. L. Rep. 299; Dick *v.* State, 30 Miss. 631, holding that there was a variance between an averment that defendant was a negro and proof that he was a mulatto. *Compare* State *v.* Hopkins, 56 Vt. 250, holding an averment that defendant was the agent of an insurance company was supported by proof that defendant was a member of a partnership which was the agent.

83. Simmons *v.* State, (Tex. Cr. App. 1897) 40 S. W. 968, holding that on an indictment of a convict for escape while hired out, the record of the conviction and bond might be introduced, although describing defendant by his initials, there being parol proof of identity.

84. Evans *v.* State, 62 Ala. 6.

85. U. S. *v.* Wright, 16 Fed. 112.

86. *Alabama.*— McGehee *v.* State, 58 Ala. 360; Johnson *v.* State, 44 Ala. 414; Elliott *v.* State, 26 Ala. 78.

Illinois.— Baker *v.* People, 105 Ill. 452, holding, however, that there may be a separate conviction.

New York.— Chatterton *v.* People, 15 Abb. Pr. 147.

Ohio.— Stephens *v.* State, 14 Ohio 386.

United States.— U. S. *v.* McDonald, 26 Fed. Cas. No. 15,667, 8 Biss. 439.

See 27 Cent. Dig. tit. "Indictment and Information," § 537.

87. Crawford *v.* State, 112 Ala. 1, 21 So. 214; Cochran *v.* State, 113 Ga. 736, 39 S. E. 337; Baker *v.* People, 105 Ill. 452; Com. *v.* Billings, 167 Mass. 283, 45 N. E. 910; Com. *v.* Cook, 12 Allen (Mass.) 542; Com. *v.* Brown, 12 Gray (Mass.) 135.

Under the New York code of criminal procedure, where a person is jointly indicted with another for an offense charged to have been the result of their joint act and is tried separately, the indictment is supported by proof sufficient to warrant a conviction if he had been indicted alone. People *v.* Cotto, 131 N. Y. 577, 29 N. E. 1008.

88. Com. *v.* Billings, 167 Mass. 283, 45 N. E. 910; State *v.* Smith, 37 Mo. 58. But see Chatterton *v.* People, 15 Abb. Pr. (N. Y.) 147; People *v.* Green, 1 Wheel. Cr. (N. Y.) 152.

but separate convictions may be shown at different times and of distinct offenses.[89]

c. Principals and Accessaries — (I) *Principals in First and Second Degree.* As a general rule, where no distinction in punishment is made, a person indicted as a principal may be convicted on proof that he was only present aiding and abetting.[90] Under a joint indictment against the perpetrator and those who were present to aid and abet in a felony, each is responsible for the act and may be convicted as principal.[91] Hence where the participation of joint defendants in an offense is so set out as to charge them respectively as principals in the first and second degrees, a variance in the proof as to which were in fact the principals in the first degree is not material and a conviction may be had according to the evidence.[92] Conversely a person indicted as an aider and abetter may be convicted as a principal in the first degree,[93] except where a more severe punishment follows.[94]

(III) *Principal and Accessary Before or After Fact.* At common law[95] and in those states in which the common-law distinctions between the principal felon and accessaries before the fact are retained,[96] there can be no conviction of a person as an accessary before the fact upon an indictment charging him

89. State *v.* Dolan, 69 Me. 573.

90. *Georgia.*— Collins *v.* State, 88 Ga. 347, 14 S. E. 474; Leonard *v.* State, 77 Ga. 764; Hill *v.* State, 28 Ga. 604.

Indiana.— Williams *v.* State, 47 Ind. 568.

Louisiana.— State *v.* Blackman, 35 La. Ann. 483.

Massachusetts.— Com. *v.* Chapman, 11 Cush. 422.

Michigan.— People *v.* Wright, 90 Mich. 362, 51 N. W. 517.

New Mexico.— Territory *v.* McGinnis, 10 N. M. 269, 61 Pac. 208.

North Carolina.— State *v.* Cockman, 60 N. C. 484.

Ohio.— Hanoff *v.* State, 37 Ohio St. 178, 41 Am. Rep. 496.

Oregon.— State *v.* Moran, 15 Oreg. 262, 14 Pac. 419.

Rhode Island.— See State *v.* Sprague, 4 R. I. 257.

Washington.— State *v.* White, 10 Wash. 611, 39 Pac. 160, 41 Pac. 442.

United States.— U. S. *v.* Douglass, 25 Fed. Cas. No. 14,989, 2 Blatchf. 207.

England.— Rex *v.* Culkin, 5 C. & P. 121, 24 E. C. L. 484.

See 27 Cent. Dig. tit. "Indictment and Information," § 540.

Contra.— Mulligan *v.* Com., 84 Ky. 229, 1 S. W. 417, 8 Ky. L. Rep. 211 [*distinguishing* Young *v.* Com., 8 Bush (Ky.) 366; Thompson *v.* Com., 1 Metc. (Ky.) 13 (*followed* in Travis *v.* Com., 96 Ky. 77, 27 S. W. 863, 16 Ky. L. Rep. 253; Leger *v.* Com., 74 S. W. 704, 25 Ky. L. Rep. 4). See also Ross *v.* Com., 9 S. W. 707, 10 Ky. L. Rep. 558, as being cases in which a joint indictment of several as principals was sustained, although the proof showed that certain of the defendants aided and abetted only].

91. *California.*— People *v.* Ah Fat, 48 Cal. 61; People *v.* Outeveras, 48 Cal. 19.

Florida.— Bryan *v.* State, 19 Fla. 864.

Illinois.— Coates *v.* People, 72 Ill. 303.

Kentucky.— Travis *v.* Com., 96 Ky. 77, 27 S. W. 863, 16 Ky. L. Rep. 253; Benge *v.* Com., 92 Ky. 1, 17 S. W. 146, 13 Ky. L. Rep. 308; Leger *v.* Com., 74 S. W. 704, 25 Ky. L. Rep. 4; Hatfield *v.* Com., 55 S. W. 679, 21 Ky. L. Rep. 1461; Ross *v.* Com., 9 S. W. 707, 10 Ky. L. Rep. 558.

North Carolina.— State *v.* Merritt, 61 N. C. 134.

Oregon.— State *v.* Kirk, 10 Oreg. 505.

South Carolina.— State *v.* Jenkins, 14 Rich. 215, 94 Am. Dec. 132.

Texas.— Davis *v.* State, 3 Tex. App. 91.

92. *Alabama.*— Brister *v.* State, 26 Ala. 107.

Delaware.— State *v.* O'Neal, Houst. Cr. Cas. 58.

Florida.— Myers *v.* State, 43 Fla. 500, 31 So. 275; Albritton *v.* State, 32 Fla. 358, 13 So. 955.

Georgia.— Morgan *v.* State, 120 Ga. 294, 48 S. E. 9.

Illinois.— Coates *v.* People, 72 Ill. 303.

Kentucky.— Benge *v.* Com., 92 Ky. 1, 17 S. W. 146, 13 Ky. L. Rep. 308; Puckett *v.* Com., 17 S. W. 335, 13 Ky. L. Rep. 466.

New Jersey.— State *v.* Mairs, 1 N. J. L. 453.

South Carolina.— State *v.* Anthony, 1 McCord 285.

England.— Mackalley's Case, 9 Coke 65*b*.

See 27 Cent. Dig. tit. "Indictment and Information," § 540.

93. State *v.* Washington, 107 La. 298, 31 So. 638; State *v.* Ross, 29 Mo. 32; State *v.* Putman, 18 S. C. 175, 44 Am. Rep. 569.

94. Kessler *v.* Com., 12 Bush (Ky.) 18.

95. Hughes *v.* State, 12 Ala. 458. See also Rex *v.* Sawyer, 2 C. & K. 101, R. & R. 218, 61 E. C. L. 101; Rex *v.* Plant, 7 C. & P. 575, 32 E. C. L. 766; Rex *v.* Gordon, 1 East P. C. 352, 1 Leach C. C. 581.

96. Sandage *v.* State, 61 Nebr. 240, 85 N. W. 35, 87 Am. St. Rep. 457; Wagner *v.* State, 43 Nebr. 1, 61 N. W. 85; Walrath *v.* State, 8 Nebr. 80; State *v.* Wyckoff, 31 N. J. L. 65; State *v.* Roberts, 50 W. Va. 422, 40 S. E. 484.

as principal, and conversely, there can be no conviction as principal of one charged as accessary before the fact;[97] but in those states in which the distinction between principals and accessaries before the fact has been abolished, it is held in many states that one indicted as principal may be convicted on evidence showing that he is an accessary,[98] and conversely,[99] especially where the statutes provide that they shall be indicted, tried, and punished alike.[1] In other states, however, it is held that, although the distinction is abolished, in the absence of express statutory permission to the contrary, the indictment must state whether defendant is charged as a principal or as an accessary and a variance in the proof is fatal.[2] One indicted as a principal cannot be convicted as such on evidence showing that he is merely an accessary after the fact,[3] nor can he be convicted as an accessary.[4]

6. The Gist or Substance of the Offense — a. In General. Under an indictment charging a particular offense, a conviction cannot be had upon evidence of another and distinct offense.[5] So a charge of cheating cannot be made out on

97. Riggins *v.* State, 116 Ga. 592, 42 S. E. 707; Cascy *v.* State, 49 Nebr. 403, 68 N. W. 643.

98. Yoe *v.* People, 49 Ill. 410; Dempsey *v.* People, 47 Ill. 323; State *v.* Beebe, 17 Minn. 241; People *v.* Bliven, 112 N. Y. 79, 19 N. E. 638, 8 Am. St. Rep. 701, 6 N. Y. Cr. 365; State *v.* Kent, 4 N. D. 577, 62 N. W. 631, 27 L. R. A. 686. *Contra,* in New York prior to the adoption of the penal code. People *v.* Katz, 23 How. Pr. (N. Y.) 93.

99. Com. *v.* Bradley, 16 Pa. Super. Ct. 561; State *v.* Robinson, 12 Wash. 349, 41 Pac. 51, 902.

1. *California.*— People *v.* Outeveras, 48 Cal. 19 [*overruling* in effect People *v.* Campbell, 40 Cal. 129; People *v.* Trim, 39 Cal. 75].

Iowa.— State *v.* Pugsley, 75 Iowa 742, 38 N. W. 498; Bonsell *v.* U. S., 1 Greene 111.

Kansas.— State *v.* Cassady, 12 Kan. 550.

Montana.— State *v.* Geddes, 22 Mont. 68, 55 Pac. 919.

Oregon.— State *v.* Branton, 33 Oreg. 533, 56 Pac. 267.

Washington.— State *v.* Duncan, 7 Wash. 336, 35 Pac. 117, 38 Am. St. Rep. 888.

See 27 Cent. Dig. tit. "Indictment and Information," § 542.

2. Williams *v.* State, 41 Ark. 173; Rix *v.* State, 33 Tex. Cr. 353, 26 S. W. 505; Phillips *v.* State, 26 Tex. App. 228, 9 S. W. 557, 8 Am. St. Rep. 471; Thornton *v.* Com., 24 Gratt. (Va.) 657; State *v.* Morgan, 21 Wash. 355, 58 Pac. 215.

3. *California.*—People *v.* Gassaway, 28 Cal. 404.

Georgia.— Tarpe *v.* State, 95 Ga. 457, 20 S. E. 217; McCoy *v.* State, 52 Ga. 287.

Illinois.— Reynolds *v.* People, 83 Ill. 479, 25 Am. Rep. 410.

Indiana.— Wade *v.* State, 71 Ind. 535.

Louisiana.— State *v.* Allen, 37 La. Ann. 685.

Mississippi.— Harper *v.* State, 83 Miss. 402, 35 So. 572, holding that evidence that after deceased was shot defendant made hypodermic injections to prevent deceased from making any statement about the killing or otherwise acted as an accessary was inadmissible where defendant was indicted for murder as a principal.

Washington.— State *v.* Jones, 3 Wash. 175, 28 Pac. 254.

See 27 Cent. Dig. tit. "Indictment and Information," § 543.

4. People *v.* Keefer, 65 Cal. 232, 3 Pac. 818.

5. *Alabama.*— Stone *v.* State, 115 Ala. 121, 22 So. 275, larceny from the person.

Illinois.— Kibs *v.* People, 81 Ill. 599 (on a charge of larceny defendant cannot be convicted of embezzlement or fraudulent conversion); Wlecke *v.* People, 14 Ill. App. 447 (sale of intoxicating liquors to a minor and gift of such liquors).

Louisiana.— State *v.* Kye, 46 La. Ann. 424, 14 So. 883, proof that defendant while in a house shot at a person therein will not sustain a charge of "shooting into a dwelling house."

Maine.— State *v.* Seguin, 98 Me. 285, 56 Atl. 840, holding that under a statute making it an offense to sell, convey, mortgage, or pledge property upon which there is a mortgage, or to which the accused bas no title, without giving notice thereof, evidence of a mortgage was fatally variant from an allegation that defendant did "grant, bargain, and sell."

Massachusetts.— Com. *v.* King, 9 Cush. 284, evidence of embezzlement will not support common-law charge of larceny.

Missouri.— State *v.* Moore, 178 Mo. 348, 77 S. W. 522, holding that on an information charging an assault upon one person, it was error to instruct the jury that they might convict defendant if they found that he had assaulted any one of three persons named.

Pennsylvania.— Com. *v.* Daniels, 2 Pars. Eq. Cas. 332.

Texas.— Harris *v.* State, 17 Tex. App. 132, holding that under a general charge of theft there can be no conviction of theft from the person.

See 27 Cent. Dig. tit. "Indictment and Information," § 550.

Larceny and false pretenses.— A common-law indictment for larceny will not be sustained by proof of obtaining goods by false pretense. People *v.* Dumar, 106 N. Y. 502, 13 N. E. 325 [*reversing* 42 Hun 80]; Hall *v.* State, 3 Coldw. (Tenn.) 125. And see State *v.* Porter, 25 W. Va. 685, holding that

proof merely of an attempt to cheat.[6] On a charge of an attempt, however, proof of a completed offense is not a variance.[7] Where an offense may be committed in various ways, the evidence must establish it to have been committed in the mode charged in the indictment.[8] A conviction cannot be had on evidence of another offense of the same kind committed on the same day but not identical with that charged.[9] Where matters in aggravation are alleged, it is not a variance to fail to establish them.[10]

b. Manner and Means. The part of the charge describing the manner of the offense must conform substantially with the evidence introduced to support it.[11] A material variance in descriptive matter is fatal.[12] A variance will not result where the allegations and the proof, although variant, are of the same legal signification.[13] The fact that a charge is general and the proof particular does not necessarily show a variance.[14]

c. Intent. Where an act must have been done with a specific intent, in order to constitute the offense, such intent must be alleged in the indictment,[15] and must be proved as alleged.[16]

7. Name and Description of Third Persons — a. In General. Where it is necessary to state the name of a third person as a part of the description of the

an indictment under a statute punishing a conspiracy for the purpose of taking and carrying away, destroying or injuring personal property, could not be sustained by proof of obtaining property by false pretenses.

6. State *v.* Corbett, 46 N. C. 264.

7. State *v.* Mahoney, 122 Iowa 168, 97 N. W. 1089.

8. *Indiana.*— Brown *v.* State, 48 Ind. 38.

Iowa.— State *v.* McConkey, 20 Iowa 574.

Massachusetts.— Com. *v.* McCarthy, 145 Mass. 575, 14 N. E. 643; Com. *v.* Richardson, 126 Mass. 34, 30 Am. Rep. 647; Com. *v.* Bossidy, 112 Mass. 277.

New York.— People *v.* Fulle, 12 Abb. N. Cas. 196.

Texas.— Randle *v.* State, 12 Tex. App. 250.

See 27 Cent. Dig. tit. "Indictment and Information," § 550.

9. Com. *v.* Dean, 109 Mass. 349.

10. People *v.* Reilly, 49 N. Y. App. Div. 218, 63 N. Y. Suppl. 18, 14 N. Y. Cr. 458 [*affirmed* in 164 N. Y. 600, 59 N. E. 1128], holding that proof of a first offense under an indictment charging a prior offense would not defeat the conviction.

11. District of Columbia *v.* Libbey, 9 App. Cas. (D. C.) 321 (holding that a charge of trespass upon a park was not supported by evidence of trespass on a plot of ground which might at some future day be converted into a park at the will of the municipality); State *v.* Rushing, 2 Nott & M. (S. C.) 560; U. S. *v.* Howard, 26 Fed. Cas. No. 15,403, 3 Sumn. 12.

Evidence of graver offense of same nature. — Where an indictment charges that defendant committed robbery by means of an assault, and by violence, and by putting in fear of life and bodily injury, evidence that defendant used a firearm does not constitute a variance of which he can complain. Carroll *v.* State, 42 Tex. Cr. 30, 57 S. W. 99. See also State *v.* Parmelee, 9 Conn. 259 (holding that an information charging an assault with intent to kill without malice was supported by proof of an assault with intent to kill with malice); Reg. *v.* Gaylor, 7 Cox C. C. 253, Dears. & B. 288.

12. Moore *v.* State, 65 Ind. 213; State *v.* Ray, 92 N. C. 810; Cronin *v.* State, 30 Tex. App. 278, 17 S. W. 410.

13. *Colorado.*— Adams *v.* People, 25 Colo. 532, 55 Pac. 806, holding that a charge that an officer failed to pay over money was sustained by proof that he collected checks and drafts and deposited them to his account, since the acceptance of checks and conversion of them into money was equivalent to the collection of money.

Maine.— State *v.* Regan, 63 Me. 127.

Massachusetts.— Com. *v.* Pease, 137 Mass. 567, mesh net and seine.

Nebraska.— Weinecke *v.* State, 34 Nebr. 14, 51 N. W. 307.

North Carolina.— State *v.* Brown, 82 N. C. 585.

14. Somers *v.* State, 5 Sneed (Tenn.) 438, so holding where the charge was of betting upon an election pending in the state and the proof was that the bet was on the result of such election in a single county.

Indictment on statute.— Where the statute punishing an offense with relation to particular kinds of property employs general and specific terms, there is a fatal variance between an indictment employing the general term and proof of one of the species named in the statute; but otherwise where the species is not mentioned in the statute. State *v.* Divine, 2 Ohio Dec. (Reprint) 80, 1 West. L. Month. 331.

15. See *supra*, V, H, 6.

16. Pence *v.* State, 110 Ind. 95, 10 N. E. 919; Morman *v.* State, 24 Miss. 54. But see Veazie's Case, 7 Me. 131, holding that an indictment for forgery with intent to defraud one person is supported by proof of intent to defraud such person and another.

Merger of offenses where an intent establishing a felony is proved on an indictment for misdemeanor. See CRIMINAL LAW, 12 Cyc. 133.

offense, the name must be correctly stated and a material variance is fatal.[17] The rule applies for example to the name of a person upon whom a felony was committed,[18] or whose property was affected thereby.[19] If the name of a third person is not essential to the description of the offense a misnomer is not fatal.[20] A variance is not necessarily established by the fact that names are spelled differently,[21] and where the names may be sounded alike or are *idem sonans*, the spelling is immaterial.[22] So also where the variance is so slight that the person would have been readily known by the name established.[23] And where no question as to the identity of a person arose, it has been held that the spelling of his name in two ways in an indictment and proof of it in one of such ways was not fatal.[24] The question of *idem sonans* is for the jury.[25] Mere terms of description which are used for the purpose of designation and distinction need not be proved as laid,[26] but where residence is unnecessarily stated it must be proved.[27] Where a person is given a fictitious name, it is not material that the proof shows that such person is a woman, while the fictitious name is masculine.[28] The fact that no

Proof of intent in particular offenses see BURGLARY, 6 Cyc. 169; HOMICIDE, 21 Cyc. 646; LARCENY; and other special titles.

17. *Arkansas.*— State *v.* Williams, 68 Ark. 241, 57 S. W. 792, 81 Am. St. Rep. 288, name of woman in unlawful cohabitation.

Indiana.— Mitchell *v.* State, 63 Ind. 276 [*followed* in Mitchell *v.* State, 63 Ind. 574], person to whom liquor was sold.

Minnesota.— State *v.* Quinlin, 40 Minn. 55, 41 N. W. 299, name of the person charged with having committed the crime in a prosecution for taking money under an agreement to withhold evidence of a crime.

Missouri.— State *v.* Houston, 19 Mo. 211 (person incited to an offense); State *v.* Curran, 18 Mo. 320.

Texas.— Martin *v.* State, 16 Tex. 240.

See 27 Cent. Dig. tit. "Indictment and Information," § 551.

Effect of change of name by marriage.— An indictment charging the name of a woman as at the time of its finding is not supported by evidence that such was her name at the time of the commission of the offense, and that it was subsequently and prior to the indictment changed by her marriage. Com. *v.* Brown, 2 Gray (Mass.) 358. But *compare* Addison *v.* State, 44 Tex. Cr. 80, 68 S. W. 679, 100 Am. St. Rep. 841.

18. Milontree *v.* State, 30 Tex. App. 151, 16 S. W. 764; Perry *v.* State, 4 Tex. App. 566; Roberts *v.* State, 2 Tex. App. 4.

Name of deceased in homicide.— Crawford *v.* State, 112 Ala. 1, 21 So. 214; Riley *v.* State, 68 Ark. 330, 58 S. W. 39; Moynahan *v.* People, 3 Colo. 367; Jacobs *v.* State, 46 Fla. 157, 35 So. 65; McBeth *v.* State, 50 Miss. 81; Milontree *v.* State, 30 Tex. App. 151, 16 S. W. 764.

Amendment to conform to proof see *supra*, X.

19. Spears *v.* State, 70 Ark. 144, 66 S. W. 660; Collins *v.* State, 43 Tex. 577.

20. Bryant *v.* Com., 68 S. W. 846, 24 Ky. L. Rep. 447; U. S. *v.* Howard, 26 Fed. Cas. No. 15,403, 3 Sumn. 12, holding that where an offense was averred to have been committed on board a ship of the United States, variance in the name of the owners was immaterial.

21. State *v.* Perkins, 70 N. H. 330, 47 Atl. 268, holding that where the indictment spelled the name of a child as "Manter" and a record of birth spelled it "Menter," the record was admissible.

22. State *v.* Houser, 44 N. C. 410; State *v.* Scurry, 3 Rich. (S. C.) 68; Milontree *v.* State, 30 Tex. App. 151, 16 S. W. 764; Henry *v.* State, 7 Tex. App. 388; Goode *v.* State, 2 Tex. App. 520. See also Howard *v.* State, (Tex. Cr. App. 1901) 65 S. W. 519.

Identity of names and questions of idem sonans see, generally, NAMES.

Where the name is a foreign one, the variance of a letter which does not vary the sound according to the pronunciation of the language in which it is is not fatal. State *v.* Timmens, 4 Minn. 325.

23. Aaron *v.* State, 37 Ala. 106; State *v.* Curran, 18 Mo. 320.

24. Davenport *v.* State, 38 Ga. 184.

25. State *v.* Perkins, 70 N. H. 330, 47 Atl. 268. See, generally, NAMES.

26. Com. *v.* Parmenter, 101 Mass. 211, as where one whose property was taken was described as "W. R. the second of that name." But see Felix *v.* State, 18 Ala. 720, holding that where a mulatto killed was described as a free negro, the variance was fatal.

"Senior" or "junior," when added to a name, are regarded as a matter of description and need not be proved. Ross *v.* State, 116 Ind. 495, 19 N. E. 451; Allen *v.* State, 52 Ind. 486; State *v.* Dankwardt, 107 Iowa 704, 77 N. W. 495. But see State *v.* Vittum, 9 N. H. 519, holding that where a third person is described in an indictment and, there being two persons of the same name, an addition such as junior is employed to designate the person intended, proof cannot be introduced of the commission of the offense with the senior of the same name.

27. Com. *v.* Stone, 152 Mass. 498, 22 N. E. 967, so holding, although a statute provided that the omission or misstatement of the residence of defendant in an indictment should not vitiate it.

28. People *v.* White, 116 Cal. 17, 47 Pac. 771, so holding where a house was described as belonging to John Doe, whose real name

witness testifies to the complete christian and surname of a person as stated in the indictment, but the witnesses testify either to the christian or surname, will not constitute a variance where there is no controversy as to identity.[29]

b. Statutory Provisions. By statute in some states, it is provided that a variance as to the name of a person in an indictment shall not be ground of acquittal unless the court upon the trial finds it material or prejudicial,[30] or that an erroneous allegation is not to be regarded as material where the offense is in other respects described with sufficient certainty to identify the act.[31]

c. Christian Names. The christian name of a third person who is necessarily described in an indictment must be proved,[32] and a material variance is fatal,[33] in the absence of a showing that the person was as well known by the name alleged in the indictment as by that proved;[34] in which case the question whether there is a variance is for the jury.[35] It is held, however, that where two names are ordinarily taken to be the same in common use, although different in sound, as where the one is a contraction or corruption of the other, no variance will arise from the allegation of one and proof of the other.[36] An allegation of initials and the proof of a name in full or conversely does not constitute a variance where the

is unknown, and it was proved that the ownership was in a woman.

29. Rutherford *v.* State, 11 Lea (Tenn.) 31; Stuart *v.* State, 1 Baxt. (Tenn.) 178; Joyce *v.* State, 2 Swan (Tenn.) 667.

30. See State *v.* Harl, 137 Mo. 252, 38 S. W. 919; State *v.* Reynolds, 106 Mo. 146, 17 S. W. 322 (holding that a variance in the name of a person defrauded by false pretenses was fatal); State *v.* Kellar, 53 Mo. App. 32 (variance in the name of a person with whom defendant played cards on Sunday); Lytle *v.* State, 31 Ohio St. 196 (variance between an allegation that a party to a judicial proceeding was "Curtis Pratt" and a transcript describing him as "Curt. Pratt"); Gustavenson *v.* State, 10 Wyo. 300, 68 Pac. 1006.

Variance must arise from mistake in name and not identity. Mead *v.* State, 26 Ohio St. 505, holding that the question of prejudice or materiality was for the court, but the question of mistake as to the identity of the person was for the jury.

31. State *v.* St. Clair, 6 Ida. 109, 53 Pac. 1; State *v.* Burns, 119 Iowa 663, 94 N. W. 238; State *v.* Carnagy, 106 Iowa 483, 76 N. W. 805; State *v.* Flynn, 42 Iowa 164.

32. *Arkansas.*— Gabe *v.* State, 6 Ark. 540.

Illinois.— Penrod *v.* People, 89 Ill. 150; Davis *v.* People, 19 Ill. 74. *Compare* Shepherd *v.* People, 72 Ill. 480, holding that the fact that there was no evidence as to the christian name of a person killed was immaterial where the identity of the deceased was determined by reference to his occupation.

Indiana.— Meyer *v.* State, 50 Ind. 18.

Texas.— Hardin *v.* State, 26 Tex. 113. And see Perry *v.* State, 4 Tex. App. 566.

England.— Reg. *v.* Dent, 2 Cox C. C. 354.

See 27 Cent. Dig. tit. "Indictment and Information," § 553.

33. *California.*— People *v.* Hughes, 41 Cal. 234.

Georgia.— Lewis *v.* State, 90 Ga. 95, 15 S. E. 697.

Missouri.— State *v.* English, 67 Mo. 136.

Nebraska.— Gandy *v.* State, 27 Nebr. 707, 43 N. W. 747, 44 N. W. 108.

Wisconsin.— State *v.* Dudley, 7 Wis. 664.

See 27 Cent. Dig. tit. "Indictment and Information," § 553.

34. State *v.* McEwen, 151 Ind. 485, 51 N. E. 1053; Brown *v.* State, 32 Tex. 124; Owens *v.* State, (Tex. Cr. App. 1892) 20 S. W. 558; Willis *v.* State, 24 Tex. App. 487, 6 S. W. 200; Humbard *v.* State, 21 Tex. App. 200, 17 S. W. 126; Reg. *v.* Gooding, C. & M. 297, 41 E. C. L. 165.

35. Com. *v.* Warren, 167 Mass. 53, 44 N. E. 1073.

Where a defendant has acquiesced in the identity of the person spoken of in the evidence with the person charged in giving his own testimony, identity will be held to have been sufficiently proved. Mason *v.* State, 55 Ark. 529, 18 S. W. 827.

36. *Alabama.*— Bradford *v.* State, 134 Ala. 141, 32 So. 742, "Jim" and "James."

California.— People *v.* Armstrong, 114 Cal. 570, 46 Pac. 611, "Sam" and "Samuel."

District of Columbia.— Williams *v.* U. S., 3 App. Cas. 335, "Delia" and "Dellie."

Illinois.— Bolombo *v.* People, 182 Ill. 411, 55 N. E. 519, "John" and "Johnnie."

Indiana.— Walter *v.* State, 105 Ind. 589, 5 N. E. 735, "Jack" and "John." But see State *v.* McEwen, 151 Ind. 485, 51 N. E. 1053 (holding that there must be proof that "Frank" and "Franklin" were applied to the same person); Vance *v.* State, 65 Ind. 460 (holding the variance between "Della" and "Dellia" fatal).

Iowa.— State *v.* Emeigh, 18 Iowa 122, "May" for "Mary."

North Carolina.— State *v.* Johnson, 67 N. C. 55, "Susan" and "Susanna."

Tennessee.— Scott *v.* State, 7 Lea 232, "De" and "De Witt."

Texas.— Alsup *v.* State, 36 Tex. Cr. 535, 38 S. W. 174, "Bob" and "Robert."

West Virginia.— State *v.* Reece, 27 W. Va. 375, holding an indictment alleging that stolen goods were the property of "Robert Buster" was sustained by proof that the

full name and the initials are consistent,[37] although the identity must be apparent.[38] Where a person is described by name and also by other matters of description, it has been held that proof of such matters rendering the identity certain may cure any variance as to the name.[39]

d. Middle Names and Initials. The proof of a middle name or initial where none is alleged is not a material variance,[40] and in many cases it is held that a middle initial or name if alleged need not be proved as alleged.[41] Under a statute making it sufficient to state one or more initials of the name and the surname, an allegation of the middle initial may be supported by proof of the first name and such initial.[42]

e. Name by Which Person Is Commonly Known. Where it is shown that the person is well and usually known by the name stated in the indictment, there is no variance, although such name may not be the true name,[43] or although the

owner was "James Robinson Buster," sometimes called "Rob," "Robin," and "Bob Buster."

See 27 Cent. Dig. tit. "Indictment and Information," § 553.

Contra.— Sullivan *v.* People, 6 Colo. App. 458, 41 Pac. 840, holding that variance between "Michael" and "Mike" fatal.

37. *Alabama.*— Thompson *v.* State, 48 Ala. 165.

Georgia.— Mitchum *v.* State, 11 Ga. 615.

Illinois.— Little *v.* People, 157 Ill. 153, 42 N. E. 389.

Iowa.— State *v.* Short, 54 Iowa 392, 6 N. W. 584.

Kansas.— State *v.* Flack, 48 Kan. 146, 29 Pac. 571.

Texas.— Franklin *v.* State, 37 Tex. Cr. 312, 39 S. W. 680.

See 27 Cent. Dig. tit. "Indictment and Information," § 543.

But *compare* Timms *v.* State, 4 Coldw. (Tenn.) 138, holding that in the absence of evidence that the party was as well known by the name of Gilbert as by the initials H G, the variance was fatal.

38. Franklin *v.* State, 52 Ala. 414; McLain *v.* State, 71 Ga. 279; Mitchum *v.* State, 11 Ga. 615 (holding that the question was for the jury); State *v.* Taylor, 15 Kan. 420 (holding that where property was charged to be that of Michael W, evidence that the property belonged to J M W was not sufficient).

Use of an initial of the English name which is equivalent to the foreign name of a third person is sufficient where the person was known by his English name. Cerda *v.* State, 33 Tex. Cr. 458, 46 S. W. 992.

39. Sewell *v.* State, 82 Ala. 57, 2 So. 622, so holding where a woman was established to be the wife of a particular person as stated in the indictment. And see Shepherd *v.* People, 72 Ill. 480, holding that an identification of a person killed by means of his trade as a barber, instead of by his christian name, both being alleged in the indictment, was sufficient upon a prosecution for homicide.

40. *Alabama.*— Terry *v.* State, 118 Ala. 79, 23 So. 776.

Illinois.— Harrington *v.* People, 90 Ill. App. 456.

Indiana.— Ross *v.* State, 116 Ind. 495, 19 N. E. 451; Miller *v.* State, 69 Ind. 284.

Iowa.— State *v.* Crawford, 66 Iowa 318, 23 N. W. 684.

Kansas.— State *v.* Gordon, 56 Kan. 64, 42 Pac. 346.

Rhode Island.— State *v.* Feeny, 13 R. I. 623.

See 27 Cent. Dig. tit. "Indictment and Information," § 554.

41. Ratcliff *v.* State, 23 Ind. App. 64, 54 N. E. 814; State *v.* Garvin, 48 S. C. 258, 26 S. E. 570; Olibare *v.* State, (Tex. Cr. App. 1898) 48 S. W. 69; Delphino *v.* State, 11 Tex. App. 30. *Contra*, Com. *v.* Buckley, 145 Mass. 181, 13 N. E. 368; Com. *v.* McAvoy, 16 Gray (Mass.) 235; Com. *v.* Shearman, 11 Cush. (Mass.) 546; Price *v.* State, 19 Ohio 423. And see Pickens *v.* State, 6 Ohio 274.

42. McAfee *v.* State, 14 Tex. App. 668.

43. *Alabama.*— Ford *v.* State, 129 Ala. 16, 30 So. 27.

California.— People *v.* Plyler, 121 Cal. 160, 53 Pac. 553.

Georgia.— Hainey *v.* State, 107 Ga. 711, 33 S. E. 418.

Illinois.— Hix *v.* People, 157 Ill. 382, 41 N. E. 862.

Indiana.— Walter *v.* State, 105 Ind. 589, 5 N. E. 735.

Maine.— State *v.* Libby, 44 Me. 469, 69 Am. Dec. 115.

Massachusetts.— Com. *v.* Williams, 161 Mass. 442, 37 N. E. 371; Com. *v.* Gormley, 133 Mass. 580.

Minnesota.— State *v.* Brecht, 41 Minn. 50, 42 N. W. 602.

Mississippi.— McBeth *v.* State, 50 Miss. 81.

Nebraska.— Binfield *v.* State, 15 Nebr. 484, 19 N. W. 607.

Ohio.— State *v.* Gardiner, Wright 392.

Texas.— Morrison *v.* State, 40 Tex. Cr. 473, 51 S. W. 358; Slaughter *v.* State, (Cr. App. 1893) 21 S. W. 247; Taylor *v.* State, 27 Tex. App. 44, 11 S. W. 35; Lott *v.* State, 24 Tex. App. 723, 14 S. W. 277; Hunter *v.* State, 8 Tex. App. 75; Owen *v.* State, 7 Tex. App. 329.

See 27 Cent. Dig. tit. "Indictment and Information," § 555.

An adopted child may be described by the name which she bore before adoption, where

person is also commonly known by some other name or names.[44] Where the true name is stated, evidence that the person is generally known by some other name is not fatal.[45] Where a variance appears in the name of a third person, evidence is admissible to show that he is commonly known by the name charged in the indictment,[46] although there is no allegation to that effect in the indictment,[47] and the burden of proof is on the prosecution,[48] the sufficiency of the proof being a question for the jury.[49]

f. Names of Corporations and Partnerships. In some cases it has been held that a corporate name must be proved strictly as laid;[50] but the better rule appears to be that a variance in a portion of the corporate name which is not an integral part thereof is not fatal,[51] such as in a part of the name which would commonly be understood as referring to the place of business of the corporation,[52] it having been said that the name of a corporation differs from that of an individual in that the transposition or the omission of words from its name may not make an essential difference in the sense.[53] The name by which the corporation is commonly known has in some cases been held sufficient.[54] A misspelling of a corporate name where it does not cause a change in pronunciation is immaterial.[55] An averment of the state or the laws under which the corporation was created need not, unless essential to the identity of the corporation, be proved.[56] The name of a partner-

she is as well known by that name as by the name of the person adopting her. Walker *v.* State, 134 Ala. 86, 32 So. 703.

The person need not be as exclusively or familiarly known by the name used in the indictment as by any other, but it is sufficient that such name identifies him as certainly as any other (Bell *v.* State, 25 Tex. 574); but it is not sufficient that the proof establish that the person was "known" simply by the name under which he was described (State *v.* Lincoln, 17 Wis. 579).

It need not be established beyond a reasonable doubt that the person is as well known by either name. Walker *v.* State, 134 Ala. 86, 32 So. 703.

44. Luna *v.* State, (Tex. Cr. App. 1902) 70 S. W. 89. And see the cases cited in the preceding note.

45. Ehlert *v.* State, 93 Ind. 76; People *v.* Lake, 110 N. Y. 61, 17 N. E. 146, 6 Am. St. Rep. 344. If a person is properly described by the use of the christian and surname, it is no variance that the proof shows that she is generally spoken of by an abbreviation of her middle name, there being no question of identity. Walter *v.* People, 32 N. Y. 147 [*affirming* 6 Park. Cr. 15]. But see Irwin *v.* State, 117 Ga. 722, 45 S. E. 59, holding that where the person against whom the offense was committed was commonly known by his middle name, a description of him by an abbreviation of his first name was not supported by the evidence.

46. Com. *v.* Gould, 158 Mass. 499, 33 N. E. 656.

47. Johnson *v.* State, 46 Ga. 269; Com. *v.* Gould, 158 Mass. 499, 33 N. E. 656.

Former convictions.— Where it is charged that the offense is a second offense, a record of the conviction of defendant under another name is admissible where it is followed by evidence of the identity of the person described in the previous indictment with the accused. People *v.* Wilson, 7 N. Y. App. Div. 326, 40 N. Y. Suppl. 107.

48. State *v.* Curran, 18 Mo. 320; Davis *v.* State, (Tex. App. 1889) 11 S. W. 647.

49. Com. *v.* Gould, 158 Mass. 499, 33 N. E. 656; Davis *v.* State, (Tex. App. 1889) 11 S. W. 647.

50. Sykes *v.* People, 132 Ill. 32, 32 N. E. 391; Com. *v.* Pope, 12 Cush. (Mass.) 272.

51. Putnam *v.* U. S., 162 U. S. 687, 16 S. Ct. 923, 40 L. ed. 1118.

Variance between railroad and railway not fatal.— Davis *v.* State, 105 Ga. 808, 32 S. E. 158; State *v.* Goode, 68 Iowa 593, 27 N. W. 772; State *v.* Brin, 30 Minn. 522, 16 N. W. 406.

Addition of the word "the" to the legal name of the corporation will not cause a variance. Cunningham *v.* State, 117 Ala. 59, 23 So. 693; Jackson *v.* State, 76 Ga. 551.

Amendment of charter.— A description of a corporation by its name under an amended charter will not prevent the admission of proof of the original charter together with the record of the amendment. Brown *v.* State, 115 Ala. 74, 22 So. 458.

52. Rogers *v.* State, 90 Ga. 463, 16 S. E. 205; People *v.* Graham, Sheld. (N. Y.) 151 (addition of the words "of Hartford, Conn.," to the name "The Travellers' Insurance Co."); Putnam *v.* U. S., 162 U. S. 687, 16 S. Ct. 923, 40 L. ed. 1118 (omission of the words "of Exeter" from the name of "The National Granite State Bank of Exeter").

53. People *v.* Graham, Sheld. (N. Y.) 151.

54. Rogers *v.* State, 90 Ga. 463, 16 S. E. 205; Com. *v.* Jacobs, 152 Mass. 276, 25 N. E. 463. *Contra*, Sykes *v.* People, 132 Ill. 32, 23 N. E. 391; McGary *v.* People, 45 N. Y. 153.

55. White *v.* State, 69 Ind. 273.

56. McCarney *v.* People, 83 N. Y. 408, 38 Am. Rep. 456, where it was averred that a corporation, the owner of property stolen, was organized under a state law and the proof was of organization under the laws of the United States.

Proof of de facto existence is sufficient where a corporation is alleged to be the owner

ship alleged to have been affected by the criminal transaction must be proved as laid.[57] Where copartners are described as such and also by their individual names, a variance in the given name of one of the partners will not be regarded as material if it cannot be misleading.[58] A name adopted as a business style simply need not be proved precisely as laid.[59]

8. Description of Property — a. In General. The allegations and the proof as to real[60] or personal[61] property essential to the description of the offense charged must correspond.[62] The proof of an allegation descriptive of real property may be more specific than the allegation where not in conflict therewith.[63] In some states it is held that where specifications are filed, the presiding judge may in his discretion admit evidence which is entirely outside of them, if it is pertinent to the indictment, and if defendant is given a sufficient opportunity to answer it.[64]

b. Money and Currency. In general an averment of the taking of "money" may be supported by proof of the taking of any particular kind of money.[65] But where a particular kind of money is specifically described it must be proved as laid.[66] An averment of the taking of promissory notes may be supported by proof of the taking of bank-bills[67] or treasury notes.[68] An averment of money, however, is not supported by proof of a certificate of deposit[69] or of a check.[70]

9. Ownership or Possession of Property — a. In General. In those cases in

of property stolen. State *v.* Savage, 36 Oreg. 191, 60 Pac. 610, 61 Pac. 1128.

The exact technical name of the state need not be alleged. State *v.* Winder, 22 R. I. 177, 46 Atl. 1046, holding that where ownership was laid in a corporation "organized under the laws of the state of Rhode Island" evidence that it was chartered by "the state of Rhode Island and Providence Plantations" was not a material variance.

57. Mathews *v.* State, 33 Tex. 102, holding that there was a fatal variance between "B. K. & Co." and "B. & K."

58. People *v.* Main, 114 Cal. 632, 46 Pac. 612.

59. Patterson *v.* People, 12 Hun (N. Y.) 137, holding that variance between "George Washington Bank" and "Geo. Wasbington Bank" immaterial.

60. See, generally, Arson, 3 Cyc. 998; Burglary, 6 Cyc. 226; Forcible Entry and Detainer, 19 Cyc. 1119; and other specific titles.

61. See, generally, Embezzlement, 15 Cyc. 525; Larceny; and other special titles.

62. Houston *v.* State, 66 Ark. 120, 49 S. W. 351 (holding that an indictment for selling seed cotton, on which was a landlord's lien, could not be sustained by proof of the sale of ginned cotton); Wilburn *v.* State, 60 Ark. 141, 29 S. W. 149 (false pretenses); Berrien *v.* State, 83 Ga. 381, 9 S. E. 609 (mortgage of property of another); Gholston *v.* State, 33 Tex. 342 (malicious mischief); Loyd *v.* State, 22 Tex. App. 646, 3 S. W. 670 (removal of mortgaged property); Com. *v.* Butcher, 4 Gratt. (Va.) 544 (cutting timber).

Sufficiency of proof of cattle brand described see Sweat *v.* State, 4 Tex. App. 617; Stoneham *v.* State, 3 Tex. App. 594.

63. State *v.* Watrous, 13 Iowa 489, holding that a deed locating land by reference to a meridian was admissible, although the indictment did not so locate the property.

64. Com. *v.* Warner, 173 Mass. 541, 54 N. E. 353, holding that under such a statute a variance between the specifications in an indictment for embezzlement and the checks offered in evidence was not material.

65. Edwards *v.* State, 49 Ala. 334 (holding that proof of obtaining by false pretenses five hundred dollars in national bank-notes sustains an indictment for obtaining such sum "in money of the currency of the United States"); State *v.* Carr, 43 Iowa 418.

66. Taylor *v.* State, 130 Ind. 66, 29 N. E. 415 (holding that failure to prove that money was "lawful money of the United States" was fatal, although a statute provided that it was sufficient to describe money, etc., as "money" simply); People *v.* Jones, 5 Lans. (N. Y.) 340; State *v.* Kube, 20 Wis. 217, 91 Am. Dec. 390.

Illustrations.— For example an indictment charging the taking of legal tender notes and postal currency is not supported by proof of the taking of national bank-notes and fractional currency (People *v.* Jones, 5 Lans. (N. Y.) 340); or a charge of the taking of gold coin and bank-notes of specific denominations by proof merely of a certain amount of money without proof as to the denomination (Williams *v.* People, 101 Ill. 382); or an averment of the taking of bank-notes by proof of the taking of "money" or "dollars" (Com. *v.* McManiman, 15 Pa. Co. Ct. 495); or an averment of "dollars" by proof of bank-notes (McAuly *v.* State, 7 Yerg. (Tenn.) 526); or an allegation of paper money of specific denominations by proof merely of an aggregate sum (Mathews *v.* State, 10 Tex. App. 279); or paper money by proof of silver (Harris *v.* State, (Tex. Cr. App. 1895) 30 S. W. 221).

67. Com. *v.* Ashton, 125 Mass. 384; Com. *v.* Butts, 124 Mass. 449.

68. Com. *v.* Griffiths, 126 Mass. 252.

69. Com. *v.* Howe, 132 Mass. 250.

70. Carr *v.* State, 104 Ala. 43, 16 So. 155.

which it is necessary to aver the ownership of property,[71] a material variance between the allegations and proof is fatal.[72] An immaterial allegation of ownership may, however, be rejected as surplusage, and need not be proved,[73] unless the averment is descriptive, in which case it cannot be rejected as surplusage.[74] As a general rule an allegation of ownership, where the injury is to the possession, is supported by proof that either the general property or the possession was in the person named.[75] Proof of possession is sufficient,[76] as is proof of right to possession,[77] or proof of custody and control rendering the possessor accountable to the true owner.[78] Where the injury is to a dwelling-house, it should be described as the dwelling of the person in possession.[79] An averment of possession must be proved as laid,[80] but may be supported by proof of possession by a servant or agent.[81] It is not necessary to prove ownership of all the property described if the ownership of sufficient to make out the offense is established.[82]

b. Statutory Provisions. Statutes in some jurisdictions provide that there shall be no variance in case it is proved at the trial that either the actual or constructive possession or the general or special property was in the person alleged to be the owner.[83]

c. Husband or Wife. Property of a married woman which by reason of coverture vests in the husband must be laid as his property,[84] but under the married woman's acts in some states the separate property of the wife may be laid

71. See *supra*, V, J.

72. *Arkansas.*— Young *v.* State, 73 Ark. 169, 83 S. W. 934.

Georgia.— Grant *v.* State, 120 Ga. 199, 47 S. E. 524, indictment for destroying a bridge alleged to be the private property of four persons not supported by proof that only one of the persons had any interest in the bridge and that he claimed only an easement.

Indiana.— Kruger *v.* State, 135 Ind. 573, 35 N. E. 1019.

Massachusetts.— Com. *v.* Wade, 17 Pick. 395.

New York.— McGary *v.* People, 45 N. Y. 153 [*reversing* 2 Lans. 227].

North Carolina.— State *v.* Mason, 35 N. C. 341.

Virginia.— Com. *v.* Booth, 2 Va. Cas. 394.

Moneys in the hands of a public officer for which he is accountable to the United States may be charged as money of the United States. U. S. *v.* Watkins, 28 Fed. Cas. No. 16,649, 3 Cranch C. C. 441.

A conveyance to a person of a different name than the alleged owner may be admissible as evidence of ownership in case the identity of the alleged owner and the grantee is established. Weaver *v.* State, 116 Ga. 550, 42 S. E. 745.

In particular offenses see ARSON, 3 Cyc. 1000; BURGLARY, 6 Cyc. 227; FALSE PRETENSES, 19 Cyc. 434; LARCENY; and like special titles.

73. See *supra*, IX, A, 8.

74. See *supra*, IX, A, 8, text and note 26.

75. Com. *v.* Wade, 17 Pick. (Mass.) 395 (holding that an indictment charging that a barn burned was the property of two persons was not supported by proof that the general property was in one of such persons who was not an occupant and the occupancy was in the other person jointly with a corporation); Lucas *v.* State, 36 Tex. Cr. 397, 37 S. W. 427.

76. State *v.* Wittier, 21 Me. 341, 38 Am. Dec. 272 (holding that a dwelling-house, if the subject of malicious injury, might be described as the property of the tenant at will); Com. *v.* Blanchette, 157 Mass. 486, 32 N. E. 658 (false pretenses).

Possession of estray as supporting averment of ownership see ANIMALS, 2 Cyc. 363.

77. State *v.* Thompson, 28 Oreg. 296, 42 Pac. 1002, holding that the right of a vendee of land to possession of a note secured by mortgage thereon, after payment of the debt according to the terms of his purchase, was sufficient to support an averment of ownership in an indictment for larceny by bailee.

78. State *v.* Nelson, 11 Nev. 334 (holding that in an indictment for robbery from a stage-coach, ownership might be laid in the driver of the coach); State *v.* Jarcke, Riley (S. C.) 296; Blackburn *v.* State, 44 Tex. 457; Williams *v.* State, 42 Tex. Cr. 18, 57 S. W. 93 (indictment for defacing a cattle brand).

79. State *v.* Wittier, 21 Me. 341, 38 Am. Dec. 272; State *v.* Mason, 35 N. C. 341. See ARSON, 3 Cyc. 1000; BURGLARY, 6 Cyc. 169.

80. State *v.* Sherrill, 81 N. C. 550; Williams *v.* State, 42 Tex. Cr. 18, 57 S. W. 93.

81. Graves *v.* State, (Tex. Cr. App. 1897) 42 S. W. 300.

82. People *v.* Clark, 106 Cal. 32, 39 Pac. 53. See LARCENY; ROBBERY.

83. See Com. *v.* Buckley, 148 Mass. 27, 18 N. E. 577, 1 L. R. A. 624; Com. *v.* Norton, 11 Allen (Mass.) 110; Com. *v.* Harney, 10 Metc. (Mass.) 422 (holding that such a provision applies to undivided estates held in common as well as to estates of which the alleged owner had a sole property in only a part); State *v.* Grimes, 50 Minn. 123, 52 N. W. 275.

84. Com. *v.* Manley, 12 Pick. (Mass.) 173. Money sent to a married woman for support of herself and children by her husband at sea must be laid as his property. Com. *v.*

either in the wife or in the husband.[85] But the separate property of the husband cannot be laid in the wife.[86]

d. Infants. Articles which a parent, in the discharge of his obligation as such, furnishes to a minor child who lives with him may be charged to be the property either of the parent or the child;[87] but property which the minor holds for purposes of pleasure and which the parent is not bound to furnish should be described as property of the minor.[88]

e. Joint Tenants and Tenants in Common. Where the injury is against the possession, ownership may be alleged to be in all or either of the persons owning property in common or jointly;[89] but in some cases where there is no actual occupation of the premises, the legal title must be stated accurately.[90] Where a joint ownership is averred, it is not supported by proof of sole ownership,[91] but since the property of joint owners may be properly described as that of any one of them proof of joint ownership of property described as that of an individual is not a variance.[92]

f. Partnerships. The property of a partnership may be laid in the name of the individual partners and proof of ownership by the partnership is not a variance,[93] provision being sometimes made by statute that it may be laid in an individual partner.[94] An averment that money embezzled was received for the account of an individual is not, however, supported by proof that it was received for a partnership, although the individual's name appears in the firm-name.[95]

g. Corporations. An averment of ownership in a corporation is supported by proof of a *de facto* corporate existence.[96] Where a sole stock-holder is in possession of the corporate property, it has been held that he may be averred to be the owner.[97]

h. Decedents' Estates. Property of an estate in the hands of an executor or administrator may be described as owned by him.[98] Under statutory provisions in some states the ownership of property of a decedent's estate may be properly

Davis, 9 Cush. (Mass.) 283. Absence of the husband from the state does not render it proper to describe the dwelling-house as that of the wife. State *v.* Martin, 7 N. C. 533.

85. McGee *v.* State, (Tex. Cr. App. 1898) 46 S. W. 930; Lucas *v.* State, 36 Tex. Cr. 397, 37 S. W. 427.

86. Lucas *v.* State, 36 Tex. Cr. 397, 37 S. W. 427.

87. State *v.* Trapp, 14 Rich. (S. C.) 203; State *v.* Williams, 2 Strobh. (S. C.) 229.

88. State *v.* Trapp, 14 Rich. (S. C.) 203 (dog); Collier *v.* State, 4 Tex. App. 12 (girl's riding horse).

89. People *v.* Horr, 7 Barb. (N. Y.) 9; Lucas *v.* State, 36 Tex. Cr. 397, 37 S. W. 427. But see Tanner *v.* State, (Tex. Cr. App. 1899) 50 S. W. 347, holding that an indictment charging an entry upon the inclosed land of an individual was not supported by proof showing a joint ownership between such person and another and that both parties attended to the land and managed it.

Under an agreement to share.— Where a person has possession of sheep of another under an agreement whereby he is to receive a share for the keeping thereof, until the share has been separated and ascertained the property may be properly laid in the original owner. West *v.* State, 6 Tex. App. 485.

90. People *v.* Horr, 7 Barb. (N. Y.) 9.

91. Territory *v.* Ortiz, 8 N. M. 220, 42 Pac. 61; State *v.* Hill, 79 N. C. 656. But see Rankin *v.* State, 42 Tex. Cr. 1, 56 S. W. 929, holding that where the indictment against two defendants charged ownership of certain premises in them jointly, and it was dismissed as to one of them, the fact that it appeared on the trial that appellant was the sole owner did not constitute a fatal variance.

92. Wash *v.* State, 14 Sm. & M. (Miss.) 120.

93. Com. *v.* O'Brien, 12 Allen (Mass.) 183. And see Williams *v.* State, 34 Tex. Cr. 523, 31 S. W. 405.

94. See Wantland *v.* State, 145 Ind. 38, 43 N. E. 931; Van Horn *v.* State, 5 Wyo. 501, 40 Pac. 964, holding that in an information for destroying a building upon a mining claim owned by four persons, it was sufficient to allege ownership in two.

95. Polkinghorne *v.* State, (Miss. 1890) 7 So. 347, so holding where there was no evidence that the individual was a member of the firm.

96. People *v.* Leonard, 106 Cal. 302, 39 Pac. 617; People *v.* Barric, 49 Cal. 342; People *v.* Ah Sam, 41 Cal. 645; People *v.* Hughes, 29 Cal. 257; People *v.* Frank, 28 Cal. 507.

Necessity of proof of corporate existence see *supra*, XI, A, 5, text and note 17.

Sufficiency of proof of existence see CORPORATIONS, 10 Cyc. 242.

97. Castleberry *v.* State, 62 Ga. 442.

98. Cole *v.* Com., 5 Gratt. (Va.) 696.

laid as in executor, administrator, heir, or other person having the charge and control thereof.[99]

10. Description of Written or Printed Matter. A variance between the pleading and proof of a writing necessarily to be described in the indictment is fatal.[1] Where the indictment attempts to set forth an instrument or writing according to its tenor, the evidence must conform to the instrument set out, although the description is unnecessarily particular.[2] A mere literal variance, however, is not fatal.[3] It is generally sufficient to describe a paper according to its legal effect;[4] but where an instrument is described according to its legal effect the description must be proved.[5] Where only the substance and effect is set out in the indictment proof to such extent is sufficient,[6] but the substance and effect must be established.[7] Under the statutes relaxing the common-law strictness of pleading, however, an immaterial variance is usually regarded as harmless.[8] There is no variance where an instrument offered in evidence corresponds to the description pleaded, although other details are shown which are not pleaded.[9] A variance

99. Dreyer *v.* State, 11 Tex. App. 503. And see Com. *v.* McGorty, 114 Mass. 299, widow.

1. U. S. *v.* Denicke, 35 Fed. 407, so holding where it was alleged that a letter embezzled from the mails was directed to "The Travellers' Ins. Co." and the proof showed that it was directed to "the Traders' Ins. Co."

Sufficiency of description see *supra*, V, K.

In particular offenses see Counterfeiting, 11 Cyc. 317; Forgery, 19 Cyc. 1400; Libel and Slander; and other special titles.

The description of a note must be proved as averred. People *v.* Reed, 70 Cal. 529, 11 Pac. 676 (holding that there was a fatal variance between an averment of an individual note and proof of a joint note); Wallace *v.* State, 11 Lea (Tenn.) 542 (holding that there was a fatal variance between an allegation that a note was executed to S and proved that it was executed to another and assigned to S).

2. State *v.* Owen, 73 Mo. 440; Baker *v.* State, 14 Tex. App. 332; U. S. *v.* Mason, 26 Fed. Cas. No. 15,736, 12 Blatchf. 497.

3. *Alabama.*— Barnett *v.* State, 54 Ala. 579, "cents" for "cts."

Arkansas.— Pruitt *v.* State, (1889) 11 S. W. 822, one hundred and seventy-three dollars and seventy-five cents for one hundred and seventy-three seventy-five one hundredths and failure to state that the word "paid" appeared on the face of the draft.

Missouri.— State *v.* Estis, 70 Mo. 427, "unde fales pretens" in warrant for "under false pretenses" in description of warrant in indictment for resisting arrest.

Texas.— McArthur *v.* State, 41 Tex. Cr. 635, 57 S. W. 847; Leonard *v.* State, 7 Tex. App. 417, holding that warehouse receipts to the "1st Nat. Bank" supported an allegation that the property belonged to the "First National Bank," especially where witnesses testified that such was the meaning of the abbreviated words in the receipt.

United States.— U. S. *v.* Mason, 26 Fed. Cas. No. 15,736, 12 Blatchf. 497.

See 27 Cent. Dig. tit. "Indictment and Information," § 573.

Definition.— A variance is literal when it does not make a word different in sense and grammar, but leaves the sound and sense in substance the same. U. S. *v.* Mason, 26 Fed. Cas. No. 15,736, 12 Blatchf. 497.

4. U. S. *v.* Keen, 26 Fed. Cas. No. 15,510, 1 McLean 429.

A name, however, cannot be stated according to its legal effect. U. S. *v.* Keen, 26 Fed. Cas. No. 15,510, 1 McLean 429.

5. Oliver *v.* State, 37 Ala. 134 (holding that a conveyance amounting to a mortgage of a crop was sufficiently described as a "deed of trust"); Prehm *v.* State, 22 Nebr. 673, 36 N. W. 295 (allegation of "drafts" not supported by evidence of an instrument payable in goods of a certain kind at a certain place and by the maker); State *v.* Farrand, 8 N. J. L. 333; U. S. *v.* Keen, 26 Fed. Cas. No. 15,510, 1 McLean 429.

6. Nixon *v.* State, 55 Ala. 120 (mortgage); State *v.* Caffey, 6 N. C. 320; State *v.* Thompson, 28 Oreg. 296, 42 Pac. 1002.

7. Honeycut *v.* State, 23 Tex. App. 71, 3 S. W. 716 (mortgage of a crop of cotton not admissible under an indictment charging the sale of four bales of cotton upon which a mortgage had been executed); Com. *v.* Hickman, 2 Va. Cas. 323.

8. People *v.* Tonielli, 81 Cal. 275, 22 Pac. 678; Thomas *v.* State, 103 Ind. 419, 2 N. E. 808; Com. *v.* Warner, 173 Mass. 541, 54 N. E. 353 (holding that under such statutes a variance between the specifications in an indictment for embezzlement and the checks offered in evidence was not material); Webster *v.* People, 92 N. Y. 422.

Constitutionality of statute.— A statute providing that any variance in the proof of written or printed matter shall be immaterial where the identity of the instrument and its purpose is evident and sufficiently described does not conflict with a constitutional provision requiring the offense to be fully, plainly, and formally described. Com. *v.* Hall, 97 Mass. 570.

9. Com. *v.* Tracy, 5 Metc. (Mass.) 536, description of warrant for arrest.

Matter, not part of the instrument, such as revenue stamps, need not be described. Giles *v.* State, (Tex. Cr. App. 1900) 57 S. W. 99.

between a signature as described and that borne by an instrument offered in evidence is a question of fact, where from the handwriting the exact name is difficult of determination.[10]

11. Matters Alleged to Be Unknown to Grand Jury. As has been seen, matters which are not within the knowledge of the grand jury may be charged as unknown to them in the indictment.[11] Of this nature are the names of persons injured and of others whose existence is essential to the charge;[12] and matters of description of property affected by the offense.[13] Where, however, it appears upon the trial that the fact or name was known, a variance arises and a conviction cannot be had upon the charge.[14] The better rule would appear to be that, to create a variance, the fact of knowledge must affirmatively appear from the evidence;[15] but in some jurisdictions the rule is stated to be that a variance results where it becomes apparent from the evidence that matters alleged as unknown might have been discovered by the exercise of ordinary diligence,[16] although these cases would seem

10. People *v.* Oubridge, (Cal. 1899) 56 Pac. 442.

11. See *supra*, V, E, 10.

12. See *supra*, V, E, 10.

13. See *supra*, V, E, 10.

14. *Alabama.*— James *v.* State, 115 Ala. 83, 22 So. 565 (description of stolen property); Winter *v.* State, 90 Ala. 637, 8 So. 556 (christian name of accused).

Colorado.— Sault *v.* People, 3 Colo. App. 502, 34 Pac. 263, person from whom stolen property was received.

Kentucky.— Yost *v.* Com., 5 Ky. L. Rep. 935, purchaser of intoxicating liquor.

Massachusetts.— Com. *v.* Sherman, 13 Allen 248 (purchaser of intoxicating liquor); Com. *v.* Stoddard, 9 Allen 280.

Missouri.— State *v.* Wiseback, 139 Mo. 214, 40 S. W. 946, ownership of stolen goods.

New York.— White *v.* People, 32 N. Y. 465 [*affirming* 55 Barb. 606].

United States.— U. S. *v.* Scott, 74 Fed. 213; U. S. *v.* Riley, 74 Fed. 210, person from whom political contributions were solicited.

England.— Rex *v.* Walker, 3 Campb. 264; Reg. *v.* Stroud, 1 C. & K. 187, 2 Moody C. C. 270, 47 E. C. L. 187; Reg. *v.* Campbell, 1 C. & K. 82, 47 E. C. L. 82; Rex *v.* Robinson, Holt N. P. 595, 3 E. C. L. 233; Rex *v.* Deakin, 2 East P. C. 653, 2 Leach C. C. 862. But *compare* Rex *v.* Bush, R. & R. 276, holding that a conviction would be sustained where it was alleged that goods were received which were stolen by certain persons unknown, although it was proved that the same grand jury had indicted a person named for the principal offense.

See 27 Cent. Dig. tit. "Indictment and Information," § 574.

Where the indictment contains two counts, one of which charges the ownership of property stolen as unknown, and the other of which states the name of the alleged owner, evidence showing that the name of the owner was known will prevent a conviction upon the first count and the trial court should confine the charge to the second count. Boren *v.* State, 23 Tex. App. 28, 4 S. W. 463.

Sufficiency of showing of knowledge.— Where money is described as "thirty-five dollars lawful money of the United States," a more particular description of which is unknown, evidence that there were three ten dollar bills and five dollars in silver does not show that a more particular description could have been given. State *v.* Ready, 44 Kan. 697, 700, 26 Pac. 58.

Indictments subsequently found against other persons, in which the matters alleged to be unknown are stated, are not conclusive upon the question of knowledge of the grand jury at the time of finding the first indictment. Com. *v.* Hill, 11 Cush. (Mass.) 137.

Admissibility of evidence.— Where an indictment charges the murder of a woman whose christian and surname is unknown and whom the grand jurors described as Bessie R, alias Bessie M, alias Diamond Bessie, it is proper to exclude the evidence of the foreman of the grand jury, offered for the purpose of showing a variance, that prior to the homicide he saw a woman whom he was told was Diamond Bessie, and afterward heard that she was killed. Rothschild *v.* State, 7 Tex. App. 519.

15. Terry *v.* State, 118 Ala. 79, 23 So. 776; Wells *v.* State, 88 Ala. 239, 7 So. 272; Duvall *v.* State, 63 Ala. 12; Com. *v.* Noble, 165 Mass. 13, 42 N. E. 328; People *v.* Fleming, 14 N. Y. Suppl. 200; People *v.* Noakes, 5 Park. Cr. (N. Y.) 291; State *v.* Carey, 15 Wash. 549, 46 Pac. 1050. *Compare* Cheek *v.* State, 38 Ala. 227, which intimates that if names alleged to be unknown might have been ascertained by due diligence an acquittal would be necessary.

Production of evidence before grand jury.— On motion to dismiss an indictment on the ground of variance with the evidence before the grand jury, such evidence must be produced. Com. *v.* Noble, 165 Mass. 13, 42 N. E. 328.

16. Blodget *v.* State, 3 Ind. 403; Oxier *v.* U. S., 1 Indian Terr. 85, 38 S. W. 331; State *v.* Thompson, 137 Mo. 620, 39 S. W. 83; State *v.* Stowe, 132 Mo. 199, 33 S. W. 799; McCloy *v.* State, (Tex. Cr. App. 1904) 80 S. W. 524; Davis *v.* State, 32 Tex. Cr. 377, 23 S. W. 794; Presley *v.* State, 24 Tex. App. 494, 6 S. W. 540; Jorasco *v.* State, 6 Tex. App. 238.

Knowledge as to a portion of the articles charged as unknown will not defeat a conviction where the articles, as to which there

to be properly placed upon the ground of lack of diligence or carelessness in making the accusation and not upon variance between the allegation and proof.[17] The fact that it appears that knowledge exists at the time of trial will not of itself establish a variance;[18] but in such case it has been said that affirmative proof must be offered that the fact was unknown to the grand jury.[19] Where the matter alleged to have been unknown was not essential to the sufficiency of the indictment, proof of knowledge will be immaterial.[20]

12. Disposition of Case on Establishment of Variance. Upon acquittal because of variance, the prisoner may be remanded to await a new indictment.[21] Under the statutes in some states where the variance appears from the evidence, it is within the power of the trial court to take the case from the jury and hold defendant to answer a new indictment.[22]

XII. CONVICTION OF OFFENSES INCLUDED IN CHARGE.

A. General Rules. The general rule at common law was that when an indictment charged an offense which included within it another less offense or one of a lower degree, defendant, although acquitted of the higher offense, might be convicted of the less.[23] This common-law rule is not abrogated, although the minor included offenses are by statute triable without a jury,[24] or although the minor offense is not triable on indictment.[25] On an indictment for a major offense, the state may abandon aggravating circumstances and proceed for a minor degree or included offense.[26]

was no knowledge, would, if charged alone, have been sufficient to support conviction. Davis *v.* State, 32 Tex. Cr. 377, 23 S. W. 794.

17. Com. *v.* Sherman, 13 Allen (Mass.) 248.

18. Com. *v.* Hendrie, 2 Gray (Mass.) 503; State *v.* Bryant, 14 Mo. 340; Hays *v.* State, 13 Mo. 246; Isbell *v.* State, 13 Mo. 86; White *v.* People, 32 N. Y. 465 [*affirming* 55 Barb. 606].

19. Oxier *v.* U. S., 1 Indian Terr. 85, 38 S. W. 331.

20. State *v.* Ladd, 15 Mo. 430; People *v.* Mather, 4 Wend. (N. Y.) 229, 21 Am. Dec. 122.

Where a sufficient description has been given, as in the case of money, an averment that a more particular description is unknown need not be established. Crawford *v.* State, 155 Ind. 692, 57 N. E. 931; Com. *v.* Gallagher, 126 Mass. 54; Com. *v.* Green, 122 Mass. 333; Wilson *v.* State, (Tex. Cr. App. 1903) 72 S. W. 862.

21. U. S. *v.* Smith, 27 Fed. Cas. No. 16,326, 2 Cranch C. C. 111.

Former jeopardy as defense to trial on new indictment see Criminal Law, 12 Cyc. 266.

22. See McClellan *v.* State, 121 Ala. 18, 25 So. 725.

Where defendant consents to an amendment, he cannot claim that he was entitled to an acquittal, although the judgment entry recites that he refused to consent until after the court had ordered a dismissal of the prosecution; since the entry will be construed to mean, not that there was a dismissal but that he refused to consent to an amendment until after the court had intimated an intention to allow a dismissal with a view to another indictment being found. Reynolds *v.* State, 92 Ala. 44, 9 So. 398.

Order.— Under such a statute the record must show that the case was taken from the jury on the ground of variance and the variance should be set out. McClellan *v.* State, 121 Ala. 18, 25 So. 725, holding that a statement that "the goods stolen does not agree with the indictment, and defendant refusing to allow the indictment to be amended, the case is dismissed," etc., was an insufficient order.

23. Watson *v.* State, 116 Ga. 607, 43 S. E. 32; Johnson *v.* State, 14 Ga. 55; Stapp *v.* State, 3 Tex. App. 138.

24. State *v.* Fruge, 106 La. 694, 31 So. 323, holding that such a provision applies only in a direct prosecution.

25. State *v.* Jarvis, 21 Iowa 44; Guy *v.* State, 1 Kan. 448.

26. State *v.* Evans, 40 La. Ann. 216, 3 So. 838; People *v.* Stein, 80 N. Y. App. Div. 357, 80 N. Y. Suppl. 847.

On an indictment drawn for murder in the first degree, the state may elect at the trial to seek a conviction for the second degree only. State *v.* Baldwin, 79 Iowa 714, 45 N. W. 297; State *v.* Moxley, 115 Mo. 644, 22 S. W. 575; State *v.* Talmadge, 107 Mo. 543, 17 S. W. 990.

On a second trial.— Where an information contains only a single count, charging murder, and on a previous trial the court directed an acquittal on the charge of murder, and on the second trial the prosecution withdraws the charge of murder, defendant may be tried for manslaughter under the same information. People *v.* McArron, 121 Mich. 1, 79 N. W. 944.

Nolle prosequi as to part of charge see, generally, Criminal Law, 12 Cyc. 376.

Conviction of lower degree as ground for reversal see Criminal Law, 12 Cyc. 934.

B. Conviction of Misdemeanor on Charge of Felony. At common law, however, there could be no conviction of a misdemeanor upon an indictment for felony, although the elements of the misdemeanor were included in the felony charged,[27] the reason for the rule being that upon a trial for misdemeanor defendant had certain advantages such as the right to appear by counsel, to have a copy of the indictment and to a special jury, which were denied him upon a trial for felony.[28] But in the United States, since the accused has the same rights upon the trial of offenses of either character, the common-law rule has not been generally recognized, there being no reason for its application,[29] it having been abolished by statute in many of the states,[30] and indeed also in England.[31] By some of the earlier statutes, however, the doctrine of merger was recognized even in the United States.[32]

C. Statutory Provisions. By statutes, variously worded in the various states, it is commonly provided that upon an indictment charging defendant with an offense consisting of several degrees, there may be a conviction of the minor degree upon a charge of a greater,[33] or that there may be a conviction for an offense necessarily included in the graver charge.[34] In case the statement of the graver offense in the indictment is sufficient to inform accused also of the essentials of the less charge, such statutes do not infringe the constitutional right of the accused to be informed of the nature and cause of the accusation;[35] or to the presentment and indictment of a grand jury.[36] Such statutes extend to offenses made punishable after their enactment.[37] Statutes authorizing a conviction of a less degree do not authorize a conviction as accessary under an indictment as principal.[38]

D. Sufficiency of Allegations — 1. Necessity of Sufficient Charge of Minor Offense. While it is not necessary to make a specific charge of all the offenses

27. Watson *v.* State, 116 Ga. 607, 43 S. E. 32; Com. *v.* Macomber, 3 Mass. 254; Stapp *v.* State, 3 Tex. App. 138. See, generally, Criminal Law, 12 Cyc. 133.

28. Watson *v.* State, 116 Ga. 607, 43 S. E. 32; Stapp *v.* State, 3 Tex. App. 138.

29. *Arkansas.*— State *v.* Nichols, 38 Ark. 550; Cameron *v.* State, 13 Ark. 712.

Georgia.— Watson *v.* State, 116 Ga. 607, 43 S. E. 32.

Massachusetts.— Com. *v.* Squire, 1 Metc. 258.

Michigan.— Hanna *v.* People, 19 Mich. 316.

New York.— People *v.* Jackson, 3 Hill 92, holding that under an indictment for procuring an abortion of a quick child, which is a felony by statute, the prisoner may be convicted of a misdemeanor, if the child was not quick.

Texas.— Stapp *v.* State, 3 Tex. App. 138.

The American rule may be properly said to be, without qualification, that in a court having general jurisdiction over both felonies and misdemeanors a defendant may be convicted under an indictment of any crime established by the evidence, if it is included in the crime charged and embraced within the terms of the indictment, although it is but a misdemeanor. Watson *v.* State, 116 Ga. 607, 43 S. E. 32.

30. See Com. *v.* Drum, 19 Pick. (Mass.) 479; Hall *v.* State, 7 Lea (Tenn.) 685. See also Criminal Law, 12 Cyc. 134 note 26.

31. St. 1 Vict. c. 85, § 11.

32. See Com. *v.* Roby, 12 Pick. (Mass.) 496; Com. *v.* Newell, 7 Mass. 245.

33. *Kentucky.*— Com. *v.* Garland, 3 Metc. 478.

Michigan.— Hanna *v.* People, 19 Mich. 316.

Minnesota.— State *v.* Lessing, 16 Minn. 75.

Nebraska.— Russell *v.* State, 66 Nebr. 497, 92 N. W. 751.

New York.— Dedieu *v.* People, 22 N. Y. 178; People *v.* Taylor, 3 N. Y. Cr. 297.

34. Benham *v.* State, 1 Iowa 542; Green *v.* State, 8 Tex. App. 71 (holding that under a statute providing that one unintentionally inflicting death may be prosecuted for and convicted of any grade of assault and battery does not require that there first be an acquittal for the homicide and afterward a prosecution for some grade of assault and battery); U. S. *v.* Carr, 25 Fed. Cas. No. 14,732, 1 Woods 480.

35. *Louisiana.*— State *v.* Moore, 8 Rob. 518.

Massachusetts.— Com. *v.* Lang, 10 Gray 11.

Mississippi.— Washington *v.* State, 76 Miss. 270, 24 So. 309.

Missouri.— State *v.* Burk, 89 Mo. 635, 2 S. W. 10.

Ohio.— Donaldson *v.* State, 10 Ohio Cir. Ct. 613, 5 Ohio Cir. Dec. 98; State *v.* Noble, 1 Ohio Dec. (Reprint) 1, 1 West. L. J. 23.

See 27 Cent. Dig. tit. "Indictment and Information," § 576.

36. Didieu *v.* People, 4 Park. Cr. (N. Y.) 593; Davis *v.* State, 20 Tex. App. 302.

37. Mulloy *v.* State, 58 Nebr. 204, 78 N. W. 525.

38. State *v.* Green, 119 N. C. 899, 26 S. E. 112.

included in the charge for which the indictment is drawn,[39] a conviction cannot be had of a crime as included in the offense specifically charged unless the indictment in describing the major offense contains all the essential averments of the less, or the greater offense necessarily includes all the essential ingredients of the less.[40] Otherwise there must be an added count.[41] So upon an indictment charging burglary and larceny, the larceny must be well laid in order to support a conviction for larceny.[42] Where it is essential that the minor offense be charged to have been done "unlawfully" or in any other particular manner, such manner may be gathered from the entire indictment.[43]

2. Effect of Insufficiency of Charge of Higher Offense. It would seem upon principle that where an indictment contains a sufficient charge of a minor offense, a conviction therefor may be sustained, although the indictment is insufficient to charge the greater offense.[44] There are holdings, however, that the less charge must fall with the greater.[45]

3. Conviction of Highest Degree When Degree Is Not Specified. An indictment which does not specify the degree will sustain a verdict for the highest degree of an offense divided by statute into degrees, when it contains the essentials of a charge of such degree.[46]

E. Conviction of Lower Degree — 1. In General. In the case of an offense divided into degrees, defendant may, on an indictment framed for the higher degree, be convicted of the lower degree and acquitted of the higher,[47] a provision to such effect being frequently made by statute.[48] Where the act for which defendant is indicted is the same as that for which he is convicted, a conviction may be had for the lower degree, although the particular intent or circumstances characterizing the lower degree are not stated.[49] But where criminal acts of

39. State *v.* Will, 49 La. Ann. 1337, 22 So. 378.

40. *Arkansas.*— Bryant *v.* State, 41 Ark. 359; Childs *v.* State, 15 Ark. 204.

California.— People *v.* Arnett, 126 Cal. 680, 59 Pac. 204; People *v.* Murat, 45 Cal. 281.

Georgia.— Watson *v.* State, 116 Ga. 607, 43 S. E. 32; Goldin *v.* State, 104 Ga. 549, 30 S. E. 749.

Iowa.— State *v.* Miller, 124 Iowa 429, 100 N. W. 334; State *v.* Desmond, 109 Iowa 72, 80 N. W. 214; State *v.* McAvoy, 73 Iowa 557, 35 N. W. 630.

Louisiana.— State *v.* Porter, 48 La. Ann. 1539, 21 So. 125.

Michigan.— People *v.* Adams, 52 Mich. 24, 17 N. W. 226.

Missouri.— State *v.* Shoemaker, 7 Mo. 177.

Nebraska.— Alyea *v.* State, 62 Nebr. 143, 86 N. W. 1066.

New Jersey.— State *v.* Thomas, 65 N. J. L. 598, 48 Atl. 1007.

North Dakota.— State *v.* Johnson, 3 N. D. 150, 54 N. W. 547.

Texas.— Foreman *v.* State, (Cr. App. 1900) 57 S. W. 843.

England.— Reg. *v.* Miller, 14 Cox. C. C. 356.

See 27 Cent. Dig. tit. "Indictment and Information," § 381.

41. Scott *v.* State, 60 Miss. 268.

42. State *v.* McClung, 35 W. Va. 280, 13 S. E. 354.

43. Bard *v.* State, 55 Ga. 319.

44. Com. *v.* Hathaway, 14 Gray (Mass.) 392 (conviction for simple larceny on indictment insufficient to charge larceny in a building); Com. *v.* Kirby, 2 Cush. (Mass.) 577 (conviction of simple assault on indictment for assault and obstruction of officer); Lobman *v.* People, 1 N. Y. 379, 49 Am. Dec. 340 (conviction of misdemeanor on an insufficient charge of felony); State *v.* Archer, 34 Tex. 646 (simple assault on an indictment for assault with intent to murder); State *v.* Howes, 26 W. Va. 110 (conviction of assault under indictment for robbery which fails to allege a forcible taking).

45. Clary *v.* State, 33 Ark. 561 (holding that a bad indictment for robbery will not sustain a conviction for larceny); Territory *v.* Dooley, 4 Mont. 295, 1 Pac. 747. And see State *v.* Porter, 48 La. Ann. 1539, 21 So. 125; Reg. *v.* Magee, 7 N. Brunsw. 14.

46. People *v.* Barnhart, 59 Cal. 381, burglary.

A common-law indictment for murder is in most states sufficient to support a conviction of murder in the first degree under the statute. Davis *v.* State, 39 Md. 355; Com. *v.* Desmarteau, 16 Gray (Mass.) 1; Sneed *v.* People, 38 Mich. 248; Wall *v.* State, 18 Tex. 682, 70 Am. Dec. 302; White *v.* State, 16 Tex. 206; Gehrke *v.* State, 13 Tex. 568. See Homicide, 21 Cyc. 646.

Statutory form of indictment for murder will support a conviction of murder in the first degree. People *v.* De la Cour Soto, 63 Cal. 165; State *v.* Millain, 3 Nev. 409; State *v.* Douglass, 41 W. Va. 537, 23 S. E. 724. See Homicide, 21 Cyc. 646.

47. Long *v.* State, 42 Fla. 509, 28 So. 775; Swinney *v.* State, 8 Sm. & M. (Miss.) 576. See also cases cited *infra*, this section.

48. See *supra*, XII, C.

49. State *v.* Lessing, 16 Minn. 75; State *v.* Dumphey, 4 Minn. 438.

widely different characteristics are arranged together under a statute as degrees of an offense of the same name, a conviction cannot be had upon an indictment for a higher degree unless the indictment of the higher degree charges all the circumstances of the lower degree and additional allegations charging the higher degree, in which case the additional allegations may be rejected as surplusage.[50]

2. ARSON. Where an indictment for arson in the first degree includes the circumstances of minor degrees, there may be a conviction for such degrees.[51]

3. BURGLARY. On a charge of burglary in the first degree, a conviction may be had for burglary in the second degree.[52]

4. COUNTERFEITING. When a different punishment is attached to the possession with intent to utter of counterfeit money according to the amount in defendant's possession, there may be a conviction for the possession of a less amount on a charge of a greater.[53]

5. HOMICIDE. Since an indictment for murder includes all the lower grades of felonious homicide,[54] under a common-law form of indictment, a conviction may be had for either of the degrees of murder as defined by statute or of the lower grades of homicide.[55] So upon an indictment charging murder generally a defendant may be found guilty of manslaughter,[56] and, where manslaughter has been divided by statute into degrees, of any of the statutory degrees.[57] It is also held that there may be a conviction for involuntary manslaughter,[58] or negligent

50. Dedieu *v.* People, 22 N. Y. 178 [*reversing* 4 Park. Cr. 593 (*affirming* 17 How. Pr. 224)]; Hennessey *v.* People, 21 How. Pr. (N. Y.) 239 (both holding that an indictment charging arson in the first degree, in the setting fire to a dwelling-house in which were human beings, would not support a conviction of the third degree which consists of the burning of chattels insured against loss or damage by fire with intent to prejudice the insurer); Morrisett *v.* People, 21 How. Pr. (N. Y.) 203 (indictment for murder committed feloniously by casting the deceased into a building which had been feloniously set on fire by the accused). Where the difference between degrees in arson consists in whether the building was occupied or not, there may be a conviction of the lower degree. Hennessey *v.* People, *supra*.

51. Hennessey *v.* People, 21 How. Pr. (N. Y.) 239; Freund *v.* People, 5 Park. Cr. (N. Y.) 198. But *compare* cases cited *supra*, note 50.

52. State *v.* Fleming, 107 N. C. 905, 12 S. E. 131. *Contra*, State *v.* Alexander, 56 Mo. 131, holding that where the proof showed that the burglary was committed in the manner constituting burglary in the first degree, there can be no conviction of burglary in the second degree, which under the statute must be committed in a distinct manner.

53. Com. *v.* Griffin, 21 Pick. (Mass.) 523.

54. Wright *v.* State, 35 Ark. 639; McPherson *v.* State, 29 Ark. 225.

55. Davis *v.* State, 39 Md. 355; Tenorio *v.* Territory, 1 N. M. 279; Livingston *v.* Com., 14 Gratt. (Va.) 592.

Language of statute may have been followed. People *v.* De la Cour Soto, 63 Cal. 165.

Second degree.— Weighorst *v.* State, 7 Md. 442; People *v.* Doe, 1 Mich. 451; Keefe *v.* People, 40 N. Y. 348, 7 Abb. Pr. N. S. (N. Y.) 76.

After conviction of second degree the accused may on a subsequent trial be convicted of murder in the second degree, or any lower grade of homicide. State *v.* Belden, 33 Wis. 120, 14 Am. Rep. 748.

Where the court has no jurisdiction of the lesser offense the rule does not apply. Nelson *v.* State, 10 Humphr. (Tenn.) 518.

Conviction of higher degree on new trial see CRIMINAL LAW, 12 Cyc. 284.

56. *Alabama.*— Smith *v.* State, 103 Ala. 4, 15 So. 843; Boulden *v.* State, 102 Ala. 78, 15 So. 341; Jackson *v.* State, 77 Ala. 18; Henry *v.* State, 33 Ala. 389 [*overruling* Bob *v.* State, 29 Ala. 20].

Arkansas.— McPherson *v.* State, 29 Ark. 225.

Georgia.— Reynolds *v.* State, 1 Ga. 222.

Idaho.— State *v.* Alcorn, 7 Ida. 599, 64 Pac. 1014, 97 Am. St. Rep. 252.

Kansas.— Roy *v.* State, 2 Kan. 405.

Mississippi.— King *v.* State, 5 How. 730.

New York.— People *v.* McDonnell, 92 N. Y. 657.

Oklahoma.— Smith *v.* Territory, 14 Okla. 162, 77 Pac. 187.

South Carolina.— State *v.* Gaffney, Rice 431.

United States.— U. S. *v.* Meagher, 37 Fed. 875; U. S. *v.* Leonard, 2 Fed. 669, 18 Blatchf. 187.

See 27 Cent. Dig. tit. "Indictment and Information," § 593.

On charge of murder in producing abortion. — Howard *v.* People, 185 Ill. 552, 57 N. E. 441; Earll *v.* People, 73 Ill. 329.

57. People *v.* McDonnell, 1 N. Y. Cr. 366; People *v.* Butler, 3 Park. Cr. (N. Y.) 377; Burns *v.* People, 1 Park. Cr. (N. Y.) 182.

Second degree.— Linnehan *v.* State, 120 Ala. 293, 25 So. 6; Brown *v.* State, 31 Fla. 207, 12 So. 640.

Third degree.— Roy *v.* State, 2 Kan. 405.

58. Isham *v.* State, 38 Ala. 213; People *v.* Pearne, 118 Cal. 154, 50 Pac. 376; Powers *v.* State, 87 Ind. 144; State *v.* Griffin, 34 La.

homicide.[59] In case an indictment is drawn under a statute for murder in the first degree, a conviction may be had of a less degree or for manslaughter,[60] since murder in the first degree, properly charged, includes every grade of homicide.[61] So where the indictment is for the second degree, a conviction of manslaughter may be had.[62] Although there is evidence tending to show a conspiracy to kill, if defendant is also shown to have been present aiding and abetting, he may be convicted of murder in the second degree under an indictment for murder in the first degree.[63]

6. LARCENY. Under a charge of grand larceny, a conviction of petit larceny may be had,[64] or, when larceny has been divided into degrees by statute, of any of the less degrees.[65]

7. ROBBERY. When an indictment for robbery in the first degree does not contain the elements of a charge of the other degrees, there can be no conviction therefor.[66]

F. Conviction of Attempt or Assault With Intent to Commit Upon Charge of Completed Offense — 1. IN GENERAL. By statute, it is commonly provided that upon an indictment charging the commission of an offense, if it appears that defendant was guilty only of an attempt to commit the offense, he may be acquitted of the offense charged and convicted of the attempt;[67] or such

Ann. 37. *Contra,* Walters *v.* Com., 44 Pa. St. 135; Com. *v.* Hiland, 1 Pa. Co. Ct. 532; Com. *v.* Bilderback, 2 Pars. Eq. Cas. 447. And see Bob *v.* State, 29 Ala. 20 [*overruled* in Henry *v.* State, 33 Ala. 389].

59. Bradshaw *v.* State, (Tex. Cr. App. 1899) 50 S. W. 359.

60. *California.*— People *v.* Dolan, 9 Cal. 576.

Delaware.— State *v.* Brinte, 4 Pennew. 551, 58 Atl. 258; State *v.* Buchanan, Houst. Cr. Cas. 79.

Florida.— Green *v.* State, 43 Fla. 556, 30 So. 656; Lewis *v.* State, 42 Fla. 253, 28 So. 397; Morrison *v.* State, 42 Fla. 149, 28 So. 97; McCoy *v.* State, 40 Fla. 494, 24 So. 485.

Kansas.— State *v.* Huber, 8 Kan. 447; Craft *v.* State, 3 Kan. 450.

New York.— People *v.* McDonnell, 92 N. Y. 657.

Oregon.— State *v.* Grant, 7 Oreg. 414.

West Virginia.— State *v.* Douglass, 41 W. Va. 537, 23 S. E. 724.

See 27 Cent. Dig. tit. "Indictment and Information," § 593.

Second degree.— Potsdamer *v.* State, 17 Fla. 895; Territory *v.* McGinnis, 10 N. M. 269, 61 Pac. 208; Riptoe *v.* State, (Tex. Cr. App. 1897) 42 S. W. 381; Giskie *v.* State, 71 Wis. 612, 38 N. W. 334. Although murder by poison is, by the statute, murder in the first degree, a verdict of guilty of murder in the second degree is responsive to an indictment charging murder by poison. Allen *v.* State, 37 Ark. 433; State *v.* Dowd, 19 Conn. 388; State *v.* Greer, 11 Wash. 244, 39 Pac. 874. *Contra,* State *v.* Bertoch, 112 Iowa 195, 83 N. W. 967.

Manslaughter.— *Indiana.*— Pigg *v.* State, 145 Ind. 560, 43 N. E. 309; Barnett *v.* State, 100 Ind. 171; Powers *v.* State, 87 Ind. 144.

Iowa.— Gordon *v.* State, 3 Iowa 410.

Missouri.— State *v.* Ludwig, 70 Mo. 412; State *v.* Sloan, 47 Mo. 604; Plummer *v.* State, 6 Mo. 231; Watson *v.* State, 5 Mo. 497.

New Mexico.— U. S. *v.* Densmore, (1904) 75 Pac. 31.

Washington.— White *v.* Territory, 3 Wash. Terr. 397, 19 Pac. 37.

See 27 Cent. Dig. tit. "Indictment and Information," § 593.

61. Potsdamer *v.* State, 17 Fla. 895.

62. Birch *v.* State, 1 Ohio Dec. (Reprint) 453, 10 West. L. J. 82.

63. State *v.* Robinson, 12 Wash. 491, 41 Pac. 884.

64. *Alabama.*— Storrs *v.* State, 129 Ala. 101, 29 So. 778 (holding that there might be a conviction of petit larceny on a charge of grand larceny from a dwelling-house under a statute providing that such larceny should be either grand or petit according to the value of the personal property stolen); Bolling *v.* State, 98 Ala. 80, 12 So. 782.

California.— People *v.* McElroy, 116 Cal. 583, 48 Pac. 718.

Indiana.— State *v.* Murphy, 8 Blackf. 498.

Massachusetts.— See Com. *v.* Griffin, 21 Pick. 523.

Michigan.— People *v.* Jacks, 76 Mich. 218, 42 N. W. 1134.

New York.— People *v.* McTameney, 30 Hun 505, 13 Abb. N. Cas. 55, 66 How. Pr. 70.

South Carolina.— State *v.* Wood, 1 Mill 29.

See 27 Cent. Dig. tit. "Indictment and Information," § 594.

65. People *v.* McCallam, 103 N. Y. 587, 9 N. E. 502.

66. State *v.* Farrar, 38 Mo. 457; State *v.* Davidson, 38 Mo. 374; State *v.* Jenkins, 36 Mo. 372.

67. *Georgia.*— Brownlow *v.* State, 112 Ga. 405, 37 S. E. 733; Hill *v.* State, 53 Ga. 125; Stephen *v.* State, 11 Ga. 225.

Kansas.— State *v.* Franklin, 69 Kan. 798, 77 Pac. 588.

Tennessee.— Lang *v.* State, 16 Lea 433, 1 S. W. 318.

West Virginia.— State *v.* Meadows, 18 W. Va. 658.

England.— Reg. *v.* Hapgood, L. R. 1 C. C.

a conviction is regarded as justified by a statute permitting defendant to be found guilty of any offense necessarily included in the charge.[68] The effect of such statutes is not altered by the fact that a specific punishment is provided for an attempt to commit any offense prohibited by law.[69] Under these statutes there may be a conviction of an attempt to commit an included offense,[70] but there can be no conviction where the attempt does not constitute a punishable offense.[71] If an indictment is insufficient to charge a crime, there can be no conviction of an attempt to commit such crime.[72] And where the evidence shows a completed offense of a lower degree than that charged, there can be no conviction of an attempt to commit the higher degree.[73]

2. Abortion. A charge of abortion will support a conviction for attempt[74] if such an attempt is an offense, but not otherwise.[75]

3. Arson. On an indictment for arson, there may be a conviction of an attempt.[76]

4. Homicide.[77] Upon an indictment for murder, it has been held that there may be a conviction of assault with intent to kill, although no assault is specifically charged in the indictment;[78] but the better rule is apparently that to support such a conviction the circumstances must be so charged in the indictment as to indicate the fact of an assault and to allow proof to be introduced in support of it.[79] It has, however, been held that an assault with intent or an attempt to commit cannot be included in a charge either of murder or of manslaughter,[80] the doctrine of merger being applicable.[81] Any difficulty on this point is solved by statute in some states which provide that there may be a conviction of assault in any degree, constituted by the act complained of and warranted by the evidence, in case the act is not proven to be the cause of death.[82]

5. Larceny. Upon an indictment for larceny, there may be a conviction of an attempt to commit larceny.[83]

6. Rape. A charge of rape will support a conviction of assault with intent to commit rape.[84]

221, 11 Cox C. C. 471, 39 L. J. M. C. 83, 21 L. T. Rep. N. S. 678, 18 Wkly. Rep. 356.

See 27 Cent. Dig. tit. "Indictment and Information;" § 596.

Subsequently defined offenses are included by such a statute. *Ex p.* Finnegan, (Nev. 1903) 71 Pac. 642, holding that there may be a conviction of an attempt to commit the offense of selling liquor to an Indian.

68. Usher *v.* Com., 2 Duv. (Ky.) 394; State *v.* Frank, 103 Mo. 120, 15 S. W. 330.

69. People *v.* Webb, 126 Mich. 29, 86 N. W. 406.

70. Marshal *v.* State, 123 Ind. 128, 23 N. E. 1141, holding that under a charge of attempting to provoke an assault and battery, there may be a conviction of attempt to commit a simple assault.

71. State *v.* Springer, 4 Ohio S. & C. Pl. Dec. 169, 3 Ohio N. P. 120; Brown *v.* State, 7 Tex. App. 569, holding that an indictment for assault with intent to commit rape will not support a conviction of attempt to rape.

72. Marley *v.* State, 58 N. J. L. 207, 33 Atl. 208.

73. Sullivan *v.* People, 27 Hun 35, so holding upon a charge of burglary in the first degree where the evidence established burglary in the second degree.

74. State *v.* Watson, 30 Kan. 281, 1 Pac. 770; State *v.* Owens, 22 Minn. 238.

75. State *v.* Springer, 4 Ohio S. & C. Pl. Dec. 169, 3 Ohio N. P. 120.

76. Benbow *v.* State, 128 Ala. 1, 29 So. 553; Young *v.* Com., 12 Bush (Ky.) 243; People *v.* Long, 2 Edm. Sel. Cas. (N. Y.) 129, holding that on a charge of the first degree, there may be a conviction of an attempt to commit arson in any of the less degrees.

77. **Conviction of offenses not involving homicide** see *infra*, XII, G, 2, e.

78. *Ex p.* Curnow, 21 Nev. 33, 24 Pac. 430; Peterson *v.* State, 12 Tex. App. 650.

79. Thomas *v.* State, 125 Ala. 45, 27 So. 920 (charge that murder was committed by striking with an iron pipe is sufficient); Davis *v.* State, 45 Ark. 464; Scott *v.* State, 60 Miss. 268. And see Stapp *v.* State, 3 Tex. App. 138.

80. Gillespie *v.* State, 9 Ind. 380.

81. See *supra*, XII, B.

82. See People *v.* Schiavi, 96 N. Y. App. Div. 479, 89 N. Y. Suppl. 564 (holding, however, that under such statute, one of two defendants who were charged with having fatally cut another, there can be no conviction of defendant of assault in the first degree, where the proof showed that the cut was the cause of death); People *v.* De Garmo, 73 N. Y. App. Div. 46, 76 N. Y. Suppl. 477.

83. Wolf *v.* State, 41 Ala. 412; Lowe *v.* State, 112 Ga. 189, 37 S. E. 401; Clifford *v.* State, 10 Ga. 422; De Lacy *v.* State, 8 Baxt. (Tenn.) 401.

84. *Alabama.*— Richardson *v.* State, 54 Ala. 158.

7. ROBBERY. A person charged with robbery may be convicted of an assault with intent to rob,[85] or of an attempt to rob.[86]

G. Conviction of Different Offense Included in Charge — 1. GENERAL RULE. Where the charge of a greater offense contains the essential elements of a minor offense, the jury may acquit defendant of the graver charge and find him guilty of the less offense included therein;[87] and such provision is usually made by statute.[88] This rule applies in all cases in which the minor offense is necessarily an elemental part of the greater when proof of the greater necessarily establishes the less;[89] or, as is sometimes stated, where the offenses are of the same generic class.[90] And the rule applies, although both crimes are statutory,[91] and although they could not be charged together in the same count.[92] But the proof of the greater crime must be sufficient to prove the less.[93]

2. APPLICATIONS OF RULE — a. Affray. Upon an indictment for an affray, there may be a conviction of assault and battery,[94] if the indictment contains the allegations necessary to allow proof thereof, but not otherwise.[95]

b. Assault and Battery and Aggravated Assaults — (i) *IN GENERAL.* In general upon a charge of an aggravated[96] or felonious[97] assault defendant may be convicted of a simple assault, or of an assault of less degree than that charged.[98] Upon an indictment for assault and battery, there may be a conviction of simple assault.[99] On an indictment for assault upon a peace officer, there may be a conviction of simple assault.[1]

Arkansas.— Pratt *v.* State, 51 Ark. 167, 10 S. W. 233.

Florida.— Schang *v.* State, 43 Fla. 561, 31 So. 346.

Georgia.— Stephen *v.* State, 11 Ga. 225.

Illinois.— Prindeville *v.* People, 42 Ill. 217.

Iowa.— State *v.* Trusty, 118 Iowa 498, 92 N. W. 677; State *v.* McLaughlin, 44 Iowa 82.

Kansas.— *In re* Lloyd, 51 Kan. 501, 33 Pac. 307.

Louisiana.— State *v.* May, 42 La. Ann. 82, 7 So. 60.

Massachusetts.— Com. *v.* Cooper, 15 Mass. 187.

Michigan.— People *v.* Dowell, 136 Mich. 306, 99 N. W. 23; People *v.* Abbott, 97 Mich. 484, 56 N. W. 862, 37 Am. St. Rep. 360; Campbell *v.* People, 34 Mich. 351.

Minnesota.— O'Connell *v.* State, 6 Minn. 279.

Mississippi.—Horton *v.* State, 84 Miss. 473, 36 So. 1033.

Pennsylvania.— Com. *v.* George, 12 Pa. Super. Ct. 1; Com. *v.* Bass, 3 Lanc. L. Rev. 279.

Utah.— State *v.* Blythe, 20 Utah 378, 58 Pac. 1108.

Wisconsin.— State *v.* Mueller, 85 Wis. 203, 55 N. W. 165.

See 27 Cent. Dig. tit. "Indictment and Information," § 603.

When the evidence shows completed offense. — People *v.* Miller, 96 Mich. 119, 55 N. W. 675. *Contra*, State *v.* Scott, 172 Mo. 536, 77 S. W. 897, under a statute. See CRIMINAL LAW, 12 Cyc. 640.

85. Cook *v.* State, 134 Ala. 137, 32 So. 696; Rambo *v.* State, 134 Ala. 71, 32 So. 650.

86. Rambo *v.* State, 134 Ala. 71, 32 So. 650; State *v.* Franklin, 69 Kan. 798, 77 Pac. 588.

87. Watson *v.* State, 116 Ga. 607, 43 S. E. 32 (holding that the common-law rule to such effect was in force in Georgia, although there had been no statute adopting it); Mulloy *v.* State, 58 Nebr. 204, 78 N. W. 525; State *v.* Gorham, 55 N. H. 152; State *v.* Butman, 42 N. H. 490; State *v.* Webster, 39 N. H. 96.

88. See *supra*, XII, C.

89. State *v.* Butman, 42 N. H. 490.

90. State *v.* Matthews, 111 La. 962, 36 So. 48.

91. State *v.* Burwell, 34 Kan. 312, 8 Pac. 470; State *v.* Matthews, 111 La. 962, 36 So. 48.

92. State *v.* Stouderman, 6 La. Ann. 286.

93. Prindeville *v.* People, 42 Ill. 217; State *v.* Erickson, 45 Wis. 86.

94. Thompson *v.* State, 70 Ala. 26; State *v.* Brown, 82 N. C. 585; State *v.* Allen, 11 N. C. 356, holding that upon an indictment against two defendants one may be acquitted and the other convicted of assault and battery.

95. Childs *v.* State, 15 Ark. 204.

96. Smith *v.* State, 35 Tex. 500; State *v.* Pierce, 26 Tex. 114; Keeling *v.* State, (Tex. Cr. App. 1898) 47 S. W. 372; Foster *v.* State, 25 Tex. App. 543, 8 S. W. 664; Milstead *v.* State, 19 Tex. App. 490; Harrison *v.* State, 10 Tex. App. 93; Clarke *v.* Territory, 1 Wash. Terr. 68.

97. State *v.* Grimes, 29 Mo. App. 470.

98. Fleming *v.* State, 107 Ala. 11, 18 So. 263 (holding that on an indictment for felonious assault, there may be a conviction of assault and battery with a weapon); State *v.* Webster, 77 Mo. 566; Clarke *v.* Territory, 1 Wash. Terr. 68.

99. State *v.* Dennis, 2 Marv. (Del.) 433, 43 Atl. 261; Lewis *v.* State, 33 Ga. 131; State *v.* Brechbill, 10 Kan. App. 575, 62 Pac. 251; Francisco *v.* State, 24 N. J. L. 30.

1. State *v.* Dennis, 2 Marv. 433, 43 Atl. 261; People *v.* Warner, 53 Mich. 78, 18

(II) *With Deadly or Dangerous Weapon.* On a charge of assault with a deadly or dangerous weapon there may be a conviction of a simple assault,[2] but not of assault and battery, unless the indictment charges a battery.[3]

(III) *With Intent to Do Bodily Harm.* An indictment for assault with intent to do bodily harm or great bodily harm includes a simple assault.[4] So an indictment for an assault with intent to do bodily harm includes an assault and battery, if a battery is averred,[5] but not if the battery is not charged.[6] On a charge of assault with intent to maim, there may be a conviction of assault,[7] or in case a battery is averred, of assault and battery.[8]

(IV) *With Intent to Kill or Murder.* On an indictment for assault,[9] where a battery is charged,[10] or for assault and battery,[11] with intent to kill or murder, defendant may be convicted of a common assault and battery or of a simple assault.[12] So there may be a conviction of assault with intent to wound

N. W. 568; Jay *v.* State, 41 Tex. Cr. 451, 55 S. W. 335.

2. *Arkansas.*—Bryant *v.* State, 41 Ark. 359.
California.— People *v.* Holland, 59 Cal. 364.
North Dakota.— State *v.* Climie, 12 N. D. 33, 94 N. W. 574.
South Dakota.— State *v.* Finder, 10 S. D. 103, 72 N. W. 97.
Texas.— Werner *v.* State, (Cr. App. 1902) 68 S. W. 681.

3. Bryant *v.* State, 41 Ark. 359; State *v.* Klein, 19 Wash. 368, 53 Pac. 364.

4. Kennedy *v.* People, 122 Ill. 649, 13 N. E. 213; Orton *v.* State, 4 Greene (Iowa) 140; State *v.* Gummell, 22 Minn. 51 (so holding under a statute which provides that in all cases of indictment in the district court for an assault to commit any felony, the jury may convict defendant of a simple assault); State *v.* Climie, 12 N. D. 33, 94 N. W. 574. See also Reg. *v.* Taylor, L. R. 1 C. C. 194, 11 Cox C. C. 261, 38 L. J. M. C. 106, 20 L. T. Rep. N. S. 402, 17 Wkly. Rep. 623; Reg. *v.* Oliver, Bell C. C. 287, 8 Cox C. C. 384, 6 Jur. N. S. 1214, 30 L. J. M. C. 12, 3 L. T. Rep. N. S. 311, 9 Wkly. Rep. 60; Reg. *v.* Yeadon, 9 Cox C. C. 91, 7 Jur. N. S. 1128, L. & C. 81, 31 L. J. M. C. 70, 5 L. T. Rep. N. S. 329, 10 Wkly. Rep. 69; Reg. *v.* Lackey, 17 N. Brunsw. 194.

5. People *v.* Ellsworth, 90 Mich. 442, 51 N. W. 531; Mulloy *v.* State, 58 Nebr. 204, 78 N. W. 525. *Contra,* State *v.* Marcks, 3 N. D. 532, 58 N. W. 25, holding that under the statutes of the state the offenses were distinct.

6. Moore *v.* People, 26 Ill. App. 137; Young *v.* People, 6 Ill. App. 434; Turner *v.* Muskegon Cir. Judge, 88 Mich. 359, 50 N. W. 310; Alyea *v.* State, 62 Nebr. 143, 86 N. W. 1066.

7. McBride *v.* State, 7 Ark. 374; Com. *v.* McGrath, 115 Mass. 150.

8. Haslip *v.* State, 4 Hayw. (Tenn.) 273.

9. *Alabama.*— Curry *v.* State, 120 Ala. 366, 25 So. 237; Horn *v.* State, 98 Ala. 23, 13 So. 329; Mooney *v.* State, 33 Ala. 419; Carpenter *v.* State, 23 Ala. 84.
Florida.— Winburn *v.* State, 28 Fla. 339, 9 So. 694 [*distinguishing* Warrock *v.* State, 9 Fla. 404, which held that under the statute assault and battery was not included in assault with intent to kill].
Georgia.— Malone *v.* State, 77 Ga. 767.
Mississippi.— Brantley *v.* State, 13 Sm. & M. 468.
Ohio.— Stewart *v.* State, 5 Ohio 241.
Tennessee.— State *v.* Bowling, 10 Humphr. 52.
Texas.— James *v.* State, 36 Tex. 645; Johnson *v.* State, 17 Tex. 515; Reynolds *v.* State, 11 Tex. 120; Gardenheir *v.* State, 6 Tex. 348.
See 27 Cent. Dig. tit. "Indictment and Information," § 586.
Contra.— Sweeden *v.* State, 19 Ark. 205; Territory *v.* Dooley, 4 Mont. 295, 1 Pac. 747, holding that under the statute, were assault and battery included in the charge, the indictment would be bad as charging two offenses.

10. Clark *v.* State, 12 Ga. 350; State *v.* Schreiber, 41 Kan. 307, 21 Pac. 263. And see Sweeden *v.* State, 19 Ark. 205; State *v.* Robinson, 31 S. C. 453, 18 S. E. 101.

11. State *v.* Stedman, 7 Port. (Ala.) 495; *Ex p.* Robinson, 3 MacArthur (D. C.) 418; Behymer *v.* State, 95 Ind. 140; Gillespie *v.* State, 9 Ind. 380; Foley *v.* State, 9 Ind. 363; State *v.* Kennedy, 7 Blackf. (Ind.) 233; State *v.* Cooper, 31 Kan. 505, 3 Pac. 429.

12. *Alabama.*— Sankey *v.* State, 128 Ala. 51, 29 So. 578; Horn *v.* State, 98 Ala. 23, 13 So. 329; Jones *v.* State, 79 Ala. 23; Mooney *v.* State, 33 Ala. 419; State *v.* Burns, 8 Ala. 313; State *v.* Stedman, 7 Port. 495.
Arkansas.— Sweeden *v.* State, 19 Ark. 205.
California.— People *v.* Defoor, 100 Cal. 150, 34 Pac. 642.
Delaware.— State *v.* Scott, 4 Pennew. 538, 57 Atl. 534; State *v.* Di Guglielmo, 4 Pennew. 336, 55 Atl. 350.
Florida.— Winburn *v.* State, 28 Fla. 339, 9 So. 694.
Georgia.— Bard *v.* State, 55 Ga. 319; Clark *v.* State, 12 Ga. 350.
Indiana.— Hays *v.* State, 77 Ind. 450; Howard *v.* State, 67 Ind. 401; McCulley *v.* State, 62 Ind. 428.
Iowa.— State *v.* Graham, 51 Iowa 72, 50 N. W. 285; State *v.* Jarvis, 21 Iowa 44; State *v.* Shepard, 10 Iowa 126; Dixon *v.* State, 3 Iowa 416.
Kansas.— State *v.* Triplett, 52 Kan. 678, 35 Pac. 815; State *v.* Schreiber, 41 Kan. 307, 21 Pac. 263.
Massachusetts.— Com. *v.* Lang, 10 Gray 11.

or to do bodily harm or injury,[13] or of aggravated or felonious assault,[14] or, where such a method of commission of the offense is charged, of shooting or stabbing.[15] Likewise there may be a conviction of an assault with a deadly weapon.[16] But in such cases the assault must be charged to have been so made.[17] Defendant cannot be convicted of any offense not necessarily included in that charged. Thus he cannot be convicted of wounding, maiming, and disfiguring,[18] or of felonious assault generally without specifying any particular felonious assault.[19] Where the indictment charges an assault with intent to commit murder or mur-

Minnesota.— Boyd *v.* State, 4 Minn. 321.
Mississippi.— Bedell *v.* State, 50 Miss. 492.
Missouri.— State *v.* Reynolds, 126 Mo. 516, 29 S. W. 594; State *v.* Brent, 100 Mo. 531, 13 S. W. 874.
Montana.— Territory *v.* Dooley, 4 Mont. 295, 1 Pac. 747.
Nebraska.— Kruger *v.* State, 1 Nebr. 365.
New Hampshire.— State *v.* Lang, 65 N. H. 284, 23 Atl. 432; State *v.* Butman, 42 N. H. 490.
North Carolina.— State *v.* Jennings, 104 N. C. 774, 10 S. E. 249; State *v.* Leary, 88 N. C. 615.
Ohio.— Stewart *v.* State, 5 Ohio 241.
Tennessee.— Morton *v.* State, 91 Tenn. 437, 19 S. W. 225; Ferrell *v.* State, 2 Lea 25; State *v.* Bowling, 10 Humphr. 52.
Texas.— James *v.* State, 36 Tex. 645; State *v.* Archer, 34 Tex. 646; Johnson *v.* State, 17 Tex. 515; Reynolds *v.* State, 11 Tex. 120; Gardenheir *v.* State, 6 Tex. 348; Jones *v.* State, 21 Tex. App. 349, 17 S. W. 424.
Vermont.— State *v.* Coy, 2 Aik. 181.
United States.— U. S. *v.* Cropley, 25 Fed. Cas. No. 14,892, 4 Cranch C. C. 517.
See 27 Cent. Dig. tit. "Indictment and Information," § 586.

13. *California.*— People *v.* Fine, 53 Cal. 263; People *v.* Congleton, 44 Cal. 92.
Iowa.— State *v.* Schele, 52 Iowa 608, 3 N. W. 632.
Kentucky.— Robinson *v.* Com., 16 B. Mon. 609.
Michigan.— People *v.* Townsend, 120 Mich. 661, 79 N. W. 901; People *v.* Prague, 72 Mich. 178, 40 N. W. 243.
Nevada.— State *v.* Collyer, 17 Nev. 275, 30 Pac. 891; State *v.* Rohey, 8 Nev. 312.
North Dakota.— State *v.* Johnson, 3 N. D. 150, 54 N. W. 547. *Compare* State *v.* Mattison, (1904) 100 N. W. 1091.
Oklahoma.— Gatliff *v.* Territory, 2 Okla. 523, 37 Pac. 809.
Washington.— State *v.* Young, 22 Wash. 273, 60 Pac. 650 [*distinguishing* State *v.* Ackles, 8 Wash. 462, 36 Pac. 597 (*followed* in State *v.* Largent, 9 Wash. 691, 38 Pac. 751)], where the indictment charged the absence of "considerable provocation."
Wisconsin.— Birker *v.* State, 118 Wis. 108, 94 N. W. 643 [*overruling* State *v.* Yanta, 71 Wis. 669, 38 N. W. 333, and *modifying* Kilkelly *v.* State, 43 Wis. 604].
See 27 Cent. Dig. tit. "Indictment and Information," § 586.
Contra.— Hungate *v.* People, 7 Ill. App. 101.

14. *Florida.*— Pittman *v.* State, 25 Fla. 648, 6 So. 437.
Missouri.— State *v.* Baldridge, 105 Mo. 319, 16 S. W. 890.
North Dakota.— State *v.* Maloney, 7 N. D. 119, 72 N. W. 927.
South Carolina.— State *v.* Robinson, 31 S. C. 453, 10 S. E. 101.
Texas.— Bittick *v.* State, 40 Tex. 117; James *v.* State, 36 Tex. 645; Posey *v.* State, 32 Tex. 476; Reynolds *v.* State, 11 Tex. 120; Blackwell *v.* State, 33 Tex. Cr. 278, 26 S. W. 397, 32 S. W. 128; Bolding *v.* State, 23 Tex. App. 172, 4 S. W. 579; Jones *v.* State, 21 Tex. App. 349, 17 S. W. 424; Davis *v.* State, 20 Tex. App. 302; Peterson *v.* State, 12 Tex. App. 650; Montgomery *v.* State, 4 Tex. App. 140; Henderson *v.* State, 2 Tex. App. 88. *Compare* Furlough *v.* State, (Cr. App. 1901) 65 S. W. 1069; Spearman *v.* State, 23 Tex. App. 224, 4 S. W. 586.
See 27 Cent. Dig. tit. "Indictment and Information," § 586.

15. Harris *v.* State, 120 Ga. 167, 47 S. E. 520 (holding that where from the evidence it might have been found that accused did shoot the prosecutor, and that the shooting was unjustifiable but not with an intention to kill, there might be a conviction of the statutory offense of shooting at another); Gaines *v.* State, 108 Ga. 772, 33 S. E. 632 (holding an indictment which charged defendant with shooting into a crowd included the offense of unlawfully shooting at another); Corley *v.* State, 95 Ga. 465, 20 S. E. 212; Isom *v.* State, 83 Ga. 378, 9 S. E. 1051; Malone *v.* State, 77 Ga. 767; Wostenholms *v.* State, 70 Ga. 720. *Contra*, McCroskey *v.* State, 2 Coldw. (Tenn.) 178.

16. *California.*— People *v.* Gordon, 103 Cal. 568, 37 Pac. 534; People *v.* Gordon, 99 Cal. 227, 33 Pac. 901; People *v.* Bentley, 75 Cal. 407, 17 Pac. 436.
Illinois.— Beckwith *v.* People, 26 Ill. 500.
Massachusetts.— Com. *v.* Clarke, 162 Mass. 495, 39 N. E. 280.
Nevada.— State *v.* Collyer, 17 Nev. 275, 30 Pac. 891.
Oregon.— State *v.* Kelly, 41 Oreg. 20, 68 Pac. 1; State *v.* McLennen, 16 Oreg. 59, 16 Pac. 879.
Contra.— State *v.* Ackles, 8 Wash. 462, 36 Pac. 597.

17. Evans *v.* Territory, (Ariz. 1894) 36 Pac. 209; People *v.* Arnett, 126 Cal. 680, 59 Pac. 204; People *v.* Murat, 45 Cal. 281. And see Carpenter *v.* People, 5 Ill. 197.

18. State *v.* Melton, 102 Mo. 683, 15 S. W. 139. See also State *v.* Murdoch, 35 La. Ann. 729.

19. State *v.* Schleagel, 50 Kan. 325, 31 Pac. 1105.

der in the first degree, there may a conviction of assault with intent to commit murder in the second degree,[20] or of intent to commit manslaughter.[21] Where an assault with intent to kill and an assault with intent to murder are recognized as distinct offenses, there may be a conviction of assault with intent to kill upon a charge of assault with intent to murder,[22] although it has been held that a conviction of an assault with intent to commit manslaughter cannot be had under a charge of an assault with intent to kill, where the offenses are distinct.[23]

(v) *WITH INTENT TO MAIM.* On a charge of assault with intent to commit mayhem, there may be a conviction of assault and battery.[24]

(vi) *WITH INTENT TO RAPE.* On an indictment for assault with intent to rape, there may be a conviction of simple assault,[25] or of assault and battery,[26] if the indictment charges a battery.[27] It also has been held that there may be a conviction under a statute punishing the taking of indecent liberties with the person of a female child.[28]

(vii) *WITH INTENT TO ROB OR COMMIT LARCENY.* An indictment for assault with intent to rob will support a conviction of assault and battery,[29] or simple assault.[30] So also a conviction of simple assault may be had under a statutory charge of assault with intent to steal from a building.[31]

20. Pyke *v.* State, 47 Fla. 93, 36 So. 577; Wall *v.* State, 23 Ind. 150; State *v.* Saylor, 6 Lea (Tenn.) 586; Smith *v.* State, 2 Lea (Tenn.) 614; Brantley *v.* State, 9 Wyo. 102, 61 Pac. 139.

21. *Connecticut.*— See State *v.* Nichols, 8 Conn. 496, holding that, under a statute providing for a conviction of manslaughter on an indictment for murder, on an indictment for an assault with intent to murder the jury may find a verdict of "guilty of an assault with intent to kill, but not with malice aforethought."

Florida.— Williams *v.* State, 41 Fla. 295, 26 So. 184.

Indiana.— Jarrell *v.* State, 58 Ind. 293; State *v.* Throckmorton, 53 Ind. 354, holding that on an indictment for assault with intent to commit murder, there can be a conviction for any degree of assault comprehended by an indictment for assault with intent to commit manslaughter.

Iowa.— State *v.* Connor, 59 Iowa 357, 13 N. W. 327, 44 Am. Rep. 686; State *v.* White, 45 Iowa 325 [*withdrawing* on rehearing 41 Iowa 316, 20 Am. Rep. 602].

Kansas.— State *v.* Tankersley, 60 Kan. 859, 57 Pac. 965.

Kentucky.— Robinson *v.* Com., 16 B. Mon. 609.

Maine.— State *v.* Clair, 84 Me. 248, 24 Atl. 843, where heat of passion and sudden provocation were established.

Missouri.— State *v.* Reynolds, 126 Mo. 516, 29 S. W. 594; State *v.* King, 111 Mo. 576, 20 S. W. 299; State *v.* Berning, 91 Mo. 82, 3 S. W. 588. And see State *v.* Prosser, 137 Mo. 624, 38 S. W. 1106, holding that one charged with assault with intent to kill may be convicted of assault with intent to kill without malice aforethought.

New Hampshire.— State *v.* Butman, 42 N. H. 490; State *v.* Williams, 23 N. H. 321; State *v.* Calligan, 17 N. H. 253.

Ohio.— Wilson *v.* State, 18 Ohio 143.

Tennessee.— Stevens *v.* State, 91 Tenn. 726, 20 S. W. 423, holding, however, that there could be no conviction of assault with intent to commit involuntary manslaughter, there being no such offense.

Texas.— Spivey *v.* State, 30 Tex. App. 343, 17 S. W. 546.

See 27 Cent. Dig. tit. "Indictment and Information," § 586.

22. State *v.* Phinney, 42 Me. 384; State *v.* Waters, 39 Me. 54; State *v.* Butman, 42 N. H. 490.

23. Morman *v.* State, 24 Miss. 54.

24. Haslip *v.* State, 4 Hayw. (Tenn.) 273.

25. *Georgia.*— Duggan *v.* State, 116 Ga. 846, 43 S. E. 253.

Iowa.— State *v.* Walters, 45 Iowa 389.

Minnesota.— State *v.* Vadnais, 21 Minn. 382.

Missouri.— State *v.* White, 52 Mo. App. 285.

North Carolina.— State *v.* Perkins, 82 N. C. 681.

Texas.— Caddell *v.* State, (Cr. App. 1903) 72 S. W. 1015.

See 27 Cent. Dig. tit. "Indictment and Information," § 588.

Consent of prosecutrix.— A charge of "assault with intent to commit rape" does not include the offense of "assault," where the prosecutrix was under the age of consent, and her willingness was fully established. People *v.* Gomez, 118 Cal. 326, 50 Pac. 427.

26. State *v.* Walters, 45 Iowa 389; People *v.* McDonald, 9 Mich. 150.

27. Goldin *v.* State, 104 Ga. 549, 30 S. E. 749; State *v.* Miller, 124 Iowa 429, 100 N. W. 334; State *v.* McAvoy, 73 Iowa 557, 35 N. W. 630.

28. State *v.* West, 39 Minn. 321, 40 N. W. 249.

29. Barnard *v.* Com., 94 Ky. 285, 22 S. W. 219, 15 Ky. L. Rep. 51; Hanson *v.* State, 43 Ohio St. 376, 1 N. E. 136; Com. *v.* Werbine, 12 Lanc. Bar (Pa.) 79.

30. Dickerson *v.* Com., 2 Bush (Ky.) 1.

31. Com. *v.* Crowley, 167 Mass. 434, 45 N. E. 766.

(VIII) *STATUTORY SHOOTINGS, STABBINGS, AND LIKE OFFENSES.* Under an indictment based on statutes which punish the shooting, cutting, stabbing, striking, or wounding of one person by another with various intents, there may as a general rule be a conviction of other included statutory assaults of minor degree or of a simple assault, or in case a battery is charged, of an assault and battery.[32]

c. Burglary. Upon a charge of burglary there may be a conviction of offenses necessarily included therein,[33] provided of course the evidence establish

32. See cases cited *infra*, this note. And see State *v.* Price, 45 La. Ann. 1430, 14 So. 250, holding that under a statute punishing shooting, stabbing, cutting, striking, or thrusting any person with a dangerous weapon with intent to commit murder while lying in wait or in the perpetration, or intent to perpetrate, any arson, rape, robbery, or burglary, there may be a conviction of such shooting, etc., without the aggravation of lying in wait or of such act without the aggravation of lying in wait and of murderous intent. State *v.* Wilson, 39 La. Ann. 203, 1 So. 418.

Shooting.— On an indictment for shooting with intent to kill, there may be a conviction of assault and battery (Heller *v.* State, 23 Ohio St. 582), or of a battery (People *v.* Chalmers, 5 Utah 274, 15 Pac. 2), or assault (White *v.* State, 13 Ohio St. 569), or of shooting with intent to kill or wound (Robinson *v.* Com., 16 B. Mon. (Ky.) 609), or of wounding under circumstances that would have constituted manslaughter had death ensued (State *v.* Ryno, 68 Kan. 348, 74 Pac. 1114, 64 L. R. A. 303; State *v.* Hammerli, (Kan. 1899) 58 Pac. 559), or of pointing a pistol at another (Jenkins *v.* State, 92 Ga. 470, 17 S. E. 693). On a charge of maliciously shooting at and wounding another, there may be a conviction of shooting at another without inflicting a wound with intent to kill (Harris *v.* Com., 15 Ky. L. Rep. 269), and on a charge of shooting with intent to kill and murder, there may be a verdict of guilty of shooting with intent to kill (State *v.* Keasley, 50 La. Ann. 761, 23 So. 900; State *v.* Vance, 49 La. Ann. 1011, 22 So. 310). In Louisiana, however, under a charge of shooting with intent to kill, there can be no conviction of assault or of assault and battery (State *v.* Washington, 107 La. 298, 31 So. 638; State *v.* Robertson, 48 La. Ann. 1067, 20 So. 296), or of assault with a dangerous weapon (State *v.* Benjamin, (La. 1893) 14 So. 71; State *v.* Allen, 40 La. Ann. 199, 3 So. 537), or of an assault with a dangerous weapon inflicting a wound less than mayhem (State *v.* Parker, 42 La. Ann. 972, 8 So. 473; State *v.* Murdoch, 35 La. Ann. 729; State *v.* Pratt, 10 La. Ann. 191); but under an indictment for shooting with intent to murder while lying in wait, there may be a conviction of shooting with intent to murder (State *v.* Price, 45 La. Ann. 1430, 14 So. 250; State *v.* Evans, 40 La. Ann. 216, 3 So. 838; State *v.* Wilson, 39 La. Ann. 203, 1 So. 418).

Cutting and stabbing.— Upon an indictment for stabbing, the prisoner may be found guilty of an assault and battery (Ward *v.* State, 56 Ga. 408; Whilden *v.* State, 25 Ga. 396, 71 Am. Dec. 181. *Contra*, State *v.* Valentine, 6 Yerg. (Tenn.) 533), or of an assault (Sessions *v.* State, 115 Ga. 18, 41 S. E. 259; Montgomery *v.* Com., 98 Va. 840, 36 S. E. 371); and on an indictment for stabbing with intent to kill, there may be a verdict of any lower degree of the offense (Tyra *v.* Com., 2 Metc. (Ky.) 1). Under the Louisiana statute, however, a charge of cutting and stabbing with intent to kill and murder does not include the offense of inflicting a wound less than mayhem with a dangerous weapon (State *v.* Jacques, 45 La. Ann. 1451, 14 So. 213; State *v.* Day, 37 La. Ann. 785. See *contra*, State *v.* Gilkie, 35 La. Ann. 53), although it will sustain a conviction of an assault with a dangerous weapon (State *v.* De Laney, 28 La. Ann. 434), or of cutting and stabbing with intent to kill (State *v.* Jacques, *supra*). Under the Ohio statute, on an indictment for maliciously cutting with intent to kill, there can be no conviction of maliciously cutting with intent to wound. Barber *v.* State, 39 Ohio St. 660; Bailey *v.* State, 9 Ohio Dec. (Reprint) 164, 11 Cinc. L. Bul. 123.

Striking.— On an indictment for striking with a deadly weapon, there may be a conviction of assault and battery in case it appears that the weapon was not deadly (Com. *v.* Yarnell, 68 S. W. 136, 24 Ky. L. Rep. 144); but under the Louisiana statute, a person charged with striking with intent to kill and murder cannot be convicted of assault (State *v.* Bellard, 50 La. Ann. 594, 23 So. 504, 69 Am. St. Rep. 461), although when charged with having lain in wait, he may be convicted of the offense without that circumstance of aggravation (State *v.* Price 45 La. Ann. 1430, 14 So. 250). On a charge of an assault with a slung shot with intent to kill, there can be no conviction for wounding, maiming, and disfiguring in the absence of any allegation of the infliction of an injury. State *v.* Melton, 102 Mo. 683, 15 S. W. 139.

Wounding.— On a charge of wounding with intent to commit murder, there may be a conviction of inflicting a wound less than mayhem with intent to kill (State *v.* Jessie, 30 La. Ann. 1170); and on an indictment for malicious wounding, the jury may convict of assault and battery (Parrott *v.* Com., 47 S. W. 452, 20 Ky. L. Rep. 761).

33. Com. *v.* Hurd, 109 Ky. 8, 58 S. W. 369, 22 Ky. L. Rep. 509 (holding that there might be a conviction of house-breaking); State *v.* Miller, 45 La. Ann. 1170, 14 So. 136; State *v.* Morris, 27 La. Ann. 480 (both holding that where the charge was of burglary

it.[34] The rule, supported by the weight of authority, is that upon an indictment for burglary charging in the same count both the breaking and entering with felonious intent, and the commission of a larceny after entering, there may be an acquittal of the burglary and a conviction of larceny alone;[35] but under the statutes in some states burglary is not regarded as a compound offense, and hence there cannot be a conviction of a felony committed after the breaking and entering as an included offense.[36] In some jurisdictions it is held that there may be a conviction of both burglary and larceny.[37] Where the charge is merely entering with intent to steal, there can be no conviction of larceny.[38] Where burglary and larceny are joined in separate counts, the jury may acquit of one and convict of the other.[39]

d. Embezzlement. Upon a charge of embezzlement there can be no conviction of a distinct offense.[40] So upon an indictment for embezzlement the accused cannot be convicted of a breach of trust.[41] It is provided in some states by statute, however, that if the evidence discloses larceny, a conviction may be had of such offense.[42]

e. Homicide. Upon an indictment for common-law homicide, although the punishment therefor has been defined by statute, there can be no conviction for a statutory homicide which is not included in the common-law definition.[43] Upon

while armed with a dangerous weapon, there might be a conviction of burglary without such weapon); Com. *v.* Hope, 22 Pick. (Mass.) 1 (holding that on an indictment for entering and breaking into a dwelling-house in the daytime, and stealing therein, there might be a conviction of stealing in the dwelling-house in the daytime or of stealing).

Entering in the daytime has been held to be included as a minor degree in the statutory offense of breaking and entering at night. State *v.* Jordan, 87 Iowa 86, 54 N. W. 63. *Contra, In re* McVey, 50 Nebr. 481, 70 N. W. 51, holding that the averment of night-time being essential, there can be no conviction of the other offense.

Breaking without intent to steal may be found under an indictment charging the intent. State *v.* Snow, 3 Pennew. (Del.) 259, 51 Atl. 607.

Entering without breaking has been held to be included in a charge of breaking and entering. State *v.* Maxwell, 42 Iowa 208; State *v.* McCort, 23 La. Ann. 326; State *v.* Moore, 12 N. H. 42; State *v.* Tough, 12 N. D. 425, 96 N. W. 1025.

On a charge of burglary with intent to commit a rape, there can be no conviction of assault with intent to commit rape. State *v.* Ryan, 15 Oreg. 572, 16 Pac. 417.

34. Ray *v.* State, 126 Ala. 9, 28 So. 634.

35. *Alabama.*— Robinson *v.* State, 84 Ala. 434, 4 So. 774; Borum *v.* State, 66 Ala. 468; Bell *v.* State, 48 Ala. 684, 17 Am. Rep. 40.

Delaware.— State *v.* Cocker, 3 Harr. 554.

Georgia.— Ray *v.* State, 121 Ga. 189, 48 S. E. 903 (holding that there may be a conviction of the statutory offense of larceny from a house); Polite *v.* State, 78 Ga. 347; Barlow *v.* State, 77 Ga. 448 (larceny from the house).

Kansas.— State *v.* Brandon, 7 Kan. 106.

Massachusetts.—Com. *v.* Lowery, 149 Mass. 67, 20 N. E. 697.

Missouri.— State *v.* Kelsoe, 76 Mo. 505; State *v.* Davis, 73 Mo. 129; State *v.* Barker, 64 Mo. 282; State *v.* Alexander, 56 Mo. 131.

New York.— People *v.* Snyder, 2 Park. Cr. 23.

North Carolina.— State *v.* Grisham, 2 N. C. 13.

United States.— U. S. *v.* Dixon, 25 Fed. Cas. No. 14,968, 1 Cranch C. C. 414; U. S. *v.* Read, 27 Fed. Cas. No. 16,126, 2 Cranch. C. C. 198.

See 27 Cent. Dig. tit. "Indictment and Information," § 608.

Contra.— State *v.* Robertson, 48 La. Ann. 1026, 20 So. 167; State *v.* Robertson, 48 La. Ann. 1024, 20 So. 166; State *v.* Ford, 30 La. Ann. 311. But see State *v.* Morgan, 39 La. Ann. 214, 1 So. 456, in which a verdict for larceny alone was sustained.

36. People *v.* Garnett, 29 Cal. 622 (holding, however, that where both offenses were stated in the same indictment, the objection would be deemed to be waived unless taken by demurrer, and a verdict of guilty of either offense would not be disturbed); State *v.* Ridley, 48 Iowa 370.

37. Bell *v.* State, 48 Ala. 684, 17 Am. Rep. 40; State *v.* Moore, 117 Mo. 395, 22 S. W. 1086. *Contra,* Miller *v.* State, 16 Tex. App. 417. See also BURGLARY, 6 Cyc. 256.

38. Bell *v.* State, 48 Ala. 684, 17 Am. Rep. 40; Fisher *v.* State, 46 Ala. 717.

39. State *v.* Hecox, 83 Mo. 531; Clarke *v.* Com., 25 Gratt. (Va.) 908; Vaughan *v.* Com., 17 Gratt. (Va.) 576.

40. Goodhue *v.* People, 94 Ill. 37, holding that under an indictment charging an officer with actual embezzlement, there can be no conviction of the offense of taking and secreting with intent to embezzle.

41. State *v.* Reonnals, 14 La. Ann. 278.

42. See State *v.* Poland, 33 La. Ann. 1161.

Constitutionality of such statutes see *infra,* XI, G, 2, f, text and note 55.

43. Buckner *v.* Com., 14 Bush (Ky.) 601; Conner *v.* Com., 13 Bush (Ky.) 714, all holding that under an indictment for murder,

the question of whether there may be a conviction under an indictment for homicide of an offense which does not involve a homicide, there is some conflict of authority. That there may be such a conviction is supported by the weight of authority in those jurisdictions in which the common-law rule preventing a conviction for a misdemeanor upon a charge of felony is not recognized.[44] Upon an indictment for murder in the commission of rape, there can be no conviction of rape,[45] or of abortion on an indictment charging murder in the commission of abortion.[46]

f. Larceny. Where a simple larceny committed under certain circumstances of aggravation is made a graver offense by statute, a conviction may be had of a simple larceny on a charge of the greater.[47] Of this nature are charges under statutes punishing larceny from the person,[48] or from the house or other build-

while there might be a conviction of murder, voluntary or involuntary manslaughter, there could be no conviction for the statutory offense of killing by wilfully striking, stabbing, or shooting another without design to cause death. Wood *v.* Com., 7 S. W. 391, 9 Ky. L. Rep. 872. And see Lucas *v.* State, 71 Miss. 471, 14 So. 537, holding that an indictment for murder drawn under a statute providing that it need not set forth the manner or means by which the crime was committed, a conviction could not be had of the statutory offense of intentionally pointing a pistol and accidentally discharging the same and killing deceased.

Sufficiency of common-law indictments where homicide has been defined by statute see HOMICIDE, 21 Cyc. 646.

44. Watson *v.* State, 116 Ga. 607, 43 S. E. 32. And other cases cited *infra*, this note.

Under statutes which provide in substance that the accused may be convicted of any offense which is necessarily included in the crime charged in the indictment, it has been held that upon an indictment charging homicide there may be a conviction of assault and battery, in case the assault and battery is alleged (State *v.* O'Kane, 23 Kan. 244; Com. *v.* Drum, 19 Pick. (Mass.) 479). See also State *v.* Thomas, 65 N. J. L. 598, 48 Atl. 1007 [*reversing* 64 N. J. L. 532, 45 Atl. 913], holding that there could not be such a conviction on an indictment for manslaughter, where the charge was only that defendant did "feloniously kill and slay"); or there may be a conviction of aggravated assault and battery (Bean *v.* State, 25 Tex. App. 346, 8 S. W. 278; Green *v.* State, 8 Tex. App. 71), or of assault with intent to kill (Davis *v.* State, 45 Ark. 465; *Ex p.* Curnow, 21 Nev. 33, 24 Pac. 430), or of assault with intent to do great bodily injury (State *v.* Parker, 66 Iowa 586, 24 N. W. 225), or of wilfully and maliciously shooting and wounding (Bush *v.* Com., 78 Ky. 268); but there can be no conviction of assault and battery under an information charging murder which does not allege that it was committed by an assault and battery (People *v.* Adams, 52 Mich. 24, 17 N. W. 226; State *v.* Thomas, 65 N. J. L. 598, 48 Atl. 1007 [*reversing* 64 N. J. L. 532, 45 Atl. 913]).

In New York it is held that an assault is not necessarily included in a homicide and the conviction therefore cannot be justified by a statute permitting the conviction of an included crime. People *v.* McDonald, 159 N. Y. 309, 54 N. E. 46; People *v.* Connors, 13 Misc. 582, 35 N. Y. Suppl. 472. See also Burns *v.* People, 1 Park. Cr. 182. On an indictment for manslaughter in causing the death of an infant by failure to furnish food and clothing, it has, however, been held that there may be a conviction of a misdemeanor of failing to furnish food and clothes. People *v.* McDonald, 49 Hun 67, 1 N. Y. Suppl. 703.

In Pennsylvania a conviction of assault and battery is impliedly forbidden by a statute which provides that a conviction of an included cutting, stabbing, or shooting may be had upon the trial of an indictment for felony, except murder or manslaughter, and it is held to be also unjust to defendant as forbidding him an opportunity to settle the misdemeanor as provided by statute and as not giving him notice of the charge against which he is to defend. Com. *v.* Adams, 38 Wkly. Notes Cas. 571.

In Texas see Presley *v.* State, 30 Tex. 160.

In the absence of a statute it has been held that upon an indictment for murder, there may be a conviction of assault and battery (State *v.* Powell, 1 Ohio Dec. (Reprint) 38, 1 West. L. J. 273; State *v.* Scott, 24 Vt. 127), or of the statutory offense of shooting at another (Watson *v.* State, 116 Ga. 607, 43 S. E. 32). And see Logan *v.* U. S., 144 U. S. 307, 12 S. Ct. 631, 36 L. ed. 429.

Where the doctrine of merger obtains, on a trial of an indictment for murder there can be no conviction of an assault and battery or of an assault, such offenses being misdemeanors. Reed *v.* State, 141 Ind. 116, 40 N. E. 525; Gillespie *v.* State, 9 Ind. 380; Wright *v.* State, 5 Ind. 527.

45. *Ex p.* Dela, 25 Nev. 346, 60 Pac. 217, 83 Am. St. Rep. 603.

46. State *v.* Belyea, 9 N. D. 353, 83 N. W. 1, holding that the essentials of such offense were not alleged.

47. State *v.* Steifel, 106 Mo. 129, 17 S. W. 227 (under a charge of stealing from the person in the night-time); and other cases in the notes following.

48. Lavender *v.* State, 107 Ga. 707, 33 S. E. 420; State *v.* Eno, 8 Minn. 220; State *v.* Steifel, 106 Mo. 129, 17 S. W. 227; State *v.* Taylor, 3 Oreg. 10. But see Brown *v.* State, 34 Nebr. 448, 51 N. W. 1028, holding that petit larceny is not an included offense

ings.[49] But upon an indictment for larceny, there can be no conviction of a form of wrongful taking which is made a distinct offense by statute.[50] The stealing of horses or other domestic animals being usually punishable under specific statute, simple larceny is not ordinarily included in a charge of such an offense,[51] nor are other statutory offenses relating to animals,[52] unless, being of the same nature under the statutes defining them, they may be regarded as minor degrees of the offense of cattle-stealing.[53] The offense of receiving stolen goods, being regarded as distinct from that of larceny, there can be no conviction therefor upon a charge of larceny.[54] Under some statutes it is provided that on a charge of larceny the accused may be found guilty of embezzlement.[55] An assault is included in a charge of larceny from the person.[56]

g. Malicious Mischief. Upon a charge of one offense of malicious mischief, there can be no conviction of another and distinct offense which is not included in the charge.[57]

h. Mayhem. On an indictment for mayhem, there may be a conviction for an included misdemeanor,[58] or assault and battery,[59] or of an aggravated

where the taking is shown to be from the person. And see Stone *v.* State, 115 Ala. 121, 22 So. 275 [*overruling* Bolling *v.* State, 98 Ala. 80, 12 So. 782], holding that upon the charge of larceny from the person, there can be no conviction of petit larceny where the proof shows that the property was not taken from the person.

49. Blandford *v.* State, 115 Ga. 824, 42 S. E. 207; Brown *v.* State, 90 Ga. 454, 16 S. E. 204; State *v.* Nordman, 101 Iowa 446, 70 N. W. 621 (larceny from store in nighttime); State *v.* Savage, 36 Oreg. 191, 60 Pac. 610, 61 Pac. 1128 (larceny from an office); State *v.* Hanlon, 32 Oreg. 95, 48 Pac. 353. But see State *v.* Davidson, 73 Mo. 428.

50. State *v.* Palmer, 4 Pennew. (Del.) 126, 53 Atl. 359 (holding that upon a charge of larceny of an animal, there can be no conviction under a statute punishing persons who without the consent of the owner, but not feloniously, take and drive off a horse or other animal); State *v.* Gabriel, 88 Mo. 631; State *v.* Davidson, 73 Mo. 428; Taylor *v.* State, 25 Tex. App. 96, 7 S. W. 861.

51. State *v.* Major, 14 Rich. (S. C.) 76.

52. State *v.* Fruge, 106 La. 694, 31 So. 323 (horse-stealing and horse-riding); Beavers *v.* State, 14 Tex. App. 541 (theft of steer and unlawfully killing steer without the owner's consent).

53. Campbell *v.* State, 22 Tex. App. 262, 2 S. W. 825; McElmurray *v.* State, 21 Tex. App. 691, 2 S. W. 892; Foster *v.* State, 21 Tex. App. 80, 17 S. W. 548, all holding that an ordinary indictment for theft would support a conviction for "fraudulently driving from their accustomed range live stock not his own." And see Counts *v.* State, 37 Tex. 593; Powell *v.* State, 7 Tex. App. 467; Turner *v.* State, 7 Tex. App. 596; Marshall *v.* State, 4 Tex. App. 549.

54. Watts *v.* People, 204 Ill. 233, 68 N. E. 563; State *v.* Moultrie, 33 La. Ann. 1146; Gaither *v.* State, 21 Tex. App. 527, 1 S. W. 456; Chandler *v.* State, 15 Tex. App. 587; Brown *v.* State, 15 Tex. App. 581 [*overruling* Parchman *v.* State, 2 Tex. App. 228, 27 Am. Rep. 435; McCampbell *v.* State, 9 Tex. App. 124, 35 Am. Rep. 726. And also in effect Vincent *v.* State, 10 Tex. App. 330; Johnson *v.* State, 13 Tex. App. 378, upon the authority of Huntsman *v.* State, 12 Tex. App. 619].

55. See the cases cited *infra*, this note.

A conviction of the offense specifically charged cannot be bad, however, where the only evidence is of the alternative offense mentioned in the statute. Reg. *v.* Gorhutt, 7 Cox C. C. 221, Dears. & B. 166, 3 Jur. N. S. 371, 26 L. J. M. C. 47, 5 Wkly. Rep. 294.

Constitutionality of statutes. — The constitutionality of such statutes has been supported in some states (State *v.* Williams, 40 La. Ann. 732, 5 So. 16; State *v.* Thompson, 144 Mo. 314, 46 S. W. 191. But see State *v.* Harmon, 106 Mo. 635, 18 S. W. 128), although the better rule would appear to be to the contrary (Howland *v.* State, 58 N. J. L. 18, 32 Atl. 257; Huntsman *v.* State, 12 Tex. App. 619 [*overruling* Whitworth *v.* State, 11 Tex. App. 414]); and even in a state in which it is held that a conviction may be had of embezzlement on a charge of larceny, such a statute is held unconstitutional in so far as it permits conviction of larceny upon a charge of embezzlement (State *v.* Burks, 159 Mo. 568, 60 S. W. 1100).

56. State *v.* Houghton, 45 Oreg. 110, 75 Pac. 887.

57. Brewer *v.* State, 28 Tex. App. 565, 13 S. W. 1004; Payne *v.* State, 17 Tex. App. 40. An indictment for wantonly killing an animal will not sustain a conviction of killing an animal in an insufficiently fenced inclosure. Brewer *v.* State, 28 Tex. App. 565, 13 S. W. 1004; McCleskey *v.* State, (Tex. App. 1890) 13 S. W. 997; McRay *v.* State, 18 Tex. App. 331; Payne *v.* State, 17 Tex. App. 40.

58. Foster *v.* People, 1 Colo. 293, holding that under an indictment for mayhem by slitting an ear, as defined by statute, accused may be convicted of a misdemeanor only, as defined by the latter part of the statute, by slitting the ear while engaged in a fight.

59. State *v.* Fisher, 103 Ind. 530, 3 N. E. 379; State *v.* Johnson, 58 Ohio St. 417, 51

assault,[60] or of assault with intent to do great bodily injury;[61] but not of assault with intent to murder,[62] or of another statutory offense of the same degree.[63] On an indictment for malicious mayhem as defined by statute, there may be a conviction of simple mayhem.[64]

i. Rape. On an indictment for rape there may be a conviction of simple assault,[65] felonious assault,[66] assault and battery,[67] in case the averments are sufficient to charge a battery,[68] or of detaining the prosecutrix against her will with intent, etc.;[69] but assault with intent to inflict great bodily injury is not necessarily included.[70] As an included offense, there may, where there are proper allegations, be a conviction of carnal knowledge of a child or idiot female,[71] or of adultery,[72] incest,[73] fornication,[74] or bastardy.[75]

j. Robbery.[76] At common law, there could be no conviction of larceny upon a charge of robbery,[77] but under the statutes commonly providing for conviction of included offenses or less degrees of the same offense the modern rule is in most instances that such a conviction may be sustained.[78] Larceny from the person, as defined by statute, is also usually regarded as an included offense,[79] and the

N. E. 40, 65 Am. St. Rep. 769; Carden *v.* State, 3 Head (Tenn.) 267.

60. Guest *v.* State, 19 Ark. 405; Benham *v.* State, 1 Iowa 542.

61. State *v.* Akin, 94 Iowa 50, 62 N. W. 667.

62. Davis *v.* State, 22 Tex. App. 45, 2 S. W. 630.

63. State *v.* Johnson, 58 Ohio St. 417, 51 N. E. 40, 65 Am. St. Rep. 769, holding that an indictment for biting the ear of another with intent to maim will not support a conviction for biting with intent to disfigure.

64. State *v.* Fisher, 103 Ind. 530, 3 N. E. 379.

65. State *v.* Trusty, 118 Iowa 498, 92 N. W. 677; State *v.* Wolf, 112 Iowa 458, 84 N. W. 536; State *v.* Hutchinson, 95 Iowa 566, 64 N. W. 610 (carnal abuse of child); State *v.* Porter, 57 Iowa 691, 11 N. W. 644 (so holding, although a drug was administered to produce stupor); State *v.* Peters, 56 Iowa 263, 9 N. W. 219; State *v.* Pennell, 56 Iowa 29, 8 N. W. 686; State *v.* Vinsant, 49 Iowa 241; State *v.* Jackson, 65 N. J. L. 62, 46 Atl. 764 (carnal abuse of woman under age of consent); State *v.* Johnson, 30 N. J. L. 185.

Where the court has no jurisdiction of assault, however, the rule stated in the text does not apply. Cato *v.* State, 9 Fla. 162.

66. Hall *v.* People, 47 Mich. 636, 11 N. W. 414.

67. Jones *v.* State, 118 Ind. 39, 20 N. E. 634. *Contra*, State *v.* Durham, 72 N. C. 447, on the ground that the misdemeanor was merged in the felony.

68. Richardson *v.* State, 54 Ala. 158; State *v.* Trusty, 118 Iowa 498, 92 N. W. 677; State *v.* Wolf, 112 Iowa 458, 84 N. W. 536; State *v.* Desmond, 109 Iowa 72, 80 N. W. 214; State *v.* Hutchinson, 95 Iowa 566, 64 N. W. 610 (carnal abuse of child); State *v.* Kyne, 86 Iowa 616, 53 N. W. 420; People *v.* Abbott, 97 Mich. 484, 56 N. W. 862, 37 Am. St. Rep. 360; State *v.* Keen, 10 Wash. 93, 38 Pac. 880 (charge of actual violence is sufficient).

69. Fagan *v.* Com., 38 S. W. 431, 18 Ky. L. Rep. 714.

70. State *v.* McDonough, 104 Iowa 6, 73 N. W. 357.

71. Fenston *v.* Com., 82 Ky. 549.

72. Com. *v.* Squires, 97 Mass. 59, where it was alleged that accused was married. *Contra*, State *v.* Hooks, 69 Wis. 182, 33 N. W. 57, 2 Am. St. Rep. 728, although the offense was charged to have been committed upon a married woman.

73. Com. *v.* Goodhue, 2 Metc. (Mass.) 193, where the victim was alleged to be the daughter of accused.

74. Com. *v.* Parker, 146 Pa. St. 343, 23 Atl. 323. *Contra*, Speer *v.* State, 60 Ga. 381, holding that under the code mutual consent was essential to fornication.

75. Com. *v.* Lewis, 140 Pa. St. 561, 21 Atl. 501.

76. Larceny from the person see *supra*, XI, G, 2, f.

77. Rex *v.* Francis, 2 East P. C. 708, 2 Str. 1015.

78. *Alabama.*— Allen *v.* State, 58 Ala. 98.

Arkansas.— Haley *v.* State, 49 Ark. 147, 4 S. W. 746.

California.— People *v.* Nelson, 56 Cal. 77; People *v.* Jones, 53 Cal. 58.

Kentucky.— Com. *v.* Prewitt, 82 Ky. 240; Sullivan *v.* Com., 5 S. W. 365, 9 Ky. L. Rep. 420.

Missouri.— State *v.* Jenkins, 36 Mo. 372.

Nebraska.— Stevens *v.* State, 19 Nebr. 647, 28 N. W. 304.

New York.— People *v.* Kennedy, 57 Hun 532, 11 N. Y. Suppl. 244; People *v.* Langton, 32 Hun 461.

North Carolina.— See State *v.* Nicholson, 124 N. C. 820, 32 S. E. 813.

Tennessee.— Tucker *v.* State, 3 Heisk. 484.

Washington.— State *v.* Dengel, 24 Wash. 49, 63 Pac. 1104.

See 27 Cent. Dig. tit. "Indictment and Information," § 619.

Petit larceny.— Morris *v.* State, 97 Ala. 82, 12 So. 276; Duffy *v.* State, 154 Ind. 250, 56 N. E. 209.

79. State *v.* Wasson, 126 Iowa 320, 101 N. W. 1125; State *v.* Graff, 66 Iowa 482, 24 N. W. 6; Brown *v.* State, 33 Nebr. 354, 50

same is true of pocket-picking.[80] A charge of robbery will sustain a conviction of assault and battery,[81] or simple assault;[82] but an indictment for robbery in the usual form does not state the elements of an aggravated assault,[83] or of an assault with intent to murder.[84]

k. Offenses Including Fornication. A conviction for fornication may be had upon a charge of a graver offense in which sexual intercourse is an element, if the essential allegations of fornication are present.[85]

l. Other Offenses. Upon the principles already referred to,[86] it has been held that, on an indictment for a negligent escape, a voluntary escape may be shown;[87] that upon a charge of dueling, there may be a conviction of an affray;[88] that upon a charge of assaulting an officer in the service of process, there may be a conviction of assault and battery;[89] that upon a charge of rescuing a prisoner, there may be a conviction of assault and battery;[90] and that upon a charge of arson of one particular kind of building, there may be a conviction of the burning of other kinds.[91] There can of course be no conviction of an included offense unless the offenses are of the same generic class and the essentials of the lesser are included in the greater.[92]

H. Conviction of First Offense on Charge of Second or Third. Upon an indictment charging a second or third offense, there may be a conviction of a first offense.[93]

I. Indictments of Accessaries and Principals in Second Degree. One indicted as a principal in the second degree may be convicted of a lower degree of the offense ascribed to the principal in the first degree.[94] So on a charge of aiding and abetting a murder, there may be a conviction of manslaughter.[95] An accessary before the fact to grand larceny may be convicted of petit larceny, although the latter is a misdemeanor only.[96]

N. W. 154; Murphy *v.* People, 3 Hun (N. Y.) 114, 5 Thomps. & C. 302.

80. Brown *v.* State, 25 Ohio Cir. Ct. 130.

81. *Alabama.*— Rambo *v.* State, 134 Ala. 71, 32 So. 650.

Iowa.— State *v.* Kegan, 62 Iowa 106, 17 N. W. 179.

New York.— Murphy *v.* People, 3 Hun 114, 5 Thomps. & C. 302.

Ohio.— Howard *v.* State, 25 Ohio St. 399.

Virginia.— Hardy *v.* Com., 17 Gratt. 592.

But *compare* Com. *v.* Stiver, 1 Pa. Co. Ct. 526, holding that to justify a conviction of an assault and battery, the battery must be charged in a separate count.

82. Rambo *v.* State, 134 Ala. 71, 32 So. 650; Howard *v.* State, 25 Ohio St. 399; Com. *v.* Stiver, 1 Pa. Co. Ct. 526.

83. Forman *v.* State, (Tex. Cr. App. 1900) 57 S. W. 843.

84. Munson *v.* State, 21 Tex. App. 329, 17 S. W. 251.

85. Bryant *v.* State, 76 Ala. 33; Respublica *v.* Roberts, 1 Yeates (Pa.) 6, 2 Dall. 124, 1 L. ed. 316; Com. *v.* Neeley, 2 Chest. Co. Rep. (Pa.) 191 (adultery); Com. *v.* Burk, 3 Lanc. L. Rev. (Pa.) 138). But see Pena *v.* State, 46 Tex. Cr. 458, 80 S. W. 1014; Cosgrove *v.* State, 37 Tex. Cr. 249, 39 S. W. 367, 66 Am. St. Rep. 802, both holding the allegations of an indictment for adultery insufficient to support a conviction of fornication.

Seduction.— Wood *v.* State, 48 Ga. 192, 15 Am. Rep. 664; Dinkey *v.* Com., 17 Pa. St. 126, 55 Am. Dec. 542; Com. *v.* Neeley, 2 Chest. Co. Rep. (Pa.) 191. See also FORNICATION, 19 Cyc. 1441.

86. See *supra*, XII, G, 1.

87. Nall *v.* State, 34 Ala. 262.

88. State *v.* Fritz, 113 N. C. 725, 45 S. E. 957.

89. State *v.* Webster, 39 N. H. 96.

90. Rose *v.* State, 33 Ind. 167.

91. State *v.* Thornton, 56 Vt. 35.

92. State *v.* Bigelow, 101 Iowa 430, 70 N. W. 600, holding that forgery was not included in the offense of altering a forged check.

On a charge of riot, there can be no conviction of assault and battery (Ferguson *v.* People, 90 Ill. 510) or assault (Price *v.* People, 9 Ill. App. 36). But see Com. *v.* Hall, 142 Mass. 454, 8 N. E. 324, holding that upon an indictment which charges in one count a riot and an assault and battery committed riotously, defendant may be convicted of assault and battery only.

93. State *v.* Gaffeny, 66 Iowa 262, 23 N. W. 659.

94. State *v.* Absence, 4 Port. (Ala.) 397, holding that on an indictment as principal in the second degree for mayhem, defendant may be found guilty of a beating perpetrated by the principal in the first degree.

Prosecution and punishment generally see CRIMINAL LAW, 12 Cyc. 192.

95. State *v.* Coleman, 5 Port. (Ala.) 32; Brown *v.* State, 28 Ga. 199; Goff *v.* Prime, 26 Ind. 196.

96. Groves *v.* State, 76 Ga. 808.

J. Upon Joint Indictments. In the case of a joint indictment, a portion of defendants may be convicted of the greater offense and others of the less.[97]

K. Effect of Proof Sufficient to Establish Charge or Higher Offense. It is no defense to an indictment that the evidence shows that defendant committed a higher offense than that charged;[98] and in the absence of a statute, a conviction of a less offense may be sustained, although the evidence establishes a greater,[99] the error, if any, not being regarded as prejudicial to defendant.[1] But by statute in some states the jury is not entitled to find defendant guilty of a less degree than established by the evidence.[2]

L. Conviction of Higher Offense. As a matter of course an indictment will not support a conviction for a more serious offense than that charged.[3]

XIII. WAIVER OF DEFECTS AND OBJECTIONS.

A. In General. As a general rule, matter of abatement must be considered as waived unless urged before plea of the general issue.[4] A prisoner, however, by pleading to an indictment charging him as a principal, does not waive rights which he would have had were he charged with being an accessary.[5]

B. Particular Defects and Objections — 1. Constitution of Grand Jury. After a plea to the indictment and conviction, it is too late to object to the constitution of the grand jury.[6]

97. People *v.* Ellsworth, 90 Mich. 442, 51 N. W. 531 (assault with intent to do great bodily harm and assault and battery); White *v.* People, 32 N. Y. 465 [*affirming* 55 Barb. 606] (in the case of several persons guilty of a joint assault, where only a portion were guilty of a battery); U. S. *v.* Harding, 26 Fed. Cas. No. 15,301, 1 Wall. Jr. 127 (holding that a portion of defendants might be convicted of murder and others of manslaughter). See also McClellan *v.* State, 53 Ala. 640. But see State *v.* Major, 14 Rich. (S. C.) 76; State *v.* Wilson, 3 McCord (S. C.) 187; State *v.* Larumbo, Harp. (S. C.) 183, all holding that where two were indicted together for stealing the same goods, one cannot be convicted of grand and the other of petit larceny.

98. Hickey *v.* State, 23 Ind. 21 (holding that there may be a conviction on an indictment for grand larceny on evidence of robbery); Wyatt *v.* State, 1 Blackf. (Ind.) 257 (proof of burglary on trial of larceny); State *v.* Graff, 66 Iowa 482, 24 N. W. 6 (proof of robbery on charge of larceny from the person); Com. *v.* Andrews, 132 Mass. 263; Com. *v.* Walker, 108 Mass. 309; Com. *v.* Burke, 14 Gray (Mass.) 100.

On a trial for murder in the second degree, defendant is not entitled to an acquittal because the evidence against him would sustain a conviction of murder in the first degree. Fuller *v.* State, 30 Tex. App. 559, 17 S. W. 1108; Blocker *v.* State, 27 Tex. App. 16, 10 S. W. 439; Smith *v.* State, 22 Tex. App. 316, 3 S. W. 684; Baker *v.* State, 4 Tex. App. 223.

Under the Missouri statutes it is no ground for reversal that the evidence tends to show accused guilty of a higher offense than that of which he was convicted. State *v.* Jones, 106 Mo. 302, 17 S. W. 366 (arson); State *v.* Keeland, 90 Mo. 337, 2 S. W. 442 (conviction of larceny in the night-time upon evidence establishing robbery).

99. People *v.* Blanchard, 136 Mich. 146, 98 N. W. 983 (assault with intent to rob on charge of robbery); State *v.* Frazier, 137 Mo. 317, 38 S. W. 913 (murder in second degree on charge of first degree).

Instructions as to included offense in the absence of evidence see Criminal Law, 12 Cyc. 640.

Where no conviction could be had for the higher offense, the statute punishing such higher degree having been changed pending the indictment, there may be a conviction as to a lower degree as to which the statute has not been altered. Packer *v.* People, 8 Colo. 361, 8 Pac. 564; Garvey's Case, 7 Colo. 384, 3 Pac. 903, 49 Am. Rep. 358.

1. See Criminal Law, 12 Cyc. 934.

2. See People *v.* Blakeman, 34 N. Y. Suppl. 262.

3. McCollough *v.* State, 132 Ind. 427, 31 N. E. 1116 (grand larceny and petit larceny); State *v.* Leavitt, 87 Me. 72, 32 Atl. 787 (assault and battery and assault with intent to kill); People *v.* Fellinger, 24 How. Pr. (N. Y.) 341 (offense in the second degree and in the first degree).

4. State *v.* Butler, 17 Vt. 145.

5. U. S. *v.* Burr, 25 Fed. Cas. No. 14,693.

6. Boyington *v.* State, 2 Port. (Ala.) 100 (holding that an objection that one of the grand jurors that found the indictment was an alien must be taken before the jury is sworn); Hamilton *v.* State, 62 Ark. 543, 36 S. W. 1054; Miller *v.* State, 40 Ark. 488; Hagenow *v.* People, 188 Ill. 545, 59 N. E. 242; Gitchell *v.* People, 146 Ill. 175, 33 N. E. 757, 37 Am. St. Rep. 147; State *v.* Vincent, 91 Md. 718, 47 Atl. 1036, 52 L. R. A. 83. See also *supra*, IX, B, 7, g; IX, C, 4, c; and Grand Juries, 20 Cyc. 1291.

By asking a continuance defendant waives

2. Finding, Filing, and Presentment. A plea to the indictment is regarded as an admission of its genuineness as a record,[7] and it is held therefore that after plea of not guilty irregularities in the filing or presentation thereof cannot be urged.[8] Nor can objections to the witnesses who appeared before the grand jury be urged.[9] But where defendant in answer to a rule to show cause why an information should not be filed objects that the presentment upon which it is founded does not state an offense, he does not waive such objection by plea.[10]

3. Indorsements, Signatures, and Verifications. The fact that an indictment is not indorsed a "true bill" is waived by pleading to the merits,[11] as are objections based upon the absence of the foreman's signature.[12] Objections to the verification of an information must be urged before going to trial or at least before verdict,[13] and in some cases have been held to be waived by giving a recognizance for appearance.[14]

4. Description of Accused. A plea of not guilty is an admission that the name by which defendant is indicted is his true name and a waiver of any misnomer.[15]

any irregularity in the formation of the grand jury. Cornelison *v.* Com., 7 Ky. L. Rep. 344.

7. *Ex p.* Winston, 52 Ala. 419; State *v.* Clarkson, 3 Ala. 378; Gitchell *v.* People, 146 Ill. 175, 33 N. E. 757, 37 Am. St. Rep. 147; Frisbie *v.* U. S., 157 U. S. 160, 15 S. Ct. 586, 39 L. ed. 657.

8. *Alabama.*— *Ex p.* Winston, 52 Ala. 419; Russell *v.* State, 33 Ala. 366, failure of the record to show a proper indorsement by the clerk of the filing.

Iowa.— Hughes *v.* State, 4 Iowa 554, failure of clerk to place file-mark on indictment.

Kentucky.— Louisville, etc., R. Co. *v.* Com., 107 Ky. 628, 57 S. W. 508, 22 Ky. L. Rep. 328 (want of recommendation of the board of railroad commissioners before indictment for violation of a constitutional provision against discrimination by a carrier); Trusty *v.* Com., 41 S. W. 766, 19 Ky. L. Rep. 706 (absence of order filing the indictment).

Louisiana.— State *v.* Dillon, 50 La. Ann. 23, 23 So. 320, where information was filed without leave.

Texas.— Moore *v.* State, 46 Tex. Cr. 520, 81 S. W. 48 (failure to enter presentation upon minutes of the court); Spence *v.* State, 1 Tex. App. 541 (failure to state term of court at which indictment was presented).

Vermont.— State *v.* Butler, 17 Vt. 145, failure of the clerk of the court to enter upon the indictment the true day, month, and year when the indictment was exhibited to the court.

Objections to a copy substituted for a lost indictment are waived by a failure to object to the reading of the copy until after the jury has been sworn. Currey *v.* State, 7 Baxt. (Tenn.) 154.

9. State *v.* Wolcott, 21 Conn. 272 (testimony of accomplice); Nixon *v.* State, 121 Ga. 144, 48 S. E. 966 (failure to swear a witness before the grand jury); U. S. *v.* Hartwell, 26 Fed. Cas. No. 15,319 (objection to examination of defendant before the grand jury). See *supra*, IX, B, 7, i.

10. Bishop *v.* Com., 13 Gratt. (Va.) 785.

11. Hughes *v.* State, 4 Iowa 554; Waukon-chaw-neek-kaw *v.* U. S., Morr. (Iowa) 332; Frisbie *v.* U. S., 157 U. S. 160, 15 S. Ct. 586, 39 L. ed. 657.

12. *Arkansas.*— McFall *v.* State, 73 Ark. 327, 84 S. W. 479; State *v.* Agnew, 52 Ark. 275, 12 S. W. 563.

California.— People *v.* Johnston, 48 Cal. 549.

Minnesota.— State *v.* Shippey, 10 Minn. 223, 88 Am. Dec. 70.

Missouri.— State *v.* Murphy, 47 Mo. 274; State *v.* Mertens, 14 Mo. 94.

South Carolina.— See State *v.* Creighton, 1 Nott & M. 256.

See 27 Cent. Dig. tit. "Indictment and Information," § 632.

13. *Florida.*— Bryan *v.* State, 41 Fla. 643, 26 So. 1022.

Kansas.— State *v.* Osborn, 54 Kan. 473, 38 Pac. 572; State *v.* Blackman, 32 Kan. 615, 5 Pac. 173; State *v.* Ruth, 21 Kan. 583; State *v.* Adams, 20 Kan. 311 (as where the clerk has failed to attach his signature and seal); State *v.* Otey, 7 Kan. 69.

Michigan.—Lambert *v.* People, 29 Mich. 71.

Missouri.— State *v.* Brown, 181 Mo. 192, 79 S. W. 1111.

Nebraska.—Johnson *v.* State, 53 Nebr. 103, 73 N. W. 463; Bailey *v.* State, 36 Nebr. 808, 55 N. W. 241; Hodgkins *v.* State, 36 Nebr. 160, 54 N. W. 86; Davis *v.* State, 31 Nebr. 247, 47 N. W. 854.

North Dakota.—State *v.* Kent, 5 N. D. 516, 67 N. W. 1052, 35 L. R. A. 518.

Washington.— Hammond *v.* State, 3 Wash. 171, 28 Pac. 334.

See 27 Cent. Dig. tit. "Indictment and Information," § 632.

14. State *v.* Barr, 54 Kan. 230, 38 Pac. 289; State *v.* Ellvin, 51 Kan. 784, 33 Pac. 547; State *v.* Longton, 35 Kan. 375, 11 Pac. 163; State *v.* Keenan, (Kan. App. 1898) 55 Pac. 102; State *v.* Hook, 4 Kan. App. 451, 46 Pac. 44.

15. *Alabama.*— Verberg *v.* State, 137 Ala. 73, 34 So. 848, 97 Am. St. Rep. 17; Wells *v.* State, 88 Ala. 239, 7 So. 272.

Indiana.— Uterburgh *v.* State, 8 Blackf. 202.

5. Statement of Substance of Offense. A plea of guilty has been held to have the same effect as a verdict of guilty with regard to defective averments;[16] but if no crime is charged in the indictment or information, a plea of guilty does not prevent defendant from raising an objection on that ground.[17] Defects of substance are not cured by plea,[18] and in some jurisdictions the right to demur has been held not waived by plea of not guilty.[19]

6. Duplicity and Joinder of Offenses. An objection on the ground of duplicity is waived by going to trial without objection,[20] or by a plea of guilty;[21] and an appearance and plea of not guilty waives an objection as to misjoinder of offenses in separate counts.[22] A demurrer to an indictment admits the propriety of charging defendants jointly.[23]

7. Variance Between Warrant and Information. An objection upon the ground of variance between the offenses charged in the warrant and that set forth in the information is waived by pleading to the information.[24]

8. Amendments. By consent to an alteration in the indorsement of an indictment upon the record, defendant waives a written motion for an amendment.[25] In case defendant agrees that an accusation for simple larceny may be amended to charge larceny from a house, the agreement will be construed to permit any amendment necessary to make the accusation valid.[26] Under a statute providing that in case defendant does not consent to an amendment correcting the statement of the name of defendant, or of the description of any person, property, or matter stated in the indictment, the indictment may be dismissed and another indictment ordered to be preferred, defendant waives a defense of former jeopardy by consenting to the amendment.[27]

9. Rulings on Demurrers and Motions. A demurrer is not waived by pleading over after it is overruled.[28] A motion to quash is waived by a plea to the merits pending a decision.[29] The state, by asking leave to amend, will not be held to have waived an exception to a ruling sustaining a motion to quash in case the

Massachusetts. — Turns *v.* Com., 6 Metc. 224.

New Hampshire. — State *v.* Thompson, 20 N. H. 250.

Ohio. — Smith *v.* State, 8 Ohio 294.

South Carolina. — State *v.* Thompson, Cheves 31.

See 27 Cent. Dig. tit. "Indictment and Information," § 634.

16. U. S. *v.* Bayaud, 16 Fed. 376, 21 Blatchf. 287, holding that upon an indictment for removing revenue stamps from liquor casks without destroying the stamps, an averment that accused fraudulently removed the stamps would, after a plea of guilty, be construed to mean with intent to defraud the United States.

17. State *v.* Ulrich, 96 Mo. App. 689, 70 S. W. 933, holding that after plea of guilty, the failure of the information to conclude against the peace and dignity of the state could be urged. And see Com. *v.* Northampton, 2 Mass. 116, holding that the failure of an indictment founded upon a statute to conclude against the form of the statute may be urged after a plea of *nolo contendere*.

18. State *v.* Carpenter, 54 Vt. 551, so holding where an indictment for hindering an officer did not allege that defendant knew of the character in which the officer claimed to act. And see People *v.* Buck, 109 Mich. 687, 67 N. E. 982, failure of an information for a third offense to allege the former convictions.

19. Stroud *v.* Com., 19 S. W. 976, 14 Ky. L. Rep. 179, where an indictment for murder did not charge that the act was feloniously done.

20. Scruggs *v.* State, 7 Baxt. (Tenn.) 38.

21. State *v.* Farnum, 66 N. J. L. 397, 52 Atl. 956.

22. Josephine *v.* State, 39 Miss. 613; George *v.* State, 39 Miss. 570; People *v.* Upton, 38 Hun (N. Y.) 107; Devere *v.* State, 5 Ohio Cir. Ct. 509, 3 Ohio Cir. Dec. 249, 25 Cinc. L. Bul. 435.

23. People *v.* Kelly, 3 N. Y. Cr. 272.

24. People *v.* Clark, 33 Mich. 112.

25. State *v.* Anderson, 45 La. Ann. 651, 12 So. 737.

26. Barlow *v.* State, 77 Ga. 448, holding that where it was discovered after the jury was sworn that the property was laid in defendant, he could not object to an amendment laying the property in the prosecutor.

27. Reynolds *v.* State, 92 Ala. 44, 9 So. 398.

28. Com. *v.* Kennedy, 131 Mass. 584 (so holding, although the plea was guilty where it was evident that the presiding judge, district attorney, and defendant had adopted that form of presenting the sufficiency of the indictment in order to avoid the trouble and expense of an actual trial); State *v.* Hinkle, 33 Oreg. 93, 54 Pac. 155; State *v.* Bosworth, 74 Vt. 315, 52 Atl. 423; State *v.* Ball, 30 W. Va. 382, 4 S. E. 645.

29. Long *v.* People, 102 Ill. 331.

leave to amend was refused, although a waiver would have resulted had the amendment been granted.[30] The right of the state to final judgment where a demurrer to an indictment is overruled is waived by placing defendant upon trial.[31]

XIV. AIDER BY VERDICT.

A. General Rules. The rule as to defects which are cured by verdict is the same in criminal as in civil cases,[32] it being that where an averment necessary to support a particular part of the indictment has been imperfectly stated, a verdict cures the defect, which might have been bad on demurrer, in case it appears to the court that unless the averment were true the verdict could not be sustained.[33] Hence after verdict advantage cannot be taken of mere formal, technical, or grammatical errors in the indictment, which do not obscure the meaning to a common intent.[34] Defects in substance are not cured by verdict.[35] And some authorities in opposition to the rule above stated hold that upon a motion in arrest, every objection, either in substance or form, which might have been taken on demurrer, may be raised,[36] and that a general verdict of guilty is a finding only of the facts sufficiently pleaded.[37]

B. Defects Which Are Cured — 1. Constitution of Grand Jury. The general rule is that it is too late after a verdict to object to the competency of the grand jurors by whom the indictment was found or to the mode of summoning or impaneling them.[38] So also an objection that the grand jury was composed of

30. State *v.* Wilson, 156 Ind. 343, 59 N. E. 932.

31. Johnson *v.* People, 22 Ill. 314.

32. State *v.* Ryan, 68 Conn. 512, 37 Atl. 377; State *v.* Keena, 63 Conn. 329, 28 Atl. 522; State *v.* Freeman, 63 Vt. 496, 22 Atl. 621; Heymann *v.* Reg., L. R. 8 Q. B. 102, 12 Cox C. C. 383, 28 L. T. Rep. N. S. 162, 21 Wkly. Rep. 357.

33. State *v.* Freeman, 63 Vt. 496, 22 Atl. 621; Reg. *v.* Stroulger, 17 Q. B. D. 327, 16 Cox C. C. 85, 51 J. P. 278, 55 L. J. M. C. 137, 55 L. T. Rep. N. S. 122, 34 Wkly. Rep. 719; Heymann *v.* Reg., L. R. 8 Q. B. 102, 12 Cox C. C. 383, 28 L. T. Rep. N. S. 162, 21 Wkly. Rep. 357; Reg. *v.* Goldsmith, L. R. 2 C. C. 74, 12 Cox C. C. 479, 42 L. J. M. C. 94, 28 L. T. Rep. N. S. 881, 21 Wkly. Rep. 791 (holding that an omission to set out particular false pretenses in an indictment for receiving goods obtained by false pretenses was cured by verdict); Reg. *v.* Knight, 14 Cox C. C. 31, 37 L. T. Rep. N. S. 801.

The indictment must contain terms sufficiently general to comprehend the presumed facts in fair and reasonable intendment. State *v.* Freeman, 63 Vt. 496, 22 Atl. 621.

The indictment is to be liberally construed as consistent with the verdict if it can be fairly done. Wilson *v.* Com., 60 S. W. 400, 22 Ky. L. Rep. 1251.

34. Lavelle *v.* State, 136 Ind. 233, 36 N. E. 135; Territory *v.* Eaton, (N. M. 1905) 79 Pac. 713; Haynes *v.* U. S., 9 N. M. 519, 56 Pac. 282; Thompson *v.* People, 3 Park. Cr. (N. Y.) 208; State *v.* Dunn, 109 N. C. 839, 13 S. E. 881 (holding that it could not be objected after verdict that an indictment for resisting an officer did not set out the warrant or name the person whom the officer was seeking to arrest); Lutz *v.* Com., 29 Pa. St. 441 (omission to connect necessary and dependent members of the same sentence by their appropriate conjunctions); Smith *v.* State, Peck (Tenn.) 165.

Objections to the caption of the indictment cannot be made after verdict (State *v.* Thibeau, 30 Vt. 100); such as failure to insert the names or the number of the grand jurors (Dawson *v.* People, 25 N. Y. 399).

35. Fellinger *v.* People, 15 Abb. Pr. (N. Y.) 128; Lutz *v.* Com., 29 Pa. St. 441; Hite *v.* State, 9 Yerg. (Tenn.) 198.

36. Com. *v.* Child, 13 Pick. (Mass.) 198; Brown *v.* Com., 8 Mass. 59; Com. *v.* Morse, 2 Mass. 128; People *v.* Wright, 9 Wend. (N. Y.) 193; Reed *v.* People, 1 Park. Cr. (N. Y.) 481. It has been held that surplusage which may have been the ground of conviction cannot be rejected after verdict (Com. *v.* Atwood, 11 Mass. 93), but this case is questioned, if not overruled, by Com. *v.* Tuck, 20 Pick. (Mass.) 356. See also Com. *v.* Hope, 22 Pick. (Mass.) 1.

37. Com. *v.* Moore, 99 Pa. St. 570, holding that where there had been a conviction upon a charge of cheating by false pretenses, it could not be assumed that the facts proved amounted to larceny, the indictment not being so drawn as to sustain a charge of larceny.

38. *Delaware.*— State *v.* Brown, 2 Marv. 380, 36 Atl. 458.

Maine.— State *v.* Carver, 49 Me. 588, 77 Am. Dec. 275.

Mississippi.— Green *v.* State, 28 Miss. 687.

New Hampshire.— State *v.* Rand, 33 N. H. 216.

New York.— People *v.* Robinson, 2 Park. Cr. 235.

West Virginia.—State *v.* Stewart, 7 W. Va. 731, 23 Am. Rep. 623.

United States.— U. S. *v.* Gale, 109 U. S. 65, 3 S. Ct. 1, 27 L. ed. 857.

See 27 Cent. Dig. tit. "Indictment and Information," § 630.

a greater number than provided by law must as a rule be taken by plea in abatement and cannot be urged after verdict.[39]

2. Finding, Filing, and Presentment. Irregularities in the finding, filing, or presentation of the indictment, or filing of the information, cannot be urged for the first time after verdict.[40] In case, however, a defendant does not learn that the indictment was not presented by the grand jury until after a verdict has been entered against him, he is entitled to move to amend the record by striking from it the indictment and so much of the entry as shows that it has been duly presented by the grand jury.[41]

3. Indorsement, Signature, and Verification. A defect in the verification of an information cannot be first urged after verdict;[42] nor can a failure to properly indorse an indictment a "true bill,"[43] or to indorse upon it the names of the witnesses,[44] or the name of the prosecutor.[45]

4. Statement of Place. An imperfect statement of place may be cured by verdict,[46] as when simply the county is stated without more particular description.[47]

5. Statement of Time. A failure to state a day certain is not necessarily a fatal defect after verdict,[48] nor is the statement of an impossible day;[49] but it seems that the omission of an allegation of time which is essential to the description of the offense is not aided by verdict.[50]

6. Description of Accused. A failure to state the christian name,[51] or the degree, mystery, or residence[52] of defendant cannot be urged after verdict. The same is true of failure to rename defendant.[53]

7. Statement of Substance of Offense. A defective statement of the offense is cured by verdict;[54] but not an insufficient description of the true character of the

Lack of an opportunity to challenge the grand jury cannot be urged after verdict. State *v.* Brown, (Iowa 1905) 102 N. W. 799.

39. Shropshire *v.* State, 12 Ark. 190.

40. Munson *v.* State, 4 Greene (Iowa) 483; Wau-kon-chaw-neek-kaw *v.* U. S., Morr. (Iowa) 332.

Illustrations.— Defendant after verdict cannot urge defects in the minutes of the court as to the formal presentment of the indictment (Douglass *v.* State, 8 Tex. App. 520) or object that the record does not show that the grand jury was present when the indictment was returned (State *v.* Mann, 83 Mo. 589), or that an affidavit was not filed with the information (Schott *v.* State, 7 Tex. App. 616), or that the bailiff was present during the deliberations of the grand jury (State *v.* Kimball, 29 Iowa 267), or that a defective copy of the indictment was served upon him (Smith *v.* State, 40 Tex. Cr. 391, 50 S. W. 938); and the fact that a presentment does not state that it was made on oath or in solemn form cannot be taken after a conviction and judgment (Com. *v.* Offner, 2 Va. Cas. 17).

Amended indictment.— After verdict defendant cannot object that the date when the indictment was found by the grand jury is not indicated upon the amended indictment or that no witnesses were sworn before the grand jury. De Berry *v.* State, 99 Tenn. 207, 42 S. W. 31.

41. State *v.* Harrison, 104 N. C. 728, 10 S. E. 131.

42. State *v.* Montgomery, 181 Mo. 19, 79 S. W. 693, 67 L. R. A. 343.

43. State *v.* Brooks, 94 Mo. 121, 7 S. W. 24; State *v.* Harris, 73 Mo. 287; State *v.* Burgess, 24 Mo. 381, 69 Am. Dec. 433; Burgess *v.* Com., 2 Va. Cas. 485.

44. De Berry *v.* State, 99 Tenn. 207, 42 S. W. 31; Skipworth *v.* State, 8 Tex. App. 135.

45. Hayden *v.* Com., 10 B. Mon. (Ky.) 125; U. S. *v.* Lloyd, 26 Fed. Cas. No. 15,616, 4 Cranch C. C. 467.

46. Nichols *v.* State, 127 Ind. 406, 26 N. E. 839, enticing female for purposes of prostitution.

47. Ledbetter *v.* U. S., 170 U. S. 606, 18 S. Ct. 774, 42 L. ed. 1162.

48. Ledbetter *v.* U. S., 170 U. S. 606, 18 S. Ct. 774, 42 L. ed. 1162. And see Perkins *v.* State, 8 Baxt. (Tenn.) 559.

49. Conner *v.* State, 25 Ga. 515, 71 Am. Dec. 184.

50. Lewis *v.* State, 16 Conn. 32, so holding with regard to failure of an indictment for burglary to charge that it was committed in the night-time.

51. Wilcox *v.* State, 31 Tex. 586.

52. State *v.* McGregor, 41 N. H. 407; Com. *v.* Jackson, 1 Grant (Pa.) 262.

53. Price *v.* State, 67 Ga. 723, holding that while an indictment which after naming defendant left a blank instead of renaming him on charging the offense was objectionable on special demurrer, the defect was not a ground for a new trial after verdict.

54. *Connecticut.*— State *v.* Ryan, 68 Conn. 512, 37 Atl. 377, uncertain statement of first offense in an indictment for a second offense in the sale of intoxicating liquors.

Indiana. — Woodworth *v.* State, 145 Ind. 276, 43 N. E. 933, assault.

Pennsylvania.— Staeger *v.* Com., 103 Pa.

offense[55] or a failure to state facts sufficient to constitute an offense,[56] or a failure to negative exceptions in the enacting clause of the statute upon which the information is based.[57] Upon an indictment for assault with intent to commit a crime or for an attempt, an objection that the offense intended to be committed is not sufficiently charged comes too late after verdict.[58] Where an indictment is sufficient in form under either of two sections of the statute, it will, in case one has been repealed by the other, be referred to the latter section.[59]

8. Description of Third Persons. A defective description of a third person named in the indictment is cured by verdict.[60]

9. Description of Property. An imperfect description of property stolen is aided by verdict.[61]

10. Duplicity and Joinder of Offenses. As a general rule duplicity in an indictment is cured by verdict,[62] the jury being presumed to have found defend-

St. 469, use of "feloniously" in describing a misdemeanor.

Vermont.— State *v.* Freeman, 63 Vt. 496, 22 Atl. 621, failure to set out language in complaint for profane swearing.

Washington.— State *v.* Anderson, 30 Wash. 14, 70 Pac. 104, description of weapon used is committing as "an iron instrument, then and there a deadly weapon."

United States.— Coffin *v.* U. S., 162 U. S. 664, 16 S. Ct. 943, 40 L. ed. 1109, allegation in indictment for violation of the banking law that the bank was "heretofore" incorporated instead of "theretofore" incorporated.

Mere indefiniteness cannot be urged for the first time after verdict where the indictment is sufficiently certain to inform defendant of the offense charged. State *v.* Marshall, 2 Kan. App. 792, 44 Pac. 49.

55. Reyes *v.* State, 34 Fla. 181, 15 So. 875, failure to set out an obscene picture or describe the same so as to inform defendant of the nature of the charge. See also People *v.* Cox, 9 Cal. 32; People *v.* Wallace, 9 Cal. 30.

56. State *v.* Godfrey, 24 Me. 232, 41 Am. Dec. 382.

Failure to conclude against the peace and dignity of the state may be urged at any time. Cox *v.* State, 8 Tex. App. 254, 34 Am. Rep. 746.

57. Crandall *v.* State, 10 Conn. 339.

58. State *v.* Peak, 130 N. C. 711, 41 S. E. 887.

59. Taylor *v.* State, 100 Ala. 68, 14 So. 875.

60. *Kansas.*— State *v.* Rook, 42 Kan. 419, 22 Pac. 626.

Massachusetts.— Com. *v.* Desmarteau, 16 Gray 1.

Pennsylvania.— Evans *v.* Com., 5 Pa. Co. Ct. 362.

South Carolina.— State *v.* Rudolph, 3 Hill 257; State *v.* Crank, 2 Bailey 66, 23 Am. Dec. 117.

Texas.— Frasher *v.* State, 3 Tex. App. 263, 30 Am. Rep. 131, holding that the omission of an indictment charging miscegenation to allege the name of defendant's consort, although fatal on a motion to quash, is not available in arrest of judgment, being cured by verdict.

See 27 Cent. Dig. tit. "Indictment and Information," § 640.

A failure to state whether the owner of funds embezzled is an association or a corporation is cured by verdict. Laycock *v.* State, 136 Ind. 217, 36 N. E. 137. See also Lithgow *v.* Com., 2 Va. Cas. 297, holding that in an indictment where the thing stolen is alleged to be the property of a corporate body by name, the political existence of the corporation will, after verdict, be inferred from its corporate name.

61. State *v.* Carter, 51 La. Ann. 442, 25 So. 385; State *v.* Perkins, 49 La. Ann. 310, 21 So. 839; State *v.* Anderson, 42 La. Ann. 590, 7 So. 687; Vaughan *v.* Com., 17 Gratt. (Va.) 576; State *v.* Hanshew, 3 Wash. 12, 27 Pac. 1029.

62. *Connecticut.*— State *v.* Holmes, 28 Conn. 230.

Georgia.— Williams *v.* State, 60 Ga. 88.

Indiana.— Naanes *v.* State, 143 Ind. 299, 42 N. E. 609.

Iowa.— State *v.* Callahan, 96 Iowa 304, 65 N. W. 150.

Kentucky.— Sturgeon *v.* Com., 37 S. W. 679, 18 Ky. L. Rep. 668; Scalf *v.* Com., 5 S. W. 361, 9 Ky. L. Rep. 412.

Massachusetts.— Com. *v.* Tuck, 20 Pick. 356.

Mississippi.— Wilkinson *v.* State, 77 Miss. 705, 27 So. 639.

Missouri.— State *v.* Fox, 148 Mo. 517, 50 S. W. 98; State *v.* Wilson, 143 Mo. 334, 44 S. W. 722; State *v.* Nagel, 136 Mo. 45, 37 S. W. 821; State *v.* Armstrong, 106 Mo. 395, 16 S. W. 604, 27 Am. St. Rep. 361, 13 L. R. A. 419; State *v.* Harrison, 62 Mo. App. 112.

Nebraska.— Aiken *v.* State, 41 Nebr. 263, 59 N. W. 888.

New Mexico.— Tomlinson *v.* Territory, 7 N. M. 195, 33 Pac. 950.

North Carolina.— State *v.* Hart, 116 N. C. 976, 20 S. E. 1014; State *v.* Cooper, 101 N. C. 684, 8 S. E. 134; State *v.* Simons, 70 N. C. 336; State *v.* Hart, 26 N. C. 246.

Pennsylvania.— Com. *v.* Hand, 3 Phila. 403.

Tennessee.— Forrest *v.* State, 13 Lea 103.

Texas.— Tucker *v.* State, 6 Tex. App. 251; Berliner *v.* State, 6 Tex. App. 181; Coney *v.* State, 2 Tex. App. 62. *Contra*, Wood *v.* State, (Cr. App. 1905) 84 S. W. 1058, hold-

ant guilty of one offense, and to have acquitted him of the other.[63] So where there is a misjoinder of counts, an objection cannot be raised after verdict.[64] In case, however, distinct offenses are joined, which are of different nature, it would seem that the verdict must be special and find defendant guilty of but one of the offenses charged,[65] although this distinction is not expressly made in many of the cases. In case there is a misjoinder of counts and a conviction upon one count only, there is no error.[66]

11. VARIANCE. Variance cannot as a general rule be taken advantage of after verdict,[67] although it has been held that in a proper case a judgment may be reversed where it is apparent from the record that there is a fatal variance between the charge and the proof.[68]

C. Verdict on Indictment Containing Good and Bad Counts — 1. GENERAL RULE. Where there is a general verdict on an indictment which contains good and bad counts, the finding of the jury will be referred to the good count or counts if sustained by the evidence, and the judgment of the court thereupon sustained.[69] So where an indictment for the taking and carrying away of a slave

ing that the fact that the trial court limits the jury to a consideration of but one of the offenses charged will not cure a duplicitous count.

United States.— Wiborg *v.* U. S., 163 U. S. 632, 16 S. Ct. 1127, 1197, 41 L. ed. 289 (where the jury were expressly told that there could be a conviction of only one of such offenses); Crain *v.* U. S., 162 U. S. 625, 16 S. Ct. 952, 40 L. ed. 1097; Durland *v.* U. S., 161 U. S. 306, 16 S. Ct. 508, 40 L. ed. 709; Connors *v.* U. S., 158 U. S. 408, 15 S. Ct. 951, 39 L. ed. 1033; Babcock *v.* U. S., 34 Fed. 873.

England.— Nash *v.* Reg., 4 B. & S. 935, 9 Cox C. C. 424, 10 Jur. N. S. 819, 33 L. J. M. C. 94, 9 L. T. Rep. N. S. 716, 12 Wkly. Rep. 421, 116 E. C. L. 935.

See 27 Cent. Dig. tit. "Indictment and Information," § 648.

Contra.— People *v.* Wright, 9 Wend. (N. Y.) 196; Reed *v.* People, 1 Park. Cr. (N. Y.) 481.

63. Simons *v.* State, 25 Ind. 331.

64. *Louisiana.*— State *v.* Clement, 42 La. Ann. 583, 7 So. 685.

Mississippi.— Wash *v.* State, 22 Miss. 120.

Pennsylvania.— See Com. *v.* Landis, 13 Pa. Super. Ct. 134.

Tennessee.— Boyd *v.* State, 7 Coldw. 69; Janeway *v.* State, 1 Head 130.

Texas.— Matt *v.* State, (Cr. App. 1900) 58 S. W. 101.

Wisconsin.— Ketchingman *v.* State, 6 Wis. 426.

See 27 Cent. Dig. tit. "Indictment and Information," § 648.

Contra.— White *v.* People, 8 Colo. App. 289, 45 Pac. 539, holding that where an indictment in several counts charged two offenses and did not show whether it charged the same offense in different form or charged two distinct offenses, a conviction of two offenses would be reversed, although the counsel for defendant interposed no objection.

65. State *v.* Leavitt, 87 Me. 72, 32 Atl. 787.

Duplicity.— State *v.* Miller, 24 Conn. 522; State *v.* Leavitt, 87 Me. 72, 32 Atl. 787 (assault with intent to maim and assault with intent to kill); State *v.* Merrill, 44 N. H. 624 (larceny of goods of separate owners).

Misjoinder of counts.— Com. *v.* Adams, 127 Mass. 15; Com. *v.* Chase, 127 Mass. 7; Com. *v.* Holmes, 103 Mass. 440 (where the counts did not aver that they contained different descriptions of the same offense); Com. *v.* Packard, 5 Gray (Mass.) 101; State *v.* Perdue, 107 N. C. 853, 12 S. E. 253; Henwood *v.* Com., 52 Pa. St. 424.

66. Reed *v.* State, 147 Ind. 41, 46 N. E. 135; Myers *v.* State, 92 Ind. 390.

67. State *v.* McMillan, 68 N. C. 440 (where goods were charged to belong to S L W and proved to belong to Samuel L W); State *v.* Meyers, 40 S. C. 555, 18 S. E. 892; State *v.* Robinson, 40 S. C. 553, 18 S. E. 891; State *v.* Senn, 32 S. C. 392, 11 S. E. 292. And see People *v.* Formosa, 131 N. Y. 478, 30 N. E. 492, 27 Am. St. Rep. 612.

Failure to sustain an averment of ownership cannot be urged after trial. State *v.* Thompson, 97 N. C. 496, 1 S. E. 921, indictment for burning an outhouse.

68. State *v.* Burgess, 74 N. C. 272, holding that evidence that property stolen belonged jointly to two persons where it was described in the indictment as the property of one constituted such a variance.

69. *Alabama.*— Owens *v.* State, 104 Ala. 18, 16 So. 575; May *v.* State, 85 Ala. 14, 5 So. 14; Barber *v.* State, 78 Ala. 19; Glenn *v.* State, 60 Ala. 104; Toney *v.* State, 60 Ala. 97; Rowland *v.* State, 55 Ala. 210; Chappell *v.* State, 52 Ala. 359; Montgomery *v.* State, 40 Ala. 684; Mose *v.* State, 35 Ala. 421; Hudson *v.* State, 34 Ala. 253; Baker *v.* State, 30 Ala. 521; Shaw *v.* State, 18 Ala. 547; State *v.* Lassley, 7 Port. 526; State *v.* Coleman, 5 Port. 32; Harris *v.* Purdy, 1 Stew. 231.

Arkansas.— Cooper *v.* State, 37 Ark. 412; Howard *v.* State, 34 Ark. 433; Brown *v.* State, 10 Ark. 607.

Connecticut.— State *v.* Stebbins, 29 Conn. 463, 79 Am. Dec. 223.

District of Columbia.— Lehman *v.* District of Columbia, 19 App. Cas. 217.

Florida.— Jordan *v.* State, 22 Fla. 528.

charged in various counts the taking by different means, it was not error for the court to instruct the jury that they need not find in what way the taking was accomplished, although some of the counts were defective, where the instructions also required the finding of facts which were averred only in the good counts.[70] The presumption of law that the general verdict of guilty was responsive to the valid count may be overcome if the evidence clearly shows that the verdict is not responsive, and upon such a conviction judgment should be arrested.[71] A general verdict of guilty will not authorize separate penalties to be inflicted upon the separate counts in the indictment.[72]

2. Qualifications of Rule. The general rule as thus stated is in some cases restricted by several important qualifications. Thus it is said that the several

Georgia.— Bulloch *v.* State, 10 Ga. 46, 54 Am. Dec. 369.

Illinois.— Gallagher *v.* People, 211 Ill. 158, 71 N. E. 842; McElroy *v.* People, 202 Ill. 473, 66 N. E. 1058; Ochs *v.* People, 124 Ill. 399, 16 N. E. 662; Thomas *v.* People, 113 Ill. 531; Duffin *v.* People, 107 Ill. 113, 47 Am. Rep. 431; Murphy *v.* People, 104 Ill. 528; Sahlinger *v.* People, 102 Ill. 241; Hiner *v.* People, 34 Ill. 297; Townsend *v.* People, 4 Ill. 326; Curtis *v.* People, 1 Ill. 256.

Iowa.— State *v.* Shelledy, 8 Iowa 477.

Kentucky.— Buford *v.* Com., 14 B. Mon. 24; Parker *v.* Com., 8 B. Mon. 30.

Louisiana.— State *v.* Dubord, 2 La. Ann. 732.

Maine.— State *v.* Tibbetts, 86 Me. 189, 29 Atl. 979; State *v.* Mayberry, 48 Me. 218; State *v.* Burke, 38 Me. 574.

Maryland.— Manly *v.* State, 7 Md. 135; Burk *v.* State, 2 Harr. & J. 426.

Massachusetts.— Com. *v.* Howe, 13 Gray 26; Larned *v.* Com., 12 Metc. 240; Josslyn *v.* Com., 6 Metc. 236; Jennings *v.* Com., 17 Pick. 80.

Michigan.— People *v.* Bird, 126 Mich. 631, 86 N. W. 127; People *v.* McKinney, 10 Mich. 54; Shannon *v.* People, 5 Mich. 71.

Mississippi.— Gates *v.* State, 71 Miss. 874, 16 So. 342; Wash *v.* State, 14 Sm. & M. 120; Miller *v.* State, 5 How. 250; Friar *v.* State, 3 How. 422.

Missouri.— State *v.* Clark, (1898) 47 S. W. 886; State *v.* Blan, 69 Mo. 317; State *v.* Testerman, 68 Mo. 408; State *v.* Watson, 31 Mo. 361; State *v.* Montgomery, 28 Mo. 594; State *v.* Jennings, 18 Mo. 435.

New Hampshire.— State *v.* Canterbury, 28 N. H. 195; Arlen *v.* State, 18 N. H. 563.

New Jersey.— Mead *v.* State, 53 N. J. L. 601, 23 Atl. 264; Hunter *v.* State, 40 N. J. L. 495; Johnson *v.* State, 29 N. J. L. 453; West *v.* State, 22 N. J. L. 212; Stone *v.* State, 20 N. J. L. 404.

New York.— Hope *v.* People, 83 N. Y. 418, 38 Am. Rep. 460; Pontius *v.* People, 82 N. Y. 339; Phelps *v.* People, 72 N. Y. 365; People *v.* Davis, 56 N. Y. 95; Crichton *v.* People, 1 Abb. Dec. 467, 1 Keyes 341, 6 Park. Cr. 363; People *v.* Levoy, 72 N. Y. App. Div. 55, 76 N. Y. Suppl. 783; Frazer *v.* People, 54 Barb. 306; People *v.* Stocking, 50 Barb. 573; People *v.* Davis, 45 Barb. 494; Wood *v.* People, 3 Thomps. & C. 506; People *v.* Wiley, 3 Hill 194; Kane *v.* People, 8 Wend. 203; People *v.* Curling, 1 Johns. 320; People *v.* Gilkinson, 4 Park. Cr. 26; People *v.* Stein, 1 Park. Cr. 202.

North Carolina.— State *v.* Lee, 114 N. C. 844, 19 S. E. 375; State *v.* Carter, 113 N. C. 639, 18 S. E. 517; State *v.* Smiley, 101 N. C. 709, 7 S. E. 904; State *v.* Miller, 29 N. C. 275.

Ohio.— Robbins *v.* State, 8 Ohio St. 131; Bailey *v.* State, 4 Ohio St. 440; Stoughton *v.* State, 2 Ohio St. 562; Turk *v.* State, 7 Ohio, Pt. II, 240.

Pennsylvania.— Com. *v.* Prickett, 132 Pa. St. 371, 19 Atl. 218; Hazen *v.* Com., 23 Pa. St. 355.

South Carolina.— State *v.* Pace, 9 Rich. 355; State *v.* Posey, 7 Rich. 484; State *v.* Connolly, 3 Rich. 337; State *v.* Brown, 3 Strobh. 508; State *v.* Turner, 2 McMull. 399; State *v.* Poole, 2 Treadw. 494, 3 Brev. 416.

Tennessee.— McTigue *v.* State, 4 Baxt. 313; Taylor *v.* State, 3 Heisk. 460; Rice *v.* State, 3 Heisk. 215; Isham *v.* State, 1 Sneed 111.

Texas.— Dent *v.* State, 43 Tex. Cr. 126, 65 S. W. 627; Fry *v.* State, 36 Tex. Cr. 582, 37 S. W. 741, 38 S. W. 168; Floyd *v.* State, (Cr. App. 1896) 35 S. W. 969; Henderson *v.* State, 2 Tex. App. 88.

Vermont.— State *v.* Davidson, 12 Vt. 300.

Virginia.— Kirk *v.* Com., 9 Leigh 627.

Washington.— Leschi *v.* Territory, 1 Wash. Terr. 13.

Wisconsin.— State *v.* Kube, 20 Wis. 217, 91 Am. Dec. 390, at least where the counts carry the same penalty.

United States.— Dunbar *v.* U. S., 156 U. S. 185, 15 S. Ct. 325, 39 L. ed. 390; Claassen *v.* U. S., 142 U. S. 140, 12 S. Ct. 169, 35 L. ed. 966; Clifton *v.* U. S., 4 How. 242, 11 L. ed. 957; Lehman *v.* U. S., 127 Fed. 41, 61 C. C. A. 577; Milby *v.* U. S., 120 Fed. 1, 57 C. C. A. 21; Dimmick *v.* U. S., 116 Fed. 825, 54 C. C. A. 329; Babcock *v.* U. S., 34 Fed. 873; U. S. *v.* Walsh, 22 Fed. 644; U. S. *v.* Jenson, 15 Fed. 138, 15 McCrary 34; U. S. *v.* Burns, 24 Fed. Cas. No. 14,691, 5 McLean 23; U. S. *v.* Burroughs, 25 Fed. Cas. No. 14,695, 3 McLean 405; U. S. *v.* Knapp, 26 Fed. Cas. No. 15,538.

See 27 Cent. Dig. tit. "Indictment and Information," § 651.

70. State *v.* Williams, 31 N. C. 140.

71. Rice *v.* State, 3 Heisk. (Tenn.) 215.

72. Buck *v.* State, 1 Ohio St. 61.

counts must relate to the same transaction,[73] and that there must be no matters of aggravation alleged in the defective counts that may be supposed to have influenced the judgment and sentence.[74] So also it is said that a general verdict is uncertain where distinct offenses are charged in separate counts of both of which the party cannot be guilty and there is evidence pertaining to both counts,[75] and this rule has been extended to cases where the same offense is charged in different counts of the indictment and evidence applicable to a bad count is submitted to the jury with the other evidence,[76] although where a general verdict could not have been rendered upon proof of the bad counts only, a general verdict may be sustained.[77] A distinction must be made between verdicts which find all of the various counts and a verdict which includes one of such counts, it being uncertain which one is included.[78] In case the court's attention has been called to the bad counts by special demurrer or motion to quash and it has refused to strike them from the indictment, some cases hold that the general verdict cannot be sustained.[79] Where the jury is required to fix the punishment, a general verdict upon good and bad counts cannot be sustained, for the reason that it is impossible to tell in what manner the jury apportioned the punishment,[80] and also because the evidence on the bad counts may have aggravated the punishment imposed by the verdict.[81]

3. In Case of Special Verdict. Where a special verdict is rendered upon the good count, it is not invalidated by the fact that the indictment contains bad counts.[82] But where there is a verdict of guilty referring especially to two counts, one of which is bad, it has been held that the verdict cannot be sustained as upon the good count.[83]

D. Verdict on Count Containing Defective Allegations. Where several acts are charged in a single count, a portion of them only being sufficiently charged, a general verdict will be regarded as sufficient if any of the acts are well charged.[84]

73. State *v.* Pitts, 58 Mo. 556, indictment for assault.

74. Arlen *v.* State, 18 N. H. 563.

75. State *v.* Anderson, 1 Strobh. (S. C.) 455, holding that where there are two counts in an indictment, one defective and the other framed with reference to a statute imposing a penalty of doubtful application to the offense charged, the court would order a new trial after a general verdict of guilty.

76. Com. *v.* Boston, etc., R. Co., 133 Mass. 383.

77. Com. *v.* Nichols, 134 Mass. 531.

78. State *v.* Posey, 7 Rich. (S. C.) 484.

79. Avirett *v.* State, 76 Md. 510, 25 Atl. 676, 987 [*overruling* Gibson *v.* State, 54 Md. 447, and *distinguishing* Robbins *v.* State, 8 Ohio St. 131]; Jones *v.* Com., 86 Va. 950, 12 S. E. 950; O'Connell *v.* Reg., 11 Cl. & F. 155, 1 Cox C. C. 413, 9 Jur. 25, 8 Eng. Reprint 1061. See also U. S. *v.* Clarke, 40 Fed. 325. *Contra*, Powers *v.* State, 87 Ind. 97 (holding that, although a motion to quash the bad counts was overruled, a general verdict will not be reversed where the evidence is not in the record, since it cannot be presumed that it tended to sustain the bad counts and not to sustain the good ones); People *v.* Willett, 102 N. Y. 251, 6 N. E. 301.

In case of a specific verdict of guilty on all the counts contained in the indictment, a judgment upon the good counts will not be arrested, although a demurrer to the bad counts was overruled. U. S. *v.* Clarke, 40 Fed. 325.

80. Richards *v.* State, 81 Va. 110; Mowbray *v.* Com., 11 Leigh (Va.) 643.

81. Mowbray *v.* Com., 11 Leigh (Va.) 643. See also Clere *v.* Com., 3 Gratt. (Va.) 615.

82. Roberts *v.* State, 14 Ga. 8, 58 Am. Dec. 528; Ridenouer *v.* State, 38 Ohio St. 272; Early *v.* Com., 86 Va. 921, 11 S. E. 795.

83. Enwright *v.* State, 58 Ind. 567, where a motion to quash had been properly made to the bad count.

84. *Alabama.*— Hornshy *v.* State, 94 Ala. 55, 10 So. 522, alternative averments.

Connecticut.— State *v.* Burns, 44 Conn. 149.

Louisiana.— State *v.* Brown, 35 La. Ann. 1058 (burglary and larceny); State *v.* Vanderlip, 4 La. Ann. 444, holding that where upon an indictment for larceny of notes, the value of a part of the notes only was stated, a conviction as to such part was good under a general verdict.

Maine.— State *v.* Bartlett, 55 Me. 200, burglary and larceny.

Massachusetts.— Com. *v.* Johns, 6 Gray 274, several assignments of perjury.

North Carolina.— State *v.* Morrison, 24 N. C. 9, indictment charging a rescue and also an assault and battery.

See 27 Cent. Dig. tit. "Indictment and Information," § 656.

Contra.— State *v.* Hinckley, 4 Minn. 345, holding that in case an indictment contains allegations which are bad, and evidence is admitted in support of them, a general verdict of guilty cannot be sustained, since it is

XV. STATUTORY PROVISIONS FOR CURE OF DEFECTS AND OBJECTIONS.

A. In General. The early statutes of amendments and jeofails were not applicable to criminal proceedings;[85] but statutes in the various states and in England now provide the time and manner of urging certain objections to the indictment, and that if they are not so urged, they cannot afterward be raised.[86] These statutes materially alter the common-law rules of waiver,[87] and aider by verdict,[88] and where they exist the effect of any defect is controlled by their wording and the construction which the courts, often intermingling statute and common-law rules, have placed upon them. Under these statutes, objections are frequently required to be taken by demurrer[89] or motion to quash,[90] and unless so taken are held to be waived.

B. Particular Defects and Objections — **1. FORMAL OBJECTIONS.** Defects in form apparent upon the face of the indictment or information cannot usually be taken advantage of after verdict,[91] especially where the amendment of such defects is provided for by statute.[92]

2. OBJECTIONS RELATING TO CONSTITUTION OF GRAND JURY. A defect in the drawing or summoning of the grand jury, when not previously urged in the manner provided by statute, cannot be taken advantage of for the first time on appeal.[93] By statute such defects are sometimes required to be urged before plea,[94] being sometimes held to be formal defects apparent upon the face of the indictment.[95]

3. FINDING, FILING, AND PRESENTMENT. As a general rule the failure of the indictment to show that it was found and presented by a grand jury having proper authority must be taken by a motion to quash or set it aside.[96] So also the want

impossible to determine whether or not the jury has considered the improper evidence.

Sufficiency of proving part of charge only see *supra*, XI, A, 9.

85. Com. *v.* Child, 13 Pick. (Mass.) 198; Brown *v.* Com., 8 Mass. 59; Com. *v.* Morse, 2 Mass. 128; People *v.* Wright, 9 Wend. (N. Y.) 193; Reed *v.* People, 1 Park. Cr. (N. Y.) 481.

86. See statutes of the various states, and see cases more particularly cited *infra*, XV, B.

Nature and form of objections see *supra*, IX.

87. See *supra*, XIII.

88. See *supra*, XIV.

89. See *supra*, IX, C.

90. See *supra*, IX, B.

91. *Massachusetts.*— Com. *v.* Wolcott, 110 Mass. 67.

Mississippi.— Wilkinson *v.* State, 77 Miss 705, 27 So. 639.

Missouri.— State *v.* Burns, 99 Mo. 471, 12 S. W. 801, 99 Mo. 542, 13 S. W. 686, omission of the expression "giving him then and there" before the phrase "one mortal wound" in an indictment for murder.

North Carolina.— State *v.* Evans, 69 N. C. 40; State *v.* Smith, 63 N. C. 234; State *v.* Shepherd, 30 N. C. 195.

Texas.— State *v.* Williamson, 43 Tex. 500, spelling "possession" as "possion."

United States.— Price *v.* U. S., 165 U. S. 311, 17 S. Ct. 366, 41 L. ed. 727.

Failure to conclude "contrary to the form," etc.— People *v.* Taylor, 119 Cal. 113, 51 Pac. 37, 638; State *v.* Scott, 48 La. Ann. 293, 19 So. 141; Com. *v.* Paxton, 14 Phila. (Pa.) 665. See also Trimble *v.* Com., 2 Va. Cas. 143.

Time and form of objection see *supra*, IX, A, 2.

92. Brazier *v.* State, 44 Ala. 387 (statement that the grand jury "charged" instead of that they "charge"); People *v.* Case, 105 Mich. 92, 62 N. W. 1017 (clerical error which could be corrected from the record); People *v.* Sutherland, 104 Mich. 468, 62 N. W. 566.

93. Sanders *v.* State, 55 Ala. 183, holding that while the actual illegality of the grand jury might be urged at any time, such was not true where the grand jury was a legal grand jury, but there were informalities in its summoning.

As ground for motion to quash see *supra*, IX, B, 7, g.

As ground for demurrer see *supra*, IX, C, 4, c.

94. Com. *v.* Chauncey, 2 Ashm. (Pa.) 90.

95. State *v.* Watson, 31 La. Ann. 379.

96. *Arkansas.*— Conrand *v.* State, 65 Ark. 559, 47 S. W. 628, objection that an indictment for slander did not show that it was found with the consent of the person slandered.

Kentucky.— Sutton *v.* Com. 97 Ky. 308, 30 S. W. 661, 17 Ky. L. Rep. 184, no order of court submitting the charge to the grand jury by which the indictment was found, the indictment not having been found by the grand jury impaneled for the first term of court after defendant was held to answer.

Nevada.— State *v.* Roderigas, 7 Nev. 328, holding that the question might also be raised by special demurrer.

Ohio.— Kerr *v.* State, 36 Ohio St. 614, that the record did not show that the indictment was presented to the court by the foreman of the grand jury.

of a legal commitment as the basis of the information cannot be raised after arraignment.[97] Nor can the fact that an information was not filed within the statutory period after the preliminary examination be raised after demurrer or plea.[98] Defects of this nature which, by statute, are permitted to be amended, are usually held to be cured by verdict.[99] Under statutes providing that the venue of the proceeding shall not be changed until after all motions, special pleas, and exceptions have been filed and acted on by the court, defendant after obtaining a change of venue cannot urge that it does not appear from the record that the indictment was returned by the grand jury.[1]

4. Indorsements, Signatures, and Verifications. Under the statutes relating to the cure of formal defects, the fact that the indictment lacks the indorsement "a true bill" must usually be taken advantage of before plea,[2] as must the fact that the signature of the foreman of the grand jury is not added to such indorsement.[3] So the failure to indorse the names of the witnesses upon the indictment must be taken by motion to set it aside.[4] An objection to the verification of an information is waived by plea under statutes making a plea to the indictment a waiver of all matters which may be urged by motion to quash;[5] and the same is true with regard to an objection that the indictment or information is not properly signed by the prosecuting attorney.[6]

5. Statement of Place. As a general rule a defective statement of the place or venue cannot be taken advantage of after verdict, where it does not prejudice the substantial rights of defendant;[7] and some statutes provide that omis-

Texas.— Jinks *v.* State, 5 Tex. App. 68.

West Virginia.— See Trimble *v.* Com., 2 Va. Cas. 143.

Absence of a statement in a count that the indictment was presented by the grand jury cannot be taken advantage of after judgment. Schrumpf *v.* People, 14 Hun (N. Y.) 10.

An indictment dated on Sunday is good as against a motion in arrest. State *v.* Norton, 16 Oreg. 105, 17 Pac. 744.

Omission to state that the grand jury was sworn for the county in which the indictment was found is cured by verdict as a defect in form. Dennis *v.* State, 5 Ark. 230.

Omission to state the place at which the court was held is cured by verdict as a defect in form. Stewart *v.* State, 13 Ark. 720.

After transfer of cause.— Kammann *v.* People, 26 Ill. App. 48.

97. People *v.* Bawden, 90 Cal. 195, 27 Pac. 204; *Ex p.* Moan, 65 Cal. 216, 3 Pac. 644.

98. State *v.* Lagoni, 30 Mont. 472, 76 Pac. 1044.

99. Osborne *v.* State, 23 Tex. App. 431, 5 S. W. 251, holding that an error in the allegation as to the term of court at which the indictment was presented was cured.

1. Caldwell *v.* State, 41 Tex. 86, so holding where the indictment had been substituted for one that had been burned, and the objection was raised after the trial.

2. People *v.* Lawrence, 21 Cal. 368; State *v.* McElvain, 35 Oreg. 365, 58 Pac. 525; Frisbie *v.* U. S., 157 U. S. 160, 15 S. Ct. 586, 39 L. ed. 657.

3. State *v.* McElvain, 35 Oreg. 365, 58 Pac. 525; Frisbie *v.* U. S., 157 U. S. 160, 15 S. Ct. 586, 39 L. ed. 657.

4. People *v.* Symonds, 22 Cal. 348, holding that the objection could not be made upon the swearing of the witnesses at the trial. And see People *v.* Lopez, 26 Cal. 112.

5. Sutton *v.* Com., 97 Ky. 308, 30 S. W. 661, 17 Ky. L. Rep. 184; State *v.* Speyer, 182 Mo. 77, 81 S. W. 430; State *v.* Patton, 94 Mo. App. 32, 67 S. W. 970 (holding that the failure to verify an information before it was filed was cured by conviction, the information having been properly verified before trial); State *v.* McCaffery, 16 Mont. 33, 40 Pac. 63 (verification of complaint on information and belief).

6. Cross *v.* People, 66 Ill. App. 170; State *v.* Robacker, 31 La. Ann. 651; Riflemaker *v.* State, 25 Ohio St. 395.

Under the Tennessee statute, the objection that the name of the prosecutor is not marked upon the indictment cannot be taken advantage of after verdict (Parham *v.* State, 10 Lea (Tenn.) 498; Rodes *v.* State, 10 Lea (Tenn.) 414), or the objection that the indictment was found before an order of court directing the attorney-general to prosecute the indictment officially (Parham *v.* State, 10 Lea (Tenn.) 498; Rodes *v.* State, 10 Lea (Tenn.) 414), or that the record does not show any appointment of an attorney-general *pro tem.*, although the bill is signed by such an attorney-general (Vincent *v.* State, 3 Heisk. (Tenn.) 120).

7. State *v.* Reid, 20 Iowa 413; Stephen *v.* Com., 2 Leigh (Va.) 759 (indictment for nuisance caused by a mill and mill-dam); Taylor *v.* Com., 2 Va. Cas. 94 (omission to charge that the offense was "within the jurisdiction of the court").

As a ground for arrest of judgment see Criminal Law, 12 Cyc. 763.

Under the English statute (7 Geo. IV, c. 64, § 20) see Reg. *v.* Albert, 5 Q. B. 37, Dav. & M. 89, 7 Jur. 741, 12 L. J. M. C. 117, 48 E. C. L. 37; Reg. *v.* O'Connor, 5 Q. B. 16, Dav. & M. 761, 7 Jur. 719, 13 L. J. M. C. 33, 48 E. C. L. 14.

sion of a venue will not affect the indictment nor the judgment or proceedings thereon.[8]

6. Statement of Time. Under an early English statute, an informality of date was cured by verdict;[9] and such statutes are commonly prevalent in the United States.[10]

7. Statement of Substance of Offense — a. In General. Statutes in many states provide that a judgment will not be interfered with for any surplusage or other defect or imperfection in the charge which does not tend to prejudice the substantial rights of defendant upon the merits.[11] Other statutes provide that it is sufficient after verdict that the crime be so set forth that a person of common understanding may know what is intended and with a degree of certainty enabling the court to pronounce the right judgment upon conviction.[12] Under other statutes all defects save that the indictment does not state facts sufficient to constitute a public offense or to confer jurisdiction upon the court are waived unless presented by a motion to quash or demurrer,[13] but the failure of the indictment to sufficiently describe the offense is not a formal defect within the meaning of such statutes.[14] A demurrer or plea in bar or of the general issue is by statute sometimes made a waiver of all defects which may be raised by motion to quash or

8. State *v.* Hughes, 82 Mo. 86.

9. St. 7 Geo. IV, c. 64, § 21. See Broome *v.* Reg., 12 Q. B. 834, 3 Cox C. C. 49, 64 E. C. L. 834, 12 Jur. 538, 17 L. J. M. C. 152; Reg. *v.* Fenwick, 2 C. & K. 915, 4 Cox C. C. 139, 61 E. C. L. 915.

10. *Colorado.*— Poole *v.* People, 24 Colo. 510, 52 Pac. 1025, 65 Am. St. Rep. 245.

Georgia.— Phillips *v.* State, 86 Ga. 427, 12 S. E. 650.

Michigan.— Cole *v.* People, 37 Mich. 544.

Missouri.— State *v.* Hughes, 82 Mo. 86; State *v.* West, 21 Mo. App. 309.

New Hampshire.— State *v.* Blaisdell, 49 N. H. 81.

North Carolina.— State *v.* Jones, 80 N. C. 415.

Rhode Island.— Kenny *v.* State, 5 R. I. 385.

Virginia.— See Aldridge *v.* Com., 2 Va. Cas. 447.

West Virginia.— State *v.* Pennington, 41 W. Va. 599, 23 S. E. 918.

See also *supra*, V, F, 2, b.

11. *Arizona.*— Downing *v.* U. S., (1902) 68 Pac. 555, holding that a failure to allege an intent to rob the mails was not prejudicial to a defendant charged with an attempt to rob the mails by threatening the person in custody thereof with dangerous weapons.

California.— People *v.* Swenson, 49 Cal. 388.

Georgia.— Pennaman *v.* State, 58 Ga. 336.

Kansas.— State *v.* Harp, 31 Kan. 496, 3 Pac. 432.

Missouri.— State *v.* Niesman, 101 Mo. App. 507, 74 S. W. 638.

Washington.— State *v.* Smith, 31 Wash. 245, 71 Pac. 767, omission of "feloniously" in an indictment charging grand larceny.

Failure to state the particular circumstances of the offense cannot be urged after verdict. People *v.* Swenson, 49 Cal. 388; State *v.* Shadwell, 22 Mont. 559, 57 Pac. 281.

As a ground for demurrer see *supra*, IX, C, 4, e.

As a ground for motion to quash see *supra*, IX, B, 7, j.

12. Merrill *v.* State, 45 Miss. 651; State *v.* Peak, 130 N. C. 711, 41 S. E. 887; Com. *v.* Israel, 4 Leigh (Va.) 675; Com. *v.* Ervin, 2 Va. Cas. 337; State *v.* Brown, 6 Wash. 609, 34 Pac. 133.

13. *Georgia.*— King *v.* State, 117 Ga. 39, 43 S. E. 426, insufficient description of stolen property.

Idaho.— People *v.* Stapleton, 2 Ida. (Hasb.) 47, 3 Pac. 6, indictment not conforming with statute requiring the setting out of the legal appellation of the offense attempted to be charged and also uncertain as to the offense.

Louisiana.— State *v.* Stelly, 48 La. Ann. 1478, 21 So. 89, failure of an indictment to sufficiently describe property stolen.

Oklahoma.— Shivers *v.* Territory, 13 Okla. 466, 74 Pac. 899; Rhea *v.* U. S., 6 Okla. 249, 50 Pac. 992.

Oregon.— State *v.* Doty, 5 Oreg. 491; State *v.* Bruce, 5 Oreg. 68, 20 Am. Rep. 734, an indictment for illegal voting.

Indictment based on repealed statute.— An objection that the indictment is defective because on its face it shows that it is based on a statute no longer in force must be taken by demurrer or by motion in arrest. After going to trial upon the merits without objection to the indictment, the accused cannot ask the direction of a verdict in his favor because of its insufficiency, nor can he urge the insufficiency of the indictment upon a motion for a new trial. Eaves *v.* State, 113 Ga. 749, 39 S. E. 318.

14. *Iowa.*— State *v.* Butcher, 79 Iowa 110, 44 N. W. 239, indictment for disturbing a school failing to state the facts constituting the disturbance.

Louisiana.— State *v.* Delerno, 11 La. Ann. 648.

Mississippi.— Newcomb *v.* State, 37 Miss. 383.

Pennsylvania.— Com. *v.* Huber, 13 Lanc. Bar 139.

plea in abatement.[15] Where an indictment, being otherwise unobjectionable, is regarded by accused as not sufficiently specific, he must seek a bill of particulars,[16] and without such demand he cannot move in arrest of judgment,[17] or urge the defect by application for a writ of habeas corpus.[18]

b. Statutory Offenses. An early English statute provided that in case the offense was one which had been defined by statute or subjected to a greater degree of punishment by statute, the indictment should be regarded as sufficient after verdict, in case it described the offense in the words of the statute;[19] and similar statutes are in effect in some of the states;[20] but they are not construed as excusing a neglect to aver descriptive facts.[21] Although an objection to an indictment might be sufficient before verdict on the ground of its insufficiency to charge a particular statutory offense, under the statutes of some states a judgment will not be reversed if any offense is charged in the indictment to which the judgment is applicable.[22]

8. Description of Accused. Under the statutes of some states, the accused on arraignment must make any objection upon the ground of misnomer which is available to him, and if he does not, he will be deemed to have waived it.[23]

9. Description of Third Persons. Under statutes which provide that the indictment or the judgment thereon shall not be affected by defects which do not prejudice the substantial rights of defendants upon the merits, an uncertainty in the description of a third person cannot as a general rule be taken advantage of after verdict.[24] The failure to state the name of a person upon whom an assault was committed has been held, however, a substantial defect within the meaning of a provision that a motion in arrest of judgment may be made upon any substantial defect in the indictment.[25]

10. Duplicity and Joinder of Offenses. Duplicity being a ground of demurrer is under the statutes of some states regarded as waived if not so taken.[26] Under a statute obviating formal objections, the objection of duplicity is cured by verdict.[27] Under a statute providing that proceedings shall not be affected by defects or imperfections in matters of form which do not tend to the prejudice of defendant, repugnant averments cannot be taken advantage of after a general verdict.[28] Under a statute requiring objections on account of formal defects

United States.— U. S. *v.* Ford, 34 Fed. 26; U. S. *v.* Conant, 25 Fed. Cas. No. 14,844.

15. Carper *v.* State, 27 Ohio St. 572 (holding that after a plea of guilty defendant might object to the jurisdiction or urge that no offense was charged, but could not object to any defect of form or manner of stating facts, if there was a substantial charge of an offense); Picket *v.* State, 22 Ohio St. 405 (failure to indorse name of prosecuting witness upon indictment).

16. See *supra*, V, U.

17. State *v.* Shade, 115 N. C. 757, 20 S. E. 537.

18. Com. *v.* Johnston, 19 Pa. Super. Ct. 241.

19. St. 7 Geo. IV, c. 64, § 21. See Hamilton *v.* Reg., 9 Q. B. 271, 2 Cox C. C. 11, 10 Jur. 1028, 16 L. J. M. C. 9, 58 E. C. L. 271; Reg. *v.* Ellis, C. & M. 564, 6 Jur. 287, 41 E. C. L. 307; Rex *v.* Harris, 7 C. & P. 429, 32 E. C. L. 691 (indictment describing a foreign note wholly in the English language); Reg. *v.* Law, 2 M. & Rob. 197; Rex *v.* Warshaner, 1 Moody C. C. 466.

20. People *v.* Butler, 122 Mich. 35, 80 N. W. 883 (information failing to state the times and places of former convictions); People *v.* Ochotski, 115 Mich. 601, 73 N. W. 889; State *v.* Whitton, 72 Wis. 18, 38 N. W. 331.

21. Enders *v.* People, 20 Mich. 233, failure to show effect of false pretense.

22. Higginbotham *v.* State, 50 Ala. 133.

23. State *v.* White, 32 Iowa 17; Wilcox *v.* State, 31 Tex. 586; Neimann *v.* State, (Tex. Cr. App. 1903) 74 S. W. 558; Piland *v.* State, (Tex. Cr. App. 1898) 47 S. W. 1007; Henry *v.* State, 38 Tex. Cr. 306, 42 S. W. 559.

24. Wilkinson *v.* State, 77 Miss. 705, 27 So. 639 (failure of an indictment for homicide to allege the names of the persons killed, or to allege that such names were unknown); State *v.* Honig, 78 Mo. 249 [*followed* in State *v.* Jacobs, 39 Mo. App. 122] (owner of stolen goods); Slaughter *v.* Com., 13 Gratt. (Va.) 767.

25. Ranch *v.* State, 5 Tex. App. 363.

26. State *v.* Mahoney, 24 Mont. 281, 61 Pac. 647; State *v.* Carlson, 39 Oreg. 19, 62 Pac. 1016, 1119; State *v.* Jarvis, 18 Oreg. 360, 23 Pac. 251.

27. State *v.* Scott, 48 La. Ann. 293, 19 So. 141; State *v.* Simons, 70 N. C. 336; Reg. *v.* Lapierre, 1 Can. Cr. Cas. 413.

28. Lehman *v.* U. S., 127 Fed. 41, 61 C. C. A. 577.

apparent on the face of the indictment to be made before the jury is sworn, a motion to elect on the ground of duplicity must be made before such time.[29]

11. VARIANCE. By statutes an immaterial variance is usually made no ground of objection to the indictment.[30]

INDIFFERENT. Having no interest in;[1] having no choice of preference;[2] impartial, and free from bias;[3] where the mind is in a state of neutrality, as respects the person, and the matter to be tried.[4] (Indifferent: Juror, see JURIES.)

INDIGENT. A person destitute of property or means of comfortable subsistence; needy; poor.[5] (See, generally, CHARITIES; INSANE PERSONS; PAUPERS.)

INDIGNITY. Unmerited contemptuous conduct towards another; any action towards another which manifests contempt for him; contumely, incivility, or injury accompanied with insult.[6] (Indignity: Ground of Divorce, see DIVORCE.)

INDIRECT. Not in a direct relation.[7] (Indirect: Evidence, see EVIDENCE. Tax, see INTERNAL REVENUE; TAXATION.)

INDIRECT EVIDENCE. Evidence which consists of inferences and presumptions.[8] (See, generally, EVIDENCE.)

IN DISJUNCTIVIS SUFFICIT ALTERAM PARTEM ESSE VERAM. A maxim meaning "In disjunctives it is sufficient that either part be true."[9]

INDISPENSABLE PARTIES. See PARTIES.

INDISPUTABLE PRESUMPTION. See EVIDENCE.

INDISPUTABLE TITLE. See VENDOR AND PURCHASER.

INDIVIDUAL. As an adjective, pertaining to one particular person or thing; distinctive.[10] As a noun, one entity, one distinct being, a single one, and when spoken of the human kind it means one man or one woman.[11] As used in statutes relative to taxation, the term applies equally to corporations and individuals.[12] (See INDIVIDUALIZE.)

INDIVIDUAL BANKER. One person banking alone.[13] (See, generally, BANKS AND BANKING.)

29. State *v.* Woods, 112 La. 617, 36 So. 626.

30. Unger *v.* State, 42 Miss. 642 (holding that a variance between a charge that goods stolen belonged to D G H and proof that they belonged to David George H was cured by statute); State *v.* Cavanaugh, 67 Mo. App. 261 (holding that a variance in an indictment for embezzlement in that the property was laid in a person as owner, when in fact he was only an agent for collection, was immaterial). See *supra*, XI, C, 2; XI, C, 7, b; XI, C, 9, b.

1. Reg. *v.* Fobbing Parish Sewer Com'rs, 14 Q. B. D. 561, 579.

2. Worcester Dict. [*cited* in Wolcott *v.* Ely, 2 Allen (Mass.) 338, 340].

3. Fox *v.* Hills, 1 Conn. 295, 307 [*cited* in Wolcott *v.* Ely, 2 Allen (Mass.) 338, 340].

4. People *v.* Vermilyea, 7 Cow. (N. Y.) 108, 122.

5. Webster Dict. [*quoted* in Juneau County *v.* Wood County, 109 Wis. 330, 333, 85 N. W. 387].

"Indigent insane," as used in a statute providing for the support of the "indigent insane" in an asylum, intends insane persons who have no income over and above what is sufficient to maintain those who are legally dependent on them. *In re* Hybart, 119 N. C. 359, 25 S. E. 963.

6. Webster Dict. [*quoted* in Coble *v.* Coble, 55 N. C. 392, 395; Cline *v.* Cline, 10 Oreg. 474, 477]. See also Everton *v.* Everton, 50 N. C. 202, 210.

7. Standard Dict. See also Nelson *v.* Johnson, 38 Minn. 255, 256, 36 N. W. 868; Rawlinson *v.* Clarke, 14 L. J. Exch. 364, 365, 14 M. & W. 187.

8. Lake County *v.* Neilon, 44 Oreg. 14, 21, 74 Pac. 212.

9. Trayner Leg. Max.

10. Standard Dict.

Individual expenses see Withers *v.* Withers, 8 Pet. (U. S.) 355, 358, 8 L. ed. 972.

"Individual earnings" see Emerson-Talcott Co. *v.* Knapp, 90 Wis. 34, 36, 62 N. W. 945; 1 Wis. St. (1898) § 2343 note.

The term "individually" may be used as meaning a term "personally" not "severally" (Mann. *v.* Pentz, 2 Sandf. Ch. (N. Y.) 257, 270), or "separately" (Meisser *v.* Thompson, 9 Ill. App. 368, 370).

11. People *v.* Doty, 80 N. Y. 225, 228.

"Individual" as used in bankruptcy proceedings see *In re* United Button Co., 132 Fed. 378, 381. See also BANKRUPTCY.

12. Otis Co. *v.* Ware, 8 Gray (Mass.) 509, 511. See also State *v.* Bell Tel. Co., 36 Ohio St. 296, 310, 38 Am. Rep. 583; Pennsylvania R. Co. *v.* Canal Comrs., 21 Pa. St. 9, 20; Primm *v.* Fort, 23 Tex. Civ. App. 605, 616, 57 S. W. 972.

"Company" may include "individual" see 8 Cyc. 399 note 53.

13. People *v.* Doty, 80 N. Y. 225, 228.

INDIVIDUALIZE. To single out from the species.[14] (See INDIVIDUAL.)

INDIVISIBLE. That which cannot be separated;[15] ENTIRE, *q. v.* (Indivisible Contract: In General, see CONTRACTS. Insurance Policy, see INSURANCE, and the particular Insurance Titles. Sales, see SALES.)

INDOOR. Done or being within doors.[16]

INDORSE. To write on the back;[17] to write upon the back of any instrument or paper.[18] (See INDORSEMENT.)

INDORSED.[19] Written upon.[20] (See INDORSE; INDORSEMENT.)

INDORSEMENT.[21] In general, assignment, transfer;[22] a transfer by writing upon an instrument.[23] As employed in its conventional use, the term implies the writing of one's name, or the making of an entry in writing upon the back of a paper;[24] something written on the outside or back of a paper, on the opposite side of which something else had been previously written.[25] In commercial law, a term applied to such written entries as may be made on the back of notes,

14. People *v.* Doty, 80 N. Y. 225, 228.

15. Cyclopedic L. Dict.

16. Webster Int. Dict.

"In-door movables" see Penniman *v.* French, 17 Pick. (Mass.) 404, 406, 28 Am. Dec. 309.

"Indoor paupers" see 51 & 52 Vict. c. 41, § 43, (1) (b).

"In doors and out doors" see Tolar *v.* Tolar, 10 N. C. 74, 14 Am. Dec. 575.

17. Richards *v.* Warring, 39 Barb. (N. Y.) 42, 45.

18. Anderson L. Dict. [*quoted* in Territory *v.* Perea, 6 N. M. 531, 541, 30 Pac. 928]. See also Redden *v.* Lambert, 112 La. 740, 743, 36 So. 668; Oexner *v.* Loehr, 106 Mo. 412, 80 S. W. 690, 691.

"Claim indorsed on the writ."—Bassett *v.* Tong, [1894] 2 Q. B. 332, 337 [*citing* 63 L. J. Q. B. 653, 71 L. T. Rep. N. S. 16, 10 Reports 212, 42 Wkly. Rep. 668; Knight *v.* Abbott, 10 Q. B. D. 11, 52 L. J. Q. B. 131, 31 Wkly. Rep. 505].

19. Distinguished from "assigned" see Williams *v.* Osbon, 75 Ind. 280, 283. See also Keller *v.* Williams, 49 Ind. 504.

20. Com. *v.* Butterick, 100 Mass. 12, 16. See Reynolds *v.* Atlas Acc. Ins. Co., 69 Minn. 93, 71 N. W. 831 (accident insurance policy); Shivers *v.* Territory, 13 Okla. 466, 472, 74 Pac. 899 (indictment); Marietta Bank *v.* Pindall, 2 Rand. (Va.) 465, 475 (bill of exchange).

21. "The word indorsement is a legal word, for which there is a proper (at least a law) Latin word, viz. *indorsamentum*, as *murdrum* is the law Latin word for murder. The meaning of the word appears from its derivation from *in* and *dorsum*, and signifies what is written on the back of the deed or instrument." Rex *v.* Bigg, 2 East P. C. 882, 3 P. Wms. 419, 428, 24 Eng. Reprint 1127. See also Richards *v.* Warring, 39 Barb. (N. Y.) 42, 45.

22. State *v.* McLeran, 1 Aik. (Vt.) 311, 314. See also Paine *v.* Smith, 33 Minn. 495, 498, 24 N. W. 305.

Distinguished from "assignment" see Lyons *v.* Divelbis, 22 Pa. St. 185, 189: Freeman's Bank *v.* Ruckman, 16 Gratt (Va.) 126, 129. *Compare* Buckner *v.* Real Estate Bank, 5 Ark. 536, 541, 41 Am. Dec. 105. "The literal meaning of the word 'assignment' is much broader" than the word "indorsement." Hendrick *v.* Daniel, 119 Ga. 358, 361, 46 S. E. 438.

23. Williams *v.* Osbon, 75 Ind. 280, 283.

24. *Georgia.*— Sibley *v.* American Exch. Nat. Bank, 97 Ga. 126, 142, 25 S. E. 470.

Illinois.— Ryan *v.* Springfield First Nat. Bank, 148 Ill. 349, 354, 35 N. E. 1120; Herring *v.* Woodhull, 29 Ill. 92, 99, 81 Am. Dec. 296 [*quoted* in Farmers' Trust Co. *v.* Schenuit, 83 Ill. App. 267, 273].

Indiana.— Reed *v.* Garr, 59 Ind. 299, 300.

Iowa.— Marshalltown First Nat. Bank *v.* Crabtree, 86 Iowa 731, 732, 52 N. W. 559.

Kansas.— Daily *v.* Bartholomew, 5 Kan. App. 148, 48 Pac. 923, 924.

Massachusetts.— Hartwell *v.* Hemmenway, 7 Pick. 117, 119.

New Mexico.— Territory *v.* Perea, 6 N. M. 531, 541, 30 Pac. 928 [*quoting* Anderson L. Dict.; Bouvier L. Dict.].

New York.— New York Security, etc., Co. *v.* Storm, 81 Hun 33, 37, 30 N. Y. Suppl. 605; Richards *v.* Warring, 39 Barb. 42, 45; Douglass *v.* Wilkeson, 6 Wend. 637, 639.

Rhode Island.— Jackson Bank *v.* Irons, 18 R. I. 718, 721, 30 Atl. 420.

Vermont.— Cowdery *v.* Johnson, 60 Vt. 595, 597, 15 Atl. 188.

England.— Rex *v.* Bigg, 2 East P. C. 882, 3 P. Wms. 419, 428, 29 Eng. Reprint 1127.

25. Powell *v.* Com., 11 Gratt. (Va.) 822, 830.

Place of indorsement immaterial.— "The place where the name, or mark, or designation is put is not material, if the signer intended it as an endorsement." Haines *v.* Dubois, 30 N. J. L. 259, 260. See also Farmers' Trust Co. *v.* Schenuit, 83 Ill. App. 267, 273. Thus it may be written on the face of the instrument (Shain *v.* Sullivan, 106 Cal. 208, 211, 39 Pac. 606; Farmers' Trust Co. *v.* Schenuit, 83 Ill. App. 267, 273; Musselman *v.* Wise, 84 Ind. 248, 251; Haines *v.* Dubois, 30 N. J. L. 259, 262; Richards *v.* Warring, 39 Barb. (N. Y.) 42, 45. See also Beatty *v.* Ambs, 11 Minn. 331, 333), or even upon a separate piece of paper (Richards *v.* Warring, 39 Barb. (N. Y.) 42, 45; Cowdery *v.* Johnson, 60 Vt. 595, 597, 15 Atl. 188. But see Montague *v.* Smith, 13 Mass. 396, 403).

checks, etc;[26] the writing of one's name on or across the back of a bill, note, or check.[27] The meaning of an indorsement is to be determined from the context.[28] The term may signify either the act of indorsing or the writing itself.[29] (Indorsement: Alteration, see ALTERATIONS OF INSTRUMENTS. Conditional Indorsement, see COMMERCIAL PAPER. Contingent Liability, see GARNISHMENT. Forgery, see FORGERY. Full Indorsement, see COMMERCIAL PAPER. In Blank, see BANKS AND BANKING; COMMERCIAL PAPER.[30] Of Award on Submission, see ARBITRATION AND AWARD. Of Ballot, see ELECTIONS. Of Bank-Book, see GIFTS. Of Bill or Note — In General, see COMMERCIAL PAPER; As Acceptance of Part Payment in Full of Debt, see ACCORD AND SATISFACTION; By Corporation, see CORPORATIONS; By Executor or Administrator, see EXECUTORS AND ADMINISTRATORS; In Gifts Causa Mortis, see GIFTS. Of Bond, see BONDS. Of Deed, see DEEDS. Of Deposition, see DEPOSITIONS. Of Filing Return of Deposition Taken, see DEPOSITIONS. Of Indictment or Information — In General, see INDICTMENTS AND INFORMATIONS; For Costs in Criminal Cases, see COSTS. Of Instrument Offered in Evidence, see EVIDENCE. Of Levy — Of Attachment, see ATTACHMENT; Of Execution, see EXECUTIONS. Of Payment — Of Execution, see EXECUTIONS; Of Negotiable Instrument, see COMMERCIAL PAPER; On Bond, see BONDS. Of Petition For Establishment of Drains, see DRAINS. Of Pleading, see PLEADING. Of Process, see PROCESS. Of Writ — As Security For Costs, see COSTS; As Special Bail, see BAIL; Authorizing Arrest, see ARREST; Authorizing an Attorney to Act, see ATTORNEY AND CLIENT; Of Attachment, see ATTACHMENT; Of Execution, see EXECUTION. Of Written Instrument as Assignment, see ASSIGNMENTS. Parol Evidence, see EVIDENCE. Restrictive Indorsement, see BANKS AND BANKING; COMMERCIAL PAPER. Special Indorsement, see BANKS AND BANKING; COMMERCIAL PAPER.)

INDORSEMENT OF NOTE. Strictly speaking, the order or appointment, by the payee to the maker, of a person to whom, according to the maker's contract, he has agreed to pay the amount as promised.[31] (See INDORSE; INDORSEMENT; and, generally, COMMERCIAL PAPER.)

INDORSOR. An old form of indorser, and strictly the true form of the word.[32]

INDOWMENT. See ENDOWMENT.

IN DUBIIS BENIGNIORA PRÆFERENDA SUNT. A maxim meaning "In doubtful matters, the more favorable are to be preferred."[33]

IN DUBIIS, MAGIS DIGNUM EST ACCIPIENDUM. A maxim meaning "In doubtful cases, the more worthy is to be accepted."[34]

IN DUBIIS, NON PRÆSUMITUR PRO TESTAMENTO. A maxim meaning "In cases of doubt, the presumption is not in favor of a will."[35]

IN DUBIO HÆC LEGIS CONSTRUCTIO QUAM VERBA OSTENDUNT. A maxim meaning "In a doubtful point, the construction which the words point out is the construction of the law."[36]

IN DUBIO PARS MITIOR EST SEQUENDA. A maxim meaning "In doubt, the gentler course is to be followed."[37]

26. Hendrick *v.* Daniel, 119 Ga. 358, 361, 46 S. E. 438. See also Clark *v.* Sigourney, 17 Conn. 511, 532; Sibley *v.* American Exch. Nat. Bank, 97 Ga. 126, 141, 25 S. E. 470; Keller *v.* Williams, 49 Ind. 504, 505; Douglass *v.* Wilkeson, 6 Wend. (N. Y.) 637, 639; Lyons *v.* Divelbis, 22 Pa. St. 185, 189; Elkin *v.* Jansen, 9 Jur. 353, 355, 14 L. J. Exch. 201, 13 M. & W. 655; Bouvier L. Dict. [*quoted* in Territory *v.* Perea, 6 N. M. 531, 541, 30 Pac. 928]; Daniel Neg. Instr. § 667 [*quoted* in Daily *v.* Bartholomew, 5 Kan. App. 148, 48 Pac. 923, 924].

27. Richards *v.* Warring, 39 Barb. (N. Y.) 42.

28. Com. *v.* Spilman, 124 Mass. 327, 329, 26 Am. Rep. 668 [*quoted* in Territory *v.* Perea, 6 N. M. 531, 541, 30 Pac. 928].

29. Territory *v.* Perea, 6 N. M. 531, 541, 30 Pac. 928 [*quoting* Rapalje & L. L. Dict.].

30. Certificate of stock indorsed in blank see CORPORATIONS, 10 Cyc. 631, 643.

31. Hicks *v.* Wirth, 10 How. Pr. (N. Y.) 555, 558.

32. Burrill L. Dict. See also Broomley *v.* Frazier, 11 Mod. 368, 369.

33. Bouvier L. Dict. [*citing* Dig. 50, 17, 56].

34. Rapalje & L. L. Dict.

35. Rapalje & L. L. Dict.

36. Wharton L. Lex.

37. Bouvier L. Dict.

IN DUBIO PRO DOTE, LIBERTATE, INNOCENTIA, POSSESSORE, DEBITORE, REO, RESPONDENDUM EST. A maxim meaning "In doubt the response is in favor of dower, liberty, innocence, of the possessor, of the debtor, and of the defendant."[38]

IN DUBIO PRO INNOCENTIA RESPONDENDUM EST. A maxim meaning "In a doubtful case, the answer or decision should be in favour of innocence."[39]

IN DUBIO SEQUENDUM QUOD TUTIUS EST. A maxim meaning "In doubt, the safer course is to be adopted."[40]

INDUBITABLE. As applied to evidence, a term which means evidence that is not only found credible, but of such weight and directness as to make out the facts alleged beyond a doubt.[41] (See, generally, EVIDENCE.)

INDUCE.[42] To influence, to persuade;[43] to move, urge, or instigate.[44]

INDUCEMENT. In contracts, the benefit or advantage which the promisor is to receive from a contract.[45] In criminal law, motive; that which leads or tempts to the commission of crime.[46] In pleading, the statement of matter which is introductory to the principal subject of the declaration or plea, and which is necessary to explain or elucidate it.[47] (Inducement: By Fraudulent Representation, see FALSE PRETENSES; FRAUD. In Contract, see CONTRACTS. In Libel or Slander, see LIBEL AND SLANDER. In Pleading — In Civil Action, see PLEADING; In Criminal Proceeding, see INDICTMENTS AND INFORMATIONS. In Procurement of Confession, see CRIMINAL LAW.)

INDUCTION.[48] In the canon law the investing of a person with the actual possession of a church or benefice.[49]

INDUCTIVE SCIENCE. A term which includes the science of medicine.[50]

IN DUE FORM.[51] According to the form prescribed;[52] following the form laid down in the statutes.[53]

INDULGENCE.[54] FORBEARANCE, *q. v.*; delay in enforcing a legal right.[55] (Indulgence: As Consideration — For Contract, see COMMERCIAL PAPER; CONTRACTS; As Discharge of Surety, see PRINCIPAL AND SURETY. Contract For — Damages For Breach of, see DAMAGES; Scope and Extent of Obligation of, see CONTRACTS; Sufficiency of Plea of, see COMMERCIAL PAPER.)

INDUSTRIAL. Consisting in or pertaining to INDUSTRY,[56] *q. v.* The term

38. Peloubet Leg. Max. [*citing* Brown L. Dict.].

39. Trayner Leg. Max.

40. Bouvier L. Dict.

41. Highlands *v.* Philadelphia, etc., R. Co., 209 Pa. St. 286, 292, 58 Atl. 560 (construing the phrase "clear, precise and indubitable"); Hart *v.* Carroll, 85 Pa. St. 508, 511. See also Ross *v.* State, 92 Ala. 28, 29, 9 So. 357, 25 Am. St. Rep. 20; Jermyn *v.* McClure, 195 Pa. St. 245, 247, 45 Atl. 938; Boyertown Nat. Bank *v.* Hartman, 147 Pa. St. 558, 562, 32 Atl. 842, 30 Am. St. Rep. 759; Ferguson *v.* Rafferty, 128 Pa. St. 337, 355, 18 Atl. 484, 6 L. R. A. 33; Erie, etc., R. Co. *v.* Knowles, 117 Pa. St. 77, 82, 11 Atl. 250; Allison *v.* Burns, 107 Pa. St. 50, 53; Ott *v.* Oyer, 106 Pa. St. 6, 17; Spencer *v.* Colt, 89 Pa. St. 314, 318.

"Indubitably certain" see Ross *v.* State, 92 Ala. 28, 29, 9 So. 357, 25 Am. St. Rep. 20.

42. "Induced crime" see People *v.* Grout, 38 Misc. (N. Y.) 181, 185, 77 N. Y. Suppl. 321.

Inducing cause see 17 Cyc. 693.

"Inducing trade" see King *v.* State, 66 Miss. 502, 506, 6 So. 188.

43. Wollaston *v.* Stafford, 15 C. B. 278, 280, 29 Eng. L. & Eq. 263, 80 E. C. L. 278.

44. State *v.* Phelan, 159 Mo. 122, 129, 60 S. W. 71.

45. Black L. Dict.

46. Burrill L. Dict. [*citing* Burrill Cir. Ev. 283]. See also 17 Cyc. 717; 8 Cyc. 674 note 45.

47. Bouvier L. Dict. [*quoted* in St. Louis Consol. Coal Co. *v.* Peers, 97 Ill. App. 188, 194].

48. Causation established by induction see 17 Cyc. 288.

49. Godwin *v.* Lunan, Jeff. (Va.) 96, 100.

50. Huffman *v.* Click, 77 N. C. 55, 57, if medicine can properly be termed a science.

51. "In due form of law" is synonymous with "according to law." Aldis *v.* Burdick, 8 Vt. 21, 24.

52. McRae *v.* Stokes, 3 Ala. 401, 402, 37 Am. Dec. 698.

53. Williams *v.* Jones, (Fla. 1905) 40 So. 28.

54. Distinguished from "right" see Brown *v.* Meady, 10 Me. 391, 395, 25 Am. Dec. 248.

55. Bouvier L. Dict.

56. Carver Mercantile Co. *v.* Hulme, 7 Mont. 566, 571, 19 Pac. 213.

"Industrial pursuit" see Bashford-Burmister Co. *v.* Agua Fria Copper Co., (Ariz. 1894) 35 Pac. 983, 984. See also Carver Mercantile Co. *v.* Hulme, 7 Mont. 566, 571, 19

is also often employed as referring to something relating to manufactures, or to the product of industry or labor.[57]

INDUSTRIAL SCHOOL. See INFANTS; REFORMATORIES.

INDUSTRY. Habitual diligence in any employment, either bodily or mental.[58]

INEBRIATE. See DRUNKARDS.

INEBRIATE ASYLUM. See ASYLUMS.

INEBRIATION. See DRUNKARDS.

INEFFICIENCY. Lack of efficiency; incompetency; inadequacy.[59]

INELIGIBLE. Not eligible; not qualified to be chosen to an office.[60] The term means as well disqualification to hold office, as disqualification to be elected to an office.[61] The word is synonymous with DISQUALIFIED,[62] *q. v.* (See, generally, ELECTIONS; OFFICERS. See also DISQUALIFICATION and Cross-References Thereunder.)

IN EO, QUOD PLUS SET, SEMPER INEST ET MINUS. A maxim meaning "The greater always includes the less."[63]

IN EO QUOD VEL IS QUI PETIT, VEL IS A QUO PETITUR A LUCRI FACTUS EST, DURIOR CAUSA EST PETITORIS. A maxim meaning "In that which either he who seeks, or he from whom it is sought for the sake of gain, the cause of the applicant is the harder."[64]

INEQUALITY. See TAXATION.

INEQUITABLE. Fraudulent; unconscientious.[65] (Inequitable: Transaction, see EQUITY.)

IN ESSE POTEST DONATIONI, MODUS, CONDITIO, SIVE CAUSA; UT, MODUS EST; SI, CONDITIO; QUIA, CAUSA. A maxim meaning "In a gift there may be a manner, condition, or cause; *ut* introduces a manner; *si*, condition; *quia*, a cause."[66]

INEVITABLE[67] ACCIDENT. A catastrophe occurring without any intervention of man;[68] a catastrophe which occurs when both parties have endeavored by every means in their power, with due care and caution, and a proper display of skill, to prevent the accident;[69] an accident physically unavoidable;[70] an accident which is absolutely unavoidable, because effected or influenced by the uncontrollable operations of nature;[71] an accident which is not occasioned in any degree,

Pac. 213; Wells *v.* Northern Pac. R. Co., 23 Fed. 469, 474, 10 Sawy. 441.

57. Worcester Dict. [*quoted* in Louisville, etc., R. Co. *v.* Fulgham, 91 Ala. 555, 558, 8 So. 803].

58. Carver Mercantile Co. *v.* Hulme, 7 Mont. 566, 571, 19 Pac. 213.

Combination to prevent employment of industry see 8 Cyc. 637 note 31.

59. Century Dict.

The word "inefficiency" is sufficiently broad to include the inability of a police officer to read or write the English language. Steinback *v.* Galveston, (Tex. Civ. App. 1897) 41 S. W. 822, 824.

60. Webster Dict. [*quoted* in Carroll *v.* Green, 148 Ind. 362, 364, 47 N. E. 223].

61. State *v.* Murray, 28 Wis. 96, 99, 9 Am. Rep. 489.

62. Soule Synonyms [*quoted* in Carroll *v.* Green, 148 Ind. 362, 364, 47 N. E. 223].

63. Wharton L. Lex. [*citing* Dig. 50, 17, 110].

64. Morgan Leg. Max.

65. The Ottumwa Belle, 78 Fed. 643, 648 [*quoting* 2 Pomeroy Eq. Jur. § 803].

66. Wharton L. Lex.

67. "'Inevitable' [says Dr. Lushington] must be considered as a relative term, and must be construed not absolutely, but reasonably, with regard to the circumstances of each particular case." The Europa, 14 Jur. 627, 628, 2 Eng. L. & Eq. 557 [*quoted* in Alliance Ins. Co. *v.* The Morning Light, 2 Wall. (U. S.) 550, 560, 17 L. ed. 862; The Fontana, 119 Fed. 853, 858, 56 C. C. A. 365; Amoskeag Mfg. Co. *v.* The John Adams, 1 Fed. Cas. No. 338, 1 Cliff. 404, 412].

It is a technical expression. Neal *v.* Saunderson, 2 Sm. & M. (Miss.) 572, 577, 41 Am. Dec. 609.

68. Russell *v.* Fagan, 7 Houst. (Del.) 389, 394, 8 Atl. 258 [*citing* 2 Kent Comm. 597]. See also Louisville, etc., R. Co. *v.* Hedger, 9 Bush (Ky.) 645, 647, 15 Am. Rep. 740 [*citing* 2 Redfield Railw. c. 26, p. 4].

69. Amoskeag Mfg. Co. *v.* The John Adams, 1 Fed. Cas. No. 338, 1 Cliff. 404, 412 [*citing* The Lochlibo, 3 W. Rob. 310, 318]. See also Macer *v.* Third Ave. R. Co., 47 N. Y. Super. Ct. 461, 466; Caldwell *v.* Murphy, 1 Duer (N. Y.) 233, 241; Harvey *v.* Dunlop, Lalor (N. Y.) 193, 194; Toudy *v.* Norfolk, etc., R. Co., 38 W. Va. 694, 695, 18 S. E. 896; The R. S. Mabey, 14 Wall. (U. S.) 204, 215, 20 L. ed. 881 [*cited* in The Rebecca, 122 Fed. 619, 622, 60 C. C. A. 251].

70. Morris *v.* Smith, 3 Dougl. 279, 26 E. C. L. 188.

71. Anderson L. Dict. [*quoted* in Dreyer *v.* People, 188 Ill. 40, 51, 58 N. E. 620, 59 N. E. 424, 58 L. R. A. 869; State *v.* Lewis, 107

either remotely or directly, by the want of such care and skill as the law holds every man bound to exercise;[72] an accident which occurs despite all efforts and skill used to prevent it;[73] any accident produced by any physical cause, which is irresistible;[74] an occurrence which the party charged could not possibly prevent by the exercise of ordinary care, caution, and skill.[75] The term is sometimes used as synonymous with ACT OF GOD,[76] *q. v.*, and with the term "perils of the sea," they being convertible terms.[77] (Inevitable Accident: Affecting Liability — For Collision, see COLLISION; For Loss or Injury to Goods, see CARRIERS. Causing Collision, see COLLISION. Excusing Non-Performance of Contract, see CONTRACTS. Liability For Negligence, see NEGLIGENCE. See also ACCIDENT; ACT OF GOD; ACCIDENT INSURANCE.)

INEVITABLE CASUALTY. An accident which happens without the slightest degree of negligence.[78] (See ACT OF GOD; INEVITABLE ACCIDENT.)

IN EXECUTIONE SENTENTIÆ, ALIBI LATÆ, SERVARE JUS LOCI IN QUO FIT EXECUTIO; NON UBI RES JUDICATA. A maxim meaning "In the execution of a judgment, otherwise extensive, the law of the place shall prevail where the execution takes effect; not where the matter was adjudged."[79]

IN EXPOSITIONE INSTRUMENTORUM, MALA GRAMMATICA, QUOD FIERI POTEST, VITANDA EST. A maxim meaning "In the construction of instruments, bad grammar is to be avoided as much as possible."[80]

IN EXTREMIS. In extremity; in the last extremity; in the last illness.[81] (In Extremis: Dying Declarations, see ABORTION; HOMICIDE. Gift, see GIFTS.)

IN FACIE CURIAE. In the face of the court.[82]

IN FACIENDO. In doing.[83]

IN FACT. Words used in pleading to introduce an amount of fact.[84] (See, generally, PLEADING.)

IN FACTO QUOD SE HABET AD BONUM ET MALUM MAGIS DE BONO QUAM DE MALO LEX INTENDIT. A maxim meaning "In an action which addresses itself to good and bad, the law looks more to the good than to the bad."[85]

N. C. 967, 979, 12 S. E. 457, 13 S. E. 247, 11 L. R. A. 105].

72. Newport News, etc., Co. *v.* U. S., 61 Fed. 488, 490, 9 C. C. A. 579; The Olympia, 61 Fed. 120, 128, 9 C. C. A. 393.

73. The Lochlibo, 3 W. Rob. 310, 318.

74. Brousseau *v.* The Hudson, 11 La. Ann. 427, 428.

75. Dygert *v.* Bradley, 8 Wend. (N. Y.) 469, 473; Alliance Ins. Co. *v.* The Morning Light, 2 Wall. (U. S.) 550, 561, 17 L. ed. 862; The Fontana, 119 Fed. 853, 855, 56 C. C. A. 365; The Ohio, 91 Fed. 547, 553, 33 C. C. A. 667; Weeks *v.* Wilson Transit Co., 61 Fed. 120, 127, 9 C. C. A. 393; Brainard *v.* The Worcester, 4 Fed. Cas. No. 1,804*a*; Lucas *v.* The Thomas Swann, 15 Fed. Cas. No. 8,588, 6 McLean 282, 288, Newb. Adm. 158; The Marpesia *v.* The America, L. R. 4 P. C. 212, 220, 1 Aspin. 261, 26 L. T. Rep. N. S. 468, 17 Eng. Reprint 387; The Schwan, [1892] P. 419, 432, 7 Aspin. 347, 69 L. T. Rep. N. S. 34; The Merchant Prince, [1892] P. 179, 190, 7 Aspin. 208, 67 L. T. Rep. N. S. 251; The Virgil, 2 W. Rob. 201, 205. See also The Mary S. Blees, 120 Fed. 44, 45; Ladd *v.* Foster, 31 Fed. 827, 831, 12 Sawy. 547; Sampson *v.* U. S., 12 Ct. Cl. 481, 491.

76. Blythe *v.* Denver, etc., R. Co., 15 Colo. 333, 338, 25 Pac. 702, 22 Am. St. Rep. 403, 11 L. R. A. 615; Brousseau *v.* The Hudson, 11 La. Ann. 427, 428; McCall *v.* Brock, 5 Strobh. (S. C.) 119, 124. See Brown *v.* Kendall, 6 Cush. (Mass.) 292, 296; Hall *v.* Cheney, 36 N. H. 26, 30. See also 1 Cyc. 758 note 8.

Distinguished from act of God see 1 Cyc. 758 note 8. See also Merritt *v.* Earle, 29 N. Y. 115, 116, 86 Am. Dec. 292, per Wright, J. [*quoted* in Redpath *v.* Vaughan, 52 Barb. (N. Y.) 489, 499].

77. Blythe *v.* Marsh, 1 McCord (S. C.) 360, 364. But see 1 Cyc. 758 note 8.

78. Hodgson *v.* Dexter, 12 Fed. Cas. No. 6,565, 1 Cranch C. C. 109.

79. Tayler L. Gloss.

80. Bouvier L. Dict. [*citing* 2 Parsons Contr. 26].

Applied in Finch's Case, 6 Coke 38*b*, 39*b*.

81. Burrill L. Dict. See also Prince *v.* Hazleton, 20 Johns. (N. Y.) 502, 511, 11 Am. Dec. 307.

82. Burrill L. Dict.

83. Bouvier L. Dict. [*citing* Story Eq. Jur. § 1308].

84. As "the said plaintiff (or defendant) further in fact saith" — indicating that what follows is a statement of acts of parties as distinguished from a legal conclusion or intendment. Bouvier L. Dict.

When pleadings were in Latin the words *in facto* were used, thus *in facto dicit*, he, in fact, says. Bouvier L. Dict.

85. Wharton L. Lex. [*citing* Coke Litt. 78].

INFAMIA FACTI. The infamy existing where a party is supposed to be guilty of an infamous crime, but it has not been judicially proved.[86]

INFAMIA JURIS. Infamy established by law as the consequence of crime.[87]

INFAMOUS.[88] A term applied at common law to certain crimes and meaning without fame or good report.[89] (Infamous: Crime, see COURTS; CRIMINAL LAW. See also INFAMIA FACTI; INFAMIA JURIS.)

INFAMOUS PERSONS. Such persons as may be challenged as jurors *propter delictum*, and therefore shall never be admitted to give evidence to inform the jury, with whom they were too scandalous to associate.[90] (See INFAMOUS; and, generally, CRIMINAL LAW; JURIES.)

INFAMOUS PUNISHMENT. A punishment of the highest grade; thus the term is said to embrace incarceration in a states prison,[91] or a penitentiary with or without hard labor.[92] As used in a convention for extradition between foreign governments which provides for the delivery of persons charged with crimes subject to infamous punishment, it means subject to infamous punishment in the nation where it was committed, without regard to the measure of punishment in the country from which extradition is demanded.[93] It may include disqualification

86. Com. *v.* Green, 17 Mass. 515, 540.

87. Com. *v.* Green, 17 Mass. 515, 540.

88. **Synonyms** of "infamous" have been enumerated as including "detestable," "odious," "scandalous," "disgraceful," "base," "vile," "shameful," "ignominious." Polson *v.* Polson, 140 Ind. 310, 311, 39 N. E. 498 [*quoting* Webster Dict.].

"Infamous conduct in any professional respect" see Allbutt *v.* General Medical Council, etc., 23 Q. B. D. 400, 402 note, 54 J. P. 36, 58 L. J. Q. B. 606, 61 L. T. Rep. N. S. 585, 37 Wkly. Rep. 771; Leeson *v.* General Medical Council, etc., 43 Ch. D. 366, 377, 59 L. J. Ch. 233, 61 L. T. Rep. N. S. 849, 38 Wkly. Rep. 303.

The term "infamous" was applied at common law to certain crimes, upon conviction of which a person became incompetent to testify as a witness. This was upon the theory that a person would not commit a crime of such heinous character, unless so depraved as to be wholly insensible to the obligation of an oath, and therefore unworthy of credit. Anderson L. Dict.

89. U. S. *v.* Block, 24 Fed. Cas. No. 14,609, 4 Sawy. 211, 212. See also Davis *v.* Carey, 141 Pa. St. 314, 325, 21 Atl. 633.

"The term 'infamous' has a technical import more extensive than mere degradation or reproach." Sodusky *v.* McGee, 5 J. J. Marsh. (Ky.) 621, 622.

90. 3 Blackstone Comm. 370 [*quoted* in McCafferty *v.* Guyer, 59 Pa. St. 109, 116].

91. Gudger *v.* Penland, 108 N. C. 593, 599, 13 S. E. 168, 23 Am. St. Rep. 73; Mackin *v.* U. S., 117 U. S. 348, 352, 6 S. Ct. 777, 29 L. ed. 909 (where the court said: "We cannot doubt that at the present day imprisonment in a State prison or penitentiary, with or without hard labor, is an infamous punishment. It is not only so considered in the general opinion of the people, but it has been recognized as such in the legislation of the States and Territories, as well as of Congress"); *Ex p.* Wilson, 114 U. S. 417, 428, 5 S. Ct. 935, 29 L. ed. 89; Jamison *v.* Wimbish, 130 Fed. 351, 355.

Illustration.—"Whether we consider the words 'infamous punishment' in their popular meaning, or as they are understood by the Constitution and laws, a sentence to the state prison, for any term of time, must be considered as falling within them. The convict is placed in a public place of punishment, common to the whole state, subject to solitary imprisonment, to have his hair cropped, to be clothed in conspicuous prison dress, subjected to hard labor without pay, to hard fare, coarse and meagre food, and to severe discipline. Some of these a convict in the house of correction is subject to; but the house of correction, under that and the various names of workhouse and bridewell, has not the same character of infamy attached to it. Besides, the state prison, for any term of time, is now by law substituted for all the ignominious punishments formerly in use; and, unless this is infamous, then there is now no infamous punishment, other than capital." Jones *v.* Robbins, 8 Gray (Mass.) 329, 349 [*quoted* in *Ex p.* Wilson, 114 U. S. 417, 428, 5 S. Ct. 935, 29 L. ed. 89].

92. Mackin *v.* U. S., 117 U. S. 348, 351, 6 S. Ct. 777, 29 L. ed. 909.

"It is not necessary, to make a punishment infamous, that the law shall require that the party should in terms be sentenced to hard labor. If, under the law, he may be sentenced to a state-prison or penitentiary, either with or without hard labor, his punishment is infamous." *Ex p.* McClusky, 40 Fed. 71, 73 [*citing Ex p.* Wilson, 114 U. S. 426, 5 S. Ct. 935, 29 L. ed. 89].

When it may include conspiracy.—"Where the conspiracy is accompanied with the *crimen falsi* it is subject to an infamous punishment, including pillory; and the person convicted is disqualified from giving evidence in a court of justice. But where the confederacy is unaccompanied with that crime, and is only calculated to prejudice a third person or the public, the punishment is merely fine and imprisonment, without any such disqualification or infamy." Journeymen Cordwainer's Case, Yates Sel. Cas. (N. Y.) 111, 217. See, generally, CONSPIRACY.

That any crime is infamous which is punishable by death or by imprisonment, with or without hard labor, in a state prison see 12 Cyc. 135.

93. *In re* Farez, 8 Fed. Cas. No. 4,645, 2 Abb. 346, 7 Blatchf. 345.

for office, if inflicted as a punishment for crime.[94] (Infamous Punishment: See, generally, CRIMINAL LAW; PRISONS.)

INFAMY. Loss of character, or public disgrace;[95] that state which is produced by the conviction of crime and the loss of honor;[96] a state of incompetency implying such a dereliction of moral principle as carries with it a conclusion of a total disregard to the obligation of an oath.[97] (Infamy: In General, see CRIMINAL LAW. Affecting Right to — Hold Office, see OFFICERS; To Vote, see ELECTIONS. Disqualifying — Juror, see JURIES; Witness, see WITNESSES. Ground For Divorce, see DIVORCE.)

INFANCY. See INFANTS.

INFANS EST QUIA, PROPTER DEFECTUM ÆTATIS, PRO SE FARI NEQUEAT. A maxim meaning "He is an infant who, on account of defect of age, can not speak for himself."[98]

INFANS NON MULTUM A FURIOSO DISTAT. A maxim meaning "An infant does not differ much from a lunatic."[99]

INFANTES DE DAMNO PRÆSTARE TENENTUR, DE PŒNA NON ITEM. A maxim meaning "Infants are sometimes obliged to performance involving loss, but never punishment."[1]

INFANTICIDE. See HOMICIDE.

94. People *v.* Kipley, 171 Ill. 44, 73, 49 N. E. 229, 41 L. R. A. 775.

In many jurisdictions, infamy, by force of statutory provisions, involves other disabilities; it may affect the right to hold office, the qualification for jury duty, etc. Abbott L. Dict.

95. Webster Dict. [*quoted* in Com. *v.* Shaver, 3 Watts & S. (Pa.) 338, 343].

96. Bouvier L. Dict. [*quoted* in Williams *v.* U. S., 4 Indian Terr. 204, 69 S. W. 849, 852].

"There are two kinds of infamy; the one founded in the opinions of the people respecting the mode of punishment; the other in the construction of law respecting the future credibility of the delinquent." *Ex p.* Wilson, 114 U. S. 417, 422, 5 S. Ct. 935, 29 L. ed. 89.

97. State *v.* Clark, 60 Kan. 450, 454, 56 Pac. 767 [*citing* 1 Greenleaf Ev. § 373].

"Infamy extends to forgery, perjury, gross cheats, &c., and disables a man to be a witness or juror." Com. *v.* Shaver, 3 Watts & S. (Pa.) 338, 342 [*citing* Tomlin L. Dict.].

98. Morgan Leg. Max.

99. Bouvier L. Dict. [*citing* Bracton 1, 3, c. 2, § 8; Dig. 50, 17, 5, 40; 1 Story Eq. Jur. §§ 223, 224, 242].

1. Morgan Leg. Max.

INFANTS

By Joseph Walker Magrath*

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Seduction, see SEDUCTION.
Testamentary Capacity of Infant, see WILLS.
Truant, see SCHOOLS AND SCHOOL-DISTRICTS.

I. WHO ARE INFANTS.

A. Definition. An infant is a person who has not arrived at the age fixed by the common law or by statute as the time when a person is presumed to have reached full maturity and becomes able to exercise all the rights and powers of the citizen.[1]

B. Age of Majority — 1. IN GENERAL. At common law the age at which an infant, whether male or female, reaches full majority is fixed at twenty-one years.[2] This rule is still almost universal under statutes in the case of males;[3] but in a number of states the age of majority as to females, at least for some purposes, has been fixed at eighteen years.[4]

1. See Black L. Dict.
The phrase "under legal disabilities" includes persons under the age of twenty-one years. Hawkins *v.* Hawkins, 28 Ind. 66.
2. *Georgia.*— Dent *v.* Cock, 65 Ga. 400.
Indiana.— Hawkins *v.* Hawkins, 28 Ind. 66.
Kentucky.— Harris *v.* Berry, 82 Ky. 137, 6 Ky. L. Rep. 157.
Pennsylvania.—Kohne's Estate, 1 Pars. Eq. Cas. 399.
Texas.— Means *v.* Robinson, 7 Tex. 502.
England.— Anonymous, 1 Salk. 44.
See 27 Cent. Dig. tit. "Infants," § 1.
Mexican law.— On an issue as to how old one must be to be an adult under the laws of Mexico, a showing that the Justinian code was the basis of jurisprudence in Mexico, and that under the civil law a male person is an adult at the age of fourteen years, was not proof that such person was an adult under the laws of Mexico, since the entire body of civil law or Justinian code might not have been adopted. Banco de Sonora *v.* Bankers' Mut. Casualty Co., 124 Iowa 576, 100 N. W. 532, 104 Am. St. Rep. 367.
3. Ganahl *v.* Sohler, (Cal. 1884) 5 Pac. 80; Magee *v.* Welsh, 18 Cal. 155; Banco de Sonora *v.* Bankers' Mut. Casualty Co., 124 Iowa 576, 100 N. W. 532, 104 Am. St. Rep. 367.
4. *California.*— Ganahl *v.* Sohler, (1884) 5 Pac. 80; Magee *v.* Welsh, 18 Cal. 155.
Colorado.— Jackson *v.* Allen, 4 Colo. 263.

2. When Age Deemed Attained. The rule is that the age of majority is attained on the day preceding the twenty-first anniversary of the person's birth, or on the corresponding day, if another age than twenty-one has been fixed by statute as that of majority.[5]

3. What Law Governs. It has been laid down that the law of the domicile of origin governs the state and condition of a person as to minority or majority, into whatever state or country he may remove;[6] but the better rule, and that supported by the great weight of authority, is that the law of the place where the contract is made or the act done governs in determining whether a party is or is not an infant.[7]

II. PRIVILEGES AND DISABILITIES.

A. Privileges — 1. Immunity From Prejudice by Lapse of Time or Laches.[8] In the absence of any positive provision of law to the contrary, an infant will not be prejudiced by lapse of time,[9] nor is laches ordinarily imputable to infants to their prejudice.[10]

2. Immunity From Estoppel.[11] It has been laid down that as a general rule the doctrine of estoppel has no application to infants;[12] but there are many cases

Illinois.— Bursen *v.* Goodspeed, 60 Ill. 277; Kester *v.* Stark, 19 Ill. 328; Stevenson *v.* Westfall, 18 Ill. 209.

Kentucky.— Harris *v.* Berry, 82 Ky. 137, 6 Ky. L. Rep. 157, stating law of Missouri.

Maryland.— McKim *v.* Handy, 4 Md. Ch. 228, for purpose of receiving a legacy.

Minnesota.— Cogel *v.* Raph, 24 Minn. 194.

Missouri.— Caho *v.* Endress, 68 Mo. 224; Reisse *v.* Clarenbach, 61 Mo. 310.

Nebraska.— Parker *v.* Starr, 21 Nebr. 680, 33 N. W. 424.

Ohio.— Craighead *v.* Pike, 5 Ohio Dec. (Reprint) 273, 4 Am. L. Rec. 199.

Pennsylvania.— Huey's Appeal, 1 Grant 51 (stating law of Ohio); Com. *v.* Montgomery, Add. 262.

Vermont.— Sparhawk *v.* Buell, 9 Vt. 41; Young *v.* Davis, Brayt. 124.

See 27 Cent. Dig. tit. "Infants," § 1.

Statute not retrospective.— Reisse *v.* Clarenbach, 61 Mo. 310.

5. State *v.* Clarke, 3 Harr. (Del.) 557; Wells *v.* Wells, 6 Ind. 447; Hamlin *v.* Stevenson, 4 Dana (Ky.) 597; Anonymous, 1 Salk. 44. But see Ganahl *v.* Sohler, (Cal. 1884) 5 Pac. 80.

6. Barrera *v.* Alpuente, 6 Mart. N. S. (La.) 69, 17 Am. Dec. 179; Le Breton *v.* Nouchet, 3 Mart. (La.) 59, 5 Am. Dec. 736. See also Kohne's Estate, 1 Pars. Eq. Cas. (Pa.) 399, stating the rule to be as above with a few exceptions.

7. *Indiana.*— Hiestand *v.* Kuns, 8 Blackf. 345, 46 Am. Dec. 481.

Kentucky.— Harris *v.* Berry, 82 Ky. 137, 6 Ky. L. Rep. 157.

Louisiana.— Saul *v.* His Creditors, 5 Mart. N. S. 569, 16 Am. Dec. 212.

Missouri.— Philpott *v.* Missouri Pac. R. Co., 85 Mo. 164.

New York.— Thompson *v.* Ketchum, 8 Johns. 189, 5 Am. Dec. 332, Kent, C. J., delivering the opinion of the court.

Ohio.— Sell *v.* Miller, 11 Ohio St. 331. See also Craighead *v.* Pike, 5 Ohio Dec. (Reprint) 273, 4 Am. L. Rec. 199.

Pennsylvania.— Huey's Appeal, 1 Grant 51; Kohne's Estate, 1 Pars. Eq. Cas. 399.

Tennessee.— Pearl *v.* Hansborough, 9 Humphr. 426.

See 27 Cent. Dig. tit. "Infants," § 3.

In Texas it has been held that the rights of infants and of persons claiming under them, in respect of contracts made and acts done before the introduction of the common law, must be determined by the principles of the Spanish law which was then in force. Means *v.* Robinson, 7 Tex. 502.

8. Laches generally see Equity.

9. Smith *v.* Sackett, 10 Ill. 534; Rector *v.* Rector, 8 Ill. 105; Calhoon *v.* Baird, 3 A. K. Marsh. (Ky.) 168; Gaugh *v.* Henderson, 2 Head (Tenn.) 628. See *infra*, IV, A, 3.

When rule not applicable.— An infant heir cannot avail himself of his disability, to excuse the non-assertion of his rights under an executory contract made with his ancestor, when the immediate performance of his part of the contract is essential to the interest of the other party. Walker *v.* Douglas, 70 Ill. 445.

Effect of statutes of limitation see Limitation of Actions.

10. Smith *v.* Sackett, 70 Ill. 534; Allen's Estate, 11 Phila. (Pa.) 48. See also Roberts *v.* Phillips, 11 Bush. (Ky.) 11. *Compare* Morgan *v.* Herrick, 21 Ill. 481.

In relation to conditions attached to an estate made either to his ancestor or himself, the laches of an infant will bar him of the right of the land forever. Havens *v.* Patterson, 43 N. Y. 218.

11. See *infra*, IV, E, 1, d; V, F, 1, c.

Estoppel generally see Estoppel.

12. *Alabama.*—Gillespie *v.* Nabors, 59 Ala. 441, 31 Am. Rep. 20; Montgomery *v.* Gordon, 51 Ala. 377.

California.— Lackman *v.* Wood, 25 Cal. 147. See also Hill's Estate, 67 Cal. 238, 7 Pac. 664.

District of Columbia.— Stansbury *v.* Inglehart, 20 D. C. 134.

recognizing an exception to this rule or denying its application in case the conduct of the infant on which the estoppel is sought to be based has been intentional and fraudulent, and the infant was at the time of years of discretion.[13] It has been laid down that as an infant is not bound by an estoppel *in pais* he cannot claim one against an adult.[14]

B. Disabilities — 1. In General. Even the disabilities of infants are really privileges, for the object is to secure the infants from damaging themselves or their property by their own improvident acts.[15] Hence an infant cannot, on reaching majority, disaffirm acts done for others and not affecting his own property.[16] So also an infant may exercise a power as fully and effectually as an adult,[17]

Illinois.— Wieland *v.* Kobick, 110 Ill. 16, 51 Am. Rep. 676; Schnell *v.* Chicago, 38 Ill. 382, 87 Am. Dec. 304.

Michigan.— Rundle *v.* Spencer, 67 Mich. 189, 34 N. W. 548; Corey *v.* Burton, 32 Mich. 30.

Minnesota.— Conrad *v.* Lane, 26 Minn. 389, 4 N. W. 695, 37 Am. Rep. 412.

Mississippi.— Upshaw *v.* Gibson, 53 Miss. 341.

Missouri.— Campbell *v.* Laclede Gas Light Co., 84 Mo. 352; McBeth *v.* Trabue, 69 Mo. 642.

Nebraska.— Cobbey *v.* Buchanan, 48 Nebr. 391, 67 N. W. 176.

New York.— Ackley *v.* Dygert, 33 Barb. 176; Brown *v.* McCune, 5 Sandf. 224; Conroe *v.* Birdsall, 1 Johns. Cas. 127, 1 Am. Dec. 105.

Pennsylvania.— Keen *v.* Coleman, 39 Pa. St. 299, 80 Am. Dec. 524.

Texas.— Steed *v.* Petty, 65 Tex. 490; Hilburn *v.* Harris, (Civ. App. 1895) 29 S. W. 923.

Wisconsin.— O'Dell *v.* Rogers, 44 Wis. 136.

United States.— Sims *v.* Everhart, 102 U. S. 300, 26 L. ed. 87; Sanger *v.* Hibbard, 104 Fed. 455, 43 C. C. A. 635; Harmon *v.* Smith, 38 Fed. 482.

See 27 Cent. Dig. tit. "Infants," § 9.

Decree of emancipation.— A person who has been emancipated on his own petition by the decree of a competent court having jurisdiction over his person, correct in form, will be estopped from invoking the nullity of such judgment against third persons who have dealt with him as an emancipated minor. Allison *v.* Watson, 36 La. Ann. 616.

Representation as to decree of emancipation.— The fact that an infant represented to non-resident plaintiffs that his disability to contract had been removed by a decree of the judge of probate of the county where he resided, as authorized by Ala. Code (1886), § 2363, before executing the notes sued on, in another state, was not sufficient to estop him from pleading infancy as a defense to the notes. Wilkinson *v.* Buster, 124 Ala. 574, 26 So. 940.

Election by court of equity.— An infant cannot make an election and thus create an estoppel against himself; but a court of equity has undoubted power to elect for him and will not allow him to receive and hold the proceeds of an unauthorized sale of his property and at the same time repudiate the sale. Equitable estoppels of this character apply to infants as well as adults. Marx *v.* Clisby, 130 Ala. 502, 30 So. 517; Goodman *v.* Winter, 64 Ala. 410, 38 Am. Rep. 13.

13. *Georgia.*— Whitington *v.* Wright, 9 Ga. 23; Irwin *v.* Merrill, Dudley 72.

Indian Territory.— Sanger *v.* Hibbard, 2 Indian Terr. 547, 53 S. W. 330.

Texas.— Steed *v.* Petty, 65 Tex. 490.

West Virginia.— Williamson *v.* Jones, 43 W. Va. 562, 27 S. E. 411, 64 Am. St. Rep. 891, 38 L. R. A. 694.

United States.— Harmon *v.* Smith, 38 Fed. 482.

See 27 Cent. Dig. tit. "Infants," § 9.

14. Such an estoppel would lack mutuality. Montgomery *v.* Gordon, 51 Ala. 377.

15. 1 Blackstone Comm. 464. See also Wambole *v.* Foote, 2 Dak. 1, 2 N. W. 239; Mercer *v.* Watson, 1 Watts (Pa.) 330; Harris *v.* Musgrove, 59 Tex. 401; U. S. *v.* Bainbridge, 24 Fed. Cas. No. 14,497, 1 Mason 71.

An infant's disabilities are for his own protection and not for the protection of the rights of third persons. U. S. *v.* Bainbridge, 24 Fed. Cas. No. 14,497, 1 Mason 71.

An infant cannot do any act to the injury of his property which he cannot avoid when he arrives at full age. Monumental Bldg. Assoc. No. 2 *v.* Herman, 33 Md. 128.

Infant cannot consent to violation of his property rights. Gay *v.* Louisville, 93 Ky. 349, 20 S. W. 266, 14 Ky. L. Rep. 327.

Validating act.— Where a person having a life-interest in a fund, with power to appoint, give, or devise it to others, made an arrangement with the next of kin of the donor as to the distribution of such fund between herself and them, it was held that the arrangement, having been validated by an act of the legislature, would be sustained, although some of the appointees under the power were infants, and could not consent to it. Thomson *v.* Norris, 20 N. J. Eq. 489.

Infancy is not permitted to protect fraudulent acts of infants. Thus if an infant receive rents, he cannot demand them again when of age. Parker *v.* Elder, 11 Humphr. (Tenn.) 546.

16. Sheldon *v.* Newton, 3 Ohio St. 494.

17. Sheldon *v.* Newton, 3 Ohio St. 494; Hill *v.* Clark, 4 Lea (Tenn.) 405; Hearle *v.* Greenbank, 3 Atk. 695, 26 Eng. Reprint 1200, 1 Ves. 298, 27 Eng. Reprint 1043.

unless such power be coupled with an interest,[18] or requires the exercise of discretion.[19] The privilege of an infant to avoid his acts or contracts is personal,[20] but after his death this privilege extends to his legal personal representatives.[21]

2. APPOINTMENT OF AGENT OR ATTORNEY. An infant cannot legally appoint an agent,[22] or give a power, warrant, or letter of attorney.[23] It has been frequently asserted that such acts on the part of an infant, as well as the acts of the person attempted to be appointed agent or attorney, are absolutely void;[24] nevertheless

A provision that the power may be executed during infancy must be inserted in a deed giving an infant a power relating to his own estate or his execution of it will have no effect. Hill *v.* Clark, 4 Lea (Tenn.) 405.

18. Thompson *v.* Lyon, 20 Mo. 155, 61 Am. Dec. 599, holding, however, that where an infant, being authorized so to do, exercises the power of appointment by conveying land, a court of equity will not interfere against a purchaser for a valuable consideration without notice. See also Hill *v.* Clark, 4 Lea (Tenn.) 405.

Instrument creating power cannot dispense with disability of infancy. Thompson *v.* Lyon, 20 Mo. 155, 61 Am. Dec. 599.

19. See Hill *v.* Clark, 4 Lea (Tenn.) 405.

20. Person *v.* Chase, 37 Vt. 647, 88 Am. Dec. 630; U. S. *v.* Bainbridge, 24 Fed. Cas. No. 14,497, 1 Mason 71. And see *infra*, IV, E, 1, c; V, E, 1; V, F, 1, b.

21. Jefford *v.* Ringgold, 6 Ala. 544; Hussey *v.* Jewett, 9 Mass. 100; Parson *v.* Hill, 8 Mo. 135; Person *v.* Chase, 37 Vt. 647, 88 Am. Dec. 630.

22. *Alabama.*— Ware *v.* Cartledge, 24 Ala. 622, 60 Am. Dec. 489.

Indiana.— Trueblood *v.* Trueblood, 8 Ind. 195, 65 Am. Dec. 756; Tapley *v.* McGee, 6 Ind. 56; Burns *v.* Smith, 29 Ind. App. 181, 64 N. E. 94, 94 Am. St. Rep. 268.

Michigan.— Armitage *v.* Widoe, 36 Mich. 124.

Missouri.—Poston *v.* Williams, 99 Mo. App. 513, 73 S. W. 1099; Turner *v.* Bondalier, 31 Mo. App. 582.

New York.— Robbins *v.* Mount, 4 Rob. 553, 33 How. Pr. 24.

North Carolina.— Sawyer *v.* Northan, 112 N. C. 261, 16 S. E. 1023.

Texas.— Vogelsang *v.* Null, 67 Tex. 465, 3 S. W. 451.

Wisconsin.— Holden *v.* Curry, 85 Wis. 504, 55 N. W. 965.

See 27 Cent. Dig. tit. "Infants," § 5.

23. *Alabama.*— Glass *v.* Glass, 76 Ala. 368; Philpot *v.* Bingham, 55 Ala. 435.

Dakota.— Wambole *v.* Foote, 2 Dak. 1, 2 N. W. 239.

Delaware.— Waples *v.* Hastings, 3 Harr. 403.

Indiana.— Pickler *v.* State, 18 Ind. 266; Tapley *v.* McGee, 6 Ind. 56.

Kentucky.— Semple *v.* Morrison, 7 T. B. Mon. 298; Pyle *v.* Cravens, 4 Litt. 17.

Michigan.— Armitage *v.* Widoe, 36 Mich. 124.

New York.— Kain *v.* Postley, 2 Edm. Sel. Cas. 132.

Ohio.— Lawrence *v.* McArter, 10 Ohio 37.

Pennsylvania.— Lutes *v.* Thompson, 5 Pa. Co. Ct. 451; Cole *v.* Cole, 9 Lanc. Bar 105; Small *v.* Murphy, 1 Luz. Leg. Reg. 332.

Rhode Island.— Rocks *v.* Cornell, 21 R. I. 532, 45 Atl. 552.

Vermont.— Wade *v.* Pulsifer, 54 Vt. 45; Fuller *v.* Smith, 49 Vt. 253, cannot appoint attorney to appear and defend for him in an action.

See 27 Cent. Dig. tit. "Infants," § 5.

Void or voidable.— An infant's naked power of attorney is void (Bool *v.* Mix, 17 Wend. (N. Y.) 119, 31 Am. Dec. 285; Barker *v.* Wilson, 4 Heisk. (Tenn.) 268; Askey *v.* Williams, 74 Tex. 294, 11 S. W. 1101, 5 L. R. A. 176), but the rule is different when the power is coupled with an interest (Askey *v.* Williams, 74 Tex. 294, 11 S. W. 1101, 5 L. R. A. 176).

24. *Alabama.*— Glass *v.* Glass, 76 Ala. 368; Flexner *v.* Dickerson, 72 Ala. 318; Philpot *v.* Bingham, 55 Ala. 435, power of attorney to sell lands.

Dakota.— Wambole *v.* Foot, 2 Dak. 1, 2 N. W. 239, naked power of attorney.

Delaware.— Waples *v.* Hastings, 3 Harr. 403.

Illinois.— Cole *v.* Pennoyer, 14 Ill. 158.

Indiana.— Fetrow *v.* Wiseman, 40 Ind. 148; Trueblood *v.* Trueblood, 8 Ind. 195, 65 Am. Dec. 756.

Kentucky.— Semple *v.* Morrison, 7 T. B. Mon. 298; Pyle *v.* Cravens, 4 Litt. 17.

Maine.— Dana *v.* Coombs, 6 Me. 89, 19 Am. Dec. 194.

Maryland.— Wainwright *v.* Wilkinson, 62 Md. 146.

Michigan.— Armitage *v.* Widoe, 36 Mich. 124.

Missouri.—Poston *v.* Williams, 99 Mo. App. 513, 73 S. W. 1099; Turner *v.* Bondalier, 31 Mo. App. 582.

New York.— Kain *v.* Postley, 2 Edm. Sel. Cas. 132; Fonda *v.* Van Horn, 15 Wend. 631; Bennett *v.* Davis, 6 Cow. 393.

Ohio.— Lawrence *v.* McArter, 10 Ohio 37, holding that letters of attorney from an infant, conveying no present interest in lands, are absolutely null.

Pennsylvania.— Knox *v.* Flack, 22 Pa. St. 337; Lutes *v.* Thompson, 5 Pa. Co. Ct. 451; Cole *v.* Cole, 9 Lanc. Bar 105; Small *v.* Murphy, 1 Luz. Leg. Reg. 332.

Vermont.— Wade *v.* Pulsifer, 54 Vt. 45.

United States.— Dexter *v.* Hall, 15 Wall. 9, 21 L. ed. 73.

England.— Doe *v.* Roberts, 16 M. & W. 778; Ashlin *v.* Langton, 3 L. J. C. P. 264, 4 Moore & S. 719, 30 E. C. L. 567.

See 27 Cent. Dig. tit. "Infants," § 5.

there is also very respectable authority for the view that such acts are voidable only and not void.[25]

3. ACTING AS AGENT. It has been held, however, that an infant may be the agent of another person.[26]

4. ACTING AS TRUSTEE. An infant may be created or charged as a trustee,[27] and in such case he is as much bound to carry out the trust as if he were an adult.[28] He will not be permitted to receive the property to his own exclusive benefit and then repudiate the trust or equitable charge created by the person from whom he derived it.[29]

5. ELIGIBILITY TO PUBLIC OFFICE OR EMPLOYMENT. At common law infants are eligible to offices which are ministerial in their character and call for the exercise of skill and diligence only;[30] but they are not eligible to offices which are judicial

A warrant of attorney to confess judgment executed by an infant is void (Fuqua *v.* Sholem, 60 Ill. App. 140; Bennett *v.* Davis, 6 Cow. (N. Y.) 393; Knox *v.* Flack, 22 Pa. St. 337; Smith *v.* Fisk, 6 Pa. Co. Ct. 167; Lutes *v.* Thompson, 5 Pa. Co. Ct. 451), and the judgment should be vacated on the infancy being shown (Karcher *v.* Green, 8 Houst. (Del.) 163, 32 Atl. 225; Bennett *v.* Davis, 6 Cow. (N. Y.) 393; Knox *v.* Flack, 22 Pa. St. 337; Smith *v.* Fisk, 6 Pa. Co. Ct. 167).

Ratification.— The bond and warrant of attorney of an infant are void, and acts done under them cannot be legalized by subsequent ratification. Waples *v.* Hastings, 3 Harr. (Del.) 403; Lutes *v.* Thompson, 5 Pa. Co. Ct. 451; Doe *v.* Roberts, 16 M. & W. 778. See also Trueblood *v.* Trueblood, 8 Ind. 195, 65 Am. Dec. 756, acts of agent.

25. Hastings *v.* Dollarhide, 24 Cal. 195 (holding that a power of attorney from an infant to sell a note authorizes the attorney to sell and transfer the same, but the infant on coming of age may disaffirm or ratify the sale); Towle *v.* Dresser, 73 Me. 252 (holding that the appointment of an agent by a minor to rescind his contract is, if not manifestly or necessarily prejudicial to him, only voidable); Hardy *v.* Waters, 38 Me. 450; Simpson *v.* Prudential Ins. Co., 184 Mass. 348, 68 N. E. 673, 63 L. R. A. 741; Whitney *v.* Dutch, 14 Mass. 457, 7 Am. Dec. 229; Cummings *v.* Powell, 8 Tex. 80. See also Stiff *v.* Keith, 143 Mass. 224, 9 N. E. 577.

26. Talbot *v.* Bowen, 1 A. K. Marsh. (Ky.) 436, 10 Am. Dec. 747, holding further that the agency may be created by parol. See also U. S. Invest. Corp. *v.* Ulrickson, 84 Minn. 14, 86 N. W. 613, 87 Am. St. Rep. 326; Sheldon *v.* Newton, 3 Ohio St. 494. But see Smally *v.* Smally, 1 Eq. Cas. Abr. 6, 21 Eng. Reprint 831, holding that an infant cannot be made to account as a factor.

27. Bridges *v.* Bidwell, 20 Nebr. 185, 29 N. W. 302; Levin *v.* Ritz, 17 Misc. (N. Y.) 737, 41 N. Y. Suppl. 405. See also Wilder *v.* Eldridge, 17 Vt. 226, trustee process.

A resulting trust should not be established as against an infant except by decree in a suit regularly instituted. *In re* Follen, 14 N. J. Eq. 147.

An infant beneficiary in an insurance policy may be charged as trustee for plaintiff, who paid the premiums and supported the insured, pursuant to an agreement with the beneficiary that plaintiff should be entitled to half of the insurance money, and with the understanding that the insured would change the certificate so as to make plaintiff one of the beneficiaries. Levin *v.* Ritz, 17 Misc. (N. Y.) 737, 41 N. Y. Suppl. 405.

A declaration of trust by an infant by a deed actually delivered is voidable, but not void; and the infant, coming of age, may by his acts confirm the deed. Ownes *v.* Ownes, 23 N. J. Eq. 60; Zouch *v.* Parsons, 3 Burr. 1794, 1 H. Bl. 575.

28. Levin *v.* Ritz, 17 Misc. (N. Y.) 737, 41 N. Y. Suppl. 405.

Application for conveyance by infant trustee must be by petition. *Ex p.* Quackenboss, 3 Johns. Ch. (N. Y.) 408, so under both the New York and English statutes.

29. Levin *v.* Ritz, 17 Misc. (N. Y.) 737, 41 N. Y. Suppl. 405.

30. *In re* Golding, 57 N. H. 146, 24 Am. Rep. 66; Moore *v.* Graves, 3 N. H. 408; Bath *v.* Haverhill, 2 N. H. 555; Harkreader *v.* State, 35 Tex. Cr. 243, 33 S. W. 117, 60 Am. St. Rep. 40; U. S. *v.* Bixby, 9 Fed. 78, 10 Biss. 520.

An infant may be a notary (U. S. *v.* Bixby, 9 Fed. 78, 10 Biss. 520), an appraiser of land to be sold on execution (White *v.* Laurel Land Co., 82 S. W. 571, 26 Ky. L. Rep. 775, 83 S. W. 628, 26 Ky. L. Rep. 1235), an overseer of a public road (Allison *v.* State, 60 Ala. 54), a clerk of the peace (Crosbie *v.* Hurley, Alc. & N. 431), a deputy steward (Eddleston *v.* Collins, 3 De G. M. & G. 1, 17 Jur. 331, 22 L. J. Ch. 480, 1 Wkly. Rep. 169, 52 Eng. Ch. 1, 43 Eng. Reprint 1), a deputy county clerk (Harkreader *v.* State, 35 Tex. Cr. 243, 33 S. W. 117, 60 Am. St. Rep. 40), or a deputy clerk of court (Talbott *v.* Hooser, 12 Bush (Ky.) 408. *Contra*, Wimberly *v.* Boland, 72 Miss. 241, 16 So. 905). So also an infant is not prohibited by statute, nor by public policy, from becoming prosecutor, and may therefore be indorsed as such. State *v.* Dillon, 1 Head (Tenn.) 389.

Estoppel to object to competency.— If a town appoint an infant to the office of hogreeve, the town cannot afterward object to his competency. Bath *v.* Haverhill, 2 N. H. 555.

or concern the administration of justice,[31] nor should offices imposing duties to the proper discharge of which judgment, discretion, and experience are necessary, be intrusted to infants.[32]

6. Acting as Common Informer. An infant who can sue only by guardian cannot be a common informer where the statute requires common informers to sue either in person or by attorney.[33]

7. Exercising Right of Election. An infant has not the legal capacity to exercise a right or power of election,[34] but where other rights are involved a court of equity will do it for him or bar him from a future exercise of the right.[35]

8. Admissions. An infant is incapable of making an admission which can affect his rights,[36] and *a fortiori* the admissions of another person cannot affect an infant's rights,[37] nor can the admissions of infants bind other persons.[38]

9. Removal of Disabilities[39] — **a. Emancipation by Act of Parent.** An infant may be emancipated by the act of his parent,[40] and such emancipation leaves the infant, so far as the parent is concerned, free to act on his own responsibility, in accordance with his own will and pleasure, with the same independence as though he were of legal age.[41] An emancipated minor is entitled to his own earnings,[42]

Minor incapable of holding civil office.— People *v.* Dean, 3 Wend. (N. Y.) 438.

31. Harkreader *v.* State, 35 Tex. Cr. 243, 33 S. W. 117, 60 Am. St. Rep. 40; U. S. *v.* Bixby, 9 Fed. 78, 10 Biss. 520.

An infant cannot act as a justice of the peace (*In re* Golding, 57 N. H. 146, 24 Am. Rep. 66), a deputy sheriff (New Albany, etc., R. Co. *v.* Grooms, 9 Ind. 243; Cuckson *v.* Winter, 2 M. & R. 313), a bailiff (Cuckson *v.* Winter, *supra*), a constable (Floyd *v.* State, 79 Ala. 39), a clerk of court (Claridge *v.* Evelyn, 5 B. & Ald. 81, 24 Rev. Rep. 289, 7 E. C. L. 55), a deputy clerk of court (Wimberly *v.* Boland, 72 Miss. 241, 16 So. 905. *Contra*, Talbott *v.* Hooser, 12 Bush (Ky.) 408), or a juryman (Wassum *v.* Feeney, 121 Mass. 93, 23 Am. Rep. 258).

Service of writ by special authority.— An infant may be legally appointed or deputed by the sheriff to serve and return a particular writ, as in such case he acts as the agent or servant of the sheriff, who is responsible for his acts (Moore *v.* Graves, 3 N. H. 408; Barrett *v.* Seward, 22 Vt. 176. See also New Albany, etc., R. Co. *v.* Grooms, 9 Ind. 243, although he cannot act as general deputy), but he cannot be authorized to serve a writ by the magistrate signing it (Tyler *v.* Tyler, 2 Root (Conn.) 519; Vail *v.* Rowell, 53 Vt. 109; Harvey *v.* Hall, 22 Vt. 211).

32. *In re* Golding, 57 N. H. 146, 24 Am. Rep. 66; Moore *v.* Graves, 3 N. H. 408.

Sustaining acts as those of de facto officer. — Where a minor exercises an office which his infancy prevents his lawfully holding, his acts are not necessarily void, but may be sustained as those of a *de facto* officer. Floyd *v.* State, 79 Ala. 39; Wimberly *v.* Boland, 72 Miss. 241, 16 So. 905.

33. Maggs *v.* Ellis, Buller N. P. 196.

34. Wilson *v.* Wilson, 18 Ala. 176; Grattan *v.* Grattan, 18 Ill. 167, 65 Am. Dec. 726.

35. Grattan *v.* Grattan, 18 Ill. 167, 65 Am. Dec. 726.

36. Barker *v.* Hamilton, 3 Colo. 291; Lunday *v.* Thomas, 26 Ga. 537; Smith *v.* Smith, 13 Mich. 258.

An admission in the answer of an infant of a contract is not binding on him. Murphy *v.* Holmes, 87 N. Y. App. Div. 366, 84 N. Y. Suppl. 806.

37. See Harris *v.* Harris, 6 Gill & J. (Md.) 111; Watson *v.* Godwin, 4 Md. Ch. 25, opinion by Chancellor Johnson.

The natural guardian has no power to admit away the rights of the infant. Power *v.* Harlow, 57 Mich. 107, 23 N. W. 606.

Admissions by guardian ad litem or next friend see *infra*, VIII, D, 4, h.

Admissions by general guardian see Guardian and Ward.

38. Barker *v.* Hamilton, 3 Colo. 291 (holding that an infant's admissions cannot be used against a third person who assumes to stand as his trustee); Smith *v.* Smith, 13 Mich. 258.

39. **Emancipation is unknown in Mississippi.** Babcock *v.* Penniman, 5 Mart. N. S. (La.) 651.

40. **What constitutes emancipation** see Parent and Child.

Emancipation by notarial act see Munday *v.* Kaufman, 48 La. Ann. 591, 19 So. 619; Richardson *v.* Richardson, 38 La. Ann. 639.

Emancipation may be shown by express agreement or circumstantial evidence. Grotjan *v.* Rice, 124 Wis. 253, 102 N. W. 551.

41. Lowell *v.* Newport, 66 Me. 78; Hoskins *v.* White, 13 Mont. 70, 32 Pac. 163; Person *v.* Chase, 37 Vt. 647, 88 Am. Dec. 630.

42. *Indiana.*— Robinson *v.* Hathaway, 150 Ind. 679, 50 N. E. 883.

Maine.— Boobier *v.* Boobier, 39 Me. 406.

Massachusetts.— See Vent *v.* Osgood, 19 Pick. 572.

New York.— Lieberman *v.* Third Ave. R. Co., 25 Misc. 296, 54 N. Y. Suppl. 574 [*affirmed* as to this point in 25 Misc. 704, 55 N. Y. Suppl. 677].

Rhode Island.—Genereux *v.* Sibley, 18 R. I. 43, 25 Atl. 345.

See 27 Cent. Dig. tit. "Infants," § 10.

as against his parent,[43] and is liable for his necessary support.[44] But it has been held that the emancipation of an infant does not enlarge or affect his capacity to contract,[45] or render him capable of suing without a guardian.[46]

b. Emancipation by Marriage. Under the statutes or policy of some jurisdictions, the marriage of an infant effects an emancipation and removes the disability of infancy at least to some extent.[47] But it has been held that statutes which con-

Revocation of emancipation.— Where, in an action on an implied contract for services, it was undisputed that whatever agreement existed between plaintiff's parent and defendant was with plaintiff's knowledge, an instruction that if plaintiff performed the services in question under a contract between his parents and defendant, although plaintiff was emancipated prior thereto, the making of such contract operated as a revocation of such emancipation and precluded him from recovery if plaintiff had knowledge of such revocation, was erroneous. Grotjan *v.* Rice, 124 Wis. 253, 102 N. W. 551.

43. Hoskins *v.* White, 13 Mont. 70, 32 Pac. 163; Person *v.* Chase, 37 Vt. 647, 88 Am. Dec. 630.

44. Robinson *v.* Hathaway, 150 Ind. 679, 50 N. E. 883; Genereux *v.* Sibley, 18 R. I. 43, 25 Atl. 345.

45. Hoskins *v.* White, 13 Mont. 70, 32 Pac. 163; Person *v.* Chase, 37 Vt. 647, 88 Am. Dec. 630.

Under the Louisiana statute an emancipated minor, when engaged in trade, is considered as having reached majority, as to acts having relation to such trade, and hence may become liable on notes. Booth *v.* McFarland, 2 La. Ann. 398. See further Jonau *v.* Blanchard, 2 Rob. (La.) 513.

46. Hoskins *v.* White, 13 Mont. 70, 32 Pac. 163.

47. *California.*— Magee *v.* Welsh, 18 Cal. 155.

Louisiana.— Mitchell's Succession, 33 La. Ann. 353; Briscoe *v.* Tarkington, 5 La. Ann. 692; Wilcox *v.* Henderson, 7 Rob. 338; Grigsby *v.* Louisiana Bank, 3 La. 491; Withers *v.* His Executors, 3 La. 363.

Maine.— Bucksport *v.* Rockland, 56 Me. 22.

Massachusetts.— See Taunton *v.* Plymouth, 15 Mass. 203.

Mississippi.— See Wood *v.* Henderson, 2 How. 893.

Nebraska.— Ward *v.* Laferty, 19 Nebr. 429, 27 N. W. 393.

New Hampshire.— Fremont *v.* Sandown, 56 N. H. 300.

New York.— Roach *v.* Quick, 9 Wend. 238.

Texas.— Burr *v.* Wilson, 18 Tex. 367; White *v.* Latimer, 12 Tex. 61; Chubb *v.* Johnson, 11 Tex. 469; Grayson *v.* Lofland, 21 Tex. Civ. App. 503, 52 S. W. 121.

Canada.— Bolduc *v.* Caille, 14 Quebec Super. Ct. 209.

See 27 Cent. Dig. tit. "Infants," § 11.

But *compare* Clark *v.* Anderson, 10 Bush (Ky.) 99.

Male minors.— It cannot be maintained, either on principle or authority, that the marriage of male minors (female minors being provided for by statute) works a removal of their civil disabilities. Trammell *v.* Trammell, 20 Tex. 406.

Retroactive effect of statute.— The Texas statute, providing that every female under twenty-one years of age, marrying in accordance with the laws of the state, from and after the time of such marriage, is deemed to be of full age, and to have all the rights and privileges to which she would have been entitled had she been at the time of her marriage of full age, applies to marriages which had taken place before the passage of the act, but not so as to legalize or affect any act done before that time. Chubb *v.* Johnson, 11 Tex. 469.

Marriage in violation of law.— The marriage of a minor in one state, when contracted in violation of the laws of the state of the minor's domicile, does not operate the emancipation of the minor in the latter state. Clement *v.* Wafer, 12 La. Ann. 599; Babin *v.* Le Blanc, 12 La. Ann. 367; Maillefer *v.* Saillot, 4 La. Ann. 375.

Marriage must be with consent of parents or guardian. Magee *v.* Welsh, 18 Cal. 155; Maillefer *v.* Saillot, 4 La. Ann. 375; Bucksport *v.* Rockland, 56 Me. 22. See also Taunton *v.* Plymouth, 15 Mass. 203. But *compare* Boyd *v.* Frantom, 14 La. Ann. 691.

Marriage in the state of Mississippi does not emancipate a minor nor make his promise binding, although he is a citizen of Louisiana. Babcock *v.* Penniman, 5 Mart. N. S. (La.) 651.

An emancipated minor has only a power of administration over his property. Mitchell's Succession, 33 La. Ann. 353. See also Withers *v.* His Executors, 3 La. 363.

An infant emancipated by marriage may make contracts (Burr *v.* Wilson, 18 Tex. 367, under the Spanish law. *Contra*, Taunton *v.* Plymouth, 15 Mass. 203) which will bind him to the extent of his revenue for one year (Broussard *v.* Mallet, 8 Mart. N. S. (La.) 269, a promissory note), exercise control over his personal property (Burr *v.* Wilson, 18 Tex. 369, under the Spanish law), alienate movables without the consent of a judge or family meeting (Grigsby *v.* Louisiana Bank, 3 La. 491; Withers *v.* His Executors, 3 La. 363), bring an action in regard to immovables with the aid of his curator without obtaining judicial authority or the consent of the family council (Bolduc *v.* Caille, 14 Quebec Super. Ct. 209), and as against his father apply all his earnings to the support of his family (Taunton *v.* Plymouth, 15 Mass. 203). He has the right to receive the balance of his estate in money or notes in the hands of his tutor without the intervention of a family meeting. Withers *v.* His Executors, 3 La. 363. On the marriage of a female minor, her

fer upon married women the power to contract generally, or even to convey their separate real estate, with or without the consent of their husbands, do not remove the disability of infancy from an infant married woman, but simply remove the disability of coverture, leaving the disability of infancy the same as if such statutes were not in force.[48] Where an infant emancipated by marriage becomes a widow before reaching the age of majority, she does not relapse into pupilage.[49]

c. Judicial Emancipation. In some states provision is made by statute for proceedings in court leading up to an order or decree removing the disabilities of a minor.[50] The power to remove such disability is usually vested in courts of chancery[51] or of probate.[52] Residence of the infant within the county where the court is held is a jurisdictional requisite.[53] Such proceedings are usually commenced by a petition[54] presented by the infant,[55] in which the guardian is sometimes required to join.[56] The petition should state the cause for the removal asked,[57]

husband, although a minor, is entitled to receive her estate from her guardian. Wood *v.* Henderson, 2 How. (Miss.) 893.

An infant emancipated by marriage cannot make binding contracts beyond what other minors may make (Taunton *v.* Plymouth, 15 Mass. 203. *Contra,* Burr *v.* Wilson, 18 Tex. 367), during her minority bind herself beyond her income (Briscoe *v.* Tarkington, 5 La. Ann. 692), or exercise any political or municipal rights which do not by law belong to minors (Taunton *v.* Plymouth, 15 Mass. 203). He cannot dispose of any property by donation, unless by marriage contracts in favor of his wife, nor can he alienate his immovables without the authority of a judge or the consent of a family meeting. Withers *v.* His Executors, 3 La. 363. See also Breaux *v.* Carmouche, 9 Rob. (La.) 36. Under the Spanish law the emancipation of a minor by marriage does not relieve him from all disability of minority, and especially in relation to real property. Burr *v.* Wilson, 18 Tex. 367.

48. Shipley *v.* Smith, 162 Ind. 526, 70 N. E. 803.

Statute discharging from guardianship on marriage.— Burns Annot. St. Ind. (1901) § 2690 (Rev. St. (1881) § 2526; Horner Annot. St. (1901) § 2526), which provides that marriage of any female ward to a person of full age shall operate as a discharge of her guardianship, and that the guardian shall be authorized to account to the wife, with the assent of the husband, does not emancipate an infant married woman, whose husband is of full age, from the disability of infancy, save in so far as such accounting is concerned, and hence, where an infant married woman, together with her adult husband, leased her lands for two years, and received rent for the first year during her minority, on arriving at her majority, at the beginning of the second year, she might disaffirm the lease, and take possession, without restoring the rent previously received. Shipley *v.* Smith, 162 Ind. 526, 70 N. E. 803.

49. Wilcox *v.* Henderson, 7 Rob. (La.) 338.

50. *Alabama.*— Boykin *v.* Collins, 140 Ala. 407, 37 So. 248, minor having no father or mother.

Arkansas.— Young *v.* Hiner, (1904) 79 S. W. 1062; Hindman *v.* O'Connor, 54 Ark. 627, 16 S. W. 1052, 13 L. R. A. 490.

Louisiana.—Pochelu's Emancipation, 41 La. Ann. 331, 6 So. 541.

Mississippi.— Marks *v.* McElroy, 67 Miss. 545, 7 So. 408.

Texas.— Brown *v.* Wheelock, 75 Tex. 385, 12 S. W. 111, 841 (if the father be not living); Stewart *v.* Robbins, 27 Tex. Civ. App. 188, 65 S. W. 899.

See 27 Cent. Dig. tit. "Infants," § 12.

Nature of proceeding.— The proceeding is an *ex parte* one, and acts only on the status of the minor, and hence it cannot be deemed a judicial proceeding, but merely as the act of the judge, and there are no presumptions to be indulged in favor of the final order. Brown *v.* Wheelock, 75 Tex. 385, 12 S. W. 111, 841. See also Marks *v.* McElroy, 67 Miss. 545, 7 So. 408.

Amount of estate.— In Louisiana the parish court has jurisdiction to emancipate a minor, even when he is the owner of property worth more than five hundred dollars. Cooper *v.* Rhodes, 30 La. Ann. 533.

51. Boykin *v.* Collins, 140 Ala. 407, 37 So. 248; Marks *v.* McElroy, 67 Miss. 545, 7 So. 408.

No presumption of jurisdiction arises from the mere fact of its exercise in the removal of the disabilities of an infant, but it is incumbent upon one relying upon the decree to show that the court acquired jurisdiction under the law. Marks *v.* McElroy, 67 Miss. 545, 7 So. 408.

52. Doles *v.* Hilton, 48 Ark. 305, 3 S. W. 193.

53. Hindman *v.* O'Connor, 54 Ark. 627, 16 S. W. 1052, 13 L. R. A. 490, defining power of circuit court under Ark. Act, Feb. 18, 1869.

54. Boykin *v.* Collins, 140 Ala. 407, 37 So. 248; Pochelu's Emancipation, 41 La. Ann. 331, 6 So. 541; Brown *v.* Wheelock, 75 Tex. 385, 12 S. W. 111, 841; Stewart *v.* Robbins, 27 Tex. Civ. App. 188, 65 S. W. 899.

55. Boykin *v.* Collins, 140 Ala. 407, 37 So. 248; Pochelu's Emancipation, 41 La. Ann. 331, 6 So. 541; Stewart *v.* Robbins, 27 Tex. Civ. App. 188, 65 S. W. 899.

56. Boykin *v.* Collins, 140 Ala. 407, 37 So. 248; Pochelu's Emancipation, 41 La. Ann. 331, 6 So. 541, petition to be accompanied by written assent of tutor.

57. Stewart *v.* Robbins, 27 Tex. Civ. App. 188, 65 S. W. 899.

and that the minor is capable of managing his own affairs;[58] but it has been held that a petition may be sufficient without alleging that the relief sought will be to the interest of the minor.[59] It is sometimes required that the petition shall be sworn to by some person cognizant of the facts set out therein.[60] Notice of the filing of the petition is sometimes required.[61] There should be a hearing on the petition,[62] at which it may be contested.[63] The minor's ability to manage his own affairs must be shown,[64] and if the court deems it advisable or for the best interest of the minor that his disabilities should be removed, it should so order.[65] The effect of an order or decree emancipating an infant or removing his disabilities is to invest him with all the powers and capacities and subject him to all the liabilities and obligations which he would have or be subject to if he had actually reached his majority.[66] Irregularities in the proceedings do not render the order or decree removing the infant's disabilities a nullity,[67] nor is such order or decree subject to collateral attack.[68]

III. CUSTODY AND PROTECTION.[69]

A. Custody in General. It is a cardinal rule that in a proceeding regarding the custody of an infant the court will regard the welfare of the child as the paramount consideration.[70]

B. Jurisdiction of Courts. The custody of a child is always a proper sub-

58. Pochelu's Emancipation, 41 La. Ann. 331, 6 So. 541.

59. Boykin *v.* Collins, 140 Ala. 407, 37 So. 248.

60. Stewart *v.* Robbins, 27 Tex. Civ. App. 188, 65 S. W. 899.

61. Boykin *v.* Collins, 140 Ala. 407, 37 So. 248, notice by publication.

Service of copy of petition upon county judge see Brown *v.* Wheelock, 75 Tex. 385, 12 S. W. 111, 841.

62. See Brown *v.* Wheelock, 75 Tex. 385, 12 S. W. 111, 841.

Hearing may be in term-time or vacation. Brown *v.* Wheelock, 75 Tex. 385, 12 S. W. 111, 841.

Appearance of county judge not essential.— Brown *v.* Wheelock, 75 Tex. 385, 12 S. W. 111, 841.

63. Boykin *v.* Collins, 140 Ala. 407, 37 So. 248.

64. Pochelu's Emancipation, 41 La. Ann. 331, 6 So. 541.

65. Boykin *v.* Collins, 140 Ala. 407, 37 So. 248; Brown *v.* Wheelock, 75 Tex. 385, 12 S. W. 111, 841.

Improper order.— Under the statute authorizing the probate court to remove the disability of minors "to transact business in general, or any particular business specified," a probate court has no jurisdiction to remove the disabilities of minors respectively seven, ten, and twelve years of age, so as to empower them to sell and convey a valuable tract of land. Doles *v.* Hilton, 48 Ark. 305, 3 S. W. 193.

66. Gaines' Succession, 42 La. Ann. 699, 7 So. 788; Cooper *v.* Rhodes, 30 La. Ann. 533 (holding that an emancipated minor is qualified to be surety on an appeal-bond); Lyne's Succession, 12 La. Ann. 155; Harman *v.* McCawley, 9 La. 567; Wilson *v.* Craighead, 6 Rob. (La.) 429. But see Johnson *v.* Alden, 15 La. Ann. 505, holding that an emancipated minor has not the right to donate his property.

Sale induced by fraud.— Where an order removing the disability of a minor, as authorized by statute, is valid on its face, the minor's sale of his property, although induced by fraud, cannot be set aside, so as to affect innocent purchasers from his grantee. Young *v.* Hiner, (Ark. 1904) 79 S. W. 1062.

Territorial effect.— Under Ala. Code (1886), § 2363, which authorizes a decree removing an infant's disability to contract, and provides that on a certified copy thereof being filed in each county in the state where such infant does business, contracts made in such counties shall be enforceable, the effect of an order removing an infant's disability is coextensive only with the limits of the counties in which a copy thereof is filed, and hence the filing of such decree in the county where the infant resides does not prevent him from pleading infancy as a defense to notes executed by him in another state during minority. Wilkinson *v.* Buster, 124 Ala. 574, 26 So. 940. An order of court of another state, made in conformity to a statute of that state, and purporting to relieve an infant residing in that state from the disability of nonage, can have no operation in Missouri. State *v.* Bunce, 65 Mo. 349.

67. Boykin *v.* Collins, 140 Ala. 407, 37 So. 248; Stewart *v.* Robbins, 27 Tex. Civ. App. 188, 65 S. W. 899.

68. Young *v.* Hiner, (Ark. 1904) 79 S. W. 1062; Johnson *v.* Alden, 15 La. Ann. 505.

69. Right of parents see PARENT AND CHILD. **Right of guardian** see GUARDIAN AND WARD.

70. *Alabama.*—Woodruff *v.* Conley, 50 Ala. 304.

Connecticut.— Kelsey *v.* Green, 69 Conn. 291, 37 Atl. 679, 38 L. R. A. 471.

District of Columbia.— Stickel *v.* Stickel, 18 App. Cas. 149 [*following* Wells *v.* Wells,

ject of chancery jurisdiction,[71] and courts of chancery generally exercise a wide jurisdiction over the persons and property of infants as "wards of court," [72] exercising the right of the crown as *parens patriæ* to protect and care for incompetent persons.[73] The benefit of the infant is the foundation of the jurisdiction,[74] and the institution of any proceedings affecting his person is sufficient to make him a ward of court.[75] Wards of the court should not be removed out of the jurisdiction [76] without leave of the court,[77] and it is a contempt of court to remove the ward out of the jurisdiction,[78] or from the custody of the person authorized

11 App. Cas. 392; Slack *v.* Perrine, 9 App. Cas. 128].

Massachusetts.— *In re* Wares, 161 Mass. 70, 36 N. E. 586.

New York.— *In re* Knowack, 158 N. Y. 482, 53 N. E. 676, 44 L. R. A. 699; People *v.* Cooper, 75 N. Y. App. Div. 620, 78 N. Y. Suppl. 161.

Ohio.— Matter of Coons, 20 Ohio Cir. Ct. 47, 11 Ohio Cir. Dec. 208.

Rhode Island.— Rhode Island Soc. P. C. C. *v.* Hueston, 22 R. I. 62, 46 Atl. 180; *In re* Hope, 19 R. I. 486, 34 Atl. 994.

Wisconsin.— *In re* Stittgen, 110 Wis. 625, 86 N. W. 563.

Letters of guardianship have but little weight where there is no property. Woodruff *v.* Conley, 50 Ala. 304.

71. *Alabama.*— Woodruff *v.* Conley, 50 Ala. 304, whether such jurisdiction be invoked by bill, petition, or application for habeas corpus.

Georgia.— See Richards *v.* East Tennessee, etc., R. Co., 106 Ga. 614, 33 S. E. 193, 45 L. R. A. 712.

Illinois.— White *v.* Glover, 59 Ill. 459; Lynch *v.* Rotan, 39 Ill. 14; Grattan *v.* Grattan, 18 Ill. 167, 65 Am. Dec. 726; Cowk *v.* Cowk, 8 Ill. 435, 44 Am. Dec. 708.

Indiana.— McCord *v.* Ochiltree, 8 Blackf. 15.

Michigan.— Westbrook *v.* Comstock, Walk. 314.

See 27 Cent. Dig. tit. "Infants," § 18.

The supreme court, like the former court of chancery, exercises a general control over all minors. People *v.* Erbert, 17 Abb. Pr. (N. Y.) 395.

The circuit court, in dealing with the subject of guardianship and custody of minors, acts judicially as a court of equity. *In re* Stittgen, 110 Wis. 625, 86 N. W. 563.

The district courts of California have the same control over the persons of minors that the courts of chancery in England possess. Wilson *v.* Roach, 4 Cal. 362.

All courts having power to issue writs of habeas corpus and to hear and determine questions arising under them may control, under certain circumstances, the custody, education, and management of minor children. Com. *v.* Barney, 29 Leg. Int. (Pa.) 317.

72. Butler *v.* Freeman, Ambl. 301, 27 Eng. Reprint 204. See also Johns *v.* Smith, 56 Miss. 727; Bacon *v.* Gray, 23 Miss. 140.

Mental or physical disability of infant does not deprive the court of its jurisdiction over its ward. *In re* Edwards, 10 Ch. D. 605, 48 L. J. Ch. 233, 40 L. T. Rep. N. S. 113, 27 Wkly. Rep. 611.

The court may give extrajudicial directions for an infant, as on a stranger's application and undertaking to pay costs. Pomfret *v.* Windsor, 2 Ves. 472, 28 Eng. Reprint 302.

Minors resident abroad.—The court of chancery has jurisdiction over the custody of the children of an English subject, although such children were born and are resident abroad. Hope *v.* Hope, 4 De G. M. & G. 328, 2 Eq. Rep. 1047, 23 L. J. Ch. 682, 2 Wkly. Rep. 545, 698, 53 Eng. Ch. 256, 43 Eng. Reprint 534.

Foreign minor.— When an infant, a citizen of a foreign country, is sent to England, the court of chancery will carry out in all respects the orders of the courts of the foreign country in regard to the infant, so far as consistent with the laws of England. *Re* Savini, 22 L. T. Rep. N. S. 61, 18 Wkly. Rep. 425.

73. Butler *v.* Freeman, Ambl. 302, 27 Eng. Reprint 204; Eyre *v.* Shaftsbury, 2 P. Wms. 103, 24 Eng. Reprint 659.

74. Stuart *v.* Bute, 9 H. L. Cas. 440, 11 Eng. Reprint 799.

75. Bowers *v.* Durr, 46 Ala. 418; Bulow *v.* Witte, 3 S. C. 308. See also Dawson *v.* Thompson, 12 L. T. Rep. N. S. 178.

76. Rochford *v.* Hackman, 2 Eq. Rep. 223, Kay 308, 23 L. J. Ch. 261, 2 Wkly. Rep. 205; Mountstuart *v.* Mountstuart, 6 Ves. Jr. 363, 31 Eng. Reprint 1095.

The court may restrain an improper removal of an infant by his guardian or even by his parent. Wood *v.* Wood, 5 Paige (N. Y.) 596, 28 Am. Dec. 451.

No affidavit is necessary to obtain an order that a ward of court shall not be taken out of the jurisdiction, even to Scotland. De Manneville *v.* De Manneville, 10 Ves. Jr. 52, 7 Rev. Rep. 342, 32 Eng. Reprint 762.

77. Rochford *v.* Hackman, 2 Eq. Rep. 223, Kay 308, 23 L. J. Ch. 261, 2 Wkly. Rep. 205.

Form of recognizance on leave being granted to take infant out of jurisdiction see *In re* Medley, Ir. R. 6 Eq. 339.

When leave granted see *In re* Callaghan, 28 Ch. D. 186, 54 L. J. Ch. 292, 52 L. T. Rep. N. S. 7, 33 Wkly. Rep. 157; *In re* Medley, Ir. R. 6 Eq. 339; *Re* Plomley, 47 L. T. Rep. N. S. 283; Biggs *v.* Terry, 1 Myl. & C. 675, 13 Eng. Ch. 675, 40 Eng. Reprint 535 (short visit); Lethem *v.* Hall, 7 Sim. 141, 8 Eng. Ch. 141, 59 Eng. Reprint 790.

Court will not compel removal of infant ward out of jurisdiction. Dawson *v.* Jay, 3 De G. M. & G. 764, 2 Wkly. Rep. 366, 52 Eng. Ch. 596, 43 Eng. Reprint 300.

78. Harrison *v.* Goodall, Kay 310, even where he has enlisted in the army without

by the court to have the custody of the infant.[79] Statutes have conferred upon various courts the power to commit juvenile delinquents and vagrants to institutions where they may be cared for,[80] but this power is of the same character as the jurisdiction exercised by the court of chancery over the persons of infants.[81]

C. Juvenile Delinquents and Vagrants. Provision is very commonly made by statute for the commitment of juvenile delinquents and vagrants to industrial or reform schools or other public institutions where they may be cared for and educated.[82] Such a statute is not rendered invalid by the fact that it

leave of court and he is sent with the regiment on foreign service.

79. Wellesley *v.* Beaufort, 2 Russ. & M. 639, 11 Eng. Ch. 639, 39 Eng. Reprint 538.

80. *Illinois.*— *In re* Ferrier, 103 Ill. 367, 43 Am. Rep. 10, county court.

Kansas.— *In re* Gassaway, (1905) 79 Pac. 113, probate court.

Louisiana.— State *v.* Marmonget, 111 La. 225, 35 So. 529, recorders in the city of New Orleans.

Maryland.— Roth *v.* House of Refuge, 31 Md. 329, justices of the peace.

Nebraska.— Scott *v.* Flowers, 61 Nebr. 620, 85 N. W. 857, discussing jurisdiction of county court.

South Dakota.— McFall *v.* Simmons, 12 S. D. 562, 81 N. W. 898, circuit or county court.

Washington.— *In re* Barbee, 19 Wash. 306, 53 Pac. 155.

See 27 Cent. Dig. tit. "Infants," § 18; and *infra*, III, C; VII, E.

Power of county judges — See People *v.* Parr, 121 N. Y. 679, 24 N. E. 481 [*affirming* 49 Hun 473, 2 N. Y. Suppl. 263].

A municipal court cannot under the Washington statute commit an infant to the reform school for incorrigibility, but can only send the child to the superior court for trial and action on the case. *In re* Barbee, 19 Wash. 306, 53 Pac. 155.

Appeal from order regarding custody.— There is no appeal to the general sessions from an order for the custody and care of children under section 13 and subsequent sections of 56 Vict. (Ont.) c. 45, made by two justices of the peace sitting under section 2 of 58 Vict. (Ont.) c. 52, amending the former act. *In re* Granger, 28 Ont. 555.

Constitutionality of statutes.— Kan. Gen. St. (1901) § 7147, conferring power on the probate court to commit to the industrial school for girls any girl under sixteen years of age who leads a vagrant life, is not repugnant to Const. art. 3, § 8, providing that the probate courts shall have jurisdiction of the property of certain persons, as shall be provided by law, and shall also have jurisdiction in habeas corpus. *In re* Gassaway, (Kan. 1905) 79 Pac. 113. Nebr. Comp. St. (1899) c. 75, § 51, is in violation of the constitution in so far as it authorizes the commitment to the state industrial school of children over the age of sixteen years, who have not been convicted of crime; but it is valid and enforceable to the extent that it authorizes the commitment to such school of children under the age of sixteen who, for want of proper parental care, are growing in mendicancy or crime. Scott *v.* Flowers, 60 Nebr. 675, 84 N. W. 81, 61 Nebr. 620, 85 N. W. 857. N. D. Laws (1897), c. 87, relating to societies organized for the purpose of securing homes for orphans, and authorizing county judges to investigate the facts in reference to children alleged to have been abandoned, and, if it shall be determined that such children belong to the classes enumerated, to direct that they be turned over to one of such societies, is not violative of Const. § 111, conferring on county courts exclusive original jurisdiction in probate matters, the appointments of guardians, and the settlement of their accounts. *In re* Kol, 10 N. D. 493, 88 N. W. 273. The power conferred on justices of the peace by Md. Pub. Laws, art. 78, § 18, to commit to the house of refuge minors charged with incorrigible or vicious conduct is not unconstitutional. Roth *v.* House of Refuge, 31 Md. 329.

81. *In re* Ferrier, 103 Ill. 367, 43 Am. Rep. 10.

82. *Indiana.*— Van Walters *v.* Marion County, 132 Ind. 567, 32 N. E. 568, 18 L. R. A. 431.

Kansas.— *In re* Gassaway, (1905) 79 Pac. 113.

Louisiana.— State *v.* Marmouget, 111 La. 225, 35 So. 529.

Maine.— Cushing *v.* Friendship, 89 Me. 525, 36 Atl. 1001, truants.

Maryland.— Roth *v.* House of Refuge, 31 Md. 329.

Massachusetts.— Kelley, Petitioner, 152 Mass. 432, 25 N. E. 615; Farnham *v.* Pierce, 141 Mass. 203, 6 N. E. 830, 55 Am. Rep. 452.

Missouri.— *Ex p.* Loving, 178 Mo. 194, 77 S. W. 508.

New York.— *In re* Knowack, 158 N. Y. 482, 53 N. E. 676, 44 L. R. A. 699; People *v.* Angie, 74 N. Y. App. Div. 539, 77 N. Y. Suppl. 832; *In re* Diss Debar, 3 N. Y. Suppl. 667; People *v.* Catholic Protectory, 61 How. Pr. 445.

Pennsylvania.— *Ex p.* Crouse, 4 Whart. 9; Com. *v.* McKeagy, 1 Ashm. 248.

Washington.— State *v.* Rasch, 24 Wash. 332, 64 Pac. 531.

Wisconsin.— Milwaukee Industrial School *v.* Milwaukee County Sup'rs, 40 Wis. 328, 22 Am. Rep. 702.

See 27 Cent. Dig. tit. "Infants," § 16; *supra*, III, C; and *infra*, VII, E.

When commitment proper.— Whenever it is made to appear affirmatively and clearly that a male or female child, who exhibits knowledge and capacity to commit crime, and who,

authorizes the same disposition of children destitute by misfortune and of children convicted of crime,[83] and fails to provide for their separation;[84] nor is it unconstitutional as involving an improper interference with the relation of parent and child, or an arbitrary invasion of any natural and inalienable rights of parent or child.[85] Neither does the commitment of a child to such an institution, except for crime, operate as an imprisonment without due process of law in violation of the constitution.[86] The commitment must be upon one of the grounds mentioned in the statute,[87] must be based upon a showing of facts sufficient to bring the case within the statute,[88] and cannot be for a term longer than that designated.[89] The detention of the child, in case of vagrancy, is not by way of punishment, but is designed for its good and welfare.[90]

D. Societies For Care and Protection of Children. At the present time there are many corporations or societies organized for the purpose of caring for poor or neglected children,[91] to which such children may be committed.[92] The

if a male, is within the age of twenty-one, and, if a female, within the age of eighteen, has been guilty of vagrancy, he or she may be lawfully committed by an alderman or a justice of the peace to the house of refuge, and to the care and custody of its managers. Com. *v.* McKeagy, 1 Ashm. (Pa.) 248.

Form of commitment see *In re* Mahoncy Children, 24 Nova Scotia 86.

A sentence for truancy may be to the reform school with an alternative sentence to the house of correction. O'Malia *v.* Wentworth, 65 Me. 129.

The court may suspend execution of a sentence to the reform school for truancy during the good behavior of the truant. O'Malia *v.* Wentworth, 65 Me. 129.

N. Y. Laws (1865), c. 172, providing for the commitment to the house of refuge of children under the age of sixteen years "deserting their homes without good and sufficient cause, or keeping company with dissolute or vicious persons, against the lawful commands of their fathers or mothers" was not repealed by the penal code or the code of criminal procedure, but remains in full force and effect. *In re* Riley, 31 Hun (N. Y.) 612.

83. Milwaukee Industrial School *v.* Milwaukee County Sup'rs, 40 Wis. 328, 22 Am. Rep. 702.

84. *Ex p.* Loving, 178 Mo. 194, 77 S. W. 508.

85. Van Walters *v.* Marion County, 132 Ind. 567, 32 N. E. 568, 18 L. R. A. 431 (provision being made for a hearing of the parents upon due notice); Milwaukee Industrial School *v.* Milwaukee County Sup'rs, 40 Wis. 328, 22 Am. Rep. 702.

86. *In re* Ferrier, 103 Ill. 367, 43 Am. Rep. 10 [*distinguishing* People *v.* Turner, 55 Ill. 280, 8 Am. Rep. 645]; Milwaukee Industrial School *v.* Milwaukee County Sup'rs, 40 Wis. 328, 22 Am. Rep. 702.

87. People *v.* Mount Magdalen School of Industry, 5 Silv. Sup. (N. Y.) 17, 7 N. Y. Suppl. 737. See also Lewiston *v.* Fairfield, 47 Me. 481; People *v.* New York Soc. P. C. C., 19 Misc. (N. Y.) 561, 44 N. Y. Suppl. 1098, 12 N. Y. Cr. 86.

Truancy is an offense unknown to the common law, and the elements of the offense must be found in some ordinance, by-law, or statute. Cushing *v.* Friendship, 89 Me. 525, 36 Atl. 1001.

New commitment.— The provisions of N. Y. Pen. Code, § 291, that "whenever any commitment of a child shall . . . be adjudged or found defective, a new commitment of the child may be made or directed by the court or magistrate, as the welfare of the child may require," does not authorize another magistrate, almost two years after the commitment, and after a writ of habeas corpus has issued, on finding that the commitment was defective, to commit the child for a different offense mentioned in the section, without having the child brought before him, and without any new examination, or legal evidence of what occurred at the former examination. People *v.* Mount Magdalen School of Industry, 5 Silv. Sup. (N. Y.) 17, 7 N. Y. Suppl. 737.

88. State *v.* Rasch, 24 Wash. 332, 64 Pac. 531, holding the facts shown insufficient to warrant a commitment to the reform school for vagrancy.

Circumstances must be urgent, unequivocal, and decisive. Com. *v.* McKeagy, 1 Ashm. (Pa.) 248.

Frequenting company of thieves and prostitutes.— See People *v.* New York Catholic Protectory, 19 Abb. N. Cas. (N. Y.) 142.

Children without home or guardianship.— See People *v.* New York Catholic Protectory, 19 Abb. N. Cas. (N. Y.) 142.

Who are truants.— Under Me. Pub. Laws (1887), c. 22, as amended by Acts (1893), c. 206, boys between ten and fifteen who refuse to attend school, and wander around the streets while the school is in session, are truants. Cushing *v.* Friendship, 89 Me. 525, 36 Atl. 1001.

89. Lewiston *v.* Fairfield, 47 Me. 481, commitment under municipal by-law.

90. State *v.* Marmouget, 111 La. 225, 35 So. 529.

91. See *In re* Ferrier, 103 Ill. 367, 42 Am. Rep. 10; Milligan *v.* State, 97 Ind. 355.

92. McFall *v.* Simmons, 12 S. D. 562, 81 N. W. 898; Napier *v.* Prison Assoc., 95 Va. 431, 28 S. E. 598.

Consent to commitment.— Under Va. Acts (1895–1896), p. 658, a minor who has no parent or guardian may be committed to

rights and powers of these organizations vary considerably according to their charters or the general statutes governing them.[93]

E. Proceedings Affecting Custody — 1. Nature. A proceeding for the commitment of a destitute or vagrant child to an institution is not a criminal proceeding.[94]

2. Petition or Complaint. The petition or complaint must show the case to be within the statute,[95] and should be verified.[96]

3. Notice. Proceedings for the commitment of juvenile delinquents or vagrants are often required to be upon notice to the parent or parents,[97] guardian,[98] or custodian[99] of the child, or some public officer or board.[1]

4. Trial or Hearing. The statutes usually provide, or at least contemplate, that the parents, guardians, or custodians of the child shall have an opportunity to be heard on the question of the commitment.[2] When the proceeding is before

the prison association without his own consent, and before conviction. Napier *v.* Prison Assoc., 95 Va. 431, 28 S. E. 598.

Constitutionality of statute.— N. D. Laws (1897), c. 87, relating to societies organized for the purpose of securing homes for orphans and providing for the delivery of children adjudged by the county judge to be abandoned to one of such societies, is not invalid as providing for an involuntary servitude which is not a punishment for crime, nor as conferring on such societies an unrestricted authority over such children, as such society occupies the legal relation of a substitute guardian, and as such its acts are subject to approval or disapproval of the court making the appointment, and the appointment may be revoked as in other guardianship. *In re* Kol, 10 N. D. 493, 88 N. W. 273.

93. Milligan *v.* State, 97 Ind. 355 (removal of child from family with which placed); People *v.* New York Catholic Protectory, 101 N. Y. 195, 4 N. E. 177; People *v.* Feeney, 43 N. Y. App. Div. 376, 60 N. Y. Suppl. 103 (children to be maintained at society's expense); People *v.* New York Juvenile Asylum, 32 Misc. (N. Y.) 74, 66 N. Y. Suppl. 157, 57 N. Y. App. Div. 383, 68 N. Y. Suppl. 279 (binding out children); *In re* Kol, 10 N. D. 493, 88 N. W. 273 (natural guardian an unfit custodian); Com. *v.* McKeagy, 1 Ashm. (Pa.) 248 (commitment by due course of law necessary).

94. State *v.* Marmouget, 111 La. 225, 35 So. 529; Matter of Knowack, 158 N. Y. 482, 53 N. E. 676, 44 L. R. A. 699 [*affirming* 29 N. Y. App. Div. 627, 52 N. Y. Suppl. 1144].

95. Lewiston *v.* Fairfield, 47 Me. 481.

Petitions or complaints held insufficient see State *v.* Kinmore, 54 Minn. 135, 55 N. W. 830, 40 Am. St. Rep. 305; People *v.* New York Catholic Protectory, 106 N. Y. 604, 13 N. E. 435.

96. Mansfield's Case, 22 Pa. Super. Ct. 224.

97. *Illinois.*— *In re* Ferrier, 103 Ill. 367, 42 Am. Rep. 10.

Indiana.— Van Walters *v.* Marion County, 132 Ind. 567, 32 N. E. 568, 18 L. R. A. 431.

Massachusetts.— Kelley, Petitioner, 152 Mass. 432, 25 N. E. 615; Fitzgerald *v.* Com., 5 Allen 509.

Michigan.— Goodchild *v.* Foster, 51 Mich. 599, 17 N. W. 74.

New York.— People *v.* New York Catholic Protectory, 101 N. Y. 195, 4 N. E. 177; Matter of Heery, 51 Hun 372, 4 N. Y. Suppl. 428, 6 N. Y. Cr. 241 [*affirming* 2 N. Y. Suppl. 247]; People *v.* Carpenter, 25 Misc. 341, 55 N. Y. Suppl. 521; People *v.* Baker, 3 N. Y. Suppl. 536.

See 27 Cent. Dig. tit. "Infants," § 19.

In what cases notice necessary.— See People *v.* Carpenter, 25 Misc. (N. Y.) 341, 55 N. Y. Suppl. 521, construing N. Y. Pen. Code, § 291, amended by N. Y. Laws (1886), c. 31.

What notice sufficient.— See *In re* Ferrier, 103 Ill. 367, 42 Am. Rep. 10.

The father's appearance at the trial and examination as a witness does not cure the jurisdictional defect, the summons required by statute not having been issued. Fitzgerald *v.* Com., 5 Allen (Mass.) 509.

Statutes not requiring notice see People *v.* Roman Catholic House of Good Shepherd, 29 Misc. (N. Y.) 466, 60 N. Y. Suppl. 771, 14 N. Y. Cr. 304 (Laws (1886), c. 353); People *v.* Catholic Protectory, 61 How. Pr. (N. Y.) 445 (Laws (1877), c. 428); Cincinnati House of Refuge *v.* Ryan, 37 Ohio St. 197 (77 Ohio Laws 217).

98. People *v.* New York Catholic Protectory, 101 N. Y. 195, 4 N. E. 177; Matter of Heery, 51 Hun (N. Y.) 372, 4 N. Y. Suppl. 428, 6 N. Y. Cr. 241 [*affirming* 2 N. Y. Suppl. 247]; People *v.* New York Soc. P. C. C., 19 Misc. (N. Y.) 561, 44 N. Y. Suppl. 1098, 12 N. Y. Cr. 86.

99. Matter of Heery, 51 Hun (N. Y.) 372, 4 N. Y. Suppl. 428, 6 N. Y. Cr. 241 [*affirming* 2 N. Y. Suppl. 247]; People *v.* New York Soc. P. C. C., 19 Misc. (N. Y.) 561, 44 N. Y. Suppl. 1098, 12 N. Y. Cr. 86.

It is immaterial how custody was obtained. Matter of Heery, 51 Hun (N. Y.) 372, 4 N. Y. Suppl. 428, 6 N. Y. Cr. 241 [*affirming* 2 N. Y. Suppl. 247].

1. Girls' Industrial Home *v.* Steffen, 9 Ohio S. & C. Pl. Dec. 696, 7 Ohio N. P. 409, board of county visitors.

Statute directory merely.—See Fanning *v.* Com., 120 Mass. 388.

2. Van Walters *v.* Marion County, 132 Ind. 567, 32 N. E. 568, 18 L. R. A. 431; Goodchild *v.* Foster, 51 Mich. 599, 17 N. W. 74.

a magistrate, the evidence taken must be reduced to writing.[3] It has been held that a minor cannot be committed to an institution as a criminal without a trial by jury.[4]

5. Evidence. The evidence must show that the child sought to be committed is in such a condition or such circumstances as to be within the purview of the statute.[5]

6. Commitment.[6] The commitment must set out the jurisdictional facts,[7] and show that the case is within the statute.[8] It is sometimes required that the commitment shall show that those to whom notice is required had such notice,[9] and were present at the examination, hearing, or trial.[10] Where the term of detention is fixed by law it need not be specified in the commitment.[11] It has been held that even if an order of commitment might be subject to criticism, as fixing the period of detention for a designated time, the commitment would not be void, but would hold good, the period of detention being left open to be met by further contingencies.[12] In New York the commitment has been held to have all the force and effect of a final judgment of a court of competent jurisdiction,[13] but in other states it has been held otherwise.[14]

F. Restoration of Child to Parents. An adjudication committing a child to an institution because of the neglect or failure of the parent to provide for it does not deprive the parent of his right to the custody of the child if he subsequently becomes competent and willing to properly care for it,[15] and in such case

See also *Ex p.* Becknell, 119 Cal. 496, 51 Pac. 692.

Presence of either parent sufficient.— People *v.* Carpenter, 123 N. Y. 640, 25 N. E. 1044 [*reversing* 57 Hun 588, 11 N. Y. Suppl. 852, and *distinguishing* People *v.* New York Catholic Protectory, 106 N. Y. 604, 13 N. E. 435].

Reference and report.— Under the Michigan statute, when complaint is made against an infant under sixteen, it must be referred to the county agent who must investigate and make a report which must be attached to the commitment. *In re* Mills, 131 Mich. 325, 91 N. W. 356, holding a commitment illegal where the report attached was dated five days later than the date of the commitment.

3. People *v.* Giles, 12 N. Y. App. Div. 495, 42 N. Y. Suppl. 749, without any demand to that effect.

A new trial should be directed where the magistrate does not reduce the evidence to writing. People *v.* Giles, 12 N. Y. App. Div. 495, 42 N. Y. Suppl. 749.

4. *Ex p.* Becknell, 119 Cal. 496, 51 Pac. 692. See Mansfield's Case, 22 Pa. Super. Ct. 224. *Compare Ex p.* Crouse, 4 Whart. (Pa.) 9.

5. See People *v.* New York Soc. P. C. C., 19 Misc. (N. Y.) 561, 44 N. Y. Suppl. 1098, 12 N. Y. Cr. 86.

6. The certificate of conviction required by N. Y. Code Cr. Proc. § 723, forming no part of the judgment or commitment, and it being made conclusive evidence of the facts stated in it, by section 724, its purpose is to furnish evidence, and a failure to file it is not cause for the discharge of the offender. People *v.* Baker, 3 N. Y. Suppl. 536.

7. People *v.* Baker, 3 N. Y. Suppl. 536.

8. People *v.* New York Soc. P. C. C., 19 Misc. (N. Y.) 561, 44 N. Y. Suppl. 1098, 12 N. Y. Cr. 86. See also Lewiston *v.* Fairfield, 47 Me. 481.

9. People *v.* Carpenter, 25 Misc. (N. Y.) 341, 55 N. Y. Suppl. 521; People *v.* New York Soc. P. C. C., 19 Misc. (N. Y.) 561, 44 N. Y. Suppl. 1098, 12 N. Y. Cr. 86; Girls' Industrial Home *v.* Steffen, 9 Ohio S. & C. Pl. Dec. 696, 7 Ohio N. P. 409.

10. People *v.* Carpenter, 25 Misc. (N. Y.) 341, 55 N. Y. Suppl. 521; People *v.* New York Soc. P. C. C., 19 Misc. (N. Y.) 561, 44 N. Y. Suppl. 1098, 12 N. Y. Cr. 86; Girls' Industrial Home *v.* Steffen, 9 Ohio S. & C. Pl. Dec. 696, 7 Ohio N. P. 409.

11. People *v.* Degnen, 54 Barb. (N. Y.) 105.

12. State *v.* Marmouget, 111 La. 225, 35 So. 529.

13. People *v.* Protestant Episcopal House of Mercy, 133 N. Y. 207, 30 N. E. 853 [*reversing* 17 N. Y. Suppl. 166].

Commitment prima facie valid.—*In re* Diss Debar, 3 N. Y. Suppl. 667.

What commitment not final.— The commitment of a child for begging in the streets, under the provisions of N. Y. Pen Code, § 291, containing no limitations as to the term of the commitment, and providing for no notice to the parent of the child, nor for a rehearing of the case upon his application, is not absolute, final, and unconditional, but is governed by other statutes which make such provisions for notice to the father, and for an appeal by him, and limit the term of commitment. People *v.* New York Catholic Protectory, 101 N. Y. 195, 4 N. E. 177.

14. State *v.* Marmouget, 111 La. 225, 35 So. 529 (holding that the order of commitment is subject at any time to be set aside under proper conditions); Com. *v.* McKeagy, 1 Ashm. (Pa.) 248.

15. Kelley, Petitioner, 152 Mass. 432, 25 N. E. 615; Farnham *v.* Pierce, 141 Mass. 203, 6 N. E. 830, 55 Am. Rep. 452.

the court, in the exercise of its general equitable power, may restore the child to the custody of its parent,[16] even though he had notice of and appeared in the proceeding for commitment,[17] and no appeal has been taken from the order of commitment and the time for appealing has expired,[18] and although the institution does not consent to the child's discharge.[19]

G. Protection of Morals. It is within the power of the legislature to provide for the protection of the morals of infants,[20] and accordingly statutes are to be found prohibiting keepers of billiard or pool rooms,[21] saloons,[22] or the like,[23] from permitting minors to remain therein or to participate in the games carried on therein.[24] So also the sale, loan, gift, or exhibition to minors of stories or pictures of bloodshed, lust, or crime is sometimes forbidden by statute.[25]

H. Regulation of Employment. It is within the police power of the legislature to make proper regulations as to the employment of children,[26] and statutes are very generally found prohibiting or restricting the employment[27] of children under a designated age,[28] in occupations specified,[29] or other than those speci-

16. Kelley, Petitioner, 152 Mass. 432, 25 N. E. 615; Farnham *v.* Pierce, 141 Mass. 203, 6 N. E. 830, 55 Am. Rep. 452; *In re* Knowack, 158 N. Y. 482, 53 N. E. 676, 44 L. R. A. 699 [*affirming* 29 N. Y. App. Div. 627, 52 N. Y. Suppl. 1144]; McFall *v.* Simmons, 12 S. D. 562, 81 N. W. 898.

A mandamus may issue commanding the county judge to hear and determine upon a petition for such restoration. McFall *v.* Simmons, 12 S. D. 562, 81 N. W. 898.

Finality of decision of commissioners.— Where a child is duly committed to the custody of commissioners for want of proper parental care, under the Massachusetts statutes, the action of the commissioners, on petition to them for discharge because the object of the commitment has been accomplished, their decision that such object has not been accomplished cannot, in the absence of errors in law or wrongful conduct on their part, be reversed. *In re* Wares, 161 Mass. 70, 36 N. E. 586 [*distinguishing* Kelley, Petitioner, 152 Mass. 432, 25 N. E. 615; Farnham *v.* Pierce, 141 Mass. 203, 6 N. E. 830, 55 Am. Rep. 452].

17. Kelley, Petitioner, 152 Mass. 432, 25 N. E. 615.

18. McFall *v.* Simmons, 12 S. D. 562, 81 N. W. 898.

19. Kelley, Petitioner, 152 Mass. 432, 25 N. E. 615; *In re* Knowack, 158 N. Y. 482, 53 N. E. 676, 44 L. R. A. 699 [*affirming* 29 N. Y. App. Div. 627, 52 N. Y. Suppl. 1144].

20. See *infra*, note 21 *et seq.*

21. Powell *v.* State, 62 Ind. 531; State *v.* Johnson, 108 Iowa 245, 79 N. W. 62.

22. See INTOXICATING LIQUORS.

23. State *v.* Johnson, 108 Iowa 245, 79 N. W. 62.

"Congregating."— An indictment under 2 Ind. Rev. St. (1876) p. 184, for permitting minors to congregate at a public place where any billiard table, etc., was kept, cannot be sustained without proof that minors did in fact congregate at the place alleged, and that two or more minors were found there together. Powell *v.* State, 62 Ind. 531.

24. Kiley *v.* State, 120 Ind. 65, 22 N. E. 99; Taylor *v.* State, 107 Ind. 483, 8 N. E. 450; Com. *v.* Wills, 82 S. W. 236, 26 Ky. L. Rep. 515 (for compensation without written permission of person having custody of the minor); State *v.* Mackin, 51 Mo. App. 129. See, generally, GAMING.

A belief that the minor was of age, based upon his statement to that effect, is no defense. State *v.* Mackin, 51 Mo. App. 129.

Indictment practically in words of statute sufficient.— Com. *v.* Wills, 82 S. W. 236, 26 Ky. L. Rep. 515.

25. Strohm *v.* People, 160 Ill. 582, 43 N. E. 622 [*affirming* 60 Ill. App. 128].

Indictment.— An indictment under Ill. Laws (1889), p. 114, forbidding the exhibition or distribution to minors of publications "devoted to the publication or principally made up of criminal news, police reports," etc., need not set out the prohibited matter *in hæc verba*, but is sufficient if it describes the publication in the language of the statute. Strohm *v.* People, 160 Ill. 582, 43 N. E. 622 [*affirming* 60 Ill. App. 128].

26. New York *v.* Chelsea Jute Mills, 13 Misc. (N. Y.) 266, 88 N. Y. Suppl. 1085.

27. **The term "employ"** in such a statute means "set to work," and the statute is not violated by merely employing a child to work, but the offense is not completed until the child is actually put to work. State *v.* Deck, 108 Mo. App. 292, 83 S. W. 314.

28. Overland Cotton Mill Co. *v.* People, 32 Colo. 263, 75 Pac. 924, 105 Am. St. Rep. 74; State *v.* Deck, 108 Mo. App. 292, 83 S. W. 314; New York *v.* Chelsea Jute Mills, 43 Misc. (N. Y.) 266, 88 N. Y. Suppl. 1085; Roberts *v.* Taylor, 31 Ont. 10.

29. Overland Cotton Mill Co. *v.* People, 32 Colo. 263, 75 Pac. 924, 105 Am. St. Rep. 74; State *v.* Dick, 108 Mo. App. 292, 83 S. W. 314; Hickey *v.* Taaffe, 99 N. Y. 204, 1 N. E. 685, 52 Am. Rep. 19; Murphy *v.* Bennett, 11 N. Y. App. Div. 298, 42 N. Y. Suppl. 61.

A **"business or vocation"** to be within the purview of N. Y. Laws (1876), c. 122, "to prevent and punish wrongs to children," must be an employment either vicious in itself or one which partakes of the character of an amusement. The statute has no application to productive industries, or useful and necessary businesses or occupations, and hence does not apply to employment in a laundry.

fied,[30] or in occupations which are, or are liable to prove, injurious to morals.[31] Such statutes are applicable to corporations as well as to natural persons.[32] The offense is complete if the employer knew or by the exercise of reasonable diligence should have known that the child was under the specified age,[33] and it is no defense that he acted in good faith on the statement of the child and an affidavit of its father that it was above such age.[34]

I. Cruelty to Children.[35] In many jurisdictions statutes have been enacted for the prevention and punishment of cruelty to children.[36] Thus the statutes provide for the punishment of any one who wilfully causes the endangering of the life or injuring of the health of a child in his care or custody,[37] or exposes it

Hickey *v.* Taaffe, 99 N. Y. 204, 1 N. E. 685, 52 Am. Rep. 19 [*reversing* 32 Hun 7, and *followed* in Cooke *v.* Lalance Grosjean Mfg. Co., 99 N. Y. 649, 1 N. E. 777 (*reversing* 33 Hun 351)].

Manufacturing establishment.— A boy employed by the owner of a planing mill to remove boards from a pile of lumber in the yard of a lumber dealer, one fourth of a mile from the mill, is not employed in a "manufacturing establishment," within N. Y. Laws (1892), c. 673, although he had been previously employed in the mill. Murphy *v.* Bennett, 11 N. Y. App. Div. 298, 42 N. Y. Suppl. 61.

Under N. Y. Pen. Code, § 292, the mayor cannot consent to a theatrical exhibition which includes singing or dancing by a child under sixteen years of age. Matter of Stevens, 70 Hun (N. Y.) 243, 24 N. Y. Suppl. 780; People *v.* Grant, 70 Hun (N. Y.) 233, 24 N. Y. Suppl. 776. On an indictment under this statute it is sufficient to prove that there was a theatrical exhibition, that defendant employed children under the age of sixteen years to perform in it, and that they did perform in such exhibition. People *v.* Meade, 10 N. Y. Suppl. 943, 24 Abb. N. Cas. 357. This statute which purports to cover the whole subject, and makes it an offense to employ children in a dangerous "practice or exhibition," repealed by implication N. Y. Laws (1876), c. 122, prohibiting their employment in a dangerous business or vocation. Ryan *v.* Buchanan, 37 Hun (N. Y.) 425.

30. Roberts *v.* Taylor, 31 Ont. 10.

31. Hickey *v.* Taaffe, 99 N. Y. 204, 1 N. E. 685, 52 Am. Rep. 19.

32. Overland Cotton Mill Co. *v.* People, 32 Colo. 263, 75 Pac. 924, 105 Am. St. Rep. 74.

Engagment by corporate officer.— Where the official of a corporation who employed a child under fourteen years of age in a mill had general authority to engage employees, the corporation is guilty of a violation of Mills Annot. St. Colo. § 413, prohibiting such employment, although the official was instructed not to employ children under fourteen. Overland Cotton Mill Co. *v.* People, 32 Colo. 263, 75 Pac. 924, 105 Am. St. Rep. 74.

Presumption as to who committed offense. — Where the foreman of a manufacturing establishment hired a child to work therein, and the child was afterward put to work therein, the legal presumption is that the foreman put him to work, and the foreman is therefore subject to the penalty prescribed by the statute. State *v.* Deck, 108 Mo. App. 292, 83 S. W. 314.

33. Overland Cotton Mill Co. *v.* People, 32 Colo. 263, 75 Pac. 924, 105 Am. St. Rep. 74.

34. New York *v.* Chelsea Jute Mills, 43 Misc. (N. Y.) 266, 88 N. Y. Suppl. 1085.

35. **Abandonment** see PARENT AND CHILD.

36. Gary *v.* State, 118 Ga. 17, 44 S. E. 817; Collins *v.* State, 97 Ga. 433, 25 S. E. 325, 35 L. R. A. 501; Reg. *v.* Senior, [1899] 1 Q. B. 283, 19 Cox C. C. 219, 3 J. P. 8, 68 L. J. Q. B. 175, 79 L. T. Rep. N. S. 562, 47 Wkly. Rep. 367.

The word "child," as used in Ga. Code, § 4612*h*, providing that whoever shall cruelly treat a child shall be guilty of a misdemeanor, means a child of tender years, or a person between infancy and youth, and hence does not include a male person who has attained the physical strength and stature of manhood. Collins *v.* State, 97 Ga. 433, 25 S. E. 325, 35 L. R. A. 501.

Unreasonably beating. — Under Ga. Pen. Code, § 708, making it a misdemeanor to "cruelly, unreasonably, and maliciously beat or ill-treat any child," the unreasonableness is an essential element of the offense. Gary *v.* State, 118 Ga. 17, 44 S. E. 817.

37. Lyman *v.* People, 65 Ill. App. 687 (injuring health or limb); Cowley *v.* People, 21 Hun (N. Y.) 415, 8 Abb. N. Cas. 1 [*affirmed* in 83 N. Y. 464, 38 Am. Rep. 464].

One who voluntarily assumes the care and custody of a child is bound to provide food, clothing, care, and medical attendance reasonably necessary and proper, and is amenable to the statute if he fails to do so. Cowley *v.* People, 83 N. Y. 464, 38 Am. Rep. 464 [*affirming* 21 Hun 415, 8 Abb. N. Cas. 1].

When offense completed. — The offense under N. Y. Laws (1876), c. 122, § 4, of wilfully causing or permitting the life of a child to be endangered or its health injured, is complete, when one, having the care or custody of a child, wilfully omits to give it proper food, or, when sick, proper medical aid. Cowley *v.* People, 21 Hun (N. Y.) 415, 8 Abb. N. Cas. 1 [*affirmed* in 83 N. Y. 464, 38 Am. Rep. 464].

Indictment.— Where the neglect of the accused has continued and extended over a long period of time, it is proper to charge in the indictment that the offense was committed on a particular day subsequent to the time when the consequences of the neglect were developed, since it is the result of the several acts that the statute is designed to

to the inclemency of the weather.[38] So also the statutes sometimes provide for the punishment of any person who wilfully omits,[39] without lawful excuse,[40] to perform a duty by law imposed upon him[41] to furnish food,[42] clothing,[43] shelter,[44] or medical attendance[45] to a minor. These statutes being penal in their nature are, according to the well established rule of construction, to be strictly construed.[46]

IV. PROPERTY AND CONVEYANCES.

A. In General — 1. Property Rights in General. Infants have the right to take and hold property[47] and cannot be deprived thereof save in the modes pro-

punish. Cowley *v.* People, 21 Hun (N. Y.) 415, 8 Abb. N. Cas. 1 [*affirmed* in 83 N. Y. 464, 38 Am. Rep. 464].

Photographs in evidence.— See Cowley *v.* People, 21 Hun (N. Y.) 415, 8 Abb. N. Cas. 1 [*affirmed* in 83 N. Y. 464, 38 Am. Rep. 464].

38. Lyman *v.* People, 65 Ill. App. 687.

Indictment insufficient to charge criminal exposure or neglect see Com. *v.* Stoddard, 9 Allen (Mass.) 280.

39. People *v.* Pierson, 176 N. Y. 201, 68 N. E. 243, 98 Am. St. Rep. 666, 63 L. R. A. 187.

40. People *v.* Pierson, 176 N. Y. 201, 68 N. E. 243, 98 Am. St. Rep. 666, 63 L. R. A. 187.

41. **The phrase "a duty by law imposed,"** as used in N. Y. Pen. Code, § 288, has reference to persons designated by the common law and by the statute, as parents, guardians, or those who by adoption or otherwise have assumed the relation *in loco parentis*, and on whom the duty is made obligatory by statute, although not required by the common law. People *v.* Pierson, 176 N. Y. 201, 68 N. E. 243, 98 Am. St. Rep. 666, 63 L. R. A. 187 [*reversing* 80 N. Y. App. Div. 415, 81 N. Y. Suppl. 214].

42. People *v.* Pierson, 176 N. Y. 201, 68 N. E. 243, 98 Am. St. Rep. 666, 63 L. R. A. 187.

43. People *v.* Pierson, 176 N. Y. 201, 68 N. E. 243, 98 Am. St. Rep. 666, 63 L. R. A. 187.

44. People *v.* Pierson, 176 N. Y. 201, 68 N. E. 243, 98 Am. St. Rep. 666, 63 L. R. A. 187.

45. People *v.* Pierson, 176 N. Y. 201, 68 N. E. 243, 98 Am. St. Rep. 666, 63 L. R. A. 187; Reg. *v.* Senior, [1899] 1 Q. B. 283, 19 Cox C. C. 219, 68 L. J. Q. B. 175, 79 L. T. Rep. N. S. 562, 47 Wkly. Rep. 367.

Necessity for attendance.— The question whether a person, by refusing to furnish medical attendance for a minor, has been guilty of a misdemeanor under N. Y. Pen. Code, § 288, is to be determined by the fact whether an ordinarily prudent person, solicitous for the welfare of the child, would deem it necessary to call in the services of a physician. People *v.* Pierson, 176 N. Y. 201, 68 N. E. 243, 98 Am. St. Rep. 666, 63 L. R. A. 187 [*reversing* on other grounds 80 N. Y. App. Div. 415, 81 N. Y. Suppl. 214].

The term "medical attendance," as used in N. Y. Pen. Code, § 288, is explained in People *v.* Pierson, 176 N. Y. 201, 63 N. E. 243, 98 Am. St. Rep. 666, 63 L. R. A. 187 [*reversing* 80 N. Y. App. Div. 415, 81 N. Y. Suppl. 214].

A failure to allege that a regular physician should have been called does not render an indictment bad where this is sufficiently implied from the language used. People *v.* Pierson, 176 N. Y. 201, 68 N. E. 243, 98 Am. St. Rep. 666, 63 L. R. A. 187 [*reversing* 80 N. Y. App. Div. 415, 81 N. Y. Suppl. 214].

Constitutionality of statute.— The constitutional guaranty of the full and free enjoyment of religious profession and worship is not violated by a statute making it a penal offense to refuse to provide "medical attendance" to a minor, such medical attendance being construed not to include that of a layman who, because of his religious beliefs that prayer for divine aid is the proper remedy for sickness, neglects to furnish proper medical attendance to a minor child. People *v.* Pierson, 176 N. Y. 201, 68 N. E. 243, 98 Am. St. Rep. 666, 63 L. R. A. 187 [*reversing* 80 N. Y. App. Div. 415, 81 N. Y. Suppl. 214].

46. Justice *v.* State, 116 Ga. 605, 42 S. E. 1013, 59 L. R. A. 601.

47. Offutt *v.* Vance, 42 Ala. 243. See also Moore *v.* U. S., 7 Ct. Cl. 356.

Bonds given to a minor as a bounty on his enlistment into the army may be held by him as his property. Cadwell *v.* Sherman, 45 Ill. 348 [*following* Parmelee *v.* Smith, 21 Ill. 636].

An infant may take possession of vacant lands and hold them in his own right in the same manner that an adult can. Lackman *v.* Wood, 25 Cal. 147.

Presumption as to entry.— Where an infant of the age of fourteen years, having no father, enters upon land, he will be presumed to enter in his own right until the contrary be shown. Riley *v.* Jameson, 3 N. H. 23, 14 Am. Dec. 325.

An alcalde's grant to an infant was valid under the Mexican government, and the infant could take and hold thereunder. Donner *v.* Palmer, 31 Cal. 500.

Products of plantation.— Where an infant of tender years inherits and is possessed of a plantation, the products thereof must be regarded as her property. Moore *v.* U. S., 7 Ct. Cl. 356.

Authorizing person to receive property.— In cases of intestacy, or where there is no

vided by law.[48] One who is tenant in common with infants is liable to them for their proportion of the rents derived from the common property as if they were of age,[49] while on the other hand, the right of cotenants to compel contribution in equity for protecting the common title may be enforced as well against infants as against adults.[50] Infants holding an equity in land, when the legal title thereto is acquired by an innocent purchaser, are in no better condition than they would have been if they were adults.[51] Infants are not regarded as capable of managing their property,[52] or of determining whether a change from one kind of property to another is for their interest;[53] and hence the general rule, both in England and in the United States, has been, in dealing with the property of infants, to impress it during the infants' minority with its original character, whatever change may have actually occurred.[54]

2. Payment of Legacy to Infant.[55] An infant legatee or distributee may receipt for his legacy or distributive share,[56] but a receipt in full executed by him will not preclude him from showing that more was due than he received;[57] although he must account for what he did receive.[58] A different rule would, however, prevail, if it were shown that the executor or administrator knew of the minority.[59]

3. Adverse Possession Against Infant. In Georgia prescription does not run against the rights of a minor during infancy;[60] but he is entitled to assert his title within the prescribed period after he has attained majority.[61] In North Carolina, however, the rule is different.[62]

4. Enforcement of Vendor's Lien. A proceeding against land to enforce a lien reserved upon the face of a deed thereto for the purchase-money has been held to be a proceeding *in rem* not affected by the infancy of one of the grantees at the time the deed and a bond for the purchase-money were executed.[63]

5. Intermeddling With Estates of Infants. A person who intermeddles with the property of an infant will be treated in equity as a trustee for the infant,[64]

opposing provision by will, a female above the age of sixteen, entitled to property of a decedent, can authorize any person merely to receive her estate by a common order, which would be binding on her, so far as any payment or delivery should be made. Pottenger *v.* Steuart, 3 Harr. & J. (Md.) 347.

An infant cannot purchase property without the authority of justice. But on coming of age he may ratify an acquisition of property made for him during his minority. Sarapure *v.* Debuys, 6 Mart. N. S. (La.) 18.

48. See Senser *v.* Bower, 1 Penr. & W. (Pa.) 450, holding that the alienation of an improvement right, by a widow after the death of her husband, will not bar her child from recovering the land in ejectment, although the proceeds of the land have been applied to the child's education, since a sale for that purpose could be ordered only by the orphans' court.

49. Linch *v.* Broad, 70 Tex. 92, 6 S. W. 751.

50. Case *v.* Case, 103 Ill. App. 177; Chesnut *v.* Chesnut, 15 Ill. App. 442.

51. Hardin *v.* Harrington, 11 Bush (Ky.) 367.

52. Horton *v.* McCoy, 47 N. Y. 21.

53. Horton *v.* McCoy, 47 N. Y. 21.

54. Horton *v.* McCoy, 47 N. Y. 21.

55. See Executors and Administrators, 18 Cyc. 625, 626.

56. See Crapster *v.* Griffith, 2 Bland (Md.) 5.

57. Ferguson *v.* Bobo, 54 Miss. 121 [*disapproving* Quinn *v.* Moss, 12 Sm. & M. (Miss.) 365]; Overton *v.* Banister, 3 Hare 503, 8 Jur. 906, 25 Eng. Ch. 503. See also Stidham *v.* Sims, 74 Ga. 187; Crapster *v.* Griffith, 2 Bland (Md.) 5.

Ratification.— If an infant legatee accepts a note from the executor in satisfaction of her claim, the executor's sureties are not released, unless she ratifies her act after attaining her majority. Durfee *v.* Abbott, 61 Mich. 471, 28 N. W. 521.

58. Ferguson *v.* Bobo, 54 Miss. 121 [*disapproving* Quinn *v.* Moss, 12 Sm. & M. 365]; Overton *v.* Banister, 3 Hare 503, 8 Jur. 906, 25 Eng. Ch. 503.

59. Ferguson *v.* Bobo, 54 Miss. 121 [*disapproving* Quinn *v.* Moses, 12 Sm. & M. (Miss.) 365].

60. Nathans *v.* Arkwright, 66 Ga. 179; Whittington *v.* Wright, 9 Ga. 23. See *supra*, II, A, 1.

61. Nathans *v.* Arkwright, 66 Ga. 179.

62. Wellborn *v.* Finley, 52 N. C. 228. See also Mebane *v.* Patrick, 46 N. C. 23.

63. Smith *v.* Henkel, 81 Va. 524, where it also appeared that the grantees had acquiesced in the sale and conveyance for ten years.

64. Lenox *v.* Notrebe, 15 Fed. Cas. No. 8,246*b*, Hempst. 225. An infant may be allowed to treat a person entering upon his estate as a guardian or bailee and to call him to account in that character (Smith *v.*

and if such person so intermeddling with the property injures the infant's estate he will be liable therefor.[65]

B. Acquisition of Property[66] — **1. By Purchase.** An infant may be a grantee in a conveyance of land,[67] and the estate conveyed vests in him, subject only to be divested in case he disagrees to the conveyance when of full age,[68] which he has power to do.[69] When a deed clearly beneficial to an infant is given to him, his acceptance of the same will be presumed.[70] A purchase of personalty by an infant is also voidable at his option,[71] but the adult seller cannot avoid the transaction.[72]

Reid, 51 N. C. 494. *Contra*, Hagley *v.* West, 3 L. J. Ch. O. S. 63), but this is merely for the benefit of the infant, to give him the largest redress against the tort-feasor, and the latter has no right to set it up for his own benefit against the infant owner (Smith *v.* Reid, 51 N. C. 494).

Intermeddler cannot buy outstanding legal title to infant's prejudice. Lenox *v.* Notrebe, 15 Fed. Cas. No. 8,246*b*, Hempst. 225.

65. Bird *v.* Black, 5 La. Ann. 189, *aliter*, however, if his administration is beneficial and he accounts fairly.

Conversion — credits. — Where defendant was concerned in the conversion by an attorney of his infant client's personalty, he is entitled to credit for such part only of payments made by the attorney to the infant and spent by her during her infancy as the attorney would have a right to be credited with had he been the general guardian of the infant — that is, such sums as were reasonably necessary for the infant under all the circumstances. Petrie *v.* Williams, 88 Hun (N. Y.) 292, 34 N. Y. Suppl. 670.

Rents and profits. — The infant is entitled to an accounting for rents and profits from one who has had possession of his estate, commencing from the time when the infant's title accrued. Patrick *v.* Woods, 3 Bibb (Ky.) 29.

66. **Liability on contract to pay for property purchased** see *infra*, V.

67. Masterson *v.* Cheek, 23 Ill. 72; Monumental Bldg. Assoc. No. 2 *v.* Herman, 33 Md. 128; Scanlan *v.* Wright, 13 Pick. (Mass.) 523, 25 Am. Dec. 344; Armfield *v.* Tate, 29 N. C. 258. See also Washband *v.* Washband, 27 Conn. 424.

Delivery of the deed is necessary (Foster *v.* Mitchell, 15 Ala. 571), but an infant may assent to a deed delivered to a third person for the benefit of the infant, so as to vest the estate (Tate *v.* Tate, 21 N. C. 22), or delivery of a deed executed in behalf of an infant to a witness of the deed, for the benefit of the infant, may operate as a delivery to the infant (Watson *v.* Myers, 73 Ga. 138).

The mere recording of a voluntary deed, with intent that the beneficial title shall pass to a grantee of tender years, amounts to a formal delivery to and acceptance by him. Masterson *v.* Cheek, 23 Ill. 72.

Destruction of deed. — A deed of land was made to plaintiff, an infant, and delivered to his father to keep for him. Under an arrangement afterward made between the grantor and the father for the benefit of the latter, the deed was destroyed without having been registered, and the grantor made another deed to defendant. The consideration for the deed to plaintiff was a promise made by his relatives to pay the purchase-money. It was held that plaintiff, being incapable of assenting to the destruction of the deed, was entitled to be restored to the position occupied by him before the destruction of the deed, unless defendant should show himself to be a purchaser for value without notice. Brendle *v.* Herron, 88 N. C. 383.

68. Monumental Bldg. Assoc. No. 2 *v.* Herman, 33 Md. 128; Scanlan *v.* Wright, 13 Pick. (Mass.) 523, 25 Am. Dec. 344; Baker *v.* Kennett, 54 Mo. 82; Armfield *v.* Tate, 29 N. C. 258. See *infra*, IV, E, 2, a, (1).

Conveyance binding on grantor. — Armfield *v.* Tate, 29 N. C. 258.

A sale by the state of orphan asylum land to an infant is not voidable only, but absolutely void, as against a subsequent actual settler in good faith. Dupree *v.* Duke, 30 Tex. Civ. App. 360, 70 S. W. 561.

69. Davenport *v.* Prewett, 9 B. Mon. (Ky.) 94; Rapid Transit Land Co. *v.* Sanford, (Tex. Civ. App. 1893) 24 S. W. 587. See *infra*, IV, E, 1, a.

70. Masterson *v.* Cheek, 23 Ill. 72; Haddon *v.* Neighbarger, 9 Kan. App. 529, 58 Pac. 568; Spencer *v.* Carr, 45 N. Y. 406, 6 Am. Rep. 112.

71. *Louisiana.* — Ducrest *v.* Bijeau, 8 Mart. N. S. 192. See also Hall *v.* Woods, 4 La. Ann. 85.

Massachusetts. — Oliver *v.* Houdlet, 13 Mass. 237, 7 Am. Dec. 134.

Michigan. — See Welch *v.* Olmsted, 90 Mich. 492, 51 N. W. 541.

Minnesota. — Cogley *v.* Cushman, 16 Minn. 397.

New York. — See Kinney *v.* Showdy, 1 Hill 544.

See 27 Cent. Dig. tit. "Infants," § 101.

Sale by husband of infant. — An infant *feme covert* can recover her personal property sold in her presence by her husband, with her knowledge, and without objection on her part, although the rights of mortgagees from the buyer have supervened. Upshaw *v.* Gibson, 53 Miss. 341.

72. Oliver *v.* Houdlet, 13 Mass. 237, 7 Am. Dec. 134.

The sale is the valid transfer of the property out of the seller, although the infant is not bound to pay the price stipulated. Crymes *v.* Day, 1 Bailey (S. C.) 320.

2. By Mortgage. An infant may take a mortgage of personal property[73] or become a mortgagee of realty.[74]

3. By Lease. A lease to an infant, while voidable at his election,[75] is not void,[76] and it is not for third persons to set up the defense of infancy.[77]

4. By Gift. An infant is capable of being a donee of property.[78] In the case of a gift to an infant no formal acceptance is necessary,[79] but if the gift is for his advantage the law accepts it for him, and will hold the donor bound,[80] while if the gift is not for the infant's advantage, the law will repudiate it at his instance, even though he may in terms have accepted it.[81]

5. Contracts of Purchase. A contract by an infant for the purchase of property is voidable, although not void.[82] It is binding upon the adult party unless disaffirmed.[83]

C. Alienation of Property — 1. Capacity to Alienate — a. In General. An infant has not the legal capacity to irrevocably alienate or dispose of his property,[84]

73. Bradford *v.* French, 110 Mass. 365 (holding that the demand authorized by Mass. Gen. St. c. 123, §§ 62, 63, providing for a demand by a mortgagee upon an officer attaching the mortgaged property upon a writ against the mortgagor, may be made by an infant mortgagee); Barnard *v.* Eaton, 2 Cush. (Mass.) 294.

74. Parker *v.* Lincoln, 12 Mass. 16.

75. Baker *v.* Pratt, 15 Ill. 568; Griffith *v.* Schwenderman, 27 Mo. 412; McCoon *v.* Smith, 3 Hill (N. Y.) 147, 38 Am. Dec. 623.

Infant liable for rent during occupation before repudiation.— Blake *v.* Concannon, Ir. R. 4 C. L. 323. *Compare* Lemprière *v.* Lange, 12 Ch. D. 675, 41 L. T. Rep. N. S. 378, 27 Wkly. Rep. 879.

76. Griffith *v.* Schwenderman, 27 Mo. 412. But *compare* Lemprière *v.* Lange, 12 Ch. D. 675, 41 L. T. Rep. N. S. 378, 27 Wkly. Rep. 879.

Assignment of lease.— Where a minor lessee assigns the remainder of the term, the assignee is liable to pay rent to the lessor during his occupancy, until the minor disaffirms the assignment by him. Rothschild *v.* Hudson, 8 Ohio Dec. (Reprint) 259, 6 Cinc. L. Bul. 752.

77. Griffith *v.* Schwenderman, 27 Mo. 412.

78. *California.*— De Levillain *v.* Evans, 39 Cal. 120.

Louisiana.— Howard *v.* Copley, 10 La. Ann. 504.

New York.— Stromberg *v.* Rubenstein, 19 Misc. 647, 44 N. Y. Suppl. 405.

South Carolina.— Steel *v.* McKnight, 1 Bay 64.

Canada.— Turgeon *v.* Guay, 15 Quebec Super. Ct. 332.

The property cannot be recovered by the donor during the infancy of the donee. Stromberg *v.* Rubenstein, 19 Misc. (N. Y.) 647, 44 N. Y. Suppl. 405.

Even without the concurrence of a curator, a minor above the age of puberty may better his condition by accepting a donation. Duplessis *v.* Kennedy, 6 La. 231.

One who has accepted a donation for a minor is *functus officio*, and cannot afterward by an explanatory act affect the donee's rights. Marie Louise *v.* Marot, 8 La. 475.

Laches of donee.— Where an infant under the age of discretion received a gift from his grandfather and never disposed of or made any transfer of the gift, or otherwise reduced it to possession, laches or neglect cannot be imputed to him during minority, so as to invalidate the gift. Steel *v.* McKnight, 1 Bay (S. C.) 64.

79. Howard *v.* Copley, 10 La. Ann. 504. But see Turgeon *v.* Guay, 15 Quebec Super. Ct. 332.

By the Spanish law a donation to a minor with delivery to the father requires no formal acceptance and is irrevocable. Pierce *v.* Grays, 5 Mart. (La.) 367.

80. De Levillain *v.* Evans, 39 Cal. 120; Gaylord *v.* Respass, 92 N. C. 553, holding that the assent of infants to a gratuitous deed to them is presumed, and the deed will stand, unless revoked by them after attaining full age.

When benefit not presumed.— There can be no presumption that a gift to an infant of a contract for the purchase of land at the price of thirteen thousand dollars, and upon which only four hundred dollars has been paid, is for the benefit of the infant. Armitage *v.* Widoe, 36 Mich. 124.

81. De Levillain *v.* Evans, 39 Cal. 120.

82. *Alabama.*— Voltz *v.* Voltz, 75 Ala. 555.

Indiana.— Rice *v.* Boyer, 108 Ind. 472, 9 N. E. 420 (personalty); Carpenter *v.* Carpenter, 45 Ind. 142.

Michigan.— Armitage *v.* Widoe, 36 Mich. 124.

Missouri.— Baker *v.* Kennett, 54 Mo. 82.

New York.— Stafford *v.* Roof, 9 Cow. 626.

Pennsylvania.— McGinn *v.* Shaeffer, 7 Watts 412.

South Carolina.— Jennings *v.* Hare, 47 S. C. 279, 25 S. E. 198.

See 27 Cent. Dig. tit. "Infants," § 26.

Power of court.— A court of equity may ratify a contract for the purchase of realty, made by infants, if it be for their advantage, or may decree a sale of the realty and reimburse them for the money paid. Thomason *v.* Phillips, 73 Ga. 140.

83. McGinn *v.* Shaeffer, 7 Watts (Pa.) 412.

84. *Alabama.*— Greenwood *v.* Coleman, 34 Ala. 150.

and the fact that the infant has received the consideration on an invalid sale does not preclude him from recovering back the land.[85]

b. Property Held in Trust. One who takes and holds the legal title to land in trust can convey or mortgage the same in execution of that trust, and cannot disaffirm or avoid his deed or mortgage on the ground of his minority, since the execution of the trust was a duty which a court of equity would have compelled him to perform notwithstanding his infancy.[86] So also an infant trustee may be directed by order or decree of court to make a conveyance,[87] and a conveyance made by the infant trustee pursuant to such a decree is good until the decree is reversed and the conveyance avoided.[88]

2. Conveyances — a. In General. A deed of an infant purporting to convey real property operates to transmit the title,[89] although it is voidable at the election of the infant.[90] It is well established, however, that such a deed is voidable

California.— See Mahoney *v.* Van Winkle, 21 Cal. 552.

Kentucky.— Sewell *v.* Sewell, 92 Ky. 500, 18 S. W. 162, 36 Am. St. Rep. 606.

Louisiana.— Breaux *v.* Carmouche, 9 Rob. 36; Sarapure *v.* Debuys, 6 Mart. N. S. 18, without the authority of justice. See also Withers *v.* His Executors, 3 La. 363.

New York.— Clapp *v.* Byrnes, 155 N. Y. 535, 50 N. E. 277 [*affirming* 3 N. Y. App. Div. 284, 38 N. Y. Suppl. 1063].

North Carolina.— Brendle *v.* Herron, 88 N. C. 383. See Doe *v.* Shanklin, 20 N. C. 431.

Tennessee.— Cheatham *v.* Huff, 2 Tenn. Ch. 616. See also Phillips *v.* Hassell, 10 Humphr. 197.

England.— Hearle *v.* Greenbank, 3 Atk. 695, 1 Ves. 298, 27 Eng. Reprint 1043.

See 27 Cent. Dig. tit. "Infants," § 24.

By the custom of Kent an infant may alien his estate. Hearle *v.* Greenbank, 3 Atk. 695, 26 Eng. Reprint 1200, 1 Ves. 298, 27 Eng. Reprint 1043.

An infant feme covert cannot bind herself by any deed or contract, either at law or in equity, except under the sanction of the court of chancery, or in cases provided for by statute. Sanford *v.* McLean, 3 Paige (N. Y.) 117, 23 Am. Dec. 773.

Under the Spanish law the written assent of the curator and the authority of the judge were necessary to a valid alienation of the real estate of the minor; but if there was no curator and the minor was more than fourteen years of age, the sale was valid without such assent, provided there was no lesion, and the judge's authority was obtained. Means *v.* Robinson, 7 Tex. 502.

Consent to sale by supposed husband.— A sale of property by one who was supposed to be a woman's husband, but who was not, by reason of a prior existing marriage, is not binding on the woman, although made with her consent, if at the time the sale was made and at the time she consented thereto, she was not twenty-one years old. Sellars *v.* Davis, 4 Yerg. (Tenn.) 503.

A trustee may refuse to pay to the assignee of an infant his share in the trust estate, for the infant, having no power to execute an acquittance which would bind him, cannot by a transfer invest his assignee with such power. Haynes *v.* Slack, 32 Miss. 193.

85. Hobbs *v.* Nashville, etc., R. Co., 122 Ala. 602, 26 So. 139, 82 Am. St. Rep. 103.

Return of consideration on avoidance see *infra*, IV, E, 5.

86. *Alabama.*— Elliott *v.* Horn, 10 Ala. 348, 44 Am. Dec. 488.

California.— Nordholdt *v.* Nordholdt, 87 Cal. 552, 26 Pac. 599, 22 Am. St. Rep. 268.

Iowa.— Des Moines Ins. Co. *v.* McIntire, 99 Iowa 50, 68 N. W. 565; Prouty *v.* Edgar, 6 Iowa 353.

Nebraska.— Bridges *v.* Bidwell, 20 Nebr. 185, 29 N. W. 302.

Ohio.— Starr *v.* Wright, 20 Ohio St. 97.

See 27 Cent. Dig. tit. "Infants," § 35.

87. Bradford *v.* Robinson, 7 Houst. (Del.) 29, 30 Atl. 670; Livingston *v.* Livingston, 2 Johns. Ch. (N. Y.) 537.

88. Thompson *v.* Dulles, 5 Rich. Eq. (S. C.) 370.

89. *Delaware.*— Wallace *v.* Lewis, 4 Harr. 75.

Illinois.— Cole *v.* Pennoyer, 14 Ill. 158.

Kentucky.— Phillips *v.* Green, 5 T. B. Mon. 344.

New York.— Wetmore *v.* Kissam, 3 Bosw. 321; Van Nostrand *v.* Wright, Lalor 260.

Ohio.— Drake *v.* Ramsay, 5 Ohio 251.

South Carolina.— Ihley *v.* Padgett, 27 S. C. 300, 3 S. E. 468.

Tennessee.— Matherson *v.* Davis, 2 Coldw. 443; Scott *v.* Buchanan, 11 Humphr. 468; White *v.* Flora, 2 Overt. 426, deed passes legal title.

Texas.— Martin *v.* Kosmyroski, (Civ. App. 1894) 27 S. W. 1042, holding that the deed of a minor will authorize the grantee to maintain trespass to try title during the grantor's minority.

United States.— Irvine *v.* Irvine, 9 Wall. 617, 19 L. ed. 800.

See 27 Cent. Dig. tit. "Infants," § 28.

Purchaser's possession not adverse.— Moore *v.* Baker, 92 Ky. 518, 18 S. W. 363, 13 Ky. L. Rep. 724. But see Doe *v.* Shanklin, 20 N. C. 431.

The vendee is entitled to the rents and profits while he is in possession under a deed from an infant. Matherson *v.* Davis, 2 Coldw. (Tenn.) 443.

90. *Georgia.*— Sharp *v.* Findley, 59 Ga. 722.

Indiana.— Dill *v.* Bowen, 54 Ind. 204.

merely, and not void,[91] unless it appears on its face to be to the prejudice of the

Maryland.— Monumental Bldg. Assoc. No. 2 *v.* Herman, 33 Md. 128.

New York.— New York Bldg. Loan Banking Co. *v.* Fisher, 20 Misc. (N. Y.) 242, 45 N. Y. Suppl. 795 [*affirmed* in 23 N. Y. App. Div. 363, 48 N. Y. Suppl. 152].

Ohio.— Mills *v.* Rodgers, 2 Ohio Dec. (Reprint) 481, 3 West. L. Month. 262.

Texas.— Morris *v.* Holland, 10 Tex. Civ. App. 474, 31 S. W. 690.

England.— *In re* Blakely Ordnance Co., L. R. 4 Ch. 31, 17 Wkly. Rep. 65; Martin *v.* Gale, 4 Ch. D. 428, 46 L. J. Ch. 84, 36 L. T. Rep. N. S. 357, 25 Wkly. Rep. 406.

See 27 Cent. Dig. tit. "Infants," § 28; and cases cited *infra*, note 91.

A deed delivered after the infant has attained majority is not voidable, although it was executed and acknowledged while the disability of infancy was in effect. Sims *v.* Smith, 99 Ind. 469, 50 Am. Rep. 99.

Deed to secure repayment of money advanced for necessaries voidable.— Martin *v.* Gale, 4 Ch. D. 428, 46 L. J. Ch. 84, 36 L. T. Rep. N. S. 357, 25 Wkly. Rep. 406. See also Askey *v.* Williams, 74 Tex. 294, 11 S. W. 1101, 5 L. R. A. 176.

Conveyance of wife's realty.— A conveyance made by an infant husband, jointly with a wife of full age, of her real estate, is voidable at his election. Barker *v.* Wilson, 4 Heisk. (Tenn.) 268.

Infants cannot consent to sale of their property. Curd *v.* Bonner, 4 Coldw. (Tenn.) 632.

An exchange of property made by a minor is voidable. Williams *v.* Brown, 34 Me. 594.

Deed pursuant to legal obligation see *infra*, IV, E, 1.

91. *Alabama.*— Manning *v.* Johnson, 26 Ala. 446, 62 Am. Dec. 732; Slaughter *v.* Cunningham, 24 Ala. 260, 60 Am. Dec. 463; West *v.* Penny, 16 Ala. 186; Freeman *v.* Bradford, 5 Port. 270.

California.— Hastings *v.* Dollarhide, 24 Cal. 195.

Connecticut.— Kline *v.* Beebe, 6 Conn. 494; Rogers *v.* Hurd, 4 Day 57, 4 Am. Dec. 182.

Delaware.— Wallace *v.* Lewis, 4 Harr. 75.

Georgia.— Nathans *v.* Arkwright, 66 Ga. 179; Wellborn *v.* Rogers, 24 Ga. 558.

Illinois.— Tunison *v.* Chamblin, 88 Ill. 378; Keil *v.* Healey, 84 Ill. 104, 25 Am. Rep. 434; Masterson *v.* Cheek, 23 Ill. 72; Cole *v.* Pennoyer, 14 Ill. 158.

Indiana.— Welsh *v.* Bruce, 83 Ind. 382; Scranton *v.* Stewart, 52 Ind. 68; Law *v.* Long, 41 Ind. 586; Johnson *v.* Rockwell, 12 Ind. 76; Babcock *v.* Doe, 8 Ind. 110; Pitcher *v.* Laycock, 7 Ind. 398; Hartman *v.* Kendall, 4 Ind. 403; Doe *v.* Abernathy, 7 Blackf. 442; Shroyer *v.* Pittenger, 31 Ind. App. 158, 67 N. E. 475.

Iowa.— Green *v.* Wilding, 59 Iowa 679, 13 N. W. 761, 44 Am. Rep. 696; Jenkins *v.* Jenkins, 12 Iowa 195.

Kentucky.— Hoffert *v.* Miller, 86 Ky. 572, 6 S. W. 447, 9 Ky. L. Rep. 732; Vallandingham *v.* Johnson, 85 Ky. 288, 3 S. W. 373, 8 Ky. L. Rep. 940; Prewit *v.* Graves, 5 J. J. Marsh. 114; Breckenridge *v.* Ormsby, 1 J. J. Marsh. 236, 19 Am. Dec. 71; Phillips *v.* Green, 5 T. B. Mon. 344; Hiles *v.* Hiles, 82 S. W. 580, 26 Ky. L. Rep. 824, 83 S. W. 615, 26 Ky. L. Rep. 1264; Ingram *v.* Ison, 80 S. W. 787, 26 Ky. L. Rep. 48.

Louisiana.— See Louisiana Bank *v.* Delery, 2 La. Ann. 648; Harty *v.* Harty, 2 La. 518.

Maine.— Davis *v.* Dudley, 70 Me. 236, 35 Am. Rep. 318; Webb *v.* Hall, 35 Me. 336; Hubbard *v.* Cummings, 1 Me. 11.

Maryland.— Ridgeley *v.* Crandall, 4 Md. 435; Key *v.* Davis, 1 Md. 32; Moale *v.* Buchanan, 11 Gill & J. 314.

Massachusetts.— Kendall *v.* Lawrence, 22 Pick. 540; Boston Bank *v.* Chamberlin, 15 Mass. 220; Worcester *v.* Eaton, 13 Mass. 371, 7 Am. Dec. 155.

Minnesota.— Dixon *v.* Merritt, 21 Minn. 196.

Mississippi.— Allen *v.* Poole, 54 Miss. 323.

Missouri.— Shipley *v.* Bunn, 125 Mo. 445, 28 S. W. 754; Ferguson *v.* Bell, 17 Mo. 347; Youse *v.* Narcoms, 12 Mo. 549, 51 Am. Dec. 175.

New Hampshire.— Dearborn *v.* Eastman, 4 N. H. 441.

New Jersey.— Ownes *v* Ownes, 23 N. J. Eq. 60.

New York.— Voorhies *v.* Voorhies, 24 Barb. 150; McIlvaine *v.* Kadel, 3 Rob. 429, 30 How. Pr. 193; Wetmore *v.* Kissam, 3 Bosw. 321; Dominick *v.* Michael, 4 Sandf. 374; Van Nostrand *v.* Wright, Lalor 260; Gillett *v.* Stanley, 1 Hill 121; Bool *v.* Mix, 17 Wend. 119, 31 Am. Dec. 285; Jackson *v.* Carpenter, 11 Johns. 539; Conroe *v.* Birdsall, 1 Johns. Cas. 127, 1 Am. Dec. 105; Eagle F. Ins. Co. *v.* Lent, 6 Paige 635 [*affirming* 1 Edw. 301]; Merchants' F. Ins. Co. *v.* Grant, 2 Edw. 544.

North Carolina.— McCormic *v.* Leggett, 53 N. C. 425.

Ohio.— Card *v.* Patterson, 5 Ohio St. 319; Cresinger *v.* Welch, 15 Ohio 156, 45 Am. Dec. 565; Drake *v.* Ramsay, 5 Ohio 251.

South Carolina.— Ihley *v.* Padgett, 27 S. C. 300, 3 S. E. 468.

Tennessee.— Hook *v.* Donaldson, 9 Lea 56; Barker *v.* Wilson, 4 Heisk. 268; Matherson *v.* Davis, 2 Coldw. 443; Scott *v.* Buchanan, 11 Humphr. 468; Wheaton *v.* East, 5 Yerg. 41, 26 Am. Dec. 251; White *v.* Flora, 2 Overt. 426.

Texas.— Searcy *v.* Hunter, 81 Tex. 644, 17 S. W. 372, 26 Am. St. Rep. 837; Bingham *v.* Barley, 55 Tex. 281, 40 Am. Rep. 801; Stuart *v.* Baker, 17 Tex. 417; Cummings *v.* Powell, 8 Tex. 80; Hieatt *v.* Dixon, (Civ. App. 1894) 26 S. W. 263.

Vermont.— Bigelow *v.* Kinney, 3 Vt. 353, 21 Am. Dec. 589.

Virginia.— Birch *v.* Linton, 78 Va. 584, 49 Am. Rep. 381; Wilson *v.* Branch, 77 Va. 65, 46 Am. Rep. 709; Bedinger *v.* Wharton, 27 Gratt. 857.

infant,[92] or the benefit of the infant demands that it shall be held void.[93] The acknowledgment by an infant, in open court, of a deed executed by him does not render it irrevocable.[94]

b. Conveyances by Femes Covert. A married woman who is an infant may convey her land by deed[95] executed jointly by her husband and herself for that purpose,[96] and although such deed is voidable at her election[97] after coming of

West Virginia.— Williamson *v.* Jones, 43 W. Va. 562, 27 S. E. 411, 64 Am. St. Rep. 891, 38 L. R. A. 694; Gillespie *v.* Bailey, 12 W. Va. 70, 29 Am. Rep. 445.

United States.— MacGreal *v.* Taylor, 167 U. S. 688, 17 S. Ct. 961, 42 L. ed. 326; Irvine *v.* Irvine, 9 Wall. 617, 19 L. ed. 800; Tucker *v.* Moreland, 10 Pet. 58, 9 L. ed. 345; Nettleton *v.* Morrison, 18 Fed. Cas. No. 10,127, 5 Dill. 503.

England.— Zouch *v.* Parsons, 3 Burr. 1794, 1 W. Bl. 575; Allen *v.* Allen, 1 C. & L. 427, 2 Dr. & War. 307, 4 Ir. Eq. 472; Whittingham's Case, 8 Coke 42*b*; —— *v.* Handcock, 17 Ves. Jr. 383, 34 Eng. Reprint 148.

Canada.— Robinson *v.* Sutherland, 9 Manitoba 199; McDonald *v.* Restigouche Salmon Club, 33 N. Brunsw. 472; Doe *v.* Charlton, 21 N. Brunsw. 119; Doe *v.* Lee, 13 N. Brunsw. 486; Whalls *v.* Learn, 15 Ont. 481 (if the deed benefits the infant or operates to pass an estate or interest); Foley *v.* Canada Permanent Loan, etc., Co., 4 Ont. 38; Miller *v.* Ostrander, 12 Grant Ch. (U. C.) 349 (exchange); Featherston *v.* McDonnell, 15 U. C. C. P. 162; Mills *v.* Davis, 9 U. C. C. P. 510; McCoppin *v.* McGuire, 34 U. C. Q. B. 157; Gilchrist *v.* Ramsay, 27 U. C. Q. B. 500; Doe *v.* Woodruff, 7 U. C. Q. B. 332.

See 27 Cent. Dig. tit. "Infants," § 28.

Conveyance by attorney.— The appointment by a minor of an attorney to sell and convey real estate, and a conveyance by the attorney under such appointment, are not void, but merely voidable and capable of ratification by the infant on attaining his majority. Coursolle *v.* Weyerhauser, 69 Minn. 328, 72 N. W. 697; Ferguson *v.* Houston, etc., R. Co., 73 Tex. 344, 11 S. W. 347. But see Philpot *v.* Bingham, 55 Ala. 435; Lawrence *v.* McArter, 10 Ohio 37.

Deed which does not take effect by delivery of hand void.— Conroe *v.* Birdsall, 1 Johns. Cas. (N. Y.) 127, 1 Am. Dec. 105; Zouch *v.* Parsons, 3 Burr. 1794, 1 W. Bl. 575.

92. MacGreal *v.* Taylor, 167 U. S. 688, 17 S. Ct. 961, 42 L. ed. 326.

93. See Wellborn *v.* Rogers, 24 Ga. 558; Breckenridge *v.* Ormsby, 1 J. J. Marsh. (Ky.) 236, 19 Am. Dec. 71.

Conveyance without consideration.— A conveyance of land by an infant without consideration is void, and his next friend may, during his infancy, maintain a bill to set such conveyance aside. Robinson *v.* Coulter, 90 Tenn. 705, 18 S. W. 250, 25 Am. St. Rep. 708; Swafford *v.* Ferguson, 3 Lea (Tenn.) 292, 31 Am. Rep. 639.

94. Slaughter *v.* Cunningham, 24 Ala. 260, 60 Am. Dec. 463.

95. Gillenwater *v.* Campbell, 142 Ind. 529, 41 N. E. 1041; Sims *v.* Bardoner, 86 Ind. 87, 44 Am. Rep. 263 [*followed* in Sims *v.* Snyder, 86 Ind. 602]; Scranton *v.* Stewart, 52 Ind. 68; Webb *v.* Hall, 35 Me. 336; Scott *v.* Buchanan, 11 Humphr. (Tenn.) 468.

A special act, authorizing a married woman nineteen years old to unite with her husband in conveying certain land, was valid, under the old constitution of Kentucky. Collins *v.* Park, 93 Ky. 6, 18 S. W. 1013, 13 Ky. L. Rep. 905.

Possession of purchaser adverse to interest subsequently acquired by feme covert.— Norcum *v.* Sheahan, 21 Mo. 25, 64 Am. Dec. 214; Norcum *v.* Gaty, 19 Mo. 65.

96. Gillenwaters *v.* Campbell, 142 Ind. 529, 41 N. E. 1041; Scranton *v.* Stewart, 52 Ind. 68; Webb *v.* Hall, 35 Me. 336.

97. *Alabama.*— Schaffer *v.* Lavretta, 57 Ala. 14; Greenwood *v.* Coleman, 34 Ala. 150.

Arkansas.— Harrod *v.* Myers, 21 Ark. 592, 76 Am. Dec. 409.

Indiana.— Gillenwaters *v.* Campbell, 142 Ind. 529, 41 N. E. 1041; Sims *v.* Smith, 86 Ind. 577; Sims *v.* Bardoner, 86 Ind. 87, 44 Am. Rep. 263 [*followed* in Sims *v.* Snyder, 86 Ind. 602]; Scranton *v.* Stewart, 52 Ind. 68; Law *v.* Long, 41 Ind. 586.

Kentucky.— Sewell *v.* Sewell, 92 Ky. 500, 18 S. W. 162, 36 Am. St. Rep. 606. See also Mackey *v.* Procter, 12 B. Mon. 433.

Maine.— Webb *v.* Hall, 35 Me. 336.

Massachusetts.— Walsh *v.* Young, 110 Mass. 396.

Minnesota.— Dixon *v.* Merritt, 21 Minn. 196.

Missouri.— Norcum *v.* Sheahan, 21 Mo. 25, 64 Am. Dec. 214.

New York.— Bool *v.* Mix, 17 Wend. 119, 31 Am. Dec. 285, holding that where the party executing a deed is an infant, as well as a *feme covert,* the disability arising from infancy remains, although the deed is duly executed.

Ohio.— Card *v.* Patterson, 5 Ohio St. 319.

Pennsylvania.— Williams *v.* Baker, 71 Pa. St. 476.

Tennessee.— Matherson *v.* Davis, 2 Coldw. 443; Scott *v.* Buchanan, 11 Humphr. 468.

Virginia.— Darraugh *v.* Blackford, 84 Va. 509, 5 S. E. 542; Wilson *v.* Branch, 77 Va. 65, 46 Am. Rep. 709.

United States.— MacGreal *v.* Taylor, 167 U. S. 688, 17 S. Ct. 961, 42 L. ed. 326; Sims *v.* Everhardt, 102 U. S. 300, 26 L. ed. 87.

Canada.— Whalls *v.* Learn, 15 Ont. 481.

See 27 Cent. Dig. tit. "Infants," § 29.

Deed conveys husband's interest.— Harrod *v.* Myers, 21 Ark. 592, 76 Am. Dec. 409; Sims *v.* Bardoner, 86 Ind. 87, 44 Am. Rep. 263 [*followed* in Sims *v.* Snyder, 86 Ind. 602]; Sewell *v.* Sewell, 92 Ky. 500, 18 S. W.

age under the general rule permitting infants to avoid transactions of this character,[98] it is nevertheless not void.[99]

3. Sales of Personalty. A sale of personalty by an infant is voidable[1] but not void.[2]

4. Mortgages. Likewise under the general rule above stated an infant may make a mortgage of his lands,[3] which, however, he may avoid[4] on attaining his

162, 36 Am. St. Rep. 606; Matherson *v.* Davis, 2 Coldw. (Tenn.) 443. But *compare* Craig *v.* Van Bebber, 100 Mo. 584, 18 S. W. 906, 18 Am. St. Rep. 569.

A wife is not concluded by a certificate of acknowledgment, under the Pennsylvania act of 1770, that she was of age, the magistrate not being required to certify as to that, but she may show that she was a minor when she acknowledged the deed. Williams *v.* Baker, 71 Pa. St. 476.

Under a North Carolina statute a deed by an infant *feme covert*, properly executed, had the effect of a fine and recovery, and could only be impeached by a writ of error which must be brought during minority. Wright *v.* Player, 72 N. C. 94. See also Kidd *v.* Venable, 111 N. C. 535, 16 S. E. 317. But under this statute as now amended (see N. C. Code, § 1256), this rule no longer prevails, but the deed of an infant *feme covert* may be collaterally impeached on the ground of infancy. Kidd *v.* Venable, *supra*.

98. Scranton *v.* Stewart, 52 Ind. 68; Law *v.* Long, 41 Ind. 586; Webb *v.* Hall, 35 Me. 336. See *infra*, IV, E, 2, a, (I).

99. *Indiana.*— Gillenwater *v.* Campbell, 142 Ind. 529, 41 N. E. 597; Sims *v.* Bardoner, 86 Ind. 87, 44 Am. Rep. 263 [*followed* in Sims *v.* Snyder, 86 Ind. 602]; Scranton *v.* Stewart, 52 Ind. 68; Law *v.* Long, 41 Ind. 586.

Maine.— Webb *v.* Hall, 35 Me. 336.

Minnesota.— Dixon *v.* Merritt, 21 Minn. 196.

Ohio.— Card *v.* Patterson, 5 Ohio St. 319.

Tennessee.—Scott *v.* Buchanan, 11 Humphr. 468.

Canada.— Whalls *v.* Learn, 15 Ont. 481, if the deed benefits the infant or operates to pass an estate or interest.

See 27 Cent. Dig. tit. "Infants," § 29.

Contra.— *Illinois.*— Harrer *v.* Wallner, 80 Ill. 197; Hoyt *v.* Swar, 53 Ill. 134.

New Jersey.— Porch *v.* Fries, 18 N. J. Eq. 204.

New York.— Sanford *v.* McLean, 3 Paige 117, 23 Am. Dec. 773. And see Kenny *v.* Udall, 5 Johns. Ch. 464, holding that the assent of an infant *feme covert* to a transfer of her equitable estate by the husband is utterly void.

Pennsylvania.— Schrader *v.* Decker, 9 Pa. St. 14, 49 Am. Dec. 538.

England.— Zouch *v.* Parsons, 3 Burr. 1794, 1 W. Bl. 575.

Necessity for ratification.— The acknowledgment of a deed by an infant married woman is invalid and not binding upon her unless ratified by her after she becomes of legal age. Markham *v.* Merritt, 7 How. (Miss.) 437, 40 Am. Dec. 76 [*followed* in Cason *v.* Hubbard, 38 Miss. 35].

1. Lowe *v.* Gist, 5 Harr. & J. (Md.) 106 note; Baker *v.* Lovett, 6 Mass. 78, 4 Am. Dec. 88. See also Smith *v.* Baker, 42 Hun (N. Y.) 504.

An assignment of a policy of insurance by an infant is not binding. City Sav. Bank *v.* Whittle, 63 N. H. 587, 3 Atl. 645; Levin *v.* Ritz, 17 Misc. (N. Y.) 737, 41 N. Y. Suppl. 405; Scobey *v.* Waters, 10 Lea (Tenn.) 551, assignment void. And see Brockhaus *v.* Kemna, 7 Fed. 609, 10 Biss. 338.

2. Wilson *v.* Porter, 13 La. Ann. 407. An assignment by an infant, for valuable consideration, of a debt due to him is good against a subsequent attachment of the debt on trustee process in a suit against him. Kingman *v.* Perkins, 105 Mass. 111.

Sale accompanied by manual delivery good against third persons.— Packer *v.* Johnson, 1 Nott & M. (S. C.) 1.

No title passes unless manual delivery made by infant.— Fonda *v.* Van Horne, 15 Wend. (N. Y.) 631, 30 Am. Dec. 77.

3. Askey *v.* Williams, 74 Tex. 294, 11 S. W. 1101, 5 L. R. A. 176.

4. *California.*— Magee *v.* Welsh, 18 Cal. 155.

Illinois.— Baker *v.* Pratt, 15 Ill. 568.

Maine.— Hubbard *v.* Cummings, 1 Me. 11.

Maryland.— Monumental Bldg. Assoc. *v.* Herman, 33 Md. 128.

Massachusetts.— Ready *v.* Pinkham, 181 Mass. 351, 63 N. E. 887; Baker *v.* Stone, 136 Mass. 405; Boston Bank *v.* Chamberlain, 15 Mass. 220.

Mississippi.— Allen *v.* Poole, 54 Miss. 323.

Missouri.— Schneider *v.* Staihr, 20 Mo. 269, mortgage by infant *feme covert*.

New Jersey.— Charles *v.* Hastedt, 51 N. J. Eq. 171, 26 Atl. 564, except as to assessment on mortgaged property paid out of proceeds.

New York.— New York Bldg. Loan Banking Co. *v.* Fisher, 23 N. Y. App. Div. 363, 48 N. Y. Suppl. 152; Palmer *v.* Miller, 25 Barb. 399.

Ohio.— Hetterick *v.* Porter, 20 Ohio Cir. Ct. 110, 11 Ohio Cir. Dec. 145, mortgage to secure debt for which infant not liable.

Pennsylvania.— Citizens' Bldg., etc., Assoc. *v.* Arvin, 207 Pa. St. 293, 56 Atl. 870; Smith *v* Eisenlord, 2 Phila. 353.

Tennessee.— Bradshaw *v.* Van Valkenburg, 97 Tenn. 316, 37 S. W. 88, infant *feme covert*.

Texas.— Askey *v.* Williams, 74 Tex. 294, 11 S. W. 1101, 5 L. R. A. 176.

Canada.— Saunders *v.* Russell, 9 Brit. Col. 321; Gallagher *v.* Gallagher, 30 U. C. Q. B. 415; Gilchrist *v.* Ramsay, 27 U. C. Q. B. 500.

See 27 Cent. Dig. tit. "Infants," § 30.

But compare Montamat *v.* Debon, 4 Mart. N. S. (La.) 147 (holding an infant bound by

majority,[5] even though it was executed to secure payment for necessaries.[6] A mortgage executed by an infant is, however, voidable only and not void,[7] and, like other executed contracts of an infant, is valid until some act is done by him to avoid it.[8] A chattel mortgage given by an infant is subject to the same rules as obtain in the case of a mortgage of real estate.[9]

5. Leases. A lease executed by a minor is not void, but only voidable at his election,[10] and the lessee cannot set up the minor's disability to defeat the lease or be relieved from its covenants.[11]

a counter letter); Daley *v.* Minnesota Loan, etc., Co., 43 Minn. 517, 45 N. W. 1100 (holding that the provision of Minn. Gen. St. (1878) c. 40, § 2 (Laws (1887), c. 47), that, where a married woman executes jointly with her husband a deed of her separate real estate, the validity of such deed is not affected by the fact of her minority, extends to mortgages).

Purchase-money mortgage.— Where real estate was sold to an infant, who executed a mortgage to secure the purchase-money, the infancy of the mortgagor is no defense to a foreclosure proceeding. Robinson *v.* Bergholz, 4 Ohio Dec. (Reprint) 103, 1 Clev. L. Rep. 29. See also Glenn *v.* Clark, 53 Md. 580.

Payment of prior mortgage by infant.— The fact that part of the money lent to a third person on a mortgage given by an infant was used to pay off a prior mortgage given by the infant will not render the latter mortgage good to that extent, where it does not appear that there was any legal liability on the prior mortgage. Thormaehlen *v.* Kaeppel, 86 Wis. 378, 56 N. W. 1089.

Mortgage of personalty voidable.— Cogley *v.* Cushman, 16 Minn. 397.

5. *Maine.*— Hubbard *v.* Cummings, 1 Me. 11.

Massachusetts.— Boston Bank *v.* Chamberlain, 15 Mass. 220.

New York.— Palmer *v.* Miller, 25 Barb. 399.

Ohio.— Hetterick *v.* Porter, 20 Ohio Cir. Ct. 110, 11 Ohio Cir. Dec. 145.

Tennessee.— Barker *v.* Wilson, 4 Heisk. 268.

See 27 Cent. Dig. tit. "Infants," § 30; and *infra*, IV, E, 2, a, (I).

6. Askey *v.* Williams, 74 Tex. 294, 11 S. W. 1101, 5 L. R. A. 176. *Contra*, Cooper *v.* State, 37 Ark. 421. And see Roberts *v.* Wiggin, 1 N. H. 73, 8 Am. Dec. 38. See *infra*, V, B, 9, c.

7. *Arkansas.*— Cooper *v.* State, 37 Ark. 421.

Minnesota.— Dixon *v.* Merritt, 21 Minn. 196.

New Hampshire.— Roberts *v.* Wiggins, 1 N. H. 73, 8 Am. Dec. 38.

New York.— Merchants' F. Ins. Co. *v.* Grant, 2 Edw. 544.

Tennessee.— McGan *v.* Marshall, 7 Humphr. 121.

Canada.— Saunders *v.* Russell, 9 Brit. Col. 321; Foley *v.* Canada Permanent Loan, etc., Co., 4 Ont. 38; Gilchrist *v.* Ramsay, 27 U. C. Q. B. 500.

See 27 Cent. Dig. tit. "Infants," § 30.

Contra.— Thurstan *v.* Nottingham Permanent Ben. Bldg. Soc., [1902] 1 Ch. 1, 71 L. J. Ch. 83, 86 L. T. Rep. N. S. 35, 50 Wkly. Rep. 179 [*reversing* [1901] 1 Ch. 88, 83 L. T. Rep. N. S. 424, 49 Wkly. Rep. 56, under Infants' Relief Act of 1874]. And see Steger's Estate, 11 Phila. (Pa.) 158; Colcock *v.* Ferguson, 3 Desauss. Eq. (S. C.) 482.

A mortgage executed by an infant feme covert is voidable only and not void. Dixon *v.* Merritt, 21 Minn. 196. *Contra*, Glenn *v.* Clark, 53 Md. 580; Ross *v.* Agens, 28 N. J. L. 160; Feitner *v.* Hoegis, 14 Daly (N. Y.) 470, 15 N. Y. St. 377. See also Magee *v.* Welsh, 18 Cal. 155.

A power of sale given to the mortgagee, in a mortgage on land given by an infant to secure his note, given as a fee to an attorney for defending him in a criminal prosecution, is voidable only. Askey *v.* Williams, 74 Tex. 294, 11 S. W. 1101, 5 L. R. A. 176.

Mortgage to secure debt of another.— A mortgage given by an infant *feme covert* to secure her husband's debt is absolutely void and incapable of confirmation. Cronise *v.* Clark, 4 Md. Ch. 403 (debt of firm of which husband a member); Chandler *v.* McKinney, 6 Mich. 217, 74 Am. Dec. 686.

8. Uecker *v.* Koehn, 21 Nebr. 559, 32 N. W. 583, 59 Am. Rep. 849; Roberts *v.* Wiggin, 1 N. H. 73, 8 Am. Dec. 38; Palmer *v.* Miller, 25 Barb. (N. Y.) 399. But *compare* Adams *v.* Ross, 30 N. J. L. 505, 82 Am. Dec. 237 [*reversing* 28 N. J. L. 160]. See *infra*, IV, E, 3.

9. *Michigan.*— Barney *v.* Rutledge, 104 Mich. 289, 62 N. W. 369 (mortgage not enforceable against infant during minority); Corey *v.* Burton, 32 Mich. 30.

Missouri.— Stotts *v.* Leonhard, 40 Mo. App. 336.

New Hampshire.— State *v.* Plaisted, 43 N. H. 413, mortgage not void but merely voidable.

New York.— Hangen *v.* Hachmeister, 49 N. Y. Super. Ct. 34.

North Carolina.— Skinner *v.* Maxwell, 66 N. C. 45.

See 27 Cent. Dig. tit. "Infants," § 110.

An assignment of the mortgage will carry to the assignee all the mortgagee's rights, whether the infant affirms or disaffirms the mortgage. Ottman *v.* Moak, 3 Sandf. Ch. (N. Y.) 431.

10. Field *v.* Herrick, 101 Ill. 110 [*affirming* 5 Ill. App. 54]; Slator *v.* Brady, Ir. R. 14 C. L. 61.

11. Field *v.* Herrick, 101 Ill. 110 [*affirming* 5 Ill. App. 54].

6. Assignments For Benefit of Creditors. An assignment for the benefit of creditors by an infant or by a firm in which an infant is a partner is voidable at the election of the infant, but it is not void.[12]

7. Releases of Dower. In the absence of any statute giving her power to do so,[13] an infant *feme covert* cannot, by joining in a conveyance with her husband or otherwise, bar her right of dower in his lands or estop herself from claiming the same,[14] nor is a woman who, while an infant, has entered into an antenuptial agreement to relinquish or release her dower barred thereby, but she may disaffirm and claim dower.[15] Several cases have gone so far as to declare such a release void,[16] although there is also authority for the view that such a release is voidable only.[17]

8. Partition. As a general rule it would seem that a partition by act of the parties, one of whom was an infant at the time, is voidable at the election of the infant,[18]

12. Soper *v.* Fry, 37 Mich. 236; Yates *v.* Lyon, 61 N. Y. 344 [*reversing* 61 Barb. 205]. *Contra*, Fox *v.* Heath, 16 Abb. Pr. (N. Y.) 163, 21 How. Pr. 384.

13. Dela *v.* Stanwood, 61 Me. 51. See also Adams *v.* Palmer, 51 Me. 480.

Statute not retroactive.— Adams *v.* Palmer, 51 Me. 480, construing Me. Acts (1863), c. 215, § 1.

14. *Arkansas.*—Watson *v.* Billings, 38 Ark. 278, 42 Am. Rep. 1.

Indiana.— Applegate *v.* Conner, 93 Ind. 185; Law *v.* Long, 41 Ind. 586. The infant wife of an adult husband may, under the Indiana statute, join with him in a conveyance of his real estate in the same manner as she would be authorized to do if of age. Kennedy *v.* Hudkins, 140 Ind. 570, 40 N. E. 52; Applegate *v.* Conner, 93 Ind. 185; Bakes *v.* Gilbert, 93 Ind. 70 (holding that consequently in a suit against a husband and wife to foreclose a mortgage, a plea of infancy on the part of the wife was bad on demurrer where it did not aver either that the real estate was the separate property of the wife, or that the husband was a minor at the time of the execution of the mortgage); Fisher *v.* Payne, 90 Ind. 183 (if father, or if he be dead, mother declare that conveyance is for the benefit of wife, or if both parents be dead, with assent of circuit judge). See also Richardson *v.* Pate, 93 Ind. 423, 47 Am. Rep. 374. But see McClanahan *v.* Williams, 136 Ind. 30, 35 N. E. 897, where an infant wife who had joined her husband in conveying his property was allowed to recover after his death, it not appearing by the report of the case whether or not the husband was an infant at the time of the conveyance.

Kentucky.— Oldham *v.* Sale, 1 B. Mon. 76; Jones *v.* Todd, 2 J. J. Marsh. 359.

Maine.— See Dela *v.* Stanwood, 61 Me. 51; Adams *v.* Palmer, 51 Me. 480.

Mississippi.— Markham *v.* Merrett, 7 How. 437, 40 Am. Dec. 76.

New York.— Cunningham *v.* Knight, 1 Barb. 399; Priest *v.* Cummings, 20 Wend. 338 [*affirming* 16 Wend. 617]; Sandford *v.* McLean, 3 Paige 117, 23 Am. Dec. 773. See also Udell *v.* Kenney, 3 Cow. 590.

Ohio.— Hughes *v.* Watson, 10 Ohio 127.

South Carolina.— McMorris *v.* Webb, 17 S. C. 558, 43 Am. Rep. 629.

Vermont.— Wiser *v.* Lockwood, 42 Vt. 720.

Virginia.— Thomas *v.* Gammel, 6 Leigh 9.

See 27 Cent. Dig. tit. "Infants," § 32; and Dower, 14 Cyc. 956 note 21.

Antenuptial agreement.— An agreement in a marriage settlement by an infant to accept a pecuniary consideration in lieu of dower is not a bar to a claim of dower. Drew *v.* Drew, 40 N. J. Eq. 458, 1 Atl. 745. But *compare* Levering *v.* Heighe, 2 Md. Ch. 81. She cannot, however, claim dower and also enforce the payment of a promissory note given to secure such consideration, but must elect between the two. Drew *v.* Drew, 40 N. J. Eq. 458, 1 Atl. 745.

Jointure.— By the New York Revised Statutes the distinction between legal and equitable bars of dower by jointure is abolished, and an infant, if she assents to the provision in the manner described, will be bound in the same cases and to the same extent as an adult. McCartee *v.* Teller, 2 Paige (N. Y.) 511.

15. McCartee *v.* Teller, 2 Paige (N. Y.) 511; Shaw *v.* Boyd, 5 Serg. & R. (Pa.) 309, 9 Am. Dec. 368.

In Louisiana a minor capable of marrying may, assisted by her parents, renounce in the marriage contract her legal, and take for her dowry a special mortgage. Union Bank *v.* Slidell, 11 La. 23.

16. Glenn *v.* Clark, 53 Md. 580; Sherman *v.* Garfield, 1 Den. (N. Y.) 329. See also Sandford *v.* McLean, 3 Paige (N. Y.) 117, 23 Am. Dec. 773.

17. Law *v.* Long, 41 Ind. 586; Wiser *v.* Lockwood, 42 Vt. 720. See also Dela *v.* Stanwood, 61 Me. 51; Adams *v.* Palmer, 51 Me. 480; Drew *v.* Drew, 40 N. J. Eq. 458, 1 Atl. 745.

18. Thompson *v.* Strickland, 52 Miss. 574. See also McCullough *v.* Finley, 69 Kan. 705, 77 Pac. 696 (agreement for partition voidable only); Allen *v.* Ruddell, 51 S. C. 366, 29 S. E. 198 (parol agreement for partition void unless ratified after coming of age).

An unfair amicable partition is not binding on an infant, even though he has exercised acts of ownership after his becoming of age. Hemmich *v.* High, 2 Watts (Pa.) 159, 27 Am. Dec. 295.

although an infant is bound by his equal partition if he might have been compelled by law to make it.[19]

9. Marriage Settlements. An infant female may settle her personalty at marriage, for such settlement cannot be to her prejudice but must be to her advantage if it secures anything to her or her issue, since without the settlement the whole would go to the husband absolutely on her marriage;[20] but the weight of authority seems to support the view that she cannot bind herself by a settlement of her real estate on marriage,[21] although such a settlement is usually considered to be voidable only and not void.[22] It has been held that an infant husband may disaffirm an antenuptial settlement with his intended wife so far as he is personally concerned, notwithstanding the subsequent marriage.[23]

10. Gifts. An infant cannot bind himself by a gift of his property,[24] even though accompanied by a manual delivery;[25] but such a gift may be revoked or avoided by the infant,[26] or his personal representative,[27] although it is not void.[28]

11. Creation of Trusts. An infant may make over property upon trust by any act of assurance, and it is not void, but voidable only, and the estate of the trustee will remain good until the assurance be avoided.[29]

12. Declaration of Trust. A declaration of trust by an infant is voidable, but not void.[30]

19. Bavington *v.* Clarke, 2 Penr. & W. (Pa.) 115, 21 Am. Dec. 432. See also Zouch *v.* Parsons, 3 Burr. 1794, 1 W. Bl. 575.

In Louisiana it has been held that partitions between minors, in order to be valid, must be made in conformity to the order of court and in the manner advised at the family meeting. Story's Succession, 5 La. Ann. 208. Where an emancipated minor joins his coheirs in a partition of the succession of his mother and accepts his portion as ascertained thereby, and the settlement does not embrace all the property of the succession, he will be concluded thereby. Wilson *v.* Craighead, 6 Rob. (La.) 429.

20. Levering *v.* Heighe, 3 Md. Ch. 365, 2 Md. Ch. 81; Wetmore *v.* Kissam, 3 Bosw. (N. Y.) 321; Strong *v.* Wilkin, 1 Barb. Ch. (N. Y.) 9; Satterfield *v.* Riddick, 43 N. C. 265; Freeman *v.* Cooke, 41 N. C. 373; Lester *v.* Frazer, 2 Hill Eq. (S. C.) 529.

21. Levering *v.* Heighe, 3 Md. Ch. 365, 2 Md. Ch. 81; Lancaster *v.* Lancaster, 13 Lea (Tenn.) 126; Milner *v.* Harewood, 18 Ves. Jr. 259, 34 Eng. Reprint 315. See also Satterfield *v.* Riddick, 43 N. C. 265. *Contra*, Tabb *v.* Archer, 3 Hen. & M. (Va.) 398, 3 Am. Dec. 657 [*followed* in Healy *v.* Rowan, 5 Gratt. (Va.) 414, 52 Am. Dec. 94].

The Texas statute of 1840, giving validity to the marriage settlements of infants, was adopted probably with a view to settle some disputed points, and to remove *pro tanto* the disabilities of infants about to marry, and should not be extended beyond this purpose. Burr *v.* Wilson, 18 Tex. 367.

22. Levering *v.* Heighe, 3 Md. Ch. 365 (where settlement contains provisions beneficial to infant); Wetmore *v.* Kissam, 3 Bosw. (N. Y.) 321; Temple *v.* Hawley, 1 Sandf. Ch. (N. Y.) 153; Lester *v.* Frazer, 2 Hill Eq. (S. C.) 529; Lancaster *v.* Lancaster, 13 Lea (Tenn.) 126.

Marriage articles may be ratified by the wife and her successors. Whichcote *v.* Lyle, 28 Pa. St. 73.

Settlement may be disaffirmed during coverture. Whichcote *v.* Lyle, 28 Pa. St. 73; Lancaster *v.* Lancaster, 13 Lea (Tenn.) 126.

Settlement not executed by infant.—A marriage settlement of the estate of a female infant was intended to be executed by her, and an order of the court of chancery was procured, appointing her mother to be her special guardian, for the purpose of assenting to the marriage, approving of the settlement, designating the trustee, and joining in the deed of settlement. The deed was executed in the name of the infant, by her special guardian as such, by the husband, and by the trustee, but not by the infant. It was held that as to the infant it was absolutely void. Temple *v.* Hawley, 1 Sandf. Ch. (N. Y.) 153.

23. Lancaster *v.* Lancaster, 13 Lea (Tenn.) 126. But *compare* Kottman *v.* Peyton, Speers Eq. (S. C.) 46.

24. Johnson *v.* Alden, 15 La. Ann. 505; Withers *v.* His Executors, 3 La. 363; Harvey *v.* Carroll, 72 Tex. 63, 10 S. W. 334 (gift not executed by delivery); Person *v.* Chase, 37 Vt. 647, 88 Am. Dec. 630. See also Oxley *v.* Tryon, 25 Iowa 95.

25. Person *v.* Chase, 37 Vt. 647, 88 Am. Dec. 630.

26. Person *v.* Chase, 37 Vt. 647, 88 Am. Dec. 630.

27. Person *v.* Chase, 37 Vt. 647, 88 Am. Dec. 630.

28. Johnson *v.* Alden, 15 La. Ann. 505. A deed of gift executed by a minor in trust for his children is not void but voidable merely. Slaughter *v.* Cunningham, 24 Ala. 260, 60 Am. Dec. 463.

29. Yates *v.* Lyon, 61 N. Y. 344 [*reversing* 61 Barb. 205]; Eagle F. Ins. Co. *v.* Lent, 6 Paige (N. Y.) 635 [*affirming* 1 Edw. 301]; Lester *v.* Frazer, 2 Hill Eq. (S. C.) 529; Hearle *v.* Greenbank, 3 Atk. 695, 26 Eng. Reprint 1200, 1 Ves. 298, 27 Eng. Reprint 1043.

30. Ownes *v.* Ownes, 23 N. J. Eq. 60.

13. CONTRACTS OF SALE. A contract of sale or bond to convey entered into or executed by an infant is voidable but not void,[31] and may be ratified after the infant reaches his majority,[32] and specific performance can then be enforced.[33] But specific performance cannot be enforced against the infant during his minority.[34] The contract is binding upon the adult party thereto until disaffirmed by the infant.[35]

D. Ratification of Transactions Affecting Property — 1. ELECTION TO RATIFY OR AVOID.[36] As has been seen, where property has been conveyed, mortgaged, etc., by or to an infant, he has his election[37] to ratify[38] or avoid the transaction,[39] and the same is true of transactions in which other persons have assumed to act for the infant.[40] Where there are in the same transaction two conveyances,

31. *Alabama.*— Weaver *v.* Jones, 24 Ala. 420.
Illinois.— Walker *v.* Ellis, 12 Ill. 470.
Indiana.— Beeson *v.* Carlton, 13 Ind. 354.
Maryland.— Brawner *v.* Franklin, 4 Gill 463.
North Carolina.— Tillery *v.* Land, 136 N. C. 537, 48 S. E. 824; Satterfield *v.* Riddick, 43 N. C. 265.
Pennsylvania.—McGinn *v.* Shaeffer, 7 Watts 412. See also Fritz *v.* Moyer, 10 Pa. Dist. 763.
Virginia.— Mustard *v.* Wohlford, 15 Gratt. 329, 76 Am. Dec. 209.
See 27 Cent. Dig. tit. "Infants," § 26.
Where a fraud has been practised on an infant in order to procure from him a contract for the sale of his land, a court of equity will neither compel him to execute the contract, nor will it require him to make compensation if the infant has been guilty of no fraud himself. Griffis *v.* Younger, 41 N. C. 520, 51 Am. Dec. 438.

32. Tillery *v.* Land, 136 N. C. 537, 48 S. E. 824. See *infra*, IV, D, 1.

33. Tillery *v.* Land, 136 N. C. 537, 48 S. E. 824.

34. Tillery *v.* Land, 136 N. C. 537, 48 S. E. 824.

35. McGinn *v.* Shaeffer, 7 Watts (Pa.) 412.

36. As to contracts generally see *infra*, V, E, 1.

37. **Must either affirm or disaffirm.**— Harty *v.* Harty, 2 La. 518.
Putting infants to their election.— Where an agreement is made for the quieting of mutual claims to real property between infants and adults, and compliance therewith is refused on the part of the infants, they may be put to their election either to confirm the agreement or to relinquish all claims thereunder. Overbach *v.* Heermance, Hopk. (N. Y.) 337, 14 Am. Dec. 546. Where a father having a life-estate in land, with remainder to his children, sold and conveyed the land in fee and gave the purchaser a bond to indemnify him against the claims of his children, the court refused to order the children, who were minors, to elect whether they would ratify or disaffirm the contract, in order to enable the assignee of the purchaser in case of disaffirmance, to commence a suit upon the bond of indemnity. Cauldwell *v.* Hannahan, McMull. Eq. (S. C.) 352.

38. *Alabama.*— McCarthy *v.* Nicrosi, 72 Ala. 332, 47 Am. Rep. 418.
Arkansas.— Vaughan *v.* Parr, 20 Ark. 600.
Louisiana.— Johnson *v.* Alden, 15 La. Ann. 505; Sarapure *v.* Debuys, 6 Mart. N. S. 18. See also Jamison *v.* Smith, 35 La. Ann. 609; State Bank *v.* Delery, 2 La. Ann. 649.
Maryland.— Monumental Bldg. Assoc. No. 2 *v.* Herman, 33 Md. 128.
Mississippi.— Allen *v.* Poole, 54 Miss. 323.
New Jersey.— Ownes *v.* Ownes, 23 N. J. Eq. 60.
North Carolina.—Armfield *v.* Tate, 29 N. C. 258.
Pennsylvania.— Dolph *v.* Hand, 156 Pa. St. 91, 27 Atl. 114, 36 Am. St. Rep. 25.
Virginia.— Birch *v.* Linton, 78 Va. 584, 49 Am. Rep. 381.
See 27 Cent. Dig. tit. "Infants," § 41.
A mortgage void as to infants cannot be ratified by them on attaining majority. Wetherill *v.* Harris, 67 Ind. 452.
When ratification impossible.— Where an infant creates an easement in his land, and afterward conveys the land, and ratifies the deed after attaining his majority, he cannot thereafter ratify the creation of the easement. McCarthy *v.* Nicrosi, 72 Ala. 332, 47 Am. Rep. 418. If a minor sells the same property twice, and after coming of age ratifies the second sale, this precludes him from ratifying the first sale. Derrick *v.* Kennedy, 4 Port. (Ala.) 41.
A guardian cannot ratify an unauthorized sale of his ward's land. Hobbs *v.* Nashville, etc., R. Co., 122 Ala. 602, 26 So. 139, 82 Am. St. Rep. 103.
A contract made by a stranger for the sale of an infant's estate may be ratified by the infant on coming of age. Livingston *v.* Jordan, 15 Fed. Cas. No. 8,415, Chase 454.

39. *Alabama.*— McCarthy *v.* Nicrosi, 72 Ala. 332, 47 Am. Rep. 418.
Maryland.— Monumental Bldg. Assoc. No. 2 *v.* Herman, 33 Md. 128.
Mississippi.— Allen *v.* Poole, 54 Miss. 323.
Pennsylvania.— Dolph *v.* Hand, 156 Pa. St. 91, 27 Atl. 114, 36 Am. St. Rep. 25.
Virginia.— Birch *v.* Linton, 78 Va. 584, 49 Am. Rep. 381.
See 27 Cent. Dig. tit. "Infants," § 41; and *infra*, IV, E.

40. Healy *v.* Rowan, 5 Gratt. (Va.) 414, 52 Am. Dec. 94. See also Lyne's Succession, 12 La. Ann. 155; Calmes *v.* Carruth, 12 Rob.

mortgages, etc., one to and the other from the infant, he cannot ratify that which he considers beneficial to him and disaffirm the other, but both must be either ratified or disaffirmed.[41]

2. Time For Ratification.[42] The power to ratify does not exist during infancy, but the ratification can be only after attaining majority,[43] unless perhaps in case the infant has been emancipated previous to that time.[44]

3. Necessity For Ratification.[45] From its very nature a deed, mortgage, etc.,

(La.) 663; Wilson *v.* Craighead, 6 Rob. (La.) 429.

Sale subject to ratification.— Where the father and sisters of a minor, acting in their own right and assuming to act for the minor, sold property in which all had a joint interest, subject to ratification of the contract by the minor when he became of age, his title was not divested until after ratification by him. Marty *v.* His Creditors, 5 Rob. (La.) 193.

41. *District of Columbia.*— Utermehle *v.* McGreal, 1 App. Cas. 359.

Kentucky.— Brashear *v.* Pusey, 7 Ky. L. Rep. 369.

Maine.— Dana *v.* Coombs, 6 Me. 89, 19 Am. Dec. 194; Hubbard *v.* Cummings, 1 Me. 11.

Massachusetts.— Ready *v.* Pinkham, 181 Mass. 351, 63 N. E. 887.

Michigan.— Langdon *v.* Clayson, 75 Mich. 204, 42 N. W. 805; Young *v.* McKee, 13 Mich. 552.

Minnesota.— U. S. Investment Corp. *v.* Ulrickson, 84 Minn. 14, 86 N. W. 613; Cogley *v.* Cushman, 16 Minn. 397.

Mississippi.— See Cocks *v.* Simmons, 57 Miss. 183.

Missouri.— Craig *v.* Van Bebber, 100 Mo. 584, 13 S. W. 906, 18 Am. St. Rep. 569.

Nebraska.— Uecker *v.* Koehn, 21 Nebr. 559, 32 N. W. 583, 59 Am. Rep. 849.

New Hampshire.— Heath *v.* West, 28 N. H. 101; Robbins *v.* Eaton, 10 N. H. 561; Roberts *v.* Wiggin, 1 N. H. 73, 8 Am. Dec. 38.

New York.— Walsh *v.* Powers, 43 N. Y. 23, 3 Am. Rep. 654; Kincaid *v.* Kincaid, 85 Hun 141, 32 N. Y. Suppl. 476; Lynde *v.* Budd, 2 Paige 191, 21 Am. Dec. 84; Ottman *v.* Moak, 3 Sandf. Ch. 431.

Ohio.— Curtiss *v.* McDougal, 26 Ohio St. 66; Robinson *v.* Bergholz, 4 Ohio Dec. (Reprint) 103, 1 Clev. L. Rep. 29.

Pennsylvania.— Kennedy *v.* Baker, 159 Pa. St. 146, 28 Atl. 252.

Vermont.— Weed *v.* Beebe, 21 Vt. 495; Richardson *v.* Boright, 9 Vt. 368; Bigelow *v.* Kinney, 3 Vt. 353, 21 Am. Dec. 589.

United States.— See MacGreal *v.* Taylor, 167 U. S. 688, 17 S. Ct. 961, 42 L. ed. 326.

England.— Thurston *v.* Nottingham Permanent Ben. Bldg. Soc., [1902] 1 Ch. 1, 71 L. J. Ch. 83, 86 L. T. Rep. N. S. 35, 50 Wkly. Rep. 179 [*affirmed* in [1903] A. C. 6, 67 J. P. 129, 72 L. J. Ch. 134, 87 L. T. Rep. N. S. 529, 51 Wkly. Rep. 273].

See 27 Cent. Dig. tit. "Infants," § 41.

Acts not forming part of same transaction.— Advances made to an infant for the purpose of erecting buildings on land purchased by him, to secure which he gives a mortgage, cannot be treated as forming one transaction with the purchase, and hence the mortgage is not binding on the infant, although he retains the land. Thurston *v.* Nottingham Permanent Ben. Bldg. Soc., [1902] 1 Ch. 1, 71 L. J. Ch. 83, 86 L. T. Rep. N. S. 35, 50 Wkly. Rep. 179 [*reversing* [1901] 1 Ch. 88, 83 L. T. Rep. N. S. 424, 49 Wkly. Rep. 56]. Where an owner of real estate gave a deed to his agent to be delivered on receipt of the cash, and payment was made by a building association which had taken a mortgage on the property from the vendee for the money loaned, and the deed was delivered at the same time that the mortgage was given to the building association, it was a borrowing of money by the vendee on his own account, and the mortgage was not a purchase-money mortgage. Citizens' Bldg., etc., Assoc. *v.* Arvin, 207 Pa. St. 293, 56 Atl. 870. See further Maupin *v.* Grady, 71 Mo. 278.

42. As to contracts generally see *infra*, V, E, 2.

43. *Alabama.*— McCarthy *v.* Nicrosi, 72 Ala. 332, 47 Am. Rep. 418; Flexner *v.* Dickerson, 72 Ala. 318. See also Hobbs *v.* Nashville, etc., R. Co., 122 Ala. 602, 26 So. 139, 82 Am. St. Rep. 103.

Arkansas.— Vaughan *v.* Parr, 20 Ark. 600.

Georgia.— Wimberley *v.* Jones, Ga. Dec. 91.

Kentucky.— Ingram *v.* Ison, 80 S. W. 787, 26 Ky. L. Rep. 48.

Louisiana.— Calmes *v.* Carruth, 12 Rob. 663; Sarapure *v.* Debuys, 6 Mart. N. S. 18.

Maryland.— Monumental Bldg. Assoc. No. 2 *v.* Herman, 33 Md. 128; Levering *v.* Heighe, 2 Md. Ch. 81.

Michigan.— Corey *v.* Burton, 32 Mich. 30.

New Hampshire.— Emmons *v.* Emmons, 16 N. H. 385.

New York.— Yates *v.* Lyon, 61 N. Y. 344 [*reversing* 61 Barb. 205].

North Carolina.— McCormic *v.* Leggett, 53 N. C. 425.

Pennsylvania.— Williams *v.* Baker, 71 Pa. St. 476.

South Carolina.— Ihley *v.* Padgett, 27 S. C. 300, 3 S. E. 468; Norris *v.* Vance, 3 Rich. 164.

Tennessee.— Scott *v.* Buchanan, 11 Humphr. 468; Wheaton *v.* East, 5 Yerg. 41, 26 Am. Dec. 251.

Virginia.— Healy *v.* Rowan, 5 Gratt. 414, 52 Am. Dec. 94.

Canada.—Foley *v.* Canada Permanent Loan, etc., Co., 4 Ont. 38.

See 27 Cent. Dig. tit. "Infants," § 42.

44. Lyne's Succession, 12 La. Ann. 155; Wilson *v.* Craighead, 6 Rob. (La.) 429.

45. As to contracts generally see *infra*, V, E, 3.

by or to an infant being voidable only, needs no positive confirmation but stands good until impeached by a proper party. In the first instance confirmation has no proper application to it, but when there is an effort to avoid the act it becomes important to inquire whether there has been a confirmation, for if so, the matter has passed beyond the control of the party and is no longer voidable.[46]

4. What Constitutes Ratification — a. In General.[47] There are three modes of affirming the voidable conveyances, mortgages, etc., of infants: (1) By express ratification;[48] (2) by the performance of acts from which an affirmance may reasonably be implied;[49] and, according to some authorities (3) by the omission to disaffirm within a reasonable time.[50] Excluding for the present a discussion of the third method, which will be treated later,[51] it may be laid down that if an express ratification is relied on, it must appear that the act of confirmation was direct and deliberate and done with the full knowledge that it was to have that effect,[52] while if an implied confirmation is relied on, this must appear from facts and circumstances tending to prove a recognition of the deed, mortgage, etc., and inconsistent with the idea of any intention to avoid it.[53] In order to constitute a ratification of a conveyance, mortgage, etc., executed by an infant during his minority, there must be some positive and clear act performed for the purpose of ratification,[54] with a full knowledge of its consequences,[55] and an intent to ratify[56] what is known to be voidable.[57] It is not necessary, however, that there should be a deed or other instrument of ratification,[58] or that there should be a reacknowledgment of the instrument executed during infancy;[59] but any act by which the infant after becoming of age assents to or recognizes as valid his act performed

46. Ihley *v.* Padgett, 27 S. C. 300, 3 S. E. 468. See also Hieatt *v.* Dixon, (Tex. Civ. App. 1894) 26 S. W. 263. But see Cason *v.* Hubbard, 38 Miss. 35.

47. As to contracts generally see *infra*, V, E, 7, a.

48. *Connecticut.*— Kline *v.* Beebe, 6 Conn. 494.

Louisiana.— See Louisiana Bank *v.* Delery, 2 La. Ann. 648.

Maryland.— Levering *v.* Heighe, 2 Md. Ch. 81.

Pennsylvania.— Dolph *v.* Hand, 156 Pa. St. 91, 27 Atl. 114, 36 Am. St. Rep. 25.

South Carolina.— Ihley *v.* Padgett, 27 S. C. 300, 3 S. E. 468.

Tennessee.—Scott *v.* Buchanan, 11 Humphr. 468.

See 27 Cent. Dig. tit. "Infants," § 44.

Express ratification may be by deed, release, or declaration. Dolph *v.* Hand, 156 Pa. St. 91, 27 Atl. 114, 36 Am. St. Rep. 25.

49. Kline *v.* Beebe, 6 Conn. 494; Dolph *v.* Hand, 156 Pa. St. 91, 27 Atl. 114, 36 Am. St. Rep. 25; Scott *v.* Buchanan, 11 Humphr. (Tenn.) 468. See also Louisiana Bank *v.* Delery, 2 La. Ann. 648.

An act which would make it inequitable to impeach a marriage settlement may give efficiency thereto. Levering *v.* Heighe, 2 Md. Ch. 81.

50. Kline *v.* Beebe, 6 Conn. 494; Dolph *v.* Hand, 156 Pa. St. 91, 27 Atl. 114, 36 Am. St. Rep. 25; Ihley *v.* Padgett, 27 S. C. 300, 3 S. E. 468; Scott *v.* Buchanan, 11 Humphr. (Tenn.) 468.

51. See *infra*, IV, D, 4, b.

52. Scott *v.* Buchanan, 11 Humphr. (Tenn.) 468.

53. Lacy *v.* Pixler, 120 Mo. 383, 25 S. W. 206; Huth *v.* Carondelet Mar. R., etc., Co., 56 Mo. 202; Scott *v.* Buchanan, 11 Humphr. (Tenn.) 468.

54. Illinois Land, etc., Co. *v.* Bonner, 75 Ill. 315 (acts of heir of infant held not to amount to affirmance of infant's conveyance); Boody *v.* McKenney, 23 Me. 517.

55. Davidson *v.* Young, 38 Ill. 145.

56. Bagley *v.* Fletcher, 44 Ark. 153; Davidson *v.* Young, 38 Ill. 145; Hoffert *v.* Miller, 86 Ky. 572, 6 S. W. 447, 9 Ky. L. Rep. 732; Craig *v.* Van Bebber, 100 Mo. 584, 13 S. W. 906, 18 Am. St. Rep. 569.

57. Bagley *v.* Fletcher, 44 Ark. 153; Davidson *v.* Young, 38 Ill. 145; Ridgeway *v.* Herbert, 150 Mo. 606, 51 S. W. 1040, 73 Am. St. Rep. 464; Rainsford *v.* Rainsford, Speers Eq. (S. C.) 385. But see *infra*, V, E, 4, d.

Presumption.— It must be presumed that an adult who affirms a deed executed by him during infancy does so with knowlege of his rights and of his exemption from liability. Foley *v.* Canada Permanent Loan, etc., Co., 4 Ont. 38.

58. *Alabama.*—West *v.* Penny, 16 Ala. 186; Fant *v.* Cathcart, 8 Ala. 725.

Connecticut.— Kline *v.* Beebe, 6 Conn. 494.

Kentucky.— Hoffert *v.* Miller, 86 Ky. 572, 6 S. W. 447, 9 Ky. L. Rep. 732.

Missouri.— Craig *v.* Van Bebber, 100 Mo. 584, 13 S. W. 906, 18 Am. St. Rep. 569.

North Carolina.— Houser *v.* Reynolds, 2 N. C. 143.

Tennessee.—Scott *v.* Buchanan, 11 Humphr. 468; Wheaton *v.* East, 5 Yerg. 41, 26 Am. Dec. 251.

See 27 Cent. Dig. tit. "Infants," § 44.

Ratification by subsequent conveyance, etc., see *infra*, IV, D, 4, d.

59. Hoffert *v.* Miller, 86 Ky. 572, 6 S. W. 447, 9 Ky. L. Rep. 732.

during minority will be sufficient to confirm the same and preclude him from afterward disaffirming it.[60] A conveyance by the infant or by a person assuming to act for him may be ratified by the act of the infant after majority in suing for the price,[61] receiving the proceeds or a part thereof,[62] or otherwise receiving benefits under the deed,[63] or renting the land from the grantee.[64] A verbal confirmation of a deed after the infant reaches majority is sufficient,[65] but mere declarations or a promise upon a contingency to make a deed of affirmance will not confirm the deed.[66] A mortgage may be ratified by paying the interest after attaining majority,[67] or procuring from the mortgagee releases of portions of the mortgaged premises,[68] or, when the consideration is executory, receiving a part thereof after attaining majority,[69] or by suffering a complaint in foreclosure proceedings brought after majority was attained to be taken as confessed.[70] A lease may be affirmed by accepting the rent.[71] A declaration of trust by an infant is affirmed where, after his majority, he recognizes the fact that he holds the property in trust.[72] A voidable purchase of property by an infant may be confirmed by acts which might not confirm a sale by him.[73] Such a purchase is ratified where the late infant

60. *Alabama.*— McCarthy *v.* Nicrosi, 72 Ala. 332, 47 Am. Rep. 418.

Illinois.— Barlow *v.* Robinson, 174 Ill. 317, 51 N. E. 1045.

Michigan.— Carrell *v.* Potter, 23 Mich. 377, suit to enforce contract of purchase.

New York.— Kincaid *v.* Kincaid, 85 Hun 141, 32 N. Y. Suppl. 476 [*affirmed* in 157 N. Y. 715, 53 N. E. 1126]. See also Eagan *v.* Scully, 29 N. Y. App. Div. 617, 51 N. Y. Suppl. 680 [*affirmed* in 173 N. Y. 581, 65 N. E. 1116].

North Carolina.— McCormic *v.* Leggett, 53 N. C. 425.

Pennsylvania.— Whichcote *v.* Lyle, 28 Pa. St. 73, ratification by successors in estate.

Tennessee.—Scott *v.* Buchanan, 11 Humphr. 468; Wheaton *v.* East, 5 Yerg. 41, 26 Am. Dec. 251.

Texas.— Houston *v.* Houston, (1891) 18 S. W. 688.

Canada.— See Foley *v.* Canada Permanent Loan, etc., Co., 4 Ont. 38.

See 27 Cent. Dig. tit. "Infants," § 44.

Slight circumstances demonstrating assent bind the late infant. Ihley *v.* Padgett, 27 S. C. 300, 3 S. E. 468; Cheshire *v.* Barrett, 4 McCord (S. C.) 241, 17 Am. Dec. 735.

Confirmation may be by act of less solemn character than avoidance. Irvine *v.* Irvine, 9 Wall. (U. S.) 617, 19 L. ed. 800.

Evidence as to declarations.— On an issue whether or not an infant had ratified a conveyance to her mother after arriving at her majority, declarations made by her to strangers were not competent, since such declarations would only be admissible when made to, or in the presence of, the person who was to receive the benefit of the ratification. Sayles *v.* Christie, 187 Ill. 420, 58 N. E. 480.

Where property of an infant is sold by another person, acts done by the infant after arriving at full age will not raise an implied affirmation of such sale unless it be made clearly to appear that he has received an equivalent either in money or property for the property sold. Norris *v.* Wait, 2 Rich. (S. C.) 148, 44 Am. Dec. 283.

61. Harty *v.* Harty, 2 La. 518, although he recover but part.

62. *Missouri.*— Lacy *v.* Pixler, 120 Mo. 383, 25 S. W. 206; Highley *v.* Barron, 49 Mo. 103.

Ohio.— Bohart *v.* Atkinson, 14 Ohio 228.

South Carolina.— Ihley *v.* Padgett, 27 S. C. 300, 3 S. E. 468; Belton *v.* Briggs, 4 Desauss. Eq. (S. C.) 465, sale by persons acting for infant.

Tennessee.— O'Conner *v.* Carver, 12 Heisk. 436.

Virginia.— Darraugh *v.* Blackford, 84 Va. 509, 5 S. E. 542.

See 27 Cent. Dig. tit. "Infants," § 44.

But *compare* Ackley *v.* Dygert, 33 Barb. (N. Y.) 176.

63. Wimberly *v.* Jones, Ga. Dec. 91; McCormic *v.* Leggett, 53 N. C. 425.

64. Ingram *v.* Ison, 80 S. W. 787, 26 Ky. L. Rep. 48.

Lease of part evidence of affirmance of deed for whole.— Irvine *v.* Irvine, 9 Wall. (U. S.) 617, 19 L. ed. 800.

65. Houser *v.* Reynolds, 2 N. C. 114, 1 Am. Dec. 551.

66. Clamorgan *v.* Lane, 9 Mo. 446. An offer to make a deed of ratification upon the condition that the unpaid purchase-price is paid or secured is no evidence of a confirmation, but shows rather a disposition to disaffirm should the proposed condition not be performed. Craig *v.* Van Bebber, 100 Mo. 584, 13 S. W. 906, 18 Am. St. Rep. 569.

67. American Mortg. Co. *v.* Wright, 101 Ala. 658, 14 So. 399.

68. Wilson *v.* Darragh, 7 N. Y. Suppl. 810.

69. Keegan *v.* Cox, 116 Mass. 289.

70. Flinn *v.* Powers, 36 How. Pr. (N. Y.) 289 [*affirming* 54 Barb. 550, 35 How. Pr. 279].

71. Lacy *v.* Pixler, 120 Mo. 383, 25 S. W. 206; Huth *v.* Carondelet Mar. R., etc., Co., 56 Mo. 202; Smith *v.* Low, 1 Atk. 489, 26 Eng. Reprint 310.

72. Ownes *v.* Ownes, 23 N. J. Eq. 60.

73. Middleton *v.* Hoge, 5 Bush (Ky.) 478, holding that in the case at bar the infant had confirmed his purchase: (1) By a recorded

pays part of the purchase-money,[74] or promises to pay a note given for the price,[75] or enters upon the property.[76]

b. Acquiescence or Failure to Disaffirm.[77] It has been frequently laid down that the mere acquiescence of the late infant in his deed, mortgage, etc., or his failure to disaffirm the same[78] within a reasonable time after attaining his majority,[79] with full knowledge of his privilege of avoidance,[80] may fairly be regarded as equivalent to an act of affirmance amounting in law and in fact to a ratifica-

deed proclaiming his mother as the true and only owner of the land; (2) by his continued use of it as her property, held for his benefit; (3) by never offering an avoidance or rescission and striving repeatedly to sell to some other person; (4) by selling to the son of the original vendor for an amount considerably less than he had declared to be the minimum for which the vendor could have it back; and (5) by suing for damages for an alleged fraud and therefore waiving an avoidance on the plea of infancy.

74. Dewey *v.* Burbank, 77 N. C. 259; Hook *v.* Donaldson, 9 Lea (Tenn.) 56; Whittingham *v.* Murdy, 60 L. T. Rep. N. S. 956. But see Rapid Transit Land Co. *v.* Sanford, (Tex. Civ. App. 1893) 24 S. W. 587.

75. Armfield *v.* Pate, 29 N. C. 258.

76. McCarty *v.* Woodstock Iron Co., 92 Ala. 463, 8 So. 417, 12 L. R. A. 136.

77. See *infra*, IV, E, 2, b.

As to contracts generally see *infra*, V, E, 7, b.

78. Terry *v.* McClintock, 41 Mich. 492, 2 N. W. 787, failure to oppose foreclosure of mortgage.

79. *California.*— Hastings *v.* Dollarhide, 24 Cal. 195.

Connecticut.— Kline *v.* Beebe, 6 Conn. 494.

Illinois.— See Blankenship *v.* Stout, 25 Ill. 132.

Louisiana.— Jamison *v.* Smith, 35 La. Ann. 609.

Minnesota.— Goodnow *v.* Empire Lumber Co., 31 Minn. 468, 18 N. W. 283, 47 Am. Rep. 798.

Nebraska.— O'Brien *v.* Gaslin, 20 Nebr. 347, 30 N. W. 274; Ward *v.* Laferty, 19 Nebr. 429, 27 N. W. 393.

North Carolina.— Weeks *v.* Wilkins, 134 N. C. 516, 47 S. E. 24; Hobdy *v.* Edgerton, 3 N. C. 79.

Pennsylvania.— Dolph *v.* Hand, 156 Pa. St. 91, 27 Atl. 114, 36 Am. St. Rep. 25. But *compare* Urban *v.* Grimes, 2 Grant 96.

South Carolina.— Ihley *v.* Padgett, 27 S. C. 300, 3 S. E. 468.

Tennessee.— Lancaster *v.* Lancaster, 13 Lea 126; Scott *v.* Buchanan, 11 Humphr. 468; Summers *v.* Wilson, 2 Coldw. 469; Mission Ridge Land Co. *v.* Nixon, (Ch. App. 1897) 48 S. W. 405.

Texas.— Searcy *v.* Hunter, 81 Tex. 644, 47 S. W. 372, 26 Am. St. Rep. 837; Bingham *v.* Barley, 55 Tex. 281, 40 Am. Rep. 801; Hieatt *v.* Dixon, (Civ. App. 1894) 26 S. W. 263. See also Askey *v.* Williams, 74 Tex. 294, 11 S. W. 1101, 5 L. R. A. 176.

Vermont.— Bigelow *v.* Kinney, 3 Vt. 353, 21 Am. Dec. 589.

Washington.— Johnston *v.* Gerry, 34 Wash. 524, 76 Pac. 258, 77 Pac. 503.

England.— *In re* Constantinople, etc., Hotel Co., L. R. 5 Ch. 302, 39 L. J. Ch. 679, 22 L. T. Rep. N. S. 424, 18 Wkly. Rep. 394; *In re* Blakely Ordnance Co., L. R. 4 Ch. 31, 17 Wkly. Rep. 65; *In re* Norwegian Charcoal Iron Co., L. R. 7 Eq. 363, 39 L. J. Ch. 199, 21 L. T. Rep. N. S. 811, 18 Wkly. Rep. 331; Ashton *v.* McDougall, 5 Beav. 56, 6 Jur. 447, 11 L. J. Ch. 344, 49 Eng. Reprint 497; Doe *v.* Smith, 6 East 530, 2 Smith K. B. 570, 2 T. R. 436; Holmes *v.* Blogg, 1 Moore C. P. 466, 8 Taunt. 35, 4 E. C. L. 29.

Canada.— McDonald *v.* Restigouche Salmon Club, 33 N. Brunsw. 472 [*overruling* Doe *v.* Charlton, 21 N. Brunsw. 119; Doe *v.* Lee, 13 N. Brunsw. 486]; Foley *v.* Canada Permanent Loan, etc., Co., 4 Ont. 38; Featherston *v.* McDonell, 15 U. C. C. P. 162.

See 27 Cent. Dig. tit. "Infants," § 45.

Illustrations.— It has been held that ratification will result from delay or acquiescence for four months (Holmes *v.* Blogg, 1 Moore C. P. 466, 8 Taunt. 35, 4 E. C. L. 29), one year (Doe *v.* Smith, 6 East 530, 2 Smith K. B. 570, 2 T. R. 436), fourteen months (*In re* Constantinople, etc., Hotel Co., L. R. 5 Ch. 302, 39 L. J. Ch. 679, 22 L. T. Rep. N. S. 424, 18 Wkly. Rep. 394), two years (*In re* Norwegian Charcoal Iron Co., L. R. 9 Eq. 363, 39 L. J. Ch. 199, 21 L. T. Rep. N. S. 811, 18 Wkly. Rep. 331), over three years (Summers *v.* Wilson, 2 Coldw. (Tenn.) 469), three and a half years (Goodnow *v.* Empire Lumber Co., 31 Minn. 468, 18 N. W. 283, 47 Am. Rep. 798), three or four years (Locknane *v.* Hoskins, 69 S. W. 719, 24 Ky. L. Rep. 639), six years (Emmons *v.* Murray, 16 N. H. 385), nine years (Teipel *v.* Vanderweier, 36 Minn. 443, 31 N. W. 934; Bingham *v.* Barley, 55 Tex. 281, 40 Am. Rep. 801), twelve years (Tunison *v.* Chamblin, 88 Ill. 378), fourteen years (Ihley *v.* Padgett, 27 S. C. 300, 3 S. E. 468), and fifteen years (Dolph *v.* Hand, 156 Pa. St. 91, 27 Atl. 114, 36 Am. St. Rep. 25; Featherston *v.* McDonell, 15 U. C. C. P. 162). But a delay of two and a half months is not sufficient. Whalls *v.* Learn, 15 Ont. 481.

Three years after majority is a reasonable time within which an infant must disaffirm a deed. Blankenship *v.* Stout, 25 Ill. 132; Gaskins *v.* Allen, 137 N. C. 426, 49 S. E. 919.

Forgetfulness of having made a deed during minority furnishes no excuse for protracted delay in disaffirming it. Tunison *v.* Chamblin, 88 Ill. 378.

80. Dolph *v.* Hand, 156 Pa. St. 91, 27 Atl. 114, 36 Am. St. Rep. 25.

tion.[81] But on the other hand there are a number of cases laying it down as the rule that, at least where the property received has been parted with, or the consideration used or consumed by the infant during minority,[82] mere inaction or acquiescence of the infant will not amount to ratification or deprive him of his right to disaffirm;[83] but there must be some positive and unequivocal act performed for the purpose of ratification which is inconsistent with the subsequent right to repudiate,[84] unless the acquiescence has continued so long as to raise the bar

81. *California.*— Hastings *v.* Dollarhide, 24 Cal. 195.

Connecticut.— Kline *v.* Beebe, 6 Conn. 494.

Kentucky.— Locknane *v.* Hoskins, 69 S. W. 719, 24 Ky. L. Rep. 639, especially after the rights of creditors have intervened.

Minnesota.— Goodnow *v.* Empire Lumber Co., 31 Minn. 468, 18 N. W. 283, 47 Am. Rep. 798.

Nebraska.— Ward *v.* Laferty, 19 Nebr. 429, 27 N. W. 393.

North Carolina.— See Hobdy *v.* Edgerton, 3 N. C. 79.

Pennsylvania.— Dolph *v.* Hand, 156 Pa. St. 91, 27 Atl. 114, 36 Am. St. Rep. 25.

South Carolina.— Kinard *v.* Proctor, 68 S. C. 279, 47 S. E. 390, acquiescence and accepting and retaining part of purchase-money.

Tennessee.— Summers *v.* Wilson, 2 Coldw. 469.

Texas.— Bingham *v.* Barley, 55 Tex. 281, 40 Am. Rep. 801.

England.— *In re* Constantinople, etc., Hotel Co., L. R. 5 Ch. 302, 39 L. J. Ch. 679, 22 L. T. Rep. N. S. 424, 18 Wkly. Rep. 394; *In re* Blakely Ordnance Co., L. R. 4 Ch. 31, 17 Wkly. Rep. 65; *In re* Norwegian Charcoal Iron Co., L. R. 9 Eq. 363, 39 L. J. Ch. 199, 21 L. T. Rep. N. S. 811, 18 Wkly. Rep. 331; Ashton *v.* McDougall, 5 Beav. 56, 6 Jur. 447, 11 L. J. Ch. 344, 49 Eng. Reprint 497; Doe *v.* Smith, 6 East 530, 2 Smith K. B. 570, 2 T. R. 436; Holmes *v.* Blogg, 1 Moore C. P. 466, 8 Taunt. 35, 4 E. C. L. 29.

Canada.— McDonald *v.* Restigouche Salmon Club, 33 N. Brunsw. 472 [*overruling* Doe *v.* Charlton, 21 N. Brunsw. 119; Doe *v.* Lee, 13 N. Brunsw. 486]; Foley *v.* Canada Permanent Loan, etc., Co., 4 Ont. 38; Featherston *v.* McDonell, 15 U. C. C. P. 162.

See 27 Cent. Dig. tit. "Infants," § 45.

In the case of a married woman who executes a deed while an infant, the presumption of ratification from long acquiescence will not arise so long as the disability of coverture continues. Stull *v.* Harris, 51 Ark. 294, 11 S. W. 104, 2 L. R. A. 741; Gaskins *v.* Allen, 137 N. C. 426, 49 S. E. 919. See *infra*, IV, E, 2, e.

82. In such case the late infant's delay in electing to disaffirm neither benefits him nor injures the other party. American Freehold Land Mortg. Co. *v.* Dykes, 111 Ala. 178, 18 So. 292, 56 Am. St. Rep. 38.

83. *Alabama.*— American Freehold Land Mortg. Co. *v.* Dykes, 111 Ala. 178, 18 So. 292, 56 Am. St. Rep. 38; Hill *v.* Nelms, 86 Ala. 442, 5 So. 796; McCarthy *v.* Nicrosi, 72 Ala. 332, 47 Am. Rep. 418. *Comapre* Voltz *v.* Voltz, 75 Ala. 555.

Arkansas.— Bagley *v.* Fletcher, 44 Ark. 153; Vaughan *v.* Parr, 20 Ark. 600.

Kentucky.— Hoffert *v.* Miller, 86 Ky. 572, 6 S. W. 447, 9 Ky. L. Rep. 732.

Maine.— Boody *v.* McKenney, 23 Me. 517.

Michigan.— Prout *v.* Wiley, 28 Mich. 164.

Mississippi.— Shipp *v.* McKee, 80 Miss. 741, 31 So. 197, 32 So. 281, 92 Am. St. Rep. 616; Allen *v.* Poole, 54 Miss. 323; Wallace *v.* Latham, 52 Miss. 291. See also Thompson *v.* Strickland, 52 Miss. 574.

Missouri.— Thomas *v.* Pullis, 56 Mo. 211; Huth *v.* Carondelet Mar. R., etc., Co., 56 Mo. 202.

New York.— Green *v.* Green, 69 N. Y. 553, 25 Am. Rep. 233 [*affirming* 7 Hun 492]; McMurray *v.* McMurray, 66 N. Y. 175; Eagan *v.* Scully, 29 N. Y. App. Div. 617, 51 N. Y. Suppl. 680 [*affirmed* in 173 N. Y. 581, 65 N. E. 1116]; O'Rourke *v.* Hall, 38 N. Y. App. Div. 534, 56 N. Y. Suppl. 471; Foley *v.* Mutual L. Ins. Co., 64 Hun 63, 18 N. Y. Suppl. 615; Voorhies *v.* Voorhies, 24 Barb. 150. But *compare* Aldrich *v.* Lunk, 48 Hun 367, 1 N. Y. Suppl. 541 (where there was an acquiescence for nearly nineteen years after reaching majority); Jones *v.* Butler, 30 Barb. 641.

Ohio.— Cresinger *v.* Welch, 15 Ohio 156, 45 Am. Dec. 565.

Virginia.— Birch *v.* Linton, 78 Va. 584, 49 Am. Rep. 381; Wilson *v.* Branch, 77 Va. 65, 46 Am. Rep. 709.

West Virginia.— Gillespie *v.* Bailey, 12 W. Va. 70, 29 Am. Rep. 445. But *compare* Trader *v.* James, 23 W. Va. 100.

United States.— Irvine *v.* Irvine, 9 Wall. 617, 19 L. ed. 800; Wells *v.* Seixes, 24 Fed. 82, 23 Blatchf. 242.

See 27 Cent. Dig. tit. "Infants," § 45.

The reason is that by his silent acquiescence in a conveyance by himself, the late infant occasions no injury to other persons and secures no benefit or new rights to himself. McCarthy *v.* Nicrosi, 72 Ala. 332, 47 Am. Rep. 418; Jackson *v.* Carpenter, 11 Johns. (N. Y.) 539; Tucker *v.* Moreland, 10 Pet. (U. S.) 58, 9 L. ed. 345.

Distinction between conveyance and lease. — See Baker *v.* Kennett, 54 Mo. 82.

84. *Alabama.*— American Freehold Land Mortg. Co. *v.* Dykes, 111 Ala. 178, 17 So. 292, 56 Am. St. Rep. 38; McCarthy *v.* Nicrosi, 72 Ala. 332, 47 Am. Rep. 418; Eureka Co. *v.* Edwards, 71 Ala. 248, 46 Am. Rep. 314.

Kentucky.— Hoffert *v.* Miller, 86 Ky. 572, 6 S. W. 447, 9 Ky. L. Rep. 732.

Maine.— Boody *v.* McKenney, 23 Me. 517.

Mississippi.— Allen *v.* Poole, 54 Miss. 323.

Virginia.— Birch *v.* Linton, 78 Va. 584, 49 Am. Rep. 381.

of the statute of limitations,[85] or was under circumtances requiring the party to decide and act as to affirmance or disaffirmance,[86] as where the purchaser was with the late infant's knowledge expending his money in improving the property.[87]

c. Retention or Disposal of Property or Consideration.[88] Where an infant who has purchased, sold, exchanged, mortgaged, or otherwise dealt with property, at the time of reaching his majority, still has the property or consideration received by him,[89] his subsequent disposal of the same to a third person,[90] or retaining it and treating it as his own for an unreasonable time without electing to disaffirm,[91] will amount to a ratification.

See 27 Cent. Dig. tit. "Infants," § 45.

85. *Alabama.*— American Freehold Land Mortg. Co. *v.* Dykes, 111 Ala. 178, 17 So. 292, 56 Am. St. Rep. 38; McCarthy *v.* Nicrosi, 72 Ala. 332, 47 Am. Rep. 418; Eureka Co. *v.* Edwards, 71 Ala. 248, 46 Am. Rep. 314.

Kentucky.— Hoffert *v.* Miller, 86 Ky. 572, 6 S. W. 447, 9 Ky. L. Rep. 732.

Mississippi.— Shipp *v.* McKee, 80 Miss. 741, 31 So. 197, 32 So. 281, 92 Am. St. Rep. 616; Wallace *v.* Latham, 52 Miss. 291.

New York.— Green *v.* Green, 69 N. Y. 553, 25 Am. Rep. 233; McMurray *v.* McMurray, 66 N. Y. 175; Eagan *v.* Scully, 29 N. Y. App. Div. 617, 51 N. Y. Suppl. 680 [*affirmed* in 173 N. Y. 580, 65 N. E. 1116]; Foley *v.* Mutual L. Ins. Co., 64 Hun 63, 18 N. Y. Suppl. 615; Voorhies *v.* Voorhies, 24 Barb. 150.

United States.— Wells *v.* Seixes, 24 Fed. 82, 23 Blatchf. 242.

See 27 Cent. Dig. tit. "Infants," § 45; and *supra*, note 84.

86. Shipp *v.* McKee, 80 Miss. 741, 31 So. 197, 32 So. 281, 92 Am. St. Rep. 616; Wallace *v.* Latham, 52 Miss. 291.

87. Allen *v.* Poole, 54 Miss. 323. See also Wallace *v.* Lewis, 4 Harr. (Del.) 75; Thompson *v.* Strickland, 52 Miss. 574.

88. As to contracts generally see *infra*, V, E, 7, c.

89. American Freehold Land Mortg Co. *v.* Dykes, 111 Ala. 178, 18 So. 292, 56 Am. St. Rep. 38; Walsh *v.* Powers, 43 N. Y. 23, 3 Am. Rep. 654.

Where property or consideration disposed of during infancy see *supra*, IV, D, 5.

90. *Alabama.*— McCarty *v.* Woodstock Iron Co., 92 Ala. 463, 8 So. 417, 12 L. R. A. 136; Flexner *v.* Dickerson, 72 Ala. 318; Manning *v.* Johnson, 26 Ala. 446, 62 Am. Dec. 732.

Indiana.— Buchanan *v.* Hubbard, 119 Ind. 187, 21 N. E. 538.

Kentucky.— Bull *v.* Sevier, 88 Ky. 515, 11 S. W. 506, 11 Ky. L. Rep. 32.

Maine.— Boody *v.* McKenney, 23 Me. 517 (personalty); Hubbard *v.* Cummings, 1 Me. 11.

Missouri.— See Lacy *v.* Pixler, 120 Mo. 383, 25 S. W. 206.

Nebraska.— Uecker *v.* Koehn, 21 Nebr. 559, 32 N. W. 583, 59 Am. Rep. 849.

New Jersey.— Williams *v.* Mabee, 7 N. J. Eq. 500.

Texas.— Harris *v.* Musgrove, 59 Tex. 401.

Utah.— Whittemore *v.* Cope, 11 Utah 344, 40 Pac. 256.

United States.— MacGreal *v.* Taylor, 167 U. S. 688, 17 S. Ct. 961, 42 L. ed. 326.

Canada.— Miller *v.* Ostrander, 12 Grant Ch. (U. C.) 349.

See 27 Cent. Dig. tit. "Infants," § 46.

91. *Alabama.*— American Freehold Land Mortg. Co. *v.* Dykes, 111 Ala. 178, 18 So. 292, 56 Am. St. Rep. 38; Flexner *v.* Dickerson, 72 Ala. 318; Manning *v.* Johnson, 26 Ala. 446, 62 Am. Dec. 732.

Connecticut.— See Kline *v.* Beebe, 6 Conn. 494.

Georgia.— McKamy *v.* Cooper, 81 Ga. 679, 8 S. E. 312.

Louisiana.— Taylor *v.* Rundell, 2 La. Ann. 367.

Maine.— Boody *v.* McKenney, 23 Me. 517; Hubbard *v.* Cummings, 1 Me. 11. See also Dana *v.* Coombs, 6 Me. 89, 19 Am. Dec. 194.

Mississippi.— Ellis *v.* Alford, 64 Miss. 8, 1 So. 155; Brantley *v.* Wolf, 60 Miss. 420.

New Hampshire.— Emmons *v.* Murray, 16 N. H. 385 (acquiescence and possession under deed, together with declaration showing intent to ratify); Robbins *v.* Eaton, 10 N. H. 561.

New York.— Henry *v.* Root, 33 N. Y. 526; Lynde *v.* Budd, 2 Paige 191, 21 Am. Dec. 84. See also Kincaid *v.* Kincaid, 32 N. Y. Suppl. 476.

North Carolina.— Dewey *v.* Burbank, 77 N. C. 259; Armfield *v.* Tate, 29 N. C. 258.

Ohio.— See Hardman *v.* Cincinnati, etc., R. Co., 9 Ohio Dec. (Reprint) 578, 15 Cinc. L. Bul. 164.

South Carolina.— Ihley *v.* Padgett, 27 S. C. 300, 3 S. E. 468; Cheshire *v.* Barrett, 4 McCord 241, 17 Am. Dec. 735. But *compare* Rainsford *v.* Rainsford, Speers Eq. 385, partition.

Utah.— Whittemore *v.* Cope, 11 Utah 344, 40 Pac. 256, parol partition.

United States.— MacGreal *v.* Taylor, 167 U. S. 688, 17 S. Ct. 961, 42 L. ed. 326.

England.— Cecil *v.* Salisbury, 2 Vern. Ch. 224, 23 Eng. Reprint 745.

Canada.— Miller *v.* Ostrander, 12 Grant Ch. (U. C.) 349.

See 27 Cent. Dig. tit. "Infants," § 46.

Retaining possession of leased premises for some time after attaining majority works a ratification. McClure *v.* McClure, 74 Ind. 108; Ihley *v.* Padgett, 27 S. C. 300, 3 S. E. 468; Cheshire *v.* Barrett, 4 McCord (S. C.) 241, 17 Am. Dec. 735; Baxter *v.* Bush, 29 Vt. 465, 70 Am. Dec. 429. But *compare* Flexner *v.* Dickerson, 72 Ala. 318.

d. Written Instruments Showing Ratification. The ratification may be by a written instrument,[92] which expressly or by necessary implication recognizes as valid the act done during infancy.[93] Where one who has conveyed land while an infant executes, after his arrival at majority, a second deed for the same land to the same grantee, this operates as a ratification of the first deed.[94] So also a deed, mortgage, or other similar instrument executed by an infant is ratified where, after attaining his majority, he reacknowledges[95] or redelivers the same.[96] The execution by an adult of a will directing that all his just debts be paid has been held a ratification of a mortgage executed by him during infancy.[97]

5. Effect of Ratification.[98] A ratification by the late infant gives to the transaction the same validity as though he had been of full age at the time.[99]

Taking new lease.— In the case of a lease by an infant, the taking of a new lease for another year of the same land after the expiration of the old one would not come within the influence of this principle. Flexner *v.* Dickerson, 72 Ala. 318.

Retaining proceeds of land purchased and resold during infancy.— The retention by a person, after he has reached the age of twenty-one, of the proceeds of land which had been purchased and sold by him while an infant, is not an act in affirmance of the contract so as to render him liable upon his covenant to pay a mortgage to which the lands were subject at the time of his purchase, and which by the deed he had agreed to pay as part of the consideration. Walsh *v.* Powers, 43 N. Y. 23, 3 Am. Rep. 654.

Retention not sufficient to constitute ratification.— Where plaintiff, on attaining her majority, promptly notified the vendor of her election to rescind an unauthorized purchase made for her by her guardian, and offered to reconvey on repayment of her money advanced, and within three months brought an action for that purpose, her retention of the property in the meantime was not a ratification of the purchase. Scott *v.* Scott, 29 S. C. 414, 7 S. E. 811.

Infants upon whose lands an invalid mortgage has been placed by a trustee to erect buildings thereon do not ratify the mortgage by taking possession of the lands on attaining full age. Pitcher *v.* Carter, 4 Sandf. Ch. (N. Y.) 1.

92. Black *v.* Hills, 36 Ill. 376, 87 Am. Dec. 224.

Instrument of ratification within registration laws.— Black *v.* Hills, 36 Ill. 376, 87 Am. Dec. 224, where the original deed was recorded but the ratification was not.

Affirmance by married woman.— Where a married woman during her minority executes a mortgage on land, she cannot affirm the mortgage, after she attains her majority and during her coverture, by an instrument not executed in the manner provided by statute for the conveyance of land by married women. Walton *v.* Gaines, 94 Tenn. 420, 29 S. W. 458.

93. See Watkins *v.* Wassell, 15 Ark. 73 (holding that where a minor executes a deed of conveyance of realty, and on arriving at age, jointly with his grantee executes a deed of mortgage to secure a debt of the grantee, such act is an affirmance of the conveyance); Story *v.* Johnson, 5 L. J. Exch. 9, 2 Y. & C. Exch. 586.

Illustrations.— An infant who has mortgaged his property ratifies the mortgage where, after reaching his majority, he conveys the property subject to the mortgage (Losey *v.* Bond, 94 Ind. 67; Boston Bank *v.* Chamberlin, 15 Mass. 220; Allen *v.* Poole, 54 Miss. 323), or executes another mortgage on the land reciting that the mortgage given during minority is a prior lien (Ward *v.* Anderson, 111 N. C. 115, 15 S. E. 933).

94. Eagle Fire Co. *v.* Lent, 6 Paige (N. Y.) 635 [*affirming* 1 Edw. 301]; Cox *v.* McGowan, 116 N. C. 131, 21 S. E. 108. Where a deed executed after reaching majority refers to a deed made while an infant and recites a design to confirm the agreement witnessed by the first deed, it is a ratification. Phillips *v.* Green, 5 T. B. Mon. (Ky.) 344.

A deed of assignment of the property, executed by the infant, with the others interested, several months after becoming of age, is sufficient. Keller *v.* Cooper, 12 Ky. L. Rep. 188.

A deed by a married woman, not properly executed, and with no probate, or privy examination taken, is no ratification of a prior deed executed by her while a minor. Gaskins *v.* Allen, 137 N. C. 426, 49 S. E. 919.

95. Blair *v.* Whittaker, 31 Ind. App. 664, 69 N. E. 182; Palmer *v.* Miller, 25 Barb. (N. Y.) 399; Murray *v.* Shanklin, 20 N. C. 431. See also McCoppin *v.* McGuire, 34 U. C. Q. B. 157.

Evidence as to time of signing deed.— In an action to set aside a sale of land made by plaintiff, while a minor, to her guardian, the testimony of defendant that plaintiff ratified the deed after coming of age, by then for the first time signing it, is insufficient, in the face of the certificate of the clerk of the court that the deed was signed, acknowledged, and recorded while plaintiff was still an infant, to prove a ratification. Outland *v.* Vance, 34 S. W. 22, 17 Ky. L. Rep. 1226.

96. Davidson *v.* Young, 38 Ill. 145; Palmer *v.* Miller, 25 Barb. (N. Y.) 399; Murray *v.* Shanklin, 20 N. C. 431.

97. Merchants' F. Ins. Co. *v.* Grant, 2 Edw. (N. Y.) 544. But *compare* Smith *v.* Mayo, 9 Mass. 62, 6 Am. Dec. 28.

98. As to contracts generally see *infra*, V, E, 9.

99. Hall *v.* Jones, 21 Md. 439; Alsworth *v.* Cordtz, 31 Miss. 32.

The ratification relates back to the time of the original conveyance or other transaction;[1] but it is the ratification which is the effective act and which rescues the deed from its liability at any moment to be made a nullity,[2] and a subsequent purchaser for valuable consideration of land conveyed by an infant during his minority will hold the land as against a ratification by the grantor of which the subsequent purchaser had neither actual nor constructive notice.[3]

E. Avoidance of Transactions Affecting Property — 1. Right to Avoid — a. In General.[4] A deed, mortgage, or other conveyance of property or any interest therein by or to an infant may be avoided by him[5] without the consent

1. *Illinois.*— Black *v.* Hills, 36 Ill. 376, 87 Am. Dec. 224.

Kentucky.— Phillips *v.* Green, 5 T. B. Mon. 344.

Maryland.— Hall *v.* Jones, 21 Md. 439.

New York.— Palmer *v.* Miller, 25 Barb. 399.

North Carolina.— Cox *v.* McGowan, 116 N. C. 131, 21 S. E. 108.

See 27 Cent. Dig. tit. "Infants," § 48.

2. Black *v.* Hills, 36 Ill. 376, 87 Am. Dec. 224.

3. Black *v.* Hills, 36 Ill. 376, 87 Am. Dec. 224 (holding, however, that possession by the first grantee from the infant would be notice, not only of the original deed, but of any acts of ratification); Palmer *v.* Miller, 25 Barb. (N. Y.) 399.

Subsequent deed as disaffirmance of prior deed see *infra*, IV, E, 4, e.

4. **Avoidance of part of entire transaction** see *supra*, IV, D, 1.

As to contracts generally see *infra*, V, F, 1, a.

5. *Florida.*— Sparr *v.* Florida Southern R. Co., 25 Fla. 185, 6 So. 60.

Illinois.— Davidson *v.* Young, 38 Ill. 145; Baker *v.* Pratt, 15 Ill. 568.

Indiana.— Dill *v.* Bowen, 54 Ind. 204.

Kentucky.— Davenport *v.* Prewett, 9 B. Mon. 94; Williams *v.* Norris, 2 Litt. 157, sale of personalty.

Massachusetts.— Baker *v.* Lovett, 6 Mass. 78, 4 Am. Dec. 88.

Mississippi.— Hill *v.* Anderson, 5 Sm. & M. 216, sale of personalty.

New York.— Eckford *v.* De Kay, 26 Wend. 29.

Ohio.— Mills *v.* Rodgers, 2 Ohio Dec. (Reprint) 481, 3 West. L. Month. 262.

Pennsylvania.— Citizens' Bldg., etc., Assoc. *v.* Arvin, 207 Pa. St. 293, 56 Atl. 870.

Tennessee.—McGan *v.* Marshall, 7 Humphr. 121; Grace *v.* Hale, 2 Humphr. 27, 36 Am. Dec. 296, sale or exchange of personalty may be avoided.

Texas.— Searcy *v.* Hunter, 81 Tex. 644, 17 S. W. 372, 26 Am. St. Rep. 837.

Wisconsin.— Salter *v.* Krueger, 65 Wis. 217, 26 N. W. 544.

See 27 Cent. Dig. tit. "Infants," § 50; and *supra*, IV, D, 1.

Recovery of amount paid on purchase.— See Rapid Transit Land Co. *v.* Sanford, (Tex. Civ. App. 1893) 24 S. W. 587.

Where a minor contracts for a lease of a room and leaves after occupying it for part of the period covered by the lease, he cannot be compelled to pay for the remaining time. Gregory *v.* Lee, 64 Conn. 407, 30 Atl. 53, 25 L. R. A. 618.

Sale at request of infant cestui que trust may be repudiated by her upon her attaining her majority. Hill *v.* Clark, 4 Lea (Tenn.) 405.

Fraud.— A court of equity will not refuse to allow an infant to avail himself of his infancy to set aside his grant or covenant, on the ground that his doing so is a fraud, unless the grantee or covenantee has been misled by some actual misrepresentation or concealment. Seabrook *v.* Gregg, 2 S. C. 68.

Changing character of transaction.— Although an infant grantee, in a deed reciting an indebtedness from the grantor to the grantee as consideration thereof, may repudiate the deed, she cannot change its character and declare it to be a mortgage. Eckford *v.* De Kay, 26 Wend. (N. Y.) 29.

Avoidance after assignment for benefit of creditors.— An infant whose estate was assigned under the Massachusetts insolvent law of 1838 could not revoke a transfer of property previously made by him in payment of his wife's debts contracted before marriage, so as to vest that property in his assignee. Butler *v.* Breck, 7 Metc. (Mass.) 164, 39 Am. Dec. 768.

A post-nuptial judicial settlement of the proceeds of the sale of property of an infant married woman, which property was in the custody of the court, or an order in such proceedings directing a conveyance to her guardian of property purchased with such proceeds, cannot be disaffirmed by the married woman by her mere act upon attaining her majority. Brown *v.* Wadsworth, 168 N. Y. 225, 61 N. E. 250.

A special act of the legislature empowering an infant to sell her real estate provided she invested the proceeds in a note secured by mortgage did not deprive her or her administrator, she having died during infancy, of the right to avoid her act in parting with the note so obtained to the maker before it fell due in consideration of a payment of it by him. Tillinghast *v.* Holbrook, 7 R. I. 230.

Where one infant buys property of another infant, and then avoids the contract, the other may avoid the implied contract to return the purchase-money, so that there can be no recovery on contract. Drude *v.* Curtis, 183 Mass. 317, 67 N. E. 317, 62 L. R. A. 755.

of the other party,[6] unless in making the same the infant merely did, without suit, what the law would have compelled him to do if suit had been brought for that purpose,[7] or unless he has after his majority ratified the same.[8] It is not necessary to entitle one who has conveyed land while an infant to disaffirm that he should be in a position to recover possession of the land.[9]

b. Conveyance, Etc., Jointly With Person Not Under Disability.[10] Where an infant and an adult who have estates or interests in the same land join in a conveyance thereof, the infant still has the right to disaffirm as to his interest;[11] but a transaction involving the title to property is not rendered voidable as to the adult parties thereto by the fact that an infant is also a party.[12]

c. Who May Avoid.[13] The right to avoid a deed, mortgage, etc., made by an infant rests primarily in the infant himself,[14] and is a privilege personal to him,[15] and not assignable for the purpose of avoiding the transaction,[16] nor capable of being exercised by third persons for the purpose of setting aside a title claimed under the infant.[17] But while it has been held that the privilege cannot be

6. Baker *v.* Pratt, 15 Ill. 568.

7. *Alabama.*— Elliott *v.* Horn, 10 Ala. 348, 44 Am. Dec. 488.
Iowa.— Prouty *v.* Edgar, 6 Iowa 353.
Ohio.— Starr *v.* Wright, 20 Ohio St. 97.
West Virginia.— See Trader *v.* Jarvis, 23 W. Va. 100.
United States.— Irvine *v.* Irvine, 9 Wall. 617, 19 L. ed. 800.
See 27 Cent. Dig. tit. "Infants," § 50; and *infra*, V, A, 6.
In the case of a voluntary distribution the doctrine that an infant will be held bound by an act which the law would have compelled him to perform does not apply, for the law, although it would have coerced a distribution, might not have made just such a one as was made by the parties. Kilcrease *v.* Shelby, 23 Miss. 161.

8. Middleton *v.* Hoge, 5 Bush (Ky.) 478.
Ratification see *supra*, IV, D.

9. Long *v.* Williams, 74 Ind. 115. And see *infra*, IV, E, 2, d.

10. As to contracts generally see *infra*, V, A, 10.

11. *Indiana.*— Dill *v.* Bowen, 54 Ind. 204.
Massachusetts.— Walsh *v.* Young, 110 Mass. 396.
Mississippi.— French *v.* McAndrew, 61 Miss. 187.
Pennsylvania.— Smith *v.* Eisenlord, 2 Phila. 353.
South Carolina.— Ihley *v.* Padgett, 27 S. C. 300, 3 S. E. 468, conveyance by adult life-tenant and infant remainder-man.
See 27 Cent. Dig. tit. "Infants," § 51.

12. Smith *v.* Eisenlord, 2 Phila. (Pa.) 353; Haw *v.* Ogle, 4 Taunt. 10. See also Long *v.* Brown, 4 Ala. 622.

13. As to contracts generally see *infra*, V, F, 1, b.

14. See Dominick *v.* Michael, 4 Sandf. (N. Y.) 374; Jackson *v.* Todd, 6 Johns. (N. Y.) 257; Merchants' F. Ins. Co. *v.* Grant, 2 Edw. (N. Y.) 544; Zouch *v.* Parsons, 3 Burr. 1794, 1 W. Bl. 575.

15. *Indiana.*— Gillenwaters *v.* Campbell, 142 Ind. 529, 41 N. E. 1041; Harris *v.* Ross, 112 Ind. 314, 13 N. E. 873; Shrock *v.* Crowl, 83 Ind. 243; Law *v.* Long, 41 Ind. 586.
Louisiana.— Wilson *v.* Porter, 13 La. Ann. 407.
Massachusetts.— Mansfield *v.* Gordon, 144 Mass. 168, 10 N. E. 773; Kendall *v.* Lawrence, 22 Pick. 540.
Michigan.— Soper *v.* Fry, 37 Mich. 236.
Mississippi.— Alsworth *v.* Cordtz, 31 Miss. 32.
Missouri.— Singer Mfg. Co. *v.* Lamb, 81 Mo. 221; Ferguson *v.* Bell, 17 Mo. 347.
New Hampshire.— Roberts *v.* Wiggin, 1 N. H. 73, 8 Am. Dec. 38.
New York.— Jones *v.* Butler, 30 Barb. 641; Jones *v.* Butler, 20 How. Pr. 189.
Pennsylvania.— Kuns *v.* Young, 34 Pa. St. 60; Ledger Bldg. Assoc. *v.* Cook, 12 Phila. 434; Love *v.* Dobson, 5 Wkly. Notes Cas. 359.
South Carolina.— Rose *v.* Daniel, 2 Treadw. 549.
United States.— Baldwin *v.* Rosier, 48 Fed. 810.
See 27 Cent. Dig. tit. "Infants," § 53.
Contra.— Illinois Land, etc., Co. *v.* Bonner, 75 Ill. 315.
An assignment for the benefit of creditors, made by copartners, one of whom is an infant, can only be avoided at the election of the infant. Yates *v.* Lyon, 61 N. Y. 344 [*reversing* 61 Barb. 205]. See also Soper *v.* Fry, 37 Mich. 236.

16. Gillenwaters *v.* Campbell, 142 Ind. 529, 41 N. E. 1041.

17. *Alabama.*— Hooper *v.* Payne, 94 Ala. 223, 10 So. 431.
Arkansas.— Bozeman *v.* Browning, 31 Ark. 364; Gullett *v.* Lamberton, 6 Ark. 109.
Indiana.— Shrock *v.* Crowl, 83 Ind. 243.
Mississippi.— Alsworth *v.* Cordtz, 31 Miss. 32.
New Hampshire.— Roberts *v.* Wiggin, 1 N. H. 73, 8 Am. Dec. 38.
New York.— Dominick *v.* Michael, 4 Sandf. 374; Jackson *v.* Todd, 6 Johns. 257.
South Carolina.— Lester *v.* Frazer, 2 Hill Eq. 529.
See 27 Cent. Dig. tit. "Infants," § 53.
The conveyance cannot be avoided by an attachment made by a creditor of the late infant after he becomes of age. Mansfield *v.* Gordon, 144 Mass. 168, 10 N. E. 773; Kingman *v.* Perkins, 105 Mass. 111; McCarty *v.*

exercised by his privies in estate merely,[18] it is well settled that it can be exercised, in case of the infant's death, by his privies in blood or heirs,[19] in the same manner as it might have been by the late infant if alive.[20] It has also been held that it may be exercised by the infant's personal representatives.[21]

d. Estoppel to Disaffirm — (i) *In General.*[22] With reference to what acts done or circumstances arising during the infancy of one holding the title to or an interest in realty will estop him from asserting such title or interest after his arrival at age as against one to whom the property has been conveyed by him or by some person acting or assuming to act for him, the cases indicate that the courts are reluctant to hold that such an estoppel has arisen where the facts are at all consistent with a contrary opinion;[23] but where an infant who has arrived at years of discretion, by direct participation, or by silence when he was called upon to speak, has entrapped a person ignorant of his title into purchasing his

Murray, 3 Gray (Mass.) 578; Kendall *v.* Lawrence, 22 Pick. (Mass.) 540.

Infancy cannot be set up by a subsequent lienholder to defeat a mortgage. Baldwin *v.* Rosier, 48 Fed. 810.

18. *Arkansas.*— Bozeman *v.* Browning, 31 Ark. 364.

Indiana.— Gillenwaters *v.* Campbell, 142 Ind. 529, 41 N. E. 1041; Harris *v.* Ross, 112 Ind. 314, 13 N. E. 873; Shrock *v.* Crowl, 83 Ind. 243; Price *v.* Jennings, 62 Ind. 111; Borum *v.* Fouts, 15 Ind. 50; Wright *v.* Bundy, 11 Ind. 398; Pitcher *v.* Laycock, 7 Ind. 398.

Maryland.— Levering *v.* Heighe, 3 Md. Ch. 365.

Massachusetts.— Mansfield *v.* Gordon, 144 Mass. 168, 10 N. E. 773.

Missouri.— Singer Mfg. Co. *v.* Lamb, 81 Mo. 221; Ferguson *v.* Bell, 17 Mo. 347.

See 27 Cent. Dig. tit. "Infants," § 53.

Contra.— Dominick *v.* Michael, 4 Sandf. (N. Y.) 374; Jackson *v.* Todd, 6 Johns. (N. Y.) 257; Nelson *v.* Eaton, 1 Redf. Surr. (N. Y.) 498; Zouch *v.* Parsons, 3 Burr. 1794, 1 W. Bl. 575.

An assignee in insolvency of the late infant cannot set up his infancy. Mansfield *v.* Gordon, 144 Mass. 168, 10 N. E. 773.

The infant's avoidance may be made available for the benefit of his privies in estate. Shrock *v.* Crowl, 83 Ind. 243.

19. *Alabama.*— Sharp *v.* Robertson, 76 Ala. 343.

Arkansas.— Bozeman *v.* Browning, 31 Ark. 364.

Illinois.— Illinois Land, etc., Co. *v.* Bonner, 75 Ill. 315.

Indiana.— Gillenwaters *v.* Campbell, 142 Ind. 529, 41 N. E. 1041; Price *v.* Jennings, 62 Ind. 111; Law *v.* Long, 41 Ind. 586; Harbison *v.* Lemon, 3 Blackf. 51, 23 Am. Dec. 376.

Kentucky.— Prewit *v.* Graves, 5 J. J. Marsh. 114.

Maryland.— Levering *v.* Heighe, 3 Md. Ch. 365.

Massachusetts.— Kendall *v.* Lawrence, 22 Pick. 540.

Mississippi.— Harvey *v.* Briggs, 68 Miss. 60, 8 So. 274, 10 L. R. A. 62.

Missouri.— Linville *v.* Greer, 165 Mo. 380, 65 S. W. 579; Harris *v.* Ross, 86 Mo. 89, 56 Am. Rep. 411; Ferguson *v.* Bell, 17 Mo. 347.

New Hampshire.— Roberts *v.* Wiggin, 1 N. H. 73, 8 Am. Dec. 38, legal representatives.

New York.— O'Rourke *v.* Hall, 38 N. Y. App. Div. 534, 56 N. Y. Suppl. 471; Dominick *v.* Michael, 4 Sandf. 374; Merchants' F. Ins. Co. *v.* Grant, 2 Edw. 544; Nelson *v.* Eaton, 1 Redf. Surr. 498.

Pennsylvania.— Ledger Bldg. Assoc. *v.* Cook, 12 Phila. 434.

Tennessee.— Walton *v.* Gaines, 94 Tenn. 420, 29 S. W. 458.

Texas.— Searcy *v.* Hunter, 81 Tex. 644, 17 S. W. 372, 26 Am. St. Rep. 837; Veal *v.* Fortson, 57 Tex. 482.

England.— Zouch *v.* Parsons, 3 Burr. 1794, 1 W. Bl. 575.

See 27 Cent. Dig. tit. "Infants," § 53.

20. Walton *v.* Gaines, 94 Tenn. 420, 29 S. W. 458; Veal *v.* Fortson, 57 Tex. 482.

21. Ferguson *v.* Bell, 17 Mo. 347. See also Bozeman *v.* Browning, 31 Ark. 364; Merchants' F. Ins. Co. *v.* Grant, 2 Edw. (N. Y.) 544.

The committee of an infant lunatic may plead his infancy in avoidance of his mortgage. Ledger Bldg. Assoc. *v.* Cook, 12 Phila. (Pa.) 434.

22. As to contracts generally see *infra*, V, F, 1, c, (i).

23. See the following cases:

Illinois.— Davidson *v.* Young, 38 Ill. 145.

Iowa.— Dohms *v.* Mann, 76 Iowa 723, 39 N. W. 823.

Kentucky.— Mathers *v.* Mathers, 66 S. W. 832, 23 Ky. L. Rep. 2159.

Louisiana.— George *v.* Delaney, 111 La. 760, 35 So. 894.

Mississippi.— Wilie *v.* Brooks, 45 Miss. 542.

New Jersey.— Tantum *v.* Coleman, 26 N. J. Eq. 128.

New York.— Spencer *v.* Carr, 45 N. Y. 406, 6 Am. Rep. 112.

See 27 Cent. Dig. tit. "Infants," § 37.

Failure to object to adverse occupation or the making of improvements will not estop the infant from setting up his title. Kane County *v.* Herrington, 50 Ill. 232; Davidson *v.* Young, 38 Ill. 145; Brantley *v.* Wolf, 60 Miss. 420; Dessaunier *v.* Murphy, 22 Mo. 95.

An equitable estoppel cannot arise out of the mere consent of an infant, unaccompanied

property from another, or lending money to such other on the security of a mortgage on the property, he will be estopped from setting up his title against the person so deceived.[24] After the infant has reached majority the rules of estoppel are more strictly applied, and he may readily, by either his acts or his acquiescence, become estopped to dispute an alienation of his property, even although it occurred during his infancy;[25] but even in such case some act or

by false representations, to the sale and conveyance of his lands by an administrator, who otherwise would have no authority so to do. Davidson *v.* Young, 38 Ill. 145.

Holding as tenant.— In ejectment against an infant, he is not estopped from setting up a title in himself adverse to plaintiff, although he has acknowledged that he occupied the premises under plaintiff and has given his note for the rent. McCoon *v.* Smith, 3 Hill (N. Y.) 147, 38 Am. Dec. 623, opinion of the court by Cowen, J.

Receiving and enjoying the purchase-money does not estop an infant grantor from disaffirming his conveyance after his arrival at age. Brantley *v.* Wolf, 60 Miss. 420.

Appearance in foreclosure suit.— The fact that an infant who purchased land subject to a mortgage, which he assumed as part of the price, was made a party defendant to a suit to foreclose the mortgage, in which a judgment of foreclosure was rendered against him after his appearance therein, does not preclude him from setting up his infancy as a defense to an action brought against him by his grantor to recover the amount of the deficiency on the foreclosure sale, which the grantor was compelled to pay by reason of the infant's default. Walsh *v.* Powers, 43 N. Y. 23, 3 Am. Rep. 654.

24. *Georgia.*— Whittington *v.* Wright, 9 Ga. 23.

Iowa.— Prouty *v.* Edgar, 6 Iowa 353.

Mississippi.— Ferguson *v.* Bobo, 54 Miss. 121.

Missouri.— Ryan *v.* Growney, 125 Mo. 474, 28 S. W. 189, 755.

New York.— Blakeslee *v.* Sincepaugh, 71 Hun 412, 24 N. Y. Suppl. 947.

South Carolina.— Hall *v.* Timmons, 2 Rich. Eq. 120. But see Norris *v.* Wait, 2 Rich. 148, 44 Am. Dec. 283.

Tennessee.— Barham *v.* Turbeville, 1 Swan 437, 57 Am. Dec. 782.

England.— Evroy *v.* Nicholas, 2 Eq. Cas. Abr. 488, 22 Eng. Reprint 415; Cory *v.* Gertcken, 2 Madd. 40, 17 Rev. Rep. 180; Savage *v.* Foster, 9 Mod. 35; Watts *v.* Creswell, 9 Vin. Abr. 415.

See 27 Cent. Dig. tit. "Infants," § 38.

25. See the following cases:

Florida.— Terrell *v.* Weymouth, 32 Fla. 255, 13 So. 429, 37 Am. St. Rep. 94.

Kentucky.— Bourne *v.* Simpson, 9 B. Mon. 454.

Louisiana.— Sewall *v.* Hebert, 37 La. Ann. 155, partition.

Mississippi.— Wilie *v.* Brooks, 45 Miss. 542.

New Jersey.— Tantum *v.* Coleman, 26 N. J. Eq. 128.

New York.— Burkard *v.* Crouch, 169 N. Y. 399, 62 N. E. 431 [*affirming* 66 N. Y. Suppl. 1127].

Virginia.— Lancaster *v.* Barton, 92 Va. 615, 24 S. E. 251.

See 27 Cent. Dig. tit. "Infants," §§ 37, 38.

The late infant may be estopped by receiving and retaining the proceeds of the sale with knowledge of the facts (Price *v.* Winter, 15 Fla. 66; Walker *v.* Mulvean, 76 Ill. 18; Pursley *v.* Hays, 17 Iowa 310; Gaines *v.* Kennedy, 53 Miss. 103; Handy *v.* Noonan, 51 Miss. 166; Highley *v.* Barron, 49 Mo. 103; Messner *v.* Giddings, 65 Tex. 301. *Aliter*, where the late infant was at the time of such receipt a *feme covert*. Workman *v.* Harold, 2 S. W. 679, 8 Ky. L. Rep. 605. See also Buchanan *v.* Hubbard, 96 Ind. 1), ratifying the distribution of the purchase-money (Wilie *v.* Brooks, 45 Miss. 542), acquiescence for a number of years, together with the receipt of the purchase-money on reaching majority (Hartman *v.* Kendall, 4 Ind. 403; Nelson *v.* Lee, 10 B. Mon. (Ky.) 495. See also McDanell *v.* Landrum, 87 Ky. 404, 9 S. W. 223, 12 Am. St. Rep. 500, 10 Ky. L. Rep. 641; Ferguson *v.* Houston, etc., R. Co., 73 Tex. 344, 11 S. W. 347, acquiescence and retaining purchase-money for two years after reaching majority), standing by for years without warning or protest and seeing the value of the land enhanced by improvements (Highley *v.* Barron, 49 Mo. 103), demanding and receiving part of the land taken in exchange with full knowledge of the facts (Nanny *v.* Allen, 77 Tex. 240, 13 S. W. 989), conveying the property received in exchange (Bull *v.* Sevier, 88 Ky. 515, 11 S. W. 506, 11 Ky. L. Rep. 32), disclaiming in open court any title to or interest in the property (Hansell *v.* Hansell, 44 La. Ann. 548, 10 So. 941), or by a foreclosure of the mortgage given and a sale of the property in proceedings to which he is a party (Buchanan *v.* Griggs, 18 Nebr. 121, 24 N. W. 452).

Acts, etc., not amounting to estoppel.— Where a minor, supposing himself to be of age, made a conveyance which he subsequently, after coming of age, sued to be set aside for fraud, the fact that he alleged in his petition that he was of age when he executed the deed does not estop him from afterward disaffirming the deed because he was a minor when he executed it. Ridgeway *v.* Herbert, 150 Mo. 606, 51 S. W. 1040, 73 Am. St. Rep. 464. A wife is not estopped, in ejectment for land sold to her during her minority, by a suit brought in her name for the purchase-money without her knowledge. Williams *v.* Baker, 71 Pa. St. 476.

Mere lapse of time may estop the heirs of a grantor from setting up the infancy of their ancestor at the time of the conveyance in

omission on his part since his majority which was prejudicial to the person in possession of the granted premises must be shown in order to work an estoppel.[26]

(II) *False Representation as to Age.*[27] It has been frequently laid down that the fact that an infant, at the time of executing a deed, mortgage, or other instrument affecting his realty, falsely represented himself to be of age and thereby deceived the person with whom he dealt, does not estop him from disaffirming his act upon his arrival at majority.[28] But on the other hand there are a number of cases holding that such misrepresentation will create an estoppel,[29] especially if the situation and appearance of the alleged infant at the time of the execution of the deed were such as tended to corroborate the statement as to his being of full age.[30] Mere failure to give notice of the fact of infancy, without any representations upon the subject or any intent to defraud, has been held insufficient to create an estoppel, although the infant appeared to be of age and was believed by the other party to be so.[31]

order to avoid the same. Sanders *v.* Bennett, 1 S. W. 436, 8 Ky. L. Rep. 261, over fifteen years.

26. Miles *v.* Lingerman, 24 Ind. 385.

27. As to contracts generally see *infra*, V, F, 1 c, (II).

28. *Kentucky.*— Wilson *v.* Wilson, 50 S. W. 260, 20 Ky. L. Rep. 1971. But see Ky. cases *infra*, note 29.

Minnesota.— Alt *v.* Graff, 65 Minn. 191, 68 N. W. 9 [*following* Conrad *v.* Lane, 26 Minn. 389, 4 N. W. 695, 37 Am. Rep. 412].

Missouri.— Ridgeway *v.* Herbert, 150 Mo. 606, 51 S. W. 1040, 73 Am. St. Rep. 464. But see Ryan *v.* Growney, 125 Mo. 474, 28 S. W. 189, 755.

New York.— New York Bldg. Loan Banking Co. *v.* Fisher, 23 N. Y. App. Div. 363, 48 N. Y. Suppl. 152.

North Carolina.— Carolina Interstate Bldg., etc., Assoc. *v.* Black, 119 N. C. 323, 25 S. E. 975.

Ohio.— Mills *v.* Rodgers, 2 Ohio Dec. (Reprint) 481, 3 West. L. Month. 262.

South Carolina.— Norris *v.* Vance, 3 Rich. 164.

United States.— Sims *v.* Everhardt, 102 U. S. 300, 26 L. ed. 87.

England.— See Lemprière *v.* Lange, 12 Ch. D. 675, 41 L. T. Rep. N. S. 378, 27 Wkly. Rep. 879; Inman *v.* Inman, L. R. 15 Eq. 260, 21 Wkly. Rep. 433.

See 27 Cent. Dig. tit. "Infants," § 39.

A recital in a deed that the grantor is over twenty-one years of age does not estop her from avoiding the deed on the ground of her infancy, even against creditors of the grantee who have acquired liens on the land conveyed on the faith of that recital. Wilson *v.* Wilson, 50 S. W. 260, 20 Ky. L. Rep. 1971.

29. *Illinois.*— Davidson *v.* Young, 38 Ill. 145.

Indiana.— See Bradshaw *v.* Van Winkle, 133 Ind. 134, 32 N. E. 877. But *compare* Carpenter *v.* Carpenter, 45 Ind. 142.

Iowa.— Prouty *v.* Edgar, 6 Iowa 353.

Kansas.— Burgett *v.* Barrick, 25 Kan. 526, under statute.

Kentucky.— Schmitheimer *v.* Eiseman, 7 Bush 298 (oath before notary, made to induce purchase); Ingram *v.* Ison, 80 S. W. 787, 26 Ky. L. Rep. 48; Damron *v.* Com., 61 S. W. 459, 22 Ky. L. Rep. 1717 (testimony of infant in open court that he was of age). See also Kendall *v.* Webber, 6 Ky. L. Rep. 513. But see Wilson *v.* Wilson, 50 S. W. 260, 20 Ky. L. Rep. 1971.

Mississippi.— Ostrander *v.* Quin, 84 Miss. 230, 36 So. 257, 105 Am. St. Rep. 426, especially where the money advanced on the mortgage is not tendered back.

Missouri.— Ryan *v.* Growney, 125 Mo. 474, 28 S. W. 189, 755. But see Ridgeway *v.* Herbert, 150 Mo. 606, 51 S. W. 1040, 73 Am. St. Rep. 464.

New Jersey.— Pemberton Bldg., etc., Assoc. *v.* Adams, 53 N. J. Eq. 258, 31 Atl. 280.

Wisconsin.— See Thormaehlen *v.* Kaeppel, 86 Wis. 378, 56 N. W. 1089.

Canada.— Goyer *v.* Morrison, 26 Grant Ch. (U. C.) 69; Bennetto *v.* Holden, 21 Grant Ch. (U. C.) 222.

See 27 Cent. Dig. tit. "Infants," § 39.

There must be a direct misrepresentation by the infant as to his age. The execution of the instrument is not in itself a sufficient representation. Confederation Life Assoc. *v.* Kinnear, 23 Ont. App. 497, mortgage.

Representation not made to grantee was held to be insufficient to create an estoppel. Vogelsang *v.* Null, 67 Tex. 465, 3 S. W. 451.

Subsequent purchaser from infant affected by estoppel.— Damron *v.* Com., 61 S. W. 459, 22 Ky. L. Rep. 1717.

Pleading insufficient as to estoppel.— See Bradshaw *v.* Van Winkle, 133 Ind. 134, 32 N. E. 877.

30. Ingram *v.* Ison, 80 S. W. 787, 26 Ky. L. Rep. 48.

31. *Indiana.*— Buchanan *v.* Hubbard, 96 Ind. 1.

Kentucky.— Sewell *v.* Sewell, 92 Ky. 500, 18 S. W. 162, 36 Am. St. Rep. 606.

Mississippi.— Brantley *v.* Wolf, 60 Miss. 420 [*distinguishing* Ferguson *v.* Babo, 54 Miss. 121].

Wisconsin.— Thormaehlen *v.* Kaeppel, 86 Wis. 378, 56 N. W. 1089.

England.— Stikeman *v.* Dawson, 1 De G. & Sm. 90, 11 Jur. 214, 16 L. J. Ch. 205, 4 R. & Can. Cas. 585, 63 Eng. Reprint 984.

See 27 Cent. Dig. tit. "Infants," § 39.

Contra.— Adams *v.* Fite, 3 Baxt. (Tenn.) 69.

e. Effect of Conveyance by Grantee to Bona Fide Purchaser. The right of a grantor to disaffirm his deed made during infancy is not lost because of the fact that the grantee has conveyed to a *bona fide* purchaser for value and without notice.[32]

2. Time For Avoidance — a. Before or After Majority — (i) *Transactions as to Realty.* The time for avoidance, by an infant, of sales, mortgages, or other transactions affecting realty is after his arrival at majority.[33] Prior to that time he cannot avoid his act,[34] although according to some authorities he may, even during infancy, enter and take the profits of the land,[35] or avoid his conveyance so far as to be enabled to recover the income of the estate conveyed.[36]

(ii) *Transactions as to Personalty.*[37] As to transactions by an infant in relation to personal property, the disaffirmance may be effected as well before as after majority.[38]

32. *Arkansas.*— Harrod *v.* Myers, 21 Ark. 592, 76 Am. Dec. 409.

Indiana.— Buchanan *v.* Hubbard, 96 Ind. 1; Sims *v.* Smith, 86 Ind. 577; Miles *v.* Lingerman, 24 Ind. 385. See also Richardson *v.* Pate, 93 Ind. 423, 47 Am. Rep. 374.

Iowa.— Jenkins *v.* Jenkins, 12 Iowa 195.

Mississippi.— Brantley *v.* Wolf, 60 Miss. 420; Hill *v.* Anderson, 5 Sm. & M. 216.

Texas.— Searcy *v.* Hunter, 81 Tex. 644, 17 S. W. 372, 26 Am. St. Rep. 837.

See 27 Cent. Dig. tit. "Infants," § 58.

33. *Indiana.*— Sims *v.* Bardoner, 86 Ind. 87, 44 Am. Rep. 263; Sims *v.* Smith, 86 Ind. 577.

Maryland.— Monumental Bldg. Assoc. No. 2 *v.* Herman, 33 Md. 128.

Mississippi.— Allen *v.* Poole, 54 Miss. 323.

New York.— Dominick *v.* Michael, 4 Sandf. 374; Jones *v.* Butler, 20 How. Pr. 189.

West Virginia.— Gillespie *v.* Bailey, 12 W. Va. 70, 29 Am. Rep. 445.

See 27 Cent. Dig. tit. "Infants," § 54.

34. *Alabama.*— McCarthy *v.* Nicrosi, 72 Ala. 332, 47 Am. Rep. 418.

Indiana.— Welch *v.* Bunce, 83 Ind. 382; Chapman *v.* Chapman, 13 Ind. 396; Schroyer *v.* Pittinger, 31 Ind. App. 158, 67 N. E. 475.

Louisiana.— See Calmes *v.* Carruth, 12 Rob. 663.

Michigan.— Armitage *v.* Widoe, 36 Mich. 124. See also Shreeves *v.* Caldwell, 135 Mich. 323, 97 N. W. 764, 106 Am. St. Rep. 396.

Minnesota.— Irvine *v.* Irvine, 5 Minn. 61.

Missouri.— Shipley *v.* Bunn, 125 Mo. 445, 28 S. W. 754; Singer Mfg. Co. *v.* Lamb, 81 Mo. 221; Baker *v.* Kennett, 54 Mo. 82; Schneider *v.* Staihr, 20 Mo. 269.

New Hampshire.— Emmons *v.* Murray, 16 N. H. 385.

New York.— Wetmore *v.* Kissam, 3 Bosw. 321; Stafford *v.* Roof, 9 Cow. 626 [*reversing* on other grounds 7 Cow. 179]; Bool *v.* Mix, 17 Wend. 119, 31 Am. Dec. 285; Merchants' F. Ins. Co. *v.* Grant, 2 Edw. 544. But *compare* Beardsley *v.* Hotchkiss, 96 N. Y. 201.

North Carolina.— McCormic *v.* Leggett, 53 N. C. 425.

Tennessee.— Matherson *v.* Davis, 2 Coldw. 443; Scott *v.* Buchanan, 11 Humphr. 468.

Texas.— Cummings *v.* Powell, 8 Tex. 80.

United States.— Tucker *v.* Moreland, 10 Pet. 58, 9 L. ed. 345.

England.— Slator *v.* Trimble, 14 Ir. C. L. 342.

See 27 Cent. Dig. tit. "Infants," § 54.

Contra.—Gilchrist *v.* Ramsay, 27 U. C. Q. B. 500; Doe *v.* Woodruffe, 7 U. C. Q. B. 332.

Infant heir of infant grantor.— Where a married woman under age conveyed her land, her husband concurring, and died while still under age, leaving a child as her sole heir, the child had until arriving at age and three years afterward to disaffirm the mother's conveyance by bringing ejectment for the land. Harris *v.* Ross, 86 Mo. 89, 56 Am. Rep. 411.

When allowed.— Avoidance of the deed of an infant during infancy will be allowed only when it is necessary to the enjoyment of his rights or manifestly to his interest that the disapproval shall take effect before he arrives at age. Matherson *v.* Davis, 2 Coldw. (Tenn.) 443.

Foreclosure of mortgage.— A married woman, a minor, joining in a mortgage of her real estate, may, in a suit to foreclose, plead infancy during minority. Schneider *v.* Staihr, 20 Mo. 269; Feitner *v.* Hoeger, 14 Daly (N. Y.) 470, 15 N. Y. St. 377. And so also an infant may, before majority, intervene and prevent a ratification of a sale of the property in *ex parte* foreclosure proceedings, which might have the effect of prejudicing his interests. Monumental Bldg. Assoc. No. 2 *v.* Herman, 33 Md. 128.

No act need be done during infancy to enable an infant to avoid his deed. Philips *v.* Green, 3 A. K. Marsh. (Ky.) 7, 13 Am. Dec. 124.

35. Bool *v.* Mix, 17 Wend. (N. Y.) 119, 31 Am. Dec. 285; Matherson *v.* Davis, 2 Coldw. (Tenn.) 443; Cummings *v.* Powell, 8 Tex. 80. See also Wetmore *v.* Kissam, 3 Bosw. (N. Y.) 321.

36. Sims *v.* Bardoner, 86 Ind. 87, 44 Am. Rep. 263.

37. As to contracts generally see *infra*, V, F, 2, a.

38. *Alabama.*— McCarthy *v.* Nicrosi, 72 Ala. 332, 47 Am. Rep. 418.

Connecticut.— Shipman *v.* Horton, 17 Conn. 481.

b. Reasonable Time.[39] According to some authorities, the deed of an infant must be disaffirmed within a reasonable time after his arrival at majority;[40] but other authorities hold that he may exercise this right at any time before his right to recover the land or to avoid the transaction is barred by the statute of limitations,[41]

Indiana.— Rice *v.* Boyer, 108 Ind. 472, 9 N. E. 420, 58 Am. Rep. 53; Carpenter *v.* Carpenter, 45 Ind. 142.

Massachusetts.— Bradford *v.* French, 110 Mass. 365; Chandler *v.* Simmons, 97 Mass. 508, 93 Am. Dec. 117; Edgerton *v.* Wolf, 6 Gray 453.

New Hampshire.— Carr *v.* Clough, 26 N. H. 280, 59 Am. Dec. 345.

New York.— Chapin *v.* Shafer, 49 N. Y. 407; Stafford *v.* Roof, 9 Cow. 626 [*reversing* 7 Cow. 179]; Bartholomew *v.* Finnemore, 17 Barb. 428. See also Bool *v.* Mix, 17 Wend. 119, 31 Am. Dec. 285.

Tennessee.— Scott *v.* Buchanan, 11 Humphr. 468.

See 27 Cent. Dig. tit. "Infants," § 54.

39. See *supra*, IV, D, 4, b.

As to contracts generally see *infra*, V, F, 2, b.

40. *Georgia.*— Bentley *v.* Greer, 100 Ga. 35, 27 S. E. 974; Nathans *v.* Arkwright, 66 Ga. 179. See also Walker *v.* Pope, 101 Ga. 665, 29 S. E. 8. But *compare* Wimberly *v.* Jones, Ga. Dec. 91.

Illinois.— Blankenship *v.* Stout, 25 Ill. 132.

Indiana.— McClanahan *v.* Williams, 136 Ind. 30, 35 N. E. 897; Richardson *v.* Pate, 93 Ind. 423, 47 Am. Rep. 374; Sims *v.* Bardoner, 86 Ind. 87, 44 Am. Rep. 263; Stringer *v.* Northwestern Mut. L. Ins. Co., 82 Ind. 100; Scranton *v.* Stewart, 52 Ind. 68; Miles *v.* Lingerman, 24 Ind. 385; Shroyer *v.* Pittenger, 31 Ind. App. 158, 67 N. E. 475. But see Sims *v.* Bardoner, 86 Ind. 87, 44 Am. Rep. 263.

Iowa.— Green *v.* Wilding, 59 Iowa 679, 13 N. W. 761, 44 Am. Rep. 696; Wright *v.* Germain, 21 Iowa 585.

Maryland.— Amey *v.* Cockey, 73 Md. 297, 20 Atl. 1071.

Nebraska.— Ward *v.* Laferty, 19 Nebr. 429, 27 N. W. 393.

North Carolina.— Weeks *v.* Wilkins, 134 N. C. 516, 47 S. E. 24.

Tennessee.— Barker *v.* Wilson, 4 Heisk. 268; Matherson *v.* Davis, 2 Coldw. 443; Scott *v.* Buchanan, 11 Humphr. 458.

Texas.— Searcy *v.* Hunter, 81 Tex. 644, 17 S. W. 372, 26 Am. St. Rep. 837; Ferguson *v.* Houston, etc., R. Co., 73 Tex. 344, 11 S. W. 347; Hieatt *v.* Dixon, (Civ. App. 1894) 26 S. W. 263.

Vermont.— Bigelow *v.* Kinney, 3 Vt. 353, 21 Am. Dec. 589.

Washington.— Johnston *v.* Gerry, 34 Wash. 524, 76 Pac. 258, 77 Pac. 503.

Wisconsin.— Thormaehlen *v.* Kaeppel, 86 Wis. 378, 56 N. W. 1089.

Canada.— Saunders *v.* Russell, 9 Brit. Col. 321; Foley *v.* Canada Permanent Loan, etc., Co., 4 Ont. 38.

See 27 Cent. Dig. tit. "Infants," § 54.

What is a reasonable time.— What would be considered a very reasonable and proper time in one case might well be considered as unreasonable and unnecessary in another, owing to the difference in the condition and situation of the property in reference to the rights to be affected by their action. Scott *v.* Buchanan, 11 Humphr. (Tenn.) 468. See also Sims *v.* Bardoner, 86 Ind. 87, 44 Am. Rep. 263; McClanahan *v.* Williams, 136 Ind. 30, 35 N. E. 897. The following periods have been held reasonable: Eighteen days (Jenkins *v.* Jenkins, 12 Iowa 195), one month and three days (Englebert *v.* Troxell, 40 Nebr. 195, 58 N. W. 852, 42 Am. St. Rep. 665, 26 L. R. A. 177), three and one-half months (Thormaehlen *v.* Kaeppel, 86 Wis. 378, 56 N. W. 1089), four months (Rapid Transit Land Co. *v.* Sanford, (Tex. Civ. App. 1893) 24 S. W. 587), five months (Searcy *v.* Hunter, 81 Tex. 644, 17 S. W. 372, 26 Am. St. Rep. 837), seven months (Cardwell *v.* Rogers, 76 Tex. 37, 12 S. W. 1006), three years (Keil *v.* Kealey, 84 Ill. 104, 25 Am. Rep. 431; Blankenship *v.* Stout, 25 Ill. 132; Cole *v.* Pennoyer, 14 Ill. 158; Weeks *v.* Wilkins, 134 N. C. 516, 47 S. E. 24; O'Dell *v.* Rogers, 44 Wis. 136), three and one-half years (Scranton *v.* Stewart, 52 Ind. 68), and five years (Doe *v.* Abernathy, 7 Blackf. (Ind.) 442). The following periods have been held unreasonable: Two years (Wright *v.* Germain, 21 Iowa 585), three years (Ward *v.* Laverty, 19 Nebr. 429, 27 N. W. 393; Johnston *v.* Gerry, 34 Wash. 524, 76 Pac. 258, 77 Pac. 503), four years (Simkins *v.* Searcy, 10 Tex. Civ. App. 406, 32 S. W. 849), eleven years (Bigelow *v.* Kinney, 3 Vt. 353, 21 Am. Dec. 589), and thirteen years (Weaver *v.* Carpenter, 42 Iowa 343).

In order to avoid an infant's note and mortgage, no disaffirmance need be made until demand of payment is made or enforcement is sought. Magee *v.* Welsh, 18 Cal. 155.

Possession of mother of infant.— The fact that the mother of a minor heir to real estate to whom the fee belongs is in possession thereof under right of dower affords no excuse for the failure on the part of such heir to disaffirm within a reasonable time after coming of age a deed made thereof. Long *v.* Williams, 74 Ind. 115.

The heirs of an infant may disaffirm his deed within the same time that the infant might himself, if living. Illinois Land, etc., Co. *v.* Bonner, 75 Ill. 315.

41. *Arkansas.*— Kountz *v.* Davis, 34 Ark. 590; Bozeman *v.* Browning, 31 Ark. 364.

Michigan.— Donovan *v.* Ward, 100 Mich. 601, 59 N. W. 254.

Mississippi.—Shipp *v.* McKee, 80 Miss. 741, 31 So. 197, 32 So. 281, 92 Am. St. Rep. 616; Wallace *v.* Latham, 52 Miss. 291.

Missouri.— Lacy *v.* Pixler, 120 Mo. 383, 25 S. W. 206; Huth *v.* Carondelet Mar. R. etc., Co., 56 Mo. 202.

New York.— Eagan *v.* Scully, 29 N. Y.

provided there has been no word or act on his part indicating assent,[42] unless he is called upon to act sooner by peculiar circumstances,[43] such as his knowledge that improvements are being made or about to be made, or money is being expended or about to be expended, upon the property by the purchaser, in which case he must act promptly or lose his right to disaffirm.[44]

c. Period of Limitation of Actions.[45] If the infant delays beyond the period of limitation after reaching majority his right to disaffirm is of course lost.[46]

d. Conveyance by Infant Remainder-Man. An infant remainder-man who has joined with the life-tenant in a conveyance of the premises may disaffirm his deed and proceed to have the same annulled as to him as soon as he reaches his majority, notwithstanding the fact that the life-tenant is still living and the late infant consequently has no right to claim actual possession of any portion of the premises;[47] but it has been held that he is under no obligation to bring suit before the life-tenant's death and his failure to do so puts him in no legal default.[48]

e. Rule as to Femes Covert. While a married woman may disaffirm her deed, etc., on arrival at age and before discoverture,[49] she is not, in the absence of statute, required to disaffirm nor estopped by failure to do so until the disabilities of both infancy and coverture are removed.[50] But under a statute by which

App. Div. 617, 51 N. Y. Suppl. 680 [*affirmed* in 173 N. Y. 581, 65 N. E. 1116].

Ohio.— Cresinger *v.* Welch, 15 Ohio 156, 45 Am. Dec. 565; Hughes *v.* Watson, 10 Ohio 127; Drake *v.* Ramsay, 5 Ohio 251.

United States.— Wells *v.* Seixas, 24 Fed. 82, 23 Blatchf. 242.

See 27 Cent. Dig. tit. "Infants," § 54.

42. Wells *v.* Seixas, 24 Fed. 82, 23 Blatchf. 242.

43. Sims *v.* Bardoner, 86 Ind. 87, 44 Am. Rep. 263.

44. Sims *v.* Bardoner, 86 Ind. 87, 44 Am. Rep. 263; Davis *v.* Dudley, 70 Me. 236, 35 Am. Rep. 318 (nine years' delay with knowledge of improvements); Highley *v.* Barron, 49 Mo. 103.

45. See, generally, LIMITATIONS OF ACTIONS.

46. Bozeman *v.* Browning, 31 Ark. 364; Sims *v.* Bardoner, 86 Ind. 87, 44 Am. Dec. 263; Hoffert *v.* Miller, 86 Ky. 572, 6 S. W. 447, 9 Ky. L. Rep. 732; Combs *v.* Noble, 58 S. W. 707, 22 Ky. L. Rep. 736.

Death of grantor.— When the statute has begun to run against a grantor who was an infant at the time of executing the deed, it will continue against his representatives after his death. Bozeman *v.* Browning, 31 Ark. 364.

47. Nathans *v.* Arkwright, 66 Ga. 179; Shipp *v.* McKee, 80 Miss. 741, 31 So. 197, 32 So. 281, 92 Am. St. Rep. 616 [*following* Fox *v.* Coon, 64 Miss. 465, 1 So. 629]; Ihley *v.* Padgett, 27 S. C. 300, 3 S. E. 468. See also Weeks *v.* Wilkins, 134 N. C. 516, 47 S. E. 24.

48. Shipp *v.* McKee, 80 Miss. 741, 31 So. 197, 32 So. 281, 92 Am. St. Rep. 616. *Contra*, Nathans *v.* Arkwright, 66 Ga. 179.

49. *Arkansas.*— Fox *v.* Drewry, 62 Ark. 316, 35 S. W. 533; Stull *v.* Harris, 51 Ark. 294, 11 S. W. 104, 2 L. R. A. 741.

Indiana.— Buchanan *v.* Hubbard, 96 Ind. 1; Richardson *v.* Pate, 93 Ind. 423, 47 Am. Rep. 374; Law *v.* Long, 41 Ind. 586; Miles *v.* Lingerman, 24 Ind. 385, without the assent and even against the will of her husband.

Kentucky.— Prewit *v.* Graves, 5 J. J. Marsh. 114.

Missouri.— Norcum *v.* Sheahan, 21 Mo. 25, 64 Am. Dec. 214.

Tennessee.— Lancaster *v.* Lancaster, 13 Lea 126.

See 27 Cent. Dig. tit. "Infants," § 55.

The disaffirmance takes effect after the death of the husband, and prior to that time the wife cannot obtain possession. Chapman *v.* Chapman, 13 Ind. 396 (conveyance of husband's property); Norcum *v.* Sheahan, 21 Mo. 25, 64 Am. Dec. 214 (conveyance of wife's property).

50. *Arkansas.*— Stull *v.* Harris, 51 Ark. 294, 11 S. W. 104, 2 L. R. A. 741.

Indiana.— Richardson *v.* Pate, 93 Ind. 423, 47 Am. Rep. 374; Applegate *v.* Conner, 93 Ind. 185; Wilhite *v.* Hamrick, 92 Ind. 594; Sims *v.* Smith, 86 Ind. 577; Sims *v.* Bardoner, 86 Ind. 87, 44 Am. Rep. 263; Stringer *v.* Northwestern Mut. L. Ins. Co., 82 Ind. 100 [*disapproving* Scranton *v.* Stewart, 52 Ind. 68]; Miles *v.* Lingerman, 24 Ind. 385.

Maryland.— Amey *v.* Cockey, 73 Md. 297, 20 Atl. 1071.

Massachusetts.— Scanlan *v.* Wright, 13 Pick. 523, 25 Am. Dec. 344.

Missouri.— Linville *v.* Greer, 165 Mo. 380, 65 S. W. 579.

Tennessee.— Walton *v.* Gaines, 94 Tenn. 420, 29 S. W. 458; Dodd *v.* Benthal, 4 Heisk. 601; Scott *v.* Buchanan, 11 Humphr. 468.

Virginia.— Darraugh *v.* Blackford, 84 Va. 509, 5 S. E. 542; Wilson *v.* Branch, 77 Va. 65, 46 Am. Rep. 709.

See 27 Cent. Dig. tit. "Infants," § 55.

A renunciation of dower may be disaffirmed after twenty-eight years, as against an innocent purchaser for value, the woman having remained under coverture all the while, as the right to dower did not mature during the husband's life. McMorris *v.* Webb, 17 S. C. 558, 43 Am. Rep. 629.

married women may be barred by estoppels *in pais*, the time for disaffirmance runs from majority notwithstanding coverture.[51] Where an infant *feme sole* has conveyed her property, her marriage shortly after attaining majority does not extend the time for avoidance of the deed.[52]

3. NECESSITY FOR ACTS OF AVOIDANCE.[53] The deed, mortgage, etc., of an infant being voidable only and not void, holds good until some act has been done by the infant to avoid it.[54]

4. WHAT CONSTITUTES AVOIDANCE[55] — a. In General. It is for an infant desiring to avoid his deed, mortgage, etc., to signify his desire, not only by refraining from any act of affirmance, but by performing some positive act of disaffirmance,[56] which is of such a character as to clearly show his intention not to be bound by his act.[57] It is not necessary that the disaffirmance of a conveyance, etc., made by an infant should be by an act or instrument of equal solemnity with the one sought to be avoided,[58] or even that the disaffirmance should be in writing;[59] but any act on the part of the late infant done with the intent to disaffirm,[60] which shows to the world that he does not intend to be bound, and is inconsistent with the continued validity of the conveyance, etc., is sufficient.[61]

51. Applegate *v.* Conner, 93 Ind. 185.

Alienation of inchoate rights.— The removal of the disability of coverture upon the disaffirmance of deeds by infants applies only where the interests conveyed are absolute and does not change the rule existing before such removal as to interests which are inchoate and against which the statute of limitations does not begin to run until the happening of some contingency making such interests absolute and permitting an action for their enforcement. McClanahan *v.* Williams, 136 Ind. 30, 35 N. E. 897.

52. Keil *v.* Healey, 84 Ill. 104, 25 Am. Rep. 434.

53. As to contracts generally see *infra*, V, F, 3.

54. *Delaware.*— Wallace *v.* Lewis, 4 Harr. 75.

Kentucky.— Hoffert *v.* Miller, 86 Ky. 572, 6 S. W. 447, 9 Ky. L. Rep. 732.

New York.— Dominick *v.* Michael, 4 Sandf. 374; Van Nostrand *v.* Wright, Lalor 260.

Ohio.— Cresinger *v.* Welch, 15 Ohio 156, 45 Am. Dec. 565.

England.— Allen *v.* Allen, 1 C. & L. 427, 2 Dr. & War. 307, 4 Ir. Eq. 472.

See 27 Cent. Dig. tit. "Infants," § 56.

Person in possession under deed before avoidance not a trespasser.— Wallace *v.* Lewis, 4 Harr. (Del.) 75.

There can be no breach of a covenant of seizin contained in the deed of an infant until he enters the land and in some legal mode avoids the conveyance. Van Nostrand *v.* Wright, Lalor (N. Y.) 260.

55. As to contracts generally see *infra*, V, F, 4.

56. McCarthy *v.* Nicrosi, 72 Ala. 332, 47 Am. Rep. 418; Law *v.* Long, 41 Ind. 586; Dixon *v.* Merritt, 21 Minn. 196. See also Welch *v.* Bunce, 83 Ind. 382.

57. *Alabama.*— McCarthy *v.* Nicrosi, 72 Ala. 332, 47 Am. Rep. 418.

Minnesota.— Cogley *v.* Cushman, 16 Minn. 397.

New Hampshire.— Roberts *v.* Wiggin, 1 N. H. 73, 8 Am. Dec. 38.

Texas.— Harris *v.* Musgrove, 59 Tex. 407.

Canada.— See Saunders *v.* Russell, 9 Brit. Col. 321.

See 27 Cent. Dig. tit. "Infants," § 57.

Acts and circumstances not showing disaffirmance see Beardsley *v.* Hotchkiss, 96 N. Y. 201.

58. Shroyer *v.* Pittenger, 31 Ind. App. 158, 67 N. E. 475; Allen *v.* Poole, 54 Miss. 323.

Deed acknowledged in open court.— The acknowledgment by a minor, in open court, of a deed executed by him does not require that the revocation should be made in open court and after notice to the parties. Slaughter *v.* Cunningham, 24 Ala. 260, 60 Am. Dec. 463.

59. Shroyer *v.* Pittenger, 31 Ind. App. 158, 67 N. E. 475.

60. Shroyer *v.* Pittenger, 31 Ind. App. 158, 67 N. E. 475.

61. *Alabama.*— Slaughter *v.* Cunningham, 24 Ala. 260, 60 Am. Dec. 463, where the grantor retains possession of the land conveyed.

Illinois.— Illinois Land, etc., Co. *v.* Beem, 2 Ill. App. 390.

Indiana.— Long *v.* Williams, 74 Ind. 115; Shroyer *v.* Pittenger, 31 Ind. App. 158, 67 N. E. 475. See also Shrock *v.* Crowl, 83 Ind. 243.

New Hampshire.— State *v.* Plaisted, 43 N. H. 413.

United States.— See Tucker *v.* Moreland, 10 Pet. 58, 9 L. ed. 345.

See 27 Cent. Dig. tit. "Infants," § 57.

Acts and circumstances showing disaffirmance see McCarty *v.* Woodstock Iron Co., 92 Ala. 463, 8 So. 417, 12 L. R. A. 136; Baker *v.* Kennett, 54 Mo. 82; Kerr *v.* Bell, 44 Mo. 120.

Retaining possession after majority of land conveyed during infancy may show disaffirmance. Slaughter *v.* Cunningham, 24 Ala. 260, 60 Am. Dec. 463.

Giving notice of disaffirmance a sufficient act of avoidance.— Scott *v.* Brown, 106 Ala.

b. Disaffirmance by Written Instrument. A conveyance, etc., made by an infant is disaffirmed by his execution, after majority, of an instrument under seal revoking and annulling the same,[62] or by his writing a letter to the purchaser stating his intention of repudiating the sale.[63]

c. Bringing or Defending Suit. The institution of a suit to set aside a deed is an avoidance of it.[64] The weight of authority supports the rule that where one, after reaching majority, brings suit to recover possession of land which he has conveyed during infancy, this is a sufficient disaffirmance;[65] but there is also authority for the view that some previous act of disaffirmance is necessary to authorize the bringing of a suit for possession of the land.[66] A suit by the late infant to recover the money paid by him on a contract for the purchase of land is an act of avoidance.[67] Setting up the defense of infancy in a suit by the other party to enforce his rights under the deed, etc., is also a sufficient avoidance.[68]

d. Reentry or Reclaiming Property. An entry by the late infant upon real estate conveyed by him or his reclaiming the property sold shows his disaffirmance.[69]

604, 17 So. 731; McCarthy *v.* Nicrosi, 72 Ala. 332, 47 Am. Rep. 418; Long *v.* Williams, 74 Ind. 115 (written notice); Scranton *v.* Stewart, 52 Ind. 68 (written notice); Roberts *v.* Wiggin, 1 N. H. 73, 8 Am. Dec. 38 (where the late infant is in possession); Sims *v.* Everhardt, 102 U. S. 300, 26 L. ed. 87 (notice followed by suit).

62. McIlvaine *v.* Kadel, 3 Rob. (N. Y.) 429. See also Slaughter *v.* Cunningham, 24 Ala. 260, 60 Am. Dec. 463.

A tender of a deed with the grantee's name in blank is a sufficient offer of reconveyance and disaffirmance to avoid a mortgage given by the mortgagor during infancy, to secure the purchase-price of the land conveyed by the deed. Kane *v.* Kane, 13 N. Y. App. Div. 544, 43 N. Y. Suppl. 662.

63. McCarty *v.* Woodstock Iron Co., 92 Ala. 463, 8 So. 417, 12 L. R. A. 136.

64. Gillespie *v.* Bailey, 12 W. Va. 70, 29 Am. Rep. 445.

65. *Alabama.*— McCarthy *v.* Nicrosi, 72 Ala. 332, 47 Am. Rep. 418; Schaffer *v.* Lavretta, 57 Ala. 14; Greenwood *v.* Coleman, 34 Ala. 150.

Maine.— Webb *v.* Hall, 35 Me. 336; Chadbourne *v.* Rackliff, 30 Me. 354.

Missouri.— Craig *v.* Van Bebber, 100 Mo. 584, 13 S. W. 906, 18 Am. St. Rep. 569.

Montana.— Clark *v.* Tate, 7 Mont. 171, 14 Pac. 761.

Ohio.— Drake *v.* Ramsay, 5 Ohio 251.

Tennessee.—Scott *v.* Buchanan, 11 Humphr. 468, suit without previous entry.

Virginia.— Birch *v.* Linton, 78 Va. 584, 49 Am. Rep. 381.

United States.— Sims *v.* Everhardt, 102 U. S. 300, 26 L. ed. 87, suit after notice of disaffirmance.

Canada.— Doe *v.* Woodruffe, 7 U. C. Q. B. 332. See also Gilchrist *v.* Ramsay, 27 U. C. Q. B. 500.

See 27 Cent. Dig. tit. "Infants," § 57.

Bringing suit all the disaffirmance required.— Birch *v.* Linton, 78 Va. 584, 49 Am. Rep. 381.

The filing of a bill for dower is a sufficient disaffirmance of an infant's renunciation of dower by deed, without any previous act. Hughes *v.* Watson, 10 Ohio 127.

A complete avoidance.— The bringing of an action of ejectment by the grantor to regain possession of the land contrary to his deed is so complete an avoidance of the deed that it cannot afterward be confirmed or set up by any subsequent deed or act of the grantor. Doe *v.* Woodruffe, 7 U. C. Q. B. 332.

Petition in the ordinary form of action of ejectment sufficient.— Craig *v.* Van Bebber, 100 Mo. 584, 13 S. W. 906, 18 Am. St. Rep. 569.

Bringing an action of replevin to recover property seized under a chattel mortgage is a repudiation of the mortgage. Stotts *v.* Leonhard, 40 Mo. App. 336.

66. Welch *v.* Bunce, 83 Ind. 382; Scranton *v.* Stewart, 52 Ind. 68; Law *v.* Long, 41 Ind. 586; Doe *v.* Abernathy, 7 Blackf. (Ind.) 442; Clawson *v.* Doe, 5 Blackf. (Ind.) 300; Voorhies *v.* Voorhies, 24 Barb. (N. Y.) 150; Bool *v.* Mix, 17 Wend. (N. Y.) 119, 31 Am. Dec. 285.

It is the disaffirmance which avoids the deed of an infant, and not the bringing of an action to recover the land. Sims *v.* Snyder, 86 Ind. 602; Sims *v.* Bardoner, 86 Ind. 87, 44 Am. Rep. 263; Long *v.* Williams, 74 Ind. 115.

67. McCarty *v.* Woodstock Iron Co., 92 Ala. 463, 8 So. 417, 12 L. R. A. 136.

68. Roberts *v.* Wiggins, 1 N. H. 73, 8 Am. Dec. 38; New York Bldg. Loan Banking Co. *v.* Fisher, 23 N. Y. App. Div. 363, 48 N. Y. Suppl. 152; Gilchrist *v.* Ramsay, 27 U. C. Q. B. 500.

69. *Alabama.*— McCarthy *v.* Nicrosi, 72 Ala. 332, 47 Am. Rep. 418.

Indiana.— Shrock *v.* Cowl, 83 Ind. 243; Long *v.* Williams, 74 Ind. 115.

Kentucky.— Utz *v.* Com., 3 Ky. L. Rep. 88.

South Carolina.— McGill *v.* Woodward, 3 Brev. 401, 1 Treadw. 468.

Tennessee.— Scott *v.* Buchanan, 11 Humphr. 468.

Texas.— Harris *v.* Musgrove, 59 Tex. 401.

United States.— Tucker *v.* Moreland, 10 Pet. 58, 9 L. ed. 345.

See 27 Cent. Dig. tit. "Infants," 161.

But acts of ownership, to amount to a disavowal of a previous sale, must be distinct and unequivocal.[70]

e. Subsequent Conveyance or Mortgage — (i) *In General.* Where one who has conveyed his property while an infant executes, after his arrival at his majority, another deed conveying the same property to another person, the first deed is thereby disaffirmed,[71] even though the deed executed after majority is a mere quitclaim, while the one executed during infancy is a warranty deed.[72] So also where one who has executed a deed while an infant executes a mortgage upon the same land upon his arrival at majority, this is a complete assumption of ownership and an avoidance of the deed.[73] The execution after reaching majority

Reëntry necessary if infant not in possession.— Roberts *v.* Wiggin, 1 N. H. 73, 8 Am. Dec. 38.

Infant cannot defeat assignment of dower by entry. McCormick *v.* Taylor, 2 Ind. 336.

That the father appropriated property sold by his son during his minority will not relieve the purchaser from the obligation of paying, unless the minor directed or assented to the appropriation. Harris *v.* Musgrove, 59 Tex. 401.

70. Harris *v.* Musgrove, 59 Tex. 401.

71. *Georgia.*— Wimberly *v.* Jones, Ga. Dec. 91.

Illinois.— Black *v.* Hills, 36 Ill. 376, 87 Am. Dec. 224.

Indiana.— Long *v.* Williams, 74 Ind. 115; Riggs *v.* Fisk, 64 Ind. 100; Steeple *v.* Downing, 60 Ind. 478; Pitcher *v.* Laycock, 7 Ind. 398.

Kentucky.— Ison *v.* Cornett, 116 Ky. 92, 75 S. W. 204, 25 Ky. L. Rep. 366; Moore *v.* Baker, 92 Ky. 518, 18 S. W. 363, 13 Ky. L. Rep. 724; Vallandingham *v.* Johnson, 85 Ky. 288, 3 S. W. 173, 8 Ky. L. Rep. 940; Estep *v.* Estep, 73 S. W. 777, 24 Ky. L. Rep. 2198. See also Combs *v.* Hall, 60 S. W. 647, 22 Ky. L. Rep. 1418, execution of deed a repudiation of title bond executed to another during infancy.

Massachusetts.— Worcester *v.* Eaton, 13 Mass. 371, 7 Am. Dec. 155, deed after entry.

Michigan.— Corbett *v.* Spencer, 63 Mich. 731, 30 N. W. 385; Haynes *v.* Bennett, 53 Mich. 15, 18 N. W. 539; Prout *v.* Wiley, 28 Mich. 164, conveyance after majority and entry by grantee under such conveyance.

Minnesota.— Dawson *v.* Helmes, 30 Minn. 107, 14 N. W. 462.

Missouri.— Ridgeway *v.* Herbert, 150 Mo. 606, 51 S. W. 1040, 73 Am. St. Rep. 464 (warranty deed); Craig *v.* Van Bebber, 100 Mo. 584, 13 S. W. 906, 18 Am. St. Rep. 569; Peterson *v.* Laik, 24 Mo. 541, 69 Am. Dec. 441; Norcum *v.* Sheahan, 21 Mo. 25, 64 Am. Dec. 214; Youse *v.* Norcum, 12 Mo. 549, 51 Am. Dec. 175; Clamorgan *v.* Lane, 9 Mo. 446.

New York.— Wetmore *v.* Kissam, 3 Bosw. 321, deed to another accompanied by an entry.

North Carolina.— Gaskins *v.* Allen, 137 N. C. 426, 49 S. E. 919; Hoyle *v.* Stowe, 19 N. C. 320.

Ohio.— Cresinger *v.* Welch, 15 Ohio 156, 45 Am. Dec. 565; Drake *v.* Ramsey, 5 Ohio 251. See also Hetterick *v.* Porter, 20 Ohio Cir. Ct. 110, 11 Ohio Cir. Dec. 145, any deed conveying the fee simple.

Pennsylvania.— Love *v.* Dobson, 5 Wkly. Notes Cas. 359.

South Carolina.— Roach *v.* Williams, 2 Mill 202; McGill *v.* Woodward, 3 Brev. 401, 1 Treadw. 468.

Tennessee.—Scott *v.* Buchanan, 11 Humphr. 468; McGan *v.* Marshall, 7 Humphr. 121; White *v.* Flora, 2 Overt. 426.

Texas.— Searcy *v.* Hunter, 81 Tex. 644, 17 S. W. 372, 26 Am. St. Rep. 837.

Virginia.— See Mustard *v.* Wohlford, 15 Gratt. 329, 76 Am. Dec. 209.

United States.— Tucker *v.* Moreland, 10 Pet. 58, 9 L. ed. 345; Nettleton *v.* Morrison, 18 Fed. Cas. No. 10,127, 5 Dill. 503.

Canada.— Robinson *v.* Sutherland, 9 Manitoba 199.

See 27 Cent. Dig. tit. "Infants," § 60.

Conveyance by heirs of infant grantor a disaffirmance.— Searcy *v.* Hunter, 81 Tex. 644, 17 S. W. 372, 26 Am. St. Rep. 837.

A contract of sale entered into with a third person after reaching majority and the execution of a bond for title is an avoidance of a sale of the same land made during infancy; and if the first vendee, with knowledge of such contract, obtains the legal title from the original vendor, he takes it subject to a trust for the second vendee. Mustard *v.* Wohlford, 15 Gratt. (Va.) 329, 76 Am. Dec. 209. Conversely a contract of sale made during infancy is disaffirmed by a conveyance after majority to another person. Cook *v.* Bronaugh, 13 Ark. 183.

The purchaser from the late infant acquires a good title (Ison *v.* Cornett, 75 S. W. 204, 25 Ky. L. Rep. 366; White *v.* Flora, 2 Overt. (Tenn.) 426; Nettleton *v.* Morrison, 18 Fed. Cas. No. 10,127, 5 Dill. 503), although he had knowledge of the prior conveyance (Ison *v.* Cornett, *supra*; Nettleton *v.* Morrison, *supra*), and is entitled to a decree quieting his title, without restoring the consideration for the voidable conveyance (Nettleton *v.* Morrison, *supra*).

Where it was not intended to include the land formerly conveyed in the conveyance executed after majority, and the former conveyance has been reacknowledged after majority, there is no disaffirmance. Blair *v.* Whitaker, 31 Ind. App. 664, 69 N. E. 182.

72. Bagley *v.* Fletcher, 44 Ark. 153.

73. Watkins *v.* Wassell, 15 Ark. 73. But *compare* McGan *v.* Marshall, 7 Humphr. (Tenn.) 121.

of an absolute conveyance or warranty deed containing no reference to a mortgage executed during infancy is a disaffirmance of the mortgage,[74] although a mere quitclaim deed will not have this effect;[75] and it seems that a mortgage up to the full value of the property executed after majority may avoid a prior mortgage executed while an infant.[76] In order, however, that the subsequent conveyance or mortgage shall operate as a disaffirmance of the former act, it must be inconsistent therewith; if both can properly stand together there is no disaffirmance.[77]

(II) *Necessity For Entry by Late Infant.* It has been held that an infant's conveyance of land may be disaffirmed on his attaining majority without entry by conveying the land to another person.[78] But on the other hand it has been laid down that while a deed executed by an infant may be avoided by another deed made to a third person, without entry by the infant when he arrives at age, in case the land continues in the possession of the infant[79] or is vacant and uncultivated,[80] a second deed executed by the infant after arriving at full age, while the land is held adversely to him under the first, and without an entry by him for the purpose of avoiding the first conveyance will not amount to a revocation thereof.[81]

5. Return of Property or Consideration.[82] If an infant, upon his arrival at majority, still has the property or consideration received by him, or any part thereof, he must, upon the avoidance of his act, restore such property or consideration;[83] but if, during infancy, he has disposed of the property received or

74. Scott *v.* Brown, 106 Ala. 604, 17 So. 731; Dixon *v.* Merritt, 21 Minn. 196; Allen *v.* Poole, 54 Miss. 323.

An unconditional sale and delivery of chattels is an avoidance of a mortgage thereon executed during infancy. Chapin *v.* Shafer, 49 N. Y. 407.

A conveyance by the infant's guardian during his minority cannot amount to a disaffirmance of a prior mortgage by the infant. Shreeves *v.* Caldwell, 135 Mich. 323, 97 N. W. 764, 106 Am. St. Rep. 396.

A deed by the administrator of the infant's husband does not disaffirm a mortgage of the homestead by the infant and her husband. Shreeves *v.* Caldwell, 135 Mich. 323, 97 N. W. 764, 106 Am. St. Rep. 396.

A warranty deed made while an infant will not avoid a prior mortgage. Singer Mfg. Co. *v.* Lamb, 81 Mo. 221.

75. Shreeves *v.* Caldwell, 135 Mich. 323, 97 N. W. 764, 106 Am. St. Rep. 396; Singer Mfg. Co. *v.* Lamb, 81 Mo. 221. See also Palmer *v.* Miller, 25 Barb. (N. Y.) 399. But see Hetterick *v.* Porter, 20 Ohio Cir. Ct. 110, 11 Ohio Cir. Dec. 145, where quitclaim deed was deemed a disaffirmance.

76. Inman *v.* Inman, L. R. 15 Eq. 260, 21 Wkly. Rep. 433.

77. Leitensdorfer *v.* Hempstead, 18 Mo. 269; Buchanan *v.* Griggs, 18 Nebr. 121, 24 N. W. 452; McGan *v.* Marshall, 7 Humphr. (Tenn.) 121.

78. Riggs *v.* Fisk, 64 Ind. 100; Steeple *v.* Downing, 60 Ind. 478; Pitcher *v.* Laycock, 7 Ind. 398; Haynes *v.* Bennett, 53 Mich. 15, 18 N. W. 539; Peterson *v.* Laik, 24 Mo. 541, 69 Am. Dec. 441; Mustard *v.* Wohlford, 15 Gratt. (Va.) 329, 76 Am. Dec. 209. And see *supra*, note 71.

Reason of the rule.— While the second deed is void as against a third person in adverse possession, it is still good between the parties and as to all the world, except the person in adverse possession, and authorizes the grantee to prosecute a suit in the name of the grantor for the recovery of the premises conveyed for the benefit of the grantee. Riggs *v.* Fisk, 64 Ind. 100; Steeple *v.* Downing, 60 Ind. 478.

79. Harris *v.* Cannon, 6 Ga. 382; Roberts *v.* Wiggin, 1 N. H. 73, 8 Am. Dec. 38; Dominick *v.* Michael, 4 Sandf. (N. Y.) 374.

80. Harris *v.* Cannon, 6 Ga. 382; Roberts *v.* Wiggin, 1 N. H. 73, 8 Am. Dec. 38; Dominick *v.* Michael, 4 Sandf. (N. Y.) 375; Bool *v.* Mix, 17 Wend. (N. Y.) 119, 31 Am. Dec. 285; Jackson *v.* Burchin, 14 Johns. (N. Y.) 124; Jackson *v.* Carpenter, 11 Johns. (N. Y.) 539.

81. *Georgia.*— Harrison *v.* Adcock, 8 Ga. 68; Harris *v.* Cannon, 6 Ga. 382, opinion of the court delivered by Lumpkin, J.

Massachusetts.— Worcester *v.* Eaton, 13 Mass. 371, 7 Am. Dec. 155.

New Hampshire.— See Roberts *v.* Wiggin, 1 N. H. 73, 8 Am. Dec. 38.

New York.—Dominick *v.* Michael, 4 Sandf. 374; Bool *v.* Mix, 17 Wend. 119, 31 Am. Dec. 285. See also Jackson *v.* Burchin, 14 Johns. 124.

North Carolina.— Murray *v.* Shanklin, 20 N. C. 431.

England.— See Slator *v.* Brady, 14 Ir. C. L. 61.

See 27 Cent. Dig. tit. "Infants," § 60.

82. **As to contracts** generally see *infra*, V, F, 5.

83. *Alabama.*— Hobbs *v.* Hobbs, 122 Ala. 602, 26 So. 139, 82 Am. St. Rep. 103; Eureka Co. *v.* Edwards, 71 Ala. 248, 46 Am. Rep. 314; Manning *v.* Johnson, 26 Ala. 446, 62 Am. Dec. 732.

Arkansas.— Stull *v.* Harris, 51 Ark. 294,

spent or wasted the consideration, he is not obliged to make restitution upon his

11 S. W. 104, 2 L. R. A. 741; St. Louis, etc., R. Co. *v.* Higgins, 44 Ark. 293.

District of Columbia.— Utermehle *v.* McGreal, 1 App. Cas. 359.

Georgia.— Harris *v.* Collins, 75 Ga. 97; Strain *v.* Wright, 7 Ga. 568.

Illinois.— Brandon *v.* Brown, 106 Ill. 519; Reynolds *v.* McCurry, 100 Ill. 356; Wickiser *v.* Cook, 85 Ill. 68; Smith *v.* Knoebel, 82 Ill. 404; Walker *v.* Mulvean, 76 Ill. 18; Padfeld *v.* Pierce, 72 Ill. 500; Chambers *v.* Jones, 72 Ill. 275; Kinney *v.* Knoebel, 51 Ill. 112; Penn *v.* Heisey, 19 Ill. 295, 68 Am. Dec. 597.

Indiana.— Dill *v.* Bowen, 54 Ind. 204; Towell *v.* Peirce, 47 Ind. 304; Carpenter *v.* Carpenter, 45 Ind. 142.

Iowa.—Beickler *v.* Guenther, 121 Iowa 419, 96 N. W. 895; Stout *v.* Merrill, 35 Iowa 47; Jenkins *v.* Jenkins, 12 Iowa 195.

Kentucky.— Ison *v.* Cornett, 116 Ky. 92, 75 S. W. 204, 25 Ky. L. Rep. 366 (if he still has the consideration or its representative in money or property); Sewell *v.* Sewell, 92 Ky. 500, 18 S. W. 162, 36 Am. St. Rep. 606.

Louisiana.— Foutelet *v.* Murrell, 9 La. 299. See also Daquin *v.* Coiron, 6 Mart. N. S. 674, 684.

Maine.— Boody *v.* McKenney, 23 Me. 517.

Maryland.— Monumental Bldg. Assoc. No. 2 *v.* Herman, 33 Md. 128.

Massachusetts.—Drude *v.* Curtis, 183 Mass. 317, 67 N. E. 317, 62 L. R. A. 755; Chandler *v.* Simmons, 97 Mass. 508, 93 Am. Dec. 117.

Minnesota.— See Miller *v.* Smith, 26 Minn. 248, 2 N. W. 942, 37 Am. Rep. 407.

Mississippi.— Evans *v.* Morgan, 69 Miss. 328, 12 So. 270; Harvey *v.* Briggs, 68 Miss. 60; Brantley *v.* Wolf, 60 Miss. 420; Ferguson *v.* Bobo, 54 Miss. 121; Hill *v.* Anderson, 5 Sm. & M. 216.

Missouri.— Lacy *v.* Pixler, 120 Mo. 383, 25 S. W. 206; Craig *v.* Van Bebber, 100 Mo. 584, 13 S. W. 906, 18 Am. St. Rep. 569; Baker *v.* Kennett, 54 Mo. 82; Highley *v.* Barron, 49 Mo. 103; Kerr *v.* Bell, 44 Mo. 120; Zuck *v.* Turner Harness, etc., Co., 106 Mo. App. 566, 80 S. W. 967; Downing *v.* Stone, 47 Mo. App. 144.

Montana.— Clark *v.* Tate, 7 Mont. 171, 14 Pac. 761.

Nebraska.— Englebert *v.* Troxell, 40 Nebr. 195, 58 N. W. 852, 42 Am. St. Rep. 665, 26 L. R. A. 177; Bloomer *v.* Nolan, 36 Nebr. 51, 53 N. W. 1039, 38 Am. St. Rep. 690.

New Hampshire.— Young *v.* Currier, 63 N. H. 419; Carr *v.* Clough, 26 N. H. 280, 59 Am. Dec. 345.

New Jersey.— See Pemberton Bldg., etc., Assoc. *v.* Adams, 53 N. J. Eq. 258, 31 Atl. 280.

New York.— Green *v.* Green, 7 Hun 492 [*affirming* 69 N. Y. 553, 25 Am. Rep. 233]; Kitchen *v.* Lee, 11 Paige 107, 42 Am. Dec. 101; Hillyer *v.* Bennett, 3 Edw. 222. See also New York Bldg. Loan Banking Co. *v.* Fisher, 23 N. Y. App. Div. 363, 48 N. Y. Suppl. 152; Gray *v.* Lessington, 2 Bosw. 257.

Ohio.— Cresinger *v.* Welch, 15 Ohio 156, 45 Am. Dec. 565; Mills *v.* Rodgers, 2 Ohio Dec. (Reprint) 481, 3 West. L. Month. 262.

Pennsylvania.—Smith *v.* Eisenlord, 2 Phila. 353.

Tennessee.— Matherson *v.* Davis, 2 Coldw. 443; Smith *v.* Evans, 5 Humphr. 70.

Texas.— Bullock *v.* Sprowls, 93 Tex. 188, 54 S. W. 661, 77 Am. St. Rep. 849, 47 L. R. A. 326 [*affirming* (Civ. App. 1899) 54 S. W. 657]; Houston, etc., R. Co. *v.* Ferguson, 73 Tex. 349, 13 S. W. 57; Ferguson *v.* Houston, etc., R. Co., 73 Tex. 344, 11 S. W. 347; Wade *v.* Love, 69 Tex. 522, 7 S. W. 225; Harris *v.* Musgrove, 59 Tex. 401; Graves *v.* Hickman, 59 Tex. 381; Bingham *v.* Barley, 55 Tex. 281, 40 Am. Rep. 801; Stuart *v.* Baker, 17 Tex. 417; Kilgore *v.* Jordan, 17 Tex. 341; Womack *v.* Womack, 8 Tex. 397, 58 Am. Dec. 119; Cummings *v.* Powell, 8 Tex. 80.

United States.— MacGreal *v.* Taylor, 167 U. S. 688, 17 S. Ct. 961, 42 L. ed. 326.

See 27 Cent. Dig. tit. "Infants," § 59.

General offer to repay sufficient.— Graves *v.* Hickman, 59 Tex. 381.

The late infant need not tender anything which he may have acquired or received in the transaction which he seeks to disaffirm in order to exercise the right of avoidance; but by exercising the right he subjects himself to liability to account for what he has received and has in his possession when he reaches majority. McCarty *v.* Woodstock Iron Co., 92 Ala. 463, 8 So. 417, 12 L. R. A. 136; Carpenter *v.* Carpenter, 45 Ind. 142; Miles *v.* Lingerman, 24 Ind. 385; Pitcher *v.* Laycock, 7 Ind. 398; Aronstein *v.* Irvine, 48 La. Ann. 301, 19 So. 131; Self *v.* Taylor, 33 La. Ann. 769.

Disaffirmance vests property in seller.— Skinner *v.* Maxwell, 66 N. C. 45. And he may maintain replevin therefor. Bennett *v.* McLaughlin, 13 Ill. App. 349.

Restoration a condition precedent.— Zuck *v.* Turner Harness, etc., Co., 106 Mo. App. 566, 80 S. W. 967; Downing *v.* Stone, 47 Mo. App. 144; Carr *v.* Clough, 26 N. H. 280, 59 Am. Dec. 345, restoration or offer to restore.

An offer in writing to return the property is, in the absence of acceptance, equivalent to an actual tender. Beickler *v.* Guenther, 121 Iowa 419, 96 N. W. 895.

An attempt to repudiate an executor's sale of real estate in which an infant is interested is within the rule. Brandon *v.* Brown, 106 Ill. 519.

Conveyance pursuant to judgment.—Where lands have been conveyed to a minor by order of a void or erroneous judgment, he may, upon arriving at the age of majority, cause such judgment to be reversed without first offering to reconvey the lands; but he must tender reconveyance before recovering the property in lieu of which the lands were conveyed to him. Roberts *v.* Roberts, 61 Ohio St. 96, 55 N. E. 411.

Tender to purchaser from vendee.— Where an infant, after selling a horse, elects to re-

avoidance.[84] The same rule applies where the transaction is sought to be

scind the sale, and tenders to the purchaser the price received, he may recover the horse, or its value, from a third person to whom it had been sold without tendering the price received to such person, and although the latter was a *bona fide* purchaser. Downing *v.* Stone, 47 Mo. App. 144.

That the consideration has changed its form is immaterial if it is still in the possession of the infant. Utermehle *v.* McGreal, 1 App. Cas. (D. C.) 359.

Indiana statutes. — Under Ind. Rev. St. (1894) § 3364, an infant *feme covert* who has sold her lands by a conveyance in which her husband joined, he being of full age, cannot disaffirm without restoring the consideration. Blair *v.* Whittaker, 31 Ind. App. 664, 69 N. E. 182. This statute applies to mortgages as well as conveyances, but does not prevent the wife's disaffirming the note secured by the mortgage and thus escaping personal liability. U. S. Sav. Fund, etc., Co. *v.* Harris, 142 Ind. 226, 40 N. E. 1072, 41 N. E. 451. The statute is not applicable where the infant *feme covert* has received no consideration (Shroyer *v.* Pittenger, 31 Ind. App. 158, 67 N. E. 475), nor where the husband was an infant at the time of the conveyance (see Gillenwaters *v.* Campbell, 142 Ind. 529, 41 N. E. 1041). Under Ind. Rev. St. (1894) § 3365, an infant cannot disaffirm his conveyance without restoring the consideration if, at the time, he falsely represented himself to be of age and the purchaser relied upon such representation and had good cause to believe it to be true. In order to bring a case within this statute there must have been a false representation by the infant as to his age (Gillenwaters *v.* Campbell, *supra*), and one who has dealt with minors in relation to real property, with full knowledge of their incapacity, cannot insist upon a restoration of the consideration as a condition precedent to their right to disaffirm (Shaul *v.* Rinker, 139 Ind. 163, 38 N. E. 593).

84. *Alabama.*— Eureka Co. *v.* Edwards, 71 Ala. 248, 46 Am. Rep. 314; Manning *v.* Johnson, 26 Ala. 446, 62 Am. Dec. 732.

Arkansas.— Fox *v.* Drewry, 62 Ark. 316, 35 S. W. 533; Stull *v.* Harris, 51 Ark. 294, 11 S. W. 104, 2 L. R. A. 741; St. Louis, etc., R. Co. *v.* Higgins, 44 Ark. 293.

Illinois.— Brandon *v.* Brown, 106 Ill. 519; Reynolds *v.* McCurry, 100 Ill. 356; Wickiser *v.* Cook, 85 Ill. 68; Smith *v.* Knoebel, 82 Ill. 392; Walker *v.* Mulvean, 76 Ill. 18; Padfield *v.* Pierce, 72 Ill. 500; Chambers *v.* Jones, 72 Ill. 275; Kinney *v.* Knoebel, 51 Ill. 112; Penn *v.* Heisey, 19 Ill. 295, 68 Am. Dec. 597.

Indiana.— Riggs *v.* Fisk, 64 Ind. 100; Dill *v.* Bowen, 54 Ind. 204; Carpenter *v.* Carpenter, 45 Ind. 142; Pitcher *v.* Laycock, 7 Ind. 398. See also White *v.* Branch, 51 Ind. 210.

Iowa.— Beickler *v.* Guenther, 121 Iowa 419, 96 N. W. 895; Jenkins *v.* Jenkins, 12 Iowa 195.

Kentucky.— Ison *v.* Cornett, 116 Ky. 92, 75 S. W. 204, 25 Ky. L. Rep. 366; Moore *v.* Baker, 92 Ky. 518, 18 S. W. 363, 13 Ky. L. Rep. 724; Vallandingham *v.* Johnson, 85 Ky. 289, 3 S. W. 173, 8 Ky. L. Rep. 940; Napier *v.* Chappell, 62 S. W. 21, 22 Ky. L. Rep. 1904.

Maine.— Boody *v.* McKenney, 23 Me. 517.

Maryland.— Monumental Bldg. Assoc. No. 2 *v.* Herman, 33 Md. 128.

Massachusetts.— Walsh *v.* Young, 110 Mass. 396; Bartlett *v.* Drake, 100 Mass. 174, 97 Am. Dec. 92, 1 Am. Rep. 101; Chandler *v.* Simmons, 97 Mass. 508, 93 Am. Dec. 117.

Michigan.— Corey *v.* Burton, 32 Mich. 30.

Minnesota.— Dawson *v.* Helmes, 30 Minn. 107, 14 N. W. 462. See also Miller *v.* Smith, 26 Minn. 248, 2 N. W. 942, 37 Am. Rep. 407.

Mississippi.— Harvey *v.* Briggs, 68 Miss. 60, 8 So. 274, 10 L. R. A. 62; Brantley *v.* Wolf, 60 Miss. 420 [*disapproving* Ferguson *v.* Bobo, 54 Miss. 121].

Missouri.— Ridgeway *v.* Herbert, 150 Mo. 606, 51 S. W. 1040, 73 Am. St. Rep. 464; Craig *v.* Van Bebber, 100 Mo. 584, 13 S. W. 906, 18 Am. St. Rep. 569.

Nebraska.— Englebert *v.* Troxell, 40 Nebr. 195, 58 N. W. 852, 26 L. R. A. 177, 42 Am. St. Rep. 665; Bloomer *v.* Nolan, 36 Nebr. 51, 53 N. W. 1039, 38 Am. St. Rep. 690. See also Rowe *v.* Griffiths, 57 Nebr. 488, 78 N. W. 20.

New York.— Green *v.* Green, 69 N. Y. 553, 25 Am. Rep. 233 [*affirming* 7 Hun 492]; New York Bldg. Loan Banking Co. *v.* Fisher, 23 N. Y. App. Div. 363, 48 N. Y. Suppl. 152; Kane *v.* Kane, 13 N. Y. App. Div. 544, 43 N. Y. Suppl. 662; Moore *v.* Appleby, 36 Hun 368.

Ohio.— Mills *v.* Rodgers, 2 Ohio Dec. (Reprint) 481, 3 West. L. Month. 262.

Pennsylvania.— Smith *v.* Eisenlord, 2 Phila. 353.

Texas.— Bullock *v.* Sprowls, 93 Tex. 188, 54 S. W. 661, 77 Am. St. Rep. 849, 47 L. R. A. 326 [*affirming* (Civ. App. 1899) 54 S. W. 657].

Vermont.— Whitcomb *v.* Joslyn, 51 Vt. 79, 31 Am. Rep. 678; Holden *v.* Pike, 14 Vt. 405, 39 Am. Dec. 228.

United States.— MacGreal *v.* Taylor, 167 U. S. 688, 17 S. Ct. 961, 42 L. ed. 326; Tucker *v.* Moreland, 10 Pet. 58, 9 L. ed. 345.

See 27 Cent. Dig. tit. "Infants," § 59.

It must affirmatively appear that the infant has squandered or lost the property during minority and is unable to refund, or the court will compel him to make restitution. Hangen *v.* Hachmeister, 49 N. Y. Super. Ct. 34. See also Green *v.* Green, 69 N. Y. 553, 25 Am. Rep. 233.

Where the consideration never came into the infant's hands there is no obligation to refund (Stull *v.* Harris, 51 Ark. 294, 11 S. W. 104, 2 L. R. A. 741; Clark *v.* Tate, 7 Mont. 171, 14 Pac. 761; Vogelsang *v.* Null, 67 Tex. 465, 3 S. W. 451. See also Fox *v.*

avoided, not by the late infant himself, but by some other person claiming in his right.[85]

6. Effect of Avoidance[86] — a. In General. The effect of the disaffirmance of a deed, mortgage, etc., executed by an infant is to render the same void *ab initio* by relation,[87] and in case of a conveyance, possession of the property may be recovered by the late infant.[88] After disaffirmance by the late infant, all persons may take advantage thereof and treat the deed or mortgage as null.[89]

b. Rents and Profits. The late infant is entitled to charge the purchaser under the deed which has been avoided with rents and profits for the whole time during which he was in possession of the property claiming under such deed.[90]

Drewry, 62 Ark. 316, 35 S. W. 533; Jenkins *v.* Jenkins, 12 Iowa 195; Yarborough *v.* Yarborough, 59 N. C. 209; O'Connor *v.* Vineyard, (Tex. Civ. App. 1897) 43 S. W. 55), even though the person who received it was the recognized agent of the infant (Vogelsang *v.* Null, 67 Tex. 465, 3 S. W. 451). So also a married woman who joined with her husband in a conveyance of his lands in order to release her dower may disaffirm without refunding any portion of the purchase-money which her husband received. Richardson *v.* Pate, 93 Ind. 423, 47 Am. Rep. 374; Law *v.* Long, 41 Ind. 586; Markham *v.* Merritt, 7 How. (Miss.) 437, 40 Am. Dec. 76. See also Bradshaw *v.* Van Valkenburg, 97 Tenn. 316, 37 S. W. 88.

If the deed was procured without consideration, no offer to refund the purchase-money as stated in the deed is necessary. Cook *v.* Toumbs, 36 Miss. 685.

Where property purchased with proceeds in infant's possession.— Where an infant sold his land in consideration of cash paid to his father, and the latter purchased a piano for the infant, he, on coming of age, need not return the piano in order to disaffirm the contract. Englehart *v.* Troxell, 40 Nebr. 195, 58 N. W. 852, 43 Am. St. Rep. 665, 26 L. R. A. 177.

Where the deed was in payment for necessaries the benefit is still *in esse* and enjoyed, and the infant must pay for the necessaries in order to avoid the deed. Stull *v.* Harris, 51 Ark. 294, 11 S. W. 104, 2 L. R. A. 741. See also Searcy *v.* Hunter, 81 Tex. 644, 17 S. W. 372, 26 Am. St. Rep. 837.

On the disaffirmance of a bond and mortgage by an infant, no restitution is necessary of the moneys advanced on the mortgage, and which went into the improvement of the property covered thereby. New York Bldg. Loan Banking Co. *v.* Fisher, 23 N. Y. App. Div. 363, 48 N. Y. Suppl. 152; Allen *v.* Lardner, 78 Hun (N. Y.) 603, 29 N. Y. Suppl. 213.

Infant not liable for conversion.— Drude *v.* Curtis, 183 Mass. 317, 67 N. E. 317, 62 L. R. A. 755.

85. Eureka Co. *v.* Edwards, 71 Ala. 248, 46 Am. Rep. 314 (subsequent grantee of late infant by deed executed after majority); Harvey *v.* Briggs, 68 Miss. 60, 8 So. 274, 10 L. R. A. 62 (heir of infant).

86. As to contracts generally see *infra*, V, F, 6.

87. *Alabama.*— Weaver *v.* Jones, 24 Ala. 420.

Illinois.— Mette *v.* Feltgen, 148 Ill. 357, 36 N. E. 81 [*affirming* 27 N. E. 911].

Indiana.— Rice *v.* Boyer, 108 Ind. 472, 9 N. E. 420, 58 Am. Rep. 53.

Mississippi.— Shipp *v.* McKee, 80 Miss. 741, 30 So. 197, 32 So. 281, 92 Am. St. Rep. 616; French *v.* McAndrew, 61 Miss. 187.

Pennsylvania.— Love *v.* Dobson, 5 Wkly. Notes Cas. 359.

Tennessee.— White *v.* Flora, 2 Overt. 426.

Virginia.— Mustard *v.* Wohlford, 15 Gratt. 329, 76 Am. Dec. 209.

United States.— Tucker *v.* Moreland, 10 Pet. 58, 9 L. ed. 345.

England.— Zouch *v.* Parsons, 3 Burr. 1794, 1 W. Bl. 575.

See 27 Cent. Dig. tit. "Infants," § 62.

Revocation of easement.— See McCarthy *v.* Nicrosi, 72 Ala. 332, 47 Am. Rep. 418, opinion by Sommerville, J.

88. Mustard *v.* Wohlford, 15 Gratt. (Va.) 329, 76 Am. Dec. 209.

A subsequent purchaser from the late infant may recover in the name of his grantor. Mustard *v.* Wohlford, 15 Gratt. (Va.) 329, 76 Am. Dec. 209.

89. Love *v.* Dobson, 5 Wkly. Notes Cas. (Pa.) 359.

90. *Alabama.*— Weaver *v.* Jones, 24 Ala. 420.

Kentucky.— Ison *v.* Cornett, 116 Ky. 92, 75 S. W. 204, 25 Ky. L. Rep. 366; Burton *v.* Little, 9 Bush 307.

Mississippi.— Shipp *v.* McKee, 80 Miss. 741, 30 So. 197, 32 So. 281, 92 Am. St. Rep. 616; French *v.* McAndrew, 61 Miss. 187.

North Carolina.— Jones *v.* Cohen, 82 N. C. 75, set-off against purchase-money which should be restored.

United States.— Tucker *v.* Moreland, 10 Pet. 58, 9 L. ed. 345.

See 27 Cent. Dig. tit. "Infants," § 62.

Purchaser not liable for rents on his improvements.— Wornack *v.* Loar, 11 S. W. 438, 11 Ky. L. Rep. 6.

The rents are not a lien on the purchaser's remaining interest in the land where all of the grantors were not infants, and he is therefore a cotenant with the infants who have disaffirmed. French *v.* McAndrew, 61 Miss. 187.

Credit for lien paid off.— On the disaffirmance of a conveyance of land on the ground of the grantor's minority, the purchaser who has paid off a judgment lien on the land as a part of the purchase-price is entitled to credit therefor in his accounting for the rents

c. Improvements and Expenditures by Purchaser. The purchaser from an infant whose deed has been avoided is entitled to be allowed for improvements placed by him upon the property [91] by setting off the same against the rents and profits,[92] but it has been held that the late infant cannot be required to compensate him for improvements exceeding the rental value.[93] Where the deed of several grantors is avoided only as to those who were infants, they are not entitled to the benefit of improvements made by the grantee.[94]

d. Waste. The purchaser may be charged with the value of timber cut by him while in possession.[95]

e. Disaffirmance of Contract of Purchase. When an infant disaffirms his contract of purchase on becoming of age, it ceases to exist for the benefit of either party and is rendered void *ab initio*,[96] and the other party is reinvested with a right to whatever he has parted with under the contract and may sue to recover it.[97] But the disaffirmance does not *ipso facto* retransfer the legal title to the land to the vendor so as to enable him to recover the land in ejectment.[98] If the infant has been in possession he is liable for rents.[99] On the avoidance of a contract for the purchase of personalty the infant may recover back what he has paid on account,[1] and is not liable for the use of the property,[2] and is liable only in tort, if at all, for damages to the property while in his possession.[3]

7. Withdrawal of Avoidance. Where the late infant has unequivocally disaffirmed and elected to avoid the transaction, he cannot subsequently withdraw or rescind the avoidance and insist upon having the transaction stand.[4]

F. Jurisdiction and Powers of Courts — 1. In General. Courts of equity exercise a broad, comprehensive, and plenary jurisdiction over the property of infants,[5] and as soon as any proceeding affecting an infant's property is instituted,

of the land. French *v.* McAndrew, 61 Miss. 187.

91. Rundle *v.* Spencer, 67 Mich. 189, 34 N. W. 548. See also McGinn *v.* Shaeffer, 7 Watts (Pa.) 412. *Aliter*, where purchaser knew of vendor's infancy. Clark *v.* Tate, 7 Mont. 171, 14 Pac. 761.

92. Weaver *v.* Jones, 24 Ala. 420; Sewell *v.* Sewell, 92 Ky. 500, 18 S. W. 162, 36 Am. St. Rep. 606; Jones *v.* Cohen, 82 N. C. 75.

93. Sewell *v.* Sewell, 92 Ky. 500, 18 S. W. 162, 36 Am. St. Rep. 606. *Compare* Harris *v.* Collins, 75 Ga. 97; Wornack *v.* Loar, 11 S. W. 438, 11 Ky. L. Rep. 6.

94. If the property can be divided, this should be done so as to leave the grantee in possession of the improvements, and if it has to be sold for division the infant grantors are entitled to only their *pro-rata* share of the value of the land at the time of the sale, exclusive of the improvements. Burton *v.* Little, 9 Bush (Ky.) 307.

95. Ison *v.* Cornett, 116 Ky. 92, 75 S. W. 204, 25 Ky. L. Rep. 366.

96. McCarty *v.* Woodstock Iron Co., 92 Ala. 463, 8 So. 417, 12 L. R. A. 136.

Sureties on note given by infant for purchase-money not liable.— Baker *v.* Kennett, 54 Mo. 82.

97. McCarty *v.* Woodstock Iron Co., 92 Ala. 463, 8 So. 417, 12 L. R. A. 136.

Payments made by the husband of an infant from his own means on a purchase of land by the infant do not give the infant, on rescinding the purchase, a claim for the money with which the payments were made. Jennings *v.* Hare, 47 S. C. 279, 25 S. E. 198.

98. McCarty *v.* Woodstock Iron Co., 92 Ala. 463, 8 So. 417, 12 L. R. A. 136.

99. Jennings *v.* Hare, 47 S. C. 279, 25 S. E. 198.

Improvements cannot be set off. Jennings *v.* Hare, 47 S. C. 279, 25 S. E. 198.

1. McCarthy *v.* Henderson, 138 Mass. 310.

2. McCarthy *v.* Henderson, 138 Mass. 310.

3. Carpenter *v.* Carpenter, 45 Ind. 142.

4. McCarty *v.* Woodstock Iron Co., 92 Ala. 463, 8 So. 417, 12 L. R. A. 136, even though he has not returned the purchase-money and no suit for its recovery has been brought. See also Doe *v.* Woodruffe, 7 U. C. Q. B. 332.

5. *Alabama.*— Rivers *v.* Durr, 46 Ala. 418. See also Crawford *v.* Creswell, 55 Ala. 497.

Arkansas.— Myrick *v.* Jacks, 33 Ark. 425.

Georgia.— Richards *v.* East Tennessee, etc., R. Co., 106 Ga. 614, 33 So. 193, 45 L. R. A. 712. See also Thomason *v.* Phillips, 73 Ga. 140.

Illinois.— Hale *v.* Hale, 146 Ill. 227, 33 N. E. 858, 20 L. R. A. 247; White *v.* Glover, 59 Ill. 459; Lynch *v.* Rotan, 39 Ill. 14; Grattan *v.* Grattan, 18 Ill. 167, 65 Am. Dec. 726; Cowls *v.* Cowls, 8 Ill. 435, 44 Am. Dec. 708.

Indiana.— McCord *v.* Ochiltree, 8 Blackf. 15.

Kentucky.— Patrick *v.* Woods, 3 Bibb 29.

Michigan.— Westbrook *v.* Comstock, Walk. 314.

Mississippi.— Johns *v.* Smith, 56 Miss. 727; Williams *v.* Duncan, 44 Miss. 375; Bacon *v.* Gray, 23 Miss. 140.

Missouri.— Kearney *v.* Vaughan, 50 Mo. 284.

New York.— Losey *v.* Stanley, 147 N. Y. 560, 42 N. E. 8 (supreme court acting as a

he becomes a ward of chancery, and his property is under the immediate guardianship and protection of the court.[6] In all cases where an infant is a ward of chancery no act can be done affecting his person or his property unless under the express or implied direction of the court itself.[7] Constitutional or statutory provisions are found in many states designating the courts which shall have jurisdiction over the estates of infants.[8]

2. PROTECTION OF INTEREST OF INFANTS.[9] It is the duty of the courts to protect

court of equity); Anderson *v.* Mather, 44 N. Y. 249 [*affirming* 38 Barb. 473].

Pennsylvania.— See Allen's Estate, 11 Phila. 48.

Wisconsin.— See Schafer *v.* Luke, 51 Wis. 669, 8 N. W. 857.

Canada.— *In re* Lawlor, 2 Nova Scotia Dec. 153.

See 27 Cent. Dig. tit. "Infants," § 65.

The infancy of a complainant is alone sufficient to bring a suit in regard to his property within the jurisdiction of a court of equity. Williams *v.* Duncan, 44 Miss. 375; Carmichael *v.* Hunter, 4 How. (Miss.) 308, 35 Am. Dec. 401.

Where some of the owners are infants a court of chancery has jurisdiction to decree an account for the profits of land against a disseizor. Carmichael *v.* Hunter, 4 How. (Miss.) 308, 35 Am. Dec. 401.

A contingent interest in property is sufficient to entitle an infant to be made a ward of court. Russell *v.* Nicholls, 16 L. J. Ch. 47.

Ratification of compromise.— See Reynolds *v.* Brandon, 3 Heisk. (Tenn.) 593.

Bill to cancel deed.— See Cook *v.* Toumbs, 36 Miss. 685.

Partition.— Allen's Succession, 48 La. Ann. 1240, 20 S. E. 683.

The power is judicial only, and a court of chancery cannot, on the application of the representatives of infants, give its advice as to whether or not acts which they wish to do will be legal. Allen *v.* Allen, 2 Litt. (Ky.) 94.

Courts of chancery cannot meddle with property of unborn infants. Downin *v.* Sprecher, 35 Md. 474.

Investment of funds.— A court of chancery may invest the money of infants in land owned by the mother, which constitutes their common home, or in her notes given for the land, but only when it is shown that the fund will extinguish the last payments, or purchase all the notes which are a lien on the land. *Ex p.* Cook, 3 Tenn. Ch. 518.

6. *Alabama.*— Proctor *v.* Scharpff, 80 Ala. 227; Rivers *v.* Durr, 46 Ala. 418, whether the infant be plaintiff or defendant.

Georgia.— Richards *v.* East Tennessee, etc., R. Co., 106 Ga. 614, 33 S. E. 193, 45 L. R. A. 712; McGowan *v.* Lufburrow, 82 Ga. 523, 9 S. E. 427, 14 Am. St. Rep. 178; Sharp *v.* Findley, 71 Ga. 654.

Illinois.— Williams *v.* Williams, 204 Ill. 44, 68 N. E. 449.

Michigan.— Westbrook *v.* Comstock, Walk. 314.

South Carolina.— Bulow *v.* Witte, 3 S. C. 308.

England.— See Dawson *v.* Thompson, 12 L. T. Rep. N. S. 178.

See 27 Cent. Dig. tit. "Infants," § 65.

No order to that effect is necessary. Gynn *v.* Gilbard, 1 Dr. & Sm. 356, 7 Jur. N. S. 91, 62 Eng. Reprint 415.

Some proceedings must be had to bring the question before the court to justify its interposition. Crawford *v.* Creswell, 55 Ala. 497.

Merely filing a bill is sufficient to make an infant a ward of the court. Butler *v.* Freeman, Ambl. 301, 27 Eng. Reprint 204; Johnstone *v.* Beattie, 10 Cl. & F. 42, 7 Jur. 1023, 8 Eng. Reprint 657 [*affirming* 5 Jur. 671, 10 L. J. Ch. 300, 1 Phil. 17, 19 Eng. Ch. 17, 41 Eng. Reprint 537].

An order for the maintenance of an infant made without suit constitutes the infant a ward of court. *In re* Graham, L. R. 10 Eq. 530, 39 L. J. Ch. 724, 22 L. T. Rep. N. S. 904, 18 Wkly. Rep. 988.

Appointment of guardian.— An order in chancery, on petition, constituting a guardian of an infant makes that infant a ward of court. Stuart *v.* Bute, 9 H. L. Cas. 440, 11 Eng. Reprint 799.

Payment of money belonging to an infant into court constitutes the infant a ward of court. De Pereda *v.* De Mancha, 19 Ch. D. 451, 51 L. J. Ch. 204, 30 Wkly. Rep. 226 (payment to infant's separate account in action to which she was not a party); *In re* Hodges, 3 Jur. N. S. 860, 3 Kay & J. 213 (payment under Trustee Relief Act and order for maintenance); *Re* Benand, 16 Wkly. Rep. 538 (under Trustee Relief Act). But see Brown *v.* Collins, 25 Ch. D. 56, 53 L. J. Ch. 368, 49 L. T. Rep. N. S. 329; *Re* Hillary, 2 Dr. & Sm. 461, 12 L. T. Rep. N. S. 840, 13 Wkly. Rep. 959, 62 Eng. Reprint 695; *Re* Wilts, etc., R. Co., 13 L. T. Rep. N. S. 207, 13 Wkly. Rep. 959.

7. *In re* Lindsay, 30 Fed. Cas. No. 18,308, 2 Hayw. & H. 430.

Contempt.— "Every act done without such direction is treated as a violation of the authority of the Court, and the offending party will be arrested upon proper process for the contempt, and compelled to submit to such orders and such punishment by imprisonment as are applied to other cases of contempt." *In re* Lindsley, 30 Fed. Cas. No. 18,308, 2 Hayw. & H. 430, 433.

8. **Alabama.**— Gregg *v.* Bethea, 6 Port. 9, county courts.

Arkansas.— Myrick *v.* Jacks, 33 Ark. 425, courts of probate have limited powers.

California.— Wilson *v.* Roach, 4 Cal. 362, district courts (now superior courts).

Texas.— Allen *v.* Von Rosenberg, (1891) 10 S. W. 1096 [*following* Messner *v.* Giddings, 65 Tex. 301], county courts.

9. See also *infra*, VIII, B.

the interest of infants,[10] and their claims to property which is under the control of the court are especially entitled to protection.[11] The jurisdiction being thus protective, it must be brought into activity and life whenever non-action would result in the loss or destruction of the infant's estate.[12]

3. Maintenance of Infant Out of Property in Which He Is Interested. Where infants who have an interest in certain property are without other means of support or education, the court may order so much of such property as may be necessary for that purpose to be applied to their maintenance.[13] Such allowance is subject to the future control of the court and may be altered with the varying circumstances of the estate.[14]

4. Sale, Mortgage, or Lease of Property Under Order of Court — a. Power of Court to Order Sale, Etc. — (i) *Inherent Power of Courts of Equity.* It has been laid down by many authorities that courts of chancery have inherent jurisdiction to direct a sale, mortgage, or lease of the real property of infants,[15] but

10. *Alabama.*— Proctor *v.* Scharpff, 80 Ala. 227; Kavanaugh *v.* Thompson, 16 Ala. 817.

Illinois.— White *v.* Glover, 59 Ill. 459; Lynch *v.* Rotan, 39 Ill. 14; Grattan *v.* Grattan, 18 Ill. 167, 65 Am. Dec. 726; Cowls *v.* Cowls, 8 Ill. 435, 44 Am. Dec. 708.

Kentucky.— Elliott *v.* Fowler, 112 Ky. 376, 65 S. W. 849, 23 Ky. L. Rep. 1676; Newland *v.* Gentry, 18 B. Mon. 666.

New Jersey.— See Pennington *v.* Metropolitan Museum of Art, (Ch. 1903) 55 Atl. 468.

New York.— Losey *v.* Stanley, 147 N. Y. 560, 42 N. E. 8; Howell *v.* Mills, 53 N. Y. 322; Wood *v.* Wood, 5 Paige 596, 28 Am. Dec. 451.

North Carolina.—Morris *v.* Gentry, 89 N. C. 248.

Tennessee.— See McMinn *v.* Richmonds, 6 Yerg. 9.

Wisconsin.— See Schafer *v.* Luke, 51 Wis. 669, 8 N. W. 857.

See 27 Cent. Dig. tit. "Infants," §§ 64, 65.

Investments.— The court will direct an investment of the shares of infants under a will, different from the provisions of the will, if required by the interests of the infants. Wood *v.* Wood, 5 Paige (N. Y.) 596, 28 Am. Dec. 451.

Claims against infants.— Where there is a fund in court belonging exclusively to infants, the chancellor, as the guardian and protector of their rights, may, in his discretion, upon a summary application, order it to be applied for the payment of any just claim against the infants, to save the expense of useless litigation; or, if the claim is contested or doubtful, he may require the claimant to establish his right by suit against the infants, or upon a reference to a master. But where an adult heir, whose share of a fund is in court, as well as that of infant heirs, is liable to contribute toward the payment of the debts of the ancestor, the creditors should be left to proceed in the usual way, by suit against all the heirs jointly. Cassidy *v.* Cassidy, 1 Barb. Ch. (N. Y.) 467.

11. Freeman *v.* Munns, 15 Abb. Pr. (N. Y.) 468; Saltus *v.* Pruyn, 18 How. Pr. (N. Y.) 512.

12. Johns *v.* Smith, 56 Miss. 727; Le Fevre *v.* Laraway, 22 Barb. (N. Y.) 167.

If there be no guardian the court must act without a guardian in all cases where the act required to be done is such that it can be performed with fidelity and proper care by the ordinary machinery of the court. Johns *v.* Smith, 56 Miss. 727.

Setting aside judicial sale.— See Howell *v.* Mills, 53 N. Y. 322. See, generally, Judicial Sales.

13. Losey *v.* Stanley, 147 N. Y. 560, 42 N. E. 8; Matter of Fritts, 19 Misc. (N. Y.) 402, 44 N. Y. Suppl. 344; Matter of Bostwick, 4 Johns. Ch. (N. Y.) 100; Chisolm *v.* Chisolm, 4 Rich. Eq. (S. C.) 266; Gayle *v.* Hayes, 79 Va. 542; Rocke *v.* Rocke, 9 Beav. 66, 50 Eng. Reprint 267; Saunders *v.* Vautier, 4 Beav. 115, 49 Eng. Reprint 282; Harvey *v.* Harvey, 2 P. Wms. 21, 24 Eng. Reprint 625. See also Gregg *v.* Bethea, 6 Port. (Ala.) 9. And see *infra*, IV, F, 4, b.

What court has jurisdiction.— The orphans' court has no jurisdiction to call the trustee of a minor's property into court, and compel him to appropriate part of it to the maintenance and education of the minor. Application for this purpose should be made to the common pleas under the Pennsylvania acts of March 24, 1819, and March 29, 1823. Matter of Potts, 1 Ashm. (Pa.) 340.

Contingent and absolute estates.— Where an infant had an absolute estate of about sixteen thousand dollars, and also an estate of about twice that amount, contingent on his attaining the age of twenty-one or marrying, it was ordered that maintenance be allowed him out of his absolute estate. Chisolm *v.* Chisolm, 4 Rich. Eq. (S. C.) 266.

14. Chisolm *v.* Chisolm, 4 Rich. Eq. (S. C.) 266.

15. *Alabama.*— Gassenheimer *v.* Gassenheimer, 108 Ala. 651, 18 So. 520; Thorington *v.* Thorington, 82 Ala. 489, 1 So. 716; Goodman *v.* Winter, 64 Ala. 410, 38 Am. Rep. 13. See also Rivers *v.* Durr, 46 Ala. 418.

Arkansas.— Myrick *v.* Jacks, 33 Ark. 425.

Georgia.— Dampier *v.* McCall, 78 Ga. 607, 3 S. E. 563. See also Richards *v.* East Tennessee, etc., R. Co., 106 Ga. 614, 33 S. E. 193, 45 L. R. A. 712; Strain *v.* Wright, 7 Ga. 568, sale of negro.

Illinois.— Gorman *v.* Mullins, 172 Ill. 349, 50 N. E. 222; Hale *v.* Hale, 146 Ill. 227, 33

other courts of equal authority and respectability deny that chancery has any such inherent jurisdiction.[16]

N. E. 858, 20 L. R. A. 247; Allman *v.* Taylor, 101 Ill. 185 [*distinguishing* Whitman *v.* Fisher, 74 Ill. 147]; Smith *v.* Sackett, 10 Ill. 534.

Maryland.— Roche *v.* Waters, 72 Md. 264, 19 Atl. 535, 7 L. R. A. 533; Downin *v.* Sprecher, 35 Md. 474; Dorsey *v.* Gilbert, 11 Gill & J. 87.

New Jersey.— Snowhill *v.* Snowhill, 3 N. J. Eq. 20.

New Mexico.— Bent *v.* Miranda, 8 N. M. 78, 42 Pac. 91, equitable estates. *Aliter* as to legal estates. Bent *v.* Maxwell Land Grant, etc., Co., 3 N. M. 158, 3 Pac. 721.

North Carolina.— Sutton *v.* Schonwald, 86 N. C. 198, 41 Am. Rep. 455; Rowland *v.* Thompson, 73 N. C. 504; Williams *v.* Harrington, 33 N. C. 616, 53 Am. Dec. 421.

South Carolina.— Bulow *v.* Witte, 3 S. C. 308; Bofil *v.* Fisher, 3 Rich. Eq. 1, 55 Am. Dec. 627; Bulow *v.* Buckner, Rich. Eq. Cas. 401; Stapleton *v.* Langstaff, 3 Desauss. Eq. 22; Huger *v.* Huger, 3 Desauss. Eq. 18. See also Clifford *v.* Clifford, 1 Desauss. Eq. 115.

Tennessee.— Thompson *v.* Mebane, 4 Heisk. 370; Martin *v.* Keeton, 10 Humphr. 536; Brown's Case, 8 Humphr. 200; Gray *v.* Barnard, 1 Tenn. Ch. 298; Mason *v.* Tinsley, 1 Tenn. Ch. 154. But *compare* Singleton *v.* Love, 1 Head 357; Rogers *v.* Clark, 5 Sneed 665.

United States.— Reed *v.* Alabama, etc., Iron Co., 107 Fed. 586, stating the rule in Georgia.

See 27 Cent. Dig. tit. "Infants," § 66.

The jurisdiction does not depend upon the nature of the estate as being absolute or contingent, but extends as well to estates in remainder as to those of any other character. Thorington *v.* Thorington, 82 Ala. 489, 1 So. 716.

Court may order realty changed into personalty or vice versa. Huger *v.* Huger, 3 Desauss. Eq. (S. C.) 18; Brown's Case, 8 Humphr. (Tenn.) 200.

Either realty or personalty may be sold. Jones *v.* Sharp, 9 Heisk. (Tenn.) 660.

Jurisdiction should be exercised with caution. Bulow *v.* Buckner, Rich. Eq. Cas. (S. C.) 401.

Where an adult has a part interest in the land, chancery cannot decree a sale because it would be for the benefit of the infant. Roche *v.* Waters, 72 Md. 264, 19 Atl. 535, 7 L. R. A. 533.

Ordering sale at chambers.— A chancellor has power at chambers to order the sale of realty held by a trustee for minors, where the latter had notice and appeared by guardian *ad litem.* Overby *v.* Hart, 68 Ga. 493. But where land is conveyed in fee to a woman and her children, the chancellor is without power to authorize a sale and reinvestment, appointing a guardian *ad litem* for the children at chambers and in vacation. Pughsley *v.* Pughsley, 75 Ga. 95 [*following* Rogers *v.* Pace, 75 Ga. 436].

Circuit court has no such inherent power. Thompson *v.* Mebane, 4 Heisk. (Tenn.) 370.

Leases.— A chancery court may authorize leasehold contracts for the enhancement of the real estate of infants, if manifestly for their interest (Talbot *v.* Provine, 7 Baxt. (Tenn.) 502), or, upon proper cause shown, decree the extension of an expiring lease of real estate in which such infants are interested as lessors (Taylor *v.* Peabody Heights Co., 65 Md. 388, 4 Atl. 886).

16. *District of Columbia.*— Stansbury *v.* Inglehart, 20 D. C. 134.

Kentucky.— Elliott *v.* Fowler, 112 Ky. 376, 65 S. W. 849, 23 Ky. L. Rep. 1676; Swearingen *v.* Abbott, 99 Ky. 271, 35 S. W. 925, 18 Ky. L. Rep. 184; Ogden *v.* Stevens, 98 Ky. 564, 33 S. W. 932, 17 Ky. L. Rep. 1115; Kinslow *v.* Grove, 98 Ky. 266, 32 S. W. 933, 17 Ky. L. Rep. 845; Walker *v.* Smyser, 80 Ky. 620 [*following* Henning *v.* Harrison, 13 Bush 723]; Bridgeford *v.* Beck, 11 Bush 539; Fall City Real Estate, etc., Assoc. *v.* Vankirk, 8 Bush 459; Paul *v.* Paul, 3 Bush 483; Bullock *v.* Gudgell, 77 S. W. 1126, 25 Ky. L. Rep. 1413; Liter *v.* Fishback, 75 S. W. 232, 25 Ky. L. Rep. 260; Hicks *v.* Jackson, 68 S. W. 419, 24 Ky. L. Rep. 218; Posey *v.* Dugan, 59 S. W. 862, 22 Ky. L. Rep. 1104.

Missouri.— See Kearney *v.* Vaughan, 50 Mo. 284, 287, where the court said: "Under some circumstances, however, it has been held that a court of equity will order the sale of the real estate of minors, though it is not supposed that the general power exists independently of statute."

New York.— Losey *v.* Stanley, 147 N. Y. 560, 42 N. E. 8 [*disapproving* Hedges *v.* Riker, 5 Johns. Ch. 163; Matter of Salisbury, 3 Johns. Ch. 348]; Jenkins *v.* Fahey, 73 N. Y. 355; Horton *v.* McCoy, 47 N. Y. 21; Forman *v.* Marsh, 11 N. Y. 544; Baker *v.* Lorillard, 4 N. Y. 257; Warren *v.* Union Bank, 28 N. Y. App. Div. 7, 51 N. Y. Suppl. 27; Onderdonk *v.* Mott, 34 Barb. 106; Miller *v.* Struppmann, 6 Abb. N. Cas. 343, 55 How. Pr. 521; Rogers *v.* Dill, 6 Hill 415. But there are several New York cases holding that the court has inherent authority to sell the estates of infants which are of an equitable character. Anderson *v.* Mather, 44 N. Y. 249 [*affirming* 38 Barb. 473]; Cochran *v.* Van Surlay, 20 Wend. 365, 32 Am. Dec. 570; Pitcher *v.* Carter, 4 Sandf. Ch. 1.

Virginia.— Rhea *v.* Shields, 103 Va. 305, 49 S. E. 70; Faulkner *v.* Davis, 18 Gratt. 651, 98 Am. Dec. 698 [*following* Pierce *v.* Trigg, 10 Leigh 406].

West Virginia.— Hoback *v.* Miller, 44 W. Va. 635, 29 S. E. 1014.

United States.— Perin *v.* Megibben, 50 Fed. 86, 3 C. C. A. 443, stating rule in Kentucky.

England.— Calvert *v.* Godfrey, 6 Beav. 97, 12 L. J. Ch. 305, 49 Eng. Reprint 761; Browne *v.* Paull, 16 Jur. 707; Simson *v.* Jones, 9 L. J. Ch. O. S. 106, 2 Russ. & M. 365, 11 Eng. Ch. 365, 39 Eng. Reprint 433;

(II) *Statutory Power.* Whatever difference of opinion there may be as to the inherent power of courts of equity, it is well established that it is within the general power of the legislature to authorize sales of the land of infants through the agency of a court or judicial tribunal,[17] and accordingly there are to be found in many states statutes expressly conferring upon the courts of chancery, or other designated courts, the power to order the land of infants sold, mortgaged, or leased when a proper occasion therefor shall arise.[18] The statutory power can of

Taylor *v.* Philips, 2 Ves. 23, 28 Eng. Reprint 16.

See 27 Cent. Dig. tit. "Infants," § 66.

Cannot appropriate estate to payment of claims. *In re* Greenhalgh, 64 Hun (N. Y.) 26, 18 N. Y. Suppl. 748.

Where nature of property not changed.— The chancellor has the power to direct the conversion of the property of an infant, when her interest requires it, if it can be done so as not to change the nature of the property nor its descendible quality. Thompson *v.* Pettibone, 79 Ky. 319.

Sale voidable only.— Chancery proceedings to sell the estate of minors are not void in the sense of being a nullity, even if the court exceeds its powers. Such action is only relatively void and strangers cannot disregard it. Kearney *v.* Vaughan, 50 Mo. 284.

17. Nelson *v.* Lee, 10 B. Mon. (Ky.) 495; Davis *v.* Helbig, 27 Md. 452, 92 Am. Dec. 646; Dorsey *v.* Gilbert, 11 Gill & J. (Md.) 87; Leggett *v.* Hunter, 19 N. Y. 445.

Power may be exercised as to persons in esse and contingent interests of unborn persons. Leggett *v.* Hunter, 19 N. Y. 445.

Non-resident infants.— The legislature may authorize the sale of land within the state belonging to non-resident as well as to resident infants. Nelson *v.* Lee, 10 B. Mon. (Ky.) 495.

18. *District of Columbia.*— Stansbury *v.* Inglehart, 20 D. C. 134; Middleton *v.* Parke, 3 App. Cas. 149.

Kentucky.— Elliott *v.* Fowler, 112 Ky. 376, 65 S. W. 849, 23 Ky. L. Rep. 1676; Kinslow *v.* Grove, 98 Ky. 266, 32 S. W. 933, 17 Ky. L. Rep. 845; Walker *v.* Smyser, 80 Ky. 620; Ewing *v.* Riddle, 8 Bush 568; Thornton *v.* McGrath, 1 Duv. 349; Nutter *v.* Russell, 3 Metc. 163; Vowles *v.* Buckman, 6 Dana 466; Peyton *v.* Alcorn, 7 J. J. Marsh. 502; Liter *v.* Fishback, 75 S. W. 232, 25 Ky. L. Rep. 260; Posey *v.* Dugan, 59 S. W. 862, 22 Ky. L. Rep. 1104. See also Nelson *v.* Lee, 10 B. Mon. 495.

Maryland.— Mumma *v.* Brinton, 77 Md. 197, 26 Atl. 184; Roche *v.* Waters, 72 Md. 264, 19 Atl. 535, 7 L. R. A. 533; Gill *v.* Wells, 59 Md. 492; Downin *v.* Sprecher, 35 Md. 474; Bolgiano *v.* Cooke, 19 Md. 375; Watson *v.* Godwin, 4 Md. Ch. 25, lands, tenements, etc., in which infants have a joint interest or interest in common with other persons.

Michigan.— *In re* Axtell, 95 Mich. 244, 54 N. W. 889; *In re* Dorr, Walk. 145.

Missouri.— See Kearney *v.* Vaughan, 50 Mo. 284.

New York.— Gomez *v.* Gomez, 147 N. Y. 195, 41 N. E. 420 [*affirming* 81 Hun 566, 31 N. Y. Suppl. 206] (power to lease); Jenkins *v.* Fahey, 73 N. Y. 355; Brown *v.* Snell, 57 N. Y. 286; Horton *v.* McCoy, 47 N. Y. 21; Baker *v.* Lorillard, 4 N. Y. 257; Warren *v.* Union Bank, 28 N. Y. App. Div. 7, 51 N. Y. Suppl. 27; Onderdonk *v.* Mott, 34 Barb. 106; Behrens *v.* Rodenburg, 1 N. Y. City Ct. 93; Rogers *v.* Dill, 6 Hill 415. See also Losey *v.* Stanley, 147 N. Y. 560, 42 N. E. 8; Battell *v.* Burrill, 50 N. Y. 13 [*affirming* 10 Abb. Pr. N. S. 97]; Muller *v.* Struppmann, 55 How. Pr. 521; Matter of Whitaker, 4 Johns. Ch. 378.

North Carolina.— Williams *v.* Harrington, 33 N. C. 616, 53 Am. Dec. 421.

Pennsylvania.— Lindsay's Petition, 2 Del. Co. 197.

Tennessee.— Thompson *v.* Mebane, 4 Heisk. 370 (statute merely declaratory of original and inherent power); Rogers *v.* Clark, 5 Sneed 665; Morris *v.* Richardson, 11 Humphr. 389 (sale of slaves); Brown's Case, 8 Humphr. 200.

Virginia.— Rhea *v.* Shields, 103 Va. 305, 49 S. E. 70; Faulkner *v.* Davis, 18 Gratt. 651, 98 Am. Dec. 698; Garland *v.* Loving, 1 Rand. 396. See also Lancaster *v.* Barton, 92 Va. 615, 24 S. E. 251.

West Virginia.— See Hoback *v.* Miller, 44 W. Va. 635, 29 S. E. 1014.

United States.— Perin *v.* Megibben, 53 Fed. 86, 3 C. C. A. 443.

Canada.— Blean *v.* Blean, 10 Ont. 693; *Re* Barker, 6 Ont. Pr. 225.

See 27 Cent. Dig. tit. "Infants," § 66.

The parish courts of Louisiana, under the constitution of 1868, were competent to grant orders for family meetings and homologate their proceedings; and a sale made in accordance with the judgment of homologation passed the title to the minor's property. Dauterive *v.* Shaw, 47 La. Ann. 882, 17 So. 345.

The orphans' court has power to decree a private sale of the undivided interest of one or more minors, although the parties owning the other interests do not unite in the sale. Gilmore *v.* Rodgers, 41 Pa. St. 120.

Regular proceeding in equity not necessary. — Richards *v.* East Tennessee, etc., R. Co., 106 Ga. 614, 33 S. E. 193, 45 L. R. A. 712, under Georgia code.

Statutory authority to confirm conveyance by infant.— A statute authorizing a court of equity to confirm and make valid a conveyance by an infant *feme covert* which is shown during her infancy to be equitable, expedient, or proper, looking to her benefit, does not apply to any case after the infant *feme covert* has attained full age, and after that time the court cannot confirm a mortgage executed by

course be exercised only in the cases, under the circumstances, and in the manner provided for.[19] It has been held that such statutes are to be strictly construed,[20] but on the other hand it has also been asserted that such statutes are eminently remedial in their nature and should receive a liberal construction so as to advance the remedy and promote the policy of the legislature.[21]

b. Purposes For Which Sale, Etc., Authorized. Where a sale or mortgage is sought under statutory authority, the court can order the same only for the purpose for which it is authorized by the statute.[22] It is usually provided, or at least contemplated in the statutes and considered necessary in the exercise of the inherent jurisdiction of equity, that there shall be some special and substantial benefit accruing to the infant by a sale in order that it may be authorized,[23] and

her while an infant, against her consent. Glenn *v.* Clark, 53 Md. 580.

Power to order sale includes power to order mortgage.— Middleton *v.* Parke, 3 App. Cas. (D. C.) 149.

Where both the parents of the infant are living, his property may be sold or mortgaged or any other step taken affecting his interest in the same manner and in the same forms as in the case of minors represented by tutors, the father occupying the place and being clothed with the powers of the tutor. Dauterive *v.* Shaw, 47 La. Ann. 882, 17 So. 345.

Territorial jurisdiction.— Under the Pennsylvania act of April 15, 1853, the sale and application of the purchase-money of the estate of a minor are under the direction and control of the court of the county where the real estate is situated. Packer's Estate, 3 Brewst. (Pa.) 527. Under the Tennessee acts of 1827, chapter 54, the circuit or chancery court of any county in which real estate of any minor lies may, on the application of such minor, order the sale thereof, where it appears to be manifestly to the interest of such minor. Brown's Case, 8 Humphr. (Tenn.) 200. The probate court of the state in which the land of infants is situated can order a sale thereof for their support, although they are domiciled and resident in another state. Bouldin *v.* Miller, (Tex. Civ. App. 1894) 26 S. W. 133 [*affirmed* in 87 Tex. 359, 28 S. W. 940].

19. *District of Columbia.* — Stansbury *v.* Inglehart, 20 D. C. 134.

Kentucky. — Singleton *v.* Cogar, 7 Dana 479; Vowles *v.* Buckman, 6 Dana 466.

Maryland.— Roche *v.* Waters, 72 Md. 264, 19 Atl. 535, 7 L. R. A. 533; Gill *v.* Wells, 59 Md. 492.

New York.— Losey *v.* Stanley, 147 N. Y. 560, 42 N. E. 8 [*reversing* 83 Hun 420]; Baker *v.* Lorillard, 4 N. Y. 257 (infants must be seized of property); Muller *v.* Struppman, 6 Abb. N. Cas. 343; Matter of Whitaker, 4 Johns. Ch. 378 (holding that the New York acts of April 9, 1814, and March 24, 1815, are not applicable to the case of an infant *feme covert*).

Virginia.— Garland *v.* Loving, 1 Rand. 396.

See 27 Cent. Dig. tit. "Infants," § 68 *et seq.*

Statute authorizing sale or mortgage does not authorize exchange. Moran *v.* James, 21 N. Y. App. Div. 183, 47 N. Y. Suppl. 486 [*affirming* 20 Misc. 235, 45 N. Y. Suppl. 537]. See also *Re* Bishoprick, 21 Grant Ch. (U. C.) 589.

20. Thornton *v.* McGrath, 1 Duv. (Ky.) 349; Peyton *v.* Alcorn, 7 J. J. Marsh. (Ky.) 502.

21. Rhea *v.* Shields, 103 Va. 305, 49 S. E. 70; Faulkner *v.* Davis, 18 Gratt. (Va.) 651, 98 Am. Dec. 698.

22. Posey *v.* Dugan, 59 S. W. 862, 22 Ky. L. Rep. 1104; Blackburn *v.* Bolan, 88 Mo. 80 [*affirming* 14 Mo. App. 592]; Strouse *v.* Drennan, 41 Mo. 289; Beal *v.* Harmon, 38 Mo. 435.

In Georgia the impossibility of carrying out a last will and testament is a ground of jurisdiction for decreeing a sale of real estate devised to minors, although the will itself directs that no sale take place until the youngest one attains majority. Southern Marble Co. *v.* Stegall, 90 Ga. 236, 15 S. E. 806; Sharp *v.* Findley, 71 Ga. 654; Rakestraw *v.* Rakestraw, 70 Ga. 806.

In Louisiana the court has permitted a plantation in which minors were interested to be mortgaged to raise the necessary funds for the purpose of cultivating it. Leisey *v.* Tanner, 28 La. Ann. 299.

23. *Alabama.*— *Ex p.* Jewett, 16 Ala. 409.

Arkansas.— Redmond *v.* Anderson, 18 Ark. 449.

Illinois.— Gorman *v.* Mullins, 172 Ill. 349, 50 N. E. 222; Allman *v.* Taylor, 101 Ill. 185.

Kentucky.— Cromwell *v.* Mason, 2 Bush 439; Watts *v.* Pond, 4 Metc. 61; Wyatt *v.* Mansfield, 18 B. Mon. 779.

Louisiana.— Mayronne *v.* Waggaman, 30 La. Ann. 974.

Maryland.— Mumma *v.* Brinton, 77 Md. 197, 26 Atl. 184; Roche *v.* Waters, 72 Md. 264, 19 Atl. 535, 7 L. R. A. 533; Davis *v.* Helbig, 27 Md. 452, 92 Am. Dec. 646; Bolgiano *v.* Cook, 19 Md. 375; Dorsey *v.* Gilbert, 11 Gill & J. 87. See also Watson *v.* Godwin, 4 Md. Ch. 25.

Massachusetts.— See *In re* Dagget, 3 Pick. 280.

Michigan.— *In re* Dorr, Walk. 145.

New Jersey.— Cool *v.* Higgins, 25 N. J. Eq. 117; *In re* Mickle, 25 N. J. Eq. 53; *In re* Steele, 19 N. J. Eq. 120.

New York.— Moscowitz *v.* Homberger, 19 Misc. 429, 43 N. Y. Suppl. 1130; Matter of Whitaker, 4 Johns. Ch. 378. See also Warren *v.* Union Bank, 28 N. Y. App. Div. 7, 51 N. Y. Suppl. 27.

a sale should not be ordered merely for the purpose of increasing the income of an adult owner of a present interest in the property.[24] A sale may be ordered for the purpose of reinvesting the proceeds more beneficially for the infant,[25] especially where the property is wholly unproductive,[26] liable to depreciate in value,[27] or exposed to waste and dilapidation.[28] A very usual purpose for which a sale of an infant's land may be ordered is the maintenance and support or education of the infant,[29] in case and only in case he is without other means of

North Carolina.— Marsh *v.* Dellinger, 127 N. C. 360, 37 S. E. 494; Williams *v.* Harrington, 33 N. C. 616, 53 Am. Dec. 421.

South Carolina.— Bulow *v.* Buckner, Rich. Eq. Cas. 401.

Tennessee.— Lenow *v.* Arrington, 111 Tenn. 720, 69 S. W. 314; Rogers *v.* Clark, 5 Sneed 665. See also Starkey *v.* Hammer, 1 Baxt. 438.

Virginia.— Lancaster *v.* Barton, 92 Va. 615, 24 S. E. 251.

Wisconsin.— Schafer *v.* Luke, 51 Wis. 669, 8 N. W. 857.

United States.— Reid *v.* Alabama, etc., R. Co., 107 Fed. 586.

Canada.— *In re* Lawlor, 2 Nova Scotia Dec. 153; Blean *v.* Blean, 10 Ont. 693; *Re* Phelan, 6 Ont. Pr. 259; *Re* Barker, 6 Ont. Pr. 225; Cayley *v.* Colbert, 2 Ch. Chamb. (U. C.) 431; Edwards *v.* Burling, 2 Ch. Chamb. (U. C.) 48.

See 27 Cent. Dig. tit. "Infants," §§ 71, 84.

Sale to remove cloud from title.— A sale of an infant's land, not for the infant's benefit, but to remove the cloud from the title of another person, is invalid, although full value was paid for the infant's interest. Moscowitz *v.* Homberger, 19 Misc. (N. Y.) 429, 43 N. Y. Suppl. 1130.

Barring issue.— Where an infant, owner of a fee conditional, might, if of age, bar his issue by a conveyance, the court will, where it is for the interest of the infant, aid him by decreeing a sale. Pearse *v.* Killian, McMull. Eq. (S. C.) 231.

Application for sale of remainder.— When application is made to the court for the sale of an infant's vested remainder in land, the only question is whether the property will bring as much now as it will at the death of the tenant for life. If it will not, it is not for the interest of the infants to sell if the life-tenant is to receive a share of the proceeds and of the income from them. *In re* Heaton, 21 N. J. Eq. 221.

Partition will not be ordered upon the application of an infant unless it be made satisfactorily to appear that the interests of the infant require such partition or sale. Struppman *v.* Muller, 52 How. Pr. (N. Y.) 211.

Ultimate benefit and not present comfort the governing consideration.— *Re* McDonald, 1 Ch. Chamb. (U. C.) 97.

Maryland statutes.— Under the Maryland acts of 1785, chapter 72, the interest of all parties concerned was the standard (Roche *v.* Waters, 72 Md. 264, 19 Atl. 535, 7 L. R. A. 533; Bolgiano *v.* Cooke, 19 Md. 375; Watson *v.* Godwin, 4 Md. Ch. 25), but under the acts of 1816, chapter 154, 1818, chapter 193, and 1835, chapter 380, the interest and advantage of the infants is the standard of adjudication (Roche *v.* Waters, *supra*; Bolgiano *v.* Cooke, *supra*).

24. Matter of Jones, 2 Barb. Ch. (N. Y.) 22.

25. *Illinois.*— Gorman *v.* Mullins, 172 Ill. 349, 50 N. E. 222.

Kentucky.— Ewing *v.* Riddle, 8 Bush 568; Paul *v.* Paul, 3 Bush 483; Tyler *v.* Tyler, 19 S. W. 666, 14 Ky. L. Rep. 149.

Maryland.— Mumma *v.* Brinton, 77 Md. 197, 26 Atl. 184.

Pennsylvania.— Bile's Estate, 2 Brewst. 609.

United States.— Reed *v.* Alabama, etc., Iron Co., 107 Fed. 586.

See 27 Cent. Dig. tit. "Infants," §§ 71, 84.

Compare Matter of Mason, Hopk. (N. Y.) 122, holding that a sale of an infant's property will not be directed by the court merely on the ground that the capital would produce a higher interest if otherwise invested.

26. *Illinois.*— Gorman *v.* Mullins, 172 Ill. 349, 50 N. E. 222.

Michigan.— *In re* Dorr, Walk. 145.

New York.— See Warren *v.* Union Bank, 28 N. Y. App. Div. 7, 51 N. Y. Suppl. 27.

Wisconsin.— Schafer *v.* Luke, 51 Wis. 669, 8 N. W. 857.

Canada.— *In re* Lawlor, 2 Nova Scotia Dec. 153.

See 27 Cent. Dig. tit. "Infants," §§ 71, 84.

27. Gorman *v.* Mullins, 172 Ill. 349, 50 N. E. 222.

28. *In re* Dorr, Walk. (Mich.) 145; Schafer *v.* Luke, 51 Wis. 669, 8 N. W. 857; *In re* Lawlor, 2 Nova Scotia Dec. 153; *In re* Phelan, 6 Ont. Pr. 259. See also Warren *v.* Union Bank, 28 N. Y. App. Div. 7, 51 N. Y. Suppl. 27.

29. *Michigan.*— *In re* Dorr, Walk. 145.

New Jersey.— Morris *v.* Morris, 15 N. J. Eq. 239.

New York.— Matter of Whitaker, 4 Johns. Ch. 378. See also Warren *v.* Union Bank, 28 N. Y. App. Div. 7, 51 N. Y. Suppl. 27.

Ohio.— Denginhart *v.* Cracraft, 36 Ohio St. 549.

Pennsylvania.— Biles' Estate, 2 Brewst. 609.

Tennessee.— Lenow *v.* Arrington, 111 Tenn. 720, 69 S. W. 314.

Texas.— Bouldin *v.* Miller, (Civ. App. 1894) 26 S. W. 133.

Wisconsin.— Schafer *v.* Luke, 51 Wis. 669, 8 N. W. 857.

Canada.— *Re* Phelan, 6 Ont. Pr. 259.

See 27 Cent. Dig. tit. "Infants," §§ 71, 84; and *supra*, IV, F, 3.

The Virginia statute of 1878 relating to this question is explained in Gayle *v.* Hayes,

support and education,[30] and his personal estate is insufficient for this purpose.[31] Property of infants may be mortgaged to pay for necessary repairs,[32] or unproductive lands may be sold to raise amounts to discharge encumbrances on productive property.[33] It has been held that a court of chancery may sell the realty of an infant for the purpose of removing the proceeds to another state where the infant permanently resides.[34] Land descended to infants is subject to be sold for the payment of the debts of the ancestor,[35] and lands of which infants are part owners may be sold for partition.[36]

c. What Property May Be Sold. The inherent power of a court of equity to order a sale or mortgage of the property of an infant, where such power is held to exist, extends to both the legal and equitable estates of the infant.[37] Where the statutes provide for a sale by the court of property of a particular character or of particular estates in land only, it must appear that the property or estate is of the character designated;[38] but under a statute authorizing generally the sale of real estate of infants, the court may order the sale of any interests of an infant in such estate, whatever may be the character of that interest, whether legal or equitable, vested or contingent, in common with others or separate, or in whatever manner it may be held, whether by descent, devise, or by contract.[39] Under some statutes real property or an interest therein cannot be sold, mortgaged, or leased contrary to the provisions of a will by which it was devised, or a conveyance or other instrument by which it was transferred to the infant.[40]

d. Consent of Infant or Guardian. Under some statutes the consent of the infant or his guardian is necessary to authorize the court to order a sale of the infant's realty.[41]

e. Proceedings — (i) *In General.* When a sale is sought under a statutory

79 Va. 542. This statute is not retroactive. Rinker *v.* Streit, 33 Gratt. (Va.) 663.

Under Mo. Rev. St. (1845) c. 73, § 22, a sale could be ordered only for the purpose of educating the infant and not for his support and maintenance. Blackburn *v.* Bolan, 88 Mo. 80 [*affirming* 14 Mo. App. 592]; Strouse *v.* Drennan, 41 Mo. 289; Beal *v.* Harmon, 38 Mo. 435.

30. Morris *v.* Morris, 15 N. J. Eq. 239.

31. Biles' Estate, 2 Brewst. (Pa.) 609; Schafer *v.* Luke, 51 Wis. 669, 8 N. W. 857. See also Warren *v.* Union Bank, 28 N. Y. App. Div. 7, 51 N. Y. Suppl. 27, personal property and income of real estate.

32. *In re* Jackson, 21 Ch. D. 786.

33. Allman *v.* Taylor, 101 Ill. 185, even though the productive property is situated in another state.

34. Greenlaw *v.* Greenlaw, 16 Lea (Tenn.) 435.

35. Elliott *v.* Fowler, 112 Ky. 376, 65 S. W. 849, 23 Ky. L. Rep. 1676; Thompson *v.* Brown, 4 Johns. Ch. (N. Y.) 619. See also U. S. Bank *v.* Ritchie, 8 Pet. (U. S.) 128, 8 L. ed. 890. And see, generally, EXECUTORS AND ADMINISTRATORS.

36. See PARTITION.

37. Allman *v.* Taylor, 101 Ill. 185; Smith *v.* Sackett, 10 Ill. 534.

38. Vowles *v.* Buckman, 6 Dana (Ky.) 466; Coger *v.* Coger, 2 Dana (Ky.) 270 (authority limited to lands descended); Crutcher *v.* Rodman, 81 S. W. 252, 26 Ky. L. Rep. 294 ("vested estates"); Liter *v.* Fishback, 75 S. W. 232, 25 Ky. L. Rep. 260. See also *Ex p.* Legh, 15 Sim. 445, 38 Eng. Ch. 445, 60 Eng. Reprint 691.

"Lands limited over to infants, or in contingency."— See *In re* Mickle, 25 N. J. Eq. 53.

An estate tail may be sold under Ont. Rev. St. c. 137. *In re* Gray, 26 Ont. 355.

39. Nutter *v.* Russell, 3 Metc. (Ky.) 163; Bolgiano *v.* Cooke, 19 Md. 375; Faulkner *v.* Davis, 18 Gratt. (Va.) 651, 98 Am. Dec. 698.

"Real estate" includes every freehold estate and interest in lands. Jenkins *v.* Fahey, 73 N. Y. 355 [*reversing* 11 Hun 351].

Such a statute authorizes a sale of an interest in the nature of an executory devise (Nutter *v.* Russell, 3 Metc. (Ky.) 163), a vested remainder in fee (Jenkins *v.* Fahey, 73 N. Y. 355 [*reversing* 11 Hun 351]; *In re* Haight, 14 Hun (N. Y.) 176), or a contingent remainder (Nutter *v.* Russell, 3 Metc. (Ky.) 163).

40. Matter of Asch, 75 N. Y. App. Div. 486, 78 N. Y. Suppl. 561; Rogers *v.* Dill, 6 Hill (N. Y.) 415; Lenow *v.* Arrington, 111 Tenn. 720, 69 S. W. 314; *Re* Smith, 6 Ont. Pr. 282; *In re* Callicott, 1 Ch. Chamb. (U. C.) 182. See also Muller *v.* Struppman, 6 Abb. N. Cas. (N. Y.) 343.

Testamentary provisions held not to prohibit sale see Matter of Asch, 75 N. Y. App. Div. 486, 78 N. Y. Suppl. 561; Lenow *v.* Arrington, 111 Tenn. 720, 69 S. W. 314.

41. Peyton *v.* Alcorn, 7 J. J. Marsh. (Ky.) 502; *Re* Harding, 13 Ont. Pr. 112, consent of infant.

Consent of majority of infant owners sufficient.— *Re* Harding, 13 Ont. Pr. 112.

Annexing consent to petition.— *Re* Axford, 6 Ont. Pr. 192.

power of the court to order the same, it is essential to the validity of the proceedings that the provisions of the statute shall be complied with;[42] and it has been held that one who claims title to property through a sale of an infant's interest must establish by affirmative evidence that every requirement of the statute necessary to confer jurisdiction upon the court to order the sale has been complied with.[43]

(II) *PARTIES.*[44] The infant should usually proceed for a sale of land in which he is interested by guardian[45] or next friend,[46] and it is not essential that the

When examination as to consent dispensed with.— See *Re* Bennett Infants, 17 Ont. Pr. 498, construing Ont. Rev. St. (1887) c. 137, § 3.

42. *Florida.*— Coy *v.* Downie, 14 Fla. 544.

Kentucky.— Elliott *v.* Fowler, 112 Ky. 376, 65 S. W. 849, 23 Ky. L. Rep. 1676 (strict compliance necessary); Ewing *v.* Riddle, 8 Bush 568; Watts *v.* Pond, 4 Metc. 61; Barrett *v.* Churchill, 18 B. Mon. 387; Vowles *v.* Buckman, 6 Dana 466; Bullock *v.* Gudgell, 77 S. W. 1126, 25 Ky. L. Rep. 1413 (strict compliance necessary); Hicks *v.* Jackson, 68 S. W. 419, 24 Ky. L. Rep. 218.

Maryland.— Roche *v.* Waters, 72 Md. 264, 19 Atl. 535, 7 L. R. A. 533. See also Tomlinson *v.* McKaig, 5 Gill 256.

New York.— Ellwood *v.* Northrup, 106 N. Y. 172, 12 N. E. 590 (statutory requirements must be strictly pursued); Battell *v.* Torrey, 65 N. Y. 294; Blanchard *v.* Blanchard, 33 Misc. 284, 67 N. Y. Suppl. 478; Moscowitz *v.* Homberger, 19 Misc. 429, 43 N. Y. Suppl. 1130.

Pennsylvania.— Kreimendahl *v.* Neuhauser, 13 Pa. Super. Ct. 606, strict compliance necessary.

Tennessee.— Morris *v.* Richardson, 11 Humphr. 389.

Virginia.— See Brown *v.* Putney, 90 Va. 447, 18 S. E. 883.

See 27 Cent. Dig. tit. "Infants," §§ 72, 85.

There must be a strict compliance with the requirements of the statute, not in form merely, but in substance and spirit, otherwise the sale will be entirely void as against such infants. Morris *v.* Richardson, 11 Humphr. (Tenn.) 389.

The South Carolina stay law of 1861 did not render a sale of infants' property, made without observing its requirements, necessarily void. Bulow *v.* Witte, 3 S. C. 308.

All applications for sale must come before same judge. *In re* Hansell, 1 Ch. Chamb. (U. C.) 205.

The rules of practice as well as the statutory requirements must be strictly followed in order to make the sale valid. Moscowitz *v.* Homberger, 19 Misc. (N. Y.) 429, 43 N. Y. Suppl. 1130.

In suit not brought for purpose of sale a decree of sale is void. Seamster *v.* Blackstock, 83 Va. 232, 2 S. E. 36, 5 Am. St. Rep. 262.

43. Ellwood *v.* Northrup, 106 N. Y. 172, 12 N. E. 590, there is no presumption of compliance in the absence of proof.

44. **Representation by guardian ad litem or next friend** generally see *infra*, VIII, D.

45. Henning *v.* Barringer, 10 S. W. 136, 10 Ky. L. Rep. 674; Mumma *v.* Brinton, 77 Md. 197, 26 Atl. 184; Roche *v.* Waters, 72 Md. 264, 19 Atl. 535, 7 L. R. A. 533; Cole *v.* Gourlay, 79 N. Y. 527 [*affirming* 9 Hun 493]; Matter of Lansing, 3 Paige (N. Y.) 264; Blean *v.* Blean, 10 Ont. 693. Where a guardian to an infant has already been appointed by the court, it is not necessary to appoint a guardian for the special purpose of presenting a petition for sale of the infant's estate under Settled Estates Act (1877), § 49 (a). *In re* Ash, 5 Brit. Col. 672, distinguishing the English practice.

A petition for the sale of real estate devised to minors need not be brought by the executors, but may be brought by the testamentary guardian of the minors, the executors being made parties defendant. Southern Marble Co. *v.* Stegall, 90 Ga. 236, 15 S. E. 806.

When guardian need not be plaintiff.— See Crutcher *v.* Rodman, 81 S. W. 252, 26 Ky. L. Rep. 294, construing Ky. Civ. Code Pr. § 491.

Under the present New York statute application must be made by the general guardian or guardian of the property of the infant, and if the infant is of the age of fourteen years he must join in the petition. See Warren *v.* Union Bank, 28 N. Y. App. Div. 7, 51 N. Y. Suppl. 27. A petition to sell real property of an infant under fourteen years of age, which recites that the infant is the petitioner, but which is executed and acknowledged by his guardian, is the petition of both the infant and guardian, and is sufficient. Matter of Hopkins, 33 N. Y. App. Div. 615, 53 N. Y. Suppl. 1051.

46. Henning *v.* Barringer, 10 S. W. 136, 10 Ky. L. Rep. 674; Mumma *v.* Brinton, 77 Md. 197, 26 Atl. 184; Roche *v.* Waters, 72 Md. 264, 19 Atl. 535, 7 L. R. A. 533; Cole *v.* Gourlay, 79 N. Y. 527 [*affirming* 9 Hun 493].

Under Md. St. (1868) c. 273, a bill for the sale of an infant's property should be filed in the name of the infant by his next friend, and not by the guardian in his own name as guardian of the infant; but the fact that the petition was filed by the guardian in his own name is not such an irregularity as would necessarily defeat the jurisdiction of the court. Newbold *v.* Schlens, 66 Md. 585, 9 Atl. 849.

"Next friend" is broad enough to include a mother. McKinney *v.* Jones, 55 Wis. 39, 11 N. W. 606, 12 N. W. 381, construing Wis. Rev. St. (1858) c. 96, § 4.

infant should join in the petition.[47] It is sometimes required that the infant shall be made a party to a proceeding to sell or mortgage his real estate,[48] and that there should be an appearance for him by guardian *ad litem* appointed by the court.[49] There is no authority for uniting in a suit to sell an infant's interest in land, persons who claim a legal title adverse to the infant's, and compelling them to litigate that claim and pronouncing upon it in such suit.[50]

(III) *Process.* Where a proceeding in equity to sell lands was for the benefit of infant owners, it will not be invalid because the infants were not cited and brought into court.[51]

(IV) *Petition or Other Application.* The application to sell an infant's property should ordinarily be by petition,[52] which should fully state all the facts or circumstances rendering the sale or other disposition of the infant's property necessary,[53] and all the matters which the statute requires to be set forth.[54] A petition embracing substantially all that is required by the statute is sufficient,[55] and where the facts necessary to give jurisdiction of an infant's land under the statute are proved, the infelicitous presentation of them in the petition is not sufficient to affect the validity of the proceedings.[56] The petition may, in the dis-

The fact that the infant sues by both guardian and next friend is only the subject of special demurrer, and can afford no ground for a reversal unless the rights of the infant have been prejudiced by the proceeding. Henning *v.* Barringer, 10 S. W. 136, 10 Ky. L. Rep. 674.

The fact that the next friend is a creditor of the infants does not disqualify him from acting in that capacity on an application for a sale of their real estate. O'Reilly *v.* King, 28 How. Pr. (N. Y.) 408.

Omission of statutory affidavit.—Where the right of the mother to sue as next friend for the infant appeared before the purchaser acquired title, the fact that she did not make affidavit of such right as required by statute was not such a jurisdictional defect as would render the judgment void. Henning *v.* Barringer, 10 S. W. 136, 10 Ky. L. Rep. 674.

Decree of sale on petition of infant by next friend valid.— Campbell *v.* Baker, 51 N. C. 255.

Next friend must be disinterested. Berry *v.* Berry, 22 Grant Ch. (U. C.) 202.

The power and duty of the next friend of infants petitioning for the sale of realty, under 2 N. Y. Rev. St. (5th ed.) p. 275, §§ 100, 101, is merely to bring the matter before the court, which then takes cognizance of the proceedings and appoints a responsible guardian authorized to act on behalf of the infants, and takes security for the faithful performance by such guardian of his duty. Matter of Whitlock, 19 How. Pr. (N. Y.) 380.

47. Mumma *v.* Brinton, 77 Md. 197, 26 Atl. 184; Cole *v.* Gourlay, 79 N. Y. 527 [*affirming* 9 Hun 493].

48. Roche *v.* Waters, 72 Md. 264, 19 Atl. 535, 7 L. R. A. 533; Hunter *v.* Hatton, 4 Gill (Md.) 115, 45 Am. Dec. 117 (holding that the provision of Md. Acts (1816), c. 154, to that effect was not repealed by Md. Acts (1818), c. 133); Horspool *v.* Davis, 6 Bosw. (N. Y.) 581 (holding that unless the infants are made parties an order authorizing the execution of a mortgage is as to them *coram non judice*; and the mortgage given in pursuance of the order is inoperative and void). But see Guardian and Ward.

Making heirs of infants parties.— See Lancaster *v.* Barton, 92 Va. 615, 24 S. E. 251.

49. Roche *v.* Waters, 72 Md. 264, 19 Atl. 535, 7 L. R. A. 533.

Failure to appoint any one to represent infants does not vitiate sale. Robinson *v.* Rechman, 2 Duv. (Ky.) 82.

50. Onderdonk *v.* Mott, 34 Barb. (N. Y.) 106.

51. Marshall *v.* Wheeler, 7 Mackey (D. C.) 414.

52. See O'Reilly *v.* King, 28 How. Pr. (N. Y.) 408.

Oral application sufficient.— O'Reilly *v.* King, 28 How. Pr. (N. Y.) 408, holding that the court might depart from the rule requiring the application to be by petition, although it would probably not be wise to allow such a practice.

53. *Ex p.* Jewett, 16 Ala. 409; *In re* Dorr, Walk. (Mich.) 145. See also *Re* Jackes, 3 Can. L. J. 69.

54. See Matter of Hopkins, 33 N. Y. App. Div. 615, 53 N. Y. Suppl. 1051.

55. Bolgiano *v.* Cooke, 19 Md. 375. See also Cole *v.* Gourlay, 79 N. Y. 527 [*affirming* 9 Hun 493].

Statement that sale asked to avoid partition.— A petition to sell the undivided interest of an infant in land, which states that the executors of the infant's ancestor are about to sell the interest of the other tenants under a power in the will, and that the purchasers will no doubt be strangers to the infant, and apt to disregard in great measure her undivided interest, and might bring partition against her, sufficiently alleges that the application is made to avoid a partition by the cotenants, within N. Y. Code Civ. Proc. § 2350, providing that where such allegation is made, the particulars concerning the real and personal estate of the infant, her income, and the debts against her estate need not be stated. Blanchard *v.* Blanchard, 33 Misc. (N. Y.) 284, 67 N. Y. Suppl. 478.

56. Ryder *v.* Wood, 8 N. Y. Suppl. 421.

cretion of the court, be granted, although it does not in form comply with the requirements of the rules of the court.[57] The petition or bill is usually required to be verified by the oath of the petitioner.[58]

(v) *TRIAL OR HEARING.* Under some statutes the court may proceed in a summary manner to inquire into the merits of the application.[59] Before the court will authorize a sale or other disposition of an infant's estate, it must be satisfied from the facts before it of the necessity and propriety of the measure,[60] and it must be proved to the satisfaction of the court that the sale will be for the benefit of the infant.[61] A sale should not be authorized until all liens against the land for taxes or otherwise are ascertained and determined so that a fair sale may be had and a clear title secured to the purchaser.[62] There is no prerequisite in the Virginia statute requiring that the will under which infants hold land shall be construed before a sale is ordered.[63] In Georgia a decree for the sale of real estate devised to minors may be made during term-time as well as in vacation, all parties, including the guardian *ad litem* of the minors, consenting.[64]

(vi) *REFERENCE.* There should ordinarily be a reference to a master, a referee, or commissioners,[65] to ascertain the necessity and propriety of the

57. Cole *v.* Gourlay, 79 N. Y. 527 [*affirming* 9 Hun 493] (holding that the rules of the New York court of chancery requiring a petition for the sale of the property of an infant to be by the general guardian of the infant, or to show that he had none, and requiring corroborative affidavits, could be dispensed with by the court); O'Reilly *v.* King, 2 Bosw. (N. Y.) 587.

58. See Lancaster *v.* Barton, 92 Va. 615, 24 S. E. 251.

Verification should be in form prescribed by rule of court.— Matter of Lansing, 3 Paige (N. Y.) 264.

What is a sufficient verification.—Where an affidavit to a bill for a sale of infants' lands, reciting, "Sworn to before me," etc., but not reciting what was sworn to, or by whom the oath was made, was supplemented by evidence that plaintiff in the bill swore to the bill, a sufficient verification, within Va. Code, § 2616, appeared. Lancaster *v.* Barton, 92 Va. 615, 24 S. E. 251, where the court said, however, that the better practice would be for the certificate to show on its face that the bill was sworn to by plaintiff, and not leave that fact to be supplied by evidence *aliunde*.

59. Schafer *v.* Luke, 51 Wis. 669, 8 N. W. 857, holding that a statute so providing permitted the court to satisfy itself by means of affidavits, inspection, and other methods of proof without the oral examination and cross-examination of witnesses.

60. Stammers *v.* McNaughten, 57 Ala. 277; *Ex p.* Jewett, 16 Ala. 409; *In re* Dorr, Walk. (Mich.) 145; Bulow *v.* Buckner, Rich. Eq. Cas. (S. C.) 401; *Re* Phelan, 6 Ont. Pr. 259.

Right of guardian to be heard.— See Hunter *v.* Hatton, 4 Gill (Md.) 115, 45 Am. Dec. 117, construing Maryland statute.

Showing sufficient to warrant sale or mortgage see Smith *v.* Sackett, 10 Ill. 534; Williams' Case, 3 Bland (Md.) 186; Lenow *v.* Arrington, 111 Tenn. 720, 69 S. W. 314.

Showing not sufficient to warrant sale see Gassenheimer *v.* Gassenheimer, 108 Ala. 651, 18 So. 520; *In re* Heaton, 21 N. J. Eq. 221; Porter *v.* Porter, 1 Baxt. (Tenn.) 299.

61. *Maryland.*— Bolgiano *v.* Cooke, 19 Md. 375; Harris *v.* Harris, 6 Gill & J. 111; Watson *v.* Godwin, 4 Md. Ch. 25.

Michigan.— *In re* Dorr, Walk. 145.

North Carolina.— Marsh *v.* Dellinger, 127 N. C. 360, 39 S. E. 494.

South Carolina.— Bulow *v.* Buckner, Rich. Eq. Cas. 401.

Wisconsin.— Schafer *v.* Luke, 51 Wis. 669, 8 N. W. 857.

Canada.—*Re* McDonald, 1 Grant Ch. (U. C.) 90.

Admissions in the pleadings do not obviate the necessity for such proof. Harris *v.* Harris, 6 Gill & J. (Md.) 111; Watson *v.* Godwin, 4 Md. Ch. 25.

Presumption.— Where an order of sale has been made, it must be presumed that the court was satisfied as to the merits of the application. Schafer *v.* Luke, 51 Wis. 669, 8 N. W. 857.

The failure of witnesses to state facts in support of their opinion that a sale will be for the benefit of the infant is not ground for vacating the decree of sale on a bill of review. Gregory *v.* Lenning, 54 Md. 51.

62. White *v.* Straus, 47 W. Va. 794, 35 S. E. 843.

63. Lancaster *v.* Barton, 92 Va. 615, 24 S. E. 251.

64. Southern Marble Co. *v.* Stegall, 90 Ga. 236, 15 S. E. 806, holding further that where the adjudication takes place in term-time and the record recites that consent was given, this is sufficient evidence that it was given, without the production of any other writing to establish the fact.

65. Campbell *v.* Clay, 6 Bush (Ky.) 498 (reference required by statute); Harrison *v.* Bradley, 40 N. C. 136 (holding that it was improper to decree a sale upon *ex parte* affidavits without any reference).

The commissioners must be sworn (Watts *v.* Pond, 4 Metc. (Ky.) 61), but the failure of the record to show that they were sworn does not warrant a presumption that they

sale,[66] and whether the interest of the infant requires it.[67] An order for the sale of an infant's realty will not be granted unless the report of the master complies with the rules of the court in all the particulars required to be reported,[68] and where a reference is required by statute, such a report as the statute requires is necessary to give the court jurisdiction to order the sale.[69] Upon a reference to examine and report whether the interest of infants requires and will be promoted by a sale of their lands, the master must report his own opinion formed from facts, not that of others, nor an opinion founded upon that of others without facts.[70] The testimony upon which the opinion of the master or commissioner as to the necessity and expediency of the sale is founded should be reported to the court so that it may form an opinion as to such necessity for itself.[71] The referee's report in a proceeding to mortgage an infant's realty for the payment of certain specified debts should specify the objects to which the avails are to be applied and not merely refer to the evidence for a statement of these objects.[72]

(VII) *FAMILY MEETING.*[73] Under the laws of Louisiana the real property of a minor cannot be sold or mortgaged unless a family meeting, duly assembled, declares that the sale or mortgage is of absolute necessity or of evident advantage to the minor.[74] A decree homologating the proceedings of a family meeting will protect a purchaser in good faith.[75]

were not (Thornton *v.* McGrath, 1 Duv. (Ky.) 349).

Discretion of court.— Aldrich *v.* Funk, 48 Hun (N. Y.) 367, 1 N. Y. Suppl. 541; Matter of McIlvaine, 15 Abb. Pr. (N. Y.) 91.

The infant must appear by guardian appointed by the court, if he is a resident of the state, before the commission under the Maryland act of 1818 for ascertaining the necessity of selling the infant's realty can rightfully issue. Hunter *v.* Hatton, 4 Gill (Md.) 115, 45 Am. Dec. 117.

66. Harrison *v.* Bradley, 40 N. C. 136.

67. Campbell *v.* Clay, 6 Bush (Ky.) 498; Watts *v.* Pond, 4 Metc. (Ky.) 61; Wells *v.* Cowherd, 2 Metc. (Ky.) 514; Hunter *v.* Hatton, 4 Gill (Md.) 115, 45 Am. Dec. 117.

68. Matter of Stiles, Hopk. (N. Y.) 341.

69. Campbell *v.* Clay, 6 Bush (Ky.) 498; Wyatt *v.* Mansfield, 18 B. Mon. (Ky.) 779, sale void unless statutory requirements as to appointment and report of commissioners complied with.

Report of value of estate.— The commissioners must report the net value of the infant's real estate and the annual profits thereof. Campbell *v.* Clay, 6 Bush (Ky.) 498.

The report must be full and explicit on all matters which the statute requires to be ascertained and communicated to the court. Woodcock *v.* Bowman, 4 Metc. (Ky.) 40; Carpenter *v.* Strother, 16 B. Mon. (Ky.) 289.

Report must show that all property is included. Bell *v.* Clark, 2 Metc. (Ky.) 573 (holding a report of commissioners stating "that there is no other estate in this country belonging to said heirs, known to them," insufficient); Wells *v.* Cowherd, 2 Metc. (Ky.) 514.

70. *In re* Heaton, 21 N. J. Eq. 221.

71. Bulow *v.* Buckner, Rich. Eq. Cas. (S. C.) 401.

Reference for convenience.— Where the cause is referred to a commissioner merely as a convenient mode of bringing before the court the necessary evidence upon which the decree of sale is to be based, the report is not one which the Virginia statute contemplates shall lie ten days before being acted upon. Lancaster *v.* Barton, 92 Va. 615, 24 S. E. 251.

72. *In re* Lampman, 22 Hun (N. Y.) 239.

73. "Family meeting" defined see 19 Cyc. 455.

74. Lemoine *v.* Ducote, 45 La. Ann. 857, 12 So. 939; Mayronne *v.* Waggaman, 30 La. Ann. 974; Weber's Succession, 16 La. Ann. 420; Beale *v.* Walden, 11 Rob. (La.) 67; Lalanne *v.* Moreau, 13 La. 431. See also Mallard *v.* Dejan, 45 La. Ann. 1270, 14 So. 238; Leisey *v.* Tanner, 28 La. Ann. 299; Beard *v.* Morancy, 3 Rob. (La.) 119.

A sale without a family meeting is void, even though the parish judge did not know that the property belonged to minors. Bynum *v.* Lemoine, 1 Mart. N. S. (La.) 628.

Meeting must be held in parish where court sits. Beale *v.* Walden, 11 Rob. (La.) 67.

The meeting must be sworn, and if that fact be not stated in the *procès verbal* it will not be presumed, but must be proved. Harty *v.* Harty, 8 Mart. N. S. (La.) 518.

Conflicting interests.— A family meeting apparently composed of one or more persons who have interests in conflict with those of the minor is not legally constituted. Mayronne *v.* Waggaman, 30 La. Ann. 974.

Coheirs of a minor interested in a partition might have been members of a family meeting prior to the Louisiana act of March 25, 1828, but it is otherwise under that act. Raguet *v.* Barron, 6 Mart. N. S. (La.) 659.

A meeting convoked for other special and definite purposes is without authority to order a sale of a minor's property. Morris *v.* Kemp, 14 La. 251.

75. Dauterive *v.* Shaw, 47 La. Ann. 882, 17 So. 345.

(VIII) *APPRAISEMENT.* In Louisiana it is required that the property shall be appraised before a sale,[76] and it cannot be sold for less than the amount of the appraisement,[77] except where it is sold to pay the debts of the ancestor.[78]

(IX) *ORDER OR DECREE.* An order of the court to that effect is necessary to authorize a sale of an infant's property.[79] The fact that the description of the lands in the decree of sale is very general does not render it ineffectual if the land can be clearly identified by the subsequent proceedings.[80] An order requiring the special guardian of an infant to mortgage its realty and apply the proceeds to the payment of certain specified debts should specify the objects to which the avails are to be applied and not merely refer to another paper therefor.[81] Where nothing to the contrary appears in the record, it will be presumed that an order for the sale of an infant's property was made upon a sufficient showing, and was for the infant's benefit,[82] and where the court acquired jurisdiction, its decree, even though erroneous, is conclusive until reversed or set aside.[83] An order for the mortgaging of property obtained by fraud against infants interested therein has been held void.[84]

f. Bond. Under some statutes the general or special guardian of the infant is required to file a bond for the faithful discharge of his trust and the accounting for and paying over of all moneys received by him in the proceedings,[85] and a

76. See Fraser *v.* Zylicz, 29 La. Ann. 534.

77. Fraser *v.* Zylicz, 29 La. Ann. 534.

Sale merely voidable at option of minors.— Richard *v.* Deuel, 11 Rob. (La.) 508.

78. Fraser *v.* Zylicz, 29 La. Ann. 534 (where the court said that in such case the property is that of the succession rather than of the minors); Towles *v.* Weeks, 7 La. 312.

79. Bill *v.* Burgess, 22 S. W. 84, 51 Ky. L Rep. 41; Mallard *v.* Dejan, 45 La. Ann. 1270, 14 So. 238; Lemoine *v.* Ducote, 45 La. Ann. 857, 12 So. 939; Beard *v.* Morancy, 3 Rob. (La.) 119.

Ratification by family meeting.— The adjudicatee at the sale of minors' property, without an order of court, cannot be compelled to accept the same, on the deliberations of a family meeting called to ratify such illegal sale, since, under La. Rev. Civ. Code, art. 1794, his assent to the ratification is essential. Mallard *v.* Dejan, 45 La. Ann. 1270, 14 So. 238.

80. Williams *v.* Harrington, 33 N. C. 616, 53 Am. Dec. 421.

81. *In re* Lampman, 22 Hun (N. Y.) 239.

82. Redmond *v.* Anderson, 18 Ark. 449.

Statement that decree entered on consent. — The mere statement in a decree, directing the sale of the interest in certain land adjudicated to an infant in the action, that it was entered on "consent," does not show that it was based on "consent" alone, the presumption being that the chancellor, in directing the sale, exercised the discretion vested in him. Bent *v.* Miranda, 8 N. M. 78, 42 Pac. 91.

83. Rhea *v.* Shields, 103 Va. 305, 49 S. E. 70. A decree for the sale of an infant's land, to which he is a party, and in a case in which the court has jurisdiction, is so far binding on him that he cannot, either by original bill or bill of review or any other proceeding, impeach it so far as to prejudice the interests of a *bona fide* purchaser for value and without notice. Livingston *v.* Noe, 1 Lea (Tenn.) 55. The same rule applies to a decree sanctioning a lease of the infant's land. Anderson *v.* Ammonett, 9 Lea (Tenn.) 1.

84. Pitcher *v.* Carter, 4 Sandf. Ch. (N. Y.) 1.

85. Loeb *v.* Struck, 42 S. W. 401, 19 Ky. L. Rep. 935; Fritsch *v.* Klausing, 13 S. W. 241, 11 Ky. L. Rep. 788; Blanchard *v.* Blanchard, 33 Misc. (N. Y.) 284, 67 N. Y. Suppl. 478. See also Matter of Thorne, 1 Edw. (N. Y.) 507.

Report as to amount of security should be made by the master. Matter of Lansing, 3 Paige (N. Y.) 264.

Statute dispensing with bond.— Bullock *v.* Gudgell, 77 S. W. 1126, 25 Ky. L. Rep. 1413.

Breach of bond.— Where a special guardian appointed to sell the real estate of an infant gave a bond conditioned upon the trust reposed in him, and to pay over, invest, and account for all moneys that should be received by him according to the order of any court having authority to give directions in the premises, and to observe the orders and directions of the supreme court in relation to said trust, his omission and neglect to account for the purchase-money and to invest the same according to the terms of the sale and the order of the court affirming the same was a clear breach of his duty as special guardian, and a breach of the condition of the bond. Hunt *v.* Hunt, 65 Barb. (N. Y.) 577, holding further that it was no excuse for not complying with the condition of his bond for the special guardian to show that he was administrator of the estate of the infant's father, or that such estate was insolvent, and he had wrongfully taken the funds which came to his hands as special guardian and had, without the order or allowance of the court, misappropriated them as administrator.

Prerequisites to suit on bond.— A bond given on the appointment of a guardian *ad litem* to sell the realty of an infant cannot be prosecuted until proceedings for an ac-

failure to require or to give such a bond has been held to render the whole proceeding void.[86]

g. Manner and Conduct of Sale — (i) *In General.* When a sale in a certain way is authorized by the court, it can be made only in that way;[87] and statutory requirements as to the manner of making the sale must be complied with.[88]

(ii) *By Whom Sale Made.* It has been held that the general guardian of the infants, if they have one, is the proper person to be appointed to sell their real estate, unless some sufficient reason is shown for substituting another for that purpose.[89]

(iii) *Time of Sale.* Where the order of sale does not require the master to consult with the guardian *ad litem* as to the time of the sale, his failure to do so cannot be regarded even as an irregularity.[90]

(iv) *Place of Sale.* In Louisiana it has been held that the sale of a minor's property must be at the place where the family meeting has determined, and this may be outside of the parish where the land lies.[91]

(v) *Terms and Conditions of Sale.* The terms of sale are usually prescribed by the court,[92] and the sale must be made upon such terms.[93]

(vi) *Public or Private Sale.* The sale of an infant's estate under order of court should ordinarily be by public outcry,[94] but private sales may in some

count have been had against the guardian in chancery. Salisbury *v.* Van Hoesen, 3 Hill (N. Y.) 77.

86. Barnett *v.* Bull, 81 Ky. 127, 4 Ky. L. Rep. 939; Loeb *v.* Struck, 42 S. W. 401, 19 Ky. L. Rep. 935; Fritsch *v.* Klausing, 13 S. W. 241, 11 Ky. L. Rep. 788 (as to the interest of the infants); Blanchard *v.* Blanchard, 33 Misc. (N. Y.) 284, 67 N. Y. Suppl. 478. *Compare* Thornton *v.* McGrath, 1 Duv. (Ky.) 349, sale voidable only. And see Higdon *v.* Lancaster, 7 Ky. L. Rep. 296, holding that the failure of a commissioner to execute a bond before making a sale of infants' realty under order of the chancellor does not affect the title of the property after confirmation of the sale.

Order that bond as general guardian be deemed sufficient is not sufficient to cure the omission to require a bond as special guardian. Blanchard *v.* Blanchard, 33 Misc. (N. Y.) 284, 287, 67 N. Y. Suppl. 478.

A recital in the decree of sale that the bond was given authorizes the inference that it was given before or simultaneously with the decree, although it is dated the day after. Thornton *v.* McGrath, 1 Duv. (Ky.) 349.

A failure to file the bond until after the order of reference, the bond having been previously duly executed and approved, is a mere irregularity in nowise affecting the validity of the proceedings. Kelly *v.* Pitcher, 4 N. Y. Suppl. 3.

87. *In re* Axtell, 95 Mich. 244, 54 N. W. 889.

88. See cases cited *infra,* this and following notes.

Construction of statute.— N. Y. Code Civ. Proc. § 2356, providing that before a sale can be made pursuant to the order, special guardian must enter into an agreement therefor, subject to the approval of the court, and report such an agreement to the court under oath, and upon confirmation thereof shall execute a deed as directed by the court, does not require that such agreement should be in writing. Warren *v.* Union Bank, 28 N. Y. App. Div. 7, 51 N. Y. Suppl. 27; Blanchard *v.* Blanchard, 33 Misc. (N. Y.) 284, 67 N. Y. Suppl. 478 [*disapproving dictum* to the contrary in Hardie *v.* Andrews, 13 N. Y. Civ. Proc. 413].

89. Matter of Lansing, 3 Paige (N. Y.) 264; Matter of Wilson, 2 Paige (N. Y.) 412.

The husband cannot be appointed guardian to sell the estate of his infant wife. Matter of Whitaker, 4 Johns. Ch. (N. Y.) 378.

90. Bulow *v.* Witte, 3 S. C. 308.

91. Pierce's Case, 9 Mart. (La.) 461.

92. Clark *v.* Stanhope, 109 Ky. 521, 59 S. W. 856. See also Luttrell *v.* Wells, 97 Ky. 84, 30 S. W. 10, 16 Ky. L. Rep. 812.

Where the order of sale does not require the master to consult with the guardian *ad litem* as to the conditions of the sale, his failure to do so cannot be regarded even as an irregularity. Bulow *v.* Witte, 3 S. C. 308.

93. *In re* Axtell, 95 Mich. 244, 54 N. W. 889.

The credits prescribed by the judgment cannot be exceeded, even though the law would generally authorize longer credits. Luttrell *v.* Wells, 97 Ky. 84, 30 S. W. 10, 16 Ky. L. Rep. 812.

94. Clark *v.* Stanhope, 109 Ky. 521, 59 S. W. 856; Luttrell *v.* Wells, 97 Ky. 84, 30 S. W. 10, 16 Ky. L. Rep. 812, holding that under the Kentucky statute the court cannot order a private sale. See also Durand *v.* Dubuclet, 24 La. Ann. 155.

Contract of sale void.— A contract for the sale of an infant's land which contemplates that the purchaser, or someone for him, shall become the accepted bidder at a public sale, is void, the tendency of such a contract being to smother bidding. Clark *v.* Stanhope, 109 Ky. 521, 59 S. W. 856.

states be authorized under certain circumstances.[95] An order for a private sale of an infant's property does not authorize a public sale.[96]

h. Who May Purchase.[97] Under the Tennessee statute, where land is sold because it is for the benefit of an infant owner that it shall be sold, neither a guardian,[98] next friend,[99] nor a witness in the cause[1] can purchase at such sale, or at any time afterward until five years from the removal of the existing disability, and if any such person makes such a purchase, original sales shall become void and the infant may bring ejectment for the land.[2] A sale by a special guardian appointed by the court to his wife is ordinarily improper,[3] but the court has power in its discretion to permit and approve such a sale.[4] The judge who ordered the sale cannot either directly or indirectly become the purchaser.[5] In South Carolina a purchase at public sale by the guardian of the infants for full value has been held valid.[6] Upon the recovery of land the sale of which was void because purchased by one standing in a confidential relation to the infant owners, the latter are entitled to an account for rents and profits;[7] but the purchaser will be entitled to an account of permanent improvements to the extent that they have enhanced the value of the land, not to exceed the rents and profits, and also for taxes paid.[8]

i. Confirmation. Confirmation by the court is necessary to complete the sale.[9] It is no objection to confirmation that the petition for confirmation is filed by the purchaser.[10] There may be cases where, in justice to a purchaser in good faith, a sale of an infant's property under order of court should be confirmed, if in good conscience this ought to be done and the interest of the infant will not be prejudiced thereby, although it was not made in strict compliance with the statute;[11] but there is no rule of law or right empowering a court of equity to confirm a private sale of an infant's real estate made by an unauthorized person without an order of court.[12] When the court can see that injustice will be

95. Durand *v.* Dubuclet, 24 La. Ann. 155 (at the wish of any of the heirs interested and on the advice of a family meeting); Pattee *v.* Thomas, 58 Mo. 163; Rowland *v.* Thompson, 73 N. C. 504; Gilmore *v.* Rodgers, 41 Pa. St. 120 (decree directing private sale cannot be collaterally impeached if court had jurisdiction).

96. Mallard *v.* Dejan, 45 La. Ann. 1270, 14 So. 238.

97. Purchase by general guardian see GUARDIAN AND WARD.

98. Starkey *v.* Hammer, 1 Baxt. (Tenn.) 438.

Where an infant's land was sold to pay the ancestor's debts at the suit of the executor, the fact that the guardian *ad litem*, who was also the clerk of the court, became the purchaser did not render the sale void. Spencer *v.* Milliken, 4 Ky. L. Rep. 856.

99. Starkey *v.* Hammer, 1 Baxt. (Tenn.) 438.

1. Starkey *v.* Hammer, 1 Baxt. (Tenn.) 438.

2. Starkey *v.* Hammer, 1 Baxt. (Tenn.) 438, holding, however, that the infant is not confined to the remedy by ejectment, but the chancery court has jurisdiction to remove the cloud from the void title.

3. Strauss *v.* Bendheim, 162 N. Y. 469, 56 N. E. 1007 [*reversing* 44 N. Y. App. Div. 82, 60 N. Y. Suppl. 398].

4. Strauss *v.* Bendheim, 162 N. Y. 469, 56 N. E. 1007 [*reversing* 44 N. Y. App. Div. 82, 60 N. Y. Suppl. 398].

5. Hoskinson *v.* Jaquess, 54 Ill. App. 59.

6. McGuire *v.* McGowan, 4 Desauss. Eq. (S. C.) 486.

7. Starkey *v.* Hammer, 1 Baxt. (Tenn.) 438.

8. Starkey *v.* Hammer, 1 Baxt. (Tenn.) 438.

9. Titman *v.* Riker, 43 N. J. Eq. 122, 10 Atl. 397; Carnes *v.* Polk, 4 Coldw. (Tenn.) 87; Harrison *v.* Ilgner, 74 Tex. 86, 11 S. W. 1054. *Compare* Battell *v.* Torrey, 65 N. Y. 294, applying the rule to a mortgage.

Report on conversion of crops.— By an order in an infancy application under 12 Vict. c. 72 (C. S. U. C. c. 12), it was referred to the master to take an account of the value of the crops grown on the premises during a given year, and of what had become thereof, and how much had been converted by one A to his own use beyond one third thereof; and it was ordered that said A, on service of the order and report, should pay into court the amount found due by the master. It was held that the order being final so far as A was concerned, the report made in pursuance thereof did not require confirmation. *Re* Yaggie, 1 Ch. Chamb. (U. C.) 168.

10. Dorsey *v.* Gilbert, 11 Gill & J. (Md.) 87; Battell *v.* Torrey, 65 N. Y. 294, sale, mortgage, or lease.

11. Kinslow *v.* Grove, 98 Ky. 266, 32 S. W. 933, 17 Ky. L. Rep. 845.

12. Kinslow *v.* Grove, 98 Ky. 266, 32 S. W. 933, 17 Ky. L. Rep. 845.

inflicted upon a party not in default by the ratification of a sale, the sale should not be ratified.[13] The confirmation of a sale cures irregularities,[14] and perfects the title of the purchaser,[15] and the purchaser cannot, after confirmation of the sale, and after the expiration of the term at which such confirmation was made, resist the payment of the purchase-money on the ground of irregularity in the sale or the proceedings under which it was had.[16] But the purchaser may except to the confirmation of the commissioner's report of sale and may appeal from the judgment on such exceptions.[17] A decree of the court of chancery confirming a lease of an infant's realty is so far binding on the infant that he cannot, by a bill of review, an original bill, or other proceeding impeach it to the prejudice of a *bona fide* purchaser for value of the leasehold interest before suit brought.[18]

j. Purchase-Money. It has been held to be the duty of a court of equity, on decreeing a sale of land belonging to infants, to retain the title as security for the purchase-money, no matter what other security may have been taken for the payment thereof.[19] The fact that Confederate money was received in payment does not render the sale void.[20] A commissioner appointed to sell lands of minors for the purpose of reinvesting the proceeds cannot transfer notes taken for the purchase-money.[21]

k. Validity and Effect of Sale. Irregularities in the proceedings do not render the sale void;[22] nor is the sale void because of the fact that the order of sale was erroneous;[23] nor is it rendered void by the reversal of the order of sale for error.[24] A sale under the order of court passes the infant's title, and the conveyance of the officers of the court operates as an estoppel to the same extent and in the same manner that a proper deed of an adult conveying his title would bar him from asserting it against his grantee.[25] It has been held that the sale of an infant's land under statute, if regular and within the provisions of the statute, is a conversion of the real property into personalty;[26] but it has also been held that

13. Bolgiano *v.* Cooke, 19 Md. 375.

14. Todd *v.* Dowd, 1 Metc. (Ky.) 281.

15. Cromwell *v.* Mason, 2 Bush (Ky.) 439; Thornton *v.* McGrath, 1 Duv. (Ky.) 349.

Omission of statutory requirements.— A sale of infants' land, although there had been neither assessment nor bond, as provided by statute, was not void, so as to prevent a decree confirming the same. Cromwell *v.* Mason, 2 Bush (Ky.) 439.

16. Todd *v.* Dowd, 1 Metc. (Ky.) 281.

17. Allen *v.* Graves, 3 Bush (Ky.) 491.

18. Anderson *v.* Ammonett, 9 Lea (Tenn.) 1.

19. Walke *v.* Moody, 65 N. C. 599.

Where the statute requires only personal security for the purchase-money, no lien on the land can be enforced therefor. Tate *v.* Bush, 62 Miss. 145 [*distinguishing* Buford *v.* McCormick, 57 Ala. 428; Mims *v.* Macon, etc., R. Co., 3 Ga. 333; Eglehart *v.* Armigen, 1 Bland (Md.) 519; Ferguson *v.* Shepherd, 58 Miss. 804; Champlin *v.* McLeod, 53 Miss. 484; Tooley *v.* Gridley, 3 Sm. & M. (Miss.) 493, 41 Am. Dec. 628; Yarborough *v.* Wood, 42 Tex. 91, 19 Am. Rep. 44].

20. Bulow *v.* Witte, 3 S. C. 308. See also Latta *v.* Vickers, 82 N. C. 501.

21. Carnes *v.* Polk, 4 Coldw. (Tenn.) 87.

22. Spencer *v.* Milliken, 4 Ky. L. Rep. 856; Lancaster *v.* Barton, 92 Va. 615, 24 S. E. 251.

Ratification.— Where infants' lands have been sold under a decree in chancery, they may, after their arrival at majority, waive any irregularity as to themselves, and confirm the sale (Nelson *v.* Lee, 10 B. Mon. (Ky.) 495; Lampton *v.* Usher, 7 B. Mon. (Ky.) 57), and insist on a specific performance by the purchaser (Nelson *v.* Lee, *supra*). Where infants, after reaching their majority, with knowledge of the facts rendering a sale of their land voidable for fraud, receive the residue of the purchase-price, they ratify the sale. Smith *v.* Gray, 116 N. C. 311, 21 S. E. 200.

Failure to answer.— Where the infant defendants have all been summoned, a failure to answer by guardian or otherwise is only an error which entitles them to a reversal, but it does not render the decree for the sale either void or voidable, this error being not included in the statutory grounds of avoidance. Thornton *v.* McGrath, 1 Duv. (Ky.) 349.

Sale on cross bill.— If real estate is sold upon informal proceedings, and the minor files a cross bill by *prochein ami* and has the sale set aside and a resale ordered, his position as defendant is changed and any defense that existed in the proceedings on the original bill cannot affect the validity of the second sale. Rankin *v.* Black, 1 Head (Tenn.) 650.

23. Taylor *v.* Parker, 1 Smith (Ind.) 225.

24. Taylor *v.* Parker, Smith (Ind.) 225; Newbold *v.* Schlens, 66 Md. 585, 9 Atl. 849.

25. Bulow *v.* Witte, 3 S. C. 308.

26. Rogers *v.* Clark, 5 Sneed (Tenn.) 665.

Upon the death of the infant intestate after such sale and before any order of the court

the proceeds of an infant's lands which have been sold under order of court retain the character of realty,[27] until the infant comes of age and elects to take them as money.[28] Infants are as much bound by the sale as adults, with the qualification that after coming of age an infant may impeach the sale for error apparent on the face of the decree,[29] or, it seems, for fraud.[30]

l. Title and Rights of Purchaser. Where the court had jurisdiction both of the parties and of the subject-matter,[31] the purchaser acquires a good title[32] to the entire estate sold,[33] even though the proceedings may have been irregular in some respects, for which irregularities the judgment might have been reversed,[34] for if jurisdiction was properly acquired, the purchaser is not bound to look beyond the decree.[35] The court of chancery sells only the interest and estate of the parties to the cause, and the doctrine of *caveat emptor* applies to all such cases;[36] but a purchaser discovering a defect of title at a proper time may be relieved from his purchase by asking a rescission of the sale.[37] If the sale is void by reason of a lack of jurisdiction, the payment of the purchase-money will not be compelled,[38] and it has been held that where the purchaser objects that the proceedings were irregular, he cannot be compelled to pay the purchase-price until the proceedings have been so far perfected as to secure him a good title.[39]

m. Deed. A statute requiring that the conveyance shall be executed under the direction of the court applies to a mortgage as well as to an absolute deed.[40] Where a court directs the execution of a deed conveying land of infants, the deed

stamping the fund with the character of realty, such fund will be transmissible under the laws of distribution as for personalty. Rogers *v.* Clark, 5 Sneed (Tenn.) 665.

27. Wood *v.* Reeves, 58 N. C. 271; Bateman *v.* Latham, 56 N. C. 35; Jones *v.* Edwards, 53 N. C. 336; Dudley *v.* Winfield, 45 N. C. 91; Scull *v.* Jernigan, 22 N. C. 144. Under 2 N. Y. Rev. St. 195, §§ 175, 180, a sale of an infant's property under order of court does not change the character of the infant's interest therein, but it remains real estate. Forman *v.* Marsh, 11 N. Y. 544 [*reversing* 7 Barb. 215]; Wells *v.* Seeley, 47 Hun (N. Y.) 109.

28. Bateman *v.* Latham, 56 N. C. 35; Jones *v.* Edwards, 53 N. C. 336; Dudley *v.* Winfield, 45 N. C. 91; Scull *v.* Jernigan, 22 N. C. 144.

The New York statute (2 Rev. St. 195, §§ 175, 180) was intended merely to preserve the character of the property as realty during the infant's minority, so that the descent of it need not be changed, and when the infant attained his majority and obtained possession of the proceeds, the character impressed upon them by statute ceased. Forman *v.* Marsh, 11 N. Y. 544 [*reversing* 7 Barb. 215].

29. Rogers *v.* Clark, 5 Sneed (Tenn.) 665.

30. Rogers *v.* Clark, 5 Sneed (Tenn.) 665.

31. Rhea *v.* Shields, 103 Va. 305, 49 S. E. 70.

32. Allen *v.* Graves, 3 Bush (Ky.) 491; Bronston *v.* Davidson, 4 Ky. L. Rep. 56; Rhea *v.* Shields, 103 Va. 305, 49 S. E. 70; Lancaster *v.* Barton, 92 Va. 615, 24 S. E. 251.

33. Davison *v.* De Freest, 3 Sandf. Ch. (N. Y.) 456.

Sale of equity of redemption.— Hunt *v.* Hunt, 65 Barb. (N. Y.) 577.

Sale of determinable fee.— See Davison *v.* De Freest, 3 Sandf. Ch. (N. Y.) 456.

34. Allman *v.* Taylor, 101 Ill. 185; Bronston *v.* Davidson, 4 Ky. L. Rep. 56; Lemoine *v.* Ducote, 45 La. Ann. 857, 12 So. 939 (purchaser not required to look to qualifications of members of family meeting); Lancaster *v.* Barton, 92 Va. 615, 24 S. E. 251.

Under the Virginia code, if a sale of property is made under a decree or order of court after six months from the date thereof, and such sale is confirmed, the title of the purchaser is not affected by the decree or order of sale being afterward set aside. Lancaster *v.* Barton, 92 Va. 615, 24 S. E. 251.

35. Beale *v.* Walden, 11 Rob. (La.) 67; Valderes *v.* Bird, 10 Rob. (La.) 396.

36. Bullock *v.* Gudgell, 77 S. W. 1126, 25 Ky. L. Rep. 1413; Bolgiano *v.* Cooke, 19 Md. 375; Kreimendahl *v.* Neuhauser, 13 Pa. Super. Ct. 606.

37. Bolgiano *v.* Cooke, 19 Md. 375.

38. Todd *v.* Dowd, 1 Metc. (Ky.) 281; Barrett *v.* Churchill, 18 B. Mon. (Ky.) 387; Carpenter *v.* Strother, 16 B. Mon. (Ky.) 289.

39. Cornwall *v.* Cornwall, 6 Bush (Ky.) 369. But *compare* Todd *v.* Dowd, 1 Metc. (Ky.) 281.

Supplementary proceedings should be allowed to perfect the title if the sale is beneficial to the infants, and when they are completed the purchaser should be compelled to pay the purchase-price with interest, unless he should in the meantime bring the money into court. Cornwall *v.* Cornwall, 6 Bush (Ky.) 369.

Where purchaser in possession.— The rule that where a purchaser remains in peaceable possession of the premises he cannot have relief against payment of the purchase-money or any part of it on the ground of defect of title has been applied to a sale of land under order of court as the property of an infant. Parkinson *v.* Jacobson, 13 Hun (N. Y.) 317.

40. Battell *v.* Torrey, 65 N. Y. 294.

must be executed in conformity with the order, or the purchaser is not bound to accept it.[41]

n. Setting Aside Sale. Where the sale is beneficial to the infant it will not be set aside for mere irregularities,[42] nor on the election of the purchaser without complaint on the part of the infant;[43] but a court of chancery will not undertake to validate void sales of infants' property because beneficial to them.[44] If the price paid at the time of sale was a fair one, the fact that the land has subsequently increased in value gives the infant no equity to have it set aside;[45] but it has been held in Louisiana that if the purchaser fails to pay the price the infant may sue for a dissolution of the sale.[46] A failure of the commissioner appointed to sell to give the bond required by law is not necessarily a ground for setting aside the sale.[47] In setting aside the sale the rents and profits since the sale may be allowed as an offset against the amount paid by the purchaser.[48]

o. Collateral Attack. Neither the sale nor the order under which it was made can be collaterally impeached for errors or irregularities if the court had jurisdiction.[49] Neither can the sale be collaterally attacked for fraud.[50] But an order for the sale or mortgaging of the property of an infant may be collaterally attacked for want of jurisdiction,[51] and the rule as to the conclusiveness of the judgment of a court of competent jurisdiction, when collaterally attacked, cannot be invoked in aid of a decree of sale made by the orphans' court subject to conditions, where neither compliance with the conditions nor confirmation of the sale has been had.[52]

p. Disposition of Proceeds. The proceeds should be secured to the benefit of the infant.[53] The court may direct the disposition of the proceeds,[54] or their

41. Hyatt *v.* Seeley, 11 N. Y. 52.

Manner of signing deed.— A guardian *ad litem* executing the deed should sign thus: "A, by B, his guardian *ad litem*." Matter of Windle, 2 Edw. (N. Y.) 585.

In Canada a mother applying for the sale of real estate settled upon infants has been required to join in the conveyance for the purpose of surrendering the life-interest vested in her under the settlement. *In re* Kennedy, 1 Ch. Chamb. (U. C.) 97.

42. Andrews *v.* Andrews, 7 Heisk. (Tenn.) 234; Elliott *v.* Blair, 5 Coldw. (Tenn.) 185; Swan *v.* Newman, 3 Head (Tenn.) 288; Rankin *v.* Black, 1 Head (Tenn.) 650.

43. Curd *v.* Bonner, 4 Coldw. (Tenn.) 632.

44. Andrews *v.* Andrews, 7 Heisk. (Tenn.) 234.

45. Latta *v.* Vickers, 82 N. C. 501.

46. Jones *v.* Crocker, 1 La. Ann. 440.

47. Dixon *v.* McCue, 21 Gratt. (Va.) 373.

48. Wichita Land, etc., Co. *v.* Ward, 1 Tex. Civ. App. 307, 21 S. W. 128.

49. Hunter *v.* Hatten, 4 Gill (Md.) 115, 45 Am. Dec. 117; Morris *v.* Gentry, 89 N. C. 248; Williams *v.* Harrington, 33 N. C. 616, 53 Am. Dec. 421; Gilmore *v.* Rodgers, 41 Pa. St. 120.

Void sale sustained as agreement to sell.— Reed *v.* Alabama, etc., Iron Co., 107 Fed. 586.

50. Bouldin *v.* Miller, 87 Tex. 359, 28 S. W. 940 [*affirming* (Civ. App. 1894) 26 S. W. 133].

An action of trespass to try title to recover from a subsequent vendee only a small part of the amount involved in the sale, without alleging any facts as a basis for a decree vacating the sale, is a collateral attack on the proceedings for the sale, notwithstanding an offer to refund a *pro-rata* portion of the purchase-money. Bouldin *v.* Miller, (Tex. Civ. App. 1894) 26 S. W. 133 [*affirmed* in 87 Tex. 359, 28 S. W. 940].

51. Losey *v.* Stanley, 147 N. Y. 560, 42 N. E. 8 [*reversing* 83 Hun 420, 31 N. Y. Suppl. 950].

The burden of proof is on the attacking party to show a want of jurisdiction. Bouldin *v.* Miller, 87 Tex. 359, 28 S. W. 940 [*affirming* (Civ. App. 1894) 26 S. W. 133].

52. Kreimendahl *v.* Neuhauser, 13 Pa. Super. Ct. 606.

53. *In re* Dagget, 3 Pick. (Mass.) 280.

The court should direct the proceeds to be held as real estate. Harrison *v.* Bradley, 40 N. C. 136, holding, however, that where the husband of the infant has received the proceeds from his wife's guardian, he cannot complain that such course has not been adopted.

54. Matter of Whitaker, 4 Johns. Ch. (N. Y.) 378; Rogers *v.* Clark, 5 Sneed (Tenn.) 665.

Order for payment of debts.— Where the special guardian is ordered to mortgage the infant's realty and apply the proceeds to the payment of specified debts, he cannot refuse to pay one of them on the ground that the court ought not to have authorized its payment. *In re* Lampman, 22 Hun (N. Y.) 239, holding that where the special guardian procured an order confirming his report without notice to the creditor who was unpaid, the latter might have the order vacated and the guardian might be directed to pay his proportionate share of the proceeds with interest from the date of the order confirming the report.

Conclusiveness of order.— The orders of the

investment for the benefit of the infant in such manner as the court may deem best and most advantageous,[55] but the failure of the court to make such order as the statute requires as to the proceeds will not vitiate the sale.[56] The solicitor who conducted the proceedings for a sale of the land of infants is entitled to a fee out of the proceeds of sale.[57] Where the land has been sold free of encumbrances, the proceeds may be applied so far as necessary to the payment of such encumbrances.[58] A special guardian appointed to sell an infant's real estate is bound to account to the infant for the purchase-money, less what was paid to the widow of the ancestor for her right of dower in the land.[59] The purchaser is not as a rule under any duty to see to the application of the proceeds of sale.[60]

q. Curative Statutes. Statutes authorizing the confirmation of defective sales of infants' real estate do not operate to impair the obligations of contracts or divest vested rights and are constitutional.[61] An act validating exchanges of property of infants cannot apply to an exchange made without authority of law.[62]

G. Private Acts Authorizing Sale of Infants' Land. In the absence of constitutional limitations, the legislature may by private acts authorize the sale of the land of infants.[63]

court made on the sale of infants' lands under the statute and distributing the proceeds, although conclusive between the infants and purchasers, do not conclude the infants as between themselves as to their respective rights and interests in the fund. Davison *v.* De Freest, 3 Sandf. Ch. (N. Y.) 456.

55. Matter of Whitaker, 4 Johns. Ch. (N. Y.) 378; Rogers *v.* Clark, 5 Sneed (Tenn.) 665; Garland *v.* Loving, 1 Rand. (Va.) 396.

Where power of court exhausted.— Where a sale of infant's property has been made and completed before the county court, a subsequent order of the same court, made in new and different proceedings, directing the special guardian to invest the proceeds in land outside the county over which its jurisdiction extends, the infant and special guardian being at the time resident in the county where such land is located, is unavailing, the power of the court having been exhausted. Stiles *v.* Stiles, 1 Lans. (N. Y.) 90.

In whose name investment made.— By an order of court the special guardian of two minors was required to invest the proceeds of their real estate in securities upon unencumbered real estate, but the order did not specify in whose name the security should be taken, nor was there any statute so specifying. It was held that the action of the special guardian in making the securities payable to himself as such was no violation of the order of the court or of the duty of a special guardian under a rule providing that the proceeds of the sale of infants' real estate should be brought into court, or the special guardian should "invest the same under the direction of the court, for the use of the infant." Swartwout *v.* Oaks, 52 Barb. (N. Y.) 622.

In Kentucky it has been held an indispensable requisite to the validity of proceedings for the sale of an infant's interest in property that the provisions of the statute as to reinvestment of the entire proceeds be followed. Dineen *v.* Hall, 112 Ky. 273, 65 S. W. 445, 66 S. W. 392, 23 Ky. L. Rep. 1615; Liter *v.* Fishback, 75 S. W. 232, 25 Ky. L. Rep. 260.

Necessity for payment into court.— A statute making it the duty of the court to see that the proceeds of the sale of property of persons under disabilities sold under its orders are reinvested and held in the same manner and subject to the same rules of descent and distribution as the property sold requires that the proceeds of sale should be paid into court and held subject to its orders. Mason *v.* Tinsley, 1 Tenn. Ch. 154.

Partition sale.— The shares of infant defendants in the proceeds of the sale of premises in a partition suit ought not to be paid to their guardians *ad litem*, but should be brought into court and invested for the benefit of such infants. Carpenter *v.* Schermerhorn, 2 Barb. Ch. (N. Y.) 314. *Compare* Cook *v.* Lee, 6 Paige (N. Y.) 158.

56. Robinson *v.* Redman, 2 Duv. (Ky.) 82; Cochran *v.* Van Surlay, 20 Wend. (N. Y.) 365, 32 Am. Dec. 570.

57. Senseney *v.* Repp, 94 Md. 77, 50 Atl. 416.

58. Cool *v.* Higgins, 25 N. J. Eq. 117.

59. Hunt *v.* Hunt, 65 Barb. (N. Y.) 577.

60. Allman *v.* Taylor, 101 Ill. 185. See also Kreimendahl *v.* Neuhauser, 13 Pa. Super. Ct. 606.

When responsible for application.— See Kreimendahl *v.* Neuhauser, 13 Pa. Super. Ct. 606, construing the Pennsylvania act of April 18, 1853.

61. Thornton *v.* McGrath, 1 Duv. (Ky.) 349.

62. Brown *v.* Putney, 90 Va. 447, 18 S. E. 883.

63. *Alabama.*— Chappell *v.* Doe, 49 Ala. 153.

California.— See Paty *v.* Smith, 50 Cal. 153.

Kentucky.— Kibby *v.* Chitwood, 4 T. B. Mon. 91, 16 Am. Dec. 143.

Maryland.— See Davis *v.* Helbig, 27 Md. 452, 92 Am. Dec. 646.

Mississippi.— Burrus *v.* Burrus, 56 Miss. 92; McComb *v.* Gilkey, 29 Miss. 146.

V. CONTRACTS.[64]

A. Capacity to Contract — 1. In General. The general rule is that except for necessaries[65] an infant is not competent to bind himself by contract, nor liable on contracts which he has made; but any contract made by him during infancy may be avoided,[66] and the defense of infancy is equally available at law

New Jersey.— Snowhill *v.* Snowhill, 3 N. J. Eq. 20.

New York.— *In re* Field, 131 N. Y. 184, 30 N. E. 48 [*affirming* 17 N. Y. Suppl. 19]; Leggett *v.* Hunter, 19 N. Y. 445; Powers *v.* Bergen, 6 N. Y. 358; Cochran *v.* Van Surlay, 20 Wend. 365, 32 Am. Dec. 570, private act authorizing sale for maintenance and education.

Virginia.— Spotswood *v.* Pendleton, 4 Call 514, act valid when not proved to have been obtained by fraud.

United States.— Garth *v.* Arnold, 115 Fed. 468, 53 C. C. A. 200 [*modifying* 106 Fed. 13], the legislature of Missouri had such power prior to the constitution of 1865.

See 27 Cent. Dig. tit. "Infants," §§ 67–69.

A special authority to a trustee to convert the real estate of his infant, lunatic, or otherwise incapable *cestui que trust* partakes more of a legislative than of a judicial character and is within the power of the general assembly. Thurston *v.* Thurston, 6 R. I. 296; Hoyt *v.* Sprague, 103 U. S. 613, 26 L. ed. 585. See also Taylor *v.* Place, 4 R. I. 324.

Consent of infant not necessary.— Powers *v.* Bergen, 6 N. Y. 358.

Sale must conform strictly to power granted. Garth *v.* Arnold, 115 Fed. 468, 53 C. C. A. 200 [*modifying* 106 Fed. 13].

Either public or private sale may be authorized. Spotswood *v.* Pendleton, 4 Call (Va.) 514.

The infant cannot disaffirm the sale on coming of age. Snowhill *v.* Snowhill, 3 N. J. Eq. 20.

Limitation of power.— The foundation of the power of the legislature to authorize the sale of the present interest of minors in realty and the reinvestment of the proceeds being in its nature parental or tutorial by the state for the purpose of kindness, in providing for the well being of persons not *sui juris*, a legislative act showing on its face that its underlying purpose was not to make such provision for the wants and welfare of minors, but was to convert their interest in remainder into money, to be held and enjoyed by the life-tenant, was void. Neither could such power be exercised so as to annul, alter, or change the settlement or disposition of property directed by deed or will. Arnold *v.* Garth, 106 Fed. 13.

Power terminates when infant reaches majority. Garth *v.* Arnold, 115 Fed. 468, 53 C. C. A. 200 [*modifying* 106 Fed. 13].

64. **Contract to marry** see Breach of Promise to Marry.

Sealed instruments.— The fact that a contract of an infant is evidenced by a sealed instrument does not take it out of the operation of the general rules applicable to the contracts of infants. See West *v.* Penny, 16 Ala. 186.

65. See *infra*, V, B, 9.

66. *Alabama.*— Flexner *v.* Dickerson, 72 Ala. 318; Shropshire *v.* Burns, 46 Ala. 108.

Arkansas.— Bozeman *v.* Browning, 31 Ark. 364. See also Kansas City, etc., R. Co. *v.* Moon, 66 Ark. 409, 50 S. W. 996.

California.— Lackman *v.* Wood, 25 Cal. 147.

Connecticut.— Gregory *v.* Lee, 64 Conn. 407, 30 Atl. 53, 25 L. R. A. 618; Riley *v.* Mallory, 33 Conn. 201; Washband *v.* Washband, 27 Conn. 424.

Georgia.— Bryan *v.* Walton, 14 Ga. 185; Strain *v.* Wright, 7 Ga. 568.

Illinois.— McCarty *v.* Carter, 49 Ill. 53, 95 Am. Dec. 572.

Indiana.— House *v.* Alexander, 105 Ind. 109, 4 N. E. 891, 55 Am. Rep. 189; Peterson *v.* Haffner, 59 Ind. 130, 26 Am. Rep. 81; Henderson *v.* Fox, 5 Ind. 489.

Iowa.— *In re* Cummings, 120 Iowa 421, 94 N. W. 1117; Holmes *v.* Mallett, Morr. 82.

Kentucky.— Duvall *v.* Graves, 7 Bush 461; Watson *v.* Cross, 2 Duv. 147; Breckenridge *v.* Ormsby, 1 J. J. Marsh. 236, 19 Am. Dec. 71; Guenther *v.* Froehle, 12 Ky. L. Rep. 604; Hill *v.* Becker, 9 Ky. L. Rep. 619; Hunter *v.* Bearn, 3 Ky. L. Rep. 327. See also Butler *v.* Stack, 79 S. W. 204, 25 Ky. L. Rep. 1886.

Louisiana.— Willet *v.* Tessier, 15 La. 13.

Maryland.— Monumental Bldg. Assoc. No. 2 *v.* Herman, 33 Md. 128; Brawner *v.* Franklin, 4 Gill 463.

Massachusetts.— Whitney *v.* Dutch, 14 Mass. 457, 7 Am. Dec. 229; Willis *v.* Twombly, 13 Mass. 204; Baker *v.* Lovett, 6 Mass. 78, 4 Am. Dec. 88.

Michigan.— Lansing *v.* Michigan Cent. R. Co., 126 Mich. 663, 86 N. W. 147, 86 Am. St. Rep. 567.

Minnesota.— Conrad *v.* Lane, 26 Minn. 389, 4 N. W. 695, 37 Am. Rep. 412.

Mississippi.— Edmunds *v.* Mister, 58 Miss. 765; Ferguson *v.* Bobo, 54 Miss. 121.

Missouri.— Kerr *v.* Bell, 44 Mo. 120.

Nebraska.— Philpot *v.* Sandwich Mfg. Co., 18 Nebr. 54, 24 N. W. 428.

New Hampshire.—Locke *v.* Smith, 41 N. H. 346; Merriam *v.* Wilkins, 6 N. H. 432, 25 Am. Dec. 472; Dearborn *v.* Eastman, 4 N. H. 441.

New Jersey.— Schenk *v.* Strong, 4 N. J. L. 87.

New York.— Beardsley *v.* Hotchkiss, 96 N. Y. 201; Sparman *v.* Keim, 83 N. Y. 245; Chapin *v.* Shafer, 49 N. Y. 407; Petrie *v.* Williams, 88 Hun 292, 34 N. Y. Suppl. 670; Heath *v.* Mahoney, 7 Hun 100; Munger *v.* Hess, 28 Barb. 75; Slocum *v.* Hooker, 13

as in equity.[67] A statute giving married women the power to contract and making their contracts valid and binding does not apply to the contracts of infant married women.[68] The contract of an infant is binding upon the adult party thereto unless avoided by the infant.[69]

2. WHETHER CONTRACTS VOID OR VOIDABLE. The rule stated above does not mean that infants are absolutely incapable of contracting in the sense that their contracts are absolutely void, but the contracts of infants are held to be merely voidable at their election.[70] It has been laid down as the proper distinction that

Barb. 536; Robbins *v.* Mount, 33 How. Pr. 24; Kinney *v.* Showdy, 1 Hill 544; Bool *v.* Mix, 17 Wend. 119, 31 Am. Dec. 285; Mason *v.* Denison, 15 Wend. 64; Stafford *v.* Roof, 9 Cow. 626.

North Carolina.— Turner *v.* Gaither, 83 N. C. 357, 35 Am. Rep. 574.

North Dakota.— Luce *v.* Jestrab, 12 N. D. 548, 97 N. W. 848.

Ohio.— Union Cent. L. Ins. Co. *v.* Hilliard, 63 Ohio St. 478, 59 N. E. 230, 81 Am. St. Rep. 644, 53 L. R. A. 462; Denning *v.* Nelson, 1 Ohio Dec. (Reprint) 503, 10 West. L. J. 215.

Oregon.— Burton *v.* Anthony, (1905) 79 Pac. 185.

Pennsylvania.— West *v.* Gregg, 1 Grant 53; Wilt *v.* Welsh, 6 Watts 9; Com. *v.* Hantz, 2 Penr. & W. 333; Harbison *v.* Mawhinney, 8 Pa. Dist. 697; Hughes *v.* Gallans, 10 Phila. 618.

South Carolina.— Deal *v.* Hanks, 3 McCord 257; Bouchell *v.* Clary, 3 Brev. 194.

Texas.— Askey *v.* Williams, 74 Tex. 294, 11 S. W. 1101, 5 L. R. A. 176; Carpenter *v.* Pridgen, 40 Tex. 32; Crayton *v.* Munger, 9 Tex. 285.

Vermont.— Whitcomb *v.* Joslyn, 51 Vt. 79, 31 Am. Rep. 678; Person *v.* Chase, 37 Vt. 647, 88 Am. Dec. 630; Holden *v.* Pike, 14 Vt. 405, 39 Am. Dec. 228; Farr *v.* Sumner, 12 Vt. 28, 36 Am. Dec. 327.

Virginia.— Saum *v.* Coffelt, 79 Va. 510.

Wisconsin.— Jones *v.* Valentines' School of Telegraphy, 122 Wis. 318, 99 N. W. 1043; Davis *v.* Turton, 13 Wis. 185.

United States.— Sanger *v.* Hibbard, 104 Fed. 455, 45 C. C. A. 635; Brockhaus *v.* Kemna, 7 Fed. 609, 10 Biss. 338; Hyer *v.* Hyatt, 12 Fed. Cas. No. 6,977, 3 Cranch C. C. 276.

England.— *Ex p.* Taylor, 8 De G. M. & G. 254, 2 Jur. N. S. 220, 25 L. J. Bankr. 35, 4 Wkly. Rep. 305, 57 Eng. Ch. 198, 44 Eng. Reprint 388; Johnson *v.* Boyfield, 1 Ves. Jr. 314, 30 Eng. Reprint 362.

Canada.— Rutherford *v.* Purdy, 21 Nova Scotia 43.

See 27 Cent. Dig. tit. "Infants," § 99.

The reasonableness and prudence of an infant's contract is immaterial where it is not one which as a matter of law is binding upon him. Simpson *v.* Prudential Ins. Co., 184 Mass. 348, 68 N. E. 673, 100 Am. St. Rep. 560, 63 L. R. A. 741.

That the common law prevails in a sister state in relation to the liability of infants on their contracts will be presumed. Holmes *v.* Mallett, Morr. (Iowa) 82.

Action on joint contract.—Where an infant declares on a joint contract and one defendant pleads infancy plaintiff cannot enter a *nolle prosequi* and proceed against the other but should commence a new action against the adult. Boyle *v.* Webster, 17 Q. B. 950, 21 L. J. Q. B. 202, 16 Jur. 683, 79 E. C. L. 950; Jaffray *v.* Frebain, 5 Esp. 47; Chandler *v.* Parkes, 3 Esp. 76.

Consent to improvement.— Infants are incapable of consenting to the making of improvements by a stranger on their real estate so as to give him or his creditors any interest or claim thereto. Mathes *v.* Dobschuetz, 72 Ill. 438.

67. Robb *v.* Halsey, 11 Sm. & M. (Miss.) 140.

68. Cummings *v.* Everett, 82 Me. 260, 19 Atl. 456.

69. *Colorado.*— Chapman *v.* Duffy, (App. 1905) 79 Pac. 746.

New Jersey.— Voorhees *v.* Wait, 15 N. J. L. 343.

South Carolina.— Eubanks *v.* Peak, 2 Bailey 497.

Texas.— Morris *v.* Kasling, 79 Tex. 141, 15 S. W. 226, 11 L. R. A. 398; Harris *v.* Musgrove, 59 Tex. 401.

Wisconsin.— Davies *v.* Turton, 13 Wis. 185.

See 27 Cent. Dig. tit. "Infants," § 99.

70. *Alabama.*— Flexner *v.* Dickerson, 72 Ala. 318; Shropshire *v.* Burns, 46 Ala. 108; West *v.* Penny, 16 Ala. 186.

Arkansas.— Bozeman *v.* Browning, 31 Ark. 364.

Connecticut.— Washband *v.* Washband, 27 Conn. 424.

Georgia.— Bryan *v.* Walton, 14 Ga. 185; Strain *v.* Wright, 7 Ga. 568. Under the present code of Georgia the contracts of an infant, except for necessaries, are void. Shuford *v.* Alexander, 74 Ga. 293.

Indiana.— Shroyer *v.* Pittenger, 31 Ind. App. 158, 67 N. E. 475.

Kentucky.—Breckenridge *v.* Ormsby, 1 J. J. Marsh. 236, 19 Am. Dec. 71; Hunter *v.* Bearn, 3 Ky. L. Rep. 327.

Maryland.— Monumental Bldg. Assoc. No. 2 *v.* Herman, 33 Md. 128.

Massachusetts.— Whitney *v.* Dutch, 14 Mass. 457, 7 Am. Dec. 229. See also McCarty *v.* Murray, 3 Gray 578.

Michigan.— Lansing *v.* Michigan Cent. R. Co., 126 Mich. 663, 86 N. W. 147, 86 Am. St. Rep. 567.

Nebraska.— Philpot *v.* Sandwich Mfg. Co., 18 Nebr. 54, 24 S. W. 428.

New York.— Slocum *v.* Hooker, 13 Barb. 536; Millard *v.* Hewlett, 19 Wend. 301.

where an infant's contract is to his benefit, as in the case of contracts for necessaries, it is good and binding upon him;[71] when it is to his prejudice it is void;[72] and when it is of an uncertain nature as to benefit or prejudice, it is voidable only

North Carolina.— Hislop *v.* Hoover, 68 N. C. 141.

North Dakota.— Luce *v.* Jestrab, 12 N. D. 548, 92 N. W. 848.

Ohio.— Union Cent. L. Ins. Co. *v.* Hilliard, 63 Ohio St. 478, 59 N. E. 230, 81 Am. St. Rep. 644, 53 L. R. A. 462.

Texas.— Ashey *v.* Williams, 74 Tex. 294, 11 S. W. 1101, 5 L. R. A. 176.

Vermont.— Farr *v.* Sumner, 12 Vt. 28, 36 Am. Dec. 327.

Wisconsin.— Jones *v.* Valentines' School of Telegraphy, 122 Wis. 318, 99 N. W. 1043.

See 27 Cent. Dig. tit. "Infants," § 99.

Minor above age of puberty may contract if engagement advantageous to him.— Southworth *v.* Bowie, 1 Mart. N. S. (La.) 537.

The English Infants' Relief Act of 1874 (37 & 38 Vict. c. 62) provided that "all contracts, whether by specialty or by simple contract, henceforth entered into by infants for the repayment of money lent or to be lent, or for goods supplied or to be supplied (other than contracts for necessaries), and all accounts stated with infants, shall be absolutely void." See Smith *v.* King, [1892] 2 Q. B. 543, 56 J. P. 775, 67 L. T. Rep. N. S. 420; *Ex p.* Kibble, L. R. 10 Ch. 373, 44 L. J. Bankr. 63, 32 L. T. Rep. N. S. 138, 23 Wkly. Rep. 433; Coxhead *v.* Mullis, 3 C. P. D. 439, 47 L. J. C. P. 761, 39 L. T. Rep. N. S. 349, 27 Wkly. Rep. 136.

71. *Alabama.*—Philpot *v.* Bingham, 55 Ala. 435.

Colorado.— Kendrick *v.* Neisz, 17 Colo. 506, 30 Pac. 245.

Iowa.— Green *v.* Wilding, 59 Iowa 679, 13 N. W. 761, 44 Am. Rep. 696.

Louisiana.— Guirot *v.* Guirot, 3 Mart. N. S. 400.

Maryland.— Ridgeley *v.* Crandall, 4 Md. 435; Fridge *v.* State, 3 Gill & J. 103, 20 Am. Dec. 463; Lovering *v.* Heighe, 2 Md. Ch. 81.

Massachusetts.— Bradford *v.* French, 110 Mass. 365; Whitney *v.* Dutch, 14 Mass. 457, 7 Am. Dec. 229; Oliver *v.* Houdlet, 13 Mass. 237, 7 Am. Dec. 134; Baker *v.* Lovett, 6 Mass. 78, 4 Am. Dec. 88.

Minnesota.— Cogley *v.* Cushman, 16 Minn. 397.

New Jersey.— Woolston *v.* King, 3 N. J. L. 1049.

Pennsylvania.— Fairmount, etc., R. Co. *v.* Stutler, 54 Pa. St. 375, 93 Am. Dec. 714; Harbison *v.* Mawhinney, 8 Pa. Dist. 697; Bowman's Estate, 10 Lanc. Bar 139.

South Carolina.— Lester *v.* Frazer, 2 Hill Eq. 529; Radford *v.* Westcott, 1 Desauss. Eq. 596.

Tennessee.— Nashville, etc., R. Co. *v.* Elliott, 1 Coldw. 611, 78 Am. Dec. 506; Langford *v.* Frey, 8 Humphr. 443; McGan *v.* Marshall, 7 Humphr. 121; McMinn *v.* Richmonds, 6 Yerg. 9; Wheaton *v.* East, 5 Yerg. 41, 26 Am. Dec. 251.

Texas.— Cummings *v.* Powell, 8 Tex. 80; South Texas Nat. Bank *v.* Texas, etc., Lumber Co., 30 Civ. App. 412, 70 S. W. 768.

United States.— U. S. *v.* Bainbridge, 24 Fed. Cas. No. 14,497, 1 Mason 71, 2 Wheel. Cr. 521.

England.— Clements *v.* London, etc., R. Co., [1894] 2 Q. B. 482, 63 L. J. Q. B. 837, 70 L. T. Rep. N. S. 896, 9 Reports 641, 42 Wkly. Rep. 663; Evans *v.* Ware, [1892] 3 Ch. 502, 62 L. J. Ch. 256, 67 L. T. Rep. N. S. 285, 3 Reports 32; Keane *v.* Boycott, 2 H. Bl. 511, 3 Rev. Rep. 494; Fellows *v.* Wood, 52 J. P. 822, 59 L. T. Rep. N. S. 513; Maddon *v.* White, 2 T. R. 159, 1 Rev. Rep. 453.

See 27 Cent. Dig. tit. "Infants," § 99; and *infra*, V, B, 9.

An infant is competent to assume by express contract the family relation toward persons not related by blood, so as to secure to himself the benefit of a home, and such contract will prevent his recovery for services rendered in the family. Purviance *v.* Shultz, 16 Ind. App. 94, 44 N. E. 766.

Contracts of infant cannot inure to benefit of another. Fairmount, etc., R. Co. *v.* Stutler, 54 Pa. St. 375, 93 Am. Dec. 714.

Acceptance by law.— When a contract is made for the benefit of a minor, the law puts in an acceptance for him, although he be ignorant of its existence. Richards *v.* Reeves, (Ind. App. 1896) 45 N. E. 624. See also Copeland *v.* Summers, 138 Ind. 219, 35 N. E. 514, 37 N. E. 971; Pruitt *v.* Pruitt, 91 Ind. 595.

72. *Alabama.*—Philpot *v.* Bingham, 55 Ala. 435; West *v.* Penny, 16 Ala. 186.

Colorado.— Kendrick *v.* Neisz, 17 Colo. 506, 30 Pac. 245.

Connecticut.—Maples *v.* Wightman, 4 Conn. 376, 10 Am. Dec. 149.

Iowa.— Green *v.* Wilding, 59 Iowa 679, 13 N. W. 761, 44 Am. Rep. 696.

Louisiana.— Guirot *v.* Guirot, 3 Mart. N. S. 400.

Maryland.— Monumental Bldg. Assoc. No. 2 *v.* Herman, 33 Md. 128; Ridgeley *v.* Crandall, 4 Md. 435; Fridge *v.* State, 3 Gill & J. 103, 20 Am. Dec. 463; Levering *v.* Heighe, 2 Md. Ch. 81.

Massachusetts.— Vent *v.* Osgood, 19 Pick. 572; Whitney *v.* Dutch, 14 Mass. 457, 7 Am. Dec. 229; Oliver *v.* Houdlet, 13 Mass. 237, 7 Am. Dec. 134; Baker *v.* Lovett, 6 Mass. 78, 4 Am. Dec. 88.

Minnesota.— Cogley *v.* Cushman, 16 Minn. 397.

New Jersey.— Woolston *v.* King, 3 N. J. L. 1049.

Pennsylvania.— Bowman's Estate, 10 Lanc. Bar 139.

South Carolina.—Cheshire *v.* Barrett, 4 McCord 241, 17 Am. Dec. 735; Lester *v.* Frazer, 2 Hill Eq. 529; Radford *v.* Westcott, 1 Desauss. Eq. 596.

Tennessee.— Nashville, etc., R. Co. *v.* Elliott, 1 Coldw. 611, 78 Am. Dec. 506; Lang-

at the election of the infant.[73] But the old distinction between the void and voidable contracts of infants is not being strictly adhered to by the courts, and the tendency of the modern decisions is in favor of the reasonableness and policy of a very liberal extension of the rule that the acts and contracts of infants should be deemed voidable only, and subject to their election when they become of age, either to affirm or disavow them.[74]

3. Executed and Executory Contracts. The rule that an infant may avoid his contracts applies to both executed[75] and executory[76] contracts.

ford *v.* Frey, 8 Humphr. 443; McGan *v.* Marshall, 7 Humphr. 121; McMinn *v.* Richmonds, 6 Yerg. 9; Wheaton *v.* East, 5 Yerg. 41, 26 Am. Dec. 251.

Texas.— Askey *v.* Williams, 74 Tex. 294, 11 S. W. 1101, 5 L. R. A. 176; Cummings *v.* Powell, 8 Tex. 80.

United States.— U. S. *v.* Bainbridge, 24 Fed. Cas. No. 14,497, 1 Mason 71, 2 Wheel. Cr. 52.

England.— Flower *v.* London, etc., R. Co., [1894] 2 Q. B. 65, 63 L. J. Q. B. 547, 70 L. T. Rep. N. S. 829, 8 Reports 494, 42 Wkly. Rep. 519; Reg. *v.* Lord, 12 Q. B. 757, 12 Jur. 1001, 17 L. J. M. C. 181, 2 New Sess. Cas. 246, 64 E. C. L. 757; Keane *v.* Boycott, 2 H. Bl. 511, 3 Rev. Rep. 494.

See 27 Cent. Dig. tit. "Infants," § 99.

Infant cannot bind himself to incur a forfeiture. Slaughter *v.* Morgan, 1 Metc. (Ky.) 27.

Only agreements which cannot possibly be regarded as beneficial to the infant are null from the beginning. Dunton *v.* Brown, 31 Mich. 182.

73. *Alabama.*—Philpot *v.* Bingham, 55 Ala. 435.

Colorado.— Kendrick *v.* Neisz, 17 Colo. 506, 30 Pac. 245.

Connecticut.— Kline *v.* Beebe, 6 Conn. 494; Maples *v.* Wightman, 4 Conn. 376, 10 Am. Dec. 149; Rogers *v.* Hurd, 4 Day 57, 4 Am. Dec. 182.

Iowa.— Green *v.* Wilding, 59 Iowa 679, 13 N. W. 761, 44 Am. Rep. 696.

Louisiana.— Guirot *v.* Guirot, 3 Mart. N. S. 400.

Maryland.— Monumental Bldg. Assoc. No. 2 *v.* Herman, 33 Md. 128; Ridgeley *v.* Crandall, 4 Md. 435; Fridge *v.* State, 3 Gill & J. 103, 20 Am. Dec. 463; Levering *v.* Heighe, 2 Md. Ch. 81.

Massachusetts.— Bradford *v.* French, 110 Mass. 365; Vent *v.* Osgood, 19 Pick. 572; Whitney *v.* Dutch, 14 Mass. 457, 7 Am. Dec. 229; Oliver *v.* Houdlet, 13 Mass. 237, 7 Am. Dec. 134; Baker *v.* Lovett, 6 Mass. 78, 4 Am. Dec. 88.

Minnesota.— Cogley *v.* Cushman, 16 Minn. 397.

New Hampshire.— New Hampshire Mut. Ins. Co. *v.* Noyes, 32 N. H. 345; Wright *v.* Steele, 2 N. H. 51; Roberts *v.* Wiggins, 1 N. H. 73, 8 Am. Dec. 38.

New Jersey.— Woolston *v.* King, 3 N. J. L. 1049.

New York.— Jackson *v.* Carpenter, 11 Johns. 539.

Pennsylvania.— Bowman's Estate, 10 Lanc. Bar 139.

South Carolina.— Cheshire *v.* Barrett, 4 McCord 241, 17 Am. Dec. 735; Lester *v.* Frazer, 2 Hill Eq. 529; Radford *v.* Westcott. 1 Desauss. Eq. 596.

Tennessee.— Nashville, etc., R. Co. *v.* Elliott, 1 Coldw. 611, 78 Am. Dec. 506; Langford *v.* Frey, 8 Humphr. 443; McGan *v.* Marshall, 7 Humphr. 121; McMinn *v.* Richmonds, 6 Yerg. 9; Wheaton *v.* East, 5 Yerg. 41, 26 Am. Dec. 251.

Texas.— Cummings *v.* Powell, 8 Tex. 80.

United States.— U. S. *v.* Bainbridge, 24 Fed. Cas. No. 14,497, 1 Mason 71, 2 Wheel. Cr. 521.

England.— Zouch *v.* Parsons, 3 Burr. 1794, 1 W. Bl. 575; Keane *v.* Boycott, 2 H. Bl. 511, 3 Rev. Rep. 494.

See 27 Cent. Dig. tit. "Infants," § 99.

Within which class a contract comes is to be determined by sound judicial discretion. Vent *v.* Osgood, 19 Pick. (Mass.) 572.

74. Morton *v.* Steward, 5 Ill. App. 533; Baker *v.* Kennett, 54 Mo. 82; Peck *v.* Cain, 27 Tex. Civ. App. 38, 63 S. W. 177; Reed *v.* Lane, 61 Vt. 481, 17 Atl. 796.

All contracts not in themselves illegal may be ratified. Morton *v.* Steward, 5 Ill. App. 533.

It is for the benefit of the infant to hold his contracts not void but voidable, for if the contract be voidable merely he can secure the advantage of a good bargain, and relieve himself if it be a bad one, while on the other hand, to hold it void might deprive him of the benefit of an advantageous contract (Askey *v.* Williams, 74 Tex. 294, 11 S. W. 1101, 5 L. R. A. 176. See also Thornton *v.* McGrath, 1 Duv. (Ky.) 349), and if a contract of an infant were held to be absolutely void the adult party contracting with him would be equally discharged (Monumental Bldg. Assoc. No. 2 *v.* Herman, 33 Md. 128).

75. *Arkansas.*— Savage *v.* Lichlyter, 59 Ark. 1, 26 S. W. 12.

Connecticut.— Gregory *v.* Lee, 64 Conn. 407, 30 Atl. 53, 25 L. R. A. 618; Riley *v.* Mallory, 33 Conn. 201.

Mississippi.— Edmunds *v.* Mister, 58 Miss. 765; Hill *v.* Anderson, 5 Sm. & M. 216.

New York.— Roof *v.* Stafford, 7 Cow. 179 [*reversed* on other grounds in 9 Cow. 626].

South Carolina.— Lester *v.* Frazer, 2 Hill Eq. 529.

Vermont.— Person *v.* Chase, 37 Vt. 647, 88 Am. Dec. 630.

Wisconsin.— Jones *v.* Valentines' School of Telegraphy, 122 Wis. 318, 99 N. W. 1043.

See 27 Cent. Dig. tit. "Infants," § 99.

76. *Arkansas.*—Savage *v.* Lichlyter, 59 Ark. 1, 26 S. W. 12.

4. Contracts by Person Acting For Infant. An infant is not bound by a contract made for him or in his name by another person purporting to act for him unless such person has been duly appointed his guardian or next friend and authorized by the court to act and bind him;[77] but the person so contracting is himself bound.[78]

5. Contracts of Infant as Agent or Trustee. The rules as to the contracts by minors and their rights to disaffirm the same have no application where the minor contracts as an agent or trustee at the instance of his principal or *cestui que trust*.[79]

6. Contracts Pursuant to Legal Obligation. Where an infant is under a legal obligation to do a certain act he may in general bind himself for its performance by a contract which will be valid notwithstanding his infancy.[80]

7. Contracts Pursuant to Statutory Authority. A contract of an infant made in pursuance of statutory authority is binding upon him.[81]

8. Where Contract on Part of Adult Legally Compulsory. It has been held that the law will not allow an infant the privilege of avoiding his contract with an adult where the contract on the part of the adult was legally compulsory.[82]

9. Where Infant Engaged in Business — a. In General. The fact that an infant undertakes to trade or engage in business for himself does not of itself cure the incapacity resulting from his infancy,[83] although his trading contracts like other contracts are not void but merely voidable.[84] Under the statutes in some jurisdictions an infant who practises a profession or trade, or engages in business

Connecticut.—Gregory *v.* Lee, 64 Conn. 407, 30 Atl. 53, 25 L. R. A. 618; Riley *v.* Mallory, 33 Conn. 201.

Maryland.— Brawner *v.* Franklin, 4 Gill 463.

Michigan.— Minock *v.* Shortridge, 21 Mich. 304.

Mississippi.— Edmunds *v.* Mister, 58 Miss. 765.

New York.— Beardsley *v.* Hotchkiss, 96 N. Y. 201; Sparman *v.* Keim, 83 N. Y. 245; Chapin *v.* Shafer, 49 N. Y. 407; Petrie *v.* Williams, 88 Hun 292, 34 N. Y. Suppl. 670; Bool *v.* Mix, 17 Wend. 119, 31 Am. Dec. 255; Stafford *v.* Roof, 9 Cow. 626 [*reversing* on other grounds 7 Cow. 179].

South Carolina.— Lester *v.* Frazer, 2 Hill Eq. 529.

Vermont.— Person *v.* Chase, 37 Vt. 647, 88 Am. Dec. 630.

See 27 Cent. Dig. tit. "Infants," § 99.

77. Pittsburg, etc., R. Co. *v.* Haley, 170 Ill. 610, 44 N. E. 920 [*affirming* 69 Ill. App. 64] (agreement by mother of infant); Calhoun *v.* Stark, 13 Tex. Civ. App. 60, 35 S. W. 410. See also Sarter *v.* Gordon, 2 Hill Eq. (S. C.) 121.

78. Sarter *v.* Gordon, 2 Hill Eq. (S. C.) 121.

79. Shaffer *v.* Kennington, 61 Ill. App. 59; Des Moines Ins. Co. *v.* McIntire, 99 Iowa 50, 68 N. W. 565.

80. *Connecticut*.— Riley *v.* Mallory, 33 Conn. 201.

Kentucky.— Stowers *v.* Hollis, 83 Ky. 544.

Massachusetts.— Baker *v.* Lovett, 6 Mass. 78, 4 Am. Dec. 88.

New York.— People *v.* Moores, 4 Den. 518, 47 Am. Dec. 272.

Oregon.— Burton *v.* Anthony, (1905) 79 Pac. 185.

Pennsylvania.— Com. *v.* Hantz, 2 Penr. & W. 333.

See 27 Cent. Dig. tit. "Infants," § 99. Further on the question of the effect of such contracts see *supra*, IV, E, 1, a.

The infant father of a bastard child may bind himself by a contract to support the child (Stowers *v.* Hollis, 83 Ky. 544), a note given to the mother as a compromise and settlement of the claim against him for its support (Gavin *v.* Burton, 8 Ind. 69), or a bond to indemnify the town for its support (People *v.* Moores, 4 Den. (N. Y.) 518, 47 Am. Dec. 272).

81. Peck *v.* Cain, 27 Tex. Civ. App. 38, 63 S. W. 177.

82. Watson *v.* Cross, 2 Duv. (Ky.) 147, 148.

83. *Louisiana*.— Holliday *v.* Marionneaux, 9 Rob. 504; Willet *v.* Tessier, 15 La. 13; Babcock *v.* Penniman, 5 Mart. N. S. 651.

Mississippi.— Evans *v.* Morgan, 69 Miss. 328, 12 So. 270.

New Jersey.— Houston *v.* Cooper, 3 N. J. L. 866.

New York.— Stern *v.* Meikleham, 56 Hun 475, 10 N. Y. Suppl. 216; Van Winkle *v.* Ketcham, 3 Cai. 323.

North Carolina.— Skinner *v.* Maxwell, 66 N. C. 45.

United States.— Sanger *v.* Hibbard, 104 Fed. 455, 43 C. C. A. 635.

England.— Dilk *v.* Keighley, 2 Esp. 480, 5 Rev. Rep. 747; Lowe *v.* Griffiths, 1 Hodges 30, 4 L. J. C. P. 94, 1 Scott 458; Miller *v.* Blankley, 38 L. T. Rep. N. S. 527; Warwick *v.* Bruce, 2 M. & S. 205, 6 Taunt. 118, 14 Rev. Rep. 636, 638, 1 E. C. L. 535.

See 27 Cent. Dig. tit. "Infants," §§ 130, 131.

84. Stern *v.* Meikleham, 56 Hun (N. Y.) 475, 10 N. Y. Suppl. 216; Skinner *v.* Maxwell, 66 N. C. 45; Warwick *v.* Bruce, 2 M. & S. 205, 6 Taunt. 118, 14 Rev. Rep. 634, 638, 1 E. C. L. 535.

as an adult, is bound by all contracts connected with the occupation in which he is engaged.[85] To engage in business within the meaning of these statutes is to have a regular employment or occupation in which the infant is engaged as a means of livelihood or profit;[86] but such statutes apply only where the infant is carrying on a business of his own, and not where he is engaged in business as a mere employee.[87]

b. Partnership. An infant may become a partner with an adult;[88] but the partnership agreement is voidable at the election of the infant,[89] although it is not void,[90] and is binding upon the adult partner.[91] Where an infant has paid money in consideration of being admitted as a partner in a business, and he has become a partner and remained so for a certain time, he cannot recover back the money thus paid[92] unless he was induced to enter into the partnership by fraudulent representations.[93] The infant cannot recover upon an implied assumpsit from his adult partner for services performed for the partnership under the partnership agreement.[94] The infancy of one of the partners does not affect the validity of

85. *Georgia.*— Such is the rule where the infant does so by permission of his parent or guardian or by permission of the law. Jimmerson *v.* Lawson, 112 Ga. 340, 37 S. E. 371; McKamy *v.* Cooper, 81 Ga. 679, 8 S. E. 312.

Iowa.—Beickler *v.* Guenther, 121 Iowa 419, 96 N. W. 895; Murphy *v.* Johnson, 45 Iowa 57; Oswald *v.* Brodwick, 1 Iowa 380.

Kansas.— Dillon *v.* Burnham, 43 Kan. 77, 22 Pac. 1016.

Louisiana.— Such is the rule as to emancipated minors. Holliday *v.* Marionneaux, 9 Rob. 504. See also Babcock *v.* Penniman, 5 Mart. N. S. 651. But minors not emancipated are not bound by their mercantile contracts, although engaged in trade. Willet *v.* Tessier, 15 La. 13; Holliday *v.* Marionneaux, *supra*; Babcock *v.* Penniman, *supra*.

Canada.—Normandin *v.* Daignault, 11 Quebec Super. Ct. 322.

See 27 Cent. Dig. tit. "Infants," § 131.

Partnership.— Such a statute applies to an infant engaged in business in partnership with an adult (Normandin *v.* Daignault, 11 Quebec Super. Ct. 322), and the fact that a minor, engaged in business as a member of a copartnership, had no property in the stock and only an interest in the profits, does not operate to discharge his liability upon his contract (Jaques *v.* Sax, 39 Iowa 367).

Knowledge of infancy.— The Iowa statute does not apply where the person with whom the infant dealt had knowledge of his infancy. Beller *v.* Marchant, 30 Iowa 350.

86. Beickler *v.* Guenther, 121 Iowa 419, 96 N. W. 895.

87. Southern Cotton Oil Co. *v.* Dukes, 121 Ga. 787, 49 S. E. 788.

The statute does not apply to a mere clerk (Howard *v.* Simpkins, 70 Ga. 322), a farm laborer (Beickler *v.* Guenther, 121 Iowa 419, 96 N. W. 895), or a person engaged as a "linter" in an oil mill (Southern Cotton Oil Co. *v.* Dukes, 121 Ga. 787, 49 S. E. 788).

88. Bush *v.* Linthicum, 59 Md. 344; Kerr *v.* Bell, 44 Mo. 120; Continental Nat. Bank *v.* Strauss, 137 N. Y. 148, 32 N. E. 1066; Avery *v.* Fisher, 28 Hun (N. Y.) 508 (contract binding on infant until disaffirmed); Penn *v.* Whitehead, 17 Gratt. (Va.) 503, 94 Am. Dec. 478.

89. *Maryland.*— Adams *v.* Beall, 67 Md. 53, 8 Atl. 664, 1 Am. St. Rep. 379; Bush *v.* Linthicum, 59 Md. 344.

Massachusetts.— Breed *v.* Judd, 1 Gray 455, so long as it remains executory.

Michigan.— Dunton *v.* Brown, 31 Mich. 182.

Missouri.— Kerr *v.* Bell, 44 Mo. 120.

New York.— Continental Nat. Bank *v.* Strauss, 137 N. Y. 148, 32 N. E. 1066; Sparman *v.* Keim, 83 N. Y. 245.

Ohio.— Lyghtel *v.* Collins, 11 Ohio Dec. (Reprint) 161, 25 Cinc. L. Bul. 125.

See 27 Cent. Dig. tit. "Infants," § 132.

Rights of infant upon rescission.— The infant cannot rescind the burden and keep the benefit of the contract, but must revoke the entire contract or none. Hence all he has received from the firm must be deducted from what he put in and only the balance recovered. Lightel *v.* Collins, 11 Ohio Dec. (Reprint) 161, 25 Cinc. L. Bul. 125. See also Sparman *v.* Keim, 83 N. Y. 235.

Complaint held sufficient to state a cause of action on the contract of partnership which it was sought to avoid see Sparman *v.* Keim, 83 N. Y. 245.

90. Bush *v.* Linthicum, 59 Md. 344; Dunton *v.* Brown, 31 Mich. 182; Continental Nat. Bank *v.* Strauss, 137 N. Y. 148, 32 N. E. 1066.

91. Avery *v.* Fisher, 28 Hun (N. Y.) 508.

92. Adams *v.* Beall, 67 Md. 53, 8 Atl. 664, 1 Am. St. Rep. 379; *Ex p.* Taylor, 8 De G. M. & G. 254, 2 Jur. N. S. 220, 25 L. J. Bankr. 35, 4 Wkly. Rep. 305, 57 Eng. Ch. 198, 44 Eng. Reprint 388.

93. Adams *v.* Beall, 67 Md. 53, 8 Atl. 664, 1 Am. St. Rep. 379.

94. Page *v.* Morse, 128 Mass. 99; Dunton *v.* Brown, 31 Mich. 182 (where the court, without deciding what might happen when the infant reached majority, held that he could not during infancy repudiate the partnership agreement and recover for his services upon an implied assumpsit); Lyghtel *v.* Collins, 11 Ohio Dec. (Reprint) 161, 25 Cinc. L. Bul. 125.

the transactions of the adult partners with respect to firm property,[95] and the acts of the infant partner before his disaffirmance of the partnership agreement bind the firm.[96] The interest of the infant partner in the firm assets is liable for firm debts.[97] It has been held that an infant who engages in business in partnership with an adult is not bound by the contracts or liable for the debts of the firm,[98] but a more accurate statement is that he may disaffirm the partnership contract and avoid all liabilities under it,[99] including the partnership debts,[1] for an infant partner is responsible for all partnership engagements unless and until he elects to set up his personal plea of infancy.[2] The court may decree the dissolution of a partnership and wind up its affairs through the medium of a receiver, notwithstanding one of the partners is an infant,[3] and upon a dissolution, whether by the court or by consent, the partnership debts must be first paid out of the partnership assets,[4] and if what remains is insufficient to repay in full the contributions of all the partners to the capital, the loss must fall upon all the partners *pro rata*, and the infant cannot throw upon his copartners the obligation of making up the deficiency to him.[5] If during infancy a person has held himself out to be a partner, he will be liable for partnership debts incurred after he attained majority, unless when he comes of age he expressly disaffirms the partnership.[6]

95. Sadler *v.* Robinson, 2 Stew. (Ala.) 520.

Where two minors while in partnership gave a mortgage of their goods, which was affirmed by one on coming of age, the other could not maintain replevin against the mortgagee in possession. Keegan *v.* Cox, 116 Mass. 289.

Assignment for benefit of creditors.— An infant is not bound by an assignment of the partnership assets executed by his copartner, such an assignment by one partner not being authorized. Foot *v.* Goldman, 68 Miss. 529, 10 So. 62. But *compare* Furlong *v.* Bartlett, 21 Pick. (Mass.) 401.

96. Avery *v.* Fisher, 28 Hun (N. Y.) 508.

97. Notwithstanding the infant's disaffirmance of his contracts upon attaining his majority. Hill *v.* Bell, 111 Mo. 35, 19 S. W. 959.

Judgment against adult partner for firm debt.— Where, in an action against a firm for a partnership debt, judgment was rendered in favor of two of the firm, on the ground that the debt was contracted during their infancy, and against the remaining adult member, the judgment against the adult partner was a partnership debt, to the payment of which the moneys and property of the firm were applicable. Whittemore *v.* Elliott, 7 Hun (N. Y.) 518.

Assets assigned to infant on agreement to pay partnership debts.— Where an infant partner takes an assignment of the partnership property from his copartner and agrees to pay the debts of the firm, he cannot refuse to pay the copartnership debts and retain the property; but the outgoing partner may insist on the property being all applied to the payment of such debts, except such as has been sold to *bona fide* purchasers without notice. Kitchen *v.* Lee, 11 Paige (N. Y.) 107, 42 Am. Dec. 101.

98. James *v.* Alford, 15 La. Ann. 506; Willet *v.* Tessier, 15 La. 13 (where not emancipated); Dana *v.* Stearns, 3 Cush. (Mass.) 372; Mason *v.* Wright, 13 Metc. (Mass.) 306 (even though the infant is emancipated); Sheafe *v.* Kimball, 21 Fed. Cas. No. 12,729*a*. See also Minock *v.* Shortridge, 21 Mich. 304.

The fact that the infant has sold out his interest at a profit over what he put in to his adult partner does not make him liable for partnership debts. Dana *v.* Stearns, 3 Cush. (Mass.) 372.

99. Adams *v.* Beall, 67 Md. 53, 8 Atl. 664, 1 Am. St. Rep. 379.

1. *Alabama.*— Sadler *v.* Robinson, 2 Stew. 520.

Kentucky.—Vinsen *v.* Lockard, 7 Bush 458; Crabtree *v.* May, 1 B. Mon. 289.

Maryland.— Adams *v.* Beall, 67 Md. 53, 8 Atl. 664, 1 Am. St. Rep. 379; Bush *v.* Linthicum, 59 Md. 344.

Minnesota.— Folds *v.* Allardt, 35 Minn. 488, 29 N. W. 201.

New York.— Whittemore *v.* Elliott, 7 Hun 518.

Pennsylvania.— See Bixler *v.* Kusge, 169 Pa. St. 405, 32 Atl. 414, 47 Am. St. Rep. 920.

See 27 Cent. Dig. tit. "Infants," § 134.

2. Continental Nat. Bank *v.* Strauss, 137 N. Y. 148, 32 N. E. 1066.

The presumption is that he will not set up his infancy to avoid his liability. Continental Nat. Bank *v.* Strauss, 137 N. Y. 148, 32 N. E. 1066.

3. Bush *v.* Linthicum, 59 Md. 344.

Costs.— The court will not compel the infant to pay any of the costs of the proceedings for dissolution. Bush *v.* Linthicum, 59 Md. 44.

4. Shirk *v.* Shultz, 113 Ind. 571, 15 N. E. 12; Bush *v.* Linthicum, 59 Md. 344; Pelletier *v.* Couture, 148 Mass. 269, 19 N. E. 400, 1 L. R. A. 863; Lyghtel *v.* Collins, 11 Ohio Dec. (Reprint) 161, 25 Cinc. L. Bul. 125.

5. Moley *v.* Brine, 120 Mass. 324.

6. Woods *v.* Woods, 3 Manitoba 33.

Drawing money from partnership.— Where both a husband and his infant wife were mentioned as members of the firm in a deed of

10. Contracts Jointly With Adults. Where an infant and an adult enter into a joint contract or assume a joint liability the adult is bound.[7]

B. Particular Acts and Contracts Considered — 1. Accounts Stated. The statement of an account by an infant is not binding on him,[8] and an action on an account stated does not lie against an infant,[9] even though the items are for necessaries.[10] But an account stated by an infant is voidable only and not void.[11]

2. Bills and Notes. A promissory note or bill single executed by an infant is not binding on him, but may be avoided.[12] In a number of cases it has been laid down that such instruments are void;[13] but the better opinion, and that supported

partnership, but the infant wife never executed the deed or took any part in the business, and there is no evidence whatever that she even knew of the partnership deed, or that she was named in it as a member of the firm, the fact that she on several occasions drew money from the concern is not sufficient to show her knowledge and acquiescence, as she might have attained such money merely as the wife of a partner, and her drawing it is quite consistent with her not being a partner or knowing that she was said to be one. Woods *v.* Woods, 3 Manitoba 33.

7. *Connecticut.*— Hallan *v.* Mumford, 1 Root 58.

Illinois.— Reid *v.* Degener, 82 Ill. 508.

Indiana.— Kirby *v.* Cannon, 9 Ind. 371.

Kentucky.— Barlow *v.* Wiley, 3 A. K. Marsh. 457.

Maine.— Cutts *v.* Gordon, 13 Me. 474, 29 Am. Dec. 520.

Massachusetts.— Winchester *v.* Thauer, 129 Mass. 129; Tappan *v.* Abbott, 1 Pick. 502 note; Woodward *v.* Newhall, 1 Pick. 500.

New Jersey.— Dacosta *v.* Davis, 24 N. J. L. 319.

New York.—Hartness *v.* Thompson, 5 Johns. 160. See also Van Bramer *v.* Cooper, 2 Johns. 279.

South Carolina.— Hull *v.* Connolly, 3 McCord 6, 15 Am. Dec. 612.

Vermont.— Allen *v.* Butler, 9 Vt. 122.

A contract for the sale of land owned jointly by an infant and another, being illegal as to the infant, is bad altogether, as the parts cannot be separated, and therefore damages cannot be recovered of either party for a breach of the contract. Clark *v.* Stanhope, 109 Ky. 521, 59 S. W. 856.

Where a confirmation by the infant after majority is pleaded whereby his liability had become fixed as a joint contractor, a release of the infant would, it seems, release both. Kirby *v.* Cannon, 9 Ind. 371.

8. Hedgley *v.* Holt, 4 C. & P. 104, 19 E. C. L. 428; Williams *v.* Moor, 2 Dowl. P. C. N. S. 993, 7 Jur. 817, 12 L. J. Exch. 253, 11 M. & W. 256. See also Bouchell *v.* Clary, 3 Brev. (S. C.) 194.

An account stated by an infant is not evidence against him after he becomes of age, even to show that he has been supplied with necessaries, as stated in the account. Ingledew *v.* Douglas, 2 Stark. 36, 3 E. C. L. 306.

9. Trueman *v.* Hurst, 1 T. R. 40.

10. Fenton *v.* White, 4 N. J. L. 100; Bartlett *v.* Emery, 1 T. R. 42 note.

11. Williams *v.* Moor, 2 Dowl. P. C. N. S. 993, 7 Jur. 817, 12 L. J. Exch. 253, 11 M. & W. 256.

12. *Indiana.*— Henderson *v.* Fox, 5 Ind. 489.

Iowa.— Des Moines Ins. Co. *v.* McIntire, 99 Iowa 50, 68 N. W. 565; Holmes *v.* Mallett, Morr. 82.

Kentucky.— Stern *v.* Freeman, 4 Metc. 309; Best *v.* Givens, 3 B. Mon. 72; Beeler *v.* Young, 1 Bibb 519; De Moss *v.* Geiltner, 5 Ky. L. Rep. 691.

Massachusetts.— Baker *v.* Stone, 136 Mass. 405; Bradford *v.* French, 110 Mass. 365; Kennedy *v.* Doyle, 10 Allen 161; Reed *v.* Batchelder, 1 Metc. 559; Whitney *v.* Dutch, 14 Mass. 457, 7 Am. Dec. 229.

Michigan.— Tyler *v.* Gallop, 68 Mich. 185, 35 N. W. 902, 13 Am. St. Rep. 336.

Minnesota.— Nichols, etc., Co. *v.* Snyder, 78 Minn. 502, 81 N. W. 516.

New Hampshire.—Wright *v.* Steele, 2 N. H. 51.

New Jersey.— Houston *v.* Cooper, 3 N. J. L. 866.

New York.— Goodsell *v.* Myers, 3 Wend. 479; Van Winkle *v.* Ketcham, 3 Cai. 323.

Ohio.— Shurragar *v.* Conklin, 3 Ohio Dec. (Reprint) 350.

Pennsylvania.— Bixler *v.* Kresge, 169 Pa. St. 405, 32 Atl. 414, 47 Am. St. Rep. 920.

South Carolina.— Little *v.* Duncan, 9 Rich. 55, 64 Am. Dec. 700.

Texas.— Askey *v.* Williams, 74 Tex. 294, 11 S. W. 1101, 5 L. R. A. 176.

Wisconsin.— Stokes *v.* Brown, 3 Pinn. 311, 4 Chandl. 39.

United States.— Sheaft *v.* Kimball, 21 Fed. Cas. No. 12,729*a*.

See 27 Cent. Dig. tit. "Infants," § 128.

The fact that a female infant has married with her parents' consent, or that on becoming a widow she has administered on her husband's estate, does not bind her individually on a note given by her while an infant for an account due by her deceased husband. Poole *v.* Hines, 52 Ga. 500.

The fact that an infant works for himself apart from his father does not render his promissory note obligatory. Tandy *v.* Masterson, 1 Bibb (Ky.) 330.

The fact that the minor was emancipated at the time he signed the note does not affect his liability. Tyler *v.* Gallop, 68 Mich. 185, 35 N. W. 902, 13 Am. St. Rep. 336.

Check not binding on infant.— Burgunder *v.* Jackson, 1 Lack. Leg. N. (Pa.) 386.

13. *New Hampshire.*— McCrillis *v.* How, 3 N. H. 348 [*followed* in Wentworth *v.* Wentworth, 5 N. H. 410].

by the weight of authority, is that they are, like other acts of an infant, merely voidable at his election.[14] The joint note of an infant and an adult is binding upon the latter,[15] but not upon the infant.[16] As an infant is liable for his torts[17] he is liable upon his note given in settlement of a tort so long as the consideration of the note is open to inquiry to the same extent as he would have been liable on the original cause of action.[18] An infant's indorsement of a promissory note being voidable only by himself or his representatives[19] passes the title as between the indorsee and the maker and entitles the former to sue the latter on the note.[20]

3. Bonds. A bond executed by an infant is not absolutely binding upon him but is voidable,[21] although it is not void.[22]

New Jersey.— See Fenton *v.* White, 4 N. J. L. 100.

New York.— Swasey *v.* Vanderheyden, 10 Johns. 33.

Pennsylvania.— Montgomery *v.* Brown, 1 Del. Co. 307; Lutes *v.* Thompson, 2 Leg. Chron. 63, judgment note.

South Carolina.—Bouchell *v.* Clary, 3 Brev. 194.

Tennessee.— McMinn *v.* Richmonds, 6 Yerg. 9.

See 27 Cent. Dig. tit. "Infants," § 128.

The reason of this is that by a rule of law in reference to negotiable instruments when in the hands of an indorsee, the consideration cannot be gone into, and consequently unless they are held to be absolutely void when executed by an infant, he would constantly be liable to be imposed upon by unprincipled and designing men who would procure his notes and immediately negotiate them. McMinn *v.* Richmonds, 6 Yerg. (Tenn.) 9. See also McCrillis *v.* How, 3 N. H. 348 [*followed* in Wentworth *v.* Wentworth, 5 N. H. 410].

An infant can scarcely ever be benefited by the execution of a note or bill single; but from the nature of the instrument and its legal incidents and the habits of the country, he will almost universally be prejudiced thereby, unless the courts hold such notes or bills single void. McMinn *v.* Richards, 6 Yerg. (Tenn.) 9.

Suit on original consideration.— A third person, holding a note void because given by an infant, cannot sue on the original consideration of the note, although such consideration was necessaries furnished the infant. Montgomery *v.* Brown, 1 Del. Co. (Pa.) 307.

14. *Alabama.*— Fant *v.* Cathcart, 8 Ala. 725.

Indiana.— Heady *v.* Boden, 4 Ind. App. 475, 30 N. E. 1119.

Kentucky.— Best *v.* Givins, 3 B. Mon. 72.

Maine.— Boody *v.* McKenney, 23 Me. 517.

Massachusetts.— Earle *v.* Reed, 10 Metc. 387; Reed *v.* Batchelder, 1 Metc. 559; Thompson *v.* Lay, 4 Pick. 48, 16 Am. Dec. 325; Whitney *v.* Dutch, 14 Mass. 457, 7 Am. Dec. 229; Martin *v.* Mayo, 10 Mass. 137, 6 Am. Dec. 103.

Michigan.— Tyler *v.* Fleming, 68 Mich. 185, 35 N. W. 902, 13 Am. St. Rep. 336; Minock *v.* Shortridge, 21 Mich. 304.

New Hampshire.—Wright *v.* Steele, 2 N. H. 51, note not void so as to be incapable of ratification.

New York.— Baldwin *v.* Van Deusen, 37 N. Y. 487; Everson *v.* Carpenter, 17 Wend. 419; Goodsell *v.* Myers, 3 Wend. 479.

South Carolina.— Little *v.* Duncan, 9 Rich. 55, 64 Am. Dec. 700.

Virginia.— Wamsley *v.* Lindenberger, 2 Rand. 478.

United States.— Young *v.* Bell, 30 Fed. Cas. No. 18,152, 1 Cranch C. C. 342.

See 27 Cent. Dig. tit. "Infants," § 128.

An extension of the time for payment granted to the infant maker is only voidable as to the infant and is valid against the holders. Burkhalter *v.* Pratt, 1 N. Y. City Ct. 22.

15. Walters *v.* Markey, 13 Lanc. Bar (Pa.) 131. See also Burgess *v.* Merrill, 4 Taunt. 468.

16. Neal *v.* Berry, 86 Me. 193, 29 Atl. 987, holding that if the adult is compelled to pay the note he cannot recover one half the amount from the infant.

17. See *infra*, VI.

18. Ray *v.* Tubbs, 50 Vt. 688, 28 Am. Dec. 519.

19. Hardy *v.* Waters, 38 Me. 450.

Claim against infant as indorser.— An infant may avoid a claim upon him as indorser of a note for the default of payment by the promisor. Nightingale *v.* Withington, 15 Mass. 272, 8 Am. Dec. 101.

20. Frazier *v.* Massey, 14 Ind. 382; Hardy *v.* Waters, 38 Me. 450; Nightingale *v.* Withington, 15 Mass. 272, 8 Am. Dec. 101.

Parol authority to another to indorse.— An infant promisee's parol authorization to another to transfer the note by indorsement for him is good, and the act of indorsement voidable only and not void. Hardy *v.* Waters, 38 Me. 450.

21. New York Bldg. Loan Banking Co. *v.* Fisher, 23 N. Y. App. Div. 363, 48 N. Y. Suppl. 152; L'Amoureux *v.* Crosby, 2 Paige 422, 22 Am. Dec. 655 (judgment bond); Conroe *v.* Birdsall, 1 Johns. Cas. 127, 1 Am. Dec. 105; Sanger *v.* Hibbard, 104 Fed. 455, 43 C. C. A. 635; Fisher *v.* Mowbray, 8 East 330; Baylis *v.* Dineley, 3 M. & S. 477.

A recognizance given by an infant accused of crime is binding on him. State *v.* Weatherwax, 12 Kan. 463; Fagin *v.* Goggin, 12 R. I. 398.

22. Conroe *v.* Birdsall, 1 Johns. Cas. (N. Y.) 127, 1 Am. Dec. 105. *Contra*, Beam *v.* Beatty,

4. Charter-Parties. A contract by which an infant charters a vessel is voidable[23] but not void.[24]

5. Compromises and Settlements. A compromise or settlement entered into by a minor is not binding upon him, but may be avoided,[25] but such settlement is voidable only and not void.[26]

6. Gambling Contracts. Where the whole amount deposited by a minor with a broker as margins in stock gambling transactions is lost in such transactions he may recover from the broker the amount so deposited.[27] Where an infant has made a bet he may repudiate his action and withdraw the money from the stakeholder with whom it was deposited;[28] but he cannot, after the result of the bet is known, and the stakeholder has paid over the money to the winner upon his instructions, recover the amount from the stakeholder.[29]

7. Life Insurance. A contract of life insurance is not binding on an infant,[30] but such a contract is voidable only and not void.[31]

8. Loans and Advances.[32] An infant is not liable upon his undertaking to repay money lent to him,[33] but his promise to repay money borrowed is voidable

4 Ont. L. Rep. 554 [*reversing* 3 Ont. L. Rep. 345], bond with a penalty void.

The recognizance of an infant is not void, but voidable. Patchin *v.* Cromach, 13 Vt. 330.

23. Thompson *v.* Hamilton, 12 Pick. (Mass.) 425, 23 Am. Dec. 619; Sheafe *v.* Kimball, 21 Fed. Cas. No. 12,729*a*.

24. Thompson *v.* Hamilton, 12 Pick. (Mass.) 425, 23 Am. Dec. 619.

25. *Alabama.*— Holloway *v.* Talbot, 70 Ala. 389; Ware *v.* Cartledge, 24 Ala. 622, 60 Am. Dec. 489.

Georgia.— Stidham *v.* Sims, 74 Ga. 187.

Indiana.— Pickler *v.* State, 18 Ind. 266.

Kentucky.— Newport News, etc., Co. *v.* Glenn, 11 Ky. L. Rep. 579.

Massachusetts.— Baker *v.* Lovett, 6 Mass. 78, 4 Am. Dec. 88.

Michigan.— Lansing *v.* Michigan Cent. R. Co., 126 Mich. 663, 86 N. W. 147, 86 Am. St. Rep. 567.

New York.— Pitcher *v.* Turin Plank-Road Co., 10 Barb. 436; Rogers *v.* Cruger, 7 Johns. 557.

North Carolina.— Tipton *v.* Tipton, 48 N. C. 552.

Ohio.— See Piatt *v.* Longworth, 27 Ohio St. 159.

Texas.— Island City Sav. Bank *v.* Wales, 3 Tex. App. Civ. Cas. § 244.

Vermont.— Bromley *v.* School Dist. No. 5, 47 Vt. 381.

England.— Mattei *v.* Vantro, 78 L. T. Rep. N. S. 682.

See 27 Cent. Dig. tit. "Infants," § 103.

In Louisiana a compromise has no force or effect in respect to minors, unless the same is duly authorized by the judge. Chambers *v.* Chambers, 41 La. Ann. 443, 6 So. 659.

In England a compromise on behalf of infants is to be obtained upon petition, supported by an affidavit of a solicitor that counsel's opinion has been given that the compromise is for the benefit of the infants. Gray *v.* Paul, 46 L. J. Ch. 818, 25 Wkly. Rep. 874. The court has no power to enforce a compromise of a claim in which infants are interested against the wish of the next friend or guardian *ad litem* of the infants, acting under the advice of counsel. *In re* Birchall, 16 Ch. D. 41, 44 L. T. Rep. N. S. 113, 29 Wkly. Rep. 27.

The amount received may reduce the infant's claim pro tanto but his right of action is not destroyed. Newport News, etc., Co. *v.* Glenn, 11 Ky. L. Rep. 579.

The infant father of a bastard child may settle with the mother and execute the necessary instruments in making such settlement. Gavin *v.* Burton, 8 Ind. 69.

26. Lansing *v.* Michigan Cent. R. Co., 126 Mich. 663, 86 N. W. 147, 86 Am. St. Rep. 567.

27. Mordecai *v.* Pearl, 63 Hun (N. Y.) 553, 18 N. Y. Suppl. 543; Ruchizky *v.* De Haven, 97 Pa. St. 202 [*reversing* 7 Wkly. Notes Cas. 311].

Where the infant never received the stocks purchased or their proceeds and has thus received no benefit from the transactions made by the broker on his account, he is entitled to recover the full amount of his deposit, and the broker cannot ask of him the impossibility of returning stocks which were never in his possession. Mordecai *v.* Pearl, 63 Hun (N. Y.) 553, 18 N. Y. Suppl. 543.

28. McLean *v.* Wilson, 36 Ill. App. 657.

29. McLean *v.* Wilson, 36 Ill. App. 657.

30. Simpson *v.* Prudential Ins. Co., 184 Mass. 348, 68 N. E. 673, 100 Am. St. Rep. 560, 63 L. R. A. 741.

An infant is not bound by his warranties in an application for life insurance, and the insurer cannot defend an action on the policy by proving their falsity. O'Rourke *v.* John Hancock Mut. L. Ins. Co., 23 R. I. 457, 50 Atl. 834, 91 Am. St. Rep. 643.

31. Union Cent. L. Ins. Co. *v.* Hilliard, 63 Ohio St. 478, 59 N. E. 230, 81 Am. St. Rep. 644, 53 L. R. A. 462.

32. Loans and advances for necessaries see *infra*, V, B, 9, i.

33. Kilgore *v.* Rich, 83 Me. 305, 22 Atl. 176, 23 Am. St. Rep. 780, 12 L. R. A. 859; Denning *v.* Nelson, 1 Ohio Dec. (Reprint) 503, 10 West. L. J. 215; West *v.* Gregg, 1 Grant (Pa.) 53.

only and may be ratified.[34] Where an infant has lent his money under an usurious agreement he may avoid the contract and with it the consequences of the usury and recover the money lent under the count for money had and received.[35]

9. Necessaries — a. General Rule. It is well established, as a general rule, that an infant or his estate may be held liable for necessaries furnished him.[36]

One who has paid off a mortgage on an infant's land cannot maintain an action against him for money had and received or money lent, although the mortgage was paid off at the request of the guardian. Bicknell *v.* Bicknell, 111 Mass. 265.

Loan by authority of court.— A person in good faith lending money to a minor by authority of a court of competent jurisdiction is protected by the decree whether or not the loan was necessary and used for the minor. Cane *v.* Cawthon, 32 La. Ann. 953.

34. Kennedy *v.* Doyle, 10 Allen (Mass.) 161, money borrowed on joint account with another person.

35. Millard *v.* Hewlett, 19 Wend. (N. Y.) 301.

36. *Alabama.*— Flexner *v.* Dickerson, 72 Ala. 318; Shropshire *v.* Burns, 46 Ala. 108. See also Waugh *v.* Emerson, 79 Ala. 295.

Arkansas.— Cooper *v.* State, 37 Ark 421.

California.— Lackman *v.* Wood, 25 Cal. 147.

Connecticut.— Barnes *v.* Barnes, 50 Conn. 572; Kline *v.* Beebe, 6 Conn. 494.

Delaware.— State *v.* Parson, 2 Harr. 52, necessaries may be set off against a claim by the infant but cannot be given in evidence under a plea of payment.

Georgia.— See Nicholson *v.* Wilborn, 13 Ga. 467.

Illinois.— Morton *v.* Steward, 5 Ill. App. 533.

Indiana.— Price *v.* Sanders, 60 Ind. 310; Grossman *v.* Lauber, 29 Ind. 618; Hobbs *v.* Godlove, 17 Ind. 359; Henderson *v.* Fox, 5 Ind. 489; Fruchey *v.* Eagleson, 15 Ind. App. 88, 43 N. E. 146. See also Meredith *v.* Crawford, 34 Ind. 399.

Iowa.— Green *v.* Wilding, 59 Iowa 679, 13 N. W. 761, 44 Am. Rep. 696; Murphy *v.* Johnson, 45 Iowa 57.

Kentucky.— Duvall *v.* Graves, 7 Bush 461; Bonney *v.* Reardin, 6 Bush 34; Watson *v.* Croos, 2 Duv. 147; Hill *v.* Becker, 9 Ky. L. Rep. 619; De Moss *v.* Giltner, 5 Ky. L. Rep. 691.

Maine.— Lawson *v.* Lovejoy, 8 Me. 405, 23 Am. Dec. 526.

Maryland.— Anderson *v.* Smith, 33 Md. 465; Monumental Bldg. Assoc. No. 2 *v.* Herman, 33 Md. 128; Brawner *v.* Franklin, 4 Gill 463; Levering *v.* Heighe, 2 Md. Ch. 81.

Massachusetts.— Bradford *v.* French, 110 Mass. 365; Vent *v.* Osgood, 19 Pick. 572; Angel *v.* McLellan, 16 Mass. 28, 8 Am. Dec. 118; Baker *v.* Lovett, 6 Mass. 78, 4 Am. Dec. 88.

Michigan.— Squier *v.* Hydliff, 9 Mich. 274.

Minnesota.— Braucht *v.* Graves-May Co., 92 Minn. 116, 99 N. W. 417.

Mississippi.— Edmunds *v.* Mister, 58 Miss. 765; Ferguson *v.* Bobo, 54 Miss. 121.

Missouri.— Kerr *v.* Bell, 44 Mo. 120; Perrin *v.* Wilson, 10 Mo. 451.

New Hampshire.— Hall *v.* Butterfield, 59 N. H. 354, 47 Am. Rep. 209; Merriam *v.* Wilkins, 6 N. H. 432, 25 Am. Dec. 472; Dearborn *v.* Eastman, 4 N. H. 441; McCrillis *v.* How, 3 N. H. 348.

New Jersey.— Fenton *v.* White, 4 N. J. L. 100. See also Schenk *v.* Strong, 4 N. J. L. 87.

New York.— Mason *v.* Denison, 15 Wend. 64; Gay *v.* Ballou, 4 Wend. 403, 21 Am. Dec. 158; Kline *v.* L'Amoureux, 2 Paige 419, 22 Am. Dec. 652.

North Carolina.— Turner *v.* Gaither, 83 N. C. 357, 35 Am. Rep. 574; Hyman *v.* Cain, 48 N. C. 111; Smith *v.* Young, 19 N. C. 26.

North Dakota.— Luce *v.* Jestrab, 12 N. D. 548, 97 N. W. 848.

Oregon.— Burton *v.* Anthony, (1905) 79 Pac. 185.

Pennsylvania.— Fairmount, etc., R. Co. *v.* Stutler, 54 Pa. St. 375, 93 Am. Dec. 714; West *v.* Gregg, 1 Grant 53; Johnson *v.* Lines, 6 Watts & S. 80, 40 Am. Dec. 542; Watson *v.* Hensel, 7 Watts 344; Rundel *v.* Keeler, 7 Watts 237; Guthrie *v.* Murphy, 4 Watts 80, 28 Am. Dec. 681; Com. *v.* Hantz, 2 Penr. & W. 333; Harbison *v.* Mawhinney, 8 Pa. Dist. 697; Hughes *v.* Gallans, 10 Phila. 618; Lancaster County Nat. Bank *v.* Moore, 22 Pittsb. Leg. J. 189.

Rhode Island.— Crafts *v.* Carr, 24 R. I. 397, 53 Atl. 275, 96 Am. St. Rep. 721, 60 L. R. A. 128.

South Carolina.—Bouchell *v.* Clary, 3 Brev. 194; Lester *v.* Frazer, 2 Hill Eq. 529.

Tennessee.— Langford *v.* Frey, 8 Humphr. 443; McGan *v.* Marshall, 7 Humphr. 121; McMinn *v.* Richmonds, 6 Yerg. 9; Wheaton *v.* East, 5 Yerg. 41, 26 Am. Dec. 251.

Texas.— Askey *v.* Williams, 74 Tex. 294, 11 S. W. 1101, 5 L. R. A. 176; Parsons *v.* Keys, 43 Tex. 557; Peck *v.* Cain, 27 Tex. Civ. App. 38, 63 S. W. 177. See also Carpenter *v.* Pridgen, 40 Tex. 32.

Vermont.— Whitcomb *v.* Joslyn, 51 Vt. 79, 31 Am. Rep. 678; Ray *v.* Tubbs, 50 Vt. 688, 28 Am. Rep. 519; Person *v.* Chase, 37 Vt. 647, 88 Am. Dec. 630; Cole *v.* Seeley, 25 Vt. 220, 60 Am. Dec. 258; Bradley *v.* Pratt, 23 Vt. 378; Middleburg College *v.* Chandler, 16 Vt. 683, 42 Am. Dec. 537; Bent *v.* Manning, 10 Vt. 225.

United States.— Hyer *v.* Hyatt, 9 Fed. Cas. No. 6,977, 3 Cranch C. C. 276; U. S. *v.* Bainbridge, 24 Fed. Cas. No. 14,497, 1 Mason 71, 2 Whcel. Cr. 521.

England.— Keane *v.* Boycott, 2 H. Bl. 511, 3 Rev. Rep. 494; Gibbs *v.* Merrill, 3 Taunt. 307.

Canada.— Rutherford *v.* Purdy, 21 Nova Scotia 43.

See 27 Cent. Dig. tit. "Infants," § 114.

b. Credit Must Be Given to Infant. But an infant cannot be held liable for things furnished to him, although they may be necessaries, if they are furnished, not upon his contract or request, but on the contract or request of the infant's parent, guardian, or some other person to whom the credit is given.[37]

c. Express Contracts. Some authorities hold that an infant is not liable on his express contract to pay for necessaries,[38] but only upon the contract to pay the reasonable value implied from his receipt of the articles;[39] but the better rule appears to be that an infant may bind himself by an express contract to pay for necessaries[40] if the form of the contract be such that the consideration may be inquired into.[41] Whichever view is adopted, however, the practical result is the same, for where the infant is held unable to bind himself by an express contract, the fact that he has attempted to do so does not prevent a recovery of the value of the necessaries on his implied contract,[42] while where he is held capable of binding himself by an express contract he can, by showing that the amount agreed to

Necessaries procured by agent are within the rule. Fruchey *v.* Eagleson, 15 Ind. App. 88, 43 N. E. 146.

The fact that a person has furnished articles not necessaries to an infant does not preclude him from recovering for the necessaries furnished. Bent *v.* Manning, 10 Vt. 225.

The obligation does not arise out of a contract in the legal sense of that term, but out of a transaction of a quasi-contractual nature, for it may be imposed on an infant too young to understand the nature of a contract at all. Gregory *v.* Lee, 64 Conn. 407, 30 Atl. 53, 25 L. R. A. 618; Hyman *v.* Cain, 48 N. C. 111.

The law will imply a promise on the part of an infant, having no legal protector, to pay for necessaries furnished him. Trainer *v.* Trumbull, 141 Mass. 527, 6 N. E. 761; Epperson *v.* Nugent, 57 Miss. 45, 34 Am. Rep. 434; Gay *v.* Ballou, 4 Wend. (N. Y.) 403, 21 Am. Dec. 158; Hyman *v.* Cain, 48 N. C. 111; Crafts *v.* Carr, 24 R. I. 397, 53 Atl. 275, 96 Am. St. Rep. 721, 60 L. R. A. 128. *Aliter*, where the infant was a member of the family of the person who supplied board, clothing, etc. Wright *v.* McLarinan, 92 Ind. 103.

Defense to action for necessaries.— If an infant has been furnished with necessaries, while working with a mechanic to learn his trade, upon an action of assumpsit brought against the infant for the value of the necessaries, it is a good defense, under the plea of non-assumpsit, that defendant's services in work and labor were equal to, or exceeded in value, the necessaries furnished. Francis *v.* Felmit, 20 N. C. 637.

37. *Georgia.*—Nicholson *v.* Wilborn, 13 Ga. 467.

Illinois.— Sinklear *v.* Emert, 18 Ill. 63.

Missouri.— Dillon *v.* Bowles, 77 Mo. 603 [*affirming* 8 Mo. App. 419]; Tharp *v.* Connelly, 48 Mo. App. 59.

New Hampshire.— Phelps *v.* Worcester, 11 N. H. 51.

New York.— Murphy *v.* Holmes, 87 N. Y. App. Div. 366, 84 N. Y. Suppl. 806; Nethercott *v.* Kelly, 57 N. Y. Super. Ct. 27, 5 N. Y. Suppl. 259; Ryan *v.* Boltz, 48 N. Y. Super. Ct. 152. See also Wailing *v.* Toll, 9 Johns. 141.

38. Henderson *v.* Fox, 5 Ind. 489; Fenton *v.* White, 4 N. J. L. 100. See Beeler *v.* Young, 1 Bibb (Ky.) 519.

He is only bound to pay what the necessaries are worth, not what he may foolishly have agreed to pay. Locke *v.* Smith, 41 N. H. 346.

Note given for necessaries not enforceable. — Morton *v.* Steward, 5 Ill. App. 533; Henderson *v.* Fox, 5 Ind. 489; Beeler *v.* Young, 1 Bibb (Ky.) 519; McCrillis *v.* How, 3 N. H. 348; Swasey *v.* Vanderheyden, 10 Johns. (N. Y.) 33; Montgomery *v.* Brown, 1 Del. Co. (Pa.) 307; Bouchell *v.* Clary, 3 Brev. (S. C.) 194; McMinn *v.* Richmonds, 6 Yerg. (Tenn.) 9.

Bond given for necessaries not enforceable. — Henderson *v.* Fox, 5 Ind. 489.

39. Morton *v.* Steward, 5 Ill. App. 533; McCrillis *v.* How, 3 N. H. 348; McMinn *v.* Richmonds, 6 Yerg. (Tenn.) 9.

40. *Arkansas.*— Guthrie *v.* Morris, 22 Ark. 411. See also Cooper *v.* State, 37 Ark. 421.

Connecticut.— See Munson *v.* Washband, 31 Conn. 303, 83 Am. Dec. 151.

Maryland.— See Monumental Bldg. Assoc. No. 2 *v.* Herman, 33 Md. 128.

Massachusetts.— Stone *v.* Dennison, 13 Pick. 1, 23 Am. Dec. 654; Earle *v.* Reed, 10 Metc. 387.

Texas.— Askey *v.* Williams, 74 Tex. 294, 11 S. W. 1101, 5 L. R. A. 176; Peck *v.* Cain, 27 Tex. Civ. App. 38, 63 S. W. 177.

Note given for necessaries enforceable.— Earle *v.* Reed, 10 Metc. (Mass.) 387; Aaron *v.* Harley, 6 Rich. (S. C.) 26; Dubose *v.* Wheddon, 4 McCord (S. C.) 221; Bradley *v.* Pratt, 23 Vt. 378 [*followed* in Ray *v.* Tubbs, 50 Vt. 688, 28 Am. Rep. 519].

Bond given for necessaries enforceable.— Guthrie *v.* Morris, 22 Ark. 411 [*followed* in Cooper *v.* State, 37 Ark. 421].

41. Guthrie *v.* Morris, 22 Ark. 411. See also Cooper *v.* State, 37 Ark. 421; Earle *v.* Reid, 10 Metc. (Mass.) 387; Stone *v.* Dennison, 13 Pick. (Mass.) 1, 23 Am. Dec. 654; Peck *v.* Cain, 27 Tex. Civ. App. 38, 63 S. W. 177; Bradley *v.* Pratt, 23 Vt. 378.

42. See McMinn *v.* Richmond, 6 Yerg. (Tenn.) 9.

be paid is unreasonable, reduce the recovery to a just compensation for the necessaries which he has received.[43]

d. Executory Contracts. No binding obligation to pay for necessaries can arise until they have been supplied to the infant, and he cannot make a binding executory agreement to purchase necessaries or to pay for necessaries to be supplied him.[44]

e. What Are Necessaries. The term "necessaries" is not confined to merely such things as are required for a bare subsistence,[45] but includes those things without which the individual cannot reasonably exist,[46] and which are useful and suitable,[47] and necessary for his support, use, and comfort,[48] taking into consideration the infant's state and condition in life.[49] The articles furnished must be actually necessary to the particular case, for use and substantial good, not mere ornament or pleasure;[50] but beyond this there is no positive rule by means of which it may be determined what are or what are not necessaries,[51] for what may be considered necessary for one infant may not be necessaries for another infant whose state is different as to rank, social position, fortune, health, or other cir-

43. Cooper *v.* State, 37 Ark. 421; Guthrie *v.* Morris, 22 Ark. 411; Earle *v.* Reid, 10 Metc. (Mass.) 387; Askey *v.* Williams, 74 Tex. 294, 11 S. W. 1101, 5 L. R. A. 176; Peck *v.* Cain, 27 Tex. Civ. App. 38, 63 S. W. 177. See *infra*, IV, B, 9, m.

44. Gregory *v.* Lee, 64 Conn. 407, 30 Atl. 53, 25 L. R. A. 618; Barnes *v.* Barnes, 50 Conn. 572; Trainer *v.* Trumbull, 141 Mass. 527, 6 N. E. 761; Earle *v.* Reed, 10 Metc. (Mass.) 387; Thomas *v.* Dike, 11 Vt. 273, 34 Am. Dec. 690; Jones *v.* Valentine School, 122 Wis. 318, 99 N. W. 1043.

Lease.— Where a married infant contracts for rent of a dwelling-house for a certain period, but abandons the same before the expiration of such period, he cannot be held liable for the rent for a longer time than he actually used such house. Peck *v.* Cain, 27 Tex. Civ. App. 38, 63 S. W. 177.

45. Turner *v.* Gaither, 83 N. C. 357, 35 Am. Rep. 540; Jordan *v.* Coffield, 70 N. C. 110; Crafts *v.* Carr, 24 R. I. 397, 53 Atl. 275, 96 Am. St. Rep. 721, 60 L. R. A. 128; Middlebury College *v.* Chandler, 16 Vt. 683, 42 Am. Dec. 737; Peters *v.* Fleming, 9 L. J. Exch. 81, 6 M. & W. 42.

46. Gregory *v.* Lee, 64 Conn. 407, 30 Atl. 53, 25 L. R. A. 618; Chapple *v.* Cooper, 13 L. J. Exch. 286, 13 M. & W. 252.

47. Turner *v.* Gaither, 83 N. C. 357, 35 Am. Rep. 574; Jordan *v.* Coffield, 70 N. C. 110; Peters *v.* Fleming, 9 L. J. Exch. 81, 6 M. & W. 42.

48. Price *v.* Sanders, 60 Ind. 310; Cobbey *v.* Buchanan, 48 Nebr. 391, 67 N. W. 176.

49. *Connecticut.*—Munson *v.* Washband, 31 Conn. 303, 83 Am. Dec. 151; Stanton *v.* Willson, 3 Day 37, 3 Am. Dec. 255.

Indiana.— Price *v.* Sanders, 60 Ind. 310.

Kentucky.— Bonney *v.* Reardin, 6 Bush 34; Sams *v.* Stockton, 14 B. Mon. 232; De Moss *v.* Giltner, 5 Ky. L. Rep. 691.

Massachusetts.— Breed *v.* Judd, 1 Gray 455; Swift *v.* Bennett, 10 Cush. 436. See also Trainer *v.* Trumbull, 141 Mass. 527, 6 N. E. 761.

Missouri.— Kerr *v.* Bell, 44 Mo. 120; Perrin *v.* Wilson, 10 Mo. 451.

Nebraska.— Cobbey *v.* Buchanan, 48 Nebr. 391, 67 N. W. 176.

New York.— Shaw *v.* Bryant, 65 Hun 57, 19 N. Y. Suppl. 618; Atchison *v.* Bruff, 50 Barb. 381; Kline *v.* L'Amoureux, 2 Paige 419, 22 Am. Dec. 652.

North Carolina.— Turner *v.* Gaither, 83 N. C. 357, 35 Am. Rep. 574; Jordan *v.* Coffield, 70 N. C. 110; Smith *v.* Young, 19 N. C. 26.

Pennsylvania.— Guthrie *v.* Murphy, 4 Watts 80, 28 Am. Dec. 681.

Rhode Island.— Crafts *v.* Carr, 24 R. I. 397, 53 Atl. 275, 96 Am. St. Rep. 721, 60 L. R. A. 128.

South Carolina.—Bouchell *v.* Clary, 3 Brev. 194.

Vermont.— Middlebury College *v.* Chandler, 16 Vt. 683, 42 Am. Dec. 537; Bent *v.* Manning, 10 Vt. 225.

Virginia.— Gayle *v.* Haynes, 79 Va. 542.

England.—Burghart *v.* Angerstein, 6 C. & P. 690, 1 M. & Rob. 458, 25 E. C. L. 641; Ford *v.* Fothergill, 1 Esp. 211, Peake 229, 3 Rev. Rep. 695; Peters *v.* Fleming, 9 L. J. Exch. 81, 6 M. & W. 42; Hill *v.* Arbon, 34 L. T. Rep. N. S. 125. See also Story *v.* Pery, 4 C. & P. 526, 19 E. C. L. 632.

See 27 Cent. Dig. tit. "Infants," § 114.

In regard to clothes the jury must consider not only whether the clothes were suitable in point of quality, but also in point of quantity. Burghart *v.* Angerstein, 6 C. & P. 690, 1 M. & Rob. 458, 25 E. C. L. 641.

Undergraduate at college.— In considering whether the goods were necessaries, suitable to the degree and condition of defendant, an undergraduate, his rank or allowance is not so much to be considered as his situation *in statu pupillari* at college. Wharton *v.* Mackenzie, 5 Q. B. 606, Dav. & M. 545, 8 Jur. 466, 13 L. J. Q. B. 130, 48 E. C. L. 606.

50. McKanna *v.* Merry, 61 Ill. 177.

51. McKanna *v.* Merry, 61 Ill. 177; Breed *v.* Judd, 1 Gray (Mass.) 455; Engelbert *v.* Troxell, 40 Nebr. 195, 58 N. W. 852, 42 Am. St. Rep. 665, 26 L. R. A. 177; Crafts *v.* Carr, 24 R. I. 397, 53 Atl. 275, 90 Am. St. Rep. 721, 60 L. R. A. 128.

cumstances, the question being one to be determined from the particular facts and circumstances of each case.[52] Necessaries for an infant include support and maintenance,[53] food,[54] lodging,[55] and clothing,[56] medicines and medical attendance

52. McKanna *v.* Merry, 61 Ill. 177; Cobbey *v.* Buchanan, 48 Nebr. 391, 67 N. W. 176; Epperson *v.* Nugent, 57 Miss. 45, 34 Am. Rep. 434; Thrall *v.* Wright, 38 Vt. 494.

The following have been held to be necessaries: A bridal outfit, including a chamber set (Jordan *v.* Coffield, 70 N. C. 110), and livery for the servant of an infant captain in the army (Hands *v.* Slaney, 8 T. R. 578). An infant widow has been held liable to pay for her deceased husband's funeral expenses. Chapple *v.* Cooper, 13 L. J. Exch. 286, 13 M. & W. 252. The estate of a deceased minor is liable to pay for nursing through his last illness and preparing his body for interment, the father being unable to pay. Werner's Appeal, 91 Pa. St. 222.

The following have been held not necessaries: Life insurance (Simpson *v.* Prudential Ins. Co., 134 Mass. 348, 68 N. E. 673, 100 Am. St. Rep. 560, 63 L. R. A. 741; Pippen *v.* Mutual Ben. L. Ins. Co., 130 N. C. 23, 40 S. E. 822, 57 L. R. A. 505); chronometers (McKanna *v.* Merry, 61 Ill. 177; Berolles *v.* Ramsay, Holt N. P. 77, 17 Rev. Rep. 610, 3 E. C. L. 40); fiddle and fiddle strings (Glover *v.* Ott, 1 McCord (S. C.) 572); pistols and powder (Glover *v.* Ott, *supra*; McKanna *v.* Merry, *supra*); cockades ordered for the soldiers of his company by an infant captain in the army (Hands *v.* Slaney, 8 T. R. 578); liquor (Glover *v.* Ott, *supra*; McKanna *v.* Merry, *supra*); cigars and tobacco (Bryant *v.* Richardson, 12 Jur. N. S. 300, 14 L. T. Rep. N. S. 24, 14 Wkly. Rep. 401); betting books (Jenner *v.* Walker, 19 L. T. Rep. N. S. 398); ices and soda water (Wharton *v.* Mackenzie, 5 Q. B. 606, Dav. & M. 545, 8 Jur. 466, 13 L. J. Q. B. 130, 48 E. C. L. 606); fruits and confectionery (Brooker *v.* Scott, 11 M. & W. 67; Wharton *v.* Mackenzie, *supra*); game and poultry (Wharton *v.* Mackenzie, *supra*); dinners and suppers (Wharton *v.* Mackenzie, *supra*; Brooker *v.* Scott, *supra*); a loan of money (Beeler *v.* Young, 1 Bibb (Ky.) 519); money advances for traveling expenses (McKanna *v.* Merry, *supra*); and a silver goblet for presentation to a friend at whose house the infant was staying (Ryder *v.* Wombwell, L. R. 4 Exch. 32, 38 L. J. Exch. 8, 19 L. T. Rep. N. S. 491, 17 Wkly. Rep. 167).

53. Grossman *v.* Lauber, 29 Ind. 618; Wilhelm *v.* Hardman, 13 Md. 140; Trainer *v.* Trumbull, 141 Mass. 527, 6 N. E. 761; Baker *v.* Lovett, 6 Mass. 78, 4 Am. Dec. 88.

54. *Connecticut.*— Gregory *v.* Lee, 64 Conn. 407, 30 Atl. 53, 25 L. R. A. 618.

Maine.— Kilgore *v.* Rich, 83 Me. 305, 22 Atl. 176, 23 Am. St. Rep. 780, 12 L. R. A. 859.

Missouri.— Kerr *v.* Bell, 44 Mo. 120.

North Carolina.— Turner *v.* Gaither, 83 N. C. 357, 35 Am. St. Rep. 574.

South Carolina.— Glover *v.* Ott, 1 McCord 572; Bouchell *v.* Clary, 3 Brev. 194.

England.—Chapple *v.* Cooper, 13 L. J. Exch. 286, 13 M. & W. 252.

See 27 Cent. Dig. tit. "Infants," § 115.

The board of an infant is included among the necessaries for which he may pledge his credit.

Connecticut.— Barnes *v.* Barnes, 50 Conn. 572.

Maine.— Kilgore *v.* Rich, 83 Me. 305, 22 Atl. 176, 29 Am. St. Rep. 780, 12 L. R. A. 859.

Maryland.— Monumental Bldg. Assoc. *v.* Herman, 33 Md. 128.

New York.— Goodman *v.* Alexander, 28 N. Y. App. Div. 227, 50 N. Y. Suppl. 884.

Vermont.— Bradley *v.* Pratt, 23 Vt. 378.

See 27 Cent. Dig. tit. "Infants," § 115.

Entertainment furnished by an innkeeper to an infant, not knowing that the latter is acting contrary to the wishes of his guardian, is necessary, and the price recoverable on that ground. Watson *v.* Cross, 2 Duv. (Ky.) 147.

55. *Connecticut.*— Gregory *v.* Lee, 64 Conn. 407, 30 Atl. 53, 25 L. R. A. 618.

Missouri.— Kerr *v.* Bell, 44 Mo. 120.

New York.— Goodman *v.* Alexander, 28 N. Y. App. Div. 227, 50 N. Y. Suppl. 884.

North Carolina.— Turner *v.* Gaither, 84 N. C. 357, 35 Am. St. Rep. 574.

South Carolina.— Glover *v.* Ott, 1 McCord 572.

England.—Chapple *v.* Cooper, 13 L. J. Exch. 286, 13 M. & W. 252.

See 27 Cent. Dig. tit. "Infants," § 115.

56. *Connecticut.*— Gregory *v.* Lee, 64 Conn. 407, 30 Atl. 53, 25 L. R. A. 618.

Maine.— Kilgore *v.* Rich, 83 Me. 305, 22 Atl. 176, 23 Am. St. Rep. 780, 12 L. R. A. 859.

Maryland.— Monumental Bldg. Assoc. *v.* Herman, 33 Md. 128.

Missouri.— Kerr *v.* Bell, 44 Mo. 120.

New York.— Atchison *v.* Bruff, 50 Barb. 381.

North Carolina.— Turner *v.* Gaither, 83 N. C. 357, 35 Am. Rep. 574.

South Carolina.— Glover *v.* Ott, 1 McCord 572; Bouchell *v.* Clary, 3 Brev. 194.

England.— Chapple *v.* Cooper, 13 L. J. Exch. 286, 13 M. & W. 252.

See 27 Cent. Dig. tit. "Infants," § 115.

Accessories.— Kid gloves, cravats, cologne, and walking canes are not necessaries for infants. Lefils *v.* Sugg, 15 Ark. 137.

Wedding outfit.— When an infant marries, such clothing as is usually worn on such occasions by persons in his situation and condition in life come under the description of necessaries. Sams *v.* Stockton, 14 B. Mon. (Ky.) 232; Jordan *v.* Coffield, 70 N. C. 110.

Regimentals furnished to an infant who was a member of a volunteer corps are necessaries. Coates *v.* Wilson, 5 Esp. 152, 8 Rev. Rep. 841.

Mourning apparel upon the death of the in-

furnished him when his health or physical condition require them,[57] and an education suitable to his station in life.[58] The professional services of an attorney may be a necessary for which an infant is bound,[59] whether such attorney be employed to enforce or protect the civil or property rights of the infant,[60] or to defend him

fant's mother is a necessary. De Moss *v.* Giltner, 5 Ky. L. Rep. 691.

An infant is not liable for clothes purchased unless they are necessaries, even though he is living separate and apart from his parents. Austin *v.* Kahn, 1 Tex. App. Civ. Cas. § 1049.

57. *Connecticut.*—Strong *v.* Foote, 42 Conn. 203, filling decayed and painful teeth.

Maine.— Kilgore *v.* Rich, 83 Me. 305, 22 Atl. 176, 23 Am. St. Rep. 780, 12 L. R. A. 859.

Maryland.— Monumental Bldg. Assoc. No. 2 *v.* Herman, 33 Md. 128.

Missouri.— See Tharp *v.* Connelly, 48 Mo. App. 59.

North Carolina.— Turner *v.* Gaither, 83 N. C. 357, 35 Am. Rep. 574.

Pennsylvania.— Werner's Appeal, 91 Pa. St. 222, nursing.

South Carolina.— Glover *v.* Ott, 1 McCord 572.

See 27 Cent. Dig. tit. "Infants," § 117.

58. *Indiana.*— Grossman *v.* Lauber, 29 Ind. 618.

Maine.— Kilgore *v.* Rich, 83 Me. 305, 22 Atl. 176, 23 Am. St. Rep. 780, 12 L. R. A. 859; Lawson *v.* Lovejoy, 8 Me. 405, 23 Am. Dec. 526.

Maryland.— Monumental Bldg. Assoc. No. 2 *v.* Herman, 33 Md. 128; Wilhelm *v.* Hardman, 13 Md. 140.

Massachusetts.— Baker *v.* Lovett, 6 Mass. 78, 4 Am. Dec. 88.

Missouri.— Kerr *v.* Bell, 44 Mo. 120.

North Carolina.— Turner *v.* Gaither, 83 N. C. 357, 35 Am. Rep. 574.

South Carolina.— Glover *v.* Ott, 1 McCord 572.

Vermont.— Middlebury College *v.* Chandler, 16 Vt. 683, 42 Am. Dec. 537, common-school education.

See 27 Cent. Dig. tit. "Infants," § 116.

A classical education is not a necessary. Gayle *v.* Hayes, 79 Va. 542.

A professional education, as in the science of medicine, is not a necessary. Turner *v.* Gaither, 83 N. C. 357, 35 Am. Rep. 574; Bouchell *v.* Clary, 3 Brev. (S. C.) 194.

A collegiate education is not necessary. Middlebury College *v.* Chandler, 16 Vt. 683, 42 Am. Dec. 537.

Religious instruction does not belong to the class of necessaries as that term is used in the common law for which the estate of an infant is liable. St. John's Parish *v.* Bronson, 40 Conn. 75, 16 Am. Rep. 17.

Instructions in music and painting furnished to an infant whose estate consisted of six thousand dollars in personalty, without the authority of the person in whose custody she was, were not necessaries. De Moss *v.* Giltner, 5 Ky. L. Rep. 691.

59. Munson *v.* Washband, 31 Conn. 303, 83 Am. Dec. 151; Hanlon *v.* Wheeler, (Tex. Civ. App. 1898) 45 S. W. 821. See also Petrie *v.* Williams, 68 Hun (N. Y.) 589, 23 N. Y. Suppl. 237. *Contra,* except where infant has no guardian. Epperson *v.* Nugent, 57 Miss. 45, 34 Am. Rep. 434.

Where suit is brought by direction of the guardian of an infant to protect the infant's title to land, the services and expenditures of counsel are not regarded as necessaries and may be avoided by the infant, even under an express promise. Phelps *v.* Worcester, 11 N. H. 51.

60. Munson *v.* Washband, 31 Conn. 303, 83 Am. Dec. 151; Nagel *v.* Schilling, 14 Mo. App. 576; Crafts *v.* Carr, 24 R. I. 397, 53 Atl. 275, 96 Am. St. Rep. 721, 60 L. R. A. 128; Hanlon *v.* Wheeler, (Tex. Civ. App. 1898) 45 S. W. 821.

A lawsuit may or may not be a necessary for an infant according to circumstances. Thrall *v.* Wright, 38 Vt. 494.

Services rendered by an attorney as guardian ad litem in defending a suit to foreclose a mortgage made by the infant's ancestor are not necessaries which would render a deed of land by the infant in consideration thereof valid, as the statute provides compensation for such guardians. Englebert *v.* Troxell, 40 Nebr. 195, 58 N. W. 852, 42 Am. St. Rep. 665, 26 L. R. A. 177.

Examination of public records.— Where at the request of an infant an attorney examined the public records and advised the infant as to his rights to certain property inherited from his deceased father, it was held that the services rendered by the attorney were not necessaries. Cobbey *v.* Buchanan, 48 Nebr. 391, 67 N. W. 176.

Suit instituted by next friend.— Although a suit was instituted and counsel employed by the infant through her next friend, yet, since this was of necessity, and since she knew of and profited by the proceedings, and must have conferred with counsel, and appeared as a witness, there was an implied promise by her to pay for the necessary counsel fees. Crafts *v.* Carr, 24 R. I. 397, 53 Atl. 275, 96 Am. St. Rep. 721, 60 L. R. A. 128.

Where a testator's adult heirs employed an attorney and agreed to give him half of the land to be recovered in case the will should be broken, and through the attorney's efforts the will was broken, an infant heir, although participating equally in the benefit of the result, could not be compelled to contribute to the attorney's compensation. Dillon *v.* Bowles, 77 Mo. 603 [*affirming* 8 Mo. App. 419].

Where request for services presumed.— A request for the defense of a suit against an infant as necessary to protect his interests may be presumed from the necessities of the

in a criminal action or prosecution.[61] So also the payment of taxes on the property of infants is a necessary.[62] Horses,[63] vehicles,[64] saddles, harness, and the like[65] are not ordinarily considered necessaries for an infant. Neither are repairs[66] and improvements[67] on an infant's realty, or articles purchased by or furnished to him for use in carrying on the business or occupation in which he is engaged, ordinarily considered necessaries.[68] It has also been held that a contract for fire insurance is not for a necessary.[69]

f. Where Infant Already Sufficiently Supplied. It is incumbent upon a tradesman before he trusts an infant for what may appear to be necessaries to inquire whether he is already provided, as otherwise he trusts the infant at his peril;[70] and

case, taken in connection with the exercise of discretion by the guardian *ad litem* in engaging the services of counsel. Nagel *v.* Schilling, 14 Mo. App. 576.

61. Barker *v.* Hibbard, 54 N. H. 539, 20 Am. Rep. 160 (bastardy proceeding); Askey *v.* Williams, 74 Tex. 294, 11 S. W. 1101, 5 L. R. A. 176.

62. Horstmeyer *v.* Connors, 56 Mo. App. 115.

Apportionment of liability.— Where special taxes on a building which belongs to infants and adults in common, and is occupied by the infants as a homestead, are paid by a third person at the request of all the owners, the infants are liable for the entire amount; but each infant is liable only for his own share of the general taxes so paid, since general taxes are apportionable under the statute. Horstmeyer *v.* Connors, 56 Mo. App. 115.

63. *Illinois.*— McKanna *v.* Merry, 61 Ill. 177.

Indiana.— House *v.* Alexander, 105 Ind. 109, 4 N. E. 891, 55 Am. Rep. 189.

Kentucky.— Beeler *v.* Young, 1 Bibb 519.

Minnesota.— Miller *v.* Smith, 26 Minn. 248, 2 N. W. 942, 37 Am. St. Rep. 407.

South Carolina.— Rainwater *v.* Durham, 2 Nott & M. 524, 10 Am. Dec. 637.

Tennessee.— Grace *v.* Hale, 2 Humphr. 27, 36 Am. Dec. 296.

Virginia.— Gayle *v.* Hayes, 79 Va. 542.

England.— Skrine *v.* Gordon, Ir. R. 9 C. L. 479.

See 27 Cent. Dig. tit. "Infants," § 118.

Contract principally for necessaries.— An agreement by an infant to work seven years for his support and schooling, and a horse in addition, if he worked seven years, is for necessaries principally, and the addition about the horse will not avoid it. Wilhelm *v.* Hardman, 13 Md. 140.

Circumstances might exist which would render a horse suitable to an infant's position and station in life. Aaron *v.* Harley, 6 Rich. (S. C.) 26.

If the infant's health requires him to ride, a horse may be necessary. Thrall *v.* Wright, 38 Vt. 494; Hart *v.* Prater, 1 Jur. 623. See also McKanna *v.* Merry, 61 Ill. 177.

64. Howard *v.* Simpkins, 70 Ga. 322; Paul *v.* Smith, 41 Mo. App. 275; Charters *v.* Bayntun, 7 C. & P. 52, 32 E. C. L. 495.

Bicycles are not ordinarily considered necessaries. Pyne *v.* Wood, 145 Mass. 558, 14 N. E. 775; Rice *v.* Butler, 25 N. Y. App. Div. 388, 49 N. Y. Suppl. 494. But see Clyde Cycle Co. *v.* Hargreaves, 78 L. T. Rep. N. S. 296.

65. McKanna *v.* Merry, 61 Ill. 177; Beeler *v.* Young, 1 Bibb (Ky.) 519; Glover *v.* Ott, 1 McCord (S. C.) 572.

66. Tupper *v.* Cadwell, 12 Metc. (Mass.) 559, 46 Am. Dec. 704; Horstmeyer *v.* Connors, 56 Mo. App. 115; Phillips *v.* Lloyd, 18 R. I. 99, 25 Atl. 909. See also West *v.* Gregg, 1 Grant (Pa.) 53.

67. Price *v.* Jennings, 62 Ind. 111; Wornack *v.* Loar, 11 S. W. 438, 11 Ky. L. Rep. 6; Allen *v.* Lardner, 78 Hun (N. Y.) 603, 29 N. Y. Suppl. 213; Freeman *v.* Bridger, 49 N. C. 1, 67 Am. Dec. 258.

68. *Indiana.*—House *v.* Alexander, 105 Ind. 109, 4 N. E. 891, 55 Am. Rep. 189.

Massachusetts.— Ryan *v.* Smith, 165 Mass. 303, 43 N. E. 109; Merriam *v.* Cunningham, 11 Cush. 40.

Michigan.— Wood *v.* Losey, 50 Mich. 475, 15 N. W. 557.

Mississippi.— Decell *v.* Lewenthal, 57 Miss. 331, 34 Am. Rep. 449.

Missouri.— Paul *v.* Smith, 41 Mo. App. 275.

See 27 Cent. Dig. tit. "Infants," § 119.

Business carried on with guardian's consent.— An infant is bound for necessaries to carry on the business in which he is employed by his guardian's consent. Watson *v.* Hensel, 7 Watts (Pa.) 344; Rundel *v.* Keeler, 7 Watts (Pa.) 237.

Where the law has intrusted a married infant with his estate, anything supplied for himself, his family, and his estate — as in the case at bar, plantation supplies — are necessaries. Chapman *v.* Hughes, 61 Miss. 339.

69. New Hampshire Mut. F. Ins. Co. *v.* Noyes, 32 N. H. 345.

70. Ryan *v.* Boltz, 48 N. Y. Super. Ct. 152; Johnson *v.* Lines, 6 Watts & S. (Pa.) 80, 40 Am. Dec. 542; Story *v.* Pery, 4 C. & P. 526, 19 E. C. L. 632; Cook *v.* Deaton, 3 C. & P. 114, 14 E. C. L. 478; Ford *v.* Fothergill, 1 Esp. 211, Peake 229, 3 Rev. Rep. 695. See also Brayshaw *v.* Eaton, 1 Arn. 466, 5 Bing. N. Cas. 231, 3 Jur. 222, 8 L. J. C. P. 153, 7 Scott 183, 35 E. C. L. 132.

Such inquiry is not a condition precedent to a recovery, but if the articles furnished are actually necessaries they may be recovered for, although no inquiry was made. Brayshaw *v.* Eaton, 1 Arn. 466, 5 Bing. N. Cas. 231, 3 Jur. 222, 8 L. J. C. P. 153, 7 Scott 183, 35 E. C. L. 132; Dalton *v.* Gibb,

although articles are of such a character that they might be necessaries if the infant was not supplied with them a recovery cannot be had for such articles furnished when the infant was already sufficiently supplied with such article or articles of a like character,[71] no matter by whom or how he was supplied[72] and regardless of whether or not the person supplying the articles knew of the existing supply.[73]

g. Where Infant Has an Allowance. It has been laid down that as a rule an infant who has an allowance from the court, his guardian, or any other source, of a sum sufficient to supply himself with necessaries suitable to his fortune and condition is not liable for necessaries supplied on credit;[74] and certainly when the infant has been supplied with money sufficient to supply him with necessaries the presumption is that he has been fully supplied from that fund and the burden is upon the person claiming for necessaries furnished on credit to rebut that presumption.[75]

h. Where Infant Has Parents or Guardian. As a rule the parent is liable for the support of his child,[76] and the guardian for the support of his ward.[77] Consequently, an infant living with his parents who provide him with everything that appears to be necessary and proper cannot bind himself to a stranger even for necessaries,[78] and where the parent has the ability and is willing to support his minor child, board, lodging, etc., furnished to such infant by another without the parent's consent is not a necessary for which the infant is liable.[79] But the mere fact that an infant has a father, mother, or guardian does not prevent his being bound to pay for what was actually necessary for him when furnished, if neither his parents nor guardian did anything toward his care or support.[80]

1 Arn. 463, 5 Bing. N. Cas. 198, 3 Jur. 43, 8 L. J. C. P. 151, 7 Scott 117, 35 E. C. L. 714.

71. *Georgia.*— Nicholson *v.* Wilborn, 13 Ga. 467.

Kentucky.— Beeler *v.* Young, 1 Bibb 519. See also De Moss *v.* Giltner, 5 Ky. L. Rep. 691.

Maryland.— Monumental Bldg. Assoc. No. 2 *v.* Herman, 33 Md. 128.

Massachusetts.— Trainer *v.* Trumbull, 141 Mass. 527, 6 N. E. 761.

Mississippi.— See Brent *v.* Williams, 79 Miss. 355, 30 So. 713.

Pennsylvania.— Johnson *v.* Lines, 6 Watts & S. 80, 40 Am. Dec. 542; Guthrie *v.* Murphy, 4 Watts 80, 28 Am. Dec. 681.

South Carolina.— Kraker *v.* Byrum, 13 Rich. 163, where infant supplied by guardian with what he thinks proper.

England.— Johnstone *v.* Marks, 19 Q. B. D. 509, 57 L. J. Q. B. 6, 35 Wkly. Rep. 806: Barnes *v.* Toye, 13 Q. B. D. 410, 48 J. P. 664, 53 L. J. Q. B. 567, 51 L. T. Rep. N. S. 292, 33 Wkly. Rep. 15 [*disapproving* Ryder *v.* Wombwell, L. R. 3 Exch. 90]; Steedman *v.* Rose, C. & M. 422, 41 E. C. L. 232; Burghart *v.* Angerstein, 6 C. & P. 690, 1 M. & Rob. 458, 25 E. C. L. 641; Cook *v.* Deaton, 3 C. & P. 114, 14 E. C. L. 478; Story *v.* Pery, 4 C. & P. 526, 19 E. C. L. 632.

Those first supplying necessaries have prior right to payment. Nicholson *v.* Wilborn, 13 Ga. 467.

72. Nicholson *v.* Wilborn, 13 Ga. 467.

73. Trainer *v.* Trumbull, 141 Mass. 527, 6 N. E. 761; Barnes *v.* Toye, 13 Q. B. D. 410, 48 J. P. 664, 53 L. J. Q. B. 567, 51 L. T. Rep. N. S. 292, 33 Wkly. Rep. 15 [*disapproving* Ryder *v.* Wombwell, L. R. 3 Exch. 90].

74. McKanna *v.* Merry, 61 Ill. 177; Rivers *v.* Gregg, 5 Rich. Eq. (S. C.) 274. See also Brent *v.* Williams, 79 Miss. 355, 30 So. 713. *Contra*, Burghart *v.* Hall, 4 M. & W. 727.

75. Nicholson *v.* Wilborn, 13 Ga. 467.

76. See PARENT AND CHILD.

77. See GUARDIAN AND WARD.

78. *Connecticut.*— Kline *v.* Beebe, 6 Conn. 494.

Massachusetts.— Hoyt *v.* Carey, 114 Mass. 397, 19 Am. Rep. 371; Angel *v.* McLellan, 16 Mass. 28, 8 Am. Dec. 118.

Missouri.— Perrin *v.* Wilson, 10 Mo. 451; Tharp *v.* Connelly, 48 Mo. App. 59.

New York.— Ryan *v.* Boltz, 48 N. Y. Super. Ct. 152; Wailing *v.* Toll, 9 Johns. 141. See also Kline *v.* L'Amoureux, 2 Paige 419.

North Carolina.— Smith *v.* Young, 19 N. C. 26.

Pennsylvania.—Guthrie *v.* Murphy, 4 Watts 80, 28 Am. Dec. 681.

Texas.— Parsons *v.* Keys, 43 Tex. 557.

England.—Bainbridge *v.* Pickering, 2 W. Bl. 1325.

Presumption.— The law presumes that a minor is supplied by his parents with necessaries, so long as the minor continues to live with them. Perrin *v.* Wilson, 10 Mo. 451; Jones *v.* Colvin, 1 McMull. (S. C.) 14. See also Edmunds *v.* Mister, 58 Miss. 765.

The parent's inability to pay for medical services to his infant child does not render the infant liable. Hoyt *v.* Casey, 114 Mass. 397, 19 Am. Rep. 371.

79. Murphy *v.* Holmes, 87 N. Y. App. Div. 366, 84 N. Y. Suppl. 806; Goodman *v.* Alexander, 28 N. Y. App. Div. 227, 50 N. Y. Suppl. 884.

80. Trainer *v.* Trumbull, 141 Mass. 527, 6 N. E. 761; Call *v.* Ward, 4 Watts & S. (Pa.) 118, 39 Am. Dec. 64. See also Giquel *v.* Daigre, 22 La. Ann. 137.

i. Loans and Advances For Necessaries.[81] It is a general rule that a loan of money is not a necessary, although the infant afterward purchases necessaries with it,[82] although it has been held that money furnished to an infant for the express purpose of purchasing necessaries may be recovered as for necessaries furnished.[83] But the courts recognize a difference between lending and paying, and hence an infant is held liable to a person who at his request pays a bill already contracted by the infant for necessaries, or advances him the money with which to pay it.[84] Such liability is, however, subject to the condition that the debt so paid must have been for a necessary,[85] and is not measured by the actual amount paid, but limited, irrespective of the contract price, to such sum as would be a reasonable compensation for the necessaries furnished.[86]

j. Necessaries of Wife and Family. The capacity of an infant husband to contract for necessaries is enlarged by his marriage, so that he will be bound for the reasonable value of necessaries for his wife and family as well as for himself.[87]

k. Question of Law and Fact. The question as to what are necessaries is a mixed one of law and fact;[88] it is a question for the court to decide whether certain subjects of expenditures are necessaries and what classes or general description of articles are necessaries;[89] and it is for the jury to determine whether the particular articles, etc., fall within any of these classes, and whether they were

81. Loans and advances generally see *supra*, V, B, 8.

82. Kilgore *v.* Rich, 83 Me. 305, 22 Atl. 176, 23 Am. St. Rep. 780, 12 L. R. A. 859. See also Beeler *v.* Young, 1 Bibb (Ky.) 519.

Infant liable in equity but not in law.— Price *v.* Sanders, 60 Ind. 310. See also Hickman *v.* Hall, 5 Litt. (Ky.) 338.

83. De Moss *v.* Giltner, 5 Ky. L. Rep. 691; Smith *v.* Oliphant, 2 Sandf. (N. Y.) 306, where money directly applied to the purchase of necessaries by the lender and under his directions.

84. *Maine.*— Kilgore *v.* Rich, 83 Me. 305, 22 Atl. 176, 23 Am. St. Rep. 780, 12 L. R. A. 859, stating reason for the rule.

Massachusetts.— Swift *v.* Bennett, 10 Cush. 436.

New Hampshire.— Conn *v.* Coburn, 7 N. H. 368, 26 Am. Dec. 746.

New York.— Randall *v.* Sweet, 1 Den. 460.

Oregon.— Burton *v.* Anthony, (1905) 79 Pac. 185.

England.— Clarke *v.* Leslie, 5 Esp. 28.

See 27 Cent. Dig. tit. "Infants," § 123.

Payment by surety on note.— If an infant purchases necessaries, and gives a promissory note signed by himself and a surety, and the surety afterward pays the note, he is entitled to recover of the infant the amount so paid. Conn *v.* Coburn, 7 N. H. 368, 26 Am. Dec. 746; Haine *v.* Tarrant, 2 Hill (S. C.) 400. But the surety cannot maintain an action against the infant for reimbursement during his infancy. Ayers *v.* Burns, 87 Ind. 245, 44 Am. Rep. 759.

85. See Turner *v.* Gaither, 83 N. C. 357, 35 Am. Rep. 574.

The redemption of land of an infant sold under foreclosure of a mortgage is not necessary to his sustenance, and hence money advanced for such redemption will not create a binding obligation. Burton *v.* Anthony, (Oreg. 1905) 79 Pac. 185.

Payment to relieve from military draft.— A plea of infancy is a good defense to an action to recover money paid at the request of the infant to relieve him from a draft for military duty. Dorrell *v.* Hastings, 28 Ind. 478.

Mortgage to pay off prior mortgage.— Where the property of an infant was mortgaged, and she raised money to take up the encumbrance and executed another mortgage to secure this new loan, this could not be considered as necessaries in contemplation of law. Magee *v.* Welsh, 18 Cal. 155.

86. Kilgore *v.* Rich, 83 Me. 305, 22 Atl. 176, 23 Am. St. Rep. 780, 12 L. R. A. 859; Swift *v.* Bennett, 10 Cush. (Mass.) 436. See also Beeler *v.* Young, 1 Bibb (Ky.) 519. See *infra*, V, B, 9, m.

87. *Arkansas.*— Cooper *v.* State, 37 Ark. 421.

Delaware.— Cantine *v.* Phillips, 5 Harr. 428.

Georgia.— See Bush *v.* Lindsey, 14 Ga. 687.

Indiana.— Price *v.* Sanders, 60 Ind. 310.

Kentucky.— Beeler *v.* Young, 1 Bibb 519.

Mississippi.— Chapman *v.* Hughes, 61 Miss. 339.

Texas.— Peck *v.* Cain, 27 Tex. Civ. App. 38, 63 S. W. 177.

See 27 Cent. Dig. tit. "Infants," § 124.

Necessaries furnished infant wife before marriage.— If an account is for necessaries furnished for the wife while an infant, she would be clearly liable if sole, and the husband equally liable during coverture, without regard to his own infancy. Cole *v.* Seeley, 25 Vt. 220, 60 Am. Dec. 258.

88. Cobbey *v.* Buchanan, 48 Nebr. 391, 67 N. W. 176; Johnson *v.* Lines, 6 Watts & S. (Pa.) 80, 40 Am. Dec. 542; Melton *v.* Katzenstein, (Tex. Civ. App. 1899) 49 S. W. 173; Ryder *v.* Wombwell, L. R. 4 Exch. 32, 38 L. J. Exch. 8, 19 L. T. Rep. N. S. 491, 17 Wkly. Rep. 167.

89. *Illinois.*— McKanna *v.* Merry, 61 Ill. 177.

Indiana.— Garr *v.* Haskett, 86 Ind. 373.

Kentucky.— Beeler *v.* Young, 1 Bibb 519.

actually necessary and suitable to the estate and condition of the infant, and were furnished under such circumstances as to authorize a recovery.[90] The quantity, quality, and value of what was furnished is of course a question for the jury.[91]

l. Burden of Proof. The person seeking to recover for articles furnished to an infant on the ground that they were necessaries has the burden of proving that the articles were in their nature necessaries suitable to the infant to whom they were supplied and were actually needed by the infant,[92] and it has been held that they or the money therefor were not supplied by the parent, guardian, or others.[93]

m. Amount of Recovery. The recovery for necessaries furnished to an infant is limited to their fair and reasonable value, and the price or amount agreed to be paid for them does not, if it exceeds such value, fix the measure of recovery.[94] It has been said that an infant has no power to incur a debt exceeding his income even for necessaries.[95]

10. Releases. A release by an infant is not binding upon him but is voidable,[96] and if such release is repudiated by the infant it cannot be interposed or

Massachusetts.— Merriam *v.* Cunningham, 11 Cush. 40.

Mississippi.— Decell *v.* Lewenthal, 57 Miss. 331, 34 Am. Rep. 449.

South Carolina.— Glover *v.* Ott, 1 McCord 572.

England.— Ryder *v.* Wombwell, L. R. 4 Exch. 32, 38 L. J. Exch. 8, 19 L. T. Rep. N. S. 491, 17 Wkly. Rep. 167.

See 27 Cent. Dig. tit. "Infants," § 127.

90. *Connecticut.*— Stanton *v.* Willson, 3 Day 37, 3 Am. Dec. 255.

Illinois.— McKanna *v.* Merry, 61 Ill. 177.

Indiana.— Garr *v.* Haskett, 86 Ind. 373.

Kentucky.— Bonney *v.* Reardin, 6 Bush 34; Beeler *v.* Young, 1 Bibb 519.

Massachusetts.— Davis *v.* Caldwell, 12 Cush. 512; Merriam *v.* Cunningham, 11 Cush. 40; Swift *v.* Bennett, 10 Cush. 436.

Michigan.— Lynch *v.* Johnson, 109 Mich. 640, 67 N. W. 908.

Mississippi.— Decell *v.* Lewenthal, 57 Miss. 331, 34 Am. Rep. 449.

Nebraska.— Cobbey *v.* Buchanan, 48 Nebr. 391, 67 N. W. 176.

South Carolina.— Glover *v.* Ott, 1 McCord 572.

Vermont.— Bent *v.* Manning, 10 Vt. 225.

England.— Peters *v.* Fleming, 9 L. J. Exch. 81, 6 M. & W. 42; Maddox *v.* Miller, 1 M. & S. 738, 14 Rev. Rep. 565; Lowe *v.* Griffiths, 1 Hodges 30, 4 L. J. C. P. 94, 1 Scott 458.

See 27 Cent. Dig. tit. "Infants," § 127.

Where supply grossly excessive.— Johnson *v.* Lines, 6 Watts & S. (Pa.) 80, 40 Am. Dec. 542.

91. Henderson *v.* Fox, 5 Ind. 489.

92. *Maryland.*— Monumental Bldg. Assoc. No. 2 *v.* Herman, 33 Md. 128.

Michigan.— Wood *v.* Losey, 50 Mich. 475, 15 N. W. 557.

Mississippi.— Brent *v.* Williams, 79 Miss. 355, 30 So. 713; Edmunds *v.* Mister, 58 Miss. 765; Decell *v.* Lewenthal, 57 Miss. 331, 34 Am. Rep. 449.

Missouri.— Perrin *v.* Wilson, 10 Mo. 451.

New York.— Gray *v.* Sands, 66 N. Y. App. Div. 572, 73 N. Y. Suppl. 322; Shaw *v.* Bryant, 65 Hun 57, 19 N. Y. Suppl. 618; Kline *v.* L'Amoureux, 2 Paige 419, 22 Am. Dec. 652; Miller *v.* Young, 27 Alb. L. J. 225.

Pennsylvania.— Johnson *v.* Lines, 6 Watts & S. 80, 40 Am. Dec. 542.

Vermont.— Thrall *v.* Wright, 38 Vt. 494.

England.— Ryder *v.* Wombwell, L. R. 4 Exch. 32, 38 L. J. Exch. 8, 19 L. T. Rep. N. S. 491, 17 Wkly. Rep. 167; Ford *v.* Fothergill, 1 Esp. 211, Peake 229, 3 Rev. Rep. 695; Mortara *v.* Hall, 4 L. J. Ch. 53, 6 Sim. 465, 9 Eng. Ch. 465, 58 Eng. Reprint 668.

See 27 Cent. Dig. tit. "Infants," § 126.

Admissibility of evidence.— See Swift *v.* Bennett, 10 Cush. (Mass.) 436.

93. Murphy *v.* Holmes, 87 N. Y. App. Div. 366, 84 N. Y. Suppl. 806; Brent *v.* Williams, 79 Miss. 355, 30 So. 713. *Contra,* Parsons *v.* Keys, 43 Tex. 557, burden of proving that he was supplied devolves on infant.

94. *Alabama.*— Flexner *v.* Dickerson, 72 Ala. 318.

Arkansas.— Cooper *v.* State, 37 Ark. 421; Guthrie *v.* Morris, 22 Ark. 411.

Connecticut.— Gregory *v.* Lee, 64 Conn. 407, 30 Atl. 53, 25 L. R. A. 618; Barnes *v.* Barnes, 50 Conn. 572.

Illinois.— Morton *v.* Steward, 5 Ill. App. 533.

Kentucky.— Beeler *v.* Young, 1 Bibb 519.

Massachusetts.— Trainer *v.* Trumbull, 141 Mass. 527, 6 N. E. 761; Earle *v.* Reed, 10 Metc. 387.

New Hampshire.— Locke *v.* Smith, 41 N. H. 346. See also Kimball *v.* Bruce, 58 N. H. 327.

New York.— Petrie *v.* Williams, 68 Hun 589, 23 N. Y. Suppl. 237; Baum *v.* Stone, 12 N. Y. Wkly. Dig. 353.

Texas.— Askey *v.* Williams, 74 Tex. 294, 11 S. W. 1101, 5 L. R. A. 176; Parsons *v.* Keys, 43 Tex. 557; Peck *v.* Cain, 27 Tex. Civ. App. 38, 63 S. W. 177. See also Smith *v.* Crohn, (Civ. App. 1896) 37 S. W. 469; McMinn *v.* Richmonds, 6 Yerg. 9.

United States.— Hyer *v.* Hyatt, 12 Fed. Cas. No. 6,977, 3 Cranch C. C. 276.

See 27 Cent. Dig. tit. "Infants," § 125.

95. State *v.* Cook, 34 N. C. 67 [*followed* in Hussey *v.* Roundtree, 44 N. C. 110].

96. *Alabama.*— Wilson *v.* Judge Pike County Ct., 18 Ala. 757.

Massachusetts.— Baker *v.* Lovett, 6 Mass. 78, 4 Am. Dec. 88.

insisted upon in bar of his rights.[97] And following the general rule with regard to contracts by infants such a release is not void but only voidable.[98]

11. SERVICES. An infant may enter into a contract for the performance of labor or personal services,[99] and although such contract is not binding upon him, but voidable at his election,[1] it is not void,[2] and cannot be avoided by the other party,[3] but the infant may recover the wages due him under the contract.[4] There are a few cases which hold an infant's contract of employment binding on him, on the ground that it is clearly beneficial to him.[5]

Missouri.— Horine *v.* Horine, 11 Mo. 649.

New York.— Palmer *v.* Conant, 58 Hun 333, 11 N. Y. Suppl. 917 [*affirmed* in 128 N. Y. 577, 28 N. E. 250].

Vermont.— See Walker *v.* Ferrin, 4 Vt. 523, even though the guardian *ad litem* joins therein.

United States.— Gilkinson *v.* Miller, 74 Fed. 131.

See 27 Cent. Dig. tit. "Infants," § 108.

The mere fact of infancy is not sufficient to avoid a release; if such instrument is executed upon a *bona fide* and sufficient satisfaction of a debt due him it is binding. Walker *v.* Ferrin, 4 Vt. 523.

97. Wilson *v.* Judge Pike County Ct., 18 Ala. 757.

98. Horine *v.* Horine, 11 Mo. 649. But *compare* Langford *v.* Frey, 8 Humphr. (Tenn.) 443.

Third person cannot object to release. Horine *v.* Horine, 11 Mo. 649.

99. Monaghan *v.* School Dist. No. 1, 38 Wis. 100, with the assent of his father.

1. *Alabama.*— Langham *v.* State, 55 Ala. 114.

Indiana.— Dallas *v.* Hollingsworth, 3 Ind. 537; Purviance *v.* Schultz, 16 Ind. App. 94, 44 N. E. 766.

Maine.— Vehue *v.* Pinkham, 60 Me. 142; Judkins *v.* Walker, 17 Me. 38, 35 Am. Dec. 229.

Massachusetts.— Dube *v.* Beaudry, 150 Mass. 448, 23 N. E. 222, 15 Am. St. Rep. 228, 6 L. R. A. 146; Gaffney *v.* Hayden, 110 Mass. 137, 14 Am. Rep. 580.

North Carolina.— Francis *v.* Felmit, 20 N. C. 637.

Rhode Island.— Dearden *v.* Adams, 19 R. I. 217, 36 Atl. 3.

Wisconsin.— Davies *v.* Turton, 13 Wis. 185.

United States.— Burdett *v.* Williams, 30 Fed. 697; The Hotspur, 12 Fed. Cas. No. 6,720, 3 Sawy. 194.

Canada.— Rutherford *v.* Purdy, 21 Nova Scotia 43.

See 27 Cent. Dig. tit. "Infants," § 112.

The minor may quit service before the expiration of his contract term. Ray *v.* Haines, 52 Ill. 485.

A contract not to quit work without a specified notice is not binding upon the infant. Danville *v.* Amoskeag Mfg. Co., 62 N. H. 133 (agreement to forfeit wages due if notice not given); Dearden *v.* Adams, 19 R. I. 217, 36 Atl. 3.

Consent of "guardian."—See Hand *v.* West, 28 La. Ann. 145.

A contract to work for support and schooling is for necessaries and hence binding. Wilhelm *v.* Hardman, 13 Md. 140.

Having received an order in payment does not prevent an infant from avoiding a contract for services on coming of age. Abell *v.* Warren, 4 Vt. 149.

Recovery on avoidance of contract for services see *infra*, V, F, 6, c.

2. Purviance *v.* Schultz, 16 Ind. App. 94, 46 N. E. 766; Ping Min., etc., Co. *v.* Grant, 68 Kan. 732, 75 Pac. 1044.

The lack of the parent's previous consent does not render a contract of hiring and service between an infant and a third person inoperative and void on the part of the infant, but it will remain binding until avoided by the infant or until the parent asserts his paramount right to put an end to it by reclaiming his minor child. Nashville, etc., R. Co. *v.* Elliott, 1 Coldw. (Tenn.) 611, 78 Am. Dec. 506. See also Ping Min., etc., Co. *v.* Grant, 68 Kan. 732, 75 Pac. 1044.

3. Davis *v.* Turton, 13 Wis. 185. See also Gates *v.* Davenport, 29 Barb. (N. Y.) 160.

4. *Massachusetts.*—Corey *v.* Corey, 19 Pick. 29, 31 Am. Dec. 117.

Minnesota.— Schoonover *v.* Sparrow, 38 Minn. 393, 37 N. W. 949.

New York.— Gates *v.* Davenport, 29 Barb. 160; Burlingame *v.* Burlingame, 7 Cow. 92.

Vermont.— Oaks *v.* Oaks, 27 Vt. 410.

Wisconsin.— Davis *v.* Turton, 13 Wis. 185.

See 27 Cent. Dig. tit. "Infants," § 112.

Implied promise to pay for services.— See Lockwood *v.* Robbins, 125 Ind. 398, 25 N. E. 455. See also Mountain *v.* Fisher, 22 Wis. 93.

Emancipated minor.— Beyond the rule that payments to an infant should be scrutinized more narrowly, and with the exception of overreaching bargains, the right of an emancipated minor to receive compensation for labor performed by him pursuant to his own contract, express or implied, rests upon the same principles as that of an adult. Waugh *v.* Emerson, 79 Ala. 295.

Assignment of claim for wages.—See O'Neil *v.* Chicago, etc., R. Co., 33 Minn. 489, 24 N. W. 192. See also Taylor *v.* Hill, 115 Cal. 143, 44 Pac. 336, 46 Pac. 922.

Where the services are rendered as a member of the family of the person to whom they are rendered and with whom the infant resides the infant cannot recover therefor in the absence of an express contract. Smith *v.* Johnson, 45 Iowa 308; Mountain *v.* Fisher, 22 Wis. 93. See also Lockwood *v.* Robbins, 125 Ind. 398, 25 N. E. 455. But *compare* Gardner *v.* Board, 27 Ind. 323. See, generally, PARENT AND CHILD.

5. And consequently his agreement not to engage in the business which he has learned

12. **Submission to Arbitration.** An infant cannot submit a dispute to arbitration,[6] and an award under such a submission is not binding on either party,[7] even though the award is in favor of the infant[8] and the submission was under an order of court.[9]

13. **Subscription to Corporate Stock.** An infant may avoid his contract of subscription to the stock of a corporation.[10]

14. **Suretyship.** An infant's contract of suretyship or execution of an instrument as surety for another is not binding upon him,[11] and while such an undertaking is usually held voidable only[12] it has been held void as a contract against the infant's interest.[13]

15. **Warranty.** An infant is not bound by a warranty made by him.[14]

C. Liability of Infant Husband For Antenuptial Debts of Wife. The liability of a husband for the debts of his wife, contracted before the marriage, is not affected by the fact that he is an infant.[15]

D. Liability of Infants For Interest. There is no general rule exempting infants from the payment of interest on amounts due by them.[16]

E. Ratification of Contracts — 1. Power to Ratify.[17] The contracts, undertakings, etc., of an infant being as a rule merely voidable and not void,[18] it follows that they are capable of being made binding by ratification.[19] An infant may

in such employment in a certain place within a certain time after the employment terminates is enforceable against him. Harbison *v.* Mawhinney, 8 Pa. Dist. 697; Fellows *v.* Wood, 52 J. P. 822, 59 L. T. Rep. N. S. 513 [*followed* in Evans *v.* Warr, [1892] 3 Ch. 502, 62 L. J. Ch. 256, 67 L. T. Rep. N. S. 285, 3 Reports 32 (*explaining* De Francesco *v.* Barnum, 43 Ch. D. 165, 54 J. P. 420, 59 L. J. Ch. 151, 62 L. T. Rep. N. S. 40, 38 Wkly. Rep. 187)].

6. *Georgia.*— Jones *v.* Payne, 41 Ga. 23.

Massachusetts.— Baker *v.* Lovett, 6 Mass. 78, 4 Am. Dec. 88.

Mississippi.— Handy *v.* Cobb, 44 Miss. 699.

New York.— Lathers *v.* Fish, 4 Lans. 213, either by himself or by guardian.

North Carolina.— Millsaps *v.* Estes, 134 N. C. 486, 46 S. E. 988, neither infant himself nor next friend or attorney for him can submit.

Texas.— Chambers *v.* Ker, 6 Tex. Civ. App. 373, 24 S. W. 1118.

Virginia.— Britton *v.* Williams, 6 Munf. 453.

See 27 Cent. Dig. tit. "Infants," § 102.

The infant's want of capacity cannot be cured by the subsequent appointment of a guardian *ad litem* by the arbitrators, nor even by the chancellor, unless there be a suit pending to which the infant is a party and the submission be under an order of the court. Jones *v.* Payne, 41 Ga. 23.

Submission of controversy to court.— See Fisher *v.* Stilson, 9 Abb. Pr. (N. Y.) 33.

7. Baker *v.* Lovett, 6 Mass. 78, 4 Am. Dec. 88; Britton *v.* Williams, 6 Munf. (Va.) 455.

Submission and judgment thereon void.— Millsaps *v.* Estes, 134 N. C. 486, 46 S. E. 988. *Contra*, Chambers *v.* Ker, 6 Tex. Civ. App. 373, 24 S. W. 1118, holding the submission and award voidable only.

8. Britton *v.* Williams, 6 Munf. (Va.) 453.

9. Britton *v.* Williams, 6 Munf. (Va.) 453. But see Jones *v.* Payne, 41 Ga. 23.

10. White *v.* New Bedford Cotton Waste Corp., 178 Mass. 20, 59 N. E. 642.

11. *Connecticut.*— Maples *v.* Wightman, 4 Conn. 376, 10 Am. Dec. 149.

Indiana.— Fetrow *v.* Wiseman, 40 Ind. 148.

Kentucky.— Wills *v.* Evans, 38 S. W. 1090, 18 Ky. L. Rep. 1067.

Massachusetts.— Owen *v.* Long, 112 Mass. 403.

Ohio.— Harner *v.* Dipple, 31 Ohio 72, 27 Am. Rep. 496.

South Carolina.— State *v.* Satterwhite, 20 S. C. 536.

Virginia.— Allen *v.* Minor, 2 Call 70.

See 27 Cent. Dig. tit. "Infants," § 106.

12. *Indiana.*— Fetrow *v.* Wiseman, 40 Ind. 148.

Massachusetts.— Owen *v.* Long, 112 Mass. 403.

Ohio.— Harner *v.* Dipple, 31 Ohio St. 72, 27 Am. Rep. 496.

South Carolina.— State *v.* Satterwhite, 20 S. C. 536. See also Williams *v.* Harrison, 11 S. C. 412.

Vermont.— Reed *v.* Lane, 61 Vt. 481, 17 Atl. 796, indorsement on writ as bail and surety for appearance of defendant named therein.

See 27 Cent. Dig. tit. "Infants," § 106.

13. West *v.* Penny, 16 Ala. 186; Maples *v.* Wightman, 4 Conn. 376, 10 Am. Dec. 149.

14. Morrill *v.* Aden, 19 Vt. 505; Howlett *v.* Haswell, 4 Campb. 118; Green *v.* Greenbank, 2 Marsh. 485, 4 E. C. L. 496, 17 Rev. Rep. 529.

15. Butler *v.* Breck, 7 Metc. (Mass.) 164, 39 Am. Dec. 768; Roach *v.* Quick, 9 Wend. (N. Y.) 238.

16. Bradley *v.* Pratt, 23 Vt. 378 [*overruling* Holden *v.* Pike, 14 Vt. 405, 39 Am. Dec. 228].

17. As to transactions affecting property see *supra*, IV, D, 1.

18. See *supra*, V, A, 2.

19. *Alabama.*— Flexner *v.* Dickerson, 72 Ala. 318; Shropshire *v.* Burns, 46 Ala. 108;

also, after coming of age, affirm a contract or settlement made for his benefit and may sue upon it as if he were originally a party to it.[20] The infant cannot, however, split up an entire contract and ratify so much thereof as he considers to his advantage and avoid the balance, or hold the other party to what he contracted, while the infant escapes his own obligation, but the contract must be ratified or avoided as a whole.[21]

2. Time For Ratification[22] — a. After Arrival of Majority. The time for the ratification of the contract or undertaking of an infant is after his arrival at majority;[23] prior to that time the rule that precludes his binding himself by his

Clark *v.* Goddard, 39 Ala. 164, 84 Am. Dec. 777; Slaughter *v.* Cunningham, 24 Ala. 260, 60 Am. Dec. 463; West *v.* Penny, 16 Ala. 186; Thomasson *v.* Boyd, 13 Ala. 419; Fant *v.* Cathcart, 8 Ala. 725; Freeman *v.* Bradford, 5 Port. 270.

Arkansas.— Vaughan *v.* Parr, 20 Ark. 600.

California.— Wall *v.* Mines, 130 Cal. 27, 62 Pac. 386.

Indiana.— Fetrow *v.* Wiseman, 40 Ind. 148; Conaway *v.* Shelton, 3 Ind. 334; Heady *v.* Boden, 4 Ind. App. 475, 30 N. E. 1119.

Louisiana.— Taylor *v.* Rundell, 2 La. Ann. 367.

Maryland.— Monumental Bldg. Assoc. No. 2 *v.* Herman, 33 Md. 128.

Massachusetts.— Owen *v.* Long, 112 Mass. 403; Kennedy *v.* Doyle, 10 Allen 161.

Mississippi.— Edmunds *v.* Mister, 58 Miss. 765.

Missouri.— Highley *v.* Barron, 49 Mo. 103.

New Hampshire.— New Hampshire Mut. F. Ins. Co. *v.* Noyes, 32 N. H. 345; Wright *v.* Steel, 2 N. H. 51.

New York.— Pecararo *v.* Pecararo, 84 N. Y. Suppl. 581; Goodsell *v.* Myers, 3 Wend. 479.

Ohio.— Harner *v.* Dipple, 31 Ohio St. 72, 27 Am. Rep. 496.

South Carolina.— State *v.* Satterwhite, 20 S. C. 536; Williams *v.* Harrison, 11 S. C. 412; Little *v.* Duncan, 9 Rich. 55, 64 Am. Dec. 700; Counts *v.* Bates, Harp. 464.

Texas.— Means *v.* Robinson, 7 Tex. 502.

Vermont.— Person *v.* Chase, 37 Vt. 647, 88 Am. Dec. 630.

Wisconsin.— Stokes *v.* Brown, 3 Pinn. 311, 4 Chandl. 39.

United States.— Hyer *v.* Hyatt, 12 Fed. Cas. No. 6,977, 3 Cranch C. C. 276.

England.— Viditz *v.* O'Hagan, [1899] 2 Ch. 569, 68 L. J. Ch. 553, 80 L. T. Rep. N. S. 794, 47 Wkly. Rep. 571; Kay *v.* Smith, 21 Beav. 522, 52 Eng. Reprint 961; Williams *v.* Moor, 2 Dowl. P. C. N. S. 993, 7 Jur. 817, 12 L. J. Exch. 253, 11 M. & W. 256; Harmer *v.* Killing, 5 Esp. 102; Cole *v.* Saxby, 3 Esp. 159.

See 27 Cent. Dig. tit. "Infants," § 137.

The appointment of an agent or attorney by an infant being void the infant cannot upon arrival at legal age ratify the acts of such attorney. Wainwright *v.* Wilkinson, 62 Md. 146; Armitage *v.* Widoe, 36 Mich. 124.

An administrator may ratify a contract of his intestate made during his infancy, although he died before attaining majority. Shropshire *v.* Burns, 46 Ala. 108; Jefford *v.* Ringgold, 6 Ala. 544. But see Counts *v.* Bates, Harp. (S. C.) 464. And acts which if done by the infant would have amounted to a ratification will be a ratification if done by the administrator. Shropshire *v.* Burns, *supra*.

20. Ward *v.* The Little Red, 8 Mo. 358; Glover *v.* Patten, 165 U. S. 394, 17 S. Ct. 411, 41 L. ed. 760.

An infant may affirm a contract irregularly made in his behalf. Bailey *v.* Boyce, 5 Rich. Eq. (S. C.) 187.

21. *Illinois.*— Biederman *v.* O'Connor, 117 Ill. 493, 7 N. E. 463, 57 Am. Rep. 876.

Kentucky.— Lowry *v.* Drake, 1 Dana 46.

Louisiana.— State *v.* New Orleans, 105 La. 768, 30 So. 97.

Maine.— Robinson *v.* Berry, 93 Me. 320, 45 Atl. 34.

Nebraska.— Philpot *v.* Sandwich Mfg. Co., 18 Nebr. 54, 24 N. W. 428.

New York.— Pecararo *v.* Pecararo, 84 N. Y. Suppl. 581.

Vermont.— Morrill *v.* Aden, 19 Vt. 505.

See 27 Cent. Dig. tit. "Infants," § 137.

22. As to transactions affecting property see *supra*, IV, D, 2.

23. *Alabama.*— Shropshire *v.* Burns, 46 Ala. 108; West *v.* Penny, 16 Ala. 186; Thomasson *v.* Boyd, 13 Ala. 419; Fant *v.* Cathcart, 8 Ala. 725.

Arkansas.— Vaughan *v.* Parr, 20 Ark. 600.

Indiana.— Fetrow *v.* Wiseman, 40 Ind. 148.

Louisiana.— Taylor *v.* Rundell, 2 La. Ann. 367.

Maryland.—Monumental Bldg. Assoc. No. 2 *v.* Herman, 33 Md. 128.

Massachusetts.— Owen *v.* Long, 112 Mass. 403.

Mississippi.— Edmunds *v.* Mister, 58 Miss. 765.

Missouri.— Highley *v.* Barron, 49 Mo. 103.

New Hampshire.— Merriam *v.* Wilkins, 6 N. H. 432, 25 Am. Dec. 472.

New York.— Henry *v.* Root, 33 N. Y. 526.

North Carolina.— Petty *v.* Rousseau, 94 N. C. 355; Turner *v.* Gaither, 83 N. C. 357, 35 Am. Rep. 574.

Ohio.— Harner *v.* Dipple, 31 Ohio St. 72, 27 Am. Rep. 496.

South Carolina.— State *v.* Satterwhite, 20 S. C. 536; Williams *v.* Harrison, 11 S. C. 412; Norris *v.* Vance, 3 Rich. 164; Ordinary *v.* Wherry, 1 Bailey 28.

United States.— Hyer *v.* Hyatt, 12 Fed. Cas. No. 6,977, 3 Cranch C. C. 276.

England.— Viditz *v.* O'Hagan, [1899] 2 Ch. 569, 68 L. J. Ch. 553, 80 L. T. Rep. N. S.

contracts also precludes him from binding himself by any subsequent ratification thereof.[24]

b. Ratification After Commencement of Action. It has been held that as the executory contract of an infant gives no cause of action against him until it is ratified,[25] a new promise or ratification made after the commencement of an action against him will not support that action.[26]

3. Necessity of Ratification.[27] Whether, when an infant arrives at full age, it is necessary that he should do any act to avoid or affirm a contract made under age in order to render it nugatory or binding is a question upon which there are contradictory authorities.[28] But the better supported rule appears to be that the executory contracts of an infant are voidable, as distinguished from void, only in the sense that they are, while *prima facie* void, susceptible of ratification, and hence they must be ratified after his arrival at age in order to become obligatory upon him;[29] while the executed contracts of an infant are voidable only in the sense that, while *prima facie* valid and binding, they may be avoided, and hence no ratification is necessary in order that he may be bound by contracts of such a character.[30]

4. Requisites to Valid Ratification — a. Ratification Must Be Voluntary. The acts, declarations, or promises relied upon to show ratification must have been voluntary, and not under terror of arrest or any other kind of duress.[31]

794, 47 Wkly. Rep. 571; Williams *v.* Moor, 2 Dowl. P. C. N. S. 993, 7 Jur. 817, 12 L. J. Exch. 253, 11 M. & W. 256; Thrupp *v.* Filder, 2 Esp. 628.

See 27 Cent. Dig. tit. "Infants," § 138.

24. Dunton *v.* Brown, 31 Mich. 182; Minock *v.* Shortridge, 21 Mich. 304; Stack *v.* Cavanaugh, 67 N. H. 149, 30 Atl. 350; Stern *v.* Meikleham, 56 Hun (N. Y.) 475, 10 N. Y. Suppl. 216; Sanger *v.* Hibbard, 104 Fed. 455, 43 C. C. A. 635.

The ratification during infancy is voidable as well as the contract. Stack *v.* Cavanaugh, 67 N. H. 149, 30 Atl. 350.

25. See *infra*, V, E, 3.

26. *Maine.*— Thing *v.* Libbey, 16 Me. 55.

Massachusetts.— Ford *v.* Phillips, 1 Pick. 202, promise made after writ was in officer's hand but before service.

New Hampshire.— Hale *v.* Gerrish, 8 N. H. 374 (where infancy has been pleaded); Merriam *v.* Wilkins, 6 N. H. 432, 25 Am. Dec. 472. *Contra*, Wright *v.* Steele, 2 N. H. 51.

United States.—Hyer *v.* Hyatt, 12 Fed. Cas. No. 6,977, 3 Cranch C. C. 276.

England.— Thornton *v.* Illingworth, 2 B. & C. 824, 4 D. & R. 545, 2 L. J. K. B. O. S. 175, 9 E. C. L. 356.

See 27 Cent. Dig. tit. "Infants," § 138.

Contra.— Best *v.* Givens, 3 B. Mon. (Ky.) 72 (confirmation sufficient to avoid plea of infancy and sustain action); Snyder *v.* Gericke, 101 Mo. App. 647, 74 S. W. 377.

The promise cannot relate back so as to make the original contract a good foundation for an action from the beginning. Merriam *v.* Wilkins, 6 N. H. 432, 25 Am. Dec. 472.

27. As to transactions affecting property see *supra*, IV, D, 3.

28. Farr *v.* Sumner, 12 Vt. 28, 36 Am. Dec. 327.

29. *Arkansas.*— Savage *v.* Lichlyter, 59 Ark. 1, 26 S. W. 12.

Illinois.— Morton *v.* Steward, 5 Ill. App. 533.

Maryland.— Brawner *v.* Franklin, 4 Gill 463.

Michigan.— Minock *v.* Shortridge, 21 Mich. 304.

Mississippi.— Edmunds *v.* Mister, 58 Miss. 765.

New Hampshire.— Edgerly *v.* Shaw, 25 N. H. 514, 57 Am. Dec. 349; Merriam *v.* Wilkins, 6 N. H. 432, 25 Am. Dec. 472.

New York.— Henry *v.* Root, 33 N. Y. 526; Roof *v.* Stafford, 7 Cow. 179 [*reversed* on other grounds in 9 Cow. 626].

Pennsylvania.— Curtin *v.* Patton, 11 Serg. & R. 305.

South Carolina.— Lester *v.* Frazer, 2 Hill Eq. 529.

Texas.— Munk *v.* Weidner, 9 Tex. Civ. App. 491, 29 S. W. 409.

England.— Thornton *v.* Illingworth, 2 B. & C. 824, 4 D. & R. 545, 2 L. J. K. B. O. S. 175, 9 E. C. L. 356.

See 27 Cent. Dig. tit. "Infants," § 99.

30. See Viditz *v.* Hagan, [1899] 2 Ch. 569, 68 L. J. Ch. 553, 80 L. T. Rep. N. S. 794, 47 Wkly. Rep. 571. *Compare* Carrell *v.* Potter, 23 Mich. 377. And see *infra*, V, F, 3.

31. *Colorado.*— Kendrick *v.* Neisz, 17 Colo. 506, 30 Pac. 245.

Massachusetts.— Ford *v.* Phillips, 1 Pick. 202.

Mississippi.— Edmunds *v.* Mister, 58 Miss. 765.

North Carolina.— Petty *v.* Rousseau, 94 N. C. 355; Turner *v.* Gaither, 83 N. C. 357, 35 Am. Rep. 574; Dunlap *v.* Hales, 47 N. C. 381.

Tennessee.— Reed *v.* Boshears, 4 Sneed 118.

Vermont.— Hatch *v.* Hatch, 60 Vt. 160, 13 Atl. 791.

England.— Harmer *v.* Killing, 5 Esp. 102.

See 27 Cent. Dig. tit. "Infants," § 142.

A threat of suit if payment be not made is

b. New Consideration. No new consideration is necessary for the late infant's ratification of his contract made during infancy.[32]

c. Whether Writing Necessary. Under some statutes the ratification of an infant's contract must be in writing,[33] but in the absence of such a statutory requirement the ratification may be oral as well as written.[34]

d. Knowledge of Non-Liability. The better considered rule appears to be that as the late infant must be presumed to know his legal rights,[35] it is not necessary to a ratification of his contract made during infancy that the act or promise relied on should have been done or made with actual knowledge that he was not bound;[36] but there are many cases asserting the contrary, although these assertions are mostly in the form of *dicta*.[37]

5. Conditional Ratification. A ratification may be absolute or conditional,[38] and if it be the latter the terms of the condition must be shown to have happened or been complied with before an action can be sustained.[39]

not such duress as to invalidate a promise to pay made after majority. Bestor *v.* Hickey, 71 Conn. 181, 41 Atl. 555. *Contra*, McCormick *v.* Walker, 15 Fed. Cas. No. 8,728, 1 Hayw. & H. 86.

32. *Alabama.*— Baker *v.* Gregory, 28 Ala. 544, 65 Am. Dec. 366.

Colorado.— Kendrick *v.* Neisz, 17 Colo. 506, 30 Pac. 245.

Maine.— Thompson *v.* Linscott, 2 Me. 186, 11 Am. Dec. 57.

Mississippi.— Edmunds *v.* Mister, 58 Miss. 765.

New York.— Hodges *v.* Hunt, 22 Barb. 150.

England.— Kay *v.* Smith, 21 Beav. 522, 52 Eng. Reprint 961.

See 27 Cent. Dig. tit. "Infants," § 146.

The moral obligation is a sufficient consideration to support the new undertaking. Cheshire *v.* Barrett, 4 McCord (S. C.) 241, 17 Am. Dec. 735.

33. *Kentucky.*— Stern *v.* Freeman, 4 Metc. 309.

Maine.— Thurlow *v.* Gilmore, 40 Me. 378.

Mississippi.— Edmunds *v.* Mister, 58 Miss. 765.

Missouri.— Koerner *v.* Wilkinson, (App. 1902) 70 S. W. 509.

Virginia.— Ward *v.* Scherer, 96 Va. 318, 31 S. E. 518.

See 27 Cent. Dig. tit. "Infants," § 143.

Ky. Rev. St. c. 22, § 1, is explained in Stern *v.* Freeman, 4 Metc. (Ky.) 309.

A ratification of an unspecified "open account" will not found an action on a bond for a different amount. Ward *v.* Scherer, 96 Va. 318, 31 S. E. 518.

Sufficiency of writing.— Bird *v.* Swain, 79 Me. 529, 11 Atl. 421.

34. West *v.* Penny, 16 Ala. 186; Vaughan *v.* Parr, 20 Ark. 600; Kendrick *v.* Neisz, 17 Colo. 506, 30 Pac. 245; Halsey *v.* Reid, 4 Hun (N. Y.) 777.

35. Bestor *v.* Hickey, 71 Conn. 181, 41 Atl. 555; Taft *v.* Sergeant, 18 Barb. (N. Y.) 320; Hatch *v.* Hatch, 60 Vt. 160, 13 Atl. 791.

36. *Alabama.*— American Mortg. Co. *v.* Wright, 101 Ala. 658, 14 So. 399.

Connecticut.— Bestor *v.* Hickey, 71 Conn. 181, 41 Atl. 555.

Massachusetts.— Morse *v.* Wheeler, 4 Allen 570.

Missouri.— Ring *v.* Jamison, 2 Mo. App. 584 [*affirmed* in 66 Mo. 424].

Ohio.— Anderson *v.* Soward, 40 Ohio St. 325, 48 Am. Rep. 687.

See 27 Cent. Dig. tit. "Infants," § 142.

37. *Indiana.*— Ogborn *v.* Hoffman, 52 Ind. 439.

Kentucky.— Petty *v.* Roberts, 7 Bush 410.

Maine.— Thing *v.* Libbey, 16 Me. 55.

Massachusetts.— Owen *v.* Long, 112 Mass. 403; Ford *v.* Phillips, 1 Pick. 202; Smith *v.* Mayo, 9 Mass. 62, 6 Am. Dec. 28.

Missouri.— Baker *v.* Kennett, 54 Mo. 82.

North Carolina.— Petty *v.* Rousseau, 94 N. C. 355; Turner *v.* Gaither, 83 N. C. 357, 35 Am. Rep. 574; Dunlap *v.* Hales, 47 N. C. 381.

Pennsylvania.— Hinely *v.* Margaritz, 3 Pa. St. 428; Curtin *v.* Patton, 11 Serg. & R. 305.

South Carolina.— Norris *v.* Vance, 3 Rich. 164.

Tennessee.— Reed *v.* Boshears, 4 Sneed 118.

Vermont.— Hatch *v.* Hatch, 60 Vt. 160, 13 Atl. 791.

United States.— McCormick *v.* Walker, 15 Fed. Cas. No. 8,727, 3 Blatchf. 209.

England.— Harmer *v.* Killing, 5 Esp. 102.

See 27 Cent. Dig. tit. "Infants," § 142; and *supra*, IV, D, 4, a.

38. Kendrick *v.* Neisz, 17 Colo. 506, 30 Pac. 245; Proctor *v.* Sears, 4 Allen (Mass.) 95; Thompson *v.* Lay, 4 Pick. (Mass.) 48, 16 Am. Dec. 325; Edgerly *v.* Shaw, 25 N. H. 514, 57 Am. Dec. 349; Peacock *v.* Binder, 57 N. J. L. 374, 31 Atl. 215. But see Minock *v.* Shortridge, 21 Mich. 304.

39. Kendrick *v.* Neisz, 17 Colo. 506, 30 Pac. 245; Procter *v.* Sears, 4 Allen (Mass.) 95; Thompson *v.* Lay, 4 Pick. (Mass.) 48, 16 Am. Dec. 325; Peacock *v.* Binder, 57 N. J. L. 374, 31 Atl. 215. See also Minock *v.* Shortridge, 21 Mich. 304.

Promise to pay when able.— An acknowledgment or promise to pay when able is a conditional promise, and plaintiff, to avail himself of it, must give in evidence the ability of defendant. Kendrick *v.* Neisz, 17 Colo. 506, 30 Pac. 245; Thompson *v.* Lay, 4 Pick. (Mass.) 48, 16 Am. Dec. 325; Peacock *v.* Binder, 57 N. J. L. 374, 31 Atl. 215 (promise to pay "if possible"); Chandler *v.* Glover, 32 Pa. St. 509. But *compare* Bobo *v.* Hansell,

6. PARTIAL RATIFICATION. It has been said that the ratification may be partial,[40] but this *dictum* must be considered in connection with the rule that the late infant cannot ratify so much as is to his benefit and avoid the rest.[41]

7. WHAT CONSTITUTES RATIFICATION — a. In General.[42] The ratification of an infant's contract must be by some act or declaration recognizing its legal existence and binding efficacy,[43] and inconsistent with any intention not to be bound.[44] The act, promise, or declaration relied upon must have been deliberately and understandingly done or made,[45] and there must have been an intention to ratify[46] unless the act relied on is of such a nature that it would be a fraud on the other party if the contract were not affirmed,[47] but no particular form of language is necessary to show a ratification.[48] It has been held that in order to constitute a ratification of an infant's executory contract for the payment of money, there must be a direct promise,[49] which is obviously a sufficient ratification,[50] or such a

2 Bailey (S. C.) 114. It is not, however, necessary to show an ability to pay without inconvenience, but evidence that there is property from which the debt might be paid or an income from some source which would enable the party to pay would be sufficient. Thompson *v.* Lay, 4 Pick. (Mass.) 48, 16 Am. Dec. 325. Slight proof in relation to defendant's property or income is sufficient to take the question to the jury, and in the absence of contradictory evidence to sustain a recovery. Kendrick *v.* Neisz, 17 Colo. 506, 30 Pac. 245.

40. Edgerly *v.* Shaw, 25 N. H. 514, 57 Am. Dec. 349.

41. See *supra*, IV, E, 1.

42. As to transactions affecting property see *supra*, IV, D, 4, a.

43. Ordinary *v.* Wherry, 1 Bailey (S. C.) 28.

A submission to arbitration after the infant becomes of age of the question whether he is liable on a note executed during infancy is not a ratification. Benham *v.* Bishop, 9 Conn. 330, 23 Am. Dec. 358.

44. See Catlin *v.* Haddox, 49 Conn. 492, 44 Am. Rep. 249; McCarty *v.* Carter, 49 Ill. 53, 95 Am. Dec. 572.

45. *Colorado.*— Kendrick *v.* Neisz, 17 Colo. 506, 30 Pac. 245.

Georgia.— Martin *v.* Byrom, Dudley 203.

Louisiana.— Rivas *v.* Bernard, 13 La. 159.

Massachusetts.— Smith *v.* Mayo, 9 Mass. 62, 6 Am. Dec. 28.

Missouri.— Baker *v.* Kennett, 54 Mo. 82.

North Carolina.— Petty *v.* Rousseau, 94 N. C. 355; Turner *v.* Gaither, 83 N. C. 357, 35 Am. Rep. 574.

Tennessee.— Reed *v.* Boshears, 4 Sneed 118.

United States.— See also Burdett *v.* Williams, 30 Fed. 697.

See 27 Cent. Dig. tit. "Infants," § 140.

46. Kendrick *v.* Neisz, 17 Colo. 506, 30 Pac. 245; Rainsford *v.* Rainsford, Speers Eq. (S. C.) 385.

47. As when it gives the late infant an advantage to which he would not be entitled but on the supposition of the validity of the contract. Rainsford *v.* Rainsford, Speers Eq. (S. C.) 385.

48. Kendrick *v.* Neisz, 17 Colo. 506, 30 Pac. 245; Hatch *v.* Hatch, 60 Vt. 160, 13 Atl. 791.

49. *Connecticut.*— Bennett *v.* Collins, 52 Conn. 1; Wilcox *v.* Roath, 12 Conn. 550.

Georgia.— See Martin *v.* Byrom, Dudley 203.

Massachusetts.— Proctor *v.* Sears, 4 Allen 95; Pierce *v.* Tobey, 5 Metc. 168; Ford *v.* Phillips, 1 Pick. 202; Smith *v.* Mayo, 9 Mass. 62, 6 Am. Dec. 28.

Mississippi.— Edmunds *v.* Mister, 58 Miss. 765.

New Hampshire.— Tibbets *v.* Gerrish, 25 N. H. 41, 57 Am. Dec. 307; Hale *v.* Gerrish, 8 N. H. 374; Wright *v.* Steele, 2 N. H. 51.

New York.— Millard *v.* Hewlett, 19 Wend. 301.

North Carolina.— Petty *v.* Rousseau, 94 N. C. 355; Turner *v.* Gaither, 83 N. C. 357, 35 Am. Rep. 574; Dunlap *v.* Hales, 47 N. C. 381.

Tennessee.— Reed *v.* Boshears, 4 Sneed 118.

England.— Thrupp *v.* Fielder, 2 Esp. 628.

See 27 Cent. Dig. tit. "Infants," §§ 140, 141.

What amounts to express promise see Martin *v.* Mayo, 10 Mass. 137, 6 Am. Dec. 103.

Will directing payment of a debt.— Where a person who had executed a note while an infant, after his arrival at age executed a will directing the payment of all his just debts, this was not an affirmance of the note. Smith *v.* Mayo, 9 Mass. 62, 6 Am. Dec. 28. *Compare* Marlow *v.* Pitfeild, 1 P. Wms. 558, 24 Eng. Reprint 516.

Ingredients of new contract necessary.— See Edmunds *v.* Mister, 58 Miss. 765; Hodges *v.* Hunt, 22 Barb. (N. Y.) 150.

Positive and precise promise, equivalent to new contract, not essential.— Henry *v.* Root, 33 N. Y. 526.

50. *Connecticut.*— Lawrence *v.* Gardner, 1 Root 477.

Indiana.— Ogborn *v.* Hoffman, 52 Ind. 439; Conklin *v.* Ogborn, 7 Ind. 553.

Maine.— Lawson *v.* Lovejoy, 8 Me. 405, 23 Am. Dec. 526.

Massachusetts.— Owen *v.* Long, 112 Mass. 403; Reed *v.* Batchelder, 1 Metc. 559; Jackson *v.* Mayo, 11 Mass. 147, 6 Am. Dec. 167; Martin *v.* Mayo, 10 Mass. 137, 6 Am. Dec. 103. See also Barnaby *v.* Barnaby, 1 Pick. 221.

direct confirmation as expressly ratifies the contract, although not in the language of a formal promise;[51] but in this connection the acts of the late infant in favor of the contract may constitute as full a ratification as an express and unequivocal promise,[52] and where the declarations or acts of the individual, after coming of age, fairly and justly lead to the inference that he intended to and did recognize and adopt as binding an agreement executory on his part made during infancy, and intended to pay the debt then incurred, this is sufficient to constitute ratification.[53] There seems, however, to be a difference between contracts simply for the payment of money or the performance of any personal duty, and those which are connected with land or grow out of an interest therein, and an affirmation of the latter class may be implied.[54] A mere acknowledgment of the debt, contract, or

Minnesota.— Houlton *v.* Manteuffel, 51 Minn. 185, 53 N. W. 541.

Missouri.—Snyder *v.* Geriche, 101 Mo. App. 647, 74 S. W. 377, promise in writing.

New Hampshire.— Edgerly *v.* Shaw, 25 N. H. 514, 57 Am. Dec. 349.

New York.— Taft *v.* Sergeant, 18 Barb. 320; Everson *v.* Carpenter, 17 Wend. 419.

North Carolina.— Armfield *v.* Pate, 29 N. C. 258.

Vermont.— Hatch *v.* Hatch, 60 Vt. 160, 13 Atl. 166.

Virginia.— Buckner *v.* Smith, 1 Wash. 296, 1 Am. Dec. 463.

See 27 Cent. Dig. tit. "Infants," § 140.

A promise to pay in labor or else in money is sufficient. Edgerly *v.* Shaw, 25 N. H. 514, 57 Am. Dec. 349.

A promise to an agent authorized to act and receive payment for the creditor is sufficient. Mayer *v.* McLure, 36 Miss. 389, 72 Am. Dec. 190; Bigelow *v.* Grannis, 2 Hill (N. Y.) 120. See also Hodges *v.* Hunt, 22 Barb. (N. Y.) 150; Chandler *v.* Glover, 32 Pa. St. 509. And a deliberate declaration by a person of full age that he would pay the amount of certain money which had been paid by a surety for him during his infancy, made to an agent of the surety, who was authorized to call on him for that purpose, is sufficient to charge him, notwithstanding there is no evidence that the agent disclosed his agency at the time, nor any express evidence that the party had knowledge of the authority. Hoit *v.* Underhill, 10 N. H. 220, 34 Am. Dec. 148.

Authorizing agent to pay.— See Orvis *v.* Kimball, 3 N. H. 314.

Agreement not carried out.— Houlton *v.* Manteuffel, 51 Minn. 185, 53 N. W. 541.

Sufficiency of promise.— The late infant's promise to pay what he owes is sufficient, although the amount is not stated. Ackerman *v.* Runyon, 3 Abb. Pr. (N. Y.) 111; Gay *v.* Battou, 4 Wend. (N. Y.) 403, 21 Am. Dec. 158, promise to pay what he owed if anything. See also Stokes *v.* Brown, 3 Pinn. (Wis.) 311, 4 Chandl. 39. And it has been held that a written promise to pay a debt contracted during infancy is sufficient, although it neither contains the name of the creditor, the amount due, nor the date; and parol evidence is admissible to supply these particulars. Hartley *v.* Wharton, 11 A. & E. 934, 4 Jur. 576, 9 L. J. Q. B. 209, 3 P. & D. 529, 39 E. C. L. 491.

Declarations to third persons are not sufficient to show ratification. The promise must have been to the creditor or his agent. Hoit *v.* Underhill, 9 N. H. 436, 32 Am. Dec. 380; Hodges *v.* Hunt, 22 Barb. (N. Y.) 150; Bigelow *v.* Grannis, 2 Hill (N. Y.) 120; Chandler *v.* Glover, 32 Pa. St. 509.

51. *Indiana.*— Conklin *v.* Ogborn, 7 Ind. 553.

Massachusetts.— Peirce *v.* Tobey, 5 Metc. 168; Thompson *v.* Lay, 4 Pick. 48, 16 Am. Dec. 325; Whitney *v.* Dutch, 14 Mass. 457, 7 Am. Dec. 229.

Missouri.— Baker *v.* Kennett, 54 Mo. 82.

New Hampshire.— Thibbets *v.* Gerrish, 25 N. H. 41, 57 Am. Dec. 307; Hale *v.* Gerrish, 8 N. H. 374.

New York.— Henry *v.* Root, 33 N. Y. 526.

North Carolina.— Petty *v.* Rousseau, 94 N. C. 355; Turner *v.* Gaither, 83 N. C. 357, 35 Am. Rep. 574; Alexander *v.* Hutcheson, 9 N. C. 535, 538.

Vermont.— Hatch *v.* Hatch, 60 Vt. 160, 13 Atl. 791.

See 27 Cent. Dig. tit. "Infants," § 141.

Ratification may be implied. Taylor *v.* Rundell, 2 La. Ann. 367.

52. *Alabama.*—Thomasson *v.* Boyd, 13 Ala. 419.

Maine.— Lawson *v.* Lovejoy, 8 Me. 405, 23 Am. Dec. 526.

New Hampshire.— Tibbets *v.* Gerrish, 25 N. H. 41, 57 Am. Dec. 307; Edgerly *v.* Shaw, 25 N. H. 514, 57 Am. Dec. 349.

North Carolina.—Alexander *v.* Hutchinson, 12 N. C. 13.

Texas.— Means *v.* Robinson, 7 Tex. 502.

See 27 Cent. Dig. tit. "Infants," §§ 140, 141.

Act relied on must amount to promise or undertaking to pay. Smith *v.* Kelley, 13 Metc. (Mass.) 309.

The execution of a mortgage to indemnify sureties on a note given by the mortgagor during infancy is a ratification of the debt evidenced by the note. Long *v.* Miller, 93 N. C. 227.

53. Henry *v.* Root, 33 N. Y. 526; Hatch *v.* Hatch, 60 Vt. 160, 13 Atl. 791.

An affirmance can only be shown by unequivocal acts of the late infant showing his intention to pay the debt, in the absence of an express promise to pay. Tobey *v.* Wood, 123 Mass. 88, 25 Am. Rep. 27.

54. Barnaby *v.* Barnaby, 1 Pick. (Mass.) 221.

obligation is not sufficient,[55] even though accompanied with a declaration of an intention or desire to pay the same, where such declaration does not amount to a positive promise;[56] nor is the payment of interest sufficient.[57] Even the payment of a part of the debt has been held not to be a ratification of the promise to pay the whole.[58] In order to confirm an executed contract of an infant, all that appears to be necessary is to show any distinct acknowledgment or act indicating an intention to be bound by the contract; and if the infant continues, after coming of full age, to occupy a position which is only explicable upon the supposition that he intends to stand by his contract, it will be considered as a ratification.[59] If an infant continues under a contract of service after he becomes of age, this is evidence of affirmance of the contract.[60] It has been held that if a person who is

55. *Colorado.*— Kendrick *v.* Neisz, 17 Colo. 506, 30 Pac. 245.

Connecticut.— Bennett *v.* Collins, 52 Conn. 1; Catlin *v.* Haddox, 49 Conn. 492, 44 Am. Rep. 249; Wilcox *v.* Roath, 12 Conn. 550; Benham *v.* Bishop, 9 Conn. 330, 23 Am. Dec. 358.

Georgia.— Martin *v.* Byrom, Dudley 203.

Indiana.— Conklin *v.* Ogborn, 7 Ind. 553.

Maine.— Lawson *v.* Lovejoy, 8 Me. 405, 23 Am. Dec. 526.

Massachusetts.— Proctor *v.* Sears, 4 Allen 95; Smith *v.* Kelley, 13 Metc. 309; Peirce *v.* Tobey, 5 Metc. 168; Thompson *v.* Lay, 4 Pick. 48, 16 Am. Dec. 325; Barnaby *v.* Barnaby, 1 Pick. 221; Ford *v.* Phillips, 1 Pick. 202; Whitney *v.* Dutch, 14 Mass. 457, 7 Am. Dec. 229; Smith *v.* Mayo, 9 Mass. 62, 6 Am. Dec. 28.

Mississippi.— Edmunds *v.* Mister, 58 Miss. 765.

Missouri.— Craig *v.* Van Bebber, 100 Mo. 584, 13 S. W. 906, 18 Am. St. Rep. 569; Baker *v.* Kennett, 54 Mo. 82; Ring *v.* Jamison, 2 Mo. App. 584 [*affirmed* in 66 Mo. 424].

New Hampshire.— Edgerly *v.* Shaw, 25 N. H. 514, 57 Am. Dec. 349; Hale *v.* Gerrish, 8 N. H. 374; Wright *v.* Steele, 2 N. H. 51.

New York.— Silver Creek Bank *v.* Browning, 16 Abb. Pr. 272; Millard *v.* Hewlett, 19 Wend. 301. *Compare* Goodsell *v.* Myers, 3 Wend. 479.

North Carolina.— Petty *v.* Rousseau, 94 N. C. 355; Turner *v.* Gaither, 83 N. C. 357, 35 Am. Rep. 574.

Pennsylvania.— Hinely *v.* Margaritz, 3 Pa. St. 428.

Vermont.— Hatch *v.* Hatch, 60 Vt. 160, 13 Atl. 791.

England.— Powe *v.* Hopwood, L. R. 4 Q. B. 1, 38 L. J. Q. B. 1, 19 L. T. Rep. N. S. 261, 17 Wkly. Rep. 28; Maccord *v.* Osborne, 1 C. P. D. 568, 45 L. J. C. P. 727, 35 L. T. Rep. N. S. 164, 25 Wkly. Rep. 9; Thrupp *v.* Filder, 2 Esp. 628.

See 27 Cent. Dig. tit. "Infants," §§ 140, 141.

But *compare* Little *v.* Duncan, 9 Rich. (S. C.) 55, 64 Am. Dec. 700.

Acknowledgment may be evidence from which jury may infer non-promise. Silver Creek *v.* Browning, 16 Abb. Pr. (N. Y.) 272.

Under the Missouri statute an acknowledgment of a debt made in writing constitutes a ratification. Koerner *v.* Wilkinson, (Mo. App. 1902) 70 S. W. 509.

56. Hale *v.* Gerrish, 8 N. H. 374 (statement that creditor "would get his pay"); Bresee *v.* Stanly, 119 N. C. 278, 25 S. E. 870 (statement that he would pay "if I ever got so that I could without inconvenience to myself"); Dunlap *v.* Hales, 47 N. C. 381; Maccord *v.* Oshorne, 1 C. P. D. 568, 45 L. J. C. P. 727, 35 L. T. Rep. N. S. 164, 25 Wkly. Rep. 9 (promise to pay the debt "as a debt of honor" when able to do so); Mawson *v.* Blane, 10 Exch. 206, 23 L. J. Exch. 342, 2 Wkly. Rep. 588 (statement that he would "take care that it is paid").

57. Kendrick *v.* Neisz, 17 Colo. 506, 30 Pac. 245; Whitney *v.* Dutch, 14 Mass. 457, 7 Am. Dec. 229.

58. *Colorado.*— Kendrick *v.* Neisz, 17 Colo. 506, 30 Pac. 245.

Connecticut.— Catlin *v.* Haddox, 49 Conn. 492, 44 Am. Rep. 249.

Massachusetts.— Whitney *v.* Dutch, 14 Mass. 457, 7 Am. Dec. 229.

New Hampshire.— Robbins *v.* Eaton, 10 N. H. 561.

Pennsylvania.— Hinely *v.* Margaritz, 3 Pa. St. 428.

Vermont.— Hatch *v.* Hatch, 60 Vt. 160, 13 Atl. 791.

See 27 Cent. Dig. tit. "Infants," §§ 140, 141, 146.

But *compare* Philpot *v.* Sandwich Mfg. Co., 18 Nebr. 54, 24 N. W. 428; Little *v.* Duncan, 9 Rich. (S. C.) 55, 64 Am. Dec. 700.

Under the Missouri statute a partial payment after majority constitutes a ratification of a contract made during infancy (Koerner *v.* Wilkinson, (Mo. App. 1902) 70 S. W. 509), but where the maker of a note after attaining his majority directed his debtor to pay the amount of the debt to the holder of the note, believing that the holder had agreed to look to the debtor for payment, such direction and a subsequent payment by the debtor did not amount to a ratification by the maker within the statute (Snyder *v.* Gericke, 101 Mo. App. 647, 74 S. W. 377).

59. Durfee *v.* Abbott, 61 Mich. 471, 28 N. W. 521; Balch *v.* Smith, 12 N. H. 437.

Ratification may be inferred from circumstances. Petty *v.* Rousseau, 94 N. C. 355.

60. Spicer *v.* Earl, 41 Mich. 191, 1 N. W. 923, 32 Am. Rep. 152 (without demanding increased wages); Cornwall *v.* Hawkins, 41 L. J. Ch. 435, 26 L. T. Rep. N. S. 607, 20 Wkly. Rep. 653. But *compare* Birkin *v.* Forth, 33 L. T. Rep. N. S. 532.

a member of a firm during his infancy concurs in carrying on the partnership, or receives profits from it after he comes of age, this amounts to a confirmation and renders him liable on a partnership note or debt, given or contracted during his minority.[61] Where a minor submitted a claim to arbitration and an award was made in his favor and paid to his guardian, his receiving the money from his guardian after attaining full age was an affirmance of the submission and a bar to the claim submitted.[62]

b. Acquiescence or Failure to Disaffirm.[63] According to some authorities the contract of an infant may become binding upon him through his failure to disaffirm the same within a reasonable time after reaching his majority, this being construed to work a ratification;[64] but on the other hand there are cases denying that mere acquiescence and failure to disaffirm will be construed as a ratification,[65] especially where the infant has not, since his majority, received any new consideration or retained any old consideration arising out of the original transaction.[66]

c. Retention or Disposal of Property or Consideration.[67] Where an infant purchases property and gives his note or promise to pay therefor, and after his becoming of age he retains the property for an unreasonable time,[68] or disposes of

61. Miller *v.* Sims, 2 Hill (S. C.) 479. But *compare* Crabtree *v.* May, 1 B. Mon. (Ky.) 289.

Obligations expressly repudiated.— The continuance of an infant in partnership after his arrival at majority can only imply a subsequent assent to the former voidable undertaking in the absence of facts repugnant to such an implication, and hence it does not amount to a ratification of partnership notes by which he has, when his attention was called to the matter, refused to be bound. Minock *v.* Shortridge, 21 Mich. 304. *Compare* Miller *v.* Sims, 2 Hill (S. C.) 479.

Agreement of other partners to pay firm debts.— See Tobey *v.* Wood, 123 Mass. 88, 25 Am. Rep. 27.

62. Jones *v.* Phœnix Bank, 8 N. Y. 228, opinions by Johnson and Taggart, JJ.

63. As to transactions affecting property see *supra*, IV, D, 4, b.

64. *Iowa.*— This rule is established by statute. Murphy *v.* Johnson, 45 Iowa 57.

Kansas.— This rule is established by statute. McCullough *v.* Finley, (1904) 77 Pac. 696; Dillon *v.* Burnham, 43 Kan. 77, 22 Pac. 1016.

Pennsylvania.— Wise *v.* Loeb, 15 Pa. Super. Ct. 601, executed contract.

Vermont.— Forsyth *v.* Hastings, 27 Vt. 646 (holding that the special contract of a minor to labor is ratified by his continuance in it for a month after his majority, and cannot afterward be avoided); Richardson *v.* Boright, 9 Vt. 368.

England.— Viditz *v.* O'Hagan, [1899] 2 Ch. 569, 68 L. J. Ch. 553, 80 L. T. Rep. N. S. 794, 47 Wkly. Rep. 571.

See 27 Cent. Dig. tit. "Infants," § 144.

Where rule not applicable.— The rule that an infant's contract is binding upon him unless repudiated within a reasonable time after attaining majority does not apply where the infant, after entering into the contract, acquires a foreign domicile, and becomes, under the law of the country of domicile, incapable of validly ratifying the contract made by her. Viditz *v.* O'Hagan, [1902] 2 Ch. 87, 69 L. J. Ch. 507, 82 L. T. Rep. N. S. 480, 48 Wkly. Rep. 516.

65. Vaughan *v.* Parr, 20 Ark. 600; Tyler *v.* Gallop, 68 Mich. 185, 35 N. W. 902, 13 Am. St. Rep. 336; Durfee *v.* Abbott, 61 Mich. 471, 28 N. W. 521; Carrell *v.* Potter, 23 Mich. 377.

66. Durfee *v.* Abbott, 61 Mich. 471, 28 N. W. 521; New Hampshire Mut. F. Ins. Co. *v.* Noyes, 32 N. H. 345.

67. As to transactions affecting property see *supra*, IV, D, 4, c.

68. *Alabama.*—Thomasson *v.* Boyd, 13 Ala. 419.

Kentucky.— Robinson *v.* Hoskins, 14 Bush 393; Stern *v.* Freeman, 4 Metc. 309; Keller *v.* Cooper, 12 Ky. L. Rep. 188.

Maine.— Hilton *v.* Shepherd, 92 Me. 160, 42 Atl. 387; Boody *v.* McKenney, 23 Me. 517; Lawson *v.* Lovejoy, 8 Me. 405, 23 Am. Dec. 526.

Massachusetts.— Tobey *v.* Wood, 123 Mass. 88, 25 Am. Rep. 27; Todd *v.* Clapp, 118 Mass. 495; Boyden *v.* Boyden, 9 Metc. 519.

Michigan.— Minock *v.* Shortridge, 21 Mich. 304.

Nebraska.— Philpot *v.* Sandwich Mfg. Co., 18 Nebr. 54, 24 N. W. 428.

New Hampshire.— New Hampshire Mut. F. Ins. Co. *v.* Noyes, 32 N. H. 345; Aldrich *v.* Grimes, 10 N. H. 194.

New York.— Henry *v.* Root, 33 N. Y. 526.

North Dakota.— Luce *v.* Jestrab, 12 N. D. 548, 97 N. W. 848.

Pennsylvania.— Kimmel's Case, 1 Walk. 290. *Contra*, Lutes *v.* Thompson, 2 Leg. Chron. 63.

South Carolina.—Cheshire *v.* Barrett, 4 McCord 241, 17 Am. Dec. 735; Alexander *v.* Heriot, Bailey Eq. 223.

See 27 Cent. Dig. tit. "Infants," § 145.

Contra.— Benham *v.* Bishop, 9 Conn. 330, 23 Am. Dec. 358.

Accepting property under award.— Barnaby *v.* Barnaby, 1 Pick. (Mass.) 221.

Where the infant tenders back the property received by him, and upon refusal of his tender, brings suit, the mere retention of the

the same,[69] this will amount to a ratification of the promise to pay. So also in the case of an executed contract the infant's retention of the property or consideration which he received for an unreasonable time after reaching majority works a ratification.[70] But a contract made by one who had no power to bind the infant's interest is not made good because he was benefited by it and accepted its fruits.[71]

8. EVIDENCE. The burden of proving a ratification rests upon the person claiming under a voidable contract of an infant,[72] but it is sufficient for plaintiff to show a new promise or ratification since the making of the contract without showing that defendant was of age at the time, and it then devolves upon defendant to prove that he was an infant when he made the alleged ratification if he claims that such was the fact.[73] Subject to the general rules of evidence,[74] any evidence is admissible which legitimately tends to show that the late infant did ratify the contract,[75] or is explanatory of what occurred after the infant reached majority.[76]

9. EFFECT OF RATIFICATION.[77] The effect of the ratification by an infant, after his arrival at majority, of his contract made during infancy is to render the same binding upon him and enforceable against him,[78] and he cannot subsequently

property after arrival at majority cannot be deemed a ratification. House *v.* Alexander, 105 Ind. 109, 4 N. E. 891, 55 Am. Rep. 189.

Retaining property in trust for another takes case without the rule. Thing *v.* Libbey, 16 Me. 55.

Contract for materials for house as an exception to the rule see Bloomer *v.* Nolan, 36 Nebr. 51, 53 N. W. 1039, 18 Am. St. Rep. 690.

Receipt of rents from property improved under contract not within the rule see McCarty *v.* Carter, 49 Ill. 53, 95 Am. Dec. 572.

Under the Missouri statute providing that "a disposal of part or all of the property for which such debt was contracted," or "a refusal to deliver property in his possession or under his control, for which the debt was contracted, to the person to whom the debt is due, on demand thereof made in writing," shall constitute a ratification, a mere retention of the property, without any refusal to return it, does not constitute a ratification. Koerner *v.* Wilkinson, 96 Mo. App. 510, 70 S. W. 509.

69. *Illinois.*— Curry *v.* St. John Plow Co., 55 Ill. App. 82.

Kentucky.— Keller *v.* Cooper, 12 Ky. L. Rep. 188.

Maine.— Boody *v.* McKenney, 23 Me. 517; Lawson *v.* Lovejoy, 8 Me. 405.

Michigan.— Minock *v.* Shortridge, 21 Mich. 304.

Missouri.— Koerner *v.* Wilkinson, 96 Mo. App. 510, 70 S. W. 509, under statute.

South Carolina.—Cheshire *v.* Barrett, 4 McCord 241, 17 Am. Dec. 735.

See 27 Cent. Dig. tit. "Infants," § 145.

Sale of the property by the infant's administrator, the infant having died before he attained majority, with full knowledge that the property was purchased by the infant and has not been paid for, is a ratification of the sale and of the undertaking to pay for the property purchased. Shropshire *v.* Burns, 46 Ala. 108.

70. Hastings *v.* Dollarhide, 24 Cal. 195; Southern Cotton Oil Co. *v.* Dukes, 121 Ga. 787, 49 S. E. 788; Delano *v.* Blake, 11 Wend. (N. Y.) 85, 25 Am. Dec. 617; Eubanks *v.* Peak, 2 Bailey (S. C.) 497. See also McKany *v.* Cooper, 81 Ga. 679, 8 S. E. 312.

71. Stone *v.* Ellis, 69 Tex. 325, 7 S. W. 349.

72. *Connecticut.*— Catlin *v.* Haddox, 49 Conn. 492, 44 Am. Rep. 249.

Georgia.— Southern Cotton Oil Co. *v.* Dukes, 121 Ga. 787, 49 S. E. 788.

Indiana.— Henderson *v.* Fox, 5 Ind. 489.

Massachusetts.— Tobey *v.* Wood, 123 Mass. 88, 25 Am. Rep. 27.

Michigan.— Tyler *v.* Gallop, 68 Mich. 185, 35 N. W. 902, 13 Am. St. Rep. 336.

New York.— Walsh *v.* Powers, 43 N. Y. 23, 3 Am. Rep. 654; Henry *v.* Root, 33 N. Y. 526; Kane *v.* Kane, 13 N. Y. App. Div. 544, 43 N. Y. Suppl. 662.

See 27 Cent. Dig. tit. "Infants," § 148.

Evidence sufficient to show ratification see Jackson *v.* Mayo, 11 Mass. 147, 6 Am. Dec. 167.

Evidence not sufficient to show ratification see Todd *v.* Clapp, 118 Mass. 495; Carrell *v.* Potter, 23 Mich. 377.

73. Bigelow *v.* Grannis, 4 Hill (N. Y.) 206 [*followed* in Bay *v.* Gunn, 1 Den. (N. Y.) 108]; Borthwick *v.* Carruthers, 1 T. R. 648.

74. See EVIDENCE.

75. **Evidence held admissible** see Curry *v.* St. John Plow Co., 55 Ill. App. 82; McDonald *v.* Sargent, 171 Mass. 492, 51 N. E. 17; Montgomery *v.* Witbeck, 23 Minn. 172.

Weight of evidence.— See Stern *v.* Freeman, 4 Metc. (Ky.) 309.

76. Owens *v.* Phelps, 95 N. C. 286.

77. As to transactions affecting property see *supra*, IV, D, 5.

78. *Louisiana.*— Richardson *v.* Downs, 23 La. Ann. 641, contract made by father on behalf of infant.

Maine.— Boody *v.* McKenney, 23 Me. 517.

Massachusetts.— Owen *v.* Long, 112 Mass. 403; Whitney *v.* Dutch, 14 Mass. 457, 7 Am. Dec. 229, ratification of partnership debt.

Mississippi.— Edmunds *v.* Mister, 58 Miss. 765.

Ohio.— Harner *v.* Dipple, 31 Ohio St. 72, 27 Am. Rep. 496.

repudiate it.[79] But it has been held that when the contract is executory the ratification does not relate back so as to render the contract good *ab initio*.[80] The ratification of one contract does not operate to ratify another separate contract with a different person, although both are connected with the same transaction.[81]

F. Avoidance of Contracts — 1. Right to Avoid — a. In General.[82] As a general rule all the contracts of an infant, except for necessaries,[83] may be disaffirmed or avoided by him.[84]

b. Who May Avoid.[85] The right of an infant to avoid his contracts is a personal privilege of which no one can take advantage but the infant himself,[86] or in

South Carolina.— State *v.* Satterwhite, 20 S. C. 536.

England.— Smith *v.* French, 2 Atk. 243, 26 Eng. Reprint 550.

Canada.— Fisher *v.* Jewett, 2 N. Brunsw. 69.

See 27 Cent. Dig. tit. "Infants," § 147.

An infant partner confirming the contract of partnership after coming of age subjects himself to all the liabilities of the firm incurred during his minority. Salinas *v.* Bennett, 33 S. C. 285, 11 S. E. 968 (partnership mortgage); Miller *v.* Sims, 2 Hill (S. C.) 479.

Promise to pay in a specified manner.— Taft *v.* Sergeant, 18 Barb. (N. Y.) 320.

79. Curry *v.* St. John Plow Co., 55 Ill. App. 82; Bedford *v.* Clay, 3 Dana (Ky.) 226 (personal representation cannot avoid the contract on the ground of infancy); Boody *v.* McKenney, 23 Me. 517; Luce *v.* Jestrab, 12 N. D. 548, 97 N. W. 868.

80. Edmunds *v.* Mister, 58 Miss. 765 (where the court said that the contract derived its validity not from the original consideration, but from the new promise or ratification); Hodges *v.* Hunt, 22 Barb. (N. Y.) 150. But *compare* West *v.* Penny, 16 Ala. 186. And see *supra*, IV, D, 5.

81. American Freehold Land Mortg. Co. *v.* Dykes, 111 Ala. 178, 18 So. 292, 56 Am. St. Rep. 38.

82. As to transactions affecting property see *supra*, IV, E, 1, a.

83. See *supra*, V, B, 9, a.

84. *Alabama.*— Flexner *v.* Dickerson, 72 Ala. 318; Shropshire *v.* Burns, 46 Ala. 108.

Connecticut.— Riley *v.* Mallory, 33 Conn. 201, whether the contract be fair or not.

Illinois.— Ray *v.* Haines, 52 Ill. 485.

Indiana.— Shipley *v.* Smith, 162 Ind. 526, 70 N. E. 803; Reish *v.* Thompson, 55 Ind. 34; Garner *v.* Board, 27 Ind. 323; Hyde *v.* Courtwright, 14 Ind. App. 106, 42 N. E. 647.

Iowa.— Leacox *v.* Griffith, 76 Iowa 89, 40 N. W. 109.

Maine.— Robinson *v.* Weeks, 56 Me. 102.

Maryland.— Monumental Bldg. Assoc. No. 2 *v.* Herman, 33 Md. 128.

Massachusetts.— Gillis *v.* Goodwin, 180 Mass. 140, 61 N. E. 813, 91 Am. St. Rep. 265; Morse *v.* Ely, 154 Mass. 458, 28 N. E. 577, 26 Am. St. Rep. 263; Gaffney *v.* Hayden, 110 Mass. 137, 14 Am. Rep. 580; Baker *v.* Lovett, 6 Mass. 78, 4 Am. Dec. 88.

Missouri.— Lowe *v.* Sinklear, 27 Mo. 308; Tower-Doyle Commission Co. *v.* Smith, 86 Mo. App. 490; Thompson *v.* Marshall, 50 Mo. App. 145.

New York.— Munger *v.* Hess, 28 Barb. 75 (even though infected with fraud and tortious dealings); Stromberg *v.* Rubenstein, 19 Misc. 647, 44 N. Y. Suppl. 405.

England.— Fisher *v.* Mowbray, 8 East 330; Baylis *v.* Dineley, 3 M. & S. 477.

See 27 Cent. Dig. tit. "Infants," § 149.

Partnership contract.— A minor who is a member of a partnership may disaffirm a contract made by his firm without disaffirming the contract of partnership. Mehlhop *v.* Rae, 90 Iowa 30, 57 N. W. 650.

85. As to transactions affecting property see *supra*, IV, E, 1, c.

86. *Alabama.*—Shropshire *v.* Burns, 46 Ala. 108.

Indiana.— Harris *v.* Ross, 112 Ind. 314, 13 N. E. 873; Frazier *v.* Massey, 14 Ind. 382.

Maine.— Hardy *v.* Waters, 38 Me. 450.

Massachusetts.— Bradford *v.* French, 110 Mass. 365; Nightingale *v.* Withington, 15 Mass. 272, 8 Am. Dec. 101; Worcester *v* Eaton, 13 Mass. 371, 7 Am. Dec. 155; Oliver *v.* Houdlet, 13 Mass. 237, 7 Am. Dec. 134.

Michigan.— Holmes *v.* Rice, 45 Mich. 142, 7 N. W. 772.

Mississippi.— Alsworth *v.* Cordtz, 31 Miss. 32.

Missouri.— Ferguson *v.* Bell, 17 Mo. 347.

New Jersey.— Patterson *v.* Lippincott, 47 N. J. L. 457, 1 Atl. 506, 54 Am. Rep. 178; Voorhees *v.* Wait, 15 N. J. L. 343.

New York.— Beardsley *v.* Hotchkiss, 96 N. Y. 201; Burkhalter *v.* Pratt, 1 N. Y. City Ct. 22; Slocum *v.* Hooker, 13 Barb. 536; Hartness *v.* Thompson, 5 Johns. 160; Van Bramer *v.* Cooper, 2 Johns. 279; Parker *v.* Baker, Clarke 136 [*reversed* on other grounds in 8 Paige 428].

Pennsylvania.—Brown *v.* Caldwell, 10 Serg. & R. 114, 13 Am. Dec. 660.

South Carolina.— Rose *v.* Daniel, 3 Brev. 438; Lester *v.* Frazer, 2 Hill Eq. 529.

Tennessee.— White *v.* Flora, 2 Overt. 426.

Texas.— Harris *v.* Musgrove, 59 Tex. 401; Peck *v.* Cain, 27 Tex. Civ. App. 38, 63 S. W. 177; Marlin *v.* Kosmyroski, (Civ. App. 1894) 27 S. W. 1042.

See 27 Cent. Dig. tit. "Infants," § 150.

A beneficiary in a policy on the life of an infant may plead infancy in answer to the company's defense of false warranties in the application; for otherwise an infant's contract of insurance would be in effect binding

case of his death his privies in blood or heirs[87] or personal representatives.[88] Neither third persons, the person with whom the contract was made, nor persons who are liable with the infant thereunder can set up the infancy of one of the parties to avoid the contract.[89]

c. Estoppel to Disaffirm — (1) *In General.*[90] The doctrine of estoppel not being as a general rule applicable to infants,[91] the court will not readily hold that his acts during infancy have created an estoppel against him to disaffirm his contracts.[92] Certainly the infant cannot be estopped by the acts or admissions of other persons.[93]

on him during his minority. O'Rourke *v.* John Hancock Mut. L. Ins. Co., 23 R. I. 457, 50 Atl. 834.

87. *Arkansas.*— Bozeman *v.* Browning, 31 Ark. 364.

Indiana.— Gillenwaters *v.* Campbell, 142 Ind. 529, 41 N. E. 1041.

Maine.— Hardy *v.* Waters, 38 Me. 450.

Maryland.— Levering *v.* Heighe, 2 Md. Ch. 81.

Missouri.— Ferguson *v.* Bell, 17 Mo. 347.

New York.— Nelson *v.* Eaton, 1 Redf. Surr. 498.

Tennessee.— White *v.* Flora, 2 Overt. 426.

See 27 Cent. Dig. tit. "Infants," § 150.

88. *Alabama.*— Shropshire *v.* Burns, 46 Ala. 108; Jefford *v.* Ringgold, 6 Ala. 544.

Indiana.— Frazier *v.* Massey, 14 Ind. 382.

Maine.— Hardy *v.* Waters, 38 Me. 450.

Massachusetts.— Martin *v.* Mayo, 10 Mass. 137, 6 Am. Dec. 103; Hussey *v.* Jewett, 9 Mass. 100.

Missouri.— Ferguson *v.* Bell, 17 Mo. 347; Parsons *v.* Hill, 8 Mo. 135.

New Jersey.— Patterson *v.* Lippincott, 47 N. J. L. 457, 1 Atl. 506, 54 Am. Rep. 178.

South Carolina.— Counts *v.* Bates, Harp. 464.

See 27 Cent. Dig. tit. "Infants," § 150.

The "legal representatives" of the infant can avoid his contract. Bozeman *v.* Browning, 31 Ark. 364; Frazier *v.* Massey, 14 Ind. 382; Lester *v.* Frazer, 2 Hill Eq. (S. C.) 529; Harris *v.* Musgrove, 59 Tex. 401.

89. *Colorado.*— Chapman *v.* Duffy, (App. 1905) 79 Pac. 746.

Indiana.— Beeson *v.* Carlton, 13 Ind. 354.

Louisiana.— Anderson *v.* Birdsall, 19 La. 441; Arnous *v.* Lesassier, 10 La. 592, 29 Am. Dec. 470.

Massachusetts.— Winchester *v.* Thayer, 129 Mass. 129.

Michigan.— Holmes *v.* Rice, 45 Mich. 142, 7 N. W. 772.

Missouri.— Hill *v.* Taylor, 125 Mo. 331, 28 S. W. 599.

New Jersey.— Patterson *v.* Lippincott, 47 N. J. L. 457, 1 Atl. 506, 54 Am. Rep. 178.

New York.— Parker *v.* Baker, Clarke 136 [*reversed* on other grounds in 8 Paige 428].

Pennsylvania.— Love *v.* Dohson, 5 Wkly. Notes Cas. 359.

Tennessee.— White *v.* Flora, 2 Overt. 426.

Texas.— Chambers *v.* Ker, 6 Tex. Civ. App. 373, 24 S. W. 1118.

Vermont.— See Putnam *v.* Hill, 38 Vt. 85.

Virginia.— Wamsley *v.* Lindenberger, 2 Rand. 478.

See 27 Cent. Dig. tit. "Infants," § 150.

Illustrations.— The drawer of a bill of exchange or the maker of a promissory note cannot set up the infancy of the payee and indorser as a defense to an action by the indorsee. Garner *v.* Cook, 30 Ind. 331; Frazier *v.* Massey, 14 Ind. 382; Dulty *v.* Brownfield, 1 Pa. St. 497; Burkhalter *v.* Pratt, 1 N. Y. City Ct. 22; Grey *v.* Cooper, 3 Dougl. 65, 1 Selw. 306, 26 E. C. L. 54. The accepter of a bill of exchange cannot set up the infancy of the indorser as a defense to an action on the bill. Burkhalter *v.* Pratt, *supra*; Taylor *v.* Croker, 4 Esp. 187. The indorser of a promissory note cannot set up the infancy of the maker as a defense to his liability. Burkhalter *v.* Pratt, *supra*. Where a note is executed by one of two partners in the firm-name an action thereon must be brought against both, although one is an infant, and cannot be brought against the adult partner alone, for plaintiff cannot allege the infancy of the infant to avoid the contract as to him. Wamsley *v.* Lindenberger, 2 Rand. (Va.) 478. The fact that the payee of a bond, at the time he made the assignment thereof under which plaintiff derived his title, was an infant, is no defense to an action on the instrument against other parties. Blake *v.* Livingston County, 61 Barb. (N. Y.) 149. Infancy cannot be set up by a purchaser at a sale under an execution to defeat prior transactions of the judgment debtor. Alsworth *v.* Cordtz, 31 Miss. 32. In assumpsit on a promise to pay the debt of another, infancy of the debtor is no defense. Hesser *v.* Steiner, 5 Watts & S. (Pa.) 476. Liability on a policy insuring the property of infants cannot be escaped on the ground that they are not bound. Monaghan *v.* Agricultural F. Ins. Co., 53 Mich. 238, 18 N. W. 797. Creditors of an infant cannot avoid an assignment by him. McCarty *v.* Murray, 3 Gray (Mass.) 578.

90. As to transactions affecting property see *supra*, IV, E, 1, d, (1).

91. See *supra*, II, A, 2.

92. See Butler *v.* Stark, 79 S. W. 204, 25 Ky. L. Rep. 1886 (contract of infants' stepmother with respect to their property); White *v.* New Bedford Cotton Waste Corp., 178 Mass. 20, 59 N. E. 642; Sautelle *v.* Carlisle, 13 Lea (Tenn.) 391; Sanger *v.* Hibbard, 104 Fed. 455, 43 C. C. A. 635.

93. Clark *v.* Goddard, 39 Ala. 164, 84 Am. Dec. 777; Atchison, etc., R. Co. *v.* Elder, 149 Ill. 173, 36 N. E. 565 [*affirming* 50 Ill. App. 276].

(11) *False Representations as to Age.*[94] According to some authorities the fact that an infant at the time of entering into a contract falsely represented to the person with whom he dealt that he had attained the age of majority does not give any validity to the contract or estop the infant from disaffirming the same or setting up the defense of infancy against the enforcement of any rights thereunder;[95] but there is also authority for the view that such false representations will create an estoppel against the infant,[96] and under the statutes of some states no contract can be disaffirmed where, on account of the minor's representations as to his majority, the other party had good reason to believe the minor capable of contracting.[97] Where the infant has made no representations whatever as to his age, the mere fact that the person with whom he dealt believed him to be of age, even though his belief was warranted by the infant's appearance and the surrounding circumstances, and the infant knew of such belief, will not render the contract valid or estop the infant to disaffirm.[98]

2. Time For Avoidance — a. During Minority.[99] An infant has the right and power to avoid his personal contracts or contracts relating to personalty during his minority as well as after he has attained his full age.[1] And his right to

94. As to transactions affecting property see *supra*, IV, E, 1, d, (II).

95. *Georgia.*— McKamy *v.* Cooper, 81 Ga. 679, 8 S. E. 312.

Illinois.— Wieland *v.* Kobick, 110 Ill. 16, 51 Am. Rep. 676.

Indiana.— Price *v.* Jennings, 62 Ind. 111; Carpenter *v.* Carpenter, 45 Ind. 142.

Kentucky.— Newport News, etc., Co. *v.* Glenn, 11 Ky. L. Rep. 579.

Massachusetts.— Merriam *v.* Cunningham, 11 Cush. 40. See also Badger *v.* Phinney, 15 Mass. 359, 8 Am. Dec. 105.

Minnesota.— Conrad *v.* Lane, 26 Minn. 389, 4 N. W. 695, 37 Am. Rep. 412.

Mississippi.— Ferguson *v.* Bobo, 54 Miss. 121.

New Hampshire.— Burley *v.* Russell, 10 N. H. 184, 34 Am. Dec. 146; Fitts *v.* Hall, 9 N. H. 441.

New York.— Studwell *v.* Shapter, 54 N. Y. 249; New York Bldg. Loan Banking Co. *v.* Fisher, 23 N. Y. App. Div. 363, 48 N. Y. Suppl. 152 [*affirming* 20 Misc. 242, 45 N. Y. Suppl. 795]; Brown *v.* McCune, 5 Sandf. 224; Johnson *v.* Clark, 23 Misc. 346, 51 N. Y. Suppl. 238; Conroe *v.* Birdsall, 1 Johns. Cas. 127, 1 Am. Dec. 105. But *compare* Eckstein *v.* Frank, 1 Daly 334.

South Carolina.— Norris *v.* Vance, 3 Rich. 164.

Vermont.— Whitcomb *v.* Joslyn, 51 Vt. 79, 31 Am. Rep. 678.

United States.— Burdett *v.* Williams, 30 Fed. 697, a Connecticut case.

England.— Bateman *v.* Kingston, L. R. 6 Ir. 328; Bartlett *v.* Wells, 1 B. & S. 836, 8 Jur. N. S. 762, 31 L. J. Q. B. 57, 5 L. T. Rep. N. S. 607, 10 Wkly. Rep. 229, 101 E. C. L. 836 [*followed* in De Roo *v.* Foster, 12 C. B. N. S. 272, 104 E. C. L. 272]. But see English cases *infra*, note 96.

See 27 Cent. Dig. tit. "Infants," § 100.

96. *Nebraska.*— Cobbey *v.* Buchanan, 48 Nebr. 391, 67 N. W. 176.

New Jersey.— Pemberton Bldg., etc., Assoc. *v.* Adams, 53 N. J. Eq. 258, 31 Atl. 280; Hayes *v.* Parker, 41 N. J. Eq. 630, 7 Atl. 511.

Texas.— Kilgore *v.* Jordan, 17 Tex. 341. See also Carpenter *v.* Pridgen, 40 Tex. 32.

England.— *Ex p.* Unity Joint-Stock Mut. Banking Assoc., 3 De G. & J. 63, 4 Jur. N. S. 1257, 27 L. J. Bankr. 33, 6 Wkly. Rep. 640, 60 Eng. Ch. 49, 44 Eng. Reprint 1192; Overton *v.* Banister, 3 Hare 503, 8 Jur. 906, 25 Eng. Ch. 503; Cornwall *v.* Hawkins, 41 L. J. Ch. 435, 26 L. T. Rep. N. S. 607, 20 Wkly. Rep. 653 [*following* Wright *v.* Snowe, 2 De G. & Sm. 321; Savage *v.* Foster, 9 Mod. 35]. But see English cases *supra*, note 95.

Canada.— Goyer *v.* Morrison, 26 Grant Ch. (U. C.) 69.

Australia.— Campbell *v.* Ridgley, 13 Vict. L. Rep. 701.

See 27 Cent. Dig. tit. "Infants," § 100.

Requirements of estoppel.— In order for a representation made by the infant as to his being of age to estop him from asserting infancy as a defense, the representation must have been fraudulently made by the infant, and believed in, relied on, and acted upon by the other party. Cobbey *v.* Buchanan, 48 Nebr. 391, 67 N. W. 176. See also Nelson *v.* Stocker, 4 De G. & J. 458, 5 Jur. N. S. 751, 28 L. J. Ch. 760, 7 Wkly. Rep. 603, 61 Eng. Ch. 361, 45 Eng. Reprint 178.

Estoppel must be pleaded. Cobbey *v.* Buchanan, 48 Nebr. 391, 67 N. W. 176.

97. Beickler *v.* Guenther, 121 Iowa 419, 96 N. W. 895; Murphy *v.* Johnson, 45 Iowa 57; Oswald *v.* Broderick, 1 Iowa 380; Dillon *v.* Burnham, 43 Kan. 77, 22 Pac. 1016.

The phrase "capable of contracting," as used in Kan. Comp. Laws (1879), c. 67, § 3, p. 553, refers to the legal capacity to contract and not to mental and physical capacity. Burgett *v.* Barrick, 25 Kan. 526.

Recovery may be had during infancy. Oswald *v.* Broderick, 1 Iowa 380.

98. Baker *v.* Stone, 136 Mass. 405; Folds *v.* Allardt, 35 Minn. 488, 29 N. W. 201; Stikeman *v.* Dawson, 1 De G. & Sm. 90, 11 Jur. 214, 16 L. J. Ch. 205, 4 R. & Can. Cas. 585.

99. See also *supra*, IV, E, 2, a, (II).

1. *Connecticut.*— Shipman *v.* Horton, 17 Conn. 481.

so avoid such contracts during minority applies not only to executory[2] but also to executed[3] contracts.

b. Reasonable Time After Majority.[4] According to some authorities and in some jurisdictions by statute the infant must disaffirm his contract within a reasonable time after reaching his majority or he will lose the right to do so.[5]

3. Necessity of Disaffirmance.[6] In the case of the executed contracts of an infant he must if he desires to avoid them do some act of disaffirmance, otherwise he will be bound;[7] but infancy is a good defense to an action on an executory contract, although there has been no disaffirmance.[8]

4. What Constitutes Avoidance.[9] An infant may avoid his act or contract by

Indiana.— Shipley *v.* Smith, 162 Ind. 526, 70 N. E. 803; Carpenter *v.* Carpenter, 45 Ind. 142.

Iowa.— Beickler *v.* Guenther, 121 Iowa 419, 96 N. W. 895; Childs *v.* Dobbins, 55 Iowa 205, 7 N. W. 496 [in effect *overruling* Murphy *v.* Johnson, 45 Iowa 57].

Kentucky.— Bailey *v.* Barnberger, 11 B. Mon. 113.

Maine.— Towle *v.* Dresser, 73 Me. 252.

Maryland.— Adams *v.* Beall, 67 Md. 53, 8 Atl. 664, 1 Am. St. Rep. 379.

Massachusetts.— Vent *v.* Osgood, 19 Pick. 572; Willis *v.* Twambly, 13 Mass. 204.

Minnesota.— Cogley *v.* Cushman, 16 Minn. 397.

Missouri.— Betts *v.* Carroll, 6 Mo. App. 518.

New Hampshire.— Carr *v.* Clough, 26 N. H. 280, 59 Am. Dec. 345; Heath *v.* West, 26 N. H. 191.

New York.— Sparman *v.* Keim, 83 N. Y. 245; Chapin *v.* Shafer, 49 N. Y. 407; Stafford *v.* Roof, 9 Cow. 626 [*reversing* 7 Cow. 179]. *Contra,* Stern *v.* Meikleham, 56 Hun 475, 10 N. Y. Suppl. 216.

North Dakota.— Luce *v.* Jestrab, 12 N. D. 548, 97 N. W. 848, under statute.

Tennessee.— Lancaster *v.* Lancaster, 13 Lea 126; Robertson *v.* Simmons, 4 Heisk. 135; Nashville, etc., R. Co. *v.* Elliott, 1 Coldw. 611, 78 Am. Dec. 506.

Texas.— Cummings *v.* Powell, 8 Tex. 80.

See 27 Cent. Dig. tit. "Infants," § 151.

Contra.— Lansing *v.* Michigan Cent. R. Co., 126 Mich. 663, 86 N. W. 147, 86 Am. St. Rep. 567; Dunton *v.* Brown, 31 Mich. 182; Farr *v.* Sumner, 12 Vt. 28, 36 Am. Dec. 327, unless in case of evident necessity.

2. Petrie *v.* Williams, 88 Hun (N. Y.) 292, 34 N. Y. Suppl. 670, 68 Hun 589, 23 N. Y. Suppl. 237; Bartholomew *v.* Finnemore, 17 Barb. (N. Y.) 428; Lancaster *v.* Lancaster, 13 Lea (Tenn.) 126.

3. Beardsley *v.* Hotchkiss, 96 N. Y. 201; Stafford *v.* Roof, 9 Cow. (N. Y.) 626 [*reversing* 7 Cow. 179]; Lancaster *v.* Lancaster, 13 Lea (Tenn.) 126.

4. See also *supra,* V, E, 7, b.

As to transactions affecting property see *supra,* IV, D, 4, b; IV, E, 2, b.

5. Leacox *v.* Griffith, 76 Iowa 89, 40 N. W. 109; Green *v.* Wilding, 59 Iowa 679, 13 N. W. 761, 44 Am. Rep. 696; Hoover *v.* Kinsey Plow Co., 55 Iowa 668, 8 N. W. 658; Childs *v.* Dobbins, 55 Iowa 205, 7 N. W. 496; Jones *v.* Jones, 46 Iowa 466; Murphy *v.* Johnson, 45 Iowa 57; Stucker *v.* Yoder, 33 Iowa 177; Jenkins *v.* Jenkins, 12 Iowa 195; Dillon *v.* Burnham, 43 Kan. 77, 22 Pac. 1016; Hegler *v.* Faulkner, 153 U. S. 109, 14 S. Ct. 779, 38 L. ed. 653, stating law of Nebraska.

What is a reasonable time is to be determined according to the circumstances of each case. Jenkins *v.* Jenkins, 12 Iowa 195. The following periods have been held reasonable: Less than one month (Peck *v.* Cain, 27 Tex. Civ. App. 38, 63 S. W. 177), thirty-two days (Leacox *v.* Griffith, 76 Iowa 89, 40 N. W. 109), and eighteen months (Johnson *v.* Storie, 32 Nebr. 610, 49 N. W. 371). The following periods have been held unreasonable: More than six months (Hoover *v.* Kinsey Plow Co., 55 Iowa 668, 8 N. W. 658; Jones *v.* Jones, 46 Iowa 466), two years (Deason *v.* Boyd, 1 Dana (Ky.) 45), three or four years (Green *v.* Wilding, 59 Iowa 679, 13 N. W. 761, 44 Am. Rep. 696), more than five years (Meriweather *v.* Herran, 8 B. Mon. (Ky.) 162), and thirteen years (Gilkinson *v.* Miller, 74 Fed. 131).

Under the **North Dakota** statute, the contract of a minor cannot be disaffirmed after the expiration of one year from his majority. Luce *v.* Jestrab, 12 N. D. 548, 97 N. W. 848.

6. **As to transactions affecting property** see *supra,* IV, E, 3.

7. *Arkansas.*— Savage *v.* Lichlyter, 59 Ark. 1, 26 S. W. 12.

Illinois.— Morton *v.* Steward, 5 Ill. App. 533.

Michigan.— Minock *v.* Shortridge, 21 Mich. 304.

Minnesota.— Cogley *v.* Cushman, 16 Minn. 397.

Mississippi.— Edmunds *v.* Mister, 58 Miss. 765.

New York.— Roof *v.* Stafford, 7 Cow. 179 [*reversed* on other grounds in 9 Cow. 626].

South Carolina.— Lester *v.* Frazer, 2 Hill Eq. 529.

See 27 Cent. Dig. tit. "Infants," § 99.

In order to maintain an action based upon his avoidance of his contract, an infant must give notice of his election to avoid. Betts *v.* Carroll, 6 Mo. App. 518.

8. Buzzell *v.* Bennett, 2 Cal. 101, promissory note. *Aliter,* under statute requiring disaffirmance within a reasonable time. Stucker *v.* Yoder, 33 Iowa 177. See *supra,* V, E, 3.

9. **As to transactions affecting property** see *supra,* IV, E, 4.

different means according to the nature of the act and the circumstances of the case,[10] but it may be laid down as a general rule that any act showing unequivocally a renunciation of or a disposition not to abide by the contract made during minority is sufficient to avoid it.[11] Bringing a suit to assert rights contrary to those existing under the contract is an election to rescind,[12] although the bringing of a suit is not essential to an avoidance.[13] So also a plea of infancy in an action based on the contract is an election to avoid.[14]

5. Return of Property or Consideration.[15] It has been laid down broadly that it is not necessary in order to give effect to a disaffirmance of an infant's voidable contract that the other party shall be placed *in statu quo* or the consideration received by the infant returned to him;[16] but on the other hand it has been asserted that the infant on avoiding his contract must restore the consideration which he received,[17] and must allow or is liable for the benefit derived from whatever

10. Shrock *v.* Crowl, 83 Ind. 243; Tucker *v.* Moreland, 10 Pet. (U. S.) 58, 9 L. ed. 345.

11. *Indiana.*— King *v.* Barbour, 70 Ind. 35.

Massachusetts.— Pyne *v.* Wood, 145 Mass. 558, 14 N. E. 775.

Minnesota.— Cogley *v.* Cushman, 16 Minn. 397.

New Hampshire.— State *v.* Plaisted, 43 N. H. 413; Heath *v.* West, 26 N. H. 191.

North Carolina.— Skinner *v.* Maxwell, 66 N. C. 45.

Tennessee.— White *v.* Flora, 2 Overt. 426.

See 27 Cent. Dig. tit. "Infants," § 153.

Illustrations.— An assignment by an infant of a note not negotiable may be avoided by him by giving notice to the assignee that he considers the bargain void and offering to return the consideration received. Willis *v.* Twambly, 13 Mass. 204. An infant who has given his note in exchange for a horse may rescind the contract while under age by making tender of the horse and demanding the note. Hoyt *v.* Wilkinson, 57 Vt. 404. A minor's contract for services is avoided by his leaving the service. Vent *v.* Osgood, 19 Pick. (Mass.) 572 (deserting ship); McGill *v.* Woodward, 1 Treadw. (S. C.) 468, 3 Brev. 401. When a son, who has been placed by his father in the care of another person under an agreement that such person should provide for and educate him, and should receive his services until he was twenty-one years old, subsequently, at the age of nineteen and after the death of both of his parents, made an agreement with his employer whereby he was to be released from such service, this was a valid repudiation of the father's contract. Barnes *v.* Barnes, 50 Conn. 572.

Rescission through agent.— See Towle *v.* Dresser, 73 Me. 252.

12. St. Louis, etc., R. Co. *v.* Higgins, 44 Ark. 293; Holt *v.* Holt, 59 Me. 464; Stotts *v.* Leonhard, 40 Mo. App. 336 (even though the action be not prosecuted to final judgment); Stack *v.* Cavanaugh, 67 N. H. 149, 30 Atl. 350; Eaton *v.* Hill, 50 N. H. 235, 9 Am. Rep. 189.

13. White *v.* Flora, 2 Overt. (Tenn.) 426.

14. Shrock *v.* Crowl, 83 Ind. 243; Pakas *v.* Racy, 13 Daly (N. Y.) 227; Tucker *v.* Moreland, 10 Pet. (U. S.) 58, 9 L. ed. 345.

15. As to transactions affecting property see *supra*, IV, E, 5.

16. St. Louis, etc., R. Co. *v.* Higgins, 44 Ark. 293; Shuford *v.* Alexander, 74 Ga. 293; Shipley *v.* Smith, 162 Ind. 526, 70 N. E. 803; Towell *v.* Pence, 47 Ind. 304; Gillis *v.* Goodwin, 180 Mass. 140, 61 N. E. 813; White *v.* New Bedford Cotton Waste Corp., 178 Mass. 20, 59 N. E. 642; Morse *v.* Ely, 154 Mass. 458, 28 N. E. 577, 26 Am. St. Rep. 263; Dube *v.* Beaudry, 150 Mass. 448, 23 N. E. 222, 15 Am. St. Rep. 228, 6 L. R. A. 146; McCarthy *v.* Henderson, 138 Mass. 310; Baker *v.* Stone, 136 Mass. 405; Walsh *v.* Young, 110 Mass. 396; Bradford *v.* French, 110 Mass. 365; Gaffney *v.* Hayden, 110 Mass. 137, 14 Am. Rep. 580; Bartlett *v.* Drake, 100 Mass. 174, 97 Am. Dec. 92, 1 Am. Rep. 101; Chandler *v.* Simmons, 97 Mass. 508, 93 Am. Dec. 117.

So long as an infant's contract remains executory, he may unconditionally repudiate it. Braucht *v.* Graves-May Co., 92 Minn. 116, 99 N. W. 417.

The infant is not liable for rent of the property while it remained in his possession. Gillis *v.* Goodwin, 180 Mass. 140, 61 N. E. 813; McCarthy *v.* Henderson, 138 Mass. 310.

Where the contract was beneficial to the minor and has been executed, he cannot disaffirm without putting the other party *in statu quo*. Welch *v.* Welch, 103 Mass. 562; Breed *v.* Judd, 1 Gray (Mass.) 455.

17. *Kentucky.*— Bailey *v.* Barnberger, 11 B. Mon. 113.

Missouri.— See Baker *v.* Kennett, 54 Mo. 82; Price *v.* Blankenship, 144 Mo. 203, 45 S. W. 1123. But see Craighead *v.* Wells, 21 Mo. 404, 409.

Montana.— Clark *v.* Tate, 7 Mont. 171, 14 Pac. 761.

New Hampshire.— Young *v.* Currier, 63 N. H. 419; Locke *v.* Smith, 41 N. H. 346.

New York.— Bartholomew *v.* Finnemore, 17 Barb. 428.

Vermont.— Holden *v.* Pike, 14 Vt. 405, 39 Am. Dec. 228; Farr *v.* Sumner, 12 Vt. 28, 36 Am. Dec. 327.

England.— Holmes *v.* Blogg, 2 Moore C. P. 552, 8 Taunt. 508, 19 Rev. Rep. 445, 4 E. C. L. 252.

See 27 Cent. Dig. tit. "Infants," § 157.

Under Cal. Civ. Code, § 35, if the contract is made by the minor while he is over the

cannot be restored in specie.[18] The true rule, however, is this: where the infant, upon his arrival at majority, or at the time he seeks disaffirmance, still has the consideration received or any part thereof, he must, upon his disaffirmance, return it,[19] for the law will not allow him to repudiate his contract and at the same time

age of eighteen he can disaffirm only upon restoring the consideration to the party from whom it was received, or paying its equivalent. Whyte *v.* Rosencrantz, 123 Cal. 634, 56 Pac. 436, 69 Am. St. Rep. 90; Combs *v.* Hawes, (Cal. 1885) 8 Pac. 597. It is not essential that there should be an ability to restore the identical money received in order to sustain an action against the infant for money had and received. Whyte *v.* Rosencrantz, 123 Cal. 634, 56 Pac. 436, 69 Am. St. Rep. 90.

The North Dakota statute establishes the same rule as that of California. Luce *v.* Jestrab, 12 N. D. 548, 97 N. W. 848.

Where an infant legatee avoids a compromise wherehy he receives property of less value than his legacy, he must account for the value of the property received by deducting the amount from his legacy. Tipton *v.* Tipton, 48 N. C. 552.

Where property damaged.— Where an infant has received a horse in exchange for other property, he cannot recover the latter upon an offer to return the horse, if he has so misused him as to materially lessen his value. Bartholomew *v.* Finnemore, 17 Barb. (N. Y.) 428. *Contra*, where injury is due to unskilful driving and not to tortious acts. Stack *v.* Cavanaugh, 67 N. H. 149, 30 Atl. 350.

Where the consideration cannot be restored the infant must place the other party in as good a position as though it had been. Locke *v.* Smith, 41 N. H. 346.

18. Stack *v.* Cavanaugh, 67 N. H. 149, 30 Atl. 350; Bartlett *v.* Bailey, 59 N. H. 408; Hall *v.* Butterfield, 59 N. H. 354, 47 Am. Rep. 209; Heath *v.* Stevens, 48 N. H. 251.

The question whether the infant has received a benefit is one of mixed law and fact to be found by the tribunal trying the facts. Hall *v.* Butterfield, 59 N. H. 354, 47 Am. Rep. 209.

19. *Arkansas.*— Stull *v.* Harris, 51 Ark. 294, 11 S. W. 104, 2 L. R. A. 741; St. Louis, etc., R. Co. *v.* Higgins, 44 Ark. 293. See also Myrick *v.* Jacks, 39 Ark. 293.

Georgia.— Strain *v.* Wright, 7 Ga. 568.

Indiana.— Shirk *v.* Shultz, 113 Ind. 571, 15 N. E. 12; Dill *v.* Bowen, 54 Ind. 204; Carpenter *v.* Carpenter, 45 Ind. 142.

Indian Territory.— Sanger *v.* Hibbard, 2 Indian Terr. 547, 53 S. W. 330.

Iowa.—Beickler *v.* Guenther, 121 Iowa 419, 96 N. W. 895; Mehlhop *v.* Rae, 90 Iowa 30, 57 N. W. 650; Hawes *v.* Burlington, etc., R. Co., 64 Iowa 315, 20 N. W. 717; Murphy *v.* Johnson, 45 Iowa 57.

Kansas.— Dillon *v.* Burnham, 43 Kan. 77, 22 Pac. 1016.

Maine.— Robinson *v.* Weeks, 56 Me. 102.

Maryland.— Monumental Bldg. Assoc. No. 2 *v.* Herman, 33 Md. 128.

Massachusetts.— Badger *v.* Phinney, 15 Mass. 359, 8 Am. Dec. 105.

Minnesota.— Braucht *v.* Graves-May Co., 92 Minn. 116, 99 N. W. 417; Miller *v.* Smith, 26 Minn. 248, 2 N. W. 942, 37 Am. Rep. 407.

Missouri.— Craig *v.* Van Bebber, 100 Mo. 584, 13 S. W. 906, 18 Am. St. Rep. 569; Highley *v.* Barron, 49 Mo. 103; Tower-Doyle Commission Co. *v.* Smith, 86 Mo. App. 490; Betts *v.* Carroll, 6 Mo. App. 518.

Nebraska.— Philpot *v.* Sandwich Mfg. Co., 18 Nebr. 54, 24 N. W. 428.

New Hampshire.— Bartlett *v.* Bailey, 59 N. H. 408; Heath *v.* Stevens, 48 N. H. 251; Carr *v.* Clough, 26 N. H. 280, 59 Am. Dec. 345.

New York.— Stromberg *v.* Rubenstein, 19 Misc. 647, 44 N. Y. Suppl. 405. See also New York Bldg. Loan Banking Co. *v.* Fisher, 23 N. Y. App. Div. 363, 48 N. Y. Suppl. 152; Dickerson *v.* Gordon, 1 Silv. Sup. 378, 5 N. Y. Suppl. 310.

Tennessee.— Lane *v.* Dayton Coal, etc., Co., 101 Tenn. 581, 48 S. W. 1094.

Vermont.— Price *v.* Furman, 27 Vt. 268, 65 Am. Dec. 194.

Virginia.— Bedinger *v.* Wharton, 27 Gratt. 857.

Wisconsin.—See Jones *v.* Valentines' School of Telegraphy, 122 Wis. 318, 99 N. W. 1043.

United States.— Sanger *v.* Hibbard, 104 Fed. 455, 45 C. C. A. 635.

See 27 Cent. Dig. tit. "Infants," § 157.

The infant is treated as a trustee of the other party. Monumental Bldg. Assoc. No. 2 *v.* Herman, 33 Md. 128.

Recovery can be had only of such part as remains in specie after majority. Stromberg *v.* Rubenstein, 19 Misc. (N. Y.) 647, 44 N. Y. Suppl. 405.

Only a return of the identical money received by the infant and not its equivalent is required by the Iowa statute. Hawes *v.* Burlington, etc., R. Co., 64 Iowa 315, 20 N. W. 717.

Tender not necessary.— Where a promissory note payable to an infant is assigned by him, he may disaffirm the act without tendering back the consideration he received for the assignment. Briggs *v.* McCabe, 27 Ind. 327, 89 Am. Dec. 503. Where an infant paid defendant a sum of money as compensation for the privilege of taking a course of study in defendant's school, and he was given a receipt, called a "scholarship," and thereafter he demanded a return of his money, making known his willingness to return the scholarship, but the attitude of defendant indicated that he intended to retain the money, it was not necessary for the infant to make any formal tender of the paper, as a condition precedent to a suit by him to recover the money, but restoration should be made on the trial as a condition of the judg-

retain its fruits as his own;[20] but where he has disposed of, lost, or wasted the same during his infancy his right to disaffirm is in no way dependent upon his making good to the other party what he received,[21] for the privilege of repudiating the contract is accorded to an infant because of the indiscretion incident to

ment. Jones *v.* Valentines' School of Telegraphy, 122 Wis. 318, 99 N. W. 1043.

When tender made and refused no further tender necessary.— House *v.* Alexander, 105 Ind. 109, 4 N. E. 891, 55 Am. Rep. 189.

Pleading not sufficient as tender.— See Adam Roth Grocery Co. *v.* Hopkins, 29 S. W. 293, 16 Ky. L. Rep. 678.

Return of receipt.— Where an infant purchases corporate stock, taking a receipt of payment of the price on account of the stock, but never receiving a certificate of stock, on becoming of age, rescinding the contract, and suing for the price, he can recover without first offering to return the receipt. Robinson *v.* Weeks, 56 Me. 102.

Fraudulent conveyance.— If the property has been fraudulently conveyed by the infant to one who is not a *bona fide* purchaser, the seller may in equity have a cancellation of the conveyance and the restoration of the property, and if such infant before disposing of the goods has intermingled them with his stock of merchandise so that identification and separation becomes impossible, the seller may subject to his demand the entire stock, or if the stock being *in custodia legis* has been turned into money, he may subject the proceeds. Evans *v.* Morgan, 69 Miss. 328, 12 So. 270.

Restoration is not a condition precedent, but the effect of the disaffirmance is that the infant cannot thereafter hold what he received as against the person from whom he received it. Shirk *v.* Shultz, 113 Ind. 571, 15 N. E. 12. *Contra,* Braucht *v.* Graves-May Co., 92 Minn. 116, 99 N. W. 417.

Disaffirmance of contract of hire.— If an infant who has a horse on hire does any wilful and positive act amounting to an election on his part to disaffirm the contract of hire, the owner is entitled to the immediate possession. Campbell *v.* Stakes, 2 Wend. (N. Y.) 137, 19 Am. Dec. 561.

20. *Illinois.*— Curry *v.* St. John Plow Co., 55 Ill. App. 82.

Massachusetts.— Badger *v.* Phinney, 15 Mass. 359, 8 Am. Dec. 105.

Mississippi.— Evans *v.* Morgan, 69 Miss. 328, 12 So. 270.

New York.— Kitchen *v.* Lee, 11 Paige 107, 42 Am. Dec. 101.

Tennessee.— Lane *v.* Dayton Coal, etc., Co., 101 Tenn. 581, 48 S. W. 1094.

See 27 Cent. Dig. tit. "Infants," § 157; and *supra,* V, E, 1.

Compensation for damages to property.— Where an infant returns goods sold to him, he must compensate the seller for injuries to the goods sustained while in his possession. Wheeler, etc., Mfg. Co. *v.* Jacobs, 2 Misc. (N. Y.) 236, 21 N. Y. Suppl. 1006.

What is a sufficient restoration.—See Jones *v.* Valentines' School of Telegraphy, 122 Wis. 318, 99 N. W. 1043.

21. *Arkansas.*— Stull *v.* Harris, 51 Ark. 294, 11 S. W. 104, 2 L. R. A. 741; St. Louis, etc., R. Co. *v.* Higgins, 44 Ark. 293.

Georgia.— Southern Cotton Oil Co. *v.* Dukes, 121 Ga. 787, 49 S. E. 788.

Illinois.— Brandon *v.* Brown, 106 Ill. 519; Reynolds *v.* McCurry, 100 Ill. 356.

Indiana.— Dill *v.* Bowen, 54 Ind. 204; Carpenter *v.* Carpenter, 45 Ind. 142. See also White *v.* Branch, 51 Ind. 210, where horse received has become of no value.

Indian Territory.— Sanger *v.* Hibbard, 2 Indian Terr. 547, 53 S. W. 330.

Iowa.— Beickler *v.* Guenther, 121 Iowa 419, 96 N. W. 895; Mehlhop *v.* Rae, 90 Iowa 30, 57 N. W. 650; Hawes *v.* Burlington, etc., R. Co., 64 Iowa 315, 20 N. W. 717; Murphy *v.* Johnson, 45 Iowa 57.

Kansas.— Dillon *v.* Burnham, 43 Kan. 77, 22 Pac. 1016.

Maryland.— Monumental Bldg. Assoc. No. 2 *v.* Herman, 33 Md. 128; Brawner *v.* Franklin, 4 Gill 463.

Massachusetts.— Brown *v.* Hartford F. Ins. Co., 117 Mass. 479; Walsh *v.* Young, 110 Mass. 396; Chandler *v.* Simmons, 97 Mass. 508, 93 Am. Dec. 117.

Minnesota.— Braucht *v.* Graves-May Co., 92 Minn. 116, 99 N. W. 417 (unless the other party shows that the contract was a fair, reasonable, and provident one, free from fraud or overreaching on his part); Miller *v.* Smith, 26 Minn. 248, 2 N. W. 942, 37 Am. Rep. 407.

Missouri.—Craig *v.* Van Bebber, 100 Mo. 584, 13 S. W. 906, 18 Am. St. Rep. 569 [*distinguishing* Baker *v.* Kennett, 54 Mo. 82; Highley *v.* Barron, 49 Mo. 103]; Tower-Doyle Commission Co. *v.* Smith, 86 Mo. App. 490.

New York.— Green *v.* Green, 69 N. Y. 553, 25 Am. Rep. 233; New York Bldg. Loan Banking Co. *v.* Fisher, 23 N. Y. App. Div. 363, 48 N. Y. Suppl. 152; Kane *v.* Kane, 13 N. Y. App. Div. 544, 43 N. Y. Suppl. 662; Petrie *v.* Williams, 68 Hun 589, 23 N. Y. Suppl. 237; Stromberg *v.* Rubenstein, 19 Misc. 647, 44 N. Y. Suppl. 405.

Tennessee.— Lane *v.* Dayton Coal, etc., Co., 101 Tenn. 581, 48 S. W. 1094.

Vermont.— Price *v.* Furman, 27 Vt. 268, 65 Am. Dec. 194.

Virginia.— Bedinger *v.* Wharton, 27 Gratt. 857.

West Virginia.— Young *v.* West Virginia, etc., R. Co., 42 W. Va. 112, 24 S. E. 615.

United States.— MacGreal *v.* Taylor, 167 U. S. 688, 17 S. Ct. 961, 42 L. ed. 326; Sanger *v.* Hibbard, 104 Fed. 455, 43 C. C. A. 635.

See 27 Cent. Dig. tit. "Infants," § 157.

Allegations sufficient to excuse failure to tender return.— See Featherstone *v.* Betlejewski, 75 Ill. App. 59.

Rule not applicable in case of partnership. —Brown *v.* Hartford F. Ins. Co., 117 Mass. 479.

his immaturity; and if he were required to restore an equivalent where he has wasted or squandered the property or consideration received, the privilege of repudiating would be of no avail when most needed.[22] There have been distinctions attempted to be made between executory and executed contracts and between seeking relief at law and in equity, but with only a few exceptions the rule stated has governed the decision regardless of the facts relied on as distinguishing.[23]

6. Effect of Avoidance — a. In General.[24] The disaffirmance of a contract made by an infant nullifies it and renders it void *ab initio*, and the parties are returned to the same condition as if the contract had never been made.[25] After the infant has disaffirmed the contract any one may take advantage of such disaffirmance.[26] Where an infant avoids his contract it cannot thereafter be resuscitated or ratified.[27]

b. Recovery of What Was Paid or Parted With. Upon the disaffirmance of a contract by an infant, he is entitled to recover what he paid or parted with pursuant to such contract, if he returns what he received,[28] or offers to return it,[29] or if he has received no consideration or no benefit whatever from the contract.[30] It has even been asserted that he may recover what he paid or parted with with-

22. Craig *v.* Van Bebber, 100 Mo. 584, 13 S. W. 906, 18 Am. St. Rep. 569.

23. Lane *v.* Dayton Coal, etc., Co., 101 Tenn. 581, 48 S. W. 1094.

24. As to transactions affecting property see *supra*, IV, E, 6.

25. *Illinois.*— Myers *v.* Rehkopf, 30 Ill. App. 209.

Indiana.— Rice *v.* Boyer, 108 Ind. 472, 9 N. E. 420, 58 Am. Rep. 53; Shrock *v.* Crowl, 83 Ind. 243.

Massachusetts.— Vent *v.* Osgood, 19 Pick. 572.

Missouri.— Skinner *v.* Young, 106 Mo. App. 615, 81 S. W. 464; Tower-Doyle Commission Co. *v.* Smith, 86 Mo. App. 490.

Virginia.— Mustard *v.* Wohlford, 15 Gratt. 329, 76 Am. Dec. 209.

See 27 Cent. Dig. tit. "Infants," § 159.

Release of sureties.— Where an infant disaffirms his contract for the payment of money, his sureties on a note given therefor are released. Patterson *v.* Cave, 61 Mo. 439.

26. Harris *v.* Cannon, 6 Ga. 382; Jackson *v.* Burchin, 14 Johns. (N. Y.) 124; Jackson *v.* Carpenter, 11 Johns. (N. Y.) 539; Peck *v.* Cain, 27 Tex. Civ. App. 38, 63 S. W. 177.

A third person may take advantage of a plea of infancy made in the same action. Shrock *v.* Crowl, 83 Ind. 243; Price *v.* Jennings, 62 Ind. 111; Peck *v.* Cain, 27 Tex. Civ. App. 38, 63 S. W. 177.

27. Edgerton *v.* Wolf, 6 Gray (Mass.) 453; Pippen *v.* Mutual Ben. L. Ins. Co., 130 N. C. 23, 40 S. E. 822, 57 L. R. A. 505, surrender of life policy for its cash value. But see Austin *v.* Burroughs, 62 Mich. 181, 28 N. W. 862.

28. *Indiana.*— Indianapolis Chair Mfg. Co. *v.* Wilcox, 59 Ind. 429.

Massachusetts.— Gillis *v.* Goodwin, 180 Mass. 140, 61 N. E. 813.

Minnesota.— Johnson *v.* Northwestern Mut. L. Ins. Co., 56 Minn. 365, 57 N. W. 934, 59 N. W. 992, 45 Am. St. Rep. 473, 26 L. R. A. 187.

New Hampshire.— Heath *v.* Stevens, 48 N. H. 251.

New York.— Cooper *v.* Allport, 10 Daly 352.

Vermont.— Whitcomb *v.* Joslyn, 51 Vt. 79, 31 Am. Rep. 678.

See 27 Cent. Dig. tit. "Infants," § 158.

That the infant stole the money from another person, if the owner of the money makes no claim upon defendant therefor, does not take the case without the rule. Riley *v.* Mallory, 33 Conn. 201.

Damages for failure to perform.— In an action to avoid on the ground of plaintiff's infancy an executory contract entered into by him and to recover back money paid by him on account thereof defendant cannot be allowed as a counter-claim damages from plaintiff's failure to carry out the contract. Radley *v.* Kenedy, 14 N. Y. Suppl. 268.

Depreciation in value of the property returned cannot be shown either to defeat or reduce the recovery. Price *v.* Furman, 27 Vt. 268, 65 Am. Dec. 194.

Condition precedent to action.— See Hilton *v.* Shepherd, 92 Me. 160, 42 Atl. 387, construing Me. Rev. St. c. 111, § 2.

29. House *v.* Alexander, 105 Ind. 109, 4 N. E. 891, 55 Am. Rep. 189; McCarthy *v.* Henderson, 138 Mass. 310 [*followed* in Morse *v.* Ely, 154 Mass. 458, 28 N. E. 577, 26 Am. St. Rep. 263; Pyne *v.* Wood, 145 Mass. 558, 14 N. E. 775]; Sparman *v.* Keim, 83 N. Y. 245; Grace *v.* Hale, 2 Humphr. (Tenn.) 27, 36 Am. Dec. 296.

Recovery of market value at time of disaffirmance.— See Beickler *v.* Guenther, 121 Iowa 419, 96 N. W. 895.

30. Shurtleff *v.* Millard, 12 R. I. 272, 34 Am. Rep. 640.

A gift may be recovered back. Holt *v.* Holt, 59 Me. 464.

The infant is not liable to an action of trespass for retaking the property parted with into his possession. Shipman *v.* Horton, 17 Conn. 481.

The retaking must be in a peaceable manner and not by perversion of legal process. Shipman *v.* Horton, 17 Conn. 481.

out first returning or offering to return what he received;[31] but where the infant has received the benefit and enjoyed the consideration of an executed contract which was fair and reasonable, and cannot or will not put the other party *in statu quo*, the weight of authority denies to him the right to recover what he has paid or parted with.[32] It has also been held that if money belonging to an infant is paid out by another under his direction the infant cannot afterward recover the money from such person.[33]

c. Recovery on Avoidance of Contract For Services. Where the infant elects to disaffirm a contract of employment he is entitled to recover for services rendered on a *quantum meruit*;[34] but the money or the value of the articles received

31. Shirk *v.* Shultz, 113 Ind. 571, 15 N. E. 12; Miles *v.* Lingerman, 24 Ind. 385. See also Ruchizky *v.* De Haven, 97 Pa. St. 202.

Where infant deprived of property.— Where an infant purchased a stock of drugs which was afterward taken on execution against another the infant may on disaffirmance of the contract sue to recover the price even though he took no steps to recover the property. Lemmon *v.* Beeman, 45 Ohio St. 505, 15 N. E. 476.

He cannot thereafter hold what he received as against the person from whom he received it. Shirk *v.* Shultz, 113 Ind. 571, 15 N. E. 12.

32. *Indiana.*— Harney *v.* Owen, 4 Blackf. 337, 30 Am. Dec. 662.

Maine.— Robinson *v.* Weeks, 56 Me. 102.

Maryland.— Adams *v.* Beall, 67 Md. 53, 8 Atl. 664, 1 Am. St. Rep. 379; Monumental Bldg. Assoc. No. 2 *v.* Herman, 33 Md. 128; Wilhelm *v.* Hardman, 13 Md. 140; Brawner *v.* Franklin, 4 Gill 463.

Massachusetts.— Breed *v.* Judd, 1 Gray 455. See also Page *v.* Morse, 128 Mass. 99; Moley *v.* Brine, 120 Mass. 324. But see Morse *v.* Ely, 154 Mass. 458, 28 N. E. 577, 26 Am. St. Rep. 263.

Minnesota.— Johnson *v.* Northwestern Mut. L. Ins. Co., 56 Minn. 365, 57 N. W. 934, 59 N. W. 992, 45 Am. St. Rep. 473, 26 L. R. A. 187.

Montana.— Clark *v.* Tate, 7 Mont. 171, 14 Pac. 761.

New York.— Crummey *v.* Mills, 40 Hun 370 [*distinguishing* Green *v.* Green, 69 N. Y. 553, 25 Am. Rep. 233]; Pierce *v.* Lee, 36 Misc. 870, 74 N. Y. Suppl. 926; Aldrich *v.* Abrahams, Lalor 423.

England.— Valentini *v.* Canali, 24 Q. B. D. 166, 54 J. P. 295, 59 L. J. Q. B. 74, 61 L. T. Rep. N. S. 731, 38 Wkly. Rep. 331; Buckingham *v.* Drury, 3 Bro. P. C. 492, 1 Eng. Reprint 1454, 2 Eden 60, 28 Eng. Reprint 818; *Ex p.* Taylor, 8 De G. M. & G. 254, 2 Jur. N. S. 220, 25 L. J. Bankr. 35, 4 Wkly. Rep. 305, 57 Eng. Ch. 198, 44 Eng. Reprint 388; Holmes *v.* Blogg, 2 Moore C. P. 552, 8 Taunt. 508, 19 Rev. Rep. 445, 4 E. C. L. 252. But *compare* Corpe *v.* Overton, 10 Bing. 252, 3 L. J. C. P. 24, 3 Moore & S. 738, 25 E. C. L. 123.

See 27 Cent. Dig. tit. "Infants," § 158.

Excess over what was fair and reasonable may be recovered. Johnson *v.* Northwestern Mut. L. Ins. Co., 56 Minn. 365, 57 N. W. 934, 59 N. W. 992, 45 Am. St. Rep. 473, 26 L. R. A. 187.

Illustrations.— If an infant buys an article which is not a necessary, although he cannot be compelled to pay for it, still if he does pay for it during his minority he cannot, on attaining his majority, recover the money back. Wilson *v.* Kearse, Peake Add. Cas. 196. So also where an infant who had purchased a bicycle on instalments, and paid part of the price, under an agreement that title should not pass from the seller until all instalments were paid, afterward disaffirmed the contract, she was not entitled to recover the instalments paid, since as to them the contract was executed, although the contract in its entirety was executory. Rice *v.* Butler, 160 N. Y. 578, 55 N. E. 275, 73 Am. St. Rep. 703, 47 L. R. A. 303 [*reversing* 28 N. Y. App. Div. 622, 51 N. Y. Suppl. 1149].

33. Welch *v.* Welch, 103 Mass. 562, money used by infant's brother by his direction for support of his parents.

34. *Illinois.*— Ray *v.* Haines, 52 Ill. 485.

Indiana.— Meredith *v.* Crawford, 34 Ind. 399; Van Pelt *v.* Corwine, 6 Ind. 363; Wheatly *v.* Miscal, 5 Ind. 142; Dallas *v.* Hollingworth, 3 Ind. 537; Purviance *v.* Schultz, 16 Ind. App. 94, 44 N. E. 766.

Kentucky.— See Barr *v.* Shields, 9 Ky. L. Rep. 357.

Maine.— Vehue *v.* Pinkham, 60 Me. 142; Judkins *v.* Walker, 17 Me. 38, 35 Am. Dec. 229.

Massachusetts.— Gaffney *v.* Hayden, 110 Mass. 137, 14 Am. Rep. 580; Vent *v.* Osgood, 19 Pick. 572; Moses *v.* Stevens, 2 Pick. 332.

Michigan.— Widrig *v.* Taggart, 51 Mich. 103, 16 N. W. 251.

Missouri.— Lowe *v.* Sinklear, 27 Mo. 308; Skinner *v.* Young, 106 Mo. App. 615, 81 S. W. 464; Tower-Doyle Commission Co. *v.* Smith, 86 Mo. App. 490; Thompson *v.* Marshall, 50 Mo. App. 145.

New Hampshire.— Lufkin *v.* Mayall, 25 N. H. 82 [*overruling* Weeks *v.* Leighton, 5 N. H. 343].

New York.— Whitmarsh *v.* Hall, 3 Den. 375; Medbury *v.* Watrous, 7 Hill 110 [*overruling* McCoy *v.* Huffman, 8 Cow. 84].

Rhode Island.— Dearden *v.* Adams, 19 R. I. 217, 36 Atl. 3. See also Shurtleff *v.* Millard, 12 R. I. 272, 34 Am. Rep. 640, *semble* that infant can recover value of services less injury arising from breach of contract.

Vermont.— Meeker *v.* Hurd, 31 Vt. 639; Price *v.* Furman, 27 Vt. 268, 65 Am. Dec.

by the infant in payment should be deducted from the recovery,[35] and the master may set off such necessaries as he has supplied to the infant against the value of the latter's services.[36] It has been held that the infant may recover the value of his services notwithstanding he has received the full wages agreed upon, if such wages were not as much as the services were worth;[37] but it has also been held that an infant is bound by his executed contract for services if it was reasonable under all the circumstances, or not so unreasonable as to be evidence of fraud or undue advantage,[38] and that where payment is made to a minor for personal services rendered by him in accordance with a contract, such payment is a full satisfaction and he cannot recover a second time for his services.[39]

VI. TORTS.

A. Liability in General. It is well established that an infant is liable for his torts in the same manner as an adult.[40] Hence infancy is no defense to an

194; Hoxie *v.* Lincoln, 25 Vt. 206; Thomas *v.* Dike, 11 Vt. 273, 34 Am. Dec. 690; Abell *v.* Warren, 4 Vt. 149.

United States.— Burdett *v.* Williams, 30 Fed. 697; The Hotspur, 12 Fed. Cas. No. 6,720, 3 Sawy. 194.

Canada.— Rutherford *v.* Purdy, 21 Nova Scotia 43.

See 27 Cent. Dig. tit. "Infants," §§ 112, 159.

Matters to be considered in estimating value.— See Vehue *v.* Pinkham, 60 Me. 142; Garner *v.* Board, 27 Ind. 323.

The injury sustained by the employer by reason of the avoidance of the contract must be allowed for. Moses *v.* Stevens, 2 Pick. (Mass.) 332; Lowe *v.* Sinklear, 27 Mo. 308; The Hotspur, 12 Fed. Cas. No. 6,720, 3 Sawy. 394. See also Thomas *v.* Dike, 11 Vt. 273, 34 Am. Dec. 690. *Contra*, Derocher *v.* Continental Mills, 58 Me. 217, 4 Am. Rep. 286; Meeker *v.* Hurd, 31 Vt. 639.

If the services were worth nothing under all circumstances the infant cannot recover. Thomas *v.* Dike, 11 Vt. 273, 34 Am. Dec. 690.

The rights of the parties are governed wholly by the law in case of repudiation of the contract and not by the contract. Myers *v.* Rehkopf, 30 Ill. App. 209, 210.

35. Hagerty *v.* Nashua Lock Co., 62 N. H. 576 (where defendant during a part of the time he worked received more than he earned); Holden *v.* Pike, 14 Vt. 405, 39 Am. Dec. 228. See also Myers *v.* Rehkopf, 30 Ill. App. 209.

36. Meredith *v.* Crawford, 34 Ind. 399; Rutherford *v.* Purdy, 21 N. Brunsw. 43.

37. Dube *v.* Beaudry, 150 Mass. 448, 23 N. E. 222, 15 Am. St. Rep. 228, 6 L. R. A. 146; Gaffney *v.* Hayden, 110 Mass. 137, 14 Am. Rep. 580 [*distinguishing* Breed *v.* Judd, 1 Gray (Mass.) 455; Stone *v.* Dennison, 13 Pick. (Mass.) 1, 23 Am. Dec. 654].

38. Wilhelm *v.* Hardman, 13 Md. 140; Spicer *v.* Earl, 41 Mich. 191, 1 N. W. 923, 32 Am. Rep. 152; Squier *v.* Hydliff, 9 Mich. 274.

The infant may abandon the service when he pleases, or stipulate for any new terms he may see fit to command and can procure assent to. He is bound by the terms of the contract so far as he executes it without dissent, but no further. Spicer *v.* Earl, 41 Mich. 191, 1 N. W. 923, 32 Am. Rep. 152.

39. Hobbs *v.* Godlove, 17 Ind. 359; Murphy *v.* Johnson, 45 Iowa 57, under statute.

40. *Alabama.*—Oliver *v.* McClellan, 21 Ala. 675.

California.— Lackman *v.* Wood, 25 Cal. 147.

Illinois.— Wilson *v.* Garrard, 59 Ill. 51; Davidson *v.* Young, 38 Ill. 145.

Indiana.— Peterson *v.* Haffner, 59 Ind. 130, 26 Am. Rep. 81.

Kentucky.— Chandler *v.* Com., 4 Metc. 66; Hill *v.* Becker, 9 Ky. L. Rep. 619.

Maine.— Kilpatrick *v.* Hall, 67 Me. 543; Shaw *v.* Coffin, 58 Me. 254, 4 Am. Rep. 290; Scott *v.* Watson, 46 Me. 362, 74 Am. Dec. 457.

Maryland.— Monumental Bldg. Assoc. No. 2 *v.* Herman, 33 Md. 128.

Massachusetts.— Slayton *v.* Barry, (1900) 56 N. E. 574; Walker *v.* Davis, 1 Gray 506; Homer *v.* Thwing, 3 Pick. 492; Sikes *v.* Johnson, 16 Mass. 389.

Mississippi.— Ferguson *v.* Bobo, 54 Miss. 121.

Missouri.— Conway *v.* Reed, 66 Mo. 346, 27 Am. Rep. 354.

Nebraska.— Churchill *v.* White, 58 Nebr. 22, 78 N. W. 369, 76 Am. St. Rep. 64.

New Hampshire.— Stearns *v.* Wallace, 59 N. H. 595; Milton School Dist. No. 1 *v.* Bragdon, 23 N. H. 507.

New Jersey.— Schenk *v.* Strong, 4 N. J. L. 87.

New York.— New York Bldg. Loan Banking Co. *v.* Fisher, 23 N. Y. App. Div. 363, 48 N. Y. Suppl. 152; Heath *v.* Mahoney, 7 Hun 100; Conklin *v.* Thompson, 29 Barb. 218; Robbins *v.* Mount, 33 How. Pr. 24; Boylen *v.* McAvoy, 29 How. Pr. 278; Tifft *v.* Tifft, 4 Den. 175; Green *v.* Burke, 23 Wend. 490; Camphell *v.* Stakes, 2 Wend. 137, 19 Am. Dec. 561. See also Studwell *v.* Shapter, 54 N. Y. 249; McCabe *v.* O'Connor, 4 N. Y. App. Div. 354, 38 N. Y. Suppl. 572.

North Carolina.— Smith *v.* Kron, 96 N. C. 392, 2 S. E. 533.

North Dakota.— O'Leary *v.* Brooks Eleva-

action *ex delicto*[41] for assault,[42] assault and battery,[43] breach of trust,[44] conversion,[45] disseizin,[46] embezzlement,[47] false representations,[48] or for fraud.[49] Neither

tor Co., 7 N. D. 554, 75 N. W. 919, 41 L. R. A. 677.

Ohio.— Denning *v.* Nelson, 1 Ohio Dec. (Reprint) 503, 10 West. L. J. 215.

Pennsylvania.— Gillespie *v.* McGowan, 100 Pa. St. 144, 45 Am. Rep. 365; *In re* Wolf, 9 Kulp 523; Vincent *v.* Warner, 16 Phila. 87.

South Carolina.— Norris *v.* Vance, 3 Rich. 164; Deal *v.* Hanks, 3 McCord 257; Vance *v.* Word, 1 Nott & M. 197, 9 Am. Dec. 683.

Tennessee.— Dial *v.* Wood, 9 Baxt. 296.

Texas.— Chandler *v.* Deaton, 37 Tex. 406; Wiley *v.* Heard, 1 Tex. App. Civ. Cas. § 1203.

Vermont.— Ray *v.* Tubbs, 50 Vt. 688, 28 Am. Rep. 519; West *v.* Moore, 14 Vt. 447, 39 Am. Dec. 235.

Virginia.— Saum *v.* Cuffelt, 79 Va. 510.

Wisconsin.— Huchting *v.* Engel, 17 Wis. 230, 84 Am. Dec. 741.

United States.— Vasse *v.* Smith, 6 Cranch 226, 3 L. ed. 207.

England.— *Re* Seager, 60 L. T. Rep. N. S. 665.

See 27 Cent. Dig. tit. "Infants," § 161.

An infant may be arrested on a capias ad respondendum for torts committed. Vincent *v.* Warner, 16 Phila. (Pa.) 87. See also Schunemann *v.* Paradise, 46 How. Pr. (N. Y.) 426.

Devastavit.— An infant executor is not in the absence of fraud or tort liable for a devastavit. Saum *v.* Coffelt, 79 Va. 510; Young *v.* Purvis, 11 Ont. 597, whether rightful executor or executor *de sont tort.*

41. The form of the action in case of fraud must be such as does not suppose the existence of a contract. Gilson *v.* Spear, 38 Vt. 311, 88 Am. Dec. 659 [*followed* in Nash *v.* Jewett, 61 Vt. 501, 18 Atl. 47, 15 Am. St. Rep. 931, 4 L. R. A. 561].

Assumpsit will lie against an infant for money or property tortiously taken and converted. Plaintiff may waive the tort. Shaw *v.* Coffin, 58 Me. 254, 4 Am. Rep. 290; Elwell *v.* Martin, 32 Vt. 217.

42. *California.*— Lackman *v.* Wood, 25 Cal. 147.

Indiana.— Watson *v.* Wrightsman, 26 Ind. App. 437, 59 N. E. 1064.

Maryland.— Monumental Bldg. Assoc. No. 2 *v.* Herman, 33 Md. 128.

New Hampshire.— School Dist. No. 1 *v.* Bragdon, 23 N. H. 507.

New York.— Bullock *v.* Babcock, 3 Wend. 391. See also McCabe *v.* O'Connor, 4 N. Y. App. Div. 354, 38 N. Y. Suppl. 572.

Pennsylvania.— Gillespie *v.* McGowan, 100 Pa. St. 144, 45 Am. Rep. 365.

43. Peterson *v.* Haffner, 59 Ind. 130, 26 Am. Rep. 81; Conway *v.* Reed, 66 Mo. 346, 27 Am. Rep. 354; Bullock *v.* Babcock, 3 Wend. (N. Y.) 391. See also Sikes *v.* Johnson, 16 Mass. 389.

44. Loop *v.* Loop, 1 Vt. 177, breach of trust as executor.

45. *California.*— Lackman *v.* Wood, 25 Cal. 147.

Indiana.— McClure *v.* McClure, 74 Ind. 108.

Maine.— Lewis *v.* Littlefield, 15 Me. 233.

Massachusetts.— Walker *v.* Davis, 1 Gray 506; Homer *v.* Thwing, 3 Pick. 492.

New Hampshire.— Fitts *v.* Hall, 9 N. H. 441.

New York.— Campbell *v.* Stakes, 2 Wend. 137, 19 Am. Dec. 561.

Ohio.— Denning *v.* Nelson, 1 Ohio Dec. (Reprint) 503, 10 West. L. J. 215.

Rhode Island.— Freeman *v.* Boland, 14 R. I. 39, 51 Am. Rep. 340.

Vermont.— Baxter *v.* Bush, 29 Vt. 465, 70 Am. Dec. 429; Towne *v.* Wiley, 23 Vt. 355, 56 Am. Dec. 85; Green *v.* Sperry, 16 Vt. 390, 42 Am. Dec. 519.

Virginia.— See Saum *v.* Coffelt, 79 Va. 510.

United States.— Vasse *v.* Smith, 6 Cranch 226, 3 L. ed. 207.

See 27 Cent. Dig. tit. "Infants," § 163.

Infancy may be shown in an action of trover, not as a bar, but because it may have some influence on the question whether the act complained of was in fact a conversion. Vasse *v.* Smith, 6 Cranch (U. S.) 226, 3 L. ed. 207.

In the case of a bailment of money generally and not of any specific coins or bills, a failure to pay over is only a non-feasance and a plea of infancy is good in an action therefor. Root *v.* Stevenson, 24 Ind. 115.

46. Lackman *v.* Wood, 25 Cal. 147. See also Gillespie *v.* McGovern, 100 Pa. St. 144, 45 Am. Rep. 365.

Ejectment may be maintained against an infant for disseizin that being a tort. Marshall *v.* Wing, 50 Me. 62.

47. Peigne *v.* Sutcliffe, 4 McCord (S. C.) 387, 17 Am. Dec. 756.

48. Carpenter *v.* Carpenter, 45 Ind. 142; Gaunt *v.* Taylor, 15 N. Y. Suppl. 589.

The measure of damages for fraudulent representations made by an infant cannot be established by evidence of any action taken by plaintiff in pursuance of a contract void by reason of the infancy of defendant. Heath *v.* Mahoney, 7 Hun (N. Y.) 100.

Pretense of purchase.— Where an infant obtains possession of property through the pretense of a purchase, but intends at the time not to pay for it, there is no contract between him and the seller, and he is chargeable in action for tort. Ashlock *v.* Vivell, 29 Ill. App. 388; Wallace *v.* Morss, 5 Hill (N. Y.) 391.

49. *Georgia.*— Burns *v.* Hill, 19 Ga. 22.

Illinois.— Mathews *v.* Cowan, 59 Ill. 341; Davidson *v.* Young, 38 Ill. 145.

Louisiana.— Christian *v.* Welch, 7 La. Ann. 533.

Maryland.— Monumental Bldg. Assoc. No. 2 *v.* Herman, 33 Md. 128.

Mississippi.— Yaeger *v.* Knight, 60 Miss. 730; Ferguson *v.* Bobo, 54 Miss. 121.

Nebraska.— Cadwallader *v.* McClay, 37

will infancy constitute a valid defense to an action for libel,[50] for slander,[51] for negligence,[52] for seduction,[53] or for trespass.[54]

B. Acts Under Orders of Parent or Guardian. The liability of an infant for his tort is not affected by the fact that the act was committed under the express orders or by the authority of his parent or guardian.[55]

C. Acts of Agent or Servant. It has been laid down that in order to hold an infant liable for a tort, the tortious act must be committed by the infant himself or under his immediate view, or by his directions or authority. For as he cannot create an agency or appoint a servant, and therefore cannot delegate powers to another, he cannot guarantee or insure the fidelity, care, or skill of such other.[56]

D. Torts Connected With Contracts.[57] There are a number of cases which

Nebr. 359, 55 N. W. 1054, 40 Am. St. Rep. 496.

New Hampshire.— Milton School Dist. No. 1 *v.* Bragdon, 23 N. H. 507.

New York.— New York Bldg. Loan Banking Co. *v.* Fisher, 23 N. Y. App. Div. 363, 48 N. Y. Suppl. 152; Heath *v.* Mahoney, 7 Hun 100. See also McCabe *v.* O'Connor, 4 N. Y. App. Div. 354, 38 N. Y. Suppl. 572.

South Carolina.— Norris *v.* Wait, 2 Rich. 148, 44 Am. Dec. 283; Vance *v.* Word, 1 Nott & M. 197, 9 Am. Dec. 683.

Vermont.— Gibson *v.* Spear, 38 Vt. 311, 88 Am. Dec. 659.

Virginia.— Saum *v.* Coffelt, 79 Va. 510.

The repudiation of a contract which is not binding on the infant because of his infancy is not an act of legal fraud. Burns *v.* Hill, 19 Ga. 22.

50. Lackman *v.* Wood, 25 Cal. 147; Fears *v.* Riley, 148 Mo. 49, 49 S. W. 836.

51. Lackman *v.* Wood, 25 Cal. 147. See also Gillespie *v.* McGowan, 100 Pa. St. 144, 45 Am. Rep. 365. The fact that defendant in an action for slander was an infant, and therefore under the control of her parents and under the influence of her father and older sister, does not constitute duress, so as to make her irresponsible for slanders, especially such as were not uttered in their presence. Drane *v.* Pawley, 8 Ky. L. Rep. 530.

52. Neal *v.* Gillett, 23 Conn. 437; McCabe *v.* O'Connor, 4 N. Y. App. Div. 354, 38 N. Y. Suppl. 572; Robbins *v.* Mount, 33 How. Pr. (N. Y.) 24. See also Conway *v.* Reed, 66 Mo. 346, 27 Am. Rep. 354.

That the infant has a general guardian does not relieve him from liability for negligence as the owner or occupant of land. McCabe *v.* O'Connor, 4 N. Y. App. Div. 354, 38 N. Y. Suppl. 572.

Negligence in performance of contract.— Where an infant contracted with plaintiff to thresh his grain, and it was destroyed by a fire caused from sparks from the engine, which was without a spark arrester, the infant was not liable therefor in tort; the negligence, which was not wilful, arising in the performance of a contract voidable as to him. Lowery *v.* Cate, 108 Tenn. 54, 64 S. W. 1068, 57 L. R. A. 673.

53. Lee *v.* Hefley, 21 Ind. 98; Wise *v.* Schloesser. 111 Iowa 16, 82 N. W. 439; Becker *v.* Mason, 93 Mich. 336, 53 N. W. 361; Fry *v.* Leslie, 87 Va. 269, 12 S. E. 671.

54. *Maine.*— Scott *v.* Watson, 46 Me. 362, 74 Am. Dec. 457.

Maryland.— Monumental Bldg. Assoc. No. 2 *v.* Herman, 33 Md. 128.

Mississippi.— Ferguson *v.* Bobo, 54 Mass. 121.

New Hampshire.—Milton School Dist. No. 1 *v.* Bragdon, 23 N. H. 507.

New York.— Bullock *v.* Babcock, 3 Wend. 391. See also McCabe *v.* O'Connor, 4 N. Y. App. Div. 354, 38 N. Y. Suppl. 572.

North Dakota.— O'Leary *v.* Brooks Elevator Co., 7 N. D. 554, 75 N. W. 919, 41 L. R. A. 677.

Pennsylvania.— Gillespie *v.* McGowan, 100 Pa. St. 144, 45 Am. Rep. 365.

Vermont.— Humphrey *v.* Douglass, 10 Vt. 71, 33 Am. Dec. 177; Priest *v.* Hamilton, 2 Tyler 44.

See 27 Cent. Dig. tit. "Infants," § 164.

55. *Maine.*— Kilpatrick *v.* Hall, 67 Me. 543; Scott *v.* Watson, 46 Me. 362, 74 Am. Dec. 457.

New Hampshire.— Milton School Dist. No. 1 *v.* Bragdon, 23 N. H. 507.

North Carolina.— Smith *v.* Kron, 96 N. C. 392, 2 S. E. 533.

North Dakota.— O'Leary *v.* Brooks Elevator Co., 7 N. D. 554, 75 N. W. 919, 41 L. R. A. 677.

Texas.— Chandler *v.* Deaton, 37 Tex. 406.

Vermont.— Humphreys *v.* Douglass, 10 Vt. 71, 33 Am. Dec. 177.

Wisconsin.— Huchting *v.* Engel, 17 Wis. 230, 84 Am. Dec. 741.

See 27 Cent. Dig. tit. "Infants," § 164.

56. Burns *v.* Smith, 29 Ind. App. 181, 64 N. E. 94, 94 Am. St. Rep. 268; Robbins *v.* Mount, 33 How. Pr. (N. Y.) 24.

Acts of next friend.— An infant is not liable for the malicious prosecution during his infancy of a suit brought in his name by his next friend without his authority, although he assented thereto after he had knowledge of it. Burnham *v.* Seaverns, 101 Mass. 360, 100 Am. Dec. 123.

Assault and battery is within the rule. Sikes *v.* Johnson, 16 Mass. 389.

57. Effect of false representations as to age on right to disaffirm deeds, contracts, etc., see *supra*, IV, E, 1, d, (II); V, F, 1, c, (II).

limit the liability of an infant for torts to acts of trespass or pure torts properly so called, and deny any redress in a court of law against the fraudulent conduct of infants in any manner connected with a contract;[58] but there is also another line of authorities which, while fully recognizing the non-liability of an infant upon his contracts, draws a distinction between holding him upon the contract and estopping him, or making him responsible for his frauds, deceits, and falsehoods in matters connected with but not forming a constituent part of the contract. These cases consider that the action brought or the defense set up against the infants must sound in tort and not in contract, but if it does sound in tort it will not be defeated, although the tort complained of was connected with the contract.[59] The true principle appears to be this: that if the injury complained of arises from a breach of contract, although there may have been false representations or concealment respecting the subject-matter of it, the infant cannot be charged for his breach of promise or contract by a change in the form of action; in short, a cause of action in contract cannot be changed to a tort in order to deprive the infant of the benefit of the plea of infancy;[60] but if the injury is not a mere breach of contract, but a distinct, wilful, and positive wrong of itself, then, although it may be connected with a contract, the infant is liable.[61] This distinction is well illustrated by the cases which have arisen with reference to injuries to property held by the infant under a contract of hire. As to such injuries the established rule is that when the infant has kept within the terms of

58. *Connecticut.*— Brown *v.* Dunham, 1 Root 272.

Iowa.— See Nolan *v.* Jones, 53 Iowa 387, 5 N. W. 572.

Massachusetts.— Slayton *v.* Barry, 175 Mass. 513, 56 N. E. 574, 49 L. R. A. 560 [*distinguishing* Walker *v.* Davis, 1 Gray 506; Homer *v.* Thwing, 3 Pick. 492; Badger *v.* Phinney, 15 Mass. 359, 8 Am. Dec. 105].

New Jersey.— See Schenk *v.* Strong, 4 N. J. L. 87.

Pennsylvania.— Wilt *v.* Welsh, 6 Watts 9; Penrose *v.* Curren, 3 Rawle 351, 24 Am. Dec. 356.

England.— Liverpool Adelphi Loan Assoc. *v.* Fairhurst, 2 C. L. R. 512, 9 Exch. 422, 18 Jur. 191, 23 L. J. Exch. 163, 2 Wkly. Rep. 233; Price *v.* Hewett, 8 Exch. 146; Johnson *v.* Pie, 1 Lev. 169; Jennings *v.* Rundall, 8 T. R. 335, 4 Rev. Rep. 680.

The infant is no more liable in chancery than at law for fraud in a contract. Geer *v.* Hovy, 1 Root (Conn.) 179.

59. *Alabama.*—Oliver *v.* McClellan, 21 Ala. 675.

Indiana.— Rice *v.* Boyer, 108 Ind. 472, 9 N. E. 420, 58 Am. Rep. 53, if recovery can be had without giving effect to the contract.

Maine.— Lewis *v.* Littlefield, 15 Me. 233.

Mississippi.— Ferguson *v.* Bobo, 54 Miss. 121.

New York.— New York Bldg. Loan Banking Co. *v.* Fisher, 23 N. Y. App. Div. 363, 48 N. Y. Suppl. 152; Heath *v.* Mahoney, 7 Hun 100; Fish *v.* Ferris, 5 Duer 49; Wallace *v.* Morss, 5 Hill 391 [*overruling* Brown *v.* McCune, 5 Sandf. 224]. But see People *v.* Kendall, 25 Wend. 399, 37 Am. Dec. 240.

South Carolina.— Vance *v.* Word, 1 Nott & M. 197, 9 Am. Dec. 683. See also Norris *v.* Wait, 2 Rich. 148, 44 Am. Dec. 283.

Texas.— Kilgore *v.* Jordan, 17 Tex. 341. See also Crayton *v.* Munger, 9 Tex. 285.

United States.— Vasse *v.* Smith, 6 Cranch 226, 3 L. ed. 207.

60. *Maine.*— Caswell *v.* Parker, 96 Me. 39, 51 Atl. 238; Lewis *v.* Littlefield, 15 Me. 233.

Maryland.— Monumental Bldg. Assoc. No. 2 *v.* Herman, 33 Md. 128.

New Hampshire.— Prescott *v.* Norris, 32 N. H. 101; Fitts *v.* Hall, 9 N. H. 44.

New York.— Hewitt *v.* Warren, 10 Hun 560; Heath *v.* Mahoney, 7 Hun 100; Robbins *v.* Mount, 33 How. Pr. 24. See also Studwell *v.* Shapter, 54 N. Y. 249.

Pennsylvania.— Curtin *v.* Patton, 11 Serg. & R. 305.

Vermont.— Nash *v.* Jewett, 61 Vt. 501, 18 Atl. 47, 15 Am. St. Rep. 931, 4 L. R. A. 561; Doran *v.* Smith, 49 Vt. 353 (holding that infancy is a bar to an action on the case for false and fraudulent representations by a vendor or pledgor as to his ownership of property sold or pledged); Gibson *v.* Spear, 38 Vt. 311, 88 Am. Dec. 659; Morrill *v.* Aden, 19 Vt. 505; West *v.* Moore, 14 Vt. 447, 39 Am. Dec. 235.

England.— Burnard *v.* Haggis, 14 C. B. N. S. 45, 9 Jur. N. S. 1325, 32 L. J. C. P. 189, 8 L. T. Rep. N. S. 320, 11 Wkly. Rep. 644, 108 E. C. L. 45; Jennings *v.* Rundall, 8 T. R. 335, 4 Rev. Rep. 680.

61. Fitts *v.* Hall, 9 N. H. 441; Towne *v.* Wiley, 23 Vt. 355, 56 Am. Dec. 85.

Replevin for goods detained in violation of the terms of a contract of conditional sale, being an action of tort, is maintainable against an infant. Wheeler, etc., Mfg. Co. *v.* Jacobs, 2 Misc. (N. Y.) 236, 21 N. Y. Suppl. 1006.

False representations inducing contract are within the rule. Fitts *v.* Hall, 9 N. H. 441; Eckstein *v.* Frank, 1 Daly (N. Y.) 334; Hughes *v.* Gallans, 10 Phila. (Pa.) 618. *Contra*, Nash *v.* Jewett, 61 Vt. 501, 18 Atl. 47, 15 Am. St. Rep. 931, 4 L. R. A. 561.

the bailment and the injury is due merely to his lack of skill and experience, and not to any wrongful intent, he is not liable, for the damages are in the nature of a breach of contract;[62] but he is liable where the injury has resulted from his departure from the object of the bailment or he has been guilty of a positive and wilful tort,[63] as when, having hired a horse or vehicle to go to a designated place he injures the same by driving or going beyond such place or to another place in a different direction,[64] where he wilfully and intentionally beats, overdrives, or otherwise misuses a hired horse,[65] or where he fails or refuses to return the property after the term of bailment has expired.[66]

E. Age of Infant. Where the tort is of such a character that malice or an intention to injure is a necessary element of the wrong, the infant in order to be held liable must have arrived at such years that malice, etc., may be fairly imputed to him;[67] but where the tort is of a character not necessarily invoking malice — as a trespass — at least compensatory damages may be recovered, although the infant is of tender years.[68]

VII. CRIMES.

A. Capacity to Commit Crime[69] — **1. In General.** Although acts which would constitute crimes if done by an adult may sometimes on account of an

But plaintiff cannot in such case recover in the damages the costs of an action upon the contract. Fitts *v.* Hall, 9 N. H. 441; Hughes *v.* Gallans, 10 Phila. (Pa.) 618.

62. *Kentucky.*— Hill *v.* Becker, 9 Ky. L. Rep. 619.

Nebraska.— Churchill *v.* White, 58 Nebr. 22, 78 N. W. 369, 76 Am. St. Rep. 64.

New Hampshire.— Stack *v.* Cavanaugh, 67 N. H. 149, 30 Atl. 350; Eaton *v.* Hill, 50 N. H. 235, 9 Am. Rep. 189.

New York.— Moore *v.* Eastman, 1 Hun 578; Young *v.* Muhling, 48 N. Y. App. Div. 617, 63 N. Y. Suppl. 181; Campbell *v.* Stakes, 2 Wend. 137, 19 Am. Dec. 561.

Vermont.— Towne *v.* Wiley, 23 Vt. 355, 56 Am. Dec. 85.

63. *Nebraska.*— Churchill *v.* White, 58 Nebr. 22, 78 N. W. 369, 76 Am. St. Rep. 64.

New Hampshire.— Eaton *v.* Hill, 50 N. H. 235, 9 Am. Rep. 189.

New York.— Moore *v.* Eastman, 1 Hun 578.

Vermont.— Towne *v.* Wiley, 23 Vt. 355, 56 Am. Dec. 85; Green *v.* Sperry, 16 Vt. 390, 42 Am. Dec. 519.

England.— Burnard *v.* Haggis, 14 C. B. N. S. 45, 9 Jur. N. S. 1325, 32 L. J. C. P. 189, 8 L. T. Rep. N. S. 320, 11 Wkly. Rep. 644, 108 E. C. L. 45; Walley *v.* Holt, 35 L. T. Rep. N. S. 631.

64. *Massachusetts.*— Homer *v.* Thwing, 3 Pick. 492.

Nebraska.— Churchill *v.* White, 58 Nebr. 22, 78 N. W. 369, 76 Am. St. Rep. 64.

New York.— See Young *v.* Muhling, 48 N. Y. App. Div. 617, 63 N. Y. Suppl. 181.

Ohio.— Denning *v.* Nelson, 1 Ohio Dec. (Reprint) 503, 10 West. L. J. 215.

Rhode Island.— Freeman *v.* Boland, 14 R. I. 39, 51 Am. Rep. 340.

Vermont.— Towne *v.* Wiley, 23 Vt. 355, 56 Am. Dec. 85.

See 27 Cent. Dig. tit. "Infants," § 163.

Contra.— Schenk *v.* Strong, 4 N. J. L. 87; Penrose *v.* Curren, 3 Rawle (Pa.) 351, 24 Am. Dec. 356.

Limitations of the rule.—The doctrine that a person who hires a horse for a specified journey is liable for conversion if he drives the horse further than the stipulated journey, or on another and different trip, cannot be pressed so far as to make the hirer chargeable as for a tort merely by reason of slight and immaterial departures from the general course of the direction outlined in the contract. Young *v.* Muhling, 48 N. Y. App Div. 617, 63 N. Y. Suppl. 181.

65. Eaton *v.* Hill, 50 N. H. 235, 9 Am. Rep. 189; Moore *v.* Eastman, 1 Hun (N. Y.) 578; Campbell *v.* Stakes, 2 Wend. (N. Y.) 137, 19 Am. Dec. 561. See also Churchill *v.* White, 58 Nebr. 22, 78 N. W. 369, 76 Am. St. Rep. 64.

66. Eaton *v.* Hill, 50 N. H. 235, 9 Am Rep. 189. See also Churchill *v.* White, 58 Nebr. 22, 78 N. W. 369, 76 Am. St. Rep. 64.

67. Ferguson *v.* Bobo, 54 Miss. 121, fraud. See also McGee *v.* Willing, 31 Leg. Int. (Pa.) 37.

Presumption.— An infant under fourteen years of age is presumed to be incapable of malice, and is therefore not liable in an action for slander, unless the evidence is such as will rebut the presumption that he was not sufficiently developed mentally to comprehend the nature of the charge as tending to discredit plaintiff in public estimation, and to understand that liability would result from speaking such slanderous words. Drane *v.* Pawley, 8 Ky. L. Rep. 530.

68. Huchting *v.* Engel, 17 Wis. 230, 84 Am. Dec. 741, infant about six years of age. See also Gillespie *v.* McGowan, 100 Pa. St. 144, 45 Am. Rep. 365.

Presumption.— Where, in an action on the case for actual damages caused by negligence, it appeared that defendants were respectively thirteen and sixteen years of age, it was held that persons of the above ages must be considered, in the absence of proof to the contrary, as emancipated from childish instincts and bound to exercise their rights with ordinary care. Neal *v.* Gillett, 23 Conn. 437.

69. **Capacity to commit rape** see RAPE.

infant's civil disabilities be not criminal when done by him,[70] the general rule is that the fact that a person is under the age of twenty-one, or eighteen, where that is the age of majority, does not render him incapable of committing crime or exempt from responsibility therefor.[71] The responsibility of infants for crime depends more on their discretion, and the power to discriminate right from wrong, what is just or otherwise, than on their age;[72] and there is no exact age at which it can be laid down that an infant becomes accountable criminally for his acts,[73] but the time of infancy is usually divided into three distinct periods, during each of which a different presumption prevails.[74]

2. PRESUMPTION OF INCAPACITY — a. Conclusive Presumption. The first period is that up to the age of seven years,[75] during which the infant is conclusively presumed to be incapable of understanding the nature of crime and can in no event be held responsible therefor.[76]

b. Prima Facie Presumption. The second is that between the ages of seven and fourteen years.[77] An infant between these ages is presumed to be incapable

70. State *v.* Howard, 88 N. C. 650; Jones *v.* State, 31 Tex. Cr. 252, 20 S. W. 578, selling mortgaged chattels.

Non-support of wife.— A minor is not criminally liable under Howell Annot. St. Mich. c. 51, for failure to support his wife, unless he has means or has been emancipated as until emancipation his earnings are his father's. People *v.* Todd, 61 Mich. 234, 28 N. W. 79.

71. *Connecticut.*— Fahay *v.* State, 25 Conn. 205.

Georgia.— See Hill *v.* State, 63 Ga. 578, 36 Am. Rep. 120, assault and battery.

Maryland.— Monumental Bldg. Assoc. No. 2 *v.* Herman, 33 Md. 128.

New Jersey.—See Boyd *v.* Banta, 1 N. J. L. 266, treason.

New York.— People *v.* Kendall, 25 Wend. 399, 37 Am. Dec. 240, obtaining goods by false pretenses.

Pennsylvania.— Com. *v.* Edson, 2 Pa. Co. Ct. 377.

Texas.— Brown *v.* State, (Cr. App. 1904) 83 S. W. 378 (violation of local option law); Lively *v.* State, (Cr. App. 1903) 74 S. W. 321 (swindling); McDaniel *v.* State, 5 Tex. App. 475.

See 27 Cent. Dig. tit. "Infants," § 172.

Rule as to assault and battery.— Although, according to the common law, a boy under the age of fourteen is not indictable for an ordinary assault and battery, yet, if the battery be of an aggravated kind, as if it be a mayhem, or be done with a deadly weapon, or be prompted by a brutal passion, such as unbridled lust, the public justice will interfere and punish, if it appear that the accused was *doli capax*. State *v.* Pugh, 52 N. C. 61.

Defenses.— Where defendant falsely represented to prosecutors, to induce them to sell him a buggy and harness, that he was the owner of certain personal property, on which he gave a mortgage to secure the price of the buggy and harness, the fact that the mortgage was voidable by reason of defendant's infancy was no defense to a prosecution for swindling, the gist of which was the false representations inducing the sale prior to the execution of the mortgage. Lively *v.* State, (Tex. Cr. App. 1903) 74 S. W. 321.

72. Monumental Bldg. Assoc. No. 2 *v.* Herman, 33 Md. 128.

73. State *v.* Davis, 104 Tenn. 501, 58 S. W. 122.

74. See *infra*, VII, A, 2, 3.

75. Under some statutes this period is different. Thus in Arkansas it extends to twelve years (Dove *v.* State, 37 Ark. 261), in Georgia and Illinois to ten years (Canton Cotton Mills *v.* Edwards, 120 Ga. 447, 47 S. E. 937; Ford *v.* State, 100 Ga. 63, 25 S. E. 845; Angelo *v.* People, 96 Ill. 209, 36 Am. Rep. 132), and in Texas to nine years (Gardiner *v.* State, 33 Tex. 692).

76. *Georgia.*— Ford *v.* State, 100 Ga. 63, 25 S. E. 845.

Kentucky.— Heilman *v.* Com., 84 Ky. 457, 1 S. W. 731, 8 Ky. L. Rep. 451, 4 Am. St. Rep. 207; Willet *v.* Com., 13 Bush 230.

New Jersey.— State *v.* Aaron, 4 N. J. L. 231, 7 Am. Dec. 592.

New York.— People *v.* Townsend, 3 Hill 479; Walker's Case, 5 City Hall Rec. 137.

North Carolina.— State *v.* Hicks, 125 N. C. 636, 34 S. E. 247; State *v.* Yeargan, 117 N. C. 706, 23 S. E. 153, 36 L. R. A. 196.

Tennessee.— State *v.* Davis, 104 Tenn. 501, 58 S. W. 122.

Virginia.— Law *v.* Com., 75 Va. 885, 40 Am. Rep. 750.

United States.— Allen *v.* U. S., 150 U. S. 551, 14 S. Ct. 196, 37 L. ed. 1179.

England.— Marsh *v.* Loader, 14 C. B. N. S. 535, 11 Wkly. Rep. 784, 108 E. C. L. 535.

See 27 Cent. Dig. tit. "Infants," § 172.

77. Under the statutes of some states the ages comprised in the second period are by statute slightly different, but the rules are otherwise the same. Thus in Arkansas the second period is from twelve to fourteen (Dove *v.* State, 37 Ark. 261), in Georgia and Illinois from ten to fourteen (Ford *v.* State, 100 Ga. 63, 25 S. E. 845; Angelo *v.* People, 96 Ill. 209, 36 Am. Rep. 132), in New York from seven to twelve (People *v.* Squazza, 40 Misc. (N. Y.) 71, 81 N. Y. Suppl. 254), and in Texas from nine to thirteen (Gardiner *v.* State, 33 Tex. 692; Wusnig *v.* State, 33 Tex. 651; Allen *v.* State, (Tex. Cr. App. 1896) 37 S. W. 757; Parker *v.* State, 20 Tex. App. 451).

of committing a crime;[78] but this presumption may be rebutted by proof that the infant possessed sufficient discretion to be aware of the nature of the act,[79] and in such cases the infant may be held liable and punished.[80] In the case of a person between such ages the burden of proving capacity is upon the prosecution,[81]

78. *Alabama.*— McCormack *v.* State, 102 Ala. 156, 15 So. 438; Martin *v.* State, 90 Ala. 602, 8 So. 858, 24 Am. St. Rep. 844; Godfrey *v.* State, 31 Ala. 323, 70 Am. Dec. 494.
Arkansas.— Harrison *v.* State, 72 Ark. 117, 78 S. W. 763; Dove *v.* State, 37 Ark. 261.
Georgia.— Ford *v.* State, 100 Ga. 63, 25 S. E. 845.
Illinois.— Angelo *v.* People, 96 Ill. 209, 36 Am. Rep. 132.
Iowa.— State *v.* Milholland, 89 Iowa 5, 56 N. W. 403.
Kentucky.— McClure *v.* Com., 81 Ky. 448, 5 Ky. L. Rep. 468; Willet *v.* Com., 13 Bush 230; Heilman *v.* Com., 1 S. W. 731, 8 Ky. L. Rep. 451; State *v.* Fowler, 2 Ky. L. Rep. 150.
Louisiana.—State *v.* Nickelson, 45 La. Ann. 1172, 14 So. 134.
Massachusetts.— Com. *v.* Mead, 10 Allen 398.
Missouri.— State *v.* Adams, 76 Mo. 355.
New Jersey.— State *v.* Guild, 10 N. J. L. 163, 18 Am. Dec. 404; State *v.* Aaron, 4 N. J. L. 231, 7 Am. Dec. 592.
New York.— People *v.* Domenico, 45 Misc. 309, 92 N. Y. Suppl. 390; People *v.* Squazza, 40 Misc. 71, 81 N. Y. Suppl. 254; People *v.* Teller, 1 Wheel. Cr. 231; People *v.* Davis, 1 Wheel. Cr. 230; Walker's Case, 5 City Hall Rec. 137.
North Carolina.— State *v.* Hicks, 125 N. C. 636, 34 S. E. 247; State *v.* Yeargan, 117 N. C. 706, 23 S. E. 153, 36 L. R. A. 196.
Pennsylvania.— Com. *v.* McKeagy, 1 Ashm. 248.
South Carolina.— State *v.* Toney, 15 S. C. 409.
Tennessee.— State *v.* Davis, 104 Tenn. 501, 58 S. W. 122; State *v.* Goin, 9 Humphr. 175; State *v.* Doherty, 2 Overt. 80.
Texas.— Gardiner *v.* State, 33 Tex. 692; Wusing *v.* State, 33 Tex. 651; Allen *v.* State, (Cr. App. 1896) 37 S. W. 757.
Virginia.— Law *v.* Com., 75 Va. 885, 40 Am. Rep. 750.
United States.— Allen *v.* U. S., 150 U. S. 551, 14 S. Ct. 196, 37 L. ed. 1179.
England.— Rex *v.* Groombridge, 7 C. & P. 582, 32 E. C. L. 770; Rex *v.* Owen, 4 C. & P. 236, 19 E. C. L. 493.
See 27 Cent. Dig. tit. "Infants," § 172.
Contra.— State *v.* Jackson, 3 Pennew. (Del.) 15, 50 Atl. 270. And see State *v.* Learnard, 41 Vt. 585, 589.
The presumption varies in strength with the age of the infant. It is very strong while he is near the age of seven but becomes weaker as he progresses toward the age of fourteen. McCormack *v.* State, 102 Ala. 156, 15 So. 438; Martin *v.* State, 90 Ala. 602, 8 So. 858, 24 Am. St. Rep. 844; State *v.* Aaron, 4 N. J. L. 231, 7 Am. Dec. 592; Walker's Case, 5 City Hall Rec. (N. Y.) 137; Law *v.* Com., 75 Va. 885, 40 Am. Rep. 750.

79. *Alabama.*— McCormack *v.* State, 102 Ala. 156, 15 So. 438; Martin *v.* State, 90 Ala. 602, 8 So. 858, 24 Am. St. Rep. 844; Godfrey *v.* State, 31 Ala. 323, 70 Am. Dec. 494.
Arkansas.— Harrison *v.* State, (1904) 78 S. W. 763; Dove *v.* State, 37 Ark. 261.
Illinois.— Angelo *v.* People, 96 Ill. 209, 36 Am. Rep. 132.
Iowa.— State *v.* Milholland, 89 Iowa 5, 56 N. W. 403.
Kentucky.— Willet *v.* Com., 13 Bush 230; Heilman *v.* Com., 1 S. W. 731, 8 Ky. L. Rep. 451; State *v.* Fowler, 2 Ky. L. Rep. 150.
Louisiana.—State *v.* Nickleson, 45 La. Ann. 1172, 14 So. 134.
Missouri.— State *v.* Adams, 76 Mo. 355.
New Jersey.— State *v.* Guild, 10 N. J. L. 163, 18 Am. Dec. 404; State *v.* Aaron, 4 N. J. L. 231, 7 Am. Dec. 592.
New York.— People *v.* Squazza, 40 Misc. 71, 81 N. Y. Suppl. 254; People *v.* Teller, 1 Wheel. Cr. 231; Walker's Case, 5 City Hall Rec. 137.
North Carolina.— State *v.* Hicks, 125 N. C. 636, 34 S. E. 247; State *v.* Yeargan, 117 N. C. 706, 23 S. E. 153, 36 L. R. A. 196.
Pennsylvania.— Com. *v.* McKeagy, 1 Ashm. 248.
South Carolina.— State *v.* Toney, 15 S. C. 409.
Tennessee.— State *v.* Davis, 104 Tenn. 501, 58 S. W. 122; State *v.* Goin, 9 Humphr. 175; State *v.* Doherty, 2 Overt. 80.
Texas.— Gardiner *v.* State, 33 Tex. 692; Wusnig *v.* State, 33 Tex. 651; Allen *v.* State, (Cr. App. 1896) 37 S. W. 757.
Virginia.— Law *v.* Com., 75 Va. 885, 40 Am. Rep. 750.
United States.— Allen *v.* U. S., 150 U. S. 551, 14 S. Ct. 196, 37 L. ed. 1179.
England.— Rex *v.* Groombridge, 7 C. & P. 582, 32 E. C. L. 770; Rex *v.* Owen, 4 C. & P. 236, 19 E. C. L. 493.
See 27 Cent. Dig. tit. "Infants," § 172.

80. *Alabama.*— Martin *v.* State, 90 Ala. 602, 8 So. 858, 24 Am. St. Rep. 844; Godfrey *v.* State, 31 Ala. 323, 70 Am. Dec. 494.
Iowa.— State *v.* Milholland, 89 Iowa 5, 56 N. W. 403.
Kentucky.— State *v.* Fowler, 2 Ky. L. Rep. 150.
Louisiana.—State *v.* Nickleson, 45 La. Ann. 1172, 14 So. 134.
New Jersey.— State *v.* Guild, 10 N. J. L. 163, 18 Am. Dec. 404.
New York.— People *v.* Teller, 1 Wheel. Cr. 231; Walker's Case, 5 City Hall Rec. 137.
North Carolina.— State *v.* Yeargan, 117 N. C. 706, 23 S. E. 153, 36 L. R. A. 196.
Pennsylvania.— Com. *v.* McKeagy, 1 Ashm. 248.
Tennessee.— State *v.* Goin, 9 Humphr. 175.
See 27 Cent. Dig. tit. "Infants," § 172.
Punishment see *infra*, VII, E.

81. *Arkansas.*— Harrison *v.* State, (1904) 78 S. W. 763; Dove *v.* State, 37 Ark. 261.

and a conviction cannot be had or sustained unless it is affirmatively made to appear that defendant was at the time of the act of sufficient maturity of mind to understand and appreciate what he did.[82] The question as to defendant's capacity is for the jury,[83] and it has been said that in order to convict the jury must be convinced beyond a reasonable doubt of defendant's capacity.[84]

3. Presumption of Capacity. The third period is after the age of fourteen years when the infant is presumed to be capable of committing crime, and of being responsible therefor in the same manner as with the case of an adult,[85] although the presumption is subject to proof as to the real fact.[86] The burden

Georgia.— Ford *v.* State, 100 Ga. 63, 25 S. E. 845.

Iowa.— State *v.* Fowler, 52 Iowa 103, 2 N. W. 983, 2 Ky. L. Rep. 150.

Missouri.— State *v.* Adams, 76 Mo. 355.

Texas.— Gardiner *v.* State, 33 Tex. 692; McDaniel *v.* State, 5 Tex. App. 475.

See 27 Cent. Dig. tit. "Infants," § 172.

82. *Arkansas.*— Dove *v.* State, 37 Ark. 261.

Georgia.— Ford *v.* State, 100 Ga. 63, 25 S. E. 845.

Kentucky.— Willet *v.* Com., 13 Bush 230.

New York.— People *v.* Domenico, 45 Misc. 309, 92 N. Y. Suppl. 390; People *v.* Squazza, 40 Misc. 71, 81 N. Y. Suppl. 254; People *v.* Davis, 1 Wheel. Cr. 230.

Tennessee.— State *v.* Davis, 104 Tenn. 501, 58 S. W. 122.

See 27 Cent. Dig. tit. "Infants," § 172.

Nature of evidence required.— Direct and positive testimony is not necesssary to prove capacity, but circumstances of education, habits of life, general character, moral and religious instructions, and often circumstances immediately connected with the offense charged, may in most instances be proven to convince the jury whether or not defendant had the discretion required. Wusnig *v.* State, 33 Tex. 651.

Actual knowledge of the unlawfulness of the act need not be shown, but if capacity is established, knowledge may be presumed. Com. *v.* Mead, 10 Allen (Mass.) 398.

A sense of moral guilt only on the part of the infant, in the absence of a knowledge of his legal responsibility for his act, will not authorize a conviction. Willet *v.* Com., 13 Bush (Ky.) 230; State *v.* Yeargan, 117 N. C. 706, 23 S. E. 153, 36 L. R. A. 196; Allen *v.* State, (Tex. Cr. App. 1896) 37 S. W. 757.

The strongest and clearest proof of capacity to entertain a criminal intent is necessary. Angelo *v.* People, 96 Ill. 209, 36 Am. Rep. 132.

Where no evidence was taken as to the capacity of infant defendants to commit crime, for the reason that the court, from their appearance, and conversation with them and their parents, was convinced that they had capacity to understand the act charged and its wrongfulness, a conviction could not be sustained. People *v.* Domenico, 45 Misc. (N. Y.) 309, 92 N. Y. Suppl. 390.

A plea of guilty by a child between seven and twelve years of age will not overcome the presumption that such a child is incapable of committing crime. People *v.* Domenico, 45 Misc. (N. Y.) 309, 92 N. Y. Suppl. 390.

Expert testimony is admissible to prove the capacity of an infant to commit crime. State *v.* Nickleson, 45 La. Ann. 1172, 14 So. 134.

Sufficiency of evidence.— Circumstances under which a theft is committed by an infant between seven and fourteen years of age, indicating that he was conscious, while stealing, that he was doing wrong, are sufficient evidence of his capacity. Stage's Case, 5 City Hall Rec. (N. Y.) 177. Under the Texas statute it must be shown that the infant understood the nature and illegality of the act; mere proof that he knew the difference between good and evil and had the ordinary intelligence of boys of his age is not sufficient. Wusnig *v.* State, 33 Tex. 651; Parker *v.* State, 20 Tex. App. 451; Keith *v.* State, 33 Tex. Cr. 341, 26 S. W. 412; Carr *v.* State, 24 Tex. App. 562, 7 S. W. 328, 5 Am. St. Rep. 905.

83. McCormack *v.* State, 102 Ala. 156, 15 So. 438; Dove *v.* State, 37 Ark. 261; Com. *v.* Mead, 10 Allen (Mass.) 398; State *v.* Learnard, 41 Vt. 585.

Independent evidence of capacity is not essential but it is a question to be determined by the jury from the facts of the case. State *v.* Toney, 15 S. C. 409.

Instructions held sufficient see State *v.* Milholland, 89 Iowa 5, 56 N. W. 403; McClure *v.* Com., 81 Ky. 448, 5 Ky. L. Rep. 468; Rocha *v.* State, 38 Tex. Cr. 69, 41 S. W. 611.

84. Martin *v.* State, 90 Ala. 602, 8 So. 858, 24 Am. St. Rep. 844; Godfrey *v.* State, 31 Ala. 323, 70 Am. Dec. 494; McClure *v.* Com., 81 Ky. 448, 5 Ky. L. Rep. 468; Law *v.* Com., 75 Va. 885, 40 Am. Rep. 750.

85. *Illinois.*— Angelo *v.* People, 96 Ill. 209, 36 Am. Rep. 132.

Minnesota.— State *v.* Kluseman, 53 Minn. 541, 55 N. W. 741.

North Carolina.— State *v.* Yeargan, 117 N. C. 706, 23 S. E. 153, 36 L. R. A. 196.

Pennsylvania.— Com. *v.* McKeagy, 1 Ashm. 248.

Tennessee.— State *v.* Davis, 104 Tenn. 501, 58 S. W. 122; State *v.* Doherty, 2 Overt. 80.

Vermont.— State *v.* Learnard, 41 Vt. 585.

See 27 Cent. Dig. tit. "Infants," § 172.

86. State *v.* Learnard, 41 Vt. 585.

Evidence to remove presumption.— Where one charged with crime is above the age at which capacity to commit crime is presumed his own testimony that he did not know it was wrong to do the act constituting the crime will not in the absence of any evidence as to his general mental capacity tend to re-

of proving mental incapacity during this period is, however, upon the infant defendant.[87]

B. Acts Under Direction of Parent. An infant otherwise liable for a crime cannot escape liability by showing that he acted under the command of his parent.[88]

C. Burden of Proof as to Age. A defendant who seeks to shield himself from responsibility for crime on the ground of infancy must show that he is within the ages under which the law either conclusively or *prima facie* presumes him to be incapable of committing a crime.[89]

D. Rights and Privileges as to Prosecution. If above the age when criminal responsibility attaches the infant appears and defends in person or by attorney.[90] As an incident to the right to defend in person the infant has a right to elect the mode of trial,[91] and as a further incident he must plead, and consequently may plead guilty.[92] It is the duty of the court to see that the infant's rights are carefully guarded and protected and to protect him from all irregular proceedings during the trial.[93]

E. Punishment. An infant who has reached the age of criminal responsibility, and has been convicted of crime, is subject to the penalty or punishment therefor, the same as an adult;[94] but in many states statutes have been enacted providing that persons under a designated age are, on conviction of charge, to be imprisoned in the county jail instead of the penitentiary,[95] or giving the courts power to commit infants convicted of crime to reformatory rather than to penal institutions.[96]

move the presumption. State *v.* Kluseman, 53 Minn. 541, 55 N. W. 741.

87. State *v.* Di Guglielmo, (Del. 1903) 55 Atl. 350; State *v.* Kavanaugh, 4 Pennew. (Del.) 131, 53 Atl. 335.

88. People *v.* Richmond, 29 Cal. 414. See also Com. *v.* Mead, 10 Allen (Mass.) 398.

89. State *v.* Arnold, 35 N. C. 184; Ake *v.* State, 6 Tex. App. 398, 32 Am. Rep. 586; McDaniel *v.* State, 5 Tex. App. 475.

Mere proof that he was a minor at the time does not even throw upon the prosecution the burden of proving his ability to understand the nature and illegality of the offense. McDaniel *v.* State, 5 Tex. App. 475.

90. People *v.* Wandell, 21 Hun (N. Y.) 515. See also Winslow *v.* Anderson, 4 Mass. 376.

To do so is his right and it has been held error to assign him a guardian and try the case upon a plea pleaded for him by the guardian. Word *v.* Com., 3 Leigh (Va.) 743. See also People *v.* Wandell, 21 Hun (N. Y.) 515.

In Connecticut a guardian should be appointed to assist the infant in his defense. State *v.* James, 37 Conn. 355; Fahay *v.* State, 25 Conn. 205. The omission to appoint a guardian renders the proceedings erroneous but not void. State *v.* James, *supra*. It renders the judgment liable to be set aside on a writ of error, but affords no ground for dismissing the complaint and setting the accused at liberty. Fahay *v.* State, *supra*. Where in answer to interrogatories of the court defendant alleged that he was supposed to be of age, and thus prevented the appointment of a guardian *ad litem*, the failure to appoint such guardian did not render the proceedings even erroneous. State *v.* James, *supra*.

91. People *v.* Wandell, 21 Hun (N. Y.) 515.

92. People *v.* Wandell, 21 Hun (N. Y.) 515.

93. McClure *v.* Com., 81 Ky. 448, 5 Ky. L. Rep. 468.

94. See *In re* Kenney, 108 Mass. 492; Ake *v.* State, 6 Tex. App. 398, 32 Am. Rep. 586 (any punishment other than death); Law *v.* Com., 75 Va. 885, 40 Am. Rep. 750.

An infant may be fined and adjudged to pay costs. Dial *v.* Wood, 9 Baxt. (Tenn.) 296; Beasley *v.* State, 2 Yerg. (Tenn.) 481.

Death penalty may be inflicted on infants. State *v.* Adams, 76 Mo. 355; State *v.* Barton, 71 Mo. 288 [*affirming* 8 Mo. App. 15]; Com. *v.* McKeagy, 1 Ashm. (Pa.) 248. *Aliter*, under the Texas statute where the crime was committed before the infant reached the age of seventeen. Ingram *v.* State, 29 Tex. App. 33, 14 S. W. 457 (holding the evidence insufficient to show that defendant was seventeen at the time of the crime); Ake *v.* State, 6 Tex. App. 398, 32 Am. Rep. 586 (holding that defendant is entitled to the benefit of a doubt as to his age).

95. Creed *v.* People, 81 Ill. 565; Monoughan *v.* People, 24 Ill. 340; *Ex p.* Gray, 77 Mo. 160; State *v.* Adams, 76 Mo. 355; State *v.* Barton, 71 Mo. 288 [*affirming* 8 Mo. App. 15].

Such a statute does not exempt minors from the death penalty. State *v.* Adams, 76 Mo. 355; State *v.* Barton, 71 Mo. 288 [*affirming* 8 Mo. App. 15].

96. *In re* Peterson, (Cal. 1903) 71 Pac. 690; State *v.* Shattuck, 45 N. H. 205 (holding that in case of a conviction for an offense which might by law be punished by imprisonment in the state prison, common jail, or

VIII. ACTIONS.[97]

A. Rights of Action — 1. Capacity to Sue or Be Sued in General. The fact that a person is an infant does not prevent his suing[98] either at law or in

house of correction, the offender may be sent to the house of reformation, although the alternative sentence actually awarded was the payment of a fine only); Com. *v.* McKeagy, 1 Ashm. (Pa.) 248; *In re* Barbee, 19 Wash. 306, 53 Pac. 155. And see *supra*, III, B, C, E.

Such statutes are constitutional. People *v.* Illinois State Reformatory, 148 Ill. 413, 36 N. E. 76, 23 L. R. A. 139.

Under the New York penal code, a child under sixteen convicted of a felony may, in the discretion of the court, instead of being sentenced to a fine or imprisonment, be placed in charge of a suitable person or institution until majority, or for a shorter term. But in case of conviction for a misdemeanor he must be committed to some reformatory, charitable, or other institution, authorized by law to receive and take charge of minors. People *v.* New York Catholic Protectory, 38 Misc. (N. Y.) 660, 78 N. Y. Suppl. 232.

The power is discretionary and does not preclude punishment other than such commitment. *In re* Kenney, 108 Mass. 492.

Proceedings may be arrested under 1 Ind. Rev. St. p. 545, § 13, with the consent of the accused and he be committed to the house of refuge at any stage, even after a motion in arrest of judgment on the verdict has been overruled. State *v.* Smith, 59 Ind. 179.

Approval of sentence.— See *In re* O'Leary, 25 Mich. 144, construing Mich. Laws (1867), p. 173, § 10.

If the house of refuge refuses to receive a child under sixteen years of age who has been sentenced to imprisonment there, the sheriff must discharge him. He cannot be detained in the city prison. Matter of Lewinski, 66 How. Pr. (N. Y.) 175.

Mistake as to age.— A prisoner having been sentenced and committed to the reform school as under sixteen years of age, the court sentencing him cannot proceed to give a new sentence on the ground of mistake as to age. The sentence is not made void by such mistake. *In re* Mason, 8 Mich. 70.

Place of confinement.— It is discretionary with the court whether the minor under sixteen years of age shall be confined in the workhouse or house of refuge. *Ex p.* Walker, 8 Ohio Dec. (Reprint) 480, 8 Cinc. L. Bul. 198.

Term of confinement.— See People *v.* Illinois State Reformatory, 148 Ill. 413, 36 N. E. 76, 23 L. R. A. 139; *In re* Amidon, 40 Mich. 628; *In re* Lorkowski, 94 Mo. App. 623, 68 S. W. 610; State *v.* Shattuck, 45 N. H. 205.

Discharge.— A minor who is committed to a reform institution on conviction of a crime is entitled to his discharge at the expiration of his term, and cannot be arbitrarily detained beyond that time by the board of managers under a statute providing that destitute, abandoned, or neglected children may be committed to such institution, but he must be committed under such statute by proper proceedings. *In re* Lorkowski, 94 Mo. App. 623, 68 S. W. 610.

97. **Actions by or against general guardian or ward under general guardianship** see Guardian and Ward.

Limitations and laches in actions by or against general guardian or ward under general guardianship see Guardian and Ward.

98. *Connecticut.*— Williams *v.* Cleaveland, 76 Conn. 426, 56 Atl. 850.

Georgia.— Hurst *v.* Goodwin, 114 Ga. 585, 40 S. E. 764, 88 Am. St. Rep. 43; Jack *v.* Davis, 29 Ga. 219.

Illinois.— Allman *v.* Taylor, 101 Ill. 185.

Indiana.— Winer *v.* Mast, 146 Ind. 177, 45 N. E. 66.

Kansas.— Schnee *v.* Schnee, 61 Kan. 643, 60 Pac. 738, proceeding for probate of will.

Maryland.— Roche *v.* Waters, 72 Md. 264, 19 Atl. 535, 7 L. R. A. 533.

Michigan.— Vanatter *v.* Marquardt, (1903) 95 N. W. 977.

Nebraska.— Clasen *v.* Pruhs, (1903) 95 N. W. 640.

New York.— Fox *v.* Interurban St. R. Co., 42 Misc. 538, 86 N. Y. Suppl. 64.

United States.— Livingston *v.* Jordan, 15 Fed. Cas. No. 8,415, Chase 454.

Canada.— Campbell *v.* Mathewson, 5 Ont. Pr. 91; Phelan *v.* Phelan, Draper (U. C.) 386; Ferris *v.* Fox, 11 U. C. Q. B. 612.

See 27 Cent. Dig. tit. "Infants," § 178.

An infant cannot sustain a suit for specific performance because the remedy is not mutual. Flight *v.* Bolland, 4 Russ. 298, 28 Rev. Rep. 101, 4 Eng. Ch. 298, 38 Eng. Reprint 817.

Infants cannot bring an action dependent on an election between two conflicting rights, except by direction of the court. Chipman *v.* Montgomery, 63 N. Y. 221.

Married infants.— La. Civ. Code, art. 368, authorizing a husband under age to appear in court in all cases was intended as an exception to the disposition of La. Civ. Code, arts. 376, 377, 1235, 1236, but the exception applies only to cases of ordinary emancipation. The amendment to article 999, La. Code Pr. (act March 25, 1828, § 22) gives a similar power to the wife, provided she is authorized by her husband. Molinari *v.* Fernandez, 2 La. Ann. 553.

The administrator of an infant who died before majority may maintain an action to forcclose a mortgage given to the infant, if brought within the time that the infant if living could have maintained such action. Nolte *v.* Libbert, 34 Ind. 163.

In a hypothecary action by a minor, it is essential that his rights be previously liqui-

equity,[99] nor does it prevent his being sued,[1] and his responsibilities as recognized by the law of the land being enforced against him.[2] But an infant must sue or be sued by next friend or guardian *ad litem*.[3]

2. Actions on Contracts. An infant may sue to recover what is due him under a contract,[4] or damages for a breach.[5] As a rule an infant is not liable to an action sounding in contract,[6] unless the contract was for necessaries;[7] but it has been held that he is liable in assumpsit for money tortiously taken by him.[8]

3. Actions in Respect to Property Rights.[9] An infant may institute and maintain such actions as may be necessary and appropriate to maintain his property rights.[10] Thus the infant owner of realty may bring ejectment,[11] or a writ of entry,[12]

dated by a judgment. Mayo *v.* Brittan, 34 La. Ann. 984.

Infant plaintiff as much bound and as little privileged as adult.— Darvin *v.* Hatfield, 4 Sandf. (N. Y.) 468; Gregory *v.* Molesworth, 3 Atk. 626; Brook *v.* Hertford, 2 P. Wms. 518, 24 Eng. Reprint 843. See also Sears *v.* Hyer, 1 Paige (N. Y.) 486; Morison *v.* Morison, 4 Myl. & C. 215, 18 Eng. Ch. 215, 41 Eng. Reprint 85.

99. Roche *v.* Waters, 72 Md. 264, 19 Atl. 535, 7 L. R. A. 533.

Joinder or intervention in actions by others. — The infancy of some of the beneficiaries of a trust estate is no obstacle to their joining with the other beneficiaries in an equitable pleading in an action of ejectment, asking for relief against the administrator, who had used trust funds in placing improvements upon his own realty. Morgan *v.* Marshall, 62 Ga. 401.

1. Cavender *v.* Smith, 5 Iowa 157 (a minor may be sued in his own name); Roche *v.* Waters, 72 Md. 266, 19 Atl. 535, 7 L. R. A. 533; Monumental Bldg. Assoc. No. 2 *v.* Herman, 33 Md. 128; New York Mut. L. Ins. Co. *v.* Holloday, 13 Abb. N. Cas. (N. Y.) 16.

Infants liable to recovery in ejectment.— Mercer *v.* Watson, 1 Watts (Pa.) 330; Campbell *v.* Hughes, 12 W. Va. 183.

Taking bill as confessed.— Clemens *v.* Clemens, 37 N. Y. 59.

Determination of adverse claims to realty.— Weiler *v.* Nembach, 114 N. Y. 36, 20 N. E. 623, 16 N. Y. Civ. Proc. 375 [*affirming* 47 Hun 166], construing N. Y. Code Civ. Proc. §§ 1638, 1686. The exception referred to has been eliminated by subsequent amendments.

Where infants and adults are joined as parties in the same action, the fact of infancy can be of no avail to the adults and they cannot claim that any more shall be proved against them than if all the parties were adults. Cox *v.* Reed, 27 Ill. 434.

Venue.— Infancy of a maker of a note will not defeat jurisdiction to sue him in the county where it was made payable in the absence of proof that the venue was fraudulently laid in that county to obtain jurisdiction of his person. Melton *v.* Katzenstein, (Tex. Civ. App. 1899) 49 S. W. 173.

The proceeding by declaration is inapplicable in a suit against an infant. People *v.* Hoffman, 7 Wend. (N. Y.) 489.

2. Enos *v.* Capps, 15 Ill. 277; Roche *v.* Waters, 72 Md. 264, 19 Atl. 535, 7 L. R. A. 533.

3. See *infra*, VII, D.

4. Roberts *v.* Maddox, 5 Ark. 51; Boynton *v.* Clay, 58 Me. 236; Kelly *v.* The Topsy, 44 Fed. 631 [*following* The David Faust, 7 Fed. Cas. No. 3,595, 1 Ben. 183].

5. Benziger *v.* Miller, 50 Ala. 206 (holding that an infant may sue for the breach of a contract for employment as a teacher, made for her by her father, although her father might also maintain an action); Strong *v.* Marcy, 33 Kan. 109, 5 Pac. 366.

6. See Munger *v.* Hess, 28 Barb. (N. Y.) 75. And see, generally, as to contracts of infants *supra*, V.

An action on a joint contract of an infant and an adult cannot be brought against both, but action can be brought against the adult only. Hull *v.* Connolly, 3 McCord (S. C.) 6, 15 Am. Dec. 612.

7. Smith *v.* Oliphant, 2 Sandf. (N. Y.) 306. See, generally, as to contracts for necessaries, *supra*, V, B, 9.

8. Elwell *v.* Martin, 32 Vt. 217.

9. **Right to sue for partition** see Partition.

10. *Indiana.*— Edwards *v.* Beall, 75 Ind. 401.

Louisiana.— Dugas *v.* Gilbeau, 15 La. Ann. 581.

Maine.— Towle *v.* Dresser, 73 Me. 252.

Michigan.— Bloomingdale *v.* Chittenden, 74 Mich. 698, 42 N. W. 166.

New York.— Segelken *v.* Meyer, 22 Hun 6 [*affirmed* in 94 N. Y. 473].

United States.— Moore *v.* U. S., 7 Ct. Cl. 356.

England.— Howard *v.* Shrewsbury, L. R. 17 Eq. 378, 43 L. J. Ch. 495, 29 L. T. Rep. N. S. 862, 22 Wkly. Rep. 290; Barnett *v.* Guildford, 11 Exch. 19, 1 Jur. N. S. 1142, 24 L. J. Exch. 281, 3 Wkly. Rep. 406.

See 27 Cent. Dig. tit. "Infants," § 182.

Property taken pursuant to contract.— An infant who has procured a person to sign a note with and for him, and as security turned out to such person property which he was to take when he pleased, cannot maintain trespass against him afterward for the taking, at least without a previous clear revocation of the contract. Hoyt *v.* Chapin, 6 Vt. 42.

11. Weidersum *v.* Naumann, 10 Abb. N. Cas. (N. Y.) 149, 62 How. Pr. 369.

12. See Jennings *v.* Collins, 99 Mass. 29, 96 Am. Dec. 687.

or maintain an action for use and occupation [13] or for damages due to his land;[14] or the infant owner of the reversionary interest in lands may have an action for injury of a permanent character amounting to waste.[15] Conversely other persons may vindicate in the courts their property rights as against infants.[16] Thus ejectment will lie against an infant,[17] or a bill in equity to redeem may be brought against an infant mortgagee.[18]

4. Actions For Torts. An infant may maintain an action against a wrong-doer for the tort.[19] Thus a minor is entitled to sue for damages for personal injuries received through the negligence of another.[20] An infant, being liable for his torts, may of course be sued therefor.[21]

5. Actions For Penalties. An infant may bring suit to recover a penalty under a statute giving the right of action therefor to the aggrieved party.[22]

6. Necessity of Joining Infants as Parties [23] — a. In General. Whenever a suit is brought for the purpose of divesting the title of infants to property or otherwise affecting their interests, they are necessary parties,[24] and a judgment or

13. Porter *v.* Bleiler, 17 Barb. (N. Y.) 149.

14. McDodrill *v.* Pardee, etc., Lumber Co., 40 W. Va. 564, 21 S. E. 878, where the infant has no guardian who has given bond.

15. Jackson *v.* Todd, 25 N. J. L. 121.

16. See McCoon *v.* Smith, 3 Hill (N. Y.) 147, 38 Am. Dec. 623. But see Bailey *v.* Briggs, 56 N. Y. 407 [*affirming* 6 Lans. 356], holding that an action under N. Y. Code, § 449, for the determination of claims to real property cannot be brought against infant defendants.

17. Marshall *v.* Wing, 50 Me. 62; McCoon *v.* Smith, 3 Hill (N. Y.) 147, 38 Am. Dec. 623.

18. See Parker *v.* Lincoln, 12 Mass. 16.

19. Clasen *v.* Pruhs, (Nebr. 1903) 95 N. W. 640; Dunston *v.* Hardy, 15 N. C. 572; Benton *v.* Pope, 5 Humphr. (Tenn.) 392, trover.

Infant may sue for slander. Hurst *v.* Goodwin, 114 Ga. 585, 40 S. E. 764, 88 Am. St. Rep. 43; Stewart *v.* Howe, 17 Ill. 71.

20. *Alabama.*— Georgia Pac. R. Co. *v.* Propst, 83 Ala. 518, 3 So. 764, construing Code (1886), §§ 2587, 2589.

Georgia.—See Atlanta, etc., R. Co. *v.* Smith, 94 Ga. 107, 20 S. E. 763.

Kentucky.— See Chesapeake, etc., R. Co. *v.* Wilder, 72 S. W. 353, 24 Ky. L. Rep. 1821.

New York.— Hartfield *v.* Roper, 21 Wend. 615, 34 Am. Dec. 273. See also Lieberman *v.* Third Ave. R. Co., 25 Misc. 296, 54 N. Y. Suppl. 574; Nemorofskie *v.* Interurban St. R. Co., 87 N. Y. Suppl. 463.

Ohio.— See Landneier *v.* Cincinnati St. R. Co., 4 Ohio S. & C. Pl. Dec. 265.

Tennessee.— See Burke *v.* Ellis, 105 Tenn. 702, 58 S. W. 855.

Texas.— Texas, etc., R. Co. *v.* Malone, 15 Tex. Civ. App. 56, 38 S. W. 538. See also Galveston, etc., R. Co. *v.* Jackson, 31 Tex. Civ. App. 342, 71 S. W. 991; Dublin Cotton Oil Co. *v.* Jarrard, (Civ. App. 1897) 40 S. W. 531.

Virginia.— See Lynchburg Cotton Mills *v.* Stanley, 102 Va. 590, 46 S. E. 908.

England.— See Collins *v.* Lefevre, 1 F. & F. 436.

See 27 Cent. Dig. tit. "Infants," § 181.

Injuries received before birth are not within the rule. Allaire *v.* St. Luke's Hospital, 76 Ill. App. 441 [*affirmed* in 184 Ill. 359, 56 N. E. 638, 75 Am. St. Rep. 176, 48 L. R. A. 225].

Contributory negligence by an infant has the same effect in disentitling him to maintain an action as in the case of an adult. Hughes *v.* Macfie, 2 H. & C. 744, 10 Jur. N. S. 682, 33 L. J. Exch. 177, 12 Wkly. Rep. 215. But it does not disentitle an infant to recover for an injury sustained otherwise than where such injury is occasioned entirely by the negligence of the infant. Gardner *v.* Grace, 1 F. & F. 359.

As to the elements of damages such as loss of time or wages, expenses incurred, and the like see Damages.

21. Oliver *v.* McClellan, 21 Ala. 675. As to liability for torts see, generally, *supra*, VI.

22. Fox *v.* Interurban St. R. Co., 42 Misc. (N. Y.) 538, 86 N. Y. Suppl. 64.

23. Actions by or against general guardians see Guardian and Ward.

24. *Alabama.*— Stammers *v.* McNaughten, 57 Ala. 277.

Georgia.— Hill *v.* Printup, 48 Ga. 452.

Kentucky.— Girty *v.* Logan, 6 Bush 8, partition proceedings.

Maryland.— Hunter *v.* Hatton, 4 Gill 115, 45 Am. Dec. 117.

New York.— Fisher *v.* Stilson, 9 Abb. Pr. 33. See also Rogers *v.* McLean, 34 N. Y. 536 [*affirming* 11 Abb. Pr. 440]; Lent *v.* New York, etc., R. Co., 55 Hun 180, 7 N. Y. Suppl. 729.

Pennsylvania.— See *In re* White, 163 Pa. St. 388, 30 Atl. 192.

Tennessee.— Winchester *v.* Winchester, 1 Head 460; Davidson *v.* Bowden, 5 Sneed 129.

Wisconsin.— McKinney *v.* Jones, 55 Wis. 39, 11 N. W. 606, 12 N. W. 381.

See 27 Cent. Dig. tit. "Infants," § 188.

Right to be admitted to defend.— See Glass *v.* Doe, 2 Blackf. (Ind.) 293.

Form not sufficient.— The simple naming of "the children of Alexander James and the children of Calvin James" as plaintiffs does not make them parties, under the rules of the North Carolina superior court requiring minors to sue by guardians *ad litem* or next friend. James *v.* Withers, 114 N. C. 474, 19 S. E. 367.

decree cannot affect an infant unless he was made a party either plaintiff or defendant to the suit in which it was rendered.[25]

b. Plaintiffs or Defendants. An infant should ordinarily be made a defendant rather than a complainant in a bill in chancery,[26] but a proceeding which divests a minor of an estate in lands is not necessarily against his interest so that he must in every possible contingency be made a defendant.[27] Upon a suggestion at any stage of the cause that an infant party is on the wrong side of the record, the court may order an inquiry, and if the fact is found as suggested the proceedings will be amended by placing the infant on the opposite side of the suit.[28]

7. Infant the Real Party. Although a suit is prosecuted or defended on behalf of an infant by a next friend or guardian *ad litem* he cannot be considered a party to the cause,[29] but the infant is the real party.[30]

The fact that an answer is filed for the infant by a guardian *ad litem* does not make him a party if he is not named in the bill. Dixon *v.* Donaldson, 6 J. J. Marsh. (Ky.) 575.

Presumption.— Where a minor was brought into court by a plea of intervention filed by his adult brothers in a matter in which they had a joint interest, it will be presumed, in the absence of a showing in the record to the contrary, that they were acting in the capacity of next friend, and that he was before the court in such manner as to confer jurisdiction of his person. Ivey *v.* Harrell, 1 Tex. Civ. App. 226, 20 S. W. 775.

25. *Illinois.*— Hickenbotham *v.* Blackledge, 54 Ill. 316.

Kentucky.— Pond *v.* Doneghy, 18 B. Mon. 558; Caldwell *v.* Jacobs, 22 S. W. 436, 27 S. W. 86, 16 Ky. L. Rep. 21.

Maryland.— Digges *v.* Beale, 1 Harr. & M. 67.

Missouri.— Burns *v.* Bangert, 16 Mo. App. 22; Bangert *v.* Bangert, 13 Mo. App. 144.

South Carolina.— Bulow *v.* Witte, 3 S. C. 308.

England.— *In re* Bell, L. R. 11 Ir. 512.

See 27 Cent. Dig. tit. "Infants," § 190.

Minors are not bound by a sale of their property under judicial proceedings to which they were not parties. Donaldson *v.* Dorsey, 5 Mart. N. S. (La.) 654. But *compare* Gibson *v.* Roll, 27 Ill. 88, 81 Am. Dec. 219.

26. McGavock *v.* Bell, 3 Coldw. (Tenn.) 512, holding, however, that where the infant is made complainant there is no such want of jurisdiction of the person as to render the decree void as against *bona fide* purchasers under it.

When immaterial on which side infants joined.— In a suit to set aside a will, and to establish a former one, it was no objection that an infant who was interested under either will, but principally under the later, was made a plaintiff instead of a defendant, the litigation being substantially between other parties, who were fully competent to conduct it. Bowen *v.* Idley, 1 Edw. (N. Y.) 148.

27. Burger *v.* Potter, 32 Ill. 66, 72.

28. Le Fort *v.* Delafield, 3 Edw. (N. Y.) 32; Bowen *v.* Idley, 1 Edw. (N. Y.) 160.

29. *Alabama.*— Thomason *v.* Gray, 84 Ala. 559, 4 So. 394, next friend not the real party.

Indiana.— Whittem *v.* State, 36 Ind. 196.

Maryland.— Baltimore, etc., R. Co. *v.* Fitzpatrick, 36 Md. 619.

Minnesota.— Bryant *v.* Livermore, 20 Minn. 313, holding that a judge was not disqualified to sit because he was related to the guardian *ad litem*.

Missouri.— Raming *v.* Metropolitan St. R. Co., (1899) 50 S. W. 791, holding that a next friend is not a party within Rev. St. (1889) § 2261, relating to changes of venue and providing that any party may apply for a change of venue.

North Carolina.— Tate *v.* Mott, 96 N. C. 19, 2 S. E. 176; George *v.* High, 85 N. C. 113; Mason *v.* McCormick, 75 N. C. 263; Falls *v.* Gamble, 66 N. C. 455.

Texas.— Gulf, etc., R. Co. *v.* Conder, 23 Tex. Civ. App. 488, 58 S. W. 58.

Vermont.— Duffy *v.* Pinard, 41 Vt. 297 (holding that therefore the next friend of an infant may properly recognize for costs in the suit under a statute requiring a recognizance by some person other than plaintiff); Brown *v.* Hull, 16 Vt. 673.

England.— Ingram *v.* Little, 11 Q. B. D. 251, 31 Wkly. Rep. 858 (holding that consequently a guardian *ad litem* canot be compelled to answer interrogatories); Foster *v.* Cautley, 10 Hare appendix xxiv, 17 Jur. 370, 22 L. J. Ch. 639, 1 Wkly. Rep. 275, 44 Eng. Ch. 737; Melluish *v.* Collier, 14 Jur. 621, 19 L. J. Q. B. 493; *In re* Corsellis, 52 L. J. Ch. 399, 48 L. T. Rep. N. S. 425, 31 Wkly. Rep. 414; Sinclair *v.* Sinclair, 14 L. J. Exch. 109, 13 M. & W. 640.

See 27 Cent. Dig. tit. "Infants," § 188.

Compare McWilliams *v.* Anderson, 68 Ga. 772 (holding that a next friend for infant plaintiffs, being a new party, cannot be brought into the case by amendment); Crossen *v.* Dryer, 17 Mass. 222 (holding that the next friend is a party within the meaning of a statute requiring original writs to be indorsed by plaintiff or his agent or attorney).

30. *Georgia.*— Bowers *v.* Kanaday, 94 Ga. 209, 21 S. E. 458; Phillips *v.* Taber, 83 Ga. 565, 10 S. E. 270.

Kentucky.— See Com. *v.* Kinnaird, 10 B. Mon. 249.

Massachusetts.— Smith *v.* Floyd, 1 Pick. 275.

Missouri.— Jones *v.* Kansas City, etc., R.

8. Parol Demurrer. The common law gave an infant who was sued in respect of land derived from his ancestor the right to resort to his parol demurrer, the effect of which was to stay the action until he arrived at full age, when the cause might be proceeded with, upon his being resummoned into court;[31] but at the present time the parol demurrer is practically obsolete and causes against infants proceed to judgment like other causes.[32]

B. Protection of Infant's Interest by Court.[33] It is the right and duty of the court to protect the interests of an infant party to litigation whether he be a plaintiff or a defendant,[34] and to exercise a general supervision over the conduct

Co., 178 Mo. 528, 77 S. W. 890, 101 Am. St. Rep. 434.

North Carolina.— George *v.* High, 85 N. C. 113; Falls *v.* Gamble, 66 N. C. 455.

Texas.— Gulf, etc., R. Co. *v.* Styron, 66 Tex. 421, 1 S. W. 161; Gulf, etc., R. Co. *v.* Conder, 23 Tex. Civ. App. 488, 58 S. W. 58.

Vermont.— Duffy *v.* Pinard, 41 Vt. 297; Brown *v.* Hull, 16 Vt. 673.

See 27 Cent. Dig. tit. "Infants," § 188.

Right to attend court and prosecute suit.— Whittem *v.* State, 36 Ind. 196.

Caption showing next friend to be plaintiff. — In a suit brought by "Samuel Winslow . . . next friend of Harrison Joy," etc., Winslow and not Joy is plaintiff. Soule *v.* Winslow, 64 Me. 518.

Petition to vacate judgment.— Where a suit commenced by an infant in the name of his next friend is defaulted and defendant pursuant to statute petitions the court to vacate the judgment on the ground that he was deprived of his day of court by reason of accident, etc., such petition should not be served upon such next friend, nor is it necessary that he be named in it. If it is served upon the infant that is all the statute requires, and the court, when the action is entered, must appoint a guardian *ad litem* to defend for him. Brown *v.* Hull, 16 Vt. 673.

31. Enos *v.* Capps, 15 Ill. 277.

In Maryland the common-law rule has been preserved by statute. Tise *v.* Shaw, 68 Md. 1, 11 Atl. 363, 582.

Time for praying parol to demur.— An infant could not pray the parol to demur in any other stage of the proceeding than at the time of pleading. Derisley *v.* Custance, 4 T. R. 75.

Right of devisee.— An infant devisee, sued by a specialty creditor of the devisor, could not pray the parol to demur; such privilege of an heir who was in by descent not being extended to a devisee by 3 Wm. & M. c. 14. Plasket *v.* Beeby, 4 East, 485, 1 Smith K. B. 264.

In equity the infant could not insist upon his non-age to suspend the suit, but it proceeded to a hearing and decree. Enos *v.* Capps, 15 Ill. 277; Hale *v.* Hide, Toth. 108, 21 Eng. Reprint 138.

32. See Enos *v.* Capps, 15 Ill. 277; Harris *v.* Youman, Hoffm. (N. Y.) 178; English *v.* Savage, 5 Oreg. 518.

33. See also *supra*, IV, F, 2.

34. *Colorado.*— Hutchinson *v.* McLaughlin, 15 Colo. 492, 25 Pac. 317, 11 L. R. A. 287; Seaton *v.* Tohill, 11 Colo. App. 211, 53 Pac. 170.

Florida.— Parken *v.* Safford, (1904) 37 So. 567, whether the claim or defense be properly pleaded or not.

Illinois.— Lloyd *v.* Kirkwood, 112 Ill. 329.

Iowa.— Cavender *v.* Smith, 5 Iowa 157.

Kentucky.— Newland *v.* Gentry, 18 B. Mon. 666; Longnecker *v.* Greenwade, 5 Dana 516; Andrews *v.* Hurt, 14 Ky. L. Rep. 765.

Louisiana.— See Hanly *v.* Crozier, 14 La. Ann. 304.

Missouri.— Revely *v.* Skinner, 33 Mo. 98.

West Virginia.— Kester *v.* Hill, 46 W. Va. 744, 34 S. E. 798.

See 27 Cent. Dig. tit. "Infants," § 186.

A court of chancery has power to authorize a settlement of a suit brought by a minor to set aside a will, upon terms which, in the opinion of the court, are advantageous to the minor. Williams *v.* Williams, 204 Ill. 44, 68 N. E. 449. But the court has no power to compromise a claim in which infants are interested against the wish of the next friend or guardian *ad litem* of the infants acting under the advice of counsel. *In re* Birchall, 16 Ch. D. 41, 44 L. T. Rep. N. S. 113, 29 Wkly. Rep. 27.

Vacation of judgment.— It is the duty of courts of equity to vacate every judgment or decree by which injustice has been done to infants. Newland *v.* Gentry, 18 B. Mon. (Ky.) 666.

Setting up statute of limitations.— A court of chancery is bound to set up the statute of limitations in favor of an infant even against its will, as against a demand in favor of a mother, unless the case discloses some circumstances which render such plea inequitable. Alling *v.* Alling, 52 N. J. Eq. 92, 27 Atl. 655.

Supplying lack of proper party.— Where one suing as next friend for an infant has omitted a proper party the court should order the person omitted to be made a party to the action. Andrews *v.* Hurt, 14 Ky. L. Rep. 765.

Suppression of deposition.— Where an infant was made a party defendant to a bill, and gave his testimony against his own interest at the request of his co-defendants, but against the advice of his guardian *ad litem*, his deposition was suppressed by the court on the ground that a court of equity is bound to protect infants against their own immature judgments and improvident conduct. Moore *v.* Moore, 4 Sandf. Ch. (N. Y.) 37.

The trial judge may act in accordance with his conscience in protecting the interest of a minor in the fund in court and order a rea-

of the next friend or guardian *ad litem*.[35] Thus, while it is not necessary that the infant should have any knowledge of the bringing of a suit by his next friend, and such suit may even be maintained against his wish,[36] the court may and in a proper case should dismiss or at least arrest the progress of a suit commenced in behalf of an infant by his next friend if it appears not to be for the benefit or interest of the infant that it should be prosecuted.[37] Before the estate of an infant is divested the court should be satisfied that he has had a full opportunity to have his day in court by a proper and suitable guardian, and should see, notwithstanding any admission of facts, even by such guardian, that his rights are not sacrificed.[38] The court should see that the guardian *ad litem* of an infant defendant makes a proper defense,[39] and that the rights of the infant are not prejudiced or abandoned by his answer,[40] and should never render judgment against an infant but on plea filed for him or on being satisfied by the guardian *ad litem* that after faithful efforts he has ascertained that no defense can be usefully

sonable delay, if in his judgment a delay may be necessary to the protection of that minor. State *v.* Sommerville, 111 La. 1015, 36 So. 104.

35. Richards *v.* East Tennessee, etc., R. Co., 106 Ga. 614, 33 S. E. 193, 45 L. R. A. 712; Longnecker *v.* Greenwade, 5 Dana (Ky.) 516.

Respecting wishes of infant.— See *In re* Chittenden, Tuck. Surr. (N. Y.) 251.

36. *Connecticut.*— McCarrick *v.* Kealy, 70 Conn. 642, 40 Atl. 603.

Illinois.— Stumps *v.* Kelley, 22 Ill. 140; Chudleigh *v.* Chicago, etc., R. Co., 51 Ill. App. 491.

Massachusetts.— Pyne *v.* Wood, 145 Mass. 558, 14 N. E. 775.

New York.— Fulton *v.* Rosevelt, 1 Paige 178, 19 Am. Dec. 409.

England.— Morgan *v.* Thorne, 9 Dowl. P. C. 228, 5 Jur. 294, 10 L. J. Exch. 125, 7 M. & W. 310; Andrews *v.* Cradock, Gilb. 36, Prec. Ch. 376, 24 Eng. Reprint 170, 25 Eng. Reprint 26.

Compare Underwood *v.* Deckard, 34 Ind. App. 198, 70 N. E. 383; Anderson *v.* Anderson, 11 Bush (Ky.) 327.

37. *Alabama.*—Barwick *v.* Rackley, 45 Ala. 215.

Illinois.— Chudleigh *v.* Chicago, etc., R. Co., 51 Ill. App. 491.

Iowa.— Ball *v.* Miller, 59 Iowa 634, 13 N. W. 667.

Kentucky.— Robinson *v.* Talbot, 78 S. W. 1108, 25 Ky. L. Rep. 1914, dismissing an appeal by the next friend from such dismissal of the suit.

Maryland.— Reichard *v.* Izer, 95 Md. 451, 52 Atl. 592.

New York.— Fulton *v.* Rosevelt, 1 Paige 178, 19 Am. Dec. 409; Garr *v.* Drake, 2 Johns. Ch. 542; Bowen *v.* Idley, 1 Edw. 148.

England.— Nalder *v.* Hawkins, Coop. t. Brough. 175, 47 Eng. Reprint 62, 2 Myl. & K. 243, 7 Eng. Ch. 243, 39 Eng. Reprint 937; Walker *v.* Else, 4 L. J. Ch. 54, 7 Sim. 234, 8 Eng. Ch. 234, 58 Eng. Reprint 826; Richardson *v.* Miller, 2 Sim. 133, 2 Eng. Ch. 633, 57 Eng. Reprint 528.

See 27 Cent. Dig. tit. "Infants," § 186.

Stay at request of infant.— See Guild *v.* Cranston, 8 Cush. (Mass.) 506.

Where two or more suits are instituted at the same time and for the same cause in behalf of an infant the court will institute an inquiry to determine which is most for his advantage. Dormer *v.* Fortescue, 3 Atk. 124, 26 Eng. Reprint 875. See also Morrisson *v.* Bell, 5 Ir. Eq. 354; Nanney *v.* Wynner, 2 Jur. 962; Harris *v.* Lightfoot, 10 Wkly. Rep. 31.

Suit may be dismissed without consent of next friend. Longnecker *v.* Greenwald, 5 Dana (Ky.) 516.

An inquiry or reference to determine whether the suit is beneficial may be directed (Fulton *v.* Rosevelt, 1 Paige (N. Y.) 178, 19 Am. Dec. 409; Garr *v.* Drake, 2 Johns. Ch. (N. Y.) 542; Percival *v.* Cross, 7 P. D. 234, 46 J. P. 792, 52 L. J. P. C. 16, 47 L. T. Rep. N. S. 353, 31 Wkly. Rep. 124; Nalder *v.* Hawkins, Coop. t. Brough. 175, 47 Eng. Reprint 62, 2 Myl. & K. 243, 7 Eng. Ch. 243, 39 Eng. Reprint 937; Towsey *v.* Groves, 9 Jur. N. S. 194, 32 L. J. Ch. 225, 7 L. T. Rep. N. S. 778, 1 New Rep. 226, 11 Wkly. Rep. 252); and all proceedings stayed in the meantime (Towsey *v.* Groves, 9 Jur. N. S. 194, 32 L. J. Ch. 225, 7 L. T. Rep. N. S. 778, 1 New Rep. 226, 11 Wkly. Rep. 259).

38. *Iowa.*— Cavender *v.* Smith, 5 Iowa 157.

Kentucky.— Greenup *v.* Bacon, 1 T. B. Mon. 108.

Massachusetts.— Austin *v.* Charlestown Female Seminary, 8 Metc. 196, 41 Am. Dec. 497.

New York.— Bloom *v.* Burdick, 1 Hill 130, 37 Am. Dec. 299.

United States.— U. S. Bank *v.* Ritchie, 8 Pet. 128, 8 L. ed. 890; Walton *v.* Coulson, 29 Fed. Cas. No. 17,132, 1 McLean 120.

See 27 Cent. Dig. tit. "Infants," § 186.

39. Peak *v.* Pricer, 21 Ill. 164; Galloway *v.* Hamilton, 1 Dana (Ky.) 576; Duncan *v.* Ross, 2 Ch. Chamb. (U. C.) 443; Sanborn *v.* Sanborn, 11 Grant Ch. (U. C.) 123, opinion of Spragge, Vice Chancellor.

40. Stark *v.* Brown, 101 Ill. 395; Thornton *v.* Vaughan, 3 Ill. 218; Thompson *v.* Hare, 8 Blackf. (Ind.) 336; Berrett *v.* Oliver, 7 Gill & J. (Md.) 191; Stephens *v.* Van Buren, 1 Paige (N. Y.) 479. See also Seaton *v.* Tohill, 11 Colo. App. 211, 53 Pac. 170; Lenox

made.[41] In the exercise of its general protection over the interests of infants the court may grant to an infant relief not asked for in the pleadings.[42] A court of chancery has the right to compromise the rights of minors in proper cases where they are parties.[43] The failure of the guardian *ad litem* to answer for the infant does not deprive the court of jurisdiction.[44]

C. Designation or Description of Parties. The infant being the real party to an action to enforce his rights,[45] the bill, petition, or complaint should be filed in his name by his guardian or next friend,[46] and not in the name of the guardian or next friend for the infant.[47] This is the rule both at law and in equity.[48] So also a suit must be brought against an infant defendant in his own name,[49] and not against the guardian in the first instance.[50]

v. Notrebe, 15 Fed. Cas. No. 8,246*c*, Hempst. 251.

41. Shaefer *v.* Gates, 2 B. Mon. (Ky.) 453, 38 Am. Dec. 164.

42. *Florida.*— Parken *v.* Safford, (1904) 37 So. 567; Walker *v.* Redding, (1898) 23 So. 565.

Illinois.— Gilmore *v.* Gilmore, 109 Ill. 277 (holding that on a bill for partition of lands it is not error to require an account of the rents and profits to be taken in favor of an infant defendant without a cross bill being filed by him); Stark *v.* Brown, 101 Ill. 395.

Kentucky.— Turner *v.* Short, (1887) 4 S. W. 347.

New York.— Roe *v.* Angevine, 7 Hun 679; Applebee *v.* Duke, 21 N. Y. Suppl. 890; Jones *v.* Weed, 4 Sandf. Ch. 208.

England.— Stapilton *v.* Stapilton, 1 Atk. 1, 26 Eng. Reprint 1.

No advantage can be taken of an infant's failure to plead, but it is the duty of the chancellor to consider as formally pleading every defense to an action against the infant which might have been made for him. Turner *v.* Short, (Ky. 1887) 4 S. W. 347.

A court of equity will not set up the statute of frauds to defeat the specific execution of a parol contract for the purchase of land in an action to which infants are parties where such defense is not relied on by the infants or their guardian *ad litem*. Thornton *v.* Vaughan, 3 Ill. 218. *Compare* Grant *v.* Craigmiles, 1 Bibb (Ky.) 203.

43. Wilson *v.* Schaefer, 107 Tenn. 300, 64 S. W. 208; Reynolds *v.* Brandon, 3 Heisk. (Tenn.) 593; Rucker *v.* Moore, 1 Heisk. (Tenn.) 726.

44. Goudy *v.* Hall, 36 Ill. 313, 87 Am. Dec. 217.

45. See *supra*, VIII, A, 7.

46. *Alabama.*— Strange *v.* Gunn, 56 Ala. 611; Croft *v.* Topp, 4 Ala. 238; Bowie *v* Minter, 2 Ala. 406; Tate *v.* Gilbert, 5 Stew. & P. 114.

Arkansas.— Roberts *v.* Maddox, 5 Ark. 51, Reno, C. J., delivering opinion of the court.

District of Columbia.— Baltimore, etc., R. Co. *v.* Taylor, 6 App. Cas. 259.

Florida.— Paul *v.* Frierson, 21 Fla. 529; Sanderson *v.* Sanderson, 17 Fla. 820.

Georgia.— Van Pelt *v.* Chattanooga R., etc., Co., 89 Ga. 706, 15 S. E. 622; Jack *v.* Davis, 29 Ga. 219.

Illinois.— Hoare *v.* Harris, 11 Ill. 24.

Kentucky.— Wilson *v.* Unselt, 12 Bush 215.

Maryland.— Downes *v.* Friel, 57 Md. 531.

Missouri.— Jones *v.* Kansas City, etc., R. Co., 178 Mo. 528, 77 S. W. 890, 10 Am. St. Rep. 434.

Virginia.— Stewart *v.* Crabbin, 6 Munf. 280.

West Virginia.— Burdett *v.* Cain, 8 W. Va. 282.

United States.— Morgan *v.* Potter, 157 U. S. 195, 15 S. Ct. 590, 39 L. ed. 670.

See 27 Cent. Dig. tit. "Infants," § 189.

Form.— The proper practice is to entitle the case "A. B., by his next friend C. D." Paul *v.* Frierson, 21 Fla. 529; Hill *v.* Thacter, 3 How. Pr. (N. Y.) 407, 2 Code Rep. 3. But it has been held to be sufficient if the names of the parties appear correctly in the body of the complaint. Hill *v.* Thacter, 3 How. Pr. (N. Y.) 407, 2 Code Rep. 3.

Error not fatal.— See Kees *v.* Maxim, 99 Mich. 493, 58 N. W. 473; Gulf, etc., R. Co. *v.* Styron, 66 Tex. 421, 1 S. W. 161, where the record informs the court who is the real party. See also Van Pelt *v.* Chattanooga, etc., R. Co., 89 Ga. 706, 15 S. E. 622; Lasseter *v.* Simpson, 78 Ga. 61, 3 S. E. 243.

Amendment may be allowed. Morford *v.* Dieffenbacker, 54 Mich. 593, 20 N. W. 600. See also Van Pelt *v.* Chattanooga, etc., R. Co., 89 Ga. 706, 15 S. E. 622.

47. *Alabama.*— Bowie *v.* Minter, 2 Ala. 406.

District of Columbia.— Baltimore, etc., R. Co. *v.* Taylor, 6 App. Cas. 259.

Florida.— Paul *v.* Frierson, 21 Fla. 529; Sanderson *v.* Sanderson, 17 Fla. 820.

Georgia.— Van Pelt *v.* Chattanooga, etc., R. Co., 89 Ga. 706, 15 S. E. 622.

Kentucky.— Wilson *v.* Unselt, 12 Bush 215.

Maryland.— Downe *v.* Friel, 57 Md. 531.

Missouri.— Jones *v.* Kansas City, etc., R. Co., 178 Mo. 528, 77 S. W. 890, 101 Am. St. Rep. 434.

Virginia.— Stewart *v.* Crabin, 6 Munf. 280

See 27 Cent. Dig. tit. "Infants," § 189.

Proceeding for sale or exchange of land.— See Ridgely *v.* Barton, (Md. 1887) 10 Atl. 148, under Md. Code (1860), art. 16, § 44.

48. Bowie *v.* Minter, 2 Ala. 406.

49. Jack *v.* Davis, 29 Ga. 219; Oliver *v.* McDuffie, 28 Ga. 522.

50. Oliver *v.* McDuffie, 28 Ga. 522.

D. Guardian Ad Litem or Next Friend[51] — **1. Definitions — a. Guardian Ad Litem.** A guardian *ad litem* is a special guardian appointed by the court to prosecute or defend in behalf of an infant a suit to which he is a party.[52]

b. Next Friend. A next friend or *prochein ami* is a person who undertakes to prosecute a suit in behalf of an infant.[53]

2. Necessity For Representation[54] — **a. In General.** Although an infant is capable of suing or being sued,[55] he is not considered to have sufficient discretion to adequately enforce or protect his rights,[56] and hence he is not allowed to prosecute or defend a suit alone;[57] but it is necessary, in order that full justice be done him, that in a suit by or against him he should have a guardian *ad litem* or next friend to safeguard his interests.[58] Where proceedings are instituted affect-

51. Effect of appointment of guardian *ad litem* or next friend on right of general guardian to sue or defend see Guardian and Ward.

52. See Black L. Dict.

53. See Isaacs *v.* Boyd, 5 Port. (Ala.) 388, 393.

54. Effect of general guardianship on right of ward to sue or defend by guardian *ad litem* or next friend see Guardian and Ward.

When action by general guardian proper rather than by next friend or guardian *ad litem* see Guardian and Ward.

Termination of general guardianship as affecting actions by or against general guardian or ward see Guardian and Ward.

Proceedings for sake of decedent's property see Executors and Administrators.

Distribution of decedent's estate see Executors and Administrators.

Accounting of executor or administrator see Executors and Administrators.

55. See *supra*, VIII, A, 1.

56. Fleming *v.* Johnson, 26 Ark. 421; Parkins *v.* Alexander, 105 Iowa 74, 74 N. W. 769; Cavender *v.* Smith, 5 Iowa 193; Duffy *v.* Pinard, 41 Vt. 297.

Infant cannot appear and defend in person. — Kesler *v.* Penninger, 59 Ill. 134; Peak *v.* Shasted, 21 Ill. 137, 74 Am. Dec. 83; Bustard *v.* Gates, 4 Dana (Ky.) 429.

An inquiry into the infant's sanity is not necessary, for the law regards the infant whether sane or insane as incapable of taking care of himself. Fleming *v.* Johnson, 26 Ark. 421.

57. Campetti *v.* Mayer, 15 Quebec Super. Ct. 198.

The infant who has been emancipated by the court pursuant to statute (Merriman *v.* Sarlo, 63 Ark. 151, 37 S. W. 879) or by marriage (Beauchamp *v.* Whittington, 10 La. Ann. 646) may sue without a guardian *ad litem* or next friend. *Compare* Hoskins *v.* White, 13 Mont. 70, 32 Pac. 163 (emancipation by parents); Casgrain *v.* Malette, 15 Quebec Super. Ct. 612.

When a party is of age and under no legal disqualification, the proceedings must be against him and he cannot be ousted from the control and management of his defense by the appointment of a guardian *ad litem*, and the fact that at the commencement of the proceedings a party was a minor, and that then a guardian *ad litem* ought to have been appointed, does not justify the appointment of one after he has become of age and is entitled to the control and management of his defense. Patton *v.* Furthmier, 16 Kan. 29.

58. *Alabama.* — Roach *v.* Hicks, 57 Ala. 576; Rhett *v.* Masten, 43 Ala. 86; Sankey *v.* Sankey, 6 Ala. 607.

Arkansas. — St. Louis, etc., R. Co. *v.* Haist, 71 Ark. 258, 72 S. W. 893, 100 Am. St. Rep. 65; Pinchback *v.* Graves, 42 Ark. 222; Williams *v.* Ewing, 31 Ark. 229; Hodges *v.* Frazier, 31 Ark. 58.

Connecticut. — Harris *v.* Rosenberg, 43 Conn. 227.

Georgia. — Burnett *v.* Summerlin, 110 Ga. 349, 35 S. E. 655; Hill *v.* Printup, 48 Ga. 452; Nicholson *v.* Wilborn, 13 Ga. 467.

Illinois. — Binns *v.* La Forge, 191 Ill. 598, 61 N. E. 382; Phillips *v.* Phillips, 185 Ill. 629, 57 N. E. 796; Chudleigh *v.* Chicago, etc., R. Co., 51 Ill. App. 491.

Indiana. — De la Hunt *v.* Holderbaugh, 58 Ind. 285; Timmons *v.* Timmons, 3 Ind. 251; Wade *v.* Fite, 5 Blackf. 212; Bouche *v.* Ryan, 3 Blackf. 472; State *v.* Burkam, 23 Ind. App. 271, 55 N. E. 237.

Iowa. — Cavender *v.* Smith, 5 Iowa 157.

Kansas. — Sutton *v.* Nichols, 20 Kan. 43; Armstrong *v.* Wyandotte Bridge Co., McCahon 167.

Kentucky. — Paul *v.* Paul, 3 Bush 483; Cook *v.* Totton, 6 Dana 108; Banta *v.* Calhoon, 2 A. K. Marsh. 166; Young *v.* Whitaker, 1 A. K. Marsh. 398. See also Shields *v.* Hinkle, 43 S. W. 485, 19 Ky. L. Rep. 1363.

Louisiana. — Gassiot *v.* Gicquel, 2 Mart. N. S. 218.

Maryland. — Hunter *v.* Hatton, 4 Gill 115, 45 Am. Dec. 117.

Massachusetts. — See Jennings *v.* Collins, 99 Mass. 29, 96 Am. Dec. 687; Knapp *v.* Crosby, 1 Mass. 479.

Mississippi. — Lee *v.* Jenkins, 30 Miss. 592.

Missouri. — Wells *v.* Wells, 144 Mo. 198, 45 S. W. 1095; Cochran *v.* Thomas, 131 Mo. 258, 33 S. W. 6; Gamache *v.* Prevost, 71 Mo. 84; Tulbright *v.* Connefox, 30 Mo. 425; Thornton *v.* Thornton, 27 Mo. 302, 72 Am. Dec. 266.

Montana. — Power *v.* Lenoir, 22 Mont. 169, 56 Pac. 106.

New Hampshire. — Young *v.* Young, 3 N. H. 345.

New Jersey. — McGiffin *v.* Stout, 1 N. J. L.

ing an infant or his property, and it appears to the court that the infant is not represented by any one fully charged with the power and duty of protecting his

92 (holding that the mere fact that the father of an infant was present at a suit instituted by the infant and swore that he permitted his son to buy and sell would not permit the maintenance of the action without the appointment of a guardian); Lang *v.* Belloff, 53 N. J. Eq. 298, 31 Atl. 604.

New York.— Harvey *v.* Large, 51 Barb. 222; Bradwell *v.* Weeks, 1 Johns. Ch. 325; Trench *v.* Kenworthy, 5 N. Y. St. 102; Russak *v.* Tobias, 12 N. Y. Civ. Proc. 390 (holding that infant *cestuis que trust* under a will must be represented by a guardian *ad litem* in a proceeding to remove the trustee); Struppman *v.* Muller, 52 How. Pr. 211; Robbins *v.* Mount, 33 How. Pr. 24; Clark *v.* Clark, 21 How. Pr. 479; Camp *v.* Bennett, 16 Wend. 48; Comstock *v.* Carr, 6 Wend. 526; Arnold *v.* Sandford, 14 Johns. 417; Hillyer *v.* Larzelere, 9 Johns. 160 (holding that in an action for dower, if the tenant be an infant, he must appear and defend by guardian *ad litem*); Alderman *v.* Tirrell, 8 Johns. 418; Mockey *v.* Grey, 2 Johns. 192. See also Fisher *v.* Stilson, 9 Abb. Pr. 33.

North Carolina.— Thorp *v.* Minor, 109 N. C. 152, 13 S. E. 702; Morris *v.* Gentry, 89 N. C. 248. See also Jones *v.* Mason, 4 N. C. 561.

Pennsylvania.— Mitchell *v.* Spaulding, 206 Pa. St. 220, 55 Atl. 968 (guardian *ad litem* or general guardian); Swain *v.* Fidelity Ins., etc., Co., 54 Pa. St. 455; Mercer *v.* Watson, 1 Watts 330; Verrier *v.* Verrier, 7 Phila. 618.

South Carolina.— Bulow *v.* Witte, 3 S. C. 308; Bailey *v.* Boyce, 5 Rich. Eq. 187.

Texas.— Bond *v.* Dillard, 50 Tex. 302; Wright *v.* McNatt, 49 Tex. 425; Gulf, etc., R. Co. *v.* Conder, 23 Tex. Civ. App. 488, 58 S. W. 58.

Vermont.—Fall River Foundry Co. *v.* Doty, 42 Vt. 412; Duffy *v.* Pinard, 41 Vt. 297.

West Virginia.— White *v.* Straus, 47 W. Va. 794, 35 S. E. 843; Campbell *v.* Hughes, 12 W. Va. 183.

Wisconsin.— McKinney *v.* Jones, 55 Wis. 39, 11 N. W. 606, 12 N. W. 381.

England.— *In re* Bell, L. R. 11 Ir. 512; Castledine *v.* Mundy, 4 B. & Ad. 90, 2 L. J. K. B. 154, 1 N. & M. 635, 24 E. C. L. 49; *In re* Barrington, 27 Beav. 272, 54 Eng. Reprint 106; *In re* Cleveland, 1 Dr. & Sm. 46, 29 L. J. Ch. 530, 8 Wkly. Rep. 336; *Re* Ward, 2 Giff. 122, 6 Jur. N. S. 441, 2 L. T. Rep. N. S. 82; Hindmarsh *v.* Chandler, 1 Moore C. P. 250, 7 Taunt. 488, 2 E. C. L. 460; Dwyer *v.* O'Brien, 1 Ridgw. 38 note.

Canada.— Grant *v.* McKay, 10 Manitoba 243 [*following* Campbell *v.* Mathewson, 5 Ont. Pr. 91]; Macaulay *v.* Neville, 5 Ont. Pr. 235; Fountain *v.* McSween, 4 Ont. Pr. 240; Beaudet *v.* Bedard, 14 Quebec Super. Ct. 522.

See 27 Cent. Dig. tit. "Infants," § 195.

Non-resident infant defendants must be defended by a guardian *ad litem*. Covington, etc., R. Co. *v.* Bowler, 9 Bush (Ky.) 468.

Answer of infant must be by guardian. Buckley *v.* Van Wyck, 5 Paige (N. Y.) 536.

Judgment should not be rendered against infants until guardian appears. Young *v.* Whitaker, 1 A. K. Marsh. (Ky.) 398.

Suit by infant and adult jointly.— See Deford *v.* State, 30 Md. 179.

In ex parte proceedings infants must be represented by a guardian or next friend. Harris *v.* Brown, 123 N. C. 419, 31 S. E. 877.

Where minors are brought into court as interveners on the application of a party to the suit a guardian *ad litem* may properly be appointed for them. Schonfield *v.* Turner, (Tex. 1887) 6 S. W. 628.

In insolvency proceedings against a partnership, when the petitioning creditors neither seek nor obtain an adjudication by the insolvent court against the infant partner or against his individual estate, the appointment of a guardian *ad litem* for him is not required. Conary *v.* Sawyer, 92 Me. 463, 43 Atl. 27, 69 Am. St. Rep. 525.

In bastardy proceedings neither the complainant (Low *v.* Mitchell, 18 Me. 372. But *compare* Coomes *v.* Knapp, 11 Vt. 543) nor defendant (Miller *v.* State, 110 Ala. 69, 20 So. 392) need appear or act by guardian *ad litem* or next friend.

Probate proceedings.— The practice in the probate court being instituted and regulated by statute, it was not necessary in the absence of a statute so providing to appoint a guardian *ad litem* to represent infant parties in any case in that court because the statute practice of the chancery court required the appointment of such guardian in similar cases in the latter court. Johnson *v.* Cooper, 56 Miss. 608. The provision of Cal. Code Civ. Proc. § 372, that a guardian *ad litem* shall be appointed to represent infants in civil actions, does not apply to probate proceedings but these are governed by section 1718 of the code providing for the appointment of an attorney to represent infants in such proceedings. Carpenter *v.* San Joaquin County Super. Ct., 75 Cal. 596, 19 Pac. 14. Under N. Y. Code Civ. Proc. § 2530, the surrogate must appoint a special guardian to represent an infant, where the infant does not appear by general guardian; and, where he does so appear, the surrogate must appoint a special guardian if for any reason the interests of the infant require it. Matter of Ludlow, 5 Redf. Surr. (N. Y.) 391. See also Kellett *v.* Rathbun, 4 Paige (N. Y.) 102; Farmers' L. & T. Co. *v.* McKenna, 3 Dem. Surr. (N. Y.) 219.

In Minnesota it is not necessary before the administration account of an executor or administrator is allowed to appoint guardians *ad litem* for minor heirs or legatees interested in the estate. Balch *v.* Hooper, 32 Minn. 158, 20 N. W. 124.

In proceedings to apprentice an orphan under the Mississippi act of Nov. 22, 1865, the court is specially charged with the duty

interests, it is the duty of the court to appoint a guardian *ad litem* for him.[59] The record should affirmatively show that a guardian *ad litem* was appointed to

of protecting the interests of the infant and hence no guardian *ad litem* need be appointed. Jack *v.* Thompson, 41 Miss. 49.

In a suit in admiralty by an infant over fourteen to recover wages as a seaman or salvage, the appointment of a guardian *ad litem* is not necessary. Brown *v.* The Henry Pratt, 4 Fed. Cas. No. 2,010; Wicks *v.* Ellis, 29 Fed. Cas. No. 17,614, Abb. Adm. 444.

Giving security for costs does not obviate the necessity of an infant suing by next friend or guardian. Sutton *v.* Nichols, 20 Kan. 43.

Next friend necessary only where infant sole plaintiff.— Hulburt *v.* Newell, 4 How. Pr. (N. Y.) 93. See also Resor *v.* Resor, 9 Ind. 347.

Ejectment.— An infant plaintiff can sue out a writ of ejectment in his own name; but after appearance entered he cannot take any further step without having a next friend appointed, and any such further proceedings in the infant's own name will be set aside. Campbell *v.* Mathewson, 5 Ont. Pr. 91.

Appointment for heirs of deceased party.— Where defendant dies during the pendency of a suit to recover land, leaving infant heirs, the court may appoint a guardian *ad litem*. Thomas *v.* Jones, 10 Tex. 52. Where plaintiff in a redemption suit died before the decree pronounced had been drawn up, leaving infants his real representatives, it was held that before an application to revive could be made the decree must be drawn up and a guardian *ad litem* appointed. Beamish *v.* Pomeroy, 1 Ch. Chamb. (U. C.) 32.

Appointment for service of process.— See Boro *v.* Holtzhauer, 67 S. W. 30, 23 Ky. L. Rep. 2317.

A demand before suit by the infant without the intervention of a next friend is sufficient. Bush *v.* Groomes, 125 Ind. 14, 24 N. E. 81.

Protection of adult defendant.— See Blair *v.* Henderson, 49 W. Va. 282, 32 S. E. 552, construing W. Va. Code, c. 50, § 24.

Guardian appointed in another state.— See Wade *v.* Fite, 5 Blackf. (Ind.) 212.

Practice when no guardian appointed.— See Roach *v.* Hix, 57 Ala. 576.

Where an infant and an adult are joined as defendants and no guardian *ad litem* is appointed for the infant it is proper to render judgment against the adult alone. Harris *v.* Rosenberg, 43 Conn. 222.

Where disability on the part of complainants does not appear from anything in the record or the evidence, an objection that they should have sued by next friend is untenable. Prince *v.* Towns, 33 Fed. 161.

Statement in answer of removal of disabilities.— An infant should not be allowed to answer simply on the statement in his answer that his disabilities have been removed by the probate court but that fact should be proved by record of the probate court or a decree against the infants will be reversed. Pinchback *v.* Graves, 42 Ark. 222.

59. *Alabama.*— Petty *v.* Britt, 46 Ala. 491; Searcy *v.* Holmes, 43 Ala. 608; Rhett *v.* Mastin, 43 Ala. 86; Wilson *v.* Wilson, 18 Ala. 176.

Florida.— McDermott *v.* Thompson, 29 Fla. 299, 10 So. 584.

Georgia.— Richards *v.* East Tennessee, etc., R. Co., 106 Ga. 614, 33 S. E. 193, 45 L. R. A. 712; Kilpatrick *v.* Strozier, 67 Ga. 247; Groce *v.* Field, 13 Ga. 24.

Illinois.— Lloyd *v.* Kirkwood, 112 Ill. 329; Kesler *v.* Penninger, 59 Ill. 134; McDaniel *v.* Correll, 19 Ill. 226, 68 Am. Dec. 587.

Indiana.— Hough *v.* Canby, 8 Blackf. 301; Glass *v.* Murphy, 2 Blackf. 293.

Iowa.— Rice *v.* Bolton, 126 Iowa 654, 100 N. W. 634, 102 N. W. 509 (petition by administrator to sell lands in which infant child of decedent interested); Cavender *v.* Smith, 5 Iowa 157.

Kentucky.— Covington, etc., R. Co. *v.* Bowler, 9 Bush 468 (whether or not plaintiff applies for such appointment); Wyatt *v.* Mansfield, 18 B. Mon. 779; Jones *v.* Barclay, 2 J. J. Marsh. 73; Robinson *v.* Fidelity Trust, etc., Co., 11 S. W. 806, 11 Ky. L. Rep. 313; Tyler *v.* Jewell, 11 S. W. 25, 10 Ky. L. Rep. 887; Schuler *v.* Mayo, 5 Ky. L. Rep. 331.

Louisiana.— See Sadler *v.* Henderson, 35 La. Ann. 826.

Massachusetts.— Parker *v.* Lincoln, 12 Mass. 16.

New Jersey.— Pierson *v.* Hitchner, 25 N. J. Eq. 129.

New York.— Matter of Cutting, 38 N. Y. App. Div. 247, 56 N. Y. Suppl. 945; Matter of Howe, 2 Edw. 484. See also Hotchkiss *v.* Auburn, etc., R. Co., 36 Barb. 600.

North Carolina.— Isler *v.* Murphy, 71 N. C. 436; Jones *v.* Mason, 4 N. C. 561.

Texas.— Pucket *v.* Johnson, 45 Tex. 550; Hawkins *v.* Forrest, 1 Tex. Unrep. Cas. 167; McDonna *v.* Wells, 1 Tex. Unrep. Cas. 35.

Virginia.— Parker *v.* McCoy, 10 Gratt. 594.

West Virginia.— Alexander *v.* Davis, 42 W. Va. 465, 26 S. E. 291; Hays *v.* Camden, 38 W. Va. 109, 18 S. E. 461; Charleston, etc., Bridge Co. *v.* Comstock, 36 W. Va. 263, 15 S. E. 69; Myers *v.* Myers, 6 W. Va. 369.

See 27 Cent. Dig. tit. "Infants," § 195; and *infra*, note 60.

Condemnation proceedings for the use of a way through land owned by an infant will be set aside, where no guardian *ad litem* was appointed to represent the infant. Jones *v.* Barclay, 2 J. J. Marsh. (Ky.) 73.

On application to the surrogate to appoint a general guardian of an infant, he may, if he thinks proper, appoint any suitable person to be guardian *ad litem* of the infant, to procure the requisite proofs, so as to prevent an improper appointment or taking of insufficient security in reference to the infant's property. Kellinger *v.* Roe, 7 Paige (N. Y.) 362.

Appointment of guardian ad litem necessary in partition proceedings.— Cost *v.* Ross,

appear and answer for infant parties, otherwise the judgment or decree will be reversed on error or appeal;[60] but the recital in a decree of the appointment and appearance of a guardian *ad litem* imports verity.[61]

b. Non-Resident Infants. A guardian *ad litem* may be appointed for non-resident infant defendants,[62] and indeed it is the duty of the court to appoint a guardian in such case,[63] and it is error to render a judgment or decree against an absent infant defendant without such appointment having been made.[64]

c. Unknown Heirs. Where the names and the number of infant heirs are unknown it is not practicable to appoint guardians *ad litem* for them, but they must be proceeded against as unknown heirs.[65]

d. Infant Femes Covert. Where an infant *feme covert* sues as sole plaintiff she must be represented by a guardian *ad litem* or next friend,[66] but where her

17 Ill. 276; Smith *v.* Rice, 11 Mass. 507; *In re* Stratton, 1 Johns. (N. Y.) 509; Tederall *v.* Bonknight, 25 S. C. 275; Sligh *v.* Sligh, 1 Brev. (S. C.) 176; Montgomery *v.* Carlton, 56 Tex. 361; O'Hara *v.* McConnell, 93 U. S. 150, 23 L. ed. 840.

See 27 Cent. Dig. tit. "Infants," § 203.

If an infant defendant will not appoint a guardian the court will do so for him. Jack *v.* Davis, 29 Ga. 219.

If an infant defendant is arrested and does not appear to the action or take any notice of the arrest, on motion of plaintiff and notice to the infant the court will appoint a nominal guardian *ad litem* for him, in order to prevent the proceedings from being afterward set aside. Fearing *v.* Clawson, 1 Hall (N. Y.) 62.

If a minor defendant fails to appear, plaintiff before plea should have a guardian *ad litem* appointed by the court. Peak *v.* Shasted, 21 Ill. 137, 74 Am. Dec. 83.

Reappointment of a guardian *ad litem* for a minor after demurrer to a petition and amendment is not necessary. Carpenter *v.* San Joaquin County Super. Ct., 75 Cal. 596, 19 Pac. 174.

Minors may be represented by a tutor ad hoc instead of a curator *ad hoc* in partition proceedings under the statutes. Covas *v.* Bertoulin, 44 La. Ann. 683, 11 So. 143.

When appointment of special tutors unnecessary see Hagan *v.* Grimshaw, 15 La. Ann. 394.

The appointment of a special tutor for each heir is unnecessary in a succession sale of property for the purpose of effecting a partition among the heirs. Peyroux *v.* Peyroux, 24 La. Ann. 175.

Evidence of appointment.— Papers filed in a cause showing an appointment of a guardian *ad litem* for infant defendants are proper as evidence to establish that fact, although they are not made a part of the record. Bosworth *v.* Vandewalker, 53 N. Y. 597.

60. Woods *v.* Montevallo Coal, etc., Co., 107 Ala. 364, 18 So. 108; McCall *v.* McCurdy, 69 Ala. 65; Rowland *v.* Jones, 62 Ala. 322; Abdil *v.* Abdil, 26 Ind. 287; Martin *v.* Starr, 7 Ind. 224. See also Davis *v.* Wells, 37 Tex. 606. See *infra*, VIII, D, 2, g, (I).

It cannot be presumed that a guardian *ad litem* was appointed for infant defendants, in the absence of proof that the records were lost or destroyed. McDonald *v.* McDonald, 3 W. Va. 676.

Failure of record to show appointment does not render judgment void. Davis *v.* Wells, 37 Tex. 606.

61. Coulson *v.* Coulson, 180 Mo. 709, 79 S. W. 473.

62. Walker *v.* Hallett, 1 Ala. 379.

Appointment of counsel.— If a defendant to a suit in equity pending in Massachusetts be a resident of another state, the court may appoint his counsel as guardian *ad litem*. Emery *v.* Parrott, 107 Mass. 95.

Guardian should not be appointed until after service of process or publication. Walker *v.* Hallett, 1 Ala. 379.

Procedure.— Where infant defendants are absentees, it is a matter of course to make an absolute order for the appointment of a guardian *ad litem* for them without further notice, where they or their friends do not procure such guardian to be appointed within twenty days after the expiration of the time limited in the order for their appearance. Concklin *v.* Hall, 2 Barb. Ch. (N. Y.) 136.

Proof should be made of the infancy of a non-resident defendant. Walker *v.* Hallett, 1 Ala. 379.

Commission to appoint guardian and take answer.— See Snowden *v.* Snowden, 1 Bland (Md.) 550.

Curator ad hoc.— A minor without any tutor in Louisiana or elsewhere, and residing in another state with his widowed mother, never confirmed or sworn as tutrix, is properly represented by a curator *ad hoc* in a suit in which it is prayed he may be joined as plaintiff. Petrie *v.* Wofford, 3 La. Ann. 562. A curator *ad hoc* must be appointed to minors who when sued are without a curator *ad litem* or absent and not represented. Kimball *v.* Dunn, 12 La. 445.

63. Covington, etc., R. Co. *v.* Bowler, 9 Bush (Ky.) 468, whether or not plaintiff applies for such appointment.

Suit by attachment.— Where a minor with his guardian resides out of the state but has property in it he may be sued by attachment through a curator *ad hoc* in the district court without the appointment of a tutor. Pool *v.* Brooks, 10 La. 14.

64. Cravens *v.* Dyer, 1 Litt. (Ky.) 153.

65. Kountz *v.* Davis, 34 Ark. 590.

66. Welch *v.* Bunce, 83 Ind. 382; *Ex p.* Post, 47 Ind. 142.

adult husband is joined with her as a co-plaintiff this is not necessary.[67] Where an infant *feme covert* is sued, the appointment of a guardian *ad litem* is necessary as in the case of other infants.[68]

e. Whether Representation by Guardian or by Next Friend Proper — (i) *INFANT PLAINTIFFS.* At common law infants were required to sue by guardian *ad litem*;[69] but by the statute of Westminster they were authorized to sue by next friend in all actions,[70] and this remedy was held to be cumulative, leaving it optional for the suit to be brought by guardian or next friend.[71] At the present time an infant plaintiff is usually represented by a next friend,[72] and it

An infant feme covert may sue alone in reference to her separate property. *Ex p.* Post, 47 Ind. 142.

Right to sue by next friend.— A female infant who has married a man of full age, and whose guardian has settled with her, being entitled to the possession of her estate, may sue one to whom her husband has fraudulently transferred a portion thereof for its recovery by next friend and need not sue by guardian. Bush *v.* Groomes, 125 Ind. 14, 24 N. E. 81. A petition by next friend of an infant *feme covert* for the sale of her real estate may be granted, the guardianship of the infant having been terminated by the marriage. *In re* Dagget, 3 Pick. (Mass.) 280.

On a bill for divorce, if the wife is an infant she must prosecute or defend by her next friend or guardian. Wood *v.* Wood, 2 Paige (N. Y.) 108. *Contra,* Snedager *v.* Kincaid, 60 S. W. 522, 22 Ky. L. Rep. 1347, under Ky. Civ. Code Pr. § 35.

67. Welch *v.* Bunce, 83 Ind. 382; Cook *v.* Rawdon, 6 How. Pr. (N. Y.) 233; Sears *v.* Hyer, 1 Paige (N. Y.) 483.

Where the action is to recover the wife's separate property a guardian or next friend is necessary. Cook *v.* Rawdon, 6 How. Pr. (N. Y.) 233. *Contra,* Welch *v.* Bunce, 83 Ind. 382.

68. Nicholson *v.* Wilborn, 13 Ga. 467; Wood *v.* Wood, 2 Paige (N. Y.) 108; O'Hara *v.* McConnell, 93 U. S. 150, 23 L. ed. 840; Colman *v.* Northcote, 2 Hare 147, 7 Jur. 528, 12 L. J. Ch. 255, 24 Eng. Ch. 147.

Even though the husband is joined as a defendant the wife must appear by guardian *ad litem* if she has a separate estate or for any reason her defense may be distinct from that of her husband. Nicholson *v.* Wilborn, 13 Ga. 467.

Settlement of estate in probate court is not within the rule. Frisby *v.* Harrisson, 30 Miss. 452.

69. Chudleigh *v.* Chicago, etc., R. Co., 51 Ill. App. 491; Cavender *v.* Smith, 5 Iowa 157; Miles *v.* Boyden, 3 Pick. (Mass.) 213.

70. Chudleigh *v.* Chicago, etc., R. Co., 51 Ill. App. 491; Whittem *v.* State, 36 Ind. 196; Cavender *v.* Smith, 5 Iowa 157; Miles *v.* Boyden, 3 Pick. (Mass.) 213.

71. Chudleigh *v.* Chicago, etc., R. Co., 51 Ill. App. 491; Cavender *v.* Smith, 5 Iowa 157; Miles *v.* Boyden, 3 Pick. (Mass.) 213; Goodwin *v.* Moore, Cro. Car. 161; Young *v.* Young, Cro. Car. 86.

Amendment.— See Slater *v.* Nason, 15 Pick. (Mass.) 345; Dehart *v.* Kerlin, 4 Pa. Co. Ct. 396. See also Hardy *v.* Scanlin, 1 Miles (Pa.) 87.

72. *Connecticut.*— Williams *v.* Cleaveland, 76 Conn. 426, 56 Atl. 850.

Delaware.— Wilson *v.* Vandyke, 2 Harr. 29, where there is no guardian.

Georgia.— Hurst *v.* Goodwin, 114 Ga. 585, 40 S. E. 764, 88 Am. St. Rep. 43; Ross *v.* Battle, 113 Ga. 742, 39 S. E. 287; Jack *v.* Davis, 29 Ga. 219.

Illinois.— Allman *v.* Taylor, 101 Ill. 185; Stewart *v.* Howe, 17 Ill. 71.

Iowa.— Byers *v.* Des Moines Valley R. Co., 21 Iowa 54.

Kansas.— Schnee *v.* Schnee, 61 Kan. 643, 60 Pac. 738; Strong *v.* Marcy, 33 Kan. 109, 5 Pac. 366.

Kentucky.— Bustard *v.* Gates, 4 Dana 429.

Maine.— Boynton *v.* Clay, 58 Me. 236.

Maryland.— Bush *v.* Linthicum, 59 Md. 344; Monumental Bldg. Assoc. No. 2 *v.* Herman, 33 Md. 128.

Michigan.— Bloomingdale *v.* Chittenden, 74 Mich. 698, 42 N. W. 166.

Mississippi.— Hurt *v.* Southern R. Co., 40 Miss. 391.

Nebraska.— See Clasen *v.* Pruhs, (1903) 95 N. W. 640.

New Jersey.— Lang *v.* Belloff, 53 N. J. Eq. 298, 31 Atl. 604.

Pennsylvania.— Heft *v.* McGill, 3 Pa. St. 256.

Tennessee.— Benton *v.* Pope, 5 Humphr. 392.

Texas.— Since the adoption of the Revised Statutes a suit can be maintained by a next friend for the benefit of a minor. Hays *v.* Hays, 66 Tex. 606, 1 S. W. 895; Gulf, etc., R. Co. *v.* Styron, 66 Tex. 421, 1 S. W. 161; Long *v.* Behan, 19 Tex. Civ. App. 325, 48 S. W. 555. See also Abrahams *v.* Vollbaum, 54 Tex. 226. But while the act of 1870 requiring special guardians to conduct suits was in force a next friend could not do so. Hays *v.* Hays, 66 Tex. 606, 1 S. W. 895; Abrahams *v.* Vollbaum, 54 Tex. 226; Piedmont, etc., L. Ins. Co. *v.* Ray, 50 Tex. 511. See also March *v.* Walker, 48 Tex. 372; Smith *v.* Redden, 1 Tex. Unrep. Cas. 360.

Vermont.— Brown *v.* Hull, 16 Vt. 673.

West Virginia.— Lawson *v.* Kirchner, 50 W. Va. 344, 40 S. E. 344. As to suits in justices' courts see *infra,* note 74.

England.— Blake *v.* Bunbury, 1 Ves. Jr. 195, 30 Eng. Reprint 297.

Canada.— Campbell *v.* Mathewson, 5 Ont. Pr. 91.

See 27 Cent. Dig. tit. "Infants," § 193.

has even been said that a guardian *ad litem* is only appointed for infant defendants or respondents, and can never prosecute for infant plaintiffs;[73] but in some states an infant may sue by guardian *ad litem*, as well as by next friend, or must sue by guardian *ad litem*;[74] and in fact with respect to the representation of an infant plaintiff there seems to be little if any difference between the functions of a guardian *ad litem* and of a next friend.

(II) *INFANT DEFENDANTS.* An infant defendant should always be represented by a guardian *ad litem* appointed for that purpose, and not by a next friend.[75]

Every application on behalf of an infant must be made by a next friend. Cox *v.* Wright, 2 New Rep. 436 [*explaining* Furtado *v.* Furtado, 6 Jur. 227].

Infant need not show absence of general guardianship. Hurt *v.* Southern R. Co., 40 Miss. 391.

A dissent from an allotment of a year's allowance for an infant widow, entered by her next friend, is sufficient when she has no guardian. Hollomon *v.* Hollomon, 125 N. C. 29, 34 S. E. 99.

73. Clark *v.* Platt, 30 Conn. 282; Spencer *v.* Robbins, 106 Ind. 580, 5 N. E. 726; Priest *v.* Hamilton, 2 Tyler (Vt.) 44. But *compare* Wade *v.* Fite, 5 Blackf. (Ind.) 212.

Where an intervener asks affirmative relief against infant plaintiffs they cannot object to the appointment of a guardian *ad litem* for them on the ground that the statute authorizes such an appointment for defendants only. Long *v.* Behan, 19 Tex. Civ. App. 325, 48 S. W. 555.

74. Grosovsky *v.* Goldenberg, 86 Minn. 378, 90 N. W. 782; Lyles *v.* Haskell, 35 S. C. 391, 14 S. E. 829; Long *v.* Behan, 19 Tex. Civ. App. 325, 48 S. W. 555 (holding that the statute providing for the appointment of a guardian *ad litem* for minor defendants does not preclude the appointment of such a guardian for minor plaintiffs); Ivey *v.* Harrell, 1 Tex. Civ. App. 226, 20 S. W. 775 (holding that Paschal Dig. Tex. arts. 6969, 6970, providing for the appointment by the court of a special guardian to take care of the interests of a minor in a suit pending or about to be commenced, do not forbid minors from suing by next friend); White *v.* Straus, 47 W. Va. 794, 35 S. E. 843.

In New York the provision of the code of civil procedure requiring a guardian *ad litem* to be appointed for an infant plaintiff has been held to deprive infants of the right to sue by next friend. Linner *v.* Crouse, 61 Barb. 289; Hoftailing *v.* Teal, 11 How. Pr. 188. See also Segelken *v.* Meyer, 22 Hun 6 [*affirmed* in 94 N. Y. 473], 14 Hun 593; Fox *v.* Interurban St. R. Co., 42 Misc. 538, 86 N. Y. Suppl. 64. Under the former practice the infant sued by next friend. Hoftailing *v.* Teal, *supra*. See also Lansing *v.* Gulick, 26 How. Pr. (N. Y.) 250.

In West Virginia the statute requires the appointment of a guardian *ad litem* for an infant plaintiff before bringing suit before a justice, but a summons in an action brought by next friend is not void but merely defective, which defect can only be taken advantage of by defendant by special appearance for that purpose only to be stated at the time of making such appearance, and a judgment rendered upon such summons after a general appearance by defendant is not void. Blair *v.* Henderson, 49 W. Va. 282, 38 S. E. 552.

Where interest of next friend is hostile to infant it is the duty of the court to appoint a guardian *ad litem*, and the infant should be represented by counsel distinct from those representing the hostile interests. Ames *v.* Ames, 151 Ill. 280, 37 N. E. 890.

An infant suing in partition must, in Missouri, sue by his regular guardian or by a guardian *ad litem* appointed by the court in term-time and cannot sue by next friend (Colvin *v.* Hauenstein, 110 Mo. 575, 19 S. W. 943; Mitchell *v.* Jones, 50 Mo. 438); but where suit is brought by next friend and no question in reference thereto is made at the trial, the infant plaintiff should have an opportunity to correct the error before the suit is dismissed for that reason (Colvin *v.* Hauenstein, *supra*).

Effect of improper representation by next friend.— See Wygal *v.* Myers, 76 Tex. 598, 13 S. W. 567; Brooke *v.* Clark, 57 Tex. 105. See also Wilkiming *v.* Schmale, 1 Hilt. (N. Y.) 263.

75. *Illinois.*— Chudleigh *v.* Chicago, etc., R. Co., 51 Ill. App. 491.

Indiana.—Spencer *v.* Robbins, 106 Ind. 580, 5 N. E. 726.

Iowa.— Cavender *v.* Smith, 5 Iowa 157.

Kentucky.— Bustard *v.* Gates, 4 Dana 429; Searcey *v.* Morgan, 4 Bibb 96; Shields *v.* Bryant, 3 Bibb 525.

Maryland.— Bush *v.* Linthicum, 59 Md. 344. See also Monumental Bldg. Assoc. No. 2 *v.* Herman, 33 Md. 128.

New Hampshire.— Clarke *v.* Gilmanton, 12 N. H. 515.

New Jersey.— Lang *v.* Belloff, 53 N. J. Eq. 298, 31 Atl. 604.

Pennsylvania.— Swain *v.* Fidelity Ins., etc., Co., 54 Pa. St. 455.

South Carolina.— Bulow *v.* Witte, 3 S. C. 308.

Texas.— Tanner *v.* Ames, (Civ. App. 1896) 37 S. W. 373. See also Long *v.* Behan, 19 Tex. Civ. App. 325, 48 S. W. 555.

Vermont.— Brown *v.* Hull, 16 Vt. 673.

England.— Goodwin *v.* Moore, Cro. Car. 161.

See 27 Cent. Dig. tit. "Infants," § 193.

Where an infant becomes a party to a trustee process as claimant, it must appear in order to render the proceeding conclusive against him that he appeared by guardian as

f. Representation Without Appointment. No one has authority to appear and answer for an infant defendant without having been first appointed by the court for that purpose,[76] and a decree rendered upon the answer or defense of a person who has assumed to act as guardian *ad litem* for the infant without any such appointment is erroneous,[77] and does not conclude the infant.[78] It has also been laid down that a next friend suing for an infant must be regularly appointed by the court,[79] and in the absence of such appointment the suit may be dismissed on motion of defendant;[80] but if defendant appears and pleads, it is then too late to question the authority of the next friend, and the recital in the suit that the infant is suing by his next friend is taken as conclusive that an order has been made;[81]

in case of an infant defendant and not by next friend. Keeler *v.* Fassett, 21 Vt. 539, 52 Am. Dec. 71.

76. *Alabama.*— Darrington *v.* Borland, 3 Port. 9.

Kentucky.— Irons *v.* Crist, 3 A. K. Marsh. 143; Letcher *v.* Letcher, 2 A. K. Marsh. 158; Shields *v.* Bryant, 3 Bibb 525.

North Carolina.— See Ivey *v.* McKinnon, 84 N. C. 651.

Pennsylvania.—Swaine *v.* Fidelity Ins., etc., Co., 54 Pa. St. 455.

Virginia.— See Turner *v.* Barraud, 102 Va. 324, 46 S. E. 318.

See 27 Cent. Dig. tit. "Infants," § 197.

An appointment by the clerk of the court of a guardian *ad litem* "to infant defendants" has reference to the infant defendants named in the memorandum of suit, and not to those named in the bill. Turner *v.* Barraud, 102 Va. 324, 46 S. E. 318.

Service of summons on the mother and stepfather of an infant under fourteen years of age, residing with them, does not authorize them to appear and answer for such infant. Irwin *v.* Irwin, 57 Ala. 614.

77. *Alabama.*— Woods *v.* Montevallo Coal, etc., Co., 107 Ala. 364, 18 So. 108; Rowland *v.* Jones, 62 Ala. 322; Darrington *v.* Borland, 3 Port. 9.

Florida.— McDermott *v.* Thompson, 29 Fla. 299, 10 So. 584.

Kentucky.— Shields *v.* Craig, 1 T. B. Mon. 72; Irons *v.* Crist, 3 A. K. Marsh. 143; Newman *v.* Kendall, 2 A. K. Marsh. 234; Searcey *v.* Morgan, 4 Bibb 96.

Mississippi.— Stanton *v.* Pollard, 24 Miss. 154.

Montana.— Power *v.* Lenoir, 22 Mont. 169, 56 Pac. 106.

Virginia.— Brown *v.* McRea, 4 Munf. 439.

See 27 Cent. Dig. tit. "Infants," § 197.

But *compare* Tuttle *v.* Garrett, 74 Ill. 444.

An appointment will not be inferred from the fact that an answer was filed by a person styling himself guardian *ad litem*. McCall *v.* McCurdy, 69 Ala. 65.

Bill of review.— Where the record shows that an answer was filed and defense made by a person acting as guardian *ad litem* the fact that the record does not show his appointment is not such error as will support a bill of review. McCall *v.* McCurdy, 69 Ala. 65.

78. Johnson *v.* Waterhouse, 152 Mass. 585, 26 N. E. 234, 23 Am. St. Rep. 858, 11 L. R. A. 440 (holding that the fact that the parents of an infant were present in court with counsel and defended on his behalf will not make the judgment binding on him, if he had no legally appointed guardian, or guardian *ad litem*); Hatch *v.* Ferguson, 57 Fed. 966 (holding that the infant may collaterally attack such judgment). But *compare* Simmons *v.* Baynard, 30 Fed. 532.

Opening decree.— Where A appeared as special guardian for infant heirs of B, but there was no order of court appointing him, and it did not appear from the record how many of the heirs were infants, it was held that the cause must be reopened. Madison *v.* Wallace, 2 J. J. Marsh. (Ky.) 581.

79. Keeran *v.* Clowser, 5 Blackf. (Ind.) 604; Haines *v.* Oatman, 2 Dougl. (Mich.) 430; Struppman *v.* Muller, 52 How. Pr. (N. Y.) 211. See also Miles *v.* Boyden, 3 Pick. (Mass.) 213; Lansing *v.* Gulick, 26 How. Pr. (N. Y.) 250.

The special permission to sue ought to be averred. Wilson *v.* Vandyke, 2 Harr. (Del.) 29.

A guardian ad litem for an infant plaintiff must be appointed before the issuing of a summons and complaint. Hill *v.* Thacter, 3 How. Pr. (N. Y.) 407.

The practice originally was for the person intending to act as next friend, to go with the infant before the judge at chambers, or for a petition to be presented in behalf of the infant stating the nature of the action and praying that in respect of his infancy the person intended might be appointed as the next friend of such infant. This was accompanied by an affidavit on which the judge granted his fiat, and on this a rule was drawn up by the clerk of the rules admitting the person designated to sue as the next friend of the infant. Chudleigh *v.* Chicago, etc., R. Co., 51 Ill. App. 491.

Proceeding for sale of infant's realty.— See *In re* Whitlock, 32 Barb. (N. Y.) 48, 19 How. Pr. 380, construing 2 N. Y. Rev. St. (5th ed.) p. 275, §§ 100, 101.

Record of admission.— If the suit be by guardian it is not necessary that there should be any other record of admission than the recital of the fact in the count. Miles *v.* Boyden, 3 Pick. (Mass.) 213.

80. Keeran *v.* Clowser, 5 Blackf. (Ind.) 604; Haines *v.* Oatman, 2 Dougl. (Mich.) 430.

81. West Chicago, etc., R. Co. *v.* Johnson, 77 Ill. App. 142; Chudleigh *v.* Chicago, etc., R. Co., 51 Ill. App. 491; Guild *v.* Cranston, 8

and according to a number of authorities an infant may sue by his next friend without an appointment at all, it being necessary only that the court should recognize the representative capacity of such person.[82] Where a person as next of kin of minors has filed a bill to protect their interests they are, in the absence of fraud, bound by a decree rendered after litigation of the entire subject-matter, and persons acquiring rights thereunder will be protected, although no formal order appears appointing the complainant as guardian *ad litem* of the minors;[83] but where a suit in equity is brought in the names of infants by one as their next friend, without any authority other than being administrator of their father's estate, and the proceeding is adverse to them, instead of being in their interest, a decree rendered may be avoided by such parties on a bill filed to impeach same.[84] A judgment rendered for defendant in an action for the recovery of land brought on behalf of an infant without his consent by one who is neither *de jure* nor *de facto* his guardian nor his natural guardian cannot be sustained on the theory that the person suing was his next friend.[85]

g. Effect of Lack of Representation — (i) *On Judgment or Decree.* A judgment or decree rendered against an infant or affecting his property or interests without the appointment of a guardian *ad litem* is erroneous and invalid, and may be reversed or set aside;[86] but the failure to appoint a guardian *ad litem*

Cush. (Mass.) 506; Archer *v.* Frowde, 1 Str. 304. See also Taylor *v.* Pullen, 152 Mo. 434, 53 S. W. 1086.

The authority of the next friend to sue is presumed. Judson *v.* Blanchard, 3 Conn. 579; Chudleigh *v.* Chicago, etc., R. Co., 51 Ill. App. 491.

Judgment will not be arrested, in an action brought on behalf of an infant, on the ground that it does not appear that the next friend or guardian was admitted by the court. Hamilton *v.* Foster, 1 Brev. (S. C.) 464.

It is only by permission of the court that the suit is permitted to be brought in the name of the infant by the person who assumes to be the guardian or next friend. Theoretically such person is appointed by the court and this is shown by its permitting the suit to be maintained. Chudleigh *v.* Chicago, etc., R. Co., 51 Ill. App. 491; Miles *v.* Boyden, 3 Pick. (Mass.) 213; Archer *v.* Frowde, 1 Str. 304.

82. *Connecticut.*— Williams *v.* Cleaveland, 76 Conn. 426, 56 Atl. 850; McCarrick *v.* Kealy, 70 Conn. 642, 40 Atl. 603.

Georgia.— See Leonard *v.* Scarborough, 2 Ga. 73.

Michigan.— Sick *v.* Michigan Aid Assoc., 49 Mich. 50, 12 N. W. 905. *Compare* Haines *v.* Oatman, 2 Dougl. 430.

North Carolina.— See Ivey *v.* McKinnon, 84 N. C. 651.

Pennsylvania.—Turner *v.* Partridge, 3 Penr. & W. 172; Dehart *v.* Kerlin, 4 Pa. Co. Ct. 396.

Tennessee.— *Ex p.* Kirkman, 3 Head 517.

See 27 Cent. Dig. tit. "Infants," § 197.

A formal order is not indispensable. See Deford *v.* State, 30 Md. 179; Klaus *v.* State, 54 Miss. 644.

83. Watkins *v.* Lawton, 69 Ga. 671.

84. Wright *v.* Gay, 101 Ill. 233.

85. Stephens *v.* Hewett, 22 Tex. Civ. App. 303, 54 S. W. 301 [*distinguishing* Martin *v.* Weyman, 26 Tex. 460].

86. *Alabama.*— Levystein *v.* O'Brien, 106 Ala. 352, 17 So. 550, 54 Am. St. Rep. 56, 30 L. R. A. 707; Searcy *v.* Holmes, 43 Ala. 608; Rhett *v.* Mastin, 43 Ala. 86; Darrington *v.* Borland, 3 Port. 9.

Arkansas.— Cowling *v.* Hill, 69 Ark. 350, 63 S. W. 800; Bonner *v.* Little, 38 Ark. 397; Trapnall *v.* State Bank, 18 Ark. 53.

Connecticut.—Harris *v.* Rosenberg, 43 Conn. 227.

Georgia.— Burnett *v.* Summerlin, 110 Ga. 349, 35 S. E. 655, judgment not binding on infant.

Illinois.— White *v.* Kilmartin, 205 Ill. 525, 68 N. E. 1086; Linebaugh *v.* Atwater, 173 Ill. 613, 50 N. E. 1004; Kesler *v.* Penninger, 59 Ill. 134; Quigley *v.* Roberts, 44 Ill. 503; Hall *v.* Davis, 44 Ill. 494; Peak *v.* Shasted, 21 Ill. 137, 74 Am. Dec. 83; Herdman *v.* Short, 18 Ill. 59; Enos *v.* Capps, 12 Ill. 255.

Indiana.— McBride *v.* States, 130 Ind. 525, 30 N. E. 699; Alexander *v.* Frary, 9 Ind. 481.

Iowa.— Wise *v.* Schloesser, 111 Iowa 16, 82 N. W. 439.

Kansas.— Delashmutt *v.* Parrent, 39 Kan. 548, 18 Pac. 712; York Draper Mercantile Co. *v.* Hutchinson, 2 Kan. App. 47, 43 Pac. 315.

Kentucky.— Keller *v.* Wilson, 90 Ky. 350, 14 S. W. 332, 12 Ky. L. Rep. 471; Girty *v.* Logan, 6 Bush 8; Horsfall *v.* Ford, 5 Bush 642; Simmons *v.* McKay, 5 Bush 25; Chandler *v.* Com., 4 Metc. 66; Chalfant *v.* Monroe, 3 Dana 35; Johnson *v.* Johnson, 1 Dana 364; Daniel *v.* Hannagan, 5 J. J. Marsh. 48; Bedell *v.* Lewis, 4 J. J. Marsh. 562; Darby *v.* Richardson, 3 J. J. Marsh. 544; Rowland *v.* Cock, 1 J. J. Marsh. 453; Searcey *v.* Morgan, 4 Bibb 96; Searcy *v.* Rearden, 3 Bibb 528; Norfleet *v.* Logan, 54 S. W. 713, 21 Ky. L. Rep. 1200; Jewell *v.* Kirk, 47 S. W. 766, 20 Ky. L. Rep. 853; Hocker *v.* Montague, 29 S. W. 874, 16 Ky. L. Rep. 766; Schuk *v.* Stoll, 6 Ky. L. Rep. 364.

Maine.— Marshall *v.* Wing, 50 Me. 62.

Maryland.— Roche *v.* Waters, 72 Md. 264, 19 Atl. 535, 7 L. R. A. 533. *Contra,* Koontz

for an infant defendant is not such a jurisdictional defect as will render the judg-

v. Koontz, 79 Md. 357, 32 Atl. 1054, holding that under Md. Code, art. 16, § 116, providing for the partition and sale of real estate in which some of the parties having an interest are infants, it is not necessary, before the sale can be ordered, that the court retain the bill until the appointment of guardian *ad litem* for the infants.

Massachusetts.— Conto *v.* Silvia, 170 Mass. 152, 49 N. E. 86; Pratt *v.* Bates, 161 Mass. 315, 37 N. E. 439; Swan *v.* Horton, 14 Gray 179; Crockett *v.* Drew, 5 Gray 399; Austin *v.* Charlestown Female Seminary, 8 Metc. 196, 41 Am. Dec. 497; Miles *v.* Boyden, 3 Pick. 213; Knapp *v.* Crosby, 1 Mass. 479.

Minnesota.— Eisenmenger *v.* Murphy, 42 Minn. 84, 43 N. W. 784, 18 Am. St. Rep. 493.

Missouri.— Wells *v.* Wells, 144 Mo. 198, 45 S. W. 1095; Neenan *v.* St. Joseph, 126 Mo. 89, 28 S. W. 963; Charley *v.* Kelley, 120 Mo. 134, 25 S. W. 571; Lehew *v.* Brummell, 103 Mo. 546, 15 S. W. 765, 23 Am. St. Rep. 895, 11 L. R. A. 828; Gamache *v.* Prevost, 71 Mo. 84; Bailey *v.* McGinnis, 57 Mo. 362; State *v.* Gawronski, 110 Mo. App. 414, 85 S. W. 126 (judgment for delinquent taxes assessed against a lot in which an infant had an interest); Weiss *v.* Coudrey, 102 Mo. App. 65, 76 S. W. 730; Garesche *v.* Gambs, 3 Mo. App. 572.

Nebraska.— Manfull *v.* Graham, 55 Nebr. 645, 76 N. W. 19, 70 Am. St. Rep. 412; Parker *v.* Starr, 21 Nebr. 680, 33 N. W. 424.

New Hampshire.— Beckley *v.* Newcomb, 24 N. H. 359.

New Jersey.—Foulkes *v.* Young, 21 N. J. L. 438.

New York.— McMurray *v.* McMurray, 66 N. Y. 175; Fox *v.* Fee, 24 N. Y. App. Div. 314, 49 N. Y. Suppl. 292; McMurray *v.* McMurray, 60 Barb. 117, 41 How. Pr. 41; Feitner *v.* Hoeger, 14 Daly 470, 15 N. Y. St. 377; Rook *v.* Dickinson, 38 Misc. 690, 78 N. Y. Suppl. 287; Frost *v.* Frost, 15 Misc. 167, 37 N. Y. Suppl. 18; Kellog *v.* Klock, 2 Code Rep. 28; Larkin *v.* Mann, 2 Paige 27; Alderman *v.* Tirrell, 8 Johns. 418. See also Smith *v.* Reid, 11 N. Y. Suppl. 739, 19 N. Y. Civ. Proc. 363 [*affirmed* in 134 N. Y. 568, 31 N. E. 1082], guardian improperly appointed.

North Carolina.— Larkins *v.* Bullard, 88 N. C. 35; Keaton *v.* Banks, 32 N. C. 381, 51 Am. Dec. 393.

Ohio.— Long *v.* Mulford, 17 Ohio St. 484, 93 Am. Dec. 638; St. Clair *v.* Smith, 3 Ohio 355.

Pennsylvania.— See Elliot *v.* Elliot, 5 Binn. 1.

South Carolina.— Robertson *v.* Blair, 56 S. C. 96, 34 S. E. 11, 76 Am. St. Rep. 543; Carrigan *v.* Drake, 36 S. C. 354, 15 S. E. 339; Haigler *v.* Way, 2 Rich. 324. See also Bailey *v.* Boyce, 5 Rich. Eq. 187.

Texas.— Wallis *v.* Stuart, 92 Tex. 568, 50 S. W. 567; Ashe *v.* Young, 68 Tex. 123, 3 S. W. 454; Piedmont, etc., L. Ins. Co. *v.* Ray, 50 Tex. 511; Taylor *v.* Whitfield, 33 Tex. 181; Butner *v.* Norwood, (Civ. App. 1904) 81 S. W. 78; Wichita Land, etc., Co. *v.* Ward, 1 Tex. Civ. App. 307, 21 S. W. 128.

Vermont.— Fall River Foundry Co. *v.* Doty, 42 Vt. 412; Starbird *v.* Moore, 21 Vt. 529.

Virginia.—Roberts *v.* Stanton, 2 Munf. 129, 5 Am. Dec. 463; Fox *v.* Cosby, 2 Call 1.

West Virginia.— Alexander *v.* Davis, 42 W. Va. 465, 26 S. E. 291; Hull *v.* Hull, 26 W. Va. 1; Campbell *v.* Hughes, 12 W. Va. 183; Piercy *v.* Piercy, 5 W. Va. 199; McDonald *v.* McDonald, 3 W. Va. 676.

Wisconsin.— Hubbard *v.* Chicago, etc., R. Co., 104 Wis. 160, 80 N. W. 454, 76 Am. St. Rep. 855; O'Dell *v.* Rogers, 44 Wis. 136.

United States.— O'Hara *v.* McConnell, 93 U. S. 150, 23 L. ed. 840; Carrington *v.* Brents, 5 Fed. Cas. No. 2,446, 1 McLean 167.

See 27 Cent. Dig. tit. "Infants," §§ 195, 250.

Louisiana rule is explained in Pinniger's Succession, 25 La. Ann. 53.

A decree cannot be made on a bill of revivor against infant defendants unless a guardian *ad litem* be appointed, who accepts the appointment, and appears or is served with process. St. Clair *v.* Smith, 3 Ohio 355.

An appointment of an administrator *de bonis non* made without notice to the minor children of decedent, and without a guardian *ad litem* being appointed to represent them, is invalid, although the application for the appointment was made by the general guardian of such children. Hubbard *v.* Chicago, etc., R. Co., 104 Wis. 160, 80 N. W. 454, 76 Am. St. Rep. 855.

In proceedings for the settlement of a decedent's estate where infants are cited and do not appear, it is not error to render a decree without the appointment of a guardian *ad litem*. Parks *v.* Stonum, 8 Ala. 752.

Probate of will as an exception to the rule see Coalson *v.* Tooke, 18 Ga. 742.

An infant may maintain a writ of error to avoid a judgment against him in an action wherein no guardian was appointed to defend in his behalf. Johnson *v.* Waterhouse, 152 Mass. 585, 26 N. E. 234, 23 Am. St. Rep. 858, 11 L. R. A. 440.

After the lapse of a great number of years the judgment or decree will not be set aside. Feitner *v.* Hoeger, 14 Daly (N. Y.) 470, 15 N. Y. St. 377, fifty years.

Infant's remedy is by motion to set aside judgment. McMurray *v.* McMurray, 9 Abb. Pr. N. S. (N. Y.) 315, 41 How. Pr. 41. And a judgment for the sale of real estate of infants rendered without the appointment of a guardian *ad litem* cannot be reversed on that account until there has first been a motion in the lower court to set aside the judgment. Norfleet *v.* Logan, 54 S. W. 713, 21 Ky. L. Rep. 1200. Entry of judgment against an infant without appointing a guardian *ad litem* is not a mere irregularity, which rule 37 of the supreme court requires to have specified in the notice of motion to set aside, but is an error in fact which need not be specified. Peck *v.* Coler, 20 Hun (N. Y.) 534.

ment void,[87] and hence the judgment remains in full force and effect until it is

Where the pleadings do not show that defendant is a minor, a motion in arrest of judgment, alleging failure to cause him to appear by guardian *ad litem*, will be overruled. Rawles *v.* State, 56 Ind. 433. See also Palmer *v.* Palmer, 25 Ohio Cir. Ct. 660.

The absence of a formal entry that a guardian *ad litem* was appointed is not ground for reversal when the mother of the infant was admitted by the court to defend as guardian. Treiber *v.* Shafer, 18 Iowa 29.

Arrest of judgment.— Cavender *v.* Smith, 5 Iowa 157, motion improperly overruled.

Interest acquired pending litigation.— Failure to appoint a guardian *ad litem* for infants who, pending a contest of a will, have acquired by conveyance from the contestant rights in the property involved, will not of itself invalidate the judgment, nor entitle the infants to have it set aside. Shelby *v.* St. James Orphan Asylum, 66 Nebr. 40, 92 N. W. 155.

Transfer of interest pending litigation.— The fact that one of the parties against whom a judgment in partition was rendered was a minor who was not represented by a guardian *ad litem* did not invalidate the judgment where the minor, during the pendency of the suit, transferred his interest in the land to the party in whose favor the judgment was rendered. Shelburn *v.* McCrocklin, (Tex. Civ. App. 1897) 42 S. W. 329.

Proceedings against joint debtors.— The New York statute authorizing a plaintiff to proceed to judgment against joint debtors, where all the defendants have not been brought in, applies as well to infants as adults, and consequently a judgment thus entered against an infant defendant will not be revoked upon a writ of error, although it was entered without the appointment of a guardian to the infant. Mason *v.* Denison, 11 Wend. (N. Y.) 612.

Where a jury has found that a defendant was of full age, notwithstanding his plea of infancy, he cannot subsequently have the judgment set aside on the ground that he was an infant and no guardian appeared for him at the trial, but the finding of the jury can only be reviewed on appeal. Genser *v.* Freeman, 2 N. Y. City Ct. 406.

87. *Alabama.*— Levystein *v.* O'Brien, 106 Ala. 352, 17 So. 550, 54 Am. St. Rep. 56, 30 L. R. A. 707.

Arkansas.—Trapnall *v.* State Bank, 18 Ark. 53.

California.— Childs *v.* Lanterman, 103 Cal. 387, 37 Pac. 382, 42 Am. St. Rep. 121; Emeric *v.* Alvarado, 64 Cal. 529, 2 Pac. 418.

Illinois.— Millard *v.* Marmon, 116 Ill. 649, 7 N. E. 468; Gage *v.* Schroder, 73 Ill. 44; Peak *v.* Shasted, 21 Ill. 137, 74 Am. Dec. 83; Lemon *v.* Sweeney, 6 Ill. App. 507. *Compare* Whitney *v.* Porter, 23 Ill. 445.

Indiana.— McBride *v.* State, 130 Ind. 525, 30 N. E. 699. See also Cohee *v.* Baer, 134 Ind. 375, 32 N. E. 920, 39 Am. St. Rep. 270.

Iowa.— Rice *v.* Bolton, 126 Iowa 654, 100 N. W. 634, 102 N. W. 509; Hoover *v.* Kinsey Plow Co., 55 Iowa 668, 8 N. W. 658; Myers *v.* Davis, 47 Iowa 325; Drake *v.* Hanshaw, 47 Iowa 291. *Compare* Dohms *v.* Mann, 76 Iowa 723, 39 N. W. 823.

Kansas.— Walkenhorst *v.* Lewis, 24 Kan. 420; Holloway *v.* McIntosh, 7 Kan. App. 34, 51 Pac. 963.

Kentucky.— Keller *v.* Wilson, 90 Ky. 350, 14 S. W. 332, 12 Ky. L. Rep. 471; Simmons *v.* McKay, 5 Bush 25; Porter *v.* Robinson, 3 A. K. Marsh. 253, 13 Am. Dec. 153; Schuk *v.* Stoll, 6 Ky. L. Rep. 364; Norfleet *v.* Logan, 54 S. W. 713, 21 Ky. L. Rep. 1200. *Compare* Isert *v.* Davis, 32 S. W. 294, 17 Ky. L. Rep. 686.

Massachusetts.— Austin *v.* Charlestown Female Seminary, 8 Metc. 196, 41 Am. Dec. 497.

Michigan.— Schimpf *v.* Wayne Cir. Judge, 129 Mich. 103, 88 N. W. 384.

Minnesota.— Eisenmenger *v.* Murphy, 42 Minn. 84, 43 N. W. 784, 18 Am. St. Rep. 493.

Mississippi.— McLemore *v.* Chicago, etc., R. Co., 58 Miss. 514; Smith *v.* Bradley, 6 Sm. & M. 485.

Missouri.— Charley *v.* Kelley, 120 Mo. 134, 25 S. W. 571; Bailey *v.* McGinniss, 57 Mo. 362.

Nebraska.— Manfull *v.* Graham, 55 Nebr. 645, 76 N. W. 19, 70 Am. St. Rep. 412; Parker *v.* Starr, 21 Nebr. 680, 33 N. W. 424.

New York.— McMurray *v.* McMurray, 66 N. Y. 175; Fox *v.* Fee, 24 N. Y. App. Div. 314, 49 N. Y. Suppl. 292; Fowler *v.* Griffin, 3 Sandf. 385; Feitner *v.* Hoeger, 14 Daly 470, 15 N. Y. St. 377; Rook *v.* Dickinson, 38 Misc. 690, 78 N. Y. Suppl. 287; Monroe *v.* Douglas, 4 Sandf. Ch. 126; Benedict *v.* Cooper, 3 Dem. Surr. 362.

North Carolina.— Fowler *v.* Poor, 93 N. C. 466. But where infants were not served with process and no guardian *ad litem* was appointed for them the judgment was void. Gay *v.* Grant, 101 N. C. 206, 8 S. E. 99, 106.

Ohio.— See Taylor *v.* Graves, 4 Ohio Dec. (Reprint) 261, 1 Clev. L. Rep. 178.

Pennsylvania.— Elliott *v.* Elliott, 5 Binn. 1.

South Carolina.— Robertson *v.* Blair, 56 S. C. 96, 34 S. E. 11, 76 Am. St. Rep. 543.

Texas.— Ashe *v.* Young, 68 Tex. 123, 3 S. W. 454; Montgomery *v.* Carlton, 56 Tex. 361; Martin *v.* Weyman, 26 Tex. 460.

See 27 Cent. Dig. tit. "Infants," § 250.

Compare Baldwin *v.* Carleton, 11 Roh. (La.) 109; Roche *v.* Waters, (Md. 1889) 18 Atl. 866; Brown *v.* Sceggell, 22 N. H. 548.

Where the appointment of the guardian ad litem was void because of irregularities this does not render the judgment void but only voidable at the option of the infants, service of process having been duly made on them. Crouter *v.* Crouter, 133 N. Y. 55, 30 N. E. 726 [*affirming* 17 N. Y. Suppl. 758].

Proceedings in insolvency, *in invitum*, against an infant who is not represented by a guardian *ad litem* are void and may be set aside on a bill in equity brought by a creditor who has an attachment upon his estate, although such creditor's claim is one

reversed on appeal or error or set aside by direct proceedings,[88] and is not subject to collateral attack.[89] Where it appears from the record of a cause that there are infant defendants for whom no guardian was appointed an appellate court cannot presume for the purpose of sustaining the judgment that such defendants attained their majority before the time of the trial.[90] Adult parties cannot invoke the infancy of another party not represented by guardian *ad litem* to set aside the decree as to themselves.[91] It is not an absolute prerequisite to jurisdiction of an action by an infant that he should sue by guardian *ad litem* or next friend;[92] but a failure to appoint a guardian *ad litem* or next friend for an infant plaintiff merely affects the regularity of the proceedings,[93] and the defect is one which before verdict is amendable, and after verdict and judgment is cured.[94]

(II) *Dismissal or Nonsuit.* It has been held, although there is also authority to the contrary, that the fact that an infant plaintiff[95] or defendant[96] is not represented by a next friend or guardian *ad litem* is not a ground for a dismissal of the suit, but an amendment should be permitted to introduce a representative. It has also been held that the fact that an infant plaintiff is not represented by guardian or next friend is not ground for a nonsuit, but the objection should be by plea in abatement.[97]

which might be avoided by the infant on plea and proof of his infancy. Farris *v.* Richardson, 6 Allen (Mass.) 118, 83 Am. Dec. 618.

Title of purchaser under decree.— The failure to appoint a guardian *ad litem* for infant defendants, and the fact that no answer was filed in their behalf, when the estate of their ancestor was sold to pay debts under the decree of the chancellor, did not affect the title of a purchaser where the purchase had been confirmed by the chancellor. Brownsinski *v.* Phelps, 3 Ky. L. Rep. 59. See also Fowler *v.* Poor, 93 N. C. 466. *Compare* Hull *v.* Hull, 26 W. Va. 1.

88. Drake *v.* Hanshaw, 47 Iowa 291; Simmons *v.* McKay, 5 Bush (Ky.) 25. And see *supra*, note 87.

89. *Alabama.*— Levystein *v.* O'Brien, 106 Ala. 352, 17 So. 550, 54 Am. St. Rep. 56, 30 L. R. A. 707.

Indiana.— Cohee *v.* Baer, 134 Ind. 375, 32 N. E. 920, 39 Am. St. Rep. 270; McBride *v.* State, 130 Ind. 525, 30 N. E. 699.

Iowa.— Myers *v.* Davis, 47 Iowa 325.

Mississippi.— McLemon *v.* Chicago, etc., R. Co., 58 Miss. 514.

New York.— Monroe *v.* Douglas, 4 Sandf. Ch. 126.

Ohio.— Morgan *v.* Burnett, 18 Ohio 535; Taylor *v.* Graves, 4 Ohio Dec. (Reprint) 261, 1 Clev. L. Rep. 178.

See 27 Cent. Dig. tit. "Infants," § 250; and *supra*, note 87.

Injunction will not lie to restrain the enforcement of the judgment. Drake *v.* Hanshaw, 47 Iowa 291.

90. Cavender *v.* Smith, 5 Iowa 157. *Compare* James *v.* Drake, 1 Linn. Cas. 109, Thomps. Cas. 170.

91. Hutton *v.* Williams, 60 Ala. 107.

92. Parkins *v.* Alexander, 105 Iowa 74, 74 N. W. 769.

93. Cahill's Estate, 74 Cal. 52, 15 Pac. 364; Cochran *v.* Thomas, 131 Mo. 258, 33 S. W. 6; Rima *v.* Rossie Iron Works, 120 N. Y. 433, 24 N. E. 940 [*affirming* 47 Hun 153]; Rogers *v.* McLean, 34 N. Y. 536 [*affirming* 11 Abb. Pr. 440 (*reversing* 31 Barb. 304)]; Aldrich *v.* Funk, 48 Hun (N. Y.) 367, 1 N. Y. Suppl. 541; Jenkins *v.* Young, 43 Hun (N. Y.) 194; Drischler *v.* Van Denhenden, 49 N. Y. Super. Ct. 508; Rutter *v.* Puckhofer, 9 Bosw. 638; Goodfriend *v.* Robins, 92 N. Y. Suppl. 240. See also Dillon *v.* Howe, 98 Mich. 168, 57 N. W. 102; Pearsall *v.* Rosebrook, 42 Misc. (N. Y.) 10, 85 N. Y. Suppl. 526.

Curing irregularity.— See *In re* Sanborn, 109 Mich. 191, 67 N. W. 128, appointment after appeal from probate to circuit court.

94. *Georgia.*— Evans *v.* Collier, 79 Ga. 319, 4 S. E. 266; King *v.* King, 37 Ga. 205; Bartlett *v.* Bates, 14 Ga. 539.

Michigan.— Sick *v.* Michigan Aid Assoc., 49 Mich. 50, 12 N. W. 905.

Missouri.— See Chrisman *v.* Divinia, 141 Mo. 122, 41 S. W. 920.

New York.— Schemerhorn *v.* Jenkins, 7 Johns. 373.

Texas.— Brooke *v.* Clark, 57 Tex. 105.

See 27 Cent. Dig. tit. "Infants," § 250.

Compare Becton *v.* Becton, 56 N. C. 419.

A judgment in favor of an infant plaintiff without the appointment of a guardian *ad litem* for him is not void. Foley *v.* California Horseshoe Co., 115 Cal. 184, 47 Pac. 42, 56 Am. St. Rep. 87.

Appointment after judgment.— See Jones *v.* Steele, 36 Mo. 324.

95. Sick *v.* Michigan Aid Assoc., 49 Mich. 50, 12 N. W. 905; Sims *v.* New York College of Dentistry, 35 Hun (N. Y.) 344. *Contra*, Imhoff *v.* Wurtz, 9 N. Y. Civ. Proc. 48; Freyburg *v.* Pelerin, 24 How. Pr. (N. Y.) 202.

96. Covington, etc., R. Co. *v.* Bowler, 9 Bush (Ky.) 468. See also Bixler *v.* Taylor, 3 B. Mon. (Ky.) 362. *Contra*, Marston *v.* Humphrey, 24 Me. 513.

Discontinuance.— A plaintiff's failure to move for the appointment of a guardian *ad litem* for an infant defendant will not work a discontinuance. Turner *v.* Douglass, 72 N. C. 127.

97. Schemerhorn *v.* Jenkins, 7 Johns.

(III) *New Trial.* Where the proofs show that some of defendants were infants and no guardian *ad litem* was appointed for them this might be cause for a new trial.[98]

(IV) *Waiver or Loss of Right to Object.* A defendant waives the objection that plaintiff is an infant suing without a guardian or next friend when he pleads to the merits,[99] and fails to raise the objection by demurrer or answer,[1] and he cannot after plea or answer move on this ground to set aside the proceedings[2] or to arrest judgment.[3] It has been held that an infant defendant cannot, while an infant, waive the defect that he did not appear by guardian;[4] but if an infant defendant appears and pleads without guardian *ad litem*, and pending the suit he attains to full age, and afterward pleads again, the judgment will be binding upon him.[5] A defendant loses his right to attack a judgment against him on the ground that he was an infant when it was rendered and was not represented by guardian *ad litem* where he acquiesces in the judgment for a number of years after he becomes of age.[6]

3. Appointment and Qualification — a. Jurisdiction of Courts. The jurisdiction to appoint guardians *ad litem* is usually regulated by statute,[7] but as a gen-

(N. Y.) 373; Carroll *v.* Montgomery, 128 N. C. 278, 38 S. E. 874 [*following* Hicks *v.* Beam, 112 N. C. 642, 17 S. E. 490, 34 Am. St. Rep. 521]. *Contra*, McDaniel *v.* Nicholson, 2 Mill (S. C.) 344.

98. Wise *v.* Schloesser, 111 Iowa 16, 82 N. W. 439; Campbell *v.* Hughes, 12 W. Va. 183.

Where infants who were apparently adults appeared in the case, employed counsel, and made their defense without making any request for the appointment of a guardian *ad litem*, and their minority was not in any way disclosed to the court, it was held that the failure to appoint a guardian *ad litem* was not, under the circumstances, a ground for a new trial. Holloway *v.* McIntosh, 7 Kan. App. 34, 51 Pac. 963 [*following* De Priest *v.* State, 68 Ind. 569; Black *v.* State, 58 Ind. 589].

99. Sims *v.* New York College of Dentistry, 35 Hun (N. Y.) 344.

1. Jones *v.* Steele, 36 Mo. 324; Lyddon *v.* Dose, 81 Mo. App. 64; Webber *v.* Ward, 94 Wis. 605, 69 N. W. 349.

A general demurrer to evidence is insufficient to save the point; the objection must be by special demurrer or by answer. Clowers *v.* Wabash, etc., R. Co., 21 Mo. App. 213.

2. Smith *v.* Allen, 16 Ind. 316; Smart *v.* Haring, 14 Hun (N. Y.) 276; Parks *v.* Parks, 19 Abb. Pr. (N. Y.) 161; Fellows *v.* Niver, 18 Wend. 563.

3. Jones *v.* Steele, 36 Mo. 324.

4. McMurray *v.* McMurray, 60 Barb. (N. Y.) 117, 41 How. Pr. 41; Fairweather *v.* Satterly, 7 Rob. (N. Y.) 546 [*distinguishing* Palmer *v.* Davis, 28 N. Y. 242; Rutter *v.* Puckhofer, 9 Bosw. (N. Y.) 638; Van Amringer *v.* Barnett, 8 Bosw. (N. Y.) 357; Parks *v.* Parks, 19 Abb. Pr. (N. Y.) 161; Robbins *v.* Wells, 26 How. Pr. (N. Y.) 15; Fellows *v.* Niver, 18 Wend. (N. Y.) 563]. *Compare* Watson *v.* Wrightsman, 26 Ind. App. 437, 59 N. E. 1064.

The rule applies in actions of tort as well as in actions on contracts. Fairweather *v.* Satterly, 7 Rob. (N. Y.) 546.

5. Marshall *v.* Wing, 50 Me. 62.

6. Howard *v.* Dusenbury, 44 How. Pr. (N. Y.) 423, nearly twenty years.

A purchaser under the judgment cannot raise the objection when the infant has for some years been of age, and when a motion, if made, would be denied on account of the delay. Clemens *v.* Clemens, 60 Barb. (N. Y.) 366 [*affirmed* in 37 N. Y. 59].

7. See cases cited *infra*, this note; and generally the statutes of the several states.

New York.— The guardian *ad litem* may be appointed by the court in which the action is pending or a judge thereof or, if the action is brought in the supreme court, by a county judge. Lyle *v.* Lyle, 13 How. Pr. (N. Y.) 104. In partition proceedings a guardian *ad litem* is not appointed in the same way as in other actions but can be appointed by the court only. Varian *v.* Stevens, 2 Duer (N. Y.) 635; Lyle *v.* Lyle, 13 How. Pr. (N. Y.) 104. *Contra*, Towsey *v.* Harrison, 25 How. Pr. (N. Y.) 266, holding that a county judge has power to appoint a guardian *ad litem* for an infant defendant in an action for partition brought in the supreme court. Under N. Y. Code Civ. Proc. § 473, relating to the appointment of guardians *ad litem* and providing that "the court must give special directions in the order respecting the service thereof which may be had upon the infant," the directions regarding service must be made by the court as such, and a justice not in court has no authority in the matter. Uhl *v.* Loughran, 4 N. Y. Suppl. 827, 16 N. Y. Civ. Proc. 386.

South Carolina.— Under the provisions of Code Civ. Proc. § 136, a probate judge may appoint a guardian *ad litem* to appear for infants who are parties to a cause in the court of common pleas (Lyles *v.* Haskell, 38 S. C. 391, 14 S. E. 829; Trapier *v.* Waldo, 16 S. C. 276), even though the order of continuance served on the infants and their father provided that the application might be to "this court," i. e. the court of common pleas (Lyles *v.* Haskell, 35 S. C. 391, 14 S. E. 829).

eral rule a guardian *ad litem* for an infant party should be appointed by the court in which the action is brought and is pending.[8] Although it is usual,[9] an application for the appointment of a guardian *ad litem* is not necessary;[10] but the court may appoint a suitable person on its own motion where no application is made.[11] The consent of the infant is not necessary to the appointment of a guardian *ad litem*.[12] The power of courts to appoint guardians *ad litem* for infant defendants is discretionary and under ordinary circumstances the exercise of that discretion is not subject to revision.[13] The appointment of a guardian *ad litem* for an infant who is not at the time a party to the suit is a nullity.[14]

b. Time For Appointment. It is not necessary that there should be a next friend or guardian *ad litem* for an infant at the time of suing out process.[15] Hence where during the progress of the trial it appears that plaintiff is an infant

Tennessee.—The guardian *ad litem* required by Code, § 3324, in a proceeding to sell the property of persons under disability, may be appointed by the clerk and master, under section 4420, as in other cases. Beaumont *v.* Beaumont, 7 Heisk. 226.

Partition—Non-resident infants.—Me. Rev. St. c. 88, § 7, which requires that a guardian *ad litem* be appointed for infants in partition proceedings, does not apply in the case of infants living out of the state. The court has jurisdiction for that purpose only of infants living within the state. Coombs *v.* Persons Unknown, 82 Me. 326, 19 Atl. 826.

Right of state to delegate power to courts. — It is the right and duty of the state to assume the guardianship of the persons and estates of infants within its jurisdiction, and in discharging this duty it has the right to delegate to its courts the power to appoint for the infants a special guardian to stand in place of the infant and to appear for him in court with the same effect as the attorney of one *sui juris* may appear for him. Burrus *v.* Burrus, 56 Miss. 92.

8. *California.*— Hathaway's Estate, 111 Cal. 270, 43 Pac. 754.

Missouri.— Vaile *v.* Sprague, 179 Mo. 393, 78 S. W. 609.

New York.— Goodfriend *v.* Robins, 92 N. Y. Suppl. 240.

Texas.— See Smith *v.* Taylor, 34 Tex. 589; Ivey *v.* Harrell, 1 Tex. Civ. App. 226, 20 S. W. 775.

Utah.— Hyndman *v.* Stowe, 9 Utah 23, 33 Pac. 227.

See 27 Cent. Dig. tit. "Infants," § 211.

Every court of justice has incidental power to appoint guardians *ad litem* (Brick's Estate, 15 Abb. Pr. (N. Y.) 12. See also Vaile *v.* Sprague, 179 Mo. 393, 78 S. W. 609) whether the court be of general or inferior jurisdiction (Brick's Estate, *supra*).

A magistrate has power to appoint a guardian *ad litem* in a suit in his court. Wideman *v.* Patton, 64 S. C. 408, 42 S. E. 190.

A justice has power to appoint a guardian *ad litem*. Bullard *v.* Spoor, 2 Cow. (N. Y.) 430.

The chancery court is the general guardian of all infants within its jurisdiction, and has authority, by virtue of its general powers, to protect their rights, when defendants in that court, by the appointment of a guardian *ad litem*. Preston *v.* Dunn, 25 Ala. 507. The Georgia act of 1821 providing a suit by a guardian should not abate by a revocation of his letters of guardianship, but that his successor might be brought in by scire facias, did not take from courts of chancery the right to appoint guardians *ad litem* where no appointment had been made by the ordinary. Leonard *v.* Scarborough, 2 Ga. 73.

The court of common pleas possesses at common law the power to appoint a guardian *ad litem* to represent infant parties. Witherspoon *v.* Dunlap, 1 McCord (S. C.) 546.

Appointment by clerk.— See Lowe *v.* Harris, 121 N. C. 287, 28 S. E. 535, construing N. C. Laws (1887), c. 389.

Infant not within jurisdiction.— A court of equity cannot appoint a guardian *ad litem* for an infant defendant who is not within its jurisdiction. Jones *v.* Mason, 4 N. C. 561.

9. See *infra*, VIII, D, 3, e, (IV).

10. Matter of Ludlow, 5 Redf. Surr. (N. Y.) 391.

The surrogate is powerless to compel the making of an application for the appointment of a special guardian in proceedings to which an infant is a party. Price *v.* Fenn, 3 Dem. Surr. (N. Y.) 341.

Where the infant is fourteen years of age or older, it seems that the court is authorized to appoint a guardian *ad litem* only on application of the infant or some other person. Filmore *v.* Russell, 6 Colo. 171.

11. Rhoads *v.* Rhoads, 43 Ill. 239; Walker *v.* Hull, 35 Mich. 488; Matter of Cutting, 38 N. Y. App. Div. 247, 56 N. Y. Suppl. 945; *In re* Monell, 19 N. Y. Suppl. 361, 22 N. Y. Civ. Proc. 377; Price *v.* Fenn, 3 Dem. Surr. (N. Y.) 341; Matter of Ludlow, 5 Redf. Surr. (N. Y.) 391; Lewis *v.* Outlaw, 1 Overt. (Tenn.) 140.

12. Brick's Estate, 15 Abb. Pr. (N. Y.) 12.

13. Smith *v.* Taylor, 34 Tex. 589. See also Walker *v.* Hull, 35 Mich. 488.

14. Bondurant *v.* Sibley, 37 Ala. 565.

15. *Delaware.*—Howell *v.* American Bridge Co., (1902) 53 Atl. 53.

Illinois.— Stumps *v.* Kelley, 22 Ill. 140.

New Jersey.— Groff *v.* Groff, 3 N. J. L. 656.

New York.— See Harvey *v.* Large, 51 Barb. 222. But see *contra*, Imhoff *v.* Wurtz, 9 N. Y. Civ. Proc. 48; Hill *v.* Thacter, 3 How.

the court may then appoint a next friend or guardian *ad litem* for him and allow the pleadings to be amended accordingly,[16] and where defendant pleads that plaintiff, an infant, did not commence his action by next friend, the court may allow a responsible person to appear as next friend and qualify, even over the objection of defendant.[17] The appointment of a next friend for an infant plaintiff at the term to which the writ is returnable does not entitle defendant to a continuance.[18] The first proceeding after the return of process served on an infant defendant is properly the appointment of a guardian *ad litem*,[19] and such guardian should be appointed before any steps are taken as to which the infant is entitled to be heard;[20] but the failure to appoint a guardian until the trial had

Pr. 407; Wilder *v.* Ember, 12 Wend. 191, all holding that a next friend must be appointed for an infant plaintiff before process is sued out. See further Butler *v.* Halsey, 4 Sandf. Ch. 354.

South Carolina.— McDaniel *v.* Nicholson, 2 Mill 344.

Canada.— O'Reilly *v.* Vanevery, 2 Ont. Pr. 184.

See 27 Cent. Dig. tit. "Infants," § 208.

Compare Sick *v.* Michigan Aid Assoc., 49 Mich. 50, 12 N. W. 905.

Statutes requiring the appointment of a guardian *ad litem* or next friend for an infant plaintiff or the consent of some person to act as such before the issuance of process have been held directory merely. Greenman *v.* Cohee, 61 Ind. 201. See also Rima *v.* Rossie Iron Works, 120 N. Y. 433, 24 N. E. 940 [*affirming* 47 Hun 153].

Necessity of service on infant defendant before appointment of guardian *ad litem* see *infra*, VIII, D, 3, e, (III).

Appointment of next friend before declaration sufficient.— Groff *v.* Groff, 3 N. J. L. 656; O'Reilly *v.* Vanevery, 2 Ont. Pr. 184.

Special guardian should not be appointed before return-day of citation in surrogate proceedings. Matter of Leinkauf, 4 Dem. Surr. (N. Y.) 1.

In England.— Under the 19 & 20 Vict. c. 120, the appointment of a guardian to infant petitioners should be made after the petition has been presented. *In re* Hargraves, 5 Jur. N. S. 60, 28 L. J. Ch. 197, 7 Wkly. Rep. 156.

A next friend should be appointed before the issuing of a capias at the suit of an infant; but the proceedings will not be set aside if an appointment be made previous to the motion and the costs of the motion be paid. Fitch *v.* Fitch, 18 Wend. (N. Y.) 513.

It is irregular to serve a declaration, where an infant is plaintiff, without serving at the same time or previously a copy of an order appointing a next friend. Schilling *v.* Welman, 5 N. Y. Leg. Obs. 20.

16. *California.*— Cahill's Estate, 74 Cal. 52, 15 Pac. 364.

Florida.— Neal *v.* Spooner, 20 Fla. 38.

Michigan.— McDonald *v.* Weir, 76 Mich. 243, 42 N. W. 1114, trial on appeal from justice's court.

Missouri.— See Chrisman *v.* Divinia, 141 Mo. 122, 41 S. W. 920.

Montana.— Hoskins *v.* White, 13 Mont. 70, 32 Pac. 163.

New York.— Rima *v.* Rossie Iron Works, 120 N. Y. 433, 24 N. E. 940 [*affirming* 47 Hun 153 (*overruling* Imhoff *v.* Wurtz, 9 N. Y. Civ. Proc. 48)].

Texas.— Gulf, etc., R. Co. *v.* Conder, 23 Tex. Civ. App. 488, 58 S. W. 58.

Vermont.— Coomes *v.* Knapp, 11 Vt. 543, prosecution for bastardy.

Wisconsin.— Sabine *v.* Fisher, 37 Wis. 376 [*followed* in Hepp *v.* Huefner, 61 Wis. 148, 20 N. W. 923].

See 27 Cent. Dig. tit. "Infants," § 209.

Where allegations of appointment of guardian not sustained.— Where an infant plaintiff's allegation of the appointment of a guardian *ad litem* is not sustained by the proof, the court may allow him, over defendant's objection, to file a new petition, and may then and there appoint a guardian *ad litem*, and order the trial to proceed (Foley *v.* California Horseshoe Co., 115 Cal. 184, 47 Pac. 42, 56 Am. St. Rep. 87) or another person may be appointed and substituted in place of the person named, and the pleadings may be amended accordingly (Hill *v.* Watkins, 77 Hun (N. Y.) 491, 28 N. Y. Suppl. 805).

17. Greenman *v.* Cohee, 61 Ind. 201.

18. Harvey *v.* Coffin, 5 Blackf. (Ind.) 566.

19. Harvey *v.* Large, 51 Barb. (N. Y.) 222.

Guardian should be appointed before plea. Crocker *v.* Smith, 10 Ill. App. 376.

Delay in appointment is of no consequence where appointment was made before trial and in time to plead. Missouri Pac. R. Co. *v.* McCarty, 97 Mo. 214, 11 S. W. 52.

Application before summons.— See Wood *v.* Martin, 66 Barb. (N. Y.) 241, in partition, by infant entitled to choose his own guardian.

20. Cost *v.* Rose, 17 Ill. 276; Larkin *v.* Mann, 2 Paige (N. Y.) 27. See also Gardner *v.* Ellis, 1 N. C. 62.

On the settlement of an estate of a decedent a guardian *ad litem* for infant distributees should be appointed a sufficient length of time before the day of final settlement to enable him to examine the accounts filed by the administrator. Jenkins *v.* Jenkins, 16 Ala. 693.

Curing irregularity.— See Kelley *v.* Kelley, 15 Lea (Tenn.) 194. See also Grimstead *v.* Huggins, 13 Lea (Tenn.) 728; Ridgely *v.* Bennett, 13 Lea (Tenn.) 210; Livingston *v.* Noe, 1 Lea (Tenn.) 55.

commenced has been held not ground for reversal or vacation of the judgment unless prejudice resulted.[21]

c. Who May Apply For Appointment. Where an infant has arrived at such an age that he is presumed to possess sufficient discretion to select a suitable person to represent him, which age is usually fixed at fourteen years, a guardian *ad litem* may be appointed upon his application,[22] and in some states he is allowed a certain time to make such application and until the expiration of such time no other person can apply.[23] Where the infant is under the age referred to above, or where he fails to apply, the application may be made on his behalf by any other party to the action or by a relative or friend of the infant.[24] In case an infant is made a party defendant to an action, the plaintiff has a right to apply to the court for the appointment of a guardian *ad litem* for such infant,[25] and

21. Webster *v.* Page, 54 Iowa 461, 6 N. W. 716; Wickersham *v.* Timmons, 49 Iowa 267.

Partition proceedings.— Burton *v.* Waples, 3 Houst. (Del.) 458, appointment before final decree.

Probate proceedings.— After a reference and hearing on the question of revoking probate of a will the court will not summarily set aside all proceedings because an infant has not been represented, but will appoint a special guardian who may renew the application if he deems the infant's interest to require it. Benedict *v.* Cooper, 3 Dem. Surr. (N. Y.) 362.

22. Filmore *v.* Russell, 6 Colo. 171; Rice *v.* Bolton, 126 Iowa 654, 100 N. W. 634, 102 N. W. 509; Bush *v.* Linthicum, 59 Md. 344. See also Varian *v.* Stevens, 2 Duer (N. Y.) 635; Matter of Ludlow, 5 Redf. Surr. (N. Y.) 391.

Under N. Y. Code Civ. Proc. § 2531, the authority of the surrogate to appoint a special guardian for an infant at the latter's instance is recognized, but that section must be construed in connection with section 2530 as authorizing such appointment only where the general guardian does not appear, or the surrogate is satisfied that he is disqualified to adequately protect the interests of his ward. Farmers' L. & T. Co. *v.* McKenna, 3 Dem. Surr. (N. Y.) 219.

23. Filmore *v.* Russell, 6 Colo. 171; McConnell *v.* Adams, 3 Sandf. (N. Y.) 728; Anonymous, 10 Paige (N. Y.) 41; Easterby *v.* McIntosh, 51 S. C. 393, 29 S. E. 87.

Application after time allowed.— McConnell *v.* Adams, 3 Sandf. (N. Y.) 728, construing N. Y. Code Civ. Proc. § 471.

Effect of premature application by another is only an irregularity, which was cured by the judgment, where the infant signed the answer with his guardian *ad litem,* who was appointed on said application. Easterby *v.* McIntosh, 50 S. C. 393, 29 S. E. 87. But *compare* Keyes *v.* Ellensohn, 72 Hun (N. Y.) 392, 25 N. Y. Suppl. 693, holding an appointment made within the twenty days on the application of plaintiff void.

24. Filmore *v.* Russell, 6 Colo. 171; Flannigan *v.* Wilmington, etc., Electric R. Co., 2 Pennew. (Del.) 415, 45 Atl. 346 (holding that where plaintiff was an infant three years of age, the petition asking for the appointment of a next friend was properly signed by the father); McConnell *v.* Adams, 3 Sandf. (N. Y.) 728; Easterby *v.* McIntosh, 51 S. C. 393, 29 S. E. 87; Lyles *v.* Haskell, 35 S. C. 391, 14 S. E. 829. See also Sloane *v.* Martin, 145 N. Y. 524, 40 N. E. 217, 45 Am. St. Rep. 630, 28 L. R. A. 347 [*affirming* 77 Hun 249, 28 N. Y. Suppl. 332]; Barrett *v.* Moise, 61 S. C. 569, 39 S. E. 755.

The mother of infant defendants under fourteen years of age is a proper person to apply for the appointment of a guardian *ad litem* for them, under S. C. Code Civ. Proc. § 137, subd. 2, where it does not appear that they have a general or testamentary guardian or that they reside apart from her, and she need not wait until the expiration of twenty days after service of summons on them. Easterby *v.* McIntosh, 50 S. C. 393, 29 S. E. 87.

The general guardian or committee of an infant lunatic who is named as a party and is interested in the subject-matter may apply to the court for the appointment of a guardian *ad litem* for such infant lunatic. Rogers *v.* McLean, 11 Abb. Pr. (N. Y.) 440.

A general guardian appointed in another state may apply for the appointment of a guardian *ad litem* for his ward, and it is not necessary that a general guardian should be appointed in the state where the action is brought for the purpose of making such appointment. Freund *v.* Washburn, 17 Hun (N. Y.) 543.

Proceedings.— Where, no application for guardian having been made, complainants petitioned for the appointment of a guardian, and the judge made an order naming one, unless within ten days the infant should procure an appointment, and, the infant remaining silent, the order was made absolute thirty-five days later, the appointment was regular. Peck *v.* Adsit, 98 Mich. 639, 57 N. W. 804.

25. *Iowa.*— Ralston *v.* Lahee, 8 Iowa 17, 74 Am. Dec. 291.

New Hampshire.— Clarke *v.* Gilmanton, 12 N. H. 515.

New Jersey.— Judson *v.* Storer, 5 N. J. L. 544.

New York.— Bullard *v.* Spoor, 2 Cow. 430; Knickerbacker *v.* De Freest, 2 Paige 304; Ontario Bank *v.* Strong, 2 Paige 301. See also Van Deusen *v.* Brower, 6 Cow. 50; Anonymous, 10 Paige 41.

indeed it has been held to be not only the right but the duty of plaintiff to do so.[26]

d. Who May Be Appointed[27] — (i) *In General.* Competent and suitable persons should be selected as guardians *ad litem*.[28] The appointment should be made only after due inquiry as to the fitness of the person to be appointed,[29] and the court should always select such person as will be most likely to protect the rights of the infant,[30] and one who has no personal interest in the suit.[31] The person appointed should be an adult,[32] and a real not a fictitious person;[33] but it

North Carolina.— Turner *v.* Douglass, 72 N. C. 127.

England.— Williams *v.* Wynn, 10 Ves. Jr. 159, 32 Eng. Reprint 805. See also Shipman *v.* Stevens, 2 Wils. C. P. 50.

Canada. — Kirkpatrick *v.* Fouquette, 4 Grant Ch. (U. C.) 549.

See 27 Cent. Dig. tit. "Infants," § 212.

Compare Malone *v.* Casey, 25 La. Ann. 466.

Practice.— When the complainant applies for the appointment of a guardian *ad litem* for an infant defendant, he will be entitled to an order appointing such person as shall then be designated by the court, unless the infant, within ten days after service of a copy of the order, shall procure a guardian to be appointed for himself, and give notice thereof to the complainant. Concklin *v.* Hall, 2 Barb. Ch. (N. Y.) 136; Knickerbacker *v.* De Freest, 2 Paige (N. Y.) 304. But a peremptory order obtained by the complainant for the appointment of a guardian *ad litem* for infant defendants is regular so far at least as to protect the title of a purchaser under the decree in the suit in which such order is made. Concklin *v.* Hall, *supra*.

Revival of action.— If the infant representative of a deceased party, against whom a suit is sought to be revived by petition and order under the statute, does not within the time prescribed by statute procure the appointment of a guardian *ad litem* and put in his answer to the petition, the party seeking to revive must proceed as in other cases for the appointment of a guardian *ad litem*. Wilkinson *v.* Parish, 3 Paige (N. Y.) 653.

Non-resident infants.— Where non-resident infants, served by publication, and having no guardian, have not appeared, a guardian *ad litem* may, under N. C. Code Civ. Proc. § 471, be appointed on plaintiff's motion, and the form of notice to the infants of the application may be prescribed. Mace *v.* Scott, 17 Abb. N. Cas. (N. Y.) 100.

26. Coulson *v.* Coulson, 180 Mo. 709, 79 S. W. 473; Harvey *v.* Large, 51 Barb. (N. Y.) 222; Mason *v.* Denison, 15 Wend. (N. Y.) 64; Campbell *v.* Hughes, 12 W. Va. 183.

Effect of plaintiff's failure to apply.— The plaintiff's failure to apply for the appointment of a guardian *ad litem* for an infant defendant is not such laches as will work a discontinuance of the action (Turner *v.* Douglass, 72 N. C. 127), but it will preclude him on an appeal by the infant from a decree against him, from objecting that no guardian was appointed (Coulson *v.* Coulson, 180 Mo. 709, 79 S. W. 473).

27. **Appointment of general guardian as guardian *ad litem* or next friend** see GUARDIAN AND WARD.

28. Walker *v.* Hallett, 1 Ala. 379; Ten Broeck *v.* Reynolds, 13 How. Pr. (N. Y.) 462.

Guardian in surrogate's court.— The statute does not prescribe the qualifications of a guardian *ad litem* in the surrogate court, but it is good practice to require the same qualifications as are required of a guardian *ad litem* for infant defendants in the supreme court. Story *v.* Dayton, 22 Hun (N. Y.) 450.

Appointment of attorney.— The master should select one of the practitioners in the county town, the one who seems best fitted for the duty, and appoint him in all cases in which he is not concerned for any of the parties, if no nomination is made on the part of the infants, and if no special reason exists for naming some other solicitor. Clements *v.* Arnold, 3 Ch. Chamb. (U. C.) 75.

General guardian or an attorney of the court should be appointed. Story *v.* Dayton, 22 Hun (N. Y.) 450. See also Huhlein *v.* Huhlein, 87 Ky. 247, 8 S. W. 260, 10 Ky. L. Rep. 107. But it seems that a rule requiring the guardian *ad litem* to be the general guardian or an attorney or other officer of the court does not apply to the guardian of an infant plaintiff. Cook *v.* Rawdon, 6 How. Pr. (N. Y.) 233.

29. Young *v.* Young, 91 N. C. 359.

Advice of family council.— Where a family council has been duly summoned, to advise as to the appointment of a curator to an emancipated minor, to assist her in a suit about to be instituted against her, and the council refuses to tender any advice to the judge as to the appointment, the court is bound to appoint a curator notwithstanding the absence of such advice. *Ex p.* Wood, 24 Quebec Super. Ct. 277.

30. Grant *v.* Van Schoonhover, 9 Paige (N. Y.) 255, 37 Am. Dec. 393. See also Foster *v.* Cautley, 10 Hare appendix xxiv, 17 Jur. 370, 22 L. J. Ch. 639, 1 Wkly. Rep. 275, 44 Eng. Ch. 737.

Some person interested in the infant's welfare should be selected if possible. Walker *v.* Hallett, 1 Ala. 379.

31. Jarvis *v.* Crozier, 98 Fed. 753. *Compare* Foster *v.* Cautley, 10 Hare appendix xxiv, 17 Jur. 370, 22 L. J. Ch. 639, 1 Wkly. Rep. 275, 44 Eng. Ch. 737.

Interest adverse to infant see *infra*, VIII, D, 3, d, (III).

32. Wolford *v.* Oakley, 43 How. Pr. (N. Y.) 118.

33. Bullard *v.* Spoor, 2 Cow. (N. Y.) 430.

is not necessary that the next friend should be selected by the infant.[34] It has been considered that a married woman should not be appointed next friend or guardian *ad litem*.[35] In the absence of any statutory prohibition a non-resident may be appointed guardian *ad litem*.[36] A next friend or guardian *ad litem* for an infant plaintiff being liable for costs,[37] should be a person of substance.[38] One who could have acted as next friend for an infant can employ and indemnify another to allow the use of his name as such.[39] Neither the adverse party nor his counsel can be allowed to select the guardian to defend for the infants,[40] nor can a defendant appeal from the court's selection of a next friend for the infant plaintiff.[41]

(II) *Relationship to Infant.* The usual practice is to appoint as guardian *ad litem* or next friend the nearest relation of the infant who is not concerned in point of interest in the matter in question and is otherwise qualified to act;[42] but it is not necessary to the validity of the appointment that this practice should be

34. Kingsbury *v.* Buckner, 134 U. S. 650, 10 S. Ct. 638, 33 L. ed. 1047, under Ill. Rev. St. (1845) c. 21, § 4; c. 47, § 13.

35. Savage *v.* Smith, 132 Ala. 64, 31 So. 374, 90 Am. St. Rep. 932; *In re* Somerset, 34 Ch. D. 465, 56 L. J. Ch. 733, 56 L. T. Rep. N. S. 145, 35 Wkly. Rep. 273; Jones *v.* Geale, 8 Ir. Eq. 239.

If the husband will join the court will appoint them both. Jones *v.* Geale, 8 Ir. Eq. 239.

36. Pine *v.* Callahan, 8 Ida. 684, 71 Pac. 473; Shannon *v.* Consolidated Tiger, etc., Min. Co., 24 Wash. 119, 64 Pac. 169. See also Scott *v.* Niagara Nav. Co., 15 Ont. Pr. 409. *Compare* —— *v.* ——, 18 Jur. 770.

37. See *infra*, VIII, R, 3.

38. Matter of Mang, 50 N. Y. Super. Ct. 96, 5 N. Y. Civ. Proc. 162; Wicke *v.* Commercial F. Ins. Co., 7 Daly (N. Y.) 258, 2 Abb. N. Cas 325; Cook *v.* Rawdon, 6 How. Pr. (N. Y.) 233; Anonymous, 1 Atk. 570. See also Ten Broeck *v.* Reynolds, 13 How. Pr. (N. Y.) 462. *Compare* Rabidon *v.* Muskegon Cir. Judge, 110 Mich. 297, 68 N. W. 147; Davenport *v.* Davenport, 1 Sim. & St. 101, 1 Eng. Ch. 101, 57 Eng. Reprint 40; *Re* McConnell, 3 Ch. Chamb. (U. C.) 423.

Insolvent person may be appointed on giving security for costs. Smith *v.* Anderson, 1 Bailey (S. C.) 123.

Where poverty of guardian shown by petition.— Hayes *v.* Second Ave. R. Co., 5 N. Y. Civ. Proc. 155, no ground for setting aside appointment.

Waiver of objection by failure to raise question of responsibility.— See Wice *v.* Commercial F. Ins. Co., 7 Daly (N. Y.) 258, 2 Abb. N. Cas. 325.

39. Evans *v.* Mason, 1 Lea (Tenn.) 26.

40. *Illinois.*— Rhoads *v.* Rhoads, 43 Ill. 239.

Indiana.— Allen *v.* McGee, (App. 1901) 60 N. E. 460.

Iowa.— Ralston *v.* Lahee, 8 Iowa 17, 74 Am. Dec. 291.

New York.— Matter of Cutting, 38 N. Y. App. Div. 247, 252, 56 N. Y. Suppl. 945, 948; Knickerbacker *v.* De Freest, 2 Paige 304; Allen's Estate, Tuck. Surr. 69.

Canada.—Clements *v.* Arnold, 3 Ch. Chamb. (U. C.) 75.

See 27 Cent. Dig. tit. "Infants," §§ 212, 222.

Where interests not conflicting the rule need not apply. Horkins *v.* Harty, 6 Ont. Pr. 200.

41. Carroll *v.* Montgomery, 128 N. C. 278, 38 S. E. 874.

42. U. S. Bank *v.* Ritchie, 8 Pet. (U. S.) 128, 8 L. ed. 890; Jarvis *v.* Crozier, 98 Fed. 753. See also Grant *v.* Van Schoonhoven, 9 Paige (N. Y.) 255, 37 Am. Dec. 393.

The father of the infant is in the first place the proper person to represent him. Allen's Succession, 48 La. Ann. 1240, 20 So. 683; Bernard *v.* Merrill, 91 Me. 358, 40 Atl. 136; Stevens *v.* Cole, 7 Cush. (Mass.) 467; Rue *v.* Meirs, 43 N. J. Eq. 377, 12 Atl. 369; Cantrell *v.* Ford, (Tenn. Ch. App. 1898) 46 S. W. 581; Donald *v.* Ballard, 34 Wash. 576, 76 Pac. 80; Woolf *v.* Pemberton, 6 Ch. D. 19, 37 L. T. Rep. N. S. 328, 25 Wkly. Rep. 873; Watson *v.* Frazer, 9 Dowl. P. C. 741, 5 Jur. 682, 10 L. J. Exch. 420, 8 M. & W. 660; German *v.* Elliott, 2 Can. L. J. 267. See also Chicago Screw Co. *v.* Weiss, 203 Ill. 536, 68 N. E. 54 [*affirming* 107 Ill. App. 39]. See 27 Cent. Dig. tit. "Infants," § 224.

Mother.— In case the father of a minor daughter has disappeared and abandoned the matrimonial domicile the mother is authorized under the law of Louisiana to appear in court in her behalf and assert her rights. Williams *v.* Pope Mfg. Co., 52 La. Ann. 1417, 27 So. 851, 78 Am. St. Rep. 390, 50 L. R. A. 816. Where a mother of a minor child has not been appointed guardian of the child in Texas, but has been appointed in another state, she can maintain trespass to try title, in which she sues as guardian and alleges her foreign appointment, since, although not entitled to sue as such guardian, she may represent the child as its next friend, the allegation of guardianship being disregarded as surplusage. Bonner *v.* Ogilvie, 24 Tex. Civ. App. 237, 58 S. W. 1027.

The grandfather of infants will be appointed their guardian *ad litem* where it appears by affidavit that they live with him; their father being a non-resident, and their mother dead. Anonymous, 10 N. J. L. J. 142. See also Cantrell *v.* Lord, (Tenn. Ch. App. 1898) 46 S. W. 581.

adhered to,[43] or even that the person appointed should be a relative of the infant,[44] although the appointment of a stranger where the parents of the infant are living is a circumstance to awaken attention.[45]

(III) *Effect of Interest Adverse to Infant.* There should be no conflicting interests between the infant and the person representing him,[46] and hence a person whose interest in a suit is adverse to an infant should not be appointed guardian *ad litem*,[47] or permitted to act as the next friend of the infant.[48] In order to disqualify, however, the adverse interest must be clear and substantial.[49] Neither should the attorney of an adverse party be appointed guardian *ad litem* of infants,[50] although the suit be an amicable one and the infants request that he

A stepfather may act as next friend for minor children. International, etc., R. Co. *v.* Kuehn, 70 Tex. 582, 8 S. W. 484.

Uncle.— Where the next friend is described as being the uncle of the infants and only male relative of full age he is by such relation a suitable person to apply for a sale of the infant's realty. O'Reilly *v.* King, 28 How. Pr. (N. Y.) 408.

Insolvent father.— The court will allow a father, although an insolvent debtor, to prosecute an action as next friend for his infant son, if it is clearly shown that no fitter person can be obtained. Duckett *v.* Satchwell, 1 D. & L. 980, 8 Jur. 408, 13 L. J. Exch. 224, 12 M. & W. 779.

A husband cannot, it seems, be next friend in a suit for the separate property of the wife. Cook *v.* Rawdon, 6 How. Pr. (N. Y.) 233.

43. Bartlett *v.* Batts, 14 Ga. 539; U. S. Bank *v.* Ritchie, 8 Pet. (U. S.) 128, 8 L. ed. 890. See also Burns *v.* Wilson, 1 Mo. App. 179, where the court said that the relation of father was not essential to the position of next friend.

44. Rhoads *v.* Rhoads, 43 Ill. 239; Leavitt *v.* Bangor, 41 Me. 458; U. S. Bank *v.* Ritchie, 8 Pet. (U. S.) 128, 8 L. ed. 890; Anonymous, 1 Atk. 570.

45. U. S. Bank *v.* Ritchie, 8 Pet. (U. S.) 128, 8 L. ed. 890.

46. Patterson *v.* Pullman, 104 Ill. 80; Sargeant *v.* Rowsey, 89 Mo. 617, 1 S. W. 823; Harris *v.* Brown, 123 N. C. 419, 31 S. E. 877.

47. *California.*— Townsend *v.* Tallant, 33 Cal. 45, 91 Am. Dec. 617.

Louisiana.— See Baldwin *v.* Carleton, 11 Rob. 109.

Michigan.— Damouth *v.* Klock, 29 Mich. 289, appointment void.

New York.— Hecker *v.* Sexton, 43 Hun 593; Story *v.* Dayton, 22 Hun 450.

Tennessee.— Elrod *v.* Lancaster, 2 Head 571, 75 Am. Dec. 749.

England.— Langford *v.* Little, 5 Ir. Eq. 343. See also Leese *v.* Knight, 8 Jur. (N. S.) 1006, 10 Wkly. Rep. 711.

See 27 Cent. Dig. tit. "Infants," § 223.

Where a prima facie case is made showing that no conflicting interests exist between the infants and the proposed guardian, or the party proposing him, the court will not go into the question of the fact or extent of interest. Ferguson *v.* Langtry, 2 Ch. Chamb. (U. C.) 473.

Plaintiff's husband, although the father and guardian of infant defendants, should not be appointed their guardian *ad litem*. Bicknell *v.* Bicknell, 111 Mass. 265.

Disclaimer of interest in suit.— See Ellis *v.* Massenburg, 126 N. C. 129, 35 S. E. 240.

Objection by party opposed to infants is not permissible. Griffith *v.* Cromley, 58 S. C. 448, 36 S. E. 738.

Fraud cannot be inferred in the foreclosure of a mortgage against infant defendants from the fact that the guardian *ad litem* appointed for them was a sister of complainants and stepmother of the infants. Stevenson *v.* Kurtz, 98 Mich. 493, 57 N. W. 580.

48. *Illinois.*— Linebaugh *v.* Atwater, 173 Ill. 613, 50 N. E. 1004; Patterson *v.* Pullman, 104 Ill. 80.

Maine.— Bernard *v.* Merrill, 91 Me. 358, 40 Atl. 136.

Massachusetts.— See Stevens *v.* Cole, 7 Cush. 467.

Michigan.— Crittenden *v.* Canfield, 87 Mich. 152, 49 N. W. 554.

North Carolina.— George *v.* High, 85 N. C. 113; Walker *v.* Crowder, 37 N. C. 478.

Pennsylvania.— Ruffel *v.* Police Beneficiary Assoc., 9 Pa. Dist. 182.

Tennessee.— O'Conner *v.* Carver, 12 Heisk. 436.

Texas.— Lumsden *v.* Chicago, etc., R. Co., 23 Tex. Civ. App. 137, 56 S. W. 605.

England.— Langford *v.* Little, 5 Ir. Eq. 343; Anonymous, 11 Jur. 258.

See 27 Cent. Dig. tit. "Infants," § 223.

A decree in partition proceedings will not be disturbed because the interest of a next friend was adverse to that of the infant unless fraud or collusion be established. Ivey *v.* McKinnon, 84 N. C. 651.

49. Langford *v.* Little, 5 Ir. Eq. Rep. 343.

The fact that a next friend is a creditor of the infants does not disqualify him from acting in that capacity on an application for a sale of their realty. O'Reilly *v.* King, 28 How. Pr. (N. Y.) 408. *Compare* Matter of Tillotson, 2 Edw. (N. Y.) 113.

50. Sargeant *v.* Rowsey, 89 Mo. 617, 1 S. W. 823; Topping *v.* Howard, 10 Jur. 629; Sheppard *v.* Harris, 10 Jur. 24, 15 L. J. Ch. 104; Aikins *v.* Blain, 1 Ch. Chamb. (U. C.) 249; James *v.* Robertson, 1 Ch. Chamb. (U. C.) 197.

Consent of plaintiff and an adult defendant that plaintiff's attorneys shall be appointed guardian *ad litem* for an infant defendant does not authorize such appointment. Sargeant *v.* Rowsey, 89 Mo. 617, 1 S. W. 823.

be appointed ;[51] and even a person connected in business with the attorney of the adverse party should not be appointed.[52] Where there are two or more infant parties whose interests conflict they should be represented by different guardians.[53]

(iv) *Appointment of Court Officer.* Where an infant is not able to obtain a responsible guardian or where no one will consent to act for him and in other proper cases the court may appoint one of its own officers.[54]

e. Proceedings — (i) *In General.* All the formalities prescribed by statute must be observed in the appointment of a guardian *ad litem* in order to make a judgment against an infant binding.[55] The court may appoint a guardian *ad litem* for an infant defendant on motion,[56] without issuing a commission.[57] In order to secure the appointment of a guardian *ad litem* for non-residents alleged to be

Attorney employed by plaintiff in other matters is not within the rule. Walters *v.* Hermann, 99 Mo. 529, 2 S. W. 890.

51. James *v.* Robertson, 1 Ch. Chamb. (U. C.) 197.

52. Lake *v.* Kessel, 64 N. Y. App. Div. 540, 72 N. Y. Suppl. 311.

A clerk of the attorney is connected in business with him within this rule. Parish *v.* Parish, 77 N. Y. App. Div. 267, 78 N. Y. Suppl. 1089 [*reversed* on other grounds in 175 N. Y. 181, 67 N. E. 298]; Lake *v.* Kessel, 64 N. Y. App. Div. 540, 72 N. Y. Suppl. 311.

Error in appointing such person not jurisdictional.— Parish *v.* Parish, 175 N. Y. 181, 67 N. E. 298 [*reversing* 77 N. Y. App. Div. 267, 78 N. Y. Suppl. 1089].

53. Estes *v.* Bridgforth, 114 Ala. 221, 21 So. 512; *In re* Gould, 48 N. Y. Suppl. 872.

54. *Kentucky.*— Greenup *v.* Bacon, 1 T. B. Mon. 108.

New York.— See Fisher *v.* Lyon, 34 Hun 183.

North Carolina.— Muir *v.* Stuart, 5 N. C. 440, clerk or master.

United States.—Brown *v.* The Henry Pratt, 4 Fed. Cas. No. 2,010.

England.— Morgan *v.* Morgan, 2 Molloy 362.

See 27 Cent. Dig. tit. "Infants," § 225.

Where an infant party resides out of the state, the register or clerk will be appointed guardian *ad litem* of the infant without security under the statute and without notice to the infant, other than the general published notice to appear and answer. Minor *v.* Betts, 7 Paige (N. Y.) 596.

Devolution of trust.— Where the register is appointed guardian *ad litem* in a partition suit, the trust, upon his resignation of the office of register, devolves upon his successor in office; and notices and other papers in the cause must be served upon the latter. Wilkes *v.* Wilkes, 1 Barb. Ch. (N. Y.) 72.

Propriety of particular appointments.— In a suit to foreclose a mortgage against several defendants, some of whom are infants, it is improper to appoint the same person guardian *ad litem* and master in chancery. Walker *v.* Hallett, 1 Ala. 379. In proceedings to alter a road to pass through the land of heirs, it is not improper to appoint one of the viewers a guardian *ad litem* to defend on behalf of the heirs. Gashweller *v.* McIlvoy, 1 A. K. Marsh. (Ky.) 84. It is bad practice, but not error, to appoint the same person guardian *ad litem* of infants and commissioner to state an account against them. Cole *v.* Johnson, 53 Miss. 94.

A county officer, as the jailer, may act as guardian *ad litem.* Wideman *v.* Patton, 64 S. C. 408, 42 S. E. 190.

55. Finley *v.* Robertson, 17 S. C. 435.

In New York there is no unbending rule of practice in relation to the appointment of a guardian *ad litem* for an infant defendant upon application of the complainant where the infant and his friends neglect to procure the appointment of a guardian *ad litem* for him within twenty days after the return-day of the subpœna (Concklin *v.* Hall, 2 Barb. Ch. 136), but the usual practice is to grant an order *nisi* appointing some suitable person as guardian *ad litem* for the infant defendant unless he, within ten days after the service of a copy of the order, procures the appointment of another person (Concklin *v.* Hall, *supra*; Knickerbacker *v.* De Freest, 2 Paige 304). The court has also sanctioned the practice of giving notice to the infant at the time of serving the subpœna where he is of the age of fourteen or upward, or to his relative or protector in whose presence the subpœna is served where he is under that age, that if he does not procure the appointment of a guardian *ad litem* within twenty days after the return-day of the subpœna the complainant will apply to the court to appoint a guardian *ad litem* for him without further notice. Concklin *v.* Hall, *supra.*

In the case of infants who are absentees it is a matter of course to make an absolute order for the appointment of a guardian *ad litem* for them without further notice, where they or their friends do not procure a guardian to be appointed within twenty days after the expiration of the time limited in the order of the court for their appearance. Concklin *v.* Hall, 2 Barb. Ch. (N. Y.) 136.

56. Barclay *v.* Govers, 2 Fed. Cas. No. 973, 1 Cranch C. C. 147; Smith *v.* Palmer, 3 Beav. 10, 43 Eng. Ch. 9, 49 Eng. Reprint 4; *In re* Goodfellow, 1 Eq. Rep. 191, 1 Wkly. Rep. 446; Jongsma *v.* Pfiel, 9 Ves. Jr. 357, 32 Eng. Reprint 640.

Motion for leave to answer by guardian must name guardian. Brassington *v.* Brassington, 2 Anstr. 369.

57. Reinhart *v.* Orme, 20 Fed. Cas. No. 11,682, 1 Cranch C. C. 244. *Contra,* Tappen *v.* Norman, 11 Ves. Jr. 563, 32 Eng. Reprint 1207, where infant resident abroad.

infants, proof of their infancy must be given.[58] The presence of infant defendants in court before the appointment of a guardian *ad litem* is necessary only for the purpose of ascertaining their infancy.[59]

(II) *Notice of Application For Appointment.* It is sometimes required that notice shall be given of an application for the appointment of a guardian *ad litem*.[60]

(III) *Service of Process on Infants.*[61] Before the appointment of a guardian *ad litem* for an infant defendant, either resident or non-resident, there should be such service of process upon the infant as is necessary to bring him within the jurisdiction of the court, and an appointment made without such service is irregular and unauthorized and will work a reversal on error of any decree rendered against the infant.[62] It has been held that an appointment without such

58. Walker *v.* Hallett, 1 Ala. 379.

59. Ray *v.* McIlroy, 1 A. K. Marsh. (Ky.) 612.

60. Swain *v.* Fidelity Ins., etc., Co., 54 Pa. St. 455 [*followed* in Graham's Estate, 14 Wkly. Notes Cas. (Pa.) 31] (holding that no court has authority to appoint a guardian *ad litem* without first giving notice to the minor or his next of kin); Finley *v.* Robertson, 17 S. C. 435 (notice to minors); Galbraith *v.* Galbraith, 5 Can. L. J. O. S. 41 (holding that where the mother of the infants is plaintiff, and the infants defendants, notice of motion to appoint a guardian *ad litem* must also be served upon them if of proper age); Hamilton *v.* Hamilton, 2 Ch. Chamb. (U. C.) 160.

Application by infant.— Under N. Y. Code Civ. Proc. § 2531, notice of application for the appointment of a special guardian to represent an infant party must be given only when the application is by a person other than the infant (Matter of Ludlow, 5 Redf. Surr. (N. Y.) 391), unless the infant has a general guardian, in which case notice of an application by the infant must be given to the general guardian (Farmers' L. & T. Co. *v.* McKenna, 3 Dem. Surr. (N. Y.) 219).

Sufficiency of notice.— See Lyles *v.* Haskell, 35 S. C. 391, 14 S. E. 829.

Service of notice.— See Bigger *v.* Beaty, 1 Ch. Chamb. (U. C.) 236; Bowman *v.* Becktel, 2 Grant Ch. (U. C.) 556; Hitch *v.* Wells, 8 Beav. 576, 50 Eng. Reprint 226.

Notice to principal of college may be sufficient, plaintiff being unable to discover the residence of the infant's parent. Christie *v.* Cameron, 2 Jur. N. S. 635, 25 L. J. Ch. 488, 4 Wkly. Rep. 589. See also Whitmarsh *v.* Ford, 1 Ch. Chamb. (U. C.) 357.

Failure to give notice is a mere irregularity rendering the decree voidable as to the infant but not void. Frierson *v.* Travis, 39 Ala. 150. It does not furnish a sufficient excuse to a purchaser at a sale ordered in such proceedings for refusing to accept title where the interests of the infants were protected by a special guardian appointed before the sale. Price *v.* Fenn, 3 Dem. Surr. (N. Y.) 341.

61. Service on infant generally see *infra*, VIII, F, 2.

62. *Alabama.*— Cook *v.* Rogers, 64 Ala. 406; Clark *v.* Gilmer, 28 Ala. 265; Hodges *v.* Wise, 16 Ala. 509; Walker *v.* Mobile Bank, 6 Ala. 452; Walker *v.* Hallett, 1 Ala. 379.

Arkansas.— Johnson *v.* Trotter, (1891) 15 S. W. 1025; Pinchback *v.* Graves, 42 Ark. 222; Evans *v.* Davies, 39 Ark. 235; Pillow *v.* Sentelle, 39 Ark. 61.

California.—McCloskey *v.* Sweeney, 66 Cal. 53, 4 Pac. 943; Gray *v.* Palmer, 9 Cal. 616. See also Randolph *v.* Bayue, 44 Cal. 366, appointment of attorney by probate court. *Compare* Stuart *v.* Allen, 16 Cal. 473, 76 Am. Dec. 551.

Florida.— Brock *v.* Doyle, 18 Fla. 172.

Illinois.— Trevor *v.* Colgate, 181 Ill. 129, 54 N. E. 909; Campbell *v.* Campbell, 63 Ill. 462.

Indiana.— Roy *v.* Rowe, 90 Ind. 54 (service or appearance); Carver *v.* Carver, 64 Ind. 194; Holliday *v.* Miller, 28 Ind. App. 121, 62 N. E. 291.

Iowa.— Rice *v.* Bolton, 126 Iowa 654, 100 N. W. 634, 102 N. W. 509; Good *v.* Norley, 28 Iowa 188; Allen *v.* Saylor, 14 Iowa 435.

Kentucky.— Allsmiller *v.* Freutchenicht, 86 Ky. 198, 5 S. W. 746, 9 Ky. L. Rep. 509; Dodge *v.* Foulks, 11 B. Mon. 178; Chambers *v.* Warren, 6 B. Mon. 244; Jones *v.* McGinty, 3 Dana 425; Coleman *v.* Coleman, 3 Dana 398, 28 Am. Dec. 86; Graham *v.* Sublett, 6 J. J. Marsh. 44; Collard *v.* Groom, 2 J. J. Marsh. 487. See also Womble *v.* Trice, 112 Ky. 533, 66 S. W. 370, 67 S. W. 9, 23 Ky. L. Rep. 1939.

Minnesota.— Phelps *v.* Heaton, 79 Minn. 476, 82 N. W. 990.

Mississippi.— Price *v.* Crone, 44 Miss. 571; Johnson *v.* McCabe, 42 Miss. 255; Ingersoll *v.* Ingersoll, 42 Miss. 155; Prewett *v.* Land, 36 Miss. 495; McAllister *v.* Moye, 30 Miss. 258; Stanton *v.* Pollard, 24 Miss. 154. Under the Mississippi code of 1867 it was not a prerequisite to the power of the probate court to appoint a guardian *ad litem* for a minor that the minor should first be cited, but the court could make such appointment without any process on the minor, and, after filing of the minor's answer by the guardian *ad litem* thus appointed, could proceed to render a valid decree affecting the interest of the minor. Burrus *v.* Burrus, 56 Miss. 92 [*followed* in Johnson *v.* Cooper, 56 Miss. 608].

Missouri.— Shaw *v.* Gregoire, 41 Mo. 407 (service on infant or general guardian); Hendricks *v.* McLean, 18 Mo. 32; Nagel *v.* Schilling, 14 Mo. App. 576.

New York.— Ingersoll *v.* Mangan, 84 N. Y.

service having been made is voidable only and not void;[63] but there is also authority for the view that failure to serve process on an infant is a jurisdictional defect, and without such service the appointment of a guardian and the proceedings had after such appointment are void.[64] If the infant is already in court or voluntarily

622 [*affirming* 24 Hun 202]; Moulton *v.* Moulton, 47 Hun 606, 13 N. Y. Civ. Proc. 420 [*distinguishing* Gotendorf *v.* Goldschmidt, 83 N. Y. 110]; Pinckney *v.* Smith, 26 Hun 524; Syracuse Sav. Bank *v.* Burton, 6 N. Y. Civ. Proc. 216; Glover *v.* Haws, 19 Abb. Pr. 161 note; Ontario Bank *v.* Strong, 2 Paige 307; Matter of Watson, 2 Dem. Surr. 642. See also Mason *v.* Denison, 15 Wend. 64. *Compare* Althause *v.* Radde, 3 Bosw. 410.

North Carolina.— Young *v.* Young, 91 N. C. 359. See also Allen *v.* Shields, 72 N. C. 504. The statute requires a service of process before the court can exercise the power of appointment, but previous to this statute such power was generally exercised without the issuance of process. See Matthews *v.* Joyce, 85 N. C. 258; Moore *v.* Gidney, 75 N. C. 34. And see also Howerton *v.* Sexton, 90 N. C. 581.

Ohio.— Keys *v.* McDonald, 1 Handy 287. 12 Ohio Dec. (Reprint) 146.

Pennsylvania.— See Swain *v.* Fidelity Ins., etc., Co., 54 Pa. St. 455; Graham's Estate, 14 Wkly. Notes Cas. 31.

South Carolina.— Tederall *v.* Bouknight, 25 S. C. 275.

Tennessee.— Linnville *v.* Darby, 1 Baxt. 306; Taylor *v.* Walker, 1 Heisk. 734; Rucker *v.* Moore, 1 Heisk. 726; Ivey *v.* Ingram, 4 Coldw. 129; Wheatley *v.* Harvey, 1 Swan 484.

Texas.— Sprague *v.* Haines, 68 Tex. 215, 4 S. W. 371; Maury *v.* Keller, (Civ. App. 1898) 53 S. W. 59. See also Tutt *v.* Morgan, (Civ. App. 1897) 42 S. W. 578.

Wisconsin.— Foster *v.* Hammond, 37 Wis. 185.

Canada.—Robinson *v.* Dobson, 1 Ch. Chamb. (U. C.) 257.

See 27 Cent. Dig. tit. "Infants," § 214.

Appointment of guardian ad litem before service complete irregular.— Darrow *v.* Calkins, 154 N. Y. 503, 49 N. E. 61, 61 Am. St. Rep. 637, 48 L. R. A. 299 [*affirming* 6 N. Y. App. Div. 28, 39 N. Y. Suppl. 527]; Crouter *v.* Crouter, 17 N. Y. Suppl. 758 [*affirmed* in 133 N. Y. 55, 30 N. E. 726].

Service of writ without petition.— In a suit for partition and sale of land, the court has no jurisdiction to appoint a guardian *ad litem* for infants living out of the county who are entitled to be served with a copy both of the writ and petition but who are only served with a copy of the writ. Kremer *v.* Haynie, 67 Tex. 450, 3 S. W. 676.

Acceptance of service.— Where an administrator filed a petition to sell land to make assets, and the heir at law accepted service of the summons and a guardian *ad litem* was appointed, but no actual service was ever made, the irregularity was cured by N. C. Code Civ. Proc. § 387. Cates *v.* Pickett, 97 N. C. 21, 1 S. E. 763.

Action in rem.— In an action in a federal court in the nature of a suit *in rem*, seeking to subject certain property in which an infant is interested to the payment of partnership debts the appointment of a guardian *ad litem* for such infant on application of the mother was sufficient to give the court jurisdiction without actual service upon the infant. Sloane *v.* Martin, 145 N. Y. 524, 40 N. E. 217, 45 Am. St. Rep. 630, 28 L. R. A. 347 [*affirming* 77 Hun 249, 28 N. Y. Suppl. 332].

Service of process on infant defendants in another state does not give jurisdiction to appoint a guardian *ad litem*, where it is not made to appear that there is no parent or guardian of the infants within the state in which the action is brought upon whom process might be served. Frank *v.* Webb, 67 Miss. 462, 6 So. 620 [*following* Erwin *v.* Carson, 54 Miss. 282].

Equity suits in federal courts.— Congress and the federal courts having failed, up to 1868, to prescribe the manner in which infant defendants in equity suits in a federal court should be subjected to the jurisdiction of the court, and equity rule 90, then in force, having provided that, where the rules of the federal courts did not apply, the practice of the circuit court should be regulated by the practice in the English chancery court, a guardian *ad litem* for infant defendants could be appointed by the court without personal service on the infants, on an appearance being entered by a solicitor for such defendants, followed by a petition by their mother for such appointment; this being proper practice in the English chancery court. Sloane *v.* Martin, 24 N. Y. Suppl. 661 [*affirmed* in 77 Hun 249, 28 N. Y. Suppl. 332].

63. Bondurant *v.* Sibley, 37 Ala. 565 (holding therefore that an appointment of a second guardian was void when made before the irregular first appointment was set aside); Preston *v.* Dunn, 25 Ala. 507 (holding that where a guardian *ad litem* was appointed by the chancery court for an infant defendant, a decree rendered against the infant cannot be collaterally attacked by the infant for want of jurisdiction, although the appointment was made without service of process); Wood *v.* Martin, 66 Barb. (N. Y.) 241 (holding that as to infants under fourteen years of age, the appointment of a guardian *ad litem* before service of summons is, at most, an irregularity to which objection must be taken within a reasonable period). See also Manson *v.* Duncanson, 166 U. S. 533, 17 S. Ct. 647, 41 L. ed. 1105; New York L. Ins. Co. *v.* Bangs, 103 U. S. 435, 26 L. ed. 580.

64. *Indiana.*— Roy *v.* Rowe, 90 Ind. 54; Carver *v.* Carver, 64 Ind. 194; Holliday *v.* Miller, 28 Ind. App. 121, 62 N. E. 291.

Iowa.— Good *v.* Norley, 28 Iowa 188.

Kentucky.— Allsmiller *v.* Freutchenicht, 86

appears, failure to serve process on him before the appointment of a guardian *ad litem* will not render the appointment invalid.[65]

(iv) *Application or Petition.* An application, petition, or motion for the appointment of a guardian *ad litem* or next friend should be in writing,[66] and should state the name of the person proposed,[67] show his pecuniary responsibility,[68] and his consent to be appointed,[69] and set forth the facts giving the court authority to make the appointment.[70] It has been held not absolutely necessary that a petition for the appointment of a guardian *ad litem* for an infant over fourteen years of age should be verified.[71] Irregularities or erroneous statements in the petition may be cured by amendment even after judgment has been rendered in the action.[72]

(v) *Affidavits.* In some jurisdictions it is necessary that there should be presented to the court an affidavit of the fact of infancy,[73] that there is no general

Ky. 198, 5 S. W. 746, 9 Ky. L. Rep. 509; Madeira *v.* Hopkins, 12 B. Mon. 595.

Missouri.— Shaw *v.* Gregoire, 41 Mo. 407 [*overruling* Shaw *v.* Gregoire, 35 Mo. 342, and *distinguishing* Hite *v.* Thompson, 18 Mo. 461].

Tennessee.— Ivey *v.* Ingram, 4 Coldw. 129. See 27 Cent. Dig. tit. "Infants," § 214.

Infants not made parties.— The appointment of a guardian *ad litem* to infants who are never served with process does not make them parties, especially where such guardian does not appear in the case or show his acceptance of the appointment. Shaefer *v.* Gates, 2 B. Mon. (Ky.) 453, 38 Am. Dec. 164.

65. Burch *v.* Breckinridge, 16 B. Mon. (Ky.) 482, 63 Am. Dec. 553; Gashweller *v.* McIlvoy, 1 A. K. Marsh. (Ky.) 84. See also Matter of Watson, 2 Dem. Surr. (N. Y.) 642.

Appearance by general guardian.— Where in proceedings for partition the guardian appointed in another state of a non-resident idiot under age appeared and obtained the appointment of a guardian *ad litem* this gave the court jurisdiction over the ward's interest in the estate, although there had been no service of summons either personally or by publication on the guardian or his ward. Rogers *v.* McLean, 34 N. Y. 536 [*affirming* 11 Abb. Pr. 440 (*reversing* 31 Barb. 304)].

Application by infant.— An application by an infant defendant who is over the age of fourteen for the appointment of a guardian *ad litem* is good even without the prior service of summons. Varian *v.* Stevens, 2 Duer (N. Y.) 635; Wood *v.* Martin, 66 Barb. (N. Y.) 241. See also Day *v.* Kerr, 7 Mo. 426; Howerton *v.* Sexton, 90 N. C. 581.

66. Young *v.* Young, 91 N. C. 359; Morris *v.* Gentry, 89 N. C. 248; Rhinelander *v.* Sanford, 20 Fed. Cas. No. 11,739, 3 Day (Conn.) 279 *Contra*, Bunton *v.* Adams, 65 Mo. App. 6, holding that the appointment of a next friend for an infant, in a proceeding before a justice of the peace, need not be preceded by the infant's written application.

The petition may be signed by the father for the infant where the latter is of tender years and unable to write or make his mark. Eades *v.* Booth, 8 Q. B. 718, 3 D. & L. 770, 10 Jur. 311, 15 L. J. Q. B. 263, 55 E. C. L. 718.

Genuineness of signature.— It is no objection to the validity of a judgment against an infant defendant that it does not appear of record that the signature to his petition for the appointment of a guardian *ad litem* was proved to be genuine. It will be presumed that such proof was given on the trial. Varian *v.* Stevens, 2 Duer (N. Y.) 635.

67. Rhinelander *v.* Sandford, 20 Fed. Cas. No. 11,739, 3 Day (Conn.) 279.

68. McDonald *v.* Brass Goods Mfg. Co., 2 Abb. N. Cas. (N. Y.) 434.

69. Rhinelander *v.* Sanford, 20 Fed. Cas. No. 11,739, 3 Day (Conn.) 279.

70. Smith *v.* Reid, 134 N. Y. 568, 31 N. E. 1082 [*affirming* 11 N. Y. Suppl. 739, 19 N. Y. Civ. Proc. 363]; Grant *v.* Schoonhoven, 9 Paige (N. Y.) 255, 37 Am. Dec. 393.

71. Van Wyck *v.* Hardy, 4 Abb. Dec. (N. Y.) 496, 39 How. Pr. 392 [*affirming* 11 Abb. Pr. 473, 20 How. Pr. 222], holding that it is sufficient if it satisfactorily appears to be the infant's act. *Compare* Rogers *v.* McLean, 11 Abb. Pr. (N. Y.) 440 [*reversing* 31 Barb. 304, and *affirmed* in 34 N. Y. 536, 31 How. Pr. 279].

The court can add a verification by an infant defendant himself, of his petition for the appointment of a guardian *ad litem* for him, to that made by plaintiff's attorney. Van Wyck *v.* Hardy, 4 Abb. Dec. (N. Y.) 496, 39 How. Pr. 392 [*affirming* 11 Abb. Pr. 473, 20 How. Pr. 222].

72. Rogers *v.* McLean, 34 N. Y. 536, 31 How. Pr. 279 [*affirming* 11 Abb. Pr. 440 (*reversing* 31 Barb. 304]; Baumeister *v.* Demuth, 84 N. Y. App. Div. 394, 82 N. Y. Suppl. 831 [*reversing* 40 Misc. 22, 81 N. Y. Suppl. 148, and *affirmed* in 178 N. Y. 630, 71 N. E. 1128].

The better practice might be to allow the filing of a new petition *nunc pro tunc*. Baumeister *v.* De Muth, 84 N. Y. App. Div. 394, 82 N. Y. Suppl. 831 [*reversing* 40 Misc. 22, 81 N. Y. Suppl. 148, and *affirmed* in 178 N. Y. 630, 71 N. E. 1128].

73. **In Alabama.**— Under Ch. Pr. rule 23 (Rev. Code, p. 826), the appointment of a guardian *ad litem* for infant defendant must be made on affidavit of the fact of infancy and of the infant's age, or on sworn bill showing the fact of infancy and age of the minor, and not otherwise. Rhett *v.* Mastin, 43 Ala. 86; Carter *v.* Ingraham, 43 Ala. 78.

guardian,[74] that all the persons on whom by statute a summons for an infant defendant might be served are plaintiffs,[75] or as to the fitness or qualifications of the person to be appointed.[76]

(VI) *Consent of Infant.* It has been held that the consent of an infant is not necessary to the appointment of a guardian *ad litem* for him.[77]

In England on an application for the appointment, without a commission, of a guardian *ad litem* to an infant abroad, an affidavit should be produced of the infancy of the party. Lingren *v.* Lingren, 7 Beav. 66, 29 Eng. Ch. 66, 49 Eng. Reprint 987.

Time of filing.— On a motion for the appointment of a guardian *ad litem*, under the 21st order of May, 1850, the court permitted an affidavit, showing that defendants were infants, to be filed after the day named for the motion to be heard. Freeland *v.* Jones, 2 Grant Ch. (U. C.) 581.

74. McMakin *v.* Shelton, 6 Ky. L. Rep. 154, holding, however, that an affidavit that there is no statutory guardian is not a prerequisite to the right to appoint, but is merely a reliable manner specified by the code for informing the court.

Effect of general guardianship on right to sue or defend by next friend or guardian *ad litem* see GUARDIAN AND WARD.

Who may make affidavit.— An affidavit for the appointment of a guardian *ad litem* for an infant defendant may be made either by plaintiff or his attorney. James *v.* Cox, 88 Ky. 270, 10 S. W. 814, 10 Ky. L. Rep. 858.

Sufficiency of affidavit.— An affidavit for the appointment of a guardian *ad litem* stating that infant defendants had no statutory guardian, curator, or committee "except their father," was a substantial compliance with Ky Code, § 38, requiring that the affidavit should show that defendant had no guardian, curator, or committee residing in the state known to the affiant. Donaldson *v.* Stone, 11 S. W. 462, 11 Ky. L. Rep. 27. An affidavit stating that affiant is the father of plaintiff, "who is an infant under 21 years of age, that he is a resident of Hardin county, Ky., and free from disability, and that he has no guardian, curator, or committee residing in this state known to affiant," is sufficient to authorize the prosecution of the action by affiant as next friend. Illinois Cent. R. Co. *v.* Nall, 51 S. W. 147, 21 Ky. L. Rep. 282.

When affidavit unnecessary.— Where the statutory guardians of infants interested, in an action to sell a decedent's realty to pay debts, are themselves defendants, and fail to secure a guardian *ad litem* for the infants, such appointment may be made by the court without the filing of any affidavit therefor in behalf of the infants. Gardner *v.* Letcher, 29 S. W. 868, 16 Ky. L. Rep. 778.

75. Walch *v.* Davis, 32 S. W. 281, 17 Ky. L. Rep. 634, holding, however, that under Ky. Civ. Code, § 52, providing certain persons on whom service may be made in case an infant be a defendant, and providing that if all such persons be plaintiffs, on affidavit of one of them, showing such fact, the clerk of court shall appoint a guardian *ad litem* for the infant, on whom the summons shall be served, a judgment against infant defendants is not void because the affidavit on which the guardian *ad litem* for them was appointed, made by their father, plaintiff, and who was the only one on whom process could be served, failed to state that there was no other on whom it could be served.

Sufficiency of affidavit.— An affidavit alleging the death of the father of infant defendants that plaintiff is their mother and guardian, and that they "reside" with her, is sufficient to authorize appointment of a guardian *ad litem*, without alleging that she is "the person having charge" of them. Robinson *v.* Clark, 34 S. W. 1083, 17 Ky. L. Rep. 1401.

76. Foster *v.* Cautley, 10 Hare appendix xxiv, 17 Jur. 370, 22 L. J. Ch. 639, 1 Wkly. Rep. 275, 44 Eng. Ch. 737.

Form.— Such affidavit, under 13 & 14 Vict. c. 35, § 5, should be entitled "In the matter of the Act 'and in the matter of A. B. the infant," and not "In the special case." Star *v.* Newbery, 20 Beav. 14, 52 Eng. Reprint 507; Maddison *v.* Skein, 6 L. T. Rep. N. S. 20.

Amendment.— Where in a suit against an infant to foreclose a mortgage, the venue of the affidavit of the guardian *ad litem* showing his qualification was incorrectly stated, the court had power to amend the proceedings *nunc pro tunc* and to correct the error after the entry of final judgment, although the better practice might have been to have allowed the filing of a new affidavit *nunc pro tunc*. Baumeister *v.* Demuth, 84 N. Y. App. Div. 394, 82 N. Y. Suppl. 831 [*reversing* 40 Misc. 22, 81 N. Y. Suppl. 148, and *affirmed* in 178 N. Y. 630, 71 N. E. 1128].

77. Beddinger *v.* Smith, (Ark. 1890) 13 S. W. 734; Brick's Estate, 15 Abb. Pr. (N. Y.) 12, holding that 2 Rev. St. 150, which requires the ward's consent to the appointment of a guardian, relates only to the appointment of general guardians, and does not deprive the surrogate of the power to appoint a special guardian, or a guardian *ad litem*, without the consent of a minor, although he be over fourteen. See also Banta *v.* Calhoon, 2 A. K. Marsh. (Ky.) 166 (holding that it is not necessary to bring an infant before the court before appointing a guardian *ad litem*); Walker *v.* Hull, 35 Mich. 488. *Contra*, E. B. *v.* E. C. B., 8 Abb. Pr. (N. Y.) 44, holding that a guardian *ad litem* cannot be appointed for an infant over fourteen years of age without the infant's consent. And see Walker *v.* Hallett, 1 Ala. 379, holding that infants above the age of fourteen years should be consulted in the appointment of a guardian

(VII) *CONSENT OF GUARDIAN AD LITEM OR NEXT FRIEND.* It is necessary to a complete and valid appointment of a guardian *ad litem* or next friend that the person so appointed should accept the appointment and consent to act in such capacity,[78] and it is sometimes required that the consent shall be in writing,[79] and

ad litem if this is not attended with too much trouble and expense, as to which the chancellor will exercise a sound discretion.

78. *Alabama.*— Petty *v.* Britt, 46 Ala. 491; Searcy *v.* Holmes, 43 Ala. 608; Laird *v.* Reese, 43 Ala. 148.

Georgia.— Welch *v.* Agar, 84 Ga. 583, 11 S. E. 149, 20 Am. St. Rep. 380.

Illinois.— Rhoads *v.* Rhoads, 43 Ill. 239.

Kentucky.— Greenup *v.* Bacon, 1 T. B. Mon. 108.

Missouri.— Creech *v.* Creech, 10 Mo. App. 586.

New York.— McVickar *v.* Constable, Hopk. 102.

Ohio.— St. Clair *v.* Smith, 3 Ohio 355.

See 27 Cent. Dig. tit. "Infants," § 218.

Allowance of time to consider.— A guardian *ad litem* appointed to prosecute an appeal on behalf of an infant is not obliged to accept the appointment and a reasonable time will be allowed him to consider whether he will accept it and to prepare for trial. Wells *v.* Winfree, 2 Munf. (Va.) 342.

Record should show acceptance. Jenkins *v.* Jenkins, 16 Ala. 693.

How acceptance indicated.— A guardian *ad litem* appointed for an infant defendant must indicate his acceptance by filing or adopting a proper answer. Alexander *v.* Davis, 42 W. Va. 465, 26 S. E. 291.

There must be an express assent or some action denoting assent and, in the absence of proof of such assent, the decree will be declared void for want of jurisdiction. Frierson *v.* Travis, 39 Ala. 150.

What is a sufficient consent.— Where a guardian appointed for infants in partition proceedings has made and filed a bond as required and has given notice thereof to the party intending to institute the action, he thereby consents to act as guardian and accepts his appointment as such. Althause *v.* Radde, 3 Bosw. (N. Y.) 410.

Acceptance after order of sale.— The fact that a guardian *ad litem*, appointed for the minor children in an application by the widow to have the homestead sold and reinvested, did not accept his appointment till after the order of sale was granted, was merely an irregularity, which was cured by the court's subsequent order confirming the sale. Deyton *v.* Bell, 81 Ga. 370, 8 S. E. 620.

A judgment against an infant will be reversed in the absence of evidence to show that the guardian *ad litem* accepted the appointment or acted as such guardian. Creech *v.* Creech, 10 Mo. App. 586.

In a collateral attack on a decree in the accounting of a guardian the record must in order to sustain the decree affirmatively show that the guardian *ad litem* accepted the appointment, and this cannot be inferred from a mere recital that the guardian *ad litem* was present and did not object to the allowance of the accounts and vouchers in the settlement of the guardian's account. Frierson *v.* Travis, 39 Ala. 150.

The clerk and master of a court of equity may be appointed as guardian to appear and answer for an infant defendant without his consent. Muir *v.* Stuart, 5 N. C. 440.

Guardian ad litem nisi.— The provision of N. Y. Code Civ. Proc. § 472, that a guardian *ad litem* shall not be appointed unless his written consent duly acknowledged is produced to the court or judge making the appointment does not apply to a guardian *ad litem nisi*, appointed under section 473, providing that where defendant is an infant resident of the state, but is temporarily absent, the court may appoint a guardian *ad litem nisi*, and give special directions in the order for the service thereof. Schell *v.* Cohen, 55 Hun (N. Y.) 207, 7 N. Y. Suppl. 858.

79. McVickar *v.* Constable, Hopk. (N. Y.) 102.

Sufficiency.— Where plaintiff's father files with the justice before whom suit was begun a written consent to become the next friend of plaintiff and responsible for the costs, this is a sufficient compliance with the Missouri statute. Bush *v.* Fisher, 85 Mo. App. 1.

A complaint signed by the next friend of the infant is a sufficient consent in writing. Peacock *v* Albin, 39 Ind. 25.

Time of filing consent.— Ind. Rev. St. (1881) § 256, providing that, "before any process shall be issued in the name of an infant, who is a sole plaintiff, a competent and responsible person shall consent in writing to appear, as the next friend," is merely directory, in respect to the time when such consent shall be filed, and process may issue and the cause proceed without such consent, until it is required by defendant. Greenman *v.* Cohee, 61 Ind. 201; Budd *v.* Rutherford, 4 Ind. App. 386, 30 N. E. 1111.

When objection to lack of consent too late. — Where a person who was sued by an infant before a justice appeared to the suit before the justice, went to trial on the merits, and suffered judgment to be rendered against him, without making the objection that the next friend of the infant had not consented in writing to his appointment, and the suit was appealed to the circuit court where defendant moved to dismiss for the want of such written consent; but the circuit court was not informed, by affidavit or otherwise, that defendant did not know of the omission complained of while the suit was pending before the justice, the circuit court properly refused to dismiss the suit. Usher *v.* Cornwell, 3 Ind. 210.

A judgment for an infant plaintiff will not be reversed because no consent of the next friend to act as such was filed. Bush *v.* Fisher, 85 Mo. App. 1.

that there shall be an acknowledgment of the written consent by the guardian *ad litem* or next friend.[80]

(VIII) *ORDER OF APPOINTMENT.* An order of the court appointing a guardian *ad litem* is usually required.[81] The order should certainly designate the person who is appointed,[82] and, if the statute requires, a bond from the guardian must direct that it be given.[83] An order appointing a guardian *ad litem* for minor defendants is inoperative if the minors are not named in the order,[84] or in the guardian's answer, or any portion of the record;[85] but it is otherwise if the record shows that some of defendants are minors.[86] An order appointing a guardian *ad litem* has been considered not to be appealable,[87] but such an order may be rescinded by the court where another person has been previously appointed and has filed an answer.[88]

(IX) *NOTICE OF APPOINTMENT.* In some states notice of the appointment of a guardian *ad litem* must be given.[89]

(X) *SUFFICIENCY OF APPOINTMENT.* It is presumed that the appointment of

80. Cole *v.* McGarvey, 6 N. Y. Civ. Proc. 305.

Acknowledgment may be filed nunc pro tunc. Tobin *v.* Cary, 34 Hun (N. Y.) 431 [*followed* in Schell *v.* Cohen, 55 Hun (N. Y.) 207, 7 N. Y. Suppl. 858].

81. Tibbs *v.* Allen, 29 Ill. 535; Madison *v.* Wallace, 2 J. J. Marsh. (Ky.) 581. See also Barrett *v.* Moise, 61 S. C. 569, 39 S. E. 755. *Contra,* French *v.* Creath, 1 Ill. 31.

In New York where a guardian *ad litem* is appointed for non-resident infant defendants on the application of plaintiff the order appoints a certain person unless within a certain time after service of the order upon them or their parents they procure a guardian to be appointed. Gotendorf *v.* Goldschmidt, 83 N. Y. 110, holding that where service was made as directed, and at the expiration of the time limited, no steps having been taken by or on behalf of the infants, the guardian was appointed and duly qualified, and the summons was served on him and the infants appeared by him and answered, this was sufficient. A justice cannot act out of court in directing how an order appointing a guardian *ad litem* under N. Y. Code Civ. Proc. § 473, shall be served but such directions must be given by the court. Uhl *v.* Loughran, 4 N. Y. Suppl. 827, 16 N. Y. Civ. Proc. 386 [*affirming* 2 N. Y. Suppl. 190, 14 N. Y. Civ. Proc. 344]. Where service was had by publication on non-resident infant defendants, and after their time to appear had expired a guardian *ad litem* was appointed on petition of plaintiffs, the appointment was not invalid because it did not contain a provision that a person might be appointed unless the infant, or someone on his behalf, procured the appointment of a guardian. Piatt *v.* Finck, 60 N. Y. App. Div. 312, 7 N. Y. Suppl. 74.

Presumption.— Where an answer is filed for infant defendants by one purporting to be their guardian *ad litem,* and the decree recites that he was so appointed, but the record shows no separate order of appointment, it will be presumed that the appointment was regularly made. Tibbs *v.* Allen, 27 Ill. 119.

What sufficient to show order.— Where a petition by infant defendants for the appointment of a guardian *ad litem* appears in the records of a cause, and the calendar entries show that an order was made appointing the guardian, and the answer of the infants is signed by their guardian *ad litem,* this is sufficient to show that an order was made appointing the guardian, although it does not appear in the files of the case. Stevenson *v.* Kurtz, 98 Mich. 493, 57 N. W. 580.

Orders signed as of course.— Orders for appointments of guardians *ad litem* for infants are signed as of course, and should not be presented at chambers, but merely mailed to the clerk on application therefor. Anonymous, 10 N. J. L. J. 22.

82. Hess *v.* Voss, 52 Ill. 472, holding, however, that it is not essential to the validity of an order appointing "the clerk of the court" guardian *ad litem* that he be designated by a name.

83. Walter *v.* De Graaf, 19 Abb. N. Cas. (N. Y.) 406, holding that an order appointing a guardian *ad litem,* which fails to direct him to give bond, is void, and the defect cannot be cured by amendment *nunc pro tunc.*

84. Sullivan *v.* Sullivan, 42 Ill. 315; Rucker *v.* Moore, 1 Heisk. (Tenn.) 726. *Compare* Ridgely *v.* Bennett, 13 Lea (Tenn.) 210, holding that proceedings in an action by an administrator to sell the lands of his decedent to pay debts are not avoided on a writ of error as to purchasers by the omission of the name of one of several infant defendants in the order appointing the guardian *ad litem,* if the answer be in the name of all and repeatedly recognized by the court as their answer.

85. Sullivan *v.* Sullivan, 42 Ill. 315.

86. Sullivan *v.* Sullivan, 42 Ill. 315.

87. Hathaway's Estate, 111 Cal. 270, 43 Pac. 754.

88. Walker *v.* Mobile Bank, 6 Ala. 452.

89. Nelson *v.* Moon, 17 Fed. Cas. No. 10,111, 3 McLean 319.

Notice need be served only on resident minors not on non-residents. Rogers *v.* McLean, 11 Abb. Pr. (N. Y.) 440.

The answer of a guardian ad litem is proof

a guardian *ad litem* was regularly and properly made and that the necessary proofs were before the court to justify its action in making the order.[90] Irregularity in the appointment of a guardian *ad litem* does not affect the jurisdiction,[91] and renders the appointment merely voidable;[92] but the appointment of a guardian *ad litem* for an infant not a party to the suit or properly brought into court is a nullity.[93] A recognition by the court of a person appearing for infants as their representative has in some cases been held equivalent to an appointment of such person as guardian *ad litem*.[94]

f. Bond — (i) *In General.* In some states the guardian *ad litem* is required to give a bond conditioned for the faithful discharge of his duties,[95] or as a prerequisite to his exercising any form or control over the money recovered by the infant;[96]

that he has notice of his appointment. Beeler *v.* Bullitt, 3 A K. Marsh. (Ky.) 280, 13 Am. Dec. 161.

90. *Alabama.*— Tabor *v.* Lorance, 53 Ala. 543.

Kansas.— Fowler *v.* Young, 19 Kan. 150.

Michigan.— Stevenson *v.* Kurtz, 98 Mich. 493, 57 N. W. 580.

New York.— Brick's Estate, 15 Abb. Pr. 12.

Tennessee.— Martin *v.* Porter, 4 Heisk. 407.

See 27 Cent. Dig. tit. "Infants," § 219.

Recital in record of appointment on motion. — Horner *v.* Doe, 1 Ind. 130, 48 Am. Dec. 355.

91. Bustard *v.* Gates, 4 Dana (Ky.) 429.

92. Bondurant *v.* Sibley, 37 Ala. 565.

Defects may be supplied by amendment nunc pro tunc. Rogers *v.* McLean, 11 Abb. Pr. (N. Y.) 440.

Improper designation.— The appointment of a curator to represent minors is not vitiated by improperly styling him "curator *ad hoc* and special tutor." Keenan *v.* Ahern, 34 La. Ann. 885.

A judgment entered after verdict will not be reversed for an error committed in the appointment of a next friend to prosecute the action for the infant plaintiff. Hafern *v.* Davis, 10 Wis. 501.

When objection as to irregularity too late see Vaile *v.* Sprague, 179 Mo. 393, 78 S. W. 609; Barnard *v* Heydrick, 49 Barb. (N. Y.) 62, holding that after a guardian *ad litem* appointed by the court has put in an answer for the infant, and judgment has been entered, the regularity of the guardian's appointment cannot be questioned.

The appointment of another guardian without reversing or setting aside the former appointment is void. Bondurant *v.* Sibley, 37 Ala. 565.

93. Bondurant *v.* Sibley, 37 Ala. 565; McDermaid *v.* Russell, 41 Ill. 489.

94. *Florida.*— Price *v.* Winter, 15 Fla. 66, appearance and defense by general guardian.

Kentucky.— See Tyler *v.* Jewell, 11 S. W. 25, 10 Ky. L. Rep. 887.

Tennessee.— See Ridgely *v.* Bennett, 13 Lea 210.

Texas.— Tanner *v.* Ames, (Civ. App. 1896) 37 S. W. 373.

Virginia.— Beverley *v.* Miller, 6 Munf. 99. See also Turner *v.* Barraud, 102 Va. 324, 46 S. E. 318.

See 27 Cent. Dig. tit. "Infants," § 221.

The naming of a person as next friend in the summons in a suit by an infant before a justice of the peace may be considered as an appointment of such person as next friend. Usher *v.* Cornwell, 3 Ind. 210.

95. Wade *v.* Fite, 5 Blackf. (Ind.) 212; Kennedy *v.* Arthur, 11 N. Y. Suppl. 661, 18 N. Y. Civ. Proc. 390 (in partition proceedings); Struppman *v.* Muller, 52 How. Pr. (N. Y.) 211; Clark *v.* Clark, 21 How. Pr. (N. Y.) 479; Piedmont, etc., L. Ins. Co. *v.* Ray, 50 Tex. 511; Hamilton *v.* Flume, 2 Tex. Unrep. Cas. 694. See also Minor *v.* Betts, 7 Paige (N. Y.) 596.

Provision for bond if required.— When the statute only requires a bond to be given if the court or the clerk require it, a failure to exact a bond does not invalidate the appointment. Henderson *v.* Kansas City, 177 Mo. 477, 76 N. Y. Suppl. 1045.

If a clerk of court is appointed guardian ad litem in a partition suit, he must give security. The statute makes no exception in his case and the court cannot relieve him. Fisher *v.* Lyon, 34 Hun (N. Y.) 183. *Compare* Minor *v.* Betts, 7 Paige (N. Y.) 596.

The father may occupy the place of tutor pro hac vice without furnishing security in case of a sale of an infant's property during the life of both the father and the mother. Allen's Succession, 48 La. Ann. 1240, 20 So. 683.

An application to amend the bond of a guardian *ad litem* for defendants in an action for partition should be made by all the obligors, and their petition should specify the alterations and expressly consent thereto and agree to execute and acknowledge the amended bond. Shaw *v.* Lawrence, 14 How. Pr. (N. Y.) 94.

Jurat in form generally used sufficient.— *Re* Ausebrook, 4 Grant Ch. (U. C.) 109.

Fixing amount and number of securities.— Under the New York statute the order appointing the guardian *ad litem* in an action for partition must fix the amount of the bond and the number of securities. Kennedy *v.* Arthur, 11 N. Y. Suppl. 661, 18 N. Y. Civ. Proc. 390.

96. Higgins *v.* Hannibal, etc., R. Co., 36 Mo. 418.

Suit on bond. — A person, who as next friend of a minor, has recovered a sum of money, and given bond faithfully to account

but it has been held that the omission of the guardian *ad litem* to file his bond is a mere irregularity[97] which is curable,[98] and does not affect the jurisdiction of the court[99] or the validity of a sale under its judgment.[1] Where an infant sues by next friend it is not usually considered necessary that he should give a bond for the security of the infant.[2]

(II) *For Costs.* The guardian *ad litem* or next friend of an infant plaintiff is in some jurisdictions required to give a bond for costs.[3]

therefor, may, upon the majority of such minor, be sued by him as for a breach of such bond in any court having jurisdiction of his person and of the subject-matter, without first obtaining an order from the court appointing the next friend and requiring the bond. Harvey *v.* Atkinson, 100 Ga. 178, 28 S. E. 31.

97. Croghan *v.* Livingston, 17 N. Y. 218 [*affirming* 25 Barb. 336]; Reed *v.* Reed, 46 Hun (N. Y.) 212, 13 N. Y. Civ. Proc. 109 [*affirmed* in 107 N. Y. 545, 14 N. E. 442].

98. Croghan *v.* Livingston, 17 N. Y. 218 [*affirming* 25 Barb. 336], by permitting filing *nunc pro tunc* after judgment and sale thereunder.

99. Croghan *v.* Livingston, 17 N. Y. 218 [*affirming* 25 Barb. 336]; Reed *v.* Reed, 46 Hun (N. Y.) 212, 13 N. Y. Civ. Proc. 109 [*affirmed* in 107 N. Y. 505, 14 N. E. 442].

1. Croghan *v.* Livingston, 17 N. Y. 218 [*affirming* 25 Barb. 336]; Reed *v.* Reed, 46 Hun (N. Y.) 212, 13 N. Y. Civ. Proc. 109.

2. Smith *v.* Floyd, 1 Pick. (Mass.) 275; Parsons *v.* Jones, 9 Mass. 106. See also Matter of Frits, 2 Paige (N. Y.) 374, holding that where a next friend to a large number of infant complainants was appointed by the court upon a bill for a sale to pay legacies, as the court could control the fund without permitting it to pass into the hands of the next friend, bonds for the security of the infants might be dispensed with.

Rule in chancery cases.— McClellan Dig. Fla. p. 812, § 7, requiring the next friend of an infant to give bond upon the institution of a suit, relates exclusively to proceedings at common law, and does not apply to suits in equity, wherein, however, chancellors have power to adopt such measures as are necessary fully to protect the interest of infant litigants. Pace *v.* Pace, 19 Fla. 438 [*overruling* Sanderson *v.* Sanderson, 17 Fla. 820].

3. Spicer *v.* Holbrook, 66 S. W. 180, 23 Ky. L. Rep. 1812; State *v.* Tooley, 1 Head (Tenn.) 9; Green *v.* Harrison, 3 Sneed (Tenn.) 131; Cohen *v.* Shyer, 1 Tenn. Ch. 192; Roy *v.* Louisville, etc., R. Co., 34 Fed. 276.

In Illinois "the filing of the bond for costs is not a jurisdictional prerequisite to beginning a suit for a minor by one who has not been appointed "next friend" by the court, but such bond may be filed at any time during the suit. Illinois Cent. R. Co. *v.* Latimer, 128 Ill. 163, 21 N. E. 7 [*affirming* 28 Ill. App. 552]. A court has power, on a proper showing made, to allow a minor to prosecute a suit by his next friend, without such next friend giving security for costs (St. Louis, etc., R. Co. *v.* Reagan, 52 Ill. App. 488; Chicago, etc., R. Co. *v.* Lane, 30 Ill. App. 437 [*affirmed* in 130 Ill. 116, 22 N. E. 513]), and is not required *sua sponte* to compel the filing of a next friend's personal bond for costs (St. Louis, etc., R. Co. *v.* Reagan, 52 Ill. App. 488).

In England a next friend is not required to give security for costs (Squirrel *v.* Squirrel, Dick. 765, 21 Eng. Reprint 468, 2 P. Wms. 298 note, 24 Eng. Reprint 738; St. John *v.* Besborough, 1 Hog. 41; Fellows *v.* Barrett, 1 Keen 119, 15 Eng. Ch. 120, 48 Eng. Reprint 252; Anonymous, Moseley 86, 25 Eng. Reprint 286; Murrell *v.* Clapham, 8 Sim. 74, 8 Eng. Ch. 74, 59 Eng. Reprint 30); except under special circumstances (see Drinan *v.* Mannix, 2 C. & L. 87, 3 Dr. & War. 154, 5 Ir. Eq. 190; Greening *v.* Bell, 2 Jur. 794; Pennington *v.* Alvin, 1 L. J. Ch. O. S. 202, 1 Sim. & S. 264, 1 Eng. Ch. 264, 57 Eng. Reprint 107; Mann *v.* Berthen, 4 M. & P. 215; Wale *v.* Salter, Moseley 47, 25 Eng. Reprint 262; Davenport *v.* Davenport, 1 Sim. & St. 101, 1 Eng. Ch. 101, 57 Eng. Reprint 101; Witts *v.* Campbell, 12 Ves. Jr. 493, 33 Eng. Reprint 186).

Where the next friend is insolvent he may be compelled to give security for costs. Fulton *v.* Rosevelt, 1 Paige (N. Y.) 178.

A non-resident guardian ad litem for an infant plaintiff, whether a responsible person or not, may be required to give security for costs, although some of the plaintiffs in the action are residents. Ten Broeck *v.* Reynolds, 13 How. Pr. (N. Y.) 462.

Substitution of new next friend.— Where the name of a next friend was stricken from the bill and another person appointed in order that the original next friend might become a witness the court required the new next friend to give security for costs already incurred. Colden *v.* Haskins, 3 Edw. (N. Y.) 311. It is to be noted that under the present New York statutes security for costs is not required.

Written consent to be responsible for costs. —Failure of a guardian *ad litem* to file a written consent to be responsible for costs, as required by N. Y. Laws (1882), c. 410, § 1295, is ground for a dismissal of the action in the municipal court. Weintraub *v.* Metropolitan L. Ins. Co., 27 Misc. (N. Y.) 540, 58 N. Y. Suppl. 295.

Leave to sue as poor person.— Where an order granted before the commencement of an action has permitted an infant to sue as a poor person, a motion of defendant that a guardian *ad litem* be required to file security for costs should be denied. Hayes *v* Second Ave. R. Co., 5 N. Y. Civ. Proc. 155.

g. Oath. In some jurisdictions a guardian *ad litem* is required to take an oath prescribed by statute.[4]

h. Effect of Appointment. The fact that a court has appointed a guardian *ad litem* for a party to a suit is conclusive evidence of his infancy only for that purpose, and does not otherwise affect the question of infancy, which may be subsequently raised by the proper plea.[5]

4. Powers, Rights, and Duties[6] — a. Powers in General. A guardian *ad litem* or next friend is recognized only for certain specific purposes and has not the general powers of a trustee or guardian.[7] His powers are strictly limited to matters connected with the suit in which he is appointed, and his acts with respect to the infant's rights concerning any other matters are unauthorized;[8] but he is a full representative of the rights and interests of the infant for the particular case in which he is appointed, and is clothed with as full and perfect authority for that suit as the general guardian is for all the duties incident to his office.[9] Neither a guardian *ad litem* nor next friend can injure or prejudice the infant by any act.[10]

4. Piedmont, etc., L. Ins. Co. *v.* Ray, 50 Tex. 511; Hamilton *v.* Flume, 2 Tex. Unrep. Cas. 694.

The failure of a tutor ad hoc to take the oath prescribed by La. Civ. Code, art. 313, is fatal to the validity of a judgment rendered or an executory sale made in the suit. Killelea *v.* Barrett, 37 La. Ann. 865.

Representation by father.— On a sale of a minor's property during the life of both father and mother, the father may occupy the place of tutor *pro hac vice* without taking and subscribing an oath. Allen's Succession, 48 La. Ann. 1240, 20 So. 683.

5. Peak *v.* Pricer, 21 Ill. 164.

6. **Right to appeal** see *infra*, VIII, A, 1, b.

Right to receive payment and enter satisfaction of judgment see *infra*, VIII, N, 14.

7. Turner *v.* Patridge, 3 Penr. & W. (Pa.) 172.

A next friend cannot make a lease of the infant's land so as to sustain an action of ejectment. Massie *v.* Long, 2 Ohio 287, 15 Am. Dec. 547.

A sale of real estate, made by the next friend without authority, pending a decree requiring the master to sell the same at public auction, etc., is invalid; but the court may, with the consent of the purchaser, if the sale is beneficial to the infants, adopt and confirm such sale and in such case the purchaser will acquire a good title. *Ex p.* Kirkman, 3 Head (Tenn.) 517.

Next friend not entitled to custody of person or property of infant.— Mitchell *v.* Connolly, 1 Bailey (S. C.) 203.

Status as officer of court.— A next friend for an infant plaintiff is considered as an officer of the court specially appointed to look after the interest of the infant, on whose behalf he acts. Baltimore, etc., R. Co. *v.* Fitzpatrick, 36 Md. 619; Bulow *v.* Witte, 3 S. C. 308; Morgan *v.* Thorne, 9 Dowl. P. C. 228, 5 Jur. 294, 10 L. J. Exch. 125, 7 M. & W. 400.

8. *In re* Kennedy, 120 Cal. 458, 52 Pac. 820; Waterman *v.* Lawrence, 19 Cal. 210, 79 Am. Dec. 212; Armstrong *v.* Weinstein, 2 Silv. Sup. (N. Y.) 61, 6 N. Y. Suppl. 148; Walker *v.* Ferrin, 4 Vt. 523, holding that a guardian *ad litem* is not competent to bind his ward by a release given to qualify a witness.

Obtaining sale by cross bill.— In a suit against an infant, the guardian *ad litem* cannot, by filing an answer as a cross bill, obtain the sanction of the court to an unauthorized sale of the infant's land. Browning *v.* Browning, 11 Lea (Tenn.) 106.

9. Burrus *v.* Burrus, 56 Miss. 92.

The powers of a guardian ad litem of infant defendants are not limited to defense, objection, and opposition merely, but he may file a cross bill to protect the infant's interest involved in the litigation. Sprague *v.* Beamer, 45 Ill. App. 17.

Power to bind infant.— Where the guardian *ad litem* has accepted the trust, his acts are good and binding upon the infant for whom he acts, especially if those acts are not impeached for fraud and more especially if they are first brought in question in the court. Smith *v.* Taylor, 34 Tex. 589. See also Harbison *v.* Harbison, (Tex. Civ. App. 1900) 56 S. W. 1006, next friend. *Contra*, Rhoads *v.* Rhoads, 43 Ill. 239, holding that the guardian *ad litem* cannot bind the infant by anything he may do.

Conveyance.— In a suit against infant devisees for specific performance of a contract of sale made by the testator the guardian *ad litem* may be directed to execute a conveyance in the names of the infants. See Knight *v.* Weatherwax, 7 Paige (N. Y.) 182. As to sufficiency of conveyance executed under order of court see U. S. Bank *v.* Van Ness, 2 Fed. Cas. No. 938, 5 Cranch C. C. 294 [*affirmed* in 13 Pet. 17, 10 L. ed. 38].

10. Isaacs *v.* Boyd, 5 Port. (Ala.) 388; Parken *v.* Safford, 48 Fla. 290, 37 So. 567; Chicago, etc., R. Co. *v.* Kennedy, 70 Ill. 350.

Dismissal of suit.— A next friend can dismiss a suit because he is himself liable for the costs, but it may well be questioned whether he can do even this when injury to the minor would be the result. Isaacs *v.* Boyd, 5 Port. (Ala.) 388. The rights of a

b. Power to Bring Suit. A next friend may bring a suit without first obtaining leave of the court;[11] but it has been held that as the power of a next friend commences with the suit he can maintain a suit for such causes of action only as may be prosecuted without a previous special demand, unless defendant has waived the necessity of a demand.[12]

c. Protection of Infant's Interest. The duty of a guardian *ad litem* or next friend is to look after the infant's interests and to act for him in all matters relating to the suit as he might act for himself if he were of capacity to do so.[13] The guardian *ad litem* should make a defense of the interests of the infant as vigorous as the nature of the case will admit.[14] His duty requires him to acquaint himself with the rights, both legal and equitable, of his ward and take all necessary steps to defend and protect them,[15] and to submit to the court for its consideration and decision every question involving the rights of the infant affected by the suit.[16] If in consequence of the culpable omission or neglect of the guardian *ad litem* the interests of the infant are sacrificed the guardian may be punished for his neglect[17] as well as made to respond to the infant for the damage sustained.[18]

d. Election For Infant. The guardian *ad litem* may sometimes with the concurrence of the court make an election for the infant,[19] but a next friend cannot elect between two rights by filing a bill in one aspect alone.[20]

minor by whom suit is brought by his next friend are not affected, nor is he estopped from subsequently suing upon the same cause of action, by a dismissal of the case by agreement of the attorneys. Chicago, etc., R. Co. *v.* Kennedy, 70 Ill. 350.

11. Barwick *v.* Rackley, 45 Ala. 215; Bethea *v.* McCall, 23 Ala. 449.

Affidavit for attachment.— The next friend of an infant can in that capacity make affidavit for an attachment in the cause, and the statement in the affidavit that he commences the action as next friend for the infant sufficiently avers the agency. McDowell *v.* Nims, 9 Ohio Dec. (Reprint) 624, 15 Cinc. L. Bul. 359.

Authority of next friend presumed.— Chudleigh *v.* Chicago, etc., R. Co., 51 Ill. App. 491.

12. Miles *v.* Boyden, 3 Pick. (Mass.) 213.

13. Clarke *v.* Gilmanton, 12 N. H. 515.

Effect of failure in duty.— If the next friend of an infant plaintiff is false to his interests the judgment is not thereby rendered void, but the defrauded plaintiff may resort to a court of equity to set aside the judgment and reform the record. Chudleigh *v.* Chicago, etc., R. Co., 51 Ill. App. 491.

14. *Arkansas.*— Pinchback *v.* Graves, 42 Ark. 222.

Illinois.— Stunz *v.* Stunz, 131 Ill. 210, 23 N. E. 407; Rhoads *v.* Rhoads, 43 Ill. 239; Enos *v.* Capps, 12 Ill. 255; Scone *v.* Whitney, 12 Ill. 150. See also Peak *v.* Pricer, 21 Ill. 164.

Nebraska.— Boden *v.* Mier, (1904) 98 N. W. 701.

New York.— Roe *v.* Angevine, 7 Hun 679. See also Loomer *v.* Wheelwright, 3 Sandf. Ch. 135.

North Carolina.— Gulley *v.* Macy, 81 N. C. 356.

See 27 Cent. Dig. tit. "Infants," § 246; and *infra*, VIII, I, 2, b, (III).

Guardian may be compelled to answer. Farmer's L. & T. Co. *v.* Reid, 3 Edw. (N. Y.) 414. *Compare* Banta *v.* Calhoon, 2 A. K. Marsh. (Ky.) 166.

Report of inability to defend.— A report by a guardian *ad litem* that he has examined the record, and that there is no defense he can make for the infant, is a substantial compliance with Ky. Civ. Code, § 36, subd. 3, which provides that no judgment shall be rendered against an infant until his guardian *ad litem* shall have made a defense, or shall have filed a report of inability to defend. Gardner *v.* Letcher, 29 S. W. 868, 16 Ky. L. Rep. 778; Vissman *v.* Bryant, 21 S. W. 759, 14 Ky. L. Rep. 874. See further Ramsey *v.* Keith, 76 S. W. 142, 25 Ky. L. Rep. 582.

The failure of the guardian ad litem to apply for a rehearing on an appeal decided against the infant is not evidence of bad faith. Kingsbury *v.* Buckner, 134 U. S. 650, 10 S. Ct. 638, 33 L. ed. 1047.

15. Andrews *v.* Hall, 15 Ala. 85; Gulley *v.* Macy, 81 N. C. 356.

The guardian's duty does not end with the filing of a general denial but includes a *bona fide* examination of the facts, and protection of the infants' interest at the trial. Allen *v.* McGee, (Ind. App. 1901) 60 N. E. 460.

16. Stark *v.* Brown, 101 Ill. 395; Rhoads *v.* Rhoads, 43 Ill. 239; Enos *v.* Capps, 12 Ill. 255; Sconce *v.* Whitney, 12 Ill. 150; Dow *v.* Jewell, 21 N. H. 470; Knickerbacker *v.* DeFreest, 2 Paige (N. Y.) 304. See also Reed *v.* Reed, 46 Hun (N. Y.) 212.

17. Andrews *v.* Hall, 15 Ala. 85.

18. Andrews *v.* Hall, 15 Ala. 85; Reed *v.* Reed, 46 Hun (N. Y.) 212.

The remedy of the infant is against the guardian *ad litem* and the sureties on his bond for omitting to care for and protect the infant's rights. Reed *v.* Reed, 46 Hun (N. Y.) 212.

19. Andrews *v.* Hall, 15 Ala. 85.

20. Haggard *v.* Benson, 3 Tenn. Ch. 268.

e. Appearance. The mere appointment of a guardian *ad litem* and his appearance for infants does not of itself make them parties to the suit,[21] but where a party is duly served with process and a guardian *ad litem* is appointed and appears and files an answer for him this brings him into court for all the purposes of the suit.[22]

f. Compromise or Settlement. A guardian *ad litem* or next friend has no authority to compromise or settle the suit,[23] except by leave of the court.[24] *A fortiori* he cannot compound or compromise a judgment in favor of the infant.[25]

g. Submission to Arbitration. A guardian *ad litem* or next friend cannot submit the rights of the infant to arbitration so as to bind the infant.[26]

h. Consent, Waiver, or Admissions.[27] The guardian *ad litem* or next friend can make no concessions.[28] He cannot waive[29] or admit away any substantial

21. Frazier *v.* Pankey, 1 Swan (Tenn.) 75.
Necessity of service of process on infants see *infra*, VIII, F, 2.

22. Deering *v.* Hurt, (Tex. 1886) 2 S. W. 42, holding that the ward is consequently charged with notice of all new pleadings that may be filed either by the original parties or by any others who may come into the case.
Defective warning order.— Where a warning order published against a minor defendant was not entirely definite as to the place at which he was warned to appear, but a guardian *ad litem* was appointed by the court and filed an answer for the minor the notice and appearance were sufficient to bind him. Williams *v.* Ewing, 31 Ark. 229.

23. *Alabama.*— Isaacs *v.* Boyd, 5 Port. 388.
Arkansas.— See Rankin *v.* Schofield, 70 Ark. 83, 66 S. W. 197, compromise judgment to which guardian assents does not preclude appeal by infant after attaining majority.
Illinois.— Johnson *v.* McCann, 61 Ill. App. 110; Chudleigh *v.* Chicago, etc., R. Co., 51 Ill. App. 491.
Louisiana.— See George *v.* Knox, 23 La. Ann. 354.
Massachusetts.— Tripp *v.* Jifford, 155 Mass. 108, 29 N. E. 208, 31 Am. St. Rep. 530.
Michigan.— See Burt *v.* McBain, 29 Mich. 260.
New York.—Edsall *v.* Vandemark, 39 Barb. 589.
Pennsylvania.— O'Donnell *v.* Broad, 2 Pa. Dist. 84. *Compare* Garman *v.* Kauffman, 3 Lanc. L. Rev. 321.
United States.—The Etna, 8 Fed. Cas. No. 4,542, 1 Ware 474.
England.— Rhodes *v.* Swithenbank, 22 Q. B. D. 577, 58 L. J. Q. B. 287, 60 L. T. Rep. N. S. 856, 37 Wkly. Rep. 457, where compromise not for benefit of infant.
See 27 Cent. Dig. tit. "Infants," § 240.

24. Johnson *v.* McCann, 61 Ill. App. 110; Chudleigh *v.* Chicago, etc., R. Co., 51 Ill. App. 491; Tripp *v.* Gifford, 155 Mass. 108, 29 N. E. 208, 31 Am. St. Rep. 530; Edsall *v.* Vandemark, 39 Barb. (N. Y.) 589. See also Rankin *v.* Schofield, 70 Ark. 83, 66 S. W. 197.
Abandonment of appeal.— Under Tex. Rev. St. arts. 3498*u*, 3498*v*, providing that any minor who has no legal guardian may sue by a next friend, who may enter into such agreed judgment or compromise as the court may approve, and the decree entered on such agreement, when approved by the court, shall be binding on the minor, an abandonment of an appeal by a next friend in good faith, when approved by the court, is binding on the minor. Harbison *v.* Harbison, (Tex. Civ. App. 1900) 56 S. W. 1006.

25. Forbes *v.* Mitchell, 1 J. J. Marsh. (Ky.) 440; O'Donnell *v.* Broad, 2 Pa. Dist. 84; Miles *v.* Kaigler, 10 Yerg. (Tenn.) 10, 30 Am. Dec. 425; Fletcher *v.* Parker, 53 W. Va. 422, 44 S. E. 422, 97 Am. St. Rep. 991.

26. Fort *v.* Battle, 13 Sm. & M. (Miss.) 133; Tucker *v.* Dabbs, 12 Heisk. (Tenn.) 18; Hannum *v.* Wallace, 9 Humphr. (Tenn.) 129.

27. **Consent judgment** see *infra*, VIII, N, 8.

28. Evans *v.* Davies, 39 Ark. 235; Pillow *v.* Sentelle, 39 Ark. 61. See also Rankin *v.* Schofield, 70 Ark. 83, 66 S. W. 197.

29. Turner *v.* Jenkins, 79 Ill. 228; Cartwright *v.* Wise, 14 Ill. 417 (even by neglect or omission); Collins *v.* Trotter, 81 Mo. 275; Litchfield *v.* Burwell, 5 How. Pr. (N. Y.) 341.
Illustrations.— The guardian *ad litem* cannot waive citation of or service of process on the infant (Pugh *v.* Pugh, 9 Ind. 132; Cormier *v.* Valcourt, 33 La. Ann. 1168. See also Robbins *v.* Robbins, 2 Ind. 74), or the disqualification of the clerk of the court (Scranton, etc., Land, etc., Co. *v.* Jennet, 128 N. C. 3, 37 S. E. 954).
Objection to jurisdiction.— An infant does not lose his right to object to the jurisdiction of the court at the hearing, although his guardian *ad litem* has omitted to raise such objection in his answer. Bowers *v.* Smith, 10 Paige (N. Y.) 193. See also Jones *v.* Jones, 56 Ala. 612; Johnston *v.* Shaw, 31 Ala. 592.
Mere non-action on the part of a guardian ad litem will not be construed as a waiver of anything in favor of infants, whether it relates to mere practice or to the substance of the defense. Turner *v.* Jenkins, 79 Ill. 228.
Irregularities and errors are not waived by the failure of the guardian *ad litem* to object in the trial court. Jones *v.* Jones, 56 Ala. 612.
Waiver by attorney.— Where infants, interested as distributees in the estate of a decedent, sue in equity by a next friend to compel the administrator to settle his accounts, and such next friend employs an attorney to represent their interests, such attorney cannot bind the infants by an agree-

rights of the infant,[30] or consent to anything which may be prejudicial to him;[31] but he may make a valid consent or waiver as to matters which merely facilitate a trial and cannot prejudicially affect the rights of the infant.[32]

ment to waive proof of the vouchers and accounts presented by the administrator, or to allow commissions to such administrator which are not allowed by statute. Crotty *v.* Eagle, 35 W. Va. 143, 13 S. E. 59.

Incompetency of testimony as against infant parties cannot be waived by their counsel. Jesperson *v.* Mech, 213 Ill. 488, 72 N. E. 1114.

30. *Alabama.*— Hooper *v.* Hardie, 80 Ala. 114; Ashford *v.* Patton, 70 Ala. 479; Matthews *v.* Dowling, 54 Ala. 202.

Arkansas.— See Rankin *v.* Schofield, 70 Ark. 83, 66 S. W. 197.

California.— Waterman *v.* Lawrence, 19 Cal. 210, 79 Am. Dec. 212.

Florida.— Parken *v.* Safford, 48 Fla. 290, 37 So. 567.

Illinois.— Turner *v.* Jenkins, 79 Ill. 228; Fischer *v.* Fischer, 54 Ill. 231; Quigley *v.* Roberts, 44 Ill. 503; Rhoads *v.* Rhoads, 43 Ill. 239; Tridley *v.* Murphy, 25 Ill. 146; Tuttle *v.* Garrett, 16 Ill. 354; Cochran *v.* McDowell, 15 Ill. 10; Hitt *v.* Ormsbee, 12 Ill. 166; McClay *v.* Norris, 9 Ill. 870; Atchison, etc., R. Co. *v.* Elder, 50 Ill. App. 276.

Indiana.— Crain *v.* Parker, 1 Ind. 374; Hough *v.* Canby, 8 Blackf. 301; Hough *v.* Doyle, 8 Blackf. 300; Taylor *v.* Parker, Smith 225.

Iowa.— Ralston *v.* Lahee, 8 Iowa 17, 74 Am. Dec. 291.

Maryland.— Benson *v.* Wright, 4 Md. Ch. 278. See also Prutzman *v.* Pitesell, 3 Harr. & J. 77.

Michigan.— Peck *v.* Adsit, 98 Mich. 639, 57 N. W. 804; Cooper *v.* Mayhew, 40 Mich. 528; Burt *v.* McBain, 29 Mich. 260; Thayer *v.* Lane, Walk. 200.

Mississippi.— Johnson *v.* McCabe, 42 Miss. 255; Ingersoll *v.* Ingersoll, 42 Miss. 115.

Missouri.— Collins *v.* Trotter, 81 Mo. 275.

New Jersey.— Shultz *v.* Sanders, 38 N. J. Eq. 154.

New York.— James *v.* James, 4 Paige 115; Wright *v.* Miller, 1 Sandf. Ch. 103 [*affirmed* in 8 N. Y. 9, 59 Am. Dec. 438 (*reversing* 4 Barb. 600)].

Rhode Island.— Eaton *v.* Tillinghast, 4 R. I. 276.

Tennessee.— Crabtree *v.* Niblett, 11 Humphr. 488.

Utah.— See Chipman *v.* Union Pac. R. Co., 12 Utah 68, 41 Pac. 562.

United States.— White *v.* Miller, 158 U. S. 128, 15 S. Ct. 788, 39 L. ed. 921; Kingsbury *v.* Buckner, 134 U. S. 650, 10 S. Ct. 638, 33 L. ed. 1047.

See 27 Cent. Dig. tit. "Infants," §§ 242, 291; and EVIDENCE, 16 Cyc. 967 notes 34, 35.

Admissions not prejudicial.— Where, in a proceeding to reach the equitable interest of a judgment debtor in real estate, against the debtor and his infant daughter, in whose name the title had been taken, the substantial matters admitted in the answer of the guardian were matters of record, it was held that the court could not presume that the decree was rendered on the admissions of the guardian, and that those admissions did not prejudice the rights of the infant. Ralston *v.* Lahee, 8 Iowa 17, 74 Am. Dec. 291.

Recital not showing admissions.— A recital in the decree that the cause was submitted "on bill, answers, decree *pro confesso*, exhibits, and original bonds," does not show that the guardian's answer was submitted or received as evidence. Ashford *v.* Patton, 70 Ala. 479.

31. Fischer *v.* Fischer, 54 Ill. 231; McClure *v.* Farthing, 51 Mo. 109 (holding that a guardian *ad litem* cannot make a binding agreement that the decision in one case shall determine that in another, although the evidence and issues are substantially similar); Litchfield *v.* Burwell, 5 How. Pr. (N. Y.) 341; Armstrong *v.* Walkup, 9 Gratt. (Va.) 372.

Cannot consent to sale of infant's property.— Martin *v.* Starr, 7 Ind. 224; Melton *v.* Brown, 47 S. W. 764, 20 Ky. L. Rep. 882; Curd *v.* Bonner, 4 Coldw. (Tenn.) 632; Daingerfield *v.* Smith, 83 Va. 81, 1 S. E. 599.

Next friend cannot consent to trial without jury. Lieserowitz *v.* West Chicago St. R. Co., 80 Ill. App. 248.

A stipulation by an attorney that the action shall abide the event of another action pending does not bind an infant party unless approved and ratified by the court upon a showing that it is not prejudicial to the interest of the infant, and that the matters in controversy in the two actions so far as they affect the infant are precisely the same and that he is represented in the two actions by the same guardian *ad litem*. Eidam *v.* Finnegan, 48 Minn. 53, 50 N. W. 933, 16 L. R. A. 507.

32. Kingsbury *v.* Buckner, 134 U. S. 650, 10 S. Ct. 638, 33 L. ed. 1047. See also Byrne's Succession, 38 La. Ann. 518.

Illustrations.— A guardian *ad litem* may enter into a stipulation as to the state of a party's bank-account at a certain time (Rarick *v.* Vandevier, 11 Colo. App. 116, 52 Pac. 743), or consent to the trial of the case at the first term (McMillan *v.* Hunnicutt, 109 Ga. 699, 35 S. E. 102). In partition suits a guardian *ad litem* may bind the infant by a stipulation in the nature of a waiver of proof. Le Bourgeoise *v.* McNamara, 82 Mo. 189 [*affirming* 10 Mo. App. 116]. Where a division reported in partition set off a parcel to infants *in solido*, but the judgment was reversed because the infants were not made defendants, on their being made parties a new division was not necessary, but if the former division appeared fair and just the guardian *ad litem* might accept the report in open court. Kentucky Union Land Co. *v.* Elliott, 15 S. W. 518, 12 Ky. L. Rep. 812. A guardian *ad litem* may

i. Employment of Attorney. Although a next friend or guardian *ad litem* may employ an attorney to conduct the suit,[33] he cannot make a contract for the payment of a specified compensation which will bind the infant or his estate;[34] but the compensation of the attorney will be fixed by the court without regard to any such contract.[35]

j. Purchase of Infant's Property.[36] A guardian *ad litem* or next friend cannot acquire the infant's property for himself pending litigation in respect to it,[37] nor, it has been held, purchase the infant's property or property in which the infant is interested at a sale ordered in the action in which he represents the infant.[38]

agree that the case may be submitted without argument, the testimony to have the same effect as if taken by the examiner after infant's answer had been filed. Biddinger *v.* Wiland, 67 Md. 359, 10 Atl. 202. Where a legatee who is a minor has been personally served with citation to appear in the probate court in a proceeding to make final settlement of the accounts of the administrator and a guardian *ad litem* is appointed by the court pending the proceeding such guardian may waive notice of citation and consent to an immediate hearing. Pollock *v.* Buie, 43 Miss. 140. The guardian *ad litem* of an infant defendant in a suit for a partition sale is not required to put in an answer, although it is advisable that such answer should be filed to protect the guardian if he is ignorant of the infant's interest in the property. Where he knows the rights of his client and is willing to assume the responsibility, there is no reason why he may not consent to the partition. At any rate it does not affect the regularity of the proceedings. Bogert *v.* Bogert, 45 Barb. (N. Y.) 121. A guardian *ad litem* may consent to the removal of the suit from one circuit court to another (Lemmon *v.* Herbert, 92 Va. 653, 24 S. E. 249), or to evidence being taken by affidavit instead of *viva voce* (Knatchbull *v.* Fowle, 1 Ch. D. 604, 24 Wkly. Rep. 629; Fryer *v.* Wiseman, 45 L. J. Ch. 199, 33 L. T. Rep. N. S. 779, 24 Wkly. Rep. 205).

Where the solicitor of an infant consents to take the evidence in a proceeding in chancery by affidavit, instead of depositions upon interrogatories, the infant will be bound thereby. Ralston *v.* Lahee, 8 Iowa 17, 74 Am. Dec. 291.

33. *Alabama.*— Glass *v.* Glass, 76 Ala. 368.

California.— Cole *v.* San Francisco Super. Ct., 63 Cal. 86.

Maryland.— Baltimore, etc., R. Co. *v.* Fitzpatrick, 36 Md. 619.

Tennessee.— Yourie *v.* Nelson, 1 Tenn. Ch. 614.

England.— Langford *v.* Little, 5 Ir. Eq. 343.

See 27 Cent. Dig. tit. "Infants," § 239.

The next friend is not supposed to be learned in the law and his intervention is by no means designed to dispense with the services of an attorney to carry on the proceedings and to try the cause if necessary. Baltimore, etc., R. Co. *v.* Fitzpatrick, 36 Md. 619.

The guardian will be directed to employ counsel approved by the court when the interests of the infant require it. Colgate *v.* Colgate, 23 N. J. Eq. 372.

Attorney must not have adverse interests. —The solicitor of a next friend must not have interests adverse to the minor's, nor be professionally bound to support adverse interests. Langford *v.* Little, 5 Ir. Eq. 343.

Order of court. — Where a guardian *ad litem* deems it necessary to employ counsel to assist in the litigation the better practice is to apply to the court for an order authorizing such employment and fixing compensation, and if he acts without such order he takes on himself the burden of showing the court that the employment is necessary before compensation therefor will be allowed out of the estate. Richardson *v.* Tyson, 110 Wis. 572, 86 N. W. 250, 84 Am. St. Rep. 937 [*following* Smith *v.* Smith, 69 Ill. 308].

34. Cole *v.* San Francisco Super. Ct. 63 Cal. 86; Houck *v.* Bridwell, 28 Mo. App. 644. *Contra,* Yourie *v.* Nelson, 1 Tenn. Ch. 614.

35. Cole *v.* San Francisco Super. Ct., 63 Cal. 86.

36. See also *supra,* IV, F, 4, h.

37. Massie *v.* Matthews, 12 Ohio 351.

38. Gallatian *v.* Cunningham, 8 Cow. (N. Y.) 361; Collins *v.* Smith, 1 Head (Tenn.) 251. *Contra,* Mitchell *v.* Berry, 1 Metc. (Ky.) 602; Spencer *v.* Milliken, 4 Ky. L. Rep. 856; Marsh *v.* Marsh, 5 Ohio Dec. (Reprint) 290, 4 Am. L. Rec. 257, if the purchase is in good faith and for a valuable consideration.

Under the New York statutes a purchase by the guardian *ad litem* at a foreclosure (Dugan *v.* Sharkey, 89 N. Y. App. Div. 161, 85 N. Y. Suppl. 778; Dugan *v.* Denyse, 13 N. Y. App. Div. 214, 43 N. Y. Suppl. 308) or partition sale (O'Donoghue *v.* Boies, 92 Hun (N. Y.) 3, 37 N. Y. Suppl. 961; LeFevre *v.* Laraway, 22 Barb. (N. Y.) 167) is void, unless such purchase is for the benefit of the infant, the burden of showing which is on the guardian (O'Donoghue *v.* Boies, *supra*), and the fact that the sale has been confirmed by the court gives it no validity (O'Donoghue *v.* Boies, *supra*). Formerly such a purchase was considered merely voidable. See Dugan *v.* Sharkey, 89 N. Y. App. Div. 161, 85 N. Y. Suppl. 778; Dugan *v.* Denyse, 13 N. Y. App. Div. 214, 43 N. Y. Suppl. 308.

5. Compensation and Allowances — a. In General. The guardian *ad litem* is allowed a reasonable compensation for his services,[39] and where serious questions were involved and he was justified in litigating the matter to the extent he did the fact that he was unsuccessful in upholding his contentions does not deprive him of the right to compensation.[40] Reasonable attorney's fees which the guardian has paid should also be allowed him.[41] A next friend is entitled to be reimbursed all his expenditures,[42] but he has been held not entitled to any compensation for personal services.[43]

b. How Allowance Made. The allowance of compensation or reimbursement is to be made by the court in which the action is brought,[44] before the case is

39. *Alabama.*— Walker *v.* Hallett, 1 Ala. 379.

Illinois.— Wilbur *v.* Wilbur, 138 Ill. 446, 27 N. E. 701; Gaynon *v.* Burton, 107 Ill. App. 506.

Kentucky.— Robinson *v.* Fidelity Trust, etc., Co., 11 S. W. 806, 11 Ky. L. Rep. 313; Snyder *v.* Fidelity Trust, etc., Co., 14 Ky. L. Rep. 615.

Missouri.— Jones *v.* Yore, 142 Mo. 38, 43 S. W. 384; Walton *v.* Yore, 58 Mo. App. 562.

New York.— Richardson *v.* Van Voorhis, 3 N. Y. Suppl. 396 (although there is no fund in court out of which payment can be directed); Matter of Hewett, 65 How. Pr. 187; Schell *v.* Hewitt, 1 Dem. Surr. 249; McCue *v.* O'Hara, 5 Redf. Surr. 336. See also *In re* Wadsworth, 6 N. Y. Suppl. 932.

Tennessee.— Kerbaugh *v.* Vance, 5 Lea 113.

Wisconsin.— Richardson *v.* Tyson, 110 Wis. 572, 86 N. W. 250, 84 Am. St. Rep. 937; Tyson *v.* Richardson, 103 Wis. 397, 79 N. W. 439.

See 27 Cent. Dig. tit. "Infants," § 232.

Departure from contract as to compensation.— Before his appointment as guardian *ad litem*, an attorney agreed to accept such appointment in a proposed suit and conduct the litigation therein for his wards for a specified sum in the trial court and for a like sum in the supreme court on appeal. He received and receipted for the agreed sum after the trial. Thereafter the opposing attorney was changed and the guardian *ad litem's* right to appeal was opposed and the general guardian attempted to secure his discharge and opposed all his efforts in behalf of the wards. It was held that the compensation of the guardian *ad litem* for services in the trial court was fixed by the agreement, but the circumstances of the appeal were so changed from those contemplated when the agreement was made that compensation should be awarded to the guardian *ad litem* independent of the agreement. Richardson *v.* Tyson, 110 Wis. 572, 86 N. W. 250, 84 Am. St. Rep. 937.

In Arkansas a guardian *ad litem* is not entitled to compensation except when appointed upon the application of plaintiff, in which case plaintiff is required to pay a reasonable compensation. Williams *v.* Ewing, 31 Ark. 229.

40. Matter of Tucker, 29 Misc. (N. Y.) 728, 62 N. Y. Suppl. 1021. See also Airey *v.* Mitchell, 21 Grant Ch. (U. C.) 510.

41. Smith *v.* Smith, 69 Ill. 308; Yourie *v.* Nelson, 1 Tenn. Ch. 614; Richardson *v.* Tyson, 110 Wis. 572, 86 N. W. 250, 84 Am. St. Rep. 937. *Aliter* as to special guardian in surrogate's court. Matter of Johnston, 6 Dem. Surr. (N. Y.) 355, 19 N. Y. St. 258.

Where the guardian is himself an attorney but he employs other counsel to assist him in conducting the litigation for his wards he should be allowed compensation for such counsel for the performance of such services only as he could not properly be expected to perform. Richardson *v.* Tyson, 110 Wis. 572, 86 N. W. 250, 84 Am. St. Rep. 937.

42. Daniel *v.* Powell, 29 Ga. 730; Voorhees *v.* Polhemus, 36 N. J. Eq. 456; Garman *v.* Kauffman, 3 Lanc. L. Rev. (Pa.) 321; Yourie *v.* Nelson, 1 Tenn. Ch. 614.

Expenses in preparing for suit.— The next friend of infants conducting a suit on their behalf to a successful issue is entitled to his costs, charges, and expenses properly incurred before suit with reference to the institution thereof. Palmer *v.* Jones, 22 Wkly. Rep. 909.

The fact that he was unsuccessful in the suit does not affect this right if he acted in good faith and with reasonable caution. Voorhees *v.* Polhemus, 36 N. J. Eq. 456.

43. Daniel *v.* Powell, 29 Ga. 730.

44. Smith *v.* Smith, 69 Ill. 308; Staggenborg *v.* Bailey, 80 S. W. 1109, 26 Ky. L. Rep. 188 (court wherein he was appointed); Robinson *v.* Fidelity Trust, etc., Co., 11 S. W. 806, 11 Ky. L. Rep. 313 (holding that the guardian *ad litem* of infant defendants must have his allowance made in the lower court for the services rendered by him in the entire case); Walton *v.* Yore, 58 Mo. App. 562 (trial court). See also Thorne *v.* Chute, 2 Ch. Chamb. (U. C.) 221.

A suspensive appeal in a case prevents, pending the appeal, any proceeding contradictorily taken for fixing the fees due to a curator *ad hoc*. State *v.* Judge Sixth Dist. Ct., 30 La. Ann. 1026.

Services in appellate court.—Under Ky. Civ. Code, § 38, subs. 4, the lower court, on the filing of a mandate of affirmance from the court of appeals, has jurisdiction to entertain a motion for an additional allowance to the guardian *ad litem* for services rendered in the court of appeals. Staggenborg *v.* Bailey, 80 S. W. 1109, 26 Ky. L. Rep. 188. See also Williams *v.* Williams, 72 S. W. 271,

finally disposed of.[45] The guardian's compensation and allowance is sometimes taxed in the bill of costs,[46] but an allowance of solicitor's fees cannot be included as part of such costs to be paid by the opposing party.[47] Where in an unsuccessful contest of the validity of a will, the same guardian *ad litem* was appointed for all the minor devisees, and their interests under the will, although different, constituted the only property owned by them, an allowance to the guardian *in solido* for all services in the cause was proper.[48] Where a reference is made to ascertain the amount of fees due a guardian *ad litem* for services to a minor the guardian and minor occupy antagonistic positions and hence another guardian *ad litem* should be appointed for that particular matter.[49]

c. Amount of Allowance. The allowance should be reasonable,[50] and is to be fixed by the court.[51] In fixing the amount the court should consider the charac-

24 Ky. L. Rep. 1753. But *compare* Fulwiler *v.* Welch, 92 Ill. App. 443, holding that the circuit court has no power to tax against an unsuccessful party the fee of a guardian *ad litem* for services rendered by him in behalf of minor defendants in the supreme court.

Power of surrogate.— Except where an appellate tribunal has given directions in the premises, the surrogate has no power to award compensation to special guardians for services rendered by them in proceedings on appeal from the surrogate's court; nor can he make to them or any other persons, in their capacity as parties to such proceedings, any award as costs or allowances. Matter of Bull, 1 Connoly Surr. (N. Y.) 395, 6 N. Y. Suppl. 565; Matter of Hewitt, 4 N. Y. Civ. Proc. 57, 65 How. Pr. 187, 1 Dem. Surr. 249. The surrogate cannot grant an allowance to a special guardian appointed for infants in a contested will case, on an *ex parte* application and without notice. *In re* Budlong, 33 Hun (N. Y.) 235 [*affirmed* in 100 N. Y. 203, 3 N. E. 334].

45. Smith *v.* Smith, 69 Ill. 308. See also Jones *v.* Yore, 142 Mo. 38, 43 S. W. 384.

A petition for such taxation while the cause is pending will be regarded but a continuation of the original cause. Smith *v.* Smith, 69 Ill. 308.

While moneys recovered for an infant are in the custody of the court, it will order the expenses of a guardian *ad litem* or next friend to be reimbursed; but after payment to the general guardian such expenses can only be reimbursed by an ordinary action or proceeding against the moneys in the hands of the guardian. Leopold *v.* Myers, 2 Hilt. (N. Y.) 580, 10 Abb. Pr. 40.

46. Walker *v.* Hallett, 1 Ala. 379 (in suits for the foreclosure of mortgages); Hutchinson *v.* Hutchinson, 152 Ill. 347, 38 N. E. 926 [*affirming* 50 Ill. App. 87]; Ames *v.* Ames, 151 Ill. 280, 37 N. E. 890; Gagnon *v.* Burton, 107 Ill. App. 506; Fulwiler *v.* Welch, 92 Ill. App. 443; Snyder *v.* Fidelity Trust, etc., Co., 14 Ky. L. Rep. 615; McCallon *v.* Cohen, (Tex. Civ. App. 1897) 39 S. W. 973; Connellee *v.* Eastland County, (Tex. Civ. App. 1895) 31 S. W. 552.

Pending an appeal from a decree in partition, an order taxing charges of the guardian *ad litem* for minors as costs may be made, as it is merely collateral to the issue on appeal. Ames *v.* Ames, 151 Ill. 280, 37 N. E. 890.

Against whom taxed.— Where a court allows a guardian *ad litem* a reasonable sum for his charges and expenditures in defending for an infant defendant in a suit in equity, and taxes the same as costs, it must be taxed against the person at whose instance the appointment of the guardian was made. Smith *v.* Smith, 69 Ill. 308.

47. Hutchinson *v.* Hutchinson, 152 Ill. 347, 38 N. E. 926 [*affirming* 50 Ill. App. 87]; Gagnon *v.* Burton, 107 Ill. App. 506; Worther *v.* Ruehrwein, 10 Ohio S. & C. Pl. Dec. 116, 8 Ohio N. P. 494.

48. Walton *v.* Yore, 58 Mo. App. 562.

49. Loftis *v.* Butler, (Tenn. Ch. App. 1900) 58 S. W. 886.

50. See *supra*, note 39.

Allowances held reasonable see McCallon *v.* Cohen, (Tex. Civ. App. 1847) 39 S. W. 973; Connellee *v.* Eastland County, (Tex. Civ. App. 1895) 31 S. W. 552.

51. Staggenborg *v.* Bailey, 80 S. W. 1109, 26 Ky. L. Rep. 188 (without reference to the opinions of the parties or other witnesses); Tyson *v.* Richardson, 103 Wis. 397, 79 N. W. 439 (holding that a guardian *ad litem* appointed to defend infant defendants' title to property is entitled to have the court appointing him and in which the litigation occurs determine the proper allowance that should be made him for services actually performed and disbursements reasonably made). See also *In re* Mathews, 27 Hun (N. Y.) 254.

Power inherent.— The power of the court to award to the guardian *ad litem* of an infant, to be paid out of the subject-matter of the action, such compensation as appears to be reasonable for his service, is inherent in it (Weed *v.* Paine, 31 Hun (N. Y.) 10, 13 Abb. N. Cas. 200; McCue *v.* O'Hara, 5 Redf. Surr. (N. Y.) 336) and does not depend on the provisions of the code of civil procedure nor is it to be included in or limited by the sum of two thousand dollars fixed by N. Y. Code Civ. Proc. § 3254, as the limit of allowance (Weed *v.* Paine, 31 Hun (N. Y.) 10, 13 Abb. N. Cas. 200).

Where an attorney acts as guardian ad litem the compensation allowed him should be measured by the standard of official emoluments, rather than by that of the highest prices demanded and paid between individuals free to contract as they will. Richardson *v.* Tyson, 110 Wis. 572, 86 N. W. 250, 84 Am. St. Rep. 937.

ter of the litigation,[52] the amount involved therein,[53] the labor or services performed,[54] and the results achieved.[55] The compensation which may be given a guardian *ad litem* is not limited to the allowance by way of taxed costs;[56] but where extra compensation is to be made it must be out of the estate of the infant,[57] for where compensation is to be made to a guardian *ad litem* out of the general fund, and not from the estate of the infant, the compensation is limited to the taxed costs of the suit as authorized by statute.[58]

d. By Whom Allowance Payable. The allowance to a guardian *ad litem* or next friend should be made out of the property or fund of the infant,[59] and is

52. Staggenborg *v.* Bailey, 80 S. W. 1109, 26 Ky. L. Rep. 188; McCallon *v.* Cohen, (Tex. Civ. App. 1897) 39 S. W. 973.

Extra allowance.— In an equitable action the court may grant an extra allowance to a guardian *ad litem*, irrespective of the allowance provided for in N. Y. Code Civ. Proc. § 3253. Roberts *v.* New York El. R. Co., 12 Misc. (N. Y.) 345, 33 N. Y. Suppl. 685.

53. Staggenborg *v.* Bailey, 80 S. W. 1109, 26 Ky. L. Rep. 188.

54. Staggenborg *v.* Bailey, 80 S. W. 1109, 26 Ky. L. Rep. 188; Snyder *v.* Fidelity Trust, etc., Co., 14 Ky. L. Rep. 615; McCallon *v.* Cohen, (Tex. Civ. App. 1897) 39 S. W. 973.

Services not included in annual compensation allowed.— See Hicks *v.* Porter, 90 Tenn. 1, 15 S. W. 1071.

55. Staggenborg *v.* Bailey, 80 S. W. 1109, 26 Ky. L. Rep. 188.

56. New York L. Ins., etc., Co., *v.* Sands, 26 Misc. (N. Y.) 252, 56 N. Y. Suppl. 741; McCue *v.* Hara, 5 Redf. Surr. (N. Y.) 336; Fearns *v.* Young, 10 Ves. Jr. 184, 32 Eng. Reprint 815.

It must be a very special case to justify the court in allowing anything beyond the taxable costs of the guardian *ad litem*, such as extra counsel fees, to be charged upon a fund belonging to an infant. Union Ins. Co. *v.* Van Rensselaer, 4 Paige (N. Y.) 85.

57. Union Ins. Co. *v.* Van Rensselaer, 4 Paige (N. Y.) 85. See also New York L. Ins., etc., Co. *v.* Sands, 26 Misc. (N. Y.) 252, 56 N. Y. Suppl. 741. And see *infra*, VIII, D, 5, d.

58. Matter of Robinson, 160 N. Y. 448, 55 N. E. 4 [*affirming* 40 N. Y. App. Div. 30, 57 N. Y. Suppl. 523]; Matter of Holden, 126 N. Y. 589, 27 N. E. 1063; *In re* Budlong, 100 N. Y. 203, 3 N. E. 334; Downing *v.* Marshall, 37 N. Y. 380; New York L. Ins., etc., Co. *v.* Sands, 26 Misc. (N. Y.) 252, 56 N. Y. Suppl. 741; Gott *v.* Cook, 7 Paige (N. Y.) 521; Union Ins. Co. *v.* Van Rensselaer, 4 Paige (N. Y.) 85. See also Matter of Tracy, 18 Abb. N. Cas. (N. Y.) 242.

In Tennessee it has been held that if there is no fund belonging to the ward, the costs which can be awarded are ordinarily only the taxable costs, but the court may provide reasonable compensation for guardians *ad litem* in the nature of a tax fee. Yourie *v.* Nelson, 1 Tenn. Ch. 614.

59. *Georgia.*— Daniel *v.* Powell, 29 Ga. 730, property secured by suit.

Illinois.— Binns *v.* La Forge, 191 Ill. 598, 61 N. E. 382.

Maryland.— See Senseney *v.* Repp, 94 Md. 77, 50 Atl. 416.

New Jersey.— Voorhees *v.* Polhemus, 36 N. J. Eq. 456.

New York.— Matter of Tucker, 29 Misc. 728, 62 N. Y. Suppl. 1021 (allowance from income of infant's estate); Tibbits *v.* Tibbits, 7 Paige 204. See also Union Ins. Co. *v.* Van Rensselaer, 4 Paige 85.

Texas.— Holloway *v.* McIlhenny Co., 77 Tex. 657, 14 S. W. 240.

Wisconsin.— Tyson *v.* Richardson, 103 Wis. 397, 79 N. W. 439.

See 27 Cent. Dig. tit. "Infants," § 235.

Where the services are rendered in the surrogate's court with reference to an estate in which the infant is interested, the allowance can be charged only on the infant's share or interest and not upon the estate generally. Brinckerhoff *v.* Farias, 52 N. Y. App. Div. 256, 65 N. Y. Suppl. 358; Matter of Tracy, 18 Abb. N. Cas. (N. Y.) 242.

A guardian ad litem is entitled to a lien for his services on the property which he has protected. Kerbaugh *v.* Vance, 5 Lea (Tenn.) 113; Loftis *v.* Butler, (Tenn. Ch. App. 1900) 58 S. W. 886; Tyson *v.* Richardson, 103 Wis. 397, 79 N. W. 439. See also Daniel *v.* Powell, 29 Ga. 730. And it is proper to order that if the amount be not paid within one year, the lien may be enforced according to the practice of the court and the statutes in regard to foreclosure of mortgages. Tyson *v.* Richardson, *supra*.

Payment from rents.— Compensation for the services of a guardian *ad litem* should be paid, where practicable, from rents instead of from the *corpus* of the estate. Persons *v.* Young, 7 Lea (Tenn.) 293. And it is proper to collect the compensation by the appointment of a receiver to rent out the infant's property and collect and apply the rents. Loftis *v.* Butler, (Tenn. Ch. App. 1900) 58 S. W. 886.

Sale to pay allowance.— See Tyson *v.* Richardson, 103 Wis. 397, 79 N. W. 439.

The costs of a petition by a guardian ad litem to be allowed compensation for services in a suit to enforce a claim of an estate, in which the infants were interested, where the adult parties made no objection to such allowance, should be borne equally by the petitioner and the interested parties, and the infants should only be charged with their proportionate share of such half. Hicks *v.* Porter, 90 Tenn. 1, 15 S. W. 1071.

not as a rule payable by the adverse party unless he has been unsuccessful and is liable to pay it as part of the costs,[60] unless there are some equitable considerations which authorize the court to impose the costs upon the successful party.[61] Neither is an adult co-defendant liable for the compensation of an infant defendant's guardian *ad litem*.[62] Under the Kentucky statute the fee of the guardian *ad litem* is to be paid by plaintiff and taxed in the costs.[63] In a Canada case where a solicitor who had been appointed guardian *ad litem* to infant defendants upon plaintiff's application was unable to obtain his costs from plaintiff or from the infants' estate, it was ordered that they be paid out of the suitors' fee fund.[64]

6. Termination of Authority — a. End of Suit. The authority of a guardian *ad litem* or next friend terminates at the conclusion of the suit in which he was appointed to act for the infant;[65] but such authority is not ended or suspended by an appeal to a higher court,[66] nor is it necessary that there should be a new guardian *ad litem* every time a pleading is amended.[67]

60. Patton *v.* Dixon, 105 Tenn. 97, 58 S. W. 299 [*overruling* Carter *v.* Montgomery, 2 Tenn. Ch. 455; Yourie *v.* Nelson, 1 Tenn. Ch. 614, and *following* House *v.* Whitis, 5 Baxt. (Tenn.) 690] (holding that a successful complainant in a suit to remove cloud on title must be compelled to pay fees of the guardian *ad litem* appointed to defend the interests of an infant, although he be a necessary defendant and have no fund out of which to pay the fees); Ashe *v.* Young, 68 Tex. 123, 3 S. W. 454. See also Hill *v.* Lee, 4 N. Y. App. Div. 154, 38 N. Y. Suppl. 641, holding that costs of a guardian *ad litem* for an infant defendant in a suit to foreclose a mortgage cannot be recovered by him, in a subsequent action against the mortgagee, on the ground that it was adjudged that such costs be paid out of the proceeds of sale, in the absence of an allegation that it was adjudged that the mortgagees should pay them. And see further *In re* Mason, (Nebr. 1903) 94 N. W. 990.

Taxation as costs see *supra*, VIII, D, 5, b.

61. Ashe *v.* Young, 68 Tex. 123, 3 S. W. 454, holding that a successful plaintiff may be held liable for a reasonable fee to the guardian *ad litem* where execution issued for the fee against the infants is returned *nulla bona*.

62. Richardson *v.* Van Voorhis, 3 N. Y. Suppl. 396.

63. See Huhlein *v.* Huhlein, 87 Ky. 247, 8 S. W. 260, 10 Ky. L. Rep. 107.

Reimbursement.— Where one of the children of a testator brought a bill against the other and the widow for partition and sale of realty in accordance with the will, and the widow filed a cross petition against one of her co-defendants, an imbecile stepdaughter, for support, and a guardian *ad litem* was appointed for such child, and upon trial of the cross petition the guardian filed a counter-claim and recovered, it was held that while it was proper to order the payment of guardian's fees by the widow, she being plaintiff under the counter-claim, the widow should have been allowed credit for such payment in her account with the imbecile daughter. Huhlein *v.* Huhlein, 87 Ky. 247, 8 S. W. 260, 10 Ky. L. Rep. 107. A defendant to a petition for partition of land, who answers and consents thereto, which partition, however, is not made by reason of opposition of other defendants, who are infants and defended by guardian *ad litem*, is not liable to pay to plaintiff the fee allowed the guardian, for which judgment is given in favor of the infants and against plaintiff. Williamson *v.* Williamson, 1 Metc. (Ky.) 303.

Appointment on cross petition.— It is error to require plaintiff in the principal action to pay the allowances to a guardian *ad litem* where the services rendered by him were under his appointment on a cross petition. Cooke *v.* Fidelity Trust, etc., Co., 104 Ky. 473, 47 S. W. 325, 20 Ky. L. Rep. 667.

64. McKay *v.* Harper, 9 Can. L. J. 161.

65. Davis *v.* Gist, Dudley Eq. (S. C.) 1 (holding that the authority of the guardian *ad litem* terminates with the judgment or decree); Hubbard *v.* Chicago, etc., R. Co., 104 Wis. 160, 80 N. W. 454, 76 Am. St. Rep. 855 (holding that the functions of a guardian *ad litem* appointed to represent infants in the general administration of an estate in the county court terminates with the final settlement of the estate unless continued by order of the county court); Dix *v.* Jarman, 1 Ch. Chamb. (U. C.) 38 (holding that the guardian *ad litem* has no authority after the object of the suit has been accomplished to act for the infant in investing any funds for the infant).

The dismissal of an action in which a guardian *ad litem* has been appointed terminates his authority, and he cannot afterward apply for permission to plaintiff to sue *in forma pauperis* in another action. Rosso *v.* Second Ave. R. Co., 13 N. Y. App. Div. 375, 43 N. Y. Suppl. 216.

Withdrawal of summons and commencement of new action does not terminate authority. Griffith *v.* Cromley, 58 S. C. 448, 36 S. E. 738.

66. Covell *v.* Porter, 81 Minn. 302, 84 N. W. 107.

Right of guardian ad litem or next friend to appeal see *infra*, VIII, Q, 1, b.

67. Carpenter *v.* San Joaquin County Super Ct., 75 Cal. 596, 19 Pac. 174.

b. Arrival of Infant at Majority. The authority of a guardian *ad litem* or next friend of an infant defendant to represent him in the conduct of the cause expires with the minority of the infant.[68]

c. Removal. The court has power to remove a guardian *ad litem*[69] or next friend[70] or revoke his authority to prosecute the suit,[71] where such action is necessary to prevent the infant being prejudiced by his acts or omissions,[72] or the interests of the infant demand a change in his representative;[73] where he has been improperly appointed,[74] where he goes out of the jurisdiction,[75] where he fails in his duty,[76] is guilty of any misconduct,[77] or is incompetent[78] or not financially responsible,[79] or where his interests are adverse to those of the infant.[80] An order removing a guardian *ad litem* is not appealable.[81] A written authority of an infant appointing his next friend to file a caveat to a will is revocable.[82]

d. Death. Where the next friend or guardian *ad litem* dies another person to represent the infant in his stead may be appointed,[83] on an *ex parte* motion in

68. Lang *v.* Belloff, 53 N. J. Eq. 298, 31 Atl. 604. See further *infra*, VIII, E.

69. Richards *v.* East Tennessee, etc., R. Co., 106 Ga. 614, 33 S. E. 193, 45 L. R. A. 712; Gashweller *v.* McIlvoy, 1 A. K. Marsh. (Ky.) 84.

The appointment of a general guardian of an infant does not of itself revoke the appointment of a special guardian appointed to protect the interests of the infant on a reference. Matter of Monell, 19 N. Y. Suppl. 361, 22 N. Y. Civ. Proc. 377.

70. *Illinois.*— Chudleigh *v.* Chicago, etc., R. Co., 51 Ill. App. 491.

Iowa.— See Thurston *v.* Cavenor, 8 Iowa 155.

Kentucky.— Robinson *v.* Talbot, 78 S. W. 1108, 25 Ky. L. Rep. 1914. See also Burks *v.* Shain, 2 Bibb 341, 5 Am. Dec. 616.

Massachusetts.— Guild *v.* Cranston, 8 Cush. 506.

Missouri.— Raming *v.* Metropolitan St. R. Co., (1899) 50 S. W. 791.

New York.— See Colden *v.* Haskins, 3 Edw. 311.

North Carolina.— Tate *v.* Mott, 96 N. C. 19, 2 S. E. 176.

Tennessee.— *Ex p.* Kirkman, 3 Head 517. See 27 Cent. Dig. tit. "Infants," § 230.

71. Guild *v.* Cranston, 8 Cush. (Mass.) 506.

72. Robinson *v.* Talbot, 78 S. W. 1108, 25 Ky. L. Rep. 1914. See also Peyton *v.* Bond, 1 Sim. 390, 2 Eng. Ch. 391, 57 Eng. Reprint 624.

73. O'Donnell *v.* Broad, 1 Pa. Dist. 650, 11 Pa. Co. Ct. 622; Martin *v.* Weyman, 26 Tex. 460.

74. Matter of Water Com'rs, 4 Edw. (N. Y.) 545.

75. Weldon *v.* Templeton, 1 Ch. Chamb. (U. C.) 360. See also Davis *v.* Fenton, 7 Ont. Pr. 261.

76. Russell *v.* Sharpe, 1 Jac. & W. 482, 37 Eng. Reprint 452; Ward *v.* Ward, 3 Meriv. 706, 36 Eng. Reprint 271.

Personal animosity toward guardian of estate and intention to engage in useless litigation.— See Matter of White, 101 N. Y. App. Div. 172, 91 N. Y. Suppl. 513.

77. *In re* Birchall, 16 Ch. D. 41, 29 Wkly. Rep. 27.

A refusal to appeal, although admittedly *bona fide*, is misconduct sufficient to justify the removal of a next friend, as he has no power to deprive the infant of his right to appeal. Dupuy *v.* Welsford, 42 L. T. Rep. N. S. 730, 28 Wkly. Rep. 762.

78. Budd *v.* Rutherford, 4 Ind. App. 386, 30 N. E. 1111.

Where a married woman has been made next friend in an action by an infant the petition may be amended by substituting another as next friend. Savage *v.* Smith, 132 Ala. 64, 31 So. 374.

79. Budd *v.* Rutherford, 4 Ind. App. 386, 30 N. E. 1111; Lees *v.* Smith, 5 H. & N. 632, 29 L. J. Exch. 294, 2 L. T. Rep. N. S. 252, 8 Wkly. Rep. 464; Watson *v.* Frazer, 9 Dowl. P. C. 741, 5 Jur. 682, 10 L. J. Exch. 420, 8 M. & W. 660. *Compare Re* McConnell, 3 Ch. Chamb. (U. C.) 423.

Statute permissive merely.— Budd *v.* Rutherford, 4 Ind. App. 386, 30 N. E. 1111.

80. Ruffel *v.* Police Beneficiary Assoc., 9 Pa. Dist. 182; *In re* Burgess, 25 Ch. D. 243, 50 L. T. Rep. N. S. 168, 32 Wkly. Rep. 511; Hopkinson *v.* Roe, 9 L. J. Ch. O. S. 7; Gee *v.* Gee, 9 L. T. Rep. N. S. 557, 12 Wkly. Rep. 187. See also Peyton *v.* Bond, 1 Sim. 390, 2 Eng. Ch. 391, 57 Eng. Reprint 624.

Mere relationship to adverse party not within the rule. Bedwin *v.* Asprey, 5 Jur. 362, 11 Sim. 530, 34 Eng. Ch. 530, 59 Eng. Reprint 978. See also Sandford *v.* Sandford, 9 Jur. N. S. 398, 8 L. T. Rep. N. S. 194, 11 Wkly. Rep. 336; S—— *v.* S——, 1 New Rep. 384.

81. Hathaway's Estate, 111 Cal. 270, 43 Pac. 754.

82. Reichard *v.* Izer, 95 Md. 451, 52 Atl. 592.

83. Richards *v.* Swan, 7 Gill (Md.) 366; Raming *v.* Metropolitan St. R. Co., (Mo. 1899) 50 S. W. 791; Harper *v.* Harper, 1 Ch. Chamb. (U. C.) 217.

The solicitor whom he had employed commonly obtains an order appointing a new next friend, and the order, in the absence of any peculiarity, is of course. Westby *v.* Westby, 2 Coop. t. Cott. 211, 47 Eng. Reprint 1131.

Nomination of next friend by defendant.— On the death of a next friend and plaintiff

court[84] without notice,[85] and there is no reason for the cause being revived any more than where a regular attorney in the case dies.[86]

E. Attainment of Majority Pending Action. Where an action is begun by guardian *ad litem* or next friend, and during the pendency thereof the infant becomes of age the action does not abate,[87] but may proceed in the name of the infant if he so elects.[88] In such case the record should show that the suit is prosecuted by plaintiff himself,[89] and it is proper to strike out the name of the guardian or next friend,[90] but an amendment of the proceedings is not necessary,[91] a mere suggestion of the fact entered on the record being sufficient.[92] Where an infant has commenced an action without a guardian *ad litem* or next friend and during the pendency thereof he reaches majority it is competent for him to continue the action thus erroneously commenced, and to ratify what has been done therein, and thereafter there is no good reason why the action should not proceed with the same effect as if it had been properly commenced.[93] So also the coming

refusing to name a new one defendant may be at liberty to name one after notice given. Lancaster *v.* Thornton, Ambl. 398, 27 Eng. Reprint 265, Dick. 346, 21 Eng. Reprint 302. See also Glover *v.* Webber, 12 Sim. 351, 35 Eng. Ch. 298, 59 Eng. Reprint 1166.

84. Daly *v.* Daly, L. R. 9 Ir. 383.

85. Harper *v.* Harper, 1 Ch. Chamb. (U. C.) 217. *Compare* Glover *v.* Webber, 12 Sim. 351, 35 Eng. Ch. 298, 59 Eng. Reprint 1166.

86. Raming *v.* Metropolitan St. R. Co., (Mo. 1899) 50 S. W. 791.

87. Campbell *v.* Bowne, 5 Paige (N. Y.) 34; Connor *v.* Ashley, 57 S. C. 305, 35 S. E. 546; Shuttlesworth *v.* Hughey, 6 Rich. (S. C.) 329, 60 Am. Dec. 130.

88. *Georgia.*— Phillips *v.* Taber, 83 Ga. 565, 10 S. E. 270; Lasseter *v.* Simpson, 78 Ga. 61, 3 S. E. 243; Sims *v.* Remwick, 25 Ga. 58.

Indiana.— Holmes *v.* Adkins, 2 Ind. 398.

Iowa.— Reed *v.* Lane, 96 Iowa 454, 65 N. W. 380.

Kentucky.— Clements *v.* Ramsey, 4 S. W. 311, 9 Ky. L. Rep. 172.

Maine.— Marshall *v.* Wing, 50 Me. 62.

Maryland.— Wainwright *v.* Wilkinson, 62 Md. 146.

Minnesota.— Germain *v.* Sheehan, 25 Minn. 338.

Mississippi.— Tucker *v.* Wilson, 68 Miss. 693, 9 So. 898.

Missouri.— Stupp *v.* Holmes, 48 Mo. 89; Randalk *v.* Wilson, 24 Mo. 76. See also Robinson *v.* Hood, 67 Mo. 660.

Pennsylvania.— Hillegass *v.* Hillegass, 5 Pa. St. 97.

South Carolina.— Connor *v.* Ashley, 57 S. C. 305, 35 S. E. 546; Shuttlesworth *v.* Hughey, 6 Rich. 329, 60 Am. Dec. 130.

See 27 Cent. Dig. tit. "Infants," § 253.

The late infant should be substituted for the guardian by whom suit was brought and not joined with him. Ricord *v.* Central Pac. R. Co., 15 Nev. 167.

The court should relieve the next friend from costs already incurred and from future liability. Wainwright *v.* Wilkinson, 62 Md. 146. *Compare* as to costs already incurred Schoen *v.* Schlessinger, 57 How. Pr. (N. Y.) 490.

Receiving the fruits of a judgment entered after the infant becomes of age is sufficient to manifest his election to proceed with the action. Connor *v.* Ashley, 57 S. C. 305, 35 S. E. 546.

Where the next friend continues to prosecute the suit and defendant answers and goes to trial without objection, he cannot subsequently object. Bramel *v.* Cunningham, 3 Ky. L. Rep. 512.

89. Holmes *v.* Adkins, 2 Ind. 398; Bernard *v.* Pittsburg Coal Co., (Mich. 1904) 100 N. W. 396, holding, however, that a failure in this respect is not ground for reversal unless prejudicial to defendant.

90. Phillips *v.* Taber, 83 Ga. 565, 10 S. E. 270; Lasseter *v.* Simpson, 78 Ga. 61, 3 S. E. 243; Bryant *v.* Helton, 66 Ga. 477; Sims *v.* Renwick, 25 Ga. 58; Bernard *v.* Pittsburg Coal Co., (Mich. 1904) 100 N. W. 396.

91. Clements *v.* Ramsey, 4 S. W. 311, 9 Ky. L. Rep. 172; Connor *v.* Ashley, 57 S. C. 305, 35 S. E. 546; Shuttlesworth *v.* Hughey, 6 Rich. (S. C. 329, 60 Am. Dec. 130.

92. Clements *v.* Ramsey, 4 S. W. 311, 9 Ky. L. Rep. 172; Bernard *v.* Pittsburg Coal Co., (Mich. 1904) 100 N. W. 396; Breese *v.* Metropolitan L. Ins. Co., 37 N. Y. App. Div. 152, 55 N. Y. Suppl. 775; Connor *v.* Ashley, 57 S. C. 305, 35 S. E. 546; Shuttlesworth *v.* Hughey, 6 Rich. (S. C.) 329, 60 Am. Dec. 130.

93. Germain *v.* Sheehan, 25 Minn. 338; Woodman *v.* Rowe, 59 N. H. 453; Smart *v.* Haring, 14 Hun (N. Y.) 276.

The infant's failure to procure a guardian ad litem is cured if he attains his majority before defendant raises any objection. Rutter *v.* Puckhofer, 9 Bosw. (N. Y.) 638.

Infancy cannot be pleaded in abatement after plaintiff is of age, although the action was brought before. Hamlin *v.* Stevenson, 4 Dana (Ky.) 597.

The judgment is binding upon both parties if the infant plaintiff arrived at full age before it was rendered. Hicks *v.* Beam, 112 N. C. 642, 17 S. E. 490, 34 Am. St. Rep. 521.

The action should not be dismissed over plaintiff's objection after he has attained his majority. Philpot *v.* Benge, 5 Ky. L. Rep. 690.

of age of an infant defendant does not abate the suit,[94] or dismiss him therefrom or relieve him of any of the duties and responsibilities of a party.[95] Neither does it render a supplemental bill necessary unless his interest in the suit is changed by that event.[96] But the late infant upon coming of age is entitled to personally manage his own defense.[97] The fact that some of defendants were infants when the suit was instituted and no guardian *ad litem* was appointed does not affect the validity of the judgment where before such judgment was rendered they became of age and were notified and aware of the pendency of the suit and its object.[98] It has been held, however, that service upon an infant will not compel his appearance after arriving at age;[99] and under a statute providing that a judgment in ejectment was conclusive upon the party against whom it was recovered, not under disability at the time of its recovery, it has been held that where a judgment in ejectment rendered in favor of an infant was reversed on appeal after he came of age, but there was nothing in the record showing his appearance as an adult, the judgment was not conclusive against him.[1] If a suit by next friend was not properly brought, the infant may, on coming of age, abandon it.[2]

F. Process[3] — **1. Requisites in General.** It has been held that where an infant is plaintiff the form of the writ may be the same as in other cases,[4] and that summons or citation to infant defendants should show the age of each infant,[5] and direct them to appear by guardian.[6] But where the summons was

94. Campbell *v.* Bowne, 5 Paige (N. Y.) 34.

Effect of proceedings after majority.— Proceedings which a defendant allows to be taken against him after he comes of age are binding on him and there is no necessity for his being served with notice of the suit after his coming of age. Lawrason *v.* Buckley, 2 Ch. Chamb. (U. C.) 477.

95. Deering *v.* Hurt, (Tex. 1886) 2 S. W. 42.

96. Campbell *v.* Bowne, 5 Paige (N. Y.) 34.

97. Dow *v.* Dow, 21 N. Y. Suppl. 487 [*affirming* 18 N. Y. Suppl. 222]. See also Mitchell *v.* Berry, 1 Metc. (Ky.) 602.

Duty to ask for substitution.— See Lancaster *v.* Barton, 92 Va. 615, 24 S. E. 251.

Appointment of solicitor.— See Bennett *v.* Wheeler, 1 Ir. Eq. 16, selection by infant. Where an infant defendant has appeared by guardian the proper course for the complainant, if defendant does not himself voluntarily appear by the solicitor after he is of age, is to apply to the court for an order that he appoint a solicitor. Campbell *v.* Bowne, 5 Paige (N. Y.) 34.

Filing new answer.— On an infant defendant's coming of age, he can disregard the answer set up for him by his guardian *ad litem*, and file an entirely new answer for himself. Shields *v.* Bryant, 2 A. K. Marsh. (Ky.) 342; Thompson *v.* Maxwell Land Grant, etc., Co., 3 N. M. 269, 6 Pac. 193. *Compare* Mason *v.* Debow, 3 N. C. 178. See also Stephenson *v.* Stephenson, 6 Paige (N. Y.) 353.

An answer by an infant may be amended on motion when he attains full age. Winston *v.* Campbell, 4 Hen. & M. (Va.) 477.

A mere suggestion by a party who was an infant at the commencement of the suit that he has arrived at full age, praying that he may be made a defendant and that no decree be rendered against him, but exhibiting no answer, is no reason for delaying the cause. Shields *v.* Bryant, 2 A. K. Marsh. (Ky.) 342.

If the late infant neglects to assert his rights for himself he cannot generally complain of the acts of his guardian *ad litem*. Mitchell *v.* Berry, 1 Metc. (Ky.) 602.

98. *Indiana.*— Thain *v.* Rudisill, 126 Ind. 272, 26 N. E. 46.

Kentucky.— Coffey *v.* Proctor Coal Co., 20 S. W. 286, 14 Ky. L. Rep. 415.

Maryland.— See Tessier *v.* Wyse, 3 Bland 28.

Missouri.— Bernecker *v.* Miller, 40 Mo. 473, 93 Am. Dec. 309.

New York.— Arnold *v.* Sandford, 14 Johns. 417.

See 27 Cent. Dig. tit. "Infants," § 253.

Appointment of guardian ad litem not necessary.— See Wilder *v.* Eldridge, 17 Vt. 226.

A judgment against several infants who appeared by attorney only may be set aside on motion, although at the date of the judgment one of the infants had attained his majority, and the judgment being entire must be set aside as to all. Randalls *v.* Wilson, 24 Mo. 76.

99. Welch *v.* Agar, 84 Ga. 583, 11 S. E. 149, 20 Am. St. Rep. 380.

1. Boro *v.* Harris, 13 Lea (Tenn.) 36.

2. Waring *v.* Crane, 2 Paige (N. Y.) 79, 21 Am. Dec. 70.

3. See, generally, Process.

4. Bouche *v.* Ryan, 3 Blackf. 472. *Compare* Wheeler *v.* Smith, 18 Wis. 651.

5. Keys *v.* McDonald, 1 Handy (Ohio) 287, 12 Ohio Dec. (Reprint) 146.

6. Kellett *v.* Rathbun, 4 Paige (N. Y.) 102.

regularly served on infants and on their guardian, a failure to name them in the summons as defendants is amendable and on collateral attack will be considered as amended and the decree based upon such service is not void.[7]

2. Service on Infant.[8] When an infant is made a party to an action he must be served with process[9] unless he is already before the court in some proper

7. Burgett *v.* Williford, 56 Ark. 187, 19 S. W. 750, 35 Am. St. Rep. 96.

8. Service as prerequisite to appointment of guardian ad litem see *supra*, VIII. D, 3, e, (III).

9. *Alabama.*— Gayle *v.* Johnston, 80 Ala. 395; Johnston *v.* Hainesworth, 6 Ala. 443; Walker *v.* Hallett, 1 Ala. 379.

Arkansas.— Johnson *v.* Trotter, (1891) 15 S. W. 1025; Freeman *v.* Russell, 40 Ark. 56; Haley *v.* Taylor, 39 Ark. 104.

California.— Campbell *v.* Drais, 125 Cal. 253, 57 Pac. 994; Gray *v.* Palmer, 9 Cal. 616.

Florida.— McDermott *v.* Thompson, 29 Fla. 299, 10 So. 584; Thompson *v.* McDermott, 19 Fla. 852.

Georgia.— Richards *v.* East Tennessee, etc., R. Co., 106 Ga. 614, 33 S. E. 193, 45 L. R. A. 712; Harvey *v.* Cubbedge, 75 Ga. 792.

Illinois.— Bonnell *v.* Holt, 89 Ill. 71; Campbell *v.* Campbell, 63 Ill. 502; Hickenbotham *v.* Blackledge, 54 Ill. 316; Greenman *v.* Harvey, 53 Ill. 386; Crocker *v.* Smith, 10 Ill. App. 376.

Indiana.— Roy *v.* Rowe, 90 Ind. 54; Abdil *v.* Abdil, 26 Ind. 287; Wells *v.* Wells, 6 Ind. 447; Peoples *v.* Stanley, 6 Ind. 410.

Kentucky.— Girty *v.* Logan, 6 Bush 8; Peak *v.* Percifull, 3 Bush 218; Pond *v.* Doneghy, 18 B. Mon. 558; Shropshire *v.* Reno, 5 Dana 583; Steele *v.* Taylor, 4 Dana 445; Bustard *v.* Gates, 4 Dana 429; Daniel *v.* Hannagan, 5 J. J. Marsh. 48; Wooldridge *v.* Harding, 51 S. W. 162, 21 Ky. L. Rep. 205; Tyler *v.* Jewell, 11 S. W. 25, 10 Ky. L. Rep. 887; Schuhart *v.* Clark, 1 S. W. 479, 8 Ky. L. Rep. 342 (infants over fourteen); Schuler *v.* Mayo, 5 Ky. L. Rep. 331. See also Shields *v.* Hinkle, 43 S. W. 485, 19 Ky. L. Rep. 1363. *Compare* Banta *v.* Calhoon, 2 A. K. Marsh. 166.

Maryland.— Hunter *v.* Hatton, 4 Gill 115, 45 Am. Dec. 117.

Mississippi.— Jones *v.* Mathews, (1888) 4 So. 547; Johnson *v.* Cooper, 56 Miss. 608; Barrus *v.* Barrus, 56 Miss. 92; Saxon *v.* Ames, 47 Miss. 565 (in ordinary suits in equity); Stanton *v.* Pollard, 24 Miss. 154.

Missouri.— Westmeyer *v.* Gallenkamp, 154 Mo. 28, 55 S. W. 231, 77 Am. St. Rep. 747; Gibson *v.* Choteau, 39 Mo. 536; Hendricks *v.* McLean, 18 Mo. 32. See also Smith *v.* Davis, 27 Mo. 298.

Nebraska.— Melcher *v.* Schluter, 5 Nebr. (Unoff.) 445, 98 N. W. 1082.

New York.— Ingersoll *v.* Mangam, 84 N. Y. 622 [*affirming* 24 Hun 202]; Matter of Greenhalgh, 64 Hun 26, 18 N. Y. Suppl. 748; Syracuse Sav. Bank *v.* Burton, 6 N. Y. Civ. Proc. 216. See also Mason *v.* Denison, 15 Wend. 64.

North Carolina.— Ward *v.* Lowndes, 96 N. C. 367, 2 S. E. 591; Young *v.* Young, 91 N. C. 359; Larkins *v.* Bullard, 88 N. C. 35; Gulley *v.* Macy, 81 N. C. 356; Turner *v.* Douglass, 72 N. C. 127.

Ohio.— Moore *v.* Starks, 1 Ohio St. 369.

South Carolina.— Carrigan *v.* Drake, 36 S. C. 354, 15 S. E. 339; Tedcrall *v.* Bouknight, 25 S. C. 275; Genobles *v.* West, 23 S. C. 154; Sligh *v.* Sligh, 1 Brev. 176.

Tennessee.— Frazier *v.* Pankey, 1 Swan 75; Valentine *v.* Cooley, Meigs 613, 33 Am. Dec. 166; Combs *v.* Young, 4 Yerg. 218, 26 Am. Dec. 225. See also Crutchfield *v.* Stewart, 10 Yerg. 237.

Texas.— Sprague *v.* Haines, 68 Tex. 215, 4 S. W. 371; Wheeler *v.* Ahrenbeak, 54 Tex. 535 [*distinguishing* Kegans *v.* Allcorn, 9 Tex. 25]; Taylor *v.* Whitfield, 33 Tex. 181.

United States.— New York L. Ins. Co. *v.* Bangs, 103 U. S. 435, 26 L. ed. 580; Carrington *v.* Brents, 5 Fed. Cas. No. 2,446, 1 McLean 167; Fitch *v.* Cornell, 9 Fed. Cas. No. 4,834, 1 Sawy. 156.

See 27 Cent. Dig. tit. "Infants," §§ 255, 256, 258.

Contra.— Ferrell *v.* Ferrell, 53 W. Va. 515, 44 S. E. 187.

Courts will so far protect an infant as to see that he is properly served with process. Alexander *v.* Frary, 9 Ind. 481.

Removal of trustee.— Infant *cestuis que trustent* under a will must be given notice of a proceeding to remove the trustee. Russak *v.* Tobias, 12 N. Y. Civ. Proc. 390.

Application for dower.— Minor heirs who have no guardians are entitled to notice of an application for assignment of dower to a widow. Pierson *v.* Hitchner, 25 N. J. Eq. 129.

Introduction as plaintiffs by amendment. — Where minors, pending a bill filed by other persons, are made parties plaintiff by amendment, and are represented by a next friend, a copy of the bill need not be served on them. Wallace *v.* Jones, 93 Ga. 419, 21 S. E. 89.

Bringing in additional defendants.— Minn. Gen. St. (1894) § 5179, providing for the bringing in of additional defendants by the service of an order reciting the summons and requiring them to answer the complaint applies as well to minors as to adults. Markell *v.* Ray, 75 Minn. 138, 77 N. W. 788.

Intervention.— Where infants are necessary parties defendant to a suit, they must be served with summons; and the court cannot acquire jurisdiction over them where, after the trial, they petition to intervene, and a guardian *ad litem* is then appointed, who files an amended answer in their behalf.

manner,[10] and a failure to serve the infant is not cured by the appointment of a guardian *ad litem* who appears or answers for him.[11] The object of service upon an infant is to attract the attention of his friends that a due regard may be had to his rights and the mind of the court directed to them.[12] A judgment rendered against an infant who has not been served with process is not binding upon him,[13]

Johnston *v.* San Francisco Sav. Union, 63 Cal. 554.

In the case of an infant feme covert service on the husband alone is a good service on both the husband and wife, for the reason that the husband and wife are one person in law, and the husband is bound to answer for both. This is an exception to the rule requiring personal service upon an infant defendant where the separate property of the wife is not the subject of the proceeding. Feitner *v.* Lewis, 119 N. Y. 131, 23 N. E. 296, 16 Am. St. Rep. 811 [*reversing* 55 N. Y. Super. Ct. 519, 1 N. Y. Suppl. 1].

Where a defendant dies leaving infant heirs during the pendency of a suit to recover land and a guardian *ad litem* appointed by the court appears for the heirs they need not be served with process. Thomas *v.* Jones, 10 Tex. 52. *Compare* Lewis *v.* Outlaw, 1 Overt. (Tenn.) 140.

A mere order of court made by consent of counsel that infants "are made parties" to the suit does not have the effect to make them parties so as to authorize the court to proceed against them. Pond *v.* Doneghy, 18 B. Mon. (Ky.) 558.

Curative statute.— N. C. Code, § 387, declaring valid judgments against infant defendants not personally served, has no application where there has been no service on the infant nor on any one representing him. Harrison *v.* Harrison, 106 N. C. 282, 11 S. E. 356; Gay *v.* Grant, 101 N. C. 206, 8 S. E. 99, 106; Perry *v.* Adams, 98 N. C. 167, 3 S. E. 729, 2 Am. St. Rep. 326; Stancil *v.* Gay, 92 N. C. 462.

10. Pond *v.* Doneghy, 18 B. Mon. (Ky.) 558; Gashweller *v.* McIlvoy, 1 A. K. Marsh. (Ky.) 84. See also Cuyler *v.* Cuyler, 5 Mackey (D. C.) 568.

Cross complaint.— Where minors were defendants to an original bill, and a guardian *ad litem* was appointed after service of process on them, and a cross complaint was filed by another defendant, and the guardian appeared and answered it, it was not necessary that the minors should be served in the cross complaint. Pillow *v.* Sentelle, 49 Ark. 430, 5 S. W. 783. *Compare* Johnson *v.* Johnson, 1 Dana (Ky.) 364.

Presumption.— Where the record simply recites that on motion, without specifying whose motion, a guardian *ad litem* was appointed, the court will presume that the minors were personally in court. Horner *v.* Doe, 1 Ind. 130, 48 Am. Dec. 355; Thompson *v.* Doe, 8 Blackf. (Ind.) 336.

11. *Arkansas.*— Freeman *v.* Russell, 40 Ark. 56.

Illinois.— Clark *v.* Thompson, 47 Ill. 25, 95 Am. Dec. 457.

Indiana.— People *v.* Stanley, 6 Ind. 410.

Kentucky.— Coleman *v.* Coleman, 3 Dana 398, 28 Am. Dec. 86; Woolridge *v.* Harding, 51 S. W. 162, 21 Ky. L. Rep. 205. See also Schaefer *v.* Gates, 2 B. Mon. 453, 38 Am. Dec. 164.

Missouri.— Westmeyer *v.* Gallenkamp, 154 Mo. 28, 55 S. W. 231, 77 Am. St. Rep. 747.

Nebraska.— Boden *v.* Mier, (1904) 98 N. W. 701.

New York.— Ingersoll *v.* Mangam, 84 N. Y. 622 [*affirming* 24 Hun 202]; Hogle *v.* Hogle, 49 Hun 313, 2 N. Y. Suppl. 172.

North Carolina.— Gulley *v.* Macy, 81 N. C. 356. But see Fry *v.* Currie, 91 N. C. 436.

Tennessee.— Robertson *v.* Robertson, 2 Swan 197.

Texas.— Moore *v.* Prince, 5 Tex. Civ. App. 352, 23 S. W. 1113.

United States.— New York L. Ins. Co. *v.* Bangs, 103 U. S. 435, 26 L. ed. 580.

See 27 Cent. Dig. tit. "Infants," §§ 258–260.

Contra.— Ferrell *v.* Ferrell, 53 W. Va. 515, 44 S. E. 187.

In Georgia, prior to the passage of the act of 1876, an appointment of a guardian *ad litem* for a minor, and notification to him before the case proceeded, was all that was required to have the interests of a minor properly represented in any case in court. Richards *v.* East Tennessee, etc., R. Co., 106 Ga. 614, 33 S. E. 193, 45 L. R. A. 712; Adams *v.* Franklin, 82 Ga. 168, 8 S. E. 44; Harvey *v.* Cubbedge, 75 Ga. 792.

12. Bulow *v.* Witte, 3 S. C. 308.

When failure to serve infants immaterial. — Where, in proceedings by petition by trustees to sell certain infants' lands, their mother was appointed guardian *ad litem*, with her consent, and by selection of the infants in open court, and she concurred in a report recommending a sale, the infants were thereby made parties to the proceedings, although no copy of the petition or subpœna *ad respondendum* was served on them, or answer put in by them. Bulow *v.* Witte, 3 S. C. 308.

13. Smith *v.* Reid, 134 N. Y. 568, 31 N. E. 1082 [*affirming* 11 N. Y. Suppl. 739, 19 N. Y. Civ. Proc. 363]; Graham's Estate, 14 Wkly. Notes Cas. (Pa.) 31; Tederall *v.* Bouknight, 25 S. C. 275.

Notice to adult heirs to defend an action of ejectment will not bind infant heirs. Bedell *v.* Lewis, 4 J. J. Marsh. (Ky.) 562.

Consolidation of actions.— Infant distributees under a will who are made defendants in one suit for distribution, but not served with process actually or constructively will not be bound by the judgment, although in another suit consolidated with the first one

but is erroneous and voidable on direct attack.[14] It has even been held that a judgment or decree rendered against or affecting the interests of an infant who has not been served with process is void for lack of jurisdiction;[15] but there is also authority to the effect that such lack of service does not render the judgment void or subject to collateral attack, if the infant was represented in the proceeding by guardian *ad litem*.[16]

3. Service on Parent, Guardian, Etc. It is usually required that when an action is brought against an infant process shall be served upon the parent,[17]

they appear as plaintiffs without next friend or guardian. Bush *v.* Bush, 2 Duv. (Ky.) 269.

14. *Alabama.*— Preston *v.* Dunn, 25 Ala. 507.

Iowa.— Good *v.* Norley, 28 Iowa 188.

Kentucky.— Benningfield *v.* Reed, 8 B. Mon. 102; Shropshire *v.* Reno, 5 Dana 583; Jones *v.* McGinty, 3 Dana 425; Coleman *v.* Coleman, 3 Dana 398, 28 Am. Dec. 86.

Mississippi.— Stanton *v.* Pollard, 24 Miss. 154.

Texas.— Alston *v.* Emmerson, 83 Tex. 231, 18 S. W. 566, 29 Am. St. Rep. 639; Wheeler *v.* Ahrenbeak, 54 Tex. 535; Taylor *v.* Whitfield, 33 Tex. 181; Ellis *v.* Stewart, (Civ. App. 1893) 24 S. W. 585; Moore *v.* Prince, 5 Tex. Civ. App. 352, 23 S. W. 1113. See also McAnear *v.* Epperson, 54 Tex. 220, 38 Am. Rep. 625.

See 27 Cent. Dig. tit. "Infants," §§ 258–260.

But *compare* White *v.* Morris, 107 N. C. 92, 12 S. E. 80. See also Fry *v.* Currie, 91 N. C. 436; Matthews *v.* Joyce, 85 N. C. 258; White *v.* Albertson, 14 N. C. 241, 22 Am. Dec. 719.

Effect on adults of failure to serve infants. — Although a scire facias be void as to infants for want of personal service it will be only irregular as to adults joined therein. Valentine *v.* Cooley, Meigs (Tenn.) 613, 33 Am. Dec. 166.

15. *Florida.*— Terrell *v.* Weymouth, 32 Fla. 255, 13 So. 429, 37 Am. St. Rep. 94.

Illinois.— Chambers *v.* Jones, 72 Ill. 275; Campbell *v.* Campbell, 63 Ill. 462. See also Bonnell *v.* Holt, 89 Ill. 71.

Missouri.— Gibson *v.* Chouteau, 39 Mo. 536; Hull *v.* Cavanaugh, 6 Mo. App. 143. *Compare* Day *v.* Kerr, 7 Mo. 426.

Nebraska.— See Melcher *v.* Schluter, 5 Nebr. (Unoff.) 445, 98 N. W. 1082.

New York.— Pinckney *v.* Smith, 26 Hun 524. But see Sloane *v.* Martin, 145 N. Y. 524, 40 N. E. 217, 45 Am. St. Rep. 630, 28 L. R. A. 347 [*affirming* 77 Hun 249, 28 N. Y. Suppl. 332 (*affirming* 24 N. Y. Suppl. 661)].

Tennessee.— Linnville *v.* Darby, 1 Baxt. 306; Taylor *v.* Walker, 1 Heisk. 734; Valentine *v.* Cooley, Meigs 613, 33 Am. Dec. 166.

See 27 Cent. Dig. tit. "Infants," §§ 258–260.

Where infants and adults are joined as defendants, the fact that the judgment is void as against the infants for lack of service does not render it void as against the adults. Valentine *v.* Cooley, Meigs (Tenn.) 613, 33 Am. Dec. 166.

16. *Georgia.*— Boardman *v.* Taylor, 66 Ga. 638.

Kentucky.— Benningfield *v.* Reed, 8 B. Mon. 102; U. S. Bank *v.* Cockran, 9 Dana 395; Bustard *v.* Gates, 4 Dana 429.

New York.— Sloane *v.* Martin, 145 N. Y. 524, 40 N. E. 217, 45 Am. St. Rep. 630, 28 L. R. A. 347 [*affirming* 77 Hun 249, 28 N. Y. Suppl. 332 (*affirming* 24 N. Y. Suppl. 661)], proceedings *in rem*. But see Pinckney *v.* Smith, 26 Hun 524.

North Carolina.—Sumner *v.* Sessoms, 94 N. C. 371; Hare *v.* Hollomon, 94 N. C. 14.

Ohio.— Robb *v.* Irwin, 15 Ohio 689.

Texas.— Alston *v.* Emmerson, 83 Tex. 231, 18 S. W. 566, 29 Am. St. Rep. 639; Wheeler *v.* Ahrenbeak, 54 Tex. 535; McAnear *v.* Epperson, 54 Tex. 220, 38 Am. Rep. 625; Moore *v.* Prince, 5 Tex. Civ. App. 352, 23 S. W. 1113.

United States.— Manson *v.* Duncanson, 166 U. S. 533, 17 S. Ct. 647, 41 L. ed. 1105, proceeding to subject non-resident infant's real estate to debts of ancestor.

See 27 Cent. Dig. tit. "Infants," §§ 258–260.

A writ of error by infants after attaining their majority, to reverse a judgment rendered against them without service of process, is a direct, and not a collateral, attack. Moore *v.* Prince, 5 Tex. Civ. App. 352, 23 S. W. 1113.

Where an infant was neither served nor represented by guardian ad litem properly appointed a judgment against him is void. Hulsewede *v.* Churchman, 111 Ky. 51, 63 S. W. 1, 23 Ky. L. Rep. 487; Gay *v.* Grant, 101 N. C. 206, 8 S. E. 99, 106.

17. *Arkansas.*— Johnson *v.* Trotter, (1891) 15 S. W. 1025.

Kentucky.—Cheatham *v.* Whitman, 86 Ky. 614, 65 S. W. 595, 9 Ky. L. Rep. 761; Wornack *v.* Loar, 11 S. W. 438, 11 Ky. L. Rep. 6.

Mississippi.— Gibson *v.* Currier, 83 Miss. 234, 35 So. 315, 102 Am. St. Rep. 442; Saxon *v.* Ames, 47 Miss. 565; Johnson *v.* McCabe, 42 Miss. 255; Ingersoll *v.* Ingersoll, 42 Miss. 155.

New York.— Hogle *v.* Hogle, 49 Hun 313, 2 N. Y. Suppl. 172.

North Carolina.— Roseman *v.* Roseman, 127 N. C. 494, 37 S. E. 518; Ward *v.* Lowndes, 96 N. C. 367, 2 S. E. 591.

Ohio.— Keys *v.* McDonald, 1 Handy 287, 12 Ohio Dec. (Reprint) 146.

South Carolina.— Foster *v.* Crawford, 57 S. C. 551, 36 S. E. 5. See also Barrett *v.* Moise, 61 S. C. 569, 39 S. E. 755.

Washington.— Morrison *v.* Morrison, 25 Wash. 466, 65 Pac. 779.

guardian,[18] or person having custody of the infant[19] or with whom he resides,[20] if such person be resident within the state.[21] Ordinarily, however, the requirement of such service is limited to cases where the infant is under the age of four-

United States.— Hatch *v.* Ferguson, 57 Fed. 966.

See 27 Cent. Dig. tit. "Infants," §§ 261–263.

Service on mother.— Where an infant defendant of tender years has no general guardian, service of subpœna may be made upon his mother, who is also the trustee of his estate. Peck *v.* Adsit, 98 Mich. 639, 57 N. W. 804. But the service of process, when issued against infants under fourteen years of age, is not valid when made on them and their mother, unless it appears in and from the affidavit of the bailiff that no father or guardian of the infants could be found. Lloyd *v.* McCauley, 14 B. Mon. (Ky.) 535.

Service on the mother and stepfather of an infant under fourteen years of age, residing with them, authorizes and requires the appointment of a guardian *ad litem.* Irwin *v.* Irwin, 57 Ala. 614.

Summons running to parent as such.— Where a summons substantially conforming to the statute was served on defendant, who was a minor under fourteen; and a similar summons, but running to D as the minor's mother, was served on her, this was sufficient to give the court jurisdiction of the minor. Kalb *v.* German Sav., etc., Soc., 25 Wash. 349, 65 Pac. 559.

Unchristened infant.— Under Ky. Civ. Code, § 52, requiring the summons to be served on the father of an infant under fourteen years of age, service on the father of several defendants under that age is good as to an unchristened infant described in the summons, where a guardian *ad litem* is appointed and defense is made for all, although the father is a party plaintiff, and the sheriff's return mentions the other children, but does not mention such infant. Donaldson *v.* Stone, 11 S. W. 462, 11 Ky. L. Rep. 27. By the act of Jan. 6, 1882, special provision is made for the case where one of the persons on whom summons for an infant defendant must be served is a plaintiff.

Where the father is plaintiff in an action against his infant son, service of process on the father as the son's representative is insufficient to give jurisdiction over his person. Isert *v.* Davis, 32 S. W. 294, 17 Ky. L. Rep. 686; Uhl *v.* Loughran, 4 N. Y. Suppl. 827.

18. *Arkansas.*— Johnson *v.* Trotter, (1891) 15 S. W. 1025.

California.— Gray *v.* Palmer, 9 Cal. 616.

Illinois.— Whitney *v.* Porter, 23 Ill. 445.

Kentucky.— Cheatham *v.* Whitman, 86 Ky. 614, 6 S. W. 595, 9 Ky. L. Rep. 761; Wornack *v.* Loar, 11 S. W. 438, 11 Ky. L. Rep. 6.

Mississippi.— Gibson *v.* Currier, 83 Miss. 234, 35 So. 315, 102 Am. St. Rep. 442; Wells *v.* Smith, 44 Miss. 296; Johnson *v.* McCabe, 42 Miss. 255; Ingersoll *v.* Ingersoll, 42 Miss. 155.

New York.— Hogle *v.* Hogle, 49 Hun 313, 2 N. Y. Suppl. 172.

North Carolina.— Roseman *v.* Roseman, 127 N. C. 494, 37 S. E. 518; Ward *v.* Lowndes, 96 N. C. 367, 2 S. E. 56.

Ohio.— Keys *v.* McDonald, 1 Handy 287, 12 Ohio Dec. (Reprint) 146.

South Carolina.— See Barrett *v.* Moise, 61 S. C. 569, 39 S. E. 755.

Tennessee.— Combs *v.* Young, 4 Yerg. 218, 26 Am. Dec. 225.

United States.— Hatch *v.* Ferguson, 57 Fed. 966.

See 27 Cent. Dig. tit. "Infants," §§ 261–263; and GUARDIAN AND WARD.

In case of scire facias sur mortgage against an infant, service need not be upon the guardian or next of kin as provided by Pa. Act (1836), § 83, in case defendant in a real action is an infant; section 36 providing that where a writ of scire facias may be issued service shall be as in case of summons in a personal action. Kennedy *v.* Baker, 159 Pa. St. 146, 28 Atl. 252.

19. *Arkansas.*— Johnson *v.* Trotter, (1891) 15 S. W. 1025.

Illinois.— Whitney *v.* Porter, 23 Ill. 445.

Kentucky.— Wornack *v.* Loar, 11 S. W. 438, 11 Ky. L. Rep. 6.

Mississippi.— Saxon *v.* Ames, 47 Miss. 565.

North Carolina.— Ward *v.* Lowndes, 96 N. C. 367, 2 S. E. 591.

Ohio.— Keys *v.* McDonald, 1 Handy 287, 12 Ohio Dec. (Reprint) 146.

South Carolina.— Foster *v.* Crawford, 57 S. C. 551, 36 S. E. 5.

United States.— Hatch *v.* Ferguson, 57 Fed. 966.

See 27 Cent. Dig. tit. "Infants," §§ 261–263.

Presumption as to control.—Where, in an action against infants under fourteen, process has been served upon their stepfather, it should be presumed that he had the care and control of them. Louisville Industrial Exposition *v.* Johnson, 8 Ky. L. Rep. 328.

An administrator having no more control over an infant than to pay for his board and schooling did not have such control as was contemplated by the Kentucky code for the purpose of service of process. Messmore *v.* Stone, 6 Ky. L. Rep. 598.

Where the person having charge of the infant is also under age but has arrived at years of discretion service upon such person is sufficient. Lawrence *v.* Conner, 14 S. W. 77, 12 Ky. L. Rep. 86.

20. Hatch *v.* Ferguson, 57 Fed. 966.

21. Johnson *v.* McCabe, 42 Miss. 255; Ingersoll *v.* Ingersoll, 42 Miss. 155; Ward *v.* Lowndes, 96 N. C. 367, 2 S. E. 591. See also Gibson *v.* Currier, 83 Miss. 234, 35 So. 315, 102 Am. St. Rep. 442.

teen years.[22] Where such a requirement exists, service upon the infant personally is not alone sufficient,[23] unless none of the other persons against whom process is required to be served is in existence or can be found,[24] and it has been held that a judgment rendered without service upon such persons is void.[25] Service of process upon such persons is usually in addition to service upon the infant;[26] but in a few states personal service upon infants under fourteen years of age is or may be dispensed with, service upon the parent, guardian, or person having custody of the infant being in such case sufficient.[27] The object of the service on

22. *California.*— Gray *v.* Palmer, 9 Cal. 616.

Colorado.— Filmore *v* Russell, 6 Colo. 171.

Kentucky.— Cheatham *v.* Whitman, 86 Ky. 614, 6 S. W. 595, 9 Ky. L. Rep. 761.

New York.— Hogle *v.* Hogle, 49 Hun 313, 2 N. Y. Suppl. 172.

North Carolina.— Roseman *v.* Roseman, 127 N. C. 494, 37 S. E. 518; Ward *v.* Lowndes, 96 N. C. 367, 2 S. E. 591.

See 27 Cent. Dig. tit. "Infants," §§ 261–263.

A petition stating generally that defendants are minors does not raise any presumption that they are over fourteen, so as to make personal service on them sufficient. Morse *v.* Grames, 3 Ohio Dec. (Reprint) 67, 2 Wkly. L. Gaz. 404, where the court said that the better practice was to state the age in the petition, and it should also be stated in the summons so that the officer might be advised in what mode he must serve the process.

When the record does not show the ages of infants the sufficiency of the return of service should be tested on the assumption that they were under the age of fourteen. Melcher *v.* Schluter, 5 Nebr. (Unoff.) 445, 98 N. W. 1082.

23. Wells *v.* American Mortg. Co., 109 Ala. 430, 20 So. 136; Whitney *v.* Porter, 23 Ill. 445; Cox *v.* Story, 80 Ky. 64; Bedell *v.* Lewis, 4 J. J. Marsh. (Ky.) 562; Hatch *v.* Ferguson, 57 Fed. 966.

24. Cocks *v.* Simmons, 57 Miss. 183; Keys *v.* McDonald, 1 Handy (Ohio) 287, 12 Ohio Dec. (Reprint) 146. See also Gibson *v.* Currier, 83 Miss. 234, 35 So. 315, 102 Am. St. Rep. 442.

In Kentucky if all of the persons named by statute on whom process should be served for an infant under fourteen are dead or are plaintiffs in the action it is the duty of the court to appoint a guardian *ad litem* on whom summons shall be served. See Isert *v.* Davis, 32 S. W. 294, 17 Ky. L. Rep. 686: Booker *v.* Kennerly, 96 Ky. 415, 29 S. W. 323, 15 Ky. L. Rep. 537; Tyler *v.* Jewell, 11 S. W. 25, 10 Ky. L. Rep. 887.

25. Whitney *v.* Porter, 23 Ill. 445; Wornack *v.* Loar, 11 S. W. 438, 11 Ky. L. Rep. 6; Gibson *v.* Currier, 83 Miss. 234, 35 So. 315; Bellamy *v.* Guhl, 62 How. Pr. (N. Y.) 460. *Contra,* Roseman *v.* Roseman, 127 N. C. 494, 37 S. E. 518.

A subsequent service cannot validate a judgment of foreclosure and sale, void by reason of failure to serve process upon the mother or general guardian of defendant, the father being dead. Bellamy *v.* Guhl, 62 How. Pr. (N. Y.) 460.

Appearance by guardian.—Where an infant under fourteen was a defendant, the fact that process was served on him instead of on his guardian, as required by statute, did not invalidate the proceedings, where his guardian appeared and answered for him. Bell *v.* Smith, 71 S. W. 433, 24 Ky. L. Rep. 1328, 72 S. W. 1107, 24 Ky. L. Rep. 2095.

26. *Arkansas.*— Johnson *v.* Trotter, (1891) 15 S. W. 1025.

California.— Fanning *v.* Foley, 99 Cal. 336, 33 Pac. 1098.

New York.— Hogle *v.* Hogle, 49 Hun 313, 2 N. Y. Suppl. 172.

North Carolina.— Roseman *v.* Roseman, 127 N. C. 494, 37 S. E. 518; Ward *v.* Lowndes, 96 N. C. 367, 2 S. E. 591.

South Carolina.— Faust *v.* Faust, 31 S. C. 576, 10 S. E. 262. *Compare* Walker *v.* Veno, 6 S. C. 459.

Tennessee.— Combs *v.* Young, 4 Yerg. 218, 26 Am. Dec. 225.

See 27 Cent. Dig. tit. "Infants," §§ 261–263.

27. Herring *v.* Ricketts, 101 Ala. 340, 13 So. 502; Hibbler *v.* Sprowl, 71 Ala. 50; McIntosh *v.* Atkinson, 63 Ala. 241; Bondurant *v.* Sibley, 37 Ala. 565 (holding personal service on an infant three or four years of age irregular); Walker *v.* Hallett, 1 Ala. 379; Lawrence *v.* Conner, 14 S. W. 77, 12 Ky. L. Rep. 86; Erskine *v.* Adams, 24 Pa. Co. Ct. 382.

The infant must be shown to be under fourteen years of age or else be served with process. Schuhart *v.* Clark, 1 S. W. 479, 8 Ky. L. Rep. 342.

In Alabama service on the surviving parent of infant defendants, for them, is sufficient, whether they are more or less than fourteen years of age. Sanders *v.* Godley, 23 Ala. 473.

Under the probate court law of Mississippi service on the guardian is sufficient. Saxon *v.* Ames, 47 Miss. 565.

Service on the official guardian in a proceeding by petition under the Quieting Titles Act is good service upon infants who are required to be notified of the proceedings. *Re* Murray, 13 Ont. Pr. 367.

Service upon the father-in-law of an infant is good. Thompson *v.* Jones, 8 Ves. Jr. 141, 32 Eng. Reprint 306.

Where a parent and child are both made parties defendant to a bill the mere service of subpœna on the parent is insufficient to bring the infant before the court. Hodges *v.* Wise, 16 Ala. 509.

the parent or guardian being simply notice, where there are several infant defendants, it is not necessary to serve the parent or guardian with a copy of the summons for each of the infants, but one copy served upon him is sufficient;[28] and it has been held that where the parent is plaintiff he need not be served,[29] nor where the parent, guardian, etc., is a co-defendant is it necessary that he should be served with a copy of the summons in addition to that served upon him as a defendant in his own right.[30]

4. Service on Guardian Ad Litem. The guardian *ad litem* should be served with the summons and complaint,[31] and with notice of all proceedings in the case in which notice to parties is required.[32]

5. Method of Serving[33] — a. In General. Statutory requirements as to the mode of serving process on infants must be strictly complied with.[34] An infant is usually to be served with process in the same manner as an adult,[35] and hence personal service is required when he is within the jurisdiction.[36] It is sometimes

28. Huggins *v.* Dabbs, 57 Ark. 628, 22 S. W. 563; Morrison *v.* Morrison, 25 Wash. 466, 65 Pac. 779. See also Richardson *v.* Loupe, 80 Cal. 490, 22 Pac. 227; Donaldson *v.* Stone, 11 S. W. 462, 11 Ky. L. Rep. 27.

29. Brown *v.* Lawson, 51 Cal. 615; Kennedy *v.* Williams, 59 S. C. 378, 38 S. E. 8. *Compare* Morrison *v.* Morrison, 25 Wash. 466, 65 Pac. 779.

30. Cheatham *v.* Whitman, 86 Ky. 614, 6 S. W. 595, 9 Ky. L. Rep. 761; Lawrence *v.* Conner, 14 S. W. 77, 12 Ky. L. Rep. 86; Louisville Industrial Exposition *v.* Johnson, 8 Ky. L. Rep. 328; Emmer *v.* Kelly, 23 La. Ann. 763 (holding that upon partition by heirs, one citation addressed to the surviving wife in her individual capacity, and as a natural tutrix of her minor children, is sufficient); McIlvoy *v.* Alsop, 45 Mass. 365. See also Donaldson *v.* Stone, 11 S. W. 462, 11 Ky. L. Rep. 27; Faust *v.* Faust, 31 S. C. 576, 10 S. E. 262. *Contra*, Hodges *v.* Wise, 16 Ala. 509; Helms *v.* Chadbourne, 45 Wis. 60.

Amendment of process.— A prayer in a cross bill filed after a decree in a foreclosure suit was held void because the record did not show that a minor defendant in that suit had no father, mother, or guardian, or that any such person was served with process for him, that the process in such suit be amended so as to show that such minor did have a father, and that the father was served as defendant on his own account, was properly denied. Gibson *v.* Currier, 83 Miss. 234, 35 So. 315, 102 Am. St. Rep. 442 [*distinguishing* McIlvoy *v.* Alsop, 45 Miss. 365].

31. Kennedy *v.* Arthur, 11 N. Y. Suppl. 661, 18 N. Y. Civ. Proc. 390; Moore *v.* Gidney, 75 N. C. 34. *Compare* Jones *v.* Drake, 3 N. C. 237.

Guardian should be served with subpœna in chancery cases. McDermott *v.* Thompson, 29 Fla. 299, 10 So. 584.

Service on guardian before appointment unauthorized.—Shaefer *v.* Gates, 2 B. Mon. (Ky.) 453, 38 Am. Dec. 164.

32. Clarke *v.* Gilmanton, 12 N. H. 515; Strayer *v.* Long, 83 Va. 715, 3 S. E. 372.

Service of a subpœna to hear judgment must be on the guardian *ad litem* and not on the infant. Freeman *v.* Carnock, Dick. 439, 21 Eng. Reprint 340; Taylor *v.* Atwood, 2 P. Wms. 643, 24 Eng. Reprint 897.

33. Curative statutes.—Defective service on infant defendants in partition proceedings is cured by N. C. Code, § 387, providing that decrees in all actions pending after March 14, 1879, in which infant defendants were not served with process, shall be as valid as if personal service was had on such infants. Smith *v.* Gray, 116 N. C. 311, 21 S. E. 200.

34. Dohms *v.* Mann, 76 Iowa 723, 39 N. W. 823; Melcher *v.* Schluter, 5 Nebr. (Unoff.) 445, 98 N. W. 1082; Helms *v.* Chadbourne, 45 Wis. 60.

The legislature has plenary power over the inheritance of an infant and can prescribe the method by which jurisdiction of the infant can be acquired. Price *v.* Winter, 15 Fla. 66.

An adult defendant cannot object that his infant co-defendant was not properly served. *In re* Schwartz, 14 Pa. St. 42.

35. De la Hunt *v.* Holderbaugh, 58 Ind. 285; Hawkins *v.* Hawkins, 28 Ind. 66; Pugh *v.* Pugh, 9 Ind. 132; Martin *v.* Starr, 7 Ind. 224; Hough *v.* Canby, 8 Blackf. (Ind.) 301; Westmeyer *v.* Gallenkamp, 154 Mo. 28, 55 S. W. 231, 77 Am. St. Rep. 747; Fischer *v.* Siekmann, 125 Mo. 165, 28 S. W. 435; Kansas City, etc., R. Co. *v.* Campbell, 62 Mo. 585; Baumgartner *v.* Guessfeld, 38 Mo. 36; Ward *v.* Lowndes, 96 N. C. 367, 2 S. E. 591; Erskine *v.* Adams, 9 Pa. Dist. 444, 24 Pa. Co. Ct. 382, infants over fourteen.

36. Johnson *v.* Trotter, (Ark. 1891) 15 S. W. 1025; Girty *v.* Logan, 6 Bush (Ky.) 8; Hogle *v.* Hogle, 49 Hun (N. Y.) 313, 2 N. Y. Suppl. 172; Faust *v.* Faust, 31 S. C. 576, 10 S. E. 262.

In Illinois, in a statutory proceeding for partition, service may be made, by reading, upon the guardians of infant defendants; but such service is insufficient, and summons must be served upon such infant defendants personally, in a proceeding for partition by a bill in chancery. Nichols *v.* Mitchell, 70 Ill. 258.

Service by delivering a copy of the summons and a certified copy of the complaint to an infant over fourteen years of age personally is sufficient. Brown *v.* Lawson, 51 Cal. 615.

required that infants shall be served in the presence of the legal guardian, or of the person who has the present care and custody of them.[37]

b. Non-Resident, Unknown, or Absent Infants. Non-resident or absent infants or unknown infant parties may be served by publication the same as adults,[38] or service upon them without the state may be ordered.[39] In such case there must be a previous affidavit of non-residence,[40] and service by publication upon an insufficient affidavit will not give jurisdiction.[41] There must be an order for such publication or service,[42] and publication must conform to the requirements of the law in such cases.[43]

c. Substituted Service. A statutory provision for substituted service upon defendants residing in the state who cannot be found or avoid or evade service applies to infant as well as to adult defendants.[44] In a partition suit an order allowing substitutional service of the bill on the official guardian of an infant

Personal service on an infant lunatic interested in an action for partition is not necessary. Rogers *v.* McLean, 11 Abb. Pr. (N. Y.) 440.

Where infant very young.— Where an infant defendant in partition was only two years old, service upon the mother, in the presence of the infant, of two duly certified copies of the notice, one for the infant and the other for the mother as his natural guardian, was sufficient. Havens *v.* Drake, 43 Kan. 484, 23 Pac. 621.

37. McDermott *v.* Thompson, 29 Fla. 299, 10 So. 584; Kellett *v.* Rathbun, 4 Paige (N. Y.) 102.

38. *Alabama.*— Clark *v.* Gilmer, 28 Ala. 265; Walker *v.* Hallett, 1 Ala. 379.

Georgia.—Gefken *v.* Graef, 77 Ga. 340.

Illinois.— Hale *v.* Hale, 146 Ill. 227, 33 N. E. 858, 20 L. R. A. 247.

Iowa.— Williams *v.* Westcott, 77 Iowa 332, 42 N. W. 314, 14 Am. St. Rep. 287.

Kansas.— Walkenhorst *v.* Lewis, 24 Kan. 420.

Nebraska.— Davis *v.* Huston, 15 Nebr. 28, 16 N. W. 820.

New York.— Ingersoll *v.* Mangam, 84 N. Y. 622 [*affirming* 24 Hun 202]; Wheeler *v.* Scully, 50 N. Y. 667; Syracuse Sav. Bank *v.* Burton, 6 N. Y. Civ. Proc. 216; Ontario Bank *v.* Strong, 2 Paige 301.

United States.— Bryan *v.* Kennett, 113 U. S. 179, 28 L. ed. 908.

Canada.— Duffy *v.* O'Connor, 1 Ch. Chamb. (U. C.) 393.

See 27 Cent. Dig. tit. "Infants," § 265.

But see Jones *v.* Mason, 4 N. C. 561.

An order of distribution is not conclusive as to a non-resident infant legatee who has no notice of the proceeding. White's Estate, 163 Pa. St. 388, 30 Atl. 192.

There is no presumption that non-resident infants have a guardian residing in the state. Davis *v.* Huston, 15 Nebr. 28, 16 N. W. 820.

In determining the residence of an infant, under N. Y. Code Civ. Proc. § 438, allowing service of summons by publication, that of the mother having the care, custody, and control of the child must be regarded as that of the child. Syracuse Sav. Bank *v.* Burton, 6 N. Y. Civ. Proc. 216.

In the District of Columbia the appointment of a guardian *ad litem* of minors by commissioners appointed by the court in a proceeding for the sale of a decedent's land and the taking of an answer by such guardian is recognized as a substitute for service on non-resident infant defendants. Duncanson *v.* Manson, 3 App. Cas. 260. So also in Maryland. See Snowden *v.* Snowden, 1 Bland (Md.) 550.

Causes removed to federal courts.— See Woolridge *v.* McKenna, 8 Fed. 650.

Under the Missouri Act of 1825 no notice by publication to non-resident infant defendants in partition was necessary when the court appointed a guardian *ad litem* who appeared and answered plaintiff's petition. Hite *v.* Thompson, 18 Mo. 461.

Service by publication generally see PROCESS.

39. See Merritt's Will, 5 Dem. Surr. (N. Y.) 544.

Time of service.— See Merritt's Will, 5 Dem. Surr. (N. Y.) 544.

40. People *v.* Stanley, 6 Ind. 410. See also Davis *v.* Huston, 15 Nebr. 28, 16 N. W. 820.

How affidavit attacked.— See Lawson *v.* Moorman, 85 Va. 880, 9 S. E. 150.

41. Claypoole *v.* Houston, 12 Kan. 324.

When too late to question affidavit.— See Syracuse Sav. Bank *v.* Burton, 6 N. Y. Civ. Proc. 216, after appearance, answer and issues determined.

42. Woods *v.* Montevallo Coal, etc., Co., 107 Ala. 364, 18 So. 108; Moulton *v.* Moulton, 47 Hun (N. Y.) 606, 13 N. Y. Civ. Proc. 420.

Record must show that order of publication was made. Woods *v.* Montevallo Coal, etc., Co., 107 Ala. 364, 18 So. 108.

Sending copy of order to mother.— See Clark *v.* Gilmer, 28 Ala. 265, not good sent to Elizabeth, when record shows mother's name to be Mary.

43. McDermaid *v.* Russell, 41 Ill. 489; Syracuse Sav. Bank *v.* Burton, 6 N. Y. Civ. Proc. 216.

Record must show that publication was regularly made. Coster *v.* Georgia Bank, 24 Ala. 37.

44. Steinhardt *v.* Baker, 163 N. Y. 410, 57 N. E. 629, 8 N. Y. Annot. Cas. 13 [*affirming* 25 N. Y. App. Div. 197, 49 N. Y. Suppl. 357

defendant, resident without the jurisdiction of the court, has been granted on the ground that the share of the infant in the lands in question was very small and substitutional service would be inexpensive.[45]

6. ACCEPTANCE OF SERVICE. An infant cannot accept service so as to bind himself,[46] nor can the parent or guardian accept service for the infant,[47] although he may accept service for himself in an action against the infant.[48]

7. RETURN. The return should show that the process was duly executed by service upon the infant.[49] Service upon the parent, guardian, or person having custody of the infant should also be shown where service on such person is required,[50] and the return should show that the person served was the proper person under the statute.[51] If service is not made on such person the return should show that there is no such person in the county,[52] or to be found,[53] or, it has been held, that the infant is of an age when service on him alone is sufficient.[54] The legal effect of a return of *nihil habet* in an action of partition in which a minor is defendant is that there was no one in the county upon whom service of

(*affirming* 20 Misc. 470, 46 N. Y. Suppl. 707)].

The act of a parent in preventing service of process on her infant children residing with her constitutes an evasion of service within N. Y. Laws (1853), providing for substituted service when defendant evades service. Steinhardt *v.* Baker, 163 N. Y. 410, 57 N. E. 629, 8 N. Y. Annot. Cas. 13 [*affirming* 25 N. Y. App. Div. 197, 49 N. Y. Suppl. 357 (*affirming* 20 Misc. 470, 46 N. Y. Suppl. 707)]. See also Lloyd *v.* Lloyd, 11 L. J. Ch. 109, 6 Jur. 313.

Service on mother.— A substituted service on infants residing with their mother was sufficient, where the process was served on her, although the order directing such service, which followed the statute literally, did not, in terms, require service on her. Steinhardt *v.* Baker, 163 N. Y. 410, 57 N. E. 629, 8 N. Y. Annot. Cas. 13 [*affirming* 25 N. Y. App. Div. 197, 49 N. Y. Suppl. 357 (*affirming* 20 Misc. 470, 46 N. Y. Suppl. 707)].

Construction of order.— An order requiring a substituted service on an infant, which directs it to be made by leaving a copy at the infant's residence, with a person of proper age, or, if such a person cannot be found, by affixing the same to the outer or other door of said defendant's residence, and by depositing another copy thereof, addressed to defendant, in the post-office, only requires a copy to be deposited in the post-office in case service cannot be made by leaving a copy at defendant's house with a person of proper age. Overton *v.* Barclay, 35 N. Y. Suppl. 326.

45. Weatherhead *v.* Weatherhead, 9 Ont. Pr. 96.

46. *Mississippi.*— Winston *v.* McLendon, 43 Miss. 254.

Missouri.— Kansas City, etc., R. Co. *v.* Campbell, 62 Mo. 585.

North Carolina.— Bass *v.* Bass, 78 N. C. 374.

South Carolina.— Whitesides *v.* Barber, 24 S. C. 373; Riker *v.* Vaughan, 23 S. C. 187; Finley *v.* Robertson, 17 S. C. 435.

Texas.— Wheeler *v.* Ahrenbeak, 54 Tex. 535.

See 27 Cent. Dig. tit. "Infants," § 266.

47. Kansas City, etc., R. Co. *v.* Campbell, 62 Mo. 585. See also Morgan *v.* Morgan, 45 S. C. 323, 23 S. E. 64.

Acceptance by guardian ad litem is almost voidable and cannot be impeached collaterally. Dwyer *v.* Wright, 14 Pa. Co. Ct. 406.

48. Barrett *v.* Moise, 61 S. C. 569, 39 S. E. 755.

Indorsement subsequent to day of service.— Service of summons personally on infant defendants under fourteen years of age in a suit by their mother as sole plaintiff against them as defendants for partition, and acceptance of service of summons by the mother as natural protector with whom the infants reside, there being no general or testamentary guardian, is good in the absence of fraud, although the acknowledgment was indorsed on a day later than the service. Foster *v.* Crawford, 57 S. C. 551, 36 S. E. 5.

49. Fischer *v.* Siekmann, 125 Mo. 165, 28 S. W. 435.

50. Ester *v.* Bridgforth, 114 Ala. 221, 21 So. 512; Erwin *v.* Carson, 54 Miss. 282; Winston *v.* McLendon, 43 Miss. 254; Mullins *v.* Sparks, 43 Miss. 129.

A return merely of service on the infant negatives the presumption that service was made upon any other person. Beverly *v.* Perkins, 1 Duv. (Ky.) 251.

Form of return held sufficient see Parker *v.* Starr, 21 Nebr. 680, 33 N. W. 424.

Impeachment of return.— See Levan *v.* Millholland, 114 Pa. St. 49, 7 Atl. 194.

51. See Allen *v.* Saylor, 14 Iowa 435.

Returns not showing service on proper person see Allen *v.* Saylor, 14 Iowa 435; Jenkins *v.* Crofton, 9 S. W. 406, 10 Ky. L. Rep. 456.

Return held sufficient see Rodgers *v.* Rodgers, 31 S. W. 139, 17 Ky. L. Rep. 358.

52. Erwin *v.* Carson, 54 Miss. 282.

Return need not show that there is no such person in the state. Erwin *v.* Carson, 54 Miss. 282 [*overruling* Ingersoll *v.* Ingersoll, 42 Miss. 155].

53. Keys *v.* McDonald, 1 Handy (Ohio) 287, 12 Ohio Dec. (Reprint) 146.

54. Keys *v.* McDonald, 1 Handy (Ohio) 287, 12 Ohio Dec. (Reprint) 146.

the writ against the minor could be made.[55] The return may be amended so as to show that proper service was actually made.[56]

8. Recitals in Record as to Service. The record should affirmatively show that process was duly served on the infant,[57] and a recital of service in the record is presumed to be true;[58] but an infant defendant is at liberty to show that the service was not in fact made.[59] If the record shows service on the infant, but does not show with whom he was residing, it will be presumed for the purpose of sustaining the jurisdiction that he was residing with his father.[60]

9. Presumption of Service. Where a court has undertaken to pass upon the rights of infants who were represented by guardian *ad litem* it will be presumed in a collateral proceeding that they were brought properly before the court.[61]

10. Waiver of Irregularities. It has been held that an irregularity in the service of summons is waived when defendant appears and answers, even though he be an infant appearing and answering by guardian *ad litem*.[62]

11. Waiver of Process.[63] Where personal service upon an infant is required he cannot waive such service,[64] nor can his parents[65] or guardian[66] waive service for him; but when service upon the general guardian is all that is required, the guardian may waive such service,[67] or a guardian *ad litem* may waive service upon himself.[68] Where a writ is sued out against and served on an infant, who, after he arrives at majority, appears and pleads to the action, he cannot afterward object that the writ was not properly served by reason of his minority.[69]

12. Arrest in Civil Actions. In North Carolina it has been held that an infant who has been arrested in a civil suit should be discharged from custody on motion, upon the fact of infancy being shown to the court.[70] But in Pennsylvania it has been held that where there is no charge of fraud, the court will not discharge a defendant summarily on the ground of infancy; but will leave him to

55. Girard L. Ins., etc., Co. *v.* Farmers', etc., Nat. Bank, 57 Pa. St. 388.

56. Foster *v.* Crawford, 57 S. C. 551, 36 S. E. 5.

Omitted name may be supplied. Tyler *v.* Jewell, 11 S. W. 25, 10 Ky. L. Rep. 887.

Even after a number of years, a sheriff may be allowed to amend his return of service of a chancery summons against infants, no intervening rights being injuriously affected by the amendment. Spellmyer *v.* Gaff, 112 Ill. 29, 1 N. E. 170.

57. Rowland *v.* Jones, 62 Ala. 322; Carver *v.* Carver, 64 Ind. 194; Abdil *v.* Abdil, 26 Ind. 287; Martin *v.* Starr, 7 Ind. 224; Sutton *v.* Louisville, 5 Dana (Ky.) 28; St. Clair *v.* Smith, 3 Ohio 355.

Sufficiency of record.—Boyd *v.* Roane, 49 Ark. 397, 5 S. W. 704; Murphy *v.* Shea, 143 N. Y. 78, 37 N. E. 675; Bosworth *v.* Vandewalker, 53 N. Y. 597; Sloane *v.* Martin, 77 Hun (N. Y.) 249, 28 N. Y. Suppl. 332 [*affirming* 24 N. Y. Suppl. 66, and *affirmed* in 145 N. Y. 524, 40 N. E. 217, 45 Am. St. Rep. 630, 28 L. R. A. 347]; Allen *v.* Allen, 48 S. C. 566, 26 S. E. 786; Lyle *v.* Horstman, (Tex. Civ. App. 1894) 25 S. W. 802.

58. Smith *v.* Reid, 134 N. Y. 568, 31 N. E. 1082 [*affirming* 11 N. Y. Suppl. 739, 19 N. Y. Civ. Proc. 363]; Sledge *v.* Elliott, 116 N. C. 712, 21 S. E. 797.

59. Smith *v.* Reid, 134 N. Y. 568, 31 N. E. 1082 [*affirming* 11 N. Y. Suppl. 739, 19 N. Y. Civ. Proc. 363].

60. Brown *v.* Lawson, 51 Cal. 615, where the father was plaintiff and hence service on him was unnecessary.

61. Brackenridge *v.* Dawson, 7 Ind. 383 (where the record showed that process was ordered against the infants); Hopper *v.* Fisher, 2 Head (Tenn.) 253 (although service of process does not appear in the record).

62. Thistle *v.* Thistle, 66 How. Pr. (N. Y.) 472; Turner *v.* Douglass, 72 N. C. 127. See also Syracuse Sav. Bank *v.* Burton, 6 N. Y. Civ. Proc. 216; *In re* Schwartz, 14 Pa. St. 42. The defect in a warning order against a minor defendant in being not strictly definite as to where defendant was warned to appear is cured by appearance and answer by his guardian *ad litem*. Williams *v.* Ewing, 31 Ark. 229.

63. Appearance by general guardian as a waiver of process see Guardian and Ward.

64. Armstrong *v.* Wyandotte Bridge Co., McCahon (Kan.) 167; Phelps *v.* Heaton, 79 Minn. 476, 82 N. W. 990; Winston *v.* McLendon, 43 Miss. 254.

Infant cannot confer jurisdiction by voluntry appearance. Phelps *v.* Heaton, 79 Minn. 476, 82 N. W. 990. See also *In re* Bartel, Myr. Prob. (Cal.) 130.

65. See Gray *v.* Palmer, 9 Cal. 616, holding that a failure to mail a notice to an infant is not cured by his mother's appearance in her own behalf.

66. Greenman *v.* Harvey, 53 Ill. 386; Cowan *v.* Anderson, 7 Coldw. (Tenn.) 284.

67. Scott *v.* Porter, 2 Lea (Tenn.) 224; Masson *v.* Swan, 6 Heisk. (Tenn.) 450; Cowan *v.* Anderson, 7 Coldw. (Tenn.) 284.

68. Whitaker *v.* Patton, 1 Port. (Ala.) 9.

69. Hillegass *v.* Hillegass, 5 Pa. St. 97.

70. Henry *v.* Smith, 3 N. C. 54.

plead it,[71] and that an infant may be arrested on a capias ad respondendum for torts, and in such case cannot execute a bond, but must either submit to imprisonment or, by the aid of a next friend, appear and execute a bond.[72]

G. Affidavit by Next Friend of Right to Sue. In some jurisdictions a person suing as the next friend of an infant is required to file an affidavit showing his right to sue in that capacity.[73]

H. Appearance and Representation by Attorney. An infant cannot appear or plead by attorney instead of guardian *ad litem*.[74] But the rule

71. Clemson *v.* Bush, 3 Binn. (Pa.) 413.

72. Vincent *v.* Warner, 16 Phila. (Pa.) 87.

73. Spicer *v.* Holbrook, 66 S. W. 180, 23 Ky. L. Rep. 1812; Covington, etc., Bridge Co. *v.* Brennan, 16 Ky. L. Rep. 126.

Filing nunc pro tunc.— Bogert *v.* Bogert, 45 Barb. (N. Y.) 121.

When failure to file affidavit not jurisdictional.— See Henning *v.* Barringer, 10 S. W. 136, 10 Ky. L. Rep. 674, construing Ky. Code, § 37.

74. *Arkansas.*—Williams *v.* Ewing, 31 Ark. 229; Hodges *v.* Frazier, 31 Ark. 58.

California.—McCloskey *v.* Sweeney, 66 Cal. 53, 4 Pac. 943.

Connecticut.— Clark *v.* Turner, 1 Root 200.

Georgia.— Nicholson *v.* Wilborn, 13 Ga. 467.

Illinois.— Bonnell *v.* Holt, 89 Ill. 71; Kesler *v.* Penninger, 59 Ill. 134; Peak *v.* Shasted, 21 Ill. 137, 74 Am. Dec. 83.

Indiana.—Wetherill *v.* Harris, 67 Ind. 452; De la Hunt *v.* Holderbaugh, 58 Ind. 285; Timmons *v.* Timmons, 6 Ind. 8; Timmons *v.* Timmons, 3 Ind. 251.

Iowa.— Cavender *v.* Smith, 5 Iowa 157.

Kansas.— Armstrong *v.* Wyandotte Bridge Co., McCahon 167.

Kentucky.— Cook *v.* Totton, 6 Dana 108; Bustard *v.* Gates, 4 Dana 429.

Maryland.— Wainwright *v.* Wilkinson, 62 Md. 146.

Minnesota.— Germain *v.* Sheehan, 25 Minn 338.

Mississippi.— Lee *v.* Jenkins, 30 Miss. 592.

Missouri.— Gamache *v.* Prevost, 71 Mo. 84; Fulbright *v.* Cannefox, 30 Mo. 425; Thornton *v.* Thornton, 27 Mo. 302, 72 Am. Dec. 266; Randalls *v.* Wilson, 24 Mo. 76; Jeffrie *v.* Robideaux, 3 Mo. 33; Creech *v.* Creech, 10 Mo. App. 586; Garesche *v.* Gambs, 3 Mo. App. 572.

New Jersey.— Lang *v.* Belloff, 53 N. J. Eq. 298, 31 Atl. 604.

New York.— Fowler *v.* Griffin, 3 Sandf. 385; Robbins *v.* Mount, 33 How. Pr. 24; Boylen *v.* McAvoy, 29 How. Pr. 278; Camp *v.* Bennett, 16 Wend. 48; Mason *v.* Denison, 15 Wend. 64; Comstock *v.* Carr, 6 Wend. 526; *In re* Scott, 1 Cow. 33; Arnold *v.* Sandford, 14 Johns. 417; Alderman *v.* Tirrell, 8 Johns. 418; Mockey *v.* Grey, 2 Johns. 192; Wood *v.* Wood, 2 Paige 108.

Pennsylvania.— Mercer *v.* Watson, 1 Watts 330; Moore *v.* McEwen, 5 Serg. & R. 373; Mercer *v.* Watson, 9 Lanc. Bar 53.

Texas.— Wright *v.* McNatt, 49 Tex. 425.

Vermont.— Fall River Foundry Co. *v.* Doty, 42 Vt. 412; Somers *v.* Rogers, 26 Vt. 585.

England.— Nunn *v.* Curtis, 4 Dowl. P. C. 729; Hindmarsh *v.* Chandler, 1 Moore C. P. 250, 7 Taunt. 488, 2 E. C. L. 460; Dwyer *v.* O'Brien, 1 Ridgw. 38 note.

Canada.— Macauley *v.* Neville, 5 Ont. Pr. 235; Fountain *v.* McSween, 4 Ont. Pr. 240.

See 27 Cent. Dig. tit. "Infants," § 276.

Infant cannot act by attorney in entering appeal. Cook *v.* Adams, 27 Ala. 294; Bradwell *v.* Weeks, 1 Johns Ch. (N. Y.) 325. *Compare* Barber *v.* Graves, 18 Vt. 290.

Motion to set aside proceedings.— An infant defendant cannot appear by attorney and move to set aside plaintiff's proceedings on the ground of the want of the appointment of a guardian. Shepherd *v.* Hibbard, 19 Wend. (N. Y.) 96.

A dismissal of a suit by an attorney appointed by an infant is void. Wainwright *v.* Wilkinson, 62 Md. 146.

When appearance by attorney not objectionable.— Where an infant defendant in an action of ejectment first appeared by attorney, but the transcript showed that he had a guardian, the appearance by attorney was not objectionable. Doe *v.* Scoggin, 2 Ind. 208. See also Mercer *v.* Watson, 9 Lanc. Bar (Pa.) 53.

Where an infant is co-plaintiff with an adult, his appearance by the attorney of the adult is valid. Chandler *v.* Chandler, 78 Ind. 417. See also Brandon *v.* Carter, 119 Mo. 572, 24 S. W. 1035, 41 Am. St. Rep. 673.

Amendment.— See Smith *v.* Minor, 1 N. J. L. 416, properly made.

In probate proceedings in California infants are, under Cal. Code Civ. Proc. § 1718, represented by an attorney appointed by the court. Carpenter *v.* San Joaquin County Super. Ct., 75 Cal. 596, 19 Pac. 174; Robinson *v.* Fair, 128 U. S. 53, 9 S. Ct. 30, 32 L. ed. 415. *Aliter* under act of 1851. Townsend *v.* Tallant, 33 Cal. 45, 91 Am. Dec. 617.

Remedy of adverse party.— Where an infant in an action of tort appears by attorney and puts in an answer and a trial and verdict is had, plaintiff cannot then be allowed on motion to have a guardian *ad litem* for the infant appointed as of the time of his appearance; but plaintiff may under his general prayer for relief have an order striking out defendant's appearance and answer by attorney and vacating all subsequent proceedings, including the verdict, without costs. Boylen *v.* McAvoy, 29 How. Pr. (N. Y.) 278.

Excuse for delay.— Where defendant does not know the infancy of plaintiff to be material, it is an excuse for delay in moving to

requiring an infant to prosecute or defend by next friend or guardian *ad litem* relates merely to the appearance upon the record and does not deprive the infant of the professional aid of an attorney,[75] and hence when suit is commenced by next friend an attorney may be retained to conduct the proceedings and in his name rules may be entered and notice served,[76] and after a guardian *ad litem* has been appointed for the infant he may defend by attorney.[77] A judgment against an infant who appeared by attorney is erroneous and voidable,[78] but it is not void;[79] and when the judgment is in favor of the infant the fact that he appeared by attorney does not even render the judgment voidable or afford ground for a stay of the judgment or a reversal on error or appeal.[80]

I. Pleading[81] — **1. Actions by Infants — a. Pleadings of Plaintiff — (i)** *In General.* In a suit brought by next friend the declaration should allege the

set the declaration aside. *In re* Scott, 1 Cow. (N. Y.) 33.

In a writ of error based on the fact that an infant defendant appeared only by attorney, the infancy of defendant is well assigned by averring him to have been an infant at the time of appearance and plea pleaded, and not at the time of rendition of judgment. Arnold *v.* Sandford, 14 Johns. (N. Y.) 417.

75. People *v.* New York C. Pl., 11 Wend. (N. Y.) 164.

76. People *v.* New York C. Pl., 11 Wend. (N. Y.) 164.

Power of next friend to employ attorney see *supra*, VIII, D, 4, i.

Power of attorney.— Where an infant by next friend employs an attorney to conduct litigation, he becomes clothed with the ordinary power of an attorney of record to bind his client by consenting to an entry of judgment finally determining the cause of action. Beliveau *v.* Amoskeag Mfg. Co., 68 N. H. 225, 40 Atl. 734, 73 Am. St. Rep. 577, 44 L. R. A. 167.

The fees of the attorney for infant plaintiffs are properly fixed by reference in the action in which the services are rendered. All the parties interested should have notice of the reference to fix the fees, but although they have no notice thereof the order confirming the master's report fixing the fees is not void but only voidable, being made in a case where the court had jurisdiction of the subject-matter and of the parties, and disclosing no infirmity on its face. Connor *v.* Ashley, 57 S. C. 305, 35 S. E. 546.

77. Alexander *v.* Frary, 9 Ind. 481; Doe *v.* Brown, 8 Blackf. (Ind.) 443.

Power of guardian ad litem to employ attorney see *supra*, VIII, D, 4, i.

78. *Illinois.*— Peak *v.* Shasted, 21 Ill. 137, 74 Am. Dec. 83.

Missouri.— Townsend *v.* Cox, 45 Mo. 401: Fulbright *v.* Cannefox, 30 Mo. 425; Randalls *v.* Wilson, 24 Mo. 76; Powell *v.* Gott, 13 Mo. 458, 53 Am. Dec. 153.

New York.— Fowler *v.* Griffin, 3 Sandf. 385; Boylen *v.* McAvoy, 29 How. Pr. 278; Bloom *v.* Burdick, 1 Hill 130, 37 Am. Dec. 299; Maynard *v.* Downer, 13 Wend. 575.

North Carolina.— Marshall *v.* Fisher, 46 N. C. 111.

Vermont.— Somers *v.* Rogers, 26 Vt. 585; Barber *v.* Graves, 18 Vt. 290.

See 27 Cent. Dig. tit. "Infants," § 276.

An order changing the venue in an action against an infant who appears by an attorney is not regular or void but simply erroneous and may be reversed or vacated on his application at majority. Turner *v.* Douglass, 72 N. C. 127.

If several defendants, one of whom is an infant, appear by attorney it is error, and on error brought all should join and the whole judgment should be reversed both as to the adults and the infants. Somers *v.* Rogers, 26 Vt. 585.

Remedy by appeal.— A trial in a justice court as to some of several defendants puts the whole number to the remedy by appeal although some, being infants, appear by attorney. Moody *v.* Gleason, 7 Cow. (N. Y.) 482.

Costs will not be allowed to the infant on revoking such a judgment. Maynard *v.* Downer, 13 Wend. (N. Y.) 575.

79. *Illinois.*— Peak *v.* Shasted, 21 Ill. 137, 74 Am. Dec. 83.

Indiana.— Cohee *v.* Baer, 134 Ind. 375, 32 N. E. 920, 39 Am. St. Rep. 270.

Missouri.— Townsend *v.* Cox, 45 Mo. 401; Fulbright *v.* Cannefox, 30 Mo. 425; Powell *v.* Gott, 13 Mo. 458, 53 Am. Dec. 153.

New York.— Fowler *v.* Griffin, 3 Sandf. 385; Bloom *v.* Burdick, 1 Hill 130, 37 Am. Dec. 299.

North Carolina.— Marshall *v.* Fisher, 46 N. C. 111.

Vermont.— Somers *v.* Rogers, 26 Vt. 585; Barber *v.* Graves, 18 Vt. 290.

See 27 Cent. Dig. tit. "Infants," § 276.

80. Apthorp *v.* Backus, Kirby (Conn.) 407, 1 Am. Dec. 26; Taylor *v.* Pullen, 152 Mo. 434, 53 S. W. 1086; Brandon *v.* Carter, 119 Mo. 572, 24 S. W. 1035, 41 Am. St. Rep. 673; Holton *v.* Tower, 81 Mo. 360; Robinson *v.* Hood, 67 Mo. 660; Bush *v.* Fisher, 85 Mo. App. 1; Matter of Bowne, 19 N. Y. St. 895, 6 Dem. Surr. (N. Y.) 51; Bird *v.* Pegg, 5 B. & Ald. 418, 7 E. C. L. 231.

A decree of a surrogate's court admitting a will to probate is a judgment within N. Y. Code Civ. Proc. § 721, which declares that a judgment of a court of record shall not be affected by reason of the appearance by attorney of an infant party if the judgment be in his favor. Matter of Bowne, 19 N. Y. St. 895, 6 Dem. Surr. (N. Y.) 51.

81. For the general rules of pleading see Pleading.

indebtedness of defendant to the infant and not to the next friend as such.[82] In a suit by an infant to recover money obtained from him it is not necessary to make any other than the general allegations of damage to plaintiff.[83] Failure of the petition, in an action by a father, as next friend of his child, to recover for her damages for personal injuries, to allege that she has no lawful guardian is cured by verdict.[84]

(II) *Allegation of Infancy and Representation by Guardian or Next Friend.* The petition or complaint in an action by an infant should allege his infancy,[85] his representation by guardian *ad litem* or next friend,[86] and, where an appointment is necessary, the due appointment of the person acting in that capacity.[87]

(III) *Allegation of Ratification or Disaffirmance of Contract, Etc.* In an action to enforce rights under a contract, etc., made while an infant, it is not necessary that plaintiff should expressly allege ratification.[88] Neither when a minor conveys land, and, after attaining majority, brings an action of ejectment to recover it, is it necessary to set out in the petition a disaffirmance of the conveyance.[89]

82. Shirley *v.* Bonham, 5 W. Va. 501.

83. Kellogg *v.* Kimball, 122 Mass. 163.

84. Gulf, etc., R. Co. *v.* Reagan, (Tex. Civ. App. 1896) 34 S. W. 796.

85. Boyd *v.* Boyd, 6 Gill & J. (Md.) 25; Rogers *v.* Marsh, 73 Mo. 64; Higgins *v.* Hannibal, etc., R. Co., 36 Mo. 418; Hunt *v.* Wing, 10 Heisk. (Tenn.) 139.

Averment should be in body of petition. Higgins *v.* Hannibal, etc., R. Co., 36 Mo. 418.

Ages of infants need not be set out. Stewart *v.* Chadwick, 8 Iowa 463.

In Indiana it is established that the failure of the complaint to aver that plaintiff is an infant does not render it bad on demurrer. Dodd *v.* Moore, 92 Ind. 397, 91 Ind. 522 [*following* Greenman *v.* Cohee, 61 Ind. 201; Lancaster *v.* Gould, 46 Ind. 397; Rowe *v.* Arnold, 39 Ind. 24; Lumpkins *v.* Justice, 1 Ind. 557, and *overruling* McGillcuddy *v.* Forsythe, 5 Blackf. (Ind.) 435; Shirley *v.* Hagar, 3 Blackf. (Ind.) 225]. *Compare* Maxedon *v.* State, 24 Ind. 370.

Rejection of procuratorship as surplusage. — See Hanly *v.* Levin, 5 Ohio 227.

Infancy as a ground of relief must be alleged, it cannot be presumed. Boyd *v.* Fitch, 71 Ind. 306.

86. See *infra*, note 87.

Amendment. — See Sick *v.* Michigan Aid Assoc., 49 Mich. 50, 12 N. W. 905, where properly directed.

Complaint sufficiently showing representative capacity see Spooner *v.* Delaware, etc., R. Co., 1 N. Y. St. 558.

Address of next friend should appear on bill. Major *v.* Arnott, 2 Jur. N. S. 80, 4 Wkly. Rep. 229.

Where a mother sues in behalf of her children but does not style herself their next friend the defect is cured by verdict. King *v.* King, 37 Ga. 205.

87. *Alabama.* — Switzer *v.* Holloway, 2 Port. 88.

California. — Crawford *v.* Neal, 56 Cal. 321.

Missouri. — Rogers *v.* Marsh, 73 Mo. 64; Higgins *v.* Hannibal, etc., R. Co., 36 Mo. 418. See also Cohn *v.* Metropolitan St. R. Co., 182 Mo. 577, 81 S. W. 846.

New York. — Grantman *v.* Thrall, 44 Barb. 173; Hulbert *v.* Young, 13 How. Pr. 413.

South Carolina. — Kid *v.* Mitchell, 1 Nott & M. 334, 9 Am. Dec. 702.

Tennessee. — Robertson *v.* Robertson, 2 Swan 197.

See 27 Cent. Dig. tit. "Infants," § 278. *Compare* Bent *v.* Maxwell Land Grant, etc., Co., 3 N. M. 158, 3 Pac. 721, holding that a bill in equity reciting that infants appear by their next friend, without showing that an order of appointment was made, is sufficient.

Allegation of giving bond. — See Temple *v.* Price 24 Mo. 288, failure to allege no ground for demurrer.

Effect of erroneous allegation. — Where a guardian *ad litem* is in fact appointed by the county judge, an allegation in a complaint filed by such guardian that he was appointed by an order of the county court does not preclude him, on a motion to dismiss the proceedings, from claiming that the order was made by the judge. Albrecht *v.* Canfield, 92 Hun (N. Y.) 240, 36 N. Y. Suppl. 940.

88. Nolte *v.* Libbert, 34 Ind. 163.

An averment that plaintiff was in possession of property bought by him when he was a minor is a sufficient averment of his ratification of his purchase after he became of age to enable him to revendicate the property against the seizing creditor of his vendor. Duvic *v.* Henry, 33 La. Ann. 102.

Statement in answer. — The ratification by an infant, after attaining majority, of a contract for services during infancy, is sufficiently alleged by the answer of defendant stating that such services had been rendered pursuant to the contract, that defendant had fully paid for them in accordance with the terms thereof, and that plaintiff, after attaining majority and with full knowledge of the facts, had ratified such contract. Voiles *v.* Beard, 58 Ind. 510.

89. Craig *v.* Van Bebber, 100 Mo. 584, 13 S. W. 906, 18 Am. St. Rep. 569.

(iv) *Verification of Petition or Complaint.* A petition or complaint in an action by an infant may be verified by his next friend or guardian *ad litem*.[90]

b. Pleadings of Defendant — (i) *Objection of Infant's Incapacity to Sue.* Plaintiff, if of lawful age, is not required to allege it;[91] but if defendant relies upon plaintiff's incapacity to sue because of infancy he must plead it.[92] The objection of the incapacity of an infant plaintiff should be taken by a plea in abatement;[93] but it has also been held that it may be taken by answer,[94] or, if the infancy appears on the face of the writ, by demurrer.[95] Infancy of plaintiff is not a sufficient plea in bar,[96] nor is it ground for a nonsuit.[97] If defendant does not in a proper manner raise the objection to plaintiff's capacity to sue it is considered as waived,[98] and he cannot raise it after pleading to the merits.[99]

90. Reed *v.* Ryburn, 23 Ark. 47; Turner *v.* Cook, 36 Ind. 129; Clay *v.* Baker, 41 Hun (N. Y.) 58.

The guardian should verify as a party and not merely as an agent. Clay *v.* Baker, 41 Hun (N. Y.) 58.

91. House *v.* Croft, 8 Mart. N. S. (La.) 704.

92. House *v.* Croft, 8 Mart. N. S. (La.) 704.

93. *Alabama.*— Howland *v.* Wallace, 81 Ala. 238, 2 So. 96.

Illinois.— Greer *v.* Wheeler, 2 Ill. 554.

Indiana.— Hollingsworth *v.* State, 8 Ind. 257, under the old practice.

Maine.— McMullin *v.* McMullin, 92 Me. 338, 42 Atl. 499, 69 Am. St. Rep. 510; Delcourt *v.* Whitehouse, 92 Me. 254, 42 Atl. 394.

Massachusetts.— Smith *v.* Carney, 127 Mass. 179; Blood *v.* Harrington, 8 Pick. 552.

Mississippi.— Gully *v.* Dunlap, 24 Miss. 410.

New Hampshire.— Young *v.* Young, 3 N. H. 345.

New Jersey.— Smith *v.* Van Houten, 9 N. J. L. 381.

New York.— Treadwell *v.* Bruder, 3 E. D. Smith 596; Schemerhorn *v.* Jenkins, 7 Johns. 373.

North Carolina.— Hicks *v.* Beam, 112 N. C. 642, 17 S. E. 490, 34 Am. St. Rep. 521.

South Carolina.— Drago *v.* Moso, 1 Speers 212, 40 Am. Dec. 592.

See 27 Cent. Dig. tit. "Infants," § 283.

If a defendant would deny the infancy of a plaintiff suing by guardian he must plead in abatement. Graham *v.* Cain, 2 Harr. (Del.) 97.

94. Hollingsworth *v.* State, 8 Ind. 257; Meyer *v.* Lane, 40 Kan. 491, 20 Pac. 258; Higgins *v.* Hannibal, etc., R. Co., 36 Mo. 418; Blumauer *v.* Clock, 24 Wash. 596, 64 Pac. 844, 85 Am. St. Rep. 966.

95. Meyer *v.* Lane, 40 Kan. 491, 20 Pac. 258; Delcourt *v.* Whitehouse, 92 Me. 254, 42 Atl. 394; Higgins *v.* Hannibal, etc., R. Co., 36 Mo. 418.

96. Howland *v.* Wallace, 81 Ala. 238, 2 So. 96.

97. *Illinois.*— Greer *v.* Wheeler, 2 Ill. 554.

Massachusetts.— Smith *v.* Carney, 127 Mass. 179.

Mississippi.— Gully *v.* Dunlap, 24 Miss. 410.

New Jersey.— Smith *v.* Van Houten, 9 N. J. L. 381.

New York.— Treadwell *v.* Bruder, 3 E. D. Smith 596; Schemerhorn *v.* Jenkins, 7 Johns. 373.

South Carolina.— Drago *v.* Moso, 1 Speers 212, 40 Am. Dec. 592.

See 27 Cent. Dig. tit. "Infants," § 283.

98. Hollingsworth *v.* State, 8 Ind. 257; Meyer *v.* Lane, 40 Kan. 491, 20 Pac. 258.

99. *Illinois.*— Greer *v.* Wheeler, 2 Ill. 554.

Maine.— McMullin *v.* McMullin, 92 Me. 338, 42 Atl. 499, 69 Am. St. Rep. 510.

Massachusetts.— Smith *v.* Carney, 127 Mass. 179.

Mississippi.— Gully *v.* Dunlap, 24 Miss. 410.

Missouri.— Rogers *v.* Marsh, 73 Mo. 64; Higgins *v.* Hannibal, etc., R. Co., 36 Mo. 418. holding that if the objection is not taken either by demurrer or answer, it is waived and will not be noticed on motion for a new trial or in arrest of judgment.

New Jersey.— Smith *v.* Van Houten, 9 N. J. L. 381.

New York.— Treadwell *v.* Bruder, 3 E. D. Smith 596; Schemerhorn *v.* Jenkins, 7 Johns. 373.

North Carolina.— See Hicks *v.* Beam, 112 N. C. 642, 17 S. E. 490, 34 Am. St. Rep. 521, holding that it was too late to raise the question by motion to dismiss after the testimony bearing upon the merits had been heard.

South Carolina.— Drago *v.* Moso, 1 Speers 212, 40 Am. Dec. 592.

Texas.— Moke *v.* Fellman, 17 Tex. 367, 67 Am. Dec. 656.

Washington.— Blumauer *v.* Clock, 24 Wash. 596, 64 Pac. 844, 85 Am. St. Rep. 966.

See 27 Cent. Dig. tit. "Infants," § 283.

Amendment.— Defendant may ordinarily get the benefit of the objection that plaintiff is an infant by motion to amend after the testimony bearing upon the merits has been heard, if the court in its discretion allows the amendment. But where the disability still continues when such motion is heard the usual practice of the court is to protect the infant by allowing him also to amend his summons and complaint by inserting the

(II) *Objection of Lack of Due Appointment of Guardian or Next Friend.* A defect in a petition by an infant, suing by next friend, because of failure to allege that the person acting as next friend has been duly appointed, may be raised by answer;[1] but the better and more convenient practice is to take a preliminary objection by motion before interposing an answer to the merits.[2] If no objection is made to the declaration on the ground that it does not show the due appointment of the next friend, the objection must, after verdict, be considered as waived.[3] An issue as to such appointment is not raised by a general denial.[4]

2. Actions Against Infants — a. Pleadings of Plaintiff — (I) *In General.* On the foreclosure of a mortgage against infant defendants the complaint must allege the requisite facts to show what the interests of the infants in the premises are.[5] In Alabama it has been held that a bill against infants should recite whether they are over the age of fourteen years.[6]

(II) *Allegations as to Necessaries.* Where a declaration on a note shows that the maker was an infant but does not allege that the note was given for necessaries the suit may be dismissed on demurrer.[7] A complaint in an action against an infant for necessaries furnished is sufficient if it contains allegations which if made in a declaration at common law would have stated a cause of action of debt for board and lodging or goods furnished.[8] Where defendant in a suit on a promissory note pleads infancy a replication stating that the consideration of the note was necessaries furnished defendant at his request, without specifying of what such necessaries consisted, or when furnished, or how or by whom, is bad.[9]

(III) *Allegations of Ratification or New Promise.* Ratification of the contract of an infant validates it between the parties,[10] and it may be declared on without noticing the ratification;[11] but where infancy is pleaded by defendant the facts constituting ratification are in avoidance of the plea and must be introduced into the pleadings, in actions at law, by a replication.[12] Where a defendant pleads infancy plaintiff may by his replication set up a new promise by defendant after reaching majority.[13] This plea admits a truth of defendant's plea of infancy, and hence that need not be proved,[14] but the new promise must be proved.[15]

name of the guardian *ad litem* or next friend. Hicks *v.* Beam, 112 N. C. 642, 17 S. E. 490, 34 Am. St. Rep. 521.

1. Cohn *v.* Metropolitan St. R. Co., 182 Mo. 577, 81 S. W. 846.

2. Schuek *v.* Hagar, 24 Minn. 339. See also Treadwell *v.* Bruder, 3 E. D. Smith (N. Y.) 596.

Objection to statement of appointment.— An objection for insufficiency of the complaint of an infant plaintiff in the statement of the appointment of a guardian *ad litem* to represent him can only be raised by a motion to make the complaint more definite and certain. Sere *v.* Coit, 5 Abb. Pr. (N. Y.) 481.

3. Wortman *v.* Ash, 4 Ind. 74.

4. Schuek *v.* Hagar, 24 Minn. 339; Cohn *v.* Metropolitan St. R. Co., 182 Mo. 577, 81 S. W. 846.

5. Aldrich *v.* Lapham, 6 How. Pr. (N. Y.) 129.

6. If it fails to do so it is insufficient to support a decree against them. Hibbler *v.* Sprowl, 71 Ala. 50.

7. Latham *v.* Kolb, 76 Ga. 291.

8. Goodman *v.* Alexander, 165 N. Y. 289, 59 N. E. 145, 55 L. R. A. 781, 31 N. Y. Civ. Proc. 342 [*reversing* 28 N. Y. App. Div. 227, 50 N. Y. Suppl. 884, 53 N. Y. Suppl. 1104].

9. Burr *v.* Wilson, 18 Tex. 367.

10. See *supra*, IV, D, 5; V, E, 9.

11. American Freehold Land Mortg. Co. *v.* Dykes, 111 Ala. 178, 18 So. 292, 56 Am. St. Rep. 38; West *v.* Penny, 16 Ala. 186.

12. American Freehold Land Mortg. Co. *v.* Dykes, 11 Ala. 178, 18 So. 292, 56 Am. St. Rep. 38; Fant *v.* Cathcart, 8 Ala. 725; Fetrew *v.* Wiseman, 40 Ind. 148. *Compare* Stern *v.* Freeman, 4 Metc. (Ky.) 309.

Under the Alabama system of equity pleading the facts constituting ratification should be introduced by amendment of the bill. American Freehold Land Mortg. Co. *v.* Dykes, 111 Ala. 178, 18 So. 292, 56 Am. St. Rep. 38.

13. Kirby *v.* Cannon, 9 Ind. 371.

14. Fant *v.* Cathcart, 8 Ala. 725; Dockery *v.* Day, 7 Port. (Ala.) 518; Goodsell *v.* Myers, 3 Wend. (N. Y.) 479.

The introduction of a protestation against the truth of the plea of infancy into the replication does not render it necessary for defendant to prove the infancy. Dockery *v.* Day, 7 Port. (Ala.) 518.

15. Fant *v.* Cathcart, 8 Ala. 725; Dockery *v.* Day, 7 Port. (Ala.) 518.

b. Pleadings of Defendant — (I) *TIME TO PLEAD.* A rule of court limiting the time within which dilatory pleas may be filed, when applied to action against an infant defending by guardian *ad litem*, should be so construed or extended as at least to allow the guardian to file such a plea within the time limited after his appointment.[16]

(II) *OBJECTIONS TO JURISDICTION.* Infants must raise objections to the jurisdiction of the court in the mode and time prescribed by statute the same as adults.[17]

(III) *ANSWER FOR INFANTS IN GENERAL.* A guardian *ad litem* should answer for the infant[18] denying every material allegation of the complaint prejudicial to him,[19] and setting up every defense to which the infant is entitled,[20] or at least calling for strict proof[21] and praying that the rights of the infant be protected;[22] and it is irregular and erroneous to proceed to a hearing[23] or render a decree against an infant[24] without an answer having been previously filed on his behalf by the guardian. The answer of a guardian *ad litem* must not be his personal answer, but the answer of the infant by the guardian.[25] It has been held that where infant defendants have no special or separate defense, no separate answer is necessary, but joinder in the general answer of defendants is sufficient.[26]

16. Fall River Foundry Co. *v.* Doty, 42 Vt. 412.

17. Boyd *v.* Martin, 9 Heisk. (Tenn.) 382.

18. Swartwood *v.* Sage, 68 Kan. 817, 75 Pac. 508; Rutherford *v.* Richardson, 1 Sneed (Tenn.) 609.

Court may compel guardian to answer. Richards *v.* Richards, 17 Ind. 636; Henly *v.* Gore, 4 Dana (Ky.) 133.

It is the duty of the court to see that a formal answer is filed by the guardian *ad litem* for his infant defendant. Alexander *v.* Frary, 9 Ind. 481.

Effect as to adult defendant of guardian's failure to answer.— The fact that a guardian *ad litem* appointed in partition proceedings for an infant defendant failed to file any answer as such guardian is no ground for review by an adult defendant. McCarthy *v.* McCarthy, 66 Ind. 128.

The guardian's failure to answer is no ground for dismissing the bill. The court should compel an answer, appoint some other guardian, or defer the hearing until an answer is filed. Henly *v.* Gore, 4 Dana (Ky.) 133.

The answer or report of a warning-order attorney cannot be taken also as his answer as guardian *ad litem*. Tatum *v.* Gibbs, 41 S. W. 565, 19 Ky. L. Rep. 695.

Omission to answer amended bill.— See Forman *v.* Stickney, 77 Ill. 575, not error sufficient to cause reversal.

When failure to answer not injurious.— Where it appears that the sale of property in which infants were interested is necessary to their interest, the failure of their guardian *ad litem* to answer the petition works no injury to the parties, and the sale will not be set aside. Howerton *v.* Sexton, 90 N. C. 581.

19. Stammers *v.* McNaughten, 57 Ala. 277; Varner *v.* Rice, 44 Ark. 236; Pillow *v.* Sentelle, 39 Ark. 61; Swartwood *v.* Sage, 68 Kan. 817, 75 Pac. 508, under a Kansas statute guardian must file general denial. See also Pinchback *v.* Graves, 42 Ark. 222.

A decree on an answer of non sum informatus by a guardian *ad litem* will not bind the infant. Tucker *v.* Bean, 65 Me. 352.

General denial.— Infants answering by guardian *ad litem* may deny generally the allegations of the petition. Revely *v.* Skinner, 33 Mo. 98.

Where the answer does not expressly deny the allegations in the petition, but the record shows that it was regarded by the court as an express denial, and that plaintiff was required to prove such allegations, a judgment rendered against the infant cannot be reversed on error for the want of such express denial. Randall *v.* Turner, 17 Ohio St. 262.

20. Curtis *v.* Ballagh, 4 Edw. (N. Y.) 635.

21. Thornton *v.* Vaughan, 3 Ill. 218, holding that where a guardian *ad litem* of infant heirs makes answer to a bill in chancery, admitting the allegations, the court may set aside the answer and direct the guardian to put in an answer requiring plaintiff to prove the facts alleged in his bill. See also Dunning *v.* Stanton, 9 Port. (Ala.) 513; Revely *v.* Skinner, 33 Mo. 98; Wood *v.* Butler, 23 Ohio St. 520.

22. See Woods *v.* Butler, 23 Ohio St. 520.

23. Swartwood *v.* Sage, 68 Kan. 817, 75 Pac. 508; Brenner *v.* Bigelow, 8 Kan. 496; Beeler *v.* Bullitt, 4 Bibb (Ky.) 11.

Omission of guardian to answer not a jurisdictional defect.— Swartwood *v.* Sage, 68 Kan. 817, 75 Pac. 508.

24. Curtis *v.* Ellis, 3 A. K. Marsh. (Ky.) 76; Shields *v.* Bryant, 3 Bibb (Ky.) 525.

Judgment against infant without answer by statutory guardian or guardian ad litem void.— Curd *v.* Williams, 18 S. W. 634, 13 Ky. L. Rep. 855.

25. Johnson *v.* McCabe, 42 Miss. 255. *Compare* Durrett *v.* Davis, 24 Gratt. (Va.) 302.

26. Western Lumber Co. *v.* Phillips, 94 Cal. 54, 29 Pac. 328. *Compare* Wood *v.* Traux, 39 Mich. 628.

The answer of an infant by his guardian cannot be excepted to for insufficiency.[27] A merely formal answer of a guardian *ad litem* submitting the rights of the infant to the protection of the court need not be under oath,[28] but such an answer has the effect of a general denial and any defense that could be availed of is to be considered as interposed.[29] An infant's answer on oath, by his guardian, is not evidence either in his favor[30] or against him.[31] Where a decree recites that the cause came on to be heard on the answer of the guardian *ad litem* for an infant defendant it will be presumed that the answer was sworn to, although there is no evidence of the fact in the record.[32] The general answer of an infant by his guardian *ad litem*, when sufficient for the purpose of putting plaintiff to his proofs, and enabling the guardian to controvert every allegation of the complaint, suffices to raise an issue of fact for the purpose of taxation of costs.[33] Where a guardian *ad litem* did not sign his answer, but it was verified and filed and treated as properly drawn, this was a mere irregularity not affecting the title of a purchaser in the proceedings.[34] Where a decree was reversed because no order appeared in the record to have been made appointing the person who answered for infants their guardian *ad litem* and the court below then appointed a new guardian but revoked such appointment on discovering that an order had actually been made appointing the first guardian *ad litem*, which did not appear in the record by reason of a clerical error, it was held that the court proceeded correctly in hearing the cause upon the answer of the guardian first appointed.[35]

(IV) *SETTING UP INFANCY.* In order for the defense of infancy to be available in an action on a contract, etc., it must be pleaded;[36] but an allegation that at the time of the transaction defendant was an infant is sufficient without alleging that the transaction was voidable.[37] A joint plea of the infancy of one defendant in an action on a joint and several bond is bad on demurrer.[38] Where an infant

27. Leggett *v.* Sellon, 3 Paige (N. Y.) 84.

28. Johnson *v.* McCabe, 42 Miss. 255; Revely *v.* Skinner, 33 Mo. 98; Ridgley *v.* Bennett, 13 Lea (Tenn.) 210. *Compare* Eakin *v.* Hawkins, 52 W. Va. 124, 43 S. E. 211.

29. Stark *v.* Brown, 101 Ill. 395; Skaggs *v.* Kincaid, 48 Ill. App. 608; Wood *v.* Butler, 23 Ohio St. 520; Boozer *v.* Teaque, 27 S. C. 348, 3 S. E. 551.

Execution of instruments.— Although defendant is a minor and answers by a guardian *ad litem* the execution of written instruments averred in the petition is admitted unless denied under oath. McLean *v.* Webster, 45 Kan. 644, 26 Pac. 10.

30. Bulkley *v.* Van Wyck, 5 Paige (N. Y.) 536.

31. Harris *v.* Harris, 6 Gill & J. (Md.) 111; Benson *v.* Wright, 4 Md. Ch. 278; Watson *v.* Godwin, 4 Md. Ch. 25; Alexandria Bank *v.* Patton, 1 Rob. (Va.) 499.

32. Durrett *v.* Davis, 24 Gratt. (Va.) 302.

33. Roosevelt *v.* Schermerhorn, 32 Misc. (N. Y.) 287, 66 N. Y. Suppl. 366; Dean *v.* Booth, 66 N. Y. Suppl. 365. See also Wendell *v.* Hirschfield, 40 Misc. (N. Y.) 527, 82 N. Y. Suppl. 879.

34. Rieman *v.* Von Kapff, 76 Md. 417, 25 Atl. 387.

35. Shields *v.* Bryant, 2 A. K. Marsh. (Ky.) 342.

36. *Delaware.*— Jarman *v.* Windsor, 2 Harr. 162.

Illinois.— Curry *v.* St. John Plow Co., 55 Ill. App. 82.

Indiana.— Cohee *v.* Baer, 134 Ind. 375, 43 N. E. 920, 39 Am. St. Rep. 270; La Grange Collegiate Inst. *v.* Anderson, 63 Ind. 367, 30 Am. Rep. 224; Blake *v.* Douglass, 27 Ind. 416.

Kentucky.— Bryant *v.* Pottinger, 6 Bush 473; McJohnston *v.* Armstrong, 14 Ky. L. Rep. 621.

Louisiana.— Patterson *v.* Frazer, 8 La. Ann. 512.

Mississippi.— Chicago Bldg., etc., Co. *v.* Higginbotham, (1901) 29 So. 79.

New York.— Cutter *v.* Getz, 22 Alb. L. J. 97.

Texas.— Foster *v.* Eoff, 19 Tex. Civ. App. 405, 47 S. W. 399.

See 27 Cent. Dig. tit. "Infants," § 282.

Where a case is submitted on an agreed statement of facts the disability of an infant to sue cannot be raised unless specially reserved. Smith *v.* Carney, 127 Mass. 179.

In a suit against a husband and wife to foreclose a mortgage, an answer by the wife that when she executed the mortgage she was an infant, without alleging that the land was her separate property, or that her husband was an infant, is insufficient. Bakes *v.* Gilbert, 93 Ind. 70.

Answer not amounting to plea of infancy see King *v.* Barbour, 70 Ind. 35.

37. Stern *v.* Freeman, 4 Metc. (Ky.) 309.

38. Bordentown Tp. *v.* Wallace, 50 N. J. L. 13, 11 Atl. 267.

has signed a mortgage, the proper time to plead infancy to avoid it is in the action of foreclosure, and he can have no relief in an independent action after foreclosure on the sole ground of infancy when he executed the mortgage.[39]

(v) *Denial of Concealment of Infancy.* Where plaintiff alleges that defendant concealed his infancy at the time of the transaction on which the action is based a denial by defendant that he concealed his infancy is not a good plea, but if he notified plaintiff of his infancy he should plead such notice affirmatively.[40]

J. Issues and Evidence — 1. In General. In actions against infants all the facts entitling plaintiff to judgment must be sustained by proof,[41] and the necessity of establishing the case as against an infant party cannot be obviated by making him a plaintiff.[42] Where a defendant sets up infancy and rescission of the contract sued on and defendant sets up matters in avoidance of the infancy and rescission he must prove the facts alleged.[43] Where a plaintiff sues on a note whose execution defendant admits, but against which he pleads minority, plaintiff must, in order to recover, bring his case within the statute providing that an emancipated minor engaged in trade is of age for all purposes of such trade.[44] Where it is alleged that a defendant at the time of the transaction in question was in business holding himself out as of full age, and concealed from plaintiff the fact of his infancy and defendant alleges that plaintiff knew of his infancy, which plaintiff denies, the burden of proof is on defendant to show such knowl-

39. Hunter *v.* Bearn, 3 Ky. L. Rep. 327.

40. Adam Roth Grocery Co. *v.* Hopkins, 29 S. W. 293, 16 Ky. L. Rep. 678.

41. *Alabama.*— Hooper *v.* Hardie, 80 Ala. 114; Matthews *v.* Dowling, 54 Ala. 202; Dumming *v.* Stanton, 9 Port. 513.

Arkansas.— State *v.* Atkins, 53 Ark. 303, 13 S. W. 1097; Boyd *v.* Roane, 49 Ark. 397, 5 S. W. 704.

Illinois.— Wilhite *v.* Pearce, 47 Ill. 413; Quigley *v.* Roberts, 44 Ill. 503; Rhoads *v.* Rhoads, 43 Ill. 239; Waugh *v.* Robbins, 33 Ill. 181; Reddick *v.* State Bank, 27 Ill. 145; Fridley *v.* Murphy, 25 Ill. 146; Carr *v.* Fielden, 18 Ill. 77; Tuttle *v.* Garrett, 16 Ill. 354; Hitt *v.* Ormsbee, 12 Ill. 166; McClay *v.* Norris, 9 Ill. 370.

Indiana.— Crain *v.* Parker, 1 Ind. 374; Bryer *v.* Chase, 8 Blackf. 508; Hough *v.* Canby, 8 Blackf. 301; Hough *v.* Doyle, 8 Blackf. 300.

Kentucky.— Madeira *v.* Hopkins, 12 B. Mon. 595; Chambers *v.* Warren, 6 B. Mon. 244; Leslie *v.* Maxey, 67 S. W. 839, 23 Ky. L. Rep. 2435; Dever *v.* Dever, 44 S. W. 986, 19 Ky. L. Rep. 1988.

Maryland.— Stewart *v.* Duvall, 7 Gill & J. 179; Robinson *v.* Townshend, 3 Gill & J. 413.

Michigan.— Thayer *v.* Lane, Walk. 200.

Mississippi.— Johnson *v.* McCabe, 42 Miss. 255; Ingersoll *v.* Ingersoll, 42 Miss. 155.

Missouri.— Collins *v.* Trotter, 81 Mo. 275; Revely *v.* Skinner, 33 Mo. 98.

New Jersey.— Shultz *v.* Sanders, 38 N. J. Eq. 154.

New York.— Aldrich *v.* Lapham, 6 How. Pr. 129; Litchfield *v.* Burwell, 5 How. Pr. 341; James *v.* James, 4 Paige 115; Wright *v.* Miller, 1 Sandf. Ch. 103 [*affirmed* in 8 N. Y. 9, 59 Am. Dec. 438 (*reversing* 4 Barb. 600)].

Ohio.— Wood *v.* Butler, 23 Ohio St. 520.

South Carolina.— Levy *v.* Williams, 4 S. C. 515.

South Dakota.— Graham *v.* Selbie, 10 S. D. 546, 74 N. W. 439.

Vermont.— See Keeler *v.* Fassett, 21 Vt. 539, 52 Am. Dec. 71.

United States.— White *v.* Miller, 158 U. S. 128, 15 S. Ct. 788, 39 L. ed. 921.

See 27 Cent. Dig. tit. "Infants," §§ 286, 291.

Even though the allegations are not traversed they must be proved. Leslie *v.* Maxey, 67 S. W. 839, 23 Ky. L. Rep. 2435; Dever *v.* Dever, 44 S. W. 986, 19 Ky. L. Rep. 1988.

Strict proof is required against infants and the record must furnish proof to sustain a decree against them, whether or not the guardian *ad litem* answers. Rhoads *v.* Rhoads, 43 Ill. 239; Tibbs *v.* Allen, 27 Ill. 119; Chaffin *v.* Kimhall, 23 Ill. 36; Masterson *v.* Wiswould, 18 Ill. 48.

Necessity for production of original notes. — It is erroneous to decree against infants on the filing of copies of notes made by their ancestor, without requiring the production of the originals. Hanna *v.* Spott, 5 B. Mon. (Ky.) 362, 43 Am. Dec. 132.

Upon a promise of an infant defendant to pay when able plaintiff must prove the ability of defendant to pay. Kendrick *v.* Neisz, 17 Colo. 506, 30 Pac. 245; Everson *v.* Carpenter, 17 Wend. (N. Y.) 419; McCormick *v.* Walker, 15 Fed. Cas. No. 8,728, 1 Hayw. & H. 86.

42. Kent *v.* Taneyhill, 6 Gill & J. (Md.) 1; Benson *v.* Wright, 4 Md. Ch. 278.

43. Harrison *v.* Burnes, 84 Iowa 446, 51 N. W. 165, reply that defendant represented himself as of full age and was carrying on business as an adult.

44. Holliday *v.* Marioneaux, 9 Rob. (La.) 504, holding that as a replication is unknown to the practice of Louisiana these facts may be proved on the trial without any pleading.

edge on the part of plaintiff.[45] The acts and admissions of an infant relative to the subject-matter of the suit are admissible in evidence,[46] but his infancy may be shown to obviate their effect, and the weight to be attached to them must depend upon the circumstances.[47] The answer of complainant to the cross bill of adult defendants, stating the consideration of a note sued upon, cannot be taken as proof against infant defendants.[48] In an action by an infant it is not necessary to make proof of the appointment of the guardian *ad litem* unless defendant makes the objection that no such appointment has been made.[49] A written notice of disaffirmance of a deed executed by a minor may be given in evidence under a pleading which alleges disaffirmance either in general terms or by setting out such notice specially.[50] It has been held that as infants are entitled to special protection in a court of chancery infant defendants in a suit to enforce a vendor's lien may show a waiver of the lien without specially pleading it.[51]

2. **Proof of Infancy.** Where suit is brought by next friend it is proper to prove the infancy of the real plaintiff and hence his right to sue in this manner.[52] Where a suit is brought by guardian or next friend a plea of the general issue[53] or of accord and satisfaction[54] admits plaintiff's infancy, and hence it need not be proved. Infancy as a ground of relief is never presumed but must be proved;[55] but it has been held that, although in an action prosecuted by next friend the answer denies the infancy of plaintiff, he need not prove that he is an infant where his right of action does not depend upon that fact.[56] When nothing appears to the contrary, persons entering into an agreement are presumed to be adults, and competent to contract,[57] and hence one who relies upon his infancy to defeat his act, contract, etc., has the burden of proving such infancy.[58] When

45. Adam Roth Grocery Co. *v.* Hopkins, 29 S. W. 293, 16 Ky. L. Rep. 678.

46. Hamblett *v.* Hamblett, 6 N. H. 333; Ackerman *v.* Runyon, 1 Hilt. (N. Y.) 169 (holding that in an action to recover money lent to an infant his admissions of the amount received by him from the plaintiff, although made during his infancy, are admissible as evidence of the sum lent); McCoon *v.* Smith, 3 Hill (N. Y.) 147, 38 Am. Dec. 623.

47. Hamblett *v.* Hamblett, 6 N. H. 333.

48. Campbell *v.* Campbell, 1 Ind. 220.

49. Strong *v.* Jenkins, 15 N. Y. Suppl. 120, 21 N. Y. Civ. Proc. 9.

50. George *v.* Brooks, 94 Ind. 274.

51. Lucas *v.* Wade, 43 Fla. 419, 31 So. 231.

52. Byers *v.* Des Moines Valley R. Co., 21 Iowa 54.

53. Hubbert *v.* Collier, 6 Ala. 269; Linville *v.* Earlywine, 4 Blackf. (Ind.) 469.

A plea denying infancy, and all other matters alleged in the declaration, is a general issue, and the infancy is admitted. Rising-Sun, etc., Turnpike Co. *v.* McCollum, 7 Ind. 677.

54. Hubbert *v.* Collier, 6 Ala. 269.

55. Boyd *v.* Fitch, 71 Ind. 306; Orchard *v.* Williamson, 6 J. J. Marsh. (Ky.) 558, 22 Am. Dec. 102; Boyd *v.* Boyd, 6 Gill & J. (Md.) 25, unless admitted by the adverse party.

56. Meyerberg *v.* Eldred, 37 Minn. 508, 35 N. W. 371.

57. Foltz *v.* Wert, 103 Ind. 404, 2 N. E. 950.

58. *Alabama.*— Rogers *v.* De Bardeleben Coal, etc., Co., 97 Ala. 154, 12 So. 81.

Illinois.— Goodwine *v.* Acton, 97 Ill. App. 11.

Kentucky.— See Adam Roth Grocery Co. *v.* Hopkins, 29 S. W. 293, 16 Ky. L. Rep. 678.

Michigan.— Lynch *v.* Johnson, 109 Mich. 640, 67 N. W. 908; Stewart *v.* Ashley, 34 Mich. 183.

Minnesota.— Klason *v.* Rieger, 22 Minn. 59.

New York.— Garbarsky *v.* Simkin, 36 Misc. 195, 73 N. Y. Suppl. 199.

Texas.— Campbell *v.* Wilson, 23 Tex. 253, 76 Am. Dec. 67.

England.— Hartley *v.* Wharton, 3 P. & D. 529, 11 A. & E. 934, 9 L. J. Q. B. 209, 4 Jur. 576, 39 E. C. L. 491; Jeune *v.* Ward, 2 Stark. 326, 3 E. C. L. 430.

See 27 Cent. Dig. tit. "Infants," § 294.

When strict proof required.— One who when near majority publicly transacts business as if of full age and gives himself out as such must be held to very strict proof of his nonage where he seeks to avoid his contract by pleading minority. Davis *v.* Coan, 14 La. 257.

Evidence not sufficient to establish infancy see Amey *v.* Cockey, 73 Md. 297, 20 Atl. 1071.

Evidence justifying finding that defendant was not an infant at the time of the transaction in question see Haywood *v.* Townsend, 4 N. Y. App. Div. 246, 38 N. Y. Suppl. 517; Johnson *v.* Brown, (Tex. Civ. App. 1901) 65 S. W. 485.

Family discussion as to birthday and acts done on the reputed day are evidence for the jury as to the age of an infant. Reg. *v.* Hayes, 2 Cox C. C. 226.

the defense of infancy rests upon the uncorroborated testimony of defendant, his physical appearance, in connection with all the other circumstances of the case, may be considered by the jury in determining whether or not his testimony is deserving of credit.[59] In an action upon a contract, etc., proof of the infancy of defendant may be made under a plea of the general issue.[60] Where there are several issues, one of which is upon the plea of infancy, and that is found for defendant, it disposes of the whole case, and entitles defendant to a judgment; and the jury need not pass upon the other issues.[61]

3. Depositions. A deposition cannot be read against an infant where it does not appear that the guardian *ad litem* was served with notice.[62] Under the statutes of some states a deposition cannot be read in a suit for the sale of the land of an infant unless taken in the presence of the guardian *ad litem* or upon interrogatories agreed upon by him;[63] but such provision does not apply to suits against infants generally.[64] If a deposition is taken in a case to which an infant is a party, before the same is at issue, and it does not appear to have been taken *de bene esse* and there is reason to believe that there was collusion between the guardian *ad litem* or next friend of the infant and the adverse party the deposition will be rejected.[65] It is no valid objection to proceedings against an infant that depositions were taken before the same person as commissioner who was the guardian *ad litem* of the infant.[66] In Kentucky where the only defendant against whom a deposition is to be read is under the disability of infancy alone, the deposition must be taken upon interrogatories except in actions and proceedings for divorce and alimony and the custody of children.[67]

4. Preservation of Evidence in Record. In Illinois it is held that all the evidence necessary to establish a decree against an infant should be preserved in the record.[68] But in Indiana it has been held that a decree against an infant will not be reversed simply because the evidence is not in the record.[69]

K. Variance. The rule that the proof adduced at the trial must correspond with the allegations in the pleadings applies to actions against infants,[70] but a variance in the name of an infant defendant as stated in the complaint and in the

Defendant may testify, from his own knowledge of himself, that he was sixteen years of age at the time of the transaction sued on. Hill *v.* Eldridge, 126 Mass. 234.

59. Waterman *v.* Waterman, 42 Misc. (N. Y.) 195, 85 N. Y. Suppl. 377; Garbarski *v.* Simkin, 36 Misc. (N. Y.) 195, 73 N. Y. Suppl. 199.

60. Forrestell *v.* Wood, (Md. 1891) 23 Atl. 133; Wailing *v.* Toll, 9 Johns. (N. Y.) 141; Stansbury *v.* Marks, 4 Dall. (Pa.) 130, 1 L. ed. 771; Kimball *v.* Lamson, 2 Vt. 138. *Contra,* Young *v.* Bell, 30 Fed. Cas. No. 18,152, 1 Cranch C. C. 342.

61. Rohrer *v.* Morningstar, 18 Ohio 579.

62. Walker *v.* Grayson, 86 Va. 337, 10 S. E. 51 [*following* Strayer *v.* Long, 83 Va. 715, 3 S. E. 372].

63. See Moore *v.* Triplett, (Va. 1895) 23 S. E. 69; Hurst *v.* Coe, 30 W. Va. 158, 3 S. E. 564.

64. Moore *v.* Triplett, (Va. 1895) 23 S. E. 69.

Suit against corporation in which infant a stock-holder.— See Hurst *v.* Coe, 30 W. Va. 158, 3 S. E. 564, construing W. Va. Code, c. 83, § 4.

65. Gaugh *v.* Henderson, 2 Head (Tenn.) 628.

Where deposition properly taken.— An objection by minor defendants to depositions, on the ground that the cause was not at issue when they were taken is not tenable where it appears that the answer of the guardian was merely formal, and was filed several months before the taking of said depositions and that even if the guardian *ad litem* had not then answered the cross bill, they were represented by him in the examination of the witnesses, and that the cross-examination of each witness by him was sufficient to test the truth of the evidence. Harton *v.* Lyons, 97 Tenn. 180, 36 S. W. 851.

66. Durrett *v.* Davis, 24 Gratt. (Va.) 302.

67. Womble *v.* Trice, 112 Ky. 533, 66 S. W. 370, 67 S. W. 9, 23 Ky. L. Rep. 1939.

68. Reddick *v.* State Bank, 27 Ill. 145; Tibbs *v.* Allen, 27 Ill. 119; Fridley *v.* Murphy, 25 Ill. 146; Masterson *v.* Wiswould, 18 Ill. 48; Cost *v.* Rose, 17 Ill. 276.

69. Bennett *v.* Welch, 15 Ind. 332 (holding this to be true under the code, but further holding that under the old practice it was error for a court trying a chancery cause to admit oral evidence against infants which was not placed in the record); McEndree *v.* McEndree, 12 Ind. 97; Alexander *v.* Frary, 9 Ind. 481.

70. Bliss *v.* Perryman, 2 Ill. 484 (holding that an action upon a written contract made by defendant while an infant, where infancy is pleaded and proved, is not sustained by proof that defendant promised, after he

petition for the appointment of a guardian *ad litem* will be disregarded when it is not pretended that neither is the true name.[71]

L. Trial — **1. Time For Trial.** In case an infant appears by guardian and makes an issue it may be noticed for trial at once like other issues.[72]

2. Questions For Court and Jury. Where a question of infancy *vel non* arises directly it must be determined by a jury,[73] but whether an infant grantor was, at the time of executing the deed, under the government of a parent or guardian, is, upon a given state of facts, strictly a question of strict law, involving only the legal operation and effect of such facts.[74] It is a question for the jury whether the deed, contract, etc., of an infant has been ratified,[75] or avoided,[76] and in case an avoidance is claimed, whether it was within a reasonable time is also a question of fact for the jury.[77] In a case where the consideration of an infant's contract consisted partly of money paid for him, and partly of an undertaking by defendant involving uncertain risks, if the infant seeks to recover back money paid in execution of the contract the jury must determine what, under all the circumstances, it was reasonable the infant should engage to pay, and that sum should be allowed to defendant against the money paid in execution of the contract, and the balance, if any, recovered by plaintiff.[78] In an action against a minor for goods sold and delivered to him pursuant to a bargain made by his father, who, with his knowledge and consent, was using his name, and doing business under it, under such circumstances that persons dealing with him might suppose that his father was the one who owned the business, it is reversible error to refuse to submit to the jury the question whether the minor obtained the goods by fraud, since, if such were the case, he would be liable for the price.[79] In New York when an issue of fact is raised by the answer of an infant defendant in partition such issue must be tried by a jury and the infant is not entitled to a reference.[80] An infant party cannot waive trial by

became of age, to pay a less sum than the original contract was for the payment of, in discharge thereof); Freeman *v.* Nichols, 138 Mass. 313.

Allegation as to judgment in former suit by infant.— Where the complaint, in an action to enforce a judgment against the administrators of the guardian of certain minors, alleged that the minors recovered the judgment against the estate of their guardian, but the judgment was in the name of their mother as their mother and next friend, the rule that the allegations and proof must correspond was not violated by admitting the judgment in evidence, as the minors had the exclusive interest in it. Wygal *v.* Myers, 76 Tex. 598, 13 S. W. 567.

71. Varian *v.* Stevens, 2 Duer (N. Y.) 635.

72. Newins *v.* Baird, 19 Hun (N. Y.) 306.

73. Hubbert *v.* Collier, 6 Ala. 269; Fenton *v.* White, 4 N. J. L. 100; Ryerson *v.* Grover, 1 N. J. L. 458; Waterman *v.* Waterman, 42 Misc. (N. Y.) 195, 85 N. Y. Suppl. 377; Rohrer *v.* Morningstar, 18 Ohio 579.

74. Kline *v.* Beebe, 6 Conn. 494.

75. Lynch *v.* Johnson, 109 Mich. 640, 67 N. W. 908; Tyler *v.* Gallop, 68 Mich. 185, 35 N. W. 902, 13 Am. St. Rep. 336; Hobdy *v.* Egerton, 3 N. C. 79.

An implied promise after arrival at full age to pay a debt contracted during infancy is a matter for the jury to infer. Alexander *v.* Hutchinson, 12 N. C. 13.

Evidence sufficient to be submitted to jury see Bay *v.* Gunn, 1 Den. (N. Y.) 108.

76. Slaughter *v.* Cunningham, 24 Ala. 260, 60 Am. Dec. 463.

77. *Georgia.* — Walker *v.* Pope, 101 Ga. 665, 29 S. E. 8.

Indiana.— Stringer *v.* Northwestern Mut. L. Ins. Co., 82 Ind. 100; Wiley *v.* Wilson, 77 Ind. 596.

New Hampshire. — State *v.* Plaisted, 43 N. H. 413, under the instructions of the court.

Tennessee.—Scott *v.* Buchanan, 11 Humphr. 468.

United States.— See Hegler *v.* Faulkner, 153 U. S. 109, 14 S. Ct. 779, 38 L. ed. 653.

See 27 Cent. Dig. tit. "Infants," § 297.

Compare Goodnow *v.* Empire Lumber Co., 31 Minn. 468, 18 N. W. 283, 47 Am. Rep. 798.

An instruction that a minor "would have to disaffirm the contract within a reasonable time after attaining his majority, and within a year or so would be a reasonable time," did not treat the question of "reasonable time" as a question of law, but left it to the jury as a question of fact. Hegler *v.* Faulkner, 153 U. S. 109, 14 S. Ct. 779, 38 L. ed. 653.

78. Heath *v.* Stevens, 48 N. H. 251.

79. Harseim *v.* Cohen, (Tex. Civ. App. 1894) 25 S. W. 977.

80. Fairweather *v.* Burling, 181 N. Y. 117, 73 N. E. 565 [*affirming* 98 N. Y. App. Div. 267, 19 N. Y. Suppl. 516].

jury.[81] The fact that plaintiff is an infant does not necessarily make the question of negligence one for the jury, but where the facts are undisputed and the inferences certain it may be a question of law for the court.[82] Whether or not plaintiff's next friend was duly and regularly appointed is a question of law for the court.[83]

3. VERDICT AND FINDINGS. In an action against several defendants, one of whom is an infant, the jury may find for the infant and against the other defendants.[84] Under an issue formed to try the question of property between a claimant and a plaintiff in execution, the jury cannot render a verdict against the claimant on the ground of infancy. The proper course in such case is to move for an issue to try the question of infancy, or for the appointment of a guardian.[85] A statutory provision that findings of fact may be waived by the several parties to an issue of fact applies to infants as well as to adults.[86]

4. REFERENCE. Where some of defendants are infants the court will not grant a summary reference until a guardian *ad litem* has been appointed.[87] An infant is not capable of consenting to a reference in an action to which he is a party,[88] and the guardian *ad litem* of an infant defendant should not consent to a general reference to a master to take an account against the infant until he has ascertained that the rights of the infant can be protected on such reference.[89] Where testimony is taken before a master in chancery without notice to the guardian *ad litem* of infant defendants it is not admissible as against the infants notwithstanding the guardian may make no objection on the hearing.[90] It is the practice of English and Canadian courts when a bill of foreclosure is filed by the mortgagee after the death of the mortgagor, and the heir is an infant, to refer it to the master with the consent of the mortgagee to inquire where a sale or foreclosure will be most for the benefit of the infant.[91]

M. New Trial. In Kentucky an infant defendant is entitled to a new trial for erroneous proceedings against him where the condition of defendant does not appear in the record nor the error in the proceedings,[92] and when it appears in evidence that defendant, sued as an adult, is an infant, plaintiff should be required to proceed against him as an infant; if the court renders judgment against the infant without requiring this to be done, it should grant relief on a motion for a new trial.[93] It was not an abuse of discretion to refuse a rehearing to a minor decreed to be holding lands as a trustee and required to convey them on payment of a debt due him, where, although not appearing in the case, his interests were defended by his father, who was his foreign guardian, or where, on attaining his majority, in two months more, he would be entitled, under the statute relating to decrees for conveyance, to a readjudication for any fraud, collusion, error, or mistake therein.[94]

N. Judgment[95] — 1. FORM OF JUDGMENT. It is error to give a joint decree in favor of several complainants for the aggregate of all their debts against defendant where one of the complainants is an infant.[96] In Louisiana it has been held that judgment cannot be given in the general terms against an emancipated

81. Lieserowitz *v.* West Chicago St. R. Co., 80 Ill. App. 248.
82. Larson *v.* Knapp, etc., Co., 98 Wis. 178, 73 N. W. 992.
83. Heinzle *v.* Metropolitan St. R. Co., 182 Mo. 528, 81 S. W. 848.
84. Cutts *v.* Gordon, 13 Me. 474, 29 Am. Dec. 520; Hartness *v.* Thompson, 5 Johns. (N. Y.) 160.
85. Mundine *v.* Perry, 2 Stew. & P. (Ala.) 130.
86. Western Lumber Co. *v.* Phillips, 94 Cal. 54, 29 Pac. 328.
87. White *v.* Cummins, 2 Grant Ch. (U. C.) 397.
88. Gamache *v.* Prevost, 71 Mo. 84; Garesche *v.* Gamhs, 3 Mo. App. 572.
89. Jenkins *v.* Freyer, 4 Paige (N. Y.) 47.
90. Boyer *v.* Boyer, 89 Ill. 447; Turner *v.* Jenkins, 79 Ill. 228.
91. Mondey *v.* Mondey, 1 Ves. & B. 223, 35 Eng. Reprint 87; Saunderson *v.* Caston, 1 Grant Ch. (U. C.) 349.
92. Jamison *v.* Petit, 6 Bush (Ky.) 669.
93. Shrout *v.* Burgess, 5 Ky. L. Rep. 691.
94. Hebron *v.* Kelly, 77 Miss. 48, 23 So. 641, 25 So. 877.
95. See, generally, JUDGMENTS.
96. Armstrong *v.* Walkup, 9 Gratt. (Va.) 372, holding this to be true, although such

minor but should direct that execution should not be levied upon immovables but only on the movables.[97]

2. Judgment to Be For or Against Infant. Where an infant party is successful the judgment should be in favor of the infant and not in favor of the next friend,[98] and where he is unsuccessful the judgment should be against the infant and not against the guardian *ad litem*.[99]

3. Time of Entry. The fact that a decree was entered as of a week earlier than it was rendered, without objection from the guardian *ad litem*, does not show fraud on his part, where this enabled the parties to get the case before the appellate court earlier, and it does not appear that the infant would have profited by delay.[1] In New York it is not necessary that twenty days shall elapse between the appointment of a guardian *ad litem* and the entry of judgment against the infant except in case of judgment by default.[2]

4. Judgment Must Be on Issues Presented. In an action for partition against infants the court is limited to a decree on the claim as made in the complaint and a decree concerning the claim of the infants to property other than that sought by the complaint to be divided is void.[3]

5. Decree For Conveyance of Land. It has been held that in an action to obtain a conveyance, where one of defendants is an infant, a decree for the conveyance of his title may be rendered if it appears that it will not be prejudicial to him.[4]

6. Effect of Recitals in Judgment. A recital in a final judgment that a guardian *ad litem* of infants appeared pursuant to a due and proper appointment by the court is sufficient to establish the guardian's authority.[5] Where the record of a cause shows that a guardian *ad litem* was appointed for minor defendants, and that he accepted the appointment and filed their answer, a recital in the decree that the cause was heard upon their answer is conclusive as to the service of legal notice on the minors.[6]

7. Judgment by Default. A judgment rendered against an infant by default and without proof of the facts relied on for relief is erroneous and voidable,[7] but

decree is made by consent of the infant or his next friend.

97. Broussard *v.* Mallet, 8 Mart. N. S. (La.) 269.

98. Galveston Oil Co. *v.* Thompson, 76 Tex. 235, 13 S. W. 60; Island City Sav. Bank *v.* Wales, 3 Tex. App. Civ. Cas. § 244. See also Galveston City R. Co. *v.* Hewitt, 67 Tex. 473, 3 S. W. 705, 60 Am. Rep. 32.

For proper form of the judgment see Texas Cent. R. Co. *v.* Stuart, 1 Tex. Civ. App. 642, 20 S. W. 962.

Amendment.— Where a judgment is entered in the name of the next friend of an infant, without showing the capacity in which he sues, it may be amended by inserting the infant's name. Kees *v.* Maxim, 99 Mich. 493, 58 N. W. 473.

99. Tucker *v.* McClure, 17 Iowa 583, action for trespass.

1. Kingsbury *v.* Buckner, 134 U. S. 650, 10 S. Ct. 638, 33 L. ed. 1047.

2. Newins *v.* Baird, 19 Hun (N. Y.) 306.

3. Waterman *v.* Lawrence, 19 Cal. 210, 79 Am. Dec. 212.

4. Pulliam *v.* Pulliam, 4 Dana (Ky.) 123. *Contra*, Whitney *v.* Stearns, 11 Metc. (Mass.) 319 [*following* Coffin *v.* Heath, 6 Metc. (Mass.) 76, holding that a decree that land be conveyed by defendants cannot be made while they remain infants].

The conveyance may be decreed to be made by the infant defendants without the interposition of their guardian. Meriwether *v.* Hite, 2 A. K. Marsh. (Ky.) 181.

Infants cannot be decreed to convey land with warranty. St. Clair *v.* Smith, 3 Ohio 355.

5. Benjamin *v.* Birmingham, 50 Ark. 433, 8 S. W. 183. See also White *v.* Morris, 107 N. C. 92, 2 S. E. 80.

6. Beddinger *v.* Smith, (Ark. 1890) 13 S. W. 734.

7. *Alabama.*— Dunning *v.* Stanton, 9 Port. 513.

Arkansas.— Boyd *v.* Roane, 49 Ark. 397, 5 S. W. 704; Woodall *v.* Delatour, 43 Ark. 521.

Illinois.— White *v.* Kilmartin, 205 Ill. 525, 68 N. E. 1086; Thomas *v.* Adams, 59 Ill. 223; Quigley *v.* Roberts, 44 Ill. 503; Rhoads *v.* Rhoads, 43 Ill. 239; Peak *v.* Pricer, 21 Ill. 164; Masterson *v.* Wiswould, 18 Ill. 48; Cost *v.* Rose, 17 Ill. 276; Hamilton *v.* Gilman, 12 Ill. 260; Enos *v.* Capps, 12 Ill. 255.

Indiana.— Richards *v.* Richards, 17 Ind. 636; Pugh *v.* Pugh, 9 Ind. 132; Wells *v.* Wells, 6 Ind. 447; Driver *v.* Driver, 6 Ind. 286. *Compare* Kirby *v.* Holmes, 6 Ind. 33.

Indian Territory.— Cook *v.* Edson, (1904) 82 S. W. 918.

the preponderance of authority is in support of the view that such a judgment is not void.[8]

8. Consent Judgment. While it has been laid down that a judgment or decree cannot be rendered against an infant by consent without evidence, for the reason that he cannot make a valid consent, nor is he bound by the consent of his guar-

Iowa.— Ralston *v.* Lahee, 8 Iowa 17, 74 Am. Dec. 291.

Kentucky.— Thornton *v.* McGrath, 1 Duv. 349; Ullery *v.* Blackwell, 3 Dana 300; Chalfant *v.* Monroe, 3 Dana 35; Bourne *v.* Bourne, 19 S. W. 401, 14 Ky. L. Rep. 189; Marshall *v.* Marshall, 7 Ky. L. Rep. 749.

Massachusetts.— Knapp *v.* Crosby, 1 Mass. 479.

Michigan.— Ballentine *v.* Clark, 38 Mich. 395.

Minnesota.— Eisenmenger *v.* Murphy, 42 Minn. 84, 43 N. W. 784, 18 Am. St. Rep. 493.

Mississippi.— McIlvoy *v.* Alsop, 45 Miss. 365.

Missouri.— Heath *v.* Ashley, 15 Mo. 393.

New Hampshire.— Beckley *v.* Newcomb, 24 N. H. 359.

New Jersey.— See Foulkes *v.* Young, 21 N. J. L. 438.

New York.— McMurray *v.* McMurray, 66 N. Y. 175; Kellett *v.* Rathbun, 4 Paige 102; Mills *v.* Dennis, 3 Johns. Ch. 367.

North Carolina.— White *v.* Albertson, 14 N. C. 241, 22 Am. Dec. 719. *Compare* Mauney *v.* Gidney, 88 N. C. 200.

Ohio.— Massie *v.* Donaldson, 8 Ohio 377.

Tennessee.— Rutherford *v.* Richardson, 1 Sneed 609.

Texas.— Carlton *v.* Miller, 2 Tex. Civ. App. 619, 21 S. W. 697.

Virginia.— Lee *v.* Braxton, 5 Call 459; Fox *v.* Cosby, 2 Call 1.

See 27 Cent. Dig. tit. "Infants," § 309.

Judgment should be arrested and a new trial granted where infant defendants have never been formally notified, and have never answered or pleaded, and no guardian *ad litem* has been appointed for them. Cavender *v.* Smith, 5 Iowa 157.

A bill of review may be filed by the infants by next friend without leave of the court. Lee *v.* Braxton, 5 Call (Va.) 459.

Infants constructively served.—See Covington, etc., R. Co. *v.* Bowler, 9 Bush (Ky.) 468, construing Ky. Code Pr. § 55.

Judgment on counter-claim.—The rendition of judgment for defendant upon his counter-claim against infant plaintiffs, before reply has been filed by their guardian *ad litem*, is fatally erroneous. Smith *v.* Ferguson, 3 Metc. (Ky.) 424.

In Kentucky under Code Civ. Proc. § 36, subs. 3, providing that no judgment shall be rendered against an infant until his guardian or guardian *ad litem* shall have made defense, or filed a report stating that, after a careful examination of the case, he is unable to make defense, it was error to render judgment against an infant defendant upon the report of the guardian *ad litem* that he had no defense to make, without any statement that he had examined the record. Womble *v.* Trice, 66 S. W. 370, 67 S. W. 9, 23 Ky. L. Rep. 1939.

Under the New York code of civil procedure a judgment by default cannot be taken against an infant defendant until twenty days have expired since the appointment of a guardian *ad litem* for him. N. Y. Code Civ. Proc. § 1218. See Newins *v.* Baird, 19 Hun (N. Y.) 306. This provision applies only to actions where the infancy is admitted, and in which judgment may be rendered against an infant defendant; and a defendant sued as an adult, and against whom a judgment has been rendered by default, is not entitled to have such judgment set aside as a matter of right, and without terms, on an *ex parte* showing of his minority. Jackson *v.* Brunor, 16 Misc. (N. Y.) 294, 38 N. Y. Suppl. 110. It is discretionary with the court to relieve defendant on motion and such discretion is not subject to review. Jackson *v.* Brunor, 17 Misc. (N. Y.) 339, 39 N. Y. Suppl. 1080 [*affirming* 16 Misc. 294, 38 N. Y. Suppl. 110]. A judgment by default will not be vacated on the ground that defendant was an infant at the time the judgment was rendered, but the defense of infancy can be interposed in such case only after procuring an order opening the default, and allowing defendant to plead. Appel *v.* Brooks, 4 Misc. (N. Y.) 626, 24 N. Y. Suppl. 100. A court will not aid a defendant, on the plea of infancy, in setting aside a judgment obtained by default, where such default was caused by his own laches. Graham *v.* Pinckney, 30 N. Y. Super. Ct. 147. Where a default judgment was taken against an infant without a guardian *ad litem* it will be set aside on motion and without imposing terms. Kellog *v.* Klock, 2 Code Rep. (N. Y.) 28.

8. *Arkansas.*— Boyd *v.* Roane, 49 Ark. 397, 5 S. W. 704.

Indian Territory.— Cook *v.* Keith, (1904) 82 S. W. 918.

Kentucky.— Thornton *v.* McGrath, 1 Duv. 349; Bourne *v.* Bourne, 19 S. W. 401, 14 Ky. L. Rep. 189.

Minnesota.— Eisenmenger *v.* Murphy, 42 Minn. 84, 43 N. W. 784, 18 Am. St. Rep. 493.

Mississippi.— Campbell *v.* Hays, 41 Miss. 561.

New York.— McMurray *v.* McMurray, 66 N. Y. 175; Althause *v.* Radde, 3 Bosw. 410; Jackson *v.* Brunor, 17 Misc. 339, 39 N. Y. Suppl. 1080 [*affirming* 16 Misc. 294, 38 N. Y. Suppl. 110].

See 27 Cent. Dig. tit. "Infants," § 309.

Contra.— Dohms *v.* Mann, 76 Iowa 723, 39 N. W. 823; Brown *v.* Downing, 137 Pa. St. 569, 20 Atl. 871. See also Chandler *v.* McKinney, 6 Mich. 217, 74 Am. Dec. 686.

dian *ad litem* or next friend,[9] there is also authority to the effect that an infant is bound by a consent decree in a suit to which he is a party,[10] at least where the decree is based upon an adjudication of the court that it is a fit and proper one to be entered against the infant.[11] Before entering a consent decree the court should inquire whether the terms of it are for the interest of the infant;[12] but it will be presumed in the absence of any showing to the contrary that the court has performed its duty in this respect;[13] and it has been held that if the court does pronounce a decree against an infant by consent and without inquiry whether it will be for his benefit he is as much bound by the decree as if there had been a reference to a master and a report by him that it was for the benefit of the infant.[14]

9. Confession of Judgment.[15] A bill cannot be taken as confessed or judgment by confession entered against an infant;[16] and the error of entering a judgment as

9. *Alabama.*— Dunning *v.* Stanton, 9 Port. 513.

Illinois.— Bennett *v.* Bradford, 132 Ill. 269, 24 N. E. 630; Lieserowitz *v.* West Chicago St. R. Co., 80 Ill. App. 248.

Indiana.— Martin *v.* Starr, 7 Ind. 224. See also McEndree *v.* McEndree, 12 Ind. 97.

Louisiana.— Mackin *v.* Wilds, 106 La. 1, 30 So. 257.

New York.— See Scott *v.* Monell, 1 Redf. Surr. 431.

See 27 Cent. Dig. tit. "Infants," § 308; and *supra*, VIII, D, 4, h.

Where infants' interests are left the same under a consent decree setting aside a will as they were under the will, their incapacity to give a valid consent is no reason for setting aside the decree. Cox *v.* Lynn, 138 Ill. 195, 29 N. E. 857.

Allegations sufficient to warrant setting aside consent decree see Bent *v.* Maxwell Land-Grant, etc., Co., 3 N. M. 158, 3 Pac. 721.

When too late to attack judgment.— See Ferrell *v.* Broadway, 127 N. C. 404, 37 S. E. 504 [*following* Arthur *v.* Broadway, 127 N. C. 407, 37 S. E. 503, and *overruling* on rehearing Ferrell *v.* Broadway, 126 N. C. 258, 35 S. E. 467].

10. Gusdofer *v.* Gunay, 72 Miss. 312, 16 So. 432 [*following* Johns *v.* Harper, 61 Miss. 142] (holding that where no fraud or collusion is shown a decree entered by consent of all parties will not be vacated on an original bill by infant parties, although the infants acted under a mistake as to their legal rights); Le Bourgeoise *v.* McNamara, 10 Mo. App. 116 [*affirmed* in 82 Mo. 189] (holding that under Wagner St. Mo. p. 973, §§ 48, 49, a guardian *ad litem*, when convinced that no defense can be made for the infant defendant, may stipulate that judgment for partition may be entered in accordance with plaintiff's petition); Thompson *v.* Maxwell Land-Grant, etc., Co., 168 U. S. 451, 18 S. Ct. 121, 42 L. ed. 538.

The judgment is not void because based on the consent of the guardian *ad litem*, although it may be erroneous. Hollis *v.* Dashiell, 52 Tex. 187.

Estoppel to deny consent.— See Cannon *v.* Hemphill, 7 Tex. 184.

11. Walsh *v.* Walsh, 116 Mass. 377, 17 Am. Rep. 162; Morriss *v.* Virginia Ins. Co., 85 Va. 588, 8 S. E. 383; Harman *v.* Davis, 30 Gratt. (Va.) 461. See also Franklin Sav. Bank *v.* Taylor, 53 Fed. 854, 4 C. C. A. 55.

If the decree is prejudicial to the infant it is not binding on him but may be set aside. Daingerfield *v.* Smith, 83 Va. 81, 1 S. E. 599. See also Morriss *v.* Virginia Ins. Co., 85 Va. 588, 8 S. E. 383.

12. Rankin *v.* Schofield, 71 Ark. 168, 66 S. W. 197, 70 S. W. 306, 100 Am. St. Rep. 59; Milly *v.* Harrison, 7 Coldw. (Tenn.) 191; Thompson *v.* Maxwell Land-Grant, etc., Co., 168 U. S. 451, 18 S. Ct. 121, 42 L. ed. 538.

13. Thompson *v.* Maxwell Land-Grant, etc., Co., 168 U. S. 451, 18 S. Ct. 121, 42 L. ed. 538.

14. Wall *v.* Bushby, 1 Bro. Ch. 484, 28 Eng. Reprint 1254. See also Walsh *v.* Walsh, 116 Mass. 377, 17 Am. Rep. 162; Thompson *v.* Maxwell Land-Grant, etc., Co., 168 U. S. 451, 18 S. Ct. 121, 42 L. ed. 538.

If the decree is beneficial to the infant it will not be reversed merely because made without a reference. Milly *v.* Harrison, 7 Coldw. (Tenn.) 191.

15. Warranty of attorney to confess judgment see *supra*, II, B, 2.

16. *Alabama.*— Daily *v.* Reid, 74 Ala. 415. See also Griffith *v.* Ventress, 91 Ala. 366, 8 So. 312, 24 Am. St. Rep. 918, 11 L. R. A. 193. *Compare* Dunning *v.* Stanton, 9 Port. 513.

Illinois.— Quigley *v.* Roberts, 44 Ill. 503; Rhoads *v.* Rhoads, 43 Ill. 239; Reddicks *v.* State Bank, 27 Ill. 145; Chaffin *v.* Kimball, 23 Ill. 36; Cost *v.* Rose, 17 Ill. 276; Enos *v.* Clapps, 12 Ill. 255.

Indiana.— Knox *v.* Coffey, 2 Ind. 161.

Kentucky.— Carneal *v.* Sthreshley, 1 A. K. Marsh. 471.

Louisiana.— De Moss *v.* Cobb, 23 La. Ann. 336.

Maine.— Tucker *v.* Bean, 65 Me. 352.

Maryland.— See Tiernan *v.* Hammond, 41 Md. 548.

Michigan.— Soper *v.* Fry, 37 Mich. 236.

Mississippi.— McIlvoy *v.* Alsop, 45 Miss. 365; Wells *v.* Smith, 44 Miss. 296; Hargrove *v.* Martin, 6 Sm. & M. 61.

New York.— Bennett *v.* Davis, 6 Cow 393.

Pennsylvania.— Know *v.* Flack, 22 Pa. St.

confessed against an infant is not cured by a reservation to him of the right to show cause against the judgment after he becomes of age.[17]

10. Reservation to Infant of Day in Court. It has been the practice in equity that a decree against an infant shall first be entered *nisi* and shall contain a provision giving him a day in court after he became of age to show cause against it before it becomes absolute;[18] and when the decree contains such a provision the

337; Rogers *v.* Smith, 4 Pa. St. 93; Read *v.* Bush, 5 Binn. 455; Small *v.* Murphy, 1 Luz. Leg. Reg. 332.

South Carolina.— Bailey *v.* Whaley, 14 Rich. Eq. 81.

Tennessee.— Rutherford *v.* Richardson, 1 Sneed 609.

United States.— Walton *v.* Coulson, 29 Fed. Cas. No. 17,132, 1 McLean 120 [*affirmed* in 9 Pet. 62, 9 L. ed. 51].

England.— Saunderson *v.* Marr, 1 H. Bl. 75, 2 Rev. Rep. 723; Ashlin *v.* Langton, 3 L. J. C. P. 264, 4 Moore & S. 719, 30 E. C. L. 567.

See 27 Cent. Dig. tit. "Infants," § 307.

A counter-claim set up by defendant in an action by an infant cannot be taken as confessed. Morris *v.* Edmonds, 43 Ark. 427.

An infant's confession of judgment is a nullity and the judgment cannot be validated by an acknowledgment of liability thereunder after attaining majority. De Moss *v.* Cobb, 23 La. Ann. 336.

In an action of debt upon a judgment confessed before a justice of the peace, defendant may defend on the ground of infancy when the judgment was confessed. Etter *v.* Curtis, 7 Watts & S. (Pa.) 170.

Where refusal to set aside proper.— See Krickow *v.* Pennsylvania Tar Mfg. Co., 87 Ill. App. 653, infant engaged in business.

17. Hargrove *v.* Martin, 6 Sm. & M. (Miss.) 61.

18. *California.*— Joyce *v.* McAvoy, 31 Cal. 273, 89 Am. Dec. 172.

Delaware.— Lockwood *v.* Stradley, 1 Del. Ch. 298, 12 Am. Dec. 97.

District of Columbia.— Stansbury *v.* Inglehart, 20 D. C. 134.

Georgia.— Coalson *v.* Tooke, 18 Ga. 742.

Kentucky.— Anderson *v.* Irvine, 11 B. Mon. 341; Hanna *v.* Spotts, 5 B. Mon. 362, 43 Am. Dec. 132; Heiatt *v.* Barnes, 5 Dana 219; Arnold *v.* Voorhies, 4 J. J. Marsh. 507; Jones *v.* Adair, 4 J. J. Marsh. 220; Funk *v.* McKeoun, 4 J. J. Marsh. 162; Ewing *v.* Armstrong, 4 J. J. Marsh, 68; Collard *v.* Groom, 2 J. J. Marsh. 487; Passmore *v.* Moore, 1 J. J. Marsh. 591; Jameson *v.* Moseley, 4 T. B. Mon. 414; Beeler *v.* Bullitt, 4 Bibb 11; Shield *v.* Bryant, 3 Bibb 525. *Compare* Williamson *v.* Johnston, 4 T. B. Mon. 253.

Maine.— McClellan *v.* McClellan, 65 Me. 500.

Mississippi.— Cole *v.* Miller, 32 Miss. 89; Williams *v.* Stratton, 10 Sm. & M. 418; Doe *v.* Bradley, 6 Sm. & M. 485.

New Hampshire.— Dow *v.* Jewell, 21 N. H. 470.

New York.— Jackson *v.* Edwards, 7 Paige 386; Wright *v.* Miller, 1 Sandf. Ch. 103 [*affirmed* in 8 N. Y. 9, 59 Am. Dec. 438 (*reversing* 4 Barb. 600)]. See also Mills *v.* Dennis, 3 Johns. Ch. 367; Harris *v.* Youman, Hoffm. 178.

Ohio.— Long *v.* Mulford, 17 Ohio St. 484, 93 Am. Dec. 638.

Tennessee.—Simpson *v.* Alexander, 6 Coldw. 619, infant defendant.

Virginia.— Tennent *v.* Pattons, 6 Leigh 196; Jackson *v.* Turner, 5 Leigh 119; Wilkinson *v.* Oliver, 4 Hen. & M. 450; Braxton *v.* Lee, 4 Hen. & M. 376; Lee *v.* Braxton, 5 Call 459.

England.— Savage *v.* Carroll, 1 Ball & B. 551, 12 Rev. Rep. 32. See also Effingham *v.* Napier, 4 Bro. P. C. 340, 2 Eng. Reprint 230.

Canada.— London, etc., Loan, etc., Co. *v.* Everitt, 8 Ont. Pr. 489; Mair *v.* Kerr, 2 Grant Ch. (U. C.) 223.

See 27 Cent. Dig. tit. "Infants," § 310.

Where the legal estate is in trustees there is no occasion to give the infant a day to show cause. Thornton *v.* Blackbourne, 2 Eq. Cas. Abr. 303, 22 Eng. Reprint 256; Bingham *v.* Clanmorris, 2 Molloy 393.

In a decree against an infant as trustee of real estate, it is not necessary to reserve a day for defendant to show cause after attaining twenty-one years of age. Lake *v.* McIntosh, 7 Grant Ch. (U. C.) 532. But an infant trustee holding the legal title to lands and having also an interest in the trust estate is entitled to a day after attaining his majority to answer. McClellan *v.* McClellan, 65 Me. 500.

A decree for the sale of mortgaged premises, instead of a technical foreclosure, is binding on an infant, although no day be given to show cause against it. Doe *v.* Bradley, 6 Sm. & M. (Miss.) 485.

Where a sale of land by commissioners is ordered for the payment of debts, the day need not be given, unless the infant is ordered to join in the conveyance. Wilkinson *v.* Oliver, 4 Hen. & M. (Va.) 450.

Interlocutory decree.— It is no ground for reversing an interlocutory decree that no time is fixed by it within which it may be objected to by infant defendants after coming of age as such defect may be remedied by the final decree. Pickett *v.* Chilton, 5 Munf. (Va.) 467.

Where title is divested by decree an infant is not entitled to a day in court after majority; this right exists only where he is directed to convey. Winchester *v.* Winchester, 1 Head (Tenn.) 460.

Infant complainant not entitled to day in court.— Coalson *v.* Tooke, 18 Ga. 742; Simpson *v.* Alexander, 6 Coldw. (Tenn.) 619.

Sale of subject-matter.— Where a decree

infant is entitled, as a matter of course, at any time before the decree is made absolute to put in a new answer and have the cause heard again.[19] In many jurisdictions, however, this practice does not now obtain, the necessity for such a reservation being obviated by statutes giving the infant time to show cause after majority.[20]

11. Operation and Effect of Judgment. A judgment or decree rendered in an action or proceeding to which an infant was a party is binding upon him the same as if he had been an adult, unless reversed or set aside in some appropriate proceeding.[21] The fact that the person in whose favor a judgment has

against infants saves the right to them to have the decree opened within a certain time, they will not be prevented from having the decree set aside within that time by the fact that the subject-matter of the contract has been sold by the complainant while the decree was in force against the infants to *bona fide* purchasers. Stanley *v.* Brannon, 6 Blackf. (Ind.) 193.

Failure to reserve day to show cause does not render decree void. Joyce *v.* McAvoy, 31 Cal. 273, 89 Am. Dec. 172; Regla *v.* Martin, 19 Cal. 463; Doe *v.* Bradley, 6 Sm. & M. (Miss.) 485.

19. Ralston *v.* Lahee, 8 Iowa 17, 74 Am. Dec. 291; Fountain *v.* Caine, 1 P. Wms. 504, 24 Eng. Reprint 491.

Amendment — Bill of discovery. — Where by the decree itself the infant is allowed time after coming of age to show cause against it he may, before the decree is made absolute, amend his answer and make a better defense, and may for that purpose file a bill for discovery. Ralston *v.* Lahee, 8 Iowa 17, 74 Am. Dec. 291.

The infant must apply to the court for its leave and direction as to the manner and terms of showing cause, he cannot assail the decree in any mode he may choose, without regard to the course of practice pursued by adult defendants. Field *v.* Williamson, 4 Sandf. Ch. (N. Y.) 613.

20. *Alabama.*—Kennedy *v.* Kennedy, 2 Ala. 571; Cato *v.* Easley, 2 Stew. 214.

Arkansas.— Woodall *v.* Moore, 55 Ark. 22, 17 S. W. 268.

Illinois.— Wadhams *v.* Gay, 73 Ill. 415; Barnes *v.* Hazleton, 50 Ill. 429; Enos *v.* Capps, 15 Ill. 277.

Maryland.— Gregory *v.* Lenning, 54 Md. 51.

Massachusetts. — Walsh *v.* Walsh, 116 Mass. 377, 17 Am. Rep. 162.

Mississippi.— McLemore *v.* Chicago, etc., R. Co., 58 Miss. 514.

Missouri.— Shields *v.* Powers, 29 Mo. 315; Creath *v.* Smith, 20 Mo. 113; Hendricks *v.* McLean, 18 Mo. 32; Heath *v.* Ashley, 15 Mo. 393.

Nebraska.— Manfull *v.* Graham, 55 Nebr. 645, 76 N. W. 19, 70 Am. St. Rep. 412.

New York.—Phillips *v.* Dusenberry, 8 Hun 348; Mutual L. Ins. Co. *v.* Holloday, 13 Abb. N. Cas. 16, 29, where reasons for rule are given.

Canada.— Scottish Manitoba Inv., etc., Co. *v.* Blanchard, 2 Manitoba 154.

See 27 Cent. Dig. tit. "Infants," § 310.

Statutory right to attack judgment after reaching majority see *infra*, VIII, N, 12, a.

21. *Alabama.*— Waring *v.* Lewis, 53 Ala. 615; Rivers *v.* Durr, 46 Ala. 418.

California.— Gray *v.* Winder, 77 Cal. 525, 20 Pac. 47.

Connecticut. — Clark *v.* Platt, 30 Conn. 282.

Georgia.— Lowe *v.* Equitable Mortg. Co., 102 Ga. 103, 29 S. E. 148; Evans *v.* Collier, 79 Ga. 319, 4 S. E. 266 (judgment in suit prosecuted by infant without next friend or guardian); Cuyler *v.* Wayne, 64 Ga. 78.

Illinois.— Enos *v.* Capps, 15 Ill. 277; Chudleigh *v.* Chicago, etc., R. Co., 51 Ill. App. 491.

Indiana.— Blake *v.* Douglass, 27 Ind. 416.

Iowa.— Dahms *v.* Alston, 72 Iowa 411, 34 N. W. 182; Ralston *v.* Lahee, 8 Iowa 17, 74 Am. Dec. 291.

Kentucky.— Beeler *v.* Bullitt, 3 A. K. Marsh. 280, 13 Am. Dec. 161; Abernathy *v.* Ross, 20 S. W. 222, 14 Ky. L. Rep. 282.

Louisiana.— Dupre *v.* Soye, 31 La. Ann. 450; Le Blanc *v.* His Creditors, 16 La. 120.

Mississippi.— Cocks *v.* Simmons, 57 Miss. 183.

Missouri.— Smith *v.* Perkins, 124 Mo. 50, 27 S. W. 574; Jeffrie *v.* Rohideaux, 3 Mo. 33.

New Jersey.— Sites *v.* Eldredge, 45 N. J. Eq. 632, 18 Atl. 214, 14 Am. St. Rep. 769.

New York.— Matter of Wood, 70 N. Y. App. Div. 321, 75 N. Y. Suppl. 272; Mutual L. Ins. Co. *v.* Schwaner, 36 Hun 373; Phillips *v.* Dusenberry, 8 Hun 348; Wood *v.* Martin, 66 Barb. 241; Mutual L. Ins. Co. *v.* Holloday, 13 Abb. N. Cas. 16; Mills *v.* Dennis, 3 Johns. Ch. 367.

North Carolina.— Grantham *v.* Kennedy, 91 N. C. 148.

Ohio.— Remmelsberg *v.* Mitchell, 29 Ohio St. 22.

Oregon.— English *v.* Savage, 5 Oreg. 518.

Pennsylvania.— Mercer *v.* Watson, 1 Watts 330.

South Carolina.— Owings *v.* Hunt, 53 S. C. 187, 31 S. E. 237; Baggott *v.* Sawyer, 25 S. C. 405; Bulow *v.* Witte, 3 S. C. 308 [*followed* in McCrosky *v.* Parks, 13 S. C. 90]; Huson *v.* Wallace, 1 Rich. Eq. 1.

Tennessee.— Hurt *v.* Long, 90 Tenn. 445, 16 S. W. 968; Allen *v.* Shanks, 90 Tenn. 359, 16 S. W. 715; Vaccaro *v.* Cicalla, 89 Tenn. 63, 14 S. W. 43; Grimstead *v.* Huggins, 13 Lea 728; Oody *v.* Roane Iron Co., (Ch. App. 1899) 53 S. W. 1002; Crawford *v.* Woodward, 1 Tenn. Ch. App. 274. *Compare* Rhodes *v.* Crutchfield, 7 Lea 518, judgment in ejectment not conclusive on infant heirs.

Texas.— McGhee *v.* Romatka, 92 Tex. 38, 45 S. W. 552; Deering *v.* Hurt, (1886) 2 S. W. 42; Cannon *v.* Hemphill, 7 Tex. 184;

been obtained is an infant does not prevent the dormancy statute from running against it.[22]

12. Opening or Vacating Judgment — a. Right to Relief.[23] Even independent of statute it has been held that a judgment irregularly obtained against an infant may be set aside after he has become of age,[24] but in many jurisdictions the statutes give to an infant against whom a judgment or decree has been rendered a certain time after attaining majority within which he may show cause against or proceed to vacate it.[25] Such a statute has also been held not applicable

Day *v.* Johnson, 32 Tex. Civ. App. 107, 72 S. W. 426. See also Miller *v.* Foster, 76 Tex. 479, 13 S. W. 529.

Virginia.— Harrison *v.* Wallton, 95 Va. 721, 30 S. E. 372, 64 Am. St. Rep. 830, 41 L. R. A. 703; Zirkle *v.* McCue, 26 Gratt. 517; Staton *v.* Pittman, 11 Gratt. 99. See also Brown *v.* Armistead, 6 Rand. 594.

Washington.— Kromer *v.* Friday, 10 Wash. 621, 39 Pac. 229, 32 L. R. A. 671.

West Virginia.— Lafferty *v.* Lafferty, 42 W. Va. 783, 26 S. E. 262.

United States.— Kansas City, etc., R. Co. *v.* Morgan, 76 Fed. 429, 21 C. C. A. 468.

England.— Gregory *v.* Molesworth, 3 Atk. 626, 26 Eng. Reprint 1160; Morgan *v.* Thorne, 9 Dowl. P. C. 228, 5 Jur. 294, 10 L. J. Exch. 125, 7 M. & W. 400; Booth *v.* Rich, 1 Vern. Ch. 295, 23 Eng. Reprint 478.

Canada.— Ricker *v.* Ricker, 27 Grant Ch. (U. C.) 576; McDougall *v.* Bell, 10 Grant Ch. (U. C.) 283.

See 27 Cent. Dig. tit. "Infants," § 321.

In an action upon a judgment against an infant, defendant cannot set up his infancy when the judgment was rendered in defense. Ludwick *v.* Fair, 29 N. C. 422, 47 Am. Dec. 333.

A judgment based on an agreed statement of facts made by the parties, which is not signed by the guardian *ad litem* of a minor defendant, or by any person representing the guardian or the minor, will not affect the rights of the minor. Samuel Cupples Wooden-Ware Co. *v.* Hill, (Tex. Civ. App. 1900) 59 S. W. 318.

Judicial proceedings upon a void instrument, as in the case at bar a will, are void and do not conclude infants. Buelow *v.* Mandal, 28 La. Ann. 697.

22. Williams *v.* Merritt, 109 Ga. 213, 34 S. E. 312.

23. **Reservation of day in court by terms of decree** see *supra*, VIII, N, 10.

Vacation of judgment entered on warrant of attorney see *supra*, II, B, 2.

24. Sliver *v.* Shelback, 1 Dall. (Pa.) 165, 1 L. ed. 84; Haigler *v.* Way, 2 Rich. (S. C.) 324; Brown *v.* Armistead, 6 Rand. (Va.) 594. See also Thompson *v.* Peebles, 6 Dana (Ky.) 387.

The fact of infancy must be tried per pais and not by inspection. Sliver *v.* Shelback, 1 Dall. (Pa.) 165, 1 L. ed. 84; Haigler *v.* Way, 2 Rich. (S. C.) 324.

25. *Alabama.*— Hooper *v.* Hardie, 80 Ala. 114; Kennedy *v.* Kennedy, 2 Ala. 571; Cato *v.* Easley, 2 Stew. 214.

Arkansas.— Blanton *v.* Rose, 70 Ark. 415, 68 S. W. 674; Woodall *v.* Moore, 55 Ark. 22, 17 S. W. 268.

Illinois.— Barnes *v.* Hazleton, 50 Ill. 429; Smith *v.* Sackett, 10 Ill. 534.

Indiana.— Zerger *v.* Flattery, 83 Ind. 399; Seward *v.* Clark, 67 Ind. 289.

Iowa.— Wise *v.* Schloesser, 111 Iowa 16, 82 N. W. 439; Dahms *v.* Alston, 72 Iowa 411, 34 N. W. 182.

Kentucky.— Bunnell *v.* Bunnell, 111 Ky. 566, 64 S. W. 420, 65 S. W. 607, 23 Ky. L. Rep. 800; Back *v.* Combs, 96 Ky. 522, 29 S. W. 352, 16 Ky. L. Rep. 613; Booker *v.* Kennerly, 96 Ky. 415, 29 S. W. 323, 16 Ky. L. Rep. 537; Richards *v.* Richards, 10 Bush 617; Speak *v.* Mattingly, 4 Bush 310; Bohannon *v.* Tarbin, 76 S. W. 46, 25 Ky. L. Rep. 515; Park *v.* Bolinger, 8 S. W. 914, 10 Ky. L. Rep. 303; House *v.* Greathouse, 10 Ky. L. Rep. 317.

Minnesota.— Hoyt *v.* Lightbody, 93 Minn. 249, 101 N. W. 304.

Mississippi.— McLemore *v.* Chicago, etc., R. Co., 58 Miss. 514; Mayo *v.* Clancy, 57 Miss. 674; Enochs *v.* Harrelson, 57 Miss. 465; Sledge *v.* Boone, 57 Miss. 222.

Nebraska.— Manfull *v.* Graham, 55 Nebr. 645, 76 N. W. 19, 70 Am. St. Rep. 412.

Ohio.— Roberts *v.* Roberts, 61 Ohio St. 96, 55 N. E. 411. If there is no error apparent upon the face of the record erroneous proceedings against an infant may be reached by proceedings filed in the court of common pleas under Ohio Rev. St. § 5354. Palmer *v.* Palmer, 25 Ohio Cir. Ct. 660.

Virginia.— Harrison *v.* Wallton, 95 Va. 721, 30 S. E. 372, 64 Am. St. Rep. 830, 41 L. R. A. 703.

Washington.— Ball *v.* Clothier, 34 Wash. 299, 75 Pac. 1099; Morrison *v.* Morrison, 25 Wash. 466, 65 Pac. 779.

West Virginia.— Seymour *v.* Alkire, 47 W. Va. 302, 34 S. E. 953; Lafferty *v.* Lafferty, 42 W. Va. 783, 26 S. E. 262.

See 27 Cent. Dig. tit. "Infants," § 315.

Even though an infant might have a remedy by appeal he may proceed at once to have the judgment vacated. Richards *v.* Richards, 10 Bush (Ky.) 617.

A purchaser of land from one whose title depends on a decree taken against infants is bound with notice of their right to show cause against such decree. Blanton *v.* Rose, 70 Ark. 415, 68 S. W. 674.

Ejectment.— Va. Code (1849), c. 135, § 36, providing that a judgment recovered in ejectment against an infant shall be no bar to an action commenced by such infant within five

to a judgment in an action in which the complaining infant was the actor,[26] and in the absence of fraud or collusion, a decree rendered in an infant's favor on a bill by next friend whether involving real or personal estate cannot be reopened by the infant.[27] The right to maintain an action to review a judgment against infant defendants after their arrival at majority exists only in those who were infants at the time of the rendition of the judgment, and interested in it, and does not belong to such as thereafter became interested in the subject-matter of the suit by reason of the death of one of the parties to it.[28] Where an attempt by an infant, after his arrival at majority, to set aside a decree, is founded in fraud, the relief asked will not be granted.[29] Where some of the persons interested in a partition proceeding were represented by guardians, but it was not shown that the money received by them or by their guardians was received with knowledge of the fact that any portion of it was the proceeds of the property of partition, the proceedings and decree for partition did not prevent the infants from electing, on attaining their majority, to follow the property itself.[30] In Kentucky where the error appears in the record the remedy is by appeal and not by an attempt to secure a vacation of the judgment.[31] Where a minor mortgaged lands, and a scire facias was sued out on the mortgage, and the premises sold for less than the sum due and a judgment was rendered for the balance, on a bill by the minor to enjoin this judgment, alleging his minority and want of notice of the proceedings at law, it was held that his only remedy was at law through a writ of error.[32]

b. Grounds.[33] An infant has no absolute right to have a judgment against him set aside on reaching majority,[34] nor does a statute giving him the right to show cause against a decree after majority extend the right beyond those cases in

years after the removal of his disability, did not apply to actions of ejectment brought by a lessee to recover possession of leased premises which had been recovered by the landlord under Code, c. 138. Leonard *v.* Henderson, 23 Gratt. (Va.) 331.

Void judgment.— A judgment against a minor in an action wherein he did not have his day in court may be reversed on petition in error filed by him within the statutory time after reaching majority, although it be void in legal effect. Roberts *v.* Roberts, 61 Ohio St. 96, 55 N. E. 411.

A decree entered in conformity with the mandate of an appellate court to which the case had been appealed cannot be attacked by original bill by a party who was an infant when the decree was entered, where he by his next friend appealed from the original decree and appeared in the appellate court by guardian *ad litem* to answer to a cross appeal. Kingsbury *v.* Buckner, 134 U. S. 650, 10 S. Ct. 638, 33 L. ed. 1047.

Effect of affirmance of judgment on appeal. — Where an infant after arriving at majority prosecuted an appeal from a judgment rendered against him during infancy a judgment of affirmance on such appeal is a good plea in bar to a petition filed in the lower court to vacate or set aside the judgment appealed from, whether such petition was filed before or after the appeal was taken. Speak *v.* Mattingly, 4 Bush (Ky.) 310. But infants are entitled to a rehearing under Miss. Code (1871), § 1265, notwithstanding the affirmance of a decree on their appeal from it, where they have failed to secure justice on the former hearing, because of the failure to present their cause as it is presented on the rehearing. Vaughn *v.* Hudson, 59 Miss. 421.

26. Woodall *v.* Moore, 55 Ark. 22, 17 S. W. 268. See also Bennet *v.* East, 7 Ind. 174, holding that an infant is concluded by proceedings for his benefit unless they are tainted with fraud.

27. Johns *v.* Harper, 61 Miss. 142.

28. Back *v.* Combs, 96 Ky. 522, 29 S. W. 352, 16 Ky. L. Rep. 613.

29. See Lowes *v.* Lowes, 127 Mich. 307, 86 N. W. 820.

30. Moore *v.* Appleby, 36 Hun (N. Y.) 368 [*affirmed* in 108 N. Y. 237, 15 N. E. 377].

31. Ogden *v.* Stevens, 98 Ky. 564, 33 S. W. 932, 17 Ky. L. Rep. 1115.

32. Clark *v.* Bond, Wright (Ohio) 282.

33. **Lack of representation by guardian or next friend** see *supra*, VIII, D, 2, g, (1).

Lack of service on infant see *supra*, VIII, F, 2.

34. Manfull *v.* Graham, 55 Nebr. 645, 76 N. W. 19, 70 Am. St. Rep. 412; Robertson *v.* Blair, 56 S. C. 96, 34 S. E. 11, 76 Am. St. Rep. 543; Haigler *v.* Way, 2 Rich. (S. C.) 324; Lafferty *v.* Lafferty, 42 W. Va. 783, 26 S. E. 262. See also Brown *v.* Keyser, 53 Ind. 85.

A compromise of a suit in equity, made by a guardian, sanctioned by the chancellor, and approved by the probate court, will not be set aside upon application of the infant after he has come of age, without good cause shown. Dunlap *v.* Petrie, 35 Miss. 590.

which, under the old practice, such right was reserved in the decree;[35] but the fact that the applicant was an infant when the judgment was rendered and that the judgment itself is shown to be unjust is sufficient to entitle the applicant to relief.[36] The judgment or decree may be set aside for fraud,[37] surprise,[38] mistake,[39] irregularity,[40] or error.[41] A judgment entered on agreement of the parties may be set aside because improvident as to an infant party,[42] and a judgment adverse to an infant may be set aside because his interests were not properly cared for.[43] The right of an infant to show cause against a decree which affects his interests after he arrives at age is limited to cause existing at the time of the rendition of the decree, and not such as arose afterward.[44] Where a guardian *ad litem* was appointed for an infant defendant but had neither knowledge nor notice of the appointment until after final judgment had been recovered and entered in the case, and on learning of his appointment he promptly applies for leave to answer,

35. Manfull *v.* Graham, 55 Nebr. 645, 76 N. W. 19, 70 Am. St. Rep. 412.

36. Allen *v.* Troutman, 10 Bush (Ky.) 61; House *v.* Greathouse, 10 Ky. L. Rep. 317.

37. *Indiana.*— Seward *v.* Clark, 67 Ind. 289; Bennett *v.* East, 7 Ind. 174.

New York.— Wright *v.* Miller, 1 Sandf. Ch. 103 [*affirmed* in 8 N. Y. 9, 59 Am. Dec. 438 (*reversing* 4 Barb. 600)].

Ohio.— Massie *v.* Mathews, 12 Ohio 351.

Virginia.— Zirkle *v.* McCue, 26 Gratt. 517.

West Virginia.— Lafferty *v.* Lafferty, 42 W. Va. 783, 26 S. E. 262.

See 27 Cent. Dig. tit. "Infants," § 316.

Evidence of fraud.— See Ralston *v.* Lahee, 8 Iowa 17, 74 Am. Dec. 291.

38. Lafferty *v.* Lafferty, 42 W. Va. 783, 26 S. E. 262.

39. Seward *v.* Clark, 67 Ind. 289.

40. Hare *v.* Hollomon, 94 N. C. 14; England *v.* Garner, 90 N. C. 197.

Where the infant has suffered no substantial injustice an irregular judgment against him will not be set aside, especially when the rights of third persons without notice have supervened. Syme *v.* Trice, 96 N. C. 243, 1 S. E. 480.

Rights of third persons.— Where the judgment is not void it will be set aside to the prejudice of a *bona fide* purchaser without notice. Hare *v.* Hollomon, 94 N. C. 14; England *v.* Garner, 90 N. C. 197. See also Ridgely *v.* Barton, (Md. 1887) 10 Atl. 148.

In New York the court has refused to set aside a judgment of sale in partition and the sale thereunder, notwithstanding such judgment was irregular, where the judgment, sale, and confirmation were not excepted to, holding that the remedy of the infants, if any, was against the guardian *ad litem* in the action for negligence. Prior *v.* Prior, 49 Hun 502, 2 N. Y. Suppl. 523, 15 N. Y. Civ. Proc. 436 [*following* Reed *v.* Reed, 107 N. Y. 545, 14 N. E. 442 (*affirming* 46 Hun 212)].

The irregular appointment of a special guardian to represent an infant defendant is not *per se* ground for setting aside the decree on motion after the time to appeal has expired. Story *v.* Dayton, 22 Hun (N. Y.) 450.

41. Mayo *v.* Clancy, 57 Miss. 674; Enochs *v.* Harrelson, 57 Miss. 465; Sledge *v.* Boone, 57 Miss. 222; Zirkle *v.* McCue, 26 Gratt. (Va.) 517; Lafferty *v.* Lafferty, 42 W. Va. 783, 26 S. E. 262. See also Prutzman *v.* Pitesell, 3 Harr. & J. (Md.) 77.

Error need not appear in record. Delashmutt *v.* Parrent, 39 Kan. 548, 18 Pac. 712; Lafferty *v.* Lafferty, 42 W. Va. 783, 26 S. E. 262. See also Bunnell *v.* Bunnell, 110 Ky. 566, 64 S. W. 420, 65 S. W. 607, 23 Ky. L. Rep. 800, 1101.

The whole record will be examined for the error alleged. Lafferty *v.* Lafferty, 42 W. Va. 783, 26 S. E. 262.

The error must be such as would be a ground of reversal on appeal. Webster *v.* Page, 54 Iowa 461, 6 N. W. 716; Bickel *v.* Erskine, 43 Iowa 213; Doe *v.* Bradley, 6 Sm. & M. (Miss.) 485. After arrival at age he cannot come in with new evidence or a new defense and have the case tried again (Bickel *v.* Erskine, 43 Iowa 213), nor will a judgment against a minor be vacated on the ground of misfortune or casualty or on a mere preponderance of evidence in favor of the minor (Webster *v.* Page, 54 Iowa 461, 6 N. W. 716).

In Nebraska an infant against whom an erroneous judgment has been entered may have it set aside under the code, providing his disability did not appear in the record, nor the error in the proceedings. If those facts did appear, he must proceed by petition in error. Manfull *v.* Graham, 55 Nebr. 645, 76 N. W. 19, 70 Am. St. Rep. 412.

42. Day *v.* Johnson, 32 Tex. Civ. App. 107, 72 S. W. 426.

43. Lloyd *v.* Kirkwood, 112 Ill. 329; Stephens *v.* Hewett, 22 Tex. Civ. App. 303, 54 S. W. 301. See also Cannon *v.* Hemphill, 7 Tex. 184.

The mere knowledge of the infant of the pendency of the suit will not preclude him from thereafter attacking the judgment. Stephens *v.* Hewitt, (Tex. Civ. App. 1903) 77 S. W. 229.

The infant is not bound by the answer of his guardian if he shows his dissent to it within the proper time. Prutzman *v.* Pitesell, 3 Harr. & J. (Md.) 77.

44. Lancaster *v.* Barton, 92 Va. 615, 24 S. E. 251; Zirkle *v.* McCue, 26 Gratt. (Va.) 517; Durrett *v.* Davis, 24 Gratt. (Va.) 302; Walker *v.* Page, 21 Gratt. (Va.) 636.

such leave should be granted unless plaintiff consents to strike out the infant's name as a party to the action.[45]

c. Time For Application. Notwithstanding an infant may be entitled to show cause against a judgment after he comes of age he is not bound to wait until that time before seeking to set aside a judgment against him, but may apply for that purpose as soon as he sees fit;[46] but he is not bound to move at the earliest possible opportunity to set aside a judgment because of the omission to appoint a guardian *ad litem* for him.[47] Where the statute allows an infant a fixed time after arrival at majority to show cause against or seek to vacate a judgment rendered against him during infancy he must proceed within such time or his right to attack the judgment will be lost.[48]

d. Proceedings. Proceedings to set aside a judgment against an infant should be commenced in the court in which the judgment was rendered.[49] The proceedings must be upon notice to the other parties to the decree,[50] and persons claiming under the decree must be made parties;[51] but it is not necessary to join a party to the original proceeding who has no further interest on the litigation and against whom no relief is sought.[52] While the infant may impeach a decree against him by motion in the cause,[53] or by bill of review,[54] he is not bound to proceed in this manner or by way of rehearing,[55] but may maintain an original bill or action to impeach a decree against him for fraud or error.[56] It has also

45. Farmers' L. & T. Co. *v.* Erie R. Co., 9 Abb. N. Cas. (N. Y.) 264.

46. Grimes *v.* Grimes, 143 Ill. 550, 32 N. E. 847; Kuchenbeiser *v.* Beckert, 41 Ill. 172; Loyd *v.* Malone, 23 Ill. 43, 74 Am. Dec. 179; Ralston *v.* Labee, 8 Iowa 17, 74 Am. Dec. 291; Newland *v.* Gentry, 18 B. Mon. (Ky.) 666; Bohannon *v.* Tarbin, 76 S. W. 46, 25 Ky. L. Rep. 515; Park *v.* Bolinger, 8 S. W. 914, 10 Ky. L. Rep. 303; Harrison *v.* Walton, 95 Va. 721, 30 S. E. 372, 64 Am. St. Rep. 830, 41 L. R. A. 703. See also Booker *v.* Kennerly, 96 Ky. 415, 29 S. W. 323, 16 Ky. L. Rep. 537, where the judgment was set aside on the petition of the statutory guardian. *Contra,* Bundy *v.* Hall, 60 Ind. 177.

47. McMurray *v.* McMurray, 60 Barb. (N. Y.) 117.

48. *Iowa.*— Dahms *v.* Alston, 72 Iowa 411, 34 N. W. 182.

Kansas.— Delashmutt *v.* Parrent, 39 Kan. 548, 18 Pac. 712.

Kentucky.— Back *v.* Combs, 96 Ky. 522, 29 S. W. 352, 16 Ky. L. Rep. 613.

Mississippi.— Mayo *v.* Clancy, 57 Miss. 674.

New York.— *In re* Tilden, 98 N. Y. 434.

Washington.— See Morrison *v.* Morrison, 25 Wash. 466, 65 Pac. 779.

See 27 Cent. Dig. tit. "Infants," § 317.

Fraud.— See McNary *v.* Bailey, 30 S. W. 392, 17 Ky. L. Rep. 60, need apply within a year after majority.

Under the Mississippi code of 1857 a party interested in concluding an infant defendant at an earlier date than the three years allowed the infant after majority to attack the decree could within six months after he attained the age of twenty-one years summon him to appear and show cause against the decree or serve him with a copy of it. McLemore *v.* Chicago, etc., R. Co., 58 Miss. 514.

49. Bennet *v.* East, 7 Ind. 174; Carey *v.* Kemper, 45 Ohio St. 93, 11 N. E. 130.

In Washington, under Ballinger Code, § 5153, authorizing the superior court to vacate any judgment for error shown by a minor within twelve months after arriving at full age, and Const. art. 27, § 10, providing that all proceedings in the territorial probate courts shall pass into the jurisdiction of the superior courts, the superior court has complete jurisdiction to review errors of the old probate court, at the suit of minors brought within twelve months after arriving at full age. Ball *v.* Clothier, 34 Wash. 299, 75 Pac. 1099.

50. Ruby *v.* Strother, 11 Mo. 417.

51. McLemore *v.* Chicago, etc., R. Co., 58 Miss. 514.

52. Morrison *v.* Morrison, 25 Wash. 466, 65 Pac. 779.

53. Morris *v.* White, 96 N. C. 91, 2 S. E. 254; Robertson *v.* Blair, 56 S. C. 96, 34 S. E. 11, 76 Am. St. Rep. 543; Haigler *v.* Way, 2 Rich. (S. C.) 324.

54. Ralston *v.* Lahee, 8 Iowa 17, 74 Am. Dec. 291; Lafferty *v.* Lafferty, 42 W. Va. 783, 26 S. E. 262. See also Waterman *v.* Lawrence, 19 Cal. 210, 79 Am. Dec. 212.

Leave of court not necessary.— Lafferty *v.* Lafferty, 42 W. Va. 783, 26 S. E. 262.

The infant may proceed by supplemental bill in the nature of a bill of review, petition, or answer. Lafferty *v.* Lafferty, 42 W. Va. 783, 26 S. E. 262.

55. Grimes *v.* Grimes, 143 Ill. 550, 32 N. E. 847; Loyd *v.* Malone, 23 Ill. 43, 74 Am. Dec. 179.

56. *California.*— Joyce *v.* Joyce, 5 Cal. 161.

Illinois.— Clark *v.* Shawen, 190 Ill. 47, 60 N. E. 116; Grimes *v.* Grimes, 143 Ill. 550, 32 N. E. 847; Coffin *v.* Argo, 134 Ill. 276, 24 N. E. 1068; Stunz *v.* Stunz, 131 Ill. 309, 23 N. E. 410; Haines *v.* Hewitt, 129 Ill.

been held that a judgment against an infant may be reversed by writ of error *coram nobis*.[57] It is not necessary to allege any of the special grounds for which new trials are granted to adults.[58] The burden is upon the infant to show that the injustice has been done him,[59] and a motion to set aside a judgment on account of defendant's minority must be sustained by proof that he had not arrived at full age at the date of the rendition of the judgment.[60] A defendant in a proceeding by an infant to vacate the judgment against him is not limited to a demurrer or plea of release of error, but may by answer controvert the allegations of the petition where it brings in question matters of fact considered by the court at the time the judgment was rendered;[61] but where an infant after reaching majority seeks to open a judgment for an error not appearing on the face of the record, the judgment sought to be opened cannot be made the basis of a plea of *res adjudicata*.[62]

e. Relief Awarded. Where the infant succeeds in showing that the judgment against him should not have been rendered the court should place him and the other parties *in statu quo* as nearly as this can be done.[63] Where upon an infant's showing cause against a decree against him an additional fact appears, which if it had been originally shown would have authorized the decree, it will not be disturbed, although without that fact being proved the decree ought not to have been entered.[64]

f. Loss of Right to Attack Judgment. An infant may become estopped to attack a judgment against him or affecting his interests,[65] or may lose his right to do so by laches,[66] as where he fails to assert his right for several years after reaching majority.[67] Where an infant has during minority unsuccessfully exercised his right to attack a judgment against him by suit by guardian he is pre-

347, 21 N. E. 930; Lloyd *v.* Kirkwood, 112 Ill. 329; Gooch *v.* Green, 102 Ill. 507 (notwithstanding the decree was made by agreement of the infant's guardian); Hess *v.* Voss, 52 Ill. 472; Kuchenbeiser *v.* Beckert, 41 Ill. 172; Loyd *v.* Malone, 23 Ill. 43, 76 Am. Dec. 179.

Indiana.— Seward *v.* Clark, 67 Ind. 289.

Iowa.— Ralston *v.* Lahee, 8 Iowa 17, 74 Am. Dec. 291.

Mississippi.— Mayo *v.* Clancy, 57 Miss. 674; Enochs *v.* Harrelson, 57 Miss. 465; Sledge *v.* Boone, 57 Miss. 222.

Washington.— Morrison *v.* Morrison, 25 Wash. 466, 65 Pac. 779.

See 27 Cent. Dig. tit. "Infants," § 318.

Compare Figg *v.* Richardson, 6 Ky. L. Rep. 49, holding that where the error in a judgment against an infant appears on the face of the record it can be corrected only by appeal.

Leave of court not necessary.— Grimes *v.* Grimes, 143 Ill. 550, 32 N. E. 847.

Good defense must appear.— See Manful *v.* Graham, 55 Nebr. 645, 76 N. W. 19, 70 Am. St. Rep. 412.

The fact that the record does not show the infancy of the complainant when the decree was rendered is no objection. Grimes *v.* Grimes, 143 Ill. 550, 32 N. E. 847.

A consent degree against infants cannot be set aside upon petition or motion at a subsequent term, the only remedy being by an original bill in the nature of a bill of review. Jones *v.* McKenna, 4 Lea (Tenn.) 630.

57. Robb *v.* Halsey, 11 Sm. & M. (Miss.) 140; Swain *v.* Heartt, 2 How. Pr. (N. Y.) 90; Higbie *v.* Comstock, 1 Den. (N. Y.) 652; McLemore *v.* Durivage, 92 Tenn. 482, 22 S. W. 207.

58. Allen *v.* Troutman, 10 Bush (Ky.) 61; House *v.* Greathouse, 10 Ky. L. Rep. 317.

59. Park *v.* Bolinger, 8 S. W. 914, 10 Ky. L. Rep. 303.

60. Stupp *v.* Holmes, 48 Mo. 89.

61. Park *v.* Bolinger, 8 S. W. 914, 10 Ky. L. Rep. 303, 9 S. W. 295.

62. Bunnell *v.* Bunnell, 111 Ky. 566, 64 S. W. 420, 65 S. W. 607, 23 Ky. L. Rep. 800, 1101.

63. Ralston *v.* Lahee, 8 Iowa 17, 74 Am. Dec. 291; Pope *v.* Lemaster, 5 Litt. (Ky.) 76.

64. Pierce *v.* Trigg, 10 Leigh (Va.) 406.

65. Sharp *v.* Findley, 71 Ga. 654 (holding that infants who have had the benefit of a decree may be estopped from afterward denying its validity as against a *bona fide* purchaser for value, who relied on the validity of the decree); Fischer *v.* Siekmann, 125 Mo. 165, 28 S. W. 435.

66. Feitner *v.* Hocger, 14 Daly (N. Y.) 470, 15 N. Y. St. 377; Williamson *v.* Hartman, 92 N. C. 236; Howell *v.* Barnes, 64 N. C. 626.

67. *Maryland.*— Kemp *v.* Cook, 18 Md. 130, 79 Am. Dec. 681.

Michigan.— Schimpf *v.* Wayne Circuit Judge, 129 Mich. 103, 88 N. W. 384.

Minnesota.— Eisenmenger *v.* Murphy, 42 Minn. 84, 43 N. W. 784, 18 Am. St. Rep. 493.

New York.— Clemens *v.* Clemens, 37 N. Y. 59; Barnes *v.* Gill, 13 Abb. Pr. N. S. 169.

cluded from again exercising it after reaching majority;[68] and where an infant against whom judgment had been rendered after coming of age joined with the other defendants in a motion for a new trial and appealed from an order denying the same, which was affirmed, it was held that by joining in the motion and appeal he submitted himself to the jurisdiction of the court and could not thereafter move to set aside the judgment on the ground of his infancy.[69]

13. COLLATERAL ATTACK ON JUDGMENT.[70] The fact that a judgment is against an infant does not render it subject to collateral attack where it would not be subject to such attack if against an adult;[71] but it can be avoided for error or irregularity only by appeal, writ of error, or some other direct proceeding for the purpose of setting it aside.[72] Where in a proceeding for the sale of a decedent's land to pay debts, a defendant, although not a minor, is brought before the court by a guardian *ad litem*, such defendant cannot, after appearing before the commissioners and failing to object to the appointment of the guardian *ad litem*, collaterally attack the proceedings by proof that he was not a minor when his answer was taken.[73]

14. PAYMENT, SATISFACTION, AND DISCHARGE OF JUDGMENT IN INFANT'S FAVOR. According to the weight of authority, a guardian *ad litem* or next friend of an infant in whose favor a judgment has been rendered is not authorized to receive the amount,[74] or receipt for, discharge, or enter satisfaction of the judg-

North Carolina.— Williams *v.* Williams, 94 N. C. 732.

Pennsylvania.— See Ziegler *v.* Evans, 8 Kulp 180.

South Carolina.— Robertson *v.* Blair, 56 S. C. 96, 34 S. E. 11, 76 Am. St. Rep. 543.

See 27 Cent. Dig. tit. "Infants," § 317.

68. Bohannon *v.* Tarbin, 76 S. W. 46, 25 Ky. L. Rep. 515.

69. Childs *v.* Lanterman, 103 Cal. 387, 37 Pac. 382, 42 Am. St. Rep. 121.

70. Lack of representation by guardian or next friend see *supra*, VIII, D, 2, g, (I).

Lack of service on infant see *supra*, VIII, F, 2.

71. *Connecticut.*— Clark *v.* Platt, 30 Conn. 282.

Georgia.— Lowe *v.* Equitable Mortg. Co., 102 Ga. 103, 29 S. E. 148.

Indiana.— Hawkins *v.* McDougal, 126 Ind. 539, 25 N. E. 820, for errors not jurisdictional.

Kentucky.— Bourne *v.* Simpson, 9 B. Mon. 454.

Louisiana.— Le Blanc *v.* His Creditors, 16 La. 120.

Mississippi.— Cocks *v.* Simmons, 57 Miss. 183.

North Carolina.— Smith *v.* Gray, 116 N. C. 311, 21 S. E. 200; Burgess *v.* Kirby, 94 N. C. 575.

Pennsylvania.— Kennedy *v.* Baker, 159 Pa. St. 146, 28 Atl. 252.

South Carolina.— Bulow *v.* Witte, 3 S. C. 308 [*followed* in McCrosky *v.* Parks, 13 S. C. 90].

Texas.— McGhee *v.* Romatka, 92 Tex. 38, 45 S. W. 552.

See 27 Cent. Dig. tit. "Infants," § 320.

The presence of a next friend or guardian ad litem to represent an infant and his recognition by the court precludes inquiry as to his authority to act in a collateral proceeding. Sumner *v.* Sessoms, 94 N. C. 371.

Trespass to try title by persons, after having reached their majority, to recover only a part of land sold by an administrator under an order of the court while they were minors, without alleging any facts as a basis for vacating the sale, will be considered a collateral attack on the probate proceedings, notwithstanding the fact that the plaintiffs on trial offer to refund the purchase-price. Bouldin *v.* Miller, (Tex. Civ. App. 1894) 26 S. W. 133.

Judgment on agreement of guardian.— See Ivey *v.* Harrell, 1 Tex. Civ. App. 226, 20 S. W. 775, not subject to collateral attack.

Judgment not responsive to pleadings.— Sandoval *v.* Rosser, (Tex. Civ. App. 1894) 26 S. W. 930, subject to collateral attack.

72. Trapnall *v.* State Bank, 18 Ark. 53; Beeler *v.* Bullitt, 3 A. K. Marsh. (Ky.) 280, 13 Am. Dec. 161; Hunter *v.* Hatton, 4 Gill (Md.) 115, 45 Am. Dec. 117. See *supra*, VIII, N, 12; VIII, Q.

73. Duncanson *v.* Manson, 3 App. Cas. (D. C.) 260.

74. *Alabama.*— Glass *v.* Glass, 76 Ala. 368; Smith *v.* Redus, 9 Ala. 99, 44 Am. Dec. 429.

Kentucky.— Johnson *v.* Beauchamp, 5 Dana 70, insolvent next friend.

South Carolina.— Allen *v.* Roundtree, 1 Speers 80.

Tennessee.— American Lead Pencil Co. *v.* Davis, (1902) 67 S. W. 864; Cody *v.* Roane Iron Co., 105 Tenn. 515, 58 S. W. 850; Benton *v.* Pope, 5 Humphr. 392; Miles *v.* Kaigler, 10 Yerg. 10, 30 Am. Dec. 425.

Texas.— Galveston Oil Co. *v.* Thompson, 76 Tex. 235, 13 S. W. 60; Galveston City R. Co. *v.* Hewitt, 67 Tex. 473, 3 S. W. 705, 60 Am. Rep. 24; Gulf, etc., R. Co. *v.* Styron, 66 Tex. 421, 1 S. W. 161; Gulf, etc., R. Co. *v.* Younger, 19 Tex. Civ. App. 242, 45 S. W. 1030 (unless the judgment does not exceed five hundred dollars, in which case under Tex. Rev. St. (1895) art. 3498, he can collect it); Austin *v.* Colgate, (Civ. App. 1894) 27 S. W. 896.

See 27 Cent. Dig. tit. "Infants," § 244.

ment,[75] nor can this be done by an attorney employed by the guardian *ad litem*.[76] Where there is no one authorized to receive the amount of a judgment in favor of an infant, it is proper to direct that the money, when collected, shall be paid into court,[77] subject to the order of the legally constituted guardian when such an one shall appear,[78] or to remain in court until the infant arrives at majority.[79] In some states, however, if there is no regular guardian[80] the amount of the judgment may be paid to and satisfaction entered by the next friend[81] or the attorney of record employed by him.[82]

O. Attachment. In the absence of any statute to the contrary, a writ of attachment can be issued in an action against an infant as well as in other cases.[83]

P. Execution. Where judgment has been rendered against an infant, execution may issue against his property the same as in the case of judgment against an adult.[84] Where an infant sued by next friend, and recovered judgment, which

Where money belonging to an infant is ordered to be paid to the registrar in a suit in chancery, the guardian *ad litem* has no right to receive it. Westbrook *v.* Comstock, Walk. (Mich.) 314.

Payment to next friend will not operate as satisfaction. Cody *v.* Roane Iron Co., 105 Tenn. 515, 58 S. W. 850; Green *v.* Perkins, 3 Lea (Tenn.) 491; Barbee *v.* Williams, 4 Heisk. (Tenn.) 522; Benton *v.* Pope, 5 Humphr. (Tenn.) 392; Miles *v.* Kaigler, 10 Yerg. (Tenn.) 10, 30 Am. Dec. 425.

75. Glass *v.* Glass, 76 Ala. 368; Smith *v.* Redus, 9 Ala. 99, 44 Am. Dec. 429. *Compare* Cody *v.* Roane Iron Co., (Tenn. Ch. App. 1899) 53 S. W. 1002, 1003.

Procedure.— Possibly the entry of satisfaction may be treated as a nullity and execution sued out notwithstanding such entry, but for regularity's sake it would be better and more seemly to have the order vacated and possibly a revivor before execution is sued out. Glass *v.* Glass, 76 Ala. 368.

76. Glass *v.* Glass, 76 Ala. 368.

77. Calmbacher *v.* Newman, 60 N. Y. Super. Ct. 404, 18 N. Y. Suppl. 198, 28 Abb. N. Cas. 155 (holding that the court may make an order on motion of defendant that he pay the amount into court and the judgment be thereupon canceled); Benton *v.* Pope, 5 Humphr. (Tenn.) 392; Texas Cent. R. Co. *v.* Stuart, 1 Tex. Civ. App. 642, 20 S. W. 962. See also Brooke *v.* Clark, 57 Tex. 105.

78. Benton *v.* Pope, 5 Humphr. (Tenn.) 392; Texas Cent. R. Co. *v.* Stewart, 1 Tex. Civ. App. 642, 20 S. W. 962.

79. Ohio, etc., R. Co. *v.* Crary, 1 Disn. (Ohio) 128, 12 Ohio Dec. (Reprint) 529; Texas Cent. R. Co. *v.* Stewart, 1 Tex. Civ. App. 642, 20 S. W. 962.

80. **Where there is a general guardian** no one but he or some person deriving authority from him can legally receive and receipt for money due the ward. Baltimore, etc., R. Co. *v.* Fitzpatrick, 36 Md. 619; Stroyd *v.* Pittsburg Traction Co., 15 Pa. Super. Ct. 245. See, generally, GUARDIAN AND WARD.

81. Baltimore, etc., R. Co. *v.* Fitzpatrick, 36 Md. 619; Stroyd *v.* Pittsburg Traction Co., 15 Pa. Super. Ct. 245; O'Donnell *v.* Broad, 2 Pa. Dist. 84.

82. Baltimore, etc., R. Co. *v.* Fitzpatrick, 36 Md. 619; Stroyd *v.* Pittsburg Traction Co., 15 Pa. Super. Ct. 245.

83. Dillon *v.* Burnham, 43 Kan. 77, 22 Pac. 1016.

The appointment of a guardian for an infant after his property has been legally seized under an attachment in an action against him will not transfer to the probate court jurisdiction of proceedings to enforce the judgment obtained against him or to remove the property in custody of the law court by virtue of the attachment to the control of the probate court and prevent execution against it. Hawk *v.* Harris, 112 Iowa 543, 84 N. W. 664, 84 Am. St. Rep. 352.

84. See Cook *v.* Keith, (Indian Terr. 1904) 82 S. W. 918; Hawk *v.* Harris, 112 Iowa 543, 84 N. W. 664, 84 Am. St. Rep. 352; Albee *v.* Winterink, 55 Iowa 184, 7 N. W. 497 (judgment for costs); Dillon *v.* Burnham, 43 Kan. 77, 22 Pac. 1016.

On a judgment of nonsuit against an infant, a fieri facias may issue against his property for costs. Howett *v.* Alexander, 12 N. C. 431.

Where a judgment has been rendered by default against an infant personally served without the appointment of a guardian *ad litem* and the record is silent as to his infancy, he is not entitled to restrain the levy of an execution under such judgment without taking steps to vacate or modify the same as provided by statute. Cook *v.* Keith, (Indian Terr. 1904) 82 S. W. 918.

Lands of an infant may be sold on execution against him. Shaffner *v.* Briggs, 36 Ind. 55, 55 Am. Rep. 1. See also Laughter *v.* Scela, 59 Tex. 177.

Execution must not be levied on immovables. Broussard *v.* Mallet, 8 Mart. N. S. (La.) 269.

When injunction against execution proper see Vansyckle *v.* Rorback, 6 N. J. Eq. 234.

Discharge from imprisonment.— An infant imprisoned on execution in a civil suit is entitled to discharge from imprisonment on assigning his property in compliance with the statute and such assignment is valid notwithstanding his infancy. People *v.* Mullin, 25 Wend. (N. Y.) 698.

Under the North Carolina acts of 1784 and 1789, an execution against the land of an

was affirmed by the supreme court, but the opinion and judgment of affirmance ignored the next friend, treating the judgment as for plaintiff in person, execution properly issued in the name of the infant.[85] The issuance of execution in favor of an infant is sometimes suspended until there is some person authorized to receive the money.[86]

Q. Review in Appellate Court[87] — **1. Right to Appeal or Writ of Error — a. Infant.** An infant has the right to appeal from a judgment against him, where the judgment if against an adult would be appealable,[88] but such appeal should be by next friend or guardian *ad litem*.[89] If an infant sues out a writ of error in his own name and there is a joinder in error his disability is waived.[90] It is not necessary that the next friend by whom a writ of error is prosecuted should be the same person who acted as next friend in the trial court.[91] An appeal by an infant whose guardian *ad litem* has become insolvent and has failed to pay the costs adjudged will not be stayed because of non-payment of such costs.[92]

b. Guardian Ad Litem or Next Friend. A guardian *ad litem* or next friend does not necessarily become *functus officio* by the rendition of a judgment or decree,[93] but may take and prosecute an appeal therefrom;[94] and in case such an appeal is taken his duties and powers continue until the final termination of the

infant ought to appear upon its face to have issued after a stay of twelve months and upon motion, or the sheriff is not bound to levy it. Newbern Bank *v.* Stanly, 13 N. C. 476. See also Ricks *v.* Blount, 15 N. C. 128.

85. Thomason *v.* Gray, 84 Ala. 559, 4 So. 394.

86. Wileman *v.* Metropolitan St. R. Co., 80 N. Y. App. Div. 53, 80 N. Y. Suppl. 233.

The judgment debtor is not injured by the suspension of execution on a judgment in favor of an infant until the appointment of a guardian to receive the money as he can pay the money into court. Mason *v.* Mason, 5 Bush (Ky.) 187.

87. See, generally, Appeal and Error.

88. *Connecticut.*— Williams *v.* Cleaveland, 76 Conn. 426, 56 Atl. 850.

Illinois.— McClay *v.* Norris, 9 Ill. 370.

Kansas.— Schnee *v.* Schnee, 61 Kan. 643, 60 Pac. 738.

New Hampshire.— See Robbins *v.* Cutler, 26 N. H. 173.

Texas.— Tanner *v.* Ames, (Civ. App. 1896) 37 S. W. 373.

See 27 Cent. Dig tit. "Infants," § 326.

Contra.— Valier *v.* Hart, 11 Mass. 300.

An infant's appeal is an act voidable by him, and on motion of his guardian *ad litem*, appointed after such appeal, the court may dismiss the appeal. Robbins *v.* Cutler, 26 N. H. 173, holding further that a motion by the guardian *ad litem* for the dismissal of an appeal by the infant from a justice's judgment is seasonably made at the next term after such guardian's appointment, if it appears that he had no previous opportunity to consider his position and the rights of his ward.

89. *Illinois.*— Ames *v.* Ames, 148 Ill. 321, 36 N. E. 110; McClay *v.* Norris, 9 Ill. 370.

Kansas.— Schnee *v.* Schnee, 61 Kan. 643, 60 Pac. 738.

Kentucky.— Ramsey *v.* Keith, 77 S. W. 693, 25 Ky. L. Rep. 1302.

Texas.— Tanner *v.* Ames, (Civ. App. 1896) 37 S. W. 373.

Wisconsin.— *In re* McLaughlin, 101 Wis. 672, 78 N. W. 144, guardian *ad litem* or general guardian.

See 27 Cent. Dig. tit. "Infants," § 326.

The fact that an infant has a guardian, if material, is only pleadable in abatement in the superior court, which upon such plea could permit the guardian to appear or direct his name to be substituted for that of the next friend. Williams *v.* Cleaveland, 76 Conn. 426, 56 Atl. 850.

Waiver of objection.— See Ramsey *v.* Keith, 77 S. W. 693, 25 Ky. L. Rep. 1302.

A third person, not being a party in interest, cannot appeal in behalf of infants from an order denying his petition to remove a general guardian. *In re* McLaughlin, 101 Wis. 672, 78 N. W. 144.

Appeal by guardian.— See Tanner *v.* Ames, (Tex. Civ. App. 1896) 37 S. W. 373.

90. McClay *v.* Norris, 9 Ill. 370.

91. Ames *v.* Ames, 148 Ill. 321, 36 N. E. 110; Carlton *v.* Miller, 2 Tex. Civ. App. 619, 21 S. W. 697.

Any person who will give the bond required by law may sue out a writ of error for an infant as his next friend. Ridgely *v.* Bennett, 13 Lea (Tenn.) 206.

92. Wice *v.* Commercial F. Ins. Co., 7 Daly (N. Y.) 258, 2 Abb. N. Cas. 325.

93. Matter of Stewart, 23 N. Y. App. Div. 17, 48 N. Y. Suppl. 999.

94. *Illinois.*— Sprague *v.* Beamer, 45 Ill. App. 17.

Kentucky.— Staggenborg *v.* Bailey, 80 S. W. 1109, 26 Ky. L. Rep. 188.

New York.— Matter of Stewart, 23 N. Y. App. Div. 17, 48 N. Y. Suppl. 999.

Ohio.— Harper *v.* Cilley, 25 Ohio Cir. Ct. 770.

Wisconsin.— Tyson *v.* Tyson, 94 Wis. 225, 68 N. W. 1015; Jones *v.* Roberts, 70 Wis. 685, 71 N. W. 883.

No leave of court is necessary to authorize

cause,[95] unless he is removed by the court[96] or the guardianship is terminated by the infant's arrival at majority.[97]

c. Waiver of Error. Where a writ of error is brought to reverse a judgment recovered on a note against an infant who appeared by attorney a promise made by him after he comes of age to pay the note is neither a release or waiver of the error nor a bar to a writ of error.[98]

2. Time For Appeal. Under the statutes of some jurisdictions an infant against whom or affecting whose interests a judgment has been rendered is allowed a certain time after reaching majority within which he may appeal or sue out a writ of error;[99] but such a statute does not prevent the infant from taking an appeal, or suing out a writ of error by next friend or guardian during his minority.[1]

3. Appointment of a Guardian Ad Litem or Next Friend on Appeal. Proceedings in review of a judgment are a continuation of the original case,[2] and hence the guardian *ad litem* or next friend who appeared for the infant in the original case is entitled to appear for him in the appellate court,[3] and it is not necessary or proper to appoint a new guardian *ad litem* or next friend on the appeal where the one who originally represented the infant appears.[4] But where infant parties were not represented by guardian or next friend in the trial court, a person may be appointed by the appellate court to represent them.[5]

4. Matters Considered on Appeal. The rule that it is the duty of the courts to protect the interests of an infant litigant[6] applies to an appellate court into which the case is brought as well as to the trial court,[7] and hence it has been laid down that on appeal an infant will be given the benefit of every defense of which he could have availed himself or which might have been interposed for him in the trial court.[8] But as against adult parties the court will enforce the

such a step. Harper *v.* Cilley, 25 Ohio Cir. Ct. 770; Tyson *v.* Tyson, 94 Wis. 225, 68 N. W. 1015; Jones *v.* Roberts, 70 Wis. 685, 71 N. W. 883.

Guardian ad litem cannot appeal in his own name. Harlan *v.* Watson, 39 Ind. 393.

Bond.— See Harper *v.* Cilley, 25 Ohio Cir. Ct. 770, individual liability although not binding on estate of infant.

95. Staggenborg *v.* Bailey, 80 S. W. 1109, 26 Ky. L. Rep. 188; Matter of Stewart, 23 N. Y. App. Div. 17, 48 N. Y. Suppl. 990.

96. Staggenborg *v.* Bailey, 80 S. W. 1109, 26 Ky. L. Rep. 188.

97. Staggenborg *v.* Bailey, 80 S. W. 1109, 26 Ky. L. Rep. 188.

Attainment of majority pending action see, generally, *supra*, VIII, E.

98. Goodridge *v.* Ross, 6 Metc. (Mass.) 487.

99. Rankin *v.* Schofield, 70 Ark. 83, 66 S. W. 197; Williams *v.* Cleaveland, 76 Conn. 426, 56 Atl. 850; Ogden *v.* Stevens, 98 Ky. 564, 32 S. W. 932, 17 Ky. L. Rep. 1115; Moss *v.* Hall, 79 Ky. 40, 3 Ky. L. Rep. 89, 1 Ky. L. Rep. 314; Ridgeley *v.* Bennett, 13 Lea (Tenn.) 206.

1. Williams *v.* Cleaveland, 76 Conn. 426, 56 Atl. 850; McClay *v.* Norris, 9 Ill. 370; Moss *v.* Hall, 79 Ky. 40, 3 Ky. L. Rep. 89, 1 Ky. L. Rep. 314; Ridgely *v.* Bennett, 13 Lea (Tenn.) 206.

Appeal may be at any time during minority. Moss *v.* Hall, 79 Ky. 40, 3 Ky. L. Rep. 89, 1 Ky. L. Rep. 314.

2. Evansville, etc., R. Co. *v.* Maddux, 134 Ind. 571, 33 N. E. 345, 34 N. E. 511. See Appeal and Error.

3. See Evansville, etc., R. Co. *v.* Maddux, 134 Ind. 571, 33 N. E. 345, 34 N. E. 511. And see *supra*, VIII, Q, 1, b.

4. Evansville, etc., R. Co. *v.* Maddux, 134 Ind. 571, 33 N. E. 345, 34 N. E. 511; Covell *v.* Porter, 81 Minn. 302, 84 N. W. 107.

5. Parkins *v.* Alexander, 105 Iowa 74, 74 N. W. 769; Fish *v.* Ferris, 3 E. D. Smith (N. Y.) 567; Moody *v.* Gleason, 7 Cow. (N. Y.) 482. See also Chaffee *v.* Baptist Missionary Convention, 10 Paige (N. Y.) 85, 40 Am. Dec. 225; Kellinger *v.* Roe, 7 Paige (N. Y.) 362.

The guardian may be appointed on the application of the appellant if the infant respondent or his relatives do not apply for such appointment within a reasonable time. Kellinger *v.* Roe, 7 Paige (N. Y.) 362.

6. See *supra*, VIII, B.

7. Kempner *v.* Dooley, 60 Ark. 526, 31 S. W. 145; Parken *v.* Safford, 48 Fla. 290, 37 So. 567; Cavender *v.* Smith, 5 Iowa 157.

8. *Alabama.*— Clark *v.* Gilmer, 28 Ala. 265.

Arkansas.— Kempner *v.* Dooley, 60 Ark 526, 31 S. W. 145; Branch *v.* Mitchell, 24 Ark. 431; Trapnall *v.* Burton, 24 Ark. 371.

Florida.— Parken *v.* Safford, 48 Fla. 290, 37 So. 567.

Illinois.— Barnard *v.* Barnard, 119 Ill. 92, 8 N. E. 320. *Compare* Turner *v.* Jenkins, 79 Ill. 228.

rule that only grounds of exception presented and reserved in the lower court will be considered.[9] The omission of the next friend of an infant plaintiff to give bond to secure the proceeds of a judgment to be recovered cannot be assigned as error by defendant on appeal, since he is not injured or prejudiced and it does not concern him.[10] Where a defendant pleaded infancy, and the justice before whom the action was tried, from examination, was of opinion that he was not an infant, and the jury so found, the infancy of defendant cannot be assigned for error, it being against the record and the fact as found by the jury.[11]

5. Disposition of Cause. Where an infant brings a writ of error to reverse a judgment rendered against him, the court only vacates the judgment, but does not set aside the proceedings altogether.[12] A judgment against minors and adults as joint trespassers may be reversed as to the minors only, since no contribution could be compelled if one were obliged to pay the judgment.[13] A decree rendered on the application of infants cannot be reversed merely on account of infancy.[14] Where a complainant's bill and a cross bill by an infant defendant were both dismissed, and on appeal by the complainant the decree is reversed, the appellate court has no power to reinstate the cross bill or grant any relief upon it; but in order that the infant may have an opportunity to assert his rights the cause will be remanded in order that another cross bill may be filed on behalf of the infant if it be deemed advisable.[15] The homologation of the proceedings of a family meeting ratifying a compromise involving the interests of a minor will be set aside on appeal when it appears that the lower court at the date of the homologation had no evidence before it going to show whether the compromise would injure or benefit the minor.[16] Where an infant was the only one to be benefited by the refusal to probate a will, and certain of her relatives improperly filed a *caveat* in their own names against such probate, but the suit was conducted as if the infant was the *caveator*, and they her next friends, on

Mississippi.— Westbrook *v.* Munger, 64 Miss. 575, 1 So. 750. *Compare* Leach *v.* Shelby, 58 Miss. 681.

New York.— Boerum *v.* Schenck, 41 N. Y. 182; Frost *v.* Frost, 15 Misc. 167, 37 N. Y. Suppl. 18. *Compare In re* New York, etc., R. Co., 35 Hun 575.

South Carolina.— Barrett *v.* Moise, 61 S. C. 569, 39 S. E. 755.

Texas.— Taylor *v.* Rowland, 26 Tex. 293.

See 27 Cent. Dig. tit. "Infants," § 329.

Compare Hawkins *v.* McDougal, 126 Ind. 539, 25 N. E. 820; Behan *v.* Warfield, 90 Ky. 151, 13 S. W. 439, 11 Ky. L. Rep. 960; Curd *v.* Williams, 18 S. W. 634, 13 Ky. L. Rep. 855; Smith *v.* Braun, 37 La. Ann. 225.

Rule applies, although infant did not appeal.— Kempner *v.* Dooley, 60 Ark. 526, 31 S. W. 145; Parken *v.* Safford, 48 Fla. 290, 37 So. 567.

Where infancy of defendant probable but not apparent.— Campbell *v.* Hughes, 12 W. Va. 183.

Lack of defense.— The rendering of judgment against infant defendants for whom no defense was being made, under the express provision of Ky. Civ. Code Pr. § 517, a clerical misprision, is not, under the express provisions of section 516, a ground for appeal until it is presented and acted on in the circuit court. Lyon *v.* Logan County Bank, 78 S. W. 454, 25 Ky. L. Rep. 1668.

9. *California.*— Wedel *v.* Herman, 59 Cal. 507.

Illinois.— West Chicago St. R. Co. *v.* Marzalkiewiecz, 75 Ill. App. 240.

Indiana.— De Priest *v.* State, 68 Ind. 569.

Kansas.— Wilson *v.* Me-ne-chas, 40 Kan. 648, 20 Pac. 468.

Kentucky.— Meredith *v.* Sanders, 2 Bibb 101. See also Thompson *v.* Peebles, 6 Dana 387.

Missouri.— Cadmus *v.* St. Louis Bridge, etc., Co., 15 Mo. App. 86.

New York.— Strong *v.* Jenkins, 15 N. Y. Suppl. 120, 21 N. Y. Civ. Proc. 9.

North Carolina.— Hicks *v.* Bean, 112 N. C. 642, 17 S. E. 490, 34 Am. St. Rep. 521.

See 27 Cent. Dig. tit. "Infants," § 329.

Appointment of next friend.— Where a cause in which an infant appeared by his next friend is appealed by defendant from the judgment of a justice of the peace to the circuit court, and no question is made in the appeal papers as to the regularity of such appearance by next friend, it must be assumed for all further purposes in the appellate court that the appointment of and appearance by the next friend were regular. Kearney *v.* Doyle, 22 Mich. 294.

10. Neal *v.* Spooner, 20 Fla. 38.

11. Ingersoll *v.* Wilson, 3 Johns. (N. Y.) 437.

12. Barber *v.* Graves, 18 Vt. 290.

13. Wilford *v.* Grant, Kirby (Conn.) 114.

14. Mason *v.* Chambers, 4 J. J. Marsh. (Ky.) 401.

15. Parks *v.* Parks, 66 Ala. 326.

16. Forstall's Succession, 32 La. Ann. 97.

appeal by the *caveators* from a decree of the prerogative court, it was held that the record should be remitted to that court that it might there be amended by a substitution of the name of the infant as *caveator* and by the admission of a next friend to prosecute the suit and for further proceedings in the cause as amended.[17] Where in an action on notes against several defendants, one of them by a separate answer alleged infancy and the issue thus raised was submitted to the jury as a separate issue and the jury found for such defendant on such issue and also found for all the defendants on the general issue it was held that the judgment in favor of the infant defendant must stand, although as to the other defendants the judgment was reversed.[18] In Maryland the court has refused to reverse a decree on account of a departure from the usual practice when the infants were not thereby subjected to any inconvenience or deprived of any right or advantage.[19]

6. Certiorari.[20] In Georgia it has been held that a minor who has sufficient discretion to understand an oath, and to form a rational opinion as to his interests, is competent to make an affidavit verifying a petition for certiorari brought for him by a guardian *ad litem*, and may allege therein his own inability, by reason of poverty, to pay costs.[21] In Massachusetts where a street was laid out over the land of minors without previous notice and without making an estimate of the amount of damage thereby sustained by the owners, and more than a year elapsed before either of the owners came of age, a writ of certiorari was ordered, on a petition filed by one of the owners at the first term after he came of age;[22] but the court has refused to issue a writ of certiorari on the application of a minor, whose guardian *ad litem* duly appointed for the occasion, assented to the proceedings sought to be quashed.[23]

R. Costs[24] **— 1. In General.** Where on the trial of an action to recover for goods sold a verdict is directed in behalf of one of defendants on the ground of infancy, he is not entitled to costs as a matter of course but their allowance depends on a special application to the court by which they may be withheld or allowed according to its sound discretion.[25] Where an infant defendant, joined with others, secures a *nolle prosequi* as to himself on account of infancy, he is not entitled to costs.[26] Where a defendant in an action on a joint liability who was not served voluntarily answers, pleading infancy, plaintiff may obtain leave to discontinue as to him without costs and such defendant cannot be allowed any costs in the action other than the costs of making his motion to compel plaintiff to receive his answer.[27] Where a judgment recovered against an infant on a note is reversed on writ of error because of the infancy of defendant below, the court will not give plaintiff in error costs unless it appears that plaintiff in the court below knew that he was an infant.[28] Where certain infant appellees were not represented by a guardian or next friend, the costs of the appeal were taxed against the appellants, although the cause was reversed.[29] Where an infant was appointed administrator and continued to act after becoming of age until the commencement of a suit, when he objected to the validity of his appointment on the ground of infancy, it was held that he was not entitled to costs of a cross

17. Middleditch *v.* Williams, 47 N. J. Eq. 585, 21 Atl. 290.

18. Arnold *v.* Lane, 71 Conn. 61, 40 Atl. 921.

19. Calwell *v.* Boyer, 8 Gill & J. (Md.) 136, although it might have been made the subject of a motion before the lower court.

20. See, generally, Certiorari.

21. Bowers *v.* Kanaday, 94 Ga. 209, 21 S. E. 458.

22. Although notice had been given to the tenant in possession to remove the buildings from the land, which he had communicated to a guardian of the minors within a year after the street was laid out. Stone *v.* Boston, 2 Metc. (Mass.) 220.

23. Peters *v.* Peters, 8 Cush. (Mass.) 529.

24. See, generally, Costs.

Taxation of guardian's compensation and allowances as costs see *supra*, VIII, D, 5, b.

25. Yamato Trading Co. *v.* Hoexter, 44 Hun (N. Y.) 491.

26. *Ex p.* Nelson, 1 Cow. (N. Y.) 417.

27. Wellington *v.* Claason, 9 Abb. Pr. (N. Y.) 175.

28. Knapp *v.* Crosby, 1 Mass. 479.

29. *Ex p.* Cooper, 136 N. C. 130, 48 S. E. 581.

bill filed by him for the purpose of substituting to his place in the suit the administrator appointed upon the revocation of the first appointment.[30]

2. LIABILITY OF INFANT.[31] According to some authorities an infant plaintiff suing by guardian *ad litem* or next friend is liable for costs in case he is unsuccessful,[32] but this is denied by other authorities.[33] An infant defendant is not liable for costs in an action to which he is a necessary party because of his being the heir of the person against whom if alive the action should be brought,[34] but in other cases an infant defendant may be liable for costs.[35]

3. LIABILITY OF NEXT FRIEND OR GUARDIAN AD LITEM. The next friend or guardian *ad litem* of an unsuccessful infant plaintiff is as a general rule liable for costs,[36] especially where the suit was needlessly or recklessly brought or was not

30. Carow *v.* Mowatt, 2 Edw. (N. Y.) 57.

31. Liability for allowance of guardian ad litem see *supra*, VIII, D, 5, d.

32. *Alabama.*— Perryman *v.* Burgster, 6 Port. 99.

Illinois.— Myers *v.* Rehkopf, 30 Ill. App. 209.

Iowa.— Albee *v.* Winterink, 55 Iowa 184, 7 N. W. 497.

Maine.— Sanborn *v.* Merrill, 41 Me. 467.

Massachusetts.— Smith *v.* Floyd, 1 Pick. 275 [*followed* in Crandall *v.* Slaid, 11 Metc. 288].

North Carolina.— Howett *v.* Alexander, 12 N. C. 431.

England.— Turner *v.* Turner, 2 P. Wms. 297, Sel. Cas. Ch. 49, 2 Str. 708, 24 Eng. Reprint 737.

See 27 Cent. Dig. tit. "Infants," § 334.

33. *Indiana.*— Holmes *v.* Adkins, 2 Ind. 398.

Kentucky.— Sproule *v.* Botts, 5 J. J. Marsh. 162 [*overruling* Wilson *v.* McGee, 2 A. K. Marsh. 600].

Nebraska.— Kleffel *v.* Bullock, 8 Nebr. 336, 1 N. W. 250.

New York.— Waring *v.* Crane, 2 Paige 79, 21 Am. Dec. 70.

Tennessee.— Stephenson *v.* Stephenson, 3 Hayw. 123.

See 27 Cent. Dig. tit. "Infants," § 334.

Effect of arrival at majority.— If the infant after coming of age elects to proceed with the cause he is liable for costs in the same manner as if the suit had been commenced by an adult. Waring *v.* Crane, 2 Paige (N. Y.) 79, 21 Am. Dec. 70. But an infant plaintiff is not liable to a judgment for costs after arriving at full age, in an action brought without a guardian or next friend, but not terminated during infancy, if on reaching his majority at the first opportunity he disclaims all benefit from the proceeding, and refuses to proceed further. Kleffel *v.* Bullock, 8 Nebr. 336, 1 N. W. 250.

Where there is a fund belonging to the infant under control of the court, the costs may be directed to be paid out of that fund; but the costs will not be charged on the infant's estate unless the court is satisfied that the suit was brought in good faith and with the *bona fide* intent to benefit the infant. Waring *v.* Crane, 2 Paige (N. Y.) 79, 21 Am. Dec. 70.

34. Tuttle *v.* Garrett, 74 Ill. 444 (suit for reconveyance); Fleming *v.* McHale, 47 Ill. 282 (suit to establish trust); Clark *v.* Clark, 21 Nebr. 402, 32 N. W. 157 (suit to quiet title); Bogey *v.* Shute, 57 N. C. 174 (suit for foreclosure of mortgage); Commander *v.* Gilrie, 6 Grant Ch. (U. C.) 473 (suit for specific performance).

35. Perryman *v.* Burgster, 6 Port. (Ala.) 99 (if he waives his plea of infancy, or fails to sustain it, or if it is not available in law); Lane *v.* Gover, 1 Harr. & M. (Md.) 459.

An infant defendant who has been guilty of a fraud may be ordered to pay the costs of a suit occasioned by his fraud. Woolf *v.* Woolf, [1899] 1 Ch. 343, 68 L. J. Ch. 82, 79 L. T. Rep. N. S. 725, 47 Wkly. Rep. 181; Lemprière *v.* Lange, 12 Ch. D. 675, 41 L. T. Rep. N. S. 378, 27 Wkly. Rep. 879; Chubb *v.* Griffiths, 35 Beav. 127, 55 Eng. Reprint 843; Cory *v.* Gertcken, 2 Madd. 40, 17 Rev. Rep. 180, 56 Eng. Reprint 250. *Compare* Westgate *v.* Westgate, 11 Ont. Pr. 62.

Infants who prosecute an unjust suit at law, and thus compel defendant to come into equity for an injunction, and who set up an inequitable defense in equity must pay the costs. Price *v.* Sykes, 8 N. C. 87.

36. *Alabama.*— Smith *v.* Gaffard, 33 Ala. 168; Perryman *v.* Burgster, 6 Port. 99.

Delaware.— Rauche *v.* Blumenthal, 4 Pennew. 521, 57 Atl. 368.

Florida.— See Sanderson *v.* Sanderson, 20 Fla. 292.

Indiana.— Whittem *v.* State, 36 Ind. 196; Tague *v.* Hayward, 25 Ind. 427; Holmes *v.* Adkins, 2 Ind. 398.

Iowa.— Vance *v.* Fall, 48 Iowa 364. *Compare* Albee *v.* Winterink, 55 Iowa 184, 7 N. W. 497.

Kentucky.— Yeizer *v.* Stone, 7 T. B. Mon. 189; Sproule *v.* Botts, 5 J. J. Marsh. 162; Wilson *v.* McGee, 2 A. K. Marsh. 600; Snyder *v.* Fidelity, etc., Co., 14 Ky. L. Rep. 615, unless he is allowed to sue *in forma pauperis*.

Maryland.— Wainwright *v.* Wilkinson, 62 Md. 146; Baltimore, etc., R. Co. *v.* Fitzpatrick, 36 Md. 619.

Michigan.—Rabidon *v.* Muskegon Cir. Judge, 110 Mich. 297, 68 N. W. 147.

Nebraska.— Kleffel *v.* Bullock, 8 Nebr. 336, 1 N. W. 250.

New York.— Wead *v.* Cantwell, 36 Hun 528; Pierce *v.* Lee, 36 Misc. 865, 74 N. Y. Suppl. 927; Grantman *v.* Thrall, 31 How. Pr. 464; Hernandez *v.* Billotte, 2 N. Y. City Ct. 319; Matter of Ryder, 11 Paige 185, 42 Am. Dec. 109; Waring *v.* Crane, 2 Paige 79,

for the interest of the infant.[37] The guardian *ad litem* of an infant defendant is not ordinarily chargeable with costs,[38] unless in case of gross misconduct on his part;[39] but it has been held that guardian *ad litem* who appeals on behalf of an infant defendant is liable for the costs of the appeal where the judgment is affirmed.[40]

4. Security For Costs.[41] In Canada it has been held that an infant out of the jurisdiction petitioning for relief will be required to give security for costs,[42] and in a case where infants were the only parties residing within the jurisdiction of the court, their next friend having died and no new guardian having been appointed, security for costs was ordered.[43]

5. Action or Defense In Forma Pauperis. It is usually considered that an infant is entitled to the benefit of statutes allowing a poor person to sue,[44] or

21 Am. Dec. 70. See also Schoen *v.* Schlessinger, 57 How. Pr. 490.

Tennessee.— Stephenson *v.* Stephenson, 3 Hayw. 123.

Texas.— Johnson *v.* Taylor, 43 Tex. 121.

Wisconsin.— Burbach *v.* Milwaukee Electric R., etc., Co., 119 Wis. 384, 96 N. W. 829.

England.— Jones *v.* Lewis, 1 De G. & Sm. 245, 63 Eng Reprint 1052; Buckly *v.* Buckeridge, Dick 395, 21 Eng. Reprint 323; *In re* Wheelers, 2 Molloy 251; Turner *v.* Turner, 2 P. Wms. 297, Sel. Cas. Ch. 297, 2 Str. 708, 24 Eng. Reprint 737.

Canada.— Smith *v.* Mason, 17 Ont. Pr. 444.

See 27 Cent. Dig. tit. "Infants," § 335.

If the infant after coming of age elects to proceed with the cause the next friend is discharged from liability for costs and the infant becomes liable. Sparmann *v.* Keim, 6 Abb. N. Cas. (N. Y.) 353; Waring *v.* Crane, 2 Paige (N. Y.) 79, 21 Am. Dec. 70. *Compare*, as to costs already incurred, Schoen *v.* Schlessinger, 57 How. Pr. (N. Y.) 490.

Proceeding for collection.— See Pierce *v.* Lee, 36 Misc. (N. Y.) 865, 74 N. Y. Suppl. 927.

The poverty of the guardian ad litem of an infant plaintiff is no defense to a motion for attachment for the costs of the action adjudged against the infant. Grantman *v.* Thrall, 31 How. Pr. (N. Y.) 464.

It is only where the infant is sole plaintiff that the next friend is chargeable with the costs of the suit. Hulburt *v.* Newell, 4 How. Pr. (N. Y.) 93.

Judgment need not expressly pass on guardian's liability. Burbach *v.* Milwaukee Electric R., etc., Co., 119 Wis. 384, 96 N. W. 829.

In Maine and Massachusetts the next friend is not liable for costs. Soule *v.* Winslow, 64 Me. 518; Sanborn *v.* Merrill, 41 Me. 467; Leavitt *v.* Bangor, 41 Me. 458; Crandall *v.* Slaid, 11 Metc. (Mass.) 288 [*following* Smith *v.* Floyd, 1 Pick. (Mass.) 275, and *overruling* Blood *v.* Harrington, 8 Pick. (Mass.) 552].

In North Carolina costs should not be awarded against the next friend except on a distinct finding by the court of mismanagement or bad faith in the institution or conduct of the cause. Smith *v.* Smith, 108 N. C. 365, 12 S. E. 1045, 13 S. E. 113.

37. Sale *v.* Sale, 1 Beav. 586, 17 Eng. Ch. 586, 48 Eng. Reprint 1068; Fox *v.* Suwerkrop, 1 Beav. 583, 17 Eng. Ch. 583, 48 Eng. Reprint 1068; Thomas *v.* Elsum, 46 L. J. Ch. 793; Mill *v.* Mill, 8 Ont. 370; McAndrew *v.* La Flamme, 19 Grant Ch. (U. C.) 193; Hutchinson *v.* Sargent, 17 Grant Ch. (U. C.) 8.

38. Perryman *v.* Burgster, 6 Port. (Ala.) 99; Gaines *v.* Ann, 26 Tex. 340; Morgan *v.* Morgan, 11 Jur. N. S. 233, 12 L. T. Rep. N. S. 199, 5 New Rep. 427. See also Brown *v.* The Henry Pratt, 4 Fed. Cas. No. 2,010.

39. Morgan *v.* Morgan, 11 Jur. N. S. 233, 12 L. T. Rep. N. S. 199, 5 New Rep. 427.

40. Ward *v.* Mathews, 122 Ala. 188, 25 So. 50 [*overruling* Brown *v.* Williams, 87 Ala. 353, 6 So. 111].

41. **Bond of guardian ad litem or next friend** see *supra*, VIII, D, 3, f, (II).

42. Stinson *v.* Martin, 2 Ch. Chamb. (U. C.) 86.

43. Parks *v.* Brown, 4 Can. L. J. 232, where the court said, however, that if the infants could find another next friend within the province application might be made to discharge the order.

44. *Illinois.*— Chicago, etc., R. Co. *v.* Lane, 130 Ill. 116, 22 N. E. 513 [*affirming* 30 Ill. App. 437]; Stelzer *v.* Warder, 109 Ill. App. 137; Consolidated Coal Co. *v.* Gruber, 91 Ill. App. 15 [*affirmed* in 188 Ill. 584, 59 N. E. 254].

Indiana.— An infant plaintiff may sue as a poor person without a next friend. Britton *v.* State, 115 Ind. 55, 17 N. E. 254; Hood *v.* Pearson, 67 Ind. 368. *Compare* Wright *v.* McLarinan, 92 Ind. 103.

Kansas.— Missouri Pac. R. Co. *v.* Cooper, 57 Kan. 185, 45 Pac. 587.

Kentucky.— Richardson *v.* Hunt, 5 Ky. L. Rep. 931. An insolvent next friend may sue for a poor infant without giving security for costs. Westerfield *v.* Wilson, 12 Bush 125.

New York.— An infant may sue *in forma pauperis* (Trimble *v.* Kilgannon, 12 Misc. 459, 34 N. Y. Suppl. 256; Tobias *v.* Broadway, etc., R. Co., 14 N. Y. Suppl. 641; Friedman *v.* Fischer, 5 N. Y. St. 913; Hotaling *v.* McKenzie, 7 N. Y. Civ. Proc. 320; Erickson *v.* Poey, 5 N. Y. Civ. Proc. 379; Irving *v.* Garrity, 4 N. Y. Civ. Proc. 105, 13 Abb. N. Cas. 182. *Compare In re* Daly, 2 N. Y. Civ. Proc. 22 note, 1 N. Y. City Ct. 437; Kleinpeter *v.* Enell, 2 N. Y. Civ. Proc. 21), notwithstanding the fact that his guardian *ad litem* is responsible (Muller *v.* Bammann, 77 N. Y. App. Div. 212, 78 N. Y. Suppl. 1022 [*explaining* Ruthowsky *v.* Cohen,

defend[45] *in forma pauperis*, although in some cases the right of an infant to sue *in forma pauperis* has been denied.[46]

IN FAVORABILIBUS ANNUS INCŒPTUS PRO COMPLETO HABETUR. A maxim meaning "In things favored the year begun is held as completed."[1]

IN FAVORABILIBUS, MAGIS ATTENDITUR QUOD PRODEST QUAM QUOD NOCET. A maxim meaning "In things favoured, what does good is more regarded than what does harm."[2]

IN FAVOREM VITÆ LIBERTATIS ET INNOCENTIÆ OMNIA PRÆSUMUNTUR. A maxim meaning "All things are presumed in favour of life, liberty, and innocence, or (as the maxim may also be rendered) the presumption is always in favour of life, liberty, and innocence."[3]

INFECTION.[4] The subtle or virulent matter proceeding from diseased bodies and imparting the same to others;[5] the application of an animal poisoning.[6]

INFECTIOUS. Capable of communicating infection; that infects, taints, or corrupts; contaminating.[7] (Infectious: Disease[8] — In General, see HEALTH; NUISANCES. Liability For Communicating, see TORTS. Of Animals, see ANIMALS.)

INFEOFFMENT. See DEEDS.

INFER.[9] To bring a result or conclusion from something back of it, that is, from some evidence or data from which it may be logically deduced.[10] (See INFERENCE; and, generally, EVIDENCE.)

INFERENCE.[11] A deduction which a person makes from the facts proved;[12] a deduction or conclusion from facts or propositions known to be true;[13] a conclusion in favor of the existing one from others proved;[14] something inferred

74 N. Y. App. Div. 415, 77 N. Y. Suppl. 546]), although such guardian *ad litem* is also his father (Larsen *v.* Interurban St. R. Co., 97 N. Y. App. Div. 150, 89 N. Y. Suppl. 649; Shapiro *v.* Burns, 7 Misc. 418, 27 N. Y. Suppl. 980, 23 N. Y. Civ. Proc. 365, 31 Abb. N. Cas. 144 [*followed* but *criticized* in Bonadoa *v.* Third Ave. R. Co., 30 N. Y. Suppl. 410]. *Compare* Muller *v.* Bammann, *supra*). An order granting leave to sue as a poor person issued on the petition of the proposed guardian but verified before his appointment and before the action is commenced is unauthorized. Kerrigan *v.* Langstaff, 64 N. Y. App. Div. 497, 72 N. Y. Suppl. 230. See also Matter of Byrne, 1 Edw. 40.

North Carolina.— Brendle *v.* Heron, 68 N. C. 495.

England.— Briant *v.* Wagner, 3 Jur. 460.

See 27 Cent. Dig. tit. "Infants," § 336.

45. Ferguson *v.* Dent, 15 Fed. 771.

46. Cargle *v.* Nashville, etc., R. Co., 7 Lea (Tenn.) 717; Musgrove *v.* Lusk, 5 Baxt. (Tenn.) 684 (holding that a pauper's oath taken by a guardian *ad litem* for infant defendants does not authorize an appeal); Green *v.* Harrison, 3 Sneed (Tenn.) 131; Roy *v.* Louisville, etc., R. Co., 34 Fed. 276; Brown *v.* The Henry Pratt, 4 Fed. Cas. No. 2,010; Lindsay *v.* Tyrrell, 3 Jur. N. S. 1014.

1. Peloubet Leg. Max. [*citing* Brown L. Dict.].

2. Wharton L. Lex. [*citing* Bacon Max.].

3. Trayner Leg. Max. See also State *v.* Bilausky, 3 Minn. 246.

4. Distinguished from "contagion" see Wirth *v.* State, 63 Wis. 51, 22 N. W. 860. See also Stryker *v.* Crane, 33 Nebr. 690, 694, 50 N. W. 1132; 8 Cyc. 1144 note 60.

5. Stryker *v.* Crane, 33 Nebr. 690, 694, 50 N. W. 1132.

6. Reg. *v.* Clarence, 22 Q. B. D. 23, 41, 16 Cox C. C. 511, 53 J. P. 149, 58 L. J. M. C. 10, 59 L. T. Rep. N. S. 780, 37 Wkly. Rep. 166.

7. Century Dict.

8. "Infectious disease defined by statute see St. 52 & 53 Vict. c. 72, § 6. See also St. 56 & 57 Vict. c. 58, § 4.

"Infectious" distinguished from "contagious" diseases see Grayson *v.* Lynch, 163 U. S. 468, 477, 16 S. Ct. 1064, 41 L. ed. 230. See CONTAGIOUS DISEASES.

9. "Derived from the Latin inferre, compounded of 'in' from, and 'ferre' to carry or bring." Morford *v.* Peck, 46 Conn. 380, 385.

Distinguished from "presumed" see Morford *v.* Peck, 46 Conn. 380, 385.

10. Morford *v.* Peck, 46 Conn. 380, 385.

11. Distinguished from "presumption" in Matter of Hopkins, 35 Misc. (N. Y.) 702, 706, 72 N. Y. Suppl. 415; Cogdell *v.* Wilmington, etc., R. Co., 132 N. C. 852, 854, 44 S. E. 618. See also Bannon *v.* Insurance Co. of North America, 115 Wis. 250, 259, 91 N. W. 666.

"Inferred" as synonymous with **"implied"** see State *v.* Millain, 3 Nev. 409, 450.

12. Lake County *v.* Neilon, 44 Oreg. 14, 21, 74 Pac. 212. See also Wintz *v.* Morrison, 17 Tex. 372, 383, 67 Am. Dec. 658.

13. Seavcy *v.* Laughlin, 98 Me. 517, 518, 57 Atl. 796; Gates *v.* Hughes, 44 Wis. 332, 336.

14. Smith *v.* Western Union Tel. Co., 57 Mo. App. 259, 266 [*citing* Tanner *v.* Hughes, 53 Pa. St. 289].

from precedent matter, separated from which it is a mere absurdity of language.[14] (See INFER; and, generally, EVIDENCE.)

INFERENTIAL. In the law of evidence, operating in the way of inference; argumentative;[16] circumstantial.[17] (See INFERENCE; and, generally, EVIDENCE.)

INFERIOR. One who in relation to another has less power and is below him; one who is bound to obey another; he who is bound to obey the law of a superior.[18]

IN FICTIONE JURIS SEMPER SUBSISTIT ÆQUITAS. A maxim meaning "In a legal fiction equity always exists."[19] (See FICTION; FICTION OF LAW; and, generally, PLEADING.)

INFIDEL. One who does not believe the Bible, or that Jesus Christ was the Messiah;[20] a person who does not believe the scriptures of the old and new testament;[21] one who does not recognize the inspiration or obligation of the Holy scriptures, or the generally recognized facts of the Christian religion.[22] (Infidel: Competency as Witness, see WITNESSES.)

INFINITESIMAL. So small as to be treated as not existing at all.[23]

INFINITUM IN JURE REPROBATUR. A maxim meaning "Infinity is reprehensible in law."[24]

INFIRMARY.[25] See HOSPITALS.

INFIRMATIVE. In the law of evidence, having the quality of diminishing force; having a tendency to weaken or render infirm.[26] (See, generally, EVIDENCE.)

INFIRMITY. An imperfection or weakness, especially a disease,[27] a malady;[28] some permanent disease; accident, or something of that kind.[29] (Infirmity: Of Person — Injured, see NEGLIGENCE; Insured, see ACCIDENT INSURANCE; LIFE INSURANCE. Of Witness, see DEPOSITIONS.)

INFLAME. To set on fire; to kindle; to cause to flame; to excite or increase

15. Chambers *v.* Hunt, 18 N. J. L. 339, 354.

As defined by statute see Cal. Code Civ. Proc. (1899) § 1958; Lake County *v.* Neilon, 44 Oreg. 14, 21, 74 Pac. 212.

16. Burrill L. Dict.

"An inferential fact is an inference or conclusion from the evidentiary facts." Louisville, etc., R. Co. *v.* Miller, 141 Ind. 533, 550, 37 N. E. 343.

17. Com. *v.* Harman, 4 Pa. St. 269, 272.

18. Bouvier Inst. No. 8. See also Black L. Dict.

"Inferior agents" or "servants" see Foster *v.* Charles Betcher Lumber Co., 5 S. D. 57, 71, 58 N. W. 9, 49 Am. St. Rep. 859, 23 L. R. A. 490.

Inferior courts see COURTS. See also 9 Cyc. 28; 7 Cyc. 203 note 42; 6 Cyc. 797, 803.

"Inferior tradesmen" see Wickham *v.* Walker, 1 Barnes Notes 100; Bennet *v.* Talbois, 1 Ld. Raym. 149.

19. Bouvier L. Dict.

Applied or explained in Coe *v.* Stow, 8 Conn. 536, 539; Cutler *v.* Wadsworth, 7 Conn. 6, 10; Watrous *v.* Southworth, 5 Conn. 305, 310; Emmons *v.* Harding, 162 Ind. 154, 160, 70 N. E. 142 [*citing* Broom Leg. Max. 127]; Gerrish *v.* Morss, 2 Pick. (Mass.) 625, 627; Emerson *v.* Thompson, 19 Mass. 473, 494; Greenleaf *v.* Mumford, 4 Abb. Pr. N. S. (N. Y.) 130, 136; Low *v.* Little, 17 Johns. (N. Y.) 346, 348; Wood *v.* Ferguson, 7 Ohio St. 288, 291 [*citing* Broom Leg. Max. 90 *et seq.*]; Foster's Appeal, 74 Pa. St. 391, 398, 15 Am. Rep. 553; Welch *v.* Sackett, 12 Wis. 243, 265; Liford's Case, 11 Coke 46*b*, 51*a*; Morrice *v.* Bank of England, 3 Swanst. 573, 582, 36 Eng. Reprint 980; Barrett *v.* Merchants' Bank, 26 Grant Ch. (U. C.) 409, 418; Crawford *v.* Cunningham, 1 Newfoundl. 36, 41.

20. Hale *v.* Everett, 53 N. H. 9, 54, 16 Am. Rep. 82. See also Heirn *v.* Bridalut, 37 Miss. 209, 226 [*citing* Calvin's case, 7 Coke 1*a*, 17*a*].

21. Thurston *v.* Whitney, 2 Cush. (Mass.) 104, 109.

22. Gibson *v.* American Mut. L. Ins. Co., 37 N. Y. 580, 584.

In a comprehensive sense it embraces Jews as well as heathen, that is, all who do not believe the christian religion. Omychund *v.* Barker, 1 Atk. 21, 25, Willes 538, 26 Eng. Reprint 15 [*citing* Coke Litt. 6*b*; 2 Coke Inst. 507; 4 Coke Inst. 155].

23. Pharmaceutical Soc. *v.* Armson, [1894] 2 Q. B. 720, 724, 59 J. P. 52, 64 L. J. Q. B. 32, 71 L. T. Rep. N. S. 315, 9 Reports 587, 42 Wkly. Rep. 662.

24. Wharton L. Lex.

25. **"County infirmary"** see Johnson *v.* Santa Clara County, 28 Cal. 545, 548.

26. Black L. Dict. [*citing* Bentham Jud. Ev. 14; Best Pres. § 217].

27. Meyer *v.* New York Fidelity, etc., Co., 96 Iowa 378, 385, 65 N. W. 328, 59 Am. St. Rep. 374; 14 Cyc. 385 note 35. See also Blackstone *v.* Standard L., etc., Ins. Co., 74 Mich. 592, 42 N. W. 156, 3 L. R. A. 486.

28. Webster Dict. [*quoted* in Bernays *v.* U. S. Mutual Acc. Assoc., 45 Fed. 455, 456].

29. *In re* Buck, [1896] 2 Ch. 727, 734, 60 J. P. 775, 65 L. J. Ch. 881, 75 L. T. Rep. N. S. 312, 45 Wkly. Rep. 106. See also Beaufort *v.* Crawshay, L. R. 1 C. P. 699, 707, 1 Harr. & R. 638, 12 Jur. N. S. 709, 35 L. J.

as passion or appetite; to enkindle into a violent action; to exaggerate; aggravate in description; to heat; to excite excessive action in the blood vessels; to provoke; to irritate to anger; to increase; to exasperate; to augment.[30]

INFLAMMABLE. Susceptible of combustion.[31] (See, generally, FIRE INSURANCE. See also COMBUSTION.)

INFLICT.[32] To lay on or impose as something that must be borne or suffered; cause to be suffered.[33]

INFLUENCE. As a noun, some external constraint under which an act is done, so strong as to deprive the doer of free consent.[34] As a verb, to use a party's endeavors, although he may not be able to carry his point.[35] (Influence: Local — Ground For Change of Venue, see CRIMINAL LAW; VENUE; Ground For Removal of Cause, see REMOVAL OF CAUSES. Undue Influence — Cancellation of Instrument For, see CANCELLATION OF INSTRUMENTS. In Procuring — Contract, Deed, Gift, or Will, see CONTRACTS; DEEDS; GIFTS; WILLS.)

INFLUENZA. As affecting horses, an epidemic catarrh caused by the season, weather, and its vicissitudes.[36] (See CONTAGION; FARCY; GLANDERS; INFECTION.)

INFORMAL ISSUE. An issue arising when that which is materially alleged by the pleadings is not traversed in a proper manner.[37] (See, generally, PLEADING.)

INFORMALITY. An irregularity; not in accordance with the usual method.[38] (Informality: In Indictment or Information, see INDICTMENTS AND INFORMATIONS. In Pleading, see PLEADING. In Practice, see APPEAL AND ERROR; TRIAL.)

IN FORMA PAUPERIS. In the character or form of a poor man.[39] (See, generally, APPEAL AND ERROR; COSTS.[40])

INFORMATION.[41] Communicated knowledge.[42] (Information: In Admiralty, see ADMIRALTY. In Civil Cases, see INFORMATIONS IN CIVIL CASES. In Criminal

C. P. 342, 14 L. T. Rep. N. S. 729, 14 Wkly. Rep. 989.

30. Webster Dict. [*quoted* in Clair *v.* State, 40 Nebr. 534, 540, 59 N. W. 118, 28 L. R. A. 367].

31. Rex *v.* McGregor, 4 Ont. L. Rep. 198, 202.

"**Inflammable liquid**" see Buchanan *v.* Exchange F. Ins. Co., 61 N. Y. 26, 29.

"**Inflammable material**" see Longabaugh *v.* Virginia City, etc., R. Co., 9 Nev. 271, 292.

32. "'Inflict' is derived from 'infligo,' for which, in Facciolati's Lexicon three Italian and three Latin equivalents are given, all meaning 'to strike,' viz. '*dare, ferire* and *percuotere*' in Italian, and '*infero, impingo* and *percutio*' in Latin." Reg. *v.* Clarence, 22 Q. B. D. 23, 42, 16 Cox C. C. 511, 53 J. P. 149, 58 L. J. M. C. 10, 59 L. T. Rep. N. S. 780, 37 Wkly. Rep. 166.

33. Century Dict.

"'Inflict' does not necessarily imply direct violence. There is no more appropriate use of the word 'inflict' than in connection with punishment; and to 'inflict punishment' clearly includes imprisonment and involuntary restraint, as well as hanging, beheading, or whipping. We can have no doubt that any bodily harm which is caused to be suffered by the act of the accused is an 'injury inflicted,' within the meaning of the statute." Com. *v.* Macloon, 101 Mass. 1, 23, 100 Am. Dec. 89. See also 6 Cyc. 704 note 98; 3 Cyc. 1036 note 31; 1 Cyc. 257 note 40.

34. Farr *v.* Thompson, 1 Speers (S. C.) 93, 102. The word does not refer to any and every line of conduct capable of disposing in one's favor a free and self-directing mind, but to a control acquired over another which virtually destroys his free agency. Caughey *v.* Bridenbaugh, 208 Pa. St. 414, 421, 57 Atl. 821, "undue influence." See also 9 Cyc. 454.

35. Respublica *v.* Ray, 3 Yeates (Pa.) 65, 66. See also Blake *v.* Voight, 16 Daly (N. Y.) 398, 11 N. Y. Suppl. 716.

36. Wirth *v.* State, 63 Wis. 51, 55, 22 N. W. 860.

37. Garrard *v.* Willet, 4 J. J. Marsh. (Ky.) 628, 629, distinguishing an "immaterial issue."

38. English L. Dict. See also Hunt *v.* Curry, 37 Ark. 100, 108 ("any informality"); Burk *v.* Huber, 2 Watts (Pa.) 306, 312 ("informality in any statement or declaration filed"); Rex *v.* Cottingham, 2 A. & E. 250, 254, 4 L. J. M. C. 65, 4 N. & M. 215, 29 E. C. L. 130 ("for informality"). And *compare* State *v.* Gallimon, 24 N. C. 372, 377, where it is said an informality in an indictment may consist in "a deviation, in charging the necessary facts and circumstances constituting the offence, from the well approved forms of expression, and a substitution in lieu thereof of other terms, which nevertheless make the charge in as plain, intelligible and explicit language."

39. Bouvier L. Dict.

40. See also 14 Cyc. 433, 515, 553; 12 Cyc. 828; 3 Cyc. 953 note 80.

41. Distinguished from "**knowledge**" see Downing North Denver Land Co. *v.* Burns, 30 Colo. 283, 285, 70 Pac. 413. See also Ednegton *v.* Mutual L. Ins. Co., 5 Hun (N. Y.) 1, 8.

42. Black L. Dict. See also Gartside *v.* Connecticut Mut. L. Ins. Co., 76 Mo. 446, 43 Am. Rep. 765; Edington *v.* Mutual L. Ins. Co., 5 Hun (N. Y.) 1, 8; U. S. *v.* Poinier,

Cases, see INDICTMENTS AND INFORMATIONS. In Equity, see EQUITY; INFORMATIONS IN CIVIL CASES. In Nature of Quo Warranto, see QUO WARRANTO. Information and Belief: Affidavit on, see AFFIDAVITS; ARREST; ATTACHMENT; CONTEMPT; CONTINUANCES IN CRIMINAL CASES. Allegation on, see PLEADING; EQUITY.)

140 U. S. 160, 162, 11 S. Ct. 752, 35 L. ed. 395; *In re* Four Cutting Machines, 9 Fed. Cas. No. 4,987, 3 Ben. 220; U. S. *v.* Whittier, 28 Fed. Cas. No. 16,688, 5 Dill. 35, 44; *In re* Stuart, [1896] 2 Ch. 328, 335, 65 L. J. Ch. 576, 74 L. T. Rep. N. S. 450, 44 Wkly. Rep. 610; *In re* Duthy, [1898] 1 Ch. 419, 422, 67 L. J. Ch. 218, 78 L. T. Rep. N. S. 223, 46 Wkly. Rep. 300; *In re* Johnson, 30 Ch. D. 42, 46, 54 L. J. Ch. 889, 53 L. T. Rep. N. S. 281, 33 Wkly. Rep. 737; Smith *v.* Moore, 1 C. B. 438, 439, 440, 9 Jur. 352, 50 E. C. L. 437; Lancaster *v.* Walsh, 1 H. & H. 258, 262, 4 M. & W. 16.

Information is not an article of commerce. State *v.* Morgan, 2 S. D. 32, 54, 48 N. W. 314.

INFORMATIONS IN CIVIL CASES

By Henry H. Skyles*

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CROSS-REFERENCES

For Matters Relating to:
Admiralty, see Admiralty.
Attorney-General, see Attorney-General.
Charities, see Charities.
Information:
In Nature of Quo Warranto, see Quo Warranto.
In Quo Warranto, see Quo Warranto.
Nuisances, see Nuisances.

I. AT LAW.

An information in civil cases is a suit filed by the attorney-general, or other proper officer, on behalf of the government to recover money or other charges, or to obtain satisfaction in damages for any personal wrong committed on the lands or other possessions of the government.[1] The usual informations are those of intrusion, for any trespass committed on the land of the government,[2] and debt upon any contract for moneys due to the government or for any forfeit due to the government from the breach of a penal statute.[3]

1. 3 Blackstone Comm. 261. See State *v.* Corbin, 16 S. C. 533.

2. Com. *v.* Hite, 6 Leigh (Va.) 588, 29 Am. Dec. 226; Reg. *v.* Hughes, L. R. 1 P. C. 81, 12 Jur. N. S. 195, 35 L. J. C. P. 23, 14 L. T. Rep. N. S. 808, 14 Wkly. Rep. 441; Nannge *v.* Rowland, Cro. Jac. 212; Reg. *v.* Blagden, 10 Mod. 296; 3 Blackstone Comm. 261; Black L. Dict. 621.

An information of intrusion is in fact an action of trespass at the suit of the government not brought to gain possession or to establish title except incidentally. Atty.-Gen. *v.* Stanley, 9 U. C. Q. B. 84. It is of the nature of an action of trespass *quare clausum fregit* and accordingly cannot be maintained by the government until it has acquired the possession. Com. *v.* Hite, 6 Leigh (Va.) 588, 29 Am. Dec. 226.

An information to recover damages for an intrusion and to enjoin further trespass is substantially an action for the recovery of real property and is not "a case of chancery" of which the supreme court has appellate jurisdiction. State *v.* Pacific Guano Co., 22 S. C. 50.

Information of intrusion in escheat proceedings see Com. *v.* Andre, 3 Pick. (Mass.) 224. And see Escheat, 16 Cyc. 555.

A judgment upon an information of intrusion is not in the nature of a seizin or possession but only that defendant be convicted and committed for the fine, and includes judgment for any damages that may have been given for the trespass; and includes also an *amoveas manus* — that is, from the judgment for the intrusion an injunction issues for the possession against defendants and all claiming under them. Atty.-Gen. *v.* Stanley, 9 U. C. Q. B. 84.

3. Ward *v.* Tyler, 1 Nott & M. (S. C.) 22 (by statute); 3 Blackstone Comm. 261. See

*Author of "Fish and Game," 19 Cyc. 986; "Fires," 19 Cyc. 977; "Improvements," 22 Cyc. 1; and joint author of "Gaming," 20 Cyc. 873, and of "A Treatise on the Law of Agency."

II. IN EQUITY.

A. Definition and Nature — **1. IN GENERAL.** Where a suit in equity is instituted on behalf of the government, state or national, or of those who partake of its prerogative, such as idiots and lunatics,[4] or whose rights are under its protection, such as the objects of public charities,[5] the matter of complaint is offered to the court not by way of petition but by way of information by the attorney-general or other proper law officer of such government.[6] By such information the attorney-general as official representative of the government undertakes to put the court in possession of facts which when communicated in proper form, through the right official channel, imposes upon the court determinate duties.[7] He does not take the attitude nor hold the language of an ordinary suitor. He is not a complainant, nor does he petition.[8] An information in its substantive characteristics is the same as a bill in equity, and in every respect follows the nature of a bill except as to name and form.[9]

2. INFORMATION AND BILL. If a private individual has an interest in the matter in dispute in connection with the government, of an injury to which he has a right to complain, apart from the government, he may have his personal complaint or bill joined to and incorporated with the information of the attorney-general, and they form together an information and bill.[10] But an information and bill cannot be supported unless the relator has some individual interest in the subject-matter of the suit;[11] and if it should afterward appear that he has no interest to be subserved, the bill will be dismissed with costs and the information retained.[12]

Pollock *v.* The Laura, 5 Fed. 133; and CUSTOM DUTIES, 12 Cyc. 1186.

Information for penalty or forfeiture in admiralty see ADMIRALTY, 1 Cyc. 855.

After the attorney-general has informed on the breach of a penal law no other information can be received. Atty.-Gen. *v.* ——, Hardres 201; 3 Blackstone Comm. 262.

4. See INSANE PERSONS.

5. See CHARITIES, 6 Cyc. 969.

6. Story Eq. Pl. § 8; Fletcher Eq. Pl. & Pr. 91; 1 Daniel Ch. Pr. 2. See also EQUITY, 16 Cyc. 217.

The practice of proceeding by information in equity has arisen from the difficulties attending the process by writ. Atty.-Gen. *v.* Dublin, 1 Bligh N. S. 312, 4 Eng. Reprint 888.

The term "information" is no longer used in England under the rules of court of 1875, order I, 1, in an action by the attorney-general at the relation of another. Atty.-Gen. *v.* Shrewsbury Bridge Co., 42 L. T. Rep. N. S. 79.

7. Atty.-Gen. *v.* Moliter, 26 Mich. 444.

8. Atty.-Gen. *v.* Moliter, 26 Mich. 444.

9. People *v.* Stratton, 25 Cal. 242; 1 Daniel Ch. Pr. 3; Fletcher Eq. Pl. & Pr. 91; Story Eq. Pl. § 8. See, generally, EQUITY, 16 Cyc. 216 *et seq.*

An exception is said to exist in respect to informations respecting charities; and in these the court will not require the same strictness neither as to parties nor pleadings as is ordinarily required in bills. Story Eq. Pl. § 8.

10. *California.*— People *v.* Stratton, 25 Cal. 242.

Massachusetts.— Atty.-Gen. *v.* Parker, 126 Mass. 216. See Atty.-Gen. *v.* Federal St. Meeting-House, 3 Gray 1.

New Hampshire.— Atty.-Gen. *v.* Dublin, 38 N. H. 459.

New Jersey.— Atty.-Gen. *v.* Central R. Co., 61 N. J. Eq. 259, 48 Atl. 347; Newark Plank Road, etc., Co. *v.* Elmer, 9 N. J. Eq. 754.

Oregon.— State *v.* Lord, 28 Oreg. 498, 43 Pac. 471, 31 L. R. A. 473; State *v.* Shively, 10 Oreg. 267.

Wisconsin.— State *v.* Cunningham, 81 Wis. 440, 51 N. W. 724, 15 L. R. A. 561.

England.— Atty.-Gen. *v.* Bristol, 3 Madd. 319, 22 Rev. Rep. 136, 56 Eng. Reprint 522; Atty.-Gen. *v.* Vivian, 1 Russ. 226, 46 Eng. Ch. 199, 38 Eng. Reprint 88. See Atty.-Gen. *v.* Heelis, 2 L. J. Ch. 189, 2 Sim. & St. 67, 25 Rev. Rep. 153, 1 Eng. Ch. 67, 57 Eng. Reprint 270.

The relator sustains both the character of plaintiff and relator in a suit by information and bill except where the bill is not incorporated with the information (Atty.-Gen. *v.* Parker, 126 Mass. 216); and if he dies pending the action, no further proceedings can be had thereon until a new relator is made a party to the record (People *v.* Stratton, 25 Cal. 242; Atty.-Gen. *v.* Haberdasher's Co., 15 Beav. 397, 16 Jur. 717, 51 Eng. Reprint 591.

11. People *v.* Stratton, 25 Cal. 242; Atty.-Gen. *v.* East India Co., 11 Sim. 380, 34 Eng. Ch. 380, 59 Eng. Reprint 920.

12. Atty.-Gen. *v.* Parker, 126 Mass. 216; State *v.* Lord, 28 Oreg. 498, 43 Pac. 471, 31 L. R. A. 473; State *v.* Cunningham, 81 Wis. 440, 51 N. W. 724, 15 L. R. A. 561; Atty.-Gen. *v.* Cockermouth Local Bd., L. R. 18 Eq. 172, 44 L. J. Ch. 118, 30 L. T. Rep.

B. When Information Will Lie. An information in equity by the attorney-general or other proper officer can be maintained only where it is brought in the interests of the public,[13] and not where it is brought in the name of the attorney-general at the relation of an individual for the protection of the latter's private interests.[14] Among other grounds, an information in equity will lie to assert the government's right to certain property,[15] to establish a charity,[16] to abate a public nuisance,[17] to restrain unauthorized corporate action or transgressions of powers,[18] or to annul a patent for lands.[19]

C. Mode of Procedure — 1. In General. The most common form of instituting information in equity is in the name of the attorney-general or other proper law officer on behalf of the government;[20] although it is sometimes brought in the name of the government upon the relation of the attorney-general,[21] or of a private citizen.[22] But in either case the information should show on its face in no uncertain manner that the attorney-general is the officer instituting and prosecuting the suit and the sole person responsible for its inception and maintenance.[23]

2. With or Without Relator. Where the suit immediately concerns the rights of the government alone the attorney-general usually proceeds by way of information without a relator;[24] and if there be a private relator, it need not appear that he has any special interest in the subject-matter or in the relief sought.[25] But where the suit is one that does not immediately concern the rights of the government, it is the more common practice for the attorney-general to depend upon

N. S. 590, 22 Wkly. Rep. 619; Atty.-Gen. *v.* London, 3 Bro. Ch. 171, 29 Eng. Reprint 472, 1 Ves. Jr. 243, 30 Eng. Reprint 323; Atty.-Gen. *v.* Vivian, 1 Russ. 226, 46 Eng. Ch. 199, 38 Eng. Reprint 88.

13. People *v.* Stratton, 25 Cal. 242; Kenney *v.* Consumers' Gas Co., 142 Mass. 417, 8 N. E. 138; Atty.-Gen. *v.* Tutor Ice Co., 104 Mass. 239, 6 Am. Rep. 227; State *v.* Shively, 10 Oreg. 267.

A public grievance must be the basis of an information in equity at the instance of the attorney-general. Atty.-Gen. *v.* Evart Booming Co., 34 Mich. 462.

Information to enforce provisions in deed by commonwealth see Attorney-General, 4 Cyc. 1030 note 46.

14. People *v.* General Electric R. Co., 172 Ill. 129, 50 N. E. 158; Kenney *v.* Consumers' Gas Co., 142 Mass. 417, 8 N. E. 138.

15. Reg. *v.* Hughes, L. R. 1 P. C. 81, 12 Jur. N. S. 195, 35 L. J. P. C. 23, 14 L. T. Rep. N. S. 808, 14 Wkly. Rep. 441.

A mortgage given to the government, it has been held, may be enforced by information in equity. Benton *v.* Woolsey, 12 Pet. (U. S.) 27, 9 L. ed. 987.

16. See Charities, 6 Cyc. 969.

17. See, generally, Nuisances.

18. Atty.-Gen. *v.* Detroit, 71 Mich. 92, 38 N. W. 714; Atty.-Gen. *v.* Moliter, 26 Mich. 444; Atty.-Gen. *v.* Cockermouth Local Bd., L. R. 18 Eq. 172, 44 L. J. Ch. 118, 30 L. T. Rep. N. S. 590, 22 Wkly. Rep. 619. See also Corporations, 10 Cyc. 1341.

19. People *v.* Stratton, 25 Cal. 242, holding this to be true where the matter involved immediately concerns the rights and interests of the government. See, generally, Public Lands.

20. Hunt *v.* Chicago Horse, etc., R. Co., 121 Ill. 638, 13 N. E. 176 [*affirming* 20 Ill. App. 282]; State *v.* Dayton, etc., R. Co., 36 Ohio St. 434; State *v.* Lord, 28 Oreg. 498, 43 Pac. 471, 31 L. R. A. 473; Atty.-Gen. *v.* Williamson, 60 L. T. Rep. N. S. 930. See Atty.-Gen. *v.* Rumford Chemical Works, 32 Fed. 608, holding that the attorney-general of the United States has no power to maintain an information in his own name.

21. State *v.* Dayton, etc., R. Co., 36 Ohio St. 434; State *v.* Lord, 28 Oreg. 498, 43 Pac. 471, 31 L. R. A. 473.

22. See State *v.* Cunningham, 82 Wis. 39, 51 N. W. 1133.

23. State *v.* Lord, 28 Oreg. 498, 43 Pac. 471, 31 L. R. A. 473; Mullan *v.* U. S., 118 U. S. 271, 16 S. Ct. 1041, 30 L. ed. 170; U. S. *v.* Throckmorton, 98 U. S. 61, 25 L. ed. 93. See U. S. *v.* Doughty, 25 Fed. Cas. No. 14,986, 7 Blatchf. 424.

The mere signature of the attorney-general or other public officer in his official capacity to a complaint or bill shown to be the bill of a private relator is not sufficient to impress it with the function and capacity of an information. State *v.* Lord, 28 Oreg. 498, 43 Pac. 471, 31 L. R. A. 473.

24. *California.*— People *v.* Stratton, 25 Cal. 242.

Michigan.— Atty.-Gen. *v.* Moliter, 26 Mich. 444.

New Jersey.— Atty.-Gen. *v.* Delaware, etc., R. Co., 27 N. J. Eq. 1.

Oregon.— State *v.* Shively, 10 Oreg. 267.

Wisconsin.— State *v.* Cunningham, 81 Wis. 440, 51 N. W. 724, 15 L. R. A. 561.

See Fletcher Eq. Pl. & Pr. 91; Story Eq. Pl. § 8.

25. State *v.* Cunningham, 82 Wis. 39, 51 N. W. 1133; State *v.* Cunningham, 81 Wis. 440, 51 N. W. 724, 15 L. R. A. 561; Atty.-

the relation of some person whose name is inserted in the information as the relator, in order that there may be someone liable for the costs of the information in case it should turn out that it is improperly filed or improperly conducted,[26] although it is not essential, even in such cases, that there should be a relator,[27] except in case of an information on behalf of an idiot or lunatic,[28] and except where the suit is substantially for the relator's benefit.[29]

D. Amendment. As a rule an information cannot be amended without the sanction of the attorney-general;[30] but leave may be granted to amend an information so as to make it a technical bill in equity,[31] or to amend an information and bill so as to make it an information only,[32] or to amend a bill by making it either a bill and information or an information.[33]

E. Conduct and Control of Proceedings. As a general rule the attorney-general has entire control of the proceedings, whether the information be filed *ex officio* or at the instance of a relator; and the suit must be prosecuted by his sanction and be guided and controlled by his judgment.[34] He may appear and

Gen. *v.* Vivian, 1 Russ. 226, 46 Eng. Ch. 199, 38 Eng. Reprint 88. But see Atty.-Gen. *v.* Oglender, 1 Ves. Jr. 246, 30 Eng. Reprint 324.

26. *California.*— People *v.* Stratton, 25 Cal. 242.

Massachusetts.— Atty.-Gen. *v.* Parker, 126 Mass. 216.

Michigan.— Atty.-Gen. *v.* Hane, 50 Mich. 447, 15 N. W. 549; Atty.-Gen. *v.* Evart Booming Co., 34 Mich. 462; Atty.-Gen. *v.* Moliter, 26 Mich. 444.

Ohio.— State *v.* Dayton, etc., R. Co., 36 Ohio St. 434.

Oregon.— State *v.* Shively, 10 Oreg. 267.

Wisconsin.— State *v.* Cunningham, 81 Wis. 440, 51 N. W. 724, 15 L. R. A. 561.

England.— Atty.-Gen. *v.* Dublin, 1 Bligh N. S. 312, 4 Eng. Reprint 888; Atty.-Gen. *v.* Vivian, 1 Russ. 226, 46 Eng. Ch. 199, 38 Eng. Reprint 88. See Atty.-Gen. *v.* Williamson, 60 L. T. Rep. N. S. 930.

See Fletcher Eq. Pl. & Pr. 91; Story Eq. Pl. § 8.

The suit is then carried on under the direction of the relator, and he is considered as answerable to the court and to the parties for the propriety of the suit and the conduct of it; and if the suit should appear to have been improperly instituted or improperly conducted, he may be made responsible for the costs. Atty.-Gen. *v.* Moliter, 26 Mich. 444; State *v.* Cunningham, 81 Wis. 440, 51 N. W. 724, 15 L. R. A. 561; Atty.-Gen. *v.* Vivian, 1 Russ. 226, 46 Eng. Ch. 199, 38 Eng. Reprint 88; Fletcher Eq. Pl. & Pr. 91; Story Eq. Pl. § 8.

An appeal from an information cannot be taken unless there is a relator responsible for the costs. Atty.-Gen. *v.* Hane, 50 Mich. 447, 15 N. W. 549.

A relator within the above rule is usually some person interested in the subject-matter of the suit and whose private rights may be protected by the decree which is sought mainly on the ground of public injury. Dist.-Atty. *v.* Lynn, etc., R. Co., 16 Gray (Mass.) 242. See Atty.-Gen. *v.* Tarr, 148 Mass. 309, 19 N. E. 358, 2 L. R. A. 87. Such relator may be a private person (Dist.-Atty. *v.* Lynn, etc., R. Co., 16 Gray (Mass.) 242; Atty.-Gen. *v.* Boston Wharf Co., 12 Gray (Mass.) 553), inhabitants of a public corporation (Atty.-Gen. *v.* Tarr, 148 Mass. 309, 19 N. E. 358, 2 L. R. A. 87; Atty.-Gen. *v.* Butler, 123 Mass. 304), a public board (Atty.-Gen. *v.* Parker, 126 Mass. 216; Atty.-Gen. *v.* Boston, etc., R. Co., 118 Mass. 345 (harbor commissioners); Atty.-Gen. *v.* Bay State Brick Co., 115 Mass. 431 (surveyors of highways); Atty.-Gen. *v.* Woods, 108 Mass. 436, 11 Am. Rep. 380; Dist. Atty. *v.* Lynn, etc., R. Co., 16 Gray (Mass.) 242); or the officers of a private institution, such as a church (Atty.-Gen. *v.* Merrimack Mfg. Co., 14 Gray (Mass.) 586; Atty.-Gen. *v.* Society for Relief, etc., 8 Rich. Eq. (S. C.) 190).

27. Dist. Atty. *v.* Lynn, etc., R. Co., 16 Gray (Mass.) 242; State *v.* Dayton, etc., R. Co., 36 Ohio St. 434; Atty.-Gen. *v.* Dublin, 1 Bligh N. S. 312, 4 Eng. Reprint 888. See ATTORNEY-GENERAL, 4 Cyc. 1033.

28. Atty.-Gen. *v.* Tyler, Dick. 378, 21 Eng. Reprint 316. See, generally, INSANE PERSONS.

29. See ATTORNEY-GENERAL, 4 Cyc. 1033.

30. Atty.-Gen. *v.* London Corp., 13 Beav. 313, 51 Eng. Reprint 121; Atty.-Gen. *v.* Fellows, 1 Jac. & W. 254, 37 Eng. Reprint 372; Atty.-Gen. *v.* Wakeman, 15 Sim. 358, 38 Eng. Ch. 358, 60 Eng. Reprint 657.

31. Thompson *v.* Thompson, 6 Houst. (Del.) 225.

32. Atty.-Gen. *v.* East India Co., 11 Sim. 380, 34 Eng. Ch. 380, 59 Eng. Reprint 920.

33. Atty.-Gen. *v.* Dublin, 38 N. H. 459; St. Mary Magdalen College *v.* Sibthorp, 1 Russ. 154, 46 Eng. Ch. 136, 38 Eng. Reprint 61. See Davis *v.* New York, 14 N. Y. 506, 67 Am. Dec. 186.

34. Parker *v.* May, 5 Cush. (Mass.) 336; Atty.-Gen. *v.* Moliter, 26 Mich. 444; Atty.-Gen. *v.* Haberdashers' Co., 15 Beav. 397, 16 Jur. 717, 51 Eng. Reprint 591. See also ATTORNEY-GENERAL, 4 Cyc. 1032.

An information by the attorney-general alone cannot be dismissed for want of prosecution, as he is privileged to proceed in what way he sees proper. Atty.-Gen. *v.* Williamson, 60 L. T. Rep. N. S. 930. **But an information in his name by a relator is** subject to be

conduct the cause by other counsel,[35] and may dismiss the proceedings if he thinks proper in the discharge of his official duty,[36] except where the relator is the real party in interest.[37] But he cannot appear otherwise than in support of the information.[38] A relator when joined is not a party in the case except so far as he may be said to be such in the sense that he is directly chargeable with costs;[39] and he cannot be heard by counsel, nor in person,[40] nor can he take any steps in the cause in his own name and independent of the attorney-general.[41]

INFORMER.[1] A person who informs or procures an action against another, whom he suspects of the violation of some penal statute.[2] (See, generally, CUSTOMS DUTIES; FINES; FORFEITURES; GAMING; INTERNAL REVENUE; INTOXICATING LIQUORS; PENALTIES; REWARDS. See also INFORMATION.)

INFRA. Below; under; underneath; within.[3]

INFRACTION. A breach, violation or infringement, as of a law, contract, a right or duty.[4] (See INFRINGEMENT.)

IN FRAUDEM VERO QUI, SALVIS VERBIS LEGIS, SENTENTIAM EJUS CIRCUMVENIT. A maxim meaning "He acts fraudulently who, observing the letter of the law, eludes its spirit."[5]

INFRINGEMENT. A word used to signify the wrongful invasion or infraction of another person's rights.[6] (Infringement: Of Copyright, see COPYRIGHT. Of

dismissed with costs for want of prosecution. Atty.-Gen. *v.* Williamson, *supra.*

35. Parker *v.* May, 5 Cush. (Mass.) 336; Com. *v.* Boston, etc., R. Co., 3 Cush. (Mass.) 25. *Compare* Atty.-Gen. *v.* Continental L. Ins. Co., 88 N. Y. 571; People *v.* Metropolitan Tel., etc., Co., 11 Abb. N. Cas. (N. Y.) 304.

36. Hesing *v.* Atty.-Gen., 104 Ill. 292; Atty.-Gen. *v.* Wyggeston's Hospital, 16 Beav. 313, 51 Eng. Reprint 799.

37. People *v.* Clark, 72 Cal. 289, 13 Pac. 858; People *v.* North San Francisco Homestead, etc., Assoc., 38 Cal. 564. See also ATTORNEY-GENERAL, 4 Cyc. 1032.

38. Atty.-Gen. *v.* Ironmongers' Co., 2 Beav. 313, 17 Eng. Ch. 313, 48 Eng. Reprint 1201; Atty.-Gen. *v.* Sherborne Grammar School, 18 Beav. 256, 18 Jur. 636, 24 L. J. Ch. 74, 2 Wkly. Rep. 396, 52 Eng. Reprint 101. But see Shore *v.* Atty.-Gen., 9 Cl. & F. 355, 8 Eng. Reprint 450, 7 Jur. 781, 11 Sim. 592, 34 Eng. Ch. 592, 59 Eng. Reprint 1002.

39. Atty.-Gen. *v.* Parker, 126 Mass. 216; Parker *v.* May, 5 Cush. (Mass.) 336; Atty.-Gen. *v.* Moliter, 26 Mich. 444; Atty.-Gen. *v.* Ironmongers' Co., 2 Beav. 313, 17 Eng. Ch. 313, 48 Eng. Reprint 1201.

40. Atty.-Gen. *v.* Parker, 126 Mass. 216; Atty.-Gen. *v.* Barker, 4 Myl. & C. 262, 18 Eng. Ch. 262, 41 Eng. Reprint 103.

Notice of a motion on behalf of relator is irregular and should be on behalf of the attorney-general. Atty.-Gen. *v.* Wright, 3 Beav. 447, 10 L. J. Ch. 234, 43 Eng. Ch. 447, 49 Eng. Reprint 176.

41. Hesing *v.* Atty.-Gen., 104 Ill. 292.

Right of appeal.— Where an information on the relation of a person is dismissed by the attorney-general, or on his motion it is dismissed, without any judgment against the relator for costs, and subsequently a motion by the relator to set aside the order of dismissal, and for the court to direct that the cause be prosecuted, is overruled at his costs, no appeal lies in favor of the relator from the orders of the court, for the reason he is no party complainant or defendant, and is not affected personally by the dismissal. Hesing *v.* Atty.-Gen., 104 Ill. 292.

1. "Common informer" defined see 8 Cyc. 341.

2. Western Union Tel. Co. *v.* Nunnally, 86 Ga. 503, 504, 12 S. E. 578 [*quoting* Bouvier L. Dict.].

In its origin the word may have meant only one who sues by way of an information. Pollock *v.* The Laura, 5 Fed. 133, 141.

The word also, no doubt, in some of its applications, includes a person who lodges information with a government officer which leads to a suit brought by the government itself. It is so used in the customs revenue laws. Pollock *v.* The Laura, 5 Fed. 133, 141.

3. Burrill L. Dict. [*citing* Inst. 3, 6, 1]. See Lord Advocate *v.* Wemyss, [1900] A. C. 48, 61, comparing the term with "*intra.*" See also Com. *v.* Macloon, 101 Mass. 1, 12, 100 Am. Dec. 89; Moore *v.* Lyttle, 4 Johns. Ch. (N. Y.) 183, 185; Hawley *v.* Smith, 25 Wend. (N. Y.) 642, 643; Smets *v.* Williams, 4 Paige (N. Y.) 364, 365; Lacaze *v.* State, Add. (Pa.) 59, 60; Jackson *v.* The Magnolia, 20 How. (U. S.) 296, 301, 15 L. ed. 909; Waring *v.* Clarke, 5 How. (U. S.) 441, 452, 464, 12 L. ed. 226; Oulton *v.* Perry, 3 Burr. 1592; London *v.* Long, 1 Campb. 22, 24, 10 Rev. Rep. 618; Anonymous, Comb. 212; The Flad Oyen, 1 C. Rob. 134, 139; Thair *v.* Fosset, Latch 214; Shalmer *v.* Pulteney, 1 Ld. Raym. 276, 277; Sawkill *v.* Warman, 10 Mod. 104; Dean *v.* Dicker, 2 Str. 1250; Emery *v.* Bartlett, 2 Str. 827.

4. Black L. Dict. See also Swift *v.* Doron, 6 Nev. 125, 127, infraction of revenue law.

5. Morgan Leg. Max.

6. Green *v.* Watson, 2 Ont. 627, 632, 633.

Corporate Name, see CORPORATIONS. Of Ferry Franchise, see FERRIES. Of Patent, see PATENTS. Of Trade-Mark, see TRADE-MARKS AND TRADE-NAMES. See also INFRACTION.)

IN GENERALIBUS VERSATUR ERROR. A maxim meaning "Error dwells in general expressions."[7]

IN GENERE QUICUNQUE ALIQUID DICIT, SIVE ACTOR SIVE REUS, NECESSE EST UT PROBAT. A maxim meaning "In general, whoever alleges anything, whether plaintiff or defendant, must prove it."[8]

INGOTS OF STEEL. The steel bars when taken from the molds of a steel manufactory, the words being applied to the finished product as it is ready for shipping.[9]

INGRESS, EGRESS, AND REGRESS. The right to enter, go upon, and return from.[10] (See, generally, LANDLORD AND TENANT.)

INHABIT. To occupy as a place of settled residence.[11] (See, generally, DOMICILE.)

INHABITANCY. See DOMICILE.

INHABITANT. See ALIENS; CITIZENS; DOMICILE.

INHABITED. As applied to a dwelling-house, occupied, or ready to be slept in when the owner or any one he sends wants to sleep in it.[12]

IN HÆREDES NON SOLENT TRANSIRE ACTIONES QUÆ PŒNALES EX MALEFICIO SUNT. A maxim meaning "Penal actions, arising from anything of a criminal nature, do not pass to heirs."[13]

INHALE. To draw in; to inspire.[14] (See, generally, ACCIDENT INSURANCE.)

INHERENT. Existing as an element of original quality.[15]

INHERIT.[16] To take, or to have;[17] to become possessed of;[18] to take as heir at law by descent or distribution;[19] to DESCEND,[20] *q. v.* (See HEIR; INHERITANCE; and, generally, DESCENT AND DISTRIBUTION.)

7. Bouvier L. Dict.

Applied in Underwood *v.* Carney, 1 Cush. (Mass.) 285, 292; Pitman *v.* Hooper, 19 Fed. Cas. No. 11,186, 3 Sumn. 286, 290.

8. Bouvier L. Dict. [*citing* Best Ev. § 252].

9. Illinois Steel Co. *v.* Bauman, 178 Ill. 351, 353, 53 N. E. 107, 69 Am. St. Rep. 316, also called "billets" of steel.

10. English L. Dict.

11. Hinds *v.* Hinds, 1 Iowa 36, 41.

"Come to inhabit" see Reg. *v.* St. Paul, 7 Q. B. 533, 540, 10 Jur. 1081, 16 L. J. M. C. 11, 2 New Sess. Cas. 508, 53 E. C. L. 533. See also Reg. *v.* Caldecote, 17 Q. B. 51, 57, 15 Jur. 537, 20 L. J. M. C. 187, 79 E. C. L. 51.

12. Smith *v.* Dauney, [1904] 2 K. B. 186, 197, 73 L. J. K. B. 646, 90 L. T. Rep. N. S. 760, 20 T. L. R. 444.

13. Wharton L. Lex. [*citing* 2 Inst. 442].

14. Lowenstein *v.* New York Fidelity, etc., Co., 88 Fed. 474, 478.

Voluntary or involuntary act.— According to one meaning it implies a voluntary act; according to another it may mean anything breathed into the lungs without intention. New York Fidelity, etc., Co. *v.* Waterman, 59 Ill. App. 297, 299.' See also Menneily *v.* Employers' Liability Assur. Corp., 148 N. Y. 596, 600, 43 N. E. 54, 51 Am. St. Rep. 716, 31 L. R. A. 686; Paul *v.* Travelers' Ins. Co., 112 N. Y. 472, 478, 20 N. E. 347, 8 Am. St. Rep. 758, 3 L. R. A. 443; Pickett *v.* Pacific Mut. L. Ins. Co., 144 Pa. St. 79, 93, 22 Atl. 871, 27 Am. St. Rep. 618, 13 L. R. A. 661; Lowenstein *v.* New York Fidelity, etc., Co., 88 Fed. 474, 478; McGlother *v.* Provident Mut. Acc. Co., 88 Fed. 685, 688, 32 C. C. A. 318.

15. English L. Dict. See also Flanigan *v.* Guggenheim Smelting Co., 63 N. J. L. 647, 654, 44 Atl. 762, comparing term with "essential" and "organic."

"Inherent and inalienable" rights see U. S. *v.* Morris, 125 Fed. 322, 326.

"Inherent covenants" see Vernon *v.* Smith, 5 B. & Ald. 1, 6, 24 Rev. Rep. 257, 7 E. C. L. 13; Bally *v.* Wells, Wilm. 341, 349.

"Inherent deterioration" see The America, 1 Fed. Cas. No. 283, 8 Ben. 491.

"Inherent power is . . . 'an authority possessed without its being derived from another; a right, ability, or faculty of doing a thing without receiving that right, ability, or faculty from another.'" Bouvier L. Dict. [*quoted* in *In re* Jessup, 81 Cal. 408, 477, 21 Pac. 976, 22 Pac. 742, 1028, 6 L. R. A. 594]. See also *In re* Waugh, 32 Wash. 50, 51, 72 Pac. 710, inherent powers of a court.

16. **"Be inherited by"** has been construed to be equivalent to "go to" or "be received by." Hill *v.* Giles, 201 Pa. St. 215, 217, 50 Atl. 758.

17. Kohl *v.* Frederick, 115 Iowa 517, 520, 88 N. W. 1055. See also Cochran *v.* Elwell, 46 N. J. Eq. 333, 338, 19 Atl. 672; Thornby *v.* Fleetwood, 1 Str. 318, 353.

18. Graham *v.* Knowles, 140 Pa. St. 325, 333, 21 Atl. 398.

19. Lyon *v.* Lyon, 88 Me. 395, 405, 34 Atl. 180; Warren *v.* Prescott, 84 Me. 483, 487, 24 Atl. 948, 30 Am. St. Rep. 370, 17 L. R. A. 435. See also 2 Blackstone Comm. 254, 255.

20. Rountree *v.* Pursell, 11 Ind. App. 522, 39 N. E. 747, 749; Tillinghast *v.* Holbrook, 7 R. I. 230, 235.

INHERITANCE.[21] That which is or is to be inherited; whatever is transmitted by descent or succession;[22] an estate descending to the heir,[23] which has descended to the heir and been cast upon him by the operation of law;[24] or which may descend or be inherited.[25] In its usual legal acceptance, the word applies to lands descended.[26] In a more general sense, it includes any property passing by death to those entitled to succeed,[27] embracing all classes of property, real, personal, and mixed.[28] The meaning of the word, however, may be controlled by the context.[29] (Inheritance: By Descent, see DESCENT AND DISTRIBUTION. Change of Rule of, see CONSTITUTIONAL LAW. Estate of, see ESTATES. Necessity of Words of, see DEEDS; EASEMENTS; ESTATES. Tax, see TAXATION.)

INHERITANCE TAX. See TAXATION.

IN HIS ENIM QUÆ SUNT FAVORABILIA ANIMÆ, QUAMVIS SUNT DAMNOSA REBUS, FIAT ALIQUANDO EXTENTIO STATUTI. A maxim meaning "In things that are favorable to the spirit, though injurious to property, an extension of the statute should sometimes be made."[30]

IN HIS QUÆ DE JURE COMMUNI OMNIBUS CONCEDUNTUR, CONSUETUDO ALICUJUS PATRIÆ VEL LOCI NON EST ALLEGANDA. A maxim meaning "In those things which by common right are conceded to all, the custom of a particular district or place is not to be alleged."[31]

INHUMAN. Destitute of the kindness and tenderness that belongs to a human being.[32] (Inhuman: Treatment, see DIVORCE. See also CRUELTY.)

IN IIS QUÆ SUNT MERÆ FACULTATIS NUNQUAM PRÆSCRIBITUR. A maxim meaning "Prescription does not run against a mere power or faculty to act."[33]

IN INVITUM. Unwillingly.[34]

INIQUISSIMA PAX EST ANTEPONENDA JUSTISSIMO BELLO. A maxim meaning "The most unjust peace is to be preferred to the justest war."[35]

INIQUUM EST ALIOS PERMITTERE, ALIOS INHIBERE MERCATURAM. A maxim meaning "It is inequitable to permit some to trade and to prohibit others."[36]

21. **Distinguished from "hereditament"** in Smith *v.* Tindal, 11 Mod. 102, 103. *Compare* McWilliams *v.* Martin, 12 Serg. & R. (Pa.) 269, 271, 14 Am. Dec. 688.

Often used synonymously with descent see 14 Cyc. 16 note 1.

22. Standard Dict. [*quoted* in Glascott *v.* Bragg, 111 Wis. 605, 608, 87 N. W. 853, 56 L. R. A. 258]. See also Wimbish *v.* Tailbois, Plowd. 38*a*, 58*a*.

23. Tucker *v.* Adams, 14 Ga. 548, 580.

24. *In re* Donahue, 36 Cal. 329, 332.

25. Kottman *v.* Ayer, 1 Strobh. (S. C.) 552, 570.

26. Horner *v.* Webster, 33 N. J. L. 387, 413.

"Inherited" is a word which implies taking immediately from the testator upon his death, as heirs take immediately from their ancestor upon his death. McArthur *v.* Scott, 113 U. S. 340, 380, 5 S. Ct. 652, 28 L. ed. 1015.

27. Century Dict. [*quoted* in Glascott *v.* Bragg, 111 Wis. 605, 608, 87 N. W. 853, 56 L. R. A. 258]. See also *In re* Donahue, 36 Cal. 329; Ridgeway *v.* Underwood, 67 Ill. 419; Shippen *v.* Izard, 1 Serg. & R. (Pa.) 222; *In re* Fort, 14 Wash. 10, 14, 44 Pac. 104.

28. Blair *v.* Adams, 59 Fed. 243, 244. See also Trent *v.* Hanning, 7 East 95, 107, construing the word in a will.

As defined by statute, it means real property descended as prescribed by law. N. Y. Code Civ. Proc. (1899) § 2514, subs. 13. See also Adams *v.* Anderson, 23 Misc. (N. Y.) 705, 708, 53 N. Y. Suppl. 141; Ark. St. (1894) § 2489; Ind. Terr. St. (1899) § 1839.

Compared with "succession."—"While, in the strict legal signification of the term as formerly employed, and as may now appear when so intended, it refers to the devolution of realty, yet, as has been often held, in its popular acceptation personal property also is included, and in meaning it is as broad as the word 'succession.'" Stolenburg *v.* Diercks, 117 Iowa 25, 28, 90 N. W. 525. See Horner *v.* Webster, 33 N. J. L. 387, 413, where it is said the term may imply "descent" as well as "succession." See also 14 Cyc. 16 note 1.

29. Blair *v.* Adams, 59 Fed. 243, 244.

30. Bouvier L. Dict.

Applied in Beaufage's Case, 10 Coke 99*b*, 101*b*.

31. Wharton L. Lex.

Applied in Monopolies' Case, 11 Coke 84*b*, 85*b*.

32. Graft *v.* Graft, 76 Ind. 136, 138.

33. Trayner Leg. Max.

34. Tayler L. Gloss. See also Cribbs *v.* Benedict, 64 Ark. 555, 560, 44 S. W. 707; McDaniel *v.* King, 5 Cush. (Mass.) 469, 475; Virginia, etc., R. Co. *v.* Elliott, 5 Nev. 358, 367; Archer *v.* Eckerson, 10 N. Y. App. Div. 598, 801, 42 N. Y. Suppl. 137; Alabama Great Southern R. Co. *v.* Thompson, 200 U. S. 206, 217.

35. Bouvier L. Dict.

Applied in Roat *v.* Stuyvesant, 18 Wend. (N. Y.) 257, 305.

36. Bouvier L. Dict. [*citing* 3 Inst. 181].

INIQUUM EST ALIQUEM REI SUI ESSE JUDICEM. A maxim meaning "It is unjust for any one to be judge in his own cause." [37]

INIQUUM EST INGENUIS HOMINIBUS NON ESSE LIBERAM RERUM SUARUM ALIENATIONEM. A maxim meaning "It is against equity for freemen not to have the free disposal of their own property." [38]

INITIAL. Beginning; placed at the beginning.[39] (Initial: As Part of Name, see NAMES. Carrier, see CARRIERS. Cause,[40] see NEGLIGENCE.)

IN ITINERE. On the voyage; on the way; *in transitu.*[41]

IN JUDICIO NON CREDITUR NISI JURATIS. A maxim meaning "In a trial, credence is given only to those who are sworn." [42]

37. Bouvier L. Dict.

38. Bouvier L. Dict. [*citing* Coke Litt. 233].

39. Cyclopedic L. Dict.

Initial terminus and "final terminus" explained in Citizens' St. R. Co. *v.* Africa, 100 Tenn. 26, 37, 42 S. W. 485, 878.

40. "Initial cause," in the law of negligence, means the same thing as "first cause," "efficient cause," and "proximate cause." Winchel *v.* Goodyear, (Wis. 1905) 105 N. W. 824, 827.

41. Burrill L. Dict. See Jackson *v.* Jackson, 1 Johns. (N. Y.) 424, 433; The Albany, 1 Fed. Cas. No. 131, 4 Dill. 439, 446; The Vrow Margaretha, 1 C. Rob. 336, 338 ("*in itinere* towards Holland"). See also 14 Cyc. 856.

42. Wharton L. Lex.

Applied in Lincoln's Case, Cro. Car. 64.

INJUNCTIONS*

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*This article as submitted to MR. ROGERS for editing was prepared by ARTHUR LINTON CORBIN and JOHN WARREN EDGERTON.

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Appeal, see APPEAL AND ERROR.
Equitable Relief in General, see EQUITY.
Injunction:
Affecting Particular Kinds of Property, see COPYRIGHT; ESTATES; LITERARY PROPERTY; MINES AND MINERALS; PARTNERSHIP; PATENTS; TRADE-MARKS AND TRADE-NAMES; TRUSTS; WATERS.
By, Between, or Against:
Husband and Wife, see HUSBAND AND WIFE.
Landlord and Tenant, see LANDLORD AND TENANT.
Partners, see PARTNERSHIP.
Receiver, see RECEIVERS.
In Particular Action or Proceeding:
Bankruptcy, see BANKRUPTCY.
Condemnation, see EMINENT DOMAIN.
Creditor's Suit, see CREDITORS' SUITS.
Determination of Right to Office, see OFFICERS.
Divorce, see DIVORCE.
Ejectment, see EJECTMENT.
Enforcement of:
Mechanic's Lien, see MECHANICS' LIENS.
Right of Exemption, see EXEMPTIONS.
Foreclosure, see CHATTEL MORTGAGES; MORTGAGES.
Insolvency, see INSOLVENCY.
Interpleader, see INTERPLEADER.
Partition, see PARTITION.
Quieting Title, see QUIETING TITLE.
Specific Performance, see SPECIFIC PERFORMANCE.
Supplementary Proceedings, see EXECUTIONS.
Pendency of as Bar to Other Suit, see ABATEMENT AND REVIVAL.
Relating to Taxation, see DRAINS; MUNICIPAL CORPORATIONS; STREETS AND HIGHWAYS; TAXATION.
Review of Decision Relating to, see APPEAL AND ERROR.
To Determine Right to Office, see OFFICERS.
To Enforce Exemption Right, see EXEMPTIONS.
To Prevent or Restrain:
Act Affecting Navigation, see NAVIGABLE WATERS.
Cloud on Title, see QUIETING TITLE.
Diversion of Use of Property, see MUNICIPAL CORPORATIONS; RELIGIOUS SOCIETIES; SCHOOLS AND SCHOOL-DISTRICTS.
Enforcement of Judgment, see JUDGMENTS; JUSTICES OF THE PEACE.
Execution or Judicial Sale, see EXECUTIONS; JUDICIAL SALES; MORTGAGES; PARTITION.
Expulsion of Member, see ASSOCIATIONS; CLUBS.
Fraudulent Disposition of Property:
In General, see FRAUDULENT CONVEYANCES.
To Defeat Alimony, see DIVORCE.
Improvement of Street or Highway, see MUNICIPAL CORPORATIONS; STREETS AND HIGHWAYS.
Nuisance, see NUISANCES.

For Matters Relating to — (*continued*)
Injunction — (*continued*)
To Prevent or Restrain — (*continued*)
Obstruction of Street or Highway, see MUNICIPAL CORPORATIONS; STREETS AND HIGHWAYS.
Proceeding of Arbitrator, see ARBITRATION AND AWARD.
Unlawful Combination, see MONOPOLIES.
Usury, see USURY.
Violation of:
Liquor Law, see INTOXICATING LIQUORS.
Ordinance, see MUNICIPAL CORPORATIONS.
Waste, see WASTE.
Wrongful Act of:
Director or Other Officer, see CORPORATIONS.
Labor Union or Member Thereof, see LABOR UNIONS.

I. DEFINITION.

An injunction is a writ framed according to the circumstances of the case commanding an act which the court regards as essential to justice, or restraining an act which it esteems contrary to equity and good conscience.[1]

II. CLASSIFICATION AND NATURE OF INJUNCTIONS.

A. Preliminary or Perpetual Injunctions[2] — 1. PRELIMINARY INJUNCTIONS. According to one well recognized classification injunctions are preliminary or interlocutory or perpetual. Preliminary or interlocutory injunctions are those granted prior to the final hearing and determination of the trial, and continue until answer, or until the final hearing, or until the further order of the court. They do not conclude the rights of the parties. Their object is to maintain the *status quo*, to maintain property in its existing condition, to prevent further or impending injury — not to determine the right itself.[3] Therefore, where the

1. Jeremy Eq. Jur. 307 [*quoted* in Rodney Commercial Bank *v.* State, 4 Sm. & M. (Miss.) 439, 514; Parsons *v.* Marye, 23 Fed. 113, 121].

Other definitions.—"A prohibitory writ restraining a person from committing or doing a thing which appears to be against equity and conscience." *Ex p.* Grimball, T. U. P. Charlt. (Ga.) 153, 155.

"A remedial writ which courts issue for the purpose of enforcing their equity jurisdiction." McDonogh *v.* Calloway, 7 Rob. (La.) 442, 444.

"A judicial process, whereby a party is required to do a particular thing, or to refrain from doing a particular thing, according to the exigency of the writ." Rogers Locomotive, etc., Works *v.* Erie R. Co., 20 N. J. Eq. 379, 388 [*quoting* Story Eq. Jur.].

As defined by statute see Ark. St. §§ 3775–3776; Cal. Code Civ. Proc. § 525; Ida. Code Civ. Proc. § 3283; Indian Terr. St. § 2487; Garland La. Code, §§ 210, 296; Nebr. Comp. St. § 1279; Nev. Comp. Laws, § 3206; Hill Annot. Laws (Oreg.), § 408.

As distinguished from stay of proceedings see ACTIONS, 1 Cyc. 751 note 47.

In Quebec by statute the injunction or restraining order is assimilated to the writ of mandamus. See Savard *v.* Moisan, 1 Rev. de Lég. 378; Carter *v.* Breakey, 3 Quebec 113; Crawford *v.* Protestant Hospital for Insane, 4 Montreal Super. Ct. 215.

2. In particular actions see ASSIGNMENTS FOR BENEFIT OF CREDITORS, 4 Cyc. 279 note 99; CREDITORS' SUITS, 12 Cyc. 48; DIVORCE, 14 Cyc. 661; EJECTMENT, 15 Cyc. 90 note 93; FRAUDULENT CONVEYANCES, 20 Cyc. 828 *et seq*; INTERPLEADER; MECHANICS' LIENS; MORTGAGES; PARTITION.

3. *California.*— Gilfillan *v.* Shattuck, 142 Cal. 27, 75 Pac. 646.

Georgia.— Mecaslin *v.* Harralson, 97 Ga. 340, 22 S. E. 971.

Kansas.— Leavenworth, etc., R. Co. *v.* Clemmans, 14 Kan. 82.

Louisiana.— State *v.* New Orleans Debenture Redemption Co., 107 La. 562, 32 So. 102.

Maryland.— Bosley *v.* Susquehanna Canal, 3 Bland 63; Murdock's Case, 2 Bland 461, 40 Am. Dec. 381.

New Jersey.— Butler *v.* Useful Manufactures Soc., 12 N. J. 264; Thompson *v.* Paterson, 9 N. J. Eq. 624.

Ohio.— Cincinnati *v.* Cincinnati Consol. St. R. Co., 7 Ohio Dec. (Reprint) 249, 2 Cinc. L. Bul. 17.

Pennsylvania.— Audenried *v.* Philadelphia, etc., R. Co., 68 Pa. St. 370, 8 Am. Dec. 195; Reading, etc., R. Co. *v.* Reading, etc., R. Co.,

issuance of a preliminary injunction would have the effect of granting all the relief that could be obtained by a final decree and would practically dispose of the whole case, it will not be granted.[4] So it will not be granted where the injurious acts have been completed,[5] or where they have been discontinued and there is no showing that they are likely to be renewed,[6] and of course it will not be granted where it is not apparent that any injury at all will occur.[7]

2. PERPETUAL INJUNCTIONS. A perpetual injunction is one granted by the judgment which finally disposes of the injunction suit.[8]

B. Preventive or Mandatory Injunctions — 1. PREVENTIVE INJUNCTIONS. Another classification of injunctions is preventive and mandatory. A preventive injunction commands a party to refrain from doing an act.[9] Injunctions of this character necessarily operate upon an unperformed and unexecuted act and prevent a threatened but non-existent injury.[10]

11 Pa. Dist. 30; Heckscher *v.* Shaefer, 1 Leg. Rec. 285; Morristown Junction R. Co. *v.* Citizens Pass. R. Co., 9 Montg. Co. Rep. 103; Maxwell *v.* Fairview Cemetery Assoc., 8 North. Co. Rep. 397; McCall *v.* Barrie, 14 Wkly. Notes Cas. 419.

South Carolina.— Meinhard *v.* Youngblood, 37 S. C. 223, 15 S. E. 947.

United States.— Harriman *v.* Northern Securities Co., 132 Fed. 464; Gring *v.* Chesapeake, etc., Canal Co., 129 Fed. 996; Denver, etc., R. Co. *v.* U. S., 124 Fed. 156, 59 C. C. A. 579.

England.— Harman *v.* Jones, Cr. & Ph. 299, 41 Eng. Reprint 595.

Canada.— Grand Trunk R. Co. *v.* Credit Valley R. Co., 26 Grant Ch. (U. C.) 572; Smith *v.* Smith, 25 Grant Ch. (U. C.) 317; Erie, etc., R. Co. *v.* Great Western R. Co., 21 Grant Ch. (U. C.) 171; Carter *v.* Breakey, 2 Quebec 232.

See 27 Cent. Dig. tit. "Injunctions," § 302.

The removal of fixtures the ownership of which is in dispute may be prevented by injunction *pendente lite.* Ashby *v.* Ashby, 59 N. J. Eq. 536, 46 Atl. 528.

Effect of right of appeal.— A preliminary injunction, to which the court believes complainants are not entitled, will not be issued merely because defendants would have a right of appeal, whereas complainants have none. Edison Electric Light Co. *v.* Buckeye Electric Co., 64 Fed. 225. *Compare* Harriman *v.* Northern Securities Co., 132 Fed. 464.

4. *Kentucky.*— Weaver *v.* Toney, 107 Ky. 419, 54 S. W. 732, 21 Ky. L. Rep. 1157, 50 L. R. A. 105.

Michigan.— Arnold *v.* Bright, 41 Mich. 207, 2 N. W. 16.

New Jersey.— Becker *v.* Gilbert, (Ch. 1905) 60 Atl. 29; Levi *v.* Schoenthal, 57 N. J. Eq. 244, 41 Atl. 105; Grand Castle of G. E. *v.* Bridgeton Castle No. 13 K. of G. E., (Ch. 1898) 40 Atl. 849; National Docks, etc., R. Co. *v.* Pennsylvania R. Co., 54 N. J. Eq. 10, 33 Atl. 219; Pennsylvania R. Co. *v.* National Docks, etc., R. Co., 53 N. J. Eq. 178, 32 Atl. 220.

New York.— Cohen *v.* United Garment Workers, 35 Misc. 748, 72 N. Y. Suppl. 341; Connolly *v.* Van Wyck, 25 Misc. 746, 72 N. Y. Suppl. 382; Seymour *v.* Mutual Reserve Fund Life Assoc., 11 Misc. 151, 35 N. Y. Suppl. 793; Whiting Mfg. Co. *v.* Joseph H. Bauland Co., 28 N. Y. Civ. Proc. 230, 56 N. Y. Suppl. 114; Van Veghten *v.* Howland, 12 Abb. Pr. N. S. 461. See also Hirsch *v.* Graves Elevator Co., 24 Misc. 472, 53 N. Y. Suppl. 664.

North Dakota.— Forman *v.* Healey, 11 N. D. 563, 93 N. W. 666.

Wisconsin.— Consolidated Vinegar Works *v.* Brew, 112 Wis. 610, 88 N. W. 603.

England.— See Andrew *v.* Raeburn, L. R. 9 Ch. 522, 31 L. T. Rep. N. S. 73, 22 Wkly. Rep. 564.

See 27 Cent. Dig. tit. "Injunction," § 302.

5. Nocton *v.* Pennsylvania R. Co., 20 Montg. Co. Rep. (Pa.) 25; U. S. *v.* La Compagnie Francaise Des Cables Telegraphiques, 77 Fed. 495.

6. Sleicher *v.* Grogan, 43 N. Y. App. Div. 213, 59 N. Y. Suppl. 1065; Home Ins. Co. *v.* Nobles, 63 Fed. 642.

7. *Georgia.*— Hamilton *v.* Eden Gold Min. Co., 75 Ga. 447.

New Jersey.— National Docks, etc., Co. *v.* Pennsylvania R. Co., 52 N. J. Eq. 552, 30 Atl. 581.

New York.— Hutchinson *v.* Skinner, 21 Misc. 729, 49 N. Y. Suppl. 360; Finger *v.* Kingston, 9 N. Y. Suppl. 175.

Pennsylvania.— Neal's Estate, 16 Wkly. Notes Cas. 441.

Texas.— Cameron *v.* White, 3 Tex. 152.

United States.— Stevens *v.* Missouri, etc., R. Co., 106 Fed. 771, 45 C. C. A. 611; Marshall *v.* Turnbull, 32 Fed. 124.

Canada.— Low *v.* Montreal Tel. Co., 4 Montreal Leg. N. 293.

See 27 Cent. Dig. tit. "Injunction," § 306.

8. Jackson *v.* Bunnell, 113 N. Y. 216, 21 N. E. 79, holding that there can be no permanent injunction granted upon affidavits and an order.

Statutes.— The right to a permanent injunction is not enlarged by the code provision as to temporary injunctions. Thompson *v.* Canal Fund Com'rs, 2 Abb. Pr. (N. Y.) 248.

Effect upon temporary injunction.— An order making a temporary injunction perpetual terminates the temporary injunction, as it becomes merged in such order. Gage *v.* Parker, 178 Ill. 455, 53 N. E. 317.

9. Bouvier L. Dict.

10. Schubach *v.* McDonald, 179 Mo. 163,

2. Mandatory Injunctions[11] — **a. In General.** Mandatory injunctions command the performance of some positive act.[12] In the very great majority of cases injunction is a merely preventive remedy, and in some cases courts have on this ground refused to issue an injunction mandatory in its nature, or have declared that it is not the object of an injunction to redress a consummated wrong or to undo what has been done;[13] yet there is no doubt as to the power of courts of equity to issue mandatory injunctions.[14] And a mandatory injunction may be granted, although the act causing the injury has been completed before the suit is brought. The complainant may by this means be put *in statu quo*.[15]

b. When Act Has Been Completed Pendente Lite. Where defendant has fully completed the act sought to be restrained, after the filing of the bill but before

78 S. W. 1020, 101 Am. St. Rep. 452, 65 L. R. A. 136.

11. See further on this subject *infra*, V, C, 3, h, 7, j; V, D, 3, b, (III), (D).

12. Bailey *v.* Schnitzius, 45 N. J. Eq. 178, 16 Atl. 680; People *v.* McKane, 78 Hun (N. Y.) 154, 28 N. Y. Suppl. 981; Procter *v.* Stuart, 4 Okla. 679, 46 Pac. 501; Parsons *v.* Marye, 23 Fed. 113; Bouvier L. Dict.

13. *Illinois.*— Baxter *v.* Chicago Bd. of Trade, 83 Ill. 146; Fisher *v.* Chicago Bd. of Trade, 80 Ill. 85; Newlin *v.* Prevo, 81 Ill. App. 75.

Kentucky.— Lexington City Nat. Bank *v.* Guynn, 6 Bush 486.

Maryland.— Murdock's Case, 2 Bland 461, 20 Am. Dec. 381.

New York.— Palmer *v.* Foley, 36 N. Y. Super. Ct. 14.

Pennsylvania.— Leibig *v.* Ginther, 4 Leg. Gaz. 245.

South Carolina.— Brooks *v.* South Carolina R. Co., 8 Rich. Eq. 30.

Canada.— Sherbrooke *v.* Sherbrooke Tel. Co., 12 Montreal Leg. N. [*confirmed* in 6 Montreal Q. B. 100].

The restoration of an office from which one has been wrongfully removed cannot be compelled by suit for injunction. Sherman *v.* Clark, 4 Nev. 138, 97 Am. Dec. 516.

In Georgia, under Civ. Code, § 4922, it is provided that an injunction can only restrain, and cannot compel, a party to perform an act; yet it has been held that a preventive injunction may incidentally compel the performance of something. Macon, etc., R. Co. *v.* Graham, 117 Ga. 555, 43 S. E. 1000; Goodrich *v.* Georgia R., etc., Co., 115 Ga. 340, 41 S. E. 659. And where a railroad was permitted by the court to lay a portion of a track on condition that it would later remove it if required, the court may compel such removal. Waycross Air-Line R. Co. *v.* Southern Pine Co., 111 Ga. 233, 36 S. E. 641.

See 27 Cent. Dig. tit. "Injunction," § 4.

14. *Kentucky.*— Louisville *v.* Park Com'rs, 112 Ky. 409, 65 S. W. 860, 24 Ky. L. Rep. 38; Henderson County Bd. of Health *v.* Ward, 107 Ky. 477, 54 S. W. 725, 21 Ky. L. Rep. 1193.

Louisiana.— Pierce *v.* New Orleans, 18 La. Ann. 242; McDonogh *v.* Calloway, 7 Rob. 442; Petit *v.* Cormier, McGloin 370.

Maryland.— Washington County *v.* Washington County School Com'rs, 77 Md. 283, 26 Atl. 115; Carlisle *v.* Stephenson, 3 Md. Ch. 499.

Mississippi.—Green *v.* Lake, 54 Miss. 540, 28 Am. Rep. 378, holding that where the injury caused by the operation of a mill can be remedied by the use of certain appliances, the court need not enjoin the operation of the mill, but may require the use of the appliances instead.

New Jersey.— Stanford *v.* Lyon, 37 N. J. Eq. 94.

Ohio.— Toledo *v.* Northwestern Ohio Natural Gas Co., 8 Ohio S. & C. Pl. Dec. 277, 6 Ohio N. P. 531.

Pennsylvania.— Alleghany Nat. Bank *v.* Reighard, 32 Pittsb. Leg. J. 51.

United States.— *Ex p.* Lennon, 166 U. S. 548, 17 S. Ct. 658, 41 L. ed. 1110; Parsons *v.* Marye, 23 Fed. 113.

England.— Herman Loog *v.* Bean, 26 Ch. D. 306, 48 J. P. 708, 53 L. J. Ch. 1128, 51 L. T. Rep. N. S. 442, 32 Wkly. Rep. 994; Cooke *v.* Chilcott, 3 Ch. D. 694, 34 L. T. Rep. N. S. 207; Smith *v.* Smith, L. R. 20 Eq. 500, 44 L. J. Ch. 630, 32 L. T. Rep. N. S. 787, 23 Wkly. Rep. 771; Mexborough *v.* Bower, 7 Beav. 127, 29 Eng. Ch. 127, 49 Eng. Reprint 1011; Hervey *v.* Smith, 1 Kay & J. 389; Lane *v.* Newdigate, 10 Ves. Jr. 192, 7 Rev. Rep. 381, 32 Eng. Reprint 818.

Canada.— Meyers *v.* Smith, 15 Grant Ch. (U. C.) 616.

See 27 Cent. Dig. tit. "Injunction," § 4.

Mandatory injunction in connection with writ of assistance see Assistance, Writ of, 4 Cyc. 297.

15. Whiteman *v.* Fayette Fuel-Gas Co., 139 Pa. St. 492, 20 Atl. 1062; Goodson *v.* Richardson, L. R. 9 Ch. 221, 43 L. J. Ch. 790, 30 L. T. Rep. N. S. 142, 22 Wkly. Rep. 337; Kelk *v.* Pearson, L. R. 6 Ch. 809, 24 L. T. Rep. N. S. 890, 19 Wkly. Rep. 665; Durell *v.* Pritchard, L. R. 1 Ch. 244, 35 L. J. Ch. 223, 13 L. T. Rep. N. S. 545, 14 Wkly. Rep. 212; Smith *v.* Smith, L. R. 20 Eq. 500, 44 L. J. Ch. 630, 32 L. T. Rep. N. S. 787; Lawrence *v.* Horton, 59 L. J. Ch. 440, 62 L. T. Rep. N. S. 749, 38 Wkly. Rep. 555; Shiel *v.* Godfrey, [1893] W. N. 115; Morris *v.* Grant, 24 Wkly. Rep. 55. *Compare* Hindley *v.* Emery, L. R. 1 Eq. 52, 13 L. T. Rep. N. S. 272, 14 Wkly. Rep. 25; Lawrence *v.* Austin, 11 Jur. N. S. 576, 34 L. J. Ch. 598, 12 L. T. Rep. N. S. 757, 13 Wkly. Rep. 981; Gort *v.* Clark, 18 L. T. Rep. N. S. 343, 16 Wkly. Rep. 569.

the issuance of any order or decree, the court has power to compel by mandatory injunction the restoration of the former condition of things.[16]

c. Preliminary or Temporary Mandatory Injunctions. Since an injunction mandatory in its nature generally does more than to maintain the *status quo*, it is generally improper to issue such an injunction prior to final hearing; and it is frequently said that such a preliminary injunction will never issue.[17] For instance it is improper to issue a preliminary injunction, the effect of which will be to compel the transfer of property from one litigant to another.[18] On the other hand there is no doubt that the court has jurisdiction to issue preliminary mandatory injunctions, and it is proper to do so in cases of extreme urgency, where the right is very clear indeed, and where considerations of the relative inconvenience bear strongly in complainant's favor.[19] If the issuance on preliminary

16. New Haven Clock Co. *v.* Kochersperger, 175 Ill. 383, 51 N. E. 629; McHugh *v.* Louisville Bridge Co., 65 S. W. 456, 23 Ky. L. Rep. 1546.

17. *Georgia.*— Georgia Pac. R. Co. *v.* Douglasville, 75 Ga. 828; Thomas *v.* Hawkins, 20 Ga. 126.

Illinois.— World's Columbian Exposition Co. *v.* Brennan, 51 Ill. App. 128.

Maryland.— Washington University *v.* Green, 1 Md. Ch. 97.

New Jersey.— Delaware, etc., R. Co. *v.* Central Stock-Yard, etc., Co., 43 N. J. Eq. 71, 10 Atl. 490.

New York.— West Side Electric Co. *v.* Consolidated Tel., etc., Co., 87 N. Y. App. Div. 550, 84 N. Y. Suppl. 1052; Kyle *v.* Auburn, etc., R. Co., 1 Ch. Sent. 86.

Pennsylvania.— Audenried *v.* Philadelphia, etc., R. Co., 68 Pa. St. 370, 8 Am. Rep. 195; Washington Borough *v.* Steiner, 19 Pa. Super. Ct. 498; Mocanaqua Coal Co. *v.* Northern Cent. R. Co., 4 Brewst. 158; Moosic Mountain Coal Co. *v.* Delaware, etc., R. Co., 4 C. Pl. 189; Kutz *v.* Hepler, 1 Leg. Rec. 357; *Ex p.* Girard, 5 Pa. L. J. Rep. 68; Philadelphia, etc., R. Co. *v.* Philadelphia, 8 Phila. 112; Loughlin *v.* Atlantic, etc., R. Co., 11 Wkly. Notes Cas. 463; Brittain *v.* Ely, 4 Wkly. Notes Cas. 412.

South Carolina.— Aldrich *v.* Kirkland, 8 Rich. 349.

United States.— Denver, etc., R. Co. *v.* Atchison, etc., R. Co., 13 Fed. 546, 4 McCrary 325; McCauley *v.* Kellogg, 15 Fed. Cas. No. 8,688, 2 Woods 13.

England.— Gale *v.* Abbot, 8 Jur. N. S. 987, 6 L. T. Rep. N. S. 852, 10 Wkly. Rep. 748; Anonymous, 1 Ves. Jr. 140, 30 Eng. Reprint 270; Johnstone *v.* Royal Courts of Justice, [1883] W. N. 5.

Canada.— Stewart *v.* Turpin, 1 Manitoba 323.

See 27 Cent. Dig. tit. "Injunction," § 302.

18. *California.*— San Antonio Water Co. *v.* Bodenhamer, etc., Water, etc., Co., 133 Cal. 248, 65 Pac. 471.

Louisiana.— New Orleans, etc., R. Co. *v.* Mississippi, etc., R. Co., 36 La. Ann. 561.

Michigan.— Toledo, etc., R. Co. *v.* Detroit, etc., R. Co., 61 Mich. 9, 27 N. W. 715.

Mississippi.— Adams *v.* Ball, (1888) 5 So. 109; Martin *v.* Broadus, Freem. 35.

Nebraska.— State *v.* Graves, 66 Nebr. 17, 92 N. W. 144; Calvert *v.* State, 34 Nebr. 616, 52 N. W. 687.

New York.— Jameson *v.* Hartford F. Ins. Co., 14 N. Y. App. Div. 380, 44 N. Y. Suppl. 15; Morgan *v.* New York, etc., R. Co., 10 Paige 290, 40 Am. Dec. 244; Deklyn *v.* Davis, Hopk. 135.

North Dakota.— Forman *v.* Healey, 11 N. D. 563, 93 N. W. 866; Dickson *v.* Dows, 11 N. D. 404, 92 N. W. 797.

Pennsylvania.— Fredericks *v.* Huber, 180 Pa. St. 572, 37 Atl. 90; Farmers' R. Co. *v.* Reno, etc., R. Co., 53 Pa. St. 224; Kutz *v.* Hepler, 1 Leg. Rec. 357; O'Brien *v.* Wilson, 10 Montg. Co. Rep. 169.

Rhode Island.— Jenckes *v.* Cooke, 8 R. I. 336.

South Carolina.— Columbia Water-Power Co. *v.* Columbia, 4 S. C. 388.

South Dakota.— Catholicon Hot Springs Co. *v.* Ferguson, 7 S. D. 503, 64 N. W. 539.

Vermont.— Cheever *v.* Rutland, etc., R. Co., 39 Vt. 653.

West Virginia.— Bettman *v.* Harness, 42 W. Va. 433, 26 S. E. 271, 36 L. R. A. 566.

United States.— Cosmos Exploration Co. *v.* Gray Eagle Oil Co., 104 Fed. 20; Southern Pac. R. Co. *v.* Oakland, 58 Fed. 50; Mexican Ore Co. *v.* Mexican Guadalupe Min. Co., 47 Fed. 351.

Canada.— Atty.-Gen. *v.* McLaughlin, 1 Grant Ch. (U. C.) 34; Canada Radiator Co. *v.* La Societé de Construction, 6 Quebec Pr. 354.

See 27 Cent. Dig. tit. "Injunction," § 302.

And the custody of children will not be taken from the husband, in a separation suit, by preliminary injunction, except to prevent the children from being carried out of the jurisdiction. Laurie *v.* Laurie, 9 Paige (N. Y.) 234.

19. *California.*— Hagen *v.* Beth, 118 Cal. 330, 50 Pac. 425; Johnson *v.* Tulare County Super. Ct., 65 Cal. 567, 4 Pac. 575.

Indiana.— Miller *v.* Shriner, 86 Ind. 493.

Kentucky.— Mason *v.* Byrley, 84 S. W. 767, 26 Ky. L. Rep. 487.

Louisiana.— New Iberia Rice-Milling Co. *v.* Romero, 105 La. 439, 29 So. 876; Black *v.* Good Intent Towboat Co., 31 La. Ann. 497.

Maryland.— Clayton *v.* Shoemaker, 67 Md. 216, 9 Atl. 635.

application of an injunction mandatory in nature will have the effect of granting to the complainant all the relief that he could obtain upon a final hearing, the application should be refused except in very rare cases, and then only where the complainant's right to the relief is clear and certain.[20]

C. Common and Special Injunctions. Under the earlier practice preliminary injunctions were classified as common and special; common injunctions being those which issue secondarily and in aid of another equity, while special injunctions issued primarily and for the prevention of irreparable injury.[21] The special injunction issued only upon good cause shown by affidavit,[22] upon special grounds arising out of the circumstances of the case,[23] and operated according to the terms of the order granting it.[24] The common injunction issued to restrain further proceedings in an action at law to enable defendant to assert an equity which he could not assert in a law court.[25] Where the common injunction issued

Mississippi.— Gulf Coast Ice, etc., Co. *v.* Bowers, 80 Miss. 570, 32 So. 113.

New Jersey.— National Docks, etc., R. Co. *v.* Pennsylvania R. Co., 54 N. J. Eq. 10, 33 Atl. 219; Bailey *v.* Schnitzius, 45 N. J. Eq. 178, 16 Atl. 680; Delaware, etc., R. Co. *v.* Central Stock-Yard Co., 43 N. J. Eq. 605, 12 Atl. 374, 13 Atl. 615; Hodge *v.* Giese, 43 N. J. Eq. 342, 11 Atl. 484; Delaware, etc., R. Co. *v.* Central Stock-Yard, etc., Co., 43 N. J. Eq. 71, 10 Atl. 490; Lord *v.* Carbon Iron Mfg. Co., 38 N. J. Eq. 452; Whitecar *v.* Michenor, 37 N. J. Eq. 6; Shivers *v.* Shivers, 32 N. J. Eq. 578; Longwood Valley R. Co. *v.* Baker, 27 N. J. Eq. 166; Rogers Locomotive, etc., Works *v.* Erie R. Co., 20 N. J. Eq. 379.

New York.— Hanover F. Ins. Co. *v.* Germania F. Ins. Co., 33 Hun 539.

Ohio.— Sampsell *v.* Escher, 11 Ohio Dec. (Reprint) 351, 26 Cinc. L. Bul. 156; Harrison *v.* Craighead, 8 Ohio Dec. (Reprint) 35, 5 Cinc. L. Bul. 270, 7 Ohio Dec. (Reprint) 634, 4 Cinc. L. Bul. 500.

Pennsylvania.— Whiteman *v.* Fayette Fuel-Gas Co., 139 Pa. St. 492, 20 Atl. 1062.

South Carolina.— Norris *v.* Cobb, 8 Rich. 58.

United States.— Pokegama Sugar-Pine Lumber Co. *v.* Klamath River Lumber, etc., Co., 86 Fed. 528; Toledo, etc., R. Co. *v.* Pennsylvania Co., 54 Fed. 730, 19 L. R. A. 387; Cole Silver Min. Co. *v.* Virginia, etc., Water Co., 6 Fed. Cas. No. 2,989, 1 Sawy. 470; Cole Silver-Min. Co. *v.* Virginia, etc., Water Co., 6 Fed. Cas. No. 2,990, 1 Sawy. 685; Kamm *v.* Stark, 14 Fed. Cas. No. 7,604, 1 Sawy. 547.

England.— Bonner *v.* Great Western R. Co., 24 Ch. D. 1, 47 J. P. 580, 48 L. T. Rep. N. S. 619, 32 Wkly. Rep. 190; Atty.-Gen. *v.* Metropolitan Bd. of Works, 1 Hem. & M. 298, 9 L. T. Rep. N. S. 139, 2 New Rep. 312, 11 Wkly. Rep. 820; Spencer *v.* London, etc., R. Co., 7 L. J. Ch. 281, 1 R. & Can. Cas. 159, 8 Sim. 193, 8 Eng. Ch. 193, 59 Eng. Reprint 77; Blakemore *v.* Glamorganshire Canal Nav. Co., 2 L. J. Ch. 95, 1 Myl. & K. 154, 7 Eng. Ch. 155, 39 Eng. Reprint 639. See Allport *v.* Securities Corp., 64 L. J. Ch. 491, 72 L. T. Rep. N. S. 533, 13 Reports 420.

Canada.— Toronto Brewing, etc., Co. *v.* Blake, 12 Ont. 175. See Mearns *v.* Petrolia, 28 Grant Ch. (U. C.) 98; Hathaway *v.* Doig, 6 Ont. App. 264.

See 27 Cent. Dig. tit. "Injunction," § 302.

Illustrations.— A preliminary injunction, mandatory in nature, has been issued to put in a bulkhead in a tunnel to prevent the further taking of water (Cole Silver Min. Co. *v.* Virginia, etc., Water Co., 6 Fed. Cas. No. 2,989, 1 Sawy. 470), to remove a plate put over a chimney, filling the house with smoke (Hervey *v.* Smith, 1 Kay & J. 389; Atty.-Gen. *v.* Metropolitan Bd. of Works, 1 Hem. & M. 298, 9 L. T. Rep. N. S. 139, 11 Wkly. Rep. 820), to remove damp jute in imminent danger of combustion (Hepburn *v.* Lordan, 2 Hem. & M. 345, 11 Jur. N. S. 132, 34 L. J. Ch. 293, 13 Wkly. Rep. 368), and to prevent the drowning of a colliery (Strelley *v.* Pearson, 15 Ch. D. 113, 49 L. J. Ch. 406, 43 L. T. Rep. N. S. 155, 28 Wkly. Rep. 752).

An attempt to anticipate the injunction by hastening the work to completion before an injunction can be issued will be of some weight in inducing the court to grant a mandatory injunction before the final hearing. Daniel *v.* Ferguson, [1891] 2 Ch. 27, 39 Wkly. Rep. 599.

Where defendant evaded service of a writ and in the meantime hurried on the work, a mandatory injunction was granted on interlocutory application compelling him to pull down such work as was done while he was so evading service. Von Joel *v.* Hornsey, [1895] 2 Ch. 774.

20. Weaver *v.* Toney, 107 Ky. 419, 54 S. W. 732, 21 Ky. L. Rep. 1157, 50 L. R. A. 105; Ladd *v.* Flynn, 90 Mich. 181, 51 N. W. 203; Grand Castle of G. E. *v.* Bridgeton Castle No. 13 K. of G. E., (N. J. Ch. 1898) 40 Atl. 849; Beck *v.* New York, etc., R. Co., 74 N. Y. App. Div. 626, 77 N. Y. Suppl. 357; Keeseville *v.* Keeseville Electric Co., 59 N. Y. App. Div. 381, 69 N. Y. Suppl. 249; New York Bldg. Dept. *v.* Jones, 24 Misc. (N. Y.) 490, 53 N. Y. Suppl. 836.

21. Jarman *v.* Saunders, 64 N. C. 367; Purnell *v.* Daniel, 43 N. C. 9.

22. Chadwell *v.* Jordan, 2 Tenn. Ch. 635.

23. Aldrich *v.* Kirkland, 6 Rich. (S. C.) 334.

24. Chadwell *v.* Jordan, 2 Tenn. Ch. 635.

25. Jarman *v.* Saunders, 64 N. C. 367;

before the declaration in the action at law, it stayed all further proceedings; but if it issued afterward, it merely stayed the execution.[26] Under the practice in those states in which both legal and equitable causes are tried in the same courts and in the same forms of action, it would seem that the necessity for a common injunction can never arise,[27] and in fact common executions no longer issue in most jurisdictions,[28] such result following as of course from statutes requiring notice to the opposing party before the issuance of an injunction,[29] and the terms "preliminary" and "special" injunctions are in some cases employed interchangeably.[30]

D. Restraining Orders. A restraining order is an order granted to maintain the subject of controversy *in statu quo* until the hearing of an application for a temporary injunction.[31] It may be issued before notice to defendant in order to prevent irreparable injury pending the hearing.[32] Its purpose is merely to suspend proceedings until there may be an opportunity to inquire whether any injunction should be granted,[33] and it is not intended as an injunction *pendente lite*;[34] hence its duration should be limited to such a reasonable time as may be necessary to notify the adverse party,[35] especially where defendant is likely to be

Heilig *v.* Stokes, 63 N. C. 612; Patterson *v.* Gordon, 3 Tenn. Ch. 18. See Anderson *v.* Noble, 1 Drew. 143.

26. Hendrick *v.* Dallum, 1 Overt. (Tenn.) 427; Chadwell *v.* Jordan, 2 Tenn. Ch. 635; Garlick *v.* Pearson, 10 Ves. Jr. 450, 32 Eng. Reprint 919.

27. Jarman *v.* Saunders, 64 N. C. 367.

28. See Patterson *v.* Gordon, 3 Tenn. Ch. 18; Chadwell *v.* Jordan, 2 Tenn. Ch. 635.

In England their employment has been abolished by statute. St. 15 & 16 Vict. c. 86, Order No. 45 (Aug. 7, 1852). See Magnay *v.* Mines Royal Co., 3 Drew. 130; Anderson *v.* Noble, 1 Drew. 143.

29. Perry *v.* Parker, 19 Fed. Cas. No. 11,010, 1 Woodb. & M. 280.

30. See Passenger R. Co. *v.* Easton, 7 Pa. Co. Ct. 569.

31. State *v.* Baker, 62 Nebr. 840, 88 N. W. 124; State *v.* Lichtenberg, 4 Wash. 407, 30 Pac. 716.

32. *Georgia.*— Strickland *v.* Griffin, 70 Ga. 541.

Indiana.— Andrews *v.* Powell, 27 Ind. 303; Wallace *v.* McVey, 6 Ind. 300.

Iowa.— Lemmon *v.* Guthrie Center, 113 Iowa 36, 84 N. W. 986, 86 Am. St. Rep. 361.

Nebraska.— State *v.* Baker, 62 Nebr. 840, 88 N. W. 124; State *v.* Greene, 48 Nebr. 327, 67 N. W. 162.

New York.— Campbell *v.* Morrison, 7 Paige 157.

Ohio.— Vornholt *v.* Gordon, 4 Ohio S. & C. Pl. Dec. 498.

United States.— Fanshawe *v.* Tracy, 8 Fed. Cas. No. 4,643, 4 Biss. 490; Yuengling *v.* Johnson, 27 Fed. Cas. No. 18,195, 1 Hughes 607.

England.— Fuller *v.* Taylor, 9 Jur. N. S. 743, 32 L. J. Ch. 376, 8 L. T. Rep. N. S. 69, 11 Wkly. Rep. 532; Fraser *v.* Whalley, 2 Hem. & M. 10, 11 L. T. Rep. N. S. 175.

See 27 Cent. Dig. tit. "Injunction," § 302. *et seq.*

The power to grant a restraining order is included by a power conferred upon a judge to grant temporary injunctions, where statutory provision is made for the granting of temporary injunctions and restraining orders in proper cases. State *v.* Greene, 48 Nebr. 327, 67 N. W. 162.

The application should inform the court of all the facts. Fuller *v.* Taylor, 9 Jur. N. S. 743, 32 L. J. Ch. 376, 8 L. T. Rep. N. S. 69, 11 Wkly. Rep. 532, holding that where it appeared that the parties had been at issue as to their rights, for almost two months, such facts should have been stated in the application, and that after such delay an *ex parte* application was improper.

Security may be required as a condition on granting a restraining order, the same as on granting a preliminary injunction. Salinas *v.* Aultman, 49 S. C. 378, 27 S. E. 407.

33. Fenwick Hall Co. *v.* Old Saybrook, 66 Fed. 389.

34. A temporary restraining order contemplates a further hearing on the application for a temporary injunction upon notice to the adverse party, while a temporary injunction contemplates no further hearing until the final action is taken upon the application. State *v.* Baker, 62 Nebr. 840, 88 N. W. 124; Miles *v.* Sheep Rock Min., etc., Co., 15 Utah 436, 49 Pac. 536, holding that such an order was not an injunction within the meaning of a statute providing that no assessment may be levied on the capital stock of a corporation while a previous assessment remains unpaid, unless the collection of such assessment has been prohibited by injunction.

Whether an order is a restraining order or a temporary injunction must be determined from its form and substance. State *v.* Baker, 62 Nebr. 840, 88 N. W. 124.

35. Wallace *v.* McVey, 6 Ind. 300. A mere temporary restraining order should by its own terms be timed to extend in any event no longer than until the preliminary hearing of the application. Vornholt *v.* Gordon, 4 Ohio S. & C. Pl. Dec. 498.

Postponement of hearing to a subsequent term is unreasonable, where the order is granted in term-time. Andrews *v.* Powell, 27 Ind. 303, holding, however, that the objection

damaged by delay.[36] A restraining order ceases to be operative at the expiration of the time fixed by its terms;[37] or if at the time fixed by it to show cause there is no appearance by either party, and the motion for injunction is not continued or kept alive in any mode,[38] although there is no order of dissolution,[39] and although the restraining order provides that it shall be effective until further order.[40] So the force of restraining orders ceases upon the granting[41] or refusal[42] of a temporary injunction. Where the order refusing the injunction is appealed from the restraining order is not prolonged,[43] nor where an injunction has been granted and dissolved does an appeal from the order of dissolution revive the restraining order.[44] In case a restraining order is dissolved, a party is not entitled to have the order dissolving it superseded pending review.[45] Where a restraining order has been granted *ex parte*, it may be dissolved on motion before answer.[46] The unauthorized issuance of a restraining order will not prevent the issuance of a temporary injunction upon a full hearing.[47] A bond given to secure a restraining order will not give effect to a temporary injunction subsequently allowed in the same case, but a new bond must be executed.[48]

III. GENERAL PRINCIPLES GOVERNING ISSUANCE.

A. Discretion of the Court. An injunction, whether temporary or permanent, cannot as a general rule be sought as a matter of right, but its granting or refusal rests in the sound discretion of the court under the circumstances of the particular case.[49] Especially is this the rule in the case of a temporary injunction

was not available on appeal from a final trial on the merits.

36. Wetzstein *v.* Boston, etc., Min. Co., 25 Mont. 135, 63 Pac. 1043; Walworth *v.* Cook County, 29 Fed. Cas. No. 17,136, 5 Biss. 133.

37. State *v.* Greene, 48 Nebr. 327, 67 N. W. 162.

38. San Diego Water Co. *v.* Pacific Coast Steamship Co., 101 Cal. 216, 35 Pac. 651.

39. San Diego Water Co. *v.* Pacific Coast Steamship Co., 101 Cal. 216, 35 Pac. 651; Miles *v.* Sheep Rock Min., etc., Co., 15 Utah 436, 49 Pac. 536.

40. San Diego Water Co. *v.* Pacific Coast Steamship Co., 101 Cal. 216, 35 Pac. 651, holding that if a contrary effect were given to such provision it would convert the order into a preliminary injunction which could not be operative until a bond was given as required by statute.

41. Cohen *v.* Gray, 70 Cal. 85, 11 Pac. 508.

42. Hicks *v.* Michael, 15 Cal. 107.

43. Hicks *v.* Michael, 15 Cal. 107.

44. Hicks *v.* Michael, 15 Cal. 107.

45. State *v.* Baker, 62 Nebr. 840, 88 N. W. 124; State *v.* Greene, 48 Nebr. 327, 67 N. W. 162; State *v.* Lichtenberg, 4 Wash. 407, 30 Pac. 716.

46. Fenwick Hall Co. *v.* Old Saybrook, 66 Fed. 389, so holding, although the bill sought a discovery or disclosure, in a case where the motion to set aside the order admitted the truth of the allegations to which discovery was asked, and where the matters sought to be discovered would not be material at the trial.

47. Lemmon *v.* Guthrie Center, 113 Iowa 36, 84 N. W. 986, 86 Am. St. Rep. 361.

48. State *v.* Greene, 48 Nebr. 327, 67 N. W. 162.

49. *California.*— Allen *v.* Pedro, 136 Cal. 1, 68 Pac. 99; Coolot *v.* Central Pac. R. Co., 52 Cal. 65; Patterson *v.* Santa Cruz County, 50 Cal. 344.

Connecticut.— Hine *v.* Stephens, 33 Conn. 497, 89 Am. Dec. 217; Whittlesey *v.* Hartford, etc., R. Co., 23 Conn. 421; Enfield Toll Bridge Co. *v.* Connecticut River Co., 7 Conn. 28.

Florida.— Swetson *v.* Call, 13 Fla. 337.

Georgia.— Savannah, etc., R. Co. *v.* Postal Tel. Cable Co., 113 Ga. 916, 39 S. E. 399; Payton *v.* Payton, 86 Ga. 773, 13 S. E. 127; Howard *v.* Lowell Mach. Co., 75 Ga. 325; Poole *v.* Sims, 67 Ga. 36; Nisbet *v.* Sawyer, 66 Ga. 256; Richardson *v.* Nacoochie-Gold Min. Co., 60 Ga. 596; Jones *v.* Johnson, 60 Ga. 260; Smith *v.* McLaren, 59 Ga. 879; Carter *v.* Hallahan, 59 Ga. 67; Jones *v.* Jones, 58 Ga. 184; Wachtel *v.* Wilde, 58 Ga. 50; Markham *v.* Angier, 57 Ga. 43; Parker *v.* Green, 49 Ga. 624; Smith *v.* Malcolm, 48 Ga. 343; Jones *v.* Thacher, 48 Ga. 83; Isam *v.* Hooks, 46 Ga. 309; Rowland *v.* Ransome, 43 Ga. 390; McDonald *v.* Davis, 43 Ga. 356; Clark *v.* Herring, 43 Ga. 226; Moses *v.* Flewellen, 42 Ga. 386; Cubbedge *v.* Adams, 42 Ga. 124; Montgomery *v.* Walker, 36 Ga. 515; Burchard *v.* Boyce, 21 Ga. 6.

Idaho.— Price *v.* Grice, 10 Ida. 443, 79 Pac. 387.

Illinois.— People *v.* Galesburg, 48 Ill. 485; Marble *v.* Bonhotel, 35 Ill. 240.

Kansas.— Olmstead *v.* Koester, 14 Kan. 463; Conley *v.* Fleming, 14 Kan. 381; Akin *v.* Davis, 14 Kan. 143; Stoddart *v.* Vanlaningham, 14 Kan. 18.

Louisiana.— State *v.* Judge Civil Dist. Ct., 51 La. Ann. 1768, 26 So. 374; State *v.* Rightor, 38 La. Ann. 916; State *v.* Judge New Orleans Third Dist. Ct., 16 La. Ann. 233.

Maryland.— Welde *v.* Scotten, 59 Md. 72;

where the granting of the injunction depends upon the determination of questions

Frostburg Bldg. Assoc. *v.* Stark, 47 Md. 338; Shoemaker *v.* National Mechanics' Bank, 31 Md. 396, 100 Am. Dec. 73; McCreery *v.* Sutherland, 23 Md. 471, 87 Am. Dec. 578.

Minnesota.— McGregor *v.* Case, 80 Minn. 214, 83 N. W. 140.

Mississippi.— Brown *v.* Speight, 30 Miss. 45.

Montana.— Boston, etc., Copper, etc., Min. Co. *v.* Montana Ore-Purchasing Co., 23 Mont. 557, 59 Pac. 919.

Nevada.— Hobart *v.* Ford, 6 Nev. 77.

New Jersey.— Rawnsley *v.* Trenton Mut. L., etc., Ins. Co., 9 N. J. Eq. 95; Doughty *v.* Somerville, etc., R. Co., 7 N. J. Eq. 629, 51 Am. Dec. 267.

New York.— Wormser *v.* Brown, 149 N. Y. 163, 43 N. E. 524 [*affirming* 72 Hun 93, 25 N. Y. Suppl. 553]; Hatch *v.* Western Union Tel. Co., 93 N. Y. 640; Brown *v.* Keeney Settlement Cheese Assoc., 59 N. Y. 242; Pfohl *v.* Sampson, 59 N. Y. 174; People *v.* Schoonmaker, 50 N. Y. 499; Van Dewater *v.* Kelsey, 1 N. Y. 533; Sun Printing, etc., Assoc. *v.* Delaney, 48 N. Y. App. Div. 623, 62 N. Y. Suppl. 750; Gloversville *v.* Johnstown, etc., Horse R. Co., 21 N. Y. Suppl. 146.

Oregon.— Burton *v.* Muffitt, 3 Oreg. 29.

Pennsylvania.— Richards' Appeal, 57 Pa. St. 105, 98 Am. Dec. 202; Kneedler *v.* Lane, 3 Grant 523; Grey *v.* Ohio, etc., R. Co., 1 Grant 412; Hill *v.* Kensington, 1 Pars. Eq. Cas. 501; McVey *v.* Brendle, 5 Lanc. L. Rev. 350; Frankfort, etc., Turnpike Co.'s Appeal, 11 Wkly. Notes Cas. 184.

South Dakota.— Huron First Nat. Bank *v.* Crabtree, (1904) 100 N. W. 744.

Wisconsin.— Ward *v.* Sweeney, 106 Wis. 44, 82 N. W. 169; Kulinski *v.* Dambrowski, 29 Wis. 109.

United States.— Buffington *v.* Harvey, 95 U. S. 99, 24 L. ed. 381; Harriman *v.* Northern Security Co., 132 Fed. 464, 575; Mitchell *v.* Colorado Fuel, etc., Co., 117 Fed. 723; National Phonograph Co. *v.* Schlegel, 117 Fed. 624; San Francisco Sanitary Reduction Works *v.* California Reduction Co., 94 Fed. 693; Nashville, etc., R. Co. *v.* McConnell, 82 Fed. 65; Atkinson *v.* Philadelphia, etc., R. Co., 2 Fed. Cas. No. 615.

England.— Jenkins *v.* Hope, [1896] 1 Ch. 278, 65 L. J. Ch. 249, 73 L. T. Rep. N. S. 705, 44 Wkly. Rep. 358; Ripon *v.* Hobart, Coop. t. Brough. 333, 47 Eng. Reprint 119, 3 Myl. & K. 169, 10 Eng. Ch. 169, 40 Eng. Reprint 65; Imperial Gas Light Co. *v.* Broad bent, 7 H. L. Cas. 600, 5 Jur. N. S. 1319, 29 L. J. Ch. 377, 11 Eng. Reprint 239; Bramwell *v.* Holcomb, 3 Myl. & C. 737, 14 Eng. Ch. 737, 40 Eng. Reprint 1110.

Canada.— Dobie *v.* Board of Temporalities, 9 Rev. Lég. 574; Graham *v.* Northern R. Co., 10 Grant Ch. (U. C.) 259; South Shore R. Co. *v.* Grand Trunk R. Co., 12 Quebec K. B. 28; Mallette *v.* Montreal, 24 L. C. Jur. 264.

See 27 Cent. Dig. tit. "Injunction," §§ 296, 304.

Where defendant has made no defense, but has stipulated that a permanent injunction shall issue, it is within the discretion of the court to refuse the injunction when the real object for which it is sought is the influence it will exert on third parties. National Phonograph Co. *v.* Schlegel, 117 Fed. 624.

Failure to fully disclose facts.— An application for an injunction goes to the sound conscience of the court, acting upon all the circumstances of each particular case; and the court, having the right to require a full and candid disclosure of all the facts, may refuse to exercise its extraordinary power by writ of injunction if the proceedings are such as to show that a full disclosure has not been made. Canton Co. *v.* Northern Cent. R. Co., 21 Md. 383; Reddall *v.* Bryan, 14 Md. 444, 74 Am. Dec. 550.

Adequacy of remedy at law.— Where it is not made clear at a trial whether plaintiff can obtain full damages at law for the violation of a covenant not to build upon or encumber a certain right of way, an injunction against such violation is discretionary with the trial court, and will not be disturbed. Dexter *v.* Beard, 2 Silv. Sup. (N. Y.) 106, 7 N. Y. Suppl. 11.

Where proof not conclusive.— Where a bill was filed to restrain the maintenance of a dam, and the question involved was whether or not the water had been raised above a certain mark fixed by the arbitrator, but the proofs did not conclusively show that such height had been exceeded, a dismissal of the bill will not be interfered with. Cobb *v.* Slimmer, 45 Mich. 176, 7 N. W. 806.

Disclaimer by defendant of intention to do acts complained of.— Where the seller of a business covenanted not to engage in the same business within a certain territory within a certain period, on an application by the purchaser to restrain him from engaging in such business in violation of his covenant the court may consider all the circumstances, and is not bound to take his disclaimer that he does not intend to violate it, or his statement that he does not propose to engage in such business under the name of his wife. Fleckenstein Bros. Co. *v.* Fleckenstein, (N. J. Ch. 1903) 53 Atl. 1043.

The English Judicature Act of 1873 gives to the high court of justice the power to issue an injunction whenever it appears to the court that such issuance would be just "or" convenient, and thus apparently very much enlarges the court's discretion. But this has been construed to authorize an injunction only when it is just "and" convenient, and the principles upon which this is to be determined are practically unchanged. Aslatt *v.* Southampton Corp., 16 Ch. D. 148, 45 J. P. 111, 50 L. J. Ch. 31, 43 L. T. Rep. N. S. 464, 29 Wkly. Rep. 117; Gaskin *v.* Balls, 13 Ch. D. 324, 28 Wkly. Rep. 552; Day *v.* Brownrigg, 10 Ch. D. 294, 48 L. J. Ch. 173, 39 L. T. Rep. N. S. 553, 27 Wkly. Rep. 217; Cork Corp. *v.* Rooney, L. R. 7 Ir. 191.

of fact and the evidence is conflicting.[50] This discretionary power, however, is not arbitrary and unlimited, but must be exercised reasonably and in harmony with well established principles.[51] And where the case made out by the complainant is perfectly clear, and he has complied with all the requirements of the law for the issuance of an injunction, he is entitled to the injunction as a matter of right.[52] The action of the court may be reviewed on appeal or error in case of a clear abuse of discretion,[53] but not otherwise;[54] and mandamus will not lie

50. *District of Columbia.*— Webb *v.* King, 21 App. Cas. 141.

Georgia.— McLeod *v.* Reid, 120 Ga. 785, 48 S. E. 315; Pittman *v.* Colbert, 120 Ga. 341, 47 S. E. 948; Steadman *v.* Dorminey-Price Lumber Co., 119 Ga. 616, 46 S. E. 839; Leath *v.* Hinson, 117 Ga. 589, 43 S. E. 985; Blats *v.* Blats, 117 Ga. 165, 43 S. E. 437; Lane *v.* Georgia L. & T. Co., 112 Ga. 702, 37 S. E. 971; Lamar *v.* Gardner, 111 Ga. 850, 36 S. E. 640; State Bank *v.* Porter, 87 Ga. 511, 13 S. E. 650; Warmack *v.* Brownlee, 84 Ga. 196, 10 S. E. 738; East Rome Town Co. *v.* Cothran, 81 Ga. 359, 8 S. E. 737; Lamar *v.* Sheppard, 80 Ga. 25, 5 S. E. 247; Couch *v.* Williams, 79 Ga. 211, 4 S. E. 16; Wheelan *v.* Clarke, 79 Ga. 181, 3 S. E. 901; Mason *v.* Kirkpatrick, 77 Ga. 492; Lamar *v.* Lanier House Co., 76 Ga. 640; Frick *v.* Davis, 74 Ga. 839; Shackleford *v.* Twiggs, 74 Ga. 828; Adcock *v.* Watts, 74 Ga. 402; Anderson *v.* Savannah, 69 Ga. 472; Wood *v.* Macon, etc., R. Co., 68 Ga. 539; Taylor *v.* Dyches, 66 Ga. 712; Thaxton *v.* Roberts, 66 Ga. 704; Nevin *v.* Printup, 59 Ga. 281; Goldsmith *v.* Elsas, 53 Ga. 186; Cherokee Iron Co. *v.* Jones, 52 Ga. 276; Kendall *v.* Dow, 46 Ga. 607; Anthony *v.* Stephens, 46 Ga. 241; Thomas *v.* Stokes, 44 Ga. 631.

Idaho.— Price *v.* Grice, 10 Ida. 443, 79 Pac. 387.

Kansas.— Johnson *v.* Wilson County, 34 Kan. 670, 9 Pac. 384.

Minnesota.— Fuller *v.* Schutz, 88 Minn. 372, 93 N. W. 118.

Montana.— Parrot Silver, etc., Co. *v.* Heinze, 24 Mont. 485, 62 Pac. 818.

New York.— Strasser *v.* Moonelis, 108 N. Y. 611, 15 N. E. 730.

See 27 Cent. Dig. tit. "Injunction," § 304.

51. Gunn *v.* James, 120 Ga. 482, 48 S. E. 148; Weaver *v.* Toney, 107 Ky. 419, 54 S. W. 732, 21 Ky. L. Rep. 1157, 50 L. R. A. 105; McHenry *v.* Jewett, 90 N. Y. 58; Camphell *v.* Seaman, 63 N. Y. 568, 20 Am. Rep. 567; Gentil *v.* Arnand, 38 How. Pr. (N. Y.) 94; Rowley *v.* Van Benthuysen, 16 Wend. (N. Y.) 369.

52. Buck *v.* Massie, 109 La. 776, 33 So. 767; State *v.* Lazarus, 36 La. Ann. 578; Beebe *v.* Guinault, 29 La. Ann. 795; Allison Bros. Co. *v.* Allison, 4 Silv. Sup. (N. Y.) 222, 7 N. Y. Suppl. 268. *Compare* McGregor *v.* Case, 80 Minn. 214, 83 N. W. 140.

Discretion limited to terms.— Where the complaint states a cause of action, and the motion papers disclose a reasonable probability of plaintiff's ultimate success, it is well nigh an imperative duty of the court to preserve the *status quo* by temporary injunction, if its disturbance *pendente lite* will render futile in considerable degree the judgment sought, or cause serious and irreparable injury to one party; especially if injury to the other is slight, or of character easily compensable in money; and the discretion vested in the court is largely over the question of the terms of the restraint and the protection of the rights by bonds from one party to the other. De Pauw *v.* Oxley, 122 Wis. 656, 100 N. W. 1028. See also Milwaukee Electric R., etc., Co. *v.* Bradley, 108 Wis. 467, 84 N. W. 870.

While the action of the chancellor is of grace, such action sometimes becomes a matter of right to the suitor, and when it is clear that the law cannot give protection and relief to which the complainant is admittedly entitled, the chancellor can no more withhold his grace than the law can deny protection and relief if able to grant them. Sullivan *v.* Jones, etc., Steel Co., 208 Pa. St. 540, 57 Atl. 1065, 66 L. R. A. 712. See also Walters *v.* McElroy, 151 Pa. St. 549, 25 Atl. 125.

53. See APPEAL AND ERROR, 3 Cyc. 329.

54. *Georgia.*— Powell *v.* Hammond, 81 Ga. 567, 8 S. E. 426; East Rome Town Co. *v.* Cothran, 81 Ga. 359, 8 S. E. 737.

Illinois.— Hinson *v.* Ralston, 100 Ill. App. 214.

Montana.— Heinze *v.* Boston, etc., Consol. Copper, etc., Min. Co., 30 Mont. 484, 77 Pac. 421 [*affirming* 26 Mont. 265, 67 Pac. 1134]; Shilling *v.* Reagan, 19 Mont. 508, 48 Pac. 1109.

New York.— Wormser *v.* Brown, 149 N. Y. 163, 43 N. E. 524 [*affirming* 72 Hun 93, 25 N. Y. Suppl. 553]; Strasser *v.* Moonelis, 108 N. Y. 611, 15 N. E. 730; McHenry *v.* Jewett, 90 N. Y. 58; Morris European, etc., Express Co. *v.* Merchants' European Express Co., 67 N. Y. App. Div. 616, 73 N. Y. Suppl. 538; Gloversville *v.* Johnstown, etc., Horse R. Co., 21 N. Y. Suppl. 146.

Wisconsin.— Paine Lumber Co. *v.* Oshkosh, 86 Wis. 397, 56 N. W. 1088; Koeffler *v.* Milwaukee, 85 Wis. 397, 55 N. W. 400.

United States.— Rahley *v.* Columbia Phonograph Co., 122 Fed. 623, 58 C. C. A. 639; U. S. Gramophone Co. *v.* Seaman, 113 Fed. 745, 51 C. C. A. 419.

Canada.— South Shore R. Co. *v.* Grand Trunk R. Co., 12 Quebec K. B. 28.

See 27 Cent. Dig. tit. "Injunction," § 304.

Effect of understanding as to right to appeal.— Although the issuance of a preliminary injunction is largely discretionary and will usually not be reviewed by an appellate court, this rule does not apply where the lower court issued the injunction with the understanding that the order would be appealable, while an order denying such injunc-

to control such discretion.[55] A temporary injunction may be refused under circumstances where a permanent injunction might be granted,[56] particularly where sought upon an *ex parte* application.[57] An injunction will not be granted when good conscience does not require it,[58] nor where it will tend to promote, rather than to prevent, fraud and injustice.[59]

B. Caution Required. Great caution is to be used in issuing mandatory injunctions;[60] and it has been said that this has no special application in the case of mandatory injunctions, but applies alike to all injunctions.[61] The complainant must make out a clear case free from doubt and dispute.[62]

C. Existence and Nature of the Right — 1. In General. The existence of a right violated is a prerequisite to the granting of an injunction. Where it is clear that the complainant does not have the right that he claims, he is not entitled to an injunction, either temporary or perpetual, to prevent a violation of such supposed right.[63] So where the complainant claims his right under a law

tion would not be, and where the facts upon which the injunction was based are clearly before the court of appeals. Northern Securities Co. *v.* Harriman, 134 Fed. 331, 67 C. C. A. 245 [*affirmed* in 197 U. S. 244, 25 S. Ct. 493, 49 L. ed. 739].

What is not abuse of discretion.— Where the hearing of an application for an injunction is upon bill, answer, and affidavits in support of the bill, and the answer fails to explain as fully as it should a material point in the case, and the action of the chancellor in granting the injunction is, as to this point, supported by the bill and the affidavits, although controverted by the answer to the extent that the latter goes, it cannot be said that the chancellor has abused his discretion, or committed any error justifying the interposition of the appellate court. McKinne *v.* Dickenson, 24 Fla. 366, 5 So. 34.

55. *Ex p.* Montgomery, 24 Ala. 98; McMillen *v.* Smith, 26 Ark. 613; *Ex p.* Hays, 26 Ark. 510; State *v.* Judge Orleans Parish Super. Dist. Ct., 28 La. Ann. 903.

Where an injunction has been granted which is clearly beyond the power of the court to grant its dissolution may be compelled by mandamus. People *v.* Judge St. Clair Cir., 31 Mich. 456.

56. Akin *v.* Davis, 14 Kan. 143; Stoddart *v.* Vanlaningham, 14 Kan. 18; Minnig's Appeal, 82 Pa. St. 373; Brown's Appeal, 62 Pa. St. 17; Mammoth Vein Consol. Coal Co.'s Appeal, 54 Pa. St. 183; Biddle *v.* Ash, 2 Ashm. (Pa.) 211.

57. State *v.* Judge Orleans Parish Civil Dist. Ct., 51 La. Ann. 1768, 26 So. 374; Chatard *v.* New Orleans, 10 La. Ann. 752.

58. Atchison, etc., R. Co. *v.* Meyer, 62 Kan. 696, 64 Pac. 597; Messner *v.* Lykens, etc., R. Co., 13 Pa. Super. Ct. 429; Mackintyre *v.* Jones, 9 Pa. Super. Ct. 543; Speese *v.* Schuylkill River East Side R. Co., 10 Pa. Dist. 515.

An unauthorized payment of public money will not be restrained when full value was received for it and the payment ought to be made, even though it is technically illegal. Where the granting of an injunction would be more inequitable than the refusing of it, it is a proper exercise of discretion to refuse it. Farmer *v.* St. Paul, 65 Minn. 176, 67 N. W. 990, 33 L. R. A. 199.

59. Farmer *v.* St. Paul, 65 Minn. 176, 67 N. W. 990, 33 L. R. A. 199; Higgins *v.* Higgins, 57 N. H. 224. See National Phonograph Co. *v.* Schlegel, 117 Fed. 624, where an injunction was denied where it would have been of no effect as between the parties and was sought simply for its effect upon third persons.

60. Isenberg *v.* East India House Estate Co., 3 De G. J. & S. 263, 10 Jur. N. S. 221, 33 L. J. Ch. 392, 9 L. T. Rep. N. S. 625, 3 New Rep. 345, 12 Wkly. Rep. 450, 68 Eng. Ch. 199, 46 Eng. Reprint 637.

61. Smith *v.* Smith, L. R. 20 Eq. 500, 44 L. J. Ch. 630, 32 L. T. Rep. N. S. 287, 23 Wkly. Rep. 771.

62. Buettgenbach *v.* Gerbig, 2 Nebr. (Unoff.) 889, 90 N. W. 654; Budd *v.* Camden Horse R. Co., 63 N. J. Eq. 804, 52 Atl. 1130; Bradbury *v.* Manchester, etc., R. Co., 15 Jur. 1167.

63. *Florida.*— Pensacola, etc., R. Co. *v.* Spratt, 12 Fla. 26, 91 Am. Dec. 747.

Idaho.— McGinnis *v.* Friedman, 2 Ida. (Hasb.) 393, 17 Pac. 635.

Louisiana.— Watson *v.* McGrath, 111 La. 1097, 36 So. 204.

Mississippi.— Planters' Compress Assoc. *v.* Hanes, 52 Miss. 469.

New York.— Empire City Subway Co. *v.* Broadway, etc., R. Co., 159 N. Y. 555, 54 N. E. 1092; Park, etc., Co. *v.* National Wholesale Druggists' Assoc., 54 N. Y. App. Div. 223, 64 N. Y. Suppl. 276, 66 N. Y. Suppl. 615.

Ohio.— Johnson *v.* West Side St. R. Co., 9 Ohio Dec. (Reprint) 71, 10 Cinc. L. Bul. 345.

Pennsylvania.— Pennsylvania Schuylkill Valley R. Co. *v.* Schuylkill Nav. Co., 167 Pa. St. 576; Reading, etc., Electric R. Co. *v.* Reading, etc., St. R. Co., 11 Pa. Dist. 30; Wilkes-Barre Gas Co. *v.* Wilkes-Barre, 6 Kulp 431.

Wisconsin.— Linden Land Co. *v.* Milwaukee Electric R., etc., Co., 107 Wis. 493, 83 N. W. 851.

United States.— New York Exhaust Ventilator Co. *v.* American Inst., 24 Fed. 561, 23 Blatchf. 321, 28 Fed. 722.

that is unconstitutional,[64] or under a contract that is illegal,[65] he is not entitled to an injunction. If the right claimed is purely legal in character, a bill in equity is not the proper proceeding to establish it; all that equity will do in such case is to protect the property involved from ruinous or irreparable injury until the existence of the right can be established at law.[66]

2. DOUBTFUL RIGHTS[67] — a. **Perpetual Injunction.** Where the complainant's right is doubtful or his title is in dispute a perpetual injunction cannot be obtained until the doubt is removed by a proper proceeding and the right made certain;[68] the only proper relief which may be granted in such cases being a

England.— See Atty.-Gen. *v.* Birmingham, etc., R. Co., 16 Jur. 113, 3 Macn. & G. 453, 49 Eng. Ch. 351, 42 Eng. Reprint 335, holding that the court, in an action by the attorney-general has no power to restrain a public company from doing an act which it is authorized to do, until the company performs some other work which it is required to perform under the act creating it.

Canada.— Montreal Park, etc., R. Co. *v.* St. Louis, 17 Quebec Super. Ct. 545.

See 27 Cent. Dig. tit. "Injunction," § 8.

Equitable as well as legal rights are entitled to the protection of equity by injunction if the case is otherwise a proper one for such relief. Stockdale *v.* Ullery, 37 Pa. St. 486, 78 Am. Dec. 440.

Ultra vires corporate acts.— A corporation will not be restrained from carrying on business in excess of its powers merely at the suit of one with whom such business comes in competition. Competition does not violate his rights. Rayburn Water Co. *v.* Armstrong Water Co., 9 Pa. Dist. 24.

A mere possessor of land is not entitled to an injunction against the holder of the legal title on the ground that the latter obtained his title from a third party in a fraudulent and illegal manner. Treadwell *v.* Payne, 15 Cal. 496.

64. Moor *v.* Veazie, 31 Me. 360.

65. Bennett *v.* American Art Union, 5 Sandf. (N. Y.) 614.

66. *California.*— Minturn *v.* Hays, 2 Cal. 590, 56 Am. Dec. 366.

Maryland.— Lanahan *v.* Gahan, 37 Md. 105.

New Jersey.— Higbee *v.* Camden, etc., R. etc., Co., 20 N. J. Eq. 435; Doughty *v.* Somerville, etc., R. Co., 7 N. J. Eq. 51.

New York.— See McHenry *v.* Jewett, 90 N. Y. 58.

Pennsylvania.— Le France *v.* Railroad Co., 5 Lack. Jur. 129.

United States.— Parker *v.* Winnipiseogee Lake Cotton, etc., Mfg. Co., 2 Black 545, 17 L. ed. 333.

England.— Hilton *v.* Granville, 4 Beav. 130, 49 Eng. Reprint 288, Cr. & Ph. 283, 18 Eng. Ch. 283, 41 Eng. Reprint 498, 10 L. J. Ch. 398; Imperial Gas Light, etc., Co. *v.* Broadbent, 7 H. L. Cas. 600, 5 Jur. N. S. 1319, 29 L. J. Ch. 377, 11 Eng. Reprint 239; Bramwell *v.* Halcomb, 3 Myl. & C. 737, 14 Eng. Ch. 737, 40 Eng. Reprint 1110. And see Albert *v.* Strange, 1 Hall & T. 1, 47 Eng. Reprint 1302, 13 Jur. 109, 18 L. J. Ch. 120, 1 Macn. & G. 25, 47 Eng. Ch. 19, 41 Eng. Reprint 1171, where it is said that the cases in which the court refuses to interfere by injunction until the legal right is established at law have no application to cases in which the court exercises an original and independent jurisdiction to prevent a wrong arising from a violation of right, or breach of contract or confidence.

See 27 Cent. Dig. tit. "Injunction," § 8.

If the right is not disputed it is not necessary to establish it at law. Quackenbush *v.* Van Riper, 3 N. J. Eq. 350, 29 Am. Dec. 716.

67. See further on this subject *infra*, V, C, 5; V, D, 1.

68. *California.*— Petersen *v.* Weissbein, 70 Cal. 423, 12 Pac. 415.

Connecticut.— Roath *v.* Driscoll, 20 Conn. 533, 52 Am. Dec. 352.

Georgia.— Everett *v.* Tabor, 119 Ga. 128, 46 S. E. 72.

Maryland.— Clayton *v.* Shoemaker, 67 Md. 216, 9 Atl. 635; Hardesty *v.* Taft, 23 Md. 512, 87 Am. Dec. 584.

Missouri.— Echelkamp *v.* Schrader, 45 Mo. 505.

New Jersey.— Atty.-Gen. *v.* Delaware, etc., R. Co., 27 N. J. Eq. 1. See Carlisle *v.* Cooper, 21 N. J. Eq. 576.

New York.— Harrison *v.* Newton, Code Rep. N. S. 207.

Ohio.— Spangler *v.* Cleveland, 43 Ohio St. 526, 3 N. E. 365.

Oregon.— Tongue *v.* Gaston, 10 Oreg. 328.

Pennsylvania.— Sparhawk *v.* Union Pass. R. Co., 54 Pa. St. 401; Painter *v.* Western Union Tel. Co., 19 Pa. Super. Ct. 168. See Getting *v.* Union Imp. Co., 7 Kulp 493; Penn Iron Co. *v.* Lancaster, 17 Lanc. L. Rev. 161; Schall *v.* Norristown, 6 Leg. Gaz. 157.

Texas.— Luckie *v.* Schneider, (Civ. App. 1900) 57 S. W. 690.

West Virginia.— Merchants' Coal Co. *v.* Billmeyer, 54 W. Va. 1, 46 S. E. 121.

United States.— Bonaparte *v.* Camden, etc., R. Co., 3 Fed. Cas. No. 1,617, Baldw. 205.

England.— Cardiff *v.* Cardiff Waterworks Co., 4 De G. & J. 596, 61 Eng. Ch. 472, 45 Eng. Reprint 231.

Canada.— Monkman *v.* Babington, 5 Manitoba 253.

See 27 Cent. Dig. tit. "Injunction," §§ 8, 409 *et seq.*

Reason for rule.— "It is rather the duty of the court to protect acknowledged rights, than to establish new and doubtful ones." Roath *v.* Driscoll, 20 Conn. 533, 539, 52 Am. Dec. 352.

temporary injunction maintaining the *status quo* until the right or title in question is established.[69]

b. Temporary Injunction — (i) *In General.* It is not sufficient ground for refusing a preliminary injunction that it is not absolutely certain that complainant has the right that he claims or that the injury feared will occur; and even though complainant's right to permanent relief is doubtful it may be proper to maintain the *status quo* pending the determination of his right, the issuance of a temporary injunction in such cases depending chiefly upon the relative inconvenience to be caused the parties.[70] Thus where there is a prospect of irremediable injury, even

Limitation of rule.— Where one who had long been in possession of land under color of title sued for an injunction to prevent injury thereto, it was held that the fact that there was a doubt as to the validity of his title was not ground for refusing the injunction, inasmuch as the complainant had an apparent title and defendant was without even color of title and a stranger to the property. Falls Village Water Power Co. *v.* Tibbetts, 31 Conn. 165.

Allegations of bill not denied.— When the material allegations contained in a petition for injunction are not denied in the answer, and defendants, after their motion to dissolve has been denied, give notice of appeal, a decree perpetuating the injunction is not error. Alsup *v.* Allen, 43 Tex. 598; Eason *v.* Killough, 1 Tex. App. Civ. Cas. § 603.

Acts under the authority of a law will not be enjoined, if there is a reasonable doubt as to the validity of the law or the proper exercise of the power it confers. Bonaparte *v.* Camden, etc., R. Co., 3 Fed. Cas. No. 1,617, Baldw. 205.

Under reformed procedure the right may be established and the injunction obtained in the same civil action. Corning *v.* Troy Iron, etc., Factory, 40 N. Y. 191.

69. Clayton *v.* Shoemaker, 67 Md. 216, 9 Atl. 635; Echelkamp *v.* Schrader, 45 Mo. 505. See *infra*, III, C, 2, b.

70. *Alabama.*— Coxe *v.* Huntsville Gaslight Co., 129 Ala. 496, 29 So. 867.

California.— Hicks *v.* Michael, 15 Cal. 107.

Georgia.— Everett *v.* Tabor, 119 Ga. 128, 46 S. E. 72; Lane *v.* Georgia L. & T. Co., 112 Ga. 702, 37 S. E. 971; Gewinner *v.* McCrary, 99 Ga. 299, 25 S. E. 648; Smith *v.* Cuyler, 78 Ga. 654, 3 S. E. 406.

Illinois.— Shaw *v.* Hill, 67 Ill. 455.

Louisiana.— Wheeler *v.* Fire Com'rs, 46 La. Ann. 731, 15 So. 179.

New Jersey.— Carll *v.* Snyder, (Ch. 1893) 26 Atl. 977. See Carlisle *v.* Cooper, 21 N. J. Eq. 576.

New York.— Bagg *v.* Robinson, 12 Misc. 299, 34 N. Y. Suppl. 37.

Pennsylvania.— Pennsylvania, etc., R. Co. *v.* Philadelphia, etc., R. Co., 151 Pa. St. 402, 24 Atl. 1086; Collins *v.* Northeastern El. R. Co., 2 Pa. Dist. 417; Atlantic, etc., Tel. Co. *v.* Philadelphia, etc., R. Co., 8 Phila. 246.

Wisconsin.— Bartlett *v.* L. Bartlett, etc., Co., 116 Wis. 450, 93 N. W. 473.

United States.— Jones *v.* Dimes, 130 Fed. 638; Gring *v.* Chesapeake, etc., Canal Co., 129 Fed. 996; Denver, etc., R. Co. *v.* U. S., 124 Fed. 156, 59 C. C. A. 579; Cartersville Light, etc., Co. *v.* Cartersville, 114 Fed. 699; Stevens *v.* Missouri, etc., R. Co., 106 Fed. 771, 45 C. C. A. 611; Cohen *v.* Delavina, 104 Fed. 946; Allison *v.* Corson, 88 Fed. 581, 32 C. C. A. 12; Newton *v.* Levis, 79 Fed. 715, 25 C. C. A. 161.

England.— Walker *v.* Jones, L. R. 1 P. C. 50, 12 Jur. N. S. 381, 35 L. J. P. C. 30, 14 L. T. Rep. N. S. 686, 14 Wkly. Rep. 484; Preston *v.* Luck, 27 Ch. D. 497; Clowes *v.* Beck, 13 Beav. 347, 20 L. J. Ch. 505, 51 Eng. Reprint 134; Ollendorf *v.* Black, 4 De G. & Sm. 209, 14 Jur. 1080, 20 L. J. Ch. 165, 64 Eng. Reprint 801; Dyke *v.* Taylor, 3 De G. F. & J. 467, 7 Jur. N. S. 583, 30 L. J. Ch. 281, 3 L. T. Rep. N. S. 717, 9 Wkly. Rep. 403, 64 Eng. Ch. 366, 45 Eng. Reprint 959; Shrewsbury, etc., R. Co. *v.* Shrewsbury, etc., R. Co., 15 Jur. 548, 20 L. J. Ch. 574, 1 Sim. N. S. 410, 61 Eng. Reprint 159; Great Western R. Co. *v.* Birmingham, etc., R. Co., 12 Jur. 106, 17 L. J. Ch. 243, 2 Phil. 597, 5 R. & Can. Cas. 241, 22 Eng. Ch. 597, 41 Eng. Reprint 1074; Glascott *v.* Lang, 2 Jur. 909, 3 Myl. & C. 451, 14 Eng. Ch. 451, 40 Eng. Reprint 1000, 8 Sim. 358, 8 Eng. Ch. 358, 59 Eng. Reprint 142; Crosse *v.* Duckers, 27 L. T. Rep. N. S. 816, 21 Wkly. Rep. 287; Atty.-Gen. *v.* Great Eastern R. Co., 25 L. T. Rep. N. S. 867.

Canada.— Atty.-Gen. *v.* McLaughlin, 1 Grant Ch. (U. C.) 34.

See 27 Cent. Dig. tit. "Injunction," § 309.

Restatement of rule.— Where the sole object for which an injunction is sought is the preservation of a fund in controversy, or the maintenance of the *status quo*, until the question of right between the parties can be decided on final hearing, the injunction properly may be allowed, although there may be serious doubt of the ultimate success of the complainant. Harriman *v.* Northern Securities Co., 132 Fed. 464.

Comparative injury.— A preliminary injunction maintaining the *status quo* may properly issue whenever the questions of law or of fact to be ultimately determined in a suit are grave and difficult, and injury to the moving party will be immediate, certain, and great, if it is denied, while the loss or inconvenience to the opposing party will be comparatively small or insignificant if it is granted. Newton *v.* Levis, 79 Fed. 715, 25 C. C. A. 161.

Right to final relief.— It is not necessary that the court should determine that the complainant is entitled to a final award in

though the title is disputed, a temporary injunction may issue at once, without waiting until a trial at law is had.[71] The injunction may be granted, although an action at law has not been commenced,[72] and the complainant or defendant may be ordered to institute a suit at law immediately.[73]

its favor. It is enough that the case presented seems sufficiently meritorious to warrant the court in preserving the *status quo* until the real merits of the controversy have been finally determined. Western Union Tel. Co. *v.* Pennsylvania R. Co., 120 Fed. 981.

The fact that an appeal does not lie from an order denying a preliminary injunction is of controlling importance where there is reasonable doubt as to whether the complainant will be entitled to permanent relief ultimately. Harriman *v.* Northern Securities Co., 132 Fed. 464.

Where defendants deny doing the acts sought to be restrained, they cannot complain of an injunction *pendente lite*. My Maryland Lodge No. 186 *v.* Adt, 100 Md. 238, 59 Atl. 721, 68 L. R. A. 752; George Jonas Glass Co. *v.* U. S., etc., Glassblowers' Assoc., 64 N. J. Eq. 640, 54 Atl. 565.

Directing issue.— Where the right is not completely established, the court may direct an issue and let the motion for an injunction lie over in the meantime. Freeman *v.* Tottenham, etc., R. Co., 11 Jur. N. S. 254, 13 Wkly. Rep. 1004.

Under modern decisions a dispute as to the title does not defeat equity jurisdiction nor does the allegation of defendant's claim of adverse title. Merced Min. Co. *v.* Fremont, 7 Cal. 317, 68 Am. Dec. 262; West *v.* Walker, 3 N. J. Eq. 279; Lowndes *v.* Bettle, 10 Jur. N. S. 226, 33 L. J. Ch. 451, 10 L. T. Rep. N. S. 55, 4 New Rep. 609, 12 Wkly. Rep. 399; Greenwich Hospital Com'rs *v.* Blackett, 12 Jur. 151.

71. *Alabama.*— Ashurst *v.* McKenzie, 92 Ala. 484, 9 So. 262.

California.— Jungerman *v.* Bovee, 19 Cal. 354.

Georgia.— Murphey *v.* Harker, 115 Ga. 77, 41 S. E. 585.

Maryland.— Chesapeake, etc., Canal Co. *v.* Young, 3 Md. 480.

New York.— Spear *v.* Cutter, 5 Barb. 486, 4 How. Pr. 175, 2 Code Rep. 100; Van Bergen *v.* Van Bergen, 3 Johns. Ch. 282, 8 Am. Dec. 511.

Oregon.— Bishop *v.* Baisley, 28 Oreg. 119, 41 Pac. 936.

Pennsylvania.— Westmoreland, etc., Natural Gas Co. *v.* De Witt, 130 Pa. St. 235, 18 Atl. 724, 5 L. R. A. 731; Rhea *v.* Forsyth, 37 Pa. St. 503, 78 Am. Dec. 441; Roddy *v.* Dickson, 25 Pa. Co. Ct. 91; Kerns *v.* Harbison, 1 Chest. Co. Rep. 506; Verdolite *v.* Richards, 7 North. Co. Rep. 113.

Texas.— Burnley *v.* Cook, 13 Tex. 586, 65 Am. Dec. 79.

Vermont.— Stetson *v.* Stevens, 64 Vt. 649, 25 Atl. Rep. 429; Griffith *v.* Hilliard, 64 Vt. 643, 25 Atl. 427.

United States.— Erhardt *v.* Boaro, 113 U. S. 537, 5 S. Ct. 565, 28 L. ed. 1116 [*affirming* 8 Fed. 692, 2 McCrary 141]; Irwin *v.* Dixion, 9 How. 10, 13 L. ed. 25; Santee River Cypress Lumber Co. *v.* James, 50 Fed. 360; McBride *v.* Pierce County, 44 Fed. 17; Lanier *v.* Alison, 31 Fed. 100.

See 27 Cent. Dig. tit. "Injunction," § 84.

Reason for rule.— When there is reasonable ground to apprehend the commission of irreparable mischief, pending the litigation, and the title is matter of doubt, the court should restrain both the parties or appoint a receiver under proper circumstances. The party restrained in a case of reasonable doubt has at least these advantages: (1) The property is left untouched for the time, and upon the termination of the suit in his favor returns to him unimpaired; (2) he has not only his remedy against the opposite party, but also against his sureties. But in case the party is not restrained and the suit should terminate adversely to him, the other party must rely solely upon his personal responsibility. It is true that notwithstanding all these advantages he may suffer seriously; but as it is a matter of doubt who has the right, and someone must incur the risk pending litigation, the risk would be less on his than on the other side. Merced Min. Co. *v.* Fremont, 7 Cal. 317, 68 Am. Dec. 262. The evident injustice of permitting the actual destruction of the subject-matter in dispute during the delay necessarily incident to the establishment by judicial determination of the rights of the parties led the equity courts to interfere, not to decide the dispute as to the legal title, but to save the property from destruction until the law courts should, by a proper proceeding, adjudge the rights of the parties. Johnson *v.* Hughes, 58 N. J. Eq. 406, 43 Atl. 901.

Shutting off supply of gas or water.— Injunction will lie to prevent a gas company from shutting off the supply of gas from a consumer's house, where the right depends on failure to pay which is disputed. Sickles *v.* Manhattan Gas-Light Co., 64 How. Pr. (N. Y.) 33. See also Cromwell *v.* Stephens, 2 Daly (N. Y.) 15, shutting off water.

72. Kane *v.* Vandenburgh, 1 Johns. Ch. (N. Y.) 11; Gause *v.* Perkins, 56 N. C. 177, 69 Am. Dec. 728; Griffith *v.* Hillard, 64 Vt. 643, 25 Atl. 427; Freer *v.* Davis, 52 W. Va. 1, 43 S. E. 164, 94 Am. St. Rep. 895, 59 L. R. A. 556. *Compare* Irwin *v.* Davidson, 38 N. C. 311.

The reason underlying this jurisdiction does not require the pending of a suit to try the title. Every good purpose is subserved if plaintiff shows his claim of title, the imminency of irreparable injury, and his intention to immediately put the question of title into a course of legal investigation and determination. Freer *v.* Davis, 52 W. Va. 1, 43 S. E. 164, 94 Am. St. Rep. 895, 59 L. R. A. 556.

73. *Alabama.*— Ashurst *v.* McKenzie, 92 Ala. 484, 9 So. 262.

(II) *Limitations of Rule.* The right asserted by complainant, however, must be perfectly clear and free from doubt where the effect of a preliminary injunction will be more than merely the maintenance of the *status quo*, or where the injunction will cause defendant greater loss and inconvenience than that which will be suffered by the complainant in the absence of an injunction.[74] In any event an injunction must be refused if the complainant's case is so doubtful that it does not appear reasonably probable that he has the right claimed and that it is being violated,[75] or if he does not make it appear reasonably probable

New Jersey.— Johnson *v.* Hughes, 58 N. J. Eq. 406, 43 Atl. 901; Weise *v.* Welsh, 30 N. J. Eq. 431; Coffin *v.* Loper, 25 N. J. Eq. 443.

Oregon.— Bishop *v.* Baisley, 28 Oreg. 119, 41 Pac. 936.

Texas.— Burnley *v.* Cook, 13 Tex. 586, 65 Am. Dec. 79, holding that in all cases where the right is doubtful the court will direct a trial and in the meantime if there be danger of irreparable mischief, or if there is any other good cause of granting a temporary injunction, it will be ordered so as to restrain all injurious proceedings, and when plaintiff's right is fully established a perpetual injunction will be decreed.

Vermont.— Griffith *v.* Hillard, 64 Vt. 643, 25 Atl. 427.

Virginia.— Harris *v.* Thomas, 1 Hen. & M. 18.

United States.— Georgia *v.* Brailsford, 2 Dall. 402, 415 L. ed. 433, 438; Santee River Cypress Lumber Co. *v.* James, 50 Fed. 360.

See 27 Cent. Dig. tit. "Injunction," § 85.

Defendant required to bring action.— It is usual where the title itself comes into controversy to grant a temporary injunction to await the event of an action at law to be prosecuted by plaintiff. But where plaintiff is in actual possession, and has been for many years, he is not in a position nor has he any occasion to sue. Defendant is the proper party to bring an action and test the rights of the respective parties at law, and if he neglects to do so this injunction will be made permanent. Echelkamp *v.* Schrader, 45 Mo. 505.

In the English practice the complainant is put under terms that he shall within a proper time bring such suit in a court of law as may be necessary to establish his right. Harmon *v.* Jones, Cr. & Ph. 299, 18 Eng. Ch. 299, 41 Eng. Reprint 505.

74. National Docks, etc., R. Co. *v.* Pennsylvania R. Co., 54 N. J. Eq. 10, 33 Atl. 219; Pennsylvania R. Co. *v.* National Docks, etc., R. Co., 53 N. J. Eq. 178, 32 Atl. 220; Painter *v.* Western Union Tel. Co., 19 Pa. Super. Ct. 168; Central Stock Yards Co. *v.* Louisville, etc., R. Co., 112 Fed. 823; Atty.-Gen. *v.* Liverpool, 7 L. J. Ch. 51, 1 Myl. & C. 171, 13 Eng. Ch. 171, 40 Eng. Reprint 342, 2 Myl. & C. 613, 14 Eng. Ch. 613, 40 Eng. Reprint 773; Norway *v.* Rowe, 1 Meriv. 347, 35 Eng. Reprint 702, 19 Ves. Jr. 144, 34 Eng. Reprint 472, 12 Rev. Rep. 157; Smith *v.* Collyer, 8 Ves. Jr. 89, 32 Eng. Reprint 286; Pillsworth *v.* Hopton, 6 Ves. Jr. 51, 31 Eng. Reprint 933.

75. *California.*— Real Del Monte Consol. Gold, etc., Min. Co. *v.* Pond Gold, etc., Min. Co., 23 Cal. 82.

Georgia.— Davis *v.* Covington, etc., R. Co., 77 Ga. 322, 2 S. E. 555; Nethery *v.* Payne, 71 Ga. 374; Read *v.* Dews, R. M. Charlt. 358.

Indiana.— Wallace *v.* McVey, 6 Ind. 300.

Montana.— Montana Ore-Purchasing Co. *v.* Boston, etc., Consol. Copper, etc., Min. Co., 22 Mont. 159, 56 Pac. 120.

New Hampshire.— Cheshire Mills *v.* Gowing, 62 N. H. 618.

New Jersey.— Ivins *v.* Jacob, (Ch. 1904) 58 Atl. 941; Roberts *v.* Scull, 58 N. J. Eq. 396, 43 Atl. 583; Amos *v.* Norcross, 58 N. J. Eq. 256, 43 Atl. 195; Delaware, etc., R. Co. *v.* Breckenridge, 56 N. J. Eq. 595, 40 Atl. 23; National Docks, etc., R. Co. *v.* Pennsylvania R. Co., 54 N. J. Eq. 10, 33 Atl. 219; Pennsylvania R. Co. *v.* National Docks, etc., R. Co., 53 N. J. Eq. 178, 32 Atl. 220; Benedict *v.* Columbus Constr. Co., 49 N. J. Eq. 23, 23 Atl. 485; Hagerty *v.* Lee, 45 N. J. Eq. 255, 17 Atl. 826; Albright *v.* Teas, 37 N. J. Eq. 171; Morris Canal, etc., Co. *v.* Useful Manufactures Soc., 5 N. J. Eq. 203; Useful Manufactures Soc. *v.* Holsman, 5 N. J. Eq. 126.

New York.— Platt *v.* Elias, 101 N. Y. App. Div. 518, 91 N. Y. Suppl. 1079; New York Carbonic Acid Gas Co. *v.* Geyser Natural Carbonic Acid Gas Co., 55 N. Y. App. Div. 128, 67 N. Y. Suppl. 439; Robinson *v.* Guaranty Trust Co., 51 N. Y. App. Div. 134, 64 N. Y. Suppl. 525; New York City, etc., R. Co. *v.* Portchester St. R. Co., 23 N. Y. App. Div. 407, 48 N. Y. Suppl. 321; Round Lake Assoc. *v.* Kellogg, 58 Hun 605; Woodward *v.* Harris, 2 Barb. 439; Dubois *v.* Budlong, 10 Bosw. 700, 15 Abb. Pr. 445; Redfield *v.* Middleton, 7 Bosw. 649; Fredericks *v.* Mayer, 1 Bosw. 227; People *v.* People's Coal Co., 32 Misc. 478, 66 N. Y. Suppl. 529; Gentil *v.* Arnand, 38 How. Pr. 94; Hart *v.* Albany, 3 Paige 213. See Storm *v.* Mann, 4 Johns. Ch. 21.

North Carolina.— Newton *v.* Brown, 134 N. C. 439, 46 S. E. 994; McNair *v.* Buncombe County, 93 N. C. 370; Bogey *v.* Shute, 57 N. C. 174.

Pennsylvania.— Audenried *v.* Philadelphia, etc., R. Co., 68 Pa. St. 370, 8 Am. Rep. 195; Pennsylvania R. Co.'s Appeal, 3 Walk. 454; Elmslie *v.* Delaware, etc., Canal Co., 4 Whart. 424; Penn Iron Co. *v.* Lancaster, 15 Pa. Super. Ct. 556, 18 Lanc. L. Rev. 89; Scranton *v.* Delaware, etc., Canal Co., 12 Pa. Co. Ct. 283; Passenger R. Co. *v.* Easton, 7 Pa. Co. Ct. 569; Berlew *v.* Electric Illuminating Co.,

that an irreparable injury is impending and will occur before the final hearing can be had.[76] It must also be reasonably certain that the acts sought to be enjoined are the real cause of the threatened or existing injury.[77]

(III) *PRIMA FACIE CASE.* To authorize a temporary injunction, the com-

1 Pa. Co. Ct. 651; Moosic Mountain, etc., R. Co. *v.* Delaware, etc., R. Co., 4 C. Pl. 189; Waring *v.* Cram, 1 Pars. Eq. Cas. 516; Scott *v.* Burton, 2 Ashm. 312; Barton *v.* Pittsburgh, 4 Brewst. 373, 3 Pittsb. 242; Baxter *v.* Buchanan, 3 Brewst. 435, 7 Phila. 315; Raub Coal Co. *v.* Waddell, 7 Kulp 282; Picar *v.* Bovolak, 7 Kulp 241; Andrews *v.* Stefansky, 5 Kulp 339; Brader's Estate, 2 Kulp 107; Farr *v.* Mullen, 5 Lack. Leg. N. 318; Grayson *v.* Darby Gas Co., 4 Lanc. L. Rev. 41; Sigle *v.* Bird-in-Hand Turnpike Co., 3 Lanc. L. Rev. 258; Park Coal Co. *v.* Cummings, 7 Leg. Gaz. 149; Norristown Junction R. Co. *v.* Citizens' Pass. R. Co., 9 Montg. Co. Rep. 103; Bolton *v.* Swartz, 3 Montg. Co. Rep. 191; Philadelphia *v.* Maxim Electric Co., 16 Phila. 20; Philadelphia *v.* Griscom, 5 Phila. 532; Cooper *v.* Second, etc., St. Pass. R. Co., 3 Phila. 262; Kennedy *v.* Burgin, 1 Phila. 441; Neal's Estate, 16 Wkly. Notes Cas. 441; Brittain *v.* Ely, 4 Wkly. Notes Cas. 412.

United States.— Paul Steam System Co. *v.* Paul, 29 Fed. 757; Mitchell *v.* Colorado Fuel, etc., Co., 117 Fed. 723; Brooklyn Baseball Club *v.* McGuire, 116 Fed. 782; Paine *v.* U. S. Playing Card Co., 90 Fed. 543; Seccomb *v.* Wurster, 83 Fed. 856; Home Ins. Co. *v.* Nobles, 63 Fed. 642; Forbush *v.* Bradford, 9 Fed. Cas. No. 4,930; French *v.* Brewer, 9 Fed. Cas. No. 5,096, 3 Wall. Jr. 346; Wilkinson *v.* Dobbie, 29 Fed. Cas. No. 17,670, 12 Blatchf. 298.

England.— Monsson *v.* Tussaud, [1894] 1 Q. B. 671, 58 J. P. 524, 63 L. J. Q. B. 454, 70 L. T. Rep. N. S. 335, 9 Reports 177; Atty.-Gen. *v.* Wigan, 5 De G. M. & G. 52, 18 Jur. 299, 23 L. J. Ch. 429, 2 Wkly. Rep. 308, 54 Eng. Ch. 44, 43 Eng. Reprint 789; Dawson *v.* Lawes, 2 Eq. Rep. 230, Kay 280, 23 L. J. Ch. 434, 2 Wkly. Rep. 213.

Canada.— Palgrave Min. Co. *v.* McMillan, 25 Nova Scotia 56.

See 27 Cent. Dig. tit. "Injunction," § 309.

Clear showing of right necessary.— An injunction *pendente lite* is very like an execution before judgment, and ought not to be issued except in clear cases of right. Amelia Milling Co. *v.* Tennessee Coal, etc., Co., 123 Fed. 811.

Decision of difficult questions of law.— An injunction *pendente lite* will not be granted when the effect thereof would be to decide difficult questions of law before the trial, unless it be first established that it is necessary to prevent an irreparable injury, or that complainant has an undoubted right to it. Weed *v.* Roberts, 22 Misc. (N. Y.) 46, 49 N. Y. Suppl. 366.

Disputed question of fact.— Equity will not assume to pass upon the validity of an ordinance upon an application for a preliminary injunction, when the validity depends upon a disputed question of fact. Stockton *v.* North Jersey St. R. Co., 54 N. J. Eq. 263, 34 Atl. 688.

The cutting of timber will not be restrained *pendente lite* when defendant's answer, if true, shows good title in him. U. S. *v.* Southern Pac. R. Co., 55 Fed. 566.

Ouster of officers.— Equity will not oust the *de facto* officers of a corporation by a temporary injunction when the question as to their right to the offices is in doubt. Washington Lighting Co. *v.* Dimmick, 41 N. Y. App. Div. 596, 58 N. Y. Suppl. 682.

A board of trade is not entitled to prevent others from using its quotations, by preliminary injunction, when there is doubt whether defendant is using such quotations of the complainant, or whether defendant is using them prior to their dedication to the public. Chicago Bd. of Trade *v.* Ellis, 122 Fed. 319; Chicago Bd. of Trade *v.* Buffalo Consol. Stock Exch., 121 Fed. 433; Chicago Bd. of Trade *v.* Thomson Commission Co., 103 Fed. 902.

76. *Georgia.*— Thrasher *v.* Holmes, 92 Ga. 571, 18 S. E. 899.

New Jersey.— Odin *v.* Bingham Copper, etc., Min. Co., 64 N. J. Eq. 363, 51 Atl. 925.

New York.— McHugh *v.* Boston, etc., R. Co., 66 Barb. 612; Howe *v.* Rochester Iron Mfg. Co., 66 Barb. 592; Spring *v.* Strauss, 3 Bosw. 607.

Oregon.— Norton *v.* Elwert, 29 Oreg. 582, 41 Pac. 926.

Pennsylvania.— Andrews *v.* Stefansky, 5 Kulp 339.

West Virginia.— Becker *v.* McGraw, 48 W. Va. 539, 37 S. E. 532; Watson *v.* Ferrell, 34 W. Va. 406, 12 S. E. 724; Cresap *v.* Kemble, 26 W. Va. 603; Schoonover *v.* Bright, 24 W. Va. 698; Cox *v.* Douglass, 20 W. Va. 175.

United States.— Ryan *v.* Seaboard, etc., R. Co., 89 Fed. 385; Canfield *v.* Minneapolis State Nat. Bank, 5 Fed. Cas. No. 2,382.

England.— Mogul Steamship Co. *v.* McGregor, 15 Q. B. D. 476, 5 Aspin. 467, 15 Cox C. C. 740, 49 J. P. 646, 54 L. J. Q. B. 540, 53 L. T. Rep. N. S. 268.

See 27 Cent. Dig. tit. "Injunction," § 309.

The enforcement of an ordinance fixing the price of gas will not be enjoined when the amount invested and the cost of production are doubtful, and the rates fixed will produce some profit in any event. The lower rates might increase consumption also, and thus increase profits; so that the unreasonableness of the ordinance is not clear. Capital City Gaslight Co. *v.* Des Moines, 72 Fed. 829.

When injury irreparable.— The injury does not appear to be irreparable when defendant is laying out money on the property claimed, which will inure to the complainant's benefit if he establishes his right. French *v.* Brewer, 9 Fed. Cas. No. 5,096, 3 Wall. Jr. 346.

77. Cornell *v.* New York, 20 N. Y. Suppl. 314.

plainant must make out at least a *prima facie* showing of a right to the final relief.[78] It is necessary also that the complainant make a full presentation of his case and of the facts.[79] If it appears from the complainant's own statement of his case that he will not be entitled to the permanent relief sought, or that his right to such relief will depend upon a contingency not yet determined, no preliminary injunction should issue.[80]

(iv) *Disputed Questions of Fact or of Law.* Applications for preliminary injunctions are frequently refused on the ground that the facts upon which the application is based are disputed, the evidence in regard to them being conflicting;[81] but the fact that there is such a dispute or conflict is not in itself sufficient ground for refusing the application. If the complainant shows that an irreparable injury will probably be suffered by him before the final hearing, that there is a reasonable probability that he will establish the facts as he alleges, and that the injunction will not cause a great injury to defendant, a preliminary injunction should issue to maintain the *status quo*, despite the conflict as to facts.[82] In

78. *Massachusetts.*— Carleton *v.* Rugg, 149 Mass. 550, 22 N. E. 55, 14 Am. St. Rep. 446, 5 L. R. A. 193.

Missouri.— Perkins *v.* Mason, 105 Mo. App. 315, 79 S. W. 987.

New York.— McHenry *v.* Jewett, 90 N. Y. 58; Gentil *v.* Arnand, 38 How. Pr. 94; Wordsworth *v.* Lyon, 5 How. Pr. 463.

Pennsylvania.— Audenried *v.* Philadelphia, etc., R. Co., 68 Pa. St. 370, 8 Am. Rep. 195; Wiener *v.* Peoples, 17 Lanc. L. Rev. 289.

Wisconsin.— Gillett *v.* Treganza, 13 Wis. 472.

United States.— Charles *v.* Marion, 98 Fed. 166.

England.— Hilton *v.* Granville, 4 Beav. 130, 49 Eng. Reprint 288, Cr. & Ph. 283, 10 L. J. Ch. 398, 18 Eng. Ch. 283, 41 Eng. Reprint 498; Saunders *v.* Smith, 2 Jur. 491, 536, 7 L. J. Ch. 227, 3 Myl. & C. 711, 14 Eng. Ch. 711, 40 Eng. Reprint 1100.

Canada.— Montreal St. R. Co. *v.* Ritchie, 16 Can. Sup. Ct. 622; Baril *v.* Pariseau, 2 Montreal Super. Ct. 352.

79. Mellor *v.* Farmers Deposit Nat. Bank, 33 Pittsb. Leg. J. N. S. (Pa.) 55; Richmond Mica Co. *v.* De Clyne, 90 Fed. 661.

80. Gillette *v.* Noyes, 92 N. Y. App. Div. 313, 86 N. Y. Suppl. 1062; Vietor *v.* Lewis, 38 N. Y. App. Div. 316, 57 N. Y. Suppl. 16; Forman *v.* Healey, 11 N. D. 563, 93 N. W. 866; Mitchell *v.* Colorado Fuel, etc., Co., 117 Fed. 723; Palgrave Mining Co. *v.* McMillan, 14 Can. L. T. Occ. Notes 137, 25 Nova Scotia 56.

Right to final relief.— The injunction *pendente lite* can be justified only upon the theory that it is a necessary incident to the granting of such final relief as the complainants appear to be entitled to. The right to such final relief must appear; if not, the injunction was error. Amelia Milling Co. *v.* Tennessee Coal, etc., R. Co., 123 Fed. 811; Brooklyn Baseball Club *v.* McGuire, 116 Fed. 782; Central Stock Yards Co. *v.* Louisville, etc., R. Co., 112 Fed. 823; Home Ins. Co. *v.* Nobles, 63 Fed. 642. Where from the admitted facts it is shown to be highly improbable, if not impossible, for defendant to succeed, a preliminary injunction should issue. Edison Storage Battery Co. *v.* Edison Automobile Co., (N. J. Ch. 1904) 56 Atl. 861.

On appeals from injunction orders the court will not only consider the merits, but dismiss the bill if it can see that the complainant is not entitled to final decree. Castner *v.* Coffman, 178 U. S. 168, 20 S. Ct. 842, 44 L. ed. 1021; Mast *v.* Stover Mfg. Co., 177 U. S. 485, 20 S. Ct. 708, 44 L. ed. 856; Smith *v.* Vulcan Iron Works, 165 U. S. 518, 17 S. Ct. 407, 41 L. ed. 810; Knoxville *v.* Africa, 77 Fed. 501, 23 C. C. A. 252; Bissell Carpet Sweeper Co. *v.* Goshen Sweeper Co., 72 Fed. 545, 19 C. C. A. 25.

A court having no jurisdiction to grant the final relief asked will not issue an injunction *pendente lite*. Davidson *v.* Calkins, 92 Fed. 230.

Facts occurring after the complaint will not sustain a preliminary injunction granted thereon. American Water-Works Co. *v.* Venner, 18 N. Y. Suppl. 379.

Whenever it is manifest that an injunction will be granted on final hearing, a preliminary injunction should issue almost as a matter of course. Allington, etc., Mfg. Co. *v.* Booth, 78 Fed. 878, 24 C. C. A. 378; De Pauw *v.* Oxley, 122 Wis. 656, 100 N. W. 1028.

The fact that an appeal does not lie from an order denying a preliminary injunction is of no importance where it appears upon the application that the complainant cannot prevail upon the final hearing, and the injunction will be denied. Harriman *v.* Northern Securities Co., 132 Fed. 464.

Consent of the parties cannot authorize an injunction in an otherwise improper case. Whelpley *v.* Erie R. Co., 29 Fed. Cas. No. 17,504, 6 Blatchf. 271.

81. Whelen *v.* Billings, 2 Wkly. Notes Cas. (Pa.) 12.

82. Everett *v.* Tabor, 119 Ga. 128, 46 S. E. 72; Sims *v.* Sims, 110 Ga. 283, 34 S. E. 847; Gewinner *v.* McCrary, 99 Ga. 299, 25 S. E. 648; Augusta *v.* Georgia R., etc., Co., 98 Ga. 161, 26 S. E. 499; Denver, etc., R. Co. *v.* U. S., 124 Fed. 156, 59 C. C. A. 579; Cartersville Light, etc., Co. *v.* Cartersville, 114 Fed. 699; Allison *v.* Corson, 88 Fed. 581, 32 C. C. A. 12.

cases, however, where the equities of the complainant's bill are satisfactorily denied in the answer, where the facts upon which complainant's right is based are disputed, or where defendant denies that he is doing the injurious acts charged, no injunction will issue except to prevent an irreparable injury that will occur before final hearing can be reached.[83] Again injunctions have been refused because the right of the complainant to permanent relief depends upon a question of law that is in dispute and undetermined;[84] but this is not necessarily a fatal objection, and a preliminary injunction is proper under the same circumstances as in the case of disputed and undetermined facts.[85] When the question of law is one of the chief issues to be determined on the final hearing, and complete relief can be then afforded, the complainant is not entitled to the preliminary injunction.[86] An injunction will not be granted where there is grave doubt as to its propriety or necessity.[87]

3. Violation of Right. The complainant must show not only the existence of his right but he must affirmatively show that the acts sought to be restrained will be a violation thereof. There must be what the law regards as a legal injury, not a mere inconvenience.[88]

Discretion of court.— The court has discretionary power to refuse the injunction under these circumstances. Gammage *v.* Powell, 101 Ga. 540, 28 S. E. 969.

83. Harrison *v.* Simmons, 114 Ga. 118, 39 S. E. 942; Grier *v.* Flitcraft, 57 N. J. Eq. 556, 41 Atl. 425; Grand Castle of G. E. *v.* Bridgeton Castle No. 13, K. of G. E., (N. J. Ch. 1898) 40 Atl. 849; Guild *v.* Meyer, 56 N. J. Eq. 183, 38 Atl. 959; Oscillating Carousal Co. *v.* McCool, (N. J. Ch. 1896) 35 Atl. 585; Garfield County School Dist. No. 112 *v.* Goodpasture, 13 Okla. 244, 74 Pac. 501; Chicago Bd. of Trade *v.* Ellis, 122 Fed. 319.

84. Stockton *v.* North Jersey St. R. Co., 54 N. J. Eq. 263, 34 Atl. 688; Newark, etc., R. Co. *v.* New Jersey Traction Co., (N. J. Ch. 1895) 33 Atl. 475; Pennsylvania R. Co. *v.* National Docks, etc., R. Co., 53 N. J. Eq. 178, 32 Atl. 220; Hagerty *v.* Lee, 45 N. J. Eq. 1, 15 Atl. 399 [*affirmed* in 45 N. J. Eq. 255, 17 Atl. 826]; Atlantic City Water-Works Co. *v.* Consumers Water Co., 44 N. J. Eq. 427, 15 Atl. 581; Delaware, etc., R. Co. *v.* Central Stock-Yard, etc., Co., 43 N. J. Eq. 77, 10 Atl. 602; New York, etc., Tel. Co. *v.* East Orange, 42 N. J. Eq. 490, 8 Atl. 289; West Jersey R. Co. *v.* Cape May, etc., R. Co., 34 N. J. Eq. 164; National Docks R. Co. *v.* Central R. Co., 32 N. J. Eq. 755; Long Branch Com'rs *v.* West End R. Co., 29 N. J. Eq. 566; Citizens' Coach Co. *v.* Camden Horse R. Co., 29 N. J. Eq. 299; Thompson *v.* Paterson, 9 N. J. Eq. 624; Noonan *v.* Grace, 49 N. Y. Super. Ct. 116; Capital City Athletic Assoc. *v.* Greenbush Police Com'rs, 9 Misc. (N. Y.) 189, 29 N. Y. Suppl. 804; De Lacy *v.* Adams, 3 Misc. (N. Y.) 432, 23 N. Y. Suppl. 297; Chester's Appeal, 5 Pa. Cas. 130, 8 Atl. 400; Scranton School Dist.'s Appeal, 1 Pa. Cas. 189, 1 Atl. 560; Lebanon, etc., St. R. Co. *v.* Philadelphia, etc., R. Co., 2 Pa. Dist. 835.

In New Jersey an injunction will not issue where the right of the complainant, which it is designed to protect, depends upon a disputed question of law, about which there may be a doubt, which has not been settled by the courts of law of this state. Citizens' Coach Co. *v.* Camden Horse R. Co., 29 N. J. Eq. 299; Stevens *v.* Paterson, etc., R. Co., 20 N. J. Eq. 126.

A street railway company will not be enjoined on preliminary application from using electricity as motive power, when its right under the law to change from horse-power to electricity is doubtful and has not been passed upon by the supreme court. Fritz *v.* Erie City Pass. R. Co., 155 Pa. St. 472, 26 Atl. 653. On the same ground a street railway will not be enjoined *pendente lite* from leasing its roads and franchises to a traction company. Smith *v.* Reading City Pass. R. Co., 156 Pa. St. 5, 26 Atl. 779.

85. Williamson *v.* Carnan, 1 Gill & J. (Md.) 184; Harriman *v.* Northern Securities Co., 132 Fed. 464; Fairfield Floral Co. *v.* Bradbury, 87 Fed. 415.

The question of law may be determined on preliminary hearing, where the case is fully presented and no sufficient reason to the contrary appears. Johnston *v.* Belmar, 58 N. J. Eq. 354, 44 Atl. 166.

86. Ryan *v.* Williams, 100 Fed. 177.

87. Kilburn *v.* Ingersoll, 67 Fed. 46.

88. *Georgia.*— Wilcoxon *v.* Harrison, 32 Ga. 480.

Michigan.— Hathaway *v.* Mitchell, 34 Mich. 164.

New Jersey.— Bayliss *v.* Newark, etc., Traction Co., 63 N. J. Eq. 310, 49 Atl. 589.

New York.— Francis *v.* Taylor, 31 Misc. 187, 65 N. Y. Suppl. 28.

Pennsylvania.— Sparhawk *v.* Union Pass. R. Co., 54 Pa. St. 401.

Wisconsin.— Warden *v.* Fond du Lac County, 14 Wis. 618.

United States.— Mason *v.* Rollins, 16 Fed. Cas. No. 9,252, 2 Biss. 99.

England.— Street *v.* Union Bank, 30 Ch. D. 156, 55 L. J. Ch. 31, 53 L. T. Rep. N. S. 262, 33 Wkly. Rep. 901; Fletcher *v.* Bealey, 28 Ch. D. 688, 54 L. J. Ch. 424, 52 L. T. Rep. N. S. 541, 33 Wkly. Rep. 745; Goodhart *v.* Hyett, 25 Ch. D. 182, 48 J. P. 293, 53 L. J.

4. Only Civil Rights Protected. The subject-matter of equitable jurisdiction is civil property and the maintenance of civil rights. Injunctions do not issue to prevent acts merely because they are immoral or illegal or criminal,[89] but only in case the complainant's civil rights are being invaded. So also rights that are purely political in their nature are not within the protection of the court of chancery.[90] This has been made one ground for refusing injunctions in cases involving public office and elections.[91]

D. Existence and Nature of the Injury — 1. Threatened Injury — a. In General. An injunction may be obtained to prevent an irreparable injury, even though no such injury has as yet occurred. If such injury is threatened or impending to property or property rights an injunction will be granted.[92] The threatened injury must, however, be clearly impending, and it is generally not sufficient to show mere threats to do the thing sought to be enjoined; some overt

Ch. 219, 50 L. T. Rep. N. S. 95, 32 Wkly. Rep. 165; Day *v.* Brownrigg, 10 Ch. D. 294, 48 L. J. Ch. 173, 39 L. T. Rep. N. S. 553, 27 Wkly. Rep. 217; Pattisson *v.* Gilford, L. R. 18 Eq. 259, 43 L. J. Ch. 524, 22 Wkly. Rep. 673; Haines *v.* Taylor, 10 Beav. 75, 50 Eng. Reprint 511; Ripon *v.* Gilford, Coop. t. Brough. 333, 47 Eng. Reprint 119, 3 L. J. Ch. 145, 3 Myl. & K. 169, 10 Eng. Ch. 169, 40 Eng. Reprint 65.

See 27 Cent. Dig. tit. "Injunction," § 8 *et seq.*

Violation of right not alone sufficient.— It is not sufficient to authorize the remedy by injunction that a violation of a naked legal right of property is threatened. There must be some special ground of jurisdiction. McHenry *v.* Jewett, 39 N. Y. 58.

Motive in exercising a right.— Where defendant has a legal right to do the acts sought to be restrained, he is violating no right of the complainant; and in such case it is immaterial that defendant may have to some degree a malicious motive in exercising his right. Montreal Park, etc., R. Co. *v.* St. Louis, 17 Quebec Super. Ct. 545.

89. Sheridan *v.* Colvin, 78 Ill. 237; Campbell *v.* Scholfield, 3 Pittsb. (Pa.) 443. See also, *infra*, V, H.

The United States government has a sufficient property right in the mails to sue for an injunction to prevent interference therewith. *In re* Debs, 158 U. S. 564, 15 S. Ct. 900, 39 L. ed. 1092.

90. Fletcher *v.* Tuttle, 151 Ill. 41, 37 N. E. 683, 42 Am. St. Rep. 220, 25 L. R. A. 143; State *v.* Aloe, 152 Mo. 466, 54 S. W. 494, 47 L. R. A. 393; *In re* Sawyer, 124 U. S. 200, 8 S. Ct. 482, 31 L. ed. 402. See also State *v.* Cunningham, 83 Wis. 90, 53 N. W. 35, 35 Am. St. Rep. 27, 17 L. R. A. 145; Calloway *v.* Pearson, 6 Manitoba 364.

Enjoining improper shipments of munitions of war is not a subject of equity cognizance. The matter is for the executive department. Pearson *v.* Parson, 108 Fed. 461.

91. Fletcher *v.* Tuttle, 151 Ill. 41, 37 N. E. 683, 42 Am. St. Rep. 220, 25 L. R. A. 143 (holding that the extraordinary jurisdiction of courts of chancery cannot be invoked to protect the right of a citizen to vote or to be voted for at an election, or his right to be a candidate for or to be elected to any office; nor can it be invoked for the purpose of restraining the holding of an election, or of directing or controlling the mode in which, or of determining the rules of law in pursuance of which, an election shall be held. These matters involve in themselves no property rights, but pertain solely to the political administration of the government; Landes *v.* Walls, 160 Ind. 216, 66 N. E. 679. See also Officers. But see *infra*, V, E.

92. *Colorado.*—Crisman *v.* Heiderer, 5 Colo. 589.

Connecticut.— Wetherell *v.* Newington, 54 Conn. 67, 5 Atl. 858.

Indiana.— White Water Valley Canal Co. *v.* Comegys, 2 Ind. 469.

Iowa.— Truesdale *v.* Jensen, 91 Iowa 312, 59 N. W. 47.

Kentucky.— Loudon *v.* Warfield, 5 J. J. Marsh. 196.

Massachusetts.— Florence Sewing Mach. Co. *v.* Grover, etc., Sewing Mach. Co., 110 Mass. 1.

Missouri.— Sherlock *v.* Kansas City Belt R. Co., 142 Mo. 172, 43 S. W. 629, 64 Am. St. Rep. 551.

Nevada.— Champion *v.* Sessions, 1 Nev. 478.

New York.— Flood *v.* Van Wormer, 147 N. Y. 284, 41 N. E. 569.

North Carolina.— Johnson *v.* Peterson, 59 N. C. 12.

Oregon.— Price *v.* Knott, 8 Oreg. 438.

United States.— Vicksburg Waterworks Co. *v.* Vicksburg, 185 U. S. 65, 22 S. Ct. 585, 46 L. ed. 808; Peik *v.* Chicago, etc., R. Co., 94 U. S. 164, 24 L. ed. 97 [*affirming* 19 Fed. Cas. No. 11,138]; Poppenhusen *v.* New York Gutta Percha Comb Co., 19 Fed. Cas. No. 11,281, 4 Blatchf. 184.

England.— Hext *v.* Gill, L. R. 7 Ch. 699, 41 L. J. Ch. 761, 27 L. T. Rep. N. S. 791, 20 Wkly. Rep. 957; Cooper *v.* Whittingham, 15 Ch. D. 501, 49 L. J. Ch. 752, 43 L. T. Rep. N. S. 16, 28 Wkly. Rep. 720; Tipping *v.* Eckersley, 2 Kay & J. 264; Dicker *v.* Popham, 63 L. T. Rep. N. S. 379; Phillips *v.* Thomas, 62 L. T. Rep. N. S. 793; Atty.-Gen. *v.* Forbes, 2 Myl. & C. 123, 14 Eng. Ch. 123, 40 Eng. Reprint 587.

Canada.— Miller *v.* Campbell, 14 Manitoba 437.

See 27 Cent. Dig. tit. "Injunction," § 10.

act toward carrying out the threat must usually be shown.[93] However, the mere fact that defendant denies his intention to do the threatened act is not sufficient ground for denying the injunction.[94]

b. Injury Improbable. It is not sufficient ground for an injunction that the injurious acts may possibly be committed or that injury may possibly result from the acts sought to be prevented. There must be at least a reasonable probability that the injury will be done if no injunction is granted, and not a mere fear or apprehension.[95] On this ground it is premature to sue for an injunction to pre-

93. Manufacturers Gas, etc., Co. *v.* Indiana Natural Gas, etc., Co., 155 Ind. 566, 58 N. E. 851; Barber County *v.* Smith, 48 Kan. 331, 29 Pac. 565; Seward County *v.* Stoufer, 47 Kan. 287, 27 Pac. 1000; St. Joseph, etc., R. Co. *v.* Dryden, 17 Kan. 278; Redfield *v.* Middleton, 7 Bosw. (N. Y.) 649; Bond *v.* Wool, 107 N. C. 139, 12 S. E. 281; Airs *v.* Billops, 57 N. C. 17.

94. Adair *v.* Young, 12 Ch. D. 13, 40 L. T. Rep. N. S. 598; Potts *v.* Levy, 2 Drew. 272, 61 Eng. Reprint 723; Jackson *v.* Cator, 5 Ves. Jr. 688, 31 Eng. Reprint 806. *Compare* Whalen *v.* Dalasbmutt, 59 Md. 250.

95. *California.*— Lorenz *v.* Waldron, 96 Cal. 243, 31 Pac. 54.

Connecticut.— Bigelow *v.* Hartford Bridge Co., 14 Conn. 565, 36 Am. Dec. 502.

Florida.— Tampa Gas Co. *v.* Tampa, 44 Fla. 813, 33 So. 465; Ruge *v.* Apalachicola Oyster Canning, etc., Co., 25 Fla. 656, 6 So. 489; Crawford *v.* Bradford, 23 Fla. 404, 2 So. 782.

Georgia.— Rounsaville *v.* Kohlheim, 68 Ga. 668, 45 Am. Rep. 505.

Kansas.— Kansas City *v.* Hobbs, 62 Kan. 866, 62 Pac. 324; Mason *v.* Independence, 61 Kan. 188, 59 Pac. 272; Hutchinson *v.* Delano, 46 Kan. 345, 26 Pac. 740; Concannon *v.* Rose, 9 Kan. App. 791, 59 Pac. 729.

Kentucky.— Louisville, etc., R. Co. *v.* McVean, 34 S. W. 525, 17 Ky. L. Rep. 1283.

Louisiana.— Lameyer *v.* Rouzan, 8 La. 280.

Mississippi.— McCutchen *v.* Blanton, 59 Miss. 116.

Missouri.— Lester Real Estate Co. *v.* St. Louis, 169 Mo. 227, 69 S. W. 300; McLemore *v.* McNeley, 56 Mo. App. 556.

Nevada.— Sherman *v.* Clark, 4 Nev. 138, 97 Am. Dec. 516.

New Jersey.— Newark German Evangelical Lutheran Church *v.* Maschop, 10 N. J. Eq. 57; Butler *v.* Rogers, 9 N. J. Eq. 487.

New York.—Reynolds *v.* Everett, 144 N. Y. 189, 39 N. E. 72; McCabe *v.* Emmons, 51 N. Y. Super. Ct. 219; Bean *v.* Pettengill, 7 Rob. 7; Vernam *v.* Palmer, 5 N. Y. Suppl. 71; Baucus *v.* Albany Northern R. Co., 8 How. Pr. 70.

Ohio.— Commercial Bank *v.* Bowman, 1 Handy 246, 12 Ohio Dec. (Reprint) 125; Sargent *v.* Ohio, etc., R. Co., 1 Handy 52, 12 Ohio Dec. (Reprint) 23.

Pennsylvania.— Sweeney *v.* Torrence, 11 Pa. Co. Ct. 497; Philadelphia, etc., Turnpike Road Co. *v.* Postal Tel. Cable Co., 8 Del. Co. 228; Sterling *v.* Maxwell, 29 Leg. Int. 173; Spring Brook R. Co. *v.* Bryan, 4 Luz. Leg. Reg. 117; Willow Grove, etc., Plank Road Co. *v.* Philadelphia, etc., R. Co., 17 Montg. Co. Rep. 66; Plank-Road Co. *v.* Railroad Co., 14 York Leg. Rec. 187.

Tennessee.— Moore *v.* Hallum, 1 Lea 511; White *v.* Schurer, 4 Baxt. 23.

Virginia.— Buffalo *v.* Pocahontas, 85 Va. 222, 7 S. E. 238.

United States.— Jenny *v.* Crase, 13 Fed. Cas. No. 7,285, 1 Cranch C. C. 443.

England.—Atty.-Gen. *v.* Manchester, [1893] 2 Ch. 87, 57 J. P. 343, 62 L. J. Ch. 459, 68 L. T. Rep. N. S. 608, 3 Reports 427, 41 Wkly. Rep. 459; Proctor *v.* Bayley, 42 Ch. D. 390, 59 L. J. Ch. 12, 61 L. T. Rep. N. S. 752, 38 Wkly. Rep. 100; Haines *v.* Taylor, 10 Beav. 75, 50 Eng. Reprint 511; Ripon *v.* Hobart, Coop. t. Brough. 333, 47 Eng. Reprint 119, 3 L. J. Ch. 145, 3 Myl. & K. 169, 10 Eng. Ch. 169, 40 Eng. Reprint 65; Bell *v.* Bell, 14 Jur. 1129; Proud *v.* Price, 63 L. J. Q. B. 61, 69 L. T. Rep. N. S. 664, 9 Reports 40, 42 Wkly. Rep. 102.

Canada.— Kerr *v.* Hillman, 8 Grant Ch. (U. C.) 285.

See 27 Cent. Dig. tit. "Injunction," § 11.

Illustrations of rule.— The granting of free passes by a railroad to state officers will not be restrained at the suit of a shareholder merely on a showing that passes have been granted to similar officers in the past. Goodwin *v.* New York, etc., R. Co., 43 Conn. 494. The dredging of sand from the bed of a lake will not be prevented by equity merely because there is a possibility that it may cause erosion of the shore line or prevent accretions to the shore line. Blatchford *v.* Chicago Dredging, etc., Co., 22 Ill. App. 376. A railroad company will not be prevented from making a junction with another, merely because such junction will render possible the breaking of a contract with the complainant company for the transportation of passengers and freight. Delaware, etc., Canal Co. *v.* Camden, etc., R. Co., 15 N. J. Eq. 13. The payment of money will not be enjoined merely because a city engineer has improperly recommended such payment, when the city council has not adopted such recommendation or ordered a warrant drawn, and there is no indication that it will do so. Union Cemetery Assoc. *v.* McConnell, 124 N. Y. 88, 26 N. E. 330. Electric light wires may be strung within a few feet of telegraph wires, even though there is some danger that they may become broken and crossed during a storm and thereby injure the telegraph company. Western Union Tel. Co. *v.* Champion Electric Light Co., 9 Ohio Dec. (Reprint) 540, 14 Cinc. L. Bul. 327.

Denial of intention.—Where defendant posi-

vent the holding of an election to levy a tax,[96] or to prevent the enforcement of a law or ordinance before the election required for ratifying it has been held.[97] Defendant will not be enjoined from doing an act merely because others are likely to follow his example and thereby cause injury.[98] A society will not be enjoined merely because it has cited the complainant to show cause why he should not be fined for breach of the society's rules.[99] The collection of a fine will not be enjoined before a judgment assessing it is rendered.[1]

2. INJURY SUSTAINED PRIOR TO SUIT — a. Injury Wholly Past. Since equity will not attempt to do a vain thing, it will not by injunction attempt to prevent an injury that has already been sustained or to prevent the doing of an act that has already been performed,[2] especially where there is no showing that such action is being continued or repeated, or that defendant is threatening or intending to repeat the injury.[3] The party injured is of necessity remitted to his remedy at

tively asserts that it is not his intention to do the injurious act, and there is no evidence to the contrary, no injunction will issue. Whalen *v.* Dalashmutt, 59 Md. 250.

The injury threatened may be too remote to warrant the issuance of an injunction. Shaw *v.* National Transit Co., 4 Pa. Co. Ct. 363; Tacoma *v.* Bridges, 25 Wash. 221, 65 Pac. 186. The injury is too remote when town trustees are about to consent to the construction of a street railway over complainant's land but no attempt to construct the railway is threatened. Dailey *v.* Nassau County R. Co., 52 N. Y. App. Div. 272, 65 N. Y. Suppl. 396.

Where the cause of an injury is doubtful no injunction will be granted to restrain its continuance. Germantown Water Co. *v.* McCallum, 5 Phila. (Pa.) 93; West Point Irr. Co. *v.* Moroni, etc., Irr. Ditch Co., 21 Utah 229, 61 Pac. 16.

The mere fact that an injunction cannot injure defendant is not a reason for issuing one, where there is no showing that defendant intends to do the acts apprehended. Dunn *v.* Bryan, Ir. R. 7 Eq. 143.

96. Roudanez *v.* New Orleans, 29 La. Ann. 271. *Compare* State *v.* Judge Seventh Judicial Dist. Ct., 42 La. Ann. 1104.

97. Kerr *v.* Riddle, (Tex. Civ. App. 1895) 31 S. W. 328; Molson *v.* Montreal, 23 L. C. Jur. 169.

98. Springer *v.* Walters, 139 Ill. 419, 28 N. E. 761; Janesville *v.* Carpenter, 77 Wis. 288, 46 N. W. 128, 20 Am. St. Rep. 123, 8 L. R. A. 805.

99. Thomas *v.* Musical Mut. Protective Union, 121 N. Y. 45, 24 N. E. 24, 8 L. R. A. 175 [*reversing* 49 Hun 171, 2 N. Y. Suppl. 195].

1. Kansas City Southern R. Co. *v.* Railroad Commission, 106 La. 583, 31 So. 131.

2. *Alabama.*— Perry County Com'rs' Ct. *v.* Perry County Medical Soc., 128 Ala. 259, 29 So. 586.

California.— Clark *v.* Willett, 35 Cal. 534.

Florida.— Smith *v.* Davis, 22 Fla. 405; Pensacola, etc., R. Co. *v.* Spratt, 12 Fla. 26, 91 Am. Dec. 747.

Georgia.— Georgia Pac. R. Co. *v.* Douglasville, 75 Ga. 828.

Illinois — Mead *v.* Cleland, 62 Ill. App. 294; Highway Com'rs *v.* Deboe, 43 Ill. App. 25.

Indiana.— Heinl *v.* Terre Haute, (1903) 66 N. E. 450; Cole *v.* Duke, 79 Ind. 107.

Kansas.— McCurdy *v.* Lawrence, 9 Kan. App. 883, 57 Pac. 1057.

Louisiana.— Trevigne *v.* School Bd., 31 La. Ann. 105.

Michigan.— East Saginaw St. R. Co. *v.* Wildman, 58 Mich. 286, 25 N. W. 193; Brown *v.* Gardner, Harr. 291.

Missouri.— Carlin *v.* Wolff, 154 Mo. 539, 51 S. W. 679, 55 S. W. 441.

Nevada.— Sherman *v.* Clark, 4 Nev. 138, 97 Am. Dec. 516.

New Jersey.— United New Jersey R., etc., Co. *v.* Standard Oil Co., 33 N. J. Eq. 123; Atty.-Gen. *v.* New Jersey R., etc., Co., 3 N. J. Eq. 136.

New York.— Barney *v.* New York, 83 N. Y. App. Div. 237, 82 N. Y. Suppl. 124.

Pennsylvania.— Whitman *v.* Shoemaker, 2 Pearson 320; Shell *v.* Kemmerer, 2 Pearson 293.

Wisconsin.— Cobb *v.* Smith, 16 Wis. 661.

United States.— U. S. *v.* La Compagnie Francaise des Cables Telegraphiques, 77 Fed. 495; Baring *v.* Erdman, 2 Fed. Cas. No. 981.

Canada.— Poudrette *v.* Ontario, etc., R. Co., 11 Montreal Leg. N. 130.

See 27 Cent. Dig. tit. "Injunction," § 12.

Applications of rule.— Bonds (Menard *v.* Hood, 68 Ill. 121) and warrants (Webster *v.* Fish, 5 Nev. 190) already issued are beyond the reach of an injunction to restrain their issuance, and a defendant will not be enjoined from selling property which he has sold prior to service of process upon him (Luft *v.* Grossrau, 31 Ill. App. 530; Cecil Nat. Bank *v.* Thurber, 59 Fed. 913, 8 C. C. A. 365).

3. *California.*— Coker *v.* Simpson, 7 Cal. 340.

Iowa.— Redley *v.* Greiner, 117 Iowa 679, 91 N. W. 1033.

Minnesota.— Vanderburgh *v.* Minneapolis, 93 Minn. 81, 100 N. W. 668.

New Jersey.— Southard *v.* Morris Canal, etc., Co., 1 N. J. Eq. 518.

Pennsylvania.— Lackawanna Iron, etc., Co. *v.* Fairlawn Coal Co., 4 C. Pl. 129.

See 27 Cent. Dig. tit. "Injunction," § 12.

law to recover damages,[4] not because it is adequate, but because no other remedy is possible.

b. Injury Continuing. If, on the other hand, the act sought to be enjoined and the injury resulting therefrom are continuing in their nature,[5] or if the injurious act has not yet been completed,[6] an injunction is proper. So where structures have been put up and are being wrongfully maintained, their maintenance may be prevented by injunction.[7]

3. Character of Injury — a. Necessity of Special Injury Different From That Suffered by Public. Where the injury complained of is really a public injury, and the right violated is a public right, the general rule is that an individual cannot maintain a suit for an injunction unless he suffers a special injury different from that suffered by the public at large.[8] In case the government is obstructed in exercising its powers and discharging its duties, it has a right to apply to its own courts for any proper assistance by way of injunction. It is a proper party complainant because of its interest in promoting the general welfare.[9]

b. Necessity For Substantial Injury. Although it may not be necessary in some cases for the complainant to make an affirmative showing of injury to himself from the acts sought to be enjoined,[10] yet such injury to the complainant must exist, and it must be substantial in character in order to warrant a court of equity in granting an injunction whether prohibitory or manda-

4. Owen *v.* Ford, 49 Mo. 436.

Equity will not give damages where the injury has already been committed and the application for an injunction is too late, even though had the application been in time damages would have been allowed as an incident to the injunction. Sherman *v.* Clark, 4 Nev. 138, 97 Am. Dec. 516.

5. Brunnenmeyer *v.* Buhre, 32 Ill. 183; Troe *v.* Larson, 84 Iowa 649, 51 N. W. 179, 35 Am. St. Rep. 336; Smith *v.* Smith, 148 Mass. 1, 18 N. E. 595; Lakenan *v.* Hannibal, etc., R. Co., 36 Mo. App. 363.

Where the injury is caused by successive acts an injunction will not be refused merely because defendant has for the time being discontinued them. American Law Book Co. *v.* Edward Thompson Co., 41 Misc. 396, 84 N. Y. Suppl. 225.

Act not wrongful.— Where an injunction would not lie to restrain the doing of acts set forth in the bill, the continuing and threatening to continue such acts cannot aid the case. Sherman *v.* Clark, 4 Nev. 138, 97 Am. Dec. 516.

6. Newell *v.* Sass, 142 Ill. 104, 31 N. E. 176; Los Angeles City Water Co. *v.* Los Angeles, 88 Fed. 720.

7. Harbison *v.* White, 46 Conn. 106; Holmes *v.* Calhoun County, 97 Iowa 360, 66 N. W. 145; Troe *v.* Larson, 84 Iowa 649, 51 N. W. 179, 35 Am. St. Rep. 336. See also *infra*, V, C, 7.

8. *Connecticut.*—Falls Village Water Power Co. *v.* Tibbetts, 31 Conn. 165; Bigelow *v.* Hartford Bridge Co., 14 Conn. 565, 36 Am. Dec. 502.

Illinois.— Chicago Gen. R. Co. *v.* Chicago, etc., R. Co., 181 Ill. 605, 54 N. E. 1026; Cicero Lumber Co. *v.* Cicero, 176 Ill. 9, 51 N. E. 758, 68 Am. St. Rep. 155, 42 L. R. A. 696.

Indiana.— Landes *v.* Walls, 160 Ind. 216, 66 N. E. 679; Manufacturers Gas, etc., Co. *v.* Indiana Natural Gas, etc., Co., 155 Ind. 566, 58 N. E. 851; McCowan *v.* Whitesides, 31 Ind. 235.

Oregon.— State *v.* Lord, 28 Oreg. 498, 43 Pac. 471, 31 L. R. A. 473.

England.— Ware *v.* Regent's Canal Co., 3 De G. & J. 212, 5 Jur. N. S. 25, 28 L. J. Ch. 153, 7 Wkly. Rep. 67, 60 Eng. Ch. 165, 44 Eng. Reprint 1250. See Pudsey Coal Gas Co. *v.* Bradford, L. R. 15 Eq. 167, 42 L. J. Ch. 293, 28 L. T. Rep. N. S. 11, 21 Wkly. Rep. 286.

Canada.— Taylor *v.* Montreal Harbour Com'rs, 17 Quebec Super. Ct. 275; Municipalité de la Pointe Claire *v.* Cie. de Chemin de Peage, etc., 5 Montreal Leg. N. 259; St. Lawrence Grain Elevating Co. *v.* Harbour Com'rs, 2 Montreal Leg. N. 197.

Compare Dudley *v.* Tilton, 14 La. Ann. 283. See also *infra*, V, F.

The reason for this rule seems to be that if any individual may maintain suit for an injunction defendant might be subjected to the expense and annoyance of innumerable suits; for a decree in favor of or against one individual would not conclude another individual not a party thereto.

An individual may be the relator in such a case, bringing the suit in the name of the state, if the attorney-general refuses to bring it. State *v.* Cunningham, 83 Wis. 90, 53 N. W. 35, 35 Am. St. Rep. 27, 17 L. R. A. 145. See also Fenelon Falls *v.* Victoria R. W. Co., 29 Grant Ch. (U. C.) 4.

9. *In re* Debs, 158 U. S. 564, 15 S. Ct. 900, 39 L. ed. 1092; Pennsylvania *v.* Wheeling, etc., Bridge Co., 13 How. (U. S.) 518, 14 L. ed. 249; Georgetown *v.* Alexandria Canal Co., 12 Pet. (U. S.) 91, 9 L. ed. 1012; Evan *v.* Avon Corporation, 29 Beav. 144, 6 Jur. 1361, 30 L. J. Ch. 165, 3 L. T. Rep. N. S. 347, 9 Wkly. Rep. 84, 54 Eng. Reprint 581. See, generally, Nuisances.

10. See *infra*, V, C, 7, 8.

tory.[11] A complainant who can show no injury to himself from the action sought to be prevented is not entitled to an injunction.[12] Equity will not interpose where the complainant's injury is merely nominal or theoretical.[13] On such grounds an injunction to prevent the building of a bridge,[14] the maintenance of a ditch or drain,[15] or the making of excavations on an adjoining lot,[16] has been refused; and

11. *Connecticut.*— Huntting *v.* Hartford St. R. Co., 73 Conn. 179, 46 Atl. 824; Bigelow *v.* Hartford Bridge Co., 14 Conn. 565, 36 Am. Dec. 502.

Illinois.— Cope *v.* Flora Dist. Fair Assoc., 99 Ill. 489, 39 Am. Rep. 30.

Indiana.— Whitlock *v.* Consumers' Gas Trust Co., 127 Ind. 62, 26 N. E. 570; Owen *v.* Phillips, 73 Ind. 284; Stauffer *v.* Cincinnati, etc., R. Co., 33 Ind. App. 356, 70 N. E. 543.

Kentucky.— Barker *v.* Warren, 6 Ky. L. Rep. 86.

Michigan.— Hall *v.* Rood, 40 Mich. 46, 29 Am. Rep. 528.

New Jersey.— New Jersey Junction R. Co. *v.* Woodward, 61 N. J. Eq. 1, 47 Atl. 273; Wakeman *v.* New York, etc., R. Co., 35 N. J. Eq. 496; United New Jersey R., etc., Co. *v.* Standard Oil Co., 33 N. J. Eq. 123; Warne *v.* Morris Canal, etc., Co., 5 N. J. Eq. 410.

New York.— Johnstown Min. Co. *v.* Butte, etc., Consol. Min. Co., 60 N. Y. App. Div. 344, 70 N. Y. Suppl. 257; Pratt *v.* New York Cent., etc., R. Co., 90 Hun 83, 35 N. Y. Suppl. 557; Castle *v.* Bell Tel. Co., 30 Misc. 38, 61 N. Y. Suppl. 743; Neiman *v.* Butler, 19 N. Y. Suppl. 403; Barnes *v.* South Side R. Co., 2 Abb. Pr. N. S. 415; New York Printing, etc., Establishment *v.* Fitch, 1 Paige 97. *Compare* Williams *v.* Western Union Tel. Co., 49 N. Y. Super. Ct. 140.

Ohio.— Newton *v.* Mahoning County Com'rs, 7 Ohio Dec. (Reprint) 32, 1 Cinc. L. Bul. 46; Erkenbrecher *v.* Este, 1 Cinc. Super. Ct. 368.

Pennsylvania.— Stewart Wire Co. *v.* Lehigh Coal, etc., Co., 203 Pa. St. 479, 53 Atl. 1127; Coburn Water Co. *v.* Citizens' Water Co., 2 Blair Co. Rep. 283; Limekiln Turnpike Road Co. *v.* Keystone Tel., etc., Co., 19 Montg. Co. Rep. 198.

South Carolina.— Hamer *v.* Brown, 40 S. C. 336, 18 S. E. 938.

Texas.— Watrous *v.* Rodgers, 16 Tex. 410.

Utah.— Tanner *v.* Nelson, 25 Utah 226, 70 Pac. 984.

Washington.— Rand *v.* Hartranft, 29 Wash. 591, 70 Pac. 77.

Wisconsin.— Ebert *v.* Langlade County, 107 Wis. 569, 83 N. W. 942; Head *v.* James, 13 Wis. 641.

United States.— Taylor *v.* Charter Oak L. Ins. Co., 17 Fed. 566, 3 McCrary 487.

England.— Beadel *v.* Perry, L. R. 3 Eq. 465, 19 L. T. Rep. N. S. 760, 17 Wkly. Rep. 185; Saunders *v.* Smith, 2 Jur. 491, 536, 7 L. J. Ch. 227, 3 Myl. & C. 711, 14 Eng. Ch. 711, 40 Eng. Reprint 1100; Edleston *v.* Crossley, 18 L. T. Rep. N. S. 15; Sparling *v.* Clarson, 17 Wkly. Rep. 518. *Compare* Goodson *v.* Richardson, L. R. 9 Ch. 221, 43 L. J. Ch. 790, 30 L. T. Rep. N. S. 142, 22 Wkly. Rep. 337.

Canada.— Delaney *v.* Guibault, 19 Rev. Lég. 544; Dobie *v.* Board of Temporalities, 9 Rev. Lég. 574; Tobique Valley R. Co. *v.* Canadian Pac. R. Co., 2 N. Brunsw. Eq. 195; Mallette *v.* Montreal, 24 L. C. Jur. 264; White *v.* Whitehead, 7 Montreal Leg. N. 292.

See 27 Cent. Dig. tit. "Injunction," § 13.

Trivial matters.— Where the damage is so very small and the right so unimportant as to make the case a trivial one, equity will dismiss the bill. Woodbury *v.* Portland Marine Soc., 90 Me. 18, 37 Atl. 323; Llandudno Urban Dist. Council *v.* Woods, [1899] 2 Ch. 705, 63 J. P. 775, 68 L. J. Ch. 623, 81 L. T. Rep. N. S. 170, 48 Wkly. Rep. 43; Bernard *v.* Gibson, 21 Grant Ch. (U. C.) 195.

The right of a taxpayer to an injunction against the holding of an election without authority of law has been denied on the ground that he will sustain no substantial injury. State *v.* Thorson, 9 S. D. 149, 68 N. W. 202, 33 L. R. A. 582.

12. *Georgia.*— Rives *v.* Rives, 113 Ga. 392, 39 S. E. 79.

Illinois.— Drummond Tobacco Co. *v.* Randle, 114 Ill. 412, 2 N. E. 536.

Indiana.— Williams *v.* Little White Lick Gravel Road Co., Wils. 7.

Louisiana.— State *v.* Judge Orleans Parish Dist. Ct., 34 La. Ann. 89.

Massachusetts.— Atkins *v.* Chilson, 7 Metc. 398.

New Jersey.— Willcox *v.* Trenton Potteries Co., 64 N. J. Eq. 173, 53 Atl. 474; Doughty *v.* Somerville, etc., R. Co., 7 N. J. Eq. 51.

New York.— Chauncey *v.* Lane, 3 How. Pr. 248.

Pennsylvania.— McCormick *v.* Kinsey, 10 Pa. Super Ct. 607.

See 27 Cent. Dig. tit. "Injunction," § 9.

13. *Illinois.*— Newby *v.* Highway Com'rs, 21 Ill. App. 245.

Nevada.— Thorne *v.* Sweeney, 13 Nev. 415.

New Hampshire.— Bassett *v.* Salisbury Mfg. Co., 47 N. H. 426.

New York.— People *v.* New York Canal Bd., 55 N. Y. 390; Purdy *v.* Manhattan El. R. Co., 13 N. Y. Suppl. 295.

Pennsylvania.— Blanchard *v.* Reyburn, 10 Phila. 427.

14. Bigelow *v.* Hartford Bridge Co., 14 Conn. 565, 36 Am. Dec. 502; Savannah, etc., Canal Co. *v.* Suburban, etc., R. Co., 93 Ga. 240, 18 S. E. 824; Carvalho *v.* Brooklyn, etc., Turnpike Co., 173 N. Y. 586, 65 N. E. 1115.

15. Jacob *v.* Day, 111 Cal. 571, 44 Pac. 243; James *v.* Bondurant, (Iowa 1901) 86 N. W. 274; Swan Creek Tp. *v.* Brown, 130 Mich. 382, 90 N. W. 38; McLaughlin *v.* Sandusky, 17 Nebr. 110, 22 N. W. 241.

16. Morrison *v.* Latimer, 51 Ga. 519; McMaugh *v.* Burke, 12 R. I. 499.

so acts that may possibly create a cloud on title to land will not be restrained without a further showing.[17] The granting of an injunction is not governed, however, by the mere value of the property,[18] nor is it limited to cases where damages could be recovered in an action at law;[19] and an adverse use may be restrained, even though the damage suffered is small, where its continuance might ripen it into a right.[20]

c. Necessity For Irreparable Injury[21] — (i) *General Rule.* As a general rule equity will not undertake to prevent an injury by an injunction unless the injury is irreparable.[22] A preliminary injunction will not as a general rule be granted in cases where it is not shown that any irreparable injury is immediately impending and will be visited upon complainant before the case can be brought to

17. Taylor *v.* Underhill, 40 Cal. 471; Barni *v.* Bragg, 70 Ill. 283; Phelps *v.* Watertown, 61 Barb. (N. Y.) 121; Weed *v.* Roberts, 22 Misc. (N. Y.) 46, 49 N. Y. Suppl. 366. See also Quieting Title.

18. White *v.* Forbes, Walk. (Mich.) 112.

19. Schuyler *v.* Curtis, 15 N. Y. Suppl. 787 [*affirmed* in 64 Hun 594, 19 N. Y. Suppl. 264].

20. Cobb *v.* Massachusetts Chemical Co., 179 Mass. 423, 60 N. E. 790; Corning *v.* Troy Iron, etc., Factory, 34 Barb. (N. Y.) 485.

21. For specific applications of general doctrine see *infra*, V, A, 3, c; V, B, 3, d, (i), (iii).

22. *Alabama.*— Rouse *v.* Martin, 75 Ala. 510, 51 Am. Rep. 463.

California.— Berri *v.* Patch, 12 Cal. 299; Ritter *v.* Patch, 12 Cal. 298; Middleton *v.* Franklin, 3 Cal. 238.

Colorado.— Meyer *v.* Ives, 28 Colo. 461, 65 Pac. 627; Smith *v.* Schlink, 15 Colo. App. 325, 62 Pac. 1044.

Connecticut.— Whittlesey *v.* Hartford, etc., R. Co., 23 Conn. 421.

District of Columbia.— Johnson *v.* Baltimore, etc., R. Co., 4 App. Cas. 491.

Florida.— Orange City *v.* Thayer, 45 Fla. 502, 34 So. 573.

Georgia.— Everett *v.* Tabor, 119 Ga. 128, 46 S. E. 72; Ocmulgee Lumber Co. *v.* Mitchell, 112 Ga. 528, 37 S. E. 749; Waters *v.* Lewis, 106 Ga. 758, 32 S. E. 854; Empire Loan, etc., Assoc. *v.* Atlanta, 77 Ga. 496.

Illinois.— Ft. Clark Horse R. Co. *v.* Anderson, 108 Ill. 64, 48 Am. Rep. 545; Leigh *v.* National Hollow Brake Beam Co., 104 Ill. App. 438; Taylor *v.* Pearce, 71 Ill. App. 525.

Indiana.— Loy *v.* Madison, etc., Gas Co., 156 Ind. 332, 58 N. E. 844; Bolster *v.* Catterlin, 10 Ind. 117.

Louisiana.— McFarlain *v.* Jennings, 106 La. 541, 31 So. 62; Southern Cotton Oil Co. *v.* Leathers, 50 La. Ann. 134, 23 So. 201.

Maryland.— Gulick *v.* Fisher, 92 Md. 353, 48 Atl. 375; Cockey *v.* Carroll, 4 Md. Ch. 344.

Massachusetts.— Walker *v.* Brooks, 125 Mass. 241.

Minnesota.— Hart *v.* Marshall, 4 Minn. 294.

Mississippi.— Poindexter *v.* Henderson, Walk. 176, 12 Am. Dec. 550.

Missouri.— State *v.* Wood, 155 Mo. 425, 56 S. W. 474, 48 L. R. A. 596.

Nebraska.— Pacific Express Co. *v.* Cornell, 59 Nebr. 364, 81 N. W. 377; Normand *v.* Otoe County, 8 Nebr. 18.

New Jersey.— Oliphant *v.* Richman, (N. J. Eq. 1904) 59 Atl. 241; Wilcox *v.* Trenton Potteries Co., N. J. Eq. 173, 53 Atl. 474; New Jersey Junction R. Co. *v.* Woodward, 61 N. J. Eq. 1, 47 Atl. 273; New Jersey Cent. R. Co. *v.* Standard Oil Co., 33 N. J. Eq. 127; Lewis *v.* Elizabeth, 25 N. J. Eq. 298.

New York.— Campbell *v.* Seaman, 63 N. Y. 568, 20 Am. Rep. 567; Roosevelt *v.* Godard, 52 Barb. 533; Sixth Ave. R. Co. *v.* Gilbert El. R. Co., 43 N. Y. Super. Ct. 292; Johnson *v.* Kingston Bd. of Education, 38 Misc. 593, 78 N. Y. Suppl. 53. But see Cure *v.* Crawford, 5 How. Pr. 293.

Ohio.— Stewart *v.* Little Miami R. Co., 14 Ohio 353; Lawrence *v.* Mitchell, 10 Ohio S. & C. Pl. Dec. 265, 8 Ohio N. P. 8; Commercial Bank *v.* Bowman, 1 Handy 246, 12 Ohio Dec. (Reprint) 125.

Oregon.— Parker *v.* Furlong, 37 Oreg. 248, 62 Pac. 490; Portland *v.* Baker, 8 Oreg. 356.

Pennsylvania.— Stewart Wire Co. *v.* Lehigh Coal, etc., Co., 203 Pa. St. 474, 53 Atl. 352; Duffy's Estate, 9 Kulp 409; Oberly *v.* Hapgood, 3 Lanc. L. Rev. 234; Sterling *v.* Maxwell, 29 Leg. Int. 173; Summit Branch R. Co. *v.* Leininger, 1 Leg. Rec. 258; Hieskell *v.* Gross, 7 Phila. 317.

United States.— Kirwan *v.* Murphy, 189 U. S. 35, 23 S. Ct. 599, 47 L. ed. 698; Western Union Tel. Co. *v.* Norman, 77 Fed. 13; Beck *v.* Flournoy Live-Stock, etc., Co., 65 Fed. 30, 12 C. C. A. 497; New York Grape Sugar Co. *v.* American Grape Sugar Co., 10 Fed. 835, 20 Blatchf. 386; Brown *v.* Pacific Mail Steamship Co., 4 Fed. Cas. No. 2,025, 5 Blatchf. 525.

England.— Hilton *v.* Granville, 4 Beav. 130, 49 Eng. Reprint 288, Cr. & Ph. 283, 10 L. J. Ch. 398, 18 Eng. Ch. 283, 41 Eng. Reprint 498; Dyke *v.* Taylor, 3 De G. F. & J. 467, 7 Jur. N. S. 583, 30 L. J. Ch. 281, 3 L. T. Rep. N. S. 717, 9 Wkly. Rep. 403, 64 Eng. Ch. 366, 45 Eng. Reprint 959; Johnson *v.* Shrewsbury, etc., R. Co., 3 De G. M. & G. 914, 17 Jur. 1015, 22 L. J. Ch. 921, 52 Eng. Ch. 710, 43 Eng. Reprint 358; Atty.-Gen. *v.* Sheffield Gas Consumers Co., 3 De G. M. & G. 304, 52 Eng. Ch. 237, 43 Eng. Reprint 119; Sainter *v.* Ferguson, 1 Hall & T. 383, 47 Eng. Reprint 1460, 14 Jur. 255, 19 L. J. Ch. 170, 1 Macn. & G. 286, 47 Eng. Ch. 228, 41 Eng. Reprint

a final hearing;[23] although under the statutes in some jurisdictions, it is held that the injury need not be irreparable to authorize a temporary injunction, but that a great injury is sufficient.[24]

(II) *WHAT CONSTITUTES*—(A) *In General.* An injury to be irreparable need not be such as to render its repair physically impossible; but it is irreparable when it cannot be adequately compensated in damages or when there exists no

1275; Shrewsbury, etc., R. Co. *v.* London, etc., R. Co., 14 Jur. 1125, 20 L. J. Ch. 90, 3 Macn. & G. 70, 49 Eng. Ch. 53, 42 Eng. Reprint 187; Southampton *v.* Birmingham R. Co., 2 Jur. 1012.

Canada.— Mason *v.* Norris, 18 Grant Ch. (U. C.) 500; Montreal Park, etc., R. Co. *v.* St. Louis, 17 Quebec Super. Ct. 545; Mallette *v.* Montreal, 24 L. C. Jur. 264.

See 27 Cent. Dig. tit. "Injunction," § 14.

23. *Maryland.*—Chesapeake, etc., Canal Co. *v.* Young, 3 Md. 480.

Massachusetts.— Wing *v.* Fairhaven, 8 Cush. 363; Charles River Bridge *v.* Warren Bridge, 6 Pick. 376.

New Jersey.— Becker *v.* Gilbert, (Ch. 1905) 60 Atl. 29; Ivins *v.* Jacobs, (Ch. 1904) 58 Atl. 941; Grand Castle of G. E. *v.* Bridgeton Castle No. 13, K. of G. E., (N. J. Ch. 1898) 40 Atl. 849; Brigantine *v.* Holland Trust Co., (Ch. 1896) 35 Atl. 344; Hagerty *v.* Lee, 45 N. J. Eq. 255, 17 Atl. 826; Booraem *v.* North Hudson County R. Co., 40 N. J. Eq. 557, 5 Atl. 106; Citizens' Coach Co. *v.* Camden Horse R. Co., 29 N. J. Eq. 299; Capner *v.* Flemington Min. Co., 3 N. J. Eq. 467.

New York.— Robinson *v.* Guaranty Trust Co., 51 N. Y. App. Div. 134, 64 N. Y. Suppl. 525; Sleicher *v.* Grogan, 43 N. Y. App. Div. 213, 59 N. Y. Suppl. 1065; Power *v.* Athens, 19 Hun 165; Troy, etc., R. Co. *v.* Boston, etc., R. Co., 13 Hun 60; Livingston *v.* New York Bank, 26 Barb. 304; Bruce *v.* Delaware, etc., Canal Co., 19 Barb. 371; Stirn *v.* Nash, 12 N. Y. Suppl. 431; New York, etc., R. Co. *v.* New York, etc., R. Co., 11 Abb. N. Cas. 386; Shaver *v.* Cohn, 40 How. Pr. 129; Brown *v.* Metropolitan Gaslight Co., 38 How. Pr. 133; Mitchell *v.* Oakley, 7 Paige 68; Osborn *v.* Taylor, 5 Paige 515. See Arthur *v.* Case, 1 Paige 447 [*affirmed* in 3 Wend. 632].

North Carolina.— Reyburn *v.* Sawyer, 128 N. C. 8, 37 S. E. 954; Raleigh, etc., R. Co. *v.* Glendon, etc., Min., etc., Co., 112 N. C. 661, 17 S. E. 77; Hettrick *v.* Page, 82 N. C. 65.

Oregon.— Burton *v.* Moffitt, 3 Oreg. 29.

Pennsylvania.— Hicks *v.* American Natural Gas Co., 207 Pa. St. 570, 57 Atl. 55, 65 L. R. A. 209; Mammoth Vein Consol. Coal Co.'s Appeal, 54 Pa. St. 183; Northern Cent. R. Co. *v.* Walworth, 7 Pa. Dist. 766; Barton *v.* Pittsburg, 4 Brewst. 373, 3 Pittsb. 242; Philadelphia *v.* Crump, 1 Brewst. 320; Crellin *v.* Schafer, 4 Kulp 211; Hannick *v.* Scranton, 2 Lack. Leg. N. 201; Kelly *v.* Philadelphia, 12 Phila. 423; McCall *v.* Barrie, 14 Wkly. Notes Cas. 419.

Wisconsin.— De Pauw *v.* Oxley, 122 Wis. 656, 100 N. W. 1028.

United States.— Miller *v.* Mutual Reserve Fund L. Assoc., 109 Fed. 278; Ahern *v.* Newton, etc., St. R. Co., 105 Fed. 702; Ryan *v.* Seaboard, etc., R. Co., 89 Fed. 385; De Neufville *v.* New York, etc., R. Co., 84 Fed. 391; Zinsser *v.* Coolidge, 17 Fed. 538; Fremont *v.* Merced Min. Co., 9 Fed. Cas. No. 5,095, McAllister 267; U. S. *v.* Duluth, 25 Fed. Cas. No. 15,001, 1 Dill. 469.

England.— Dyke *v.* Taylor, 3 De G. F. & J. 467, 7 Jur. N. S. 583, 30 L. J. Ch. 281, 3 L. T. Rep. N. S. 717, 9 Wkly. Rep. 403, 64 Eng. Ch. 366, 45 Eng. Reprint 959; Johnson *v.* Shrewsbury, etc., R. Co., 3 De G. M. & G. 914, 17 Jur. 1015, 22 L. J. Ch. 921, 52 Eng. Ch. 710, 43 Eng. Reprint 358; Atty.-Gen. *v.* Gas Co., 3 De G. M. & G. 304, 52 Eng. Ch. 237, 43 Eng. Reprint 119; Kettle *v.* Corbin, Dick. 314, 21 Eng. Reprint 290.

Canada.— Dwyre *v.* Ottawa, 25 Ont. App. 121; McLaren *v.* Caldwell, 5 Ont. App. 363.

See 27 Cent. Dig. tit. "Injunction," § 306; and cases cited in preceding note.

The proceeding with a garnishment suit should not be prevented by a temporary restraining order when it does not appear that the suit will be reached before a hearing on the bill can be had, and the complainant alleges merely that he will be prejudiced if the order is not issued. Thurston *v.* Chott, 86 Ill. App. 543.

A breach of contract will not be prevented on interlocutory application, when a final hearing and decree can be had before the breach can do any injury to the complainant. Metropolitan Exhibition Co. *v.* Ward, 9 N. Y. Suppl. 779, 24 Abb. N. Cas. 393.

Corporate officers.— No preliminary injunction will issue to prevent officers from acting as such, because of alleged fraud in their election, when they are filling the offices honestly. Ogden *v.* Kip, 6 Johns. Ch. (N. Y.) 160.

There must be affirmative ground for issuing an injunction, and it is erroneous to grant one merely because it can do no harm. Teller *v.* U. S., 113 Fed. 463, 51 C. C. A. 297. But it has been said that where a preliminary injunction has been issued, defendant has no ground for complaint where his rights are protected against all possible injury. Huron First Nat. Bank *v.* Crabtree, (S. D. 1904) 100 N. W. 744.

24. Price *v.* Grice, 10 Ida. 443, 79 Pac. 387; Staples *v.* Rossi, 7 Ida. 618, 65 Pac. 67; Xenia Real Estate Co. *v.* Macy, 147 Ind. 568, 47 N. E. 147; Champ *v.* Kendrick, 130 Ind. 549, 30 N. E. 787; Covert *v.* Bray, 26 Ind. App. 671, 60 N. E. 709; Price *v.* Baldauf, 82 Iowa 669, 46 N. W. 983, 47 N. W. 1079; Chambers *v.* Haskell, 78 S. W. 478, 25 Ky. L. Rep. 1707. See also Central Vermont R. Co. *v.* St. John, 13 Rev. Lég. 343.

certain pecuniary standard for the measurement of the damage.[25] This inadequacy of damages as a compensation may be due to the nature of the injury itself or to the nature of the right or property injured, and many courts have said that it may also be due to the insolvency or want of responsibility of the person committing it.[26] Where compensation in money would be adequate, the injury cannot be said to be irreparable.[27]

(B) *Destruction of Property and Business.* Acts that will cause the destruc-

25. *Idaho.*— Wilson *v.* Eagleson, 9 Ida. 17, 71 Pac. 613.

Indiana.— American Steel, etc., Co. *v.* Tate, 33 Ind. App. 504, 71 N. E. 189.

Maryland.— Cockey *v.* Carroll, 4 Md. Ch. 344.

Michigan.— Ives *v.* Edison, 124 Mich. 402, 83 N. W. 120, 83 Am. St. Rep. 329, 50 L. R. A. 134.

Missouri.— See State Sav. Bank *v.* Kercheval, 65 Mo. 682, 27 Am. Rep. 310.

New Jersey.— Hodge *v.* Giese, 43 N. J. Eq. 342, 11 Atl. 484.

New York.— Weber *v.* Rogers, 41 Misc. 662, 85 N. Y. Suppl. 232, danger to life.

North Carolina.— Gause *v.* Perkins, 56 N. C. 177, 69 Am. Dec. 728.

Pennsylvania.— Philadelphia Ball Club *v.* Lajoie, 202 Pa. St. 210, 51 Atl. 973, 90 Am. St. Rep. 627, 58 L. R. A. 227; Com. *v.* Pittsburgh, etc., R. Co., 24 Pa. St. 159, 62 Am. Dec. 372; Neill *v.* Gallagher, 10 Phila. 172.

Virginia.— Sanderlin *v.* Baxter, 76 Va. 299, 44 Am. Rep. 165.

Wisconsin.— Wilson *v.* Mineral Point, 39 Wis. 160.

England.— Bloxam *v.* Metropolitan R. Co., L. R. 3 Ch. 337, 18 L. T. Rep. N. S. 41, 16 Wkly. Rep. 490; Pinchin *v.* London, etc., R. Co., 5 De G. M. & G. 851, 3 Eq. Rep. 433, 1 Jur. N. S. 241, 24 L. J. Ch. 417, 3 Wkly. Rep. 125, 54 Eng. Ch. 667, 43 Eng. Reprint 1101; Atty.-Gen. *v.* Sheffield Gas Consumers Co., 3 De G. M. & G. 304, 52 Eng. Ch. 237, 43 Eng. Reprint 119; East Lancashire R. Co. *v.* Hattersley, 8 Hare 72, 32 Eng. Ch. 72; Cory *v.* Yarmouth, etc., R. Co., 3 Hare 593, 3 R. & Can. Cas. 524, 25 Eng. Ch. 593.

See 27 Cent. Dig. tit. "Injunction," § 14.

Fair and reasonable redress in court of law. — When irreparable injury is spoken of it is not meant that the injury is beyond the possibility of repair, or beyond the possibility of compensation in damages, but it must be of such constant and frequent recurrence that no fair or reasonable redress can be had therefor in a court of law. Chicago Gen. R. Co. *v.* Chicago, etc., R. Co., 181 Ill. 605, 54 N. E. 1026. See also Montgomery First Nat. Bank *v.* Tyson, 133 Ala. 459, 32 So. 114, 91 Am. St. Rep. 46, 59 L. R. A. 399.

It is not necessary that all the complainant's transactions will be ruined unless he obtain an injunction, but only that he will lose irreparably the right or property concerning which he brings suit. Oliphant *v.* Richman, 67 N. J. Eq. 280, 59 Atl. 241.

Damages at law are not adequate when they cannot put the injured party *in statu quo.* Wood *v.* Sutcliffe, 16 Jur. 75, 21 L. J. Ch. 253, 2 Sim. N. S. 163, 42 Eng. Ch. 163, 61 Eng. Reprint 303.

Multiplicity of suits.— Injury is irreparable and a ground for injunction when the only remedy at law is by a large number of suits for damages, which, by reason of their number and cost, will produce no substantial results. Nashville, etc., R. Co. *v.* McConnell, 82 Fed. 65.

Illustrations.— Irreparable injury may be caused by the sale of chattels which cannot be replaced, as for example wedding presents (Church *v.* Haeger, 33 N. Y. Suppl. 47); blasting operations likely to do serious injury to adjoining buildings (Miller *v.* Campbell, 14 Manitoba 437); the operation of a bowling alley at night (Morey *v.* Black, 20 Montg. Co. Rep. (Pa.) 150), the breach of a contract for extraordinary personal services (Philadelphia Ball Club *v.* Lajoie, 202 Pa. St. 210, 51 Atl. 973, 90 Am. St. Rep. 627, 58 L. R. A. 227. See also *infra,* V, C, 6); or not to carry on a competing business (Mullis *v.* Nichols, 105 Ga. 465, 30 S. E. 654. See also Robinson *v.* Heuer, [1898] 2 Ch. 451, 67 L. J. Ch. 644, 79 L. T. Rep. N. S. 281, 47 Wkly. Rep. 34); but not the breach of a contract to allow complainant to use ice in his dairy business, when ice can be obtained elsewhere and defendant is able to respond in damages (Glassbrenner *v.* Groulik, 110 Wis. 402, 85 N. W. 962).

26. *Missouri.*— Schubach *v.* McDonald, 179 Mo. 163, 78 S. W. 1020, 101 Am. St. Rep. 452, 65 L. R. A. 136.

New Jersey.— Kerlin *v.* West, 4 N. J. Eq. 449.

New York.— Hart *v.* Albany, 3 Paige 214.

North Carolina.— Gause *v.* Perkins, 56 N. C. 177, 69 Am. Dec. 227.

West Virginia.— Stephenson *v.* Burdett, 56 W. Va. 109, 48 S. E. 846.

See also *infra,* III, F, 1, 4.

27. *Florida.*— Carney *v.* Hadley, 32 Fla. 344, 14 So. 4, 37 Am. St. Rep. 101, 22 L. R. A. 233.

Illinois.— Lloyd *v.* Catlin Coal Co., 210 Ill. 460, 71 N. E. 335; Chicago Public Stock Exch. *v.* McClaughry, 148 Ill. 372, 36 N. E. 88.

North Carolina.— Gause *v.* Perkins, 56 N. C. 177, 69 Am. Dec. 728.

Pennsylvania.— Richards' Appeal, 57 Pa. St. 105, 98 Am. Dec. 202.

United States.— Atkinson *v.* Philadelphia, etc., R. Co., 2 Fed. Cas. No. 615.

Canada.— Montreal Park, etc., R. Co. *v.* St. Louis, 17 Quebec Super. Ct. 545.

See 27 Cent. Dig. tit. "Injunction," § 14.

tion of complainant's property,[28] or acts that interfere with the carrying on of complainant's business, or with the use of his property, destroying his custom, his credit, or his profits,[29] do an irreparable injury, and authorize the issuance of a preliminary injunction. Thus it has very generally been decided that interference with complainant's employees and business by striking workmen,[30] or the enforcement of laws and ordinances fixing unreasonably low rates for service by quasi-public corporations[31] will be restrained in proper cases. So also the obstruction or interference with the use of highways, wharves, and docks,[32] or

28. Rohrer *v.* Babcock, 114 Cal. 124, 45 Pac. 1054; St. Amand *v.* Lehman, 120 Ga. 253, 47 S. E. 949; English *v.* Jones, 108 Ga. 123, 34 S. E. 122; Goettee *v.* Lane, 99 Ga. 282, 25 S. E. 736; Cooke *v.* Boynton, 135 Pa. St. 102, 19 Atl. 944; Maffet *v.* Quine, 93 Fed. 347; Newton *v.* Levis, 79 Fed. 715, 25 C. C. A. 161; Clapp *v.* Spokane, 53 Fed. 515.

If the destruction of the subject-matter is threatened, the damage is often regarded as irreparable, even though it may be accurately measured. Hilton *v.* Granville, 4 Beav. 130, 49 Eng. Reprint 288, Cr. & Ph. 283, 10 L. J. Ch. 398, 18 Eng. Ch. 283, 41 Eng. Reprint 498.

The occupation of a street by a railroad may destroy its use by the city or by abutting owners and amount to an absolute destruction of property. Cincinnati Northern R. Co. *v.* Cincinnati, 8 Ohio Dec. (Reprint) 554, 8 Cinc. L. Bul. 334; Ward *v.* Ohio River R. Co., 35 W. Va. 481, 14 S. E. 142.

The publication of books by an insolvent defendant unable to keep his contract to pay royalties to the complainant may be prevented *pendente lite.* Saltus *v.* Belford Co., 133 N. Y. 499, 31 N. E. 518 [*affirming* 18 N. Y. Suppl. 619].

Trespasses that do permanent damage to the land or destroy the substance of the estate are held to do irreparable injury (Itasca *v.* Schroeder, 182 Ill. 192, 55 N. E. 50; Edwards *v.* Haeger, 180 Ill. 99, 54 N. E. 176; Newlin *v.* Prevo, 81 Ill. App. 75; Rogers *v.* Hanfield, 14 Daly (N. Y.) 339, 12 N. Y. St. 671; King *v.* Stuart, 84 Fed. 546), such as the unlawful extraction of oil or gas from land (Moore *v.* Jennings, 47 W. Va. 181, 34 S. E. 793); but not trespasses not going to the substance of the estate (Sharpe *v.* Loane, 124 N. C. 1, 32 S. E. 318, cutting of timber; Moore *v.* Halliday, 43 Oreg. 243, 72 Pac. 801, 99 Am. St. Rep. 724, cutting of hay and grain), as the erection of a trestle on complainant's land, not destructive of the estate (Whitman *v.* St. Paul, etc., R. Co., 8 Minn. 116; Schurmeier *v.* St. Paul, etc., R. Co., 8 Minn. 113, 83 Am. Dec. 770).

29. *Alabama.*— Wadsworth *v.* Goree, 96 Ala. 227, 11 So. 848.

Missouri.— Schubach *v.* McDonald, 179 Mo. 163, 78 S. W. 1020, 101 Am. St. Rep. 452, 65 L. R. A. 136.

New York.— Westside Electric Co. *v.* Consolidated Tel., etc., Co., 87 N. Y. App. Div. 550, 84 N. Y. Suppl. 1052.

South Carolina.— Wilson *v.* Alderman, etc., Co., 69 S. C. 176, 48 S. E. 81; Darlington Oil Co. *v.* Pee Dee Oil, etc., Co., 62 S. C. 196, 40 S. E. 169.

Texas.— Sweeney *v.* Webb, 32 Tex. Civ. App. 324, 76 S. W. 766.

United States.—Pokegama Sugar Line Lumber Co. *v.* Klamath River Lumber, etc., Co., 96 Fed. 34; San Francisco Sanitary Reduction Works *v.* California Reduction Co., 94 Fed. 693; Coe *v.* Louisville, etc., R. Co., 3 Fed. 775.

Canada.— Wilson *v.* Corby, 11 Grant Ch. (U. C.) 92.

See 27 Cent. Dig. tit. "Injunction," § 306.

Placing telephone wires along the line of complainant's wires, but on higher poles, is not such an interference as will be restrained temporarily. Louisville Home Tel. Co. *v.* Cumberland Tel., etc., Co., 111 Fed. 663, 49 C. C. A. 524 [*reversing* 110 Fed. 593].

The use of the firm-name by a retiring partner for the purpose of taking some of the trade away from the continuing partner may be prevented by injunction *pendente lite.* Steinfeld *v.* National Shirt Waist Co., 99 N. Y. App. Div. 286, 90 N. Y. Suppl. 964.

Condemnation proceedings may be restrained temporarily until the rights of the parties can be determined on the final hearing. Hoke *v.* Georgia R., etc., Co., 89 Ga. 215, 15 S. E. 124; Harvey *v.* Kansas, etc., R. Co., 45 Kan. 228, 25 Pac. 578.

30. Jonas Glass Co. *v.* U. S., etc., Glass-blowers' Assoc., 64 N. J. Eq. 640, 54 Atl. 565; Wabash R. Co. *v.* Hannahan, 121 Fed. 563; Hagan *v.* Blindell, 56 Fed. 696, 6 C. C. A. 86 [*affirming* 54 Fed. 40].

31. Tampa Waterworks Co. *v.* Tampa, 124 Fed. 932; New Memphis Gas, etc., Co. *v.* Memphis, 72 Fed. 952.

A state board of transportation which has ordered a railroad company to show cause why rates should not be reduced will not be temporarily enjoined from proceeding with the hearing, on the ground that it has no power to reduce rates. Higginson *v.* Chicago, etc., R. Co., 102 Fed. 197, 42 C. C. A. 254.

The enforcement of a statute fixing fares on street railroads will not be enjoined *pendente lite,* even though such statute may be unconstitutional, where it is not shown what loss the company or its stock-holders are likely to sustain. Ahern *v.* Newton, etc., R. Co., 105 Fed. 702.

32. *California.*— Sisson *v.* Johnson, (1893) 34 Pac. 617.

Florida.— Indian River Steamboat Co. *v.* East Coast Transp. Co., 28 Fla. 387, 10 So. 480, 29 Am. St. Rep. 258.

with a water-supply,[33] ordinarily causes irreparable injury and authorizes the granting of an injunction.

E. Multiplicity of Suits[34] — **1. In General.** The prevention of a multiplicity of actions at law is one of the special grounds of equity jurisdiction, and for that purpose the remedy by injunction is freely used.[35] However, the saving of expense is not alone a sufficient ground for bringing a bill in equity.[36]

2. Parties Numerous — a. Injury to One Requiring Suits Against Many. Where the consummation of a wrongful act will injure the complainant, and in order to obtain redress at law he would be required to bring many actions against many persons, he is entitled to an injunction to prevent the performance of the act.[37]

b. Wrongful Act Causing Many Suits Against One. Where the consummation of a wrongful or illegal act will probably result in many disputed claims and many actions at law against the complainant, his remedy at law is inadequate and he is entitled to the protection of equity by injunction.[38]

New York.— Dimon *v.* Shewan, 34 Misc. 72, 69 N. Y. Suppl. 402.

Ohio.— Cincinnati Northern R. Co. *v.* Cincinnati, 8 Ohio Dec. (Reprint) 554, 8 Cinc. L. Bul. 334.

South Carolina.— Alderman *v.* Wilson, 69 S. C. 156, 48 S. E. 85.

West Virginia.—Ward *v.* Ohio River R. Co., 35 W. Va. 481, 14 S. E. 142.

United States.— Crocker *v.* New York, 15 Fed. 405, 21 Blatchf. 197.

See 27 Cent. Dig. tit. "Injunction," § 306.

The erection of a bridge will be prevented temporarily on a reasonable showing that it will obstruct navigation. Silliman *v.* Hudson River Bridge Co., 22 Fed. Cas. No. 12,851, 4 Blatchf. 74.

33. Johnston *v.* Belmar, 58 N. J. Eq. 354, 44 Atl. 166; Rudy *v.* Myton, 19 Pa. Super. Ct. 319; Diffendal *v.* Virginia Midland R. Co., 86 Va. 459, 10 S. E. 536.

34. See further on this subject *infra*, V, A, 3, g.

35. *Alabama.*— Rouse *v.* Martin, 75 Ala. 510, 51 Am. Rep. 463.

Connecticut.— Colt *v.* Cornwell, 2 Root 109.

Georgia.— Brinson *v.* Hadden, 77 Ga. 499, 2 S. E. 694; Kendall *v.* Dow, 46 Ga. 607.

Maryland.— McCreery *v.* Sutherland, 23 Md. 471, 87 Am. Dec. 578.

Minnesota.— McRoberts *v.* Washburne, 10 Minn. 23.

New York.— Campbell *v.* Seaman, 63 N. Y. 568, 20 Am. Rep. 567; Purdy *v.* Manhattan El. R. Co., 13 N. Y. Suppl. 295.

See 27 Cent. Dig. tit. "Injunction," § 18.

Public interest consulted.—Even though an injunction would prevent a multiplicity of actions at law, the interests of the public may be paramount to those of the complainant, and an injunction may be refused for that reason. So also the court may for some special reason be without jurisdiction to grant the injunction asked. People *v.* Tenth Judicial Dist. Ct., 29 Colo. 182, 68 Pac. 242. See also Peninsular Constr. Co. *v.* Merritt, 90 Md. 589, 45 Atl. 172.

Threatened suits against third persons.— Multiplicity of suits is not ground for an injunction unless such multiplicity is threatened to the complainant, not to third persons. Lewisohn *v.* Anaconda Copper-Min. Co., 26 Misc. (N. Y.) 613, 56 N. Y. Suppl. 807; Crevier *v.* New York, 12 Abb. Pr. N. S. (N. Y.) 340.

36. Sheldon *v.* Centre School Dist., 25 Conn. 224.

37. *Georgia.*— Mayer *v.* Coley, 80 Ga. 207, 7 S. E. 164.

Kentucky.— Allen *v.* New Domain Oil, etc., Co., 73 S. W. 747, 24 Ky. L. Rep. 2169.

New York.—Pennsylvania Coal Co. *v.* Delaware, etc., Canal Co., 31 N. Y. 91.

Pennsylvania.— York Mfg. Co. *v.* Oberdick, 10 Pa. Dist. 463, 15 York Leg. Rec. 29.

South Dakota.— Halley *v.* Ingersoll, 14 S. D. 7, 84 N. W. 201.

United States.—McConnaughy *v.* Pennoyer, 43 Fed. 339.

See 27 Cent. Dig. tit. "Injunction," § 18.

38. National Park Bank *v.* Goddard, 131 N. Y. 494, 30 N. E. 566; Dinsmore *v.* Southern Express Co., 92 Fed. 714; Western Union Tel. Co. *v.* Norman, 77 Fed. 13; Sheffield Waterworks *v.* Yeomans, L. R. 2 Ch. 8, 15 L. T. Rep. N. S. 342, 15 Wkly. Rep. 76; North British, etc., Ins. Co. *v.* Lamb, 27 L. C. Jur. 222.

Applications of rule.— The enforcement of an ordinance reducing rates of fare on a street railway in violation of a contract between the municipality and the company may be enjoined on the ground that otherwise a multiplicity of actions and harassing and expensive litigation would result. Conflicts over the right to be carried at the reduced rate would result, with breaches of the peace and suits for damages. Cleveland *v.* Cleveland City R. Co., 194 U. S. 517, 24 S. Ct. 756, 48 L. ed. 1102; Detroit *v.* Detroit Citizens' St. R. Co., 184 U. S. 368, 22 S. Ct. 410, 46 L. ed. 592. For similar reasons equity may enjoin the enforcement of an unconstitutional freight rate law. Smyth *v.* Ames, 169 U. S. 466, 18 S. Ct. 418, 42 L. ed. 819.

Multiplicity of suits not threatened.— A county treasurer is not entitled to an injunction to restrain twenty-three grand jurors from attempting to collect similar invalid

c. Wrongful Act Doing Common Injury to Many. Where the wrongful act will injure many persons in a similar way, interfering with the common right of each, they are allowed in a great many cases to unite in a bill to restrain the commission of the act.[39] In some cases, however, an injunction has been refused because no common right or title was involved and there was no community of interest in the subject-matter.[40] In other cases jurisdiction has been extended to cases where there would seem to be no actual common right invaded, but where the separate and individual rights of many are invaded by the same wrongful act, injuring all in a similar manner, and where as to all alike the wrongfulness of the act is to be established by the same principles of law and by proof of the very same facts.[41] As illustrating the variance in the decisions many courts have held that the prevention of a multiplicity of actions is not sufficient ground for enjoining the collection of illegal taxes. The interests of the taxpayers are said not to be common in a manner that will authorize a suit in equity by one or more in behalf of all.[42] Many cases, however, hold that injunction is a proper remedy to

claims, even though all depend upon the same principles and facts, where one of those jurors has sued at law and the proof is direct and positive that no other suits are threatened but that the other jurors intend to abide by the event of the one suit. Andel *v.* Starkel, 192 Ill. 206, 61 N. E. 356.

Independent causes of action.— The mere fact that numerous independent parties hold separate instruments upon which they might bring separate suits is not sufficient to justify a court of equity in entertaining an action by the debtor to compel them to litigate their claims in an action in the forum he selects. And this even though the validity of all those instruments is attacked upon a common ground. Venice *v.* Woodruff, 62 N. Y. 462, 20 Am. Rep. 495 [*distinguishing* New York, etc., R. Co. *v.* Schuyler, 17 N. Y. 592]. See also Tribette *v.* Illinois Cent. R. Co., 70 Miss. 182, 12 So. 32, 35 Am. St. Rep. 642, 19 L. R. A. 660; Lehigh Valley R. Co. *v.* McFarlan, 31 N. J. Eq. 730 [*affirming* 30 N. J. Eq. 135]; Zanhizer *v.* Hefner, 47 W. Va. 418, 35 S. E. 4; French *v.* Union Pac. R. Co., 92 Fed. 28.

39. *Arkansas.*—Greedup *v.* Franklin County, 30 Ark. 101.

Colorado.— Dumars *v.* Denver, 16 Colo. App. 375, 65 Pac. 580.

Florida.— Carney *v.* Hadley, 32 Fla. 344, 14 So. 4, 37 Am. St. Rep. 101, 22 L. R. A. 233.

Georgia.— Noble *v.* State, 43 Ga. 466.

Kentucky.— Stovall *v.* McCutcheon, 107 Ky. 577, 54 S. W. 969, 21 Ky. L. Rep. 1317, 92 Am. St. Rep. 373, 47 L. R. A. 287.

Mississippi.— Tisdale *v.* Philadelphia Underwriters Ins. Co., 84 Miss. 709, 36 So. 568.

Nebraska.— Siever *v.* Union Pac. R. Co., (1903) 93 N. W. 943.

Pennsylvania.— Kretzer *v.* Moorhead, 35 Pittsb. Leg. J. N. S. 153.

United States.— Holst *v.* Savannah Electric Co., 131 Fed. 931; Mills *v.* Chicago, 127 Fed. 731; Virginia-Carolina Chemical Co. *v.* Home Ins. Co., 113 Fed. 1, 51 C. C. A. 21.

See 27 Cent. Dig. tit. "Injunction," § 18.

The enforcement of an invalid ordinance licensing plumbers and fixing a penalty for working at that trade without such a license may be enjoined at the suit of a number of the plumbers for the purpose of avoiding a multiplicity of suits. Wilkie *v.* Chicago, 188 Ill. 444, 58 N. E. 1004, 80 Am. St. Rep. 182. See also Chicago *v.* Collins, 175 Ill. 445, 51 N. E. 907, 67 Am. St. Rep. 224, 49 L. R. A. 408, where the ordinance affected several hundred thousand taxpayers and suit was brought by some hundreds in behalf of all. And see Mills *v.* Chicago, 127 Fed. 731.

Wrongful diversion of water.— Where several owners of separate mills are injured by the diversion of the water, they may maintain a joint bill to prevent such diversion. Ballou *v.* Hopkinton, 4 Gray (Mass.) 324.

40. *Alabama.*— Brown *v.* Birmingham, 140 Ala. 590, 37 So. 173.

Maryland.— Hardesty *v.* Taft, 23 Md. 512, 87 Am. Dec. 584.

Massachusetts.— Hale *v.* Cushman, 6 Metc. 425.

New York.— Venice *v.* Woodruff, 62 N. Y. 462, 20 Am. Rep. 495.

Tennessee.— Ducktown Sulphur, etc., Co. *v.* Fain, (1902) 70 S. W. 813.

United States.— Kirwan *v.* Murphy, 189 U. S. 35, 23 S. Ct. 599, 47 L. ed. 698 [*reversing* 109 Fed. 354].

See 27 Cent. Dig. tit. "Injunction," § 18.

41. See *infra*, note 43.

Résumé of decisions.—All of the cases assert that where the ground of the jurisdiction is merely the numerousness of the parties injured by the wrongful act, such parties cannot maintain a bill for an injunction unless the act sought to be enjoined affects some right or interest that all have in common; but there are no uniform rules for determining the existence and nature of this community of right or interest. It is easy to see the reason for the jurisdiction in case the common right invaded is a right of common such as was possessed by the tenants of a feudal lord in the common pasture or forest or waste land of the manor. Tenham *v.* Herbert, 2 Atk. 483, 26 Eng. Reprint 692; Powell *v.* Powis, 1 Y. & J. 159.

42. *Connecticut.*— Dodd *v.* Hartford, 25 Conn. 232; Sheldon *v.* Centre School Dist., 25 Conn. 224.

prevent the levy and collection of an illegal tax and that the taxpayers similarly affected may unite in bringing the suit, even though the remedy of each is perfect at law, and they have no common property that is affected.[43]

3. MULTIPLICITY OF ACTIONS BETWEEN TWO PARTIES. It is now well settled that where an injury committed by one against another is continuous or is being constantly repeated, so that the complainant's remedy at law requires the bringing of successive actions, that remedy is inadequate and the injury will be prevented by injunction. If repeated trespasses are threatened for which a remedy at law could be obtained only through a multiplicity of suits, making the expense excessive and disproportionate to the damages, an injunction will commonly be issued. Especially is this true when the acts complained of constitute a wilful invasion of the complainant's right.[44] On the other hand it has been held that

Delaware.— Equitable Guarantee, etc., Co. *v.* Donahoe, (1900) 45 Atl. 583.

District of Columbia.—Harkness *v.* District of Columbia, 1 MacArthur 121.

Michigan.—Youngblood *v.* Sexton, 32 Mich. 406, 410, 20 Am. Rep. 654, where Cooley, J., says: "No other complainant has any joint interest with him in resisting this tax. The sum demanded of each is distinct and separate, and it does not concern one of the complainants whether another pays or not. All the joint interest the parties have is a joint interest in a question of law; just such an interest as might exist in any case where separate demands are made of several persons."

Wisconsin.— Barnes *v.* Beloit, 19 Wis. 93; Newcomb *v.* Horton, 18 Wis. 566.

United States.— Dows *v.* Chicago, 11 Wall. 108, 20 L. ed. 65; Cutting *v.* Gilbert, 6 Fed. Cas. No. 3,519, 5 Blatchf. 259.

See 27 Cent. Dig. tit. "Injunction," § 18.

43. *Illinois.*— Du Page County *v.* Jenks, 65 Ill. 275.

Indiana.— Heagy *v.* Black, 90 Ind. 534; Forgey *v.* Northern Gravel Road Co., 37 Ind. 118; Greencastle, etc., Turnpike Co. *v.* Albin, 34 Ind. 554; Robbins *v.* Sand Creek Turnpike Co., 34 Ind. 461. See Jones *v.* Rushville Nat. Bank, 138 Ind. 87, 37 N. E. 338.

Iowa.— Brandirff *v.* Harrison County, 50 Iowa 164.

Kansas.— McGrath *v.* Newton, 29 Kan. 364; Hudson *v.* Atchison County Com'rs, 12 Kan. 140; Gilmore *v.* Norton, 10 Kan. 491.

Ohio.— Glenn *v.* Waddel, 23 Ohio St. 605.

Virginia.— Bull *v.* Read, 13 Gratt. 78.

West Virginia.—Williams *v.* Grant County Ct., 26 W. Va. 488, 53 Am. Rep. 94; Doonan *v.* Grafton Bd. of Education, 9 W. Va. 246; McClung *v.* Livesay, 7 W. Va. 329.

Suit by some taxpayers in behalf of all.— In Du Page County *v.* Jenks, 65 Ill. 275, it is doubted whether one taxpayer may sue to enjoin the collection of taxes from others who have not authorized him to bring such a suit. But in a number of cases it has been held that the suit may be brought by one or more taxpayers for themselves in behalf of all others similarly situated. Bull *v.* Read, 13 Gratt. (Va.) 78; Williams *v.* Grant County Ct., 26 W. Va. 488, 53 Am. Rep. 94; Doonan *v.* Grafton Bd. of Education, 9 W. Va. 246. And some courts have held that the suit to enjoin collection of the tax "must" be brought in behalf of all others similarly situated. Wood *v.* Draper, 24 Barb. (N. Y.) 187; Mann *v.* Union Free School Dist. Bd. of Education, 53 How. Pr. (N. Y.) 289; McClung *v.* Livesay, 7 W. Va. 329.

44. *Alabama.*— Birmingham Traction Co. *v.* Southern Bell Tel., etc., Co., 119 Ala. 144, 24 So. 731.

Connecticut.— Canastota Knife Co. *v.* Newington Tramway Co., 69 Conn. 146, 36 Atl. 1107.

Kansas.— Jordan *v.* Western Union Tel. Co., 69 Kan. 140, 76 Pac. 396.

Kentucky.— Ellis *v.* Wren, 84 Ky. 254, 1 S. W. 440, 8 Ky. L. Rep. 285; Musselman *v.* Marquis, 1 Bush 463, 89 Am. Dec. 637.

Maryland.— Blondell *v.* Consolidated Gas Co., 89 Md. 732, 43 Atl. 817, 46 L. R. A. 187.

Massachusetts.— Providence, etc., Steamboat Co. *v.* Fall River, 183 Mass. 535, 67 N. E. 647; Boston, etc., R. Co. *v.* Sullivan, 177 Mass. 230, 58 N. E. 689, 83 Am. St. Rep. 275; Slater *v.* Gunn, 170 Mass. 509, 49 N. E. 1017, 41 L. R. A. 268; Lynch *v.* Union Sav. Inst., 159 Mass. 306, 34 N. E. 364, 20 L. R. A. 842, 158 Mass. 394, 33 N. E. 603; Tucker *v.* Howard, 128 Mass. 361; Ballou *v.* Hopkinton, 4 Gray 324.

Michigan.— Davis *v.* Frankenlust Tp., 118 Mich. 494, 76 N. W. 1045.

Mississippi.—Warren Mills *v.* New Orleans Seed Co., 65 Miss. 391, 4 So. 298, 7 Am. St. Rep. 671.

New Jersey.—Shimer *v.* Morris Canal, etc., Co., 27 N. J. Eq. 364.

New York.— Coatsworth *v.* Lehigh Valley R. Co., 156 N. Y. 451, 51 N. E. 301; McGean *v.* Metropolitan El. R. Co., 133 N. Y. 9, 30 N. E. 647; Henderson *v.* New York Cent. R. Co., 78 N. Y. 423; Corning *v.* Troy Iron, etc., Factory, 40 N. Y. 191; Williams *v.* New York Cent. R. Co., 16 N. Y. 97, 69 Am. Dec. 651; Hahl *v.* Sugo, 46 N. Y. App. Div. 632, 61 N. Y. Suppl. 770; Olivella *v.* New York, etc., R. Co., 31 Misc. 203, 64 N. Y. Suppl. 1086. *Compare* Jerome *v.* Ross, 7 Johns. Ch. 315, 11 Am. Dec. 484. In Corning *v.* Troy Iron, etc., Factory, *supra*, a mandatory injunction to compel the restoration of water to its natural channel was granted, in part for the reason that at law the complainant's only remedy would consist of a

an injunction will not be granted to relieve one person from the necessity of suing another for a succession of wrongful acts, where the remedy at law is adequate;[45] and it may be a prerequisite that the complainant first establish his right at law.[46]

F. Existence of Other Remedies[47] **— 1. Existence and Adequacy of Remedy at Law**[48] **— a. In General.** Except as changed by statute,[49] the rule is that an injunction will not be granted where there is an adequate remedy at law.[50] All

series of actions for the continued detention of the water. This was regarded as a multiplicity.

North Carolina.— Featherston *v.* Carr, (1903) 46 S. E. 15.

Pennsylvania.— Sullivan *v.* Jones, etc., Steel Co., 208 Pa. St. 540, 57 Atl. 1065, 66 L. R. A. 712; Walters *v.* McElroy, 151 Pa. St. 549, 25 Atl. 125; Bussier *v.* Weekey, 11 Pa. Super. Ct. 463.

Rhode Island.— Lonsdale Co. *v.* Woonsocket, 21 R. I. 498, 44 Atl. 929.

United States.— U. S. Freehold Land, etc., Co. *v.* Gallegos, 89 Fed. 769, 32 C. C. A. 470; King *v.* Stuart, 84 Fed. 546.

England.— Goodson *v.* Richardson, L. R. 9 Ch. 221, 43 L. J. Ch. 790, 30 L. T. Rep. N. S. 142, 22 Wkly. Rep. 337; Allen *v.* Martin, L. R. 20 Eq. 462, 32 L. T. Rep. N. S. 750, 23 Wkly. Rep. 904.

See 27 Cent. Dig. tit. "Injunction," § 18.

Illustrations.— Where trespasses upon land are continuous, the owner has a right to invoke the power of a court of equity to restrain such trespasses, and thus prevent a multiplicity of suits. For example, when the trespasses consist in the continued maintenance of a railroad track and structures and the running of trains over complainant's land. Coatsworth *v.* Lehigh Valley R. Co., 156 N. Y. 451, 51 N. E. 301; McGean *v.* Metropolitan El. R. Co., 133 N. Y. 9, 30 N. E. 647; Williams *v.* New York Cent. R. Co., 16 N. Y. 97, 69 Am. Dec. 651. *Compare* Pensacola, etc., R. Co. *v.* Jackson, 21 Fla. 146.

45. *Arkansas.*— Ellsworth *v.* Hale, 33 Ark. 633.

Florida.— Carney *v.* Hadley, 32 Fla. 344, 14 So. 4, 37 Am. St. Rep. 101, 22 L. R. A. 233. See Pensacola, etc., R. Co. *v.* Jackson, 21 Fla. 146, holding that where the judgment in an action at law may include damages for future injury an injunction will not be granted.

Georgia.— Hatcher *v.* Hampton, 7 Ga. 49.

Illinois.— See Chicago Gen. R. Co. *v.* Chicago, etc., R. Co., 181 Ill. 605, 54 N. E. 1026; Chicago Public Stock Exch. *v.* McClaughry, 148 Ill. 372, 36 N. E. 88.

Maryland.— Nicodemus *v.* Nicodemus, 41 Md. 529.

New York.— Jerome *v.* Ross, 7 Johns. Ch. 335, 11 Am. Dec. 484.

United States.— Roebling *v.* Richmond First Nat. Bank, 30 Fed. 744.

See 27 Cent. Dig. tit. "Injunction," § 18.

A breach of a contract will not be restrained by injunction in order to prevent a multiplicity of suits, when it will be at the complainant's option to sue for damages once for all or many separate times. Atty.-Gen. *v.* Detroit Bd. of Education, 133 Mich. 681, 95 N. W. 746.

46. Lloyd *v.* Catlin Coal Co., 210 Ill. 460, 71 N. E. 335, holding that the cases where equity will enjoin to prevent a multiplicity of suits between two persons only are where the whole controversy arises out of the same matter and has been settled at law, and further litigation, which seems purely vexatious, is persisted in. See also Pratt *v.* Kendig, 128 Ill. 293, 21 N. E. 495; Imperial F. Ins. Co. *v.* Gunning, 81 Ill. 236.

Reason for rule.— If the right claimed affects numerous parties, equity will sometimes enjoin a continuance of the litigation because the judgment against one of the parties would not be binding on the others. But where there are continued suits between two single individuals, arising from the separate repetition of trespasses, equity will not interfere by injunction where the right has not been established at law, because a judgment in any one of the suits would be evidence in all of the others. Chicago Public Stock Exch. *v.* McClaughry, 148 Ill. 372, 36 N. E. 88.

47. See further on this subject *infra*, V, A, 4; V, B, 1, 3, c, d; V, C, 3, b.

48. See Equity, 16 Cyc. 30 *et seq.*

As affecting right to enjoin executions, levies, and sales see Executions, 17 Cyc. 1169 *et seq.*

As affecting right to enjoin judgments see Judgments.

As affecting right to enjoin nuisances see Nuisances.

As affecting right to enjoin collection of taxes see Taxation.

49. See the statutes of the several states.

In Maryland the code provides that no court shall refuse to issue an injunction on the ground that the party asking for it has an adequate remedy in damages, but this does not authorize an injunction to be issued to pay a debt. Frederick County Nat. Bank *v.* Shafer, 87 Md. 54, 39 Atl. 320. See also Brehm *v.* Sperry, 92 Md. 378, 48 Atl. 368.

In Missouri Rev. St. (1879) § 2722, provides that the existence of an adequate remedy at law, other than the remedy in damages, shall not be ground for refusing an injunction. Towner *v.* Bowers, 81 Mo. 491. See also Neiser *v.* Thomas, 99 Mo. 224, 12 S. W. 725; Lytle *v.* James, 98 Mo. App. 337; Sedalia Brewing Co. *v.* Sedalia Waterworks Co., 34 Mo. App. 49.

50. *Alabama.*— Brown *v.* Brown, 68 Ala. 114; Moulton *v.* Reid, 54 Ala. 320.

Alaska.— U. S. *v.* North-West Trading Co., 1 Alaska 5.

Arkansas.— Wingfield *v.* McLure, 48 Ark.

the courts agree in stating this principle, the problem in any individual case

510, 3 S. W. 439; Cummins *v.* Bentley, 5 Ark. 9.

California.— Irwin *v.* Exton, 125 Cal. 622, 58 Pac. 257; Mechanics' Foundry *v.* Ryall, 62 Cal. 416; Burnett *v.* Whitesides, 13 Cal. 156.

Colorado.—Woodward *v.* Ellsworth, 4 Colo. 580.

Connecticut.— Botsford *v.* Wallace, 72 Conn. 195, 44 Atl. 10.

District of Columbia.— Bohrer *v.* Fay, 3 MacArthur 145.

Florida.— Carney *v.* Hadley, 32 Fla. 344, 14 So. 4, 37 Am. St. Rep. 101, 22 L. R. A. 233.

Georgia.— Armour Packing Co. *v.* Lovell, 118 Ga. 164, 44 S. E. 990; Sharpe *v.* Hodges, 116 Ga. 795, 43 S. E. 48; Tucker *v.* Murphey, 114 Ga. 662, 40 S. E. 836; Johnson *v.* Gilmer, 113 Ga. 1146, 39 S. E. 469; Beysiegel *v.* Rome Mut. Loan Assoc., 113 Ga. 1071, 39 S. E. 405; Moultrie *v.* Patterson, 109 Ga. 370, 34 S. E. 600; McKey *v.* Fulton County, 73 Ga. 117; Barnes *v.* Hartwell, 66 Ga. 754.

Illinois.— Lloyd *v.* Catlin Coal Co., 210 Ill. 460, 71 N. E. 335 [*affirming* 109 Ill. App. 37]; Field *v.* Western Springs, 181 Ill. 186, 54 N. E. 929; People *v.* Galesburg, 48 Ill. 485.

Indiana.— Ricketts *v.* Spraker, 77 Ind. 371.

Iowa.— McDonald *v.* Nashua Second Nat. Bank, 106 Iowa 517, 76 N. W. 1011.

Kentucky.— Louisville, etc., R. Co. *v.* Smith, 117 Ky. 364, 78 S. W. 160, 25 Ky. L. Rep. 1459.

Louisiana.— State *v.* Judge Ninth Judicial Dist., 39 La. Ann. 1108, 3 So. 342.

Maine.— Haskell *v.* Thurston, 80 Me. 129, 13 Atl. 273.

Maryland.— Whalen *v.* Dalashmutt, 59 Md. 250; Richardson *v.* Baltimore, 8 Gill 433.

Massachusetts.— Brewer *v.* Springfield, 97 Mass. 152.

Michigan.— Noble *v.* Grandin, 125 Mich. 383, 84 N. W. 465.

Minnesota.— Goodrich *v.* Moore, 2 Minn. 61, 72 Am. Dec. 74.

Mississippi.— Poindexter *v.* Henderson, Walk. 176, 12 Am. Dec. 550.

Missouri.— Planet Property, etc., Co. *v.* St. Louis, etc., R. Co., 115 Mo. 613, 22 S. W. 616.

Nebraska.— Nebraska Tel. Co. *v.* Cornell, 58 Nebr. 823, 80 N. W. 43; Normand *v.* Otoe County, 8 Nebr. 18.

Nevada.— Sherman *v.* Clark, 4 Nev. 138, 97 Am. Dec. 516.

New Hampshire.— Perley *v.* Dolloff, 60 N. H. 504.

New Jersey.— Budd *v.* Camden Horse R. Co., 63 N. J. Eq. 804, 52 Atl. 1130; Pronick *v.* Spirits Distributing Co., 58 N. J. Eq. 97, 42 Atl. 586; Jarvis *v.* Henwood, 25 N. J. Eq. 460; Wooden *v.* Wooden, 3 N. J. Eq. 429.

New York.— Mallett *v.* Weybossett Bank, 1 Barb. 217; Interborough Rapid Transit Co. *v.* Gallagher, 44 Misc. 536, 90 N. Y. Suppl. 104; Schulz *v.* Albany, 27 Misc. 51, 57 N. Y. Suppl. 963; Ward *v.* Kelsey, 14 Abb. Pr. 106; Marks *v.* Wilson, 11 Abb. Pr. 87.

North Carolina.— Kistler *v.* Weaver, 135 N. C. 388, 47 S. E. 478; Puryear *v.* Sanford, 124 N. C. 276, 32 S. E. 685; Long *v.* Merrill, 4 N. C. 549, 7 Am. Dec. 700.

Ohio.— Robert Mitchell Furniture Co. *v.* Cleveland, etc., R. Co., 9 Ohio S. & C. Pl. Dec. 674, 7 Ohio N. P. 640.

Oklahoma.— Winans *v.* Beidler, 6 Okla. 603, 52 Pac. 405.

Oregon.— Wells *v.* Wall, 1 Oreg. 295.

Pennsylvania.— Leahy *v.* Tompkins, 31 Pittsb. Leg. J. N. S. 218; Summit Branch R. Co. *v.* Leininger, 1 Leg. Rec. 258.

South Carolina.— Miller *v.* Furse, Bailey Eq. 187.

Tennessee.— Smith *v.* Ross, 3 Humphr. 220.

Texas.— Givens *v.* Delprat, 28 Tex. Civ. App. 363, 67 S. W. 424.

Vermont.— White *v.* Booth, 7 Vt. 131.

Virginia.— Hudson *v.* Kline, 9 Gratt. 379.

Washington.— Furth *v.* West Seattle, 37 Wash. 387, 79 Pac. 936; Standard Gold Min. Co. *v.* Byers, 31 Wash. 100, 71 Pac. 766.

West Virginia.— Shay *v.* Nolan, 46 W. Va. 299, 33 S. E. 225; Lance *v.* McCoy, 34 W. Va. 416, 12 S. E. 728; Miller *v.* Miller, 25 W. Va. 495.

Wisconsin.— Crandall *v.* Bacon, 20 Wis. 639, 91 Am. Dec. 451.

United States.— Davis, etc., Mfg. Co. *v.* Los Angeles, 189 U. S. 207, 23 S. Ct. 498, 47 L. ed. 778.

Canada.— Webster *v.* Watters, 21 Rev. Lég. 447; Anglo-Continental Guano Works *v.* Emerald Phosphate Co., 21 Rev. Lég. 288, 7 Montreal Q. B. 196; Fish *v.* Corp. d'Argenteuil, 3 Themis (L. C.) 87.

See 27 Cent. Dig. tit. "Injunction," § 15.

Deprivation of right of trial by jury.— To entertain a suit in equity when the party has a plain and complete remedy at law is to deprive defendant of his constitutional right of trial by jury. Spring *v.* Domestic Sewing-Mach. Co., 13 Fed. 446.

The remedy of an employee against his employer for withholding part of his wages is not inadequate merely because the employee would be discharged in case he sought the legal remedy. Buffalo *v.* Pocahontas, 85 Va. 222, 7 S. E. 238.

A prospective injury will not be prevented by injunction unless it appears that the law would not be able to give adequate redress. Wilkes-Barre Gas Co. *v.* Wilkes-Barre, 6 Kulp (Pa.) 431.

Another suit pending.— Where there is an action already pending in which the complainant may obtain relief, he is not entitled to an injunction. Grant *v.* Moore, 88 N. C. 77; Carson *v.* Jansen, 65 Nebr. 423, 91 N. W. 398; Waymire *v.* Jetmore, 22 Ohio St. 271.

The filing of a notice of lis pendens may be sufficient to prevent the injury sought to be enjoined, in which case no injunction will be granted. Gregory *v.* Gregory, 33 N. Y. Super. Ct. 1; Stevenson *v.* Fayerweather, 21 How. Pr. (N. Y.) 449; Mills *v.* Mills, 21

being whether the remedy at law is adequate.[51] To defeat the equitable jurisdiction, however, it is not sufficient that the law should merely afford some remedy; that remedy must be as practical and efficient as is the equitable remedy in rendering justice and as prompt in its administration.[52] An injunction is in many cases more prompt and efficient than any legal remedy, and because of this promptness and efficiency there is a strong tendency to grant injunctions in cases where formerly the remedy at law would have been deemed fully adequate.[53] So the existence of a remedy at law which would ordinarily be available is no objection to the granting of an injunction when, for reasons beyond his control, the complainant cannot avail himself of it;[54] and the same is true where the remedy must be sought in a foreign court.[55]

b. Damages as a Remedy. The principal remedy afforded by courts of law for an injury is money damages. If such damages will constitute an adequate compensation for the injury threatened or inflicted, equity will not interfere by injunction.[56] But the mere fact that damages are recoverable at law is no objec-

How. Pr. (N. Y.) 437; Waddell *v.* Bruen, 4 Edw. (N. Y.) 671.

51. Watson *v.* Sutherland, 5 Wall. (U. S.) 74, 18 L. ed. 580.

Early illustration.— Early in the fifth century a plaintiff asked that defendant be restrained from using "the craftys of enchantement, wychecraft and sorcerye" whereby plaintiff "brake his legge and foul was hurt." The ground alleged was that "the comyn lawe may nout helpe." See Selden Soc., Sel. Chan. Cas. xxxiv.

52. *Alabama.*— Roy *v.* Henderson, 132 Ala. 175, 31 So. 457.

Georgia.— Brooks *v.* Stroud, 111 Ga. 875, 36 S. E. 960.

Indiana.— Meyer *v.* Boonville, 162 Ind. 165, 70 N. E. 146; Ingle *v.* Bottoms, 160 Ind. 73, 66 N. E. 160; Drew *v.* Geneva, 150 Ind. 662, 50 N. E. 871, 42 L. R. A. 814; Stauffer *v.* Cincinnati, etc., R. Co., 33 Ind. App. 356, 70 N. E. 543; Chappell *v.* Jasper County Oil, etc., Co., 31 Ind. App. 170, 66 N. E. 515.

Iowa.— Lemmon *v.* Guthrie Center, 113 Iowa 36, 84 N. W. 986, 86 Am. St. Rep. 361; Des Moines City R. Co. *v.* Des Moines, 90 Iowa 770, 58 N. W. 906, 26 L. R. A. 767.

Maryland.— Jay *v.* Michael, 92 Md. 198, 48 Atl. 61.

Massachusetts.— Driscoll *v.* Smith, 184 Mass. 221, 68 N. E. 210.

Minnesota.— Lerch *v.* Duluth, 88 Minn. 295, 92 N. W. 1116.

Mississippi.— Irwin *v.* Lewis, 50 Miss. 363.

Nebraska.— Warlier *v.* Williams, 53 Nebr. 143, 73 N. W. 539.

New York.— American Law Book Co. *v.* Edward Thompson Co., 41 Misc. 396, 84 N. Y. Suppl. 225.

Texas.— Sumner *v.* Crawford, 91 Tex. 129, 41 S. W. 994.

West Virginia.— Oil Run Petroleum Co. *v.* Gale, 6 W. Va. 525.

United States.— Watson *v.* Sutherland, 5 Wall. 74, 18 L. ed. 580; Georgetown *v.* Alexandria Canal Co., 12 Pet. 91, 9 L. ed. 1012; Boyce *v.* Grundy, 3 Pet. 210, 7 L. ed. 655; Williams *v.* Neely, 134 Fed. 1, 67 C. C. A. 171; Crane *v.* McCoy, 6 Fed. Cas. No. 3,354, 1 Bond 422; Pierpont *v.* Fowle, 19 Fed. Cas. No. 11,152, 2 Woodb. & M. 23. *Compare* Spring *v.* Domestic Sewing-Mach. Co., 13 Fed. 446.

See 27 Cent. Dig. tit. "Injunction," § 15.

The right to intervene in an equitable action is not such an adequate remedy as will prevent the person having such right from bringing an injunction suit to restrain the withdrawal of the fund from the court until the determination of the new action. Mann *v.* Flower, 26 Minn. 479, 5 N. W. 365.

53. See Equitable Guarantee, etc., Co. *v.* Donahoe, (Del. 1900) 45 Atl. 583.

54. Long *v.* Beard, 4 N. C. 684; Nicolson *v.* Hancock, 4 Hen. & M. (Va.) 491.

55. Stanton *v.* Embry, 46 Conn. 595.

The fact that defendant is a non-resident of the state does not make the remedy at law inadequate. Morgan *v.* Baxter, 113 Ga. 144, 38 S. E. 411.

The federal courts are not prevented from giving equitable relief by injunction against the enforcement of void freight rate laws, to citizens of other states, merely because the state in passing the law has provided a remedy in the courts of law of that state. A state cannot tie up a citizen of another state, having property rights within its territory invaded by unauthorized acts of its own officers, to suits for redress in its own courts. Smyth *v.* Ames, 169 U. S. 466, 18 S. Ct. 418, 42 L. ed. 819.

56. *Alabama.*— Deegan *v.* Neville, 127 Ala. 471, 29 So. 173, 85 Am. St. Rep. 137.

California.— Middleton *v.* Franklin, 3 Cal. 238.

Georgia.— Detwiler *v.* Bainbridge Grocery Co., 119 Ga. 981, 47 S. E. 553; McFarland *v.* Park Woolen Mills, 113 Ga. 1072, 39 S. E. 405; Moore *v.* Guyton, 110 Ga. 330, 35 S. E. 339; Morrison *v.* Latimer, 51 Ga. 519.

Illinois.— Pennsylvania Co. *v.* Chicago, 181 Ill. 289, 54 N. E. 825, 53 L. R. A. 223; Stolp *v.* Hoyt, 44 Ill. 219.

Indiana.— Christman *v.* Howe, (1904) 70 N. E. 809; Wabash R. Co. *v.* Engleman, 160 Ind. 329, 66 N. E. 892; Laughlin *v.* Lamasco City, 6 Ind. 223.

Iowa.—Dinwiddie *v.* Roberts, 1 Greene 363.

Kansas.— Atchison, etc., R. Co. *v.* Meyer, 62 Kan. 696, 64 Pac. 597.

tion to the granting of an injunction in case such damages would not be an adequate compensation for the injury.[57] An action for damages is an inadequate remedy where there is no method by which the amount of the damage can be accurately computed,[58] or where the amount cannot be adequately proved.[59]

c. Relief by Motion in Pending Suit. A party to a pending suit is not entitled to relief by injunction with reference to any matter affected by that suit, when he might obtain adequate relief by a motion in that suit itself.[60]

Maryland.— Hardesty *v.* Taft, 23 Md. 512, 87 Am. Dec. 584.

Missouri.— Victor Min. Co. *v.* Morning Star Min. Co., 50 Mo. App. 525.

Montana.— Atchison *v.* Peterson, 1 Mont. 561.

Nebraska.— Wabaska Electric Co. *v.* Wymore, 60 Nebr. 199, 82 N. W. 626.

New Jersey.— Morris Canal, etc., Co. *v.* Central R. Co., 16 N. J. Eq. 419; Warne *v.* Morris Canal, etc., Co., 5 N. J. Eq. 410.

New York.— Knickerbocker Ice Co. *v.* Forty Second St., etc., R. Co., 176 N. Y. 408, 68 N. E. 864; New Hartford Canning Co. *v.* Bulifant, 78 N. Y. App. Div. 6, 78 N. Y. Suppl. 951; Swett *v.* Troy, 62 Barb. 630; Waterbury *v.* Dry Dock, etc., R. Co., 54 Barb. 388; Hackett *v.* Northern Pac. R. Co., 36 Misc. 583, 73 N. Y. Suppl. 1087; Newbury *v.* Newbury, 6 How. Pr. 182; Austin *v.* Chapman, 11 N. Y. Leg. Obs. 103.

North Carolina.— Jordan *v.* Lanier, 73 N. C. 90.

Ohio.— Commercial Bank *v.* Bowman, 1 Handy 246, 12 Ohio Dec. (Reprint) 125; Toledo Electric St. R. Co. *v.* Toledo, etc., R. Co., 1 Ohio S. & C. Pl. Dec. 33, 7 Ohio N. P. 211.

Oklahoma.— Marshall *v.* Homier, 13 Okla. 264, 74 Pac. 368.

Pennsylvania.— Shaw *v.* National Transit Co., 4 Pa. Co. Ct. 363; Reading Iron Works *v.* South Chester, 3 Lanc. L. Rev. 107.

Virginia.— James River, etc., Co. *v.* Anderson, 12 Leigh 278.

Washington.— Lawrence *v.* Times Printing Co., 22 Wash. 482, 61 Pac. 166.

West Virginia.— Zanhizer *v.* Hefner, 47 W. Va. 418, 35 S. E. 4.

Wisconsin.— Strœbe *v.* Fehl, 22 Wis. 337.

United States.— Cruickshank *v.* Bidwell, 176 U. S. 73, 20 S. Ct. 280, 44 L. ed. 377 [*affirming* 86 Fed. 7]; Strang *v.* Richmond, etc., R. Co., 93 Fed. 71; Spooner *v.* McConnell, 22 Fed. Cas. No. 13,245, 1 McLean 337.

Canada.— Miller *v.* Campbell, 14 Manitoba 437.

See 27 Cent. Dig. tit. "Injunction," § 16.

The sign of three balls attached by a tenant to a building to indicate his business does no injury to the landlord that cannot be amply compensated in money. Goodell *v.* Lassen, 69 Ill. 145.

57. *Indiana.*— Miller *v.* Bowers, 30 Ind. App. 116, 65 N. E. 559.

Kentucky.— Louisville, etc., R. Co. *v.* Pittsburg, etc., Coal Co., 111 Ky. 960, 64 S. W. 969, 23 Ky. L. Rep. 1318, 98 Am. St. Rep. 447, 55 L. R. A. 601 (mandatory injunction to compel defendant to furnish cars for coal shipments); Barnett *v.* Morrison, 2 Litt. 68.

Texas.— Anderson *v.* Rowland, 17 Tex. Civ. App. 460, 44 S. W. 911.

United States.— Missouri, etc., R. Co. *v.* Texas, etc., R. Co., 10 Fed. 497, 4 Woods 360, grade crossings by intersecting railroads.

England.— Jordeson *v.* Sutton, etc., S. Gas Co., [1899] 2 Ch. 217, 68 L. J. Ch. 457, 80 L. T. Rep. N. S. 815, 63 J. P. 692; Cooper *v.* Crabtree, 20 Ch. D. 589, 51 L. J. Ch. 544, 47 L. T. Rep. N. S. 5, injury to reversioner's possessory rights.

See 27 Cent. Dig. tit. "Injunction," § 16.

Reason for inadequacy.— Damages at law may be inadequate, because redress at law would require numerous actions, because defendant is insolvent, or because the injurious act would greatly derange business. Haskell *v.* Thurston, 80 Me. 129, 13 Atl. 273; Delaware, etc., R. Co. *v.* Frank, 110 Fed. 689.

Penalty fixed for breach of contract.—Even though a sum is named in a contract as liquidated damages to be payable upon its breach, such breach may be enjoined if such damages would not be in fact adequate and were not intended to be payable in return for the privilege of doing the acts prohibited by the contract. Augusta Steam Laundry Co. *v.* Debow, 98 Me. 496, 57 Atl. 845; Ewing *v.* Davis, 25 Ohio Cir. Ct. 203.

The cutting of electric wires causes an injury to business for which damages are not adequate compensation. Point Pleasant Electric Light, etc., Co. *v.* Bayhead, 62 N. J. Eq. 296, 49 Atl. 1108.

Damages inadequate because of collateral injury.— Legal compensation refers solely to the injury done to the property taken, and not to any collateral or consequential damages, resulting to the owner, by the trespass. Loss of trade, destruction of credit, and failure of business prospects are collateral or consequential damages. In such case equity may prevent the injury by injunction. Watson *v.* Sutherland, 5 Wall. (U. S.) 74, 18 L. ed. 580. See also McCreery *v.* Sutherland, 23 Md. 471, 87 Am. Dec. 578.

58. Hepburn *v.* Voute, 5 Ohio S. & C. Pl. Dec. 311, 7 Ohio N. P. 290; Gilchrist *v.* Van Dyke, 63 Vt. 75, 21 Atl. 1099; Delaware, etc., R. Co. *v.* Frank, 110 Fed. 689. But see Atty.-Gen. *v.* Detroit Bd. of Education, 133 Mich. 681, 95 N. W. 746, holding that where one enters into a contract knowing that in case of breach the measure of damages will be uncertain, he is not entitled to an injunction restraining a breach on the ground that damages will be inadequate.

59. Christie *v.* Shankey, 12 N. Y. St. 657.

60. *Alabama.*— Haralson *v.* George, 56 Ala. 295.

d. Insolvency of Defendant.[61] The solvency or insolvency of defendant is not important where the injunction is sought on the ground of the impossibility of measuring the injury in terms of money; there the remedy at law is inadequate, however responsible defendant may be.[62] Insolvency of defendant is frequently an added ground for an injunction where the complainant is really entitled on other grounds to the relief asked.[63] But in many cases an injunction has been granted on the ground that defendant is insolvent, where, were it not for such insolvency, an action for damages would be an adequate remedy. Thus an insolvent defendant has been enjoined from making a wrongful transfer of property,[64] from wrongfully paying out money that belongs to the complainant,[65] or from doing other wrongful acts to the injury of the complainant.[66] Suits for the purchase-money of property have often been restrained where defendant therein has a set-off that he could make use of only in a separate action, and that action would afford him an inadequate remedy because the other party is insolvent.[67] And the payment of money by third persons to one who is insolvent may be restrained at the suit of those entitled to the money.[68] It is self-evident that where damages would fully compensate for the injury and defendant is

Nevada.— Hamer *v.* Kane, 7 Nev. 61.

New York.— Wood *v.* Swift, 81 N. Y. 31; Hayward *v.* Hood, 39 Hun 596; Savage *v.* Allen, 59 Barb. 291; Stover *v.* Cogswell, 57 Barb. 448; Van Vleck *v.* Clark, 38 Barb. 316; Peet *v.* Hatcher, 13 N. Y. Civ. Proc. 449; Steffin *v.* Steffin, 4 N. Y. Civ. Proc. 179; Ely *v.* Lowenstein, 9 Abb. Pr. N. S. 37.

North Carolina.— Faison *v.* McIlwaine, 72 N. C. 312; Childs *v.* Martin, 69 N. C. 126; Jarman *v.* Saunders, 64 N. C. 367; Mason *v.* Mills, 63 N. C. 564; Washington *v.* Emery, 57 N. C. 29.

Canada.— Rogers *v.* Burnham, 24 Nova Scotia 535.

See 27 Cent. Dig. tit. "Injunction," § 15.

Stay effective only in part.— If a stay of proceedings in the action at law would not embrace the whole case, then an injunction is proper, even though such a stay could be obtained on motion. That such a stay is obtainable bars the right to an injunction only when the whole object of the injunction would be accomplished by the simple order to stay proceedings. Chappell *v.* Potter, 11 How. Pr. (N. Y.) 365.

61. See further on this subject *infra*, V, B, 3, d, (v).

62. Sullivan *v.* Dooley, 31 Tex. Civ. App. 589, 73 S. W. 82.

63. *California.*— Bensley *v.* Mountain Lake Water Co., 13 Cal. 306, 73 Am. Dec. 575.

Georgia.— Graham *v.* Dahlonega Gold Min. Co., 71 Ga. 296.

Illinois.— Jackson Union Tel. Co. *v.* Ava, etc., Tel. Co., 100 Ill. App. 535.

Indiana.— Shoemaker *v.* South Bend Spark Arrester Co., 135 Ind. 471, 35 N. E. 280, 22 L. R. A. 332.

Maine.— Augusta Steam Laundry Co. *v.* Debow, 98 Me. 496, 57 Atl. 845.

Massachusetts.—Boston, etc., R. Co. *v.* Sullivan, 177 Mass. 230, 58 N. E. 689, 83 Am. St. Rep. 275.

Missouri.— Schubach *v.* McDonald, 179 Mo. 163, 78 S. W. 1020, 101 Am. St. Rep. 452, 65 L. R. A. 136; Provolt *v.* Chicago, etc., R. Co., 69 Mo. 633.

New York.— Caro *v.* Metropolitan El. R. Co., 46 N. Y. Super. Ct. 138.

Pennsylvania.— Heilman *v.* Union Canal Co., 37 Pa. St. 100.

Texas.— Foster *v.* Roseberry, (Civ. App. 1904) 78 S. W. 701.

See 27 Cent. Dig. tit. "Injunction," § 17.

64. Lewis *v.* Christian, 40 Ga. 187; Delafield *v.* Illinois, 2 Hill (N. Y.) 159; Phillips *v.* Trezevant, 67 N. C. 370.

Application of proceeds.—Such transfer will not be enjoined where the property is trust property and there appears no danger that the insolvent trustee will misapply the proceeds. Tooke *v.* Newman, 75 Ill. 215. And see also Charlotte First Nat. Bank *v.* Jenkins, 64 N. C. 719.

Remedy by replevin.— Where the complainant could amply protect himself by replevin, there should not be an injunction to prevent the transfer. Marks *v.* Jones, 71 Minn. 136, 73 N. W. 719.

65. Lawson *v.* Virgin, 21 Ga. 356; Denson *v.* Stewart, 15 La. Ann. 456; Drury *v.* Roberts, 2 Md. Ch. 157.

66. Chappell *v.* Boyd, 56 Ga. 578; Amoskeag Mfg. Co. *v.* Shirley, 69 N. H. 269, 39 Atl. 976; Peterson *v.* Smith, 30 Tex. Civ. App. 139, 69 S. W. 542; Hodgson *v.* Duce, 2 Jur. N. S. 1014, 4 Wkly. Rep. 576.

67. Hunter *v.* Bradford, 3 Fla. 269; Carswell *v.* Macon Mfg. Co., 38 Ga. 403; Ponder *v.* Cox, 28 Ga. 305; Brownston *v.* Cropper, 1 Litt. (Ky.) 173; Jones *v.* Stanton, 11 Mo. 433. See also *infra*, V, A, 4 c, (v).

Collection of illegal tax.— The insolvency of a tax-collector is held sufficient ground for an injunction against the collection of an illegal tax. Deming *v.* James, 72 Ill. 78.

Insolvency doubtful.— It is not error to refuse to enjoin an execution sale on the ground that complainant holds unpaid notes of the execution plaintiff, where the evidence of such execution plaintiff's insolvency is conflicting. Eady *v.* Blanton, 96 Ga. 768, 22 S. E. 323.

68. Wheeler *v.* Lack, 37 Oreg. 238, 61 Pac.

solvent and able to respond, no injunction should issue.[69] Some courts have held that in cases where damages at law are capable of fully compensating for the injury, the remedy at law is not to be deemed inadequate merely because defendant appears to be insolvent.[70] There can be no doubt that in cases where there are positive reasons why equity should not take jurisdiction and in cases over which the equitable jurisdiction has never been extended, such jurisdiction cannot be conferred by merely showing that defendant is insolvent.[71]

e. Injunction Incidental to Other Relief. An injunction may be granted as incidental to relief asked in a case where equity has jurisdiction for some other purpose, even though the law might afford a sufficient remedy for the specific injury sought to be prevented by the injunction. Equity having jurisdiction for one purpose may dispose of the entire matter in its own way.[72]

f. Negligence of Party Asking Injunction as Affecting Adequacy of Remedy. The remedy at law is not regarded as inadequate, where the injustice is likely to occur because of the party's own negligence, and in such case an injunction will not be granted.[73] Where one has allowed his case to go to trial with insufficient evidence, and has negligently omitted to file a bill of discovery, he is not entitled to an injunction.[74]

2. Statutory Remedy — a. In General. An injunction should not be granted to restrain the violation of any right, whether it be a statutory right or not, if

849; Chattanooga Grocery Co. *v.* Livingston, (Tenn. Ch. App. 1900) 59 S. W. 470.

69. *Connecticut.*— Johnson *v.* Connecticut Bank, 21 Conn. 148.

Indiana.— McQuarrie *v.* Hildebrand, 23 Ind. 122.

Missouri.— Hopkins *v.* Lovell, 47 Mo. 102.

Nebraska.— Brown *v.* Reed, (1904) 100 N. W. 143.

New York.— De Carvajal *v.* Young Men's Christian Assoc., 37 Misc. 727, 76 N. Y. Suppl. 474; Syracuse Rapid Transit R. Co. *v.* Salt Springs Nat. Bank, 28 Misc. 619, 59 N. Y. Suppl. 1066.

North Carolina.— Kistler *v.* Weaver, 135 N. C. 388, 47 S. E. 478; Goldsboro Lumber Co. *v.* Hines Bros. Lumber Co., 127 N. C. 130, 37 S. E. 152; Mahoney *v.* Stewart, 123 N. C. 106, 31 S. E. 384; Byrd *v.* Bazemore, 122 N. C. 115, 28 S. E. 965.

See 27 Cent. Dig. tit. "Injunction," § 17.

70. Pensacola, etc., R. Co. *v.* Spratt, 12 Fla. 26, 91 Am. Dec. 747; Heilman *v.* Union Canal Co., 37 Pa. St. 100; Stump's Appeal, 1 Pa. Cas. 420; Strang *v.* Richmond, etc., R. Co., 93 Fed. 71.

Where there is no showing of irreparable injury to the substance of the estate, acts of trespass will not be enjoined merely because the trespasser is insolvent. Mechanics' Foundry *v.* Ryall, 75 Cal. 601, 17 Pac. 703; Centreville, etc., Turnpike Co. *v.* Barnett, 2 Ind. 536; Moore *v.* Halliday, 43 Oreg. 243, 72 Pac. 801, 99 Am. St. Rep. 724.

Contracts.— Where defendant is given by contract the right to do a certain thing in return for which he promises to pay a sum named, he will not be enjoined from doing the thing on the ground that he is insolvent. Dills *v.* Doebler, 62 Conn. 366, 26 Atl. 398, 36 Am. St. Rep. 345, 20 L. R. A. 432. See also Vincent *v.* King, 13 How. Pr. (N. Y.) 234.

71. Brown *v.* Birmingham, 140 Ala. 590, 37 So. 173; Reyes *v.* Middleton, 36 Fla. 99, 17 So. 937, 51 Am. St. Rep. 17, 29 L. R. A. 66.

Preferring creditors.— A debtor has a legal right to prefer some of his creditors, even though he is insolvent, and he will not be enjoined. Heidingsfelder *v.* Slade, 60 Ga. 396.

72. McClellan *v.* Kerby, 4 Indian Terr. 736, 76 S. W. 295; Davis *v.* Butters Lumber Co., 132 N. C. 233, 43 S. E. 650; Hamilton *v.* Fond du Lac, 25 Wis. 490.

As dependent on right to principal relief.— The right to the injunction stands or falls with the right to the principal relief asked to which the injunction is incidental. Kahn *v.* Kahn, 15 Fla. 400.

Incidental to a receivership.— Vernon *v.* Kinzie, 2 U. C. Q. B. O. S. 40; Harrold *v.* Wallis, 9 Grant Ch. (U. C.) 443.

73. *Alabama.*— Howell *v.* Motes, 54 Ala. 1.

Connecticut.— Johnson *v.* Connecticut Bank, 21 Conn. 148.

Georgia.— Dulin *v.* Caldwell, 28 Ga. 117.

New York.— Van Vleck *v.* Clark, 38 Barb. 316; Miller *v.* Avery, 2 Barb. Ch. 582.

Texas.— Harrison *v.* Crumb, 1 Tex. App. Civ. Cas. § 991.

Vermont.— Isham *v.* Higbee, 2 Vt. 354.

England.— Curtess *v.* Smalridge, 1 Ch. Cas. 43, 22 Eng. Reprint 685, 2 Freem. 178, 22 Eng. Reprint 1143.

See 27 Cent. Dig. tit. "Injunction," §§ 24, 28. And see Equity, 16 Cyc. 38, 39. See also 1 Spence Eq. 675; 2 Story Eq. § 895.

Neglect to move for new trial.—Equity will not take jurisdiction on grounds that might have been made the basis of a motion for a new trial. Bateman *v.* Willoe, 1 Sch. & Lef. 201.

74. 2 Story Eq. § 895; Sewell *v.* Freeston, 1 Ch. Cas. 65, 22 Eng. Reprint 697; Protheroe *v.* Forman, 2 Swanst. 227, 36 Eng. Reprint 602.

the remedy provided by statute is an adequate one;[75] but if the statutory remedy is not adequate a bill for injunction lies.[76]

b. By Criminal Proceedings. Although the wrongful act sought to be enjoined has also been made the subject of criminal prosecution by statute, the complainant is entitled to an injunction in case such prosecution is not an adequate remedy to prevent or make good the injury to him.[77] It is otherwise in case the criminal prosecution will effectually redress the complainant's wrong.[78]

3. Remedy by Appeal, Certiorari, Writ of Prohibition, Quo Warranto, or Mandamus. An injunction will not be granted when relief may be obtained by an appeal,[79] by certiorari,[80] by a writ of prohibition,[81] or by habeas corpus.[82] So also quo warranto is the proper and adequate remedy in many cases, particularly where

75. *Colorado.*— Price *v.* Kramer, 4 Colo. 546.

Idaho.— Picotte *v.* Watt, 3 Ida. 447, 31 Pac. 805.

Illinois.— Wahl *v.* School Directors, 78 Ill. App. 403; Sidell Drainage Com'rs *v.* Sconce, 38 Ill. App. 120.

Indiana.— Wayne County *v.* Dickinson, 153 Ind. 682, 53 N. E. 929.

Maryland.— Glenn *v.* Fowler, 8 Gill & J. 340.

Massachusetts.—Freeman *v.* Carpenter, 147 Mass. 23, 16 N. E. 714.

Michigan.—Strack *v.* Miller, 134 Mich. 311, 96 N. W. 452.

Minnesota.— Kerr *v.* Waseca, 88 Minn. 191, 92 N. W. 932.

Missouri.— People's R. Co. *v.* Grand Ave. R. Co., 149 Mo. 245, 50 S. W. 829.

New York.— See People *v.* Vanderbilt, 24 How. Pr. 301, holding that a statutory power to compel the removal of a structure does not exclude the remedy in equity to prevent the erection of the structure.

Pennsylvania.— Brown's Appeal, 66 Pa. St. 155; Corcoran *v.* Pittston, 11 Kulp 81; Reynolds *v.* Davis, 1 Kulp 342; Hamersly *v.* Germantown, etc., Turnpike Co., 8 Phila. 314.

Texas.— *Ex p.* Mayes, 39 Tex. Cr. 36, 44 S. W. 831, election contest.

United States.— Eureka, etc., R. Co. *v.* California, etc., R. Co., 103 Fed. 897, condemnation proceedings.

England.—Hayward *v.* East London Waterworks Co., 28 Ch. D. 138, 54 L. J. Ch. 523, 52 L. T. Rep. N. S. 175; Cooper *v.* Whittingham, 15 Ch. D. 501, 49 L. J. Ch. 752, 43 L. T. Rep. N. S. 16, 28 Wkly. Rep. 720; Hood *v.* North Eastern R. Co., L. R. 11 Eq. 116, 40 L. J. Ch. 17, 23 L. T. Rep. N. S. 433, 19 Wkly. Rep. 266. But see Stevens *v.* Chown, [1901] 1 Ch. 894, 65 J. P. 470, 70 L. J. Ch. 571, 84 L. T. Rep. N. S. 796, 49 Wkly. Rep. 460, holding that the remedy by injunction may be invoked to prevent an invasion of proprietary rights whether newly created or merely confirmed by statute, unless the statute expressly or by a necessary implication excludes that remedy.

Canada.— Central Vermont R. Co. *v.* St. Johns, 13 Rev. Lég. 343; Beauregard *v.* Roxton Falls, 6 Quebec Pr. 155.

See 27 Cent. Dig. tit. "Injunction," § 15.

Interstate Commerce Act.— The remedies provided by sections 8 and 9 of the Interstate Commerce Act are exclusive. Central Stock Yards Co. *v.* Louisville, etc., R. Co., 112 Fed. 823.

76. Norwood *v.* Dickey, 18 Ga. 528; Vincent *v.* Chicago, etc., R. Co., 49 Ill. 33; Boston, etc., R. Co. *v.* Salem, etc., R. Co., 2 Gray (Mass.) 1; Hamilton, etc., Road Co. *v.* Raspberry, 13 Ont. 466.

77. *Alabama.*— Cabbell *v.* Williams, 127 Ala. 320, 28 So. 405; Mobile *v.* Louisville, etc., R. Co., 84 Ala. 115, 4 So. 106, 5 Am. St. Rep. 342.

Illinois.— Christie St. Commission Co. *v.* Chicago Bd. of Trade, 92 Ill. App. 604.

Kentucky.— Underhill *v.* Murphy, 117 Ky. 640, 78 S. W. 482, 25 Ky. L. Rep. 1731.

Massachusetts.— Vegelahn *v.* Guntner, 167 Mass. 92, 44 N. E. 1077, 57 Am. St. Rep. 443, 35 L. R. A. 722.

Michigan.— Beck *v.* Railway Teamsters' Protective Union, 118 Mich. 497, 77 N. W. 13, 74 Am. St. Rep. 421, 42 L. R. A. 407.

Missouri.— Hamilton-Brown Shoe Co. *v.* Saxey, 131 Mo. 212, 32 S. W. 1106, 52 Am. St. Rep. 622.

New Jersey.—Grey *v.* New York, etc., Traction Co., 56 N. J. Eq. 463, 40 Atl. 21.

United States.— *In re* Debs, 158 U. S. 564, 15 S. Ct. 900, 39 L. ed. 1092.

See 27 Cent. Dig. tit. "Injunction," § 15.

Nuisances.— The fact that a nuisance is also a criminal offense does not deprive a party specially injured of his right to an injunction. J. K. Gilcrest, etc., Co. *v.* Des Moines, (Iowa 1905) 102 N. W. 831.

78. Com. *v.* McGovern, 116 Ky. 212, 75 S. W. 261, 25 Ky. L. Rep. 411, 66 L. R. A. 280; Neaf *v.* Palmer, 103 Ky. 496, 45 S. W. 506, 20 Ky. L. Rep. 176, 41 L. R. A. 219; State *v.* Capital City Dairy Co., 62 Ohio St. 123, 56 N. E. 651; Edwards *v.* McClure, 11 Pa. Dist. 230, 32 Pittsb. Leg. J. N. S. 352; Caldwell *v.* Galt, 27 Ont. App. 162. See also *infra*, V, G, H.

One threatened with a prosecution under either a valid or a void statute or ordinance has an adequate remedy at law, in the opportunity to establish his innocence in the criminal court. Brown *v.* Birmingham, 140 Ala. 590, 37 So. 173.

79. See *infra*, V, A, 4, e.

80. See *infra*, V, A, 4, e.

81. Birmingham R., etc., Co. *v.* Birmingham Traction Co., 121 Ala. 475, 25 So. 777.

82. Turner *v.* Newton, 31 Ill. App. 423

the question involved is really the title to an office.[83] A mandatory injunction will not be granted where mandamus furnishes an adequate remedy.[84] Such is the case where the object of the bill is to compel the performance of some official ministerial act as required by law.[85]

4. Remedy Outside the Courts. Where the complainant has an adequate means of redress in his own hands,[86] or before some private quasi-judicial tribunal,[87] he is not entitled to an injunction. It is no objection to an injunction, however, that the complainant may have the right to abate a nuisance or remove an obstruction or otherwise redress his own grievance by force. Although he may be allowed to take the law into his own hands in some cases, the law will in no case compel him to do so.[88]

G. Conduct of Complainant as Affecting Right — 1. Fraudulent or Dishonest Conduct. The applicant for an injunction is governed by the usual equitable rules, and the relief will be denied him, even though he shows that he has a right and would otherwise be entitled to the remedy, in case he himself has acted dishonestly, fraudulently, or illegally.[89] It is not enough to show that defendant is without right; the complainant who seeks equity must do equity and must affirmatively show himself to be equitably entitled to the relief asked.[90]

83. Grove Dist. Tp. *v.* Myles, 109 Iowa 541, 80 N. W. 544; Arnold *v.* Henry, 155 Mo. 48, 55 S. W. 1089, 78 Am. St. Rep. 556; State *v.* Withrow, 154 Mo. 397, 55 S. W. 460; Newton County School Dist. No. 4 *v.* Smith, 90 Mo. App. 215; Greene *v.* Knox, 175 N. Y. 432, 67 N. E. 910; Brower *v.* Kantner, 190 Pa. St. 182, 43 Atl. 7; Corcoran *v.* Pittston, 11 Kulp (Pa.) 81. See Com. *v.* Banks, 9 Pa. Dist. 436, quo warranto not exclusive remedy. See, generally, Officers; Quo Warranto.

84. Mason *v.* Byrley, 84 S. W. 767, 26 Ky. L. Rep. 487; Coleman *v.* New York, 173 N. Y. 612, 66 N. E. 1106 [*affirming* 70 N. Y. App. Div. 218, 75 N. Y. Suppl. 342]; State *v.* Chester Tp., 25 Ohio Cir. Ct. 424. See, generally, Mandamus.

Illustration.— Mandamus is the proper and adequate remedy to compel a municipal corporation to apply its funds in payment of a judgment. Safe-Deposit, etc., Co. *v.* Anniston, 96 Fed. 661.

Where mandamus would not be sufficiently prompt, an injunction may issue. Baker *v.* Briggs, 99 Va. 360, 38 S. E. 277.

Where the relief asked is prohibitory in nature, injunction and not mandamus is the proper remedy. State *v.* Moran, 24 Mont. 433, 63 Pac. 390.

85. Nassau Electric R. Co. *v.* White, 12 Misc. (N. Y.) 631, 34 N. Y. Suppl. 960; Safe-Deposit, etc., Co. *v.* Anniston, 96 Fed. 661. But see Condon *v.* Maloney, 108 Tenn. 82, 65 S. W. 871.

86. Jarvis *v.* Henwood, 25 N. J. Eq. 460.

Illustrations.— A school-board may prevent the reading of the Bible in school by discharging the teacher. New Antioch Bd. of Education *v.* Paul, 10 Ohio S. & C. Pl. Dec. 17, 7 Ohio N. P. 58. And one who holds an option to purchase stock may prevent its being voted so as to depreciate its value by exercising his option to purchase. Clowes *v.* Miller, 60 N. J. Eq. 179, 47 Atl. 345.

87. Gregg *v.* Massachusetts Medical Soc., 111 Mass. 185, 15 Am. Rep. 24; Thomas *v.* Musical Mut. Protective Union, 121 N. Y. 45, 24 N. E. 24, 8 L. R. A. 175.

Suspension from a fraternal order cannot be prevented by the issuance of a writ of injunction until the remedies provided by the rules of the order are first exhausted. Mead *v.* Stirling, 62 Conn. 586, 27 Atl. 591, 23 L. R. A. 227.

Remedy before a public officer.— Where a harbor-master has summary power to prevent an obstruction to a ship canal, the application should be first made to him and not to the courts for an injunction. People *v.* Horton, 5 Hun 516 [*affirmed* in 64 N. Y. 610].

88. Stamford *v.* Stamford Horse R. Co., 56 Conn. 381, 15 Atl. 749, 1 L. R. A. 375; *In re* Debs, 158 U. S. 564, 15 S. Ct. 900, 39 L. ed. 1092.

89. Skrainka *v.* Oertel, 14 Mo. App. 474; Messner *v.* Lykens, etc., St. R. Co., 13 Pa. Super. Ct. 429; Brophy *v.* American Brewing Co., 11 Pa. Dist. 333; Great Western R. Co. *v.* Oxford, etc., R. Co., 3 De G. M. & G. 341, 52 Eng. Ch. 267, 43 Eng. Reprint 133, 5 De G. & Sm. 437, 64 Eng. Reprint 1188, 16 Jur. 443; Williams *v.* Roberts, 8 Hare 315, 32 Eng. Ch. 315; Blakemore *v.* Glamorganshire Canal Co., 2 L. J. Ch. 95, 1 Myl. & K. 154, 7 Eng. Ch. 154, 39 Eng. Reprint 639; Browning *v.* Ryan, 4 Manitoba 486.

An abutting owner may obtain an injunction to prevent the construction of tracks on the street, even though he has acquired the property recently and from collateral motives. Savannah, etc., R. Co. *v.* Woodruff, 86 Ga. 94, 13 S. E. 156.

The non-disclosure of material facts on the *ex parte* application for a preliminary injunction does not necessarily disentitle the complainant to a permanent injunction on the final hearing. Miller *v.* Campbell, 14 Manitoba 437.

90. Wood *v.* Bangs, 1 Dak. 179, 46 N. W. 586; Marks *v.* Jones, 71 Minn. 136, 73 N. W. 719; Mott *v.* U. S. Trust Co., 19 Barb. (N. Y.) 568.

2. Estoppel. If the complainant has himself acted in such a way as to raise an estoppel against him, he will not be granted an injunction to prevent the act in question.[91]

3. Laches — a. In General. The mere lapse of time, independent of the statute of limitations, may be a sufficient ground for denying an injunction unless a legal excuse for such delay is shown.[92] It has been held, however, that laches will not bar relief where complainant's right is clear and of such character as entitles him to ask the interference of the court without resorting to law for the establishment of his right.[93] Furthermore it has been held that delay will not constitute a bar, although complainant has suffered a considerable time to elapse where he has frequently protested to defendant against the doing of the act sought to be enjoined.[94] No arbitrary rule exists for determining what constitutes laches, but the question

91. Pennsylvania R. Co. *v.* Glenwood, etc., Electric St. R. Co., 184 Pa. St. 227, 39 Atl. 80; Big Mountain Imp. Co.'s Appeal, 54 Pa. St. 361; Foster *v.* Smith, 10 Kulp 380; Com. *v.* Wilkes-Barre, etc., Coal, etc., Co., 12 Luz. Leg. Reg. (Pa.) 75; Davies *v.* Sear, L. R. 7 Eq. 427, 38 L. J. Ch. 545, 20 L. T. Rep. N. S. 56, 17 Wkly. Rep. 390; Rochdale Canal Co. *v.* King, 16 Beav. 630, 17 Jur. 1000, 22 L. J. Ch. 604, 1 Wkly. Rep. 278, 51 Eng. Reprint 924; Williams *v.* Jersey, Cr. & Ph. 91, 10 L. J. Ch. 149, 18 Eng. Ch. 91, 41 Eng. Reprint 424; *Ex p.* White, 4 Deac. & C. 279, 4 L. J. Bankr. 50, 2 Mont. & A. 104; Clegg *v.* Edmondson, 8 De G. M. & G. 299, 26 L. J. Ch. 673; 57 Eng. Ch. 608, 44 Eng. Reprint 593; Great Western R. Co. *v.* Oxford, etc., R. Co., 3 De G. M. & G. 341, 52 Eng. Ch. 267, 43 Eng. Reprint 133, 5 De G. & Sm. 437, 64 Eng. Reprint 1188, 16 Jur. 443; Rochdale Canal Co. *v.* King, 15 Jur. 962, 20 L. J. Ch. 675, 2 Sim. N. S. 78, 42 Eng. Ch. 78, 61 Eng. Reprint 270; Greenhalgh *v.* Manchester, etc., R. Co., 3 Jur. 693, 8 L. J. Ch. 75, 3 Myl. & C. 784, 1 R. & Can. Cas. 68, 14 Eng. Ch. 784, 40 Eng. Reprint 1128; Ernest *v.* Vivian, 33 L. J. Ch. 513, 9 L. T. Rep. N. S. 785, 12 Wkly. Rep. 295. And see Philadelphia *v.* Philadelphia, etc., R. Co., 58 Pa. St. 253, holding that a complainant cannot create equities in his favor by expenditures while his own bill is pending.

Waiver.— The complainant may waive his right to an injunction. Poudrette *v.* Ontario, etc., R. Co., 11 Montreal Leg. N. 130.

92. *Illinois.*— Higgins *v.* Bullock, 73 Ill. 205.

Kentucky.— McHugh *v.* Louisville Bridge Co., 65 S. W. 456, 23 Ky. L. Rep. 1546.

Maryland.— Binney's Case, 2 Bland 99.

Michigan.— Birdsall *v.* Johnson, 44 Mich. 134, 6 N. W. 226.

Missouri.— Stamper *v.* Roberts, 90 Mo. 683, 3 S. W. 214; Crum *v.* Hathaway, 32 Mo. App. 555.

Nebraska.— North *v.* Platte County, 29 Nebr. 447, 45 N. W. 692, 26 Am. St. Rep. 395.

New Jersey.— Schoenfeld *v.* American Can Co., (Ch. 1903) 55 Atl. 1044; Bell *v.* Pennsylvania, etc., R. Co., (Ch. 1887) 10 Atl. 741; East Newark Co. *v.* Gilbert, 12 N. J. Eq. 78; Scudder *v.* Trenton Delaware Falls Co., 1 N. J. Eq. 694, 23 Am. Dec. 756.

New York.— Van Ranst *v.* New York Veterinary Surgeons' College, 4 Hun 620; Rondout First Nat. Bank *v.* Navarro, 17 N. Y. Suppl. 900. See Post *v.* Hudson River Tel. Co., 76 N. Y. App. Div. 621, 78 N. Y. Suppl. 576.

Ohio.— Chapman *v.* Mad River, etc., R. Co., 6 Ohio St. 119. But see Cilly *v.* Cincinnati, 7 Ohio Dec. (Reprint) 344, 2 Cinc. L. Bul. 135.

Pennsylvania.— Grey *v.* Ohio, etc., R. Co., 1 Grant 412; Westhaeffer *v.* Lebanon, etc., St. R. Co., 3 Pa. Dist. 56; Summit Branch R. Co. *v.* Leininger, 1 Leg. Rec. 258; Parker *v.* Spillin, 10 Phila. 8. But see Hoyt *v.* Hoyt, 2 Pa. Co. Ct. 152.

South Carolina.— Gilmer *v.* Hunnicutt, 57 S. C. 166, 35 S. E. 521.

Texas.— Morris *v.* Edwards, 62 Tex. 205.

Wisconsin.— Sheldon *v.* Rockwell, 9 Wis. 166, 76 Am. Dec. 265.

United States.— Edwards *v.* Mercantile Trust Co., 121 Fed. 203.

Canada.— Rich *v.* Brantford, 14 Grant Ch. (U. C.) 83; Grier *v.* St. Vincent, 12 Grant Ch. (U. C.) 330; Carroll *v.* Perth, 10 Grant Ch. (U. C.) 64; Radenhurst *v.* Coate, 6 Grant Ch. (U. C.) 139; Atty.-Gen. *v.* McLaughlin, 1 Grant Ch. (U. C.) 34. *Compare* Canada Paint Co. *v.* Johnson, 4 Quebec 253.

See 27 Cent. Dig. tit. "Injunction," §§ 199, 308.

As affecting taxpayer's right to enjoin illegal act.— Ordinarily laches in bringing suit will not prevent a resident taxpayer from enjoining a disbursement of public funds about to be made by county officials without authority or in defiance of law. Storey *v.* Murphy, 9 N. D. 115, 81 N. W. 23.

93. Burden *v.* Stein, 27 Ala. 104, 62 Am. Dec. 758.

Where a clear invasion of a legal right is shown, and good ground for equitable interference, mere delay short of the period fixed by the statute of limitations does not usually deprive one of his right to restrain the invasion. Fullwood *v.* Fullwood, 9 Ch. D. 176, 47 L. J. Ch. 459, 38 L. T. Rep. N. S. 380, 26 Wkly. Rep. 435; Rochdale Canal Co. *v.* King, 15 Jur. 962, 20 L. J. Ch. 675, 2 Sim. N. S. 78, 42 Eng. Ch. 78, 61 Eng. Reprint 270; Rowland *v.* Michell, 75 L. T. Rep. N. S. 65.

94. Corcoran *v.* Nailor, 6 Mackey (D. C.) 580.

is to be decided upon the particular circumstances of each case.[95] It is a general rule that the principle of laches is not applicable to the government and its higher officials.[96]

b. Assent or Acquiescence. When, in addition to the lapse of time, plaintiff assents by word or conduct to the adverse claim or injurious conduct of defendant, he will be deprived of his right to the interference of a court of equity,[97]

A mere threat to take legal proceedings, on the other hand, has been held insufficient to exclude the consequence of laches or acquiescence. Holt *v.* Parsons, 118 Ga. 895, 45 S. E. 690; Eaton *v.* New York, etc., R. Co., 24 N. J. Eq. 49.

95. See EQUITY, 16 Cyc. 152. See also the following cases:

Connecticut.— Fisk *v.* Ley, 76 Conn. 295, 56 Atl. 559.

Georgia.— Manly Bldg. Co. *v.* Newton, 114 Ga. 245, 40 S. E. 274; Murdock *v.* Mitchell, 30 Ga. 74, 76 Am. Dec. 634.

Illinois.— Tilton *v.* Stein, 87 Ill. 122; Anderson *v.* Frye, 18 Ill. 94.

Kentucky.— Offut *v.* Bradford, 4 Bush 413; McHugh *v.* Louisville Bridge Co., 65 S. W. 456, 23 Ky. L. Rep. 1546.

Maryland.— Northern Cent. R. Co. *v.* Baltimore, 21 Md. 93.

Massachusetts.— Fuller *v.* Melrose, 1 Allen 166.

Michigan.— Swan Creek Tp. *v.* Brown, 130 Mich. 382, 90 N. W. 38; Birdsall *v.* Johnson, 44 Mich. 134, 6 N. W. 226.

Missouri.— Stamper *v.* Roberts, 90 Mo. 683, 3 S. W. 214; Crum *v.* Hathaway, 32 Mo. App. 555.

Montana.— Mantle *v.* Speculator Min. Co., 27 Mont. 473, 71 Pac. 665.

Nebraska.— North *v.* Platte County, 29 Nebr. 447, 45 N. W. 692, 26 Am. St. Rep. 395.

New Jersey.— Schoenfeld *v.* American Can Co., (Ch. 1903) 55 Atl. 1044; Cranford *v.* Watters, 61 N. J. Eq. 284, 48 Atl. 316; Bell *v.* Pennsylvania, etc., R. Co., (Ch. 1882) 10 Atl. 741; East Newark Co. *v.* Gilbert, 12 N. J. Eq. 78; Hulme *v.* Shreve, 4 N. J. Eq. 116.

New York.— Beekman *v.* Third Ave. R. Co., 13 N. Y. App. Div. 279, 43 N. Y. Suppl. 174; Rondout First Nat. Bank *v.* Navarro, 17 N. Y. Suppl. 900; Brush *v.* Manhattan R. Co., 13 N. Y. Suppl. 908, 26 Abb. N. Cas. 73; Mackay *v.* Blackett, 9 Paige 437.

North Carolina.— Jones *v.* Person County Com'rs, 107 N. C. 248, 12 S. E. 69.

Ohio.— Defiance Water Co. *v.* Defiance, 68 Ohio St. 520, 67 N. E. 1052; Baltimore, etc., R. Co. *v.* Pittsburg, etc., R. Co., 1 Ohio Cir. Ct. 100, 1 Ohio Cir. Dec. 60.

Pennsylvania.— Nesinger *v.* Clay, etc., Turnpike Co., 203 Pa. St. 265, 52 Atl. 197; Heilman *v.* Lebanon, etc., R. Co., 175 Pa. St. 188, 34 Atl. 647; Gatzmer *v.* St. Vincent School Soc., 147 Pa. St. 313, 23 Atl. 452; Westhaeffer *v.* Lebanon, etc., St. R. Co., 3 Pa. Dist. 56; Jackson *v.* Slate Belt Electric St. R. Co., 7 North. Co. Rep. 286.

South Carolina.— Brooks *v.* South Carolina R. Co., 8 Rich. Eq. 30.

Texas.— Fleming *v.* Reed, 37 Tex. 152; San Antonio *v.* Campbell, (Civ. App. 1900) 56 S. W. 97; Ware *v.* Millican, (Civ. App. 1895) 30 S. W. 728.

Wisconsin.— Quayle *v.* Bayfield County, 114 Wis. 108, 89 N. W. 892; Sherry *v.* Smith, 72 Wis. 339, 39 N. W. 556.

United States.— Edwards *v.* Mercantile Trust Co., 121 Fed. 203; Ritter *v.* Ulman, 78 Fed. 222, 24 C. C. A. 71.

Delay, although not amounting to acquiescence, may be sufficient ground for refusing an interlocutory injunction, and is often made an additional ground for refusing equitable relief where other grounds for refusal exist. Lewis *v.* Elizabeth, 25 N. J. Eq. 298; Atty.-Gen. *v.* Brown, 24 N. J. Eq. 89; Stewart Wire Co. *v.* Lehigh Coal, etc., Co., 203 Pa. St. 474, 53 Atl. 352; Gaunt *v.* Flynney, L. R. 8 Ch. 8, 42 L. J. Ch. 122, 27 L. T. Rep. N. S. 569, 21 Wkly. Rep. 129; Bovill *v.* Crate, L. R. 1 Eq. 388; Bridson *v.* Benecke, 12 Beav. 1, 50 Eng. Reprint 960; Atty.-Gen. *v.* Sheffield Gas Consumers Co., 3 De G. M. & G. 304, 17 Jur. 677, 22 L. J. Ch. 811, 1 Wkly. Rep. 185, 52 Eng. Ch. 237, 43 Eng. Reprint 119; Ware *v.* Regent's Canal Co., 3 De G. & J. 212, 5 Jur. N. S. 25, 28 L. J. Ch. 153, 7 Wkly. Rep. 67, 60 Eng. Ch. 165, 44 Eng. Reprint 1250; Isaacson *v.* Thompson, 41 L. J. Ch. 101, 20 Wkly. Rep. 196; Salisbury *v.* Metropolitan R. Co., 39 L. J. Ch. 429, 18 Wkly. Rep. 484; Winter *v.* Bristol, etc., R. Co., 6 L. T. Rep. N. S. 20, 10 Wkly. Rep. 210. But *compare* Lee *v.* Haley, 18 Wkly. Rep. 181.

96. Atty.-Gen. *v.* Algonquin Club, 153 Mass. 447, 27 N. E. 2, 11 L. R. A. 500; U. S. *v.* Kirpatrick, 9 Wheat. (U. S.) 720, 6 L. ed. 199.

Exception to rule.— Where a grantee in good faith and upon a reasonable construction of his grant has expended large sums in public works and the government, knowing this fact, has looked on in silence, it will be denied an injunction because of its laches. Atty.-Gen. *v.* Delaware, etc., R. Co., 27 N. J. Eq. 1.

97. *California.*— Bigelow *v.* Los Angeles, 141 Cal. 503, 75 Pac. 111.

Illinois.— Vail *v.* Mix, 74 Ill. 127.

Louisiana.— City Bank *v.* McIntyre, 8 Rob. 467.

New York.— See Olssen *v.* Smith, 7 How. Pr. 481, failure to aver certain matters in complaint as barring right to temporary injunction.

Ohio.— Goodin *v.* Cincinnati, etc., Canal Co., 18 Ohio St. 169, 98 Am. Dec. 95.

Pennsylvania.— Butler *v.* Egge, 170 Pa. St. 239, 32 Atl. 402; Chambers *v.* Baltimore, etc., R. Co., 139 Pa. St. 347, 21 Atl. 2; Grey

until after he has established his right at law.[98] In this connection assent is not deemed evidence of a grant or privilege conferred, but simply operates to deprive plaintiff of the right to equitable interference.[99]

c. Delay Prejudicial to Defendant. Where plaintiff, with knowledge of all the facts, has delayed so long in seeking equitable relief, without sufficient excuse, that the injury to defendant if the injunction is granted will be much greater by reason of expenditures, etc., than that suffered by plaintiff, an injunction will be refused.[1]

v. Ohio, etc., R. Co., 1 Grant 412; Verdolite Co. *v.* Richards, 7 North. Co. Rep. 113.

The showing of acquiescence required to cause the refusal of a preliminary injunction is much less strong than the showing required to warrant the denial of an injunction at the final hearing on the merits. Gordon *v.* Cheltenham, etc., R. Co., 5 Beav. 229, 2 R. & Can. Cas. 800, 49 Eng. Reprint 565; Child *v.* Douglas, 5 De G. M. & G. 739, 2 Jur. N. S. 950, Kay 560, 2 Wkly. Rep. 701, 54 Eng. Ch. 580, 43 Eng. Reprint 1057; Patching *v.* Gubbins, 17 Jur. 1113, 1 Kay 1, 23 L. J. Ch. 45, 2 Wkly. Rep. 2; Johnson *v.* Wyatt, 9 Jur. N. S. 1333, 33 L. J. Ch. 394, 9 L. T. Rep. N. S. 618, 3 New Rep. 270, 12 Wkly. Rep. 234.

A qualified acquiescence may cause the court to grant damages in lieu of an injunction. Lockwood *v.* London, etc., R. Co., 19 L. T. Rep. N. S. 68.

The failure to object to the passage of an ordinance authorizing the wrongful act is not such acquiescence as to bar the right to an injunction. Townsend *v.* Epstein, 93 Md. 537, 49 Atl. 629, 86 Am. St. Rep. 441, 52 L. R. A. 409.

Acquiescence by the previous holder of stock in illegal dividends does not bar the present holder from enjoining the issuance of other such dividends. Bloxam *v.* Metropolitan R. Co., L. R. 3 Ch. 337, 18 L. T. Rep. N. S. 41, 16 Wkly. Rep. 490.

98. Higbee *v.* Camden, etc., R., etc., Co., 20 N. J. Eq. 435; Reid *v.* Gifford, 6 Johns. Ch. (N. Y.) 19; Baltimore, etc., R. Co. *v.* Pittsburgh, etc., R. Co., 1 Ohio Cir. Ct. 100, 1 Ohio Cir. Dec. 60; Caldwell *v.* Knott, 10 Yerg. (Tenn.) 209; Weller *v.* Smeaton, 1 Bro. Ch. 572, 28 Eng. Reprint 1304, 1 Cox Ch. 102, 29 Eng. Reprint 1081.

99. Grey *v.* Ohio, etc., R. Co., 1 Grant (Pa.) 412. See also ESTOPPEL, 16 Cyc. 759 *et seq.*

1. *Connecticut.*— Whittlesey *v.* Hartford, etc., R. Co., 23 Conn. 421.

Georgia.— Holt *v.* Parsons, 118 Ga. 895, 45 S. E. 690; Wood *v.* Macon, etc., R. Co., 68 Ga. 539; Water-Lot Co. *v.* Bucks, 5 Ga. 315.

Illinois.— Lowery *v.* Pekin, 210 Ill. 575, 71 N. E. 626; Ewertsen *v.* Gerstenberg, 186 Ill. 344, 57 N. E. 1051, 51 L. R. A. 310.

Indiana.— Wayne County *v.* Dickinson, 153 Ind. 682, 53 N. E. 929; Kincaid *v.* Indianapolis Natural Gas Co., 124 Ind. 577, 24 N. E. 1066, 19 Am. St. Rep. 113, 8 L. R. A. 602; Logansport *v.* Uhl, 99 Ind. 531, 49 Am. Rep. 109.

Kansas.— Reisner *v.* Strong, 24 Kan. 410.

Kentucky.— Herr *v.* Central Kentucky Lunatic Asylum, 110 Ky. 282, 61 S. W. 283, 22 Ky. L. Rep. 1722.

Louisiana.—Rudman *v.* Bockel, 28 La. Ann. 276; Richardson *v.* Dinkgrave, 26 La. Ann. 632.

Maryland.— Baltimore *v.* Grand Lodge I. O. O. F., 44 Md. 436.

Massachusetts.— Tash *v.* Adams, 10 Cush. 252.

Michigan.— Payne *v.* Paddock, Walk. 487.

Nebraska.— Brown *v.* Merrick Co., 18 Nebr. 355, 25 N. W. 356; Fremont Ferry, etc., Co. *v.* Dodge County, 6 Nebr. 18.

New Jersey.—Dobleman *v.* Gately, etc., Co., 64 N. J. Eq. 223, 53 Atl. 812; Mumford *v.* Ecuador Development Co., (Ch. 1901) 50 Atl. 476; Levi *v.* Schoenthal, 57 N. J. Eq. 244, 41 Atl. 105 (preliminary injunction); Trout *v.* Lucas, 54 N. J. Eq. 361, 35 Atl. 153; Hyde *v.* French, (Ch. 1891) 21 Atl. 1069; Traphagen *v.* Jersey City, 29 N. J. Eq. 206 [*affirmed* in 29 N. J. Eq. 650]; Liebstein *v.* Newark, 24 N. J. Eq. 200; Higbee *v.* Camden, etc., R. Co., 20 N. J. Eq. 435; Tichenor *v.* Wilson, 8 N. J. Eq. 197; Hulme *v.* Shreve, 4 N. J. Eq. 116. See Simmons *v.* Paterson, 60 N. J. Eq. 385, 45 Atl. 995, 83 Am. St. Rep. 642, 48 L. R. A. 717.

New York.— Musgrave *v.* Sherwood, 23 Hun 669, 54 How. Pr. 338; Munro *v.* Tousey, 13 N. Y. Suppl. 79; Ninth Ave. R. Co. *v.* New York El. R. Co., 3 Abb. N. Cas. 347.

North Carolina.— Jones *v.* Cameron, 81 N. C. 154.

Ohio.— Wirth *v.* Postal Tel. Cable Co., 7 Ohio Cir. Ct. 290, 4 Ohio Cir. Dec. 601; Duhme *v.* Jones, 8 Ohio Dec. (Reprint) 757, 9 Cinc. L. Bul. 293; Cilly *v.* Cincinnati, 7 Ohio Dec. (Reprint) 344, 2 Cinc. L. Bul. 135.

Pennsylvania.— Keeling *v.* Pittsburg, etc., R. Co., 205 Pa. St. 31, 54 Atl. 485; Orne *v.* Fridenberg, 143 Pa. St. 487, 22 Atl. 832, 24 Am. St. Rep. 567; Powers *v.* Bald Eagle Boom Co., 125 Pa. St. 175, 17 Atl. 254; Mayer's Appeal, 73 Pa. St. 164; Pennsylvania R. Co.'s Appeal, 3 Walk. 454; Donohugh *v.* Lister, 11 Pa. Dist. 123, 8 Lack. Leg. N. 52; Plymouth *v.* Plymouth St. R. Co., 10 Kulp 308; Leibig *v.* Ginther, 4 Leg. Gaz. 245; Canton Tp. *v.* Washington, etc., R. Co., 34 Pittsb. Leg. J. 142. See Simcox *v.* Struse, 13 Pa. Dist. 376.

Wisconsin.— Webster *v.* Douglas County, 102 Wis. 181, 77 N. W. 885, 78 N. W. 451, 72 Am. St. Rep. 870; Helms *v.* McFadden, 18 Wis. 191; Pettibone *v.* La Crosse, etc., R. Co., 14 Wis. 443.

England.— Cooper *v.* Hubbuck, 30 Beav. 160, 7 Jur. N. S. 457, 31 L. J. Ch. 123, 9 Wkly. Rep. 352, 54 Eng. Reprint 849.

Canada.— Sanson *v.* Northern R. Co., 29 Grant Ch. (U. C.) 459.

The government and quasi-public corporations may avail themselves of this principle as fully as an individual.[2]

d. Delay Prejudicial to Third Persons. When plaintiff has improperly delayed action until the right of third persons have intervened and an injunction cannot be granted without substantial injury to such rights, an injunction will be denied.[3]

e. Excuse For Delay. Laches will not bar plaintiff's right to an injunction if a legal excuse for the delay is proved.[4] For instance, where plaintiff has used due diligence and investigated every fact suggested by the surrounding circumstances, ignorance of an essential fact will excuse delay.[5]

H. Former Applications For Injunction as Affecting Right — 1. Former Injunction Dissolved or Application Refused. Where the complainant has obtained an injunction which has later been dissolved, he may be entitled to a second injunction if he amends his bill or files a supplemental one;[6] but he is not entitled to a second injunction on grounds that were set up in his first bill or should have been set up.[7]

2. Former Injunction Existing. If the complainant has obtained an injunction in one court and that injunction is still in force, there is no need for a second injunction in that or in another court, and it will be refused.[8]

See 27 Cent. Dig. tit. "Injunction," §§ 199, 200.

Mandatory injunction.— The complainant may forfeit his right to a mandatory injunction by unreasonably delaying in bringing suit or by apparently acquiescing in the wrongful act. Mackintyre *v.* Jones, 9 Pa. Super. Ct. 543; Henderson *v.* Price, 11 Pa. Dist. 80; Brown *v.* Howell, 8 North. Co. Rep. (Pa.) 181; Gaunt *v.* Fynney, L. R. 8 Ch. 8, 42 L. J. Ch. 122, 27 L. T. Rep. N. S. 569, 21 Wkly. Rep. 129; Gaskin *v.* Balls, 13 Ch. D. 324, 28 Wkly. Rep. 552; Folkestone *v.* Woodward, L. R. 15 Eq. 159, 42 L. J. Ch. 782, 27 L. T. Rep. N. S. 574, 21 Wkly. Rep. 97; Senior *v.* Pawson, L. R. 3 Eq. 330, 15 Wkly. Rep. 220; Caldwell *v.* Galt, 27 Ont. App. 162. See Smith *v.* Smith, L. R. 20 Eq. 500, 44 L. J. Ch. 630, 32 L. T. Rep. N. S. 787, 23 Wkly. Rep. 771.

2. Western Union Tel. Co. *v.* Judkins, 75 Ala. 428; Byron *v.* Louisville, etc., R. Co., 59 S. W. 519, 22 Ky. L. Rep. 1007; State *v.* Trenton, (N. J. Sup. 1894) 29 Atl. 149; Meredith *v.* Sayre, 32 N. J. Eq. 557; Traphagen *v.* Jersey City, 29 N. J. Eq. 206 [*affirmed* in 29 N. J. Eq. 650]; Pickert *v.* Ridgefield Park R. Co., 25 N. J. Eq. 316; Nesinger *v.* Clay, etc., Turnpike Co., 203 Pa. St. 265, 52 Atl. 197.

3. Pender *v.* Pittman, 84 N. C. 372; Witte *v.* People's Pass. R. Co., 1 Leg. Chron. (Pa.) 252.

4. *Connecticut.*— Harding *v.* Stamford Water Co., 41 Conn. 87.

District of Columbia.— Brainard *v.* Buck, 16 App. Cas. 595; Corcoran *v.* Nailor, 6 Mackey 580.

Georgia.— Holt *v.* Parsons, 118 Ga. 895, 45 S. E. 690; Gammage *v.* Georgia Southern R. Co., 65 Ga. 614.

Iowa.— Bush *v.* Dubuque, 69 Iowa 233, 28 N. W. 542.

New Jersey.—Ocean City Assoc. *v.* Schurch, 57 N. J. Eq. 268, 41 Atl. 914; Easton *v.* New York, etc., R. Co., 24 N. J. Eq. 49.

Pennsylvania.— Seal *v.* Northern Cent. R. Co., 1 Pearson 547.

United States.— Lyon *v.* Tonawanda, 98 Fed. 361.

See 27 Cent. Dig. tit. "Injunction," § 201.

The laches of a covenantee in seeking to enjoin the breaking of a covenant is not excused, because the injunction is sought to restrain the doing of business on Sunday. Ocean City Assoc. *v.* Schurch, 57 N. J. Eq. 268, 41 Atl. 914.

5. Harding *v.* Stamford Water Co., 41 Conn. 87; Brainard *v.* Buck, 16 App. Cas. (D. C.) 595.

6. Cox *v.* Griffin, 17 Ga. 249; Buckley *v.* Corse, 1 N. J. Eq. 504; Van Bergen *v.* Demarest, 4 Johns. Ch. (N. Y.) 37; Armstrong *v.* Hickman, 6 Munf. (Va.) 287.

New party complainant.— Where one bill has been dismissed it is proper to refuse an injunction asked for the same reasons on the same statement of facts against the same parties, even though the complainant may be a different person. Stoddart *v.* Vanlaningham, 14 Kan. 18.

7. *Georgia.*— Conwell *v.* Neal, 118 Ga. 624, 45 S. E. 910.

Kentucky.— Grubbs *v.* Lipscomb, 1 Bibb 145.

Louisiana.— Fluker *v.* Davis, 12 La. Ann. 613.

New Jersey.— Hornor *v.* Leeds, 10 N. J. Eq. 86.

New York.— Jewett *v.* Albany City Bank, Clarke 241.

Ohio.— U. S. Bank *v.* Schultz, 3 Ohio 61.

See 27 Cent. Dig. tit. "Injunction," § 7.

Removal of grounds.— Where the grounds on which a preliminary injunction was granted have been removed by the person enjoined, it is error to grant a second preliminary injunction. Meadville's Appeal, 1 Pa. Cas. 463, 5 Atl. 730.

8. *California.*—Eldridge *v.* Wright, 15 Cal. 88.

Kansas.— McMillen *v.* Butler, 15 Kan. 62.

I. Injunction Ineffectual or Unnecessary — 1. In General. A court of equity will refuse to grant an injunction where circumstances are such that the injunction cannot be enforced by the court, or where such enforcement will require a continuous supervision on the part of the court.[9] In like manner a court will refuse an injunction where for any reason it can be of no benefit to the complainant.[10] Such is the case where the complainant has already in some other manner obtained the relief sought.[11]

2. Injuria Sine Damno. A defendant will not be enjoined from doing an illegal or wrongful act where, because of the illegality or for other reasons, the attempted action will be void and of no effect, and hence of no injury to the complainant.[12]

3. Change in Circumstances After Suit Brought. Where, after the filing of the bill, events occur which render an injunction unnecessary or ineffectual, it will generally be refused;[13] but defendant cannot, by hastening his wrongful acts to completion after the filing of the bill, thereby deprive the court of jurisdiction. Although it cannot prevent the act, it can give damages.[14] It has also been held that the abandonment by defendant of his illegal course of action is not sufficient reason for denying the injunction asked;[15] and the same is true of a mere propo-

Montana.— Montana Ore Purchasing Co. *v.* Boston, etc., Consol. Copper, etc., Min. Co., 27 Mont. 410, 71 Pac. 403.

New York.— Livingston *v.* Gibbons, 4 Johns. Ch. 571.

United States.— Leverich *v.* Mobile, 122 Fed. 549.

See 27 Cent. Dig. tit. "Injunction," § 7.

The pendency of another bill asking the same relief is no objection to the granting of an injunction. Roberts *v.* Jordan, 3 Munf. (Va.) 488.

Counter injunctions.—In case the complainant has been enjoined from erecting a structure, he cannot obtain an injunction to prevent interference with his erecting such structure, for this would be an irregular way to dissolve the first injunction. Martin *v.* O'Brien, 34 Miss. 21. *Compare* Wells *v.* New Orleans, 32 La. Ann. 676.

9. McConnell *v.* Arkansas Brick, etc., Co., 70 Ark. 568, 69 S. W. 559; Miller *v.* Edison Electric Illuminating Co., 66 N. Y. App. Div. 470, 73 N. Y. Suppl. 376; Atty.-Gen. *v.* International Bridge Co., 22 Grant Ch. (U. C.) 298.

10. Joliet, etc., R. Co. *v.* Healy, 94 Ill. 416; Owen *v.* Field, 12 Allen (Mass.) 457.

Restraining payment.— Where a creditor's assignee has attached money to the debtor in another state that would have been exempt in New Jersey, the debtor is not entitled to an injunction to prevent the assignee from paying such money over to the creditor, since such injunction would not restore the money to the debtor. Margarum *v.* Moon, 63 N. J. Eq. 586, 53 Atl. 179.

11. Hallenborg *v.* Cobre Grande Copper Co., (Ariz. 1904) 74 Pac. 1052; Daugherty *v.* Curtis, (Iowa 1903) 97 N. W. 67; Union Terminal R. Co. *v.* State R. Com'rs, 54 Kan. 352, 38 Pac. 290.

Divorce.—A divorced wife will not be enjoined from using her former husband's name, when the divorce decree itself prohibits such use. Blanc *v.* Blanc, 21 Misc. (N. Y.) 268, 47 N. Y. Suppl. 694.

12. *Louisiana.*— New Orleans, etc., R. Co. *v.* New Orleans, 52 La. Ann. 1831, 28 So. 311.

New York.— Adirondack R. Co. *v.* Indian River Co., 27 N. Y. App. Div. 326, 50 N. Y. Suppl. 245; Bagaley *v.* Vanderbilt, 16 Abb. N. Cas. 359.

Pennsylvania.— Sebring *v.* Joanna Heights Assoc., 2 Pa. Dist. 629.

United States.— Stevens *v.* Missouri, etc., R. Co., 106 Fed. 771, 45 C. C. A. 611; Ryan *v.* Williams, 100 Fed. 172.

Canada.—Stephens *v.* Montreal, 7 Montreal Leg. N. 114.

See 27 Cent. Dig. tit. "Injunction," § 20.

An injunction to restrain the enforcement of an ordinance will not be refused on the ground that it will not injure complainant because it is void on its face, where such invalidity appears only in connection with outside facts which must be established by evidence *aliunde*. Los Angeles City Water Co. *v.* Los Angeles, 88 Fed. 720.

13. Lanahan *v.* Gahan, 37 Md. 105; People *v.* Grand Rapids, etc., Plank Road Co., 67 Mich. 5, 34 N. W. 250; Reynolds *v.* Everett, 144 N. Y. 189, 39 N. E. 72 [*affirming* 67 Hun 294, 22 N. Y. Suppl. 306]. *Compare* Duff *v.* Russell, 60 N. Y. Super. Ct. 80, 14 N. Y. Suppl. 134.

The holding of an election cannot be restrained by injunction when the date for holding it goes by before the suit can be determined. McKinney *v.* Bradford County Com'rs, (Fla. 1888) 3 So. 887; Kerr *v.* Riddle, (Tex. Civ. App. 1895) 31 S. W. 328.

14. Langmaid *v.* Reed, 159 Mass. 409, 34 N. E. 593; Lewis *v.* North Kingstown, 16 R. I. 15, 11 Atl. 173, 27 Am. St. Rep. 724; Davenport *v.* Rylands, L. R. 1 Eq. 302, 35 L. J. Ch. 204.

15. Patterson *v.* Barber Asphalt Pav. Co., 94 Minn. 39, 101 N. W. 1064, 102 N. W. 176.

The withdrawal of an illegal ordinance is not necessarily sufficient reason for not restraining its passage by injunction. Roberts *v.* Louisville, 92 Ky. 95, 17 S. W. 216, 13 L. R. A. 844.

sition on the part of a defendant, made after the bill is filed, to change his course of action so as to avoid the injury.[16]

J. Relative Convenience and Injury[17] — **1. In General.** If it is clear that there is a violation of a right of the complainant and his injury is regarded as irreparable and his other remedies inadequate, he is ordinarily entitled to an injunction even though the injunction will cause defendant a greater loss than his own.[18] But in any event, when the injunction will cause great injury to defendant and will confer no benefit or very little benefit in comparison upon the complainant, it is within the discretion of the court to refuse the application.[19]

16. Pacific Mut. Tel. Co. *v.* Chicago, etc., Bridge Co., 36 Kan. 118, 12 Pac. 560. But see Behn *v.* Young, 21 Ga. 207, holding that an injunction should be refused where defendant, in the presence of the chancellor, proposes to do all that complainant asks in his bill.

17. See further on this subject *infra*, V, B, 2, c, (I), (C).

18. Proskey *v.* Cumberland Realty Co., 35 Misc. (N. Y.) 50, 70 N. Y. Suppl. 1125. There can be no balancing of conveniences when such balancing involves the preservation of an established right. Sullivan *v.* Jones, etc., Steel Co., 208 Pa. St. 540, 57 Atl. 1065, 66 L. R. A. 712, so holding where an injunction was sought to protect the possession and enjoyment of property as against its destruction by the artificial use of the land of another.

A public necessity will not prevent equitable relief when private property is being taken without compensation. Cilly *v.* Cincinnati, 7 Ohio Dec. (Reprint) 344, 2 Cinc. L. Bul. 135.

Injury to real estate.— A continuing trespass or permanent injury may be enjoined, although the injunction will cost defendant more than failure to grant it would cost complainant. Lynch *v.* Union Sav. Inst., 159 Mass. 306, 34 N. E. 364, 20 L. R. A. 842. See also Tucker *v.* Howard, 128 Mass. 361; Sullivan *v.* Jones, etc., Steel Co., 208 Pa. St. 540, 57 Atl. 1065, 66 L. R. A. 712; Walters *v.* McElroy, 151 Pa. St. 549. The question whether complainant shall have a prohibitory injunction or, if the work affecting the property has been done, a mandatory injunction requiring the restoration of the estate to its former condition depends upon a consideration of the equities between the parties. Lynch *v.* Union Sav. Inst., *supra*. In general where defendant has gone on without right and without excuse, in an attempt to appropriate complainant's property, or to interfere with his rights, and has changed the condition of his real estate, he is compelled to undo so far as possible what he has wrongfully done affecting complainant and pay the damages. Lynch *v.* Union Sav. Inst., *supra*; Lynch *v.* Union Sav. Inst., 158 Mass. 394, 33 N. E. 603. On the other hand, where, by an innocent mistake, erections have been placed a little upon complainant's land, and the damage caused to defendant by their removal would be greatly disproportionate to the injury of which complainant complains, the court will not order their removal, but will leave complainant to his remedy at law. Lynch *v.* Union Sav. Inst., 159 Mass. 306, 34 N. E. 364, 20 L. R. A. 842; Brande *v.* Grace, 154 Mass. 210, 31 N. E. 633; Hunter *v.* Carroll, 64 N. H. 572, 15 Atl. 17; Aynsley *v.* Glover, L. R. 18 Eq. 544, 43 L. J. Ch. 777, 31 L. T. Rep. N. S. 219, 23 Wkly. Rep. 147; Lowe *v.* Innes, 4 De G. J. & S. 286, 69 Eng. Ch. 222, 46 Eng. Reprint 929.

Diversion of water.— A mandatory injunction may be obtained to compel the restoration of water to its natural channel, even though great loss to defendant would result without apparent benefit to plaintiff. Corning *v.* Troy Iron, etc., Factory, 40 N. Y. 191.

Loss of profits.— An injunction will not be refused where the complainant's property is about to be taken wrongfully, on the ground that defendant can make more money out of the property than the complainant can. Lynch *v.* Union Sav. Inst., 158 Mass. 394, 33 N. E. 603. See also Goodson *v.* Richardson, L. R. 9 Ch. 221, 43 L. J. Ch. 790, 30 L. T. Rep. N. S. 142, 22 Wkly. Rep. 337. *Compare* Taggart *v.* Interstate Tel., etc., Co., 19 Montg. Co. Rep. (Pa.) 9, 16 York Leg. Rec. 204.

19. *Alabama.*— Western R. Co. *v.* Alabama Grand Trunk R. Co., 96 Ala. 272, 11 So. 483, 17 L. R. A. 474.

California.— Clark *v.* Willett, 35 Cal. 534.

Connecticut.— Robinson *v.* Clapp, 67 Conn. 538, 35 Atl. 504, 52 Am. St. Rep. 298; Whittlesey *v.* Hartford, etc., R. Co., 23 Conn. 421.

District of Columbia.— Harkness *v.* District of Columbia, 1 MacArthur 121.

Georgia.— Everett *v.* Tabor, 119 Ga. 128, 46 S. E. 72.

Illinois.— Lloyd *v.* Catlin Coal Co., 210 Ill. 460, 71 N. E. 335 [*affirming* 109 Ill. App. 37]; Seeger *v.* Mueller, 28 Ill. App. 28.

Michigan.— Scott *v.* Palms, 48 Mich. 505, 12 N. W. 677.

Montana.— Atchison *v.* Peterson, 1 Mont. 561.

New Jersey.— Gray *v.* Paterson, (1900) 45 Atl. 995; Erie R. Co. *v.* Delaware, etc., R. Co., 21 N. J. Eq. 283; Higbee *v.* Camden, etc., R., etc., Co., 20 N. J. Eq. 435.

New York.— Gerken *v.* Hall, 65 N. Y. App. Div. 16, 71 N. Y. Suppl. 753, 72 N. Y. Suppl. 1104; Gallatin *v.* Oriental Bank, 16 How. Pr. 253.

Pennsylvania.— Stewart Wire Co. *v.* Lehigh Coal, etc., Co., 203 Pa. St. 474, 53 Atl. 352; Richard's Appeal, 57 Pa. St. 105, 98 Am. Dec. 202; New Boston Coal, etc., Co. *v.* Pottsville Water Co., 54 Pa. St. 164; Elkin *v.* Potter County Poor Dist., etc., Com'rs, 25

Likewise, where the complainant can at comparatively slight cost protect himself, he is not entitled to equitable relief.[20] In all cases the court takes into consideration the relative inconvenience to be caused to the parties, and will refuse an injunction if it appears inequitable to issue it.[21] The court may, however, refuse to consider the comparative loss or inconvenience to defendant where his action has been wanton and unprovoked.[22]

2. Temporary or Preliminary Injunctions. The discretionary power of the court in granting or refusing a temporary injunction should be exercised with a particular view to the relative amount of inconvenience or injury to be suffered by the parties. If the injunction will cause defendant little inconvenience it should be granted even though the complainant's rights are not clearly established.[23] But if the injunction will cause defendant more injury than its refusal

Pa. Co. Ct. 531; Com. *v.* Potter County Poor Dist., 4 Dauph. Co. Rep. 213; Taggart *v.* Interstate Tel., etc., Co., 19 Montg. Co. Rep. 12; Neal's Estate, 16 Wkly. Notes Cas. 443. *Compare* Sullivan *v.* Jones, etc., Steel Co., 208 Pa. St. 540, 57 Atl. 1065, 66 L. R. A. 712; Walters *v.* McElroy, 151 Pa. St. 549, 25 Atl. 125.

Rhode Island.— Chapin *v.* Ground, 15 R. I. 579, 10 Atl. 639.

United States.— Day *v.* Candee, 7 Fed. Cas. No. 3,676. *Compare* Northern Pac. R. Co. *v.* Cunningham, 103 Fed. 708, holding that where railroad and public lands lie in alternate sections, a defendant restrained from grazing his sheep upon railroad lands should have a right of way of necessity across such lands in order to reach the public lands upon which he had a right to graze, the use of the railroad lands being strictly confined to the purposes of a way.

England.— Atty.-Gen. *v.* Dorking Union Guardians of Poor, 20 Ch. D. 595, 51 L. J. Ch. 585, 46 L. T. Rep. N. S. 573, 30 Wkly. Rep. 579.

See 27 Cent. Dig. tit. "Injunction," § 22.

Mandatory injunctions.— The general proposition applies particularly to injunctions mandatory in their nature (Springfield *v.* Springfield St. R. Co., 182 Mass. 41, 64 N. E. 577); and a defendant will not ordinarily be compelled to pull down an expensive structure because it does a comparatively slight injury to the complainant (Cobb *v.* Massachusetts Chemical Co., 179 Mass. 423, 60 N. E. 790; Brande *v.* Grace, 154 Mass. 210, 31 N. E. 633; Engle *v.* Thorn, 3 Duer (N. Y.) 15).

In Massachusetts it is held that where the injunction is denied jurisdiction may be retained for the purpose of awarding damages. Cobb *v.* Massachusetts Chemical Co., 179 Mass. 423, 60 N. E. 790.

20. Hawley *v.* Beardsley, 47 Conn. 571; Cumberland Tel., etc., Co. *v.* United Electric R. Co., 42 Fed. 273, 12 L. R. A. 544. See also Wilkes-Barre Gas Co. *v.* Turner, 7 Kulp (Pa.) 399.

21. Peterson *v.* Santa Rosa, 119 Cal. 387, 51 Pac. 557; Gray *v.* Paterson, (N. J. 1900) 45 Atl. 995; Morris, etc., R. Co. *v.* Prudden, 20 N. J. Eq. 530; Jones *v.* Newark, 11 N. J. Eq. 452; Doherty *v.* Allman, 3 App. Cas. 709, 39 L. T. Rep. N. S. 129, 26 Wkly. Rep. 513.

Evidence of acquiescence on the part of complainant is given special weight against him when, although his right has been violated by defendant, the injury to be caused to defendant by the injunction is much greater than the complainant's injury. Herr *v.* Central Kentucky Lunatic Asylum, 110 Ky. 282, 61 S. W. 283, 22 Ky. L. Rep. 1722; Gray *v.* Paterson, (N. J. 1900) 45 Atl. 995; Grey *v.* Ohio, etc., R. Co., 1 Grant (Pa.) 412 [*citing* Hilton *v.* Granville, 4 Beav. 130, 49 Eng. Reprint 288, Cr. & Ph. 283, 18 Eng. Ch. 283, 41 Eng. Reprint 498, 10 L. J. Ch. 398] (holding that where property taken by a railroad company had scarcely any appreciable value complainant's right was doubtful and he had acquiesced in the encroachment until defendant's road was constructed, an injunction would be denied); Pettibone *v.* La Crosse, etc., R. Co., 14 Wis. 443.

22. *Massachusetts.*— Lynch *v.* Union Sav. Inst., 158 Mass. 394, 33 N. E. 603, holding that a threatened eviction of a tenant by the owner of the fee might be enjoined where the lease had three years to run from the date of the filing of the bill. *Compare* Brande *v.* Grace, 154 Mass. 210, 31 N. E. 633, where an injunction was refused where plaintiff's lease had but eight months to run and a structure had been built by defendant on the premises after a decision in an inferior court that it had a right to do so, although such decision was afterward reversed on appeal.

Michigan.— Ives *v.* Edeson, 124 Mich. 402, 83 N. W. 120, 83 Am. St. Rep. 329, 50 L. R. A. 134.

New Jersey.— Morris, etc., R. Co. *v.* Prudden, 20 N. J. Eq. 530; Jones *v.* Newark, 11 N. J. Eq. 452.

New York.— Corning *v.* Troy Iron, etc., Factory, 40 N. Y. 191.

England.— Goodson *v.* Richardson, L. R. 9 Ch. 221, 43 L. J. Ch. 790, 30 L. T. Rep. N. S. 142, 22 Wkly. Rep. 337.

Tortious act.— The principle that the court will refuse to enjoin where greater injury will result from granting than from refusing an injunction has no application where the act complained of is in itself as well as in its incidents tortious. Walters *v.* McElroy, 151 Pa. St. 549, 25 Atl. 125. See also Sullivan *v.* Jones, etc., Steel Co., 208 Pa. St. 540, 57 Atl. 1065, 66 L. R. A. 712.

23. *Alabama.*— East, etc., R. Co. *v.* East Tennessee, etc., R. Co., 75 Ala. 275.

would impose on the complainant, it should generally not be issued.[24] The same principle applies in case the issuance or refusal of the injunction will cause injury to the public and third persons, the rule being that even though as against defendant alone the complainant may be entitled to the order asked, the court may in its discretion refuse it because of public or outside interests.[25]

K. Injury or Inconvenience to the Public. The interests of the public are to be taken into consideration by the court, and when the issuance of an injunction will cause serious public inconvenience or loss, without a correspondingly great advantage to the complainant, no injunction will be granted.[26] If the injunction

Georgia.— Everett *v.* Tabor, 119 Ga. 128, 46 S. E. 72; Hartridge *v.* Rockwell, R. M. Charlt. 260. *Compare* Chestatee Pyrites Co. *v.* Cavenders Creek Gold Min. Co., 118 Ga. 255, 45 S. E. 267.

Kansas.— Bertenshaw *v.* Hargrove, 33 Kan. 668, 7 Pac. 270.

New York.— Engle *v.* Thorn, 3 Duer 15.

North Carolina.— Roanoke Nav. Co. *v.* Emry, 108 N. C. 130, 12 S. E. 900.

Ohio.— Hepburn *v.* Voute, 5 Ohio S. & C. Pl. Dec. 311, 7 Ohio N. P. 290.

Pennsylvania.— Grey *v.* Ohio, etc., R. Co., 1 Grant 412; Gebbie's Estate, 9 Pa. Dist. 711; Grant Tp. Water Co. *v.* Pennypacker, 6 Dauph. Co. Rep. 81.

Tennessee.— Flippin *v.* Knaffle, 2 Tenn. Ch. 238, holding that all that the judge should require, upon the preliminary application, is a case of probable right, and probable danger to that right, without the interposition of the court, and then his discretion should be regulated by the balance of inconvenience or injury to one party or the other.

United States.— Harriman *v.* Northern Securities Co., 132 Fed. 464; Sampson, etc., Co. *v.* Seaver-Radford Co., 129 Fed. 761; Indianapolis Gas Co. *v.* Indianapolis, 82 Fed. 245; Newton *v.* Levis, 79 Fed. 715, 25 C. C. A. 161; Coe *v.* Louisville, etc., R. Co., 3 Fed. 775; Forbush *v.* Bradford, 9 Fed. Cas. No. 4,930; Pullan *v.* Cincinnati, etc., R. Co., 20 Fed. Cas. No. 11,461, 4 Biss. 35.

England.— Newson *v.* Pender, 27 Ch. D. 43, 52 L. T. Rep. N. S. 9, 33 Wkly. Rep. 243; Mitchell *v.* Henry, 15 Ch. D. 181, 43 L. T. Rep. N. S. 186; Elwes *v.* Payne, 12 Ch. D. 468, 48 L. J. Ch. 831, 41 L. T. Rep. N. S. 118, 28 Wkly. Rep. 234; Plimpton *v.* Spiller, 4 Ch. D. 286, 35 L. T. Rep. N. S. 656, 25 Wkly. Rep. 152; Cork *v.* Rooney, L. R. 7 Ir. 191; Clowes *v.* Beck, 13 Beav. 347, 20 L. J. Ch. 505, 51 Eng. Reprint 134; Hilton *v.* Granville, 4 Beav. 130, 49 Eng. Reprint 288, Cr. & Ph. 283, 18 Eng. Ch. 283, 41 Eng. Reprint 498, 10 L. J. Ch. 398; Child *v.* Douglas, 5 De G. M. & G. 739, 2 Jur. N. S. 950, Kay 560, 2 Wkly. Rep. 701, 54 Eng. Ch. 580, 43 Eng. Reprint 1057; Greenhalgh *v.* Manchester R. Co., 3 Jur. 693, 8 L. J. Ch. 75, 3 Myl. & C. 784, 1 R. & Can. Cas. 68, 14 Eng. Ch. 784, 40 Eng. Reprint 1128; Hadley *v.* London Bank, 11 Jur. N. S. 554, 12 L. T. Rep. N. S. 747, 13 Wkly. Rep. 978; William *v.* Heath, 1 L. T. Rep. N. S. 267.

Canada.— Dwyre *v.* Ottawa, 18 Can. L. T. 168, 25 Ont. App. 121; Jones *v.* Victoria, 2 Brit. Col. 8; Atty.-Gen. *v.* Ryan, 5 Manitoba 81; Hamilton, etc., Road Co. *v.* Raspberry, 13 Ont. 466.

24. *Illinois.*—Fullenwider *v.* Supreme Council R. L., 73 Ill. App. 321.

New Jersey.— Mumford *v.* Ecuador Development Co., (Ch. 1901) 50 Atl. 476.

New York.— Robinson *v.* Guaranty Trust Co., 51 N. Y. App. Div. 134, 64 N. Y. Suppl. 525; Brower *v.* Williams, 44 N. Y. App. Div. 337, 60 N. Y. Suppl. 716; West Troy Water-Works *v.* Green Island, 32 Hun 530; Bruce *v.* Delaware, etc., Canal Co., 19 Barb. 371; McCafferty *v.* Glazier, 10 How. Pr. 475; Abraham *v.* Meyers, 23 N. Y. Suppl. 225, 228, 29 Abb. N. Cas. 384; New York, etc., R. Co. *v.* New York, etc., R. Co., 11 Abb. N. Cas. 386.

Ohio.— Dissette *v.* Lowrie, 9 Ohio S. & C. Pl. Dec. 545, 6 Ohio N. P. 392.

Pennsylvania.— Hibbert *v.* Nether Providence School Dist., 8 Del. Co. 285; Mocanaqua Coal Co. *v.* Northern Cent. R. Co., 9 Phila. 250; McCall *v.* Barrie, 14 Wkly. Notes Cas. 419.

United States.— Amelia Milling Co. *v.* Tennessee Coal, etc., Co., 123 Fed. 811; U. S. *v.* Jellico Mountain Coke, etc., Co., 43 Fed. 898; Swift *v.* Jenks, 19 Fed. 641; Day *v.* Candee, 7 Fed. Cas. No. 3,676.

England.— Wells *v.* Attenborough, 24 L. T. Rep. N. S. 312, 19 Wkly. Rep. 465.

Canada.— White *v.* Whitehead, 7 Montreal Leg. N. 292; McLaren *v.* Caldwell, 5 Ont. App. 363.

See 27 Cent. Dig. tit. "Injunction," § 307.

25. *New Jersey.*—Delaware, etc., Canal Co. *v.* Raritan, etc., R. Co., 14 N. J. Eq. 445.

New York.— Tracy *v.* Troy, etc., R. Co., 54 Hun 550, 7 N. Y. Suppl. 892; Hutchinson *v.* Skinner, 21 Misc. 729, 49 N. Y. Suppl. 360; Jones *v.* Lynds, 7 Paige 301.

Pennsylvania.— Second St., etc., R. Co. *v.* Morris, 8 Phila. 304.

United States.— Stein *v.* Bienville Water Supply Co., 32 Fed. 876; New Mexico Land Co. *v.* Elkins, 20 Fed. 545.

Canada.— Dwyre *v.* Ottawa, 25 Ont. App. 121.

See 27 Cent. Dig. tit. "Injunction," § 307.

26. *New Jersey.*— Hugg *v.* Camden, 29 N. J. Eq. 6; Higbee *v.* Camden, etc., Transp. Co., 20 N. J. Eq. 435; Torrey *v.* Camden, etc., R. Co., 18 N. J. Eq. 293.

New York.— Barney *v.* New York, 83 N. Y. App. Div. 237, 82 N. Y. Suppl. 124.

North Carolina.— Ellison *v.* Washington, 58 N. C. 57, 75 Am. Dec. 430.

Pennsylvania.— Rogers *v.* Ashbridge, 9 Pa.

would have the effect of greatly injuring or inconveniencing the public, it may be refused even though as against defendant the complainant would be entitled to its issuance.[27] The doctrine has been applied where the issuance of the injunction asked would result in cutting off the public water-supply,[28] or the supply of electricity for lights and power,[29] or where it would deprive the public of a necessary highway,[30] or prevent the necessary discharge of sewage,[31] or interfere with the public system of taxation.[32]

IV. PERSONS WHO MAY BE ENJOINED.[33]

An injunction operates *in personam*, and it will not issue against one not within the jurisdiction of the court.[34] Nor will a party be enjoined from taking certain action unless he himself is before the court as a defendant.[35] But if the person be within the reach of the court, he is liable to be restrained by injunc-

Dist. 195, 23 Pa. Co. Ct. 492; Bradford City *v.* Philadelphia, etc., Tel., etc., Co., 26 Pa. Co. Ct. 321; Keeling *v.* Pittsburgh, etc., R. Co., 33 Pittsh. Leg. J. N. S. 133.

Wisconsin.— Kneeland *v.* Milwaukee, 15 Wis. 454.

See 27 Cent. Dig. tit. "Injunction," § 23.

A school-board will not be restrained from maintaining a school for white children, because it has unlawfully failed to use the public money to maintain equal facilities for colored children. Cumming *v.* Richmond County Bd. of Education, 175 U. S. 528, 20 S. Ct. 197, 44 L. ed. 262 [*affirming* 103 Ga. 641, 29 S. E. 488].

Injury to third persons.— The court is bound to consider the amount of injury that may be inflicted upon strangers to the suit by the issuance of the injunction. Maythorne *v.* Palmer, 11 Jur. N. S. 230, 11 L. T. Rep. N. S. 261, 13 Wkly. Rep. 37.

Statutory prohibition.— Where defendant has been prohibited by statute from doing the thing in question, and for the benefit of the complainant, inconvenience to the public, however great, is not to be considered. Cromford, etc., R. Co. *v.* Stockport, etc., R. Co., 3 Jur. N. S. 628, 5 Wkly. Rep. 636.

27. Whittlesey *v.* Hartford, etc., R. Co., 23 Conn. 421; Harkness *v.* District of Columbia, 1 MacArthur (D. C.) 121; New Antioch Bd. of Education *v.* Pulse, 10 Ohio S. & C. Pl. Dec. 17, 7 Ohio N. P. 58.

28. Fisk *v.* Hartford, 70 Conn. 720, 40 Atl. 906, 66 Am. St. Rep. 147; Cameron Furnace Co. *v.* Pennsylvania Canal Co., 2 Pearson (Pa.) 208; Wintermute *v.* Tacoma Light, etc., Co., 3 Wash. 727, 29 Pac. 444; McCullough *v.* Denver, 39 Fed. 307; Stein *v.* Bienville Water Supply Co., 32 Fed. 876.

29. Stewart Wire Co. *v.* Lehigh Coal, etc., Co., 203 Pa. St. 474, 53 Atl. 352.

30. *Connecticut.*— Whittlesey *v.* Hartford, etc., R. Co., 23 Conn. 421, railroad.

New Jersey.— Scharr *v.* Camden, (Ch. 1901) 49 Atl. 817; Delaware River Bridge *v.* Trenton City Bridge Co., 13 N. J. Eq. 46, bridge.

New York.— Hentz *v.* Long Island R. Co., 13 Barb. 646 (railroad); Barney *v.* New York Rapid Transit Com'rs, 38 Misc. 549, 77 N. Y. Suppl. 1083 (New York subway).

Ohio.— Fogarty *v.* Cincinnati, 9 Ohio S. & C. Pl. Dec. 753, 7 Ohio N. P. 100, public street.

United States.— Turner *v.* People's Ferry Co., 21 Fed. 90, public ferry.

England.— Wood *v.* Charing Cross R. Co., 33 Beav. 290, 55 Eng. Reprint 379 (railroad); Ryde Com'rs *v.* Isle of Wight Ferry Co., 30 Beav. 616, 54 Eng. Reprint 1029 (landing-place).

See 27 Cent. Dig. tit. "Injunction," § 23.

31. Boston Rolling Mills *v.* Cambridge, 117 Mass. 396. *Compare* Sammons *v.* Gloversville, 34 Misc. (N. Y.) 459, 70 N. Y. Suppl. 284.

32. People *v.* Tenth Judicial Dist. Ct., 29 Colo. 182, 68 Pac. 242; Harkness *v.* District of Columbia, 1 MacArthur (D. C.) 121.

The issuance of illegal tax deeds will not be enjoined, when, although the court is convinced that the tax is unconstitutional, such a decision would involve a departure from the doctrine of *stare decisis*, and would invalidate a great part of the transactions in the whole state for a number of years. Kneeland *v.* Milwaukee, 15 Wis. 454.

33. **Ambassadors** see AMBASSADORS AND CONSULS, 2 Cyc. 266 note 36.

Head of executive department see CONSTITUTIONAL LAW, 8 Cyc. 854 note 45.

34. See COURTS, 11 Cyc. 684.

A stakeholder may be enjoined from paying over a fund even though his principal is not within the jurisdiction. Gladstone *v.* Musurus Bey, 9 Jur. N. S. 71, 32 L. J. Ch. 155, 7 L. T. Rep. N. S. 477, 1 New Rep. 178, 11 Wkly. Rep. 180.

An injunction issues against persons, and does not issue to suppress a business as such. Fleckenstein Bros. Co. *v.* Fleckenstein, 66 N. J. Eq. 252, 57 Atl. 1025.

35. *Massachusetts.*— Atty.-Gen. *v.* Walworth Light, etc., Co., 157 Mass. 86, 31 N. E. 482, 16 L. R. A. 398.

New Jersey.— Schalk *v.* Schmidt, 14 N. J. Eq. 268.

New York.— Waller *v.* Harris, 7 Paige 167 [*affirmed* in 20 Wend. 555, 32 Am. Dec. 590]; Fellows *v.* Fellows, 4 Johns. Ch. 25.

Tennessee.— Kerr *v.* White, 7 Baxt. 394; Brown *v.* Daniels, (Ch. App. 1898) 51 S. W. 991.

Texas.— Olsen *v.* Smith, (Civ. App. 1902) 68 S. W. 320.

tion, even though the wrong sought to be prevented is to be performed beyond the court's jurisdiction.[36] An injunction will not be issued restraining defendant from taking certain action unless he is himself the person attempting to take such action or is the person in control thereof.[37] On the other hand it is no reason for refusing an injunction that defendant in committing the injurious acts did not act for himself and received no benefit,[38] nor that he is not the only guilty party.[39]

V. SUBJECTS OF PROTECTION AND RELIEF.

A. Actions and Other Legal Proceedings[40] **— 1. INJUNCTION DIRECTED AGAINST PARTIES.** The power of courts of equity to restrain persons from prose-

Virginia.— Chapman *v.* Harrison, 4 Rand. 336.

United States.— Taylor *v.* Southern Pac. Co., 122 Fed. 147; Oxley Stave Co. *v.* Cooper's International Union, 72 Fed. 695. But see U. S. *v.* Parrott, 27 Fed. Cas. No. 15,998, McAllister 271, holding that where the claimants to mining property are using another tribunal to settle the title thereto, and are in constructive possession of such property through their agents, equity will not refuse an injunction to prevent the agents from destroying the property merely because the claimants are not made parties because of their absence.

England.— Norbury *v.* Alleyne, 1 Dr. & Wal. 337; Freeman *v.* Burke, 7 Ir. Eq. 282; Iveson *v.* Harris, 7 Ves. Jr. 251, 32 Eng. Reprint 102.

Canada.— Paradis *v.* Paradis, 19 Quebec Super. Ct. 375.

See 27 Cent. Dig. tit. "Injunction," § 412.

Exceptions to rule.— Equity may enjoin one not a party to the suit who is the solicitor, agent, or tenant of a party to the suit, having no rights involved, or where the right has already been determined. Schalk *v.* Schmidt, 14 N. J. Eq. 268.

Defendant not the sole wrong-doer.— A defendant may be enjoined even though others who are not made parties are participating in the wrongful act causing the injury to complainant. Sammons *v.* Gloversville, 34 Misc. (N. Y.) 459, 70 N. Y. Suppl. 284.

Joint wrong-doers may be restrained jointly, even though their acts be separately done. Matsell *v.* Flanagan, 2 Abb. Pr. N. S. (N. Y.) 459.

Non-joinder of parties in interest.— Where persons in interest are not made parties, the court will allow time in which complainant may apply for leave to amend or for process, and, on failure to do so, will dismiss the bill. Middletown, etc., St. R. Co. *v.* Middletown Electric R. Co., 4 Dauph. Co. Rep. (Pa.) 280. The defect of want of necessary parties may be cured by their appearance through counsel and consenting to be bound by the proceedings. Atty.-Gen. *v.* Grey, 7 Grant Ch. (U. C.) 592.

Unknown persons.— A preliminary injunction has been issued against persons unknown. Campbell *v.* Poultney, 6 Gill & J. (Md.) 94, 26 Am. Dec. 559.

One who has been garnisheed is a "defendant in an action" within the meaning of Rev. St. c. 129, § 2. Almy *v.* Platt, 16 Wis. 169.

Persons with actual notice may be amenable to an injunction, although they were not parties to the suit and were not actually served with a copy of the injunction. U. S. *v.* Sweeney, 95 Fed. 434.

36. Carron Iron Co. *v.* MacLaren, 5 H. L. Cas. 416, 24 L. J. Ch. 620, 3 Wkly. Rep. 597, 10 Eng. Reprint 961; Portarlington *v.* Soulby, 4 L. J. Ch. 241, 3 Myl. & K. 104, 10 Eng. Ch. 104, 40 Eng. Reprint 40.

37. Macon *v.* Harris, 75 Ga. 761; Stefanini *v.* Levy, 49 N. Y. App. Div. 638, 63 N. Y. Suppl. 267; Talbot *v.* New York, etc., R. Co., 78 Hun (N. Y.) 473, 29 N. Y. Suppl. 187 [*affirmed* in 151 N. Y. 155, 45 N. E. 382]; Pewaukee *v.* Wisconsin Lakes Ice, etc., Co., 110 Wis. 67, 85 N. W. 660; Evans *v.* Manchester, etc., R. Co., 36 Ch. D. 639, 57 L. J. Ch. 153, 57 L. T. Rep. N. S. 198, 36 Wkly. Rep. 331. See also *infra*, VI, C.

The statutory successors of a health board will not be enjoined merely because their predecessors had done a wrongful act and were enjoined. Atty.-Gen. *v.* Birmingham, etc., Drainage Bd, 17 Ch. D. 685, 46 J. P. 36, 50 L. J. Ch. 786, 44 L. T. Rep. N. S. 906, 29 Wkly. Rep. 793. But the fact that all the members of the board of health have resigned since the bringing of the bill is no reason for refusing the injunction. Hardinge *v.* Southborough Local Bd., 32 L. T. Rep. N. S. 250.

Against corporation.— Where an injunction is asked against a corporation, it will not be refused merely because the petition asks the writ to be directed against the governor and directors of the corporation. Bosley *v.* Susquehanna Canal, 3 Bland (Md.) 63.

38. Peoples' Tel., etc., Co. *v.* East Tennessee Tel. Co., 103 Fed. 212, 43 C. C. A. 185.

39. Sammons *v.* Gloversville, 34 Misc. (N. Y.) 459, 70 N. Y. Suppl. 284.

40. For injunction against criminal proceedings see *infra*, V, H.

For injunctions against judgments see JUDGMENTS.

For injunctions against executions see EXECUTIONS.

For injunctions against arbitration proceedings see ARBITRATION AND AWARD.

Election between action at law and suit in equity see ELECTION OF REMEDIES, 15 Cyc. 267.

cuting suits rests on the clear authority vested in them over persons within their jurisdiction.[41] An injunction to stay proceedings in courts of law is not directed against the court itself but against the parties to the proceeding.[42] An injunction, granted at the instance of a private citizen, restraining a judge, duly commissioned by the governor of the state, from discharging his judicial functions, is wholly unwarranted.[43] The court in which the action sought to be enjoined is pending may proceed despite the injunction, in case the enjoined party chooses to commit a contempt by disobeying the order, and the judgment of the court of law will be valid just as if no injunction had ever been issued.[44] However, if the attention of the court is properly called to the fact that a party has been enjoined from proceeding, it will usually not permit the party to disobey the injunction, and will stay the proceeding out of respect for the court issuing the injunction.[45]

2. Persons in Whose Favor Injunctions May Be Issued. An action will not ordinarily be enjoined at the instance of one not a party thereto,[46] particularly where complainant is not interested in the decision of that action,[47] where the judgment in that action will not conclude the rights of complainant and he will suffer no injury,[48] or where he may become a party to that action and protect his rights therein.[49] But the general rule is subject to many exceptions, and where

41. Keyser *v.* Rice, 47 Md. 203, 28 Am. Rep. 448.

Where the res was within the jurisdiction and the order could be made effective, one not personally within the jurisdiction of the court was held to be properly enjoined. Moors *v.* Ladenburg, 178 Mass. 272, 59 N. E. 676.

42. *Connecticut.*— Stanton *v.* Embry, 46 Conn. 595; Tyler *v.* Hamersley, 44 Conn. 419, 26 Am. Rep. 479.

Maryland.— Keyser *v.* Rice, 47 Md. 203, 28 Am. Rep. 448.

Massachusetts.— Moors *v.* Ladenburg, 178 Mass. 272, 59 N. E. 676.

Michigan.— Burpee *v.* Smith, Walk. 327.

New York.— Conover *v.* New York, 25 Barb. 513.

Tennessee.— Sanders *v.* Metcalf, 1 Tenn. Ch. 419.

England.— Hill *v.* Turner, 1 Atk. 515, 26 Eng. Reprint 326.

Canada.— Baxter *v.* Howland, 20 Rev. Lég. 503; Clattenburg *v.* Morine, 30 Nova Scotia 221.

See 27 Cent. Dig. tit. "Injunction," § 24 *et seq.*

Where an order of a probate court has been obtained by fraud, the order cannot be set aside by a court of equity, but the parties may be enjoined from taking advantage of it. Larue *v.* Friedman, 49 Cal. 278.

Injunction against clerk of court as well as against the parties was denied in Tyler *v.* Hamersley, 44 Conn. 419, 423, 26 Am. Rep. 479.

43. Sanders *v.* Metcalf, 1 Tenn. Ch. 419.

44. Platt *v.* Woodruff, 61 N. Y. 378; Glazebrook *v.* McCreedie, 9 Wend. (N. Y.) 437; Stephens *v.* Forsyth, 14 Pa. St. 67.

Contra.— A judgment obtained in violation of an injunction is void. Collins *v.* Fraiser, 27 Ind. 477; Winn *v.* Albert, 2 Md. Ch. 42; Patterson *v.* Gordon, 3 Tenn. Ch. 18. *Compare* Turner *v.* Gatewood, 8 B. Mon. (Ky.) 613 (holding that after an injunction against further proceedings in an action, an officer was liable as a trespasser *ab initio*, in case he sold property upon an execution issued upon a judgment rendered in such action and levied before the injunction was granted); Farnsworth *v.* Fowler, 1 Swan (Tenn.) 1, 55 Am. Dec. 718 (holding that a writ of possession, issued after an injunction against further proceedings, was no defense to an action of forcible entry and detainer). But see Lee *v.* Gross, 126 Ind. 102, 25 N. E. 891, where an injunction was not violated by a confession of judgment in favor of defendant, whose equities appeared to be at least equal to those of complainant.

45. Engels *v.* Lubeck, 4 Cal. 31; Dubuque Branch State Bank *v.* Rhomberg, 37 Iowa 664; Platt *v.* Woodruff, 61 N. Y. 378.

Mandamus.— Where the court, in its discretion, has thus stayed the proceeding, it cannot be compelled by mandamus to proceed, even though mandamus would otherwise be a proper remedy. State *v.* Judge Macon Orphans' Ct., 15 Ala. 740.

46. Campbell *v.* Bush, 112 Ga. 737, 38 S. E. 50; Aaron *v.* Baum, 7 Rob. (N. Y.) 340; Lowenstein *v.* Keller, 3 Kulp (Pa.) 361; Wells *v.* Collins, 11 Lea (Tenn.) 213.

A debtor cannot restrain an attachment by a creditor because it is unfair to other creditors. Fielding *v.* Lucas, 87 N. Y. 197.

Action against principal or surety.—A principal cannot enjoin his creditor from proceeding against the surety merely because he himself has a good defense. Riegel *v.* Riegel, 14 Wkly. Notes Cas. (Pa.) 303. Nor can a surety enjoin an action against the principal on a bond merely because he himself has a set-off. George Woods Co. *v.* Storer, 144 Mass. 399, 11 N. E. 662.

47. New York *v.* Connecticut, 4 Dall. (U. S.) 1, 1 L. ed. 715.

48. Smith *v.* Cuyler, 78 Ga. 654, 3 S. E. 406; Turk *v.* Ross, 59 Ga. 378; Beatty's Appeal, 122 Pa. St. 428, 15 Atl. 861.

49. *Connecticut.*— Williams *v.* Elting-Woolen Co., 33 Conn. 353.

Kentucky.— Conner *v.* Covington Transfer Co., 19 S. W. 597, 14 Ky. L. Rep. 135.

complainant is likely to suffer irreparable injury,[50] or where the continuation of the action will result in causing a multiplicity of suits or other unnecessary difficulty,[51] the action will be enjoined on his application. Here, as always,[52] complainant must come into equity with clean hands.[53] The fact that a defendant has appeared in an action at law and pleaded thereto does not deprive him of his right to an injunction against the prosecution of that action.[54]

3. Grounds of Jurisdiction — a. More Adequate Remedy. The object of equity in restraining proceedings at law is to afford a more plain, adequate, and complete remedy for the wrong complained of than the party can have at law.[55] The jurisdiction to enjoin actions or other proceedings at law is to be sparingly exercised, and only when other remedies are inadequate and the equities invoking it are apparent and strong.[56] Where plaintiff in the action at law is not abusing the legal process, and defendant is not being oppressed or defrauded, then of course such defendant has no standing in a court of equity and no right to an injunction.[57] The remedy at law is not inadequate merely because complainant has no defense whatever either in law or equity,[58] nor will equity interfere merely because one fears that the court of law will decide incorrectly.[59] An injunction will not be

Massachusetts.— McBride *v.* Little, 115 Mass. 308.

Minnesota.— Rogers *v.* Holyoke, 14 Minn. 220.

Rhode Island.— Nichols *v.* Baxter, 5 R. I. 491.

United States.— Eureka, etc., R. Co. *v.* California, etc., R. Co., 109 Fed. 509, 48 C. C. A. 517.

See 27 Cent. Dig. tit. "Injunction," § 26.

50. *Louisiana.*— Lannes *v.* Courege, 31 La. Ann. 74.

Maryland.— Negro Charles *v.* Sheriff, 12 Md. 274.

Massachusetts.— Moors *v.* Ladenburg, 178 Mass. 272, 59 N. E. 676.

Pennsylvania.— McDowell's Appeal, 123 Pa. St. 381, 16 Atl. 753; Hutchinson's Appeal, (1889) 16 Atl. 761.

Texas.— Texas Land Co. *v.* Turman, 53 Tex. 619.

United States.— Fisher *v.* Lord, 9 Fed. Cas. No. 4,821; Sumner *v.* Marcy, 23 Fed. Cas. No. 13,609, 3 Woodb. & M. 105.

See 27 Cent. Dig. tit. "Injunction," § 26.

51. McCullough *v.* Absecom Land Imp. Co., (N. J. Ch. 1887) 10 Atl. 606.

Action by receiver.— Where a suit has been brought in the name of another by a receiver, but wrongfully and without that other's consent, the court will enjoin the receiver, even though complainant is not a party to the suit in which the receiver was appointed. Matter of Merritt, 5 Paige (N. Y.) 125.

Person becoming party pendente lite.— It is no objection to the right of a defendant in ejectment to injunctive relief that he came into the ejectment action after it was commenced, by purchasing the interest of the tenant and uniting with him in the defense. Hackwith *v.* Damron, 1 T. B. Mon. (Ky.) 235.

52. See Equity, 16 Cyc. 114 *et seq.*

53. Chesapeake Guano Co. *v.* Montgomery, 116 Ala. 384, 22 So. 497; Hopkins *v.* Myers, 8 Blackf. (Ind.) 498; Von Prochazka *v.* Von Prochazka, 3 N. Y. Suppl. 301.

54. Simon *v.* Townsend, 27 N. J. Eq. 302.

55. Athens Nat. Bank *v.* Carlton, 96 Ga. 469, 23 S. E. 388; Lehigh Valley R. Co. *v.* Useful Manufacturers Soc., 30 N. J. Eq. 145; Henwood *v.* Jarvis, 27 N. J. Eq. 247; Minturn *v.* Farmers' L. & T. Co., 3 N. Y. 498; Morse *v.* Cloyes, 11 Barb. (N. Y.) 100.

56. Norfolk, etc., Hosiery Co. *v.* Arnold, 143 N. Y. 265, 38 N. E. 271; Erie R. Co. *v.* Ramsey, 45 N. Y. 637.

57. *Alabama.*— Williams *v.* Dismukes, 106 Ala. 402, 17 So. 620.

Connecticut.— Monson *v.* Lawrence, 27 Conn. 579; Peck *v.* Woodbridge, 3 Day 508.

Illinois.— Eberhardt *v.* Pennsylvania Co., 15 Ill. App. 541.

New Jersey.— McInnes *v.* McInnes Brick Mfg. Co., (Ch. 1897) 38 Atl. 182; Long Dock Co. *v.* Bentley, 37 N. J. Eq. 15.

New York.— American Waterworks Co. *v.* Venner, 18 N. Y. Suppl. 379.

South Carolina.— Goodwyn *v.* State Bank, 4 Desauss. Eq. 389.

See 27 Cent. Dig. tit. "Injunction," § 28.

Merely for the purpose of changing the venue of an action, an injunction will not be granted. Cheney *v.* Schuyler, 20 N. Y. Suppl. 546. *Compare* Darmsdatt *v.* Wolfe, 4 Hen. & M. (Va.) 246.

58. *Georgia.*— Dawson *v.* Merchants', etc., Bank, 30 Ga. 664.

Illinois.— Scott *v.* Scott, 61 Ill. App. 103.

Maine.— Alley *v.* Chase, 83 Me. 537, 22 Atl. 393; Jordan *v.* Same, 83 Me. 540, 22 Atl. 394.

Massachusetts.— George Woods Co. *v.* Storer, 144 Mass. 399, 11 N. E. 662.

New Jersey.— Keron *v.* Coon, 26 N. J. Eq. 26.

New York.— Norfolk, etc., Hosiery Co. *v.* Arnold, 76 Hun 19, 27 N. Y. Suppl. 661; Burgess *v.* Smith, 2 Barb. Ch. 276.

Rhode Island.— Tiffany *v.* Emmet, 24 R. I. 411, 53 Atl. 281.

59. *Connecticut.*— Hood *v.* New York, etc., R. Co., 23 Conn. 609.

Louisiana.— State *v.* Judge Orleans Parish Civ. Dist. Ct., 39 La. Ann. 619; Butchers' Ben. Assoc. *v.* Cutler, 26 La. Ann. 500.

granted on the ground that the well settled rules of law will work a hardship in the individual case.[60] So where by statute the right to pursue a remedy at law is positively given, it may be pursued and equity will not interfere, since where positive law in point of fact injures, it is the legislature which must furnish the corrective, not the courts.[61] When the bringing in of new parties is necessary in order to do complete justice, and this cannot be done at law, equity will assume jurisdiction of the case and enjoin the proceedings at law.[62]

b. Unfair Advantage and Abuse of Process. When a party is attempting, through the instrumentality of an action at law, to obtain an unconscionable advantage of another,[63] as where an unfair, oppressive, or fraudulent use is being made of legal process,[64] equity will restrain such action.

c. Prevention of Irreparable Injury. A judicial proceeding will be enjoined to restrain the assertion of doubtful rights in a manner productive of irreparable damage, and to prevent injury to a person from the doubtful title of others.[65]

d. Protection of Officers of Court in Execution of Its Orders. If an officer of a court of equity is sued at law for carrying out his orders, the action will be enjoined.[66] For instance, if a receiver, guardian, or committee of a lunatic, appointed in one court, be prosecuted in any other court for his official acts, the court from which he derived his authority will enjoin such a suit.[67]

e. Confining Litigation to One Forum. The court first having possession of the case — its power being adequate to the administration of complete justice in the premises — should retain its jurisdiction, and efforts by either party to divert the litigation to another court may be restrained by injunction, especially after an adverse decision in the court to which resort is first had.[68]

Mississippi.— *Ex p.* Wimberly, 57 Miss. 437.

New York.— Wolfe *v.* Burke, 56 N. Y. 115; New York City Baptist Mission Soc. *v.* Potter, 20 Misc. 191, 44 N. Y. Suppl. 1051.

West Virginia.— National Tube Co. *v.* Smith, 57 W. Va. 210, 50 S. E. 717, 1 L. R. A. N. S. 195, no injunction should be granted against the prosecution of an action before a justice because he is interested.

Exceptional cases.— Galveston, etc., R. Co. *v.* Dowe, 70 Tex. 5, 7 S. E. 368 (where many similar suits had been brought on similar demands before a justice of the peace, for amounts so small as to preclude an appeal, and although complainant had a perfect defense the justice was deciding against him, an injunction was granted); Darmsdatt *v.* Wolfe, 4 Hen. & M. (Va.) 246 (where an injunction was granted because of prejudice, to secure a change of venue).

60. Glenn *v.* Fowler, 8 Gill & J. (Md.) 340; Wierengo *v.* Mason, 115 Mich. 646, 74 N. W. 183.

61. Freeman *v.* Carpenter, 147 Mass. 23, 16 N. E. 714; Brown's Appeal, 66 Pa. St. 155; Hornesby *v.* Burdell, 9 S. C. 303.

62. Radcliffe *v.* Varner, 56 Ga. 222; Pond *v.* Harwood, 139 N. Y. 111, 34 N. E. 768.

63. *Connecticut.* — Stanton *v.* Embry, 46 Conn. 595; Pearce *v.* Olney, 20 Conn. 544; Phalen *v.* Clark, 19 Conn. 435, 50 Am. Dec. 253.

Massachusetts.— Tompson *v.* Redemption Nat. Bank, 106 Mass. 128.

Missouri.— Lindley *v.* Russell, 16 Mo. App. 217.

New Jersey.— Acquackanonk Water Co. *v.* Manhattan L. Ins. Co., 36 N. J. Eq. 586.

New York.— Dinsmore *v.* Neresheimer, 32 Hun 204; Garrison *v.* Marie, 7 N. Y. Civ. Proc. 113.

Pennsylvania.— Semple *v.* Cleveland, etc., R. Co., 172 Pa. St. 369, 33 Atl. 504; Brown *v.* Atkinson, 9 Kulp 164.

See 27 Cent. Dig. tit. "Injunction," § 28.

64. Elder *v.* Prussing, 101 Ill. App. 655; New Music Hall Co. *v.* Orpheon Music Hall Co., 100 Ill. App. 278; Fallon *v.* Remington, 10 Wkly. Notes Cas. (Pa.) 119. See Gibbs *v.* Usher, 10 Fed. Cas. No. 5,387, Holmes 348, where a replevin action was enjoined because its real purpose was to obtain unlawfully an inspection of papers relating to patent rights, and the injury would be irreparable.

65. Shaw *v.* Chambers, 48 Mich. 355, 12 N. W. 486; Moody *v.* Harper, 38 Miss. 599; Skinker *v.* Heman, 64 Mo. App. 441; Henwood *v.* Jarvis, 27 N. J. Eq. 247.

66. *New York.* — Mackay *v.* Blackett, 9 Paige 437.

Tennessee.— Turner *v.* Breeden, 2 Lea 713.

Vermont.— Peck *v.* Crane, 25 Vt. 146.

England.— Frowd *v.* Lawrence, 1 Jac. & W. 655, 37 Eng. Reprint 518; Bailey *v.* Devereux, 1 Vern. Ch. 269, 23 Eng. Reprint 463.

Canada.— Simpson *v.* Hutchison, 7 Grant Ch. (U. C.) 308.

67. Conover *v.* New York, 25 Barb. (N. Y.) 513; Batchelor *v.* Blake, 1 Hog. 98; Kaye *v.* Cunningham, 5 Madd. 406, 56 Eng. Reprint 950; Simpson *v.* Hutchison, 7 Grant Ch. (U. C.) 308. And see RECEIVERS.

68. Maloney *v.* King, 30 Mont. 414, 76 Pac. 939; Schuehle *v.* Reiman, 86 N. Y. 270; Pike *v.* Merchants', etc., Bank, 81 Hun (N. Y.) 78, 30 N. Y. Suppl. 952; Conover *v.* New York, 25 Barb. (N. Y.) 513, 14 How. Pr.

f. Aid of Equitable Remedy.[69] Where complainant shows himself to be entitled to some purely equitable remedy, thus giving equity jurisdiction of the case, an injunction will be granted to restrain pending or threatened actions at law concerning the same subject-matter.[70] Equity having obtained jurisdiction for one purpose will generally dispose of the entire case and enjoin actions at law in order to prevent circuity of action and a multiplicity of suits and to render justice more completely and conveniently.[71]

g. Multiplicity and Vexatious Suits[72] — (i) *In General.* An undisputed ground of equity jurisdiction to enjoin pending or threatened actions at law is the avoidance of a multiplicity or circuity of actions and the prevention of vexatious ones. Courts are not altogether agreed as to what constitutes such a multiplicity as to justify the interference of equity, but where this multiplicity exists equity will take jurisdiction, determine the rights of all the parties in one proceeding, and enjoin all actions at law relating to the same subject-matter.[73] In

550; Grant *v.* Quick, 5 Sandf. (N. Y.) 612; York *v.* Pilkington, 2 Atk. 302, 9 Mod. 273, 26 Eng. Reprint 584.

69. For injunction incidental to accounting see ACCOUNTING, 1 Cyc. 418.

For injunctions incidental to foreclosure of mortgages see MORTGAGES.

For injunctions incidental to suits for specific performance see SPECIFIC PERFORMANCE.

For injunction incidental to partition see PARTITION.

70. Brooks *v.* Raiden, 113 Ga. 86, 38 S. E. 409 (marshaling); Sloane *v.* Clauss, 64 Ohio St. 125, 59 N. E. 884; Anonymous, 1 Atk. 491, 26 Eng. Reprint 311; Tanfield *v.* Davenport, Toth. 114, 21 Eng. Reprint 140 (wife's equity to a settlement).

71. *Georgia.*— Mitchell *v.* Word, 60 Ga. 525.

Mississippi.— Dreyfus *v.* Gage, 79 Miss. 403, 30 So. 691; Gilliam *v.* Chancellor, 43 Miss. 437, 5 Am. Rep. 498.

North Carolina.— Featherstone *v.* Carr, 132 N. C. 800, 44 S. E. 592; Curtis *v.* Hartsfield, 4 N. C. 114.

Pennsylvania.— Burke's Estate, 1 Pars. Eq. Cas. 470.

United States.— Berliner Gramophone Co. *v.* Seaman, 113 Fed. 750, 51 C. C. A. 440.

England.— *Ex p.* Smith, 2 Ch. D. 51, 45 L. J. Bankr. 116, 34 L. T. Rep. N. S. 603, 24 Wkly. Rep. 310; The Teresa, 7 Aspin. 505, 71 L. T. Rep. N. S. 342, 11 Reports 681.

See 27 Cent. Dig. tit. "Injunction," § 31. And see EQUITY, 16 Cyc. 106 *et seq.*

The application for the injunction should be made in the same court where the suit is pending. McCauley *v.* Givens, 1 Dana (Ky.) 261; Deaderick *v.* Smith, 6 Humphr. (Tenn.) 138.

Applications of rule — Discovery.— In accordance with the doctrine stated injunctions are sometimes issued where a discovery is asked. Glenn *v.* Fowler, 8 Gill & J. (Md.) 340; Stannard *v.* St. Giles, 20 Ch. D. 190, 51 L. J. Ch. 629, 46 L. T. Rep. N. S. 243, 30 Wkly. Rep. 693; James *v.* Snarr, 15 Grant Ch. (U. C.) 229. But equity may treat the bill for a discovery as merely ancillary to complainant's defense at law, and the action will not be enjoined. Pratt *v.* Boody, 55 N. J. Eq. 175, 35 Atl. 1113; Crane *v.* Bunnell, 10 Paige (N. Y.) 333. Where the discovery can be equally well obtained by examining the adverse party as a witness in the action at law, no equitable relief is necessary and no injunction will be granted. Drexel *v.* Berney, 14 Fed. 268.

Reformation and cancellation of instruments.— So injunctions are sometimes issued as incidental to suits for the reformation (Robbins *v.* Battle House Co., 74 Ala. 499; Bush *v.* Hicks, 60 N. Y. 298. *Compare* Murphree *v.* Bishop, 79 Ala. 404); or the cancellation of a written instrument (Lehman *v.* Shook, 69 Ala. 486; New York, etc., R. Co. *v.* Schuyler, 17 How. Pr. (N. Y.) 464; Baltimore Monumental Sav. Assoc. *v.* Fentress, 125 Fed. 812. But *compare* Hoare *v.* Bremridge, L. R. 8 Ch. 22, 42 L. J. Ch. 1, 27 L. T. Rep. N. S. 593, 21 Wkly. Rep. 43; Scotland Life Assoc. *v.* McBlane, Ir. R. 9 Eq. 176; National L. Assur. Co. *v.* Egan, 20 Grant Ch. (U. C.) 469).

72. As ground for enjoining suits in equity see *infra*, V, A, 5.

73. *District of Columbia.*— Painter *v.* Drane, 2 MacArthur 163.

Georgia.— Guess *v.* Stone Mountain Granite, etc., Co., 67 Ga. 215.

Massachusetts.— Carr *v.* Silloway, 105 Mass. 543, actions on several notes restrained to prevent multiplicity, under Gen. St. c. 113, § 2.

Mississippi.— Bishop *v.* Rosenbaum, 58 Miss. 84.

Missouri.— Damschroeder *v.* Thias, 51 Mo. 100.

New Jersey.— Maher *v.* Mutual Electric Mfg. Co., (Ch. 1889) 17 Atl. 968.

New York.— Norfolk, etc., Hosiery Co. *v.* Arnold, 143 N. Y. 265, 38 N. E. 271; Saratoga County *v.* Devoe, 77 N. Y. 219; Pfohl *v.* Simpson, 74 N. Y. 137; Third Ave. R. Co. *v.* New York, 54 N. Y. 159; New York, etc., R. Co. *v.* Schuyler, 17 N. Y. 592; National Park Bank *v.* Goddard, 62 Hun 31, 16 N. Y. Suppl. 343; Kellogg *v.* Chenango Valley Sav. Bank, 42 N. Y. Suppl. 379; Lawrence *v.* Manning, 9 N. Y. Suppl. 223; Huntington *v.* Nicoll, 3 Johns. 566; Coit *v.* Horn, 1 Sandf. Ch. 1.

Ohio.— Yeoman *v.* Lasley, 36 Ohio St. 416.

Vermont.— Paddock *v.* Palmer, 19 Vt. 581.

such cases the existence of a perfect defense at law makes no difference; the jurisdiction is exercised to prevent the necessity of making that defense in a multitude of suits with the attendant trouble and expense.[74] Where a multiplicity of suits between the same parties is threatened, it is proper to restrain the prosecution of all but one and allow that one to proceed.[75]

(II) *Multitude Alone Not Multiplicity.* The fact that there is a multitude of actions does not in itself constitute multiplicity.[76] In order to maintain an injunction against numerous separate parties, to restrain them from prosecuting separate actions against complainant, they must have a common title, or a community of right or interest in the subject-matter of the controversy, and a community of interest in the questions of law and fact involved in the litigation.[77] The mere fact that the actions grew out of the same occurrence and depend for

Virginia.— Royall *v.* Royall, 5 Munf. 82.

United States.— Texas, etc., R. Co. *v.* Kuteman, 54 Fed. 547, 4 C. C. A. 503.

England.— Sheffield Waterworks *v.* Yeomans, L. R. 2 Ch. 8, 15 L. T. Rep. N. S. 342, 15 Wkly. Rep. 76.

See 27 Cent. Dig. tit. "Injunction," § 31. And see EQUITY, 16 Cyc. 60 *et seq.*

Suits against common carriers.— Where seventy-seven suits were sought in a justice's court, each for a fifty-dollar penalty for running a car without a license, the defense being the same in each case and the justice having no power to consolidate the actions, an injunction was granted restraining the prosecution of all but one. Third Ave. R. Co. *v.* New York, 54 N. Y. 159.

Suits by abutting owners.— Where a city granted permission to a railroad company to operate in the streets, and several abutting property-owners sued the company for damages, a bill filed by the company for an injunction on the ground that the parties had no right of action was sustained as being in the nature of a bill of peace. Guess *v.* Stone Mountain Granite, etc., Co., 67 Ga. 215; South Carolina R. Co. *v.* Steiner, 44 Ga. 546.

Patent suits.— To prevent a multiplicity of suits, the court may require the prosecution of suits between the patentee and the mere user of a patented machine to be suspended, and await the result of a suit pending between the patentee and the principal infringer, from whom the user purchased the machine. Allis *v.* Stowell, 16 Fed. 783; Barnum *v.* Goodrich, 2 Fed. Cas. No. 1,036.

Where the creditors of an insolvent estate are numerous, the executor may file a bill to enjoin them from proceeding at law and to have the estate administered in equity. Thomson *v.* Palmer, 2 Rich. Eq. (S. C.) 32.

74. See cases cited in preceding note.

75. Third Ave. R. Co. *v.* New York, 54 N. Y. 159; Cuthbert *v.* Chauvet, 60 Hun (N. Y.) 577, 14 N. Y. Suppl. 385.

76. *Delaware.*— Murphy *v.* Wilmington, 6 Houst. 108, 22 Am. St. Rep. 345.

Georgia.— Lightfoot *v.* Planters' Banking Co., 58 Ga. 136.

Illinois.— Henderson *v.* Flanagan, 75 Ill. App. 283; Chicago City R. Co. *v.* General Electric Co., 74 Ill. App. 465.

Michigan.— Lapeer County *v.* Hart, Harr. 157.

New Jersey.— Lehigh Valley R. Co. *v.* McFarlan, 31 N. J. Eq. 730.

New York.— Venice *v.* Woodruff, 62 N. Y. 462, 20 Am. Rep. 495; Manhattan R. Co. *v.* New York El. R. Co., 29 Hun 309.

See 27 Cent. Dig. tit. "Injunction," § 31.

77. *Illinois.*— Edward Hines Lumber Co. *v.* Scott, 101 Ill. App. 523.

Maine.— Farmington Village Corp. *v.* Sandy River Nat. Bank, 85 Me. 46, 26 Atl. 965.

Michigan.— Southern Michigan Lumber Co. *v.* McDonald, 57 Mich. 292, 24 N. W. 87.

Minnesota.— Albert Lea *v.* Neilsen, 83 Minn. 246, 86 N. W. 83.

Mississippi.— Johnston *v.* Stone, 71 Miss. 593, 14 So. 81.

New Jersey.— Lehigh Valley R. Co. *v.* McFarlan, 31 N. J. Eq. 730.

New York.— New York Security, etc., Co. *v.* Blydenstein, 70 Hun 216, 24 N. Y. Suppl. 164 [*affirmed* in 139 N. Y. 657, 35 N. E. 208 (*distinguishing* National Park Bank *v.* Goddard, 131 N. Y. 494, 30 N. E. 566)].

See 27 Cent. Dig. tit. "Injunction," § 31.

Multiplicity must affect plaintiff. The objection of a multiplicity of suits must be one to which plaintiff will be subject, and of which he may complain. A person liable in respect to a proceeding which may create a lien or cloud on the title of his separate property cannot obtain an injunction because there are others whose property may be similarly affected. Crevier *v.* New York, 12 Abb. Pr. N. S. (N. Y.) 340.

"The object to be attained by resort to a court of equity, in such cases, is, to obtain a final determination of the particular right in controversy, as between all the parties concerned, by a single issue, instead of leaving the right open to litigation by separate suits brought by each of the parties in interest." Lehigh Valley R. Co. *v.* McFarlan, 31 N. J. Eq. 730, 754.

Single question involved — Illustration. — The Earl of Powis fenced up a certain common forest. Complainant and others, claiming rights of common, broke down the fence. The earl then brought eight suits in trespass. An injunction against those suits was obtained because there was a common question involved — the right of the earl to fence the common. Powell *v.* Powis, 1 Y. & J. 159.

their solution upon the same questions of fact and of law is not sufficient, where there is no community of interest.[78] Equity will not enjoin the prosecution of separate suits by several parties against the same person, and compel them to be determined in one proceeding, if each claim is a distinct cause of action, arising out of different transactions and relating to different property.[79] If a defendant has an independent cause of action against plaintiff, he may sue at law thereon, and his suit will not be enjoined, even though he might have made use of his cause of action as a counter-claim or set-off in the action brought by plaintiff.[80]

(III) *Adequate Remedy at Law by Consolidation.* Where it is possible by a consolidation of the actions at law to avoid a multiplicity of actions, there is no ground for the interference of equity.[81]

(IV) *Disputed Right Must Affect Many Persons.* Where actions brought or threatened are not in themselves vexatious, and the right has not been established at law, to entitle a party to maintain a bill of peace the right claimed must be one affecting many persons, a suitable number of whom must be before the court; if the right is disputed between two persons only, the bill should in most cases be dismissed, for as between them the first judgment might be used as a bar in all the other actions.[82]

(V) *Necessity of First Ascertaining Right at Law.* If a bill of peace cannot be justified on the ground of the great number of parties interested in common, it will be allowed in general only where complainant has satisfactorily established his right at law.[83]

(VI) *Repeated Ejectment Actions.* At common law the judgment in an ejectment suit did not operate as a bar to subsequent actions for the same purpose, and there was no limit to the number that might be brought, however much the vexation and cost to the possessor of the land and however just his claim. Under these circumstances equity early interfered by injunction to prevent repeated vexatious ejectment suits.[84] An injunction will not be granted, however, until the title to the land in dispute has been fully and satisfactorily established

78. Lehigh Valley R. Co. *v.* McFarlan, 31 N. J. Eq. 730 [*affirming* 30 N. J. Eq. 135]; McHenry *v.* Hazard, 45 Barb. (N. Y.) 657; Hanstein *v.* Johnson, 112 N. C. 253, 17 S. E. 155.

Where property of several owners was burned as they alleged because sparks were negligently allowed to escape from complainant's engine, they have a right to sue separately and will not be enjoined. They have no common interest and it makes no difference that they all happened to suffer from the same act. Tribette *v.* Illinois Cent. R. Co., 70 Miss. 182, 12 So. 32, 35 Am. St. Rep. 642, 19 L. R. A. 660. *Compare* National Park Bank *v.* Goddard, 131 N. Y. 494, 30 N. E. 566.

79. National Union Bank *v.* London, etc., Plate Bank, 2 N. Y. App. Div. 208, 37 N. Y. Suppl. 741; Gould *v.* Edison Electric Illuminating Co., 26 Misc. (N. Y.) 64, 56 N. Y. Suppl. 485.

80. Kerngood *v.* Pond, 84 N. Y. App. Div. 227, 82 N. Y. Suppl. 723; Bradley Salt Co. *v.* Keating, 61 Hun (N. Y.) 251, 16 N. Y. Suppl. 795; Liftchild *v.* Smith, 7 Rob. (N. Y.) 306.

81. Lehigh Valley R. Co. *v.* McFarlan, 31 N. J. Eq. 730; Galveston, etc., R. Co. *v.* Dowe, 70 Tex. 5, 7 S. W. 368; Peters *v.* Prevost, 19 Fed. Cas. No. 11,032, 1 Paine 64. See Minor *v.* Webb, 10 Abb. Pr. (N. Y.) 284, holding that an injunction will not be granted where, by statute, the questions may be finally determined in one of the actions.

82. Moses *v.* Mobile, 52 Ala. 198; Wolfe *v.* Burke, 56 N. Y. 115. See also Gray *v.* Coan, 36 Iowa 296.

83. *Alabama.*— Gunn *v.* Harrison, 7 Ala. 585.

Illinois.— Imperial F. Ins. Co. *v.* Gunning, 81 Ill. 236.

Michigan.—Lapeer County Com'rs *v.* Hart, Harr. 157.

New Jersey.— Lehigh Valley R. Co. *v.* McFarlan, 31 N. J. Eq. 730 (containing a statement of the rule of considerable length); Thompson *v.* Engle, 4 N. J. Eq. 271.

New York.— West *v.* New York, 10 Paige 539; Eldridge *v.* Hill, 2 Johns. Ch. 281. But see Norfolk, etc., Hosiery Co. *v.* Arnold, 143 N. Y. 265, 38 N. E. 271.

Texas.—See Galveston, etc., R. Co. *v.* Dowe, 70 Tex. 5, 7 S. W. 368, holding that the rule does not apply where no appeal lies to the judgment in a court of law.

England.— Sheffield Waterworks *v.* Yeomans, L. R. 2 Ch. 8, 15 L. T. Rep. N. S. 342, 15 Wkly. Rep. 76; Tenham *v.* Herbert, 2 Atk. 483, 25 Eng. Reprint 692.

See 27 Cent. Dig. tit. "Injunction," § 31.

84. *Georgia.*— Bond *v.* Little, 10 Ga. 395.

Illinois.— Pratt *v.* Kendig, 128 Ill. 293, 21 N. E. 495.

Kentucky.— Dedman *v.* Chiles, 3 T. B. Mon. 426.

at law. It is not necessary that there should have been any specific number of trials at law, but they must have uniformly established the title in favor of complainant. Even one judgment in his favor may be sufficient.[85] But where many ejectment suits have been brought, and are still pending, it has been held proper, even though the title has not been determined, to enjoin all but one and to let that one proceed.[86]

(VII) *VEXATIOUS SUITS.* Equity has jurisdiction to enjoin vexatious suits, not brought in good faith and instituted for annoyance and to cause unnecessary litigation.[87] But actions are not necessarily vexatious because they are numerous,[88] nor where they are successive.[89]

(VIII) *INJUNCTION INCIDENTAL TO JURISDICTION ON OTHER GROUNDS.* Where equity has obtained jurisdiction of a case on some special equitable ground, it will retain jurisdiction for all purposes and do complete justice; and in such case, in order to avoid a multiplicity of suits, the complainant is entitled to an injunction, as incidental to his principal case, to prevent other actions upon the same subject-matter.[90]

Michigan.— Woods *v.* Monroe, 17 Mich. 238.

United States.— Craft *v.* Lathrop, 6 Fed. Cas. No. 3,318, 2 Wall. Jr. 103.

England.— Leighton *v.* Leighton, 4 Bro. P. C. 378, 1 Str. 404, 2 Eng. Reprint 256; Bath *v.* Sherwin, 4 Bro. P. C. 373, 2 Eng. Reprint 253.

See 27 Cent. Dig. tit. "Injunction," § 32.

85. Brown *v.* Redwyne, 16 Ga. 67; Bond *v.* Little, 10 Ga. 395; Gray *v.* Coan, 36 Iowa 296; Patterson *v.* McCamant, 28 Mo. 210; Harmer *v.* Gwynne, 11 Fed. Cas. No. 6,075, 5 McLean 313.

Source of equity jurisdiction.— It is the previous determination of the title at law by an inconclusive judgment that gives equity its whole jurisdiction. The determination of the title pertains exclusively to the court of law, and equity can only determine, not whether the title has been rightly found at law, but whether sufficient effort has been made in order to its being rightly found. The rule is that the complainant must be in possession, and must have established his right at law. No precise number of trials is necessary. Marsh *v.* Reed, 10 Ohio 34.

A judgment appealed from is not such a real settlement of the title as to authorize an injunction. Knowles *v.* Inches, 12 Cal. 212.

When a second action is allowed by statute, it is not vexatious. Dishong *v.* Finkbiner, 46 Fed. 12.

86. Cuthbert *v.* Chauvet, 14 N. Y. Suppl. 385.

87. *California.*— Southern Pac. Co. *v.* Robinson, 132 Cal. 408, 64 Pac. 572, in which case there were three thousand threatened suits for penalties for refusal to furnish certain tickets.

Georgia.— Jenkins *v.* Jenkins, 85 Ga. 208, 11 S. E. 608; Mahone *v.* Central Bank, 17 Ga. 111.

Kansas.— Jordan *v.* Western Union Tel. Co., 69 Kan. 140, 76 Pac. 396, suits brought in bad faith to recover penalties for failure to send five hundred and forty-two telegrams at fifteen cents each.

Montana.— Maloney *v.* King, 30 Mont. 414, 76 Pac. 939.

New York.— See Huntington *v.* Nicoll, 3 Johns. 566.

Pennsylvania.— Moneghan *v.* Conyngham Tp., 2 Luz. Leg. Reg. 145.

Tennessee.— Walker *v.* Fox, 85 Tenn. 154, 2 S. W. 98; Tarbox *v.* Hartenstein, 4 Baxt. 78.

Texas.— Cannon *v.* Hendrick, 5 Tex. 339.

Wisconsin.— Milwaukee Electric R., etc., Co. *v.* Bradley, 108 Wis. 467, 84 N. W. 870.

England.— Buckland *v.* Gibbins, 9 Jur. N. S. 781, 32 L. J. Ch. 391, 8 L. T. Rep. N. S. 129, 11 Wkly. Rep. 483; Waters *v.* Taylor, 2 Ves. & B. 299, 13 Rev. Rep. 91, 35 Eng. Reprint 333.

See 27 Cent. Dig. tit. "Injunction," §§ 31, 32.

One of the earliest illustrations was an application to the Bishop of Exeter, Chancellor of England, before 1400, by one Campyn Pynell, a Lombardy merchant, to secure relief against vexatious proceedings at common law, which were being brought against him by one Richard Underwood, a tailor, charging Pynell with taking away his wife and goods. Underwood had been nonsuited twice, and still brought more actions. Selden Soc. Sel. Cas. Chan. 18.

88. Jackson *v.* Darcy, 1 N. J. Eq. 194.

89. Patterson *v.* Seaton, 64 Iowa 115, 19 N. W. 869.

90. Hughlett *v.* Harris, 1 Del. Ch. 349, 12 Am. Dec. 104; Goodwynne *v.* Bellerby, 116 Ga. 901, 43 S. E. 275.

No injunction on independent matters.— An injunction asked in a proceeding brought for other purposes must have some relation and be subsidiary to those purposes. It is not proper in that proceeding to ask an injunction for some independent purpose. Wilson *v.* Alleghany Co., (N. C. 1899) 32 S. E. 326.

Denial of principal relief.— When an injunction is asked as ancillary to other relief, if the right to the other relief fails the right to the injunction fails also. State *v.* McGlynn, 20 Cal. 233, 81 Am. Dec. 118.

h. Fraud[91] — (i) *In General.* Courts of law and courts of equity have concurrent jurisdiction to relieve in cases of fraud. Courts of equity assumed such jurisdiction in earliest times, and have still retained it even though courts of law are competent to give relief.[92] This jurisdiction is not concurrent, however, in the sense that each party is at liberty to take his choice of courts, nor that the injured party has the option of going into equity after the other has already sued at law.[93] Whether a suit can be brought in equity at all depends, not only upon which party is bringing it, but also upon the remedy that is asked.[94] Where the injured party seeks some equitable remedy before any action at law is begun, it is generally held that equity will assume jurisdiction and proceed to dispose of the whole case, and enjoin the bringing of actions at law even though a court of law might also have been able to give adequate relief.[95] But when an action at law has been brought by either party and adequate relief can be obtained in that action, equity will rarely entertain a bill for relief, much less restrain the prosecution of the action at law.[96] Nevertheless where by fraud a party has an unfair advantage in proceedings in a court of law, which must necessarily make that court an instrument of injustice, and it is therefore against conscience that he should use that advantage, a court of equity will interfere and restrain him from proceeding with the action and from reaping the benefit of his improper advantage.[97] Without considering whether defendant can set up his defense of fraud in the action at law and secure complete justice, courts of equity, when convinced that plaintiff is suing on a fraudulent claim or is attempting

Illegal proceeding.— An injunction will not be granted in aid of an illegal proceeding at law. Haight *v.* Bergh, 3 N. J. Eq. 386.

91. As defense to action at law see *infra*, V, A, 4, c, (VI).

92. See EQUITY, 16 Cyc. 81; FRAUD, 19 Cyc. 94.

93. Hoare *v.* Bremridge, L. R. 8 Ch. 22, 42 L. J. Ch. 1, 27 L. T. Rep. N. S. 593, 21 Wkly. Rep. 43.

94. Hoare *v.* Bremridge, L. R. 8 Ch. App. 22, 42 L. J. Ch. 1, 27 L. T. Rep. N. S. 593, 21 Wkly. Rep. 43. See EQUITY, 16 Cyc. 81, 82. See also Teft *v.* Stewart, 31 Mich. 367, 371, where the court said: "It is admitted that the books commonly say that equity has jurisdiction in all cases of fraud, but every one knows that the proposition is not to be accepted literally. It must always be understood in connection with the genius and specific remedial powers of the court. These confine it absolutely to civil suits. They also confine it, when the point is seasonably and properly made and insisted on, to transactions where, in consequence of the indicated state of facts, there appears to be ground for employing some mode of action, or some kind of aid or relief not practicable in a court of law, but allowable in equity."

95. Sweeny *v.* Williams, 36 N. J. Eq. 627; Henwood *v.* Jarvis, 27 N. J. Eq. 247; Davies *v.* Stainbank, 6 De G. M & G. 679, 55 Eng. Ch. 528, 43 Eng. Reprint 1397. *Compare* Phœnix Mut. L. Ins. Co. *v.* Bailey, 13 Wall. (U. S.) 616, 20 L. ed. 501.

Where evidence is likely to disappear.— If no action at law has been brought but from lapse of time evidence is likely to disappear, an injunction may be granted to prevent the bringing of such action. Anthony *v.* Valentine, 130 Mass. 119; Sweeny *v.* Williams, 36 N. J. Eq. 627; Metler *v.* Metler, 19 N. J. Eq. 457; Hamilton *v.* Cummings, 1 Johns. Ch. (N. Y.) 517; Hoare *v.* Bremridge, L. R. 8 Ch. 22, 42 L. J. Ch. 1, 27 L. T. Rep. N. S. 593, 21 Wkly. Rep. 43; Anderson *v.* Dowling, 11 Ir. Eq. 590.

96. Ross *v.* Buchanan, 13 Ill. 55; Crane *v.* Ely, 37 N. J. Eq. 564.

Purpose of injunction.— A court of equity does not grant an injunction for the mere purpose of transferring the jurisdiction from a court of law, after the commencement of a suit there, except to stay the trial of the suit at law until defendant in the equity court has fully answered the complainant's bill. Crane *v.* Bunnell, 10 Paige (N. Y.) 333. See also Ætna L. Ins. Co. *v.* Smith, 73 Fed. 318.

97. *Connecticut.*— Pearce *v.* Olney, 20 Conn. 544; Sacket *v.* Hillhouse, 5 Day 551.

Georgia.— Kendy *v.* Beatty, 82 Ga. 669, 10 S. E. 267; Pierce *v.* Jones, 23 Ga. 374.

Missouri.— Lindley *v.* Russell, 16 Mo. App. 217.

New Jersey.— Lundy *v.* Seymour, 55 N. J. Eq. 1, 35 Atl. 893; Huettinger *v.* Huettinger, (Ch. 1899) 43 Atl. 574.

New York.— Dale *v.* Roosevelt, 5 Johns. Ch. 174.

United States.— Gibbs *v.* Usher, 10 Fed. Cas. No. 5,387, Holmes 348, where a writ of replevin was for the purpose of unlawfully obtaining an inspection of papers relating to patent rights, and injury would be irreparable, the replevin action was enjoined.

See 27 Cent. Dig. tit. "Injunction," § 45. And see 2 Story Eq. § 885.

The unfair advantage must have been due to fraud, and not to negligence on the part of complainant. Witaker *v.* Wickersham, 5 Del. Ch. 187; Harrison *v.* Crumb, 1 Tex. App. Civ. Cas. § 991.

to make a fraudulent use of his action, have assumed jurisdiction and enjoined that action.[98]

(II) *Necessity For Existence of Fraud.* Where the facts alleged do not amount to fraud, of course there will be no injunction against the action.[99] So where the fraudulent representations were made by a third person, not acting for plaintiff at law, an injunction will not issue.[1]

i. Accident and Mistake. The same rules may be laid down as governing cases of accident and mistake as in cases of fraud. The right to relief depends upon the adequacy of the remedy at law, except that many courts favor equitable jurisdiction here as in cases of fraud.[2] The usual rules apply in the matter of requiring the mistake to be mutual,[3] and in cases where the mistake is purely a mistake of law.[4] Accident and mistake are often ground for asking some specific equitable remedy, such as reformation or cancellation, and in such case the court may take complete jurisdiction and enjoin an action at law.[5]

j. Inequitable Defenses — (I) *In General.* A defendant in an action at law will be enjoined from making an inequitable defense or one which he is equitably estopped from asserting, where otherwise it would result in injustice to plaintiff.[6]

98. *California.*— Larue *v.* Friedman, 49 Cal. 278.

Connecticut.—Henshaw *v.* Atkins, 2 Root 7.

Georgia.— Elder *v.* Allison, 45 Ga. 13.

Indiana.— Reed *v.* Tioga Mfg. Co., 66 Ind. 21; Hinkle *v.* Margerum, 50 Ind. 240.

Iowa.— Gardner *v.* Cole, 21 Iowa 205.

Kentucky.— Lee *v.* Vaughan, Ky. Dec. 238.

Michigan.— Oconto Co. *v.* Lundquist, 119 Mich. 264, 77 N. W. 950.

Mississippi.— Adams *v.* Ball, (1888) 5 So. 109.

Pennsylvania.— McGranighan *v.* McGranighan, 19 Pa. Co. Ct. 75.

United States.— Cage *v.* Cassidy, 23 How. 109, 16 L. ed. 430.

See 27 Cent. Dig. tit. "Injunction," § 45.

Where cancellation of an insurance policy was sought, on the ground of fraudulent representations, an injunction against an action at law on the policy was granted, even though the court admitted that the defense at law was perfect and the cancellation wholly unnecessary. John Hancock Mut. L. Ins. Co. *v.* Dick, 114 Mich. 337, 72 N. W. 179, 43 L. R. A. 566. *Contra,* Hoare *v.* Bremridge, L. R. 8 Ch. 22, 42 L. J. Ch. 1, 27 L. T. Rep. N. S. 593, 21 Wkly. Rep. 43.

99. Douglass *v.* Boardman, 113 Mich. 618, 71 N. W. 1100; Roemer *v.* Conlon, 45 N. J. Eq. 234, 19 Atl. 664; Bridges *v.* Robinson, 2 Tenn. Ch. 720; Gaines *v.* Nicholson, 9 How. (U. S.) 356, 13 L. ed. 172.

Disaffirmance of contract by infant.— It is not fraudulent for an infant to disaffirm a contract, even though she has enjoyed the purchase-money. Brawner *v.* Franklin, 4 Gill (Md.) 463.

1. Griffith *v.* Reynolds, 4 Gratt. (Va.) 46.

2. *Alabama.*— Williams *v.* Mitchell, 30 Ala. 299.

Connecticut.— Stanton *v.* Embry, 46 Conn. 595.

Georgia.— Morris *v.* Barnwell, 60 Ga. 147; Conyers *v.* Hamilton, 19 Ga. 76.

Massachusetts.— Payson *v.* Lamson, 134 Mass. 593, 45 Am. Rep. 348.

New Jersey.— Kirchner *v.* Miller, 39 N. J. Eq. 455; Maps *v.* Cooper, 39 N. J. Eq. 316; Field *v.* Cory, 7 N. J. Eq. 574.

Wisconsin.— Ferson *v.* Drew, 19 Wis. 225.

See 27 Cent. Dig. tit. "Injunction," § 45.

3. Rommel *v.* Mass, (N. J. Ch. 1895) 32 Atl. 127; Rankin *v.* Atherton, 3 Paige (N. Y.) 143. See Equity, 16 Cyc. 68.

Even where the mistake was mutual no injunction will be granted unless complainant shows that he is equitably entitled to it under the specific circumstances. Jones *v.* Underwood, 11 Tex. 116.

4. Wood *v.* Price, 46 Ill. 439; Hubbard *v.* Martin, 8 Yerg. (Tenn.) 498; Proctor *v.* Thrall, 22 Vt. 262; Griswold *v.* Hazard, 141 U. S. 260, 11 S. Ct. 972, 35 L. ed. 678. See Equity, 16 Cyc. 73 *et seq.*

5. Field *v.* Cory, 7 N. J. Eq. 574; Crellin *v.* Ely, 13 Fed. 420, 7 Swy. 532.

Lost deed.— When a deed forming a link in a chain of title is lost, equity will restrain a suit to get possession of the land, on the ground of accident and to prevent a cloud upon the title. Butch *v.* Lash, 4 Iowa 215.

6. *Alabama.*— Tyson *v.* Weber, 81 Ala. 470, 2 So. 901.

Indiana.— Bush *v.* Keller, 2 Ind. 69.

Mississippi.— Champlin *v.* Dotson, 13 Sm. & M. 553, 53 Am. Dec. 102.

New Hampshire.— Stevens *v.* Williams, 12 N. H. 246.

New Jersey.— Seymour *v.* Goodwin, (Ch. 1904) 59 Atl. 93; Hackettstown Nat. Bank *v.* Ming, 52 N. J. Eq. 156, 27 Atl. 920; Morris, etc., R. Co. *v.* Green, 15 N. J. Eq. 469.

North Carolina.—Barnes *v.* Ward, 45 N. C. 93, 57 Am. Dec. 590.

United States.— Davis *v.* Wakelee, 156 U. S. 680, 15 S. Ct. 555, 39 L. ed. 578; Bernards Tp. *v.* Stebbins, 109 U. S. 341, 3 S. Ct. 252, 27 L. ed. 956; Cornwall *v.* Davis, 38 Fed. 878, 4 L. R. A. 563; Magniac *v.* Thomson, 16 Fed. Cas. No. 8,957, 2 Wall. Jr. 209 [*affirmed* in 15 How. 281, 14 L. ed. 696].

See 27 Cent. Dig. tit. "Injunction," § 66.

One who has obtained a fraudulent divorce decree may be enjoined from setting it up as

But the putting in of a defense that would not be sustained in a court of law will not be enjoined.[7] A defense is not to be enjoined merely because plaintiff is no longer in a position to rebut it because his witnesses are dead or incompetent.[8]

(11) *STATUTE OF LIMITATIONS.* A defendant will not be enjoined from pleading the statute of limitations when the delay in bringing the action was not caused by artifice or fraud on the part of defendant or by an injunction since dissolved.[9] But where such delay was caused by an injunction obtained at defendant's instance, he is not equitably entitled to use the statute as a defense and will be enjoined.[10]

4. EXISTENCE OF ANOTHER SUFFICIENT REMEDY — a. Remedy at Law in General. Since it is a general rule that an injunction will not be granted for any purpose where the law furnishes an adequate remedy,[11] it follows as a matter of course that an action at law will not be enjoined where adequate relief can be obtained in the court where that action is pending.[12] The remedy at law is not inadequate merely because the court refuses to grant a continuance or to postpone a trial, this being a discretionary matter for that court;[13] nor because the remedy at law is not quite so prompt as the remedy in equity;[14] nor because complainant is unable to furnish the bond required by law as a prerequisite to the remedy.[15]

a defense in an action for a divorce brought by the other spouse. Streitwolf *v.* Streitwolf, 181 U. S. 179, 21 S. Ct. 553, 45 L. ed. 807 [*affirming* 58 N. J. Eq. 563, 41 Atl. 876, 43 Atl. 683, 78 Am. St. Rep. 630].

If defendant enjoined, plaintiff not allowed to proceed.— Equity will not enjoin a defendant from making his defense and yet allow plaintiff to proceed in the action. Plaintiff must submit the whole matter to equity. Jones *v.* Ramsey, 3 Ill. App. 303.

7. Couch *v.* City F. Ins. Co., 37 Conn. 248; Roberts *v.* Mathews, 18 Abb. Pr. (N. Y.) 199; Wakelee *v.* Davis, 44 Fed. 532; Cornwall *v.* Davis, 44 Fed. 533; Robinson *v.* St. Louis Mut. L. Ins. Co., 20 Fed. Cas. No. 11,964.

Defense waived.— An injunction is not proper to prevent the setting up of a defense that has been waived. Couch *v.* City F. Ins. Co., 37 Conn. 248.

8. Dubois *v.* Campau, 37 Mich. 248.

9. Bowman *v.* Violet, 4 T. B. Mon. (Ky.) 350; Holloway *v.* Appleget, 55 N. J. Eq. 583, 40 Atl. 27, 62 Am. St. Rep. 827; Lamb *v.* Martin, 43 N. J. Eq. 34, 9 Atl. 747; Martin *v.* Lamb, 40 N. J. Eq. 669, 5 Atl. 153; Cowan *v.* Telford, 5 Lea (Tenn.) 449; Tennessee Bank *v.* Hill, 10 Humphr. (Tenn.) 176, 51 Am. Dec. 698; Andrae *v.* Redfield, 1 Fed. Cas. No. 367, 12 Blatchf. 407.

10. Marshall *v.* Minter, 43 Miss. 666; Sugg *v.* Thrasher, 30 Miss. 135; Chilton *v.* Scruggs, 5 Lea (Tenn.) 308.

11. See *supra*, III, F. And see EQUITY, 16 Cyc. 31.

12. *California.*— Reay *v.* Butler, 69 Cal. 572, 11 Pac. 463; Uhlfelder *v.* Levy, 9 Cal. 607; Gorham *v.* Toomey, 9 Cal. 77; Phelan *v.* Smith, 8 Cal. 520; Chipman *v.* Hibbard, 8 Cal. 268; Revalk *v.* Kraemer, 8 Cal. 66, 68 Am. Dec. 304; Rickett *v.* Johnson, 8 Cal. 34; Anthony *v.* Dunlap, 8 Cal. 26.

Connecticut.— Welles *v.* Rhodes, 59 Conn. 498, 22 Atl. 286.

Florida.— Finegan *v.* Fernandina, 18 Fla. 127.

Illinois.— Long *v.* Barker, 85 Ill. 431; Klinesmith *v.* Van Bramer, 104 Ill. App. 384.

New Jersey.— Reeves *v.* Cooper, 12 N. J. Eq. 223 [*affirmed* in 12 N. J. Eq. 498]; Wooden *v.* Wooden, 3 N. J. Eq. 429.

New York.— Schepp *v.* Manley, 59 Hun 440, 13 N. Y. Suppl. 728; Grant *v.* Quick, 5 Sandf. 612; Lazarus *v.* Danziger, 16 N. Y. Suppl. 200; Saxton *v.* Wyckoff, 6 Paige 182.

North Carolina.— Johnson *v.* Jones, 75 N. C. 206.

Pennsylvania.— Hogue *v.* Matlack, 8 Pa. Co. Ct. 657; Powell *v.* Abbott, 9 Wkly. Notes Cas. 231.

South Carolina.— Brown *v.* Dickinson, 10 Rich. Eq. 408.

Canada.— French *v.* Taylor, 23 Grant Ch. (U. C.) 436; Imperial Loan, etc., Co. *v.* Boulton, 22 Grant Ch. (U. C.) 121.

An injunction to prevent a distraint for rent by a landlord against the assignee of his lessee should not be granted, since plaintiff has a complete remedy at law by an action of replevin or trespass. Banks *v.* Busey, 34 Md. 437.

Where indemnity in a replevin action can be required by the law court and will fully protect defendant against injury; an injunction will not lie. Bletcher *v.* Burns, 9 Grant Ch. (U. C.) 425.

Where a statutory remedy has been given the remedy by injunction is not granted. Bird *v.* Merchants Tel. Co., 5 Quebec Super. Ct. 445.

Where the statute stays a proceeding without the necessity of an injunction, an injunction will not be granted. Darrow *v.* Adams Exp. Co., 41 Conn. 525.

13. Hamilton *v.* Dobbs, 19 N. J. Eq. 227; Woodworth *v.* Van Buskerk, 1 Johns. Ch. (N. Y.) 432. As to continuances being discretionary see CONTINUANCES IN CIVIL CASES, 9 Cyc. 146.

14. Glenn *v.* Fowler, 8 Gill & J. (Md.) 340.

15. Hall *v.* Holmes, 42 Ga. 179; Huyler *v.* Westervelt, 7 Paige (N. Y.) 155; McAnaspie

b. Court of Law More Suitable Forum For Questions Involved. An action at law will not ordinarily be enjoined where a court of law is a more suitable forum for a trial of the questions involved. Where the question in the action sought to be enjoined is one properly triable at law, a court of equity will not usurp the function of the court of law by granting an injunction.[16] Where the title to land is being tested in an action at law, an injunction will rarely be granted even in cases where equity would have concurrent jurisdiction.[17] So the proper construction,[18] or the constitutionality[19] of a statute, or the validity of an ordinance,[20] is a purely legal question, the litigation of which in a court of law will not ordinarily be enjoined.

c. Defense Available in Actions at Law[21] — (i) *In General.* Matters that will constitute a defense of which the complainant may avail himself in a suit pending or threatened against him cannot be made the ground of an injunction to restrain proceedings in such suit.[22] Furthermore, an action will not be enjoined

v. Dickson, 13 Ir. Eq. 216. See Lapeer County Com'rs *v.* Hart, Harr. (Mich.) 157, holding that the inability to take an appeal because of lack of funds does not make the remedy by appeal inadequate. But see Gilmore *v.* Wells, 78 Ga. 197, where it was held that where a landlord brings a summary proceeding to oust a tenant, and the latter alleges that he himself has title, but that because of poverty he cannot give the bond required for retaining possession, and that the alleged landlord is insolvent, an injunction is proper.

16. Harrison *v.* McCrary, 37 Ala. 687; Croom *v.* Davis, 6 Ala. 40; King *v.* Hall, 5 Cal. 82; Winslow Tp. *v.* Hudson, 21 N. J. Eq. 172; Hoare *v.* Bremridge, L. R. 8 Ch. 22, 42 L. J. Ch. 1, 27 L. T. Rep. N. S. 593, 21 Wkly. Rep. 43.

17. Knowles *v.* Inches, 12 Cal. 212; Thompson *v.* Engle, 4 N. J. Eq. 271; Brooklyn *v.* Meserole, 26 Wend. (N. Y.) 132; Szymanski *v.* Zunts, 20 Fed. 361. See also *infra*, V, B, 2.

18. Newkirk *v.* Morris, 12 N. J. Eq. 62.

19. Balogh *v.* Lyman, 6 N. Y. App. Div. 271, 39 N. Y. Suppl. 780; Wallack *v.* New York Reformation Soc., 67 N. Y. 23; Kip *v.* New York, etc., R. Co., 6 Hun (N. Y.) 24 [*affirmed* in 67 N. Y. 227].

20. Chicago, etc., R. Co. *v.* Ottawa, 148 Ill. 397, 36 N. E. 85; West *v.* New York, 10 Paige (N. Y.) 539.

21. See EQUITY, 16 Cyc. 30 *et seq.*

22. *Alabama.*— Norwood *v.* Tyson, 138 Ala. 269, 36 So. 370; German *v.* Browne, 137 Ala. 429, 34 So. 985; Rucker *v.* Morgan, 122 Ala. 308, 25 So. 242; Newsom *v.* Thornton, 66 Ala. 311; Howell *v.* Motes, 54 Ala. 1; Womack *v.* Powers, 50 Ala. 5; Foster *v.* State Bank, 17 Ala. 672; Standifer *v.* McWhorter, 1 Stew. 532.

California.— Waymire *v.* San Francisco, etc., R. Co., 112 Cal. 646, 44 Pac. 1086; Smith *v.* Sparrow, 13 Cal. 596.

Connecticut.— Hood *v.* New York, etc., R. Co., 23 Conn. 609.

Florida.— Cohen *v.* State Bank, 29 Fla. 579, 11 So. 47.

Georgia.— Sayer *v.* Douglas County, 119 Ga. 550, 46 S. E. 654; Sayer *v.* Brown, 119 Ga. 539, 46 S. E. 649; Conwell *v.* Neal, 115 Ga. 421, 41 S. E. 629; Winn *v.* Pittman, 114 Ga. 862, 40 S. E. 993; Teft *v.* Booth, 104 Ga. 590, 30 S. E. 803; Bryan *v.* Windsor, 99 Ga. 176, 25 S. E. 268; Mallory *v.* Cowart, 90 Ga. 600, 16 S. E. 658; Burks *v.* Beall, 77 Ga. 271, 3 S. E. 155; Northeastern R. Co. *v.* Barrett, 65 Ga. 601; Arnold *v.* Arnold, 62 Ga. 627; Carr *v.* Lee, 44 Ga. 376; Camp *v.* Matheson, 30 Ga. 170; Chambless *v.* Taber, 26 Ga. 167.

Illinois.— Andel *v.* Starkel, 192 Ill. 206, 61 N. E. 356; Cook County *v.* Chicago, 158 Ill. 524, 42 N. E. 67; Dierks *v.* Highway Com'rs, 142 Ill. 197, 31 N. E. 496; McCormick *v.* Littler, 85 Ill. 62, 28 Am. Rep. 610; McCullom *v.* Chidester, 63 Ill. 477; Finley *v.* Thayer, 42 Ill. 350; Staley *v.* Murphy, 47 Ill. 241; Harris *v.* Galbraith, 43 Ill. 309; Bard *v.* Jones, 96 Ill. App. 370; Rodger Ballast Car Co. *v.* Perrin, 88 Ill. App. 323; Mexican Asphalt Co. *v.* Mexican Asphalt Pav. Co., 61 Ill. App. 354; Scott *v.* Scott, 61 Ill. App. 103.

Indiana.— Martin *v.* Orr, 96 Ind. 27; Palmer *v.* Hayes, 93 Ind. 189; Hartman *v.* Heady, 57 Ind. 545; Patten *v.* Stewart, 24 Ind. 332.

Iowa.— Smith *v.* Short, 11 Iowa 523.

Kentucky.— Powell *v.* Powell, 5 Dana 168.

Louisiana.— Hall *v.* Egelly, 35 La. Ann. 312; Megget *v.* Lynch, 8 La. Ann. 6.

Maryland.— Atlantic, etc., Consol. Coal Co. *v.* Maryland Coal Co., 62 Md. 135; Bowen *v.* Gent, 54 Md. 555.

Massachusetts.— Worcester *v.* Lakeside Mfg. Co., 174 Mass. 299, 54 N. E. 833; Payson *v.* Lamson, 134 Mass. 593, 45 Am. Rep. 348; Fuller *v.* Cadwell, 6 Allen 503.

Michigan.— St. Johns Nat. Bank *v.* Bingham Tp., 113 Mich. 203, 71 N. W. 588; Lapeer County Com'rs *v.* Hart, Harr. 157.

Mississippi.— Larson *v.* Larson, 82 Miss. 116, 33 So. 717; New Orleans Shell Lime Mfg. Co. *v.* Lowenstein, (1891) 11 So. 187.

New Jersey.— United New Jersey R., etc., Co. *v.* McCulley, (Ch. 1904) 59 Atl. 229; Slater *v.* Schwegler, (Ch. 1903) 54 Atl. 937; Screw Mower, etc., Co. *v.* Mettler, 26 N. J. Eq. 264; Emery *v.* Vansickel, 15 N. J. Eq. 144; Yard *v.* Pacific Mut. Ins. Co., 10 N. J. Eq. 480, 67 Am. Dec. 467.

New York.— Thomas *v.* Musical Mut. Pro-

while it is uncertain whether the court of law will entertain a defense.[23] And *a fortiori* an action will not be enjoined on grounds that constitute no defense either at law or in equity.[24] Nevertheless the existence of a defense at law does not make an injunction against the action at law improper when for any reason the court of equity is a more suitable tribunal for the determination of the matter or where equitable remedies, unavailable in the court of law, are necessary;[25] and the defense at law is regarded as inadequate unless it is available in the courts of the state where the injunction is asked.[26]

tective Union, 121 N. Y. 45, 24 N. E. 24, 8 L. R. A. 175 [*reversing* 49 Hun 171, 2 N. Y. Suppl. 195]; Kinnan *v.* Sullivan County Club, 26 N. Y. App. Div. 213, 50 N. Y. Suppl. 95; Weber *v.* Rogers, 41 Misc. 662, 85 N. Y. Suppl. 232. *Compare* Bomeisler *v.* Forster, 154 N. Y. 229, 48 N. E. 534, 39 L. R. A. 240; Kelly *v.* Christal, 81 N. Y. 619; Wolfe *v.* Burke, 56 N. Y. 115; Savage *v.* Allen, 54 N. Y. 458 [*affirming* 59 Barb. 291]; Minturn *v.* Farmers' L. & T. Co., 3 N. Y. 498; Pratt *v.* Roman Catholic Orphan Asylum, 20 N. Y. App. Div. 352, 46 N. Y. Suppl. 1035; Bradley Salt Co. *v.* Keating, 61 Hun 251, 16 N. Y. Suppl. 795; Gardner *v.* Oliver Lee, etc., Bank, 11 Barb. 558; New York City Baptist Mission Soc. *v.* Potter, 20 Misc. 191, 44 N. Y. Suppl. 1051; Bliss *v.* Murray, 7 N. Y. Suppl. 917; Farmers' L. & T. Co. *v.* McHenry, 9 Abb. N. Cas. 235; Conkling *v.* Secor Sewing Mach. Co., 55 How. Pr. 269; New York Dry Dock Co. *v.* American L. Ins., etc., Co., 11 Paige 384; Le Roy *v.* Platt, 4 Paige 77; Teller *v.* Van Deusen, 3 Paige 33; Sailly *v.* Elmore, 2 Paige 497; Davis *v.* American L. Ins., etc., Co., 4 Edw. 308; Geer *v.* Kissam, 3 Edw. 129.

Pennsylvania.— Olmsted's Appeal, 86 Pa. St. 284.

Rhode Island.— Wilbor *v.* Matteson, 8 R. I. 166.

South Carolina.— Schnell *v.* Schroder, Bailey Eq. 334.

Tennessee.— Huddleston *v.* Williams, 1 Heisk. 579.

Texas.— Smith *v.* Ryan, 20 Tex. 661; McMickle *v.* Hardin, 25 Tex. Civ. App. 222, 61 S. W. 322.

Vermont.— Westminster *v.* Willard, 65 Vt. 266, 26 Atl. 952; Safford *v.* Gallup, 53 Vt. 291; Morse *v.* Morse, 44 Vt. 84.

Virginia.— Harvey *v.* Fox, 5 Leigh 444.

Wisconsin.— Wolf River Lumber Co. *v.* Brown, 88 Wis. 638, 60 N. W. 996 (replevin will not be enjoined where any matter of title may be shown in defense in that action); Rogers *v.* Cross, 3 Pinn. 36, 3 Chandl. 34.

United States.— Grand Chute *v.* Winegar, 15 Wall. 373, 21 L. ed. 174; Phœnix Mut. L. Ins. Co. *v.* Bailey, 13 Wall. 616, 20 L. ed. 501; Sunset Tel., etc., Co. *v.* Eureka, 122 Fed. 960; Columbia Bldg., etc., Assoc. *v.* Grange, 77 Fed. 798; Burhans *v.* Jefferson, 76 Fed. 25, 22 C. C. A. 25; Ætna L. Ins. Co. *v.* Smith, 73 Fed. 318; Northern Pac. R. Co. *v.* Cannon, 49 Fed. 517; Pullman's Palace-Car Co. *v.* Central Transp. Co., 34 Fed. 357; Concord *v.* Norton, 16 Fed. 477; Drexel *v.* Berney, 14 Fed. 268, 16 Fed. 522, 21 Blatchf. 348.

England.— Ochsenbein *v.* Papelier, L. R. 8 Ch. 695, 42 L. J. Ch. 861, 28 L. T. Rep. N. S. 459, 21 Wkly. Rep. 516; Kemp *v.* Tucker, L. R. 8 Ch. 369, 42 L. J. Ch. 532, 28 L. T. Rep. N. S. 458, 21 Wkly. Rep. 470; Hoare *v.* Bremridge, L. R. 8 Ch. 22, 42 L. J. Ch. 1, 27 L. T. Rep. N. S. 593, 21 Wkly. Rep. 43; Lee *v.* Lancashire, etc., R. Co., L. R. 6 Ch. 527, 25 L. T. Rep. N. S. 77, 19 Wkly. Rep. 729; Derbyshire, etc., R. Co. *v.* Serrell, 2 De G. & Sm. 353, 12 Jur. 826, 64 Eng. Reprint 158; Anderson *v.* Dowling, 11 Ir. Eq. 590; Johnston *v.* Young, Ir. R. 10 Eq. 403; Scotland Life Assoc. *v.* McBlane, Ir. R. 9 Eq. 176; Anderson *v.* Lamb, 21 Wkly. Rep. 764.

Canada.— Morrison *v.* McLean, 7 Grant Ch. (U. C.) 167; Pomeroy *v.* Boswell, 7 Grant Ch. (U. C.) 163, an agreement by plaintiff to give time is no ground for an injunction.

See 27 Cent. Dig. tit. "Injunction," §§ 15, 35.

Insanity and adjudication thereof is a legal defense to an action on a note, so no injunction issues. McCormick *v.* Littler, 85 Ill. 62, 28 Am. Rep. 610.

Subsequent alteration of a note is a perfect defense at law and a suit on it will not be enjoined. Ross *v.* Buchanan, 13 Ill. 55.

The unconstitutionality of an ordinance or law is a defense in any action or prosecution to enforce it, and in ordinary cases such a defense affords an adequate remedy. Bainbridge *v.* Reynolds, 111 Ga. 758, 36 S. E. 935; Home Sav., etc., Co. *v.* Hicks, 116 Iowa 114, 89 N. W. 103.

A plea in abatement in a pending suit is a sufficient remedy, and injunction will not be granted because of matter that might be so pleaded. Worcester *v.* Lakeside Mfg. Co., 174 Mass. 299, 54 N. E. 833.

23. Gibbs *v.* Ward, (N. J. Ch. 1901) 48 Atl. 243; Terre Haute, etc., R. Co. *v.* Peoria, etc., R. Co., 82 Fed. 943. But *compare* Hurlbut *v.* Phelps, 30 Conn. 42.

24. Daughdrill *v.* Edwards, 59 Ala. 424; Cook County *v.* Chicago, 158 Ill. 524, 42 N. E. 67; Peabody *v.* Hoard, 46 Ill. 242.

25. Bissell *v.* Beckwith, 33 Conn. 357; John Hancock Mut. L. Ins. Co. *v.* Dick, 114 Mich. 337, 72 N. W. 179, 43 L. R. A. 566; Siemon *v.* Schurck, 29 N. Y. 598.

Complete defense but inadequate remedy.— Although there be a complete defense at law, if more adequate relief is necessary, to prevent the bringing out of scandalous matters affecting reputation and doing irreparable injury, the action at law will be enjoined. Bomeisler *v.* Forster, 154 N. Y. 229, 48 N. E. 534, 39 L. R. A. 240.

26. Stanton *v.* Embry, 46 Conn. 595.

(II) *Equitable Defenses* — (A) *In General.* The existence of an equitable defense which cannot be made available as a defense in an action at law is sufficient ground for an injunction to restrain proceedings at law.[27] But the party asking the injunction must make out a clear case showing that he is actually entitled to an equitable remedy, and in many cases an injunction has been refused because there existed in reality no equitable defense.[28] So where purely equitable defenses are equally available at law, no injunction will be granted restraining an action at law because of the existence of such a defense.[29] And equitable

27. *Alabama.*— Snediker *v.* Boyleston, 83 Ala. 408, 4 So. 33.

California.— Gregory *v.* Diggs, 113 Cal. 196, 45 Pac. 261.

Connecticut.— Ferguson *v.* Fisk, 28 Conn. 501.

Delaware.— Plunkett *v.* Dillon, 3 Del. Ch. 496.

Georgia.— Pollock *v.* Gilbert, 16 Ga. 398, 60 Am. Dec. 732.

Illinois.— See Doane *v.* Fuller, 192 Ill. 617, 61 N. E. 839 [*affirming* 88 Ill. App. 515], holding that no injunction will issue where there will be no irreparable injury.

Missouri.— De Moss *v.* Economy Furniture, etc., Co., 74 Mo. App. 117; Orr *v.* McCurdy, 34 Mo. App. 418.

New York.— Crawford *v.* Kastner, 26 Hun 440.

Ohio.— Sloane *v.* Clauss, 64 Ohio St. 125, 59 N. E. 884.

Tennessee.— Hough *v.* Chaffin, 4 Sneed 238.

Virginia.— Penn *v.* Ingles, 82 Va. 65.

United States.— Leigh *v.* Kewanee Mfg. Co., 127 Fed. 990; Ely *v.* Elliott, 8 Fed. Cas. No. 4,429*a*.

Canada.— McLaggan *v.* Hutchison, 30 N. Brunsw. 185.

See 27 Cent. Dig. tit. "Injunction," § 36.

For instance the action will be enjoined where an instrument has been given for the payment of money absolutely, but where payment was really conditional, or to which there was some other equitable defense. Knight *v.* Knight, 28 Ga. 165; Westfall *v.* Heisen, 78 Ill. App. 622; Lynch *v.* Colgate, 2 Harr. & J. (Md.) 34; Grinnan *v.* Platt, 31 Barb. (N. Y.) 328; Clayton *v.* Lyle, 55 N. C. 188; Bell *v.* Gamble, 9 Humphr. (Tenn.) 117.

See 27 Cent. Dig. tit. "Injunction," § 36.

Where a grantor brought ejectment on the ground of condition broken, the grantee was given an injunction because he had substantially fulfilled the condition, although not literally. Bowen *v.* Bowen, 20 Conn. 127.

Action in violation of agreement.— Where one sues on a bond against the obligors thereon alone, when he had agreed to collect it ratably from the obligors and others, his action will be enjoined. Briggs *v.* Law, 4 Johns. Ch. (N. Y.) 22.

28. *California.*— Adams *v.* Andross, 77 Cal. 483, 20 Pac. 26.

Delaware.— Hayes *v.* Hayes, 2 Del. Ch. 191, 73 Am. Dec. 709.

Florida.— Thompson *v.* Maxwell, 16 Fla. 773.

Georgia.— Way *v.* Brown, 30 Ga. 806; Castleberry *v.* Scandrett, 20 Ga. 242.

Kentucky.— Clark *v.* Finnell, 16 B. Mon. 329.

Maryland.— Carswell *v.* Walsh, 70 Md. 504, 17 Atl. 335.

Michigan.— Sparrow *v.* Smith, 63 Mich. 209, 29 N. W. 691.

New Jersey.— Cox *v.* Gruver, 40 N. J. Eq. 473, 3 Atl. 172; Long Dock Co. *v.* Bentley, 37 N. J. Eq. 15; Hall *v.* Piddock, 21 N. J. Eq. 311.

New York.— Wolfe *v.* Burke, 56 N. Y. 115; Koehler *v.* Farmers', etc., Nat. Bank, 51 Hun 418, 4 N. Y. Suppl. 232; McCartee *v.* Teller, 2 Paige 511.

North Carolina.— Whitaker *v.* Bond, 63 N. C. 290.

South Carolina.— McAliley *v.* Barber, 4 Rich. 45.

Tennessee.— Moore *v.* Johnson, 7 Lea 580.

United States.— Cabaniss *v.* Reco Min. Co., 116 Fed. 318, 54 C. C. A. 190; Harman *v.* Harman, 70 Fed. 894, 17 C. C. A. 479.

See 27 Cent. Dig. tit. "Injunction," §§ 28, 36.

An action will not be enjoined on the ground that the attorney for plaintiff had no authority to bring it (Harris *v.* Galbraith, 43 Ill. 309); nor on the ground that if plaintiffs recover they will hold the proceeds in trust for defendants (Long Dock Co. *v.* Bentley, 37 N. J. Eq. 15).

29. *Connecticut.*— Metropolitan L. Ins. Co. *v.* Fuller, 61 Conn. 52, 23 Atl. 193, 29 Am. St. Rep. 196; Welles *v.* Rhodes, 59 Conn. 498, 22 Atl. 286; Hood *v.* New York, etc., R. Co., 23 Conn. 609.

Georgia.— Mordecai *v.* Stewart, 37 Ga. 364.

Idaho.— Utah, etc., R. Co. *v.* Crawford, 1 Ida. 770.

Illinois.— Hopkins *v.* Medley, 99 Ill. 509.

Louisiana.— State *v.* Judge Orleans Parish Civ. Dist. Ct., 39 La Ann. 619, 2 So. 385.

New York.— Winfield *v.* Bacon, 24 Barb. 154; Richardson *v.* Davidson, 2 Silv. Sup. 194, 5 N. Y. Suppl. 617; Snow *v.* New York Fourth Nat. Bank, 7 Rob. 479; Sampson *v.* Wood, 10 Abb. Pr. N. S. 223 note; Arndt *v.* Williams, 16 How. Pr. 244; Foot *v.* Sprague, 12 How. Pr. 355.

Texas.— Gibson *v.* Moore, 22 Tex. 611.

Wisconsin.— Winterfield *v.* Stauss, 24 Wis. 394; Marsh *v.* Edgerton, 2 Pinn. 230, 1 Chandl. 198.

England.— Waterlow *v.* Bacon, L. R. 2 Eq. 514, 12 Jur. N. S. 614, 35 L. J. Ch. 643, 14 L. T. Rep. N. S. 724, 14 Wkly. Rep. 855; Terrell *v.* Higgs, 1 De G. & J. 388, 4 Jur. N. S. 41, 5 Wkly. Rep. 746, 58 Eng. Ch. 301,

defenses may, under the codes, be set up in an action at law, even though to make them effectual affirmative equitable relief is necessary, and therefore they cannot be made the basis of an independent suit for such equitable relief.[30]

(B) *Equitable Title.*[31] An action by the holder of the legal title to recover property or its value from one who holds the equitable title will be enjoined.[32]

(C) *Equitable Estoppel.*[33] An injunction will be granted on a showing of facts constituting an equitable estoppel against plaintiff in the action at law.[34] However, if the facts constituting the ground of the estoppel can be made use of equally well in the action at law, that action will not be enjoined.[35]

44 Eng. Reprint 773; Wild *v.* Hillas, 28 L. J. Ch. 170, 7 Wkly. Rep. 82.

Canada.— Boulton *v.* Cameron, 9 Grant Ch. (U. C.) 297.

See 27 Cent. Dig. tit. "Injunction," §§ 35, 36.

Where defendant's own imperfect pleading is responsible for the impossibility of making the equitable defense at law and not the limitations of the court of law, he is not entitled to an injunction. Richardson *v.* Davidson, 2 Silv. Sup. (N. Y.) 194, 5 N. Y. Suppl. 617.

Where a defendant unsuccessfully pleads an equitable plea, grounded not on equitable principles but on the course and practice of a court of equity, he is not prevented by the decision at law from filing a bill on the same grounds for an injunction to restrain proceedings in the action. Evans *v.* Bremridge, 8 De G. M. & G. 100, 2 Jur. N. S. 311, 25 L. J. Ch. 334, 4 Wkly. Rep. 350, 57 Eng. Ch. 78, 44 Eng. Reprint 327; Phelps *v.* Prothero, 7 De G. M. & G. 722, 2 Jur. N. S. 773, 25 L. J. Ch. 105, 4 Wkly. Rep. 189, 56 Eng. Ch. 557, 44 Eng. Reprint 280.

When a defendant by mistake pleads an equitable defense as a legal one, and it fails for that reason, he is not debarred from asking an injunction against the action at law. Arnold *v.* Allinor, 16 Grant Ch. (U. C.) 213, 15 Grant Ch. (U. C.) 375.

In England the Judicature Act of 1873 abolished the jurisdiction of the court of chancery to restrain by injunction an action at law in the high court of justice or the court of appeal on the ground that the complainant has a good equitable defense; and provided that such equitable defense may be made use of to the same extent in the action at law as it might have been in equity. *In re* Artistic Colour Printing Co., 14 Ch. D. 502, 49 L. J. Ch. 526, 42 L. T. Rep. N. S. 803, 28 Wkly. Rep. 943; Kerr Inj. (4th ed.) 10. But an injunction still lies against the institution of proceedings at law, although not to restrain an action that is already pending. Besant *v.* Wood, 12 Ch. D. 605, 48 L. J. Ch. 497, 40 L. T. Rep. N. S. 445; Kerr Inj. (4th ed.) 517. And see *In re* A Company, [1894] 2 Ch. 349; Cercle Restaurant Castiglione Co. *v.* Lavery, 18 Ch. D. 555, 50 L. J. Ch. 837, 30 Wkly. Rep. 283; 17 & 18 Vict. c. 125, § 83, giving a right to plead an equitable defense, is only permissive and not compulsory; and a defendant who has not exercised his option of pleading an equitable plea may come for an injunction to restrain the action, as he might have done before that act. Gompertz *v.* Pooley, 4 Drew. 448, 5 Jur. N. S. 261, 28 L. J. Ch. 484, 7 Wkly. Rep. 275; Kingsford *v.* Swinford, 5 Jur. N. S. 261, 28 L. J. Ch. 413, 62 Eng. Reprint 173, 7 Wkly. Rep. 215.

30. McCall *v.* Fry, 120 Ga. 661, 48 S. E. 200; Ducktown Sulphur, etc., Co. *v.* Fain, 109 Tenn. 56, 70 S. W. 813.

31. Equitable title as ground for enjoining ejectment see *infra*, V, A, 4, c, (XV).

32. Brown *v.* Newsom, 24 Ga. 466; Frith *v.* Roe, 23 Ga. 139; Miles *v.* Wise, 11 Rich. Eq. (S. C.) 536, 78 Am. Dec. 461; Cotesworth *v.* Stephens, 4 Hare 185, 30 Eng. Ch. 185.

33. As ground to enjoin ejectment see *infra*, V, A, 4, c, (XV).

34. *Georgia.*— Beckham *v.* Newton, 21 Ga. 187.

Maine.— Chafee *v.* New York Fourth Nat. Bank, 71 Me. 514, 36 Am. Rep. 345.

New York.— Pettigrew *v.* Foshay, 12 Hun 483; Leonard *v.* Crommelin, 1 Edw. 206.

North Carolina.— Smith *v.* Hays, 54 N. C. 321.

West Virginia.— Norfolk, etc., R. Co. *v.* Perdue, 40 W. Va. 442, 21 S. E. 755.

United States.— Given *v.* Times-Republican Printing Co., 114 Fed. 92, 52 C. C. A. 40.

England.— Tredegar *v.* Windus, L. R. 19 Eq. 607, 44 L. J. Ch. 268, 32 L. T. Rep. N. S. 596, 23 Wkly. Rep. 511.

See 27 Cent. Dig. tit. "Injunction," § 38.

Illustrations.— Where parties interested in a chancery foreclosure sale prevented the property from being sold for a greater amount than it was actually sold for, their action at law for the deficiency created by their interference will be enjoined in equity. Innes *v.* Stewart, 36 Mich. 285. A widow proceeding to procure the admeasurement of dower, in a case where she is estopped by knowingly permitting the purchaser of the land to part with his money on her assurance that she made no claim to dower, and threatening to bring ejectment to recover the same, may be permanently enjoined from doing so. Wood *v.* Seely, 32 N. Y. 105. Where a note is signed and delivered with the understanding that it shall not be enforced, a court of chancery will enjoin its enforcement. Bell *v.* Gamble, 9 Humphr. (Tenn.) 117.

35. *Connecticut.*— Hood *v.* New York, etc., R. Co., 23 Conn. 609.

Florida.— Byrne *v.* Brown, 40 Fla. 109, 23 So. 877.

(D) *Laches and Statute of Limitations.* Generally speaking mere delay in bringing an action is no ground for an injunction against its prosecution; although delay, along with other circumstances constituting an equitable estoppel, may be.[36] The right to plead the statute of limitations does not constitute an equitable defense, and therefore the fact that the period fixed by the statute has run is no ground for enjoining the action at law, even though the plea of the statute cannot be made available at law.[37]

(III) *Both Legal and Equitable Defenses.* Where complainant has a purely equitable defense as well as a perfect legal one, equity will usually take jurisdiction of the case, and incidentally enjoin the action at law.[38]

(IV) *Want of Consideration.* The fact that an instrument sued upon at law was without consideration is no ground for enjoining the action.[39]

(V) *Failure of Consideration*—(A) *In General.* Where one of the parties to a contract has failed to perform his part, especially in cases where land has been sold with general covenant of warranty, and later it appears that the title is defective, the courts are not in harmony as to the circumstances under which the vendee can obtain an injunction against an action for the collection of the purchase-money or the enforcement of the contract. In cases where the defect of title or the non-performance can be used as a defense in the action at law, it would seem that there is no reason for the interposition of a court of equity.[40] But where the defense could not be availed of in the action at law, or where some special equitable remedy is necessary to do complete justice, or the remedy at law is otherwise inadequate, there is no objection to an injunction restraining the action at law.[41] Cases seeming to make mere failure of consideration the ground for enjoining an action can generally be justified on the foregoing grounds. Where a defendant is sued on a negotiable note, the consideration for which has

Georgia.— Northeastern R. Co. *v.* Barrett, 65 Ga. 601.

Maryland.— Roland Park Co. *v.* Hull, 92 Md. 301, 48 Atl. 366.

United States.— Wehrman *v.* Conklin, 155 U. S. 314, 15 S. Ct. 129, 39 L. ed. 167. See Drexel *v.* Berney, 16 Fed. 522, 21 Blatchf. 348, where it was said that the doctrine of equitable estoppel or estoppel *in pais* is now enforced as liberally in courts of law as in courts of equity, and hence an injunction was refused.

36. Keron *v.* Coon, 26 N. J. Eq. 26; Clark *v.* Clapp, 14 R. I. 248; Wehrman *v.* Conklin, 155 U. S. 314, 15 S. Ct. 129, 39 L. ed. 167. But see Jonekin *v.* Holland, 7 Ga. 589. 50 Am. Dec. 414; Frevall *v.* Barclay, 5 Pa. L. J. Rep. 268.

37. Thorndike *v.* Thorndike, 142 Ill. 450, 32 N. E. 510, 34 Am. St. Rep. 90, 21 L. R. A. 71; Caldwell *v.* Williams, Bailey Eq. (S. C.) 175. But see Moody *v.* Harper, 38 Miss. 599.

As for instance where the action at law is brought in another state in which the statutory period is longer than in the state wherein the injunction is asked (Thorndike *v.* Thorndike, 142 Ill. 450, 32 N. E. 510, 34 Am. St. Rep. 90, 21 L. R. A. 71 [*affirming* 42 Ill. App. 491]), or where the statute is not available at law because of the incapacity of parties for whom the action is brought (Fleming *v.* Collins, 27 Ga. 494).

38. *Ex p.* Hodges, 24 Ark. 197; Henwood *v.* Jarvis, 27 N. J. Eq. 247.

For example a defendant is under no obligation to plead the statute of limitations, and therefore he may enjoin an action if he has proper equitable grounds, even though he might make the statute a complete defense at law. Hastings *v.* Belden, 55 Vt. 273.

39. Megget *v.* Lynch, 8 La. Ann. 6; Anthony *v.* Valentine, 130 Mass. 119.

Action on note.— Want of consideration is no ground for enjoining an action on a promissory note when it is in the hands of one with notice and it is past maturity. Geer *v.* Kissam, 3 Edw. (N. Y.) 129.

40. Black *v.* Stone, 33 Ala. 327; Smith *v.* Short, 11 Iowa 523; Anthony *v.* Valentine, 130 Mass. 119; Bostwick *v.* Covell, 24 Fed. 402.

41. *Arkansas.*— Black *v.* Bowman, 9 Ark. 501.

Delaware.— Ewing *v.* Chase, 2 Del. Ch. 278; Robinson *v.* Jefferson, 1 Del. Ch. 244.

Indiana.— Sandage *v.* Studebaker Bros. Mfg. Co., 142 Ind. 148, 41 N. E. 380, 51 Am. St. Rep. 165, 34 L. R. A. 363.

New Jersey.— Sweeney *v.* Williams, 36 N. J. Eq. 459 [*affirmed* in 36 N. J. Eq. 627]. See also Shannon *v.* Marselis, 1 N. J. Eq. 413.

North Carolina.— Richardson *v.* Williams, 56 N. C. 116; Green *v.* Campbell, 55 N. C. 446; King *v.* Lindsey, 38 N. C. 77.

Tennessee.— Sommerhill *v.* Cartwright, 7 Humphr. 461; Donelson *v.* Young, Meigs 155.

Vermont.— Bowen *v.* Thrall, 28 Vt. 382.

Virginia.— Bullitt *v.* Songster, 3 Munf. 54, cancellation of an instrument.

Canada.— Kilborn *v.* Workman, 9 Grant Ch. (U. C.) 255.

See 27 Cent. Dig. tit. "Injunction," § 42.

failed, the suit will be enjoined and the note ordered delivered up for cancellation to prevent its coming into the hands of a *bona fide* purchaser.[42] In the case of a sale of land the vendee still has a right of action against his vendor on the covenant of warranty, and many courts hold that this in itself affords an adequate remedy at law, and therefore refuse an injunction against an action for the purchase-price.[43]

(B) *Insolvency of Grantor.* Ordinarily the collection of the purchase price will not be enjoined unless the grantor or covenantor is insolvent, since otherwise an action at law on the covenant would be an adequate remedy.[44] And an injunction may be refused, even though insolvency is shown.[45]

(C) *Eviction Under Paramount Title.* Where the vendee has been actually evicted by one holding title paramount, he is entitled to an injunction against the collection of the purchase-money.[46]

(D) *Defect in Title.* An injunction has been held improper where the purchaser had notice of the defect of title or adverse claim at the time of his purchase.[47] But if the defect in the title was fraudulently concealed an injunction will be granted.[48] According to some decisions where a purchaser has been let into possession and has continued without interruption or eviction by one holding a paramount title, he is not, in the absence of fraud, entitled to equitable relief from payment of the purchase-money on the ground of defect of title.[49] Unless there is fraud on the part of the vendor an actual eviction is a prerequisite to the obtaining of an injunction, and a mere threat to evict or the mere existence of a defect in the title is not alone sufficient.[50] There is a line of cases, however,

42. Metler *v.* Metler, 19 N. J. Eq. 457; Darst *v.* Brockway, 11 Ohio 462.

Injunction against bona fide purchaser.— Of course no injunction will be granted as against a *bona fide* purchaser of a negotiable note for value, without notice, and before maturity, merely on the ground that the payee has failed to perform his promise. McLain *v.* Coulter, 5 Ark. 13; Gridley *v.* Tucker, Freem. (Miss.) 209; Bumpus *v.* Platner, 1 Johns. Ch. (N. Y.) 213; Donelson *v.* Young, Meigs (Tenn.) 155.

43. McKoy *v.* Chiles, 5 T. B. Mon. (Ky.) 259; Swain *v.* Burnley, 1 Mo. 404. See also Threlkelds *v.* Campbell, 2 Gratt. (Va.) 198, 44 Am. Dec. 384.

44. *Alabama.*— Walton *v.* Bonham, 24 Ala. 513; McLemore *v.* Mabson, 20 Ala. 137.

Florida.— Hunter *v.* Bradford, 3 Fla. 269.

Georgia.— McCauley *v.* Moses, 43 Ga. 577, no showing of insolvency required.

Indiana.— Wimberg *v.* Schwegeman, 97 Ind. 528; Crowfoot *v.* Zink, 26 Ind. 187.

Kentucky.— Taylor *v.* Lyon, 2 Dana 276; Simpson *v.* Hawkins, 1 Dana 303; Brownston *v.* Cropper, 1 Litt. 173.

Missouri.— Jones *v.* Stanton, 11 Mo. 433 (vendor's solvency doubtful); Barton *v.* Rector, 7 Mo. 524 (insolvency not necessary).

New York.— Woodruff *v.* Bunce, 9 Paige 443, 38 Am. Dec. 559.

Tennessee.— Young *v.* Butler, 1 Head 640.

West Virginia.— Renick *v.* Renick, 5 W. Va. 285.

See 27 Cent. Dig. tit. "Injunction," § 44.

45. Rawlins *v.* Timberlake, 6 T. B. Mon. (Ky.) 225; Patton *v.* Taylor, 7 How. (U. S.) 132, 12 L. ed. 637.

46. Rawlins *v.* Timberlake, 6 T. B. Mon. (Ky.) 225; Barrow *v.* Cazeaux, 5 La. 72; Kyle *v.* Thompson, 11 Ohio St. 616.

47. *Arkansas.*— Worthington *v.* Curd, 22 Ark. 277.

Kentucky.— Rawlins *v.* Timberlake, 6 T. B. Mon. 225.

Mississippi.— Green *v.* Finucane, 5 How. 542.

Virginia.— Washington *v.* Pollard, 5 Gratt. 432.

West Virginia.— See Renick *v.* Renick, 5 W. Va. 285.

See 27 Cent. Dig. tit. "Injunction," § 42.

Contra.— Jaques *v.* Esler, 4 N. J. Eq. 461.

48. Houston *v.* Hurley, 2 Del. Ch. 247; Carswell *v.* Macon Mfg. Co., 38 Ga. 403; Warren *v.* Carey, 5 Ind. 319.

49. *Alabama.*— Blanks *v.* Walker, 54 Ala. 117.

Arkansas.— Worthington *v.* Curd, 22 Ark. 277; Hoppes *v.* Cheek, 21 Ark. 585.

Georgia.— McCauley *v.* Moses, 43 Ga. 577.

Indiana.— Strong *v.* Downing, 34 Ind. 300. But see Fehrle *v.* Turner, 77 Ind. 530.

Mississippi.— Vick *v.* Percy, 7 Sm. & M. 256, 45 Am. Dec. 303.

Missouri.— Barton *v.* Rector, 7 Mo. 524.

New York.— Woodruff *v.* Bunce, 9 Paige 443, 38 Am. Dec. 559.

Tennessee.— Topp *v.* White, 12 Heisk. 165; Young *v.* Butler, 1 Head 640; Senter *v.* Hill, 5 Sneed 505; Buchanan *v.* Alwell, 8 Humphr. 516.

See 27 Cent. Dig. tit. "Injunction," §§ 42, 43.

50. Walker *v.* Gilbert, 7 Sm. & M. (Miss.) 456; Vick *v.* Percy, 7 Sm. & M. (Miss.) 256, 45 Am. Dec. 303; Coleman *v.* Rowe, 5 How. (Miss.) 460, 37 Am. Dec. 164; Bumpus *v.* Platner, 1 Johns. Ch. (N. Y.) 213; Wilkins *v.* Hogue, 55 N. C. 479; Patton *v.* Taylor, 7 How. (U. S.) 132, 12 L. ed. 637; Truly *v.* Wanzer, 5 How. (U. S.) 141, 12 L. ed. 88.

which hold that equity will enjoin the collection of purchase-money of land, on the ground of a defect of title after the purchaser has taken possession under a conveyance with covenants of general warranty, if the title is questioned by a suit, either prosecuted or threatened, or if the purchaser can show clearly that the title is defective, even though no fraud is shown and there has been no eviction.[51] Some of the courts hold that where no suit to enforce the adverse claim has been actually brought, an injunction will not be granted.[52] Again it has been held that the fact that such a suit is actually pending is in itself sufficient ground for an injunction,[53] although the contrary has been held in a well considered case.[54]

(E) *Deficiency in Amount.* It has been said that a deficiency in quantity of land sold is ground for enjoining the collection of the purchase-price.[55]

(F) *Where Contract of Sale Is Executory.* A distinction is to be made between cases where the purchaser has actually received possession and a deed of warranty has been given, and cases where the sale is still executory and the purchaser has only an agreement to convey or bond for title; in the case of an unexecuted contract for the sale of land, the vendee is entitled to have that for which he contracts, before he can be compelled to pay, and if the vendor has no title at the time he agreed to convey, equity will enjoin him from proceeding at law for the purchase-money.[56]

A fortiori is this the rule where the vendee remains in possession and does not offer to return the land to the vendor. Jackson *v.* Norton, 6 Cal. 187; Shreveport *v.* Flournoy, 26 La. Ann. 709.

51. *Florida.*— Yonge *v.* McCormick, 6 Fla. 368, 63 Am. Dec. 214.

Indiana.— Equity will not require a purchaser to assume the burden and risk of settling the question of title in a suit for the purchase-money; for were he compelled to do so, he would still have the risk and burden of litigating with the outstanding claimants who are asserting or are about to assert in court their alleged paramount title. Fehrle *v.* Turner, 77 Ind. 530. See also Arnold *v.* Curl, 18 Ind. 339; Buell *v.* Tate, 7 Blackf. 55.

Louisiana.— Bushnell *v.* Brown, 3 Mart. N. S. 449.

Maryland.— Dorsey *v.* Smith, 7 Harr. & J. 345.

Mississippi.— Green *v.* McDonald, 13 Sm. & M. 445; Puckett *v.* McDonald, 6 How. 269.

New York.— Johnson *v.* Gere, 2 Johns. Ch. 546. *Contra,* Miller *v.* Avery, 2 Barb. Ch. 582.

Tennessee.— Ingram *v.* Morgan, 4 Humphr. 36, 40 Am. Dec. 626.

Virginia.— Clarke *v.* Hardgrove, 7 Gratt. 399; Price *v.* Browning, 4 Gratt. 68; Koger *v.* Kane, 5 Leigh 606; Ralston *v.* Miller, 3 Rand. 44, 15 Am. Dec. 704. But see Keyton *v.* Brawford, 5 Leigh 39, holding that failure of title to a portion of the land included in the description of the deed is no ground for enjoining action for payment, where such land was included in the description by mistake.

West Virginia.— Kinports *v.* Rawson, 29 W. Va. 487, 2 S. E. 85; Renick *v.* Renick, 5 W. Va. 285; Lovell *v.* Chilton, 2 W. Va. 410.

England.— Tourville *v.* Naish, 3 P. Wms. 307, 24 Eng. Reprint 1077.

See 27 Cent. Dig. tit. "Injunction," § 42.

Compare Cooley *v.* Rankin, 11 Mo. 642.

An allegation that the claim of paramount title by the third person is a valid one is necessary. Gayle *v.* Fattle, 14 Md. 69; Kinports *v.* Rawson, 29 W. Va. 487, 2 S. E. 85.

52. Hile *v.* Davison, 20 N. J. Eq. 228; Van Waggoner *v.* McEwen, 2 N. J. Eq. 412; Shannon *v.* Marselis, 1 N. J. Eq. 413.

The mere fact of a failure of title in the vendor affords no sufficient ground for coming into equity for relief by injunction, where the purchaser has not been disturbed in his possession, and no suit has been brought against him by the rightful owner of the land. Edwards *v.* Bodine, 26 Wend. (N. Y.) 109; Miller *v.* Avery, 2 Barb. Ch. (N. Y.) 582; Woodruff *v.* Bunce, 9 Paige (N. Y.) 443, 38 Am. Dec. 559; Bumpus *v.* Platner, 1 Johns. Ch. (N. Y.) 213; Withers *v.* Morrell, 3 Edw. (N. Y.) 560.

53. Jaques *v.* Esler, 4 N. J. Eq. 461. See also Johnson *v.* Gere, 2 Johns. Ch. (N. Y.) 546.

54. Miller *v.* Avery, 2 Barb. Ch. (N. Y.) 582, holding that the mere bringing of an ejectment suit against the grantee of lands, by persons claiming to have a title paramount to that of the grantor, without establishing the fact that plaintiff in the ejectment suit is the real owner of the land, affords no sufficient ground for coming into this court for relief against an action at law for the recovery of the unpaid purchase-money due to the vendor of the land.

55. Moredock *v.* Rawlings, 3 T. B. Mon. (Ky.) 73; Koger *v.* Kane, 5 Leigh (Va.) 606.

Sale in gross.— Deficiency in amount is no ground for relief if the sale of land was in gross, a contract of hazard on both sides. Keyton *v.* Brawford, 5 Leigh (Va.) 39. And see, generally, VENDOR AND PURCHASER.

56. *Arkansas.*— Black *v.* Bowman, 9 Ark. 501.

(G) *No Actual Failure of Consideration.* In many cases where an injunction was sought on the ground of failure of consideration, it has been refused because there was no actual failure.[57]

(VI) *FRAUD.* Ordinarily if an action is brought upon any contract or evidence of indebtedness which has been obtained by fraud, defendant can make a good defense at law, and a bill in equity to restrain the prosecution of that action will be dismissed.[58] But if the cause of action is likely to be transferred to some *bona fide* purchaser against whom the defense would not avail,[59] or if for any reason the party who is liable to be sued, or who has been sued, cannot, in an action at law, present his defense as fully and effectually as he could in a court of equity, and such disability has been brought about by any fraud, equity will give relief and enjoin the action at law.[60]

(VII) *PAYMENT OR DISCHARGE.* The fact that a debt or obligation has been paid, discharged, or released is in ordinary cases an adequate defense at law to an action for collection or for the enforcement of the obligation, and such action

Connecticut.— Williams *v.* Smith, 2 Root 464.

Georgia.— Morris *v.* Continental Ins. Co., 116 Ga. 53, 42 S. E. 474; McCauley *v.* Moses, 43 Ga. 577.

Kentucky.— Vittitoe *v.* Jones, 6 J. J. Marsh. 515; Gill *v.* Corbin, 4 J. J. Marsh. 392.

Maryland.— Dorsey *v.* Hobbs, 10 Md. 412; Buchanan *v.* Lorman, 3 Gill 51.

Mississippi.— Liddell *v.* Sims, 9 Sm. & M. 596.

Missouri.— Barton *v.* Rector, 7 Mo. 524.

North Carolina.— Brannum *v.* Ellison, 58 N. C. 435; Brittain *v.* McLain, 41 N. C. 165; Lane *v.* Patrick, 7 N. C. 473; Welch *v.* Watkins, 2 N. C. 369.

Tennessee.—Johnson *v.* Siesfield, 6 Baxt. 41; Puckett *v.* Draper, 2 Baxt. 395; Topp *v.* White, 12 Heisk. 165; Buchanan *v.* Alwell, 8 Humphr. 516.

West Virginia.— Amick *v.* Bowyer, 3 W. Va. 7.

United States.— Galloway *v.* Finley, 12 Pet. 264, 9 L. ed. 1079.

Canada.— Walton *v.* Armstrong, 11 Grant Ch. (U. C.) 379; Thomson *v.* Brunskill, 7 Grant Ch. (U. C.) 542.

See 27 Cent. Dig. tit. "Injunction," § 42.

57. *Alabama.*— Wray *v.* Furniss, 27 Ala. 471.

Kentucky.— Wilder *v.* Smith, 12 B. Mon. 94; Stark *v.* Thompson, 3 T. B. Mon. 296.

Louisiana.— Baird *v.* Brown, 28 La. Ann. 842.

New Jersey.— Savage *v.* Ball, 17 N. J. Eq. 142.

Virginia.— Price *v.* Ayres, 10 Gratt. 575; Findlay *v.* Hickman, 10 Leigh 354; Koger *v.* Kane, 5 Leigh 606.

See 27 Cent. Dig. tit. "Injunction," §§ 41, 42.

58. *Iowa.*— Dubuque, etc., R. Co. *v.* Cedar Falls, etc., R. Co., 76 Iowa 702, 39 N. W. 691; Smith *v.* Short, 11 Iowa 523.

Massachusetts.— Payson *v.* Lamson, 134 Mass. 593, 45 Am. Rep. 348.

Mississippi.— Learned *v.* Holmes, 49 Miss. 290.

New Jersey.— Roemer *v.* Conlon, 45 N. J. Eq. 234, 19 Atl. 664.

New York.— Crane *v.* Bunnell, 10 Paige 333.

Ohio.— White *v.* Semper, 8 Ohio Cir. Ct. 346, 4 Ohio Cir. Dec. 408.

Wisconsin.— Wolf River Lumber Co. *v.* Brown, 88 Wis. 638, 60 N. W. 996.

United States.— Grand Chute *v.* Winegar, 15 Wall. 373, 21 L. ed. 174; Phœnix Mut. L. Ins. Co. *v.* Bailey, 13 Wall. 616, 20 L. ed. 501; Ætna L. Ins. Co. *v.* Smith, 73 Fed. 318.

See 27 Cent. Dig. tit. "Injunction," § 45.

Applications of rule.— This rule applies *inter alia* to an action brought on a voidable note or bond (Hardy *v.* Newton First Nat. Bank, 46 Kan. 88, 26 Pac. 423; Dorsey *v.* Monnett, (Md. 1890) 20 Atl. 196; Pool *v.* Lloyd, 5 Metc. (Mass.) 525; Outhwite *v.* Porter, 13 Mich. 533; Dougherty *v.* Scudder, 17 N. J. Eq. 248; Crane *v.* Bunnell, 10 Paige (N. Y.) 333), on an insurance policy (Home L. Ins. Co. *v.* Selig, 81 Md. 200, 31 Atl. 503; Phœnix Mut. L. Ins. Co. *v.* Bailey, 13 Wall. (U. S.) 616; Ætna L. Ins. Co. *v.* Smith, 73 Fed. 318), or on a foreign judgment (Grand Chute *v.* Winegar, 15 Wall. (U. S.) 373, 21 L. ed. 174; Ochsenbein *v.* Papelier, L. R. 8 Ch. 695, 42 L. J. Ch. 861, 28 L. T. Rep. N. S. 459, 21 Wkly. Rep. 516).

Where a bill was brought to set aside a policy on the ground that insured made false representations, and later insured sued at law on the policy, an injunction was refused because the question in dispute was properly for a jury. Hoare *v.* Bremridge, L. R. 8 Ch. 22, 42 L. J. Ch. 1, 27 L. T. Rep. N. S. 593, 21 Wkly. Rep. 43; Anderson *v.* Dowling, 11 Ir. Eq. 590; Scotland Life Assoc. *v.* McBlane, Ir. R. 9 Eq. 176. *Contra*, John Hancock Mut. L. Ins. Co. *v.* Dick, 114 Mich. 337, 72 N. W. 179, 43 L. R. A. 566. And see National L. Assur. Co. *v.* Egan, 20 Grant Ch. (U. C.) 469.

59. Warner *v.* Armstrong, 10 Ohio Dec. (Reprint) 426, 21 Cinc. L. Bul. 124; Phœnix Mut. L. Ins. Co. *v.* Bailey, 13 Wall. (U. S.) 616.

60. Payson *v.* Lamson, 134 Mass. 593, 45 Am. Rep. 348; Maher *v.* Mutual Electric Mfg. Co., (N. J. Ch. 1889) 17 Atl. 968; Henwood *v.* Jarvis, 27 N. J. Eq. 247.

will not be enjoined.[61] But where the defense at law is not clearly adequate an injunction may issue, and of course an injunction may be proper on other equitable grounds.[62]

(VIII) *SET-OFF.* Where a complainant has a set-off to the cause of action upon which he is sued at law, and it is possible to avail himself of it in the action at law itself, he is not entitled to an injunction because of the set-off.[63] But where there are mutual demands between the parties which cannot be set off at law, but which a court of equity may apply in satisfaction of each other without interfering with the equitable rights of any person, the fact that plaintiff at law is insolvent is sufficient ground for enjoining his action and allowing the set-off in equity.[64] Such is the case where an equitable accounting or the winding-up of

Where cancellation is also useful, equity will take jurisdiction away from the court of law. John Hancock Mut. L. Ins. Co. *v.* Dick, 114 Mich. 337, 72 N. W. 179, 43 L. R. A. 566. So the enforcement of a fraudulent report of appraisers on the loss under an insurance policy may be enjoined. North British, etc., Ins. Co. *v.* Lathrop, 70 Fed. 429, 17 C. C. A. 175.

This is especially true in cases where the fraud could not be made a defense at law. Kelly *v.* Allen, 34 Ala. 663; Sisk *v.* Garey, 27 Md. 401; Leigh *v.* Clark, 11 N. J. Eq. 110; Taylor *v.* Gilman, 25 Vt. 411.

61. *Connecticut.*—Metropolitan L. Ins. Co. *v.* Fuller, 61 Conn. 252, 23 Atl. 193, 29 Am. St. Rep. 196; Beardsly *v.* Curtice, 1 Root 499.

Delaware.— Burton *v.* Willen, 6 Del. Ch. 403, 33 Atl. 675.

Georgia.— Williams *v.* Stewart, 56 Ga. 663.

Illinois.— Dunham *v.* Miller, 75 Ill. 379; Finley *v.* Thayer, 42 Ill. 350; Beauchamp *v.* Putnam, 34 Ill. 378.

Maine.— Coombs *v.* Warren, 17 Me. 404.

Massachusetts.— Saunders *v.* Huntington, 166 Mass. 96, 44 N. E. 127.

Mississippi.— Saucier *v.* Rouse, (1893) 12 So. 481.

New Jersey.— Chase *v.* Chase, 50 N. J. Eq. 143, 24 Atl. 914.

New York.— Fowler *v.* Palmer, 62 N. Y. 533; Bomeisler *v.* Forster, 10 N. Y. App. Div. 43, 41 N. Y. Suppl. 742; Lansing *v.* Eddy, 1 Johns. Ch. 49.

Rhode Island.— Clark *v.* Clapp, 14 R. I. 248.

Vermont.— Henry *v.* Tupper, 27 Vt. 518, holding that the fact that the mortgagor has performed the condition of the mortgage is no ground for enjoining ejectment by the mortgagee.

West Virginia.— Gall *v.* Tygart's Valley Bank, 50 W. Va. 597, 40 S. E. 390.

See 27 Cent. Dig. tit. "Injunction," § 47.

Compare Davis *v.* Hubbard, 38 Ala. 185.

An action of trover will not be enjoined, although the goods were bought and paid for. Pardridge *v.* Brennan, 64 Mich. 575, 31 N. W. 524.

62. Hurlbut *v.* Phelps, 30 Conn. 42; Melcher *v.* Jefferson City Exch. Bank, 85 Mo. 362; Boardman *v.* Florez, 37 Mo. 559; Baker *v.* Hawkins, 14 R. I. 359; Holmes *v.* Holmes, 36 Vt. 525.

Discharge not available in equity.— A discharge not available at law may be unavailable in equity also, in which case no injunction will be granted. Foote *v.* Percy, 40 Conn. 85.

Irreparable injury.— Injunction may be proper in order to enforce a release, when otherwise there would be irreparable injury to business and social reputation. Cantoni *v.* Forster, 12 Misc. (N. Y.) 376, 33 N. Y. Suppl. 645.

63. *Alabama.*— Harrison *v.* McCrary, 37 Ala. 687.

Delaware.— Hayes *v.* Hayes, 2 Del. Ch. 191, 73 Am. Dec. 709.

Georgia.— Clay *v.* Sheftall, T. U. P. Charlt. 263.

Michigan.— Dewey *v.* Billings, 76 Mich. 89, 42 N. W. 1077.

New Jersey.— Dungan *v.* Miller, 19 N. J. Eq. 218.

New York.— Michael *v.* Kronthal, 13 Misc. 428, 34 N. Y. Suppl. 681; American Waterworks Co. *v.* Venner, 18 N. Y. Suppl. 379.

West Virginia.— Miller *v.* Miller, 25 W. Va. 495.

United States.— Pullman Palace Car Co. *v.* Chicago, etc., R. Co., 56 Fed. 756, 6 C. C. A. 105 [*reversing* 49 Fed. 409].

See 27 Cent. Dig. tit. "Injunction," § 49.

A judgment can be set off at law, so it is no reason for equity jurisdiction even though the court of law refused to allow the set-off. Simpson *v.* Hart, 1 Johns. Ch. (N. Y.) 91.

64. *Alabama.*— Nelson *v.* Dunn, 15 Ala. 501, holding that equity, having jurisdiction on other grounds, will do complete justice, enjoin a pending action, and allow a set-off.

Connecticut.— Pond *v.* Smith, 4 Conn. 297.

Delaware.— Harrington *v.* Fulton, 5 Del. Ch. 492.

Georgia.— Beall *v.* Rust, 68 Ga. 774; Lee *v.* Lee, 31 Ga. 26, 76 Am. Dec. 681; Swift *v.* Swift, 13 Ga. 140.

Indiana.— Spicer *v.* Hoop, 51 Ind. 365, set-off good at law but remedy there not complete.

New York.— Mel *v.* Holbrook, 4 Edw. 539; Lindsay *v.* Jackson, 2 Paige 581.

United States.— Pullman Palace Car Co. *v.* Chicago, etc., R. Co., 56 Fed. 756, 6 C. C. A. 105.

See 27 Cent. Dig. tit. "Injunction," § 49.

a partnership is necessary to determine the complainant's counter-claim.[65] Even though the set-off is a purely equitable one, the action at law is usually not enjoined unless plaintiff therein is insolvent; if solvent, an action against him on the counter-claim is an adequate remedy.[66]

(IX) *Former Adjudication.* After a question has once been decided in a court of competent jurisdiction, a second action on the same subject-matter will usually not be enjoined, because the former adjudication is an adequate defense at law.[67] However, subsequent actions may be enjoined on the ground that they are vexations.[68]

(X) *Incompetency of Witnesses to Establish a Defense.* Where a defendant has a perfect legal defense to an action at law, but cannot prove it for the reason that the only possible witnesses are incompetent to testify because of interest or otherwise, equity will in some cases enjoin the action at law and allow the defense to be proved in equity.[69]

(XI) *Absence of Grounds For Action.* A groundless or frivolous action will not be enjoined,[70] even though it is prosecuted by irresponsible parties against whom costs could not be collected.[71]

(XII) *Invalidity of Instruments Sued on.* For similar reasons an action brought on a void or voidable bond or contract will not be restrained,[72] unless

A set-off purchased since suit brought is not available at law, and if plaintiff is insolvent equity will take jurisdiction to allow the set-off. Fields *v.* Carney, 4 Baxt. (Tenn.) 137.

65. Williams *v.* Stevens, 5 N. J. Eq. 119; Commercial Bank *v.* Cabell, 96 Va. 552, 32 S. E. 53.

66. *New York.*— Staten Island Dyeing Establishment *v.* Skinner Engine Co., 75 Hun 116, 26 N. Y. Suppl. 1100; Tone *v.* Brace, 8 Paige 597.

South Carolina.— Peek *v.* Wakely, 1 McCord Eq. 43.

Tennessee.— Hough *v.* Chaffin, 4 Sneed 238.

Virginia.— McClellan *v.* Kinnaird, 6 Gratt. 352.

West Virginia.— Farland *v.* Wood, 35 W. Va. 458, 14 S. E. 140.

See 27 Cent. Dig. tit. "Injunction," § 49.

67. *Illinois.*— Chicago, etc., R. Co. *v.* Chicago, 143 Ill. 641, 32 N. E. 178.

Indiana.— Palmer *v.* Hayes, 93 Ind. 189.

Iowa.— Gray *v.* Coan, 36 Iowa 296.

Maryland.— Bowen *v.* Gent, 54 Md. 555.

New York.— Jay's Case, 6 Abb. Pr. 293.

Vermont.— Holmes *v.* Clark, 46 Vt. 22.

See 27 Cent. Dig. tit. "Injunction," § 35.

When injunction granted.— When the question has been adjudicated since the suit in question was begun, and the court of law could not take adequate notice of such adjudication for that reason, equity will interfere and enjoin the action. Zurbrugg *v.* Reed, (N. J. Ch. 1896) 35 Atl. 298.

68. *Iowa.*— Gray *v.* Coan, 36 Iowa 296.

Massachusetts.— Field *v.* Early, 167 Mass. 449, 45 N. E. 917.

Missouri.— Primm *v.* Raboteau, 56 Mo. 407.

New Hampshire.— Pease *v.* Bennett, 17 N. H. 124.

New Jersey.— Slater *v.* Schwegler, (Ch. 1903) 54 Atl. 937.

New York.— See Conover *v.* New York, 25 Barb. 513.

See 27 Cent. Dig. tit. "Injunction," § 32.

The remedy at law is not so adequate, it is said, as is a decree in equity because of the possibility of bringing further actions. Foltz *v.* St. Louis, etc., R. Co., 60 Fed. 316, 8 C. C. A. 635.

One who was not a party to the former action will not be enjoined. Morgan *v.* Morgan, 50 Ala. 89; Ray *v.* Ray, 1 Ida. 566.

69. Dodgson *v.* Henderson, 113 Ill. 360; Bradshaw *v.* Combs, 102 Ill. 428; Thompson *v.* Wilson, 56 Ill. App. 159; Miller *v.* McCan, 7 Paige (N. Y.) 451; Norton *v.* Woods, 5 Paige (N. Y.) 249; Jarvis *v.* Chandler, Turn. & R. 319, 12 Eng. Ch. 319, 37 Eng. Reprint 1123. *Contra,* Phillip *v.* Love, 54 Ill. App. 526; Dubois *v.* Campau, 37 Mich. 248; Linn *v.* Neldon, 23 N. J. Eq. 169. And *compare* Savage *v.* Todd, 9 Paige (N. Y.) 578.

70. *Louisiana.*— Butchers' Benev. Assoc. *v.* Cutler, 26 La. Ann. 500.

New Jersey.— Long Dock Co. *v.* Bentley, 37 N. J. Eq. 15.

Rhode Island.— Tiffany *v.* Emmet, 24 R. I. 411, 53 Atl. 281.

Texas.— Chadoin *v.* Magee, 20 Tex. 476.

West Virginia.— Evans *v.* Taylor, 28 W. Va. 184.

England.— Kemp *v.* Tucker, L. R. 8 Ch. 369, 42 L. J. Ch. 532, 28 L. T. Rep. N. S. 458, 21 Wkly. Rep. 470.

See 27 Cent. Dig. tit. "Injunction," §§ 24, 28.

71. Gray *v.* Coan, 36 Iowa 296.

72. *Connecticut.*— Beardsley *v.* Curtice, 1 Root 499.

Kentucky.— Campbell *v.* Ketcham, 1 Bibb 406, bond signed while obligor drunk.

Nevada.— Elder *v.* Shaw, 12 Nev. 78.

New Jersey.— Slater *v.* Schwegler, (Ch. 1903) 54 Atl. 937, lease for an illegal purpose.

New York.— Venice *v.* Woodruff, 62 N. Y. 462, 20 Am. Rep. 495; Minturn *v.* Farmers' L. & T. Co., 3 N. Y. 498.

See 27 Cent. Dig. tit. "Injunction," § 40.

there is danger that the evidence of the defense may be lost by lapse of time, inasmuch as the action at law may be terminated by a dismissal or a nonsuit,[73] or where the defense at law is inadequate because some equitable remedy is necessary.[74] This is particularly true where the cause of action is on an instrument bearing on its face the evidence of its invalidity.[75]

(XIII) *INVALIDITY OF LAWS OR ORDINANCES UNDER WHICH SUIT BROUGHT.* An action will not be enjoined merely because brought under an invalid ordinance or law, since such invalidity is a legal defense and the remedy at law is adequate.[76]

(XIV) *UNEXECUTED GAMBLING CONTRACTS.* Courts of equity may enjoin the enforcement of unexecuted contracts grounded on wagers or bets prohibited by law.[77]

(XV) *APPLICATION OF RULES ENUNCIATED TO ACTIONS TO RECOVER REAL PROPERTY.*[78] An action of ejectment will not be restrained because of facts constituting a good defense in that action itself;[79] but where the defense at law

73. Sweeny *v.* Williams, 36 N. J. Eq. 627; Metler *v.* Metler, 19 N. J. Eq. 457; Hamilton *v.* Cummings, 1 Johns. Ch. (N. Y.) 517; Anderson *v.* Dowling, 11 Ir. Eq. 590.

"There is a ground of equitable jurisdiction, which supports a bill brought for the purpose of protecting a plaintiff against an invalid contract in the possession of the defendant, when the invalidity is not apparent on the face of the instrument, and when there is danger that the evidence to support a defense to it in a court of law may be lost by the delay of the other party to prosecute his claim." Anthony *v.* Valentine, 130 Mass. 119, 120.

Where the testimony may be perpetuated, it has been held that the danger of loss of evidence is not sufficient ground for a cancellation and an injunction. Globe Mut. L. Ins. Co. *v.* Reals, 79 N. Y. 202; Fowler *v.* Palmer, 62 N. Y. 533; Venice *v.* Woodruff, 62 N. Y. 462, 20 Am. Rep. 495; Allerton *v.* Belden, 49 N. Y. 373.

Legal defense extrinsic.—"If there be a legal defence to a written instrument depending on facts not appearing upon the face of the instrument, the party charged on that instrument with some liability may come into a court of equity to get rid of it, notwithstanding the legal defence, because the evidence of those extrinsic facts upon which the defence depends might not be forthcoming at all times." Hoare *v.* Bremridge, L. R. 8 Ch. 22, 26, 42 L. J. Ch. 1, 27 L. T. Rep. N. S. 593, 21 Wkly. Rep. 43.

74. Crampton *v.* Zabriskie, 101 U. S. 601, 25 L. ed. 1070, cancellation asked. See also *supra*, V, A, 3.

An action on a negotiable note, valid on its face, will be enjoined because of the danger of its coming into the hands of a *bona fide* holder by transfer and the note will be ordered to be delivered up. Metler *v.* Metler, 19 N. J. Eq. 457.

75. See cases cited *supra*, notes 73, 74.

76. Denver *v.* Beede, 25 Colo. 172, 54 Pac. 624; Chicago, etc., R. Co. *v.* Ottawa, 148 Ill. 397, 36 N. E. 85 [*affirming* 47 Ill. App. 73]; Wallack *v.* New York Reformation Soc., 67 N. Y. 23; Columbia Bldg., etc., Assoc. *v.* Grange, 77 Fed. 798. But see *infra*, V, E, 7, f.

77. Petillon *v.* Hipple, 90 Ill. 420, 32 Am. Rep. 31; Milltown *v.* Stewart, 3 Myl. & C. 18, 14 Eng. Ch. 18, 40 Eng. Reprint 830; Portarlington *v.* Soulby, 3 Myl. & K. 104, 10 Eng. Ch. 104, 40 Eng. Reprint 40.

78. As to when successive ejectment actions will be enjoined see *supra*, V, A, 3, g, (VI).

Enjoining forcible entry and detainer see LANDLORD AND TENANT.

Enjoining summary proceedings to dispossess tenant see LANDLORD AND TENANT.

79. *Alabama.*— Shaw *v.* Lindsey, 60 Ala. 344.

Florida.— Freeman *v.* Timanus, 12 Fla. 393.

Georgia.— Alexander *v.* Biggers, 43 Ga. 161, pendency of another action.

Illinois.— Cook County *v.* Chicago, 158 Ill. 524, 42 N. E. 67; Chicago Catholic Bishop *v.* Chiniquy, 74 Ill. 317; Staley *v.* Murphy, 47 Ill. 241.

Maryland.— Mountain Lake Park Assoc. *v.* Shartzer, 83 Md. 10, 34 Atl. 536.

Michigan.— Shaw *v.* Chambers, 48 Mich. 355, 12 N. W. 486, holding that the fact that defendant at law has the legal title is no ground for enjoining ejectment.

New Jersey.— Camden, etc., R. Co. *v.* Stewart, 18 N. J. Eq. 489; Philhower *v.* Todd, 11 N. J. Eq. 54.

New York.— Savage *v.* Allen, 54 N. Y. 458; Bullard *v.* Bearss, 3 N. Y. Suppl. 683.

Vermont.— Barrett *v.* Sargeant, 18 Vt. 365.

See 27 Cent. Dig. tit. "Injunction," § 56.

Where mistake is available as a defense at law, an injunction has been refused. Bowen *v.* Gent, 54 Md. 555.

No injunction before judgment.—It has been held that no injunction will be granted until the suit for possession has proceeded to a judgment adverse to the complainant. Earle *v.* Hale, 31 Ark. 473.

Invalidity of plaintiff's deed.—And so where one in possession of land is sued in ejectment, he is not entitled to an injunction against that action on the ground that the

is not perfect an injunction may be obtained.[80] Thus an ejectment suit by one holding the naked legal title to land will be enjoined on the application of a complainant having complete equitable title,[81] or where defendant has been allowed to take possession and make permanent improvements without objection by plaintiff, or where plaintiff is otherwise estopped.[82] So an ejectment suit will be enjoined where the only remedy is an action on a covenant defectively executed.[83] So where the defense must be made out in part by proof of a lost instrument, the court may regard the defense at law as not adequate and grant an injunction.[84] And ejectment will be enjoined when plaintiff's title is fraudulent, and a release should be decreed or cancellation had to remove a cloud on title.[85]

d. Remedy by Action For Damages. No injunction will issue to stay an action at law where an action for damages would be an adequate remedy.[86]

e. Remedy by Appeal or Certiorari. Where complainant has a right of appeal in the suit sought to be enjoined, and the injustice complained of can be redressed

deed under which plaintiff claims is void, either from want of delivery, or because obtained by duress or fraud, or otherwise. Earle *v.* Hale, 31 Ark. 473; Chicago Catholic Bishop *v.* Chiniquy, 74 Ill. 317; Morris Canal, etc., Co. *v.* Dennis, 12 N. J. Eq. 249; Hawkinberry *v.* Snodgrass, 39 W. Va. 332, 19 S. E. 417; Deweese *v.* Reinhard, 165 U. S. 386, 17 S. Ct. 340, 41 L. ed. 757.

See 27 Cent. Dig. tit. "Injunction," § 56.

80. Clement *v.* Young-McShea Amusement Co., (N. J. Ch. 1905) 60 Atl. 419.

81. *Alabama.*— Smith *v.* Spencer, 73 Ala. 299; Reavis *v.* Reavis, 50 Ala. 60; McCaa *v.* Woolf, 42 Ala. 389.

Connecticut.— Goddard *v.* Prentice, 17 Conn. 546.

Georgia.— Scott *v.* Taylor, 57 Ga. 168; Dwelle *v.* Roath, 29 Ga. 733.

Michigan.— McKibbin *v.* Bristol, 50 Mich. 319, 15 N. W. 491; Seager *v.* Cooley, 44 Mich. 14, 15 N. W. 1058.

New Hampshire.— Ferrin *v.* Errol, 59 N. H. 234.

New Jersey.— Pierson *v.* Ryerson, 5 N. J. Eq. 196.

New York.— Siemon *v.* Schurck, 29 N. Y. 598.

Tennessee.— Kendrick *v.* Dallum, Cooke 220; Hendrick *v.* Dallum, 1 Overt. 427.

Virginia.— Goodwin *v.* McCluer, 3 Gratt. 291.

United States.— Apgar *v.* Christophers, 10 Fed. 857; Bright *v.* Boyd, 4 Fed. Cas. No. 1,875, 1 Story 478.

England.— Crofts *v.* Middleton, 8 De G. M. & G. 192, 2 Jur. N. S. 528, 25 L. J. Ch. 513, 4 Wkly. Rep. 439, 57 Eng. Ch. 150, 44 Eng. Reprint 364.

See 27 Cent. Dig. tit. "Injunction," § 58.

Where an agent to purchase land took title in his own name, he was enjoined from prosecuting an ejectment against his principal. Trenton Banking Co. *v.* McKelway, 8 N. J. Eq. 84.

Fraud or mistake.— Equity interferes by injunction to restrain an action at law to recover possession of real estate when the person seeking the injunction has an equitable title, and the person sought to be enjoined has the legal title which has been obtained by fraud or mistake. Northern Pac. R. Co. *v.* Cannon, 49 Fed. 517.

Condition precedent.— A purchaser of land from a decedent cannot maintain a bill to enjoin ejectment by the administrator without proof of full payment of the purchase-price or a tender and refusal thereof. McRae *v.* McDonald, 57 Ala. 423.

82. *Alabama.*— South, etc., Alabama R. Co. *v.* Alabama Great Southern R. Co., 102 Ala. 236, 14 So. 747.

Georgia.— Iverson *v.* Saulsbury, 65 Ga. 724; Jackson *v.* Jones, 25 Ga. 93.

Illinois.— Litchfield *v.* Litchfield Water Supply Co., 95 Ill. App. 647.

Michigan.— Detroit, etc., R. Co. *v.* Brown, 37 Mich. 533.

Mississippi.— Cole *v.* Johnson, 53 Miss. 94, ejectment may be restrained until the purchase-money paid by the complainant has been returned to him.

New Jersey.— Farrington *v.* Forman, (Ch. 1893) 26 Atl. 532; Pierson *v.* Ryerson, 14 N. J. Eq. 181; Mulford *v.* Minch, 11 N. J. Eq. 16, 64 Am. Dec. 472.

New York.— Wood *v.* Seely, 32 N. Y. 105; Storrs *v.* Barker, 6 Johns. Ch. 166, 10 Am. Dec. 316.

Pennsylvania.— Big Mountain Imp. Co.'s Appeal, 54 Pa. St. 361.

United States.— Lonsdale Co. *v.* Moies, 15 Fed. Cas. No. 8,496.

See 27 Cent. Dig. tit. "Injunction," §§ 58, 59.

The making of valuable improvements by defendant in ejectment is not ground for injunction where compensation therefor, obtainable at law, would be an adequate remedy. Berrien *v.* Thomas, 65 Ga. 61. See also West *v.* Flannagan, 4 Md. 36.

83. Segee *v.* Thomas, 21 Fed. Cas. No. 12,633, 3 Blatchf. 11.

84. Butch *v.* Lash, 4 Iowa 215. But see Clingman *v.* Hopkie, 78 Ill. 152.

85. Lehman *v.* Shook, 69 Ala. 486; State *v.* Reed, 4 Harr. & M. (Md.) 6; Shaw *v.* Chambers, 48 Mich. 355, 12 N. W. 486.

86. Cobb *v.* Garner, 105 Ala. 467, 17 So. 47, 53 Am. St. Rep. 136; Leopold *v.* Judson, 75 Ill. 536; Chicago City R. Co. *v.* General Electric Co., 74 Ill. App. 465; Duigan *v.*

on such appeal, the action will not be enjoined,[87] especially where a stay of proceedings pending the appeal can be obtained.[88] So an injunction will not issue when there is an adequate remedy by certiorari.[89] Otherwise where the remedy by certiorari is not prompt and efficient.[90]

f. Where Court Is Without Jurisdiction. While it has been held proper to enjoin actions where the court was without jurisdiction,[91] the general rule is that where a tribunal is proceeding without jurisdiction no injunction will ordinarily be granted to restrain the action, since the proceeding is void at law as in equity and the law affords an adequate remedy.[92]

Hogan, 1 Bosw. (N. Y.) 645; Hemsley *v.* Myers, 45 Fed. 283. And see EQUITY, 16 Cyc. 48.

87. *Alabama.*— Birmingham R., etc., Co. *v.* Birmingham Traction Co., 121 Ala. 475, 25 So. 777; Hart *v.* Life Assoc. of South, 54 Ala. 495.

Connecticut.— White *v.* Strong, 75 Conn. 308, 53 Atl. 654.

Idaho.— Picotte *v.* Watt, 3 Ida. 447, 31 Pac. 805.

Illinois.— Winkler *v.* Winkler, 40 Ill. 179.

Indiana.— Owen County *v.* Spangler, 159 Ind. 575, 65 N. E. 743; Lowe *v.* White County, 156 Ind. 163, 59 N. E. 466; Sims *v.* Frankfort, 79 Ind. 446; Shoemaker *v.* Axtell, 78 Ind. 561.

Kansas.— Shelden *v.* Motter, (App. 1898) 53 Pac. 89.

Louisiana.— Boin *v.* Jennings, 107 La. 410, 31 So. 866; Chaffe *v.* Du Bose, 36 La. Ann. 257; Devron *v.* First Municipality, 4 La. Ann. 11; McLean *v.* Carroll, 6 Rob. 43.

New Jersey.— McMahon *v.* Weart, (Ch. 1896) 35 Atl. 444.

New York.— Wright *v.* Fleming, 12 Hun 469 [*affirmed* in 76 N. Y. 517]; People *v.* Coffin, 7 Hun 608 [*reversed* on other grounds in 71 N. Y. 612].

Pennsylvania.— Brown's Appeal, 66 Pa. St. 155; Wolf *v.* Schleiffer, 2 Brewst. 563; Reynolds *v.* Davis, 1 Kulp 342; Heckscher *v.* Shaefer, 1 Leg. Rec. 285.

Texas.— Texas, etc., R. Co. *v.* Kuteman, 79 Tex. 465, 14 S. W. 693; Kyle *v.* Richardson, 31 Tex. Civ. App. 101, 71 S. W. 399.

Wisconsin.— Stone *v.* Little Yellow Drainage Dist., 118 Wis. 388, 95 N. W. 405.

England.— McAnaspie *v.* Dickson, 13 Ir. Eq. 216, holding that where, by the custom of the lower court, a defendant was not permitted a trial on the merits, but was defaulted, unless he furnished a certain bond, an injunction will not be granted because of inability to furnish the bond. The remedy, if any, is by writ of error.

Canada.— Van Norman *v.* Grant, 27 Grant Ch. (U. C.) 498.

See 27 Cent. Dig. tit. "Injunction," § 34.

Inability to take an appeal because of lack of funds is a misfortune against which a court of equity does not relieve. Lapeer County Com'rs *v.* Hart, Harr. (Mich.) 157.

Where consolidation is necessary.— Where, although there is no right of appeal from several actions singly, they can be consolidated and an appeal will then lie, their prosecution will not be enjoined. Gulf, etc., R. Co. *v.* Bacon, 3 Tex. Civ. App. 55, 21 S. W. 783. If such consolidation cannot be had, and appeal is impossible, an injunction is the proper remedy. Galveston, etc., R. Co. *v.* Dowe, 70 Tex. 5, 7 S. W. 368.

Where a court of law improperly disallows certain equitable defenses, and the case is appealed by defendant, an injunction will not be granted at his instance as the court of law is competent to give adequate relief. Hopkins *v.* Medley, 99 Ill. 509.

88. Wordsworth *v.* Lyon, 5 How. Pr. (N. Y.) 463.

89. *Iowa.*— Kroeger *v.* Walcott, (1898) 76 N. W. 841; McLachlan *v.* Gray, 105 Iowa 259, 74 N. W. 773.

Michigan.— Strack *v.* Miller, 134 Mich. 311, 96 N. W. 452.

New Jersey.— Dusenbury *v.* Newark, 25 N. J. Eq. 295.

New York.— Heywood *v.* Buffalo, 14 N. Y. 534.

Pennsylvania.— Brown's Appeal, 66 Pa. St. 155; Rockwell *v.* Tupper, 7 Pa. Super. Ct. 174; Wolf *v.* Schleiffer, 2 Brewst. 563; Reynolds *v.* Davis, 1 Kulp 342.

Texas.— Smith *v.* Ryan, 20 Tex. 661.

See 27 Cent. Dig. tit. "Injunction," § 15.

A court-martial will not be enjoined, even though it is being unfairly conducted, where there is a remedy by certiorari. Perault *v.* Rand, 10 Hun (N. Y.) 222.

90. Collins *v.* Kinnare, 89 Ill. App. 236; Gilcrest Co. *v.* Des Moines, (Iowa 1905) 102 N. W. 831.

91. English *v.* Smock, 34 Ind. 115, 7 Am. Rep. 215; Ward *v.* Callahan, 49 Kan. 149, 30 Pac. 176; Schneider *v.* Leizman, 57 Hun (N. Y.) 561, 11 N. Y. Suppl. 434; Kiernan *v.* Reming, 7 N. Y. Civ. Proc. 311; Chadwick *v.* Spargur, 1 N. Y. Civ. Proc. 422; New York *v.* Conover, 5 Abb. Pr. (N. Y.) 252; Bokee *v.* Hamersley, 16 How. Pr. (N. Y.) 461.

92. *Alabama.*— Birmingham R., etc., Co. *v.* Birmingham Traction Co., 121 Ala. 475, 25 So. 777.

Illinois.— Gray *v.* Jones, 178 Ill. 169, 52 N. E. 941 [*affirming* 78 Ill. App. 309].

Missouri.— St. Louis, etc., R. Co. *v.* Reynolds, 89 Mo. 146, 1 So. 208.

New York.— Bean *v.* Pettengill, 7 Rob. 7. But see Sherman *v.* Wright, 49 N. Y. 227; Schneider *v.* Leizman, 57 Hun 561, 11 N. Y. Suppl. 434; Crawford *v.* Kastner, 26 Hun 440.

Texas.— Smith *v.* Ryan, 20 Tex. 661.

5. Injunctions Against Suits in Equity. It is a general rule that a party will not be restrained by injunction from proceeding with a suit in equity, because complainant's equitable rights can be fully protected in that suit.[93] An order to stay such suit should be obtained by an application in that court itself.[94] It follows that equity will not enjoin a suit to obtain an injunction,[95] or an accounting,[96] or a receiver.[97] Nor will a foreclosure suit be enjoined for the relief of one who might obtain full relief in that suit itself.[98] However, a court of equity has "power" to enjoin a party from proceeding with other equitable suits, and such an injunction, when issued, is not void and must be obeyed.[99] But the power should be exercised only in extreme cases.[1] The court first acquiring jurisdiction of a case will protect that jurisdiction by enjoining an action by the same parties on the same subject-matter in another court, even though that other court may also have equity jurisdiction.[2] Wherever complainant's rights cannot be fully protected in the other suit it will be enjoined.[3] An injunction will be granted in actions of interpleader against the further prosecution of suits against complainant, even though one of these suits may be in equity, because of the necessity of disposing of the whole matter in one action.[4] And where equity has undertaken to administer the assets of an insolvent corporation, so far as they are within its jurisdiction, other equitable suits for the same purpose will be enjoined.[5]

Wisconsin.— Winterfield *v.* Stauss, 24 Wis. 394.

See 27 Cent. Dig. tit. "Injunction," § 29.

Rule restated.— "A Court of Equity has no power to restrain by an injunction, or to set aside, the proceedings of a subordinate tribunal of special jurisdiction, upon the ground that it has threatened to exceed, or has exceeded its authority and powers as defined by law, but that the proper remedy of an aggrieved party, in all such cases, must be sought in a court of law. There may formerly have been, and may still be, some exceptions to this general rule, as where the effect of the proceedings sought to be restrained or annulled, would be to cast a cloud upon a title to real estate, or where the interposition of the court is plainly necessary to prevent a multiplicity of suits." New York L. Ins. Co. *v.* New York, 4 Duer (N. Y.) 192, 199.

Mere possibility of exceeding jurisdiction. — When a court has jurisdiction of proceedings, they will not be enjoined upon the claim that questions will arise therein which will be beyond the jurisdiction of the court. Conant *v.* Wright, 22 N. Y. App. Div. 216, 48 N. Y. Suppl. 422 [*affirmed* in 162 N. Y. 635, 57 N. E. 1107].

Application of rule.— An injunction will not be granted when an action is proceeding without service of process. Secor *v.* Woodward, 8 Ala. 500; Etowah Mfg., etc., Co. *v.* Dobbins, 68 Ga. 823; Walker *v.* Robbins, 14 How. (U. S.) 584, 14 L. ed. 552.

93. Redd *v.* Blandford, 54 Ga. 123; Pond *v.* Harwood, 139 N. Y. 111, 34 N. E. 768; Erie R. Co. *v.* Ramsey, 45 N. Y. 637; Hall *v.* Fisher, 1 Barb. Ch. (N. Y.) 53; Smith *v.* American L. Ins., etc., Co., Clarke (N. Y.) 307; Dayton *v.* Relf, 34 Wis. 86; Wilson *v.* Jarvis, 19 Wis. 597.

Application to compel attorney to pay over funds.— An injunction will not be granted to prevent a party from applying to the equitable powers of the supreme court, to compel payment, by an attorney, of money received by him in his character of attorney of that court. Saxton *v.* Wyckoff, 6 Paige (N. Y.) 182.

94. Ellsworth *v.* Cook, 8 Paige (N. Y.) 643.

95. Robertson *v.* Montgomery Baseball Assoc., 141 Ala. 348, 37 So. 388; Wallack *v.* New York Reformation Soc., 67 N. Y. 23; Balogh *v.* Lyman, 6 N. Y. App. Div. 271, 39 N. Y. Suppl. 780; Cowper *v.* Theall, 40 Hun (N. Y.) 520; Dyckman *v.* Kernochan, 2 Paige (N. Y.) 26; Williams *v.* Brown, 127 N. C. 51, 37 S. E. 86.

96. Pond *v.* Harwood, 139 N. Y. 111, 34 N. E. 768; Hall *v.* Fisher, 1 Barb. Ch. (N. Y.) 53.

97. Columbia Bldg., etc., Assoc. *v.* Grange, 77 Fed. 798.

98. Waymire *v.* San Francisco, etc., R. Co., 112 Cal. 646, 44 Pac. 1086; Dayton *v.* Relf, 34 Wis. 86; Mercantile Trust Co. *v.* Baltimore, etc., R. Co., 89 Fed. 606. And see Mortgages.

99. Mann *v.* Flower, 26 Minn. 479, 5 N. W. 365; Erie R. Co. *v.* Ramsey, 45 N. Y. 637; Prudential Assur. Co. *v.* Thomas, L. R. 3 Ch. 74, 37 L. J. Ch. 202, 16 Wkly. Rep. 470.

1. Erie R. Co. *v.* Ramsey, 45 N. Y. 637.

2. Conover *v.* New York, 25 Barb. (N. Y.) 513.

3. Mann *v.* Flower, 26 Minn. 479, 5 N. W. 365.

4. Prudential Assur. Co. *v.* Thomas, L. R. 3 Ch. 74, 37 L. J. Ch. 202, 16 Wkly. Rep. 470; Warington *v.* Wheatstone, Jac. 202, 4 Eng. Ch. 202, 37 Eng. Reprint 826; Sieveking *v.* Behrens, 1 Jur. 50, 2 Myl. & C. 581, 14 Eng. Ch. 581, 40 Eng. Reprint 761; Crawford *v.* Fisher, 10 Sim. 479, 16 Eng. Ch. 479, 59 Eng. Reprint 701. And see, generally, Interpleader.

5. Smith *v.* St. Louis Mut. L. Ins. Co., 6 Lea (Tenn.) 564.

So a bill of peace lies to prevent a multiplicity of suits, even though the suits may themselves be in courts of equity.[6]

6. Injunctions Against Particular Proceedings or Remedies in Civil Actions — a. Introduction of Evidence. The introduction in an action at law of evidence obtained by fraud or duress will be enjoined, where in justice and good faith it should not be used against complainant.[7]

b. Appeals. A party will not be enjoined from prosecuting an appeal from a judgment against him on any ground that might be made use of in the appellate court.[8]

c. Settlement or Discontinuance of Action. Under some circumstances a plaintiff will be enjoined from dismissing his action, as where an assignor attempts to dismiss an action at law brought in his name for the benefit of the assignee,[9] or where one has given a power of attorney to another authorizing the use of his name in a suit for the other's benefit;[10] and especially where such a dismissal would work irreparable injury because complainant would be barred by the statute of limitations from commencing a subsequent action.[11] But the settlement of a suit will not be enjoined merely because creditors of plaintiff would be benefited in case its prosecution was continued.[12]

7. Injunctions Against Mandamus, Writ of Prohibition, and Supersedeas. Equity has no jurisdiction to grant an injunction to stay proceedings on a mandamus or a writ of prohibition,[13] and the effect of a supersedeas cannot be controlled or destroyed by injunction.[14]

8. Concurrent Jurisdiction, as Affecting Right to Relief. In all cases of concurrent jurisdiction, the tribunal which first obtains jurisdiction of the subject-matter ordinarily will proceed and finally dispose of it.[15] Where a court of law first acquires jurisdiction, equity will not interfere by injunction, unless there is some equitable circumstance in the case of which the party cannot avail himself at law.[16] And even though the suit in equity is begun first, it does not follow

6. Stoddart *v.* Vanlaningham, 14 Kan. 18; Conover *v.* New York, 25 Barb. (N. Y.) 513; Allegany, etc., R. Co. *v.* Weidenfeld, 5 Misc. (N. Y.) 43, 25 N. Y. Suppl. 71.

7. Ely *v.* Frisbie, 17 Cal. 250; Wells *v.* Bridgeport Hydraulic Co., 30 Conn. 316, 79 Am. Dec. 250; Rosenthal *v.* Muskegon Cir. Judge, 98 Mich. 208, 57 N. W. 112, 39 Am. St. Rep. 535, 22 L. R. A. 693.

Confessions.— Where a husband who has obtained from his wife by fraud and duress a confession in writing that she has committed adultery commences an action for divorce upon the ground of adultery, a court of equity will enjoin him from using such confession as evidence in such divorce action. Callender *v.* Callender, 53 How. Pr. (N. Y.) 364.

8. *Florida.*— State *v.* Jacksonville, etc., R. Co., 15 Fla. 201.

Mississippi.— Ford *v.* Weir, 24 Miss. 563.

New York.— Kilmer *v.* Bradley, 45 N. Y. Super. Ct. 585.

Tennessee.— See Perkins *v.* Woodfolk, 8 Baxt. 411.

Texas.— Lopez *v.* Rodriguez, 3 Tex. App. Civ. Cas. § 112.

See 27 Cent. Dig. tit. "Injunction," § 53.

9. Deaver *v.* Eller, 42 N. C. 24.

Effect of injunction.— Where one is enjoined from dismissing an action, the court where it is pending will not let him dismiss it. Dubuque Branch State Bank *v.* Rhomberg, 37 Iowa 664.

10. Monroe *v.* McIntyre, 41 N. C. 65.

11. Miller *v.* Coffin, 19 R. I. 164, 36 Atl. 6.

12. Boughton *v.* Smith, 26 Barb. (N. Y.) 635.

13. Tyler *v.* Hamersley, 44 Conn. 419, 26 Am. Rep. 479; Columbia County *v.* Bryson, 13 Fla. 281; White *v.* Holt, 20 W. Va. 792; Montague *v.* Dudman, 2 Ves. 396, 134 Eng. Reprint 253; 2 Story Eq. Jur. § 893.

14. Burns *v.* Sanderson, 13 Fla. 381.

15. Northeastern R. Co. *v.* Barrett, 65 Ga. 601; Sweeny *v.* Williams, 36 N. J. Eq. 627; Schuehle *v.* Reiman, 86 N. Y. 270; Crane *v.* Bunnell, 10 Paige (N. Y.) 333. See also Equity, 16 Cyc. 33.

In matters of account there are many cases in which a court of equity will entertain jurisdiction in the first instance, where, if the party making the claim had proceeded at law, the court would not, if applied to for that purpose, withdraw the matter from legal jurisdiction. Crane *v.* Ely, 37 N. J. Eq. 564.

16. *Georgia.*— Northeastern R. Co. *v.* Barrett, 65 Ga. 601.

Illinois.— Ross *v.* Buchanan, 13 Ill. 55; Mason *v.* Piggott, 11 Ill. 85.

New Jersey.— Swecny *v.* Williams, 36 N. J. Eq. 627.

New York.— Schuehle *v.* Reiman, 86 N. Y. 270; Crane *v.* Bunnell, 10 Paige 333; Mitchell *v.* Oakley, 7 Paige 68.

Tennessee.— Chadwell *v.* Jordan, 2 Tenn. Ch. 635.

necessarily that the action at law will be enjoined. An injunction will be refused where the question can be tried better before a jury.[17]

9. Confession of Judgment as Prerequisite to Allowance of Injunction. Where an injunction is asked because of the existence of equitable defenses not cognizable at law, courts have frequently refused to enjoin the action prior to judgment therein, on the ground that complainant's equitable rights may be fully protected by enjoining execution of the judgment,[18] except in cases where a discovery is asked in order to assist the defense at law.[19] The general rule is that it is in the discretion of the chancellor whether he will stay proceedings in an action at law prior to the rendition of judgment therein, or whether he will require complainant to confess judgment as a condition of obtaining an injunction against its execution.[20] A confession of judgment has often been required,[21] but in such case the order should require execution of the judgment to be stayed and the judgment itself to be dealt with as equity may finally direct.[22] In other cases it has been said that where complainant has ground for equitable relief and also a good legal defense, he need not abandon the latter by confessing judgment in order to obtain an injunction.[23]

10. Designation of Tribunal by Statute as Affecting Right to Relief. Where the legislature has specified a particular tribunal for determining a question, that tribunal ought not in general to be prevented from proceeding with the action or proceeding before it.[24] This rule has been applied to courts of pro-

England.— Ochsenbein *v.* Papelier, L. R. 8 Ch. 695, 42 L. J. Ch. 861, 28 L. T. Rep. N. S. 459, 21 Wkly. Rep. 516; Hoare *v.* Bremridge, L. R. 8 Ch. 22, 42 L. J. Ch. 1, 27 L. T. Rep. N. S. 593, 21 Wkly. Rep. 43; Waterlow *v.* Bacon, L. R. 2 Eq. 514, 12 Jur. N. S. 614, 35 L. J. Ch. 643, 14 L. T. Rep. N. S. 724, 14 Wkly. Rep. 855.

Where complainant has a perfect defense at law, to a suit commenced against him there, if the allegations in his bill are true, the court of chancery, although it has concurrent jurisdiction with the court of law in relation to the subject of the suit, will not grant a preliminary injunction for the mere purpose of obtaining exclusive jurisdiction of the case and thus deprive the adverse party of his right to jury trial. Mitchell *v.* Oakley, 7 Paige (N. Y.) 68.

Removal of cloud on title.— Equity may have jurisdiction to remove a cloud on title, but not when the party setting up the claim has brought an action at law where the question can be determined and the cloud removed. Reay *v.* Butler, 69 Cal. 572, 11 Pac. 463.

17. Mitchell *v.* Oakley, 7 Paige (N. Y.) 68; Anderson *v.* Dowling, 11 Ir. Eq. 590; Hoare *v.* Bremridge, L. R. 8 Ch. App. 22, 42 L. J. Ch. 1, 27 L. T. Rep. N. S. 593, 21 Wkly. Rep. 43; Scotland Life Assoc. *v.* McBlane, Ir. R. 9 Eq. 176.

18. *Georgia.*— Camp *v.* Matheson, 29 Ga. 351.

Mississippi.— Hill *v.* Billingsly, 53 Miss. 111; Anderson *v.* Walton, Freem. 347.

New York.— Ham *v.* Schuyler, 2 Johns. Ch. 140.

North Carolina.— Johnson *v.* McArthur, 64 N. C. 675.

United States.— Mutter *v.* Hamilton, 2 Fed. Cas. No. 9,974, Brunn. Col. Cas. 27.

See 27 Cent. Dig. tit. "Injunction," § 27.

The complainant has no right to delay the trial at law until his cause shall have been heard in equity, and, perhaps, his bill dismissed, by which time the other party may not be able to prove his case at law, by the death or removal of witnesses, or the loss of documents. All plaintiff can justly ask is that, as he has an undetermined equity, plaintiff at law shall not proceed to execution. Justice *v.* Scott, 39 N. C. 108.

19. Williams *v.* Sadler, 57 N. C. 378, 75 Am. Dec. 424. See also Semple *v.* Murphy, 8 B. Mon. (Ky.) 271; Melick *v.* Drake, 6 Paige (N. Y.) 470; Chadwell *v.* Jordan, 2 Tenn. Ch. 635.

20. Great Falls Mfg. Co. *v.* Henry, 25 Gratt. (Va.) 575; Parsons *v.* Snider, 42 W. Va. 517, 26 S. E. 285; Miller *v.* Miller, 25 W. Va. 495.

21. Hunt *v.* Sneed, 62 N. C. 351; Williams *v.* Sadler, 57 N. C. 378, 75 Am. Dec. 424; Nelson *v.* Owen, 38 N. C. 175; Chadwell *v.* Jordan, 2 Tenn. Ch. 635; Warwick *v.* Norvell, 1 Leigh (Va.) 96; Mathews *v.* Douglass, 16 Fed. Cas. No. 9,276, Brunn Col. Cas. 196; Turner *v.* American Baptist Missionary Union, 24 Fed. Cas. No. 14,251, 5 McLean 344.

22. Trousdale *v.* Maxwell, 6 Lea (Tenn.) 161; Henley *v.* Cottrell Real Estate, etc., Co., 101 Va. 70, 43 S. E. 191; Dudley *v.* Miner, 93 Va. 408, 25 S. E. 100; Great Falls Mfg. Co. *v.* Henry, 25 Gratt. (Va.) 575; Parsons *v.* Snider, 42 W. Va. 517, 26 S. E. 285; Miller *v.* Miller, 25 W. Va. 495.

23. *Ex p.* Hodges, 24 Ark. 197; Henwood *v.* Jarvis, 27 N. J. Eq. 247; Dudley *v.* Miner, 93 Va. 408, 25 S. E. 100; Lawrence *v.* Bowman, 15 Fed. Cas. No. 8,134, McAllister 419.

24. Machem *v.* Machem, 28 Ala. 374; *Ex p.* Wimberly, 57 Miss. 437, election contest. *Compare* Frost *v.* Myrick, 1 Barb. (N. Y.) 362.

bate,[25] of admiralty,[26] and of insolvency.[27] Yet here also the necessity of some equitable remedy or the danger of a multiplicity of suits or the probability of irreparable injury may be sufficient ground for an injunction.[28]

11. COURT IN WHICH ACTION IS PENDING AS AFFECTING RIGHT TO RELIEF[29] — a. Actions in the Same Court. Ordinarily it is improper to restrain by injunction in one suit proceedings in the same court in another action, because the court can grant as adequate relief in that action as in the one asking the injunction.[30] Nevertheless injunctions have been granted in such cases, even though the action to be enjoined is an equitable one.[31]

b. Actions in Courts of Coördinate Jurisdiction. Although it has been said that a court has no power to enjoin an action pending in another court of coördinate jurisdiction,[32] there is no doubt that such power exists and should be exercised whenever the circumstances justify an injunction.[33]

c. Actions in Courts of Other States or Countries — (i) *In General.* A court of equity has clear and undoubted jurisdiction, on a proper case being made out, to restrain persons within its jurisdiction from prosecuting suits in foreign courts. The injunction should be granted whenever the equities of complainant require it, and the location of the court where the action is pending is immaterial.[34] This jurisdiction is not founded upon any pretension to judicial or administrative rights abroad, but solely upon the fact that the person of the party to be enjoined

Expulsion from a medical society will not be enjoined where the society is proceeding under its own rules to hear and decide as to violations thereof by complainant and to expel him. Gregg *v.* Massachusetts Medical Soc., 111 Mass. 185, 15 Am. Rep. 24.

Exclusive jurisdiction to determine priority of an invention is in the commissioner of patents, and hence the prosecution of a claim before him will not be enjoined. Griffith *v.* Dodgson, 103 N. Y. App. Div. 542, 93 N. Y. Suppl. 155.

25. *Alabama.*— Newsom *v.* Thornton, 66 Ala. 311.

Delaware.— Kinney *v.* Redden, 2 Del. Ch. 44.

Rhode Island.— Clarke *v.* Clarke, 7 R. I. 45.

Vermont.— Brown *v.* Brown, 66 Vt. 81, 28 Atl. 666.

Virginia.— Stone *v.* Simmons, 56 W. Va. 88, 48 S. E. 841.

26. Anonymous, 3 Atk. 350, 26 Eng. Reprint 1003.

27. Fellows *v.* Spaulding, 141 Mass. 89, 61 N. E. 548.

28. Stannard *v.* St. Giles, 20 Ch. D. 190, 51 L. J. Ch. 629, 46 L. T. Rep. N. S. 243, 30 Wkly. Rep. 693.

29. See COURTS, 11 Cyc. 990.

Stay of proceedings in another action see ACTIONS, 1 Cyc. 751.

30. *Michigan.*— Beekman *v.* Fletcher, 48 Mich. 156, 12 N. W. 37.

New York.— Gould *v.* Thompson, 39 How. Pr. 5; Harman *v.* Remsen, 23 How. Pr. 174.

North Carolina.— McReynolds *v.* Harshaw, 37 N. C. 195.

South Carolina.— Medlock *v.* Cogburn, 1 Rich. Eq. 477.

United States.— Fuentes *v.* Gaines, 9 Fed. Cas. No. 5,145, 1 Woods 112.

See 27 Cent. Dig. tit. "Injunction," § 68.

See also *supra*, V, A, 3, e.

31. Alspaugh *v.* Adams, 80 Ga. 345, 5 S. E. 496; Farwell *v.* Great Western Tel. Co., 161 Ill. 522, 44 N. E. 891; Bond *v.* Greenwald, 7 Baxt. (Tenn.) 466.

32. Schell *v.* Erie R. Co., 51 Barb. (N. Y.) 368; New York *v.* Conover, 5 Abb. Pr. (N. Y.) 171.

33. Robertson *v.* Emerson, 26 La. Ann. 351; Platt *v.* Woodruff, 61 N. Y. 378; Erie R. Co. *v.* Ramsey, 45 N. Y. 637; Koehler *v.* Farmers', etc., Bank, 14 N. Y. Civ. Proc. 71; New York, etc., R. Co. *v.* Schuyler, 8 Abb. Pr. (N. Y.) 239.

34. *Massachusetts.*— Dehon *v.* Foster, 4 Allen 545.

Minnesota.— Hawkins *v.* Ireland, 64 Minn. 339, 67 N. W. 73, 58 Am. St. Rep. 534.

New York.— Dainese *v.* Allen, 3 Abb. Pr. N. S. 212; Field *v.* Holbrook, 3 Abb. Pr. 377.

United States.— Gage *v.* Riverside Trust Co., 86 Fed. 984.

England.— McHenry *v.* Lewis, 22 Ch. D. 397, 52 L. J. Ch. 325, 47 L. T. Rep. N. S. 549, 31 Wkly. Rep. 305; Armstrong *v.* Armstrong, [1892] P. 98, 61 L. J. P. 63, 66 L. T. Rep. N. S. 384; Bunbury *v.* Bunbury, 1 Beav. 318, 3 Jur. 644, 8 L. J. Ch. 297, 17 Eng. Ch. 318, 48 Eng. Reprint 963; Carron Iron Co. *v.* Maclaren, 5 H. L. Cas. 416, 24 L. J. Ch. 620, 3 Wkly. Rep. 597, 10 Eng. Reprint 961; Wedderburn *v.* Wedderburn, 4 Jur. 66, 9 L. J. Ch. 205, 4 Myl. & C. 585, 18 Eng. Ch. 585, 41 Eng. Reprint 225; Hearn *v.* Glanville, 48 L. T. Rep. N. S. 356; Portarlington *v.* Soulby, 3 Myl. & K. 104, 10 Eng. Ch. 104, 40 Eng. Reprint 40.

Canada.— North American L. Assur. Co. *v.* Sutherland, 3 Manitoba 147; Matter of Canada Cent. Bank, 20 Ont. 214. *Compare* Parent *v.* Shearer, 23 L. C. Jur. 42, 2 Montreal Leg. N. 125.

See 27 Cent. Dig. tit. "Injunction," § 70. And see Kerr Inj. (4th ed.) 520.

is within the jurisdiction of the court and he can be prevented from doing an inequitable thing.[35] It follows that it is immaterial that the subject-matter of the action to be enjoined is not within the jurisdiction of the court of equity.[36]

(II) *Courts of Sister States.* Injunctions against actions in the courts of sister states are governed by the same rules as apply in the case of actions in foreign courts, the jurisdiction to grant such injunctions being well settled.[37]

(III) *Burden of Showing Equitable Grounds.* No injunction will be granted where no equitable ground is shown, the burden of making such a showing being on complainant.[38]

(IV) *Evasion of Laws of Domicile.* A citizen of one state may be enjoined from prosecuting an action against another citizen of the same state, in a foreign jurisdiction, for the purpose of evading the laws of his own state.[39] An injunction has frequently been granted at the instance of a debtor to restrain a resident creditor from attempting to enforce a claim in a foreign jurisdiction, where the attempt, if successful, would deprive the debtor of his exemption under the local law;[40] especially where the creditor is attempting to reach exempt wages, earned

35. *Indiana.*—Sandage *v.* Studebaker Bros. Mfg. Co., 142 Ind. 148, 41 N. E. 380, 51 Am. St. Rep. 165, 34 L. R. A. 363.

Massachusetts.— Dehon *v.* Foster, 4 Allen 545.

New Jersey.— Margarum *v.* Moon, 63 N. J. Eq. 586, 53 Atl. 179, holding that the person to be enjoined must be shown to be in actual control of the action in question.

Vermont.— Vermont, etc., R. Co. *v.* Vermont Cent. R. Co., 46 Vt. 792; Bellows Falls Bank *v.* Rutland, etc., R. Co., 28 Vt. 470, holding that the party himself must be within the power of the court so that it can enforce its decree, or no injunction will issue.

England.— Portarlington *v.* Soulby, 3 Myl. & K. 104, 10 Eng. Ch. 104, 40 Eng. Reprint 40.

See 27 Cent. Dig. tit. "Injunction," § 70.

36. Home Ins. Co. *v.* Howell, 24 N. J. Eq. 238; Mead *v.* Merritt, 2 Paige (N. Y.) 402.

37. *Arkansas.*— Pickett *v.* Ferguson, 45 Ark. 177, 55 Am. Dec. 545.

California.— Spreckels *v.* Hawaiian Commercial, etc., Co., 117 Cal. 377, 49 Pac. 353.

Georgia.— Engel *v.* Scheuerman, 40 Ga. 206, 2 Am. Rep. 573.

Indiana.— Sandage *v.* Studebaker Bros. Mfg. Co., 142 Ind. 148, 41 N. E. 380, 51 Am. St. Rep. 165, 34 L. R. A. 363.

Maryland.— Keyser *v.* Rice, 47 Md. 203, 28 Am. Rep. 448.

Massachusetts.— Dehon *v.* Foster, 4 Allen 545.

New York.— Vail *v.* Knapp, 49 Barb. 299; Williams *v.* Ayrault, 31 Barb. 364; Barry *v.* New York Mut. L. Ins. Co., 2 Thomps. & C. 15; Hammond *v.* Baker, 3 Sandf. 704; Kittle *v.* Kittle, 8 Daly 72 (divorce action enjoined); Allegany, etc., R. Co. *v.* Weidenfeld, 5 Misc. 43, 25 N. Y. Suppl. 71; White *v.* Caxton Book-Binding Co., 10 N. Y. Civ. Proc. 146; Chaflin *v.* Hamlin, 62 How. Pr. 284; Nason Mfg. Co. *v.* Rankin Ice Mfg. Co., 1 N. Y. City Ct. 455; Burgess *v.* Smith, 2 Barb. Ch. 276. But see Mead *v.* Merritt, 2 Paige 402.

Ohio.— Snook *v.* Snetzer, 25 Ohio St. 516.

Vermont.— Bellows Falls Bank *v.* Rutland, etc., R. Co., 28 Vt. 470.

See 27 Cent. Dig. tit. "Injunction," § 70.

In Illinois it has been said to be inconsistent with interstate harmony that after a suit has been commenced in one of the states the prosecution thereof should be controlled by the courts of another state. Harris *v.* Pullman, 84 Ill. 20, 25 Am. Rep. 416.

38. *Alabama.*— Birmingham R., etc., Co. *v.* Birmingham Traction Co., 121 Ala. 477, 25 So. 777.

Massachusetts.— Carson *v.* Dunham, 149 Mass. 52, 20 N. E. 312, 14 Am. St. Rep. 397, 3 L. R. A. 202.

Missouri.— Wyeth Hardware, etc., Co. *v.* Lang, 54 Mo. App. 147.

New York.— Bennett *v.* Le Roy, 5 Abb. Pr. 55, 14 How. Pr. 178.

England.— Hyman *v.* Helm, 24 Ch. D. 531, 49 L. T. Rep. N. S. 376, 32 Wkly. Rep. 258; Moor *v.* Anglo-Italian Bank, 10 Ch. D. 681, 40 L. T. Rep. N. S. 620, 27 Wkly. Rep. 652; Browne *v.* Roberts, Ir. R. 5 Eq. 540, 19 Wkly. Rep. 115; Dawkins *v.* Simonetti, 50 L. J. P. & Adm. 30, 44 L. T. Rep. N. S. 266, 29 Wkly. Rep. 228.

See 27 Cent. Dig. tit. "Injunction," § 70.

An entirely void proceeding in the courts of another state will not be enjoined. Kasson First Nat. Bank *v.* La Due, 39 Minn. 415, 40 N. W. 367.

Mere hardship or inconvenience is not sufficient reason for enjoining an action in a foreign court. Fletcher *v.* Rogers, 27 Wkly. Rep. 97.

39. Sandage *v.* Studebaker Bros. Mfg. Co., 142 Ind. 148, 41 N. E. 380, 51 Am. St. Rep. 165, 34 L. R. A. 363; Miller *v.* Gittings, 85 Md. 601, 37 Atl. 372, 60 Am. St. Rep. 352, 37 L. R. A. 654; Edgell *v.* Clarke, 19 N. Y. App. Div. 199, 45 N. Y. Suppl. 979; Dinsmore *v.* Neresheimer, 32 Hun (N. Y.) 204; Archer *v.* Belding, 12 Ohio S. & C. Pl. Dec. 418.

40. *Indiana.*— Wilson *v.* Joseph, 107 Ind. 490, 8 N. E. 616.

Iowa.— Teager *v.* Landsley, 69 Iowa 725, 27 N. W. 739; Hager *v.* Adams, 70 Iowa 746, 30 N. W. 36.

Maryland.— Keyser *v.* Rice, 47 Md. 203, 28 Am. Rep. 448.

in the state of residence, or property only temporarily removed therefrom to another state.[41] An injunction is also proper to restrain a fraudulent action for a divorce brought in another state to evade the laws of the domicile,[42] or an action brought by a creditor in another state for the purpose of securing a preference and to evade the insolvency law of the domicile.[43]

d. Injunctions by Federal Courts Against Actions in State Courts. Because of the greater danger of a conflict between the two jurisdictions, of which there has been at least one illustration,[44] federal courts will rarely enjoin the prosecution of an action in a state court; and they are prohibited by statute from enjoining actions in the state courts except in bankruptcy proceedings.[45] The

Missouri.— Kelly *v.* Siefert, 71 Mo. App. 143; Wabash Western R. Co. *v.* Siefert, 41 Mo. App. 35.

New Jersey.— Margarum *v.* Moon, 63 N. J. Eq. 586, 53 Atl. 179.

Ohio.— Snook *v.* Snetzer, 25 Ohio St. 516.

Wisconsin.— Griggs *v.* Docter, 89 Wis. 161, 61 N. W. 761, 46 Am. St. Rep. 824, 30 L. R. A. 360.

See 27 Cent. Dig. tit. "Injunction," § 71.

Contra.— Cole *v.* Young, 24 Kan. 435.

41. Hager *v.* Adams, 70 Iowa 746, 30 N. W. 36; Teager *v.* Landsley, 69 Iowa 725, 27 N. W. 739; Caldwell *v.* Stevens, 14 Ky. L. Rep. 894; Moton *v.* Hull, 77 Tex. 80, 13 S. W. 849, 8 L. R. A. 722.

42. Miller *v.* Miller, 66 N. J. Eq. 436, 58 Atl. 188; Kempson *v.* Kempson, 58 N. J. Eq. 94, 43 Atl. 97 [*affirmed* on this point in 63 N. J. Eq. 783, 52 Atl. 360, 625, 92 Am. St. Rep. 682, 58 L. R. A. 484]; Forrest *v.* Forrest, 2 Edm. Sel. Cas. (N. Y.) 180. See also Kittle *v.* Kittle, 8 Daly (N. Y.) 72.

Parties domiciled in different states.— This rule does not apply where the parties are not domiciled in the same state. Griffith *v.* Langsdale, 53 Ark. 71, 13 S. W. 733, 22 Am. St. Rep. 182.

43. Cunningham *v.* Butler, 142 Mass. 47, 6 N. E. 782, 56 Am. Rep. 657; Dehon *v.* Foster, 7 Allen (Mass.) 57; Cole *v.* Cunningham, 133 U. S. 107, 10 S. Ct. 269, 33 L. ed. 538.

44. State *v.* Chicago, etc., R. Co., 61 Nebr. 545, 85 N. W. 556, 62 Nebr. 123, 87 N. W. 188; Starr *v.* Chicago, etc., R. Co., 110 Fed. 3.

45. Bryan *v.* Hickson, 40 Ga. 405; Kittredge *v.* Emerson, 15 N. H. 227; White *v.* Holt, 20 W. Va. 792; Dial *v.* Reynolds, 96 U. S. 340, 24 L. ed. 644; Haines *v.* Carpenter, 91 U. S. 254, 23 L. ed. 345; Diggs *v.* Wolcott, 4 Cranch (U. S.) 179, 2 L. ed. 587; Massie *v.* Buck, 128 Fed. 27, 62 C. C. A. 535; Phelps *v.* Mutual Reserve Fund Life Assoc., 112 Fed. 453, 50 C. C. A. 339, 61 L. R. A. 717; Tuchman *v.* Welch, 42 Fed. 548; Yick Wo *v.* Crowley, 26 Fed. 207; Rensselaer, etc., R. Co. *v.* Bennington, etc., R. Co., 18 Fed. 617; Freeney *v.* Plattsmouth First Nat. Bank, 16 Fed. 433, 3 McCrary 622; Moore *v.* Holliday, 17 Fed. Cas. No. 9,765, 4 Dill. 52; Rogers *v.* Cincinnati, 20 Fed. Cas. No. 12,008, 5 McLean 337; Chaffin *v.* St. Louis, 5 Fed. Cas. No. 2,572, 4 Dill. 19; Judiciary Act of 1793 (U. S. Rev. St. (1878) § 720 [U. S. Comp. St. (1901) p. 581]). See also ADMIRALTY, 1 Cyc. 825 note 21; COURTS, 11 Cyc. 847 note 11, 11 Cyc. 849 note 18.

U. S. Rev. St. (1878) § 720 [U. S. Comp. St. (1901) p. 581], applies to injunctions directed to parties in state suits. Dial *v.* Reynolds, 96 U. S. 340, 24 L. ed. 644; Cœur D'Alene R., etc., Co. *v.* Spalding, 93 Fed. 280, 35 C. C. A. 295. But *compare* Fisher *v.* Lord, 9 Fed. Cas. No. 4,821.

Effect of dismissal.— The action will not be enjoined, even though plaintiff after his suit was removed to the federal court, which dismissed it without prejudice, reduced his claim below the jurisdictional amount for removal to the federal courts, and brought a new action in the state court. Texas Cotton Products Co. *v.* Starnes, 128 Fed. 183.

Injunction against state officers.— The federal courts are not prevented by U. S. Rev. St. (1878) § 720 [U. S. Comp. St. (1901) p. 581], nor by the eleventh amendment of the constitution from enjoining state officials from prosecuting cases in the state courts contrary to federal law. Smyth *v.* Ames, 169 U. S. 466, 18 S. Ct. 418, 42 L. ed. 819; Starr *v.* Chicago, etc., R. Co., 110 Fed. 3; Tuchman *v.* Welch, 42 Fed. 548. *Contra*, State *v.* Chicago, etc., R. Co., 61 Nebr. 545, 85 N. W. 556, 62 Nebr. 123, 87 N. W. 188, refusing to dismiss an action on motion of the attorney-general of the state, who had been enjoined by the federal court from prosecuting it further.

Defense available in state court.— A federal court will not enjoin a proceeding in a state court brought under an ordinance in conflict with federal law, for the defense can be made in the state court, with possibility of review by writ of error in the United States supreme court. Rogers *v.* Cincinnati, 20 Fed. Cas. No. 12,008, 5 McLean 337.

Want of jurisdiction.—A federal court will not enjoin a state action for want of jurisdiction apparent on the fact of the record. Blythe *v.* Hinckley, 84 Fed. 246.

Rulings reviewable in federal courts.— A federal court will not enjoin an action in a state court on the ground that the state court may not give full faith and credit to a federal judgment, such a ruling being reviewable in the federal courts. Chicago, etc., R. Co. *v.* St. Joseph Union Depot Co., 92 Fed. 22.

Enjoining execution.— Where a case went into judgment in a state court and was afterward carried to the United States supreme court by writ of error, it was held that a federal court could not issue an injunction to restrain the service of execution

federal courts have construed the Judiciary Act to not apply to injunctions in cases where the federal court has acquired jurisdiction before any state action has been started, and hence parties may be enjoined from commencing any such action.[46] And where the federal court acquires jurisdiction of a case it may enjoin the prosecution of actions in state courts to protect its own jurisdiction or as ancillary thereto;[47] as in cases that have been properly removed from a state court to the federal courts.[48]

e. **Injunctions by State Courts Against Actions in Federal Courts.** In nearly all cases state courts have refused to enjoin the prosecution of a suit in the federal courts.[49] However, a state court may protect its jurisdiction, when it has first attached, by enjoining proceedings in a federal court, and it may enjoin such a proceeding in order to enforce its own process already issued.[50]

B. Property and Conveyances[51] — **1. Inadequacy of Remedy at Law in General.** The jurisdiction of equity to protect by injunction legal rights and interests in property is based on the inadequacy of the remedy at law and the jurisdiction is never exercised where the remedy at law is ample and complete.[52]

based on the state court judgment even though the writ of error acted as a supersedeas. Murray *v.* Overstoltz, 8 Fed. 110, 1 McCrary 606.

46. French *v.* Hay, 22 Wall. (U. S.) 250, 28 L. ed. 857; Camden Interstate R. Co. *v.* Catlettsburg, 129 Fed. 421; State Trust Co. *v.* Kansas City, etc., R. Co., 110 Fed. 10; Starr *v.* Chicago, etc., R. Co., 110 Fed. 3; Fisk *v.* Union Pac. R. Co., 9 Fed. Cas. No. 4,830, 10 Blatchf. 518.

47. French *v.* Hay, 22 Wall. (U. S.) 250, 22 L. ed. 857; Osborne *v.* U. S. Bank, 9 Wheat. (U. S.) 738, 6 L. ed. 204; Central Trust Co. *v.* Western North Carolina R. Co., 112 Fed. 471; Riverdale Cotton Mills *v.* Alabama, etc., Mfg. Co., 111 Fed. 431; Mercantile Trust, etc., Co. *v.* Roanoke, etc., R. Co., 109 Fed. 3; Iron Mountain R. Co. *v.* Memphis, 96 Fed. 113, 37 C. C. A. 410; Terre Haute, etc., R. Co. *v.* Peoria, etc., R. Co., 82 Fed. 943; Union Mutual L. Ins. Co. *v.* Chicago University, 6 Fed. 443, 10 Biss. 191; Fisk *v.* Union Pac. R. Co., 9 Fed. Cas. No. 4,827, 6 Blatchf. 362; Fisk *v.* Union Pac. R. Co., 9 Fed. Cas. No. 4,830, 10 Blatchf. 518.

48. Kern *v.* Huidekoper, 103 U. S. 494, 26 L. ed. 497; French *v.* Hay, 22 Wall. (U. S.) 231, 22 L. ed. 799; Home Ins. Co. *v.* Virginia-Carolina Chemical Co., 109 Fed. 681 [*affirmed* in 113 Fed. 1]; Cœur D'Alene R., etc., Co. *v.* Spalding, 93 Fed. 280, 35 C. C. A. 295; Baltimore, etc., R. Co. *v.* Ford, 35 Fed. 170. But see Penrose *v.* Penrose, 19 Fed. Cas. No. 10,958, 17 Blatchf. 332; Missouri, etc., R. Co. *v.* Scott, 13 Fed. 793, 4 Woods 386.

Several actions involving same question.— Where an insured has sued several insurers separately for losses by fire, for which they are liable *pro rata* if at all, and some of these suits are properly removed to the federal court, but the others cannot be because the amount involved is too small, and where defendants all have the same defense and the whole matter should be decided in one action, the federal court of equity will assume jurisdiction and enjoin all actions at law in state as well as federal courts. Rochester German Ins. Co. *v.* Schmidt, 126 Fed. 998; Virginia-Carolina Chemical Co. *v.* Home Ins. Co., 113 Fed. 1.

49. *Alabama.*— Opelika *v.* Daniel, 59 Ala. 211.

California.— Phelan *v.* Smith, 8 Cal. 520.

Georgia.— Fillingin *v.* Thornton, 49 Ga. 384; Bryan *v.* Hickson, 40 Ga. 405.

Illinois.— Logan *v.* Lucas, 59 Ill. 237.

New York.— Barry *v.* New York Mut. L. Ins. Co., 2 Thomps. & C. 15; Johnstown Min. Co. *v.* Morse, 44 Misc. 504, 90 N. Y. Suppl. 107; Thompson *v.* Norris, 11 Abb. N. Cas. 163; Mead *v.* Merritt, 2 Paige 402; Coster *v.* Griswold, 4 Edw. 364; Schuyler *v.* Pelissier, 3 Edw. 191. *Compare* Pusey *v.* Bradley, 1 Thomps. & C. 661.

See 27 Cent. Dig. tit. "Injunction," § 73.

Grounds.— A state court will not enjoin the bringing of an action in a federal court of competent jurisdiction on the ground that the federal court is likely to decide the case differently from the state court. Venice *v.* Woodruff, 62 N. Y. 462, 20 Am. Rep. 495; Thompson *v.* Norris, 11 Abb. N. Cas. (N. Y.) 163, 63 How. Pr. 418. See Dinsmore *v.* Neresheimer, 32 Hun (N. Y.) 204.

A state court will not enjoin a receiver appointed by a federal court. Rogers *v.* Chippewa Cir. Judge, 135 Mich. 79, 97 N. W. 154.

50. Bryan *v.* Hickson, 40 Ga. 405; Home Ins. Co. *v.* Howell, 24 N. J. Eq. 238; Akerly *v.* Vilas, 15 Wis. 401.

51. Injunctions to protect enjoyment of easements see Easements, 14 Cyc. 1216 *et seq.*

Injunction against alteration or destruction of party-wall see Party-Walls.

Injunction against fraudulent conveyances see Fraudulent Conveyances, 20 Cyc. 828 *et seq.*

Injunction against sale of land to prevent cloud on title see Quieting Title.

Injunction against sale of decedent's lands see Executors and Administrators, 18 Cyc. 756.

52. Southworth *v.* Smith, 27 Conn. 355, 71 Am. Dec. 72; Great Hive L. of M. *v.* Su-

2. Complainant's Right or Title — a. Character of the Interest — (I) *In General.* Complainant must have title to property or some interest therein before an injunction will be granted at his instance to protect it.[53] So one who is in effect a mere trespasser will not be aided by an injunction in preserving the fruits of his wrong-doing.[54]

(II) *Remainder or Reversionary Interest.* A reversionary or remainder

preme Hive L. of M. of W., 129 Mich. 324, 88 N. W. 882; Hart *v.* Leonard, 42 N. J. Eq. 416, 7 Atl. 865; Stockton *v.* Russell, 54 Fed. 224. 4 C. C. A. 300.

Personal property.— Equity will not interfere to prevent an injury to, or sale of, ordinary personal chattels or property, since an action at law for damages is an adequate remedy. Davidson *v.* Floyd, 15 Fla. 667; Ganow *v.* Denney, (Nebr. 1903) 94 N. W. 959; Wilson *v.* Respass, 86 N. C. 112; Howell *v.* Howell, 40 N. C. 258; Mechanics', etc., Bank *v.* Debolt, 1 Ohio St. 591; Poage *v.* Bell, 3 Rand. (Va.) 586; Dowling *v.* Betjemann, 2 Johns. & H. 544, 8 Jur. N. S. 538, 6 L. T. Rep. N. S. 512, 10 Wkly. Rep. 574; Bradley *v.* Barber, 30 Ont. 443. But in England and Canada injunctions have been granted to protect specific chattels of such peculiar value that they cannot be the subject of adequate compensation by damages. Tonnins *v.* Prout, Dick. 387, 21 Eng. Reprint 320 (diamonds); Falcke *v.* Gray, 4 Drew. 651, 5 Jur. N. S. 645, 29 L. J. Ch. 28, 7 Wkly. Rep. 535, 62 Eng. Reprint 250 (china jars); North *v.* Great Northern R. Co., 2 Giff. 64, 6 Jur. N. S. 244, 29 L. J. Ch. 301, 1 L. T. Rep. N. S. 510; Redgway *v.* Roberts, 4 Hare 106, 30 Eng. Ch. 106 (ship); Flint *v.* Corby, 4 Grant Ch. (U. C.) 45. See also Prenman *v.* Somerville, 22 Grant Ch. (U. C.) 178, which held that where the court has possession of a matter in which real estate is concerned, it will, if chattel property form part of the subject-matter in dispute, deal with that also for the purpose of preserving the same *in medio*.

53. *California.* — Treadwell *v.* Payne, 15 Cal. 496.

Georgia.— Flannery *v.* Hightower, 97 Ga. 592, 25 S. E. 371.

Illinois.— See Chicago Yacht Club *v.* Marks, 97 Ill. App. 406, holding that a riparian owner cannot protect his view over the water.

Iowa.— Wearin *v.* Munson, 62 Iowa 466, 17 N. W. 746.

Louisiana.— McAdam *v.* Rainey, 33 La. Ann. 108.

Michigan.— Carley *v.* Gitchell, 105 Mich. 38, 62 N. W. 1003, 55 Am. St. Rep. 428, title acquired under void contract.

New Jersey.— New Jersey Junction R. Co. *v.* Woodward, 61 N. J. Eq. 1, 47 Atl. 273.

New York.— Country Club Land Assoc. *v.* Lohhauer, 56 N. Y. App. Div. 306, 67 N. Y. Suppl. 909; Clark *v.* New York, 32 Misc. 52, 66 N. Y. Suppl. 103.

Ohio.— Moore *v.* Lima Nat. Bank, 8 Ohio Cir. Ct. 287, 4 Ohio Cir. Dec. 529.

South Carolina.— Bailey *v.* Gray, 53 S. C. 503, 31 S. E. 354.

South Dakota.— St. Lawrence *v.* Gross, (1900) 81 N. W. 640.

Wisconsin.— Laird *v.* Boyle, 2 Wis. 431, where complainant's lease expired before hearing.

See 27 Cent. Dig. tit. "Injunction," § 77.

Erections overlooking exhibition grounds.— Equity will not restrain one from erecting and using a platform on his own land overlooking a baseball ground to which an admission fee is charged, it not appearing that complainants have any special privilege by law in the exhibition of the ball games to the public. Detroit Base Ball Club *v.* Deppert, 61 Mich. 63, 27 N. W. 856, 1 Am. St. Rep. 566.

Complainant must rely on the strength of his own title and not on the weakness of defendant's. Clark *v.* Durland, 35 N. Y. App. Div. 312, 55 N. Y. Suppl. 14. See also Cornett *v.* Combs, 53 S. W. 32, 21 Ky. L. Rep. 837.

A right common to the public is not sufficient to justify issuing an injunction. Harrell *v.* Hannum, 56 Ga. 508; Municipality No. 1 *v.* Municipality No. 2, 12 La. 49.

Right to possession.— Plaintiff must show a clear right to possession before an injunction will be granted to restrain injuries to chattel interests in land. Ellsworth *v.* Hale, 33 Ark. 633. A mere technical right to possession will not sustain an injunction against a party in possession and having the whole beneficial interest. Converse *v.* Ketchum, 18 Wis. 202.

A warrantor of title, who has no other interest in land, cannot maintain a bill for an injunction to quiet possession unless he seeks also an account and other equitable relief. Brooks *v.* Fowle, 14 N. H. 248.

Right of purchaser at execution sale to restrain waste see Executions, 17 Cyc. 1319.

Life-tenant.— The grantee of a widow who was given a life-estate by the will is entitled to an injunction against the unlawful interference with his possession through unfounded claims. Nicholson *v.* Drennan, 35 S. C. 333, 14 S. E. 719.

54. *California.*—O'Conner *v.* Corbitt, 3 Cal. 370.

Indiana.— Windfall Natural Gas, etc., Co. *v.* Terwilliger, 152 Ind. 364, 53 N. E. 284.

Iowa.— Currier *v.* Jones, 121 Iowa 160, 96 N. W. 766.

New York.— Littlejohn *v.* Attrill, 94 N. Y. 619.

Pennsylvania.— Philadelphia, etc., Pass. R. Co. *v.* Philadelphia, 2 Wkly. Notes Cas. 639.

United States.— Central Trust Co. *v.* Wabash, etc., R. Co., 25 Fed. 1.

See 27 Cent. Dig. tit. "Injunction," § 77.

interest is sufficient to entitle complainant to an injunction against injury to the inheritance.[55]

(III) *EQUITABLE INTEREST.*[56] An equitable interest in property is in general sufficient title on which to base a suit for an injunction.[57] This doctrine has been applied in proceedings to enjoin waste,[58] trespass,[59] or a wrongful sale,[60] and in proceedings to quiet title.[61]

(IV) *LEASEHOLD INTEREST.* A lessee has such an interest as entitles him to an injunction to prevent irreparable injury to his leasehold estate.[62]

(V) *LIEN OF ATTACHING CREDITOR.* A plaintiff in a suit by attachment may have an injunction to prevent acts of waste being committed by an insolvent defendant.[63]

b. Establishment of Right or Title at Law — (I) *THE GENERAL RULE AND ITS APPLICATIONS.* As a general rule a court of equity will not interfere to protect legal rights in property until the complainant has established his title or right by an action at law,[64] especially where the answer denies the title of the complainant to the property sought to be protected.[65] If the legal right or title

55. *Connecticut.*— Williams *v.* Wadsworth, 51 Conn. 277.

Georgia.— New South Bldg., etc., Assoc. *v.* Gann, 97 Ga. 367, 24 S. E. 448.

Massachusetts.— Ingraham *v.* Dunnell, 5 Metc. 118.

New Hampshire.— Dennett *v.* Dennett, 43 N. H. 499.

New York.— Thompson *v.* Manhattan R. Co., 130 N. Y. 360, 29 N. E. 264 [*affirming* 16 Daly 64, 8 N. Y. Suppl. 641], injunction may be granted against the construction and operation of an elevated railroad. See also Macy *v.* Metropolitan El. R. Co., 59 Hun 365, 12 N. Y. Suppl. 804 [*affirmed* in 128 N. Y. 624, 28 N. E. 485].

North Carolina.— Gordon *v.* Lowther, 75 N. C. 193.

Oregon.— Bishop *v.* Baisley, 28 Oreg. 119, 41 Pac. 936.

See 27 Cent. Dig. tit. "Injunction," § 77; and ESTATES, 16 Cyc. 643.

56. **Injunctions to protect equitable liens** see *infra*, II, B, 4, a, (IV), (D).

57. Graham *v.* Horton, 6 Kan. 343; Hackett *v.* Patterson, 16 N. Y. Suppl. 170.

58. Thompson *v.* Lynam, 1 Del. Ch. 64; Vandemark *v.* Schoonmaker, 9 Hun (N. Y.) 16; Webb *v.* Boyle, 63 N. C. 271; Garrison *v.* Hall, 75 Va. 150.

59. Wilson *v.* Rockwell, 29 Fed. 674.

60. Gould *v.* Hill, 18 Ala. 457; Wade *v.* Powell, 20 Ga. 645 (separate estate of a married woman); O'Neil *v.* Hamilton, 44 Pa. St. 18; Filler *v.* Tyler, 91 Va. 458, 22 S. E. 235 (separate estate of married woman).

61. Webb *v.* Harp, 38 Ga. 641; Walsh *v.* Rice, 1 Lack. Leg. Rec. (Pa.) 62.

62. See LANDLORD AND TENANT.

63. Camp *v.* Bates, 11 Conn. 51, 27 Am. Dec. 707. *Compare* Cooney *v.* Moroney, 45 Iowa 292.

64. *Florida.*— Carney *v.* Hadley, 32 Fla. 344, 14 So. 4, 37 Am. St. Rep. 101, 22 L. R. A. 233.

Georgia.— Powers *v.* Heery, R. M. Charlt. 523.

Illinois.— W. H. Howell Co. *v.* Charles Pope Glucose Co., 171 Ill. 350, 49 N. E. 497; Stolp *v.* Hoyt, 44 Ill. 219.

Kansas.— Harden *v.* Metz, (1901) 63 Pac. 1126 [*affirming* (App. 1900) 58 Pac. 281].

Kentucky.— Watson *v.* Holmes, 5 Ky. L. Rep. 515.

Massachusetts.— Washburn *v.* Miller, 117 Mass. 376; Cummings *v.* Barrett, 10 Cush. 186.

Mississippi.— Grayson *v.* Wilson, 27 Miss. 553; Nevitt *v.* Gillespie, 1 How. 108, 26 Am. Dec. 696.

Missouri.— Arnold *v.* Klepper, 24 Mo. 273.

New Hampshire.— Hodgman *v.* Richards, 45 N. H. 28.

New Jersey.— Oppenheim *v.* Loftus, (Ch. 1901) 50 Atl. 795; Delaware, etc., R. Co. *v.* Breckenridge, 55 N. J. Eq. 141, 35 Atl. 756; Ocean City R. Co. *v.* Bray, 55 N. J. Eq. 101, 35 Atl. 839; New Jersey Zinc Co. *v.* New Jersey Franklinite Co., 13 N. J. Eq. 322; Shields *v.* Arndt, 4 N. J. Eq. 234.

New York.— Lansing *v.* North River Steam Boat Co., 7 Johns. Ch. 162. See also Baron *v.* Korn, 127 N. Y. 224, 27 N. E. 804.

North Carolina.— Irwin *v.* Davidson, 38 N. C. 311.

Pennsylvania.— King *v.* McCully, 38 Pa. St. 76; Rhea *v.* Forsyth, 37 Pa. St. 503, 78 Am. Dec. 441; Philadelphia *v.* Crump, 1 Brewst. 320; Summit Branch R. Co. *v.* Leininger, 1 Leg. Rec. 258; McDonald *v.* Bromley, 6 Phila. 302.

South Carolina.— Lining *v.* Geddes, 1 McCord Eq. 304, 16 Am. Dec. 606.

Tennessee.— Caldwell *v.* Knott, 10 Yerg. 209.

West Virginia.— Burns *v.* Mearns, 44 W. Va. 744, 30 S. E. 112.

United States.— Lownsdale *v.* Gray's Harbor Room Co., 117 Fed. 983; Preston *v.* Smith, 26 Fed. 884.

See 27 Cent. Dig. tit. "Injunction," § 85.

Title from state.— Where a state, having authority, grants a right upon conditions which have been complied with, the right need not be established by a trial at law before applying for an injunction. Moor *v.* Veazie, 31 Me. 360.

65. *Maryland.*— Chesapeake, etc., Canal Co. *v.* Young, 3 Md. 480.

to property has not been established at law, is not clear or established *prima facie*, or has not been long enjoyed, but is disputed, and the injury threatened is not irreparable or the remedy at law inadequate, an injunction will not issue.[66] So where there is a reasonable doubt as to the right or title of the applicant for an injunction to protect property, equity will not interfere in the absence of emergency until after the right or title has been established at law.[67] For instance it has been held that an injunction will not be granted in cases where the right depends upon the meaning of an ambiguous and uncertain contract,[68] deed,[69] or

Missouri.— Echelkamp *v.* Schrader, 45 Mo. 505.

North Carolina.— Wright *v.* Grist, 45 N. C. 203.

Pennsylvania.— Gross *v.* Wieland, 151 Pa. St. 639, 25 Atl. 50; Quinn's Appeal, (1887) 11 Atl. 649; Morse *v.* Reilly, 6 Pa. L. J. 501.

United States.— Morse *v.* O'Reilly, 17 Fed. Cas. No. 9,858; Parker *v.* Winnipiseogee Lake Cotton, etc., Mfg. Co., 18 Fed. Cas. No. 10,752, 1 Cliff. 247 [*affirmed* in 2 Black 545, 17 L. ed. 333].

See 27 Cent. Dig. tit. "Injunction," § 84.

Procedure.— The proper course, when an injunction is applied for and the legal title is doubtful, is to send the complainant to a court of law to have his title first established. Chesapeake, etc., Canal Co. *v.* Young, 3 Md. 480.

Title in third person under whom defendant claims is a sufficient answer to a bill to enjoin a trespass. Whitlock *v.* Consumers' Gas Trust Co., 127 Ind. 62, 26 N. E. 570.

Mere denial of title is not sufficient; facts must be stated showing a substantial dispute of complainant's title. Miller *v.* Lynch, 149 Pa. St. 460, 24 Atl. 80.

66. *Alabama.*— Wharton *v.* Hannon, 115 Ala. 518, 22 So. 287; Kellar *v.* Bullington, 101 Ala. 267, 14 So. 466; Ashurst *v.* McKenzie, 92 Ala. 484, 9 So. 262; Boulo *v.* New Orleans, etc., R. Co., 55 Ala. 480.

Georgia.— Mathews *v.* Cody, 60 Ga. 355; Crown *v.* Leonard, 32 Ga. 241.

Idaho.— Washington, etc., R. Co. *v.* Cœur D'Alene R., etc., Co., 2 Ida. (Hasb.) 580, 21 Pac. 562.

Illinois.— Chicago *v.* Wright, 69 Ill. 318; Davis *v.* Hinton, 29 Ill. App. 327.

Missouri.— Echelkamp *v.* Schrader, 45 Mo. 505.

New Hampshire.— Perkins *v.* Foye, 60 N. H. 496; Maloon *v.* White, 57 N. H. 152.

New Jersey.— Morris Canal, etc., Co. *v.* Fagin, 22 N. J. Eq. 430; Hinchman *v.* Paterson Horse R. Co., 17 N. J. Eq. 75, 86 Am. Dec. 252; West *v.* Walker, 3 N. J. Eq. 279.

New Mexico.— Lockhart *v.* Leeds, 10 N. M. 568, 63 Pac. 48.

New York.— Koehler *v.* Brady, 144 N. Y. 135, 38 N. E. 978; Lacustrine Fertilizer Co. *v.* Lake Guano, etc., Co., 82 N. Y. 476; Amoskeag Mfg. Co. *v.* Spear, 2 Sandf. 599; Hart *v.* Albany, 3 Paige 213.

Oregon.— Bishop *v.* Baisley, 28 Oreg. 119, 41 Pac. 936.

Pennsylvania.— Goldsworthy *v.* Boyle, 175 Pa. St. 246, 34 Atl. 630; Leininger's Appeal, 106 Pa. St. 398; Wright Tp. Water Co. *v.* Hines, 10 Kulp 274; Scanlan *v.* Conshohocken, 18 Montg. Co. Rep. 193.

Utah.— McGregor *v.* Silver King Min. Co., (1896) 45 Pac. 1091.

Vermont.— Griffith *v.* Hilliard, 64 Vt. 643, 25 Atl. 427.

Virginia.— Henrico County *v.* Hart, 3 Leigh 1.

Wisconsin.— Wolf River Lumber Co. *v.* Pelican Boom Co., 83 Wis. 426, 53 N. W. 678.

United States.— Irwin *v.* Dixon, 9 How. 10, 13 L. ed. 25.

England.— Motley *v.* Downman, 6 L. J. Ch. 308, 3 Myl. & C. 1, 14 Eng. Ch. 1, 40 Eng. Reprint 824.

See 27 Cent. Dig. tit. "Injunction," § 83.

The use of property not causing an irreparable injury will not be enjoined *pendente lite* when the title is in dispute. Real Del Monte Consol. Gold, etc., Min. Co. *v.* Pond Gold, etc., Min. Co., 23 Cal. 82; Davis *v.* Covington, etc., R. Co., 77 Ga. 322, 2 S. E. 555; Delaware, etc., R. Co. *v.* Newton Coal Min. Co., 137 Pa. St. 314, 21 Atl. 171; U. S. *v.* Southern Pac. R. Co., 55 Fed. 566.

67. *Georgia.*—White *v.* Williamson, 92 Ga. 443, 17 S. E. 604.

Maryland.— Cherry *v.* Stein, 11 Md. 1.

New Jersey.— Worthington *v.* Moon, 53 N. J. Eq. 46, 30 Atl. 251.

New York.—Braker *v.* McMorrow, 30 Misc. 390, 63 N. Y. Suppl. 1016; North River Steamboat Co. *v.* Livingston, 3 Cow. 713; Snowden *v.* Noah, Hopk. 347, 14 Am. Dec. 547.

Ohio.— Commercial Bank *v.* Bowman, 1 Handy 246, 12 Ohio Dec. (Reprint) 125.

Pennsylvania.— Hughes *v.* Hess, 11 Pa. Dist. 455; Parry *v.* Sensenig, 12 Lanc. Bar 89; Oberly *v.* Hapgood, 3 Lanc. L. Rev. 234; Alter *v.* Bowman, 2 Leg. Chron. 323; Kutz *v.* Hepler, 1 Leg. Rec. 357; Heckscher *v.* Sheafer, 1 Leg. Rec. 285; Summit Branch R. Co. *v.* Leininger, 1 Leg. Rec. 258; Neill *v.* Gallagher, 10 Phila. 172; Dyer *v.* People's Bank, 9 Phila. 159; Shuster *v.* Bennett, 9 Phila. 208; Kelly *v.* Long, 7 Phila. 455; Fitzpatrick *v.* Childs, 6 Phila. 135.

See 27 Cent. Dig. tit. "Injunction," § 82.

68. Bennett *v.* Seligman, 32 Mich. 500; Wakeman *v.* New York, etc., R. Co., 35 N. J. Eq. 496; Agate *v.* Lowenbein, 4 Daly (N. Y.) 62.

69. Whalen *v.* Dalashamutt, 59 Md. 250; Booher *v.* Browning, 169 Pa. St. 18, 32 Atl. 85. *Compare* Jennings *v.* Beale, 158 Pa. St. 283, 27 Atl. 948, which held that where a deed cited in chain of title is admitted the chancellor may construe it.

will;[70] where the principles of law upon which the right depends are doubtful and have not been adjudicated by a court of law;[71] or where complainant has previously attempted and failed in an action at law to establish his title.[72]

(II) *Exceptions to Rule*—(A) *Facts Admitted.* It is not necessary that the right or title of the complainant should first be settled by an adjudication of a court of law if the material facts on which it is based are admitted.[73]

(B) *Clear Right or Title.* When, from the showing on the bill or the evidence, the right is clear and certain, its establishment at law is not a prerequisite;[74] but the interposition must be based on a clear and certain right to the enjoyment of the subject in question, and an injurious interruption of that right which on just and equitable grounds ought to be prevented.[75]

(C) *Right or Title Established Prima Facie.* Where complainant makes out a strong *prima facie* case of right or title, the injunction will be granted without a previous trial at law.[76]

(D) *Right Long Enjoyed.* Where a right has been enjoyed by complainant without interruption for a long period of years, its violation will be enjoined, without it being first established at law.[77]

(E) *Avoidance of Multiplicity of Suits.* Where a multiplicity of suits will be avoided, a court of equity may proceed and define the right and not remit

70. Duncan *v.* Hollidaysburg, etc., Iron-Works, 136 Pa. St. 478, 20 Atl. 647.

71. Muir *v.* Howell, 37 N. J. Eq. 39; Black *v.* Delaware, etc., Canal Co., 22 N. J. Eq. 130; Stevens *v.* Paterson, etc., R. Co., 20 N. J. Eq. 126; Caldwell *v.* Knott, 10 Yerg. (Tenn.) 209.

72. Hagerty *v.* Lee, 48 N. J. Eq. 98, 21 Atl. 933; Cornelius *v.* Post, 9 N. J. Eq. 196; West *v.* Page, 9 N. J. Eq. 119; Mowday *v.* Moore, 133 Pa. St. 598, 19 Atl. 626.

73. Tuolumne Water Co. *v.* Chapman, 8 Cal. 392; Black *v.* Delaware, etc., Canal Co., 22 N. J. Eq. 130; Rankin's Appeal, (Pa. 1888) 16 Atl. 82; Ensign *v.* Lyon, 1 Lack. Jur. (Pa.) 102; Brundage *v.* Deardorf, 55 Fed. 839.

74. *New Jersey.*— Robertson *v.* Meyer, 59 N. J. Eq. 366, 45 Atl. 983.

New York.—Nicoll *v.* Huntington, 1 Johns. Ch. 166; Seneca Woollen Mills *v.* Tillman, 2 Barb. Ch. 9.

North Carolina.— Atty.-Gen. *v.* Hunter, 16 N. C. 12.

Pennsylvania.— Richmond *v.* Bennett, 205 Pa. St. 470, 55 Atl. 17; Manbeck *v.* Jones, 21 Pa. Co. Ct. 300; Biddle *v.* Ash, 2 Ashm. 211; Sprenkle *v.* Thomas, 13 York Leg. Rec. 89.

Virginia.— Basore *v.* Henkel, 82 Va. 474; Berkeley *v.* Smith, 27 Gratt. 892.

United States.— Hagge *v.* Kansas City S. R. Co., 104 Fed. 391.

See 27 Cent. Dig. tit. "Injunction," § 85.

75. *Colorado.*— Union Iron-Works *v.* Bassick Min. Co., 10 Colo. 24, 14 Pac. 54. In this case it was held that the enforcement of a legal right will not be enjoined in equity except where there is a clear showing of a right superior to that which it is sought to enjoin.

Maine.— Morse *v.* Machias Water Power, etc., Co., 42 Me. 119.

New Jersey.— Harper *v.* McElroy, 42 N. J. Eq. 280, 10 Atl. 879; Black *v.* Delaware, etc., Canal Co., 22 N. J. Eq. 130.

New York.— Olmsted *v.* Loomis, 6 Barb. 152.

Pennsylvania.— Eshleman's Case, 5 Leg. Op. 141; Simson *v.* Bates, 10 Phila. 66; Allen *v.* Benners, 10 Phila. 10.

United States.— Orton *v.* Smith, 18 How. 263, 15 L. ed. 393; Alexander *v.* Pendleton, 8 Cranch 462, 3 L. ed. 624; Preston *v.* Smith, 26 Fed. 884.

See 27 Cent. Dig. tit. "Injunction," § 85.

Amount of interest.— Where plaintiff's right is settled or proved, there is no need of a suit at law before an injunction is granted, even though the amount of plaintiff's interest is not settled. Marston *v.* Durgin, 54 N. H. 347.

76. *California.*— Hunt *v.* Steese, 75 Cal. 620, 17 Pac. 920.

Georgia.— McArthur *v.* Matthewson, 67 Ga. 134.

New York.— Hart *v.* Albany, 9 Wend. 571, 24 Am. Dec. 165.

Pennsylvania.— Florey *v.* Wind Gap, etc., R. Co., 1 Lehigh Val. L. Rep. 125.

Virginia.— Miller *v.* Wills, 95 Va. 337, 28 S. E. 337.

United States.— Texas, etc., R. Co. *v.* Interstate Transp. Co., 155 U. S. 585, 15 S. Ct. 228, 39 L. ed. 271; Parker *v.* Winnipiseogee Lake Cotton, etc., Mfg. Co., 2 Black 545, 17 L. ed. 333.

See 27 Cent. Dig. tit. "Injunction," § 85.

77. *Connecticut.*— Falls Village Water-Power Co. *v.* Tibbetts, 31 Conn. 165.

Georgia.— Shirley *v.* Hicks, 110 Ga. 516, 35 S. E. 782, thirty years.

Maine.— Jordan *v.* Woodward, 38 Me. 423, Porter *v.* Witham, 17 Me. 292.

New York.— Olmsted *v.* Loomis, 9 N. Y. 423; Belknap *v.* Trimble, 3 Paige 577.

Pennsylvania.— Coal Co. *v.* Savage, 4 Pa. Dist. 557; Springdale M. E. Church *v.* Shoop, 30 Pittsb. Leg. J. N. S. 132.

Virginia.— Sanderlin *v.* Baxter, 76 Va. 299, 44 Am. Rep. 165.

See 27 Cent. Dig. tit. "Injunction," § 85.

the case to a court of law, although it may be necessary to decide between adverse titles.[78]

(F) *Protection of Public Domain.* Public domain will be protected at the instance of the government without the title being first established at law.[79]

(G) *Statutory Exceptions.* Under the statutes of one state an injunction may be issued without the title of the party being first established in a suit at law.[80] The title, if in dispute, and the equitable remedy may be determined in the same action.[81] So under the statutes of another state parties in possession need not establish their title at law before bringing suit to restrain waste and trespass.[82]

(III) *Trial of Title.* A court of chancery is not the appropriate tribunal for the trial of title to land, and where the main object of a suit asking for relief by injunction is to determine the legal title to property,[83] or to fix the boundaries of land,[84] equity will not interfere by injunction, but will remit the parties to a court of law. Likewise equity will not try title to personal property in an injunction suit.[85]

c. Protection Pending Litigation as to Right or Title[86] — (I) *In General* — (A) *Rule Stated.* Pending a suit in equity,[87] or at law,[88] an injunction may be granted to preserve *in statu quo* the property involved until a final settlement of the right or title. The injunction should not, however, give either party an advantage.[89]

78. *Florida.*— Caro *v.* Pensacola City Co., 19 Fla. 766.

Georgia.— Fields *v.* Ralston, 30 Ga. 79.

New York.— West Point Iron Co. *v.* Reymert, 45 N. Y. 703.

Virginia.— Switzer *v.* McCulloch, 76 Va. 777; Hanna *v.* Clarke, 31 Gratt. 36.

West Virginia.— Bettman *v.* Harness, 42 W. Va. 433, 26 S. E. 271, 36 L. R. A. 566.

See 27 Cent. Dig. tit. "Injunction," § 85.

79. U. S. *v.* Cleveland, etc., Cattle Co., 33 Fed. 323.

80. Lacustrine Fertilizer Co. *v.* Lake Guano, etc., Co., 82 N. Y. 476; Corning *v.* Troy Iron, etc., Factory, 40 N. Y. 191.

81. Hinckel *v.* Stevens, 17 N. Y. App. Div. 279, 45 N. Y. Suppl. 678.

82. Allen *v.* Dunlap, 24 Oreg. 229, 33 Pac. 675.

83. *California.*— Kredo *v.* Phelps, 145 Cal. 526, 78 Pac. 1044.

Illinois.— Parker *v.* Shannon, 114 Ill. 192, 28 N. E. 1099; Hacker *v.* Barton, 84 Ill. 313.

Kentucky.— Newport, etc., Co. *v.* Fitzsimmons, 7 S. W. 609, 8 S. W. 201, 9 Ky. L. Rep. 939.

Michigan.— Devaux *v.* Detroit, Harr. 98.

Missouri.— Graham *v.* Womack, 82 Mo. App. 618.

New Jersey.— De Groot *v.* Washington Banking Co., 3 N. J. Eq. 198.

Oregon.— Tomasini *v.* Taylor, 42 Oreg. 576, 72 Pac. 324.

Pennsylvania.— Washburn's Appeal, 105 Pa. St. 480; Burke *v.* Brown, 9 Kulp 296.

Rhode Island.— Rogers *v.* Rogers, 17 R. I. 623, 24 Atl. 46.

Texas.— Gregg *v.* Cole, 5 Tex. 417.

England.— Gilmour *v.* Mauroit, 14 App. Cas. 645, 59 L. J. P. C. 38, 61 L. T. Rep. N. S. 442 [*affirming* 33 L. C. Jur. 231, 3 Montreal Q. B. 449].

Canada.— Toronto Brewing, etc., Co. *v.* Blake, 2 Ont. 175; Gilman *v.* Mauriot, 12 Montreal Leg. N. 322.

84. Andries *v.* Detroit, etc., R. Co., 105 Mich. 557, 63 N. W. 526; Wykes *v.* Ringleberg, 49 Mich. 567, 4 N. W. 498; Summit Branch R. Co. *v.* Leininger, 1 Leg. Rec. (Pa.) 258; McDonald *v.* Bromley, 6 Phila. (Pa.) 302; Callaway *v.* Webster, 98 Va. 790, 37 S. E. 276.

85. Young *v.* Young, 9 B. Mon. (Ky.) 66; Power *v.* Alger, 13 Abb. Pr. (N. Y.) 284; Kistler *v.* Weaver, 135 N. C. 388, 47 S. E. 478; Baxter *v.* Baxter, 77 N. C. 118.

86. Injunction against waste see WASTE.

87. Green *v.* Kenn, 4 Md. 98; Kyle *v.* Rhodes, 71 Miss. 487, 15 So. 40; New Jersey Zinc, etc., Co. *v.* Trotter, 38 N. J. Eq. 3; Huffman *v.* Hummer, 17 N. J. Eq. 263; Staats *v.* Freeman, 6 N. J. Eq. 490; St. Louis Min., etc., Co. *v.* Montana Min. Co., 58 Fed. 129.

88. Johnson *v.* Hughes, 58 N. J. Eq. 406, 43 Atl. 901; Buskirk *v.* King, 72 Fed. 22, 18 C. C. A. 418; Harmon *v.* Jones, Cr. & Ph. 299, 18 Eng. Ch. 299, 41 Eng. Reprint 505; Barry *v.* Donnellan, 1 Hog. 339; Shrewsbury, etc., R. Co. *v.* Shrewsbury, etc., R. Co., 15 Jur. 548, 20 L. J. Ch. 574, 1 Sim. N. S. 410, 61 Eng. Reprint 159; Carter *v.* Breakey, 2 Quebec 232.

Preservation of property.— The protection of property from damage or destruction pending litigation is an established head of equity. The court does not undertake to settle the right, but merely to preserve the property until the right is settled at law. Manchester Cotton Mills *v.* Manchester, 25 Gratt. (Va.) 825.

89. Johnson *v.* Hall, 83 Ga. 281, 9 S. E. 783.

Scope of order.— The purpose of a restraining order *pendente lite* in all cases of this

(B) *Substantial Question in Pending Action.* An injunction *pendente lite* may be granted where there appears to be a substantial question between the parties and a reasonable ground to believe that complainant may ultimately be successful in his claim;[90] but it is not necessary that it should clearly appear that complainant will ultimately succeed, it being sufficient if he makes out a *prima facie* right.[91]

(C) *Balance of Convenience.* The court, in exercising its discretion in cases where the right or title is in litigation, will be largely guided by the relative inconvenience which would result from granting or refusing the relief.[92]

(D) *Terms Imposed.* In granting the injunction the court may limit the time for the complainant or defendant to prosecute the pending suit to a speedy determination,[93] or require security to protect defendant in case the complainant ultimately fails.[94]

nature is to preserve property which is the subject of controversy, in its existing condition, until a final hearing and determination of the cause, and the order should be so limited as to simply preserve the *status quo* and should not give either party an advantage by proceeding in the acquisition or alteration of property the right to which is disputed, while the hands of the other party are tied. Northern Pac. R. Co. *v.* Spokane, 52 Fed. 428.

In North Carolina a receiver is appointed *pendente lite* where carrying off the substance of the estate consists in mining, as the policy of the state is to develop its mining resources. Parker *v.* Parker, 82 N. C. 165; Deep River Gold Min. Co. *v.* Fox, 39 N. C. 61; Falls *v.* McAfee, 24 N. C. 236.

90. Hunt *v.* Steese, 75 Cal. 620, 17 Pac. 920; State *v.* McGlynn, 20 Cal. 233, 81 Am. Dec. 118; New Jersey Zinc, etc., Co. *v.* Tootle, 38 N. J. Eq. 3; Ellett *v.* Newman, 92 N. C. 519; Levenson *v.* Elson, 88 N. C. 182; Morris *v.* Willard, 84 N. C. 293; Craycroft *v.* Morehead, 67 N. C. 422; Parker *v.* Grammer, 62 N. C. 28; Harman *v.* Jones, Cr. & Ph. 299, 18 Eng. Ch. 299, 41 Eng. Reprint 505; Great Western R. Co. *v.* Birmingham, etc., R. Co., 12 Jur. 106, 17 L. J. Ch. 243, 2 Phil. 597, 5 R. & Can. Cas. 241, 22 Eng. Ch. 597, 41 Eng. Reprint 1074.

91. *Georgia.*— Hitt *v.* Americus Preston, etc., Warehouse, etc., Co., 96 Ga. 788, 22 S. E. 926.

Maryland.— Whalen *v.* Dalashmutt, 59 Md. 250.

New Jersey.— Huffman *v.* Hummer, 17 N. J. Eq. 263.

Pennsylvania.— Rhea *v.* Forsyth, 37 Pa. St. 503, 78 Am. Dec. 444.

United States.— Western Union Tel. Co. *v.* New York, 38 Fed. 552, 3 L. R. A. 449.

England.— Great Western R. Co. *v.* Birmingham, etc., R. Co., 12 Jur. 106, 17 L. J. Ch. 243, 2 Phil. 597, 5 R. & Can. Cas. 241, 22 Eng. Ch. 597, 41 Eng. Reprint 1074.

See 27 Cent. Dig. tit. "Injunction," § 86.

Substantial nature of question.— Equity will not interfere if it thinks there is no real question between the parties, but if it sees there is a substantial question to be decided it will preserve the property until such question can be regularly disposed of; and in order to support an injunction for such purpose it is not necessary for the court to decide upon the merits in favor of the complainant. If the bill states a substantial question between the parties, the right to the injunction may be good, although the title to the relief may immediately fail. New Jersey Zinc, etc., Co. *v.* Trotter, 38 N. J. Eq. 3.

Second action.— Where a question has been settled once in law or equity against the complainant, an injunction will not be granted pending a second suit or action. Tifel *v.* Jenkins, 95 Md. 665, 53 Atl. 429. See also State *v.* McGlynn, 20 Cal. 233, 81 Am. Dec. 118; Newport, etc., R. Co. *v.* Fitzsimmons, 7 S. W. 609, 8 S. W. 201, 9 Ky. L. Rep. 939.

92. *New Hampshire.*—Winnipissiogee Lake Co. *v.* Worster, 29 N. H. 433.

New York — Morris *v.* New York, 7 N. Y. Suppl. 943, 17 N. Y. Civ. Proc. 407.

Utah.— Kahn *v.* Old Telegraph Min. Co., 2 Utah 13.

United States.— Western Union Tel. Co. *v.* Pennsylvania R. Co., 120 Fed. 981; Allison *v.* Corson, 88 Fed. 581, 32 C. C. A. 12.

England.— Hilton *v.* Granville, 4 Beav. 130, 49 Eng. Reprint 288, Cr. & Ph. 283, 18 Eng. Ch. 283, 41 Eng. Reprint 498, 10 L. J. Ch. 398; Munro *v.* Wivenhoe, etc., R. Co., 4 De G. J. & S. 723, 12 L. T. Rep. N. S. 562, 13 Wkly. Rep. 880, 69 Eng. Ch. 553, 46 Eng. Reprint 1100; Elmhirst *v.* Spencer, 2 Macn. & G. 45, 48 Eng. Ch. 34, 42 Eng. Reprint 18.

93. Clayton *v.* Shoemaker, 67 Md. 216, 9 Atl. 635; Huffman *v.* Hummer, 17 N. J. Eq. 263; Thomas *v.* Nantahala Marble, etc., Co., 58 Fed. 485, 7 C. C. A. 330.

Scope of order.— When plaintiff claims to be the legal owner, he must show that he is prosecuting his suit at law and the injury which he will sustain by the acts of defendant before he can obtain judgment will be irreparable, and in the latter case the court, in continuing the injunction, must make such order as will insure the speedy determination of the suit at law. Irwin *v.* Davidson, 38 N. C. 311.

94. Bennett *v.* Wright, 77 Hun (N. Y.) 331, 28 N. Y. Suppl. 453; Humphreys *v.* Hurtt, 3 Hun (N. Y.) 216; McLure *v.* Sherman, 70 Fed. 190; Shaw *v.* Jersey, 4 C. P. D.

(II) *Use of Property Pending Litigation.* A defendant in possession will not be enjoined from the use of the property in controversy unless it is made to appear that complainant will thus lose the fruits of his action at law if he establishes title.[95]

(III) *Protection Against Ouster.* One in possession of land under a claim of title which is not merely colorable may maintain a suit for an injunction to protect his possession pending litigation as to the title to the property, when dispossession would result in irreparable injury, or where the remedy at law is inadequate;[96] and, as ancillary to a suit in equity, an injunction may be granted to protect possession, in cases in which the complainant would be entitled to the relief if ultimately successful.[97]

(IV) *Protection of Funds.* Where the matter in litigation is a trust fund, an injunction may be granted to preserve the fund and secure it for the party to whom it may belong upon the final decree,[98] and funds in the court's possession will be protected until the controversy in regard to them has been determined.[99] Where there is danger that the fund in controversy will be lost or dissipated and complainant will lose the fruit of his action, equity will preserve the fund by a restraining order.[1]

359, 28 Wkly. Rep. 142; Chappell *v.* Davidson, 8 De G. M. & G. 1, 57 Eng. Ch. 1, 44 Eng. Reprint 289; Whitworth *v.* Rhodes, 20 L. J. Ch. 105.

95. *California.*— Williams *v.* Long, 129 Cal. 229, 61 Pac. 1087; Hunt *v.* Steese, 75 Cal. 620, 17 Pac. 920.

Georgia.— Kelly *v.* Morris, 31 Ga. 54.

Kansas.— Snyder *v.* Hopkins, 31 Kan. 557, 3 Pac. 367.

North Carolina.— Baldwin *v.* York, 71 N. C. 463.

Pennsylvania.— Summit Branch R. Co. *v.* Leininger, 1 Leg. Rec. 258.

Vermont.— White *v.* Booth, 7 Vt. 131, use of church for public worship not enjoined.

See 27 Cent. Dig. tit. "Injunction," § 86.

The use of telegraph poles will not be enjoined pending an action to recover a tax levied on them. New Orleans *v.* Grand Southern Tel., etc. Co., 37 La. Ann. 571.

96. *Georgia.*— Cottle *v.* Harrold, 72 Ga. 830.

Mississippi.— Jones *v.* Brandon, 60 Miss. 556.

New York.— Graham *v.* James, 7 Rob. 468.

Washington.— West Coast Imp. Co. *v.* Winsor, 8 Wash. 490, 36 Pac. 441.

United States.— La Chapelle *v.* Bubb, 69 Fed. 481.

See 27 Cent. Dig. tit. "Injunction," § 88.

Widow's homestead right will be protected pending a suit brought by the heirs and administrator against her to determine her rights under an antenuptial contract. Collins *v.* Collins, 72 Iowa 104, 33 N. W. 442.

Acquiescence of defendant.—Where defendant has long permitted the complainant to act under an illegal contract, complainant may have an injunction to protect possession acquired under such contract. Western Union Tel. Co. *v.* St. Joseph R. Co., 3 Fed. 430, 1 McCrary 565.

97. Gower *v.* Andrew, 59 Cal. 119, 43 Am. Rep. 242 (bill to compel transfer of lease); Comer *v.* Comer, 92 Ga. 569, 18 S. E. 417; Rutherford *v.* Metcalf, 5 Hayw. (Tenn.) 58 (suit to quiet possession); Flagstaff Silver Min. Co. *v.* Patrick, 2 Utah 304 (suit to quiet possession).

98. Knight *v.* Knight, 75 Ga. 386; Hodges *v.* McDuff, 69 Mich. 76, 36 N. W. 704; Morris *v.* Willard, 84 N. C. 293.

99. *Georgia.*— Marshall *v.* Lockett, 76 Ga. 289.

Minnesota.— Mann *v.* Flower, 26 Minn. 479, 5 N. W. 365.

New York.— Hendricks *v.* Morrill, 3 Silv. Sup. 21, 6 N. Y. Suppl. 254.

Ohio.— Bromley *v.* Cohen, 3 Ohio Dec. (Reprint) 296.

Pennsylvania.— Manly's Appeal, 3 Walk. 222.

United States.— St. Paul, etc., R. Co. *v.* Northern Pac. R. Co., 49 Fed. 306 [*affirming* 47 Fed. 536].

See 27 Cent. Dig. tit. "Injunction," § 86 *et seq.*

Solvency of defendant.— A court of equity having become possessed of a cause will enforce its decree and not leave the enforcement of it to a subsequent action at law. Equity will maintain the matter in controversy in its present condition until a decree so that the decree shall not be impaired by acts of the parties during litigation, and it is no answer that defendant is solvent and able to respond in damages if they convert fund. Mann *v.* Flower, 26 Minn. 479, 5 N. W. 365.

1. *Indiana.*— Cheek *v.* Tilley, 31 Ind. 121.

Louisiana.— Denson *v.* Stewart, 15 La. Ann. 456.

New Jersey.— Hopper *v.* Morgan, (Ch. 1898) 42 Atl. 171.

New York.— Adams *v.* Ball, 24 N. Y. App. Div. 69, 48 N. Y. Suppl. 778; Bertha Zinc, etc., Co. *v.* Clute, 7 Misc. 123, 27 N. Y. Suppl. 342; Roca *v.* Byrne, 17 N. Y. Suppl. 891; Rogers *v.* Marshall, 6 Abb. Pr. (N. S.) 457; Lewis *v.* Dodge, 17 How. Pr. 229; Cashmere *v.* Crowell, 1 Code Rep. 95.

North Carolina.— Jones *v.* Jones, 115 N. C. 209, 20 S. E. 370; Horton *v.* White, 84 N. C. 297.

(v) *Sale, Transfer, or Removal of Property.* Where the main suit is pending in equity, the court, as ancillary thereto, will grant an injunction to prevent the sale, transfer, or any change in the status of the property which will interfere with the equitable adjustment of the rights of the parties upon final decree.[2] Pending an action at law an injunction will be granted against a sale or disposition of the property in controversy where it is necessary to prevent irreparable injury.[3]

Pennsylvania.— Koons *v.* Koons, 4 Kulp 30; Hattrick's Estate, 7 Wkly. Notes Cas. 261.

Vermont.— Hanks *v.* Hanks, 75 Vt. 273, 54 Atl. 959.

Wisconsin.— Todd *v.* Lee, 15 Wis. 365.

See 27 Cent. Dig. tit. "Injunction," § 89.

2. *Louisiana.*— Sowell *v.* Cox, 10 Rob. 68.

Michigan.— Sherman *v.* American Stove Co., 85 Mich. 169, 48 N. W. 537, cancellation of stock subscription.

New Jersey.— Hutchinson *v.* Johnson, 7 N. J. Eq. 40.

New York.— Alexander Smith, etc., Carpet Co. *v.* Skinner, 91 Hun 641, 36 N. Y. Suppl. 1000; Manning *v.* Ogden, 70 Hun 399, 24 N. Y. Suppl. 70; Strahlheim *v.* Wallach, 12 Daly 313; Virginia Tide-Water Coal Co. *v.* Mercantile Trust Co., 12 N. Y. Suppl. 529; Weston *v.* Goldstein, 26 Misc. 171, 56 N. Y. Suppl. 755.

North Carolina.— Caldwell *v.* Stirewat, 109 N. C. 201, 6 S. E. 202; Parker *v.* Grammer, 62 N. C. 28.

Pennsylvania.— Crawford *v.* Serfass, 2 Lehigh Val. L. Rep. 361, cancellation of deed.

South Carolina.— Pelzer *v.* Hughes, 27 S. C. 408, 3 S. E. 781 (set aside sale); Wilson *v.* Wilson, 1 Desauss. 224.

Wisconsin.— Taylor *v.* Collins, 51 Wis. 123, 8 N. W. 22, pending foreclosure, removal of fixtures enjoined.

United States.— Higgins *v.* Jenks, 12 Fed. Cas. No. 6,468, 3 Ware 17; Rateau *v.* Bernard, 20 Fed. Cas. No. 11,579, 3 Blatchf. 244.

England.— London, etc., Banking Co. *v.* Lewis, 21 Ch. D. 490, 47 L. T. Rep. N. S. 501, 31 Wkly. Rep. 233.

Canada.— Heap *v.* Crawford, 10 Grant Ch. (U. C.) 442.

See 27 Cent. Dig. tit. "Injunction," § 89.

Pending accounting.— Where a bill of sale has been given as collateral security for a debt, the amount of which is undetermined, and for the determination of which an accounting is necessary, the fund will be protected by injunction *pendente lite.* Castoriano *v.* Dupe, 145 N. Y. 250, 39 N. E. 1065.

Where the filing of the bill operates as a lis pendens, no injunction will issue restraining the conveyance of lands alleged to be held under deeds fraudulently obtained and now sought to be canceled. Barstow *v.* Becket, 110 Fed. 826.

3. *California.*— People *v.* Kent, 6 Cal. 89.

Georgia.— Merchants', etc., Bank *v.* Tillman, 106 Ga. 55, 31 S. E. 794.

Illinois.— Baker *v.* National Biscuit Co., 96 Ill. App. 228, removal of fixtures.

North Carolina.— British, etc., Mortg. Co. *v.* Long, 113 N. C. 123, 18 S. E. 165; Ellett *v.* Newman, 92 N. C. 519.

Pennsylvania.— McCarthur *v.* Ashmead, 2 Brewst. 533.

England.— Malcolm *v.* Scott, 3 Hare 39, 8 Jur. 1059, 14 L. J. Ch. 57, 25 Eng. Ch. 39; Anwye *v.* Owens, 22 L. J. Ch. 995, 1 Wkly. Rep. 205.

See 27 Cent. Dig. tit. "Injunction," § 89.

Pending an action to recover specific personalty, an injunction will lie to restrain defendant from disposing of it, although he may have ample property to satisfy plaintiff in any pecuniary demand. Atkins *v.* Veach, 7 Ohio Dec. (Reprint) 176, 1 Cinc. L. Bul. 234.

Forfeiture.— At the instance of the vendor an injunction will not be granted to restrain a vendee from removing a house which the vendee had erected, and which the vendor claimed on the ground that under the contract of purchase the vendee had forfeited all his rights by failure to pay part of purchase-price. Crane *v.* Dwyer, 9 Mich. 350, 80 Am. Dec. 87.

Transfer as preventing judgment from being conclusive.— A conveyance or transfer of land will be enjoined *pendente lite* where such action would prevent judgment at law being conclusive. Cole *v.* Jerman, 77 Conn. 374, 59 Atl. 425.

Slaves.— The sale or removal of slaves *pendente lite* was generally restrained. Barnes *v.* Edward, 17 B. Mon. (Ky.) 632; Leah *v.* Young, 2 J. J. Marsh. (Ky.) 18; Miller *v.* Washburn, 38 N. C. 161; Loftin *v.* Espy, 4 Yerg. (Tenn.) 84; Smith *v.* Koontz, 4 Hayw. (Tenn.) 189.

Fraudulent disposition of property pending action.— Where the aid of equity is sought as ancillary to prevent defendants from fraudulently depriving plaintiff of the anticipated fruits of an action of trespass. by disposing of their property, when there is sufficient probability of a judgment being obtained, the chancellor may and should interpose to prevent the legal remedy from being defeated by fraud. Cottrell *v.* Moody, 12 B. Mon. (Ky.) 500. But see Burdett *v.* Fader, 40 Can. L. J. 32.

Assignment of judgment.— In a suit by the United States to set off cross judgments, there is no necessity for an injunction to prevent the transfer by defendant of his judgment against the United States, because, under 18 U. S. St. at L. 481 [U. S. Comp. St. (1901) p. 746] any transferee will take subject to the government's right of set-off. Teller *v.* U. S., 113 Fed. 463, 51 C. C. A. 297.

(VI) *PENDING APPEAL.* The unsuccessful party in an action at law may be granted an injunction where it appears that otherwise there will be such a change in the status of the subject-matter of the controversy as may render nugatory the judgment of the court of review when announced.[4] But if the injury will be insignificant,[5] or the remedy at law adequate,[6] or if complainant has seemingly acquiesced in defendant's right and allowed him to make great expenditures,[7] or if appellant fails to show a *prima facie* right,[8] or if the statutes provide a remedy,[9] an injunction will be denied. Pending an appeal from a decision dismissing a bill for an injunction or dissolving one, an injunction will not be granted or revived.[10]

3. TRESPASS OR OTHER INJURY TO PROPERTY[11] — a. Jurisdiction. The jurisdiction of equity, in a proper case, to restrain trespasses is now well settled.[12]

In New York one of the code grounds for an injunction is that defendant, during the pendency of the action, threatens or is about to remove or dispose of his property with intent to defraud plaintiff. This code provision does not apply where a money judgment only is sought. Campbell *v.* Ernest, 64 Hun 188, 19 N. Y. Suppl. 123, 22 N. Y. Civ. Proc. 218. See also Jerome Co. *v.* Loeb, 59 How. Pr. 508. But see Malcom *v.* Miller, 6 How. Pr. 456. It does not warrant an injunction before the trial restraining defendant from disposing of a note which is the cause of action. Sebring *v.* Lant, 9 How. Pr. 346. Nor does it apply to a case where plaintiff has obtained an attachment against defendant's property. Brooks *v.* Stone, 11 Abb. Pr. 220, 19 How. Pr. 395.

4. *Georgia.*— Walker *v.* Maddox-Rucker Banking Co., 97 Ga. 386, 23 S. E. 897.

Iowa.— Iowa College *v.* Davenport, 7 Iowa 213.

Mississippi.— Woods *v.* Riley, 72 Miss. 73, 18 So. 384.

Montana.— Finleh *v.* Heinze, 27 Mont. 107, 60 Pac. 829, 70 Pac. 517.

New Jersey.— People's Traction Co. *v.* Central Passenger R. Co., (Ch. 1904) 58 Atl. 597.

New York.— Hart *v.* Albany, 3 Paige 380.

Ohio — Wagner *v.* Railway Co., 38 Ohio St. 32.

United States.— Wood *v.* Braxton, 54 Fed. 1005.

England.— Polini *v.* Gray, 12 Ch. D. 438, 49 L. J. Ch. 41, 40 L. T. Rep. N. S. 861, 28 Wkly. Rep. 360.

Canada.— Commercial Bank *v.* Upper Canada Bank, 1 Ch. Chamb. (U. C.) 64.

See 27 Cent. Dig. tit. "Injunction," § 90.

Successive actions.— Before final decision on appeal from a decree finding plaintiff was not the owner of alleged interests in mining property, he could not obtain an injunction *pendente lite* against the original defendant's successor in interest in a subsequent action, wherein his claim of title was identical with that of the original suit. Wetzstein *v.* Boston, etc., Consol. Copper, etc., Min. Co., 25 Mont. 85, 63 Pac. 799.

5. Maloney *v.* King, 27 Mont. 428, 71 Pac. 469.

6. McFadden *v.* Owens, 54 Ark. 118, 15 S. W. 84; Campbell *v.* Coonradt, 26 Kan. 67.

7. Reisner *v.* Strong, 24 Kan. 410.

8. Callaway *v.* Baltimore, 99 Md. 315, 57 Atl. 661.

9. Fellows *v.* Heermans, 13 Abb. Pr. N. S. (N. Y.) 1.

10. Webster *v.* Hawley, 4 Ch. Sent. (N. Y.) 75; Galloway *v.* London, 11 Jur. N. S. 537, 12 L. T. Rep. N. S. 623, 13 Wkly. Rep. 933.

Discretion of court.— Where the whole matter in controversy is continuance of injunction, or where it appears that such order is necessary to prevent great and irreparable mischief to rights of appellant, the order is usually granted, but it lies in the sound discretion of the chancellor. Van Walkenburgh *v.* Rahway Bank, 8 N. J. Eq. 725.

Fraud or want of jurisdiction.— If proceedings were fraudulent or collusive or gave the magistrate no jurisdiction, an injunction might issue. The only ground on which the court would have power to do this would be fraud or want of jurisdiction. Coster *v.* Van Schaick, 64 How. Pr. (N. Y.) 100.

11. **Injunctions against blasting** see ADJOINING LANDOWNERS, 1 Cyc. 771.

Injunction against use of sidewalk see ADJOINING LANDOWNERS, 1 Cyc. 772 note 18.

Injunction to protect natural support of adjoining land see ADJOINING LANDOWNERS, 1 Cyc. 785.

Injunction to prevent building beyond boundary see BOUNDARIES, 5 Cyc. 953 note 94.

Injunction against working of mines by trespasser see MINES AND MINERALS.

Injunction against construction and maintenance of street railroad see MUNICIPAL CORPORATIONS.

12. See cases cited *infra*, this note.

Historical.— The interference of courts of equity by injunction to protect property in cases of trespass is of comparatively modern origin. The remedy was originally confined to cases of waste, that is, cases between parties who were privies in title, such as landlord and tenant, or remainder-man and tenant of a particular estate. The court refused to interfere where the injury was caused by a stranger or one claiming adversely to the owner. The distinction between technical waste and trespass has gradually been disregarded until it no longer exists. The earliest case known in which an injunction was

b. Parties Entitled to Injunction — (I) *Complainant in Possession.* When the complainant is in possession and seeks to restrain a trespass by one who claims under color of right, the injunction will usually be granted where the threatened acts may tend to the destruction of the inheritance,[13] or would result in a multiplicity of suits,[14] or would produce a confusion of boundaries.[15]

(II) *Complainant out of Possession.* As a general rule where plaintiff is out of possession and claims possession, the court will refuse to interfere against a defendant in possession under claim of right.[16] But where the threatened

granted against trespass is Flamang's Case [*cited* in Livingston *v.* Livingston, 6 Johns. Ch. (N. Y.) 497, 499, 10 Am. Dec. 353], in which Lord Thurlow enjoined a trespasser from working a mine on the ground that irreparable and destructive injury might result otherwise. The parent case in the United States is Livingston *v.* Livingston, *supra*, in which Chancellor Kent laid down the rule that where the title is not controverted equity will always interpose to prevent irreparable mischief. See Gilbert *v.* Arnold, 30 Md. 29; Georges Creek Coal, etc., Co. *v.* Detmold, 1 Md. Ch. 371 (no distinction between waste and trespass); Schurmeier *v.* St. Paul, etc., R. Co., 8 Minn. 113, 83 Am. Dec. 770 (waste and trespass stand on same ground to-day); Livingston *v.* Livingston, 6 Johns. Ch. (N. Y.) 497, 10 Am. Dec. 353; Chapman *v.* Toy Long, 5 Fed. Cas. No. 2,610, 4 Sawy. 38; Lowndes *v.* Bettle, 33 L. J. Ch. 451, 4 New Rep. 609, 12 Wkly. Rep. 399.

13. *California.*— More *v.* Massini, 32 Cal. 590.

Illinois.— Barm *v.* Bragg, 70 Ill. 283.

Michigan.— Rhodes *v.* McNamara, (1904) 98 N. W. 392.

Missouri.— Powell *v.* Canaday, 95 Mo. App. 713, 69 S. W. 686.

New Jersey.— Johnston *v.* Hyde, 25 N. J. Eq. 454.

New York.— Reis *v.* Rohde, 34 Hun 161.

Pennsylvania.— Pennsylvania Co. *v.* Ohio River Junction R. Co., 204 Pa. St. 356, 54 Atl. 259; Bussier *v.* Weekey, 4 Pa. Super. Ct. 69 (title by adverse possession sufficient); Munson *v.* Tryon, 6 Phila. 395.

Wisconsin.— New Elm German Evangelical Cong. *v.* Hoessli, 13 Wis. 348.

United States.— Pittsburg, etc., R. Co. *v.* Fiske, 123 Fed. 760, 60 C. C. A. 621.

England.— Lowndes *v.* Bettle, 33 L. J. Ch. 451, 4 New Rep. 609, 12 Wkly. Rep. 399.

See 27 Cent. Dig. tit. "Injunction," § 100.

Sufficiency of possession.— Possession sufficient to enable a plaintiff to maintain an action of trespass is the possession which is the test of the right to be treated as a plaintiff in possession for the purposes of an injunction suit or motion. Atty.-Gen. *v.* Ryan, 5 Manitoba 81.

Use of violence.— One who claims land in possession of another, and who attempts to enforce his claim by violence, will be enjoined. Osterstock *v.* Heberling, 2 Lehigh Val. L. Rep. (Pa.) 368. The rule is otherwise, however, where the complainant purchased a lawsuit. Latham *v.* Northern Pac. R. Co., 45 Fed. 721.

Possession disputed. — An injunction will not be granted to quiet possession where both possession and right of possession are disputed. Stone *v.* Snell, (Nebr. 1903) 94 N. W. 525; Cornelius *v.* Post, 9 N. J. Eq. 196; Philadelphia *v.* Brosius, 2 Leg. Rec. (Pa.) 313; St. Louis, etc., R. Co. *v.* Dewees, 23 Fed. 691.

14. Ashurst *v.* McKenzie, 92 Ala. 484, 9 So. 262.

15. Preston *v.* Preston, 85 Ky. 16, 2 S. W. 501, 8 Ky. L. Rep. 633.

16. *Alabama.*— Hamilton *v.* Brent Lumber Co., 127 Ala. 78, 28 So. 698; Kellar *v.* Bullington, 101 Ala. 267, 14 So. 466.

California.— Felton *v.* Justice, 51 Cal. 529.

Georgia.— Morgan *v.* Baxter, 113 Ga. 144, 38 S. E. 411.

Idaho.— Washington, etc., R. Co. *v.* Cœur D'Alene R., etc., Co., 2 Ida. (Hasb.) 580, 21 Pac. 562.

Illinois.— Toledo, etc., R. Co. *v.* St. Louis, etc., Co., 208 Ill. 623, 7 N. E. 715.

Indian Territory.— Munyos *v.* Filmore, 4 Indian Terr. 619, 76 S. W. 257.

Kentucky.— Hillman *v.* Hurley, 82 Ky. 626, 6 Ky. L. Rep. 682.

Maryland.— Chesapeake, etc., Canal Co. *v.* Young, 3 Md. 480.

Mississippi.— J. E. North Lumber Co. *v.* Gary, (1904) 36 So. 2.

Missouri.— Gildersleeve *v.* Overstolz, 97 Mo. App. 303, 71 S. W. 371.

New Jersey — Morris Canal, etc., Co. *v.* Fagin, 22 N. J. Eq. 430.

New York.— Dosoris Pond Co. *v.* Campbell, 164 N. Y. 596, 58 N. E. 1087; Hart *v.* Albany, 3 Paige 213.

Pennsylvania.— Patterson's Appeal, 129 Pa. St. 109, 18 Atl. 563; Leininger's Appeal, 106 Pa. St. 398.

United States.— Taylor *v.* Clark, 89 Fed. 7; Le Roy *v.* Wright, 15 Fed. Cas. No. 8,273, 4 Sawy. 530.

England.— Lowndes *v.* Bettle, 33 L. J. Ch. 451, 4 New Rep. 609, 12 Wkly. Rep. 399; Lloyd *v.* Trimleston, 2 Molloy 81; Fingal *v.* Blake, 2 Molloy 50.

See 27 Cent. Dig. tit. "Injunction," § 98 *et seq.*

Statutes.— Actual possession of land is not essential to maintain the equitable jurisdiction given by the act of June 4, 1889. Reddick *v.* Meffert, 32 Fla. 409, 13 So. 894.

There are two distinct classes of cases, the one where the party against whom the application for injunction is made is in possession, and the other where plaintiff is in possession and asking the court to protect the estate. *A priori* it is obvious that the court will draw a clear distinction between the two

injury would be irreparable, an injunction will lie at the instance of a complainant out of possession,[17] although in some cases the injunction has been refused even against irreparable injury if the title has not been established at law, and no action to establish it has been brought.[18]

c. Adequate Remedy at Law — (I) *In General.* The inadequacy of the remedy at law is the basis of the jurisdiction in cases of trespass, and it is now well settled that equity will interfere to prevent the commission or continuance of a trespass where full and ample relief cannot be granted at law, where the value of the inheritance is put in jeopardy, where the trespass goes to the destruction of the property in the character in which it has been enjoyed, or where the relief is necessary to prevent a multiplicity of suits.[19]

(II) *Ordinary or Naked Trespass.* Equity will not restrain by injunction

classes of cases. If a man claims to be owner of an estate of which he is in possession, or in a position tantamount to that, the court will be very slow to interfere to restrain such an apparent owner from doing those acts which an owner so situated may properly do. There is a wide difference between such case and that of a person claiming to be the owner (whatever the ground of his claim), not taking proceedings at law to recover but coming on the owner's estate and doing acts injurious to it. Lowndes *v.* Bettle, 33 L. J. Ch. 451, 4 New Rep. 609, 12 Wkly. Rep. 399.

Possession acquired by a tortious trespass on the day the suit for injunction was begun is no defense. Carter *v.* Warner, 2 Nebr. (Unoff.) 688, 89 N. W. 747.

Where a stranger to the title is in possession, the injunction may be granted, although the complainant is not the sole owner. Gilpin *v.* Sierra Nevada Consol. Min. Co., 2 Ida. 696, 23 Pac. 547, 1014.

17. *California.*— Kaiser *v.* Dalto, 140 Cal. 167, 73 Pac. 828; Hicks *v.* Michael, 15 Cal. 107.

Indian Territory.— Gaines *v.* Leslie, 1 Indian Terr. 546, 37 N. W. 947.

Kentucky.— Hillman *v.* Hurley, 82 Ky. 626.

Maryland.— Chesapeake, etc., Canal Co. *v.* Young, 3 Md. 480.

Missouri.— Heman *v.* Wade, 74 Mo. App. 339.

New Jersey.— New Jersey Zinc, etc., Co. *v.* Trotter, 38 N. J. Eq. 3.

South Carolina.— Shubrick *v.* Guerard, 2 Desauss. Eq. 616.

United States.— Le Roy *v.* Wright, 15 Fed. Cas. No. 8,273, 4 Sawy. 530.

England.— Strelley *v.* Pearson, 15 Ch. D. 113, 49 L. J. Ch. 406, 43 L. T. Rep. N. S. 155, 28 Wkly. Rep. 752; Harman *v.* Jones, Cr. & Ph. 299, 18 Eng. Ch. 299, 41 Eng. Reprint 505; Wilson *v.* Townend, 1 Dr. & Sm. 324, 6 Jur. N. S. 1109, 30 L. J. Ch. 25, 3 L. T. Rep. N. S. 342, 9 Wkly. Rep. 30, 62 Eng. Reprint 403; Lowndes *v.* Bettle, 33 L. J. Ch. 451, 4 New Rep. 609, 12 Wkly. Rep. 399.

See 27 Cent. Dig. tit. "Injunction," § 98 *et seq.*

18. *California.*— Smith *v.* Wilson, 10 Cal. 528.

Mississippi.— Eskridge *v.* Eskridge, 51 Miss. 522; Nevitt *v.* Gillespie, 1 How. 108, 26 Am. Dec. 696.

Missouri.— Smith *v.* Jamison, 91 Mo. 13, 3 S. W. 212.

South Carolina.— McNamee *v.* Waterbury, 4 S. C. 156.

England.— Davenport *v.* Davenport, 7 Hare 217, 13 Jur. 227, 18 L. J. Ch. 163, 27 Eng. Ch. 217.

Mining.— In order to justify the issuance of an injunction restraining a trespass in mining on the land of another, the complainant must in general be in possession, or have established his right at law, or brought an action to recover possession, or his exclusive right must be admitted by defendant; and the court will act in the case with great caution. It will not take jurisdiction to try title, and ordinarily will not decree that defendant surrender possession. Bracken *v.* Preston, 1 Pinn. (Wis.) 584, 44 Am. Dec. 412.

19. *Alabama.*— Robbins *v.* Battle House Co., 74 Ala. 499.

Georgia.— Catching *v.* Terrell, 10 Ga. 576; Moore *v.* Ferrell, 1 Ga. 7.

Kentucky.— Musselman *v.* Marquis, 1 Bush 463, 89 Am. Dec. 637.

Maryland.— Shipley *v.* Ritter, 7 Md. 408, 61 Am. Dec. 371; Georges Creek Coal, etc., Co. *v.* Detmold, 1 Md. Ch. 371.

Missouri.— State Sav. Bank *v.* Kercheval, 65 Mo. 682, 27 Am. Rep. 310.

New Hampshire.— Winnipissiogee Lake Co. *v.* Worster, 29 N. H. 433.

New Jersey.— Kerlin *v.* West, 4 N. J. Eq. 449 (holding that where the circumstances of the case are so peculiar as to bring it under the head of quieting a possession, or preventing a multiplicity of suits, or to put the value of the inheritance in jeopardy, or to threaten irreparable mischief, equity will interfere); Scudder *v.* Trenton Delaware Falls Co., 1 N. J. Eq. 694, 23 Am. Dec. 756.

Ohio.— New York, etc., R. Co. *v.* Wenger, 9 Ohio Dec. (Reprint) 815, 17 Cinc. L. Bul. 306.

Oregon.— Mendenhall *v.* Harrisburg Water Co., 27 Oreg. 38, 39 Pac. 399; Smith *v.* Gardner, 12 Oreg. 221, 6 Pac. 771, 53 Am. Rep. 342.

Wisconsin.— Bracken *v.* Preston, 1 Pinn. 584, 44 Am. Dec. 412.

the commission of a mere ordinary or naked trespass. The nature of the trespass or the injury resulting therefrom must be such as to require equitable interference.[20]

(III) *RECOVERY OF POSSESSION.* An injunction is not the proper method of evicting a party from the actual possession of land.[21] Nor will an injunction be granted when its effect would be to take possession from defendant if the com-

United States.— Nichols *v.* Jones, 19 Fed. 855.

England.— Lowndes *v.* Bettle, 33 L. J. Ch. 451, 4 New Rep. 609, 12 Wkly. Rep. 399.

Canada.— Atty.-Gen. *v.* Ryan, 5 Manitoba 81.

See 27 Cent. Dig. tit. "Injunction," § 98 *et seq.*

In Maine the statute conferring chancery jurisdiction upon the court extends to cases of technical waste only, and not to those trespasses which courts that have full chancery powers restrain by injunction. Leighton *v.* Leighton, 32 Me. 399.

A deed delivered to defendant after the trespass should be considered in determining the right to an injunction. Caldwell *v.* Morganton Mfg. Co., 121 N. C. 339, 28 S. E. 475.

20. *Arkansas.*— Meyers *v.* Hawkins, (1900) 56 S. W. 640.

California.— More *v.* Ord, 15 Cal. 204; Tevis *v.* Ellis, 25 Cal. 515.

Florida.— Carney *v.* Hadley, 32 Fla. 344, 14 So. 4, 37 Am. St. Rep. 101, 22 L. R. A. 233, trespass by working pine trees for turpentine.

Georgia.— Woodstock Iron Works *v.* Leake, 118 Ga. 642, 45 S. E. 429; Rogers *v.* Brand, 118 Ga. 494, 45 S. E. 305; Ocmulgee Lumber Co. *v.* Mitchell, 112 Ga. 528, 37 S. E. 749; Ryan *v.* Fulghum, 96 Ga. 234, 22 S. E. 940; Lingo *v.* Harris, 74 Ga. 368; Kennedy *v.* Guise, 62 Ga. 171; Paramore *v.* Persons, 57 Ga. 473; Seymour *v.* Morgan, 45 Ga. 201; Peterson *v.* Orr, 12 Ga. 464, 58 Am. Dec. 484; Pike County *v.* Griffin, etc., Plank Road Co., 11 Ga. 246; Bethune *v.* Wilkins, 8 Ga. 118; Anthony *v.* Brooks, 5 Ga. 576.

Illinois.— Ashmore Highway Com'rs *v.* Green, 156 Ill. 504, 41 N. E. 154; Thornton *v.* Roll, 118 Ill. 350, 8 N. E. 145; Barm *v.* Bragg, 70 Ill. 283; Davis *v.* Hinton, 29 Ill. App. 327.

Indiana.— Centerville, etc., Turnpike Co. *v.* Barnett, 2 Ind. 536; Cooper *v.* Hamilton, 8 Blackf. 377.

Iowa.— Wilson *v.* Hughell, Morr. 461.

Kansas.— Snyder *v.* Hopkins, 31 Kan. 557, 3 Pac. 367; Bridges *v.* Sargent, 1 Kan. App. 442, 40 Pac. 823.

Kentucky.— Hillman *v.* Hurley, 82 Ky. 626, 6 Ky. L. Rep. 682; Watson *v.* Holmes, 5 Ky. L. Rep. 515.

Maryland.— Hamilton *v.* Ely, 4 Gill 34.

Missouri.— Echelkamp *v.* Schrader, 45 Mo. 505.

Nebraska.— Leach *v.* Harbaugh, 3 Nebr. (Unoff.) 346, 91 N. W. 521.

New Jersey.— Worthington *v.* Moon, 53 N. J. Eq. 46, 30 Atl. 251; De Veney *v.* Gallagher, 20 N. J. Eq. 33; German Evangelical Lutheran Church *v.* Maschop, 10 N. J. Eq. 57; Kerlin *v.* West, 4 N. J. Eq. 449.

New York.— March *v.* New York, 69 N. Y. App. Div. 1, 74 N. Y. Suppl. 630, 1151; Mapes *v.* Charles, 8 N. Y. Suppl. 665; Gentil *v.* Arnand, 38 How. Pr. 94.

North Carolina.— Dunkart *v.* Rinehart, 87 N. C. 224; German *v.* Clark, 71 N. C. 417; Bell *v.* Chadwick, 71 N. C. 329; Lyerly *v.* Wheeler, 45 N. C. 267, 59 Am. Dec. 596.

Ohio.—Ross *v.* Page, 6 Ohio 166; Cincinnati *v.* Covington, etc., Bridge Co., 20 Ohio Cir. Ct. 396, 10 Ohio Cir. Dec. 792; Jefferson Iron Works *v.* Gill, 9 Ohio Dec. (Reprint) 481, 14 Cinc. L. Bul. 112.

Oregon.— Garrett *v.* Bishop, 27 Oreg. 349, 41 Pac. 10.

Pennsylvania.— Davenport *v.* Harvey, 4 Kulp 499; Leiter *v.* Murdock, 33 Pittsb. Leg. J. N. S. 381.

West Virginia.— Lazzell *v.* Garlow, 44 W. Va. 466, 30 S. E. 171; Western Min., etc., Co. *v.* Virginia Cannel Coal Co., 10 W. Va. 250.

England.— Cooper *v.* Crabtree, 20 Ch. D. 589, 51 L. J. Ch. 544, 47 L. T. Rep. N. S. 5, 30 Wkly. Rep. 649; Saunders *v.* Smith, 2 Jur. 491, 536, 7 L. J. Ch. 227, 3 Myl. & C. 711, 14 Eng. Ch. 711, 40 Eng. Reprint 1100; Jackson *v.* Stanhope, 15 L. J. Ch. 446.

See 27 Cent. Dig. tit. "Injunction," §§ 16, 98.

21. *Alabama.*— David *v.* Shepard, 40 Ala. 587.

Georgia.— Vaughn *v.* Yawn, 103 Ga. 557, 29 S. E. 759; Daniels *v.* Edwards, 72 Ga. 196.

Illinois.— Lowenthal *v.* New Music Hall Co., 100 Ill. App. 274.

Iowa.— Minneapolis, etc., R. Co. *v.* Chicago, etc., R. Co., 116 Iowa 681, 88 N. W. 1082.

Kansas.— Bodwell *v.* Crawford, 26 Kan. 292, 40 Am. Rep. 306.

Louisiana.— See Petit *v.* Cormier, McGloin 370.

Maryland.— Hubbard *v.* Mobray, 20 Md. 165. *Compare* McKomb *v.* Kankey, 1 Bland 363 note.

Nebraska.— Wehmer *v.* Fokenga, 57 Nebr. 510, 78 N. W. 28; Warlier *v.* Williams, 53 Nebr. 143, 73 N. W. 539.

New Mexico.— Waddingham *v.* Robledo, 6 N. M. 347, 28 Pac. 663.

New York.— See De Lancey *v.* Piepgras, 141 N. Y. 88, 35 N. E. 1089, where under special circumstances a mandatory injunction was held proper for this purpose.

Oklahoma.— Laughlin *v.* Fariss, 7 Okla. 1, 50 Pac. 254; Proctor *v.* Stuart, 4 Okla. 679, 46 Pac. 501. But see Barnett *v.* Ruyle, 9 Okla. 635, 60 Pac. 243; Glover *v.* Swartz,

plainant's title has not been established at law.[22] An injunction will not be granted against a defendant who is claimed to be in wrongful possession of property who is not doing irreparable damage, since the remedy at law by ejectment is ample and complete.[23]

(IV) *Recovery of Damages.* Where the resulting injury is susceptible of perfect pecuniary compensation, the remedy will be denied in the absence of other grounds calling for equitable interference.[24] But where one party makes a

8 Okla. 642, 58 Pac. 943; Calhoun *v.* McCornack, 7 Okla. 347, 54 Pac. 493; Barnes *v.* Newton, 5 Okla. 428, 48 Pac. 190, 49 Pac. 1074.

Pennsylania.— Stoot *v.* Williams, 203 Pa. St. 161, 52 Atl. 169; Wilkinson *v.* Philadelphia, etc., R. Co., 13 Montg. Co. Rep. 93.

South Dakota.— Catholicon Hot Springs Co. *v.* Ferguson, 7 S. D. 503, 64 N. W. 539.

Wisconsin.— Bracken *v.* Preston, 1 Pinn. 584, 44 Am. Dec. 412.

United States.— Potts *v.* Hollon, 177 U. S. 365, 20 S. Ct. 654, 44 L. ed. 808 [*reversing* 6 Okla. 696, 52 Pac. 917]; Black *v.* Jackson, 177 U. S. 349, 20 S. Ct. 648, 44 L. ed. 801 [*reversing* 6 Okla. 751, 52 Pac. 406]; Lacassagne *v.* Chapuis, 144 U. S. 119, 12 S. Ct. 659, 36 L. ed. 368. But see Pokegama Sugar-Pine Lumber Co. *v.* Klamath River Lumber, etc., Co., 86 Fed. 528; St. Louis, etc., R. Co. *v.* Dewees, 23 Fed. 691; Central Branch Union Pac. R. Co. *v.* Western Union Tel. Co., 3 Fed. 417, 1 McCrary 551.

England.— *In re* Black Point Syndicate *v.* Eastern Concessions, 79 L. T. Rep. N. S. 658.

See 27 Cent. Dig. tit. "Injunction," § 98 *et seq.*

22. Harris *v.* Pounds, 64 Ga. 121; Akrill *v.* Selden, 1 Barb. (N. Y.) 316; Littlefield *v.* Todd, 3 Okla. 1, 42 Pac. 10; Fredericks *v.* Huber, 180 Pa. St. 572, 37 Atl. 90; Mammoth Vein Consol. Coal Co.'s Appeal, 54 Pa. St. 183. *Compare* Matthews *v.* Whitaker, (Tex. Civ. App. 1893) 23 S. W. 538.

23. *Illinois.*— Wangelin *v.* Goe, 50 Ill. 459.

Iowa.— Council Bluffs *v.* Stewart, 51 Iowa 385, 1 N. W. 628.

Maryland.— Pfeltz *v.* Pfeltz, 14 Md. 376.

New Jersey.— Morris Canal, etc., Co. *v.* Fagin, 22 N. J. Eq. 430.

New Mexico.— Lockhart *v.* Leeds, 10 N. M. 568, 63 Pac. 48.

New York.— Troy, etc., R. Co. *v.* Boston, etc., R. Co., 86 N. Y. 107.

Pennsylvania.— O'Niel *v.* McKeesport, 201 Pa. St. 386, 50 Atl. 920; Hoch *v.* Bass, 133 Pa. St. 328, 19 Atl. 360; Philadelphia, etc., R. Co. *v.* Pottsville Water Co., 18 Pa. Co. Ct. 501; Seal *v.* Railroad Co., 2 Leg. Gaz. 182; Kutz *v.* Hepler, 1 Leg. Rec. 357.

Wisconsin.— Bracken *v.* Preston, 1 Pinn. 584, 44 Am. Dec. 412.

See 27 Cent. Dig. tit. "Injunction," § 98 *et seq.*

In Missouri a disseizin is not ground for an injunction under Rev. St. § 2722. Boeckler *v.* Missouri Pac. R. Co., 10 Mo. App. 448.

24. *Alabama.*— High *v.* Whitfield, 130 Ala. 444, 30 So. 449, hauling coal over land.

Arkansas.— *Ex p.* Foster, 11 Ark. 304.

California.— Waldron *v.* March, 5 Cal. 119.

Connecticut.— Stein *v.* Coleman, 73 Conn. 524, 48 Atl. 206; Whittlesey *v.* Hartford, etc., R. Co., 23 Conn. 421.

Florida.— Carney *v.* Hadley, 32 Fla. 344, 14 So. 4, 37 Am. St. Rep. 101, 22 L. R. A. 233.

Georgia.— Putney *v.* Bright, 106 Ga. 199, 32 S. E. 107.

Indiana.— Wabash R. Co. *v.* Engleman, 160 Ind. 329, 66 N. E. 892; Anthony *v.* Sturges, 86 Ind. 479; Indiana Rolling Mills Co. *v.* Indiana, 29 Ind. 245, covering freight railroad with gravel.

Maryland.— Whalen *v.* Dalashmutt, 59 Md. 250 (erecting iron post to support awning); Nicodemus *v.* Nicodemus, 41 Md. 529; Hamilton *v.* Ely, 4 Gill 34.

Minnesota.— Whitman *v.* St. Paul, etc., R. Co., 8 Minn. 116; Schurmeier *v.* St. Paul, etc., R. Co., 8 Minn. 113, 83 Am. Dec. 770.

Missouri.— Schuster *v.* Myers, 148 Mo. 422, 50 S. W. 103; Anderson *v.* St. Louis, 47 Mo. 479; Crenshaw *v.* Cook, 65 Mo. App. 264.

Nebraska.— Tigard *v.* Moffitt, 13 Nebr. 565, 14 N. W. 534.

Nevada.— Thorn *v.* Sweeney, 12 Nev. 251.

New Hampshire.— Fisher *v.* Carpenter, 67 N. H. 569, 39 Atl. 1018; Winnipissiogee Lake Co. *v.* Worster, 29 N. H. 433.

New Jersey.— Boyden *v.* Bragaw, 53 N. J. Eq. 26, 30 Atl. 330; Higbee *v.* Camden, etc., R., etc., Co., 20 N. J. Eq. 435; Miller *v.* English, 6 N. J. Eq. 304; Kerlin *v.* West, 4 N. J. Eq. 449.

New York.— Gentil *v.* Arnaud, Sweeny 641; Vernam *v.* Palmer, 5 N. Y. Suppl. 71; Dawley *v.* Brown, 43 How. Pr. 22; Marshall *v.* Peters, 12 How. Pr. 218.

North Carolina.— Frink *v.* Stewart, 94 N. C. 484.

Pennsylvania.— Clark's Appeal, 62 Pa. St. 447; Mulvany *v.* Kennedy, 26 Pa. St. 44; Graver *v.* Otto, 23 Pa. Co. Ct. 227.

Utah.— Crescent Min. Co. *v.* Silver King Min. Co., 17 Utah 444, 54 Pac. 244, 70 Am. St. Rep. 810.

West Virginia.— McMillen *v.* Ferrell, 7 W. Va. 223.

United States.— Kennedy *v.* Elliott, 85 Fed. 832; Erskine *v.* Forest Oil Co., 80 Fed. 583.

See 27 Cent. Dig. tit. "Injunction," § 98.

Illustrations.—Cutting a ditch through wild land is no irreparable injury. Waldron *v.* Marsh, 5 Cal. 119; Thorn *v.* Sweeney, 12 Nev. 251; Crescent Min. Co. *v.* Silver King Min. Co., 17 Utah 444, 54 Pac. 244, 70 Am. St. Rep. 810. Damages are adequate to compensate for the tearing down of a fence.

tortious attempt to use and possess the real property of another, or is permanently injuring the estate, an injunction may issue, although a recovery of damages would be adequate, in case the remedy of the complainant is otherwise inadequate at law.[25]

d. Inadequate Remedy at Law — (1) *IRREPARABLE INJURY IN GENERAL.* It is well settled that if the bill shows that irreparable injury will result from a trespass, a sufficient ground for the interference of equity by injunction to restrain its commission or continuance is made out.[26]

Nichols *v.* Sutton, 22 Ga. 369; Catching *v.* Terrell, 10 Ga. 576; Mining's Appeal, 82 Pa. St. 373; Shell *v.* Kemmerer, 13 Phila. (Pa.) 502; Smith *v.* Oconomowoc, 49 Wis. 694, 6 N. W. 329. *Compare* Hoff *v.* Olson, 101 Wis. 118, 76 N. W. 1121, 70 Am. St. Rep. 903.

The erection of fences will not be enjoined since the injury is insignificant. Giller *v.* West, 162 Ind. 17, 69 N. E. 548; Lutcher *v.* Norsworthy, (Tex. Civ. App. 1894) 27 S. W. 630.

Removal of monument.— In a suit to compel a trespasser to remove a monument which was erected on a grave lot, a mandatory injunction was denied on the ground that the only question was the cost of removing the stone and putting the lot back into its original condition. Boyden *v.* Bragaw, 53 N. J. Eq. 26, 30 Atl. 330.

Damages already incurred.— Where the trespass has already been committed and the wrong has spent its force, it is evident that the object of the suit is to collect damages and an injunction will be denied. Ewing *v.* Rourke, 14 Oreg. 514, 13 Pac. 483.

Irreparable injury.— One making a fair *prima facie* showing in support of his title to land may obtain an injunction to restrain the commission of waste or of trespass if the injury would be irreparable, without showing that he could not obtain adequate compensation in damages in a suit at law. Rakes *v.* Rustin Land, etc., Co., (Va. 1895) 22 S. E. 498.

25. *California.*— Daubenspeck *v.* Grear, 18 Cal. 443.

Massachusetts.— Lynch *v.* Union Sav. Inst., 158 Mass. 394, 33 N. E. 603, 159 Mass. 306, 34 N. E. 364, 20 L. R. A. 842.

New Jersey.— Robertson *v.* Meyer, 59 N. J. Eq. 366, 45 Atl. 983.

Ohio.— Denver *v.* U. S. Telephone Co., 10 Ohio S. & C. Pl. Dec. 273, 8 Ohio N. P. 666.

Pennsylvania.— Sullivan *v.* Jones, etc., Steel Co., 208 Pa. St. 540, 57 Atl. 1065, 66 L. R. A. 712; Walters *v.* McElroy, 151 Pa. St. 549, 25 Atl. 125; Burns *v.* Shaub, 17 Lanc. L. Rev. 137; Consumers' Heating Co. *v.* American Land Co., 31 Pittsb. Leg. J. N. S. 24.

Rhode Island.— Battalion Westerly Rifles *v.* Swan, 22 R. I. 333, 47 Atl. 1090, 84 Am. St. Rep. 849, rule applied to record books of militia company.

England.— Goodson *v.* Richardson, L. R. 9 Ch. 221, 43 L. J. Ch. 790, 30 L. T. Rep. N. S. 142, 22 Wkly. Rep. 337.

Canada.— Cie. de Ch. de Fer de Beauharnois *v.* Hainault, 17 Rev. Lég. 116; Cie. de Ch. de Fer de Beauharnois *v.* Bergevin, 17 Rev. Lég. 113; Wright *v.* Turner, 10 Grant Ch. (U. C.) 67; Bourgouin *v.* The Montreal Northern Colonization R. Co., 19 L. C. Jur. 57; Everse *v.* North Western R. Co., 2 Montreal Super. Ct. 290.

26. *Arkansas.*—Mooney *v.* Cooledge, 30 Ark. 640.

Florida.— Woodford *v.* Alexander, 35 Fla. 333, 17 So. 658.

Georgia.— Justice *v.* Akin, 104 Ga. 714, 30 S. E. 941; Justices Pike County Inferior Ct. *v.* Griffin, etc., Plank Road Co., 11 Ga. 246.

Maryland.— Georges Creek Coal, etc., Co. *v.* Detmold, 1 Md. Ch. 371.

Mississippi.— Coulson *v.* Harris, 43 Miss. 728.

Montana.— Lee *v.* Watson, 15 Mont. 228, 38 Pac. 1077.

New Hampshire.—Winnipissiogee Lake Co. *v.* Worster, 29 N. H. 433.

New Jersey.— Oliphant *v.* Richman, 67 N. J. Eq. 280, 59 Atl. 241; Scudder *v.* Trenton Delaware Falls Co., 1 N. J. Eq. 694, 23 Am. Dec. 756.

New York.— Tribune Assoc. *v.* Sun Printing, etc., Assoc., 7 Hun 175; Jerome *v.* Ross, 7 Johns. Ch. 315; Stevens *v.* Beekman, 1 Johns. Ch. 318.

Ohio.— Mechanics', etc., Bank *v.* Debolt, 1 Ohio St. 591.

Tennessee.— Parker *v.* East Tennessee, etc., R. Co., 13 Lea 669.

Vermont.— Brock *v.* Connecticut, etc., R. Co., 35 Vt. 373.

See 27 Cent. Dig. tit. "Injunction," § 98.

"Irreparable" defined.— Irreparable injury authorizing the interference of a court of chancery need not always be such injury as is beyond the possibility of repair or beyond compensation in damages, nor necessarily great damage; but it is that species of injury, great or small, that ought to be submitted to on the one hand or inflicted on the other, and is of constant and frequent occurrence, so that no fair or reasonable redress can be had therefor in a court of law. Wahle *v.* Reinbach, 76 Ill. 322. "Irreparable" means that which cannot be repaired, retrieved, put back again, or atoned for. The most absolute and positive instance of it is the cutting down of ornamental trees. Gause *v.* Perkins, 56 N. C. 177, 69 Am. Dec. 728. The word "irreparable" means that which cannot be repaired, restored, or adequately compensated for in money, or where the compensation cannot be safely measured.

(II) *Damages as Inadequate.* Where the injury is of such a nature that it cannot be fully compensated in damages,[27] or cannot be measured by any certain pecuniary standard,[28] it is irreparable and the trespass may be enjoined.

(III) *Destruction of the Inheritance*— (A) *In General.* The rule is well settled that when the injury goes to the destruction of the inheritance, it is irreparable, and the trespass will be enjoined. The injury may consist in the destruction of that on which the value of the estate depends, or in the destruction of the estate in the character in which it has been enjoyed.[29] So threatened occupation

Bettman *v.* Harness, 42 W. Va. 433, 26 S. E. 271, 36 L. R. A. 566.

Mandatory injunction.— The removal of a combustible substance likely to cause irreparable injury to adjoining property may be compelled (Hepburn *v.* Lordan, 11 Jur. N. S. 122, 254, 13 Wkly. Rep. 368, 1004, 34 L. J. Ch. 293), and also the removal of material wrongfully deposited upon complainant's property (Eno *v.* Christ, 25 Misc. (N. Y.) 24, 54 N. Y. Suppl. 400; Guinness *v.* Fitzsimons, L. R. 13 Ir. 71).

27. *Connecticut.*—Camp *v.* Charles Thatcher Co., 75 Conn. 165, 52 Atl. 953.

Indiana.— Clark *v.* Jeffersonville, etc., R. Co., 44 Ind. 248.

Mississippi.— Coulson *v.* Harris, 43 Miss. 728.

New York.— Hill *v.* Schneider, 13 N. Y. App. Div. 299, 43 N. Y. Suppl. 1; Clark *v.* Syracuse, 13 Barb. 32, removal of mill-dam and mill.

Virginia.— Crenshaw *v.* Slate River Co., 6 Rand. 245, removal of mill-dam.

West Virginia.— Haskell *v.* Sutton, 53 W. Va. 206, 44 S. E. 533.

See 27 Cent. Dig. tit. "Injunction," § 98.

Rule restated.— In enjoining interference with church property the court said: "The general rule undoubtedly is, that in cases of private trespass an injunction would not be granted, for the reason that the aggrieved party had an adequate common-law remedy by action, where proper damages could be assessed by a jury. In ordinary cases this was found to be sufficient for the protection of property. 'But in cases of a peculiar nature . . . which damages could not compensate, or where the injury reached to the very substance and value of the estate, and went to the destruction of it in the character in which it was enjoyed,' then courts of equity would grant an injunction to prevent the injury complained of. . . . Now it must be admitted that the circumstances of this case are so special, the nature and use of the property itself so peculiar, that an ordinary action of trespass would furnish no adequate compensation for an injury to the possession. . . . The entire value of such property consists in its free and undisturbed use and enjoyment for religious worship." New Elm German Evangelical Cong. *v.* Hoessli, 13 Wis. 348, 354.

28. *Georgia.*— Camp *v.* Dixon, 112 Ga. 872, 38 S. E. 71.

Illinois.— First Evangelical Church *v.* Walsh, 57 Ill. 363, 11 Am. Rep. 21; First Cong. Church *v.* Stewart, 43 Ill. 81; Smith *v.* Bangs, 15 Ill. 399.

Louisiana.— Choppin *v.* Dauphin, 48 La. Ann. 1217, 20 So. 681, 55 Am. St. Rep. 313, 33 L. R. A. 133.

Maryland.— Gilbert *v.* Arnold, 30 Md. 29, interference with public worship.

Missouri.—Fulbright *v.* Higginbotham, 133 Mo. 668, 34 S. W. 875, trespass on church property.

New Hampshire.— Ford *v.* Burleigh, 60 N. H. 278.

New York.— Poughkeepsie Gas Co. *v.* Citizens' Gas Co., 89 N. Y. 493; Genesee Valley, etc., R. Co. *v.* Retsof Min. Co., 15 Misc. 187, 36 N. Y. Suppl. 896.

Pennsylvania.— Westmoreland, etc., Gas Co. *v.* De Witt, 130 Pa. St. 235, 18 Atl. 724, 5 L. R. A. 731.

Wisconsin.— Wilson *v.* Mineral Point, 39 Wis. 160; Lutheran Evangelical Church *v.* Gristgau, 34 Wis. 328.

United States.— Beatty *v.* Kurtz, 2 Pet. 566, 7 L. ed. 521; Southern Pac. R. Co. *v.* Oakland, 58 Fed. 50.

See 27 Cent. Dig. tit. "Injunction," § 98.

In enjoining trespass on a cemetery the court said: "What, we may ask, would be the measure of damages at law, for the wounded sensibilities of the living, in having the graves of kindred and loved ones blotted out and desecrated by common highway travel? The inadequacy of a remedy at law, is too apparent to admit of argument." First Evangelical Church *v.* Walsh, 57 Ill. 363, 366, 11 Am. Rep. 21.

29. *California.*— Schneider *v.* Brown, 85 Cal. 205, 24 Pac. 715 (construction of ditch); Crescent City Wharf, etc., Co. *v.* Simpson, 77 Cal. 286, 19 Pac. 426 (removal of wharf).

Delaware.— Wilds *v.* Layton, 1 Del. Ch. 226, 12 Am. Dec. 91.

Florida.— Carney *v.* Hadley, 32 Fla. 344, 14 So. 4, 37 Am. St. Rep. 101, 22 L. R. A. 233.

Georgia.— Bates *v.* Slade, 76 Ga. 50.

Missouri.— Eschelkamp *v.* Schrader, 45 Mo. 505, cutting off end of a house.

New York.— Wheelock *v.* Noonan, 108 N. Y. 179, 15 N. E. 67, 2 Am. St. Rep. 405, covering land with heavy boulders.

Oregon.— Mendehall *v.* Harrisburg Water Co., 27 Oreg. 38, 39 Pac. 399.

Pennsylvania.— Bussier *v.* Weekey, 4 Pa. Super. Ct. 69 [*affirming* 18 Pa. Co. Ct. 33].

United States.— Northern Pac. R. Co. *v.* Cunningham, 103 Fed. 708.

See 27 Cent. Dig. tit. "Injunction," § 98 *et seq.*

by permanent structures may be enjoined. The injury would be irreparable in its nature.[30]

(B) *Cutting Timber.*[31] The general rule is that the cutting of timber is such a destruction to the inheritance as will cause a court of equity to interfere to restrain the trespass.[32] So where it appears that the trees are necessary to the enjoyment of the property in the particular character in which it has been used,[33] or that the cutting defeats the purpose for which the trees are being grown,[34] an injunction will be granted, but not if the injury results from using trees for the

Illustrations.— Removal of gravel, which constituted the chief value of land, will be enjoined. Newall *v.* Staffordville Gravel Co., (N. J. Ch. 1887) 11 Atl. 495, (Ch. 1888) 13 Atl. 270. The mining of land valuable for grazing purposes only will be enjoined. Hunt *v.* Steese, 75 Cal. 620, 17 Pac. 920. Hunting on lands valuable only for shooting will be enjoined. Lamprey *v.* Danz, 86 Minn. 317, 90 N. W. 578. See also Simpson *v.* Moorhead, 65 N. J. Eq. 623, 56 Atl. 887.

30. Richards *v.* Dower, 64 Cal. 62, 28 Pac. 113 (tunnel); Reddall *v.* Bryan, 14 Md. 444, 74 Am. Dec. 550 (aqueduct); Proctor *v.* Campbell, 1 Wilcox (Pa.) 270 (log-slide).

31. Action by adjoining landowner to prevent threatened destruction of trees see ADJOINING LANDOWNERS, 1 Cyc. 793.

32. *California.*— Halleck *v.* Mixer, 16 Cal. 574; Natoma Water, etc., Co. *v.* Clarkin, 14 Cal. 544.

Delaware.— Fleming *v.* Collins, 2 Del. Ch. 230.

Georgia.— Enterprise Lumber Co. *v.* Clegg, 117 Ga. 901, 45 S. E. 281.

Indiana.— Thatcher *v.* Humble, 67 Ind. 444; Owens *v.* Lewis, 46 Ind. 488, 15 Am. Rep. 295.

Kentucky.— Peak *v.* Hayden, 3 Bush 125; McDowell *v.* Wiseman, 3 Ky. L. Rep. 332.

Louisiana.— De la Croix *v.* Villere, 11 La. Ann. 39.

Maryland.— Fulton *v.* Harman, 44 Md. 251; Shipley *v.* Ritter, 7 Md. 408, 61 Am. Dec. 371.

Missouri.— Powell *v.* Canaday, 95 Mo. App. 713, 69 S. W. 686; Palmer *v.* Crisle, 92 Mo. App. 510.

New Jersey.— Kerlin *v.* West, 4 N. J. Eq. 449.

New York.— Relyea *v.* Beaver, 34 Barb. 547.

Pennsylvania.— Smith's Appeal, 69 Pa. St. 474; Kerns *v.* Harbison, 1 Chest. Co. Rep. 506; Echert *v.* Ferst, 10 Phila. 514.

South Carolina.— Shubrick *v.* Guerard, 2 Desauss. Eq. 616.

Vermont.— Smith *v.* Rock, 59 Vt. 232, 9 Atl. 551; Smith *v.* Pettingill, 15 Vt. 82, 40 Am. Dec. 667.

Virginia.— Bruce *v.* John L. Roper Lumber Co., 87 Va. 381, 13 S. E. 153, 24 Am. St. Rep. 657.

West Virginia.— Fluharty *v.* Mills, 49 W. Va. 446, 38 S. E. 521.

United States.— King *v.* Campbell, 85 Fed. 814; King *v.* Stuart, 84 Fed. 546; U. S. *v.* Guglard, 79 Fed. 21; Wood *v.* Braxton, 54 Fed. 1005.

England.— Gilmour *v.* Mauroit, 14 App. Cas. 645, 59 L. J. P. C. 38, 61 L. T. Rep. N. S. 442 [*affirming* 33 L. C. Jur. 231, 3 Montreal Q. B. 449].

Canada.— McLean *v.* Burton, 24 Grant Ch. (U. C.) 134; Wightman *v.* Fields, 19 Grant Ch. (U. C.) 559; McDougall *v.* Grignon, 15 Quebec Super. Ct. 535. See Robins *v.* Porter, 2 Can. L. J. 230, holding that a writ of injunction will be granted in the first instance, on an *ex parte* application under C. L. P. Act (1856), § 286, in an action of ejectment, to restrain defendant from cutting and carrying timber and hay off from the land which is the subject of the action.

See 27 Cent. Dig. tit. "Injunction," § 105.

Timber land.— Cutting off timber from a tract of land, valuable only or chiefly for wood on it, is not irreparable injury. West *v.* Walker, 3 N. J. Eq. 279. *Contra,* Wood *v.* Braxton, 54 Fed. 1005.

Possession of complainant is necessary to maintain a suit to enjoin the cutting of timber. Hamilton *v.* Brent Lumber Co., 127 Ala. 78, 28 So. 698. See also Flannery *v.* Hightower, 97 Ga. 592, 25 S. E. 371; Worth Lumber Co. *v.* Gary, 83 Miss. 640, 36 So. 2; Powell *v.* Canaday, 95 Mo. App. 713, 69 S. W. 686.

Complainant no standing at law.— Where a husband, as trustee for his wife's separate estate, wrongfully enters into agreement for arbitration of an unfounded claim of defendant to cut timber, and the award is in favor of defendant, who enters and cuts timber under this claim of right, an injunction will issue. Thomas *v.* Vames, 32 Ala. 723.

33. Powell *v.* Cheshire, 70 Ga. 357, 48 Am. Rep. 572 (trees necessary to proper use of farm and shading a contemplated house); Musch *v.* Burkhart, 83 Iowa 301, 48 N. W. 1025, 32 Am. St. Rep. 305, 12 L. R. A. 484; Davis *v.* Reed, 14 Md. 152; Griffith *v.* Hilliard, 64 Vt. 643, 25 Atl. 427 (charcoal plant). *Compare* Heaney *v.* Butte, etc., Commercial Co., 10 Mont. 590, 27 Pac. 379, which held that where trees were to be used for fuel for a limestone kiln, even if fuel was hard to obtain on account of remoteness from railroad, no irreparable damage was shown, and injunction would not issue.

Illustration.— Where the owner of timber had made large investments in sawmills for converting the timber into lumber, the remedy at law was inadequate because expected profits cannot be measured in money. Camp *v.* Dixon, 112 Ga. 872, 37 S. E. 71, 52 L. R. A. 755.

34. Clendening *v.* Ohl, 118 Ind. 46, 20 N. E. 639 (growing trees for sugar orchard); Smith *v.* Rock, 59 Vt. 232, 9 Atl. 551.

purposes for which they are grown.[35] The injunction has, however, been refused in some cases on the ground that it did not appear that the trees had any particular value,[36] and in others because irreparable injury was not shown.[37] As an exception to the rule that equity will not interfere to prevent a trespass when the impending injury is remediable by the recovery of damages at law,[38] it is held that the destruction of ornamental, shade, and fruit trees, and ornamental shrubbery, is an injury going to the destruction of the inheritance which may be enjoined.[39] In some states the right to injunctive relief against the cutting of timber is regulated by statutes the construction of which is shown in the notes.[40]

35. Carney *v.* Hadley, 32 Fla. 344, 14 So. 4, 37 Am. St. Rep. 101, 22 L. R. A. 233; Gause *v.* Perkins, 56 N. C. 177, 69 Am. Dec. 728.

36. Hatcher *v.* Hampton, 7 Ga. 49; Poweli *v.* Rawlings, 38 Md. 239.

37. *Florida.*— Woodford *v.* Alexander, 35 Fla. 333, 17 So. 658.

Georgia.— Morgan *v.* Baxter, 113 Ga. 144, 38 S. E. 411.

Indiana.— Smith *v.* Weldon, 73 Ind. 454.

Iowa.— Cowles *v.* Shaw, 2 Iowa 496.

Kansas.— Jordan *v.* Updegraff, McCahon 103.

Kentucky.— Hillman *v.* Hurley, 82 Ky. 626.

Mississippi.— Blewitt *v.* Vaughn, 5 How. 418.

New Jersey.— Cornelius *v.* Post, 9 N. J. Eq. 196.

New York.— Griffin *v.* Winne, 79 N. Y. 637; Van Rensselaer *v.* Griswold, 3 N. Y. Leg. Obs. 94 (cutting timber on wild lands); Stevens *v.* Beekman, 1 Johns. Ch. 318.

North Carolina.— Thompson *v.* McNair, 62 N. C. 121.

West Virginia.— Cox *v.* Douglass, 20 W. Va. 175.

England.— Atty.-Gen. *v.* Hallett, 16 L. J. Exch. 131, 16 M. & W. 569.

See 27 Cent. Dig. tit. "Injunction," § 105.

Owner of timber on land of another will not be granted an injunction to prevent its being cut. Doke *v.* Peek, 45 Fla. 244, 34 So. 896. *Contra,* Sears *v.* Ackerman, 138 Cal. 583, 72 Pac. 171.

Vendor of timber.— Where plaintiff has sold timber on his land by an unambiguous contract, defendant will not be enjoined from cutting if no suit is pending to correct the contract on the ground of mistake. Swindell *v.* Saddler, 122 Ga. 15, 49 S. E. 753.

Multiplicity of suits.— In some cases the cutting of timber has been enjoined on the ground of preventing a multiplicity of suits. Owens *v.* Lewis, 46 Ind. 488, 15 Am. Rep. 295; O'Hara *v.* Johns, 7 Ky. L. Rep. 296; Echert *v.* Ferst, 10 Phila. (Pa.) 514; King *v.* Stuart, 84 Fed. 546.

38. See Smith *v.* Pettingill, 15 Vt. 82, 40 Am. Dec. 667.

39. *Illinois.*— Smith *v.* Price, 39 Ill. 28, 89 Am. Dec. 284.

Maryland.— Shipley *v.* Ritter, 7 Md. 408, 61 Am. Dec. 371.

Nebraska.— Sapp *v.* Roberts, 18 Nebr. 299, 25 N. W. 96.

New Jersey.— Tainter *v.* Morristown, 19 N. J. Eq. 46.

Vermont.— Smith *v.* Pettingill, 15 Vt. 82, 40 Am. Dec. 667.

Wisconsin.— Wilson *v.* Mineral Point, 39 Wis. 160.

See 27 Cent. Dig. tit. "Injunction," § 105.

Trees not planted.— It is immaterial whether they were planted for shade and ornament or grew naturally in the position which renders them thus valuable to the owner. Shipley *v.* Ritter, 7 Md. 408, 61 Am. Dec. 371.

40. See cases cited *infra,* this note.

In Florida, Rev. St. (1892) § 1469, giving the right to an injunction to any person claiming to own any timbered lands in the state, does not apply to one claiming to own only the turpentine in the trees with the privilege of cutting, boxing, and scraping the trees. McDonald *v.* Padgett, 46 Fla. 501, 35 So. 336. The owner of timber on lands is not an owner of "timbered" lands within section 1469. Doke *v.* Peek, 45 Fla. 244, 34 So. 896. The statute, to the extent that it confers jurisdiction on the court of chancery to enjoin trespass on timber lands, by a mere trespasser, without color of right or authority, is constitutional. McMillan *v.* Wiley, 45 Fla. 487, 33 So. 993. Under Rev. St. § 1469, a bill in equity can be maintained by a party claiming to own timbered lands to enjoin commission of trespasses thereon by the cutting of trees. Louisville, etc., R. Co. *v.* Gibson, 43 Fla. 315, 31 So. 230.

In Georgia, where plaintiff has not a "perfect title" required under Civ. Code (1895), § 4927, insolvency or irreparable injury must be alleged. Swindell *v.* Saddler, 122 Ga. 15, 49 S. E. 753; Wiggins *v.* Middleton, 117 Ga. 162, 43 S. E. 432. "Perfect title," under Civ. Code, § 4927, giving a right to injunction against cutting timber, means a complete and perfect paper title, capable of being recorded. A parol title is not sufficient to meet requirement of "perfect title," under Civ. Code, § 4927. Powell *v.* Brinson, 120 Ga. 36, 47 S. E. 499; Wilcox Lumber Co. *v.* Bullock, 109 Ga. 532, 35 S. E. 52. Where part of plaintiff's chain of title to certain land was a deed executed by an attorney in fact of the grantor containing certain time reservations in favor of the grantor, plaintiff's title was not a "perfect title" within Civ. Code, § 4927. Camp *v.* Dixon, 111 Ga. 674, 36 S. E. 878.

In North Carolina defendant's insolvency need not be alleged. John L. Roper Lumber Co. *v.* Wallace, 93 N. C. 22. Act (1885), p. 664, c. 401, providing that insolvency need

According to the weight of authority the removal of timber already cut will not ordinarily be enjoined.[41]

(c) *Erecting Buildings and Walls.* Encroachment on the land of another by erecting permanent buildings or walls is such a destruction of the inheritance as may be enjoined.[42] An injunction will not ordinarily issue, however, after the erection is completed.[43]

not be alleged, has no application to an order requiring defendants to desist from removing lumber unless they first give bond to secure any damages plaintiffs may sustain by the removal. Kistler *v.* Weaver, 135 N. C. 388, 47 S. E. 478.

41. North Lumber Co. *v.* Gary, 83 Miss. 640, 36 So. 2; Worthington *v.* Moon, 53 N. J. Eq. 46, 30 Atl. 251 (holding that if already severed it is personal property, and the claim that the removal of it is an irreparable injury to the inheritance is unavailing); Van Wyck *v.* Alliger, 6 Barb. (N. Y.) 507; Spear *v.* Cutter, 5 Barb. (N. Y.) 486, 4 How. Pr. 175, 2 Code Rep. 100; Watson *v.* Hunter, 5 Johns. Ch. (N. Y.) 169, 9 Am. Dec. 295. *Compare* Disbrow *v.* Westchester Hardwood Co., 17 N. Y. App. Div. 610, 45 N. Y. Suppl. 376.

Cutting after issuance, but before service, of injunction.— But if the timber has been cut after issuance of a restraining order, but before service thereof, its removal will be enjoined. King *v.* Campbell, 85 Fed. 814.

A mortgagee may restrain removal of timber where it constitutes the principal value of the land and defendants are insolvent. Terry *v.* Robbins, 122 Fed. 725.

Creditors may restrain heirs from cutting and carrying away timber pending a creditors' bill to subject the real estate of the deceased debtor. Tessier *v.* Wise, 3 Bland (Md.) 28.

A temporary injunction is authorized to restrain a trespasser from removing timber which he had cut on land claimed by plaintiff, pending a suit to establish plaintiff's title. Staples *v.* Rossi, 7 Ida. 618, 65 Pac. 67.

42. *California.*— Kaiser *v.* Dalto, 140 Cal. 167, 73 Pac. 828.

Iowa.— Chicago, etc., R. Co. *v.* Porter, 72 Iowa 426, 34 N. W. 286.

Maryland.— Long *v.* Ragan, 94 Md. 462, 51 Atl. 181; Herr *v.* Bierbower, 3 Md. Ch. 456.

New Jersey.— Southmayd *v.* McLaughlin, 24 N. J. Eq. 181.

New York.— Fox *v.* Fitzsimons, 29 Hun 574; Tribune Assoc. *v.* Sun Printing, etc., Assoc., 7 Hun 175.

Pennsylvania.— Miller *v.* Lynch, 149 Pa. St. 460, 24 Atl. 80; Whitman *v.* Shoemaker, 2 Pearson, 320; Sprenkle *v.* Thomas, 13 York Leg. Rec. 89.

Rhode Island.— Gobeille *v.* Meunier, 21 R. I. 193, 41 Atl. 1001.

Wisconsin.— Huber *v.* Stark, 124 Wis. 359, 102 N. W. 12.

See 27 Cent. Dig. tit. "Injunction," § 103.

Grounds for enjoining.— Erecting a building in part on land of another is not a mere trespass for which a pecuniary compensation may be obtained in the ordinary course of law, but plaintiff's estate would be destroyed to a certain extent by rendering it unfit for building. And it is no answer to say that if plaintiffs recover the land in dispute in an action of ejectment they would get the wall which defendant put upon it, because that wall, if suffered to remain, would have to be removed and the foundation filled up before they could have the just use and enjoyment of their property. Herr *v.* Bierbower, 3 Md. Ch. 456.

Erection of schoolhouse by public authorities without damages having been paid will be enjoined. Church *v.* Joint School-Dist. No. 12, 55 Wis. 399, 13 N. W. 272.

Mandatory injunctions have frequently been held proper to compel the removal of buildings and other structures wrongfully erected. Crocker *v.* Manhattan L. Ins. Co., 61 N. Y. App. Div. 226, 70 N. Y. Suppl. 492; Norton *v.* Elwert, 29 Oreg. 583, 41 Pac. 926; Bright *v.* Allan, 203 Pa. St. 394, 93 Am. St. Rep. 769, 53 Atl. 251; Allegheny Nat. Bank *v.* Reighard, 32 Pittsb. Leg. J. N. S. (Pa.) 51; Krehl *v.* Burrell, 7 Ch. D. 551, 47 L. J. Ch. 353, 38 L. T. Rep. N. S. 407 [*affirmed* in 11 Ch. D. 146, 48 L. J. Ch. 252, 40 L. T. Rep. N. S. 637, 27 Wkly. Rep. 805]; Hepburn *v.* Lordan, 2 Hem. & M. 345, 11 Jur. N. S. 132, 34 L. J. Ch. 293, 13 Wkly. Rep. 368; Great North of England, etc., Junction R. Co. *v.* Clarence R. Co., 1 Coll. 507, 28 Eng. Ch. 507, 63 Eng. Reprint 520; Rankin *v.* Huskisson, 4 Sim. 13, 6 Eng. Ch. 13, 58 Eng. Reprint 6.

Water-pipes laid without consent through the soil of the complainant may be ordered to be removed. Goodson *v.* Richardson, L. R. 9 Ch. 221, 43 L. J. Ch. 790, 30 L. T. Rep. N. S. 142, 22 Wkly. Rep. 337.

A building obstructing ancient lights may be ordered to be torn down. Greenwood *v.* Hornsey, 33 Ch. D. 471, 55 L. J. Ch. 917, 55 L. T. Rep. N. S. 135, 35 Wkly. Rep. 163.

Spite structures.— A mandatory injunction may be granted, under Ballinger Annot. Codes & St. § 5433, to compel the removal of a structure on defendant's land erected to spite and annoy the complainant. Karasek *v.* Peier, 22 Wash. 419, 61 Pac. 33, 50 L. R. A. 345.

Defenses.— Offering to buy the land is no defense against bill for an injunction to restrain encroachment by buildings. Herr *v.* Bierbower, 3 Md. Ch. 456; Hahl *v.* Sugo, 27 Misc. (N. Y.) 1, 57 N. Y. Suppl. 920.

43. Bigelow *v.* Los Angeles, 85 Cal. 614, 24 Pac. 778; Fox *v.* Fitzsimons, 29 Hun (N. Y.) 574. See also Rankin *v.* Charless, 19 Mo. 490, 61 Am. Dec. 574; Sutcliff *v.* Isaacs, 1 Pars. Eq. Cas. (Pa.) 494; Deere *v.* Guest,

(D) *Construction and Maintenance of Railroads.* A threatened injury of a permanent and irreparable character by a railroad to the vested rights of an individual or another corporation may be enjoined, especially when sought to be done under the color of a charter.[44] So where it clearly appears that a railroad company threatens or is about to enter upon and take permanent possession of land without first having in some way acquired the right to do so, and without making compensation, the landowner is entitled to an injunction[45] on the ground of necessity to prevent irreparable injury,[46] or to prevent a continuing trespass,[47] although there is a remedy at law.[48] A strong case must, however, be presented, and the impending danger must be imminent and impressive to justify the issuing of an injunction as a precautionary and preventive remedy.[49] In case of a conflict in the evidence as to the title to the premises affected, the injunction may be granted in part and refused in part.[50]

(E) *Opening Highways.* When municipal authorities threaten to enter upon and take permanent possession of land for a public use, without having acquired the right by complying with the statutory requirements, an injunction will be granted to restrain them.[51]

6 L. J. Ch. 69, 1 M. & C. 516, 13 Eng. Ch. 516, 40 Eng. Reprint 473.

44. Florida, etc., R. Co. *v.* Pensacola, etc., R. Co., 10 Fla. 145, holding that the construction of a railroad in violation of exclusive rights conferred upon complainant by its charter may be enjoined.

45. Lake Erie, etc., R. Co. *v.* Michener, 117 Ind. 465, 20 N. E. 254; Midland R. Co. *v.* Smith, 113 Ind. 233, 15 N. E. 256; Chicago, etc., R. Co. *v.* Jones, 103 Ind. 386, 6 N. E. 8; Baltimore Belt R. Co. *v.* Lee, 75 Md. 596, 23 Atl. 901; Morris, etc., R. Co. *v.* Hudson Tunnel R. Co., 25 N. J. Eq. 384 (so holding where a railroad entered upon the land of complainants and made excavations thereon); Diedrichs *v.* Northwestern Union R. Co., 33 Wis. 219; Bohlman *v.* Green Bay, etc., R. Co., 30 Wis. 105. See also EMINENT DOMAIN, 15 Cyc. 987.

A railroad company has such a title in its right of way as to permit it to obtain an injunction against the construction of a street railroad crossing over its track at a point other than a highway crossing. Northern Cent. R. Co. *v.* Harrisburg, etc., Electric R. Co., 177 Pa. St. 142, 35 Atl. 624, 34 L. R. A. 572, holding that there was a sufficient increase of danger to the operation of the railroad as to authorize an injunction against the construction by a street railroad company of an overhead crossing, one hundred or more feet in length, at a point where there had never previously been either an overhead or grade crossing.

Good faith as a defense.— Where a railroad has entered upon premises against the express refusal of permission of complainants, it is not entitled to protection on the ground that it has begun its work in good faith and under a misapprehension as to the control of municipal authorities over the premises, or upon the ground that it is making an effort to afford compensation. Morris, etc., R. Co. *v.* Hudson Tunnel R. Co., 25 N. J. Eq. 384.

Relative convenience and injury.— Where the person injured will obtain but small benefit and the injunction will operate oppressively and to the great annoyance and injury of the other party, an injunction will not be granted unless the wrong is wanton and unprovoked. Morris, etc., R. Co. *v.* Prudden, 20 N. J. Eq. 530 (holding that an injunction would not be granted against the placing of an additional track in a street in front of plaintiff's premises, none of plaintiff's property being occupied, and there being a remedy by action at law for damages, or, in case the use of the railroad became a nuisance or proved to be a permanent injury without adequate remedy at law, by an injunction to prevent its continuance or for its removal); Higbee *v.* Camden, etc., R., etc., Co., 20 N. J. Eq. 435. See *supra*, III, J.

Exclusiveness of other remedies.—A remedy afforded to the landowner by the charter of the railroad is not exclusive. Parker *v.* East Tennessee, etc., R. Co., 13 Lea (Tenn.) 669.

46. Lake Erie, etc., R. Co. *v.* Michener, 117 Ind. 465, 20 N. E. 254. See *supra*, V, B, 3, d, (I).

An irreparable injury is shown where it is admitted that the current of a river will be turned over complainant's land, or where the track of the railroad is to be used for the purpose of continuously removing soil and sand from complainant's premises. Cobb *v.* Illinois, etc., R., etc., Co., 68 Ill. 233.

47. Morris, etc., R. Co. *v.* Hudson Tunnel R. Co., 25 N. J. Eq. 384. See *infra*, V, B, 3, d, (IV).

48. Cobb *v.* Illinois, etc., R., etc., Co., 68 Ill. 233; Moorhead *v.* Little Miami R. Co., 17 Ohio 340; Jarden *v.* Philadelphia, etc., R. Co., 3 Whart. (Pa.) 502.

49. Morris, etc., R. Co. *v.* Prudden, 20 N. J. Eq. 530; Drake *v.* Hudson River R. Co., 7 Barb. (N. Y.) 508.

50. Murphy *v.* Southern R. Co., 99 Ga. 207, 24 S. E. 867.

51. *Illinois.*— McIntyre *v.* Storey, 80 Ill. 127; Peoria *v.* Johnston, 56 Ill. 45; Green

(IV) *Repeated or Continuing Trespasses.*[52] Where acts of trespass are continuous or constantly recurring whereby, if permitted to continue, irreparable injury may result,[53] as where the continuous wrongful invasion of plaintiff's right might ripen into a prescriptive right,[54] an injunction will lie to restrain such trespasses,[55] both on the ground that the remedy at law by suits for damages is inade-

v. Green, 34 Ill. 320; Willett *v.* Woodhams, 1 Ill. App. 411.

Kentucky.— Dudley *v.* Frankfort, 12 B. Mon. 610.

Massachusetts.— Creely *v.* Bay State Brick Co., 103 Mass. 514.

Michigan.— Diamond Match Co. *v.* Ontonagon, 72 Mich. 249, 40 N. W. 448.

Missouri.— McPike *v.* West, 71 Mo. 199; Carpenter *v.* Grisham, 59 Mo. 247.

Nebraska.— Peterson *v.* Hopewell, 55 Nebr. 670, 76 N. W. 451.

New York.— Excelsior Brick Co. *v.* Haverstraw, 142 N. Y. 146, 36 N. E. 819.

Pennsylvania.— Pennsylvania R. Co. *v.* Oil City, 25 Pa. Co. Ct. 477, 32 Pittsb. Leg. J. N. S. 150.

Rhode Island.— Lewis *v.* North Kingston, 16 R. I. 15, 11 Atl. 173, 27 Am. St. Rep. 724.

West Virginia.— Jarvie *v.* Grafton, 44 W. Va. 453, 30 S. E. 178; Yates *v.* West Grafton, 33 W. Va. 507, 11 S. E. 3; Mason City Salt, etc., Co. *v.* Mason, 23 W. Va. 211; Boughner *v.* Clarksburg, 15 W. Va. 394.

Wisconsin.— Uren *v.* Walsh, 57 Wis. 98, 14 N. W. 902.

See 27 Cent. Dig. tit. "Injunction," § 102.

Compare Ballantine *v.* Harrison, 37 N. J. Eq. 560, 45 Am. Rep. 667.

Opening a street under unlawful claim of dedication is an irreparable injury. Rosenberger *v.* Miller, 61 Mo. App. 422.

Distinction between public and private trespasses.— An obvious distinction exists between the cases where officers of a corporation are proceeding to appropriate land to the use of the public and an ordinary trespass. In the latter case there is not an attempt to permanently occupy and take from the owner the enjoyment of his property, although his possessory rights may be invaded. Uren *v.* Walsh, 57 Wis. 98, 14 N. W. 902. See also Dudley *v.* Frankfort, 12 B. Mon. (Ky.) 610; Ryan *v.* Brown, 18 Mich. 196, 100 Am. Dec. 154.

Irreparable injury.— A private person who applied for an injunction to restrain a public company or body from entering illegally upon his land is not required to make out a case of destructive trespass or irreparable damage. Inability of private persons to contend with these powerful bodies raises an equity for the prompt interference of equity to keep them within the strict limits of their statutory powers, and prevent them from deviating from the terms prescribed by the statute which gives the authority. Sutton *v.* Norwich, 27 L. J. Ch. 739, 6 Wkly. Rep. 432.

Possession is sufficient title upon which to maintain an action against a road-overseer who is attempting to open a road without right. Cramer *v.* Kester, (Cal. 1894) 36 Pac. 415. But see Smith *v.* Navasota, 72 Tex. 422, 10 S. W. 414, holding that possession without title in fee is not sufficient evidence of title to justify a permanent injunction against opening streets.

52. Injunction to restrain diversion of streams from their natural channels see WATERS.

53. Hamilton *v.* Ely, 4 Gill (Md.) 34 (holding that in cases of repeated or continuing trespass, to authorize an injunction, the allegation that the trespass was to the destruction of the inheritance or the mischief is irreparable is essential, and facts must be stated to show that apprehension of further acts of trespass was well founded); Washburn *v.* Miller, 117 Mass. 376; Proctor *v.* Campbell, Wilcox (Pa.) 270 (holding that equity will not interfere unless the trespass is of a permanent nature but it need not necessarily last forever); Hickman *v.* Maisey, [1900] 1 Q. B. 752, 69 L. J. Q. B. 511, 82 L. T. Rep. N. S. 321, 48 Wkly. Rep. 385 (holding that an injunction may be granted where the trespass, although not of a continuing nature, is threatened to be repeated). And see cases cited in the following notes.

Continuity relating to one act.— An injunction will be granted to prevent a threatened continued disturbance of the possession of a rightful owner, but where the threatened trespass is continuous only in a limited sense, that is, continuing long enough to cut or remove wheat, and defendant asserts no right except to enter and remove the wheat, an injunction will not be granted. Miller *v.* Burket, 132 Ind. 469, 32 N. E. 309. See also Rider *v.* New York, etc., R. Co., 65 How. Pr. (N. Y.) 419.

54. *California.*— Mendelson *v.* McCabe, 144 Cal. 230, 77 Pac. 915, 103 Am. St. Rep. 78 (gate continually left open by person having right of way); Richards *v.* Dower, 64 Cal. 62, 28 Pac. 113.

Kentucky.— McCloskey *v.* Doherty, 97 Ky. 300, 30 S. W. 649, 17 Ky. L. Rep. 178.

Massachusetts.— Cobb *v.* Massachusetts Chemical Co., 179 Mass. 423, 60 N. E. 790.

New York.— Johnson *v.* Rochester, 13 Hun 285; Carpenter *v.* Gwynn, 35 Barb. 395.

Canada.— Atty.-Gen. *v.* Ryan, 5 Manitoba 81.

Where the statute provides another method of interrupting adverse use an injunction will be denied. Hart *v.* Hildebrandt, 30 Ind. App. 415, 66 N. E. 173.

55. Owens *v.* Lewis, 46 Ind. 488, 15 Am. Rep. 295; Lynch *v.* Egan, 67 Nebr. 541, 93 N. W. 775 (tearing down fences); Pohlman *v.* Evangelical Lutheran Trinity Church, 60 Nebr. 364, 83 N. W. 201 (tearing down fences); Axthelm *v.* Chicago, etc., R. Co.,

quate[56] and to prevent a repetition or multiplicity of such suits.[57] But it is held in some jurisdictions that a multiplicity of suits within the meaning of this rule

2 Nebr. (Unoff.) 444, 89 N. W. 313 (leaving gates open); Fonda, etc., R. Co. *v.* Olmstead, 84 N. Y. App. Div. 127, 81 N. Y. Suppl. 1041; Hale *v.* Burns, 91 N. Y. Suppl. 929.

56. *Connecticut.*— New York, etc., R. Co. *v.* Scovill, 71 Conn. 136, 41 Atl. 246, 71 Am. St. Rep. 159, 42 L. R. A. 157.

Illinois.— Owens *v.* Crossett, 105 Ill. 354; Alden Coal Co. *v.* Challis, 103 Ill. App. 52; Stroup *v.* Chalcraft, 52 Ill. App. 608.

Kentucky.— Ellis *v.* Wren, 84 Ky. 254, 1 S. W. 440 (hauling stone off land); Musselman *v.* Marquis, 1 Bush 463, 89 Am. Dec. 637. See Scott *v.* Means, 80 Ky. 460; O'Hara *v.* Johns, 7 Ky. L. Rep. 296.

Massachusetts.— Boston, etc., R. Co. *v.* Sullivan, 177 Mass. 230, 58 N. E. 639, 83 Am. St. Rep. 275; Slater *v.* Gunn, 170 Mass. 509, 49 N. E. 1017, 41 L. R. A. 268.

Mississippi.— Warren Mills *v.* New Orleans Seed Co., 65 Miss. 391, 4 So. 298, 7 Am. St. Rep. 671.

New Hampshire.— Ellis *v.* Blue Mountain Forest Assoc., 69 N. H. 385, 41 Atl. 856, 42 L. R. A. 570.

New Jersey.— Rogers Locomotive, etc., Works *v.* Erie R. Co., 20 N. J. Eq. 379. See Useful Manufacturers Soc. *v.* Morris Canal, etc., Co., 1 N. J. Eq. 157, 21 Am. Dec. 41.

Ohio.— Lembeck *v.* Nye, 47 Ohio St. 336, 24 N. E. 686, 21 Am. St. Rep. 828, 8 L. R. A. 578. See Perkins *v.* Rogg, 11 Ohio Dec. (Reprint) 585, 28 Cinc. L. Bul. 32.

Oregon.— Haines *v.* Hall, 17 Oreg. 165, 20 Pac. 831, 3 L. R. A. 609. See Smith *v.* Gardner, 12 Oreg. 221, 6 Pac. 771, 53 Am. Rep. 342.

South Carolina.— McClellan *v.* Taylor, 54 S. C. 430, 32 S. E. 527.

Texas.— Gulf, etc., R. Co. *v.* Puckett, (Civ. App. 1904) 82 S. W. 662, using railroad track with a railway velocipede.

Utah.— McGregor *v.* Silver King Min. Co., 14 Utah 47, 45 Pac. 1091, 60 Am. St. Rep. 883; Strawberry Valley Cattle Co. *v.* Chipman, 13 Utah 454, 45 Pac. 348; Henderson *v.* Ogden City R. Co., 7 Utah 199, 26 Pac. 286, holding that a mandatory writ may issue against defendant who has piled obstructions on the road-bed of a street railroad.

See 27 Cent. Dig. tit. "Injunction," § 101; and cases cited in the following note.

After the recovery of damages in an action at law if defendant still persists in the trespass an injunction will be granted, since it can then be seen that the remedy at law is inadequate. Carlisle *v.* Stevenson, 3 Md. Ch. 499; Washburn *v.* Miller, 117 Mass. 376.

If the act would ultimately produce serious breaches of the peace and acts of violence, then there is a clear case for equity and no complete remedy at law. McIntyre *v.* Storey, 80 Ill. 127.

57. *California.*— Mendelson *v.* McCabe, 144 Cal. 230, 77 Pac. 915, 103 Am. St. Rep. 78; Kellogg *v.* King, 114 Cal. 378, 46 Pac. 166, 55 Am. St. Rep. 74; Smithers *v.* Fitch, 82 Cal. 153, 22 Pac. 935; Leach *v.* Day, 27 Cal. 643.

Colorado.— Boglino *v.* Giorgetta, 20 Colo. App. 338, 78 Pac. 612.

Georgia.— Gray Lumber Co. *v.* Gaskin, 122 Ga. 342, 50 S. E. 164. But see Hatcher *v.* Hampton, 7 Ga. 49.

Indian Territory.— Barbee *v.* Shannon, 1 Indian Terr. 199, 40 S. W. 584.

Iowa.— Halpin *v.* McCune, 107 Iowa 494, 78 N. W. 210; Ladd *v.* Osborne, 79 Iowa 93, 44 N. W. 235, constantly tearing down fences. See Thomas *v.* Robinson, (1902) 92 N. W. 70.

Kentucky.— Ellis *v.* Wren, 84 Ky. 254, 1 S. W. 440, 8 Ky. L. Rep. 285; Chambers *v.* Haskell, 78 S. W. 478, 25 Ky. L. Rep. 1707.

Maryland.— Blondell *v.* Consolidated Gas Co., 89 Md. 732, 43 Atl. 817, 46 L. R. A. 187; Gilbert *v.* Arnold, 30 Md. 29; Hamilton *v.* Ely, 4 Gill 34; Carlisle *v.* Stevenson, 3 Md. Ch. 499.

Massachusetts.— Providence, etc., Steamboat Co. *v.* Fall River, 183 Mass. 535, 67 N. E. 647.

Michigan.— Rhoades *v.* McNamara, 135 Mich. 644, 98 N. W. 392; Hall *v.* Nester, 122 Mich. 141, 80 N. W. 982.

Minnesota.— Colliton *v.* Oxborough, 86 Minn. 361, 90 N. W. 793 (planting, harvesting, and carrying away crops); Carlson *v.* St. Louis River Dam, etc., Co., 73 Minn. 128, 75 N. W. 1044, 72 Am. St. Rep. 610, 41 L. R. A. 371; Kern *v.* Field, 68 Minn. 317, 71 N. W. 393, 64 Am. St. Rep. 479.

Missouri.— Metropolitan Land Co. *v.* Manning, 98 Mo. App. 248, 71 S. W. 696; Palmer *v.* Crisle, 92 Mo. App. 510; Sills *v.* Goodyear, 80 Mo. App. 128.

Montana.— Palmer *v.* Israel, 13 Mont. 209, 33 Pac. 134.

New York.— Coatsworth *v.* Lehigh Valley R. Co., 156 N. Y. 451, 51 N. E. 301; McGean *v.* Metropolitan El. R. Co., 133 N. Y. 9, 30 N. E. 647; Pappenheim *v.* Metropolitan El. R. Co., 128 N. Y. 436, 28 N. E. 518, 26 Am. St. Rep. 486, 13 L. R. A. 401; Henderson *v.* New York Cent. R. Co., 78 N. Y. 423; Williams *v.* New York Cent. R. Co., 16 N. Y. 97, 69 Am. Dec. 651; Crocker *v.* Manhattan L. Ins. Co., 61 N. Y. App. Div. 226, 70 N. Y. Suppl. 492; Hinckel *v.* Stevens, 17 N. Y. App. Div. 279, 45 N. Y. Suppl. 678; Hill *v.* Schneider, 13 N. Y. App. Div. 299, 43 N. Y. Suppl. 1, 4 N. Y. Annot. Cas. 70; Johnson *v.* Rochester, 13 Hun 285; Olivella *v.* New York, etc., R. Co., 31 Misc. 203, 64 N. Y. Suppl. 1086; Hahl *v.* Sugo, 61 N. Y. Suppl. 770 [*affirming* 27 Misc. 1, 57 N. Y. Suppl. 920]. *Compare* Drake *v.* Hudson R. Co., 7 Barb. 508; Jerome *v.* Ross, 7 Johns. Ch. 315, 11 Am. Dec. 484.

Pennsylvania.— Sullivan *v.* Jones, etc., Steel Co., 208 Pa. St. 540, 57 Atl. 1065, 66 L. R. A. 712; Walters *v.* McElroy, 151 Pa.

arises only when different persons assail the same right and not when repeated trespasses are committed by the same person.[58]

(v) *Insolvency.* Insolvency of the trespasser may afford an additional ground for the granting of an injunction to restrain a trespass,[59] particularly in

St. 549, 25 Atl. 125; Scheetz's Appeal, 35 Pa. St. 88; Glenn *v.* Christie, 17 Montg. Co. Rep. 202. Under the act of June 16, 1836, § 15, and the act of Feb. 14, 1857, an injunction is the proper remedy for the prevention of trespasses which by reason of the persistency with which they are repeated threaten to become of a permanent character, and in such cases it is no objection to the jurisdiction of the court of equity that the injured party may have a remedy at law. Walters *v.* McElroy, *supra.*

Rhode Island.— Lonsdale Co. *v.* Woonsocket, 21 R. I. 498, 44 Atl. 929.

Wisconsin.— Miller *v.* Hoeschler, 121 Wis. 558, 99 N. W. 228.

United States.— Holst *v.* Savannah Electric Co., 131 Fed. 931; Pittsburg, etc., R. Co. *v.* Fiske, 123 Fed. 760, 60 C. C. A. 621; Lake Shore, etc., R. Co., *v.* Felton, 103 Fed. 227, 43 C. C. A. 189; U. S. Freehold Land, etc., Co. *v.* Gallegos, 89 Fed. 769, 32 C. C. A. 470; King *v.* Stuart, 84 Fed. 546; Smith *v.* Bivens, 56 Fed. 352.

England.— Allen *v.* Martin, L. R. 20 Eq. 462, 32 L. T. Rep. N. S. 750, 23 Wkly. Rep. 904. See Goodson *v.* Richardson, L. R. 9 Ch. 221, 43 L. J. Ch. 790, 30 L. T. Rep. N. S. 142, 22 Wkly. Rep. 337.

See 27 Cent. Dig. tit. "Injunction," § 101; and cases cited in preceding note.

Continuous injury as distinguished from continuous trespass.— The remedy at law is inadequate where the party injured by the trespass cannot obtain complete redress by one action for damages, but would be forced to bring numerous actions. Equity will in such cases interfere to prevent a multiplicity of suits. The cases in which relief has been granted against trespass on this ground are of two kinds, those where a continuous injury results from one act of trespass by defendant, and those where the injury results from constantly repeated acts of trespass. The authorities are not entirely in harmony on the question whether the constant repetition of a mere trespass by one person who is not insolvent constitutes a sufficient ground for interference by injunction. The tendency and great weight of the modern authorities, however, is to grant the remedy wherever the trespass is vexatiously persisted in, even if the trespasser is not insolvent, as otherwise a multiplicity of suits would result and the action at law would be inadequate. See cases cited *supra,* this note.

In Florida equity will not interfere to prevent multiplicity of suits where injury to land caused by its occupation for railroad purposes is permanent, since a judgment in an action at law for damages may include damages for future injury. Pensacola, etc., R. Co. *v.* Jackson, 21 Fla. 146.

58. *Alabama.*— Deegan *v.* Neville, 127 Ala. 471, 29 So. 173, 85 Am. St. Rep. 137.

Florida.— Carney *v.* Hadley, 32 Fla. 344, 14 So. 4, 37 Am. St. Rep. 101, 22 L. R. A. 233. See Burns *v.* Sanderson, 13 Fla. 381.

Georgia.— Hatcher *v.* Hampton, 7 Ga. 49. But see Gray Lumber Co. *v.* Gaskin, 122 Ga. 342, 50 S. E. 164.

Illinois.— Chicago Gen. R. Co. *v.* Chicago, etc., R. Co., 181 Ill. 605, 54 N. E. 1026; Ashmore Highway Com'rs *v.* Green, 156 Ill. 504, 41 N. E. 154; Chicago Public Stock Exch. *v.* McClaughry, 148 Ill. 372, 36 N. E. 88.

Missouri.— Crenshaw *v.* Cook, 65 Mo. App. 264.

United States.— Roebling *v.* Richmond First Nat. Bank, 30 Fed. 744.

See 27 Cent. Dig. tit. "Injunction," § 101.

Community of interest.— The perpetration of several similar trespasses on each of several distinct persons, thus laying the ground for each to bring a separate action against the same trespasser, does not give rise to such a multiplicity of suits as will justify the granting of an injunction; but there must be some joint or common interest of all in the same wrongful act which is about to be committed. Coulson *v.* Harris, 43 Miss. 728.

59. *Alabama.*— Lyon *v.* Hunt, 11 Ala. 295, 46 Am. Dec. 216.

California.— West *v.* Smith, 52 Cal. 322; Grigsby *v.* Burtnett, 31 Cal. 406; Bensley *v.* Mountain Lake Water Co., 13 Cal. 306, 73 Am. Dec. 575.

Colorado.— Derry *v.* Ross, 5 Colo. 295.

Georgia.— Silva *v.* Rankin, 80 Ga. 79, 4 S. E. 756; Millbank *v.* Penniman, 73 Ga. 136; Cottle *v.* Harrold, 72 Ga. 830; Walker *v.* Walker, 51 Ga. 22; Webb *v.* Harp, 38 Ga. 641.

Illinois.— Harms *v.* Jacobs, 158 Ill. 505, 41 N. E. 1071; Ashmore Highway Com'rs *v.* Green, 156 Ill. 504, 41 N. E. 154; Chicago Public Stock Exch. *v.* McClaughry, 148 Ill. 372, 36 N. E. 88.

Iowa.— Martin *v.* Davis, 96 Iowa 718, 65 N. W. 1001; Gibbs *v.* McFadden, 39 Iowa 371.

Kansas.— Long *v.* Kasebeer, 28 Kan. 226; Sword *v.* Allen, 25 Kan. 67.

Kentucky.— Musselman *v.* Marquis, 1 Bush 463, 89 Am. Dec. 637.

Missouri.— Lockwood *v.* Lunsford, 56 Mo. 68; James *v.* Dixon, 20 Mo. 79.

New Hampshire.— Milan Steam Mills *v.* Hickey, 59 N. H. 241.

New Jersey.— Wilson *v.* Hill, 46 N. J. Eq. 367, 19 Atl. 1097.

New York.— Mulry *v.* Norton, 100 N. Y. 424, 3 N. E. 581, 53 Am. Rep. 206.

North Carolina.— Gause *v.* Perkins, 56 N. C. 177, 69 Am. Dec. 728.

cases of repeated or continuing trespasses.[60] For instance an insolvent trespasser may be enjoined from removing a growing crop[61] or from cutting timber.[62] But insolvency of the trespasser will not of itself give chancery jurisdiction to enjoin a trespass. It is one element to be weighed but it is not of itself decisive.[63] If there are other sufficient means of preventing the commission of the threatened trespass,[64] or no such pressing injury or danger in delay as calls for an injunction,[65] none will issue. Where the main object of suit is to settle title, an injunction to restrain a trespass will not be granted merely because of the insolvency of defendant.[66]

e. Franchises and Privileges.[67] An injunction will be granted to secure a party in the enjoyment of an exclusive privilege which has been conferred by legislative or government grant, such as an exclusive franchise for a bridge,[68] ferry,[69] or toll-road or turnpike.[70] However, to entitle the complainant to an injunction, his right must be clear,[71] his privilege exclusive,[72] and he must be in

Ohio.— Mechanics', etc., Bank *v.* Debolt, 1 Ohio St. 591.

Pennsylvania.— Echert *v.* Ferst, 10 Phila. 514.

West Virginia.— Hanly *v.* Watterson, 39 W. Va. 214, 19 S. E. 536; Cox *v.* Douglass, 20 W. Va. 175.

See 27 Cent. Dig. tit. "Injunction," § 99.

60. *California.*— De Groot *v.* Peters, 124 Cal. 406, 57 Pac. 209, 71 Am. St. Rep. 91.

Georgia.— Justice *v.* Aikin, 104 Ga. 714, 30 S. E. 941; Wall *v.* Mercer, 119 Ga. 346, 46 S. E. 420.

Illinois.— Owens *v.* Crossett, 105 Ill. 354; Alden Coal Co. *v.* Challis, 103 Ill. App. 52.

Iowa.— Martin *v.* Davis, 96 Iowa 718, 65 N. W. 1001; Council Bluffs *v.* Stewart, 51 Iowa 385, 1 N. W. 628; Gibbs *v.* McFadden, 39 Iowa 371; Cowles *v.* Shaw, 2 Iowa 496.

Kentucky.— Musselman *v.* Marquis, 1 Bush 463, 89 Am. Dec. 637.

Missouri.— Graham *v.* Womack, 82 Mo. App. 618.

Montana.— Lee *v.* Watson, 15 Mont. 228, 38 Pac. 1077.

New Hampshire.— Milan Steam Mills *v.* Hickey, 59 N. H. 241. But *compare* Hodgman *v.* Richards, 45 N. H. 28.

New Jersey.— Wilson *v.* Hill, 46 N. J. Eq. 367, 19 Atl. 1097.

See 27 Cent. Dig. tit. "Injunction," §§ 99, 101.

61. Paige *v.* Akins, 112 Cal. 401, 44 Pac. 666; West *v.* Smith, 52 Cal. 322; Wall *v.* Mercer, 119 Ga. 364, 46 S. E. 420.

62. *Alabama.*— Sullivan *v.* Rabb, 86 Ala. 433, 5 So. 746.

Illinois.— Kaufman *v.* Wiener, 169 Ill. 596, 48 N. E. 479.

New Jersey.— Piper *v.* Piper, 38 N. J. Eq. 81.

North Carolina.— McKay *v.* Chapin, 120 N. C. 159, 26 S. E. 701; Dunkart *v.* Henry, 87 N. C. 228; Dunkart *v.* Rinehart, 87 N. C. 224; McCormick *v.* Nixon, 83 N. C. 113.

Pennsylvania.— Echert *v.* Ferst, 10 Phila. 514.

See 27 Cent. Dig. tit. "Injunction," § 105.

63. Watson *v.* Holmes, 5 Ky. L. Rep. 515; Hodgman *v.* Richards, 45 N. H. 28.

64. Mechanics' Foundry *v.* Ryall, 75 Cal. 601, 17 Pac. 703; Centreville, etc., Turnpike Co. *v.* Barnett, 2 Ind. 536; Stump's Appeal, 1 Walk. (Pa.) 420.

65. Murray *v.* Knapp, 62 Barb. (N. Y.) 566, 42 How. Pr. 462.

66. Morgan *v.* Palmer, 48 N. H. 336.

67. See, generally, FRANCHISES.

68. Micou *v.* Tallassee Bridge Co., 47 Ala. 652; Harrell *v.* Ellsworth, 17 Ala. 576; Columbus *v.* Rodgers, 10 Ala. 37; Enfield Toll Bridge Co. *v.* Connecticut River Co., 7 Conn. 28; Charles River Bridge *v.* Warren Bridge, 6 Pick. (Mass.) 376; Thompson *v.* New York, etc., R. Co., 3 Sandf. Ch. (N. Y.) 625.

69. See FERRIES, 19 Cyc. 502.

70. Welch *v.* Plumas County, 80 Cal. 338, 22 Pac. 254; Croton Turnpike Road *v.* Ryder, 1 Johns. Ch. (N. Y.) 611; Greenburg, etc., Turnpike Road *v.* Breidenthal, 1 Phila. (Pa.) 93.

71. Charles River Bridge *v.* Warren Bridge, 6 Pick. (Mass.) 376; Jersey City Gaslight Co. *v.* Consumers Gas Co., 40 N. J. Eq. 427, 2 Atl. 922; Chester *v.* New Chester Water Co., 5 Pa. Cas. 130, 8 Atl. 400; Kilburn *v.* Ingersoll, 67 Fed. 46; Minturn *v.* Larue, 17 Fed. Cas. No. 9,646, McAllister 370.

If the right is not doubtful, an injunction will always be granted to secure the enjoyment of a statute privilege of which the party is in the actual possession. To restrain multiplicity of suits and prevent immediate damage to a statute privilege is the exercise of a sound discretion. But to prevent future damage that by possibility may arise when plaintiff is not in the possession or enjoyment of a franchise, and perhaps never may be, a court of equity is not called upon to exercise its extraordinary powers. Enfield Toll Bridge Co. *v.* Connecticut River Co., 7 Conn. 28.

72. Collins *v.* Sherman, 31 Miss. 679; Janesville Bridge Co. *v.* Stoughton, 1 Pinn. (Wis.) 667.

Claim of exclusive franchise by one corporation will be enjoined at the suit of another to whom the legislature has also granted a franchise, when the granting of an exclusive privilege is unconstitutional. Citizens' Gaslight Co. *v.* Louisville Gas Co., 81 Ky. 263; Crescent City Gaslight Co. *v.* New Orleans Gaslight Co., 27 La. Ann. 138.

actual possession.[73] If statutes provide a legal remedy the injunction will be denied,[74] but the mere fact that the statute gives treble damages does not prevent the granting of an injunction.[75]

4. Conveyance and Disposition of Property[76] — a. Removal or Destruction of Property. Except where there is a complete remedy at law, as by execution and attachment, an injunction will lie at the instance of creditors and encumbrancers, such as mortgagees,[77] chattel mortgagees,[78] or mechanic's lienors,[79] to aid them in the enforcement of their claims by restraining the removal, disposition, or destruction of property subject to their claims or encumbrances, to their prejudice.[80]

b. Negotiation and Transfer of Instruments or Securities For Payment of Money — (i) *In General.* The negotiation or transfer of negotiable securities by a holder who has obtained them fraudulently will be enjoined.[81]

73. Gates *v.* McDaniel, 2 Stew. (Ala.) 211, 19 Am. Dec. 49; Croton Turnpike Road *v.* Ryder, 1 Johns. Ch. (N. Y.) 611.

Possession without title.— The owner of an incorporeal hereditament, although he may have no estate in the land, shows a sufficient case in equity for an injunction if his complaint avers possession and a right to possession. Welch *v.* Plumas County, 80 Cal. 338, 22 Pac. 254.

74. Salem, etc., Turnpike Co. *v.* Lyme, 18 Conn. 451.

75. Thompson *v.* New York, etc., R. Co., 3 Sandf. Ch. (N. Y.) 625.

76. **For injunction to restrain conveyance in fraud of creditors** see Fraudulent Conveyances, 20 Cyc. 828 *et seq.*

For disposition of property pending litigation see *supra*, V, B, 2, c, (v).

77. Baltimore City Brick Co. *v.* Robinson, 55 Md. 410, injunction to restrain sale of property by junior mortgagee. See, generally, Mortgages.

78. Outlaw *v.* Reddick, 11 Ga. 669 (injunction to prevent removal of mortgaged chattels from jurisdiction of the court); Dunham *v.* Isett, 15 Iowa 284 (restraining attachment against revenues of railroad pledged); Seabrook *v.* Mostowitz, 51 S. C. 433, 29 S. E. 202; Schoonover *v.* Condon, 12 Wash. 475, 41 Pac. 195 (injunction to restrain destruction of mortgaged chattels pending foreclosure proceedings). And see Chattel Mortgages, 7 Cyc. 54.

79. Barber *v.* Reynolds, 33 Cal. 497. See, generally, Mechanics' Liens.

80. Orton *v.* Madden, 75 Ga. 83; Phillips *v.* Winslow, 18 B. Mon. (Ky.) 431, 68 Am. Dec. 729; Rogers *v.* Michigan, etc., R. Co., 28 Barb. (N. Y.) 539; Gillette *v.* Murphy, 7 Okla. 91, 54 Pac. 413. See also Attachment, 4 Cyc. 830; Fraudulent Conveyances, 20 Cyc. 672 *et seq.* And see, generally, Judgments; Vendor and Purchaser.

Injunction in aid of creditor's bills see Creditors' Suits, 12 Cyc. 48.

81. *District of Columbia.*— Mason *v.* Jones, 7 D. C. 247.

Georgia.— Willcox *v.* Ryals, 110 Ga. 287, 34 S. E. 575; Zeigler *v.* Beasley, 44 Ga. 56.

Illinois.— Hodson *v.* Eugene Glass Co., 156 Ill. 397, 40 N. E. 971.

Indiana.— Burns *v.* Weesner, 134 Ind. 442, 34 N. E. 10.

Nebraska.— Reynolds *v.* Touzalin Imp. Co., 62 Nebr. 236, 87 N. W. 24.

Nevada.— Sierra Nevada Silver Min. Co. *v.* Sears, 10 Nev. 346; Sherman *v.* Clark, 4 Nev. 138, 97 Am. Dec. 516.

Ohio.— Atkins *v.* Veach, 7 Ohio Dec. (Reprint) 176, 1 Cinc. L. Bul. 234.

Pennsylvania.— Boies *v.* Scranton, 1 Lack. Leg. Rec. 261.

Tennessee.— Bridges *v.* Robinson, 2 Tenn. Ch. 720.

Virginia.— Dickerson *v.* Bankers' Loan, etc., Co., 93 Va. 498, 25 S. E. 548.

United States.— Osborn *v.* U. S. Bank, 9 Wheat. 738, 6 L. ed. 204; Hower *v.* Weiss, Malting, etc., Co., 55 Fed. 356, 5 C. C. A. 129.

England.— Thiedemann *v.* Goldschmidt, 1 De G. F. & J. 4, 1 L. T. Rep. N. S. 50, 8 Wkly. Rep. 14, 62 Eng. Ch. 4, 45 Eng. Reprint 260; Green *v.* Pledger, 3 Hare 165, 8 Jur. 801, 13 L. J. Ch. 213, 25 Eng. Ch. 165; Hood *v.* Aston, 1 Russ. 412, 25 Rev. Rep. 93, 46 Eng. Ch. 366, 38 Eng. Reprint 160; Day *v.* Longhurst, [1893] W. N. 3.

See 27 Cent. Dig. tit. "Injunction," § 95.

Reasons for rule.— The holder of negotiable securities, indorsed in the usual manner, if he has acquired them fraudulently, will be enjoined from negotiating them, because if negotiated the maker or indorser must pay them. So a transfer of stock will be restrained in favor of the person having the real property in the article. In these cases the injured party would have his remedy at law, but it is the province of a court of equity to arrest the injury and prevent the wrong. The remedy is more beneficial and complete than the law can give. Osborn *v.* U. S. Bank, 9 Wheat. (U. S.) 738, 6 L. ed. 204, per Marshall, C. J.

Statutes.—A proceeding to enjoin the negotiation of notes until the validity of their consideration can be tested at law is not a suit to enjoin the "payment of money" within the meaning of Paschal Dig. Tex. 3935. Bedwell *v.* Thompson, 25 Tex. Suppl. 247.

Transfer of a chattel mortgage obtained in consideration of a claim whose validity is doubtful will be enjoined until final action in the cause. Jones *v.* Diederich, 3 Daly (N. Y.) 177.

Mere indebtedness is not a sufficient ground

(II) *Failure of Consideration.* Complete or partial failure of consideration constitutes ground for restraining the transfer of negotiable securities to prevent their falling into the hands of a *bona fide* purchaser.[82]

(III) *Defense Available at Law.* If the complainant's defense can be presented in a suit at law, an injunction against the negotiation of the securities will not be granted.[83] This rule applies *inter alia* to defenses on past due notes,[84] to the defense that the note was altered,[85] or where the instrument is invalid on its face or its invalidity will appear upon the proofs of the party claiming under it.[86]

5. Collection or Payment of Money — a. In General.[87] Courts of chancery cannot be appealed to to take original cognizance in the mere collection of debts.[88] As a general rule equity will never interfere to restrain the collection or payment of money where there is an adequate and complete remedy at law.[89] But where the remedy at law is inadequate,[90] or when the party about to receive or collect the money is insolvent,[91] an injunction may be granted. For the purpose of preventing fraud,[92] and as ancillary relief to suits in equity,[93] the payment of money has been enjoined.

b. Collection of Notes by Fraudulent Holder. In the exercise of its jurisdic-

for restraining negotiation of a note (Sebring *v.* Lant, 9 How. Pr. (N. Y.) 346); but insolvency seems to be (Dickerson *v.* Bankers' Loan, etc., Co., 93 Va. 498, 25 S. E. 548).

82. *Illinois.*— Belohradsky *v.* Kuhn, 69 Ill. 547; Thurman *v.* Burt, 53 Ill. 129.

Iowa.— McDunn *v.* Des Moines, 34 Iowa 467.

Louisiana.— Thompson *v.* Flathers, 45 La. Ann. 120, 12 So. 245.

Maryland.— Six *v.* Chaner, 26 Md. 415.

Massachusetts.— Locke *v.* Locke, 166 Mass. 435, 44 N. E. 346.

New York.— Delafield *v.* Illinois, 2 Hill 159.

Ohio.— Brush Electric Light Co. *v.* Cincinnati, 11 Ohio Dec. (Reprint) 581, 28 Cinc. L. Bul. 29.

Vermont.— Chase *v.* Torrey, 20 Vt. 395.

Virginia.— Moomaw *v.* Fairview Cemetery Co., (1897) 27 S. E. 489.

See 27 Cent. Dig. tit. "Injunction," § 95.

83. Fowler *v.* Loomis, 37 Ill. App. 363. *Contra,* Ritterhoff *v.* Puget Sound Nat. Bank, 37 Wash. 76, 79 Pac. 601.

Loss of testimony.— Where, under a statute, testimony may be perpetuated, the mere fact that witnesses by whom the defense to the note is expected to be established may die is not sufficient ground for restraining negotiation. Erickson *v.* Oakland First Nat. Bank, 44 Nebr. 622, 62 N. W. 1078, 48 Am. St. Rep. 753, 28 L. R. A. 577.

84. Galusha *v.* Flour City Nat. Bank, 1 Hun (N. Y.) 573, 4 Thomps. & C. 68; New York Const. Co. *v.* Simon, 53 Fed. 1.

85. Erickson *v.* Oakland First Nat. Bank, 44 Nebr. 622, 62 N. W. 1078, 48 Am. St. Rep. 753, 28 L. R. A. 577.

86. Springport *v.* Franklin Sav. Bank, 75 N. Y. 397; Venice *v.* Woodruff, 62 N. Y. 462, 20 Am. Rep. 495; Marsh *v.* Brooklyn, 59 N. Y. 280; Ward *v.* Dewey, 16 N. Y. 519; Cox *v.* Swift, 2 N. Y. 118; Peirsoll *v.* Elliott, 6 Pet. (U. S.) 95, 8 L. ed. 332.

Bonds valid on face.— Where bonds, although invalid, are apparently good, one who has bought with knowledge of their fraudulent origin will be restrained from transferring them. Cass County *v.* Green, 66 Mo. 498.

87. Enjoining withdrawal of fund in court see Deposits in Court, 13 Cyc. 1040 note 62.

88. Arthur *v.* Batte, 42 Tex. 159; Lamson *v.* Mix, 14 Fed. Cas. No. 8,034.

89. Masland *v.* Kemp, 72 Ga. 182; Beatty's Appeal, 122 Pa. St. 428, 15 Atl. 861; Hamilton's Estate, 4 Pa. Dist. 231, 16 Pa. Co. Ct. 319; Machette *v.* Hodges, 1 Brewst. (Pa.) 313, 6 Phila. 296.

Assignments.— The assignor of a debt, after the assignment, sued and recovered judgment on the debt assigned. An injunction restraining collection of the judgment was refused, as the assignee's right against the debtor would not be affected by such payment. Perry *v.* Thompson, 108 Ala. 586, 18 So. 524.

A bank will not be enjoined from paying out money where it has such notice that payment would be at its peril. Pettey *v.* Dunlap Hardware Co., 99 Ga. 300, 25 S. E. 697.

90. Rawlings *v.* Bowie, 33 La. Ann. 573; Bertha Zinc, etc., Co. *v.* Clute, 7 Misc. (N. Y.) 123, 27 N. Y. Suppl. 342; McDonald *v.* Bayne, 12 N. Y. Suppl. 772; Potter *v.* Potter, 64 Vt. 298, 23 Atl. 856.

91. Lawson *v.* Virgin, 21 Ga. 356; Brownston *v.* Cropper, 1 Litt. (Ky.) 173; Zellenkoff *v.* Collins, 23 Hun (N. Y.) 156; Rogers *v.* Marshall, 38 How. Pr. (N. Y.) 43; Davis *v.* Fulton, 1 Overt. (Tenn.) 121; Dulaney *v.* Scudder, 94 Fed. 6, 36 C. C. A. 52.

92. Dunn *v.* Dunn, 8 Ala. 784; Memphis Grocery Co. *v.* Trotter, (Miss. 1890) 7 So. 550.

93. Moses *v.* Watson, 65 Ga. 196; Stewart *v.* Hubbard, 56 N. C. 186; Ashe *v.* Johnson, 55 N. C. 149.

tion to prevent the consummation of fraud, equity will enjoin the holder or indorsee from collecting notes or other negotiable securities which he has obtained or holds fraudulently.[94]

6. TRADE OR BUSINESS — a. Trade Secrets — (I) *DEFINITION.* A trade secret is a plan or process, tool, mechanism, or compound, known only to its owner and those of his employees to whom it is necessary to confide it. It is a property right which equity, in the exercise of its power to prevent a breach of trust, will protect. It differs from a patent in that as soon as the secret is discovered, either by an examination of the product or in any other honest way, the discoverer has the full right to use it.[95] A process commonly known to the trade is not a trade secret and will not be protected by injunction,[96] but the mere fact that there are secret processes of a different kind accomplishing the same result will not prevent the granting of an injunction.[97] It is immaterial whether the process is patentable.[98]

(II) *PARTIES PROTECTED* — (A) *Inventor or Discoverer of Secret.* One who invents or discovers and keeps a secret process of manufacturing, whether patentable or not, has a property therein which equity will protect against one who in violation of contract and breach of confidence undertakes to apply it to his own use or disclose it to a third person;[99] but a complainant who is not the dis-

94. *Georgia.*— Reese *v.* Reese, 89 Ga. 645, 15 S. E. 846.

Illinois.— Doolittle *v.* Cook, 75 Ill. 354.

Massachusetts.— Sears *v.* Carrier, 4 Allen 339.

Michigan.— McKinney *v.* Curtiss, 60 Mich. 611, 27 N. W. 691; Pratt *v.* Campbell, Harr. 236.

Tennessee.— Deaderick *v.* Mitchell, 6 Baxt. 35.

West Virginia.— Grobe *v.* Roup, 44 W. Va. 197, 28 S. E. 699.

England.— Glasse *v.* Marshall, 15 L. J. Ch. 25, 15 Sim. 71, 38 Eng. Ch. 71, 60 Eng. Reprint 543.

See 27 Cent. Dig. tit. "Injunction," § 97.

Equitable owner.— At the instance of a complainant equitably entitled to a note, equity will enjoin a defendant who holds only the legal title from collecting and appropriating the proceeds. Newton *v.* Newton, 46 Minn. 33, 48 N. W. 450.

95. Bell, etc., Soap Co. *v.* Petrolia Mfg. Co., 25 Misc. (N. Y.) 66, 54 N. Y. Suppl. 663; National Tube Co. *v.* Eastern Tube Co., 23 Ohio Cir. Ct. 468. But see Deming *v.* Chapman, 11 How. Pr. (N. Y.) 382, holding that an injunction will not lie.

Source of knowledge.— "By a careful reading of the various decisions upon this subject, it will be seen that some are made to depend upon a breach of an express contract between the parties, while others proceed upon the theory that, where a confidential relation exists between two or more parties engaged in a business venture, the law raises an implied contract between them that the employé will not divulge any trade secrets imparted to him or discovered by him in the course of his employment, and that a disclosure of such secrets, thus acquired, is a breach of trust and a violation of good morals, to prevent which a court of equity should intervene. It may also be observed in this connection that the word 'property' as applied to trade secrets and inventions, has its limitations; for it is undoubtedly true that when an article manufactured by some secret process, which is not the subject of a patent, is thrown upon the market, the whole world is at liberty to discover, if it can, by any fair means, what that process is, and, when discovery is thus made, to employ it in the manufacture of similar articles. In such case the manufacturer's or inventor's property in his process is gone. But the authorities all hold that, while knowledge obtained in this manner is perfectly legitimate, that which is obtained by any breach of confidence cannot be sanctioned." O. & W. Thum Co. *v.* Tloczynski, 114 Mich. 149, 156, 72 N. W. 140, 68 Am. St. Rep. 469, 38 L. R. A. 200.

96. Bell, etc., Soap Co. *v.* Petrolia Mfg. Co., 25 Misc. (N. Y.) 66, 54 N. Y. Suppl. 663; National Tube Co. *v.* Eastern Tube Co., 23 Ohio Cir. Ct. 468; Chain Belt Co. *v.* Von Spreckelsen, 117 Wis. 106, 94 N. W. 78.

97. Westervelt *v.* National Paper, etc., Co., 154 Ind. 673, 57 N. E. 552.

98. Peabody *v.* Norfolk, 98 Mass. 452, 96 Am. Dec. 664; O. & W. Thum Co. *v.* Tloczynski, 114 Mich. 149, 72 N. W. 140, 68 Am. St. Rep. 469, 38 L. R. A. 200; Hammer *v.* Barnes, 26 How. Pr. (N. Y.) 174.

99. *Georgia.*— Stewart *v.* Hook, 118 Ga. 445, 45 S. E. 369, 63 L. R. A. 255.

Indiana.— Westerfelt *v.* National Paper, etc., Co., 154 Ind. 673, 57 N. E. 552.

Massachusetts.— Peabody *v.* Norfolk, 98 Mass. 452, 96 Am. Dec. 664.

Michigan.— O. & W. Thum Co. *v.* Tloczynski, 114 Mich. 149, 72 N. W. 140, 68 Am. St. Rep. 469, 38 L. R. A. 200.

New Jersey.— Salomon *v.* Hertz, 40 N. J. Eq. 400, 2 Atl. 379.

New York.— Tabor *v.* Hoffman, 118 N. Y. 30, 23 N. E. 12, 16 Am. St. Rep. 740; G. F. Harvey Co. *v.* National Drug Co., 75 N. Y. App. Div. 103, 77 N. Y. Suppl. 674; National Gum, etc., Co. *v.* Braendly, 27 N. Y. App. Div. 219, 51 N. Y. Suppl. 93; Champ-

coverer and has acquired no right to the secret cannot maintain a suit for an injunction.[1]

(B) *Purchaser or Assignee of Secret.* A trade secret is assignable, and the purchaser or assignee of the exclusive property in the secret may have an injunction to prevent the disclosure of the secret by the assignor or third persons who have acquired a knowledge of the secret in confidence,[2] but he will not be protected against the assignor where the conditions of the assignment have not been performed.[3]

(III) *Parties Enjoined* — (A) *Employees.* Employees of one having a trade secret, who are under express contract,[4] or a contract implied from their confidential relation to their employer,[5] not to disclose the secret will be enjoined from divulging or using the same to the injury of their employer, whether before or after they have left his employ.

(B) *Parties With Knowledge of the Contract.* Where there is a contract not to disclose a trade secret between the owner of the secret and the person intrusted

lin *v.* Stoddart, 30 Hun 300; Hammer *v.* Barnes, 26 How. Pr. 174; Jarvis *v.* Peck, 10 Paige 118.

Ohio.— National Tube Co. *v.* Eastern Tube Co., 23 Ohio Cir. Ct. 468; Cincinnati Bell Foundry Co. *v.* Dodds, 10 Ohio Dec. (Reprint) 154, 19 Cinc. L. Bul. 84.

Pennsylvania.— Fralich *v.* Depar, 165 Pa. St. 24, 30 Atl. 521.

England.— Exchange Tel. Co. *v.* Central News, [1897] 2 Ch. 48, 66 L. J. Ch. 672, 76 L. T. Rep. N. S. 591, 45 Wkly. Rep. 595.

See 27 Cent. Dig. tit. "Injunction," § 110.

Publication of secret.— Owners of a trade secret will not be deprived of their remedy because they necessarily made a disclosure to the court for the purposes of a suit to protect it. Such a disclosure is no publication to the world, and although it may endanger the complainants' secret, it does not deprive them of the right to enjoin defendant from making use of it. Stone *v.* Goss, 65 N. J. Eq. 756, 55 Atl. 736, 103 Am. St. Rep. 794, 63 L. R. A. 344. See also Newbery *v.* James, 2 Meriv. 446, 35 Eng. Reprint 1011.

Suit against bailee.— Where an inventor of a machine sells it without a patent, but still retains an exclusive property in the patterns by which the machine is made, and one to whom such patterns are given to be repaired measures them, the latter may be enjoined from using patterns made from such measurements. Tabor *v.* Hoffman, 118 N. Y. 30, 23 N. E. 12, 16 Am. St. Rep. 740 [*affirming* 41 Hun 5].

1. G. F. Harvey Co. *v.* National Drug Co., 75 N. Y. App. Div. 103, 77 N. Y. Suppl. 674.

2. Vulcan Detinning Co. *v.* American Can Co., (N. J. Ch. 1904) 58 Atl. 290; Nessle *v.* Reese, 49 Barb. (N. Y.) 374; Cincinnati Bell Foundry Co. *v.* Dodds, 10 Ohio Dec. (Reprint) 154, 19 Cinc. L. Bul. 84; C. F. Simmons Medicine Co. *v.* Simmons, 81 Fed. 163.

Suit against second assignee.—One who has purchased a trade secret cannot enjoin another to whom the discoverer has subsequently sold the same secret without showing that defendant has been guilty of a breach of confidence or contract with the complainant. Stewart *v.* Hook, 118 Ga. 445, 45 S. E. 369, 63 L. R. A. 255.

3. New York Chemical Co. *v.* Halleck, 15 N. Y. Suppl. 517.

4. Westervelt *v.* National Paper, etc., Co., 154 Ind. 673, 57 N. E. 552; Stone *v.* Goss, 65 N. J. Eq. 756, 55 Atl. 736, 103 Am. St. Rep. 794, 63 L. R. A. 344; Tode *v.* Gross, 127 N. Y. 480, 28 N. E. 469, 24 Am. St. Rep. 475, 13 L. R. A. 652; National Gum, etc., Co. *v.* Braendly, 27 N. Y. App. Div. 219, 51 N. Y. Suppl. 93; Nessle *v.* Reese, 49 Barb. (N. Y.) 374; Fralich *v.* Despar, 165 Pa. St. 24, 30 Atl. 521.

5. *Michigan.*— Sanitas Nut Food Co. *v.* Cemer, 134 Mich. 370, 96 N. W. 454; O. & W. Thum Co. *v.* Tloczynski, 114 Mich. 149, 72 N. W. 140, 68 Am. St. Rep. 469, 38 L. R. A. 200.

New Jersey.— Stone *v.* Goss, 65 N. J. Eq. 756, 55 Atl. 736, 103 Am. St. Rep. 794, 63 L. R. A. 344.

New York.— G. F. Harvey Co. *v.* National Drug Co., 75 N. Y. App. Div. 103, 77 N. Y. Suppl. 674; Little *v.* Gallus, 4 N. Y. App. Div. 569, 38 N. Y. Suppl. 487, 1014; Eastman Co. *v.* Reichenbach, 20 N. Y. Suppl. 110.

Ohio.— National Tube Co. *v.* Eastern Tube Co., 23 Ohio Cir. Ct. 468; Cincinnati Bell Foundry Co. *v.* Dodds, 10 Ohio Dec. (Reprint) 154, 19 Cinc. L. Bul. 84.

Pennsylvania.— Pressed Steel Car Co. *v.* Standard Steel Car Co., 210 Pa. St. 464, 60 Atl. 4; Pressed Steel Car Co. *v.* Hansen, 34 Pittsb. Leg. J. N. S. 31.

United States.— Harrison *v.* Glucose Sugar Refining Co., 116 Fed. 304, 53 C. C. A. 484, 58 L. R. A. 915.

England.— Lamb *v.* Evans, [1892] 3 Ch. 462, 61 L. J. Ch. 681; Merryweather *v.* Moore, [1892] 2 Ch. 518, 61 L. J. Ch. 505, 66 L. T. Rep. N. S. 719, 40 Wkly. Rep. 540; Morison *v.* Moat, 9 Hare 241, 15 Jur. 787, 20 L. J. Ch. 513 [*affirmed* in 16 Jur. 321, 21 L. J. Ch. 248]; Evitt *v.* Price, 1 Sim. 483, 2 Eng. Ch. 483, 57 Eng. Reprint 659.

See 27 Cent. Dig. tit. "Injunction," § 110.

with it, equity will restrain the use of information acquired in violation of that contract by a person having notice or knowledge of it.[6]

b. Unfair Trade.[7] The fraudulent use or imitation of names, labels, wrappers, signs, or advertising devices so like those of complainant as to be calculated to deceive the incautious or the unwary into believing they are buying the goods of or dealing with another manufacturer is a fraud on the manufacturer and on the public, and will be enjoined.[8] A person will be restrained from holding himself out as a partner, where such representation may cause injury to the complainant, and such claim has no foundation in fact.[9] So persons falsely representing to the public that they are successors of a going concern will be enjoined;[10] but a vendor of a business, after he has ceased to do business for a long time, cannot enjoin another from holding himself out as his successor.[11] Nor will a vendor be enjoined from setting up a rival business, where the sale of the business and good-will was without any restrictive agreement.[12] A former employee may inform the public that he has been in such employment,[13] or may use his familiarity with the business and his knowledge of the customers to the advantage of a rival manufacturer.[14]

C. Contracts — 1. Injunction and Specific Performance Compared. Classifying contracts as either affirmative, where one agrees that something has been or will be done, or negative, where one agrees that something has not been or will not be done, the equitable remedy for breach of the first is a decree for specific performance, and for breach of the second is an injunction. An injunction against the breach of a negative contract is in effect enforcing specific performance.[15]

6. *Indiana.*— Westervelt *v.* National Paper, etc., Co., 154 Ind. 673, 57 N. E. 552.

Massachusetts.— Peabody *v.* Norfolk, 98 Mass. 452, 96 Am. Dec. 664.

New Jersey.— Stone *v.* Goss, 65 N. J. Eq. 756, 55 Atl. 736, 103 Am. St. Rep. 794, 63 L. R. A. 344.

New York.— Tabor *v.* Hoffman, 41 Hun 5 [*affirmed* in 118 N. Y. 30, 23 N. E. 12, 16 Am. St. Rep. 740].

England.— Exchange Tel. Co. *v.* Central News, [1897] 2 Ch. 48, 66 L. J. Ch. 672, 76 L. T. Rep. N. S. 591, 45 Wkly. Rep. 595.

See 27 Cent. Dig. tit. "Injunction," § 110.

7. Injunction against use of corporate name see Corporations, 10 Cyc. 153.

8. *Mississippi.*— Warren Mills *v.* New Orleans Seed Co., 65 Miss. 391, 4 So. 298, 7 Am. St. Rep. 671.

New York.— Devlin *v.* Devlin, 69 N. Y. 212, 25 Am. Rep. 173; Gillott *v.* Kettle, 3 Duer 624; New York Cab Co. *v.* Mooney, 15 Abb. N. Cas. 152; Stone *v.* Carlan, 3 Code Rep. 67.

Pennsylvania.— Colton *v.* Thomas, 2 Brewst. 308, 7 Phila. 257.

United States.— Shaver *v.* Heller, etc., Co., 108 Fed. 821, 48 C. C. A. 48, 65 L. R. A. 878.

England.—Manchester Brewery Co. *v.* North Cheshire, etc., Brewery Co., [1898] 1 Ch. 539, 67 L. J. Ch. 351, 78 L. T. Rep. N. S. 537, 46 Wkly. Rep. 515 (company name); Croft *v.* Day, 7 Beav. 84, 29 Eng. Ch. 84, 49 Eng. Reprint 994 (firm-name); Knott *v.* Morgan, 2 Keen 213, 16 Eng. Ch. 213, 48 Eng. Reprint 610 (omnibus, imitation names); Cash *v.* Cash, [1902] W. N. 32.

See 27 Cent. Dig. tit. "Injunction," § 109.

Laches may prevent complainant from having a preliminary injunction in such cases. Dodd *v.* Smith, 144 Pa. St. 340, 22 Atl. 710.

9. De Groot *v.* Peters, 124 Cal. 406, 57 Pac. 209, 71 Am. St. Rep. 91; McCabe *v.* Hunt, 40 Misc. (N. Y.) 466, 82 N. Y. Suppl. 664; Walter *v.* Ashton, [1902] 2 Ch. 282, 71 L. J. Ch. 839, 87 L. T. Rep. N. S. 196, 51 Wkly. Rep. 131; Routh *v.* Webster, 10 Beav. 561, 50 Eng. Reprint 698; Bullock *v.* Chapman, 2 De G. & Sm. 211, 64 Eng. Reprint 94.

10. Massam *v.* Thorley's Cattle Food Co., 14 Ch. D. 748, 42 L. T. Rep. N. S. 851, 28 Wkly. Rep. 966; Witt *v.* Corcoran, 2 Ch. D. 69, 45 L. J. Ch. 603, 34 L. T. Rep. N. S. 550, 24 Wkly. Rep. 501; Dence *v.* Mason, 41 L. T. Rep. N. S. 573; Edgington *v.* Edgington, 11 L. T. Rep. N. S. 299; Harper *v.* Pearson, 3 L. T. Rep. N. S. 547.

11. Shonk Tin Printing Co. *v.* Shonk, 138 Ill. 34, 27 N. E. 529 [*affirming* 37 Ill. App. 20].

12. Close *v.* Flesher, 8 Misc. (N. Y.) 299, 28 N. Y. Suppl. 737.

13. Van Wyck *v.* Horowitz, 39 Hun (N. Y.) 237 (holding that use of sign "late with" his former employer cannot be enjoined); Hookham *v.* Pottage, L. R. 8 Ch. 91, 27 L. T. Rep. N. S. 595, 21 Wkly. Rep. 47; Glenny *v.* Smith, 2 Dr. & Sm. 476, 11 Jur. N. S. 964, 13 L. T. Rep. N. S. 11, 6 New Rep. 363, 13 Wkly. Rep. 1032.

14. Wm. Rogers Mfg. Co. *v.* Rogers, 58 Conn. 356, 20 Atl. 467, 18 Am. St. Rep. 278, 7 L. R. A. 779; Stein *v.* National L. Assoc., 105 Ga. 821, 32 S. E. 615, 46 L. R. A. 150. *Compare* Smith *v.* Kernan, 8 Ohio Dec. (Reprint) 32, 5 Cinc. L. Bul. 145.

15. Lumley *v.* Wagner, 1 De G. M. & G. 604, 16 Jur. 871, 21 L. J. Ch. 898, 50 Eng. Ch. 466, 42 Eng. Reprint 687.

The general principles upon which the two remedies are granted are in the main the same, and where a contract is one of a class that will be specifically enforced, equity will enjoin a breach.[16] But, on the other hand, the remedy by injunction may be obtainable even though a decree for specific performance is not. Where such a decree is proper the right to an injunction follows as a matter of course; but since the purpose of an injunction is the prevention of irreparable injury, it will be granted in many cases where performance of the entire contract could not be specifically enforced.[17] A contract will not be specifically enforced in part only, but the breach of a part of a contract will in many instances be enjoined. If the contract contains both affirmative and negative terms, breach of the latter may be enjoined, even though the former cannot be enforced by decree.[18] The difficulties inherent in enforcing an affirmative contract, such as to perform personal services or to carry on an extensive business, are not met with in preventing the breach of a contract not to do something;[19] but a court will not attempt to overcome such difficulties and enforce such an affirmative contract specifically by issuing an injunction mandatory in its nature.[20] And so too where the contract is one that will not be specifically enforced for the reason that the remedy at law is regarded as adequate, as in the case of sales of ordinary marketable chattels, the contract will not be indirectly enforced by injunction even though it contains a distinct negative term.[21]

2. AFFIRMATIVE AND NEGATIVE CONTRACTS — a. Express Negative. Where the contract is negative in form, requiring a party to refrain from doing certain things, injunction is the appropriate equitable remedy. Thus a contract not to disclose information,[22] not to remove machinery,[23] or pillars of coal[24] from a mine,

16. South Chicago City R. Co. *v.* Calumet Electric St. R. Co., 171 Ill. 391, 49 N. E. 576; Chicago Municipal Gas Light, etc., Co. *v.* Lake, 130 Ill. 42, 22 N. E. 616.

17. American Electrical Works *v.* Varley Duplex Magnet Co., 26 R. I. 295, 58 Atl. 977; Brush-Swan Electric Light Co. *v.* Brush Electric Co., 41 Fed. 163; Chicago, etc., R. Co. *v.* New York, etc., R. Co., 24 Fed. 516; De Mattos *v.* Gibson, 4 De G. & J. 276, 5 Jur. N. S. 347, 555, 28 L. J. Ch. 165, 498, 7 Wkly. Rep. 100, 152, 403, 514, 61 Eng. Ch. 218, 45 Eng. Reprint 108; Lumley *v.* Wagner, 1 De G. M. & G. 604, 16 Jur. 871, 21 L. J. Ch. 898, 50 Eng. Ch. 466, 42 Eng. Reprint 687.

18. Standard Fashion Co. *v.* Siegel-Cooper Co., 30 N. Y. App. Div. 564, 52 N. Y. Suppl. 433; Daly *v.* Smith, 49 How. Pr. (N. Y.) 150; Cort *v.* Lassard, 18 Oreg. 221, 22 Pac. 1054, 17 Am. St. Rep. 726, 6 L. R. A. 653; Chicago, etc., R. Co. *v.* New York, etc., R. Co., 24 Fed. 516; Western Union Tel. Co. *v.* Union Pac. R. Co., 3 Fed. 423, 1 McCrary 558; Singer Sewing-Mach. Co. *v.* Union Button-Hole, etc., Co., 22 Fed. Cas. No. 12,904, 1 Holmes 253; Wolverhampton, etc., & W. R. Co. *v.* London, etc., R. Co., L. R. 16 Eq. 433, 43 L. J. Ch. 131; Lumley *v.* Wagner, 1 De G. M. & G. 604, 16 Jur. 871, 21 L. J. Ch. 898, 50 Eng. Ch. 466, 42 Eng. Reprint 687; Holmes *v.* Eastern Counties R. Co., 3 Jur. N. S. 737, 3 Kay & J. 675, 5 Wkly. Rep. 870.

Separable and distinct part.— But the breach of a part of a contract will not be enjoined unless it is separable from the rest and forms a distinct part in itself. Kernot *v.* Potter, 3 De G. F. & J. 447, 64 Eng. Ch. 350, 45 Eng. Reprint 951.

19. See cases cited in preceding note.

20. Franklin Fire Proofing Co. *v.* Dallas, 29 Tex. Civ. App. 448, 68 S. W. 820.

21. St. Regis Paper Co. *v.* Santa Clara Lumber Co., 55 N. Y. App. Div. 225, 67 N. Y. Suppl. 149 [*reversing* 31 Misc. 695, 66 N. Y. Suppl. 59]; Fothergill *v.* Rowland, L. R. 17 Eq. 132, 43 L. J. Ch. 252, 29 L. T. Rep. N. S. 414, 22 Wkly. Rep. 42; Baldwin *v.* Useful Knowledge Soc., 2 Jur. 961, 9 Sim. 393, 16 Eng. Ch. 393, 59 Eng. Reprint 409.

Contract for sale of patented articles.— But a contract for the sale of chattels may be such as to make a decree for specific performance proper, as in case of a sale of patented articles not to be obtained elsewhere. Adams *v.* Messinger, 147 Mass. 185, 17 N. E. 491, 9 Am. St. Rep. 679. See too Vail *v.* Osburn, 174 Pa. St. 580, 34 Atl. 315.

Impossibility of performance.— Where it has become impossible to perform a contract, the court will not attempt to enforce it indirectly by injunction. Griffin *v.* Western Union Tel. Co., 8 Ohio Dec. (Reprint) 572, 9 Cinc. L. Bul. 22.

22. Exchange Tel. Co. *v.* Central News, [1897] 2 Ch. 48, 66 L. J. Ch. 672, 76 L. T. Rep. N. S. 591, 45 Wkly. Rep. 595. See also Kiernan *v.* Manhattan Quotation Tel. Co., 50 How. Pr. (N. Y.) 194.

23. Hamilton *v.* Dunsford, 6 Ir. Ch. 413. But see Bangor Excelsior Slate Co. *v.* Shimer, 12 Pa. Dist. 777, 16 York Leg. Rec. 207.

24. Mostyn *v.* Lancaster, 23 Ch. D. 583, 52 L. J. Ch. 848, 48 L. T. Rep. N. S. 715, 31 Wkly. Rep. 686.

or not to remove fixtures[25] or placards and advertisements[26] will be enforced by enjoining a breach. So also in the case of an agreement not to ring church bells[27] or not to manufacture and sell a patented article.[28] But the breach of a contract will not be enjoined merely because it is negative in form in case it is affirmative in substance.[29] It has been said that where the contract contains a direct negative stipulation, the breach thereof will be enjoined, even though no special damage can be proved, and even though damages at law would be an adequate remedy.[30] Generally, however, it is necessary to show affirmatively that damages are not an adequate remedy, even though the contract is negative in terms and substance.[31] Where, however, defendant has expressly agreed not to do the act in question, he will ordinarily be enjoined irrespective of the relative inconvenience to be caused to the parties. If the complainant's damage is irreparable, courts usually do not investigate whether defendant will be more greatly injured by being enjoined.[32] A negative agreement will be enforced by injunction only in those cases where the court would enforce an affirmative agreement if it had the power.[33]

b. Implied Negative — (1) *In General.* A contract affirmative in form often involves a negative in substance, and in such case the court will import the negative quality and enjoin acts in breach of the contract, in cases where an injunction is otherwise proper. The test is not in the form of the language used, but in the quality of the acts required.[34] Where one has agreed to do a thing

25. Bidder *v.* Trinidad Petroleum Co., 17 Wkly. Rep. 153.

26. Holmes *v.* Eastern Counties' R. Co., 3 Jur. N. S. 737, 3 Kay & J. 675, 5 Wkly. Rep. 870.

27. Martin *v.* Nutkin, 2 P. Wms. 266, 24 Eng. Reprint 724.

28. Kinsman *v.* Parkhurst, 18 How. (U. S.) 289.

29. Davis *v.* Foreman, [1894] 3 Ch. 654, 64 L. J. Ch. 187, 8 Reports 725, 43 Wkly. Rep. 168, where a master agreed not to require his servant to leave his employ. See also Kingston *v.* Kingston, etc., Electric R. Co., 28 Ont. 399 [*affirmed* in 25 Ont. App. 462].

30. *California.*— Brown *v.* Kling, 101 Cal. 295, 35 Pac. 995.

Illinois.—Andrews *v.* Kinsbury, 212 Ill. 97, 72 N. E. 11; Star Brewery Co. *v.* Primas, 163 Ill. 652, 45 N. E. 145 [*affirming* 59 Ill. App. 581]; Consolidated Coal Co. *v.* Schmisseur, 135 Ill. 371, 25 N. E. 795.

New York.— Walker *v.* McNulty, 19 Misc. 701, 45 N. Y. Suppl. 42.

Pennsylvania.— Emrick *v.* Grooms, 4 Pa. Dist. 511.

England.—Doherty *v.* Allman, 3 App. Cas. 709, 39 L. T. Rep. N. S. 129, 26 Wkly. Rep. 513; De Mattos *v.* Gibson, 4 De G. & J. 276, 5 Jur. N. S. 347, 555, 28 L. J. Ch. 165, 498, 7 Wkly. Rep. 100, 152, 403, 514, 61 Eng. Ch. 218, 45 Eng. Reprint 108; Lumley *v.* Wagner, 1 De G. M. & G. 604, 16 Jur. 871, 21 L. J. Ch. 898, 50 Eng. Ch. 466, 42 Eng. Reprint 687.

Cases distinguished.— It is submitted that in many of these cases the statement will be found to be a mere *obiter dictum*, while in others it is so in essence for the reason that the cases dealt with restrictive covenants as to the use of land (see *infra*, V, C, 7) or with contracts not to conduct a certain trade or business in competition with the complainant (see *infra*, V, C, 8) in which classes of contracts it is not necessary to prove substantial or irreparable injury because it is presumed to be irreparable from the very nature of the subject-matter of the contract.

31. Sternberg *v.* O'Brien, 48 N. J. Eq. 370, 22 Atl. 348; Kessler *v.* Chappelle, 73 N. Y. App. Div. 447, 77 N. Y. Suppl. 285; W. J. Johnston Co. *v.* Hunt, 66 Hun (N. Y.) 504, 21 N. Y. Suppl. 314; Carter *v.* Ferguson, 58 Hun (N. Y.) 569, 12 N. Y. Suppl. 580; Sanquirico *v.* Benedetti, 1 Barb. (N. Y.) 315; De Pol *v.* Sohlke, 7 Rob. (N. Y.) 280; Fredricks *v.* Mayer, 13 How. Pr. (N. Y.) 566; Hamblin *v.* Dinneford, 2 Edw. (N. Y.) 529; Cort *v.* Lassard, 18 Oreg. 221, 22 Pac. 1054, 17 Am. St. Rep. 726, 6 L. R. A. 653; World's Columbian Exposition *v.* U. S., 56 Fed. 654, 6 C. C. A. 58 [*reversing* 56 Fed. 630].

The conflict in the decisions as to contracts for personal service containing a negative clause has turned upon the question of whether or not the services were so unique as to make the damage irreparable in case of breach. See *infra*, V, C, 6.

32. Doherty *v.* Allman, 3 App. Cas. 709, 39 L. T. Rep. N. S. 129, 26 Wkly. Rep. 513; Wilkinson *v.* Rogers, 2 De G. J. & S. 62, 10 Jur. N. S. 162, 9 L. T. Rep. N. S. 696, 3 New Rep. 347, 12 Wkly. Rep. 284, 67 Eng. Ch. 50, 46 Eng. Reprint 298. *Compare* Ewertsen *v.* Gerstenberg, 186 Ill. 344, 57 N. E. 1051, 51 L. R. A. 310; Garrett *v.* Banstead, etc., R. Co., 4 De G. J. & S. 462, 11 Jur. N. S. 591, 12 L. T. Rep. N. S. 654, 13 Wkly. Rep. 878, 69 Eng. Ch. 355, 46 Eng. Reprint 997; Shrewsbury, etc., R. Co. *v.* Shrewsbury, etc., R. Co., 15 Jur. 548, 20 L. J. Ch. 574, 1 Sim. N. S. 410, 61 Eng. Reprint 159.

33. Rice *v.* D'Arville, 162 Mass. 559, 39 N. E. 180.

34. Beatty *v.* Coble, 142 Ind. 329, 41 N. E. 590; Dwight *v.* Hamilton, 113 Mass. 175;

in a certain manner, the negative may be imported that he will not do it otherwise;[35] as for example, in the case of a contract to cultivate in a certain manner,[36] or to construct a building according to certain plans.[37] Where one has agreed to perform services for another and to devote his time thereto some cases have held that by implication the promisor has agreed not to work for anyone else and have prevented such work by injunction;[38] but the doctrine cannot be said to be well established, and in any case the implication must be clear and its limits very definite, or an injunction will not be granted.[39]

(II) *Contracts For Exclusive Privileges.* Injunctions have been granted in many cases where the complainant had an exclusive contract right to some privilege, to prevent such privilege from being extended to and being enjoyed by others. These are nearly all cases where the negative agreement must be implied from the fact that the right is agreed in positive terms to be exclusive. Such an implied negative will be enforced by injunction when the remedy at law is not sufficient.[40] In some instances the court, where the legal remedy has been deemed adequate, has refused an injunction.[41] The remedy at law is adequate in the case

Doherty *v.* Allman, 3 App. Cas. 709, 39 L. T. Rep. N. S. 129, 26 Wkly. Rep. 513; Metropolitan Electric Supply Co. *v.* Ginder, [1901] 2 Ch. 799, 65 J. P. 519, 70 L. J. Ch. 862, 84 L. T. Rep. N. S. 818, 49 Wkly. Rep. 508; De Mattos *v.* Gibson, 4 De G. & J. 276, 5 Jur. N. S. 347, 555, 28 L. J. Ch. 165, 498, 7 Wkly. Rep. 100, 152, 403, 514, 61 Eng. Ch. 218, 45 Eng. Reprint 108; Lumley *v.* Wagner, 1 De G. M. & G. 604, 21 L. J. Ch. 898, 50 Eng. Ch. 466, 42 Eng. Reprint 687; Snider *v.* McKelvey, 27 Ont. App. 339.

The use of a ship in breach of a charter-party will be enjoined, even though the charter-party itself cannot be specifically enforced, and even though there be no express negative covenant. De Mattos *v.* Gibson, 4 De G. & J. 276, 5 Jur. N. S. 347, 555, 28 L. J. Ch. 165, 498, 7 Wkly. Rep. 100, 152, 403, 514, 61 Eng. Ch. 218, 45 Eng. Reprint 108; Sevin *v.* Deslandes, 7 Jur. N. S. 837, 30 L. J. Ch. 457, 9 Wkly. Rep. 218; Messageries Imperiales Co. *v.* Baines, 7 L. T. Rep. N. S. 763, 11 Wkly. Rep. 322; Heriot *v.* Nicholas, 12 Wkly. Rep. 844.

35. Bathurst *v.* Burden, 2 Bro. Ch. 64, 29 Eng. Reprint 37 (repair of river banks); Bernard *v.* Meara, 12 Ir. Ch. 389 (preserving timber); Edinburgh, etc., R. Co. *v.* Campbell, 9 L. T. Rep. N. S. 157, 4 Macq. H. L. 570 (construction of bridge); London *v.* Hedger, 18 Ves. Jr. 355, 34 Eng. Reprint 352 (covenant to keep buildings in repair).

36. Rogers *v.* Price, 13 Jur. 820; Pratt *v.* Brett, 2 Madd. 62, 17 Rev. Rep. 187, 56 Eng. Reprint 258; Drury *v.* Molins, 6 Ves. Jr. 328, 31 Eng. Reprint 1076.

37. Backes *v.* Curran, 69 N. Y. App. Div. 188, 74 N. Y. Suppl. 723.

38. See *infra*, V, C, 6.

39. Whitwood Chemical Co. *v.* Hardman, [1891] 2 Ch. 416, 60 L. J. Ch. 428, 64 L. T. Rep. N. S. 716, 39 Wkly. Rep. 433; Mutual Reserve Fund L. Assoc. *v.* New York L. Ins. Co., 75 L. T. Rep. N. S. 528. And see Metropolitan Electric Supply Co. *v.* Ginder, [1901] 2 Ch. 799, 65 J. P. 519, 70 L. J. Ch. 862, 84 L. T. Rep. N. S. 818, 49 Wkly. Rep. 508.

40. *Indiana.*— Baker *v.* Pottmeyer, 75 Ind. 451.

New Jersey.— Western Union Tel. Co. *v.* Rogers, 42 N. J. Eq. 311, 11 Atl. 13 (hotel telegraph privilege); Manhattan Mfg., etc., Co. *v.* New Jersey Stock Yard, etc., Co., 23 N. J. Eq. 161.

New York.— Lowenbein *v.* Fuldner, 2 Misc. 176, 21 N. Y. Suppl. 615 (unique article of furniture); Banker, etc., Co. *v.* Stimson, 16 N. Y. Suppl. 60; Kiernan *v.* Manhattan Quotation Tel. Co., 50 How. Pr. 194.

Ohio.— Lacy *v.* Heuck, 9 Ohio Dec. [Reprint] 347, 12 Cinc. L. Bul. 209, use of theater.

Pennsylvania.— Bald Eagle Valley R. Co. *v.* Nittany Valley R. Co., 171 Pa. St. 284, 33 Atl. 239, 50 Am. St. Rep. 807, 29 L. R. A. 423, contract by a furnace company to give all its traffic to plaintiff.

United States.— Alpers *v.* San Francisco, 32 Fed. 503, 12 Sawy. 631 (exclusive right to remove dead animals); Singer Sewing-Mach. Co. *v.* Union Button, etc., Co., 22 Fed. Cas. No. 12,904, 1 Holmes 253.

England.— Catt *v.* Tourle, L. R. 4 Ch. 654, 38 L. J. Ch. 665, 21 L. T. Rep. N. S. 188, 17 Wkly. Rep. 939 (exclusive right to furnish ale); Metropolitan Electric Supply Co. *v.* Ginder, [1901] 2 Ch. 799, 65 J. P. 519, 70 L. J. Ch. 862, 84 L. T. Rep. N. S. 818, 49 Wkly. Rep. 508 (exclusive right to furnish electric energy); Altman *v.* Royal Aquarium Soc., 3 Ch. D. 228.

Compare Nelty *v.* Jacobs, 171 Ill. 624, 49 N. E. 723, 40 L. R. A. 98.

See 27 Cent. Dig. tit. "Injunction," § 116.

Where complainant has the "first refusal" of something defendant will be enjoined from disposing of the thing to another without giving complainant a chance to make an offer. Manchester Ship Canal Co. *v.* Manchester Racecourse Co., [1901] 2 Ch. 37, 70 L. J. Ch. 468, 84 L. T. Rep. N. S. 436, 49 Wkly. Rep. 418. See also Baker *v.* Pottmeyer, 75 Ind. 451.

41. *District of Columbia.*— Dewey Hotel Co. *v.* U. S. Electric Lighting Co., 17 App. Cas. 356.

of contracts to sell chattel articles exclusively to the complainant, where such articles are to be obtained in the market.[42]

3. Breaches of Contract in General — a. Propriety of Injunction Generally. In general the granting of an injunction to restrain a breach of contract rests largely in the sound discretion of the court,[43] and relief will be refused when the injured party may obtain adequate redress at law in case the breach should be committed.[44] However, the general principle applied by all courts is that where the breach of a contract consists in the doing of acts that a court of equity can prevent by injunction, and when it further appears that damages at law are not an adequate remedy, because the damage cannot be computed or is otherwise irreparable, such acts will be enjoined.[45] Whether or not the damage

Indiana.— New Albany Gas Light, etc., Co. *v.* New Albany, 139 Ind. 660, 39 N. E. 462.

Kentucky.—Newport *v.* Newport Light Co., 21 S. W. 645, 14 Ky. L. Rep. 845.

Massachusetts.— Kempton *v.* Bray, 99 Mass. 350, agreement that plaintiff should be sole agent.

New York.— Samuel Cupples Envelope Co. *v.* Lackner, 99 N. Y. App. Div. 231, 90 N. Y. Suppl. 954, right to be sole agent.

Ohio.— Steinau *v.* Cincinnati Gas-Light, etc., Co., 48 Ohio St. 324, 27 N. E. 545.

See 27 Cent. Dig. tit. "Injunction," § 116.

Where the remedy would not be mutual, an injunction has been refused. Iron Age Pub. Co. *v.* Western Union Tel. Co., 83 Ala. 498, 3 So. 449, 3 Am. St. Rep. 758.

Telegraph agreement.— An agreement by a railroad company with a telegraph company not to allow any other to put a telegraph line along its rigbt of way does not grant an exclusive privilege that will be enforced by injunction. Pacific Postal Tel. Cable Co. *v.* Western Union Tel. Co., 50 Fed. 493.

42. St. Regis Paper Co. *v.* Santa Clara Lumber Co., 55 N. Y. App. Div. 225, 67 N. Y. Suppl. 149 (contract to sell wood pulp exclusively to complainant); Fothergill *v.* Rowland, L. R. 17 Eq. 132, 43 L. J. Ch. 252, 29 L. T. Rep. N. S. 414, 22 Wkly. Rep. 42 (contract to sell coal from a mine exclusively to complainant).

43. Chicago Municipal Gas Light, etc., Co. *v.* Lake, 130 Ill. 42, 22 N. E. 616; Low *v.* Innes, 4 De G. J. & S. 286, 10 Jur. N. S. 1037, 11 L. T. Rep. N. S. 217, 69 Eng. Ch. 222, 46 Eng. Reprint 929.

44. *California.*— Long Beach School Dist. *v.* Lutge, 129 Cal. 409, 62 Pac. 36.

Georgia.— Nicholson *v.* Cook, 76 Ga. 24.

Michigan.— Atty.-Gen. *v.* Detroit Bd. of Education, 133 Mich. 681, 95 N. W. 746.

New Jersey.— Sperry, etc., Co. *v.* Vine, 66 N. J. Eq. 339, 57 Atl. 1036.

Ohio.— Sipe *v.* Bartlett, 22 Ohio Cir. Ct. 230, 12 Ohio Cir. Dec. 226.

Pennsylvania.— Mundy *v.* Brooks, 204 Pa. St. 232, 53 Atl. 1000.

Washington.— Thacker Wood, etc., Co. *v.* Mallory, 27 Wash. 670, 67 Pac. 199.

45. *Arkansas.* — McConnell *v.* Arkansas Brick, etc., Co., 70 Ark. 568, 69 S. W. 559; Cockrell *v.* Warner, 14 Ark. 345.

California.— Posten *v.* Rassette, 5 Cal. 467.

Georgia.— Allen *v.* Morgan, 61 Ga. 107, enjoined from acting contrary to an estoppel.

Illinois.— Inter-Ocean Pub. Co. *v.* Associated Press, 184 Ill. 438, 56 N. E. 822, 75 Am. St. Rep. 184, 48 L. R. A. 568; Pool *v.* Potter, 63 Ill. 533; Pindell *v.* Quinn, 7 Ill. App. 605.

Michigan.— Rolfe *v.* Burnham, 110 Mich. 660, 68 N. W. 980; Smith *v.* Smith, 46 Mich. 301, 9 N. W. 425; Coldwater *v.* Tucker, 36 Mich. 474, 24 Am. St. Rep. 601.

Missouri.— Jones *v.* Williams, 139 Mo. 1, 39 S. W. 486, 40 S. W. 353, 61 Am. St. Rep. 436, 37 L. R. A. 682.

New Jersey.— McGovern *v.* Loder, (Ch. 1890) 20 Atl. 209.

New York.— Langan *v.* Supreme Council A. L. of H., 174 N. Y. 266, 66 N. E. 932; Gold, etc., Tel. Co. *v.* Todd, 17 Hun 548; Hascall *v.* Madison University, 8 Barb. 174; U. S. Trust Co. *v.* O'Brien, 61 N. Y. Super. Ct. 1, 18 N. Y. Suppl. 798; World Mut. L. Ins. Co. *v.* Bund Hand in Hand, 47 How. Pr. 32; Briggs *v.* Law, 4 Johns. Ch. 22.

Pennsylvania.— Bate *v.* Keystone Surgical Supply Mfg. Co., 3 Lack. Jur. 391; Marsh *v.* Railroad Co., 18 York Leg. Rec. 116.

Tennessee.— Western Union Tel. Co. *v.* Western, etc., R. Co., 8 Baxt. 54.

United States.— Rutland Marble Co. *v.* Ripley, 10 Wall. 339, 19 L. ed. 955; Lowenfeld *v.* Curtis, 72 Fed. 105.

Canada.— Ontario Salt Co. *v.* Merchants Salt Co., 18 Grant Ch. (U. C.) 551.

See 27 Cent. Dig. tit. "Injunction," § 114.

Provision in contract for arbitration.— A provision in a contract that any differences arising thereunder shall be settled by arbitrators does not estop a party thereto from seeking an injunction to restrain a violation thereof. Richardson *v.* Emmert, 44 Kan. 262, 24 Pac. 478.

A breach of the spirit and intent of a contract will be enjoined even though not a breach of its express terms. Lukens *v.* Kelley, 2 Phila. (Pa.) 380.

The cutting off of telephone communication in a breach of contract has been enjoined. Keith *v.* National Tel. Co., [1894] 2 Ch. 147, 58 J. P. 573, 63 L. J. Ch. 373, 70 L. T. Rep. N. S. 276, 8 Reports 776, 42 Wkly. Rep. 380.

Where a contract is of doubtful propriety or is void as against public policy, it will not be enforced by enjoining a breach. South Chicago City R. Co. *v.* Calumet Electric St.

actually is irreparable is a matter to be determined by the circumstances of each particular case.[46] The injury is considered irreparable in many cases where the parties have entered into contracts for the assignment or use of patented articles or patent rights,[47] or for the use or construction of a railroad or its right of way,[48] or for the sale of chattels not to be obtained elsewhere.[49]

b. Adequate Remedy at Law. Since the jurisdiction of equity to enjoin a breach of contract depends upon the inadequacy of the remedy at law, no injunction will be granted when the damages can be exactly ascertained, and no irreparable injury will be inflicted, and there is nothing that will give rise to a multiplicity of actions.[50] The complainant must make an affirmative showing that the

R. Co., 171 Ill. 391, 49 N. E. 576; Olin *v.* Bate, 98 Ill. 53, 38 Am. Rep. 78; Jerome *v.* Bigelow, 66 Ill. 452, 16 Am. Rep. 597; Berks County *v.* Reading City Pass. R. Co., 167 Pa. St. 102, 31 Atl. 474, 663; Ehrman *v.* Bartholomew, [1898] 1 Ch. 671, 67 L. J. Ch. 319, 78 L. T. Rep. N. S. 646, 46 Wkly. Rep. 509.

Where a minute supervision would be required to enforce the contract, an injunction for that purpose will not be granted. Kingston *v.* Kingston, etc., Electric R. Co., 25 Ont. App. 462 [*affirming* 28 Ont. 399]; Eickford *v.* Chatham, 16 Can. Sup. Ct. 235.

46. See cases cited in the preceding note.

47. *District of Columbia.*— Sanche *v.* The Electrolibration Co., 4 App. Cas. 453.

Massachusetts.— Adams *v.* Messinger, 147 Mass. 185, 17 S. E. 491, 9 Am. St. Rep. 679.

Ohio.— Gordon *v.* Deckeback, 9 Ohio Dec. (Reprint) 324, 12 Cinc. L. Bul. 169.

Pennsylvania.— Reese's Appeal, 122 Pa. St. 392, 15 Atl. 807.

United States.— Kinsman *v.* Parkhurst, 18 How. 289, 15 L. ed. 385.

See 27 Cent. Dig. tit. "Injunction," § 113.

The removal of patented machinery by defendant in breach of his contract was enjoined in a case where such removal would have shut down plaintiff's business, prevented him from performing other contracts, and hurt his business reputation. American Electrical Works *v.* Varley Duplex Magnet Co., 26 R. I. 295, 58 Atl. 977.

48. *New York.*— Niagara Falls International Bridge Co. *v.* Great Western R. Co., 39 Barb. 212.

Ohio.— Western Union Tel. Co. *v.* Atlantic, etc., Tel. Co., 5 Ohio Dec. (Reprint) 407, 5 Am. L. Rec. 429.

Pennsylvania.— Unangst's Appeal, 55 Pa. St. 128; Martin *v.* Second, etc., St. Pass. R. Co., 3 Phila. 316.

Virginia.— Southern R. Co. *v.* Franklin, etc., R. Co., 96 Va. 693, 32 S. E. 465, 44 L. R. A. 297.

United States.— Johnson *v.* St. Louis, etc., R. Co., 141 U. S. 602, 12 S. Ct. 124, 35 L. ed. 875; St. Louis, etc., R. Co. *v.* Indianapolis, etc., R. Co., 21 Fed. Cas. Nos. 12,236, 12,237, 9 Biss. 99, 144.

See 27 Cent. Dig. tit. "Injunction," § 111 *et seq.*

Freight contract.— A railroad that has contracted to forward its freight over a certain line will be enjoined from sending it over another. Chicago, etc., R. Co. *v.* New York, etc., R. Co., 24 Fed. 516; Wolverhampton, etc., R. Co. *v.* London, etc., R. Co., L. R. 16 Eq. 433, 43 L. J. Ch. 131.

49. Adams *v.* Messinger, 147 Mass. 185, 17 Atl. 491, 9 Am. St. Rep. 679; Vail *v.* Osburn, 174 Pa. St. 580, 34 Atl. 315.

50. *Alabama.*— Winter *v.* Montgomery, 93 Ala. 539, 9 So. 366; Davis *v.* Sowell, 77 Ala. 262; Powell *v.* Central Plank-Road Co., 24 Ala. 441.

Connecticut.— Dills *v.* Doehler, 62 Conn. 366, 26 Atl. 398, 36 Am. St. Rep. 345, 20 L. R. A. 432.

Illinois.— Goodell *v.* Lassen, 69 Ill. 145; Thomas *v.* Cook County, 56 Ill. 351; Thompson *v.* Weeks, 32 Ill. App. 642.

Kentucky.—Newport *v.* Newport Light Co., 21 S. W. 645, 14 Ky. L. Rep. 845.

Louisiana.— Seiler *v.* Fairex, 23 La. Ann. 397.

Massachusetts.— Brown *v.* Niles, 165 Mass. 276, 43 N. E. 90; Medford, etc., R. Co. *v.* Somerville, 111 Mass. 232, holding that where one has contracted to do that which is necessary to prevent the forfeiture of a franchise, he will not be compelled to do it by mandatory injunction, for the other party can do the thing himself and sue for damages.

New Jersey.— Sternberg *v.* O'Brien, 48 N. J. Eq. 370, 22 Atl. 348.

New York.— Bronk *v.* Riley, 50 Hun 489, 3 N. Y. Suppl. 446; Agate *v.* Lowenbein, 4 Daly 62; Close *v.* Flesher, 8 Misc. 299, 28 N. Y. Suppl. 737.

Ohio.— Coe *v.* Columbus, etc., R. Co., 10 Ohio St. 372, 75 Am. Dec. 518.

Oregon.— Harlow *v.* Oregonian Pub. Co., 45 Oreg. 520, 78 Pac. 737.

Pennsylvania.— Saltsburg Gas Co. *v.* Saltsburg, 138 Pa. St. 250, 20 Atl. 844, 10 L. R. A. 193; Brown's Appeal, 62 Pa. St. 17; Pusey *v.* Wright, 31 Pa. St. 387; Western Union Tel. Co. *v.* Philadelphia, etc., R. Co., 9 Phila. 494.

Wisconsin.— Converse *v.* Ketchum, 18 Wis. 202.

United States.— World's Columbian Exposition *v.* U. S., 56 Fed. 654, 6 C. C. A. 58 [*reversing* 56 Fed. 630]; James T. Hair Co. *v.* Huckins, 56 Fed. 366, 5 C. C. A. 522; Burdon Cent. Sugar-Refining Co. *v.* Leverich, 37 Fed. 67; Chicago, etc., R. Co. *v.* New York, etc., R. Co., 24 Fed. 516.

England.— Doherty *v.* Allman, 3 App. Cas. 709, 39 L. T. Rep. N. S. 129, 26 Wkly. Rep. 513; Fothergill *v.* Rowland, L. R. 17 Eq. 132, 43 L. J. Ch. 252, 29 L. T. Rep. N. S. 414, 22 Wkly. Rep. 42; Pickering *v.* Ely,

remedy at law is not adequate, except in cases where the very nature of the subject-matter has led courts to presume that damages would not compensate, as in the case of contracts affecting the use and enjoyment of real property and contracts not to open up a competing business.[51]

e. Contracts For Water-Rights. Since the law can usually afford no adequate remedy in case of a breach of contracts for a supply of water for domestic, manufacturing, or other purposes, the shutting off of the supply will be enjoined.[52] So also the user will be enjoined from taking more than he is entitled to when he cannot otherwise be prevented and the excess cannot be measured.[53] Injunction is also the proper remedy to prevent acts in breach of contract destructive of or injurious to water or steam power.[54]

d. Contracts For Supply of Gas. The shutting off of gas by one under contract to supply it will be enjoined, since the remedy at law is not adequate.[55]

e. Corporate Franchises. Where a franchise amounts to a contract between a corporation and a municipality, the latter will be enjoined from interfering with the enjoyment of the franchise and contract rights.[56]

f. Mutuality — (i) *Of Remedy.* The general rule is that an injunction will not be granted to restrain a breach of contract by defendant when the complainant's promises are of such a nature that they could not be specifically enforced, unless they have already been performed.[57] There is no doubt that this principle

7 Jur. 479, 12 L. J. Ch. 271, 2 Y. & Coll. 249, 21 Eng. Ch. 249, 63 Eng. Reprint 109.

Canada.— Cass *v.* Couture, 14 Manitoba 458.

See 27 Cent. Dig. tit. "Injunction," § 114.

The fact that a party to a contract is insolvent so that a judgment against him for damages could not be collected is not ground for an injunction to restrain him from breaking the contract. Dills *v.* Doebler, 62 Conn. 366, 26 Atl. 398, 36 Am. St. Rep. 345, 20 L. R. A. 432.

Where a statutory remedy is provided an injunction will be denied. Gallagher *v.* Fayette County R. Co., 38 Pa. St. 102.

Horse-racing.—An injunction may be granted to enjoin a racing association from violating its agreement by not permitting a horse to compete at a race for which it has been entered, on the ground that, if the horse should be excluded, plaintiff would be remediless, as it would be impossible for him to prove that the horse would have won. Corrigan *v.* Coney Island Jockey Club, 15 N. Y. Suppl. 705, 27 Abb. N. Cas. 294.

51. See *infra*, V, C, 7, 8.

52. *Indiana.*— Brauns *v.* Glesige, 130 Ind. 167, 29 N. E. 1061.

Kentucky.— Brown *v.* Frankfort, 9 S. W. 384, 702, 10 Ky. L. Rep. 462.

Louisiana.—Callery *v.* New Orleans Waterworks Co., 35 La. Ann. 798.

Massachusetts.— Wright *v.* Newton, 130 Mass. 552.

Missouri.— Sedalia Brewing Co. *v.* Sedalia Waterworks Co., 34 Mo. App. 49.

Montana.— Horsky *v.* Helena Consol. Water Co., 13 Mont. 229, 33 Pac. 689.

New York.— Cooley *v.* Cummings, 1 N. Y. Suppl. 631.

See 27 Cent. Dig. tit. "Injunction," § 115.

53. Salem Mills Co. *v.* Lord, 42 Oreg. 82, 69 Pac. 1033, 70 Pac. 832; Lawson *v.* Menasha Wooden-Ware Co., 59 Wis. 393, 18 N. W. 440, 48 Am. St. Rep. 528.

54. Hendricks *v.* Hughes, 117 Ala. 591, 23 So. 637; B. Roth Tool Co. *v.* Champ Spring Co., 93 Mo. App. 530, 67 S. W. 967; Traitel Marble Co. *v.* Chase, 35 Misc. (N. Y.) 233, 71 N. Y. Suppl. 628; Tipping *v.* Eckersley, 2 Kay & J. 264.

55. Gallagher *v.* Equitable Gas Light Co., 141 Cal. 699, 75 Pac. 329; Xenia Real-Estate Co. *v.* Macy, 147 Ind. 568, 47 N. E. 147; Simpson *v.* Pittsburgh Plate Glass Co., 28 Ind. App. 343, 62 N. E. 753; Graves *v.* Key City Gas Co., 83 Iowa 714, 50 N. W. 283; Sewickly Borough School Dist. *v.* Ohio Valley Gas Co., 154 Pa. St. 539, 25 Atl. 868; Corbet *v.* Oil City Fuel Supply Co., 5 Pa. Super. Ct. 19; Hagan *v.* Fayette Gas-Fuel Co., 21 Pa. Co. Ct. 503.

56. See *infra*, V, D, 2.

57. *Alabama.*— Iron Age Pub. Co. *v.* Western Union Tel. Co., 83 Ala. 498, 3 So. 449, 3 Am. St. Rep. 758.

California.— Cooper *v.* Pena, 21 Cal. 403.

Illinois.— Welty *v.* Jacobs, 171 Ill. 624, 49 N. E. 723, 40 L. R. A. 98; Lancaster *v.* Roberts, 144 Ill. 213, 33 N. E. 27; Chicago Municipal Gas Light, etc., Co. *v.* Lake, 130 Ill. 42, 22 N. E. 616; Suburban Constr. Co. *v.* Naugle, 70 Ill. App. 384.

Ohio.— Hill *v.* Anderson, 9 Ohio S. & C. Pl. Dec. 480, 6 Ohio N. P. 111.

England.— Pickering *v.* Ely, 7 Jur. 479, 12 L. J. Ch. 271, 2 Y. & Coll. 249, 21 Eng. Ch. 249, 63 Eng. Reprint 109; Peto *v.* Brighton, etc., R. Co., 1 Hem. & M. 468, 32 L. J. Ch. 677, 11 Wkly. Rep. 874, where the court refused to enjoin a transfer of stock by defendant, which stock was by contract to go to plaintiff upon his constructing a certain number of miles of railway.

Rule restated.—It is a general principle that when, from personal incapacity, the nature of the contract, or any other cause,

is applied where plaintiff is asking a decree for specific performance against defendant, but there is doubt as to how far it should be applied when plaintiff asks only the negative remedy of the court and not its positive remedy.[58]

(II) *Of Benefit*—(A) *Inequitable Contracts.* If a contract is palpably unfair and inequitable and the complainant is attempting to enforce an unconscionable bargain he is not entitled to the equitable remedy of injunction.[59]

(B) *Adequacy of Consideration.* On the other hand a court of equity will not undertake to determine, any more than a court of law would, whether the complainant gave an adequate consideration for the right he claims. The consideration must be valuable, otherwise there is no contract either in equity or at law, but its adequacy is for the parties to determine and an injunction issues without investigating whether defendant used poor judgment.[60] However, if the inadequacy is evident and so great as to shock the chancellor's conscience and lead to a conclusion of fraud or mistake, an injunction will be refused.[61]

g. Incapacitating Oneself, or Preventing Others, From Performing. A party to a contract will be enjoined from doing acts that will prevent himself from performing his contract,[62] and from doing acts that will prevent the complainant from performing his part of the contract,[63] where irreparable injury will result.

a contract is incapable of being enforced against one party, that party is equally incapable of enforcing it specifically against the other, although its enforcement in the latter way might in itself be free from the difficulty attending its enforcement in the former. Rutland Marble Co. *v.* Ripley, 10 Wall. (U. S.) 339, 19 L. ed. 955.

58. Jones *v.* Williams, 139 Mo. 1, 39 S. W. 486, 40 S. W. 353, 61 Am. St. Rep. 436, 37 L. R. A. 682; Singer Sewing-Mach. Co. *v.* Union Button-Hole, etc., Co., 22 Fed. Cas. No. 12,904, Holmes 253.

A contract terminable at the option of one only of the parties is none the less enforceable by injunction. Philadelphia Ball Club *v.* Lajoie, 202 Pa. St. 210, 51 Atl. 973, 90 Am. St. Rep. 627, 58 L. R. A. 227; Singer Sewing-Mach. Co. *v.* Union Button-Hole, etc., Co., 22 Fed. Cas. No. 12,904, Holmes 253. *Compare* Metropolitan Exhibition Co. *v.* Ward, 9 N. Y. Suppl. 779; Philadelphia Ball Club *v.* Hallman, 8 Pa. Co. Ct. 57.

Identity of remedy.— The legal principle that contracts must be mutual does not mean that in every case each party must have the same remedy for a breach as the other. Philadelphia Ball Club *v.* Lajoie, 202 Pa. St. 210, 51 Atl. 973, 90 Am. St. Rep. 627, 58 L. R. A. 227; Grove *v.* Hodges, 55 Pa. St. 504.

59. Duff *v.* Russell, 60 N. Y. Super. Ct. 80, 14 N. Y. Suppl. 134; Metropolitan Exhibition Co. *v.* Ward, 9 N. Y. Suppl. 779; Fry *v.* Howes, 25 Pa. Co. Ct. 493, 17 Montg. Co. Rep. 196; Philadelphia Ball Club *v.* Hallman, 8 Pa. Co. Ct. 57; Kimberley *v.* Jennings, 5 L. J. Ch. 115, 6 Sim. 340, 9 Eng. Ch. 340, 58 Eng. Reprint 621.

60. *Alabama.*—McCurry *v.* Gibson, 108 Ala. 451, 18 So. 806, 54 Am. St. Rep. 177.

Illinois.— Ryan *v.* Hamilton, 205 Ill. 191, 68 N. E. 781; Hursen *v.* Gavin, 162 Ill. 377, 44 N. E. 735; Linn *v.* Sinsbee, 67 Ill. 75.

Indiana.— Beatty *v.* Coble, 142 Ind. 329, 41 N. E. 590; Eisel *v.* Hayes, 141 Ind. 41, 40 N. E. 119.

Maryland.— Guerand *v.* Dandelet, 32 Md. 561, 3 Am. Rep. 164.

Massachusetts.— Lee *v.* Kirby, 104 Mass. 420.

Michigan.— Up River Ice Co. *v.* Denler, 114 Mich. 296, 72 N. W. 157, 68 Am. St. Rep. 480.

Pennsylvania.— McClurg's Appeal, 58 Pa. St. 51.

England.— Gravely *v.* Barnard, L. R. 18 Eq. 518, 43 L. J. Ch. 659, 30 L. T. Rep. N. S. 863, 22 Wkly. Rep. 891; Hitchcock *v.* Coker, 6 A. & E. 438, 2 Hurl. & W. 464, 6 L. J. Exch. 266, 1 N. & P. 796, 33 E. C. L. 241; Pilkington *v.* Scott, 15 L. J. Exch. 329, 15 M. & W. 657; Coles *v.* Trecothick, 1 Smith K. B. 233, 9 Ves. Jr. 234, 7 Rev. Rep. 167, 32 Eng. Reprint 592.

See 27 Cent. Dig. tit. "Injunction," § 113.

61. Thayer *v.* Younge, 86 Ind. 259; Western R. Corp. *v.* Babcock, 6 Metc. (Mass.) 346.

62. Cockrell *v.* Warner, 14 Ark. 345; Columbus, etc., R. Co. *v.* Indianapolis, etc., R. Co., 6 Fed. Cas. No. 3,047, 5 McLean 450; De Mattos *v.* Gibson, 4 De G. & J. 276, 5 Jur. N. S. 347, 555, 28 L. J. Ch. 165, 498, 7 Wkly. Rep. 100, 152, 403, 514, 61 Eng. Ch. 218, 45 Eng. Reprint 108; Hooper *v.* Broderick, 9 L. J. Ch. 321, 11 Sim. 41, 34 Eng. Ch. 47, 59 Eng. Reprint 791.

Making other purchases.— Nevertheless it has been held that a vendor cannot enjoin a vendee from making other purchases of property on the ground that they may disable him from completing the contract between them. Syers *v.* Brighton Brewery Co., 11 L. T. Rep. N. S. 560, 13 Wkly. Rep. 220.

63. *Maryland.*— Chesapeake, etc., Tel. Co. *v.* Baltimore, 89 Md. 689, 43 Atl. 784, 44 Atl. 1033, 90 Md. 638, 45 Atl. 446.

Nebraska.— State Bank *v.* Rohren, 55 Nebr. 223, 75 N. W. 543.

Ohio.— Kinner *v.* Lake Shore, etc., R. Co., 23 Ohio Cir. Ct. 294.

Rhode Island.— American Electrical Works

Under some circumstances also injunctions have issued against persons not parties to the contract to prevent them from doing acts and making threats and inducements to prevent parties to a contract from carrying it out.[64]

h. Mandatory Injunction. The court has power to prevent irreparable injury by issuing mandatory injunctions, where property or privileges have been taken away in violation of contract.[65] For example a contract for a water-supply may be enforced by mandatory injunction,[66] and a gas consumer can force a reconnection with the gas mains.[67]

4. Parties — a. Persons Not Parties to Contract. Although the party asking an injunction must usually be a party to the contract itself,[68] yet assignees and grantees may also obtain an injunction to prevent the breach of contract, when the contract right was intended to be thus transferable and to inure to their benefit.[69]

b. Conduct of Complainant as Affecting Right — (i) *Breach by Complainant.* A party is not entitled to enjoin the breach of a contract by another unless he himself has performed what the contract required of him so far as possible. If he himself is in default or has given cause for non-performance by defendant, he has no standing in equity.[70] Where several lots have been sold subject to the

v. Varley Duplex Marget Co., 26 R. I. 295, 58 Atl. 977.

United States.— Rutland Marble Co. *v.* Ripley, 10 Wall. 339, 19 L. ed. 955; Foster *v.* Joliet, 27 Fed. 899.

64. *Georgia.*— Employing Printers' Club *v.* Doctor Blosser Co., 122 Ga. 509, 50 S. E. 353, 106 Am. St. Rep. 137, 69 L. R. A. 90.

New York.— American Law Book Co. *v.* Edward Thompson Co., 41 Misc. 396, 84 N. Y. Suppl. 225.

Ohio.— Kinner *v.* Lake Shore, etc., R. Co., 23 Ohio Cir. Ct. 294.

Pennsylvania.— Flaccus *v.* Smith, 199 Pa. St. 128, 48 Atl. 894, 85 Am. St. Rep. 779, 54 L. R. A. 640; O'Neil *v.* Behanna, 182 Pa. St. 236, 37 Atl. 843, 61 Am. St. Rep. 702, 38 L. R. A. 382; York Mfg. Co. *v.* Oberdick, 10 Pa. Dist. 463, 25 Pa. Co. Ct. 321.

United States— Chesapeake, etc., Coal Agency Co. *v.* Fire Creek Coal, etc., Co., 119 Fed. 942, strikers enjoined. *Compare* Proctor, etc., Co. *v.* Mahin, 93 Fed. 875.

65. Earle *v.* Gorham Mfg. Co., 2 N. Y. App. Div. 460, 37 N. Y. Suppl. 1037; Audenreid *v.* Philadelphia, etc., R. Co., 27 Leg. Int. (Pa.) 149.

Injunction in effect mandatory.— The lessee of a railroad will be enjoined from abandoning operation of it, and this is so even though performance of continuous services requiring the exercise of skill and judgment is involved. Southern R. Co. *v.* Franklin, etc., R. Co., 96 Va. 693, 32 S. E. 485, 44 L. R. A. 297.

66. Brauns *v.* Glesige, 130 Ind. 167, 29 N. E. 1061; Lane *v.* Newdigate, 10 Ves. Jr. 192, 7 Rev. Rep. 381, 32 Eng. Reprint 818.

67. Corbet *v.* Oil City Fuel Supply Co., 5 Pa. Super. Ct. 19.

68. Atlantic, etc., R. Co. *v.* Southern Pine Co., 116 Ga. 224, 42 S. E. 500; Woods *v.* Garson, 34 Pittsb. Leg. J. (Pa.) 318.

Person likely to be injured.— An application to enjoin an act which will impair the obligation of a contract must be made by the one likely to be injured. Cincinnati *v.* Dexter, 55 Ohio St. 93, 44 N. E. 520.

69. Salem Flouring Mills Co. *v.* Lord, 42 Oreg. 32, 69 Pac. 1033, 70 Pac. 832; Jacoby *v.* Whitmore, 48 J. P. 335, 49 L. T. Rep. N. S. 335, 32 Wkly. Rep. 18.

Lessee of assignee.— Where a newspaper was sold with stipulations against conducting a competing paper, the lessee of the purchaser's assignees was allowed an injunction. Cowan *v.* Fairbrother, 118 N. C. 406, 24 S. E. 212, 54 Am. St. Rep. 733, 32 L. R. A. 829.

A tenant may enjoin his landlord from breaking a covenant that will cause a forfeiture of the estate, even though it was not made with the tenant. Rogers *v.* Danforth, 9 N. J. Eq. 289.

Restriction as to use of premises.— When the complainant has no reserved restriction in his own deed as to the use of adjoining land, but relies upon a restriction in an earlier deed between other parties, he must show that such restriction was intended for the benefit of subsequent grantees and not merely for the grantor's alone. Beals *v.* Case, 138 Mass. 138. See also *infra*, V, C, 7.

70. *Illinois.*—Chicago Municipal Gas Light, etc., Co. *v.* Lake, 130 Ill. 42, 22 N. E. 616; Lawrence, etc., Dental Co. *v.* Gilroy, 50 Ill. App. 310. *Compare* Wallace *v.* McLaughlin, 57 Ill. 53, where non-payment was held not a sufficient reason.

Kentucky.— Reynolds *v.* Vance, 4 Bibb 213.

Pennsylvania.— Mint's Appeal, 128 Pa. St. 163, 18 Atl. 509; Loughery *v.* McIlvain, 8 Phila. 278; North Versailles Tp. *v.* Union R. Co., 33 Pittsb. L. J. N. S. 410.

United States.— Pullman's Palace-Car Co. *v.* Missouri, etc., R. Co., 55 Fed. 138; Texas, etc., R. Co. *v.* Baton Rouge, 36 Fed. 845.

England.— Telegraph Despatch Co. *v.* McLean, L. R. 8 Ch. 658; Fechter *v.* Montgomery, 33 Beav. 22, 55 Eng. Reprint 274; De Mattos *v.* Gibson, 4 De G. & J. 276, 5 Jur. N. S. 347, 555, 28 L. J. Ch. 165, 498, 7 Wkly. Rep. 100, 152, 403, 514, 61 Eng. Ch. 218, 45 Eng. Reprint 108; Peto *v.* Brighton, etc., R. Co., 1 Hem. & M. 468, 32 L. J. Ch.

same restrictive covenant intended for the benefit of all, the owner of one who has himself broken the covenant cannot obtain an injunction to prevent similar breaches by others.[71] Small and insignificant breaches by the complainant will not, however, bar his right to an injunction.[72] Of course the complainant is subject to the rule that equity will not grant relief unless he comes in with clean hands.[73]

(II) *ACQUIESCENCE.* A party may lose his right to an injunction through his own acquiescence in the breach by the other party. This acquiescence may be indicated in various ways, as by delay in making any objection and in seeking the injunction,[74] or by consenting to the breach in question, whether the consent be express or implied from acts inconsistent with an intention to enforce the terms of the contract.[75] Complainant's own acts inconsistent with the contract may amount to an acquiescence in similar acts by others,[76] and acquiescence may be shown also by allowing third persons under the same contract relations with the complainant as is defendant to break their contracts without objection from him.[77]

677, 11 Wkly. Rep. 874; Sheard *v.* Webb, 2 Wkly. Rep. 343.

See 27 Cent. Dig. tit. "Injunction," § 129.

The contract of an actress not to sing for others than the complainant will not be enforced by injunction when complainant has shown that he will be unable to pay for the services. Rice *v.* D'Arville, 162 Mass. 559, 39 N. E. 180.

If the agreements are mutually independent of each other, the rule may be otherwise. Clum *v.* Brewer, 5 Fed. Cas. No. 2,910, Brunn. Col. Cas. 635.

71. Alvord *v.* Fletcher, 28 N. Y. App. Div. 493, 51 N. Y. Suppl. 117; Acheson *v.* Stevenson, 130 Pa. St. 633, 18 Atl. 873.

72. Graves *v.* Key City Gas Co., 83 Iowa 714, 50 N. W. 283; McGuire *v.* Caskey, 62 Ohio St. 419, 57 N. E. 53; Western *v.* McDermott, L. R. 2 Ch. 72, 36 L. J. Ch. 76, 15 L. T. Rep. N. S. 64, 15 Wkly. Rep. 265; Besant *v.* Wood, 12 Ch. D. 605, 48 L. J. Ch. 497, 40 L. T. Rep. N. S. 455; Chitty *v.* Bray, 47 J. P. 695, 48 L. T. Rep. N. S. 860; Jackson *v.* Winnifrith, 47 L. T. Rep. N. S. 243.

73. Maythorne *v.* Palmer, 11 Jur. N. S. 230, 11 L. T. Rep. N. S. 261, 13 Wkly. Rep. 37; Stiff *v.* Cassell, 2 Jur. N. S. 348.

74. Whitney *v.* Union R. Co., 11 Gray (Mass.) 359, 71 Am. Dec. 715; Gaunt *v.* Fynney, L. R. 8 Ch. 8, 42 L. J. Ch. 122, 27 L. T. Rep. N. S. 569, 21 Wkly. Rep. 129; Hepworth *v.* Pickles, [1900] 1 Ch. 108, 69 L. J. Ch. 55, 81 L. T. Rep. N. S. 818, 48 Wkly. Rep. 184; Sayers *v.* Collyer, 28 Ch. D. 103, 49 J. P. 244, 54 L. J. Ch. 1, 51 L. T. Rep. N. S. 723, 33 Wkly. Rep. 91; Great Western R. Co. *v.* Oxford, etc., R. Co., 3 De G. M. & G. 341, 52 Eng. Ch. 267, 43 Eng. Reprint 133; Scarisbrick *v.* Tunbridge, 3 Eq. Rep. 240; Rogers *v.* Great Northern R. Co., 53 J. P. 484; Northumberland *v.* Bowman, 56 L. T. Rep. N. S. 773.

75. *Georgia.*— Cook *v.* North, etc., R. Co., 46 Ga. 618.

Massachusetts.— Smith *v.* Brown, 164 Mass. 584, 42 N. E. 101 (conduct amounting to an estoppel); Hubbell *v.* Warren, 8 Allen 173.

New Jersey.—Ocean City Assoc. *v.* Schurch, 57 N. J. Eq. 268, 41 Atl. 914.

Pennsylvania.— Saunders *v.* Taylor, 5 Lack. Leg. N. 153.

England.— Sayers *v.* Collyer, 28 Ch. D. 103, 49 J. P. 244, 54 L. J. Ch. 1, 51 L. T. Rep. N. S. 723, 33 Wkly. Rep. 91; Eastwood *v.* Lever, 4 De G. J. & S. 114, 28 J. P. 212, 33 L. J. Ch. 355, 9 L. T. Rep. N. S. 615, 3 New Rep. 232, 12 Wkly. Rep. 195, 69 Eng. Ch. 88, 46 Eng. Reprint 859; Johnstone *v.* Hall, 2 Jur. N. S. 780, 2 Kay & J. 414, 25 L. J. Ch. 462, 4 Wkly. Rep. 417; Child *v.* Douglas, 5 De G. M. & G. 739.

Where one has been given a right to a preference in a certain dealing, and has been made an offer which he has refused, he cannot enjoin a transaction with others on the same terms that he refused. Baker *v.* Pottmeyer, 75 Ind. 451.

Standing by and seeing a building erected without objection may amount to an acquiescence in the breach of a building restriction. Hemsley *v.* Marlborough Hotel Co., 63 N. J. Eq. 804, 52 Atl. 1132.

A grantor waives a restrictive covenant in a deed to one lot when he sells remaining lots without any restriction, so that the purpose of the restriction cannot be obtained by enforcing it alone (Duncan *v.* Central Pass. R. Co., 85 Ky. 525, 4 S. W. 228, 9 Ky. L. Rep. 92); but not when the owners of the lots free from such restriction have in fact observed it (Frink *v.* Hughes, 133 Mich. 63, 94 N. W. 601).

76. Scollard *v.* Normile, 181 Mass. 412, 63 N. E. 941; Page *v.* Murray, 46 N. J. Eq. 325, 19 Atl. 11; Landell *v.* Hamilton, 177 Pa. St. 23, 35 Atl. 242; Sayers *v.* Collyer, 28 Ch. D. 103, 49 J. P. 244, 54 L. J. Ch. 1, 51 L. T. Rep. N. S. 723, 33 Wkly. Rep. 91; Child *v.* Douglas, 5 De G. M. & G. 739, Kay 560, 2 Wkly. Rep. 701, 54 Eng. Ch. 580, 43 Eng. Reprint 1057; Bedford *v.* British Museum, 2 L. J. Ch. 129, 2 Myl. & K. 552, 7 Eng. Ch. 552, 39 Eng. Reprint 1055; Roper *v.* Williams, Turn. & R. 18, 12 Eng. Ch. 18, 37 Eng. Reprint 999; Whitehead *v.* Bennett, 9 Wkly. Rep. 626.

77. Ocean City Assoc. *v.* Schurch, 57 N. J. Eq. 268, 41 Atl. 914; Guthrie *v.* Johnson, 34 Pittsb. Leg. J. N. S. (Pa.) 245; Knight *v.* Simmonds, [1896] 2 Ch. 294, 65 L. J. Ch. 583,

But acquiescence in a mere trifling breach does not bar the right to enjoin some subsequent substantial breach.[78]

c. Persons Who May Be Enjoined. Not only are parties to the contract liable to be enjoined from breaking it, but other persons with notice may sometimes be also enjoined. For instance, where property, either movable or immovable, has been conveyed subject to certain restrictions, a subsequent transferee with notice must observe them or he may be enjoined.[79] So third persons may be enjoined from assisting a party to a contract to commit a breach thereof.[80]

d. Rights of Third Persons. Defendant will not be restrained by injunction from breaking his contract with the complainant, when such action would necessarily compel him to break a contract with an innocent third person to the injury of such third person.[81] The public interest is also to be considered, and it may be given sufficient weight to cause the injunction to be refused.[82]

74 L. T. Rep. N. S. 563, 44 Wkly. Rep. 580; Sayers *v.* Collyer, 28 Ch. D. 103, 49 J. P. 244, 54 L. J. Ch. 1, 51 L. T. Rep. N. S. 723, 33 Wkly. Rep. 91; Peek *v.* Matthews, L. R. 3 Eq. 515, 16 L. T. Rep. N. S. 991, 15 Wkly. Rep. 689; Kelsey *v.* Dodd, 52 L. J. Ch. 34.

Landlord and tenant.— Where a landlord has relaxed, in favor of some of his tenants, a covenant entered into for the benefit of all, he cannot obtain an injunction to restrain the other tenants from infringing it. Roper *v.* Williams, Turn. & R. 18, 12 Eng. Ch. 18, 37 Eng. Reprint 999.

78. Hall *v.* Solomon, 61 Conn. 476, 23 Atl. 876, 29 Am. St. Rep. 218; Payson *v.* Burnham, 141 Mass. 547, 6 N. E. 708; Western *v.* MacDermott, L. R. 2 Ch. 72, 36 L. J. Ch. 76, 15 L. T. Rep. N. S. 64, 15 Wkly. Rep. 265; Nottingham Patent Brick Co. *v.* Butler, 15 Q. B. D. 261; Knight *v.* Simmonds, [1896] 2 Ch. 294, 65 L. J. Ch. 583, 74 L. T. Rep. N. S. 563, 44 Wkly. Rep. 580; German *v.* Chapman, 7 Ch. D. 271, 47 L. J. Ch. 250, 37 L. T. Rep. N. S. 685, 26 Wkly. Rep. 149; Richards *v.* Revitt, 7 Ch. D. 224, 47 L. J. Ch. 472, 37 L. T. Rep. N. S. 632, 26 Wkly. Rep. 166.

One who has allowed one breach is not always bound to permit another. Lloyd *v.* London, etc., R. Co., 2 De G. & S. 568, 11 Jur. N. S. 380, 34 L. J. Ch. 401, 12 L. T. Rep. N. S. 363, 13 Wkly. Rep. 698, 67 Eng. Ch. 444, 46 Eng. Reprint 496.

Breach gradual and inconspicuous.— The court will grant an injunction to restrain a breach of a covenant, although the covenantee has allowed the breach to go on for a few months, if such breach has been of a gradual and not a conspicuous character. Mitchell *v.* Steward, L. R. 1 Eq. 541, 35 L. J. Ch. 393, 14 L. T. Rep. N. S. 134, 14 Wkly. Rep. 453.

79. Maher *v.* Garry, 87 Hun (N. Y.) 315, 34 N. Y. Suppl. 363 (covenantor's executors enjoined); New York Bank Note Co. *v.* Hamilton Bank Note Engraving, etc., Co., 83 Hun (N. Y.) 593, 31 N. Y. Suppl. 1060; Kinsman *v.* Parkhurst, 18 How. (U. S.) 289, 15 L. ed. 385; De Mattos *v.* Gibson, 4 De G. & J. 276, 5 Jur. N. S. 347, 555, 28 L. J. Ch. 165, 498, 7 Wkly. Rep. 100, 152, 403, 514, 61 L. J. Ch. 218, 45 Eng. Reprint 108. *Compare* Hodgson *v.* Coppard, 29 Beav. 4, 7 Jur. N. S. 11, 30 L. J. Ch. 20, 9 Wkly. Rep. 9, 54 Eng. Reprint 525; Canada Paint Co. *v.* Johnson, 4 Quebec Super. Ct. 253. See also *infra*, V, C, 7, f.

Sale of drugs by retailer.— Where a proprietary medicine was sold to a purchaser, who agreed to retail it at a certain price, but he fraudulently turned it over to a third person to be sold at a less price, such third person was enjoined. Garst *v.* Charles, 187 Mass. 144, 72 N. E. 839. See also Dr. Miles Medical Co. *v.* Goldthwaite, 133 Fed. 794.

Assignees of a waterworks are bound by a contract made by the assignor, and will be enjoined just as the assignor might be. Brown *v.* Frankfort, 9 S. W. 384, 702, 10 Ky. L. Rep. 462; Sedalia Brewing Co. *v.* Sedalia Waterworks Co., 34 Mo. App. 49.

The purchaser of a ship with notice of a charter-party will be enjoined from interfering with its performance. Messageries Imperiales Co. *v.* Baines, 7 L. T. Rep. N. S. 763, 11 Wkly. Rep. 322.

The grantee in a deed poll containing restrictions will be enjoined from violating them. Atlantic Dock Co. *v.* Leavitt, 54 N. Y. 35, 13 Am. Rep. 556.

80. Fleckenstein Bros. Co. *v.* Fleckenstein, 66 N. J. Eq. 252, 57 Atl. 1025 (holding that parties with notice may be enjoined from employing one who has contracted not to engage in the business in question); Booth *v.* Seibold, 37 Misc. (N. Y.) 101, 74 N. Y. Suppl. 776 (holding that parties with notice that one has agreed not to carry on a certain business may be enjoined from carrying on such business in conjunction with him). See also *supra*, V, C, 3, g.

Brokerage in railway tickets.— A remedy provided in a railroad ticket contract does not exclude the remedy by injunction against one not a party to such contract, as for example a ticket broker who has purchased tickets from passengers for a use contrary to the stipulations in the ticket contract. Nashville, etc., R. Co. *v.* McConnell, 82 Fed. 65.

81. Roosen *v.* Carlson, 46 N. Y. App. Div. 233, 47 N. Y. App. Div. 638, 62 N. Y. Suppl. 157; Goddard *v.* American Queen, 27 Misc. (N. Y.) 482, 59 N. Y. Suppl. 46; Foster *v.* Ballenberg, 43 Fed. 821.

82. Harley *v.* Chicago Sanitary Dist., 54 Ill. App. 337; Newport *v.* Newport Light Co.,

5. Doubtful and Disputed Rights — a. Contract Right Doubtful. An injunction against a breach of contract may be refused because its terms are indefinite and uncertain,[83] the relief being improper where it is not clear what acts are to be performed.[84] Where there is no immediately impending injury irreparable in nature, the complainant will be left to establish his right at law.[85]

b. Breach Doubtful. It is not necessary that a breach of contract should have already occurred in order to obtain an injunction, since threatened breaches will be enjoined if there is good ground for fearing their commission by defendant.[86]

21 S. W. 645, 14 Ky. L. Rep. 845; Morris, etc., R. Co. *v.* Hoboken, etc., R. Co., (N. J. Ch. 1904) 59 Atl. 332.

83. *Arkansas.*— Ft. Smith *v.* Brogan, 49 Ark. 306, 5 S. W. 337.

Georgia.— Hill *v.* Staples, 85 Ga. 863, 11 S. E. 967.

Indiana.— Gas Light, etc., Co. *v.* New Albany, 139 Ind. 660, 39 N. E. 462.

Missouri.— Chouteau *v.* Union R., etc., Co., 22 Mo. App. 286.

New Jersey.— Mandeville *v.* Harman, 42 N. J. Eq. 185, 7 Atl. 37.

Ohio.— Bryan *v.* Chyne, 10 Ohio Dec. (Reprint) 599, 22 Cinc. L. Bul. 165.

Pennsylvania.— Gatzmer *v.* St. Vincent's School Soc., 147 Pa. St. 313, 22 Atl. 452; Pfeifer *v.* Rahiser, 2 Pa. Super. Ct. 355, 38 Wkly. Notes Cas. 539; Jordan *v.* Woodhouse, 5 Luz. Leg. Reg. 141; Trenwith *v.* Dealy, 12 Phila. 386.

Wisconsin.— Hazelton *v.* Putnam, 3 Pinn. 107, 3 Chandl. 117, 54 Am. Dec. 158.

United States.— Miller *v.* Morley Finishing Mach. Co., 87 Fed. 621, 31 C. C. A. 148; Babcock, etc., Co. *v.* World's Columbian Exposition Co., 54 Fed. 214; American Preservers' Co. *v.* Norris, 43 Fed. 711.

England.— Low *v.* Innes, 4 De G. J. & S. 286, 10 Jur. N. S. 1037, 11 L. T. Rep. N. S. 217, 69 Eng. Ch. 222, 46 Eng. Reprint 929; Garrett *v.* Banstead, etc., R. Co., 4 De G. J. & S. 462, 11 Jur. N. S. 592, 12 L. T. Rep. N. S. 654, 13 Wkly. Rep. 878, 69 Eng. Ch. 355, 46 Eng. Reprint 997; Wilkinson *v.* Rogers, 2 De G. J. & S. 62, 11 Jur. N. S. 162, 9 L. T. Rep. N. S. 696, 3 New Rep. 347, 12 Wkly. Rep. 284, 67 Eng. Ch. 50, 46 Eng. Reprint 298; Sainter *v.* Ferguson, 1 Hall & T. 383, 47 Eng. Reprint 1460, 14 Jur. 255, 19 L. J. Ch. 170, 1 Macn. & G. 286, 47 Eng. Ch. 228, 41 Eng. Reprint 1275; Capes *v.* Hutton, 2 Russ. 357, 26 Rev. Rep. 102, 3 Eng. Ch. 357, 38 Eng. Reprint 370.

See 27 Cent. Dig. tit. "Injunction," § 112.

Where the legality of the right claimed is doubtful, acts interfering with it will not be enjoined. Seventh Regiment Veterans *v.* Seventh Regiment Field Officers, 5 N. Y. Suppl. 391 [*affirmed* in 14 N. Y. Suppl. 811].

Where the intention of the parties must be gathered from the surrounding circumstances, which cannot be satisfactorily determined from the affidavits, an injunction will not be granted. Consolidated Fastener Co. *v.* Traut, etc., Mfg. Co., 81 Fed. 383.

84. *Massachusetts.*— Giles *v.* Dunbar, 181 Mass. 22, 62 N. E. 985.

Michigan.— Caswell *v.* Gibbs, 33 Mich. 331.

Missouri.— Chouteau *v.* Union R., etc., Co., 22 Mo. App. 286.

New York.— Metropolitan Exhibition Co. *v.* Ward, 9 N. Y. Suppl. 779.

Pennsylvania.— Ohio Valley Gas Co.'s Appeal, 1 Mona. 97.

England.— Low *v.* Innes, 4 De G. J. & S. 286, 10 Jur. N. S. 1037, 11 L. T. Rep. N. S. 217, 69 Eng. Ch. 222, 46 Eng. Reprint 929; De Mattos *v.* Gibson, 4 De G. & J. 276, 5 Jur. N. S. 347, 555, 28 L. J. Ch. 165, 498, 7 Wkly. Rep. 100, 152, 403, 514, 61 Eng. Ch. 218, 45 Eng. Reprint 108; Paris Chocolate Co. *v.* Crystal Palace Co., 1 Jur. N. S. 720, 3 Smale & G. 119, 3 Wkly. Rep. 267, 65 Eng. Reprint 588; Kimberley *v.* Jennings, 5 L. J. Ch. 115, 6 Sim. 340, 9 Eng. Ch. 340, 58 Eng. Reprint 621.

See 27 Cent. Dig. tit. "Injunction," § 112.

Illustrations.— A contract not to build, except so as to be an ornament to adjoining property, is too uncertain. Mann *v.* Stephens, 10 Jur. 650, 15 Sim. 377, 38 Eng. Ch. 377, 60 Eng. Reprint 665. A contract by a retiring partner not to open up a competing business within any space "so far as the law allows" was held too vague. Davies *v.* Davies, 36 Ch. D. 359, 56 L. J. Ch. 962, 58 L. T. Rep. N. S. 209, 36 Wkly. Rep. 86, where the validity of the contract cannot be determined because the contract itself and the surrounding circumstances are not disclosed in the bill and affidavits. Grier *v.* Flitcraft, 57 N. J. Eq. 556, 41 Atl. 425; Richmond Mica Co. *v.* De Clyne, 90 Fed. 661.

Illustrations of contracts held sufficiently definite and certain.— Rock Island, etc., R. Co. *v.* Dimick, 144 Ill. 628, 32 N. E. 291, 19 L. R. A. 105; Xenia Real Estate Co. *v.* Macy, 147 Ind. 568, 47 N. E. 147; House *v.* Clemens, 16 Daly (N. Y.) 3, 9 N. Y. Suppl. 484.

85. W. H. Howell Co. *v.* Charles Pope Glucose Co., 171 Ill. 350, 49 N. E. 497; Livingston *v.* Tompkins, 4 Johns. Ch. (N. Y.) 415, 8 Am. Dec. 598; Brown's Appeal, 62 Pa. St. 17; Butler Tp. School Dist. *v.* Dougherty, 13 Pa. Co. Ct. 233; Brader's Estate, 2 Kulp (Pa.) 107.

86. Casey *v.* Holmes, 10 Ala. 776; Jackson *v.* Stevenson, 156 Mass. 496, 31 N. E. 691, 32 Am. St. Rep. 476; Bryan *v.* Chyne, 10 Ohio Dec. (Reprint) 599, 22 Cinc. L. Bul. 165; Lloyd *v.* London, etc., R. Co., 11 Jur. N. S. 380, 34 L. J. Ch. 401, 12 L. T. Rep. N. S. 363, 13 Wkly. Rep. 698; Tipping *v.* Eckersley, 2 Kay & J. 264; Worsley *v.* Swann, 51 L. J.

But if the threatened breach is not clearly impending, or if there is grave doubt as to whether the acts of defendant actually constitute a breach, an injunction will not issue.[87]

6. Contracts For Personal Services — a. Breach by Employer. Under ordinary circumstances an employee, whether classed as an agent or as a servant, cannot enforce a contract for service by enjoining a breach on the part of his employer. So the employer will not be enjoined from dismissing an employee or from refusing to continue to employ him, even though such action is a direct violation of contract.[88] *A fortiori* no injunction will be granted when the complainant has given cause for dismissal.[89] And if there is any doubt as to the existence of the contract right or as to the fact of a breach on the part of the employer, the case against the complainant is all the stronger.[90] So the appointment of a successor and the assumption by him of the duties of the position cannot be prevented by injunction.[91] Nor is injunction the proper remedy to prevent employers from continuing a conspiracy not to employ complainant.[92] For reasons similar to those given for refusing to enjoin the dismissal of an employee,

Ch. 576; Foster *v.* Birmingham, etc., R. Co., 2 Wkly. Rep. 378.

A notice that one intends to violate a restrictive building covenant is sufficient basis for an injunction. Lattimer *v.* Livermore, 72 N. Y. 174.

87. *Connecticut.*— Hall *v.* Solomon, 61 Conn. 476, 23 Atl. 876, 29 Am. St. Rep. 218.

District of Columbia.— Barber *v.* Strong, 1 MacArthur 575.

Indiana.— Baker *v.* Pottmeyer, 75 Ind. 451.

New York.— Arena Athletic Club *v.* McPartland, 41 N. Y. App. Div. 352, 58 N. Y. Suppl. 477; L. E. Waterman Co. *v.* Waterman, 27 N. Y. App. Div. 133, 50 N. Y. Suppl. 131; Abernethy *v.* Puritans' Church Soc., 3 Daly 1; Boyd *v.* Kerwin, 15 N. Y. Suppl. 721.

Ohio.— Cain *v.* Western Union Tel. Co., 10 Ohio Dec. (Reprint) 72, 18 Cinc. L. Bul. 267.

Pennsylvania.— Harkinson's Appeal, 78 Pa. St. 196, 21 Am. Rep. 9.

United States.— Erie R. Co. *v.* Erie, etc., Valley R. Co., 100 Fed. 808, building of railroad will not be enjoined because it may be used in violation of a contract.

See 27 Cent. Dig. tit. "Injunction," § 111 *et seq.*

An injunction stopping the performance of a play has been refused, where it is wholly uncertain whether a breach has been committed. Kerker *v.* Lederer, 30 Misc. (N. Y.) 651, 64 N. Y. Suppl. 506.

88. *Illinois.*— Thomas *v.* Cook County, 56 Ill. 351; Reid Ice Cream Co. *v.* Stephens, 62 Ill. App. 334; Kennicott *v.* Leavitt, 37 Ill. App. 435.

Iowa.— Stewart *v.* Pierce, 116 Iowa 733, 89 N. W. 234.

Louisiana.— Healy *v.* Allen, 38 La. Ann. 867.

New York.— Miller *v.* Warner, 42 N. Y. App. Div. 208, 59 N. Y. Suppl. 956; Bronk *v.* Riley, 50 Hun 489, 3 N. Y. Suppl. 446.

United States.— Boyer *v.* Western Union Tel. Co., 124 Fed. 246.

England.— Davis *v.* Foreman, [1894] 3 Ch. 654, 64 L. J. Ch. 187, 8 Reports 725, 43 Wkly. Rep. 168; Johnson *v.* Shrewsbury, etc., R. Co., 3 De G. M. & G. 914, 17 Jur. 1015, 22 L. J. Ch. 921, 52 Eng. Ch. 710, 43 Eng. Reprint 358; Brett *v.* East India, etc., Shipping Co., 2 Hem. & M. 404, 10 L. T. Rep. N. S. 187, 3 New Rep. 688, 12 Wkly. Rep. 596; Stocker *v.* Brockelhank, 15 Jur. 591. 20 L. J. Ch. 401, 3 Macn. & G. 250, 49 Eng. Ch. 189, 42 Eng. Reprint 257; Pickering *v.* Ely, 7 Jur. 479, 12 L. J. Ch. 271, 2 Y. & Coll. 249, 21 Eng. Ch. 249, 63 Eng. Reprint 109; Millican *v.* Sullivan, 4 T. L. R. 203.

See 27 Cent. Dig. tit. "Injunction," § 119.

Remedy not mutual.— One reason that has been given for refusing an injunction is that the remedy would not be mutual, since the employee could not be compelled to serve. Mair *v.* Himalaya Tea Co., L. R. 1 Eq. 411, 11 Jur. N. S. 1013, 13 L. T. Rep. N. S. 586, 14 Wkly. Rep. 165.

Employment connected with other interest. — On the other hand, if the contract is not one for personal service merely, but involves a large expenditure on the part of the complainant and the management by him of property and business in which he has an interest, he may be able to compel by injunction the continuation of the employment. Jones *v.* Williams, 139 Mo. 1, 39 S. W. 486, 40 S. W. 353, 61 Am. St. Rep. 436, 37 L. R. A. 682; Ewing *v.* Wilcox, etc., Sewing Mach. Co., 9 Wkly. Notes Cas. (Pa.) 272.

89. Coburn *v.* Cedar Valley Land, etc., Co., 25 Fed. 791.

90. Bronk *v.* Riley, 50 Hun (N. Y.) 489, 3 N. Y. Suppl. 446; Bryan *v.* Chyne, 10 Ohio Dec. (Reprint) 599, 22 Cinc. L. Bul. 165; Windrim *v.* Philadelphia, 1 Leg. Gaz. (Pa.) 311.

91. Healey *v.* Dillon, 39 La. Ann. 503, 2 So. 49; Johnson *v.* Shrewsbury, etc., R. Co., 3 De G. M. & G. 914, 17 Jur. 1015, 22 L. J. Ch. 921, 52 Eng. Ch. 710, 43 Eng. Reprint 358; Pickering *v.* Ely, 7 Jur. 479, 12 L. J. Ch. 271, 2 Y. & Coll. 249, 21 Eng. Ch. 249, 63 Eng. Reprint 109; Millican *v.* Sullivan, 4 T. L. R. 203.

92. Worthington *v.* Waring, 157 Mass. 421, 32 N. E. 744, 34 Am. St. Rep. 294, 20 L. R. A. 342.

the breach of a contract to employ only members of a certain union will not be enjoined.[93]

b. Breach by Employee — (I) *In General.* A court of equity will not attempt to enforce specifically a contract to render personal services,[94] and it was formerly held that the court would not attempt to do indirectly by injunction that which it could not do directly by a decree for specific performance.[95]

(II) *Services Requiring No Special Skill.* In the case of contracts to render services requiring no special skill or qualification, the rule still holds that a breach by the employee will not be enjoined, even though he has expressly agreed to work for no one else or to devote all his time to the service of the complainant; but the reason for this is that other employees can be found to do the work and damages at law are adequate compensation for the breach of contract.[96] Upon this general proposition the courts are substantially agreed, but variations will be found in determining whether certain positions do or do not require special qualifications.[97]

(III) *Services Requiring Special Skill* — (A) *In General.* Where one contracts to render special, unique, or extraordinary personal services requiring special merit or qualification, or where the services to be rendered are purely intellectual, or are peculiar and individual in their character, and where in case of default the same service is not to be obtained from others, although equity will not interfere to enforce specific performance of the whole contract, yet

93. Stone Cleaning, etc., Union *v.* Russell, 38 Misc. (N. Y.) 513, 77 N. Y. Suppl. 1049.

94. See SPECIFIC PERFORMANCE. *Compare* Southern California R. Co. *v.* Rutherford, 62 Fed. 796.

95. Burton *v.* Marshall, 4 Gill (Md.) 487, 45 Am. Dec. 171; De Pol *v.* Sohlke, 7 Rob. (N. Y.) 280; Rutland Marble Co. *v.* Ripley, 10 Wall. (U. S.) 339, 19 L. ed. 955; Fothergill *v.* Rowland, L. R. 17 Eq. 132, 43 L. J. Ch. 252, 29 L. T. Rep. N. S. 414, 22 Wkly. Rep. 42; Baldwin *v.* Society for Diffusion of Useful Knowledge, 2 Jur. 961, 9 Sim. 393, 16 Eng. Ch. 393, 59 Eng. Reprint 409; Kemble *v.* Kean, 6 Sim. 333, 9 Eng. Ch. 333, 58 Eng. Reprint 619.

Modern rule.— This doctrine is correct in so far as it is applied in cases where a decree for specific performance would be improper because the remedy at law is adequate; but in so far as it is applied in cases where a decree for specific performance would be refused only for the reason of the difficulties inherent in its enforcement, the attitude of the courts has in large measure changed, and if the remedy at law is inadequate an injunction may be granted, even though direct specific performance cannot be enforced.

96. *Georgia.*— Burney *v.* Ryle, 91 Ga. 701, 17 S. E. 986.

Missouri.— E. Jaccard Jewelry Co. *v.* O'Brien, 70 Mo. App. 432.

New Jersey.— Sternberg *v.* O'Brien, 48 N. J. Eq. 370, 22 Atl. 348.

New York.— Kessler *v.* Chappelle, 73 N. Y. App. Div. 447, 77 N. Y. Suppl. 285; W. J. Johnston Co. *v.* Hunt, 66 Hun 504, 21 N. Y. Suppl. 314; Strobridge Lith. Co. *v.* Crane, 12 N. Y. Suppl. 898; Carter *v.* Ferguson, 58 Hun 569, 12 N. Y. Suppl. 580; De Pol *v.* Sohlke, 7 Rob. 280.

Ohio.— Delavan *v.* Macarte, 1 Ohio Dec. (Reprint) 226, 4 West. L. J. 555; Paragon Oil Co. *v.* Familton, 5 Ohio S. & C. Pl. Dec. 219, 5 Ohio N. P. 23.

Pennsylvania.— Scott Fertilizer Co. *v.* Wagner, 19 Lanc. L. Rev. 345.

England.— Cochrane *v.* Exchange Tel. Co., 65 L. J. Ch. 334.

See 27 Cent. Dig. tit. "Injunction," § 117.

Especial value of services.— It makes no difference that because of his familiarity with the business and acquaintance with the customers the services of the employee in question are of especial value to complainant. Wm. Rogers Mfg. Co. *v.* Rogers, 58 Conn. 356, 20 Atl. 467, 18 Am. St. Rep. 278, 7 L. R. A. 779.

Bad faith.— An injunction will be refused, although the employees show bad faith in quitting, and a reckless disregard of contract rights and of public convenience. Arthur *v.* Oakes, 63 Fed. 310, 11 C. C. A. 209, 25 L. R. A. 414.

Betrayal of trust.— An employee will be enjoined when he betrays trust and confidence and attempts to take away his employer's customers. Cahill *v.* Madison, 94 Ill. App. 216.

Performance of duty during continuance of employment.— Railroad employees are properly enjoined from refusing to haul trains to which Pullman cars were attached, so long as they continued in the company's employ. Southern California R. Co. *v.* Rutherford, 62 Fed. 796.

97. See cases cited *infra*, this note.

Illustrations.— An injunction has been held properly refused to restrain a breach of contract by an insurance agent (Burney *v.* Ryle, 91 Ga. 701, 17 S. E. 986), jewelry salesman (E. Jaccard Jewelry Co. *v.* O'Brien, 70 Mo. App. 432), lithographer (Strobridge Lith. Co. *v.* Crane, 12 N. Y. Suppl. 898), advertising solicitor (W. J. Johnston Co. *v.* Hunt, 66 Hun (N. Y.) 504, 21 N. Y. Suppl. 314),

because the damage will be irreparable it will exert its preventive power and enjoin the employee from working for others or doing positive acts in violation of the contract.[98]

(B) *Negative Agreement.* Although the affirmative part of the contract cannot be specifically enforced, yet the breach of an express negative agreement may be enjoined. When the employee expressly agrees not to work for any other, the specific enforcement of such a negative is possible.[99] Where there is no express negative agreement, but the contract is such that its due performance must necessarily prevent any service for others, the weight of authority is to the effect that a negative will be implied and will be enforced by injunction;[1] and where the contract provides that the employee shall devote his whole time to the business or shall work exclusively for the employer, a negative may be implied and the employee enjoined,[2] although practically the contrary has been held in English cases requiring the implication to be very clear and definite.[3]

(C) *Theatrical Performers.* The earlier cases in both England and America held that a theatrical performer would not be enjoined from performing for a rival theater, even though he had specifically agreed not to do so.[4] But where the performer's services are to be regarded as requiring special qualification and

dancer (De Pol *v.* Sohlke, 7 Rob. (N. Y.) 280; Butler *v.* Galletti, 21 How. Pr. (N. Y.) 465), acrobat (Cort *v.* Lassard, 18 Oreg. 221, 22 Pac. 1054, 17 Am. St. Rep. 726, 6 L. R. A. 653), or an equestrian (Delavan *v.* Macarte, 1 Ohio Dec. (Reprint) 226, 4 West. L. J. 555).

98. *California.*— California Bank *v.* Fresno Canal, etc., Co., 53 Cal. 201.

Connecticut.— Rogers Mfg. Co. *v.* Rogers, 58 Conn. 356, 20 Atl. 467, 18 Am. St. Rep. 278, 7 L. R. A. 779.

New York.— Metropolitan Exhibition Co. *v.* Ward, 9 N. Y. Suppl. 779, 24 Abb. N. Cas. 393.

Oregon.— Cort *v.* Lassard, 18 Oreg. 221, 22 Pac. 1054, 17 Am. St. Rep. 726, 6 L. R. A. 653.

United States.— Western Union Tel. Co. *v.* Union Pac. R. Co., 3 Fed. 423, 1 McCrary 558; Singer Sewing-Mach. Co. *v.* Union Button-Hole, etc., Co., 22 Fed. Cas. No. 12,904, Holmes 253.

England.— Montague *v.* Flockton, L. R. 16 Eq. 189, 42 L. J. Ch. 677, 28 L. T. Rep. N. S. 580, 21 Wkly. Rep. 668; South Wales R. Co. *v.* Wythes, 5 De G. M. & G. 880, 3 Eq. Rep. 153, 24 L. J. Ch. 87, 3 Wkly. Rep. 133, 54 Eng. Ch. 690, 43 Eng. Reprint 1112; Lumley *v.* Wagner, 1 De G. M. & G. 604, 16 Jur. 871, 21 L. J. Ch. 898, 50 Eng. Ch. 466, 42 Eng. Reprint 687.

See 27 Cent. Dig. tit. "Injunction," § 118: and Pomeroy Eq. § 1343; 2 Story Eq. § 958*a*.

Impossibility of filling defendant's place.— Even in these cases the complainant must show affirmatively that defendant's place cannot be filled. Universal Talking Mach. Co. *v.* English, 34 Misc. (N. Y.) 342, 69 N. Y. Suppl. 813. But it has been held that it is not necessary that the services be such that it is impossible to replace the employee; it is enough if he has such peculiar skill and ability as to render his services of peculiar value to the employer and difficult of substitution. Philadelphia Ball Club *v.* Lajoie, 202 Pa. St. 210, 51 Atl. 973, 90 Am. St. Rep. 627, 58 L. R. A. 227.

99. See cases cited *supra*, note 98, and *infra*, this note.

An agreement by an author not to write for any one other than the complainant will be enforced by injunction. Stiff *v.* Cassell, 2 Jur. N. S. 348; Morris *v.* Colman, 18 Ves. Jr. 437, 11 Rev. Rep. 230, 34 Eng. Reprint 382.

1. Duff *v.* Russell, 60 N. Y. Super. Ct. 80, 14 N. Y. Suppl. 134 [*affirmed* in 133 N. Y. 678, 31 N. E. 622]; Daly *v.* Smith, 49 How. Pr. (N. Y.) 150; Lacy *v.* Heuck, 9 Ohio Dec. (Reprint) 347, 12 Cinc. L. Bul. 209; Cort *v.* Lassard, 18 Oreg. 221, 22 Pac. 1054, 17 Am. St. Rep. 726, 6 L. R. A. 653; Montague *v.* Flockton, L. R. 16 Eq. 189, 42 L. J. Ch. 677, 28 L. T. Rep. N. S. 580, 21 Wkly. Rep. 668 [*criticized* in Whitwood Chemical Co. *v.* Hardman, [1891] 2 Ch. 416, 60 L. J. Ch. 428, 64 L. T. Rep. N. S. 716, 39 Wkly. Rep. 433]; Jackson *v.* Astley, Cab. & E. 181. And see *infra*, V, C, 6, (III), (C). *Compare* Welty *v.* Jacobs, 171 Ill. 624, 49 N. E. 723, 40 L. R. A. 98.

2. Myers *v.* Steel Mach. Co., (N. J. Eq. 1904) 57 Atl. 1080.

3. Whitwood Chemical Co. *v.* Hardman, [1891] 2 Ch. 416, 60 L. J. Ch. 428, 64 L. T. Rep. N. S. 716, 39 Wkly. Rep. 433; Mutual Reserve Fund L. Assoc. *v.* New York L. Ins. Co., 75 L. T. Rep. N. S. 528. And see Metropolitan Electric Supply Co. *v.* Ginder, [1901] 2 Ch. 799, 65 J. P. 519, 70 L. J. Ch. 862, 84 L. T. Rep. N. S. 818, 49 Wkly. Rep. 508.

4. Burton *v.* Marshall, 4 Gill (Md.) 487, 45 Am. Dec. 171; Sanquirico *v.* Benedetti, 1 Barb. (N. Y.) 315; De Pol *v.* Sohlke, 7 Rob. (N. Y.) 280; Mapleson *v.* Del Puente, 13 Abb. N. Cas. (N. Y.) 144; Butler *v.* Galletti, 21 How. Pr. (N. Y.) 465; Fredricks *v.* Mayer, 13 How. Pr. (N. Y.) 566; Hamblin *v.* Dinneford, 2 Edw. (N. Y.) 529; Delavan *v.* Macarte, 1 Ohio Dec. (Reprint) 226, 4 West. L. J. 555 (celebrated equestrian); Kemble *v.* Kean, 6 Sim. 333, 9 Eng. Ch. 333, 58 Eng. Reprint 619.

not to be duplicated by others, so that the damage caused by the breach is irreparable, the weight of authority now is that a specific negative agreement not to perform for another will be enforced by injunction;[5] and so too where the agreement not to perform elsewhere is not express but can be implied from the impossibility of performing in two places at once.[6]

(D) *Baseball Players.* When the court regards the services of a particular player as extraordinary in character, so that a breach of contract by him will cause irreparable injury, his agreement not to play for others or to play exclusively for the complainant will be enforced by injunction.[7] When the services are not so regarded, no injunction will be granted.[8] In any case an injunction will be refused when the contract lacks mutuality and fairness or is vague and doubtful.[1]

7. Restrictive Covenants as to Use of Premises — a. General Considerations.[2] Where one has made a valid contract restricting the use to which he may put his land, a violation of such restriction by him will be restrained by injunction; such covenants are usually made at the time of a conveyance, the grantee agreeing not to use the land conveyed in certain ways, or the grantor limiting his use of other land retained by him.[3] So also where a parol license has been granted

5. *New York.*— Duff *v.* Russell, 133 N. Y. 678, 31 N. E. 622 [*affirming* 60 N. Y. Super. Ct. 80, 14 N. Y. Suppl. 134]; Daly *v.* Smith, 38 N. Y. Super. Ct. 158, 49 How. Pr. 150; Canary *v.* Russell, 9 Misc. 558, 30 N. Y. Suppl. 122; Hoyt *v.* Fuller, 19 N. Y. Suppl. 962; Pratt *v.* Montegriffo, 10 N. Y. Suppl. 903; Hayes *v.* Willio, 11 Abb. Pr. N. S. 167.

Oregon.— Cort *v.* Lassard, 18 Oreg. 221, 22 Pac. 1054, 17 Am. St. Rep. 726, 6 L. R. A. 653.

United States.— McCaull *v.* Braham, 16 Fed. 37, 21 Blatchf. 278.

England.— Grimston *v.* Cunningham, [1894] 1 Q. B. 125; Lumley *v.* Wagner, 1 De G. M. & G. 604, 16 Jur. 871, 21 L. J. Ch. 898, 50 Eng. Ch. 466, 42 Eng. Reprint 687, leading case. But see Whitwood Chemical Co. *v.* Hardman, [1891] 2 Ch. 416, 60 L. J. Ch. 428, 64 L. T. Rep. N. S. 716, 39 Wkly. Rep. 433.

Australia.— Hallman *v.* Harvey, 1 N. S. Wales 155.

See 27 Cent. Dig. tit. "Injunction," § 118.

Artistic ability must be unusual. An injunction will be refused unless the artistic abilities of defendant are extraordinary and preëminent. Carter *v.* Ferguson, 58 Hun (N. Y.) 569, 12 N. Y. Suppl. 580.

The services of a professional acrobat are not such as will cause equity to interfere by injunction to prevent his performing for another employer. Cort *v.* Lassard, 18 Oreg. 221, 22 Pac. 1054, 17 Am. St. Rep. 726, 6 L. R. A. 653.

Grounds for refusing.—An express negative agreement not to sing elsewhere will not be enforced by injunction when it appears that the complainant will not be able to pay the singer (Rice *v.* D'Arville, 162 Mass. 559); nor where the parties have stipulated the damages to be paid in order to have the privilege of performing elsewhere (Hahn *v.* Baltimore Concordia Soc., 42 Md. 460).

6. Duff *v.* Russell, 60 N. Y. Super. Ct. 80, 14 N. Y. Suppl. 134 [*affirmed* in 133 N. Y. 678, 31 N. E. 622]; Cort *v.* Lassard, 18 Oreg. 221, 22 Pac. 1054, 17 Am. St. Rep. 726, 6 L. R. A. 653; Montague *v.* Flockton, L. R. 16 Eq. 189, 42 L. J. Ch. 677, 28 L. T. Rep. N. S. 580, 21 Wkly. Rep. 668; Webster *v.* Dillon, 3 Jur. N. S. 432, 5 Wkly. Rep. 867. But see Whitwood Chemical Co. *v.* Hardman, [1891] 2 Ch. 416, 60 L. J. Ch. 428, 64 L. T. Rep. N. S. 716, 39 Wkly. Rep. 433.

7. Philadelphia Ball Club *v.* Lajoie, 202 Pa. St. 210, 51 Atl. 973, 90 Am. St. Rep. 627, 55 L. R. A. 227; American Assoc. Base-Ball Club *v.* Pickett, 8 Pa. Co. Ct. 232.

Actor and baseball player compared.— Between an actor of great histrionic ability and a professional baseball player of peculiar fitness and skill to fill a particular position, no substantial distinction in applying the rule laid down in the cases can be made. Each is sought for his particular and peculiar fitness, each performs in public for compensation, and each possesses for the manager a means of attracting an audience. Metropolitan Exhibition Co. *v.* Ward, 9 N. Y. Suppl. 779, 24 Abb. N. Cas. 393.

8. Columbus Base Ball Club *v.* Reiley, 11 Ohio Dec. (Reprint) 272, 25 Cinc. L. Bul. 385; Harrisburg Base Ball Club *v.* Athletic Assoc., 8 Pa. Co. Ct. 337.

1. Metropolitan Exhibition Co. *v.* Ward, 9 N. Y. Suppl. 779, 24 Abb. N. Cas. 393; Philadelphia Ball Club *v.* Hallman, 8 Pa. Co. Ct. 57; Metropolitan Exhibition Co. *v.* Ewing, 42 Fed. 198, 7 L. R. A. 381.

2. **Power of equity in general** see Deeds, 13 Cyc. 719.

Effect of change in surrounding conditions see Deeds, 13 Cyc. 719.

3. *New Jersey.*— Haskell *v.* Wright, 23 N. J. Eq. 389; Bechtel *v.* Carslake, 11 N. J. Eq. 500.

New York.— Phenix Ins. Co. *v.* Continental Ins. Co., 14 Abb. Pr. N. S. 266.

Pennsylvania.— Electric City Land, etc., Co. *v.* West Ridge Coal Co., 187 Pa. St. 500, 41 Atl. 458; Acheson *v.* Stevenson, 146 Pa. St. 228, 23 Atl. 331, 396; St. Andrew's Lutheran Church's Appeal, 67 Pa. St. 512; Unangst's Appeal, 55 Pa. St. 128.

to use land in a certain way, and improvements have been made on the faith of it, the licensor will be restrained by injunction from revoking the license to the irreparable injury of the licensee.[4]

b. Amount of Damage Immaterial. Where one who has entered into a restrictive covenant as to the use of land commits a distinct breach thereof, he will be enjoined irrespective of the amount of damage caused by his breach, and even if there appears to be no particular damage.[5] It is not necessary to prove that the injury will be irreparable,[6] nor is it a question of comparative benefit or injury.[7]

c. Erection of Buildings. A contract not to erect buildings on land is enforceable by injunction.[8] So is an agreement not to put up a building other

Virginia.— Brooke *v.* Barton, 6 Munf. 306; Trueheart *v.* Price, 2 Munf. 468.

England.— Holford *v.* Acton Urban Dist. Council, [1898] 2 Ch. 240, 67 L. J. Ch. 636, 78 L. T. Rep. N. S. 829.

Restriction against public policy.— A restriction will not be enforced by injunction when it is contrary to public policy. Fullington *v.* Kyle Lumber Co., 139 Ala. 242, 35 So. 852. *Compare* Morris, etc., R. Co. *v.* Hoboken, etc., R. Co., (N. J. Ch. 1904) 59 Atl. 332.

Restrictive agreement implied.— The contract may be enforced by injunction even though it is not made in express terms but is implied from conduct and representations. Bimson *v.* Bultman, 3 N. Y. App. Div. 198, 38 N. Y. Suppl. 209.

Covenants in deed poll.— The grantee is bound, although the covenants be contained in a deed poll. Atlantic Dock Co. *v.* Leavitt, 54 N. Y. 35, 13 Am. Rep. 556.

4. Raritan Water-Power Co. *v.* Veghte, 21 N. J. Eq. 463; Delaware, etc., R. Co. *v.* McNeal, 4 Luz. Leg. Reg. (Pa.) 47; Clark *v.* Glidden, 60 Vt. 702, 15 Atl. 358.

5. *Illinois.*— Star Brewery Co. *v.* Primas, 163 Ill. 652, 45 N. E. 145 [*affirming* 59 Ill. App. 581].

Massachusetts.— Jackson *v.* Stevenson, 156 Mass. 496, 31 N. E. 691, 32 Am. St. Rep. 476; Atty.-Gen. *v.* Algonquin Club, 153 Mass. 447, 27 N. E. 2, 11 L. R. A. 500.

Missouri.— Hall *v.* Wesster, 7 Mo. App. 56.

New York.— Dodge *v.* Lambert, 2 Bosw. 570; Walker *v.* McNulty, 19 Misc. 701, 45 N. Y. Suppl. 42; Steward *v.* Winters, 4 Sandf. Ch. 587.

Rhode Island.— Beckwith *v.* Howard, 6 R. I. 1.

Texas.— Anderson *v.* Rowland, 18 Tex. Civ. App. 460, 44 S. W. 911.

England.— Collins *v.* Castle, 36 Ch. D. 243, 57 L. J. Ch. 76, 57 L. T. Rep. N. S. 764, 36 Wkly. Rep. 300; Tipping *v.* Eckersley, 2 Kay & J. 264; Allen *v.* Seckham, 47 L. J. Ch. 742 [injunction *dissolved* in 11 Ch. D. 790, 48 L. J. Ch. 611, 41 L. T. Rep. N. S. 260, 28 Wkly. Rep. 26]. *Compare* Bowes *v.* Law, L. R. 9 Eq. 636, 39 L. J. Ch. 483, 22 L. T. Rep. N. S. 267, 18 Wkly. Rep. 640.

See 27 Cent. Dig. tit. "Injunction," § 124 *et seq.*

Covenantee the sole judge of his injury.— The owner of land, selling or leasing it, may insist upon such covenants as he pleases, touching the use and mode of enjoyment of the land; and he is not to be defeated when the covenant is broken, by the opinion of any number of persons, that the breach occasions him no substantial injury. He has a right to define the injury for himself, and the party contracting with him must abide by the definition. Steward *v.* Winters, 4 Sandf. Ch. (N. Y.) 587.

Where the restriction was made for the public benefit, compensation would be an unsuitable remedy. The injury is not measureable in money. Atty.-Gen. *v.* Algonquin Club, 153 Mass. 447, 27 N. E. 2, 11 L. R. A. 500.

Limitation of rule.— An injunction against the erection of wooden buildings on another street and some eight hundred feet away from plaintiff's building, although in violation of covenant, has been held properly refused. Binison *v.* Bultman, 3 N. Y. App. Div. 198, 38 N. Y. Suppl. 209.

6. Everly *v.* Driskill, 24 Tex. Civ. App. 413, 58 S. W. 1046; Frank *v.* Brunnemann, 8 W. Va. 462.

7. Kirkpatrick *v.* Peshine, 24 N. J. Eq. 206; Beckwith *v.* Howard, 6 R. I. 1; Atty.-Gen. *v.* Mid-Kent R. Co., L. R. 3 Ch. 100, 16 Wkly. Rep. 258; Dickenson *v.* Grand Junction Canal Co., 15 Beav. 260, 51 Eng. Reprint 538. *Compare* Lynch *v.* Union Sav. Inst., 159 Mass. 306, 34 N. E. 364, 20 L. R. A. 842; Corning *v.* Troy Iron, etc., Factory, 40 N. Y. 191.

Public convenience.— Even the public convenience was not considered in Lloyd *v.* London, etc., R. Co., 2 De G. J. & S. 568, 11 Jur. N. S. 380, 34 L. J. Ch. 401, 12 L. T. Rep. N. S. 363, 13 Wkly. Rep. 698, 67 Eng. Ch. 444, 46 Eng. Reprint 496.

8. *Missouri.*— Meriwether *v.* Joy, 85 Mo. App. 634.

New York.— Phœnix Ins. Co. *v.* Continental Ins. Co., 87 N. Y. 400.

Pennsylvania.— Meigs *v.* Milligan, 177 Pa. St. 66, 35 Atl. 600; Muzzarelli *v.* Hulshizer, 163 Pa. St. 643, 30 Atl. 291; St. Andrew's Lutheran Church's Appeal, 67 Pa. St. 512; Fisher *v.* Jordan, 1 Lack. Leg. N. 127.

England.— Western *v.* MacDermott, L. R. 2 Ch. 72, 36 L. J. Ch. 76, 15 L. T. Rep. N. S. 64, 15 Wkly. Rep. 265; Rogers *v.* Hosegood, [1900] 2 Ch. 388, 69 L. J. Ch. 652, 83 L. T. Rep. N. S. 186, 48 Wkly. Rep. 659; Manners *v.* Johnson, 1 Ch. D. 673, 45 L. J. Ch. 404, 24 Wkly. Rep. 481; Atty.-Gen. *v.* Briggs, 1

than one to be used as a dwelling,[9] not to build a tenement house,[10] or not to put up a building costing less than a specified amount.[11] An injunction will be granted to restrain the breach of a contract fixing the limits within which buildings may be erected,[12] as in the case of a contract not to put up a building within a certain number of feet from the street line,[13] or not to erect it above a certain height.[14] So the breach of a covenant not to erect buildings so as to obstruct a view,[15] or the passage of light and air,[16] will be enjoined. In like manner a contract not to erect a building composed of any except specified materials will be enforced by injunction.[17]

d. Restrictions as to Kinds of Business. Where defendant has agreed not to carry on certain classes of business on the premises, he will be enjoined from breaking his contract.[18] In particular the use of premises for saloon purposes contrary to agreement has been enjoined in many cases.[19]

Jur. N. S. 1084; Rankin *v.* Huskisson, 4 Sim. 13, 6 Eng. Ch. 13, 58 Eng. Reprint 6; Haigh *v.* Waterman, [1867] W. N. 150.

Canada.— Van Koughnet *v.* Denison, 28 Grant Ch. (U. C.) 485.

See 27 Cent. Dig. tit. "Injunction," § 127.

9. Parker *v.* Nightingale, 6 Allen (Mass.) 341, 83 Am. Dec. 632; Winnipesaukee Camp-Meeting Assoc. *v.* Gordon, 63 N. H. 505, 3 Atl. 426; Columbia College *v.* Lynch, 70 N. Y. 440, 26 Am. Rep. 615; Schenck *v.* Campbell, 11 Abb. Pr. (N. Y.) 292. *Compare* Equitable L. Assur. Soc. *v.* Brennan, 24 N. Y. Suppl. 784, 30 Abb. N. Cas. 260, where a court of equity granted damages in lieu of an injunction.

10. Lewis *v.* Gollner, 129 N. Y. 227, 29 N. E. 81, 26 Am. St. Rep. 516; Musgrave *v.* Sherwood, 23 Hun (N. Y.) 669, 54 How. Pr. 339.

11. Frink *v.* Hughes, 133 Mich. 63, 94 N. W. 601; Page *v.* Murray, 46 N. J. Eq. 325, 19 Atl. 11; Roberts *v.* Burke, 15 Montg. Co. Rep. (Pa.) 109; Collins *v.* Castle, 36 Ch. D. 243, 57 L. J. Ch. 76, 57 L. T. Rep. N. S. 764, 36 Wkly. Rep. 300.

12. Gawtry *v.* Leland, 40 N. J. Eq. 323; Landell *v.* Hamilton, 175 Pa. St. 327, 34 Atl. 663, 34 L. R. A. 227; Muzzarelli *v.* Hulshizer, 163 Pa. St. 643, 30 Atl. 291; Pennsylvania R. Co. *v.* Pittsburgh Grain Elevator Co., 50 Pa. St. 499.

13. Frink *v.* Hughes, 133 Mich. 63, 94 N. W. 601; Lattimer *v.* Livermore, 72 N. Y. 174; Bauer *v.* Gribbel, 2 N. Y. App. Div. 80, 37 N. Y. Suppl. 609; Maxwell *v.* East River Bank, 3 Bosw. (N. Y.) 124; Tallmadge *v.* East River Bank, 2 Duer (N. Y.) 614 [*affirmed* in 26 N. Y. 105]; Zipp *v.* Barker, 55 N. Y. Suppl. 246; McGuire *v.* Caskey, 62 Ohio St. 419, 57 N. E. 53; Guthrie *v.* Johnson, 34 Pittsb. Leg. J. N. S. (Pa.) 245.

A fence may be within the meaning of the word "building." Wright *v.* Evans, 2 Abb. Pr. N. S. (N. Y.) 308.

Extent of injury immaterial.— An injunction will be granted even though the inconvenience to the complainant caused by the breach is slight. Kirkpatrick *v.* Peshine, 24 N. J. Eq. 206.

14. Thruston *v.* Minke, 32 Md. 487; Landell *v.* Hamilton, 175 Pa. St. 327, 34 Atl. 663, 34 L. R. A. 227; Muzzarelli *v.* Hulshizer, 163 Pa. St. 643, 30 Atl. 291; Clark *v.* Martin, 49 Pa. St. 289; Lloyd *v.* London, etc., R. Co., 2 De G. J. & S. 568, 11 Jur. N. S. 380, 34 L. J. Ch. 401, 12 L. T. Rep. N. S. 363, 13 Wkly. Rep. 698, 67 Eng. Ch. 444, 46 Eng. Reprint 496; Dover Harbour *v.* South Eastern R. Co., 9 Hare 489, 21 L. J. Ch. 886, 41 Eng. Ch. 489.

15. Buck *v.* Adams, 45 N. J. Eq. 552, 17 Atl. 961.

16. Thruston *v.* Minke, 32 Md. 487; Phœnix Ins. Co. *v.* Continental Ins. Co., 87 N. Y. 400; Muzzarelli *v.* Hulshizer, 163 Pa. St. 643, 30 Atl. 291; Hummel *v.* Krautter, 17 Phila. (Pa.) 392.

17. Atlantic Dock Co. *v.* Leavitt, 54 N. Y. 35, 13 Am. Rep. 556.

18. *Massachusetts.*— Hills *v.* Metzenroth, 173 Mass. 423, 53 N. E. 890 (Chinese laundry); Tobey *v.* Moore, 130 Mass. 448; Dorr *v.* Harrahan, 101 Mass. 531, 3 Am. Rep. 398 (covenant to use premises for dwelling purposes only; grocery enjoined); Parker *v.* Nightingale, 6 Allen 341, 83 Am. Dec. 632 (public eating-house).

Michigan.— Wertheimer *v.* Wayne County Cir. Judge, 83 Mich. 56, 47 N. W. 47.

New York.— Columbia College *v.* Thacher, 87 N. Y. 311, 41 Am. Rep. 365; Atlantic Dock Co. *v.* Leavitt, 54 N. Y. 35, 13 Am. Rep. 556 (distillery for resin oil); Orvis *v.* National Commercial Bank, 81 N. Y. App. Div. 631, 80 N. Y. Suppl. 1029; Schenck *v.* Campbell, 11 Abb. Pr. 292 (livery stable); Seymour *v.* McDonald, 4 Sandf. Ch. 502; Barron *v.* Richard, 3 Edw. 96.

Ohio.— Heidorn *v.* Wright, 6 Ohio S. & C. Pl. Dec. 315, 4 Ohio N. P. 235, blacksmith shop.

England.— German *v.* Chapman, 7 Ch. D. 271, 47 L. J. Ch. 250, 37 L. T. Rep. N. S. 685, 26 Wkly. Rep. 149 (girls' school); Wickenden *v.* Webster, 6 E. & B. 387, 2 Jur. N. S. 590, 25 L. J. Q. B. 264, 4 Wkly. Rep. 562, 88 E. C. L. 387; Kemp *v.* Sober, 15 Jur. 458, 20 L. J. Ch. 602, 1 Sim. N. S. 517, 40 Eng. Ch. 517, 61 Eng. Reprint 200; Johnstone *v.* Hall, 2 Jur. N. S. 780, 2 Kay & J. 414, 25 L. J. Ch. 462, 4 Wkly. Rep. 417; Collins *v.* Slade, [1874] W. N. 205; Treacher *v.* Treacher, [1874] W. N. 4.

See 27 Cent. Dig. tit. "Injunction," § 126.

19. *Alabama.*—Brooks *v.* Diaz, 35 Ala. 599.

e. Covenants by Lessees. A lessee who has agreed to use the demised premises only in certain ways will be enjoined at the suit of the lessor from using them contrary to the covenant, since the remedy at law is not regarded as adequate even though no substantial injury can be proved.[20]

f. Enforcement as Against Grantees of Covenantor. It is a general rule that where one by gift or purchase acquires property from another, with knowledge of a previous contract made by him with a third person affecting the use of such property, injunction will lie to prevent such acquirer of the property from using it inconsistently with the contract to the injury of the third person.[21] Such agreements are valid, and capable of being enforced in equity against all those who take the estate with notice of them, although they may not be strictly speaking real covenants, so as to run with the land, or of a nature to create a technical qualification of the title conveyed by the deed.[22] It follows therefore

Connecticut.— Hall *v.* Solomon, 61 Conn. 476, 23 Atl. 876, 29 Am. St. Rep. 218.

Illinois.— Star Brewery Co. *v.* Primas, 163 Ill. 652, 45 N. E. 145.

Kentucky.— Sutton *v.* Head, 86 Ky. 156, 5 S. W. 410, 9 Ky. L. Rep. 453, 9 Am. St. Rep. 274.

Michigan.— Watrous *v.* Allen, 57 Mich. 362, 24 N. W. 104, 58 Am. Rep. 363.

New Jersey.— Richards *v.* Burdsall, (Ch. 1887) 10 Atl. 274.

Ohio.— Taylor *v.* Becker, 8 Ohio Dec. (Reprint) 151, 6 Cinc. L. Bul. 25.

Texas.— Anderson *v.* Rowland, 17 Tex. Civ. App. 460, 44 S. W. 911.

England.— Clements *v.* Welles, L. R. 1 Eq. 200, 11 Jur. N. S. 991, 35 L. J. Ch. 565, 13 L. T. Rep. N. S. 548, 14 Wkly. Rep. 187; Hodgson *v.* Coppard, 29 Beav. 4, 7 Jur. N. S. 11, 30 L. J. Ch. 20, 9 Wkly. Rep. 9, 54 Eng. Reprint 525; Parker *v.* Whyte, 1 Hem. & M. 167, 32 L. J. Ch. 520, 8 L. T. Rep. N. S. 446, 2 New Rep. 157, 11 Wkly. Rep. 683.

See 27 Cent. Dig. tit. "Injunction," § 125.

Substantial damages.—It is immaterial that the complainant is unable to show any substantial damage. Star Brewery Co. *v.* Primas, 163 Ill. 652, 45 N. E. 145 [*affirming* 59 Ill. App. 581].

Forfeiture as penalty.— The fact that forfeiture is prescribed by the contract as a penalty for its breach is no objection to the granting of an injunction. Watrous *v.* Allen, 57 Mich. 362, 24 N. W. 104, 58 Am. Rep. 363; Richards *v.* Burdsall, (N. J. Ch. 1887) 10 Atl. 274.

20. See LANDLORD AND TENANT.

21. *Alabama.*— Webb *v.* Robbins, 77 Ala. 176.

Illinois.— Ewertsen *v.* Gerstenberg, 186 Ill. 344, 57 N. E. 1051, 51 L. R. A. 310; Star Brewery *v.* Primas, 163 Ill. 652, 45 N. E. 145; Frye *v.* Partridge, 82 Ill. 267.

New York.— Lewis *v.* Gollner, 129 N. Y. 227, 29 N. E. 81, 26 Am. St. Rep. 516; Phœnix Ins. Co. *v.* Continental Ins. Co., 87 N. Y. 400; Columbia College *v.* Thacher, 87 N. Y. 311, 41 Am. Rep. 365; Columbia College *v.* Lynch, 70 N. Y. 440, 26 Am. Rep. 615; Maxwell *v.* East River Bank, 3 Bosw. 124.

Ohio.— Shields *v.* Titus, 46 Ohio St. 528, 22 N. E. 717.

Pennsylvania.— Landell *v.* Hamilton, 175 Pa. St. 327, 34 Atl. 663, 34 L. R. A. 227; Muzzarelli *v.* Hulshizer, 163 Pa. St. 643, 30 Atl. 291; Bricker *v.* Grover, 10 Phila. 91.

Tennessee.— Crutchfield *v.* Wason Car Works, 8 Baxt. 242.

Texas.— Anderson *v.* Rowland, 18 Tex. Civ. App. 460, 44 S. W. 911.

Vermont.— Howe *v.* Jericho School Dist. No. 3, 43 Vt. 282.

England.— Mander *v.* Falcke, [1891] 2 Ch. 554, 65 L. T. Rep. N. S. 203; De Mattos *v.* Gibson, 4 De G. & J. 276, 5 Jur. N. S. 347, 555, 28 L. J. Ch. 165, 498, 7 Wkly. Rep. 100, 152, 403, 514, 61 Eng. Ch. 218, 45 Eng. Reprint 108.

See 27 Cent. Dig. tit. "Injunction," § 124 *et seq.*

Sublessees and under-tenants may be enjoined. Maddox *v.* White, 4 Md. 72, 59 Am. Dec. 67; Wertheimer *v.* Wayne County Cir. Judge, 83 Mich. 56, 47 N. W. 47; Stees *v.* Kranz, 32 Minn. 313, 20 N. W. 241; Ambler *v.* Skinner, 7 Rob. (N. Y.) 561; Gillilan *v.* Norton, 6 Rob. (N. Y.) 546. See also LANDLORD AND TENANT.

Assignees of the covenantor may be enjoined from selling liquor on premises contrary to the covenant. Watrous *v.* Allen, 57 Mich. 362, 24 N. W. 104, 58 Am. Rep. 363; Richards *v.* Burdsall, (N. J. Ch. 1887) 10 Atl. 274; Anderson *v.* Rowland, 18 Tex. Civ. App. 460, 44 S. W. 911.

22. *Massachusetts.*— Tobey *v.* Moore, 130 Mass. 448; Parker *v.* Nightingale, 6 Allen 341, 83 Am. Dec. 632; Whitney *v.* Union R. Co., 11 Gray 359, 71 Am. Dec. 715.

New Jersey.— Gawtry *v.* Leland, 31 N. J. Eq. 385.

New York.— Lewis *v.* Gollner, 129 N. Y. 227, 29 N. E. 81, 26 Am. St. Rep. 516; Columbia College *v.* Lynch, 70 N. Y. 440, 26 Am. Rep. 615.

Pennsylvania.— Bricker *v.* Grover, 10 Phila. 91.

Rhode Island.— Middletown *v.* Newport Hospital, 16 R. I. 319, 15 Atl. 800.

Texas.— Anderson *v.* Rowland, 18 Tex. Civ. App. 460, 44 S. W. 911.

England.— Wilson *v.* Hart, 1 Ch. 463, 12 Jur. N. S. 460, 35 L. J. Ch. 569, 14 L. T. Rep. N. S. 499, 14 Wkly. Rep. 748; McLean *v.* McKay, L. R. 5 P. C. 327, 29 L. T. Rep.

that a *bona fide* purchaser without notice of a restrictive covenant not running with the land will not be enjoined from acting contrary to its terms.[23] Constructive notice of a restrictive covenant is sufficient in equity to bind a purchaser to observe it, and hence such purchaser must observe the terms of a covenant contained in a deed to some of his predecessors in title, even though remote, and even though such limitation is not contained in the deed to the purchaser himself.[24] Subsequent purchasers with notice of a covenant not running with the land are bound only when the covenant is restrictive, and not when it is affirmative and requires the expenditure of money or some positive act, as for example a covenant to repair.[25]

g. Enforcement by Grantees of Covenantee. When a restrictive covenant inserted by the grantor in the deed of a particular lot is part of a general scheme for the benefit and improvement of all the lands included in a larger tract, it may be enforced by injunction against the purchaser of such lot or his grantees, at the suit of a holder of another lot in the tract who bought with notice of the general scheme and on the faith of the covenants inserted in the several deeds to carry it out.[26] But although it is not necessary that the complainant should be a direct party

N. S. 352, 21 Wkly. Rep. 798; Holloway *v.* Hill, [1902] 2 Ch. 612, 71 L. J. Ch. 818, 87 L. T. Rep. N. S. 201; John Bros. Abergarw Brewery Co. *v.* Holmes, [1900] 1 Ch. 188, 64 J. P. 153, 69 L. J. Ch. 149, 81 L. T. Rep. N. S. 771, 48 Wkly. Rep. 236; Knight *v.* Simmonds, [1896] 2 Ch. 294, 65 L. J. Ch. 583, 74 L. T. Rep. N. S. 563, 44 Wkly. Rep. 580; Mander *v.* Falcke, [1891] 2 Ch. 554, 65 L. T. Rep. N. S. 203; Nicoll *v.* Fenning, 19 Ch. D. 258, 51 L. J. Ch. 166, 45 L. T. Rep. N. S. 738, 30 Wkly. Rep. 95; Gaskin *v.* Balls, 13 Ch. D. 324, 28 Wkly. Rep. 552; Richards *v.* Revitt, 7 Ch. D. 224, 47 L. J. Ch. 473, 37 L. T. Rep. N. S. 632, 26 Wkly. Rep. 166; Mann *v.* Stephens, 10 Jur. 650, 15 Sim. 377, 38 Eng. Ch. 377, 60 Eng. Reprint 665; Tulk *v.* Moxhay, 2 Phil. 774, 22 Eng. Ch. 774, 41 Eng. Reprint 1143.

See 27 Cent. Dig. tit. "Injunction," § 124 *et seq.*

23. Whitney *v.* Union R. Co., 11 Gray (Mass.) 359, 71 Am. Dec. 715; Knapp *v.* Hall, 17 N. Y. Suppl. 437.

Subsequent lessees of the covenantor will not be enjoined from using the premises in a way contrary to their lessor's covenant with a neighbor when they were neither parties nor privies to that covenant. Napa Valley Wine Co. *v.* Boston Block Co., 44 Minn. 130, 46 N. W. 239, 20 Am. St. Rep. 562.

24. Atlantic Dock Co. *v.* Leavitt, 54 N. Y. 35, 13 Am. Rep. 556; Plumb *v.* Tubbs, 41 N. Y. 442; Gibert *v.* Peteler, 38 Barb. (N. Y.) 488 [*affirmed* in 38 N. Y. 165, 6 Transcr. App. 329, 97 Am. Dec. 785]; Bricker *v.* Grover, 10 Phila. (Pa.) 91; Wilson *v.* Hart, L. R. 1 Ch. 463, 12 Jur. N. S. 460, 35 L. J. Ch. 569, 14 L. T. Rep. N. S. 499, 14 Wkly. Rep. 748; Nottingham Patent Brick, etc., Co. *v.* Butler, 16 Q. B. D. 787, 55 L. J. Q. B. 280, 54 L. T. Rep. N. S. 444, 34 Wkly. Rep. 405; *In re* Cox, [1891] 2 Ch. 109, 64 L. T. Rep. N. S. 733, 39 Wkly. Rep. 412; Patman *v.* Harland, 17 Ch. D. 353, 50 L. J. Ch. 642, 44 L. T. Rep. N. S. 728, 29 Wkly. Rep. 707.

25. Haywood *v.* Brunswick Permanent Ben. Bldg. Soc., 8 Q. B. D. 403, 51 L. J. Q. B. 73, 45 L. T. Rep. N. S. 699, 30 Wkly. Rep. 299; Austerberry *v.* Oldham, 29 Ch. D. 750, 49 J. P. 532, 55 L. J. Ch. 633, 53 L. T. Rep. N. S. 543, 33 Wkly. Rep. 807; London, etc., R. Co. *v.* Gomm, 20 Ch. D. 562, 51 L. J. Ch. 530, 46 L. T. Rep. N. S. 449, 30 Wkly. Rep. 620.

26. *Massachusetts.*— Hills *v.* Metzenroth, 173 Mass. 423, 53 N. E. 890; Hopkins *v.* Smith, 162 Mass. 444, 38 N. E. 1122; Jackson *v.* Stevenson, 156 Mass. 496, 31 N. E. 691, 22 Am. St. Rep. 426; Payson *v.* Burnham, 141 Mass. 547, 6 N. E. 708; Beals *v.* Case, 138 Mass. 138; Tobey *v.* Moore, 130 Mass. 448; Linzee *v.* Mixer, 101 Mass. 512; Parker *v.* Nightingale, 6 Allen 341, 83 Am. Dec. 632; Whitney *v.* Union R. Co., 11 Gray 359, 71 Am. Dec. 715.

New Jersey.— Atlantic City *v.* New Auditorium Pier Co., (1904) 59 Atl. 158 [*reversing* (Ch. 1904) 58 Atl. 729].

New York.— Lattimer *v.* Livermore, 72 N. Y. 174; Raynor *v.* Lyon, 46 Hun 227; Brouwer *v.* Jones, 23 Barb. 153; Maxwell *v.* East River Bank, 3 Bosw. 124; Tallmadge *v.* East River Bank, 2 Duer 614 [*affirmed* in 26 N. Y. 105]; Equitable L. Assur. Soc. *v.* Brennan, 24 N. Y. Suppl. 784; Barrow *v.* Richard, 8 Paige 351, 35 Am. Dec. 713.

Ohio.— McGuire *v.* Caskey, 62 Ohio St. 419, 57 N. E. 53; Shields *v.* Titus, 46 Ohio St. 528, 22 N. E. 717; Isham *v.* Matchett, 18 Ohio Cir. Ct. 338, 10 Ohio Cir. Dec. 267.

Pennsylvania.— Electric City Land, etc., Co. *v.* West Ridge Coal Co., 187 Pa. St. 500, 41 Atl. 458; Landell *v.* Hamilton, 175 Pa. St. 327, 34 Atl. 663, 34 L. R. A. 227; Muzzarelli *v.* Hulshizer, 163 Pa. St. 643, 30 Atl. 291; Clark *v.* Martin, 49 Pa. St. 289.

England.— Nottingham Patent Brick, etc., Co. *v.* Butler, 15 Q. B. D. 268; Knight *v.* Simmonds, [1896] 2 Ch. 294, 65 L. J. Ch. 583, 74 L. T. Rep. N. S. 563, 44 Wkly. Rep. 580; Collins *v.* Castle, 36 Ch. D. 243, 57 L. J. Ch. 76, 57 L. T. Rep. N. S. 764, 36

to the covenant sought to be enforced, it is necessary that he should have bought with notice of and in reliance on it, and that the covenant should have been entered into for the benefit of the land the complainant owns, and not merely for the personal advantage of the original covenantee.[27]

h. Restriction Must Concern the Estate Itself. While there are cases to the contrary,[28] the general rule is that equity will not enforce a restriction as to the use of land unless it concerns the thing conveyed and is for the benefit of the estate.[29]

i. Conduct of Complainant as Affecting His Right. As in the case of other contracts, the breach of a restriction as to the use of premises may be acquiesced in so as to bar the right to an injunction, or the right may be abandoned or lost by breach on the part of the complainant himself.[30]

j. Mandatory Injunction. When buildings have been erected in breach of covenant, their removal may be ordered,[31] even though the complainant sought no

Wkly. Rep. 300; Tyndall *v.* Castle, 62 L. J. Ch. 555, [1893] W. N. 40.

See 27 Cent. Dig. tit. "Injunction," § 124 *et seq.*

Rule restated.— When it appears by a fair interpretation of the words of a grant that it was the intent of the parties to create or reserve a right, in the nature of a servitude or easement, in the property granted, for the benefit of other land owned by the grantor, and originally forming with the land one parcel, such right will be deemed appurtenant to the land of the grantor and binding on that conveyed to the grantee, and the right and burden thus created will respectively pass to and be binding on all subsequent grantees of the respective lots of land. Whitney *v.* Union R. Co., 11 Gray (Mass.) 359, 71 Am. Dec. 715.

Restrictions not in complainant's deed.— It is immaterial that the lots belonging to complainant were not subject to the same restriction as that sought to be enforced against defendant. Collins *v.* Castle, 36 Ch. D. 243, 57 L. J. Ch. 76, 57 L. T. Rep. N. S. 764, 36 Wkly. Rep. 300.

27. Clapp *v.* Wilder, 176 Mass. 332, 57 N. E. 692, 50 L. R. A. 120; Jewell *v.* Lee, 14 Allen (Mass.) 145, 92 Am. Dec. 744; Coughlin *v.* Barker, 46 Mo. App. 54; Renals *v.* Cowlishaw, 9 Ch. D. 125 [*affirmed* in 11 Ch. D. 866, 48 L. J. Ch. 830, 41 L. T. Rep. N. S. 116, 28 Wkly. Rep. 9]; Master *v.* Hansard, 4 Ch. D. 718, 46 L. J. Ch. 505, 36 L. T. Rep. N. S. 535; Keates *v.* Lyon, 4 Ch. 218, 38 L. J. Ch. 357, 20 L. T. Rep. N. S. 255, 17 Wkly. Rep. 338.

28. Frye *v.* Partridge, 82 Ill. 267; National Union Bank *v.* Segur, 39 N. J. L. 173; Stines *v.* Dorman, 25 Ohio St. 580; Keppell *v.* Bailey, Coop. t. Brough. 298, 47 Eng. Reprint 106, 2 Myl. & K. 517, 7 Eng. Ch. 517, 39 Eng. Reprint 1042.

29. See cases cited *infra*, this note.

Illustrations.— Where a quarry was conveyed and a covenant was entered into by the vendor not to open up other quarries on land not conveyed, an injunction to enforce this covenant was refused because the restriction was not for the benefit of the quarry conveyed, but for the personal benefit of the grantee by preventing competition. Norcross *v.* James, 140 Mass. 188, 2 N. E. 946. In like manner it was held in Brewer *v.* Marshall, 18 N. J. Eq. 337 [*affirmed* in 19 N. J. Eq. 537, 97 Am. Dec. 679], that a covenant with a vendee not to sell marl on land retained by the vendor does not bind a purchaser from the vendor and will not be enforced by injunction. A covenant restraining the exercise of one's rights to condemn property by eminent domain proceedings is not one running with any land but is for personal benefit only, and will not be enforced by injunction against a successor of the covenantor. Morris, etc., R. Co. *v.* Hoboken, etc., R. Co., (N. J. Ch. 1904) 59 Atl. 332.

30. *Kentucky.*— Duncan *v.* Central Pass. R. Co., 85 Ky. 525, 4 S. W. 228, 9 Ky. L. Rep. 92.

Massachusetts.— Scollard *v.* Normile, 181 Mass. 412, 63 N. E. 941; Smith *v.* Brown, 164 Mass. 584, 42 N. E. 101; Whitney *v.* Union R. Co., 11 Gray 359, 71 Am. Dec. 715.

New Jersey.— Hemsley *v.* Marlborough Hotel Co., 63 N. J. Eq. 804, 52 Atl. 1132 [*affirming* 62 N. J. Eq. 164, 50 Atl. 14]; Sutcliffe *v.* Eisele, 62 N. J. Eq. 222, 50 Atl. 69; Ocean City Assoc. *v.* Schurch, 57 N. J. Eq. 268, 41 Atl. 914; Page *v.* Murray, 46 N. J. Eq. 325, 19 Atl. 11.

New York.— Alvord *v.* Fletcher, 28 N. Y. App. Div. 493, 51 N. Y. Suppl. 117.

Pennsylvania.— Acheson *v.* Stevenson, 130 Pa. St. 633, 18 Atl. 873.

England.— Gaunt *v.* Fynney, L. R. 8 Ch. 8, 42 L. J. Ch. 122, 27 L. T. Rep. N. S. 569, 21 Wkly. Rep. 129; Sayers *v.* Collyer, 28 Ch. D. 103, 59 J. P. 244, 54 L. J. Ch. 1, 51 L. T. Rep. N. S. 723, 33 Wkly. Rep. 91; Peek *v.* Matthews, L. R. 3 Eq. 515, 16 L. T. Rep. N. S. 991, 15 Wkly. Rep. 689; Rogers *v.* Great Northern R. Co., 53 J. P. 484; Bedford *v.* British Museum, 2 L. J. Ch. 129, 2 Myl. & K. 552, 7 Eng. Ch. 552, 39 Eng. Reprint 1055; Roper *v.* Williams, Turn. & R. 18, 23 Rev. Rep. 169, 12 Eng. Ch. 18, 37 Eng. Reprint 999.

See 27 Cent. Dig. tit. "Injunction," § 124 *et seq.*

31. Harbison *v.* White, 46 Conn. 106; Atty.-Gen. *v.* Algonquin Club, 153 Mass. 447, 27 N. E. 2, 11 L. R. A. 500; Roberts *v.* Burke,

injunction to prevent their erection, if they were erected deliberately with knowledge that the complainant insisted on the observance of the contract, so that there is no estoppel.[32] The granting of the injunction does not depend upon the relative inconvenience to the parties or to the public, except in cases where the damage caused by the breach is very minute.[33] On the other hand it has been said that a mandatory injunction to remove a building will not be issued when it will operate inequitably and oppressively, or when there has been unreasonable delay by the party asking it, or when the injury complained of is not serious and substantial and may be readily compensated in damages, while to restore things to their original condition would subject the other party to great loss.[34] The court may in its discretion refuse the injunction and assess damages instead.[35] A mandatory injunction will not be granted when its enforcement would require too great an amount of supervision by the court.[36] But while a court will not ordinarily order and supervise the erection of a structure, yet under some circumstances it may do so, either by direct mandate, or indirectly by an injunction prohibiting the enjoyment of privileges until the work is done.[37]

8. Contracts in Restraint of Trade and Business — a. Relief as Dependent on Validity.[38] If a contract is declared by the court to be contrary to public policy and void, whatever the principle may be upon which the decision is based, the contract will not be enforced in any manner, and a breach[39] or execution[40] of the

15 Montg. Co. Rep. (Pa.) 109; Manners *v.* Johnson, 1 Ch. D. 673, 45 L. J. Ch. 404, 24 Wkly. Rep. 481 (building altered); Phillips *v.* Treeby, 8 Jur. N. S. 999 (wall removed); Rankin *v.* Huskisson, 4 Sim. 13, 6 Eng. Ch. 13, 58 Eng. Reprint 6 (building removed); Morris *v.* Grant, 24 Wkly. Rep. 55.

The breach must be very clear to justify a mandatory injunction to remove. Gatzmer *v.* St. Vincent School Soc., 147 Pa. St. 313, 23 Atl. 452.

Form of order.— A mandatory injunction may be framed in the form of a direct positive order. Jackson *v.* Normanby Brick Co., [1899] 1 Ch. 438, 68 L. J. Ch. 407, 80 L. T. Rep. N. S. 482.

32. Atty.-Gen. *v.* Algonquin Club, 153 Mass. 447, 27 N. E. 2, 11 L. R. A. 500; Atty.-Gen. *v.* Gardiner, 117 Mass. 492; Linzee *v.* Mixer, 101 Mass. 512.

33. Hood *v.* North Eastern R. Co., L. R. 5 Ch. 525, 23 L. T. Rep. N. S. 206, 18 Wkly. Rep. 473; Atty.-Gen. *v.* Mid-Kent R. Co., L. R. 3 Ch. 100, 16 Wkly. Rep. 258; McManus *v.* Cooke, 35 Ch. D. 681, 51 J. P. 708, 56 L. J. Ch. 662, 56 L. T. Rep. N. S. 900, 35 Wkly. Rep. 754; Manners *v.* Johnson, 1 Ch. D. 673, 45 L. J. Ch. 404, 24 Wkly. Rep. 481; Lloyd *v.* London, etc., R. Co., 2 De G. J. & S. 568, 11 Jur. N. S. 380, 34 L. J. Ch. 401, 12 L. T. Rep. N. S. 363, 13 Wkly. Rep. 698, 67 Eng. Ch. 444, 46 Eng. Reprint 496; Price *v.* Bala, etc., R. Co., 50 L. T. Rep. N. S. 787.

34. Starkie *v.* Richmond, 155 Mass. 188, 29 N. E. 770; Gaskin *v.* Balls, 13 Ch. D. 324, 28 Wkly. Rep. 552; Aynsley *v.* Glover, L. R. 18 Eq. 544, 43 L. J. Ch. 777, 31 L. T. Rep. N. S. 219, 23 Wkly. Rep. 147; Curriers' Co. *v.* Corbett, 2 Dr. & Sm. 355, 12 L. T. Rep. N. S. 169, 13 Wkly. Rep. 1056, 62 Eng. Reprint 656.

35. Bowes *v.* Law, L. R. 9 Eq. 636, 39 L. J. Ch. 483, 22 L. T. Rep. N. S. 267, 18 Wkly. Rep. 640.

36. See cases cited *infra*, this note.

Rule illustrated.— In applying the rule it has been held that a farmer will not be compelled to farm in accordance with his covenant. Fleming *v.* Snook, 5 Beav. 250, 49 Eng. Reprint 574; Phipps *v.* Jackson, 56 L. J. Ch. 550, 33 Wkly. Rep. 378; Musgrave *v.* Horner, 31 L. T. Rep. N. S. 632, 23 Wkly. Rep. 125.

37. Rock Island, etc., R. Co. *v.* Dimick, 144 Ill. 628, 32 N. E. 291, 19 L. R. A. 105 (to construct passage under railway); Atty.-Gen. *v.* Mid-Kent R. Co., L. R. 3 Ch. 100, 16 Wkly. Rep. 258; Allport *v.* Securities Corp., 64 L. J. Ch. 491, 72 L. T. Rep. N. S. 533, 13 Reports 420 (to rebuild stairway); Storer *v.* Great Western R. Co., 12 L. J. Ch. 65, 3 R. & Can. Cas. 106, 2 Y. & Coll. 48, 21 Eng. Ch. 48, 63 Eng. Reprint 21 (to construct passage under railway); Newton *v.* Nock, 43 L. T. Rep. N. S. 197 (to restore fence); Brocklesby *v.* Munn, [1870] W. N. 42 (to put in windows); De Nicols *v.* Abel, [1869] W. N. 14 (to restore building to former condition).

38. Validity of contract see Contracts, 9 Cyc. 523 *et seq.*

39. Mallinckrodt Chemical Works *v.* Nemnich, 169 Mo. 388, 69 S. W. 355 [*affirming* 83 Mo. App. 6]; Hulen *v.* Earel, 13 Okla. 246, 73 Pac. 927; Herreshoff *v.* Boutineau, 17 R. I. 3, 19 Atl. 712, 33 Am. St. Rep. 850, 8 L. R. A. 469.

Illustration.— A retailer, who purchased goods from a dealer, will not be enjoined from selling them at less than agreed upon. National Phonograph Co. *v.* Schlegel, 117 Fed. 624.

40. Tanenbaum *v.* New York F. Ins. Exch., 33 Misc. (N. Y.) 134, 68 N. Y. Suppl. 342.

contract will not be enjoined. If a contract in restraint of trade is divisible and valid as to one part, although invalid as to the other, an injunction against a breach of the valid part is proper.[41] If a contract in restraint of trade is regarded by the court as not against public policy, a breach of such contract will be enjoined.[42] The damage is presumed to be irreparable and an injunction will be granted in most cases without requiring any specific showing as to the amount of damage.[43] Not only the promisee but also his assignee is entitled to an injunction to restrain a breach of the contract.[44]

b. Doubtful Right. Before the court will enjoin a breach, there must be no doubt about the validity of the contract, and its terms must be clearly proved and the fact of breach established beyond doubt.[45]

c. Restrictions as to Particular Lines of Business — (1) *In General.* The commonest instance of a contract in restraint of trade is a contract for the sale of a business with its good-will, with an agreement on the part of the vendor not to open up a competing business of the same kind for a certain time within a certain space. If the restraint is reasonable and is no greater than is necessary for the proper protection of the purchaser in enjoying his property a breach will be enjoined.[46]

41. Franz *v.* Bieler, 126 Cal. 176, 56 Pac. 249, 58 Pac. 466; Dean *v.* Emerson, 102 Mass. 480; Monongahela River Consol. Coal, etc., Co. *v.* Jutte, 33 Pittsb. Leg. J. N. S. (Pa.) 305; Dulowski *v.* Goldstein, [1896] 1 Q. B. 478, 65 L. J. Q. B. 397, 74 L. T. Rep. N. S. 180, 44 Wkly. Rep. 436; Nicholls *v.* Stretton, 10 Q. B. 346, 11 Jur. 1009, 59 E. C. L. 346; Haynes *v.* Doman, [1899] 2 Ch. 13, 68 L. J. Ch. 419, 80 L. T. Rep. N. S. 569; Rogers *v.* Maddocks, [1892] 3 Ch. 346, 62 L. J. Ch. 219, 67 L. T. Rep. N. S. 329, 2 Reports 53; Baines *v.* Geary, 35 Ch. D. 154, 51 J. P. 628, 56 L. J. Ch. 935, 56 L. T. Rep. N. S. 567, 36 Wkly. Rep. 98; Green *v.* Price, 9 Jur. 857, 14 L. J. Exch. 105, 13 M. & W. 695 [*affirmed* in 9 Jur. 880, 16 L. J. Exch. 198, 16 M. & W. 346]; Mallan *v.* May, 7 Jur. 536, 12 Exch. 376, 11 M. & W. 653. See Consumers' Oil Co. *v.* Nunnemaker, 142 Ind. 560, 41 N. E. 1948, 51 Am. St. Rep. 193; Trenton Potteries Co. *v.* Oliphant, 56 N. J. Eq. 680, 39 Atl. 923; Herreshoff *v.* Boutineau, 17 R. I. 3, 19 Atl. 712, 33 Am. St. Rep. 850, 8 L. R. A. 469; Mills *v.* Dunham, [1891] 1 Ch. 576, 60 L. J. Ch. 362, 64 L. T. Rep. N. S. 712, 39 Wkly. Rep. 289.

42. *Indiana.*— O'Neal *v.* Hines, 145 Ind. 32, 43 N. E. 946.

Kentucky.— Royer Wheel Co. *v.* Miller, 50 S. W. 62, 20 Ky. L. Rep. 1831.

Nebraska.— Downing *v.* Lewis, 56 Nebr. 386, 76 N. W. 909.

New Hampshire.— Bailey *v.* Collins, 59 N. H. 459.

Pennsylvania.— Pittsburg Stove, etc., Co. *v.* Pennsylvania Stove Co., 208 Pa. St. 37, 57 Atl. 77; Eckart *v.* Gerlach, 12 Phila. 530.

Tennessee.— Jackson *v.* Byrnes, 103 Tenn. 698, 54 S. W. 984.

England.— Leather Cloth Co. *v.* Lorsont, L. R. 9 Eq. 345, 39 L. J. Ch. 86, 21 L. T. Rep. N. S. 661, 18 Wkly. Rep. 572; Mumford *v.* Gething, 7 C. B. N. S. 305, 6 Jur. N. S. 428, 29 L. J. C. P. 105, 1 L. T. Rep. N. S. 64, 8 Wkly. Rep. 187, 97 E. C. L. 305; Mallan *v.* May, 7 Jur. 536, 12 L. J. Exch. 376, 11 M. & W. 665.

See 27 Cent. Dig. tit. "Injunction," § 121 *et seq.*

Enforcement of injunction.— Where the injunction could not conveniently be enforced it will not be granted. Stull *v.* Westfall, 25 Hun (N. Y.) 1.

The conduct of the complainant may bar his right to an injunction to which he would otherwise be entitled. Smith *v.* Brown, 164 Mass. 584, 42 N. E. 101.

43. Brown *v.* Kling, 101 Cal. 295, 35 Pac. 995; Andrews *v.* Kingsbury, 212 Ill. 97, 72 N. E. 11 [*affirming* 112 Ill. App. 518]; Gordon *v.* Mansfield, 84 Mo. App. 367; Smith's Appeal, 113 Pa. St. 579, 6 Atl. 251; Emrick *v.* Groome, 4 Pa. Dist. 511.

Damages adequate.— When it appears that damages at law would be an adequate remedy, an injunction will not be granted. Harkinson's Appeal, 78 Pa. St. 196, 21 Am. Rep. 9.

44. Cowan *v.* Fairbrother, 118 N. C. 406, 24 S. E. 212, 54 Am. St. Rep. 733, 32 L. R. A. 829; Friedman *v.* Ulsamer, 8 Pa. Dist. 217; Jacoby *v.* Whitmore, 48 J. P. 335, 49 L. T. Rep. N. S. 335, 32 Wkly. Rep. 18.

45. Hill *v.* Staples, 85 Ga. 863, 11 S. E. 967; Mandeville *v.* Harman, 42 N. J. Eq. 185, 7 Atl. 37; Harkinson's Appeal, 78 Pa. St. 196, 21 Am. Rep. 9; Hall's Appeal, 60 Pa. St. 458, 100 Am. Dec. 584; Pfeifer *v.* Rahiser, 2 Pa. Super. Ct. 355; Mosher *v.* Moyer, 22 Pa. Co. Ct. 586; Frost *v.* Seitz, 1 Dauphin Co. Rep. (Pa.) 251; Trenwith *v.* Dealy, 12 Phila. (Pa.) 386.

46. *Illinois.*— Cobbs *v.* Niblo, 6 Ill. App. 60.

Indiana.— Beatty *v.* Coble, 142 Ind. 329, 41 N. E. 590; Eisel *v.* Hayes, 141 Ind. 41, 40 N. E. 119; Pickett *v.* Green, 120 Ind. 584, 22 N. E. 737; Baker *v.* Pottmeyer, 75 Ind. 451; Beard *v.* Dennis, 6 Ind. 200, 63 Am. Dec. 380.

(II) *Clerks and Salesmen.* In like manner a clerk, apprentice, or salesman who, as a part of his contract of employment, agrees that he will not solicit in opposition to the employer or open up a competitive establishment after he leaves the employ, will be enjoined from doing that which he agreed not to do.[47]

(III) *Retiring Partners.* A retiring partner who agrees for a consideration not to open up a competing business will be enjoined from so doing.[48]

(IV) *Physicians.* In the case of a contract by a physician not to reopen

Maryland.— Guerand *v.* Dandelet, 32 Md. 561, 3 Am. Rep. 164.

Massachusetts.— Ropes *v.* Upton, 125 Mass. 258; Boutelle *v.* Smith, 116 Mass. 111; Dwight *v.* Hamilton, 113 Mass. 175; Angier *v.* Webber, 14 Allen 211, 92 Am. Dec. 748.

Michigan.— Timmerman *v.* Dever, 52 Mich. 34, 17 N. W. 230, 50 Am. Rep. 240.

Missouri.— Gordon *v.* Mansfield, 84 Mo. App. 367.

New Jersey.— Althen *v.* Vreeland, (Ch. 1897) 36 Atl. 479; Carll *v.* Snyder, (Ch. 1893) 26 Atl. 977; Richardson *v.* Peacock, 28 N. J. Eq. 151; Genelin *v.* Reisel, 10 N. J. L. J. 208.

New York.— Diamond Match Co. *v.* Roeber, 106 N. Y. 473, 13 N. E. 419, 60 Am. Rep. 464; Zimmermann *v.* Gerzog, 13 N. Y. App. Div. 210, 43 N. Y. Suppl. 339; Mackinnon Pen Co. *v.* Fountain Ink Co., 48 N. Y. Super. Ct. 442; Niles *v.* Fenn, 12 Misc. 470, 33 N. Y. Suppl. 857; Shearman *v.* Hart, 14 Abb. Pr. 358.

North Carolina.— Cowan *v.* Fairbrother, 118 N. C. 406, 24 S. E. 212, 54 Am. St. Rep. 733, 32 L. R. A. 829.

Pennsylvania.— Wilkinson *v.* Colley, 164 Pa. St. 35, 30 Atl. 286, 26 L. R. A. 114; McClurg's Appeal, 58 Pa. St. 51; Palmer *v.* Graham, 1 Pars. Eq. Cas. 476; Reece *v.* Hendricks, 1 Leg. Gaz. 79.

United States.— Davis *v.* Booth, 131 Fed. 31, 65 C. C. A. 269 [*modifying* 127 Fed. 875].

England.— Archer *v.* Marsh, 6 A. & E. 959, 6 L. J. K. B. 244, 2 N. & P. 562, W. W. & D. 641, 33 E. C. L. 498; Clarkson *v.* Edge, 33 Beav. 227, 10 Jur. N. S. 871, 33 L. J. Ch. 443, 12 Wkly. Rep. 518, 55 Eng. Reprint 354; Wallis *v.* Day, 1 Jur. 73, 6 L. J. Exch. 92, McH. 222, 2 M. & W. 273.

Canada.— McCausland *v.* Hill, 23 Ont. App. 738.

See 27 Cent. Dig. tit. "Injunction," § 121.

Implied contract.—Where a business is sold including the good-will, there is an implied contract not to interfere with the enjoyment of that good-will, and such interference will be enjoined. Dwight *v.* Hamilton, 113 Mass. 175.

Who may object.— A covenant by defendant not to reopen business after having sold to the complainant is not enforceable by injunction on the complainant's petition in case he himself has resold to a third person and likewise himself covenanted not to reopen such business. Jones *v.* Wooley, 16 Grant Ch. (U. C.) 106. See also Mossop *v.* Mason, 17 Grant Ch. (U. C.) 360.

47. Davies *v.* Racer, 72 Hun (N. Y.) 43, 25 N. Y. Suppl. 293; A. L. & J. J. Reynolds Co. *v.* Dreyer, 12 Misc. (N. Y.) 368, 33 N. Y. Suppl. 649; Shoemaker Ice Co. *v.* Rutherford, 20 Montg. Co. Rep. (Pa.) 159; Davis *v.* Booth, 131 Fed. 31, 65 C. C. A. 269 [*modifying* 127 Fed. 875]; Dubowski *v.* Goldstein, [1896] 1 Q. B. 478, 65 L. J. Q. B. 397, 74 L. T. Rep. N. S. 180, 44 Wkly. Rep. 436; Haynes *v.* Doman, [1899] 2 Ch. 13, 68 L. J. Ch. 419, 80 L. T. Rep. N. S. 569; Gravely *v.* Barnard, L. R. 18 Eq. 518, 43 L. J. Ch. 659, 30 L. T. Rep. N. S. 863; Allsopp *v.* Wheatcroft, L. R. 15 Eq. 59, 42 L. J. Ch. 12, 27 L. T. Rep. N. S. 372, 21 Wkly. Rep. 162; Benwell *v.* Inns, 24 Beav. 307, 26 L. J. Ch. 663, 53 Eng. Reprint 376; Nicholls *v.* Stretton, 7 Beav. 42, 29 Eng. Ch. 42, 49 Eng. Reprint 978 [*affirmed* in 10 Q. B. 346, 11 Jur. 1009, 59 E. C. L. 346]; Sainter *v.* Ferguson, 7 C. B. 716, 13 Jur. 828, 18 L. J. C. P. 217, 62 E. C. L. 716 [*affirmed* in 1 Hall & T. 383, 47 Eng. Reprint 1460, 14 Jur. 255, 19 L. J. Ch. 170, 1 Macn. & G. 286, 47 Eng. Ch. 228, 41 Eng. Reprint 1275]; Mumford *v.* Gething, 7 C. B. N. S. 305, 6 Jur. N. S. 428, 29 L. J. C. P. 105, 1 L. T. Rep. N. S. 64, 8 Wkly. Rep. 187, 97 E. C. L. 305; Mallan *v.* May, 7 Jur. 536, 12 L. J. Exch. 376, 11 M. & W. 653; Cornwall *v.* Hawkins, 41 L. J. Ch. 435, 26 L. T. Rep. N. S. 607, 20 Wkly. Rep. 653.

Injunction against third persons.— Parties with notice may be enjoined from employing such a person in a business contrary to his contract. Fleckenstein Bros. Co. *v.* Fleckenstein, 66 N. J. Eq. 252, 57 Atl. 1025; Davis *v.* Booth, 131 Fed. 31, 65 C. C. A. 269 [*modifying* 127 Fed. 875]. But not parties who had no such notice. Shoemaker Ice Co. *v.* Rutherford, 20 Montg. Co. Rep. (Pa.) 159.

48. *Illinois.*— Watson *v.* Ross, 46 Ill. App. 188; Cobbs *v.* Niblo, 6 Ill. App. 60.

Massachusetts.— Ropes *v.* Upton, 125 Mass. 258; Angier *v.* Webber, 14 Allen 211, 92 Am. Dec. 748; Dooley *v.* Watson, 1 Gray 414.

New Jersey.— Althen *v.* Vreeland, (Ch. 1897) 36 Atl. 479.

New York.— Salzman *v.* Siegelman, 102 N. Y. App. Div. 406, 92 N. Y. Suppl. 844; Shearman *v.* Hart, 14 Abb. Pr. 358.

Pennsylvania.— Lukens *v.* Kelley, 2 Phila. 380.

Vermont.— Butler *v.* Burleson, 16 Vt. 176.

England.— Tallis *v.* Tallis, 1 E. & B. 391, 17 Jur. 1149, 22 L. J. Q. B. 185, 1 Wkly. Rep. 114, 72 E. C. L. 391; Price *v.* Green, 9 Jur. 880, 16 L. J. Exch. 108, 16 M. & W. 346; Leighton *v.* Wales, 7 L. J. Exch. 145, 3 M. & W. 545.

See 27 Cent. Dig. tit. "Injunction," § 121.

practice, he will be enjoined from practising again within the agreed limits, if they are reasonable,[49] or even from answering special unsolicited calls,[50] even though a penalty for a breach is fixed in the contract.[51] It is not necessary for plaintiff to prove that the consideration was adequate,[52] or that defendant is insolvent or the damage irreparable.[53]

(v) *Miscellaneous Lines of Business.* The rule has been applied to the sale of many other kinds of business.[54] For instance a teacher will be prevented from opening up a rival school contrary to his contract.[55] So the vendor of a published work will be enjoined from publishing a rival work of the same nature in violation of the contract of sale.[56]

d. Agreement Not to Use the Same Business Name. A contract not to open up a competing business under the same name and style is valid and will be enforced by injunction,[57] and even though there be no term in the contract to that effect, if the good-will of the business is a part of the subject-matter of the sale, the vendor will be enjoined from using the former name in such a way as to injure the enjoyment by the vendee of the rights he purchased.[58]

e. What Constitutes Breach of Contract — (i) *In General.* It is a question of fact and of construction of the contract whether or not there has actually been a breach of the contract to be enjoined.[59] If there has been no breach and none is threatened, of course no injunction will issue.[60] It is a breach to conduct

49. *Indiana.*— Beatty *v.* Coble, 142 Ind. 329, 41 N. E. 590; Pickett *v.* Green, 120 Ind. 584, 22 N. E. 737; Thayer *v.* Younge, 86 Ind. 259.

Michigan.— Timmerman *v.* Dever, 52 Mich. 34, 17 N. W. 230, 50 Am. Rep. 240; Doty *v.* Martin, 32 Mich. 462.

Oklahoma.— Hulen *v.* Earel, 13 Okla. 246, 73 Pac. 927.

Pennsylvania.— Wilkinson *v.* Colley, 164 Pa. St. 35, 30 Atl. 286, 26 L. R. A. 114; McClurg's Appeal, 58 Pa. St. 51; Gaul *v.* Hoffman, 5 Pa. Co. Ct. 355; McNutt *v.* McEwen, 10 Phila. 112.

Vermont.— Butler *v.* Burleson, 16 Vt. 176.

Canada.— Snider *v.* McKelvey, 27 Ont. App. A. R. 339.

See 27 Cent. Dig. tit. "Injunction," § 122.

50. Gaul *v.* Hoffman, 5 Pa. Co. Ct. 355.

51. Wilkinson *v.* Colley, 164 Pa. St. 35, 30 Atl. 286, 26 L. R. A. 114; Snider *v.* McKelvey, 27 Ont. App. 339.

Liquidated damages.— No injunction will be granted when stipulated damages are agreed upon (Martin *v.* Murphy, 129 Ind. 464, 28 N. E. 1118); but otherwise when it is clear that the parties intended that there should be no resumption of practice (McCurry *v.* Gibson, 108 Ala. 451, 18 So. 806, 54 Am. St. Rep. 177).

52. Ryan *v.* Hamilton, 205 Ill. 191, 68 N. E. 781 [*reversing* 103 Ill. App. 212].

53. Gordon *v.* Mansfield, 84 Mo. App. 367.

54. *Illinois.*— Hursen *v.* Gavin, 162 Ill. 377, 44 N. E. 735, livery business.

Indiana.— Eisel *v.* Hayes, 141 Ind. 41, 40 N. E. 119, butcher business.

Massachusetts.— Angier *v.* Webber, 14 Allen 211, 92 Am. Dec. 748, transfer business.

Michigan.— Up River Ice Co. *v.* Denler, 114 Mich. 296, 72 N. W. 157, 68 Am. St. Rep. 480, ice business.

New Jersey.— Carll *v.* Snyder, (Ch. 1893) 26 Atl. 977 (iron and tin business); Genelin *v.* Reisel, 10 N. J. L. J. 208 (barber shop).

Pennsylvania.— Stofflet *v.* Stofflet, 160 Pa. St. 529, 28 Atl. 857 (photograph gallery); Eckart *v.* Gerlach, 12 Phila. 530 (bakery); Carroll *v.* Hickes, 10 Phila. 308 (blacksmith); Hamilton *v.* Gerster, 33 Pittsb. Leg. J. N. S. 24 (restaurant).

See 27 Cent. Dig. tit. "Injunction," § 121.

55. Spier *v.* Lambdin, 45 Ga. 319. And see Herreshoff *v.* Boutineau, 17 R. I. 3, 19 Atl. 712, 33 Am. St. Rep. 850, 8 L. R. A. 469.

56. Ingram *v.* Stiff, 5 Jur. N. S. 947; Barfield *v.* Nicholson, 2 L. J. Ch. 90, 2 Sim. & St. 1, 25 Rev. Rep. 144, 1 Eng. Ch. 1, 57 Eng. Reprint 245; Ainsworth *v.* Bentley, 14 Wkly. Rep. 630. See also Cowan *v.* Fairbrother, 118 N. C. 406, 24 S. E. 212, 54 Am. St. Rep. 733, 32 L. R. A. 829, sale of newspaper.

57. Grow *v.* Seligman, 47 Mich. 607, 11 N. W. 404, 41 Am. Rep. 737; Vernon *v.* Hallam, 34 Ch. D. 748, 56 L. J. Ch. 115, 55 L. T. Rep. N. S. 676, 35 Wkly. Rep. 156.

58. Dwight *v.* Hamilton, 113 Mass. 175; U. S. Cordage Co. *v.* William Wall's Sons Rope Co., 90 Hun (N. Y.) 429, 35 N. Y. Suppl. 978; Churton *v.* Douglas, Johns. 174, 5 Jur. N. S. 887, 28 L. J. Ch. 841, 7 Wkly. Rep. 365; Cash *v.* Cash, [1902] W. N. 32.

59. See Contracts, 9 Cyc. 523 *et seq.*

60. Emmert *v.* Richardson, 44 Kan. 268, 24 Pac. 480; Weil *v.* Auerbach, 33 N. Y. App. Div. 629, 53 N. Y. Suppl. 339; Frost *v.* Seitz, 1 Dauph. Co. Rep. (Pa.) 251; Gophir Diamond Co. *v.* Wood, [1902] 1 Ch. 950, 71 L. J. Ch. 550, 86 L. T. Rep. N. S. 801, 50 Wkly. Rep. 603; Josselyn *v.* Parson, L. R. 7 Exch. 127, 41 L. J. Exch. 60, 25 L. T. Rep. N. S. 912, 20 Wkly. Rep. 316; Bird *v.* Lake, 1 Hem. & M. 338; Allen *v.* Taylor, 19 Wkly. Rep. 35, 556.

a business substantially similar to the one transferred or to do acts in violation of the spirit and intent of the contract, even though not of its letter.[61] Serving former customers and patients may be a breach, even though defendant did not solicit their business.[62]

(II) *Engaging in Business in Name of Another.* A contract not to engage in a certain business may be broken as well by engaging in it under the name of another person as in one's own name. If the use of the new name is not *bona fide*, but is a mere subterfuge to escape the penalty for breach of contract, the carrying on of such business under the new name will be enjoined.[63] Although the carrying on of the business by one under color of his wife's name will be enjoined,[64] there is nothing to prevent the other spouse or a near relative from carrying on such business if it is conducted in good faith and not really on behalf of the one who was a party to the contract.[65] So a contract may be broken by permitting acts of a third person contrary to it.[66] In some cases third persons may be enjoined from assisting a party to such a contract to break it.[67]

f. Adequacy of Consideration. An injunction against the breach of a contract in restraint of trade will not be refused on the ground that the consideration was inadequate,[68] unless the inadequacy is so great as to shock the conscience of the chancellor and to indicate that unfair and fraudulent advantage was taken.[69]

9. Effect of Providing For Penalty or Damages — a. Penalty. The fact that a sum of money is named in a contract as payable upon its breach as a penalty and not as liquidated damages does not prevent equity from granting an injunc-

Loaning money to competitor.— It is no breach to lend money to another to enable him to carry on a competing business. Salzman *v.* Siegelman, 101 N. Y. App. Div. 406, 92 N. Y. Suppl. 844; Harkinson's Appeal, 78 Pa. St. 196, 21 Am. Rep. 9.

61. Richardson *v.* Peacock, 28 N. J. Eq. 151; Patterson *v.* Glassmire, 166 Pa. St. 230, 31 Atl. 40; Lukens *v.* Kelley, 2 Phila. (Pa.) 380.

Engaging in business as an employee of another may be a breach of contract to be restrained by injunction. Pittsburgh Valve, etc., Co. *v.* Klingelhofer, 35 Pittsb. Leg. J. N. S. (Pa.) 1; Hamilton *v.* Gerster, 33 Pittsb. Leg. J. N. S. (Pa.) 24.

Becoming the president of a competing corporation may be a breach. Pittsburgh Store, etc., Co. *v.* Pennsylvania Stove Co., 208 Pa. St. 37, 57 Atl. 77.

62. Angier *v.* Webber, 14 Allen (Mass.) 211, 92 Am. Dec. 748; Gaul *v.* Hoffman, 5 Pa. Co. Ct. 355; Rogers *v.* Drury, 57 L. J. Ch. 502, 36 Wkly. Rep. 496.

63. *Indiana.*— Baker *v.* Pottmeyer, 75 Ind. 451.

New Jersey.— Richardson *v.* Peacock, 26 N. J. Eq. 40.

New York.— Booth *v.* Seibold, 37 Misc. 101, 74 N. Y. Suppl. 776.

Ohio.— Empson *v.* Bissinger, 8 Ohio Dec. (Reprint) 629, 9 Cinc. L. Bul. 86.

Pennsylvania.—Carroll *v.* Hickes, 10 Phila. 308, 1 Wkly. Notes Cas. 198.

See 27 Cent. Dig. tit. "Injunction," § 123.

64. Cobbs *v.* Niblo, 6 Ill. App. 60; Up River Ice Co. *v.* Denler, 114 Mich. 296, 72 N. W. 157, 68 Am. St. Rep. 480; Fleckenstein Bros. Co. *v.* Fleckenstein, (N. J. Ch. 1903) 53 Atl. 1043.

65. Emmert *v.* Richardson, 44 Kan. 268, 24 Pac. 480; Harkinson's Appeal, 78 Pa. St. 196, 21 Am. Rep. 9.

66. Tode *v.* Gross, 127 N. Y. 480, 28 N. E. 469, 24 Am. St. Rep. 475, 13 L. R. A. 652; Borgnis *v.* Edwards, 2 F. & F. 111.

67. Eisel *v.* Hayes, 141 Ind. 41, 40 N. E. 119; Grow *v.* Seligman, 47 Mich. 607, 11 N. W. 404, 41 Am. Rep. 737; Fleckenstein Bros. Co. *v.* Fleckenstein, (N. J. Ch. 1903) 53 Atl. 1043; Empson *v.* Bissinger, 8 Ohio Dec. (Reprint) 629, 9 Cinc. L. Bul. 86.

68. *Alabama.*— McCurry *v.* Gibson, 103 Ala. 451, 18 So. 806, 54 Am. St. Rep. 177.

Illinois.— Ryan *v.* Hamilton, 205 Ill. 191, 68 N. E. 781; Hursen *v.* Gavin, 162 Ill. 377, 44 N. E. 735; Linn *v.* Sigsbee, 67 Ill. 75.

Indiana.— Beatty *v.* Coble, 142 Ind. 329, 41 N. E. 590; Eisel *v.* Hayes, 141 Ind. 41, 40 N. E. 119.

Michigan.— Up River Ice Co. *v.* Denler, 114 Mich. 296, 72 N. W. 157, 68 Am. St. Rep. 480.

Pennsylvania.— McClurg's Appeal, 58 Pa. St. 51.

England.— Collins *v.* Locke, 4 App. Cas. 674, 48 L. J. P. C. 68, 41 L. T. Rep. N. S. 292, 28 Wkly. Rep. 189; Davies *v.* Davies, 36 Ch. D. 359, 56 L. J. Ch. 962, 58 L. T. Rep. N. S. 209, 36 Wkly. Rep. 86; Gravely *v.* Barnard, L. R. 18 Eq. 518, 43 L. J. Ch. 659, 30 L. T. Rep. N. S. 863; Hitchcock *v.* Coker, 6 A. & E. 438, 2 Hurl. & W. 464, 6 L. J. Exch. 266, 1 N. & P. 796, 33 E. C. L. 241; Pilkington *v.* Scott, 15 L. J. Exch. 329, 15 M. & W. 657.

See 27 Cent. Dig. tit. "Injunction," § 121 *et seq.*

69. Thayer *v.* Younge, 86 Ind. 259; Middleton *v.* Brown, 47 L. J. Ch. 411, 38 L. T. Rep. N. S. 334.

tion.[70] In the case of restrictive covenants as to the use of land it is no objection to an injunction that forfeiture of the premises is fixed as a penalty for a breach or that a right of entry is reserved in case of a breach.[71]

b. Liquidated Damages. If liquidated damages are provided for in case of a breach, and it appears that the intention was to give the party the alternative to perform or pay, the breach will not be enjoined.[72] Where the contract is an absolute one, and cannot be construed as meaning that defendant shall have the right to do the prohibited acts on paying the sum named, an injunction will be granted to restrain him, whether or not the sum to be paid be regarded as liquidated damages.[73]

10. Restraining Execution of Contract. It is seldom that a party to a contract will be prevented by injunction from carrying it out, since the complainant's remedy at law is adequate. He can refuse to perform his part, can defend when sued for such non-performance, and, if damaged, can sue for compensation.[74]

70. *Massachusetts.*— Ropes *v.* Upton, 125 Mass. 258.

New York.— Diamond Match Co. *v.* Roeber, 106 N. Y. 473, 13 N. E. 419, 60 Am. Rep. 464.

Pennsylvania.— Wilkinson *v.* Colley, 164 Pa. St. 35, 30 Atl. 286, 26 L. R. A. 114 [*reversing* 6 Kulp 401].

United States.— McCaull *v.* Braham, 16 Fed. 37, 21 Blatchf. 278.

England.— Jones *v.* Heavens, 4 Ch. D. 636, 25 Wkly. Rep. 460; Fox *v.* Scard, 33 Beav. 327, 55 Eng. Reprint 394; French *v.* Macale, 1 C. & L. 459, 2 Dr. & War. 269, 4 Ir. Eq. 568; Hardy *v.* Martin, 1 Cox Ch. 26, 29 Eng. Reprint 1046; Bird *v.* Lake, 1 Hem. & M. 111, 8 L. T. Rep. N. S. 632; London, etc., Bank *v.* Pritt, 56 L. J. Ch. 987, 57 L. T. Rep. N. S. 875, 36 Wkly. Rep. 135.

Canada.— Toronto Dairy Co. *v.* Gowans, 26 Grant Ch. (U. C.) 290.

See 27 Cent. Dig. tit. "Injunction," § 128.

Breach of lease.— Where a contract provides for a certain rent, and upon breach, for a certain higher rent, this is not generally regarded as a penalty but as liquidated damages. In case it is the latter, and the contract contemplates the doing of the act in case of such increased payment, no injunction will be granted. Rolfe *v.* Peterson, 2 Bro. P. C. 436, 1 Eng. Reprint 1048; French *v.* Macale, 1 C. & L. 459, 2 Dr. & War. 269, 4 Ir. Eq. 568; Woodward *v.* Gyles, 2 Vern. Ch. 119, 23 Eng. Reprint 686.

71. McMahon *v.* Williams, 79 Ala. 288; Watrous *v.* Allen, 57 Mich. 362, 24 N. W. 104, 58 Am. Rep. 363; Stees *v.* Kranz, 32 Minn. 313, 20 N. W. 241; Richards *v.* Burdsall, (N. J. Ch. 1887) 10 Atl. 274.

72. *Connecticut.*— Dills *v.* Doebler, 62 Conn. 366, 26 Atl. 398, 36 Am. St. Rep. 345, 20 L. R. A. 432.

Indiana.— Martin *v.* Murphy, 129 Ind. 464, 28 N. E. 1118.

Maryland.— Hahn *v.* Baltimore City Concordia Soc., 42 Md. 460.

New York.— Mapleson *v.* Del Puente, 13 Abb. N. Cas. 144; Nessle *v.* Reese, 19 Abb. Pr. 240, 29 How. Pr. 382; Vincent *v.* King, 13 How. Pr. 234, where it was held immaterial that defendant was insolvent.

United States.— McCaull *v.* Braham, 16 Fed. 37, 21 Blatchf. 278.

England.— General Acc. Assur. Corp. *v.* Noel, [1902] 1 K. B. 377, 71 L. J. K. B. 236, 86 L. T. Rep. N. S. 555, 50 Wkly. Rep. 381; Gerrard *v.* O'Reilly, 2 C. & L. 165, 3 Dr. & War. 414; French *v.* Macale, 1 C. & L. 459, 2 Dr. & War. 269, 4 Ir. Eq. 568; Sainter *v.* Ferguson, 1 Hall & T. 383, 47 Eng. Reprint 1460, 14 Jur. 255, 19 L. J. Ch. 170, 1 Macn. & G. 286, 47 Eng. Ch. 228, 41 Eng. Reprint 1275; Ranger *v.* Great Western R. Co., 5 H. L. Cas. 72, 10 Eng. Reprint 824; Carnes *v.* Nesbitt, 7 H. & N. 778, 31 L. J. Exch. 273, 4 L. T. Rep. N. S. 558, 9 Wkly. Rep. 811; Young *v.* Chalkley, 16 L. T. Rep. N. S. 286, 15 Wkly. Rep. 743.

Canada.— Snider *v.* McKelvey, 27 Ont. App. 339.

See 27 Cent. Dig. tit. "Injunction," § 128.

73. *Alabama.*— McCurry *v.* Gibson, 108 Ala. 451, 18 So. 806, 54 Am. St. Rep. 177.

Massachusetts.—Ropes *v.* Upton, 125 Mass. 258.

New York.— Diamond Match Co. *v.* Roeber, 106 N. Y. 473, 13 N. E. 419, 60 Am. Rep. 464; Phœnix Ins. Co. *v.* Continental Ins. Co., 87 N. Y. 400; Zimmermann *v.* Gerzog, 13 N. Y. App. Div. 210, 43 N. Y. Suppl. 339; Reynolds Co. *v.* Dreyer, 12 Misc. 368, 33 N. Y. Suppl. 649.

Pennsylvania.— American Ice Co. *v.* Luff, 12 Pa. Dist. 381, 28 Pa. Co. Ct. 622; Gillis *v.* Hall, 2 Brewst. 342.

England.— Weston *v.* Metropolitan Asylum Dist., 9 Q. B. D. 404, 46 J. P. 564, 51 L. J. Q. B. 399, 46 L. T. Rep. N. S. 580, 30 Wkly. Rep. 623; Bird *v.* Lake, 1 Hem. & M. 111, 8 L. T. Rep. N. S. 632; Howard *v.* Woodward, 10 Jur. N. S. 1123, 34 L. J. Ch. 47, 11 L. T. Rep. N. S. 414, 5 New Rep. 8, 13 Wkly. Rep. 132; Cole *v.* Sims, 23 L. J. Ch. 258, 1 Wkly. Rep. 151; Hanbury *v.* Cundy, 58 L. T. Rep. N. S. 155.

See 27 Cent. Dig. tit. "Injunction," § 128.

74. *Georgia.*— Macon *v.* Huff, 60 Ga. 221.

New Jersey.— Hulme *v.* Sbreve, 4 N. J. Eq. 116.

New York.— Murdock *v.* Prospect Park, etc., R. Co., 10 Hun 598.

Pennsylvania.—Gallagher *v.* Fayette County

But where defendant is attempting to carry out a contract when he has no right to do so, and is doing acts likely to cause irreparable injury to the complainant, the doing of those acts will be enjoined.[75] So a court of equity will interpose by injunction to prevent the several members of an illegal combination from enforcing an agreement to the injury of one engaged in a competing business.[76]

D. Corporate Franchises, Management, and Dealings[77] — **1. Doubtful or Disputed Rights.** The invasion of a corporate right or franchise will be enjoined only when the existence of such right or franchise is clear or has been established at law.[78] So the interference by the corporation with the rights of a member of the corporation,[79] or with the rights of third persons or the public,[80] will be enjoined only when such rights are free from doubt. The existing doubt should first be cleared up in a court of law.[81] Much less will interference with a right be enjoined where there is no such right, as where the statute under which the right is claimed is unconstitutional.[82] But an injunction may be issued to restrain a corporation from acting illegally, even though there is doubt as to its committing the acts charged, where, if true, irreparable injury would be done and where the injunction will work no injury in any event.[83]

2. Protection of Corporate Franchises and Rights. Corporate property is entitled to the same protection as the property of natural persons, and the remedy by injunction on behalf of a corporation is to be obtained on the same principles and for the same reasons as in other cases. An injunction is held to be the

R. Co., 38 Pa. St. 102; Philadelphia, etc., R. Co. *v.* Philadelphia, 8 Phila. 112, 284.

West Virginia.— Shepherd *v.* Groff, 34 W. Va. 123, 11 S. E. 997.

Wisconsin.— Joint School Dist. No. 17 *v.* Reid, 82 Wis. 96, 51 N. W. 1089.

See 27 Cent. Dig. tit. "Injunction," § 130.

The execution of a contract in restraint of trade will not be enjoined at the instance of a third party injured thereby. Tanenbaum *v.* New York F. Ins. Exch., 33 Misc. (N. Y.) 134, 68 N. Y. Suppl. 342.

75. Clark *v.* Layne, 97 Ky. 290, 30 S. W. 644, 17 Ky. L. Rep. 176; Merz Capsule Co. *v.* U. S. Capsule Co., 67 Fed. 414.

The execution of an illegal contract may be enjoined if the complainant repented in time, even though after execution of the contract equity would do nothing for either party. Atherton *v.* Wilkes-Barre, 3 Kulp (Pa.) 402.

The carrying out of a contract that is contrary to public policy may be enjoined when public policy is the better subserved by such a course. Cook County Brick Co. *v.* Labahn Brick Co., 92 Ill. App. 526; Basket *v.* Moss, 115 N. C. 448, 20 S. E. 733, 44 Am. St. Rep. 463, 48 L. R. A. 842; Hale *v.* Sharp, 4 Coldw. (Tenn.) 275; Law *v.* Law, 3 P. Wms. 39, 24 Eng. Reprint 1114.

76. Employing Printers' Club *v.* Doctor Blosser Co., 122 Ga. 509, 50 S. E. 353, 106 Am. St. Rep. 137, 69 L. R. A. 90; Brown *v.* Jacobs Pharmacy Co., 115 Ga. 429, 41 S. E. 553, 90 Am. St. Rep. 126, 57 L. R. A. 547.

77. Injunction as effecting dissolution of corporation see Corporations, 10 Cyc. 1294.

Injunction to prevent corporation from petitioning legislature for amendment of charter see Corporations, 10 Cyc. 218.

Injunction as excusing corporate officer for failure to file report see Corporations, 10 Cyc. 870 note 77.

78. Mobile *v.* Louisville, etc., R. Co., 84 Ala. 115, 4 So. 106, 5 Am. St. Rep. 342; Moses *v.* Mobile, 52 Ala. 198.

79. Baxter *v.* Chicago Bd. of Trade, 83 Ill. 146.

Insolvency doubtful.— Where an injunction is asked to prevent a corporation from doing business on the ground that it is insolvent, the injunction will be refused if the insolvency is doubtful and no dishonesty appears. Goodheart *v.* Raritan Min., etc., Co., 8 N. J. Eq. 73; Brundred *v.* Paterson Mach. Co., 4 N. J. Eq. 294.

The directors of a corporation will be enjoined from doing an act only where it is beyond question that the act is wrongful and the case is free from reasonable doubt. Gere *v.* New York Cent., etc., R. Co., 19 Abb. N. Cas. (N. Y.) 193.

80. Atty.-Gen. *v.* Delaware, etc., R. Co., 27 N. J. Eq. 1; Troth *v.* Troth, 8 N. J. Eq. 237.

Questions for courts of law.— The parties will be left to their remedy at law where the existence of the wrong of which plaintiff complains depends upon the construction of a statute (Atty.-Gen. *v.* Utica Ins. Co., 2 Johns. Ch. (N. Y.) 371), or where the right of the corporation to do the thing complained of depends upon the construction of its charter (Moore *v.* Green St., etc., Pass. R. Co., 3 Phila. (Pa.) 210; Sheboygan *v.* Sheboygan, etc., R. Co., 21 Wis. 667).

81. Sheboygan *v.* Sheboygan, etc., R. Co., 21 Wis. 667.

82. Norwich Gas Light Co. *v.* Norwich City Gas Co., 25 Conn. 19.

83. Manderson *v.* Commercial Bank, 28 Pa. St. 379.

proper remedy in nearly all cases where a corporate franchise is being invaded, the remedy at law not being regarded as adequate.[84] An injunction is proper whether such invasion be by another corporation,[85] or by the public,[86] and whether the invasion seeks to destroy the franchise or merely to participate in its exclusive privileges.[87] Where a corporation has been granted a franchise which amounts to a contract between the municipal body and the corporation, the latter will be protected in the exercise of its franchise and contract rights by injunction against interference therewith.[88] The illegal interference will be enjoined even though it is accompanied by or consists of acts of personal trespass,[89] or even arrests and criminal prosecutions.[90] But where damages or other remedies at law are adequate an injunction will be denied,[91] and also where the interference

84. Mobile *v.* Louisville, etc., R. Co., 84 Ala. 115, 4 So. 106, 5 Am. St. Rep. 342; Birmingham, etc., St. R. Co. *v.* Birmingham St. R. Co., 79 Ala. 465, 58 Am. Rep. 615; Kansas City, etc., R. Co. *v.* Kansas City, etc., R. Co., 129 Mo. 62, 31 S. W. 451 (interference with right to lay track enjoined); Central R. Co. *v.* Pennsylvania R. Co., 31 N. J. Eq. 475; Jersey City Gas Co. *v.* Dwight, 29 N. J. Eq. 242; Stage Horse Cases, 15 Abb. Pr. N. S. (N. Y.) 51.

The operation of an electric railway will not be enjoined because its electric currents seriously interfere with the business of a telephone company where the latter's franchise was subject to the rights of the railway company. Hudson River Tel. Co. *v.* Watervliet Turnpike, etc., Co., 135 N. Y. 393, 32 N. E. 148, 31 Am. St. Rep. 838, 17 L. R. A. 674.

85. *Alabama.*— Birmingham, etc., R. Co. *v.* Birmingham St. R. Co., 79 Ala. 465, 58 Am. Rep. 615.

Massachusetts.— Boston, etc., R. Corp. *v.* Salem, etc., R. Co., 2 Gray 1.

Montana.— Montana Cent. R. Co. *v.* Helena, etc., R. Co., 6 Mont. 416, 12 Pac. 916, interference with railroad right of way.

New Jersey.— Camden Horse R. Co. *v.* Citizens' Coach Co., 31 N. J. Eq. 525, obstructing use of car tracks.

New York.— Hudson, etc., Canal Co. *v.* New York, etc., & E. R. Co., 9 Paige 323; Newburgh, etc., Turnpike Road *v.* Miller, 5 Johns. Ch. 101, 9 Am. Dec. 274.

Ohio.— Hauss Electric Lighting Power Co. *v.* Jones Bros. Electric Co., 10 Ohio Dec. (Reprint) 709, 23 Cinc. L. Bul. 137, use by one company of electric light poles belonging to another.

Pennsylvania.— Com. *v.* Pittsburgh, etc., R. Co., 24 Pa. St. 159, 62 Am. Dec. 372; Pennsylvania Gas Co. *v.* Warren, etc., Gas Co., 3 Pa. Dist. 67 (interference with gas pipes).

See 27 Cent. Dig. tit. "Injunction," § 133.

Injury to electric lines.— One corporation will be enjoined from unlawful interference with and from wanton and negligent damage to the electric lines of a rival corporation in the lawful exercise of its franchise. Edison Electric Light, etc., Co. *v.* Merchants', etc., Electric Light, etc., Co., 209 Pa. St. 209, 49 Atl. 766, 86 Am. St. Rep. 712.

86. Mobile *v.* Louisville, etc., R. Co., 84 Ala. 115, 4 So. 106, 5 Am. St. Rep. 342; Franklin, etc., Turnpike Co. *v.* Maury County Ct., 8 Humphr. (Tenn.) 342 (turnpike toll franchise). *Compare* Salem, etc., Turnpike Co. *v.* Lyme, 18 Conn. 451. See, generally, MUNICIPAL CORPORATIONS.

Stoppage of electric railway.— A city may be enjoined from removing the poles and wires of an electric railway where great injury would be caused to the corporation and to the public, even though the corporation had broken its contract with the city in some respects. Newark Pass. R. Co. *v.* East Orange Tp., 53 N. J. Eq. 248, 31 Atl. 722.

87. Osborn *v.* U. S. Bank, 9 Wheat. (U. S.) 738, 6 L. ed. 204.

Unlawful competition.— An injunction may be obtained to prevent unlawful competition. Combs *v.* Sewell, 59 S. W. 526, 22 Ky. L. Rep. 1026; Central R. Co. *v.* Pennsylvania R. Co., 31 N. J. Eq. 475. *Compare* East St. Louis Connecting R. Co. *v.* East St. Louis Union R. Co., 108 Ill. 265. But a competing electric light company will not be enjoined when complainant has no exclusive privilege. Scranton Electric Light, etc., Co.'s Appeal, 122 Pa. St. 154, 15 Atl. 446, 9 Am. St. Rep. 79, 1 L. R. A. 285.

88. *Illinois.*— Quincy *v.* Bull, 106 Ill. 337.

Kansas.— La Harpe *v.* Elm Tp. Gas, etc., Co., 69 Kan. 97, 76 Pac. 448.

Maryland.— Baltimore *v.* Baltimore County Water, etc., Co., 95 Md. 232, 52 Atl. 670; Chesapeake, etc., Tel. Co. *v.* Baltimore, 89 Md. 689, 43 Atl. 784, 44 Atl. 1033; Hooper *v.* Baltimore City Pass. R. Co., 85 Md. 509, 37 Atl. 359, 38 L. R. A. 509.

Missouri.— Springfield R. Co. *v.* Springfield, 85 Mo. 674.

Pennsylvania.— Easton, etc., R. Co. *v.* Easton, 133 Pa. St. 505, 19 Atl. 486, 19 Am. St. Rep. 658.

United States.— Walla Walla *v.* Walla Walla Water Co., 172 U. S. 1, 19 S. Ct. 77, 43 L. ed. 341; Osborn *v.* U. S. Bank, 9 Wheat. 738, 6 L. ed. 204.

See 27 Cent. Dig. tit. "Injunction," § 134.

89. Mobile *v.* Louisville, etc., R. Co., 84 Ala. 115, 4 So. 106, 5 Am. St. Rep. 342; Stage Horse Cases, 15 Abb. Pr. N. S. (N. Y.) 51.

90. La Harpe *v.* Elm Tp. Gas, etc., Co., 69 Kan. 97, 76 Pac. 448.

91. Salem, etc., Turnpike Co. *v.* Lyme, 18

causes but slight inconvenience to the complainant and public convenience is being served by defendant.[92]

3. Exceeding or Misusing Corporate Franchises and Powers — a. Injunctions in Behalf of Public and Third Persons[93] — (I) *Restraining Corporate Action.* When a corporation is acting or threatening to act in excess of its corporate powers, or is misusing the franchise it possesses, to the injury of others, an injunction to restrain it is the proper remedy.[94] So where a railroad or a turnpike company is locating its road in a manner beyond its corporate authority it will be enjoined.[95] The injunction may be obtained by the public if the injury is public,[96] even without making an affirmative showing of any special or definite injury;[97]

Conn. 451 (special statutory remedy); East St. Louis Connecting R. Co. *v.* East St. Louis Union R. Co., 108 Ill. 265; Consumers' Gas Co. *v.* Kansas City Gas-Light, etc., Co., 100 Mo. 501, 13 S. W. 874, 18 Am. St. Rep. 563.

92. Ninth Ave. R. Co. *v.* New York El. R. Co., 3 Abb. N. Cas. (N. Y.) 347.

Illustrations.— A turnpike company is not entitled to an injunction against the laying on its road of water-pipes for the public use (Spring Grove Ave. Co. *v.* St. Bernard, 1 Ohio S. & C. Pl. Dec. 99, 1 Ohio N. P. 85) or against the construction of a sewer thereon (Providence, etc., Turnpike, etc., Co. *v.* Flanagan, 2 Lack. Leg. N. (Pa.) 101); but the remedy is an action for damages. So a railroad company cannot obtain an injunction to prevent another from using its abandoned right of way. Troy, etc., R. Co. *v.* Boston, etc., R. Co., 86 N. Y. 107; New York, etc., R. Co. *v.* New York, etc., R. Co., 11 Abb. N. Cas. (N. Y.) 386; Pennsylvania R. Co.'s Appeal, (Pa. 1882) 3 Walk. 454

93. Injunction against promoters of company for nuisance after its formation see Corporations, 10 Cyc. 269 note 4.

94. Atty.-Gen. *v.* Chicago, etc., R. Co., 112 Ill. 520; Ricker *v.* Larkin, 27 Ill. App. 625; Frederick *v.* Groshon, 30 Md. 436, 96 Am. Dec. 591; New York *v.* New York, etc., Ferry Co., 64 N. Y. 622; Volmer's Appeal, 115 Pa. St. 166, 8 Atl. 223; Baptist Cong. *v.* Scannel, 3 Grant (Pa.) 48.

In Pennsylvania, under the act of June 19, 1871 (Pamphl. Laws 1360, § 1; Pepper & L. Dig. 974), a court of equity may enjoin a corporation from exercising a franchise to which it has no right. Hopkins *v.* Catasauqua Mfg. Co., 180 Pa. St. 199, 36 Atl. 735; Sterling's Appeal, 111 Pa. St. 35, 2 Atl. 105, 56 Am. Rep. 246; McCandless' Appeal, 70 Pa. St. 210; Coalville Pass. R. Co. *v.* Wilkes-Barre Southside R. Co., 5 Kulp 340.

95. *Georgia.*— Justices Pike County Inferior Ct. *v.* Griffin, etc., Plank-Road Co., 9 Ga. 475.

New Jersey.— Delaware, etc., Canal Co. *v.* Raritan, etc., R. Co., 16 N. J. Eq. 321; Newark Plank Road, etc., Co. *v.* Elmer, 9 N. J. Eq. 754.

New York.— People *v.* Third Ave. R. Co., 45 Barb. 63.

Ohio.— Walker *v.* Mud River, etc., R. Co., 8 Ohio 38, holding that the discretion of a railroad company as to the exact location of its road will not be controlled by injunction.

Pennsylvania.— Edgewood R. Co.'s Appeal, 79 Pa. St. 257.

See 27 Cent. Dig. tit. "Injunction," § 135.

Suit by abutting owner.— Where a turnpike company appropriated a road in excess of its rights, an injunction was granted at suit of an adjoining property-owner without any showing of irreparable injury. Groff's Appeal, 128 Pa. St. 621, 18 Atl. 431.

96. Craig *v.* People, 47 Ill. 487; Chicago Fair Grounds Assoc. *v.* People, 60 Ill. App. 488; People *v.* Third Ave. R. Co., 45 Barb. (N. Y.) 63; McNulty *v.* Brooklyn Heights R. Co., 31 Misc. (N. Y.) 674, 66 N. Y. Suppl. 57; People *v.* Albany, etc., R. Co., 11 Abb. Pr. (N. Y.) 136, 19 How. Pr. 523; Buck Mountain Coal Co. *v.* Lehigh Coal, etc., Co., 50 Pa. St. 91, 88 Am. Dec. 534.

Resulting nuisance.— Misuser of a franchise will not be enjoined when no resulting nuisance exists. Erin Tp. *v.* Detroit, etc., Plank-Road Co., 115 Mich. 465, 73 N. W. 556.

97. Grey *v.* Greenville, etc., R. Co., 60 N. J. Eq. 153, 46 Atl. 636; Grey *v.* Greenville, etc., R. Co., 59 N. J. Eq. 372, 46 Atl. 638; Atty.-Gen. *v.* Paterson, etc., R. Co., 9 N. J. Eq. 526; Atty.-Gen. *v.* Chicago, etc., R. Co., 35 Wis. 425; Atty.-Gen. *v.* London, etc., R. Co., [1900] 1 Q. B. 78, 63 J. P. 772, 69 L. J. Q. B. 26, 81 L. T. Rep. N. S. 649; Jordeson *v.* Sutton, [1899] 2 Ch. 217, 63 J. P. 692, 68 L. J. Ch. 457, 80 L. T. Rep. N. S. 815; Bonner *v.* Great Western R. Co., 24 Ch. D. 1, 47 J. P. 580, 48 L. T. Rep. N. S. 619, 32 Wkly. Rep. 190; Atty.-Gen. *v.* Cockermouth Local Bd., L. R. 11 Eq. 172, 44 L. J. Ch. 118, 30 L. T. Rep. N. S. 590, 22 Wkly. Rep. 619; Ware *v.* Regent's Canal Co., 3 De G. & J. 212, 5 Jur. N. S. 25, 28 L. J. Ch. 153, 7 Wkly. Rep. 67, 60 Eng. Ch. 165, 44 Eng. Reprint 1250; Liverpool *v.* Chorley Water-Works Co., 2 De G. M. & G. 852, 51 Eng. Ch. 666, 42 Eng. Reprint 1105.

Illustrations.— The invasion of a public canal by a railroad company will be enjoined even though it has fallen into disuse. Com. *v.* Pittsburgh, etc., R. Co., 24 Pa. St. 159, 62 Am. Dec. 372. A corporation will be enjoined from throwing a dam across a navigable stream, even though there be little actual navigation. It will not be heard to say that the dam will not materially obstruct navigation. Atty.-Gen. *v.* Eau Claire, 37 Wis. 400.

and may be obtained by another corporation or an individual when special injury from the acts of the corporation is shown,[98] but not otherwise.[99]

(II) *Restraining Over-Charge by Carrier.*[1] Injunctions against charging more than the maximum rates fixed by law have been held proper,[2] although there are cases to the contrary,[3] the propriety of the relief usually depending on the adequacy of the legal remedy.

(III) *Compelling Corporate Action.* If a corporation fails to carry out duties imposed upon it by its charter it may be compelled to perform them by mandatory injunction,[4] at least where the remedy by mandamus would not be adequate,[5] and where the performance of certain things is a condition precedent

98. *Illinois.*— Hickey *v.* Chicago, etc., R. Co., 6 Ill. App. 172.

Kansas.— Pacific Mut. Tel. Co. *v.* Chicago, etc., Bridge Co., 36 Kan. 118, 12 Pac. 560.

Maryland.— Frederick County *v.* Groshon, 30 Md. 436, 96 Am. Dec. 591.

Pennsylvania.— Becker *v.* Lebanon, etc., R. Co., 188 Pa. St. 484, 41 Atl. 612; Packer *v.* Sunbury, etc., R. Co., 19 Pa. St. 211.

Tennessee.— Franklin, etc., Turnpike Co. *v.* Campbell, 2 Humphr. 467.

Wisconsin.— Marshfield Land, etc., Co. *v.* John Week Lumber Co., 108 Wis. 268, 84 N. W. 434.

The assignee of a corporation is not liable because of the threatened breach of duty by the corporation itself. Sterne *v.* Metropolitan Tel., etc., Co., 33 N. Y. App. Div. 169, 53 N. Y. Suppl. 467.

Remedy at law adequate.—If the complainant's remedy at law is adequate he is not entitled to an injunction. Davis *v.* American S. P. C. A., 6 Daly (N. Y.) 81 [*affirmed* in 75 N. Y. 362].

Illegal acquisition of property.— An individual cannot enjoin a corporation from exercising its legitimate corporate powers, on the ground that it has acquired a portion of its property illegally. Brown *v.* Atlanta R., etc., Co., 113 Ga. 462, 39 S. E. 71.

Protection of corporate name by injunction see CORPORATIONS, 10 Cyc. 151.

99. Chicago Gen. R. Co. *v.* Chicago, etc., R. Co., 181 Ill. 605, 54 N. E. 1026; Hickey *v.* Chicago, etc., R. Co., 6 Ill. App. 172; Levy *v.* Mutual L. Ins. Co., 54 Hun (N. Y.) 315, 7 N. Y. Suppl. 562; McNulty *v.* Brooklyn Heights R. Co., 31 Misc. (N. Y.) 674, 66 N. Y. Suppl. 57; Sullivan *v.* Venner, 18 N. Y. Suppl. 398; Philipsburg Water Co. *v.* Citizens' Water Co., 189 Pa. St. 23, 42 Atl. 194; Buck Mountain Coal Co. *v.* Lehigh Coal, etc., Co., 50 Pa. St. 91, 88 Am. Dec. 534; Coatesville, etc., St. R. Co. *v.* Uwchlan St. R. Co., 18 Pa. Super. Ct. 524; Cumberland Valley R. Co.'s Appeal, 62 Pa. St. 218; Pudsey Coal Gas Co. *v.* Bradford, L. R. 15 Eq. 167, 42 L. J. Ch. 293, 28 L. T. Rep. N. S. 11, 21 Wkly. Rep. 286; Liverpool *v.* Chorley Water-Works Co., 2 De G. M. & G. 852, 860, 51 Eng. Ch. 666, 42 Eng. Reprint 1105; Holyoake *v.* Shrewsbury, etc., R. Co., 5 R. & Can. Cas. 421.

Effect of laches.— Under the act of June 19, 1871 (Pamphl. Laws 1360, § 1) a railway company will not be enjoined from continuing its tracks in front of plaintiff's property, even though if put there without right, when plaintiff is guilty of laches. Becker *v.* Lebanon, etc., St. R. Co., 188 Pa. St. 484, 41 Atl. 612.

Illegal consolidation.— But a private citizen has sufficient interest to obtain an injunction to prevent a consolidation of corporations contrary to statute. Currier *v.* Concord R. Corp., 48 N. H. 321.

1. See CARRIERS, 6 Cyc. 498 *et seq.*

Enforcement of orders of interstate commerce commission see COMMERCE, 7 Cyc. 492.

2. Des Moines *v.* Des Moines Waterworks Co., 95 Iowa 348, 64 N. W. 269; American Coal Co. *v.* Consolidation Coal Co., 46 Md. 15; Atty.-Gen. *v.* Chicago, etc., R. Co., 35 Wis. 425. See Anderson *v.* Midland R. Co., [1902] 1 Ch. 369, 71 L. J. Ch. 89, 85 L. T. Rep. N. S. 408, 50 Wkly. Rep. 40; Palmer *v.* London, etc., R. Co., L. R. 1 C. P. 588, 12 Jur. N. S. 926, 35 L. J. C. P. 289, 15 L. T. Rep. N. S. 159, 15 Wkly. Rep. 11.

Suit by attorney-general.— The remedy is to be had on application of the attorney-general, not of an individual. McNulty *v.* Brooklyn Heights R. Co., 31 Misc. (N. Y.) 674, 66 N. Y. Suppl. 57.

Individuals exempted by the charter from paying turnpike toll may enjoin the corporation from imposing it. Louisville, etc., Turnpike Road Co. *v.* Boss, 44 S. W. 981, 19 Ky. L. Rep. 954.

3. Rogers Locomotive, etc., Works *v.* Erie R. Co., 20 N. J. Eq. 379. See Cambridge *v.* Cambridge R. Co., 10 Allen (Mass.) 50.

4. People *v.* Albany, etc., R. Co., 11 Abb. Pr. (N. Y.) 136, 19 How. Pr. 523 (railroad company may be enjoined from discontinuing business); Zanesville Gas-Light Co. *v.* Zanesville, 47 Ohio St. 35, 23 N. E. 60 (gas company may be compelled to continue to supply the city so long as it enjoys the city's franchise).

The rights of the public and third persons will be considered in granting such a mandatory injunction. Louisville, etc., R. Co. *v.* Pittsburg, etc., Coal Co., 111 Ky. 960, 64 S. W. 969, 98 Am. St. Rep. 447, 55 L. R. A. 601, 23 Ky. L. Rep. 1318. *Compare* Atty.-Gen. *v.* Chicago, etc., R. Co., 35 Wis. 425.

5. New York, etc., R. Co. *v.* Montclair Tp., 47 N. J. Eq. 591, 21 Atl. 493; U. S. *v.* Western Union Tel. Co., 50 Fed. 28.

Posting of by-laws.— Mandamus and not injunction is the proper remedy to compel a corporation to post its by-laws as provided

to its right to enjoy corporate franchises, the exercise by it of its franchises may be enjoined until such performance.[6]

b. In Behalf of Shareholders and Creditors[7]—(i) *Acts Contrary to Charter or Law.* The execution of *ultra vires* contracts will be enjoined at the suit of a shareholder.[8] But such shareholder must show that he is acting *bona fide* in the interest of the corporation and not in the interest of persons hostile to it.[9] The illegal issuance and transfer of corporate stock may be enjoined at the suit of shareholders holding stock legally issued.[10] It is not necessary for the shareholder to show special injury to himself,[11] but it must be diligent to prevent the illegal acts and prompt in applying to the courts.[12] The illegal consolidation of corporations may be enjoined,[13] and under statutes the continued exercise of corporate powers by an insolvent corporation may be enjoined.[14]

(ii) *Misapplication of Corporate Funds.* The rule is well settled that the misapplication of corporate funds and property will be enjoined[15] at the suit of a

by statute. Boardman *v.* Marshalltown Grocery Co., 105 Iowa 445, 75 N. W. 343.

6. Unangst's Appeal, 55 Pa. St. 128; Jarden *v.* Philadelphia, etc., R. Co., 3 Whart. (Pa.) 502; Philadelphia *v.* Lombard St., etc., Pass. R. Co., 5 Phila. (Pa.) 248; Martin *v.* Second, etc., St. Pass. R. Co., 3 Phila. (Pa.) 316; Whitson *v.* Philadelphia, etc., Pass. R. Co., 3 Phila. (Pa.) 284; Atty.-Gen. *v.* Great Western R. Co., L. R. 7 Ch. 767.

Payment.— If payment for a privilege was not made a condition precedent, the enjoyment of the privilege will not be enjoined because of non-payment. Stump's Appeal, 38 Leg. Int. (Pa.) 205.

Time limit exceeded.— When the right of a corporation to construct a road through a township is limited to a certain time, it will be enjoined at suit of the township from proceeding after that time. Plymouth Tp. *v.* Chestnut Hill, etc., R. Co., 168 Pa. St. 181, 32 Atl. 19.

Intent to default in part.— A railroad will not be enjoined from constructing its road because it does not intend to construct all of it. Aurora, etc., R. Co. *v.* Lawrenceburgh, 56 Ind. 80.

7. See Corporations, 10 Cyc. 983–986.

8. See Corporations, 10 Cyc. 985 note 31.

9. Belmont *v.* Erie R. Co., 52 Barb. (N. Y.) 637; Camblos *v.* Philadelphia, etc., R. Co., 4 Fed. Cas. No. 2,331, 4 Brewst. (Pa.) 563, 9 Phila. (Pa.) 411; Forrest *v.* Manchester, etc., R. Co., 4 De G. F. & J. 126, 7 Jur. N. S. 887, 4 L. T. Rep. N. S. 666, 9 Wkly. Rep. 818, 65 Eng. Ch. 99, 45 Eng. Reprint 1131; Filder *v.* London, etc., R. Co., 1 Hem. & M. 489. *Compare* Bloxam *v.* Metropolitan R. Co., L. R. 3 Ch. 337, 18 L. T. Rep. N. S. 41, 16 Wkly. Rep. 490; Mutter *v.* Eastern, etc., R. Co., 38 Ch. D. 92, 57 L. J. Ch. 615, 59 L. T. Rep. N. S. 117, 36 Wkly. Rep. 401.

10. Fisk *v.* Chicago, etc., R. Co., 53 Barb. (N. Y.) 513; Davis *v.* San Antonio, etc., R. Co., (Tex. Civ. App. 1898) 44 S. W. 1012.

11. Kuhn *v.* American Academy of Music, 17 Phila. (Pa.) 198; Munster *v.* Cammell Co., 21 Ch. D. 183, 51 L. J. Ch. 731, 47 L. T. Rep. N. S. 44, 30 Wkly. Rep. 812; Pulbrook *v.* Richmond Consolidated Min. Co., 9 Ch. D. 610, 48 L. J. Ch. 65, 27 Wkly. Rep. 377.

12. Rabe *v.* Dunlap, 51 N. J. Eq. 40, 25 Atl. 959; Leo *v.* Union Pac. R. Co., 19 Fed. 283.

13. See Corporations, 20 Cyc. 299 note 65.

14. Parsons *v.* Monroe Mfg. Co., 4 N. J. Eq. 187; Oakley *v.* Paterson Bank, 2 N. J. Eq. 173; Osgood *v.* Maguire, 61 N. Y. 524; Morgan *v.* New York, etc., R. Co., 10 Paige (N. Y.) 290, 40 Am. Dec. 244; Matthews *v.* Trustees, 7 Phila. (Pa.) 270.

The solvency must not be doubtful. Goodheart *v.* Raritan Min., etc., Co., 8 N. J. Eq. 73; Brundred *v.* Paterson Mach. Co., 4 N. J. Eq. 294.

15. *Georgia.*— Atlanta Real Estate Co. *v.* Atlanta Nat. Bank, 75 Ga. 40.

Illinois.— Smith *v.* Bangs, 15 Ill. 399.

Indiana.— Redkey Citizens' Natural Gas Light, etc., Co. *v.* Orr, 27 Ind. App. 1, 60 N. E. 716.

New Jersey.— Gifford *v.* New Jersey R., etc., Co., 10 N. J. Eq. 171.

Ohio.— Baldwin *v.* Hillsborough, etc., R. Co., 1 Ohio Dec. (Reprint) 532, 10 West. L. J. 337.

Pennsylvania.— Langolf *v.* Seiberlitch, 2 Pars. Eq. Cas. 64; Diller *v.* Rosenthal, 6 Luz. Leg. Reg. 33.

See 27 Cent. Dig. tit. "Injunction," § 138.

A receiver may thus prevent the improper disposition of corporate property. Gray *v.* De Castro, etc., Sugar-Refining Co., 57 Hun (N. Y.) 592, 10 N. Y. Suppl. 632.

Transfer to another corporation.— An intent to transfer the whole property to another corporation is not shown by the fact that a majority of the stock-holders have traded their shares to the other corporation for shares in it. Odlin *v.* Bingham Copper, etc., Min. Co., 64 N. J. Eq. 363, 51 Atl. 925. Directors will not be restrained from transferring the whole property to another corporation when the corporate charter is about to expire and the transfer is for the purpose of liquidation. Buford *v.* Keokuk Northern Line Packet Co., 3 Mo. App. 159.

Collection of stock subscription.— Under proper circumstances a stock-holder may enjoin the collection of unpaid instalments on his stock subscription when the money is not

shareholder,[16] or of a creditor who would otherwise be without adequate remedy.[17] The payment of illegal dividends will be enjoined.[18] Acts of directors that are in breach of trust and are calculated to render the corporation insolvent will be enjoined at the suit of shareholders;[19] but a court of equity will not control by injunction the exercise of discretion vested in directors or other corporate officers as to the disposition of corporate property and funds, when there is no fraud.[20]

being expended according to agreement. Dill *v.* Wabash Valley R. Co., 21 Ill. 91.

16. *Connecticut.*— Scofield *v.* Eighth School Dist., 27 Conn. 499.

New Hampshire.— March *v.* Eastern R. Co., 43 N. H. 515.

Pennsylvania.— Barrett *v.* Building Assoc., 7 Luz. Leg. Reg. 143.

United States.— Pollock *v.* Farmers L. & T. Co., 157 U. S. 429, 15 S. Ct. 673, 39 L. ed. 759; Mechanics, etc., Bank *v.* Thomas, 18 How. 384, 15 L. ed. 460; Mechanics, etc., Bank *v.* Debolt, 18 How. 380, 15 L. ed. 458; Dodge *v.* Woolsey, 18 How. 331, 15 L. ed. 401; New York, etc., Rapid-Transit Co. *v.* Parrott, 36 Fed. 462.

England.— Hoole *v.* Great Western R. Co., L. R. 3 Ch. 262, 17 L. T. Rep. N. S. 153, 16 Wkly. Rep. 260; Salomons *v.* Laing, 12 Beav. 339, 14 Jur. 279, 19 L. J. Ch. 255, 6 R. & Can. Cas. 289, 50 Eng. Reprint 1091; Colman *v.* Eastern Counties R. Co., 10 Beav. 1, 11 Jur. 74, 16 L. J. Ch. 73, 4 R. & Can. Cas. 513, 50 Eng. Reprint 481; Fawcett *v.* Laurie, 1 Dr. & Sm. 192, 7 Jur. N. S. 61, 8 Wkly. Rep. 352, 62 Eng. Reprint 352; Carlisle *v.* South Eastern R. Co., 2 Hall & T. 366, 47 Eng. Reprint 1724, 14 Jur. 535, 1 Macn. & G. 689, 47 Eng. Ch. 546, 41 Eng. Reprint 1432, 6 R. & Can. Cas. 682; Bagshaw *v.* Eastern Union R. Co., 2 Hall & T. 201, 47 Eng. Reprint 1655, 14 Jur. 491, 19 L. J. Ch. 410, 2 Macn. & G. 389, 48 Eng. Ch. 300, 42 Eng. Reprint 151, 6 R. & Can. Cas. 169; MacBride *v.* Lindsay, 9 Hare 574, 16 Jur. 535, 41 Eng. Ch. 574; Simpson *v.* Westminster Palace Hotel Co., 8 H. L. Cas. 712, 6 Jur. N. S. 985, 2 L. T. Rep. N. S. 707, 11 Eng. Reprint 608.

Canada.— Angus *v.* Montreal, etc., R. Co., 23 L. C. Jur. 161, 2 Montreal Leg. N. 203.

See 27 Cent. Dig. tit. "Injunction," § 138.

The issuance of stock in exchange to the holder of fraudulent bonds bought by him with notice will be enjoined. Belmont *v.* Erie R. Co., 52 Barb. (N. Y.) 637.

Remedy at law.— The payment of money will not be enjoined where there would be a remedy at law to recover it. Nash *v.* Hall, 11 Misc. (N. Y.) 468, 32 N. Y. Suppl. 701.

Suit by outsiders to prevent bond issue. — An outsider is not entitled to enjoin a bond issue on the ground that it will depreciate the stock which he has contracted to acquire. Mayer *v.* Denver, etc., R. Co., 38 Fed. 197.

17. *Maryland.*— State *v.* Northern Cent. R. Co., 18 Md. 193.

Massachusetts.—Phillips *v.* Eastern R. Co., 138 Mass. 122.

New York.— Buel *v.* Baltimore, etc., R. Co., 24 Misc. 646, 53 N. Y. Suppl. 749.

Ohio.— Dayton, etc., R. Co. *v.* Shoemaker, 3 Ohio Cir. Ct. 473, 2 Ohio Cir. Dec. 270; Columbus, etc., R. Co. *v.* Burke, 10 Ohio Dec. (Reprint) 136, 19 Cinc. L. Bul. 27.

Wisconsin.— Platteville *v.* Galena, etc., R. Co., 43 Wis. 493.

See 27 Cent. Dig. tit. "Injunction," § 138.

Unliquidated claim.—But a sale of property will not be enjoined at the instance of a creditor who has no lien thereon and whose claim is an unliquidated one. Erie R. Co. *v.* Wilkesbarre Coal, etc., Co., 9 Phila. (Pa.) 262.

Creditor without lien on specific property. — A creditor cannot obtain an injunction to restrain a corporation from dealing with its assets, other than the assets comprised in his particular security, as the company sees fit. Mills *v.* Northern R. Co., L. R. 5 Ch. 621, 23 L. T. Rep. N. S. 719, 19 Wkly. Rep. 171.

18. Williams *v.* Western Union Tel. Co., 48 N. Y. Super. Ct. 349; Underwood *v.* New York, etc., R. Co., 17 How. Pr. (N. Y.) 537 (payment of dividends on spurious stock may be enjoined); Montreal Street R. Co. *v.* Ritchie, 16 Can. Sup. Ct. 622.

Remedy by action against directors.— When the law makes directors liable for dividends illegally declared, they will not be enjoined from declaring one, without a showing that they are insolvent and the remedy at law is inadequate. Schoenfeld *v.* American Can Co., (N. J. Ch. 1903) 55 Atl. 1044.

19. *Alabama.*— Birmingham Min., etc., Co. *v.* Mutual L. & T. Co., 96 Ala. 364, 11 So. 368.

California.— Wright *v.* Oroville Gold, etc., Min. Co., 40 Cal. 20.

Connecticut.— Sears *v.* Hotchkiss, 25 Conn. 171, 65 Am. Dec. 557.

Indiana.— Carmien *v.* Cornell, 148 Ind. 83, 47 N. E. 216.

New Jersey.— Wildes *v.* Rural Homestead Co., 53 N. J. Eq. 452, 32 Atl. 676.

New York.— Ives *v.* Smith, 8 N. Y. Suppl. 46.

See 27 Cent. Dig. tit. "Injunction," § 138.

Propriety of use of property.— The property must be used contrary to the charter or in breach of trust or such use will not be enjoined at the instance of the shareholders. Moses *v.* Tompkins, 84 Ala. 613, 4 So. 763.

Fraudulent acts of stock-holders in violation of the charter may be enjoined at the instance of other stock-holders. Kuhn *v.* American Music Academy, 15 Wkly. Notes Cas. (Pa.) 251.

20. *Indiana.*— Rogers *v.* Lafayette Agricultural Works, 52 Ind. 296.

Where there is an adequate remedy elsewhere for the illegal disposition of property or the misapplication of funds no injunction will be granted.[21]

(III) *Denial of Rights of Stock-Holders*—(A) *Expulsion of Members.* A corporation will not be enjoined from investigating charges against one of its members in accordance with its by-laws,[22] nor from expelling a member in like manner;[23] nor is injunction the proper remedy to restore a member improperly expelled, the rightfulness of the expulsion being properly for a court of law.[24]

(B) *Disposal of Stock of Shareholder.* The forfeiture and sale of shares of stock, where authorized, will not be enjoined,[25] but if wrongful the shareholder is entitled to an injunction unless his remedy at law in damages is adequate;[26] and an injunction will be granted to prevent a fraudulent abuse of the statutory power to sell in fraud of other creditors of the shareholder.[27] Where shares to which a stock-holder is entitled are withheld from him he is not entitled to an injunction if the corporation is able to respond in damages,[28] but he may be entitled to enjoin their transfer to anybody else.[29]

New Jersey.— Sternberg *v.* Wolff, 56 N. J. Eq. 555, 42 Atl. 1078; Bateman *v.* Hollinger, (Ch. 1894) 30 Atl. 1107; Elkins *v.* Camden, etc., R. Co., 36 N. J. Eq. 241.

New York.— Hatch *v.* American Union Tel. Co., 9 Abb. N. Cas. 223; Bach *v.* Pacific Mail Steamship Co., 12 Abb. Pr. N. S. 373.

Ohio.— Baldwin *v.* Hillsborough, etc., R. Co., 1 Ohio Dec. (Reprint) 532, 10 West. L. J. 337.

Pennsylvania.— Taylor *v.* Scranton Poor Dist., 2 Lack. Leg. N. 205.

United States.— Taylor *v.* Southern Pac. Co., 122 Fed. 147.

See 27 Cent. Dig. tit. "Injunction," § 138.

Public sale of stock.— A sale of stock belonging to the corporation will not be enjoined merely because the directors intend to perpetuate their own power by having their friends buy it, when the sale is to be public and to the highest bidder. Lomis *v.* Dexter, 10 Ohio Dec. (Reprint) 287, 20 Cinc. L. Bul. 5.

Deadlock in the management.— An injunction is impracticable to restrain and supervise the actions of officers on the ground of a deadlock in the management because of dissensions. Sternberg *v.* Wolff, 56 N. J. Eq. 389, 39 Atl. 397, 67 Am. St. Rep. 494, 39 L. R. A. 762.

21. Schoenfeld *v.* American Can Co., (N. J. Ch. 1903) 55 Atl. 1044; Lewisohn *v.* Anaconda Copper Min. Co., 26 Misc. (N. Y.) 613, 56 N. Y. Suppl. 807; Weidenfeld *v.* Allegheny, etc., R. Co., 47 Fed. 11; Matthews *v.* Murchison, 15 Fed. 691.

22. Chicago Bd. of Trade *v.* Weare, 105 Ill. App. 289; Hurst *v.* New York Produce Exch., 100 N. Y. 605, 3 N. E. 42.

23. Sturges *v.* Chicago Bd. of Trade, 86 Ill. 441; Gregg *v.* Massachusetts Medical Soc., 111 Mass. 185, 15 Am. Rep. 24. See EXCHANGES, 17 Cyc. 860–862.

24. Baxter *v.* Chicago Bd. of Trade, 83 Ill. 146; Fisher *v.* Chicago Bd. of Trade, 80 Ill. 85; White *v.* Brownell, 4 Abb. Pr. N. S. (N. Y.) 162. But see Albers *v.* Merchants' Exch., 39 Mo. App. 583, where an injunction issued under the statute.

25. Burnham *v.* San Francisco Fuse Mfg. Co., 76 Cal. 24, 17 Pac. 940; Sullivan *v.* Triunfo Gold, etc., Min. Co., 29 Cal. 585.

26. Elliott *v.* Sibley, 101 Ala. 344, 13 So. 500 (remedy at law adequate); Moore *v.* New Jersey Lighterage Co., 57 N. Y. Super. Ct. 1, 5 N. Y. Suppl. 192; Johnson *v.* Lyttle's Iron Agency Co., 5 Ch. D. 687, 46 L. J. Ch. 786, 36 L. T. Rep. N. S. 528, 25 Wkly. Rep. 548; Norman *v.* Mitchell, 19 Beav. 278, 52 Eng. Reprint 356, 5 De G. M. & G. 648, 54 Eng. Ch. 511, 43 Eng. Reprint 1022; Goulton *v.* London Architectural Brick, etc., Co., [1877] W. N. 141.

Stock of no market value.— When a corporation is threatening to sell out a shareholder's stock because of a default that does not exist, injunction is proper if the stock has no market value. Schuetz *v.* German-American Real Estate Co., 21 N. Y. App. Div. 163, 47 N. Y. Suppl. 500.

Fraudulent forfeiture.— It has been held that the forfeiture and cancellation of stock will be enjoined when it is fraudulent and for the purpose of gaining voting control by excluding complainant from voting his shares. Hall *v.* Lay, 27 Misc. (N. Y.) 602, 59 N. Y. Suppl. 638.

Unauthorized assessments.— Where a solvent corporation assesses non-assessable stock, and demands payment of the assessment, on penalty of a forfeiture and sale of the stock, injunction will lie, at suit of a stock-holder. San Antonio St. R. Co. *v.* Adams, (Tex. Civ. App. 1894) 25 S. W. 639. See also CORPORATIONS, 10 Cyc. 489.

27. Seagraves *v.* Railroad Bank, 4 R. I. 372.

28. Meredith *v.* New Jersey Zinc, etc., Co., 56 N. J. Eq. 454, 41 Atl. 1116 [*affirming* 55 N. J. Eq. 211, 37 Atl. 539].

29. Bedford *v.* American Aluminum, etc., Co., 51 N. Y. App. Div. 537, 64 N. Y. Suppl. 856; Quin *v.* Havenor, 118 Wis. 53, 94 N. W. 642.

Disposal by fraudulent holder.— The disposal of a shareholder's stock, fraudulently obtained, will be enjoined. Wanner *v.* Powell, 75 Ill. App. 297.

(c) *Preventing Shareholders From Voting.* An injunction is the proper remedy to restrain a corporation or its officers from preventing a shareholder from voting as his ownership of shares entitles him.[30]

(d) *Mandatory Injunction.* A stock-holder may compel corporate action by a mandatory injunction where mandamus is not a proper remedy.[31]

4. Elections of Corporate Officers[32] — a. Injunction to Prevent Voting of Stock. When stock in a corporation is transferred without consideration, for the purpose of fraudulently obtaining more votes than the real owner of the stock might otherwise cast, in order to control an election, the transferees may be enjoined from voting.[33] In order to prevent one from voting, it must be clearly shown that he is not entitled to vote,[34] and an injunction will not be granted where its real purpose is to control an election by keeping the majority from ruling,[35] nor to restrain a stock-holder from voting a certain way.[36]

b. Injunction Against Holding Election. The holding of an election will rarely be enjoined,[37] although equity has power to do so;[38] nor is an application for an injunction the proper method of trying the right to an office or settling a disputed election.[39]

5. Officers Not Enjoined From Acting as Such.[40] Officers of a corporation will not be enjoined from acting as such within their chartered powers and in the exercise of discretion, for malfeasance in office or other reasons,[41] even though

30. Supreme Lodge O. of G. C. *v.* Simering, 88 Md. 276, 40 Atl. 723, 71 Am. St. Rep. 409, 41 L. R. A. 720; Ayer *v.* Seymour, 15 Daly (N. Y.) 249, 5 N. Y. Suppl. 650; Hall *v.* Lay, 27 Misc. (N. Y.) 602, 59 N. Y. Suppl. 638; Brown *v.* Pacific Mail Steamship Co., 4 Fed. Cas. No. 2,025, 5 Blatchf. 525. See also Corporations, 10 Cyc. 986.

31. Blymyer *v.* Blymyer Iron Works Co., 8 Ohio S. & C. Pl. Dec. 463, 5 Ohio N. P. 71 (mandatory injunction to obtain inspection of books); Boardman *v.* Marshalltown Grocery Co., 105 Iowa 445, 75 N. W. 343 (mandamus remedy for compelling the posting of by-laws as required by law).

32. See also Corporations, 10 Cyc. 349, 986.

33. Webb *v.* Ridgely, 38 Md. 364; Campbell *v.* Poultney, 6 Gill & J. (Md.) 94, 26 Am. Dec. 559; Allen *v.* De Lagerberger, 10 Ohio Dec. (Reprint) 341, 20 Cinc. L. Bul. 368.

Injunction against receiving votes.— It is proper to enjoin election inspectors from receiving the votes of certain persons. People *v.* Albany, etc., R. Co., 55 Barb (N. Y.) 344, 38 How. Pr. 228.

34. McHenry *v.* Jewett, 90 N. Y. 58; McIlvain *v.* Christ Church, 2 Woodw. (Pa.) 293.

Invalidity of stock not shown.— No injunction will be granted against voting shares alleged to be in excess where no steps have been taken to declare them void and no injury is impending. Reed *v.* Jones, 6 Wis. 680.

35. *Alabama.*— American Refrigerating, etc., Co. *v.* Linn, 93 Ala. 610, 7 So. 191.

Kansas.— Emerson *v.* South Fork Irr., etc., Co., (1898) 53 Pac. 756.

Massachusetts.— Converse *v.* Hood, 149 Mass. 471, 21 N. E. 878, 4 L. R. A. 521.

New Jersey.— Hilles *v.* Parrish, 14 N. J. Eq. 380.

New York.— See *In re* Rochester Dist. Tel. Co., 40 Hun 172.

36. Converse *v.* Hood, 149 Mass. 471, 21 N. E. 878, 4 L. R. A. 521.

37. People *v.* Albany, etc., R. Co., 55 Barb. (N. Y.) 344, 38 How. Pr. 228; Walker *v.* Devereaux, 4 Paige (N. Y.) 229. See Greenough *v.* Alabama Great Southern R. Co., 64 Fed. 22, holding that equity will not restrain the election of certain persons as officers of the corporation on a showing as to the course they intend to pursue if elected.

Election of successor.— An officer cannot restrain the election of a successor on the ground that there is no vacancy, since he has a sufficient remedy by quo warranto. Hooe *v.* Hall, 9 Ohio Cir. Ct. 654, 4 Ohio Cir. Dec. 547.

38. People *v.* Albany, etc., R. Co., 55 Barb. (N. Y.) 344, 38 How. Pr. 228; Walker *v.* Devereaux, 4 Paige (N. Y.) 229.

39. *Georgia.*— Hussey *v.* Gallagher, 61 Ga. 86.

Massachusetts.—New England Mut. L. Ins. Co. *v.* Phillips, 141 Mass. 535, 6 N. E. 534.

Nevada.— Sherman *v.* Clark, 4 Nev. 138, 97 Am. Dec. 516.

New York.— Thompson *v.* Tammany Soc., 17 Hun 305.

Pennsylvania.— Paynter *v.* Clegg, 9 Phila. 480.

See 27 Cent. Dig. tit. "Injunction," § 137.

40. To prevent instalment of officers elected by corporation see Corporations, 10 Cyc. 752 note 53.

41. *Connecticut.*— Mead *v.* Stirling, 62 Conn. 586, 27 Atl. 591, 23 L. R. A. 227.

Michigan.— People *v.* St. Clair Cir. Judge, 31 Mich. 456.

Mississippi.— Bayless *v.* Orne, Freem. 161.

Nevada.— Sherman *v.* Clark, 4 Nev. 138, 97 Am. Dec. 516.

New York.— People *v.* Albany, etc., R. Co., 55 Barb. 344, 38 How. Pr. 228; Latimer *v.*

they are only *de facto* officers.[42] It is not the province of equity to decide the right to an office, although it may do so as an incident to matters otherwise within its jurisdiction;[43] and where an injunction to prevent an officer from acting as such is really to test the validity of his election it will be refused.[44] Nor is injunction the proper remedy for the removal of an officer,[45] nor for restoring one wrongfully removed.[46]

E. Public Officers, Boards, and Municipalities — 1. Power to Enjoin[47] — a. In General. Where public officers are acting illegally or without authority and in breach of trust and are causing irreparable injury or a multiplicity of actions at law, they will be enjoined.[48]

b. Discretion in Exercise of Official Functions. Where public officials are intrusted with discretionary power in certain matters, their exercise of such discretion will not be controlled by injunction in the absence of any showing that

Eddy, 46 Barb. 61; People *v.* Erie R. Co., 36 How. Pr. 129.

Pennsylvania.— Hill *v.* Kensington, 1 Pars. Eq. Cas. 501.

United States.— Converse *v.* Dimock, 22 Fed. 573.

See 27 Cent. Dig. tit. "Injunction," § 137.

Officers whose powers have expired.— Commissioners to receive subscriptions for stock may be enjoined from acting further after the corporation has been organized and directors chosen. Smith *v.* Bangs, 15 Ill. 399.

Misdeeds of predecessors.— Officers will not be enjoined from continuing to act because their predecessors had acted improperly. Rowlands *v.* Workingmen's Bldg., etc., Assoc., 1 Lack. Leg. Rec. (Pa.) 456.

42. Hussey *v.* Gallagher, 61 Ga. 86; People *v.* Conklin, 5 Hun (N. Y.) 452; People *v.* Mattier, 2 Abb. Pr. N. S. (N. Y.) 289.

43. Johnston *v.* Jones, 23 N. J. Eq. 216.

44. *Indiana.*— Carmel Natural Gas, etc., Co. *v.* Small, 150 Ind. 427, 47 N. E. 11, 50 N. E. 476.

Maryland.— Supreme Lodge O. of G. C. *v.* Simering, 88 Md. 276, 40 Atl. 723, 71 Am. St. Rep. 409, 41 L. R. A. 720.

New Hampshire.— Hughes *v.* Parker, 20 N. H. 58.

New Jersey.— Johnston *v.* Jones, 23 N. J. Eq. 216.

Pennsylvania.— Jenkins *v.* Baxter, 160 Pa. St. 199, 28 Atl. 682; Hagner *v.* Heyberger, 7 Watts & S. 104, 42 Am. Dec. 220.

England.— Mozley *v.* Alston, 11 Jur. 315, 16 L. J. Ch. 217, 1 Phil. 790, 4 R. & Can. Cas. 636, 19 Eng. Ch. 790, 41 Eng. Reprint 833.

45. Supreme Lodge O. of G. C. *v.* Simering, 88 Md. 276, 40 Atl. 723, 71 Am. St. Rep. 409, 41 L. R. A. 720; People *v.* Conklin, 5 Hun (N. Y.) 452.

46. Sherman *v.* Clark, 4 Nev. 138, 97 Am. Dec. 516.

47. Injunction against head of executive department see Constitutional Law, 8 Cyc. 854 note 45.

Injunction against occupancy of office see Officers.

48. *Arkansas.*— Crawford *v.* Carson, 35 Ark. 565.

Delaware.— Morris *v.* Pilot Com'rs, 7 Del. Ch. 136, 30 Atl. 667 (pilot commissioners enjoined from revoking a license); Mealy *v.* Buckingham, 6 Del. Ch. 356, 22 Atl. 357.

Illinois.— Smith *v.* Bangs, 15 Ill. 399.

Maryland.— Baltimore *v.* Porter, 18 Md. 284, 79 Am. Dec. 686.

Michigan.— Cooper *v.* Alden, Harr. 72.

New York.—People *v.* New York Canal Bd., 55 N. Y. 390; Lutes *v.* Briggs, 5 Hun 67; Christopher *v.* New York, 13 Barb. 567; Mohawk, etc., R. Co. *v.* Artcher, 6 Paige 83; Belknap *v.* Belknap, 2 Johns. Ch. 463, 7 Am. Dec. 548.

Ohio.— Griffith *v.* Crawford County, 1 Ohio Dec. (Reprint) 457, 10 West. L. J. 97.

Pennsylvania.— West *v.* Pennsylvania L. Ins. Co., 64 Pa. St. 195.

South Carolina.— Burroughs School *v.* Horry County, 62 S. C. 68, 39 S. E. 793.

Virginia.— Roanoke *v.* Bolling, 101 Va. 182, 43 S. E. 343.

Wisconsin.— Montague *v.* Horton, 12 Wis. 599.

United States.— Noble *v.* Union River Logging R. Co., 147 U. S. 165, 13 S. Ct. 271, 37 L. ed. 123 [*affirming* 20 D. C. 555]; Frayser *v.* Russell, 9 Fed. Cas. No. 5,067, 3 Hughes 227, internal revenue officers. *Compare* Sheriff *v.* Turner, 119 Fed. 782.

Canada.— Clint *v.* Quebec Harbour Com'rs, 14 Quebec 343; Bourgoin *v.* Malhiot, 7 Montreal Leg. N. 286.

See 27 Cent. Dig. tit. "Injunction," § 142.

When the injury is slight or doubtful, no injunction will be granted. Brown *v.* Gardner, Harr. (Mich.) 291; Brown *v.* Reding, 50 N. H. 336.

A postmaster may be enjoined from carrying out an invalid order of the postmaster-general not to deliver mail to the complainant. American Magnetic Healing School *v.* McAnnulty, 187 U. S. 94, 23 S. Ct. 33, 47 L. ed. 90.

A board of health may be enjoined from suppressing a nuisance until the facts, which are doubtful, are established at law. Rogers *v.* Barker, 31 Barb. (N. Y.) 447.

Exemptions.—A statute exempting a certain class of officers from liability to be enjoined has been held unconstitutional. Guy *v.* Hermance, 5 Cal. 73, 63 Am. Dec. 85.

their action is fraudulent or in bad faith.[49] It follows that the action of judicial officers will rarely be enjoined, because they are given discretion, and for the further reason that their action is subject to review by some proceeding at law.[50]

c. Showing of Injury and Lack of Other Remedy. Complainant must show injury to himself and his lack of an adequate remedy at law,[51] and must clearly show actual illegal action on the part of defendants.[52] Officers will not be enjoined when they are proceeding in accordance with a valid statute.[53] Where the action of the officer amounts to a mere trespass, for which the remedy at law is adequate, no injunction will be granted.[54] So where there is a remedy by cer-

49. *Georgia.*— Tupper *v.* Dart, 104 Ga. 179, 30 S. E. 624.

Maryland.— Henkel *v.* Millard, 97 Md. 24, 54 Atl. 657.

New York.— Livingston *v.* Sage, 95 N. Y. 289 (arbitrators); Leigh *v.* Westervelt, 2 Duer 618 (discretion in granting licenses).

North Carolina.— Burwell *v.* Vance County Com'rs, 93 N. C. 73, 53 Am. Rep. 454.

Ohio.— Bellaire Goblet Co. *v.* Findlay, 5 Ohio Cir. Ct. 418, 3 Ohio Cir. Dec. 205; Plessner *v.* Pray, 8 Ohio S. & C. Pl. Dec. 149, 6 Ohio N. P. 444; Predigested Food Co. *v.* McNeal, 4 Ohio S. & C. Pl. Dec. 356, 1 Ohio N. P. 266.

Pennsylvania.— Biltz *v.* Borough, 3 Pa. Co. Ct. 412; Chandler *v.* Gardner, 2 Pa. Co. Ct. 407; Rittenhouse *v.* Creasy, 12 Luz. Leg. Reg. 14; Ford *v.* West Pittston, 6 Luz. Leg. Reg. 54.

United States.— Enterprise Sav. Assoc. *v.* Zumstein, 67 Fed. 1000, 15 C. C. A. 153; Western Union Tel. Co. *v.* New York, 38 Fed. 552, 3 L. R. A. 449; Koehler *v.* Barin, 25 Fed. 161; McElrath *v.* McIntosh, 16 Fed. Cas. No. 8,781. *Compare* American Magnetic Healing School *v.* McAnnulty, 187 U. S. 94, 23 S. Ct. 33, 47 L. ed. 90.

See 27 Cent. Dig. tit. "Injunction," § 142.

Acts in bad faith which will cause great and irreparable injury will be enjoined, even though the officers have discretionary powers. Gravesend *v.* Curtiss, 34 How. Pr. (N. Y.) 261.

50. Bell *v.* Payne, 2 Stew. (Ala.) 414; Clayton *v.* Calhoun, 76 Ga. 270; Dougherty County *v.* Croft, 18 Ga. 473; Osterhout *v.* Hyland, 27 Hun (N. Y.) 167; Melody *v.* Goodrich, 35 Misc. (N. Y.) 138, 70 N. Y. Suppl. 568; Ward *v.* Kelsey, 14 Abb. Pr. (N. Y.) 106.

51. *California.*— Payne *v.* English, 79 Cal. 540, 21 Pac. 952.

Florida.— Strickland *v.* Knight, 47 Fla. 327, 36 So. 363.

Louisiana.— New Orleans City, etc., R. Co. *v.* State Bd. of Arbitration, 47 La. Ann. 874, 17 So. 418.

Missouri.— Business Men's League *v.* Waddill, 143 Mo. 495, 45 S. W. 262, 40 L. R. A. 501.

New York.— People *v.* New York Canal Bd., 55 N. Y. 390; Lewis *v.* Oliver, 4 Abb. Pr. 121.

North Carolina.— Mitchell *v.* Ward, 59 N. C. 66; Mills *v.* Mills, 40 N. C. 244.

Oregon.— Weiss *v.* Jackson County, 9 Oreg. 470.

Pennsylvania.— Hey *v.* Estabrook, 15 Wkly. Notes Cas. 222.

Washington.— Birmingham *v.* Cheetham, 19 Wash. 657, 54 Pac. 37.

Wisconsin.— Judd *v.* Fox Lake, 28 Wis. 583.

United States.— Coquard *v.* Indian Grave Drainage Dist., 69 Fed. 867, 16 C. C. A. 530.

See 27 Cent. Dig. tit. "Injunction," § 142.

An audit board will not be enjoined from allowing an account when there is no fund from which payment can be made and hence no injury. Sherwood *v.* Connolly, 35 How. Pr. (N. Y.) 124.

Taxpayer.— It is not enough to show that one is a resident of a county affected by defendant's action; the complainant must show that he is a taxpayer and will be injured as such. Caruthers *v.* Harnett, 67 Tex. 127, 2 S. W. 523.

52. *New York.*— Supreme Council O. of C. F. *v.* Fairman, 62 How. Pr. 386.

North Carolina.— Busbee *v.* Wake County Com'rs, 93 N. C. 143.

Ohio.— Predigested Food Co. *v.* McNeal, 4 Ohio S. & C. Pl. Dec. 356, 1 Ohio N. P. 266.

Pennsylvania.— Delaware County's Appeal, 119 Pa. St. 159, 13 Atl. 62.

Washington.— Tacoma *v.* Bridges, 25 Wash. 221, 65 Pac. 186.

Canada.— Joly *v.* Macdonald, 10 Rev. Lég. 391, 23 L. C. Jur. 16.

See 27 Cent. Dig. tit. "Injunction," § 142.

A board of medical examiners will not be enjoined from performing its duties merely because one member was not notified as to time and place of organization thereof. Howard *v.* Parker, 49 Tex. 236.

53. *Florida.*— Mendenhall *v.* Denham, 35 Fla. 250, 17 So. 561.

Georgia.— See Southern Min. Co. *v.* Lowe, 105 Ga. 352, 31 S. E. 191, holding that an injunction that interferes with the performance of the duties devolved by law upon a public officer will not be granted.

New Jersey.— Greenville Tp. *v.* Seymour, 22 N. J. Eq. 458.

North Carolina.— Chatham County *v.* Thorn, 117 N. C. 211, 23 S. E. 184.

Pennsylvania.— Schall *v.* Norristown, 6 Leg. Gaz. 157.

Canada.— Joly *v.* Macdonald, 10 Rev. Lég. 391, 23 L. C. Jur. 16; Joly *v.* Macdonald, 2 Montreal Leg. N. 2.

See 27 Cent. Dig. tit. "Injunction," § 142 *et seq.*

54. Baldwin *v.* Tucker, 16 Fla. 258; Herron *v.* Runkle, 12 Fed. Cas. No. 6,428.

tiorari,[55] appeal,[56] mandamus,[57] or writ of prohibition,[58] or where another remedy is provided by statute,[59] no injunction should be granted.

2. Particular Officers — a. Officers of the Land Department. The acts of the officers of the United States land department, so long as within the scope of their powers as conferred upon them by statute, will not be enjoined.[60] The determination as to what person is entitled to certain land scrip,[61] to a patent to certain public land,[62] to a right of preëmption,[63] or to the right to make entry in the office of the register and receiver,[64] is a judicial function that has been intrusted to the land department, and in its performance the land officers will not be enjoined. The same has been held as to the decision whether or not certain land is open for settlement,[65] and as to the cancellation of an entry for lands.[66] On the other hand, when the officers of the land department go beyond their jurisdiction, they are liable to be enjoined just as are other public officers.[67]

b. State Officers.[68] Although a state itself cannot be enjoined, yet when state officials are acting in an unconstitutional or otherwise illegal manner, they are not regarded as acting for the state, and they may be enjoined.[69] An injunction has been held proper to prevent treasurers from receiving worthless paper in payment of taxes,[70] or to control the state auditor,[71] the secretary of state,[72] health officers and boards,[73] and even the governor of a state may be enjoined from doing

55. Lane *v.* Morrill, 51 N. H. 422; Tucker *v.* Burlington County, 1 N. J. Eq. 282; Hyatt *v.* Bates, 40 N. Y. 164; Gaertner *v.* Fond du Lac, 34 Wis. 497.

56. Morgan *v.* Kootenai County, 4 Ida. 418, 39 Pac. 1118; Osterhout *v.* Hyland, 27 Hun (N. Y.) 167.

57. Dougherty County *v.* Croft, 18 Ga. 473; Mills *v.* Mills, 40 N. C. 244.

58. Ward *v.* Kelsey, 14 Abb. Pr. (N. Y.) 106.

59. Clayton *v.* Calhoun, 76 Ga. 270; Hardesty *v.* Taft, 23 Md. 512, 87 Am. Dec. 584.

60. Barden *v.* Northern Pac. R. Co., 154 U. S. 288, 14 S. Ct. 1030, 38 L. ed. 992; Lane *v.* Anderson, 67 Fed. 563; Sioux City, etc., R. Co. *v.* U. S., 34 Fed. 835.

State courts in particular are without jurisdiction to control the federal land officers by injunction. People *v.* Kidd, 23 Mich. 440.

61. Walker *v.* Smith, 21 How. (U. S.) 579, 16 L. ed. 223.

62. Maese *v.* Herman, 183 U. S. 572, 22 S. Ct. 91, 46 L. ed. 335; Leitensdorfer *v.* Campbell, 15 Fed. Cas. No. 8,225, 5 Dill. 419.

63. Litchfield *v.* Richards, 9 Wall. (U. S.) 575, 19 L. ed. 681 [*affirming* 15 Fed. Cas. No. 8,388, Woolw. 299].

64. Koehler *v.* Barin, 25 Fed. 161.

65. Sioux City, etc., R. Co. *v.* U. S., 34 Fed. 835.

66. Gaines *v.* Thompson, 7 Wall. (U. S.) 347, 19 L. ed. 62; Chapman *v.* Keindel, 46 Fed. 99.

67. See cases cited *infra*, this note.

Ejection of occupant.—The officers or agents of the interior department may be enjoined from unlawfully ejecting a person having a vested right to the possession of lands. Caldwell *v.* Robinson, 59 Fed. 653.

State land-officer.— The same principles apply to enjoining a state land-office commissioner. Kaufman County *v.* McGaughey, 3 Tex. Civ. App. 655, 21 S. W. 261; Lyne *v.* Jackson, 1 Rand. (Va.) 114.

68. Improper interference of judicial with executive department of government see Constitutional Law, 8 Cyc. 854.

69. McConnell *v.* Arkansas Brick, etc., Co., 70 Ark. 568, 69 S. W. 559 (penitentiary commissioners); Chesapeake, etc., R. Co. *v.* Miller, 19 W. Va. 408; Smyth *v.* Ames, 169 U. S. 466, 18 S. Ct. 418, 42 L. ed. 819; Starr *v.* Chicago, etc., R. Co., 110 Fed. 3. *Compare* State *v.* Chicago, etc., R. Co., 61 Nebr. 545, 85 N. W. 556, 62 Nebr. 123, 87 N. W. 188.

The insurance commissioner of a state may be enjoined from illegally and oppressively refusing a license to do business in states, but not from bringing quo warranto to test the right. New York Mut. L. Ins. Co. *v.* Boyle, 82 Fed. 705. See also Business Men's League *v.* Waddill, 143 Mo. 495, 45 S. W. 262, 40 L. R. A. 501.

The federal courts will not attempt by injunction to compel a state officer to perform his duties. McCauley *v.* Kellogg, 15 Fed. Cas. No. 8,688, 2 Woods 13.

70. Auditor *v.* Treasurer, 4 S. C. 311.

71. Chesapeake, etc., R. Co. *v.* Miller, 19 W. Va. 408.

72. Delaware Surety Co. *v.* Layton, (Del. 1901) 50 Atl. 378.

73. Wong Wai *v.* Williamson, 103 Fed. 1.

The issuance of a certificate to a physician by the state board of health under Nebr. Comp. St. (1899) c. 55, art. 1, cannot be prevented by a medical college. Lincoln Medical College *v.* Poynter, 60 Nebr. 228, 82 N. W. 855.

An osteopath may prevent interference with his practice by the state board of health. Nelson *v.* State Bd. of Health, 108 Ky. 769, 57 S. W. 501, 22 Ky. L. Rep. 438, 50 L. R. A. 383.

an illegal act merely ministerial in nature and not a part of the governor's duties as such.[74]

c. County and Town Officers[75] — (i) *In General.* The officers of a county or town may be restrained by injunction when they are proceeding illegally to the irreparable injury of the complainant. Thus county commissioners may be enjoined from interfering with a railway franchise,[76] from laying out a road over private property,[77] from removing books and records,[78] or from changing the county-seat.[79] A county treasurer may be enjoined from wrongfully levying on property for taxes,[80] and a county court may be enjoined from proceeding in an illegal manner to levy and collect a tax,[81] or from illegally selling a public square.[82]

(ii) *Discretionary Powers of Officers.* Where the county commissioners are vested with discretionary power, an injunction will not issue in the absence of fraud or an abuse of discretion.[83] This rule applies *inter alia* to fixing the amount of a tax levy;[84] the location of a jail,[85] bridge,[86] or ditch;[87] or the choosing a county depository.[88]

(iii) *Compelling Performance of Duty.* A county officer will not be compelled by injunction to perform his duties, the remedy, if any, being either by mandamus or by an action on the officer's bond.[89]

(iv) *Removal of County-Seat.* Removal of a county-seat may be enjoined,[90] as where the county commissioners have fraudulently canvassed the votes cast in a county-seat election, and have purposely declared the result improperly.[91] Of

74. Mott *v.* Pennsylvania R. Co., 30 Pa. St. 9, 72 Am. Dec. 664. See CONSTITUTIONAL LAW, 8 Cyc. 854.

A state board of liquidation, composed of the governor and other state officers, is subject to the jurisdiction of equity; and when such board is about to act, under the authority of an unconstitutional law, to the injury of any person whose remedy at law would be inadequate, such person may obtain an injunction to prevent the action. Louisiana Bd. of Liquidation *v.* McComb, 92 U. S. 531, 23 L. ed. 623.

75. Against issuance or payment of county warrants see COUNTIES, 11 Cyc. 535.

To prevent unlawful appropriation or disposition of county funds see COUNTIES, 11 Cyc. 513.

To prevent award by county commissioners of illegal contract or carrying out of such contract see COUNTIES, 11 Cyc. 476.

Restraining organization of county see COUNTIES, 11 Cyc. 364 note 67.

Against creation of debts by county in excess of statutory limitations see COUNTIES, 11 Cyc. 508.

76. Pueblo, etc., R. Co. *v.* Prowers County, 5 Colo. App. 129, 38 Pac. 112.

77. Welton *v.* Dickson, 38 Nebr. 767, 57 N. W. 559, 41 Am. St. Rep. 771, 22 L. R. A. 496.

78. Way *v.* Fox, 109 Iowa 340, 80 N. W. 405.

79. Gile *v.* Stegner, 92 Minn. 429, 100 N. W. 101.

80. Phelan *v.* Smith, 22 Wash. 397, 61 Pac. 31.

81. State *v.* Hager, 91 Mo. 452, 3 S. W. 844.

82. Sturmer *v.* Randolph County Ct., 42 W. Va. 724.

83. Harms *v.* Fitzgerald, 1 Ill. App. 325; Medicine Lodge First Nat. Bank *v.* Barber County, 43 Kan. 648, 23 Pac. 1079. *Compare* Hospers *v.* Wyatt, 63 Iowa 264, 19 N. W. 204.

The abuse of discretion in accepting a bond will be prevented by the courts. State *v.* Franklin County, 1 Ohio Cir. Ct. 194, 1 Ohio Cir. Dec. 106.

84. Long *v.* Richmond County Com'rs, 76 N. C. 273.

85. Bacon *v.* Walker, 77 Ga. 336.

86. Allen *v.* Monmouth County, 13 N. J. Eq. 68.

87. Vornholt *v.* Gordon, 4 Ohio S. & C. Pl. Dec. 498.

88. Medicine Lodge First Nat. Bank *v.* Barber County, 43 Kan. 648, 23 Pac. 1079.

89. Goodwin *v.* Glazer, 10 Cal. 333; Barber *v.* West Jersey Title, etc., Co., 53 N. J. Eq. 158, 32 Atl. 222.

90. Doan *v.* Logan County, 3 Ida. 38, 26 Pac. 167; Streissguth *v.* Geib, 67 Minn. 360, 69 N. W. 1097; Stuart *v.* Blair, 8 Baxt. (Tenn.) 141.

A county-seat election held under a void statute does not justify a change, and an injunction to prevent the change is a proper remedy. Todd *v.* Rustad, 43 Minn. 500, 46 N. W. 73; Rickey *v.* Williams, 8 Wash. 479, 36 Pac. 480.

The holding of an election to change the county-seat will not be enjoined. The remedy, if any, is to be had after the result of the election has been declared. Weber *v.* Timlin, 37 Minn. 274, 34 N. W. 29. But it has been held that where the holding of a county-seat election is unauthorized and will result in a waste of public money, a taxpayer is entitled to enjoin the holding of such election. Solomon *v.* Fleming, 34 Nebr. 40, 51 N. W. 304.

91. Markle *v.* Clay County, 55 Ind. 185, Sweatt *v.* Faville, 23 Iowa 321; Krieschel *v.* Snohomish County, 12 Wash. 428, 41 Pac.

course no injunction will be granted when the removal is regular.[92] The suit must be brought by one who will be damaged by such removal,[93] although it is generally held that a resident taxpayer has sufficient interest to bring the suit.[94]

d. School-Boards and Officers.[95] School directors and other school officers may be enjoined when they are proceeding illegally.[96] A taxpayer may prevent the collection of taxes illegally levied for school purposes.[97] Such officers will not, however, be interfered with in the exercise of their legal discretion, when there is no abuse of the power, even though they may be acting unwisely.[98] This rule applies to the adoption of text-books,[99] the location of a school or of a school building,[1] and the letting of contracts for buildings or supplies.[2]

e. Highway Officers. The acts of highway officers which are outside of the scope of the authority conferred upon them and productive of irreparable injury will be enjoined, although not where there is doubt as to the illegality of the action.[3] So it is held that the illegal establishment of a road over private property,[4]

186. *Compare* Parmeter *v.* Bourne, 8 Wash. 45, 35 Pac. 586, 757.

92. Worsham *v.* Richards, 46 Tex. 441; Walker *v.* Tarrant County, 20 Tex. 16.

93. McMillen *v.* Butler, 15 Kan. 62; Harrell *v.* Lynch, 65 Tex. 146.

94. *Idaho.*— Doan *v.* Logan County Com'rs, 3 Ida. 781.

Minnesota.— Todd *v.* Rustad, 43 Minn. 500, 46 N. W. 73.

Tennessee.— Stuart *v.* Blair, 8 Baxt. 141.

Washington.— Krieschel *v.* Snohomish County, 12 Wash. 428, 41 Pac. 186.

West Virginia.—Hamilton *v.* Tucker County Ct., 38 W. Va. 71, 18 S. E. 8.

See 27 Cent. Dig. tit. "Injunction," § 157.

Removal of county-seat compelled.— The removal of the county-seat in accordance with the vote of the people may be compelled at the suit of a citizen and taxpayer. Clarke County Com'rs *v.* State, 61 Ind. 75.

Vested right.— A citizen and taxpayer has no such vested right in the location of the county-seat that he can prevent its removal by the legislature. Walker *v.* Tarrant County, 20 Tex. 16.

95. See, generally, SCHOOLS AND SCHOOL-DISTRICTS.

96. Wharton *v.* Cass Tp., 42 Pa. St. 358; Krickbaum *v.* Benton, 3 Kulp (Pa.) 30; Kulp *v.* Reets, 1 Luz. Leg. Reg. (Pa.) 675.

A county superintendent may be enjoined from illegally detaching territory from a school-district. Caddo County School Dist. No. 44 *v.* Turner, 13 Okla. 71, 73 Pac. 952.

97. Moss *v.* Special School Dist. Bd. of Education, 58 Ohio St. 354, 50 N. E. 921.

A taxpayer may bring the suit for the injunction. Youmans *v.* Pataskala Special School Dist. Bd. of Education, 13 Ohio Cir. Ct. 207, 7 Ohio Cir. Dec. 269.

The power of taxation for the support of schools may be controlled by injunction. Mason *v.* Caffrey, 9 Kulp (Pa.) 414.

98. Wiley *v.* Allegany County School Com'rs, 51 Md. 401; Lane *v.* Morrill, 51 N. H. 422; Wharton *v.* Cass Tp., 42 Pa. St. 358; Black Fork Dist. Bd. of Education *v.* Holt, 51 W. Va. 435, 41 S. E. 337.

Excessive tax.— Although a school-board may have discretion as to the tax to be levied, if a tax is clearly excessive, its collection may be enjoined. Mason *v.* Caffrey, 9 Kulp (Pa.) 414.

99. Krickbaum *v.* Benton, 3 Kulp (Pa.) 30; Tanner *v.* Nelson, 25 Utah 226, 70 Pac. 984.

1. Brasher *v.* Miller, 114 Ala. 485, 21 So. 467; Cooney *v.* Gardner, 16 Pa. Co. Ct. 547.

2. Baltimore *v.* Weatherby, 52 Md. 442; Hughes *v.* School Directors, 8 Luz. Leg. Reg. (Pa.) 284.

3. Glaze *v.* Bogle, 97 Ga. 340, 22 S. E. 969; Montana Tp. *v.* Ruark, 39 Kan. 109, 18 Pac. 61. See also Brown *v.* Gardner, Harr. (Mich.) 291.

4. *Illinois.*— Willett *v.* Woodhams, 1 Ill. App. 411. See also Green *v.* Green, 34 Ill. 320.

Indiana.— Erwin *v.* Fulk, 94 Ind. 235. See Kern *v.* Isgrigg, 132 Ind. 4, 31 N. E. 455.

Iowa.— Morgan *v.* Miller, 59 Iowa 481, 13 N. W. 643.

Kansas.— Oliphant *v.* Atchison County Com'rs, 18 Kan. 386.

Massachusetts.— See *In re* Adams, 10 Pick. 273; Cragie *v.* Mellen, 6 Mass. 7.

Missouri.— Carpenter *v.* Grisham, 59 Mo. 247.

Pennsylvania.— See *In re* Bonsall Ave., 16 Pa. Super. Ct. 1.

Texas.— Floyd *v.* Turner, 23 Tex. 292. See also Evans *v.* Santona Live-Stock, etc., Co., 81 Tex. 622, 17 S. W. 232.

West Virginia.— Wenger *v.* Fisher, 55 W. Va. 13, 46 S. E. 695.

See 27 Cent. Dig. tit. "Injunction," § 149.

Irreparable injury.— A road supervisor and a township board may be enjoined from opening a road over plaintiff's land, although the injury will not necessarily be irreparable, and although there is no allegation of defendant's insolvency. Harris *v.* Gomer Tp. Bd., 22 Mo. App. 462. *Compare* Prospect Park, etc., R. Co. *v.* Williamson, 24 Hun (N. Y.) 216.

One not a citizen or taxpayer of a town cannot enjoin a supervisor from opening a highway established within the limits of the town by the board of commissioners. Sparling *v.* Dwenger, 60 Ind. 72.

or the improper removal of trees and fences,[5] will be enjoined. Such officers, however, have discretionary power over the grading, draining, and repair of highways, and when such discretion is not abused they will not be enjoined from exercising their power in such matters.[6] So where the injured party's remedy at law is adequate, no injunction will issue.[7] And the right to an injunction may be precluded by complainant's acquiescence in the proceedings.[8] Injunction lies to prevent a proposed vacation of a highway,[9] although not before some action has been taken by the proper officers.[10]

f. Canal and Drainage Officers.[11] Officers acting without authority of law may be enjoined from diverting a stream,[12] or from constructing drains or drainage systems,[13] so as to cause irreparable injury or a multiplicity of suits. But an injunction will not be granted when they are acting in good faith and within their statutory powers.[14]

3. Injunction to Prevent Action Under Void Statutes. An injunction is proper to restrain an officer from acting under an unconstitutional or otherwise invalid statute, where irreparable injury to complainant will result therefrom.[15] So

Action against town instead of its officers. — The action may be maintained against the town as a corporate body. Wetherell *v.* Newington, 54 Conn. 67, 5 Atl. 858; Woodruff *v.* Glendale, 23 Minn. 537.

Scope of injunction.—An injunction against county commissioners who have failed to comply with certain requirements of law, to restrain their opening a road, cannot be final and perpetual, but only until they comply with such requirements. Champion *v.* Sessions, 2 Nev. 271.

The condemnation of land for a highway by commissioners will not be enjoined except under extraordinary circumstances. Brown *v.* Gardner, Harr. (Mich.) 291.

5. Bolton *v.* McShane, 67 Iowa 207, 25 N. W. 135; Bills *v.* Belknap, 36 Iowa 583; Chadbourne *v.* Zilsdorf, 34 Minn. 43, 24 N. W. 308; Doughty *v.* Somerville, 33 N. J. Eq. 1; Evans *v.* Hudson St. Com'rs, 84 Hun (N. Y.) 206, 32 N. Y. Suppl. 547. See also Poirier *v.* Fetter, 20 Kan. 47.

6. *Illinois.*— Hotz *v.* Hoyt, 135 Ill. 388, 25 N. E. 753 (construction of ditch); Rankin *v.* Road Dist. No. 15, 97 Ill. App. 206 (vacating of road).

Indiana.— State *v.* Hanna, 97 Ind. 469.

Kentucky.— Flemingsburg *v.* Wilson, 1 Bush 203.

New Jersey.— Matthiessen, etc., Sugar Refining Co. *v.* Jersey City, 26 N. J. Eq. 247, extension of street.

New York.— Greaton *v.* Griffin, 4 Abb. Pr. N. S. 310.

Rhode Island.— Smart *v.* Johnston, 17 R. I. 778, 24 Atl. 830, establishment of road.

See 27 Cent. Dig. tit. "Injunction," § 149.

7. Nichols *v.* Sutton, 22 Ga. 369; Montana Tp. *v.* Ruark, 39 Kan. 109, 18 Pac. 61; Doughty *v.* Somerville, 33 N. J. Eq. 1; Hyatt *v.* Bates, 40 N. Y. 164.

8. Sunderland *v.* Martin, 113 Ind. 411, 15 N. E. 689. See Stewart *v.* Beck, 90 Ind. 458.

9. Moffit *v.* Brainard, 92 Iowa 122, 60 N. W. 226, 26 L. R. A. 821. See Hyde *v.* Teal, 46 La. Ann. 645, 15 So. 416.

The burden of proving rights existing in complainant not in common with others, which will be abridged or destroyed by vacating the highway, is on him. Sawyer *v.* Meyer, 45 Iowa 152.

10. Troy *v.* Doniphan County, 32 Kan. 507, 4 Pac. 1009.

11. As remedy for wrongful enforcement of assessment for drainage see Drains, 14 Cyc. 1072.

12. Baring *v.* Erdman, 2 Fed. Cas. No. 981.

13. Zabel *v.* Harshman, 68 Mich. 270, 36 N. W. 71; Woodruff *v.* Fisher, 17 Barb. (N. Y.) 224; Belknap *v.* Belknap, 2 Johns. Ch. (N. Y.) 463, 7 Am. Dec. 548.

A mandatory injunction may be granted to compel a canal superintendent to protect defendant's property from overflow. Wright *v.* Shanahan, 61 Hun (N. Y.) 264, 16 N. Y. Suppl. 785.

14. Hartwell *v.* Armstrong, 19 Barb. (N. Y.) 166; Philips *v.* Wickham, 1 Paige (N. Y.) 590; Cooper *v.* Williams, 4 Ohio 253, 22 Am. Dec. 745; Voonholt *v.* Gordon, 30 Cinc. L. Bul. 33, 4 Ohio S. & C. Pl. Dec. 498.

15. State *v.* Judge Seventh Judicial Dist. Ct., 42 La. Ann. 1104, 8 So. 305; Bradley *v.* Commissioners, 2 Humphr. (Tenn.) 428, 37 Am. Dec. 563; State *v.* Cunningham, 81 Wis. 440, 51 N. W. 724, 15 L. R. A. 561; Louisiana Bd. of Liquidation *v.* McComb, 92 U. S. 531, 23 L. ed. 623; Minneapolis Brewing Co. *v.* McGillivray, 104 Fed. 258; Bondholders *v.* Railroad Com'rs, 3 Fed. Cas. No. 1,625; Self *v.* Jenkins, 22 Fed. Cas. No. 12,640, 1 Hughes 23, 71 N. C. 578.

See 27 Cent. Dig. tit. "Injunction," § 156.

The governor of a state will not be enjoined from carrying out a law alleged to be unconstitutional, when his action pertains to matters political or governmental in their nature. Frost *v.* Thomas, 26 Colo. 222, 56 Pac. 899, 77 Am. St. Rep. 259; State *v.* Lord, 25 Oreg. 498, 43 Pac. 471, 31 L. R. A. 473. But the governor may be enjoined when the act is purely ministerial in its nature. Mott *v.* Pennsylvania R. Co., 30 Pa. St. 9, 72 Am. Dec. 664.

The attorney-general of a state may be enjoined from enforcing a law fixing railway rates in such a way as to be obnoxious to the fourteenth amendment to the consti-

equity has power to prevent the enforcement of a law impairing the obligation of a prior contract.[16] Taxpayers have sufficient interest to maintain a suit to enjoin action by public officers under an invalid law which will affect the property of the state or the amount of taxes to be paid.[17] So a creditor of a city whose rights are impaired by an issue of bonds under an unconstitutional statute may sue.[18] The unconstitutionality of the law must be clearly established to authorize an injunction.[19] No injunction will be granted to prevent the enforcement of an unconstitutional law, when the remedy at law is adequate either by way of an action for damages or by way of an action to compel the performance of acts forbidden by the unconstitutional law.[20]

4. Elections and Election Officers — a. Injunction Against Holding Election. Equity has no jurisdiction to enjoin the holding of an election legally and properly called.[21] Nor will the court ordinarily issue an injunction to prevent the holding of an illegal election, since the legality of an election and the title of persons chosen thereat to their respective offices is a question for a court of law in quo warranto proceedings.[22] It has been held, however, that the hold-

tution. Smyth *v.* Ames, 169 U. S. 466, 18 S. Ct. 418, 42 L. ed. 819; Starr *v.* Chicago, etc., R. Co., 110 Fed. 3. *Compare* State *v.* Chicago, etc., R. Co., 61 Nebr. 545, 85 N. W. 556, 62 Nebr. 123, 87 N. W. 188.

Railroad commissioners will not be enjoined from fixing rates under an unconstitutional rate law when the mere fixing of the rates can do no injury. It is the enforcement of the rates that is to be enjoined. McChord *v.* Louisville, etc., R. Co., 183 U. S. 483, 22 S. Ct. 165, 46 L. ed. 289. And see Southern Pac. Co. *v.* Railroad Com'rs, 87 Fed. 21. Such a board, however, may be enjoined from enforcing an unconstitutional rate law. Peik *v.* Chicago, etc., R. Co., 94 U. S. 164, 24 L. ed. 97 [*affirming* 19 Fed. Cas. No. 11,138]. Enforcement of order of interstate commerce commission see Commerce, 7 Cyc. 492.

16. Bancroft *v.* Thayer, 2 Fed. Cas. No. 835, 5 Sawy. 502.

17. Lynn *v.* Polk, 8 Lea (Tenn.) 121.

Establishment of state dispensary.— A taxpayer may sue to enjoin the establishment of a state dispensary under an unconstitutional law. State *v.* O'Donnell, 41 S. C. 553, 19 S. E. 748; McCullough *v.* Brown, 41 S. C. 220, 19 S. E. 458, 23 L. R. A. 410.

Invalid exemption laws.— A taxpayer, a creditor of the state, or canal commissioners as public officers, have sufficient interest to bring suit for injunction to prevent the carrying out of an invalid exemption law. Mott *v.* Pennsylvania R. Co., 30 Pa. St. 9, 72 Am. Dec. 664.

A stock-holder in a bank, who may become liable personally, may sue to restrain the collection of taxes against the bank under an invalid law. Markoe *v.* Hartranft, 15 Am. L. Reg. 487.

18. Smith *v.* Appleton, 19 Wis. 468.

19. New Jersey Cent. R. Co. *v.* Pennsylvania R. Co., 31 N. J. Eq. 475.

A demurrer to the bill for an injunction will be overruled where the constitutionality of the statute is doubtful and the proof will shed more light upon the subject. Glover *v.* Board of Flour Inspectors, 48 Fed. 348.

Prior acts under another statute.— An officer will not be enjoined from paying out money as required by a valid law on the ground that he has previously paid out money illegally. Self *v.* Jenkins, 22 Fed. Cas. No. 12,640, 1 Hughes 23, 71 N. C. 578.

20. *New York.*— Thompson *v.* Canal Fund Com'rs, 2 Abb. Pr. 248.

Oregon.— State *v.* Pennoyer, 26 Oreg. 205, 37 Pac. 906, 41 Pac. 1104, 25 L. R. A. 862.

South Carolina.—Butler *v.* Ellerbe, 44 S. C. 256, 22 S. E. 425.

Virginia.— Thomas *v.* Rowe, (1895) 22 S. E. 157.

United States.— Baker *v.* Portland, 2 Fed. Cas. No. 777, 5 Sawy. 566.

See 27 Cent. Dig. tit. "Injunction," § 156.

Denial of right to vote.— A negro denied the right to vote in violation of amendments 14 and 15 to the constitution has an adequate remedy at law. Gowdy *v.* Green, 69 Fed. 865.

Quo warranto as adequate remedy.— When the organization of a county under an invalid law will do great and irreparable injury, the remedy by quo warranto is not adequate. Bradley *v.* Powell County, 2 Humphr. (Tenn.) 428, 37 Am. Dec. 563.

21. Guebelle *v.* Epley, 1 Colo. App. 199, 28 Pac. 89; Mendenhall *v.* Denham, 35 Fla. 250, 17 So. 561; Harris *v.* Schryock, 82 Ill. 119; Darst *v.* People, 62 Ill. 306; Walton *v.* Develing, 61 Ill. 201; Morgan *v.* Wetzel County Ct., 53 W. Va. 372, 44 S. E. 182.

The remedy of a delegate to a convention is quo warranto or a contest, not injunction. *In re* Grear, 9 Ohio S. & C. Pl. Dec. 299, 6 Ohio N. P. 312.

22. *Illinois.*— People *v.* Galesburg, 48 Ill. 485.

Indiana.— Fesler *v.* Brayton, 145 Ind. 71, 44 N. E. 37, 32 L. R. A. 578.

Minnesota.— Weber *v.* Timlin, 37 Minn. 274, 34 N. W. 29, county-seat election.

North Carolina.— Cozart *v.* Fleming, 123 N. C. 547, 31 S. E. 822.

Pennsylvania.— Smith *v.* McCarthy, 56 Pa. St. 359; *In re* Taxes Election, 4 Pa. Dist. 71. *Compare* Kearney *v.* Flannery, 8 Kulp 219.

Texas.— See Caruthers *v.* Harnett, 67 Tex. 127, 2 S. W. 523, holding that, although a

ing of an election will be enjoined, where it is illegal, and its effect would be to depreciate railroad bonds.[23] And that where the election is not one in which a public office is involved, and the election would be void and cause unnecessary and improper expense, a taxpayer or other person who will be injured thereby is entitled to an injunction.[24]

b. Injunction to Prevent Canvass of Votes. Election officers will not be restrained from canvassing the vote and declaring the result,[25] even though there was fraud and illegality in the election.[26] Election officers will not be enjoined from giving a certificate of election to the successful candidate, since this is not the proper method of trying title to office.[27] Nor is injunction the proper remedy to prevent election registrars from proceeding in an irregular or illegal manner.[28]

5. Appointment and Removal of Officers. While injunctions have been granted to prevent the improper removal of an officer where there was no doubt as to the illegality of the action and where the removal had not already taken place but was threatened,[29] the general rule is that equity has no jurisdiction to enjoin the appointment or removal of public officers, whether the power

court of equity, on application for injunction, will not try and determine a contested election or the title to an office, yet, when there is no controversy as to the vote cast, the court will inquire into its legal effect, when set up to defeat a right or pecuniary interest.

United States.—Holmes *v.* Oldham, 12 Fed. Cas. No. 6,643, 1 Hughes 76.

See 27 Cent. Dig. tit. "Injunction," § 151.

But see State *v.* Cunningham, 81 Wis. 440, 51 N. W. 724, 15 L. R. A. 561, where it was held that the calling of an election under an unconstitutional law will be enjoined, since it is a mere ministerial act, not a political one.

Election to vote on levy of tax.— The holding of an election to vote on the levying of a tax will not be enjoined at suit of a taxpayer, because the holding of the election invades no rights and causes no injury. Roudanez *v.* New Orleans, 29 La. Ann. 271.

The ordering of a new election may be enjoined until the result of one just held has been determined, where the announced result shows a tie, and there are allegations of fraud. Cozart *v.* Fleming, 123 N. C. 547, 31 S. E. 822.

23. Murfreesboro R. Co. *v.* Hertford County, 108 N. C. 56, 12 S. E. 952.

24. Macon *v.* Hughes, 110 Ga. 795, 36 S. E. 247; Solomon *v.* Fleming, 34 Nebr. 40, 51 N. W. 304. *Compare* Weber *v.* Timlin, 37 Minn. 274, 34 N. W. 29.

25. *California.*— People *v.* Shasta County, 75 Cal. 179, 16 Pac. 776.

Florida.— State *v.* Gibbs, 13 Fla. 55, 7 Am. Rep. 233.

Georgia.— Ogburn *v.* Elmore, 121 Ga. 72, 48 S. E. 702.

Illinois.— Dickey *v.* Reed, 78 Ill. 261.

Kansas.— Wilder *v.* Underwood, (1899) 57 Pac. 965.

Nebraska.— State *v.* Carlson, (1904) 101 N. W. 1004.

Pennsylvania.— Thompson *v.* Ewing, 1 Brewst. 67; Lawrence *v.* Knight, 4 Phila. 355.

Texas.— Robinson *v.* Wingate, 36 Tex. Civ. App. 65, 80 S. W. 1067 [*affirmed* in 98 Tex. 267, 83 S. W. 182].

West Virginia.— Alderson *v.* Commissioners, 32 W. Va. 640, 9 S. E. 868, 25 Am. St. Rep. 840, 5 L. R. A. 334; Fleming *v.* Guthrie, 32 W. Va. 1, 9 S. E. 23, 25 Am. St. Rep. 792, 3 L. R. A. 53.

United States.— Weil *v.* Calhoun, 25 Fed. 865.

Canada.— McLeod *v.* Noble, 21 Ont. App. 459.

See 27 Cent. Dig. tit. "Injunction," § 151.

The counting of illegal votes has been enjoined. Hardacre *v.* Dalton, 9 Ohio Dec. (Reprint) 527, 14 Cinc. L. Bul. 315.

The right of a delegate to a convention is a mere political right, and the election board will not be enjoined from counting votes cast in the election for choosing such delegates. *In re* Grear, 9 Ohio S. & C. Pl. Dec. 299, 6 Ohio N. P. 312.

Injunction against common council.— The mayor cannot obtain an injunction to prevent the council from declaring the result of an investigation as to the legality of his election, where it cannot be made the basis of a proceeding to oust him. Garside *v.* Cohoes, 12 N. Y. Suppl. 192.

26. Willeford *v.* State, 43 Ark. 62; McWhirter *v.* Brainard, 5 Oreg. 426.

27. *Colorado.*— People *v.* McClees, 20 Colo. 403, 38 Pac. 468, 26 L. R. A. 646.

Indiana.— Beal *v.* Ray, 17 Ind. 554.

Kentucky.— Smith *v.* Doyle, 76 S. W. 519, 25 Ky. L. Rep. 958.

New York.— Halloran *v.* Carter, 13 N. Y. Suppl. 214.

Wisconsin.— Ward *v.* Sweeney, 106 Wis. 44, 82 N. W. 169.

See 27 Cent. Dig. tit. "Injunction," § 151.

28. Hardesty *v.* Taft, 23 Md. 512, 87 Am. Dec. 584; *Ex p.* Lumsden, 41 S. C. 553, 19 S. E. 749.

29. Stahlhut *v.* Bauer, 51 Nebr. 64, 70 N. W. 496; Armatage *v.* Fisher, 74 Hun (N. Y.) 167, 26 N. Y. Suppl. 364. See also Weir *v.* Mathiesen, 11 Grant Ch. (U. C.) 383. *Compare* Cox *v.* Moores, 55 Nebr. 34, 75 N. W. 35.

of appointment or removal is vested in executive or administrative boards or officers or is intrusted to a judicial tribunal.[30] It is immaterial that the appointee is within the protection of the civil service rules.[31] Furthermore a board of officers will not be restrained from hearing and acting upon charges against an officer, on the ground that it is prejudiced and will proceed illegally.[32] But equity will interfere in behalf of an officer *de facto*, claiming to be the officer *de jure*, to prevent another, especially an intruder, from wresting the office from him without process of law.[33]

The removal of election officers, whose appointment on recommendation of party committees is provided for by statute, was prevented by a mandatory injunction under special circumstances in Denny *v.* Bosworth, 113 Ky. 785, 68 S. W. 1078, 24 Ky. L. Rep. 554.

Corrupt appointment.— The mayor of a city may be enjoined from making a corrupt and illegal appointment of a particular person, although not from making any appointment whatever. People *v.* Edson, 51 N. Y. Super. Ct. 238.

30. *Alabama.*— Moulton *v.* Reid, 54 Ala. 320; Beebe *v.* Robinson, 52 Ala. 66.

Georgia.— Coleman *v.* Glenn, 103 Ga. 458, 30 S. E. 297, 68 Am. St. Rep. 108, holding that the appointment of a successor will not be enjoined because, if it is illegal, the complainant may refuse to surrender the office, and then defend when an attempt at law is made to oust him.

Illinois.— Heffran *v.* Hutchins, 160 Ill. 550, 43 N. E. 709, 52 Am. St. Rep. 353; Delahanty *v.* Warner, 75 Ill. 185, 20 Am. Rep. 237; Raycraft *v.* Harrison, 108 Ill. App. 313; Marshall *v.* Illinois State Reformatory, 103 Ill. App. 65 [*affirmed* in 201 Ill. 9, 66 N. E. 314].

Louisiana.— Callan *v.* Fire Dept. Com'rs, 45 La. Ann. 673, 12 So. 834; State *v.* Judges Orleans Parish Civ. Dist. Ct., 35 La. Ann. 1075.

Maryland.— Glenn *v.* Fowler, 8 Gill & J. 340.

New York.— People *v.* Howe, 177 N. Y. 499, 69 N. E. 1114, 66 L. R. A. 664; Melody *v.* Goodrich, 67 N. Y. App. Div. 368, 73 N. Y. Suppl. 741 [*affirmed* in 170 N. Y. 185, 63 N. E. 133]; Palmer *v.* Board of Education, 47 N. Y. App. Div. 547, 62 N. Y. Suppl. 485; Tappan *v.* Gray, 7 Hill 259 [*affirming* 9 Paige 507].

Oklahoma.— Howe *v.* Dunlap, 12 Okla. 467, 72 Pac. 365, 895.

Texas.— Riggins *v.* Thompson, 30 Tex. Civ. App. 242, 70 S. W. 578.

United States.— White *v.* Berry, 171 U. S. 366, 18 S. Ct. 917, 43 L. ed. 199 [*reversing* 83 Fed. 578]; *In re* Sawyer, 124 U. S. 200, 8 S. Ct. 482, 31 L. ed. 402.

See 27 Cent. Dig. tit. "Injunction," § 152.

Reasons for rule.— Courts of equity will not interfere to determine questions concerning the appointment or election of public officers or their title to office. Various reasons have been assigned for the rule, as the existence of an adequate remedy at law, the non-concern of equity with matters of a political nature, and the impolicy of interfering with a *de facto* officer pending a contest as to his title. Landes *v.* Walls, 160 Ind. 216, 66 N. E. 679.

Proper remedy.— The jurisdiction to determine title to a public office belongs exclusively to the courts of law, and is exercised either by certiorari, error, or appeal, or by mandamus, prohibition, quo warranto, or information in the nature of a writ of quo warranto. Delahanty *v.* Warner, 75 Ill. 185, 20 Am. Rep. 327; White *v.* Berry, 171 U. S. 366, 18 S. Ct. 917, 43 L. ed. 199; *In re* Sawyer, 124 U. S. 200, 8 S. Ct. 482, 31 L. ed. 402.

The officer's right to his salary is not a property right such as to authorize an injunction to prevent the officer's removal. Reeves *v.* Griffin, 4 Ohio S. & C. Pl. Dec. 461.

Mandatory injunction.— An ousted officer will not be reinstated by mandatory injunction when his right is doubtful. McNiece *v.* Sohmer, 29 Misc. (N. Y.) 238, 61 N. Y. Suppl. 193.

Declaring office vacant.— A public board will not be enjoined from declaring an office vacant when the purpose of the suit is the determination of title to the office. Cozart *v.* Fleming, 123 N. C. 547, 31 S. E. 822.

In England the court has jurisdiction, under the Judicature Act (1873), § 25, subs. 8, to restrain by injunction a school-board from declaring a member in default and proceeding to the election of a new member. Richardson *v.* Methley School Bd., [1893] 3 Ch. 510, 62 L. J. Ch. 943, 69 L. T. Rep. N. S. 308, 3 Reports 701, 42 Wkly. Rep. 27.

31. White *v.* Berry, 171 U. S. 366, 18 S. Ct. 917, 43 L. ed. 199 [*reversing* 83 Fed. 578]; Page *v.* Moffett, 85 Fed. 38; Couper *v.* Smyth, 84 Fed. 757; Morgan *v.* Nunn, 84 Fed. 551; Taylor *v.* Kercheval, 82 Fed. 497; Carr *v.* Gordon, 82 Fed. 373. *Contra,* Priddie *v.* Thompson, 82 Fed. 186.

32. Cox *v.* Moores, 55 Nebr. 34, 75 N. W. 35; Reeves *v.* Griffin, 4 Ohio S. & C. Pl. Dec. 461.

33. *Indiana.*— Landes *v.* Walls, 160 Ind. 216, 66 N. E. 679; Parsons *v.* Durand, 150 Ind. 203, 49 N. E. 1047; Huntington *v.* Cast, 149 Ind. 255, 48 N. E. 1025.

Kansas.— Braidy *v.* Theritt, 17 Kan. 468.

Louisiana.— Guillotte *v.* Poincy, 41 La. Ann. 333, 6 So. 507, 5 L. R. A. 403.

New York.— Palmer *v.* Foley, 45 How. Pr. 110.

Washington.— State *v.* Snohomish County

6. Exercise of Office. The incumbent of a public office will not generally be enjoined from performing the duties of that office, and it is immaterial whether he holds the office rightfully or wrongfully where he is the *de facto* officer.[34] Injunction is not the proper remedy, even though the statute under which the officer holds is unconstitutional and void.[35] Quo warranto affords an adequate remedy for the trial of title to an office.[36]

7. Municipalities and Municipal Officers in General — a. Jurisdiction. Unlawful interference by a municipal corporation with the property or property rights of an individual or of another corporation will be enjoined when irreparable injury is caused thereby.[37]

b. Persons Entitled to Injunction. If the illegal acts of a municipal corpora-

Super. Ct., 17 Wash. 12, 48 Pac. 741, 61 Am. St. Rep. 893.

See 27 Cent. Dig. tit. "Injunction," § 152.

34. *Colorado.*—People *v.* Lake County Dist. Ct., 29 Colo. 277, 68 Pac. 224, 93 Am. St. Rep. 61.

Illinois.— People *v.* Rose, 211 Ill. 252, 71 N. E. 1124 (holding that where property and civil rights are not involved, an order enjoining a public officer in the performance of his duties is void); Hilligoss *v.* Grinslade, 32 Ill. App. 45.

Iowa.— Cochran *v.* McCleary, 22 Iowa 75.

New York.— Dows *v.* Irvington, 13 Abb. N. Cas. 162.

North Dakota.— State *v.* Wilcox, 11 N. D. 329, 91 N. W. 955.

Pennsylvania.— Updegraff *v.* Crans, 47 Pa. St. 103; Hagner *v.* Heyberger, 7 Watts & S. 104, 42 Am. Dec. 220; Clopper *v.* Greensburg, 9 Pa. Dist. 598; Brower *v.* Schuylkill County, 21 Pa. Co. Ct. 311.

South Dakota.— State *v.* Herreid, 10 S. D. 16, 71 N. W. 319.

Tennessee.— Fugate *v.* Holloway, 1 Tenn. Ch. App. 387.

Where defendant is a mere intruder and not even a *de facto* officer, an injunction may be granted. State *v.* Davies, 12 Ohio Cir. Ct. 218, 1 Ohio Cir. Dec. 525; McCue *v.* Holleran, 9 Kulp (Pa.) 433; Pottsville Borough's Appeal, 1 Mona. (Pa.) 705. A public weigher is entitled to an injunction to prevent persons from weighing cotton as a business contrary to a law making such weighing the exclusive privilege of the public officer. Davidson *v.* Sadler, 23 Tex. Civ. App. 300, 57 S. W. 54.

Failure to take oath of office, whether prescribed by law or not, is not ground for restraining an officer from acting as such. Miller *v.* Craig, 11 N. J. Eq. 175; Dows *v.* Irvington, 13 Abb. N. Cas. (N. Y.) 162.

Members of a council will not be enjoined from hindering another from taking his seat, because the presumption is that they will not hinder him after he has established his right legally. State *v.* Grace, 113 Tenn. 9, 82 S. W. 485.

35. Sheridan *v.* Colvin, 78 Ill. 237; Franklin *v.* Appel, 10 S. D. 391, 73 N. W. 259; Jones *v.* Stallsworth, 55 Tex. 138.

36. *Alabama.*— Little *v.* Bessemer, 138 Ala. 127, 35 So. 64.

Florida.— MacDonald *v.* Rehrer, 22 Fla. 198.

Illinois.— Deemar *v.* Boyne, 103 Ill. App. 464.

New Hampshire.— Osgood *v.* Jones, 60 N. H. 543.

Pennsylvania.— Brower *v.* Schuylkill County, 21 Pa. Co Ct. 311.

37. *California.*— Los Angeles City Water Co. *v.* Los Angeles, 124 Cal. 368, 57 Pac. 210, 571.

Colorado.— Denver *v.* Mullen, 7 Colo. 345, 3 Pac. 693.

Illinois.— Griswold *v.* Brega, 160 Ill. 490, 43 N. E. 864, 52 Am. St. Rep. 350 [*affirming* 57 Ill. App. 554].

Iowa.— Lemmon *v.* Guthrie Center, 113 Iowa 36, 84 N. W. 986, 86 Am. St. Rep. 361.

Missouri.— Springfield R. Co. *v.* Springfield, 85 Mo. 674; Glasgow *v.* St. Louis, 15 Mo. App. 112 [*affirmed* in 87 Mo. 678].

New Jersey.— Coast Co. *v.* Spring Lake, 56 N. J. Eq. 615, 36 Atl. 21; Bond *v.* Newark, 19 N. J. Eq. 376.

New York.— People *v.* New York, 32 Barb. 102; Davis *v.* New York, 1 Duer 451; Ambrose *v.* Buffalo, 20 N. Y. Suppl. 129; Oakley *v.* Williamsburgh, 6 Paige 262.

Ohio.— Cincinnati, etc., Tp. Co. *v.* Cincinnati, 5 Ohio Dec. (Reprint) 299, 4 Am. L. Rec. 325, changing the grade of a turnpike.

Pennsylvania.— Matthews *v.* Scranton, 7 Luz. Leg. Reg. 108; Kerr *v.* Trego, 5 Phila. 229, illegal organization of a city council.

Rhode Island.— Place *v.* Providence, 12 R. I. 1.

Virginia.— Bristol Door, etc., Co. *v.* Bristol, 97 Va. 304, 33 S. E. 588, 75 Am. St. Rep. 783.

Wisconsin.— Doty *v.* Menasha, 14 Wis. 75; Lumsden *v.* Milwaukee, 8 Wis. 485.

Canada.— Quebec Warehouse Co. *v.* Levis, 11 Can. Sup. Ct. 666; Laferté *v.* St. Aimé, 14 Rev. Lég. 476; Cote *v.* St. Augustin, 13 Quebec 348.

See 27 Cent. Dig. tit. "Injunction," § 146.

Acts beyond territorial limits.— The exercise of municipal authority over territory not within the legal limits of the municipality will be prevented by injunction, when a case for equitable interference is made out. Hyde Park *v.* Chicago, 124 Ill. 156, 16 N. E. 222; East St. Louis *v.* New Brighton, 34 Ill. App. 494.

The creation of a nuisance by licensing a market in a public street may be prevented

tion are such as to increase taxation or violate public rights, any taxpayer,[38] or the state acting through its proper legal officers,[39] may bring suit for an injunction; but where the interests of the state at large are not affected, the state is not a proper party.[40]

c. Exercise of Discretion. A court of equity will not interfere with the exercise of discretionary powers on the part of a municipal corporation or its officers so long as the limits of those powers are not exceeded.[41] So the legislative discretion of a municipal council or board will rarely be interfered with.[42]

d. When Injunction Will Be Refused. Where the municipality is proceeding legally,[43] or where there will be no irreparable injury to the complainant,[44] or where the injured party has an adequate remedy at law,[45] an injunction will be refused.

e. Police Officers. Police officers will not be enjoined from performing their proper duties in the exercise of the general police power, even though they perform them in an oppressive and unlawful way.[46] But such officers will be enjoined from illegally doing irreparable injury to the property of an individual.[47]

by injunction. McDonald *v.* Newark, 42 N. J. Eq. 136, 7 Atl. 855.

Where there is doubt as to the power of a city to do an act it will not be ordered to do it by mandatory injunction. Andrews *v.* Steele City, 2 Nebr. (Unoff.) 676, 89 N. W. 739.

The minority members of a council will not be enjoined from meeting and having the majority members arrested and forced to attend, even though the date for the meeting is disputed. Burch *v.* Cavanaugh, 12 Abb. Pr. N. S. (N. Y.) 410.

38. Matthis *v.* Cameron, 62 Mo. 504; Poppleton *v.* Moores, 67 Nebr. 388, 93 N. W. 747, 62 Nebr. 851, 88 N. W. 128.

39. State *v.* Neodesha, 3 Kan. App. 319, 45 Pac. 122; Matthis *v.* Cameron, 62 Mo. 504.

40. People *v.* New York, 27 How. Pr. (N. Y.) 34.

41. *Connecticut.*— Dailey *v.* New Haven, 60 Conn. 314, 22 Atl. 945, 14 L. R. A. 69; Fellowes *v.* New Haven, 44 Conn. 240, 26 Am. Rep. 447.

Louisiana.— Municipality No. 1 *v.* Municipality No. 2, 12 La. 49.

New York.— Wilkins *v.* New York, 9 Misc. 610, 30 N. Y. Suppl. 424.

Pennsylvania.— Potts *v.* Philadelphia, 23 Pa. Co. Ct. 212; Roumfort *v.* Harrisburg, 2 Pearson 101.

United States.— Richmond Safety Gate Co. *v.* Ashbridge, 116 Fed. 220; Union Steam Boat Co. *v.* Chicago, 39 Fed. 723.

See 27 Cent. Dig. tit. "Injunction," § 146.

The fact that the municipality is making a mistake, if it is honestly made in the exercise of discretion, is no ground for injunction. Schall *v.* Norristown, 6 Leg. Gaz. (Pa.) 157.

The construction of a sewer and the adoption of a sewerage plan involves discretion, and equity will not interfere in the absence of gross abuse. Valparaiso *v.* Hagen, 153 Ind. 337, 54 N. E. 1062, 74 Am. St. Rep. 305, 48 L. R. A. 707; Johnson *v.* Avondale, 1 Ohio Cir. Ct. 229, 1 Ohio Cir. Dec. 124.

The maintenance of a lamp-post in a certain place is within the discretionary power of a city. Parsons *v.* Travis, 1 Duer (N. Y.) 439.

The board of electrical control has discretion, under Laws (1887), c. 716, § 4, as to the granting of permits to replace electric wires with larger ones, and will not be enjoined from refusing such a permit. U. S. Illuminating Co. *v.* Grant, 55 Hun (N. Y.) 222, 7 N. Y. Suppl. 788. Under the same statute the board is given discretionary control as to when, where, and in what manner electric wires shall be placed underground. U. S. Illuminating Co. *v.* Hess, 3 N. Y. Suppl. 777.

The removal of what is prima facie a nuisance will not be enjoined, but the party injured will be left to his remedy at law. Hart *v.* Albany, 3 Paige (N. Y.) 213.

42. See *infra*, V, E, 7, f.

43. Americus *v.* Mitchell, 74 Ga. 377; Ladd *v.* Boston, 170 Mass. 332, 49 N. E. 627, 40 L. R. A. 171; Lynch *v.* Wilkes-Barre, 10 Kulp (Pa.) 418; Altemose *v.* West Pittston, 8 Kulp (Pa.) 275.

44. Stephens *v.* Minnerly, 3 Hun (N. Y.) 566 (incorporation of a village); Hulbert *v.* Mason, 29 Ohio St. 562; San Antonio *v.* Campbell, (Tex. Civ. App. 1900) 56 S. W. 97.

45. Klinesmith *v.* Harrison, 18 Ill. App. 467 (remedy in damages); Willis *v.* Stapels, 30 Hun (N. Y.) 644; U. S. Illuminating Co. *v.* Hess, 3 N. Y. Suppl. 777 (remedy by mandamus); Gaertner *v.* Fond du Lac, 34 Wis. 497 (remedy by certiorari).

46. Olympic Athletic Club *v.* Speer, 29 Colo. 158, 67 Pac. 161 (preventing sparring exhibitions); Dry Dock, etc., R. Co. *v.* New York, 47 Hun (N. Y.) 221; Campbell *v.* York, 30 Misc. (N. Y.) 340, 63 N. Y. Suppl. 581 (preventing unlicensed music exhibitions); Sterman *v.* Kennedy, 15 Abb. Pr. (N. Y.) 201.

The preserving of the peace and the keeping of streets open will not be prevented by injunction. Chicago *v.* Wright, 69 Ill. 318.

47. McKibbin *v.* Ft. Smith, 35 Ark. 352 (illegal removal of building); Hale *v.* Burns, 91 N. Y. Suppl. 929.

Where, however, they act in good faith in warning the public concerning plaintiff's business they will not be enjoined.[48]

f. Injunction Against Enactment of Ordinances — (i) *Power to Enjoin.* The general rule is that a municipal corporation, in the exercise of legislative power in relation to the subjects committed to its jurisdiction, can no more be enjoined than can the legislature of the state.[49] There are exceptions, however, to this doctrine of non-interference, as where the mere passage of the ordinance would immediately occasion, or would be followed by, some irreparable loss or injury beyond the power of redress by subsequent judicial proceedings, or where it would cause a multiplicity of suits.[50] So a distinction has been drawn between a case where the municipality is acting in its governmental or public character with discretionary authority and where it is acting as the owner of property.[51] Furthermore if the ordinance, the passing of which is sought to be enjoined, is

The police commissioners of New York are not state officers, within the meaning of St. (1851) p. 920, c. 488, and are subject to the court's restraint. New York, etc., R. Co. *v.* New York, 1 Hilt. (N. Y.) 562.

The transmission of express matter, constituting interstate commerce, may not be obstructed by a police board and such board may be enjoined. Dinsmore *v.* New York Bd. of Police, 12 Abb. N. Cas. (N. Y.) 436; Adams Express Co. *v.* New York Bd. of Police, 65 How. Pr. (N. Y.) 72.

48. Weiss *v.* Herlihy, 23 N. Y. App. Div. 608, 49 N. Y. Suppl. 81; Prendorill *v.* Kennedy, 34 How. Pr. (N. Y.) 416; Gilbert *v.* Mickle, 4 Sandf. Ch. (N. Y.) 357, duty to warn of mock auctions.

The stationing of policemen in front of complainant's premises on mere suspicion that a pool-room is being run there, when such action amounts to "official lawlessness and outrage," will be enjoined. Cullen *v.* Bourke, 93 N. Y. Suppl. 1085.

49. *Alabama.*— Montgomery Gas-Light Co. *v.* Montgomery, 87 Ala. 245, 6 So. 113, 4 L. R. A. 616.

Colorado.— Lewis *v.* Denver City Water-Works Co., 19 Colo. 236, 34 Pac. 993, 41 Am. St. Rep. 248.

Illinois.— Stevens *v.* St. Mary's Training School, 144 Ill. 336, 32 N. E. 962, 36 Am. St. Rep. 438, 18 L. R. A. 832.

Iowa.— Des Moines Gas Co. *v.* Des Moines, 44 Iowa 505, 24 Am. Rep. 756.

Louisiana.— Harrison *v.* New Orleans, 33 La. Ann. 222, 39 Am. Rep. 272.

Michigan.— Detroit *v.* Wayne County Cir. Judge, 79 Mich. 384, 44 N. W. 622.

New Jersey.— Bond *v.* Newark, 19 N. J. Eq. 376.

New York.— Whitney *v.* New York, 28 Barb. 233; Milhau *v.* Sharp, 15 Barb. 193; New York, etc., R. Co. *v.* New York, 1 Hilt. 562.

Ohio.— Johnson *v.* Cincinnati, 11 Ohio Dec. (Reprint) 383, 26 Cinc. L. Bul. 223.

Oregon.— Kadderly *v.* Portland, 44 Oreg. 118, 74 Pac. 710, 75 Pac. 222.

United States.—New Orleans Water-Works *v.* New Orleans, 164 U. S. 471, 17 S. Ct. 161, 41 L. ed. 518; Alpers *v.* San Francisco, 32 Fed. 503, 12 Sawy. 631.

See 27 Cent. Dig. tit. "Injunction," § 154.

The passing of an ordinance creating a debt will not be enjoined, even though the debt exceeds the limit fixed by the charter. Murphy *v.* East Portland, 42 Fed. 308.

An ordinance levying a tax is an exercise of legislative power in which the corporation is acting as a local government, not as a trustee. Coulson *v.* Portland, 6 Fed. Cas. No. 3,275, Deady 481.

Ordinance as contract.— The fact that the ordinance sought to be enjoined amounts to a contract with another gas company by no means deprives it of its legislative character. Des Moines Gas Co. *v.* Des Moines, 44 Iowa 505, 24 Am. Rep. 756.

50. *Colorado.*—Lewis *v.* Denver City Water-Works Co., 19 Colo. 236, 34 Pac. 993, 41 Am. St. Rep. 248.

Kentucky.— Roberts *v.* Louisville, 92 Ky. 95, 17 S. W. 216, 13 L. R. A. 844.

New York.— People *v.* Dwyer, 90 N. Y. 402 [*affirming* 27 Hun 548]; People *v.* Sturtevant, 9 N. Y. 263, 59 Am. Dec. 536; Davis *v.* New York, 1 Duer 451; Negus *v.* Brooklyn, 10 Abb. N. Cas. 180, 62 How. Pr. 291.

Pennsylvania.— Wheeler *v.* Philadelphia, 32 Leg. Int. 75.

Tennessee.— International Trading Stamp Co. *v.* Memphis, 101 Tenn. 181, 47 S. W. 136.

United States.— Leverich *v.* Mobile, 110 Fed. 170; Spring Valley Water-Works *v.* Bartlett, 16 Fed. 615, 8 Sawy. 555.

See 27 Cent. Dig. tit. "Injunction," § 154.

51. Roberts *v.* Louisville, 92 Ky. 95, 107, 17 S. W. 216, 13 Ky. L. Rep. 406, 13 L. R. A. 844. In this case the following statement is made: "The general proposition that a court of equity may not enjoin passage of a municipal ordinance, must be confined in its application to subjects over which the corporation in its governmental or public character has discretionary authority. And if it be conceded taxable inhabitants have a right to resort to equity, at all, to restrain a municipal corporation and its officers from making an illegal or wrongful disposition of corporate property, whereby disposition will be injuriously affected, it reasonably follows the power exists to enjoin passage of the ordinance authorizing the act whenever irreparable injury will be done to the plaintiffs, and they have no adequate remedy at law; for, from its nature, a preventive remedy

not within the legislative discretion of the municipal body, there is no question as to the jurisdiction to grant an injunction.[52]

(II) *Grounds For Refusing.* An injunction will not issue to prevent the passing of an unconstitutional or otherwise void ordinance where it will not result in any irreparable injury.[53] Moreover, the injury threatened must be impending as a direct result of the voting on and passing of the ordinance as distinguished from injury that may result from the carrying out or enforcement of the ordinance.[54] Where it is the enforcement of the ordinance that will cause the injury it is the enforcement that must be enjoined.[55]

(III) *Ordinance Violating Prior Contract.* Under ordinary circumstances the passing of an ordinance will not be enjoined on the ground that its enforcement will violate the obligation of a prior contract.[56]

g. Injunction Against Enforcement of Ordinances — (I) *Void Ordinances.* A municipality and its officials will be enjoined from acting under and enforcing a void ordinance, when the proposed enforcement will deprive the complainant of his property or property rights and will cause him injury which cannot be compensated by damages,[57] or where the illegal action will give rise to a multi-

may be applied at the inception of a wrongful act."

52. Des Moines Gas Co. *v.* Des Moines, 44 Iowa 505, 24 Am. Rep. 756; International Trading Stamp Co. *v.* Memphis, 101 Tenn. 181, 47 S. W. 136; Leverich *v.* Mobile, 110 Fed. 170.

An extension of a franchise, although made in the form of an ordinance, is not such an act of legislative power as to be free from interference by injunction. Poppleton *v.* Moores, 62 Nebr. 851, 88 N. W. 128.

53. *Alabama.*— Montgomery Gas-Light Co. *v.* Montgomery, 87 Ala. 245, 6 So. 113, 4 L. R. A. 616.

Colorado.— Lewis *v.* Denver City Water-Works Co., 19 Colo. 236, 34 Pac. 993, 41 Am. St. Rep. 248.

Illinois.— Chicago *v.* Evans, 24 Ill. 52.

Iowa.— Des Moines Gas Co. *v.* Des Moines, 44 Iowa 505, 24 Am. Rep. 756.

Louisiana.— New Orleans El. R. Co. *v.* New Orleans, 39 La. Ann. 127, 1 So. 434.

United States.— Spring Valley Water-Works Co. *v.* Bartlett, 16 Fed. 615, 8 Sawy. 555.

See 27 Cent. Dig. tit. "Injunction," § 154.

The signing of an ordinance by the mayor will not be prevented by injunction. New Orleans El. R. Co. *v.* New Orleans, 39 La. Ann. 127, 1 So. 434.

54. Whitney *v.* New York, 28 Barb. (N. Y.) 233.

55. People *v.* New York, 32 Barb. (N. Y.) 35; New Orleans Water-Works *v.* New Orleans, 164 U. S. 471, 17 S. Ct. 161, 41 L. ed. 518; Alpers *v.* San Francisco, 32 Fed. 503, 12 Sawy. 631; Spring Valley Water-Works *v.* Bartlett, 16 Fed. 615, 8 Sawy. 555.

56. Montgomery Gas-Light Co. *v.* Montgomery, 87 Ala. 245, 6 So. 113, 4 L. R. A. 616; Lewis *v.* Denver City Water-Works Co., 19 Colo. 236, 34 Pac. 993, 41 Am. St. Rep. 248; New Orleans El. R. Co. *v.* New Orleans, 39 La. Ann. 127, 1 So. 434; New Orleans Water-Works *v.* New Orleans, 164 U. S. 471, 17 S. Ct. 161, 41 L. ed. 518.

57. *Illinois.*— Cicero Lumber Co. *v.* Cicero, 176 Ill. 9, 51 N. E. 758, 68 Am. St. Rep. 155, 42 L. R. A. 696.

Indiana.— Spiegel *v.* Gansberg, 44 Ind. 418.

Louisiana.— Guillotte *v.* New Orleans, 12 La. Ann. 479.

Maryland.— Deems *v.* Baltimore, 80 Md. 164, 30 Atl. 648, 45 Am. St. Rep. 339, 26 L. R. A. 541; Baltimore *v.* Scharf, 54 Md. 499; Baltimore *v.* Radecke, 49 Md. 217, 33 Am. Rep. 239.

New Jersey.— Cape May, etc., R. Co. *v.* Cape May, 35 N. J. Eq. 419; Morris Canal, etc., Co. *v.* Jersey City, 12 N. J. Eq. 252.

New York.— Birdsall *v.* Clark, 73 N. Y. 73, 29 Am. Rep. 105; People *v.* New York, 32 Barb. 35; United Traction Co. *v.* Watervliet, 71 N. Y. Suppl. 977.

Ohio.— Ryan *v.* Jacob, 8 Ohio Dec. (Reprint) 167, 4 Cinc. L. Bul. 167.

Pennsylvania.— Harper's Appeal, 109 Pa. St. 9, 1 Atl. 791; Grayson *v.* Darby Gas Co., 4 Lanc. L. Rev. 41; Sank *v.* Philadelphia, 4 Brewst. 133, 8 Phila. 177.

Texas.— Austin *v.* Austin City Cemetery Assoc., 87 Tex. 330, 28 S. W. 528, 47 Am. St. Rep. 114.

United States.— Greenwich Ins. Co. *v.* Carroll, 125 Fed. 121; Old Colony Trust Co. *v.* Wichita, 123 Fed. 762; Busch *v.* Webb, 122 Fed. 655; Los Angeles City Water Co. *v.* Los Angeles, 88 Fed. 720; Barthet *v.* New Orleans, 24 Fed. 563.

Canada.— Jodoin *v.* Beloeil, 6 Quebec Pr. 430; Mallette *v.* Montreal, 24 L. C. Jur. 264. See also Grier *v.* St. Vincent, 12 Grant Ch. (U. C.) 330; Carroll *v.* Perth, 10 Grant Ch. (U. C.) 64.

See 27 Cent. Dig. tit. "Injunction," § 155.

Ordinance void in part.— Chancery may enjoin, to the extent to which it is void, the enforcement of an ordinance void in part. Ignaz *v.* Knoxville, 1 Tenn. Ch. App. 1.

Bondholders have sufficient interest to maintain a suit to enjoin the enforcement of an ordinance fixing rates of fare. Old Colony Trust Co. *v.* Atlanta, 83 Fed. 39.

plicity of actions at law if it is not prevented.[58] This principle applies even though the ordinance under which the action is taken is criminal or quasi-criminal in character, and the action consists of arrests and criminal prosecutions.[59] Where damages at law would afford adequate compensation, the enforcement of an ordinance will not be prevented by injunction.[60]

(II) *Valid Ordinances.* When the action of the municipality is within its charter powers, and raises mere questions of expediency, the decision of which is within the discretion of the municipal body, no injunction will be granted.[61] Where a valid ordinance requires a license as a prerequisite to carrying on a certain business, the enforcement of the ordinance will not be enjoined merely because the license is wrongfully withheld.[62]

(III) *Validity of Ordinance a Legal Question.* The validity or invalidity of a municipal ordinance, being a purely legal question, a court of equity will not assume to determine it on an application for an injunction where no irreparable injury is impending and no multiplicity of suits threatened.[63] In such case the invalidity of the ordinance must be established at law.[64]

58. Gould *v.* Atlanta, 55 Ga. 678; Joseph Schlitz Brewing Co. *v.* Superior, 117 Wis. 297, 93 N. W. 1120; Cleveland *v.* Cleveland City R. Co., 194 U. S. 517, 24 S. Ct. 756, 48 L. ed. 1102; Cleveland *v.* Cleveland Electric R. Co., 194 U. S. 538, 24 S. Ct. 764, 48 L. ed. 1109 [*affirming* 94 Fed. 385]; Hutchinson *v.* Beckham, 118 Fed. 399, 55 C. C. A. 333.

Equity will entertain jurisdiction of a suit to restrain the enforcement of a municipal ordinance reducing street railway rates in view of the multiplicity of suits which would be occasioned by resistance to the enforcement of the ordinance. Cleveland *v.* Cleveland City R. Co., 194 U. S. 517, 24 S. Ct. 756, 48 L. ed. 1102; Detroit *v.* Detroit Citizens' St. R. Co., 184 U. S. 368, 22 S. Ct. 410, 46 L. ed. 592. See also Los Angeles City Water Co. *v.* Los Angeles, 88 Fed. 720.

Collection of license-fees.— Equity will not restrain the collection of license-fees under a valid ordinance on the ground that it does not apply to the complainant, when only one action is brought against him. Ludlow, etc., Coal Co. *v.* Ludlow, 102 Ky. 354, 43 S. W. 435, 19 Ky. L. Rep. 1381.

59. *Alabama.*— Montgomery *v.* Louisville, etc., R. Co., 84 Ala. 127, 4 So. 626; Mobile & Louisville, etc., R. Co., 84 Ala. 115, 4 So. 106, 5 Am. St. Rep. 342.

Louisiana.— McFarlain *v.* Jennings, 106 La. 541, 31 So. 62.

Missouri.— Sylvester Coal Co. *v.* St. Louis, 130 Mo. 323, 32 S. W. 649, 51 Am. St. Rep. 566.

Texas.— Austin *v.* Austin City Cemetery Assoc., 87 Tex. 330, 28 S. W. 528, 47 Am. St. Rep. 114.

Wisconsin.— Joseph Schlitz Brewing Co. *v.* Superior, 117 Wis. 297, 93 N. W. 1120.

United States.— Hutchinson *v.* Beckham, 118 Fed. 399, 55 C. C. A. 333.

See 27 Cent. Dig. tit. "Injunction," § 155.

60. Klinesmith *v.* Harrison, 18 Ill. App. 467; St. Peter's Episcopal Church *v.* Washington, 109 N. C. 21, 13 S. E. 700; Arnold *v.* Van Wert, 3 Ohio Cir. Ct. 545, 2 Ohio Cir. Dec. 314; Hayman *v.* Eshelby, 8 Ohio Dec. (Reprint) 797, 9 Cinc. L. Bul. 365.

61. *Alabama.*— Nashville, etc., R. Co. *v.* Attalla, 118 Ala. 362, 24 So. 450.

Connecticut.— Whitney *v.* New Haven, 58 Conn. 450, 20 Atl. 666; Hine *v.* New Haven, 40 Conn. 478.

Illinois.— Wagner *v.* Rock Island, 146 Ill. 139, 34 N. E. 545, 21 L. R. A. 519.

Indiana.— Davis *v.* Fasig, 128 Ind. 271, 27 N. E. 726.

New York.— Coykendall *v.* Hood, 36 N. Y. App. Div. 558, 55 N. Y. Suppl. 718; Roberts *v.* New York, 5 Abb. Pr. 41.

North Carolina.— Paul *v.* Washington, 134 N. C. 363, 47 S. E. 793, 65 L. R. A. 902; Rosenbaum *v.* Newbern, 118 N. C. 83, 24 S. E. 1, 32 L. R. A. 123.

Washington.— Hillman *v.* Seattle, 33 Wash. 14, 73 Pac. 791.

See 27 Cent. Dig. tit. "Injunction," § 155.

62. Mutual Electric Light Co. *v.* Ashworth, 118 Cal. 1, 50 Pac. 10; Klinesmith *v.* Harrison, 18 Ill. App. 467.

63. *Connecticut.*— Dunham *v.* New Britain, 55 Conn. 378, 11 Atl. 354.

Florida.— Orange City *v.* Thayer, 45 Fla. 502, 34 So. 573.

Georgia.— L. B. Price Co. *v.* Atlanta, 105 Ga. 358, 31 S. E. 619; Nelms *v.* Pinson, 92 Ga. 441, 17 S. E. 350.

Illinois.— Yates *v.* Batavia, 79 Ill. 500.

Kentucky.— Brown *v.* Catlettsburg, 11 Bush 435

Louisiana.— Browne *v.* New Orleans, 38 La. Ann. 517, in which case the ordinance had been abandoned and had become inoperative.

Pennsylvania.— Barton *v.* Pittsburg, 4 Brewst. 373.

Texas.— Wade *v.* Nunnelly, 19 Tex. Civ. App. 256, 46 S. W. 668.

United States.— Torpedo Co. *v.* Clarendon, 19 Fed. 231.

See 27 Cent. Dig. tit. "Injunction," § 155.

64. Forcheimer *v.* Mobile, 84 Ala. 126, 4 So. 112; Pope *v.* Savannah, 74 Ga. 365; Hottinger *v.* New Orleans, 42 La. Ann. 629, 3 So. 575; Levy *v.* Shreveport, 27 La. Ann. 620; Marvin Safe Co. *v.* New York, 38 Hun (N. Y.) 146; Schulz *v.* Albany, 27 Misc. (N. Y.) 51,

8. Unauthorized Contracts and Expenditures — a. In General. Equity has jurisdiction to prevent public officers and boards from letting or carrying out unauthorized and illegal contracts for public buildings, bridges, and other improvements, when such action may cause the levy of illegal taxes, the expenditure of public funds in an improper manner, or a complication of the public business that will bring about many actions at law.[65]

b. Suit by Taxpayer. It is generally proper for the application to be made in such cases by a taxpayer;[66] but he must show that he is interested in the matter and will be damaged if the improper action is not prevented by injunction,[67] and

57 N. Y. Suppl. 963; West *v.* New York, 10 Paige (N. Y.) 539.

65. *Arkansas.*—Fones Hardware Co. *v.* Erb, 54 Ark. 645, 17 S. W. 7, 13 L. R. A. 353.

Connecticut.— Mooney *v.* Clark, 69 Conn. 241, 37 Atl. 506, 1080.

Delaware.— Riddle *v.* Delaware County, 2 Del. Co. 232.

Indiana.— Bluffton *v.* Silver, 63 Ind. 262; Benton County *v.* Templeton, 51 Ind. 266; State *v.* Custer, 11 Ind. 210.

Kansas.— Shanks *v.* Pearson, 66 Kan. 168, 71 Pac. 252; State *v.* Marion County Com'rs, 21 Kan. 419.

New York.— Pullman *v.* New York, 49 Barb. 57.

Ohio.— Ruffner *v.* Hamilton County, 1 Disn. 39, 12 Ohio Dec. (Reprint) 473.

Pennsylvania.— Shaefer *v.* Schuylkill County, 19 Pa. Co. Ct. 508; McIntyre *v.* Perkins, 9 Phila. 484; Cummings *v.* Sheble, 1 Phila. 492.

Wisconsin.— Webster *v.* Douglas County, 102 Wis. 181, 77 N. W. 885, 78 N. W. 451, 72 Am. St. Rep. 870.

Canada.— Shrimpton *v.* Winnipeg, 13 Manitoba 311; Wallace *v.* Orangeville, 5 Ont. 37; Smith *v.* Raleigh, 3 Ont. 405.

See 27 Cent. Dig. tit. "Injunction," § 158.

Suit by the state.— Although the state may intervene to protect its citizens when public rights are affected, the threatened injury must be substantial and the illegality must amount to more than a mere irregularity when the object is proper and beneficial. Atty.-Gen. *v.* Detroit, 55 Mich. 181, 20 N. W. 894.

Contract let to member of the board.— An injunction is proper to prevent the carrying out of an illegal contract between a board and one of its own members, and the fact that he would be liable to an action on his bond does not afford an adequate remedy. Alexander *v.* Johnson, 144 Ind. 82, 41 N. E. 811.

Balance of injury considered.— Where the building is nearly done and an injunction to stop it would cause serious loss, its completion will not be enjoined. White *v.* Stamford, 37 Conn. 578.

Title to office in dispute.— Officers will not be enjoined from purchasing property where the only question is their right to the office. Quo warranto is the remedy. Graeff *v.* Felix, 200 Pa. St. 137, 49 Atl. 758.

In Pennsylvania, by the act of April 8, 1846, the courts of Philadelphia were prohibited from enjoining the erection of public works under certain circumstances. This statute has been construed in Wolbert *v.* Philadelphia, 48 Pa. St. 439; Wheeler *v.* Rice, 4 Brewst. 129; Hecksher *v.* Shenandoah Citizens' Water, etc., Co., 2 Leg. Chron. 273; West Philadelphia Pass. R. Co. *v.* Philadelphia, 10 Phila. 70; City Sewage Utilization Co. *v.* Davis, 8 Phila. 625; Windrim *v.* Philadelphia, 8 Phila. 361; Philadelphia, etc., R. Co. *v.* Philadelphia, 8 Phila. 284; Flanagan *v.* Philadelphia, 8 Phila. 110.

66. *Arkansas.*—Fones Hardware Co. *v.* Erb, 54 Ark. 645, 17 S. W. 7, 13 L. R. A. 353.

Connecticut.— Mooney *v.* Clark, 69 Conn. 241, 37 Atl. 506, 1080.

Illinois.— Holden *v.* Alton, 179 Ill. 318, 53 N. E. 556; Adams *v.* Brenan, 177 Ill. 194, 52 N. E. 314, 69 Am. St. Rep. 222, 42 L. R. A. 718.

Indiana.— Scott *v.* La Porte, (1903) 68 N. E. 278; Deweese *v.* Hutton, 144 Ind. 114, 43 N. E. 13; Alexander *v.* Johnson, 144 Ind. 82, 41 N. E. 811; Middleton *v.* Greeson, 106 Ind. 18, 5 N. E. 755.

Minnesota.— Schiffmann *v.* St. Paul, 88 Minn. 43, 92 N. W. 503; Farmer *v.* St. Paul, 65 Minn. 176, 67 N. W. 990, 33 L. R. A. 199.

Missouri.— Matthis *v.* Cameron, 62 Mo. 504.

New York.— Birge *v.* Berlin Iron Bridge Co., 133 N. Y. 477, 31 N. E. 609.

Wisconsin.— Webster *v.* Douglas County, 102 Wis. 181, 77 N. W. 885, 78 N. W. 451, 72 Am. St. Rep. 870.

See 27 Cent. Dig. tit. "Injunction," § 158.

After collection of the tax.— A taxpayer is not entitled to an injunction to stop a public improvement, on the ground that it is unauthorized, after the taxes have been levied for it and have been collected without objection. State *v.* Bader, 13 Ohio Cir. Ct. 15, 7 Ohio Cir. Dec. 1; Harpster *v.* Brower, 5 Ohio Cir. Ct. 395, 3 Ohio Cir. Dec. 194.

Suit by the state.— The state, through its attorney-general, may bring suit for an injunction provided the state is pecuniarily interested. See Atty.-Gen. *v.* Detroit, 55 Mich. 181, 20 N. W. 894; Matthis *v.* Cameron, 62 Mo. 504.

67. Dewey Hotel Co. *v.* U. S. Electric Lighting Co., 17 App. Cas. (D. C.) 356; Adair *v.* Browning, 6 D. C. 243; Swett *v.* Troy, 62 Barb. (N. Y.) 630; Sherman *v.* Bellows, 24 Oreg. 553, 34 Pac. 549; Wood *v.* Victoria, 18 Tex. Civ. App. 573, 46 S. W. 284.

in addition to these facts it is also necesary for him to show that he has no other adequate remedy.[68]

c. Necessity of Injury and Illegality. Where the action sought to be enjoined is not contrary to law, no injunction will issue,[69] as where the making of the proposed contract is within the discretion of the officers in charge and no fraud is alleged.[70] It has been held that where the proposed contract would be void and no rights could be acquired under it, no injunction will be granted.[71]

d. Letting Contracts to Lowest Bidders. Where the statute requires a contract to be let to the lowest bidder, the letting of it to one not the lowest bidder will be enjoined;[72] but not in case the matter is in the discretion of the officers sought to be enjoined.[73] The disappointed bidder, unless he is also a taxpayer,[74] is not the proper party to sue for an injunction.[75]

e. Issuance of Bonds. When bonds or other evidences of indebtedness are about to be issued by public officers illegally or without complying with the statute authorizing their issue, equity has jurisdiction to grant an injunction.[76]

68. Jackson *v.* Newark, 53 N. J. Eq. 322, 31 Atl. 233; Manly Mfg. Co. *v.* Broaddus, 94 Va. 547, 27 S. E. 438.

69. *Connecticut.*— Mooney *v.* Clark, 69 Conn. 241, 37 Atl. 506, 1080.

District of Columbia.— Downing *v.* Ross, 1 App. Cas. 251.

New York.— Pullman *v.* New York, 54 Barb. 169.

Wisconsin.— Phillips *v.* Albany, 28 Wis. 340.

United States.— Moore *v.* Walla Walla, 60 Fed. 961.

See 27 Cent. Dig. tit. "Injunction," § 158.

Validity of contract not invalid.—The question is not as to the validity of the contract, but as to the validity of the action by the board. Barker *v.* Oswegatchie, 16 N. Y. Suppl. 727, 732.

Formal defect.— Where there is no want of power and no misdoing, a mere defect in a notice is not sufficient ground for an injunction. Hanley *v.* Randolph County Ct., 50 W. Va. 439, 40 S. E. 389.

Pending an appeal from an order to remove the county-seat the court of appeals will not enjoin the commissioners from letting a contract for a building in a new place. Mode *v.* Crawford County, 141 Ind. 574, 40 N. E. 1089.

70. Andrews *v.* Knox County, 70 Ill. 65; Bell *v.* Rochester, 30 N. Y. Suppl. 365; State *v.* Lord, 28 Oreg. 498, 43 Pac. 471, 31 L. R. A. 473; Manly Mfg. Co. *v.* Broaddus, 94 Va. 547, 27 S. E. 438.

71. Barto *v.* San Francisco, 135 Cal. 494, 67 Pac. 758; Linden *v.* Case, 46 Cal. 171. But see Middleton *v.* Greeson, 106 Ind. 18, 4 N. E. 755.

72. Holden *v.* Alton, 179 Ill. 318, 53 N. E. 556; Akron *v.* France, 24 Ohio Cir. Ct. 63.

Modification of contract.— Where the contract was to be with the lowest bidder, a taxpayer may enjoin material modifications in the contract after it has been let. Le Tourneau *v.* Hugo, 90 Minn. 420, 97 N. W. 115.

A provision that only union labor shall be employed, thus limiting competition among bidders, is illegal, and a public board will be enjoined from expending money under such a contract. Adams *v.* Brenan, 177 Ill. 194, 52 N. E. 314, 69 Am. St. Rep. 222, 42 L. R. A. 718.

73. Kelly *v.* Chicago, 62 Ill. 279; Plessner *v.* Pray, 8 Ohio S. & C. Pl. Dec. 149, 6 Ohio N. P. 444; Findley *v.* Pittsburgh, 82 Pa. St. 351.

Where ratification by the town is required before the contract is made, no injunction will be granted either before or after such ratification. The reason for this is that there can be no injury before ratification and afterward the will of the majority must prevail. Dibble *v.* New Haven, 56 Conn. 199, 14 Atl. 210.

74. Holden *v.* Alton, 179 Ill. 318, 53 N. E. 556.

75. *Maryland.*— Kelly *v.* Baltimore, 53 Md. 134.

New York.— Adams *v.* Ives, 1 Hun 457 [*affirmed* in 63 N. Y. 650]; Cleveland Fire Alarm Tel. *v.* Metropolitan Fire Com'rs, 55 Barb. 288; Trowbridge *v.* New York, 24 Misc. 517, 53 N. Y. Suppl. 616; McCafferty *v.* Glazier, 10 How. Pr. 475.

Ohio.— Johnson *v.* West Side St. R. Co., 9 Ohio Dec. (Reprint) 71, 10 Cinc. L. Bul. 345.

Pennsylvania.— Kerr *v.* Board of Education, 42 Pa. L. J. 54.

Wisconsin.— Kendall *v.* Frey, 74 Wis. 26, 42 N. W. 466, 17 Am. St. Rep. 118.

See 27 Cent. Dig. tit. "Injunction," § 158.

76. *Arkansas.*— Russell *v.* Tate, 52 Ark. 541, 13 S. W. 130, 20 Am. St. Rep. 193, 7 L. R. A. 180.

Idaho.— Dunbar *v.* Canyon County, 5 Ida. 407, 49 Pac. 409.

Illinois.— Littler *v.* Jayne, 124 Ill. 123, 16 N. E. 374.

Indiana.— Owen County *v.* Spangler, 159 Ind. 575, 65 N. E. 743.

Kentucky.— Allison *v.* Louisville, etc., R. Co., 9 Bush 247.

Michigan.— Dodge *v.* Van Buren Cir. Judge, 118 Mich. 189, 76 N. W. 315.

Minnesota.— Harrington *v.* Plainview, 27 Minn. 224, 6 N. W. 777.

Where the law requires that the question shall be submitted to popular vote, an issue of bonds without such a vote will be enjoined.[77] The complainant must, however, be a party who will be injured by such issue,[78] as for example a taxpayer,[79] and he must show that the bond issue is actually contemplated [80] and is illegal,[81] and that he has no other adequate remedy.[82] Where the bonds would be utterly void, even in the hands of innocent third persons, no injunction will be granted, since the complainant will suffer no injury.[83]

f. Payment of Public Money — (i) *In General.* Injunction is a proper

New York.— Rochester *v.* Davis, 44 How. Pr. 95.

Wisconsin.— Noesen *v.* Port Washington, 37 Wis. 168; Lawson *v.* Schnellen, 33 Wis. 288.

United States.— Louisiana Bd. of Liquidation *v.* McComb, 92 U. S. 531, 23 L. ed. 623; Union Pac. R. Co. *v.* Lincoln County, 24 Fed. Cas. No. 14,380, 3 Dill. 300.

Canada.— Belanger *v.* Cie. du Ch. de Fer de Temiscouata, 16 Quebec 112.

See 27 Cent. Dig. tit. "Injunction," § 159.

Mistake in time for payment.— The issue of twenty-year bonds will be enjoined when the statute requires such bonds to be paid in ten years. Union Pac. R. Co. *v.* Lincoln Co., 24 Fed. Cas. No. 14,380, 3 Dill. 300.

Exceeding the constitutional limit in suing city bonds for the benefit of a railroad may be prevented by injunction. List *v.* Wheeling, 7 W. Va. 501. See also Owen County *v.* Spangler, 159 Ind. 575, 65 N. E. 743.

The payment of interest on bonds said to have been illegally issued will not be enjoined when fraud is not alleged and the money to pay such interest has already been collected by taxation before the validity of the bonds was questioned. Calhoun *v.* Millard, 121 N. Y. 69, 24 N. E. 27, 8 L. R. A. 248.

In Maine the power of equity to prevent action by a city and its officers is limited by Acts (1864), c. 239, and under that law no injunction can issue to prevent the issue of bonds or the payment of money lawfully voted for a lawful purpose to pay a railway stock subscription, when the only objection is misdoing on the part of the railway corporation. Johnson *v.* Thorndike, 56 Me. 32.

77. State *v.* State University, 57 Mo. 178; Cook *v.* Beatrice, 32 Nebr. 80, 48 N. W. 828; State *v.* Com'rs, 7 Ohio S. & C. Pl. Dec. 34, 5 Ohio N. P. 260; Goedgen *v.* Manitowoc County, 10 Fed. Cas. No. 5,501, 2 Biss. 328.

The consent of a majority of the landowners is not sufficient when the law requires the consent of a majority of the taxpayers. Lane *v.* Schomp, 20 N. J. Eq. 82.

Where it would be inequitable to enjoin payment, no injunction will issue, even though the question was not submitted to vote. Wood *v.* Bangs, 1 Dak. 179, 46 N. W. 586.

78. Jones *v.* Little Rock, 25 Ark. 301; Fellows *v.* Walker, 39 Fed. 651.

The state may sue for an injunction where the issuance of the bonds is a violation of the constitution and laws of the state. State *v.* Callaway County Ct., 51 Mo. 395; State *v.* Saline County Ct., 51 Mo. 350, 11 Am. Rep. 454.

The town may sue in its own name to prevent an illegal issue of bonds. Duanesburgh *v.* Jenkins, 46 Barb. (N. Y.) 294.

79. *Idaho.*— Dunbar *v.* Canyon County, 5 Ida. 407, 49 Pac. 409.

Indiana.— Delaware County *v.* McClintock, 51 Ind. 325.

New York.— Ayers *v.* Lawrence, 59 N. Y. 192.

North Carolina.— Galloway *v.* Jenkins, 63 N. C. 147.

Ohio.— State *v.* Com'rs, 7 Ohio S. & C. Pl. Dec. 34, 5 Ohio N. P. 260.

Virginia.— Redd *v.* Henry County, 31 Gratt. 695.

Wisconsin.— Perkins *v.* Port Washington, 37 Wis. 177; Nœsen *v.* Port Washington, 37 Wis. 168; Lawson *v.* Schnellen, 33 Wis. 288.

See 27 Cent. Dig. tit. "Injunction," § 159.

In New York the right of a taxpayer to sue for an injunction is established by the laws of 1872, chapter 161. Ayers *v.* Lawrence, 59 N. Y. 192. The contrary had previously been held. See Roosevelt *v.* Draper, 23 N. Y. 318.

Where subscription to railroad stock has been made, taxpayers are entitled to an injunction to prevent an illegal issue of bonds, even though they have not been called for by the company and no attempt has been made to issue them. Winston *v.* Tennessee, etc., R. Co., 1 Baxt. (Tenn.) 60.

The issuance of warrants in payment of sums due under an illegal contract may be enjoined, even though the officers issuing the warrants have no public money under their control. The injunction will none the less prevent the misapplication of the public funds. Littler *v.* Jayne, 124 Ill. 123, 16 N. E. 374.

The governor of a state and other state officers are not liable to be enjoined from issuing bonds illegally at the suit of a taxpayer whose injury is only that which he sustains in common with all the other citizens. Morgan *v.* Graham, 17 Fed. Cas. No. 9,801, 1 Woods 124.

80. Phillips *v.* Albany, 28 Wis. 340.

81. Heilbron *v.* Cuthbert, 96 Ga. 312, 23 N. E. 206; Carlisle *v.* Saginaw, 84 Mich. 134, 47 N. W. 444.

82. Morgan *v.* Kootenai County, 4 Ida. 418, 39 Pac. 1118.

83. McCoy *v.* Briant, 53 Cal. 247; Hopkins *v.* Lovell, 47 Mo. 102; Polly *v.* Hopkins, 74 Tex. 145, 11 S. W. 1084; Bolton *v.* San Antonio, (Tex. Civ. App. 1893) 21 S. W.

remedy to restrain the fraudulent or unlawful appropriation of public moneys.[84] For example, illegal appropriations for the celebration of the Fourth of July,[85] or for the payment of bounties to enlisted soldiers,[86] will be enjoined. Where an action against the officers making the illegal application of funds will afford an adequate remedy,[87] or where the payment is actually not illegal,[88] or where the propriety of the payment is merely doubtful,[89] or where there is a sufficient remedy by appeal or certiorari,[90] an injunction will not issue.

(II) *Proper Parties to Bring Suit*— (A) *The State.* Where a municipality is attempting to exceed the powers conferred upon it by the state and is about to expend public money, the suit to restrain such expenditure may be brought in the name of the state or its attorney-general.[91] So the munici-

64, 401. And see Harrington *v.* Plainview, 27 Minn. 224, 6 N. W. 777.

84. *California.*— Andrews *v.* Pratt, 44 Cal. 309; Foster *v.* Coleman, 10 Cal. 278.

Colorado.— Packard *v.* Jefferson County, 2 Colo. 338.

Connecticut.— Webster *v.* Harwinton, 32 Conn. 131.

Illinois.— Perry *v.* Kinnear, 42 Ill. 160; Colton *v.* Hanchett, 13 Ill. 615.

Indiana.— Rothrock *v.* Carr, 55 Ind. 334; Warren County Agricultural Joint Stock Co. *v.* Barr, 55 Ind. 30.

Kentucky.— Patton *v.* Stephens, 14 Bush 324.

Maryland.— Wiley *v.* Allegany County, 51 Md. 401.

Massachusetts.— Hood *v.* Lynn, 1 Allen 103; Pope *v.* Halifax, 12 Cush. 410.

New Hampshire.— Brown *v.* Marsh, 21 N. H. 81.

New Jersey.— McKinley *v.* Union County, 29 N. J. Eq. 164; Bond *v.* Newark, 19 N. J. Eq. 376.

Ohio.— Moore *v.* Hoffman, 2 Cinc. Super. Ct. 453.

Pennsylvania.— Bergner *v.* Harrisburg, 1 Pearson 291.

Rhode Island.— Fiske *v.* Hazard, 7 R. I. 438.

Tennessee.— Fine *v.* Stuart, (Ch. App. 1898) 48 S. W. 371.

United States.— Crampton *v.* Zabriskie, 101 U. S. 601, 25 L. ed. 1070.

See 27 Cent. Dig. tit. "Injunction," § 160.

A payment only technically illegal, but which ought to be made because value has been received for it, will not be enjoined. A court of equity may exercise discretion, and in such a case it would be more inequitable to grant an injunction than to refuse it. Farmer *v.* St. Paul, 65 Minn. 176, 6 N. W. 990, 33 L. R. A. 199. See also Wood *v.* Bangs, 1 Dak. 179, 46 N. W. 586; Dawson Water-Works Co. *v.* Carver, 95 Ga. 565, 20 S. E. 502. Where the payment, although illegal, is made in settlement of a claim for which the county would ultimately be liable, no injunction will be granted. Ebert *v.* Langlade County, 107 Wis. 569, 83 N. W. 942.

A mandatory injunction to rectify the unconstitutional application of money from taxes will not be granted when there is no lawful authority for applying it for any purpose whatever. Davenport *v.* Cloverport, 72 Fed. 689.

The payment of salary to an officer will not be enjoined where the pivotal question is really his right to the office. Quo warranto is the remedy. Greene *v.* Knox, 175 N. Y. 432, 67 N. E. 910. The same is particularly true where there is a contest pending to determine the right to the office. Lawrence *v.* Leidigh, 58 Kan. 676, 50 Pac. 889.

A teacher holding no certificate is not entitled to payment, and such payment by the directors will be restrained. Martin *v.* Jamison, 39 Ill. App. 248. See, generally, Schools and School-Districts.

85. New London *v.* Brainard, 22 Conn. 552; Hood *v.* Lynn, 1 Allen (Mass.) 103.

86. Fiske *v.* Hazard, 7 R. I. 438.

87. Winn *v.* Shaw, (Cal. 1890) 25 Pac. 244; Kilbourne *v.* Allyn, 7 Lans. (N. Y.) 352; Hurlburt *v.* Lookout Mountain, (Tenn. Ch. App. 1898) 49 S. W. 301.

88. *California.*— Merriam *v.* Yuba County, 72 Cal. 517, 14 Pac. 137.

Connecticut.— Hine *v.* Stephens, 33 Conn. 497, 89 Am. Dec. 217.

Louisiana.— Citizens' Bank *v.* Dubuclet, 26 La. Ann. 81.

New York.— Hecker *v.* New York, 18 Abb. Pr. 369; Fitzpatrick *v.* Flagg, 5 Abb. Pr. 213.

Ohio.— Lucas County Com'rs *v.* Hunt, 5 Ohio St. 488, 67 Am. Dec. 303.

See 27 Cent. Dig. tit. "Injunction," § 160.

Partial illegality.— The execution of an order making numerous allowances will not be enjoined where only a few of those allowances were illegal. Armstrong *v.* Taylor County Ct., 41 W. Va. 602, 24 S. E. 993.

89. Tappen *v.* Crissey, 64 How. Pr. (N. Y.) 496.

90. Picotte *v.* Watt, 3 Ida. 447, 31 Pac. 805; Gillespie *v.* Broas, 23 Barb. (N. Y.) 370.

91. Atty.-Gen. *v.* Detroit, 26 Mich. 263; State *v.* Callaway County Ct., 51 Mo. 395; State *v.* Saline County Ct., 51 Mo. 350, 11 Am. Rep. 454.

Voluntary payments by taxpayers.— The state is not entitled to an injunction to restrain the payment of money voluntarily paid by the taxpayers and levied to pay for improvements that have been built. Atchison Nat. Bank *v.* State, 34 Kan. 379, 8 Pac. 367.

pality whose officers are about to make the illegal expenditure may sue for an injunction.[92]

(B) *Taxpayers.*[93] As a general rule resident taxpayers are proper parties to sue for an injunction to prevent an illegal payment of public funds, and it is not generally required that the complainants show an injury to themselves other than that which they will suffer in common with the public at large.[94] There are, however, some decisions holding that the complainant must show a special injury to himself different from that suffered by the general public.[95] In a few cases it has been required that the taxpayer should bring the suit, not for his own benefit alone, but also on behalf of all the other taxpayers.[96]

(C) *Creditors.* Where his remedy at law is adequate,[97] or where he can compel by mandamus the application of public funds to the payment of the debt,[98] an injunction is not the proper remedy of a creditor to prevent the misapplication of such funds. Under some circumstances, however, the holder of bonds, for the payment of which certain funds were to be set aside, may be entitled to an injunction against the misapplication of such funds, on the ground that he is entitled to a specific enforcement of the agreement with him.[99]

F. Public Welfare, Property, and Rights[1] — **1. In General.** An injunction is frequently a proper remedy for the protection of the rights and property of the public as such, where one of the grounds for equitable jurisdiction exists.[2] So injunction may be proper to prevent a railroad company from buying up a

92. Missouri River, etc., R. Co. *v.* Miami County Com'rs, 12 Kan. 230; Cherry Creek *v.* Becker, 2 N. Y. Suppl. 514.

93. See also Counties; Municipal Corporations; Schools and School-Districts; States; Towns.

94. *California.*— Barry *v.* Goad, 89 Cal. 215, 26 Pac. 785; Winn *v.* Shaw, 87 Cal. 631, 25 Pac. 968; Andrews *v.* Pratt, 44 Cal. 309.

Connecticut.— Terrett *v.* Sharon, 34 Conn. 105; New London *v.* Brainard, 22 Conn. 552.

Illinois.— Littler *v.* Jayne, 124 Ill. 123, 16 N. E. 374; Springfield *v.* Edwards, 84 Ill. 626; Beauchamp *v.* Kankakee Co., 45 Ill. 274; Perry *v.* Kinnear, 42 Ill. 160; Colton *v.* Hanchett, 13 Ill. 615; Lundberg *v.* Boldenweck, 35 Ill. App. 79.

Iowa.— Anderson *v.* Orient F. Ins. Co., 88 Iowa 579, 55 N. W. 348.

Massachusetts.— Prince *v.* Crocker, 166 Mass. 347, 44 N. E. 446, 32 L. R. A. 610 (statutes); Allen *v.* Marion, 11 Allen 108; Hood *v.* Lynn, 1 Allen 103.

Minnesota.— Farmer *v.* St. Paul, 65 Minn. 176, 67 N. W. 990, 33 L. R. A. 199.

Missouri.— Black *v.* Ross, 37 Mo. App. 250.

New York.— Greene *v.* Knox, 175 N. Y. 432, 67 N. E. 910; Warrin *v.* Baldwin, 105 N. Y. 534, 12 N. E. 49.

Wisconsin.— Kircher *v.* Pederson, 117 Wis. 68, 93 N. W. 813.

United States.— Crampton *v.* Zabriskie, 101 U. S. 601, 609, 25 L. ed. 1070, in which case it is said: "Of the right of resident tax-payers to invoke the interposition of a court of equity to prevent an illegal disposition of the moneys of the county or the illegal creation of a debt which they in common with other property-holders of the county may otherwise be compelled to pay, there is at this day no serious question."

See 27 Cent. Dig. tit. "Injunction," § 160.

95. Highway Com'rs *v.* Deboe, 43 Ill. App. 25; Miller *v.* Grandy, 13 Mich. 540; Morgan *v.* Graham, 17 Fed. Cas. No. 9,801, 1 Woods 124.

96. Packard *v.* Jefferson County, 2 Colo. 338. And see Littler *v.* Jayne, 124 Ill. 123, 16 N. E. 374, where the suit was so brought.

97. Courtney *v.* Cherryvale, 7 Kan. App. 391, 51 Pac. 930.

98. Hausmeister *v.* Porter, 21 Fed. 355.

Grounds.— A public creditor is not entitled to an injunction to prevent moneys from being paid out where they properly belong merely because other moneys which should have been paid to him have been wrongfully diverted elsewhere. Self *v.* Jenkins, 21 Fed. Cas. No. 12,640, 1 Hughes 23, 71 N. C. 578. See also Webster *v.* Fish, 5 Nev. 190.

99. Internal Imp. Fund *v.* Bailey, 10 Fla. 112, 81 Am. Dec. 194; Fazende *v.* Houston, 34 Fed. 95. See also Board of Liquidation *v.* McComb, 92 U. S. 531, 23 L. ed. 623. *Compare* Roosevelt *v.* Draper, 23 N. Y. 318.

Grounds for refusal.— Injunction may be refused on the ground that it should be asked only as an ancillary remedy to an action for enforcement of the debt. Droz *v.* East Baton Rouge Parish, 36 La. Ann. 307.

1. Injunctions against criminal acts and conspiracies see *infra*, V, H.

Injunctions against obstruction of streets and highways see Municipal Corporations; Streets and Highways.

Injunction against obstruction of interstate commerce see Commerce, 7 Cyc. 425.

Injunctions against nuisances see Nuisances.

Injunctions against obstruction of navigable waters see Navigable Waters.

Injunction against taking possession of public highway for toll-road see Turnpikes and Toll-Roads.

2. Putnam *v.* Valentine, 5 Ohio 187; Shamokin Borough *v.* Shamokin, etc., Elec-

competing line in violation of statute,[3] or the illegal collection of wharfage for the use of a public wharf.[4] But no injunction should be granted when there is an adequate remedy elsewhere.[5]

2. PROTECTION OF PUBLIC SAFETY. Acts which are a menace to the health[6] or safety[7] of the public will be enjoined. But an act will not be restrained when the complainant will suffer no special injury,[8] or where another remedy has been provided.[9]

3. PROTECTION OF PUBLIC PROPERTY. The unlawful transfer of public property will be enjoined,[10] and the public funds will be protected against unlawful and improper expenditures.[11] The appropriation of public property for private uses may be restrained,[12] as, for example, the unauthorized erection of a building upon public property.[13] The suit for an injunction may be brought by a private citizen only when he suffers a special injury.[14]

G. Personal Rights[15] — 1. PERSONAL LIBERTY. In order to prevent an alienation of affections of complainant's wife, it has been held that defendant may be enjoined from visiting or communicating with her, notwithstanding the objection that the injunction will deprive defendant of personal rights relating to his liberty.[16]

tric R. Co., 196 Pa. St. 166, 46 Atl. 382; Young *v.* Emery, 155 Pa. St. 273, 26 Atl. 424.

The maintenance of a saloon in an improper place may be prevented by injunction. *In re* Board of Education, 5 Ohio S. & C. Pl. Dec. 578, 7 Ohio N. P. 289.

License obtained by fraud.—When a license to do business as a race-track bookmaker has been obtained by fraud, the carrying on of such business may be enjoined. State *v.* Zachritz, 166 Mo. 307, 65 S. W. 999, 89 Am. St. Rep. 711.

3. Louisville, etc., R. Co. *v.* Com., 97 Ky. 675, 31 S. W. 476, 17 Ky. L. Rep. 427; Pennsylvania R. Co. *v.* Com., 3 Pa. Cas. 100, 7 Atl. 368.

4. Wharf's Case, 3 Bland (Md.) 361.

5. Swan Creek Tp. *v.* Brown, 130 Mich. 382, 90 N. W. 38; Concord Tp.'s Appeal, 1 Walk. (Pa.) 195; Hammersley *v.* Turnpike Co., 1 Leg. Gaz. (Pa.) 343. *Compare* Hoffman *v.* Schultz, 31 How. Pr. (N. Y.) 385.

6. Dubos *v.* Dreyfous, 52 La. Ann. 1117, 27 So. 663.

The use of a building as a pest-house hospital in the heart of the city may be prevented when there are ample facilities in safe localities. Hanzell *v.* Allegheny, 33 Pittsb. Leg. J. N. S. (Pa.) 313.

7. See cases cited *infra*, this note.

The disregard of a speed limit fixed by statute, by a railroad at grade crossings, may be enjoined without any showing of actual public injury. Atty.-Gen. *v.* London, etc., R. Co., [1899] 1 Q. B. 72, 68 L. J. Q. B. 4, 79 L. T. Rep. N. S. 412 [*affirmed* in [1900] 1 Q. B. 78, 63 J. P. 772, 69 L. J. Q. B. 26].

The use of unsafe material in the construction of a roadway may be enjoined. Detroit, etc., Plank-Road Co. *v.* Macomb Cir. Judge, 109 Mich. 371, 67 N. W. 531.

Continuous bicycle riding on railroad tracks may be enjoined. Atchison, etc., R. Co. *v.* Spaulding, 69 Kan. 431, 77 Pac. 106, 105 Am. St. Rep. 175, 66 L. R. A. 587.

A railroad crossing at grade will not be enjoined when the danger will be eliminated by proper precautions, or where by means of it other grade crossings are avoided and the public safety enhanced. Abington Tp. *v.* Philadelphia, etc., R. Co., 10 Pa. Dist. 719; Pennsylvania R. Co. *v.* Suburban Rapid Transit Co., 11 Pa. Co. Ct. 591. But a grade crossing on public streets may be enjoined where there is no sufficient reason for it. Norristown *v.* Philadelphia, etc., R. Co., 10 Pa. Dist. 539. See also Bolivar *v.* Pittsburg, etc., R. Co., 179 N. Y. 523, 71 N. E. 1141.

8. McBean *v.* Wyllie, 14 Manitoba 135.

9. Pennsylvania Schuylkill Valley R. Co. *v.* Philadelphia, etc., R. Co., 7 Pa. Co. Ct. 490.

10. McCord *v.* Pike, 121 Ill. 288, 12 N. E. 259, 2 Am. St. Rep. 85 (suit may be brought by taxpayers); Rutherford *v.* Taylor, 38 Mo. 315.

Officers acting within their powers in disposing of public property will not be enjoined. Taylor *v.* Montreal Harbour Com'rs, 17 Quebec Super. Ct. 275.

11. Miller *v.* Bowers, 30 Ind. App. 116, 65 N. E. 559; Board of Education *v.* Territory, 12 Okla. 286, 70 Pac. 792. See also *supra*, V, E, 8

12. Atty.-Gen. *v.* Cohoes Co., 6 Paige (N. Y.) 133, 29 Am. Dec. 755.

The improper use of property granted by the complainant to the public on a special trust may be prevented by injunction. Warren *v.* Lyons, 22 Iowa 351.

13. Pitt County *v.* Cosby, 58 N. C. 254; Pittsburg *v.* Epping-Carpenter Co., 194 Pa. St. 318, 45 Atl. 129.

14. Riverside *v.* MacLain, 210 Ill. 308, 71 N. E. 408, 102 Am. St. Rep. 164, 66 L. R. A. 288; Smith *v.* Heuston, 6 Ohio 101, 25 Am. Dec. 741; Hulse *v.* Powell, 21 Tex. Civ. App. 471, 51 S. W. 862.

15. **Injunctions relating to strikes and boycotts** see LABOR UNIONS.

16. *Ex p.* Warfield, 40 Tex. Cr. 413, 50 S. W. 933, 76 Am. St. Rep. 724.

2. Political Rights. An injunction will not be granted restraining a citizen from petitioning the legislature on any subject of legislation in which he is interested.[17]

3. Protection From Physical Injury. A court of equity has no jurisdiction to prevent mere threatened physical injury, since the remedy at law by an action for damages or a criminal prosecution is adequate.[18]

4. Personal Privacy. In the absence of a breach of confidence or contract, equity will not restrain the publication of a photograph of either a living or deceased person so long as it does not amount to a libel.[19] Neither will it restrain the publication of a biography,[20] nor the making and exhibition of a statue of a deceased person,[21] nor the assumption of the family name of another where no trade rights are involved.[22]

5. Private Writings. One in possession of private letters will be restrained from publishing them against the will of the writer except when the publication is necessary to clear the character of the publisher.[23] So the publication of unpub-

17. Story *v.* Jersey City, etc., R. Co., 16 N. J. Eq. 13, 84 Am. Dec. 134.

In England the rule seems to be otherwise. Heathcote *v.* North Staffordshire R. Co., 2 Hall & T. 332, 47 Eng. Reprint 1710, 14 Jur. 859, 2 Macn. & G. 100, 48 Eng. Ch. 78, 42 Eng. Reprint 39, 6 R. & Can. Cas. 358; Stockton, etc., R. Co. *v.* Leeds, etc., R. Co., 12 Jur. 735, 2 Phil. 666, 5 R. & Can. Cas. 695, 22 Eng. Ch. 666, 41 Eng. Reprint 1101; Ware *v.* Grand Junction Water Works Co., 2 Russ. & M. 470, 34 Rev. Rep. 136, 11 Eng. Ch. 470, 39 Eng. Reprint 472. But see Steele *v.* North Metropolitan R. Co., L. R. 2 Ch. 237, 36 L. J. Ch. 540, 16 L. T. Rep. N. S. 192, 15 Wkly. Rep. 597.

18. Montgomery, etc., R. Co. *v.* Walton, 14 Ala. 207; Herrington *v.* Herrington, 11 Ill. App. 121 (threat to use violence to gain possession of property); Supp *v.* Keusing, 5 Rob. (N. Y.) 609; Kneedler *v.* Lane, 3 Grant (Pa.) 523.

19. Atkinson *v.* Doherty, 121 Mich. 372, 80 N. W. 285, 80 Am. St. Rep. 507, 46 L. R. A. 219 (use of name and likeness of a deceased person as a cigar label); Roberson *v.* Rochester Folding-Box Co., 171 N. Y. 538, 64 N. E. 442 [*reversing* 64 N. Y. App. Div. 30, 71 N. Y. Suppl. 876 (*affirming* 32 Misc. 344, 65 N. Y. Suppl. 1109)] (unauthorized publication of the photograph of young woman as part of an advertisement); Owen *v.* Partridge, 40 Misc. (N. Y.) 415, 82 N. Y. Suppl. 248 (photograph in rogue's gallery); Murray *v.* Gast Lith., etc., Co., 8 Misc. (N. Y.) 36, 28 N. Y. Suppl. 271, 31 Abb. N. Cas. 266. But see Marks *v.* Jaffa, 6 Misc. (N. Y.) 290, 26 N. Y. Suppl. 908, holding that publication of picture in newspaper may be enjoined where printed in connection with a bid to the readers to vote on the question of the popularity of the original as compared with another actor whose picture was published in such paper.

Photographer cannot publish customer's photograph as it is a breach of implied contract or confidence. Pollard *v.* Photographic Co., 40 Ch. D. 345, 58 L. J. Ch. 251, 60 L. T. Rep. N. S. 418, 37 Wkly. Rep. 266.

Non-compliance with conditions on which photographs were delivered authorizes an injunction against publication thereof. Corliss *v.* E. W. Walker Co., 57 Fed. 434 [in 64 Fed. 280, the preliminary injunction in this case was dissolved on the facts shown, although the court recognized the rule upon which the injunction was granted].

Libelous portrait.— An injunction may be granted against the exhibition of a picture which is a libel upon the complainant. Monson *v.* Tussauds, [1894] 1 Q. B. 671, 58 J. P. 524, 63 L. J. Q. B. 454, 70 L. T. Rep. N. S. 335, 9 Reports 177; Du Bost *v.* Beresford, 2 Campb. 511.

Distinction between public and private persons.— While the general rule is as stated above, an attempt has been made to limit the rule to public characters. A federal court has held that a private individual may enjoin the publication of his portrait, but a "public character" such as a statesman, author, artist, or inventor, cannot, unless defendant has not observed the conditions on which the portrait was obtained. Corliss *v.* E. W. Walker Co., 64 Fed. 280, 31 L. R. A. 283, 57 Fed. 434.

20. Corliss *v.* E. W. Walker Co., 64 Fed. 280, 31 L. R. A. 283, 57 Fed. 434.

21. Schuyler *v.* Curtis, 147 N. Y. 434, 42 N. E. 22, 49 Am. St. Rep. 671, 31 L. R. A. 286 [*overruling* Schuyler *v.* Curtis, 64 Hun (N. Y.) 594, 19 N. Y. Suppl. 264; Schuyler *v.* Curtis, 24 N. Y. Suppl. 509].

22. Du Boulay *v.* Du Boulay, L. R. 2 P. C. 430, 38 L. J. P. C. 35, 6 Moore P. C. N. S. 31, 17 Wkly. Rep. 594.

23. *Georgia.*— Roberts *v.* McKee, 29 Ga. 161.

Kentucky.— Grigsby *v.* Breckinridge, 2 Bush 480, 92 Am. Dec. 509.

Louisiana.— Denis *v.* Leclerc, 1 Mart. 297, 5 Am. Dec. 712.

New York.— Eyre *v.* Higbee, 35 Barb. 502; Woolsey *v.* Judd, 4 Duer 379, 11 How. Pr. 49 [*overruling* Hoyt *v.* Mackenzie, 3 Barb. Ch. 320, 49 Am. Dec. 178; Wetmore *v.* Scovell, 3 Edw. 515].

United States.— Folsom *v.* Marsh, 9 Fed. Cas. No. 4,901, 2 Story 100.

England.— Lytton *v.* Devey, 54 L. J. Ch.

lished manuscript or other documents will be enjoined where the publication is a breach of an agreement between the parties.[24] And the unauthorized publication of lectures which have been delivered but not otherwise published will be enjoined.[25]

6. Libel and Slander. A court of equity has no jurisdiction to restrain a mere libel or slander.[26] Nor does the fact that the false statement may injure

293, 52 L. T. Rep. N. S. 121; Labouchere *v.* Hess, 77 L. T. Rep. N. S. 559.

See 27 Cent. Dig. tit. "Injunction," § 168.

Title to letters see Literary Property.

Ground for relief.— Equity cannot prevent publication of private letters merely on the ground that such a publication, as a breach of confidence and social duty, is injurious to the writer; the interference of the court can only be justified upon the ground that the writer has an exclusive property which remains in him even when the letters have been transmitted to the addressee. Woolsey *v.* Judd, 11 How. Pr. (N. Y.) 49. See also Gee *v.* Pritchard, 2 Swanst. 402.

Stenographer's notes.— The publication of notes or drafts of private letters dictated to a stenographer in the ordinary course of business, and by him surreptitiously taken from the office and given to a third person who knew how they were obtained, will be enjoined at the instance of the person who dictated them. Laidlaw *v.* Lear, 30 Ont. 26.

Publication by writer.— Where the writer of a letter authorizes others than the addressee to read it, this is a publication by the writer, and its publication cannot be restrained on the ground of its being a private communication. Widdemer *v.* Hubbard, 19 Phila. (Pa.) 263.

Opening letters addressed to another may be enjoined. Edgington *v.* Edgington, 11 L. T. Rep. N. S. 299; Scheile *v.* Brakell, 11 Wkly. Rep. 796.

24. Williams *v.* Prince of Wales Life, etc., Co., 23 Beav. 338, 3 Jur. N. S. 55, 53 Eng. Reprint 133; Queensberry *v.* Shebbeare, 2 Eden 329, 28 Eng. Reprint 924; Anonymous, 3 Jur. N. S. 685; Ainsworth *v.* Bentley, 14 Wkly. Rep. 630.

Unauthorized recommendation.— A physician may enjoin the advertising of an unauthorized recommendation of a medicinal preparation under his name on the grounds that such publication is injurious to his professional reputation and an infringement of his right to the use of his name and orejudicial to public interest. Mackenzie *v.* Soden Mineral Springs Co., 18 N. Y. Suppl. 240, 27 Abb. N. Cas. 402.

Publication of census.— A census compiler cannot enjoin the publication of his work by the government, because it is not in all respects in form and substance as prepared by him, although its publication may affect and injure him in his character as an author and statistician. Donaldson *v.* Wright, 7 App. Cas. (D. C.) 45.

25. Keene *v.* Kimball, 16 Gray (Mass.) 545, 77 Am. Dec. 426; Nicols *v.* Pitman, 26 Ch. D. 374, 48 J. P. 549, 35 L. J. Ch. 552, 50 L. T. Rep. N. S. 254, 32 Wkly. Rep. 631. See also Caird *v.* Sime, 12 App. Cas. 326, 57 L. J. P. C. 2, 57 L. T. Rep. N. S. 634, 36 Wkly. Rep. 199; Abernethy *v.* Hutchinson, 1 Hall & T. 28, 3 L. J. Ch. O. S. 209, 47 Eng. Reprint 1313.

26. *District of Columbia.*— Donaldson *v.* Wright, 7 App. Cas. 45.

Georgia.— Singer Mfg. Co. *v.* Domestic Sewing Mach. Co., 49 Ga. 70, 15 Am. Rep. 674. *Contra*, Bell *v.* Singer Mfg. Co., 65 Ga. 452.

Illinois.— Chicago City R. Co. *v.* General Electric Co., 74 Ill. App. 465.

Louisiana.— State *v.* Judge Civ. Dist. Ct., 34 La. Ann. 741.

Massachusetts.— Whitehead *v.* Kitson, 119 Mass. 484; Boston Diatite Co. *v.* Florence Mfg. Co., 114 Mass. 69, 19 Am. Rep. 310.

Missouri.— Life Assoc. of America *v.* Boogher, 3 Mo. App. 173.

New York.— Marlin Firearms Co. *v.* Shields, 171 N. Y. 384, 64 N. E. 163; De Wick *v.* Dobson, 18 N. Y. App. Div. 399, 46 N. Y. Suppl. 390; Owen *v.* Partridge, 40 Misc. 415, 82 N. Y. Suppl. 248; Brandeth *v.* Lance, 8 Paige 24, 34 Am. Dec. 368. Under the New York constitutional provision (art. 1, § 8) that every citizen may freely speak, write, and publish his sentiments on all subjects, being responsible for the abuse of that right, and that no law shall be passed to restrain or abridge the liberty of speech or of the press, a court of equity cannot restrain the publication of libelous matter. New York Juvenile Guardian Soc. *v.* Roosevelt, 7 Daly 188.

Ohio.— Dopp *v.* Doll, 9 Ohio Dec. (Reprint) 428, 13 Cinc. L. Bul. 334; Columbus Grocery Co. *v.* Wholesale Grocers' Assoc., 5 Ohio S. & C. Pl. Dec. 582, 7 Ohio N. P. 606.

United States.— Francis *v.* Flinn, 118 U. S. 385, 6 S. Ct. 1148, 30 L. ed. 165; Balliet *v.* Cassidy, 104 Fed. 704; Kidd *v.* Horry, 28 Fed. 773; Palmer *v.* Travers, 20 Fed. 501.

See 27 Cent. Dig. tit. "Injunction," § 169.

See also Constitutional Law, 8 Cyc. 892.

Compare Quirk *v.* Dudley, 4 Ont. L. Rep. 532.

Inability to prove special damages.— Nor will the action lie, although the complainant has no remedy at law, because of his inability to prove special damage. Marlin Firearms Co. *v.* Shields, 171 N. Y. 384, 64 N. E. 163.

Insolvency of defendant is no ground for interference, for it is obvious that, if this remedy be given on the ground of the insolvency of defendant, the freedom to speak and write, which is secured, by the Constitution of Missouri, to all its citizens, will be enjoyed by a man able to respond in damages to a civil action, and denied to one who has

plaintiff in his business or as to his property constitute a sufficient ground for an injunction,[27] in the absence of acts of conspiracy, intimidation, or coercion.[28]

7. Slander of Title. The mere fact that an injury may result to property does not take the case out of the general rule that mere slander or libel will not be enjoined.[29] However, in some of the cases a distinction is taken between false statements made maliciously, and those made in good faith, and this class of cases hold that the injunction will be granted where malice or a wilful purpose to inflict injury is present.[30] An injunction will not be granted to restrain a per-

no property liable to an execution. Life Assoc. of America *v.* Boogher, 3 Mo. App. 173, 176.

In England since the Judicature Act of 1873, injunctions are granted to restrain libelous publications. Collard *v.* Marshall, [1892] 1 Ch. 581, 61 L. J. Ch. 268, 66 L. T. Rep. N. S. 248, 40 Wkly. Rep. 473; Salomons *v.* Knight, [1891] 2 Ch. 294, 60 L. J. Ch. 743, 64 L. T. Rep. N. S. 589, 39 Wkly. Rep. 506; Bonnard *v.* Perryman, [1891] 2 Ch. 269, 60 L. J. Ch. 617, 65 L. T. Rep. N. S. 506, 39 Wkly. Rep. 435; Loog *v.* Bean, 26 Ch. D. 306, 48 J. P. 708, 53 L. J. Ch. 1128, 51 L. T. Rep. N. S. 442, 32 Wkly. Rep. 994; Quartz Hill Consol. Gold Min. Co. *v.* Beall, 20 Ch. D. 501, 51 L. J. Ch. 874, 46 L. T. Rep. N. S. 746, 30 Wkly. Rep. 583; Thomas *v.* Williams, 14 Ch. D. 864, 49 L. J. Ch. 605, 43 L. T. Rep. N. S. 91, 28 Wkly. Rep. 983; Thorley's Cattle Food, etc., Co. *v.* Messam, 14 Ch. D. 673, 42 L. T. Rep. N. S. 851, 28 Wkly. Rep. 966; Dixon *v.* Holden, L. R. 7 Eq. 488, 20 L. T. Rep. N. S. 357, 17 Wkly. Rep. 482; Lee *v.* Gibbings, 67 L. T. Rep. N. S. 263; Stevens *v.* Paine, 18 L. T. Rep. N. S. 600. *Compare* Prudential Assur. Co. *v.* Knott, L. R. 10 Ch. 142, 44 L. J. Ch. 192, 31 L. T. Rep. N. S. 866, 23 Wkly. Rep. 249; Springhead Spinning Co. *v.* Riley, L. R. 6 Eq. 551, 37 L. J. Ch. 889, 19 L. T. Rep. N. S. 64, 16 Wkly. Rep. 1138.

27. *Massachusetts.*— Raymond *v.* Russell, 143 Mass. 295, 9 N. E. 544, 58 Am. Rep. 137.

New Jersey.— Mayer *v.* Journeymen Stone-Cutters' Assoc., 47 N. J. Eq. 519, 2 Atl. 492.

New York.— Marlin Firearms Co. *v.* Shields, 171 N. Y. 384, 64 N. E. 163; Greene *v.* U. S. Dealers' Protective Assoc., etc., Agency, 39 Hun 300, 16 Abb. N. Cas. 419.

Ohio.— Rothchild *v.* Brunswick-Balke-Collender Co., 12 Ohio Cir. Ct. 741; Richter *v.* Journeymen Tailors' Union, 11 Ohio Dec. (Reprint) 45, 24 Cinc. L. Bul. 189; Bopp *v.* Doll, 9 Ohio Dec. (Reprint) 428, 13 Cinc. L. Bul. 335; Predigested Food Co. *v.* McNeal, 4 Ohio S. & C. Pl. Dec. 356, 1 Ohio N. P. 266.

Pennsylvania.— Baltimore L. Ins. Co. *v.* Gleisner, 202 Pa. St. 386, 51 Atl. 1024.

See 27 Cent. Dig. tit. "Injunction," § 170.

28. Casey *v.* Cincinnati Typographical Union No. 3, 45 Fed. 135, 12 L. R. A. 193.

29. *Florida.*— Reyes *v.* Middleton, 36 Fla. 99, 17 So. 937.

Illinois.— Everett Piano Co. *v.* Bent, 60 Ill. App. 372.

Massachusetts.— Whitehead *v.* Kitson, 119 Mass. 484; Boston Diatite Co. *v.* Florence Mfg. Co., 114 Mass. 69, 19 Am. Rep. 310.

Missouri.— Flint *v.* Hutchinson Smoke-Burner Co., 110 Mo. 492, 19 S. W. 804, 33 Am. St. Rep. 476, 16 L. R. A. 243.

New York.— Wolfe *v.* Burke, 56 N. Y. 115; Wren *v.* Cosmopolitan Gas-Works Co., 2 Hun 666, 5 Thomps. & C. 686; Mauger *v.* Dick, 55 How. Pr. 132.

Texas.— Cook *v.* Burnley, 45 Tex. 97.

United States.— Welsbach Light Co. *v.* American Incandescent Lamp Co., 99 Fed. 501; New York Filter Co. *v.* Schwarzwalder, 58 Fed. 577; Baltimore Car-Wheel Co. *v.* Bemis, 29 Fed. 95; Kidd *v.* Horry, 28 Fed. 773; Preston *v.* Smith, 26 Fed. 884; Palmer *v.* Travers, 20 Fed. 501.

See 27 Cent. Dig. tit. "Injunction," § 171.

Contra.— Quartz Hill Consol. Gold Min. Co. *v.* Beall, 20 Ch. D. 501, 51 L. J. Ch. 874, 46 L. T. Rep. N. S. 746, 30 Wkly. Rep. 583; Halsey *v.* Brotherhood, 15 Ch. D. 514, 49 L. J. Ch. 786, 43 L. T. Rep. N. S. 366, 29 Wkly. Rep. 9; Thomas *v.* Williams, 14 Ch. D. 864, 49 L. J. Ch. 605, 43 L. T. Rep. N. S. 91, 28 Wkly. Rep. 983; Thorley's Cattle Food Co. *v.* Marsam, 14 Ch. D. 763, 42 L. T. Rep. N. S. 851, 28 Wkly. Rep. 966; James *v.* James, L. R. 13 Eq. 421, 41 L. J. Ch. 353, 26 L. T. Rep. N. S. 568, 20 Wkly. Rep. 434.

30. Shoemaker *v.* South Bend Spark Arrester Co., 135 Ind. 471, 35 N. E. 280, 22 L. R. A. 332; Hovey *v.* Rubber Tip Pencil Co., 57 N. Y. 119, 15 Am. Rep. 470; Snow *v.* Judson, 38 Barb. (N. Y.) 210; Croft *v.* Richardson, 59 How. Pr. (N. Y.) 356; Adriance *v.* National Harrow Co., 121 Fed. 827; A. B. Farquhar Co. *v.* National Harrow Co., 102 Fed. 714, 99 Fed. 160; Lewin *v.* Welsbach Light Co., 81 Fed. 904; Kelley *v.* Ypsilanti Dress Stay Mfg. Co., 44 Fed. 19, 10 L. R. A. 686; Emack *v.* Kane, 34 Fed. 46; Chase *v.* Tuttle, 27 Fed. 110. *Compare* Marlin Firearms Co. *v.* Shields, 171 N. Y. 384, 64 N. E. 163; Francis *v.* Flinn, 118 U. S. 385, 6 S. Ct. 1148, 30 L. ed. 165. *Contra,* Whitehead *v.* Kitson, 119 Mass. 484; Boston Diatite Co. *v.* Florence Mfg. Co., 114 Mass. 69, 19 Am. Rep. 310; Flint *v.* Hutchinson Smoke Burner Co., 110 Mo. 492, 19 S. W. 804, 33 Am. St. Rep. 476, 16 L. R. A. 243.

Reason for rule.— Redress for mere personal slander or libel may perhaps properly be left to the courts of law, because no falsehood, however gross and malicious, can wholly destroy a man's reputation with those who know him; but statements and charges intended to frighten away a man's customers and intimidate them from dealing with him may wholly break up and ruin him financially, with no adequate remedy if a court of

son from notifying the public that a patent infringement suit has been brought,[31] or that an injunction has been granted to restrain another from using a patent,[32] except where the decree has been obtained by fraud.[33]

8. PUBLICATION OF COURT PROCEEDINGS. Publications concerning a pending trial, where false or unfair, have been enjoined.[34]

H. Criminal Acts and Prosecutions — 1. CRIMINAL ACTS AND OMISSIONS. Equity has no criminal jurisdiction, and acts or omissions will not be enjoined merely on the ground that they constitute a violation of law and are punishable as crimes.[35] For instance injunctions will not be granted to restrain violation of city ordinances, where the acts complained of do not amount to such a nuisance as equity would restrain.[36] Nevertheless the rule is well settled that where the intervention of equity by injunction is warranted by the necessity of protection to civil rights or property interests, the mere fact that a crime or statutory

equity cannot afford protection by its restraining writ. Emack *v.* Kane, 34 Fed. 46.

31. Meyer *v.* Devries, 64 Md. 532, 2 Atl. 915.

32. Hobbs Mfg. Co. *v.* Gooding, 113 Fed. 615, 51 C. C. A. 335; Westinghouse Air-brake Co. *v.* Carpenter, 32 Fed. 545. *Compare* Wilson Packing Co. *v.* Clapp, 30 Fed. Cas. No. 17,850, 8 Biss. 154.

33. Grand Rapids School Furniture Co. *v.* Haney School Furniture Co., 92 Mich. 558, 52 N. W. 1009, 31 Am. St. Rep. 611, 16 L. R. A. 721.

34. Matthews *v.* Smith, 3 Hare 331, 25 Eng. Ch. 331; Brook *v.* Evans, 6 Jur. N. S. 1025, 29 L. J. Ch. 616, 3 L. T. Rep. N. S. 571, 8 Wkly. Rep. 688; Kitcat *v.* Sharp, 52 L. J. Ch. 134, 48 L. T. Rep. N. S. 64, 31 Wkly. Rep. 227; Coleman *v.* West Hartlepool R. Co., 8 Wkly. Rep. 734.

Publication as contempt see CONTEMPT, 9 Cyc. 20.

35. *Colorado.*—People *v.* Lake County Dist. Ct., 26 Colo. 386, 58 Pac. 604.

Georgia.— O'Brien *v.* Harris, 105 Ga. 732, 31 S. E. 745.

Illinois.— Cope *v.* Flora Dist. Fair Assoc., 99 Ill. 489, 39 Am. Rep. 30 (gambling on fair grounds); Christensen *v.* Kellogg Switchboard, etc., Co., 110 Ill. App. 61; Christie St. Commission Co. *v.* Chicago Bd. of Trade, 92 Ill. App. 604 (keeping bucket-shop); Chicago City R. Co. *v.* General Electric Co., 74 Ill. App. 465.

Indiana.— Chicago, etc., R. Co. *v.* Indiana Natural Gas, etc., Co., 161 Ind. 445, 68 N. E. 1008.

Kentucky.— Neaf *v.* Palmer, 103 Ky. 496, 45 S. W. 506, 20 Ky. L. Rep. 176, 41 L. R. A. 219, bawdy-house.

New Jersey.—Ocean City Assoc. *v.* Schurch, 57 N. J. Eq. 268, 41 Atl. 914.

New York.— Smith *v.* Lockwood, 13 Barb. 209 (public nuisance, no special damage to complainant); Gilbert *v.* Mickle, 4 Sandf. Ch. 357.

North Carolina.— Hargett *v.* Bell, 134 N. C. 394, 46 S. E. 749.

Ohio.— Fisher *v.* Lakeside Park Hotel, etc., Co., 7 Ohio S. & C. Pl. Dec. 67, 4 Ohio N. P. 329, violation of Sunday law.

Pennsylvania.— Campbell *v.* Schofield, 29 Leg. Int. 325, illegal sale of liquors.

Texas.— York *v.* Ysaguairre, 31 Tex. Civ. App. 26, 71 S. W. 563 (barber shop open on Sunday); State *v.* Patterson, 14 Tex. Civ. App. 465, 37 S. W. 478 (common gambling-house).

Wisconsin.— Tiede *v.* Schneidt, 99 Wis. 201, 74 N. W. 798.

United States.— *In re* Debs, 158 U. S. 564, 15 S. Ct. 900, 39 L. ed. 1092.

England.— Atty.-Gen. *v.* Sheffield Gas Consumers Co., 5 De G. M. & G. 304, 17 Jur. 677, 22 L. J. Ch. 811, 1 Wkly. Rep. 185, 52 Eng. Ch. 237, 43 Eng. Reprint 119; Austria *v.* Day, 3 De G. F. & G. 217, 7 Jur. N. S. 639, 30 L. J. Ch. 690, 4 L. T. Rep. N. S. 494, 9 Wkly. Rep. 712, 64 Eng. Ch. 171, 45 Eng. Reprint 861.

See 27 Cent. Dig. tit. "Injunction," § 176.

36. Finegan *v.* Allen, 46 Ill. App. 553 (iron foundry); Mt. Vernon *v.* Seeley, 74 N. Y. App. Div. 50, 77 N. Y. Suppl. 250 (posting bills without permit); Forty Fort *v.* Forty Fort Water Co., 9 Kulp (Pa.) 241.

Rule restated.— It is no part of the mission of a court of equity to administer the criminal law of the state or to enforce the principles of religion or morality except so far as it may be incidental to the enforcement of property rights and perhaps other matters of equitable cognizance. Cope *v.* Flora Dist. Fair Assoc., 99 Ill. 489.

Wooden buildings within fire limits.— Injunction will not lie to restrain the erection or location of wooden buildings within the fire limits in violation of municipal ordinance; the remedy being by prosecution or enforcement of an appropriate penalty. Rochester *v.* Walyer, 27 Ind. App. 194, 60 N. E. 1101; St. Johns *v.* McFarlan, 33 Mich. 72, 20 Am. Rep. 671; Rice *v.* Jefferson, 50 Mo. App. 464; Young *v.* Scheu, 56 Hun (N. Y.) 307, 9 N. Y. Suppl. 349; New Rochelle *v.* Lang, 27 N. Y. Suppl. 600; Brockport *v.* Johnston, 13 Abb. N. Cas. (N. Y.) 468; Ellwood City *v.* Mani, 16 Pa. Co. Ct. 474; Williamsport *v.* McFadden, 15 Wkly. Notes Cas. (Pa.) 269; Janesville *v.* Carpenter, 77 Wis. 288, 46 N. W. 128, 20 Am. St. Rep. 123, 8 L. R. A. 808; Waupun *v.* Moore, 34 Wis. 450, 17 Am. Rep. 446. *Contra*, see Kaufman *v.* Stein, 138 Ind. 49, 37 N. E. 333, 46 Am. St. Rep. 368.

The mere negelect or refusal of officers to perform their duty in enforcing the law

offense must be enjoined as incidental thereto will not operate to deprive the court of its jurisdiction.[37]

2. Criminal Prosecutions — a. General Rule. The general rule is that an injunction will not be granted to stay criminal or quasi-criminal proceedings, whether the prosecution be for the violation of the common law or the infraction of statutes or municipal ordinances.[38] But where the statute or ordinance under

against offenders constitutes no ground on which a court of equity can interfere by enjoining the criminal act. People *v.* Lake County Dist. Ct., 26 Colo. 386, 58 Pac. 604.

37. *Alabama.*— Mobile *v.* Louisville, etc., R. Co., 84 Ala. 115, 4 So. 106, 5 Am. St. Rep. 342.

Georgia.— Jones *v.* Oemler, 110 Ga. 202, 35 S. E. 375.

Illinois.— Barrett *v.* Mt. Greenwood Cemetery Assoc., 159 Ill. 385, 42 N. E. 891, 50 Am. St. Rep. 168, 31 L. R. A. 109; Minke *v.* Hopeman, 87 Ill. 450, 29 Am. Rep. 63; People *v.* St. Louis, 10 Ill. 351, 48 Am. Dec. 339; Christensen *v.* Kellogg Switchboard, etc., Co., 110 Ill. App. 61; Alton Grain Co. *v.* Norton, 105 Ill. App. 385; Montreal Bank *v.* Waite, 105 Ill. App. 373; Christie St. Commission Co. *v.* Chicago Bd. Trade, 92 Ill. App. 604, 94 Ill. App. 229; Chicago City R. Co. *v.* General Electric Co., 74 Ill. App. 465.

Indiana.— Greenfield Gas Co. *v.* People's Gas Co., 131 Ind. 599, 31 N. E. 61; People's Gas Co. *v.* Tyner, 131 Ind. 277, 31 N. E. 59, 31 Am. St. Rep. 433, 16 L. R. A. 443, accumulation of nitroglycerin enjoined at instance of individual.

Maryland.— Hamilton *v.* Whitridge, 11 Md. 128, 69 Am. Dec. 184.

Massachusetts.— Vegelahn *v.* Guntner, 167 Mass. 92, 44 N. E. 1077, 57 Am. St. Rep. 443, 35 L. R. A. 722; Sherry *v.* Perkins, 147 Mass. 212, 17 N. E. 307, 9 Am. St. Rep. 689.

Michigan.— Beck *v.* Railway Teamsters' Protective Union, 118 Mich. 497, 77 N. W. 13, 74 Am. St. Rep. 421, 42 L. R. A. 407.

Missouri.— Hamilton-Brown Shoe Co. *v.* Saxey, 131 Mo. 212, 32 S. W. 1106, 52 Am. St. Rep. 622.

New Jersey.— Cumberland Glass Mfg. Co. *v.* Glass Bottle Blowers' Assoc., 59 N. J. Eq. 49, 46 Atl. 208; Barr *v.* Essex Trades Council, 53 N. J. Eq. 101, 30 Atl. 881.

New York.— Cranford *v.* Tyrell, 128 N. Y. 341, 28 N. E. 514; Davis *v.* Zimmerman, 91 Hun 489, 36 N. Y. Suppl. 303; Dunham *v.* Binghamton, etc., Baseball Assoc., 44 Misc. 112, 89 N. Y. Suppl. 762 (Sunday ball-playing); Gilbert *v.* Mickle, 4 Sandf. Ch. 357.

Ohio.— Perkins *v.* Rogg, 11 Ohio Dec. (Reprint) 585, 28 Cinc. L. Bul. 32; State *v.* Hobart, 11 Ohio S. & C. Pl. Dec. 166, 8 Ohio N. P. 246 (prize-fight); Shaw *v.* Inter-state Sav. Co., 8 Ohio S. & C. Pl. Dec. 510, 5 Ohio N. P. 411.

Pennsylvania.— Flaccus *v.* Smith, 199 Pa. St. 128, 48 Atl. 894, 85 Am. St. Rep. 779, 54 L. R. A. 640; Klein *v.* Livingston Club, 177 Pa. St. 224, 35 Atl. 606, 55 Am. St. Rep. 717, 34 L. R. A. 94 (misdemeanor by club enjoined at instance of member); State Line, etc., R. Co. *v.* Brown, 11 Pa. Dist. 509.

United States.— *In re* Debs, 158 U. S. 564, 15 S. Ct. 900, 39 L. ed. 1092; Union Pac. R. Co. *v.* Ruef, 120 Fed. 102; Allis Chalmers Co. *v.* Reliable Lodge, 111 Fed. 264; Nashville, etc., R. Co. *v.* McConnell, 82 Fed. 65; Consolidated Steel, etc., Co. *v.* Murray, 80 Fed. 811; U. S. *v.* Elliott, 64 Fed. 27; Arthur *v.* Oakes, 63 Fed. 310, 11 C. C. A. 209, 25 L. R. A. 414; Cœur D'Alene Consol., etc., Co. *v.* Miners' Union, 51 Fed. 260, 19 L. R. A. 382, criminal conspiracies.

England.— Monson *v.* Tussauds, [1894] 1 Q. B. 671, 58 J. P. 524, 63 L. J. Q. B. 454, 70 L. T. Rep. N. S. 335, 9 Reports 177; Loog *v.* Bean, 26 Ch. D. 306, 48 J. P. 708, 53 L. J. Ch. 1128, 51 L. T. Rep. N. S. 442, 32 Wkly. Rep. 994; Austria *v.* Day, 3 De G. F. & J. 217, 7 Jur. N. S. 639, 30 L. J. Ch. 690, 4 L. T. Rep. N. S. 494, 9 Wkly. Rep. 712, 64 Eng. Ch. 171, 45 Eng. Reprint 712.

See 27 Cent. Dig. tit. "Injunction," § 176.

Chancellor no criminal jurisdiction.— In the celebrated Debs case it was held that something more than the threatened commission of an offense against the laws of the land is necessary to call into exercise the injunctive power of the courts; that there must be some interferences, actual or threatened, with property or rights of a pecuniary nature, but that when such interferences appear the jurisdiction of a court of equity arises and is not destroyed by the fact that they are accompanied by or are themselves violations of the criminal law. *In re* Debs, 158 U. S. 564, 15 S. Ct. 900, 39 L. ed. 1092.

Conspiracy.— Under U. S. Act, July 2, 1890 (26 U. S. St. at L. 209 [U. S. Comp. St. (1901) p. 3200]), a combination to arrest the operation of railroads engaged in interstate commerce until they should accede to certain demands is an unlawful conspiracy in restraint of commerce among the states, which will be enjoined. U. S. *v.* Elliott, 62 Fed. 801.

Theatrical performances.— An injunction will lie to restrain impromptu performances, consisting of solos, duets, and other songs in a public place or garden, on a raised stage or platform, by actors dressed in costumes adapted to the characters of the piece, for admission to which a price is charged, where no license has been obtained. Juvenile Delinquents Reformation Soc. *v.* Diers, 60 Barb. (N. Y.) 152.

38. *Alabama.*— Old Dominion Tel. Co. *v.* Powers, 140 Ala. 220, 37 So. 195; Moses *v.* Mobile, 52 Ala. 198.

Arkansas.— New Home Sewing Mach. Co. *v.* Fletcher, 44 Ark. 139; Waters Pierce Oil Co. *v.* Little Rock, 39 Ark. 412; Taylor *v.* Pine Bluff, 34 Ark. 603; Medical, etc., Inst. *v.* Hot Springs, 34 Ark. 559.

which the complainant is prosecuted is void or unconstitutional, and the prosecution may result in irreparable injury to his property rights, an injunction will be granted to restrain the commencement or continuance of criminal proceedings under such statute or ordinance.[39] Nevertheless where no property rights are involved, the proceeding constitutes a mere trespass on the person and the injunction will not be granted.[40]

Colorado.— Denver *v.* Beede, 25 Colo. 172, 54 Pac. 624.

Connecticut.— Tyler *v.* Hammersley, 44 Conn. 419, 26 Am. Rep. 479.

District of Columbia.— Washington, etc., R. Co. *v.* District of Columbia, 6 Mackey 570.

Georgia.— Bainbridge *v.* Reynolds, 111 Ga. 758, 36 S. E. 935; Paulk *v.* Sycamore, 104 Ga. 24, 30 S. E. 417, 69 Am. St. Rep. 128, 41 L. R. A. 772; Garrison *v.* Atlanta, 68 Ga. 64; Phillips *v.* Stone Mountain, 61 Ga. 386; Gault *v.* Wallis, 53 Ga. 675.

Illinois.— Yates *v.* Batavia, 79 Ill. 500.

Indiana.— Joseph *v.* Burk, 46 Ind. 59.

Iowa.— Ewing *v.* Webster City, 103 Iowa 226, 72 N. W. 511.

Louisiana.— Lecourt *v.* Gaster, 49 La. Ann. 487, 21 So. 646; State *v.* Theard, 48 La. Ann. 1448, 21 So. 28; Levy *v.* Shreveport, 27 La. Ann. 620; Devron *v.* First Municipality, 4 La. Ann. 11.

Mississippi.— Crighton *v.* Dahmer, 70 Miss. 602, 13 So. 237, 35 Am. St. Rep. 666, 21 L. R. A. 84.

Missouri.— State *v.* Wood, 155 Mo. 425, 56 S. W. 474, 48 L. R. A. 596; Kansas City Cable R. Co. *v.* Kansas, 29 Mo. App. 89.

New York.— Peranlt *v.* Rand, 10 Hun 222; Davis *v.* Society P. of C. A., 16 Abb. Pr. N. S. 73.

North Carolina.— Hargett *v.* Bell, 134 N. C. 394, 46 S. E. 749.

Ohio.— Predigested Food Co. *v.* McNeal, 4 Ohio S. & C. Pl. Dec. 356, 1 Ohio N. P. 266.

Oklahoma.— Golden *v.* Guthrie, 3 Okla. 128, 41 Pac. 350.

Pennsylvania.— Dillonis *v.* Corcoran, 10 Kulp 282.

Texas.— Greiner-Kelly Drug Co. *v.* Truett, 97 Tex. 377, 79 S. W. 4; Chisholm *v.* Adams, 71 Tex. 678, 10 S. W. 336; Yellowstone Kit *v.* Wood, 19 Tex. Civ. App. 683, 43 S. W. 1068.

United States.— Fitts *v.* McGhee, 172 U. S. 516, 19 S. Ct. 269, 43 L. ed. 535; Harkrader *v.* Wadley, 172 U. S. 148, 19 S. Ct. 119, 43 L. ed. 399 (criminal proceedings for embezzlement of assets of a bank); *In re* Sawyer, 124 U. S. 200, 8 S. Ct. 282, 31 L. ed. 402; Camden Interstate R. Co. *v.* Catlettsburg, 129 Fed. 421; Arbuckle *v.* Blackburn, 113 Fed. 616, 51 C. C. A. 122, 65 L. R. A. 864; Hemsley *v.* Meyers, 45 Fed. 283; Suess *v.* Noble, 31 Fed. 855. *Compare* Schandler Bottling Co. *v.* Welch, 43 Fed. 561.

England.— Kerr *v.* Preston, 6 Ch. D. 463, 46 L. J. Ch. 409, 25 Wkly. Rep. 264; Holderstaffe *v.* Saunders, 6 Mod. 16.

See 27 Cent. Dig. tit. "Injunction," § 178.

Collection of fine and costs, assessed for violation of city ordinance, will not be enjoined on the ground that there was no offense charged or cause of action filed, since the remedy in such case is by appeal. Schwab *v.* Madison, 49 Ind. 329.

A suit to restrain the enforcement by a railroad commission of rates fixed by it is not a suit to restrain criminal prosecutions. Southern Pac. Co. *v.* Railroad Com'rs, 78 Fed. 236.

39. *Alabama.*— Mobile *v.* Louisville, etc., R. Co., 84 Ala. 115, 4 So. 106, 5 Am. St. Rep. 342; Montgomery *v.* Louisville, etc., R. Co., 84 Ala. 127, 4 So. 626.

Colorado.— Platte, etc., Canal, etc., Co. *v.* Lee, 2 Colo. App. 184, 29 Pac. 1036. But *compare* Denver *v.* Beede, 25 Colo. 172, 54 Pac. 624.

Georgia.— Paulk *v.* Sycamore, 104 Ga. 24, 30 S. E. 417, 69 Am. St. Rep. 128, 41 L. R. A. 772.

Indiana.— Rushville *v.* Rushville Natural Gas Co., 132 Ind. 575, 28 N. E. 853, 15 L. R. A. 321; Davis *v.* Fasig, 128 Ind. 271, 27 N. E. 726, preventing multiplicity of suits.

Maryland.— Baltimore *v.* Radecke, 49 Md. 217, 33 Am. Rep. 239.

New York.— Hall *v.* Schultz, 31 How. Pr. 331.

United States.— Dobbins *v.* Los Angeles, 195 U. S. 223, 25 S. Ct. 18, 49 L. ed. 169 [*reversing* 139 Cal. 216, 72 Pac. 1097]; Southern Express Co. *v.* Ensley, 116 Fed. 756; Central Trust Co. *v.* Citizens' St. R. Co., 80 Fed. 218; M. Schandler Bottling Co. *v.* Welch, 42 Fed. 561.

See 27 Cent. Dig. tit. "Injunction," § 179.

To protect corporate franchises.—When the damages would be irreparable if the threatened injury is not prevented, equity, if properly appealed to, will not permit valuable vested corporate franchises granted by the state to be seriously impaired or practically destroyed by a prosecution instituted under color of municipal ordinances which are wrested from their legitimate purposes and fraudulently used, in a matter to which they cannot apply, as a means to prevent the exercise of these franchises. Paulk *v.* Sycamore, 104 Ga. 24, 30 S. E. 417, 69 Am. St. Rep. 128, 41 L. R. A. 772.

Where the statute or ordinance has been previously adjudged invalid, an injunction may issue against further prosecutions under it. Poyer *v.* Des Plaines, 123 Ill. 111, 13 N. E. 819, 5 Am. St. Rep. 494; Wallack *v.* Society P. C. of A., 67 N. Y. 23; West *v.* New York, 10 Paige (N. Y.) 539; Cavanaugh *v.* Cleveland, 8 Ohio S. & C. Pl. Dec. 329, 6 Ohio N. P. 423.

40. *Alabama.*— Brown *v.* Birmingham, 140 Ala. 590, 37 So. 173; Burnett *v.* Craig, 30 Ala. 135, 68 Am. Dec. 115.

b. Pendency of Suit in Equity as Affecting Right. In the federal and English courts, when the parties sought to be enjoined have as plaintiffs submitted themselves to the court by a bill of equity as to the matter or right affected by or involved in the criminal proceeding, an injunction will be granted restraining the criminal proceedings, since a court of chancery has general authority to control the conduct of parties who seek its aid in furtherance of their civil rights.[41]

c. Rights as Affected by Oppressiveness of Litigation. In a few cases criminal proceedings have been held to be properly restrained to prevent oppressive and vexatious litigation.[42]

3. ARRESTS.[43] An injunction will not issue to restrain officers from making an arrest for alleged violation of law,[44] unless the arrest is illegal and will be accompanied by interference with property rights.[45]

Colorado.— Denver *v.* Beede, 25 Colo. 172, 54 Pac. 624.

Illinois.— Shakel *v.* Roche, 27 Ill. App. 423; Poyer *v.* Des Plaines, 20 Ill. App. 30.

Louisiana.— Levy *v.* Shreveport, 27 La. Ann. 620.

North Carolina.— Cohen *v.* Goldsboro, 77 N. C. 2.

United States.— Davis, etc., Mfg. Co. *v.* Los Angeles, 115 Fed. 537; Minneapolis Brewing Co. *v.* McGillivray, 104 Fed. 258.

See 27 Cent. Dig. tit. "Injunction," § 179.

41. Davis, etc., Mfg. Co. *v.* Los Angeles, 189 U. S. 207, 23 S. Ct. 498, 47 L. ed. 778; Karkrader *v.* Wadley, 172 U. S. 148, 19 S. Ct. 119, 43 L. ed. 399 (suit must be already pending in equity); Camden Interstate R. Co. *v.* Catlettsburg, 129 Fed. 421; Wadley *v.* Blount, 65 Fed. 667 (subject-matter of both proceedings must be the same).

Identity of parties and controversy.— The exception comes under the general authority of chancery to control the conduct of parties who seek its aid in furtherance of their civil rights. It is the double harassing by the equity suit and by the criminal procedure that the equity court interrupts. The pursuer and pursued must be identical in the case, i. e., defendant in the bill and in the indictment must be the same person, and the person preferring the bill and the criminal charge must also be the same. As to parties and controversy, the inquiry is analogous to that in regard to the plea of *lis pendens.* Spink *v.* Francis, 20 Fed. 567. Unless the cases raised and the objects sought are identical, the court will not prevent a plaintiff in the court of chancery from proceeding in a criminal court against defendants to the suit in chancery. Saull *v.* Browne, L. R. 10 Ch. 64, 3 Cox C. C. 30, 44 L. J. Ch. 1, 31 L. T. Rep. N. S. 493, 23 Wkly. Rep. 50; York *v.* Pilkington, 2 Atk. 302, 9 Mod. 273, 26 Eng. Reprint 584; Turner *v.* Turner, 15 Jur. 218; Atty.-Gen. *v.* Cleaver, 18 Ves. Jr. 211, 34 Eng. Reprint 297.

42. *Alabama.*— Old Dominion Tel. Co. *v.* Powers, 140 Ala. 220, 37 So. 195.

Georgia.— Atlanta *v.* Gate City Gas Co., 71 Ga. 106. Equity will not interfere with the enforcement of criminal law, but that principle in no way deprives a court of chancery of its power to protect private property, nor ousts chancery of its jurisdiction over nuisances and trespasses, nor defeats its power to enjoin a continuing injury to property or business. When equity acts in such instances it ignores the criminal feature and exercises jurisdiction solely to enjoin a continuing injury to property or business. Georgia R., etc., Co. *v.* Atlanta, 118 Ga. 486, 45 S. E. 256.

Kentucky.— Sninkle *v.* Covington, 83 Ky. 420, where plaintiff had been arrested fifteen times under a city ordinance for occupying a highway, to which he claimed title, and fined in each case an amount too small to allow an appeal.

New York.— Wallack *v.* Society, etc., 67 N. Y. 23; Balogh *v.* Lyman, 6 N. Y. App. Div. 271, 39 N. Y. Suppl. 780.

Texas.— Yellowstone Kit *v.* Wood, 19 Tex. Civ. App. 683, 43 S. W. 1068.

See 27 Cent. Dig. tit. "Injunction," § 178.

Contra.— Denver *v.* Beede, 25 Colo. 172, 54 Pac. 624.

43. **Restraining society for prevention of cruelty to animals** see ANIMALS, 2 Cyc. 353.

44. Brown *v.* Birmingham, 140 Ala. 590, 37 So. 173; Louisville, etc., R. Co. *v.* Barrall, 77 S. W. 1117, 25 Ky. L. Rep. 1395; Davis *v.* American Soc. P. C. of A., 75 N. Y. 362 [*affirming* 6 Daly 81]; Balogh *v.* Lyman, 6 N. Y. App. Div. 271, 39 N. Y. Suppl. 780; Dry Dock, etc., R. Co. *v.* New York, 47 Hun (N. Y.) 221; Kramer *v.* New York City Police Dept., 53 N. Y. Super. Ct. 492; Kenny *v.* Martin, 11 Misc. (N. Y.) 651, 32 N. Y. Suppl. 1087; Anonymous, 12 Abb. N. Cas. (N. Y.) 455, 458; Murphy *v.* New York Bd. of Police, 11 Abb. N. Cas. (N. Y.) 337, 63 How. Pr. 396; Burch *v.* Cavanaugh, 12 Abb. Pr. N. S. (N. Y.) 410; Fincke *v.* New York Police Com'rs, 66 How. Pr. (N. Y.) 318; McLaughlin *v.* Jones, 3 Wkly. Notes Cas. (Pa.) 203.

45. Mobile *v.* Louisville, etc., R. Co., 84 Ala. 115, 4 So. 106, 5 Am. St. Rep. 342; La Harpe *v.* Elm Tp., etc., Co., 69 Kan. 97, 76 Pac. 448; Ryan *v.* Jacob, 8 Ohio Dec. (Reprint) 167, 6 Cinc. L. Bul. 139; Daly *v.* Elton, 195 U. S. 242, 25 S. Ct. 22, 49 L. ed. 177 [*reversing* 139 Cal. 216, 72 Pac. 1097]; Dobbins *v.* Los Angeles, 195 U. S. 223, 25 S. Ct. 18, 49 L. ed. 169 [*reversing* 139 Cal. 179, 72 Pac. 970, 96 Am. St. Rep. 95].

VI. SUITS FOR INJUNCTIONS.

A. Jurisdiction — 1. As Affected by Parties and Interest Involved. Since a decree in equity acts upon and is enforced against the person and not the property involved,[46] a court having jurisdiction of the parties may grant and enforce an injunction, although the subject-matter affected is beyond its territorial jurisdiction,[47] as where it is outside the county[48] or state[49] or in a foreign country.[50] In some cases, however, in apparent exception to this rule jurisdiction of the *res* has been held to confer jurisdiction of the parties.[51] Where neither defendants nor the subject-matter are within the territorial jurisdiction of the court, an injunction cannot issue.[52] Jurisdiction must exist as to all indispensable parties;[53] but jurisdiction as to co-defendants resident within the state and outside of the territorial jurisdiction of the court may, under the statutes of some states, be acquired by the issuance and service of process, where jurisdiction has been obtained of one defendant;[54] or where the *res* is within the state, jurisdiction of

Violation of Sunday law.— Where an arrest was threatened for violation of a state statute prohibiting work on Sunday except in case of "necessity" and complainant was doing only what was necessary to preserve his property from ruin, an injunction was granted. Manhattan Iron Works Co. *v.* French, 12 Abb. N. Cas. (N. Y.) 446.

46. Schmaltz *v.* York Mfg. Co., 204 Pa. St. 1, 53 Atl. 522, 93 Am. St. Rep. 782, 59 L. R. A. 907. See EQUITY, 16 Cyc. 119.

47. *Illinois.*— Alexander *v.* Tolleston Club, 110 Ill. 65.

Missouri.— State *v.* Zachritz, 166 Mo. 307, 65 S. W. 999, 89 Am. St. Rep. 711.

Pennsylvania.— Schmaltz *v.* York Mfg. Co., 204 Pa. St. 1, 53 Atl. 522, 93 Am. St. Rep. 782, 59 L. R. A. 907; Clad *v.* Paist, 181 Pa. St. 148, 37 Atl. 194; Jennings *v.* Beale, 158 Pa. St. 283, 27 Atl. 948; Munson *v.* Tryon, 6 Phila. 395.

Tennessee.— Childress *v.* Perkins, Cooke 87.

United States.— Phelps *v.* McDonald, 99 U. S. 298, 25 L. ed. 473.

See 27 Cent. Dig. tit. "Injunction," § 193.

An action seeking an injunction is a personal action. Everett *v.* Pottawattamie County, 93 Iowa 721, 61 N. W. 1062.

Foreign judgment.—A bill to secure a trust fund in the hands of a defendant seeking an injunction against a judgment against the holder of the fund as ancillary to its main purpose may be instituted in the county in which defendant resides, although the judgment was obtained in another county. Eldridge *v.* Turner, 11 Ala. 1049 [*distinguishing* Shrader *v.* Walker, 8 Ala. 244, in which it was held that a bill to enjoin a judgment on the ground that it was inequitable should be filed in the chancery court of the county in which the judgment was recovered]. See, generally, JUDGMENTS.

48. Rourke *v.* Rourke, 8 Ind. 427; Clad *v.* Paist, 181 Pa. St. 148, 37 Atl. 194; Jennings *v.* Beale, 158 Pa. St. 283, 27 Atl. 948; Winston *v.* Midlothian Coal Min. Co., 20 Gratt. (Va.) 686.

Under a statutory provision that equity causes are to be tried in the county of the residence of defendant against whom substantial relief is prayed, an action for an injunction against waste may be tried in the county of the residence of defendant, although the land is situated in another county and another statute provides that cases respecting titles to land must be tried where the land lies. Powell *v.* Cheshire, 70 Ga. 357, 48 Am. Rep. 572.

49. Allen *v.* Buchanan, 97 Ala. 399, 11 So. 777, 38 Am. St. Rep. 187; Alexander *v.* Tolleston Club, 110 Ill. 65 (holding that the courts of Illinois had jurisdiction of a bill to prevent interference with the right of way claimed under a lease of lands in Indiana, the controversy involving the construction of the lease); Great Falls Mfg. Co. *v.* Worster, 23 N. H. 462; Schmaltz *v.* York Mfg. Co., 204 Pa. St. 1, 53 Atl. 522, 93 Am. St. Rep. 782, 59 L. R. A. 907 (holding that where a resident of Pennsylvania sold machinery to a brewery in a foreign state, reserving title until such machinery should be paid for, the Pennsylvania court had jurisdiction at the suit of a subsequent mortgagee of the brewery to restrain the seller from taking away such machinery).

50. Marshall *v.* Turnbull, 32 Fed. 124.

51. Mossy *v.* Gordy, 28 La. Ann. 585, holding that where the object of a suit was to control the proceeds of property sold or to be sold in a certain parish in which the suit was brought, persons domiciled in another parish were properly made parties defendant. And *compare* Delaware County, etc., Electric R. Co. *v.* Philadelphia, 164 Pa. St. 457, 30 Atl. 396, where jurisdiction of an injunction against a municipal corporation located within another county, to restrain the removal of railroad tracks upon a bridge within the county in which the injunction issued, was retained when it appeared that the agent of the corporation who gave the order of removal and the person who was to execute such order were defendants and within the jurisdiction.

52. Brent *v.* Peyton, 1 Rob. (Va.) 604.

53. Tobin *v.* Walkinshaw, 23 Fed. Cas. No. 14,068, McAllister 26.

54. Urmston *v.* Evans, 138 Ind. 285, 37 N. E. 792 (holding that where it is shown

the person may be acquired by constructive service in the manner prescribed by statute generally.[55] The court may also obtain jurisdiction by a voluntary appearance,[56] or from the fact that defendants have submitted to its jurisdiction in a pending suit with relation to the same subject-matter.[57] An injunction against the acts of a receiver should be sought in the court appointing him.[58] An injunction will not issue to control matters of internal management of a foreign corporation,[59] although, where a corporation has been incorporated in each of two states, an injunction may issue in either of such states against an improper expenditure of funds in the other.[60] An injunction granted by the court without jurisdiction is void.[61]

2. As Depending on the Amount in Controversy. A general power conferred upon a court to issue injunctions is not subject to a limitation as to the amount in controversy applicable to other powers of the court unless the intent to provide such a limitation is thoroughly apparent.[62]

3. Particular Courts — a. In General. Since the jurisdiction of particular courts is as a general rule expressly defined by the laws creating them, their jurisdiction of matters relating to injunctions as a rule must be determined by the existence and construction of such laws.[63] Injunctions, however, being matters

that a portion of the subject-matter was within the county at the time the suit was begun, and the acts of the parties with respect to such subject-matter is a part of the controversy, the circuit court of the county has jurisdiction if process is served on some of defendants within the county); Toledo Tie, etc., Co. *v.* Thomas, 33 W. Va. 566, 11 S. E. 37, 25 Am. St. Rep. 925.

Defendant of whom jurisdiction has been obtained must be a necessary and not a sham defendant, joined solely for the purpose of bringing in defendants served in another county. Siever *v.* Union Pac. R. Co., (Nebr. 1903) 93 N. W. 943.

55. See, generally, Process.

Foreign divorce.— Where a husband and wife are both domiciled within the state and one of them is seeking a foreign divorce, an injunction may issue, although it is not within the power of the court to serve defendant with jurisdictional process within the state. Kempson *v.* Kempson, 61 N. J. Eq. 303, 48 Atl. 244.

In Canada it has been held that when the solicitors of both parties reside in the same county the local judge has jurisdiction to grant an injunction until the trial. Dougall *v.* Hutton, 19 Can. L. T. Occ. Notes 190 [*overruling* Kohles *v.* Costello, 16 Can. L. T. Occ. Notes 84].

56. State *v.* Kennan, 35 Wash. 52, 76 Pac. 516. And see Appearances, 3 Cyc. 515.

57. Marco *v.* Low, 55 Me. 549 (holding that the court sitting as a court of equity may upon a proper bill duly served upon an attorney and upon the respondent in the state in which he resides enjoin a respondent from further prosecuting in the court as a court of law an action in favor of the respondent against the complainant, although the respondent has not resided or been within the state since the commencement of the bill); Chalmers *v.* Hack, 19 Me. 124 (holding that the substituted services might be made upon his attorney in the suit at law); Birdsell *v.* Hagerstown Agricultural Implement Mfg. Co., 3 Fed. Cas. No. 1,437, 1 Hughes 64.

58. McCoy *v.* Marietta, etc., R. Co., 15 Fed. Cas. No. 8,730*b*. See also Alspaugh *v.* Adams, 80 Ga. 345, 5 S. E. 496.

Injunctions against receivers generally see Receivers.

59. Taylor *v.* Mutual Reserve Fund L. Assoc., 97 Va. 60, 33 S. E. 385, 45 L. R. A. 621. See Foreign Corporations, 19 Cyc. 1236.

60. State *v.* Northern Cent. R. Co., 18 Md. 193.

61. State *v.* Carlson, (Nebr. 1904) 101 N. W. 1004.

62. Stein *v.* Frieberg, 64 Tex. 271 (holding that a district court has power to issue writs of injunction in cases in which a court of chancery under the settled rules of equity would have power to issue them without reference to the amount in controversy); Anderson County *v.* Kennedy, 58 Tex. 616.

63. See the constitutions and the statutes of the several states. And see also *Ex p.* Jones, 2 Ark. 93; New York, etc., R. Co. *v.* New York, 1 Hilt. (N. Y.) 562, holding that under Code Proc. §§ 33, 123, 124, Laws (1847), p. 279, § 7; Laws (1854), p. 464, the court of common pleas had jurisdiction of a motion for an injunction to restrain the enforcement of an ordinance of a municipal corporation.

Exclusive jurisdiction is not conferred upon a court by a provision that it shall have original jurisdiction in certain cases. McGeorge *v.* Hancock Steel, etc., Co., 11 Phila. (Pa.) 602, holding that the jurisdiction of the supreme court was not exclusive of that of the common pleas in case of an injunction against a corporation.

In case the injunction is sought upon behalf of the state jurisdiction is by statute sometimes conferred upon a particular court. McMullen *v.* Ingham Cir. Judge, 102 Mich. 608, 61 N. W. 260, holding that a statute pro-

of purely equitable cognizance,[64] are, in the absence of express statutory provision, within the jurisdiction only of courts possessing general equitable powers.[65] For example they cannot as a general rule be granted by courts limited to probate jurisdiction.[66] Where a court has power to issue a temporary injunction, it has also the power to make such an injunction permanent.[67]

b. Appellate Courts. Appellate courts as a rule are granted no original jurisdiction to issue writs of injunction,[68] and where such jurisdiction is granted it cannot be exercised with regard to actions still pending and undetermined in other courts,[69] nor in cases not of equity jurisdiction.[70] Authority given to a judge of an appellate court cannot be exercised by the court collectively.[71]

c. Federal Courts. Federal courts are prohibited by statute from interfering with parties prosecuting suits in state courts.[72] The circuit court may issue an injunction to restrain the prosecution of a suit pending before it without regard to the citizenship of the parties. In such cases the jurisdiction depends on cognizance of the original case.[73]

4. Preliminary Injunctions — a. In General. The power to issue temporary or preliminary injunctions is usually a matter as to which statutory provision is made, and may be vested in courts of general chancery jurisdiction,[74] or in a judge thereof;[75] or in some states in court commissioners,[76] or surrogates.[77] So

viding that such proceedings might be begun in the county court of a particular county was within the power of the legislature to enact.

64. Smith *v.* Ellis, 29 Me. 422; American Colonization Soc. *v.* Wade, 8 Sm. & M. (Miss.) 610; Scott *v.* Searles, 5 Sm. & M. (Miss.) 25.

65. A grant of special chancery powers does not, in the absence of an express grant, confer the power to grant an injunction. Cummings *v.* Des Moines, etc., R. Co., 36 Iowa 173.

A statute which authorizes the judge of a particular court to allow injunctions does not confer a similar power upon the court. Cummings *v.* Des Moines, etc., R. Co., 36 Iowa 173.

66. American Colonization Soc. *v.* Wade, 8 Sm. & M. (Miss.) 610; Scott *v.* Searles, 5 Sm. & M. (Miss.) 25.

In New York surrogates of certain counties have authority to issue writs of injunction. Aldinger *v.* Pugh, 132 N. Y. 403, 30 N. E. 745 [*affirming* 57 Hun 181, 10 N. Y. Suppl. 684].

In Pennsylvania the orphans' court has authority to issue injunctions in all cases coming within the meaning of the act of May 19, 1874, § 7, which provides that they "shall have power to prevent by order, in the nature of writs of injunction, acts contrary to law or equity, prejudicial to property over which they shall have jurisdiction." Light *v.* Light, 1 Pa. Co. Ct. 21.

67. Stein *v.* Frieberg, 64 Tex. 271.

68. Jones *v.* Little Rock, 25 Ark. 284; *Ex p.* Jones, 2 Ark. 93; Campbell *v.* Campbell, 22 Ill. 664; Reed *v.* Murphy, 2 Greene (Iowa) 568.

69. Cooper *v.* Mineral Point, 34 Wis. 181. See also Atty.-Gen. *v.* Blossom, 1 Wis. 317.

70. Smith *v.* Ellis, 29 Me. 422; Riley *v.* Ellmaker, 6 Whart. (Pa.) 545; Gilder *v.* Merwin, 6 Whart. (Pa.) 522.

71. Reed *v.* Murphy, 2 Greene (Iowa) 568; Mayo *v.* Haines, 2 Munf. (Va.) 423.

72. See *supra*, V, A, 11, d.

73. Jones *v.* Andrews, 10 Wall. (U. S.) 327, 19 L. ed. 935; Simms *v.* Guthrie, 9 Cranch (U. S.) 19, 3 L. ed. 642; Logan *v.* Patrick, 5 Cranch (U. S.) 288, 3 L. ed. 103; Dunlap *v.* Stetson, 8 Fed. Cas. No. 4,164, 4 Mason 349.

74. See Drake *v.* Hudson River R. Co., 2 Code Rep. (N. Y.) 67, holding that the general term of the supreme court had such power.

75. See Merrifield *v.* Weston, 68 Ind. 70; Columbus *v.* Hydraulic Woolen Mills Co., 33 Ind. 435 (both holding that a judge of the court of common pleas might act in vacation); Sprinkle *v.* Hutchinson, 66 N. C. 450 (holding that a judge of the superior court might grant an order with regard to a proceeding in the probate court).

A county judge may act. Morris *v.* New York, 7 N. Y. Suppl. 943; Eddy *v.* Howlett, 2 Code Rep. (N. Y.) 76; Rosenberger *v.* Bowen, 84 Va. 660, 5 S. E. 697. But see People *v.* Windholz, 68 N. Y. App. Div. 552, 74 N. Y. Suppl. 241.

Where an officer occupies two capacities, in one of which he has power to issue an injunction, and in the other of which he has not — as where he may have granted an injunction as vice-chancellor acting as judge or as an injunction master — he will be presumed to have acted in the capacity in which he had power. Melick *v.* Drake, 6 Paige (N. Y.) 470.

76. Glass *v.* Ripley County, 16 Ind. 113; Reed *v.* Jones, 6 Wis. 680. But see Bay Land, etc., Co. *v.* Washburn, 79 Wis. 423, 48 N. W. 492. See Court Commissioners, 11 Cyc. 623 note 5.

77. Aldinger *v.* Pugh, 132 N. Y. 403, 30 N. E. 745, holding that Laws (1849), c. 306, as amended by Laws (1851), c. 108, was not repealed by the code of civil procedure.

judges of courts of limited jurisdiction may be granted power to award injunctions with respect to actions in courts of more general jurisdiction.[78] A requirement that equity cases shall be heard in the county where defendant resides does not demand that an application for a temporary injunction made *ex parte* to the judge at chambers must be made in such county.[79] A preliminary injunction will be refused where the jurisdiction of the court is doubtful.[80]

b. Appellate Court. It seems that in a proper case a court may in the exercise of its appellate jurisdiction issue a temporary injunction.[81] A judge of an appellate court may have a power to grant an injunction which cannot be exercised by the court.[82]

c. Judge Absent or Under Disability. In the event of the absence or disability of the proper judge, an injunction may usually be issued, under statutes, by some other officer, such as the clerk of the court,[83] a court commissioner,[84] or another judge called for the purpose.[85]

B. Venue — 1. In General. Generally the residence of the parties determines the county in which the action should be brought.[86]

2. Injunctions to Protect Interests in Lands. In some jurisdictions statutes defining local actions have been interpreted to include applications for injunctions when their essential purpose is the protection of an interest in lands. Under these circumstances the injunction must be sought in the county where the land lies.[87]

78. See *Ex p.* Greene, 29 Ala. 52; Thompson *v.* Williams, 6 Cal. 88. See People *v.* Windholz, 68 N. Y. App. Div. 552, 74 N. Y. Suppl. 241 (holding that while except where otherwise specially prescribed by law a county judge had power to grant an injunction in an action in the supreme court, such power did not exist in the case of an action brought to recover penalties for alleged violations of the agricultural law); Rosenberger *v.* Bowen, 84 Va. 660, 5 S. E. 697.

The bill need not be addressed to the judge granting the order. Rosenberger *v.* Bowen, 84 Va. 660, 5 S. E. 697, holding that a county judge may award an injunction against a judgment, although the bill is addressed to the judge of a circuit court, and afterward filed in the latter court.

Such a provision is not unconstitutional as an infringement upon a constitutional division of the jurisdiction of courts. Thompson *v.* Williams, 6 Cal. 88.

79. Burchard *v.* Boyce, 21 Ga. 6, so holding since defendant on notice of an application for an injunction is not called to answer out of his county, but he may appear or not at his option or may show cause against granting the injunction by filing an answer in the county where the cause is to be heard.

80. Ames *v.* Kruzner, 1 Alaska 596; Ewing *v.* Blight, 8 Fed. Cas. No. 4,590, 3 Wall. Jr. 139, holding that an injunction would not be granted pending a plea to the jurisdiction; but in a case where irreparable mischief is threatened or there was any suspicion that the plea was intended for delay, an immediate trial of the plea would be ordered. *Contra*, Fremont *v.* Merced Min. Co., 9 Fed. Cas. No. 5,095, McAllister 267, holding that a temporary injunction might issue where no defect in jurisdiction appeared on the record and irreparable mischief was alleged and not denied.

81. Doughty *v.* Somerville, etc., R. Co., 7 N. J. Eq. 629, 51 Am. Dec. 267; Chegary *v.* Scofield, 5 N. J. Eq. 525; Wagner *v.* Railway Co., 38 Ohio St. 32. See Cohen *v.* L'Engle, 24 Fla. 542, 5 So. 235, in which, without deciding the question, the court refused an injunction upon the ground that the exercise of the power was not indispensable to the protection of the rights of the party seeking it.

The supreme court of Ohio cannot exercise original jurisdiction in the granting of a provisional injunction. Pittsburg, etc., R. Co. *v.* Hurd, 17 Ohio St. 144; Kent *v.* Mahaffy, 2 Ohio St. 498.

82. Hall *v.* O'Brien, 5 Ill. 410. *Contra*, Riley *v.* Ellmaker, 6 Whart. (Pa.) 545.

83. Witkowski *v.* Selby, 15 La. Ann. 328.

Power of deputy clerk see Clerks of Court, 7 Cyc. 250 note 92.

84. See Court Commissioners, 11 Cyc. 623 text and note 5.

85. See Judges.

86. Street *v.* Selig, 88 Ala. 533, 7 So. 236; Eldridge *v.* Turner, 11 Ala. 1049; Urmston *v.* Evans, 138 Ind. 285, 37 N. E. 792; Everett *v.* Pottawattamie County, 93 Iowa 721, 61 N. W. 1062; Childress *v.* Perkins, Cooke (Tenn.) 87. See, generally, Venue.

87. *Arkansas.*— Cox *v.* Little Rock, etc., R. Co., 55 Ark. 454, 18 S. W. 630.

California.— Drinkhouse *v.* Spring Valley Water-Works, 80 Cal. 308, 22 Pac. 252.

Georgia.— Meeks *v.* Roan, 117 Ga. 865, 45 S. E. 252.

Indiana.— Becknell *v.* Becknell, 110 Ind. 42, 10 N. E. 414; Pendleton, etc., Turnpike Co. *v.* Barnard, 40 Ind. 146.

New York.— Leland *v.* Hathorn, 42 N. Y. 547, 9 Abb. Pr. N. S. 97.

Texas.—O'Connor *v.* Shannon, (Civ. App. 1895) 30 S. W. 1096.

See 27 Cent. Dig. tit. "Injunction," § 195.

3. Injunctions to Stay Proceedings at Law. In some jurisdictions, by statute, suits for injunction to stay proceedings at law must be brought in the county in which the suit at law is being tried.[88] This rule does not apply when the application for the injunction is a mere incident to other relief.[89]

C. Parties[90] **— 1. In General.** If the injunction is sought to protect an interest in lands, all persons who have a beneficial interest in the land which is the subject-matter of the suit should be made parties.[91] Where an injunction is sought relating to rights in a private or municipal corporation, all persons should be made parties whose legal or equitable interests will be affected by the decree prayed for.[92]

2. Complainants — a. In General. An injunction suit can be maintained only by one whose special or personal interest is affected by the wrongful act, and hence where an interest is neither greater nor of a different character than that of all citizens of the same community, or all citizens of one class, it is insufficient to maintain an injunction.[93] It has been held, however, that liability to pay taxes

Waiver of objection.— When plaintiff in a pure bill of injunction sues in one county to restrain a sale of land situated in another county, and defendant answers and fails to object to the jurisdiction, plaintiff cannot afterward raise the question of jurisdiction. Muller *v.* Bayly, 21 Gratt. (Va.) 521.

88. Clark *v.* Beall, 39 Ga. 533; Key *v.* Robison, 29 Ga. 34; Dorsett *v.* Frith, 21 Ga. 245; Hayes *v.* O'Brien, 149 Ill. 403, 37 N. E. 73, 23 L. R. A. 555; Baker *v.* Rockabrand, 118 Ill. 365, 8 N. E. 456; Garretson *v.* Appleton Mfg. Co., 61 Ill. App. 443.

89. Hayes *v.* O'Brien, 149 Ill. 403, 37 N. E. 73, 23 L. R. A. 555; Baker *v.* Rockabrand, 118 Ill. 365, 8 N. E. 456; Davison *v.* Hough, 165 Mo. 561, 65 S. W. 731, 88 Am. St. Rep. 416, 55 L. R. A. 332.

90. See Equity, 16 Cyc. 181 *et seq.*

91. *Florida.*— Brown *v.* Solary, 37 Fla. 102, 19 So. 161.

Illinois.— Davidson *v.* Reed, 111 Ill. 167, 53 Am. Rep. 613; Oglesby Coal Co. *v.* Pasco, 79 Ill. 164; Illinois, etc., Canal *v.* Dewes, 11 Ill. 592.

Kentucky.— Berry *v.* Berry, 3 T. B. Mon. 263.

Massachusetts.—Linzee *v.* Mixer, 101 Mass. 512.

Mississippi.— Lemmon *v.* Dunn, 61 Miss. 210; Cogburn *v.* Pollock, 54 Miss. 639; Hunt *v.* Booth, Freem. 215.

New York.— Sieman *v.* Austin, 33 Barb. 9; Brouwer *v.* Jones, 23 Barb. 153.

Pennsylvania.— Lehigh Coal, etc., Co. *v.* Inter-County St. R. Co., 15 Pa. Co. Ct. 293; Riddle *v.* Delaware County, 2 Del. Co. 232, Jackson *v.* State Belt Electric S. R. Co., 7 North. Co. Rep. 286.

South Carolina.— *Ex p.* Mackay, 8 S. C. 48; Georgia Cent. R., etc., Co. *v.* Claghorn, Speers Eq. 545.

Vermont.— Shaw *v.* Chamberlain, 45 Vt. 512.

West Virginia.— Steelsmith *v.* Fisher Oil Co., 47 W. Va. 391, 35 S. E. 15.

See 27 Cent. Dig. tit. "Injunction," § 202 *et seq.*

Adverse claimants.— All persons who have or claim an adverse title should be brought in. Turpin *v.* Dennis, 139 Ill. 274, 28 N. E. 1065.

92. Bradley *v.* Gilbert, 155 Ill. 154, 39 N. E. 593; Minnesota *v.* Northern Securities Co., 184 U. S. 199, 22 S. Ct. 308, 46 L. ed. 499, holding that the fact that a corporation owning a majority of the stock of two other corporations was made a party to a suit did not dispense with the necessity of making the other corporations or their stock-holders parties. See also People *v.* Clark, 53 Barb. (N. Y.) 171, holding that a railroad company was a necessary party to a proceeding in the name of the people against commissioners appointed under a statute authorizing towns to subscribe for stock in aid of railroad companies to restrain such commissioners from executing or disposing of any bonds of a town in payment for subscriptions to the stock of such railroad.

Restraining municipal corporation from making unauthorized contract.—In a proceeding for an injunction to restrain a municipal corporation from making a contract not authorized by its charter, on the ground that the contract was about to be given to one not the lowest bidder, no one but the people and the city need be made parties. People *v.* New York, 32 Barb. (N. Y.) 35, 19 How. Pr. 155.

Consolidation of corporations.— Where the articles of association of a company prohibited it from consolidating with any other company, and an attempt was made to consolidate with a second company, the second company and its officers are not necessary parties to an action by stock-holders of the first corporation to enjoin the consolidation. Blatchford *v.* Ross, 54 Barb. (N. Y.) 42.

93. *Alabama.*— Jones *v.* Black, 48 Ala. 540.

Colorado.— Denver, etc., R. Co. *v.* Denver City R. Co., 2 Colo. 673; Packard *v.* Jefferson County, 2 Colo. 338.

District of Columbia.— Grant *v.* Cooke, 7 D. C. 165.

Illinois.— Oglesby Coal Co. *v.* Pasco, 79 Ill. 164; Kerfoot *v.* People, 51 Ill. App. 409.

Indiana.— O'Brien *v.* Loner, 158 Ind. 211, 61 N. E. 1004; Sidener *v.* Han Creek Turnpike Co., 91 Ind. 186.

is sufficient interest to enable a taxpayer to sue to enjoin an illegal expenditure of public funds.[94] The interest may be either legal or equitable.[95]

b. Suits to Stay Proceedings at Law. Generally a suit to enjoin a proceeding at law should be brought by the person who has the beneficial interest in the property which is the subject of the action at law.[96] For instance a vendee who has paid but part of the purchase-price may enjoin a stranger from foreclosing a pretended lien.[97] Likewise a purchaser of property who many years after the purchase discovered that his deed was defectively executed may enjoin the person who fraudulently obtained a deed from the heir from bringing ejectment.[98] When an injunction is sought as ancillary to an action at law suit must be brought by the same plaintiff in the same capacity.[99]

c. Suits Relating to Corporate Rights. Relief by injunction against the illegal or fraudulent proceedings of corporate officers should be sought by a stock-holder[1] or other person whose pecuniary interest is affected.[2] Stock-holders who have failed to comply with the terms of their stock subscription have no interest which will enable them to sue for an injunction.[3] The state, in the absence of a statute to the contrary, is not a necessary party to a suit to enjoin a corporation from making an improper use of a corporate name.[4] Such a suit may be maintained by a private party.[5]

Kansas.— Barber County *v.* Smith, 48 Kan. 331, 29 Pac. 565; Craft *v.* Jackson County Com'rs, 5 Kan. 518.

Maryland.— Davidson *v.* Baltimore, 96 Md. 509, 53 Atl. 1121; American Coal Co. *v.* Consolidation Coal Co., 46 Md. 15; Delaware, etc., R. Co. *v.* Stump, 8 Gill & J. 479, 29 Am. Dec. 561.

Massachusetts.— International Trust Co. *v.* International L. & T. Co., 153 Mass. 271, 26 N. E. 693, 10 L. R. A. 758. See Simmons *v.* Hanover, 23 Pick. 188.

New Jersey.— Allen *v.* Monmouth County, 13 N. J. Eq. 68.

New York.— Doolittle *v.* Broome County, 18 N. Y. 155, 16 How. Pr. 512; Mitchell *v.* Thorne, 57 Hun 405, 10 N. Y. Suppl. 682, 25 Abb. N. Cas. 295; Smith *v.* Lockwood, 13 Barb. 209; Manhattan Gaslight Co. *v.* Barker, 36 How. Pr. 233.

Pennsylvania.— Sparhawk *v.* Union Pass. R. Co., 54 Pa. St. 401; Buck Mountain Coal Co. *v.* Lehigh Coal, etc., Co., 50 Pa. St. 91, 88 Am. Dec. 534; Rees *v.* West Pennsylvania Exposition Soc., 2 Pa. Co. Ct. 385; Bergner *v.* Harrisburg, 1 Pearson 291; Horstman *v.* Young, 13 Phila. 19; Campbell *v.* Taggart, 2 Wkly. Notes Cas. 93.

Tennessee.— Wilkins *v.* Chicago, etc., R. Co., 110 Tenn. 442, 75 S. W. 1026; Bradley *v.* County Com'rs, 2 Humphr. 428, 37 Am. Dec. 563.

Vermont.— Howe *v.* Jericho School Dist. No. 3, 43 Vt. 282.

West Virginia.—Osburn *v.* Staley, 5 W. Va. 85, 13 Am. Rep. 640.

See 27 Cent. Dig. tit. "Injunction," §§ 205, 206.

Contra.— Collins *v.* Ripley, 8 Iowa 129.

When a person's interest ceases, his right to apply for an injunction ceases. Gilbert *v.* Cooley, Walk. (Mich.) 494; Hutton *v.* Metropolitan El. R. Co., 19 N. Y. App. Div. 243, 46 N. Y. Suppl. 169.

94. Clay County *v.* Markle, 46 Ind. 96; Harney *v.* Indianapolis, etc., R. Co., 32 Ind. 244; Collins *v.* Ripley, 8 Iowa 129; Simmons *v.* Hanover, 23 Pick. (Mass.) 188; Rees *v.* West Pennsylvania Exposition Soc., 2 Pa. Co. Ct. 385; Bergner *v.* Harrisburg, 1 Pearson (Pa.) 291. See also *supra*, V, E, 7, b. *Contra*, Packard *v.* Jefferson County, 2 Colo. 338; Buck *v.* Fitzgerald, 21 Mont. 482, 54 Pac. 942.

May enjoin act when the effect would be to place upon them an illegal tax.— Clay County *v.* Markle, 46 Ind. 96; Harney *v.* Indianapolis, etc., R. Co., 32 Ind. 244; Collins *v.* Ripley, 8 Iowa 129.

95. State *v.* Parkville, etc., R. Co., 32 Mo. 496.

96. *Louisiana.*— Lazarus *v.* McGuirk, 42 La. Ann. 194, 8 So. 253.

Mississippi.— Adams *v.* Harris, 47 Miss. 144.

Missouri.— Smith *v.* Harris, 43 Mo. 557.

New Hampshire.— Doe *v.* Doe, 37 N. H. 268.

New York.— Brouwer *v.* Jones, 23 Barb. 153; Miller *v.* McCan, 7 Paige 451.

Ohio.— Morgan *v.* Hayes, 1 Ohio Dec. (Reprint) 454, 10 West. L. J. 83.

See 27 Cent. Dig. tit. "Injunction," § 202 *et seq.*

97. Adams *v.* Harris, 47 Miss. 144.

98. Smith *v.* Harris, 43 Mo. 557.

99. Morgan *v.* Hayes, 1 Ohio Dec. (Reprint) 454, 10 West. L. J. 83.

1. Roebling *v.* Richmond First Nat. Bank, 30 Fed. 744.

2. People *v.* Conklin, 5 Hun (N. Y.) 452.

3. Busey *v.* Hooper, 35 Md. 15, 6 Am. Rep. 350.

4. Armington *v.* Palmer, 21 R. I. 109, 42 Atl. 308, 79 Am. St. Rep. 786, 43 L. R. A. 95.

5. Armington *v.* Palmer, 21 R. I. 109, 42 Atl. 308, 79 Am. St. Rep. 786, 43 L. R. A. 95.

d. Attorney-General or Other Public Officer. A suit to restrain a public wrong when the individual complaining suffers such injury only as is common to the other members of the community should be brought by the attorney-general.[6] Relief will not be granted in such a suit if not brought in fact for the protection of public rights but in aid of a private enterprise.[7] The right to sue to protect rights under the charter of a municipal corporation and to enjoin violations of ordinances is sometimes vested exclusively in the city.[8] So similar authority is sometimes vested in state or county officers.[9]

e. Trustees and Other Representatives. Provided a trustee or other representative has qualified and is properly acting as such,[10] he may sue to enjoin acts prejudicial to the estate which he represents.[11]

f. One or More Suing in Behalf of All. When parties are numerous or widely scattered a part of those who have a common interest in the object of the suit may sue in behalf of all.[12] The interest of those who sue must be of such a character as to fully and fairly represent those not in court.[13]

3. DEFENDANTS — a. In General. All persons not joined as plaintiffs who have an interest in the controversy presented by the bill, and whose presence is requi-

6. *Illinois.*— People *v.* General Electric R. Co., 172 Ill. 129, 50 N. E. 158; Kerfoot *v.* People, 51 Ill. App. 409.

Kansas.— State *v.* Marion County Com'rs, 21 Kan. 419; State *v.* Day, (App. 1898) 54 Pac. 917.

Michigan.— Taggart *v.* Wayne County, 73 Mich. 53, 40 N. W. 852.

Missouri.— State *v.* Zachritz, 166 Mo. 307, 65 S. W. 999, 89 Am. St. Rep. 711.

New Jersey.— McGovern *v.* Loder, (Ch. 1890) 20 Atl. 209.

New York.— People *v.* Clark, 53 Barb. 171; Davis *v.* New York, 2 Duer 663; Morris *v.* Whelan, 11 Abb. N. Cas. 64, 64 How. Pr. 109.

Pennsylvania.— Sparbawk *v.* Union Pass. R. Co., 54 Pa. St. 401; Com. *v.* Kepner, 1 Pearson 182.

See 27 Cent. Dig. tit. "Injunction," § 208.

Moral interest sufficient to sustain action by state.— Under Mo. Rev. St. (1899) § 4943, authorizing the attorney-general to institute in the name of the state suits at law and in equity to protect the interests of the state, he is authorized in bringing suit to restrain book-making and pool-selling, although the state has no pecuniary interest in the result. State *v.* Zachritz, 166 Mo. 307, 65 S. W. 999, 89 Am. St. Rep. 711.

7. People *v.* General Electric R. Co., 172 Ill. 129, 50 N. E. 158.

8. Genois *v.* Lockett, 13 La. 545; Ogden *v.* Welden, 15 N. Y. Suppl. 790; Cincinnati *v.* Moorman, 11 Ohio Dec. (Reprint) 162, 25 Cinc. L. Bul. 126; Milwaukee *v.* Milwaukee, etc., R. Co., 7 Wis. 85. See also Philadelphia *v.* Crump, 1 Brewst. (Pa.) 320.

9. Hoffman *v.* Shepherdsville, 36 S. W. 522, 18 Ky. L. Rep. 302; Venango County Com'rs *v.* Oil City St. R. Co., 3 Pa. Dist. 546; Auditor *v.* Parker, 4 S. C. 311; Rickey *v.* Williams, 8 Wash. 479, 36 Pac. 480.

The fence commissioners of a district may enjoin highway commissioners from removing a gate erected by them across a highway at the district limits, and are the proper parties to bring such suit (Edwards *v.* Manning Tp., 127 N. C. 62, 37 S. E. 73); but if a portion of a county forms a district, the county commissioners are not the proper parties to enjoin the improper location and construction of the district fence, as the people of the district are the persons interested (Freeman *v.* Lee County, 66 Miss. 1, 5 So. 516).

10. Holde *v.* Mudlem, 4 Lanc. L. Rev. 347.

11. Simpson *v.* King, 36 N. C. 11; Murdock *v.* Woodson, 17 Fed. Cas. No. 9,942, 2 Dill. 188.

12. *Colorado.*—Packard *v.* Jefferson County, 2 Colo. 338.

Georgia.— Atlanta Real Estate Co. *v.* Atlanta Nat. Bank, 75 Ga. 40.

Indiana.— Beard *v.* Dennis, 6 Ind. 200, 63 Am. Dec. 380.

Nebraska.— Normand *v.* Otoe County, 8 Nebr. 18.

New York.— Cady *v.* Conger, 19 N. Y. 256; Korff *v.* Green, 7 Abb. Pr. 108, 16 How. Pr. 140; Smith *v.* Lockwood, Code Rep. N. S. 319; Smith *v.* Lockwood, 2 Edm. Sel. Cas. 224; Strong *v.* Waterman, 11 Paige 607.

Ohio.— Ruffner *v.* Hamilton County, 1 Disn. 196, 12 Ohio Dec. (Reprint) 571; Gidden *v.* Cincinnati, 4 Ohio S. & C. Pl. Dec. 423, 30 Cinc. L. Bul. 213.

United States.— Scott *v.* Donald, 165 U. S. 107, 17 S. Ct. 262, 41 L. ed. 648.

See 27 Cent. Dig. tit. "Injunction," § 207.

When the attorney-general can and should act in behalf of the people, an individual cannot sue to protect himself and other taxpayers. Korff *v.* Green, 7 Abb. Pr. (N. Y.) 108, 16 How. Pr. 140.

Interest in enforcement of liquor law.— Men who import liquors for their own consumption have not such a community of interest as will permit one to sue in behalf of all to restrain a seizure of liquor by a constable acting under a foreign state law alleged to be void. Scott *v.* Donald, 165 U. S. 107, 17 S. Ct. 262, 41 L. ed. 648.

13. Atlanta Real Estate Co. *v.* Atlanta Nat. Bank, 75 Ga. 40; Beard *v.* Dennis, 6 Ind. 200, 63 Am. Dec. 380; Normand *v.* Otoe County, 8 Nebr. 18; Strong *v.* Waterman, 11 Paige (N. Y.) 607.

site to a complete adjudication of the controversy, must be made defendants.[14] In actions to enjoin the issuance of municipal bonds, some of the persons to whom

14. *Arkansas.*— McConnell *v.* Arkansas Brick, etc., Co., 70 Ark. 568, 69 S. W. 559.

Georgia.— Atlantic, etc., R. Co. *v.* Southern Pine Co., 116 Ga. 224, 42 S. E. 500.

Illinois.— Lussen *v.* Chicago Sanitary Dist., 192 Ill. 404, 61 N. E. 544; Bradley *v.* Gilbert, 155 Ill. 154, 39 N. E. 593; Walker *v.* Gibson, 35 Ill. App. 49.

Indiana.— Newton County Draining Co. *v.* Nofsinger, 43 Ind. 566; Brandis *v.* Grissom, 26 Ind. App. 661, 60 N. E. 455.

Kansas.— Jeffries-Basom *v.* Nation, 63 Kan. 247, 65 Pac. 226; Union Terminal R. Co. *v.* State Railroad Com'rs, 52 Kan. 680, 35 Pac. 224; State *v.* Anderson, 5 Kan. 90; Walker *v.* Cambern, 5 Kan. App. 545, 47 Pac. 980. But see Dixon Tp. *v.* Sumner County, 25 Kan. 519.

Louisiana.— State *v.* Judge Civil Dist. Ct., 52 La. Ann. 1065, 27 So. 580; Green *v.* Huey, 23 La. Ann. 704; Denton *v.* Erwin, 5 La. Ann. 18.

Maine.— Brown *v.* Haven, 12 Me. 164.

Maryland.— Blondell *v.* Baltimore Consol. Gas Co., 89 Md. 732, 43 Atl. 817, 46 L. R. A. 187; Busey *v.* Hooper, 35 Md. 15, 6 Am. Rep. 350; Baltimore United Fire Dept. *v.* Creamer, 17 Md. 243; Maddox *v.* White, 4 Md. 72, 59 Am. Dec. 67; Campbell *v.* Poultney, 6 Gill & J. 94, 26 Am. Dec. 559.

Massachusetts.— Florence Sewing Mach. Co. *v.* Grover, etc., Sewing Mach. Co., 110 Mass. 1; Sears *v.* Carrier, 4 Allen 339; Allen *v.* Turner, 11 Gray 436.

Michigan.—Hoppock *v.* Chambers, 96 Mich. 509, 56 N. W. 86; Field *v.* Ashley, 79 Mich. 231, 44 N. W. 602; Palmer *v.* Rich, 12 Mich. 414.

Minnesota.— Graham *v.* Minneapolis, 40 Minn. 436, 42 N. W. 291.

Missouri.— Kennerly *v.* Shepley, 15 Mo. 640, 57 Am. Dec. 219.

Nebraska.— Siever *v.* Union Pac. R. Co., (1903) 93 N. W. 943; Hodges *v.* Seward County, 49 Nebr. 666, 68 N. W. 1027.

New Jersey.— Maher *v.* Mutual Electric Mfg. Co., (Ch. 1889) 17 Atl. 968; Butcher *v.* Camden, 29 N. J. Eq. 478; Bingham *v.* Camden, 29 N. J. Eq. 464; Morgan *v.* Rose, 22 N. J. Eq. 583.

New York.— Shepard *v.* Manhattan R. Co., 117 N. Y. 442, 23 N. E. 30; People *v.* Clark, 70 N. Y. 518; New York *v.* Burleson Hardware Co., 89 N. Y. App. Div. 222, 85 N. Y. Suppl. 763; Standard Fashion Co. *v.* Siegel-Cooper Co., 30 N. Y. App. Div. 564, 52 N. Y. Suppl. 433; New York Bank Note Co. *v.* Hamilton Bank Note Engraving, etc., Co., 83 Hun 593, 31 N. Y. Suppl. 1060; Mitchell *v.* Thorne, 57 Hun 405, 10 N. Y. Suppl. 682, 25 Abb. N. Cas. 295; Levy *v.* Mutual L. Ins. Co., 54 Hun 315, 7 N. Y. Suppl. 562; Onondaga County Milk Assoc. *v.* Wall, 17 Hun 494; People *v.* Conklin, 5 Hun 452; Rorke *v.* Russell, 2 Lans. 244; People *v.* Clark, 53 Barb. 171; People *v.* New York, 32 Barb. 35; Benson *v.* Albany, 24 Barb. 248; Brouwer *v.* Jones, 23 Barb. 153; Haskins *v.* George A. Fuller Co., 36 Misc. 38, 72 N. Y. Suppl. 440; O'Sullivan *v.* New York El. R. Co., 7 N. Y. Suppl. 51; Turner *v.* Conant, 10 N. Y. Civ. Proc. 192; Smith *v.* Crissey, 13 Abb. N. Cas. 149, 66 How. Pr. 112; Hammer *v.* Barnes, 26 How. Pr. 174; Peterson *v.* Bangs, 9 Paige 627; Lawyer *v.* Cipperly, 7 Paige 281; Reed *v.* Warner, 5 Paige 650; Bailey *v.* Inglee, 2 Paige 278; Chase *v.* Chase, 1 Paige 198.

North Carolina.— Oliver *v.* Dix, 21 N. C. 158.

Ohio.— Perkins *v.* Rogg, 11 Ohio Dec. (Reprint) 585, 28 Cinc. L. Bul. 32.

Pennsylvania.—Seitz *v.* Lafayette Traction Co., 5 Pa. Co. Ct. 469; Com. *v.* Kepner, 1 Pearson 182; Long *v.* Dickinson, 10 Phila. 108. But see Hoffman *v.* Gallatin County, 18 Mont. 224, 44 Pac. 973.

Rhode Island.— Armington *v.* Palmer, 21 R. I. 109, 42 Atl. 308, 79 Am. St. Rep. 786, 43 L. R. A. 95; Goddard *v.* Providence, 18 R. I. 536, 28 Atl. 765.

South Carolina.— Moore *v.* Gentry, 25 S. C. 334.

Tennessee.— Bradley *v.* Powell County, 2 Humphr. 428, 37 Am. Dec. 563.

Vermont.— Howe *v.* School Dist. No. 3, 43 Vt. 282.

Virginia.— Robertson *v.* Tapscott, 81 Va. 533; Robinson *v.* Shacklett, 29 Gratt. 99.

West Virginia.— Wenger *v.* Fisher, 55 W. Va. 13, 46 S. E. 695; Grobe *v.* Roup, 43 W. Va. 197, 28 S. E. 699; Calwell *v.* Prindle, 11 W. Va. 307; Stewart *v.* Jackson, 8 W. Va. 29.

Wisconsin.— Nicolai *v.* Vernon, 88 Wis. 551, 60 N. W. 999.

Wyoming.— Metcalf *v.* Hart, 3 Wyo. 513, 27 Pac. 900, 31 Am. St. Rep. 122.

United States.— Minnesota *v.* Northern Securities Co., 184 U. S. 199, 22 S. Ct. 308, 46 L. ed. 499; *Ex p.* Haggarty, 124 Fed. 441; New York Phonograph Co. *v.* Jones, 123 Fed. 197; People's Tel., etc., Co. *v.* East Tennessee Tel. Co., 103 Fed. 212, 43 C. C. A. 185; Consolidated Water Co. *v.* San Diego, 93 Fed. 849, 35 C. C. A. 631; Oxley Stave Co. *v.* Coopers' International Union, 72 Fed. 695; Roebling *v.* Richmond First Nat. Bank, 30 Fed. 744; Abbot *v.* American Hard Rubber Co., 1 Fed. Cas. No. 9, 4 Blatchf. 489; Tyson *v.* Virginia, etc., R. Co., 24 Fed. Cas. No. 14,321, 1 Hughes 80.

England.— Landed Estates Co. *v.* Weeding, 21 L. T. Rep. N. S. 384, 18 Wkly. Rep. 35.

See 27 Cent. Dig. tit. "Injunction," § 212.

Joint tort-feasor.— A joint tort-feasor cannot successfully claim that his co-tort-feasor should be joined as defendant. New York Phonograph Co. *v.* Jones, 123 Fed. 197; People's Tel., etc., Co. *v.* East Tennessee Tel. Co., 103 Fed. 212, 43 C. C. A. 185.

they are to be issued must generally be made defendants.[15] Where the suit is to enjoin public officers from paying out moneys the payee is a proper,[16] and usually a necessary,[17] party. So where an assignee for the benefit of creditors is sought to be enjoined on account of illegal preferences in the assignment, the creditors alleged to be preferred should be joined.[18]

b. Public Officers. Where a suit is brought to restrain action in behalf of a municipality, the officers whose duty it is to perform the acts sought to be enjoined are proper,[19] and usually necessary,[20] parties.

c. Municipal Corporations. The municipality is usually a necessary party where it is sought to enjoin officers thereof from the performance of acts apparently within the scope of their authority.[21] In any event the municipality is a proper defendant.[22]

d. Private Corporations or Associations or Officers Thereof. A corporation or its officers must be joined where injunctive relief is sought against the corporation or its officers.[23] When a part of the stock-holders seek to enjoin a corporation from paying an extra dividend, the other stock-holders are necessary parties.[24] Where several defendants who have incorporated are sued as individuals, and the

15. Patterson *v.* Yuba County, 12 Cal. 105; Hutchinson *v.* Burr, 12 Cal. 103; King *v.* Throckmorton County, 10 Tex. Civ. App. 114, 30 S. W. 257. See also Anthony *v.* State, 40 Kan. 246, 30 Pac. 488. *Contra*, see Dixon Tp. *v.* Sumner County, 25 Kan. 519; Hoffman *v.* Gallatin County, 18 Mont. 224, 44 Pac. 973.

16. Modoc County *v.* Spencer, 103 Cal. 498, 37 Pac. 483.

17. Hoppock *v.* Chambers, 96 Mich. 509, 56 N. W. 86; Butcher *v.* Camden, 29 N. J. Eq. 478; Benson *v.* Albany, 24 Barb. (N. Y.) 248. *Compare* Hughson *v.* Crane, 115 Cal. 404, 47 Pac. 120 (holding that in an action to enjoin the collection by the collector of an irrigation district, of an excessive assessment for interest on bonds in the district, an agent of the district for the sale of the bonds, and the holder of illegal bonds, were not necessary parties); Abbot *v.* American Hard Rubber Co., 2 Fed. Cas. No. 9, 4 Blatchf. 489.

18. Old Hickory Distilling Co. *v.* Bleyer, 74 Ga. 201.

19. Palo Alto Banking, etc., Co. *v.* Mahar, 65 Iowa 74, 21 N. W. 187 (holding that recorder of deeds is a proper party in an action to restrain conspirators from making and accepting deeds for the purpose of fraud); Anderson *v.* State, 23 Miss. 459; Com. *v.* Kepner, 1 Pearson (Pa.) 182.

20. Trinity County *v.* McCammon, 25 Cal. 117; Bradley *v.* Gilbert, 46 Ill. App. 623; Palmer *v.* Rich, 12 Mich. 414; Bingham *v.* Camden, 29 N. J. Eq. 464, election officers.

Probate judge.— It is improper to make a probate judge a party to a suit in chancery to enjoin the settlement of an estate pending in his court. McNeill *v.* McNeill, 36 Ala. 109, 76 Am. Dec. 320.

The sheriff is usually a necessary party to a suit to enjoin proceedings under an attachment, execution, or replevin writ. National Park Bank *v.* Goddard, 131 N. Y. 494, 30 N. E. 566; North *v.* Peters, 138 U. S. 271, 11 S. Ct. 346, 34 L. ed. 936. See also Meinhard *v.* Youngblood, 37 S. C. 223, 15 S. E. 947; Robertson *v.* Tapscott, 81 Va. 533. *Contra*, Shrader *v.* Walker, 8 Ala. 244; McLane *v.* Manning, 60 N. C. 608.

21. Samis *v.* King, 40 Conn. 298; Bradley *v.* Gilbert, 155 Ill. 154, 39 N. E. 593; Allen *v.* Turner, 11 Gray (Mass.) 436; People *v.* Clark, 70 N. Y. 518; People *v.* Law, 34 Barb. (N. Y.) 494, 22 How. Pr. 109. *Contra*, Anderson *v.* Orient F. Ins. Co., 88 Iowa 579, 55 N. W. 348. See also Hughson *v.* Crane, 115 Cal. 404, 47 Pac. 120, holding that in an action to enjoin the collection by the collector of an irrigation district, of an excessive assessment for interest on bonds of the district, the irrigation district was not a necessary party, no relief being sought against it and plaintiffs not seeking to set aside or vacate the assessment, or to prevent the enforcement of the assessment except as against their own land, which constituted but a small part of the district, the validity of the assessment being only incidentally involved.

22. Brown *v.* Frankfort, 9 S. W. 384, 702, 9 Ky. L. Rep. 462; Nicolai *v.* Vernon, 88 Wis. 551, 60 N. W. 999, holding that the town is a proper party to an action to prevent the wrongful removal of a fence by the supervisors and pathmaster of a town on the ground that the fence encroached upon a public highway. *Compare* Com. *v.* Kepner, 1 Pearson (Pa.) 182, in which the court held that in an action to restrain the obstruction of a street, the attorney-general and taxpayers whose lands front on the street opposite the obstruction are the proper complainants and the mayor, contractor, and members of the town council who voted for the erection of the obstruction are the proper respondents, but that the borough is not a proper party and that the bill is not vitiated by the omission of one of the councilmen.

23. Tyson *v.* Virginia, etc., R. Co., 24 Fed. Cas. No. 14,321, 1 Hughes 80. See Florence Sewing-Mach. Co. *v.* Grover, etc., Sewing Mach. Co., 110 Mass. 1.

24. Gregg *v.* Baltimore, 14 Md. 479.

acts complained of are threatened by the corporation, the corporation is a necessary party.[25] So where a corporation has a *de facto* but not a *de jure* existence, suit may be brought against it in its corporate name.[26] A religious corporation should be made a party to a bill to restrain unauthorized acts of its trustees; but where an injunction has issued the failure to make it a party is not necessarily a fatal defect.[27] An action by policy-holders against a mutual insurance company to enjoin it from buying land, when such purchase is a violation of its charter, should be brought against the officers and trustees of the company and not against the company itself.[28] The acts of an unincorporated association cannot be enjoined in a suit against the officers alone, in the absence of a statutory provision authorizing such procedure.[29]

e. Persons in Representative Capacity or Represented by Others. It is unnecessary to join persons who are fully and legally represented by another when the act to be enjoined affects the representative in his official capacity.[30] This proposition assumes that there is no conflict of interest between the representative and the person he represents, and that the representative has duly qualified.[31] Where, however, the act to be enjoined does not affect him in his representative capacity he need not be joined as a party.[32] The trustee of a resulting trust does not represent the *cestui que trust* within the meaning of this rule.[33]

f. Principal, Agents, or Employees. The action should be brought against the person doing or causing the wrong to be done and not against his agents and servants.[34] Where, however, the agent or servant is permitted to exercise an independent judgment or discretion, he should be made a party.[35]

4. Joinder of Parties — a. Of Plaintiffs. All persons between whom there

25. Dieter *v.* Estill, 95 Ga. 370, 22 S. E. 622.

26. Newton County Draining Co. *v.* Nofsinger, 43 Ind. 566.

27. Morgan *v.* Rose, 22 N. J. Eq. 583. See also Lawyer *v.* Cipperly, 7 Paige (N. Y.) 281.

28. Levy *v.* Mutual L. Ins. Co., 54 Hun (N. Y.) 315, 7 N. Y. Suppl. 562.

29. Rorke *v.* Russell, 2 Lans. (N. Y.) 244; Oxley Stave Co. *v.* Coopers' International Union, 72 Fed. 695, holding that an association cannot be sued as a body nor members thereof enjoined who are not parties to the record.

30. Simpson *v.* King, 36 N. C. 11; Murdock *v.* Woodson, 17 Fed. Cas. No. 9,942, 2 Dill. 188; Foote *v.* Linck, 9 Fed. Cas. No. 4,913, 5 McLean 616.

31. Holde *v.* Madlem, 4 Lanc. L. Rev. (Pa.) 347.

32. Everett *v.* Winn, Sm. & M. Ch. (Miss.) 67; Dayton, etc., R. Co. *v.* Shoemaker, 3 Ohio Cir. Ct. 473, 2 Ohio Cir. Dec. 270.

33. Richards *v.* Richards, 9 Gray (Mass.) 313.

34. *California.*— Trinity County *v.* McCammon, 25 Cal. 117.

Illinois.— Knopf *v.* Chicago First Nat. Bank, 173 Ill. 331, 50 N. E. 660; Knopf *v.* Chicago Real Estate Bd., 173 Ill. 196, 50 N. E. 658.

Iowa.— Palo Alto Banking, etc., Co. *v.* Mahar, 65 Iowa 74, 21 N. W. 187.

Kentucky.— Sweets *v.* Biggs, 5 Litt. 17.

Louisiana.— Egan *v.* Russ, 39 La. Ann. 967, 3 So. 85.

Mississippi.— Anderson *v.* State, 23 Miss. 459.

Missouri.— New County School Dist. No. 4 *v.* Smith, 90 Mo. App. 215.

New York.— Grover *v.* Swain, 29 Hun 454; Ely *v.* Lowenstein, 9 Abb. Pr. N. S. 37.

North Carolina.— McLane *v.* Manning, 60 N. C. 608.

Wisconsin.— Kircher *v.* Pederson, 117 Wis. 68, 93 N. W. 813.

United States.— Osborn *v.* U. S. Bank, 9 Wheat. 738, 6 L. ed. 204.

See 27 Cent. Dig. tit. "Injunction," § 216.

An attorney of record is not a proper party to an action to restrain his clients from prosecuting a suit at law, where nothing is charged against the attorney except the doing of his professional duty to his clients. Ely *v.* Lowenstein, 9 Abb. Pr. N. S. (N. Y.) 37; Kircher *v.* Pederson, 117 Wis. 68, 93 N. W. 813.

Principal out of jurisdiction.— Where the principal is out of the jurisdiction, the suit may be brought against the agent. Osborne *v.* U. S. Bank, 22 U. S. 738, 6 L. ed. 204.

35. *Alabama.*— Shrader *v.* Walker, 8 Ala. 244.

New York.— National Park Bank *v.* Goddard, 131 N. Y. 494, 30 N. E. 566; Meyer *v.* Phillips, 97 N. Y. 485, 49 Am. Rep. 538; McCrea *v.* Chahoon, 54 Hun 577, 8 N. Y. Suppl. 88.

Rhode Island.— Goddard *v.* Providence, 18 R. I. 536, 28 Atl. 765.

South Carolina.— Meinhard *v.* Youngblood, 37 S. C. 223, 15 S. E. 947.

is a unity of interest in the subject-matter of the suit and a common right to the relief sought may join as plaintiffs.[36] Persons having similar but separate and distinct rights cannot join as plaintiffs.[37] In order to prevent a multiplicity of suits and as a matter of convenience courts sometimes make an exception to the rule by permitting persons to join as plaintiffs who seek the same object but between whom there is no common interest in the subject-matter.[38]

b. Of Defendants. Where the act sought to be enjoined is threatened or being performed by more than one, all may be joined as defendants.[39] So where it is sought to restrain the payment of claims allowed by a single resolution of town supervisors, all the claimants are properly joined as defendants.[40]

5. New Parties — a. Bringing in Pending Trial. If, in the course of a trial, it appears that additional persons must be brought in as parties to accomplish the ends of justice, they must be brought in before the trial proceeds.[41]

b. Substitution. When plaintiff dies his heirs or personal representatives must be substituted as parties.[42] Where plaintiff's term of office expires pending the litigation, a substitution may be permitted by amendment.[43]

c. Intervention. If the decree sought will materially affect the pecuniary interests of a person not a party, he has a right to intervene.[44] But a court of

United States.— North *v.* Peters, 138 U. S. 271, 11 S. Ct. 346, 34 L. ed. 936.

See 27 Cent. Dig. tit. "Injunction," § 216.

36. *Alabama.*— Elliott *v.* Boaz, 9 Ala. 772.

Indiana.— Field *v.* Holzman, 93 Ind. 205.

New Jersey.— Springer *v.* Lawrence, 47 N. J. Eq. 461, 21 Atl. 41; Pennsylvania R. Co. *v.* National R. Co., 23 N. J. Eq. 441.

Ohio.— Hardacre *v.* Dalton, 9 Ohio Dec. (Reprint) 527, 14 Cinc. L. Bul. 315, candidates for office may join in an action to enjoin counting of illegal ballots.

Oregon — Elliott *v.* Bloyd, 40 Oreg. 326, 67 Pac. 202.

Pennsylvania.— Sweeny *v.* Torrence, 11 Pa. Co. Ct. 497; Wiener *v.* Peoples, 17 Lanc. L. Rev. 289.

South Carolina.— Meinhard *v.* Strickland, 29 S. C. 491, 7 S. E. 838.

Vermont.— Walker *v.* Pierce, 38 Vt. 94.

See 27 Cent. Dig. tit. "Injunction," § 210.

37. *Georgia.* — Moore *v.* Hill, 59 Ga. 760.

Indiana.— Jones *v.* Cardwell, 98 Ind. 331, holding that the owners of separate tracts of land cannot join in one proceeding to enjoin the collection of a drainage assessment against their lands.

New York.— Wood *v.* Perry, 1 Barb. 114.

Ohio.— Arnold *v.* Van Wert, 3 Ohio Cir. Ct. 545, 2 Ohio Cir. Dec. 314.

United States.— Woolstein *v.* Welch, 42 Fed. 566.

See 27 Cent. Dig. tit. "Injunction," § 210.

38. Mt. Vernon First Nat. Bank *v.* Sarlls, 129 Ind. 201, 28 N. E. 434, 28 Am. St. Rep. 185, 13 L. R. A. 481; Heagy *v.* Black, 90 Ind. 534; Robbins *v.* Sand Creek Turnpike Co., 34 Ind. 461; Ballou *v.* Hopkinton, 4 Gray (Mass.) 324; Taylor *v.* Bay City St. R. Co., 80 Mich. 77, 45 N. W. 335; Sewickley Borough *v.* Ohio Valley Gas Co., 6 Pa. Co. Ct. 99. See also *supra*, III, E.

39. London Mills *v.* White, 208 Ill. 289, 70 N. E. 313; Field *v.* Holzman, 93 Ind. 205; Riggs *v.* Bell, 39 La. Ann. 1030, 3 So. 183; Meyer *v.* Phillips, 97 N. Y. 485, 49 Am. Rep. 538; O'Sullivan *v.* New York El. R. Co., 7 N. Y. Suppl. 51. See also Coleman *v.* Claytor, 93 Va. 20, 24 S. E. 463.

Separate and distinct titles.— Where several persons, whose titles are separate and distinct and between whom there is no conspiracy or concerted action, threaten to do the same wrongful act they may all be joined as defendants in one suit. Putnam *v.* Sweet, 2 Pinn. (Wis.) 302, 1 Chandl. 286; Delaware, etc., R. Co. *v.* Frank, 110 Fed. 689; Nashville, etc., R. Co. *v.* McConnell, 82 Fed. 65.

40. McCrea *v.* Chahoon, 54 Hun 577, 8 N. Y. Suppl. 88.

41. *Idaho.*— Oro Fino, etc., Min. Co. *v.* Cullen, 1 Ida. 113.

Illinois.— Hopkins *v.* Roseclare Lead Co., 72 Ill. 373.

New York.— Davis *v.* New York, 2 Duer 663; Hammer *v.* Barnes, 26 How. Pr. 174.

United States.— Pullan *v.* Cincinnati, etc., Air-line R. Co., 20 Fed. Cas. No. 11,461, 4 Biss. 35.

England.— Dalton *v.* St. Mary Abbots, Kensington, 47 L. T. Rep. N. S. 349.

See 27 Cent. Dig. tit. "Injunction," § 219. And see, generally, Parties.

42. Miller *v.* McDonald, 72 Ga. 20; Bergmann *v.* Salmon, 69 Hun (N. Y.) 295, 23 N. Y. Suppl. 482. See, generally, Abatement and Revival.

43. Winthrop *v.* Farrar, 11 Allen (Mass.) 398.

44. *Connecticut.*— *In re* Ferris, 56 Conn. 396, 15 Atl. 751.

Kentucky.— Hendrick *v.* Tipton, 30 S. W. 618, 17 Ky. L. Rep. 123.

Louisiana.— New Orleans *v.* Gravier, 11 Mart. 620.

Maryland.— Gregg *v.* Baltimore, 14 Md. 479.

Mississippi.— Attala County *v.* Niles, 58 Miss. 48.

Missouri.— Cape Girardeau Southwestern

equity will not join a person as plaintiff if by doing so it will be ousted of jurisdiction where he may be joined as a defendant.[45] A stranger to a suit whose rights have been affected unfavorably by an injunction may appear by petition and request a construction or modification of the injunction.[46]

6. Defects, Objections, and Amendments. Where a misjoinder occurs the court may allow an amendment by striking out the parties improperly joined,[47] but when the action is brought by one not entitled to sue an amendment cannot be allowed to bring in the proper plaintiff.[48] In the case of a non-joinder of a necessary party, the court will not proceed until the necessary party is joined, the usual order being for the case to stand over with liberty to amend by adding the proper party.[49] It has been held that necessary parties may be joined by amendment after an injunction has been granted.[50] Where, however, a suit is brought by the wrong parties, and the injunction granted is void for want of jurisdiction, an amendment inserting a correct party does not validate the injunction.[51] If the proper parties to a bill for an injunction are not before the court, a decree may for this defect be reversed on appeal.[52]

D. Process and Appearance[53]**— 1. In General.** Unless defendant voluntarily appears and submits himself to the jurisdiction, it is necessary that process issue and service be made upon defendant before the court grants a final injunction.[54] The English chancery practice permitted service of process, by leave of court, upon an attorney, to restrain proceedings at law, when the client was out of the jurisdiction.[55] In this country the federal courts have recognized and applied this rule,[56] and have extended it to permit the service of a cross bill on the

Co. *v.* Hatton, 102 Mo. 45, 14 S. W. 763; Traven *v.* Dawson, 65 Mo. App. 93.

New York.—Strowbridge Lith. Co. *v.* Crane, 12 N. Y. Suppl. 834, 20 N. Y. Civ. Proc. 15.

Tennessee.— Speak *v.* Ransom, 2 Tenn. Ch. 210.

Texas.— Ivory *v.* Kempner, 2 Tex. Civ. App. 474, 21 S. W. 1006.

See 27 Cent. Dig. tit. "Injunction," § 219.

Private person may intervene as plaintiff to support public right. In a suit by a city to enjoin the erection of buildings in a public place, an adjacent property-owner may intervene and urge his private right to strengthen those of the public. New Orleans *v.* Gravier, 11 Mart. (La.) 620.

45. Brown *v.* Pacific Mail Steamship Co., 4 Fed. Cas. No. 2,025, 5 Blatchf. 525.

46. Speak *v.* Ransom, 2 Tenn. Ch. 210.

47. Dana *v.* Valentine, 5 Metc. (Mass.) 8.

48. Davis *v.* New York, 14 N. Y. 506, 67 Am. Dec. 186.

49. *California.*— Parrott *v.* Byers, 40 Cal. 614.

Massachusetts.— Winthrop *v.* Farrar, 11 Allen 398.

Missouri.— Wabash Western R. Co. *v.* Siefert, 41 Mo. App. 35.

South Carolina.— Meinhard *v.* Strickland, 29 S. C. 491, 7 S. E. 838.

England.— Evans *v.* Coventry, 3 Eq. Rep. 545, 3 Wkly. Rep. 149.

See 27 Cent. Dig. tit. "Injunction," § 220.

Defense of suit by omitted party does not cure defect. Where the clerk, auditor, and treasurer of a city sued to enjoin the payment of salaries to policemen who were not legally appointed, but the city itself was not made a party, the fact that the city assumed the defense of the case by its attorney does not cure the defect in parties. Samis *v.* King, 40 Conn. 298.

50. Mayer *v.* Coley, 80 Ga. 207, 7 S. E. 164.

51. Kerfoot *v.* People, 51 Ill. App. 409.

52. Morse *v.* Machias Water Power, etc., Co., 42 Me. 119.

53. See, generally, Process.

54. *Georgia.*— Kebler *v.* G. W. Jack Mfg. Co., 55 Ga. 639.

New York.— Marty *v.* Marty, 66 N. Y. App. Div. 527, 73 N. Y. Suppl. 369.

Pennsylvania.— Spangler, etc., Canal Co.'s Appeal, 64 Pa. St. 387.

England.— Read *v.* Bowers, 4 Bro. Ch. 441, 29 Eng. Reprint 978; Memenham *v.* O'Sullivan, 1 Ir. Eq. R. 65.

Canada.— Hart *v.* Rainville, 15 Quebec Super. Ct. 17.

55. Anderson *v.* Lewis, 3 Bro. Ch. 429, 29 Eng. Reprint 625.

Service on the housekeeper of defendant's attorney is insufficient. Angier *v.* May, 3 Eq. Rep. 488, 3 Wkly. Rep. 330.

56. Bartlett *v.* His Imperial Majesty the Sultan of Turkey, 19 Fed. 346; Crellin *v.* Ely, 13 Fed. 420, 7 Sawy. 532; Eckert *v.* Bauert, 8 Fed. Cas. No. 4,266, 4 Wash. 370; Hitner *v.* Suckley, 12 Fed. Cas. No. 6,543, 2 Wash. 465; Kamm *v.* Stark, 14 Fed. Cas. No. 7,604, 1 Sawy. 547; Lowenstein *v.* Glidewell, 15 Fed. Cas. No. 8,575, 5 Dill. 325; Read *v.* Consequa, 20 Fed. Cas. No. 11,606, 4 Wash. 174; Segee *v.* Thomas, 21 Fed. Cas. No. 12,633, 3 Blatchf. 11; Ward *v.* Seabry, 29 Fed. Cas. No. 17,161, 4 Wash. 426.

Presumption of authority.— The attorney is presumed to have authority to accept service because of his relation to the action at law. Crellin *v.* Ely, 13 Fed. 420, 7 Sawy.

attorney of a non-resident plaintiff.[57] Under a statute providing for service on a non resident by publication, service on his attorney gives the court no jurisdiction.[58]

2. Effect of Appearance. Want or insufficiency of service of process is cured by defendant's appearance.[59]

E. Notice of Application For Preliminary Injunction — 1. In General. A preliminary injunction will generally not be granted until after an order to show cause or notice of the application has been given to defendant so that he may oppose the application by answer or by affidavits or otherwise.[60] Especially

532. This rule does not apply where the injunction sought will not affect the action at law in which the attorney is employed. Hitner *v.* Suckley, 12 Fed. Cas. No. 6,543, 2 Wash. 465. Nor does it apply where the judgment at law is satisfied. Kamm *v.* Stock, 14 Fed. Cas. No. 7,604, 1 Sawy. 547.

57. Eckert *v.* Bauert, 8 Fed. Cas. No. 4,266, 4 Wash. 370; Lewenstein *v.* Glidewell, 15 Fed. Cas. No. 8,575, 5 Dill. 325; Ward *v.* Seabry, 29 Fed. Cas. No. 17,161, 4 Wash. 426.

58. Death *v.* Pittsburg Bank, 1 Iowa 382.

59. Underwood *v.* Wood, 93 Ky. 177, 19 S. W. 405, 14 Ky. L. Rep. 129, 15 L. R. A. 825; Harris *v.* Gwin, 10 Sm. & M. (Miss.) 563; Cooley *v.* Lawrence, 5 Duer (N. Y.) 605, 12 How. Pr. 176; Seebor *v.* Hess, 5 Paige (N. Y.) 85; Parker *v.* Williams, 4 Paige (N. Y.) 439. See Hyre *v.* Hoover, 3 W. Va. 11. See also Appearances, 3 Cyc. 515.

60. *California.*— Johnson *v.* Wide West Min. Co., 22 Cal. 479.

Georgia.— Strickland *v.* Griffin, 70 Ga. 541.

Indiana.— Flagg *v.* Sloan, 16 Ind. 432; Wallace *v.* McVey, 6 Ind. 300; Indiana Cent. R. Co. *v.* State, 3 Ind. 421; Vance *v.* Workman, 8 Blackf. 305.

Iowa.— Minneapolis, etc., R. Co. *v.* Chicago, etc., R. Co., 116 Iowa 681, 88 N. W. 1082; Ewell *v.* Greenwood, 26 Iowa, 377.

Maryland.— Barnum *v.* Gordon, 28 Md. 85; Todd *v.* Pratt, 1 Harr. & J. 465.

Michigan.— Boinay *v.* Coats, 17 Mich. 411.

Nebraska.— State *v.* Baker, 62 Nebr. 840, 88 N. W. 124.

Nevada.— Lady Bryan Gold, etc., Min. Co. *v.* Lady Bryan Min. Co., 4 Nev. 414.

New Jersey.— Ross *v.* Elizabeth-Town, etc., R. Co., 2 N. J. Eq. 422. See Kempson *v.* Kempson, 61 N. J. Eq. 303, 48 Atl. 244.

New York.— Babcock *v.* Clark, 23 Hun 391; Vandervoort *v.* Astoria, 1 Ch. Sent. 50. See Hallenborg *v.* Greene, 66 N. Y. App. Div. 590, 73 N. Y. Suppl. 403.

Pennsylvania.— Cassidy *v.* Knapp, 167 Pa. St. 305, 31 Atl. 638; Blair *v.* Boggs Tp. School Dist., 31 Pa. St. 274; Morse *v.* O'Reilly, 6 Pa. L. J. 501. See also Coal Ridge Imp., etc., Co. *v.* Welsch, 16 Pa. Co. Ct. 465.

Washington.— Larsen *v.* Winder, 14 Wash. 109, 44 Pac. 123, 53 Am. St. Rep. 864.

United States.— *In re* Cary, 10 Fed. 622; Morse *v.* O'Reilly, 17 Fed. Cas. No. 9,858; Wynn *v.* Wilson, 30 Fed. Cas. No. 18,116, Hempst. 698.

England.— Lord Byron *v.* Johnston, 2 Meriv. 29, 16 Rev. Rep. 135, 35 Eng. Reprint 851.

Canada.— MacDonald *v.* Charlebois, 10 Can. L. T. Occ. Notes 385, 7 Manitoba 35; Canadian Pac. Nav. Co. *v.* Vancouver, 2 Brit. Col. 298; Hart *v.* Rainville, 15 Quebec Super. Ct. 17; Kane *v.* Montreal Tel. Co., 20 L. C. Jur. 120.

See 27 Cent. Dig. tit. "Injunction," § 315.

Injunction suspending business of corporation.— In some states there are code provisions that the general and ordinary business of a corporation shall not be suspended by injunction until after notice and a hearing. Fischer *v.* San Francisco Super. Ct., 110 Cal. 129, 42 Pac. 561; Hobbs *v.* Amador, etc., Canal Co., 66 Cal. 161, 4 Pac. 1147; Golden Gate Consol. Hydraulic Min. Co. *v.* Yuba County Super. Ct., 65 Cal. 187, 3 Pac. 628; New York *v.* Starin, 56 N. Y. Super. Ct. 153, 2 N. Y. Suppl. 346; Ciancimino *v.* Man, 1 Misc. (N. Y.) 121, 20 N. Y. Suppl. 702; Howlett *v.* New York, etc., R. Co., 14 Abb. N. Cas. (N. Y.) 328. See also Bay Land, etc., Co. *v.* Washburn, 79 Wis. 423, 48 N. W. 492. An *ex parte* injunction granted in such cases contrary to the statute is void. Wilkie *v.* Rochester, etc., R. Co., 12 Hun (N. Y.) 242.

An injunction to restrain the prosecution of an appeal will be denied where no notice of the application was given to appellant. State *v.* Ruff, 6 Ind. App. 38, 33 N. E. 124.

Verification on information and belief.— Where the allegations in the complaint are verified on information and belief, an injunction should not be granted except after notice. Dinehart *v.* La Fayette, 19 Wis. 677.

A mandatory injunction will not be issued except on proper notice (People *v.* Lake County Dist. Ct., 29 Colo. 277, 68 Pac. 224, 93 Am. St. Rep. 61; Smith *v.* People, 2 Colo. App. 99, 29 Pac. 924), but a temporary restraining order to maintain the *status quo* may be made without notice on such an application (Chicago, etc., R. Co. *v.* Burlington, etc., R. Co., 34 Fed. 481).

After a notice has been served, and the hearing pursuant thereto has not yet been reached, an injunction should not be granted *ex parte*. Graham *v.* Campbell, 7 Ch. D. 490, 47 L. J. Ch. 593, 38 L. T. Rep. N. S. 195, 26 Wkly. Rep. 336.

Leave of court to give notice.— A motion for an injunction cannot be made after notice given and before appearance, unless leave of court to give such notice has been obtained and the notice expresses that fact. Johnson *v.* Cass, 11 Grant Ch. (U. C.) 117; Cook *v.* ——, 4 L. J. Ch. O. S. 141.

is this the rule after a defendant has answered or is otherwise before the court.[61] Such notice is always required where there is no showing of injury likely to occur before a hearing can be had.[62]

2. Cases of Emergency. If it is made to appear to the satisfaction of the court that an irreparable injury will probably occur if a restraining order is delayed until notice of the application can be given, the order will usually be granted *ex parte* to remain in force until a preliminary hearing can be had.[63] This power should be exercised with caution,[64] the granting of such an order resting in the

In New York the irregularity of granting an injunction after answer without notice, thereof, as required by Code Civ. Proc. § 609, is not cured by continuing the injunction on an order to show cause, in case such order to show cause and the injunction were made by a judge without jurisdiction to entertain applications therefor. Rhodes *v.* Wheeler, 48 N. Y. App. Div. 410, 63 N. Y. Suppl. 184.

Service upon the mayor of a municipal corporation is service upon every member of the corporation. Davis *v.* New York, 1 Duer (N. Y.) 451.

61. *New Jersey.*—Buckley *v.* Corse, 1 N. J. Eq. 504.

New York.— Rhodes *v.* Wheeler, 48 N. Y. App. Div. 410, 63 N. Y. Suppl. 184; Snediker *v.* Pearson, 2 Barb. Ch. 107; Bloomfield *v.* Snowden, 2 Paige 355.

North Carolina.— Hemphill *v.* Moore, 104 N. C. 379, 10 S. E. 313.

Oklahoma.— Couch *v.* Orne, 3 Okla. 508, 41 Pac. 368.

England.— Langham *v.* Great Northern R. Co., 1 De G. & Sm. 486, 11 Jur. 839, 16 L. J. Ch. 437, 5 R. & Can. Cas. 269, 63 Eng. Reprint 1160; Collard *v.* Cooper, 6 Madd. 190, 56 Eng. Reprint 1064; Perry *v.* Weller, 3 Russ. 519, 3 Eng. Ch. 519, 38 Eng. Reprint 670; Marasco *v.* Boiton, 2 Ves. 112, 28 Eng. Reprint 74. But see Petley *v.* Eastern Counties R. Co., 8 L. J. Ch. 209, 8 Sim. 483, 8 Eng. Ch. 483, 59 Eng. Reprint 193; Bell *v.* Hull, etc., R. Co., 1 R. & Can. Cas. 616.

See 27 Cent. Dig. tit. "Injunction," § 315.

62. *Florida.*— Richardson *v.* Kittlewell, 45 Fla. 551, 33 So. 984.

Illinois.— General Gas Co. *v.* Stuart, 69 Ill. App. 560; Becker *v.* Defebaugh, 66 Ill. App. 504.

Michigan.— Toledo, etc., R. Co. *v.* Detroit, etc., R. Co., 61 Mich. 9, 27 N. W. 715.

New York.— Androvette *v.* Bowne, 4 Abb. Pr. 440, 15 How. Pr. 75.

Washington.— *In re* Groen, 22 Wash. 53, 60 Pac. 123.

United States.— Worth Mfg. Co. *v.* Bingham, 116 Fed. 785, 54 C. C. A. 119; Central Trust Co. *v.* Wabash, etc., R. Co., 25 Fed. 1.

See 27 Cent. Dig. tit. "Injunction," § 315.

63. *Arkansas.*— *Ex p.* Martin, 13 Ark. 198, 56 Am. Dec. 321.

California.— Eureka Lake, etc., Canal Co. *v.* Yuba County Super. Ct., 66 Cal. 311, 5 Pac. 490; Golden Gate Consol. Hydraulic Min. Co. *v.* Yuba County Super. Ct., 65 Cal. 187, 3 Pac. 628.

Delaware.— Davis *v.* Browne, 2 Del. Ch. 188.

Florida.— Lewton *v.* Hower, 18 Fla. 872; Swepson *v.* Call, 13 Fla. 337; Allen *v.* Hawley, 6 Fla. 142, 63 Am. Dec. 198.

Georgia.— Jackson *v.* Byne, 56 Ga. 525; Burchard *v.* Boyce, 21 Ga. 6; Semmes *v.* Columbus, 19 Ga. 471.

Illinois.— Williams *v.* Chicago Exhibition Co., 188 Ill. 19, 58 N. E. 611; Itasca *v.* Schroeder, 182 Ill. 192, 55 N. E. 50; Parish *v.* Vance, 110 Ill. App. 50; New Music Hall Co. *v.* Orpheon Music Hall Co., 100 Ill. App. 278; Hill *v.* Tarbel, 91 Ill. App. 272; Chicago Exhibition Co. *v.* Illinois State Bd. of Agriculture, 77 Ill. App. 339; Saratoga European Hotel, etc., Co. *v.* Mossler, 76 Ill. App. 688; Henderson *v.* Flanagan, 75 Ill. App. 283.

Indiana.— Indiana Cent. R. Co. *v.* State, 3 Ind. 421.

Maryland.— Thompson Scenic R. Co. *v.* Young, 90 Md. 278, 44 Atl. 1024; Bosley *v.* Susquehanna Canal, 3 Bland 63.

New Jersey.— Thomas Iron Co. *v.* Allentown Min. Co., 28 N. J. Eq. 77; Perkins *v.* Collins, 3 N. J. Eq. 482; Ross *v.* Elizabeth-Town, etc., R. Co., 2 N. J. Eq. 422; Buckley *v.* Corse, 1 N. J. Eq. 504.

New York.— Littlejohn *v.* Leffingwell, 40 N. Y. App. Div. 13, 57 N. Y. Suppl. 839; Murray *v.* Knapp, 62 Barb. 566, 42 How. Pr. 462; Springsteen *v.* Powers, 4 Rob. 624; Becker *v.* Hager, 8 How. Pr. 68; Ogden *v.* Kip, 6 Johns. Ch. 160.

South Carolina.— Watson *v.* Citizens' Sav. Bank, 5 S. C. 159.

Washington.— Rockford Watch Co. *v.* Rumpf, 12 Wash. 647, 42 Pac. 213.

United States.— New York *v.* Connecticut, 4 Dall. 3, 1 L. ed. 715; Jones *v.* Dimes, 130 Fed. 638; Payne *v.* Kansas, etc., R. Co., 46 Fed. 546; Chicago, etc., R. Co. *v.* Burlington, etc., R. Co., 34 Fed. 481; Love *v.* Fendall, 15 Fed. Cas. No. 8,547, 1 Cranch C. C. 34.

England.— London, etc., Banking Co. *v.* Lewis, 21 Ch. D. 490, 47 L. T. Rep. N. S. 501, 31 Wkly. Rep. 233; Ramsbottom *v.* Freeman, 4 Beav. 145, 10 L. J. Ch. 362, 49 Eng. Reprint 294; Crawford *v.* Scott, 6 Jur. 163; Anonymous, 1 L. J. Ch. O. S. 3; Acraman *v.* Bristol Dock Co., 1 Russ. & M. 321, 5 Eng. Ch. 321, 39 Eng. Reprint 124; Home *v.* Thompson, Sau. & Sc. 615; Mills *v.* Pearson, 4 Y. & C. Exch. 468.

Canada.— Wilmot *v.* Maitland, 2 Grant Ch. (U. C.) 556; Bolduc *v.* Prevost, 31 L. C. Jur. 68.

See 27 Cent. Dig. tit. "Injunction," § 315.

64. State *v.* Judge Civ. Dist. Ct., 51 La. Ann. 1768, 26 So. 374; Ross *v.* Elizabeth-Town, etc., R. Co., 2 N. J. Eq. 422; Crowder

sound discretion of the court.[65] Whether a temporary injunction should be granted in a particular case without notice depends on the special facts of that case.[66] The complainant must make out a very clear case as to the propriety of such an *ex parte* remedy.[67]

3. Waiver of Notice. The want of proper notice as required by statute or otherwise is waived by defendant if he appears and resists the application by answer, motion, or affidavit.[68]

4. Service of Notice. Notice of motion must be served within the time provided by rule of court or statute,[69] and if no time is provided, then within a reasonable time.[70]

F. Security Required on Application For Preliminary Injunction — 1. Necessity. As a condition to the granting of a temporary injunction, plaintiff may be required to make a deposit or give a bond to cover the damages resulting from the injunction.[71] In many states the giving of an injunction bond is by statute made an absolute prerequisite to the right to a preliminary injunction or even to a temporary restraining order.[72] Where there is no statutory provision

v. Tinkler, 19 Ves. Jr. 618, 13 Rev. Rep. 267, 34 Eng. Reprint 645.

65. Thomas Iron Co. *v.* Allentown Min. Co., 28 N. J. Eq. 77; Perkins *v.* Collins, 3 N. J. Eq. 482; Buckley *v.* Corse, 1 N. J. Eq. 504; Proctor *v.* Soulier, 82 Hun (N. Y.) 353, 31 N. Y. Suppl. 472; Morris *v.* New York, 7 N. Y. Suppl. 943; Kalbitzer *v.* Goodhue, 52 W. Va. 435, 44 S. W. 264; Jones *v.* Dimes, 130 Fed. 638.

66. Tatem *v.* Gilpin, 1 Del. Ch. 13; Perkins *v.* Collins, 3 N. J. Eq. 482; Capner *v.* Flemington Min. Co., 3 N. J. Eq. 467; Buckley *v.* Corse, 1 N. J. Eq. 504; Hallenborg *v.* Greene, 66 N. Y. App. Div. 590, 73 N. Y. Suppl. 403; Collard *v.* Cooper, 6 Madd. 190, 56 Eng. Reprint 1064.

67. Sprague *v.* Monarch Book Co., 105 Ill. App. 530; Suburban Constr. Co. *v.* Naugle, 70 Ill. App. 384; Weaver *v.* Toney, 107 Ky. 419, 54 S. W. 732, 21 Ky. L. Rep. 1157, 20 L. R. A. 105; *In re* Groen, 22 Wash. 53, 60 Pac. 123.

The fact that defendant may evade service of process upon him in case notice be given him does not make out such a case of emergency as to justify an *ex parte* injunction. Henderson *v.* Flanagan, 75 Ill. App. 283.

68. Williams *v.* Chicago Exhibition Co., 188 Ill. 19, 58 N. E. 611; Chicago Bd. of Trade *v.* Weare, 105 Ill. App. 289; Cook County Brick Co. *v.* Kaehler, 83 Ill. App. 448; Hemphill *v.* Moore, 104 N. C. 379, 10 S. E. 313; Brown *v.* Pacific Mail Steamship Co., 4 Fed. Cas. No. 2,025, 5 Blatchf. 525.

Defective notice.— The fact that the notice served on defendant states that more is asked than leave was given to ask does not vitiate the notice. Defects in the mode of service of the notice are waived by defendant's demanding copies of plaintiff's affidavit. McDonald *v.* Charlebois, 7 Manitoba 35.

69. Hovey *v.* McCrea, 4 How. Pr. (N. Y.) 31.

70. Peltier *v.* Peltier, Harr. (Mich.) 19; New York *v.* Connecticut, 4 Dall. (U. S.) 1, 1 L. ed. 715; Heron *v.* Swisbee, 13 Grant Ch. (U. C.) 438; Canada Paint Co. *v.* Johnson, 4 Quebec 253.

71. *Alabama.*— Thorington *v.* Gould, 59 Ala. 461.

California.— Alaska Imp. Co. *v.* Hirsch, 119 Cal. 249, 47 Pac. 124, 51 Pac. 340.

Georgia.— Macon, etc., R. Co. *v.* Gibson, 85 Ga. 1, 11 S. E. 442, 21 Am. St. Rep. 135; Gardner *v.* Waters, 68 Ga. 294.

New York.— Hudson *v.* Thorne, 7 Paige 261.

Tennessee.— Black *v.* Caruthers, 6 Humphr. 87; Bridges *v.* Robinson, 3 Tenn. Ch. 352.

United States.— Staffords *v.* King, 90 Fed. 136, 32 C. C. A. 536.

England.— Graham *v.* Campbell, 7 Ch. D. 490, 47 L. J. Ch. 593, 38 L. T. Rep. N. S. 195, 26 Wkly. Rep. 336; Chappell *v.* Davidson, 3 De G. M. & G. 1, 44 Eng. Reprint 289.

See 27 Cent. Dig. tit. "Injunction," § 323.

Non-resident.— Security for damages resulting from the injunction, if defendant ultimately prevails, should be required where the complainant is a non-resident alien. Lowenfeld *v.* Curtis, 72 Fed. 105.

72. *California.*— McCracken *v.* Harris, 54 Cal. 81.

Connecticut.— Miller *v.* Cross, 73 Conn. 538, 48 Atl. 213.

Florida.— Stockton *v.* Harmon, 32 Fla. 312, 13 So. 833.

Idaho.— Price *v.* Grice, 10 Ida. 443, 79 Pac. 387.

Illinois.— American Fine Art Co. *v.* Voigt, 103 Ill. App. 659.

Louisiana.— Berens *v.* Boutte, 31 La. Ann. 112 (Code Pr. art. 739, exempts complainant from necessity of giving bond in certain cases); Witkodski *v.* Selby, 15 La. Ann. 328; Lafon *v.* Gravier, 1 Mart. N. S. 243; Canby *v.* Gerodias, McGloin 217.

Michigan.— Lawton *v.* Richardson, 115 Mich. 12, 72 N. W. 988.

Nebraska.— Jameson *v.* Bartlett, 63 Nebr. 638, 88 N. W. 860. But see State *v.* Greene, 48 Nebr. 327, 67 N. W. 162, bond not required in cases where a mere temporary restraining order is granted.

New York.— New York Methodist Churches *v.* Barker, 18 N. Y. 463; Potter *v.* Potter, 59 N. Y. App. Div. 140, 69 N. Y.

or it is not imperative, the requirement of a bond is within the discretion of the court.[73]

2. Parties Required to Give Bond. In some states, by statute or otherwise, certain persons or corporations are not required to give security in all, or in particular, actions.[74] The exemption does not extend to the state,[75] or to a bank of the state united with the state as complainants,[76] or to executors or administrators.[77]

Suppl. 183; Manley *v.* Leggett, 62 Hun 562, 17 N. Y. Suppl. 68; Pratt *v.* Underwood, 4 N. Y. Civ. Proc. 167; Tappen *v.* Crissey, 64 How. Pr. 496.

North Carolina.— Wilson *v.* Featherstone, 120 N. C. 449, 27 S. E. 121; James *v.* Withers, 114 N. C. 474, 19 S. E. 367; Miller *v.* Parker, 73 N. C. 58.

Pennsylvania.— Erie, etc., R. Co. *v.* Casey, 26 Pa. St. 287; Wheeling's Appeal, 1 Pa. Cas. 213, 3 Atl. 12; Holl *v.* Holl, 5 Pa. L. J. Rep. 108, 11 Pa. L. J. 224; Dull *v.* Holl, 1 Phila. 258.

South Carolina.— Roberts *v.* Pipkin, 63 S. C. 252, 41 S. E. 300; Smith *v.* Smith, 51 S. C. 379, 22 S. E. 227.

Washington.— Swope *v.* Seattle, 35 Wash. 69, 76 Pac. 517; Cherry *v.* Western Washington Industrial Exposition Co., 11 Wash. 586, 40 Pac. 136; Keeler *v.* White, 10 Wash. 420, 38 Pac. 1134.

Canada.— Dobie *v.* Presbyterian Church of Canada, 23 L. C. Jur. 71; Baril *v.* Pariseau, 2 Montreal Super. Ct. 352.

See 27 Cent. Dig. tit. "Injunction," § 323.

In actions to restrain proceedings at law security is necessary. Elliott *v.* Osborne, 1 Cal. 396; Hall *v.* Holmes, 42 Ga. 179; Lemon *v.* Morehead, 8 Blackf. (Ind.) 561; Vial *v.* Moll, 37 La. Ann. 203; Reynolds *v.* Howard, 3 Md. Ch. 331; Walsh *v.* Smyth, 3 Bland (Md.) 9; Carrol *v.* Farmer's, etc., Bank, Harr. (Mich.) 197; Cairo, etc., R. Co. *v.* Titus, 26 N. J. Eq. 94 (construing the statute not to cover the case of an action on a judgment); Cook *v.* Dickerson, 2 Sandf. (N. Y.) 691; Richards *v.* Goldberg, 7 Misc. (N. Y.) 388, 27 N. Y. Suppl. 919 (Code Civ. Proc. § 611, requires a bond only in case issue has been joined in the action to be restrained); Dickey *v.* Craig, 5 Paige (N. Y.) 283; Jenkins *v.* Wilde, 2 Paige (N. Y.) 394; Boker *v.* Curtis, 2 Edw. (N. Y.) 111; Fant *v.* Martin, 10 Rich. (S. C.) 428; Hunt *v.* Smith, 1 Rich. Eq. (S. C.) 277. But see Newman *v.* Frevlin, 42 La. Ann. 720, 7 So. 799.

A bond to prosecute the suit in equity with effect may be required of the complainant. Walsh *v.* Smyth, 3 Bland (Md.) 9.

73. *Georgia.*— Wells *v.* Rountree, 117 Ga. 839, 45 S. E. 215; Smith *v.* Smith, 105 Ga. 106, 31 S. E. 135 (Civ. Code, § 4927, is not applicable when defendant is insolvent); Guerry *v.* Durham, 11 Ga. 9.

Illinois.— Deemar *v.* Boyne, 103 Ill. App. 464 (Rev. St. c. 69, § 9, requires a bond only in the discretion of the court); Greenberg *v.* Holmes, 100 Ill. App. 186.

Kansas.— *In re* Mitchell, 1 Kan. 643.

Louisiana.— State *v.* King, 47 La. Ann. 229, 16 So. 805; Newman *v.* Frevin, 42 La. Ann. 720, 7 So. 799; Corner *v.* Zuntz, 14 La. Ann. 861.

Maryland.— White *v.* Davidson, 8 Md. 169, 63 Am. Dec. 699.

Michigan.— American Foundry, etc., Co. *v.* Charlevoix Cir. Judge, (1904) 101 N. W. 210.

New Jersey.— Ely *v.* Crane, 37 N. J. Eq. 157.

New York.— Gray *v.* Redfield, 4 Daly 95.

South Carolina.— Meinhard *v.* Youngblood, 37 S. C. 223, 15 S. E. 947.

United States.— Briggs *v.* Neal, 120 Fed. 224, 56 C. C. A. 572 [*reversing* 110 Fed. 477].

See 27 Cent. Dig. tit. "Injunction," § 323.

Illustrations of cases where bond not necessary.— A statute requiring a bond does not apply to cases where the right to the injunction is itself given by statute and the case is absolutely within the latter statute. Hutchinson *v.* New York Cent. Mills, 2 Abb. Pr. (N. Y.) 394. Nor does it apply to an injunction restraining all actions against an insolvent company or interference with its assets until further order of court, where such injunction is incidental to a receivership. Phœnix Foundry, etc., Co. *v.* North River Constr. Co., 6 N. Y. Civ. Proc. 106. And it is not necessary to require an injunction bond when the answers have come in and show on their face the propriety of a personal injunction. Alexander *v.* Ghiselin, 5 Gill (Md.) 138. So where the adjudication is in effect final, the complainant cannot be required to give the bond required by Rev. St. (1899) § 3637. Davison *v.* Hough, 165 Mo. 561, 65 S. W. 731. Where the complainant's right is clear, and the infraction of that right established, he will not be required to give security for such damages as defendant may sustain by reason of the injunction. Dodd *v.* Flavell, 17 N. J. Eq. 255.

A bond is void when required by an officer who has no authority to require it. Fant *v.* Martin, 10 Rich. (S. C.) 428.

74. Atty.-Gen. *v.* Albany Hotel Co., [1896] 2 Ch. 696, 65 L. J. Ch. 885, 75 L. T. Rep. N. S. 195, bond not required of the crown.

A public officer suing to prevent a misappropriation of public funds is not required to give the bond provided for in Rev. St. § 5576. Forsythe *v.* Winans, 44 Ohio St. 277, 7 N. E. 13.

75. Com. *v.* Franklin Canal Co., 21 Pa. St. 117.

76. *Ex p.* State, 15 Ark. 263.

77. Habersham *v.* Carter, R. M. Charlt. (Ga.) 526; Osborn *v.* Ellis, 1 Ind. 451; Mahan *v.* Tydings, 10 B. Mon. (Ky.) 351; Brown *v.* Speight, 30 Miss. 45. *Contra*, Lo-

So it has been held that the exemption is not operative in the case of receivers,[78] or trustees.[79]

3. SUFFICIENCY OF THE BOND — a. Form and Terms. All that is required is that the bond should afford the security required by law or by the court.[80] When the terms of the bond are prescribed by the court the bond must comply with the court's order.[81] When the terms are prescribed by statute, the bond must at least substantially comply therewith.[82] Defects and irregularities of form are not ordinarily fatal to the injunction, for they may be cured by construction, or amended, or even overlooked when unimportant.[83] So a bond will be sustained, although it does not literally comply with the statute in naming the obligee.[84]

b. Amount. The amount to be named as penalty in the bond should be fixed by the judge,[85] and is very generally left wholly to his discretion.[86] It should be large enough to cover all costs and damages that may reasonably be expected to accrue in case the complainant is not entitled to the injunction.[87]

4. SURETIES. It is generally held that the complainant himself need not sign the bond.[88] And it is discretionary in some states whether to require sureties.[89] The sureties may be required to justify on notice or request,[90] the amounts in

max *v.* Picot, 2 Rand. (Va.) 247; State *v.* Johnson, 28 W. Va. 56.

78. Cherry *v.* Western Washington Industrial Exposition Co., 11 Wash. 586, 40 Pac. 136; Keeler *v.* White, 10 Wash. 420, 38 Pac. 1134.

79. Galt *v.* Carter, 6 Munf. (Va.) 245.

80. Stanbrough *v.* Scott, 1 Rob. (La.) 43.

Estoppel to object.— Defendant cannot question the sufficiency of the bond while at the same time attempting to hold the obligors thereon. Walters *v.* Faulk, McGloin (La.) 236.

81. *Illinois.* — Jones *v.* Gray, 91 Ill. App. 79.

Louisiana.— Speyer *v.* Miller, 108 La. 204, 32 So. 524, 61 L. R. A. 781.

New York.— See Corbin *v.* Casina Land Co., 26 N. Y. App. Div. 408, 49 N. Y. Suppl. 929, holding that if the order of the court requires a bond much broader in its terms than required by statute it should be modified.

North Carolina. — Bynum *v.* Powe, 101 N. C. 416, 8 S. E. 139.

West Virginia.— State *v.* Purcell, 31 W. Va. 44, 5 S. E. 301, holding that the fact that the terms of the bond are more onerous than necessary is no objection.

See 27 Cent. Dig. tit. "Injunction," § 328.

A private letter guaranteeing payment of costs and damages is not sufficient under the Quebec Injunction Act of 1878. Presbyterian Church *v.* Dobie, 23 L. C. Jur. 229.

82. Stirlen *v.* Neustadt, 50 Ill. App. 378; Palmer *v.* Foley, 71 N. Y. 106; St. Peter Episcopal Church *v.* Varian, 28 Barb. (N. Y.) 644; White *v.* Clay, 7 Leigh (Va.) 68; Yale *v.* Flanders, 4 Wis. 96.

Defects are waived unless they are taken advantage of by motion to correct them or to dissolve. Jones *v.* Gray, 91 Ill. App. 79.

83. Massie *v.* Mann, 17 Iowa 131; Woolfolk *v.* Woolfolk, 22 La. Ann. 206; Union Wharf *v.* Mussey, 48 Me. 307, certain words treated as surplusage.

The omission of the amount of the penalty may be cured by construing the bond in connection with the order of court. Mason *v.* Fuller, 12 La. Ann. 68.

The names of the sureties need not appear in the body of the bond. Hyatt *v.* Washington, 20 Ind. App. 148, 50 N. E. 402, 67 Am. St. Rep. 248.

84. Buckner *v.* Stewart, 34 Ala. 529; Collins *v.* Ripley, 8 Iowa 129; Pargoud *v.* Morgan, 2 La. 99; Canby *v.* Gerodias, McGloin (La.) 217; Parker *v.* Boyd, (Tex. Civ. App. 1897) 42 S. W. 1031.

85. Speyrer *v.* Miller, 108 La. 204, 32 So. 524, 61 L. R. A. 781; Harman *v.* Howe, 27 Gratt. (Va.) 676. But see Cummins *v.* Miller, 7 Ky. L. Rep. 670.

The order may be amended in case it fails to fix the amount of the bond. Dickenson *v.* McDermott, 13 Tex. 248.

86. New York Bank Note Co. *v.* Kerr, 77 Ill. App. 53; Bell *v.* Riggs, 37 La. Ann. 812; State *v.* Judge Fifth Judicial Dist. Ct., 28 La. Ann. 889; Gulick *v.* Heermans, 6 Luz. Leg. Reg. (Pa.) 227.

The discretion may be abused by fixing an unreasonably large amount. Swope *v.* Seattle, 35 Wash. 69, 76 Pac. 517.

87. Buckner *v.* Stewart, 34 Ala. 529; Crawford *v.* Paine, 19 Iowa 172; Billingslea *v.* Gilbert, 1 Bland (Md.) 566; San Remo Hotel Co. *v.* Brennan, 19 N. Y. Suppl. 276; Gilman *v.* Prentice, 11 N. Y. Civ. Proc. 310; Loveland *v.* Burnham, 1 Barb. Ch. (N. Y.) 65.

It is not reversible error to require too small a bond, in case the injunction was properly granted. Drake *v.* Phillips, 40 Ill. 388.

88. Pence *v.* Durbin, 1 Ida. 550; State *v.* Eggleston, 34 Kan. 714, 10 Pac. 3; Leffingwell *v.* Chave, 5 Bosw. (N. Y.) 703, 10 Abb. Pr. 472, 19 How. Pr. 54.

89. Meinhard *v.* Strickland, 29 S. C. 491, 7 S. E. 838.

90. McSherry *v.* Pennsylvania Consol. Gold Min. Co., 97 Cal. 637, 32 Pac. 711; Wilson

which they must justify varying from the amount of the penalty in the bond to double that amount.[91]

5. Execution and Approval of Bond. The statutory and other requirements as to execution and acknowledgment of the bond must be complied with;[92] and it must be approved by the proper officer.[93]

6. New or Additional Security. Additional security may be required on the insolvency of a surety,[94] or when for any other reason the security appears to be inadequate.[95] Where an injunction has issued subsequent to a temporary restraining order or to a former injunction that has been dissolved, a new bond should be filed,[96] although it seems that the old bond may be continued.[97]

7. Effect of Failure to Give Bond. Where the statute requires that the party applying for an injunction shall, as a condition precedent to its issuance, execute a bond or undertaking, with sufficient sureties, an injunction issued without such bond or undertaking is inoperative and void and may be discharged without danger of punishment for contempt.[98] But where the granting of a

v. Eagleson, 3 Ida. 17, 71 Pac. 613; Lee *v.* Watson, 15 Mont. 228, 38 Pac. 1077.

91. Dangel *v.* Levy, 1 Ida. 722; Lee *v.* Watson, 15 Mont. 228, 38 Pac. 1077; Loveland *v.* Burnham, 1 Barb. Ch. (N. Y.) 65.

92. State Bank *v.* Wilson, 19 La. Ann. 1; Harrington *v.* American L. Ins., etc., Co., 1 Barb. (N. Y.) 244; Loveland *v.* Burnham, 1 Barb. Ch. (N. Y.) 65; Harman *v.* Howe, 27 Gratt. (Va.) 676.

93. *Illinois.*—Rutan *v.* Lagonda Nat. Bank, 72 Ill. App. 35.

Indiana.— McGragor *v.* State, Smith 179.

Kentucky.— Greathouse *v.* Hord, 1 Dana 105, duty of the clerk to approve the security.

Maryland.— Burgess *v.* Lloyd, 7 Md. 178.

New York.— Sheldon *v.* Allerton, 1 Sandf. 700; Boker *v.* Curtis, 2 Edw. 111.

See 27 Cent. Dig. tit. "Injunction," § 332.

Mode of raising objection.— The objection that the bond was not approved by the court must be taken advantage of by motion to dissolve and not at the hearing. Boston *v.* Nichols, 47 Ill. 353.

Presumption.— In the absence of evidence to the contrary, it will be presumed that the court acted regularly in approving an injunction bond. Silver *v.* Smith, 106 Ill. App. 411.

The court is not bound to approve of sureties whose solvency and sufficiency are unknown to the court. Mourain *v.* Devall, 12 La. 93.

94. Randall *v.* Carpenter, 22 Hun (N. Y.) 571.

If the other sureties are solvent and sufficient, the court may in its discretion hold the bond to be sufficient. Willett *v.* Stringer, 15 How. Pr. (N. Y.) 310.

95. *Delaware.*— Palmer *v.* Ellegood, 4 Del. Ch. 53.

Iowa.— Crawford *v.* Paine, 19 Iowa 172.

Louisiana.— Woolfolk *v.* Woolfolk, 22 La. Ann. 206.

New York.—Ryckman *v.* Coleman, 21 How. Pr. 404.

Tennessee.—Moredock *v.* Williams, 1 Overt. 325.

Texas.— Downes *v.* Monroe, 42 Tex. 307.

Virginia.— Ross *v.* Pleasants, 1 Hen. & M. 1.

West Virginia.— Mason *v.* Harper's Ferry Bridge Co., 17 W. Va. 396; Hutchinson *v.* Landcraft, 4 W. Va. 312.

United States.— Goldmark *v.* Kreling, 25 Fed. 349.

England.— Dobie *v.* Presbyterian Church of Canada, 23 L. C. Jur. 71.

See 27 Cent. Dig. tit. "Injunction," § 333.

96. State *v.* Greene, 48 Nebr. 327, 67 N. W. 162; Disbro *v.* Disbro, 37 How. Pr. (N. Y.) 147.

97. Preiss *v.* Cohen, 112 N. C. 278, 17 S. E. 520.

An order continuing an injunction pending appeal continues the injunction bond already executed. Davis *v.* Connolly, 104 Ky. 87, 46 S. W. 679, 20 Ky. L. Rep. 411.

98. *California.*— Elliott *v.* Osborne, 1 Cal. 396.

Kansas.— Van Fleet *v.* Stout, 44 Kan. 523, 24 Pac. 960; State *v.* Kearny County, 42 Kan. 739, 22 Pac. 735; State *v.* Rush County, 35 Kan. 150, 10 Pac. 535.

Kentucky.— Pell *v.* Lander, 8 B. Mon. 554.

Michigan.— Lawton *v.* Richardson, 115 Mich. 12, 72 N. W. 988.

New York.— Carpenter *v.* Keating, 10 Abb. Pr. N. S. 223.

Ohio.— Diehl *v.* Frieston, 37 Ohio St. 473; *In re* George, 5 Ohio Cir. Ct. 207, 3 Ohio Cir. Dec. 104.

Canada.— Weekes *v.* Underfeed Stoker Co., 19 Ont. Pr. 299.

See 27 Cent. Dig. tit. "Injunction," § 327.

Want of bond vitiates proceedings.— The want of a bond for an injunction vitiates all the proceedings in an injunction suit subsequent to the order commanding the writ of injunction to issue. Williams *v.* Huff, Dall. (Tex.) 554.

Where two have joined in an application for an injunction, the failure of one to execute the bond does not affect the right of the other who has given a sufficient bond and who is before the court standing on his own rights. State *v.* Judge Cir. Dist. Ct., 46 La. Ann. 78, 14 So. 423.

Injunction against judgment at law.— An

restraining order without a bond is merely an irregularity which does not render it void, the subsequent execution of a proper bond will cure the irregularity and render the proceedings valid.[99] While the bond is mandatory, if the complainant offers to supply it, this may be allowed even in the court of last resort.[1] The want of a bond or undertaking is good ground for a motion to dissolve the injunction, but the proper order in such case is that a bond be executed within a reasonable time or the injunction be dissolved in default thereof.[2] And if defendant waits an unreasonable time before making his objection, he will be presumed to have waived the irregularity.[3]

G. Pleading — 1. Bill or Complaint — a. Necessity. Since a permanent injunction can only be granted when the facts stated in the complaint show that plaintiff is entitled to the relief sought, a complaint is necessary.[4]

b. Sufficiency — (i) *In General.*[5] As the granting of an injunction rests in some degree in the discretion of the chancellor, allegations in the complaint should show candor and frankness.[6] Omission of material facts known to plaintiff will preclude the granting of relief.[7] An injunction will be denied if the allegations of a bill are inconsistent and contradictory,[8] or if the allegations are in the alternative.[9] An injunction may be refused because the allegations are argumentative and inferential.[10] If an action at law is sought to be enjoined, the complaint, in addition to alleging facts showing that the remedy at law is inadequate,

order from the chancellor granting an injunction to a judgment at common law upon the usual terms is not sufficient to stay the proceedings until the complainant has complied with the terms of the order by giving bond and security; and in such case it is no contempt of court for plaintiff or the sheriff to proceed to sell under the execution, notwithstanding the chancellor's order was shown to them. Clarke *v.* Hoomes, 2 Hen. & M. (Va.) 23.

99. Bennett *v.* Richards, (Ky. 1904) 83 S. W. 154; Manley *v.* Leggett, 62 Hun (N. Y.) 562, 17 N. Y. Suppl. 68; McKay *v.* Chapin, 120 N. C. 159, 26 S. E. 701; Richards *v.* Baurman, 65 N. C. 162; Crouse *v.* Bedell, 11 Pa. Super. Ct. 598.

It is no ground for the dismissal of the suit that a temporary restraining order was issued without the required bond. Gallagher *v.* Johnson, 1 Ohio S. & C. Pl. Dec. 264.

1. McKay *v.* Chapin, 120 N. C. 159, 26 S. E. 701; James *v.* Withers, 114 N. C. 474, 19 S. E. 367; Miller *v.* Parker, 73 N. C. 58.

2. *Alabama.*— Jones *v.* Ewing, 56 Ala. 360.

California.— Neumann *v.* Moretti, 146 Cal. 31, 79 Pac. 512; Alaska Imp. Co. *v.* Hirsch, 119 Cal. 249, 47 Pac. 124, 51 Pac. 340; McCracken *v.* Harris, 54 Cal. 81.

Florida.— Gamble *v.* Cambell, 6 Fla. 347.

Maryland.— Alexander *v.* Ghiselin, 5 Gill 138.

Mississippi.— Smith *v.* Harrington, 49 Miss. 771; Miller *v.* McDougall, 44 Miss. 682.

New York.— O'Donnell *v.* McMurn, 3 Abb. Pr. 391; Cayuga Bridge Co. *v.* Magee, 2 Paige 116.

Texas.— Ricker *v.* Douglas, 75 Tex. 180, 12 S. W. 975.

West Virginia.— Chesapeake, etc., R. Co. *v.* Patton, 5 W. Va. 234.

England.— Fort *v.* Bank of England, 10 Sim. 616, 16 Eng. Ch. 616, 59 Eng. Reprint 754.

Canada.— Moon *v.* Bullock, 6 Quebec Pr. 59.

See 27 Cent. Dig. tit. "Injunction," § 327.

Insufficiency of sureties.— Where the sureties in an injunction bond are insufficient, the court ought not, for that cause, to dissolve the injunction without first giving the complainant reasonable time to procure additional sureties, or to present a sufficient bond. New *v.* Wright, 44 Miss. 202.

3. Howze *v.* Green, 62 N. C. 250.

4. Morgan *v.* Quackenbush, 22 Barb. (N. Y.) 72; New York City Baptist Mission Soc. *v.* Potter, 20 Misc. (N. Y.) 191, 44 N. Y. Suppl. 1051; Austin *v.* Chapman, 11 N. Y. Leg. Obs. 103; Matter of Hallock, 7 Johns. Ch. (N. Y.) 24; Peck *v.* Crane, 25 Vt. 146; Lawson *v.* Morgan, 1 Price 303; Bradley *v.* Barber, 30 Ont. 443; Young *v.* Wright, 8 Ont. 198.

5. Forms of complaints see Kittinger *v.* Buffalo Traction Co., 25 N. Y. App. Div. 329, 49 N. Y. Suppl. 713; Brennan *v.* Schreiner, 20 N. Y. Suppl. 130, 28 Abb. N. Cas. 481; Mackenzie *v.* Soden Mineral Springs Co., 18 N. Y. Suppl. 240, 27 Abb. N. Cas. 402; Myers *v.* Merchants' Nat. Bank, 16 N. Y. Suppl. 58, 27 Abb. N. Cas. 266; Corrigan *v.* Coney Island Jockey Club, 15 N. Y. Suppl. 705, 27 Abb. N. Cas. 294.

6. Moffat *v.* Calvert County Com'rs, 97 Md. 266, 54 Atl. 960; Johnston *v.* Glenn, 40 Md. 200; Edison Storage Battery Co. *v.* Edison Automobile Co., 67 N. J. Eq. 44, 56 Atl. 861; Sharp *v.* Ashton, 3 Ves. & B. 144, 35 Eng. Reprint 433.

7. Sprigg *v.* Western Tel. Co., 46 Md. 67. See also Walker *v.* Burks, 48 Tex. 206.

8. Camp *v.* Matheson, 30 Ga. 170.

9. Ladd *v.* Ramsby, 10 Oreg. 207.

10. Battle *v.* Stephens, 32 Ga. 25; Warsop *v.* Hastings, 22 Minn. 437.

must show the state of the pleadings and the court in which it is pending,[11] and grounds upon which the action at law may be sustained.[12] Where a bill for an injunction refers to another bill pending in the same court and relating to closely connected matter, the allegations of the latter bill may be examined in passing upon the prayer for relief contained in the former.[13]

(II) *DEFINITENESS AND CERTAINTY.*[14] The allegations of the complaint must be definite and certain,[15] and set forth the facts with particularity and minuteness.[16] A material fact should not be left to inference.[17]

(III) *CONCLUSIONS OF LAW.*[18] Facts and not the conclusions or opinions of the pleader must be stated.[19]

11. Carroll *v.* Farmers', etc., Bank, Harr. (Mich.) 197; Teller *v.* Van Deusen, 3 Paige (N. Y.) 33.

12. Worthington *v.* Lee, 61 Md. 530.

13. Bolton *v.* Flournoy, R. M. Charlt. (Ga.) 125.

14. See EQUITY, 16 Cyc. 228.

15. *Alabama.*— Attalla Min., etc., Co. *v.* Winchester, 102 Ala. 184, 14 So. 565; Perry *v.* New Orleans, etc., R. Co., 55 Ala. 413, 28 Am. Rep. 740.

Arkansas.— *Ex p.* Foster, 11 Ark. 304.

California.— Grimes *v.* Linscott, (1895) 40 Pac. 421; Farish *v.* Koon, 40 Cal. 33.

Florida.— Cunningham *v.* Tucker, 14 Fla. 251.

Georgia.— Battle *v.* Stephens, 32 Ga. 25; McGough *v.* Columbus Ins. Bank, 2 Ga. 151, 66 Am. Dec. 382.

Illinois.— Campbell *v.* Paris, etc., R. Co., 71 Ill. 611; Greenberg *v.* Holmes, 100 Ill. App. 186.

Indiana.— Hill *v.* Probst, 120 Ind. 528, 22 N. E. 664; College Corner, etc., Gravel Road Co. *v.* Moses, 77 Ind. 139.

Kentucky.— Hunter *v.* Bertram, 6 Ky. L. Rep. 593.

Maine.— Westbrook Mfg. Co. *v.* Warren, 77 Me. 437, 1 Atl. 246.

Maryland.— Lamm *v.* Burrell, 69 Md. 272, 14 Atl. 682; Worthington *v.* Lee, 61 Md. 530.

Michigan.— Carroll *v.* Farmers', etc., Bank, Harr. 197.

Nebraska.— Clark *v.* Dayton, 6 Nebr. 192.

New Jersey.— Heckscher *v.* Trotter, 41 N. J. Eq. 502, 5 Atl. 652; Hewitt *v.* Kuhl, 25 N. J. Eq. 24; Rawnsley *v.* Trenton Mut. L. Ins. Co., 9 N. J. Eq. 95.

New York.— McHenry *v.* Jewitt, 90 N. Y. 58; Pierce *v.* Wright, 6 Lans. 306; McHenry *v.* Hazard, 45 Barb. 657; Roosevelt *v.* Edson, 51 N. Y. Super. Ct. 227; Redfield *v.* Middleton, 7 Bosw. 649; Crocker *v.* Baker, 3 Abb. Pr. 182; Teller *v.* Van Deusen, 3 Paige 33.

North Carolina.— Long *v.* Cross, 58 N. C. 323; Ashe *v.* Hale, 40 N. C. 55.

Oregon.— Dorothy *v.* Pierce, 27 Oreg. 373, 41 Pac. 668; Longshore Printing Co. *v.* Howell, 26 Oreg. 527, 38 Pac. 547, 46 Am. St. Rep. 640, 28 L. R. A. 464.

Pennsylvania.— Wilson *v.* Keely, 19 Phila. 396.

Tennessee.— Plowman *v.* Satterwhite, 3 Tenn. Ch. 1.

Texas.— Ewing *v.* Duncan, 81 Tex. 230, 16 S. W. 1000; Buie *v.* Cunningham, (Civ. App. 1895) 29 S. W. 801; Nalle *v.* Austin, (Civ. App. 1893) 21 S. W. 375; Harrison *v.* Crumb, 1 Tex. App. Civ. Cas. § 991.

Virginia.— Cleaver *v.* Matthews, 83 Va. 801, 3 S. E. 439.

West Virginia.— Kinports *v.* Rawson, 29 W. Va. 487, 2 S. E. 85.

United States.— St. Louis *v.* Knapp, 104 U. S. 658, 26 L. ed. 883; Whitney Nat. Bank *v.* Parker, 41 Fed. 402; Leo *v.* Union Pac. R. Co., 17 Fed. 273; Brooks *v.* O'Hara, 8 Fed. 529, 2 McCrary 644.

See 27 Cent. Dig. tit. "Injunction," § 227.

16. Minor *v.* Terry, Code Rep. N. S. (N. Y.) 384.

17. Warsop *v.* Hastings, 22 Minn. 437; Philhower *v.* Todd, 11 N. J. Eq. 54; Perkins *v.* Collins, 3 N. J. Eq. 482.

18. See EQUITY, 16 Cyc. 229; and, generally, PLEADING.

19. *District of Columbia.*— McBride *v.* Ross, 13 App. Cas. 576.

Illinois.— Parish *v.* Vance, 110 Ill. App. 50; Chicago Bd. of Trade *v.* Riordan, 94 Ill. App. 298; General Gas Co. *v.* Stuart, 69 Ill. App. 560; Ockenholdt *v.* Frohman, 60 Ill. App. 300; North Chicago St. R. Co. *v.* Cheetham, 58 Ill. App. 318; Northern Electric R. Co. *v.* Chicago, etc., R. Co., 57 Ill. App. 409.

Michigan.— Great Hive L. of M. *v.* Supreme Hive L. of M. W., 129 Mich. 324, 88 N. W. 882.

Mississippi.— Gaillard *v.* Thomas, 61 Miss. 166.

New York.— Melody *v.* Goodrich, 67 N. Y. App. Div. 368, 73 N. Y. Suppl. 741 [*affirmed* in 170 N. Y. 185, 63 N. E. 133]; Balog'i *v.* Lyman, 6 N. Y. App. Div. 271, 39 N. Y. Suppl. 780; Prince Mfg. Co. *v.* Prince Metallic Paint Co., 51 Hun 443, 4 N. Y. Suppl. 348; East River Electric Light Co. *v.* Grant, 57 N. Y. Super. Ct. 553, 9 N. Y. Suppl. 317.

Pennsylvania.— Clopper *v.* Greensburg Borough, 9 Pa. Dist. 598, 31 Pittsb. Leg. J. N. S. 112.

Tennessee.— Fort *v.* Orndoff, 7 Heisk. 167.

United States.— Morris *v.* Bean, 123 Fed. 618; Texas, etc., R. Co. *v.* Kuteman, 54 Fed. 547, 4 C. C. A. 503.

See 27 Cent. Dig. tit. "Injunction," § 228.

Allegations of a mere apprehension or fear of injury, without showing the basis in fact, are insufficient. Parish *v.* Vance, 110 Ill. App. 50; Quin *v.* Havenor, 118 Wis. 53, 94 N. W. 642.

(iv) *Averments on Information and Belief.*[20] An injunction will not ordinarily be granted when the material allegations are made upon information and belief.[21] This rule is strictly applied when the statements are those of the people.[22] An injunction may be granted, however, when the information is alleged to have been obtained from defendant,[23] or where the facts alleged on information are charged to rest within defendant's knowledge and not within the knowledge of plaintiff.[24]

c. Particular Averments — (i) *Description of Plaintiff.* Plaintiff must clearly allege his status so that his right to sue can be determined.[25] It is not sufficient that it may be inferred from an exhibit attached to the bill.[26]

(ii) *Title or Right of Plaintiff.*[27] The complaint must show the title or right of plaintiff,[28] although it is usually sufficient to allege that title is vested

20. See Equity, 16 Cyc. 230.

21. *Florida.*— Cunningham *v.* Tucker, 14 Fla. 251.

Illinois.— Greenberg *v.* Holmes, 100 Ill. App. 186.

New York.— Knapp *v.* Hall, 17 N. Y. Suppl. 437; Hecker *v.* New York, 18 Abb. Pr. 369, 28 How. Pr. 211; People *v.* New York, 9 Abb. Pr. 253; Rateau *v.* Bernard, 12 How. Pr. 464; Jones *v.* Atterbury, Code Rep. N. S. 87; Cole *v.* Savage, Clarke 361; Waddell *v.* Bruen, 4 Edw. 671.

North Carolina.— Patterson *v.* Miller, 57 N. C. 451; Swindall *v.* Bradley, 56 N. C. 353.

Oklahoma.— Tibbits *v.* Miller, 9 Okla. 677, 60 Pac. 95.

Texas.— Ewing *v.* Duncan, 81 Tex. 230, 16 S. W. 1000.

West Virginia.—Lovell *v.* Chilton, 2 W. Va. 410.

United States.— Brooks *v.* O'Hara, 8 Fed. 529, 2 McCrary 644; *In re* Bloss, 3 Fed. Cas. No. 1,562.

England.— Scott *v.* Becher, 4 Price 346, 18 Rev. Rep. 722.

See 27 Cent. Dig. tit. "Injunction," § 230.

22. People *v.* New York, 9 Abb. Pr. (N. Y.) 253.

23. Cole *v.* Savage, Clarke (N. Y.) 361.

24. Greenberg *v.* Holmes, 100 Ill. App. 186; Scott *v.* Becher, 4 Price 346, 18 Rev. Rep. 722.

25. Ayers *v.* Lawrence, 59 N. Y. 192; Seitz *v.* Lafayette Traction Co., 5 Pa. Co. Ct. 469.

Suit by one in behalf of many.— Plaintiff must in the complaint distinctly state that he sues in behalf of all others equally interested with himself. Smith *v.* Lockwood, 2 Edm. Sel. Cas. (N. Y.) 224. *Compare* Glidden *v.* Cincinnati, 11 Ohio Dec. (Reprint) 853, 30 Cinc. L. Bul. 213.

26. Seitz *v.* Lafayette Traction Co., 5 Pa. Co. Ct. 469.

27. See Equity, 16 Cyc. 233.

28. *Alabama.*— Hooper *v.* Birchfield, 138 Ala. 423, 35 So. 351; Roy *v.* Henderson, 132 Ala. 175, 31 So. 457; Perry County Com'rs Ct. *v.* Perry County Medical Soc., 128 Ala. 257, 29 So. 586; McCurry *v.* Gibson, 108 Ala. 451, 18 So. 806, 54 Am. St. Rep. 177; Wharton *v.* Hannon, 101 Ala. 554, 14 So. 630.

Alaska.— McBride *v.* Coy, 1 Alaska 238.

California.— Van Horn *v.* Decrow, 136 Cal. 117, 68 Pac. 473; McBride *v.* Newlin, 129 Cal. 36, 61 Pac. 577; McDermont *v.* Anaheim Union Water Co., 124 Cal. 112, 56 Pac. 779; Davitt *v.* American Bakers' Union, 124 Cal. 99, 56 Pac. 775.

Connecticut.— Fisk *v.* Ley, 76 Conn. 295, 56 Atl. 559; Camp *v.* Charles Thatcher Co., 75 Conn. 165, 52 Atl. 953; Levy *v.* Metropolis Mfg. Co., 73 Conn. 559, 48 Atl. 429.

Florida.— Louisville, etc., R. Co. *v.* Gibson, 43 Fla. 315, 31 So. 230; Brown *v.* Solary, 37 Fla. 102, 19 So. 161; McKinney *v.* Bradford County, 26 Fla. 267, 4 So. 855; Bevill *v.* Smith, 25 Fla. 209, 6 So. 62; Griffin *v.* Fries, 23 Fla. 173, 2 So. 266, 11 Am. St. Rep. 351; Sullivan *v.* Moreno, 19 Fla. 200.

Georgia.— Prey *v.* Oemler, 120 Ga. 223, 47 S. E. 546.

Illinois.— Coquard *v.* National Linseed Oil Co., 171 Ill. 480, 49 N. E. 563; Petillon *v.* Hipple, 90 Ill. 420, 32 Am. Rep. 31; Dill *v.* Wabash Valley R. Co., 21 Ill. 91; Ockenholdt *v.* Frohman, 60 Ill. App. 300; Poyer *v.* Des Plaines, 20 Ill. App. 30.

Indiana.— Kelley *v.* Marion, 161 Ind. 322, 68 N. E. 594; Wabash R. Co. *v.* Engleman, 160 Ind. 329, 66 N. E. 892; O'Brien *v.* Louer, 158 Ind. 211, 61 N. E. 1004; Peoria, etc., R. Co. *v.* Attica, etc., R. Co., 154 Ind. 218, 56 N. E. 210; Beatty *v.* Coble, 142 Ind. 329, 41 N. E. 590; Patoka Tp. *v.* Hopkins, 131 Ind. 142, 30 N. E. 896, 31 Am. St. Rep. 417; Mt. Vernon First Nat. Bank *v.* Sarlis, 129 Ind. 201, 28 N. E. 434, 28 Am. St. Rep. 185, 13 L. R. A. 481; Anderson, etc., R. Co. *v.* Kernodle, 54 Ind. 314; Newhouse *v.* Hill, 7 Blackf. 584; Brandis *v.* Grisson, 26 Ind. App. 661, 60 N. E. 455.

Iowa.— Snyder *v.* Ft. Madison St. R. Co., 105 Iowa 284, 75 N. W. 179, 41 L. R. A. 345; Crocker *v.* Robertson, 8 Iowa 404.

Kansas.— Emmert *v.* Richardson, 44 Kan. 268, 24 Pac. 480.

Kentucky.— Wiggins *v.* Jackson, 73 S. W. 779, 24 Ky. L. Rep. 2189; Parsons *v.* Weller, 72 S. W. 273, 24 Ky. L. Rep. 1770; Flaugher *v.* Yates, 56 S. W. 411, 57 S. W. 244, 22 Ky. L. Rep. 77.

Louisiana.— Eugene Dietzgen Co. *v.* Kokosky, 113 La. 449, 37 So. 24, 66 L. R. A. 503.

Maryland.—Bruns *v.* Spalding, 90 Md. 349, 45 Atl. 194; Johnston *v.* Glenn, 40 Md. 200; Mahaney *v.* Lazier, 16 Md. 69.

in plaintiff without going into a particular or detailed statement as to how he acquired title.[29]

(III) *Acts or Claims of Defendant.* Plaintiff must clearly show the threats or acts of defendant which cause him to apprehend future injury.[30] It is not sufficient to allege that defendant claims the right to do an act which plaintiff believes is illegal and injurious to him, since the intention to exercise the right must be alleged.[31]

(IV) *Averment of Injury*[32] — (A) *In General.* The bill must allege facts

Massachusetts.— Wright *v.* Dame, 22 Pick. 55.

Minnesota.— Pine Tree Lumber Co. *v.* McKinley, 83 Minn. 419, 86 N. W. 414.

Mississippi.— Day *v.* Louisville, etc., R. Co., 69 Miss. 589, 11 So. 25.

Missouri.— State *v.* Wood, 155 Mo. 425, 56 S. W. 474, 48 L. R. A. 596; Foster *v.* Reynolds, 38 Mo. 553; Grand Chapter O. of E. S. *v.* Francis, 93 Mo. App. 560, 67 S. W. 732.

Montana.— Buck *v.* Fitzgerald, 21 Mont. 482, 54 Pac. 942.

New Jersey.— Vulcan Detinning Co. *v.* American Can Co., (Ch. 1904) 58 Atl. 290; Smith *v.* Delaware, etc., Tel., etc., Co., 63 N. J. Eq. 93, 51 Atl. 464; Grier *v.* Flitcraft, 57 N. J. Eq. 556, 41 Atl. 425; Thompson *v.* Ocean City R. Co., (Ch. 1897) 37 Atl. 129; Anglesey *v.* Colgan, 44 N. J. Eq. 203, 9 Atl. 105, 14 Atl. 627.

New York.— Davis *v.* Cornue, 151 N. Y. 172, 45 N. E. 449; Sullivan *v.* Parkes, 69 N. Y. App. Div. 221, 74 N. Y. Suppl. 787; John D. Park, etc., Co. *v.* National Wholesale Druggists' Assoc., 30 N. Y. App. Div. 508, 52 N. Y. Suppl. 475; Mitchell *v.* Thorne, 57 Hun 405, 10 N. Y. Suppl. 682, 25 Abb. N. Cas. 295; Farrell *v.* New York, 5 N. Y. Suppl. 580; Marsh *v.* Davison, 9 Paige 580.

North Carolina.— Featherstone *v.* Carr, 132 N. C. 800, 44 S. E. 592.

Pennsylvania.— Mengel *v.* Lehigh Coal, etc., Co., 24 Pa. Co. Ct. 152; Morck *v.* Pennsylvania Gas Co., 8 Pa. Co. Ct. 131.

Rhode Island.— Sprague *v.* Rhodes, 4 R. I. 301.

Tennessee.— Ducktown Sulphur, etc., Iron Co. *v.* Fain, 109 Tenn. 56, 70 S. W. 813; Senter *v.* Hill, 5 Sneed 505; Fine *v.* Stuart, (Ch. App. 1898) 48 S. W. 371.

Texas.— Harding *v.* McLennan County, 95 Tex. 174, 66 S. W. 44; Chance *v.* East Texas R. Co., 63 Tex. 152; Eppstein *v.* Webb, (Civ. App. 1903) 75 S. W. 337; Hall *v.* La Salle County, (Civ. App. 1898) 46 S. W. 862; Clarke *v.* San Jacinto County, 17 Tex. Civ. App. 204, 45 S. W. 315.

Virginia.— Ramey *v.* Counts, 102 Va. 902, 47 S. E. 1006.

West Virginia.— Merrinar *v.* Merrinar, 54 W. Va. 169, 46 S. E. 118; Frank *v.* Brunnemann, 8 W. Va. 462.

Wisconsin.— Kircher *v.* Pederson, 117 Wis. 68, 93 N. W. 813.

United States.— Walla Walla *v.* Walla Walla Water Co., 172 U. S. 1, 19 S. Ct. 77, 43 L. ed. 341; S. Jarvis Adams Co. *v.* Knapp, 121 Fed. 34, 58 C. C. A. 1; Wallace *v.* Arkansas Cent. R. Co., 118 Fed. 422, 55 C. C. A. 192; Los Angeles University *v.* Swarth, 107 Fed. 798, 46 C. C. A. 647, 54 L. R. A. 262; Otaheite Gold, etc., Min., etc., Co. *v.* Dean, 102 Fed. 929; Thomas *v.* Nantahala Marble, etc., Co., 58 Fed. 485, 7 C. C. A. 330.

England.— McNamara *v.* Arthur, 2 Ball & B. 349.

See 27 Cent. Dig. tit. "Injunction," §§ 225, 233.

Where, by statute, possession of a perfect title authorizes the granting of an injunction in certain cases without the showing of other grounds, such a title must appear upon the face of the moving papers, and extrinsic evidence will not be admissible to explain defects apparent therein. Dixon *v.* Monroe, 112 Ga. 158, 37 S. E. 180.

29. Logan *v.* Clough, 2 Colo. 323; Western Min., etc., Co. *v.* Virginia Cannel Coal Co., 10 W. Va. 250; McMillan *v.* Ferrell, 7 W. Va. 223; Thomas *v.* Mantahala Marble, etc., Co., 58 Fed. 485, 7 C. C. A. 330. *Contra*, Fitzpatrick *v.* Childs, 2 Brewst. (Pa.) 365.

30. *California.*—Mendelson *v.* McCabe, 144 Cal. 230, 77 Pac. 915, 103 Am. St. Rep. 78.

Georgia.— Ryan *v.* Fulghum, 96 Ga. 234, 22 S. E. 940.

Indiana.— Belknap *v.* Caldwell, 83 Ind. 14; Roelker *v.* St. Louis, etc., R. Co., 50 Ind. 127; Ploughe *v.* Boyer, 38 Ind. 113.

Iowa.— Berger *v.* Armstrong, 41 Iowa 447.

Kansas.— Coffeyville Min., etc., Co. *v.* Citizens' Natural Gas, etc., Co., 55 Kan. 173, 40 Pac. 326.

Missouri.— McKinzie *v.* Mathews, 59 Mo. 99.

New York.— People *v.* New York, etc., R. Co., 45 Barb. 73, 26 How. Pr. 44; Livingston *v.* Gibbons, 4 Johns. Ch. 571.

West Virginia.— Chesapeake, etc., R. Co. *v.* Patton, 5 W. Va. 234.

Wisconsin.— Diedrichs *v.* Northwestern Union R. Co., 33 Wis. 219.

See 27 Cent. Dig. tit. "Injunction," § 235.

Where an injunction is sought on the ground that a railroad is about to take possession of plaintiff's land without compensation therefor it is necessary that the complaint must contain a positive averment that defendant threatens or intends to take possession of the land without making such payment or tender. Diedrichs *v.* Northwestern Union R. Co., 33 Wis. 219.

31. Lutman *v.* Lake Shore, etc., R. Co., 56 Ohio St. 433, 47 N. E. 248; Atty.-Gen. *v.* Eau Claire, 37 Wis. 400.

32. See Equity, 16 Cyc. 235.

which clearly show that plaintiff will sustain a substantial injury because of the acts complained of.[33] It is not sufficient to merely allege injury without stating the facts.[34]

(B) *Inadequacy of Remedy at Law.* As the jurisdiction of equity depends on the lack of an adequate remedy at law, a bill for an injunction must state facts from which the court can determine that the remedy at law is inadequate.[35] If the inadequacy of the legal remedy depends on defendant's insolvency, the fact of insolvency must be positively alleged.[36]

33. *Indiana.*— Home Electric Light, etc., Co. *v.* Globe Tissue Paper Co., 146 Ind. 673, 45 N. E. 1108; Hart *v.* Hildebrandt, 30 Ind. App. 415, 66 N. E. 173.

Massachusetts.— Boston, etc., R. Co. *v.* Sullivan, 177 Mass. 230, 58 N. E. 689, 83 Am. St. Rep. 275.

New Jersey.— McGovern *v.* Loder, (Ch. 1890) 20 Atl. 209; Green *v.* Wilson, 21 N. J. Eq. 211.

New York.— Smith *v.* Lockwood, 13 Barb. 209.

Tennessee.— Jones *v.* Stewart, (Ch. App. 1900) 61 S. W. 105.

Washington.— Spokane St. R. Co. *v.* Spokane, 5 Wash. 634, 32 Pac. 456.

Wisconsin.— State *v.* Eau Claire, 40 Wis. 533.

See 27 Cent. Dig. tit. "Injunction," § 232.

34. *Alabama.*— Bowling *v.* Crook, 104 Ala. 130, 16 So. 131.

District of Columbia.— Grant *v.* Cooke, 7 D. C. 165.

Georgia.— Coast Line R. Co. *v.* Cohen, 50 Ga. 451.

Iowa.— Dinwiddie *v.* Roberts, 1 Greene 363.

Nebraska.— Wabaska Electric Co. *v.* Wymore, 60 Nebr. 199, 82 N. W. 626.

Oregon.— Luhrs *v.* Sturtevant, 10 Oreg. 170.

West Virginia.— Farland *v.* Wood, 35 W. Va. 458, 14 S. E. 140; Watson *v.* Ferrell, 34 W. Va. 406, 12 S. E. 724.

United States.— Griffing *v.* Gibb, 2 Black 519, 17 L. ed. 353; Spooner *v.* McConnell, 22 Fed. Cas. No. 13,245, 1 McLean 337.

35. *Alabama.*— Fullington *v.* Kyle Lumber Co., 139 Ala. 242, 35 So. 852; Graham *v.* Tankersley, 15 Ala. 634.

Arkansas.— Murphy *v.* Harbison, 29 Ark. 340.

California.— Schmidt *v.* Bitzer, (1903) 71 Pac. 563.

Colorado.— Fulton Irr. Ditch Co. *v.* Twombly, 6 Colo. App. 554, 42 Pac. 253.

Connecticut.— Empire Transp. Co. *v.* Johnson, 76 Conn. 79, 55 Atl. 587; New York, etc., R. Co. *v.* Scovill, 71 Conn. 136, 41 Atl. 246, 71 Am. St. Rep. 159, 42 L. R. A. 157.

Georgia.— Ocmulgee Lumber Co. *v.* Mitchell, 112 Ga. 528, 37 S. E. 749; Jenkins *v.* Carmen, 112 Ga. 476, 37 S. E. 719; Dixon *v.* Monroe, 112 Ga. 158, 37 S. E. 180; Camp *v.* Dixon, 111 Ga. 674, 36 S. E. 878; Swift Specific Co. *v.* Jacobs, 87 Ga. 507, 13 S. E. 643; Redd *v.* Blandford, 54 Ga. 123; Koockogey *v.* Flewellen, 24 Ga. 608; Hatcher *v.* Hampton, 7 Ga. 49.

Illinois.— Chicago Gen. R. Co. *v.* Chicago, etc., R. Co., 181 Ill. 605, 54 N. E. 1026; Cook County Brick Co. *v.* Labahn Brick Co., 92 Ill. App. 526; Kesner *v.* Miesch, 90 Ill. App. 437.

Indiana.— Denny *v.* Denny, 113 Ind. 22, 14 N. E. 593.

Iowa.— Burroughs *v.* Saterlee, 67 Iowa 396, 25 N. W. 808, 56 Am. Rep. 350.

Maryland.— Hamilton *v.* Ely, 4 Gill 34.

Montana.— Haupt *v.* Independent Tel. Messenger Co., 25 Mont. 122, 63 Pac. 1033.

Nevada.— Connery *v.* Swift, 9 Nev. 39.

New York.— Corscadden *v.* Haswell, 88 N. Y. App. Div. 158, 84 N. Y. Suppl. 597 [*reversed* in 177 N. Y. 499, 69 N. E. 1114, 66 L. R. A. 664]; Schulz *v.* Albany, 27 Misc. 51, 57 N. Y. Suppl. 963; Austin *v.* Chapman, 11 N. Y. Leg. Obs. 103.

North Carolina.— Porter *v.* Armstrong. 132 N. C. 66, 43 S. E. 542; Morganton Land, etc., Co. *v.* Webb, 117 N. C. 478, 23 S. E. 458.

North Dakota.— Burton *v.* Walker, (1904) 100 N. W. 257.

Virginia.— Collins *v.* Sutton, 94 Va. 127, 26 S. E. 415.

West Virginia.— Ward *v.* Ohio River R. Co., 35 W. Va. 481, 14 S. E. 142; Chesapeake, etc., R. Co. *v.* Bobbett, 5 W. Va. 138.

Wisconsin.— Poertner *v.* Russel, 33 Wis. 193.

United States.— Pollock *v.* Farmers' L. & T. Co., 157 U. S. 429, 15 S. Ct. 673, 39 L. ed. 759; Safe-Deposit, etc., Co. *v.* Anniston, 96 Fed. 661.

See 27 Cent. Dig. tit. "Injunction," § 238.

36. *Alabama.*— Fullington *v.* Kyle Lumber Co., (1904) 35 So. 852; Graham *v.* Tankersley, 15 Ala. 634.

Connecticut.— New York, etc., R. Co. *v.* Scovill, 71 Conn. 136, 41 Atl. 246, 71 Am. St. Rep. 159, 42 L. R. A. 157.

Georgia.— Jenkins *v.* Carmen, 112 Ga. 476, 37 S. E. 719; Dixon *v.* Monroe, 112 Ga. 158, 37 S. E. 180; Camp *v.* Dixon, 111 Ga. 674, 36 S. E. 878.

Illinois.— Cook County Brick Co. *v.* Labahn Brick Co., 92 Ill. App. 526; Kesner *v.* Miesch, 90 Ill. App. 437.

Iowa.— Burroughs *v.* Saterlee, 67 Iowa 396, 25 N. W. 808, 56 Am. Rep. 350, holding that an allegation that defendants have very little property not exempt from execution and are not responsible for the damages is a sufficient averment.

Maryland.— Hamilton *v.* Ely, 4 Gill 34.

Nevada.— Connery *v.* Swift, 9 Nev. 39, 41, holding insufficient an allegation that defendant has "no visible property exempt from execution."

(c) *Irreparable Injury.* An injunction will not be granted unless the complaint shows that a refusal to grant the writ will work irreparable injury.[37] It is not sufficient simply to allege that the injury will be irreparable, but the facts must be stated so that the court may see that the apprehension of irreparable injury is well founded.[38]

(v) *Fraud.* Fraud must be pleaded, where relied on, and the facts which constitute the fraud must be set forth rather than the conclusion of fraud.[39]

New York.— Austin *v.* Chapman, 11 N. Y. Leg. Obs. 103.

North Carolina.— Porter *v.* Armstrong, 132 N. C. 66, 43 S. E. 542.

Virginia.— Collins *v.* Sutton, 94 Va. 127, 26 S. E. 415.

West Virginia.— Chesapeake, etc., R. Co. *v.* Babbett, 5 W. Va. 138. See Ward *v.* Ohio River R. Co., 35 W. Va. 481, 14 S. E. 142, holding allegation unnecessary where execution has been returned *nulla bona.*

See 27 Cent. Dig. tit. "Injunction," § 236.

Compare Poertner *v.* Russel, 33 Wis. 193.

37. *California.*— California Nav. Co. *v.* Union Transp. Co., 122 Cal. 641, 55 Pac. 591.

Illinois.— Cook County Brick Co. *v.* Labahn Brick Co., 92 Ill. App. 526; W. H. Howell Co. *v.* Charles Pope Glucose Co., 61 Ill. App. 593.

Indiana.— Manufacturers' Gas, etc., Co. *v.* Indiana Natural Gas, etc., Co., 156 Ind. 679, 59 N. E. 169, 60 N. E. 1080; McGreggor *v.* State, 31 Ind. App. 483, 68 N. E. 315; Chappell *v.* Jasper County Oil, etc., Co., 31 Ind. App. 170, 66 N. E. 515; Covert *v.* Bray, 26 Ind. App. 671, 60 N. E. 709.

Kentucky.— Gwyn *v.* Paul, 4 Ky. L. Rep. 729.

Maryland.— Knighton *v.* Young, 22 Md. 359; Shipley *v.* Caples, 17 Md. 179; Davis *v.* Reed, 14 Md. 152; Hamilton *v.* Ely, 4 Gill 34.

New York.— Austin *v.* Chapman, 11 N. Y. Leg. Obs. 103.

North Dakota.— Schaffner *v.* Young, 10 N. D. 245, 86 N. W. 733.

Pennsylvania.— Derry Council No. 40 J. O. A. M. of H. *v.* State Council J. O. of U. A. M., 3 Dauph. Co. Rep. 77.

Virginia.— Talley *v.* Tyree, 2 Rob. 500.

West Virginia.— Farland *v.* Wood, 35 W. Va. 458, 14 S. C. 140; Watson *v.* Farrell, 34 W. Va. 406, 12 S. E. 724.

An allegation of "great injury" without an allegation of irreparable injury is sufficient. Chappell *v.* Jasper County Oil, etc., Co., 31 Ind. App. 170, 66 N. E. 515; Covert *v.* Bray, 26 Ind. App. 671, 60 N. E. 709.

"Almost" irreparable.— In a bill for an injunction to restrain a trespass, it is no objection to the form that the bill charges the mischief will be "almost," instead of "absolutely" irreparable. Davis *v.* Reed, 14 Md. 152.

See 27 Cent. Dig. tit. "Injunction," § 232.

38. *California.*— California Nav. Co. *v.* Union Transp. Co., 122 Cal. 641, 55 Pac. 951; Mechanics' Foundry *v.* Ryall, 75 Cal. 601, 17 Pac. 703; Branch Turnpike Co. *v.* Yuba County, 13 Cal. 190; De Witt *v.* Hays, 2 Cal. 463, 56 Am. Dec. 352.

Connecticut.— Empire Transp. Co. *v.* Johnson, 76 Conn. 79, 55 Atl. 587; Mead *v.* Stirling, 62 Conn. 586, 27 Atl. 591, 23 L. R. A. 227.

Florida.— Orange City *v.* Thayer, 45 Fla. 502, 34 So. 573.

Georgia.— Bailey *v.* Simpson, 57 Ga. 523; Catching *v.* Terrell, 10 Ga. 576.

Illinois.— Poyer *v.* Des Plaines, 123 Ill. 111, 13 N. E. 819, 5 Am. St. Rep. 494 [*affirming* 20 Ill. App. 30]; Kesner *v.* Miesch, 90 Ill. App. 437; Chicago City R. Co. *v.* General Electric Co., 74 Ill. App. 465.

Indiana.— Wabash R. Co. *v.* Engleman, 160 Ind. 329, 66 N. E. 892.

Louisiana.— Otis *v.* Sweeney, 48 La. Ann. 940, 20 So. 229; Williams *v.* Douglass, 21 La. Ann. 468.

Maryland.— Davis *v.* Reed, 14 Md. 152; Roman *v.* Strauss, 10 Md. 89; Green *v.* Keen, 4 Md. 98; Chesapeake, etc., Canal Co. *v.* Young, 3 Md. 480; Amelung *v.* Seekamp, 9 Gill & J. 468; Carlisle *v.* Stevenson, 3 Md. Ch. 499.

Minnesota.— Whitman *v.* St. Paul, etc., R. Co., 8 Minn. 116; Schurmeier *v.* St. Paul, etc., R. Co., 8 Minn. 113, 83 Am. Dec. 770.

Missouri.— Schuster *v.* Myers, 148 Mo. 422, 50 S. W. 103.

Nebraska.—State Bank *v.* Rohren, 55 Nebr. 223, 75 N. W. 543.

Nevada.— Thorn *v.* Sweeney, 12 Nev. 251.

New Hampshire.— Boston, etc., R. Co. *v.* Portsmouth, etc., R. Co., 57 N. H. 200.

New York.— McHenry *v.* Jewett, 90 N. Y. 58; Hogel *v.* Warner, 59 N. Y. Suppl. 786; Gravesend *v.* John T. Hoffman, 1 Alb. L. J. 99.

North Carolina.— Porter *v.* Armstrong, 132 N. C. 66, 43 S. E. 542; Bogey *v.* Shute, 54 N. C. 180; Thompson *v.* Williams, 54 N. C. 176.

Ohio.— Van Wert *v.* Webster, 31 Ohio St. 420.

Oregon.— Portland *v.* Baker, 8 Oreg. 356.

Pennsylvania.— Northern Cent. R. Co. *v.* Walworth, 7 Pa. Dist. 766.

Utah.— Leitham *v.* Cusick, 1 Utah 242.

Virginia.— Moore *v.* Steelman, 80 Va. 331.

Washington.— Colby *v.* Spokane, 12 Wash. 690, 42 Pac. 112.

West Virginia.— Cresap *v.* Kemble, 26 W. Va. 603; Schoonover *v.* Bright, 24 W. Va. 698; Hale *v.* Point Pleasant, etc., R. Co., 23 W. Va. 454.

See 27 Cent. Dig. tit. "Injunction," § 232.

39. *Florida.*— Kearnes *v.* Hill, 21 Fla. 185.

Georgia.— Powell *v.* Parker, 38 Ga. 644.

Maryland.— Frostburg Bldg. Assoc. *v.* Stark, 47 Md. 338.

(VI) *Doing and Offering to Do Equity.* Plaintiff must allege that he has done or is willing to do everything which is necessary to entitle him to the relief sought.[40]

d. Prayer.[41] The bill or complaint must contain a prayer for process against defendant; and an injunction will not ordinarily be granted under a prayer for general relief, but it must be expressly prayed. The rule applies both to perpetual[42] and temporary[43] injunctions. The reason assigned is that defendant might by his answer make a different case under the general prayer from what he would if an injunction were specifically prayed.[44] So the bill or complaint should contain a prayer for injunction in the prayer for process as well as in the prayer for relief,[45]

Massachusetts.— Russell *v.* Bryant, 181 Mass. 447, 63 N. E. 927.

Missouri.— Nagel *v.* Lindell R. Co., 167 Mo. 89, 66 S. W. 1090; Grand Chapter O. of E. S. *v.* U. S. Chapter of E. S., 93 Mo. App. 560, 67 S. W. 732.

New Hampshire.— Marden *v.* Portsmouth Milling Co., 70 N. H. 269, 48 Atl. 282.

New Jersey.— Dobbins *v.* Cragin, 50 N. J. Eq. 640, 23 Atl. 172.

New York.— New York Cent., etc., R. Co. *v.* Reeves, 41 Misc. 490, 85 N. Y. Suppl. 28.

Ohio.— Morgan *v.* Hayes, 1 Ohio Dec. (Reprint) 454, 10 West. L. J. 83.

Pennsylvania.— Graeff *v.* Felix, 200 Pa. St. 137, 49 Atl. 758.

Virginia.— Dickenson *v.* Bankers' Loan, etc., Co., 93 Va. 498, 25 S. E. 548.

United States.— Patton *v.* Taylor, 7 How. 132, 12 L. ed. 637.

See 27 Cent. Dig. tit. "Injunctions," § 237. And see EQUITY, 16 Cyc. 231; FRAUD, 20 Cyc. 96.

40. *Alabama.*— Elliott *v.* Sibley, 101 Ala. 344, 13 So. 500.

California.— Burhan *v.* San Francisco Fuse Mfg. Co., 76 Cal. 26, 17 Pac. 939.

Iowa.— Sloan *v.* Coolbaugh, 10 Iowa 31.

New York.— Lewis *v.* Wilson, 17 N. Y. Suppl. 128.

Texas.— Spann *v.* Sterns, 18 Tex. 556.

United States.— Stanley *v.* Gadsby, 10 Pet. 521, 9 L. ed. 518.

See 27 Cent. Dig. tit. "Injunction," § 234. And see EQUITY, 16 Cyc. 235.

41. See EQUITY, 16 Cyc. 224.

42. *Florida.*— Thompson *v.* Maxwell, 16 Fla. 773.

Georgia.— Hairalson *v.* Carson, 111 Ga. 57, 36 S. E. 319; Jefferson *v.* Hamilton, 69 Ga. 401.

Indiana.— Lefforge *v.* West, 2 Ind. 514.

Louisiana.— Trevigne *v.* School Bd., 31 La. Ann. 105.

Maine.— Lewiston Falls Mfg. Co. *v.* Franklin County, 54 Me. 402.

Maryland.— Binney's Case, 2 Bland 99.

Pennsylvania.— Wilson *v.* Bridgeport School Directors, 22 Pa. Co. Ct. 545; Wilson *v.* Delaney, 15 Montg. Co. Rep. 149. See Moyer *v.* Livingood, 2 Woodw. 317.

United States.— Georgia *v.* Stanton, 6 Wall. 50, 18 L. ed. 721.

England.— Davile *v.* Peacock, Barn. Ch. 25. See Savory *v.* Dyer, Ambl. 70, 27 Eng. Reprint 41; Jesus College *v.* Bloom, 3 Atk. 262, 26 Eng. Reprint 953; Atty.-Gen. *v.* Birmingham, etc., R. Co., 4 De G. & Sm. 490, 15 Jur. 1024, 64 Eng. Reprint 925; Munro *v.* Wivenhoe, etc., R. Co., 4 De G. J. & S. 723, 11 Jur. N. S. 612, 12 L. T. Rep. N. S. 562, 655, 13 Wkly. Rep. 880, 69 Eng. Ch. 553, 46 Eng. Reprint 1100. But see Blomfield *v.* Eyre, 8 Beav. 250, 9 Jur. 717, 14 L. J. Ch. 260, 50 Eng. Reprint 99.

See 27 Cent. Dig. tit. "Injunction," § 239. And see Story Eq. Pl. § 41.

If a perpetual injunction is desired the prayer should be for a perpetual injunction. Gaines *v.* Hale, 26 Ark. 168; Municipality No. 1 *v.* Municipality No. 2, 12 La. 49.

43. College Corner, etc., Gravel Road Co. *v.* Moss, 77 Ind. 139; Southern Plank Road Co. *v.* Hixon, 5 Ind. 165; Ragsdale *v.* Green, 55 N. Y. Suppl. 760, 28 N. Y. Civ. Proc. 229; Walker *v.* Devereaux, 4 Paige (N. Y.) 229; Forman *v.* Healey, 11 N. D. 563, 93 N. W. 866. See Kahn *v.* Kahn, 15 Fla. 400. *Contra*, Hamilton *v.* Wood, 55 Minn. 482, 57 N. W. 208.

Where the ultimate purpose of the action is not an injunction, but an accounting, a demand for an injunction is not necessary, under Code Civ. Proc. § 603. Safety Electric Constr. Co. *v.* Creamer, 19 N. Y. Suppl. 747.

A prayer for an injunction, although not for a temporary injunction, will sustain the issuance of a preliminary injunction. Shipley *v.* Western Maryland Tidewater R. Co., 99 Md. 115, 56 Atl. 968.

Relief in excess of prayer.— An injunction granted upon an interlocutory application cannot exceed that prayed by the bill. Munro *v.* Wivenhoe, etc., R. Co., 4 De G. J. & S. 723, 11 Jur. N. S. 612, 12 L. T. Rep. N. S. 562, 655, 13 Wkly. Rep. 880, 69 Eng. Ch. 553, 46 Eng. Reprint 1180.

44. Story Eq. Pl. § 41.

45. *Illinois.*— Primmer *v.* Pathen, 32 Ill. 528; American Fine Art Co. *v.* Voigt, 103 Ill. App. 659; Willett *v.* Woodhams, 1 Ill. App. 411.

Maine.— Lewiston Falls Mfg. Co. *v.* Franklin Co., 54 Me. 402.

Maryland.— Union Bank *v.* Kerr, 2 Md. Ch. 460.

United States.— U. S. *v.* Agler, 62 Fed. 824.

England.— Wood *v.* Beachell, 3 Sim. 273, 6 Eng. Ch. 273, 57 Eng. Reprint 1001.

Canada.— Brandon *v.* Elliott, 14 Grant Ch. (U. C.) 109; Clarke *v.* Manners, 2 U. C. Q. B. O. S. 1.

and if it does not it is demurrable.[46] The complaint is not subject to attack because of a prayer for relief to which plaintiff is not entitled,[47] nor is a prayer for relief in the alternative objectionable,[48] although inconsistent relief cannot be prayed for.[49] It is proper to ask at the same time for both an injunction and for damages.[50] Relief by injunction may be sought as ancillary relief, but in such case if the right to the main relief falls the right to injunctive relief also falls.[51]

e. Verification — (i) *In General.*[52] Where a preliminary injunction is asked the bill or complaint must be verified. It will not be sufficient either alone or in connection with affidavits where it is not verified or the verification is defective.[53] But an objection on these grounds cannot be raised on final hearing or thereafter to raise the objection.[54] Verification, however, is not necessary where only a perpetual injunction is demanded.[55] It is not necessary to verify a bill for an injunction in order to give the court jurisdiction.[56]

46. U. S. *v.* Agler, 62 Fed. 824.

47. Patoka Tp. *v.* Hopkins, 131 Ind. 142, 30 N. E. 896, 31 Am. St. Rep. 417.

48. Sharon R. Co.'s Appeal, 122 Pa. St. 533, 17 Atl. 234, 9 Am. St. Rep. 133.

49. McKibbin *v.* Bristol, 50 Mich. 319, 15 N. W. 491; Lamport *v.* Abbott, 12 How. Pr. (N. Y.) 340; Metcalf *v.* Hart, 3 Wyo. 513, 27 Pac. 900, 31 Pac. 407, 31 Am. St. Rep. 122.

50. Berger *v.* Armstrong, 41 Iowa 447; Gillilan *v.* Norton, 6 Rob. (N. Y.) 546; Anglo-Danubian Co. *v.* Rogerson, L. R. 4 Eq. 3, 36 L. J. Ch. 667, 16 L. T. Rep. N. S. 262, 15 Wkly. Rep. 729.

51. Blackwood *v.* Van Vleet, 11 Mich. 252.

52. See EQUITY, 16 Cyc. 366.

53. *Arkansas.*— *Ex p.* State, 15 Ark. 263.

Florida.— Bowes *v.* Hoeg, 15 Fla. 403.

Georgia.— Boykin *v.* Epstein, 87 Ga. 25, 13 S. E. 15.

Indiana.— Owsley *v.* Barbour, 4 Ind. 585. But see Laughlin *v.* Lamasco City, 6 Ind. 223.

Iowa.— Stump *v.* Buzick, 3 Greene 245.

Kansas.— State *v.* Loomis, 46 Kan. 107, 26 Pac. 472.

Louisiana.— Lewis *v.* Winston, 26 La. Ann. 707; Lewis *v.* Daniels, 23 La. Ann. 170; Campbell *v.* Boute, 10 La. Ann. 114; Haydel *v.* Nixon, 5 La. Ann. 558; Rice *v.* Walsh, 4 La. Ann. 346; Jewell *v.* Jewell, 1 Rob. 316; Le Blanc *v.* Dashiell, 14 La. 274; Catlett *v.* McDonald, 13 La. 44; Ricard *v.* Hiriart, 5 La. 244; Reboul *v.* Behrens, 5 La. 79; Dutton *v.* Dupuy, 5 La. 61.

Maryland.— Conolly *v.* Riley, 25 Md. 402. But see Negro Charles *v.* Sheriff, 12 Md. 274.

Michigan.— Manistique Lumber Co. *v.* Lovejoy, 55 Mich. 189, 20 N. W. 899, holding that verification must be on affiant's personal knowledge.

New Jersey.— Youngblood *v.* Schamp, 15 N. J. Eq. 42; Capner *v.* Flemington Min. Co., 3 N. J. Eq. 467.

New York.— Penfield *v.* White, 8 How. Pr. 87; Smith *v.* Reno, 6 How. Pr. 124; Paterson *v.* Bangs, 9 Paige 627; Sizer *v.* Miller, 9 Paige 605; Marsh *v.* Davison, 9 Paige 580; Bogert *v.* Haight, 9 Paige 297.

Ohio.— Ett *v.* Snyder, 5 Ohio Dec. (Reprint) 523, 6 Am. L. Rec. 415.

Pennsylvania.— Gilroy's Appeal, 100 Pa. St. 5.

Texas.— Smith *v.* Allen, 28 Tex. 497; Johnson *v.* Daniel, 25 Tex. Civ. App. 587, 63 S. W. 1032.

United States.— Black *v.* Henry G. Allen Co., 42 Fed. 618, 9 L. R. A. 433.

Canada.— Trites *v.* Humphries, 19 Can. L. T. Occ. Notes 407, 2 N. Brunsw. Eq. 1; Bourgoin *v.* Malhiot, 8 Rev. Lég. 396; Glasier *v.* MacPherson, 34 N. Brunsw. 206.

See 27 Cent. Dig. tit. "Injunction," § 317.

An injunction may be granted on an unverified complaint, where the accompanying affidavits convince the judge of the truth of the averments and that an exigency for such relief exists. Meinhard *v.* Youngblood, 37 S. C. 223, 15 S. E. 947.

A material amendment to a bill for an injunction should be verified in the same manner and to the same extent as the bill itself. Semmes *v.* Boykin, 27 Ga. 47; Walker *v.* Ayres, 1 Iowa 449; Gunn *v.* Blair, 1 Barb. (N. Y.) 539; Rogers *v.* De Forest, 3 Edw. (N. Y.) 171.

54. Union Lumber Co. *v.* Allen, 114 Ga. 346, 40 S. E. 231; Rothenburg *v.* Vierath, 87 Md. 634, 40 Atl. 655.

55. *Illinois.*— Hawkins *v.* Hunt, 14 Ill. 42, 56 Am. Dec. 487.

Indiana.— Rich *v.* Dessar, 50 Ind. 309; Cox *v.* Louisville, etc., R. Co., 48 Ind. 178; Sand Creek Turnpike Co. *v.* Robbins, 41 Ind. 79.

Louisiana.— Claverie *v.* Gerodias, 30 La. Ann. 291.

Missouri.— Fisher *v.* Patton, 134 Mo. 32, 33 S. W. 451, 34 S. W. 1096.

Rhode Island.— Harrington *v.* Harrington, 15 R. I. 341, 5 Atl. 502.

Texas.— Eccles *v.* Daniels, 16 Tex. 136; Johnson *v.* Daniel, 25 Tex. Civ. App. 587, 63 S. W. 1032.

United States.— Black *v.* Henry G. Allen Co., 42 Fed. 618, 9 L. R. A. 433; Hancock *v.* Walsh, 11 Fed. Cas. No. 6,012, 3 Woods 351.

Canada.— Trites *v.* Humphrey, 19 Can. L. T. Occ. Notes 407, 2 N. Brunsw. Eq. 1.

See 27 Cent. Dig. tit. "Injunction," § 262.

56. North *v.* Swartz, 79 Ill. App. 557; Johnson *v.* Jones, 2 Nebr. 126.

(II) *Who May Verify.*[57] The complaint need not always be sworn to by plaintiff.[58] Generally any person having personal knowledge of the facts contained in the complaint may verify it.[59] Plaintiff's attorney, if acquainted with the facts, may make the affidavit.[60] One of several complainants may verify the bill.[61]

(III) *Sufficiency.* The verification must be definite and positive.[62] It must be of such a character as to render the affiant liable for perjury if the facts sworn to are untrue.[63] When averments are made on information and belief that fact should be stated,[64] and it should clearly appear in the affidavit itself which allegations are sworn to of personal knowledge and which on information and belief.[65]

(IV) *Amendment and Waiver of Defects.* When the verification is defective it may be amended.[66] Defects in the verification are waived by the failure to formally object.[67]

f. Filing Bill. A bill may be so manifestly unwarranted that the court will not permit it to be filed.[68] Leave of court to file a bill where otherwise necessary, is not required if a temporary injunction is not requested;[69] and the granting of a temporary injunction cures the failure to obtain consent of court to file the bill.[70]

g. Filing Exhibits. Any document which is the basis of plaintiff's claim to

57. See Equity, 16 Cyc. 366; and, generally, Pleading.

58. Brunswick *v.* Finney, 54 Ga. 317; Chesapeake, etc., R. Co. *v.* Huse, 5 W. Va. 579.

59. Youngblood *v.* Schamp, 15 N. J. Eq. 42; Wooster Bank *v.* Spencer, Clarke (N. Y.) 386; Smith *v.* Republic L. Ins. Co., 2 Tenn. Ch. 631.

60. Cook *v.* Houston County, 54 Ga. 163; Williams *v.* Douglass, 21 La. Ann. 468; Edrington *v.* Allsbrooks, 21 Tex. 186. See Scotson *v.* Gaury, 1 Hare 99, 11 L. J. Ch. 98, 23 Eng. Ch. 99; Spalding *v.* Reiley, 4 L. J. Ch. 169.

61. Hemphill *v.* Ruckersville Bank, 3 Ga. 435.

62. *Georgia.*— Jordan *v.* Gaulden, 73 Ga. 191.

Illinois.— Chicago Bd. of Trade *v.* Riordan, 94 Ill. App. 298.

Iowa.— Kelly *v.* Briggs, 58 Iowa 332, 12 N. W. 299.

Louisiana.— Speyrer *v.* Miller, 108 La. 204, 32 So. 524, 61 L. R. A. 781; Knox *v.* Coroner, 13 La. Ann. 88; Carroll *v.* Miller, 3 La. Ann. 555; Jewell *v.* Jewell, 1 Rob. 316; Stanbrough *v.* Scott, 1 Rob. 43; Boatner *v.* Walker, 17 La. 461; Stein *v.* Gibbons, 16 La. 103; Exchange, etc., Co. *v.* Walden, 15 La. 431; Sauvinet *v.* Poupono, 14 La. 87; Catlett *v.* McDonald, 13 La. 44; Reboul *v.* Behrens, 5 La. 79.

Maryland.— Triebert *v.* Burgess, 11 Md. 452.

Minnesota.— McRoberts *v.* Washburne, 10 Minn. 23.

Mississippi.— Yeizer *v.* Burke, 3 Sm. & M. 439.

Montana.— Butte, etc., Consol. Min. Co. *v.* Montana Ore Purchasing Co., 24 Mont. 125, 60 Pac. 1039, 25 Mont. 41, 63 Pac. 825.

New Jersey.— Thompson *v.* Ocean City R. Co., (Ch. 1897) 37 Atl. 129; Perkins *v.* Collins, 3 N. J. Eq. 482.

New York.— Le Roy *v.* Veeder, 1 Johns. Cas. 417; Hamersley *v.* Wyckoff, 8 Paige 72.

See 27 Cent. Dig. tit. "Injunction," § 265. And see Equity, 16 Cyc. 367; and, generally, Pleading.

63. Reboul *v.* Behrens, 5 La. 79.

64. Coxetter *v.* Huertas, 14 Fla. 270; Schuber *v.* Bosgereau, 17 La. 174.

65. *Illinois.*— Neil *v.* Oldach, 86 Ill. App. 354; Werner Co. *v.* Miamisburg First Nat. Bank, 55 Ill. App. 321.

Louisiana.— Livingston *v.* Dick, 1 La. Ann. 323; Woodruff *v.* Payne, 9 Rob. 163.

Maryland.— Fowble *v.* Kemp, 92 Md. 630, 48 Atl. 379.

Virginia.— Southern R. Co. *v.* Washington, etc., R. Co., 102 Va. 483, 46 S. E. 784.

West Virginia.— Chesapeake, etc., R. Co. *v.* Huse, 5 W. Va. 579.

See 27 Cent. Dig. tit. "Injunction," § 265.

In Maryland the source of affiant's information must be stated. Moffat *v.* Calvert County Com'rs, 97 Md. 266, 54 Atl. 960; Fowble *v.* Kemp, 92 Md. 630, 48 Atl. 379.

66. Cook County Brick Co. *v.* Bach, 93 Ill. App. 88; Hughes *v.* Feeter, 18 Iowa 142; Glidden *v.* Norvell, 44 Mich. 202, 6 N. W. 195; Johnson *v.* Jones, 2 Nebr. 126. And see Equity, 16 Cyc. 368 note 44.

In Georgia the deficiency may be supplied by affidavits at the hearing. Rice *v.* Dodd, 94 Ga. 414, 20 S. E. 339; Dunham *v.* Curtis, 92 Ga. 514, 17 S. E. 910; Martin *v.* Burgwyn, 88 Ga. 78, 13 S. E. 958; Alspaugh *v.* Adams, 80 Ga. 345, 5 S. E. 496.

67. Hughes *v.* Feeter, 18 Iowa 142 (filing of answer is waiver of failure to affix revenue stamp); Moses *v.* Risdon, 46 Iowa 251; Yeizer *v.* Burke, 3 Sm. & M. (Miss.) 439. And see Equity, 16 Cyc. 368 note 44.

68. Mississippi *v.* Johnson, 4 Wall. (U. S.) 475, 18 L. ed. 437.

69. Atlanta Real Estate Co. *v.* Atlanta Nat. Bank, 75 Ga. 40.

70. Talbott *v.* Todd, 5 Dana (Ky.) 190.

relief or materially supports that claim should, if its existence is stated or assumed in the bill, be filed as an exhibit or its non-production explained.[71] Documents which are not the basis of plaintiff's claim, but are remote or collateral, need not be filed.[72] So failure to file exhibits is not fatal where the bill incorporates or sets out all that the exhibits would show.[73]

2. Answer[74] — a. In General. Defendant must set up every ground on which he intends to rely.[75] The answer must be complete in itself,[76] but need not answer all of the complaint.[77] It should be free from uncertainty, ambiguity, and evasion.[78] The matter alleged in the answer must be relevant and must either deny or avoid the allegations of the complaint or show a want of equity therein.[79] Immaterial matter may be stricken out.[80] The answer must be that of defendant and not his attorney.[81] The time to answer is governed by the rules prevailing in the forum where the action is brought.[82] A motion to dissolve, where putting in issue the truth of the allegations of the complaint, may be ordered to stand as a part of the answer.[83]

b. Admissions. A failure to deny the material allegations of a verified bill justifies the court in considering them proved.[84]

c. Verification.[85] The general rule is that a verified complaint requires a verified answer,[86] although, by statute in some states, a verified answer is not required unless requested in the complaint.[87] Defects in the verification of an

71. Banks *v.* Busey, 34 Md. 437; Shoemaker *v.* National Mechanics' Bank, 31 Md. 396, 100 Am. Dec. 73; Hankey *v.* Abrahams, 28 Md. 588; Mahaney *v.* Lazier, 16 Md. 69; Nusbaum *v.* Stein, 12 Md. 315; Buchanan *v.* Torrance, 11 Gill & J. (Md.) 342; Union Bank *v.* Poultney, 8 Gill & J. (Md.) 324.

72. Plunkett *v.* Black, 117 Ind. 14, 19 N. E. 537; Day *v.* Bowman, 109 Ind. 383, 10 N. E. 126; Sedgwick *v.* Tucker, 90 Ind. 271.

73. Behn *v.* Young, 21 Ga. 207.

74. See Equity, 16 Cyc. 297 *et seq.*

75. Crescent City Mill, etc., Co. *v.* Hayes, (Cal. 1886) 11 Pac. 319; Hollis *v.* Border, 10 Tex. 360.

Where defendant relies on a judgment at law against plaintiff, it is held that he must show the record of the suit at law. Williams *v.* Caplinger, 6 Humphr. (Tenn.) 257.

Inadequacy of remedy at law.— Proceeding to a hearing on the merits without objecting because of the adequacy of the remedy at law is a waiver of such an objection. Driscoll *v.* Smith, 184 Mass. 221, 68 N. E. 210. But in the United States courts the inadequacy of the remedy at law is jurisdictional, and where such remedy is adequate, a court of equity may enforce the objection *sua sponte*, although the question is not raised in the pleadings. Parker *v.* Winnipiseogee Lake Cotton, etc., Mfg. Co., 2 Black (U. S.) 545, 17 L. ed. 333.

76. Carr *v.* Weld, 18 N. J. Eq. 41.

77. Houck *v.* Patty, 100 Mo. App. 302, 73 S. W. 389.

78. Miller *v.* Cross, 73 Conn. 538, 48 Atl. 213; Brown *v.* Solary, 37 Fla. 102, 19 So. 161; McMahan *v.* O'Donnell, 20 N. J. Eq. 306; Swindall *v.* Bradley, 56 N. C. 353.

79. McBride *v.* Ross, 13 App. Cas. (D. C.) 576; McAllister *v.* Henderson, 134 Ind. 453, 34 N. E. 221; Lamasco City *v.* Brinkmeyer, 12 Ind. 349; Rochester, etc., R. Co. *v.* Monroe County Electric Belt Line Co., 78 N. Y. App. Div. 38, 78 N. Y. Suppl. 998; Stevens *v.* Salomon, 39 Misc. (N. Y.) 159, 79 N. Y. Suppl. 136; Martin *v.* Platte Valley Sheep Co., 12 Wyo. 432, 76 Pac. 571, 78 Pac. 1093.

80. Wheeler *v.* West, 78 Cal. 95, 20 Pac. 45.

81. Read *v.* Consequa, 20 Fed. Cas. No. 11,606, 4 Wash. 174.

82. Matter of Phillips, 52 Iowa 232, 3 N. W. 49. See Equity, 16 Cyc. 299 note 58, where the rules of various states are digested.

Defendant may answer at once and will if his answer is sufficient to shake the confidence of the court in plaintiff's case, prevent a temporary injunction from issuing. Hall *v.* McPherson, 3 Bland (Md.) 529.

Motion to strike filed after submission.— Where a case has been submitted for decree on a motion to dissolve a temporary injunction on a sworn answer denying the allegations of the bill, a motion to strike such an answer, filed after the submission, could not be treated as a part of the pleadings thereon. Howle *v.* Scarbrough, 138 Ala. 148, 35 So. 113.

83. Denson *v.* Stewart, 14 La. Ann. 703.

84. Chester Traction Co. *v.* Philadelphia, etc., R. Co., 188 Pa. St. 105, 41 Atl. 449, 44 L. R. A. 269; Peterson *v.* Bean, 22 Utah 43, 61 Pac. 213; Hudson *v.* Yost, 88 Va. 347, 13 S. E. 436; Dinehart *v.* La Fayette, 19 Wis. 677.

Admission of a conclusion.— In an action to restrain a municipal corporation from erecting an electric light plant, an admission that such plant is a necessary expense, being a conclusion merely, and not a fact, is not binding on the court. Mayo *v.* Washington, 122 N. C. 5, 29 S. E. 343, 40 L. R. A. 163.

85. See Equity, 16 Cyc. 369.

86. See Pleading.

87. See Pleading.

answer are waived by not taking a formal objection,[88] or by proceeding to trial on the merits.[89]

3. Demurrer or Exception[90] — **a. In General.** Where the prayer and scope of a bill shows that its chief purpose is to obtain an injunction it will be held bad on demurrer if insufficient for that purpose, although it may be sufficient to warrant other relief.[91] A complaint for an injunction is not demurrable if, on any state of proof which its allegations justify, the court could grant an injunction.[92]

b. Grounds.[93] Demurrer is the proper remedy for such defects as multifariousness,[94] want of equity appearing on the face of the bill,[95] and misjoinder or non-joinder of necessary parties.[96] A bill which is improperly verified or entirely lacks verification is not demurrable, because the demurrer admits the truth of the allegations.[97]

c. Form.[98] The demurrer should specify the defects complained of.[99]

d. Admissions.[1] The demurrer admits all facts well pleaded.[2] The allegation of "irreparable injury" is regarded as a conclusion of law which is not admitted by a demurrer.[3]

e. Hearing.[4] A demurrer to a bill must be decided before a motion for an injunction can be heard.[5] When a demurrer to a bill for an injunction and a

88. Moses *v.* Risdon, 46 Iowa 251.

89. Yeizer *v.* Burke, 3 Sm. & M. (Miss.) 439.

90. See Equity, 16 Cyc. 261 *et seq.*; and, generally, Pleading.

91. Carmel Natural Gas, etc., Co. *v.* Small, 150 Ind. 427, 47 N. E. 11, 50 N. E. 476; Logansport *v.* Uhl, 99 Ind. 531, 49 Am. Rep. 109.

92. New York, etc., R. Co. *v.* Scovill, 71 Conn. 136, 41 Atl. 246, 71 Am. St. Rep. 159, 42 L. R. A. 157; Nashville Trust Co. *v.* Weaver, 102 Tenn. 66, 50 S. W. 763.

A petition containing a general allegation of injury to real estate by waste, without stating the particulars, is not demurrable for want of facts; but a motion may be made to make the petition more definite and certain. Piatt *v.* Piatt, 3 Ohio Dec. (Reprint) 92, 3 Wkly. L. Gaz. 140.

93. See Equity, 16 Cyc. 265 *et seq.*; and, generally, Pleading.

94. New York Cent., etc., R. Co. *v.* Reeves, 41 Misc. (N. Y.) 490, 85 N. Y. Suppl. 28.

95. McMinn *v.* Karter, 123 Ala. 502, 26 So. 649; Old Hickory Distilling Co. *v.* Bleyer, 74 Ga. 201; Mechanics', etc., Bank *v.* Harrison, 68 Ga. 463; Porter *v.* Moffatt, Morr. (Iowa) 153; Boyd *v.* Hickey, (Tenn. Ch. App. 1895) 35 S. W. 1024. See Pennsylvania Schuylkill Valley R. Co. *v.* Reading Paper Mills, 149 Pa. St. 18, 24 Atl. 205; Wilson *v.* Keely, 19 Phila. (Pa.) 396.

Failure to allege facts showing that the remedy at law is inadequate renders the complaint demurrable. Chicago Gen. R. Co. *v.* Chicago, etc., R. Co., 181 Ill. 605, 54 N. E. 1026; Safe Deposit, etc., Co. *v.* Anniston, 96 Fed. 661; Schulz *v.* Albany, 27 Misc. (N. Y.) 51, 57 N. Y. Suppl. 963.

96. *California.*— People *v.* Morrill, 26 Cal. 336; Dunn *v.* Tozer, 10 Cal. 167.

Delaware.—Wilmington *v.* Addicks, 7 Del. Ch. 56, 43 Atl. 297.

Indiana.— Westervelt *v.* National Paper, etc., Co., 154 Ind. 673, 57 N. E. 552; Hall *v.* Hough, 24 Ind. 273.

West Virginia.— West Virginia Oil, etc., Co. *v.* Vinal, 14 W. Va. 637.

United States.— Carroll *v.* Chesapeake, etc., Coal Agency Co., 124 Fed. 305, 61 C. C. A. 49.

See 27 Cent. Dig. tit. "Injunction," § 251 *et seq.*

97. Tibbits *v.* Miller, 9 Okla. 677, 60 Pac. 95; Cobb *v.* Clough, 83 Fed. 604; Hancock *v.* Walsh, 11 Fed. Cas. No. 6,012, 3 Woods 351.

98. See Equity, 16 Cyc. 271.

99. Adams *v.* Olive, 57 Ala. 249; Miller *v.* Cross, 73 Conn. 538, 48 Atl. 213; Chesapeake, etc., Tel. Co. *v.* Mackenzie, 74 Md. 36, 21 Atl. 690, 28 Am. St. Rep. 219 (statute); Marden *v.* Portsmouth Milling Co., 70 N. H. 269, 48 Atl. 282.

Where a complaint in a single paragraph specifies several reasons, a demurrer may be addressed to each of them. Hilton *v.* Mason, 92 Ind. 157.

General demurrer.— A bill in equity to restrain the prosecution of several actions at law presents several distinct grounds of equity jurisdiction. A general demurrer to such a bill is properly overruled. Marden *v.* Portsmouth Milling Co., 70 N. H. 269, 48 Atl. 282.

1. See Equity, 16 Cyc. 276.

2. Nagel *v.* Lindell R. Co., 167 Mo. 89, 66 S. W. 1090; Lewin *v.* Welsbach Light Co., 81 Fed. 904.

3. Justices Pike County Inferior Ct. *v.* Griffin, etc., Plank Road Co., 11 Ga. 246; Boston, etc., R. Co. *v.* Portsmouth, etc., R. Co., 57 N. H. 200; Gibson *v.* Gibson, 46 Wis. 462, 1 N. W. 154.

4. See Equity, 16 Cyc. 275.

5. Ketchum *v.* Driggs, 13 Fed. Cas. No. 7,735, 6 McLean 13.

motion to dissolve a temporary injunction issued thereon are both pending it is within the discretion of the trial court to determine which shall be heard first.[6] At an interlocutory hearing on a demurrer, it has been held that it can be considered only as a paper showing cause why a temporary injunction should not issue.[7]

4. Amended and Supplemental Pleadings — a. Amendments[8] — (i) *Purposes For Which Amendments Permissible.* The pleadings may be amended to correct a formal defect or mistake,[9] or to add necessary allegations.[10] Thus the prayer for relief may be added by amendment.[11] However, no amendment will be permitted which changes the essential nature of the action.[12] Furthermore, no amendment should be allowed unless the interests of justice manifestly require it.[13] An amendment should never be allowed when its manifest purpose is delay.[14] In the case of verified bills the right of amendment is granted with greater caution than in case of unverified bills.[15]

(ii) *Leave of Court.* After a bill in equity has been filed it cannot be amended without leave of court, and a motion for an injunction based upon an amendment made without leave will be dismissed.[16]

(iii) *Time to Amend.*[17] An amendment may be made, in the absence of a rule of court to the contrary, at any time within the discretion of the court.[18] Amendments are usually allowed before an answer is filed;[19] but they may be

6. Clark *v.* Shaw, 101 Ind. 563.

7. Reynolds, etc., Mortg. Co. *v.* Kingsbery, 118 Ga. 254, 45 S. E. 235; Old Hickory Distilling Co. *v.* Bleyer, 74 Ga. 201.

8. See Equity, 16 Cyc. 335 *et seq.*; and, generally, Pleading.

9. Weill *v.* Metropolitan R. Co., 10 Misc. (N. Y.) 72, 30 N. Y. Suppl. 833, 24 N. Y. Civ. Proc. 85, 1 N. Y. Annot. Cas. 40; Packer *v.* Sunbury, etc., R. Co., 19 Pa. St. 211.

Motion for preliminary injunction.— Defects in a bill which are amendable do not interfere with a motion for a preliminary injunction. Com. *v.* Pittsburg, etc., R. Co., 24 Pa. St. 159, 62 Am. Dec. 372.

10. Lanning *v.* Heath, 25 N. J. Eq. 425; Renwick *v.* Wilson, 6 Johns. Ch. (N. Y.) 81.

11. Bailey *v.* Stiles, 3 N. J. Eq. 245.

12. Houck *v.* Patty, 100 Mo. App. 302, 73 S. W. 389; Lloyd *v.* Brewster, 4 Paige (N. Y.) 537, 27 Am. Dec. 88; McNair *v.* Buncombe County, 93 N. C. 364; Eakin *v.* Hawkins, 48 W. Va. 364, 37 S. E. 622.

13. *Georgia.*— Walker *v.* Walker, 3 Ga. 302.

Indiana.— Watson *v.* Adams, 32 Ind. App. 281, 69 N. E. 696.

Louisiana.— Barrow *v.* Wright, 3 La. Ann. 130; Calderwood *v.* Trent, 9 Rob. 227.

New Jersey.— Bailey *v.* Stiles, 3 N. J. Eq. 245.

North Carolina.— Latham *v.* Wiswall, 37 N. C. 294.

Texas.— Dailey *v.* Wynn, 33 Tex. 614; Taylor *v.* Gillean, 23 Tex. 508; Eppstein *v.* Webb, (Civ. App. 1903) 75 S. W. 337.

England.— Creighton *v.* Talbot, 1 Hog. 334; Ferrand *v.* Hamer, 3 Jur. 236, 8 L. J. Ch. 96, 4 Myl. & C. 143, 18 Eng. Ch. 143, 41 Eng. Reprint 57; King *v.* Turner, 6 Madd. 255, 56 Eng. Reprint 1088; Vesey *v.* Wilks, 3 Madd. 475, 56 Eng. Reprint 579; Pickering *v.* Hanson, 2 Sim. 488, 2 Eng. Ch. 488, 57 Eng. Reprint 870.

Canada.— Macdonald *v.* Joley, 1 Montreal Leg. N. 460.

See 27 Cent. Dig. tit. "Injunction," § 253 *et seq.*

Striking out allegation.— A verified bill for an injunction cannot be amended by striking out any of its allegations. It may, however, be connected by the addition of explanatory or supplemental statements. Carey *v.* Smith, 11 Ga. 539; Marble *v.* Bonhotel, 35 Ill. 240; Renwick *v.* Wilson, 6 Johns. Ch. (N. Y.) 81.

Matters occurring after the filing of the bill may be added by amendment before service of the answer. Luft *v.* Gossrau, 31 Ill. App. 530.

14. Calderwood *v.* Trent, 9 Rob. (La.) 227.

15. Verplanck *v.* Mercantile Ins. Co., 1 Edw. (N. Y.) 46; Parker *v.* Grant, 1 Johns. Ch. (N. Y.) 434; Fricke *v.* Magee, 10 Wkly. Notes Cas. (Pa.) 50.

16. Baker *v.* Baldwin, 1 R. I. 489.

17. See Equity, 16 Cyc. 342 *et seq.*, 354 *et seq.*; and, generally, Pleading.

18. Fullington *v.* Kyle Lumber Co., 139 Ala. 242, 35 So. 852; Cook County Brick Co. *v.* Bach, 93 Ill. App. 88; Hawley *v.* Crescent City Bank, 26 La. Ann. 230. *Compare* Forward School Dist.'s Appeal, 56 Pa. St. 318.

Prejudice by amendments.— To justify an application to amend an injunction bill after answer, and without prejudice to the injunction, the application must be made in such season that defendant could not be prejudiced by it in bringing the cause to a hearing. Jackson, etc., Co. *v.* Philadelphia, etc., R. Co., 3 Del. Ch. 512.

19. Luft *v.* Grossrau, 31 Ill. App. 530; Bronson *r.* Green, Walk. (Mich.) 486; Insurance Co. of North America *v.* Svendsen,

allowed after the answer is filed and before the hearing,[20] or after the dissolution of a temporary injunction and before the final hearing,[21] or even after the final hearing and before the final decree.[22]

(iv) *Procedure.* In some jurisdictions an amendment will be permitted only by special order granted upon notice to the adverse party.[23] The causes necessitating the amendment should be stated and sworn to.[24] The amendment, when short, may be interlined; but if the amendment is of considerable length it should be on a separate sheet of paper and annexed to the bill.[25]

(v) *Operation and Effect.* An amendment of a bill relates back to the time the bill was filed.[26] If the bill as amended states a good ground for injunction it is immaterial that the original bill did not.[27] If the amendments do not change the aspect of the bill a new motion for injunction will be denied.[28] If the court had no jurisdiction of the bill as filed any amendment is a nullity.[29] An amendment to a bill on which an injunction has issued may be filed by leave of court without invalidating the injunction.[30]

b. Supplemental Pleadings.[31] Whenever facts occurring after the original bill is filed are to be presented to the court, it must be done by a supplemental bill.[32] A defense consisting of facts arising after issue joined must be alleged in a cross bill in the nature of a plea.[33]

5. Issues, Proof, and Variance. Evidence not tending to support allegations in the pleadings will be rejected on the ground of variance.[34] Plaintiff must prove

74 Fed. 346; Evans *v.* Roote, 1 Ch. Chamb. (U. C.) 357.

20. Jackson, etc., Co. *v.* Philadelphia, etc., R. Co., 3 Del. Ch. 512; Marble *v.* Bonhotel, 35 Ill. 240; Keerl *v.* Keerl, 28 Md. 157; McDonald *v.* Tinnon, 20 Tex. 245.

21. Des Moines Nav., etc., Co. *v.* Carpenter, 27 Iowa 487; Crawford *v.* Paine, 19 Iowa 172; Rhodes *v.* Union Bank, 7 Rob. (La.) 63; Kelley *v.* Whitmore, 41 Tex. 647.

22. Mayer *v.* Coley, 80 Ga. 207, 7 S. E. 164; Meyers *v.* Shields, 61 Fed. 713.

23. Clark *v.* Judson, 2 Barb. (N. Y.) 90; Donegal *v.* Berry, 1 Hog. 46. *Compare* Creighton *v.* Talbot, 1 Hog. 334; McGregor *v.* Maud, 2 Ch. Chamb. (U. C.) 387; Westacott *v.* Cockerline, 13 Grant Ch. (U. C.) 159.

24. Jackson, etc., Co. *v.* Philadelphia, etc., R. Co., 3 Del. Ch. 512; Gunn *v.* Blair, 1 Barb. (N. Y.) 539; Parker *v.* Grant, 1 Johns. Ch. (N. Y.) 434; Woodroffe *v.* Daniel, 8 L. J. Ch. 16, 9 Sim. 410, 16 Eng. Ch. 410, 59 Eng. Reprint 415; Penfold *v.* Stoveld, 3 Madd. 471, 56 Eng. Reprint 578; Jackson *v.* Strong, McClell. 245, 13 Price 494.

The particular amendments must be specified. Bell *v.* Brookbank, 2 Y. & J. 181.

If the amendment is insufficient to make out a case for injunctive relief, it is proper for the court to refuse to permit it to be filed. Haupt *v.* Independent Tel. Messenger Co., 25 Mont. 122, 63 Pac. 1033.

25. Layton *v.* Ivans, 2 N. J. Eq. 387.

26. See Equity, 16 Cyc. 350 note 24.

27. Miller *v.* Cook, 135 Ill. 190, 25 N. E. 756, 10 L. R. A. 292.

28. Matthiessen, etc., Sugar Refining Co. *v.* Jersey City, 26 N. J. Eq. 275.

29. Kerfoot *v.* People, 51 Ill. App. 409.

30. Barber *v.* Reynolds, 33 Cal. 497; Read *v.* Consequa, 20 Fed. Cas. No. 11,606, 4 Wash. 174; McDonell *v.* McKay, 12 Grant Ch. (U. C.) 414.

31. See Equity, 16 Cyc. 320 *et seq.*; and, generally, Pleading.

32. *Alabama.*— Balkum *v.* Harper, 50 Ala. 372.

Florida.— Ledwith *v.* Jacksonville, 32 Fla. 1, 13 So. 454; Smith *v.* Davis, 22 Fla. 405.

Louisiana.— Howard *v.* Simmons, 25 La. Ann. 668.

New York.— Preservaline Mfg. Co. *v.* Selling, 75 N. Y. App. Div. 474, 78 N. Y. Suppl. 299; Griswold *v.* Jackson, 2 Edw. 461; Bloomfield *v.* Snowden, 2 Paige 355.

Vermont.— Waterman *v.* Buck, 63 Vt. 544, 22 Atl. 15.

See 27 Cent. Dig. tit. "Injunction," § 260.

The supplemental bill must be verified. Maillot *v.* Martin, 15 La. Ann. 40.

Imposition of terms.— Where an entirely new cause of action is brought to the court's attention by means of a supplemental bill, after expense has been incurred in trying an issue framed on the original bill, the court may first require costs previously incurred to be paid. Dailey *v.* Wynn, 33 Tex. 614.

33. McAlpin *v.* Universal Tobacco Co., (N. J. Ch. 1904) 57 Atl. 418.

34. Nieman *v.* Detroit Suburban St. R. Co., 103 Mich. 256, 61 N. W. 519; McCulla *v.* Beadleston, 17 R. I. 20, 20 Atl. 11; Ehlinger *v.* Rankin, 9 Tex. Civ. App. 424, 29 S. W. 240; Baring *v.* Erdman, 2 Fed. Cas. No. 981.

Evidence contradicting the judicial admissions in complainant's bill is inadmissible in his behalf. Feltus *v.* Blanchin, 26 La. Ann. 401.

Evidence held admissible under pleadings.— An allegation in the bill for an injunction to compel the issuance of a bill of lading that the action of defendant carrier was due to a certain agreement made at a meeting,

all the essential allegations of his bill which are not admitted,[35] and defendant all his defenses.[36]

6. Waiver of Objections to Pleadings. Formal defects in a bill for an injunction are waived by failing to demur and filing an answer.[37] If, however, a bill is clearly bad because of substantial defects failure to demur is not a waiver, and objection may be made at the hearing.[38]

H. Evidence — 1. Presumptions and Burden of Proof — a. Presumptions. It will be presumed that all facts not fully and candidly disclosed by a party praying for an injunction are detrimental to him;[39] and that all legal proceedings are regular, in the absence of a specific designation of irregularities.[40] An execution of an act of the legislature authorizing an erection will not be presumed to be impossible.[41] The intention of defendant to perform the acts sought to be enjoined will, if such intention is essential to the maintenance of the action, be presumed.[42]

b. Burden of Proof. By analogy to the rules of procedure in actions generally, the burden of proving the right to injunctive relief is on complainant,[43]

the terms of which were unknown to complainants, but the tenor of which was to restrain trade and in violation of the laws of the United States, is sufficient to admit evidence of what was done at the meeting, the policies outlined and the terms and circumstances of a division of traffic there made. Post *v.* Southern R. Co., 103 Tenn. 184, 52 S. W. 301, 55 L. R. A. 481.

35. *Alabama.*— Carter *v.* Garrett, 13 Ala. 728.

Louisiana.— Tenney *v.* Abraham, 43 La. Ann. 240, 9 So. 40.

Maryland.— Briesch *v.* McCauley, 7 Gill 189.

New Jersey.— Ketchum *v.* Sandt, (Ch. 1893) 26 Atl. 863; Keeler *v.* Green, 21 N. J. Eq. 27.

New York.— Ketchum *v.* Depew, 81 Hun 278, 30 N. Y. Suppl. 794.

Texas.— Junction City School Incorporation *v.* School Dist. No. 6, 81 Tex. 148, 16 S. W. 742; Morphy *v.* Garrett, 48 Tex. 247.

See 27 Cent. Dig. tit. "Injunction," § 270.

36. McRae *v.* McDonald, 57 Ala. 423; Watson *v.* Adams, 32 Ind. App. 281, 69 N. E. 696; Lambert *v.* Huber, 22 Misc. (N. Y.) 462, 50 N. Y. Suppl. 793.

37. *Illinois.*—Rutledge *v.* Drainage Com'rs, 16 Ill. App. 655.

Iowa.— Price *v.* Baldauf, 82 Iowa 669, 46 N. W. 983, 47 N. W. 1079.

Mississippi.— Yeizer *v.* Burke, 3 Sm. & M. 439.

New Jersey.— Perkins *v.* Collins, 3 N. J. Eq. 482.

Tennessee.— Boyd *v.* Hickey, (Ch. App. 1895) 35 S. W. 1024.

England.—Davile *v.* Peacock, Barn. Ch. 25.

See 27 Cent. Dig. tit. "Injunction," § 271.

Asking time to answer is not a waiver. Travers *v.* Stafford, Ambl. 104, 27 Eng. Reprint 66, 2 Ves. 19, 28 Eng. Reprint 13.

38. Kriechbaum *v.* Bridges, 1 Iowa 14.

39. Sauvinet *v.* New Orleans, 1 La. Ann. 346.

40. Homer *v.* Warren, 10 Heisk. (Tenn.) 471.

41. State *v.* Eau Claire, 40 Wis. 533.

42. Williams *v.* Boynton, 147 N. Y. 426, 42 N. E. 184, holding that where persons apparently members of a municipal board authorized by law to direct a public officer to perform a certain act direct him to perform such act, it will be assumed, in an action to enjoin its performance, that he intends to perform it, if such intention is essential to the maintenance of the action.

Erection of telephone poles.— In an action for injunction to prevent the placing of poles in front of plaintiff's house on which to support electric wires, a presumption that the electric lighting company intends erecting poles at a certain point arises from the fact that it has received permission to do so, and has already erected poles at intervals on the line of streets approaching the point. Tiffany *v.* U. S. Illuminating Co., 51 N. Y. Super. Ct. 280.

43. *Alabama.*— McRae *v.* McDonald, 57 Ala. 423.

Arizona.— Hampson *v.* Adams, 6 Ariz. 335, 57 Pac. 621.

California.— Oglesby *v.* Santa Barhara, 119 Cal. 114, 51 Pac. 181.

Illinois.— Ryan *v.* Hamilton, 205 Ill. 191, 68 N. E. 781 [*reversing* 103 Ill. App. 212].

Louisiana.— New Orleans Mut. Nat. Bank *v.* Moore, 104 La. 150, 29 So. 103.

Maine.— Dillingham *v.* Roberts, 77 Me. 284.

Maryland.— Hutchins *v.* Hope, 7 Gill 119.

Missouri.— Powell *v.* Canaday, 95 Mo. App. 27, 69 S. W. 686.

New York.— O'Brien *v.* Buffalo Traction Co., 165 N. Y. 637, 59 N. E. 1128; Universal Talking Mach. Co. *v.* English, 34 Misc. 342, 69 N. Y. Suppl. 813.

Ohio.— Spangler *v.* Cleveland, 43 Ohio St. 526, 3 N. E. 365.

Oklahoma.— Territory *v.* Whitehall, 13 Okla. 534, 76 Pac. 148.

Pennsylvania.— Bryner *v.* Youghiogheny Bridge Co., 190 Pa. St. 617, 42 Atl. 1100.

Texas.— McGhee Irr. Ditch Co. *v.* Hud-

while on the other hand the burden of proving defenses thereto is on defendant.[44]

2. Admissibility. So as regards admissibility, injunction proceedings are in general governed by the same rules of evidence that are applicable to other equitable proceedings,[45] such rules extending to evidence in the form of depositions,[46]

son, 85 Tex. 587, 22 S. W. 398 [*reversing* (Civ. App. 1893) 21 S. W. 175].

Virginia.— Radford *v.* Innes, 1 Hen. & M. 7.

See 27 Cent. Dig. tit. "Injunction," § 276.

Title or interest.— In an action to enjoin a county treasurer from issuing a deed to land sold for taxes, where the petition showed upon its face that plaintiff had sold the land before the commencement of the suit, the burden was on plaintiff to show such an interest in the property as to entitle him to the relief asked. Harlow *v.* Gow, 44 Iowa 533. Plaintiffs must show that they are taxpayers to entitle them to enjoin the construction of a bridge by highway commissioners. Scott *v.* Allen, 53 Ill. App. 341.

Compliance with ordinances.— In an action to restrain the destruction of plaintiff's street railway tracks, where defendant denied that the tracks were constructed in accordance with the requirements of the city ordinances and contracts for their construction, specifying the imperfections and deficiencies, plaintiff has the burden of proving a compliance with such ordinances and contract Spokane St. R. Co. *v.* Spokane Falls, 46 Fed. 322.

Existence of claim.— Where a person seeks to restrain collection of a note executed by him on the ground that he did not owe the money therein specified, and an arbitration of the claim was had, in which the award was uncertain as to the disputed question, the burden of proof is on complainant to establish his claim. Hershe *v.* Delaney, 7 Iowa 496.

Existence of writ.— In an action to restrain the issuance of a treasurer's deed because the property was sold in violation of an injunction, the burden of proving that at the time of the sale a decree for an injunction was in existence is on plaintiff. Monell *v.* Irey, 47 Nebr. 213, 66 N. W. 289.

44. People *v.* Third Ave. R. Co., 45 Barb. (N. Y.) 63.

Existence of highway.— The burden of proving that the place where a fence is standing is a highway is upon the county commissioners in an action to restrain them from tearing down the fence. McIntyre *v.* Storey, 80 Ill. 127.

Destruction of easement.— The burden of proof is on defendant to show that an easement has been destroyed in whole or in part in an action to restrain him from erecting a building in violation of a covenant issuing such easement in air, light, and vision. Lattimer *v.* Livermore, 72 N. Y. 174.

45. See Equity, 16 Cyc. 382. See also Taft *v.* Tarpey, 125 Cal. 376, 58 Pac. 24 (holding that evidence of a statement made by plaintiff's grantor after the conveyance to plaintiff with regard to his custom of reserving rights of way was inadmissible for the purpose of establishing a dedication as against plaintiff); Central Stock, etc., Exch. *v.* Chicago Bd. of Trade, 196 Ill. 396, 63 N. E. 740 [*affirming* 91 Ill. 212], in which it was held that in an action to enjoin defendant from refusing to furnish market quotations to the complainant, evidence that defendant conducted its business upon the same plan as that pursued by complainant is irrelevant); Houck *v.* Patty, 100 Mo. App. 302, 73 S. W. 389 (holding that where trespasses were justified by a deed evidence that the consideration for such deed was fictitious and the deed a mere sham was admissible); Roosen *v.* Carlson, 46 N. Y. App. Div. 233, 47 N. Y. App. Div. 638, 62 N. Y. Suppl. 157 (holding that in an action to enjoin defendant from working for other persons than complainant and to compel the surrender of certain chemical formulas, evidence that defendant was the owner of such formulas was admissible); Hill *v.* Haberkorn, 3 Silv. Sup. (N. Y.) 87, 6 N. Y. Suppl. 474 (holding that where it was sought to enforce a contract for the services of an actress which was a continuation of a prior contract, evidence of complainant's breach of such first contract was admissible).

Evidence of a parol license is admissible where the bill is upon the grounnd of wrongful possession and prays for both damages and injunction. Sheldon *v.* Preva, 57 Vt. 263.

On bill and cross bill for injunction it is correct practice to consider on the cross bill the evidence taken on the bill. McCue *v.* Holleran, 7 Del. Co. (Pa.) 458, 9 Kulp 433, 13 York Leg. Rec. 106.

Statements in letters of third persons may in some cases be used in support of the bill. Merritt *v.* Thompson, 3 E. D. Smith (N. Y.) 599, 620, 1 Abb. Pr. 223, 10 How. Pr. 428.

The record of a prior suit wherein, on the same facts, an injunction was denied, is admissible to resist a second application. Wetzstein *v.* Boston, etc., Consol. Copper, etc., Min. Co., (Mont. 1901) 66 Pac. 943.

A judgment in a prior action at law in favor of defendant may be considered by the court on application for a preliminary injunction, even though such judgment is to be appealed from. Boston, etc., Consol. Copper, etc., Min. Co. *v.* Montana Ore Purchasing Co., (Mont. 1901) 66 Pac. 752. See also Wetzstein *v.* Boston, etc., Consol. Copper, etc., Min. Co., (Mont. 1901) 66 Pac. 943.

46. Camden, etc., Transp. Co. *v.* Stewart, 21 N. J. Eq. 484, holding that it was not sufficient that a deposition attached to a bill appeared to have been taken in a suit between the same parties without a showing that the

or affidavits,[47] although upon the hearing of a motion for a preliminary injunction the rules of evidence are less strictly applied than upon a final hearing, and evidence may be admissible which would not be competent in support of an application for a permanent injunction.[48] Complainant is entitled to show the nature and extent of the threatened injury,[49] and that the acts complained of will be continued,[50] and defendant may controvert such evidence.[51] Plaintiff may show the manner in which the evil may be remedied,[52] but defendant is not entitled to show that by the taking of measures not required of plaintiff the damages might be prevented.[53] Secondary evidence is inadmissible where the best evidence may be procured,[54] although the sufficiency of the foundation for the admission of secondary evidence is somewhat discretionary with the trial judge.[55]

suit related to the same subject-matter, and holding further that the only legitimate proof of a deposition was by a compared or duly certified copy.

The deposition of a co-defendant upon cross-examination on his answer is inadmissible on a motion for an injunction against another defendant in reply to the affidavits filed in answer to the motion, where the latter defendant had no notice of the cross-examination or of plaintiff's intention to read the deposition. Curtis *v.* Dales, 12 Grant Ch. (U. C.) 244.

47. Warren *v.* Monnish, 97 Ga. 399, 23 S. E. 823, holding that an affidavit was not admissible which was not entitled in the cause and as to which there was no proof that it was made or intended to be used as evidence in another court or in any case save a memorandum on the back containing the names of the parties and of the court in which the application for injunction was pending. And see *infra*, VI, H, 4.

48. My Maryland Lodge No. 186 *v.* Adt, 100 Md. 238, 59 Atl. 721, 68 L. R. A. 752; Casey *v.* Cincinnati Typographical Union No. 3, 45 Fed. 135, 12 L. R. A. 193 (holding that in an action to enjoin a boycott of a newspaper, statements of defendant repeated by an advertiser to a solicitor at the time the advertiser refused to renew his advertisement as reasons for such refusal may be given in evidence); Matthews *v.* Iron Clad Mfg. Co., 19 Fed. 321; Buck *v.* Hermance, 4 Fed. Cas. No. 2,081, 1 Blatchf. 322 (holding that the object of the rule stated in the text was to enable the court to exercise a sound discretion in granting or refusing the injunction).

Oral evidence.— It is not an abuse of discretion to refuse any oral evidence. Boyce *v.* Burchard, 21 Ga. 74.

Hearsay evidence is admissible upon an interlocutory application, and if not denied will be assumed to be true. Bird *v.* Lake, 1 Hem. & M. 111, 8 L. T. Rep. N. S. 632.

49. Weaver *v.* Shipley, 127 Ind. 526, 27 N. E. 146, holding that where it was sought to enjoin interference with land leased for title-making it was proper to show that no other land in the neighborhood was suitable for such purpose.

50. Heilhron *v.* Last Chance W. D. Co., (Cal. 1886) 9 Pac. 456, holding it error to refuse to allow an officer of defendant corporation to answer when asked on the trial, "Unless there is an injunction issued in this case forbidding the corporation, through its agents, from doing this act, you, as long as you are agent of the corporation, will continue to do it when you think it necessary to do it, and to the advantage of the corporation?"

51. Cook *v.* Miller, 26 Ill. App. 421 (holding that where it was sought to enjoin the purchaser of premises at a tax-sale from taking a conveyance because of the destruction of complainant's security as mortgagee, it may be shown that the complainant held additional security for his debt); Whitlock *v.* Consumers' Gas Trust Co., 127 Ind. 62, 26 N. E. 570 (holding evidence that plaintiff had acquiesced in an alleged trespass and had offered to receive a certain sum in compensation therefor and that his grantor had conveyed an interest in the land to a third person admissible in defense where it was sought to enjoin the trespass); Stoddart *v.* Vanlaningham, 14 Kan. 18.

Benefits to property may be shown to controvert a showing of irreparable injury. Purdy *v.* Manhattan R. Co., 13 N. Y. Suppl. 295, holding that an occupant of the property might be asked whether his business was interfered with while he was such an occupant. And see EMINENT DOMAIN, 15 Cyc. 899 *et seq.*

52. Winchell *v.* Waukesha, 110 Wis. 101, 85 N. W. 668, 84 Am. St. Rep. 902, holding that in an action to enjoin the pollution of a stream by sewage complainant might show that defendant's sewer system might be so equipped as to render the outflow harmless, the question of whether an injunction would completely destroy the existing sewer system being material in such a case.

53. Sylvester *v.* Jerome, 19 Colo. 128, 34 Pac. 760, holding that in an action to restrain the flooding of defendant's cellar evidence that the cellar might be made watertight was not admisible.

54. Houck *v.* Patty, 100 Mo. App. 302, 73 S. W. 389; New York Cent., etc., R. Co. *v.* Rochester, 1 N. Y. Suppl. 456, holding that the fact that complaints had been made concerning the flooding of cellars was secondary evidence of the fact that such cellars had been flooded.

55. Davis *v.* Covington, etc., R. Co., 77 Ga. 322, 2 S. E. 655, holding that he need

3. Weight and Sufficiency — a. In General. Plaintiff in an action praying for injunctive relief must establish the facts necessary for the granting of such relief by a preponderance of evidence,[56] what constitutes a preponderance of evidence being a question for the court trying the case, taking into consideration all the circumstances.[57] If the evidence is hopelessly conflicting[58] or doubtful,[59] an injunction will not be granted. If an unverified bill is met by the sworn denial of defendant, evidence of at least two witnesses or of one witness and corroborating evidence equal to the testimony of one witness is generally necessary.[60] If, however, the bill is verified,[61] or the answer is upon information and belief,[62] or fails to deny important material allegations,[63] the testimony of one witness may be suffi-

not require absolutely that all means of discovering the primary evidence be exhausted.

56. Blumeneurer *v.* O'Conner, 32 Misc. (N. Y.) 17, 66 N. Y. Suppl. 137; Humphreys *v.* McCloud, 3 Head (Tenn.) 235.

An allegation of insolvency is not sustained by a plaintiff's evidence upon direct examination that he does not think defendant is worth anything, where, upon cross-examination, he admits that all he knows about the matter is hearsay. Parker *v.* Furlong, 37 Oreg. 248, 62 Pac. 490.

57. *California.*— Kaiser *v.* Dalto, 140 Cal. 167, 73 Pac. 828.

Florida.— Campbell *v.* White, 39 Fla. 745, 23 So. 555.

Georgia.— Savannah Electric Co. *v.* Pedrick, 116 Ga. 320, 42 S. E. 467.

Illinois.— Chicago, etc., R. Co. *v.* Bastian, 97 Ill. App. 38.

Iowa.— Cattell *v.* Wilhelm, 39 Iowa 288.

Kansas.— Richardson *v.* Emmert, 44 Kan. 262, 24 Pac. 478.

Maryland.— Maryland Hotel Co. *v.* Baltimore Engraving Co., 92 Md. 710, 48 Atl. 716.

Missouri.— Chicago, etc., R. Co. *v.* Brandau, 81 Mo. App. 7.

Montana.— Colusa Parrot Min., etc., Co. *v.* Barnard, 28 Mont. 11, 72 Pac. 45.

Nebraska.— Kelley *v.* Boyer, (1904) 99 N. W. 832.

New Jersey.— Fleckenstein Bros. Co. *v.* Fleckenstein, 66 N. J. Eq. 252, 57 Atl. 1025; Williams *v.* Tomlin, (Ch. 1899) 46 Atl. 225.

New York.— Backes *v.* Curran, 69 N. Y. App. Div. 188, 74 N. Y. Suppl. 723; Flint *v.* Charman, 6 N. Y. App. Div. 121, 39 N. Y. Suppl. 892; Grenell *v.* Stillwell, 60 Hun 577, 14 N. Y. Suppl. 662; Kiernan *v.* Manhattan Quotation Tel. Co., 50 How. Pr. 194.

Oregon.— See Tolman *v.* Casey, 15 Oreg. 83, 13 Pac. 669.

South Carolina.— See *Ex p.* Hampton, etc., R., etc., Co., 45 S. C. 122, 22 S. E. 804.

Texas.— Oak Cliff Sewerage Co. *v.* Marsalis, 30 Tex. Civ. App. 42, 69 S. W. 176.

Wyoming.— Martin *v.* Platte Valley Sheep Co., 12 Wyo. 432, 76 Pac. 571, 78 Pac. 1093.

United States.— Matthews *v.* Warner, 112 U. S. 600, 5 S. Ct. 312, 2 L. ed. 851 [*affirming* 6 Fed. 461]; Walsh *v.* Preston, 109 U. S. 297, 3 S. Ct. 169, 27 L. ed. 940; Hagan *v.* Blindell, 56 Fed. 696, 6 C. C. A. 86 [*affirming* 54 Fed. 40].

See 27 Cent. Dig. tit. "Injunction," § 278.

Evidence of injury from act.— In an action by the "Employers' Liability Assurance Corporation, Limited," of Great Britain, doing business in the state of New York, to restrain defendant, the "Employers' Liability Insurance Company of the United States," a junior company, from doing business in the same state, on account of similarity of name, where there is evidence that defendant is, contrary to law, attempting to do business in the state of New York, without a license from the superintendent of the insurance department of the state, by making out policies in Jersey City, in the state of New Jersey, and delivering them in New York city, in the state of New York, the court erred in refusing the injunction, although there was only slight evidence to show that plaintiff was injured by the acts of defendant in the premises. Employers' Liability Assur. Corp. *v.* Employers' Liability Ins. Co., 61 Hun (N. Y.) 552, 16 N. Y. Suppl. 397 [*reversing* 10 N. Y. Suppl. 845, 24 Abb. N. Cas. 368].

Existence of agreement.— A judgment for defendants should not be disturbed in an action by the trustee of a school-district against the trustees of a church to enjoin defendants from holding services in the room immediately over the school-room when school is in session, where it appeared that plaintiffs and defendants jointly leased a two-story building, the lower story for school purposes and the upper room as a church, and there was evidence that defendants agreed verbally that no services would be held during school hours, which was denied by defendants, and the written contracts of the parties in reference to such building did not contain the agreement agreed between plaintiffs. Miller *v.* Nelson, 21 S. W. 875, 14 Ky. L. Rep. 829.

58. Bank of Commerce *v.* McAfee, 110 Ga. 302, 34 S. E. 1037; Humphreys *v.* McCloud, 3 Head (Tenn.) 235.

59. Philadelphia's Appeal, 78 Pa. St. 33.

60. Ashby *v.* Ashby, (N. J. Ch. 1898) 40 Atl. 118; Union Bank *v.* Geary, 5 Pet. (U. S.) 99, 8 L. ed. 60. See also Equity, 16 Cyc. 392.

61. Bogert *v.* Jackson Cir. Judge, 118 Mich. 457, 76 N. W. 983; Clad *v.* Paist, 5 Pa. Dist. 657; Krider *v.* Krider, 17 Montg. Co. Rep. (Pa.) 9; Brown *v.* Daniels, (Tenn. Ch. App. 1898) 51 S. W. 991; Searcy *v.* Pannell, 21 Fed. Cas. No. 12,584, Cooke 110.

62. Watson *v.* Palmer, 5 Ark. 501; Doke *v.* Peek, 45 Fla. 244, 34 So. 896.

63. Smith *v.* Delaware Tel., etc., Co., 63

cient. A jurisdictional fact necessary to the allowance of an injunction must be established *prima facie* before the court can proceed further.[64]

b. For Preliminary Injunction. On an application for a preliminary injunction, it is not necessary that a case should be made out that would entitle the complainant to relief at all events on the final hearing. If the complainant has made out a *prima facie* case or if from the pleadings and the conflicting affidavits it appears to the court that a case is presented proper for its investigation on a final hearing, a preliminary injunction may issue to maintain the *status quo*.[65] Where the evidence on material points is conflicting, it is within the discretion of the court either to grant[66] or refuse[67] the injunction. It will nearly always be refused where the preponderance of the evidence as to the complainant's right or as to the existence of an impending irreparable injury is on the side of defendant.[68]

4. Pleadings and Affidavits as Evidence[69] **— a. For Complainant** — (i) *Bill or Complaint.* Except on final hearing for a perpetual injunction,[70] the bill or complaint itself, when properly verified, may be used as an affidavit as to the facts properly stated therein,[71] and frequently the bill alone, when so verified, may be a sufficient basis for the issuance of a temporary injunction[72] if it contains

N. J. Eq. 93, 51 Atl. 464; Parker *v.* Furlong, 37 Oreg. 248, 62 Pac. 490; York *v.* Gregg, 9 Tex. 85; Boardman *v.* Wroughton, 16 Grant Ch. (U. C.) 384; Treadwell *v.* Morris, 15 Grant Ch. (U. C.) 165.

64. Ward *v.* Ohio River R. Co., 35 W. Va. 481, 14 S. E. 142.

65. *Indiana.*— Spicer *v.* Hoop, 51 Ind. 365.

Maryland.— Laupheimer *v.* Rosenbaum, 25 Md. 219; Union Bank *v.* Poultney, 8 Gill & J. 324.

New York.— Litchfield *v.* Brooklyn, 10 Misc. 74, 31 N. Y. Suppl. 151.

North Carolina.— Faison *v.* Hardy, 114 N. C. 58, 19 S. E. 91; Roberts *v.* Lewald, 107 N. C. 305, 12 S. E. 279.

Tennessee.— Flippin *v.* Knaffle, 2 Tenn. Ch. 238.

United States.— Buskirk *v.* King, 72 Fed. 22, 18 C. C. A. 418; Automatic Phonograph Exhibition Co. *v.* North American Phonograph Co., 45 Fed. 1.

See 27 Cent. Dig. tit. "Injunction," § 322.

Defendant's oral testimony taken by consent of the parties is to be given the same effect as his *ex parte* affidavit. Crellin *v.* Schafer, 4 Kulp (Pa.) 211.

66. Thigpen *v.* Aldridge, 92 Ga. 563, 17 S. E. 860; Brunner *v.* Royal, 89 Ga. 776, 15 S. E. 689; Ruhsam *v.* Cobb, 84 Ga. 552, 11 S. E. 138; Brinson *v.* Hadden, 77 Ga. 499, 2 S. E. 694; Faison *v.* Hardy, 114 N. C. 58, 19 S. E. 91; Cheeseman *v.* Shreeve, 37 Fed. 36.

67. Rome St. R. Co. *v.* Van Dyke, 92 Ga. 570, 17 S. E. 906; Hammett *v.* Tanner, 78 Ga. 355; Savannah, etc., R. Co. *v.* Coast-Line R. Co., 49 Ga. 202; Decatur County *v.* Humphrey, 47 Ga. 565; Richardson, etc., Co. *v.* Barstow Stove Co., 11 N. Y. Suppl. 935, 26 Abb. N. Cas. 150; Moosic Mountain Coal Co. *v.* Delaware, etc., R. Co., 4 C. Pl. (Pa.) 189; Post *v.* Young, 7 Kulp (Pa.) 102; Pennsylvania Coal Co. *v.* Kelley, 2 Kulp (Pa.) 41; Smith *v.* Schmidt, 1 Leg. Gaz. 58; Cooper *v.* Mattheys, 5 Pa. L. J. 38; Sanxter *v.* Foster, Cr. & Ph. 302, 18 Eng. Ch. 302, 41 Eng. Reprint 506; De Tastet *v.* Bordenave, Jac. 516, 4 Eng. Ch. 516, 37 Eng. Reprint 945; McCurdy *v.* Noak, 17 L. J. Ch. 165.

In case adequate relief can be had on final hearing, and the evidence is conflicting, a preliminary injunction will be refused. Hemsley *v.* Bew, 53 N. J. Eq. 241, 31 Atl. 210.

68. *Georgia.*— Ivey *v.* Georgia Southern. etc., R. Co., 84 Ga. 536, 11 S. E. 128; Cozart *v.* Georgia R., etc., Co., 54 Ga. 379.

Maryland.— Nushaum *v.* Stein, 12 Md. 315.

New Jersey.— Packard *v.* Bergen Neck R. Co., 48 N. J. Eq. 281, 22 Atl. 227.

New York.— Kerr *v.* Joslin, 20 N. Y. Suppl. 929.

Pennsylvania.— Mahanoy Tp. *v.* Beaver Meadow, etc., R. Co., 13 Pa. Co. Ct. 344.

United States.— Wabash R. Co. *v.* Hannahan, 121 Fed. 563.

See 27 Cent. Dig. tit. "Injunction," § 322.

69. Pleadings as evidence in equity generally see Equity, 16 Cyc. 382 *et seq.*

70. Jones *v.* Johnson, 57 Kan. 629, 47 Pac. 523. See New Orleans Mut. Nat. Bank *v.* Moore, 104 La. 150, 29 So. 103.

71. Center Tp. *v.* Hunt, 16 Kan. 430; Atchison *v.* Bartholow, 4 Kan. 124; Levy *v.* Ely, 6 Abb. Pr. (N. Y.) 89, 15 How. Pr. 395; Minor *v.* Terry, 6 How. Pr. (N. Y.) 208; Smith *v.* Reno, 6 How. Pr. (N. Y.) 124.

72. Smith *v.* Stearns Rancho Co., 129 Cal. 58, 61 Pac. 662; Falkinburg *v.* Lucy, 35 Cal. 52, 95 Am. Dec. 76; State *v.* Judge Civ. Dist. Ct., 52 La. Ann. 1065, 27 So. 580; Stees *v.* Kranz, 32 Minn. 313, 20 N. W. 241. *Compare* Atty.-Gen. *v.* Chicago, etc., R. Co., 35 Wis. 425.

Where the answer does not deny the material charges, or answers them argumentatively, the bill alone may be sufficient basis for an injunction. Sperry, etc., Co. *v.* Brady, 134 Fed. 691.

Sufficiency of verification.—Allegations will be taken as true only when positively sworn to (Crawford-Adsit Co. *v.* Bell, 95 Ill. App. 427; Foster *v.* Retail Clerks' International

allegations of facts sufficient, if taken as true (as they will be before answer),[73] to authorize the issuance of an injunction, and defects in the bill in this respect cannot be supplied by affidavits, nor can the complainant's claims be enlarged or supplemented by affidavits.[74]

(II) *AFFIDAVITS*—(A) *In General.* Except on final hearing,[75] it is generally held proper for the complainant to support his case by affidavits, either before or after the answer, and either in support of his bill or in contradiction of the answer.[76] A sufficient showing may be made by bill and plaintiff's affidavit without other

Protective Assoc., 39 Misc. (N. Y.) 48, 78 N. Y. Suppl. 860); or sworn to on information and belief, with the sources of information and the grounds for the belief (Foster *v.* Retail Clerks' International Protective Assoc., 39 Misc. (N. Y.) 48, 78 N. Y. Suppl. 860).

In New York it has generally been the practice not to issue an injunction upon a verified complaint alone but there must be supporting affidavits. Chatterton *v.* Kreitler, 2 Abb. N. Cas. 453; Hecker *v.* New York, 18 Abb. Pr. 369, 28 How. Pr. 211; Millikin *v.* Cary, 5 How. Pr. 272, 3 Code Rep. 250; Roome *v.* Webb, 3 How. Pr. 327, 1 Code Rep. 114. *Contra,* Woodruff *v.* Fisher, 17 Barb. 224.

In Pennsylvania supporting affidavits are usually required. Light *v.* Light, 1 Pa. Co. Ct. 21; Stine *v.* Atkins, 1 Leg. Chron. 41.

In Maryland the affidavit of the complainant alone has been held to be sufficient to warrant an interlocutory injunction except as to facts of record or provable by documentary evidence. Myers *v.* Amey, 21 Md. 302.

73. *Ex p.* Pile, 9 Ark. 336; New Music Hall Co. *v.* Orpheon Music Hall Co., 100 Ill. App. 278; Marion *v.* Johnson, 22 La. Ann. 512; Michigan State Bank *v.* Hastings, Walk. (Mich.) 9.

An allegation of inferences which does not set out the facts or circumstances upon which it is founded does not rise to the rank of testimony. Howard *v.* Eddy, 56 Kan. 498, 43 Pac. 1133.

74. *Florida.*—McKinney *v.* Bradford County, 26 Fla. 267, 4 So. 855.

Georgia.— Brown *v.* Wilson, 56 Ga. 534.

Indiana.— Landes *v.* Walls, 160 Ind. 216, 66 N. E. 679.

Kansas.— Conley *v.* Fleming, 14 Kan. 381.

Maryland.— Bowie *v.* Smith, 97 Md. 326, 55 Atl. 625.

New York.— Sanford Dairy Co. *v.* Sanford, 82 N. Y. App. Div. 641, 81 N. Y. Suppl. 563; Huntington *v.* Cortland Home Tel. Co., 62 N. Y. App. Div. 517, 71 N. Y. Suppl. 84; Woodburn *v.* Hyatt, 34 N. Y. App. Div. 246, 54 N. Y. Suppl. 597; Heine *v.* Rohner, 29 N. Y. App. Div. 239, 51 N. Y. Suppl. 427; Sanders *v.* Ader, 26 N. Y. App. Div. 176, 49 N. Y. Suppl. 964; Sheehy *v.* McMillan Co., 26 N. Y. App. Div. 140, 49 N. Y. Suppl. 1088; Pierce *v.* Wright, 6 Lans. 306, 45 How. Pr. 1; Hentz *v.* Long Island R. Co., 13 Barb. 646; Glascoe *v.* Willard, 44 Misc. 166, 89 N. Y. Suppl. 791; Bagg *v.* Robinson, 12 Misc. 299, 34 N. Y. Suppl. 37; Close *v.* Flesher, 8 Misc. 299, 28 N. Y. Suppl. 737; Badger *v.* Wagstaff, 11 How. Pr. 562; Rose *v.* Rose, 11 Paige 166; Blunt *v.* Hay, 4 Sandf. Ch. 362.

North Dakota.— Burton *v.* Walker, (1904) 100 N. W. 257; McClure *v.* Hunnewell, (1904) 99 N. W. 48; Forman *v.* Healey, 11 N. D. 563, 93 N. W. 866.

United States.— Montgomery Water Power Co. *v.* Chapman, 128 Fed. 197; St. Louis Type Foundry *v.* Carter, etc., Printing Co., 31 Fed. 524; Leo *v.* Union Pac. R. Co., 17 Fed. 273.

Canada.— Jones *v.* Victoria, 2 Brit. Col. 8; Lionais *v.* De Lorimier, 16 Quebec Super. Ct. 50.

See 27 Cent. Dig. tit. "Injunction," § 318.

Where a proper case for investigation is made out in the bill, the court will not examine further into its sufficiency on an application for temporary relief. Greenfield Gas Co. *v.* People's Gas Co., 131 Ind. 599, 31 N. E. 61; People's Gas Co. *v.* Tyner, 131 Ind. 277, 31 N. E. 59, 31 Am. St. Rep. 433, 16 L. R. A. 443.

An order to show cause may be refused and an injunction denied where it appears to the chancellor upon a mere inspection of the bill that it is clearly without equity. Remshart *v.* Savannah, etc., R. Co., 54 Ga. 579.

An apparent misnomer of defendant is not sufficient ground for refusing an injunction on *ex parte* application. Bosley *v.* Susquehanna Canal, 3 Bland (Md.) 63.

Waiver.— The defect may be waived by setting up a counter-claim and seeking a counter injunction. Marshfield Land, etc., Co. *v.* John Week Lumber Co., 108 Wis. 268, 84 N. W. 434.

Where the complaint is demurred to it is not available error to issue a restraining order without first disposing of the demurrer. Morey *v.* Ball, 90 Ind. 450. And the court has the right to have all the defenses of defendant put in before disposing of the demurrer. Hambrick *v.* Crawford, 55 Ga. 335.

75. May *v.* Williams, 109 Ky. 682, 60 S. W. 525, 22 Ky. L. Rep. 1328.

76. *California.*— Hicks *v.* Michael, 15 Cal. 107.

Delaware.— Tatem *v.* Gilpin, 1 Del. Ch. 13.

New Jersey.— Rawnsley *v.* Trenton Mut. L. Ins. Co., 9 N. J. Eq. 95; Renton *v.* Chaplain, 9 N. J. Eq. 62; Hardenburgh *v.* Farmers', etc., Bank, 3 N. J. Eq. 68. But see Brundred *v.* Paterson Mach. Co., 4 N. J. Eq. 294.

New York.— Hentz *v.* Long Island R. Co., 13 Barb. 646; Bagg *v.* Robinson, 12 Misc. 299, 34 N. Y. Suppl. 37; Rogers *v.* Marshall,

evidence,[77] but the complainant may introduce other proper evidence if he sees fit.[78] If it appears that the facts are evidenced by documents, a mere affidavit of those facts is not sufficient without accounting for the absence of the better form of evidence.[79]

(B) *Sufficiency of Affidavits.* Mere statements of conclusions are not as a rule sufficient.[80] The affidavits must contain all the facts material to the complainant's case,[81] and should be entitled in the cause and show that they were

38 How. Pr. 43; Blunt *v.* Hay, 4 Sandf. Ch. 362.

Pennsylvania.— Buchanan *v.* Streper, 5 Wkly. Notes Cas. 289.

United States.— Bradley *v.* Reed, 3 Fed. Cas. No. 1,785; Brooks *v.* Bicknell, 4 Fed. Cas. No. 1,944, 3 McLean 250; Poor *v.* Carleton, 19 Fed. Cas. No. 11,272, 3 Sumn. 70; Wilson *v.* Stolley, 30 Fed. Cas. No. 17,839, 4 McLean 272.

England.— Jeffery *v.* Smith, 1 Jac. & W. 298, 21 Rev. Rep. 175, 37 Eng. Reprint 389; Glassington *v.* Thwaites, 1 L. J. Ch. O. S. 113, 1 Sim. & St. 124, 24 Rev. Rep. 153, 1 Eng. Ch. 124, 57 Eng. Reprint 50 (holding that affidavits filed before answer may be read, where plaintiff, by saving notice of motion till a future day, enabled defendant to file his answer before the motion); Morgan *v.* Goode, 3 Meriv. 10, 36 Eng. Reprint 4; Edmunds *v.* Bird, 1 Ves. & B. 542, 35 Eng. Reprint 211. *Compare* Sommerville *v.* Buckler, 3 Anstr. 658; Rock *v.* Mathews, 2 De G. & Sm. 227, 12 Jur. 643, 64 Eng. Reprint 102; Lawson *v.* Morgan, 1 Price 303; Smythe *v.* Smythe, 1 Swanst. 252, 36 Eng. Reprint 378; Platt *v.* Button, 19 Ves. Jr. 447, 34 Eng. Reprint 583.

Canada.— Merchants' Union Express Co. *v.* Morton, 2 Ch. Chamb. (U. C.) 319, 15 Grant Ch. (U. C.) 274.

See 27 Cent. Dig. tit. "Injunction," § 318.

In Louisiana, on hearing of the rule to show cause, affidavits may not be read, since the object of the rule as there regarded is to test the sufficiency of the petition. Heyniger *v.* Hoffnung, 29 La. Ann. 57.

Affidavits filed at the time of procuring a rule to show cause are not evidence on the hearing of the rule, but the averments in the bill must be supported by testimony. Philadelphia, etc., R. Co. *v.* Armstrong, 9 Del. Co. (Pa.) 301.

The replication has no effect upon an application for an injunction, and the application will be considered upon the bill and the answer, so far as responsive thereto. Dougherty *v.* Piet, 52 Md. 425.

Affidavits in support of title have been excluded on a motion for injunction to prevent waste. U. S. *v.* Parrott, 1 Fed. Cas. No. 15,998, McAllister 271.

77. Hardy *v.* Donnellan, 33 Ind. 501; Rogers *v.* Danforth, 9 N. J. Eq. 289.

In New York, where the right to an injunction depends on the nature of the action, the complaint must be one of the moving papers. Woodburn *v.* Hyatt, 34 N. Y. App. Div. 246, 54 N. Y. Suppl. 597; Sanders *v.* Ader, 26 N. Y. App. Div. 176, 49 N. Y. Suppl. 964; Rondout First Nat. Bank *v.* Navarro, 17 N. Y. Suppl. 900; Roosevelt *v.* Edson, 7 N. Y. Civ. Proc. 5; Central Cross-Town R. Co. *v.* Bleecker St., etc., Ferry R. Co., 49 How. Pr. 233. But where an action was commenced by the service of a summons, without complaint, and a motion for an injunction was made based on an affidavit which contained all the essential facts of a complaint, an objection to the form was held insufficient. Morgan *v.* Quackenbush, 22 Barb. (N. Y.) 72.

78. Davis *v.* Covington, etc., R. Co., 77 Ga. 322, 2 S. E. 555; Cox *v.* Garrett, 7 Okla. 375, 54 Pac. 546; Schermerhorn *v.* L'Espenasse, 21 Fed. Cas. No. 12,454, 2 Dall. 360, holding that an affidavit is not an indispensable prerequisite to the issuance of an injunction and the court may accept other proofs. And see *supra*, VI, H, 2.

A referee may be appointed to take testimony. Fabian *v.* Collins, 2 Mont. 510; Kerr *v.* Joslin, 20 N. Y. Suppl. 929. And see Audenreid *v.* Philadelphia, etc., R. Co., 68 Pa. St. 370, 8 Am. Rep. 195.

79. Davis *v.* Covington, etc., R. Co., 77 Ga. 322, 2 S. E. 555; Laupheimer *v.* Rosenbaum, 25 Md. 219; Union Bank *v.* Poultney, 8 Gill & J. (Md.) 324.

80. Fuller *v.* Cason, 26 Fla. 476, 7 So. 870; Brough *v.* Schanzenbach, 59 Ill. App. 407; Thrall *v.* Williamsport, 4 Pa. Super. Ct. 165 [*affirming* 18 Pa. Co. Ct. 330].

To show irreparable injury the affidavits must state the facts constituting the injury; an allegation in general terms is not sufficient. Waldron *v.* Marsh, 5 Cal. 119.

General objections to the introduction of affidavits on the ground that the facts set out are irrelevant will be overruled if any of the facts are relevant. Davis *v.* Covington, etc., R. Co., 77 Ga. 322, 2 S. E. 555.

81. Thompson *v.* Ocean City R. Co., (N. J. Ch. 1897) 37 Atl. 129; Samuel Cupples Envelope Co. *v.* Lackner, 99 N. Y. App. Div. 231, 90 N. Y. Suppl. 954; Smith *v.* Reno, 6 How. Pr. (N. Y.) 124.

Aider by documentary evidence.— It is not necessary that the affidavits should of themselves make a sufficient showing. They may be supplemented by documentary and record evidence. Oil Run Petroleum Co. *v.* Gale, 6 W. Va. 525.

All facts within the knowledge of the applicant and material to the application must be disclosed, on a motion *ex parte*. Sprigg *v.* Western Tel. Co., 46 Md. 67; Stewart *v.* Turpin, 1 Manitoba 323.

Agents are competent to make the necessary affidavits in the absence of their princi-

made for use in the particular case.[82] Independent affidavits are not necessary, it being sufficient to attach an affidavit to the bill or complaint, and thus make it answer a double purpose.[83]

(c) *In Rebuttal.* The court may refuse to allow the filing of affidavits in rebuttal of defendant's affidavits,[84] but it is within the court's discretion to allow such affidavits to be filed.[85] New matter set up in defense may, however, be contradicted or explained by affidavits.[86]

(III) *Allegations on Information and Belief.* Allegations of facts upon information and belief without giving the sources of the information and the grounds for the belief, and without the affidavit of any person having actual knowledge of the facts, are ordinarily insufficient, whether contained in the complaint or in other affidavits.[87] But statements on information and belief may be

pals, if they know the facts. Long *v.* Kasebeer, 28 Kan. 226; Wilson *v.* Curtis, 13 La. Ann. 601.

Applicability to complaint.— The affidavits must be founded solely upon the allegations in the bill. Stull *v.* Westfall, 25 Hun (N. Y.) 1.

An ordinary affidavit of verification of a bill praying an injunction is not sufficient evidence to establish as a fact the positive allegations in the complaint. Bostwick *v.* Elton, 25 How. Pr. (N. Y.) 362.

82. Hill *v.* McBurney Oil, etc., Co., 112 Ga. 788, 38 S. E. 42, 52 L. R. A. 398; Whitley *v.* Berry, 105 Ga. 251, 31 S. E. 171.

83. Fowler *v.* Burns, 7 Bosw. (N. Y.) 637; Roome *v.* Webb, 3 How. Pr. (N. Y.) 327.

An affidavit of a third person that what he has stated in the complaint is true, when no complaint has been filed by him, is not sufficient. Martin *v.* Sloan, 69 N. C. 128.

84. Day *v.* Boston Belting Co., 7 Fed. Cas. No. 3,674, Brunn. Col. Cas. 585. See Boyce *v.* Burchard, 21 Ga. 74, holding that further affidavits, notice of which has not been given to defendant, should not be allowed to be read.

After argument.— It is not an abuse of discretion on an application for an injunction to refuse to allow plaintiff to file an additional affidavit after defendant has submitted its affidavits, and closed its argument. Daugherty Typewriter Co. *v.* Kittanning Iron, etc., Mfg. Co., 178 Pa. St. 215, 35 Atl. 1111.

85. Childs *v.* Fox, 2 Rob. (N. Y.) 650, 18 Abb. Pr. 112; Lessig *v.* Langton, Brightly (Pa.) 191; Wisler *v.* Williams, 26 Leg. Int. (Pa.) 213; Benbow-Brammer Mfg. Co. *v.* Simpson Mfg. Co., 132 Fed. 614.

86. Davis *v.* Hackley, 14 Abb. Pr. (N. Y.) 64 note; Powell *v.* Clark, 5 Abb. Pr. (N. Y.) 70. See Morphett *v.* Jones, 19 Ves. Jr. 350, 34 Eng. Reprint 548; Peacock *v.* Peacock, 16 Ves. Jr. 49, 10 Rev. Rep. 138, 33 Eng. Reprint 902.

87. *Florida.*— Ruge *v.* Apalachicola Oyster Canning, etc., Co., 25 Fla. 656, 6 So. 489; Ballard *v.* Eckman, 20 Fla. 661.

Georgia.— Bailey *v.* Bailey, 90 Ga. 435, 16 S. E. 90; Landes *v.* Globe Planter Mfg. Co., 73 Ga. 176; Hone *v.* Moody, 59 Ga. 731; Bryan *v.* King, 51 Ga. 291; Jones *v.* Macon, etc., R. Co., 39 Ga. 138; Taylor *v.* Harp, 37 Ga. 358.

Indiana.— Southern Plank Road Co. *v.* Hixon, 5 Ind. 165.

Kansas.— Atchison *v.* Bartholow, 4 Kan. 124.

Louisiana.— New Orleans Canal, etc., Co. *v.* Carriel, 3 La. Ann. 225.

Maryland.— Bowie *v.* Smith, (1903) 55 Atl. 625; Blondheim *v.* Moore, 11 Md. 365.

Minnesota.— Armstrong *v.* Sanford, 7 Minn. 49.

New Jersey.— Schoenfeld *v.* American Can Co., (Ch. 1903) 55 Atl. 1044; Brundred *v.* Paterson Mach. Co., 4 N. J. Eq. 294.

New York.— Cupples Envelope Co. *v.* Lackner, 99 N. Y. App. Div. 231, 90 N. Y. Suppl. 954; Gillette *v.* Noyes, 92 N. Y. App. Div. 313, 86 N. Y. Suppl. 1062; Cushing *v.* Ruslander, 49 Hun 19, 1 N. Y. Suppl. 505; Livingston *v.* New York Bank, 26 Barb. 304; Woodruff *v.* Fisher, 17 Barb. 224; Kuh *v.* Barnett, 57 N. Y. Super. Ct. 234, 6 N. Y Suppl. 881; Pidgeon *v.* Oatman, 3 Rob. 706; Young *v.* American Bank, 44 Misc. 308, 89 N. Y. Suppl. 915; Keator *v.* Dalton, 29 Misc. 692, 62 N. Y. Suppl. 878; Press Pub. Co. *v.* Holahan, 29 Misc. 684, 62 N. Y. Suppl. 872; Hecker *v.* New York, 18 Abb. Pr. 369, 28 How. Pr. 211; Roome *v.* Webb, 3 How. Pr. 327; Jewett *v.* Allen, 3 How. Pr. 129; Orleans Bank *v.* Skinner, 9 Paige 305; Campbell *v.* Morrison, 7 Paige 157; Atty.-Gen. *v.* Chenango Bank, Hopk. 596.

Tennessee.— Brown *v.* Hamlett, 8 Lea 732.

West Virginia.— Shonk *v.* Knight, 12 W. Va. 667.

Wisconsin.— Woodruff *v.* Lockerby, 8 Wis. 369.

England.— *In re* Young Mfg. Co., [1900] 2 Ch. 753, 69 L. J. Ch. 868, 83 L. T. Rep. N. S. 418, 49 Wkly. Rep. 115.

Canada.— Rowland *v.* Railway Commissioner, 6 Manitoba 401; Kane *v.* Montreal Tel. Co., 20 L. C. Jur. 120.

See 27 Cent. Dig. tit. "Injunction," § 321.

Affidavits on information and belief are outweighed by affidavits in denial on knowledge. Pine-Coffin *v.* Erie R. Co., 34 Misc. (N. Y.) 13, 69 N. Y. Suppl. 333.

Where the rights of third persons are involved, the injunction will not be granted where the complainant's affidavits are merely

sufficient in exceptional cases where positive knowledge is not attainable and the danger of injury is immediate.[88]

b. For Defendant — (I) *Counter Affidavits in General.* Affidavits may be used in opposition to the motion for an injunction;[89] but the counter affidavits are of no avail unless they contradict the material allegations of the complaint.[90]

(II) *Use and Effect of Answer*[91] — (A) *In General.* Upon an application for a preliminary injunction, defendant may at once file his answer which must be considered and given its proper effect in deciding as to the propriety of issuing a temporary injunction.[92] If properly verified it must be given effect as an affidavit of and for defendant.[93] On motions for an injunction made on bill

on information and belief. Walker *v.* Devereaux, 4 Paige (N. Y.) 229.

As to the affidavit required in Quebec see Laferté *v.* St. Aimé, 14 Rev. Lég. 476; Central Vermont R. Co. *v.* St. Johns, 13 Rev. Lég. 343; Coté *v.* St. Augustin, 13 Quebec 348.

88. *Florida.*— Cunningham *v.* Tucker, 14 Fla. 251.

Georgia.— Harper *v.* Whitehead, 33 Ga. 138.

Louisiana.— Klein *v.* Coon, 10 La. Ann. 522.

New Jersey.— Youngblood *v.* Schamp, 15 N. J. Eq. 42.

New York.— Cornwall *v.* Sachs, 69 Hun 283, 23 N. Y. Suppl. 500; French *v.* Maguire, 55 How. Pr. 471; Campbell *v.* Morrison, 7 Paige 157.

See 27 Cent. Dig. tit. "Injunction," § 321.

After a rule to show cause has been issued and no return has been made thereto, and especially if a demurrer has been interposed, allegations upon information and belief may be sufficient to authorize an injunction. Niles *v.* U. S. Trust Co., 22 App. Cas. (D. C.) 225.

89. *Kansas.*— Stoddart *v.* Vanlaningham, 14 Kan. 18.

Michigan.— Hart *v.* Baxter, 47 Mich. 198, 10 N. E. 198, holding that the affidavit of one defendant may properly be used in support of the answer of the other.

New Jersey.— Bell *v.* Romaine, 30 N. J. Eq. 24; Rawnsley *v.* Trenton Mut. L. Ins. Co., 9 N. J. Eq. 95; Kean *v.* Colt, 5 N. J. Eq. 365.

New York.— Florence *v.* Bates, 2 Sandf. 675; Blunt *v.* Hay, 4 Sandf. Ch. 362; Seneca Falls *v.* Matthews, 9 Paige 504; Haight *v.* Case, 4 Paige 525.

Pennsylvania.—Lessig *v.* Langton, Brightly 191.

United States.— Baker *v.* Taylor, 2 Fed. Cas. No. 782, 2 Blatchf. 82; Wilson *v.* Stolley, 30 Fed. Cas. No. 17,839, 4 McLean 272.

See 27 Cent. Dig. tit. "Injunction," § 320.

Defendant's affidavit must be entitled in the cause. Goldstein *v.* Whelan, 62 Fed. 124.

The affidavit of defendant' attorney giving a history of the protracted litigation between the parties may be admitted in defendant's behalf. Wetzstein *v.* Boston, etc., Min. Co., 26 Mont. 193, 66 Pac. 943.

Defendant in contempt.— On the hearing defendant's evidence should not be excluded merely because he has violated a temporary restraining order. Harley *v.* Montana Ore Purchasing Co., 27 Mont. 388, 71 Pac. 407.

90. McRoberts *v.* Washburne, 10 Minn. 23; Low *v.* Holmes, 17 N. J. Eq. 148; Sanford Dairy Co. *v.* Sanford, 82 N. Y. App. Div. 641, 81 N. Y. Suppl. 563.

Implied admissions.— An affidavit made by defendant to oppose a motion for an injunction, which denies a material allegation of the bill, must be construed as an admission of all other allegations not controverted. Brown *v.* Pacific Mail Steamship Co., 4 Fed. Cas. No. 2,025, 5 Blatchf. 525.

A denial by defendant that he had knowledge of the injurious acts done by his employees on his behalf is not reason for denying the preliminary injunction. Wamsutta Mills *v.* Fox, 49 Fed. 141.

91. See Equity, 16 Cyc. 383 *et seq.*

92. *Florida.*— Sullivan *v.* Moreno, 19 Fla. 200.

Maryland.— Riggs *v.* Winterode, 100 Md. 439, 59 Atl. 762; Krone *v.* Krone, 27 Md. 77.

Ohio.— Hulse *v.* Wright, Wright 61.

Pennsylvania.— Hinkson *v.* Statzell, 7 Del. Co. 474.

United States.— Brooks *v.* Bicknell, 4 Fed. Cas. No. 1,944, 3 McLean 250.

On an order to show cause defendant need not file his answer or serve it on the complainant before the hearing. Dean *v.* Bonnell, 4 N. J. L. J. 348.

Ex parte application.— Where an injunction is being applied for *ex parte*, counsel who desire to appear in opposition to the application should be heard. McLeod *v.* Noble, 24 Ont. App. 459.

93. *Georgia.*— Shirley *v.* Hicks, 105 Ga. 504, 31 S. E. 105.

Maryland.— Blundon *v.* Crosier, 93 Md. 355, 49 Atl. 1.

New Jersey.— Shreve *v.* Black, 4 N. J. Eq. 177.

New York.— McEncroe *v.* Decker, 58 How. Pr. 250.

Pennsylvania.— Warren, etc., R. Co. *v.* Clarion Land, etc., Co., 54 Pa. St. 28; Deschamps *v.* Second, etc., St. Pass. R. Co., 3 Phila. 279.

United States.— Tobin *v.* Walkinshaw, 23 Fed. Cas. No. 14,068, McAllister 26; U. S. *v.* Parrott, 27 Fed. Cas. No. 15,998, McAllister 271.

See 27 Cent. Dig. tit. "Injunction," § 319.

and answer, statements made under oath in the answer, where responsive to the bill, will be taken as true,[94] and if in such answer under oath the facts constituting the claim of the complainant for the interposition of the court are controverted by defendant, the court will not generally interfere but will deny the injunction.[95] So the injunction will be refused when defendant denies having any intention to do the acts in question, and there is no evidence that his denial is untrue.[96] But notwithstanding positive denials under oath in the answer, the

94. Woodruff *v.* Dubuque, etc., R. Co., 30 Fed. 91.

95. *Arkansas.*— Cummin *v.* Harrell, 6 Ark. 308.

California.— Kohler *v.* Los Angeles, 39 Cal. 510; Gagliardo *v.* Crippen, 22 Cal. 362; Crandall *v.* Woods, 6 Cal. 449.

District of Columbia.— Barber *v.* Strong, 1 MacArthur 575.

Georgia.— Georgia Slate Co. *v.* Dalvitte, 79 Ga. 627, 4 S. E. 873; Flash *v.* Long, 67 Ga. 767; Kenan *v.* Johnson, 48 Ga. 28; Bridwell *v.* McNair, 43 Ga. 176; Cross *v.* Payne, 31 Ga. 342; Brett *v.* Sellers, 27 Ga. 185. See Davis *v.* Weaver, 46 Ga. 626.

Kansas.— Atchison, etc., R. Co. *v.* Troy, 10 Kan. 513.

Maryland.— Riggs *v.* Winterode, 100 Md. 439, 59 Atl. 762; Blundon *v.* Crosier, 93 Md. 355, 49 Atl. 1; Lynn *v.* Mt. Savage Iron Co., 34 Md. 603; State *v.* Jarrett, 17 Md. 309; Bell *v.* Purvis, 15 Md. 22; Whetcroft *v.* Christie, 4 Harr. & M. 385. But *compare* Smith-Dixon Co. *v.* Stevens, 100 Md. 110, 59 Atl. 401.

Michigan.— Mandeville *v.* Comstock, 9 Mich. 536.

Nevada.— Lady Bryan Gold, etc., Min. Co. *v.* Lady Bryan Min. Co., 4 Nev. 414.

New Jersey.— Grey *v.* Greenville, etc., R. Co., 60 N. J. Eq. 153, 46 Atl. 636; Kountze *v.* Morris Aqueduct Co., 54 N. J. Eq. 40, 33 Atl. 817; Nibert *v.* Baghurst, 47 N. J. Eq. 201, 20 Atl. 252; Newark Aqueduct Bd. *v.* Passaic, 46 N. J. Eq. 552, 20 Atl. 54, 22 Atl. 55; Hyde *v.* French, (Ch. 1889) 18 Atl. 356; Hatch *v.* Kaighns Point, etc., Ferry Co., (Ch. 1899) 16 Atl. 433, 17 Atl. 833; West Jersey R. Co. *v.* Cape May, etc., R. Co., 34 N. J. Eq. 164; Citizens' Coach Co. *v.* Camden Horse R. Co., 29 N. J. Eq. 299; Van Houten *v.* Totowa First Reformed Dutch Church, 17 N. J. Eq. 126; Rogers *v.* Danforth, 9 N. J. Eq. 289; Van Horn *v.* Talmage, 8 N. J. Eq. 108; Freeman *v.* Elmendorf, 7 N. J. Eq. 475; Kerlin *v.* West, 4 N. J. Eq. 449; Shreve *v.* Black, 4 N. J. Eq. 177.

New York.—Close *v.* Kjelgaard, 25 N. Y. App. Div. 193, 49 N. Y. Suppl. 313; Warsaw Water Works Co. *v.* Warsaw, 4 N. Y. App. Div. 509, 40 N. Y. Suppl. 28; Tammien *v.* Clause, 67 Barb. 430; Allison Bros. Co. *v.* Allison, 4 Silv. Sup. 222, 7 N. Y. Suppl. 268; Manhattan Gas Light Co. *v.* Barker, 7 Rob. 523; Campbell *v.* Carter, 3 Daly 165; Barker *v.* Oswegatchie, 16 N. Y. Suppl. 727, 732; Benedict *v.* Seventh Ward R. Co., 6 N. Y. St. 548; White *v.* Caxton Book-binding Co., 10 N. Y. Civ. Proc. 146; Cassell *v.* Fisk, 2 N. Y. Civ. Proc. 94; Blatchford *v.* New York, etc., R. Co., 5 Abb. Pr. 276; Decker *v.* Decker, 52 How. Pr. 218; Steinberg *v.* O'Conner, 42 How. Pr. 52; Finnegan *v.* Lee, 18 How. Pr. 186; Perkins *v.* Warren, 6 How. Pr. 341; Martin *v.* Odell, 1 How. Pr. 108. See also Gray *v.* De Castro, 8 N. Y. Suppl. 237, 23 Abb. N. Cas. 314; Tone *v.* Brace, Clarke 291.

North Carolina.— Woodfin *v.* Beach, 70 N. C. 455.

Oregon.— Wellman *v.* Harker, 3 Oreg. 253.

Pennsylvania.— McCartney *v.* Cassidy, 141 Pa. St. 453, 21 Atl. 778; Thompson Glass Co. *v.* Fayette Fuel-Gas Co., 137 Pa. St. 317, 21 Atl. 93; Whetham *v.* Clyde, 1 Leg. Gaz. 53; Spring Brook R. Co. *v.* Bryan, 4 Luz. Leg. Reg. 117; Bolton *v.* Swartz, 3 Montg. Co. Rep. 191; Cooper *v.* Second, etc., St. Pass. R. Co., 3 Phila. 262; Doolittle *v.* Barnitz, 1 Phila. 574; Lynch *v.* Jennings, 6 Wkly. Notes Cas. 500; Brittain *v.* Ely, 4 Wkly. Notes Cas. 412.

Wisconsin.— Verbeck *v.* Scott, 71 Wis. 59, 36 N. W. 600; Menasha *v.* Milwaukee, etc., R. Co., 52 Wis. 414, 9 N. W. 396.

United States.— Monroe Cattle Co. *v.* Becker, 147 U. S. 47, 13 S. Ct. 217, 37 L. ed. 72; Pennsylvania R. Co. *v.* National Docks, etc., R. Co., 56 Fed. 697; Spokane St. R. Co. *v.* Spokane Falls, 46 Fed. 322; Day *v.* Goodyear, 7 Fed. Cas. No. 3,678.

See 27 Cent. Dig. tit. "Injunction," §§ 275, 319. And see EQUITY, 16 Cyc. 383.

Injury to defendant and the public.— A preliminary injunction will not be granted where all the grounds for equitable relief are denied, and it would necessitate the decision of difficult questions of law and fact, and would, if granted, work incalculable injury to defendant and the public. Gummere *v.* Lehigh Valley R. Co., 12 Pa. Co. Ct. 106.

Failure to file answer.— It is within the court's discretion to refuse an injunction as to all the defendants, even though some have failed to answer. Cobb *v.* Hogue, 87 Ga. 450, 13 S. E. 633.

96. *California.*— Benton *v.* Budd, 120 Cal. 329, 52 Pac. 851.

Illinois.— Lambert *v.* Alcorn, 144 Ill. 313, 33 N. E. 53, 21 L. R. A. 611.

Maine.— McFadden *v.* Dresden, 80 Me. 134, 13 Atl. 275.

Maryland.— Whalen *v.* Dalashmutt, 59 Md. 250.

Minnesota.— Hagemeyer *v.* St. Michael, 70 Minn. 482, 73 N. W. 412.

New Jersey.— Guild *v.* Meyer, 56 N. J. Eq. 183, 38 Atl. 959. But see Crandall *v.* Grow, (N. J. Ch. 1886) 4 Atl. 311.

New York.— Watson *v.* New York, etc., R.

court has discretion to grant a preliminary injunction, and it will not be denied as of course,[97] especially where the evidence of disinterested witnesses supports the complainant or the court is otherwise satisfied that his allegations are true,[98] or where a denial of the preliminary injunction would cause embarrassment if the issue should be ultimately decided in the complainant's favor and would amount to a denial of the entire relief sought.[99]

(B) *Character of Verification and Denials.* For the answer to be given such weight as to cause the denial of the motion for an injunction, it must be sworn to positively and not on information and belief,[1] and it must be responsive to the bill and contain a denial of the facts therein, and not a mere denial of conclusions or mere allegations of new matter in avoidance which can be established only by evidence.[2]

I. Dismissal — **1. Voluntary Dismissal.** Ordinarily plaintiff may discontinue his suit as a matter of right where no rights of defendant as against plaintiff have arisen.[3] Where the rights of defendant or of intervening parties have attached,

Co., 64 How. Pr. 220. But see Lewis *v.* Wilson, 17 N. Y. Suppl. 128.

See 27 Cent. Dig. tit. "Injunction," § 319.

Evidence to rebut.— Such a sworn disclaimer is not overcome by the testimony of four witnesses, testifying to a single assertion of defendant as to his intention in the matter. Lieb *v.* Henderson, 91 Ill. 282.

97. Sullivan *v.* Moreno, 19 Fla. 200; Conyers *v.* Smith, 94 Ga. 728, 19 S. E. 882; Hughes *v.* McIntosh, 83 Ga. 431, 9 S. E. 1110; Stanford *v.* Lyon, 37 N. J. Eq. 94; Holsman *v.* Boiling Spring Bleaching Co., 14 N. J. Eq. 335; Shields *v.* Arndt, 4 N. J. Eq. 234; Pennsylvania Coal Co. *v.* Savage, 1 Lack. Leg. N. (Pa.) 213.

Where irreparable injury might result, the injunction will be granted. Chambers *v.* Alabama Iron Co., 67 Ala. 353; Bibb *v.* Shackelford, 38 Ala. 311; Williams *v.* Long, 129 Cal. 229, 61 Pac. 1087; U. S. *v.* Parrott, 27 Fed. Cas. No. 15,998, McAllister 271.

Balance of convenience.—The inconvenience the parties or public will suffer from the granting or refusing of the injunction is a controlling factor in a case where the bill is denied by the answer. East, etc., R. Co. *v.* East Tennessee, etc., R. Co., 75 Ala. 275; Jones *v.* Brandon, 60 Miss. 556; Higbee *v.* Camden, etc., R., etc., Co., 20 N. J. Eq. 435.

Right to do the act not in issue.— The intimidation of employees by strikers may be enjoined *pendente lite* notwithstanding denials of the acts charged, for such denials do not put in issue the right to do the acts, and it is only in such case that the general rule applies. Herzog *v.* Fitzgerald, 74 N. Y. App. Div. 110, 77 N. Y. Suppl. 366.

98. Stanton Mfg. Co. *v.* McFarland, 52 N. J. Eq. 85, 27 Atl. 828; Thielens *v.* Dialogue, (N. J. Ch. 1890) 19 Atl. 970; Martin's Appeal, 6 Pa. Cas. 312, 9 Atl. 490.

99. Riggs *v.* Winterode, 100 Md. 439, 59 Atl. 762; Kountze *v.* Morris Aqueduct Co., 54 N. J. Eq. 40, 33 Atl. 817; Connelly Mfg. Co. *v.* Wattles, 49 N. J. Eq. 92, 23 Atl. 123; Quayle *v.* Bayfield County, 114 Wis. 108, 89 N. W. 892; Africa *v.* Knoxville, 70 Fed. 729.

1. Wetzstein *v.* Boston, etc., Consol. Copper, etc., Min. Co., 26 Mont. 193, 66 Pac. 943; Useful Manufactures Soc. *v.* Low, 17 N. J. Eq. 19; Rome, etc., R. Co. *v.* Rochester, 46 Hun (N. Y.) 149.

An answer verified by the attorney for a defendant on information and belief only is insufficient as proof of the facts alleged. Lake Shore, etc., R. Co. *v.* Felton, 103 Fed. 227, 43 C. C. A. 189.

2. Riggs *v.* Winterode, 100 Md. 439, 59 Atl. 762; U. S. *v.* Carlisle, 25 Fed. Cas. No. 14,724. And see cases cited in preceding notes.

3. Bryant *v.* Jones, 87 Ga. 451, 13 S. E. 636; Chicago, etc., R. Co. *v.* Union Rolling Mill Co., 109 U. S. 702, 3 S. Ct. 594, 27 L. ed. 1081; Bluck *v.* Colnaghi, 8 L. J. Ch. 89, 9 Sim. 411, 16 Eng. Ch. 411, 59 Eng. Reprint 416; Cooper *v.* Lewis, 2 Phil. 178, 22 Eng. Ch. 178, 41 Eng. Reprint 909. See also Conner *v.* Drake, 1 Ohio St. 166. And see Equity, 16 Cyc. 460 *et seq.*; Dismissal and Nonsuit, 14 Cyc. 394 *et seq.*

Exception to rule.— As a general rule a complainant in an original bill has the right at any time upon payment of costs to dismiss his bill; but this later rule is subject to a distinct and well settled exception, namely, that after a decree whether final or interlocutory has been made by which the rights of a party defendant have been adjudicated, or such proceedings have been taken as entitle defendant to a decree, the complainant will not be allowed to dismiss his bill without the consent of defendant. Chicago, etc., R. Co. *v.* Union Rolling Mill Co., 109 U. S. 702, 3 S. Ct. 594, 27 L. ed. 1081; Bluck *v.* Colnaghi, 8 L. J. Ch. 89, 9 Sim. 411, 16 Eng. Ch. 411, 59 Eng. Reprint 416.

After a full hearing on an application for temporary injunction and after the judge has announced his purpose to deny the injunction, plaintiff has still the right to dismiss his bill. Bryant *v.* Jones, 87 Ga. 451, 13 S. E. 636; Bynum *v.* Powe, 97 N. C. 374, 2 S. E. 170.

Dismissal by representative plaintiff.— Where proceedings for an administration of assets are in behalf of all creditors, the original complainants had no power to discon-

plaintiff will not be allowed to dismiss his suit except on terms.[4] If plaintiff withdraws his suit before a final determination of the issues, he is not concluded from pursuing another remedy,[5] from bringing a new suit for injunction for the same cause,[6] or from making an application for reinstatement.[7]

2. INVOLUNTARY DISMISSAL — a. Grounds — (I) *WANT OF JURISDICTION.* Where the court is without jurisdiction,[8] as where the amount involved is not within the court's jurisdiction,[9] the suit will be dismissed. So a dismissal is proper where the action is brought in the wrong county,[10] or where a court of concurrent jurisdiction has secured prior jurisdiction of the cause of action.[11]

(II) *WANT OF EQUITY ON FACE OF BILL.* If the allegations of the petition do not show plaintiff to be entitled to equitable relief,[12] as where it is apparent that he has an adequate remedy at law,[13] the bill will be dismissed.

(III) *DEFECT OF PARTIES.* The failure to join necessary parties is ground for dismissal.[14] Where only part of plaintiffs have been served with process the bill should not be dismissed on motion of those who have appeared.[15]

(IV) *FAILURE TO PROSECUTE.* The bill may be dismissed for failure of the complainant to use due diligence in prosecuting his suit.[16]

(V) *CHANGE OF CIRCUMSTANCES.* If plaintiff had a right of action at the time of filing the bill but has lost it by a subsequent change of circumstances the bill

tinue as against the objections of the others. Atlas Bank *v.* Nahant Bank, 23 Pick. (Mass.) 480. To the same effect see McAlpin *v.* Universal Tobacco Co., (N. J. Ch. 1904) 57 Atl. 418.

4. Chicago, etc., R. Co. *v.* Estes, 71 Iowa 603, 33 N. W. 124; Field *v.* Weaver, 32 La. Ann. 1242; Whittemore *v.* Watts, 7 Rob. (La.) 10; Canadian, etc., Mortg., etc., Co. *v.* Fitzpatrick, 71 Miss. 347, 14 So. 270; Peet *v.* Kimball, 58 N. Y. App. Div. 329, 68 N. Y. Suppl. 1010.

5. Cavenaugh *v.* Davis, 7 J. J. Marsh. (Ky.) 371.

6. Harrington *v.* American L. Ins., etc., Co., 1 Barb. (N. Y.) 244; Mayfield *v.* Hawkins, 3 N. C. 15.

7. Shannahan *v.* Stevens, 139 Ill. 428, 28 N. E. 804 [*reversing* 38 Ill. App. 571].

8. Hall *v.* Davis, 5 J. J. Marsh. (Ky.) 290; Shields *v.* Pipes, 31 La. Ann. 765; American Colonization Soc. *v.* Wade, 8 Sm. & M. (Miss.) 610; Scott *v.* Searles, 5 Sm. & M. (Miss.) 25; Campbell's Case, 4 Fed. Cas. No. 2,349, 1 Abb. 185, 6 Phila. (Pa.) 445; Ruggles *v.* Simonton, 20 Fed. Cas. No. 12,120, 3 Biss. 325.

9. York *v.* Kile, 67 Ill. 233.

10. Phelan *v.* Johnson, 80 Iowa 727, 46 N. W. 68; Norfolk, etc., R. Co. *v.* Postal Tel. Cable Co., 88 Va. 932, 14 S. E. 689; Beckley *v.* Palmer, 11 Gratt. (Va.) 625.

11. Withers *v.* Denmead, 22 Md. 135.

12. Beaugenon *v.* Turcotte, 1 Ill. 167; Dobleman *v.* Gately, etc., Co., 64 N. J. Eq. 223, 53 Atl. 812; Buning *v.* Cincinnati St. R. Co., 1 Ohio Cir. Ct. 323, 1 Ohio Cir. Dec. 178; Rogers *v.* Stokes, 87 Tenn. 294, 11 S. W. 215; Hudson *v.* Kline, 9 Gratt. (Va.) 379.

Want of equity raised only incidentally.— Where no demurrer to a bill for injunction or motion to dismiss it for want of equity has been heard and the equity of the bill is drawn in question only incidentally and the decree is rendered in vacation, absolute dismissal of the bill without affording complainant an opportunity to amend is erroneous. Bishop *v.* Wood, 59 Ala. 253.

13. Hall *v.* Davis, 5 J. J. Marsh. (Ky.) 290; Brewer *v.* Day, 23 N. J. Eq. 418; Van Horn *v.* Talmage, 8 N. J. Eq. 108; Mallett *v.* Weybossett Bank, 1 Barb. (N. Y.) 217; Beckley *v.* Palmer, 11 Gratt. (Va.) 625; Hudson *v.* Kline, 9 Gratt. (Va.) 379; Haden *v.* Garden, 7 Leigh (Va.) 157.

Relief by motion.— An injunction will not be sustained to stay proceedings under a judgment obtained by neglect of a party, or consent, where if the neglect were excusable full relief might have been had on motion in the original action. Borland *v.* Thornton, 12 Cal. 440.

14. Caldwell *v.* Dulan, 22 Ga. 4; Saddler *v.* Glover, 1 B. Mon. (Ky.) 53; Harris *v.* Worcester Academy, 110 Mass. 290; Beasley *v.* Shively, 20 Oreg. 508, 26 Pac. 846. See also Frank *v.* Brunnemann, 8 W. Va. 462.

Dismissal by certain stock-holders acting for all.— Where a bill for an injunction was filed by certain stock-holders of a corporation on their own behalf and for all other stock-holders who should come in and contribute to the expense of the suit against the corporation and others, and thereafter other stock-holders applied and were admitted as parties complainant, defendants were not entitled to a dismissal of the bill on the ground that the matters in controversy had been settled, over the objection of such subsequently admitted parties. McAlpin *v.* Universal Tobacco Co., (N. J. Ch. 1904) 57 Atl. 418.

15. Duncan *v.* State Bank, 2 Ill. 262.

16. Duncan *v.* Finch, 10 Ill. 296; Mallett *v.* Weybossett Bank, 1 Barb. (N. Y.) 217; Seebor *v.* Hess, 5 Paige (N. Y.) 85; Ward *v.* Van Bokkelen, 1 Paige (N. Y.) 100; Higgins *v.* Woodward, Hopk. (N. Y.) 342; Dawson *v.* ——, 3 N. C. 296; Bizzell *v.* Burke, 3 N. C. 61; Avery *v.* Brunce, 2 N. C. 372; Howe *v.* Willard, 40 Vt. 654. See Grey *v.*

may be dismissed.[17] For instance, when the act enjoined is subsequently legalized by statute, the bill may be dismissed.[18]

(VI) *Dissolution of Preliminary Injunction.* While by consent of the parties the cause may be heard on its merits at the hearing on the temporary injunction, and the bill dismissed in a proper case,[19] it is improper to dismiss the bill where defendant moves only for the dissolution of the injunction.[20] If the injunction is the principal relief asked, and the hearing of the motion to dissolve is on bill, answer, and affidavits, the bill itself may be dismissed if it appears that the complainant is not entitled to the relief asked.[21] In some states the dismissal

Northumberland, 17 Ves. Jr. 281, 34 Eng. Reprint 109.

17. Odell *v.* Bretney, 93 N. Y. App. Div. 607, 87 N. Y. Suppl. 655; Philadelphia Real-Estate Trust Co. *v.* Hatton, 194 Pa. St. 449, 45 Atl. 379; West *v.* East Coast Cedar Co., 113 Fed. 737, 51 C. C. A. 411; Baird *v.* Shore Line R. Co., 2 Fed. Cas. No. 759, 6 Blatchf. 461. See Crook *v.* People, 16 Ill. 534.

18. Pennsylvania *v.* Wheeling Bridge Co., 18 How. (U. S.) 421, 15 L. ed. 435; Hatch *v.* Wallamet Iron Bridge Co., 27 Fed. 673; Wallamet Iron Bridge Co. *v.* Hatch, 19 Fed. 347, 9 Sawy. 643; Baird *v.* Shore Line R. Co., 2 Fed. Cas. No. 759, 6 Blatchf. 461.

19. Kelly *v.* Baltimore, 53 Md. 134; Goodrich *v.* Moore, 2 Minn. 61, 72 Am. Dec. 74; Alford *v.* Moore, 15 W. Va. 597; Kuhn *v.* Mack, 4 W. Va. 186.

20. *Alabama.*— Johnson *v.* Southern Bldg., etc., Assoc., (1902) 31 So. 496. See Williams *v.* Berry, 3 Stew. & P. 284.

Arkansas.— Johnston *v.* Alexander, 6 Ark. 302.

Florida.— Baya *v.* Lake City, 44 Fla. 491, 33 So. 400.

Illinois.— Wilson *v.* Weber, 3 Ill. App. 125.

Iowa.— Walters *v.* Fredericks, 11 Iowa 181.

Maryland.— Huston *v.* Ditto, 20 Md. 305; Dorsey *v.* Hagerstown Bank, 17 Md. 408; O'Bryan *v.* Gibbons, 2 Md. Ch. 9.

Mississippi.— Maury *v.* Smith, 46 Miss. 81.

Missouri.— Home Mut. Ins. Co. *v.* Bauman, 14 Mo. 74.

Virginia.— Blow *v.* Taylor, 4 Hen. & M. 159.

See 27 Cent. Dig. tit. "Injunction," § 280.

21. *Alabama.*—Steele *v.* Lowry, 6 Ala. 124. See also Trump *v.* McDonnell, 112 Ala. 256, 20 So. 524.

Illinois.— Goddard *v.* Chicago, etc., R. Co., 202 Ill. 362, 66 N. E. 1066; Field *v.* Western Springs, 181 Ill. 186, 54 N. E. 929; Heinroth *v.* Kochersperger, 173 Ill. 205, 50 N. E. 171; American Livestock Commission Co. *v.* Chicago Livestock Exch., 143 Ill. 210, 32 N. E. 274, 36 Am. St. Rep. 385, 18 L. R. A. 190; Gardt *v.* Brown, 113 Ill. 475, 55 Am. Rep. 434; Prout *v.* Lomer, 79 Ill. 331; Weaver *v.* Poyer, 70 Ill. 567; Shaw *v.* Hill, 67 Ill. 455; Titus *v.* Mabee, 25 Ill. 257; Gillett *v.* Booth, 6 Ill. App. 423.

Maryland.— Gulick *v.* Fisher, 92 Md. 353, 48 Atl. 375.

Minnesota.— Goodrich *v.* Moore, 2 Minn. 61, 72 Am. Dec. 74.

Missouri.— Davis *v.* Wade, 58 Mo. App. 641.

Tennessee.— Merriman *v.* Norman, 9 Heisk. 269; Mayse *v.* Biggs, 3 Head 36.

Texas.— See Pryor *v.* Emerson, 22 Tex. 162.

Virginia.— Anderson *v.* Ellington, 2 Hen. & M. 16.

West Virginia.— Alford *v.* Moore, 15 W. Va. 597; Kuhn *v.* Mack, 4 W. Va. 186.

See 27 Cent. Dig. tit. "Injunction," § 280.

Contra.— See Wilcox *v.* Elberton, 108 Ga. 799, 33 S. E. 981; Lyon *v.* Lyon, 103 Ga. 747, 30 S. E. 575; Gullott *v.* Thrasher, 42 Ga. 429; Allen *v.* Smitherman, 41 N. C. 341; Buck Mountain Coal Co.'s Appeal, 5 Wkly. Notes Cas. (Pa.) 309.

Motion as equivalent to demurrer.— "The only relief sought by the bill, was to enjoin the sale of the property under the executions, and when defendants entered their motion to dissolve the temporary injunction, it was for the want of equity appearing on the face of the bill. The motion operated precisely as a demurrer, and by it the defendant admitted the truth of all the allegations relied upon to entitle the complainants to an injunction. The practice is to allow either a demurrer to the bill, or a motion to dissolve the injunction, and either course produces precisely the same result, so far as the injunction is concerned. On sustaining the demurrer, or allowing the motion, the temporary injunction is in either case dissolved, and if no other relief is sought, the case is virtually at an end. If the bill were retained, and full proof of all the allegations which it contained was made, the result would not be changed. It would only be to prove what is admitted by the demurrer or the motion." Titus *v.* Mabee, 25 Ill. 257. And see Gardt *v.* Brown, 113 Ill. 475, 55 Am. Rep. 434; Prout *v.* Lomer, 79 Ill. 331; Weaver *v.* Poyer, 70 Ill. 567; Shaw *v.* Hill, 67 Ill. 455.

On hearing of a motion at chambers, the bill should not be dismissed. Mitchell *v.* Williams, (Tenn. Ch. App. 1897) 46 S. W. 325.

Dissolution as to part of parties.— Upon the dissolution of the injunction, the bill may be dismissed as to a part of the parties and retained as to the remainder. Pettit *v.* Jennings, 2 Rob. (Va.) 676.

Answer must traverse all material allegations. A formal traverse of material matters contained in the bill is not sufficient. The answers must be full and satisfactory. Brown *v.* Fuller, 13 N. J. Eq. 271.

is proper only where plaintiff fails to move for leave to amend,[22] or that the bill be continued over to trial on its merits as an original petition.[23] On the other hand, if the injunction is ancillary to other relief, the bill should not be dismissed or the dissolution of the injunction, but will be continued for a hearing upon the merits of the other relief demanded.[24] In some jurisdictions statutes require that the bill shall be dismissed of course at the next term after the dissolution of the injunction, unless cause is shown why the case should be retained.[25]

(VII) *Miscellaneous Grounds.* Grounds for dissolving a temporary injunction, such as the failure to file an injunction bond,[26] defects in the bond,[27] or want of an affidavit or a defective affidavit,[28] do not warrant a dismissal of the suit. If defendant in his answer concedes plaintiff's claims and disavows any purpose or intention to commit the acts which plaintiff seeks to restrain, the suit may be dismissed at the discretion of the court or retained with leave to plaintiff to move for an injunction on defendant's disregarding his avowed intentions.[29]

b. Procedure.[30] In general a bill demanding injunctive relief may be dismissed at any stage of the proceedings before the final decree.[31] But it has been

22. Jones *v.* Coker, 53 Miss. 195.

23. Love *v.* Powell, 67 Tex. 15, 2 S. W. 456; Clegg *v.* Darragh, 63 Tex. 357; Baldridge *v.* Cook, 27 Tex. 565; Lively *v.* Bristow, 12 Tex. 60. See also Rayle *v.* Indianapolis, etc., R. Co., 40 Ind. 347.

24. *Florida.*— Indian River Steamboat Co. *v.* East Coast Transp. Co., 28 Fla. 387, 10 So. 480, 29 Am. St. Rep. 258.

Georgia.— Atkins *v.* Orr, 83 Ga. 34, 9 S. E. 787.

Illinois.— Brockway *v.* Rowley, 66 Ill. 99; Hummert *v.* Schwab, 54 Ill. 142; Gillett *v.* Booth, 6 Ill. App. 423. But see Gardt *v.* Brown, 113 Ill. 475, 55 Am. Rep. 434; Wilson *v.* Weber, 3 Ill. App. 125.

Iowa.— Porter *v.* Moffett, Morr. 108.

Maryland.— Kelly *v.* Baltimore, 53 Md. 134.

Mississippi.— Drane *v.* Winter, 41 Miss. 517.

Tennessee.— See Merriman *v.* Norman, 9 Heisk. 269.

Texas.— Texas Land Co. *v.* Turman, 53 Tex. 619; Dearborn *v.* Phillips, 21 Tex. 449; Burnley *v.* Cook, 13 Tex. 586, 65 Am. Dec. 79; Roe *v.* Dailey, 1 Tex. Unrep. Cas. 247.

Virginia.— Ruffners *v.* Barrett, 6 Munf. 207.

West Virginia.— Noyes *v.* Vickers, 39 W. Va. 30, 19 S. E. 429.

United States.—Pennsylvania R. Co. *v.* National Docks, etc., R. Co., 51 Fed. 858; Imlay *v.* Norwich, etc., R. Co., 13 Fed. Cas. No. 7,012, 4 Blatchf. 227.

See 27 Cent. Dig. tit. "Injunction," § 280.

25. Wagner *v.* Edmiston, 1 Tex. App. Civ. Cas. § 678; Adkins *v.* Edwards, 83 Va. 300, 2 S. E. 435; Pulliam *v.* Winston, 5 Leigh (Va.) 324; Singleton *v.* Lewis, 6 Munf. (Va.) 397; Hough *v.* Shreeve, 4 Munf. (Va.) 490; Franklin *v.* Wilkinson, 3 Munf. (Va.) 112; Pitt *v.* Tidwell, 3 Munf. (Va.) 88; Beal *v.* Gibson, 4 Hen. & M. (Va.) 481; Anderson *v.* Ellington, 2 Hen. & M. (Va.) 16; Gallego *v.* Quesnall, 1 Hen. & M. (Va.) 205.

Waiver of objection.— If the bill is not dismissed upon the dissolution of the injunction and the cause is set for hearing on defendant's motion he cannot afterward object that the bill should have been dismissed under the statute. Franklin *v.* Wilkinson, 3 Munf. (Va.) 112.

Where other relief is demanded, the statute does not apply. Adkins *v.* Edwards, 83 Va. 300, 2 S. E. 435; Pulliam *v.* Winston, 5 Leigh (Va.) 324; Singleton *v.* Lewis, 6 Munf. (Va.) 397; Hough *v.* Shreeve, 4 Munf. (Va.) 490.

A dissolution in vacation or at chambers is not within the statute. Price *v.* Bland, 44 Tex. 145; Coleman *v.* Goyne, 37 Tex. 552; Wagner *v.* Edmiston, 1 Tex. App. Civ. Cas. § 678; Muller *v.* Bayly, 21 Gratt. (Va.) 521.

26. Guerry *v.* Dunham, 11 Ga. 9; Gallagher *v.* Johnson, 31 Cinc. L. Bul. 24.

27. Gamble *v.* Campbell, 6 Fla. 347; Massie *v.* Mann, 17 Iowa 131; Boswell *v.* Wheat, 37 Miss. 610; Pillow *v.* Thompson, 20 Tex. 206.

28. Corey *v.* Voorhies, 2 N. J. Eq. 5; Pullen *v.* Baker, 41 Tex. 419.

29. Behn *v.* Young, 21 Ga. 207; Philadelphia Real-Estate Trust Co. *v.* Hatton, 194 Pa. St. 449, 45 Atl. 379.

Enjoining foreclosure.— A bill having been filed to enjoin a sale of mortgaged property under the power contained in the mortgage, and a cross bill to have the mortgage foreclosed, the cross bill may be considered as a waiver of any purpose to sell under the power, and the original bill may thereupon be dismissed. Warrick *v.* Hull, 102 Ill. 280.

30. During vacation.— If a dismissal takes place during vacation it is no judgment until entered of record at a succeeding term of court. Campbell *v.* Carroll, 35 Mo. App. 640.

At chambers.— Comp. St. (1893) c. 19, authorizing the district judge at chambers "to grant, dissolve, or modify temporary injunctions," does not include a final disposition of an action for an injunction, either by dismissal or otherwise. Browne *v.* Edwards, etc., Lumber Co., 44 Nebr. 361, 62 N. W. 1070.

31. Merifee *v.* Myers, 33 Tex. 690.

held improper for a court before answer or demurrer to dismiss a bill on a hearing, on the bill and affidavits, of a motion to continue the preliminary injunction.[32] In general a bill may be dismissed for want of equity upon demurrer,[33] motion to dismiss,[34] upon the dissolution of a temporary injunction,[35] or by the court upon its own motion, where it appears that it has been improperly issued,[36] or at or after hearing on the application for a preliminary injunction.[37] Where the answer has been filed and the case called for trial on its merits, it is too late for defendant to move to dismiss a bill on the ground that complainant has an adequate remedy at law.[38] Upon the death of a party a reasonable time for the appointment of his personal representative and making him a party in the case by amended bill and bringing him into court by proper process will be allowed, and the bill will not be dismissed until such reasonable time shall have passed unheeded.[39] A necessary party to an injunction suit who has not been joined has the right to have the dismissal set aside and the suit reinstated.[40]

c. Operation and Effect. The dismissal of a bill *ipso facto* dissolves a temporary injunction already allowed.[41] So the dismissal from a petition of all

32. Conner *v.* Smith, 74 Ala. 115; Massey *v.* Modawell, 73 Ala. 421; Yonge *v.* Hooper, 73 Ala. 119; Bishop *v.* Wood, 59 Ala. 253; Beard *v.* Geran, Hard. (Ky.) 12; Buck Mountain Coal Co.'s Appeal, 5 Wkly. Notes Cas. (Pa.) 309. *Contra*, Davis *v.* McDuffie, 18 S. C. 495.

33. Bishop *v.* Wood, 59 Ala. 253; Atkinson *v.* Orr, 83 Ga. 34, 9 S. E. 787; Jones *v.* Coker, 53 Miss. 195.

Leave to amend.— Upon sustaining a demurrer the bill will be dismissed unless plaintiff makes seasonable application for leave to amend. Gaskins *v.* Peebles, 44 Tex. 390.

In vacation it is error to dismiss the bill except upon demurrer. Wilcox *v.* Elberton, 108 Ga. 799, 33 S. E. 981; Gullatt *v.* Thrasher, 42 Ga. 429.

34. *Alabama.*— Bishop *v.* Wood, 59 Ala. 253.

Illinois.— People *v.* General Electric R. Co., 172 Ill. 129, 50 N. E. 158; Beaugenon *v.* Turcotte, 1 Ill. 167.

New Jersey.— Morris Canal, etc., Co. *v.* Biddle, 4 N. J. Eq. 222.

South Carolina.— Davis *v.* McDuffie, 18 S. C. 495.

Texas.— Gaskins *v.* Peebles, 44 Tex. 390.

See 27 Cent. Dig. tit. "Injunction," § 279 *et seq.*

But see Beard *v.* Geran, Hard. (Ky.) 12.

Motion as equivalent to demurrer.— A motion to dismiss a petition for an injunction is in the nature of a demurrer, and in deciding upon it the court can only look to the statements in the petition. Floyd *v.* Turner, 23 Tex. 292.

Amendable defects.— On motion to dismiss a bill for injunction for want of equity all amendable defects in matters of form, although not in matters of substance, will be considered as amended. Cahalan *v.* Monroe, 56 Ala. 303. Under Code, § 5129, subd. 4, providing that a bill for an injunction may be dismissed on motion of defendant "for want of any of the prerequisites of the issuance of the writ," the failure of the bill to state, as required by section 5180, that it is the first application for such process, must be taken by motion to dismiss, so that complainant may have an opportunity to amend. Boyd *v.* Hickey, (Tenn. Ch. App. 1895) 35 S. W. 1024.

35. Gardt *v.* Brown, 113 Ill. 475, 55 Am. Rep. 434; American Livestock Commission Co. *v.* Chicago Livestock Exch. Co., 143 Ill. 210, 32 N. E. 274, 36 Am. St. Rep. 385, 18 L. R. A. 190; Withers *v.* Denmead, 22 Md. 135; Merriman *v.* Norman, 9 Heisk. (Tenn.) 269; Mayse *v.* Biggs, 3 Head (Tenn.) 36. *Contra*, Allen *v.* Smitherman, 41 N. C. 341.

36. Conover *v.* Ruckman, 32 N. J. Eq. 685, want of equity appearing on motion to dismiss bill.

37. Saules *v.* Freeman, 24 Fla. 209, 4 So. 525, 12 Am. St. Rep. 190; Field *v.* Western Springs, 181 Ill. 186, 54 N. E. 929.

38. Hargraves *v.* Jones, 27 Ga. 233.

39. Frank *v.* Brunnemann, 8 W. Va. 462.

40. Shannahan *v.* Stevens, 139 Ill. 428, 28 N. E. 804 [*reversing* 38 Ill. App. 571].

41. *California.*— Dowling *v.* Polack, 18 Cal. 625.

Georgia.— Neisler *v.* Smith, 2 Ga. 265.

Illinois.— Thomsen *v.* McCormick, 136 Ill. 135, 26 N. E. 373; Gold *v.* Johnson, 59 Ill. 62; Phelps *v.* Foster, 18 Ill. 309.

New York.— Loomis *v.* Brown, 16 Barb. 325.

United States.— Coleman *v.* Hudson River Bridge Co., 6 Fed. Cas. No. 2,983, 5 Blatchf. 56.

England.— Green *v.* Pulsford, 2 Beav. 70, 17 Eng. Ch. 70, 48 Eng. Reprint 1105.

See 27 Cent. Dig. tit. "Injunction," § 285.

Dissolution without formal order.— Where demurrers are sustained to that portion of the bill on the strength of which a temporary injunction has been issued, and the record recites that "the sufficiency of said causes of demurrer having been passed upon when the order dissolving the injunction was made and entered," the injunction will be considered dissolved, although no formal order of dissolution appears on the record. Thomsen *v.* McCormick, 136 Ill. 135, 26 N. E. 373.

charges upon which the injunction was issued dissolves the injunction.[42] A dismissal not on the merits,[43] such as a dismissal for want of prosecution,[44] or for want of jurisdiction,[45] is not *res judicata*. So a voluntary dismissal does not preclude an action at law.[46] A dismissal by stipulation or consent is not conclusive upon a defendant who was not brought in and was not a party to the stipulation.[47]

J. Trial or Hearing[48] — **1. Right to Trial or Hearing.** A court of equity will not make a decree for a perpetual injunction, which is to operate directly upon the parties in interest, without giving them an opportunity to be heard.[49] The parties are entitled to a trial in open court.[50] It is not proper to issue a permanent injunction upon the hearing of an order to show cause why a preliminary injunction should not issue or upon motion to dissolve heard before answer. A permanent injunction should issue, or a temporary injunction should be made permanent, only upon final hearing after the parties are at issue[51] and after notice to defendant.[52]

2. Time For Hearing[53] — **a. In General.** In some states statutes provide for the prompt and summary trial of suits involving injunctions.[54] The court may proceed to hear the cause on its merits before it is formally set for hearing, on a

42. Thomsen *v.* McCormick, 136 Ill. 135, 26 N. E. 373. See Lyon *v.* Lyon, 103 Ga. 747, 30 S. E. 575.

43. Mayfield *v.* Hawkins, 3 N. C. 15; Hersberger *v.* Lindsey, 1 Tex. App. Civ. Cas. § 1167.

Where a bill seeks to prevent trespass on realty because of irreparable injury, and the evidence leaves it in doubt as to the complainant's ownership and possession, the bill may be dismissed without prejudice, so that such controverted questions may be settled at law. Hacker *v.* Barton, 84 Ill. 313.

44. Chamberlain *v.* Southerland, 4 Ill. App. 494.

45. Smith *v.* McNeal, 109 U. S. 426, 3 S. Ct. 319, 27 L. ed. 986; Walden *v.* Bodley, 14 Pet. (U. S.) 156, 10 L. ed. 398.

46. Cavenaugh *v.* Davis, 7 J. J. Marsh. (Ky.) 371.

47. Shannahan *v.* Stevens, 139 Ill. 428, 28 N. E. 804 [*reversing* 38 Ill. App. 571].

48. See Equity, 16 Cyc. 407.

49. Chicago, etc., R. Co. *v.* St. Louis, etc., R. Co., 79 Ill. App. 384; Marshall *v.* Beverley, 5 Wheat. (U. S.) 313, 5 L. ed. 97.

50. Chicago, etc., R. Co. *v.* St. Louis, etc., R. Co., 79 Ill. App. 384. holding that where issues of fact are formed, it is the right of the parties unless waived to have the evidence heard, either by deposition or orally, in open court, and thus secure the right of cross-examination of the witnesses.

51. *Georgia.*— Collins *v.* Carr, 112 Ga. 868, 38 S. E. 346.

Illinois.—Chicago, etc., R. Co. *v.* St. Louis, etc., R. Co., 79 Ill. App. 384.

Louisiana.— State *v.* Booth, 28 La. Ann. 726.

New York.— Jackson *v.* Bunnell, 113 N. Y. 216, 21 N. E. 79.

North Carolina.— Williamston, etc., R. Co. *v.* Battle, 66 N. C. 540; McReynolds *v.* Harshaw, 37 N. C. 29.

United States.— Marshall *v.* Beverley, 5 Wheat. 313, 5 L. ed. 97; Adams *v.* Crittenden, 17 Fed. 42, 4 Woods 618.

England.— Day *v.* Snee, 3 Ves. & B. 170, 35 Eng. Reprint 443. See also Morrell *v.* Pearson, 12 Beav. 284, 50 Eng. Reprint 1070.

See 27 Cent. Dig. tit. "Injunction," § 409 *et seq.*

52. State *v.* Jacksonville, etc., R. Co., 15 Fla. 201.

53. See Equity, 16 Cyc. 408.

54. Williamson *v.* Richardson, 30 La. Ann. 1163 (the suit need not be at issue or set for trial); Cumming *v.* Rapides Police Jury, 5 La. Ann. 634 (but the only suits required to be tried summarily are those in which no security is required); Sliddell *v.* Righter, 4 Rob. (La.) 59 (but the parties cannot be deprived of any means of procuring evidence within a reasonable delay); Love *v.* Banks, 3 La. 480 (the case need not wait turn on docket, and a jury is not required, but the judge cannot cite the parties before him and try the case at chambers out of the regular term of court). See also Johnson *v.* Holt, 3 Ga. 117, holding that a statute requiring injunction suits to be disposed of at the second term of court held in and for the county in which the suit originated means the second term after the parties are served and the cause set down for trial.

Trial at term of appearance.— Under Mo. Rev. St. (1889) § 5505, relating to injunctions and providing that after answer is filed motion may be made at any time in term to dissolve the injunction, and upon such motion the parties may introduce testimony, etc., section 2013, relating to suits in general and providing that they may be instituted by filing a petition and the voluntary appearance of the adverse party, or by the filing of a petition and suing out process thereon, and section 2024, relating only to cases in which defendant has been served with process and making actions triable at the return-term, the court has power to order an injunction suit in which no temporary injunction has been asked, and in which defendant has voluntarily appeared at the term preceding the return-term, to be tried at the term of appearance. Harding *v.* Carthage, 105 Mo. App. 16, 78 S. W. 654.

motion to dissolve a temporary injunction, if defendant is present in court and offers no objections.[55]

b. Continuances. The rules relating to continuances in general[56] apply to continuances in injunction suits.[57]

3. Papers and Evidence on Hearing.[58] A cause before the court for final decree, although seeking for special injunction, should be heard on bill, answer, replication, and proofs; and the bill should not be treated as an affidavit in plaintiff's behalf.[59] An affidavit tendered and received in evidence on the hearing of an application for an injunction, where no objection is made on the ground of incompetency of the witness, and no motion made to withdraw or rule out the affidavit, may be considered whether the witness was competent or not.[60]

4. Inspection of Subject-Matter.[61] In a proper case in an injunction suit an order for an inspection of the subject-matter of the suit may be granted on motion after issue has been joined,[62] but not before.[63]

5. Scope of Inquiry — a. Preliminary Injunction — (i) *In General.* On the hearing of a motion for a preliminary injunction or an order to show cause the court may go into the merits of the case, but is limited to the issues that are raised by the bill, answer, and affidavits, and cannot go into outside or collateral matters.[64] The merits of the case, however, will not usually be determined on

55. Brakeley *v.* Tuttle, 3 W. Va. 86.

56. See Continuances in Civil Cases, 9 Cyc. 83 *et seq.*; Equity, 16 Cyc. 409.

57. See cases cited *infra*, this note.

What are grounds.— Where plaintiff applies to the clerk and master for a dedimus to take testimony within two terms after the dissolution of the injunction the cause will not be dismissed or heard, but continued on his application (Dawson *v.* ——, 3 N. C. 296); and where, since the granting of a temporary injunction, the statute on which it was based has materially changed, and the case is not ready for final judgment, and the term of court is about to close, the cause will be continued to the next term (Atty.-Gen. *v.* Chicago, etc., R. Co., 38 Wis. 69). The hearing may be postponed until the issues are made specific. Wilkesbarre, etc., R. Co. *v.* Danville, etc., R. Co., 29 Leg. Int. (Pa.) 373.

What are not grounds.— But it has been held to be no ground for continuance that defendant on answering had failed to produce certain papers which plaintiff believed were in his possession (Dunson *v.* Pitts, 67 Ga. 767); or, when a case is set for hearing by one defendant, that the issues have not been framed with a co-defendant who lives in an adjoining parish and whom plaintiff has neglected for eleven months to cite (Adams *v.* Dupuy, 2 La. 259); or that a witness is absent (Soderberg *v.* Pierce, 33 Mo. App. 60).

Statutes.— Mo. Rev. St. § 2718, providing that "if, after a motion for a dissolution of an injunction is made, either party will satisfy the court, by his own affidavit . . . that any material specified part of the bill or answer . . . is untrue, that he has witnesses whose testimony he believes he can procure at the next term, or other material testimony which will disprove the same, and that he has not been able to procure such testimony by using due diligence, the court may continue the motion until the next term," applies only to the motion for dissolution, and an application for a continuance of the cause on the ground of absent witnesses, which complies with such section only, is insufficient and properly denied. The motion for continuance of the cause must conform to section 3595, which contains additional requirements. Soderberg *v.* Pierce, 33 Mo. App. 60.

Continuance pending trial of title.— Where the title to land has been tried in a court of law and the case is pending in a higher court on a writ of error, an equity suit involving such title should be continued pending the hearing on the writ of error. Delaware, etc., R. Co. *v.* Breckenridge, 56 N. J. Eq. 595, 40 Atl. 23.

58. See Equity, 16 Cyc. 382, 411; and *supra*, VI, H, E.

59. Airs *v.* Billops, 57 N. C. 17.

60. Putney *v.* Kohler, 84 Ga. 528, 11 S. E. 127.

Affidavits or depositions used on motion to dissolve.— Under the Illinois statute declaring that the testimony to be heard on a motion to dissolve an injunction, aside from the bill and answer, shall be by depositions in writing as in other cases in chancery proceedings, except that the affidavits which may have been filed with the bill or answer may be read on such motion as heretofore, and the depositions taken to dissolve an injunction may be read on the final hearing of the case, affidavits thus taken cannot be read on final hearing, but the depositions may. Hopkins *v.* Granger, 52 Ill. 504.

61. See Discovery, 14 Cyc. 368; and, generally, Patents.

62. Wilson *v.* Keeley, 19 Phila. (Pa.) 396, suit to enjoin an assignment of a machine and invention.

63. Com. *v.* Perkins, 46 Leg. Int. (Pa.) 67.

64. *Georgia.*— Winn *v.* Ham, R. M. Charlt. 70.

the preliminary hearing, and questions going to the merits will not be finally disposed of.[65] No right of trial by jury exists.[66]

(II) *Questions of Title.* Questions of title to real estate will not be passed upon, although rights will be protected *pendente lite* even though the title be doubtful.[67]

(III) *Difficult Questions of Law and Fact.* Difficult or doubtful questions of law or of fact will generally not be determined upon preliminary hearing,[68] as for example the constitutionality of a statute.[69]

b. Permanent Injunction. On the hearing as to a permanent injunction only questions necessarily involved can be considered,[70] but all incidental questions

Indiana.— Aurora, etc., R. Co. *v.* Lawrenceburgh, 56 Ind. 80.

New Jersey.—Atty.-Gen. *v.* Greenville, etc., R. Co., (Ch. 1900) 46 Atl. 638.

New York.— Hartt *v.* Harvey, 32 Barb. 55; Le Roy *v.* Chesebrough, 39 Misc. 285, 79 N. Y. Suppl. 442; Cure *v.* Crawford, 2 Edm. Sel. Cas. 233.

South Carolina.— Rose *v.* Hamilton, 1 Desauss. Eq. 137.

Wisconsin.— See Dalrymple *v.* Milwaukee, 53 Wis. 178, 10 N. W. 141.

United States.— Fidelity Trust, etc., Co. *v.* Mobile St. R. Co., 53 Fed. 687; Rateau *v.* Bernard, 20 Fed. Cas. No. 11,579, 3 Blatchf. 244.

See 27 Cent. Dig. tit. "Injunction," § 336.

Dissolution of a prior injunction.— The question as to whether a previous order should be dissolved is a collateral matter and should not be determined upon the hearing of a rule to show cause. Manhattan Mfg., etc., Co. *v.* Van Keuren, 23 N. J. Eq. 251.

Submission of all of defenses.— Defendant may be required to submit all of his defenses together, for the court is entitled to possess the whole case. Hambrick *v.* Crawford, 55 Ga. 335.

65. *Delaware.*— Wilmington *v.* Addicks, (1900) 47 Atl. 366.

Georgia.— Masland *v.* Kemp, 72 Ga. 182.

Louisiana.— Sinnot *v.* A. Rochereau Co., 34 La. Ann. 784.

Maryland.— Dail *v.* Traverse, 8 Gill 41.

New York.— People *v.* Harlem Bridge Co., 1 Abb. Pr. N. S. 169 note.

North Carolina.— Bradshaw *v.* Guilford County, 92 N. C. 278.

South Carolina.— Darlington Oil Co. *v.* Pee Dee Oil, etc., Co., 62 S. C. 196, 40 S. E. 169.

See 27 Cent. Dig. tit. "Injunction," § 336.

Where all the evidence is before the court as to the defense of former adjudication, there is no reason for reserving the question for the final hearing. Isham *v.* Cooper, 56 N. J. Eq. 398, 37 Atl. 462, 39 Atl. 760. *Compare* Masland *v.* Kemp, 72 Ga. 182. So also where the facts are substantially undisputed and are all before the court, a final decree may be entered on preliminary hearing. Allegheny Oil Co. *v.* Snyder, 106 Fed. 764, 45 C. C. A. 604.

The question of jurisdiction will not be summarily disposed of, although the complainant must show a reasonable probability that such jurisdiction exists. Huntington *v.* New York, 118 Fed. 683.

Disputed questions of fact will not be determined on a motion for a preliminary injunction. Pennsylvania Coal Co. *v.* Kelley, 2 Kulp (Pa.) 41.

66. Hopkins *v.* Greensburg, etc., Turnp. Co., 46 Ind. 187.

67. Christ Church *v.* Savannah, 69 Ga. 749; Howes *v.* Mauney, 66 N. C. 218; Northern Pac. R. Co. *v.* Spokane, 52 Fed. 428.

68. Leake *v.* Smith, 76 Ga. 524; Municipal Tel. Co. *v.* McCreary, 77 N. Y. Suppl. 409; Loudenschlager *v.* Benton, 3 Grant (Pa.) 384; Hill *v.* Kensington, 1 Pars. Eq. Cas. (Pa.) 501.

69. Deering *v.* York, etc., R. Co., 31 Me. 172; Municipal Tel. Co. *v.* McCreary, 77 N. Y. Suppl. 409.

70. Hamilton St. R., etc., Co. *v.* Hamilton, etc., Electric Transit Co., 5 Ohio Cir. Ct. 319, 3 Ohio Cir. Dec. 158 (the question of forfeiture of franchise by failure to complete road cannot be determined in suit by one street railroad company to enjoin occupation of street by another); Riddle *v.* Delaware County Com'rs, 3 Pa. Co. Ct. 600.

Violation of covenants by landlord.—Where a tenant attempts to restrain his landlord from dispossessing him for non-payment of rent on the ground of the landlord's violation of independent covenants, the court has no authority to direct its inquiry into such independent matters. Huff *v.* Markham, 70 Ga. 284.

Adequate remedy at law.— On a bill to restrain construction of a public causeway across plaintiff's land, the objection that plaintiff has an adequate remedy at law must be raised by demurrer, or at least be specially relied on in the answer, and cannot be raised for the first time at the hearing. Creely *v.* Bay State Brick Co., 103 Mass. 514; Jennings *v.* Whittemore, 2 Thomps. & C. (N. Y.) 377.

Suit to restrain issue of county bonds.— Where, in an action to restrain the issue of county bonds in aid of a railroad, the question is only as to a power that depends on the result of an election, the sole inquiry is whether the election has been held and the result ascertained. Trimmier *v.* Bomar, 20 S. C. 354.

Authority of arbitrators.— The question whether the authority of arbitrators was revoked before the award was made cannot be raised in a proceeding to enjoin a suit on a bond conditioned for the performance of the award. Gardner *v.* Masters, 56 N. C. 462.

necessarily involved must be determined.[71] The question of title, being one of law, will not ordinarily be determined.[72]

6. Submission of Issues to Jury.[73] In the absence of a statute issues cannot be required to be submitted to a jury, unless the injunction is merely ancillary to the determination of legal rights, in which case it may be required.[74] But the court has power in its discretion to grant an application for such submission.[75] When issues of fact have been submitted to the jury for determination the court will instruct the jury as to the nature and extent of the verdict and counsel have no right to address the jury on these subjects.[76]

7. Verdict and Findings.[77] A special verdict will authorize the chancellor to decree a perpetual injunction without the finding by the jury in express words

Adequacy of consideration for contract.— In an action to enjoin the breach of a contract on the sale of a business not to engage in such business in competition with the purchaser, the court will not consider the inadequacy of the consideration, where the contract shows on its face a sufficient consideration. McCurry *v.* Gibson, 108 Ala. 451, 18 So. 806, 54 Am. St. Rep. 177.

71. Riddle *v.* Delaware County Com'rs, 3 Pa. Co. Ct. 600, holding that in a suit to restrain county commissioners from erecting a bridge brought by one whose property will be damaged thereby, the question of the commissioners' authority can be raised as an incidental question necessarily involved.

Right of possession.— In an action to restrain defendant from interfering with plaintiff's use of property in his possession, where the parties are at issue upon plaintiff's right of possession and the validity of the authority for defendant's acts, the court must examine into plaintiff's right of possession. Pride *v.* Weyenberg, 83 Wis. 59, 53 N. W. 29.

Injunction against breach of contract after expiration.— In an action for an injunction to restrain defendant from carrying out a contract with a third party, in violation of a previous contract with plaintiff, where an arrangement was made by which defendant, on giving an undertaking conditioned to pay a certain sum as liquidated damages if it should be finally determined that plaintiff was entitled to an injunction, was permitted to fulfil her contract with such third party, it was held that the rights of both parties having been expressly reserved, the court, even after plaintiff's contract had expired, would determine plaintiff's original right to relief by injunction. Duff *v.* Russell, 60 N. Y. Super. Ct. 80, 14 N. Y. Suppl. 134 [*affirmed* without opinion in 16 N. Y. Suppl. 958, which was *affirmed* without opinion in 133 N. Y. 678, 31 N. E. 622].

72. Morris, etc., R. Co. *v.* Blair, 9 N. J. Eq. 635.

73. See Equity, 16 Cyc. 413.

Right to jury trial see Juries.

74. Love *v.* Banks, 3 La. 480; Ophir Silver Min. Co. *v.* Carpenter, 4 Nev. 534, 97 Am. Dec. 550; Alston *v.* Limehouse, 61 S. C. 1, 39 S. E. 192.

Damages assessed by jury.— Where a perpetual injunction is prayed for, and also damages, the complaint stating a single cause of action, the court must try the issue raised as to the injunction, and, on demand of either party, submit the question of damages to a jury, and thereafter enter the proper judgment; and it is error to try the issue as to the injunction, enter judgment thereon, and continue the question of damages to a subsequent term of the court. Stocker *v.* Kirtley, 6 Ida. 795, 59 Pac. 891.

Reasonableness of ordinance.— In a suit to enjoin the enforcement of a city ordinance making it a misdemeanor to bury human bodies within the city limits except in certain localities, as being unreasonable, the facts going to show the unreasonableness of the ordinance, if controverted, must be determined by the jury. Austin *v.* Austin City Cemetery Assoc., (Tex. Civ. App. 1895) 28 S. W. 1023.

75. Harris *v.* Mackintosh, 133 Mass. 228.

Existence of verdict in action at law.— Where a bill, asking an injunction and other relief, charges defendants with sinking a deep well, and thereby diverting the plaintiff's water-course, and the fact is denied by the answer, issues may be framed for a jury, although plaintiff has obtained a verdict in an action at law; it being shown by defendant that this verdict was founded on very unsatisfactory evidence, and materially affected by new evidence. Dexter *v.* Providence Aqueduct Co., 7 Fed. Cas. No. 3,864, 1 Story 387.

Existence of injury.— On an application to restrain the building of a railroad on the ground that it would cause material and irreparable injury to a preëxisting corporation, the interest involved being important, an issue may be directed to ascertain whether the building of the road would be productive of such injury. Hudson, etc., Canal Co. *v.* New York, etc., R. Co., 9 Paige (N. Y.) 323.

Questions of fact necessary to be determined before granting an injunction to restrain the grantees of a mill privilege from using more water than that granted may be settled as well by an issue out of the court of chancery as by an action of law. Olmsted *v.* Loomis, 9 N. Y. 423.

76. Harrison *v.* Park, 1 J. J. Marsh. (Ky.) 170.

77. See Equity, 16 Cyc. 422, 423; and, generally, Trial.

that the perpetual injunction be granted.[78] But such a verdict must contain a finding on all the issues submitted.[79] The verdict is not conclusive on the court.[80] Findings of the court, master, or jury will be construed, if possible, to sustain the judgment or decree granted.[81] The findings of course must be within the issues made by the pleadings.[82]

8. Rehearing or Second Application. The refusal of an application for a preliminary injunction does not necessarily bar complainant from making a second application.[83] The court is not bound to adhere to its former ruling, nor is it bound, in case the former application was in another court, to follow the ruling of that court,[84] although it will generally do so by way of comity.[85] As a general rule the second application will be denied merely on a showing that the first one was denied, unless complainant presents new and additional matter discovered since the former hearing.[86]

9. Reopening Case to Receive Further Evidence. It is discretionary with

78. McManus *v.* Cook, 59 Ga. 485.

79. Parker *v.* Laney, 58 N. Y. 469.

80. Comesky *v.* Postal Tel. Cable Co., 41 N. Y. App. Div. 245, 58 N. Y. Suppl. 467.

81. See Belcher *v.* Murphey, 81 Cal. 39, 22 Pac. 264, holding that, in an action to enjoin defendant from destroying a levee alleged to have been built by plaintiff on land belonging to her, a finding that "said levee is upon the line dividing the lands of plaintiff and defendant, and is built partly upon the lands of each," is a sufficient finding that said levee was built upon land owned by plaintiff to sustain a judgment for her.

Finding as to injury from railroad.— The finding of the judge, on an application for an injunction against a street railroad company, that the railroad "will be especially injurious to the property of plaintiffs, and other property similarly situated" means that, although the cause of the injury would be common, the special injury to each plaintiff would be several and direct. Milhau *v.* Sharp, 27 N. Y. 611, 84 Am. Dec. 314.

Fraud.— In a suit to enjoin foreclosure of a mortgage because of false and fraudulent representations, a master's finding that plaintiff was entitled to the relief demanded, and that the representations were made, were material, and were relied on, is equivalent to a finding that the representations were false and fraudulent, although there was no specific finding to that effect. Russell *v.* Bryant, 181 Mass. 447, 63 N. E. 927.

82. Thus under Cal. Code Civ. Proc. § 526, authorizing the granting of an injunction only where the complaint shows that plaintiff is entitled to a decree restraining the act complained of, or where it appears that the commission of some act will produce irreparable injury to plaintiff, where, in a suit by a grantee of the use of an undivided one fourth of the waters of an irrigation ditch to restrain the diversion of the water by the grantor, the latter in his answer denies the diversion and admits the grantee's right to the use of an undivided one eighth, a finding outside of the issues that the grantor denied the grantee's right to the use of any of the water, conceding the right of the court to make it, is insufficient to sustain an injunction restraining the grantor from interfering with the grantee's right to use the water.

Immaterial findings.— In a suit to enjoin the transfer, foreclosure, or collection of a mortgage given to secure the purchase-price of property, the purchase of which by plaintiff from defendant was alleged to have been induced by a false and fraudulent representation that defendant's lessor had consented to the assignment of the lease of the realty where the property was located to a responsible party, a finding that no such consent was given rendered a finding as to whether or not plaintiff was a responsible party immaterial. Russell *v.* Bryant, 181 Mass. 447, 63 N. E. 927.

83. Glass *v.* Clark, 41 Ga. 544; Winship *v.* Pitts, 3 Paige (N. Y.) 259.

84. Welch *v.* People, 38 Ill. 20; Jaynes *v.* Brock, 10 Gratt. (Va.) 211; Toll Bridge *v.* Free Bridge, 1 Rand. (Va.) 206.

Denial of motion not on merits.— If the former refusal was not based upon a consideration of the merits, it should be without prejudice to a new application. Tammien *v.* Clause, 67 Barb. (N. Y.) 430.

85. *Maryland.*— Wood *v.* Bruce, 9 Gill & J. 215.

New Jersey.— Mumford *v.* Ecuador Development Co., (Ch. 1901) 50 Atl. 476.

New York.— New York *v.* Conover, 5 Abb. Pr. 252.

Pennsylvania.— McNair *v.* Cleave, 9 Phila. 212.

United States.— Chicago Bd. of Trade *v.* Ellis, 122 Fed. 319.

See 27 Cent. Dig. tit. "Injunction," § 343.

Counter injunction.— Where an injunction has been issued in another court, a second injunction that might clash with the first will be refused. State *v.* Judge Civ. Dist. Ct., 37 La. Ann. 400.

86. *Georgia.*— Beckwith *v.* Blanchard, 79 Ga. 303, 7 S. E. 224; Blizzard *v.* Nosworthy, 50 Ga. 514.

Iowa.— Graves *v.* Key City Gas Co., 83 Iowa 714, 50 N. W. 283.

Montana.— Maloney *v.* King, 30 Mont. 414, 76 Pac. 939.

New Jersey.— Mumford *v.* Ecuador Development Co., (Ch. 1901) 50 Atl. 476;

the judge sitting at chambers, upon an application for injunction, to reopen the case for more testimony, upon discovery of additional witnesses by one of the parties after argument, and while holding the matter for decision.[87]

10. Reference.[88] In injunction cases proof may be taken before any one agreed upon, to be used at the hearing;[89] or the court may in a proper case order a reference to take testimony.[90] The court may also, subject to statutory provisions, order a reference in a proper case to take an account, assess damages, determine title, etc.,[91] or to determine other questions and report upon the form of decree.[92] A reference, however, should not be ordered to determine an account before evidence has been adduced tending to prove the material allegations of the bill;[93] and in actions involving the title to land, the legal issues should be tried before a reference of equitable issues.[94] The master should report the form of decree, and, when specifically directed, any means or schemes by which the injury could be remedied.[95] If the report is not sufficiently specific, it will be referred back to the master for further action.[96] If the master finds the bill to be scandalous, the court will not grant an injunction until the scandalous matter has been stricken out.[97]

K. Writ, Order, or Decree — 1. Writ or Order — a. Issuance.[98] The injunction will not usually issue prior to the service or filing of the bill or complaint;[99] but in England and some of the United States, whenever the court has jurisdiction over the subject-matter and parties in a proceeding, an injunction may be issued before the bill or complaint has been filed.[1] As a rule a preliminary injunction cannot be granted before issuance of the summons or subpœna;[2] but

Matthiessen, etc., Sugar Refining Co. *v.* Jersey City, 26 N. J. Eq. 275.

New York.— New York *v.* Conover, 5 Abb. Pr. 252; Cummins *v.* Bennett, 8 Paige 79.

North Carolina.— Halcombe *v.* Haywood County, 89 N. C. 346.

United States.— Virginia Coupon Cases, 25 Fed. 654.

See 27 Cent. Dig. tit. "Injunction," § 343.

87. Savannah Electric R. Co. *v.* Savannah, etc., R. Co., 87 Ga. 261, 13 S. E. 512.

88. See Equity, 16 Cyc. 429.

89. Steigerwald *v.* Winans, 17 Md. 62.

90. See Equity, 16 Cyc. 435.

91. Bailey *v.* Jordan, 32 Ala. 50; Arbuckle *v.* McClanahan, 6 W. Va. 101. See Equity, 16 Cyc. 436 *et seq.*

92. Breed *v.* Lynn, 126 Mass. 367; Reid *v.* Anderson, 6 Lanc. L. Rev. (Pa.) 26. See also Equity, 16 Cyc. 435 *et seq.*

93. Arbuckle *v.* McClanahan, 6 W. Va. 101.

94. Alston *v.* Limehouse, 60 S. C. 559, 39 S. E. 188.

95. Breed *v.* Lynn, 126 Mass. 367.

96. Reid *v.* Anderson, 6 Lanc. L. Rev. (Pa.) 26.

97. Neale *v.* Wadeson, 1 Cox Ch. 104, 29 Eng. Reprint 1082, 1 Bro. Ch. 574, 28 Eng. Reprint 1306; Davenport *v.* Davenport, 6 Madd. 251, 56 Eng. Reprint 1087.

98. On Sunday see Sunday.

Postponing issuance.— The issuance of an order may be properly delayed to allow the parties to agree between themselves as to compensation for the injury done. Pine *v.* New York, 103 Fed. 337.

99. Jerolaman *v.* Foster, 28 Ind. 232; Vliet *v.* Sherwood, 37 Wis. 165; Wilson *v.* Childs, 30 Fed. Cas. No. 17,796; Savory *v.* Dyer, Ambl. 70, 27 Eng. Reprint 41. But see Davis *v.* Reed, 14 Md. 152, holding that the fact that the bill was not filed until after the writ issued was not fatal to the validity of the writ.

1. *Alabama.*— Henry *v.* Watson, 109 Ala. 335, 19 So. 413; *Ex p.* Sayre, 95 Ala. 288, 11 So. 378.

California.— Heyman *v.* Landers, 12 Cal. 107.

New York.— Leffingwell *v.* Chave, 5 Bosw. 703, 19 How. Pr. 54; Mattice *v.* Gifford, 16 Abb. Pr. 246; Continental Store Service Co. *v.* Clark, 1 How. Pr. 497; Matter of Heminp, 2 Paige 316; Matter of Hallock, 7 Johns. Ch. 24.

Vermont.— Peck *v.* Crane, 25 Vt. 146.

England.— *Ex p.* Figes, 1 Glyn & J. 122; *Ex p.* Gould, 1 Glyn & J. 231; Beauchamp *v.* Huntley, Jac. 546, 4 Eng. Ch. 546; *Ex p.* Hawkins, 1 Mont. & M. 115; Farlon *v.* Wilson, 11 Price 95; *Ex p.* Pease, 1 Rose 232; *Ex p.* Hardenberg, 1 Rose 204; Casamajor *v.* Stode, 1 Sim. & St. 381, 1 Eng. Ch. 381, 57 Eng. Reprint 152. In pressing cases the injunction may issue before the filing of the bill (Campana *v.* Webb, 22 Wkly. Rep. 622; Thorneloe *v.* Skoines, L. R. 16 Eq. 126, 42 L. J. Ch. 788, 21 Wkly. Rep. 880), and it may later be filed *nunc pro tunc* (Carr *v.* Morice, L. R. 16 Eq. 125, 42 L. J. Ch. 787).

2. Horne *v.* Cumberland County, 122 N. C. 466, 29 S. E. 581; Grant *v.* Edwards, 90 N. C. 31; Trexler *v.* Newsom, 88 N. C. 13; Hirsh *v.* Whitehead, 65 N. C. 516; McArthur *v.* McEachin, 64 N. C. 72, 454; Patrick *v.* Joyner, 63 N. C. 573.

In a very urgent case an injunction may

the writ may be issued or the order signed prior to the service of the summons or subpœna,[3] in which case, however, the summons or subpœna should be served before or at the same time as the order.[4] A temporary injunction cannot be granted after final judgment.[5] A common injunction issued as of course upon the showing made in the bill and default in answer.[6]

b. Form and Sufficiency — (i) *In General.* No particular form is necessary,[7] but the writ or order should show on its face that it was issued by proper authority,[8] and in some jurisdictions the grounds for the order must be stated.[9] It is impossible to lay down any precise rule of universal application as to the degree of certainty required,[10] further than the rule that the injunction should be so clear and certain in its terms that the defendants may readily know what they are restrained from doing.[11] A preliminary restraining order must be in accordance

issue before summons issues. Thorneloe *v.* Skoines, L. R. 16 Eq. 126, 42 L. J. Ch. 788, 21 Wkly. Rep. 880; Carr *v.* Morice, L. R. 16 Eq. 125, 42 L. J. Ch. 787; Campana *v.* Webb, 22 Wkly. Rep. 622. See also Universal Sav., etc., Co. *v.* Stoneburner, 113 Fed. 251, 51 C. C. A. 208.

3. *Florida.*— Thebaut *v.* Canova, 11 Fla. 143.

Maryland.— Jones *v.* Magill, 1 Bland 177, except to stay proceedings at law in an action of ejectment by a lessor or to recover mortgaged property.

New York.— Leffingwell *v.* Chave, 5 Bosw. 703.

North Carolina.— Fleming *v.* Patterson, 99 N. C. 404, 6 S. E. 396.

Ohio.— Howe *v.* Seiberling, 2 Ohio S. & C. Pl. Dec. 51, 2 Ohio N. P. 8.

South Carolina.— Jordan *v.* Wilson, 69 S. C. 256, 48 S. E. 224.

England.— Colebourne *v.* Colebourne, 1 Ch. D. 690, 45 L. J. Ch. 749, 24 Wkly. Rep. 235; Thorneloe *v.* Skoines, L. R. 16 Eq. 126, 42 L. J. Ch. 788, 21 Wkly. Rep. 880; Brand *v.* Mitson, 45 L. J. P. & Adm. 41, 34 L. T. Rep. N. S. 854, 24 Wkly. Rep. 524.

Canada.— Canada Paint Co. *v.* Johnson, 4 Quebec 253; Wilder *v.* Quebec, 25 Quebec Super. Ct. 128; Paradis *v.* Paradis, 19 Quebec Super. Ct. 375.

Failure to serve the summons may be ground for dissolving the injunction, but until dissolved it is obligatory. Lash *v.* McCormick, 14 Minn. 482.

4. Leffingwell *v.* Chave, 19 How. Pr. (N. Y.) 54; Jordan *v.* Wilson, 69 S. C. 256, 48 S. E. 224; Canada Paint Co. *v.* Johnson, 4 Quebec 253; Wilder *v.* Quebec, 25 Quebec Super. Ct. 128; Paradis *v.* Paradis, 19 Quebec Super. Ct. 375. But see Fleming *v.* Patterson, 99 N. C. 404, 6 S. E. 396.

5. Bell *v.* Rochester, 30 N. Y. Suppl. 365.

Pending an appeal, the court should be liberal in granting an injunction to maintain the *status quo*, when the refusal of an injunction would thwart the very object of appeal. Ajax Gold Min. Co. *v.* Hilkey, 30 Colo. 115, 69 Pac. 523.

6. Capehart *v.* Mhoon, 45 N. C. 30; Chadwell *v.* Jordan, 2 Tenn. Ch. 635.

7. Summers *v.* Farish, 10 Cal. 347; Laferté *v.* St. Aimé, 14 Rev. Lég. 476.

Ordinary summons.— A writ of injunction in the form of an ordinary writ of summons is sufficient. Prefontaine *v.* Cité de Ste. Cunegonde, 3 Quebec 429.

Address of the writ may be to the party sought to be enjoined, or to the bailiffs, commanding them "to summon the party to appear," etc. Beauport *v.* Cie. du Ch. de Fer, 15 Quebec 1.

8. Governor *v.* Wiley, 14 Ala. 172.

9. Lingwood *v.* Stowmarket Papermaking Co., 13 L. T. Rep. N. S. 540.

In New York the code provision requiring the grounds for the order to be stated is not complied with by an order granting an injunction and stating in the language of Code Civ. Proc. § 603, that it appears from the complaint that plaintiffs demanded and are entitled to a judgment restraining the commission or continuance of an act, the commission or continuance of which, during the pendency of the action, would produce injury to plaintiffs. Hotchkiss *v.* Hotchkiss, 2 N. Y. Suppl. 825, 16 N. Y. Civ. Proc. 129. But such omission will be disregarded when the order states that it was made on a verified complaint and affidavit, copies of which, containing the grounds, were served on defendants. Church *v.* Haeger, 33 N. Y. Suppl. 47. An injunction granted in a suit for the appointment of a receiver, restraining all actions against the insolvent company, or interference with its assets, until further order of the court, need not state the grounds on which it is granted. Phœnix Foundry, etc., Co. *v.* North River Constr. Co., 6 N. Y. Civ. Proc. 106.

Form of order see Jordan *v.* O'Connor, 17 N. Y. Suppl. 462, 27 Abb. N. Cas. 376.

10. Robinson *v.* Clapp, 65 Conn. 365, 32 Atl. 939, 29 L. R. A. 582.

11. *Connecticut.*— Robinson *v.* Clapp, 65 Conn. 365, 32 Atl. 939, 29 L. R. A. 582; Baldwin *v.* Miles, 58 Conn. 496, 20 Atl. 618.

Louisiana.— Avery *v.* Onillon, 10 La. Ann. 127.

New York.— G. F. Harvey Co. *v.* National Drug Co., 75 N. Y. App. Div. 103, 77 N. Y. Suppl. 674; Little *v.* Gallus, 39 N. Y. App. Div. 646, 57 N. Y. Suppl. 104; Lyon *v.* Botchford, 25 Hun 57; Clark *v.* Clark, 25 Barb. 76; Laurie *v.* Laurie, 9 Paige 234; Sullivan

with the terms of the prayer of the bill,[12] but a substantial compliance therewith is sufficient.[13] It must be specific and definite.[14] It should not impose a greater restraint than is asked or is necessary.[15] Jurisdictional facts need not be recited.[16] Minor irregularities do not vitiate the order.[17] In some states the order need make no reference to an injunction bond,[18] while in other states the order must direct the kind and amount of the bond.[19]

(II) *Mandatory Injunction.* Mandatory injunction should be framed in a positive and not an indirect form.[20] In most cases they have been issued in prohibitory form, either commanding defendant thereafter not to omit to do certain acts, or commanding him not to continue a certain course of action when his only means of discontinuing is to perform some positive act.[21] It is not necessary, however, that the negative form should be used, but the injunction may be expressed in positive terms commanding the performance of an act.[22] The court may decree that the operation of the mandatory injunction shall be suspended

v. Judah, 4 Paige 444; Moat *v.* Holbein, 2 Edw. 188.

North Dakota.— Regan *v.* Sorenson, (1904) 100 N. W. 1095.

United States.— Arthur *v.* Oakes, 63 Fed. 310, 11 C. C. A. 209, 25 L. R. A. 414; St. Louis Min., etc., Co. *v.* Montana Min. Co., 58 Fed. 129.

England.— Sweet *v.* Maugham, 4 Jur. 479, 9 L. J. Ch. 323, 11 Sim. 51, 34 Eng. Ch. 51, 59 Eng. Reprint 793; Cother *v.* Midland R. Co., 17 L. J. Ch. 235, 2 Phil. 469, 5 R. & Can. Cas. 187, 22 Eng. Ch. 469, 41 Eng. Reprint 1025.

See 27 Cent. Dig. tit. "Injunction," §§ 422, 423.

12. State *v.* Rush County, 35 Kan. 150, 10 Pac. 535; McEldowney *v.* Lowther, 49 W. Va. 348, 38 S. E. 644.

13. Leake *v.* Smith, 76 Ga. 524.

14. Orvis *v.* National Commercial Bank, 81 N. Y. App. Div. 631, 80 N. Y. Suppl. 1029; St. Regis Paper Co. *v.* Santa Clara Lumber Co., 55 N. Y. App. Div. 225, 67 N. Y. Suppl. 149; Norris *v.* Cobb, 8 Rich. (S. C.) 58; Parker *v.* First Ave. Hotel Co., 24 Ch. D. 282, 49 L. T. Rep. N. S. 318, 32 Wkly. Rep. 105; Hackett *v.* Baiss, L. R. 20 Eq. 494, 45 L. J. Ch. 13; Dover Harbour *v.* London, etc., R. Co., 3 De G. F. & J. 559, 7 Jur. N. S. 453, 30 L. J. Ch. 474, 4 L. T. Rep. N. S. 387, 9 Wkly. Rep. 523, 64 Eng. Ch. 438, 45 Eng. Reprint 995; Low *v.* Innes, 4 De G. J. & S. 286, 10 Jur. N. S. 1037, 11 L. T. Rep. N. S. 217, 69 Eng. Ch. 222, 46 Eng. Reprint 929.

Aider by bill.— The order is to be construed with reference to the prayer and object of the bill, and this may make an otherwise indefinite order sufficiently specific. Hamilton *v.* State, 32 Md. 348.

15. Shubert *v.* Angeles, 80 N. Y. App. Div. 625, 80 N. Y. Suppl. 146; New York Fire Dept. *v.* Baudet, 4 N. Y. Suppl. 206, 21 Abb. N. Cas. 164.

16. Powers *v.* Wright, 39 Mo. App. 205.

17. Corcoran *v.* Doll, 35 Cal. 476; Jordan *v.* Wapello County Cir. Ct., 69 Iowa 177, 28 N. W. 548; State *v.* Pierce, 51 Kan. 241, 32 Pac. 924; Atlantic, etc., Tel. Co. *v.* Baltimore, etc., R. Co., 46 N. Y. Super. Ct. 377.

When issued in vacation the order must be in writing and it must be signed by the judge. Kiser *v.* Lovett, 106 Ind. 325, 6 N. E. 816.

18. Manley *v.* Leggett, 62 Hun (N. Y.) 562, 17 N. Y. Suppl. 68.

19. Stevenson *v.* Miller, 2 Litt. (Ky.) 306, 13 Am. Dec. 271; Harman *v.* Howe, 27 Gratt. (Va.) 676. See Greathouse *v.* Hord, 1 Dana (Ky.) 105; Duckworth *v.* Millsaps, 7 Sm. & M. (Miss.) 308.

20. Jackson *v.* Normanby Brick Co., [1899] 1 Ch. 438, 68 L. J. Ch. 407, 80 L. T. Rep. N. S. 482.

21. Carlisle *v.* Stevenson, 3 Md. Ch. 499; Strelley *v.* Pearson, 15 Ch. D. 113, 49 L. J. Ch. 406, 43 L. T. Rep. N. S. 155, 28 Wkly. Rep. 752; Mexborough *v.* Bower, 7 Beav. 127, 29 Eng. Ch. 127, 49 Eng. Reprint 1011; Spencer *v.* London, etc., R. Co., 7 L. J. Ch. 281, 8 Sim. 193, 1 R. & Can. Cas. 159, 8 Eng. Ch. 193, 59 Eng. Reprint 77. See Audenried *v.* Philadelphia, etc., R. Co., 68 Pa. St. 370, 8 Am. Rep. 195.

Illustrations.— A defendant may be restrained by injunction from continuing to appropriate water unlawfully, even though this requires him to build a bulkhead across a tunnel. Cole Silver Min. Co. *v.* Virginia, etc., Water Co., 6 Fed. Cas. Nos. 2,989, 2,990, 1 Sawy. 470, 685. The continued flooding of complainant's land has been prevented by an injunction in effect requiring defendant to remove floodgates. Robinson *v.* Byron, 1 Bro. Ch. C. 588, 28 Eng. Reprint 1315. In like manner a defendant has been compelled to repair a canal and to restore stop-gates. Lane *v.* Newdigate, 10 Ves. Jr. 192, 7 Rev. Rep. 381, 32 Eng. Reprint 818.

Minor acts incidentally required.— An injunction, only incidentally compelling the performance of certain minor acts, is not regarded as being a mandatory injunction. Macon, etc., R. Co. *v.* Graham, 117 Ga. 555, 43 S. E. 1000; Fairfield Floral Co. *v.* Bradbury, 87 Fed. 415.

22. Mason *v.* Byrley, 84 S. W. 767, 26 Ky. L. Rep. 487; Jackson *v.* Normanby Brick Co., [1899] 1 Ch. 438, 68 L. J. Ch. 407, 80 L. T. Rep. N. S. 482; Bidwell *v.* Holden, 63 L. T. Rep. N. S. 104.

until after a certain fixed time,[23] but it is not the duty of the court to suggest to defendant ways and means of carrying out the injunction.[24]

c. Conditions on Granting or Refusing[25]—(i) *In General.* The court may impose such terms as seem proper as a condition to the granting of a preliminary injunction,[26] or as a condition to its refusal.[27]

(ii) *Giving of Bond as Condition of Refusal.* Defendant may be required to keep accounts in cases where otherwise the amount of the complainant's loss would be uncertain.[28] The injunction may be denied, particularly where defendant will be caused greater inconvenience by the injunction than the complainant by its refusal, on condition that defendant give bond to secure the complainant against loss.[29] But if complainant has a clear right to the injunction itself, and a bond would not provide an adequate reparation, it is error to withhold it on the giving of a bond by defendant, or to provide for its dissolution on the giving of such bond.[30]

23. Atty.-Gen. *v.* Colney Hatch Lunatic Asylum, L. R. 4 Ch. 146, 30 L. J. Ch. 265, 19 L. T. Rep. N. S. 708, 17 Wkly. Rep. 240; Smith *v.* Smith, L. R. 20 Eq. 500, 44 L. J. Ch. 630, 32 L. T. Rep. N. S. 787, 23 Wkly. Rep. 771; Shiel *v.* Godfrey, [1893] W. N. 115.

24. Atty.-Gen. *v.* Colney Hatch Lunatic Asylum, L. R. 4 Ch. 146, 30 L. J. Ch. 265, 19 L. T. Rep. N. S. 708, 17 Wkly. Rep. 240.

25. Imposing conditions in final decree see *infra*, VI, K, 2, g.

26. *California.*— Prader *v.* Purkett, 13 Cal. 588.

Georgia.— Thompson *v.* Hall, 67 Ga. 627; Guerry *v.* Durham, 11 Ga. 9.

Illinois.— Hanford *v.* Blessing, 80 Ill. 188.

New Jersey.— Packard *v.* Bergen Neck R. Co., 48 N. J. Eq. 281, 22 Atl. 227.

New York.— Banker, etc., Co. *v.* Stimson, 16 N. Y. Suppl. 60; Jenkins *v.* Wilde, 2 Paige 394.

Pennsylvania.— Ewing *v.* Filley, 43 Pa. St. 384.

Washington.— Everett Water Co. *v.* Powers, 37 Wash. 143, 79 Pac. 617.

United States.— Forbush *v.* Bradford, 9 Fed. Cas. No. 4,930.

England.— Coleman *v.* West Hartlepool R. Co., 3 L. T. Rep. N. S. 847.

See 27 Cent. Dig. tit. "Injunction," § 338.

Where title is disputed, a temporary injunction may issue against a trespasser conditioned to become perpetual unless he bring with reasonable diligence an action to determine the title. Sillis *v.* Goodyear, 80 Mo. App. 128.

27. Holmes *v.* Harris, 70 Ga. 309; Thompson *v.* Hall, 67 Ga. 627; Forbush *v.* Bradford, 9 Fed. Cas. No. 4,930; Smith *v.* Baxter, [1900] 2 Ch. 138, 69 L. J. Ch. 437, 82 L. T. Rep. N. S. 650, 48 Wkly. Rep. 458; Wall *v.* London, etc., Assets Corp., [1898] 2 Ch. 469, 69 L. J. Ch. 596, 79 L. T. Rep. N. S. 249; Mitchell *v.* Henry, 15 Ch. D. 181, 43 L. T. Rep. N. S. 186; Elwes *v.* Payne, 12 Ch. D. 468, 48 L. J. Ch. 831, 41 L. T. Rep. N. S. 118, 28 Wkly. Rep. 234; Rigby *v.* Great Western R. Co., Coop. t. Cott. 3, 47 Eng. Reprint 715, 10 Jur. 531, 15 L. J. Ch. 266, 2 Phil. 44, 22 Eng. Ch. 44, 41 Eng. Reprint 858, 4 R. & Can. Cas. 491; Low *v.* Innes, 4 De G. J. & S. 286, 10 Jur. N. S. 1037, 11 L. T. Rep. N. S. 217, 69 Eng. Ch. 222, 46 Eng. Reprint 929. Defendant may be required to perform acts (Waterlow *v.* Bacon, L. R. 2 Eq. 514, 12 Jur. N. S. 614, 14 L. T. Rep. N. S. 724, 14 Wkly. Rep. 855; Barker *v.* North Staffordshire, etc., R. Co., 2 De G. & Sm. 55, 12 Jur. 324, 575, 589, 5 R. & Can. Cas. 401, 64 Eng. Reprint 25), or may be required to give bond to refrain from doing the thing sought to be enjoined (Clarke *v.* Clarke, 11 L. T. Rep. N. S. 366, 13 Wkly. Rep. 133).

28. John L. Roper Lumber Co. *v.* Wallace, 93 N. C. 22; Mitchell *v.* Henry, 15 Ch. D. 181, 43 L. T. Rep. N. S. 186; Elwes *v.* Payne, 12 Ch. D. 468, 48 L. J. Ch. 831, 41 L. T. Rep. N. S. 118, 28 Wkly. Rep. 234; Rigby *v.* Great Western R. Co., Coop. t. Cott. 3, 47 Eng. Reprint 715, 10 Jur. 531, 15 L. J. Ch. 266, 2 Phil. 44, 22 Eng. Ch. 44, 41 Eng. Reprint 858, 4 R. & Can. Cas. 491; Swallow *v.* Wallingford, 12 Jur. 403; Bramwell *v.* Halcomb, 3 Myl. & C. 737, 14 Eng. Ch. 737, 40 Eng. Reprint 1110.

29. *Georgia.*— Buck *v.* Beach, 99 Ga. 183, 25 S. E. 206; Glessner *v.* Windsor, 97 Ga. 422, 24 S. E. 845; Baker *v.* Mills, 81 Ga. 342, 9 S. E. 1100; Leary *v.* McDonough, 74 Ga. 838; Gardner *v.* Waters, 68 Ga. 294.

North Carolina.— Ousby *v.* Neal, 99 N. C. 146, 5 S. E. 901; Lewis *v.* John L. Roper Lumber Co., 99 N. C. 11, 5 S. E. 19; John L. Roper Lumber Co. *v.* Wallace, 93 N. C. 22.

Utah.— Crescent Min. Co. *v.* Silver King Min. Co., 14 Utah 57, 45 Pac. 1093.

United States.— Dorsey Harvester Revolving Rake Co. *v.* Marsh, 7 Fed. Cas. No. 4,014, 9 Phila. (Pa.) 395.

England.— McNeill *v.* Williams, 11 Jur. 344; Jones *v.* Great Western R. Co., 1 R. & Can. Cas. 684; Ford *v.* Gye, 6 Wkly. Rep. 235.

See 27 Cent. Dig. tit. "Injunction," § 339.

30. Union Lumber Co. *v.* Allen, 114 Ga. 346, 40 S. E. 231; Woodall *v.* Cartersville Min., etc., Co., 104 Ga. 156, 30 S. E. 665; Forrester *v.* Butte, etc., Consol., etc., Min. Co., 21 Mont. 544, 55 Pac. 229, 353.

d. Service of Writ or Order and Return — (I) *Necessity For Service.*[31] To make a temporary injunction effectual, it is generally necessary to serve a copy of the writ or restraining order on the parties enjoined.[32] But actual notice of the granting of an injunction is sufficient to bind a party against whom it is issued, without service upon him.[33]

(II) *Time For Service.* The writ or order of injunction should be served within a reasonable time.[34] Where the writ or order issues before the service of the summons or subpœna to appear and answer, the injunction and process may be served together;[35] and although service of the writ or order before or without the service of the summons is irregular, the injunction is not rendered void but is binding until dissolved.[36]

(III) *Mode of Service.* Independent of statutory provisions, to effect a regular service of a writ of injunction, the writ itself, under the seal of the court, must be shown to defendant, and a true copy delivered to him.[37] By statute in some jurisdictions service by delivery of a copy of the writ or order is sufficient, and the original need not be shown.[38] The moving affidavits must also be served with the order, in some states.[39] It is not necessary that agents of defendant be served with a copy,[40] but, on the other hand, service on an agent may be sufficient to bind the principal.[41] The courts are inclined to disregard mere technical defects in the service,[42] and a strictly regular service of an injunction order is not necessary to entitle plaintiff to proceed by attachment as for a contempt against defendant.[43]

(IV) *Personal or Substituted Service.* Personal service may be dispensed with, by order of court, where defendant avoids the service of the writ or other circumstances render such order necessary and proper.[44] Service by leaving a copy at the residence of defendant may constitute a good service.[45] Constructive

31. Necessity to justify punishment for violation see *infra*, VII, C.

32. *In re* Cary, 10 Fed. 622; Gooch *v.* Marshall, 8 Wkly. Rep. 410.

Service on attorney.— Where defendants are all jointly interested, service of a copy of the writ or order on the attorney representing them is sufficient. Seebor *v.* Hess, 5 Paige (N. Y.) 85.

33. See *infra*, VII, C.

34. McCormick *v.* Jerome, 15 Fed. Cas. No. 8,721, 3 Blatchf. 486.

35. Thebaut *v.* Canova, 11 Fla. 143; Leffingwell *v.* Chave, 10 Abb. Pr. (N. Y.) 472, 19 How. Pr. 54; Seebor *v.* Hess, 5 Paige (N. Y.) 85; Parker *v.* Williams, 4 Paige (N. Y.) 439; Wilder *v.* Quebec, 25 Quebec Super. Ct. 128.

36. Lash *v.* McCormick, 14 Minn. 482. *Compare* Leffingwell *v.* Chave, 19 How. Pr. (N. Y.) 54.

37. Edmondson *v.* Mason, 16 Cal. 386; Haring *v.* Kauffman, 13 N. J. Eq. 397, 78 Am. Dec. 102; Coddington *v.* Webb, 4 Sandf. (N. Y.) 639.

In New York when the injunction is granted by the court service of a certified copy is sufficient. New York *v.* Conover, 5 Abb. Pr. 244.

38. Edmondson *v.* Mason, 16 Cal. 386; Woodward *v.* King, 2 Ch. Cas. 203, 22 Eng. Reprint 911.

39. Penfield *v.* White, 8 How. Pr. (N. Y.) 87.

But service of a copy of a verified complaint is sufficient compliance with such a statute. Leffingwell *v.* Chave, 10 Abb. Pr. (N. Y.) 472; Krom *v.* Hogan, 4 How. Pr. (N. Y.) 225.

40. Daly *v.* Amberg, 13 N. Y. Suppl. 379.

41. Carron Iron Co. *v.* Maclaren, 5 H. L. Cas. 416, 24 L. J. Ch. 620, 3 Wkly. Rep. 597, 10 Eng. Reprint 961, service on agent of foreign corporation.

When a city is enjoined, service on the mayor binds all the officers of the city and members of the city government. People *v.* Sturtevant, 9 N. Y. 263, 59 Am. Dec. 536.

Under the New York code, service upon a corporation may be made upon its president, managing agent, etc. Rochester, etc., Co. *v.* New York, etc., R. Co., 48 Hun 190.

42. Ades *v.* Levi, 137 Ind. 506, 37 N. E. 388; Knudsen *v.* Friedery, 27 Misc. (N. Y.) 98, 57 N. Y. Suppl. 581.

43. Daly *v.* Amberg, 126 N. Y. 490, 27 N. E. 1038; Rorke *v.* Russell, 2 Lans. (N. Y.) 242; New York *v.* New York, etc., Ferry Co., 40 N. Y. Super. Ct. 300; Koehler *v.* Farmer's, etc., Bank, 14 N. Y. Civ. Proc. 71; Watson *v.* Fuller, 9 How. Pr. (N. Y.) 425; Ramstock *v.* Roth, 18 Wis. 522.

Punishment for violation see *infra*, VIII, H.

44. Haring *v.* Kauffman, 13 N. J. Eq. 397, 78 Am. Dec. 102; Heald *v.* Hay, 9 Wkly. Rep. 369.

45. Morris *v.* Bradford, 19 Ga. 527; Jordan *v.* Wapello County, 69 Iowa 177, 28 N. Y. 548; Bodnam *v.* Morgan, Cary 101, 21 Eng. Reprint 54; Holgate *v.* Grantham, Cary 58, 21 Eng. Reprint 31; Pearce *v.*

service, by publication, however, is not sufficient to make an injunction binding on a person who is a non-resident of the state.[46]

(v) *Return.* Writs of injunction are usually returnable to the county in which the action is pending.[47]

(vi) *Waiver.* The parties may by agreement waive personal service.[48] So defects in service may be waived by defendant appearing and contesting the right to an injunction.[49]

e. Operation and Effect of Order[50] — (i) *In General.* The order of the court granting or refusing a preliminary injunction is not an adjudication of the rights of the parties and is not conclusive upon the court on subsequent hearing.[51] A temporary injunction must be obeyed until set aside, even though it was improperly issued, provided the irregularity is not such as to make the order void.[52] The presumption is that where an injunction may have been regularly issued it was so issued.[53] The order relates back to the date of the decision granting the injunction,[54] and continues in force until dissolved or modified or until final judgment is entered.[55] Transfers and contracts or agreements in violation of an injunction are invalid and may be set aside,[56] except as against an innocent third

Crutchfield, 14 Ves. Jr. 206, 33 Eng. Reprint 500.

Substituted service may be ordered by the court under the English practice. Kirkman *v.* Honnor, 6 Beav. 400, 12 L. J. Ch. 336, 49 Eng. Reprint 880.

46. State *v.* Nathans, 49 S. C. 199, 27 S. E. 52; Hart *v.* Sansom, 110 U. S. 151, 3 S. Ct. 586, 28 L. ed. 101.

Service outside state.— Whether an injunction served beyond the borders of the state upon an individual not personally under the jurisdiction of the court will bind him depends on the nature of the suit. If the suit be one in which the court can acquire no right to render a binding decree against an absent defendant, then its injunction, preliminary or subsequent to decree, cannot bind him. Kempson *v.* Kempson, 63 N. J. Eq. 783, 52 Atl. 360, 625, 92 Am. St. Rep. 682.

47. Androscoggin, etc., R. Co. *v.* Androscoggin R. Co., 49 Me. 392; Allen *v.* Menard, 5 Tex. 378. See Galbreath *v.* Everett, 84 N. C. 546.

Return of subpœna.— A subpœna must be taken out with the injunction, and returned within thirty days. Lee *v.* Cargill, 10 N. J. Eq. 331.

48. Waterman *v.* Clark, 58 Vt. 601, 2 Atl. 578.

49. Thebaut *v.* Canova, 11 Fla. 143; Sheffield *v.* Cooper, 21 N. Y. App. Div. 518, 48 N. Y. Suppl. 639; Parker *v.* Williams, 4 Paige (N. Y.) 439.

50. Temporary injunction as affecting validity of assessment by corporation see CORPORATIONS, 10 Cyc. 490 note 20.

51. *Kansas.*— Union Terminal R. Co. *v.* State Railroad Com'rs, 54 Kan. 352, 38 Pac. 290; Dryden *v.* St. Joseph, etc., R. Co., 23 Kan. 525.

Maryland.— State *v.* Northern Cent. R. Co., 18 Md. 193.

New York.— Brown *v.* Kenney Settlement Cheese Assoc., 59 N. Y. 242; Meyers *v.* New York, 58 N. Y. App. Div. 534, 69 N. Y. Suppl. 529.

Pennsylvania.— Paxson's Appeal, 106 Pa. St. 429; Philadelphia *v.* Philadelphia, etc., R. Co., 58 Pa. St. 253.

South Carolina.— Alston *v.* Limehouse, 60 S. C. 559, 39 S. E. 188.

United States.—Andrae *v.* Redfield, 1 Fed. Cas. No. 367, 12 Blatchf. 407 [*affirmed* in 98 U. S. 225, 25 L. ed. 158].

See 27 Cent. Dig. tit. "Injunction," § 341.

The sufficiency of the complaint is not *res adjudicata* merely because the court has denied a preliminary injunction asked thereon. Rogers *v.* John Week Lumber Co., 117 Wis. 5, 93 N. W. 821.

An objection to the jurisdiction may be renewed, even though it was overruled by one judge on preliminary hearing in vacation. Galvin *v.* Shaw, 12 Me. 454.

52. State *v.* Pierce, 51 Kan. 241, 32 Pac. 924; Leberry *v.* Braden, 7 Brit. Col. 403.

An injunction in general terms must be obeyed until dissolved even though defendant may subsequently to its issuance obtain the right to do the act enjoined. Williamson *v.* Carnan, 1 Gill & J. (Md.) 184.

A preliminary injunction against the enforcement of an ordinance on the ground that it was in violation of a contract, even though it is in terms to continue to final hearing, does not operate to extend the life of such contract in case it expires prior to the final hearing. Kimball *v.* Cedar Rapids, 100 Fed. 802.

53. Silver *v.* Smith, 106 Ill. App. 411; Stanbrough *v.* Scott, 1 Rob. (La.) 43; Beebe *v.* Coleman, 8 Paige (N. Y.) 392.

54. Rochester, etc., Water Co. *v.* Rochester, 82 N. Y. Suppl. 455 [*affirmed* in 176 N. Y. 36, 68 N. E. 117].

55. Carroll *v.* Provincial Natural Gas, etc., Co., 16 Ont. Pr. 518.

Effect of reversal on appeal.— An order granting an injunction, although reversed on appeal for the purpose of modification, is in force until so modified below. Stevens Point Boom Co. *v.* Reilly, 44 Wis. 295.

56. People *v.* Tenth Judicial Dist. Ct., 29 Colo. 182, 68 Pac. 242; Springfield M. & F.

person,[57] or when it appears on final hearing that there was no ground for granting the injunction.[58] The writ has been held to create an equitable lien.[59]

(II) *Effect on Actions at Law.* An injunction restraining a person from commencing or further prosecuting an action at law does not operate as a prohibition to the law court in the exercise of its jurisdiction, but only prevents plaintiff therein from proceeding.[60] Before judgment in the suit at law it does not operate as a release of errors therein.[61] Nor does an injunction restraining persons from doing certain acts prevent a court of law from compelling them by mandamus to perform such acts.[62]

(III) *Persons Bound or Affected.* As a general rule an injunction does not bind or affect those who are not parties to the injunction suit or in privity with parties thereto;[63] but persons not parties may be bound if they have

Ins. Co. *v.* Peck, 102 Ill. 265; Taylor *v.* Hopkins, 40 Ill. 442; Wilhoit *v.* Castell, 3 Baxt. (Tenn.) 419; Union Trust Co. *v.* Southern Inland Nav., etc., Co., 130 U. S. 565, 9 S. Ct. 606, 32 L. ed. 1043. *Compare* Hewitt *v.* Patrick, 26 Tex. 326.

57. Waldo *v.* Portland, 33 Conn. 363.

Bona fide indorsee of note.— If, in defiance of an injunction, negotiable paper is transferred to a *bona fide* holder, the only effect would be to give the complainant the redress to be found in the authority of the court to imprison defendant until he paid the amount of the note transferred or so much as would satisfy the complainant's demand. Winston *v.* Westfeldt, 22 Ala. 760, 58 Am. Dec. 278.

Valid in favor of third person.— A deed made in violation of an injunction is not void or inoperative except as to the person for whose benefit the injunction was executed. Herman *v.* Sartor, 107 Tenn. 235, 63 S. W. 1120.

58. Caldwell *v.* White, 4 T. B. Mon. (Ky.) 561.

Acts already done.— Warrants already issued by a county auditor are beyond the reach of an injunction suit brought to restrain him from issuing such warrants. Webster *v.* Fish, 5 Nev. 190. An injunction does not operate upon proceedings subsequent to its allowance, but before its service. Ramsdall *v.* Craighill, 9 Ohio 197.

59. Sheafe *v.* Sheafe, 40 N. H. 516, holding that a perpetual injunction against one's alienating his interest in certain property, as against plaintiff's claims upon it, gives to plaintiff an equitable lien upon that interest to the extent of those claims as against the parties to the suit in which the injunction issued.

60. Tyler *v.* Hamersley, 44 Conn. 419, 26 Am. Rep. 479; Platt *v.* Woodruff, 61 N. Y. 378; Ewart *v.* Schwartz, 48 N. Y. Super. Ct. 390.

A perpetual injunction against plaintiff in an action at law continuing the suit does not justify the law court in entering up judgment for costs against plaintiff. Rogers *v.* Smiley, 2 Stew. & P. (Ala.) 49.

Dismissal of action.— Where a person who is enjoined from taking possession of goods brings replevin, the replevin suit is void and should be dismissed. Shelton *v.* Franklin, 68 Ill. 333.

Proceeding in violation of injunction.— A court of law will not permit a plaintiff who has been ordered by an injunction "absolutely to desist from further prosecuting" the suit, to proceed to trial and judgment, although the case is ready for trial, and his only object is to save delay in case the injunction is dissolved. Hutchinson *v.* Hutchinson, 1 Houst. (Del.) 613.

Arbitration proceedings.— Where a case has been referred to an arbitrator and the matter is still before him, pending an appeal from an injunction obtained by defendant restraining plaintiff from proceeding with the reference, the arbitrator is not prevented from proceeding with his award. Northern Cent. R. Co. *v.* Canton Co., 24 Md. 500.

61. McConnel *v.* Ayres, 4 Ill. 210; Prodot *v.* Doe, 24 Miss. 169.

62. Dishon *v.* Smith, 10 Iowa 212; Roberts *v.* Davidson, 83 Ky. 279; Com. *v.* Sheehan, 81* Pa. St. 132; U. S. *v.* Keokuk, 6 Wall. (U. S.) 514, 18 L. ed. 933.

63. *Illinois.*— Hopkins *v.* Roseclare Lead Co., 72 Ill. 373.

Kansas.— Atchison, etc., R. Co. *v.* Jefferson County Com'rs, 12 Kan. 127.

Kentucky.— Roberts *v.* Davidson, 83 Ky. 279.

Louisiana.— Barthe *v.* Larquié, 42 La. Ann. 131, 7 So. 80; State *v.* Clinton, 28 La. Ann. 350.

Massachusetts.— Harvey *v.* Smith, 179 Mass. 592, 61 N. E. 217, chattel mortgagee not restrained by injunction against his mortgagor.

Nebraska.— Boyd *v.* State, 19 Nebr. 128, 26 N. W. 925, mayor of a city is not restrained from tearing up railway tracks by an injunction against contractors for the building of a city sewer, "their agents, servants, laborers and employes."

New York.— Rigas *v.* Livingston, 178 N. Y. 20, 70 N. E. 107; Edmonston *v.* McLoud, 19 Barb. 356; Watson *v.* Fuller, 9 How. Pr. 425; Sage *v.* Quay, Clarke 347.

Texas.— Shelby *v.* Burtis, 18 Tex. 644.

United States.— Hawley *v.* U. S., 108 U. S. 543, 2 S. Ct. 846, 27 L. ed. 820.

England.— Bootle *v.* Stanley, 2 Eq. Cas. Abr. 528, 22 Eng. Reprint 446; Iveson *v.* Harris, 7 Ves. Jr. 251, 32 Eng. Reprint 102.

See 27 Cent. Dig. tit. "Injunction," § 425.

knowledge or notice of the injunction, provided they are agents or servants of defendant, such as the officers or agents of a private or municipal corporation.[64]

f. Objections and Waiver. Objections to the granting of a preliminary injunction must usually be taken before final hearing.[65] The right to object may be waived by the acts of defendant.[66]

2. Final Judgment or Decree[67] — a. Against Whom Entered. A final decree should not be granted against one not made a party and not in court,[68] but the fact that the injunction cannot be granted against some defendants does not preclude granting it against others who have been properly summoned.[69] An injunction is properly issued against all of a number of joint wrong-doers,[70] but it should be limited to the parties to the suit where no conspiracy with others is charged.[71]

b. When Entered. A final decree may be granted against a complainant upon the granting of a motion to dissolve a preliminary injunction granted in the cause, when an injunction is the only relief sought;[72] but not against defendant on the denial of such a motion.[73] A decree may be entered against a defendant where he fails to answer and the bill states a good cause of action.[74] But where no answer is required, or a rule to show cause is equivalent to an answer,[75] or where a verified answer is filed which is in effect a general denial,[76] a final decree should not be entered until after a hearing.[77]

Compare West *v.* Belches, 5 Munf. (Va.) 187, which held that even in favor of persons not parties to a suit a valid sale on execution could not be made in violation of an injunction restraining a defendant and all others from selling slaves.

Unknown defendants.— When it appears from the complaint that certain of several defendants have been sued by fictitious names, and no substitution of the true names has been made, a general appearance for defendants is an appearance only for those who were sued or served by their proper names, and the injunction will be operative only against those designated by their proper names. Moulton *v.* Parks, 64 Cal. 166, 30 Pac. 613. *Contra*, see U. S. *v.* Agler, 62 Fed. 824.

Conspiracy to interfere with interstate commerce.— Under Act Cong. July 2, 1890, § 50, an injunction against an illegal conspiracy to interfere with interstate commerce may provide that it shall be operative on all persons acting in concert with the designated conspirators, although not named in the writ, after the commission of some act by them in furtherance of the conspiracy, and service of the writ on them. U. S. *v.* Elliott, 64 Fed. 27.

64. See *infra*, VIII, B.

65. Freeland *v.* Stillman, 49 Kan. 197, 30 Pac. 235. But see Steffin *v.* Steffin, 4 N. Y. Civ. Proc. 179.

66. Freeland *v.* Stillman, 49 Kan. 197, 30 Pac. 235.

A motion to vacate a void injunction is no waiver of the defect of want of notice of the application for the injunction. Wilkie *v.* Rochester, etc., R. Co., 12 Hun (N. Y.) 242.

67. **Form of decree** see York, etc., Steamboat Ferry Co. *v.* Jersey Co., Hopk. (N. Y.) 460; Newburgh, etc., Turnpike Road Co. *v.* Miller, 5 Johns. Ch. (N. Y.) 101; Christopherus *v.* Chomely, Cary 37, 21 Eng. Reprint 20; Lund *v.* Blanshard, 4 Hare 9, 30 Eng. Reprint 9.

68. McLaughlin *v.* Kansas City First Nat. Bank, 60 Mo. 437; Long *v.* Dickinson, 10 Phila. (Pa.) 108; Peterson *v.* Smith, 30 Tex. Civ. App. 139, 69 S. W. 542.

69. Alspaugh *v.* Adams, 80 Ga. 345, 5 S. E. 496; Brown *v.* Pacific Mail Steamship Co., 4 Fed. Cas. No. 2,025, 5 Blatchf. 525. *Compare* McCarthy *v.* Marsh, 41 Kan. 17, 20 Pac. 479.

An agent may be enjoined, although his principal is not a party, if the principal is not subject to the jurisdiction of the court. Oshorn *v.* U. S. Bank, 2 Wheat. (U. S.) 738, 6 L. ed. 204.

70. Henshaw *v.* People's Mut. Natural Gas Co., 132 Ind. 545, 32 N. E. 318.

71. Scott *v.* Donald, 165 U. S. 107, 17 S. Ct. 262, 41 L. ed. 648.

72. See *infra*, VII, E, 6.

73. Fadely *v.* Tomlinson, 41 W. Va. 606, 24 S. E. 645.

74. St. Amand *v.* Lehman, 120 Ga. 253, 47 S. E. 949.

In Washington, under 2 Hill Code, § 412, it is not error for the court to take evidence on defendant's failure to answer. Cross *v.* Johnson, 20 Wash. 124, 54 Pac. 1000.

75. Dawson *v.* Duplantier, 15 La. 289.

76. McCrea *v.* Leavenworth, 46 Kan. 767, 27 Pac. 129.

77. Hargraves *v.* Lewis, 3 Ga. 162.

Technical informalities. — The fact that technical formalities relating to the pleadings or procedure have not been complied with does not affect the validity of the decree. Geyer *v.* Douglass, 85 Iowa 93, 52 N. W. 111 (failure on final hearing to read pleadings and affidavits with which judge is familiar); Chiles *v.* Ringo, 14 Ky. L. Rep. 302 (mistake of clerk in not issuing a

c. Decree as Substitute For Writ. In some states it is not necessary or proper to issue a writ of injunction; the function of the writ may be served by an order contained in the decree itself.[78] One result of the abolition of the writ and the substitution of relief by order or decree is that an injunction cannot be granted subsequent to the final decree or judgment, on motion and affidavits.[79] The decree, however, must be definite and explicit and based upon sufficient findings of fact.[80]

d. As Dependent on Bill or Complaint — (I) *In General.* A permanent injunction is not ordinarily justifiable, unless the bill or petition therefor sets out facts that are a sufficient basis for granting the relief asked;[81] but if a preliminary injunction, although granted upon an insufficient bill, has been allowed to stand till final hearing, it may be perpetuated if the showing then made is sufficient.[82]

(II) *Prayer For Relief.* As a general rule an injunction can only be granted where the bill prays for relief by injunction.[83] So defendant cannot have relief by injunction unless his answer prays for it.[84] When relief by injunction is prayed for, the injunction should be confined to the issues raised by the pleading and should not be allowed in broader terms than prayed for in the bill.[85]

e. Effect of Granting or Denying Temporary Injunction. The fact that a preliminary injunction was granted or continued should not influence the court on final hearing, but the relief granted should be in accordance with the rights as they then appear.[86] The same is true in case the preliminary injunction was

temporary injunction). Nor does failure to dissolve an injunction granted to preserve the *status quo pendente lite* affect the validity of a final decree. Musgrave *v.* Staylor, 36 Md. 123.

78. Jackson *v.* Bunnell, 113 N. Y. 216, 21 N. E. 79; German Evangelical Cong. *v.* Hoessli, 13 Wis. 348.

79. Jackson *v.* Bunnell, 113 N. Y. 216, 21 N. E. 79.

80. Walker *v.* McGinness, 9 Ida. 162, 72 Pac. 885.

Restraint of acts consummated pendente lite.— But an injunction restraining defendant from operating railroad tracks, "if it shall appear" that he has laid any new tracks *pendente lite*, is inoperative. Pennsylvania Co. *v.* Bond, 99 Ill. App. 535.

Provision as to penalty for disobedience.— No condition is usually inserted in the decree granting an injunction for the payment of a pecuniary penalty for its violation, although one is almost always found in the English forms. Low *v.* Hauel, 15 Fed. Cas. No. 8,560 1 Wall. Jr. 345.

81. Blakeney *v.* Ferguson, 9 Ark. 487; Burrus *v.* Columbus, 105 Ga. 42, 31 S. E. 124; Pittman *v.* Robicheau, 14 La. Ann. 108; Jackson *v.* Bunnell, 113 N. Y. 216, 21 N. E. 79.

Prayer.— Under a prayer for an injunction until further order of court, it may be proper to grant a permanent injunction if the court is satisfied there should never be any further order. Wilmington Star Min. Co. *v.* Allen, 95 Ill. 288.

Failure to verify.— If, on the hearing, an injunction appears to be the proper relief, it may be granted even though the bill is not verified. Shobe *v.* Luff, 66 Ill. App. 414.

Consent of parties.— An injunction cannot be made perpetual by consent of parties so that an appeal may be taken. Blakey *v.* West, 3 Munf. (Va.) 75.

The supreme court may on appeal enter a perpetual injunction, when an order dissolving an injunction had been inadvertently made in the court below. Gardner *v.* Hershey, 27 Ark. 552.

82. Smith *v.* Blake, 96 Mich. 542, 55 N. W. 978.

83. Berrien *v.* Thomas, 65 Ga. 61; Hovey *v.* McCrea, 4 How. Pr. (N. Y.) 31. *Contra*, Wright *v.* Atkyns, Turn. & R. 143, 12 Eng. Ch. 143, 37 Eng. Reprint 1051, 1 Ves. & B. 313, 35 Eng. Reprint 122, 13 Rev. Rep. 199.

84. Cobb *v.* Smith, 23 Wis. 261.

85. *California.*— Kredo *v.* Phelps, 145 Cal. 526, 78 Pac. 1044; Oliver *v.* Blair, (1885) 6 Pac. 847; Gregory *v.* Nelson, 41 Cal. 278.

Illinois.— Bryan *v.* Howland, 98 Ill. 625; German Printing, etc., Co. *v.* Illinois Staats Zeitung Co., 55 Ill. 127, prayer against publication of proceedings under a particular resolution of a common council; injunction which restrained publication "under said or any resolution" too broad.

Kentucky.— Mundy's Landing, etc., Turnpike Co. *v.* Hardin, 20 S. W. 385, 14 Ky. L. Rep. 460, prayer for an injunction against opening a disused culvert does not justify injunction ordering defendant to dig a ditch so as to enable water to escape through another culvert.

New York.—Carroll *v.* Sand, 10 Paige 298; Laurie *v.* Laurie, 9 Paige 234.

Tennessee.— Gilreath *v.* Gilliland, 95 Tenn. 383, 32 S. W. 250.

See 27 Cent. Dig. tit. "Injunction," § 432.

86. *Florida.*— Caro *v.* Pensacola City Co., 19 Fla. 766.

Illinois.— Brown *v.* Luehrs, 79 Ill. 575.

denied or was dissolved.[87] So the decree may afford complete relief as to injuries that have been consummated since the suit was begun; for even though no temporary injunction was obtained, defendant acts at his peril in doing *pendente lite* the acts sought to be enjoined.[88]

f. Scope of the Restraint.[89] The permanent injunction should not extend beyond the necessities of the case.[90] It should not cover more property or extend over a greater time than does the right of the complainant for the protection of which the injunction is asked.[91] Where the bill covers more than plaintiff's interest, the decree should be limited to his interest.[92] Furthermore the injunction should not be so broad as to prevent defendant from exercising his rights,[93] or rights that he may acquire in the future.[94] The injunction should be broad enough to cover the whole case,[95] but it may be granted as to part of the bill and refused as to the rest.[96] It may, in a proper case, provide for a modification of the injunction when changed conditions require it.[97]

g. Relief Granted or Refused on Condition. As a condition to entering the decree, the complainant may be required to do what is equitable.[98] The decree

Michigan.— Smith *v.* Blake, 96 Mich. 542, 55 N. W. 978.

New York.— Bomeisler *v.* Forster, 10 N. Y. App. Div. 43, 41 N. Y. Suppl. 742.

Texas.— Nicholson *v.* Campbell, 15 Tex. Civ. App. 317, 40 S. W. 167.

England.— Drew *v.* Harman, 5 Price 319. See 27 Cent. Dig. tit. "Injunction," § 409.

Compare Rodgers *v.* Pitt, 129 Fed. 932.

After the cause for an injunction has been removed, equity will not make perpetual a temporary injunction theretofore properly granted. Wiswell *v.* First Cong. Church, 14 Ohio St. 31.

87. Commercial State Bank *v.* Ketchum, 1 Nebr. (Unoff.) 454, 96 N. W. 614; Reyburn *v.* Sawyer, 128 N. C. 8, 37 S. E. 954.

88. Holden *v.* Alton, 179 Ill. 318, 53 N. E. 556; Penn. Co. *v.* Bond, 99 Ill. App. 535.

The relative inconvenience and the public interest are to be considered, where a railroad has been put in operation during the pendency of the suit, and the complainant sought no preliminary injunction to maintain the *status quo*. Oshorne *v.* Missouri Pac. R. Co., 37 Fed. 830 [*affirmed* in 147 U. S. 248, 13 S. Ct. 299, 37 L. ed. 155].

89. **Beyond territorial limits of court's jurisdiction** see COURTS, 11 Cyc. 684.

90. Hubbard *v.* Miller, 27 Mich. 15, 15 Am. Rep. 153; Pennsylvania R. Co. *v.* Turtle Creek Valley Electric R. Co., 179 Pa. St. 584, 36 Atl. 348; Hutchinson *v.* Landcraft, 4 W. Va. 312.

91. *Illinois.*— Yeager *v.* Manning, 183 Ill. 275, 55 N. E. 691; Brownmark *v.* Livingston, 100 Ill. App. 474.

Louisiana.— Penouilh *v.* Abraham, 42 La. Ann. 326, 7 So. 533.

Maryland.— Hill *v.* Bowie, 1 Bland 593.

Missouri.— Crigler *v.* Mexico, 101 Mo. App. 624, 74 S. W. 384.

New Jersey.— Firmstone *v.* De Camp, 17 N. J. Eq. 317.

Oregon.— York *v.* Davidson, 39 Oreg. 81, 65 Pac. 819.

Wyoming.— Martin *v.* Platte Valley Sheep Co., 12 Wyo. 432, 76 Pac. 571, 78 Pac. 1093.

United States.— Carter *v.* New Orleans, 19 Fed. 659.

See 27 Cent. Dig. tit. "Injunction," § 409 *et seq.*

92. Moore *v.* Massini, 43 Cal. 389, holding that, in an action to restrain trespasses on land, the court, in granting the injunction, should not extend it to land not owned by plaintiff, although included in the description given in the complaint.

93. Simmons *v.* McPhaul, 117 Ga. 751, 45 S. E. 76; Myers *v.* Kalamazoo Buggy Co., 54 Mich. 215, 19 N. W. 961, 20 N. W. 545, 52 Am. Rep. 811; Clark Carriage Co. *v.* Smith-Eggers Co., 3 Ohio S. & C. Pl. Dec. 77, 1 Ohio N. P. 391; Martin *v.* Platte Valley Sheep Co., 12 Wyo. 432, 76 Pac. 571, 78 Pac. 1093.

94. Crigler *v.* Mexico, 101 Mo. App. 624, 74 S. W. 384; Loomis *v.* Thirty-Fourth St. R. Co., 38 Hun (N. Y.) 517; Morgan's Appeal, 43 Leg. Int. (Pa.) 282.

Conditions precedent to exercise of right.— If defendant may obtain the right to do the act enjoined by performing some condition precedent, the injunction should be granted only until such performance. Omaha Horse R. Co. *v.* Cable Tramway Co., 30 Fed. 324; McElroy *v.* Kansas City, 21 Fed. 257.

95. Field *v.* Barling, 149 Ill. 556, 37 N. E. 850, 41 Am. St. Rep. 311, 24 L. R. A. 406.

Right to relief by order to stay proceedings.— The mere fact that part of the relief sought may be obtained by an order to stay proceedings does not prevent an injunction from being granted to cover the whole case. Chappell *v.* Potter, 11 How. Pr. (N. Y.) 365; State *v.* Dayton, etc., R. Co., 36 Ohio St. 434.

96. Stokes *v.* Weems, 72 Ga. 179; Clement *v.* Putnam, 68 Vt. 285, 35 Atl. 181.

97. Phillips *v.* Davis, 61 Ga. 159 (dissolution on giving bond); Frink *v.* Hughes, 133 Mich. 63, 94 N. W. 601; McNiel *v.* Baird, 6 Munf. (Va.) 316; Omaha Horse R. Co. *v.* Cable Tramway Co., 30 Fed. 324; McElroy *v.* Kansas City, 21 Fed. 257.

98. Drake *v.* Sherman, 179 Ill. 362, 53 N. E. 628; Locke *v.* Davison, 111 Ill. 19.

may provide that the injunction shall be made perpetual, or that a permanent injunction shall issue, only upon the performance of some condition by the complainant, as for example the payment of money due;[99] but on final decree it is not necessary or proper to require the complainant to file a bond as in the case of temporary injunctions.[1] Likewise an injunction may be refused, conditioned upon the doing of certain things by defendant.[2]

h. Alternative or Additional Relief — (I) *In General.* Where the court has jurisdiction to issue a permanent injunction, further appropriate relief may be granted in the decree.[3] For instance equity, while enjoining defendant, has decreed the execution of a deed,[4] an accounting,[5] or a personal decree against defendant for money due.[6] Likewise, in addition to enjoining the commission of future injuries, equity may in proper cases prevent by mandatory injunction a continuing injury from acts already committed.[7] Where an unsuccessful complainant has been allowed to keep property pending the litigation, the court can compel him to return it, or to pay its value;[8] and where complainant fails to make out his case, the bond given to stay an action at law may be ordered delivered to the person entitled for prosecution.[9] If, however, the court is not a court of general chancery jurisdiction, but merely has power to enjoin in certain cases, it has no power to retain the case for the granting of other equitable relief when the right to the injunction asked is not established.[10] Although equity may enjoin the prosecution of an action at law or the execution of an order of sale, it should not attempt in its decree to nullify the order of the court of law or to direct that certain further steps be taken in the action at law.[11]

(II) *Damages as Alternative or Additional Relief* — (A) *Incidental Relief.*[12] In order to avoid a multiplicity of suits, and to dispose of the entire matter at once, equity may, in addition to an injunction, decree that defendant pay damages to the complainant for all past injury,[13] and in addition to this

99. Kansas Pac. R. Co. *v.* Amrine, 10 Kan. 318; Commercial State Bank *v.* Ketcham, 3 Nebr. (Unoff.) 839, 92 N. W. 998; Crocker *v.* Manhattan L. Ins. Co., 61 N. Y. App. Div. 226, 70 N. Y. Suppl. 492 [*modifying* 31 Misc. 687, 66 N. Y. Suppl. 84]; Plato *v.* Roe, 14 Wis. 453.

1. Lake Erie, etc., R. Co. *v.* Cluggish, 143 Ind. 347, 42 N. E. 743; Downes *v.* Monroe, 42 Tex. 307.

2. Crocker *v.* Manhattan L. Ins. Co., 61 N. Y. App. Div. 226, 70 N. Y. Suppl. 492 [*modifying* 31 Misc. 687, 66 N. Y. Suppl. 84]; Taylor *v.* Standard Brick Co., 66 Ohio St. 360. 64 N. E. 428; Overholtzer *v.* Daily Times Limited, 2 Montg. Co. Rep. (Pa.) 169.

3. *Alabama.*— Roy *v.* Henderson, 132 Ala. 175, 31 So. 457.

Georgia.— Walker *v.* Maddox, 105 Ga. 253, 31 S. E. 165.

Illinois.— Peoria *v.* Johnston, 56 Ill. 45; People *v.* Chicago, 53 Ill. 424.

Nebraska.— Larrabee *v.* Given, 65 Nebr. 701, 91 N. W. 504.

New York.— Hackett *v.* Patterson, 16 N. Y. Suppl. 170. But see Tucker *v.* Manhattan R. Co., 78 Hun 439, 29 N. Y. Suppl. 202.

See 27 Cent. Dig. tit. "Injunction," § 414.

Even though the injunction is not granted because the necessity for it has disappeared, the other relief asked in the bill may be granted. Wilson *v.* Boise City, 7 Ida. 69, 60 Pac. 84.

Alternative relief may in some cases be granted instead of an injunction, but not such alternative relief as is inconsistent with the relief sought in the bill. Burns *v.* Campbell, 56 N. C. 410.

4. Craft *v.* Lathrop, 6 Fed. Cas. No. 3,318, 2 Wall. Jr. 103.

5. Conover *v.* Walling, 28 N. J. Eq. 333; Spear *v.* Cutter, 5 Barb. (N. Y.) 486, 4 How. Pr. 175. See also Billings *v.* Billings, 42 Leg. Int. (Pa.) 132.

6. Spears *v.* New York, 87 N. Y. 359; Dulaney *v.* Scudder, 94 Fed. 6, 36 C. C. A. 52.

7. State *v.* Dayton, etc., R. Co., 36 Ohio St. 434; Denver *v.* U. S. Tel. Co., 10 Ohio S. & C. Pl. Dec. 273, 8 Ohio N. P. 666; Clark *v.* Martin, 49 Pa. St. 289.

The court may restore the status quo at the time of application in case defendant has taken possession in violation of the temporary injunction, even though a permanent injunction is refused. Byne *v.* Byne, 54 Ga. 257.

8. Moore *v.* Diament, 41 N. J. Eq. 612, 7 Atl. 509.

9. Carpenter *v.* Acby, Hoffm. (N. Y.) 311.

10. Richmond *v.* Dubuque, etc., R. Co., 33 Iowa 422.

11. Larue *v.* Friedman, 49 Cal. 278; Blair *v.* Reading, 99 Ill. 600.

12. See Equity, 16 Cyc. 109 *et seq.*

13. *Alabama.*— Roberts *v.* Vest, 126 Ala. 355, 28 So. 412; Harrell *v.* Ellsworth, 17 Ala. 576.

California.— Jungerman *v.* Bovee, 19 Cal. 354.

the court may even render a decree for damages for injury that has occurred since the commencement of the suit.[14]

(B) *Alternative Relief.* When the damage to the complainant is not great and the injunction would cause inequitable loss and hardship to defendant, equity may, in its discretion, especially when the injunction sought would be injurious to the public interest, grant damages instead.[15] Likewise the court may

Connecticut.— Platt *v.* Waterbury, 72 Conn. 531, 45 Atl. 154, 77 Am. St. Rep. 335, 48 L. R. A. 691.

Florida.— McMillan *v.* Wiley, 45 Fla. 487, 33 So. 993.

Georgia.— Macon *v.* Harris, 75 Ga. 761, holding, however, that damages will not be awarded against persons who are merely nominal parties.

Indiana.— Bonnell *v.* Allen, 53 Ind. 130.

Maryland.— Reese *v.* Wright, 98 Md. 272, 56 Atl. 976.

Massachusetts.— Providence, etc., Steamboat Co. *v.* Fall River, 183 Mass. 535, 67 N. E. 647.

Missouri.— Downing *v.* Dinwiddie, 132 Mo. 92, 33 S. W. 470, 575.

New York.— McGean *v.* Metropolitan El. R. Co., 133 N. Y. 9, 30 N. E. 647; Thorne *v.* French, 4 Misc. 436, 24 N. Y. Suppl. 694; Henderson *v.* New York Cent. R. Co., 78 N. Y. 423; Williams *v.* New York Cent. R. Co., 16 N. Y. 97, 69 Am. Dec. 651; Fox *v.* Fitzsimons, 29 Hun 574.

Oregon.— Gohres *v.* Illinois Min. Co., 40 Oreg. 516, 67 Pac. 666.

Pennsylvania.—Patterson *v.* Glassmire, 166 Pa. St. 230, 31 Atl. 40; Stofflet *v.* Stofflet, 160 Pa. St. 529, 28 Atl. 857; Allison's Appeal, 77 Pa. St. 221; Wright *v.* Weber, 17 Pa. Super. Ct. 451; Rieker *v.* Harrisburg Consumers' Brewing Co., 10 Pa. Dist. 406, 4 Dauph. Co. Rep. 99; Keppel *v.* Lehigh Coal, etc., Co., 9 Pa. Dist. 219.

Rhode Island.— Lonsdale Co. *v.* Woonsocket, 25 R. I. 428, 56 Atl. 448.

South Carolina.— Bird *v.* Wilmington, etc., R. Co., 8 Rich. Eq. 46, 64 Am. Dec. 739, amount to be determined by a reference or by directing an issue.

Tennessee.— Richi *v.* Chattanooga Brewing Co., 105 Tenn. 651, 58 S. W. 646.

West Virginia.— Williamson *v.* Jones, 43 W. Va. 562, 27 S. E. 411, 64 Am. St. Rep. 891, 38 L. R. A. 694.

England.— Hindley *v.* Emery, L. R. 1 Eq. 52, 11 Jur. N. S. 874, 35 L. J. Ch. 6, 13 L. T. Rep. N. S. 272, 14 Wkly. Rep. 25.

See 27 Cent. Dig. tit. "Injunction," § 417.

Compare Calvit *v.* Williams, 35 La. Ann. 322; Stevenson *v.* Morgan, 64 N. J. Eq. 219, 53 Atl. 677, where it was held that damages for past overflows of land were not recoverable in a suit to restrain the causing of future overflows, on the ground that such damages were recoverable in a single action at law at the time the suit in equity was brought.

Waiver of claim for damages.— In a suit for injunction and damages, the waiver of the claim for damages does not affect the right to an injunction. Cooley *v.* Cummings, 1 N. Y. Suppl. 631.

Election to sue for damages at law.— This rule does not require the complainant to ask for damages in the chancery suit but he may still sue at law for damages as he could prior to the statute authorizing equity to give damages. McRae *v.* London, etc., R. Co., 37 L. J. Ch. 267, 18 L. T. Rep. N. S. 226. See also Sponenburg *v.* Gloversville, 96 N. Y. App. Div. 157, 89 N. Y. Suppl. 19.

14. Downing *v.* Dinwiddie, 132 Mo. 92, 33 S. W. 470, 575; Warwick, etc., Canal Nav. Co. *v.* Burman, 63 L. T. Rep. N. S. 670. *Compare* Merz *v.* Interior Conduit, etc., Co., 20 Misc. (N. Y.) 378, 46 N. Y. Suppl. 243.

15. *Massachusetts.*—Cobb *v.* Massachusetts Chemical Co., 179 Mass. 423, 60 N. E. 790.

New Jersey.— Simmons *v.* Paterson, 60 N. J. Eq. 385, 45 Atl. 995, 48 L. R. A. 717, 83 Am. St. Rep. 642.

New York.— Goldbacher *v.* Eggers, 82 N. Y. App. Div. 637, 84 N. Y. Suppl. 1127 [*affirming* 38 Misc. 36, 76 N. Y. Suppl. 881]; Crocker *v.* Manhattan L. Ins. Co., 61 N. Y. App. Div. 226, 70 N. Y. Suppl. 492 [*modifying* 31 Misc. 687, 66 N. Y. Suppl. 84]; Hessler *v.* Schafer, 20 Misc. 645, 46 N. Y. Suppl. 1076.

United States.— New York *v.* Pine, 185 U. S. 93, 22 S. Ct. 592, 46 L. ed. 820 [*reversing* 112 Fed. 98, 50 C. C. A. 145].

Canada.— Arthur *v.* Grand Trunk R. Co., 22 Ont. App. 89; Tolton *v.* Canadian Pac. R. Co., 22 Ont. 204.

Injunction in the alternative.— The decree should be for the payment of damages, with injunction in the alternative. New York *v.* Pine, 185 U. S. 93, 22 S. Ct. 592, 46 L. ed. 820 [*reversing* 112 Fed. 98, 50 C. C. A. 145].

In England Lord Cairns Act, 21 & 22 Vict. c. 27, allows equity in its discretion to give damages in lieu of an injunction. Durell *v.* Pritchard, L. R. 1 Ch. 244, 12 Jur. N. S. 16, 35 L. J. Ch. 223, 13 L. T. Rep. N. S. 545, 14 Wkly. Rep. 212; Bowen *v.* Hall, 6 Q. B. D. 333, 45 J. P. 373, 50 L. J. Q. B. 305, 44 L. T. Rep. N. S. 75, 29 Wkly. Rep. 367; Shelfer *v.* London Electric Lighting Co., [1895] 1 Ch. 287, 64 L. J. Ch. 216, 72 L. T. Rep. N. S. 34, 12 Reports 112, 43 Wkly. Rep. 238; Martin *v.* Price, [1894] 1 Ch. 276, 63 L. J. Ch. 209, 70 L. T. Rep. N. S. 202, 7 Reports 90, 42 Wkly. Rep. 262; Holland *v.* Worley, 26 Ch. D. 578, 47 J. P. 7, 54 L. J. Ch. 268, 50 L. T. Rep. N. S. 526, 32 Wkly. Rep. 749; Swaine *v.* Great Northern R. Co., 4 De G. J. & S. 211, 10 Jur. N. S. 191, 33 L. J. Ch. 399, 9 L. T. Rep. N. S. 745, 3 New Rep. 399, 12 Wkly. Rep. 391, 69 Eng. Ch. 164, 46 Eng. Reprint 899. See Sayers *v.* Collyer, 24 Ch.

grant an injunction conditioned to be dissolved upon the giving of a sufficient bond by defendant to pay all damages that may be assessed against him.[16] On the other hand where equitable principles clearly entitle the complainant to an injunction, even though his damage is small in amount, it is error to decree damages in lieu of the injunction asked.[17]

(c) *Damages Where Injunction Improper.* The general rule is that where the right to an injunction is not established, equity has no jurisdiction to retain the case for the purpose of awarding damages;[18] but in some courts where the equity practice is not sharply distinguished from the law, cases have been retained for the purpose of giving damages, even though an injunction was held not to be a proper remedy.[19] Where the injury has been wholly completed prior to the bringing of the suit for an injunction, equity has no jurisdiction to enjoin and hence will not give damages;[20] and the same rule must of necessity be followed where the injury is merely threatened. In such case equity cannot

D. 180, 47 J. P. 741, 52 L. J. Ch. 770, 48 L. T. Rep. N. S. 939, 32 Wkly. Rep. 200.

Discretion of court.— If defendant, in the injury he is inflicting, is doing an act which will render the property of the complainant absolutely useless to him unless it is stopped, then, inasmuch as the only compensation which could be given to the complainant would be to compel defendant absolutely to purchase the property, the court will not, in the exercise of its discretion, withhold an injunction. Where, however, the injury is less serious, and the court considers that the property may yet remain the property of the complainant, and be still substantially as useful as it was before defendant's acts, and that the injury therefore is of such a nature as can be compensated by money without taking away the property from the complainant, the court has and will exercise a discretion to award damages in place of an injunction. Holland *v.* Worley, 26 Ch. D. 578, 49 J. P. 7, 54 L. J. Ch. 268, 50 L. T. Rep. N. S. 526, 32 Wkly. Rep. 749.

Prayer for damages.— The court may grant damages in lieu of an injunction, even though the complainant has not prayed for damages in his bill. Crawford *v.* Hornsea Steam Brick, etc., Co., 45 L. J. Ch. 432, 34 L. T. Rep. N. S. 923.

16. *Georgia.*— Tift *v.* Harrell, 68 Ga. 291.

New Hampshire.— Pike *v.* New Hampshire Trust Co., 67 N. H. 227, 38 Atl. 721.

New York.— Sponenburg *v.* Gloversville, 96 N. Y. App. Div. 157, 89 N. Y. Suppl. 19 [*affirming* 42 Misc. 563, 87 N. Y. Suppl. 602]; Barney *v.* New York, 83 N. Y. App. Div. 237, 82 N. Y. Suppl. 124 [*affirming* 39 Misc. 719, 80 N. Y. Suppl. 972].

West Virginia.— Ward *v.* Ohio River R. Co., 35 W. Va. 481, 14 S. E. 142, injunction conditioned to be dissolved upon payment of damages assessed to the complainant or into court.

United States.— Comly *v.* Buchanan, 81 Fed. 58; Northern Pac. R. Co. *v.* St. Paul, etc., R. Co., 4 Fed. 688, 2 McCrary 260.

See 27 Cent. Dig. tit. "Injunction," § 416.

17. McLaughlin *v.* Kelly, 22 Cal. 211; Philadelphia, etc., R. Co. *v.* Pennsylvania Schuylkill Valley R. Co., 7 Pa. Co. Ct. 491; Lonsdale Co. *v.* Woonsocket, 25 R. I. 428, 56 Atl. 448; Krehl *v.* Burrell, 11 Ch. D. 146, 48 L. J. Ch. 252, 40 L. T. Rep. N. S. 637, 27 Wkly. Rep. 805. See also Martin *v.* Price, [1894] 1 Ch. 276, 63 L. J. Ch. 209, 70 L. T. Rep. N. S. 202, 7 Reports 90, 42 Wkly. Rep. 262; Pennington *v.* Brinsop Hall Coal Co., 5 Ch. D. 769, 46 L. J. Ch. 773, 37 L. T. Rep. N. S. 149, 25 Wkly. Rep. 874; Woodhouse *v.* Newry Nav. Co., [1898] 1 Ir. 161.

18. McMillan *v.* Wiley, 45 Fla. 487, 33 So. 993 (legislature has no power to confer such jurisdiction); Baltimore, etc., Turnpike Road *v.* United R., etc., Co., 93 Md. 138, 48 Atl. 723 (case of a mere trespass); Western Union Tel. Co. *v.* Syracuse Electric Light, etc., Co., 178 N. Y. 325, 70 N. E. 866 [*reversing* 81 N. Y. App. Div. 655, 81 N. Y. Suppl. 1147]; Rosenheimer *v.* Standard Gaslight Co., 39 N. Y. App. Div. 482, 57 N. Y. Suppl. 330; W. J. Johnston Co. *v.* Hunt, 66 Hun (N. Y.) 504, 21 N. Y. Suppl. 314; Brockington *v.* Palmer, 18 Grant Ch. (U. C.) 488. See EQUITY, 16 Cyc. 111 *et seq.*

In England, under 25 & 26 Vict. c. 42, the court has no jurisdiction to enter into the question of damages, if in other respects the complainant has no standing in equity and no ground for equitable relief. Durell *v.* Pritchard, L. R. 1 Ch. 244, 12 Jur. N. S. 16, 35 L. J. Ch. 223, 13 L. T. Rep. N. S. 545, 14 Wkly. Rep. 212; Swaine *v.* Great Northern R. Co., 4 De G. J. & S. 211, 10 Jur. N. S. 191, 33 L. J. Ch. 399, 9 L. T. Rep. N. S. 745, 3 New Rep. 399, 12 Wkly. Rep. 391, 69 Eng. Ch. 164, 46 Eng. Reprint 899; Betts *v.* Gallais, 22 L. T. Rep. N. S. 841; Martin *v.* Douglas, 16 Wkly. Rep. 268.

19. McHugh *v.* Louisville Bridge Co., 65 S. W. 456, 23 Ky. L. Rep. 1546; Lane *v.* Michigan Traction Co., 135 Mich. 70, 97 N. W. 354; Strœbe *v.* Fehl, 22 Wis. 337.

In New York it has been held to be discretionary with the court to refuse to retain the cause for the purpose of determining the damages, after refusing an injunction. Morse *v.* Wheeler, 175 N. Y. 502, 67 N. E. 1085 [*affirming* 68 N. Y. App. Div. 428, 73 N. Y. Suppl. 930].

20. Sherman *v.* Clark, 4 Nev. 138, 97 Am. Dec. 516.

give damages, although it refuses to enjoin.[21] But where, at the time of bringing his bill, complainant was entitled to equitable relief, defendant cannot deprive equity of its jurisdiction over the case by hastening the injurious acts to completion before the hearing. In such case equity may give damages.[22]

i. Relief to Defendant. Not only may equity grant relief indirectly to defendant by issuing an injunction against him on a condition to be performed by complainant, but it is proper to grant him direct relief. For instance, when he shows himself entitled to such relief, defendant may be granted an injunction against complainant.[23] Such affirmative relief will generally not be granted, however, except upon defendant's cross bill and prayer therefor.[24] Generally equity will not compel a transfer of possession in favor of defendant.[25]

j. Stay or Suspension of Decree. The court may in its discretion suspend the operation of an injunction.[26] It may in the very decree itself provide that the operation of the injunction shall be stayed for a certain length of time or until the happening of a condition,[27] and it is within the discretion of the court to stay the operation of the decree pending an appeal therefrom, until the hearing of the appeal on the merits.[28] After one such stay or suspension it is within the power of the court to extend it further or to grant a second suspension.[29] A bond may be required of defendant, as a condition of suspending an injunction,

21. Huntting *v.* Hartford St. R. Co., 73 Conn. 179, 46 Atl. 824.

No actual damage.— Where there is no ground for equity jurisdiction and also no actual damage, there is no foundation for a judgment in damages. Empire Transp. Co. *v.* Johnson, 76 Conn. 79, 55 Atl. 587.

22. Langmaid *v.* Reed, 159 Mass. 409, 34 N. E. 593; Smith *v.* Ingersoll-Sergeant Rock Drill Co., 7 Misc. (N. Y.) 374, 27 N. Y. Suppl. 907; Lewis *v.* North Kingstown, 16 R. I. 15, 11 Atl. 173, 27 Am. St. Rep. 724; Fritz *v.* Hobson, 14 Ch. D. 542, 49 L. J. Ch. 321, 42 L. T. Rep. N. S. 225, 28 Wkly. Rep. 459; Davenport *v.* Rylands, L. R. 1 Eq. 302, 12 Jur. N. S. 71, 35 L. J. Ch. 204, 14 L. T. Rep. N. S. 53, 1 New Rep. 173, 14 Wkly. Rep. 248.

23. Sternberg *v.* Wolff, 56 N. J. Eq. 389, 39 Atl. 397, 67 Am. St. Rep. 494, 39 L. R. A. 762; Power *v.* Athens, 99 N. Y. 592, 2 N. E. 609; Knickerbocker Ice Co. *v.* Forty-Second St., etc., Ferry R. Co., 48 N. Y. Super. Ct. 489; Sproat *v.* Durland, 2 Okla. 24, 35 Pac. 682, 886; Lake Shore, etc., R. Co. *v.* Wiley, 193 Pa. St. 496, 44 Atl. 583 (mandatory order compelling complainant to grade and drain a street occupied by its tracks); Lane *v.* Ridgway, etc., R. Co., 9 Pa. Co. Ct. 386. *Compare* Springsteen *v.* Powers, 4 Rob. (N. Y.) 624.

An intervener is not entitled to a decree that he holds title in fee, even though his showing justifies a dismissal of complainant's bill. Watkins *v.* Arnold, 69 Ark. 263, 62 S. W. 904.

24. Herndon *v.* Higgs, 15 Ark. 389; People *v.* Pacheco, 27 Cal. 175; Nebraska Tel. Co. *v.* York Gas, etc., Co., 27 Nebr. 284, 43 N. W. 126; Wright *v.* Delafield, 25 N. Y. 266. See also Rives *v.* Toulmin, 25 Ala. 452. *Compare* Flickinger *v.* Hull, 5 Gill (Md.) 60.

In Iowa, under Code, § 2084, the court, in a suit to enjoin a foreclosure, may decree such a foreclosure on behalf of defendants, without a cross bill or prayer therefor. Westfall *v.* Lee, 7 Iowa 12.

A general prayer for relief may be sufficient basis for granting judgment for the amount of a debt due defendant. Bourke *v.* Vanderlip, 22 Tex. 221.

25. Starke *v.* Lewis, 23 Miss. 151.

Where defendant has voluntarily relinquished property during the pendency of an injunction, he is not entitled to have it restored to him upon dissolution of the injunction. Washington University *v.* Green, 1 Md. Ch. 97.

26. Sponenburg *v.* Gloversville, 96 N. Y. App. Div. 157, 89 N. Y. Suppl. 19; Cincinnati *v.* Cincinnati Inclined Plane R. Co., 7 Ohio S. & C. Pl. Dec. 2, 4 Ohio N. P. 187.

27. Sammons *v.* Gloversville, 34 Misc. (N. Y.) 459, 70 N. Y. Suppl. 284; Cincinnati *v.* Cincinnati Inclined Plane R. Co., 7 Ohio S. & C. Pl. Dec. 2, 4 Ohio N. P. 187; Southern R. Co. *v.* Franklin, etc., R. Co., 96 Va. 693, 32 S. E. 485, 4 L. R. A. 297.

28. Genet *v.* Delaware, etc., Canal Co., 113 N. Y. 472, 21 N. E. 390; Laney *v.* Rochester R. Co., 81 Hun (N. Y.) 346, 30 N. Y. Suppl. 893, 24 N. Y. Civ. Proc. 156; Pach *v.* Geoffroy, 19 N. Y. Suppl. 583.

The appellate court, as well as the trial court, may grant a stay or suspension. McClung *v.* North Bend Coal, etc., Co., 7 Ohio Cir. Ct. 182, 3 Ohio Cir. Dec. 719.

Taking an appeal does not of itself operate as a stay of the decree enjoining defendant. New York Mail, etc., Transp. Co. *v.* Shea, 30 N. Y. App. Div. 374, 52 N. Y. Suppl. 5. See also Hovey *v.* McDonald, 109 U. S. 150, 3 S. Ct. 136, 27 L. ed. 888; New Orleans Butchers Benev. Assoc. *v.* Crescent City Livestock Landing, etc., Co., 10 Wall. (U. S.) 273, 19 L. ed. 915.

29. Sponenburgh *v.* Gloversville, 96 N. Y. App. Div. 157, 89 N. Y. Suppl. 19 [*affirming* 42 Misc. 563, 87 N. Y. Suppl. 602]; Conklin *v.* New York El. R. Co., 13 N. Y.

to pay all damages to be caused the complainant by reason of the suspension,[30] and other conditions may be imposed;[31] but in no case will a stay or suspension be allowed unless a necessity therefor is clearly made to appear.[32]

k. Effect as Res Judicata. In determining whether a final decree operates as *res adjudicata*, the same rules apply as in case of any other decree.[33]

l. Opening Final Decree. A final decree awarding an injunction will not be opened except on good cause shown,[34] such as mistake or surprise.[35] Where, after the decree, facts arise which show that it ought not to be executed, the decree may be vacated.[36] And where a default has been taken improperly and final judgment entered,[37] or where defendant has misunderstood the meaning of the papers served on him,[38] the court may open the decree.

L. Enforcement of Decree. The writ or decree may be enforced by contempt proceedings,[39] and sometimes a writ of assistance is proper.[40] Where an injunction has been violated an order may be granted compelling the party violating it to restore the *status quo*.[41] The injunction will not ordinarily be enforced at the instance of a third person who is not himself entitled to the restraint.[42]

Suppl. 782, 18 N. Y. Civ. Proc. 366; Cincinnati *v.* Cincinnati Inclined Plane R. Co., 6 Ohio S. & C. Pl. Dec. 81, 4 Ohio N. P. 57.

30. Genet *v.* Delaware, etc., Canal Co., 113 N. Y. 472, 21 N. E. 390; Pach *v.* Geoffroy, 19 N. Y. Suppl. 583.

31. Hine *v.* New York El. R. Co., 149 N. Y. 154, 43 N. E. 414 [*affirming* 8 Misc. 18, 28 N. Y. Suppl. 66].

32. Fulton Bank *v.* New York, etc., Canal Co., 3 Paige (N. Y.) 31.

33. *Colorado.*— Denver *v.* Lobenstein, 3 Colo. 216.

Illinois.— Hopkins *v.* Roseclare Lead Co., 72 Ill. 373; St. Louis, etc., R. Co. *v.* Gray, 100 Ill. App. 538.

Mississippi.— Green *v.* McDonald, 13 Sm. & M. 445.

Nevada.— Ahlers *v.* Thomas, 24 Nev. 407, 56 Pac. 93, 77 Am. St. Rep. 820.

New York.—Inderlied *v.* Whaley, 32 N. Y. Suppl. 640.

United States.—Union Trust Co. *v.* Southern Inland Nav., etc., Co., 130 U. S. 565, 9 S. Ct. 606, 32 L. ed. 1043.

See 27 Cent. Dig. tit. "Injunction," §§ 434, 435. And see, generally, JUDGMENTS.

Matters concluded.— Refusal of an injunction to a railroad company seeking to enjoin a party from interfering with the company's use of a right of way on the ground that defendant is not likely to again interfere is not an adjudication that the right of way does not belong to the company. Dryden *v.* St. Joseph, etc., R. Co., 23 Kan. 525.

As between defendants, a final decree refusing an injunction is not *res adjudicata* of the questions involved where it does not appear that their interests were adverse. Tama County *v.* Melendy, 55 Iowa 395, 7 N. W. 669.

The sureties on an injunction bond, by signing the bond, assume such a connection with the injunction suit that they are concluded by the decree, when sued at law upon the bond, as far as the same matters are in question. Towle *v.* Towle, 46 N. H. 431.

Suit by one in behalf of many.— The provision of federal equity rule 48, permitting a few individuals to be sued as representing a numerous class, that "the decree shall be without prejudice to the rights and claims of absent parties" prevents the decree from being conclusive as to such parties. American Steel, etc., Co. *v.* Wire Drawers, etc., Unions Nos. 1 and 3, 90 Fed. 598.

34. Bloss *v.* Tacke, 59 Mo. 174; Delafield *v.* Commercial Tel. Co., 3 N. Y. Suppl. 921, 22 Abb. N. Cas. 450.

After term when rendered.— A judgment making an injunction perpetual, after hearing on the merits, and concluding with the words "or until the further order of this court" is final, and will not be opened on motion after the expiration of the term at which it was rendered. Woffenden *v.* Woffenden, 1 Ariz. 328, 25 Pac. 666.

35. Sheehan *v.* Osborne, (Cal. 1902) 69 Pac. 842.

36. Weaver *v.* Mississippi, etc., Boom Co., 30 Minn. 477, 16 N. W. 269; Wetmore *v.* Law, 34 Barb. (N. Y.) 515.

37. Clegg *v.* Fithian, 32 Ind. 90; Brett *v.* Farr, 58 Iowa 442, 10 N. W. 853.

An interlocutory injunction granted in a suit to obtain a perpetual injunction will remain in full force on a default being set aside. Nicoll *v.* Weldon, 130 Cal. 666, 63 Pac. 63.

38. Walcutt *v.* Gaskin, 18 Misc. (N. Y.) 118, 41 N. Y. Suppl. 678. *Compare* Ulshafer's Appeal, 1 Walk. (Pa.) 457.

39. See *infra*, VIII.

40. Kershaw *v.* Thompson, 4 Johns. Ch. (N. Y.) 609. See also Garretson *v.* Cole, 1 Harr. & J. (Md.) 370; Com. *v.* Dieffenbach, 3 Grant (Pa.) 368.

41. McDonogh *v.* Calloway, 7 Rob. (La.) 442; Hammond *v.* Fuller, 1 Paige (N. Y.) 197. See also Baker *v.* Weaver, 104 Ga. 228, 30 S. E. 726.

42. Leverich *v.* Mobile, 122 Fed. 549, holding that a stranger to the original suit can-

M. Costs and Fees.[43] A complainant who on final hearing is decreed a perpetual injunction according to his prayer is usually entitled to costs.[44] So also where a temporary injunction is perpetuated only in part it may be error to tax costs against complainant.[45] But complainant will not be allowed costs, when the action enjoined was undertaken by defendant through the fault of complainant.[46] Attorney's fees will not usually be allowed to complainant,[47] except perhaps where defendant has attempted to evade the injunction and has caused an extra suit.[48] In case relief by injunction is denied on the final hearing, complainant must in general pay costs of the suit.[49] Defendant is also entitled to the costs of a previous motion to dissolve a preliminary injunction, whether such motion was granted or denied,[50] unless the court at the time of hearing the motion ordered that neither party should be entitled to costs of the motion.[51] Where the evi-

not enforce an injunction restraining an action in ejectment, without showing that the property claimed by him, as grantee of the original complainant, is the identical property involved in the litigation and to which the injunction related.

43. See COSTS, 11 Cyc. 32 *et seq.*

Effect of injunction in admiralty to prevent collection of costs see ADMIRALTY, 1 Cyc. 912 note 26.

Sheriff's fees made necessary by service of injunction on him in suit restraining sale on execution are recoverable as damages, but must first be ascertained and allowed by the court issuing the execution. Fox *v.* Oriel Cabinet Co., 70 Ill. App. 322.

44. *Indiana.*— Douglass *v.* Blankenship, 50 Ind. 160.

Kentucky.— White *v.* Guthrie, 1 J. J. Marsh. 503.

Louisiana.— Smith *v.* Bradford, 17 La. 263.

New York.— Doe *v.* Green, 2 Paige 347, charge for filing certificate of allowance not taxable.

Oregon.— Jones *v.* Conn, 39 Oreg. 30, 64 Pac. 855, 65 Pac. 1068, 87 Am. St. Rep. 634, 5 L. R. A. 630.

Pennsylvania.— Sayen *v.* Johnston, 4 Pa. Co. Ct. 360.

England.— Mounsey *v.* Lonsdale, L. R. 6 Ch. 141, 40 L. J. Ch. 198, 23 L. T. Rep. N. S. 794, 19 Wkly. Rep. 235; Blakey *v.* Hall, 56 L. J. Ch. 568, 56 L. T. Rep. N. S. 400, 35 Wkly. Rep. 592; Mayhew *v.* Maxwell, 3 L. T. Rep. N. S. 847; Fradella *v.* Weller, 2 Russ. & M. 247, 11 Eng. Ch. 247, 39 Eng. Reprint 388.

See 27 Cent. Dig. tit. "Injunction," § 420.

Non-participating defendants.— Costs will not be adjudged against defendants who had not participated in the tort enjoined. Morris *v.* Sanders, 43 S. W. 733, 19 Ky. L. Rep. 1433.

New grounds for injunction.—Where an injunction is perpetuated on grounds that did not exist at the time it was originally granted costs may be taxed against the complainant. Tucker *v.* Brackett, 28 Tex. 336.

After obtaining relief by injunction complainant is not justified in continuing for costs only, and costs of such subsequent proceedings will he denied him. Taylor *v.* Davis, 7 L. J. Ch. 179.

An attorney's fee, taxed as costs in an injunction suit, accrues on final determination of the cause, and belongs to complainant, if successful, notwithstanding a dissolution of the injunction. Rosser *v.* Timberlake, 78 Ala. 162.

45. Combs *v.* Boswell, 1 Dana (Ky.) 473; Golden *v.* Maupin, 2 J. J. Marsh. (Ky.) 236; Hoofman *v.* Marshall, 1 J. J. Marsh. (Ky.) 64; Ross *v.* Gordon, 2 Munf. (Va.) 289. See also Howard *v.* Bennett, 72 Ill. 297; Anderson *v.* Mason, 6 Dana (Ky.) 217.

Each party may be compelled to pay his own costs. Rochdale Canal Co. *v.* King, 16 Beav. 630, 17 Jur. 1001, 22 L. J. Ch. 604, 1 Wkly. Rep. 278, 51 Eng. Reprint 924.

Bill for discovery and injunction.— Where a bill is brought for a discovery, as well as for an injunction, if complainant succeeds to a partial extent, he is entitled to costs. Ross *v.* Adams, 5 Dana (Ky.) 509.

46. Johnson *v.* Taber, 10 N. Y. 319.

The costs in an enjoined action at law may be given defendant in equity where he actually had a legal demand for a portion of his claim at law. Harvey *v.* Crawford, 2 Blackf. (Ind.) 43.

47. Townsend *v.* Fontenot, 42 La. Ann. 890, 6 So. 616; New Orleans Bank *v.* Toledano, 20 La. Ann. 571; Neveu *v.* Voorhies, 14 La. Ann. 738; Smith *v.* Bradford, 17 La. 263.

48. Jewelers' Mercantile Agency *v.* Rothschild, 6 N. Y. App. Div. 499, 39 N. Y. Suppl. 700. See Ludeling *v.* Garrett, 50 La. Ann. 118, 23 So. 94.

49. *California.*— Brown *v.* Delavau, 63 Cal. 303; Himes *v.* Johnson, 61 Cal. 259.

Kentucky.— Combs *v.* Boswell, 1 Dana 473.

New Jersey.— Conover *v.* Walling, 28 N. J. Eq. 333.

New York.— Davis *v.* Briggs, 3 How. Pr. 171.

England.— Barwell *v.* Barwell 5 Beav. 373, 7 Jur. 272, 12 L. J. Ch. 9, 49 Eng. Reprint 622; Great Western R. Co. *v.* Oxford, etc., R. Co., 5 De G. & Sm. 437, 16 Jur. 443, 64 Eng. Reprint 1188.

See 27 Cent. Dig. tit. "Injunction," § 420.

50. Mann *v.* Rice, 3 Barb. Ch. (N. Y.) 42; Otis *v.* Forman, 1 Barb. Ch. (N. Y.) 30.

51. Van Wyck *v.* Alliger, 4 How. Pr. (N. Y.) 164.

dence is so conflicting that the bill is retained with leave to renew the application for an injunction, each party may be compelled to pay his own costs.[52]

VII. CONTINUING, DISSOLVING, AND MODIFYING.

A. Right to Continuance — 1. In General. When a preliminary injunction was properly obtained, the complainant is entitled to have it continued until its purpose is attained, where nothing has occurred subsequently to render its dissolution proper. If it is still reasonably necessary to protect the complainant's rights, or if some of the questions involved are so important that they should await the final hearing, or depend upon testimony that is to be given on final hearing, the injunction will not be dissolved prior thereto.[1]

2. Reasonable Probability of Success. To be entitled to a continuance, the complainant must show a reasonable probability that he will be able to establish his case at the hearing, and if this appears very doubtful the injunction will be dissolved.[2]

3. Pending Determination of Right. Where the right for the protection of which the injunction was obtained is in process of determination in either the same or another court it is proper to continue the injunction until such determination is had to stand or fall at that time according to the event.[3]

4. Pending Appeal. In the absence of any statutory rule on the subject, the

52. McCaffrey's Appeal, 105 Pa. St. 253; Bass *v.* Dawber, 19 L. T. Rep. N. S. 626. See also Rousseau *v.* Troy, 49 How. Pr. (N. Y.) 492.

1. *Alabama.*— Hamilton *v.* Brent Lumber Co., 127 Ala. 78, 28 So. 698; Ferris *v.* Hoglan, 121 Ala. 240, 25 So. 834.

California.— Bullard *v.* Kempff, 119 Cal. 9, 50 Pac. 780.

District of Columbia.—U. S. Electric Lighting Co. *v.* Metropolitan Club, 6 App. Cas. 536.

Louisiana.—Cotten *v.*Christen, 110 La. 444, 34 So. 597.

Maine.— Marble *v.* McKenney, 60 Me. 332.

Mississippi.— Alcorn *v.* Alcorn, 76 Miss. 907, 25 So. 877; Crane *v.* Davis, (1896) 21 So. 17.

New Jersey.— Morris County School Dist. No. 44 *v.* Gray, 27 N. J. Eq. 278; New Jersey Cent. R. Co. *v.* Bunn, 11 N. J. Eq. 336; Cooper *v.* Cooper, 5 N. J. Eq. 9.

New York.— Butler *v.* Butler, 91 N. Y. App. Div. 327, 86 N. Y. Suppl. 586.

North Carolina.— Solomon *v.* Wilmington Sewerage Co., 133 N. C. 144, 45 S. E. 536; Jolly *v.* Brady, 127 N. C. 142, 37 S. E. 153; Edwards *v.* Manning Tp., 127 N. C. 62, 37 S. E. 73; Griffin *v.* Goldsboro Water Co., 122 N. C. 206, 30 S. E. 319, 41 L. R. A. 240; Jones *v.* Buxton, 121 N. C. 285, 28 S. E. 545; Marshall *v.* Stanly County Com'rs, 89 N. C. 103; Heilig *v.* Stokes, 63 N. C. 612.

Ohio.— State *v.* Cuyahoga County Com'rs, 21 Ohio Cir. Ct. 780, 12 Ohio Cir. Dec. 328.

Pennsylvania.— Packard *v.* Thiel College, 207 Pa. St. 280, 56 Atl. 869; Given *v.* Grier, 3 Lanc. L. Rev. 289.

United States.— U. S. *v.* Dastervignes, 118 Fed. 199 [*affirmed* in 122 Fed. 30]; Philadelphia, etc., Coal, etc., Co. *v.* Mayor, 21 Fed. 97.

Canada.— Canadian Pac. R. Co. *v.* Northern Pac., etc., R. Co., 5 Manitoba 301.

See 27 Cent. Dig. tit. "Injunction," § 346 *et seq.*

Where two have properly joined in asking a preliminary injunction, it will be continued if it appears that either one is entitled thereto. Linden Land Co. *v.* Milwaukee Electric R., etc., Co., 107 Wis. 493, 83 N. W. 851.

If an action at law is pending in which the dispute is properly triable, and wherein the complainant's rights can be protected, the injunction will not be continued. Hamilton *v.* Ross, 7 N. J. Eq. 465.

2. Secor *v.* Weed, 7 Rob. (N. Y.) 67; Springsteen *v.* Powers, 3 Rob. (N. Y.) 483; Craycroff *v.* Morehead, 67 N. C. 422; Black Lick Mfg. Co. *v.* Saltsburg Gas Co., 139 Pa. St. 448, 21 Atl. 432; Berlew *v.* Electric Illuminating Co., 1 Pa. Co. Ct. 651; Barber Asphalt-Pav. Co. *v.* Scranton, 2 Lack. Leg. N. 173; Hugher *v.* School Directors, 8 Luz. Leg. Reg. (Pa.) 284; Bedford *v.* Potter, 9 Phila. (Pa.) 560; Hay *v.* Immell, 7 York Leg. Rec. (Pa.) 110; Ingles *v.* Straus, 91 Va. 209, 21 S. E. 490.

Certainty of ultimate success.— It is not necessary to the continuance of an injunction that it should be clear that the complainant will succeed at the hearing. Huffman *v.* Hummer, 17 N. J. Eq. 263.

Improbability in the statements of a bill is a strong ground for refusing the continuance of an injunction sought by it. Fowler *v.* Roe, 11 N. J. Eq. 367; Schœffler *v.* Schwarting, 17 Wis. 30.

3. Chappell *v.* Roberts, 140 Ala. 324, 37 So. 241; Fletcher *v.* New Orleans, etc., R. Co., 20 Fed. 345.

Where it is very clear that the complainant has no title upon which to base his right to an injunction, it will be dissolved even before the title is determined in a pending action. Westcott *v.* Gifford, 5 N. J. Eq. 24.

better opinion is that an appeal from a decree dissolving the injunction does not have the effect of continuing or reviving the injunction.[4] But a preliminary injunction may be continued pending an appeal from a decree dismissing complainant's bill, or from a judgment at law deciding the disputed right adversely to the complainant, in case such continuance is necessary to protect the complainant and to maintain the subject-matter in such condition that the complainant will not be deprived of relief in case of his success on the appeal,[5] but not otherwise.[6]

5. INJUNCTION RESTRAINING ACTION AT LAW. It is proper to continue an injunction restraining the prosecution of an action at law until the equitable rights involved are determined on final hearing.[7]

B. Grounds For Dissolving — 1. IRREGULARITIES — a. In General. Mere technical informalities in the injunction itself or in the proceedings therefor are not generally sufficient ground for dissolving an injunction on motion.[8] If,

4. *Alabama.*— Garrow *v.* Carpenter, 4 Stew. & P. 336.

Arkansas.— Payne *v.* McCabe, 37 Ark. 318.

New Jersey.— Chegary *v.* Scofield, 5 N. J. Eq. 525.

New York.— Hoyt *v.* Gelston, 13 Johns. 139; Wood *v.* Dwight, 7 Johns. Ch. 295.

North Carolina.— Reyburn *v.* Sawyer, 128 N. C. 8, 37 S. E. 954; James *v.* Markham, 125 N. C. 145, 34 S. E. 241.

United States.—Knox County *v.* Harshman, 132 U. S. 14, 10 S. Ct. 8, 33 L. ed. 249; Hovey *v.* McDonald, 109 U. S. 150, 3 S. Ct. 136, 27 L. ed. 888.

5. *Georgia.*— Neisler *v.* Smith, 2 Ga. 265.

Missouri.— State *v.* Dearing, 180 Mo. 53, 79 S. W. 454.

New Jersey.— Jewett *v.* Dringer, 29 N. J. Eq. 199. In Chegary *v.* Scofield, 5 N. J. Eq. 525, 529, Hornblower, C. J., said: "The chancellor, after an appeal from his decision, may make a temporary order suspending the effects or legal consequences of such decision until the appeal can be heard, but in case the chancellor does not do so, that this court has power to restrain the party from proceeding to execute or act under or in pursuance of a chancellor's decree or to do what the decree has simply left him at liberty to do, I have no doubt."

New York.— Disbro *v.* Disbro, 37 How. Pr. 147.

Pennsylvania.— Magrath *v.* Cooper, 10 Wkly. Notes Cas. 173.

Washington.— State *v.* Stallcup, 15 Wash. 263, 46 Pac. 251.

United States.— Reynolds *v.* Iron Silver Min. Co., 33 Fed. 354.

Canada.— Cotton *v.* Corby, 7 Grant Ch. (U. C.) 50.

See 27 Cent. Dig. tit. "Injunction," § 346 *et seq.*

Appeal from dismissal of bill.— The court may in its discretion grant a continuance of an injunction against the enforcement of a maximum rate law, even though the bill itself is dismissed, where great damage will otherwise result pending an appeal from the decree dismissing the bill. Cotting *v.* Kansas City Stock-Yards Co., 82 Fed. 850.

Termination of injunction.— An injunction granted to continue pending an appeal exists where such appeal has been reinstated after a dismissal. Winship *v.* Clendenning, 24 Ind. 439.

Order of appellate court.— The lower court may continue a preliminary injunction pending an appeal from an order of dissolution, subject to the order of the appellate court. Watson *v.* Enriquez, 1 Philippine Rep. 480; Hovey *v.* McDonald, 109 U. S. 150, 159, 3 S. Ct. 136, 27 L. ed. 888. On appeal from a judgment refusing to set aside an injunction improperly issued, the appellate court may suspend the injunction till final judgment on the appeal. Joly *v.* Macdonald, 23 L. C. Jur. 16.

6. Delaware, etc., R. Co. *v.* Central Stock-Yard, etc., Co., 43 N. J. Eq. 77, 10 Atl. 602; New Jersey R. Co. *v.* Standard Oil Co., 33 N. J. Eq. 372; Wolf *v.* Durst, 10 Tex. 425.

7. Ford *v.* Buchanan, 31 Ga. 386; Dupau *v.* Richardson, 4 Mart. N. S. (La.) 181; Hentz *v.* Delta Bank, 76 Miss. 429, 24 So. 902; Aron *v.* Chaffe, 72 Miss. 159, 17 So. 11; Morris, etc., R. Co. *v.* Haskins, 26 N. J. Eq. 295; Mulford *v.* Bowen, 9 N. J. Eq. 797.

Retention by equity of jurisdiction.— Defendant may be compelled to litigate his entire claim in equity, equity having acquired jurisdiction for one purpose, and an injunction may be continued. Pine *v.* Shannon, 32 N. J. Eq. 85.

Where discovery is the relief asked, the complainant will be presumed to have obtained it upon the coming in of the answer, and his right thereafter to have the injunction against the action at law continued must depend upon whether purely equitable defenses to the action at law have been made to appear. Gibbs *v.* Ward, (N. J. Ch. 1901) 48 Atl. 243.

8. Beauchamp *v.* Kankakee County, 45 Ill. 274; Way *v.* Lamb, 15 Iowa 79; Nashville Sav. Bank *v.* Nashville, 3 Tenn. Ch. 338. See Judah *v.* Chiles, 3 J. J. Marsh. (Ky.) 302, holding that an injunction may be "discharged" for irregularity but can be dissolved only for want of equity.

The fact that the injunction is too broad is not ground for dissolving in case the irregularity is not material. People *v.* Law, 34 Barb. (N. Y.) 494, 22 How. Pr. 109.

however, the irregularities are not merely technical, but are substantial, the rule is that the injunction should be dissolved.[9]

b. Irregular Service. The injunction will not be dissolved for mere irregularities in the service of the injunction or the subpœna,[10] although a total failure to serve may be sufficient ground.[11] A failure to make a return of the service is ground for dissolving.[12]

c. Verification. An injunction will generally be dissolved for lack of or material defects in the verification;[13] but it has been held that even in case of such defects an opportunity to amend should be allowed.[14]

d. Amendable Defects. The injunction should not be dissolved because of defects that have been or may be amended.[15]

2. Want of Equity in the Bill. In cases where the injunction was improvidently granted because of the want of equity in the bill, it will be dissolved on motion either before or after answer.[16] And it is immaterial that the answer

9. Avery *v.* Onillon, 10 La. Ann. 127 (vagueness of injunction); Brodie *v.* Cronly, 3 Edw. Ch. 355 (antedating the injunction).

The existence of a previous injunction inconsistent with the one dissolution of which is sought is sufficient ground for granting the motion. People's R. Co. *v.* Syracuse, etc., R. Co., 6 N. Y. Suppl. 326. But not in case the prior injunction is merely to the same effect as the later one. McKim *v.* Fulton, 1 Overt. (Tenn.) 238. And the granting of a second injunction on cross complaint of defendant does not necessarily dissolve or modify the first injunction. State *v.* Fawcett, (Nebr. 1902) 89 N. W. 273.

Failure to file the papers upon which the injunction was granted, or illegibility thereof, is ground for dissolving. Johnson *v.* Casey, 28 How. Pr. (N. Y.) 492. But when such failure was due to inadvertence the court has discretion to refuse to dissolve on proper terms. Leffingwell *v.* Chave, 19 How. Pr. (N. Y.) 54.

An injunction issued without notice, when no cause was shown for so doing, will be dissolved. Hovnanian *v.* Bedessern, 63 Ill. App. 353.

An injunction granted without prayer therefor in the bill will be dissolved. Brannock *v.* Moll, 2 Bland (Md.) 106 note. And see Taylor *v.* Snyder, Walk. Ch. (Mich.) 490.

Failure of the complainant to comply with the terms upon which the injunction issued is ground for dissolving it. Carson Min. Co. *v.* Hill, 7 Colo. App. 141, 42 Pac. 678.

An injunction granted contrary to statute will be set aside without putting defendant to his motion to dissolve. Marlatt *v.* Perrine, 17 N. J. Eq. 49.

10. Lodomillo Dist. Tp. *v.* Cass Dist. Tp., 54 Iowa 115, 6 N. W. 163; Payne *v.* Cowan, Sm. & M. Ch. (Miss.) 26; Phœnix Foundry, etc., Co. *v.* North River Constr. Co., 6 N. Y. Civ. Proc. 106. But see Menzies *v.* Rodrigues, 1 Price 92.

The service may be set aside but the injunction will not be dissolved. Penfield *v.* White, 8 How. Pr. (N. Y.) 87.

Service of the injunction on defendant's attorney and not on defendant has been held not to be such an irregularity as to warrant dissolving the injunction. Becker *v.* Hager, 8 How. Pr. (N. Y.) 68. But see Johnson *v.* Casey, 28 How. Pr. (N. Y.) 492.

11. Lash *v.* McCormick, 14 Minn. 482; West *v.* Smith, 2 N. J. Eq. 309. *Compare* Corey *v.* Voorhies, 2 N. J. Eq. 5.

A failure to serve an amended bill is no reason for dissolving when the proposed amendments were set out in the order for the injunction so that defendant had notice of them. Taylor *v.* Hall, 29 Grant Ch. (U. C.) 101.

12. Tantum *v.* West, (N. J. Ch. 1886) 3 Atl. 338.

13. Barrow *v.* Richardson, 23 La. Ann. 203; Robertson *v.* Travis, 4 La. Ann. 151; Judson *v.* Connolly, 3 La. Ann. 466; Catlett *v.* McDonald, 13 La. 44; Reboul *v.* Behrens, 5 La. 79; Youngblood *v.* Schamp, 15 N. J. Eq. 42; Hicks *v.* Derrick, 17 Pa. Co. Ct. 605.

That the allegations are sworn to upon information and belief is sufficient ground for dissolving. Lee *v.* Clark, 49 Ga. 81. See Pullen *v.* Baker, 41 Tex. 419.

The filing of an unverified and unnecessary amendment to the bill is no ground for dissolving. Maddox *v.* Rowe, 28 Ga. 61.

14. Forney *v.* Calhoun County, 84 Ala. 215, 4 So. 153; Jacoby *v.* Goetter, 74 Ala. 427.

The federal courts will not dissolve an injunction on removal of the cause from a state court, on the ground that the bill filed in the state court was not verified according to federal chancery practice. Smith *v.* Schwed, 6 Fed. 455, 4 McCrary 441.

Failure of officer taking affidavit to sign the jurat as ground for dismissing injunction see Affidavits, 2 Cyc. 31.

15. Gamble *v.* Campbell, 6 Fla. 347; Sweatt *v.* Faville, 23 Iowa 321; Fisher *v.* Wilson, 1 Grant Ch. (U. C.) 218.

16. *Alabama.*— Morrison *v.* Coleman, 87 Ala. 655, 6 So. 374, 5 L. R. A. 384; Harrison *v.* McCrary, 37 Ala. 687; Miller *v.* Bates, 35 Ala. 580; Norris *v.* Norris, 27 Ala. 519; Cave *v.* Webb, 22 Ala. 583.

California.— Harris *v.* McGregor, 29 Cal. 124.

District of Columbia.— Macfarland *v.* Washington, etc., R. Co., 18 App. Cas. 456.

Georgia.— Armstead *v.* Smith, 115 Ga. 428, 41 S. E. 583; Howard *v.* Lowell Mach. Co.,

does not deny the equities,[17] or admits all the allegations of the bill,[18] or is defective in form or substance.[19]

3. Laches of Complainant. A preliminary injunction will be dissolved in case of unreasonable delay on the part of the complainant in prosecuting his suit in equity,[20]

75 Ga. 325; Cabiness *v.* Crawford, 21 Ga. 312; Miller *v.* Maddox, 21 Ga. 327; Read *v.* Dews, R. M. Charlt. 358.

Illinois.— Fahs *v.* Roberts, 54 Ill. 192.

Indiana.— Sutherland *v.* Lagro, etc., Plank Road Co., 19 Ind. 192.

Iowa.— Ellison *v.* Smyth, 75 Iowa 570, 39 N. W. 898.

Kansas.— Holderman *v.* Jones, 52 Kan. 743, 34 Pac. 352.

Kentucky.— Beard *v.* Geran, Hard. 12.

Michigan.— Eldred *v.* Camp, Harr. 162; Cooper *v.* Alden, Harr. 72.

New Jersey.— Smith *v.* Kuhl, 25 N. J. Eq. 39; Morris Canal, etc., Co. *v.* Biddle, 4 N. J. Eq. 222. *Compare* Conover *v.* Ruckman, 32 N. J. Eq. 685.

New York.— Moser *v.* Polhamus, 4 Abb. Pr. N. S. 442.

West Virginia.— Null *v.* Elliott, 52 W. Va. 229, 43 S. E. 173; Morehead *v.* De Ford, 6 W. Va. 316; White Sulphur Springs Co. *v.* Robinson, 3 W. Va. 542; Hyre *v.* Hoover, 3 W. Va. 11.

United States.— Kidwell *v.* Masterson, 14 Fed. Cas. No. 7,758, 3 Cranch C. C. 52.

See 27 Cent. Dig. tit. "Injunction," § 364.

No prima facie case being made out in the petition, the injunction is properly dissolved on motion. Henderson *v.* Marcell, 1 Kan. 137.

Upon sustaining a demurrer to the entire bill the injunction must be dissolved in the absence of an amendment. Clark *v.* Noblesville, 44 Ind. 83; Phillips *v.* Sioux Falls, 5 S. D. 524, 59 N. W. 881; O'Neal *v.* Wills Point Bank, 64 Tex. 644.

The sustaining of a demurrer to the portion of a bill on the strength of which an injunction has been granted is in effect a dissolution of the injunction. Thomsen *v.* McCormick, 136 Ill. 135, 26 N. E. 373.

If the bill is held insufficient on appeal and the case is remanded, a motion to dissolve the temporary injunction should be granted. Pfister *v.* Wade, 59 Cal. 273. But the injunction may be saved by filing an amended bill. Shipman *v.* Superior Ct., (Cal. 1887) 12 Pac. 787.

After appeal.— Where a preliminary injunction is granted in an action to try the right to a mining claim, and on appeal a judgment in favor of plaintiff is reversed on matter of evidence only and a new trial granted, the granting of such new trial does not entitle defendant to a dissolution or modification of the injunction. Hess *v.* Winder, 34 Cal. 270.

17. Bishop *v.* Wood, 59 Ala. 253; Quackenbush *v.* Van Riper, 1 N. J. Eq. 476.

18. Nelson *v.* Dunn, 15 Ala. 501.

19. Hart *v.* Clark, 54 Ala. 490; Chesapeake, etc., Canal Co. *v.* Baltimore, etc., R. Co., 4 Gill & J. (Md.) 1.

20. *Delaware.*— Russell *v.* Stockley, 4 Del. Ch. 567.

Illinois.— Classen *v.* Danforth, 56 Ill. App. 552.

New Jersey.— Hendrickson *v.* Norcross, 19 N. J. Eq. 417; Huffman *v.* Hummer, 17 N. J. Eq. 263; Dodd *v.* Flavell, 17 N. J. Eq. 255; Schalk *v.* Schmidt, 14 N. J. Eq. 268; Hoagland *v.* Titus, 14 N. J. Eq. 81; Brown *v.* Fuller, 13 N. J. Eq. 271; Robinson *v.* Davis, 11 N. J. Eq. 302, 69 Am. Dec. 591; Lee *v.* Cargill, 10 N. J. Eq. 331; Greenin *v.* Hoey, 9 N. J. Eq. 137; West *v.* Smith, 2 N. J. Eq. 309; Corey *v.* Voorhies, 2 N. J. Eq. 5.

New York.— Mallett *v.* Weybossett Bank, 1 Barb. 217; Seebor *v.* Hess, 5 Paige 85; Ward *v.* Van Bokkelen, 1 Paige 100; Higgins *v.* Woodward, Hopk. 390; Depeyster *v.* Graves, 2 Johns. Ch. 148 (even though some of defendants have not answered); Hastings *v.* Palmer, Clarke 52.

North Carolina.— Coward *v.* Chastain, 99 N. C. 443, 6 N. E. 703, 6 Am. St. Rep. 533, failure to appear at hearing.

Pennsylvania.— Butler *v.* Egge, 170 Pa. St. 239, 32 Atl. 402; Barrett *v.* Workingmen's Bldg., etc., Assoc., 5 Lanc. L. Rev. 269; White *v.* Schlect, 14 Phila. 88 (one year); Parker *v.* Spillin, 10 Phila. 8 (ten years); Huey *v.* Union Passenger R. Co., 18 Wkly. Notes Cas. 26 (several days' delay).

South Carolina.— Hunt *v.* Smith, 3 Rich. Eq. 465, sixteen years' delay.

Vermont.— Howe *v.* Willard, 40 Vt. 654.

Virginia.— Motley *v.* Frank, 87 Va. 432, 13 S. E. 26.

United States.— Bradley *v.* Reed, 3 Fed. Cas. No. 1,785, 3 Pittsb. (Pa.) 519.

England.— Morice *v.* Bank of England, W. Kel. 43. See Burgess *v.* Burgess, 3 De G. M. & G. 896, 17 Jur. 292, 22 L. J. Ch. 675, 52 Eng. Ch. 696, 42 Eng. Reprint 351.

Canada.— Winnipeg, etc., R. Co. *v.* Mann, 6 Manitoba 409.

See 27 Cent. Dig. tit. "Injunction," § 368.

Pendency of negotiations for settlement.— In the exercise of its discretion, the court may decline to dismiss a suit during the pendency of negotiations for a settlement if such negotiations are diligently prosecuted. Brown *v.* Fuller, 13 N. J. Eq. 271.

Delay in obtaining the injunction is not ground for dissolving it (Pugh *v.* Maer, 11 N. C. 362), unless defendant is inequitably prejudiced thereby (Collings *v.* Camden, 27 N. J. Eq. 293. *Compare* Butler *v.* Egge, 170 Pa. St. 239, 32 Atl. 402).

A plea of limitations set up in an answer is not sufficient ground for dissolving the injunction. White *v.* Flannigain, 1 Md. 525, 54 Am. Dec. 668; Hutchins *v.* Hope, 12 Gill & J. (Md.) 244.

An injunction to restrain an action at law will not be continued when it is based merely

or his action at law for the determination of his right,[21] especially where defendant is being deprived of the use of property or is otherwise suffering loss because of the restraint.[22] So the injunction may be dissolved because of neglect to serve the subpœna,[23] of failure to file or to serve a copy of the bill,[24] or of delay in taking testimony.[25] However, if there is a reasonable excuse for the delay, a dissolution will not be granted on the ground of laches.[26]

4. Fraud and Misrepresentation. The injunction will be dissolved without any showing of other grounds, when it appears to the court that the complainant's suit is collusive or in bad faith,[27] that the complainant's previous conduct does not entitle him to equitable consideration,[28] or that he has obtained the preliminary injunction by either careless or intentional misrepresentation of the facts,[29] or by suppressing facts which good faith required him to disclose.[30]

5. Misjoinder or Non-Joinder of Parties. A misjoinder of complainants is not

upon the staleness of the claim forming the ground of the action. Horner *v.* Jobs, 13 N. J. Eq. 19.

21. Parker *v.* Winnipiseogee Lake Cotton, etc., Mfg. Co., 2 Black (U. S.) 545, 17 L. ed. 333.

22. Collings *v.* Camden, 27 N. J. Eq. 293 (laches in not filing the bill); Dodd *v.* Flavell, 17 N. J. Eq. 255.

23. Payne *v.* Cowan, 1 Sm. & M. Ch. (Miss.) 26; West *v.* Smith, 2 N. J. Eq. 309; Hightour *v.* Rush, 3 N. C. 552. See Lee *v.* Cargill, 10 N. J. Eq. 331; Mallett *v.* Weybossett Bank, 1 Barb. (N. Y.) 217; Depeyster *v.* Graves, 2 Johns. Ch. (N. Y.) 149; Hastings *v.* Palmer, Clarke (N. Y.) 52; Grey *v.* Northumberland, 17 Ves. 281, 34 Eng. Reprint 109.

Sheriff's return conclusive.— Upon a motion to dissolve an injunction on the ground that the subpœna has not been served the sheriff's return of the subpœna is conclusive and cannot be contradicted by affidavits unless collusion be shown between the sheriff and the complainant or his solicitor. Corey *v.* Voorhies, 2 N. J. Eq. 5.

Necessity for delay.— Delay in issuing the subpœna is not ground for dissolving, in case such delay was reasonably required for complainant's protection. Schermerhorn *v.* L'Espennasse, 21 Fed. Cas. No. 12,454, 2 Dall. 360.

One upon whom a subpœna has been served is not entitled to dissolution because other defendants have not been served. Seebor *v.* Hess, 5 Paige (N. Y.) 85.

24. Prettyman *v.* Ratcliffe, 4 Del. Ch. 29; Furgison *v.* Robinson, Hopk. (N. Y.) 8; Heron *v.* Swisher, 13 Grant Ch. (U. C.) 438.

25. Perry *v.* Wittich, 37 Fla. 237, 20 So. 238 (delay of seven years); Hoagland *v.* Titus, 14 N. J. Eq. 81.

26. Smith *v.* Cooper, 21 Ga. 359; Schermerhorn *v.* Merrill, 1 Barb. (N. Y.) 511.

Delay because defendant is abroad and beyond reach of process is not ground for dissolving. Read *v.* Consequa, 20 Fed. Cas. No. 11,606, 4 Wash. 174. See also Scarlett *v.* Hicks, 13 Fla. 314.

27. Kimball *v.* Hewitt, 15 Daly (N. Y.) 124, 3 N. Y. Suppl. 756; Shimer *v.* Easton St. R. Co., 7 North. Co. Rep. (Pa.) 249.

An injunction protecting an exclusive privilege to supply electric lights will be dissolved on a showing that the complainant company has transferred its stock to a gas company to defeat the use of electric lights altogether. Scranton Electric Light, etc., Co. *v.* Scranton Illuminating, etc., Co., 4 Com. Pl. (Pa.) 18.

28. Hill *v.* Averett, 27 Ala. 484; Leigh *v.* Clark, 11 N. J. Eq. 110.

29. *New Jersey.*— Endicott *v.* Mathis, 9 N. J. Eq. 110.

Tennessee.— Black *v.* Higgins, 2 Tenn. Ch. 780.

United States.— Cœur d'Alene Consol. & Min. Co. *v.* Miners' Union, 51 Fed. 260, 19 L. R. A. 382.

England.— Wimbledon Local Bd. *v.* Croydon Sanitary Authority, 32 Ch. D. 421.

Canada.— Burbank *v.* Webb, 5 Manitoba 264.

See 27 Cent. Dig. tit. "Injunction," § 369.

Unintentional and immaterial misstatements do not affect complainant's right to continuance of the injunction. Frome *v.* Warren County, 33 N. J. Eq. 464.

Disregarding misstatements.— The court may in a strong case continue an injunction notwithstanding misstatements, when a good case is made out otherwise, and the maintenance of the *status quo* cannot harm defendant. But the complainant may be required to pay costs of motion. Winnipeg, etc., R. Co. *v.* Mann, 6 Manitoba 409.

30. *Maryland.*— Tifel *v.* Jenkins, 95 Md. 665, 53 Atl. 429.

Pennsylvania.—Mullen *v.* Springfield Water Co., 8 Del. Co. 265, 15 York Leg. Rec. 58.

Tennessee.— Black *v.* Huggins, 2 Tenn. Ch. 780.

England.— Hilton *v.* Granville, 4 Beav. 130, 49 Eng. Reprint 288, Cr. & Ph. 283, 18 Eng. Ch. 283, 41 Eng. Reprint 498, 10 L. J. Ch. 398; Dease *v.* Plunkett, Drury 255; Hemphill *v.* McKenna, 2 C. & L. 76, 3 Dr. & War. 183, 6 Ir. Eq. 57; Dalglish *v.* Jarvie, 2 Hall & T. 437, 47 Eng. Reprint 1754, 14 Jur. 945, 20 L. J. Ch. 475, 2 Macn. & G. 231, 48 Eng. Ch. 178, 42 Eng. Reprint 89; Randall *v.* Commercial R. Co., 8 L. J. Ch. 252; Harbottle *v.* Pooley, 20 L. T. Rep. N. S. 436.

Canada.— Poirier *v.* Blanchard, 16 Can. L. T. Occ. Notes 295, 1 N. Brunsw. Eq. 322; Hynes *v.* Fisher, 4 Ont. 60; Ley *v.* McDonald, 2 Grant Ch. (U. C.) 398.

See 27 Cent. Dig. tit. "Injunction," § 369.

ground for a motion to dissolve.[31] And a defect of parties is not necessarily ground for dissolving,[32] although in case it appears to the court that justice cannot be done in the absence of certain parties, the injunction will be dissolved unless those parties can be and are brought in.[33]

C. Grounds For Refusal to Dissolve. Where it is apparent that the complainant, in case his injunction is dissolved, would be immediately entitled to the same remedy upon a new application, the motion to dissolve should be denied.[34]

D. Balance of Convenience — 1. In General. In continuing and dissolving injunctions, the relative inconvenience to be suffered by the parties may be of controlling weight. For instance, although the answer denies all the equity of the bill, yet the injunction will be continued in case its dissolution might thwart the object of the litigation and render a subsequent victory by the complainant of no avail.[35] So where the dissolution would work irreparable injury to the complainant, or greater injury to him than its continuance would cause defendant, the injunction should be continued.[36] If the continuance will work no injury but

31. Gill *v.* Ferris, 82 Mo. 156; Johnson *v.* Vail, 14 N. J. Eq. 423; Abraham *v.* Plestoro, 3 Wend. (N. Y.) 538, 20 Am. Dec. 738. See also Hoffman *v.* Wheelock, 62 Wis. 434, 22 N. W. 713, 716.

The objection that a bill is multifarious cannot be made on motion to dissolve but only on final hearing. Shirley *v.* Long, 6 Rand. (Va.) 764; Beall *v.* Shaull, 18 W. Va. 258.

32. Irick *v.* Black, 17 N. J. Eq. 189.

The objection should be taken by answer. Astie *v.* Leeming, 3 Abb. N. Cas. (N. Y.) 25.

33. Robertson *v.* Bosque, 6 La. 306; Harrison *v.* Morton, 4 Hen. & M. (Va.) 483; Eldred *v.* American Palace-Car Co., 105 Fed. 457, 44 C. C. A. 554.

34. Kivel *v.* Wharton, 5 Ky. L. Rep. 423; Cotten *v.* Christen, 110 La. 444, 34 So. 597; Savoie *v.* Thibodeaux, 28 La. Ann. 169; Dupre *v.* Swafford, 25 La. Ann. 222; Ward *v.* Douglass, 22 La. Ann. 463; Henderson *v.* Maxwell, 22 La. Ann. 357; Woolfolk *v.* Woolfolk, 22 La. Ann. 206; Lafleur *v.* Mouton, 8 La. Ann. 489; Woodward *v.* Dashiell, 15 La. 184; Morgan *v.* Whitesides' Curator, 14 La. 277; Campbell *v.* His Creditors, 8 La. 71; Dutton *v.* Dupuy, 5 La. 61; Eastin *v.* Dugat, 4 La. 397; Landry *v.* L'Eglise, 3 La. 219; Hudson *v.* Dangerfield, 2 La. 63, 20 Am. Dec. 297; Louisiana Ins. Co. *v.* Morgan, 8 Mart. N. S. 680; Crane *v.* Baillio, 7 Mart. N. S. 273; Bushnell *v.* Brown, 4 Mart. (N. S.) 499; Exnicios *v.* Weiss, 3 Mart. (N. S.) 480; Mosser *v.* Pequest Min. Co., 26 N. J. Eq. 200.

New grounds shown by answer.— So an injunction will be continued even though the answer denies the equity of the bill, in case the answer in so doing merely makes out another case upon which the complainant would equally be entitled to an injunction. Plunkett *v.* Dillon, 3 Del. Ch. 496. *Compare* Crane *v.* Ely, 37 N. J. Eq. 564.

A stipulation to continue pending the final determination of the cause is sufficient ground for denying a motion to vacate. Maggs *v.* Morgan, 30 Wash. 604, 71 Pac. 188.

The absence or negligence of the solicitor on the hearing is not sufficient reason for refusing to dissolve. Heck *v.* Vollmer, 29 Md. 507.

35. *Michigan.*— Atty.-Gen. *v.* Oakland County Bank, Walk. Ch. 90.

Mississippi.— Stewart *v.* Belt, (1896) 19 So. 957; Madison County *v.* Paxton, 56 Miss. 679.

New Jersey.— Hoagland *v.* Titus, 14 N. J. Eq. 81; Fleischman *v.* Young, 9 N. J. Eq. 620.

New York.— Hart *v.* Ogdensburg, etc., R. Co., 20 N. Y. Suppl. 918; Hammond *v.* Hammond, Clarke 151.

North Carolina.— Blackwell Durham Tobacco Co. *v.* McElwee, 94 N. C. 425.

Ohio.— Hepburn *v.* Voute, 10 Ohio S. & C. Pl. Dec. 311, 7 Ohio N. P. 290.

Tennessee.— Owen *v.* Brien, 2 Tenn. Ch. 295.

Texas.—Friedlander *v.* Ehrenworth, 58 Tex. 350.

See 27 Cent. Dig. tit. "Injunction," § 359.

Multiplicity of suits.— The injunction will be continued where defendants are numerous and pecuniarily irresponsible, and if the complainant should later establish his right his only remedy would lie in a multiplicity of suits and would be of little avail. Britton *v.* Hill, 27 N. J. Eq. 389.

36. *Alabama.*— Planters', etc., Bank *v.* Laucheimer, 102 Ala. 454, 15 So. 776; Scholze *v.* Steiner, 100 Ala. 148, 14 So. 552; Harrison *v.* Yerby, 87 Ala. 185, 6 So. 3.

California.— Hicks *v.* Compton, 18 Cal. 206.

Delaware.— Kersey *v.* Fash, 3 Del. Ch. 321.

Florida.— Linton *v.* Denham, 6 Fla. 533.

Louisiana.— Brown *v.* Brown, 30 La. Ann. 506; De La Croix *v.* Villere, 11 La. Ann. 39

Mississippi.— Jones *v.* Brandon, 60 Miss. 556.

New Jersey.— Chetwood *v.* Brittan, 2 N. J. Eq. 438.

New York.— Metropolitan El. R. Co. *v.* Manhattan R. Co., 65 How. Pr. 277.

North Carolina.— Marshall *v.* Stanly County, 89 N. C. 103; Williamston, etc., R. Co. *v.* Battle, 66 N. C. 540; Blossom *v.* Van Amringe, 62 N. C. 133; Peterson *v.* Matthis, 56 N. C. 31; Troy *v.* Norment, 55 N. C. 318;

will merely maintain the *status quo* the injunction will not be dissolved.[37] On the other hand, when it appears that the complainant will suffer no irreparable injury in case of dissolution, and defendant's answer fully meets the equity of the bill, the injunction will be dissolved.[38] It will also be dissolved in case it appears that greater injury is being done by its continuance than will be done by its dissolution, especially where the equities of the bill are fully answered.[39]

Purnell *v.* Daniel, 43 N. C. 9; McBrayer *v.* Hardin, 42 N. C. 1, 53 Am. Dec. 389.

Pennsylvania.— Williamsport, etc., R. Co. *v.* Philadelphia, etc., R. Co., 8 Pa. Co. Ct. 10.

Tennessee.— Edgefield Ladies' Ben. Soc. No. 2 *v.* Edgefield Ben. Soc. No. 2, 2 Tenn. Ch. 77.

Canada.— Taylor *v.* Hall, 29 Grant Ch. (U. C.) 101.

The cutting off of a water-supply will work much greater damage than will a continued refusal to pay the price asked, and an injunction will be continued. Van Nest Land, etc., Co. *v.* New York, etc., Water Co., 7 N. Y. App. Div. 295, 40 N. Y. Suppl. 212.

The cutting off of sewer connections has been prevented and the injunction not dissolved for similar reasons, even though answer has been filed. Solomon *v.* Wilmington Sewerage Co., 133 N. C. 144, 45 S. E. 536.

See 27 Cent. Dig. tit. "Injunction," § 359.

37. Morris Canal, etc., Co. *v.* Jersey City, 11 N. J. Eq. 13; Carpenter *v.* Danforth, 19 Abb. Pr. (N. Y.) 225; Durham *v.* Richmond & D. R. Co., 104 N. C. 261, 10 S. E. 208; McBrayer *v.* Hardin, 42 N. C. 1, 53 Am. Dec. 389.

Denials and admissions.— Allegations that defendant has no intention of doing the acts charged are not sufficient reason for dissolving an injunction. Hammond *v.* Hammond, Clarke (N. Y.) 151. And if defendant, although otherwise fully answering the bill, asserts no right to do the acts sought to be prevented, the general rule that the injunction will be dissolved on the coming in of the answer does not apply. Davis *v.* Zimmerman, 91 Hun (N. Y.) 489, 36 N. Y. Suppl. 303.

Strikers who deny boycotting, as charged, are not, because of such denial alone, entitled to dissolution of the injunction. My Maryland Lodge No. 186 of Machinists *v.* Adt, 100 Md. 238, 59 Atl. 721, 38 L. R. A. 752.

38. *Alabama.*— Turner *v.* Stephens, 106 Ala. 546, 17 So. 706; Weems *v.* Roberts, 96 Ala. 378, 11 So. 434.

Maryland.— Cherry *v.* Stein, 11 Md. 1.

Minnesota.— Chamblin *v.* Slichter, 12 Minn. 276.

New Jersey.— Kent *v.* De Baun, 12 N. J. Eq. 220; Mullen *v.* Jennings, 9 N. J. Eq. 192; Greenin *v.* Hoey, 9 N. J. Eq. 137.

New York.— Storer *v.* Coe, 2 Bosw. 661; Steele *v.* Pittsburgh, etc., R. Co., 12 N. Y. Suppl. 576; Clinton Liberal Inst. *v.* Fletcher, 55 How. Pr. 431.

North Carolina.— James *v.* Markham, 125 N. C. 145, 34 S. E. 241.

Pennsylvania.— Jensen's Estate, 6 Pa. Co. Ct. 463; Berks, etc., Turnpike Road *v.* Lebanon Steam Co., 5 Pa. Co. Ct. 354.

England.— Barnard *v.* Wallis, Cr. & Ph. 85, 5 Jur. 813, 2 R. & Can. Cas. 162, 18 Eng. Ch. 85, 41 Eng. Reprint 422.

See 27 Cent. Dig. tit. "Injunction," § 367.

The filing of a lis pendens is ground for dissolving in case it affords adequate protection. Babcock *v.* Jones, 62 Hun (N. Y.) 565, 17 N. Y. Suppl. 67; Cornell *v.* Utica, etc., R. Co., 61 How. Pr. (N. Y.) 184.

If the final decree will give all the relief to which complainant is entitled, a preliminary injunction will be dissolved. Steele *v.* Pittsburgh, etc., R. Co., 58 Hun (N. Y.) 611, 12 N. Y. Suppl. 576.

An injury wholly completed prior to notice of the injunction is not sufficient ground for continuing the injunction. Delger *v.* Johnson, 44 Cal. 182; Dixon *v.* Greene County, 76 Miss. 794, 25 So. 665.

39. *Georgia.*— Wooding *v.* Malone, 30 Ga. 979.

Louisiana.— State *v.* American Cotton Oil Trust, 40 La. Ann. 8, 3 So. 409; Jefferson, etc., R. Co. *v.* New Orleans, 3 La. Ann. 970.

New Jersey.— Higgins *v.* Westervelt, 44 N. J. Eq. 254, 14 Atl. 118; Furman *v.* Clark, 11 N. J. Eq. 135; Clark *v.* Wood, 6 N. J. Eq. 458.

New York.— Ehrenreich *v.* Froment, 54 N. Y. App. Div. 196, 66 N. Y. Suppl. 597; People *v.* Conklin, 5 Hun 452; American Grocer Pub. Assoc. *v.* Grocer Pub. Co., 51 How. Pr. 402.

Rhode Island.— Thornton *v.* Grant, 10 R. I. 477, 14 Am. Rep. 701.

England.— Rigby *v.* Great Western R. Co., 1 Coop. t. Cott. 3, 47 Eng. Reprint 715, 10 Jur. 531, 2 Phil. 44, 22 Eng. Ch. 44, 41 Eng. Reprint 858; Hodgson *v.* Powis, 1 De G. M. & G. 6, 15 Jur. 1022, 21 L. J. Ch. 17, 50 Eng. Ch. 5, 42 Eng. Reprint 453; Shrewsbury, etc., R. Co. *v.* London, etc., R. Co., 14 Jur. 1125, 20 L. J. Ch. 90, 3 Macn. & G. 70, 49 Eng. Ch. 53, 42 Eng. Reprint 187; Atty.-Gen. *v.* Aspinall, 1 Jur. 812, 7 L. J. Ch. 51, 2 Myl. & C. 613, 14 Eng. Ch. 613, 40 Eng. Reprint 773.

See 27 Cent. Dig. tit. "Injunction," § 367.

Even though the injunction does no harm, it will be dissolved in case it is no longer necessary to protect the complainant (Mullen *v.* Jennings, 9 N. J. Eq. 192); or in case the complainant has no right to protect (Macfarland *v.* Washington, etc., R. Co., 18 App. Cas. (D. C.) 456).

Other adequate remedy.— It will be dissolved when the complainant has an adequate remedy at law. Freeman *v.* Elmendorf, 7 N. J. Eq. 475; Reynolds *v.* Gilman, 4 L. T. N. S. (Pa.) 41; Smith *v.* Power, 2 Tex. 57.

2. The Public Interest. The interests of the public and third persons will be given weight in considering a motion to dissolve.[40] For instance, where a public improvement is being interfered with by the continuance of the injunction a dissolution will be favored;[41] while if the dissolution of an injunction would cause interference with and confusion in the public schools, the injunction will be continued.[42]

E. Dissolution by Reason of Subsequent Events — 1. In General. A preliminary injunction will be dissolved when the reasons for granting it have ceased to exist and it can no longer serve any useful purpose.[43] So it will be dissolved in case the complainant has subsequently obtained in some other way all that he asked in his bill.[44] An injunction against an official is not dissolved merely upon the official's ceasing to hold the office.[45]

2. Death of Party. The abatement of a suit by the death of a party thereto does not ordinarily dissolve a preliminary injunction theretofore granted,[46] although in some cases the injunction has been held to fall with the death of defendant.[47] The proper procedure is for defendant, or his representatives in case of his death, to obtain an order that the complainant, or his representatives in case of his death, revive the suit by a fixed time or that the injunction be dissolved.[48]

Even though the equity of the bill is not answered, the court may in its discretion dissolve the injunction on grounds of relative convenience. Bechtel *v.* Carslake, 11 N. J. Eq. 244.

40. Manko *v.* Chambersburgh, 25 N. J. Eq. 168; Reinach *v.* Meyer, 55 How. Pr. (N. Y.) 283. *Compare* Emery *v.* Vansickel, 15 N. J. Eq. 144.

Danger from railroad crossing.— The fact that a railroad crossing will be dangerous to the public may cause an injunction to prevent such crossing to be continued till final hearing. Reynoldsville, etc., R. Co. *v.* Buffalo, etc., R. Co., 134 Pa. St. 541, 19 Atl. 674.

41. Mobile, etc., R. Co. *v.* Alabama Midland R. Co. 116 Ala. 51, 23 So. 57; Scanlan *v.* Howe, 24 N. J. Eq. 273.

42. Edinboro Normal School *v.* Cooper, 150 Pa. St. 78, 24 Atl. 348.

43. Gibson *v.* Powell, 96 Mo. App. 681, 70 S. W. 935; Wetmore *v.* Law, 34 Barb. (N. Y.) 515, 22 How. Pr. 130; Lowe *v.* Warren Canal Co., Wright (Ohio) 616; *In re* Jackson, 9 Fed. 493.

The negotiation of a note can do no injury after its maturity, and an injunction to restrain its negotiation will then be dissolved. Gaul *v.* Hoffman, 5 Pa. Co. Ct. 355.

The enforcement of an ordinance reducing rates will be restrained even after the expiration of the contract between the water company and the city whereby water was to be supplied at fixed rates, where the stock-holder suing alleges that the reduction will amount to an unlawful taking of property. Kimball *v.* Cedar Rapids, 100 Fed. 802.

The holder of an exclusive license is entitled to a continuance of the injunction protecting it even after his license expires, in case he has a right to a renewal, even though a renewal has been refused. Chard *v.* Stone, 7 Cal. 117.

44. Welch *v.* Parran, 2 Gill (Md.) 320; Wetmore *v.* Law, 34 Barb. (N. Y.) 515, 22 How. Pr. 130; Hanley *v.* Randolph County Ct., 50 W. Va. 439, 40 S. E. 389; Hostler *v.* Marlowe, 44 W. Va. 707, 30 S. E. 146; Lovell *v.* Chilton, 2 W. Va. 410; Baird *v.* Shore Line R. Co., 2 Fed. Cas. No. 759, 6 Blatchf. 461. See also Chenault *v.* George, 25 S. W. 4, 15 Ky. L. Rep. 649. *Compare* Hatch *v.* Wallamet Iron Bridge Co., 27 Fed. 673, where the dissolution of an injunction restraining the building of a bridge was refused, although there had been a change in the law and a corresponding alteration in the plans of the bridge.

Counter affidavits.— Where a defendant moves to dissolve because he has acquired a title subsequent to the filing of the bill, plaintiff may resist such application by any means in his power, whether stated in the bill or not. Grand Trunk R. Co. *v.* Credit Valley R. Co., 26 Grant Ch. (U. C.) 572.

45. Clark *v.* Wardwell, 55 Me. 61; People *v.* Connolly, 2 Abb. Pr. N. S. (N. Y.) 315.

46. Walsh *v.* Smyth, 3 Bland (Md.) 9; Hawley *v.* Bennett, 4 Paige (N. Y.) 163; Collier *v.* Newbern Bank, 21 N. C. 328.

47. Gewinner *v.* McCrary, 99 Ga. 299, 25 S. E. 648; Yocona Mills *v.* Gibbs, (Miss. 1900) 27 So. 647; Robertson *v.* Bingley, 1 McCord Eq. (S. C.) 333.

48. *Maryland.*— Griffith *v.* Bronaugh, 1 Bland 547.

New Jersey.— Cummins *v.* Cummins, 8 N. J. Eq. 173.

New York.— Hawley *v.* Bennett, 4 Paige 163; Leggett *v.* Dubois, 2 Paige 211.

Virginia.— Kenner *v.* Hord, 1 Hen. & M. 204; Carter *v.* Washington, 1 Hen. & M. 203; White *v.* Fitzhugh, 1 Hen. & M. 1.

England.— Hill *v.* Hoare, 2 Cox Ch. 50, 30 Eng. Reprint 24; Stuart *v.* Ancell, 1 Cox Ch. 411, 29 Eng. Reprint 1226.

See 27 Cent. Dig. tit. "Injunction," §§ 371, 393.

The evidence of defendant's death must be clear. Janson *v.* Solarte, 6 L. J. Exch. 75, 2 Y. & C. Exch. 127.

3. Amendment of Bill. The filing of an amendment to the bill may operate to render a temporary injunction ineffective, unless filed after leave of court and without prejudice to the injunction.[49]

4. Dismissal or Discontinuance. Upon the dismissal of the bill or the discontinuance of the suit the temporary injunction will be dissolved.[50]

5. Denial of Principal Relief. If the temporary restraint is merely ancillary to protect *pendente lite* a right of the complainant, it will be dissolved on motion upon a determination in another action that the complainant has no such right, or upon a finding in the suit for an injunction in favor of defendant.[51]

6. Entry of Final Decree. The entry of a final decree in the injunction suit renders a temporary injunction ineffective,[52] even though an appeal has been taken therefrom,[53] and a formal order of dissolution is not required.[54]

7. Lapse of Time. A preliminary injunction or temporary restraining order

Before administration.— The motion is not proper, when made after the death of complainant and before administration. Hill *v.* Jones, 5 N. C. 211.

49. *California.*— Barber *v.* Reynolds, 33 Cal. 497.

Georgia.— Semmes *v.* Columbus, 19 Ga. 471.

New York.— Selden *v.* Vermilya, 4 Sandf. Ch. 573, holding that the injunction continues in force, although the order granting leave to amend is silent on the subject.

Pennsylvania.— Rogers *v.* Ashbridge, 9 Pa. Dist. 195, 23 Pa. Co. Ct. 492.

England.— Harvey *v.* Hall, L. R. 11 Eq. 31, 23 L. T. Rep. N. S. 391; Atty.-Gen. *v.* Marsh, 13 Jur. 317, 18 L. J. Ch. 272, 16 Sim. 572, 39 Eng. Ch. 572, 60 Eng. Reprint 996; Bliss *v.* Boscawen, 2 Ves. & B. 101, 35 Eng. Reprint 257.

See 27 Cent. Dig. tit. "Injunction," § 392.

An amendment adding other defendants does not have the effect of dissolving the injunction. Fairchild *v.* House, 18 Fla. 770; Irick *v.* Black, 17 N. J. Eq. 189.

The dissolution is not as of course upon amendment, but the amendment cannot be used to sustain the injunction. Barnes *v.* Dickenson, 16 N. C. 330; Mason *v.* Murray, Dick. 536, 21 Eng. Reprint 378; Vere *v.* Glynn, Dick. 441, 21 Eng. Reprint 341; Brooks *v.* Purton, 6 Jur. 94, 11 L. J. Ch. 122, 1 Y. & Coll. 271, 20 Eng. Ch. 271, 62 Eng. Reprint 885; Welsh *v.* Hannan, 2 Sch. & Lef. 516; Davis *v.* Davis, 2 Sim. 515, 2 Eng. Ch. 515, 57 Eng. Reprint 881.

50. *Georgia.*— Old Hickory Distilling Co. *v.* Bleyer, 74 Ga. 201.

Illinois.— Gold *v.* Johnson, 59 Ill. 62.

Kentucky.— Shackelford *v.* Williams, 51 S. W. 614, 21 Ky. L. Rep. 422.

Maryland.— Wagoner *v.* Wagoner, 77 Md. 189, 26 Atl. 284.

New York.— Palmer *v.* Foley, 2 Abb. N. Cas. 191; Crockett *v.* Smith, 14 Abb. Pr. 62; Hope *v.* Acker, 7 Abb. Pr. 308; Hoyt *v.* Carter, 7 How. Pr. 140.

Ohio.— Krug *v.* Bishop, 9 Ohio Dec. (Reprint) 250, 11 Cinc. L. Bul. 295.

South Carolina.— Lewis *v.* Jones, 65 S. C. 157, 43 S. E. 525.

Tennessee.— Winslow *v.* Mulchey, (Ch. App. 1895) 35 S. W. 762.

United States.— Coleman *v.* Hudson River Bridge Co., 6 Fed. Cas. No. 2,983, 5 Blatchf. 56.

England.— Green *v.* Pulsford, 2 Beav. 70, 17 Eng. Ch. 70, 48 Eng. Reprint 1105; Willis *v.* Yates, Coop. t. Brough. 498, 47 Eng. Reprint 177; Blennerhasset *v.* Scanlan, 1 Hog. 363.

See 27 Cent. Dig. tit. "Injunction," § 392.

A dismissal of the suit for want of prosecution amounts to a dissolution of a temporary injunction. Dowling *v.* Polack, 18 Cal. 625.

That the dismissal was without prejudice makes no difference. Yale *v.* Baum, 70 Miss. 225, 11 So. 879.

Removal to a federal court may *ipso facto* dissolve a prior temporary injunction. Hatch *v.* Chicago, etc., R. Co., 11 Fed. Cas. No. 6,204, 6 Blatchf. 105. *Compare* Smith *v.* Schwed, 6 Fed. 455, 2 McCrary 441.

51. *Arkansas.*— Lyons *v.* Green, 68 Ark. 205, 56 S. W. 1075.

California.— Brennan *v.* Gaston, 17 Cal. 372.

Illinois.— Phelps *v.* Foster, 18 Ill. 309.

Kentucky.— Crook *v.* Turpin, 10 B. Mon. 243.

New Jersey.— Fulton *v.* Greacen, 44 N. J. Eq. 443, 15 Atl. 827.

West Virginia.— Atkinson *v.* Beckett, 36 W. Va. 438, 15 S. E. 179; Thompson *v.* Edwards, 3 W. Va. 659.

United States.— King *v.* Williamson, 80 Fed. 170, 25 C. C. A. 355; King *v.* Buskirk, 78 Fed. 233, 24 C. C. A. 82.

See 27 Cent. Dig. tit. "Injunction," § 392.

Incidental to receivership.— A temporary injunction pending an application for a receivership will not be continued after such application is denied. Walker *v.* House, 4 Md. Ch. 39.

Suit barred by limitations.— The injunction will not be dissolved because the main action is barred by the statute of limitations, when the statutory bar has not been pleaded. Littlejohn *v.* Leffingwell, 40 N. Y. App. Div. 13, 57 N. Y. Suppl. 839.

52. Sweeney *v.* Hanley, 126 Fed. 97, 61 C. C. A. 153.

53. Gardner *v.* Gardner, 87 N. Y. 14 [*reversing* 24 Hun 627].

54. Musgrave *v.* Staylor, 36 Md. 123.

will expire without motion to dissolve, in case it was granted to continue until a specified time and that time has elapsed.[55] Otherwise it will continue in effect until the hearing, unless sooner dissolved by order of court.[56]

8. Consent of Parties. The complainant may at any time waive the benefits of the injunction and consent to its dissolution, or he may render it ineffective by an agreement inconsistent with the terms of the injunction.[57]

F. Discretion of Court. The continuing or dissolving of a preliminary injunction lies within the sound discretion of the court.[58] However, this discretion is to be regulated by sound and just rules.[59] But in the absence of any

55. *Georgia.*— Powell *v.* Parker, 38 Ga. 644.

Texas.— Ft. Worth St. R. Co. *v.* Rosedale St. R. Co., 68 Tex. 163, 7 S. W. 381.

Virginia.— Beal *v.* Gibson, 4 Hen. & M. 481. *Compare* Turner *v.* Scott, 5 Rand. 332.

England.— Bolton *v.* London School Bd., 7 Ch. D. 766, 47 L. J. Ch. 461, 26 Wkly. Rep. 549.

Canada.— McCuaig *v.* Conmee, 19 Ont. Pr. 45.

See 27 Cent. Dig. tit. "Injunction," § 391.

An injunction granted in vacation in a federal court expires at the commencement of the next term. Gray *v.* Chicago, etc., R. Co., 10 Fed. Cas. No. 5,713, Woolw. 63. Otherwise in Iowa. Curtis *v.* Crane, 38 Iowa 459.

56. Scarlett *v.* Hicks, 13 Fla. 314; Jamison *v.* Knotts, 12 Rich. (S. C.) 190.

57. *Indiana.*— Baltimore, etc., R. Co. *v.* Wabash R. Co., 28 Ind. App. 185, 62 N. E. 520.

New Jersey.— Scudder *v.* Kilfoil, 57 N. J. Eq. 171, 40 Atl. 602.

South Carolina.— Duckett *v.* Dalrymple, 1 Rich. 143.

Tennessee.— Courtland Wagon Co. *v.* Shields, (Ch. App. 1899) 56 S. W. 278.

England.— Norway *v.* Ede, 6 Price 156.

See 27 Cent. Dig. tit. "Injunction," § 363.

58. *Alabama.*— Mobile School Com'rs *v.* Putnam, 44 Ala. 506.

California.— Schmidt *v.* Bitzer, (1903) 71 Pac. 563; White *v.* Nunan, 60 Cal. 406; Parrott *v.* Floyd, 54 Cal. 534; Payne *v.* McKinley, 54 Cal. 532; Patterson *v.* Santa Cruz County, 50 Cal. 344; De Godey *v.* Godey, 39 Cal. 157.

Georgia.— Howard *v.* Lowell Mach. Co., 75 Ga. 325; Clark *v.* Herring, 43 Ga. 226; Hollis *v.* Williams, 43 Ga. 214; Cubbedge *v.* Adams, 42 Ga. 124; Johnson *v.* Allen, 35 Ga. 252; Webb *v.* Wynn, 35 Ga. 216; Rainey *v.* Jones, 31 Ga. 111; Cash *v.* Williams, 30 Ga. 20; Buchanan *v.* Ford, 29 Ga. 490; Semmes *v.* Columbus, 19 Ga. 471; Cox *v.* Griffin, 18 Ga. 728; Loyless *v.* Howell, 15 Ga. 554.

Iowa.— Shricker *v.* Field, 9 Iowa 366.

Kansas — Wood *v.* Millspaugh, 15 Kan. 14.

Louisiana.— Cottam *v.* Currie, 42 La. Ann. 875, 8 So. 600.

Minnesota.— Todd *v.* Rustad, 43 Minn. 500, 46 N. W. 73.

Mississippi.— Jones *v.* Commercial Bank, 5 How. 43, 35 Am. Dec. 419.

Montana.— Cotter *v.* Cotter, 16 Mont. 63, 40 Pac. 63; Klein *v.* Davis, 11 Mont. 155, 27 Pac. 511.

New Jersey.— Jewett *v.* Dringer, 27 N. J. Eq. 271; Cammack *v.* Johnson, 2 N. J. Eq. 163.

New York.— Pfohl *v.* Sampson, 59 N. Y. 174; People *v.* Schoonmaker, 50 N. Y. 499; Paul *v.* Munger, 47 N. Y. 469; Van Dewater *v.* Kelsey, 1 N. Y. 533; Adams *v.* Grey, 11 Misc. 446, 32 N. Y. Suppl. 223; Ciancimino *v.* Man, 1 Misc. 121, 20 N. Y. Suppl. 702; Minor *v.* Terry, 6 How. Pr. 208; Roberts *v.* Anderson, 2 Johns. Ch. 202.

United States.— Buffington *v.* Harvey, 95 U. S. 99, 24 L. ed. 381; Nelson *v.* Robinson, 17 Fed. Cas. No. 10,114, Hempst. 464; Tucker *v.* Carpenter, 24 Fed. Cas. No. 14,217, Hempst. 440.

England.— Atty.-Gen. *v.* Aspinwall, 1 Jur. 812, 7 L. J. Ch. 613, 2 Myl. & C. 613, 14 Eng. Ch. 613, 40 Eng. Reprint 773; Caird *v.* Campbell, 1 Molloy 484.

See 27 Cent. Dig. tit. "Injunction," § 347.

Discretion to modify.— The court has discretion to modify its former order as well as to continue or to dissolve it. Hobbs *v.* Amador, etc., Canal Co., 66 Cal. 161, 4 Pac. 1147; Stanley *v.* Pollard, 5 Misc. (N. Y.) 490, 25 N. Y. Suppl. 766.

The admission of evidence on the hearing of a motion to dissolve is not discretionary, and for error a reversal of the order may be obtained. Bennett Bros. Co. *v.* Congdon, 20 Mont. 208, 50 Pac. 556.

59. Burnett *v.* Whitesides, 13 Cal. 156; Chetwood *v.* Brittan, 2 N. J. Eq. 438; Rowley *v.* Van Benthuysen, 16 Wend. (N. Y.) 369.

The court has no discretion, but must dissolve the injunction, where the only question is as to the validity of a statute, and from the face of the pleadings it appears that the complainant has no right. Burlington, etc., R. Co. *v.* Dey, 82 Iowa 312, 48 N. W. 98, 31 Am. St. Rep. 477, 12 L. R. A. 436.

Allegations on information and belief.— The discretion of the court is not abused in refusing to dissolve, even though some allegations of the complaint are on information and belief, where they are not all denied, and where they are supported by affidavits. Hiller *v.* Collins, 63 Cal. 235.

On an uncontradicted showing that the complainant was guilty of gross misconduct as an employee, an injunction restraining his dismissal should be dissolved. Miller *v.* Warner, 42 N. Y. App. Div. 208, 59 N. Y. Suppl. 956.

showing of abuse, the discretion of the chancellor will not be controlled by an appellate court.[60] The court has discretion to dissolve the injunction upon security to be given by defendant, even though complainant has sworn that an irreparable injury will occur.[61]

G. Dissolution of Court's Own Motion. The court may of its own motion, without notice, dissolve a temporary injunction where it is satisfied that it was improperly allowed.[62]

H. Authority of Court or Officer.[63] The court or judge who issued the temporary injunction has also the power to dissolve or modify it.[64] Motions to dissolve should, when it is convenient, be heard by the judge who issued the injunction and no other, although it is not necessary.[65] It is proper for the regular judge to dissolve or modify an injunction granted by another temporarily called in from another court.[66] In fact the outside judge has no authority over the matter after he ceases sitting in the court of issuance.[67] The motion to dissolve must generally be heard in the district and in the same court in which the suit is pending.[68]

The relative inconvenience to be suffered by the parties should largely control the exercise of the court's discretion. Mabel Min. Co. *v.* Pearson Coal, etc., Co., 121 Ala. 567, 25 So. 754.

60. *Georgia.*— Robenson *v.* Ross, 40 Ga. 375.

Indiana.— Appelgate *v.* Edwards, 45 Ind. 239.

Minnesota.— Stillwater Water Co. *v.* Farmer, 92 Minn. 230, 99 N. W. 882.

New York.— Content *v.* Metropolitan St. R. Co., 73 N. Y. App. Div. 230, 76 N. Y. Suppl. 749 [*affirming* 37 Misc. 618, 76 N. Y. Suppl. 151].

Pennsylvania.— Harley *v.* Meshoppen Water Co., 174 Pa. St. 416, 34 Atl. 568.

Wisconsin.— Valley Iron Works Mfg. Co. *v.* Goodrick, 103 Wis. 436, 78 N. W. 1096.

See 27 Cent. Dig. tit. "Injunction," § 347.

A dissolution because of a defective jurat will not be disturbed, even though the court might have allowed an amendment. Simms *v.* Redding, 20 Tex. 386.

61. Fouché *v.* Rome St. R. Co., 84 Ga. 233, 10 S. E. 726; Cameron *v.* Godchaux, 48 La. Ann. 1345, 20 So. 710; State *v.* Judge Dist. Ct., 38 La. Ann. 49; Crescent City Live Stock Landing, etc., Co. *v.* Butchers' Union Slaughter-House, etc., Co., 33 La. Ann. 930; Crescent City Live-Stock Landing, etc., Co. *v.* Jefferson Parish Police Jury, 32 La. Ann. 1192; State *v.* Judge Super. Dist. Ct., 29 La. Ann. 360.

62. Conover *v.* Ruckman, 33 N. J. Eq. 303.

63. For dissolution or modification of injunction at chambers or in vacation see JUDGES.

64. *California.*— Creanor *v.* Nelson, 23 Cal. 464.

Louisiana.— State *v.* King, 46 La. Ann. 163, 15 So. 283.

Tennessee.— Dibrell *v.* Williams, 3 Coldw. 528.

Texas.— Ellis *v.* Harrison, 24 Tex. Civ. App. 13, 56 S. W. 592, 57 S. W. 984; Modisett *v.* Kalamazoo Nat. Bank, 23 Tex Civ. App. 589, 56 S. W. 1007.

Utah.— Bullion, etc., Min. Co. *v.* Eureka Hill Min. Co., 5 Utah 182, 12 Pac. 660.

See 27 Cent. Dig. tit. "Injunction," § 349.

In New York there are conflicting decisions as to the power of a county judge to continue injunctions on hearing of an order to show cause. Hathaway *v.* Warren, 44 How. Pr. (N. Y.) 161; Middletown *v.* Rondont, etc., R. Co., 43 How. Pr. (N. Y.) 144.

In South Carolina the surrogate judge cannot review his order granting a temporary injunction after notice and hearing. Jordan *v.* Wilson, 69 S. C. 52, 48 S. E. 37.

A court without jurisdiction to grant a temporary restraining order is without jurisdiction to continue it. Taylor *v.* Southern Pac. Co., 122 Fed. 147.

Clerk of court.— A continuance must be granted by the court or judge on hearing, not by the clerk on præcipe. Rex *v.* Freeman, 1 Ch. Chamb. 350.

65. Welch *v.* People, 38 Ill. 20; Martin *v.* O'Brien, 34 Miss. 21; Koehler *v.* Farmers', etc., Bank, 14 N. Y. Civ. Proc. 71; Harold *v.* Hefferman, 42 How. Pr. (N. Y.) 241; Ramsey *v.* Erie R. Co., 38 How. Pr. (N. Y.) 193; Ide *v.* Crosby, 104 Fed. 582; Westerly Waterworks *v.* Westerly, 77 Fed. 783; Klein *v.* Fleetford, 35 Fed. 98.

If the injunction was granted at chambers, it is not necessary to apply for a dissolution to the same judge who issued the order. Woodruff *v.* Fisher, 17 Barb. (N. Y.) 224.

In Louisiana the modifying or rescinding order should be reviewed on certiorari by the judge of the particular division who has control of the case by allotment at the time of application for the writ. State *v.* King, 46 La. Ann. 163, 15 So. 283.

A special surrogate has no power, on an *ex parte* application, to vacate an injunction granted by a county judge in an action brought in the supreme court. People *v.* Van Buren, 18 N. Y. Suppl. 734.

66. Borland *v.* Thornton, 12 Cal. 440; Mason *v.* Cromwell, 3 Okla. 240, 41 Pac. 82.

67. Wooley *v.* Russ, 23 La. Ann. 580.

68. Adams *v.* Kyzer, 61 Miss. 407; Koehler *v.* Farmers', etc., Bank, 14 N. Y.

I. Parties Entitled to Move to Dissolve — 1. In General. In general only a party to the suit can move to dissolve the injunction,[69] and he must have a substantial interest;[70] but a defendant who has not been served may appear and move to dissolve.[71]

2. Parties in Contempt. One who is in contempt of court for disobeying its injunction cannot move to dissolve until he purges himself of the contempt.[72] However, the mere fact that the moving party has violated the injunction, where he has not been adjudged guilty of contempt, does not preclude the motion.[73] Especially is this so where the nature and extent of the punishment to be inflicted for the contempt must depend somewhat upon the determination of the motion to dissolve.[74] However, the fact that defendant is in contempt will influence the court against granting his motion in so far as the decision is discretionary.[75]

J. Parties Entitled to Oppose Dissolution. Aside from the original complainants, the dissolution of an injunction may be opposed by new parties who have been properly brought in as complainants;[76] but interveners cannot oppose unless they show that they themselves would have been entitled to the issuance of the injunction.[77]

K. Time For Motion.[78] A motion to dissolve may be made before an answer is filed.[79] Of course the injunction will not be dissolved on motion before answer

Civ. Proc. 71; Phœnix Foundry, etc., Co. *v.* North River Constr. Co., 6 N. Y. Civ. Proc. 106. But see Matter of Porter, 30 N. Y. App. Div. 251, 51 N. Y. Suppl. 613; Mauney *v.* Montgomery County, 71 N. C. 486.

In Ohio the supreme court cannot dissolve an injunction issued in a suit in chancery pending in the court of common pleas. Carey *v.* Wyandot Co. Com'rs, 20 Ohio 624; Griffith *v.* Crawford County Com'rs, 20 Ohio 609. But a judge of the supreme court has unlimited jurisdiction as a judge of the district court and may dissolve an injunction issued therein, even though application is made to him in a different county. Baldwin *v.* Hillsborough, etc., R. Co., 1 Ohio Dec. (Reprint) 532, 10 West. L. J. 337. See Pittsburg, etc., R. Co. *v.* Hurd, 17 Ohio St. 144.

In South Carolina, although the supreme court may issue injunctions, it cannot dissolve an injunction granted by the circuit court. State *v.* Westmoreland, 27 S. C. 625, 7 S. E. 256.

A court commissioner has only such power to dissolve an injunction as is conferred upon him by the court referring the matter to him. Stone *v.* Bunker Hill Copper, etc., Min. Co., 28 Cal. 497.

69. Linn *v.* Wheeler, 21 N. J. Eq. 231. But see Robertson *v.* Bosque, 6 La. 306.

70. James *v.* Norris, 57 N. C. 225.

A defendant cannot object that others not parties to the suit are also enjoined. Tradesman's, etc., Bank *v.* Merritt, 1 Paige (N. Y.) 302.

71. Waffle *v.* Vanderheyden, 8 Paige (N. Y.) 45.

72. Jacoby *v.* Goetter, 74 Ala. 427; Krom *v.* Hogan, 4 How. Pr. (N. Y.) 225; Fadely *v.* Tomlinson, 41 W. Va. 606, 24 S. E. 645.

The court may refuse to dissolve until after a hearing is had on an order to show cause why defendant should not be attached for contempt. Kleinech *v.* Drake, 10 N. J. L. J. 252.

The motion may be granted on condition that defendant pay the costs of the proceedings for his punishment. Field *v.* Chapman, 13 Abb. Pr. (N. Y.) 320; Hall *v.* Darney, Dick. 289, 21 Eng. Reprint 279.

73. State *v.* Clancy, 24 Mont. 359, 61 Pac. 987; Smith *v.* Reno, 6 How. Pr. (N. Y.) 124; Smith *v.* Austin, Code Rep. N. S. (N. Y.) 137; Kaehler *v.* Dobberpuhl, 56 Wis. 497, 14 N. W. 631; Marcil *v.* Montreal, 3 Quebec 346; Jolly *v.* Macdonald, 23 L. C. Jur. 16.

An ex parte affidavit showing a violation of an injunction by defendant is not of itself sufficient ground for denying a motion to dissolve. Smith *v.* Austin, 1 Code Rep. N. S. (N. Y.) 137.

74. Crabtree *v.* Baker, 75 Ala. 91, 51 Am. Rep. 424; Williamson *v.* Carnan, 1 Gill & J. (Md.) 184; Endicott *v.* Matbis, 9 N. J. Eq. 110.

75. Michel *v.* O'Brien, 6 Misc. (N. Y.) 408, 27 N. Y. Suppl. 173; Turpin *v.* Jefferson, 4 Hen. & M. (Va.) 483.

76. Warren *v.* Pim, 65 N. J. Eq. 36, 55 Atl. 66.

77. Taylor *v.* Gillean, 23 Tex. 508.

78. Motions generally see Motions.

79. *Florida.*— Wordehoff *v.* Evers, 18 Fla. 339.

Georgia.— Read *v.* Dews, R. M. Charlt. 358.

Kentucky.— Beard *v.* Hardin, Hard. 12.

Minnesota.— Perrin *v.* Oliver, 1 Minn. 202.

Mississippi.— Jones *v.* Commercial Bank, 5 How. 43, 35 Am. Dec. 419.

New Jersey.— Morris Canal, etc., Co. *v.* Biddle, 4 N. J. Eq. 222; Woodhull *v.* Neafie, 2 N. J. Eq. 409.

New York.— Middletown *v.* Rondout, etc., R. Co., 43 How. Pr. 144; Ramsey *v.* Erie R. Co., 38 How. Pr. 193; Minturn *v.* Seymour, 4 Johns. Ch. 173.

Pennsylvania.— King *v.* Wimley, 26 Leg. Int. 254.

in case the bill shows sufficient grounds for its issuance,[80] especially where fraud is alleged.[81] Defendant may move to dissolve after the filing of his answer, as well as before,[82] although great delay may be fatal.[83] The pendency of other proceedings in the suit may require a postponement of the motion.[84] The fact that the trial is near at hand is no reason for denying the motion to dissolve.[85]

West Virginia.— White Sulphur Springs Co. *v.* Robinson, 3 W. Va. 542; Hyre *v.* Hoover, 3 W. Va. 11.

United States.— Fenwick Hall Co. *v.* Old Saybrook, 66 Fed. 389; Metropolitan Grain, etc., Exch. *v.* Chicago Bd. of Trade, 15 Fed. 847, 11 Biss. 531; Adams *v.* Douglas County, 1 Fed. Cas. No. 52, McCahon (Kan.) 235.

See 27 Cent. Dig. tit. "Injunction," § 374.

Ex parte injunctions only.— This rule applies only in case the injunction was granted *ex parte* and not on hearing. Heyl *v.* Philadelphia, 10 Phila. (Pa.) 112. But in Westerly Waterworks *v.* Westerly, 77 Fed. 783, it is said that the motion lies at all times, even though the court in granting the injunction may have discussed the merits of the case.

It is said to be irregular to file a motion to dissolve, prior to answer, in Ransom *v.* Shuler, 43 N. C. 304. And see also Taylor *v.* Morgan, 2 Mart. (La.) 77; Thompson *v.* Allen, 3 N. C. 237; Rentfroe *v.* Dickinson, 1 Overt. (Tenn.) 196.

An answer to an amendment to the bill is not required before motion to dissolve where the amendment presents no new equity. Mahone *v.* Central Bank, 17 Ga. 111.

An injunction granted until further answer and further order must stand until the answer comes in. Read *v.* Consequa, 20 Fed. Cas. No. 11,606, 4 Wash. 174.

80. *Kentucky.*— Judah *v.* Chiles, 3 J. J. Marsh. 302.

New York.— Strange *v.* Longley, 3 Barb. Ch. 650.

North Carolina.— Thompson *v.* Allen, 3 N. C. 237.

Pennsylvania.— O'Hara *v.* Horn, 5 Luz. Leg. Reg. 67; Delaware, etc., Canal Co. *v.* Scranton School Dist., 25 Pa. L. J. 176.

West Virginia.— Russell *v.* Dickeschied, 24 W. Va. 61; Peterson *v.* Parriott, 4 W. Va. 42.

See 27 Cent. Dig. tit. "Injunction," § 374.

The lack of an allegation that there is no adequate remedy at law is not sufficient ground for motion to dissolve before answer. Clover *v.* Silverman, 6 Misc. (N. Y.) 347, 26 N. Y. Suppl. 779.

Where a supplemental bill is filed showing equity on the part of complainant, a motion to dissolve before answer thereto will be denied. Rogers *v.* Solomons, 17 Ga. 598.

81. Cook *v.* Smith, 39 Ga. 335; Prickett *v.* Tuller, 29 N. J. Eq. 154; Shotwell *v.* Smith, 20 N. J. Eq. 79; Orr *v.* Moore, 1 Tex. App. Civ. Cas. § 587.

82. Wordehoff *v.* Evers, 18 Fla. 339; Butman *v.* Forshay, 21 La. Ann. 165; Walker *v.* Vanwinkle, 8 Mart. N. S. (La.) 560; Gibbs *v.* Ward, (N. J. Ch. 1901) 48 Atl. 243; Benson *v.* Fash, 1 Code Rep. (N. Y.) 50; Deklyn *v.* Davis, Hopk. (N. Y.) 154; Patton *v.* Panton, 3 Anstr. 651.

Right to consider answer.— On the hearing of such motion defendant is entitled to the benefit of his answer, even though he might have made his motion prior to answer. McMechen *v.* Story, 1 Bland (Md.) 183 note; Goddin *v.* Vaughn, 14 Gratt. (Va.) 102. But not in case his answer was filed after the motion was filed and notice given. Cattel *v.* Nelson, 7 N. J. Eq. 122; Benson *v.* Fash, 1 Code Rep. (N. Y.) 50.

Before the expiration of the time to reply a motion to dissolve on the answer is improper. Moss *v.* Pettingill, 3 Minn. 217. *Contra*, Waldrop *v.* Green, 63 N. C. 344.

The fact that a replication has been filed is no objection to a motion to dissolve on bill and answer. Grandin *v.* Le Roy, 2 Paige (N. Y.) 509.

83. Baird *v.* Moses, 21 Ga. 249; Florence Sewing Mach. Co. *v.* Grocer, etc., Sewing Mach. Co., 110 Mass. 1; Feistel *v.* King's College, 10 Beav. 491, 11 Jur. 506, 16 L. J. Ch. 339, 50 Eng. Reprint 671; Glascott *v.* Lang, 2 Jur. 909, 14 Eng. Ch. 451, 40 Eng. Reprint 1000, 3 Myl. & C. 451, 8 Sim. 358, 8 Eng. Ch. 358, 59 Eng. Reprint 142.

A motion to dissolve because of failure to subpœna defendant is too late after the error has been cured by service. Seebor *v.* Hess, 5 Paige (N. Y.) 85.

Delay in bringing the case to trial, on the part of defendant, may be sufficient ground for refusing to dissolve. Clark *v.* Farrell, 86 Hun (N. Y.) 156, 33 N. Y. Suppl. 324.

84. Storer *v.* Jackson, 12 Sim. 503, 35 Eng. Ch. 425, 59 Eng. Reprint 1225.

While awaiting the report of a referee appointed to take testimony, it is irregular to move to dissolve. Fahian *v.* Collins, 2 Mont. 510.

The hearing of a demurrer already set down for argument should precede the filing of a subsequent motion to dissolve. Ransom *v.* Shuler, 43 N. C. 304. But the mere fact that a demurrer has been filed does not prevent the hearing of a subsequent motion. Challis *v.* Atchison County Com'rs, 15 Kan. 49.

Decree pro confesso.— Where defendant has failed to answer and an order *pro confesso* has been taken out against him, he cannot move to dissolve the injunction previously granted, at the same time allowing the order *pro confesso* to stand. Manley *v.* Williams, 5 Can. L. J. 163.

Either after or during the taking of proofs the injunction will be dissolved only for urgent reasons. Baird *v.* Ellsworth Trust Co., 45 Fla. 187, 34 So. 565; Grandin *v.* Le Roy, 2 Paige (N. Y.) 509.

85. Secor *v.* Weed, 7 Rob. (N. Y.) 67.

L. Successive Motions. A second motion to dissolve, made on the same papers, is improper without leave of court.[86] But where such leave has been granted, as where the denial of the first motion is without prejudice to a second motion, a second or further motion is proper.[87] A second motion to dissolve is proper after an amendment of the answer.[88] The fact that the court has erroneously refused to dissolve on the first motion requires a dissolution on a second motion where the facts are the same.[89]

M. Notice of Motion — 1. Necessity. As a general rule an injunction will not be dissolved or modified on motion unless notice has been given to the complainant,[90] and this is so, although the injunction was obtained *ex parte*.[91] Courts have power, however, to dissolve an injunction on motion without notice where delay will result in serious loss,[92] and in some states where the face of the bill shows a lack of equity,[93] or where the motion is made in term and in open court.[94]

2. Form. A general notice setting up want of equity in the bill as ground for the motion is sufficient,[95] but if there are other special grounds they should be set out in the notice.[96] The proper court or judge must be specified with certainty,[97] but immaterial mistakes do not vitiate the notice;[98] and it is not necessary to specify in detail the affidavits that are to be used in support of the motion.[99]

86. Lowry *v.* Chautauque County Bank, Clarke (N. Y.) 67. See also Williams *v.* Huber, 5 Misc. (N. Y.) 488, 25 N. Y. Suppl. 327.

In Iowa the making of a second motion to dissolve after a denial of the first is prevented by statute. See Hinkle *v.* Sadler, 97 Iowa 526, 66 N. W. 765; Carrothers *v.* Newton Mineral Spring Co., 61 Iowa 681, 17 N. W. 43.

87. Hudson *v.* Crutchfield, 12 Ala. 433; Carrothers *v.* Newton Min. Spring Co., 61 Iowa 681, 17 N. W. 43.

88. Thomas *v.* Horn, 21 Ga. 177; Edney *v.* Motz, 40 N. C. 233.

89. Arbuckle *v.* McClanahan, 6 W. Va. 101.

90. *California.*— Hefflon *v.* Bowers, 72 Cal. 270, 13 Pac. 690.

Florida.— McAdow *v.* Wachob, 45 Fla. 482, 33 So. 702.

Louisiana.— Pike *v.* Bates, 34 La. Ann. 391; Gravais *v.* Falgoust, 34 La. Ann. 99.

Maryland.— Wood *v.* Bruce, 9 Gill & J. 215; Walsh *v.* Smyth, 3 Bland 9.

Mississippi.— Carraway *v.* Odeneal, 56 Miss. 233.

New York.— Barclay *v.* Moloney, 44 N. Y. App. Div. 632, 60 N. Y. Suppl. 403; Peck *v.* Yorks, 41 Barb. 547 [*affirming* 24 How. Pr. 363]; Bruce *v.* Delaware, etc., Canal Co., 8 How. Pr. 440; Mills *v.* Thursby, 1 Code Rep. 121.

West Virginia.— Fadely *v.* Tomlinson, 41 W. Va. 606, 24 S. E. 645.

Wisconsin.— Marshfield Land, etc., Co. *v.* John Week Lumber Co., 108 Wis. 268, 84 N. W. 434.

See 27 Cent. Dig. tit. "Injunction," § 355.

Compare Collier *v.* Newbern Bank, 21 N. C. 328.

91. Page *v.* Vaughn, 133 Cal. 335, 65 Pac. 740; Hefflon *v.* Bowers, 72 Cal. 270, 13 Pac. 690; Spanish General Agency Corp. *v.* Spanish Corp., 63 L. T. Rep. N. S. 161. *Contra*, Borland *v.* Thornton, 12 Cal. 440.

In New York the statute expressly provides for dissolution without notice where the injunction was granted *ex parte*. Gere *v.* New York Cent., etc., R. Co., 38 Hun 231; Peck *v.* Yorks, 41 Barb. 547.

92. Gere *v.* New York Cent., etc., R. Co., 38 Hun (N. Y.) 231; Bruce *v.* Delaware, etc., Canal Co., 8 How. Pr. (N. Y.) 440; Peck *v.* Yorks, 41 Barb. (N. Y.) 547.

Notice of dissolution.— Complainant is entitled to notice of the order in case an injunction is dissolved on motion *ex parte*. State *v.* Judge Twenty-Second Judicial Dist., 37 La. Ann. 118.

93. Williams *v.* Berry, 3 Stew. & P. (Ala.) 284; Meyer *v.* Cœur d'Alene First Nat. Bank, 10 Ida. 175, 77 Pac. 334; Thayer *v.* Bellamy, 9 Ida. 1, 71 Pac. 544; Beard *v.* Geran, Hard. (Ky.) 12; White Sulphur Springs Co. *v.* Robinson, 3 W. Va. 542.

If defendant's affidavits are to be considered on a motion to dissolve, the complainant is entitled to notice. Thayer *v.* Bellamy, 9 Ida. 1, 71 Pac. 544; Sledge *v.* Blum, 63 N. C. 374.

94. Williams *v.* Cooper, 20 S. W. 229, 14 Ky. L. Rep. 284; James County *v.* Hamilton County, 89 Tenn. 237, 14 S. W. 601; Kester *v.* Alexander, 47 W. Va. 329, 34 S. E. 819.

95. Morris Canal, etc., Co. *v.* Bartlett, 3 N. J. Eq. 9.

96. Brown *v.* Winans, 11 N. J. Eq. 267; Miller *v.* Traphagan, 6 N. J. Eq. 200.

97. Florence *v.* Paschal, 48 Ala. 458; Younglove *v.* Steinman, 80 Cal. 375, 22 Pac. 189; Smith *v.* Painter, 10 N. J. L. 182.

98. Hiller *v.* Cotten, 54 Miss. 551; Smith *v.* Painter, 10 N. J. L. J. 182.

99. Kemper *v.* Campbell, 45 Kan. 529, 26 Pac. 53.

Evidence not mentioned in notice.— The court may if necessary hear evidence other than that mentioned in the notice. Younglove *v.* Steinman, 80 Cal. 375, 22 Pac. 189.

3. SERVICE. Service should usually be made on plaintiff's attorney.[1] In the absence of a statute fixing the time, the notice must be served a reasonable time before the day fixed for hearing.[2]

4. WAIVER. The want of, or defects in, the notice are waived by appearing and contesting the motion.[3]

N. Use and Effect of Bill or Complaint. Upon a motion to dissolve a preliminary injunction before answer, or at any time, for want of equity in the bill, the allegations of fact properly made therein will be taken as true.[4] In this respect the motion operates the same as a demurrer.[5] All amendable defects in the bill may be considered, for the purposes of the motion, as having been amended.[6] After the filing of the answer the bill may be read as an affidavit to contradict the answer.[7]

O. Use and Effect of Answer — 1. GENERAL RULE. The general rule is that on a motion to dissolve an injunction made upon the filing of a verified answer, the allegations of the answer, so far as they are responsive to the bill, will be taken as true;[8] and in case such allegations meet and deny all the equities of the

1. Moore *v.* Ferrell, 1 Ga. 7; Hiller *v.* Cotten, 54 Miss. 551.

2. Newton Mfg. Co. *v.* White, 47 Ga. 400; Caldwell *v.* Walters, 4 Fed. Cas. No. 2,305, 4 Cranch C. C. 577; Wilkins *v.* Jordan, 29 Fed. Cas. No. 17,665, 3 Wash. 266.

Notice of motion to continue.— An unreasonably short notice should not be given to show cause on a motion to continue, since the complainant is adequately protected by the pending restraining order. Barclay *v.* Moloney, 44 N. Y. App. Div. 632, 60 N. Y. Suppl. 403.

Practice in federal courts see Burford *v.* Ringgold, 4 Fed. Cas. No. 2,152, 1 Cranch C. C. 253; Ramsay *v.* Wilson, 20 Fed. Cas. No. 11,545, 1 Cranch C. C. 304; Stoddert *v.* Waters, 23 Fed. Cas. No. 13,472, 1 Cranch C. C. 483.

3. Penrice *v.* Wallis, 37 Miss. 172; Hyre *v.* Hoover, 3 W. Va. 11.

A defect in the service of a rule to dissolve an injunction is not cured by the appearance of the party merely to appeal from the decision on the rule to dissolve. Marin *v.* Thierry, 29 La. Ann. 362.

4. *Georgia.*— Semmes *v.* Columbus, 19 Ga. 471.

Louisiana.— Rawlings *v.* Bowie, 33 La. Ann. 573; Vance *v.* Cawthon, 32 La. Ann. 124; Butman *v.* Forshay, 21 La. Ann. 165; Ferriere *v.* Schreiber, 16 La. Ann. 7; Jenkins *v.* Felton, 9 Rob. 200; Fisk *v.* Hart, 11 La. 479; Johnston *v.* Hickey, 4 La. 292; Morgan *v.* Peet, 8 Mart. N. S. 395.

Michigan.— Schwarz *v.* Sears, Harr. 440.

New York.— New York Printing, etc., Establishment *v.* Fitch, 1 Paige 97.

Virginia.— Peatross *v.* McLaughlin, 6 Gratt. 64.

West Virginia.— Ludington *v.* Tiffany, 6 W. Va. 11.

United States.— Lyster *v.* Stickney, 12 Fed. 609, 4 McCrary 109.

See 27 Cent. Dig. tit. "Injunction," § 373.

The rule does not apply when the motion is made on other grounds than the insufficiency of the case made on the face of the papers. Hebert *v.* Joly, 5 La. 50.

Where a contract is set out in the complaint, and it is alleged that an amount agreed therein to be forfeited on breach was intended as a penalty, an injunction to prevent a breach will not be dissolved on motion on the ground that the amount represented liquidated damages. Becman *v.* Hexter, 98 Iowa 378, 67 N. W. 270.

Allegations of mere conclusions, although insufficient on demurrer, will be held sufficient on motion to dissolve, in the absence of objection on that ground. Louisville, etc., R. Co. *v.* Bessemer, 108 Ala. 238, 18 So. 880. But see Schermerhorn *v.* New York, 3 Edw. (N. Y.) 119.

5. Smith *v.* Kochersperger, 173 Ill. 201, 50 N. E. 187; Weaver *v.* Poyer, 70 Ill. 567; Bennett *v.* McFadden, 61 Ill. 334; Titus *v.* Mabee, 25 Ill. 257; Dorwart *v.* Reed, 8 Lanc. Bar (Pa.) 58.

What facts admitted by motion.— A demurrer admits only such facts as are well pleaded and only such as existed at the time of filing the bill. A motion admits no more. Chicago Bd. of Trade *v.* Weare, 105 Ill. App. 289.

6. Alabama, etc., R. Co. *v.* Kenney, 39 Ala. 307.

An insufficiency in the affidavit to a bill on which an injunction is allowed cannot be waived or amended at the hearing of the motion to dissolve. Perkins *v.* Collins, 3 N. J. Eq. 482.

The court may consider an amended bill, even though it was filed subsequent to the motion to dissolve. Alcorn *v.* Alcorn, 76 Miss. 907, 25 So. 877.

7. Peterson *v.* Matthis, 56 N. C. 31; Lloyd *v.* Heath, 45 N. C. 39.

8. Hampson *v.* Adams, 6 Ariz. 335, 57 Pac. 621; Castleberry *v.* Scandrett, 20 Ga. 242; Semmes *v.* Columbus, 19 Ga. 471; Wenzel *v.* Milbury, 93 Md. 427, 49 Atl. 618; Webster *v.* Hardisty, 28 Md. 592; Colvin *v.* Warford, 17 Md. 433; Magnet Min. Co. *v.* Page, etc., Silver Min. Co., 9 Nev. 346.

Arguments and inferences from the facts are not to be taken as true. Chase *v.* Manhardt, 1 Bland (Md.) 333.

bill, the preliminary injunction theretofore issued will be dissolved.[9] Especially is this true where the answer is verified positively, while the allegations of the

9. *Alabama.*—Harrison *v.* Maury, 140 Ala. 523, 37 So. 361; Simonson *v.* Cain, 138 Ala. 221, 34 So. 1019; Sidney Land, etc., Co. *v.* Milner, etc., Lumber Co., 138 Ala. 185, 35 So. 48; Queen City Stock, etc., Co. *v.* Cunningham, 128 Ala. 645, 29 So. 583, 86 Am. St. Rep. 164; Knope *v.* Reeves, (1900) 28 So. 666; Alabama Mineral R. Co. *v.* Southern R. Co., 116 Ala. 402, 23 So. 239; Turner *v.* Stephens, 106 Ala. 546, 17 So. 706; Worthington *v.* Hatch, (1893) 13 So. 518; Hagler *v.* Jones, 100 Ala. 541, 14 So. 487; Hartley *v.* Matthews, 96 Ala. 224, 11 So. 452; Morrison *v.* Coleman, 87 Ala. 655, 6 So. 374, 5 L. R. A. 384; Clay *v.* Powell, 85 Ala. 538, 5 So. 330, 7 Am. St. Rep. 70; Weems *v.* Weems, 73 Ala. 462; Bishop *v.* Wood, 59 Ala. 253; Barr *v.* Collier, 54 Ala. 39; Satterfield *v.* John, 53 Ala. 127; Robertson *v.* Walker, 51 Ala. 484; Garrett *v.* Lynch, 44 Ala. 683; Yonge *v.* Shepperd, 44 Ala. 315; McClanahan *v.* Ware, 42 Ala. 381; Brooks *v.* Diaz, 35 Ala. 599; Miller *v.* Bates, 35 Ala. 580; Hogan *v.* Decatur Branch Bank, 10 Ala. 485; Williams *v.* Berry, 3 Stew. & P. 284.

Arizona.— Hampson *v.* Adams, 6 Ariz. 335, 57 Pac. 621.

California.— Real Del Monte Consol. Gold, etc., Min. Co. *v.* Pond Gold, etc., Min. Co., 23 Cal. 82; Johnson *v.* Wide West Min. Co., 22 Cal. 479; Burnett *v.* Whitesides, 13 Cal. 156; Gardner *v.* Perkins, 9 Cal. 553.

Delaware.— Marvel *v.* Ortlip, 3 Del. Ch. 9, even though the answer may be open to exceptions on other grounds.

Georgia.— Douglass *v.* Thomson, 39 Ga. 134; Crawford *v.* Ross, 39 Ga. 44; Thrasher *v.* Partee, 37 Ga. 392; Rhodes *v.* Lee, 32 Ga. 470; Applewhite *v.* Baldwin, 30 Ga. 915; Howard *v.* Marine Bank, 30 Ga. 841; Gravely *v.* Southerland, 29 Ga. 335; Weaver *v.* Garner, 28 Ga. 503; Alexander *v.* Markham, 25 Ga. 148; Miller *v.* Maddox, 21 Ga. 327; Boring *v.* Rollins, 20 Ga. 623; Castleberry *v.* Scandrett, 20 Ga. 242; West *v.* Rouse, 14 Ga. 715; Jones *v.* Joyner, 8 Ga. 562; Clark *v.* Cleghorn, 6 Ga. 220; Hemphill *v.* Ruckersville Bank, 3 Ga. 435; Moore *v.* Farrell, 1 Ga. 7.

Idaho.— Oro Fino, etc., Min. Co. *v.* Cullen, 1 Ida. 113.

Illinois.— Farrell *v.* McKee, 36 Ill. 225; Beams *v.* Denham, 3 Ill. 58.

Indiana.— Aurora, etc., R. Co. *v.* Miller, 56 Ind. 88; Rayle *v.* Indianapolis, etc., R. Co., 32 Ind. 259; Case *v.* Green, 4 Ind. 526; Doolittle *v.* Jones, 2 Ind. 21.

Iowa.— Phillips *v.* Watson, 63 Iowa 28, 18 N. W. 659; Russell *v.* Wilson, 37 Iowa 377; Taylor *v.* Dickinson, 15 Iowa 483; Jones *v.* Jones, 13 Iowa 276; Stevens *v.* Myers, 11 Iowa 183; Anderson *v.* Reed, 11 Iowa 177; Shricker *v.* Field, 9 Iowa 366; Fitch *v.* Richardson, Morr. 245.

Maryland.— Johnson Co. *v.* Henderson, 83 Md. 125, 34 Atl. 835; Philadelphia Trust, etc., Co. *v.* Scott, 45 Md. 451; Webster *v.* Hardisty, 28 Md. 592; Voshell *v.* Hynson, 26 Md. 83; Hubbard *v.* Mobray, 20 Md. 165; Hyde *v.* Ellery, 18 Md. 496; Dorsey *v.* Hagerstown Bank, 17 Md. 408; Furlong *v.* Edwards, 3 Md. 99; Hutchins *v.* Hope, 12 Gill & J. 244; Harris *v.* Sangston, 4 Md. Ch. 394; Wood *v.* Patterson, 4 Md. Ch. 335; Washington University *v.* Green, 1 Md. Ch. 97; Stewart *v.* Chew, 3 Bland 440; Salmon *v.* Clagett, 3 Bland 125.

Michigan.— Atty.-Gen. *v.* Oakland County Bank, Walk. 90; Eldred *v.* Camp, Harr. 162.

Minnesota.— Knoblauch *v.* Minneapolis, 56 Minn. 321, 57 N. W. 928; Armstrong *v.* Sanford, 7 Minn. 49; Moss *v.* Pettingill, 3 Minn. 217.

Mississippi.— Davis *v.* Hart, 66 Miss. 642, 6 So. 318; Pass *v.* Dykes, 8 Sm. & M. 92.

Nevada.— Magnet Min. Co. *v.* Page, etc., Silver Min. Co., 9 Nev. 346.

New Hampshire.— Hollister *v.* Barkley, 9 N. H. 230.

New Jersey.— Brewer *v.* Day, 23 N. J. Eq. 418; Moies *v.* O'Neill, 23 N. J. Eq. 207; Winslow Tp. *v.* Hudson, 21 N. J. Eq. 172; Eaton *v.* Jenkins, 19 N. J. Eq. 362; Teasey *v.* Baker, 19 N. J. Eq. 61; Suffern *v.* Butler, 18 N. J. Eq. 220; Morris Canal, etc., Co. *v.* Fagan, 18 N. J. Eq. 215; Marshman *v.* Conklin, 17 N. J. Eq. 282; Thorp *v.* Pettit, 16 N. J. Eq. 488; Price *v.* Armstrong, 14 N. J. Eq. 41; Gariss *v.* Gariss, 13 N. J. Eq. 320; Furman *v.* Clark, 11 N. J. Eq. 135; Masterton *v.* Barney, 11 N. J. Eq. 26; Greenin *v.* Hoey, 9 N. J. Eq. 137; Vervalen *v.* Older, 8 N. J. Eq. 98; Grafton *v.* Brady, 7 N. J. Eq. 79; Jones *v.* Sherwood, 6 N. J. Eq. 210; Washer *v.* Brown, 5 N. J. Eq. 81; Hatch *v.* Daniels, 5 N. J. Eq. 14; Wooden *v.* Wooden, 3 N. J. Eq. 429; Youle *v.* Richards, 1 N. J. Eq. 534, 23 Am. Dec. 722; Quackenbush *v.* Van Riper, 1 N. J. Eq. 476.

New York.— Kerbs *v.* Rosenstein, 56 N. Y. App. Div. 619, 67 N. Y. Suppl. 385; Durant *v.* Einstein, 5 Rob. 423, 35 How. Pr. 223; Dubois *v.* Budlong, 10 Bosw. 700; Kuntz *v.* C. C. White Co., 8 N. Y. Suppl. 505; Blatchford *v.* New York, etc., R. Co., 5 Abb. Pr. 276; Fullan *v.* Hooper, 66 How. Pr. 75; American Grocer Pub. Assoc. *v.* Grocer Pub. Co., 51 How. Pr. 402; Central Cross-town R. Co. *v.* Bleecker St., etc., R. Co., 49 How. Pr. 233; Hazard *v.* Hudson River Bridge Co., 27 How. Pr. 296; Clark *v.* Law, 22 How. Pr. 426; Gould *v.* Jacobsohn, 18 How. Pr. 158; Manchester *v.* Dey, 6 Paige 295; Reid *v.* Gifford, Hopk. 416; White *v.* Jeffers, Clarke 206.

North Carolina.— Walker *v.* Gurley, 83 N. C. 429; Perry *v.* Michaux, 79 N. C. 94; Faison *v.* McIlwaine, 72 N. C. 312; Woodfin *v.* Beach, 70 N. C. 455; Jones *v.* McKenzie, 59 N. C. 203; Mims *v.* McLean, 59 N. C. 200; Wright *v.* Grist, 45 N. C. 203; Dyche *v.* Patton, 43 N. C. 295; Green *v.* Phillips,

bill are not verified at all or are verified merely upon information and belief.[10] The fact that a sworn answer was not required by the bill will not prevent a dissolution on motion in case the answer is verified.[11] An injunction against trespass, waste, or a transfer of property will ordinarily be dissolved on an answer that denies title in the complainant or sets up paramount title in defendant.[12]

2. Limitations of, and Exceptions to, Rule — a. Discretion of Court. Dissolution is not as of course upon the coming in of the answer. The general rule that the injunction is then to be dissolved is not absolute, but is to be applied subject

41 N. C. 223; Perkins *v.* Hollowell, 40 N. C. 24; Cowles *v.* Carter, 39 N. C. 105; Radcliff *v.* Bartholomew, 38 N. C. 556; Sharpe *v.* King, 38 N. C. 402; Miller *v.* Washburn, 38 N. C. 161; Moore *v.* Reed, 36 N. C. 418; Lindsay *v.* Etheridge, 21 N. C. 36; McFarland *v.* McDowell, 4 N. C. 15.

Ohio.— Chicago, etc., R. Co. *v.* Hamilton, 3 Ohio Cir. Ct. 455, 2 Ohio Cir. Dec. 259; Afsprung *v.* Althoff, 7 Ohio Dec. (Reprint) 550, 3 Cinc. L. Bul. 890.

Pennsylvania.— New Era Life Assoc.'s Appeal, 1 Pa. Cas. 199, 2 Atl. 59; Carpenter *v.* Burden, 2 Pars. Eq. Cas. 24; Noble *v.* Becker, 3 Brewst. 550; Page *v.* Vankirk, 1 Brewst. 282; Shoenberger *v.* Ruth, 17 Lanc. L. Rev. 92; McVey *v.* Brendle, 5 Lanc. L. Rev. 360; Sigle *v.* Bird-in-Hand Turnpike Co., 3 Lanc. L. Rev. 258; Eshleman *v.* Electric Co., 1 Lanc. L. Rev. 26; Tierney's Appeal, 3 L. T. N. S. 233; Hammond *v.* Weidow, 8 Luz. Leg. Reg. 70; Jordan *v.* Woodhouse, 5 Luz. Leg. Reg. 141; White *v.* Schlect, 9 Wkly. Notes Cas. 77; Orth *v.* Carston, 1 Wkly. Notes Cas. 199; Houston *v.* Houston, 1 Wkly. Notes Cas. 26.

South Dakota.— Howell *v.* Dinneen, 16 S. D. 618, 94 N. W. 698.

Tennessee.— Lytton *v.* Steward, 2 Tenn. Ch. 586.

Texas.— Blum *v.* Loggins, 53 Tex. 121; Lively *v.* Bristow, 12 Tex. 60; Hansborough *v.* Towns, 1 Tex. 58; Horton *v.* Jones, Dall. 466; Stone Cattle Co. *v.* Davis, 3 Tex. App. Civ. Cas. § 149.

Virginia.— Thomas *v.* Rowe, (1895) 22 S. E. 157; Spencer *v.* Jones, 85 Va. 172, 7 S. E. 180; Webster *v.* Couch, 6 Rand. 519.

West Virginia.— Schoonover *v.* Bright, 24 W. Va. 698; Shonk *v.* Knight, 12 W. Va. 667; Hayzlett *v.* McMillan, 11 W. Va. 464; Arbuckle *v.* McClanahan, 6 W. Va. 101; Rosset *v.* Greer, 3 W. Va. 1.

Wisconsin.— Walker *v.* Backus Heating Co., 97 Wis. 160, 72 N. W. 230; Wilson *v.* Omro, 52 Wis. 131, 8 N. W. 821.

United States.— McLean *v.* Mayo, 113 Fed. 106; Mittleburger *v.* Stanton, 17 Fed. Cas. No. 9,676; Nelson *v.* Robinson, 17 Fed. Cas. No. 10,114, Hempst. 464; Poor *v.* Carleton, 19 Fed. Cas. No. 11,272, 3 Sumn. 70; U. S. *v.* Parrott, 27 Fed. Cas. No. 15,998, McAllister 271.

See 27 Cent. Dig. tit. "Injunction," § 376.

In Louisiana this rule has not been adopted. See Orleans Nav. Co. *v.* New Orleans, 1 Mart. 23.

A formal denial is not necessary. The injunction will be dissolved if the answer affirmatively avers facts showing that the allegations of the bill are not true. Knoblauch *v.* Minneapolis, 56 Minn. 321, 57 N. W. 928.

In a suit by a shareholder as such a denial that the complainant is a shareholder is sufficient. Blatchford *v.* New York, etc., R. Co., 5 Abb. Pr. (N. Y.) 276.

Scandalous or impertinent matters in the answer do not prevent dissolution of the injunction in case the equities of the bill are fully denied. Livingston *v.* Livingston, 4 Paige (N. Y.) 111.

The burden of proof is said to be on defendant in case he moves to dissolve on the ground that the complainant's allegations are untrue. Kuhn *v.* Woolson Spice Co., 10 Ohio S. & C. Pl. Dec. 292, 8 N. P. 686. See Grobe *v.* Roup, 46 W. Va. 488, 33 S. E. 261.

A replication to an answer consisting of a denial, being unnecessary, will not be considered. Kester *v.* Alexander, 47 W. Va. 329, 34 S. E. 819.

The answer may be filed in vacation so as to be used on a motion to dissolve. Hayzlett *v.* McMillan, 11 W. Va. 464.

10. *California.*— Yuba County *v.* Cloke, 79 Cal. 239, 21 Pac. 740.

Georgia.— Williams *v.* Garrison, 29 Ga. 503.

Michigan.— Caufield *v.* Curry, 63 Mich. 594, 30 N. W. 191.

Nevada.— Perley *v.* Forman, 7 Nev. 309.

New Jersey.— Hinkle *v.* Jones, 32 N. J. Eq. 186.

New York.— Where allegations in the complaint could not have been on knowledge, even though they are not made on information and belief, the injunction will be dissolved on the coming in of an answer containing complete denials. Levy *v.* Rosenstein, 66 N. Y. Suppl. 101 [*affirmed* in 56 N. Y. App. Div. 618, 67 N. Y. Suppl. 630].

North Carolina.— McCormick *v.* Nixon, 83 N. C. 113, insolvency alleged only on information and belief.

See 27 Cent. Dig. tit. "Injunction," § 376.

11. Gelston *v.* Rullman, 15 Md. 260; Ireland *v.* Kelly, 60 N. J. Eq. 308, 47 Atl. 51; Walker *v.* Hill, 21 N. J. Eq. 191; Manchester *v.* Dey, 6 Paige (N. Y.) 295.

12. Curtis *v.* Sutter, 15 Cal. 259; Field *v.* Howell, 6 Ga. 423; Stewart *v.* Chew, 3 Bland (Md.) 440; Schermerhorn *v.* Merrill, 1 Barb. (N. Y.) 511; Higgins *v.* Woodward, Hopk. (N. Y.) 342.

Merely questioning complainant's title is not ground for dissolving a preliminary injunction. Moore *v.* Ferrell, 1 Ga. 7.

to the sound discretion of the court.[13] Where irreparable injury may result from such dissolution, the court may in its discretion continue the injunction even though the equities of the bill are denied in the answer.[14] If important questions are to be decided, for the solution of which further information is necessary,[15] or if there remains an issue of fact which is undetermined, the result of which may show the complainant to be entitled, the court may refuse to dissolve the injunction.[16]

13. *Alabama.*—Bibb *v.* Shackelford, 38 Ala. 611.

California.— Efford *v.* South Pac. Coast R. Co., 52 Cal. 277.

Georgia.— Savannah, etc., Canal Co. *v.* Ryan, 38 Ga. 144; Upson County R. Co. *v.* Sharman, 37 Ga. 644; Howell *v.* Lee, 36 Ga. 76; Edwards *v.* Banksmith, 35 Ga. 213; Kervin *v.* Walker, 30 Ga. 906; Swift *v.* Swift, 13 Ga. 140.

Indiana.— Edwards *v.* Applegate, 70 Ind. 325.

Michigan.— Chicago, etc., R. Co. *v.* Kalamazoo Cir. Judge, (1904) 101 N. W. 525; Atty.-Gen. *v.* Oakland County Bank, Walk. 90.

Mississippi.— Bowen *v.* Hoskins, 45 Miss. 183, 7 Am. Rep. 728.

New York.— Mead *v.* Richards, 4 Edw. 667.

North Carolina.— Harrington *v.* Rawls, 131 N. C. 39, 42 S. E. 461; James *v.* Lemly, 37 N. C. 278.

Virginia.— Jenkins *v.* Waller, 80 Va. 668.

West Virginia.— McEldowney *v.* Lowther, 49 W. Va. 348, 38 S. E. 644.

United States.— Poor *v.* Carleton, 19 Fed. Cas. No. 11,272, 3 Sumn. 70.

See 27 Cent. Dig. tit. "Injunction," § 376.

14. *Alabama.*— Harrison *v.* Yerby, 87 Ala. 185, 6 So. 3; Bibb *v.* Shackelford, 38 Ala. 611; Miller *v.* Bates, 35 Ala. 580.

California.— Rogers *v.* Tennant, 45 Cal. 184; McCreery *v.* Brown, 42 Cal. 457.

Florida.— Carter *v.* Bennett, 6 Fla. 214.

Georgia.— Gullatt *v.* Thrasher, 42 Ga. 429; Louis *v.* Bamberger, 36 Ga. 589; Crutchfield *v.* Danilly, 16 Ga. 432; Holt *v.* Augusta Bank, 9 Ga. 552; Cornwise *v.* Bourgum, Ga. Dec. Pt. II, 15; Shellman *v.* Scott, R. M. Charlt. 380.

Idaho.— Oro Fino, etc., Min. Co. *v.* Cullen, 1 Ida. 113.

Indiana.— Spicer *v.* Hoop, 51 Ind. 365.

Minnesota.— Hamilton *v.* Wood, 55 Minn. 482, 57 N. W. 208.

New Hampshire.— Hollister *v.* Barkley, 9 N. H. 230.

New Jersey.— Snyder *v.* Seeman, 41 N. J. Eq. 405, 5 Atl. 637; Simon *v.* Townsend, 27 N. J. Eq. 302; Cregar *v.* Creamer, 27 N. J. Eq. 281; Mulock *v.* Mulock, 26 N. J. Eq. 461; Murray *v.* Elston, 23 N. J. Eq. 127; Camden, etc., R. Co. *v.* Stewart, 18 N. J. Eq. 489; Carr *v.* Weld, 18 N. J. Eq. 41; Firmstone *v.* De Camp, 17 N. J. Eq. 309; Irick *v.* Black, 17 N. J. Eq. 189; Fleischman *v.* Young, 9 N. J. Eq. 620.

New York.— Rochester *v.* Bell Tel. Co., 52 N. Y. App. Div. 6, 64 N. Y. Suppl. 804; Grill *v.* Wiswall, 82 Hun 281, 31 N. Y. Suppl. 470; Dubois *v.* Budlong, 10 Bosw. 700; Monroe Bank *v.* Schermerhorn, Clarke 303.

North Carolina.— Blackwell Durham Tobacco Co. *v.* McElwee, 94 N. C. 425; McCorkle *v.* Brem, 76 N. C. 407.

Rhode Island.— Bradford *v.* Peckham, 9 R. I. 250.

South Carolina.— Cudd *v.* Calvert, 54 S. C. 457, 32 S. E. 503.

Tennessee.— Owen *v.* Brien, 2 Tenn. Ch. 295.

Texas.— Hart *v.* Mills, 38 Tex. 517.

Wisconsin.— Chain Belt Co. *v.* Von Spreckelsen, 117 Wis. 106, 94 N. W. 78; Milwaukee Electric R., etc., Co. *v.* Bradley, 108 Wis. 467, 84 N. W. 870; Valley Iron Works Mfg. Co. *v.* Goodrick, 103 Wis. 436, 78 N. W. 1096.

United States.— Nelson *v.* Robinson, 17 Fed. Cas. No. 10,114, Hempst. 464; Poor *v.* Carleton, 19 Fed. Cas. No. 11,272, 3 Sumn. 70.

See 27 Cent. Dig. tit. "Injunction," § 376 *et seq.*

The rule will not be applied where it appears that the complainant may, through the dissolution of the injunction, be deprived of all relief in case he is finally successful and will suffer irreparable injury or great hardship. Stilt *v.* Hilton, 30 N. J. Eq. 579; Scott *v.* Ames, 11 N. J. Eq. 261.

Application of exception to rule.— This rule is frequently applied in cases where defendant sets up no right to do the acts sought to be restrained but merely denies doing them; in such case if defendant's allegations are true, he can be little harmed by the injunction. Jersey City Printing Co. *v.* Cassidy, 63 N. J. Eq. 759, 53 Atl. 230.

15. *Indiana.*— Gagnon *v.* French Lick Springs Hotel Co., 163 Ind. 687, 72 N. E. 849, 68 L. R. A. 175.

Iowa.— Fargo *v.* Ames, 45 Iowa 494.

New Jersey.— Pope *v.* Bell, 35 N. J. Eq. 1.

New York.— Reinach *v.* Meyer, 55 How. Pr. 283.

Pennsylvania.— Pennsylvania R. Co. *v.* Philadelphia, etc., R. Co., 149 Pa. St. 218, 24 Atl. 210.

United States.— Kilgore *v.* Norman, 119 Fed. 1006.

Canada.— Gamble *v.* Howland, 3 Grant Ch. (U. C.) 231, 1 U. C. Q. B. O. S. 161.

See 27 Cent. Dig. tit. "Injunction," § 376.

16. St. Joseph, etc., R. Co. *v.* Dryden, 11 Kan. 186; Lynch *v.* Colgate, 2 Harr. & J. (Md.) 34; Chase *v.* Manhardt, 1 Bland (Md.) 333; Sickles *v.* Manhattan Gas-Light Co., 64 How. Pr. (N. Y.) 33; Cornell *v.* Utica, etc., R. Co., 61 How. Pr. (N. Y.) 184; Allegheny Co. *v.* East Coast Lumber Co., 131 N. C. 6, 42 S. E. 331; Raleigh, etc., Air-Line R. Co.

This rule as to the effect of the answer does not apply if the injunction was granted after hearing, defendant having filed affidavits.[17]

b. Sufficiency of Answer in General. The injunction will not be dissolved on the coming in of the answer in case it does not appear to be entitled to as much credit as the bill.[18] The denials of the answer must be clear, explicit, positive, and unqualified.[19] They must not be argumentative,[20] evasive,[21] or mere denials of legal conclusions.[22] If, after the answer comes in, there remains a reasonable doubt as to whether the equity of the bill is sufficiently negatived, the court may continue the injunction to the hearing.[23] Allegations of the bill not

v. Aberdeen, etc., R. Co., 125 N. C. 96, 34 S. E. 197.

Extending scope of order.— On the same grounds the court may refuse to extend the scope of the injunction until the matter at issue is determined. Farwell *v.* Wallbridge, 2 Grant Ch. (U. C.) 332.

17. Natoma Water, etc., Co. *v.* Parker, 16 Cal. 83; Curtis *v.* Sutter, 15 Cal. 259; Natoma Water, etc., Co. *v.* Clarkin, 14 Cal. 544; Sinnickson *v.* Johnson, 3 N. J. Eq. 374.

18. *Florida.*— Linton *v.* Denham, 6 Fla. 533; Carter *v.* Bennett, 6 Fla. 214; Allen *v.* Hawley, 6 Fla. 142, 63 Am. Dec. 198.

Georgia.— Castleberry *v.* Scandrett, 20 Ga. 242.

Iowa.— Sinnett *v.* Moles, 38 Iowa 25.

Minnesota.— Knoblauch *v.* Minneapolis, 56 Minn. 321, 57 N. W. 928; Stees *v.* Kranz, 32 Minn. 313, 20 N. W. 241.

New Jersey.— Zabriskie *v.* Vreeland, 12 N. J. Eq. 179; Morris Canal, etc., Co. *v.* Jersey City, 11 N. J. Eq. 13.

New York.— Merritt *v.* Thompson, 3 E. D. Smith 283.

South Dakota.— Huron Waterworks Co. *v.* Huron, 3 S. D. 610, 54 N. W. 652.

Virginia.— Gray *v.* Overstreet, 7 Gratt. 346.

West Virginia.— Robrecht *v.* Robrecht, 46 W. Va. 738, 34 S. E. 801.

See 27 Cent. Dig. tit. "Injunction," § 377.

Statements improbable.—Where there is an extreme improbability in the statements of defendant the injunction will be continued. American Grocer Pub. Assoc. *v.* Grocer Pub. Co., 51 How. Pr. (N. Y.) 402; Moore *v.* Hylton, 16 N. C. 429.

19. *Alabama.*— Consolidated Electric Light Co. *v.* People's Electric Light, etc., Co., 94 Ala. 372, 10 So. 440; Rembert *v.* Brown, 17 Ala. 667.

Georgia.— Thomas *v.* Horn, 24 Ga. 481; Daniel *v.* Sapp, 20 Ga. 514; Horn *v.* Thomas, 19 Ga. 270.

Indiana.— Thompson *v.* Adams, 2 Ind. 151.

Mississippi.— Buckner *v.* Bierne, 9 Sm. & M. 304.

New Jersey.— Gibby *v.* Hall, 27 N. J. Eq. 282; Randall *v.* Morrell, 17 N. J. Eq. 343.

See 27 Cent. Dig. tit. "Injunction," § 377.

A mere formal or technical denial is not sufficient. Brown *v.* Fuller, 13 N. J. Eq. 271; Horner *v.* Jobs, 13 N. J. Eq. 19.

There must be a full and fair discovery of all material matters within defendant's knowledge, as well as a denial. Cartwright *v.* Bamberger, 90 Ala. 405, 8 So. 264; Thompson *v.* Mills, 39 N. C. 390.

An injunction against carrying on a business will not be dissolved on an answer that does not disclose the character of the business and show that it is such as not to constitute a breach of the contract. Richardson *v.* Peacock, 26 N. J. Eq. 40.

20. Coleman *v.* Hudspeth, 49 Miss. 562.

Denials of inferences from the facts are not denials of the facts themselves and are not sufficient. Teasey *v.* Baker, 19 N. J. Eq. 61.

21. Rembert *v.* Brown, 17 Ala. 667; Smith *v.* Loomis, 5 N. J. Eq. 60; Everly *v.* Rice, 4 N. J. Eq. 553; Storer *v.* Coe, 2 Bosw. (N. Y.) 661; American Grocer Pub. Assoc. *v.* Grocer Pub. Co., 51 How. Pr. (N. Y.) 402; Allen *v.* Pearce, 59 N. C. 309; Jones *v.* Edwards, 57 N. C. 257; Wilson *v.* Mace, 55 N. C. 5; Deaver *v.* Eller, 42 N. C. 24; Moore *v.* Hylton, 16 N. C. 429.

Illustration.— Where a bill alleged that a certain street had been dedicated and had been used as a public highway for sixteen years, an answer merely denying the existence of such a street is evasive. Fuhn *v.* Weber, 38 Cal. 636.

Fraud.— Evasive answers are insufficient especially where the bill charges fraud. Lee *v.* Vaughan, Ky. Dec. 238; Scull *v.* Reeves, 3 N. J. Eq. 84, 29 Am. Dec. 703.

22. Columbus, etc., R. Co. *v.* Witherow, 82 Ala. 190, 3 So. 23; Volrath *v.* Drum, 7 Luz. Leg. Reg. (Pa.) 223; Hughes *v.* Tinsley, 80 Va. 259, holding that an answer admitting a contract but denying the complainant's construction of it is not one that entitles defendant to a dissolution.

23. Sinnett *v.* Moles, 38 Iowa 25; McKibbin *v.* Brown, 14 N. J. Eq. 13; Lowe *v.* Davidson County, 70 N. C. 532; Monroe *v.* McIntyre, 41 N. C. 65.

The decision of another court upon the same matters and tending to support the complainant is to be given weight in favor of continuing the injunction, even though defendant was not a party to the other action. Reinach *v.* Meyer, 55 How. Pr. (N. Y.) 283.

Extraneous matters.— Likewise the court may consider the action of stock-holders in a corporation who have, by a large majority, reëlected defendants as officers notwithstanding the charges of wrong-doing because of which defendants were enjoined. Carpenter *v.* Burden, 2 Pars. Eq. Cas. (Pa.) 24.

denied, or insufficiently denied, will be taken as true.[24] The answer must fully and fairly meet all the equities of the bill, and if any material allegation is admitted or not denied the injunction will not be dissolved on the coming in of such incomplete answer.[25]

c. Want or Insufficiency of Verification. It is a general rule that the injunction will not be dissolved on the coming in of an unverified answer,[26] and this rule

24. *Alabama.*— Mobile, etc., R. Co. *v.* Alabama Midland R. Co., 116 Ala. 51, 23 So. 57.
Maryland.— Briesch *v.* McCauley, 7 Gill 189; Alexander *v.* Ghiselin, 5 Gill 138; Cronise *v.* Clark, 4 Md. Ch. 403; Washington University *v.* Green, 1 Md. Ch. 97; Brown *v.* Stewart, 1 Md. Ch. 87.
Mississippi.— Hooker *v.* Austin, 41 Miss. 717.
New Jersey.— Merwin *v.* Smith, 2 N. J. Eq. 182.
North Carolina.— Wilson *v.* Hendricks, 54 N. C., 295; Parks *v.* Spurgin, 38 N. C. 153.
Tennessee.— Tyne *v.* Dougherty, 3 Tenn. Ch. 52.
Virginia.— Randolph *v.* Randolph, 6 Rand. 194.
United States.— Young *v.* Grundy, 6 Cranch 51, 3 L. ed. 149.
See 27 Cent. Dig. tit. "Injunction," § 376 *et seq.*

25. *Alabama.*— Kinney *v.* Ensmenger, 87 Ala. 340, 6 So. 72.
California.— De Godey *v.* Godey, 39 Cal. 157.
Georgia.— Grubbs *v.* McGlawm, 39 Ga. 672; Upson County R. Co. *v.* Sharman, 37 Ga. 644; Smith *v.* Bryan, 34 Ga. 53; Laub *v.* Burnett, 31 Ga. 304; McGinnis *v.* Justices Gordon County Inferior Ct., 30 Ga. 47; Lawrence *v.* Philpot, 27 Ga. 585; Farmers', etc., Bank *v.* Ruse, 27 Ga. 391; Wooten *v.* Smith, 27 Ga. 216; Jackson *v.* Jones, 25 Ga. 93; Pledger *v.* McCauley, 25 Ga. 46; Bond *v.* Watson, 22 Ga. 637; Hammett *v.* Christie, 21 Ga. 251; Justices Pike County Inferior Ct. *v.* Griffin, etc., Plank-Road Co., 11 Ga. 246.
Indiana.— Cheek *v.* Tilley, 31 Ind. 121.
Maryland.— Sisk *v.* Garey, 27 Md. 401; Hamilton *v.* Whitridge, 11 Md. 128, 69 Am. Dec. 184; Hutchins *v.* Hope, 12 Gill & J. 244; Brown *v.* Stewart, 1 Md. Ch. 87; Paul *v.* Nixon, 1 Bland 200 note; Stewart *v.* Barry, 1 Bland 191 note.
New Jersey.— Ireland *v.* Kelly, 60 N. J. Eq. 308, 47 Atl. 51; French *v.* Snell, 29 N. J. Eq. 95; Woodruff *v.* Ritter, 26 N. J. Eq. 86; Kuhl *v.* Martin, 26 N. J. Eq. 60; Shotwell *v.* Struble, 21 N. J. Eq. 31; Morris Canal, etc., Co. *v.* Jersey City, 11 N. J. Eq. 13; Lines *v.* Spear, 8 N. J. Eq. 154; Miller *v.* Ford, 1 N. J. Eq. 358.
New York.— Schermerhorn *v.* Merrill, 1 Barb. 511; Skinner *v.* White, 17 Johns, 357 [*reversing* 2 Johns. Ch. 526]; Wakeman *v.* Gillespy, 5 Paige 112; Clark *v.* Martin, 4 Edw. 424.
North Carolina.— Ponton *v.* McAdoo, 71 N. C. 101; Reynolds *v.* McKenzie, 62 N. C. 50; Rich *v.* Thomas, 57 N. C. 71; Sherrill *v.* Harrell, 36 N. C. 194.
South Dakota.— Searle *v.* Lead, 10 S. D. 312, 73 N. W. 101, 39 L. R. A. 345.
Tennessee.— Yale *v.* Moore, 3 Tenn. Ch. 76.
Texas.— Bedwell *v.* Thompson, 25 Tex. Suppl. 247.
Virginia.— Scott *v.* Loraine, 6 Munf. 117.
West Virginia.— Mason City Salt, etc., Co. *v.* Mason, 23 W. Va. 211.
United States.— Gulf Bag Co. *v.* Suttner, 124 Fed. 467; Northern Pac. R. Co. *v.* Barnesville, etc., R. Co., 4 Fed. 298, 2 McCrary 203.
See 27 Cent. Dig. tit. "Injunction," § 376 *et seq.*
An injunction against the taking of public property will not be dissolved on an answer that admits the acts charged but denies that the public will be hurt. Atty.-Gen. *v.* Cohoes Co., 6 Paige (N. Y.) 133.

26. *Alabama.*— Trump *v.* McDonnell, 112 Ala. 256, 20 So. 524.
Illinois.— Gray *v.* McCance, 11 Ill. 325.
Mississippi.— Little *v.* Hamlin, (1900) 27 So. 528.
New York.— Astie *v.* Leeming, 3 Abb. N. Cas. 25.
Pennsylvania.— Wick China Co. *v.* Brown, 164 Pa. St. 449, 30 Atl. 261.
See 27 Cent. Dig. tit. "Injunction," § 382.
The general oath of defendant may be sufficient even though all the material facts of the bill are specially verified by affidavit. Keron *v.* Coon, 26 N. J. Eq. 26.
Oath of one defendant only.— The injunction may be dissolved on the sworn answer of defendant against whom the gravamen of the charges are directed, even though the answer of another nominal defendant is not verified. Hartley *v.* Matthews, 96 Ala. 224, 11 So. 452. See also Schermerhorn *v.* Merrill, 1 Barb. (N. Y.) 511.
The answer of a corporation must be sworn to by a person acquainted with the facts. Griffin *v.* State Bank, 17 Ala. 258 (corporate seal not sufficient verification); Fulton Bank *v.* New York, etc., Canal Co., 1 Paige (N. Y.) 311.
Mere irregularity in the jurat is not sufficient ground for refusing to dissolve, when objection is long delayed and the jurat would be sufficient to sustain a perjury indictment. Graham *v.* Stagg, 2 Paige (N. Y.) 321. See also Vermilya *v.* Christie, 4 Sandf. Ch. (N. Y.) 376.
The injunction may be dissolved on affidavits even though the answer is not sworn to. Kidd *v.* Bates, 124 Ala. 670, 27 So. 491. *Compare* Little *v.* Hamlin, (Miss. 1900) 27 So. 528. An unsworn answer may be made part of a separate affidavit by annexation and reference for purposes of a motion to dissolve. Fowler *v.* Burns, 7 Bosw. (N. Y.) 637.

has been held to be applicable even though the bill for the injunction did not require a sworn answer.[27]

d. Denials on Information and Belief. The answer is insufficient as ground for dissolving if its denials are not positive and of personal knowledge, but are merely on information and belief,[28] except where the allegations of the bill or complaint are upon information and belief.[29] Much less is a mere denial of all knowledge on the part of defendant sufficient,[30] even though defendant is an executor or administrator and could not have personal knowledge of his decedent's transactions.[31] But where, without the knowledge in question, defendant would be a *bona fide* purchaser, with equities equal or superior to those of the complainant, a denial of such knowledge is a sufficient answer and justifies dissolution of an injunction.[32]

27. Mobile, etc., R. Co. *v.* Alabama Midland R. Co., 123 Ala. 145, 26 So. 324; Rainey *v.* Rainey, 35 Ala. 282; Mahaney *v.* Lazier, 16 Md. 69; Dougrey *v.* Topping, 4 Paige (N. Y.) 94. But see Lockhart *v.* Troy, 48 Ala. 579.

28. *Alabama.*— Mobile, etc., R. Co. *v.* Alabama Midland R. Co., 123 Ala. 145, 26 So. 324; Columbus, etc., R. Co. *v.* Witherow, 82 Ala. 190, 3 So. 23; Hart *v.* Clark, 54 Ala. 490; Calboun *v.* Cozens, 3 Ala. 498.

California.— Chace *v.* Jennings, (1892) 28 Pac. 681; Porter *v.* Jennings, 89 Cal. 440, 26 Pac. 965.

Florida.— Hunter *v.* Bradford, 3 Fla. 269.

Georgia.— Ketchens *v.* Howard, 30 Ga. 931; Holmes *v.* George, 24 Ga. 636; Powell *v.* Brown, 22 Ga. 275; Coffee *v.* Newsom, 8 Ga. 444.

Iowa.— Sinnett *v.* Moles, 38 Iowa 25.

Maryland.— Doub *v.* Barnes, 4 Gill 1, 1 Md. Ch. 127; Kent *v.* Richards, 3 Md. Ch. 392.

Michigan.— Atty.-Gen. *v.* Oakland County Bank, Walk. 90.

Mississippi.— Coleman *v.* Hudspeth, 49 Miss. 562; Miller *v.* McDougall, 44 Miss. 682; Hooker *v.* Austin, 41 Miss. 717.

New Jersey.— Higbee *v.* Camden, etc., R. Co., 19 N. J. Eq. 276; Irick *v.* Black, 17 N. J. Eq. 189; Boston Franklinite Co. *v.* New Jersey Zinc Co., 13 N. J. Eq. 215; Morris Canal, etc., Co. *v.* Jersey City, 11 N. J. Eq. 13; Pierson *v.* Ryerson, 5 N. J. Eq. 196; Everly *v.* Rice, 4 N. J. Eq. 553.

New York.— Norton *v.* Woods, 5 Paige 249; Rodgers *v.* Rodgers, 1 Paige 426; Ward *v.* Van Bokkelen, 1 Paige 100.

North Carolina.— Turner *v.* Cuthrell, 94 N. C. 239; Smith *v.* Harkins, 38 N. C. 613, 44 Am. Dec. 83.

Pennsylvania.— Luburg's Appeal, (1889) 17 Atl. 245; Jordan *v.* Woodhouse, 5 Luz. Leg. Reg. 141.

Tennessee.— Tyne *v.* Dougherty, 3 Tenn. Ch. 52.

Wisconsin.— Tainter *v.* Lucas, 29 Wis. 375; Smith *v.* Appleton, 19 Wis. 468.

United States.— Cole Silver Min. Co. *v.* Virginia, etc., Water Co., 6 Fed. Cas. No. 2,990, 1 Sawy. 689; Nelson *v.* Robinson, 17 Fed. Cas. No. 10,114, Hempst. 464; Poor *v.* Carleton, 19 Fed. Cas. No. 11,272, 3 Sumn. 70.

See 27 Cent. Dig. tit. "Injunction," § 378.

A statement that defendant "does not believe and denies" the equities of the bill is an express denial and is sufficient. Philadelphia Trust, etc., Co. *v.* Scott, 45 Md. 451.

A belief that the injury will not occur is not a sufficient answer upon which to dissolve the injunction. Atty.-Gen. *v.* Cohoes Co., 6 Paige (N. Y.) 133, 29 Am. Dec. 775.

A denial consisting of mere opinion is not a sufficient answer. Callaway *v.* Jones, 19 Ga. 277.

Rule not inflexible see Campbell *v.* Runyon, 42 N. J. Eq. 483, 8 Atl. 298. Facts appearing in the bill may aid defendant's denials on belief only, and justify a dissolution. Carter *v.* Carlisle, 5 Fed. Cas. No. 2,474, 1 Hayw. & H. 246. The complainant's equity may be rendered so doubtful by allegations on information and belief, aided by the facts and circumstances, as to justify dissolution. Clayton *v.* Lyle, 55 N. C. 188; McFarland *v.* McDowell, 4 N. C. 15.

29. Hogan *v.* Decatur Branch Bank, 10 Ala. 485; Holdrege *v.* Gwynne, 18 N. J. Eq. 26; Kaighn *v.* Fuller, 14 N. J. Eq. 419; Tainter *v.* Lucas, 29 Wis. 375.

30. *Georgia.*— Connally *v.* Cruger, 40 Ga. 259; Powell *v.* Brown, 22 Ga. 275.

Iowa.— Gates *v.* Ballou, 54 Iowa 485, 6 N. W. 701.

Mississippi.— Hooker *v.* Austin, 41 Miss. 717.

New Jersey.— Williams *v.* Stevens, 5 N. J. Eq. 119.

North Carolina.— Cobb *v.* Clegg, 127 N. C. 153, 49 S. E. 80. *Compare* Clayton *v.* Lyle, 55 N. C. 188.

The denial of one who knows nothing concerning the transaction in question is not a sufficient basis for a dissolution. Ward *v.* Van Bokkelen, 1 Paige (N. Y.) 100.

31. Coffee *v.* Newsom, 8 Ga. 444; Ashe *v.* Johnson, 55 N. C. 149. *Contra*, Coale *v.* Chase, 1 Bland (Md.) 136.

32. Mahone *v.* Central Bank, 17 Ga. 111; Horner *v.* Jobs, 13 N. J. Eq. 19; De Groot *v.* Wright, 7 N. J. Eq. 516; Rockwell *v.* Lawrence, 5 N. J. Eq. 20; Evans *v.* Lovengood, 54 N. C. 298. See Haynes *v.* Hazlerigg, 1 Overt. (Tenn.) 242. *Compare* Comstock *v.* Apthorpe, 8 Cow. (N. Y.) 386 [*affirming* Hopk. 163]; Roberts *v.* Anderson, 2 Johns. Ch. (N. Y.) 202.

e. Where Fraud Is Involved. Where the substance of the bill upon which the injunction was granted is fraud on the part of defendant, the court will as a usual thing retain the injunction until the question can be investigated on final hearing, even though the answer denies the fraud and meets the whole equity of the bill.[33]

f. New Matter in Answer. An injunction will not be dissolved on the coming in of the answer if defendant entitles himself to such dissolution only by setting out new matter, not responsive to the bill.[34] The burden of proving such new matter is on defendant, and to support this burden he must produce evidence.[35] But the presence of new matter in the answer is no ground

33. *Georgia.*—Dent *v.* Summerlin, 12 Ga. 5.

Iowa.— Walker *v.* Stone, 70 Iowa 103, 30 N. W. 39; Johnston *v.* Chicago, etc., R. Co., 58 Iowa 537, 12 N. W. 576; Brigham *v.* White, 44 Iowa 677; Stewart *v.* Johnston, 44 Iowa 435.

New Jersey.— Emson *v.* Ivins, 42 N. J. Eq. 277, 10 Atl. 877; Hartly *v.* Hartly, (Ch. 1886) 4 Atl. 677; Scott *v.* Hartman, 26 N. J. Eq. 89; Leigh *v.* Clark, 11 N. J. Eq. 110.

New York.— Litchfield *v.* Pelton, 6 Barb. 187; Claflin *v.* Hamlin, 62 How. Pr. 284; Hastings *v.* Palmer, Clarke 52.

North Carolina.— Coleman *v.* Howell, 131 N. C. 125, 42 S. E. 555; Key *v.* Dobson, 62 N. C. 170; Peterson *v.* Matthis, 56 N. C. 31.

Pennsylvania.— Diller *v.* Rosenthal, 6 Luz. Leg. Reg. 33.

Texas.— Friedlander *v.* Ehrenworth, 58 Tex. 350.

Compare Sanders *v.* Cavett, 38 Ala. 51.

Denials of fraud on the part of defendants are not sufficient, when the bill may be sustained by showing fraud on the part of persons under whom defendants hold. Schermerhorn *v.* Merrill, 1 Barb. (N. Y.) 511.

34. *Alabama.*— Mobile, etc., R. Co. *v.* Alabama Midland R. Co., 123 Ala. 145, 26 So. 324; Hendricks *v.* Hughes, 117 Ala. 591, 23 So. 637; Birmingham Mineral R. Co. *v.* Bessemer, 98 Ala. 274, 13 So. 487; Bolling *v.* Roman, 95 Ala. 518, 10 So. 553; Columbus, etc., R. Co. *v.* Witherow, 82 Ala. 190, 3 So. 23; Farris *v.* Houston, 78 Ala. 250; Rembert *v.* Brown, 17 Ala. 667.

Delaware.— Maclary *v.* Reznor, 3 Del. Ch. 445.

Florida.— Indian River Steamboat Co. *v.* East Coast Transp. Co., 28 Fla. 387, 10 So. 480, 29 Am. St. Rep. 258; Yonge *v.* McCormick, 6 Fla. 368, 63 Am. Dec. 214.

Georgia.— Laub *v.* Burnett, 31 Ga. 304; Hargraves *v.* Jones, 27 Ga. 233; Wooten *v.* Smith, 27 Ga. 216; Lewis *v.* Leak, 9 Ga. 95; Moore *v.* Ferrell, 1 Ga. 7.

Idaho.— Oro Fino, etc., Min. Co. *v.* Cullen, 1 Ida. 113.

Iowa.— Huskins *v.* McElroy, 62 Iowa 508, 17 N. W. 670; Fargo *v.* Ames, 45 Iowa 494; Judd *v.* Hatch, 31 Iowa 491.

Maryland.— State *v.* Northern Cent. R. Co., 18 Md. 193; Hutchins *v.* Hope, 12 Gill & J. 244; Hardy *v.* Summers, 10 Gill & J. 316, 22 Am. Dec. 167; Chesapeake, etc., Canal Co. *v.* Baltimore, etc., R. Co., 4 Gill & J. 1; Drury *v.* Roberts, 2 Md. Ch. 157; Bellona Co.'s Case, 3 Bland 442; Salmon *v.* Clagett, 3 Bland 125.

Michigan.— Atty.-Gen. *v.* Oakland County Bank, Walk. 90.

Minnesota.— Moss *v.* Pettingill, 3 Minn. 217.

Mississippi.— Richardson *v.* Lightcap, 52 Miss. 508; Hooker *v.* Austin, 41 Miss. 717; Ferriday *v.* Selcer, Freem. 258.

New Jersey.— Johnston *v.* Corey, 25 N. J. Eq. 311; Vreeland *v.* New Jersey Stone Co., 25 N. J. Eq. 140; Armstrong *v.* Potts, 23 N. J. Eq. 92; West Jersey R. Co. *v.* Thomas, 21 N. J. Eq. 205; Huffman *v.* Hummer, 17 N. J. Eq. 263; Useful Manufactures Soc. *v.* Low, 17 N. J. Eq. 19; Green *v.* Pallas, 12 N. J. Eq. 267; Morris Canal, etc., Co. *v.* Jersey City, 12 N. J. Eq. 227; Brewster *v.* Newark, 11 N. J. Eq. 114; Carson *v.* Coleman, 11 N. J. Eq. 106; Cornelius *v.* Post, 9 N. J. Eq. 196.

New York.— Simson *v.* Hart, 14 Johns. 63; Minturn *v.* Seymour, 4 Johns. Ch. 498.

North Carolina.— Carter *v.* Hoke, 64 N. C. 348; Russ *v.* Gulick, 64 N. C. 301; Allen *v.* Pearce, 59 N. C. 309; Wilson *v.* Mace, 55 N. C. 5; Deaver *v.* Erwin, 42 N. C. 24; Strong *v.* Menzies, 41 N. C. 544; Kerns *v.* Chambers, 38 N. C. 576; Nelson *v.* Owen, 38 N. C. 175; Lyrely *v.* Wheeler, 38 N. C. 170; McNamara *v.* Irwin, 22 N. C. 13.

West Virginia.— Noyes *v.* Vickers, 39 W. Va. 30, 19 S. E. 429.

United States.— Cole Silver Min. Co. *v.* Virginia, etc., Water Co., 6 Fed. Cas. No. 2,990, 1 Sawy. 685; Robinson *v.* Cathcart, 20 Fed. Cas. No. 11,946, 2 Cranch C. C. 590.

See 27 Cent. Dig. tit. "Injunction," § 381.

Illustrations.— On a motion to dissolve an injunction to prevent waste, a justification of the waste is not available, unless it was set up in the bill. Van Syckel *v.* Emery, 18 N. J. Eq. 387. When the bill alleged discontinuance of car service, an answer setting up as a reason the failure of complainant to pay a debt sets up new matter not to be considered on motion to dissolve. Agee *v.* Louisville, etc., R. Co., (Ala. 1904) 37 So. 680.

An injunction to prevent breach of contract may be dissolved on the coming in of an answer setting up a prior breach by complainant as justification. St. Regis Paper Co. *v.* Santa Clara Lumber Co., 55 N. Y. App. Div. 225, 67 N. Y. Suppl. 149 [*reversing* 66 N. Y. Suppl. 59].

35. *Alabama.*— Mabel Min. Co. *v.* Pearson

for refusing to dissolve, if, in addition, the entire equity of the bill is negatived.[36]

3. Answers to Bills For Discovery. Where the bill merely asks discovery in aid of a defense at law, the injunction will be dissolved of course upon the coming in of the answer, even though the charges of the bill are not denied;[37] but if the bill prays for relief also, as well as discovery, the injunction is not to be dissolved as of course.[38]

4. Answer by Only Part of Defendants. Although generally an injunction will not be dissolved on the coming in of answers from only part of defendants,[39] yet it may in the court's discretion be dissolved under such circumstances,[40] particularly in case the complainant has taken no steps to compel an answer from the rest,[41] or where those who have answered are the ones against whom the charges were really directed.[42] The answers of merely nominal defendants are not

Coal, etc., Co., 121 Ala. 567, 25 So. 754; Jackson *v.* Jackson, 91 Ala. 292, 10 So. 31; Jackson *v.* Jackson, 84 Ala. 343, 4 So. 174.

Iowa.— Mills *v.* Hamilton, 49 Iowa 105.

Maryland.— Hutchins *v.* Hope, 7 Gill 119; Hutchins *v.* Hope, 12 Gill & J. 244.

Pennsylvania.— Luburg's Appeal, (1889) 17 Atl. 245.

West Virginia.— Grobe *v.* Roup, 46 W. Va. 488, 33 S. E. 261.

See 27 Cent. Dig. tit. "Injunction," § 381.

A denial in the reply of new matter contained in the answer is sufficient to overcome such new matter. Moss *v.* Pettingill, 3 Minn. 217.

36. Shricker *v.* Field, 9 Iowa 366; Crane *v.* Ely, 37 N. J. Eq. 564.

37. Adams *v.* Whiteford, 9 Gill (Md.) 501; King *v.* Clark, 3 Paige (N. Y.) 76.

38. Henwood *v.* Jarvis, 27 N. J. Eq. 247; Brown *v.* Edsall, 9 N. J. Eq. 256.

39. *Arkansas.*—Fowler *v.* Williams, 20 Ark. 641; Johnston *v.* Alexander, 6 Ark. 302.

Illinois.— Reynolds *v.* Mitchell, 1 Ill. 177.

Maryland.— Heck *v.* Vollmer, 29 Md. 507.

New Jersey.— Robinson *v.* Davis, 11 N. J. Eq. 302, 69 Am. Dec. 591; Wisham *v.* Lippincott, 9 N. J. Eq. 353; Gregory *v.* Stillwell, 6 N. J. Eq. 51; Smith *v.* Loomis, 5 N. J. Eq. 60; Stoutenburg *v.* Peck, 4 N. J. Eq. 446; Price *v.* Clevenger, 3 N. J. Eq. 207.

New York.— Noble *v.* Wilson, 1 Paige 164; Vandervoort *v.* Williams, Clarke 377.

North Carolina.— Councill *v.* Walton, 39 N. C. 155.

Virginia.— Baltimore, etc., R. Co. *v.* Wheeling, 13 Gratt. 40.

United States.— Robinson *v.* Cathcart, 20 Fed. Cas. No. 11,946, 2 Cranch C. C. 590.

See 27 Cent. Dig. tit. "Injunction," § 375.

40. *Illinois.*— Reynolds *v.* Mitchell, 1 Ill. 177.

New Jersey.— Gregory *v.* Stillwell, 6 N. J. Eq. 51.

New York.— Rogers *v.* Hosack, 18 Wend. 319.

South Carolina.— Goodwyn *v.* State Bank, 4 Desauss. Eq. 389.

Wisconsin.— Tiede *v.* Schneidt, 99 Wis. 201, 74 N. W. 798.

See 27 Cent. Dig. tit. "Injunction," § 375.

Where the non-answering defendant is a foreign corporation and cannot be compelled to answer, the injunction may be dissolved. Baltimore, etc., R. Co. *v.* Wheeling, 13 Gratt. (Va.) 40.

Where a sworn answer is waived by the bill, the injunction may be dissolved on the answer of one of several. Woolfolk *v.* Rumph, 37 Ga. 684.

If the interests of defendants are independent and the answer of one defendant not yet filed cannot affect the rights of the other defendants, dissolution may be granted on motion of those answering. McVickar *v.* Wolcott, 4 Johns. (N. Y.) 510; Evans *v.* Lovengood, 54 N. C. 298; Wilson *v.* Hendricks, 54 N. C. 295.

41. Jones *v.* Magill, 1 Bland (Md.) 177; Stoutenberg *v.* Peck, 4 N. J. Eq. 446; Mallett *v.* Weybossett Bank, 1 Barb. (N. Y.) 217; Noble *v.* Wilson, 1 Paige (N. Y.) 164; Ward *v.* Van Bokkelen, 1 Paige (N. Y.) 100; Shonk *v.* Knight, 12 W. Va. 667.

42. *Alabama.*— Garrett *v.* Lynch, 44 Ala. 683; Mobile School Com'rs *v.* Putnam, 44 Ala. 506.

Arkansas.— Fowler *v.* Williams, 20 Ark. 641.

Delaware.— Marvel *v.* Ortlip, 3 Del. Ch. 9.

Georgia.— Semmes *v.* Columbus, 19 Ga. 471; Dennis *v.* Green, 8 Ga. 197.

Maryland.— Heck *v.* Vollmer, 29 Md. 507.

Missouri.— August Gast Bank Note, etc., Co. *v.* Fennimore Assoc., 79 Mo. App. 612.

New Jersey.— Adams *v.* Hudson County Bank, 10 N. J. Eq. 535, 64 Am. Dec. 469; Stoutenburg *v.* Peck, 4 N. J. Eq. 446; Price *v.* Clevenger, 3 N. J. Eq. 207; Vliet *v.* Lowmason, 2 N. J. Eq. 404.

New York.— Mallett *v.* Weybossett Bank, 1 Barb. 217; Depeyster *v.* Graves, 2 Johns. Ch. 148.

West Virginia.— Livesay *v.* Feamster, 21 W. Va. 83.

See 27 Cent. Dig. tit. "Injunction," § 375.

The representatives of a deceased co-defendant need not answer as a prerequisite to a dissolution on the answer of other defendants, when they are not charged with knowledge. Wakeman *v.* Gillespy, 5 Paige (N. Y.) 112.

The answer of the cashier, as such, in a suit to enjoin the bank, is not sufficient to warrant dissolving the injunction. McGuffie *v.* Planters' Bank, Freem. (Miss.) 383.

required;[43] nor are the answers of those who would have no knowledge of the facts and are not charged with such knowledge.[44]

5. EFFECT OF EXCEPTIONS TO ANSWER. The filing of exceptions to an answer does not prevent dissolution of the injunction on motion of defendant. The exceptions and the motion may be considered together,[45] and if, despite the exceptions, it appears that the equity of the bill has been fully answered, as where the exceptions are not well taken or are too immaterial or unresponsive portions of the answer or are for impertinence merely, the motion to dissolve may be granted.[46] Further the injunction may be dissolved on motion even though the exceptions have not been disposed of.[47]

P. Affidavits and Other Evidence in Support of Motion. Defendant may generally introduce affidavits in support of his motion to dissolve.[48] In some jurisdictions affidavits may be used before answer with much the same effect that the answer itself would have, so that the injunction may be dissolved on affidavits fully and positively denying the equities of the bill;[49] but they must contain a

43. Hartley *v.* Matthews, 96 Ala. 224, 11 So. 452; Shricker *v.* Field, 9 Iowa 366; Annapolis *v.* Harwood, 32 Md. 471, 3 Am. Rep. 161; Livesay *v.* Feamster, 21 W. Va. 83.

Answers of persons not enjoined will not be regarded on motion to dissolve. Van Syckel *v.* Emery, 18 N. J. Eq. 387.

44. Dunlap *v.* Clements, 7 Ala. 539; Long *v.* Brown, 4 Ala. 622; Coleman *v.* Gage, Clarke (N. Y.) 295; Thompson *v.* McNair, 62 N. C. 121; Ijams *v.* Ijams, 62 N. C. 39; Ashe *v.* Hale, 40 N. C. 55.

An injunction against a county board may be dissolved on the answer of fewer than all, when no objection is made and those answering possess all the knowledge that the rest have on the subjects in question. Douglass *v.* Baker County Com'rs, 23 Fla. 419, 2 So. 776.

45. *Maryland.*— Keighler *v.* Savage Mfg. Co., 12 Md. 383, 71 Am. Dec. 600; Salmon *v.* Clagett, 3 Bland 125; Gibson *v.* Tilton, 1 Bland 352, 17 Am. Dec. 306.

New Jersey.— Wyckoff *v.* Cockran, 4 N. J. Eq. 420.

North Carolina.— Edney *v.* Motz, 40 N. C. 233; Smith *v.* Thomas, 22 N. C. 126.

Rhode Island.— Bradford *v.* Peckham, 9 R. I. 250.

West Virginia.— Sandusky *v.* Paris, 49 W. Va. 150, 38 S. E. 563.

See 27 Cent. Dig. tit. "Injunction," § 383.

46. *Florida.*— Indian River Steamboat Co. *v.* East Coast Transp. Co., 28 Fla. 387, 10 So. 480, 29 Am. St. Rep. 258.

Georgia.— Lewis *v.* Leak, 9 Ga. 95.

Mississippi.— O'Conner *v.* Starke, 59 Miss. 481.

New Jersey.— Stitt *v.* Hilton, 31 N. J. Eq. 285; McGee *v.* Smith, 16 N. J. Eq. 462; Robert *v.* Hodges, 16 N. J. Eq. 299.

New York.— Jewett *v.* Belden, 11 Paige 618; Doe *v.* Roe, Hopk. 276. *Compare* Parker *v.* Williams, 4 Paige 439.

West Virginia.— Sandusky *v.* Faris, 49 W. Va. 150, 38 S. E. 563.

Canada.— Harrison *v.* Baby, 1 Grant Ch. (U. C.) 247.

See 27 Cent. Dig. tit. "Injunction," § 383.

Exceptions to merits.— If the exceptions are submitted to and go to the merits no dissolution will be granted. Noble *v.* Wilson, 1 Paige (N. Y.) 164.

An order enlarging the time for exceptions does not in the meantime prevent dissolution on motion. Wakeman *v.* Gillespy, 5 Paige (N. Y.) 112.

Exceptions well taken, on the ground that the answer fails to make discovery, are sufficient ground for continuing the injunction till the hearing. Symons *v.* Reid, 58 N. C. 327.

47. Barney *v.* Earle, 13 Ala. 106; Foxworth *v.* Magee, 48 Miss. 532; Mitchell *v.* Mitchell, 20 N. J. Eq. 234.

48. Spicer *v.* Hoop, 51 Ind. 365; Sacket *v.* Hill, 2 Mich. 182 (holding that an injunction may be dissolved on affidavits only in cases of waste and partnership); Carrol *v.* Farmers', etc., Bank, Harr. (Mich.) 197; Perry *v.* Volkening, 44 N. Y. Super. Ct. 332; Minor *v.* Terry, Code Rep. N. S. (N. Y.) 384; Markham *v.* Markham, 1 Barb. Ch. (N. Y.) 374; Thompson *v.* Allen, 3 N. C. 150.

Matters of justification of defendant's acts are properly for the hearing on the merits, and defendant cannot, on motion to dissolve, introduce evidence to show justification. New Orleans Waterworks Co. *v.* Oser, 36 La. Ann. 918.

Failure to give bond, as a ground for dissolving, must be shown by affidavit. Burns *v.* Morse, 6 Paige (N. Y.) 108.

Materiality.— Where, during the pendency of an action, an injunction is granted to prevent defendant from fraudulently removing his property, the issue on motion to dissolve is the fraudulent intent, not the existence of the debt, and affidavits must be restricted to the issue. Brewster *v.* Hodges, 1 Duer (N. Y.) 609.

On a motion to continue an injunction defendant may introduce just such evidence as he might in case he were moving to dissolve. Hynes *v.* Fisher, 4 Ont. 60.

49. Union St. R. Co. *v.* Hazleton, etc., Electric R. Co., 154 Pa. St. 422, 26 Atl. 557; Kneedler *v.* Lane, 3 Grant (Pa.) 523; Machette *v.* Hodges, 1 Brewst. (Pa.) 313, 6 Phila. 560; Holl *v.* Holl, 5 Pa. L. J. Rep.

specific denial of the facts and not a mere general denial of the equity.[50] Affidavits may also be filed after answer, in support thereof, and may be read on a motion to dissolve,[51] although the contrary has been held in earlier cases.[52] Such affidavits cannot aid an answer whose denials are insufficient.[53] Where supporting affidavits are filed with the bill by the complainant, they may be rebutted by evidence in support of the answer.[54] Even though the bill does not require a sworn answer, such an answer may be used as an affidavit on behalf of defendant, upon the hearing of his motion to dissolve.[55] Supplemental affidavits cannot ordinarily be filed where the opposing affidavits merely rebut, and set up no new matters.[56]

Q. Affidavits and Other Evidence in Opposition to Motion. While there are early decisions in some states, and the rule is apparently adhered to in other states, that affidavits are inadmissible in opposition to the motion to dissolve, at least to contradict the answer,[57] the rule in most of the states is to the contrary

108, 11 Pa. L. J. 224; Park Coal Co. *v.* O'Donnell, 7 Leg. Gaz. (Pa.) 149; Dull *v.* Holl, 1 Phila. (Pa.) 258. *Contra*, see Marks *v.* Weinstock, 121 Cal. 53, 53 Pac. 362, holding that an affidavit cannot take the place of an answer.

50. Galland *v.* Butler Coal Co., 4 Kulp (Pa.) 406.

51. Sullivan *v.* Bailey, 21 App. Cas. (D. C.) 100; Hummert *v.* Schwab, 54 Ill. 142; Freeport Highway Com'rs *v.* Goddard, 103 Ill. App. 36; Brightman *v.* Fry, 17 Tex. Civ. App. 531, 43 S. W. 60.

52. Hobson *v.* Bein, 2 Rob. (La.) 109; Roberts *v.* Anderson, 2 Johns. Ch. (N. Y.) 202; Hoffman *v.* Livingston, 1 Johns. Ch. (N. Y.) 211; Thompson *v.* Allen, 3 N. C. 150; Manser *v.* Jenner, 2 Hare 600, 24 Eng. Ch. 600; Barwell *v.* Brookes, 7 Jur. 364, 12 L. J. Ch. 457.

53. Bouldin *v.* Baltimore, 15 Md. 18. See Seneca Falls *v.* Matthews, 9 Paige (N. Y.) 504.

54. Gariss *v.* Gariss, 13 N. J. Eq. 320; Merwin *v.* Smith, 2 N. J. Eq. 182; Brown *v.* Haff, 5 Paige (N. Y.) 235, 28 Am. Dec. 425.

The affidavit of a third person cannot be used when the complainant's affidavit alone is annexed to the bill. Mulock *v.* Mulock, 26 N. J. Eq. 461.

55. Gelston *v.* Rullman, 15 Md. 260; Walker *v.* Hill, 21 N. J. Eq. 191; Schermerhorn *v.* Merrill, 1 Barb. (N. Y.) 511; Manchester *v.* Dey, 6 Paige (N. Y.) 295. See also Ingles *v.* Straus, 91 Va. 209, 21 S. E. 490.

An unsworn answer is no evidence on which to dissolve. Rainey *v.* Rainey, 35 Ala. 282.

After defendant's death an answer theretofore made and sworn to by him may be filed and used on a motion to dissolve. Dennis *v.* Green, 8 Ga. 197.

Answer used for benefit of complainant.— The answer may show that the injunction was proper, and it will not be dissolved, even though on the complainant's showing it was improvidently issued. Smith *v.* McLeod, 38 N. C. 390. *Contra*, Cresy *v.* Beavan, 13 Sim. 99, 36 Eng. Ch. 99, 60 Eng. Reprint 39. So the complainant may use the answer of one of defendants in his favor. Blossom *v.* Van Amringe, 62 N. C. 65.

56. Jacobs *v.* Miller, 10 Hun (N. Y.) 230; Hardt *v.* Liberty Hill Consol. Min., etc., Co., 27 Fed. 788.

57. *Alabama.*— Long *v.* Brown, 4 Ala. 622; Withers *v.* Dickey, 1 Stew. 190.

Delaware.— Kersey *v.* Rash, 3 Del. Ch. 321.

Maryland.— Bellona Co.'s Case, 3 Bland 442.

New Jersey.— Merwin *v.* Smith, 2 N. J. Eq. 182.

New York.— Jacobs *v.* Miller, 10 Hun 230; Servoss *v.* Stannard, 2 Code Rep. 56; Evans *v.* Van Hall, Clarke 22.

North Carolina.— Gentry *v.* Hamilton, 38 N. C. 376; West *v.* Coke, 5 N. C. 191; Thompson *v.* Allen, 3 N. C. 328.

Pennsylvania.— Gillis *v.* Hall, 2 Brewst. 342.

See 27 Cent. Dig. tit. "Injunction," § 386.

Affidavits filed prior to answer.— The complainant is restricted to such affidavits as he filed prior to the coming in of the answer. Hartwell *v.* Kingsley, 2 Sandf. (N. Y.) 674; Merrimack Mfg. Co. *v.* Garner, 4 E. D. Smith (N. Y.) 387, 2 Abb. Pr. 318; Haight *v.* Case, 4 Paige (N. Y.) 525; Eastburn *v.* Kirk, 1 Johns. Ch. (N. Y.) 444; Flynn *v.* Enterprise Bldg., etc., Assoc., 6 Luz. Leg. Reg. (Pa.) 133; Carpenter *v.* Burden, 2 Pars. Eq. Cas. (Pa.) 24; Kinsler *v.* Clarke, 2 Hill Eq. (S. C.) 617; Lloyd *v.* Jenkins, 4 Beav. 230, 5 Jur. 697, 49 Eng. Reprint 327; Beatty *v.* Beatty, 2 Molloy 541; Woodin *v.* Field, 15 Sim. 307, 38 Eng. Ch. 307, 60 Eng. Reprint 636. See also Poor *v.* Carleton, 19 Fed. Cas. No. 11,272, 3 Sumn. 70.

Affidavits to prove allegations in bill.— The complainant cannot read affidavits to prove allegations in the bill of matters of fact, which the answer neither denies nor admits. Castellain *v.* Blumenthal, 5 Jur. 501, 10 L. J. Ch. 223, 12 Sim. 47, 35 Eng. Ch. 42, 59 Eng. Reprint 1048. *Compare* Ord *v.* White, 3 Beav. 357, 43 Eng. Ch. 357, 49 Eng. Reprint 140.

New grounds and new facts not set out in the original application cannot be proved by additional affidavits on hearing of motion to dissolve. Stockett *v.* Johnson, 22 La. Ann. 89; Fryer *v.* Warne, 29 Wis. 511.

subject to certain limitations.[58] Affidavits in opposition are generally held proper where defendant relies on new matter,[59] as where he uses his affidavit as an answer,[60] or where the motion to dissolve is supported by affidavits.[61] So where waste or irreparable injury may occur prior to the final hearing, affidavits in contradiction of the answer and in opposition to the motion to dissolve are admissible.[62]

R. Hearing on Motion — 1. Time of Hearing. The hearing of a motion to dissolve a preliminary injunction may be at any time after its issuance and prior to the final hearing or trial.[63] The motion will not be heard, however, before the

58. *Alabama.*— Highland Ave., etc., R. Co. *v.* Birmingham R., etc., Co., 113 Ala. 239, 21 So. 342.

California.— Falkinburg *v.* Lucy, 35 Cal. 52, 95 Am. Dec. 76.

Indiana.— Spicer *v.* Hoop, 51 Ind. 365.

Kansas.— Olsson *v.* Topeka, 42 Kan. 709, 21 Pac. 219, oral evidence admitted.

Maryland.— See Bellona Co.'s Case, 3 Bland 442, depositions admitted under special circumstances.

Montana.— Butte, etc., Consol. Min. Co. *v.* Montana Ore-Purchasing Co., (1898) 55 Pac. 112.

New York.— Zellenkoff *v.* Collins, 23 Hun 156; Fowler *v.* Burns, 7 Bosw. 637; Jaques *v.* Areson, 4 Abb. Pr. 282; Schoonmaker *v.* Reformed Protestant Dutch Church, 5 How. Pr. 265; Minor *v.* Terry, Code Rep. N. S. 384.

North Carolina.— Blackwell Durham Tobacco Co. *v.* McElwee, 94 N. C. 425.

Pennsylvania.— Baltimore, etc., R. Co. *v.* Hanover, etc., St. R. Co., 13 Pa. Co. Ct. 291.

Wisconsin.— Starks *v.* Redfield, 52 Wis. 349, 9 N. W. 168.

United States.— Cœur d'Alene Consol., etc., Co. *v.* Miners' Union, 51 Fed. 260, 19 L. R. A. 382 (statements in a governor's proclamation); Poor *v.* Carleton, 19 Fed. Cas. No. 11,272, 3 Sumn. 70.

England.— Custance *v.* Cunningham, 13 Beav. 363, 51 Eng. Reprint 140; Smith *v.* Cleasby, 5 Jur. 383, 10 L. J. Ch. 163, 10 Sim. 91, 16 Eng. Ch. 91, 59 Eng. Reprint 547.

See 27 Cent. Dig. tit. "Injunction," § 386.

Discretion of court.— "The admission of the affidavits, whether filed before or after the answer, whether they are to the title of plaintiff or to the acts of defendant, although they are contradictory to the answer, ought to rest in the sound discretion of the Court. . . . If it were necessary, I should not hesitate to admit affidavits to contradict the answer, for the purpose of continuing or even of granting a special injunction, where I perceived, that, without it, irreparable mischiefs would arise." Poor *v.* Carleton, 19 Fed. Cas. No. 11,272, 3 Sumn. 70, 81, per Justice Story. See also Cagney *v.* Fisher, 34 Hun (N. Y.) 549.

Depositions regularly taken before the filing of an amended answer may be read on motion to dissolve after such answer. Leroy *v.* Dickerson, 4 N. C. 110.

A complaint on information and belief may be supported by affidavit setting out the sources of the information and grounds for the belief. Price *v.* Grice, 10 Ida. 443, 79 Pac. 387.

Proof of contempt.— Affidavits showing disobedience of the injunction by defendant are admissible to enable the court to determine whether defendant is in contempt. Evans *v.* Van Hall, Clarke (N. Y.) 22.

59. Merwin *v.* Smith, 2 N. J. Eq. 182; Society *v.* Diers, 60 Barb. (N. Y.) 152; Hollins *v.* Mallard, 10 How. Pr. (N. Y.) 540.

60. *California.*— Delger *v.* Johnson, 44 Cal. 182.

Iowa.— Palo Alto Banking, etc., Co. *v.* Mahar, 65 Iowa 74, 21 N. W. 187.

New York.— Minor *v.* Buckingham, 8 Abb. Pr. 68.

North Carolina.— Blackwell Durham Tobacco Co. *v.* McElwee, 94 N. C. 425; Howerton *v.* Sprague, 64 N. C. 451.

Pennsylvania.— Dreydoppel *v.* Young, 14 Phila. 226.

Rhode Island.— Bradford *v.* Peckham, 9 R. I. 250.

England.— Gibson *v.* Nicol, 6 Beav. 422, 49 Eng. Reprint 889.

See 27 Cent. Dig. tit. "Injunction," § 386.

In New York affidavits are not admissible in case the answer is used only as such and not as an affidavit. Fowler *v.* Burns, 7 Bosw. 637.

61. Campbell *v.* Flannery, 29 Mont. 246, 74 Pac. 450; Armstrong *v.* Sweeney, 65 Nebr. 676, 91 N. W. 570; Hascall *v.* Madison University, 8 Barb. (N. Y.) 174; Roome *v.* Webb, 3 How. Pr. (N. Y.) 327; Sledge *v.* Blum, 63 N. C. 374.

In New York the complainant is not entitled, under the code, to oppose by affidavits unless defendant moves on affidavits. Blatchford *v.* New York, etc., R. Co., 7 Abb. Pr. 322.

62. Henry *v.* Watson, 109 Ala. 335, 19 So. 413; Swindall *v.* Bradley, 56 N. C. 353; Davis *v.* Fulton, 1 Overt. (Tenn.) 121; Champlain Constr. Co. *v.* O'Brien, 104 Fed. 930; Poor *v.* Carleton, 19 Fed. Cas. No. 11,272, 3 Sumn. 70.

Some courts have restricted the use of affidavits to such cases and no others. Harrison *v.* Maury, 140 Ala. 523, 37 So. 361; Barnard *v.* Davis, 54 Ala. 565; Lewis *v.* Leak, 9 Ga. 95; Eastburn *v.* Kirk, 1 Johns. Ch. (N. Y.) 444; Moredock *v.* Williams, 1 Overt. (Tenn.) 325.

63. Rosenfield *v.* Gilmore, 32 Tex. 659; Smith *v.* Ryan, 20 Tex. 661; Huston *v.* Berry,

expiration of the time allowed for taking testimony,[64] or for excepting to the answer in case it has been filed.[65] In emergency cases the hearing will be set at an early day, even in vacation.[66]

2. CONTINUANCE. The court may in its discretion continue the hearing of a motion to dissolve,[67] only on a showing of great necessity.[68] It will not be granted, even to allow the complainant to procure further evidence, in case he has had plenty of time already for securing it.[69]

3. QUESTIONS CONSIDERED. On motion to dissolve the court may properly consider all questions involved in the grounds for the motion as set out therein,[70] but cannot consider extraneous matters not based on the motion papers.[71] After answer all facts therein except those by way of confession and avoidance, and all facts in the bill, may be considered.[72] If the injunction is ancillary only, the court will not investigate the merits of the principal case further than to determine whether it is one that merits the consideration of the court on final hearing.[73] The court may refuse to determine questions of doubt and difficulty, upon which the merits of the case may depend, reserving them till final hearing.[74] Matters of fact may be referred to a referee upon hearing the motion, and so

3 Tex. 235; Byrne *v.* Lyle, 1 Hen. & M. (Va.) 7.

Before service of process.— The injunction may be dissolved even before service of process. Shields *v.* McClung, 6 W. Va. 79. See Barton *v.* Lytle, Cooke (Tenn.) 89.

In a cause removed to a federal court the hearing must await the return-day. New Orleans City R. Co. *v.* Crescent City R. Co., 5 Fed. 160.

The question of the death of defendant may be tried instanter when suggested. Thompson *v.* Allen, 3 N. C. 237.

On rehearing a motion must be disposed of as of the time originally submitted. Gibbs *v.* Ward, (N. J. Ch. 1901) 48 Atl. 243.

In New York, the statute directing decisions on the motion to be within twenty days after submission is directory only. Watson *v.* Coe, 2 Silv. Sup. 339, 5 N. Y. Suppl. 614.

Rule 16 of the circuit court for the first circuit as to rehearings has no application to motions to dissolve. Westerly Waterworks *v.* Westerly, 77 Fed. 783.

A petition for a rule against defendant for contempt may be heard at the same time as a motion to dissolve. Steelsmith *v.* Fisher Oil Co., 47 W. Va. 391, 35 S. E. 15.

64. Richardson *v.* Kittlewell, 45 Fla. 551, 33 So. 984.

65. Carraway *v.* Odeneal, 56 Miss. 223; Satterlee *v.* Bargy, 3 Paige (N. Y.) 142.

66. Finegan *v.* Allen, 46 Ill. App. 553; Williamson *v.* Carnan, 1 Gill & J. (Md.) 184.

67. Smith *v.* Painter, 10 N. J. L. J. 182; Dillin *v.* Sessoms, 59 N. C. 256.

68. Taylor *v.* Dickinson, 15 Iowa 483; Botts *v.* Tabb, 10 Leigh (Va.) 616; Radford *v.* Innes, 1 Hen. & M. (Va.) 7; Steelsmith *v.* Fisher Oil Co., 47 W. Va. 391, 35 S. E. 15; Pithole Creek Petroleum Co. *v.* Rittenhouse, 12 W. Va. 313; Tiede *v.* Schneidt, 99 Wis. 201, 74 N. W. 798.

69. Freeman *v.* Finnall, Sm. & M. Ch. (Miss.) 623; Emmons *v.* Pidcock, 93 Va. 146, 24 S. E. 905; Ingles *v.* Straus, 91 Va. 209, 21 S. E. 490.

70. McLain Land, etc., Co. *v.* Kelly, 11 Okla. 26, 66 Pac. 282; Howell *v.* Dinneen, 16 S. D. 618, 94 N. W. 698.

Questions previously determined on demurrer to the bill will not be reconsidered on motion to dissolve. McGinnis *v.* Justices Gordon County Inferior Ct., 30 Ga. 47.

A finding of the court on the same question in another action may be considered on hearing a motion to dissolve. Barker *v.* Oswegatchie, 16 N. Y. Suppl. 727, 732.

71. Hartwell *v.* Kingsley, 2 Code Rep. (N. Y.) 101.

Independent matters such as the discharge of a receiver of the funds to which the injunction related need not be considered on motion to dissolve. Sanders *v.* Christie, 1 Grant Ch. (U. C.) 137.

If the injunction should be continued on one ground, the court need not consider matters that could not affect the right to continuance on that ground. Brody *v.* Chittenden, 106 Iowa 340, 76 N. W. 740.

Matters in the presence of the court and its former action may be determined by the chancellor's own recollection, and he may refuse to hear evidence in contradiction. Howard *v.* Lowell Mach. Co., 75 Ga. 325.

72. Mabel Min. Co. *v.* Pearson Coal, etc., Co., 121 Ala. 567, 25 So. 754; Chesapeake, etc., Canal Co. *v.* Baltimore, etc., R. Co., 4 Gill & J. (Md.) 1; Dalrymple *v.* Milwaukee, 53 Wis. 178, 10 N. W. 141.

73. Crary *v.* Port Arthur Channel, etc., Co., (Tex. Civ. App. 1898) 45 S. W. 842; Robrecht *v.* Robrecht, 46 W. Va. 738, 34 S. E. 801.

74. Morris Canal, etc., Co. *v.* Matthiesen, 17 N. J. Eq. 385; Huffman *v.* Hummer, 17 N. J. Eq. 263; Van Kuren *v.* Trenton Locomotive, etc., Mfg. Co., 13 N. J. Eq. 302. See Baltimore, etc., R. Co. *v.* Wheeling, 13 Gratt. (Va.) 40.

Disputed facts proper for the consideration of a jury will not be determined on mo-

long as his report is not set aside the court will determine the motion in accordance with it.[75]

4. Weight of Evidence. On the hearing of a motion to dissolve, it cannot be said that any particular amount of evidence is necessary either to dissolve or to sustain the injunction. It will be dissolved if the evidence is clearly in favor of defendant,[76] but the complainant is not required to make out as strong a case as he must on final hearing.[77] The injunction will be continued if the preponderance is with the complainant,[78] or if defendant's evidence is weak and unsatisfactory.[79] If the evidence is evenly balanced, the injunction may be continued;[80] and it has been said that the burden of showing cause for dissolving is on defendant.[81]

S. Order. On dissolving an injunction affirmative relief cannot ordinarily be granted to defendant in the absence of a cross bill asking it,[82] although where the injunction has taken property from defendant the order should grant restitution thereof.[83] So, on a mere motion to continue, the court has no power to grant relief to defendant for which he has not moved,[84] nor should the complainant be granted relief for which he has not prayed.[85] An injunction may be dissolved in part only,[86] and should be dissolved only as to such defendants as move for dissolution.[87] It may be dissolved conditionally,[88] or without prejudice.[89] The order is not final on the merits even though the merits are involved,[90] although a dismissal of the bill on the merits has been held proper as a part of the order.[91] The entry of a formal order or decree is not usually necessary to effect the dissolution or the continuance of an injunction.[92] But a decree should

tion. Alleghany Co. *v.* East Coast Lumber Co., 131 N. C. 6, 42 S. E. 331.

75. Fabian *v.* Collins, 2 Mont. 510; Stubbs *v.* Ripley, 39 Hun (N. Y.) 620.

76. Tiede *v.* Schneidt, 99 Wis. 201, 74 N. W. 798; Cary *v.* Domestic Spring-Bed Co., 26 Fed. 38.

77. Bibb *v.* Prather, Ky. Dec. 136, 2 Am. Dec. 711.

78. Baumgarten *v.* Broadaway, 77 N. C. 8; Lewis *v.* Wilson, 17 N. Y. Suppl. 128.

The presumption of sanity, added to the complainant's affidavits, may make out a preponderance. Eakin *v.* Hawkins, 48 W. Va. 364, 37 S. E. 622.

79. Astie *v.* Leeming, 3 Abb. N. Cas. (N. Y.) 25; Metropolitan El. R. Co. *v.* Manhattan R. Co., 65 How. Pr. (N. Y.) 277.

80. St. Joseph, etc., R. Co. *v.* Dryden, 11 Kan. 186; Christmas *v.* Campbell, 2 N. C. 123.

A sworn answer is not overcome by the testimony of one witness. Gelston *v.* Rullman, 15 Md. 260. See Equity, 16 Cyc. 392 *et seq.*

81. Miller *v.* Washburn, 38 N. C. 161; Ingles *v.* Straus, 91 Va. 209, 29 S. E. 490; Edison Electric Light Co. *v.* Buckeye Electric Co., 59 Fed. 691 See Ross *v.* Stevens, 45 N. J. Eq. 231, 19 Atl. 622 [*affirming* (Ch. 1887) 11 Atl. 114]. *Compare* North *v.* Perrow, 4 Rand. (Va.) 1.

82. Earle *v.* Hale, 31 Ark. 473; Weber *v.* San Francisco, 1 Cal. 455; McDonald *v.* Cook, 11 Mo. 632; Powers *v.* Waters, 8 Mo. 299.

83. Lake Shore, etc., R. Co. *v.* Taylor, 134 Ill. 603, 25 N. E. 588 [*reversing* 33 Ill. App. 116]; Wangelin *v.* Goe, 50 Ill. 459; Herrington *v.* Herrington, 11 Ill. App. 121.

Effect of reversal.— Where the appellate court has dissolved the injunction, plaintiff may be directed to restore with interest the damages awarded in the contempt proceedings. Eads *v.* Brazelton, 22 Ark. 499, 79 Am. Dec. 88. See also Worden *v.* Searls, 121 U. S. 14, 7 S. Ct. 814, 30 L. ed. 853.

84. Kelly *v.* Jeroloman, 7 Rob. (N. Y.) 158.

85. McKenzie *v.* Ballard, 14 Colo. 426, 24 Pac. 1.

Under a prayer for "other relief" a new defendant may be ordered to be joined. Martin *v.* Kanouse, 2 Abb. Pr. (N. Y.) 390.

86. Edwards *v.* Perryman, 18 Ga. 374; Milwaukee *v.* O'Sullivan, 25 Wis. 666.

87. Duncan *v.* State Bank, 2 Ill. 262; Teller *v.* Van Deusen, 3 Paige (N. Y.) 33.

88. Read *v.* Dews, R. M. Charlt. (Ga.) 358; Livingston *v.* Kane, 3 Johns. Ch. (N. Y.) 224; Mercur *v.* State Line, etc., R. Co., 171 Pa. St. 12, 32 Atl. 1126.

Short notice of trial.— As a condition of the continuance, the court may require the complainant to prepare for trial of the issue on short notice. Hudson River Tel. Co. *v.* Johnstown, 37 Misc. (N. Y.) 41, 74 N. Y. Suppl. 767.

Retention of money in court.— The order on dissolution may provide that the fund shall be retained in court and not paid over to defendant. Lane *v.* Brown, 3 N. C. 215.

The giving of a bond may be required. Kilgore *v.* Norman, 119 Fed. 1006.

89. Davis *v.* Hart, 66 Miss. 642, 6 So. 318; Buskirk *v.* Chafin, 48 W. Va. 630, 37 S. E. 552.

90. Simrall *v.* Grant, 79 Ky. 435.

91. See *supra*, VI, I, 2, a, (VI).

92. Chicago Veneered Door Co. *v.* Parks, 79 Ill. App. 188; Coffey *v.* Gamble, 117 Iowa 545, 91 N. W. 813.

A mere expression of opinion that the filing of an amendment worked the dissolution of

be set aside if the reasons upon which it is based are not placed on record by the court.[93]

T. Dissolution on Giving Bond. If the right is doubtful and the continuance of the injunction will cause defendant much greater damage than its dissolution will cause the complainant, or if whatever damage the complainant will suffer may be amply compensated in money, it is proper to dissolve the injunction on the giving of a proper indemnity bond by defendant.[94] If the right is not doubtful,[95] or if the complainant is likely to suffer an irreparable loss not to be adequately estimated or compensated in money in case the injunction is dissolved, a dissolution will not be granted on the giving of a bond.[96] The matter rests largely in the discretion of the court.[97]

U. Effect of Dissolution. The dissolution of a preliminary injunction merely puts the parties in the same position in which they were prior to its issuance.[98]

an injunction does not amount to a decree dissolving such injunction. Robertson *v.* Montgomery Base Ball Assoc., 140 Ala. 320, 37 So. 241. *Compare* Chicago Veneered Door Co. *v.* Parks, 79 Ill. App. 188.

A reversal of a decree making a temporary injunction perpetual, on the ground that complainant was not entitled to the injunction constitutes a dissolution of the injunction. Gage *v.* Parker, 178 Ill. 455, 53 N. E. 317.

An order of court to continue is not necessary when the injunction was issued until further order. Kelly *v.* Jeroloman, 7 Rob. (N. Y.) 158.

A denial of several successive motions to dissolve an injunction may be equivalent to an order continuing it. Parker *v.* Judges Maryland Cir. Ct., 12 Wheat. (U. S.) 561, 6 L. ed. 729.

A decree refusing to dissolve a restraining order improvidently awarded amounts to the granting of an injunction. Universal Sav., etc., Co. *v.* Stoneburner, 113 Fed. 251, 51 C. C. A. 208.

93. Robertson *v.* Travis, 5 La. Ann. 401; Nathan *v.* Lee, 2 Mart. N. S. (La.) 32; New York, etc., Gas Coal Co. *v.* United Mine Workers' Assoc., 172 Pa. St. 125, 33 So. 1048.

94. *Alaska.*— U. S. *v.* Price, 1 Alaska 204.

Georgia.— Seago *v.* Bass, 49 Ga. 9; Cook *v.* Jenkins, 35 Ga. 113.

Louisiana.— State *v.* Ellis, 111 La. 93, 35 So. 471; State *v.* King, 104 La. 735, 29 So. 359; State *v.* Judges Fourth Judicial Dist. Ct., 52 La. Ann. 103, 26 So. 769; Lattier *v.* Abney, 43 La. Ann. 1016, 10 So. 360; State *v.* Debaillon, 37 La. Ann. 110.

New York.— Hudson River Tel. Co. *v.* Watervliet Turnpike, etc., Co., 56 Hun 67, 9 N. Y. Suppl. 177; Friedman *v.* Saul, 31 Misc. 52, 64 N. Y. Suppl. 599; Metropolitan El. R. Co. *v.* Manhattan El. R. Co., 11 Daly 367; Whitney *v.* Monro, 4 Edw. 5.

North Carolina.— Burke County *v.* Catawba Lumber Co., 114 N. C. 505, 19 S. E. 636; French *v.* Wilmington, 75 N. C. 387.

Tennessee.— Hansard *v.* State Bank, 5 Humphr. 53.

United States.— Wood *v.* Braxton, 54 Fed. 1005.

See 27 Cent. Dig. tit. "Injunction," § 390.

Strict compliance with statute.— Defendant must comply strictly with the statute permitting dissolution on bond. Chamberlin *v.* Buffalo, etc., R. Co., 31 Hun (N. Y.) 339.

Successive applications.— After one application for dissolution on bond has been made and refused, the decision does not bar a second application. Sanders *v.* Ditch, 107 La. 333, 31 So. 777.

If the complainant's bond affords sufficient protection to defendant, there is no cause for dissolving the injunction on motion. Smith *v.* Alberta, etc., Exploration, etc., Co., 9 Ida. 399, 74 Pac. 1071.

The bond should be conditioned to pay only the damages for which defendant may be determined to be liable. Wynkoop *v.* Van Beuren, 58 Hun (N. Y.) 604, 11 N. Y. Suppl. 379.

The city of New Orleans is exempt from giving bond on dissolution of an injunction under Acts (1856), p. 166, § 131. Jefferson, etc., R. Co. *v.* New Orleans, 30 La. Ann. 970; Wells *v.* New Orleans, 20 La. Ann. 300.

95. Wells *v.* Rountree, 117 Ga. 839, 45 S. E. 215; State *v.* Crozier, 50 La. Ann. 245, 23 So. 288; New Orleans *v.* Becker, 31 La. Ann. 644; Thayer *v.* Rochester City, etc., R. Co., 15 Abb. N. Cas. (N. Y.) 52.

96. Cotten *v.* Christen, 110 La. 444, 34 So. 597; Sanders *v.* Ditch, 107 La. 333, 31 So. 777; Baldwin *v.* Bellocq, 35 La. Ann. 982; Torres *v.* Falgoust, 33 La. Ann. 560; Boedicker *v.* East, 24 La. Ann. 154; Marion *v.* Johnson, 22 La. Ann. 512; Knabe *v.* Fernot, 14 La. Ann. 847; San Remo Hotel Co. *v.* Brennan, 64 Hun (N. Y.) 607, 19 N. Y. Suppl. 276.

97. Massie *v.* Buck, 128 Fed. 27, 62 C. C. A. 535.

98. State *v.* Duffel, 41 La. Ann. 516, 6 So. 512; Schmidt *v.* Foucher, 37 La. Ann. 174; Bell *v.* Houston, 36 La. Ann. 886; Duckett *v.* Dalrymple, 1 Rich. (S. C.) 143; General Land Office Com'rs *v.* Smith, 5 Tex. 471.

A motion to quash a defective writ in an action at law may be made in that action, even though an injunction based upon such defect has been dissolved. Waters *v.* Duvall, 6 Gill & J. (Md.) 76; Henley *v.* Cottrell

It does not amount to a dismissal of the bill,[99] nor does it prevent the granting of a permanent injunction.[1] On the other hand an order refusing to dissolve is not conclusive; on final hearing the complainant may be refused relief.[2] Only such matters as are properly at issue on the question of dissolving become *res adjudicata*.[3] The dissolution is *prima facie* evidence that defendant has suffered damage,[4] but it is not an adjudication that the injunction was wrongfully obtained.[5]

V. Modifying and Suspending Injunction. An injunction will be modified on motion when it is made to appear that its restraint is broader than is necessary for the complainant's protection,[6] or where a modification is necessary in order to allow defendant to maintain his property in its then existing condition by repair or otherwise,[7] or to establish his rights at law.[8] In case defendant has obtained certain rights by statute or ordinance, an injunction theretofore granted should be so modified as to allow the exercise of those rights.[9] An unnecessary modification will not be made, nor will one be granted when there is no sufficient showing that the restraint as originally ordered is improper.[10] As a condition of modifying the injunction defendant may be required to give a proper indemnity bond.[11] Where the injunction will cause defendant great loss, it may be temporarily suspended in the discretion of the court, on terms that will properly protect the complainant.[12]

Real Estate, etc., Co., 101 Va. 70, 43 S. E. 191.

Order self-executing.— An order dissolving an injunction is self-executing, and is not superseded by filing an appeal-bond. Manning *v.* Poling, 114 Iowa 20, 83 N. W. 895, 86 N. W. 30.

99. Cole *v.* Sands, 1 Overt. (Tenn.) 183. *Compare* Scarlett *v.* Hicks, 13 Fla. 314.

1. *Iowa.*— Fisher *v.* Beard, 40 Iowa 625.

Kansas.— Johns *v.* Schmidt, 32 Kan. 383, 4 Pac. 872.

Louisiana.— Peters *v.* Fralinghouse, 20 La. Ann. 85.

New York.— Rogers *v.* New York, etc., Land Co., 134 N. Y. 197, 32 N. E. 27; Banks *v.* American Tract Soc., 4 Sandf. Ch. 438.

Wisconsin.— Barnes *v.* Racine, 4 Wis. 454.

See 27 Cent. Dig. tit. "Injunction," § 396.

2. Augusta Nat. Bank *v.* Printup, 63 Ga. 570; Peck *v.* Goodberlett, 109 N. Y. 180, 16 N. E. 350; Cooper *v.* Tappan, 9 Wis. 361.

3. Clark *v.* Young, 2 B. Mon. (Ky.) 57; Lemeunier *v.* McCearley, 41 La. Ann. 411, 6 So. 338.

4. Lemeunier *v.* McCearley, 41 La. Ann. 411, 6 So. 338.

5. Butchers' Union, etc., Co. *v.* Howell, 37 La. Ann. 280.

6. *California.*— Christopher *v.* Condogeorge, 128 Cal. 581, 61 Pac. 174.

Georgia.— Savannah, etc., R. Co. *v.* Fort, 84 Ga. 300, 13 S. E. 1014.

Michigan.— Detroit, etc., Plank-Road Co. *v.* Macomb Cir. Judge, 109 Mich. 371, 67 N. W. 531.

New Jersey.— Delaware, etc., R. Co. *v.* Breckenridge, 55 N. J. Eq. 159, 35 Atl. 831; Hugg *v.* Fath, 37 N. J. Eq. 46.

New York.— Littlejohn *v.* Leffingwell, 40 N. Y. App. Div. 13, 57 N. Y. Suppl. 839; Gurnee *v.* Odell, 13 Abb. Pr. 264.

United States.— Denver, etc., R. Co. *v.* U. S., 124 Fed. 156, 59 C. C. A. 579; Portland *v.* Oregonian R. Co., 6 Fed. 321, 7 Sawy. 122.

See 27 Cent. Dig. tit. "Injunction," § 362.

Parties.— The injunction may be modified so as to include the complainant in the restraint. Downing *v.* Reeves, 24 Kan. 167.

Review.— A modifying order may be reviewed on final hearing of the cause. Herring *v.* Wiggins, 7 Okla. 312, 54 Pac. 483.

Modification by consent.— An injunction may be modified in accordance with a stipulation of the parties. Alexander *v.* Oneida County, 76 Wis. 56, 45 N. W. 21.

7. Wheeler *v.* Steele, 50 Ga. 34; Osborn *v.* Heyer, 2 Paige (N. Y.) 342; Webster *v.* Douglas County, 102 Wis. 181, 77 N. W. 885, 78 N. W. 451, 72 Am. St. Rep. 870.

8. Aleck *v.* Jackson, 49 N. J. Eq. 507, 23 Atl. 760.

9. Erin Tp. *v.* Detroit, etc., Plank-Road Co., 115 Mich. 465, 73 N. W. 556; Keogh *v.* Pittston, etc., R. Co., 195 Pa. St. 131, 45 Atl. 672. *Compare* Hatch *v.* Wallamet Iron-Bridge Co., 27 Fed. 673.

10. Pence *v.* Garrison, 93 Ind. 345; Rhoades *v.* Woolsey, 9 How. Pr. (N. Y.) 510; American Electric Works *v.* Varley Duplex Magnet Co., 26 R. I. 440, 59 Atl. 110; Sperry, etc., Co. *v.* Mechanics' Clothing Co., 128 Fed. 1015; Ulman *v.* Ritter, 72 Fed. 1000.

Laches of the applicant may be a sufficient reason for refusing to modify. McLean *v.* F. E. McAllister Co., 40 N. Y. App. Div. 623, 57 N. Y. Suppl. 1097.

Motion on same facts.—A motion to modify an injunction granted after notice and hearing cannot be maintained on the same facts thertofore set up in defense. Butte Consol. Min. Co. *v.* Frank, 24 Mont. 506, 62 Pac. 922.

11. Weatherby *v.* Wood, 29 How. Pr. (N. Y.) 404; Campbell *v.* Point Pleasant, etc., R. Co., 23 W. Va. 448; Portland *v.* Oregonian R. Co., 6 Fed. 321, 7 Sawy. 122.

12. Michigan Land, etc., Co. *v.* Cleveland

W. Reinstatement After Dissolution. After an injunction has been dissolved it may be revived or reinstated where the complainant is entitled to the injunction,[13] on a motion therefor,[14] after notice,[15] or on a rehearing of the order dissolving the injunction.[16] There must be a new showing on the part of the complainant, and the absence of negligence in failing to make such showing on the prior hearing.[17] It will not usually be reinstated pending an appeal from the order dissolving it;[18] but if it was dissolved upon the granting of a nonsuit, and that judgment has been reversed on appeal, the complainant is entitled to

Sawmill, etc., Co., 109 Mich. 164, 66 N. W. 953; Shelfer *v.* London Electric Lighting Co., [1895] 2 Ch. 388, 64 L. J. Ch. 736, 73 L. T. Rep. N. S. 42, 12 Reports 441, 44 Wkly. Rep. 198; Sieveking *v.* Behrens, 1 Jur. 50, 2 Myl. & C. 581, 14 Eng. Ch. 581, 40 Eng. Reprint 761.

13. *Illinois.*— Blount *v.* Tomlin, 26 Ill. 531, special order of court necessary.

Kentucky.— Jones *v.* Walter, 70 S. W. 191, 24 Ky. L. Rep. 878.

Maryland.— Billingslea *v.* Gilbert, 1 Bland 566.

Virginia.— Radford *v.* Innes, 1 Hen. & M. 7.

United States.— Tucker *v.* Carpenter, 24 Fed. Cas. No. 14,217, Hempst. 440.

England.— Vipan *v.* Mortlock, 2 Meriv. 476, 35 Eng. Reprint 1022.

See 27 Cent. Dig. tit. "Injunction," § 394.

When party not entitled.— A party is not entitled to a reinstatement in case the dissolution was on a full hearing and consideration (Heck *v.* Vollmer, 29 Md. 507) nor after dissolution on final judgment, in which case the remedy is by appeal (Elizabethtown, etc., R. Co. *v.* Ashland, etc., R. Co., 94 Ky. 478, 22 S. W. 855, 15 Ky. L. Rep. 258).

14. Beal *v.* Gibson, 4 Hen. & M. (Va.) 481; James *v.* Downes, 18 Ves. Jr. 522, 11 Rev. Rep. 247, 34 Eng. Reprint 415.

Nature of motion.— A motion for reinstatement is in the nature of an original application for an injunction. Ogle *v.* Dill, 55 Ind. 130; State *v.* Northern Cent. R. Co., 18 Md. 193; Gilliam *v.* Allen, 1 Rand. (Va.) 414.

Where application made.— The application should be made to the judge who originally granted and later dissolved the injunction. Jewett *v.* Albany City Bank, Clarke (N. Y.) 59. In Kentucky the application may be made to a single judge of the court of appeals, under Civ. Code Pr. § 296, but this does not apply to temporary restraining orders issued by the clerk. Matthews *v.* Rogers, 107 Ky. 236, 53 S. W. 413, 21 Ky. L. Rep. 905; Rodman *v.* Forline, 2 Metc. (Ky.) 325.

In Kentucky no reinstatement can be asked for in the court of appeals when the injunction was granted and dissolved by the circuit court by the same order, in effect no injunction having been granted. St. Bernard Coal Co. *v.* Pittsburg Coal Co., 112 Ky. 418, 64 S. W. 288, 23 Ky. L. Rep. 52 [*overruling* Poyntz *v.* Shackelford, 107 Ky. 546, 54 S. W. 855, 21 Ky. L. Rep. 1323]. See also Caille Co. *v.* Haager, 50 S. W. 244, 20 Ky. L. Rep. 1889.

15. State *v.* Second City Ct. Judge, 37 La. Ann. 285; Blake *v.* White, 4 L. J. Exch. 48, 1 Y. & C. Exch. 420.

16. Peck *v.* Spencer, 26 Fla. 23, 7 So. 642; Van Bergen *v.* Demarest, 4 Johns. Ch. (N. Y.) 37.

17. Lowry *v.* McGee, 5 Yerg. (Tenn.) 238; Larson *v.* Moore, 1 Tex. 22; Spencer *v.* Jones, 85 Va. 172, 7 S. E. 180; James *v.* Downes, 18 Ves. Jr. 522, 11 Rev. Rep. 247, 34 Eng. Reprint 415; Powell *v.* Lassalette, Jac. 549, 4 Eng. Ch. 549, 37 Eng. Reprint 957.

Dissolution by consent.— There must be new and special reasons in case the dissolution was by consent. Livingston *v.* Gibbons, 5 Johns. Ch. (N. Y.) 250.

An indictment of defendant for perjury in his answer is not ground for reviving the injunction. Clapham *v.* White, 8 Ves. Jr. 35, 32 Eng. Reprint 263.

Dissolution on defective notice is not ground for reinstatement when there were good grounds for the dissolution and the injunction if reinstated might be again immediately dissolved. Shields *v.* McClung, 6 W. Va. 79.

Failure to file bond.— A reinstatement will be denied when no bond has been filed by the complainant as required by Civ. Code Pr. § 278. St. Bernard Coal Co. *v.* Pittsburg Coal Co., 112 Ky. 418, 64 S. W. 288, 23 Ky. L. Rep. 52.

An injunction dissolved on bond may be reinstated in case the bond becomes insufficient through insolvency. Willett *v.* Stringer, 6 Duer (N. Y.) 686, 15 How. Pr. 310.

Testimony taken after dissolution has been held inadmissible on a motion for the renewal of an injunction. France *v.* France, 8 N. J. Eq. 619. *Compare* Tucker *v.* Carpenter, 24 Fed. Cas. No. 14,217, Hempst. 440.

18. Spears *v.* Mathews, 66 N. Y. 127; Jewett *v.* Albany City Bank, Clarke (N. Y.) 59.

Taking an appeal and filing a supersedeas bond does not revive a preliminary injunction that has been dissolved (Sitia Teco *v.* Ventura, 1 Philippine Rep. 497; Knox County *v.* Harshman, 132 U. S. 14, 10 S. Ct. 8, 33 L. ed. 249; Butchers Ben. Assoc. *v.* Crescent City Livestock Landing, etc., Co., 10 Wall. (U. S.) 273, 19 L. ed. 915) nor does the filing of a bill of exceptions (Watson *v.* Enriquez, 1 Philippine Rep. 480).

reinstatement.[19] An order reinstating an injunction does not relate back so as to render invalid proceedings in the interim.[20]

X. Damages on Dissolution or Modification — **1. Power to Assess.** In the absence of statute a court of equity will not, upon dissolving an injunction, enforce payment of damages in the original cause, but will remit the parties aggrieved to their action on the bond, if one has been given, or to their action at common law.[21] But in some states, by statute, damages may be assessed in the injunction suit,[22] where the injunction was issued to restrain a judgment or final order of court.[23] But even where this is the case, the granting of damages rests in the discretion of the court.[24]

2. Nature and Grounds of Liability — **a. Necessity For Final Adjudication.** Defendant is not entitled to a decree for damages or to an order of reference to ascertain damages until there has been a final adjudication in his favor that the complainant is not entitled to an injunction.[25] There is no final adjudication in case the injunction is merely dissolved upon the coming in of the answer.[26] A dissolution which follows a dismissal of the complaint is to be regarded as a final adjudication.[27]

b. Injunction Ineffective or Harmless. In case defendant has never actually been restrained, he has suffered no damage because of any injunction, and he is not entitled to damages on dissolution. Such would be the case where no injunction actually existed,[28] or where the injunction issued was void for want of jurisdiction,[29] was suspended *pendente lite*,[30] or was granted on condition and the con-

19. Harris *v.* McGregor, 29 Cal. 124.

20. Young *v.* Davis, 1 T. B. Mon. (Ky.) 152.

21. Greer *v.* Stewart, 48 Ark. 21, 2 S. W. 251; Phelps *v.* Foster, 18 Ill. 309; Taylor *v.* Brownfield, 41 Iowa 264; Gillaspie *v.* Scott, 32 La. Ann. 767; Elam *v.* Nolan, 11 La. Ann. 523; High Inj. § 1657. And see *supra*, IX, D, 1, a.

Under the Illinois statute, upon the dissolution of an injunction, defendant may at any time before final decree file a suggestion in writing of the nature and amount of his damages, and the court will hear evidence and assess the damages accordingly. Wilson *v.* Haecker, 85 Ill. 349; Wing *v.* Dodge, 80 Ill. 564; Albright *v.* Smith, 68 Ill. 181; Hamilton *v.* Stewart, 59 Ill. 330; Forth *v.* Xenia, 54 Ill. 210.

In the federal courts, independent of statute, equity may determine whether damages shall be allowed and may order a reference to ascertain them, irrespective of whether it may enter a decree for damages. Russell *v.* Farley, 105 U. S. 433, 26 L. ed. 1060; West *v.* East Coast Cedar Co., 113 Fed. 742, 51 C. C. A. 416 [*affirming* 110 Fed. 727]; Lea *v.* Deakin, 13 Fed. 514, 11 Biss. 40.

22. Mallory *v.* Matlock, 10 Ala. 595 (damages imposed when injunction was for delay); Kohlsaat *v.* Crate, 144 Ill. 14, 32 N. E. 481 [*affirming* 44 Ill. App. 274]; Gault *v.* Goldthwaite, 34 Tex. 104; Beatty *v.* Smith, 2 Hen. & M. (Va.) 395. See Phelps *v.* Foster, 18 Ill. 309. And see *supra*, VIII, D, 1, b.

Decreeing damages twice, on dissolution of an injunction, is error. Noland *v.* Richards, 1 J. J. Marsh. (Ky.) 582.

23. Stanley *v.* Bonham, 52 Ark. 354, 12 S. W. 706; Greer *v.* Stewart, 48 Ark. 21, 2 S. W. 251; Moore *v.* Granger, 30 Ark. 574; Bailey *v.* Gibson, 29 Ark. 472; Johnson *v.* Walker, 25 Ark. 196; Marshall *v.* Green, 24 Ark. 410; Phelps *v.* Foster, 18 Ill. 309.

24. Moore *v.* Granger, 30 Ark. 574; Mulholland *v.* Troutman, 10 Ky. L. Rep. 263.

25. Chicago Bill Posting Co. *v.* Schuster, 88 Ill. App. 513; Post-Boynton-Strong Co. *v.* Williams, 57 Ill. App. 434; Woerishoffer *v.* Lake Erie, etc., R. Co., 25 Ill. App. 84.

The claim for damages may be filed prior to the entry of a decree. Wing *v.* Dodge, 80 Ill. 564.

26. Terry *v.* Hamilton Primary School, 72 Ill. 476.

27. Streit *v.* Cooke, 90 Ill. App. 257.

28. Harlan *v.* Wingate, 2 J. J. Marsh. (Ky.) 138.

Act completed before issuance of injunction.— But where the injunction is ineffective merely because the act was completed before issuance, defendant may be entitled to a dissolution and to his expenses in securing it. Mead *v.* Cleland, 62 Ill. App. 294.

Although the writ was never issued, if defendant had notice of the order for the writ so as to be bound thereby, he may secure damages on dissolution of the order. Danville Banking, etc., Co. *v.* Parks, 88 Ill. 170; Bishop *v.* Bascoe, 8 Ohio Dec. (Reprint) 423, 7 Cinc. L. Bul. 342.

An order to "desist and refrain" is an injunction such as to entitle defendant to damages on dissolution. Lindblom *v.* Williams, 51 Ill. App. 483.

29. Joslyn *v.* Dickerson, 71 Ill. 25; Montgomery *v.* Houston, 4 J. J. Marsh. (Ky.) 488, 20 Am. Dec. 223.

30. Hyde *v.* Teal, 46 La. Ann. 645, 15 So. 416.

dition was never complied with.[31] So where the injunction actually caused no damage defendant should not be allowed damages by decree.[32]

c. Injunction Rightfully Obtained. Damages will not be allowed on dissolution of an injunction on grounds accruing since its issuance, when it was rightfully obtained in the first place;[33] nor in case it has been sustained in part and there was no abuse of the remedy.[34]

3. Parties Liable. In case of an injunction obtained by one acting in a representative capacity, damages on dissolution, if any, are to be assessed against the representative personally;[35] but damages are not to be assessed against him in case he acted disinterestedly and in good faith.[36]

4. Method of Ascertaining — a. Suggestion of Damages and Hearing. In some states the practice, as regulated by statute, is to file, upon dissolution of the injunction, a suggestion of damages. Unless this suggestion is filed in writing and in due time, stating the nature and amount of the damages, the court has no jurisdiction to hear evidence and assess damages.[37] The suggestion must be so framed as to inform the other party with reasonable certainty of the nature and amount of the damages claimed.[38] Upon the filing of such suggestions the court will proceed to hear evidence and to assess the damages.[39] This proceeding by

31. McCoun *v.* Delany, 2 Bibb (Ky.) 440.

32. Alexander *v.* Colcord, 85 Ill. 323; Kilpatrick *v.* Tunstall, 5 J. J. Marsh. (Ky.) 80; Taylor *v.* Simpson, 12 La. Ann. 587; Hammond *v.* St. John, 4 Yerg. (Tenn.) 107.

Nominal damages only will be awarded if there is no injury to property or to a pecuniary right. Bradford *v.* Jellico, 1 Tenn. Ch. App. 700.

33. Lampton *v.* Usher, 7 B. Mon. (Ky.) 57; Payne *v.* Wallace, 6 T. B. Mon. (Ky.) 380; McKoy *v.* Chiles, 5 T. B. Mon. (Ky.) 259; Taylor *v.* Bush, 5 T. B. Mon. (Ky.) 84; Massie *v.* Sebastian, 4 Bibb (Ky.) 433; Woodward *v.* Dashiel, 15 La. 184.

Failure to allege ground for injunction.— Although complainant had a good ground for the injunction, if he did not set it up he may be liable for the costs and damages on dissolution. Rowly *v.* Kemp, 2 La. Ann. 360.

34. Caillouet *v.* Coguenhem, 111 La. 60, 35 So. 385; Speyrer *v.* Miller, 108 La. 204, 32 So. 524, 61 L. R. A. 781; Vicksburg, etc., R. Co. *v.* Traylor, 105 La. 748, 30 So. 117; Stafford *v.* Renshaw, 33 La. Ann. 443; Berens *v.* Boutte, 31 La. Ann. 112; Pointer *v.* Roth, 19 La. Ann. 78; Raiford *v.* Thorn, 15 La. Ann. 81; Teaff *v.* Hewitt, 1 Ohio St. 511, 59 Am. Dec. 634. See Leflore County *v.* Allen, 80 Miss. 298, 31 So. 815.

Where failure to give bond is the ground of dissolution, no damages will be allowed in case the complainant is really entitled to an injunction and at once files a bond. Beauchamp *v.* Kankakee County, 45 Ill. 274.

35. Offut *v.* Bradford, 4 Bush (Ky.) 413; Nixon *v.* Seal, 78 Miss. 363, 29 So. 399.

A principal and not his surety is liable for damages caused by an injunction obtained by the principal to delay collection. Garnett *v.* Jones, 4 Leigh (Va.) 633.

A county may be liable for damages in Mississippi, under code, section 897. Freeman *v.* Lee County, 66 Miss. 1, 5 So. 516.

36. Lamorere *v.* Cox, 32 La. Ann. 246; Berens *v.* Boutte, 31 La. Ann. 112; Cobb *v.* Richardson, 30 La. Ann. 1228.

37. Albright *v.* Smith, 68 Ill. 181; Hamilton *v.* Stewart, 59 Ill. 330; Winkler *v.* Winkler, 40 Ill. 179; Stinnett *v.* Wilson, 19 Ill. App. 38. See also Driggers *v.* Bell, 8 Ill. App. 254.

Merely filing a motion for assessment of damages is not sufficient. Forth *v.* Xenia, 54 Ill. 210. *Contra*, Hoffelmann *v.* Franke, 96 Mo. 533, 10 S. W. 45.

Time for filing.— A suggestion of damages comes too late when filed in a term succeeding that in which the suit ended. Albright *v.* Smith, 68 Ill. 181; Hoffelmann *v.* Franke, 96 Mo. 533, 10 S. W. 45. *Compare* Grant *v.* Defenbaugh, 91 Ill. App. 618. Yet even though the injunction has been dissolved and the case stricken from the docket, the case may be reinstated for the determination of damages. Stinnett *v.* Wilson, 19 Ill. App. 38. In England the application for an inquiry as to damages must be within a reasonable time after adjudication of the right to the injunction. *Ex p.* Hall, 23 Ch. D. 644, 52 L. J. Ch. 907, 49 L. T. Rep. N. S. 275, 32 Wkly. Rep. 179; Smith *v.* Day, 21 Ch. D. 421, 31 Wkly. Rep. 187.

Propriety of inquiry.— An inquiry as to damages will not be granted if the court can equally well determine the amount without such inquiry. Graham *v.* Campbell, 7 Ch. D. 490, 47 L. J. Ch. 593, 38 L. T. Rep. N. S. 195, 26 Wkly. Rep. 336.

Court.— On dissolution by the supreme court on writ of error, the circuit court may proceed to assess damages. Garrity *v.* Chicago, etc., R. Co., 22 Ill. App. 404.

38. Independent Medical College *v.* Zeigler, 86 Ill. App. 360; Stinnett *v.* Wilson, 19 Ill. App. 38; Howard *v.* Austin, 12 Ill. App. 655.

39. Holmes *v.* Stateler, 57 Ill. 209; Lengfelder *v.* Smith, 69 Ill. App. 238; Howard *v.* Austin, 12 Ill. App. 655.

way of a suggestion of damages may be continued from time to time on a proper showing made to the court.[40]

b. Reference. In some states it is proper to order a reference to ascertain the damages caused to defendant by an injunction, upon dissolution thereof.[41]

c. Assessment by Jury. In at least one state the damages must be assessed by a jury unless it is otherwise agreed by the parties,[42] while in other states the trial by jury is within the discretion of the court.[43]

5. Elements of Damage — a. In General. In assessing damages the court will allow only such damages as are the direct and proximate result of the injunction between the time of its issuance and its dissolution.[44] Proper elements of damage include expenses and losses due to the injunction,[45] such as interest on money tied up by the injunction,[46] rental or interest value of property, the use of which has been lost to defendant;[47] depreciation in the value of personal property during the restraint,[48] and loss of time.[49] But no depreciation or loss should be estimated in case it might equally well have occurred had no injunction been granted,[50] nor should trifling or remote damages be allowed.[51]

b. Counsel Fees. In most of the states counsel fees are allowed as a part of the expenses incurred.[52] The counsel fees are limited, however, to those incurred in procuring the dissolution of the injunction on motion.[53] Furthermore defend-

40. Poyer *v.* Des Plaines, 123 Ill. 111, 13 N. E. 819, 5 Am. St. Rep. 494, 124 Ill. 310, 15 N. E. 768; Holmes *v.* Stateler, 57 Ill. 209; Curtis *v.* Wright, 40 Ill. App. 494.

41. Sturgis *v.* Knapp, 33 Vt. 486.

Reference to assess damages on injunction bond or undertaking see *supra*, IX, D, 4.

42. Home Mut. Ins. Co. *v.* Bauman, 14 Mo. 74; Wabash R. Co. *v.* Sweet, 110 Mo. App. 100, 84 S. W. 95.

In Virginia, in one case, damages were computed by the clerk. Washington *v.* Parks, 6 Leigh 581.

43. Holmes *v.* Stateler, 57 Ill. 209.

44. McDaniel *v.* Crabtree, 21 Ark. 431; Chicago Title, etc., Co. *v.* Chicago, 110 Ill. App. 395 [*affirmed* in 209 Ill. 172, 70 N. E. 572]; Iliff *v.* School Directors, 45 Ill. App. 419; Sturgis *v.* Knapp, 33 Vt. 486.

45. Alexander *v.* Colcord, 85 Ill. 323 (value of wood taken); Edwards *v.* Pope, 4 Ill. 465 (cost of readvertising sale); McKinzie *v.* Mathews, 59 Mo. 99 (increased cost of articles bought); French *v.* McCready, (Tex. Civ. App. 1900) 57 S. W. 894 (cost of moving tramway for use elsewhere); Sturgis *v.* Knapp, 33 Vt. 486 (cost of inventories, removing wood, and losses in the sale of cars).

The amount sued for in an action restrained by the injunction is not to be allowed as damages merely because defendant in that action became insolvent pending the injunction. Walker *v.* Pritchard, 135 Ill. 103, 25 N. E. 573, 11 L. R. A. 577.

46. *Illinois.*— Post-Boynton-Strong Co. *v.* Williams, 57 Ill. App. 434. *Compare* Wagner *v.* Rock Island, 61 Ill. App. 583.

Louisiana.— De Lizardi *v.* Hardaway, 8 Rob. 20; Brown *v.* Cougot, 8 Rob. 14; Pepper *v.* Dunlap, 19 La. 491.

Missouri.— St. Louis, etc., R. Co. *v.* Schneider, 30 Mo. App. 620.

New York.— Aldrich *v.* Reynolds, 1 Barb. Ch. 613; Hosack *v.* Rogers, 9 Paige 461.

Virginia.— Washington *v.* Parks, 6 Leigh 581.

See 27 Cent. Dig. tit. "Injunction," § 402.

47. Sturgis *v.* Knapp, 33 Vt. 486, value of use of engine and rent of railroad.

The full value of the property is not to be allowed as damages. Bircher *v.* Parker, 40 Mo. 118.

It must be shown that the rent was lost because of the injunction. Rosenthal *v.* Boas, 27 Ill. App. 430.

48. Meysenburg *v.* Schlieper, 48 Mo. 426; St. Louis, etc., R. Co. *v.* Schneider, 30 Mo. App. 620; Sturgis *v.* Knapp, 33 Vt. 486.

49. St. Louis, etc., R. Co. *v.* Schneider, 30 Mo. App. 620. *Compare* Densch *v.* Scott, 58 Ill. App. 33.

50. Sturgis *v.* Knapp, 33 Vt. 486.

The depreciation in value of United States notes in terms of gold during the pendency of the injunction will not be assessed as damages. Riddlesbarger *v.* McDaniel, 38 Mo. 138.

51. Smith *v.* Day, 21 Ch. D. 421, 31 Wkly. Rep. 187.

52. Toledo, etc., R. Co. *v.* St. Louis, etc., R. Co., 208 Ill. 623, 70 N. E. 715; Darst *v.* Gale, 83 Ill. 136; Cummings *v.* Burleson, 78 Ill. 281; Joslyn *v.* Dickerson, 71 Ill. 25; Misner *v.* Bullard, 43 Ill. 470; Lamphere *v.* Glover, 60 Ill. App. 564; Hereford *v.* Babin, 14 La. Ann. 333; Hinton *v.* Perry County, 84 Miss. 536, 36 So. 565; Leflore County *v.* Allen, 80 Miss. 298, 31 So. 815. *Contra*, Oliphint *v.* Mansfield, 36 Ark. 191; McDaniel *v.* Crabtree, 21 Ark. 431.

53. Milligan *v.* Nelson, 188 Ill. 139, 58 N. E. 938 [*affirming* 88 Ill. App. 511]; Lambert *v.* Alcorn, 144 Ill. 313, 33 N. E. 53, 21 L. R. A. 611; Lawrence *v.* Traner, 136 Ill. 474, 27 N. E. 197; Walker *v.* Pritchard, 135 Ill. 103, 25 N. E. 573, 11 L. R. A. 577; Blair *v.* Reading, 99 Ill. 600; Wilson *v.* Haecker, 85 Ill. 349; Elder *v.* Sabin, 66 Ill. 126; Javne *v.* Osgood, 57 Ill. 340; Independent Medical College *v.* Zeigler, 86 Ill.

ant is not ordinarily entitled to fees of counsel for services upon unsuccessful applications to dissolve, but only for services upon the application that is granted.[54] Counsel fees will not be allowed in case counsel are acting *ex officio* for a public corporation,[55] nor in case defendant has acted as his own attorney.[56] It is not necessary for defendant to show that he has paid the fees, it being sufficient that he has become liable to pay them.[57]

6. Amount of Damages — a. In General. The amount which defendant is entitled to have assessed as damages is the amount of the damage actually sustained by him and no more.[58] The damages allowed should not exceed the amount of the bond, if a bond was given.[59] The question of amount of damages is in some states regulated by statute.[60] Where a judgment bearing interest has been enjoined, such interest must be considered in awarding interest allowed by law, and in no case should the amount allowed bring the total interest up to more than the highest conventional rate.[61] The amount to be assessed as damages on dissolution of an injunction must be reduced by any receipts, benefits, and improvements that accrue to defendant pending the injunction.[62]

b. Counsel Fees. The amount to be allowed by way of counsel fees is the usual and customary fee paid by clients for such services when they have no hope of being reimbursed.[63] Such fees cannot be allowed at all unless there is evidence

App. 360; Chicago Veneered Door Co. *v.* Parks, 79 Ill. App. 188; Gooch *v.* Furman, 62 Ill. App. 340; Harley *v.* Chicago Sanitary Dist., 54 Ill. App. 337; Kotz *v.* Glos, 53 Ill. App. 485; Mainard *v.* Webb, 48 Ill. App. 182; Mackay *v.* Plumb, 36 Ill. App. 604; Reich *v.* Berdel, 33 Ill. App. 186; Doyle *v.* Brown, 30 Ill. App. 88; Field *v.* Medenwald, 26 Ill. App. 642; Lichtenstadt *v.* Fleisher, 24 Ill. App. 92; Moriarty *v.* Galt, 23 Ill. App. 213 [*affirmed* in 125 Ill. 417, 17 N. E. 714]; Gerard *v.* Gateau, 15 Ill. App. 520; Hocking Valley Coal Co. *v.* Climie, (Iowa 1902) 92 N. W. 77; Caillouet *v.* Coguenhem, 111 La. 60, 35 So. 385.

If the injunction expires by its own force, counsel fees will not be allowed, even though counsel may have prevented the issuance of a temporary injunction. Palmer *v.* Vermillion County, 46 Ill. 447.

Counsel fees on appeal will not be allowed when such appeal was taken by voluntary consent of both parties. Lemeunier *v.* McCearley, 41 La. Ann. 411, 6 So. 338.

54. Lyon *v.* Hersey, 32 Hun (N. Y.) 253. But see McGown *v.* Barnum, 42 Misc. (N. Y.) 585, 87 N. Y. Suppl. 605.

55. Wilson *v.* Weber, 3 Ill. App. 125; Uhrig *v.* St. Louis, 47 Mo. 528.

56. Jevne *v.* Osgood, 57 Ill. 340; Stinnett *v.* Wilson, 19 Ill. App. 38.

57. Milligan *v.* Nelson, 88 Ill. App. 511 [*affirmed* in 188 Ill. 139, 58 N. E. 938]; Broken Bow Nat. Bank *v.* Freeman, 87 Ill. App. 622; Independent Medical College *v.* Zeigler, 86 Ill. App. 360; Reich *v.* Berdel, 33 Ill. App. 186; MacRea *v.* Brown, 12 La. Ann. 181. *Contra*, see Rhodes *v.* Skolfield, 10 Rob. (La.) 131; Brashear *v.* Wilkin, 9 Rob. (La.) 56.

58. Collins *v.* Sinclair, 51 Ill. 328; Greig *v.* Eastin, 30 La. Ann. 1130; Church *v.* Barkman, 16 N. Y. Suppl. 624.

Execution of judgment.— The damages caused by an injunction restraining execution of a judgment are to be computed on the basis of the principal, interest, and costs due at the time the injunction was issued. Washington *v.* Parks, 6 Leigh (Va.) 581.

Only nominal damages should be allowed if the complainant had some equity in his case. Mallory *v.* Dauber, 83 Ky. 239, 7 Ky. L. Rep. 243.

59. Sturgis *v.* Knapp, 33 Vt. 486. *Contra*, Kohlsaat *v.* Crate, 144 Ill. 14, 32 N. E. 481 [*affirming* 44 Ill. App. 274].

60. See Miller *v.* Hemphill, 9 Ark. 488; Williamson *v.* Williamson, 6 B. Mon. (Ky.) 507; Veech *v.* Pennebaker, 2 Bibb (Ky.) 326; Mulholland *v.* Troutman, 10 Ky. L. Rep. 263 (ten per cent on money enjoined); Monroe Bldg., etc., Assoc. *v.* Johnston, 51 La. Ann. 470, 25 So. 383; Campbell *v.* Oliver, 15 La. Ann. 183; Calderwood *v.* Trent, 9 Rob. (La.) 227; Wabash R. Co. *v.* McCabe, 118 Mo. 640, 24 S. W. 217; Hale *v.* Meegan, 39 Mo. 272 (ten per cent on money enjoined).

61. Todd *v.* Paton, 12 La. Ann. 88; Mills *v.* Jones, 9 La. Ann. 11; Maxwell *v.* Mallard, 5 La. Ann. 702; Dwight *v.* Richard, 4 La. Ann. 240; Whittemore *v.* Watts, 10 Rob. (La.) 39; Stafford *v.* Mead, 9 Rob. (La.) 142; De Lizardi *v.* Hardaway, 8 Rob. (La.) 20; Dabbs *v.* Hemken, 3 Rob. (La.) 123; McCarty *v.* McCarty, 19 La. 300.

62. Alexander *v.* Colcord, 85 Ill. 323; Collins *v.* Sinclair, 51 Ill. 328; Sturgis *v.* Knapp, 33 Vt. 486.

63. Spring *v.* Olney, 78 Ill. 101 (two hundred dollars excessive); Jevne *v.* Osgood, 57 Ill. 340 (two hundred and fifty dollars excessive); Lomax *v.* Ragor, 85 Ill. App. 679; Chicago Veneered Door Co. *v.* Parks, 79 Ill. App. 188; Mead *v.* Cleland, 62 Ill. App. 294 (one hundred and fifty dollars not excessive); Stinnett *v.* Wilson, 19 Ill. App. 38; Nixon *v.* Seal, 78 Miss. 363, 29 So. 399 (Code (1892), § 572, allows five per cent to cover fees).

Opinions of witnesses.— The court may

that they are reasonable and customary,[64] and the opinion of the attorney himself is not sufficient evidence.[65] In no event can defendant recover more than he has paid or has become bound to pay.[66]

7. EXEMPLARY DAMAGES. While it is doubtful whether in any case it is proper to award exemplary or punitive damages on dissolution of an injunction,[67] it is certain that no such damages will be allowed in the absence of any showing that the injunction was applied for with malice and without probable cause, or that the remedy has been abused.[68] If such a showing is made, however, it has been held proper to award as damages the highest amount or per cent allowed by statute.[69]

8. DECREE AND RECORD. The decree for damages on dissolution should fix the amount thereof;[70] and the record must show the evidence upon which the decree for damages is based, or it must contain a finding of the facts amounting to more than mere statements of conclusions.[71]

Y. Costs on Dissolution.[72] While the costs of proceedings to dissolve an injunction are largely in the discretion of the court,[73] and while they may be left to abide the event of the final hearing,[74] costs will generally be awarded to defendant upon granting his motion to dissolve.[75] Defendant is entitled, however, only

allow less than the lowest amount fixed as reasonable by any witness. Lichtenstadt *v.* Fleisher, 24 Ill. App. 92.

As dependent on value of subject-matter.— The fee allowed should bear a reasonable relation to the value of the subject-matter of the services. One thousand dollars is an excessive fee when subject-matter is worth about two thousand dollars. Alexander *v.* Colcord, 85 Ill. 323.

64. Delahanty *v.* Warner, 75 Ill. 185, 20 Am. Rep. 237; Iliff *v.* School Directors, 45 Ill. App. 419.

The inquiry should be, what has defendant paid or become liable to pay, and is it the usual customary fee for such services. Jevne *v.* Osgood, 57 Ill. 340.

Services relating to dissolution only.— The evidence must show the value of the services with distinct reference to the dissolution of the injunction. Gibell *v.* Barrett, 30 Ill. App. 112; McQuown *v.* Law, 18 Ill. App. 34.

65. Lomax *v.* Ragor, 85 Ill. App. 679; Rosenthal *v.* Boas, 27 Ill. App. 430.

66. Jevne *v.* Osgood, 57 Ill. 340; Cors *v.* Tompkins, 51 Ill. App. 315; Stinnett *v.* Wilson, 19 Ill. App. 38.

67. Galveston, etc., R. Co. *v.* Wave, 74 Tex. 47, 11 S. W. 918.

68. Chicago Title, etc., Co. *v.* Chicago, 110 Ill. App. 395 [*affirmed* in 209 Ill. 172, 70 N. E. 572]; Luckett *v.* Crain, 29 La. Ann. 128; Gray *v.* Lowe, 11 La. Ann. 391; Morancy *v.* Clare, 6 La. Ann. 178; Galveston, etc., R. Co. *v.* Wave, 74 Tex. 47, 11 S. W. 918; Muller *v.* Landa, 31 Tex. 265, 98 Am. Dec. 529; Jordan *v.* David, 20 Tex. 712.

69. Walker *v.* Villavaso, 23 La. Ann. 799; Raiford *v.* Wood, 14 La. Ann. 116; Oulliber *v.* Joublanc, 12 La. Ann. 237.

70. Harrison *v.* Lee, 7 J. J. Marsh. (Ky.) 171; Griffin *v.* Pickett, 6 J. J. Marsh. (Ky.) 388; Wilson *v.* McCullough, 5 J. J. Marsh. (Ky.) 363; Taylor *v.* Morton, 5 J. J. Marsh. (Ky.) 65; Clarkson *v.* White, 4 J. J. Marsh. (Ky.) 529, 20 Am. Dec. 229; Bartlett *v.* Blanton, 4 J. J. Marsh. (Ky.) 426; Ballard *v.* Davis, 3 J. J. Marsh. (Ky.) 656; Cook *v.* Edmondson, 3 J. J. Marsh. (Ky.) 423; Downing *v.* Dean, 3 J. J. Marsh. (Ky.) 378; Dawson *v.* Stratton, 2 J. J. Marsh. (Ky.) 551; Booth *v.* Rogers, 2 J. J. Marsh. (Ky.) 515; Stagner *v.* Fox, 1 J. J. Marsh. (Ky.) 556; White *v.* Guthrie, 1 J. J. Marsh. (Ky.) 503.

Decreeing damages twice, once on dissolution of the injunction, and again on dismissing the bill, is error. McIlvoy *v.* McIlvoy, 4 Dana (Ky.) 289; Downing *v.* Dean, 3 J. J. Marsh. (Ky.) 378.

71. Wilson *v.* Haecker, 85 Ill. 349; Delahanty *v.* Warner, 75 Ill. 185, 20 Am. Rep. 237; Kransz *v.* Kagebein, 60 Ill. App. 430; Mitchell *v.* Northwestern Mfg., etc., Co., 26 Ill. App. 295; Panton *v.* Collar, 12 Ill. App. 160.

The record must show that the injunction was ordered or issued. Ridgley *v.* Minneapolis Threshing-Mach. Co., 61 Ill. App. 173.

72. See, generally, COSTS.

73. Howard *v.* Bennett, 72 Ill. 297.

The court may compel each party to pay his own costs. Smith *v.* Schmidt, 1 Leg. Gaz. (Pa.) 58.

74. Columbus *v.* Jaques, 30 Ga. 506; Mann *v.* Rice, 3 Barb. Ch. (N. Y.) 42; Leggett *v.* Dubois, 1 Paige (N. Y.) 574; Barnett *v.* Spencer, 2 Hen. & M. (Va.) 7.

75. *Arkansas.*—Johnson *v.* Walker, 25 Ark. 196.

Louisiana.— Sale *v.* Van Bibber, 11 La. Ann. 628.

Michigan.— Kellogg *v.* Barnes, Harr. 258.

Montana.— Colusa Parrot Min., etc., Co. *v.* Barnard, 28 Mont. 11, 72 Pac. 45.

New York.— Madison *v.* Brower, 81 N. Y. App. Div. 116, 80 N. Y. Suppl. 1059; O'Donnell *v.* McMurn, 3 Abb. Pr. 391.

North Carolina.— Thompson *v.* Allen, 3 N. C. 362.

to costs of the dissolution and not to costs of the suit.[76] The complainant will not be required to pay costs upon dissolution in case the injunction was rightfully obtained, but is dissolved because of matters arising subsequently.[77] Defendant is entitled also to the expense of the proceedings taken to ascertain the damages sustained by reason of the injunction,[78] in case there were any such damages to render a reference necessary.[79]

VIII. VIOLATION AND PUNISHMENT.[80]

A. Writ or Mandate Violated — 1. In General. Where the injunction is void, and not merely voidable, as where the court had no jurisdiction, disobedience thereof is not punishable.[81] Where, however, the court had jurisdiction, the fact that an order of injunction is merely erroneous, or was improvidently granted or irregularly obtained, is no excuse for violating it,[82] the remedy in

Virginia. — See Donally *v.* Ginmatt, 5 Leigh 359.

Canada.— Frontenac Loan Co. *v.* Morrice, 4 Manitoba 439; Walton *v.* Henry, 13 Ont. Pr. 390; Taylor *v.* Hall, 29 Grant Ch. (U. C.) 101.

See 27 Cent. Dig. tit. "Injunction," § 408.

Although the motion to dissolve is denied, defendant may be given costs in case the complainant has not diligently prosecuted the suit. Randall *v.* Morrell, 17 N. J. Eq. 343. So where plaintiff subsequently withdraws his suit before trial. Conlon *v.* Prior, 62 Conn. 489, 26 Atl. 1057.

Superfluous and unnecessary expenses will not be allowed. Hayes *v.* Chicago, etc., Sand, etc., Co., 37 Ill. App. 19.

76. Dale *v.* Cooke, Hard. (Ky.) 97; Andrews *v.* Ford, 6 N. J. Eq. 488; Aldrich *v.* Reynolds, 1 Barb. Ch. (N. Y.) 613; Boughton *v.* Phillips, 6 Paige (N. Y.) 433.

Costs and expenses of an appeal are not to be included. Teasdale *v.* Jones, 40 Mo. App. 243.

Costs of an excusable adjournment at complainant's instance cannot be given defendant. Smith *v.* Painter, 10 N. J. L. J. 182.

77. Noland *v.* Pope, 7 J. J. Marsh. (Ky.) 137; McKoy *v.* Chiles, 5 T. B. Mon. (Ky.) 259; Taylor *v.* Bush, 5 T. B. Mon. (Ky.) 84; Massie *v.* Sebastian, 4 Bibb (Ky.) 433. See also Golden *v.* Maupin, 2 J. J. Marsh. (Ky.) 236; Temple *v.* Marshall, 11 La. Ann. 641; Young *v.* McClung, 9 Gratt. (Va.) 336.

Costs on dissolution on bill and answer cannot be given to defendant in case the bill is sufficient on its face. Otis *v.* Forman, 1 Barb. Ch. (N. Y.) 30.

Costs on opening an injunction issued upon default of defendant will be taxed against defendant. Fenton Metallic Mfg. Co. *v.* Chase, 73 Fed. 831.

78. O'Connor *v.* New York, etc., Land Imp. Co., 8 Misc. (N. Y.) 243, 28 N. Y. Suppl. 544 (Code Civ Proc. § 3251); Preuschl *v.* Wendt, 5 N. Y. St. 429; Aldrich *v.* Reynolds, 1 Barb. Ch. (N. Y.) 613.

79. Sweet *v.* Mowry, 71 Hun (N. Y.) 381, 25 N. Y. Suppl. 32.

80. See, generally, CONTEMPT.

Punishment for violation of injunction as due process of law see CONSTITUTIONAL LAW, 8 Cyc. 1087 note 87.

81. *Arkansas.*— Willeford *v.* State, 43 Ark. 62.

Colorado. — Wright *v.* People, 31 Colo. 461, 73 Pac. 869; Smith *v.* People, 2 Colo. App. 99, 29 Pac. 924.

Illinois. — Dickey *v.* Reed, 78 Ill. 261; Andrews *v.* Knox County, 70 Ill. 65; Darst *v.* People, 62 Ill. 306; Kerfoot *v.* People, 51 Ill. App. 409.

Louisiana.— State *v.* Rost, 50 La. Ann. 1006, 24 So. 783; State *v.* Voorhies, 37 La. Ann. 605.

Maryland. — Williamson *v.* Carnan, 1 Gill & J. 184.

Michigan.— People *v.* Kidd, 23 Mich. 440.

New York.— See Milhau *v.* Sharp, 15 Barb. 193.

Washington.— Savage *v.* Sternberg, 19 Wash. 679, 54 Pac. 611, 67 Am. St. Rep. 751; State *v.* Milligan, 3 Wash. 144, 28 Pac. 369.

United States. — Evans *v.* Pack, 8 Fed. Cas. No. 4,566, 2 Flipp. 267.

See 27 Cent. Dig. tit. "Injunction," § 439. And see CONTEMPT, 9 Cyc. 10.

A temporary injunction granted at chambers on disputed questions of fact is void and a violation thereof is not a contempt. Calvert *v.* State, 34 Nebr. 616, 52 N. W. 687.

82. *California.*— *Ex p.* Fil Ki, 79 Cal. 584, 21 Pac. 974.

Colorado.— People *v.* Tenth Judicial Dist. Ct., 29 Colo. 182, 68 Pac. 242.

Illinois.— Loven *v.* People, 158 Ill. 159, 42 N. E. 82; St. Louis, etc., R. Co. *v.* Gray, 100 Ill. App. 538; Glay *v.* People, 94 Ill. App. 598; Kerfoot *v.* People, 51 Ill. App. 409.

Indiana.—Central Union Tel. Co. *v.* State, 110 Ind. 203, 10 N. E. 922, 12 N. E. 136.

Iowa.— State *v.* Baldwin, 57 Iowa 266, 10 N. W. 645; Bloomington First Cong. Church *v.* Muscatine, 2 Iowa 69.

Kansas.— State *v.* Pierce, 51 Kan. 241, 32 Pac. 924; Billard *v.* Erhart, 35 Kan. 616, 12 Pac. 42.

Louisiana. — State *v.* Levy, 36 La. Ann. 941.

such a case being by appeal or writ of error from the order or decree.[83] So, although the injunction is broader than authorized by the bill, it must be obeyed.[84]

2. INDEFINITE OR UNCERTAIN INJUNCTION. An injunction should contain within itself sufficient to apprise the party upon whom it is served what he is restrained from doing, without the necessity of his resorting to the bill on file; and if the party does not in fact know to what the injunction applies he will not be punished for contempt.[85]

3. INJUNCTION GRANTED ON CONDITIONS. Where an injunction is ordered to issue upon the performance of certain acts by plaintiff, there can be no contempt until the acts are performed.[86]

4. EFFECT OF PENDENCY OF AN APPEAL. In jurisdictions where an appeal from an order granting an injunction does not stay the operation of the writ,[87] a violation thereof pending the appeal will be punished as a contempt.[88] An appeal with supersedeas from a judgment perpetuating an injunction does not have the effect of dissolving or suspending the injunction, and a party against whom a judgment

Maryland.— Davis *v.* Reed, 14 Md. 152.

Minnesota.— State *v.* Mower County Dist. Ct., 78 Minn. 464, 81 N. W. 323.

New Jersey.— Forrest *v.* Price, 52 N. J. Eq. 16, 29 Atl. 215.

New York.— People *v.* Van Buren, 136 N. Y. 252, 32 N. E. 775, 20 L. R. A. 446; New York *v.* New York, etc., Ferry Co., 64 N. Y. 622; Sheffield *v.* Cooper, 21 N. Y. App. Div. 518, 48 N. Y. Suppl. 639; People *v.* McKane, 78 Hun 154, 28 N. Y. Suppl. 981; Koehler *v.* Farmers', etc., Nat. Bank, 3 Silv. Sup. 141, 6 N. Y. Suppl. 470, 17 N. Y. Civ. Proc. 307; People *v.* Edson, 51 N. Y. Super. Ct. 238; Lehmaier *v.* Griswold, 46 N. Y. Super. Ct. 11; People *v.* Bouchard, 6 Misc. 459, 27 N. Y. Suppl. 201; Church *v.* Haeger, 33 N. Y. Suppl. 47; Daly *v.* Amberg, 13 N. Y. Suppl. 379; Roosevelt *v.* Edson, 7 N. Y. Civ. Proc. 5; Peck *v.* Yorks, 32 How. Pr. 408; Sullivan *v.* Judah, 4 Paige 444; Smith *v.* Fitch, Clarke 265; Moat *v.* Holbein, 2 Edw. 188.

North Dakota.— State *v.* Markuson, 7 N. D. 155, 73 N. W. 82.

Oregon.— State *v.* Gray, 42 Oreg. 261, 70 Pac. 904, 71 Pac. 978.

Tennessee.— Rutherford *v.* Metcalf, 5 Hayw. 58.

Texas.— *Ex p.* Warfield, (Civ. App. 1899) 50 S. W. 933.

Vermont.— Stimpson *v.* Putnam, 41 Vt. 238.

Wisconsin.— State *v.* Green Lake County Cir. Ct., 98 Wis. 143, 73 N. W. 788. And see Kaehler *v.* Halpin, 59 Wis. 40, 17 N. W. 868; Koehler *v.* Dobberpuhl, 56 Wis. 497, 14 N. W. 631.

United States.— Callanan *v.* Friedman, 101 Fed. 321; U. S. *v.* Debs, 64 Fed. 724; Union Trust Co. *v.* Atchison, etc., R. Co., 64 Fed. 724; *In re* Eaton, 51 Fed. 804.

Canada.—Clint *v.* Quebec Harbour Com'rs, 14 Quebec 343.

See 27 Cent. Dig. tit. "Injunction," §§ 440, 441. And see CONTEMPT, 9 Cyc. 11.

83. See cases cited *supra*, note 82.

84. Loven *v.* People, 158 Ill. 159, 42 N. E. 82; Richards *v.* West, 3 N. J. Eq. 456; New York *v.* New York, etc., Ferry Co., 64 N. Y. 622; Sickels *v.* Borden, 22 Fed. Cas. No. 12,833, 4 Blatchf. 14. *Contra*, Freeman *v.* Deming, 4 Edw. (N. Y.) 598, holding that a defendant is not enjoined by so much of an injunction as goes beyond the prayer of the bill, and will not be punished for violation of such portion.

85. Sullivan *v.* Judah, 4 Paige (N. Y.) 444; *In re* Cary, 10 Fed. 622; Whipple *v.* Hutchinson, 29 Fed. Cas. No. 17,517, 4 Blatchf. 190. And see CONTEMPT, 9 Cyc. 11.

86. *Alabama.*— *Ex p.* Miller, 129 Ala. 130, 30 So. 611, 87 Am. St. Rep. 49.

Massachusetts.— Winslow *v.* Nayson, 113 Mass. 411.

Ohio.— Diehl *v.* Friester, 37 Ohio St. 473.

Pennsylvania.— Streater's Estate, 2 Kulp 288.

Virginia.— Clarke *v.* Hoomes, 2 Hen. & M. 23.

West Virginia.— State *v.* Irwin, 30 W. Va. 404, 4 S. E. 413.

See 27 Cent. Dig. tit. "Injunction," § 441.

87. See APPEAL AND ERROR, 2 Cyc. 913.

88. *Alabama.*— Balkum *v.* Harper, 50 Ala. 372.

California.— Heinlen *v.* Cross, 63 Cal. 44; Merced Min. Co. *v.* Fremont, 7 Cal. 130.

Kentucky.— Kentucky, etc., Bridge Co. *v.* Kreiger, 91 Ky. 625, 16 S. W. 824, 13 Ky. L. Rep. 219.

Missouri.— State *v.* Dillon, 96 Mo. 56, 8 S. W. 781.

New York.— People *v.* Dwyer, 1 N. Y. Civ. Proc. 484.

Pennsylvania.— Delaware, etc., Canal Co. *v.* Lackawanna St. R. Co., 3 Lack. Leg. N. 291.

South Carolina.—Klinck *v.* Black, 14 S. C. 241.

See 27 Cent. Dig. tit. "Injunction," § 442.

An appeal from a counter-claim revives the injunction, and a violation thereof pending the appeal constitutes a contempt. Elizabethtown, etc., R. Co. *v.* Ashland, etc., R. Co., 94 Ky. 478, 22 S. W. 855, 15 Ky. L. Rep. 258.

has been rendered acquires no right to disregard that judgment by the execution of a supersedeas bond.[89]

5. Effect of Modification. Where the injunction has been modified, defendant therein cannot be punished for contempt in violating the order as originally granted where the act does not violate the injunction as modified.[90]

6. Effect of Dissolution. The fact that an injunction has been dissolved is no protection to a defendant in a proceeding against him for its violation while it was in force.[91] And where the injunction has been dissolved by a court without jurisdiction to dissolve, a violation thereafter will be a contempt.[92]

B. Persons Liable[93] — 1. Liability of Particular Persons — a. Agents and Employees in General. Agents and other employees who have knowledge that an injunction has been served upon their principal must obey the injunction while continuing in the employment,[94] although they themselves were not served;[95] but after the relation of master and servant has ceased to exist they are not bound by the injunction.[96]

b. Public Officials. Public officers and others acting in legal proceedings are

89. State *v.* Chase, 41 Ind. 356; Kentucky, etc., Bridge Co. *v.* Krieger, 91 Ky. 625, 16 S. W. 824, 13 Ky. L. Rep. 219; Smith *v.* Western Union Tel. Co., 83 Ky. 269. See also Turner *v.* Scott, 5 Rand. (Va.) 332.

In Colorado an appeal with a supersedeas bond ousts the court of authority to enforce the decree. Hurd *v.* People, 14 Colo. 207, 23 Pac. 342.

Where an injunction is dissolved, the execution by plaintiff of a supersedeas bond, and the service of the order to supersede, leave the injunction in force as fully as if the final judgment had not been rendered; and defendant, violating it before a decision on appeal, is guilty of contempt. State *v.* Houston, 37 La. Ann. 852; Elizabethtown, etc., R. Co. *v.* Ashland, etc., R. Co., 94 Ky. 478, 22 S. W. 855, 15 Ky. L. Rep. 258; Smith *v.* Western Union Tel. Co., 7 Ky. L. Rep. 255; State *v.* Harness, 42 W. Va. 414, 26 S. E. 270.

Public interest.— Where public interest would suffer, the court will refuse to enforce compliance, as in the case of contempt, if the rights of the other party are sufficiently protected by the undertaking given on the appeal. Troy, etc., R. Co. *v.* Boston, etc., R. Co., 57 How. Pr. (N. Y.) 181.

90. U. S. *v.* Price, 1 Alaska 204; Fremont *v.* Merced Min. Co., 9 Cal. 18; State *v.* King, 47 La. Ann. 696, 17 So. 254, 49 Am. St. Rep. 374; Peck *v.* Yorks, 32 How. Pr. (N. Y.) 408.

The pendency of a motion to modify does not justify a violation of the injunction as originally granted. Young *v.* Rothrock, 121 Iowa 588, 96 N. W. 1105.

91. Crook *v.* People, 16 Ill. 534; Smith *v.* Reno, 6 How. Pr. (N. Y.) 124. But *compare* Krone *v.* Kings County El. R. Co., 50 Hun (N. Y.) 431, 3 N. Y. Suppl 149; Gulf, etc., R. Co. *v.* Cleburne Ice, etc., Co., (Tex. Civ. App. 1904) 83 S. W. 1100.

Effect of appeal.— Where, before an appeal has been taken from the dissolution of an injunction against the disposal of property, defendants sold the property, it was not a violation for them to aid the purchaser in disposing of the property, even after the appeal had been perfected. Smith *v.* Whitfield, 38 Fla. 211, 20 So. 1012.

Restoration pending appeal.— The violation of an injunction which has been dissolved but restored pending an appeal is punishable as a contempt. Balkum *v.* Harper, 50 Ala. 372. But see Weeks *v.* Smith, 3 Abb. Pr. (N. Y.) 211.

Pendency of motion to dissolve.— A defendant cannot avoid compliance with the prohibition by simply moving to dissolve the injunction. McCardel *v.* Peck, 28 How. Pr. (N. Y.) 120.

92. People *v.* Van Buren, 18 N. Y. Suppl. 734; Koehler *v.* Farmers,' etc., Nat. Bank, 6 N. Y. Suppl. 470, 17 N. Y. Civ. Proc. 307.

93. See Contempt, 9 Cyc. 23 *et seq.*

94. *Georgia.*— Wimpy *v.* Phinizy, 68 Ga. 188.

Michigan.— Wilcox Silver-Plate Co. *v.* Schimmel, 59 Mich. 524, 26 N. W. 692.

New York.— See Batterman *v.* Finn, 32 How. Pr. 501.

South Carolina.— See Klinck *v.* Black, 14 S. C. 241.

United States.— Sickels *v.* Borden, 22 Fed. Cas. No. 12,833, 4 Blatchf. 14.

England.— Seaward *v.* Paterson, [1897] 1 Ch. 545, 66 L. J. Ch. 267, 76 L. T. Rep. N. S. 215, 45 Wkly. Rep. 610; Wellesley *v.* Mornington, 11 Beav. 180, 12 Jur. 367, 50 Eng. Reprint 785, 786.

Canada.— Brown *v.* Sage, 12 Grant Ch. (U. C.) 25.

A lessee is a "servant or agent." Batterman *v.* Finn, 34 How. Pr. (N. Y.) 108, 32 How. Pr. 501.

See 27 Cent. Dig. tit. "Injunction," § 485.

95. Aldinger *v.* Pugh, 57 Hun (N. Y.) 181, 10 N. Y. Suppl. 684, 19 N. Y. Civ. Proc. 91.

96. Dadirrian *v.* Gullian, 79 Fed. 784; Toledo, etc., R. Co. *v.* Pennsylvania Co., 54 Fed. 730, 19 L. R. A. 387; Mexican Ore Co. *v.* Mexican Guadalupe Min. Co., 47 Fed. 351. But see Brown *v.* Sage, 12 Grant Ch. (U. C.) 25.

guilty of contempt in doing acts prohibited by the court and are punishable therefor.[97]

c. Private Corporations. A private corporation is subject to punishment for a contempt.[98] While it cannot be imprisoned, it may be fined.[99]

d. Municipal Corporations. While a municipal corporation cannot be guilty of contempt, yet its officers and agents, through whom alone it acts, may be punished.[1]

e. Persons Not Parties. A person may be guilty of a contempt of court in doing an act which he knows the court has prohibited by injunction, although he was not a party to the suit.[2] In such a case he is not technically guilty of a violation, but of an independent act of disrespect to the court, which constitutes a contempt of the court, and may be punished as such without reference to its effect upon the rights of the suitors.[3]

f. Complainants. Unless the injunction in terms restrains the person who obtains its allowance, he is not liable in contempt for doing the acts enjoined.[4]

2. Liability For Acts of Others — a. In General. One against whom an injunction order has been issued is bound not only to abstain from violating it in person, but also to endeavor in good faith to prevent its violation by his agents or assignees.[5] But one who in good faith has made an earnest effort to secure obedience to the injunction will not be held in contempt for disobedience by

97. Randall *v.* Parkison, 7 Rob. (La.) 134; New York *v.* Conover, 5 Abb. Pr. (N. Y.) 244.

98. Golden Gate Consol. Hydraulic Min. Co. *v.* Yuba County Super. Ct., 65 Cal. 187, 3 Pac. 628.

99. New York *v.* New York, etc., Ferry Co., 64 N. Y. 622; People *v.* Albany, etc., R. Co., 12 Abb. Pr. (N. Y.) 171; U. S. *v.* Memphis, etc., R. Co., 6 Fed. 237.

1. Bass *v.* Shakopee, 27 Minn. 250, 4 N. W. 619, 6 N. W. 776; People *v.* Sturtevant, 9 N. Y. 263, 59 Am. Dec. 536; People *v.* Compton, 1 Duer (N. Y.) 512; Forsythe *v.* Winans, 44 Ohio St. 277, 7 N. E. 13.

2. *Illinois.*— Parsons *v.* People, 51 Ill. App. 467.

New Hampshire.— Fowler *v.* Beckman, 66 N. H. 424, 30 Atl. 1117.

New York.— People *v.* Marr, 84 N. Y. Suppl. 965.

Ohio.— Miller *v.* Toledo Grain, etc., Co., 21 Ohio Cir. Ct. R. 325, 11 Ohio Cir. Dec. 629.

Pennsylvania.— Titusville Iron Co. *v.* Quinn, 13 Pa. Dist. 416; York Mfg. Co. *v.* Oberdick, 11 Pa. Dist. 616.

Virginia.— West *v.* Belches, 5 Munf. 187.

Wisconsin.— Poertner *v.* Russel, 33 Wis. 193.

United States.— Chisolm *v.* Caines, 121 Fed. 397; *Ex p.* Lennon, 64 Fed. 320, 12 C. C. A. 134; Phillips *v.* Detroit, 19 Fed. Cas. No. 11,101, 2 Flipp. 92.

England.— Smith-Barry *v.* Dawson, L. R. 27 Ir. 558.

See 27 Cent. Dig. tit. "Injunction," § 495.

An injunction against a corporate body is binding upon all individuals acting for the corporation to whose knowledge it comes, and they are liable for disobeying it whether parties to the suit or not. State *v.* Cutler, 13 Kan. 131; People *v.* Sturtevant, 9 N. Y. 263, 59 Am. Dec. 536; Davis *v.* New York, 1 Duer (N. Y.) 451; Heck *v.* Bulkley, (Tenn. Ch. App. 1886) 1 S. W. 612; Sidway *v.* Missouri Land, etc., Co., 116 Fed. 381; Toledo, etc., R. Co. *v.* Pennsylvania Co., 54 Fed. 746, 19 L. R. A. 395; New York *v.* New Jersey Steamboat Transp. Co., 24 Fed. 817.

3. Chisholm *v.* Caines, 121 Fed. 397; *In re* Reese, 107 Fed. 942, 47 C. C. A. 87.

His offense is totally different from the offense of a party defendant, or a person against whom the order is made, and by whom alone it can be violated. Barthe *v.* Larquié, 42 La. Ann. 131, 7 So. 80; Watson *v.* Fuller, 9 How. Pr. (N. Y.) 425.

4. Vanzandt *v.* Argentine Min. Co., 48 Fed. 770.

5. Kentucky Heating Co. *v.* Louisville Gas Co., 109 Ky. 428, 59 S. W. 490, 22 Ky. L. Rep. 984; Reed *v.* Philadelphia, etc., R. Co., (N. J. Ch. 1892) 24 Atl. 922; Feild *v.* Chapman, 13 Abb. Pr. (N. Y.) 320; Poertner *v.* Russel, 33 Wis. 193.

A lessor who leases property, simply informing the lessees that an injunction is in force against a certain use of the property, is liable for a violation thereof by the lessees. Batterman *v.* Finn, 34 How. Pr. (N. Y.) 108, 32 How. Pr. 501. And a lessor is guilty of contempt if his tenant by his direction acts in violation of the injunction. State *v.* Lavery, 31 Oreg. 77, 49 Pac. 852.

An assignor cannot purge himself of contempt by showing that the attachment proceedings continued in violation of an injunction were continued by his assignees, unless he can also show that he endeavored to stop the proceedings. U. S. *v.* Bancroft, 24 Fed. Cas. No. 14,513, 6 Ben. 392.

Sale by sheriff.— An injunction against an attaching creditor forbidding a sale of attached property is violated by a sale by the officer in his presence without objection. Blood *v.* Martin, 21 Ga. 127.

those in his employ.[6] A pledgee is not liable for acts of a pledgor in violation of an injunction,[7] nor is a husband liable for the acts of his wife where she is living apart from him.[8]

b. Attorneys. An attorney who deliberately advises his client to disobey an injunction is guilty of contempt.[9]

c. Partners and Receivers. A partner,[10] or a receiver,[11] may be guilty of contempt by acquiescence in the acts of his associates.

d. Officers or Agents of Corporation. Officers or agents of a corporation are not liable for the breach by the corporation if they neither do anything contrary to it nor conduce to its violation by concealing the fact that it has been issued.[12]

C. Knowledge or Notice. One cannot be punished for violating an order of injunction, unless it is made to appear that such order was personally served upon him, or that he had notice of the making of such order.[13] Where, however, a party has actual notice of an injunction, clearly informing him from what he must abstain, he is bound by the injunction from that time, and will be punished for a violation thereof, although it may not have been served, or be defectively served on him.[14] And where an injunction has been ordered, a party hav-

6. Shirk *v.* Cox, 141 Ind. 301, 40 N. E. 750; Stock *v.* Jefferson Tp., 132 Mich. 96, 92 N. W. 769; Pennsylvania R. Co. *v.* Thompson, 49 N. J. Eq. 318, 24 Atl. 544.

7. Haring *v.* Hamilton, 107 Wis. 112, 82 N. W. 698.

8. Hope *v.* Carnegie, L. R. 7 Eq. 254.

9. *Ex p.* Vance, 88 Cal. 281, 26 Pac. 118; Stolts *v.* Tuska, 82 N. Y. App. Div. 81, 81 N. Y. Suppl. 638; Brenan *v.* Preston, 1 Wkly. Rep. 172.

An attorney, acting for two principals, one of whom is enjoined, and the other, claiming different rights, is not enjoined, is not guilty of contempt in advising or acting professionally for the latter. Slater *v.* Merritt, 75 N. Y. 268.

10. Neale *v.* Osborne, 15 How. Pr. (N. Y.) 81.

Objecting partner.— A partner who took no part in the illegal proceedings, and attempted to prevent his partner from doing so, will be exonerated. *In re* South Side R. Co., 22 Fed. Cas. No. 13,190, 7 Ben. 391.

Change in partnership name.— A permanent injunction against a partnership continues to be effective against the persons composing it after a change in the partnership name. Carter *v.* Bartel, 110 Iowa 211, 81 N. W. 462.

11. Safford *v.* People, 85 Ill. 558.

12. Trimmer *v.* Pennsylvania, etc., R. Co., 36 N. J. Eq. 411; Tieran *v.* Cie. de Chemin de Fer M. O. & O., 8 Rev. Lég. 375.

13. *Oregon.*— State *v.* Lavery, 31 Oreg. 77, 49 Pac. 852.

Pennsylvania.— Young *v.* Salber, 2 Wkly. Notes Cas. 394.

South Carolina.— Columbia Water Power Co. *v.* Columbia, 4 S. C. 388.

Tennessee.— State *v.* Adcock, (Ch. App. 1898) 51 S. W. 992.

Texas.— *Ex p.* Stone, (Cr. App. 1903) 72 S. W. 1000.

Wisconsin.— Witter *v.* Lyon, 34 Wis. 564.

United States.— *In re* Cary, 10 Fed. 622; Whipple *v.* Hutchinson, 29 Fed. Cas. No. 17,517, 4 Blatchf. 190.

England.— Willis *v.* Daniel, 1 Anstr. 36.

See 27 Cent. Dig. tit. "Injunction," § 445. And see CONTEMPT, 9 Cyc. 12.

Notice to the solicitor of defendant that an application will be made on a day specified for an injunction against taking out an execution upon a judgment, of which notice it is not shown that defendant had actual knowledge, is not sufficient to render defendant liable for contempt for taking out and levying such execution previous to the day fixed for the hearing of the application for the injunction. Greenleaf *v.* Leach, 20 Vt. 281.

14. *California.*— Golden Gate Consol. Hydraulic Min. Co. *v.* Yuba County Super. Ct., 65 Cal. 187, 3 Pac. 628. *Contra,* Elliott *v.* Osborne, 1 Cal. 396.

Colorado.— People *v.* El Paso County Dist. Ct., 19 Colo. 343, 35 Pac. 731.

Florida.— Thebaut *v.* Canova, 11 Fla. 143.

Georgia.— Murphey *v.* Harker, 115 Ga. 77, 41 S. E. 585.

Illinois.— Danville Banking, etc., Co. *v.* Parks, 88 Ill. 170; Glay *v.* People, 94 Ill. App. 598.

Iowa.— Milne *v.* Van Buskirk, 9 Iowa 558.

Massachusetts.— Winslow *v.* Nayson, 113 Mass. 411.

Missouri.— Sharp *v.* Aarding, 2 Mo. App. Rep. 1145. And see *In re* Coggshall, 100 Mo. App. 585, 75 S. W. 183.

New Hampshire.— Fowler *v.* Beckman, 66 N. H. 424, 30 Atl. 1117.

New Jersey.— Kempson *v.* Kempson, 61 N. J. Eq. 303, 48 Atl. 244; Cape May, etc., R. Co. *v.* Johnson, 35 N. J. Eq. 422; Haring *v.* Kauffman, 13 N. J. Eq. 397, 78 Am. Dec. 102; Endicott *v.* Mathis, 9 N. J. Eq. 110.

New York.— Boon *v.* McGucken, 67 Hun 251, 22 N. Y. Suppl. 424; Koehler *v.* Farmers', etc., Nat. Bank, 3 Silv. Sup. 141, 6 N. Y. Suppl. 470; New York *v.* New York, etc., Ferry Co., 40 N. Y. Super. Ct. 300; Ewing *v.* Johnson, 34 How. Pr. 202; Livingston *v.*

ing knowledge of that order, who deliberately violates the injunction that has been ordered, although not yet issued, is guilty of contempt of court; but in order to convict a person of contempt, under circumstances of that kind, it must be shown clearly that he had knowledge of the order for the injunction in such a way that it can be held that he understood it, and with that knowledge committed a wilful violation thereof.[15] Where an order of injunction forms part of a decree rendered in regular course, upon issue joined by answer, the parties to the suit are bound to take notice of the order and are not entitled to have a certified copy of the decree served upon them.[16] Where defendants or their attorneys are in court when the decree of injunction is rendered, they are chargeable with knowledge of its contents, and the decree need not be served upon them, to render them guilty of contempt for violating the same.[17] Where a preliminary injunction is granted on condition that a bond be filed by plaintiff, and defendant was present in court at the time the order was read and approved, and the complainant then exhibited the form of bond which he was required to give and stated that the bond would be filed as soon as executed, and it was in fact filed on the same day, defendant cannot plead that he was ignorant of the filing of the

Swift, 23 How. Pr. 1; Waffle *v.* Vanderheyden, 8 Paige 45; Hull *v.* Thomas, 3 Edw. 236.

North Carolina.— Fleming *v.* Patterson, 99 N. C. 404, 6 S. E. 396; Edney *v.* King, 39 N. C. 465.

Rhode Island.— Hazard *v.* Durant, 11 R. I. 195.

Tennessee.— Farnsworth *v.* Fowler, 1 Swan 1, 55 Am. Dec. 718.

Texas.— *Ex p.* Stone, (Cr. App. 1903) 72 S. W. 1000; San Antonio *v.* Rische, (Civ. App. 1896) 38 S. W. 388.

Vermont.— Howe *v.* Willard, 40 Vt. 654.

West Virginia.— Wenger *v.* Fisher, 55 W. Va. 13, 46 S. E. 695; Osborn *v.* Glasscock, 39 W. Va. 749, 20 S. E. 702.

Wisconsin.— Poertner *v.* Russel, 33 Wis. 193; Mead *v.* Norris, 21 Wis. 315; Ramstock *v.* Roth, 18 Wis. 522.

United States.— *Ex p.* Lennon, 166 U. S. 548, 17 S. Ct. 658, 41 L. ed. 1110; *Ex p.* Richards, 117 Fed. 658; Ulman *v.* Ritter, 72 Fed. 1000; *In re* Feeny, 8 Fed. Cas. No. 4,715, 1 Hask. 304.

England.— Vansandau *v.* Rose, 2 Jac. & W. 264, 22 Rev. Rep. 114, 37 Eng. Reprint 628; Powel *v.* Follet, Dick. 116, 21 Eng. Reprint 212; McNeil *v.* Garratt, Cr. & Ph. 98, 5 Jur. 836, 10 L. J. Ch. 297, 18 Eng. Ch. 98, 41 Eng. Reprint 427; Ireland Min. Co. *v.* Delany, L. R. 21 Ir. 8; Avery *v.* Andrews, 51 L. J. Ch. 414, 46 L. T. Rep. N. S. 279, 30 Wkly. Rep. 564; United Tel. Co. *v.* Dale, 25 Ch. D. 778, 53 L. J. Ch. 295, 50 L. T. Rep. N. S. 85, 32 Wkly. Rep. 428; Kimpton *v.* Eve, 2 Ves. & B. 349, 35 Eng. Reprint 352.

Canada.— De Cosmos *v.* Victoria, etc., Tel. Co., 3 Brit. Col. 347.

See 27 Cent. Dig. tit. "Injunction," § 446.

Where a corporation or its officers have actual notice of an injunction against it, it is bound thereby, although no service is had. Golden Gate Consol. Hydraulic Min. Co. *v.* Yuba County Super. Ct., 65 Cal. 187, 3 Pac. 628; Rochester, etc., R. Co. *v.* New York, etc., R. Co., 48 Hun (N. Y.) 190.

Notice by telegram.— Sufficient notice of the granting of an injunction may be given by telegram. Cape May, etc., R. Co. *v.* Johnson, 35 N. J. Eq. 422; State *v.* Knight, 3 S. D. 509, 54 N. W. 412, 44 Am. St. Rep. 809; *Ex p.* Langley, 13 Ch. D. 110, 49 L. J. Bankr. 1, 43 L. T. Rep. N. S. 181, 28 Wkly. Rep. 174; *In re* Bryant, 4 Ch. D. 98, 35 L. T. Rep. N. S. 489, 25 Wkly. Rep. 230.

A failure to name or describe a sheriff in an injunction does not absolve him from the duty of obeying the order when notified of it. Buffandeau *v.* Edmondson, 17 Cal. 436, 79 Am. Dec. 139; *In re* Lady Bryan Min. Co., 14 Fed. Cas. No. 7,980.

Service of copy of order is sufficient notice without a writ. Fowler *v.* Beckman, 66 N. H. 424, 30 Atl. 1117.

Great negligence in serving a writ of injunction is not a ground for disregarding its existence. Streater's Estate, 2 Kulp (Pa.) 288; Howe *v.* Willard, 40 Vt. 654.

15. Dowagiac Mfg. Co. *v.* Minnesota Moline Plow Co., 124 Fed. 736 [*affirmed* without opinion in 129 Fed. 1005, 64 C. C. A. 122].

16. Hawkins *v.* State, 126 Ind. 294, 26 N. E. 43.

17. New York Bank Note Co. *v.* Kerr, 77 Ill. App. 53; Hawks *v.* Fellows, 108 Iowa 133, 78 N. W. 812; Milne *v.* Van Buskirk, 9 Iowa 558; Monell *v.* Lawrence, 12 Johns. (N. Y.) 521; Anonymous, 3 Atk. 567, 26 Eng. Reprint 1127; Scott *v.* Becher, 4 Price 346, 18 Rev. Rep. 722; Kimpton *v.* Eve, 2 Ves. & B. 349, 13 Rev. Rep. 116, 35 Eng. Reprint 352; Hearn *v.* Tennant, 14 Ves. Jr. 136, 9 Rev. Rep. 253, 33 Eng. Reprint 473; James *v.* Downes, 18 Ves. Jr. 522, 11 Rev. Rep. 247, 34 Eng. Reprint 415. *Compare In re* Ferrior, L. R. 3 Ch. 175, 37 L. J. Ch. 569, 18 L. T. Rep. N. S. 65, 16 Wkly. Rep. 298.

Defendant's clerk in court is not his agent for purpose of receiving notice. Gooseman *v.* Dann, 10 Sim. 517, 16 Eng. Ch. 517, 59 Eng. Reprint 716.

Even though no regular writ is issued such notice is sufficient. Milne *v.* Van Buskirk, 9 Iowa 558.

bond, it being his duty, without notification, to ascertain whether the bond had been filed or not.[18]

D. Acts or Conduct Constituting Violation — 1. Acts Within Scope of Injunction in General. In order to authorize punishment for a violation of an injunction, the acts complained of must be clearly embraced within the restraining clause of the injunction.[19] And whether or not particular acts constitute a violation of an injunction depends largely upon its special provisions.[20] The language

18. Burr *v.* Kimbark, 29 Fed. 428.

19. *Connecticut.*— Baldwin *v.* Miles, 58 Conn. 496, 20 Atl. 618.

District of Columbia.— Mason *v.* Jones, 7 D. C. 247.

Georgia.— Wray *v.* Harrison, 116 Ga. 93, 42 S. E. 351, holding that procurance of license is not violation of injunction against selling under void license.

Kansas.— Raff *v.* State, 48 Kan. 44, 28 Pac. 986.

Kentucky.— Louisville, etc., R. Co. *v.* Miller, 66 S. W. 5, 23 Ky. L. Rep. 1714; Bannon *v.* Rohmeiser, 9 S. W. 293, 10 Ky. L. Rep. 395.

Louisiana.— Pasley *v.* McConnell, 39 La. Ann. 1097, 3 So. 484, 485.

Massachusetts.—Florence Sewing Mach. Co. *v.* Grover, etc., Sewing Mach. Co., 110 Mass. 1.

Montana.— Harley *v.* Montana Ore Purchasing Co., 27 Mont. 388, 71 Pac. 407.

New Jersey.— George Jonas Glass Co. *v.* Glass Bottle Blowers' Assoc., (Ch. 1902) 53 Atl. 138.

New York.— *In re* Argus Co., 138 N. Y. 557, 34 N. E. 388; German Sav. Bank *v.* Habel, 80 N. Y. 273 [*reversing* 45 N. Y. Super Ct. 615]; Corwin *v.* Erie R. Co., 84 N. Y. App. Div. 555, 82 N. Y. Suppl. 753; Stolts *v.* Tuska, 82 N. Y. App. Div. 81, 81 N. Y. Suppl. 638; Ireland *v.* Smith, 1 Barb. 419; Barker *v.* Oswegatchie, 16 N. Y. Suppl. 732; Standard Stock Farm *v.* National Trotting Assoc., 9 N. Y. Suppl. 898; Porous Plaster Co. *v.* Seabury, 1 N. Y. Suppl. 134; Laurie *v.* Laurie, 9 Paige 234; Matter of Lynch, 5 Paige 120; Dale *v.* Rosevelt, 1 Paige 35, holding that the suing executors is not a violation of an injunction against suing heirs.

Tennessee.— Blair *v.* Nelson, 8 Baxt. 1; Chattanooga Fourth Nat. Bank *v.* Cresent Min. Co., (Ch. App. 1897) 52 S. W. 1021.

Utah.— Bullion, etc., Min. Co. *v.* Eureka Hill Min. Co., 5 Utah 151, 13 Pac. 174.

Virginia.— Harrisonburg *v.* Roller, 97 Va. 582, 34 S. E. 523.

Wisconsin.— Wisconsin Cent. R. Co. *v.* Smith, 52 Wis. 140, 8 S. W. 613.

United States.— *Ex p.* Richards, 117 Fed. 658; U. S. *v.* Weber, 114 Fed. 950; Mackall *v.* Ratchford, 82 Fed. 41; Wakelee *v.* Davis, 50 Fed. 522; *In re* North Bloomfield Gravel Min. Co., 27 Fed. 795; Mason *v.* Jones, 16 Fed. Cas. No. 9,240, 1 Hayw. & H. 329; Smith *v.* Patton, 22 Fed. Cas. No. 13,088; Woodworth *v.* Rogers, 30 Fed. Cas. No. 18,018, 3 Woodb. & M. 135.

England.— Lund *v.* Blanshard, 4 Hare 290, 14 L. J. Ch. 332, 30 Eng. Ch. 290; Grand Junction Canal Co. *v.* Dimes, 13 Jur. 779, 18 L. J. Ch. 419, 17 Sim. 38, 42 Eng. Ch. 38, 60 Eng. Reprint 1041; Buenos Ayres Gas Co. *v.* Wilde, 29 Wkly. Rep. 43; Imperial Gas Light Co. *v.* Clarke, Younge 580.

See 27 Cent. Dig. tit. "Injunction," § 448.

Acts not injurious to plaintiff.— An injunction will not be construed to restrain acts which would not be injurious, or which would be beneficial to the complainant, unless its words clearly have that import or effect. People *v.* Diedrich, 141 Ill. 665, 30 N. E. 1038; Van Wagonen *v.* Terpenning, 122 N. Y. 222, 25 N. E. 254; Wilkinson *v.* Worcester First Nat. F. Ins. Co., 72 N. Y. 499, 28 Am. Rep. 166.

20. See cases cited *infra*, this note.

Injunction against strikers.—An injunction order requiring defendants to "desist from interference with plaintiff's employes" is shown to have been violated where it appears that defendants addressed a number of the employees inciting them to strike. U. S. *v.* Haggerty, 116 Fed. 510; U. S. *v.* Weber, 114 Fed. 950.

Injunction against carrying on business.— The employment of counsel to advise and defend in injunction proceedings against carrying on business is not within the scope of the prohibition against carrying on business. Beneville *v.* Whalen, 14 Daly (N. Y.) 508, 2 N. Y. Suppl. 20.

Injunction against interference with business.— Where defendant is restrained from interfering with the business of another, except for a clear violation of the law, he is justified when he has facts on which to base a sound judgment that the law has been violated. Stage Horse Cases, 15 Abb. Pr. N. S. (N. Y.) 51.

Injunction against acts of assignee for benefit of creditors.— An assignee for the benefit of creditors, enjoined from "intermeddling with, or receiving or collecting" any of the property of the assignor, may sue the sheriff for taking the assigned property out of his possession. McQueen *v.* Babcock, 41 Barb. (N. Y.) 337.

If defendant who is enjoined from corresponding with complainant's customers answers letters written by them to him, he violates the injunction. Loven *v.* People, 158 Ill. 159, 42 N. E. 82.

Injunction against public officer.— An injunction against the incumbent of an office restraining the doing of an official act will be construed with reference to the case made, and if it appears that the ground of attack is the personal disability of the officer, the injunction will bind him alone; but, if it ap-

of an order of injunction should not be extended to cover acts not fairly and reasonably within its meaning.[21] An injunction decree is to be construed with reference to the nature of the proceeding and the purpose of the injunction.[22] Although the command of an injunction must be implicitly obeyed, yet it is the spirit and not the letter of the command to which obedience is required.[23] But one who violates the letter of an injunction in reliance on his judgment that he does not violate its spirit acts at his peril, and if mistaken, his good faith is not a defense.[24]

2. Acts Constituting Evasion — a. In General. No subterfuge amounting to a substantial violation of an injunction will be allowed to succeed simply because not contrary to the letter of the prohibitory clause.[25]

pears that the only ground of attack is the illegality of the official act, then the decree will bind the officer, although only the officer is personally named therein. Crans *v.* Francis, 24 Kan. 750.

Injunction against publications.— An injunction enjoining defendants from appropriating information contained in semiannual directories and weekly bulletin sheets, in the future, and publishing it, covers not only directories and sheets published by the complainant before the commencement of the action, but also those published thereafter. Jewelers' Mercantile Agency *v.* Rothschild, 6 N. Y. App. Div. 499, 39 N. Y. Suppl. 700.

21. *California.*— White *v.* Wise, 134 Cal. 613, 66 Pac. 959.

Kentucky.— Louisville, etc., R. Co. *v.* Miller, 112 Ky. 464, 66 S. W. 5, 23 Ky. L. Rep. 1714.

Michigan.— People *v.* Simonson, 10 Mich. 335.

New Hampshire.— Amoskeag Mfg. Co. *v.* Shirley, 69 N. H. 638, 45 Atl. 589.

Utah.— Coit *v.* Freed, 15 Utah 426, 49 Pac. 533.

United States.— Champlain Constr. Co. *v.* O'Brien, 107 Fed. 333, holding that the terms of the writ should be strictly construed.

Canada.— Ball *v.* Sherlock, 16 Grant Ch. (U. C.) 658.

See 27 Cent. Dig. tit. "Injunction," § 448.

22. St. Louis R. Co. *v.* Gray, 100 Ill. App. 538; Missouri, etc., R. Co. *v.* Hoereth, 144 Mo. 136, 45 S. W. 1085; Jewelers' Mercantile Agency *v.* Rothschild, 6 N. Y. App. Div. 499, 39 N. Y. Suppl. 700; Enoch Morgan's Sons Co. *v.* Gibson, 122 Fed. 420, 59 C. C. A. 46; *Ex p.* Richards, 117 Fed. 658; Duluth *v.* Abbott, 117 Fed. 137, 55 C. C. A. 153.

23. *District of Columbia.*— Morrison *v.* Shuster, 1 Mackey 190.

Kentucky.— Kentucky Heating Co. *v.* Louisville Gas Co., 109 Ky. 428, 59 S. W. 490, 22 Ky. L. Rep. 984; Newport *v.* Newport Light Co., 21 S. W. 645, 14 Ky. L. Rep. 845.

Michigan.— Daniels *v.* Long, 111 Mich. 562, 69 N. W. 1112; Hemingway *v.* Preston, Walk. 528.

New Jersey.— West Jersey R. Co. *v.* Thomas, 23 N. J. Eq. 431; Magennis *v.* Parkhurst, 4 N. J. Eq. 433.

New York.— See Fischer *v.* Blank, 81 Hun 579, 31 N. Y. Suppl. 10.

Pennsylvania.— Philadelphia, etc., R. Co.'s Appeal, 2 Walk. 243.

Canada.— Bickford *v.* Welland R. Co., 17 Grant Ch. (U. C.) 484.

See 27 Cent. Dig. tit. "Injunction," § 448.

24. North *v.* Swartz, 79 Ill. App. 557; Young *v.* Rothrock, 121 Iowa 588, 96 N. W. 1105; New York Cent. Trust Co. *v.* Wabash, etc., R. Co., 132 Fed. 582; Indianapolis, etc., Traction Co. *v.* Consolidated Traction Co., 125 Fed. 247; Rodgers *v.* Pitt, 89 Fed. 424; Economist Furnace Co. *v.* Wrought-Iron Range Co., 86 Fed. 1010; Stateler *v.* California Nat. Bank, 77 Fed. 43. And see *infra*, VIII, E, 2.

25. *Alabama.*— *Ex p.* Miller, 129 Ala. 130, 30 So. 611, 87 Am. St. Rep. 49.

Illinois.— Perry *v.* Kinnear, 42 Ill. 160.

Iowa.— Lake *v.* Wolfe, 108 Iowa 184, 78 N. W. 811.

Kentucky.— Kentucky, etc., Bridge Co. *v.* Krieger, 91 Ky. 625, 16 S. W. 824, 13 Ky. L. Rep. 219.

New Hampshire.— State *v.* Concord R. Corp., 62 N. H. 375.

New Jersey.— Alcorn *v.* Newark, etc., Traction Co., (Ch. 1901) 48 Atl. 235; Gibbs *v.* Morgan, 39 N. J. Eq. 79.

New York.— Jewelers' Mercantile Agency *v.* Rothschild, 6 N. Y. App. Div. 499, 39 N. Y. Suppl. 700; McCredie *v.* Senior, 4 Paige 378; Ogden *v.* Gibbons, 4 Johns. Ch. 174.

North Carolina.— Baker *v.* Cordon, 86 N. C. 116, 41 Am. Rep. 448.

Ohio.— Wing *v.* Cleveland, 9 Ohio Dec. (Reprint) 551, 15 Cinc. L. Bul. 50.

Tennessee.— Newsom *v.* Newsom, (Ch. App. 1900) 56 S. W. 29.

United States.— *In re* Schwarz, 14 Fed. 787; *In re* Tift, 11 Fed. 463.

Canada.— Prentiss *v.* Brennan, 1 Grant Ch. (U. C.) 428, 497.

See 27 Cent. Dig. tit. "Injunction," § 449.

Illustrations.— When defendant, being enjoined from publishing a letter, annexes a copy to his answer, and by an advertisement invites all who wish to see the letter to call at the clerk's office, he is guilty of contempt. Denis *v.* Leclerc, 1 Mart. (La.) 297, 5 Am. Dec. 712. Where a judgment enjoins defendants from using the system of numbers devised by plaintiffs, or any similar numbers based thereon, to enable customers to order goods from samples by number, they should be punished for contempt in telling cus-

b. Procuring or Permitting Violation by Another. The obligation to obey an injunction cannot be avoided by procuring or permitting a third person to violate it.[26]

3. Acts Acquiesced in or Provoked by Complainant. The party at whose instance an injunction issued cannot have the party enjoined punished in contempt proceedings for breach of the injunction when the breach was committed with his consent or acquiescence,[27] or where the breach was provoked by plaintiff.[28]

4. Acts of Bodies, Boards, or Associations, and Officers Thereof. An injunction restraining a corporation from the commission of certain acts is violated by the performance of such acts by the officers of the corporation as individuals.[29] An injunction restraining a city and its officers from making a certain grant is violated by a vote of the city council to make such grant.[30] Where the enforcement of an ordinance has been enjoined on the ground that certain provisions of the ordinance are invalid, the passage and enforcement of a new ordinance on the same subject, without such invalid provisions, is not a violation of the injunction.[31]

5. Particular Acts — a. Bringing or Continuing Legal Proceedings. Where the bringing or continuing of legal proceedings is prohibited by injunction, any steps, although merely preliminary or incidental, taken for the purpose of bringing or continuing such proceedings, constitute a violation of the injunction.[32]

b. Interference With Property. Whether or not particular acts constitute a

tomers to order by a system the same as the old, except that in front of the old numbers the figure 1 was inserted. Brown *v.* Braunstein, 86 N. Y. App. Div. 499, 83 N. Y. Suppl. 798. An injunction prohibiting the use of a wharf for any of the purposes of a specified ferry company is violated by using the wharf during the night to supply the company's boat with coal and water. New York *v.* New York, etc., Ferry Co., 40 N. Y. Super. Ct. 300. One who has been enjoined from engaging in a certain business cannot escape the effect of the injunction by organizing a corporation which he controls, for the purpose of engaging in the prohibited business. Westervelt *v.* National Mfg. Co., 33 Ind. App. 18, 69 N. E. 169. See also Chapman *v.* Mad River, etc., R. Co., 1 Ohio Dec. (Reprint) 559, 10 West. L. J. 391.

26. *Georgia.*— Blood *v.* Martin, 21 Ga. 127.

Montana.— State *v.* Fourth Judicial Dist. Ct., 13 Mont. 347, 34 Pac. 39.

New York.— New York *v.* New York, etc., Ferry Co., 64 N. Y. 622; Douglass *v.* Halstead, 34 N. Y. App. Div. 226, 54 N. Y. Suppl. 428; People *v.* Albany, etc., R. Co., 12 Abb. Pr. 171; Wheeler *v.* Gilsey, 35 How. Pr. 139.

Oregon.— State *v.* Lavery, 31 Oreg. 77, 49 Pac. 852.

Vermont.— Stimpson *v.* Putnam, 41 Vt. 238.

United States.— Société Anonyme, etc., *v.* Western Distilling Co., 42 Fed. 96.

England. — St. John's College *v.* Carter, 8 L. J. Ch. 218, 4 Myl. & C. 497, 18 Eng. Ch. 497, 41 Eng. Reprint 191.

See 27 Cent. Dig. tit. "Injunction," § 473.

Infringement as agent.— Parties enjoined from doing acts which infringe on a trademark cannot do the same acts as agents for others. Dadirrian *v.* Gullian, 79 Fed. 784.

27. Howard *v.* Durand, 36 Ga. 346, 91 Am. Dec. 767.

The acquiescence must be distinct and of the clearest kind. Rodgers *v.* Nowill, 1 Wkly. Rep. 205.

28. Loder *v.* Arnold, 15 Jur. 117; Barfield *v.* Nicholson, 2 L. J. Ch. O. S. 90, 2 Sim. & St. 1, 25 Rev. Rep. 144, 1 Eng. Ch. 1, 57 Eng. Reprint 245.

29. Morton *v.* Tulare County Super. Ct., 65 Cal. 496, 4 Pac. 489.

30. People *v.* Sturtevant, 9 N. Y. 263, 59 Am. Dec. 536; Davis *v.* New York, 1 Duer (N. Y.) 451.

31. Ledwith *v.* Jacksonville, 32 Fla. 1, 13 So. 454; Wong Wai *v.* Williamson, 103 Fed. 384; Young *v.* Ridgetown, 18 Ont. 140. See also Waldie *v.* Burlington, 7 Ont. 192 [*affirming* 13 Ont. 104]; McGarvey *v.* Strathroy, 6 Ont. 138.

An attempt to evade the injunction by passing another ordinance similar to the one enjoined is a contempt. Perry *v.* Kinnear, 42 Ill. 160.

32. *Alabama.*— *Ex p.* Miller, 129 Ala. 130, 30 So. 611, 87 Am. St. Rep. 49.

Georgia.— Hines *v.* Rawson, 40 Ga. 356, 2 Am. Rep. 581.

New York.— Gage *v.* Denbow, 49 Hun 42, 1 N. Y. Suppl. 826.

United States.—*In re* Fortunato, 123 Fed. 622; Stateler *v.* California Nat. Bank, 77 Fed. 43; *In re* South Side R. Co., 22 Fed. Cas. No. 13,190, 7 Ben. 391.

England.— Woodward *v.* King, 2 Ch. Cas. 203, 22 Eng. Reprint 911; Axe *v.* Clarke, Dick. 549, 21 Eng. Reprint 383; Parienta *v.* Bensusen, 7 Jur. 618, 13 Sim. 522, 36 Eng. Ch. 522, 60 Eng. Reprint 202; Brooks *v.* Purton, 6 Jur. 94, 11 L. J. Ch. 122, 1 Y. & Coll. 271, 20 Eng. Ch. 271, 62 Eng. Reprint 885; Woodley *v.* Bonnington, 2 Jur. 513, 7

breach of an injunction against setting up title to property or interference with its possession depends largely upon the facts and circumstances of each case.[33]

c. Conveyance or Disposition of Property. Where the conveyance or disposal of property is enjoined[34] a conveyance or transfer intended to confirm one

L. J. Ch. 196, 9 Sim. 214, 16 Eng. Ch. 214, 59 Eng. Reprint 340; Marack *v.* Bailey, 4 L. J. Ch. O. S. 205, 2 Sim. & St. 577, 1 Eng. Ch. 577, 57 Eng. Reprint 466; Parke *v.* Shrewsbury, McClell. 103, 13 Price 289; Partington *v.* Booth, 3 Meriv. 148, 17 Rev. Rep. 48, 36 Eng. Reprint 57; Mills *v.* Cobby, 1 Meriv. 3, 35 Eng. Reprint 578; Birdwood *v.* Hart, 6 Price 32; Chaplin *v.* Cooper, 1 Ves. & B. 16, 35 Eng. Reprint 7; —— *v.* Handcock, 17 Ves. Jr. 383, 34 Eng. Reprint 148; Bullen *v.* Ovey, 16 Ves. Jr. 141, 33 Eng. Reprint 937. But see Franco *v.* Franco, 2 Cox Ch. 420, 30 Eng. Reprint 194.

See 27 Cent. Dig. tit. "Injunction," § 457.

Giving notice of trial is a breach of an injunction to stay trial. Clark *v.* Wood, 6 N. J. Eq. 458; Bird *v.* Brancher, 3 L. J. Ch. O. S. 84, 2 Sim. & St. 186, 1 Eng. Ch. 186, 57 Eng. Reprint 316.

Showing cause against a rule for a new trial is not a breach of an injunction. Whitmore *v.* Thornton, 3 Price 241.

Proceeding to judgment in pending suit.— Where defendant in a creditor's suit, after the service of the ordinary injunction on him, proceeds to judgment in a suit which he had previously commenced against a third person, there is not such a breach of the injunction as would authorize complainant to proceed against him for a contempt. Parker *v.* Wakeman, 10 Paige (N. Y.) 485.

An injunction against obtaining preference over creditors is violated by obtaining such preference by means of proceedings instituted in a lower court. Winn *v.* Albert, 2 Md. Ch. 42.

33. An injunction prohibiting the setting up of title to property is violated by a suit asserting a different title than was set up in the original suit. Texas *v.* White, 22 Wall. (U. S.) 157, 22 L. ed. 819.

Enjoining claim of title under certain deeds. — An injunction enjoining a party holding certain deeds from setting up any claim of title or possession under them does not prevent him from maintaining ejectment for the land and claiming under such deeds. Wildy *v.* Bonney, 35 Miss. 77.

In creditor's suit.— While it would not be a breach of the usual injunction issued in a creditors' suit for the debtor to sue and recover damages for injury in relation to exempt property, it would be a contempt for him to sue for injury to property not exempt. Hudson *v.* Plets, 11 Paige (N. Y.) 180.

An injunction prohibiting interference with possession is violated by driving plaintiff's cattle from the land. *Ex p.* Vance, 88 Cal. 281, 26 Pac. 118. Where an injunction restrains an owner of property from interfering with the possession of another pending an appeal to the supreme court, such owner cannot institute proceedings to obtain possession pending such appeal. Dennett *v.* Reisdorfer, 15 S. D. 466, 90 N. W. 138.

Restraining use of a machine so as not to endanger plaintiff's mill by sparks or interfere with their business by smoke does not require defendants to cease operating where they can continue to use the machine without doing the injury specified. Bancroft *v.* Russell, 3 Tex. Civ. App. 95, 22 S. W. 240.

Cutting timber.— An injunction enjoining the life-tenant "from cutting down any timber, trees, or wood, standing or growing upon the premises . . . or in any way disposing of the same (except what might be cut in a husbandlike manner for firewood, and timber for fencing and ordinary repairs upon the premises)," and from committing waste or spoil, restrained not only the commission of waste but also the cutting of timber for any purpose save those noted in the exception, although it would not be in violation of the rules of good husbandry. Lillie *v.* Lillie, 55 Vt. 470; Loder *v.* Arnold, 15 Jur. 117.

Interference with waters.— One enjoined from preventing waters of specified springs from flowing into a certain creek is not prevented from availing himself of percolations on his own land, even though he might thereby diminish the water which would otherwise issue from the springs. Huston *v.* Leach, 53 Cal. 262. A decree which enjoins interference with the waters of a creek which rise above a dam does not prohibit the use of the waters in the creek below the dam. American Co. *v.* Bradford, 27 Cal. 360.

An injunction against obstructing the use of a towing path as a highway is not violated by obstructions to the use of such path for other purposes. Bosley *v.* Susquehanna Canal, 3 Bland (Md.) 63. Bringing a suit to recover choses in action of a company is a violation of an injunction against disturbing or interfering with the property of the company. Smith *v.* New York, etc., Co., 18 Abb. Pr. (N. Y.) 419.

34. McQueen *v.* Babcock, 41 Barb. (N. Y.) 337 (an action of trespass against any one interfering with such property may be maintained); Lansing *v.* Easton, 7 Paige (N. Y.) 364 (injunction violated by any active interference by defendant or his agents for the purpose of having the legal title transferred to another); Mason *v.* Jones, 16 Fed. Cas. No. 9,240, 1 Hayw. & H. 329 (an injunction against negotiating a promissory note is not violated by suing thereon).

An injunction against the sale of property by a trustee does not prevent his suing at law to recover the trust property. Continental Securities Co. *v.* Northern Securities

made prior to the injunction,[35] or a delivery of the property sold before the injunction issued,[36] or an offer to sell,[37] constitutes a violation. Where a party is enjoined from disposing of property, he will not be permitted to obtain a transfer by means of collusive proceedings at law.[38]

d. Execution Sales. Where the enforcement of an order of sale or the collection of a judgment has been enjoined, a sale of the property under execution is a violation of the injunction.[39]

e. Construction of Buildings or Other Works. An injunction against "constructing" is not violated by repairing property constructed before the injunction was granted.[40] So an injunction against building on an alley is only technically violated by putting additional stories on a building formerly erected.[41]

E. Excuse and Justification[42] — **1. In General.** Lack of jurisdiction of the court granting the injunction is a good excuse for violating it.[43] If a person against whom an injunction is issued by a judge or court having jurisdiction has doubts as to its extent, significance, or validity, he should not disregard it but should apply to the court for a vacation, modification, or construction of it.[44] Therefore, although the form of the writ is irregular, violation thereof will not be excused where defendant has knowledge of what is required of him,[45] although the court would on motion vacate the injunction.[46] Neither the fact that there is not sufficient equity on the face of the bill to support an injunction nor the fact that the injunction was improvidently granted will justify a violation thereof.[47] Defendant is not thereby justified in violating the decree, although the equities of the case have materially changed since the granting of the injunction.[48] That the injury complained of was done before the service of the injunction upon defendant, and that his acts since the service of the injunction have done the complainant no further injury, will not, when those acts were intended to make the injury complete, and the obvious intention of the interdict was to prohibit

Co., 66 N. J. Eq. 274, 57 Atl. 876; Nichols *v.* Campbell, 10 Gratt. (Va.) 560.

35. Romeyn *v.* Caplis, 17 Mich. 449.

36. Jewett *v.* Bowman, 27 N. J. Eq. 171.

37. Tyler *v.* Poppe, 4 Edw. (N. Y.) 430.

38. Sheafe *v.* Sheafe, 40 N. H. 516; Ross *v.* Clussman, 3 Sandf. (N. Y.) 676.

39. Ward *v.* Billups, 76 Tex. 466, 11 S. W. 308.

Placing the execution in the hands of the sheriff is a violation, although no sale takes place under it. Sugg *v.* Thrasher, 30 Miss. 135.

Paying over proceeds of sale.—Even though the injunction was not obtained until after execution has been levied and the sale made, it is a breach of the injunction to call on the sheriff to pay over the money. Franklyn *v.* Thomas, 3 Meriv. 225, 36 Eng. Reprint 86.

40. Detroit, etc., Plank-Road Co. *v.* Detroit Citizens' St. R. Co., 97 Mich. 583, 56 N. W. 940.

Construction of street railway.— A street railway restrained from tearing up streets and laying down a new track cannot make any repairs whatever, not even such as may be necessary to enable them to operate their cars. Hawthorne *v.* McArthur, 8 Ky. L. Rep. 526.

41. Bannon *v.* Rohmeiser, 9 S. W. 293, 10 Ky. L. Rep. 395.

42. See CONTEMPT, 9 Cyc. 25 *et seq.*

43. Forrest *v.* Price, 52 N. J. Eq. 16, 29 Atl. 215; Beebe *v.* Hatch, 1 Redf. Surr. (N. Y.) 475; American Lighting Co. *v.* New Jersey Public Service Corp., 134 Fed. 129; Drury *v.* Ewing, 7 Fed. Cas. No. 4,095, 1 Bond 540. And see *supra*, VIII, A, 1.

44. North *v.* Swartz, 79 Ill. App. 557; Morris *v.* Hill, 28 N. J. Eq. 33; People *v.* Edson, 51 N. Y. Super. Ct. 238; Capet *v.* Parker, 3 Sandf. (N. Y.) 662; Wells *v.* Oregon R., etc., Co., 19 Fed. 20, 9 Sawy. 601. See also Heron *v.* Swisher, 13 Grant Ch. (U. C.) 438.

45. Endicott *v.* Mathis, 9 N. J. Eq. 110; Byam *v.* Stevens, 4 Edw. (N. Y.) 119. And see *supra*, VIII, A, 1.

46. Wilber *v.* Woolley, 44 Nebr. 739, 62 N. W. 1095.

47. Roosevelt *v.* Edson, 7 N. Y. Civ. Proc. 5; People *v.* Dwyer, 1 N. Y. Civ. Proc. 484; Young *v.* Rollins, 90 N. C. 125; Howe *v.* Willard, 40 Vt. 654; Notter *v.* Smith, 1 Ch. Chamb. (U. C.) 21. And see *supra*, VIII, A, 1.

48. Kempson *v.* Kempson, 61 N. J. Eq. 303, 48 Atl. 244; Alcorn *v.* Newark Traction Co., (N. J. Ch. 1901) 48 Atl. 235; Matter of Ganz, 38 Misc. (N. Y.) 666, 78 N. Y. Suppl. 260 [*affirmed* in 78 N. Y. App. Div. 399, 79 N. Y. Suppl. 899]; Ciancimino's Towing, etc., Co. *v.* Ciancimino, 17 N. Y. Suppl. 125. And see Smith *v.* Waalkes, 109 Mich. 16, 66 N. W. 679, where death of co-defendant after service of writ was held immaterial.

him from continuing the injury, relieve the defendant from the effects of his violation of the injunction.[49] A violation of an injunction cannot be justified upon the ground of public convenience.[50] Where a court of law allows a party to violate an injunction against proceeding with an action before it, the disobedience may nevertheless be punished as contempt.[51]

2. Good Faith. Good faith, or the absence of an intention to violate the injunction, is no defense in a contempt proceeding.[52] Nor is failure or inability to understand the scope of the injunction a defense.[53] But absence of intent to violate the injunction will be considered in mitigation of punishment.[54]

3. Advice of Counsel. It is no defense to the party violating the injunction that he acted under advice of counsel,[55] although such fact will be considered in mitigation of punishment.[56]

4. Authority Granted by Legislature. Authority granted by a legislature,[57] or a city council,[58] is no defense. A defendant cannot protect himself against punishment for disobeying an injunction on the ground that he acted by authority

49. Thropp *v.* Field, 25 N. J. Eq. 166.

50. Kentucky, etc., Bridge Co. *v.* Krieger, 91 Ky. 625, 16 S. W. 824, 13 Ky. L. Rep. 219.

51. Bennett *v.* Leroy, 5 Abb. Pr. (N. Y.) 156. See also Taber *v.* New York El. R. Co., 12 Misc. (N. Y.) 460, 34 N. Y. Suppl. 29.

52. *Illinois.*— Loven *v.* People, 57 Ill. App. 306.

Indiana.— Thistlethwait *v.* State, 149 Ind. 319, 49 N. E. 156.

Iowa.— Young *v.* Rothrock, 121 Iowa 588, 96 N. W. 1105.

New Jersey.— Thompson *v.* Pennsylvania R. Co., 48 N. J. Eq. 105, 21 Atl. 182.

Pennsylvania.— Bullock *v.* McDonough, 2 Pearson 195.

South Carolina.— Watson *v.* Citizens' Sav. Bank, 5 S. C. 159.

Wisconsin.— Webster *v.* Douglas County, 102 Wis. 181, 77 N. W. 885, 78 N. W. 451, 72 Am. St. Rep. 870; Hessey *v.* Gund, 98 Wis. 531, 74 N. W. 342; Nieuwankamp *v.* Ullman, 47 Wis. 168, 2 N. W. 131.

Wyoming.— Laramie Nat. Bank *v.* Steinhoff, 7 Wyo. 464, 53 Pac. 299.

United States.— Economist Furnace Co. *v.* Wrought-Iron Range Co., 86 Fed. 1010; Atlantic Giant Powder Co. *v.* Dittmar Powder Mfg. Co., 9 Fed. 316.

See 27 Cent. Dig. tit. "Injunction," § 478.

Compare Hull *v.* Harris, 45 Conn. 544; Salter *v.* Tillotson, 89 Ga. 29, 14 S. E. 903.

Discharge of official duties.— The fact that the acts done in violation were in discharge of official duties is no defense. People *v.* Tenth Judicial Dist. Ct., 29 Colo. 182, 68 Pac. 242.

53. Shirk *v.* Cox, 141 Ind. 301, 40 N. E. 750; Boston, etc., Consol. Copper, etc., Min. Co. *v.* Montana Ore Purchasing Co., 24 Mont. 117, 60 Pac. 807.

54. See *infra*, VIII, H, 2.

55. *Colorado.*— People *v.* Tenth Judicial Dist. Ct., 29 Colo. 182, 68 Pac. 242.

Iowa.— Lindsay *v.* Hatch, 85 Iowa 332, 52 N. W. 226.

New Jersey.— McKillop *v.* Taylor, 25 N. J. Eq. 139.

New York.— Matter of Granz, 78 N. Y. App. Div. 399, 79 N. Y. Suppl. 899; Boon *v.* McGucken, 67 Hun 251, 22 N. Y. Suppl. 424; People *v.* Edson, 51 N. Y. Super. Ct. 238; People *v.* Compton, 1 Duer 512; Capet *v.* Parker, 3 Sandf. 662; Smith *v.* New York Consol. Stage Co., 18 Abb. Pr. 419; Lansing *v.* Easton, 7 Paige 364; Rogers *v.* Paterson, 4 Paige 450; Hawley *v.* Bennett, 4 Paige 163.

North Carolina.— Green *v.* Griffin, 95 N. C. 50.

South Carolina.— Columbia Water-Power Co. *v.* Columbia, 4 S. C. 388.

United States.— Ulman *v.* Ritter, 72 Fed. 1000; Société, etc. *v.* Western Distilling Co., 42 Fed. 96; Atlantic Giant Powder Co. *v.* Dittman Powder Mfg. Co., 9 Fed. 316; Hamilton *v.* Simons, 11 Fed. Cas. No. 5,991, 5 Biss. 77. But see Dinsmore *v.* Louisville, etc., R. Co., 3 Fed. 593.

See 27 Cent. Dig. tit. "Injunction," § 479.

Courts should hesitate before punishing as a contempt an act advised by competent counsel, and this is especially true in the absence of bad faith. Parsons *v.* People, 51 Ill. App. 467.

Criminal contempt.—Advice of counsel may protect from punishment for a criminal contempt. Hawley *v.* Bennett, 4 Paige (N. Y.) 163. But see People *v.* Edson, 51 N. Y. Super. Ct. 238.

56. See *infra*, VIII, H, 2.

57. Muller *v.* Henry, 17 Fed. Cas. No. 9,916, 5 Sawy. 464. But see Pennsylvania *v.* Wheeling, etc., Bridge Co., 18 How. (U. S.) 421, 15 L. ed. 435; Spokes *v.* Banbury Local Bd. of Health, 11 Jur. N. S. 1010, 35 L. J. Ch. 105, 13 L. T. Rep. N. S. 453.

The fact that the law has been changed so that defendants might obtain a dissolution of the injunction is no defense. Allen *v.* Edinburgh L. Assur. Co., 26 Grant Ch. (U. C.) 192.

58. Des Moines St. R. Co. *v.* Des Moines Broad-Gauge R. Co., 74 Iowa 585, 38 N. W. 496; Fowler *v.* Beckman, 66 N. H. 424, 30 Atl. 1117; Muller *v.* Henry, 17 Fed. Cas. No. 9,916, 5 Sawy. 464.

and direction and for the benefit of a third person.[59] A person can only be relieved from the operation of an injunction absolutely prohibiting a certain act by the court granting the injunction.[60]

5. Protection of Property. A party will not be punished for contempt for acts done in violation of an injunction, when such acts are necessary to the preservation of the property in controversy.[61]

F. Power to Punish.[62] The power to punish the violation of an injunction as a contempt is incident to the power to grant a restraining order,[63] and such power is generally vested alone in the court granting the injunction.[64] The violation of an injunction after a writ of prohibition has been issued by the supreme court directing the lower court to take no further action is, however, punishable by the supreme court.[65] After a dissolved injunction has been reinstated by the appellate court, the lower court has authority to punish for a breach thereof.[66]

G. Procedure[67] — **1. Right to Bring Proceedings.** The court will not entertain contempt proceedings where plaintiff's purpose is to coerce defendant into making a contract.[68] Contempt proceedings cannot be resorted to to adjudicate and settle title to property in no way affected by the decree; otherwise a party might be summarily deprived of his property without due process of law.[69] Seeking a second injunction to prevent new and additional wrongs to the same property does not prevent complainant from instituting proceeding for acts constituting a violation of the first injunction granted to protect the property.[70]

2. Who May Institute Proceedings.[71] When an injunction has been granted to protect a purely private right, only those who have a present interest in the right or property protected can institute contempt proceedings; that is the offense complained of must be injurious to the rights of plaintiff in the action.[72] When,

59. Krom *v.* Hogan, 4 How. Pr. (N. Y.) 225.

60. Muller *v.* Henry, 17 Fed. Cas. No. 9,916, 5 Sawy. 464.

A subsequent order of an inferior court is not a good ground of defense for violating an injunction issued by a higher court. State *v.* Jacobs, 11 Oreg. 314, 8 Pac. 332. But see People *v.* Randall, 73 N. Y. 416.

61. Mowrer *v.* State, 107 Ind. 539, 8 N. E. 561; McQueen *v.* Babcock, 41 Barb. (N. Y.) 337. But see Quackenbush *v.* Van Riper, 3 N. J. Eq. 350, 29 Am. Dec. 716.

62. See Contempt, 9 Cyc. 26 *et seq.*

63. Mowrer *v.* State, 107 Ind. 539, 8 N. E. 561.

In New York the statute (N. Y. Code Civ. Proc. § 14) empowering courts of record to punish by fine and imprisonment disobedience to a lawful mandate gives such courts power to punish violation of an injunction. Boon *v.* McGucken, 67 Hun 251, 22 N. Y. Suppl. 424, 23 N. Y. Civ. Proc. 115.

64. Hayden *v.* Phinizy, 67 Ga. 758; Hines *v.* Rawson, 40 Ga. 356, 2 Am. Rep. 581; Zimmerman *v.* State, 46 Nebr. 13, 64 N. W. 375; Prince Mfg. Co. *v.* Prince's Metallic Paint Co., 51 Hun (N. Y.) 443, 4 N. Y. Suppl. 348 [*affirming* 2 N. Y. Suppl. 682].

65. People *v.* Tenth Judicial Dist. Ct. 29 Colo. 182, 68 Pac. 242; State *v.* Judge Eleventh Judicial Dist. Ct., 48 La. Ann. 1501, 21 So. 94.

66. Gates *v.* McDaniel, 3 Port. (Ala.) 356; Dowagiac Mfg. Co. *v.* Minnesota Moline Plow Co., 124 Fed. 735, 61 C. C. A. 57, holding that where the appellate court directs the entry of a decree granting an injunction in the lower court, jurisdiction to punish for contempt for a violation of the injunction is in the lower court.

67 Entitling proceedings see Contempt, 9 Cyc. 36.

68. Howard *v.* Durand, 36 Ga. 346, 91 Am. Dec. 767.

69. State *v.* Second Judicial Dist. Ct., 30 Mont. 96, 75 Pac. 956.

70. Bond *v.* Pennsylvania Co., 126 Fed. 749, 61 C. C. A. 355. See also McGirr *v.* Jervis, Hay & J. 501. *Compare* South Carolina, etc., R. Co. *v.* American Tel., etc., Co., 65 S. C. 459, 43 S. E. 970, holding that the commencement of a second action for injunction in itself affords evidence that the first action was abandoned, or in some manner disposed of, for the law presumes that the second action for injunction would not have been instituted while the first action was pending.

71. See Contempt, 9 Cyc. 35.

72. Jessup, etc., Paper Co. *v.* Ford, 7 Del. Ch. 226, 44 Atl. 778; Dolese *v.* McDougall, 182 Ill. 486, 55 N. E. 547.

Third person.— A person who has no right to manufacture and sell a patented article in a certain territory cannot complain of the violation by another of an injunction in selling it therein. Diedrich *v.* People, 37 Ill. App. 604 [*affirmed* in 141 Ill. 665, 30 N. E. 1038].

Former owners cannot bring contempt proceedings for violation of an injunction restraining the levy of taxes, after the property has been sold under foreclosure. Secor *v.* Singleton, 35 Fed. 376.

however, the injunction forbids acts which are in themselves against the criminal law of the state, any one knowing the facts may institute proceedings.[73]

3. Time For Bringing. The complainant is entitled to a reasonable time in which to proceed for a violation of the injunction and lapse of time since the commission of such violation is not necessarily fatal to its punishment.[74] Contempt proceedings begun after the dissolution of the injunction, on the ground of an infringement of it while in force, cannot be sustained.[75]

4. Attachment, Rule to Show Cause, Etc.[76] Contempt proceedings for violation of an injunction may be instituted by attachment,[77] rule to show cause,[78] information, or complaint,[79] or in England, by motion to commit.[80] The affidavit for an attachment should state the specific acts which constitute the alleged contempt,[81] it not being sufficient to make the charge argumentatively.[82] The affidavit must also show that the wrong charged has been injurious to complainant.[83] A reference to the injunction violated is sufficient without setting out a copy of it.[84] It need not set forth the pendency of the proceeding in which the injunction

73. Castner *v.* Pocahontas Collieries Co., 117 Fed. 184.

74. Gulf, etc., R. Co. *v.* Ft. Worth, etc., R. Co., 68 Tex. 98, 2 S. W. 199, 3 S. W. 564; Gamble *v.* Howland, 3 Grant Ch. (U. C.) 281. And see Matheson *v.* Hanna-Schoellkopf Co., 122 Fed. 836.

75. Moat *v.* Holbein, 2 Edw. (N. Y.) 188.

76. See Contempt, 9 Cyc. 39 *et seq.*

77. *Mississippi.*— Robertson *v.* Hoy, 12 Sm. & M. 566; Commercial Bank *v.* Waters, 10 Sm. & M. 559.

New Jersey.— Newark Plank Road, etc., Co. *v.* Van Wagenen, 9 N. J. Eq. 754.

New York.— Schoonmaker *v.* Gillett, 3 Johns. Ch. 311.

Tennessee.— See Rutherford *v.* Metcalf, 5 Hayw. 58.

Vermont.— See Stimpson *v.* Putnam, 41 Vt. 238.

Variance.— Although there is a variance between the affidavit for an attachment and the injunctive decree, the variance is immaterial when defendant is clearly apprised of the misconduct charged against him. State *v.* Gray, 42 Oreg. 261, 70 Pac. 904, 71 Pac. 978.

In Canada an order for attachment cannot be made without previous notice. Melling *v.* Ellis, 7 Can. L. J. 18. Substitutional service of notice of the motion to commit may be sufficient. Farwell *v.* Walbridge, 3 Grant Ch. (U. C.) 628.

78. Eureka Lake, etc., Canal Co. *v.* Yuba County Super. Ct., 116 U. S. 410, 6 S. Ct. 429, 29 L. ed. 671.

Slight evidence will justify a judgment *nisi* to show cause why a party should not be fined, etc., for violating an injunction. Blood *v.* Martin, 21 Ga. 127.

In California service of an order to show cause, on the attorney of record, is sufficient, in the case of a foreign corporation whose agent to accept service conceals himself. Eureka Lake, etc., Canal Co. *v.* Yuba County Super. Ct., 116 U. S. 410, 6 S. Ct. 429, 29 L. ed. 671.

In Colorado a warrant of attachment may issue in the first instance without first making a rule to show cause. Shore *v.* People, 26 Colo. 516, 59 Pac. 49.

79. Castner *v.* Pocahontas Collieries Co., 117 Fed. 184.

An information need not be filed.— The essential thing is the filing of a statement or charge that shall show clearly and distinctly that the restraining order has been served on defendant, or if it has not been served on him that he had notice or knowledge of its contents. U. S. *v.* Agler, 62 Fed. 824.

80. Mander *v.* Falcke, [1891] 3 Ch. 488, 61 L. J. Ch. 3, 64 L. T. Rep. N. S. 791, 40 Wkly. Rep. 31; Angerstein *v.* Hunt, 6 Ves. Jr. 488, 31 Eng. Reprint 1158.

Personal service of a notice of motion to commit for breach of an injunction is necessary under the English practice, and cannot be dispensed with, although counsel undertakes to appear for the party. Ellerton *v.* Thirsk, 1 Jac. & W. 376, 37 Eng. Reprint 419; Bowdler *v.* Bowdler, 4 Jur. 626, 9 L. J. Ch. 394; Durant *v.* Moore, 9 L. J. Ch. O. S. 12, 2 Russ. & M. 33, 11 Eng. Ch. 33, 39 Eng. Reprint 307; Angerstein *v.* Hunt, 6 Ves. Jr. 488, 31 Eng. Reprint 1158.

81. Parkhurst *v.* Kinsman, 18 Fed. Cas. No. 10,759, 2 Blatchf. 76; Morris *v.* Morris, 1 Hog. 238.

Specific statement and verification.—To obtain an attachment for violation of an injunction, the party aggrieved must, by petition, state particularly the nature and extent of the breaches and the person by whom committed, and his petition must be supported by his own oath or by the affidavit of others. Murdock's Case, 2 Bland (Md.) 461, 20 Am. Dec. 381.

82. Boston, etc., Consol. Copper, etc., Min. Co. *v.* Montana Ore Purchasing Co., 24 Mont. 117, 60 Pac. 807.

83. People *v.* Diedrich, 141 Ill. 665, 30 N. E. 1038; Hynes *v.* Fisher, 4 Ont. 78. *Compare* Aldinger *v.* Pugh, 57 Hun (N. Y.) 181, 10 N. Y. Suppl. 684. But see Loven *v.* People, 158 Ill. 159, 42 N. E. 82.

84. Silvers *v.* Traverse, 82 Iowa 52, 47 N. W. 888, 11 L. R. A. 804.

In Iowa it is provided by statute that the basis for a precept for violating an injunction is an authenticated copy of the injunction and satisfactory proof that it has been vio-

issued.[85] Service of the writ,[86] or full knowledge of the contents of the writ,[87] should be alleged. An attachment will not issue unless the violation of the injunction is clearly proven,[88] and when the damages cannot be calculated the attachment will be refused.[89] Counter affidavits may be used by defendant, but he cannot read his answer to the injunction bill as evidence.[90] When the proceedings are begun by a rule to show cause, no interrogatories need be filed to enable a party to purge himself of the contempt alleged;[91] nor is it necessary that the matter alleged as the ground of the charge of contempt should appear on the face of the rule to show cause.[92] But a rule to show cause should always be accompanied by a copy of the affidavits and other papers upon which it is founded.[93] When the rule is against the person enjoined in the injunction, its terms should be that he show cause why he should not be punished for disobedience or breach of the injunction;[94] but as against a person not enjoined, it should be that he show cause why he should not be punished for aiding and abetting or knowingly assisting in the violation.[95] Defendants should be allowed a reasonable time in which to make defense.[96]

5. Evidence. The burden of proving defendant guilty is upon defendant, but if an affirmative defense is set up the burden is upon defendant to sustain it.[97] The evidence of a breach of the injunction must be clear to authorize punishment therefor.[98] Neither defendant's denial of a violation of the injunction, by affidavit or otherwise,[99] nor his answers to interrogatories[1] are conclusive, but may

lated, and this proof may be established by affidavit. Iowa Code, § 3403. And see State *v.* Myers, 44 Iowa 580.

85. *Ex p.* Fong Yen Yon, (Cal. 1888) 19 Pac. 500; *Ex p.* Ah Men, 77 Cal. 198, 19 Pac. 380, 11 Am. Rep. 263.

86. State *v.* Gilfin, 1 Del. Ch. 25.

87. Hedges *v.* Yuba County Super. Ct., 67 Cal. 405, 7 Pac. 767.

88. Probasco *v.* Probasco, 30 N. J. Eq. 61; Birdsell *v.* Hagerstown, etc., Mfg. Co., 3 Fed. Cas. No. 1,436, 1 Hughes 59.

89. Byam *v.* Stevens, 4 Edw. (N. Y.) 119.

90. Rutherford *v.* Metcalf, 5 Hayw. (Tenn.) 58.

91. Pitt *v.* Davidson, 37 N. Y. 235; New York *v.* New York, etc., Ferry Co., 40 N. Y. Super. Ct. 300 [*affirmed* in 64 N. Y. 622].

92. Columbia Water-Power Co. *v.* Columbia, 4 S. C. 388, holding that the rule is a mere process, and is sufficient if it appear that the proceeding is one within the jurisdiction of the court.

93. Columbia Water Power Co. *v.* Columbia, 4 S. C. 388.

94. Parsons *v.* People, 51 Ill. App. 467.

95. Parsons *v.* People, 51 Ill. App. 467; Seaward *v.* Patterson, [1897] 1 Ch. 545, 66 L. J. Ch. 267, 76 L. T. Rep. N. S. 215, 45 Wkly. Rep. 610; Wellesley *v.* Mornington, 11 Beav. 181, 12 Jur. 367, 50 Eng. Reprint 785, 786.

96. Columbia Water Power Co. *v.* Columbia, 4 S. C. 388. And see Power *v.* Athens, 19 Hun (N. Y.) 165.

Continuance.— Where defendant had eight days' notice, his motion for a continuance on the ground of not knowing what he was charged with and surprise at the showing made by his opponent was properly overruled. Williams *v.* Lumpkin, 53 Ga. 200.

97. See Contempt, 9 Cyc. 45.

Where a defendant justifies under an exception stated in the injunction, the burden is on him to bring his acts within the exception. Thompson *v.* Pennsylvania R. Co., 48 N. J. Eq. 105, 21 Atl. 182.

98. *Delaware.*— Jessup, etc., Paper Co. *v.* Ford, 7 Del. Ch. 226, 44 Atl. 778.

Illinois.— Toledo, etc., Co. *v.* St. Louis, etc., Co., 208 Ill. 623, 70 N. E. 715.

Michigan.— Richter *v.* Kahat, 114 Mich. 575, 72 N. W. 600; Verplank *v.* Hall, 21 Mich. 469.

Montana.— State *v.* Second Judicial Dist. Ct., 30 Mont. 96, 75 Pac. 956.

New Jersey.— George Jonas Glass Co. *v.* U. S. Glass Blowers' Assoc., 64 N. J. Eq. 644, 54 Atl. 567; Reed *v.* Philadelphia, etc., R. Co., (Ch. 1893) 24 Atl. 922.

New York.— Douglass *v.* Halsted, 11 N. Y. App. Div. 101, 42 N. Y. Suppl. 588; Beard *v.* Snook, 47 Hun 158.

United States.— Hennessey *v.* Budde, 82 Fed. 541; Woodruff *v.* North Bloomfield Gravel Min. Co., 45 Fed. 129; Celluloid Mfg. Co. *v.* Crolithian Collar, etc., Co., 24 Fed. 585.

England.— Dawson *v.* Paver, 5 Hare 424, 11 Jur. 766, 16 L. J. Ch. 274, 4 R. & Can. Cas. 81, 26 Eng. Ch. 415; Harding *v.* Pingey, 10 Jur. N. S. 872, 34 L. J. Ch. 13, 10 L. T. Rep. N. S. 323, 12 Wkly. Rep. 684; Ripley *v.* Arthur, 86 L. T. Rep. N. S. 735.

Canada.— Stewart *v.* Richardson, 17 Grant Ch. (U. C.) 150.

See 27 Cent. Dig. tit. "Injunction," § 514. And see Contempt, 9 Cyc. 45.

99. Loven *v.* People, 158 Ill. 159, 42 N. E. 82; *In re* Underwood, 2 Humphr. (Tenn.) 46. *Compare* Witter *v.* Lyon, 34 Wis. 564.

1. Crook *v.* People, 16 Ill. 534; Anderson *v.* Indianapolis Drop Forging Co., 34 Ind. App. 100, 72 N. E. 277.

be contradicted by evidence. Proofs may be taken to contradict such answers.

6. Scope of Inquiry. The court will not inquire into the merits of the original suit.[2]

7. Order.[3] The order in contempt proceedings should be sufficient on its face to show jurisdiction, and justification for the punishment;[4] defendant cannot be required to give up possession of property unless he acquired such possession in breach of the injunction.[5]

H. Punishment[6] **— 1. Nature — a. Fine or Imprisonment.** One who violates an injunction is liable to punishment by fine,[7] or imprisonment,[8] or both.[9] Where

2. *Illinois.*— Loven *v.* People, 158 Ill. 159, 42 N. E. 82.

Iowa.— Bloomington First Cong. Church *v.* Muscatine, 2 Iowa 69.

Kentucky.— Kentucky Heating Co. *v.* Louisville Gas Co., 109 Ky. 428, 59 S. W. 490, 22 Ky. L. Rep. 984.

New Hampshire.— State *v.* Kennedy, 65 N. H. 247, 23 Atl. 431.

New Jersey.— Grey *v.* Greenville, etc., R. Co., 60 N. J. Eq. 153, 46 Atl. 636.

New York.— People *v.* Dwyer, 90 N. Y. 402.

United States.— International Register Co. *v.* Recording Fare Register Co., 125 Fed. 790; U. S. *v.* Debs, 64 Fed. 724; Drury *v.* Ewing, 7 Fed. Cas. No. 4,095, 1 Bond 540.

England.— Russell *v.* East Anglian R. Co., 15 Jur. 935, 20 L. J. Ch. 257, 3 Macn. & G. 104, 6 R. & Can. Cas. 501, 49 Eng. Ch. 80, 42 Eng. Reprint 201; Woodward *v.* Lincoln, 3 Swanst. 626, 36 Eng. Reprint 1000.

See 27 Cent. Dig. tit. "Injunction," § 512. And see Contempt, 9 Cyc. 47.

3. See Contempt, 9 Cyc. 48 *et seq.*

4. Loven *v.* People, 158 Ill. 159, 42 N. E. 82.

Jurisdictional recitals.— An order for committal for breach of an injunction must recite the affidavit of service of the order granting the injunction, and either the affidavit of service of the notice of motion, or the appearance of defendant personally or by counsel upon the motion. Stephens *v.* Workman, 8 L. T. Rep. N. S. 232, 11 Wkly. Rep. 503.

In Colorado the facts constituting a contempt need not be set out in a judgment for contempt in violating an injunction. Shore *v.* People, 26 Colo. 516, 59 Pac. 49, construing Civ. Code (1887), § 322.

In New York an order adjudicating a defendant guilty of contempt must definitely adjudicate the facts constituting the violation and contain a recital of the acts calculated to defeat or prejudice plaintiff's right. Mutual Milk, etc., Co. *v.* Tietjen, 73 N. Y. App. Div. 532, 77 N. Y. Suppl. 287, construing Code Civ. Proc. §§ 14, 2266, 2281.

5. Columbia Water Power Co. *v.* Columbia, 4 S. C. 388.

6. See Contempt, 9 Cyc. 52 *et seq.*

What law governs.— One who violates an injunction subsequently to the passage of a law providing for punishment for contempt is punishable under such law, although the injunction was granted prior to the passage of the act. State *v.* Durein, 46 Kan. 695, 27 Pac. 148.

7. Hydock *v.* State, 59 Nebr. 297, 80 N. W. 902; Taher *v.* New York El. R. Co., 12 Misc. (N. Y.) 460, 34 N. Y. Suppl. 29. And see Socialistic Co-operative Pub. Assoc. *v.* Kuhn, 164 N. Y. 473, 58 N. E. 649 [*reversing* 51 N. Y. App. Div. 579, 64 N. Y. Suppl. 930]; Donahue *v.* Lyons, 51 N. Y. Suppl. 612.

Collection.— Scire facias does not lie for the amount of the penalty for the violation of a temporary injunction, until the injunction suit has been prosecuted to final judgment. Smith *v.* Jewell, 71 Conn. 473, 42 Atl. 657.

Review as to amount.— The question of the amount of a fine imposed for contempt in violating an injunction cannot be reviewed on appeal from an order refusing to set aside the order imposing the fine, but must be raised by appeal from the order imposing the fine. Watrous *v.* Kearney, 11 Hun (N. Y.) 584.

Conditional punishment.— The court may order the offender to pay a fine within a certain time, with a conditional penalty for disobedience of such order. Roberts *v.* Thomas, 13 Lanc. Bar (Pa.) 63.

8. *Alabama.*— Gates *v.* McDaniel, 3 Port. 356.

Georgia.— Robinson *v.* Woodmansee, 76 Ga. 830.

Michigan.— *In re* Osborn, 113 Mich. 118, 90 N. W. 1029.

New Jersey.— Frank *v.* Harold, (1902) 51 Atl. 774.

Utah.— Elliot *v.* Whitmore, 10 Utah 246, 37 Pac. 461.

United States.— U. S. *v.* Weber, 114 Fed. 950.

See 27 Cent. Dig. tit. "Injunction," § 522.

An application for discharge from imprisonment will be denied where defendant's petition makes no acknowledgment of his fault and the court doubts the credibility of his statements. Palmer *v.* Kelly, 4 Sandf. Ch. (N. Y.) 575.

9. Stearns *v.* Marr, 41 Misc. (N. Y.) 252, 84 N. Y. Suppl. 36; People *v.* Barnes, 7 N. Y. Suppl. 802; *Ex p.* Huidekoper, 55 Fed. 709 [*affirmed* in 149 U. S. 164, 13 S. Ct. 785, 37 L. ed. 689].

Want of wilfulness.— One who through gross carelessness violates an injunction may be punished by fine, or fine and imprisonment, although there was no wilful purpose to violate the injunction. Indianapolis Water Co. *v.* American Strawboard Co., 75 Fed. 972.

the equities of the case require it, the court may order an imprisonment of defendant until he manifests a willingness to fairly comply with the order.[10]

b. Damages. In some jurisdictions by statute where defendant has been guilty of contempt in violating an injunction, thereby causing pecuniary loss or injury to plaintiff, the court, in imposing punishment upon defendant, may do so for the benefit of plaintiff, who is entitled to recover sufficient damages to indemnify for the loss and injury occasioned by the violation,[11] including costs[12] and counsel fees.[13] But exemplary damages will not be awarded where defendant has acted in good faith.[14] Where money has been paid out,[15] or collected,[16] in violation of an injunction, the court may in the same proceeding render judgment against defendant for the amount so obtained by him.

c. Undoing the Wrong. Where defendant has interfered with property in violation of an injunction, he may be required to restore the property to its former condition.[17] Where defendant has obtained a divorce in violation of an injunction he cannot be ordered to have it set aside, as he has no power to do so.[18]

d. Denial of Privileges as Litigant. One in contempt may be denied certain favors of court until he has purged himself of the contempt.[19] For instance the

10. Shore *v.* People, 26 Colo. 516, 59 Pac. 49; Thompson *v.* Pennsylvania R. Co., 48 N. J. Eq. 105, 21 Atl. 182; Stolts *v.* Tuska, 82 N. Y. App. Div. 81, 81 N. Y. Suppl. 638; Wheelock *v.* Noonan, 55 N. Y. Super. Ct. 302, 13 N. Y. St. 317; Donald *v.* Scott, 76 Fed. 554.

11. *Colorado.*— Shore *v.* People, 26 Colo. 516, 59 Pac. 49.

Louisiana.— Levy *v.* New Orleans Waterworks Co., 38 La. Ann. 29.

New York.— Sheffield *v.* Cooper, 21 N. Y. App. Div. 518, 48 N. Y. Suppl. 639; Harteau *v.* Deer Park Blue Stone Co., 1 Hun 493, 3 Thomps. & C. 763; People *v.* Van Buren, 18 N. Y. Suppl. 734.

Tennessee.— Robins *v.* Frazier, 5 Heisk. 100.

Wisconsin.— See Kaehler *v.* Dobberpuhl, 60 Wis. 256, 18 N. W. 841.

United States.— Cary Mfg. Co. *v.* Acme Flexible Clasp Co., 108 Fed. 873, 48 C. C. A. 118; American Graphophone Co. *v.* Walcutt, 86 Fed. 468; Wells *v.* Oregon R., etc., Co., 19 Fed. 20, 9 Sawy. 601. But see Dowagiac Mfg. Co. *v.* Minnesota Moline Plow Co., 124 Fed. 736 [*affirmed* in 129 Fed. 1005, 64 C. C. A. 122].

See 27 Cent. Dig. tit. "Injunction," § 524. And see CONTEMPT, 9 Cyc. 54.

Injunction wrongfully granted.—Defendant will not be required to indemnify plaintiff for the violation of an injunction which never ought to have been granted, and for the obtaining of which plaintiff would be liable to defendant in damages. Kaehler *v.* Halpin, 59 Wis. 40, 17 N. W. 868; Kaehler *v.* Dobberpuhl, 56 Wis. 497, 14 N. W. 631.

12. Macy *v.* Jordan, 2 Den. (N. Y.) 570; Thomson *v.* Palmer, 3 Rich. Eq. (S. C.) 139; Burden *v.* Howard, 2 N. Brunsw. Eq. 531. *Contra,* Miller *v.* Toledo Grain, etc., Co., 21 Ohio Cir. Ct. 325, 11 Ohio Cir. Dec. 629.

Costs of motion.— Although there may not have been such a wilful breach of an injunction as to call for punishment by committal, yet where defendant by his conduct invited the application to commit, he will be ordered to pay the costs of the motion. Hardie *v.* Lavery, 5 Manitoba 135; Donnelly *v.* Donnelly, 9 Ont. 673; Campbell *v.* Gorham, 2 Grant Ch. (U. C.) 403.

In New York in a "criminal contempt" the fine imposed belongs to the public and not to the moving party, and costs are not allowed. Mutual Milk, etc., Co. *v.* Tietjen, 73 N. Y. App. Div. 532, 77 N. Y. Suppl. 287.

13. U. S. *v.* Bancroft, 24 Fed. Cas. No. 14,513, 6 Ben. 392. *Contra,* People *v.* Jacobs, 5 Hun (N. Y.) 428.

14. Power *v.* Athens, 19 Hun (N. Y.) 165; Erie R. Co. *v.* Ramsey, 3 Lans. (N. Y.) 178 [*affirmed* in 45 N. Y. 637]; Lansing *v.* Easton, 7 Paige (N. Y.) 364; Champlain Constr. Co. *v.* O'Brien, 107 Fed. 333; Matthews *v.* Spangenberg, 15 Fed. 813.

15. Webster *v.* Douglas County, 102 Wis. 181, 77 N. W. 885, 78 N. W. 451, 72 Am. St. Rep. 870.

16. Teager *v.* Landsley, 69 Iowa 725, 27 N. W. 739; Main *v.* Field, 13 Ind. App. 401, 40 N. E. 1103, 41 N. E. 829; Griggs *v.* Docter, 89 Wis. 161, 61 N. W. 761, 46 Am. St. Rep. 824, 30 L. R. A. 360.

17. *Georgia.*— Marietta Chair Co. *v.* Henderson, 119 Ga. 65, 45 S. E. 725; Murphey *v.* Harker, 115 Ga. 77, 41 S. E. 585.

Maryland.— Murdock's Case, 2 Bland 461, 20 Am. Dec. 381.

New Jersey.— Ashby *v.* Ashby, 62 N. J. Eq. 618, 50 Atl. 473.

United States.— Donald *v.* Scott, 76 Fed. 554.

Canada.— Grasett *v.* Carter, 6 Ont. 584.

Where a restoration is not entirely effectual, defendant may be required to meet any expenditure of money necessary to remedy the wrong done. Ashby *v.* Ashby, 62 N. J. Eq. 618, 50 Atl. 473.

18. Kempson *v.* Kempson, 63 N. J. Eq. 783, 52 Atl. 360, 625, 92 Am. St. Rep. 682, 58 L. R. A. 484 [*reversing* 61 N. J. Eq. 303, 48 Atl. 244].

19. See CONTEMPT, 9 Cyc. 55 *et seq.*

court may refuse to hear his motion to dissolve the injunction,[20] or to discharge a ne exeat.[21] So his appeal may be dismissed.[22] But the violation cannot be punished by instructing that his testimony in his own behalf is not to be considered.[23]

2. MATTERS CONSIDERED IN MITIGATION. The fact that the injunction was erroneously issued may be considered in mitigation of punishment,[24] as may the fact that the acts in violation were without intention to disobey the injunction,[25] that they caused no substantial injury to the adverse party,[26] or that they were performed by advice of counsel.[27] The fact that the violation was a merely technical contempt should also be considered in mitigation.[28] A compliance subsequent to the breach of an injunction may be considered in mitigation.[29]

I. Review. The general rules as to the review of contempt proceedings, which are fully discussed elsewhere,[30] are applicable to such proceedings for the violation of an injunction.

J. Costs.[31] The unsuccessful defendant must pay the costs of a reference in contempt proceedings,[32] although the injunction was improvidently issued;[33] and the successful party on a demurrer to interrogatories is entitled to costs on the demurrer.[34]

IX. LIABILITY ON BONDS OR UNDERTAKINGS.[35]

A. Accrual of Liability — 1. IN GENERAL. Until there has been a breach of an injunction bond or undertaking, no liability accrues thereon.[36]

20. See *supra*, VII, 1, 2.

21. Evans *v.* Van Hall, Clarke (N. Y.) 22.

22. Kentucky Heating Co. *v.* Louisville Gas Co., 59 S. W. 1090, 22 Ky. L. Rep. 1139.

23. Lake *v.* Copeland, 31 Tex. Civ. App. 358, 72 S. W. 99.

24. Sullivan *v.* Judah, 4 Paige (N. Y.) 444; State *v.* Green Lake County Cir. Ct., 98 Wis. 143, 73 N. W. 788.

25. *Delaware.*— State *v.* Eddy, 2 Del. Ch. 269.

Iowa.— Coffey *v.* Gamble, 117 Iowa 545, 91 N. W. 813; Des Moines St. R. Co. *v.* Des Moines Broad-Gauge R. Co., 74 Iowa 585, 38 N. W. 496.

New Hampshire.— State *v.* Collins, 62 N. H. 694.

New York.— Daly *v.* Amberg, 13 N. Y. Suppl. 379 [*affirmed* in 126 N. Y. 490, 27 N. E. 1038].

Virginia.— Postal Tel. Cable Co. *v.* Norfolk, etc., R. Co., 88 Va. 929, 14 S. E. 691; Wells *v.* Com., 21 Gratt. 500.

United States.— Champlain Constr. Co. *v.* O'Brien, 107 Fed. 333; Bowers *v.* Von Schmidt, 87 Fed. 293; Donald *v.* Scott, 76 Fed. 554; Morss *v.* Domestic Sewing-Mach. Co., 38 Fed. 482; Matthews *v.* Spangenberg, 15 Fed. 813.

See 27 Cent. Dig. tit. "Injunction," §§ 478, 521.

26. Boston, etc., Consol. Copper, etc., Min. Co. *v.* Montana Ore Purchasing Co., 24 Mont. 117, 60 Pac. 807; Lehmaier *v.* Griswold, 46 N. Y. Super. Ct. 11; Ciancimino's Towing, etc., Co. *v.* Ciancimino, 17 N. Y. Suppl. 125; Comly *v.* Buchanan, 81 Fed. 58. And see People *v.* Dwyer, 90 N. Y. 402; Brown *v.* Sage, 12 Grant Ch. (U. C.) 25.

Criminal contempt.— Where the contempt is criminal in its nature, it is unimportant whether injury to the complainant is shown or not. Glay *v.* People, 94 Ill. App. 602.

27. Young *v.* Rothrock, 121 Iowa 588, 96 N. W. 1105; Coffey *v.* Gamble, 117 Iowa 545, 91 N. W. 813; Fraas *v.* Barlement, 25 N. J. Eq. 84; Stolts *v.* Tuska, 82 N. Y. App. Div. 81, 81 N. Y. Suppl. 638; New York Mail, etc., Transp. Co. *v.* Shea, 30 N. Y. App. Div. 374, 52 N. Y. Suppl. 5; Boon *v.* McGucken, 67 Hun (N. Y.) 251, 23 N. Y. Civ. Proc. 115, 22 N. Y. Suppl. 424; People *v.* Edson, 51 N. Y. Super. Ct. 238; Smith *v.* New York Consolidated Stage Co., 18 Abb. Pr. (N. Y.) 419; Rodgers *v.* Pitt, 89 Fed. 424; Pokegama Sugar-Pine Lumber Co. *v.* Klamath River Lumber, etc., Co., 86 Fed. 538; Ulman *v.* Ritter, 72 Fed. 1000.

28. Scott *v.* Layng, 59 Mich. 43, 26 N. W. 220, 791; Mutual Milk, etc., Co. *v.* Tietjen, 73 N. Y. App. Div. 532, 77 N. Y. Suppl. 287; Diffany *v.* Risley, 23 N. Y. App. Div. 371, 48 N. Y. Suppl. 283.

In Wisconsin a defendant guilty of a mere technical violation cannot be punished by a fine and costs. McEvoy *v.* Gallagher, 107 Wis. 331, 83 N. W. 633.

29. Ashby *v.* Ashby, 62 N. J. Eq. 618, 50 Atl. 473; Ray *v.* New York Bay Extension R. Co., 48 N. Y. App. Div. 502, 62 N. Y. Suppl. 924; Aldinger *v.* Pugh, 57 Hun (N. Y.) 181, 10 N. Y. Suppl. 684; Cornish *v.* Upton, 4 L. T. Rep. N. S. 862.

30. See CONTEMPT, 9 Cyc. 61 *et seq.*

31. See CONTEMPT, 9 Cyc. 69.

32. Hennessey *v.* Budde, 82 Fed. 541.

33. Smith *v.* Fitch, Clarke (N. Y.) 265.

34. Parkhurst *v.* Kinsman, 18 Fed. Cas. No. 10,759, 2 Blatchf. 76.

35. See, generally, PRINCIPAL AND SURETY; UNDERTAKINGS.

36. *Alabama.*— May *v.* Walter, 85 Ala. 438, 6 So. 610 (holding that plaintiff failed to

2. Final Determination of Injunction Suit. Although under the peculiar conditions of particular bonds it has been held that the right to damages is not postponed until after a final hearing on the merits,[37] as a general rule no action at law can be maintained upon an injunction bond until the final determination of the cause in which the injunction issued, even though the injunction has been dissolved because improperly granted.[38] It is held that no right of action accrues upon an injunction bond until the court has finally decided that plaintiff was not entitled to the injunction,[39] or until something occurs equivalent to such a

show a breach where no decree dismissing the bill for the injunction, or dissolving the injunction, was made, and the suits were not finally disposed of); Garrett *v.* Logan, 19 Ala. 344 (holding that where the bond was conditioned to pay "all damages . . . occasioned . . . by the vexatious suing out of said writ," no recovery could be had unless the injunction was sued out vexatiously).

Kentucky.— Sims *v.* Canary, 9 Dana 368.

Mississippi.— Burroughs *v.* Jones, 79 Miss. 214, 30 So. 605; Yates *v.* Mead, 69 Miss. 473, 13 So. 695.

Missouri.— Nolan *v.* Johns, 27 Mo. App. 502, holding that where the bond was conditioned that plaintiff "shall abide the decision which shall be made thereon, and pay all sums of money, damages, and costs that shall be adjudged against him if the said injunction shall be dissolved," a judgment against plaintiff was a condition precedent to the liability of the sureties.

New Hampshire.— Gage *v.* Porter, 64 N. H. 619, 15 Atl. 147, holding that where complainant files a bill to redeem from foreclosure and for an injunction, and gives a bond to pay all damages in case the "proceeding shall be determined against her," and obtains leave to redeem, but does not do so, there is no breach of the bond.

New York.— New York Security, etc., Co. *v.* Lipman, 83 Hun 569, 32 N. Y. Suppl. 65, holding that where the bond was conditioned so that the damages were not to be payable "unless the court finally decides that the plaintiff was not entitled" to the injunction, and the final judgment determines that plaintiff was entitled to the injunction, defendant cannot recover damages on the undertaking, although the temporary injunction was vacated.

Ohio.— Worden *v.* Klag, 13 Ohio Cir. Ct. 627, 6 Ohio Cir. Dec. 359.

South Carolina.— Aldrich *v.* Kirkland, 8 Rich. 349, 6 Rich. 334.

Tennessee.—Smith *v.* Ruohs, (Ch. App. 1900) 58 S. W. 1101.

United States.— Deakin *v.* Lea, 7 Fed. Cas. No. 3,696, 11 Biss. 34.

See 27 Cent. Dig. tit. "Injunction," § 533.

37. Jesse French Piano, etc., Co. *v.* Porter, 134 Ala. 302, 32 So. 678, 92 Am. St. Rep. 31; Sizer *v.* Anthony, 22 Ark. 465 (where the bond was conditioned to "pay all sums . . . that may be adjudged against him if said injunction shall be dissolved in whole, or in part" and there was nothing in the statute requiring the suit to be finally determined. See also Carpenter *v.* Wright, 4 Bosw. (N. Y.) 655.

38. *California.*— Dougherty *v.* Dore, 63 Cal. 170; Clark *v.* Clayton, 61 Cal. 634; Dowling *v.* Polack, 18 Cal. 625.

Colorado.— Kilpatrick *v.* Haley, 6 Colo. App. 407, 41 Pac. 508.

Iowa.— Lacey *v.* Davis, 126 Iowa 675, 102 N. W. 535; Monroe Bank *v.* Gifford, 65 Iowa 648, 22 N. W. 913.

Kansas.— Jones *v.* Ross, 48 Kan. 474, 29 Pac. 680; Brown *v.* Galena Min., etc., Co., 32 Kan. 528, 4 Pac. 1013.

Kentucky.— Newport *v.* McArthur, 4 Ky. L. Rep. 632.

Maryland.— Gray *v.* Veirs, 33 Md. 159.

Mississippi.— Goodbar *v.* Dunn, 61 Miss. 624

Nebraska.— Johnson *v.* Bouton, 56 Nebr. 626, 77 N. W. 57; Browne *v.* Edwards, etc., Lumber Co., 44 Nebr. 361, 62 N. W. 1070; Bemis *v.* Gannett, 8 Nebr. 236.

Ohio.— Welch *v.* Benham, 8 Ohio S. & C. Pl. Dec. 70, 6 Ohio N. P. 33.

See 27 Cent. Dig. tit. "Injunction," § 560.

Reversal of decree.— In an injunction case, commenced in the common pleas, but appealed to the circuit court, the judgment of the common pleas court making the injunction perpetual does not end the liability of the obligors on the injunction bond; but on a reversal by the appellate court of the judgment of the common pleas, and dissolving the injunction, such obligors are liable on the bond for the damages sustained by the other party by such injunction, although the appellate court does not expressly find that the judgment was improperly granted. Williams *v.* Baker, 13 Ohio Cir. Ct. 500, 7 Ohio Cir. Dec. 515.

39. Palmer *v.* Foley, 71 N. Y. 106; Prefontaine *v.* Richards, 47 Hun (N. Y.) 418; Krug *v.* Bishop, 44 Ohio St. 221, 6 N. E. 252 [*reversing* 9 Ohio Dec. (Reprint) 250, 11 Cinc. L. Bul. 295].

Facts must appear from judgment itself. It is not sufficient that it appear by facts developed on the trial that plaintiff was not entitled to the injunction. Benedict *v.* Benedict, 76 N. Y. 600.

What is a final decision.— The decision of the court of appeals, affirming the decision of the courts below, that plaintiff was not entitled to an injunction, is the final decision of the court, within the meaning of the undertaking to pay defendant's damages if the court shall finally decide that plaintiff was not entitled to the injunction. Ninth

decision.[40] A dismissal or discontinuance of the suit by plaintiff has the same effect as a decision of the court that the injunction was improperly sued out,[41] except where the discontinuance was corruptly induced,[42] or was by stipulation of the parties.[43] So liability accrues upon the granting of a motion to dissolve

Ave. R. Co. *v.* New York El. R. Co., 3 Abb. N. Cas. (N. Y.) 22. But no damages can be recovered by the party enjoined, although the court of appeals decided the suit against plaintiff, unless the judgment amounts to a determination that plaintiff was not entitled to the injunction at the time it was issued. New York, etc., R. Co. *v.* Omerod, 29 Hun (N. Y.) 274. *Compare* Vanderbilt *v.* Schreyer, 28 Hun (N. Y.) 61.

Reversal of a decree dissolving an injunction is a good defense to an action on an injunction bond conditioned for the payment of damages in case the injunction is dissolved. Fahs *v.* Darling, 82 Ill. 142. But see Somerville *v.* Mayes, 54 Miss. 31, holding that the obligee, as well as the obligor, in an injunction bond, may claim to stand upon the precise terms of the bond; and that where the bond given on enjoining proceedings on a judgment is conditioned to pay all costs, etc., in case the injunction should be dissolved, such condition is broken, so as to give the obligee a complete right of action on the bond upon a dissolution of the injunction, although the judgment of dissolution is afterward reversed.

When an injunction has been dissolved and then reinstated, no suit for breach of the bond will lie. Bentley *v.* Joslin, 30 Fed. Cas. No. 18,232, Hempst. 218.

40. Palmer *v.* Foley, 71 N. Y. 106.

Circumstances equivalent to final decision see Rice *v.* Cook, 92 Cal. 144, 28 Pac. 219; Harter *v.* Westcott, 155 N. Y. 211, 49 N. E. 676 [*affirming* 11 Misc. 180, 32 N. Y. Suppl. 111]; New York City Suburban Water Co. *v.* Bissell, 78 Hun (N. Y.) 176, 28 N. Y. Suppl. 938 (where, pending an appeal from an order reversing an order granting a temporary injunction, the parties stipulated that if the order be affirmed on its merits the complaint should be dismissed, and the court of appeals affirmed the order and judgment was entered according to the stipulation); Loomis *v.* Brown, 16 Barb. (N. Y.) 325; Foley *v.* Schiedmati, 17 N. Y. Suppl. 663; Jordan *v.* Donnelly, 11 N. Y. Suppl. 836, 19 N. Y. Civ. Proc. 413 (where an *ex parte* preliminary injunction was vacated on a contested motion, without stating why it was vacated, and the complaint was dismissed on the trial).

Circumstances not equivalent to final decision see Gray *v.* Bremer, 122 Iowa 11, 97 N. W. 991; Apollinaris Co. *v.* Venable, 136 N. Y. 46, 32 N. E. 555 (where the injunction was dissolved because of contempt of plaintiff in interfering with the commissioner appointed to take evidence); Weeks *v.* Southwick, 12 How. Pr. (N. Y.) 170 (where a referee reported dismissing the complaint, but judgment was not entered making his decision the judgment of the court); Columbus, etc., R. Co. *v.* Burke, 54 Ohio St. 98, 43 N. E. 282, 32 L. R. A. 329; Krug *v.* Bishop, 44 Ohio St. 221, 6 N. E. 252 [*reversing* 9 Ohio Dec. (Reprint) 250, 11 Cinc. L. Bul. 295] (where, on motion of part of defendants, and because co-defendants had not been served with summons, the court dismissed the action without prejudice to another action, the injunction was dissolved and the costs paid by plaintiff); Supreme Ct. I. O. of F. *v.* Supreme Ct. U. O. of F., 94 Wis. 234, 68 N. W. 1011 (where an order was made sustaining a motion to vacate or dissolve a temporary injunction).

41. *California.*— Frahm *v.* Walton, 130 Cal. 396, 62 Pac. 618; Asevado *v.* Orr, 100 Cal. 293, 34 Pac. 777.

Kansas.— Tullock *v.* Mulvane, 61 Kan. 650, 60 Pac. 749; Mitchell *v.* Sullivan, 30 Kan. 231, 1 Pac. 518.

Kentucky.— Pugh *v.* White, 78 Ky. 210.

Minnesota.— Nielsen *v.* Lea, 87 Minn. 285, 91 N. W. 1113.

Mississippi.— Yale *v.* Baum, 70 Miss. 225, 11 So. 879.

Missouri.— Alliance Trust Co. *v.* Stewart, 115 Mo. 236, 21 S. W. 793; Sharpe *v.* Harding, 65 Mo. App. 28; Campbell *v.* Carroll, 35 Mo. App. 640.

Nebraska.— Gyger *v.* Courtney, 59 Nebr. 555, 81 N. W. 437.

New York.— Pacific Mail Steamship Co. *v.* Toel, 85 N. Y. 646; New York Cent., etc., R. Co. *v.* Hastings-on-Hudson, 9 N. Y. App. Div. 256, 41 N. Y. Suppl. 492; Manning *v.* Cassidy, 80 Hun 127, 30 N. Y. Suppl. 23; Wynkoop *v.* Van Beuren, 63 Hun 500, 18 N. Y. Suppl. 557; Vanderbilt *v.* Schreyer, 28 Hun 61; McGown *v.* Barnum, 42 Misc. 585, 87 N. Y. Suppl. 605; Amberg *v.* Kramer, 8 N. Y. Suppl. 821; Parker *v.* Commercial Tel. Co., 3 N. Y. St. 174; Pacific Mail Steamship Co. *v.* Leuling, 7 Abb. Pr. N. S. 37; Cunningham *v.* White, 45 How. Pr. 486; Mutual Safety Ins. Co. *v.* Roberts, 4 Sandf. Ch. 592.

Ohio.— Bishop *v.* Bascoe, 8 Ohio Dec. (Reprint) 654, 9 Cinc. L. Bul. 111.

Virginia.— Roach *v.* Gardner, 9 Gratt. 89.

See 27 Cent. Dig. tit. "Injunction," § 534.

Dismissal after motion to dissolve.— After defendant in an injunction suit has filed his motion to dissolve the temporary injunction, plaintiff cannot voluntarily dismiss the action without first permitting defendant to establish the damages sustained by him as a result of bringing the action. Field *v.* Weaver, 32 La. Ann. 1242; Whittemore *v.* Watts, 7 Rob. (La.) 10; Canadian, etc., Mortg., etc., Co. *v.* Fitzpatrick, 71 Miss. 347, 14 So. 270.

42. Boynton *v.* Robb, 22 Ill. 525.

43. Palmer *v.* Foley, 71 N. Y. 106; Freifeld *v.* Sire, 96 N. Y. App. Div. 296, 89

after a demurrer to the complaint has been sustained on the ground that it does not state a cause of action,[44] dismissal because of failure to prosecute,[45] an involuntary nonsuit,[46] voluntary abandonment by failing to appear when called,[47] or dismissal for want of prosecution by an administrator after complainant's death.[48]

3. Dissolution of Injunction. Liability upon such a bond attaches upon the rendition of a judgment for defendant on the merits,[49] whether or not an order of dissolution has issued.[50] But dissolution of the injunction on motion does not necessarily of itself create a liability on the bond.[51] No liability accrues where the dissolution was by a judge without jurisdiction,[52] nor where the dissolution was for matters done or arising subsequent to the issuance of the injunction, where the original issuance was proper.[53] So if the dissolution is conditional no liability arises until the condition is complied with.[54] But a dissolution in part is ordinarily a breach of bond as well as a total dissolution.[55]

4. Effect of Appeal. It has been decided that upon a final judgment dissolving an injunction a right of action upon such bond immediately follows,

N. Y. Suppl. 260; Large *v.* Steer, 121 Pa. St. 30, 15 Atl. 490. But see Tullock *v.* Mulvane, 184 U. S. 497, 22 S. Ct. 372, 46 L. ed. 657, holding that the withdrawal by stipulation of the only part of a case which can sustain an injunction is the equivalent of a final determination against the right to an injunction, for the purpose of creating a right of action on the injunction bond, notwithstanding the fact that an appeal may be taken from the decree rendered in that part of the case which is not dismissed.

44. Bennett *v.* Pardini, 63 Cal. 154.

45. Dowling *v.* Polack, 18 Cal. 625; De Berard *v.* Prial, 34 N. Y. App. Div. 502, 54 N. Y. Suppl. 534; Manufacturers', etc., Bank *v.* C. F. Dare Co., 67 Hun (N. Y.) 44, 21 N. Y. Suppl. 806; Kane *v.* Casgrain, 69 Wis. 430, 34 N. W. 241.

46. Whitehead *v.* Tulane, 11 La. Ann. 302; Nansemond Timber Co. *v.* Rountree, 122 N. C. 45, 29 S. E. 61.

47. Penniman *v.* Richardson, 3 La. 101.

48. Lloyd *v.* Burgess, 4 Gill (Md.) 187; Humfeldt *v.* Moles, 63 Nebr. 448, 88 N. W. 655; Jones *v.* Hill, 6 N. C. 131. *Compare* Johnson *v.* Elwood, 82 N. Y. 362, where, upon motion of complainant's administratrix, the court ordered the action discontinued, providing for a reference to ascertain the damages by reason of the injunction, and it was held that there was no breach of the condition of the undertaking providing for the payment of damages in case of a decision that plaintiff was not entitled to the injunction, as there had been no such decision.

49. Rice *v.* Cook, 92 Cal. 144, 28 Pac. 219. See also Montana Min. Co. *v.* St. Louis Min., etc., Co., 23 Mont. 311, 58 Pac. 870.

50. Fox *v.* Hudson, 20 Kan. 246; Alexander *v.* Gish, 88 Ky. 13, 9 S. W. 801, 10 Ky. L. Rep. 989; Thurston *v.* Haskell, 81 Me. 303, 17 Atl. 73; Coltart *v.* Ham, 2 Tenn. Ch. 356. See also Mulvane *v.* Tullock, 58 Kan. 622, 50 Pac. 897. But see Harrison *v.* Park, 1 J. J. Marsh. (Ky.) 170; Pickett *v.* Boyd, 11 Lea (Tenn.) 498, holding that the statute of limitations does not begin to run in favor of the administrator of a surety upon an injunction bond until the injunction is dissolved.

51. See *supra*, VIII, A, 6.

An injunction is dissolved, within the meaning of the bond, so as to create a liability against the surety whether it is dissolved on the merits or in consequence of the death of plaintiff, or of his negligence in suing out the process in due time. Jones *v.* Hill, 6 N. C. 131.

Dissolution by federal court after removal. — Where the injunction was dissolved by a federal court after removal from a state court, it was held that the liability of the sureties is the same as if the injunction had been dissolved by the court in which the action was instituted. Alexander *v.* Gish, 88 Ky. 13, 9 S. W. 801, 10 Ky. L. Rep. 989. But where, on appeal to the supreme court, the case was remanded to the state court, judgment of the federal circuit court dissolving the injunction must be regarded as a nullity, and plaintiffs have no cause of action. Alexander *v.* Gish, 17 S. W. 287, 13 Ky. L. Rep. 515.

52. Browne *v.* Edwards, etc., Lumber Co., 44 Nebr. 361, 62 N. W. 1070.

53. Scott *v.* Frank, 121 Iowa 218, 96 N. W. 764; Carroll *v.* Roadheimer, 35 La. Ann. 374; New York, etc., R. Co. *v.* Dennis, 40 N. J. L. 340; Yarwood *v.* Cedar Canyon Consol. Min. Co., 37 Wash. 56, 79 Pac. 483. But see De Berard *v.* Prial, 34 N. Y. App. Div. 502, 54 N. Y. Suppl. 534.

54. Shackelford *v.* Smith, 61 Miss. 5.

55. Rice *v.* Cook, 92 Cal. 144, 28 Pac. 219; Willits *v.* Slocumb, 24 Ill. App. 484; Pierson *v.* Ells, 46 Hun (N. Y.) 336; White *v.* Clay, 7 Leigh (Va.) 68. But *compare* Ovington *v.* Smith, 78 Ill. 250 (where the bond was conditioned so that the obligors were liable only if the injunction was dissolved as to both defendants and it was dissolved only as to one); Walker *v.* Pritchard, 34 Ill. App. 65 (where the injunction was sustained as to the larger part); Newport *v.* McArthur, 4 Ky. L. Rep. 632; Penny *v.* Holberg, 53 Miss. 567.

unless the judgment is superseded.[56] But according to some decisions an action on the bond is premature, where an appeal taken without supersedeas from the order dismissing the bill is pending and undetermined.[57] A suit cannot be dismissed, on exception of prematurity, because the year for a devolutive appeal has not expired, defendant filing the exception not having appealed from the judgment dissolving the injunction.[58]

B. Nature of Liability and Discharge — 1. In General. Under the terms of most bonds the extent of liability of the sureties is measured by the liability of their principal.[59] The undertaking of the surety in an injunction bond, where there are several complainants, is, in law, for the principals severally as well as jointly; that is, the surety is bound in effect that each and all of his principals shall perform and fulfil whatever decree may be rendered in the cause against all or either of them.[60] The usual rules[61] that a surety cannot be liable except in accordance with the strict terms of the undertaking,[62] and that his liability cannot be extended by implication beyond the express terms of his contract,[63] apply. The terms of the undertaking are construed by the statute in force at the time it was given.[64]

2. Persons Liable and Extent of Liability. Only those who sign the bond or undertaking are liable on it.[65] Where an administrator is required as a condition to the grant of an injunction applied for by him, to execute an injunction bond, if he does so, it will be binding on him and his sureties in their individual capacity.[66] Where the suit is in the name of the state, on the relation of certain persons, who are required to give security for the costs, it is the suit of the relators, and not of the state, so that they and the sureties on their injunction bond are liable to defendant for any damages consequent on the wrongful suing out of the injunction.[67] Where the surety in the bond is held insufficient, and a new bond is executed with other sureties, the sureties on both bonds are equally liable upon a dissolution of the injunction.[68] In the State of Louisiana the rule seems to be

56. Alexander *v.* Gish, 88 Ky. 13, 9 S. W. 801, 10 Ky. L. Rep. 989. See also Woodbury *v.* Bowman, 13 Cal. 634, holding that for defendant to offer an order of the supreme court to the court in which the injunction was obtained, directing that court to fix the amount of a suspensive appeal-bond, is insufficient to show that the injunction had not been decided, without proof that the appellant took the necessary steps to, and actually did, prosecute his appeal.

A suspension by supersedeas is matter in abatement and not in bar of an action on the injunction bond. Saddler *v.* Glover, 1 B. Mon. (Ky.) 50.

57. Yazoo, etc., R. Co. *v.* Adams, 18 Miss. 977, 30 So. 44; Cohn *v.* Lehman, 93 Mo. 574, 6 S. W. 267; Tutty *v.* Ryan, 13 Wyo. 134, 78 Pac. 657, 79 Pac. 920, holding that where a writ of error is issued after action on the bond the action abates, and should be dismissed, rather than continued pending decision on the writ of error.

58. Elms *v.* Wright-Blodgett Co., 106 La. 19, 30 So. 315.

59. Harrison *v.* Park, 1 J. J. Marsh. (Ky.) 170.

If the principal dies before final hearing and the cause is revived in the name of his administrator, the sureties are bound for the satisfaction of the decree rendered against him, costs included. Fowler *v.* Scott, 11 Ark. 675.

The tortious conversion of the property by plaintiff pending the action is not included in the surety's liability. Cummings *v.* Mugge, 94 Ill. 186.

60. Kelly *v.* Gordon, 3 Head (Tenn.) 683.

61. See Principal and Surety.

62. Ovington *v.* Smith, 78 Ill. 250; Hall *v.* Williamson, 9 Ohio St. 17.

63. Tyler Min. Co. *v.* Last Chance Min. Co., 90 Fed. 15, 32 C. C. A. 498.

Where the principal in a bond for enjoining a sale was appointed receiver of the property, the sureties on his receiver bond, and not those on his injunction bond, were liable to account for the value on dismissal of his bill for want of equity. Harvey *v.* Berry, 1 Baxt. (Tenn.) 252.

64. Krug *v.* Bishop, 44 Ohio St. 221, 6 N. E. 252.

65. Patterson *v.* Bloomer, 9 Abb. Pr. N. S. (N. Y.) 27 (holding that if the injunction plaintiff does not sign the undertaking, he cannot be charged upon it, but can be proceeded against only by an independent action); Graham *v.* Citizens' Nat. Bank, 45 W. Va. 701, 32 S. E. 245.

66. Brown *v.* Speight, 30 Miss. 45.

67. State *v.* Springfield, (Tenn. Ch. App. 1898) 48 S. W. 813.

68. Bentley *v.* Harris, 2 Gratt. (Va.) 357. *Compare* Odell *v.* Henry, 8 Baxt. (Tenn.) 302, where the first bond was adjudged not to be good because of the insolvency of the only surety on it, and a second bond was given, but the clerk's name was not signed

well settled that the principal and sureties on an injunction bond are liable *in solido*.[69]

3. Release or Discharge of Liability — a. In General. A dismissal of the action as to one of defendants has been held not to be such a change in the action as to relieve the parties to the bond from liability thereunder.[70] A surety's liability is not changed by a suit to recover damages in the names of the obligors for the use of their attorneys.[71] A judgment sustaining the injunction on a motion to dissolve before a trial on the merits does not release the surety who may be liable in damages if the injunction is finally dissolved.[72] Although the judgment enjoined has been reversed since the decree against the injunction plaintiff, the sureties on the bond are not entitled to relief so long as the decree stands.[73] A surety cannot be relieved from his obligation on the bond by showing that his signature was affixed thereto as an escrow, unless his proof on petition be as clear, satisfactory, and demonstrative as that required to set aside a decree or judgment of a court of record upon the ground of fraud.[74] The surety is not exonerated by the compliance of defendant in equity with the condition upon which the injunction is to be dissolved.[75] Where the bill for injunction was at the same time a creditors' bill, the obligation of the surety on the injunction bond on which suit is brought is not discharged by the admission of other parties as complainants to prosecute the cause in which the injunction was issued.[76] A release of the surety by part of the obligees does not release him from all liability.[77] A court should not release the surety from liability unless he, or someone for him, asks to be released.[78] A surety may have the bond canceled in a proper case.[79]

b. Stipulation of Principals. The parties to an injunction bill cannot vary the liability of the sureties on the bond by stipulation.[80] A stipulation entered into with the principal obligor on an injunction bond, which in no way changes the contract, cannot affect the sureties' liability under the bond.[81] In the absence of fraud a mere dismissal of the bill will not release the surety on the bond, although the dismissal is the result of an agreement with defendant in the bill.[82] A dissolution upon consideration of the payment of a sum of money by defendant to complainant has been held to release the surety, although there was an express agreement to retain the surety's liability on the bond.[83]

to it, whereupon a third bond was given with the same names as the first and second bonds, and two additional names, the penalties of all the bonds being the same, and it was held that the parties to the last bond were the ones who were liable for the penalty of the bond for the wrongful suing out of the injunction.

69. Lallande *v.* Trezevant, 39 La. Ann. 830, 2 So. 573, 5 So. 862; Wentzel *v.* Robinson, 23 La. Ann. 451; Perry *v.* Kearney, 14 La. Ann. 400.

70. Kleeb *v.* Bard, 12 Wash. 140, 40 Pac. 733.

71. Patterson *v.* Rinard, 81 Ill. App. 80.

72. McMillen *v.* Gibson, 10 La. 517.

73. Blythe *v.* Peters, 3 Yerg. (Tenn.) 378.

74. Ward *v.* Cullom, 2 Coldw. (Tenn.) 353.

75. Gray *v.* Campbell, 3 Munf. (Va.) 251.

76. Levy *v.* Taylor, 24 Md. 282.

77. Mulvane *v.* Tullock, 58 Kan. 622, 50 Pac. 897.

78. Sobey *v.* Thomas, 37 Wis. 568.

79. Leake *v.* Breedlove, 1 Mart. N. S. (La.) 259. And see Kinealy *v.* Staed, 55 Mo. App. 176, holding that a bond required by the court to be given to the party enjoined as trustee of persons not parties whose interests, however, are affected, said bond having been given in addition to the regular statutory bond to obtain the injunction, will not be canceled on motion of injunction plaintiff after dissolution of the injunction.

80. Mix *v.* Vail, 86 Ill. 40. See also Baker *v.* Frellsen, 32 La. Ann. 822, holding that a surety on an injunction bond is discharged by an agreement entered into, without his consent, by plaintiff and defendant, to have the case tried at chambers and decided after court term.

81. Keith *v.* Henkleman, 173 Ill. 137, 50 N. E. 692; Brackebush *v.* Dorsett, 138 Ill. 167, 27 N. E. 934 [*affirming* 37 Ill. App. 581], holding that an order, entered by consent, modifying an injunction so as to make it less comprehensive than before, does not release the surety on the injunction bond from liability upon dissolution of the injunction as modified, since the modification does not increase his liability.

82. Patterson *v.* Rinard, 81 Ill. App. 80; Dickerson *v.* Herman, 9 Daly (N. Y.) 298.

83. Cassem *v.* Ernst, 84 Ill. App. 70.

c. Giving New Bond. If the injunction be continued on complainant's application, upon the giving of a new bond with security, the first bond is discharged;[84] but an order continuing an injunction upon the giving of "further bond" does not discharge the first bond.[85] An appeal-bond given upon the appeal from the order of dissolution does not supersede the injunction bond.[86]

d. Arrest. The arrest of a judgment debtor under a capias is not a satisfaction of the judgment and does not discharge an injunction bond entered into on a bill being filed to enjoin the judgment.[87]

4. Remedies of Surety. A surety becomes a party to the record by judgment being rendered against him on the bond and may therefore appeal from the judgment.[88] Of course the sureties on an injunction bond are not parties to a judgment which is enjoined and have no right to interfere with the conduct of the original suit.[89] In a jurisdiction [90] where by statute the surety is a plaintiff in the injunction suit, if he has neither appeared nor answered nor has been notified of the judgment, his right to appeal is not affected by defects in the transcript, through the fault of the other appellant;[91] but the fact that the judgment includes the surety, although the principal alone is named in the verdict, does not authorize a reversal on account of this variance in favor of the surety who appeals.[92] A surety can have no right of action against his principal so long as the suit in which an undertaking was given is still pending, since until the suit is determined no liability on the bond arises on the part of either principal or surety.[93] In a jurisdiction where a bond made in accordance with the statutory provisions has the force of a judgment when the injunction is dissolved, the surety on a bond not executed according to the statute and therefore not having the force of a judgment, who voluntarily discharges the apparent liability on the bond, has no equity of subrogation for his relief.[94]

C. Assessment of Damages Before Action on Bond — 1. As Condition Precedent to Action on Bond. Generally an assessment of damages is not a condition precedent to a suit on the injunction bond.[95] The rule that an assessment

84. Kent *v.* Bierce, 6 Ohio 336.

85. Kent *v.* Bierce, 7 Ohio, Pt. II, 209. And see Stone *v.* Keller, 4 Ind. App. 436, 30 N. E. 1113.

86. Rynearson *v.* Fredenburg, 42 Mich. 412, 4 N. W. 187.

87. Conner *v.* Winn, 1 Brev. (S. C.) 185 [*questioning* Porteous *v.* Snipes, 1 Bay (S. C.) 215].

88. Loehner *v.* Hill, 19 Mo. App. 141.

In New York it has been held that where a judge, directing a reference to ascertain the damages in consequence of an injunction, requires five days' notice of the hearing to be given to the sureties on the undertaking, which was not signed by plaintiff, and the sureties appear before the referee and oppose the confirmation of the report at special term, they are entitled to maintain an appeal to the general term from the order confirming the referee's report, although they are not parties to the action. Hotchkiss *v.* Platt, 7 Hun 56.

89. St. Louis Zinc Co. *v.* Hesselmeyer, 50 Mo. 180.

90. Mason *v.* Poulallier, 10 La. Ann. 418.

91. Verges *v.* Gonzales, 33 La. Ann. 410.

92. Mason *v.* Poulallier, 10 La. Ann. 418.

93. American Bonding, etc., Co. *v.* Logansport, etc., Gas Co., 95 Fed. 49.

94. Halsey *v.* Murray, 112 Ala. 185, 20 So. 575.

95. *Colorado.*— Sartor *v.* Strassheim, 8 Colo. 185, 6 Pac. 215; Duckett *v.* Price, 7 Colo. 84, 1 Pac. 228; Lynch *v.* Metcalf, 3 Colo. App. 131, 32 Pac. 183.

Iowa.— Fountain *v.* West, 68 Iowa 380, 27 N. W. 264.

Kentucky.— Alexander *v.* Gish, 88 Ky. 13, 9 S. W. 801, 10 Ky. L. Rep. 989. And see Hunt *v.* Scohie, 6 B. Mon. 469.

Minnesota.— Hayden *v.* Keith, 32 Minn. 277, 20 N. W. 195.

Mississippi.— Barber *v.* Levy, 73 Miss. 484, 18 So. 797. But see Anderson *v.* Falconer, 34 Miss. 257.

Missouri.— See Teasdale *v.* Jones, 40 Mo. App. 243.

See 27 Cent. Dig. tit. "Injunction," § 561.

In Illinois, before the act of 1861, an assessment was not a necessary preliminary. Edwards *v.* Edwards, 31 Ill. 474; Brown *v.* Gorton, 31 Ill. 416; Hibbard *v.* McKindley, 28 Ill. 240; Phelps *v.* Foster, 18 Ill. 309. After that act, and until the act of 1874 took effect, an assessment was a necessary preliminary. McWilliams *v.* Morgan, 70 Ill. 551; Brownfield *v.* Brownfield, 58 Ill. 152; Russell *v.* Rogers, 56 Ill. 176. Since the act of 1874, the rule has been as stated in the text. That act, however, does not affect a bond executed after the passage of the act but before it took effect. Mix *v.* Vail, 86 Ill. 40; Alwood *v.* Mansfield, 81 Ill. 314;

is a necessary preliminary to an action on the bond is usually confined to cases where the injunction issued to stay proceedings on a judgment.[96]

2. Mode of Assessment. Where an assessment is necessary or proper, the damages are in some jurisdictions determined by the court, or by a referee appointed by the court.[97] In others the court may in its discretion cause a jury to be impaneled to find the damages.[98] And in others the parties to the bond have an absolute right to a jury if they wish one.[99]

3. Time For Making Motion and Order For Assessment. It is sometimes required that the motion to assess damages be filed at the same term of court at which the judgment dissolving the injunction is entered.[1] If plaintiff appeals from the judgment of dissolution, the motion for the assessment of damages on the injunction bond may be made by defendant on the affirmance of the judgment by the appellate court on due notice to plaintiff.[2] An order to ascertain the damages cannot be made until it has been determined by judgment or other decision of the court that plaintiff was not entitled to the injunction.[3] Hence it cannot be made where the injunction has been dissolved on the coming in of the

Marthaler *v.* Druiding, 58 Ill. App. 336; Linington *v.* Strong, 8 Ill. App. 384. And such act does not apply to a bond with conditions so framed as to require the payment of damages or the performance of any other act, irrespective of whether damages were awarded on dissolution of the injunction or not. Rees *v.* Peltzer, 1 Ill. App. 315. The act of 1874 does not affect the chancellor's power of assessment. Toledo, etc., R. Co. *v.* St. Louis, etc., R. Co., 208 Ill. 623, 70 N. E. 715.

An action on the case to determine damages need not be brought before bringing an action of debt on the bond. Garrett *v.* Logan, 19 Ala. 344; Dougherty *v.* Lewellen, 3 Bibb (Ky.) 364; Falls *v.* McAffee, 23 N. C. 139.

To pay such damages "as shall be awarded." — A surety on an injunction bond, agreeing to pay such damages "as shall be awarded" against his principal, is not liable where no damages have been awarded, although the injunction is dissolved and the obligee has suffered damages. Ashby *v.* Chambers, 3 Dana (Ky.) 437. See also Anderson *v.* Falconer, 34 Miss. 257.

Where the ascertainment of damages is referred, the report of a referee to assess damages on the dissolution of an injunction must be confirmed before the court will entertain an application to prosecute the undertaking given on the issuance of the injunction. Griffing *v.* Slate, 5 How. Pr. (N. Y.) 205.

96. Blakeney *v.* Ferguson, 18 Ark. 347; Hayden *v.* Phillips, 89 Ky. 1, 11 S. W. 951, 11 Ky. L. Rep. 239 [*reversing* 9 Ky. L. Rep. 933]; Alexander *v.* Gish, 88 Ky. 13, 9 S. W. 801, 10 Ky. L. Rep. 989; Rankin *v.* Estes, 13 Bush (Ky.) 428; Crawford *v.* Woodworth, 9 Bush (Ky.) 745; Dorriss *v.* Carter, 67 Mo. 544. And see Loehner *v.* Hill, 17 Mo. App. 32; Carpenter *v.* Fisher, 68 N. H. 486, 38 Atl. 211, 73 Am. St. Rep. 616.

97. See Russell *v.* Elliott, 2 Cal. 245, holding that an assessment by reference is not a violation of the constitutional right to a trial by jury.

98. See Hayden *v.* Phillips, 89 Ky. 1, 11 S. W. 951, 11 Ky. L. Rep. 239.

99. Nolan *v.* Jones, 108 Mo. 431, 18 S. W. 1107; Batterton *v.* Sims, 73 Mo. App. 351.

If the jury are sworn to "try the issues and assess the damages on the defendant's motion," it is sufficient. Dunn *v.* Miller, 15 Mo. App. 580.

1. Hoffelmann *v.* Franke, 96 Mo. 533, 10 S. W. 45; Moore *v.* Mexico Sav. Bank, 58 Mo. App. 469; Loehner *v.* Hill, 19 Mo. App. 141. But see Woods *v.* Irish, 14 Iowa 427 (holding that if the parties appear and make no objection to an award made after a long lapse of time, the award will not be reversed upon appeal); Holcomb *v.* Rice, 119 N. Y. 598, 23 N. E. 1112 (holding that a delay of several years in applying for an assessment of damages against the sureties on an injunction bond will not bar recovery, the claim for damages having been left open on a settlement between the sureties and their principal).

2. Neiser *v.* Thomas, 46 Mo. App. 47.

If appeal be without bond, so that it does not operate as a supersedeas, motion to assess damages on the injunction bond is properly made at the same term the decree was entered, and is therefore not premature. Fears *v.* Riley, 147 Mo. 453, 48 S. W. 828.

3. Adams *v.* Ball, (Miss. 1888) 5 So. 109; Benedict *v.* Benedict, 76 N. Y. 600 [*affirming* 15 Hun 305]; Roberts *v.* White, 73 N. Y. 375; Palmer *v.* Foley, 71 N. Y. 106; New York Methodist Churches *v.* Barker, 18 N. Y. 463; Kelley *v.* McMahon, 32 Hun (N. Y.) 347; Benedict *v.* Dixon, 47 N. Y. Super. Ct. 477; Harter *v.* Westcott, 11 Misc. (N. Y.) 180, 32 N. Y. Suppl. 111; Neugent *v.* Swan, 61 How. Pr. (N. Y.) 40. See also Carpenter *v.* Wright, 4 Bosw. (N. Y.) 655. *Contra*, Dunn *v.* Miller, 15 Mo. App. 580.

In Illinois damages may be assessed on the partial dissolution of an injunction. Walker *v.* Pritchard, 135 Ill. 103, 25 N. E. 573, 11 L. R. A. 577 [*reversing* 34 Ill. App. 65].

The irregularity may be waived by permitting the referee to proceed to a final report

answer,[4] or pending an appeal.[5] But a dissolution upon the matter of the bill only may be regarded as a final adjudication,[6] or a dissolution which follows a dismissal of the complaint.[7]

4. Who May Move and Parties to Motion. A defendant, even though he obeys the injunction before being served, may have a reference to ascertain damages, since the undertaking is for the benefit of all defendants who are enjoined.[8] If separate motions are filed by the joint obligees who are the real parties in interest, the motions should be treated and tried as one motion, and at the same time, to the end that all the parties plaintiff therein who are united in interest should be before the court, and that one final judgment should be rendered on the bond.[9] Defendants in the injunction suit, who have no interest in the litigation and are only formal parties, need not join in the motion.[10]

5. Scope of Inquiry. It is not generally competent to go into the merits of the proceedings restrained.[11] The inquiry is only as to the amount of damages, if any, and not as to the right to recover them.[12] If the conditions of the bond are sufficient to cover any damages for waste committed during the pendency of the injunction, the inquiry should be so extended as to determine whether there has been any waste or destruction of the property.[13]

6. Determination and Effect Thereof. On a reference, in at least one state, findings of fact and conclusions of law need not be reported by the referee.[14] The order confirming the report of the referee or the decision of the court as to the amount of the damages is conclusive upon all persons who have executed the undertaking, unless the decision or order is reversed on appeal,[15] or unless it is shown that the decision was reached by fraud or mistake.[16] And it is none the less conclusive because no notice of the motion for the reference or of the motion to confirm the referee's report was given.[17]

D. Enforcement of Liability in Injunction Suit — 1. Power of Court — a. In General. In a few jurisdictions it is held, apparently without statutory aid, that a court of chancery has power over all bonds given pursuant to its orders and rules of practice, and also to determine all questions of liability and damages

without withdrawing from the reference. Roberts *v.* White, 73 N. Y. 375.

4. Dunkin *v.* Lawrence, 1 Barb. (N. Y.) 447.

5. Musgrave *v.* Sherwood, 76 N. Y. 194; Howard *v.* Park, 59 How. Pr. (N. Y.) 344.

6. Waterbury *v.* Bouker, 10 Hun (N. Y.) 262; Dunkin *v.* Lawrence, 1 Barb. (N. Y.) 447.

7. Wabash R. Co. *v.* Sweet, 110 Mo. App. 100, 85 S. W. 95; Price Baking Powder Co. *v.* Calumet Baking Powder Co., 82 Mo. App. 19; Wilson *v.* Dreyer, 65 N. Y. App. Div. 249, 72 N. Y. Suppl. 578; Granger *v.* Smyth, 70 Hun (N. Y.) 9, 23 N. Y. Suppl. 934; Apollinaris Co. *v.* Venables, 63 Hun (N. Y.) 554, 18 N. Y. Suppl. 535; Amberg *v.* Kramer, 8 N. Y. Suppl. 821; Lewis *v.* Jones, 65 S. C. 157, 43 S. E. 525; Featherstone *v.* Smith, 20 Grant Ch. (U. C.) 474.

Leave to discontinue given the complainant does not deprive defendant of his right to a reference to ascertain the damages. Perlman *v.* Bernstein, 83 N. Y. App. Div. 203, 82 N. Y. Suppl. 148.

8. Cumberland Coal, etc., Co. *v.* Hoffman Steam Coal Co., 39 Barb. (N. Y.) 16.

9. Helmkampf *v.* Wood, 84 Mo. App. 261. See also August Gast Bank Note, etc., Co. *v.* Fennimore Assoc., 79 Mo. App. 612.

10. Fears *v.* Riley, 147 Mo. 453, 48 S. W. 828. *Compare* Ohnsorg *v.* Turner, 33 Mo. App. 486.

11. Dunn *v.* Miller, 15 Mo. App. 580; Andrews *v.* Glenville Woolen Co., 50 N. Y. 282. See also Livingston *v.* Exum, 19 S. C. 223.

12. Hayden *v.* Keith, 32 Minn. 277, 20 N. W. 195; Leavitt *v.* Dabney, 2 Sweeny (N. Y.) 613; Palmer *v.* Foley, 2 Abb. N. Cas. (N. Y.) 191. See also Patterson *v.* Bloomer, 6 Abb. Pr. N. S. (N. Y.) 446, 37 How. Pr. 450. But see Henley *v.* Cliborne, 3 Lea (Tenn.) 213.

13. Hayden *v.* Phillips, 89 Ky. 1, 11 S. W. 951, 11 Ky. L. Rep. 239.

14. Matthews *v.* Murchison, 14 Abb. N. Cas. (N. Y.) 512 note.

15. Bailey *v.* Gibson, 29 Ark. 472; McAllister *v.* Clark, 86 Ill. 236; Hayden *v.* Phillips, 89 Ky. 1, 11 S. W. 951, 11 Ky. L. Rep. 239 [*reversing* 9 Ky. L. Rep. 933]; Leavitt *v.* Dabney, 2 Sweeny (N. Y.) 613.

16. Jones *v.* Mastin, 60 Mo. App. 578; Jordan *v.* Volkenning, 72 N. Y. 300; Lawton *v.* Green, 64 N. Y. 326; New York Methodist Churches *v.* Barker, 18 N. Y. 463; Poillen *v.* Volkenning, 11 Hun (N. Y.) 385.

17. Jordan *v.* Volkenning, 72 N. Y. 300; Lawton *v.* Green, 64 N. Y. 326; New York Methodist Churches *v.* Barker, 18 N. Y. 463; Poillen *v.* Volkenning, 11 Hun (N. Y.) 385. But see Stein *v.* Levy, 13 N. Y. Suppl. 45.

arising thereon;[18] and it is firmly settled in the federal courts that the court which grants an injunction, and takes an injunction bond, to save defendant from loss caused thereby, may, in an ancillary proceeding, summarily enforce this bond against the sureties.[19] But according to the English practice, until it was changed by statute,[20] and according to the weight of American authority, in the absence of legislation on the subject, a court of chancery has no power to award damages to the aggrieved party upon the dissolution of an injunction, but must remit the party aggrieved to an action at law upon the injunction bond.[21]

b. Under Statutes. This subject has, however, received much legislative attention, and according to some of the statutory provisions the court which awarded the injunction is empowered, upon its dissolution, to enter judgment against the obligors in the bond for the damages occasioned by the injunction, and there can be no recovery on the bond until the court has so adjudged the damages.[22] And according to others the damages are assessed after dissolution of

18. Easton *v.* New York, etc., R. Co., 30 N. J. Eq. 236; Wauters *v.* Van Vorst, 28 N. J. Eq. 103; Sturgis *v.* Knapp, 33 Vt. 486.

19. Meyers *v.* Block, 120 U. S. 206, 7 S. Ct. 525, 30 L. ed. 642; Russell *v.* Farley, 105 U. S. 433, 26 L. ed. 1060; West *v.* East Coast Cedar Co., 113 Fed. 742, 51 C. C. A. 416; Leslie *v.* Brown, 90 Fed. 171, 32 C. C. A. 556; Coosaw Min. Co. *v.* Farmers' Min. Co., 51 Fed. 107; Lehman *v.* McQuown, 31 Fed. 138; Lea *v.* Deakin, 13 Fed. 514, 11 Biss. 40.

A court of equity, on the dissolution of an injunction, may under its general powers, and in the absence of statutory provisions, have the damages occasioned by its issuance assessed under its own direction, and may render judgment therefor against the sureties as an incident to the principal suit. Tyler Min. Co. *v.* Last Chance Min. Co., 90 Fed. 15, 32 C. C. A. 498. But according to the early cases the rule was otherwise and the obligee was left to proceed at law against the obligors in the bond, if he sustained damage from the delay occasioned by the injunction. Bein *v.* Heath, 12 How. (U. S.) 168, 13 L. ed. 939; Merryfield *v.* Jones, 17 Fed. Cas. No. 9,486, 2 Curt. 306.

20. 2 Daniel Ch. Pl. & Pr. (6th Am. ed.) p. 1080. See 21 & 22 Vict. c. 27, § 2; 36 & 37 Vict. c. 66, § 16; 46 & 47 Vict. c. 49, § 4, giving the chancellor power to award damages. See Newby *v.* Harrison, 3 De G. F. & J. 287, 30 L. J. Ch. 863, 4 L. T. Rep. N. S. 424, 9 Wkly. Rep. 849, 64 Eng. Ch. 226, 45 Eng. Reprint 889.

21. *Alabama.*— Bogacki *v.* Welch, 94 Ala. 429, 10 So. 330; Zeigler *v.* David, 23 Ala. 127.

Arkansas.— Greer *v.* Stewart, 48 Ark. 21, 2 S. W. 251.

Colorado.— Sartor *v.* Strassheim, 8 Colo. 185, 6 Pac. 215.

Georgia.— Offerman, etc., R. Co. *v.* Waycross Air-Line R. Co., 112 Ga. 610, 37 S. E. 871.

Illinois.— Phelps *v.* Foster, 18 Ill. 309. See Duncan *v.* Morrison, 1 Ill. 151.

Iowa.— Spencer *v.* Sherwin, 86 Iowa 117, 53 N. W. 86; Chicago, etc., R. Co. *v.* Dey, 76 Iowa 278, 41 N. W. 17; Fountain *v.* West, 68 Iowa 380, 27 N. W. 264; Taylor *v.* Brownfield, 41 Iowa 264. But see Woods *v.* Irish, 14 Iowa 427.

Missouri.— Elliott *v.* Missouri, etc., R. Co., 77 Mo. App. 652.

New York.— Lawton *v.* Green, 64 N. Y. 326.

Virginia.— Claytor *v.* Anthony, 15 Gratt. 518.

22. *Arkansas.*— Bailey *v.* Gibson, 29 Ark. 472.

District of Columbia.— Dodge *v.* Cohen, 14 App. Cas. 582.

Kentucky.— Eastern Kentucky R. Co. *v.* Brown, 99 Ky. 540, 36 S. W. 555, 18 Ky. L. Rep. 825; Alexander *v.* Gish, 88 Ky. 13, 9 S. W. 801, 10 Ky. L. Rep. 989; Logsden *v.* Willis, 14 Bush 183; Crawford *v.* Woodworth, 9 Bush 745. See Yantis *v.* Lyon, 3 J. J. Marsh. 152; Mulholland *v.* Troutman, 10 Ky. L. Rep. 263.

Louisiana.— Crescent City Live Stock Landing, etc., Co. *v.* Larrieux, 30 La. Ann. 740.

Mississippi.— Canadian, etc., Mortg., etc., Co. *v.* Fitzpatrick, 71 Miss. 347, 14 So. 270; Brooks *v.* Shelton, 47 Miss. 243.

Missouri.— Dorriss *v.* Carter, 67 Mo. 544. Damages are not assessable except as an incident to a bond or stipulation given by the complainant to pay damages on dissolution. St. Louis *v.* St. Louis Gaslight Co., 82 Mo. 349.

Tennessee.— Haynes *v.* Lebanon Second Nat. Bank, 106 Tenn. 425, 61 S. W. 775. See Black *v.* Caruthers, 6 Humphr. 87.

See 27 Cent. Dig. tit. "Injunction," § 548.

In Texas under the Revised Statutes parties seeking to enforce a demand for damages to the amount of an injunction bond may bring an original action on the bond or may in the pending suit attain the same object by pleading over in reconvention and setting forth in appropriate terms the facts on which his claim for judgment is based. Coates *v.* Caldwell, 71 Tex. 19, 8 S. W. 922, 10 Am. St. Rep. 725; Sharp *v.* Schmidt, 62 Tex. 263; Avery *v.* Stewart, 60 Tex. 154; Ferguson *v.* Herring, 49 Tex. 126; Griffin *v.* Chadwick, 44 Tex. 409 [*overruling* Gault *v.* Goldthwaite, 34 Tex. 104]; Foster *v.* Shephard, 33 Tex. 687; Carlin *v.* Hudson,

the injunction by reference or otherwise as the court may direct.[23] Under some of these statutes the right to determine and enforce damages in the principal suit is confined to cases where the principal suit is an injunction to restrain the enforcement of a judgment.[24]

c. As Against Sureties — (i) *In General.* In some jurisdictions judgment, on the dissolution of an injunction, cannot be rendered against the sureties on the injunction bond,[25] except by an action on the bond.[26] But in other jurisdictions it is held that the court has inherent[27] or statutory[28] power to render a judgment against the sureties on dissolution of the injunction.

12 Tex. 202, 62 Am. Dec. 521; Givens *v.* Delprat, 28 Tex. Civ. App. 363, 67 S. W. 424; Robertson *v.* Schneider, 1 Tex. Civ. App. 408, 20 S. W. 1129; Johnson *v.* Moore, 2 Tex. App. Civ. Cas. § 210. Or the court may assess damages where it is satisfied that the injunction was obtained for delay only. Avery *v.* Stewart, 60 Tex. 154; Texas, etc., R. Co. *v.* White, 57 Tex. 129; Givens *v.* Delprat, 28 Tex. Civ. App. 363, 67 S. W. 424. Upon the dissolution of an injunction against the enforcement of a judgment, a judgment creditor pursues his ordinary remedy to collect the same and the injunction bond gives him additional security for his debt (Texas, etc., R. Co. *v.* White, *supra*; Appleton *v.* Draughn, 11 Tex. Civ. App. 89, 32 S. W. 46), although formerly by statute upon the dissolution of an injunction restraining the collection of judgment damages could be adjudged, as a matter of course (Garner *v.* Smith, 40 Tex. 505; Pryor *v.* Emerson, 22 Tex. 162; Cook *v.* De la Garza, 13 Tex. 431; Fall *v.* Ratliff, 10 Tex. 291).

Where bill is dismissed for want of jurisdiction of the cause, the chancellor has no power to render a decree upon the injunction bond, but can render a decree for costs only. Cartmell *v.* McClaren, 12 Heisk. (Tenn.) 41.

A legal prerequisite to a judgment on an injunction bond is the giving of a refunding bond by the complainant. Allen *v.* Nelson, 7 Baxt. (Tenn.) 343.

Discretion of court.— The power to award an inquiry as to, or to assess damages without a reference, where an injunction has been granted and an undertaking as to damages given, is a discretionary one, to be exercised judicially. Gault *v.* Murray, 21 Ont. 458; Hessin *v.* Coppin, 21 Grant Ch. (U. C.) 253.

23. Crawford *v.* Pearson, 116 N. C. 718, 21 S. E. 561; McKesson *v.* Hennessee, 66 N. C. 473; Emmons *v.* McKesson, 58 N. C. 92; Parish *v.* Reeve, 63 Wis. 315, 23 N. W. 568. And see *infra*, IX, D, 4.

24. Stanley *v.* Bonham, 52 Ark. 354, 12 S. W. 706; Portsmouth, etc., Turnpike Co. *v.* Byington, 12 Ohio 114.

In Louisiana under the statutes on the subject, the right to recover damages, in the same judgment in which the injunction is dissolved, arises only in cases where ordinary judgments are enjoined and not to injunctions restraining orders of seizure and sale. Where an order of seizure and sale is enjoined, defendant in such injunction, in obtaining its dissolution, may, however, obtain judgment, in reconvention, for damages against plaintiff in injunction. Jourdan *v.* Garland, 105 La. 486, 29 So. 912; Verges *v.* Gonzales, 33 La. Ann. 410; Dejean *v.* Hebert, 31 La. Ann. 729; Elder *v.* New Orleans, 31 La. Ann. 500; Crescent City Live Stock Landing, etc., Co. *v.* Larrieux, 30 La. Ann. 740. And see King *v.* Labranche, 35 La. Ann. 305; Green *v.* Reagan, 32 La. Ann. 974; Scott *v.* Sheriff, 30 La. Ann. 580; Sheen *v.* Stothart, 29 La. Ann. 630; Michel *v.* Meyer, 27 La. Ann. 173; Stewart *v.* Robinson, 24 La. Ann. 182; Witkowski *v.* Selby, 15 La. Ann. 328; Robinson *v.* Freret, 9 La. Ann. 303; Ludwig *v.* Kohlman, 5 La. Ann. 298; Griffin *v.* Cotten, 1 Rob. 142; Dashiell *v.* Lesassier, 15 La. 101; Selby *v.* Marionneaux, 11 La. 484; Offutt *v.* Hendsley, 9 La. 1; Hudson *v.* Plunket, 4 La. 524; Crain *v.* Baillo, 4 La. 513; Florance *v.* Nixon, 3 La. 289.

25. Daniel *v.* Daniel, 39 Ark. 266 (holding, however, that although judgment against sureties be erroneous, it will not be reversed upon the appeal of the principal alone); Clayton *v.* Martin, 31 Ark. 217; Bailey *v.* Gibson, 29 Ark. 472.

In Missouri a judgment cannot be rendered summarily against the sureties in the bond. Coates *v.* Elliott, 27 Mo. App. 510; Nolan *v.* Johns, 27 Mo. App. 502.

26. McWilliams *v.* Morgan, 70 Ill. 551; Brownfield *v.* Brownfield, 58 Ill. 152; Russell *v.* Rogers, 56 Ill. 176; Leavitt *v.* Dabney, 2 Sweeny (N. Y.) 613, 9 Abb. Pr. N. S. 373, 40 How. Pr. 277; Troxell *v.* Haynes, 16 Abb. Pr. N. S. (N. Y.) 1; Hovey *v.* Rubber Tip Pencil Co., 47 How. Pr. (N. Y.) 289.

27. Leslie *v.* Brown, 90 Fed. 171, 32 C. C. A. 556; Tyler Min. Co. *v.* Last Chance Min. Co., 90 Fed. 15, 32 C. C. A. 498. See also Easton *v.* New York, etc., R. Co., 30 N. J. Eq. 236 [*reversing* 26 N. J. Eq. 359]. And see *supra*, IX, D, 1, a.

28. Patterson *v.* Stewart, 6 Yerg. (Tenn.) 26; Garratt *v.* Eliff, 4 Humphr. (Tenn.) 323, both of which hold, however, that where an injunction is dissolved or abated by the death of the complainant, this is not such a dissolution as is contemplated by the statute of 1817, authorizing judgment to be entered on the injunction bond on the dissolution of the injunction against the sureties therein. And see *supra*, IX, D, 1, b.

(II) *Jurisdiction of Parties and Notice.* In some jurisdictions the sureties are not regarded as parties to the injunction suit and judgment for damages therefore cannot be rendered against them, on dissolution of the injunction,[29] unless they have notice and their day in court before the amount of damages is fixed against them.[30] But in some of the states the surety is considered a party plaintiff,[31] or a quasi-party plaintiff,[32] to the injunction suit, and therefore notice is unnecessary.[33]

2. Exclusiveness of Remedy. Although a court of equity may have power to assess the damages, yet it is in its discretion to exercise it or to leave the parties to an action of law;[34] where the power to assess damages is granted by statute, defendant in the injunction suit is,[35] or is not,[36] confined to this remedy, according to the terms of the particular statute. If the equity court has exercised its function, the obligee in the bond is precluded from subsequently maintaining an action on the bond for damages.[37] *E converso* if the injunction defendant sue and obtain judgment at law upon the bond, he cannot afterward have execution out of the court of chancery upon the bond.[38]

3. Who May Claim Damages. All defendants who have been enjoined, and have obeyed the injunction,[39] and who in consequence of the allowance of the

On final decree of perpetual injunction against the principal in a refunding bond, a decree cannot be rendered against the sureties in the bond, but they must be proceeded against by scire facias and not by motion. Cherry *v.* Newson, 3 Yerg. (Tenn.) 369 [*citing Ex p.* Miller, 1 Yerg. (Tenn.) 435].

29. Grove *v.* Bush, 86 Iowa 94, 53 N. W. 88. See Wright *v.* Thomas, 6 Tex. 420.

30. Terry *v.* Robbins, 122 Fed. 725; Leslie *v.* Brown, 90 Fed. 171, 32 C. C. A. 556, holding that a judgment entered by agreement between the parties, but without notice or process against the sureties, which purported to fix the amount of liability on the injunction bond, is void as against the sureties and cannot be made the basis of an action at law against them to recover such amount.

31. Friedman *v.* Adler, 36 La. Ann. 384; Union Bank *v.* Smith, 3 La. Ann. 147.

When the surety is not before the court on appeal, no judgment for interest or damages can be pronounced against him on dissolving the injunction. Davis *v.* Carroll, 11 La. Ann. 705, 707, where the court said: "As no appeal was taken as it [the judgment] respects the surety on the injunction bond, the judgment cannot be disturbed as to such surety."

32. Black *v.* Caruthers, 6 Humphr. (Tenn.) 87. See Emmons *v.* McKesson, 58 N. C. 92, holding that on dissolution of an injunction the principal in the injunction bond cannot be heard to object to the entry of judgment against him on the ground that the only surety on the bond was his son who ought to have been joined as a party to the bill.

33. See cases cited *supra*, notes 31, 32.

When damages are pleaded in reconvention, they may be adjudged against the sureties without their being cited (Smith *v.* Wilson, 18 Tex. Civ. App. 24, 44 S. W. 556), if the proper pleadings and proof are made (Coates *v.* Caldwell, 71 Tex. 19, 8 S. W. 922, 10 Am. Rep. 725); for the sureties are bound to take notice of the answer in the original suit, and of amendments, and cannot escape liability because of failure of notice (Sharp *v.* Schmidt, 62 Tex. 263).

34. Russell *v.* Farley, 105 U. S. 433, 26 L. ed. 1060. See also Howell *v.* Cronan, 31 La. Ann. 247; White *v.* Brown, 10 Lea (Tenn.) 685; Hammonds *v.* Belcher, 10 Tex. 271.

35. Black *v.* Caruthers, 6 Humphr. (Tenn.) 87, holding that if the court of equity fail to act, a court of law is not ousted of its jurisdiction of an action on the bond.

36. Crawford *v.* Pearson, 116 N. C. 718, 21 S. E. 561.

37. Bridges *v.* Wilson, 2 Tex. App. Civ. Cas. § 625, holding that a judgment for costs in the equity court has this effect.

38. Harrison *v.* Casey, 21 N. C. 322.

39. Cumberland Coal, etc., Co. *v.* Hoffman Steam Coal Co., 39 Barb. (N. Y.) 16. See Thomas *v.* Brashear, 4 T. B. Mon. (Ky.) 65.

Defendant not enjoined.— Where an injunction is obtained against one defendant, against whom the suit is successfully prosecuted, another defendant who has not been enjoined cannot have judgment on the bond. Meek *v.* Mathis, 1 Heisk. (Tenn.) 534.

Parties.— Damages should not be assessed in favor of one not a party to the suit. Rice *v.* Goldberg, 26 Ill. App. 603.

A claimant for damages may be estopped by his own conduct, as by disobeying the injunction. Heck *v.* Bulkley, (Tenn. 1886) 1 S. W. 612, holding that where an injunction has been granted against the treasurer of a corporation restraining him from collecting certain royalties or dividends of stock due the corporation, and to prevent such income from being distributed and paid out as dividends among the stock-holders, and the injunction was disregarded and the income received, on dissolution the corporation will not be suffered to recover damages for the deten-

injunction and their obedience thereto have suffered loss,[40] can claim and recover damages.

4. Reference to Ascertain Damages. Damages may be ascertained after a final decision by reference, under some statutory provisions,[41] and the amount so assessed is conclusive upon the parties and sureties; but payment thereof, in some jurisdictions, can be enforced only by action on the bond or undertaking,[42] or, as has been held, by order of court.[43] The procedure on the reference, except as controlled by statute or order of court, is the same as on other like references.[44]

5. Judgment. After fixing costs on the complainant, the court may content itself with an order that no further damages can be recovered against him.[45] A joint judgment against all of a number of creditors who sued out separate injunction writs is erroneous, although all the writs affected the same property.[46]

E. Bond Having Force of Judgment. In some jurisdictions it is provided

tion of the funds in their own treasury; and the treasurer will not be allowed to recover interest on his own dividends as damages for the wrongful suing out of the injunction.

40. Segond *v.* Remy, 3 La. Ann. 126 (holding that to authorize a judgment on the dissolution of an injunction condemning the principal and surety to pay *in solido* the amount of the judgment enjoined, the creditor must prove that he has lost his judgment in consequence of the injunction); Dole *v.* Hickey, 67 N. H. 496, 32 Atl. 761 (holding that inasmuch as the injunction in question was issued to and its only effect was to restrain persons asking damages from committing a trespass, their rights were not infringed by it and they were not entitled to claim reimbursements for expenses in an attempt to procure a dissolution); Coosaw Min. Co. *v.* Carolina Min. Co., 75 Fed. 860.

41. *New York.*— Lawton *v.* Green, 64 N. Y. 326 (but not until judgment has been entered, except where the order is entered by plaintiff's consent); Jacobs *v.* Miller, 11 Hun 441; Waterbury *v.* Bowker, 10 Hun 262; Patterson *v.* Bloomer, 9 Abb. Pr. N. S. 27 [*reversing* 7 Abb. Pr. N. S. 376, 38 How. Pr. 280]. See Park *v.* Musgrave, 6 Hun 223.

South Carolina.— Lewis *v.* Jones, 65 S. C. 157, 43 S. E. 525; Greenville *v.* Mauldin, 64 S. C. 438, 42 S. E. 200; Hill *v.* Thomas, 19 S. C. 230.

Tennessee.— Smith *v.* Ruohs, (Ch. App. 1900) 58 S. W. 1101.

Vermont.— See Sturgis *v.* Knapp, 33 Vt. 486.

Wisconsin.— Parish *v.* Reeve, 63 Wis. 315, 23 N. W. 568.

England.— See Graham *v.* Campbell, 7 Ch. D. 490, 47 L. J. Ch. 593, 38 L. T. Rep. N. S. 195, 26 Wkly. Rep. 336.

Canada.— Gault *v.* Murray, 21 Ont. 458; Hessin *v.* Coppin, 21 Grant Ch. (U. C.) 253; Featherstone *v.* Smith, 20 Grant Ch. (U. C.) 474.

On the dismissal of an injunction on appeal, the injunction bond being conditioned to pay such costs and damages as the court may order, defendant is entitled to a reference to ascertain the damages, for which purpose the cause will be remanded to the chancery court. Ragan *v.* Aiken, 9 Lea (Tenn.) 623.

Discretion of court.— A reference is within the court's discretion to ascertain the amount of the damages, aside from the question as to whether it may enter a decree for damages. West *v.* East Coast Cedar Co., 113 Fed. 742, 51 C. C. A. 416 [*affirming* 110 Fed. 727]. See Coosaw Min. Co. *v.* Farmers' Min. Co., 51 Fed. 107.

The motion for appointment of a referee must be made within the judicial district within which the action was triable. Wilson *v.* Dreyer, 65 N. Y. App. Div. 249, 72 N. Y. Suppl. 578.

If the damage be trifling or remote the court will not direct an inquiry. Smith *v.* Day, 21 Ch. D. 421, 31 Wkly. Rep. 187.

42. Lawton *v.* Green, 64 N. Y. 326; Garcie *v.* Sheldon, 3 Barb. (N. Y.) 232; Randall *v.* Carpenter, 47 N. Y. Super. Ct. 205; Leavitt *v.* Dabney, 2 Sweeny (N. Y.) 613, 9 Abb. Pr. N. S. 373, 40 How. Pr. 277; Harter *v.* Westcott, 11 Misc. (N. Y.) 180, 32 N. Y. Suppl. 111; Higgins *v.* Allen, 6 How. Pr. (N. Y.) 30. *Compare* Sturgis *v.* Knapp, 33 Vt. 486.

The reference fixes the measure of damages on the bond or undertaking but not the final liability thereon, which must be determined by a direct proceeding on the bond. Palmer *v.* Foley, 2 Abb. N. Cas. (N. Y.) 191.

43. Hill *v.* Thomas, 19 S. C. 230.

44. See, generally, Reference.

The reference is in the nature of a suit on the bond and the surety is entitled to appear and resist it. Smith *v.* Ruohs, (Tenn. Ch. App. 1900) 58 S. W. 1101.

If no evidence as to damages is given on a reference to determine damages and other things, it is proper to disallow anything for damages or counsel fees. Packer *v.* Nevin, 67 N. Y. 550.

Failure of the witness to subscribe his testimony is a mere irregularity to be corrected on motion. Roberts *v.* White, 43 N. Y. Super. Ct. 455.

A report de novo may be required of the referee, with the supporting evidence, in case his first report is unsatisfactory. Roberts *v.* White, 43 N. Y. Super. Ct. 455 [*affirmed* in 73 N. Y. 375].

45. Russell *v.* Farley, 105 U. S. 433, 26 L. ed. 1060.

46. Stringfield *v.* Hirsch, 94 Tenn. 425, 29 S. W. 609, 45 Am. St. Rep. 733.

that the bond shall have, upon dissolution of the injunction, the force and effect of a judgment.[47] A judgment follows without an order of the chancellor,[48] but it is not error to enter up judgment.[49] This statutory resulting judgment is a judgment against the surety as well as the principal.[50] Where the injunction is against the collection of a judgment, the bond has the effect of a judgment only where the injunction suit was brought by persons who were parties to the proceedings which resulted in the judgment which was enjoined;[51] where the injunction actually issued;[52] and where the bond substantially complies with the requirements of the statute.[53] If the bond describes a different judgment from that sought to be enjoined, it will not have the force and effect of a judgment.[54] If the execution issued on the bond which misdescribes the judgment sought to be enjoined pursues the judgment, the execution cannot be so amended as to make it conform to the judgment described in the bond, and thus vary from that which it was intended to describe.[55]

F. Actions on Bond — 1. Demand Of, or Proceedings Against, Principal. Neither the issuance of execution,[56] a suit against the principal obligor,[57] nor a demand for payment of the principal debtor[58] or his sureties[59] is a condition precedent to an action on the bond.

2. Leave to Sue. An action on the bond may be brought without an order granting leave to sue.[60]

3. Successive Actions. If the bond is made payable to the state, actions thereon may be prosecuted from time to time for the benefit of the person injured

47. See the statutes of the different states. And see Halsey *v.* Murray, 112 Ala. 185, 20 So. 575; Dubberly *v.* Black, 38 Ala. 193; Wiswell *v.* Munroe, 4 Ala. 9; Dunn *v.* Mobile Bank, 2 Ala. 152.

48. Newsom *v.* Thornton, 61 Ala. 95; Wiswell *v.* Munroe, 4 Ala. 9.

That the register failed to issue a certificate of dissolution for the injunction and file with the clerk of the circuit court does not affect the validity of the statutory judgment against obligors on the bond. Dubberly *v.* Black, 38 Ala. 193; Wiswell *v.* Munroe, 4 Ala. 9.

49. Western *v.* Woods, 1 Tex. 1.

A judgment on a scire facias against the obligor in an injunction bond will not be reversed for error, since the issuance of the writ, by notifying defendant, operated to his benefit, and cannot be complained of by him, and although unnecessary was not erroneous. Boggs *v.* Bandy, 2 Stew. (Ala.) 459.

50. Dubberly *v.* Black, 38 Ala. 193.

When two of their principals are relieved from the judgment by chancellor's decree, the sureties in an injunction bond cannot be subjected to a statutory judgment. The bond in such case does not have the effect of a judgment. Hill *v.* McKenzie, 39 Ala. 314.

Indemnity of surety.— A surety on an injunction bond, having paid the judgment against his principal and himself, which resulted by operation of law from the dissolution of the injunction, may maintain a summary proceeding against his principal, under section 2644 of the code; and under section 2650 the motion may be made in the county of defendant's residence. Dubberly *v.* Black, 38 Ala. 193.

51. Halsey *v.* Murray, 112 Ala. 185, 20 So. 575.

52. Shorter *v.* Mims, 18 Ala. 655. See Western *v.* Woods, 1 Tex. 1.

53. Hanks *v.* Horton, 5 Tex. 103; Janes *v.* Reynolds, 2 Tex. 250.

Awkward phrasing but meaning clear.— A condition in an injunction bond to pay the obligees "all damages they may sustain by the suing out of said injunction, if the same is dissolved, then this obligation to remain in full force and effect," although awkward, will not avoid the bond. Washington *v.* Timberlake, 74 Ala. 259.

54. Wiswell *v.* Munroe, 4 Ala. 9.

55. Shorter *v.* Mims, 18 Ala. 655.

56. Sizer *v.* Anthony, 22 Ark. 465; Harrison *v.* Balfour, 5 Sm. & M. (Miss.) 301; Fogle *v.* Hanlin, Tapp. (Ohio) 231. But see Seymour *v.* King, 11 Ohio 342 (holding that a sheriff's return that he could not find any goods or chattels, lands, or tenements, of the principal debtor, unencumbered by mortgage, is sufficient to authorize suit on an injunction bond); Kent *v.* Bierce, 6 Ohio 336.

57. Dangel *v.* Levy, 1 Ida. 722; Block *v.* Myers, 35 La. Ann. 220.

58. Browner *v.* Davis, 15 Cal. 9.

Solvency of principal no defense.— It is no defense therefore in mitigation of damages or otherwise, in an action against the sureties, that the principal is solvent and able to pay his own debts. Hunt *v.* Burton, 18 Ark. 188.

59. Vicksburg, etc., R. Co. *v.* Barksdale, 15 La. Ann. 465; Rosendorf *v.* Mandel, 18 Nev. 129, 1 Pac. 672.

60. Zeigler *v.* David, 23 Ala. 127; Lothrop *v.* Southworth, 5 Mich. 436. But see Higgins *v.* Allen, 6 How. Pr. (N. Y.) 30.

Vacation of order.— The order granting leave to sue may be rescinded if the equities of the parties were not considered at the time

by the breach thereof, until damages are recovered, in the aggregate, equal to the penalty of the bond.[61]

4. Jurisdiction and Venue. An injunction bond given in a federal court may be sued on in a state court,[62] and an injunction bond given in a state court in one county may be sued on in another county where some of the defendants reside.[63]

5. Defenses — a. Good Faith. It has been held where the bond protects, not from malicious injuries only, but from any injury, that the existence or non-existence of probable cause for the issuing of the injunction is immaterial,[64] and the fact that the obligor proceeded in good faith is no defense to an action on the bond.[65] There are, however, authorities to the contrary.[66]

b. Matter Constituting Defense to Injunction Suit. In an action on an injunction bond, an answer setting up matter which would have been merely a defense to the action for an injunction is insufficient.[67] In other words the dismissal of the bill and the dissolution is conclusive as to the improper issuing of the writ.[68] Want of jurisdiction to grant the injunction is no defense,[69] nor is the fact that the suit in which the injunction issued was not brought against the proper party,[70] or that no such suit was pending as that the prosecution of which was enjoined.[71]

c. Want of Injury. Where defendant in the injunction suit was not, or could not possibly have been, injured, he is precluded from recovering damages on the bond.[72]

of its allowance. Eastin *v.* New York, etc., R. Co., 30 N. J. Eq. 236.

61. State *v.* Hall, 40 W. Va. 455, 21 S. E. 760.

62. Montana Min. Co. *v.* St. Louis Min., etc., Co., 19 Mont. 313, 48 Pac. 305.

63. Wood *v.* Hollander, 84 Tex. 394, 19 S. W. 551. See also Kimbrough *v.* Walker, 27 La. Ann. 566, where the bond was given in one parish, in which the surety resided, the two principals residing in another parish, and it was held that the surety might be sued in the parish in which he resided, but that the principals must be sued at their domicile.

64. Cox *v.* Taylor, 10 B. Mon. (Ky.) 17.

65. Winslow *v.* Mulchey, (Tenn. Ch. App. 1895) 35 S. W. 762. See also Alliance Trust Co. *v.* Stewart, 115 Mo. 236, 21 S. W. 793.

66. Smith *v.* Kuhl, 26 N. J. Eq. 97; Crawford *v.* Pearson, 116 N. C. 718, 21 S. E. 561; Burnett *v.* Nicholson, 79 N. C. 548; Falls *v.* McAfee, 24 N. C. 236; Coosaw Min. Co. *v.* Carolina Min. Co., 75 Fed. 860. See also Stewart *v.* Miller, 1 Mont. 301.

67. Sipe *v.* Holliday, 62 Ind. 4; Nansemond Timber Co. *v.* Rountree, 122 N. C. 45, 29 S. E. 61. But see Macey *v.* Titcombe, 19 Ind. 135, holding that in an action on a bond given in proceedings restraining the performance of a street contract with a city, the regularity of all the proceedings to the making of the contract is open to investigation.

68. *California.*— Dowling *v.* Polack, 18 Cal. 625 [*overruling* Gelston *v.* Whitesides, 3 Cal. 309].

Illinois.— Landis *v.* Wolf, 206 Ill. 392, 69 N. E. 103 [*reversing* 109 Ill. App. 44]; Cummings *v.* Mugge, 94 Ill. 186.

Mississippi.— Yale *v.* Baum, 70 Miss. 225, 11 So. 879.

Nevada.— Bryant *v.* Anderson, 24 Nev. 326, 53 Pac. 497.

Wyoming.— Fullerton *v.* Pool, 9 Wyo. 9, 59 Pac. 431.

United States.— Oelrichs *v.* Williams, 15 Wall. 211, 21 L. ed. 43, holding that sureties on an injunction bond cannot go behind the decree dissolving the injunction to raise a question of illegality as to an agreement on which it is founded.

69. *Alabama.*— Adams *v.* Olive, 57 Ala. 249.

Idaho.— Boise City *v.* Randall, 8 Ida. 119, 66 Pac. 938.

Indiana.— Robertson *v.* Smith, 129 Ind. 422, 28 N. E. 857, 15 L. R. A. 273. *Contra,* Jenkins *v.* Parkhill, 25 Ind. 473.

Kentucky.— Hanna *v.* McKenzie, 5 B. Mon. 314, 43 Am. Dec. 122; Stevenson *v.* Miller, 2 Litt. 306, 13 Am. Dec. 271; Hornback *v.* Swope, 8 Ky. L. Rep. 533.

Michigan.— Kimm *v.* Steketee, 44 Mich. 527, 7 N. W. 237.

New York.— Cumberland Coal, etc., Co. *v.* Hoffman Steam Coal Co., 39 Barb. 16; Loomis *v.* Brown, 16 Barb. 325.

See 27 Cent. Dig. tit. "Injunction," § 566.

70. Boise City *v.* Randall, 8 Ida. 119, 66 Pac. 938.

71. Person *v.* Thornton, 86 Ala. 308, 5 So. 470; Stockton *v.* Turner, 7 J. J. Marsh. (Ky.) 192.

72. *Iowa.*— Monroe Bank *v.* Gifford, 70 Iowa 580, 31 N. W. 881 (holding that where a party enjoined from negotiating a note, in obtaining dissolution, denied any intention to negotiate, such denial precluded a recovery of damages on the bond); Ford *v.* Loomis, 62 Iowa 586, 16 N. W. 193, 17 N. W. 910 (holding that where, by extraordinary efforts, injunction defendant accomplished the object sought to be enjoined before the writ was served, he could not, in an action on the bond, claim that he was delayed by the injunction, and recover damages therefor).

d. Issuance of Another Injunction. It cannot be shown either in bar,[73] or in mitigation of damages,[74] that an injunction was afterward obtained in another suit.

e. Violation of Injunction. The fact that an injunction was violated in part does not prevent a recovery on the bond to the extent that it was observed;[75] but no recovery is proper where there is evidence of frequent sales in violation of an injunction, and practically none of any failure to make sales.[76]

f. Defects in Injunction. The obligees cannot escape liability on the ground that the injunction was ambiguous and should not have been obeyed,[77] or that it was broader in its commands than the order of the court would authorize.[78]

g. Defects in Bond. The law court can look into the proceedings in equity in order to determine the validity of the bond.[79] It is a good defense to an action thereon that the bond was procured by fraud,[80] or that no injunction ever issued.[81] The obligors cannot, however, question the mere form of the bond after obtaining an injunction on the strength of it.[82] Hence the injunction defendant can recover thereon notwithstanding irregularities in the form of the undertaking,[83]

Kentucky.— East Tennessee Tel. Co. *v.* Anderson County Tel. Co., 115 Ky. 488, 74 S. W. 218, 24 Ky. L. Rep. 2358; Bennett *v.* Vandyke, 11 Ky. L. Rep. 953; Watson *v.* Holmes, 8 Ky. L. Rep. 780, holding that where an injunction was dissolved on the ground that it would not lie to prevent a mere trespass, defendant could not recover damages, since he could not be hurt by being restrained from doing a wrong.

Louisiana.— Jamison *v.* Duncan, 12 La. Ann. 785; Thompson *v.* Nicholson, 12 Rob. 326.

Maryland.— Steuart *v.* State, 20 Md. 97.

Pennsylvania.— Kulp *v.* Bowen, 122 Pa. St. 78, 15 Atl. 717, holding that an injunction against waste in ejectment for lands of which defendants are not in possession, and to which they lay no claim, and which are not mislocated in the writ, does not injure defendants; and that they cannot sue on the bond, although the affidavit by mistake alleges that they are committing waste thereon, and although by reason of the injunction they refrain from cutting timber upon another tract to which plaintiffs make no claim. See also Jenkins *v.* Parkhill, 25 Ind. 473.

73. Weaver *v.* Poyer, 73 Ill. 489; Swan *v.* Timmons, 81 Ind. 243; De Camp *v.* Burns, 33 N. Y. App. Div. 517, 53 N. Y. Suppl. 1035.

74. Swan *v.* Timmons, 81 Ind. 243.

75. Colcord *v.* Sylvester, 66 Ill. 540; Wadsworth *v.* O'Donnell, 7 Ky. L. Rep. 837; Van Hoozer *v.* Van Hoozer, 18 Mo. App. 19; Steel *v.* Gordon, 14 Wash. 521, 45 Pac. 151.

76. Steel *v.* Gordon, 14 Wash. 521, 45 Pac. 151.

77. Asevado *v.* Orr, 100 Cal. 293, 34 Pac. 777; Oemler *v.* Goette, 115 Ga. 190, 41 S. E. 716; Bishop *v.* Bascoe, 8 Ohio Dec. (Reprint) 654, 9 Cinc. L. Bul. 111.

78. Sturges *v.* Hart, 45 Ill. 103; Gibson *v.* Reed, 54 Nebr. 309, 75 N. W. 1085.

79. Norris *v.* Cobb, 8 Rich. (S. C.) 58.

80. Guild *v.* Thomas, 54 Ala. 414, 25 Am. Rep. 703; Bray *v.* Poillon, 4 Thomps. & C. (N. Y.) 663, holding that in an action on the bond the sureties may set up fraud in its execution, but cannot do so on a motion to open the assessment of damages. *Compare* Dangel *v.* Levy, 1 Ida. 722; Harman *v.* Howe, 27 Gratt. (Va.) 676.

81. Adams *v.* Olive, 57 Ala. 249; Alaska Imp. Co. *v.* Hirsch, 119 Cal. 249, 47 Pac. 124, 51 Pac. 340; Carter *v.* Mulrein, 82 Cal. 167, 169, 22 Pac. 1086, 16 Am. St. Rep. 99; Byam *v.* Cashman, 78 Cal. 525, 21 Pac. 113; Kiser *v.* Lovett, 106 Ind. 325, 6 N. E. 816; Eakle *v.* Smith, 27 Md. 467. *Compare* Le Strange *v.* State, 58 Md. 26. *Contra*, Mahan *v.* Tydings, 10 B. Mon. (Ky.) 351.

Filing of bond and issuance of writ deemed concurrent.— The filing of an injunction bond and consequent issue of the writ on the same day are regarded as concurrent acts; and a recital in the bond that the obligors "have obtained" such writ, in an action on the bond, will be interpreted in the present tense, and held to refer to the writ actually issued. Wallis *v.* Dilley, 7 Md. 237.

82. Nimocks *v.* Welles, 42 Kan. 39, 21 Pac. 787; Cobb *v.* Curts, 4 Litt. (Ky.) 235; Harman *v.* Howe, 27 Gratt. (Va.) 676.

83. Barnes *v.* Brookman, 107 Ill. 317; Underhill *v.* Spencer, 25 Kan. 71; Alexander *v.* Gish, 88 Ky. 13, 9 S. W. 801, 10 Ky. L. Rep. 989; Vicksburg, etc., R. Co. *v.* Barksdale, 15 La. Ann. 465.

Amount blank.— Where, by a clerical error at the time of signing the bond, it was not filled up with the amount fixed as the penalty, leaving a blank space for its insertion, the law implies that the bond was given for the sum fixed by the order, and the principal and sureties will be bound thereby for that amount. Mason *v.* Fuller, 12 La. Ann. 68. Or the damages may be ascertained by reference or otherwise, as the judge shall direct. North Carolina Gold Amalgamating Co. *v.* North Carolina Ore-Dressing Co., 79 N. C. 48. Where a surety signs an injunction bond in blank, which is afterward properly filled up, his liability attaches from the time of his signature. Eyssallenne *v.* Citizens' Bank, 3 La. Ann. 663.

A misrecital as to the amount of the judgment enjoined may be corrected by the bill, where the injunction bond contains a plain

even where the injunction is dissolved on the ground of insufficient security,[84] and notwithstanding it is unusual in its terms,[85] or is more[86] or less[87] extensive in its terms than the statute or order for the injunction requires. No recovery can be had, however, for breach of such part of the condition as is not provided for by the statute or order.[88]

h. Miscellaneous. Among the facts held not to constitute a defense to an action on an injunction bond, are the following: That the business which was enjoined and for which damages are claimed was a public nuisance;[89] that plaintiffs had offered to give up all claim to the money whose payment to them had been enjoined, the offer having been made by way of compromise;[90] that plaintiff's damages had been paid by the county, which was bound to indemnify him against loss;[91] that plaintiff held title to the property, the sale of which was enjoined, in fraud of the creditors of the true owner;[92] that, until after the dis-

reference to it, on the principle that that is certain which can be made certain. Williamson *v.* Hall, 1 Ohio St. 190. But see Hamner *v.* Cobb, 2 Stew. & P. (Ala.) 383. That a bond is in a larger sum than that prescribed by order of the court is not prejudicial to the sureties in an action thereon, where the damages recovered are for a smaller amount than the penalty in the bond as fixed by the court. Quinn *v.* Baldwin Star Coal Co., 19 Colo. App. 497, 76 Pac. 552. A plaintiff and his sureties in an injunction bond given in a suit to enjoin the collection of a money judgment cannot complain that it was executed for less than the amount of the judgment, instead of being for double that amount, where judgment was rendered against them on dissolution of the injunction for only such amount of the principal debt as was covered by the bond. Miller *v.* Clements, 54 Tex. 351.

Approval of bond.—It is not necessary to the maintenance of an action on an injunction bond that in the proceedings to obtain the injunction the approval of the court or judge should be indorsed on the bond. Griffin *v.* Wallace, 66 Ind. 410. See also Farni *v.* Tesson, 51 Ill. 393.

Immaterial defects as to obligees see Scott *v.* Fowler, 7 Ark. 299; Stockton *v.* Turner, 7 J. J. Marsh. (Ky.) 192; Vicksburg, etc., R. Co. *v.* Barksdale, 15 La. Ann. 465; Pargoud *v.* Morgan, 2 La. 99.

Defects as to obligors.—To maintain an action on an injunction bond it is not essential that the name of the surety should appear in the body of the bond. Griffin *v.* Wallace, 66 Ind. 410. And the officers of a corporation who have sued out an injunction in the name of the corporation, and signed their names to the bond, cannot escape liability because the corporation did not sign the bond. Hawthorne *v.* McArthur, 8 Ky. L. Rep. 526; Safranski *v.* St. Paul, etc., R. Co., 72 Minn. 185, 75 N. W. 17.

Failure to bind obligors to pay costs.—Where a bond does not bind the obligors to pay such costs as may become due, this is not a defect of which the obligors can complain. Gillespie *v.* Thompson, 5 Gratt. (Va.) 132.

Failure to name court granting injunction.—A bond entitled: "State of Indiana, Clinton County. A. v. B.," is not void for failure to state the name of the court by which the injunction was issued. Winship *v.* Clendenning, 24 Ind. 439.

Repugnant expressions will be rejected as void (Connon *v.* Paxson, 1 Blackf. (Ind.) 207), and the bond will be so construed as to give effect to the intention of the parties (Nichol *v.* White, 4 Hayw. (Tenn.) 257).

Necessity for seal see Cox *v.* Vogh, 33 Miss. 187; Yale *v.* Flanders, 4 Wis. 96.

84. Betts *v.* Mougin, 15 La. Ann. 52.

85. Candee *v.* Wilcox, 26 Hun (N. Y.) 666; Black *v.* Caruthers, 6 Humphr. (Tenn.) 87.

86. Wanless *v.* West Chicago St. R. Co., 77 Ill. App. 120; Johnson *v.* Vaughan, 9 B. Mon. (Ky.) 217; Hopkins *v.* Morgan, 7 T. B. Mon. (Ky.) 1; Barrett *v.* Bowers, 87 Me. 185, 32 Atl. 871; Menken *v.* Frank, 57 Miss. 732.

87. Holliday *v.* Myers, 11 W. Va. 276.

88. *Colorado.*—Quinn *v.* Baldwin Star Coal Co., 19 Colo. App. 497, 76 Pac. 552.

Mississippi.—Menken *v.* Frank, 57 Miss. 732.

Missouri.—Rubelman Hardware Co. *v.* Greve, 18 Mo. App. 6.

West Virginia.—Holliday *v.* Meyers, 11 W. Va. 276.

United States.—Hays *v.* Maryland Fidelity, etc., Co., 112 Fed. 872, 50 C. C. A. 569. See 27 Cent. Dig. tit. "Injunction," § 529.

Where there is no statute prescribing the condition the chancellor has discretion as to the form of the bond (Newell *v.* Partee, 10 Humphr. (Tenn.) 325), and a clause inserted in such bond rendering it insensible will be stricken out as surplusage introduced by mistake (Gully *v.* Gully, 8 N. C. 20); but where there was no order of court prescribing the conditions of the bond, and no statutory provision for such a condition as was inserted, the sureties upon the bond incur no liability (Baxter *v.* Washburn, 8 Lea (Tenn.) 1).

89. Cunningham *v.* Breed, 4 Cal. 384.

90. Smith *v.* Atkinson, 78 Colo. 255, 32 Pac. 425.

91. Haley *v.* Breeze, 13 Colo. App. 435, 59 Pac. 212.

92. Slack *v.* Stephens, 18 Colo. App. 538, 76 Pac. 741.

solution of the injunction, no permit had been obtained to erect the building whose erection was enjoined;[93] that execution issued on the judgment enjoined and a forthcoming bond was executed and forfeited;[94] that defendant paid the costs of the original bill;[95] that the injunction was allowed by consent of the parties, where the entry of such consent was conditional on the execution of the injunction bond;[96] that a justice of the peace had no jurisdiction of forcible entry and detainer where the bond was given to prevent the prosecution of a forcible entry and detainer action against plaintiff before a justice, or in any way interfering with his possession;[97] that no order of court had been obtained for the sale of a minor's property, the sale of which by the minor was enjoined;[98] that the injunction plaintiff was misled by defendant's statements into bringing suit, unless it can be shown that defendant instigated or desired the institution of the suit;[99] or that a remedy other than an injunction afforded to a class of which defendant was not a member was inadequate.[1] Where the bond was given to prevent the sale of land under a deed of trust, the *cestui que trust* is the only person who can execute a sufficient release for damages, and a release by a naked trust is no defense.[2] Where an answer sets up a settlement, but the evidence fails to show that the matter in litigation was included therein, or that more than one of several plaintiffs participated or consented, or that any one who acted was empowered to bind them, a verdict for defendants cannot stand.[3] Where an injunction bond is required before the injunction is granted, the obligors on such a bond may show that no injunction issued, although it recites that an injunction was prayed for and obtained.[4]

6. Parties — a. Plaintiffs — (i) *Generally.* At the common law, the rule is that actions upon injunction bonds are required to be prosecuted in the name of the obligee in the bond.[5] In some jurisdictions, however, such a suit may be brought by the real party in interest.[6] Suit on the bond may be maintained by an assignee;[7] but where the injunction defendant has assigned part of his interest in the subject-matter of that suit, but has not assigned the undertaking, the assignee is not considered a necessary party plaintiff to an action on the bond.[8] The action, it has been decided, may be brought by an injunction defendant not named in the bond,[9] by one not served in the injunction suit,[10] or by one of a class

93. Le Strange *v.* State, 58 Md. 26.
94. Harrison *v.* Balfour, 5 Sm. & M. (Miss.) 301.
95. Kent *v.* Bierce, 6 Ohio 336.
96. Bishop *v.* Bascoe, 8 Obio Dec. (Reprint) 423, 7 Cinc. L. Bul. 342.
97. Bishop *v.* Bascoe, 8 Ohio Dec. (Reprint) 423, 7 Cinc. L. Bul. 342.
98. Slack *v.* Stephens, 19 Colo. App. 538, 76 Pac. 741.
99. Schuyler County *v.* Donaldson, 9 Mo. App. 385.
1. Hornback *v.* Swope, 8 Ky. L. Rep. 533.
2. O'Reilly *v.* Miller, 52 Mo. 210.
3. Silcox *v.* Lang, 78 Cal. 118, 20 Pac. 297.
4. Adams *v.* Olive, 57 Ala. 249.
5. Smith *v.* Mutual L. & T. Co., 102 Ala. 282, 14 So. 625; Richardson *v.* Allen, 74 Ga. 719; Spears *v.* Armstrong, (Tenn. Ch. App. 1897) 42 S. W. 37. See also Andrews *v.* Glenville Woolen Co., 50 N. Y. 282.
6. Boise City *v.* Randall, 8 Ida. 119, 66 Pac. 938; Hawthorne *v.* McArthur, 8 Ky. L. Rep. 526 (holding that, since an injunction restraining an agent selected by law from doing a thing is a restraint upon the principal, the process operates by force of law to the restraint of the real party in interest, who is entitled to maintain an action on the bond); Helena *v.* Brule, 15 Mont. 429, 39 Pac. 456, 852.
7. Nimocks *v.* Welles, 42 Kan. 39, 21 Pac. 787 (holding that where the only damages sustained are attorney's fees and the bond has been assigned as payment for the attorney's services, he can maintain an action thereon); Pottier *v.* Grant, 26 La. Ann. 283; Cay *v.* Galliott, 4 Strobh. (S. C.) 282. *Compare* Safford *v.* Miller, 59 Ill. 205, where, in an action on a bond given to two jointly, there was a misjoinder of counts by assigning breaches for damages resulting to both plaintiffs, one for damages sustained by one plaintiff, and another for damages sustained by the other, in which the co-plaintiff had no interest, and it was held that a judgment giving entire damages on all the counts cannot be sustained because the action was brought in the name of both obligees for the use of one, as the bond was not assignable at law, and the court could pay no regard to an equitable assignment.
8. Smith *v.* Atkinson, 18 Colo. 255, 32 Pac. 425.
9. Rice *v.* Smith, 9 Iowa 570.
10. Lally *v.* Wise, 28 Cal. 539; Dry Dock,

enjoined;[11] but one who is not a defendant is not named in the undertaking, and does not belong to a class who ought to have been made defendants, cannot maintain an action on the bond.[12] One whose title to land, the enjoyment of which has been enjoined, is merely possessory, has a sufficient interest to enable him to maintain an action on the bond.[13] Where the bond runs to certain persons as officials, they cannot maintain an action thereon as individuals.[14]

(II) *JOINDER.* Suit may be brought in the name of the obligee without joining the person or persons for whose benefit the suit is prosecuted.[15] The obligees of a joint bond may sue jointly, although their damages are several,[16] or they may sue severally unless the damages are joint.[17] Although the bond is in terms executed to but one of defendants, all may unite in an action thereon.[18]

b. Defendants. Ordinarily all the obligors on the bond should be joined in defendants;[19] but where, although the injunction proceedings are begun in the name of the state as plaintiff, the relator is the real complainant, suit may be maintained against him and the sureties on the bond, without making the state a co-defendant.[20]

7. PLEADING[21] — a. Complaint, Declaration, or Petition. Where suit is brought on an injunction bond or undertaking, it is essential that plaintiff should disclose his right to maintain the action,[22] and allege the fulfilment of any statutory

etc., R. Co. *v.* Cunningham, 45 How. Pr. (N. Y.) 458.

11. Alexander *v.* Gish, 88 Ky. 13, 9 S. W. 801, 10 Ky. L. Rep. 989.

12. Dunham *v.* Seiberling, 12 Ind. App. 210, 39 N. E. 1044. See also Hays *v.* Fidelity, etc., Co., 112 Fed. 872, 50 C. C. A. 569.

13. Winship *v.* Clendenning, 24 Ind. 439.

14. Kinkead *v.* Benton, 19 Nev. 437, 14 Pac. 294. *Compare* Breeze *v.* Haley, 13 Colo. App. 438, 59 Pac. 333, where it was held that a county treasurer, who, upon the filing of a bond conditioned to pay all costs and damages, had been enjoined from collecting taxes, was entitled, after the expiration of his term of office, to recover costs and damages incurred by him in the defense of the injunction suit.

15. Breeze *v.* Haley, 13 Colo. App. 438, 59 Pac. 333; Gyger *v.* Courtney, 59 Nebr. 555, 81 N. W. 437.

16. Watts *v.* Sanders, 10 B. Mon. (Ky.) 372; Montana Min. Co. *v.* St. Louis Min., etc., Co., 19 Mont. 313, 48 Pac. 305; Lillie *v.* Lillie, 55 Vt. 470; Peerce *v.* Athey, 4 W. Va. 22.

17. *California.*— Fowler *v.* Frisbie, 37 Cal. 34; Lally *v.* Wise, 28 Cal. 539; Browner *v.* Davis, 15 Cal. 9, holding, where the complaint showed these facts, that where a bond is given to several obligees, the obligee who is the sole owner of the property and the only party injured may sue alone upon the bond.

Illinois.— Safford *v.* Miller, 59 Ill. 205. *Compare* Rees *v.* Peltzer, 1 Ill. App. 315, where, under the provisions of a peculiar bond, it was held that no damages could be recovered, save such as were sustained by all the obligees.

Louisiana.— Corner *v.* Zuntz, 14 La. Ann. 861.

Missouri.— Helmkampf *v.* Wood, 85 Mo. App. 227.

New York.— New York Fourth Nat. Bank *v.* Scott, 31 Hun 301.

Oregon.— Ruble *v.* Coyote Gold, etc., Min. Co., 10 Oreg. 39.

Vermont.— Sturgis *v.* Knapp, 33 Vt. 486. See 27 Cent. Dig. tit. "Injunction," § 573.

Compare Montana Min. Co. *v.* St. Louis Min., etc., Co., 19 Mont. 313, 48 Pac. 305.

18. Boden *v.* Dill, 58 Ind. 273.

19. Wallis *v.* Dilley, 7 Md. 237, holding that the fact that one of the number has become insolvent, and that a permanent trustee in insolvency has been appointed for his estate, is no ground for objection to joining him.

Where service cannot be had on the principal, a judgment may be taken against the surety alone. Gyger *v.* Courtney, 59 Nebr. 555, 81 N. W. 437.

20. Wason *v.* Frank, 7 Colo. App. 541, 44 Pac. 378.

21. See, generally, PLEADING.

22. Sherman *v.* Logan County, 9 Colo. App. 154, 47 Pac. 973; State *v.* Hall, 40 W. Va. 455, 21 S. E. 760.

Nature and extent of plaintiff's right.— A petition alleging that plaintiff had a right to remove a building and suffered damage by reason of being enjoined from so doing is sufficient to entitle him to the damages sustained by reason of the wrongful issuance of the injunction, it being unnecessary to allege the nature and extent of plaintiff's right in the building. Williams *v.* Ballinger, 125 Iowa 410, 101 N. W. 139.

Legality of contract enjoined.— When the action was brought on a bond given on enjoining the carrying out of a contract between the individual defendant and the city of Indianapolis, it was held that plaintiff should show that the contract was a legal one. Macey *v.* Titcombe, 19 Ind. 135.

Right of part to sue for all.— Where plaintiffs allege the granting of an injunction against the funding and payment of county

conditions.[23] It should of course appear that an injunction issued and was served, although an express allegation to that effect is unnecessary where facts are alleged which of necessity imply such issuance and service.[24] Plaintiff need not, however, allege that the judge had authority to grant the injunction,[25] that any petition for the injunction was ever presented to the judge by the injunction plaintiffs in the suit in which the same is alleged to have been granted,[26] that any cause was shown for granting the same,[27] or that the injunction was granted in vacation, where the date on which it was granted is stated.[28] Nor need he set out specifically any part of the record of the suit in which the injunction on which the bond is given was granted,[29] nor file the same with the complaint,[30] nor allege the validity of the judgments whose collection was enjoined.[31] Plaintiff need not allege the existence of an order of the court of equity authorizing a withdrawal of the bond and permitting suit to be brought upon it.[32] The bond declared on must be described with such precision, certainty, and clearness as fully to apprise defendants of the cause of action which they are required to answer;[33] and when the action is brought against plaintiff in the injunction suit it must be alleged that he was a party to the bond.[34] Plaintiff should allege a final determination of the injunction suit,[35]

bonds, execution of the bond and final judgment dissolving the order, and that, by reason thereof, plaintiffs and those whom they represent have been damaged, it sufficiently shows that they have a right to sue for all the bondholders. Alexander *v.* Gish, 88 Ky. 13, 9 S. W. 801, 9 Ky. L. Rep. 989.

Where suit must be brought in the name of the state, the name of the real party in interest must be disclosed. Le Strange *v.* State, 58 Md. 26.

23. Hillyer *v.* Richards, 13 Ohio 135.

Value of property whose sale enjoined.— When the statute provides, in case of the dissolution of an injunction staying a sale under a deed of trust, for the recovery of five per cent damages on the amount of the debt, except where the value of the property is less than the debt, in which event the damages shall be computed on the value of the property, if the action be to recover the five per cent penalty on the amount of the debt the complaint must allege that the value of the property was not less than the amount of the debt. Barber *v.* Levy, 73 Miss. 484, 18 So. 797.

24. Merrifield *v.* Weston, 68 Ind. 70. See also Lambert *v.* Haskell, 80 Cal. 611, 22 Pac. 327; Loomis *v.* Brown, 16 Barb. (N. Y.) 325.

An allegation that the principal in the bond "obtained an injunction" from a circuit judge involves the assertion that an injunction issued. Dubberly *v.* Black, 38 Ala. 193.

Variance.— Where the original writ was lost and its contents were proved by secondary evidence, it was held that there was no variance between allegations that the writ was an absolute injunction against conveying or leasing, and proof of an injunction against conveying or leasing "to the injury of your orator," which was sworn to have been in accordance with the prayer of the bill, which was an injunction against "conveying, leasing, incumbering or interfering with said premises to the injury of your orator in any way or manner whatsoever." Sturges *v.* Hart, 45 Ill. 103.

25. Merrifield *v.* Weston, 68 Ind. 70.

26. Merrifield *v.* Weston, 68 Ind. 70.

27. Merrifield *v.* Weston, 68 Ind. 70.

28. Merrifield *v.* Weston, 68 Ind. 70.

29. Merrifield *v.* Weston, 68 Ind. 70.

Affords no foundation for oyer.— The fiat for an injunction is part of the record of the suit for injunction, and hence does not form a proper foundation for defendant's claim of oyer in an action on the bond. Adams *v.* Olive, 57 Ala. 249.

30. Winship *v.* Clendenning, 24 Ind. 439.

A variance between the record and the complaint, when such a copy is filed, is immaterial. Cress *v.* Hook, 73 Ind. 177; Arthur *v.* Crenshaw, 4 Leigh (Va.) 394. See also McAllister *v.* Clark, 86 Ill. 236.

31. Midland R. Co. *v.* Stevenson, 6 Ind. App. 207, 702, 33 N. E. 254, 256.

A substantial description of the judgments so as to identify them being sufficient, a variance in the recital as to the amount of costs recovered is immaterial. Hunt *v.* Burton, 18 Ark. 188. *Compare* Hall *v.* Williamson, 9 Ohio St. 17.

32. Falls *v.* McAffee, 23 N. C. 139.

33. Tallahassee R. Co. *v.* Hayward, 4 Fla. 411. And see Lambert *v.* Haskell, 80 Cal. 611, 22 Pac. 327; Carson *v.* Pearl, 4 J. J. Marsh. (Ky.) 92.

34. Asevado *v.* Orr, 100 Cal. 293, 34 Pac. 777.

35. Midland R. Co. *v.* Stevenson, 6 Ind. App. 207, 254, 33 N. E. 254, 256; Welch *v.* Benham, 8 Ohio S. & C. Pl. Dec. 70, 6 Ohio N. P. 33; Reddick *v.* Webb, 6 Okla. 392, 50 Pac. 363.

Sufficient averment.— A complaint on an injunction bond, alleging that the court finally decided the injunction suit and dismissed it, states a cause of action, at least as against an objection made for the first time on the trial. Cuptill *v.* Red Wing, 76 Minn. 129, 78 N. W. 970.

Want of allegation not cured by answer.— Where the petition is defective for failure to allege a final determination of the injunction suit, it is not cured by an allegation in the

and should show that the injunction was wrongfully issued,[36] although an express averment to that effect is unnecessary if facts are pleaded which show it to be a fact.[37] Plaintiff must also clearly assign a breach of the conditions of the bond or undertaking,[38] but it is sufficient to set forth such facts as constitute a breach.[39] Unless damages have been awarded by the decree dissolving the injunction,[40] or otherwise, plaintiff must specify the particular injuries sustained with such clearness that they may be understood by defendants.[41] He must also aver facts showing how the issuance of the injunction caused the particular damages set out.[42] In order to recover special damages, they must of course be alleged.[43]

answer that it was terminated, and judgment given for the injunction plaintiff, because that does not show that it had been determined at the inception of the action on the bond, or that the dissolution of the interlocutory injunction on which the petition declared was incorporated into the final decree. Welch *v.* Benham, 8 Ohio S. & C. Pl. Dec. 70, 6 Ohio N. P. 33.

36. Gray *v.* Bremer, 122 Iowa 110, 97 N. W. 991 (where it was held that a demurrer to the petition was properly sustained, plaintiff having made all the pleadings, record entries, and proceedings in the injunction suit a part of his petition, and these conclusively showing that the injunction was rightfully issued); Olds *v.* Cary, 13 Oreg. 362, 10 Pac. 786 (holding that it is not enough to aver that the injunction was dissolved by the court). But see Newell *v.* Partee, 10 Humphr. (Tenn.) 325.

37. Williams *v.* Ballinger, 125 Iowa 410, 101 N. W. 139.

Sufficient allegation.— Allegations that an injunction was dissolved, that it enabled defendant to move his property out of plaintiff's reach, and that the sureties had not complied with their engagement, are equivalent to an allegation that the writ illegally issued and caused damage. Florance *v.* Nixon, 3 La. 289.

38. *Alabama.*— Dunn *v.* Davis, 37 Ala. 95; Ansly *v.* Mock, 8 Ala. 444.

Arkansas.— Blakeney *v.* Ferguson, 18 Ark. 347.

California.— Curtiss *v.* Bachman, (1895) 40 Pac. 801, 84 Cal. 216, 24 Pac. 379; Tarpey *v.* Shillenberger, 10 Cal. 390.

Indiana.— Boden *v.* Dill, 58 Ind. 273.

Kentucky.— Riggan *v.* Crain, 86 Ky. 249, 5 S. W. 561, 9 Ky. L. Rep. 528.

Mississippi.— Anderson *v.* Falconer, 34 Miss. 257.

Montana.— Van Horn *v.* Holt, 30 Mont. 69, 75 Pac. 680.

Nebraska.— Smith *v.* Gregg, 9 Nebr. 212, 2 N. W. 459.

New York.— See Loomis *v.* Brown, 16 Barb. 325.

Tennessee.— McCombs *v.* Hall, 4 Yerg. 455.

See 27 Cent. Dig. tit. "Injunction," §§ 574, 575.

39. Tallahassee R. Co. *v.* Hayward, 4 Fla. 411.

Sufficiency of facts to show breach see Riggan *v.* Crain, 86 Ky. 249, 5 S. W. 561, 9 Ky. L. Rep. 528; Le Strange *v.* State, 58 Md. 26; Burgess *v.* Lloyd, 7 Md. 178; Rosendorf *v.* Mandel, 18 Nev. 129, 1 Pac. 672.

40. State *v.* Purcell, 31 W. Va. 44, 5 S. E. 301.

41. Meaux *v.* Pittman, 35 La. Ann. 360; Warren *v.* Foust, 36 Tex. Civ. App. 59, 81 S. W. 323; State *v.* Purcell, 31 W. Va. 44, 5 S. E. 301. See, however, Tallahassee R. Co. *v.* Hayward, 4 Fla. 411.

Proof of allegations as to damage see Brandamour *v.* Trant, 45 Ill. 372; Sturges *v.* Hart, 45 Ill. 103; Hildrup *v.* Brentano, 16 Ill. App. 443; Rohwer *v.* Chadwick, 7 Utah 385, 26 Pac. 1116.

42. Pipher *v.* Bissonet, (Tex. Civ. App. 1896) 36 S. W. 770.

Variance.— Where plaintiff alleged that the principal obligors became insolvent before the injunction was dissolved, while defendants claimed that it was subsequent thereto that they became insolvent or that their insolvency became known, the question whether the damages sued for were the result of a failure occurring before the dissolution of the injunction, or so shortly thereafter that plaintiffs could not make their debt, was immaterial, and there was no material variance between the pleadings and the proof. Jones *v.* Allen, 85 Fed. 523, 29 C. C. A. 318.

Defective statement cured by verdict.— Where the act enjoined was the sale or collection of a note and plaintiff alleged as damage the loss of an opportunity to sell the note to "divers responsible parties" who had offered to purchase it, the failure to name such persons is cured by verdict. Shreffler *v.* Nadelhoffer, 133 Ill. 536, 25 N. E. 630, 23 Am. St. Rep. 626.

43. Parker *v.* Bond, 5 Mont. 1, 1 Pac. 209; Miller *v.* Montague, 1 Disn. (Ohio) 164, 12 Ohio Dec. (Reprint) 551.

Attorney's fees for procuring the dissolution of the injunction cannot be recovered unless claimed as special damages in the complaint. Washington *v.* Timberlake, 74 Ala. 259. And plaintiff must show that there was occasion for his employing a lawyer and incurring expenses. Hibbs *v.* Western Land Co., 81 Iowa 285, 46 N. W. 1119.

Allegation as to costs and expenses in procuring dissolution see Williams *v.* Ballinger, 125 Iowa 410, 101 N. W. 139.

Variance.— Where plaintiff alleged that when the injunction issued, restraining him from selling corporate stock, it had a certain value, and that a sale was prevented by the writ, and that at and after the dissolution

b. Answer or Plea. Affirmative defenses must be pleaded, in order to be available.[44] As a bar defendant may deny the dissolution of the injunction;[45] but he cannot deny that the injunction was granted,[46] or allege that there was no injunction in existence when the bond was acknowledged,[47] or that the court granting the injunction was without jurisdiction.[48] The motive in suing out the injunction cannot be pleaded in bar,[49] nor can a settlement of all matters in controversy in the injunction suit.[50] An answer setting up that defendants did not cause the bond to be filed is bad, since it is immaterial whether they or someone else caused it to be filed.[51] Where plaintiff alleges that he lost his debt by reason of the injunction, a plea that defendant was insolvent at the time is a good answer;[52] but a plea that if the injunction defendant was damaged it was by reason of his own wrong is bad, since the question of whether the injunction was wrongfully sued out is then *res judicata*.[53] A plea alleging merely the want of consideration is bad.[54] A plea that defendant has performed the conditions of a bond payable on dissolution of the injunction amounts to an admission that the injunction has been dissolved, since until that time there can be no conditions to perform.[55] A verified answer denying execution of the bond requires plaintiff to prove its execution.[56]

c. Replication or Reply. The replication must be responsive to the plea,[57] and not depart from the material allegations of the complaint.[58]

8. Evidence — a. Burden of Proof and Presumptions.[59] As in other civil actions, the burden of proving a right of recovery is on plaintiff;[60] but he

of the injunction the stock had become and continued valueless, evidence is warranted that he had a purchaser who could and would have bought, such proof not being of special damage. Slack *v.* Stephens, 19 Colo. App. 538, 76 Pac. 741.

44. See, generally, Pleading.

Misrepresentations in procuring the signatures to the bond must be specially pleaded. Foley *v.* Schiedemantel, 17 N. Y. Suppl. 663.

Pendency of injunction suit.— Where the petition on an injunction bond does not disclose the fact that the injunction suit is still pending, defendants must plead the same in order to take advantage thereof. Lacey *v.* Davis, (Iowa 1904) 98 N. W. 366.

Sufficiency of plea of pendency see Alaska Imp. Co. *v.* Hirsch, 119 Cal. 249, 47 Pac. 124, 51 Pac. 340; Cohn *v.* Lehman, 93 Mo. 574, 6 S. W. 267.

45. Cates *v.* Wooldridge, 1 J. J. Marsh. (Ky.) 267. See also De Forest *v.* Baker, 1 Abb. Pr. N. S. (N. Y.) 34.

Pendency of subsequent injunction.— A plea that since the dissolution of the injunction another injunction has been obtained constitutes no bar, since defendant's liability depends on the dissolution of the injunction mentioned in the bond, and not on the dissolution of any other injunction which might be subsequently obtained. Cates *v.* Woolridge, 1 J. J. Marsh. (Ky.) 267.

46. Allen *v.* Luckett, 3 J. J. Marsh. (Ky.) 164.

47. Allen *v.* Luckett, 3 J. J. Marsh. (Ky.) 164.

48. Hanna *v.* McKenzie, 5 B. Mon. (Ky.) 314, 43 Am. Dec. 122.

49. Sturges *v.* Hart, 45 Ill. 103.

50. Silcox *v.* Lang, 78 Cal. 118, 20 Pac. 297.

51. Lambert *v.* Haskell, 80 Cal. 611, 22 Pac. 327.

52. Keel *v.* Ogden, 3 Dana (Ky.) 103. *Compare* Shreffler *v.* Nadelhoffer, 133 Ill. 536, 25 N. E. 630, 23 Am. St. Rep. 626 [*affirming* 34 Ill. App. 252].

53. State *v.* Corvin, 51 W. Va. 19, 41 S. E. 211, holding that the plea *non damnificatus* is only proper when the condition of the bond declared on is to indemnify and save harmless, and cannot be filed in an action on an injunction bond, for the condition of the bond is to pay costs and damages, which is an affirmative act.

54. Mahan *v.* Tydings, 10 B. Mon. (Ky.) 351.

55. Harrison *v.* Park, 1 J. J. Marsh. (Ky.) 170.

56. Jones *v.* Ross, 48 Kan. 474, 29 Pac. 680.

57. Fullerton *v.* Pool, 9 Wyo. 9, 59 Pac. 431, 87 Am. St. Rep. 971.

A plea that no cause of action had accrued at the time suit was commenced is not met by a replication alleging that, at a day subsequent to the commencement of the suit, a decree of the circuit court dissolving the injunction was affirmed. Scott *v.* Fowler, 14 Ark. 427.

58. Gildart *v.* Howell, 1 How. (Miss.) 198.

59. See Evidence, 16 Cyc. 926 *et seq.*

60. Jenkins *v.* Parkhill, 25 Ind. 473; Towle *v.* Leacox, 59 Iowa 42, 12 N. W. 764; Dwight *v.* Northern Indiana R. Co., 54 Barb. (N. Y.) 271; Tyler *v.* Ryan, 5 Ohio Dec. (Reprint) 336, 4 Am. L. Rec. 670.

The burden of proving the quantum of damages is upon plaintiff. Dwight *v.* Northern Indiana R. Co., 54 Barb. (N. Y.) 271; Hyman *v.* Devereaux, 65 N. C. 588.

makes out a *prima facie* case by establishing the dissolution of the temporary injunction, and the dismissal of the original suit, and the burden is then on defendant to show that the injunction was rightfully issued.[61] Defendant has the burden of proving the performance of the conditions of the bond.[62] In the absence of evidence to the contrary, it will be presumed that delivery of the bond was unconditional;[63] and where the law authorizes an injunction only upon bond for debt and costs it will be presumed that the bond was executed for the debt and costs,[64] but a plea of *non est factum* casts on plaintiff the *onus probandi* as in other cases.[65] It will also be presumed that the petition for injunction contained the necessary allegations to entitle the injunction plaintiff to the writ,[66] and that delay in the prosecution of the equity cause arose because all the parties were willing that the hearing should be postponed.[67]

b. Admissibility and Sufficiency.[68] In a suit on an injunction bond, the record of the suit in which the injunction was issued is admissible.[69] Where the execution of the bond is admitted by the pleadings, it is properly admitted in evidence, although slightly defective in form,[70] and a surety cannot object to its admissibility on the ground that it does not appear that the order for the injunction required a bond to be given, since he is estopped by the recitals of the bond.[71] A recital therein that plaintiff had obtained an order for an injunction is not evidence of the issuing of the injunction,[72] and it may be shown *aliunde* that the bond erroneously recites the name of the nominal defendant in the suit sought to be restrained, and that there was a suit pending in which the person so recited as defendant was the real party in interest, although others were the nominal defendants.[73] On the question of damages plaintiff may introduce evidence to prove the payment of fees to counsel for defending the chancery suit in which such bond was given, and any costs paid by him during the progress of such suit,[74] or to show the increase or decrease in the value of the property during the existence of the injunction.[75] So evidence that the damages claimed did not result from

61. Williams *v.* Ballinger, 125 Iowa 410, 101 N. W. 139; Findlay *v.* Carson, 97 Iowa 537, 66 N. W. 759.

62. Burgess *v.* Lloyd, 7 Md. 178.

63. Gyger *v.* Courtney, 59 Nebr. 555, 81 N. W. 437.

64. Hicks *v.* Haywood, 4 Heisk. (Tenn.) 598.

65. Robards *v.* Wolfe, 1 Dana (Ky.) 155; Burgess *v.* Lloyd, 7 Md. 178, holding that plaintiff must prove the court's approval of the bond.

66. Monroe Bank *v.* Gifford, 70 Iowa 580, 31 N. W. 881.

67. Jones *v.* Allen, 85 Fed. 523, 29 C. C. A. 318.

68. See, generally, EVIDENCE.

69. Garrett *v.* Logan, 19 Ala. 344; Ansley *v.* Mock, 8 Ala. 444; Banks *v.* State, 62 Md. 88; Le Strange *v.* State, 58 Md. 26.

The whole record need not be produced, and a breach of the bond may be shown by an attested copy of the decree dissolving the injunction, there being no conflict between the decree and the bond; and the identity of the injunction dissolved with the one referred to in the bond may be established by the testimony of the clerk that the bond was filed with the papers in the case. Northwestern Bank *v.* Fleshman, 22 W. Va. 317. But where the bond was conditioned to pay all moneys due on a judgment which the bond undertook to describe, the original petition for the injunction, which did not contain a description of the judgment, was not admissible in evidence. Hall *v.* Williamson, 9 Ohio St. 17.

70. Winship *v.* Clendenning, 24 Ind. 430, where it was not entitled in any court.

71. Hamilton *v.* State, 32 Md. 348.

72. Dubberly *v.* Black, 38 Ala. 193.

73. Person *v.* Thornton, 86 Ala. 308, 5 So. 470.

74. Baggett *v.* Beard, 43 Miss. 120.

In the absence of proof of actual payment, in addition to proof of what such services were worth, it should at least be shown that the solicitors were retained upon a *quantum meruit*. Steele *v.* Thatcher, 56 Ill. 257.

A certified bill of costs in an injunction suit which was assigned to respondent therein, against whom they were taxed, by the parties in whose favor they were taxed, is admissible in estimating damages against the sureties on the injunction bond, if no objection was made on the trial that such costs were not regularly taxed. Nolan *v.* Johns, 126 Mo. 159, 28 S. W. 492.

75. Quinn *v.* Baldwin Star Coal Co., 19 Colo. App. 497, 76 Pac. 552; Langworthy *v.* McKelvey, 25 Iowa 48.

Injury to cattle.— The effect of exposure on cows may be shown where plaintiff was enjoined from erecting a stable for their shelter, this being an element of damage. Lange *v.* Wagner, 52 Md. 310, 36 Am. Rep. 380.

the injunction,[76] or were excessive,[77] or that their assessment was procured by fraud,[78] is admissible. Where execution is enjoined the creditor may show, in an action against the surety on the injunction bond, that the property was appraised below its real value.[79] Of course evidence is inadmissible which bears on no issue in the case,[80] and the same is true of evidence as to matters which were involved in and concluded by the injunction suit.[81]

G. Damages[82] — **1. In General.** Plaintiff can recover only such proximate damages as he can establish with reasonable certainty.[83] He cannot recover for damages caused by his voluntary act or his omission to act when he should do so.[84] Where a receiver of defendant's property is appointed at the same time the injunction is granted, damages arising from the receiver's misconduct and negligence are not recoverable.[85]

2. Nominal Damages. It has been held that nominal damages cannot be recovered, where there is no evidence of actual damages sustained,[86] but the

76. Creek *v.* McManus, 17 Mont. 445, 43 Pac. 497.

77. Cage *v.* Iler, 5 Sm. & M. (Miss.) 410, 43 Am. Dec. 521.

78. Jordan *v.* Volkenning, 72 N. Y. 300.

79. Elliot *v.* Cox, 5 Mart. N. S. (La.) 285.

80. McIntosh *v.* Coulthard, (Iowa 1902) 88 N. W. 1069.

81. Hopkins *v.* State, 53 Md. 502; Lange *v.* Wagner, 52 Md. 310, 36 Am. Rep. 380 (where plaintiff was enjoined from erecting a stable and it was held that evidence for the purpose of proving that the stable was built in part on land belonging to defendant was not competent); Smith *v.* Wells, 46 Miss. 64 (holding that the decree of dissolution is conclusive as to the propriety of suing out the injunction, and that evidence to show that it was not properly dissolved is inadmissible); Fullerton *v.* Pool, 9 Wyo. 9, 59 Pac. 431, 78 Am. St. Rep. 971.

82. See, generally, Damages.

83. *California.*— San José Fruit Packing Co. *v.* Cutting, 133 Cal. 237, 65 Pac. 565.

Kansas.— Rhodes *v.* Auld, 5 Kan. App. 225, 47 Pac. 170.

Kentucky.— Hawthorne *v.* McArthur, 8 Ky. L. Rep. 526.

Missouri.— Alliance Trust Co. *v.* Stewart, 115 Mo. 236, 21 S. W. 793.

Nevada.— Brown *v.* Jones, 5 Nev. 374, holding that where plaintiff had been restrained from cutting and drawing wood, neither the loss occasioned by reason of his cattle and wagon being thrown out of employment, the expense of making a road, which had become useless, nor injury to his credit, could be taken into consideration.

Ohio.— Bishop *v.* Bascoe, 8 Ohio Dec. (Reprint) 423, 7 Cinc. L. Bul. 343.

Tennessee.— South Penn Oil Co. *v.* Stone, (Ch. App. 1900) 57 S. W. 374.

Texas.— Wood *v.* Hollander, 84 Tex. 394, 19 S. W. 551.

And see *infra*, IX, G, 6.

Only such damages will be allowed as are the natural consequence of the injunction under all the circumstances, of which the complainant had notice at the time of his application for the injunction. Smith *v.* Day, 21 Ch. D. 421, 31 Wkly. Rep. 187.

84. Gadsden *v.* Georgetown Bank, 5 Rich. (S. C.) 336; Bancroft *v.* Russell, 3 Tex. Civ. App. 95, 22 S. W. 240; Lillie *v.* Lillie, 55 Vt. 470, holding plaintiffs, who had been enjoined from cutting any wood except such as did not continue waste, but forbore cutting for fear of violating the order, were not entitled to damages for refraining from cutting wood or timber, unless such cutting would constitute waste.

Duty to decrease damages.— Defendant should do nothing to enhance the damages, and it is his duty to do all that he reasonably can to diminish them; but he is not bound to incur any hazard or assume unusual risks, and if he adopts such a course as experienced and prudent persons under similar circumstances would regard proper, he is not responsible if another course might have been adopted which would have been equally safe and proper, and which would have reduced the damages. Roberts *v.* White, 73 N. Y. 375. See also Behrens *v.* McKenzie, 23 Iowa 333, 92 Am. Dec. 428.

Laches of injunction defendant.— Courts proceed upon equitable grounds; and losses in estimating damages caused by injunctions, sustained by delays and laches on the part of defendant should be borne by him. Edmison *v.* Sioux Falls Water Co., 9 S. D. 440, 73 N. W. 910. The injunction defendant was not chargeable with want of diligence in failing to press his action to judgment pending an appeal in the injunction suit where the court announced that it would take no steps in the action at law pending the appeal in an injunction suit. Allen *v.* Jones, 79 Fed. 698.

85. Kerngood *v.* Gusdorf, 5 Mackey (D. C.) 161; Hotchkiss *v.* Platt, 8 Hun (N. Y.) 46; Wood *v.* Hollander, 84 Tex. 394, 19 S. W. 551. But see Terrell *v.* Ingersoll, 10 Lea (Tenn.) 77.

After a receiver has settled his accounts and been discharged, without objection, plaintiff cannot recover as an item of damage any alleged loss by reason of such receiver's mismanagement, for which, if established, the receiver might have been held responsible before his discharge. Lehman *v.* McQuown, 31 Fed. 138.

86. Bustamente *v.* Stewart, 55 Cal. 115;

weight of authority is that nominal damages are recoverable without any showing of actual damage.[87]

3. Punitive Damages. Punitive damages may be recovered where the suing out of the writ amounts to an abuse of process,[88] or where it was obtained maliciously.[89]

4. Time When Damages Accrued. Damages sustained after the issuance of the injunction but before the giving of the bond may be recovered if within the terms of the bond.[90] So a second bond may be broad enough to cover all damages under both bonds.[91] And damages incurred pending an appeal from an order dissolving the injunction may be recovered where the injunction continues in force during such time.[92] Damages accruing after the preliminary injunction is made permanent cannot be recovered, although the decree should be afterward reversed and the action dismissed, because the order for a preliminary injunction is merged by a decree for a perpetual injunction.[93]

5. Damages as Limited by Scope of Bond. Where a bond is given only such damages are recoverable as are clearly embraced within the terms of the injunction bond.[94] Ordinarily the liability does not extend to the amount of a judgment which is enjoined unless expressly provided for in the bond.[95]

Taylor Worsted Co. *v.* Beolchi, 37 Misc. (N. Y.) 691, 76 N. Y. Suppl. 379; Foster *v.* Stafford Nat. Bank, 58 Vt. 658, 5 Atl. 890.

87. *Alabama.*— Rosser *v.* Timberlake, 78 Ala. 162.

Colorado.— Mack *v.* Jackson, 9 Colo. 536, 13 Pac. 542.

Illinois.— Mix *v.* Singleton, 86 Ill. 194.

Iowa.— See Boardman *v.* Willard, 73 Iowa 20, 34 N. W. 487.

Ohio.— Dwelle *v.* Wilson, 14 Ohio Cir. Ct. 551, 7 Ohio Cir. Dec. 611.

Oregon.— Stone *v.* Cason, 1 Oreg. 100.

Tennessee.— Boyd *v.* Knox, (Ch. App. 1899) 53 S. W. 972.

Utah.— Rohwer *v.* Chadwick, 7 Utah 385, 26 Pac. 1116.

See 27 Cent. Dig. tit. "Injunction," § 587.

88. Pendleton *v.* Eaton, 23 La. Ann. 435; South Penn Oil Co. *v.* Stone, (Tenn. Ch. App. 1900) 57 S. W. 374.

89. Bishop *v.* Bascoe, 8 Ohio Dec. (Reprint) 423, 7 Cinc. L. Bul. 342; Terry *v.* Robbins, 122 Fed. 725. *Contra,* Chicago Title, etc., Co. *v.* Chicago, 110 Ill. App. 395 [*affirmed* in 209 Ill. 172, 70 N. E. 572].

90. Alaska Imp. Co. *v.* Hirsch, 119 Cal. 249, 47 Pac. 124, 51 Pac. 340; Dodge *v.* Cohen, 14 App. Cas. (D. C.) 582; Meyers *v.* Block, 120 U. S. 206, 7 S. Ct. 525, 30 L. ed. 642.

91. Towle *v.* Towle, 46 N. H. 431. But see California Ins. Co. *v.* Schindler, (Cal. 1883) 1 Pac. 474, where it was held that sureties on the second undertaking filed for the "further continuance" of the injunction are not liable for damages caused during the time covered by the first undertaking.

92. Hamilton *v.* State, 32 Md. 348. See also Winship *v.* Clendenning, 24 Ind. 439. *Compare* Cooper *v.* Hames, 93 Ala. 280, 9 So. 341.

93. Webber *v.* Wilcox, 45 Cal. 301; Bemis *v.* Spalding, 9 Ky. L. Rep. 764.

94. *Alabama.*— Curry *v.* American Freehold Land Mortg. Co., 124 Ala. 614, 27 So. 454; Bullock *v.* Ferguson, 30 Ala. 227.

Colorado.— Eaton *v.* Larimer, etc., Reservoir Co., 3 Colo. App. 366, 33 Pac. 278.

Illinois.— Ryan *v.* Anderson, 25 Ill. 372 (holding that where the collection of a school tax had been enjoined and the bond was conditioned to pay the collector "all moneys and costs due or to become due," the obligors were not liable to pay the taxes which were due from the inhabitants of the district); Rees *v.* Peltzer, 1 Ill. App. 315. And see Shreffler *v.* Nadelhoffer, 133 Ill. 536, 25 N. E. 630, 23 Am. Rep. 626 [*affirming* 34 Ill. App. 252].

Kentucky.— Burgen *v.* Sharer, 14 B. Mon. 497; Cain *v.* McGuire, 13 B. Mon. 340.

Louisiana.— Block *v.* Myers, 35 La. Ann. 220; McMillen *v.* Gibson, 10 La. 517.

Maryland.— Morgan *v.* Blackiston, 5 Harr. & J. 61.

Oklahoma.— Frantz *v.* Saylor, 12 Okla. 39, 69 Pac. 794.

South Dakota.— Edmison *v.* Sioux Falls Water Co., 10 S. D. 440, 73 N. W. 910.

Tennessee.— Collins *v.* Crownover, (Ch. App. 1900) 57 S. W. 357. See also Crowley *v.* Robinson, (Ch. App. 1898) 46 S. W. 461.

United States.— Swift *v.* Kortrecht, 112 Fed. 709, 50 C. C. A. 429.

See 27 Cent. Dig. tit. "Injunction," § 590.

95. Grove *v.* Bush, 86 Iowa 94, 53 N. W. 88; Ferguson *v.* Tipton, 1 B. Mon. (Ky.) 28; Ashby *v.* Tureman, 3 Litt. (Ky.) 6; Jameson *v.* Kelly, 1 Bibb (Ky.) 479; Corder *v.* Martin, 17 Mo. 41; Browning *v.* Porter, 12 Fed. 460, 2 McCrary 581.

The amount of a judgment enjoined can be recovered only where it is proved that the judgment was lost in consequence of the injunction. Hefner *v.* Hesse, 29 La. Ann. 149. *Compare* Fauber *v.* Gentry, 89 Va. 312, 15 S. E. 899, holding that an administrator enjoined by the judgment debtor from collecting a debt due the estate should be per-

6. Remote or Speculative Damages. Such damages as are remote, conjectural, or speculative cannot be recovered.[96] Profits actually lost while the injunction was pending may be recovered,[97] provided they are not merely conjectural.[98]

7. Measure of Damages. No recovery can be had in excess of the penalty of the bond,[99] even though the actual damages exceed that amount,[1] and the court has no power to make an allowance beyond that amount for disbursements.[2]

mitted to collect the debt by a suit on the injunction bond. It cannot be recovered at all when the code limits the liability of obligors to the payment of costs and damages. Horton *v.* Cope, 6 Lea (Tenn.) 155.

96. *Arkansas.*— McDaniel *v.* Crabtree, 21 Ark. 431.

Illinois.— Chicago Title, etc., Co. *v.* Chicago, 110 Ill. App. 395 [*affirmed* in 209 Ill. 172, 70 N. E. 572]; Hibbard *v.* McKindley, 28 Ill. 240, holding that injury to creditors resulting from an injunction restraining plaintiffs from transacting any business is not recoverable as damages.

Missouri.— McKinzie *v.* Mathews, 59 Mo. 99.

New York.— Hotchkiss *v.* Platt, 8 Hun 46.

Pennsylvania.— Sensenig *v.* Parry, 113 Pa. St. 115, 5 Atl. 11; Morgan *v.* Negley, 53 Pa. St. 153.

Tennessee.— State *v.* Springfield, (Ch. App. 1898) 48 S. W. 813, holding that damages to a justice of the peace from being wrongfully enjoined, at the suit of private persons not claiming his office or fees, from opening and running a separate office out of his district, cannot be recovered, being speculative.

Wisconsin.— Gear *v.* Shaw, 1 Pinn. 608.

United States.— Coosaw Min. Co. *v.* Carolina Min. Co., 75 Fed. 860.

See 27 Cent. Dig. tit. "Injunction," § 592.

97. Lambert *v.* Haskell, 80 Cal. 611, 22 Pac. 327; Landis *v.* Wolf, 206 Ill. 392, 69 N. E. 103 [*affirming* 109 Ill. App. 44]; Hotchkiss *v.* Platt, 8 Hun (N. Y.) 46; Galveston City R. Co. *v.* Miller, (Tex. Civ. App. 1897) 38 S. W. 1132; Swasey *v.* Gay, 3 Tex. App. Civ. Cas. § 226.

98. *Illinois.*— Chicago City R. Co. *v.* Howison, 86 Ill. 215, holding that damages for loss of profits of a prospective increase of business by the extension of a street-railway line were too remote to be recoverable.

Kentucky.— Epenbaugh *v.* Gooch, 15 Ky. L. Rep. 576, holding that profits which might have been realized from the use of land of which plaintiff was deprived were not recoverable.

Louisiana.— Elms *v.* Wright-Blodgett Co., 106 La. 19, 30 So. 315.

South Carolina.— Moorer *v.* Andrews, 39 S. C. 427, 17 S. E. 948.

United States.— Coosaw Min. Co. *v.* Carolina Min. Co., 75 Fed. 860; Lehman *v.* McQuown, 31 Fed. 138.

See 27 Cent. Dig. tit. "Injunction," § 592.

Prospective profits lost because of the stopping of business are generally too uncertain to be proper elements of assessment. Densch *v.* Scott, 58 Ill. App. 33; Gerard *v.* Gateau, 15 Ill. App. 520; Manufacturers', etc., Bank *v.* C. W. F. Dare Co., 67 Hun (N. Y.) 44, 21 N. Y. Suppl. 806; Manufacturers', etc., Bank *v.* C. W. F. Dare Co., 16 N. Y. Suppl. 67.

99. *Kentucky.*— Hughes *v.* Wickliffe, 11 B. Mon. 202; Campbell *v.* Brainard, 4 Ky. L. Rep. 735. But see Keel *v.* Ogden, 3 Dana 103.

Maryland.— Levy *v.* Taylor, 24 Md. 282.

New York.— Lawton *v.* Green, 64 N. Y. 326; Hovey *v.* Rubber Tip Pencil Co., 38 N. Y. Super. Ct. 428; Dickerson *v.* Cook, 3 Duer 324.

North Carolina.— Nansemond Timber Co. *v.* Rountree, 122 N. C. 45, 29 S. E. 61.

Ohio.— Bishop *v.* Bascoe, 8 Ohio Dec. (Reprint) 423, 7 Cinc. L. Bul. 342.

Oregon.— See Ruble *v.* Coyote Gold, etc., Min. Co., 10 Oreg. 39.

South Carolina.— Hill *v.* Thomas, 19 S. C. 230.

Tennessee.— Rhea *v.* McCorkle, 11 Heisk. 415.

Vermont.— Glover *v.* McGaffey, 56 Vt. 294.

See 27 Cent. Dig. tit. "Injunction," § 591.

Compare Marshall *v.* Minter, 43 Miss. 666, holding that, where execution of a judgment is enjoined and it appears that the judgment and the interest accrued thereon exceed in amount the penalty of the bond, a court of equity will provide a remedy, and allow interest on the penalty of such bond to an amount not exceeding the principal and interest of the judgment.

Where the limit of liability is not established either by the order of court granting an injunction or by the bond, the liability of the obligors is coextensive with the damages defendants may sustain by reason of the writ. Cummins *v.* Miller, 7 Ky. L. Rep. 670.

It is error to give the full amount where injunction plaintiff sought to restrain the enforcement of a judgment only as against particular property, and defendant's answer asked only that such property be sold, and for ten per cent damages, such damages alone being recoverable. Attoway *v.* Still, 2 Tex. Unrep. Cas. 697.

Liability is not limited to the smaller amount named where the bond was executed for the sum of two thousand dollars, and the figures one thousand dollars were affixed between the signature and the seal of the obligor. Dangel *v.* Levy, 1 Ida. 722.

1. Hughes *v.* Wickliffe, 11 B. Mon. (Ky.) 202.

2. Lawton *v.* Green, 64 N. Y. 326.

Where there is no evidence of malice in suing out an injunction,[3] the damages therefor should be measured by simple compensation for the loss sustained,[4] and defendant himself is bound to follow such a course as not to enhance the damages, although if he acts reasonably the amount assessed in his favor will not be decreased because he might have acted differently and prevented some loss.[5] Where the injunction deprives defendant of his right to act as owner, the loss actually incurred thereby,[6] such as net profits lost,[7] or loss of rent,[8] is the measure of damages. So where the removal or sale of property is enjoined the measure is the loss to the party enjoined during the time the injunction is in force.[9]

3. See *supra*, IX, G, 3.

4. Wabash R. Co. *v.* McCabe, 118 Mo. 640, 24 S. W. 217; Hale *v.* Meegan, 39 Mo. 272 (Rev. Code (1855), p. 1249, § 13, applies only to cases where payment of money is restrained); Brown *v.* Tyler, 34 Tex. 168. See also Hanley *v.* Wallace, 3 B. Mon. (Ky.) 184; Greig *v.* Eastin, 30 La. Ann. 1130; Moulton *v.* Richardson, 49 N. H. 76; Bray *v.* Poillon, 4 Thomps. & C. (N. Y.) 663; Leavitt *v.* Dabney, 2 Sweeny (N. Y.) 613, 9 Abb. Pr. N. S. 373, 40 How. Pr. 277 (holding that the measure of recovery is the amount of damages suffered by defendant in the injunction suit, as ascertained by a referee); Miller *v.* Montague, 1 Disn. (Ohio) 164.

Stipulation as to damages.— Certain damages having been stipulated, it is unnecessary that they should be estimated or taxed. Poerschke *v.* Smith, 26 Misc. (N. Y.) 874, 56 N. Y. Suppl. 1089.

Measure of damages where collection of a judgment is enjoined see Neal *v.* Taylor, 56 Ark. 521, 20 S. W. 352; Hunt *v.* Burton, 18 Ark. 188; Roberts *v.* Fahs, 36 Ill. 268; Canby *v.* Gerodias, McGloin (La.) 217; Harvard First Nat. Bank *v.* Hackett, 2 Nebr. (Unoff.) 512, 89 N. W. 412.

Where an injunction was framed in ambiguous terms, defendant is entitled to such damages as he may have sustained by obeying it as he reasonably and in good faith understood it. Webb *v.* Laird, 62 Vt. 448, 20 Atl. 599, 22 Am. St. Rep. 121.

Not limited to damages adjudged against principal obligor.— On a bond conditioned to pay all damages occasioned by the injunction, plaintiff is not limited to damages adjudged against the principal obligor. Wash *v.* Lackland, 8 Mo. App. 122.

Where damages are limited to a certain per cent on the amount enjoined, the amount within that limit is discretionary with the judge. Combs *v.* Bentley, 41 S. W. 8, 19 Ky. L. Rep. 505.

Where defendant agreed to accept banknotes for his judgment, and the injunction was therefore dissolved, it was held that the recovery on the injunction bond should be for the specie value of the notes and not in kind. Hardin *v.* Barbour, 6 T. B. Mon. (Ky.) 395.

Where proceedings at law were enjoined, the obligee was held to be entitled to recover the principal with lawful interest to the time of the verdict, the costs at law and in chancery, with damages at the rate of ten pen cent per annum on said principal sum during the existence of said injunction, although the condition of the bond said nothing as to interest and damages. Fox *v.* Mountjoy, 6 Munf. (Va.) 36.

5. Roberts *v.* White, 73 N. Y. 375; O'Connor *v.* New York, etc., Land Imp. Co., 8 Misc. (N. Y.) 243, 28 N. Y. Suppl. 544.

6. Barton *v.* Fisk, 30 N. Y. 166, where it was held that where the obligees were prevented from asserting their ownership to certain timber lying on defendant's land, which the latter removed during the pendency of the injunction, the value of the timber in question was *prima facie* the measure of damages.

Where the injunction prevented the sale of personal property, the measure of damages is the depreciation in value because of the delay. Meysenburg *v.* Schlieper, 48 Mo. 426.

7. Moorer *v.* Andrews, 39 S. C. 427, 17 S. E. 948.

8. McDonald *v.* James, 47 How. Pr. (N. Y.) 474.

9. *Kentucky.*— Hord *v.* Trimble, 1 Litt. 413.

Louisiana.— Corning *v.* Elliott, 10 La. Ann. 753.

Maryland.— Wood *v.* State, 66 Md. 61, 5 Atl. 476, holding that where the removal of a mill had been prevented the true rule of damages was the rental value of a mill of the same size for the same period plus the payment of employees, under subsisting contracts, during the period the mill was idle.

Mississippi.— Rubon *v.* Stephan, 25 Miss. 253, holding that where the sale of property was enjoined the measure of damages was the difference between the cash value of the property when the bond was given and when it was sold, with interest thereon.

Virginia.— Johns *v.* Davis, 2 Rob. 729, holding that on an injunction to restrain the tenant for life of a slave from removing the slave from the state the measure was the reversionary interest in the slave only.

See 27 Cent. Dig. tit. "Injunction," § 591.

Amount of mortgage debt.— Where injunction defendant was enjoined from selling under a mortgage and was unable to collect his debt by reason of the mortgagee's insolvency and sale of the property to a second mortgagee, the amount of the debt was recoverable on a bond. White *v.* Brooke, 11 Wash. 99, 39 Pac. 237.

Amount of deficiency.— Where a decree was

Where the payment of money is detained, interest thereon is the measure of damages.[10]

8. Particular Items — a. Attorney's Fees. While in some jurisdictions attorney's fees are not a proper element of damage in an action, or assessment of damages, on an injunction bond,[11] the rule in most jurisdictions is to the contrary.[12] While no hard and fast rule can be laid down on the subject, and the right to, and the amount of, recovery depends upon the facts of each case,[13] it appears to be the general rule that when the injunction is merely ancillary or in aid of the relief sought, or is relied on to secure the relief when obtained, or to prevent the commission of a wrongful or tortious act that would result in irreparable injury before the termination of the main action, a recovery may be had on the bond for the payment of reasonable counsel fees where defendant, prior to the determination of the main action, has succeeded in dissolving the injunction, or has made an effort to obtain its dissolution.[14] But where an injunction

rendered for a certain sum, an appeal was taken, the sum was reduced on appeal, judgment for the reduced sum entered in the court below, a sale made, and a deficiency left after sale, the amount of the deficiency is recoverable in an action on a bond conditioned to pay the obligees any amount decreed to them. Rynearson *v.* Fredenburg, 42 Mich. 412, 4 N. W. 187.

10. Heyman *v.* Landers, 12 Cal. 107; Horton *v.* Cope, 6 Lea (Tenn.) 155.

11. Richards *v.* Green, (Ariz. 1890) 32 Pac. 266; Frantz *v.* Saylor, 12 Okla. 39, 69 Pac. 794; Crowley *v.* Robinson, (Tenn. Ch. App. 1898) 46 S. W. 461; Missouri, etc., R. Co. *v.* Elliott, 184 U. S. 530, 22 S. Ct. 446, 46 L. ed. 673 [*reversing* 77 Mo. App. 652], holding that attorney's fees cannot be allowed as damages on an injunction bond given in a federal court.

12. *Alabama.*— Holmes *v.* Weaver, 52 Ala. 516. But a recovery cannot be had for counsel fees in the supreme court, to which the injunction suit was removed by plaintiff below, after the dismissal of his bill by the chancellor. Bullock *v.* Ferguson, 30 Ala. 227.

California.— Lambert *v.* Haskell, 80 Cal. 611, 22 Pac. 327.

Indiana.—Binford *v.* Grimes, 26 Ind. App. 481, 59 N. E. 1085. See also Beeson *v.* Beeson, 59 Ind. 97.

Kansas.— Mulvane *v.* Tullock, 58 Kan. 622, 50 Pac. 897, holding that the fact that they are not allowed in the federal court will not preclude recovery of such damages in a state court, where an action is brought upon an injunction bond given in a federal court.

Missouri.— Helmkampf *v.* Wood, 85 Mo. App. 227; Price Baking Powder Co. *v.* Calumet Baking Powder Co., 82 Mo. App. 19. See St. Louis, etc., R. Co. *v.* Schneider, 30 Mo. App. 620; Buford *v.* Keokuk Northern Line Packet Co., 3 Mo. App. 159 [*affirmed* in 69 Mo. 611].

Montana.— Montgomery *v.* Gilbert, 24 Mont. 121, 60 Pac. 1038; Cook *v.* Greenough, 14 Mont. 352, 36 Pac. 357.

Nebraska.— Gibson *v.* Reed, 54 Nebr. 309, 75 N. W. 1085.

New York.— Perlman *v.* Bernstein, 179 N. Y. 531, 71 N. E. 1138 [*affirming* 93 N. Y. App. Div. 335, 87 N. Y. Suppl. 862]; Roberts *v.* White, 73 N. Y. 375; Sweet *v.* Mowry, 71 Hun 381, 25 N. Y. Suppl. 32; Baylis *v.* Scudder, 6 Hun 300; Willett *v.* Scovil, 4 Abb. Pr. 405; Aldrich *v.* Reynolds, 1 Barb. Ch. 613. But *compare* Taacks *v.* Schmidt, 18 Abb. Pr. 307.

West Virginia.—State *v.* Corvin, 51 W. Va. 19, 41 S. E. 211; State *v.* Medford, 34 W. Va. 633, 12 S. E. 864.

Wisconsin.— Wisconsin M. & F. Ins. Co. Bank *v.* Durner, 114 Wis. 369, 90 N. W. 435.

See 27 Cent. Dig. tit. "Injunction." § 597. See also *infra*, IX, G, 8, a; X, C, 2.

Only the necessary counsel fees can be assessed regardless of the number of counsel actually engaged in the defense. Neiser *v.* Thomas, 46 Mo. App. 47.

Proof of present injury caused by the injunction order is unnecessary as any suit, if undefended, may result in costs, if not in a more grievous wrong, against defendant. Rosser *v.* Timberlake, 78 Ala. 162. See, however, Grove *v.* Wallace, 11 Colo. App. 160, 52 Pac. 639.

Acceptance of taxed costs.— The acceptance by injunction defendant, on discharge of the injunction, of the statutory attorney's fees, taxed as part of the costs, is not a waiver by him of his right to recover attorney's fees as damages in an action on the injunction bond. Steel *v.* Gordon, 14 Wash. 521, 45 Pac. 151.

13. Elms *v.* Wright-Blodgett Co., 106 La. 19, 30 So. 315. And see Gadsden *v.* Georgetown Bank, 5 Rich. (S. C.) 336.

Both reasonable and customary.— Proof that the services were reasonably worth the amount claimed is not by itself sufficient. Rees *v.* Peltzer, 1 Ill. App. 315.

14. *Iowa.*— Leonard *v.* Capital Ins. Co., 101 Iowa 482, 70 N. W. 629; Ady *v.* Freeman, 90 Iowa 402, 57 N. W. 879; Carroll County *v.* Iowa R. Land Co., 53 Iowa 685, 6 N. W. 69; Langworthy *v.* McKelvey, 25 Iowa 48.

Kentucky.— New National Turnpike Co. *v.* Dulaney, 86 Ky. 516, 6 S. W. 590, 9 Ky.

is the relief sought in the action, and the temporary injunction gives such relief if sustained, no recovery for counsel fees can be had.[15] Since, however, the only damages properly allowable on the dissolution of an injunction are such as result from an improper suing out of the same,[16] the allowance of attorney's fees should be confined to services rendered in connection with the dissolution,[17] and should

L. Rep. 697; Epenbaugh *v.* Gooch, 15 Ky. L. Rep. 576; Boyd *v.* Chambers, 9 Ky. L. Rep. 56.

Missouri.— Anderson *v.* Anderson, 55 Mo. App. 268.

Nebraska.— Jameson *v.* Bartlett, 63 Nebr. 638, 88 N. W. 860.

Ohio.— Bishop *v.* Bascoe, 8 Ohio Dec. (Reprint) 654, 9 Cinc. L. Bul. 111.

Washington.— Donahue *v.* Johnson, 9 Wash. 187, 37 Pac. 322.

See 27 Cent. Dig. tit. "Injunction," § 597.

15. Tyler *v.* Hamilton, 108 Ky. 120, 55 S. W. 920, 21 Ky. L. Rep. 1516; New National Turnpike Co. *v.* Dulaney, 86 Ky. 516, 6 S. W. 590, 9 Ky. L. Rep. 697; Chicago, etc., R. Co. *v.* Sullivan, 80 S. W. 791, 26 Ky. L. Rep. 46; Epenbaugh *v.* Gooch, 15 Ky. L. Rep. 576; Barber *v.* Edelin, 9 Ky. L. Rep. 971; Bemis *v.* Spalding, 9 Ky. L. Rep. 764; Reading *v.* Davis, 6 Ky. L. Rep. 661. But see Reece *v.* Northway, 58 Iowa 187, 12 N. W. 258 (where it was held that, the rule being that attorney's fees are allowable for defending in the entire action where an injunction was the only relief sought and dissolution is procured only upon final hearing, the court will not reverse a judgment for plaintiff in an action on the injunction bond, because of the admission of evidence as to the amount of attorney's fees paid in the entire action, in the absence of evidence that injunction was not the only relief sought); Creek *v.* McManus, 13 Mont. 152, 32 Pac. 675 (holding that plaintiff need not show how much of the attorney's fee was paid "to dissolve the temporary injunction," and how much "to resist the permanent injunction," as the right to the injunction was the only cause of action).

16. Dunning *v.* Young, 67 Ill. App. 668.

17. *Illinois.*— Landis *v.* Wolf, 206 Ill. 392, 69 N. E. 103 [*reversing* 109 Ill. App. 44]; Dunning *v.* Young, 67 Ill. App. 668.

Louisiana.— Levert *v.* Sharpe, 52 La. Ann. 599, 27 So. 64.

Missouri.— See Brownlee *v.* Fenwick, 103 Mo. 420, 15 S. W. 611, fees allowed, although no motion to dissolve was made.

Nebraska.— Cunningham *v.* Fitch, 63 Nebr. 189, 88 N. W. 168; Barr *v.* Post, 4 Nebr. (Unoff.) 32, 93 N. W. 144. See also Kittle *v.* De Lamater, 7 Nebr. 70, holding that the sureties on an undertaking given on obtaining a temporary order for an injunction, which is allowed to expire, cannot be held for attorney's fees incurred upon resisting an application for another order.

New York.— Roberts *v.* White, 73 N. Y. 375 (fees on motion to dissolve and on appeal from order of dissolution); Harrison *v.* Harrison, 75 Hun 191, 22 N. Y. Suppl. 965; Bock *v.* Bohn, 29 Misc. 102, 60 N. Y. Suppl. 211; Strong *v.* De Forest, 15 Abb. Pr. 427; Willett *v.* Scovil, 4 Abb. Pr. 405 (fees for drawing answer, moving to dissolve, and attending the reference); Aldrich *v.* Reynolds, 1 Barb. Ch. 613. *Compare* Hovey *v.* Rubber-Tip Pencil Co., 35 N. Y. Super. Ct. 81; Coates *v.* Coates, 1 Duer 664.

Vermont.— Sturgis *v.* Knapp, 33 Vt. 486.

And see *infra*, IX, G, 8, a.

But *compare* Bush *v.* Kirkbride, 131 Ala. 405, 30 So. 780.

Appeal from judgment dismissing complaint.— Fees incurred on appeal from a judgment dismissing a complaint are not allowable as damages sustained by the injunction, or by reason of the continuance thereof after the dismissal of the complaint, where such continuation was not objected to by defendants, and no motion was made by them to vacate the injunction. Phœnix Bridge Co. *v.* Keystone Bridge Co., 10 N. Y. App. Div. 176, 41 N. Y. Suppl. 891.

Appeals from order of dissolution.— Fees incurred in defending an appeal from an order of dissolution are recoverable (Roberts *v.* White, 73 N. Y. 375), when the injunction is reinstated (Cooper *v.* Humes, 93 Ala. 280, 9 So. 341); but not otherwise (Ellwood Mfg. Co. *v.* Rankin, 70 Iowa 403, 30 N. W. 677; Neiser *v.* Thomas, 46 Mo. App. 47).

Effort to set aside decree of dissolution.— Fees incurred in resisting an effort to have a decree dissolving an injunction set aside are recoverable. Jesse French Piano, etc., Co. *v.* Porter, 134 Ala. 302, 32 So. 678, 92 Am. St. Rep. 31.

Modification of injunction.— Where, on a motion to dissolve, the court merely modified the injunction instead of dissolving it, fees paid for services in relation to such motion are not recoverable. Ford *v.* Loomis, 62 Iowa 586, 16 N. W. 193, 17 N. W. 910. But the reverse is true where a party against whom an injunction is awarded is obliged to employ counsel to procure a modification of the injunction in order to carry on his ordinary business. London, etc., Bank *v.* Walker, 74 Hun (N. Y.) 395, 26 N. Y. Suppl. 844.

Motion to dissolve injunction.— Fees incurred in prosecuting a motion to dissolve the injunction are recoverable, even though the injunction defendant has voluntarily abandoned the thing enjoined when the abandonment was caused by the injunction (Cooper *v.* Humes, 93 Ala. 280, 9 So. 341), although injunction plaintiff dismissed the suit and dissolved the writ before the filing or hearing of the motion to dissolve (Quinn *v.* Baldwin Star Coal Co., 19 Colo. App. 497, 76 Pac. 552), or although the injunction is dissolved by motion on the face of the bill (Keith *v.* Henkleman, 173 Ill. 137, 50 N. E.

not include services rendered before the giving of the bond and issuance of the writ,[18] or services directed to the merits of the main controversy,[19] except where a trial of the motion to dissolve must have brought up all the material issues of the case, and rendered it necessary to dispose of the whole case on the motion,[20] or where the expense of the trial was increased by the injunction.[21] If no liability to pay for the services exists, it is, of course, obvious that no recovery can be had therefor.[22] Nevertheless, it has been held that the mere fact that the

692). The motion must, however, have been successful in the sense that the injunction was somehow dissolved. Curtiss *v.* Bachman, 110 Cal. 433, 42 Pac. 910, 52 Am. St. Rep. 111; Cunningham *v.* Finch, 63 Nebr. 189, 88 N. W. 168; Manufacturers', etc., Bank *v.* C. W. F. Dare Co., 67 Hun (N. Y.) 44, 21 N. Y. Suppl. 806; Lyon *v.* Hersey, 32 Hun (N. Y.) 253; Garlington *v.* Copeland, 43 S. C. 389, 21 S. E. 317. *Contra*, Nielsen *v.* Albert Lea, 87 Minn. 285, 91 N. W. 1113.

Order to show cause against continuance.— Counsel fees incurred upon an order to show cause why a restraining order should not be continued cannot be recovered in an action on a bond conditioned to pay such damages as might be sustained by reason of the injunction, although the action was eventually dismissed. Curtiss *v.* Bachman, 110 Cal. 433, 42 Pac. 910, 52 Am. St. Rep. 111. Nor are they recoverable as damages caused by the continuance since they occurred before the continuance. Youngs *v.* McDonald, 56 N. Y. App. Div. 14, 67 N. Y. Suppl. 375, 8 N. Y. Annot. Cas. 461 [*affirmed* in 166 N. Y. 639, 60 N. E. 1123].

Reference to ascertain damages.— Reasonable counsel fees incurred in a proceeding to ascertain the damage caused by the continuance of a preliminary injunction are properly allowed as part of the damages. Youngs *v.* McDonald, 56 N. Y. App. Div. 14, 67 N. Y. Suppl. 375, 8 N. Y. Annot. Cas. 461 [*affirmed* in 166 N. Y. 639, 60 N. E. 1123]; Wisconsin M. & F. Ins. Co. Bank *v.* Durner, 114 Wis. 369, 90 N. W. 435.

Time of payment.— Since the restraining order embraces all the time until the hearing on the rule to show cause why the injunction should not issue, although it be continued from the day first fixed, fees incurred for dissolving the order are recoverable, although paid after the day first fixed, provided a retainer was paid before. Prader *v.* Grim, 13 Cal. 585.

18. Alaska Imp. Co. *v.* Hirsch, (Cal. 1896) 47 Pac. 124; Quinn *v.* Silka, 19 Colo. App. 507, 76 Pac. 555; Quinn *v.* Baldwin Star Coal Co., 19 Colo. App. 497, 76 Pac. 552; Randall *v.* Carpenter, 88 N. Y. 293; Whiteside *v.* Noyac Cottage Assoc., 84 Hun (N. Y.) 555, 32 N. Y. Suppl. 724.

Where an injunction is continued after an order to show cause, upon no cause being shown, it becomes a new proceeding and counsel fees incurred in a subsequent trial of the action cannot be allowed as damages incurred by reason of the preliminary injunction. McDonald *v.* James, 38 N. Y. Super. Ct. 76, 47 How. Pr. 474.

19. *Alabama.*— Robertson *v.* Robertson, 58 Ala. 68.

California.— Curtiss *v.* Bachman, 110 Cal. 433, 42 Pac. 910, 52 Am. St. Rep. 111; Mitchell *v.* Hawley, 79 Cal. 301, 21 Pac. 833.

Colorado.— Church *v.* Baker, 18 Colo. App. 369, 71 Pac. 888.

Illinois.— Goff *v.* Eckert, 65 Ill. App. 616.

Indiana.— Hyatt *v.* Washington, 20 Ind. App. 148, 50 N. E. 402, 67 Am. St. Rep. 248. See also Robertson *v.* Smith, 129 Ind. 422, 28 N. E. 857, 15 L. R. A. 273.

Iowa.— Langworthy *v.* McKelvey, 25 Iowa 48.

Missouri.— Brown *v.* Baldwin, 121 Mo. 126, 25 S. W. 863; Louisville Banking Co. *v.* M. V. Monarch Co., 68 Mo. App. 603.

Montana.— Creek *v.* McManus, 17 Mont. 445, 43 Pac. 497; Campbell *v.* Metcalf, 1 Mont. 378. *Compare* Allport *v.* Kelley, 2 Mont. 343.

Nebraska.— Jameson *v.* Bartlett, 63 Nebr. 638, 88 N. W. 860; Harvard First Nat. Bank *v.* Hockett, 2 Nebr. (Unoff.) 512, 89 N. W. 412.

New York.— Randall *v.* Carpenter, 88 N. Y. 293; Newton *v.* Russell, 87 N. Y. 527 [*reversing* 24 Hun 40]; Disbrow *v.* Garcia, 52 N. Y. 654; Phœnix Bridge Co. *v.* Keystone Bridge Co., 10 N. Y. App. Div. 176, 41 N. Y. Suppl. 891; Whiteside *v.* Noyac Cottage Assoc., 84 Hun 555, 32 N. Y. Suppl. 724; Hovey *v.* Rubber Tip Pencil Co., 12 Abb. Pr. N. S. 360.

South Carolina.— Hill *v.* Thomas, 19 S. C. 230.

Vermont.— Barre Water Co. *v.* Carnes, 68 Vt. 23, 33 Atl. 898.

See 27 Cent. Dig. tit. "Injunction," § 597.

Contra.— Nielsen *v.* Albert Lea, 87 Minn. 285, 91 N. W. 1113.

Evidence as to apportionment.— Where plaintiff, without contradiction, stated that he paid attorneys for moving for the dissolution a certain agreed sum, a finding that he did not pay his attorneys to procure such dissolution was not sustained by the evidence, although he had previously employed the same attorneys to defend him in the suit, and the receipt did not specify the particular object for which the payment was made. Frahm *v.* Walton, 130 Cal. 396, 62 Pac. 618.

20. Hammerslough *v.* Kansas City Bldg., etc., Assoc., 79 Mo. 80; Trester *v.* Pike, 60 Nebr. 510, 83 N. W. 676.

21. Hotchkiss *v.* Platt, 8 Hun (N. Y.) 46; Allen *v.* Brown, 5 Lans. (N. Y.) 511.

22. Curry *v.* American Freehold Land Mortg. Co., 124 Ala. 614, 27 So. 454; Schening *v.* Cofer, 97 Ala. 726, 12 So. 414.

party has not paid the counsel fees where he is liable therefor does not prevent their recovery.[23]

b. Expenses and Costs.[24] Reasonable expenses to which a party is put in procuring the dissolution of an injunction constitute damages which may be recovered in a proceeding on the bond or undertaking;[25] but these are limited to such as have accrued from the time of issuing the injunction down to its dissolution or the determination of an appeal from the dissolution,[26] and must be confined to those actually proved.[27] So too in accordance with the rule already stated,[28] no damages are to be allowed which are not the actual, natural, and proximate results of the injunction proceedings.[29] The costs and expenses must have been necessarily incurred in connection with the injunction.[30] Where,

23. *Alabama.*— Garrett *v.* Logan, 19 Ala. 344.

Florida.— Wittich *v.* O'Neal, 22 Fla. 592.

Kansas.— Underhill *v.* Spencer, 25 Kan. 71.

Louisiana.— Meaux *v.* Pittman, 35 La. Ann. 360.

Missouri.— Holthaus *v.* Hart, 9 Mo. App. 1.

New York.— Crounse *v.* Syracuse, etc., R. Co., 32 Hun 497.

Ohio.— Noble *v.* Arnold, 23 Ohio St. 264.

See 27 Cent. Dig. tit. "Injunction," § 597.

Contra.— See Hooper *v.* Patterson, (Cal. 1893) 32 Pac. 514; Prader *v.* Grimm, 28 Cal. 11; Wilson *v.* McEvoy, 25 Cal. 169.

24. See, generally, COSTS.

25. Pargoud *v.* Morgan, 2 La. 99; Andrews *v.* Glenville Woolen Co., 50 N. Y. 282; Ten Eyck *v.* Sayer, 76 Hun (N. Y.) 37, 27 N. Y. Suppl. 588; Preuschl *v.* Wendt, 5 N. Y. St. 429 (cost of drawing and serving papers); Fitzpatrick *v.* Flagg, 12 Abb. Pr. (N. Y.) 189; Willett *v.* Scovil, 4 Abb. Pr. (N. Y.) 405; Galveston, etc., R. Co. *v.* Ware, 74 Tex. 47, 11 S. W. 918; State *v.* Corvin, 51 W. Va. 19, 41 S. E. 211.

Expenses incurred in attending the hearing. — Helmkampf *v.* Wood, 85 Mo. App. 227. *Compare* Tamaroa *v.* Southern Illinois Normal University, 54 Ill. 334.

26. Wallis *v.* Dilley, 7 Md. 237.

27. Cook *v.* Greenough, 14 Mont. 352, 36 Pac. 357. See also Hotchkiss *v.* Platt, 8 Hun (N. Y.) 46.

28. See *supra*, IX, G, 1.

29. Streeter *v.* Marshall Silver Min. Co., 4 Colo. 535. See also Youngs *v.* McDonald, 56 N. Y. App. Div. 14, 67 N. Y. Suppl. 375, 8 N. Y. Annot. Cas. 46 [*affirmed* in 166 N. Y. 639, 60 N. E. 1123], holding that, although the expense of a trial necessary to prevent a preliminary injunction from becoming permanent is properly allowed as damage caused by the continuance of the preliminary injunction, expenses incurred in preparing for the trial before the preliminary injunction was continued cannot be allowed against the surety, since such expenses were not caused by the continuance.

Attendance of defendants and solicitors at proposed sale.— The personal services of defendants and their solicitors in attending a proposed foreclosure sale are not a proper item. Edwards *v.* Bodine, 11 Paige (N. Y.) 223 [*modifying* 4 Edw. 292].

Attending to taking depositions.— Personal expense in attending to the taking of depositions in an injunction suit is not recoverable. Williams *v.* Allen, 54 S. W. 720, 21 Ky. L. Rep. 1191.

Cost of pumping a mine for the purpose of permitting an inspection may be recovered, although continued much longer than was necessary for the making of the inspection, where such continuance was solely by reason of the order, and complainant itself delayed its examination and took no steps to have the work stopped. Tyler Min. Co. *v.* Last Chance Min. Co., 90 Fed. 15, 32 C. C. A. 498.

Expenses incurred by attorneys during trial of the injunction suit are properly excluded, where it does not appear but that they were included in the sum found as general damages. Steel *v.* Gordon, 14 Wash. 521, 45 Pac. 151.

Expense of feeding teams which remained idle is not recoverable where there is no evidence that diligence was used in attempting to find employment for them. Nansemond Timber Co. *v.* Rountree, 122 N. C. 45, 29 S. E. 61.

Taxes paid by a receiver on funds in his hands under an impounding order made in injunction suits are not a proper element of damages for wrongfully suing out the injunction writs. Stringfield *v.* Hirsch, 94 Tenn. 425, 29 S. W. 609, 45 Am. St. Rep. 733.

Wages of watchmen.— Money paid for the expenses of men to watch or hold a mine, the use of which was enjoined, in question, against other than defendants cannot be recovered. Streeter *v.* Marshall Silver Min. Co., 4 Colo. 535. But where the removal of a mill was enjoined, sums paid to a watchman, under a subsisting contract, during the period the mill was idle may be recovered. Wood *v.* State, 66 Md. 61, 5 Atl. 476.

30. Williams *v.* Ballinger, 125 Iowa 410, 101 N. W. 139; Tyler *v.* Hamilton, 108 Ky. 120, 55 S. W. 920, 21 Ky. L. Rep. 1516; Aldrich *v.* Reynolds, 1 Barb. Ch. (N. Y.) 613; Center *v.* Hoag, 52 Vt. 401.

Expenses of sale.— The master's fees for attending a sale, which was enjoined, and the expense of advertising and posting notices of the sale, are proper elements of damage. Alliance Trust Co. *v.* Stewart, 115 Mo. 236, 21 S. W. 793; Edwards *v.* Bodine, 4 Edw. (N. Y.) 292. See, however, Bullard *v.* Harkness, 83 Iowa 373, 49 N. W. 855. So too

however, the main suit is so blended with the temporary injunction proceedings that it is impossible to separate the two, expenses incurred by defendant in the injunction suit in preparation for the final hearing should be included.[31] The obligors on an injunction bond are also liable for such costs as are occasioned by the writ;[32] but here, as with expenses, recovery is limited to such as may have accrued from the time of the issuing of the injunction down to the affirmance of the order for its dissolution,[33] and to such as were the result of the temporary injunction.[34] There can be no recovery of costs imposed on plaintiff, in an action on the bond, as the condition of a continuance,[35] nor of costs incurred on an order to show cause why a restraint should not be continued.[36] So the costs of an unsuccessful motion to dissolve are not recoverable,[37] even though the action was eventually dismissed.[38] Likewise the costs on an appeal from an order dissolving the injunction,[39] or in a suit or proceeding to which the injunction was a mere

are the master's fees for services which were performed a second time, after the dissolution of the injunction, and the expense of readvertising the sale of the mortgaged premises. Edwards *v.* Bodine, 11 Paige (N. Y.) 223 [*modifying* to this extent 4 Edw. 292].

Preparations for removal of house.— Where the injunction defendant was enjoined from moving a house, he may recover the money expended in preparation for its removal, but not the expense of fitting up another house for his occupancy. Center *v.* Hoag, 52 Vt. 401.

Reference to ascertain damages.— Where the damages sustained in consequence of an injunction order are ascertained by a reference, the costs of the reference are properly allowed as part of the damages (Holcomb *v.* Rice, 119 N. Y. 598, 23 N. E. 1112; Lawton *v.* Green, 64 N. Y. 326), except where no other damages for which injunction plaintiff was liable are proved (Randall *v.* Carpenter, 88 N. Y. 293; Whiteside *v.* Noyac Cottage Assoc., 84 Hun (N. Y.) 555, 32 N. Y. Suppl. 724).

Special train.— The expense of hiring a special train to reach a judge to make an application to dissolve an injunction may be allowed as damages on the undertaking, where large interests would have suffered from delay. Crounse *v.* Syracuse, etc., R. Co., 32 Hun (N. Y.) 497, where the election of directors of a corporation had been enjoined and an election was necessary for the protection of large property interests.

31. Jackson *v.* Millspaugh, 100 Ala. 285, 14 So. 44; Alliance Trust Co. *v.* Stewart, 115 Mo. 236, 21 S. W. 793; Youngs *v.* McDonald, 56 N. Y. App. Div. 14, 67 N. Y. Suppl. 375, 8 N. Y. Annot. Cas. 461 [*affirmed* in 166 N. Y. 639, 60 N. E. 1123].

32. *Illinois.*— Ryan *v.* Anderson, 25 Ill. 372.

Kentucky.— Hayden *v.* Phillip, 89 Ky. 1, 11 S. W. 951, 11 Ky. L. Rep. 239; Cummins *v.* Miller, 7 Ky. L. Rep. 670, although there was no other damage.

Louisiana.— Hefner *v.* Hesse, 29 La. Ann. 149.

Missouri.— Lewis *v.* Leahey, 14 Mo. App. 564.

Nebraska.— Harvard First Nat. Bank *v.* Hackett, 2 Nebr. (Unoff.) 512, 89 N. W. 412, holding that where the collection of a judgment is enjoined the additional court costs may be recovered.

New York.— Edwards *v.* Bodine, 11 Paige 223.

Pennsylvania.— Henrie *v.* Orangeville Sav. Fund, 3 Walk. 169.

Tennessee.— Glaze *v.* Eason, 2 Yerg. 301. See 27 Cent. Dig. tit. "Injunction," § 596.

Costs recovered in the enjoined judgments may be recovered, although they are not specified in the condition of the bond. Moore *v.* Harton, 1 Port. (Ala.) 15. See also Derry Bank *v.* Heath, 45 N. H. 524.

Prepayment of costs.— Where a bond given on an injunction of a judgment was conditioned to "abide the decision on the bill, and pay all sums of money, damages, and costs adjudged" on dissolution complainant was not liable to defendant in chancery suit for the costs unless defendant had first paid them. Corder *v.* Martin, 17 Mo. 41.

Error in the taxation of costs in an injunction suit should be corrected on appeal from the clerk's taxation and cannot be corrected in a suit on the injunction bond. Hill *v.* Thomas, 19 S. C. 230.

33. Wallis *v.* Dilley, 7 Md. 237.

34. Williams *v.* Ballinger, 125 Iowa 410, 101 N. W. 139; Ellwood Mfg. Co. *v.* Rankin, 70 Iowa 403, 30 N. W. 677; Edmison *v.* Sioux Falls Water Co., 14 S. D. 486, 85 N. W. 1016; Center *v.* Hoag, 52 Vt. 401.

Where an extra allowance is awarded to defendant upon plaintiff obtaining leave to discontinue, the extra allowance is not to be included. Howell *v.* Miller, 12 Daly (N. Y.) 277.

35. Bullock *v.* Ferguson, 30 Ala. 227.

36. Curtiss *v.* Bachman, 110 Cal. 433, 42 Pac. 910, 52 Am. St. Rep. 111.

37. Curtiss *v.* Bachman, 110 Cal. 433, 42 Pac. 910, 52 Am. St. Rep. 111; Pollock *v.* Whipple, 57 Nebr. 82, 77 N. W. 355; Lyon *v.* Hersey, 32 Hun (N. Y.) 253; Langdon *v.* Gray, 22 Hun (N. Y.) 511; Allen *v.* Brown, 5 Lans. (N. Y.) 511; Childs *v.* Lyons, 3 Rob. (N. Y.) 704.

38. Curtiss *v.* Bachman, 110 Cal. 433, 42 Pac. 910, 52 Am. St. Rep. 111; Allen *v.* Brown, 5 Lans. (N. Y.) 511.

39. Hamilton *v.* State, 32 Md. 348; Guil-

incident,[40] are not recoverable unless the injunction rendered the trial of the action more difficult and expensive than it would otherwise have been.[41]

c. Interest.[42] Where a person is enjoined from paying over money in his hands, the legal rate of interest during the period of detention may be recovered as damages;[43] but where suit on a note is enjoined interest on the note cannot be recovered unless it be shown that the person liable thereon has become insolvent since the injunction, or that plaintiff, without his fault, has suffered some damage equal to such interest.[44] Where the collection of a judgment is enjoined, interest thereon, during the existence of the injunction, may be recovered;[45] but the interest can be allowed only to the date of dissolution,[46] and on the amount actually due,[47] and cannot exceed the rate permitted by law.[48] But where an execution or foreclosure sale is enjoined, interest on the purchase-price for the period during which the sale is enjoined cannot be recovered as it is impossible to know what the result of the sale, if made, would have been.[49] Nor can interest be allowed on the amount of the debt for the period the sale was delayed, at least in the absence of evidence that the property would probably have been sold at the time first fixed for a sum equal to, or greater than, that for which the sale was finally made.[50] Interest on the damages sustained is usually held to be allowable.[51]

d. Injury to, or Depreciation in Value of, Property. Damages for injury to,

ford *v.* Cornell, 4 Abb. Pr. (N. Y.) 220; Woodson *v.* Johns, 3 Munf. (Va.) 230.

40. *Iowa.*— Bullard *v.* Harkness, 83 Iowa 373, 49 N. W. 855.

Kentucky.— Bennett *v.* Lambert, 100 Ky. 737, 39 S. W. 419, 18 Ky. L. Rep. 1057.

Missouri.— Lewis *v.* Leahey, 14 Mo. App. 564.

New York.— Disbrow *v.* Garcia, 52 N. Y. 654; Hovey *v.* Rubber Tip Co., 12 Abb. Pr. N. S. 360.

Ohio.— Tarbell *v.* Ennis, 10 Ohio S. & C. Pl. Dec. 346, 7 Ohio N. P. 416.

South Dakota.— Edmison *v.* Sioux Falls Water Co., 14 S. D. 486, 85 N. W. 1016.

Vermont.— Lillie *v.* Lillie, 55 Vt. 470.

See 27 Cent. Dig. tit. "Injunction," § 596.

41. Allen *v.* Brown, 5 Lans. (N. Y.) 511.

42. See, generally, INTEREST.

43. Lally *v.* Wise, 28 Cal. 539; Heyman *v.* Landers, 12 Cal. 107; Wallis *v.* Dilley, 7 Md. 237, holding that, where an injunction forbade the payment of money by an insurance company, interest is recoverable thereon as a matter of right up to the day the money is paid into court; and that an offer by the company to invest the amount, less costs and expenses thereon, is not admissible in evidence to reduce the interest.

44. Derry Bank *v.* Heath, 45 N. H. 524.

45. *Arkansas.*— Neal *v.* Taylor, 56 Ark. 521, 20 S. W. 352.

District of Columbia.— Dodge *v.* Cohen, 14 App. Cas. 582.

Maryland.— Gist *v.* McGuire, 4 Harr. & J. 9.

Mississippi.— Weatherby *v.* Shackleford, 37 Miss. 559.

Nebraska.— Harvard First Nat. Bank *v.* Hackett, 2 Nebr. (Unoff.) 512, 89 N. W. 412.

Tennessee.— Horton *v.* Cope, 6 Lea 155.

See 27 Cent. Dig. tit. "Injunction," § 595.

Contra:— Grundy *v.* Young, 11 Fed. Cas. No. 5,851, 2 Cranch C. C. 114.

46. Amis *v.* Commonwealth Bank, 8 La. Ann. 441.

47. Cannon *v.* Labarre, 13 La. 399.

48. Woods *v.* Wylie, 8 La. Ann. 18; Gamard *v.* Hart, 4 La. Ann. 503.

49. Colby *v.* Meservey, 85 Iowa 555, 52 N. W. 499; Bullard *v.* Harkness, 83 Iowa 373, 49 N. W. 855. But see Aldrich *v.* Reynolds, 1 Barb. Ch. (N. Y.) 613; Hill *v.* Thomas, 19 S. C. 230, holding that where judgment creditors were enjoined from selling lands under execution which were sold a year afterward, by consent, for an amount not sufficient to pay their judgments, they were entitled to recover interest on the purchase-money for the year as an element of damages.

50. Belmont Min., etc., Co. *v.* Costigan, 21 Colo. 465, 42 Pac. 650. But see Winslow *v.* Mulchey, (Tenn. Ch. App. 1895) 35 S. W. 762.

Where the bond was conditioned to "keep down all interest accruing or accrued" on a prior mortgage, the injunction being against a sale under a second mortgage, it was held that plaintiff could recover the interest accrued on the first mortgage at the time the injunction issued, as well as that accruing thereon from that time to the dissolution of the injunction. Goodrich *v.* Foster, 131 Mass. 217. But he was not entitled to recover the interest on either mortgage accruing after that time. Foster *v.* Goodrich, 127 Mass. 176.

51. Levy *v.* Taylor, 24 Md. 282; Rubon *v.* Stephan, 25 Miss. 253. *Contra*, Poydras *v.* Patin, 5 La. 324.

When interest begins to run.— Interest on the amount of an undertaking does not commence to run until there has been a confirmation of the report of the referee fixing the amount of damages occasioned by the injunction. Poillon *v.* Volkenning, 11 Hun (N. Y.) 385.

or depreciation in the value of, property, caused by the injunction, may be recovered in an action on the injunction bond.[52]

e. Value of Use or Occupation of Property. Where, by reason of an injunction, a party is restrained from the use,[53] occupation,[54] or disposition,[55] of property, he may recover the value of such use or occupation of which he has been deprived. This does not, however, entitle a party to recover rents, the collection[56] or interception[57] of which was not enjoined, or any sum which depends on contingencies which cannot be known.[58] Under a mortgage empowering the mortgagee on default to sell certain lands therein named, the assignee of the

52. *Colorado.*— Slack *v.* Stephens, 19 Colo. App. 538, 76 Pac. 741; Quinn *v.* Baldwin Star Coal Co., 19 Colo. App. 497, 76 Pac. 552, holding that the equitable owner of the realty may recover for injuries to a coal mine caused by the issuance of an injunction restraining the working thereof.

Kentucky.— Hayden *v.* Phillips, 89 Ky. 1, 11 S. W. 951, 11 Ky. L. Rep. 239.

Maryland.— Lange *v.* Wagner, 52 Md. 310, 36 Am. Rep. 380 (holding that a dairyman, prevented by an injunction from continuing the erection of a brick stable, may recover the injury done to his cattle by exposure to the weather, requiring extra care and food, and decreasing the quantity of milk from them); Levy *v.* Taylor, 24 Md. 282.

Nebraska.— Gibson *v.* Reed, 54 Nebr. 309, 75 N. W. 1085.

North Carolina.— Nansemond Timber Co. *v.* Rountree, 122 N. C. 45, 29 S. E. 61.

South Carolina.— Tryon *v.* Robenson, 10 Rich. 160.

Tennessee.— Chattanooga Fourth Nat. Bank *v.* Crescent Min. Co., (Ch. App. 1897) 52 S. W. 1021.

See 27 Cent. Dig. tit. "Injunction," § 594.

Loss or depreciation in hands of receiver.— In Hotchkiss *v.* Platt, 8 Hun (N. Y.) 46, it was held that where property is placed in a receiver's hands any loss of property occurring in consequence of the change in the custody and control of defendant's goods or stoppage of defendant's business is allowable as damages. But in Lehman *v.* McQuown, 31 Fed. 138, it was held that the amount of an alleged depreciation in the value of the property while in the receiver's hands could not be recovered as an item of damages, where it appeared that the receiver did all he could to dispose of the property to the best advantage.

Where there is no proof that property is less valuable after the injunction than before, there can be no recovery for the difference between the price it brought and the price which had been agreed upon for it. Donahue *v.* Johnson, 9 Wash. 187, 37 Pac. 322.

53. Wadsworth *v.* O'Donnell, 7 Ky. L. Rep. 837.

54. *Illinois.*— Silsbe *v.* Lucas, 53 Ill. 479.

Indiana.— Rutherford *v.* Moore, 24 Ind. 311.

Missouri.— Holloway *v.* Holloway, 103 Mo. 274, 15 S. W. 536.

New York.— McDonald *v.* James, 38 N. Y. Super. Ct. 76, 47 How. Pr. 474, holding that a landlord, enjoined at the suit of a third party from prosecuting summary proceedings against his tenant, is entitled to recover the value of the use and occupation of the property for any period it remains unoccupied during such injunction, provided the rent was lost on account of the irresponsibility of the tenant.

United States.— Lehman *v.* McQuown, 31 Fed. 138.

See 27 Cent. Dig. tit. "Injunction," § 593.

Where the crops of a season are lost by reason of an injunction restraining a party from taking possession of a farm from March to September, he is not restricted to proof of the value of the use of the land up to the time of the dissolution of the injunction, but may show that by reason of being kept out of the land he lost the crops for the entire season. Edwards *v.* Edwards, 31 Ill. 474.

55. Holthaus *v.* Hart, 9 Mo. App. 1 (holding that rents lost by a mortgagee pending an injunction against his sale are recoverable as damages where the premises are worth less than the debt); Roberts *v.* White, 73 N. Y. 375 (rent of building, completion of which was delayed); Edwards *v.* Bodine, 4 Edw. (N. Y.) 292 (holding that where an injunction has prevented the sale of mortgaged premises under a decree of foreclosure the value of the use and occupation of the premises during the time of the suspension and delay of the sale is a proper item of damage).

56. Edmison *v.* Sioux Falls Water Co., 14 S. D. 486, 85 N. W. 1016, where the party who enjoined the cutting off of his water-supply was solvent during the time the rents accrued.

57. Curry *v.* American Freehold Land Mortg. Co., 124 Ala. 614, 27 So. 454, where plaintiff was enjoined from selling lands under a mortgage and it was held that he could not recover for rents collected during the life of the injunction, since it did not prevent the appointment of a receiver to conserve the rents.

58. Colby *v.* Meservey, 85 Iowa 555, 52 N. W. 499; Bullard *v.* Harkness, 83 Iowa 373, 49 N. W. 855; Johnson *v.* Moser, 72 Iowa 654, 34 N. W. 459. See also Wood *v.* State, 66 Md. 61, 5 Atl. 476; Roberts *v.* White, 73 N. Y. 375; Ridpath *v.* Merriam, 22 Wash. 311, 60 Pac. 1120.

Where the erection of a building was enjoined, an instruction excluding from the com-

mortgagee is not entitled to damages by reason of an injunction restraining the assignee from collecting the rents, unless on a sale of the land under the mortgage it failed to satisfy the mortgage.[59]

f. Miscellaneous. The damages recoverable in an action on the bond, in proper cases, include loss of materials,[60] loss of time,[61] increased cost in building[62] or manufacturing,[63] and loss of sales of land.[64] The damages assessed by the court on dissolving the injunction are also a proper element of damages.[65]

9. Deductions and Set-Offs. The general costs of an injunction are not part of the damages awarded on the undertaking and, where they have been paid, cannot be deducted from the damages allowed.[66] Nor are sureties entitled to credit for what has been paid on a judgment in the action enjoined where it appears that the unpaid balance exceeds the penalty.[67] So where a third person has wrongfully enjoined a landlord from prosecuting summary proceedings against his tenant for possession, he is not entitled to any deduction on the damages on his bond by reason of repairs or improvements unless they were allowed by him to be deducted from the rents collected by him, and for which he was held liable.[68] And where a lessee enjoined from erecting an engine has obtained an order allowing him to do so under certain restrictions, damages caused by preventing such erection cannot be counter-claimed without showing that the order permitting it has been violated.[69] But damages caused by the entry of one who had been enjoined from taking possession of land, caused by his entry and removal of growing crops, may be counter-claimed.[70]

10. Amount as Question of Fact. In jurisdictions where assessment is not made before bringing action, or where such an assessment is not the measure of damages,[71] the amount of damages is a question of fact for the jury.[72]

putation of damages all evidence of the rental value of the building if it had been completed was correct. Lange *v.* Wagner, 52 Md. 310, 36 Am. Rep. 380. *Contra,* Spears *v.* Armstrong, (Tenn. Ch. App. 1897) 42 S. W. 37.

Where the collection of tolls is not authorized by law, injunction defendant cannot recover as damages the tolls of which it has been deprived by the injunction, notwithstanding a judgment of dismissal in the injunction suit. Turnpike Co. *v.* Kelley, 41 Ohio St. 144.

59. Schening *v.* Cofer, 97 Ala. 726, 12 So. 414.

60. Dougherty *v.* Dore, 63 Cal. 170.

61. Helmkampf *v.* Wood, 85 Mo. App. 227: Skrainka *v.* Oertel, 14 Mo. App. 474. But see Cook *v.* Chapman, 41 N. J. Eq. 152, 2 Atl. 286.

Usual rate of wages.— Loss of time occasioned by the injunction may be compensated at the usual rate of wages where injunction defendants used diligence to secure other employment during such period. Muller *v.* Fern, 35 Iowa 420.

62. Roberts *v.* White, 73 N. Y. 375.

63. San José Fruit Packing Co. *v.* Cutting, 133 Cal. 237, 65 Pac. 565.

64. Reece *v.* Northway, 58 Iowa 187, 12 N. W. 258.

Proximate cause.— Where plaintiff seeks to recover damages for loss of sales of land which were prevented by the injunction, it must appear that a *bona fide* application to buy had been made by some person, and that the failure to sell was fairly attributable to the injunction. Sturges *v.* Hart, 45 Ill. 103.

65. McAllister *v.* Clark, 86 Ill. 236. See also Roberts *v.* Dust, 4 Ohio St. 502, where it was held that damages for stoppage of mills may be recovered, although the decree of the court dissolving the injunction was for the costs of suit only.

66. Troxell *v.* Haynes, 16 Abb. Pr. N. S. (N. Y.) 1, 49 How. Pr. 517.

Where an extra allowance was awarded to defendant, on the discontinuance of an action for an injunction by plaintiff, and defendant was thereafter awarded the damages sustained by him from the obtaining of an injunction by plaintiff, what was given as an allowance should not be applied to the payment of the damages from the injunction, there being nothing in the order for the allowance showing such an intent. Howell *v.* Miller, 5 N. Y. Civ. Proc. 164.

67. Jones *v.* Allen, 85 Fed. 523, 29 C. C. A. 318 [*affirming* 79 Fed. 698]. *Compare* Wood *v.* McFerrin, 2 Baxt. (Tenn.) 493.

68. McDonald *v.* James, 38 N. Y. Super. Ct. 76, 47 How. Pr. 474.

69. Omaha Lith., etc., Co. *v.* Simpson, 29 Nebr. 96, 45 N. W. 261.

70. Tinsley *v.* Tinsley, 15 B. Mon. (Ky.) 454.

71. See *supra,* VII, X.

72. *Colorado.*— Kilpatrick *v.* Haley, 6 Colo. App. 407, 41 Pac. 508.

Iowa.— Parker *v.* Slaughter, 24 Iowa 252.

Montana.— Creek *v.* McManus, 17 Mont. 445, 43 Pac. 497.

H. Judgment. The judgment on an injunction bond must recite the facts giving jurisdiction.[73] The judgment may be for the full penalty of the bond, although in excess of the amount of damages demanded in the complaint.[74] The general rules as to collateral attack apply.[75]

X. WRONGFUL INJUNCTION.

A. Nature and Grounds of Liability. Where an injunction has been wrongfully issued there is no liability for damages in an action other than the injunction suit except in an action on the injunction bond, unless the party against whom the injunction was issued can make out a case of malicious prosecution by showing malice and want of probable cause on the part of the party who obtained it.[76] The remedies by suit on the bond and by an action for damages may both exist where a bond has been given on obtaining the injunction.[77] The action does not lie where an injunction is prayed for but none is granted,[78] but it is no defense that the injunction was void.[79] The action does not lie until the injunction suit has been finally disposed of.[80]

B. Procedure — 1. PLEADING. In an action for damages against a party for wrongfully suing out an injunction, it is essential that the complaint should

New Hampshire.— Jackman *v.* Eastman, 62 N. H. 273.

Washington.— Steel *v.* Gordon, 14 Wash. 521, 45 Pac. 151.

See 27 Cent. Dig. tit. "Injunction," § 601.

73. Coltart *v.* Ham, 2 Tenn. Ch. 356.

74. Harrison *v.* Park, 1 J. J. Marsh. (Ky.) 170.

75. See, generally, JUDGMENTS. And see Boos *v.* Morgan, 140 Ind. 206, 39 N. E. 919, where it is held that the pendency of an appeal from a judgment for injunction defendant might, in the discretion of the court, have been interposed for a stay of proceedings but did not render a judgment on the bond subject to collateral attack.

76. *Alabama.*— McLaren *v.* Bradford, 26 Ala. 616.

California.— Robinson *v.* Kellum, 6 Cal. 399.

Georgia.— Short *v.* Spragins, 104 Ga. 628, 30 S. E. 810; Mitchell *v.* Southwestern R. Co., 75 Ga. 398.

Indiana.— Harless *v.* Consumers' Gas Trust Co., 14 Ind. App. 545, 43 N. E. 456.

Iowa.— Beach *v.* Williams, (1899) 79 N. W. 393.

Kentucky.— Cox *v.* Taylor, 10 B. Mon. 17; Lexington, etc., R. Co. *v.* Applegate, 8 Dana 289, 33 Am. Dec. 497.

Minnesota.— See Hayden *v.* Keith, 32 Minn. 277, 20 N. W. 195.

Mississippi.— Davis *v.* Davis, 65 Miss. 498, 4 So. 554; Manlove *v.* Vick, 55 Miss. 567.

Missouri.— Campbell *v.* Carroll, 35 Mo. App. 640; Iron Mountain Bank *v.* Mercantile Bank, 4 Mo. App. 505; Keber *v.* Mercantile Bank, 4 Mo. App. 195.

New York.— Mark *v.* Hyatt, 135 N. Y. 306, 31 N. E. 1099, 18 L. R. A. 275; Palmer *v.* Foley, 71 N. Y. 106; Lawton *v.* Green, 64 N. Y. 326. *Compare* New York *v.* Brown, 179 N. Y. 303, 72 N. E. 114 [*reversing* 85 N. Y. Suppl. 1127].

North Carolina.— Burnett *v.* Nicholson, 79 N. C. 548.

Ohio.— Newark Coal Co. *v.* Upson, 40 Ohio St. 17.

Pennsylvania.— Ferdinando *v.* Scranton, 4 Lack. Jur. 14; Hutchins *v.* Rogers, 22 Wkly. Notes Cas. 79.

West Virginia.— Glen Jean, etc., R. Co. *v.* Kanawha, etc., R. Co., 47 W. Va. 725, 35 S. E. 978.

United States.— Meyers *v.* Block, 120 U. S. 206, 7 S. Ct. 525, 30 L. ed. 642; Scheck *v.* Kelly, 95 Fed. 941.

Canada.— Montreal St. R. Co. *v.* Ritchie, 16 Can. Sup. Ct. 622.

See 27 Cent. Dig. tit. "Injunction," § 606.

A voluntary dismissal of the action is not an admission on the part of plaintiff that he had no probable cause for commencing it. Asevado *v.* Orr, 100 Cal. 293, 34 Pac. 777.

77. *California.*— Asevado *v.* Orr, 100 Cal. 293, 34 Pac. 777; Robinson *v.* Kellum, 6 Cal. 399.

Kentucky.— Cox *v.* Taylor, 10 B. Mon. 17.

Louisiana.— Riggs *v.* Bell, 39 La. Ann. 1030, 3 So. 183.

Mississippi.— Manlove *v.* Vick, 55 Miss. 567.

Washington.— Anderson *v.* Provident Life, etc., Co., 25 Wash. 192, 66 Pac. 415.

See 27 Cent. Dig. tit. "Injunction," § 606.

Contra.— Gorton *v.* Brown, 27 Ill. 489, 81 Am. Dec. 245; Hutchins *v.* Rogers, 22 Wkly. Notes Cas. (Pa.) 79.

78. Garner *v.* Strode, 5 Litt. (Ky.) 314.

79. Franke *v.* Alexander, 88 Mo. App. 35. *Compare* Mark *v.* Hyatt, 135 N. Y. 306, 31 N. E. 1099, 18 L. R. A. 275.

80. Tatum *v.* Morris, 19 Ala. 302; Hussey *v.* Neal, 49 Ga. 160. But see Morgan *v.* Driggs, 17 La. 176; Parks *v.* O'Connor, 70 Tex. 377, 8 S. W. 104; Galveston City R. Co. *v.* Miller, (Tex. Civ. App. 1897) 38 S. W. 1132.

allege malice and want of probable cause,[81] and that this allegation should be specific.[82]

2. PARTIES. All persons directly concerned in the issuance of the wrongful injunction may be joined as defendants.[83] A sheriff, who together with a judgment creditor has been enjoined from making a sale under execution, need not be joined as a plaintiff.[84]

C. Damages — 1. PERSONS ENTITLED TO, OR LIABLE FOR, DAMAGES. One enjoined, although not a party to the injunction suit, may recover damages,[85] as may a partnership which has suffered damages from one of the firm being enjoined from carrying on business;[86] but a person restrained from doing what he had no legal right to do has no right of action for damages even though the injunction has been wrongfully issued.[87] Only the party who was instrumental in obtaining a wrongful injunction is liable for damages.[88]

2. WHAT DAMAGES RECOVERABLE. In an action for damages for the wrongful suing out of an injunction, plaintiff can recover only such damages as naturally and approximately result therefrom, and remote or speculative damages cannot be taken into consideration.[89] A party against whom a wrongful injunction is issued is entitled to nominal damages, although he sustains no actual damages.[90] Reasonable attorney's fees are recoverable as an item of damages in an action for damages for the wrongful suing out of an injunction, and it is not necessary that they should have been actually paid if the liability has been incurred,[91] nor is it necessary to prove a specific contract of hiring to justify the recovery of the fees.[92] But such fees are limited to fees for services connected with the motion or other similar proceeding for dissolution of the injunction.[93]

INJURE.[1] To cause loss or detriment to; to impair; to impair soundness; to

81. *California.*— Robinson *v.* Kellum, 6 Cal. 399.

Delaware.— MacFarlane *v.* Garrett, 3 Pennew. 36, 49 Atl. 175.

Kentucky.— Cox *v.* Taylor, 10 B. Mon. 17.

Mississippi.— Manlove *v.* Vick, 55 Miss. 567.

Missouri.— Keber *v.* Mercantile Bank, 4 Mo. App. 195.

Oregon.— Hess *v.* German Baking Co., 37 Oreg. 297, 60 Pac. 1011.

See 27 Cent. Dig. tit. "Injunction," § 609.

82. Barry *v.* Salt Co., 14 Phila. (Pa.) 124.

83. Riggs *v.* Bell, 39 La. Ann. 1030, 3 So. 183, holding that the sureties on the bond, and a third person, the alleged instigator or fomenter of the proceeding, although sued, some *ex contractu* and others *ex delicto*, may be joined as defendants in the same suit.

84. Anderson *v.* Philadelphia Provident Life, etc., Co., 26 Wash. 192, 66 Pac. 419.

85. Jackson *v.* Larche, 11 Mart. (La.) 284.

86. Drews *v.* Williams, 50 La. Ann. 579, 23 So. 897.

87. Parks *v.* O'Connor, 70 Tex. 377, 8 S. W. 104.

An execution plaintiff enjoined from selling goods illegally seized under execution cannot recover damages. Sumner *v.* Crawford, (Tex. Civ. App. 1897) 41 S. W. 825.

88. Watters *v.* Weed, 36 N. Y. Suppl. 955; Roche *v.* District of Columbia, 18 Ct. Cl. 217.

89. Chicago Title, etc., Co. *v.* Chicago, 209 Ill. 172, 70 N. E. 572; Lengfelder *v.* Smith, 69 Ill. App. 238; Simkins *v.* Wells, 58 S. W. 432, 22 Ky. L. Rep. 542; Galveston City R. Co. *v.* Miller, (Tex. Civ. App. 1897) 38 S. W. 1132.

Measure of damages.— Where the wrongful injunction restrained the operation of mines, the measure of damages is the profit on possible sales of coal. Newark Coal Co. *v.* Upson, 40 Ohio St. 17.

90. Simpkin *v.* Wells, 58 S. W. 432, 22 Ky. L. Rep. 452; Chattanooga Fourth Nat. Bank *v.* Crescent Min. Co., (Tenn. Ch. App. 1897) 52 S. W. 1021.

91. Fox *v.* Oriel Cabinet Co., 70 Ill. App. 322; Anderson *v.* Philadelphia Provident Life, etc., Co., 26 Wash. 192, 66 Pac. 415.

92. Broken Bow Nat. Bank *v.* Freeman, 87 Ill. App. 622.

93. Anderson *v.* Pennsylvania Provident Life, etc., Co., 26 Wash. 192, 66 Pac. 415; Donahue *v.* Johnson, 9 Wash. 187, 37 Pac. 322.

1. **The synonyms of "injure" are:** "To do harm to; inflict damage or detriment upon; impair or deteriorate in any way." State *v.* Associated Press, 159 Mo. 410, 442, 60 S. W. 91, 81 Am. St. Rep. 368, 51 L. R. A. 151. The word is also a synonym of "abuse." 1 Cyc. 219 note 4.

Distinguished from: "Defraud" see U. S. *v.* Lee, 12 Fed. 816, 819. "Harass" see Moody *v.* Levy, 58 Tex. 532, 533.

"Injure, aggrieve, or annoy" see Reg *v.* Wilkins, 9 Cox C. C. 20, 21, 7 Jur. N. S. 1128, 31 L. J. Q. B. 72, L. & C. 89, 5 L. T. Rep. N. S. 330, 10 Wkly. Rep. 62.

"Injure or defraud" see Carlisle *v.* State,

damage and lessen the value of, to make worse, etc.;[2] to vex.[3] (See DEPRIVE; INJURY.)

IN JURE NON REMOTA CAUSA, SED PROXIMA, SPECTATUR. A maxim meaning "In law, the proximate and not the remote cause is to be looked to."[4] (See CAUSA PROXIMA NON REMOTA SPECTATUR.)

INJURIA.[5] A tortious act, not necessarily wilful and malicious.[6] (See INJURY.)

INJURIA FIT EI CUI CONVICIUM DICTUM EST, VEL DE EO FACTUM CARMEN FAMOSUM. A maxim meaning "An injury is done to him of whom a reproachful thing is said or concerning whom an infamous song is made."[7]

INJURIA ILLATA JUDICI, SEU LOCUM TENENTI REGIS VIDETUR IPSI REGI ILLATA MAXIMÈ SI FIAT IN EXERCENTEM OFFICIUM. A maxim meaning "An injury offered to a judge or person representing the king, is considered as offered to the king himself, especially if it be done in the exercise of his office."[8]

INJURIA NON EXCUSAT INJURIAM. A maxim meaning "A wrong does not excuse a wrong."[9]

INJURIA NON PRÆSUMITUR. A maxim meaning "Wrong is not presumed."[10]

INJURIA PROPRIA NON CADET BENEFICIUM FACIENTIS. A maxim meaning "No one shall profit by his own wrong."[11]

76 Ala. 75, 77; People *v.* Comstock, 115 Mich. 305, 309, 73 N. W. 245.

"**Injured**" is sometimes used as synonymous with the word "damaged." Gran *v.* Houston, 45 Nebr. 813, 823, 64 N. W. 245. It has a broader meaning than "taken." See 15 Cyc. 656.

Injured party or person see People *v.* Howard, 17 Cal. 63, 65 [*quoted* in Jordan *v.* State, 142 Ind. 422, 427, 41 N. E. 817]; McCarthy *v.* Guild, 12 Metc. (Mass.) 291, 292; French *v.* Mascoma Flannel Co., 66 N. H. 90, 98, 20 Atl. 363; Gale *v.* Liston, 52 N. H. 174, 180; Monterey, etc., Plank Road Co. *v.* Chamberlain, 32 N. Y. 659, 664; Hanaghan *v.* State, 51 Ohio St. 24, 26, 36 N. E. 1072; Taylor *v.* Bliss, 26 R. I. 16, 57 Atl. 939, 940 [*citing* Smith *v.* Sherman, 4 Cush. (Mass.) 408]; January *v.* State, 36 Tex. Cr. 488, 492, 38 S. W. 179; Eames *v.* Brattleboro, 54 Vt. 471, 475.

"**Injuring liability**" see Sutherland-Innes Co. *v.* Romney, 30 Can. Sup. Ct. 495, 513.

"**Injuring, taking, detaining**" see Bridgers *v.* Taylor, 102 N. C. 86, 89, 8 S. E. 893, 3 L. R. A. 376.

2. Job *v.* Harlan, 13 Ohio St. 485, 494. See also Smith *v.* Wilcox, 47 Vt. 537, 545; Mogul Steamship Co. *v.* McGregor, 23 Q. B. D. 598, 612.

3. Biesenbach *v.* Key, 63 Tex. 79, 81.

4. Bouvier L. Dict.

Applied or explained in Little Rock, etc., R. Co. *v.* Haynes, 47 Ark. 497, 502, 1 S. W. 774; Heuer *v.* Northwestern Nat. Ins. Co., 144 Ill. 393, 397, 33 N. E. 410, 19 L. R. A. 594; Bigelow *v.* Reed, 51 Me. 325, 332; Lynn Gas, etc., Co. *v.* Meriden F. Ins. Co., 158 Mass. 570, 575, 33 N. E. 691, 35 Am. St. Rep. 540, 20 L. R. A. 297; Scripture *v.* Lowell Mut. F. Ins. Co., 10 Cush. (Mass.) 356, 363, 57 Am. Dec. 111; Nelson *v.* Suffolk Ins. Co., 8 Cush. (Mass.) 477, 490, 54 Am. Dec. 470; Marble *v.* Worcester, 4 Gray (Mass.) 395, 409; Rice *v.* Homer, 12 Mass. 230, 234; Tilton *v.* Hamilton F. Ins. Co., 1 Bosw. (N. Y.) 367, 378; Fawcett *v.* Pittsburg, etc., R. Co., 24 W. Va. 755, 759; Washington *v.* Baltimore, etc., R. Co., 17 W. Va. 190, 197; Mueller *v.* Milwaukee St. R. Co., 86 Wis. 340, 343, 56 N. W. 914, 21 L. R. A. 721; Servatius *v.* Pichel, 34 Wis. 292, 299; Trinder *v.* Thames, etc., Ins. Co., [1898] 2 Q. B. 114, 123, 8 Aspin. 114, 123, 67 L. J. Q. B. 666, 78 L. T. Rep. N. S. 485, 46 Wkly. Rep. 561; De Vaux *v.* Salvador, 4 A. & E. 420, 431, 5 L. J. Q. B. 134, 6 N. & M. 713, 31 E. C. L. 195; Emmens *v.* Elderton, 13 C. B. 495, 76 E. C. L. 495, 4 H. L. Cas. 624, 630, 18 Jur. 21, 10 Eng. Reprint 606; Hadley *v.* Baxendale, 2 C. L. R. 517, 9 Exch. 341, 18 Jur. 358, 359, 23 L. J. Exch. 179, 2 Wkly. Rep. 302; Thompson *v.* Hopper, 5 Wkly. Rep. 83, 84; Thistle *v.* Union Forwarding, etc., Co., 29 U. C. C. P. 76, 83.

5. "Injuria" comes from "in," against, and "jus," right, and means something done against the right of the party, producing damage, and has no reference to the fact or amount of damages. West Virginia Transp. Co. *v.* Standard Oil Co., 50 W. Va. 611, 615, 40 S. E. 591, 88 Am. St. Rep. 895, 56 L. R. A. 804, distinguishing this word from "*damnum.*"

"**Injuria sine damno**" see Purdy *v.* Manhattan El. R. Co., 13 N. Y. Suppl. 295, 297; Ashby *v.* White, 2 Ld. Raym. 938, 958. See also DAMNUM ABSQUE INJURIA.

6. Wright *v.* Chicago, etc., R. Co., 7 Ill. App. 438, 446; Barnes *v.* Allen, 1 Abb. Dec. (N. Y.) 111, 117, 1 Keyes 390; Hutcheson *v.* Peck, 5 Johns. (N. Y.) 196, 205; Winsmore *v.* Greenbank, Willes 577, 581.

7. Bouvier L. Dict. See also Lamb's Case, 9 Coke 59b, 60*a*.

8. Wharton L. Lex. [*citing* 3 Inst. 1].

9. Trayner Leg. Max.

Applied in Mogul Steamship Co. *v.* McGregor, 23 Q. B. D. 598, 604; Hilton *v.* Eckersley, 2 Jur. N. S. 587, 25 L. J. Q. B. 199, 4 Wkly. Rep. 326, 6 E. & B. 47, 76, 88 E. C. L. 47.

10. Trayner Leg. Max.

Applied in State *v.* Townley, 18 N. J. L. 311, 317.

11. Bouvier L. Dict.

INJURIA SERVI DOMINUM PERTINGIT. A maxim meaning "The master is liable for injury done by his servant."[12]

INJURIOUS. Anything that is hurtful, disturbs happiness, impairs rights, or prevents enjoyment of them.[13] (Injurious: Words, see LIBEL AND SLANDER. See also INJURY.)

INJURY.[14] A tort;[15] the unlawful infringement or privation of a right;[16] the deprivation of a legal right;[17] a wrong;[18] a wrong done to a person, or, in other words, a violation of his right;[19] any wrong or damage done to another, either in his person, rights, reputation or property;[20] any wrong or damage done to that

12. Bouvier L. Dict. [*citing* Lofft Max. 229].

13. Rowland *v.* Miller, 15 N. Y. Suppl. 701, where it is said: "The disturbing cause must be real, not fanciful; something more than mere delicacy or fastidiousness; but it need not necessarily be apparent to the senses of sight, smell, or hearing, for it may be injurious without offending either."

"**Injurious accident**" see Pennsylvania R. Co. *v.* Raiordon, 119 Pa. St. 577, 583, 13 Atl. 324, 4 Am. St. Rep. 670.

"**Injurious to health**" see Malton Local Bd. of Health *v.* Malton Farmers' Manure, etc., Co., 4 Ex. D. 302, 306, 44 J. P. 155, 49 L. J. M. C. 90.

"**Injuriously affected**" is a term synonymous with and equivalent to "damaged." Longmont *v.* Parker, 14 Colo. 386, 389, 23 Pac. 443, 20 Am. St. Rep. 277. See Memphis, etc., R. Co. *v.* Birmingham, etc., R. Co., 96 Ala. 571, 577, 11 So. 642, 18 L. R. A. 166 [*citing* McCarthy *v.* Metropolitan Bd. of Works, L. R. 8 C. P. 191]; Denver *v.* Bayer, 7 Colo. 113, 122, 2 Pac. 6; Rochette *v.* Chicago, etc., R. Co., 32 Minn. 201, 203, 20 N. W. 140; Delaplaine *v.* Chicago, etc., R. Co., 42 Wis. 214, 233, 24 Am. Rep. 386; McCarthy *v.* Metropolitan Bd. of Works, L. R. 8 C. P. 191, 208; Reg. *v.* Eastern Counties R. Co., 2 Ad. & E. 347, 363, 42 E. C. L. 706; East, etc., India Docks, etc., R. Co. *v.* Gattke, 15 Jur. 261, 262, 20 L. J. Ch. 217, 3 Macn. & G. 155, 6 R. & Can. Cas. 371, 49 Eng. Ch. 118, 42 Eng. Reprint 220. See also EMINENT DOMAIN, 15 Cyc. 652 *et seq.*

14. Distinguished from: "Damage" see 12 Cyc. 1194 note 66. "Damages" see North Vernon *v.* Voegler, 103 Ind. 314, 318, 2 N. E. 821.

"**Injures corporelles.**" — "The French version of the [Civil] code refers to '*injures corporelles*,' and the word '*injures*' means injuries inflicted with malice." Canadian Pac. R. Co. *v.* Robinson, 19 Can. Sup. Ct. 292, 301 [*citing* Mackenzie Rom. L. (6th ed.) p. 261].

15. Woodruff *v.* North Bloomfield Gravel Min. Co., 18 Fed. 753, 781, 9 Sawy. 441 [*citing* Bouvier L. Dict.]. See also Jordan *v.* State, 142 Ind. 422, 427, 41 N. E. 817; Brown *v.* Kendall, 6 Cush. (Mass.) 292, 295.

16. Manning *v.* Klein, 1 Pa. Super. Ct. 210, 217. See also State *v.* Reddington, 7 S. D. 368, 371, 64 N. W. 170; Allday *v.* Great Western R. Co., 5 B. & S. 903, 907, 11 Jur. N. S. 12, 34 L. J. Q. B. 5, 11 L. T. Rep. N. S. 267, 13 Wkly. Rep. 43, 117 E. C. L. 903.

"**Injuries**, in the sense of wrongful invasions of a right, may be considered as of two kinds: (1) pecuniary and (2) non-pecuniary. Pecuniary injuries are such as can be, and usually are, without difficulty estimated by a money standard. Loss of real or personal property, or of its use, loss of time, and loss of services are examples of this class of injuries. Non-pecuniary injuries are those for the measurement of which no money standard is or can be applicable. As the books phrase it, damages in such cases are 'at large.' Bodily and mental pain and suffering are familiar examples of this class." Broughel *v.* Southern New England Tel. Co., 73 Conn. 614, 621, 48 Atl. 751, 84 Am. St. Rep. 176.

17. Brittle Silver Co. *v.* Rust, 10 Colo. App. 463, 51 Pac. 526, 529. See also Jordan *v.* State, 142 Ind. 422, 427, 41 N. E. 817.

As used in the constitution the word "injury" means such a legal injury as would be the subject of an action for damages at common law. Pennsylvania R. Co. *v.* Marchant, 119 Pa. St. 541, 576, 13 Atl. 690, 4 Am. St. Rep. 659.

18. Parker *v.* Griswold, 17 Conn. 288, 298, 42 Am. Dec. 739; Woodruff *v.* North Bloomfield Gravel Min. Co., 18 Fed. 753, 781, 9 Sawy. 441 [*citing* Bouvier L. Dict.].

19. Carstesen *v.* Stratford, 67 Conn. 428, 437, 35 Atl. 276; Parker *v.* Griswold, 17 Conn. 288, 302, 42 Am. Dec. 739; Springer *v.* J. H. Somers Fuel Co., 196 Pa. St. 156, 160, 46 Atl. 370.

20. Northern R. Co. *v.* Carpentier, 13 How. Pr. (N. Y.) 222, 223 [*citing* Webster Dict.]; Hitch *v.* Edgecombe County Com'rs, 132 N. C. 573, 575, 44 S. E. 30 [*citing* Black L. Dict.]; Jordan *v.* State, 142 Ind. 422, 427, 41 N. E. 817 [*quoting* Anderson L. Dict.]; Kennard *v.* Burton, 25 Me. 39, 45, 43 Am. Dec. 249; Brailey *v.* Southborough, 6 Cush. (Mass.) 141, 142; Nichols *v.* Minneapolis, 30 Minn. 545, 546, 16 N. W. 410; Hodge *v.* Wetzler, 67 N. J. L. 490, 494, 66 Atl. 49; Taylor *v.* Bliss, 26 R. I. 16, 57 Atl. 939, 940.

"**Injury to property**" defined see Weiller *v.* Schreiber, 11 Abb. N. Cas. (N. Y.) 175, 177; Goodhand *v.* Ayscough, 10 Q. B. D. 71, 73; Bouvier L. Dict. [*quoted* in Northern R. Co. *v.* Carpentier, 13 How. Pr. (N. Y.) 222, 223]; N. Y. Code Civ. Proc. § 3343, subs. 10 [*quoted* in People *v.* Barondess, 61 Hun (N. Y.) 571, 573, 16 N. Y. Suppl. 436; Morenus *v.* Crawford, 51 Hun (N. Y.) 89, 93, 5 N. Y. Suppl. 453].

which is good or valuable;[21] every wrong, everything that is not done rightfully;[22] a wrongful act or tort which causes loss or harm to another;[23] damage resulting from an unlawful act,[24] or from a violation of a legal right.[25] The word is sometimes used in the sense of ACCIDENT,[26] *q. v.* (Injury: In General, see DAMAGES; NEGLIGENCE; TORTS. Personal Injury—In General, see NEGLIGENCE; To Children, see CARRIERS; MUNICIPAL CORPORATIONS; NEGLIGENCE; STREETS AND HIGHWAYS; STREET RAILROADS; To Passenger, see CARRIERS; To Person on or Near Railroad, see RAILROADS; To Person on Street or Highway, see MUNICIPAL CORPORATIONS; STREETS AND HIGHWAYS; To Servant, see MASTER AND SERVANT. To Animal—In General, see ANIMALS; By Railroad, see RAILROADS.)

INJUSTUM EST NISI TOTA LEGE INSPECTÆ, DE UNA ALIQUA EJUS PARTICULA PROPOSITA JUDICARE VEL RESPONDERE. A maxim meaning "It is unjust to give judgment or advice concerning any particular clause of a law without having examined the whole law."[27]

IN KIND. Of the same class, description, or kind of property.[28]

INLAND. Within a country, state or territory; within the same country.[29] (Inland: Bill of Exchange, see COMMERCIAL PAPER. Navigation, see COLLISION; NAVIGABLE WATERS; WATERS.)

IN LEGE OMNIA SEMPER IN PRÆSENTI STARE CONSENTUR. A maxim meaning "In law all things are always judged from their present status."[30]

INLET. A term which is construed to mean the indentation in the shore at the mouth or outlet of a navigable stream.[31] (See CREEK; and, generally, WATERS.)

IN LIEU OF. A term which signifies instead of, or in place of.[32] And

Personal insults and reproachful language are included in the "injures graves"—grievous insults—which are by the Code Napoleon made a just cause of divorce, but are not, either in terms or by implication, made under our law the cause for the dissolution of the marriage bond. Butler *v.* Butler, 1 Pars. Eq. Cas. (Pa.) 329, 346.

21. Utica *v.* Blakeslee, 46 How. Pr. (N. Y.) 165, 167.

22. Ayers *v.* Lawrence, 59 N. Y. 192, 197.

23. North Vernon *v.* Voegler, 103 Ind. 314, 319, 2 N. E. 821.

Injuries from judicial proceedings see Wordsworth *v.* Lyon, 5 How. Pr. (N. Y.) 463, 464 [*cited* in McGune *v.* Palmer, 5 Rob. (N. Y.) 607, 608].

24. Bohn Mfg. Co. *v.* Hollis, 54 Minn. 223, 233, 55 N. W. 1119, 40 Am. St. Rep. 319, 21 L. R. A. 337; State *v.* Moore, 69 N. H. 99, 101, 39 Atl. 584; Reynolds *v.* Plumbers' Material Protective Assoc., 30 Misc. (N. Y.) 709, 716, 63 N. Y. Suppl. 303; Thornton *v.* Thornton, 63 N. C. 211, 212 [*citing* Sedgwick Dam. 31]. See also Smith *v.* Wilcox, 47 Vt. 537, 545.

It may include a present as well as a continuing or prospective damage. Jenks *v.* Clifden, [1897] 1 Ch. 694, 697, 66 L. J. Ch. 338, 76 L. T. Rep. N. S. 382, 45 Wkly. Rep. 424 [*citing* Woodhouse *v.* Walker, 5 Q. B. D. 404 44 J. P. 666, 49 L. J. Q. B. 609, 42 L. T. Rep. N. S. 770, 28 Wkly. Rep. 765].

"Continuance of injury or damage" see Markey *v.* Tolworth Joint Isolation Hospital Dist. Bd., [1900] 2 Q. B. 454, 458, 64 J. P. 647, 69 L. J. Q. B. 738, 83 L. T. Rep. N. S. 28.

25. Macauley *v.* Tierney, 19 R. I. 255, 258, 33 Atl. 1, 61 Am. St. Rep. 770, 37 L. R. A. 455.

26. Smith *v.* Erie R. Co., 67 N. J. L. 636, 645, 52 Atl. 634, 59 L. R. A. 302; Fenton *v.* Thorley, [1903] A. C. 443, 448, 72 L. J. K. B. 787, 89 L. T. Rep. N. S. 314, 52 Wkly. Rep. 81, "injury to a workman by accident." See also Bayless *v.* Travellers' Ins. Co., 2 Fed. Cas. No. 1,138, 14 Blatchf. 143, 145; 2 Biddle Ins. p. 780, c. 10 [*quoted* in Fidelity, etc., Co. *v.* Johnson, 72 Miss. 333, 337, 17 So. 2, 30 L. R. A. 206].

27. Cyclopedic L. Dict.

Applied in Bonham's Case, 8 Coke 114*a*, 117*b*.

28. Bouvier L. Dict. See also Wilson *v.* State, 51 Ark. 212, 215, 10 S. W. 491.

29. Burrill L. Dict.

"Inland fisheries" are private fishings in non-tidal rivers. Phair *v.* Venning, 22 N. Brunsw. 362, 372. See, generally, FISH AND GAME.

"Inland parcels" see St. 45 & 46 Vict. c. 74, § 17. See, generally, POST-OFFICE.

"Inland postage" see 1 Vict. c. 36, § 47. See, generally, POST-OFFICE.

"Inland revenue" see 53 & 54 Vict. c. 21, § 39.

"Inland revenue affidavit" see 57 & 58 Vict. c. 30, § 22.

30. Morgan Leg. Max.

31. Tillotson *v.* Hudson River R. Co., 9 N. Y. 575, 580.

32. Irwin *v.* McDowell, (Cal. 1893) 34 Pac. 708, 709; National Sewing-Mach. Co. *v.* Wilcox, etc., Sewing-Mach. Co., 74 Fed. 557, 559, 20 C. C. A. 654. See also Reg. *v.* St. Saviour Parish, 7 A. & E. 925, 945, 2 Jur. 565, 7 L. J. M. C. 59, 3 N. & P. 345, 1 W. W.

the words are often employed as meaning in substitution for, as in the phrase "forty-five per cent., in lieu of forty per cent." [33] (See INSTEAD OF.)

IN LIMINE. In or at the beginning.[34]

IN LOCO FACTI IMPRESTABILIS SUBEST DAMNUM ET INTERESSE. A maxim meaning "Damages come in the place of an act which cannot be performed." [35]

IN LOCO PARENTIS. In the place of a parent.[36] (See, generally, GUARDIAN AND WARD.)

IN MAJORE SUMMÂ CONTINETUR MINOR. A maxim meaning "In the greater sum of money is contained the less." [37]

IN MALEFICIIS VOLUNTAS SPECTATUR NON EXITUS. A maxim meaning "In evil deeds regard must be had to the intention and not to the result." [38]

IN MALEFICIO RATIHABITIO MANDATO COMPARETUR. A maxim meaning "In a tort, ratification is equivalent to authority." [39]

INMATE. One who lives in the same house or apartment with another; a fellow lodger; especially one of the occupants of an asylum, hospital, or prison; by extension, one who occupies or lodges in any place or dwelling; [40] one who is a mate or associate in the occupancy of a place; hence, an in-dweller; an associated lodger or inhabitant.[41] (See, generally, DOMICILE; HOSPITALS; INSANE PERSONS; PAUPERS.)

& H. 234, 34 E. C. L. 478; Boyer *v.* Bancroft, [1883] W. N. 67, 68.

33. National Sewing-Mach. Co. *v.* Wilcox, etc., Sewing-Mach. Co., 74 Fed. 557, 559, 20 C. C. A. 654. See also State *v.* Farmer, 21 Mo. 160, 162; Matter of Underhill, 20 N. Y. Suppl. 134, 135, 2 Conolly Surr. 262; Gossler *v.* Goodrich, 10 Fed. Cas. No. 5,631, 3 Cliff. 71, 79; Barrett *v.* Stockton, 11 Cl. & F. 590, 8 Eng. Reprint 1225, 2 M. & G. 134, 162, 40 E. C. L. 528, 2 Scott N. R. 337.

"In lieu . . . of dower" see Bryan *v.* Bryan, 62 Ark. 79, 83, 34 S. W. 260; Britt *v.* Rawlings, 87 Ga. 146, 147, 13 S. E. 336. See also DOWER.

"In lieu of other taxes" see State *v.* Smyrna Bank, 2 Houst. (Del.) 99, 116, 73 Am. Dec. 699; Hunter *v.* Memphis, 93 Tenn. 571, 576, 26 S. W. 828; Tennessee *v.* Bank of Commerce, 53 Fed. 735, 736.

"In lieu of oxen" see Hickok *v.* Thayer, 49 Vt. 372, 374.

"In lieu of payments" see York *v.* Railway Officials', etc., Acc. Assoc., 51 W. Va. 38, 47, 41 S. E. 227.

"In lieu and in substitution of" see *In re* Boddington, 25 Ch. D. 685, 689, 54 L. J. Ch. 475, 50 L. T. Rep. N. S. 761, 32 Wkly. Rep. 448.

"In lieu thereof" see Shaftesbury *v.* Marlborough, 7 Sim. 237, 8 Eng. Ch. 237, 58 Eng. Reprint 827.

"In lieu whereof" see Barclay *v.* Maskelyne, 5 Jur. N. S. 12, 13.

34. English L. Dict. See also Von Schmidt *v.* Huntington, 1 Cal. 55, 59; Cunningham *v.* Dwyer, 23 Md. 219, 231; Southern Pac. R. Co. *v.* U. S., 200 U. S. 341, 352, 26 S. Ct. 296, — L. ed. —; Illinois Cent. R. Co. *v.* Illinois, 146 U. S. 384, 468, 13 S. Ct. 110, 36 L. ed. 1018; Death *v.* Harrison, L. R. 6 Exch. 15, 40 L. J. Exch. 26, 27, 23 L. T. Rep. N. S. 495.

In limine litis see 1 Cyc. 746 note 21.

35. Trayner Leg. Max.

36. Burrill L. Dict. [*citing* 1 Blackstone Comm. 192].

When used to designate a person it means one who means to put himself in the situation of a lawful father to the child, with reference to the office and duty of making provision for the child (Brinkerhoff *v.* Merselis, 24 N. J. L. 680, 683; Marsh *v.* Taylor, 43 N. J. Eq. 1, 4, 10 Atl. 486. See also Atlanta, etc., R. Co. *v.* Gravitt, 93 Ga. 369, 378, 20 S. E. 550, 44 Am. St. Rep. 145, 26 L. R. A. 553; Capek *v.* Kropik, 129 Ill. 509, 515, 21 N. E. 836; Von der Horst *v.* Von der Horst, 88 Md. 127, 130, 41 Atl. 124; Davis *v.* Davis, 39 N. J. Eq. 13, 16; Findlay *v.* Riddle, 3 Binn. (Pa.) 139, 166, 5 Am. Dec. 355; Sanderlin *v.* Sanderlin, 1 Swan (Tenn.) 441, 444; Steber *v.* State, 23 Tex. App. 176, 178, 4 S. W. 880; Daly *v.* James, 8 Wheat. (U. S.) 495, 504, 5 L. ed. 670; Bennet *v.* Bennet, 10 Ch. D. 474, 477, 40 L. T. Rep. N. S. 378, 27 Wkly. Rep. 573; Berkhampstead School Case, L. R. 1 Eq. Cas. 102, 119; 3 Cyc. 1052 note 83); one assuming the parental character and discharging parental duties (Brinkerhoff *v.* Merselis, 24 N. J. L. 680, 683 [*quoting* Wetherby *v.* Dixon, Coop. 279, 35 Eng. Reprint 558, 19 Ves. Jr. 407, 412, 34 Eng. Reprint 568, 13 Rev. Rep. 228].

37. Wharton L. Lex.

Applied in Foliamb's Case, 5 Coke 115*b*.

38. Wharton L. Lex. [*citing* Dig. 48, 8, 14].

39. Bouvier L. Dict. [*citing* Dig. 50, 17, 152, 2].

40. Webster Dict. [*quoted* in Farrell *v.* Security Mut. L. Ins. Co., 125 Fed. 684, 688, 60 C. C. A. 374].

"All inmates of the County Infirmary" see Johnson *v.* Santa Clara County, 28 Cal. 545, 548.

May include a clerk.— Mason *v.* Bibby, 2 H. & C. 881, 888, 10 Jur. N. S. 519, 33 L. J. M. C. 105, 9 L. T. Rep. N. S. 692, 12 Wkly. Rep. 382.

41. Century Dict. [*quoted* in Farrell *v.* Security Mut. L. Ins. Co., 125 Fed. 684, 688, 60 C. C. A. 374].

"Injurious or dangerous to the health of

IN MAXIMÂ POTENTIÂ MINIMA LICENTIA. A maxim meaning "In the greatest power there is the smallest license." [42]

IN MERCIBUS ILLICITIS NON SIT COMMERCIUM. A maxim meaning "There should be no commerce in illicit goods." [43]

INNAVIGABLE. In insurance law, not navigable; a term applied to a vessel when, by a peril of the sea, she ceases to be navigable, by irremediable misfortune.[44] (See, generally, MARINE INSURANCE.)

IN NECESSARIIS, UNITAS; IN NON NECESSARIIS, LIBERTAS; IN OMNIBUS, CARITAS. A maxim meaning "In those things which are essential let there be unity; in non-essentials, liberty; in all things, charity." [45]

the inmates" see Reg. *v.* Slade, 18 Cox C. C. 316, 60 J. P. 358, 65 L. J. M. C. 108, 74 L. T. Rep. N. S. 656.

Presentment of bill of exchange to inmate see Buxton *v.* Jones, 1 M. & G. 83, 86, 39 E. C. L. 656.

42. Wharton L. Lex.

43. Bouvier L. Dict. [*citing* 3 Kent Comm. 262 note].

44. Burrill L. Dict., distinguishing the term "shipwreck."

45. Morgan Leg. Max.

INNKEEPERS

By Joseph Henry Beale, Jr.
Bussey Professor of Law in Harvard University *

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I. DEFINITIONS AND GENERAL PRINCIPLES.

A. Inns — 1. WHO ARE INNKEEPERS. An innkeeper is a person who publicly professes that he keeps an inn, and will receive therein all travelers who are willing to pay an adequate price, and who come in a situation in which they are fit to be received.[1]

2. WHAT IS AN INN. A house where a traveler is furnished, as a regular matter of business, with food and lodging while on his journey;[2] or a house of

1. This definition may be extracted from the opinions in Thompson *v.* Lacy, 3 B. & Ald. 283, 22 Rev. Rep. 385, 5 E. C. L. 169.

Another definition is: "One who keeps a house publicly, openly and notoriously, for the entertainment and accommodation of travelers and others, for a reward." State *v.* Stone, 6 Vt. 295, 298.

The innkeeper is the person who really owns and carries on the business. Dixon *v.* Birch, L. R. 8 Exch. 135, 42 L. J. Exch. 135, 28 L. T. Rep. N. S. 360, 28 Wkly. Rep. 443. And this, although the license is taken out and the advertisements published in the name of a person who was really merely the manager. McKay *v.* Brown, 5 Can. L. J. 91. But the manager, even though not the innkeeper, might be indicted for illegally carrying on the inn; since although not the person principally concerned he would be a party to the offense. Winter *v.* State, 30 Ala. 22.

A hotel-keeper is a person who receives and entertains as guests those who choose to visit his house, and it does not include one who merely keeps a restaurant where meals are furnished. People *v.* Jones, 54 Barb. (N. Y.) 311, 316. The keeper of a private lodging-house, who also furnishes her guests with provisions at a profit, is subject to the bankrupt laws as a "hotel keeper," although the provisions were set apart as the separate property of each guest. Smith *v.* Scott, 9 Bing. 14, 2 Moore & S. 35, 23 E. C. L. 465.

Restaurant proprietor.— To constitute an innkeeper, a tavern-keeper, or hotel-keeper, the party so designated must receive and entertain as guests those who choose to visit his house; and a restaurant where meals are furnished is not an inn or tavern. People *v.* Jones, 1 Cow. Cr. (N. Y.) 381.

A lodging-house keeper is not an innkeeper because he may send out and procure cooked food for his guests. Kelly *v.* Excise Com'rs, 54 How. Pr. (N. Y.) 327.

Failure to obtain a license, as required by law, does not prevent one from being an innkeeper. Lanier *v.* Youngblood, 73 Ala. 587; Lyon *v.* Smith, Morr. (Iowa) 184; Atwater *v.* Sawyer, 76 Me. 539, 49 Am. Rep. 634; Norcross *v.* Norcross, 53 Me. 163; State *v.* Wynne, 8 N. C. 451.

2. *California.*— Pinkerton *v.* Woodward, 33 Cal. 557, 91 Am. Dec. 657.

Connecticut.— Walling *v.* Potter, 35 Conn. 183.

New York.— Wintermute *v.* Clark, 5 Sandf. 242; Cromwell *v.* Stephens, 2 Daly 15. And see Willard *v.* Reinhardt, 2 E. D. Smith 148.

Tennessee.— Dickerson *v.* Rogers, 4 Humphr. 179, 40 Am. Dec. 642.

England.— Thompson *v.* Lacy, 3 B. & Ald. 283, 22 Rev. Rep. 385, 5 E. C. L. 169.

Hotel, tavern.— The words "hotel" and "tavern" are usually used as synonymous with "inn"; and a hotel or tavern which is maintained for the accommodation of travelers is an inn. Foster *v.* State, 84 Ala. 451, 4 So. 833; Bonner *v.* Welborn, 7 Ga. 296; Fruchey *v.* Eagleson, 15 Ind. App. 88, 43 N. E. 146; Com. *v.* Shortridge, 3 J. J. Marsh. (Ky.) 638; St. Louis *v.* Siegrist, 46 Mo. 593; Bunn *v.* Johnson, 77 Mo. App. 596; Martin *v.* State Ins. Co., 44 N. J. L. 485, 43 Am. Rep. 397; People *v.* Jones, 54 Barb. (N. Y.) 311; Taylor *v.* Monnot, 4 Duer (N. Y.) 116; Cromwell *v.* Stephens, 2 Daly (N. Y.) 15; Overseers of Poor *v.* Warner, 3 Hill (N. Y. 150; *In re* Liquor Licenses, 4 Montg. Co. Rep. (Pa.) 77; *In re* Beaver County Licenses 3 Montg. Co. Rep. (Pa.) 64; *In re* License Application, 19 Wkly. Notes Cas. (Pa.) 359; Comer *v.* State, 26 Tex. App. 509, 10 S. W. 106; Jones *v.* Osborn, 2 Chit. 484, 18 E. C. L. 748; Reg. *v.* Salter, 8 N. Brunsw. 321.

An inn or hotel is a house where all who conduct themselves properly and who are able and ready to pay for their entertainment are received, if there is accommodation for them, or who, without any stipulated engagement as to the duration of their stay or as to

entertainment for travelers,[3] is perhaps as good a definition of what constitutes an inn as can be found among the many definitions given of the term.

3. What Wants an Inn Must Supply. An innkeeper must be prepared to entertain the traveler; that is, to supply him with both food and lodging.[4] For this reason a house which supplies only food or drink, like a restaurant,[5] a coffee-house,[6] or a drinking saloon,[7] or only lodging, like a lodging-house,[8] or apartment hotel,[9] or a sleeping-car[10] is not an inn. On the other hand it is not necessary that the inn should be perfectly equipped to supply all that a traveler might desire.[11]

the rate of compensation, are, while there, supplied at a reasonable charge with their meals, their lodging, and such services and attention as are necessarily incident to the use of the house as a temporary abode. Matter of Brewster, 39 Misc. (N. Y.) 689, 80 N. Y. Suppl. 666, 667; Cromwell *v.* Stephens, 3 Abb. Pr. N. S. (N. Y.) 26. Where the occupants of a building fitted up one side of a room with several stalls, where oysters, cooked and raw, pies, cheese, etc., were served to persons who might call for the same, mostly to teamsters and others who were stopping in the village for a short time, the building is used for "hotel purposes," within the restriction of a deed prohibiting the use for such purposes. Stevens *v.* Pillsbury, 57 Vt. 205, 52 Am. Rep. 121.

Hotel on European plan.— A hotel is no less an inn because it is conducted on the "European plan," so-called; the fact that food is separately paid for does not alter the legal character of the house. Bullock *v.* Adair, 63 Ill. App. 30; Johnson *v.* Chadbourn Finance Co., 89 Minn. 310, 94 N. W. 874, 99 Am. St. Rep. 571; Bernstein *v.* Sweeny, 33 N. Y. Super. Ct. 271; Krohn *v.* Sweeney, 2 Daly (N. Y.) 200; McClure *v.* Krumbholz, 9 Pa. Dist. 544, where it was said that a hotel of this character is not a restaurant or eating-house because some of the guests pay for their lodgings and meals at different times.

Hotel at watering-place.— A hotel to which persons resort for health and pleasure only, not for entertainment in the course of a journey, is not an inn. Therefore a hotel at a watering-place is a boarding-house, and may reject guests at pleasure. Bonner *v.* Welborn, 7 Ga. 296; Southwood *v.* Myers, 3 Bush (Ky.) 681; Kisten *v.* Hildebrand, 9 B. Mon. (Ky.) 72, 48 Am. Dec. 416.

Hôtel garni.— A species of establishment once common in Paris in which furnished apartments were let by the day, week, or month. Cromwell *v.* Stephens, 2 Daly (N. Y.) 15.

The words "regular hotels and eating-houses" as used in a statute designate places, the principal and not the subordinate business of which is the carrying on of a hotel or an eating-house. Lederer *v.* State, 5 Ohio Cir. Ct. 623, 3 Ohio Cir. Dec. 303.

The facts that the house stands upon inclosed grounds reserved for the exclusive use of guests, that the gates are closed at night, and that the house is thus rendered attractive as a pleasure resort does not prevent its being an inn, if it is held out as a place of public entertainment for travelers. Fay *v.* Pacific Imp. Co., 93 Cal. 253, 26 Pac. 1099, 28 Pac. 943, 27 Am. St. Rep. 198, 16 L. R. A. 188.

"The word hotel, in France, has long ceased to be confined to its original signification, and has become a word of a most extensive meaning. It is the term for the mansion of a prince, nobleman, minister of state, or of a person of distinction, or of celebrity. It is applied to a hospital, as Hotel Dieu; or to a town hall, as Hôtel de Ville; to the residence of a judge, to certain public offices, and to any house in which furnished apartments are let by the day, week, or month." Cromwell *v.* Stephens, 2 Daly (N. Y.) 15, 19.

Boarders.— A house is none the less an inn, although boarders as well as travelers are entertained there. Wintermute *v.* Clark, 5 Sandf. (N. Y.) 242.

3. Foster *v.* State, 84 Ala. 451, 4 So. 833.

4. Walling *v.* Potter, 35 Conn. 183; Thompson *v.* Lacy, 3 B. & Ald. 283, 22 Rev. Rep. 385, 5 E. C. L. 169.

5. Sheffer *v.* Willoughby, 163 Ill. 518, 45 N. E. 253, 54 Am. St. Rep. 483, 34 L. R. A. 464 [*affirming* 61 Ill. App. 263]; La Salle Restaurant, etc. *v.* McMasters, 85 Ill. App. 677; Carpenter *v.* Taylor, 1 Hilt. (N. Y.) 193; Block *v.* Sherry, 43 Misc. (N. Y.) 342, 87 N. Y. Suppl. 160; Harris *v.* Childs' Unique Dairy Co., 84 N. Y. Suppl. 260; Reg. *v.* Rymer, 2 Q. B. D. 136, 13 Cox C. C. 378, 46 L. J. M. C. 108, 35 L. T. Rep. N. S. 778, 25 Wkly. Rep. 415; Dunn *v.* Beau, 11 Quebec Super. Ct. 538.

6. Doe *v.* Laming, 4 Campb. 73, 15 Rev. Rep. 728.

7. People *v.* Jones, 54 Barb. (N. Y.) 311; Kelly *v.* Excise Com'rs, 54 How. Pr. (N. Y.) 327; Pabe *v.* Myers, 5 Ohio S. & C. Pl. Dec. 578, 7 Ohio N. P. 564.

8. Cromwell *v.* Stephens, 2 Daly (N. Y.) 15; Kelly *v.* Excise Com'rs, 54 How. Pr. (N. Y.) 327; Parker *v.* Flint, 12 Mod. 254.

9. Davis *v.* Gay, 141 Mass. 531, 6 N. E. 549.

10. See Carriers, 6 Cyc. 656.

11. Thus one may be an innkeeper, although he does not supply accommodation for horses (Kisten *v.* Hildebrand, 9 B. Mon. (Ky.) 72, 48 Am. Dec. 416; Com. *v.* Wetherbee, 101 Mass. 214); so one may be an innkeeper, although he does not sell wine or liquor (Pinkerton *v.* Woodward, 33 Cal. 557, 91 Am. Dec. 657; People *v.* Murphy, 5 Park.

B. Boarding-Houses. The distinction between an innkeeper and the keeper of a boarding-house is that the latter, not having made a profession of willingness to serve the public, is at liberty to choose his guests, and to make special arrangements with them.[12]

C. Private Houses of Entertainment. A person is not an innkeeper who receives guests out of mere hospitality, or from motives among which gain is at most incidental, and not because he has regularly entered into the business of receiving guests.[13]

D. Proof of Character of Inn.[14] The question whether a house of entertainment is a public inn, a boarding-house, or a private house is a question of fact, to be determined, like any fact, upon all the evidence.[15] The profession of serving the public is often made by displaying a sign, but that is not necessary;[16] the profession may be made by any method of soliciting the patronage of the public.[17]

II. CONTROL AND REGULATION OF INNS AND OTHER HOUSES OF PUBLIC ENTERTAINMENT.

A. Power to Regulate. The regulation of inns and other houses of public entertainment (such as boarding and lodging-houses) is a matter which is concerned with health and morals, and is therefore within the police power of a state.[18] The power to regulate is commonly committed to local bodies such as municipal corporations.[19]

B. Regulations. All houses of public entertainment may be regulated by statute or ordinance; those most commonly so regulated are inns, boarding-houses,[20]

Cr. (N. Y.) 130; Curtis *v.* State, 5 Ohio 324).

12. Pinkerton *v.* Woodward, 33 Cal. 557, 91 Am. Dec. 657; Willard *v.* Reinhardt, 2 E. D. Smith (N. Y.) 148; Com. *v.* Cuncannon, 3 Brewst. (Pa.) 344; Beall *v.* Beck, 19 Fed. Cas. No. 1,161, 3 C. C. A. 666.

Difference in character of contracts.— In a boarding-house the guest is under an express contract at a certain rate for a certain period of time, but in an "inn" there is no express agreement; the guest being on his way, is entertained from day to day according to his business on an implied contract. Pullman Palace Car Co. *v.* Lowe, 28 Nebr. 239, 245, 44 N. W. 226, 26 Am. St. Rep. 325, 6 L. R. A. 809.

Transient guests.— A boarding-house does not cease to be such because transient guests are entertained there. Kisten *v.* Hildebrand, 9 B. Mon. (Ky.) 72, 48 Am. Dec. 416.

13. Lyon *v.* Smith, Morr. (Iowa) 184; Kisten *v.* Hildebrand, 9 B. Mon. (Ky.) 72, 48 Am. Dec. 416; State *v.* Mathews, 19 N. C. 424; Howth *v.* Franklin, 20 Tex. 798, 73 Am. Dec. 218.

14. Evidence generally see EVIDENCE.

15. Howth *v.* Franklin, 20 Tex. 798, 73 Am. Dec. 218; Clary *v.* Willey, 49 Vt. 55. Therefore an appellate court will not disturb the finding, although it might as an original question have found differently. Rees *v.* McKeown, 7 Ont. App. 521.

If the housekeeper does an act which he could not legally do unless he were an innkeeper, he will be presumed, in the absence of evidence to the contrary, to be an innkeeper. Korn *v.* Schedler, 11 Daly (N. Y.) 234.

Parol evidence is admissible to prove a person an innkeeper, in an action against him by a guest for goods lost in his house; and it is not necessary to produce the record of his license. Owings *v.* Wyant, 3 Harr. & M. (Md.) 393.

16. Lyon *v.* Smith, Morr. (Iowa) 184; Dickerson *v.* Rogers, 4 Humphr. (Tenn.) 179, 40 Am. Dec. 642; Anonymous, Godb. 345.

17. Pinkerton *v.* Woodward, 33 Cal. 557, 91 Am. Dec. 657. As by advertising, by keeping a public register, or by running a coach to the railroad station. Fay *v.* Pacific Imp. Co., 93 Cal. 253, 26 Pac. 1099, 28 Pac. 943, 27 Am. St. Rep. 198, 16 L. R. A. 188.

18. Com. *v.* Muir, 38 Wkly. Notes Cas. (Pa.) 328.

19. Whether in a particular case the power has been so committed depends upon the interpretation of the statute. Smith *v.* Hightstown, 71 N. J. L. 276, 57 Atl. 901.

20. Statutory regulations of "boarding-houses" apply to houses in which persons are taken to board as a regular business, and not to a house where one or more boarders are kept occasionally upon special occasions. Cady *v.* McDowell, 1 Lans. (N. Y.) 484. Where two adjoining houses are connected by a door, and used as a single establishment for boarders, with a single entrance, sitting-room, and dining-room, they constitute a single boarding-house; and if there are more than fifteen sleeping-rooms in all, they must under the regulation be provided with fire-escapes. Department of Bldgs. *v.* Field, 12 N. Y. App. Div. 258, 42 N. Y. Suppl. 691.

and lodging-houses.[21] The regulations may cover the safety of the house itself[22] or the conduct of the business.[23]

C. Licenses.[24] The power to regulate inns and other public houses includes the power to license them.[25] The granting of a license is usually confided to some legal municipal administrative or quasi-judicial body.[26] And the procedure by which the license is obtained is solely a matter of statutory regulation.[27] Such a body in granting or refusing a license is exercising a public duty, and may be indicted for exercising it corruptly,[28] and if it refuses to act at all may be compelled to do so by writ of mandamus.[29] The licensing body, however, has discretion, which ordinarily cannot be controlled by the courts.[30] Where a board is given by statute power to license public houses, it cannot legally refuse to grant licenses enough to serve the requirements of public convenience, if proper persons apply; the power to license is not the power to prohibit.[31]

D. Penalty[32] **For Unlicensed Dealings.** Where a license is required for carrying on a public house, one who carries on such a house without a license cannot sue for damage to his business,[33] or as a general rule recover compensation for board furnished,[34] or establish a lien on property of the guest;[35] but failure to obtain a license will not protect the innkeeper from the responsibilities of his occupation.[36]

21. If the entire control over part of the house is given up to the occupant, as in the case of an apartment house, the house is not a lodging-house, and the relation between owner and occupant is that of landlord and tenant. Porter *v.* Merrill, 124 Mass. 534; Shearman *v.* Iroquois Hotel, etc., Co., 42 Misc. (N. Y.) 217, 85 N. Y. Suppl. 365.

22. **Fire-escapes.**— Perry *v.* Bangs, 161 Mass. 35, 36 N. E. 683 (inspector must give notice in writing of necessity); Johnson *v.* Snow, 102 Mo. App. 233, 76 S. W. 675 (to be put in by innkeeper, not by owner of building). The law requiring fire-escapes in Missouri has repealed the earlier law requiring rope ladders. Yall *v.* Gillham, (Mo. 1905) 86 S. W. 125; People *v.* Pierson, 59 Hun (N. Y.) 450, 13 N. Y. Suppl. 365. general law does not apply to city of New York, which has a special law.

Building laws.— Murdock *v.* Swasey, 183 Mass. 573, 67 N. E. 671, "enlargement" covers every external increase in size.

23. **Accommodations.** — Overseers of Poor *v.* Warner, 3 Hill (N. Y.) 150, applies to licensed inns only.

Sunday law.— Com. *v.* Naylor, 34 Pa. St. 86, applies to sale of liquor only, not to reception of guest.

Sale of liquor.— Proctor *v.* Nicholson, 7 C. & P. 67, 32 E. C. L. 503 (does not apply to resident guests); McAuley *v.* Lawler, 9 N. Brunsw. 600 (applies to innkeepers and tavern-keepers only).

24. Licenses generally see LICENSES.

25. Russellville *v.* White, 41 Ark. 485.

Necessity of license.— In some states all inns must be licensed. Lord *v.* Jones, 24 Me. 439, 41 Am. Dec. 391; State *v.* Fletcher, 5 N. H. 257; State *v.* Stone, 6 Vt. 295. And an individual, although wrongly refused a license, cannot legally act without it (State *v.* Stone, 6 Vt. 295); in others a license is necessary only if liquor is sold (People *v.* Murphy, 5 Park. Cr. (N. Y.) 130; McClure *v.* Krumbholz, 9 Pa. Dist. 544).

26. The fact that different local boards may exercise discretion in granting licenses differently, and the statute to that extent may operate unequally in different parts of the state, is no legal objection. Bancroft *v.* Dumas, 21 Vt. 456.

27. **An application for license,** with the requisite number of signers, duly certified, gives jurisdiction to the licensing tribunal, and the burden is on those who object to it to show that it is fatally defective (Ferguson *v.* Atlantic City, 63 N. J. L. 95, 42 Atl. 747); if a license to keep an inn at one place is rejected, the petitioner may apply within a year for a license at another place (Cramer *v.* Sooy, 67 N. J. L. 107, 50 Atl. 685).

Determination of application.— An application for license to keep inns must be obtained by the court on the twentieth day of its session, or upon a day thus publicly fixed by the court, possibly upon a day of public adjournment fixed in open court thereafter. Cramer *v.* Sooy, 67 N. J. L. 107, 50 Atl. 685.

28. People *v.* Jones, 54 Barb. (N. Y.) 311.

29. Louisville *v.* Kean, 18 B. Mon. (Ky.) 9. In White *v.* Mears, 44 Oreg. 215, 74 Pac. 931, where the board, by deciding to license only one sailor's boarding-house, created an illegal monopoly, it was compelled by mandamus to issue a license to a second applicant.

30. Louisville *v.* Kean, 18 B. Mon. (Ky.) 9. The statute may provide a remedy where a license is wrongly refused. Sights *v.* Yarnalls, 12 Gratt. (Va.) 292.

31. Louisville *v.* Kean, 18 B. Mon. (Ky.) 9; State *v.* Stone, 6 Vt. 295.

32. Penalty generally see PENALTIES.

33. Bonner *v.* Welborn, 7 Ga. 296.

34. Randall *v.* Tuell, 89 Me. 443, 36 Atl. 910, 38 L. R. A. 143. And see CONTRACTS.

35. Stanwood *v.* Woodward, 38 Me. 192.

36. Dickerson *v.* Rogers, 4 Humphr. (Tenn.) 179, 40 Am. Dec. 642. For instance from indictment for exacting more than the established rates. State *v.* Wynne, 8 N. C. 451.

E. Offenses Against Public Regulations.[37] For illegally keeping a public house without a license, or for other breach of public regulation, the ordinary method of punishment is by indictment or other criminal proceeding,[38] and the punishment may be inflicted as often as the offense is repeated.[39] It is no defense that defendant was ignorant of the fact that he had no license,[40] or that he carried on the business on account of an employer, and not for himself.[41] The ordinary rules of criminal pleading apply to the indictment.[42] If drawn substantially in the language of the statute which embraces in its terms the material ingredients of the offense it is sufficient.[43]

III. DUTY TO RECEIVE GUESTS.

A. Extent of Duty to Receive. An innkeeper, as one carrying on a public employment, is obliged to receive all travelers who properly apply to be admitted, provided he has room, and they pay his reasonable charges.[44] If called upon to do so, the guest must tender the price of his entertainment as a condition of being received; but if payment is not demanded by the innkeeper, he need not make tender.[45] This obligation to serve the public attaches to every one professing the trade of innkeeper.[46] The innkeeper must provide such accommodation as he may reasonably foresee to be necessary. He must for instance keep on hand food for a sufficient number of guests.[47] When the innkeeper's accommodation is exhausted, he may refuse to receive an applicant as a guest.[48] The innkeeper is not obliged to admit a guest to any particular room; so long as the accommodation provided is reasonable, the guest must occupy the room chosen for him.[49] An innkeeper who combines with his public business another in which he is under no obligation to serve the public need not serve a guest in the latter business.[50]

B. Excuses For Refusal to Receive. It has sometimes been laid down

37. Criminal liability of tavern-keepers for offense of keeping faro table see GAMING.
Sale of liquor see INTOXICATING LIQUORS.
Inns and hotels as resorts for gaming see GAMING.
Criminal law and procedure generally see CRIMINAL LAW; INDICTMENTS AND INFORMATIONS.

38. State *v.* Cloud, 6 Ala. 628; State *v.* Fletcher, 5 N. H. 257.

39. State *v.* Johnson, 65 Me. 362.

40. Com. *v.* Keathley, 82 S. W. 232, 26 Ky. L. Rep. 493.

41. Winter *v.* State, 30 Ala. 22.

42. See CRIMINAL LAW; INDICTMENTS AND INFORMATIONS.
Uncertainty.— An indictment on St. (1791) c. 58, § 3, forbidding innholders to entertain "any" of the inhabitants of the towns where they dwell, etc., on the Lord's day, which contains only the averment that defendant entertained "divers" inhabitants of the town where he lived, is bad for uncertainty. Com. *v.* Maxwell, 2 Pick. (Mass.) 139.

43. State *v.* Adams, 16 Ark. 497. And see State *v.* Barrett, 20 R. I. 313, 38 Atl. 949.
Under the Alabama statutes the indictment need not allege that defendant was engaged in the business of keeping a restaurant, but it is sufficient to allege that he "did keep" a restaurant without license. Huttenstein *v.* State, 37 Ala. 157 [*distinguishing* Pettibone *v.* State, 19 Ala. 586, decided under a statute previously in force].
An indictment for failure to post rules was held insufficient without an allegation that the rates had been duly fixed, in Jackson *v.* Com., 7 Bush (Ky.) 99.

44. *Kentucky.*— Kisten *v.* Hildebrand, 9 B. Mon. 72, 48 Am. Dec. 416.
New Hampshire.— Markham *v.* Brown, 8 N. H. 523, 31 Am. Dec. 209.
New York.— Cornell *v.* Huber, 102 N. Y. App. Div. 293, 92 N. Y. Suppl. 434; Adams *v.* Freeman, 12 Johns. 408, 7 Am. Dec. 327.
Pennsylvania.— Com. *v.* Mitchell, 2 Pars. Eq. Cas. 431, 1 Phila. 63.
England.— Hawthorn *v.* Hammond, 1 C. & K. 404, 47 E. C. L. 404; Rex *v.* Ivens, 7 C. & P. 213, 32 E. C. L. 578.
See 27 Cent. Dig. tit. "Innkeepers," § 10.

45. Rex *v.* Ivens, 7 C. & P. 213, 32 E. C. L. 578.

46. Atwater *v.* Sawyer, 76 Me. 539, 49 Am. Rep. 634 (even though he has neglected to obtain a license); State *v.* Wynne, 8 N. C. 451.

47. Atwater *v.* Sawyer, 76 Me. 539, 49 Am. Rep. 634. This case went upon the language of a statute, which, however, merely codified the common-law provision.

48. If all his sleeping-rooms are occupied, he need not admit a guest to sleep in a sitting-room or (in modern times) to share the sleeping-room of another guest. Browne *v.* Brandt, (1902) 1 K. B. 696, 71 L. J. K. B. 367, 86 L. T. Rep. N. S. 625, 50 Wkly. Rep. 654.

49. Scrivenor *v.* Reed, 6 Wkly. Rep. 603.

50. Thus an innkeeper who keeps post-horses need not supply them to a guest. Dicas *v.* Hides, 1 Stark. 247, 2 E. C. L. 99.

broadly that persons may be refused admission if they would be so objectionable to the patrons of the house that it would injure the business of the innkeeper to admit them.[51] While this is doubtless too broadly stated as a common-law proposition, a person who is in himself reasonably objectionable may be excluded.[52]

C. Punishment For Refusal to Receive Guests.[53] An innkeeper is indictable for illegally refusing to receive a guest.[54]

D. Justification For Exclusion of Guests After Acceptance. A guest who has been admitted to the inn may afterward be excluded by the innkeeper if he refuses to pay his bill,[55] or if he becomes obnoxious to the guests by his own fault.[56] If, however, he becomes obnoxious through no fault of his own (as by illness), while the innkeeper may probably under some circumstances eject him from the inn, it must be done reasonably, and in such a way as to avoid injury to him.[57] If in the lapse of time the guest has ceased to be a traveler and has become a resident, being no longer in the class of those who may legally demand entertainment, he may be excluded.[58]

E. End of Duty to Receive. An innkeeper may put an end to his duty to receive travelers by definitively going out of the business, and this he may do at any time.[59] But he does not avoid the requirements of his business merely by taking down his sign and ceasing to advertise his inn, so long as he really conducts the business he remains subject to its obligations.[60]

IV. LIABILITY TO GUESTS.

A. Beginning of Liability — 1. Creation of Relation of Host and Guests — a. Reception by Innkeeper Necessary. To establish the relation of host and guest the traveler must visit the inn or hotel for the purpose of availing himself of the entertainment offered, that is, to obtain refreshments or lodging.[61] But when a traveler comes to an inn and is received by the innkeeper for the purpose

51. State *v.* Steele, 106 N. C. 766, 11 S. E. 478, 19 Am. St. Rep. 573, 8 L. R. A. 516, and this, although the reason for exclusion is simply the race of the applicant.

52. Thus one may be excluded because he is drunk (Markham *v.* Brown, 8 N. H. 523, 31 Am. Dec. 209; State *v.* Steele, 106 N. C. 766, 11 S. E. 478, 19 Am. St. Rep. 573, 8 L. R. A. 516; Rex *v.* Ivens, 7 C. & P. 213, 32 E. C. L. 578), or because he is filthy (Markham *v.* Brown, *supra*; State *v.* Steele, *supra*), or profane (State *v.* Steele, *supra*), or indecently or improperly behaved (Rex *v.* Ivens, *supra*), or because he is a common brawler or thief (Markham *v.* Brown, *supra*), or a person of bad reputation (Goodenow *v.* Travis, 3 Johns. (N. Y.) 427), or if he desires to enter for an unlawful purpose, as to assault an inmate (Markham *v.* Brown, *supra*), or if he attempts to enter by violence, as by breaking the door (Goodenow *v.* Travis, *supra*), or if he insists upon bringing large dogs with him, to the annoyance of the guests (Reg. *v.* Rymer, 20 Q. B. D. 136, 13 Cox C. C. 378, 46 L. J. M. C. 108, 35 L. T. Rep. N. S. 774, 25 Wkly. Rep. 415); on the other hand it is not a sufficient excuse for refusal to receive a person as guest that he came on Sunday, or late at night, or that he refused to give his name and address (Rex *v.* Ivens, *supra*) or that other members of a military company to which he belonged had previously misconducted themselves at the inn (Atwater *v.* Sawyer, 76 Me. 539, 49 Am. Rep. 634), or that he is peculiarly dressed, provided the dress is decent (Reg. *v.* Sprague, 63 J. P. 233).

53. Criminal law and procedure generally see Criminal Law; Indictments and Informations.

54. Kisten *v.* Hildebrand, 9 B. Mon. (Ky.) 72, 48 Am. Dec. 416; Com. *v.* Mitchell, 2 Pars. Eq. Cas. (Pa.) 431, 1 Phila. 63; Rex *v.* Ivens, 7 C. & P. 213, 32 E. C. L. 578.

55. Doyle *v.* Walker, 26 U. C. Q. B. 502.

56. State *v.* Steele, 106 N. C. 766, 11 S. E. 478, 19 Am. St. Rep. 573, 8 L. R. A. 516 (by soliciting their custom in his business); McHugh *v.* Schlosser, 159 Pa. St. 480, 28 Atl. 291, 39 Am. St. Rep. 699, 23 L. R. A. 574 (by becoming intoxicated).

57. McHugh *v.* Schlosser, 159 Pa. St. 480, 28 Atl. 291, 39 Am. St. Rep. 699, 23 L. R. A. 574.

58. Lamond *v.* Richard, [1897] 1 Q. B. 541, 61 J. P. 260, 66 L. J. Q. B. 315, 76 L. T. Rep. N. S. 141, 45 Wkly. Rep. 289. To make out a justification on this ground the innkeeper must show affirmatively that the guest has become a resident. Whiting *v.* Mills, 7 U. C. Q. B. 450.

59. Conklin *v.* Prospect Park Hotel Co., 1 N. Y. Suppl. 406; Rex *v.* Collins, Palm. 373.

60. Rex *v.* Collins, Palm. 373.

61. Bunn *v.* Johnson, 77 Mo. App. 596, holding that one who engages and pays for a room merely to secure a safe place for the deposit of his valuables is not a guest.

of entertaining him, the relation of host and guest is thereby established.[62] Everyone received by the innkeeper for entertainment is a guest, whether he is himself responsible for his board bill or another pays it for him.[63] The liability as innkeeper and the right to make charges enforced by the innkeeper's lien are concurrent.[64]

b. Entertainment During Day Only. One may become a guest at an inn without remaining over night; a traveler who resorts to an inn merely for food during the day is a guest.[65]

c. Reception of One Not a Traveler. Since no one but a traveler has a right to be received as a guest,[66] it is often said that one who lives in the same town with the innkeeper cannot be a guest.[67] This statement is probably too broad. If such a person is received into the inn on the footing of a guest, the innkeeper is liable to him as to a guest.[68] And it is clear that one need not be taking a long journey in order to be regarded as a traveler.[69]

d. Illegal Conduct or Purpose of Guest. The relation of host and guest is not affected by the fact that the guest is acting illegally in a matter outside the actual relationship.[70] Although perhaps if the illegality is connected with his conduct in the inn, he may not be entitled to the rights of a guest.[71]

e. Guest Must Be Personally Present. One who is not personally entertained at the inn cannot be a guest there.[72] On this principle it has been held

62. Pinkerton *v.* Woodward, 33 Cal. 557, 91 Am. Dec. 657; Healey *v.* Gray, 68 Me. 489, 28 Am. Rep. 80; Norcross *v.* Norcross, 53 Me. 163; Ross *v.* Mellin, 36 Minn. 421, 32 N. W. 172. And see McDaniels *v.* Robinson, 26 Vt. 316, 62 Am. Dec. 574.

Necessity for communication with innkeeper or agent. — The relation is usually established by registration, but it may be by other communication with the innkeeper or his proper agent. There must, however, be some communication. Thus one who enters the dining-room of an ordinary inn and calls for food without notice to the innkeeper does not thereby become a guest; a waiter is not a servant authorized to receive guests. Gastenhofer *v.* Clair, 10 Daly (N. Y.) 265.

Immediate continuance of journey. — Where a traveler came to an inn intending to become a guest, but on arriving there received a telegram in consequence of which he continued his journey at once, he never became a guest, and the innkeeper was not responsible as such for the luggage he brought to the inn. Strauss *v.* County Hotel, etc., Co., 12 Q. B. D. 27, 48 J. P. 69, 53 L. J. Q. B. 25, 49 L. T. Rep. N. S. 601, 32 Wkly. Rep. 170.

Where the innkeeper refuses, whether rightfully or not, to admit an applicant as guest, the applicant cannot become a guest by insisting on leaving his goods in the inn (Centlivre *v.* Ryder, 1 Edm. Sel. Cas. (N. Y.) 273; Bird *v.* Bird, 1 And. 29, Benl. 60; Bennett *v.* Mellor, 5 T. R. 273, 2 Rev. Rep. 593), or by inducing a guest to share his bed (White's Case, 2 Dyer 158*b*).

63. Kopper *v.* Willis, 9 Daly (N. Y.) 460; Read *v.* Amidon, 41 Vt. 15, 98 Am. Dec. 560.

64. Carter *v.* Hobbs, 12 Mich. 52, 83 Am. Dec. 762; Ingalsbee *v.* Wood, 36 Barb. (N. Y.) 452 [*affirmed* in 33 N. Y. 577, 88 Am. Dec. 409].

65. McDonald *v.* Edgerton, 5 Barb. (N. Y.) 560; Kopper *v.* Willis, 9 Daly (N. Y.) 460; Read *v.* Amidon, 41 Vt. 15, 98 Am. Dec. 560. So when one came to an inn with goods and set them down while he had some liquor, and while he was drinking the goods were stolen, he was a guest, and the innkeeper was liable as such for the goods. Bennett *v.* Mellor, 5 T. R. 273, 2 Rev. Rep. 593. And where a person came to an inn in the afternoon, intending to leave by a late train that night, and therefore took no sleeping-room, but remained in the public room of an inn, waiting for the train, he was a guest. Overstreet *v.* Moser, 88 Mo. App. 72.

66. See *supra*, III, A.

67. Curtis *v.* Murphy, 63 Wis. 4, 22 N. W. 825, 53 Am. Rep. 242.

68. Walling *v.* Potter, 35 Conn. 183; Orchard *v.* Bush, [1898] 2 Q. B. 284, 289, 67 L. J. Q. B. 650, 78 L. T. Rep. N. S. 557, 46 Wkly. Rep. 527.

69. Thus a man on his way from his city office to his suburban home has the rights of a traveler at an inn. Orchard *v.* Bush, [1898] 2 Q. B. 284, 67 L. J. Q. B. 650, 78 L. T. Rep. N. S. 557, 46 Wkly. Rep. 527.

70. Cox *v.* Cook, 14 Allen (Mass.) 165, traveling on Sunday.

71. Thus where a person went to an inn with a prostitute he was held no more entitled to the rights of a guest than a thief would be who hired a room to steal from the guests. Curtis *v.* Murphy, 63 Wis. 4, 22 N. W. 825, 53 Am. Rep. 242. But in a similar case where the man remained after the woman left the inn, he was held entitled to the rights of a guest from the time at least when his immoral conduct ceased. Lucia *v.* Omel, 46 N. Y. App. Div. 200, 61 N. Y. Suppl. 659 [*affirmed* in 53 N. Y. App. Div. 641, 66 N. Y. Suppl. 1136].

72. It is, to be sure, sometimes said that where a man's servant or minor child is received at an inn, the master or father is the

that a traveler who sends his horse to an inn while he himself lodges at a private house is not a guest, and the innkeeper is not responsible as such for the horse.[73] But in other jurisdictions the innkeeper is held liable as such for the horse, although the owner does not lodge in the inn, since he is paid for keeping the horse.[74]

f. Reception in Another Capacity Than as Guest. One admitted to an inn becomes a guest only if he is received to be treated as a guest. A person who is invited by the innkeeper as his friend does not become technically a guest at the inn.[75] On this principle one who goes to an inn merely to attend a banquet or a ball held there does not become a guest at the inn.[76] Even if the attendant at the ball buys liquor or stables his horse he is still not a guest.[77]

g. Guest or Boarder. An innkeeper may, and commonly does, entertain not only merely transient guests, but other persons who stay at the inn for a considerable period, making in fact their residence there; such persons are boarders, not guests.[78] If a person is at an inn for entertainment, the question whether he is a guest or a boarder is a question of fact.[79] The determination of this question may depend upon a number of considerations; whether the person is a resident or a stranger might, for instance, have a bearing on its solution.[80] If he is staying at the inn under a contract by which he is to remain there a certain considerable

guest. Coykendall *v.* Eaton, 55 Barb. (N. Y.) 188, 37 How. Pr. 438; Robinson *v.* Waller, 1 Rolle Abr. 3, pl. 6, 7. These cases, however, mean no more than that the master or father is entitled to sue in his own name for his property lost in the inn.

73. Healey *v.* Gray, 68 Me. 489, 28 Am. Rep. 80; Ingallsbee *v.* Wood, 33 N. Y. 577, 88 Am. Dec. 409; Neale *v.* Croker, 8 U. C. C. P. 224. In McDaniels *v.* Robinson, 28 Vt. 387, 67 Am. Dec. 720, the innkeeper in such a case was held not responsible as innkeeper for goods left in the inn, not connected with the horse; the implication being that he might have been held responsible as innkeeper for the horse.

74. Russell *v.* Fagan, 7 Houst. (Del.) 389, 8 Atl. 258; Mason *v.* Thompson, 9 Pick. (Mass.) 280, 20 Am. Dec. 471; Yorke *v.* Grenaugh, 2 Ld. Raym. 866.

75. Anonymous, 1 Rolle Abr. 3, pl. 4. So where an innkeeper refused to accept a traveler because he must go to serve on a jury next morning and the traveler at his own request took the keys for the purpose of looking out for himself, the relation of host and guest was not established. Y. B. 11, Hen. IV. 45, pl. 18.

76. Carter *v.* Hobbs, 12 Mich. 52, 83 Am. Dec. 762; Amey *v.* Winchester, 68 N. H. 447, 39 Atl. 487, 73 Am. St. Rep. 614, 39 L. R. A. 760. *Contra*, Burgoin *v.* Hogan, 13 L. C. Rep. 424.

The innkeeper is not liable as such even if he himself gives the ball and invites the public to come, since he does not give it in his capacity as innkeeper. Fitch *v.* Casler, 17 Hun (N. Y.) 126.

77. Carter *v.* Hobbs, 12 Mich. 52, 83 Am. Dec. 762; Fitch *v.* Casler, 17 Hun (N. Y.) 126. In Amey *v.* Winchester, 68 N. H. 447, 39 Atl. 487, 73 Am. St. Rep. 614, 39 L. R. A. 760, a guest of the inn attended a banquet in the inn, and while in the banquet-room his hat which he took with him was lost; the court held that the innkeeper was not responsible as such for the loss.

78. *Connecticut.*— Walling *v.* Potter, 35 Conn. 183.

Massachusetts.— Hall *v.* Pike, 100 Mass. 495.

New Mexico.— Horner *v.* Harvey, 3 N. M. 197, 5 Pac. 329.

Pennsylvania.— Jeffords *v.* Crump, 12 Phila. 500.

Utah.— Lawrence *v.* Howard, 1 Utah 142.

See 27 Cent. Dig. tit. "Innkeepers," § 12.

79. *Arizona.*— Haff *v.* Adams, (1899) 59 Pac. 111.

California.— Magee *v.* Pacific Imp. Co., 98 Cal. 678, 33 Pac. 772, 35 Am. St. Rep. 199.

Iowa.— Pollock *v.* Landis, 36 Iowa 651.

Massachusetts.— Hall *v.* Pike, 100 Mass. 495.

New York.— Hancock *v.* Rand, 94 N. Y. 1, 46 Am. Rep. 112.

Canada.— Light *v.* Abel, 11 N. Brunsw. 400.

See 27 Cent. Dig. tit. "Innkeepers," § 13.

80. *Alabama.*— Beale *v.* Posey, 72 Ala. 323, merchant of another city staying on business; guest.

Arizona.— Haff *v.* Adams, (1899) 59 Pac. 111, breaks up home and goes to hotel in same town; boarder.

Minnesota.— Lusk *v.* Belote, 22 Minn. 468, practice of living at hotel; boarder.

New Mexico.— Horner *v.* Harvey, 3 N. M. 197, 5 Pac. 329, railroad man has room at hotel at each end of his run; boarder.

New York.— Hancock *v.* Rand, 94 N. Y. 1, 46 Am. Rep. 112 (soldier unable to establish permanent home, living meanwhile at hotels; guest); Metzger *v.* Schnabel, 23 Misc. 698, 52 N. Y. Suppl. 105 (foreigner; guest).

Tennessee.— Meacham *v.* Galloway, 102 Tenn. 415, 52 S. W. 859, 73 Am. St. Rep. 886, 46 L. R. A. 319, breaks up home and goes to hotel in same town; boarder.

See 27 Cent. Dig. tit. "Innkeepers," § 13.

time, and in return gets a special rate for board, he is presumably a boarder.[81] But the mere fact that he has stayed for a week or longer, and that he is paying the weekly rather than the daily rate, does not prove that he is a boarder.[82]

2. CREATION OF RESPONSIBILITY FOR GOODS OF GUEST — a. By Bailment to Innkeeper — (I) *BEFORE ESTABLISHMENT OF RELATION OF HOST AND GUEST.* The innkeeper may become responsible for the goods of a guest, even before the relation of host and guest is established, by a delivery to him and an acceptance by him, thus creating a bailment. This often happens when the innkeeper sends a conveyance to a railroad station to bring guests and their baggage to the inn. In such a case when the intending guest gives baggage to the porter or other person authorized by the innkeeper to receive it, the innkeeper becomes liable for it as innkeeper.[83] So where goods of an intending guest are sent to an inn and received by the innkeeper, the liability of the innkeeper begins from the moment the goods are received.[84] In these cases, however, the innkeeper's responsibility as such is conditioned on the owner becoming a guest within a reasonable time. Even though the owner intends to become a guest at the time of delivery, still if he changes his mind and does not do so the responsibility of the innkeeper for the goods becomes *ab initio* that of a mere bailee.[85]

(II) *AT TIME OF ESTABLISHMENT OF RELATION OF HOST AND GUEST.* Goods are ordinarily delivered to the innkeeper or his servant at the time the guest comes to the inn. When the goods are delivered to a servant, if he is at a proper place and clothed with the appearance of authority to receive the goods, the innkeeper is liable from the time of delivery to the servant.[86] If goods are delivered

81. *Arizona.*— Haff *v.* Adams, (1899) 59 Pac. 111.

California.— Moore *v.* Long Beach Development Co., 87 Cal. 483, 26 Pac. 92, 22 Am. St. Rep. 265.

Iowa.— Shoecraft *v.* Bailey, 25 Iowa 553.

Kansas.—Johnson *v.* Reynolds, 3 Kan. 251.

New York.— Smith *v.* Keyes, 2 Thomps. & C. 650.

Tennessee.— Meacham *v.* Galloway, 102 Tenn. 415, 52 S. W. 859, 73 Am. St. Rep. 886, 46 L. R. A. 319.

See 27 Cent. Dig. tit. "Innkeepers," § 13.

82. *Alabama.*— Beale *v.* Posey, 72 Ala. 323.

California.— Magee *v.* Pacific Imp. Co., 98 Cal. 678, 33 Pac. 772, 35 Am. St. Rep. 199; Fay *v.* Pacific Imp. Co., 93 Cal. 253, 26 Pac. 1099, 28 Pac. 943, 27 Am. St. Rep. 198, 16 L. R. A. 188; Pinkerton *v.* Woodward, 33 Cal. 557, 91 Am. Dec. 657.

Iowa.— Pollock *v.* Landis, 36 Iowa 651; Shoecraft *v.* Bailey, 25 Iowa 553.

Massachusetts.— Hall *v.* Pike, 100 Mass. 495; Berkshire Woolen Co. *v.* Proctor, 7 Cush. 417.

Michigan.— Polk *v.* Melenbacker, 136 Mich. 611, 99 N. W. 867.

Minnesota.— Ross *v.* Mellin, 36 Minn. 421, 32 N. W. 172.

New York.— Metzger *v.* Schnabel, 23 Misc. 698, 52 N. Y. Suppl. 105; Lima *v.* Dwinelle, 7 Alb. L. J. 44.

Wisconsin.— Jalie *v.* Cardinal, 35 Wis. 118.

Canada.— Whiting *v.* Mills, 7 U. C. Q. B. 450.

See 27 Cent. Dig. tit. "Innkeepers," § 13.

Occasional visits to family boarding at hotel.— Where a man sent his family to an inn in a distant city and they remained there for several months, while he made them an occasional short visit, his family were boarders and he was a guest. Lusk *v.* Belote, 22 Minn. 468.

83. Coskery *v.* Nagle, 83 Ga. 696, 10 S. E. 491, 20 Am. St. Rep. 333, 6 L. R. A. 483; Williams *v.* Moore, 69 Ill. App. 618 (arrangement by innkeeper with a baggage transfer company to receive and bring to an inn the guest's baggage; liability as innkeeper begins when transfer company takes baggage for innkeeper); Dickinson *v.* Winchester, 4 Cush. (Mass.) 114, 50 Am. Dec. 760. Even if only the check for the baggage is delivered to the innkeeper's servant, the innkeeper is presumably liable from the moment of receiving the check, and can escape liability only by showing that he never in fact received the baggage. Carhart *v.* Wainman, 114 Ga. 632, 40 S. E. 781, 88 Am. St. Rep. 45.

84. Eden *v.* Drey, 75 Ill. App. 102. Delivery to and acceptance by the innkeeper may be made without actual knowledge of the innkeeper or his servants. Thus where a transfer company placed a trunk of an intending guest on the platform of a hotel and shouted "baggage," this being the customary method of delivering baggage to the hotel, the innkeeper at once became responsible for it. Maloney *v.* Bacon, 33 Mo. App. 501. To the same effect see Becker *v.* Haynes, 29 Fed. 441.

85. Tulane Hotel Co. *v.* Holohan, 112 Tenn. 214, 79 S. W. 113, 105 Am. St. Rep. 930; Strauss *v.* County Hotel, etc., Co., 12 Q. B. D. 27, 48 J. P. 69, 53 L. J. Q. B. 25, 49 L. T. Rep. N. S. 601, 32 Wkly. Rep. 170.

86. Rockwell *v.* Proctor, 39 Ga. 105; Buckle

to an innkeeper by a guest it may be shown that they are given to him in another capacity than as innkeeper; in which case he would be at most an ordinary bailee.[87]

(III) *After Establishment of Relation of Host and Guest.* The innkeeper who receives goods for the guest after the relationship has been established is responsible as innkeeper.[88]

b. By Acceptance Without Bailment — (I) *Possession in the Guest.* In order for the innkeeper to become responsible as such for the goods of the guest it is not necessary that possession should be given up to the innkeeper; if the guest takes the goods to his room and keeps them there, the innkeeper is responsible for the safety of the goods.[89] So where a guest places his overcoat or other outer garment in the place provided for them in the inn the innkeeper's liability attaches to them, although the innkeeper has no notice.[90] And where the goods of the guest are placed in a public room in the inn, even where it is done by special request of the guest, the innkeeper is liable for them as innkeeper.[91]

(II) *Control in the Innkeeper.* But while the goods may remain in the possession of the guest, the general control must be in the innkeeper if he is to be held responsible; if the guest himself undertakes the entire care and control of the goods the innkeeper is not responsible.[92] So where a guest by arrangement with an innkeeper displays merchandise in a room of the inn and invites cus-

v. Probasco, 58 Mo. App. 49; Labold *v.* Southern Hotel Co., 54 Mo. App. 567; Houser *v.* Tully, 62 Pa. St. 92, 1 Am. Rep. 390; Curtis *v.* Murphy, 63 Wis. 4, 22 N. W. 825, 53 Am. Rep. 242.

Presumption as to time of reception of goods.— Where the goods were accepted by the innkeeper before the guest came to the inn, and some time after the guest came to the inn the goods could not be found, they are presumed to have been in the hands of the innkeeper at the time the guest was received; and unless he can prove that the goods were lost before the guest was received the innkeeper will be held liable as such. Oriental Hotel Assoc. *v.* Faust, (Tex. Civ. App. 1905) 86 S. W. 373.

87. Bemon *v.* Watson, 1 Rolle Abr. 3, p. 1. So where they are handed to a servant of the innkeeper it may be shown that they were given to him not as representing the innkeeper, but individually. Sneider *v.* Geiss, 1 Yeates (Pa.) 34.

Delivery to innkeeper a question of fact.— Whether they are given to the innkeeper or his servant in respect of the innkeeper's public calling or as a private matter is a question of fact in each case. Houser *v.* Tully, 62 Pa. St. 92, 1 Am. Rep. 390. So where an innkeeper carries on another business on the same premises, it is a question of fact whether property delivered is given to the innkeeper as such, or as the person conducting the other business. Mason *v.* Thompson, 9 Pick. (Mass.) 280, 20 Am. Dec. 471, horse delivered to innkeeper who also kept a livery stable.

88. Needles *v.* Howard, 1 E. D. Smith (N. Y.) 54, goods delivered by tradesmen at the office for the guest.

89. *California.*— Fay *v.* Pacific Imp. Co., 93 Cal. 253, 26 Pac. 1099, 28 Pac. 943, 27 Am. St. Rep. 198, 16 L. R. A. 188.

Kentucky.— Weisenger *v.* Taylor, 1 Bush 275, 89 Am. Dec. 626.

Mississippi.— Epps *v.* Hinds, 27 Miss. 657, 61 Am. Dec. 528.

Wisconsin.— Jalie *v.* Cardinal, 35 Wis. 118.

England.— Y. B. 11, Hen. IV, 45, pl. 18; 42 Edw. III, 11, pl. 13.

Bringing goods during stay.— It is immaterial whether the owner brings the goods with him, or brings them into the inn during his stay there. Mateer *v.* Brown, 1 Cal. 221, 52 Am. Dec. 303.

90. Norcross *v.* Norcross, 53 Me. 163; McDonald *v.* Edgerton, 5 Barb. (N. Y.) 560; Bradner *v.* Mullen, 27 Misc. (N. Y.) 479, 59 N. Y. Suppl. 178; Read *v.* Amidon, 41 Vt. 15, 98 Am. Dec. 560.

91. Packard *v.* Northcraft, 2 Metc. (Ky.) 439; Burrows *v.* Trieber, 21 Md. 320, 83 Am. Dec. 590; Richmond *v.* Smith, 8 B. & C. 9, 6 L. J. K. B. O. S. 279, 2 M. & R. 235, 15 E. C. L. 14; Candy *v.* Spencer, 3 F. & F. 306.

92. Vance *v.* Throckmorton, 5 Bush (Ky.) 41, 96 Am. Dec. 327. Thus where, the innkeeper being absent, the guest received the key and undertook to look out for himself, the innkeeper was not responsible for the goods. Y. B. 11, Hen. IV, 45, pl. 18. And where a stallion was by a special arrangement brought to an inn on certain days of each week, and there cared for by the owner's servant, the innkeeper was not responsible for him as an innkeeper. Mowers *v.* Fethers, 61 N. Y. 34, 19 Am. Rep. 244. The earlier case of Washburn *v.* Jones, 14 Barb. (N. Y.) 193, where on similar facts the innkeeper was held liable is not law.

Where a horse was pastured in a field belonging to the inn, but taken care of by the owner, the innkeeper was not liable. Neal *v.* Wilcox, 49 N. C. 146, 67 Am. Dec. 266.

tomers there, the control of the room and the goods for this purpose being in the guest, the innkeeper is not responsible for the goods.[93]

(III) *Goods Within the Precincts of the Inn.* The innkeeper is not liable as innkeeper for the goods of his guest unless they are brought within the precincts of the inn, and only while they remain within the inn.[94] If at the request of the guest or by his act the goods are placed outside the inn, the innkeeper is not liable.[95] If, however, the innkeeper himself directs that the goods be placed outside the inn, he is liable as innkeeper for the goods when his directions are followed.[96]

B. Extent of Liability — 1. Liability For Personal Injury to Guest — a. Nature of Duty to Guest. It is the duty of an innkeeper to take reasonable care of the persons of his guests, so that they may not be injured while in the inn by want of such care on his part.[97] He is not, however, an insurer of the guest's safety; his responsibility is limited to the exercise of reasonable care.[98]

b. Reasonable Accommodations. A guest is entitled to reasonable accommodations, but not to any particular room in an inn.[99] A landlord has the sole right to select a room for a guest, and he may even change the room assigned and assign the guest to another.[1]

c. Injury by Other Persons. The innkeeper must protect his guest against third persons, where it is within the power of himself or his servants to do so.[2] *A fortiori* the innkeeper is liable for injury to his guest committed intentionally

93. Fisher *v.* Kelsey, 121 U. S. 383, 7 S. Ct. 929, 30 L. ed. 930; Myers *v.* Cottrill, 17 Fed. Cas. No. 9,985, 5 Biss. 465; Burgess *v.* Clements, Holt N. P. 211 note, 3 E. C. L. 90, 4 M. & S. 306, 1 Stark. 251 note, 16 Rev. Rep. 473, 2 E. C. L. 101; Farnworth *v.* Packwood, Holt N. P. 209, 3 E. C. L. 89, 1 Stark. 249, 2 E. C. L. 100. Where, however, the room is also used as a sleeping-room, the innkeeper is responsible for the personal baggage of the guest placed in the room. Myers *v.* Cottrill, 17 Fed. Cas. No. 9,985, 5 Biss. 465.

94. Where a guest put goods in a bathing-house belonging to the innkeeper, but outside the inn, and they were lost, the innkeeper was not liable as such. Minor *v.* Staples, 71 Me. 316, 36 Am. Rep. 318.

95. Hawley *v.* Smith, 25 Wend. (N. Y.) 642 (as where at the request of the guest a horse is pastured outside the inn); Windham's Case, 4 Leon. 96; Dale *v.* Gibson, 1 Rolle Abr. 3, pl. 3. *A fortiori* where the innkeeper directs the guest to place the goods inside the inn, and the guest notwithstanding leaves them outside, the innkeeper is not liable. Brand's Case, Moore K. B. 59.

96. Cohen *v.* Manuel, 91 Me. 274, 39 Atl. 1030, 64 Am. St. Rep. 225, 40 L. R. A. 491 (carriage placed in open street, yard, or outhouse outside the inn precincts by direction of the innkeeper); Piper *v.* Manny, 21 Wend. (N. Y.) 282; Clute *v.* Wiggins, 14 Johns. (N. Y.) 175, 7 Am. Dec. 448 and note; Jones *v.* Tyler, 1 A. & E. 522, 3 L. J. K. B. 166, 3 N. & M. 576, 28 E. C. L. 252; Calye's Case, 8 Coke 32*a*, Smith Lead. Cas. 246; Windham's Case, 4 Leon. 96; Dale *v.* Gibson, 1 Rolle Abr. 3 F, pl. 3 (horse placed in pasture by direction of the innkeeper). But the mere fact that the innkeeper is accustomed to place a horse or carriage of a guest in a shed outside the inn is not a request to the guest to place one there; and if a guest, without notice to the innkeeper, places his horse or carriage in such customary place the innkeeper does not thereby become responsible for it. Albin *v.* Presby, 8 N. H. 408, 29 Am. Dec. 679; Bradley Livery Co. *v.* Snook, 66 N. J. L. 654, 50 Atl. 358, 55 L. R. A. 208.

97. Stott *v.* Churchill, 15 Misc. (N. Y.) 80, 36 N. Y. Suppl. 476; Sandys *v.* Florence, 47 L. J. C. P. 598.

98. Weeks *v.* McNulty, 101 Tenn. 495, 48 S. W. 809, 70 Am. St. Rep. 693, 43 L. R. A. 185; Clancy *v.* Barker, 131 Fed. 161, 66 C. C. A. 469, 69 L. R. A. 653.

99. Fell *v.* Knight, 5 Jur. 554, 10 L. J. Exch. 277, 8 M. & W. 269; Scrivenor *v.* Reed, 6 Wkly. Rep. 603; Doyle *v.* Walker, 26 U. C. Q. B. 502.

1. Doyle *v.* Walker, 26 U. C. Q. B. 502.

Forcible removal of guest.— A landlord of an inn may, after a request to withdraw, forcibly remove a guest from a particular room in an inn where he has improperly placed himself, in case of a refusal to remove. Scrivenor *v.* Reed, 6 Wkly. Rep. 603.

2. Curran *v.* Olson, 88 Minn. 307, 92 N. W. 1124, 97 Am. St. Rep. 517, 60 L. R. A. 733 (where a drunken guest was injured by another guest, while the innkeeper's servant permitted the act, the innkeeper was liable); Rommel *v.* Schambacher, 120 Pa. St. 579, 11 Atl. 779, 6 Am. St. Rep. 732.

Failure to warn of contagious disease.—An innkeeper who without warning him allows a guest to come to an inn in which to the innkeeper's knowledge there is a contagious disease, the innkeeper is liable if the guest contracts the disease. Gilbert *v.* Hoffman, 66 Iowa 205, 23 N. W. 632, 55 Am. Rep. 263.

or negligently by a servant, since it is the servant's duty and it is within the servant's power to prevent the injury.[3]

d. Injury by Defective Premises. The requirement of reasonable care for the safety of the guests extends to the buildings and appliances of the inn, which both in construction and in maintenance must be such as reasonably to secure the safety of the guest. For any injury to the guest caused by lack of due care in this respect the innkeeper is liable.[4] If, however, the defect is an obvious one, the guest must use reasonable care on his own part; and if he is himself negligent, he cannot recover from the innkeeper.[5] The duty of securing safe premises and appliances cannot be delegated to another, even though the latter is a proper person, so as to avoid responsibility; the innkeeper is liable if the guest is injured by his delegate's negligence.[6]

e. Injury by Bad Food. An innkeeper or restaurant keeper is not an insurer of the quality of the food he provides, although he would be liable for knowingly or negligently furnishing bad and deleterious food.[7]

f. Injury by Fire. It has been held that an innkeeper is not liable for injuries sustained through failure to warn his guests when a fire breaks out on the premises.[8]

2. Liability For Goods of Guest — a. Nature of Obligation — (i) *Extent of Liability* — (a) *The Rules Prevailing.* Different theories have been advanced as to the law governing the innkeeper's liability for the goods of his guest.[9] The prevailing view is that he is liable, like the carrier, for all goods of the guest lost in the inn, unless the loss happened by act of God or a public enemy or by fault of the owner.[10] According to this view the innkeeper is liable if the goods are

3. Curran *v.* Olson, 88 Minn. 307, 92 N. W. 1124, 97 Am. St. Rep. 517, 60 L. R. A. 733; Overstreet *v.* Moser, 88 Mo. App. 72; Clancy *v.* Barker, (Nebr. 1904) 98 N. W. 440, (1905) 103 N. W. 446. *Contra*, Rahmel *v.* Lehndorff, 142 Cal. 681, 76 Pac. 659, 100 Am. St. Rep. 154, 65 L. R. A. 88; Curtis *v.* Dinneen, 4 Dak. 245, 30 N. W. 148; Clancy *v.* Barker, 131 Fed. 161, 66 C. C. A. 469, 69 L. R. A. 653.

Liability of restaurant keeper.— In Block *v.* Sherry, 43 Misc. (N. Y.) 342, 87 N. Y. Suppl. 160, a restaurant keeper (whose duty is not so absolute as that of an innkeeper) was held liable for his servant negligently spilling water on a guest.

4. West *v.* Thomas, 97 Ala. 622, 11 So. 768 (stairway unguarded); Omaha Hotel Assoc. *v.* Walters, 23 Nebr. 280, 36 N. W. 561 (defective railing by reason of which a guest fell into an area); Stott *v.* Churchill, 157 N. Y. 692, 51 N. E. 1094 [*affirming* 15 Misc. 80, 36 N. Y. Suppl. 476] (elevator fell because of negligent inspection); Sandys *v.* Florence, 47 L. J. C. P. 598.

Unguarded elevator shaft.— Where the innkeeper leaves unguarded the opening to an elevator or a staircase well, and the guest falls into the opening in the night, the question of liability has been a subject of discussion. Ordinarily the innkeeper is liable. West *v.* Thomas, 97 Ala. 622, 11 So. 768; Hayward *v.* Merrill, 94 Ill. 349, 34 Am. Rep. 229; Mauzy *v.* Kinzel, 19 Ill. App. 571. Where the guest first wandered into an unlighted service room, not open to guests, and in one corner of it he fell into the unguarded elevator shaft, the innkeeper was held not to be liable by a majority of the English house of lords. Walker *v.* Midland R. Co., 51 J. P. 116, 55 L. T. Rep. N. S. 489.

Injuries not resulting from defects.—Where fire-escapes were lacking, but the death of a guest in a fire was not due to the lack of them, the innkeeper was not liable. Weeks *v.* McNulty, 101 Tenn. 495, 48 S. W. 809, 70 Am. St. Rep. 693, 43 L. R. A. 185.

5. Sneed *v.* Morehead, 70 Miss. 690, 13 So. 235 (unrailed gallery); Bremer *v.* Pleiss, 121 Wis. 61, 98 N. W. 945 (elevator door, with which guest was familiar, partly open); Ten Broeck *v.* Wells, 47 Fed. 690 (unrailed gallery).

6. Stott *v.* Churchill, 157 N. Y. 692, 51 N. E. 1094 [*affirming* 15 Misc. 80, 36 N. Y. Suppl. 476].

7. Sheffer *v.* Willoughby, 163 Ill. 518, 45 N. E. 253, 54 Am. St. Rep. 483, 34 L. R. A. 464, restaurant. In Stringfellow *v.* Grunewald, 109 La. 187, 33 So. 190, the allegation that the guest had been injured by bad food furnished by defendant was not established on the facts.

8. Hare *v.* Henderson, 43 U. C. Q. B. 571.

9. Lanier *v.* Youngblood, 73 Ala. 587; Sibley *v.* Aldrich, 33 N. H. 553, 66 Am. Dec. 745; Hulett *v.* Swift, 33 N. Y. 571, 88 Am. Dec. 405.

10. *California.*— Mateer *v.* Brown, 1 Cal. 221, 52 Am. Dec. 303.

Delaware.—Russell *v.* Fagan, 7 Houst. 389, 8 Atl. 258.

Maine.— Norcross *v.* Norcross, 53 Me. 163; Shaw *v.* Berry, 31 Me. 478, 52 Am. Dec. 628.

Massachusetts.— Mason *v.* Thompson, 9 Pick. 280, 20 Am. Dec. 471.

Nebraska.— Dunbier *v.* Day, 12 Nebr. 596, 12 N. W. 109, 41 Am. Rep. 772.

burnt by an accidental fire[11] or are stolen without his fault;[12] *a fortiori* if they are stolen by the innkeeper's servants.[13] Even if the goods are injured by an excepted cause, an act of God, the innkeeper is liable if he negligently failed to provide against the loss from this cause.[14] According to another view frequently held an innkeeper is responsible only if he is negligent. He owes the highest possible degree of care to his guest, but if he has been as careful as possible, and the goods have been injured without his fault, he is not liable.[15] Another view, which is perhaps best in accord with the history of the law and the language of the leading case,[16] holds the innkeeper liable only for actual default in his undertaking, which is to provide at his peril absolute protection against the dangers of the road, and to use the utmost care to protect against loss from other causes. The innkeeper would, according to this view, be absolutely liable for loss of the goods by robbery or theft in the inn; but he would be excused if without any default on the part of himself or his servants the goods were lost or injured by accidental fire or by the act (other than theft) or the negligence of a third person. This appears to be the rule adopted in a few jurisdictions, as may be seen by an examination of their decisions.[17]

(B) *Presumption of Negligence.* Whatever view is adopted, it is agreed that upon loss or injury to the goods being shown the innkeeper is *prima facie* liable, and the burden is on him of establishing such facts as will exonerate him.[18]

New Hampshire.— Sibley *v.* Aldrich, 33 N. H. 553, 66 Am. Dec. 745.

New York.— Hulett *v.* Swift, 33 N. Y. 571, 88 Am. Dec. 405 [*affirming* 42 Barb. 230]; Lucia *v.* Omel, 53 N. Y. App. Div. 641, 66 N. Y. Suppl. 1136; Gile *v.* Libby, 36 Barb. 70; Classen *v.* Leopold, 2 Sweeny 705; Willard *v.* Reinhardt, 2 E. D. Smith 148.

Ohio.— Gast *v.* Gooding, 1 Ohio Dec. (Reprint) 315, 7 West. L. J. 234.

West Virginia.— Cunningham *v.* Bucky, 42 W. Va. 671, 26 S. E. 442, 57 Am. St. Rep. 878, 35 L. R. A. 850.

Wisconsin.— Jalie *v.* Cardinal, 35 Wis. 118.

See 27 Cent. Dig. tit. "Innkeepers," § 17.

11. Hulett *v.* Swift, 33 N. Y. 571, 88 Am. Dec. 405. *Contra*, Moore *v.* Long Beach Development Co., 87 Cal. 483, 26 Pac. 92, 22 Am. St. Rep. 265.

12. *Alabama.*— Lanier *v.* Youngblood, 73 Ala. 587.

Georgia.— Sasseen *v.* Clark, 37 Ga. 242.

Nebraska.— Dunbier *v.* Day, 12 Nebr. 596, 12 N. W. 109, 41 Am. Rep. 772.

New York.— Wies *v.* Hoffman House, 28 Misc. 225, 59 N. Y. Suppl. 38.

Ohio.— Gast *v.* Gooding, 1 Ohio Dec. (Reprint) 315, 7 West. L. J. 234.

South Carolina.— Newson *v.* Axon, 1 McCord 509, 10 Am. Dec. 685.

See 27 Cent. Dig. tit. "Innkeepers," § 18.

See also McDaniels *v.* Robinson, 26 Vt. 316, 62 Am. Dec. 574.

13. Shultz *v.* Wall, 134 Pa. St. 262, 19 Atl. 742, 19 Am. St. Rep. 686, 8 L. R. A. 97; Walsh *v.* Porterfield, 87 Pa. St. 376; McDaniels *v.* Robinson, 26 Vt. 316, 62 Am. Dec. 574.

14. Scheffer *v.* Corson, 5 S. D. 233, 58 N. W. 555.

15. *Illinois.*— Johnson *v.* Richardson, 17 Ill. 302, 63 Am. Dec. 369; Metcalf *v.* Hess, 14 Ill. 129.

Indiana.— Baker *v.* Dessauer, 49 Ind. 28; Laird *v.* Eichold, 10 Ind. 212, 71 Am. Dec. 323 [*disapproving dictum* to the contrary in Thickstun *v.* Howard, 8 Blackf. (Ind.) 535]; Hill *v.* Owen, 5 Blackf. 323, 35 Am. Dec. 124.

Kentucky.— Vance *v.* Throckmorton, 5 Bush 41, 96 Am. Dec. 327; Weisenger *v.* Taylor, 1 Bush 275, 89 Am. Dec. 626; Packard *v.* Northcraft, 2 Metc. 439.

Louisiana.— Woodworth *v.* Morse, 18 La. Ann. 156, under the civil law.

Maryland.— Towson *v.* Havre-de-Grace Bank, 6 Harr. & J. 47, 14 Am. Dec. 254.

Michigan.— Cutler *v.* Bonney, 30 Mich. 259, 18 Am. Rep. 127.

Texas.— Howth *v.* Franklin, 20 Tex. 798, 73 Am. Dec. 218.

Civil law rule.— The rule stated in the text is the rule of the civil code of the province of Quebec. McElwaine *v.* Balmoral Hotel Co., 7 Montreal Super. Ct. 139.

16. Calye's Case, 8 Coke 32*a*, 1 Smith Lead. Cas. 246, where it is held that the innkeeper is liable only for default in himself or his servants.

17. Johnson *v.* Chadbourn Finance Co., 89 Minn. 310, 94 N. W. 874, 99 Am. St. Rep. 571; Olson *v.* Crossman, 31 Minn. 222, 17 N. W. 375; Lusk *v.* Belote, 22 Minn. 468; Howe Mach. Co. *v.* Pease, 49 Vt. 477; McDaniels *v.* Robinson, 26 Vt. 316, 62 Am. Dec. 574; Merritt *v.* Claghorn, 23 Vt. 177; Dawson *v.* Chamney, 5 Q. B. 164, Dav. & M. 348, 7 Jur. 1037, 13 L. J. Q. B. 33, 48 E. C. L. 164; Richmond *v.* Smith, 8 B. & C. 9, 6 L. J. K. B. O. S. 276, 2 M. & R. 235, 15 E. C. L. 14; Morgan *v.* Ravey, 6 H. & N. 265, 30 L. J. Exch. 131, 3 L. T. Rep. N. S. 784, 9 Wkly. Rep. 376.

18. *Georgia.*— Sasseen *v.* Clark, 37 Ga. 242.

Illinois.— Johnson *v.* Richardson, 17 Ill. 302, 63 Am. Dec. 369; Hulbert *v.* Hartman,

(c) *Safety of Premises.* The innkeeper is bound to provide safe premises and is absolutely liable if the goods are injured by a defect in the premises.[19]

(ii) *For What Goods the Innkeeper Is Responsible.* The innkeeper's liability is not confined to goods of any particular kind, but extends to money[20] and to all other personal property brought by the guest to the inn.[21]

(iii) *Notice to Conform to Rules.* The innkeeper may by notice require the guest to conform to reasonable rules. The commonest rule enforced is that valuable packages must be left at the office to be placed in the safe. So far as this may reasonably be required of a guest, failure by the guest to observe it will exonerate the innkeeper from liability for the goods.[22] But the notice is effective only as to property which can conveniently be left in the safe, not as to property which the guest needs to keep by him; if applied to such property it would be unreasonable. Clothing and articles of daily use are therefore not covered by the notice.[23] Reasonable notice of the rule must be given to the guest;[24] and the terms of the notice must be construed strictly.[25]

b. Contributory Negligence of the Guest. The guest cannot recover for loss of his goods if his own negligence contributed to the loss.[26] And in order to

79 Ill. App. 289; Eden *v.* Drey, 75 Ill. App. 102.

Indiana.— Bowell *v.* De Wald, 2 Ind. App. 303, 28 N. E. 430, 50 Am. St. Rep. 240.

Maryland.— Burrows *v.* Trieber, 21 Md. 320, 83 Am. Dec. 590.

Michigan.— Baehr *v.* Downey, 133 Mich. 163, 94 N. W. 750, 103 Am. St. Rep. 444.

New York.—Murray *v.* Clarke, 2 Daly 102; Cheesebrough *v.* Taylor, 12 Abb. Pr. 227. *Compare* Willard *v.* Reinhardt, 2 E. D. Smith 148.

North Carolina.— Quinton *v.* Courtney, 2 N. C. 40.

South Carolina.— Jordan *v.* Boone, 5 Rich. 528.

Vermont.—Howe Mach. Co. *v.* Pease, 49 Vt. 477.

See 27 Cent. Dig. tit. "Innkeepers," § 37.

19. Woodward *v.* Birch, 4 Bush (Ky.) 510; Hilton *v.* Adams, 71 Me. 19; Washburn *v.* Jones, 14 Barb. (N. Y.) 193; Dickerson *v.* Rogers, 4 Humphr. (Tenn.) 179, 40 Am. Dec. 642.

20. Kent *v.* Shuckard, 2 B. & Ad. 803, 1 L. J. K. B. 1, 22 E. C. L. 338.

21. *Georgia.*— Sasseen *v.* Clark, 37 Ga. 242, said to be the probable rule in Georgia.

Illinois.— Eden *v.* Drey, 75 Ill. App. 102.

Kentucky.— Weisenger *v.* Taylor, 1 Bush 275, 89 Am. Dec. 626.

Massachusetts.— Berkshire Woollen Co. *v.* Proctor, 7 Cush. 417.

Minnesota.— Smith *v.* Wilson, 36 Minn. 334, 31 N. W. 176, 1 Am. St. Rep. 669.

New York.— Wilkins *v.* Earle, 44 N. Y. 172, 4 Am. Rep. 655; Kellogg *v.* Sweeney, 1 Lans. 397; Taylor *v.* Monnot, 1 Abb. Pr. 325.

See 27 Cent. Dig. tit. "Innkeepers," § 25.

In Louisiana, however, a state governed by the civil law, the innkeeper is absolutely responsible only for baggage and for money for immediate expenses, unless it is deposited with the innkeeper. Profilet *v.* Hall, 14 La. Ann. 524; Pope *v.* Hall, 14 La. Ann. 324; Simon *v.* Miller, 7 La. Ann. 360.

In Maryland, the same rule as in Louisiana appears to prevail, perhaps in accordance with the provisions of the code. Treiber *v.* Burrows, 27 Md. 130; Pettigrew *v.* Barnum, 11 Md. 434, 69 Am. Dec. 212.

Baggage means articles for use on the journey or while a guest; it does not include silver knives, forks, and spoons (Pettigrew *v.* Barnum, 11 Md. 434, 69 Am. Dec. 212); nor surgical instruments or pistols (Giles *v.* Fauntleroy, 13 Md. 126).

22. Stanton *v.* Leland, 4 E. D. Smith (N. Y.) 88; Fuller *v.* Coats, 18 Ohio St. 343. The innkeeper is liable for the loss of everything deposited under this notice. Pinkerton *v.* Woodward, 33 Cal. 557, 91 Am. Dec. 657.

23. Johnson *v.* Richardson, 17 Ill. 302, 63 Am. Dec. 369; Milford *v.* Wesley, Wils. (Ind.) 119; Stanton *v.* Leland, 4 E. D. Smith (N. Y.) 88.

24. Thus notice given him a year previously to his becoming a guest was not reasonably given. Lanier *v.* Youngblood, 73 Ala. 587. And notice posted on the door of the guest's chamber was held not to have been brought home to him unless it was found as a matter of fact either that he saw it or that he was negligent for not doing so. Bodwell *v.* Bragg, 29 Iowa 232.

25. Thus a notice that "valuables" must be put in the safe does not extend to mineral specimens (Brown Hotel Co. *v.* Burckhardt, 13 Colo. App. 59, 56 Pac. 188) or to money (Stanton *v.* Leland, 4 E. D. Smith (N. Y.) 88); and notice that a guest had better dispose of goods in a certain way is not notice that he must do so in order to hold the innkeeper responsible (Packard *v.* Northcraft, 2 Metc. (Ky.) 439).

26. *Alabama.*— Chamberlain *v.* Masterton, 26 Ala. 371.

Georgia.— Watson *v.* Loughran, 112 Ga. 837, 38 S. E. 82; Sasseen *v.* Clark, 37 Ga. 242.

Illinois.— Hulbert *v.* Hartman, 79 Ill. App. 289.

Michigan.— Rubenstein *v.* Cruikshanks, 54 Mich. 199, 19 N. W. 954, 52 Am. Rep. 806.

protect the innkeeper the negligence of the guest need not be gross.[27] Nevertheless the negligence must have to do with the loss of the goods; and evidence of careless conduct on the part of the guest either before or after the time of the loss will not be received.[28] Whether his negligence did or did not contribute to the loss is a question of fact,[29] and the burden of proving this fact is on the inn-

New York.— Ramaley *v.* Leland, 6 Rob. 359.

Texas.— Hadley *v.* Upshaw, 27 Tex. 547, 86 Am. Dec. 654.

United States.— Elcox *v.* Hill, 98 U. S. 218, 25 L. ed. 103.

England.— Armistead *v.* Wilde, 17 Q. B. 261, 15 Jur. 1010, 20 L. J. Q. B. 524, 79 E. C. L. 261; Cashill *v.* Wright, 6 E. & B. 891, 2 Jur. N. S. 1072, 4 Wkly. Rep. 709, 88 E. C. L. 891; Burgess *v.* Clements, Holt N. P. 211 note, 4 M. & S. 306, 1 Stark. 251 note, 16 Rev. Rep. 473, 2 E. C. L. 101.

See 27 Cent. Dig. tit. "Innkeepers," § 31.

27. Lanier *v.* Youngblood, 73 Ala. 587; Fowler *v.* Dorlon, 24 Barb. (N. Y.) 384; Cashill *v.* Wright, 6 E. & B. 891, 2 Jur. N. S. 1072, 4 Wkly. Rep. 709, 88 E. C. L. 891. The negligence on the part of the guest which excuses an innkeeper from liability for loss of the guest's property by theft is the want of such ordinary care as a reasonably prudent man would exercise under the existing circumstances. Lanier *v.* Youngblood, 73 Ala. 587. But the care required of the guest is not such care as will cause him personal inconvenience; so great an effort cannot be demanded of him. Maltby *v.* Chapman, 25 Md. 310.

28. Burrows *v.* Trieber, 21 Md. 320, 83 Am. Dec. 590.

29. Lanier *v.* Youngblood, 73 Ala. 587; Hadley *v.* Upshaw, 27 Tex. 547, 86 Am. Dec. 654; Read *v.* Amidon, 41 Vt. 15, 98 Am. Dec. 560; Armistead *v.* Wilde, 17 Q. B. 261, 15 Jur. 1010, 20 L. J. Q. B. 524, 79 E. C. L. 261.

Failure to lock door of chamber was held not negligent on the part of the guest in Classen *v.* Leopold, 2 Sweeny (N. Y.) 705; Buddenburg *v.* Benner, 1 Hilt. (N. Y.) 84 (boarding-house); Cunningham *v.* Bucky, 42 W. Va. 671, 26 S. E. 442, 57 Am. St. Rep. 878, 35 L. R. A. 850; Mitchell *v.* Woods, 16 L. T. Rep. N. S. 676. In Swann *v.* Smith, 14 Daly (N. Y.) 114, it was held negligent. In other cases it is held that negligence depends on circumstances. Murchison *v.* Sergent, 69 Ga. 206, 47 Am. Rep. 754 ("not necessarily negligent"); Bohler *v.* Owens, 60 Ga. 185 (guest not concluded by his own admission of negligence); Batterson *v.* Vogel, 10 Mo. App. 235; Dunbier *v.* Day, 12 Nebr. 596, 12 N. W. 109, 41 Am. Rep. 772 ("not necessarily . . . such negligence as would prevent recovery"); Becker *v.* Warner, 90 Hun (N. Y.) 187, 35 N. Y. Suppl. 739; Ramaley *v.* Leland, 6 Rob. (N. Y.) 358; Shultz *v.* Wall, 134 Pa. St. 262, 19 Atl. 742, 19 Am. Rep. 686, 8 L. R. A. 97; Oppenheim *v.* White Lion Hotel Co., L. R. 6 C. P. 515, 40 L. J. C. P. 231, 25 L. T. 93; Filipowski *v.* Merryweather, 2 F. & F. 285 ("as that it was a London inn, where bad characters might be expected"); Herbert *v.* Markwell, [1882] W. N. 112 [*affirming* 46 J. P. 358, 45 L. T. Rep. N. S. 649].

Directing guest not to lock door.— It is clearly not negligent, where the innkeeper directed the guest not to lock the door, because other parties had to come into the room. Milford *v.* Wesley, Wils. (Ind.) 119.

Failure, after locking the door, to look for and find a bolt is not negligence, although if the guest saw the bolt the jury might find him negligent if he did not use it. Spring *v.* Hager, 145 Mass. 186, 13 N. E. 479, 1 Am. St. Rep. 451. And where the guest saw the bolt, failure to use it was relied upon as one element of negligence to bar recovery. Hulbert *v.* Hartman, 79 Ill. App. 289.

Failure to notify the innkeeper that the lock is out of repair is not negligence on the part of the guest. Lanier *v.* Youngblood, 73 Ala. 587.

Retaining valuables in guest's possession.— In the absence of a regulation that would bind the guest, it is not contributory negligence for him to retain valuables in his own possession instead of giving them to the innkeeper. McClay *v.* Nash, 6 Ky. L. Rep. 299; Smith *v.* Wilson, 36 Minn. 334, 31 N. W. 176, 1 Am. St. Rep. 669; Jalie *v.* Cardinal, 35 Wis. 118. Even, in the absence of knowledge of that fact by the guest, where it is customary to place valuables in the innkeeper's hands. Berkshire Woollen Co. *v.* Proctor, 7 Cush. (Mass.) 417; Jones *v.* Jackson, 29 L. T. Rep. N. S. 399. But where the guest receives notice that he must leave valuables at the bar for safekeeping, or that the proprietor will be happy to take care of valuables, it has been held negligent to neglect the notice. Wilson *v.* Halpin, 1 Daly (N. Y.) 496, 30 How. Pr. 124.

Failure to inform innkeeper of value of package intrusted to him.— It is not contributory negligence to fail to inform the innkeeper that a package intrusted to him or his servants contains valuables.

Georgia.— Coskery *v.* Nagle, 83 Ga. 696, 10 S. E. 491, 20 Am. St. Rep. 333, 6 L. R. A. 483.

Indiana.— Bowell *v.* De Wald, 2 Ind. App. 303, 28 N. E. 430, 50 Am. St. Rep. 240.

Iowa.— Shoecraft *v.* Bailey, 25 Iowa 553.

Michigan.— Rubenstein *v.* Cruikshanks, 54 Mich. 199, 19 N. W. 954, 52 Am. Rep. 806.

New York.— Fowler *v.* Dorlon, 24 Barb. 384.

See 27 Cent. Dig. tit. "Innkeepers," § 27.

Publicly displaying money.— Taking out or counting one's money in a public place was held not negligent in Dunbier *v.* Day, 12 Nebr. 596, 12 N. W. 109, 41 Am. Rep. 772. But in Armistead *v.* Wilde, 17 Q. B. 261, 15

keeper.[30] If subsequently to the guest's negligence the innkeeper could have avoided the effect thereof but failed to do so, he will be responsible for the loss.[31] Upon this general principle, where an innkeeper acts in accordance with the definite instructions of the owner, and the goods are thereby lost without negligence of the innkeeper, he is not liable.[32]

3. Liability to One Not a Guest. Where goods are put into the innkeeper's possession by one who is not a guest, he is not liable for the goods as innkeeper, but only as ordinary bailee.[33] As ordinary bailee, the innkeeper is liable in such a case if the goods are lost by neglect of due care on his part,[34] or by misdelivery.[35]

4. Liability of Keepers of Other Public Houses — a. Boarding-House Keepers. The liability of a boarding-house keeper, or of an innkeeper toward a boarder's goods, is regulated by the ordinary rules of law; he is liable only for loss by his own act or negligence, or that of his servants.[36] In case of loss resulting from

Jur. 1010, 20 L. J. Q. B. 524, 79 E. C. L. 261, it was said that the jury might find it negligent.

Intoxication of the guest is not in itself contributory negligence (Cunningham *v.* Bucky, 42 W. Va. 671, 26 S. E. 442, 57 Am. St. Rep. 878, 35 L. R. A. 850); but might be if it actually contributed to the loss (Walsh *v.* Porterfield, 87 Pa. St. 376).

Failure to occupy the room at night is not contributory negligence. Turner *v.* Whitaker, 9 Pa. Super. Ct. 83, 43 Wkly. Notes Cas. 375.

Failure to request a search of a place where the goods might be is not contributory negligence. Dunbier *v.* Day, 12 Nebr. 596, 12 N. W. 109, 41 Am. Rep. 772.

Failure for several days after the innkeeper received the goods to inquire after their safety is not contributory negligence. Eden *v.* Drey, 75 Ill. App. 102.

Where the owner permitted the person who finally took the goods to exercise acts of ownership without informing the innkeeper of the facts, he is not liable. Kelsey *v.* Berry, 42 Ill. 469. But the mere fact that the guest gave the party who took the goods authority to sell the goods, and that they had previously been together in the room in which the goods were, did not authorize the landlord to admit the other to the room, nor exonerate him from liability for the loss of them. Jacobi *v.* Haynes, 14 Misc. (N. Y.) 15, 35 N. Y. Suppl. 120.

30. Jefferson Hotel Co. *v.* Warren, 128 Fed. 565, 63 C. C. A. 193.

31. Watson *v.* Loughran, 112 Ga. 837, 38 S. E. 82, innkeeper's servants discovered door left unlocked by guest, but did not lock it.

32. Owens *v.* Geiger, 2 Mo. 39, 22 Am. Dec. 435.

33. *Missouri.*— Bunn *v.* Johnson, 77 Mo. App. 596; Hutchinson *v.* Donovan, 76 Mo. App. 391.

New York.— Toub *v.* Schmidt, 60 Hun 409, 15 N. Y. Suppl. 616; Centlivre *v.* Ryder, 1 Edm. Sel. Cas. 273.

Ohio.— Arcade Hotel Co. *v.* Wiatt, 44 Ohio St. 32, 4 N. E. 398, 58 Am. Rep. 785 [*reversing* 8 Ohio Dec. (Reprint) 570, 9 Cinc. L. Bul. 21].

Tennessee.— Tulane Hotel Co. *v.* Holohan, 112 Tenn. 214, 79 S. W. 113, 105 Am. St. Rep. 930.

England.— Strauss *v.* County Hotel, etc., Co., 12 Q. B. D. 27, 48 J. P. 69, 53 L. J. Q. B. 25, 49 L. T. Rep. N. S. 601, 32 Wkly. Rep. 170; Broadwater *v.* Blot, Holt N. P. 547, 3 E. C. L. 216.

Canada.— Holmes *v.* Moore, 17 L. C. Rep. 143; Bernard *v.* Lalonde, 8 Montreal Leg. N. 215.

Where the goods are given the innkeeper by a boarder in his inn, his liability is the same as that of a keeper of a boarding-house. See *infra*, IV, B, 4, a.

34. *Arkansas.*— Tombler *v.* Koelling, 60 Ark. 62, 28 S. W. 795, 46 Am. St. Rep. 146, 27 L. R. A. 502; Wear *v.* Gleason, 52 Ark. 364, 12 S. W. 756, 20 Am. St. Rep. 186.

Georgia.— Stewart *v.* Head, 70 Ga. 449, valise of guest found by innkeeper, who was ignorant of ownership, and put it in the baggage-room.

Missouri.— Wiser *v.* Chesley, 53 Mo. 547, money placed in safe for a boarder.

New York.— Ingalsbee *v.* Wood, 33 N. Y. 577, 88 Am. Dec. 409 [*affirming* 36 Barb. 452]; Coykendall *v.* Eaton, 55 Barb. 188, 37 How. Pr. 438; George *v.* Depierris, 17 Misc. 400, 39 N. Y. Suppl. 1082.

United States.— Myers *v.* Cottrill, 17 Fed. Cas. No. 9,985, 5 Biss. 465.

England.— Doorman *v.* Jenkins, 2 A. & E. 256, 4 L. J. K. B. 29, 4 N. & M. 170, 29 E. C. L. 132.

35. Wear *v.* Gleason, 52 Ark. 364, 12 S. W. 756, 20 Am. St. Rep. 186; Coykendall *v.* Eaton, 55 Barb. (N. Y.) 188, 37 How. Pr. 438; Murray *v.* Clarke, 2 Daly (N. Y.) 102.

36. *Alabama.*— Chamberlain *v.* Masterton, 26 Ala. 371.

Arizona.— Haff *v.* Adams, (1899) 59 Pac. 111.

Iowa.— Lyon *v.* Smith, Morr. 184.

Kansas.— Johnson *v.* Reynolds, 3 Kan. 251.

Kentucky.— Vance *v.* Throckmorton, 5 Bush 41, 96 Am. Dec. 327; Kisten *v.* Hildebrand, 9 B. Mon. 72, 48 Am. Dec. 416.

Michigan.— Taylor *v.* Downey, 104 Mich. 532, 62 N. W. 716, 53 Am. St. Rep. 472, 29 L. R. A. 92.

Minnesota.— Lusk *v.* Belote, 22 Minn. 468.

Missouri.— Wiser *v.* Chesley, 53 Mo. 547.

his own negligence or that of his servants acting within the scope of their employment he is of course liable.[37]

b. Restaurant Keeper. A restaurant keeper is bailee of a guest's coat taken by a waiter or other servant to hang up, and is responsible for its misdelivery or negligent loss.[38] But where the customer himself hangs up his coat without notice to the restaurant keeper or his servants, there is no bailment, and the restaurant keeper cannot be held responsible for its loss unless it is shown that he was remiss in his general supervision of the restaurant.[39]

5. Statutory Liability of Innkeepers. Statutes regulating the innkeeper's liability and providing means by which he may protect himself from liability have been frequently passed. These statutes are in derogation of the common law and are to be strictly construed.[40] And all notices required by the statute must be given exactly as provided.[41] The burden is on the innkeeper to show compliance with the statute,[42] and whether he has complied is a question for the jury.[43] Where compliance with the statute is shown by the innkeeper, and he is by the terms of the statute liable only for the theft or negligence of himself or his servants, the burden of proving such theft or negligence is on the guest.[44] Decisions upon the statutes of several states are cited in the note below.[45]

New York.— Smith *v.* Read, 6 Daly 33, 52 How. Pr. 14; Siegman *v.* Keeler, 4 Misc. 528, 24 N. Y. Suppl. 821; Barber *v.* Harrison, 6 City Hall Rec. 89.

Pennsylvania.— Shultz *v.* Wall, 134 Pa. St. 262, 19 Atl. 742, 19 Am. St. Rep. 686, 8 L. R. A. 97; Jeffords *v.* Crump, 12 Phila. 500.

Tennessee.— Meacham *v.* Galloway, 102 Tenn. 415, 52 S. W. 859, 73 Am. St. Rep. 886, 46 L. R. A. 319; Manning *v.* Wells, 9 Humphr. 746, 51 Am. Dec. 688.

Utah.— Lawrence *v.* Howard, 1 Utah 142.

See 27 Cent. Dig. tit. "Innkeepers," §§ 20, 21.

What is not negligence. — The boarding-house keeper is under no obligation to keep a boarder's room locked in his absence, and it is not negligent to fail to rid his house of a boarder who has left the house door unlocked after entering late at night. Siegman *v.* Keeler, 4 Misc. (N. Y.) 528, 24 N. Y. Suppl. 821.

37. Smith *v.* Read, 6 Daly (N. Y.) 33, 52 How. Pr. 14.

38. La Salle Restaurant, etc. *v.* McMasters, 85 Ill. App. 677; Appleton *v.* Welch, 20 Misc. (N. Y.) 343, 45 N. Y. Suppl. 751; Ultzen *v.* Nicol, [1894] 1 Q. B. 92, 58 J. P. 103, 63 L. J. Q. B. 289, 70 L. T. Rep. N. S. 140, 10 Reports 13, 42 Wkly. Rep. 58. This is true even though the words "not responsible for hats and coats" were printed on the bill of fare, and the waiters were forbidden to take hats and coats from the guests. La Salle Restaurant, etc. *v.* McMasters, 85 Ill. App. 677.

39. Montgomery *v.* Ladjing, 30 Misc. (N. Y.) 92, 61 N. Y. Suppl. 840; Harris *v.* Childs' Unique Dairy Co., (1903) 84 N. Y. Suppl. 260. In both these cases the guest had notice that articles might be deposited with the cashier; but the decision in each case seems to have turned on the absence of bailment.

40. Lanier *v.* Youngblood, 73 Ala. 587; Briggs *v.* Todd, 28 Misc. (N. Y.) 208, 59 N. Y. Suppl. 23. But see Ramaley *v.* Leland, 6 Rob. (N. Y.) 358.

41. **Posting notices.**— Thus where notice is to be posted on the doors, it must be posted on the door of every room occupied by a guest. Lanier *v.* Youngblood, 73 Ala. 587; Beale *v.* Posey, 72 Ala. 323; Lima *v.* Dwinelle, 7 Alb. L. J. (N. Y.) 44. Putting it at the head of each page of the guest's register is not enough. Olson *v.* Crossman, 31 Minn. 222, 17 N. W. 375; Batterson *v.* Vogel, 8 Mo. App. 24. And when the notice is required to be printed "in ordinary sized plain English type" printing it in very small type is not enough, even if the guest could just as easily have read it. Porter *v.* Gilkey, 57 Mo. 235.

42. Myers *v.* Cottrill, 17 Fed. Cas. No. 9,985, 5 Biss. 465.

43. Chamberlain *v.* West, 37 Minn. 54, 33 N. W. 114.

44. Burnham *v.* Young, 72 Me. 273; Elcox *v.* Hill, 98 U. S. 218, 25 L. ed. 103; Becker *v.* Haynes, 29 Fed. 441. *Contra*, Faucett *v.* Nichols, 64 N. Y. 377. And *compare* Burbank *v.* Chapin, 140 Mass. 123, 2 N. E. 934.

45. *California.*— The innkeeper is liable for loss "unless occasioned by an irresistible superhuman cause"; fire originating in the battery room of a hotel is not such a cause. Fay *v.* Pacific Imp. Co., 93 Cal. 253, 26 Pac. 1099, 28 Pac. 943, 27 Am. St. Rep. 198, 16 L. R. A. 188.

Maine.— The statutory limitation excepts "wearing apparel, articles worn or carried upon the person, to a reasonable amount, personal baggage, and money necessary for traveling expenses and personal use." A gold watch, a pair of gold bracelets, a gold thimble, three gold rings and a gold neck-pin, all for the owner's personal use, and forty dollars for traveling expenses come within the exception, and the innkeeper is liable for their loss, although they were retained by the guest. Noble *v.* Milliken, 74 Me. 225, 43 Am. Rep. 581.

Maryland.— Under the code, money, plate,

C. End of Liability to Guests — 1. Liability During Temporary Absence of Guest. A guest may be temporarily absent from the inn, and yet leave his prop-

and jewels must be deposited with the innkeeper. This does not include personal baggage (Treiber *v.* Burrows, 27 Md. 130), or a watch, or money necessary for traveling expenses (Maltby *v.* Chapman, 25 Md. 310).

Massachusetts.— The guest must by statute deposit goods other than personal baggage with the innkeeper; but after the arrival of the guest the innkeeper, in spite of the statute, remains under his common-law liability until a reasonable time has elapsed for depositing the goods. Becker *v.* Haynes, 29 Fed. 441. The innkeeper is relieved from liability by statute when the loss is attributable to the guest's negligence or non-compliance with reasonable regulations of the inn which are brought to his notice. Burbank *v.* Chapin, 140 Mass. 123, 2 N. E. 934.

Missouri.— An innkeeper is not liable for loss of merchandise for sale or sample belonging to the guest, unless written notice of the fact is given; if no such notice is given, actual knowledge of the innkeeper that such goods are in the guest's room will not render him liable. Fisher *v.* Kelsey, 121 U. S. 383, 7 S. Ct. 929, 30 L. ed. 930.

Nebraska.— An innkeeper who fails to provide his office with an iron safe is responsible as at common law, and can take no advantage of the statute. Dunbier *v.* Day, 12 Nebr. 596, 12 N. W. 109, 41 Am. Rep. 772.

New York.— Although the innkeeper does not post a notice as required by the statute, he is entitled to the benefit of the statute if he has given actual verbal notice to the guest (Purvis *v.* Coleman, 21 N. Y. 111 [*affirming* 1 Bosw. 321]); but knowledge of the rule must be brought home to the guest by affirmative evidence (Kellogg *v.* Sweeney, 1 Lans. 397); and the verbal notice given him must be unmistakable (Van Wyck *v.* Howard, 12 How. Pr. 147). According to the statute, money, jewels, or ornaments are to be deposited with the innkeeper. A watch is not a jewel or ornament (Ramaley *v.* Leland, 43 N. Y. 539, 3 Am. Rep. 728 [*reversing* 6 Rob. 358]; Becker *v.* Warner, 90 Hun 187, 35 N. Y. Suppl. 739; Bernstein *v.* Sweeny, 33 N. Y. Super. Ct. 271), even though the state coat-of-arms is engraved on the cover of the watch, and a picture of the owner's mother is inside the case (Briggs *v.* Todd, 28 Misc. 208, 59 N. Y. Suppl. 23); silver table forks and a ladle are not jewels or ornaments (Briggs *v.* Todd, *supra*). All money must under the statute be deposited, without deducting a reasonable amount for traveling expenses. Ramaley *v.* Leland, *supra*; Hyatt *v.* Taylor, 42 N. Y. 258 [*affirming* 51 Barb. 632, and *overruling* Krohn *v.* Sweeney, 2 Daly 200, and Gile *v.* Libby, 36 Barb. 70]. If the innkeeper or his authorized agent waives a deposit of valuables as called for by the statute, and authorizes the guest to take them into his own room, he is liable in case of loss (Friedman *v.* Breslin, 51 N. Y. App Div. 268, 65 N. Y. Suppl. 5 [*affirmed* in 169 N. Y. 574, 61 N. E. 1129]); but this will not be the case where the innkeeper was not informed that the package was valuable, and there was nothing about it to indicate that fact (Bendetson *v.* French, 46 N. Y. 266 [*reversing* 44 Barb. 31]). So if the innkeeper customarily permits guests to hang their coats behind the office desk, although the statute requires wearing apparel to be "specially intrusted" to his care (Bradner *v.* Mullen, 27 Misc. 479, 59 N. Y. Suppl. 178); if the guest deposits a package which in fact contains a large sum of money, and the innkeeper, although ignorant of the contents, receives it without objection, he is liable in case of loss for the whole amount (Wilkins *v.* Earle, 44 N. Y. 172, 4 Am. Rep. 655); the deposit required by the statute need not be made by the guest until a reasonable time after arrival (Rosenplaenter *v.* Roessle, 54 N. Y. 262); and the exemption ceases when the goods are packed for departure and the innkeeper is so informed (Bendetson *v.* French, *supra*). Failure by the guest to fulfil the statutory requirement that the guest should lock the door at night does not exempt the innkeeper, when the loss occurred by theft of a room-mate put into the room by the innkeeper. Gile *v.* Libby, *supra*.

Ohio.— The statute requires the deposit of a watch and money for traveling expenses; and the innkeeper is not liable for the loss of them if they are retained by the guest. Lang *v.* Arcade Hotel Co., 9 Ohio Dec. (Reprint) 372, 12 Cinc. L. Bul. 250. "Baggage" as used in the statute includes a gold watch, chain, and seal. Prescott *v.* Bruce, 2 Cinc. Super. Ct. 58.

Pennsylvania.— Although notice is not posted on the door, as required by statute, if the guest has actual knowledge of a regulation requiring the deposit of valuables it might be negligence for him to carry a large sum of money into his room. Shultz *v.* Wall, 134 Pa. St. 262, 19 Atl. 742, 19 Am. St. Rep. 686, 8 L. R. A. 97. The statute excepts from its operation such amount of money and such goods as it is common and prudent for a guest to keep with him. As to such articles the common-law liability of the innkeeper remains. Turner *v.* Whitaker, 9 Pa. Super. Ct. 83, 43 Wkly. Notes Cas. 375.

Tennessee.— A watch and fob is within the phrase "jewels and ornaments," and must under the statute be deposited with the innkeeper in order to hold him liable for loss. Rains *v.* Maxwell House Co., 112 Tenn. 219, 79 S. W. 114, 64 L. R. A. 470.

Wisconsin.— A watch and fob is within the phrase "jewels and ornaments," as in Tennessee. Stewart *v.* Parsons, 24 Wis. 241.

England.— A material error in the terms of the posted printed notice will prevent the innkeeper from taking advantage of the statute. Spice *v.* Bacon, 2 Ex. D. 463, 46 L. J. Exch. 713, 36 L. T. Rep. N. S. 896, 25 Wkly. Rep. 840. Unless the loss of goods not de-

erty under the safeguard of the innkeeper's responsibility.[46] In order that the liability may continue during the absence of the guest, certain conditions must be fulfilled: (1) There must be an *animus revertendi* on the part of the guest.[47] (2) The intent must be to return within a definite and reasonable time.[48] (3) The liability to compensate the innkeeper must continue during the absence.[49]

2. Liability For Goods Pending Removal. After a guest pays his bill and departs, leaving goods to be at once removed, the innkeeper's liability for the goods continues for a reasonable time pending removal.[50]

3. Goods Left to Be Removed at a Later Time. If the guest pays his bill and departs without any intention of returning, but leaves goods, with the consent of the innkeeper, to be kept until called for, the relation of host and guest is at an

posited with the innkeeper occurred wholly by the wilful act, default, or neglect of the innkeeper, the recovery is limited to £30. Medawar *v.* Grand Hotel Co., [1891] 2 Q. B. 11, 55 J. P. 614, 60 L. J. Q. B. 209, 64 L. T. Rep. N. S. 851. In the phrase, "wilful act, default or neglect" the word "wilful" qualifies the word "act" only, not the "default or neglect." Squire *v.* Wheeler, 16 L. T. Rep. N. S. 93. Jewels were not deposited according to the act, and were lost; failure of the innkeeper's servants to search the premises when the loss was reported did not constitute such negligence as would make the innkeeper responsible. Huntley *v.* Bedford Hotel Co., 56 J. P. 53. The fact of a notice in the guest's room that articles of value if not kept under lock must be deposited did not constitute a special bargain with the guest that the jewels need not be deposited if they were kept under lock in the room. Huntley *v.* Bedford Hotel Co., *supra*.

See 27 Cent. Dig. tit. "Innkeepers," § 33.

46. *Colorado.*— Brown Hotel Co. *v.* Burckhardt, 13 Colo. App. 59, 56 Pac. 188.

New York.—McDonald *v.* Edgerton, 5 Barb. 560; Grinnell *v.* Cook, 3 Hill 485, 38 Am. Dec. 663.

Tennessee.— Whitemore *v.* Haroldson, 2 Lea 312.

Vermont.— McDaniels *v.* Robinson, 26 Vt. 316, 62 Am. Dec. 574.

England.— Allen *v.* Smith, 12 C. B. N. S. 638, 9 Jur. N. S. 230, 31 L. J. C. P. 306, 6 L. T. Rep. N. S. 459, 10 Wkly. Rep. 646, 104 E. C. L. 638 [*affirmed* in 9 Jur. N. S. 1284, 11 Wkly. Rep. 440]; Day *v.* Bather, 2 H. & C. 14, 9 Jur. N. S. 440, 32 L. J. Exch. 171, 8 L. T. Rep. N. S. 205, 11 Wkly. Rep. 575.

Canada.— McElwaine *v.* Balmoral Hotel Co., 7 Montreal Super. Ct. 139.

Illustration.— Thus where the guest having registered goes out to view the town, intending to return before night, the relation continues. Hays *v.* Turner, 23 Iowa 214; McDonald *v.* Edgerton, 5 Barb. (N. Y.) 560.

47. McDaniels *v.* Robinson, 28 Vt. 387, 67 Am. Dec. 720; Allen *v.* Smith, 12 C. B. N. S. 638, 9 Jur. N. S. 230, 31 L. J. C. P. 306, 6 L. T. Rep. N. S. 459, 10 Wkly. Rep. 646, 104 E. C. L. 638 [*affirmed* in 9 Jur. N. S. 1284, 11 Wkly. Rep. 440]. The innkeeper must know or have reason to know of this intention, as in the ordinary case he does. When a traveler took a room merely to dress in, dressed, and left the inn, the innkeeper was not responsible as such for goods left in the room, although the guest secretly intended to return and stay all night. Lynar *v.* Mossop, 36 U. C. Q. B. 230.

48. Whitemore *v.* Haroldson, 2 Lea (Tenn.) 312. If the return is accidentally delayed the relation will nevertheless continue. Day *v.* Bather, 2 H. & C. 14, 9 Jur. N. S. 440, 32 L. J. Exch. 171, 8 L. T. Rep. N. S. 205, 11 Wkly. Rep. 575.

49. Miller *v.* Peeples, 60 Miss. 819, 45 Am. Rep. 423. Thus where the guest pays his bill and has his name checked off the register he ceases to be a guest, although he intends soon to return. Hays *v.* Turner, 23 Iowa 214. But where he pays his bill in order to cash a draft, and does not have his name checked off the register; but on the contrary it is understood that he intends to continue a guest during his absence, the relation continues. Brown Hotel Co. *v.* Burckhardt, 13 Colo. App. 59, 56 Pac. 188.

50. Murray *v.* Marshall, 9 Colo. 482, 13 Pac. 589, 59 Am. Rep. 152; Adams *v.* Clem, 41 Ga. 65, 5 Am. Rep. 524; Baehr *v.* Downey, 133 Mich. 163, 94 N. W. 750, 103 Am. St. Rep. 444; Maxwell *v.* Gerard, 84 Hun (N. Y.) 537, 32 N. Y. Suppl. 849.

Illustrations.— After the bill had been paid and while the guest's horse was being harnessed in order that he might drive away the innkeeper continued liable for the safety of the horse (Seymour *v.* Cook, 53 Barb. (N. Y.) 451, 35 How. Pr. 180); and where a traveler was told that he could have a room only until an expected guest who had engaged it should arrive, and on these terms he took the room and put his goods in it, and when the expected guest arrived the innkeeper's servants put the goods in the corridor, where they were lost, the innkeeper's liability continued after the goods had been placed in the corridor (Medawar *v.* Grand Hotel Co., [1891] 2 Q. B. 11, 55 J. P. 614, 60 L. J. Q. B. 209, 64 L. T. Rep. N. S. 851); so where, on leaving the inn, the innkeeper or a servant acting within the scope of his employment undertakes to deliver the guest's baggage at a railroad station or a steamboat wharf, the relation of innkeeper and guest continues until delivery at the designated place (Glenn *v.* Jackson, 93 Ala. 342, 9 So. 259, 12 L. R. A. 382; Sasseen *v.* Clark, 37 Ga. 242; Giles *v.* Fauntleroy, 13 Md. 126).

end, and the innkeeper is responsible for the goods as a gratuitous bailee only ;[51] and this is true *a fortiori* when the goods are left without the consent of the innkeeper,[52] or by a guest who does not pay his bill.[53]

4. Goods Received After Departure of Guest. Where goods are received by the innkeeper for the guest after the relation has terminated and the guest has departed, the innkeeper is responsible for the goods only as an ordinary bailee,[54] even though the innkeeper may have agreed while the guest was at the inn to receive and forward the goods.[55]

V. Compensation of Innkeeper.

The innkeeper can charge for entertaining a guest only a reasonable compensation[56] at rates made by the innkeeper[57] or by agreement of the parties.[58] As soon as the guest is accepted, the right of the innkeeper to charge compensation for his services begins.[59] And the innkeeper may demand payment in advance before he receives the guest.[60] An undertaking to board and lodge a guest implies an engagement to pay without extra charge the usual and reasonable attentions to the health and comfort of the guest, but not to provide the services of a nurse in a severe or protracted illness.[61] Before being entitled to compensation the innkeeper or boarding-house keeper must perform his whole obligation. If the obligation is to furnish both room and board, the innkeeper cannot recover compensation, although he furnishes the room, if he has failed to provide proper board.[62]

VI. Lien.

A. Right to Lien. An innkeeper is entitled to a lien on the goods of his guest for the amount of his charges,[63] including money lent to the guest by the

51. *Alabama.*— Glenn *v.* Jackson, 93 Ala. 342, 9 So. 259, 12 L. R. A. 382.

Florida.— O'Brien *v.* Vaill, 22 Fla. 627, 1 So. 137, 1 Am. St. Rep. 219.

Iowa.— Hays *v.* Turner, 23 Iowa 214.

New York.— Wintermute *v.* Clark, 5 Sandf. 242; Hoffman *v.* Roessle, 39 Misc. 787, 81 N. Y. Suppl. 291.

Tennessee.— Whitemore *v.* Haroldson, 2 Lea 312.

England.— Gelley *v.* Clerk, Cro. Jac. 188.

52. Wintermute *v.* Clark, 5 Sandf. (N. Y.) 242; Palin *v.* Reid, 10 Ont. App. 63.

53. Murray *v.* Marshall, 9 Colo. 482, 13 Pac. 589, 59 Am. Rep. 152; Murray *v.* Clarke, 2 Daly (N. Y.) 102; Lawrence *v.* Howard, 1 Utah 142.

54. Wear *v.* Gleason, 52 Ark. 364, 12 S. W. 756, 20 Am. St. Rep. 186; Baehr *v.* Downey, 133 Mich. 163, 94 N. W. 750, 103 Am. St. Rep. 444.

55. Baehr *v.* Downey, 133 Mich. 163, 94 N. W. 750, 103 Am. St. Rep. 444.

56. Baldwin *v.* Webb, 121 Ga. 416, 49 S. E. 265.

57. Failure to post the rates fixed, as required by the statute, does not prevent the innkeeper or boarding-house keeper from recovering compensation. Whalley *v.* Toddington, 13 Phila. (Pa.) 2.

During a temporary absence of the guest a reasonable charge may be made, if such is the rule established by the innkeeper. Smith *v.* Keyes, 2 Thomps. & C. (N. Y.) 650.

58. Notice to a boarder to quit, where the board in fact continues, effects no change in the contract as to compensation. Shoemaker *v.* Beaver, 42 Leg. Int. (Pa.) 511.

Absence during part of time.— One who takes a room for a definite time, and leaves before the expiration of the time, stating that his room should be reserved for him or some tenant whom he may procure, is liable for rent during the whole term, and the host is not bound to try to relet. Sonneborn *v.* Steinan, 85 N. Y. Suppl. 334, lodging-house keeper.

Joint liability of several guests.— Where a party of several persons dine together at an inn, and there is no agreement to give credit to one, they are jointly liable for the whole expense, not merely each for his own share. Forster *v.* Taylor, 3 Campb. 49, 13 Rev. Rep. 748.

59. Medawar *v.* Grand Hotel Co., [1891] 2 Q. B. 11, 55 J. P. 614, 60 L. J. Q. B. 209, 64 L. T. Rep. N. S. 851.

60. Mulliner *v.* Florence, 3 Q. B. D. 484, 47 L. J. Q. B. 700, 38 L. T. Rep. N. S. 167, 26 Wkly. Rep. 385.

61. Kennard *v.* Hobson, 1 Houst. (Del.) 36.

62. Wilson *v.* Martin, 1 Den. (N. Y.) 602. But although the innkeeper is forbidden by law to recover for liquor he has furnished to his guest, he may nevertheless recover the amount due for board. Chase *v.* Burkholder, 18 Pa. St. 48; Scattergood *v.* Waterman, 2 Miles (Pa.) 323.

63. *Iowa.*— Pollock *v.* Landis, 36 Iowa 651.

Minnesota.— Singer Mfg. Co. *v.* Miller, 52

innkeeper.[64] This lien is properly speaking not created by a contract, but by law; the innkeeper being obliged by law to receive the guest is given the lien by the law as a protection. Consequently an innkeeper may maintain his lien even against a guest who is not legally capable of making a binding contract.[65] The lien is restricted to charges as between innkeeper and guest.[66] Thus an innkeeper has no lien at common law on the goods of a boarder,[67] unless there is a special agreement for such lien with the boarder.[68] So an innkeeper taking horses to board for one who is not a guest has no lien at common law.[69]

B. To What Property It Extends — 1. Nature of the Property. The lien extends to all property brought to the inn, whether technically baggage or not; and holds each article of property for the whole bill.[70] The lien cannot be exercised over the person of the guest, or over his wearing apparel actually on his person,[71] nor in such a way as to violate the law.[72] The lien may be exercised over property exempt from execution.[73]

2. Property of Third Person. Where a guest brings to an inn goods ostensibly his, the lien of the innkeeper attaches to the goods, although they were in fact the goods of a third person.[74] If, however, the innkeeper knows that the

Minn. 516, 55 N. W. 56, 38 Am. St. Rep. 568, 21 L. R. A. 229.

Missouri.— Hursh *v.* Byers, 29 Mo. 469.

South Carolina.— Ewart *v.* Stark, 8 Rich. 423; Dunlap *v.* Thorne, 1 Rich. 213 [*overruling* Carlisle *v.* Quattlebaum, 2 Bailey 452].

England.— Thompson *v.* Lacy, 3 B. & Ald. 283, 22 Rev. Rep. 385, 5 E. C. L. 169; Proctor *v.* Nicholson, 7 C. & P. 67, 32 E. C. L. 503.

See 27 Cent. Dig. tit. "Innkeepers," §§ 42, 43.

64. Watson *v.* Cross, 2 Duv. (Ky.) 147; Proctor *v.* Nicholson, 7 C. & P. 67, 32 E. C. L. 503.

65. Watson *v.* Cross, 2 Duv. (Ky.) 147. There is a *dictum* to the opposite effect in Proctor *v.* Nicholson, 7 C. & P. 440, 32 E. C. L. 503.

66. A lodging-house keeper has no lien at common law. Cochrane *v.* Schryver, 12 Daly (N. Y.) 174; Hardin *v.* State, (Tex. Cr. App. 1905) 84 S. W. 591.

67. *Iowa.*— Pollock *v.* Landis, 36 Iowa 651.

Kentucky.— Reed *v.* Teneyck, 103 Ky. 65, 44 S. W. 356, 19 Ky. L. Rep. 1690.

Minnesota.— Singer Mfg. Co. *v.* Miller, 52 Minn. 516, 55 N. W. 56, 38 Am. St. Rep. 568, 21 L. R. A. 229.

Missouri.— Hursh *v.* Byers, 29 Mo. 469.

New Hampshire.— Cross *v.* Wilkins, 43 N. H. 332.

South Carolina.— Ewart *v.* Stark, 8 Rich. 423.

England.— Lamond *v.* Richard, [1897] 1 Q. B. 541, 61 J. P. 260, 66 L. J. Q. B. 315, 76 L. T. Rep. N. S. 141, 45 Wkly. Rep. 289.

Canada.— Neale *v.* Croker, 8 U. C. C. P. 224.

See 27 Cent. Dig. tit. "Innkeepers," § 43.

68. Reg. *v.* Askin, 20 U. C. Q. B. 626.

69. *Alabama.*— Hickman *v.* Thomas, 16 Ala. 666.

Michigan.— Elliott *v.* Martin, 105 Mich. 506, 63 N. W. 525, 55 Am. St. Rep. 461; Taylor *v.* Downey, 104 Mich. 532, 62 N. W. 716, 53 Am. St. Rep 472, 29 L. R. A. 92.

New York.— Fox *v.* McGregor, 11 Barb. 41; Grinnell *v.* Cook, 3 Hill 485, 38 Am. Dec. 663.

England.— Smith *v.* Dearlove, 6 C. B. 132, 12 Jur. 377, 17 L. J. C. P. 219, 60 E. C. L. 132; Binns *v.* Pigot, 9 C. & P. 208, 38 E. C. L. 130.

Canada.— Dixon *v.* Dalby, 11 U. C. Q. B. 79.

See 27 Cent. Dig. tit. "Innkeepers," § 43.

Lien as farrier.— But it has been held that an innkeeper to whom a horse is committed to be cured has a lien on the horse for his charges as a farrier. Danforth *v.* Pratt, 42 Me. 50.

70. Mulliner *v.* Florence, 3 Q. B. D. 484, 47 L. J. Q. B. 700, 38 L. T. Rep. N. S. 167, 26 Wkly. Rep. 385. There is a *dictum* in Broadwood *v.* Granara, 3 C. L. R. 177, 10 Exch. 417, 1 Jur. N. S. 19, 24 L. J. Exch. 1, 3 Wkly. Rep. 25, that the lien extends to such goods only as the innkeeper is compelled to receive with his guest; but this is questionable.

71. Sunbolf *v.* Alvord, 1 H. & H. 13, 2 Jur. 110, 7 L. J. Exch. 60, 3 M. & W. 248.

72. Thus where horses, whether owned by an individual or by the government, are employed in transporting the mails, the innkeeper cannot hold the horses on lien so as to interfere with the mails. U. S. *v.* Barney, 24 Fed. Cas. No. 14,525, 3 Hughes 545, 2 Wheel. Cr. (Md.) 513.

73. Swan *v.* Bournes, 47 Iowa 501, 29 Am. Rep. 492.

74. *Kentucky.*— Black *v.* Brennan, 5 Dana 310.

Michigan.— Polk *v.* Melenbacker, 136 Mich. 611, 99 N. W. 867.

Minnesota.— Singer Mfg. Co. *v.* Miller, 52 Minn. 516, 55 N. W. 56, 38 Am. St. Rep. 568, 21 L. R. A. 229.

New York.— Jones *v.* Morrill, 42 Barb. 623.

North Carolina.— Covington *v.* Newberger, 99 N. C. 523, 6 S. E. 205.

Oregon.— Cook *v.* Kane, 13 Oreg. 482, 11 Pac. 226, 57 Am. Rep. 28.

guest has no right to the goods he brings to the inn, there will be no lien on the goods;[75] but if the innkeeper knows that the guest is a servant or agent of the owner of the goods, employed to deal with the goods he brings to the inn, the lien may be enforced against the master in spite of the knowledge of the innkeeper.[76]

3. Property of Guest Not Chargeable. Where a person goes to an inn under such circumstances that he is not chargeable because the bill is to be paid by another, the goods of the guest who is not chargeable cannot be held on lien.[77]

4. Property Held Under Statutory Liens. Where the lien is given by statute it is usually limited to the property of the guest; the lien cannot be exercised upon property of a third person, even if it was brought to the house by the guest as his own property.[78]

C. Beginning and Continuance of Lien. The lien attaches as soon as the services are performed, although payment may be postponed by agreement until

Pennsylvania.— Singer Mfg. Co. *v.* Flennigan, 7 Pa. Co. Ct. 45.

Vermont.— Alvord *v.* Davenport, 43 Vt. 30.

Wisconsin.— Manning *v.* Hollenbeck, 27 Wis. 202.

England.— Robins *v.* Gray, [1895] 2 Q. B. 501, 59 J. P. 741, 65 L. J. Q. B. 44, 73 L. T. Rep. N. S. 252, 14 Reports 671, 44 Wkly. Rep. 1; Threfall *v.* Borwick, L. R. 10 Q. B. 210, 44 L. J. Q. B. 87, 32 L. T. Rep. N. S. 32, 23 Wkly. Rep. 312; Turrill *v.* Crawley, 13 Q. B. 197, 13 Jur. 878, 18 L. J. Q. B. 155, 66 E. C. L. 197; Stirt *v.* Drungold, 3 Bulstr. 289; Robinson *v.* Walter, 3 Bulstr. 269; Snead *v.* Watkins, 1 C. B. N. S. 267, 26 L. J. C. P. 57, 87 E. C. L. 267; Johnson *v.* Hill, 3 Stark. 172, 23 Rev. Rep. 764, 3 E. C. L. 641. The view was once held in England that this lien could be enforced against a third party only on goods brought by the guest at the time he entered the inn, and of such a nature that the innkeeper could not refuse to receive them (Broadwood *v.* Granara, 3 C. L. R. 177, 10 Exch. 417, 1 Jur. N. S. 19, 24 L. J. Exch. 1, 3 Wkly. Rep. 25); but cases of this character are better explained on the ground that in them the innkeeper had notice of the right of the third person (Robins *v.* Gray, [1895] 2 Q. B. 501, 59 J. P. 741, 65 L. J. Q. B. 44, 73 L. T. Rep. N. S. 252, 14 Reports 671, 44 Wkly. Rep. 1).

See 27 Cent. Dig. tit. "Innkeepers," § 44.

Rule in Quebec.— The rule stated in Brodwood *v.* Granara, 3 C. L. R. 177, 10 Exch. 417, 1 Jur. N. S. 19, 24 L. J. Exch. 1, 3 Wkly. Rep. 25, appears to be the law in Quebec Taylor *v.* O'Brien, 24 Quebec Super. Ct. 407; Lindsay *v.* Vallée, 16 Quebec Super. Ct. 160. But see Fogarty *v.* Dion, 6 Quebec 163; Marcuse *v.* Hogan, 7 Montreal Super. Ct. 184.

In Georgia it is held that no lien can be exercised over goods of one not a guest except for charges on the specific article on which the lien is claimed. Domestic Sewing Mach. Co. *v.* Watters, 50 Ga. 573.

75. Covington *v.* Newberger, 99 N. C. 523, 6 S. E. 205.

76. Robins *v.* Gray, [1895] 2 Q. B. 501, 59 J. P. 741, 65 L. J. Q. B. 44, 73 L. T. Rep. N. S. 252, 14 Reports 671, 44 Wkly. Rep. 1.

77. Baker *v.* Stratton, 52 N. J. L. 277, 19 Atl. 661 (where the wife is guest, and the husband is by agreement to pay the bill, the wife's goods cannot be held); McIlvane *v.* Hilton, 7 Hun (N. Y.) 594 (a similar case, the lien claimed being the lodging-house keeper's statutory lien); Birney *v.* Wheaton, 2 How. Pr. N. S. (N. Y.) 519 (where husband and wife are guests, the wife's property cannot be held unless it is shown that credit was extended to her); Clayton *v.* Butterfield, 10 Rich. (S. C.) 300 (father and daughter went together to an inn; the daughter's goods could not be held for the whole bill. The daughter tendered the amount of her own charges, otherwise even those could probably not be enforced against her goods).

78. *Massachusetts.*— Mills *v.* Shirley, 110 Mass. 158, boarding-house keeper's lien.

Missouri.— Wyckoff *v.* Southern Hotel Co., 24 Mo. App. 382, statutory innkeeper's lien; but the goods could be held on warehouseman's lien for storage after the guest departed.

New York.— Barnett *v.* Walker, 39 Misc. 323, 79 N. Y. Suppl. 859 (boarding-house keeper's lien); Misch *v.* O'Hare, 9 Daly 361 (boarding-house keeper's lien). But under earlier statutes the boarding-house keeper had a lien on goods of a third party brought by the guest. Jones *v.* Morrill, 42 Barb. 623.

Pennsylvania.— Gump *v.* Showalter, 43 Pa. St. 507 (livery-stable keeper's lien); McManigle *v.* Crouse, 1 Walk. 43 (livery-stable keeper's lien; and it may be exercised on each horse only for keeping that horse).

South Dakota.— McClain *v.* Williams, 11 S. D. 227, 76 N. W. 930, 74 Am. St. Rep. 791, 49 L. R. A. 610, statutory innkeeper's lien.

Texas.— Torrey *v.* McClellan, 17 Tex. Civ. App. 371, 43 S. W. 64.

Washington.— Wertheimer-Swarts Shoe Co. *v.* Hotel Stevens Co., 38 Wash. 409, 80 Pac. 563.

Canada.— Newcombe *v.* Anderson, 11 Ont. 665, boarding-house keeper's lien.

See 27 Cent. Dig. tit. "Innkeepers," § 46.

Under the Iowa statute the lien extends to all goods under the control of the guest, although belonging to another. Brown Shoe Co. *v.* Hunt, 103 Iowa 586, 72 N. W. 765, 64 Am. St. Rep. 198, 39 L. R. A. 291.

a future day.[79] A sale of the property by the guest to a third person does not terminate the lien; the innkeeper may retain the goods against the purchaser for all charges accrued (even after the sale) until notice of the sale is received by the innkeeper.[80] The lien is not lost by taking the goods into another state, even if no such lien would be created by the law of the latter state; for the lien, once having attached to the goods, remains, wherever they may be taken by the innkeeper.[81]

D. Care of Goods Held on Lien. An innkeeper holding goods on lien is bound to take due care of the goods, which is said to be the care which he takes of his own goods of a similar description.[82] He may make reasonable use of the goods, if such use is beneficial to the owner, as for instance in the case of live animals, but in that case he is bound to account for the value of the use.[83]

E. End of Lien. The lien is at an end when the innkeeper voluntarily delivers the goods to the guest,[84] unless he is induced to give up the goods by fraud, in which case he may recover the goods and the lien will again attach to them.[85] Therefore an innkeeper cannot claim a general lien, that is, a lien to cover services rendered previously on another occasion.[86] The innkeeper may allow the guest to take the goods temporarily without parting with his lien; as for instance, where a horse is put up at an inn and the guest drives it out from time to time, the innkeeper does not lose his lien.[87] In such a case the lien continues even while the guest has temporary possession.[88] The lien is of course destroyed by payment of the debt.[89] But a mere agreement to accept security for the bill if it is not inconsistent with the lien does not put an end to it.[90] Conversion of the goods or wrongful dealing with them by the innkeeper while he holds them on lien puts an end to the lien.[91] The fact that the innkeeper claims a lien for a greater amount than he has a right to do does not, however, destroy his lien for the rightful amount.[92]

F. Enforcement of Lien. At common law an innkeeper holding goods on lien cannot sell the goods to reimburse himself, without legal process, even though the care and keeping of the goods is expensive;[93] nor can he pledge the goods.[94] The proper method of enforcing the lien, in the absence of statute, is by a bill in equity, to foreclose the lien; and on such a bill the court may order the sale

79. Smith *v.* Colcord, 115 Mass. 70.

80. Bayley *v.* Merrill, 10 Allen (Mass.) 360, boarding-house keeper's lien.

81. Jaquith *v.* American Express Co., 60 N. H. 61.

82. Angus *v.* McLachlan, 23 Ch. D. 330, 52 L. J. Ch. 587, 48 L. T. Rep. N. S. 863, 31 Wkly. Rep. 641.

83. Alvord *v.* Davenport, 43 Vt. 30.

84. Danforth *v.* Pratt, 42 Me. 50, but a mere executory agreement to do so, without consideration, is not enough.

85. Manning *v.* Hollenbeck, 27 Wis. 202.

86. Jones *v.* Thurloe, 8 Mod. 172, 1 Str. 556.

87. Allen *v.* Smith, 12 C. B. N. S. 638, 9 Jur. N. S. 230, 31 L. J. C. P. 306, 6 L. T. Rep. N. S. 459, 10 Wkly. Rep. 646, 104 E. C. L. 638 [*affirmed* in 9 Jur. N. S. 1284, 11 Wkly. Rep. 440]; Huffman *v.* Walterhouse, 19 Ont. 186.

88. Caldwell *v.* Tutt, 10 Lea (Tenn.) 258, 43 Am. Rep. 307. But see Crahtree *v.* Griffith, 22 U. C. Q. B. 573, where it seems to be held that there is no lien while the guest has the horse.

89. Where the innkeeper owes the guest for labor more than the guest owes for food, and the guest has a right to set off the amount due him against his debt, there is no lien. Hanlin *v.* Walters, 3 Colo. App. 519, 34 Pac. 686.

90. Angus *v.* McLachlan, 23 Ch. D. 330, 52 L. J. Ch. 587, 48 L. T. Rep. N. S. 863, 31 Wkly. Rep. 641. The lien is not lost by the innkeeper suing the guest and attaching the goods held. Lambert *v.* Niklass, 45 W. Va. 527, 31 S. E. 951, 72 Am. St. Rep. 828, 44 L. R. A. 561.

91. In England the effect is not only to destroy the lien, but also to make the innkeeper liable for the entire value of the goods, without deducting his charges. Mulliner *v.* Florence, 3 Q. B. D. 484, 47 L. J. Q. B. 700, 38 L. T. Rep. N. S. 167, 26 Wkly. Rep. 385.

92. Allen *v.* Smith, 12 C. B. N. S. 638, 9 Jur. N. S. 230, 31 L. J. C. P. 306, 6 L. T. Rep. N. S. 459, 10 Wkly. Rep. 646, 104 E. C. L. 638 [*affirmed* in 9 Jur. N. S. 1284, 11 Wkly. Rep. 440].

93. Case *v.* Fogg, 46 Mo. 44; Fox *v.* McGregor, 11 Barb. (N. Y.) 41; Gildea *v.* Earle, 2 N. Y. City Ct. 122; Mulliner *v.* Florence, 3 Q. B. D. 484, 47 L. J. Q. B. 700, 38 L. T. Rep. N. S. 167, 26 Wkly. Rep. 385; Jones *v.* Thurloe, 8 Mod. 172, 1 Str. 556.

94. People *v.* Husband, 36 Mich. 306.

of the goods.[95] If, however, there is an adequate statutory remedy, a bill in equity will not lie.[96] The lien may be set up in an answer to a suit in replevin brought by the owner of the goods.[97] Statutory methods of enforcing the lien are provided in several states.[98]

G. Statutory Liens. Boarding-house keepers, lodging-house keepers, and livery-stable keepers, and innkeepers as to the goods of boarders, and as to horses standing at livery, are often given a lien by statute;[99] and other statutes subject wages to a lien for board.[1]

95. Black *v.* Brennan, 5 Dana (Ky.) 310; Fox *v.* McGregor, 11 Barb. (N. Y.) 41; Gildea *v.* Earle, 2 N. Y. City Ct. 122.

96. Coates *v.* Acheson, 23 Mo. App. 255.

97. Pollock *v.* Landis, 36 Iowa 651.

98. Notice of sale, if not required by the statute, need not be given. Brooks *v.* Harrison, 41 Conn. 184. The statutory method of enforcing the lien does not affect the innkeeper's rights at common law. Polk *v.* Melenbacker, 136 Mich. 611, 99 N. W. 867. A judgment for the debt is a prerequisite to enforcing the lien. Coates *v.* Acheson, 23 Mo. App. 255. And though a case is not made out for enforcing the lien, judgment may be given for the amount of the debt proved. Hodo *v.* Benecke, 11 Mo. App. 393. Although the statutory method of enforcement, by sale, does not aptly apply to a lien on wages, yet the enforcement must be according to the statute; the lien cannot be enforced by garnishment. Hodo *v.* Benecke, *supra*.

99. *Massachusetts.*— Mills *v.* Shirley, 110 Mass. 158.

New Hampshire.— Cross *v.* Wilkins, 43 N. H. 332, boarding-house keeper's lien does not cover a charge for keeping a horse.

New York.— Barnett *v.* Walker, 39 Misc. 323, 79 N. Y. Suppl. 859; Shafer *v.* Guest, 6 Rob. 264, 35 How. Pr. 184 (cannot be extended to any charge except for board; for instance, to damages for breach of contract to remain as a boarder); Stewart *v.* McCready, 24 How. Pr. 62 (no difference in this respect between transient and permanent boarders). The New York statute extends to keepers of boarding and lodging-houses only and not to the owner of an apartment hotel, where the relation is that of landlord and tenant (Shearman *v.* Iroquois Hotel, etc., Co., 42 Misc. 217, 85 N. Y. Suppl. 265); nor to a private housekeeper who incidentally receives a person to board (Cady *v.* McDowell, 1 Lans. 484).

Pennsylvania.— Gump *v.* Showalter, 43 Pa. St. 507; Singer Mfg. Co. *v.* Flennigan, 7 Pa. Co. Ct. 45.

Texas.— Hardin *v.* State, (Cr. App. 1905) 84 S. W. 591, lodging-house keeper is not entitled to the lien given to boarding-house keepers.

Wisconsin.— Nichols *v.* Halliday, 27 Wis. 406.

Canada.— Newcombe *v.* Anderson, 11 Ont. 665.

See 27 Cent. Dig. tit. "Innkeepers," § 46.

1. In Missouri wages for the last thirty days' services are exempt. Hodo *v.* Benecke, 11 Mo. App. 393.

In Pennsylvania under an act of 1876 wages were allowed to be attached for board without giving the debtor the benefit of the ordinary three hundred dollars' exemption. Smith *v.* McGinty, 101 Pa. St. 402; Thomas *v.* Glasgow, 2 Pa. Dist. 711, 13 Pa. Co. Ct. 167; Hughes *v.* Jones, 8 Kulp 242; Blythan *v.* Rescorla, 1 Kulp 351; Carden *v.* Scott, 1 Kulp 196; McGentey *v.* Keefe, 8 Luz. Leg. Reg. 179. Under the statute of 1889, however, the ordinary exemption is allowed by the courts in some counties (Thomas *v.* Glasgow, *supra*; Karnes *v.* McGuire, 18 Pa. Co. Ct. 306); but not allowed in other counties (Dillon *v.* Treverton, 16 Pa. Co. Ct. 89; McCarty *v.* Dougherty, 16 Pa. Co. Ct. 86). The lien is for four weeks' board only; and eight weeks' board cannot thus be collected by splitting up the judgment and issuing two separate executions, each for four weeks' board. Hawk *v.* Rock, 14 Pa. Co. Ct. 490. The procedure requires first a judgment for the amount of the wages, and then an attachment of the wages on the judgment. Dillon *v.* Treverton, *supra*; McCarty *v.* Dougherty, *supra*; Thatcher *v.* Beam, 14 Pa. Co. Ct. 109; Carden *v.* Scott, 1 Kulp (Pa.) 196; McGinley *v.* McDonough, 3 Lanc. L. Rev. 202, 27 Wkly. Notes Cas. 340. *Contra* in a few counties. Thomas *v.* Glasgow, *supra*; Smith *v.* Dingus, 2 Pa. Dist. 710, 12 Pa. Co. Ct. 299). A recognizance must be given by plaintiff; a bond will not take its place. Thomas *v.* Glasgow, *supra*. The record must show that plaintiff was the proprietor of an inn or boarding-house (Walker *v.* Kennedy, 7 Pa. Dist. 516, 20 Pa. Co. Ct. 433; McCourt *v.* Brenaman, 11 Pa. Co. Ct. 645); and that the debt was for wages (Leiss *v.* Engard, 8 Pa. Dist. 608).

A horse left at an inn by a thief was subsequently claimed by the owner, who refused to pay for his keeping. The landlord filed his bill, asserting a lien on the horse, and that the amount was more than his value. The owner filed a bond, under order of the court, conditioned to abide by the decree of the court, and took away the horse, and sold him. It was held that the owner was not bound for more than the value of the horse, and that for the balance, if any, the landlord must look to the party from whom he received the horse. Black *v.* Brennan, 5 Dana (Ky.) 310. An innkeeper is entitled to a lien as against the owner for keeping a horse, although the animal was placed in his possession by one other than the owner. Hunter *v.* Sevier, 7 Yerg. (Tenn.) 127.

VII. DUTY OF INNKEEPER TO STRANGERS.

A. Duty to Permit Access to the Inn. One who is not a guest has in general no legal right to enter the inn or remain in it against the will of the innkeeper.[2] A stranger who actually has business with a guest might perhaps have a legal right to be admitted if the guest so requested;[3] but one who comes merely to make a social call upon a guest has no right to enter the inn and may be excluded.[4] *A fortiori* one who comes merely upon his own business may be excluded, even though a business rival is admitted by the innkeeper.[5] But where to exclude such a person would subject the guest to a monopoly in a necessary service, the innkeeper, it seems, has no right to deprive the guest of the benefit of competition by the admission of one person and the exclusion of his rivals.[6]

B. Liability to Strangers For Acts of Guests. The innkeeper is not generally liable to strangers for the acts of his guests;[7] but may be made so by statute.[8]

VIII. REMEDY.

A. Procedure — 1. Form of Action. An action against an innkeeper for injury to a guest may be brought either in tort or in contract,[9] but the gist of the action is tort.[10] Under the ordinary form of statute, an action for personal injury to a guest does not survive against an innkeeper's executor, being an action for a mere personal tort;[11] but an action for loss of the guest's goods survives against the representative of the innkeeper.[12]

2. Parties. An innkeeper may be sued as such for loss of goods only by the guest. If one lends his property to another and the bailee comes with it to an inn and it is there lost, the guest alone may enforce the innkeeper's peculiar liability.[13] If, however, the guest is a member of the owner's family the owner may sue; so a father may sue the innkeeper for the loss of his goods taken to an inn by his minor son,[14] and a master may sue for his goods lost at an inn by his servant.[15] So it has been held that both partners may sue for goods of the firm taken to an inn by one partner and lost there.[16] In several cases it has been said that a bailee stands in the same position as a servant, and the bailor may sue the innkeeper for loss of the goods;[17] but these decisions must be confined to cases

2. State *v.* Whithy, 5 Harr. (Del.) 494.

3. Markham *v.* Brown, 8 N. H. 523, 31 Am. Dec. 209; State *v.* Steele, 106 N. C. 766, 11 S. E. 478, 19 Am. St. Rep. 573, 8 L. R. A. 516; Com. *v.* Mitchell, 2 Pars. Eq. Cas. (Pa.) 431, 1 Phila. 63.

4. Com. *v.* Mitchell, 2 Pars. Eq. Cas. (Pa.) 431, 1 Phila. 63.

5. State *v.* Steele, 106 N. C. 766, 11 S. E. 478, 19 Am. St. Rep. 573, 8 L. R. A. 516, solicitor for a livery stable.

6. It was so held in Markham *v.* Brown, 8 N. H. 523, 31 Am. Dec. 209, where it was held illegal for an innkeeper to admit the solicitor of one stage line to his inn and exclude the representatives of rival lines.

7. He is not liable to pay for washing the linen of his guests. Callard *v.* White, 1 Stark. 171, 2 E. C. L. 72.

8. Under a statute by which the occupier of any house where a dog is permitted to live is regarded as the owner of the dog, an innkeeper is liable for injuries caused by a guest's dog kept in the inn. Gardner *v.* Hart, 44 Wkly. Rep. 527.

9. Norcross *v.* Norcross, 53 Me. 163.

10. People *v.* Willett, 26 Barb. (N. Y.) 78, right to arrest determined as in action of tort. An action for loss of goods of the guest is an action on the case for negligence rather than an action of trover, unless an actual conversion is shown. Hallenbake *v.* Fish, 8 Wend. (N. Y.) 547, 24 Am. Dec. 88.

11. Stanley *v.* Bircher, 78 Mo. 245.

12. Morgan *v.* Ravey, 6 H. & N. 265, 30 L. J. Exch. 131, 3 L. T. Rep. N. S. 784, 9 Wkly Rep. 376.

13. Coykendall *v.* Eaton, 55 Barb. (N. Y.) 188, 37 How. Pr. 438; Chandler *v.* Haas, 12 York Leg. Rec. (Pa.) 127; Robinson *v.* Waller, 1 Rolle Abr. 3, pl. 6.

14. Dickinson *v.* Winchester, 4 Cush. (Mass.) 114, 50 Am. Dec. 760; Epps *v.* Hinds, 27 Miss. 657, 61 Am. Dec. 528; Coykendall *v.* Eaton, 55 Barb. (N. Y.) 188, 37 How. Pr. 438; Read *v.* Amidon, 41 Vt. 15, 98 Am. Dec. 560.

15. Berkshire Woollen Co. *v.* Proctor, 7 Cush. (Mass.) 417; Robinson *v.* Waller, 1 Rolle Abr. 3, pl. 7.

16. Needles *v.* Howard, 1 E. D. Smith (N. Y.) 54.

17. Towson *v.* Havre-de-Grace Bank, 6 Harr. & J. (Md.) 47, 14 Am. Dec. 254; Mason *v.* Thompson, 9 Pick. (Mass.) 280, 20

where the innkeeper was negligent, and they are therefore based on the ordinary liability to an owner of goods for a tort by which the goods are injured.

3. Pleading. The declaration need not set out the customary liability of innkeepers, since the custom is part of the law of the land.[18] The declaration for injury to a guest must show the relation of host and guest at the time of the injury.[19] So a petition to foreclose a lien must allege that the petitioner keeps an inn or tavern.[20] Contributory negligence of the guest must be set up in the answer.[21]

4. Evidence. At common law the guest, being an interested party, could not testify in his action for goods lost at the inn.[22] By an exception, however, in the case of a carrier, founded on necessity, which was in some states extended to the case of the innkeeper, the owner could testify to the contents and value of his personal baggage.[23] Evidence of declarations or conduct of a servant, outside the master's business, is not admissible;[24] nor of defendant's character for honesty.[25] Questions of relevancy of evidence are settled on the general principles of the law of evidence.[26]

B. Damages. Damages for injury to health by refusal to receive one as guest may be recovered,[27] but not for loss of reputation or for mental anguish.[28] Exemplary damages cannot be recovered where there is no actual damage.[29] The measure of damages for loss of goods is the market value, of which the cost price is some evidence.[30] In an action by the innkeeper for his charges, the guest may recoup the value of goods lost from his room.[31]

C. What Law Governs. The obligation of the innkeeper is to be determined by the law of the country where the inn is.[32]

IX. Offenses Against Innkeepers.

In several states, by statutes varying in their terms, frauds upon innkeepers have been made criminal offenses; the construction of these statutes is shown in the notes.[33]

Am. Dec. 471; Walker *v.* Sharpe, 31 U. C. Q. B. 340.

18. Kisten *v.* Hildebrand, 9 B. Mon. (Ky.) 72, 48 Am. Dec. 416.

19. Towson *v.* Havre-de-Grace Bank, 6 Harr. & J. (Md.) 47, 14 Am. Dec. 254.

"Being entertained as a guest at defendant's inn" sufficiently alleges defendant to be an innkeeper. Norcross *v.* Norcross, 53 Me. 163.

"Being a public innkeeper, received the horses as such," sufficiently alleges that the owner was a guest. Peet *v.* McGraw, 25 Wend. (N. Y.) 653.

20. Southwood *v.* Myers, 3 Bush (Ky.) 681 [*overruling* it seems Banks *v.* Oden, 1 A. K. Marsh. (Ky.) 546].

21. Gile *v.* Libby, 36 Barb. (N. Y.) 70.

22. Pope *v.* Hall, 14 La. Ann. 324; Sparr *v.* Wellman, 11 Mo. 230.

23. Sasseen *v.* Clark, 37 Ga. 242; Kitchen *v.* Robbins, 29 Ga. 713; Pettigrew *v.* Barnum, 11 Md. 434, 69 Am. Dec. 212; Taylor *v.* Monnot, 1 Abb. Pr. (N. Y.) 325.

24. Beale *v.* Posey, 72 Ala. 323; Mateer *v.* Brown, 1 Cal. 221, 52 Am. Dec. 303.

25. Dunbier *v.* Day, 12 Nebr. 596, 12 N. W. 109, 41 Am. Rep. 772.

26. Baker *v.* Dessauer, 49 Ind. 28 (whether another occupant was to be placed in the room); Dunbier *v.* Day, 12 Nebr. 596, 12 N. W. 109, 41 Am. Rep. 772 (whether innkeeper or his servants saw the property); Bradner *v.* Mullen, 27 Misc. (N. Y.) 479, 59 N. Y. Suppl. 178 (circumstance of placing coat on hook); Jefferson Hotel Co. *v.* Warren, 128 Fed. 565, 63 C. C. A. 193 (assurance of clerk that hotel was fireproof).

27. Willis *v.* McMahon, 89 Cal. 156, 26 Pac. 649.

28. Malin *v.* McCutcheon, 33 Tex. Civ. App. 387, 76 S. W. 586.

29. Malin *v.* McCutcheon, 33 Tex. Civ. App. 387, 76 S. W. 586.

30. Wies *v.* Hoffman House, 28 Misc. (N. Y.) 225, 59 N. Y. Suppl. 38. Damages on a bond given under the Pennsylvania act of 1875 do not include damages recovered in a suit instituted under the act of 1854. Crouse *v.* Com., 87 Pa. St. 168.

31. Burbank *v.* Chapin, 140 Mass. 123, 2 N. E. 934.

32. Holland *v.* Pack, Peck (Tenn.) 151.

33. *Alabama.*— *Ex p.* King, 102 Ala. 182, 15 So. 524.

Illinois.— A mere refusal to pay is not the crime; it must be a fraudulent refusal. Hutchinson *v.* Davis, 58 Ill. App. 358. And refusal to pay damages for a breach of a contract to board does not come within the statute; only refusal to pay for board actually furnished. Sundmacher *v.* Block, 39 Ill. App. 553. The offense of surreptitiously removing baggage involves fraud and conceal-

While the constitutionality of these statutes has been upheld,[34] they are nevertheless subject to strict construction.[35]

INNOCENCE. The absence of guilt.[1] (See, generally, CRIMINAL LAW.)

INNOCENT. Free from legal or specific wrong;[2] not injurious.[3]

INNOCENT PURCHASER. See BONA FIDE PURCHASER,[4] and Cross-References Thereunder.

INNOMINATE. Unclassified.[5]

ment, and is not committed if the baggage is openly removed, even if the removal was not seen. Hutchinson *v.* Davis, *supra.*

Minnesota.— The complaint need not allege either the board obtained or the baggage removed to be of any value. State *v.* Benson, 28 Minn. 424, 10 N. W. 471.

Missouri.— The board must have been obtained by means of the false pretense; it is no offense to make a false promise after the board has been obtained. State *v.* Kingsley, 108 Mo. 135, 18 S. W. 994; State *v.* Tull, 42 Mo. App. 324.

New York.— The crime is not committed unless the fraudulent intent existed at the time the board was obtained, and it was obtained by means of the false pretense. People *v.* Nicholson, 25 Misc. 266, 55 N. Y. Suppl. 447.

Pennsylvania.— The statute makes no distinction between a guest and a boarder, and includes every person who with intent to defraud obtains food or accommodations. Com. *v.* Gough, 3 Kulp 148. Evidence of removal of the baggage with the intent of not paying the board bill will justify conviction. Com. *v.* Billig, 25 Pa. Super. Ct. 477. The statute punishing surreptitious removal applies to the removal of baggage or of any other property; and it applies to such goods obtained by fraud after the act went into effect, although the charges on which they are held were incurred before the passage of the act. Com. *v.* Morton, 9 Lanc. Bar (Pa.) 79, 6 Luz. Leg. Reg. 207. In an indictment under this statute the innkeeper need not prove that he had posted the notices required by law. Com. *v.* Morton, 9 Lanc. Bar (Pa.) 79, 6 Luz. Leg. Reg. 207. An indictment for obtaining board by false pretenses must set out the nature and character of the pretenses. Com. *v.* Dennis, 1 Pa. Co. Ct. 278.

See 27 Cent. Dig. tit. "Innkeepers," § 48.

34. *Ex p.* King, 102 Ala. 182, 15 So. 524 (the statute is not unconstitutional as creating imprisonment for debt); State *v.* Benson, 28 Minn. 424, 10 N. W. 471; State *v.* Kingsley, 108 Mo. 135, 18 S. W. 994; State *v.* Yardley, 95 Tenn. 546, 32 S. W. 481, 34 L. R. A. 656.

35. Hutchinson *v.* Davis, 58 Ill. App. 358.

1. Black L. Dict.

2. Century Dict.

"Innocent agent" is one who does the forbidden thing, moved thereto by another person, yet incurs no guilt, because not endowed with sufficient mental capacity or not made acquainted with the necessary facts (1 Bishop Cr. L. § 310 [*quoted* in Smith *v.* State, 21 Tex. App. 107, 132, 17 S. W. 552]. See also State *v.* Carr, 28 Oreg. 389, 397, 42 Pac. 215); one who is ignorant of the unlawful intent of his principal, and is merely the instrument of the guilty party in committing an offense (Smith *v.* State, 21 Tex. App. 107, 132, 17 S. W. 552). See, generally, CRIMINAL LAW; PRINCIPAL AND AGENT.

"Innocent possession" is not convertible in legal terminology with the term "lawful possession." Intent does not enter into whether an act is unlawful or tortious, although it does as to whether it is innocent or criminal. Milligan *v.* Brooklyn Warehouse, etc., Co., 34 Misc. (N. Y.) 55, 62, 68 N. Y. Suppl. 744.

"Innocent shippers" see Brooking *v.* Maudslay, 38 Ch. D. 636, 642, 6 Aspin. 296, 57 L. J. Ch. 1001, 58 L. T. Rep. N. S. 852, 36 Wkly. Rep. 664.

"Innocent woman" is one whose character is unsullied; that is, undefiled, not stained with moral turpitude (State *v.* Davis, 92 N. C. 764, 765), or one who has never had sexual commerce with man (State *v.* Malloy, 115 N. C. 737, 739, 20 S. E. 461; State *v.* Brown, 100 N. C. 519, 525, 6 S. E. 568) and who is chaste, or pure (State *v.* Crowell, 116 N. C. 1052, 1058, 21 S. E. 502). "The woman must not only be 'innocent' but 'virtuous.'" State *v.* Ferguson, 107 N. C. 841, 849, 12 S. E. 574. See State *v.* Grigg, 104 N. C. 882, 885, 10 S. E. 684; State *v.* Hinson, 103 N. C. 374, 378, 9 S. E. 552. See, generally, ADULTERY; FORNICATION; LIBEL AND SLANDER.

"Acted innocently" see Christie *v.* Cooper, [1900] 2 Q. B. 522, 528, 64 J. P. 692, 69 L. J. Q. B. 708, 83 L. T. Rep. N. S. 54, 49 Wkly. Rep. 46; Coopen *v.* Moore, [1898] 2 Q. B. 306, 313, 62 J. P. 453, 67 L. J. Q. B. 689, 78 L. T. Rep. N. S. 520, 46 Wkly. Rep. 620; Kirshenhoim *v.* Salmon, [1898] 2 Q. B. 19, 24, 62 J. P. 439, 67 L. J. Q. B. 601, 78 L. T. Rep. N. S. 658, 46 Wkly. Rep. 573; Wood *v.* Burgess, 24 Q. B. D. 162, 164, 16 Cox C. C. 729, 54 J. P. 325, 59 L. J. M. C. 11, 61 L. T. Rep. N. S. 593, 38 Wkly. Rep. 331.

3. Macfarlane *v.* Taylor, L. R. 1 H. L. Sc. 245, 18 L. T. Rep. N. S. 214, 217.

4. See 5 Cyc. 719.

5. Black. L. Dict., where it is said: "'Unclassified' contracts of Roman law . . . are contracts which are neither *re, verbis, literis,* nor *consensu* simply, but some mixture of or variation upon two or more of such contracts. They are principally the

IN NOSTRA LEGE UNA COMMA EVERTIT TOTUM PLACITUM. A maxim meaning "In our law, one comma upsets the whole plea." [6]

IN NOVO CASU, NOVUM REMEDIUM APPONENDUM EST. A maxim meaning "A new remedy is to be applied to a new case." [7]

INNS OF CHANCERY. The buildings known as Clifford's Inn, Clement's Inn, New Inn, Staple's Inn. They were formerly a sort of collegiate houses, in which law students learnt the elements of law before being admitted into the Inns of Court, but they have long ceased to occupy that position.[8] (See INNS OF COURT.)

INNS OF COURT. Certain private unincorporated associations in the nature of collegiate houses, having the exclusive privilege of calling to the bar that is, conferring the rank or degree of barrister.[9] (See BENCHER; INNS OF CHANCERY.)

IN NUBIBUS. In the clouds; in abeyance; in suspension; in the custody of law.[10]

INNUENDO. See LIBEL AND SLANDER.

IN NULLO EST ERRATUM. Literally, "In nothing is there error." The name of the common plea or joinder in error, denying the existence of error in the record or proceedings; which is in the nature of a demurrer, and at once refers the matter of law arising thereon, to the judgment of the court.[11] (In Nullo Est Erratum: Effect of Plea, see APPEAL AND ERROR.)

IN OBSCURA VOLUNTATE MANUMITTENTIS FAVENDUM EST LIBERTATI. A maxim meaning "When the expression of the will of one who seeks to manumit a slave is obscure, liberty is to be favored." [12]

IN OBSCURIS INSPICI SOLERE QUOD VERSISIMILIUS EST, AUT QUOD PLERUMQUE FIERI SOLET. A maxim meaning "Where there is obscurity, we usually regard what is probable or what is generally done." [13]

IN OBSCURIS QUOD MINIMUM EST SEQUIMUR. A maxim meaning "In obscure cases, we follow that which is least so." [14]

IN ODIUM SPOLIATORIS OMNIA PRÆSUMUNTUR. A maxim meaning "All things are presumed against a wrong doer." [15]

contracts of *permutatio, de æstimato, precarium,* and *transactio.*"

6. Tayler L. Gloss.

7. Wharton L. Lex. [*citing* 2 Inst. 3].

8. Sweet L. Dict. [*citing* Stephen Comm. 1, 16 *et seq.*].

Purpose of foundation.—"Here in Term time the students of the law attend in great numbers, as it were to public schools, and are there instructed in all sorts of law learning and in the practice of the Courts. There belong to it ten lesser Inns, and sometimes more, which are called the Inns of Chancery, in each of which there are an hundred students at the least, and in some of them a far greater number, though not constantly residing. The students are for the most part young men. Here they study the nature of original and judicial writs, which are the very first principles of the law. After they have made some progress here and are more advanced in years, they are admitted into the Inns of Court properly so called; of these there are four in number. In that which is the least frequented there are about 200 students . . . for the young student, which most commonly cometh from one of the Universities, for his entrance or beginning were first instituted and erected eight houses of Chancery, to learn there the elements of the law, that is to say (*inter alia*) 'Clifford's Inn, and each of these houses consists of forty or thereabouts.' . . . 'All these are not far distant from one another, and altogether do make the most famous university for profession of law only, or of any one human science that is in the world, and advanceth itself above all others *quantum inter viburna cupressus.* In which Houses of Court and Chancery, the readings and other exercises of the laws therein continually used are most excellent and behooffful for attaining to the knowledge of these laws.'" Smith *v.* Kerr, [1900] 2 Ch. 511, 518, 64 J. P. 772, 69 L. J. Ch. 755, 82 L. T. Rep. N. S. 795.

9. They are: The Inner Temple, the Middle Temple, Lincoln's Inn, and Gray's Inn. They have a common Council of Legal Education for giving lectures and holding examinations. Sweet L. Dict. [*citing* 1 Stephen Comm. 19 *et seq.*].

10. Rapalje & L. L. Dict. See also Howell *v.* Ackerman, 89 Ky. 22, 27, 11 S. W. 819, 11 Ky. L. Rep. 251.

11. Burrill L. Dict. See also Booth *v.* Com., 7 Metc. (Mass.) 285, 287; Whelan *v.* Reg., 28 U. C. Q. B. 2, 158; 2 Cyc. 1007 note 67.

12. Peloubet Leg. Max.

13. Bouvier L. Dict. [*citing* Dig. 50, 17, 114].

14. Bouvier L. Dict. [*citing* Dig. 50, 17, 9].

15. Bouvier L. Dict. [*citing* Broom Leg. Max. 939].

Applied in State *v.* Crowell, 149 Mo. 391,

INOFFICIOUS. Unnatural;[16] a term used in the Roman law to designate a testament in which no mention was made of the heir.[17] (See, generally, WILLS.)

IN OMNI ACTIONE UBI DUÆ CONCURRUNT DISTRICTIONES, VIDELICET IN REM ET IN PERSONAM, ILLA DISTRICTIO TENENDA EST QUÆ MAGIS TIMETUR ET MAGIS LIGAT. A maxim meaning "In every action where two distresses concur, that is *in rem* and *in personam*, that is to be chosen which is most dreaded, and which binds most firmly."[18]

IN OMNIBUS. On ALL FOURS,[19] *q. v.*

IN OMNIBUS CAUSIS PRO FACTO ACCIPITUR ID, IN QUO PER ALIUM MORÆ SIT, QUO MINUS FIAT. A maxim meaning "In all causes, that is taken for a fact in which, by means of another, there may be a hindrance to prevent its being done."[20]

IN OMNIBUS CONTRACTIBUS, SIVE NOMINATIS, SIVE INNOMINATIS, PERMUTATIO CONTINETUR. A maxim meaning "In all agreements, whether it is named or not, an exchange is comprised."[21]

IN OMNIBUS FERE MINORI ÆTATI SUCCURITUR. A maxim meaning "In all cases aid is given to minors."[22]

IN OMNIBUS OBLIGATIONIBUS, IN QUIBUS DIES NOM PONITUR, PRÆSENTI DIE DEBETUR. A maxim meaning "In all obligations, when no time is fixed for the performance, the thing is due immediately."[23]

IN OMNIBUS PŒNALIBUS JUDICIIS, ET ÆTATI ET IMPRUDENTIÆ SUCCURRITUR. A maxim meaning "In all trials for penal offences, allowance is made for youth and lack of discretion."[24]

IN OMNIBUS QUIDEM, MAXIME TAMEN IN JURE, ÆQUITAS SPECTANDA SIT. A maxim meaning "In everything, but especially in law, equity is to be regarded."[25]

IN OMNI RE NASCITUR RES QUÆ IPSAM REM EXTERMINAT. A maxim meaning "In every thing, the thing is born which destroys the thing itself."[26]

INOPPORTUNE. Unseasonable in time; at the wrong time.[27]

INOPS CONSILII. Destitute of counsel; without or deprived of the aid of counsel.[28] (See, generally, ATTORNEY AND CLIENT; CRIMINAL LAW.)

IN PAIS. In the country, as distinguished from in court; out of court, or without judicial process; by deed, or not of record.[29] (In Pais: Estoppel, see ESTOPPEL.)

395, 50 S. W. 893, 73 Am. St. Rep. 402; State *v.* Alexander, 119 Mo. 447, 462, 24 S. W. 1060; State *v.* Porter, 9 Mo. 356, 358; Raymond *v.* Cox, 44 N. J. Eq. 415, 423, 15 Atl. 593; Jones *v.* Knauss, 31 N. J. Eq. 609, 615.

16. *In re* Willford, (N. J. Prerog. 1902) 51 Atl. 501, 502.

17. Clayton *v.* Clayton, 3 Binn. (Pa.) 476, 486. See also Stein *v.* Wilzinski, 4 Redf. Surr. (N. Y.) 441, 450; La. Civ. Code (1900), art. 3556.

18. Bouvier L. Dict. [*citing* Bracton 372].

19. Bouvier L. Dict. See also Clark *v.* Swift, 3 Metc. (Mass.) 390, 394.

"Parallel in omnibus" see Sawkill *v.* Warman, 10 Mod. 104.

20. Morgan Leg. Max.

Applied in The Palo Alto, 18 Fed. Cas. No. 10,700, 2 Ware 344, 349, 6 N. Y. Leg. Obs. 262 [*citing* Dig. 50, 17, 39].

21. Tayler L. Gloss.

22. Morgan Leg. Max.

23. Bouvier L. Dict. [*citing* Dig. 50, 17, 14].

24. Bouvier L. Dict. [*citing* Broom Leg. Max. 314, Dig. 50, 17, 108].

25. Rapalje & L. L. Dict. [*citing* Dig. 15, 70, 108].

26. Bouvier L. Dict. [*citing* 2 Inst. 215].

27. Pennsylvania Co. *v.* Sloan, 125 Ill. 72, 80, 17 N. E. 37, 8 Am. St. Rep. 337.

28. Burrill L. Dict. See also Hastings *v.* Farmer, 4 N. Y. 293, 299 (where the term is applied to an Indian); Ruffin *v.* Ruffin, 112 N. C. 102, 105, 16 S. E. 1021; Leathers *v.* Gray, 96 N. C. 548, 552, 2 S. E. 455; Auman *v.* Auman, 21 Pa. St. 343, 347; *In re* Eichelberger, 5 Pa. St. 264, 267; Eby *v.* Eby, 5 Pa. St. 461, 464; Findlay *v.* Riddle, 3 Binn. (Pa.) 139, 149, 5 Am. Dec. 355; Otterback *v.* Bohrer, 87 Va. 548, 552, 12 S. E. 1013; Wyatt *v.* Sadler, 1 Munf. (Va.) 544; Poor *v.* Considine, 6 Wall. (U. S.) 458, 481, 18 L. ed. 869; Lewis *v.* Rees, 3 Jur. N. S. 12, 13, 3 K. & J. 132, 26 L. J. Ch. 101, 5 Wkly. Rep. 96.

29. Burrill L. Dict. [*citing* 2 Blackstone Comm. 294], where it is said that matter *in pais* is distinguished from matter of record. See also Vallandingham *v.* Johnson, 85 Ky. 288, 293, 3 S. W. 173, 8 Ky. L. Rep. 940; Erskine *v.* Townsend, 2 Mass. 493, 495, 3 Am. Dec. 71; Provolt *v.* Chicago, etc., R.

IN PAPER. In English practice, a term used of a record until its final enrolment on the parchment record.[30] (See, generally, RECORDS.)

IN PARI CAUSA POSSESSOR POTIOR HABERI DEBET. A maxim meaning "When two parties have equal rights, the advantage is always in favor of the possessor."[31]

IN PARI CAUSA POTIOR EST CONDITIO POSSIDENTIS. A maxim meaning "In an equal case (i. e., where the claimants are in a similar position), the possessor is in the better position."[32]

IN PARI DELICTO. In equal fault; equal in guilt.[33] (In Pari Delicto: Duress of Plaintiff as Affecting Validity of Defense, see ACTIONS. Relief Given in Aid of Public Policy, see ACTIONS. Rights of Parties to Illegal Contract, see CONTRACTS.)

IN PARI DELICTO MELIOR EST CONDITIO POSSIDENTIS.[34] A maxim meaning "When the parties are equally in the wrong, the condition of the possessor is better."[35]

IN PARI DELICTO POTIOR EST CONDITIO DEFENDENTIS (ET POSSIDENTIS). A maxim meaning "Where both parties are equally in fault, the condition of the defendant is preferable."[36]

Co., 57 Mo. 256, 263; Sanderson *v.* Price, 21 N. J. L. 637, 647; Dickerson *v.* Robinson, 6 N. J. L. 195, 199, 10 Am. Dec. 396; Merchants Nat. Bank *v.* State Nat. Bank, 10 Wall. (U. S.) 604, 649, 19 L. ed. 1008; Strother *v.* Lucas, 12 Pet. (U. S.) 410, 447, 9 L. ed. 1137; Durant *v.* Ritchie, 8 Fed. Cas. No. 4,190, 4 Mason 45, 70; 16 Cyc. 681; 14 Cyc. 1185; 10 Cyc. 1274.

30. Bouvier L. Dict. [*citing* 3 Blackstone Comm. 406]. See also Ruth *v.* Seymour, 10 Mod. 88.

31. Bouvier L. Dict. [*citing* Broom Leg. Max. 714, Dig. 50, 128].

32. Trayner Leg. Max.

33. Bouvier L. Dict. See also New York, etc., Grain, etc., Exch. *v.* Mellen, 27 Ill. App. 556, 558; Pennypacker *v.* Capital Ins. Co., 80 Iowa 56, 59, 45 N. W. 408, 20 Am. St. Rep. 395, 8 L. R. A. 236; Setter *v.* Alvey, 15 Kan. 157, 160; Anderson *v.* Merideth, 82 Ky. 564, 571; Ratcliffe *v.* Smith, 13 Bush (Ky.) 172, 174; Long *v.* Long, 9 Md. 348, 354; Haven *v.* Foster, 9 Pick. (Mass.) 112, 129, 19 Am. Dec. 353; Hamilton *v.* Wood, 55 Minn. 482, 488, 57 N. W. 208; Bell *v.* Campbell, 123 Mo. 1, 16, 25 S. W. 359, 45 Am. St. Rep. 505; Poston *v.* Balch, 69 Mo. 115, 116; Hutchinson *v.* Targee, 14 N. J. L. 386, 387; Curtis *v.* Leavitt, 15 N. Y. 1, 95; Moody *v.* Levy, 58 Tex. 532, 533; Rex *v.* North Collingham, 1 B. & C. 578, 584, 2 D. & R. 743, 8 E. C. L. 244; 16 Cyc. 149; 9 Cyc. 549, 550, 551, 552; 6 Cyc. 316, 888; 4 Cyc. 962.

"Where both parties are in delicto, concurring in an illegal act, it does not always follow that they stand *in pari delicto*; for there may be, and often are, very different degrees in their guilt." Story Eq. Jur. § 300 [*quoted* in Rozell *v.* Vansyckle, 11 Wash. 79, 85, 39 Pac. 270].

34. "A maxim of public policy equally respected in courts of law and courts of equity." Baldwin *v.* Campfield, 8 N. J. Eq. 891, 899. See also State Bank *v.* Niles, 1 Dougl. (Mich.) 401, 411, 41 Am. Dec. 575.

35. Bouvier L. Dict. [*citing* Broom Leg. Max. 325; 4 Bouvier Inst. No. 3724].

Applied or explained in Keel *v.* Larkin, 83 Ala. 142, 146, 3 So. 296, 3 Am. St. Rep. 702; Sampson *v.* Shaw, 101 Mass. 145, 150, 3 Am. Rep. 327; Bayley *v.* Taber, 5 Mass. 286, 289, 4 Am. Dec. 57; State Bank *v.* Niles, 1 Dougl. (Mich.) 401, 411, 41 Am. Dec. 575; Bauer *v.* Sawyer, etc., Land Co., 90 Minn. 536, 538, 97 N. W. 428; Sherron *v.* Humphreys, 14 N. J. L. 217, 219; Moss *v.* Cohen, 11 Misc. (N. Y.) 184, 187, 32 N. Y. Suppl. 1078; Duval *v.* Wellman, 15 N. Y. St. 404, 405; Nellis *v.* Clark, 4 Hill (N. Y.) 424, 436; McQuade *v.* Rosecrans, 36 Ohio St. 442, 448; Hooker *v.* De Palvs, 28 Ohio St. 251, 263; Oliver *v.* Moore, 26 Ohio St. 298, 306; Pittsburgh, etc., R. Co. *v.* Methven, 21 Ohio St. 586, 592; Hannay *v.* Eve, 3 Cranch (U. S.) 242, 246, 2 L. ed. 427; Haigh *v.* Kaye, L. R. 7 Ch. 469, 473, 41 L. J. Ch. 567, 26 L. T. Rep. N. S. 675, 20 Wkly. Rep. 597; Ayerst *v.* Jenkins, L. R. 16 Eq. 275, 283, 42 L. J. Ch. 690, 29 L. T. Rep. N. S. 126, 21 Wkly. Rep. 878; Osborne *v.* Williams, 18 Ves. Jr. 379, 382, 11 Rev. Rep. 218, 34 Eng. Reprint 360; Cormick *v.* Dooling, 1 Newfoundl. 151, 153.

36. Bouvier L. Dict. See also 10 Cyc. 1153; 9 Cyc. 546; 6 Cyc. 316; 1 Cyc. 675 note 88.

Applied or explained in Potter *v.* Gracie, 58 Ala. 303, 305, 29 Am. Rep. 748; Camp *v.* Bates, 11 Conn. 487, 500; Cook *v.* Meyers, 166 Ill. 282, 289, 46 N. E. 765; American Mut. L. Ins. Co. *v.* Bertram, 163 Ind. 51, 61, 70 N. E. 258, 64 L. R. A. 935; Tucker *v.* Allen, 16 Kan. 312, 324; Ratcliff *v.* Smith, 13 Bush (Ky.) 172, 175; Smart *v.* White, 73 Me. 332, 337, 40 Am. Rep. 356; Low *v.* Hutchinson, 37 Me. 196; Marean *v.* Langley, 21 Me. 26, 28; Baxter *v.* Deneen, 98 Md. 181, 208, 57 Atl. 601, 64 L. R. A. 949; Chesapeake, etc., Canal Co. *v.* Allegany County Com'rs, 57 Md. 201, 221, 40 Am. Rep. 430; Schuman *v.* Peddicord, 50 Md. 560, 562; Roman *v.* Mali, 42 Md. 513, 537; Scott *v.* Leary,

IN PARI MATERIA. See, generally, STATUTES.

IN PERICULO QUIE ETIAM TUTUS CAVET SETINUS EST. A maxim meaning "He is most free from danger who, even when safe, is on his guard."[37]

IN PERPETUAM REI MEMORIAM. In perpetual memory of a thing.[38]

IN PERSONAM. A term applied to remedies where the proceedings are against the person in contradistinction to those which are against specific things, or *in rem*.[39] (In Personam: Equity Jurisdiction of the Person, see EQUITY. Maxims in Equity, see EQUITY. Remedies in Admiralty, see ADMIRALTY. See also IN REM.)

IN PLACE. A mining term.[40] (See, generally, MINES AND MINERALS.)

34 Md. 389, 394; Lester *v.* Howard Bank, 33 Md. 558, 562, 3 Am. Rep. 211; Gotwalt *v.* Neal, 25 Md. 434, 446; Harris *v.* Woodruff, 124 Mass. 205, 26 Am. Rep. 658; Hall *v.* Corcoran, 107 Mass. 251, 259, 9 Am. Rep. 30; Atwood *v.* Fisk, 101 Mass. 363, 364, 100 Am. Dec. 124; Harvey *v.* Varney, 98 Mass. 118, 123; Lowell *v.* Boston, etc., R. Corp., 23 Pick. (Mass.) 24, 32, 34 Am. Dec. 33; Knapp *v.* Lee, 3 Pick. (Mass.) 452, 455; Watkins *v.* Otis, 2 Pick. (Mass.) 88, 97; Worcester *v.* Eaton, 11 Mass. 368, 376, 377; Thurston *v.* Prentiss, 1 Mich. 193, 199; Green *v.* Corrigan, 87 Mo. 359, 370; Poston *v.* Balch, 69 Mo. 115, 122; Davis *v.* Luster, 64 Mo. 43, 46; Kitchen *v.* Greenbaum, 61 Mo. 110, 115; Adams Express Co. *v.* Reno, 48 Mo. 264, 268; Sedalia Bd. of Trade *v.* Brady, 78 Mo. App. 585, 592; Scudder *v.* Bailey, 66 Mo. App. 40, 46; Hatch *v.* Hansom, 46 Mo. App. 323, 333; Turley *v.* Edwards, 18 Mo. App. 676, 692 [*citing* 21 Cent. L. J. 175]; Bateman *v.* Robinson, 12 Nebr. 508, 512, 11 N. W. 736; Brown *v.* McIntosh, 39 N. J. L. 22, 23; Den *v.* Shotwell, 24 N. J. L. 789, 792 [*affirming* 23 N. J. L. 465, 473, 475]; Evans *v.* Trenton, 24 N. J. L. 764, 772; Van Doren *v.* Staats, 3 N. J. L. 887, 892; Pitney *v.* Bolton, 45 N. J. Eq. 639, 643, 18 Atl. 211; Schenck *v.* Hart, 32 N. J. Eq. 774, 782; Ownes *v.* Ownes, 23 N. J. Eq. 60, 62; Marlatt *v.* Warwick, 19 N. J. Eq. 439, 453; Clark *v.* Condit, 18 N. J. Eq. 358, 362; Irwin *v.* Curie, 56 N. Y. App. Div. 514, 516, 67 N. Y. Suppl. 280; Graham *v.* Wallace, 50 N. Y. App. Div. 101, 103, 63 N. Y. Suppl. 372; Hirshbach *v.* Ketchum, 5 N. Y. App. Div. 324, 326, 39 N. Y. Suppl. 291; Collier *v.* Miller, 62 Hun (N. Y.) 99, 109, 16 N. Y. Suppl. 633; Barker *v.* Hoff, 7 Hun (N. Y.) 284, 286; Stannard *v.* Eytinge, 5 Rob. (N. Y.) 90, 92; Bennett *v.* American Art Union, 5 Sandf. (N. Y.) 614, 631; De Witt Wire-Cloth Co. *v.* New Jersey Wire-Cloth Co., 16 Daly (N. Y.) 529, 533, 14 N. Y. Suppl. 277, 279; Marie *v.* Garrison, 13 Abb. N. Cas. (N. Y.) 210, 330; Kerrison *v.* Kerrison, 8 Abb. N. Cas. (N. Y.) 444, 449; Griswold *v.* Waddington, 16 Johns. (N. Y.) 438, 491; Swan *v.* Howard, 3 Edw. (N. Y.) 287, 289; Fleischer *v.* Fleischer, 11 N. D. 221, 232, 91 N. W. 51; Kahn *v.* Walton, 46 Ohio St. 195, 212, 20 N. E. 203; Bredin's Appeal, 92 Pa. St. 241, 246, 37 Am. Rep. 677; Pierce *v.* Kibbee, 51 Vt. 559, 561; Kendall *v.* Wilson, 41 Vt. 567, 572; Harris *v.* Harris, 23 Gratt. (Va.) 737, 767; Middleton *v.* Arnold, 13 Gratt. (Va.) 489, 494; Starke *v.* Littlepage, 4 Rand. (Va.) 368, 372; Austin *v.* Winston, 1 Hen. & M. (Va.) 33, 46, 3 Am. Dec. 583; Edgell *v.* Smith, 50 W. Va. 349, 355, 40 S. E. 402; Goldsmith *v.* Goldsmith, 46 W. Va. 426, 431, 33 S. E. 266; Rock *v.* Mathews, 35 W. Va. 531, 534, 536, 14 S. E. 137, 14 L. R. A. 508; Horn *v.* Star Foundry Co., 23 W. Va. 522, 533; Kiewert *v.* Rindskopf, 46 Wis. 481, 485, 1 N. W. 163, 32 Am. Rep. 731; Miller *v.* Larson, 19 Wis. 463, 467; Randall *v.* Howard, 2 Black (U. S.) 585, 588, 17 L. ed. 269; *Ex p.* Stubbins, 17 Ch. D. 58, 64, 50 L. J. Ch. 547, 44 L. T. Rep. N. S. 877, 29 Wkly. Rep. 653; *In re* Mapleback, 4 Ch. D. 150, 156, 13 Cox C. C. 374, 46 L. J. Bankr. 14, 35 L. T. Rep. N. S. 503, 25 Wkly. Rep. 103; Symes *v.* Hughes, L. R. 9 Eq. 475, 478, 39 L. J. Ch. 304, 22 L. T. Rep. N. S. 462; Browning *v.* Morris, 2 Cowp. 790, 792; Clarke *v.* Johnson, 1 Cowp. 197, 200; Brandon *v.* Pate, 2 H. Bl. 308, 309; Wheelwright *v.* Jackson, 5 Taunt. 109, 113, 1 E. C. L. 66; Peters *v.* Horton, 15 N. Brunsw. 176, 180; Hager *v.* O'Neil, 20 Ont. App. 198, 219; Schroeder *v.* Rooney, 11 Ont. App. 673, 692; Bell *v.* Riddell, 10 Ont. App. 544, 551; Dowker *v.* Canada L. Assur. Co., 24 U. C. Q. B. 591, 596.

37. Morgan Leg. Max.

38. Rapalje & L. L. Dict. See also Carson *v.* Blazer, 2 Binn. (Pa.) 475, 491, 4 Am. Dec. 463; Richter *v.* Jerome, 115 U. S. 55, 56, 5 S. Ct. 1162, 29 L. ed. 345; Vattier *v.* Hinde, 7 Pet. (U. S.) 252, 257, 8 L. ed. 675; Harris *v.* Cotterell, 3 Meriv. 678, 680, 36 Eng. Reprint 260; 13 Cyc. 854; 2 Cyc. 1053 note 45.

39. Bouvier L. Dict. See also McLaughlin *v.* McCrory, 55 Ark. 442, 443, 18 S. W. 762, 29 Am. St. Rep. 56; Cunningham *v.* Shanklin, 60 Cal. 118, 125; Schenck *v.* Griffin, 38 N. J. L. 462, 470; Schenck *v.* Conover, 13 N. J. Eq. 220, 222, 78 Am. Dec. 95; Bates *v.* Delavan, 5 Paige (N. Y.) 299, 305; Cross *v.* Armstrong, 44 Ohio St. 613, 624, 10 N. E. 160; Walton *v.* Goodnow, 13 Wis. 661; U. S. *v.* Hill, 120 U. S. 169, 177, 7 S. Ct. 510, 30 L. ed. 627; 7 Cyc. 373 note 75; 4 Cyc. 397; 2 Cyc. 953, 930 note 68; 1 Cyc. 846, 813, 754, 730.

40. See Williams *v.* Gibson, 84 Ala. 228, 231, 4 So. 350, 5 Am. St. Rep. 368; Jones *v.* Prospect Mountain Tunnel Co., 21 Nev. 339, 351, 31 Pac. 642; Leadville Co. *v.* Fitzgerald, 15 Fed. Cas. No. 8,158; Stevens *v.* Williams, 23 Fed. Cas. No. 13,414; Tabor *v.* Dexler, 23 Fed. Cas. No. 13,723.

IN PŒNALIBUS CAUSIS BENIGNIUS INTERPRETANDUM EST. A maxim meaning "In penal cases, the more favorable interpretation is to be made."[41]

IN PRÆPARATORIIS AD JUDICIUM FAVETUR ACTORI. A maxim meaning "In things preparatory before trial, the plaintiff is favored."[42]

IN PRÆSENTIA MAJORIS CESSAT POTENTIA MINORIS. A maxim meaning "In presence of the greater the power of the inferior ceases."[43]

IN PRÆSENTIA MAJORIS POTESTATIS, MINOR POTESTAS CESSAT. A maxim meaning "In the presence of the superior power, the minor power ceases."[44]

IN PRETIO EMPTIONIS ET VENDITIONIS NATURALITER LICET CONTRAHENTIBUS SE CIRCUMVENIRE. A maxim meaning "In the price of buying and selling, it is naturally allowed to the contracting parties to overreach each other."[45]

IN PROPRIA CAUSA NEMO JUDEX. A maxim meaning "No one can be judge in his own cause."[46]

INQUEST or INQUISITION. In its broadest sense a term including any judicial inquiry, but more generally confined to an inquiry by jury.[47] (Inquest or Inquisition: Death of Party Pending, see ABATEMENT AND REVIVAL. Judgment Entered by Clerk on, see APPEAL AND ERROR. Of Coroner — Generally, see CORONERS; Evidence of, see HOMICIDE. Of Damages — In Condemnation Proceedings, see EMINENT DOMAIN; On Default or Interlocutory Judgment, see DAMAGES; JUDGMENT. Of Drunkenness, see DRUNKARDS. Of Forcible Entry and Detainer, see FORCIBLE ENTRY AND DETAINER. Of Insanity, see INSANE PERSONS. Of Office, see ESCHEAT.)

INQUIRE. To search for; seek; make investigation concerning.[48] (See INQUIRY.)

INQUIRY. Investigation into facts, causes, effects, and relations generally; research.[49] (See INQUEST, and Cross-References Thereunder.)

INQUISITION. See INQUEST.

IN QUO QUIS DELINQUIT, IN EO DE JURE EST PUNIENDUS. A maxim meaning "One who fails to perform the duties of his office ought to be punished, in that office."[50]

IN REBUS MANIFESTIS ERRAT QUI AUCTORITATES LEGUM ALLEGAT; QUIA PERSPICUA VERA NON SUNT PROBANDA. A maxim meaning "He errs who alleges the authorities of law in things manifest; because obvious truths need not be proved."[51]

41. Bouvier L. Dict. [*citing* Dig. 50, 17, 155].
Applied in Daniel *v.* Vaccaro, 41 Ark. 316, 331.
42. Bouvier L. Dict. [*citing* 2 Inst. 57].
43. Broom Leg. Max.
44. Bouvier L. Dict. [*citing* Broom Leg. Max. 111, 112; Jenkins Cent. 214]. See Smith *v.* Reg., 13 Q. B. 738, 740, 13 Jur. 850, 18 L. J. M. C. 207, 3 New Sess. Cas. 564, 66 E. C. L. 738.
45. Bouvier L. Dict. [*citing* 1 Story Contr. 606].
46. Bouvier L. Dict.
47. People *v.* Coombs, 36 N. Y. App. Div. 284, 295, 55 N. Y. Suppl. 276 [*citing* Burrill L. Dict.]. See also Davidson *v.* Garrett, 5 Can. Cr. Cas. 200, 208, 30 Ont. 653.
It sometimes signifies the jury itself. Davis *v.* Bibb County, 116 Ga. 23, 26, 42 S. E. 403. See also Haines *v.* Davis, 3 How. Pr. (N. Y.) 118, 119.
48. Century Dict.
"Inquire and report" see Austin *v.* Ahearne, 61 N. Y. 6, 12.
"To 'inquire into the circumstances' imports a judicial investigation of the questions of fact." Matter of Gill, 95 N. Y. App. Div. 174, 175, 88 N. Y. Suppl. 466.
49. Standard Dict. See also Wenlock *v.* River Dee Co., 19 Q. B. D. 155, 158, 56 L. J. Q. B. 589, 57 L. T. Rep. N. S. 320, 35 Wkly. Rep. 822, discussing the scope and meaning of an inquiry by referee.
"After due inquiry" see Leeson *v.* General Medical Education, etc., Council, 43 Ch. D. 366, 371, 59 L. J. Ch. 233, 61 L. T. Rep. N. S. 849, 38 Wkly. Rep. 303; Reg. *v.* Staines Union, 58 J. P. 182, 62 L. J. Q. B. 540, 543, 69 L. T. Rep. N. S. 714, 10 Reports 292. *Compare* Labouchere *v.* Wharncliffe, 13 Ch. D. 346, 350, 41 L. T. Rep. N. S. 638, 28 Wkly. Rep. 367, per Jessel, M. R.
"Due inquiry" see Allbutt *v.* General Medical Education, etc., Council, 23 Q. B. D. 400, 402, 54 J. P. 36, 58 L. J. Q. B. 606, 61 L. T. Rep. N. S. 585, 37 Wkly. Rep. 771.
"For inquiry and report" see Wenlock *v.* River Dee Co., 19 Q. B. D. 155, 158, 56 L. J. Q. B. 589, 57 L. T. Rep. N. S. 320, 35 Wkly. Rep. 822.
50. Rapalje & L. L. Dict. [*citing* Coke Litt. 233].
51. Bouvier L. Dict.

IN REBUS NOVIS CONSTITUENDIS EVIDENS ESSE INUTILES DEBET, UT RECEDATUS AB EO JURE, QUOD DIU ÆQUAM VISUM EST. A maxim meaning "In settling new matters, the utility must be very apparent in order to justify a departure from laws long acquiesced in as salutary."[52]

IN REBUS QUÆ SUNT FAVORIBILIA ANIMÆ, QUAMVIS SUNT DAMNOSA REBUS, FIAT ALIQUANDO EXTENSIO STATUTI. A maxim meaning "In things that are favorable to the spirit, though injurious to things, an extension of the statute should sometimes be made."[53]

IN RE COMMUNI MELIOR EST CONDITIO PROHIBENTIS. A maxim meaning "In common property the condition of the one prohibiting is the better."[54]

IN RE COMMUNI NEMINEM DOMINORUM JURE FACERE QUICQUAM, INVITO ALTERO, POSSE. A maxim meaning "One co-proprietor can exercise no authority over the common property against the will of the other."[55]

IN RE DUBIA BENIGNIOREM INTERPRETATIONEM SEQUI, NON MINUS JUSTIUS EST, QUAM TITUS. A maxim meaning "In a doubtful case to follow the milder interpretation is not the less more just than it is the safer course."[56]

IN RE DUBIA MAGIS INFICIATIO QUAM AFFIRMATIO INTELLIGENDA. A maxim meaning "In a doubtful matter the negative is to be understood rather than the affirmative."[57]

IN RE LUPANARI, TESTES LUPANARES ADMITTENTUR. A maxim meaning "In a matter concerning a brothel, prostitutes are admitted as witnesses."[58]

IN REM. A term applied to a proceeding where the process is served on the thing itself;[59] a proceeding to determine the state, or condition, of the thing itself.[60] In a strict sense, a term applied to a proceeding taken directly against property, having for its object the disposition of the property, without reference to the title of individual claimants;[61] but, in a larger and more general sense, a term applied to actions between parties, where the direct object is to reach and

Applied in Jeffrey's Case, 5 Coke 66*b*, 67*a*.

52. Morgan Leg. Max.

53. Morgan Leg. Max.

54. Trayner Leg. Max.

55. Bouvier L. Dict. [*citing* Dig. 10, 3, 28].

56. Bouvier L. Dict. [*citing* Dig. 50, 17, 192, 2, 28, 4, 3].

57. Bouvier L. Dict.

58. Bouvier L. Dict.

Applied or explained in Van Epps *v.* Van Epps, 6 Barb. (N. Y.) 320, 324.

59. Herman L. Estop. c. 1, p. 110, 129 [*quoted* in Stroupper *v.* McCauley, 45 Ga. 74, 77].

As used in the admiralty courts "a proceeding *in rem* is not a remedy afforded by the common law; it is a proceeding under the civil law." Griswold *v.* The Otter, 12 Minn. 465, 93 Am. Dec. 239 [*citing* The Hine *v.* Trevor, 4 Wall. (U. S.) 555, 18 L. ed. 451].

"Proceedings in rem may be, and often are, upon personal chattels, directly declaring the right to them, in such cases." Woodruff *v.* Taylor, 20 Vt. 65, 75 [*quoted* in Stroupper *v.* McCauley, 45 Ga. 74, 76].

60. Woodruff *v.* Taylor, 20 Vt. 65, 71. See also Cross *v.* Armstrong, 44 Ohio St. 613, 624, 10 N. E. 160.

61. Pennoyer *v.* Neff, 95 U. S. 714, 734, 24 L. ed. 565. See also Stroupper *v.* McCauley, 45 Ga. 74, 77.

It is a technical term, taken from the Roman law, and there used to distinguish an action against the thing from one against the person, the terms *in rem* and *in personam* always being the opposite one of the other; an act *in personam* being one done or directed against a specific person, while an act *in rem* was one done with reference to no specific person, but against or with reference to a specific thing, and so against whom it might concern, or "all the world." Cross *v.* Armstrong, 44 Ohio St. 613, 623, 10 N. E. 160. See also McLaughlin *v.* McCrory, 55 Ark. 442, 443, 18 S. W. 762, 29 Am. St. Rep. 56; Gindele *v.* Corrigan, 129 Ill. 582, 585, 22 N. E. 516, 16 Am. St. Rep. 292; Whitney *v.* Walsh, 1 Cush. (Mass.) 29, 32, 48 Am. Dec. 590; Bates *v.* Delavan, 5 Paige (N. Y.) 299, 300; Stanley *v.* Schwalhy, 162 U. S. 255, 300, 16 S. Ct. 754, 30 L. ed. 960; Hazlehurst *v.* The Lulu, 10 Wall. (U. S.) 192, 201, 19 L. ed. 906; The Belfast *v.* Boon, 7 Wall. (U. S.) 624, 625, 19 L. ed. 266; Vandewater *v.* Mills, 19 How. (U. S.) 82, 89, 15 L. ed. 554; Cutler *v.* Rae, 7 How. (U. S.) 729, 735, 12 L. ed. 890, 8 How. 615, 12 L. ed. 1221; The Jerusalem, 13 Fed. Cas. No. 7,293, 2 Gall. 191, 197; Seller *v.* The Pacific, 21 Fed. Cas. No. 12,644, Deady 17, 1 Oreg. 409, 417; The Hewsons, L. R. 5 P. C. 134, 152, 28 L. T. Rep. N. S. 745, 21 Wkly. Rep. 707.

"The object and purpose of a proceeding purely *in rem* is to ascertain the right of every possible claimant; and it is instituted on an allegation, that the title of the former owner, whoever he may be, has become divested; and notice of the proceeding is given to the whole world to appear and make claim to it." Woodruff *v.* Taylor, 20 Vt. 65, 76 [*quoted* in Peters *v.* Dunnells, 5 Nebr. 460, 465].

dispose of property owned by them, or of some interest therein.[62] (In Rem: Actions in General, see ACTIONS.[63] Appeal and Error, see APPEAL AND ERROR.[64] Attachment Proceedings, see ATTACHMENT. Divorce Proceedings, see DIVORCE. Equity Jurisdiction of Property or Other Subject-Matter, see EQUITY. Judgment, see JUDGMENTS. Pendency of Proceeding Ground For Abatement of Action *In Personam*, see ABATEMENT AND REVIVAL. Proceedings in Admiralty, see ADMIRALTY. See also IN PERSONAM.)

IN REM ACTIO EST PER QUAM REM NOSTRAM QUÆ AB ALIO POSSIDETUR POTIMUS, ET SEMPER ADVERSUS EUM EST QUI REM POSSIDET. A maxim meaning "The action *in rem* is that by which we seek our property which is possessed by another, and is always against him who possesses the property."[65]

IN REM SUAM TUTOR FIERI NON POTEST AUCTOR. A maxim meaning "A tutor cannot act, or transact for his own behoof."[66]

IN RE OBSCURA MELIUS EST FAVERE REPETITIONI QUAM ADVENTITIO LUCRO. A maxim meaning "In an obscure case it is better to favor repetition than adventitious gain."[67]

IN RE PARI, POTIOREM CAUSAM ESSE PROHIBENTIS CONSTAT. A maxim meaning "Where a thing is owned in common, it is agreed that the cause of him prohibiting (its use) is the stronger."[68]

IN RE POTIOREM CAUSAM ESSE PROHIBENTIS CONSTARE. A maxim meaning "A better cause in the matter is found to exist on the part of the person defending."[69]

IN RE PROPRIA INIQUUM ADMODUM EST ALICUI LICENTIAM TRIBUERE SENTENTIÆ. A maxim meaning "It is extremely unjust that any one should be judge in his own cause."[70]

IN REPUBLICA MAXIME CONSERVANDA SUNT JURA BELLI. A maxim meaning "In the state, the laws of war are to be especially observed."[71]

IN RESTITUTIONEM, NON IN PŒNAM, HÆRES SUCCEDIT. A maxim meaning "The heir succeeds to the restitution, not the penalty."[72]

IN RESTITUTIONIBUS BENIGNISSIMA INTERPRETATIO FACIENDA EST. A maxim meaning "The most favorable construction is to be made in restitutions."[73]

IN REX NON POTEST CONJUNCTIM TENERE CUM ALIO. A maxim meaning "One king can not hold conjointly with another."[74]

INROLMENT. See ENROLMENT.

INSANE ASYLUM. See ASYLUMS.

62. Pennoyer *v.* Neff, 95 U. S. 714, 734, 24 L. ed. 565 [*quoted* in Arndt *v.* Griggs, 134 U. S. 316, 326, 10 S. Ct. 557, 33 L. ed. 918].

In a very proper sense, a suit against the owner of the thing, even though he may be unknown, and may, in fact, have no knowledge of the suit. *In re* Norwich, etc., Transp. Co., 18 Fed. Cas. No. 10,362, 17 Blatchf. 221.

63. See 1 Cyc. 754, 730.

64. See 2 Cyc. 930 note 68, 952.

65. Pelouhet Leg. Max. [*citing* Dig. 44, 7, 25].

66. Trayner Leg. Max.

67. Morgan Leg. Max.

68. Bouvier L. Dict.

Applied in Griswold *v.* Waddington, 16 Johns. (N. Y.) 438, 491.

69. Tayler L. Gloss.

70. Bouvier L. Dict.

71. Bouvier L. Dict. [*citing* 2 Inst. 58].

Applied in Tyler *v.* Pomeroy, 8 Allen (Mass.) 480, 484 [*citing* Coke Litt. 11*b*; 4 Inst. 123, 129].

72. Bouvier L. Dict. [*citing* 2 Inst. 198].

73. Bouvier L. Dict.

74. Morgan Leg. Max.

INSANE PERSONS

By Henry F. Buswell*

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I. PRELIMINARY CONSIDERATIONS.

A. Nature and Forms of Insanity — Definitions. The terms "lunatic,"[1]

1. "Lunatick is a technical word, coined in more ignorant times, as imagining these persons were affected by the moon; but discovered by philosophy and ingenious men, that it is entirely owing to a defect of the organs of the body." *Ex p.* Barnsley, 3 Atk. 168, 174, 26 Eng. Reprint 899 [*quoted* in Piper *v.* Stinson, 3 McCord (S. C.) 252], per Lord Hardwicke.

The term may include a person of unsound mind (*In re* Browne, [1894] 3 Ch. 412, 416, 63 L. J. Ch. 729, 71 L. T. Rep. N. S. 365, 7 Reports 580, 43 Wkly. Rep. 175), whether such unsoundness results from old age or intemperate habits (Robertson *v.* Lyon, 24 S. C. 266).

Previous sanity.— In North Carolina it is said that a lunatic is one who has possessed reason, but through disease, grief, or other cause has lost it. The term is especially applicable to one who has lucid intervals and may yet in contemplation of the law recover his reason. *In re* Anderson, 132 N. C. 243, 246, 43 S. E. 649; Millison *v.* Nicholson, 1 N. C. 549, 551 [both *citing* 1 Blackstone Comm. 304]. But in Pennsylvania the word is construed to mean every person of unsound mind, whether so from nativity, as an idiot, or subsequently becoming so. McLaughlin's Estate, 8 Pa. Dist. 113.

Failure of memory and decay and feebleness of the intellectual faculties are the natural concomitants of old age, and are not evidences of that unsoundness of mind which constitutes a man a lunatic. To render him such there must be a total deprivation or suspension of the ordinary powers of the mind. *In re* Vanauken, 10 N. J. Eq. 186.

"insane,"[2] "of unsound mind,"[3] and "*non compos mentis*"[4] are convertible and generic terms, and include all the specific forms of mental disease recognized by the

2. Insane means "exhibiting unsoundness of mind; mad; deranged in mind; delirious; distracted." Hawe *v.* State, 11 Nebr. 537, 538, 10 N. W. 452, 38 Am. Rep. 375 [*quoting* Webster Dict.]. And see Nicewander *v.* Nicewander, 151 Ill. 156, 165, 37 N. E. 698; Crosswell *v.* People, 13 Mich. 427, 435, 87 Am. Dec. 774. It "implies every degree of unsoundness of mind." Seitsinger *v.* M. W. of A., 204 Ill. 58, 65, 68 N. E. 478. And see Nicewander *v.* Nicewander, *supra*.

Insane person may include idiot, *non compos*, lunatic, or distracted person (St. George *v.* Biddeford, 76 Me. 593, 595; Bliss *v.* Connecticut, etc., R. Co., 24 Vt. 424, 425; Hiett *v.* Shull, 36 W. Va. 563, 565, 15 S. E. 146. And see Cundall *v.* Haswell, 23 R. I. 508, 513, 51 Atl. 426), and the term has been held to include even an intoxicated person (Bliss *v.* Connecticut, etc., R. Co., 24 Vt. 424). A man may be insane, although neither a raving maniac nor an absolute imbecile; and it is not necessary that his delusion operate at all times with the same force, or that his self-control be at all times entirely lost. Haviland *v.* Hayes, 37 N. Y. 25.

3. Of unsound mind imports a total deprivation of sense. Witte *v.* Gilbert, 10 Nebr. 539, 541, 7 N. W. 288; *In re* James, 35 N. J. Eq. 58, 59 [*citing Ex p.* Barnsley, 3 Atk. 168, 26 Eng. Reprint 899]; Matter of Bush, 5 N. Y. Suppl. 23, 25, 1 Connoly Surr. 330; Stewart *v.* Lispenard, 26 Wend. (N. Y.) 255, 301; Jackson *v.* King, 4 Cow. (N. Y.) 207, 217, 15 Am. Dec. 354; Foster *v.* Means, Speers Eq. (S. C.) 569, 575, 42 Am. Dec. 332. By statute the term includes every species of insanity or mental unsoundness. McCammon *v.* Cunningham, 108 Ind. 545, 547, 9 N. E. 455 [*citing* Eggers *v.* Eggers, 57 Ind. 461; Willett *v.* Porter, 42 Ind. 250]. And see Hamrick *v.* State, 134 Ind. 324, 34 N. E. 3; Fiscus *v.* Turner, 125 Ind. 46, 24 N. E. 662. "Every person is to be deemed of unsound mind who has lost his memory and understanding, by old age, sickness, or other accident, so as to render him incapable of transacting his business and of managing his property." Dennett *v.* Dennett, 44 N. H. 531, 537, 84 Am. Dec. 97.

A person of unsound mind means, by statute, any idiot, *non compos*, lunatic, monomaniac, or distracted person. Teegarden *v.* Lewis, 145 Ind. 98, 102, 40 N. E. 1047, 44 N. E. 9; Somers *v.* Pumphrey, 24 Ind. 231, 244.

Monomaniacs.— One who is controlled by an insane delusion on a certain subject is as to that subject a person of unsound mind, although his reason as to other subjects is unimpaired. Schuff *v.* Ransom, 79 Ind. 458; Riggs *v.* American Tract Soc., 95 N. Y. 503.

Convertible terms.— "Of unsound mind" and "*non compos mentis*" are convertible terms. Blanchard *v.* Nestle, 3 Den. (N. Y.) 37, 41; Foster *v.* Means, Speers Eq. (S. C.) 569, 575, 42 Am. Dec. 332. *Contra*, Delafield *v.* Parish, 1 Redf. Surr. (N. Y.) 1.

4. Non compos mentis means "not of sound mind. This is a generic term, and includes all the species of madness, whether it arises from: 1, idiocy; 2, sickness; 3, lunacy; or, 4, drunkenness." Bouvier L. Dict. [*quoted in* Somers *v.* Pumphrey, 24 Ind. 231, 244]. To the same effect see Greenwade *v.* Greenwade, 43 Md. 313; Johnson *v.* Phifer, 6 Nebr. 401; Blanchard *v.* Nestle, 3 Den. (N. Y.) 37, 41; Delafield *v.* Parish, 1 Redf. Surr. (N. Y.). A person *non compos mentis* is one "who was of good and sound memory, and by the visitation of God had lost it," or "he that by sickness, grief, or other accident, wholly loseth his understanding." Jackson *v.* King, 4 Cow. (N. Y.) 207, 217, 15 Am. Dec. 354 [*quoting* Coke Litt. 247*a*]. And see Sprague *v.* Duel, Clarke (N. Y.) 90, 93 [*quoting* Matter of Barker, 2 Johns. Ch. (N. Y.) 232, 233].

Convertible terms.— *Non compos mentis* is a term convertible with "of non-sane memory" and "not of sound memory." Yoe *v.* McCord, 74 Ill. 33, 41 [*citing* 2 Coke Litt. § 405].

Business incapacity.— The fact that a man has not sufficient intelligence and understanding to manage his affairs and transact business in a proper and prudent manner does not necessarily show him to be *non compos mentis*. Hovey *v.* Chase, 52 Me. 304, 83 Am. Dec. 514. One is *non compos mentis* so as to be liable to guardianship, however, when he cannot manage property himself. Gray *v.* Obear, 59 Ga. 675.

Necessity of total deprivation of sense.— Formerly the words "*non compos mentis*" were regarded as words of determinate signification implying a total deprivation of sense. Lackey *v.* Lackey, 8 B. Mon. (Ky.) 107; Nailor *v.* Nailor, 4 Dana (Ky.) 339; Witte *v.* Gilbert, 10 Nebr. 539, 541, 7 N. W. 288; Mulloy *v.* Ingalls, 4 Nebr. 115; *In re* James, 35 N. J. Eq. 58, 59; *In re* Mason, 1 Barb. (N. Y.) 436; Matter of Barker, 2 Johns. Ch. (N. Y.) 232; Matter of Bush, 5 N. Y. Suppl. 23, 25, 1 Connoly Surr. 330; Stewart *v.* Lispenard, 26 Wend. (N. Y.) 255, 301; Jackson *v.* King, 4 Cow. (N. Y.) 207, 217, 15 Am. Dec. 354; *In re* Beaumont, 1 Whart. (Pa.) 52, 29 Am. Dec. 33; Foster *v.* Means, Speers Eq. (S. C.) 569, 575, 42 Am. Dec. 332; *Ex p.* Barnsley, 3 Atk. 168, 26 Eng. Reprint 899; Beverley's Case, 4 Coke 123, Fitzh. N. Br. 532, Reg. Brev. 267. But under the influence of modern legislation this construction of the term has been practically abrogated, and the words "*non compos mentis*" are generally construed to intend the subject's inability to manage himself and his ordinary affairs, from whatever cause

text writers and medical authorities.[5] He is lunatic, insane, *non compos mentis*, or of unsound mind whose mind is affected by general fatuity,[6] such as an idiot,[7]

such inability may arise. *In re* Carmichael, 36 Ala. 514; Shapter *v.* Pillar, 28 Colo. 209, 63 Pac. 302; Gray *v.* Obear, 59 Ga. 675; Titcomb *v.* Vantyle, 84 Ill. 371; Hamrick *v.* State, 134 Ind. 324, 34 N. E. 3; Fiscus *v.* Turner, 125 Ind. 46, 24 N. E. 662; McCammon *v.* Cunningham, 108 Ind. 545, 9 N. E. 455; Garretson *v.* Hubbard, 110 Iowa 7, 81 N. W. 174; Martin *v.* Stewart, 67 Kan. 424, 73 Pac. 107; Darby *v.* Hayford, 56 Me. 246; *In re* Bassett, 68 Mich. 348, 36 N. W. 97; *In re* Brown, 45 Mich. 326, 7 N. W. 899; *In re* Williams, 157 N. Y. 704, 52 N. E. 1126; *In re* Anderson, 132 N. C. 243, 43 S. E. 649; Shroyer *v.* Richmond, 16 Ohio St. 455; Matter of Tempest, Ohio Prob. 200; Com. *v.* Schneider, 59 Pa. St. 328; *In re* Smith, 12 Pa. Super. Ct. 649; Robertson *v.* Lyon, 24 S. C. 266; Bliss *v.* Connecticut, etc., R. Co., 24 Vt. 424; *In re* Streiff, 119 Wis. 566, 97 N. W. 189, 100 Am. St. Rep. 903.

5. *Alabama.*— *In re* Carmichael, 36 Ala. 514; Rawdon *v.* Rawdon, 28 Ala. 565.

Connecticut.— Hale *v.* Hills, 8 Conn. 39.

Delaware.— Frazer *v.* Frazer, 2 Del. Ch. 260.

Indiana.— Willett *v.* Porter, 42 Ind. 250; Kenworthy *v.* Williams, 5 Ind. 375.

Maine.— Hovey *v.* Chase, 52 Me. 304, 83 Am. Dec. 514.

Maryland.— Greenwade *v.* Greenwade, 43 Md. 313; Owing's Case, 1 Bland 370, 17 Am. Dec. 311.

New Hampshire.— Dennett *v.* Dennett, 44 N. H. 531, 84 Am. Dec. 97.

New Jersey.— *In re* Vanauken, 10 N. J. Eq. 186.

New York.— Stanton *v.* Wetherwax, 16 Barb. 259; Matter of Rogers, 9 Abb. N. Cas. 141; Blanchard *v.* Nestle, 3 Den. 37.

Pennsylvania.— Ludwick *v.* Com., 18 Pa. St. 172.

Tennessee.— Fentress *v.* Fentress, 7 Heisk. 428.

England.— Ball *v.* Mannin, 3 Bligh N. S. 1, 4 Eng. Reprint 1241, 1 Dow. & Cl. 380, 6 Eng. Reprint 568; Mannin *v.* Ball, Smith & B. 183.

6. **Delusion as element of insanity.**— Formerly insanity was held not to be established unless delusion had at some time prevailed (Wheeler *v.* Alderson, 3 Hagg. Eccl. 574); but it is now well settled that loss of mental power to a certain degree, although not accompanied by delusion, may constitute insanity within the view of the law (American Seamen's Friend Soc. *v.* Hopper, 33 N. Y. 619; Reg. *v.* Shaw, L. R. 1 C. C. 145, 11 Cox C. C. 109, 37 L. J. M. C. 112, 18 L. T. Rep. N. S. 583, 16 Wkly. Rep. 913; Nichols *v.* Binns, 1 Swab. & Tr. 239).

7. "**An idiot, or natural fool,** is one that hath had no understanding from his nativity; and therefore is by law presumed never likely to attain any." 1 Blackstone Comm. 302 [*quoted* in Battle *v.* State, 105 Ga. 703, 708, 32 S. E. 160; Clark *v.* Robinson, 88 Ill. 498, 502; *In re* Anderson, 132 N. C. 243, 246, 43 S. E. 649; Millison *v.* Nicholson, 1 N. C. 549, 551; Evans *v.* Johnson, 39 W. Va. 299, 311, 19 S. E. 623, 45 Am. St. Rep. 912, 23 L. R. A. 737, per Dent, J., dissenting]. And see Bouvier L. Dict. [*quoted* in Somers *v.* Pumphrey, 24 Ind. 231, 244]; Chitty Contr. 130 [*quoted* in Somers *v.* Pumphrey, *supra*]. An idiot is "a natural fool; a fool from birth; a human being in form, but destitute of reason, and of the ordinary intellectual power of man." Webster Dict. [*cited* in People *v.* Crosswell, 13 Mich. 427, 435, 87 Am. Dec. 774]. An idiot is "a person who has been defective in intellectual powers from the instant of his birth, or at least before the mind had received the impression of any idea." Chitty Med. Jur. [*cited* in People *v.* Crosswell, *supra*]. "An idiot is known by his perpetual infirmity of nature; a nativitate, for he never had any sense or understanding." Ewell Lead. Cas. 528 [*cited* in Evans *v.* Johnson, *supra*]. "Idiots are classified by themselves as mental infants with congenital obstacles to development." Ordronaux Jud. Ins. 50 [*cited* in Evans *v.* Johnson, *supra*]. "A man is not an idiot, if he have any glimmering of reason, so that he can tell his parents, his age, or the like common matters." 1 Blackstone Comm. 303 [*quoted* in Clark *v.* Robinson, *supra*]. And see Chitty Contr. 130 [*quoted* in Somers *v.* Pumphrey, *supra*]. A man may be of imbecile mind and yet not be an idiot. Odell *v.* Buck, 21 Wend. (N. Y.) 142. A person ordinarily denominated an "idiot," but who became such only after reaching the age of nine years, is not an "idiot," but an "insane person," under Miller Iowa Code, § 1434, which restricts the term "idiot" to persons foolish from birth. Speedling *v.* Worth County, 68 Iowa 152, 26 N. W. 50.

Idiocy is "that condition of mind in which the reflective, or all, or a part, of the affective powers, are either entirely wanting, or are manifested to the least possible extent. Idiocy generally depends upon organic defects." Bouvier L. Dict. [*quoted* in Somers *v.* Pumphrey, 24 Ind. 231, 244]. It "consists in a defect or sterility of the intellectual power" (Chitty Med. Jur. [*cited* in People *v.* Crosswell, 13 Mich. 427, 436]) "and not a perversion of the understanding" (Bouvier L. Dict. [*quoted* in Somers *v.* Pumphrey, *supra*]. And see Owing's Case, 1 Bland (Md.) 370, 17 Am. Dec. 311). Complete idiocy is defined as "total fatuity from birth." Browning *v.* Reane, 2 Phillim. 69.

Idiotism is a total want of reasoning powers, growing from a malformation of the organ of thought at the time of birth. People *v.* Lake, 2 Park. Cr. (N. Y.) 215.

An imbecile is a person destitute of strength, either of body or mind; weak; feeble; impotent; decrepit. Campbell *v.* Campbell, 130 Ill. 466, 477, 22 N. E. 620,

or a person subject to one or more specific delusions.[8] The term "lunacy," has been judicially defined as that condition in which the mind is directed by the will but is wholly or partially misguided or erroneously governed by it or it is the impairment of any one or more of the faculties of the mind accompanied with or inducing a defect in the comparing faculty.[9] "Insanity" has been judicially defined to be such a derangement of the mental faculties that the individual has lost the power of reasoning correctly.[10] "Unsoundness of

6 L. R. A. 167 [*citing* Webster Dict.]. Those designated as imbeciles in law may make use of their senses; may have ideas, memory, and some judgment; and may read and articulate words with more or less clearness; and even calculate, when the calculation is not difficult. Calderon *v.* Martin, 50 La. Ann. 1153, 1155, 23 So. 909.

Imbecility is that feebleness of mind which, without depriving entirely the person of the use of his reason, leaves only the faculty of conceiving ideas the most common and which relate almost always to physical wants and habits. Delafield *v.* Parish, 1 Redf. Surr. (N. Y.) 1, 115. "Imbecility, as distinguished from idiocy or lunacy, is usually incident to extreme age, and is generally the result of a gradual decay of the mental faculties." Messenger *v.* Bliss, 35 Ohio St. 587, 592. Corporal imbecility see DIVORCE; IMPOTENCY.

An inquisition of lunacy finding a person "of unsound mind" is no evidence that he is an idiot. Christmas *v.* Mitchell, 38 N. C. 535.

Deaf and dumb and blind persons.— A person who is deaf, dumb, and blind is considered in law as incapable of any understanding. Brown *v.* Brown, 3 Conn. 299, 8 Am. Dec. 187. But blindness alone does not constitute incompetency (Griffin *v.* Collins, 122 Ga. 102, 49 S. E. 827); neither at the present time does the fact that a person is deaf and dumb raise a presumption of idiocy or insanity (Brown *v.* Brown, *supra*; Hebert's Succession, 33 La. Ann. 1099; Badineau *v.* Bendy, 7 La. 248), although formerly the rule was otherwise (see Browner *v.* Fisher, 4 Johns. Ch. (N. Y.) 441). Even where a presumption of idiocy arises from physical infirmity, it is rebuttable. Com. *v.* Hill, 14 Mass. 207; Brower *v.* Fisher, *supra*; Barnett *v.* Barnett, 54 N. C. 221; Christmas *v.* Mitchell, 38 N. C. 535; Rex *v.* Dyson, 7 C. & P. 305, 32 E. C. L. 627; Rex *v.* Pritchard, 7 C. & P. 303, 32 E. C. L. 626; Dickenson *v.* Blisset, Dick. 268, 21 Eng. Reprint 271.

8. Duffield *v.* Morris, 2 Harr. (Del.) 375; Riggs *v.* American Tract Soc., 95 N. Y. 503; American Seamen's Friend Soc. *v.* Hopper, 33 N. Y. 619; McElroy's Case, 6 Watts & S. (Pa.) 451; Wheeler *v.* Alderson, 3 Add. Eccl. 574; Dew *v.* Clark, 3 Add. Eccl. 79; Sutton *v.* Sadler, 3 C. B. N. S. 87, 3 Jur. N. S. 1150, 26 L. J. C. P. 284, 5 Wkly. Rep. 880, 91 E. C. L. 87; *In re* Sombre, 1 Hall & T. 285, 13 Jur. 857, 1 Macn. & G. 116, 47 Eng. Ch. 93, 41 Eng. Reprint 1207; Frere *v.* Peacocke, 1 Rob. Eccl. 442.

9. Owing's Case, 1 Bland (Md.) 370, 386, 17 Am. Dec. 311.

Lunacy "consists in a perversion of the intellect." Chitty Med. Jur. [*cited* in People *v.* Crosswell, 13 Mich. 427, 436]. It includes mania and dementia. *In re* Vanauken, 10 N. J. Eq. 186. By statute the term "lunacy" embraces every description of unsoundness of mind except idiocy, but it does not embrace mere weakness of mind or lack of business capacity, and still less want of business experience. *In re* Brugh, 61 Hun (N. Y.) 193, 197, 16 N. Y. Suppl. 551.

10. Waters *v.* Connecticut Mut. L. Ins. Co., 2 Fed. 892, 893.

Scope of term.— Insanity, etymologically, signifies unsoundness; lexically, it signifies unsoundness of mind or derangement of the intellect. Johnson *v.* Maine, etc., Ins. Co., 83 Me. 182, 186, 22 Atl. 107. And see Cundall *v.* Haswell, 23 R. I. 508, 513, 51 Atl. 426. It is "a chronic disease of the brain inducing chronic, disorded mental symptoms." Encycl. Brit. [*quoted* in Matter of Brugh, 61 Hun (N. Y.) 193, 197, 16 N. Y. Suppl. 551]. It is "the state of being unsound in mind, derangement of intellect, madness. . . . the word is applicable to any degree of mental derangement from slight delirium or wandering to distraction." Meyers *v.* Com., 3 Wkly. Notes Cas. (Pa.) 506, 508. Whether mental unsoundness be congenital or a result of arrested mental development, of religious excitement, of physical disease, of old age, or of unknown causes; whether it be casual, temporary, or permanent; whether it be personal or hereditary; whether it be manifest in the mildest dementia or the wildest mania, it is expressed by the term "insanity." Johnson *v.* Maine, etc., Ins. Co., *supra*. As used in statutes it may include every species of organic mental derangement, whether of a mild or violent form, and excludes every other condition of the mind. Sage *v.* State, 91 Ind. 141, 145. Insanity may be divided into (1) mania, (2) monomania, (3) dementia, (4) idiotism. People *v.* Lake, 2 Park. Cr. (N. Y.) 215, 218. Definition of insanity as a defense to crime see CRIMINAL LAW.

Illustrations.— Mere sexual perversion, high temper, and immoral tendencies will not alone constitute insanity (Schick *v.* Stuhr, 120 Iowa 396, 94 N. W. 915); nor will old age and feebleness conjoined (Emerick *v.* Emerick, 83 Iowa 411, 49 N. W. 1017, 13 L. R. A. 757; Fairfield Overseers of Poor *v.* Gullifer, 49 Me. 360, 77 Am. Dec. 265), although the subject is also wasteful

mind" has been judicially declared to be synonymous with insanity.[11] Insane delusion consists in such an hallucination or false conception in regard to facts or objects as cannot fairly be supposed to exist in a healthy mind, and of which the subject cannot be disabused by reason or evidence.[12] Definitions of other forms

of his property under the influence of profligate children (Darling *v.* Bennet, 8 Mass. 129), or conveys away his property for a nominal or inadequate consideration (*In re* Shelleig, 11 Ohio S. & C. Pl. Dec. 81, 11 Ohio N. P. 399; *In re* Welch, 108 Wis. 387, 84 N. W. 550). Mere thriftlessness or want of success in business is not proof of insanity (Dominick *v.* Randolph, 124 Ala. 557, 27 So. 481); but a person's absurd contracts or investments continued for a series of years may authorize the appointment of a guardian for him (*In re* Emswiler, 11 Ohio S. & C. Pl. Dec. 10, 8 Ohio N. P. 132); and it has been held that one who is unable correctly to multiply simple numbers is incompetent (Calderon *v.* Martin, 50 La. Ann. 1153, 23 So. 909; Frantz *v.* Frantz, 6 Ohio S. & C. Pl. Dec. 555, 4 Ohio N. P. 278).

General and partial insanity.— A man may be mad on all subjects, and then, although he may have glimmerings of reason, he is not a responsible agent. This is general insanity. Com. *v.* Wireback, 190 Pa. St. 138, 147, 42 Atl. 542, 70 Am. St. Rep. 625; Com. *v.* Mosler, 4 Pa. St. 264; Com. *v.* Sayre, 5 Wkly. Notes Cas. (Pa.) 424. Partial insanity is the derangement of one or more of the faculties of the mind which prevents freedom of action. Thomas *v.* Carter, 170 Pa. St. 272, 283, 33 Atl. 81, 50 Am. St. Rep. 770 [*citing* Taylor *v.* Trich, 165 Pa. St. 586, 30 Atl. 1053, 44 Am. St. Rep. 679]. It means "not some intermediate stage in the development of mental derangement, but disturbance at some particular point not involving the mind at any other point. A person thus affected is said to be under the influence of a delusion." Taylor *v.* Trich, *supra*. "Partial insanity is confined to a particular subject, the man being sane on every other." Com. *v.* Wireback, 190 Pa. St. 138, 147, 42 Atl. 542, 70 Am. St. Rep. 625 [*quoting* Com. *v.* Mosler, *supra*]. See further as to partial insanity *infra*, note 12.

Habitual insanity is such insanity as is, in its nature, continuous and chronic. Wright *v.* Market Bank, (Tenn. Ch. App. 1900) 60 S. W. 623, 624.

Moral insanity is usually applied to those mental disorders which are confined to the affective faculties, or where the derangement of the affective faculties is the striking feature of the disorder. Denson *v.* Beazley, 34 Tex. 191, 214. No perversion of the moral nature or mere disorder of the moral affections and propensities, unless accompanied by such delusion as indicates the subversion of the will and reason, will in law amount to insanity. Boswell *v.* State, 63 Ala. 307, 35 Am. Rep. 20; Humphreys *v.* State, 45 Ga. 190; Choice *v.* State, 31 Ga. 424; Boardman *v.* Woodman, 47 N. H. 120; State *v.* Spencer, 21 N. J. L. 196; Flanagan *v.* People, 52 N. Y. 467, 11 Am. Rep. 731; State *v.* Brandon, 53 N. C. 463; Com. *v.* Mosler, 4 Pa. St. 264; U. S. *v.* Holmes, 26 Fed. Cas. No. 15,382, 1 Cliff. 98; McNaghten's Case, 10 Cl. & F. 200, 8 Eng. Reprint 718; Reg. *v.* Oxford, 9 C. & P. 525, 38 E. C. L. 309; Reg. *v.* Townley, 3 F. & F. 839; Reg. *v.* Burton, 3 F. & F. 772; Frere *v.* Peacocke, 1 Rob. Eccl. 442. See also CRIMINAL LAW, 12 Cyc. 170.

An ignorant man, duped to a fixed and unchangeable belief of things which do not exist, is not therefore insane. *In re* Rubright, 3 Pittsb. (Pa.) 299. And see Griffin *v.* Collins, 122 Ga. 102, 49 S. E. 827, holding that limited education is not incompetency.

Mere weakness of mind is not insanity (Francke *v.* His Wife, 29 La. Ann. 302; Odell *v.* Buck, 21 Wend. (N. Y.) 142; Ekin *v.* McCracken, 11 Phila. (Pa.) 534); and although a man may not have, in the judgment of his fellows, sufficient intelligence to manage his affairs properly, yet he may not be legally speaking *non compos mentis* (Somers *v.* Pumphrey, 24 Ind. 231; *In re* Rush, 53 N. Y. Suppl. 581; *In re* Tempest, 10 Ohio Dec. (Reprint) 502, 21 Cinc. L. Bul. 301; Com. *v.* Reeves, 140 Pa. St. 258, 21 Atl. 315); and so when the weakness is merely physical, however great, without proof of mental incapacity (Emes *v.* Emes, 11 Grant Ch. (U. C.) 325). See also CONTRACTS; CRIMINAL LAW; DEEDS; MORTGAGES; WILLS.

As used in a statute authorizing guardianship, insane person includes idiots, *non compos*, lunatics, and distracted persons. Stannard *v.* Burns, 63 Vt. 244, 253, 22 Atl. 460; Blisdell *v.* Holmes, 48 Vt. 492, 495. See also Reeves' Appeal, 6 Wash. 271, 274, 33 Pac. 615.

11. St. George *v.* Biddeford, 76 Me. 593, 596; Witte *v.* Gilbert, 10 Nebr. 539, 7 N. W. 288; Matter of Brugh, 61 Hun (N. Y.) 193, 197, 16 N. Y. Suppl. 551.

Distinction between eccentricity and unsoundness of mind see Elkin *v.* McCracken, 11 Phila. (Pa.) 534, 535.

"Insanity" is not a stronger term than "of unsound mind" and does not imply a greater degree of mental infirmity. McCammon *v.* Cunningham, 108 Ind. 545, 9 N. E. 455.

12. *Connecticut.*— Kimberly's Appeal, 68 Conn. 428, 437, 36 Atl. 847, 57 Am. St. Rep. 101, 37 L. R. A. 261.

Illinois.— Huggins *v.* Drury, 192 Ill. 528, 536, 61 N. E. 652 [*citing* Nicewander *v.* Nicewander, 151 Ill. 156, 37 N. E. 698; Schneider *v.* Manning, 121 Ill. 376, 12 N. E. 267].

Mississippi.— Mullins *v.* Cottrell, 41 Miss. 291.

of insanity and of other terms relating thereto will be found in other places in this work.[13]

B. Presumptions as to Insanity[14] — **1. Presumption of Sanity.**[15] It is a pre-

New Hampshire.— Concord *v.* Rumney, 45 N. H. 423.

New York.— *In re* Forman, 54 Barb. 274; Stanton *v.* Wetherwax, 16 Barb. 259; Matter of Tracy, 11 N. Y. St. 103, 107; Bull *v.* Wheeler, 6 Dem. Surr. 123, 126; Merrill *v.* Rolston, 5 Redf. Surr. 220; Colhoun *v.* Jones, 2 Redf. Surr. 34, 40. See also Morse *v.* Scott, 4 Dem. Surr. 507, 508.

Oregon.— Potter *v.* Jones, 20 Oreg. 239, 247, 25 Pac. 769, 12 L. R. A. 161.

England.— Boughton *v.* Knight, L. R. 3 P. & D. 64, 68, 42 L. J. P. & M. 25, 28 L. T. Rep. N. S. 562; Dew *v.* Clark, 3 Add. Eccl. 79; Waring *v.* Waring, 12 Jur. 947, 6 Moore P. C. 341, 13 Eng. Reprint 715.

Illustrations.— Delusion may consist in the belief of things impossible as being against the laws of nature, or of things possible but so improbable that no sane man would give them credit; but mere belief, however absurd, is not delusion unless it amounts to a perversion of reason. Dr. Lushington in Prinsep *v.* Dyce Sombre, 10 Moore P. C. 232, 14 Eng. Reprint 480. Insane delusion does not relate to mere sentiments or theories, or abstract questions in law, politics, or religion. All these are the subject of opinions, which are beliefs founded on reasoning and reflection, and however absurd are not insane delusions. Guiteau's Case, 10 Fed. 161, 171. Thus a belief, however preposterous, as to the conditions of the future state, as in the transmigration of human souls into animals, is not evidence of insanity, since it is to be refuted only by advancing some other belief which itself can have no foundation in positive knowledge. Bonard's Will, 16 Abb. Pr. N. S. (N. Y.) 128; Chafin Will Case, 32 Wis. 557. So a belief in spiritualism is not necessarily an insane delusion. Brown *v.* Ward, 53 Md. 376, 36 Am. Rep. 422; Middleditch *v.* Williams, 45 N. J. Eq. 726, 17 Atl. 826, 4 L. R. A. 738. See, however, Matter of Beach, 23 N. Y. App. Div. 411, 48 N. Y. Suppl. 437. Weakness shown by vacillation, shiftlessness, occasional despondency, and a religious hobby does not of itself prove the subject incompetent for business dealings. West *v.* Russell, 48 Mich. 74, 11 N. W. 812. Mere opinions, antipathies, or prejudices as to other persons do not constitute insane delusions. Hall *v.* Hall, 38 Ala. 131; Barnes *v.* Barnes, 66 Me. 286; Trumbull *v.* Gibbons, 22 N. J. L. 117. Generally insane delusions are either of the physical senses or such as relate to facts or objects. Chafin Will Case, 32 Wis. 557; Reg. *v.* Burton, 3 F. & F. 772. For illustrations of these rules as applied to cases of testamentary capacity see Thompson *v.* Thompson, 21 Barb. (N. Y.) 107; Lee *v.* Lee, 4 McCord (S. C.) 183, 17 Am. Dec. 722; Smith's Will, 52 Wis. 543, 8 N. W. 616, 9 N. W. 665, 38 Am. Rep. 766; Turner *v.* Hand, 24 Fed. Cas. No. 14,257, 3 Wall. Jr. 88; Ditchburn *v.* Fearn, 6 Jur. 201; Walcot *v.* Alleyn, Milw. 65. See, generally, Delusion.

Mistaken belief distinguished from insane delusion see *In re* Kendrick, 130 Cal. 360, 370, 62 Pac. 605.

Partial insanity.— The degree of insanity as partial or total is to be measured by the extent and number of the delusions existing in the mind of the person in question, who, if his delusion exists as to one subject only, is to be deemed sane upon other subjects (Forman's Will, 54 Barb. (N. Y.) 274) and so capable of transacting business the matter of which is not within the scope of his delusion (Banks *v.* Goodfellows, L. R. 5 Q. B. 549, 39 L. J. Q. B. 237, 22 L. T. Rep. N. S. 813; Jenkins *v.* Morris, 14 Ch. D. 674, 42 L. T. Rep. N. S. 817; Smee *v.* Smee, 5 P. D. 84, 44 J. P. 220, 49 L. J. P. & Adm. 8, 28 Wkly. Rep. 703). And the mere existence of a delusion not connected with the act done will not excuse an unlawful act committed by one partially insane. State *v.* Spencer, 21 N. J. L. 196; McNaghten's Case, 10 Cl. & F. 200, 8 Eng. Reprint 718. See Criminal Law. In a few English cases it was considered that, the mind being an integer, the existence of a single delusion should be conclusive of such general unsoundness of mind as to render all the civil acts of the subject invalid and his unlawful acts excusable. Expressions in Dyce Sombre *v.* Troup, D. & Sw. 24; Groom *v.* Thomas, 2 Hagg. Eccl. 433; Waring *v.* Waring, 12 Jur. 947, 6 Moore P. C. 341, 13 Eng. Reprint 715. But the doctrine of these cases has been overruled repeatedly. Frazer *v.* Jennison, 42 Mich. 206, 3 N. W. 882; Benoist *v.* Murrin, 58 Mo. 307; Boardman *v.* Woodman, 47 N. H. 120; Dennett *v.* Dennett, 44 N. H. 531, 84 Am. Dec. 97; Pidcock *v.* Potter, 68 Pa. St. 342, 8 Am. Rep. 181; Denson *v.* Beazley, 34 Tex. 191; Matter of Blakely, 48 Wis. 294, 4 N. W. 337; Jenkins *v.* Morris, 14 Ch. D. 674, 42 L. T. Rep. N. S. 817; Dew *v.* Clark, 3 Add. Eccl. 79. And see Stanton *v.* Wetherwax, 16 Barb. (N. Y.) 259. General and partial insanity defined see *supra*, note 10.

13. See Crazy; Delirium; Delusion; Dementia; Dipsomania; Drunkards; Eccentricity; Epilepsy; Fanatica Mania; Hallucination; Hemiplegy; Homicidal Mania; Hysteria; Irresistible Impulse; Kleptomania; Madness; Mania; Monomania; Senile Dementia; Somnolentia; Somnambulism; Suicidal Mania.

14. **As to insanity:** Of accused see Criminal Law, 12 Cyc. 165, 386, 389. Of grantor see Deeds, 13 Cyc. 738. Of testator see Wills.

Presumption as to capacity to exercise ordinary care see Negligence.

15. **Rebuttal of presumption** see *infra*, I, C, 1.

sumption of law that all men are sane,[16] and the burden to prove insanity is upon the party alleging it.[17] If, however, a party alleges sanity as an element of his case the burden of proof, as distinguished from the burden of adducing evidence,[18] rests on him to establish that fact,[19] although the presumption of sanity operates in his favor at the outset.[20]

2. Presumption of Continuance of Insanity.[21] Insanity admitted or once proved to exist is presumed to continue; and if a recovery or a lucid interval is alleged to have occurred, the burden to prove such allegation is on the party making

16. *Delaware.*— Armstrong *v.* Timmons, 3 Harr. 342; Duffield *v.* Robeson, 2 Harr. 375.

Illinois.— Stevens *v.* Shannahan, 160 Ill. 330, 43 N. E. 350; Chicago West Div. R. Co. *v.* Mills, 91 Ill. 39; Titcomb *v.* Vantyle, 84 Ill. 371; Myatt *v.* Walker, 44 Ill. 485; Lilly *v.* Waggoner, 27 Ill. 395; Fidelity, etc., Co. *v.* Weise, 80 Ill. App. 499.

Indiana.— Dearmond *v.* Dearmond, 12 Ind. 455.

Louisiana.— Chandler *v.* Barrett, 21 La. Ann. 58, 99 Am. Dec. 701.

Maine.— Thornton *v.* Appleton, 29 Me. 298.

Maryland.— Brown *v.* Ward, 53 Md. 376, 36 Am. Rep. 422.

New Hampshire.— Young *v.* Stevens, 48 N. H. 133, 2 Am. Rep. 202, 97 Am. Dec. 592; Perkins *v.* Perkins, 39 N. H. 163.

New York.— Weed *v.* Mutual Ben. L. Ins. Co., 70 N. Y. 561; Coffey *v.* Home L. Ins. Co., 35 N. Y. Super. Ct. 314; Jackson *v.* King, 4 Cow. 207, 15 Am. Dec. 354; People *v.* Kirby, 2 Park. Cr. 28; People *v.* Robinson, 1 Park. Cr. 649.

Ohio.— Lore *v.* Truman, 1 Ohio Dec. (Reprint) 510, 10 West. L. J. 250.

South Carolina.— Lee *v.* Lee, 4 McCord 183, 17 Am. Dec. 722.

Texas.— Carter *v.* State, 12 Tex. 500, 62 Am. Dec. 539.

Virginia.— Miller *v.* Rutledge, 82 Va. 863, 1 S. E. 202; Burton *v.* Scott, 3 Rand. 399.

West Virginia.— Eakin *v.* Hawkins, 52 W. Va. 124, 43 S. E. 211, 48 W. Va. 364, 37 S. E. 622.

United States.— Nimick *v.* Mutual Ben. L. Ins. Co., 18 Fed. Cas. No. 10,266, 3 Brewst. (Pa.) 502; U. S. *v.* McGlue, 26 Fed. Cas. No. 15,679, 1 Curt. 1.

England.— Atty.-Gen. *v.* Parnther, 3 Bro. Ch. 441, 29 Eng. Reprint 632.

See 27 Cent. Dig. tit. "Insane Persons," § 4.

A person of extreme old age is not presumed to be of unsound mind. *In re* Collins, 18 N. J. Eq. 253.

On the hearing of a commission of lunacy, the burden of proof is upon the commonwealth, as the presumption is in favor of sanity. Com. *v.* Haskell, 2 Brewst. (Pa.) 491.

The rejection of evidence of the sanity of a grantor is not error, where no evidence has been introduced to prove him insane, since every man is presumed to be sane until the contrary appears. Dearmond *v.* Dearmond, 12 Ind. 455.

17. *Alabama.*— Rawdon *v.* Rawdon, 28 Ala. 565.

Delaware.— Frazer *v.* Frazer, 2 Del. Ch. 260.

Illinois.— Stevens *v.* Shannaban, 160 Ill. 330, 43 N. E. 350; English *v.* Porter, 109 Ill. 285; Titcomb *v.* Vantyle, 84 Ill. 371.

Indiana.— Fay *v.* Burditt, 81 Ind. 433, 42 Am. Rep. 142; Crouse *v.* Holman, 19 Ind. 30.

Iowa.— State *v.* Geddies, 42 Iowa 264.

Kentucky.— Mutual Ben. L. Ins. Co. *v.* Daviess, 87 Ky. 541, 9 S. W. 812, 10 Ky. L. Rep. 577.

Massachusetts.— Howe *v.* Howe, 99 Mass. 88.

New York.— Ean *v.* Snyder, 46 Barb. 230; Dorchester *v.* Dorchester, 3 N. Y. Suppl. 238.

Ohio.— *In re* Shelleig, 11 Ohio S. & C. Pl. Dec. 81, 8 Ohio N. P. 399.

Pennsylvania.— Com. *v.* Kirkbride, 11 Phila. 427.

West Virginia.— Eakin *v.* Hawkins, 52 W. Va. 124, 43 S. E. 211.

United States.— Hiatt *v.* Mutual L. Ins. Co., 12 Fed. Cas. No. 6,449*a*, 2 Dill. 572.

See 27 Cent. Dig. tit. "Insane Persons," § 4.

The general rule obtains where a party alleges his own insanity at the time of doing a certain act (Chicago West Div. R. Co. *v.* Mills, 91 Ill. 39), or where a conservator sets up the insanity of his ward (English *v.* Porter, 109 Ill. 285).

If insanity is set up as an affirmative defense the burden of proving it rests on defendant. Wright *v.* Wright, 139 Mass. 177, 29 N. E. 380; Brown *v.* Brown, 39 Mich. 792; Youn *v.* Lamout, 56 Minn. 216, 57 N. W. 478; Perkins *v.* Perkins, 39 N. H. 163; Weed *v.* Mutual Ben. L. Ins. Co., 70 N. Y. 561; Jarrett *v.* Jarrett, 11 W. Va. 584; Hoge *v.* Fisher, 12 Fed. Cas. No. 6,585, Pet. C. C. 163.

18. See Evidence, 16 Cyc. 926.

19. Pennell *v.* Cummings, 75 Me. 163, holding that where, in a suit against physicians upon whose certificate plaintiff was confined in an asylum as insane, the pleadings raise the issue of plaintiff's insanity at the time the certificate was made, the burden is on plaintiff to show that she was then sane.

20. Pennell *v.* Cummings, 75 Me. 163. And see cases cited *supra*, note 16.

21. Rebuttal of presumption see *infra*, I, C, 2.

Previous insanity as showing insanity at the time of execution of deed see Deeds, 13 Cyc. 573, 752.

it.[22] The burden of proof, however, as distinguished from the burden of adducing evidence,[23] still remains on the party who alleges insanity.[24] The presumption arises only in cases where the insanity is continuing and permanent in its nature or where the cause of the disorder is continuing and permanent.[25]

22. *Alabama.*— Pike *v.* Pike, 104 Ala. 642, 16 So. 689; Wray *v.* Wray, 33 Ala. 187; Rawdon *v.* Rawdon, 28 Ala. 565.

Delaware.— Armstrong *v.* Timmons, 3 Harr. 342; Duffield *v.* Robeson, 2 Harr. 375; Frazer *v.* Frazer, 2 Del. Ch. 260.

Georgia.— Terry *v.* Buffington, 11 Ga. 337, 56 Am. Dec. 423; Dicken *v.* Johnson, 7 Ga. 484.

Illinois.— Emory *v.* Hoyt, 46 Ill. 258; Menkins *v.* Lightner, 18 Ill. 282.

Indiana.— Physio-Medical College *v.* Wilkinson, 108 Ind. 314, 9 N. E. 167; Wade *v.* State, 37 Ind. 180; Rush *v.* Megee, 36 Ind. 69; Crouse *v.* Holman, 19 Ind. 30; Achey *v.* Stephens, 8 Ind. 411.

Iowa.— Corbit *v.* Smith, 7 Iowa 60, 71 Am. Dec. 431.

Kansas.— Lantis *v.* Davidson, 60 Kan. 389, 56 Pac. 745.

Louisiana.— Chandler *v.* Barrett, 21 La. Ann. 58, 99 Am. Dec. 701.

Maine.— Pennell *v.* Cummings, 75 Me. 163; Thornton *v.* Appleton, 29 Me. 298.

Maryland.— Taylor *v.* Creswell, 45 Md. 422; Townshend *v.* Townshend, 7 Gill 10.

Massachusetts.— Hix *v.* Whittemore, 4 Metc. 545.

Mississippi.— Ricketts *v.* Joliff, 62 Miss. 440.

Missouri.— Kiehne *v.* Wessell, 53 Mo. App. 667.

New Hampshire.— Pettes *v.* Bingham, 10 N. H. 514.

New Jersey.— Meeker *v.* Boylan, 28 N. J. L. 274; Goble *v.* Grant, 3 N. J. Eq. 629.

New York.— Cook *v.* Cook, 53 Barb. 180; Peters *v.* Peters, 3 Misc. 264, 22 N. Y. Suppl. 764; Jackson *v.* King, 4 Cow. 207, 15 Am. Dec. 354; Jackson *v.* Van Dusen, 5 Johns. 144, 4 Am. Dec. 330; Sprague *v.* Duel, 11 Paige 480 [*affirming* Clarke 90].

North Carolina.— Wood *v.* Sawyer, 61 N. C. 251.

Pennsylvania.— Noel *v.* Karper, 53 Pa. St. 97; Grabill *v.* Barr, 5 Pa. St. 441, 47 Am. Dec. 418; Pittsburg Nat. Bank *v.* Palmer, 22 Pa. L. J. 189; Aurentz *v.* Anderson, 3 Pittsb. 310.

Tennessee.— Haynes *v.* Swann, 6 Heisk. 560.

Texas.— Elston *v.* Jasper, 45 Tex. 409; Herndon *v.* Vick, 18 Tex. Civ. App. 583, 45 S. W. 852.

Virginia.— Fishburne *v.* Ferguson, 84 Va. 87, 4 S. E. 575.

West Virginia.— Jarrett *v.* Jarrett, 11 W. Va. 584; Anderson *v.* Cranmer, 11 W. Va. 562.

Wisconsin.— Wright *v.* Jackson, 59 Wis. 569, 18 N. W. 486; Ripley *v.* Babcock, 13 Wis. 425.

United States.— Hoge *v.* Fisher, 12 Fed. Cas. No. 6,585, Pet. C. C. 163; Stevens *v.* Vancleve, 23 Fed. Cas. No. 13,412, 4 Wash. 262.

England.— Smee *v.* Smee, 5 P. D. 84, 44 J. P. 220, 49 L. J. P. & Adm. 8, 28 Wkly. Rep. 703; Atty.-Gen. *v.* Parnther, 3 Bro. Ch. 441, 29 Eng. Reprint 632; Cartwright *v.* Cartwright, 1 Phillim. 90; White *v.* Driver, 1 Phillim. 84.

See 27 Cent. Dig. tit. "Insane Persons," § 6.

A recovery being proved, the burden is on the party alleging a relapse into insanity to show that fact. Wright *v.* Jackson, 59 Wis. 569, 18 N. W. 486.

Presumption of recovery.— Where the committee of the lunatic's person and estate was appointed in 1866 and resigned in 1871, and no other was appointed until 1881, it was held, as to a contract made in the interval, that there was a presumption of recovered sanity. Miller *v.* Rutledge, 82 Va. 863, 1 S. E. 202.

When the existing insanity is of the kind called monomania, the rule is applied as regards the quality of the party's acts in respect of the subject as to which the monomania exists. Staples *v.* Wellington, 58 Me. 453; Thornton *v.* Appleton, 29 Me. 298; Jenckes *v.* Smithfield Probate Ct., 2 R. I. 255. And see Wood *v.* Sawyer, 61 N. C. 251.

23. See EVIDENCE, 16 Cyc. 926.

24. Fay *v.* Burditt, 81 Ind. 433, 42 Am. Rep. 142; Wright *v.* Wright, 139 Mass. 177, 29 N. E. 380.

25. *Indiana.*— Branstrator *v.* Crow, 162 Ind. 362, 69 N. E. 668.

Maine.— Thornton *v.* Appleton, 29 Me. 298.

Maryland.— Turner *v.* Rusk, 53 Md. 65.

New York.— Clarke *v.* Sawyer, 3 Sandf. Ch. 351.

Tennessee.— Puryear *v.* Reese, 6 Coldw. 21.

England.— Brogden *v.* Brown, 2 Add. Eccl. 441; Legeyt *v.* O'Brien, Milw. 325.

See 27 Cent. Dig. tit. "Insane Persons," § 6.

Illustrations.— Proof of convulsive epilepsy, although periodical, will not defeat the presumption of sanity as to an act not done during a recurrence of the disease. Brown *v.* Riggin, 94 Ill. 560; Aurentz *v.* Anderson, 3 Pittsb. (Pa.) 310. A like rule has been held as to insanity or delirium induced by paralysis (Trish *v.* Newell, 62 Ill. 196, 14 Am. Rep. 79; Burton *v.* Scott, 3 Rand. (Va.) 399), and as to occasional flightiness or wandering of intellect (McMasters *v.* Blair, 29 Pa. St. 298) or heaviness or stupor during sickness (Blake *v.* Johnson, Milw. 162). Long continued inebriety of the party will not make it necessary to prove that his act in question was done in a lucid interval (Duffield *v.* Morris, 2 Harr. (Del.) 375; Hallcy *v.* Webster, 21 Me. 461; Gardner *v.*

C. Evidence as to Insanity[26] — **1. Rebuttal of Presumption of Sanity — a. In General.** A party alleging insanity is bound to establish it by a preponderance of the evidence.[27] The ordinary rules of evidence apply as to the relevancy of evidence offered on the issue of insanity.[28] In the trial of a question of insanity evidence of hereditary taint is competent to corroborate direct proof.[29] Insanity is shown by the proof of acts and conduct inconsistent with the character and previous habits of the person in question.[30] Where insanity at a particular time is in issue, evidence of insanity before or after that time will be received,[31]

Gardner, 22 Wend. (N. Y.) 526, 34 Am. Dec. 340), and so as to delirium tremens, which is generally a short madness (State *v.* Sewell, 48 N. C. 245). It has been held that where the paroxysms of insanity are periodical, the party generally recovering from them in a few days, the presumption of insanity does not apply. Carpenter *v.* Carpenter, 8 Bush (Ky.) 283. And the same has been held where the insanity was due to a violent disease. Staples *v.* Wellington, 58 Me. 453; Hix *v.* Whittemore, 4 Metc. (Mass.) 545 [*citing* Cartwright *v.* Cartwright, 1 Phillim. 90]; Richardson *v.* Smart, 2 Mo. App. Rep. 1107.

26. Declarations of alleged insane person as evidence of his insanity see Evidence, 16 Cyc. 1181.

Evidence as to capacity: Of grantor see Deeds, 13 Cyc. 741, 752. Of testator see Wills.

Hearsay evidence of insanity see Evidence, 16 Cyc. 1130.

Opinion evidence of insanity see Evidence, 17 Cyc. 74, 91, 138, 197, 237.

Relevancy of evidence as to insanity see Evidence, 16 Cyc. 1130, 1131.

27. English *v.* Porter, 109 Ill. 285; Lilly *v.* Waggoner, 27 Ill. 395; Crouse *v.* Holman, 19 Ind. 30; Com. *v.* Kirkbride, 11 Phila. (Pa.) 427; Missouri Pac. R. Co. *v.* Brazzil, 72 Tex. 233, 10 S. W. 403, holding that no greater degree of evidence is required.

A clear preponderance of the evidence is required. Titcomb *v.* Vantyle, 84 Ill. 371; Dorchester *v.* Dorchester, 3 N. Y. Suppl. 238.

Proof of a reliable character and which satisfies the mind has been held necessary. State *v.* Geddis, 42 Iowa 264.

The affirmative testimony of those best acquainted with the person alleged to be insane should outweigh the testimony of those who testify merely from interviews, at or about the time of the act sought to be avoided for insanity, that they saw nothing indicating an insane mind. Emery *v.* Hoyt, 46 Ill. 258.

Insanity held to exist see Haviland *v.* Hayes, 37 N. Y. 25; Barbo *v.* Rider, 67 Wis. 598, 31 N. W. 155.

Finding of insanity held to have been warranted see Cotton States L. Ins. Co. *v.* Merritt, 59 Ga. 664; Meacham *v.* New York State Mut. Ben. Assoc., 46 Hun (N. Y.) 363; Gibbons *v.* Gibbons, 175 Pa. St. 475, 34 Atl. 846; Denny *v.* Stokes, 31 Tex. Civ. App. 425, 72 S. W. 209.

Insanity held not to exist see Hodgdon *v.* Cummings, 151 Mass. 293, 23 N. E. 836; Matter of Mason, 60 Hun (N. Y.) 46, 14 N. Y. Suppl. 434.

Delusion.— A fixed belief in things which are contrary to universal experience and known natural laws is a delusion, and evidence of insanity. Com. *v.* Meredith, 14 Wkly. Notes Cas. (Pa.) 188. See also Meacham *v.* New York State Mut. Ben. Assoc., 46 Hun (N. Y.) 363.

Depravity of character and bad habits in themselves are not evidence of insanity. Hill *v.* Hill, 27 N. J. Eq. 214.

Mere inadequacy of consideration according to the judgment of others does not show that the contracting party was of non-sane memory. Johnson *v.* Johnson, 10 Ind. 387.

Sick-bed delusions and bad memory are not sufficient to justify a finding that the party affected is of unsound mind, necessitating the appointment of a committee of his estate and person. Matter of Mason, 60 Hun (N. Y.) 46, 14 N. Y. Suppl. 434.

That a person makes improvident bargains and is generally unthrifty in his business or unsuccessful in his enterprises does not *per se* prove him to be *non compos mentis*, although it may tend to show that fact. Dominick *v.* Randolph, 124 Ala. 557, 27 So. 481; *In re* Carmichael, 36 Ala. 514.

28. See the following cases:

Connecticut.— Grant *v.* Thompson, 4 Conn. 203, 10 Am. Dec. 119.

Georgia.— Abercrombie *v.* Salisbury, 67 Ga. 734.

Illinois.— Snyder *v.* Snyder, 142 Ill. 60, 31 N. E. 303.

Minnesota.— Woodcock *v.* Johnson, 36 Minn. 217, 30 N. W. 894.

Pennsylvania.— Miller's Case, 27 Pa. Co. Ct. 49.

See 27 Cent. Dig. tit. "Insane Persons," § 7.

29. Smith *v.* Kramer, 5 Pa. L. J. 226.

However, proof of a taint of insanity in a person's family without actual evidence of insanity existing in the person himself will not defeat the presumption of his sanity. Snow *v.* Benton, 28 Ill. 306; Bradley *v.* State, 31 Ind. 492; Cole's Trial, 7 Abb. Pr. N. S. (N. Y.) 321.

30. McCurry *v.* Hooper, 12 Ala. 823, 46 Am. Dec. 280. And see Haviland *v.* Hayes, 37 N. Y. 25.

31. Dickinson *v.* Barber, 9 Mass. 225, 6 Am. Dec. 58; Bryant *v.* Jackson, 6 Humphr.

subject to a proper restriction as to remoteness.[32] In investigating the acts of men as evidence of their unsoundness of mind, surrounding circumstances should not be overlooked.[33] The presumption of sanity is not defeated by facts appearing incidentally on the trial of a different issue.[34]

b. Effect of Suicide. The presumption of sanity is not rebutted by the fact of suicide of the person in question.[35]

2. Rebuttal of Presumption of Continuance of Insanity. When insanity has once existed and it is sought to be proved that a subsequent act of its subject was done in a lucid interval, capacity must be shown as of the very time of the doing of the act in question; it is not sufficient to show a lucid interval before and after the day of the act.[36] Where the testimony of unprejudiced experts of high standing is that the person is not restored to mental soundness, their conclusion

(Tenn.) 199. And see McDonald *v.* McDonald, 14 Grant Ch. (U. C.) 545. *Compare* Darby *v.* Hayford, 56 Me. 246. See further CONTRACTS, 9 Cyc. 771; DEEDS, 13 Cyc. 742 note 8.

Adjudication of insanity.—To show mental incapacity at a certain time, the record of a subsequent adjudication of incapacity is admissible in connection with evidence that there had been no change in the conditions between the time in question and such adjudication. Giles *v.* Hodge, 74 Wis. 360, 43 N. W. 163.

Appointment of guardian.— On the issue of the mental condition of a person at the time of the appointment of a guardian for him, proceedings in such appointment are admissible, but not for the purpose of showing his condition at a previous period. Burnham *v.* Mitchell, 34 Wis. 117.

32. Dickinson *v.* Barber, 9 Mass. 225, 6 Am. Dec. 58; Harden *v.* Hays, 14 Pa. St. 91.

33. Ekin *v.* McCracken, 11 Phila. (Pa.) 534, holding that it would be incorrect to apply the same rules to cultivated and to ignorant minds.

34. Carpenter *v.* Carpenter, Milw. 159.

35. *Delaware.*— Duffield *v.* Morris, 2 Harr. 375.

Georgia.— Merritt *v.* Cotton States L. Ins. Co., 55 Ga. 103.

Kentucky.— Mutual Ben. L. Ins. Co. *v.* Daviess, 87 Ky. 541, 9 S. W. 812, 10 Ky. L. Rep. 577.

Maryland.— Knickerbocker L. Ins. Co. *v.* Peters, 42 Md. 414.

New York.— Weed *v.* Mutual Ben. L. Ins. Co., 70 N. Y. 561; Fowler *v.* Mutual L. Ins. Co., 4 Lans. 202; Coffey *v.* Home L. Ins. Co., 35 N. Y. Super. Ct. 314, 44 How. Pr. 481.

Tennessee.— Phadenhauer *v.* Germania L. Ins. Co., 7 Heisk. 567, 19 Am. Rep. 623; Pettitt *v.* Pettitt, 4 Humphr. 191.

United States.— Mutual L. Ins. Co. *v.* Terry, 15 Wall. 580, 21 L. ed. 236; Ritter *v.* Mutual L. Ins. Co., 69 Fed. 505; Coverston *v.* Connecticut Mut. L. Ins. Co., 6 Fed. Cas. No. 3,290; Jarvis *v.* Connecticut Mut. L. Ins. Co., 13 Fed. Cas. No. 7,226; Terry *v.* Mutual L. Ins. Co., 23 Fed. Cas. No. 13,839, 1 Dill. 403; Wolff *v.* Connecticut Mut. L. Ins. Co., 30 Fed. Cas. No. 17,929, 2 Flipp. 355.

England.— Rex *v.* Coroner, Comb. 2; Reg. *v.* Barton, 3 Cox C. C. 275; McAdam *v.* Walker, 1 Dow. 148, 3 Eng. Reprint 654; Rex *v.* Saloway, 3 Mod. 100.

See 27 Cent. Dig. tit. "Insane Persons," § 5.

A fortiori an attempt at or threat of suicide will not destroy the presumption of sanity. Wolff *v.* Connecticut Mut. L. Ins. Co., 30 Fed. Cas. No. 17,929, 2 Flipp. 355.

Suicide in connection with other facts.— The rule has been adhered to, although it appeared that the suicide was immediately preceded by the murder or attempted murder of the suicide's family and the destruction of his property without apparent motive or provocation. Karow *v.* New York Continental Ins. Co., 57 Wis. 56, 15 N. W. 27, 46 Am. Rep. 17.

36. *Alabama.*— Pike *v.* Pike, 104 Ala. 642, 16 So. 689; Saxon *v.* Whitaker, 30 Ala. 237.

Indiana.— Kenworthy *v.* Williams, 5 Ind. 375.

Pennsylvania.— Harden *v.* Hays, 9 Pa. St. 151.

Virginia.— Fishburne *v.* Ferguson, 84 Va. 87, 4 S. E. 575.

England.— Waring *v.* Waring, 12 Jur. 947, 6 Moore P. C. 341, 13 Eng. Reprint 715; White *v.* Wilson, 13 Ves. Jr. 87, 33 Eng. Reprint 227.

See 27 Cent. Dig. tit. "Insane Persons," § 6.

The fact that the consideration of a note was adequate would not of itself justify the inference that the maker was enjoying a lucid interval when he made it. Emery *v.* Hoyt, 46 Ill. 258.

Proof of a lucid interval must be as strong and demonstrative as would have been required to show insanity, and must go to the state and habit of the mind, and not merely to an accidental conversation or behavior on a particular occasion. Ricketts *v.* Jolliff, 62 Miss. 440. And see Fishburne *v.* Ferguson, 84 Va. 87, 4 S. E. 575.

The burden of proving that a contract was made in a lucid interval is satisfied by showing that the party then had memory and judgment enough to understand the character of his act and the legal responsibility entailed thereby. Noel *v.* Karper, 53 Pa. St. 97.

will not be rejected as erroneous, although from the evidence of physicians, and the appearance of the patient under examination in court, and his condition for some time past, the court might reasonably infer that no mental disorder existed.[37]

D. Province of Court and Jury.[38] Capacity to do an act is always a question of law; the condition from which such capacity may be deduced is a question of fact.[39] It is for the court to decide whether sufficient evidence appears to justify the submission of the issue of insanity to the jury;[40] and that, the issue being submitted, it is the exclusive province of the jury to determine the weight and effect of the evidence.[41] A court of full chancery powers may direct an issue to be framed for a jury upon the question of the sanity of a party not judicially found insane, where the question arises collaterally.[42]

37. Sherman, Petitioner, 17 R. I. 356, 22 Atl. 276.

38. Instructions as to capacity to contract see CONTRACTS, 9 Cyc. 781.

39. *Alabama.*— Walker *v.* Walker, 34 Ala. 469.

California.— People *v.* Best, 39 Cal. 690.

Connecticut.— Baldwin's Appeal, 44 Conn. 37.

Georgia.— Gardner *v.* Lamback, 47 Ga. 133.

Maryland.— Townshend *v.* Townshend, 7 Gill 10.

Michigan.— Kempsey *v.* McGinniss, 21 Mich. 123.

New Hampshire.— Young *v.* Stevens, 48 N. H. 133, 2 Am. Rep. 202, 97 Am. Dec. 592; Boardman *v.* Woodman, 47 N. H. 120.

New York.— New York *v.* Mott, 60 Hun 423, 15 N. Y. Suppl. 22.

Compare Bradley *v.* State, 31 Ind. 492; State *v.* Pike, 49 N. H. 399, 6 Am. Rep. 533. And see Robinson *v.* Adams, 62 Me. 369, 16 Am. Rep. 473; Wright *v.* Wright, 139 Mass. 177, 29 N. E. 380.

See CRIMINAL LAW; WILLS.

The question of the existence of unsoundness of mind giving the courts jurisdiction is a question of fact depending on the proof. Greenwade *v.* Greenwade, 43 Md. 313.

40. *Alabama.*— Atwood *v.* Smith, 11 Ala. 894.

Georgia.— Armor *v.* Moore, 104 Ga. 579, 30 S. E. 821.

Michigan.— John Hancock Mut. F. Ins. Co. *v.* Moore, 34 Mich. 41.

Pennsylvania.— Cauffman *v.* Long, 82 Pa. St. 72.

Texas.— Powell *v.* State, 37 Tex. 348.

Wisconsin.—Boorman *v.* Northwestern Mut. Relief Assoc., 90 Wis. 144, 62 N. W. 924.

England.— Reg. *v.* Law, 2 F. & F. 836.

If the evidence shows mental weakness merely, not amounting to insanity, it is not the duty of the court to instruct the jury upon the law of insanity. Powell *v.* State, 37 Tex. 348.

Evidence held sufficient to go to the jury see Easton First Nat. Bank *v.* Wirebach, 106 Pa. St. 37; Bachmeyer *v.* Mutual Reserve Fund Life Assoc., 82 Wis. 255, 52 N. W. 101.

Evidence held insufficient to go to the jury see White *v.* Davis, 17 N. Y. Suppl. 548; Boorman *v.* Northwestern Mut. Relief Assoc., 90 Wis. 144, 62 N. W. 924.

Time of submitting issue.— In a suit by a lunatic by his next friend, where defendant relies on a power of attorney given by plaintiff to dismiss the suit, the court may submit to the jury the issue whether plaintiff was *compos mentis* when the power of attorney was executed at the same time the issues raised in the suit are submitted. Smith *v.* Smith, 106 N. C. 498, 11 S. E. 188.

41. *Arkansas.*— Jenkins *v.* Tobin, 31 Ark. 306; McDaniel *v.* Crosby, 19 Ark. 533.

Indiana.— Guetig *v.* State, 63 Ind. 278; Doe *v.* Reagan, 5 Blackf. 217, 33 Am. Dec. 466.

Maine.— Hill *v.* Nash, 41 Me. 585, 66 Am. Dec. 266.

Maryland.— Townshend *v.* Townshend, 7 Gill 10.

Michigan.— *In re* Alexander, 135 Mich. 518, 99 N. W. 746.

Missouri.— Bishop *v.* Hunt, 24 Mo. App. 373.

New Hampshire.— Young *v.* Stevens, 48 N. H. 133, 97 Am. Dec. 592.

North Carolina.— Wood *v.* Sawyer, 61 N. C. 251.

Pennsylvania.— Starrett *v.* Douglass, 2 Yeates 46.

Texas.— Rogers *v.* Armstrong, (Civ. App. 1895) 30 S. W. 848.

United States.— Charter Oak L. Ins. Co. *v.* Rodel, 95 U. S. 232, 24 L. ed. 433.

Although the evidence to prove insanity is uncontroverted, this will not authorize the court to instruct the jury that it proves the fact. Townshend *v.* Townshend, 7 Gill (Md.) 10.

42. Flock *v.* Wyatt, 49 Iowa 466; Evans *v.* Blood, 2 Bro. P. C. 632, 1 Eng. Reprint 543. And see EQUITY, 16 Cyc. 413 *et seq.*

The most useful and proper course is to have the issue made up and prepared for trial, under the directions of the court of chancery, instead of delivering over the record and traverse, after the attorney-general had joined issue thereon, to the court of law, as practised in England. Matter of Wendell, 1 Johns. Ch. (N. Y.) 599.

Generally the court will not direct such an issue unless some evidence of insanity appears. Long *v.* Long, 4 Ir. Ch. 106; Harrod *v.* Harrod, 18 Jur. 853, 1 Kay & J. 4, 2 Wkly. Rep. 612.

II. INQUISITION AND GUARDIANSHIP.

A. Jurisdiction[43] — **1. Generally.** In England the king is considered to assume the care of insane persons and their property; and the discharge of this function is committed to the lord chancellor by warrant under the sign manual of the king.[44] The English chancery jurisdiction in lunacy is therefore in theory distinct from the general chancery jurisdiction under the great seal, although the fact of insanity having once been adjudicated, the chancellor thereafter acts, in the superintendence of the lunatic's custodians, not under the king's sign manual, but by virtue of his general equity powers.[45] In the United States it seems to be clear that the courts of equity, in the absence of statutory provisions investing them with a lunacy jurisdiction, derive such a jurisdiction not from a personal sovereign but from the commonwealth *ex necessitate*, for the protection of the persons and property of the citizens;[46] but generally in the United States, the jurisdiction over insane persons and their estates is committed by statute either to the courts of equity as such, or to other courts exercising general probate jurisdiction.[47] To whatever tribunals, in different states, the

The finding of the jury is not conclusive upon the court, which may decide the collateral issue without submitting it to a jury. Alexander *v.* Alexander, 5 Ala. 517.

The finding, whether by court or jury, concludes only the matter in dispute; and the issue cannot be directed as to the insanity of the party at a particular time, upon an *ex parte* petition brought to determine that issue merely. Whitlock *v.* Smith, 13 Fla. 385; Meurer's Appeal, 119 Pa. St. 115, 132, 12 Atl. 868, 871.

Issuance of inquisition.— In Yourie *v.* Nelson, 1 Tenn. Ch. 275, it was held that pending a bill to set aside a conveyance on the ground of the grantor's incapacity an inquisition might issue to determine whether the party was still of sound mind.

43. **Jurisdiction:** To commit lunatic to asylum see *infra*, III, A, 1. To order sale of lunatic's property see *infra*, IV, K, 1. In actions by or against lunatic or his representative see *infra*, VIII, A.

44. *Ex p.* Grimstone, Ambl. 706, 27 Eng. Reprint 458; Burford *v.* Lenthall, 2 Atk. 551, 26 Eng. Reprint 731; *In re* Fitzgerald, Ll. & G. t. Pl. 20, 2 Sch. & Lef. 432. And see Eyre *v.* Shaftsbury, 2 P. Wms. 103, 24 Eng. Reprint 659.

45. *Ex p.* Grimstone, Ambl. 706, 27 Eng. Reprint 458; Burford *v.* Lenthall, 2 Atk. 551, 26 Eng. Reprint 731; *In re* Fitzgerald, Ll. & G. t. Pl. 20, 2 Sch. & Lef. 432.

46. Dodge *v.* Cole, 97 Ill. 338, 37 Am. Dec. 111; McCord *v.* Ochiltree, 8 Blackf. (Ind.) 15; Corrie's Case, 2 Bland (Md.) 488; Latham *v.* Wiswall, 37 N. C. 294 [*approved* in Dowell *v.* Jacks, 58 N. C. 417].

In South Carolina the care exercised by equity over the persons and estates of lunatics is considered as a branch of the inherent equity jurisdiction, not, as in England, an exercise of prerogative. Ashley *v.* Holman, 15 S. C. 97.

In Tennessee, however, the chancery court has no jurisdiction of lunatics in the absence of statute conferring jurisdiction. Fentress *v.* Fentress, 7 Heisk. 428; Oakley *v.* Long, 10 Humphr. 254. And see Franklin *v.* Armfield, 2 Sneed 305; Dickson *v.* Montgomery, 1 Swan 348; Green *v.* Allen, 5 Humphr. 170.

47. See the following cases:

Alabama.— Craft *v.* Simon, 118 Ala. 625, 24 So. 380; Laughinghouse *v.* Laughinghouse, 38 Ala. 257.

California.— Halett *v.* Patrick, 49 Cal. 590.

Indiana.— Martin *v.* Motsinger, 130 Ind. 555, 30 N. E. 523, circuit court.

Kentucky.— Coleman *v.* Lunatic Asylum, 6 B. Mon. 239; Dinkelspiel *v.* Central Kentucky Asylum, 73 S. W. 771, 24 Ky. L. Rep. 2240; Taylor *v.* Barker, 47 S. W. 217, 20 Ky. L. Rep. 582.

Louisiana.— Segur *v.* Pellerin, 16 La. 63; Stafford *v.* Stafford, 5 Mart. N. S. 136.

Maine.— Coolidge *v.* Allen, 82 Me. 23, 19 Atl. 89; Eastport *v.* Belfast, 40 Me. 262; Insane Hospital *v.* Belgrade, 35 Me. 497.

Maryland.— Tomlinson *v.* Devore, 1 Gill 345; Corrie's Case, 2 Bland 448.

Michigan.— Partello *v.* Holton, 79 Mich. 372, 44 N. W. 619.

Minnesota.— Knox *v.* Haug, 48 Minn. 58, 50 N. W. 934; State *v.* Wilcox, 24 Minn. 143.

Missouri.— Cox *v.* Osage County, 103 Mo. 385, 15 S. W. 763; State *v.* St. Louis County Ct., 38 Mo. 402.

New York.— Gridley *v.* St. Francis Xavier College, 137 N. Y. 327, 33 N. E. 321; Matter of Clark, 57 N. Y. App. Div. 5, 67 N. Y. Suppl. 631; Matter of Brown, 4 Duer 613; Agricultural Ins. Co. *v.* Barnard, 14 Abb. N. Cas. 502.

Ohio.— Heckman *v.* Adams, 50 Ohio St. 305, 34 N. E. 155; Brown *v.* Infirmary Directors, 49 Ohio St. 578, 31 N. E. 744.

Pennsylvania.— Kennedy *v.* Johnston, 65 Pa. St. 451, 3 Am. Rep. 650; Shenango Tp. *v.* Wayne Tp., 34 Pa. St. 184; *In re* Clark, 22 Pa. St. 466; Butler County *v.* Public Charities, 14 Pa. Super. Ct. 70; Eckstein's Estate, 1 Pa. L. J. Rep. 224.

jurisdiction in insanity may be committed, it is everywhere to be exercised by the application of the equitable principles which govern the courts of chancery under like circumstances; and generally the character of the committee, guardian, or conservator in the American courts is assimilated to that of the committee under the English system;[48] but a much wider jurisdiction as to the property of insane persons is vested in those American courts in which the authority over insane persons and their estates is derived from statute provisions than was exercised by the lord chancellor of England by virtue of his delegated prerogative, for the possession of the committee appointed by the chancellor was that of a mere bailiff or curator, and in the absence of statutory authority neither the court nor the committee could alienate the lunatic's property or satisfy the claims of his creditors, while the courts in most, if not all, of the United States may sell the lunatic's property and satisfy his debts.[49] An application for the appointment of a conservator for a lunatic domiciled in the state is not affected by proceedings pending in another state to inquire into his mental condition and set aside his conveyance of real property in the latter state.[50]

2. Over Non-Residents.[51] Even though an insane person resident in one jurisdiction is seized of lands in another jurisdiction, yet a committee of his person cannot be appointed in the latter jurisdiction;[52] but in such a case the court may appoint a committee of the property within the state.[53]

Rhode Island.— Providence County Sav. Bank *v.* Hughes, 26 R. I. 73, 58 Atl. 254, 106 Am. St. Rep. 682.

South Carolina.— Walker *v.* Russell, 10 S. C. 82.

Tennessee.— Fentress *v.* Fentress, 7 Heisk. 428; Cooper *v.* Summers, 1 Sneed 453; Oakley *v.* Long, 10 Humphr. 254.

Texas.— Flynn *v.* Hancock, 35 Tex. Civ. App. 395, 80 S. W. 245.

Vermont.— Harwood *v.* Boardman, 38 Vt. 554.

Virginia.— Harrison *v.* Garnett, 86 Va. 763, 11 S. E. 123.

Washington.—Reeves' Appeal, 6 Wash. 271, 33 Pac. 615.

West Virginia.—Lance *v.* McCoy, 34 W. Va. 416, 12 S. E. 728.

See 27 Cent. Dig. tit. "Insane Persons," §§ 16, 47.

Lunacy proceedings should show on their face such facts as will authorize the judgment appointing a guardian, else they are void on direct attack. Morton *v.* Sims, 64 Ga. 298.

48. *Alabama.*— Campbell *v.* Campbell, 39 Ala. 312.

Maine.— Hovey *v.* Harmon, 49 Me. 269.

New Jersey.— Van Horn *v.* Hann, 39 N. J. L. 207.

Ohio.— Wheeler *v.* State, 34 Ohio St. 394, 32 Am. Rep. 372.

South Carolina.— Walker *v.* Russell, 10 S. C. 82; *Ex p.* Richards, 2 Brev. 375.

See 27 Cent. Dig. tit. "Insane Persons," §§ 16, 47.

49. Berry *v.* Rogers, 2 B. Mon. (Ky.) 308; Brasher *v.* Van Cortlandt, 2 Johns. Ch. (N. Y.) 242 (per Kent, C.); Buswell Insanity § 32. See *infra*, IV, K, 1, 2.

50. Wentz's Appeal, 76 Conn. 405, 56 Atl. 625.

51. Foreign and ancillary guardianship see *infra*, II, D, 7.

Jurisdiction: As to custody and support of non-resident lunatic see *infra*, III, A, 2. To sell property of non-resident lunatic see *infra*, IV, K, 1.

52. Beall *v.* Stokes, 95 Ga. 357, 22 S. E. 637; *In re* B., Ir. R. 1 Eq. 181; *In re* Tottenham, 1 Jur. 653, 2 Myl. & C. 39, 2 Mont. & C. 39, 14 Eng. Ch. 39, 40 Eng. Reprint 556.

Actual residence within the state is necessary. Mere domicile is insufficient. Sears *v.* Terry, 26 Conn. 273; *In re* Dumas, 32 La. Ann. 679.

A lunatic does not lose his residence in the state because he is committed to an asylum in another state (Clark *v.* Whitaker, 18 Conn. 543, 46 Am. Dec. 337), nor by the fact that he leaves for parts unknown (Matter of Ganse, 9 Paige (N. Y.) 416. And see Southern Tier Masonic Relief Assoc. *v.* Laudenbach, 5 N. Y. Suppl. 901).

A commission of lunacy may issue against an alien temporarily within the jurisdiction. Matter of Colah, 3 Daly (N. Y.) 529; *Ex p.* Rosenberg, 1 Leg. Gaz. (Pa.) 49; *In re* Burbidge, [1902] 1 Ch. 426, 71 L. J. Ch. 271, 86 L. T. Rep. N. S. 331; *In re* Bariatinski, 8 Jur. 157, 13 L. J. Ch. 69, 1 Phil. 375, 19 Eng. Ch. 375, 41 Eng. Reprint 674; Matter of Houstoun, 1 Russ. 312, 46 Eng. Ch. 276, 38 Eng. Reprint 121.

53. Brown *v.* Fox, (N. J. Ch. 1901) 51 Atl. 621; *In re* Devausney, 52 N. J. Eq. 502, 28 Atl. 459; Matter of Taylor, 9 Paige (N. Y.) 611; Matter of Ganse, 9 Paige (N. Y.) 416; Matter of Neally, 26 How. Pr. (N. Y.) 402; Burke *v.* Wheaton, 4 Fed. Cas. No. 2,164, 3 Cranch C. C. 341. See also Matter of Fowler, 2 Barb. Ch. (N. Y.) 305. *Contra*, Beall *v.* Stokes, 95 Ga. 357, 22 S. E. 637.

A committee must be appointed in the state for a non-resident lunatic, to enable him to obtain control of the property in the state. Matter of Petit, 2 Paige (N. Y.) 174.

B. Venue.[54] The rule of the courts of chancery was that the commission in lunacy should be executed at or near the residence of the party,[55] and the principle of this rule is recognized in the modern statutory provisions that the proceedings are to be had in the county of the party's residence. But when the commission is to ascertain the insanity of one not a resident of the state the rule yields to necessity, and the commission may be executed in such county as may be most convenient.[56] Where the proceedings are not had under commissions, but the statute commits the insanity jurisdiction to the probate or other courts, the venue of the proceedings will generally be determined by the place of residence of the party.[57]

When an incompetent, so found, removes into another jurisdiction, where a committee is appointed for him, a committee of his property may be appointed in New York under Code Civ. Proc. § 2326. Matter of Fidelity Trust Co., 27 Misc. (N. Y.) 118, 57 N. Y. Suppl. 361.

Chancery may appoint a receiver for the property of a non-resident insane person. Beall *v.* Stokes, 95 Ga. 357, 22 S. E. 637.

A petition for a commission of lunacy against a non-resident must show that he is the owner of property situated in the state. It is not sufficient to state that fact in the affidavits annexed to the petition. Matter of Fowler, 2 Barb. Ch. (N. Y.) 305.

Eligibility of foreign guardian as committee of property within the state see *infra*, II, D, 1, b, (I).

54. Venue generally see VENUE.

55. *In re* Dumas, 32 La. Ann. 679; *In re* Child, 16 N. J. Eq. 498; *In re* Covenhoven, 1 N. J. Eq. 19; *Ex p.* Wilson, 11 Rich. Eq. (S. C.) 445; *Ex p.* Southcote, Ambl. 111, 27 Eng. Reprint 71, 2 Ves. 401, 28 Eng. Reprint 256; *Ex p.* Baker, Coop. 205, 35 Eng. Reprint 532, 19 Ves. Jr. 340, 34 Eng. Reprint 544; *Ex p.* Hall, 7 Ves. Jr. 261, 32 Eng. Reprint 106.

However, it has been held upon certiorari to an inquisition that the question of residence having been passed upon by the inquisition, the court could not consider it (Com. *v.* Harrold, 204 Pa. St. 154, 53 Atl. 760); and that when the proceedings were had in a judicial district not that of the party's residence the error was in practice and not jurisdictional (Matter of Porter, 34 N. Y. App. Div. 147, 54 N. Y. Suppl. 654, 28 N. Y. Civ. Proc. 405); but in a later case an order appointing a committee under like circumstances was reversed (Matter of Bischoff, 80 N. Y. App. Div. 326, 80 N. Y. Suppl. 917).

Discretion of court.— *Ex p.* Wilson, 11 Rich. Eq. (S. C.) 445. Thus to avoid expense, a commission was issued in Middlesex, although the party resided in Herts (*In re* Waters, 2 Myl. & C. 38, 14 Eng. Ch. 38, 40 Eng. Reprint 555); and where it appeared that a strong local feeling as to the proceedings existed in the neighborhood where the party resided, the inquiry was directed to be held elsewhere (*In re* ——, 18 Ch. D. 26, 48 L. T. Rep. N. S. 97). In Pennsylvania, however, sittings of the commissioners are not, under the act of June 13, 1836, authorized outside the county in which the proceedings were instituted. Com. *v.* Bergstresser, 8 Pa. Dist. 721, 23 Pa. Co. Ct. 65, 2 Dauph. Co. Rep. 347.

Where an ungovernable lunatic is at large, the court of proper jurisdiction in any county may hold an inquisition to determine his lunacy and make proper orders to restrain him. Coleman *v.* Fayette County Lunatic Asylum Com'rs, 6 B. Mon. (Ky.) 239.

56. Matter of Pettit, 2 Paige (N. Y.) 174.

In New Jersey, under 2 Gen. St. p. 1704, par. 37, the orphans' court in any county may appoint a guardian of a lunatic not resident in the state. Wallis *v.* Brown, (1902) 52 Atl. 475.

If the lunatic has left the state, the commission may be executed in the county in which he last resided. Campbell's Case, 2 Bland (Md.) 209, 20 Am. Dec. 360; Southern Tier Masonic Relief Assoc. *v.* Laudenbach, 5 N. Y. Suppl. 901.

57. *California.*— *In re* Tittel, Myr. Prob. 97.

Connecticut.— Sears *v.* Terry, 26 Conn. 273.

Kentucky.— Castleman *v.* Castleman, 6 Dana 55.

Nebraska.— Clay County *v.* Adams County, (1903) 95 N. W. 58.

Ohio.— *In re* Canady, 7 Ohio S. & C. Pl. Dec. 285, 4 Ohio N. P. 403.

See 27 Cent. Dig. tit. "Insane Persons," § 17.

Length of residence is immaterial in Missouri (Cox *v.* Osage County, 103 Mo. 385, 15 S. W. 763), but it is otherwise in Pennsylvania (Pringle *v.* Wilkes-Barre Second Nat. Bank, 10 Pa. Dist. 674, 10 Kulp 312).

A person's voting in a county is sufficient evidence of his residence therein to allow a commission of lunacy to be issued against him there. Com. *v.* Emerson, 1 Pearson (Pa.) 204.

An equitable estate of freehold will give a settlement for a lunatic for whom a guardian is appointed where the statute regulating settlements makes no distinction for the purpose between equitable and legal estates. Smith *v.* Angell, 14 R. I. 192.

The residence of an insane married woman is that of her husband, although he has changed his residence since she has been confined in an insane asylum. Schwartz *v.* West, (Tex. Civ. App. 1904) 84 S. W. 282.

Where a lunatic is in an asylum, a commission of lunacy should be issued, in New

C. Lunacy Proceedings[58] — **1. In General.** In the English court of chancery commissions in the nature of the ancient writs de lunatico inquirendo or de idiota inquirendo[59] issue upon a petition to the lord chancellor filed by the attorney-general or by a friend of the party and supported by affidavits;[60] and the practice is substantially the same in those American courts of chancery having insanity jurisdiction.[61] The issuing of a commission out of chancery is always discretionary, and the commission will be withheld if its execution would produce consequences detrimental to the party;[62] and mere weakness of mind or mere occasional or temporary unsoundness of mind arising from fortuitous causes is not ground for a commission,[63] unless its issuance is necessary for the protection of the public,[64] or of the person or estate of the party in question.[65] It seems that a

Jersey, in the county where his mansion and property are, or where his last residence was before he came to the asylum, in the absence of very special cause for a different course. *In re* Child, 16 N. J. Eq. 498. See also Clark *v.* Whitaker, 18 Conn. 543, 46 Am. Dec. 337. In Pennsylvania, however, the party being confined in a state hospital, proceedings may be had in the county in which the hospital is situated or in that of the party's residence. Brooke's Estate, 24 Pa. Super. Ct. 430.

58. Conspiracy to wrongfully prosecute lunacy proceedings see CONSPIRACY, 8 Cyc. 649 note 14.

Malicious prosecution of lunacy proceedings see MALICIOUS PROSECUTION.

59. For forms of writs see Shelford Lun. 80.

Under 25 & 26 Vict. c. 86, § 4, the issue of insanity may be determined either by a commission out of chancery or by an issue directed to one of the common-law divisions of the high court of justice.

60. 2 Collinson Lun. 151; Shelford Lun. 79, 82.

61. Burke *v.* Wheaton, 4 Fed. Cas. No. 2,164, 3 Cranch C. C. 341. See also Coleman *v.* Fayette County Lunatic Asylum Com'rs, 6 B. Mon. (Ky.) 239; Morgan's Case, 3 Bland (Md.) 332; Boarman's Case, 2 Bland (Md.) 89; *In re* Covenhoven, 1 N. J. Eq. 19.

A commission cannot issue in a collateral proceeding. Carter *v.* Carter, 1 Paige (N. Y.) 463; *In re* Gaul, 7 Wkly. Notes Cas. (Pa.) 522.

Commission against non-resident. To justify the issuance of a commission against a party domiciled abroad but having real estate within the state (see *supra*, II, A, 2), the petition must recite the fact of owning property. Matter of Fowler, 2 Barb. Ch. (N. Y.) 305.

Supporting affidavits are necessary. Nailor *v.* Nailor, 4 Dana (Ky.) 339. The affidavit need not be by a physician. *In re* Zimmer, 15 Hun (N. Y.) 214. In Pennsylvania it was held that where the sworn petition alleges that the party is incapable of managing his estate, and is wasting it, affidavits are not necessary (Birbeck's Case, 11 Pa. Co. Ct. 336), but later, under Act (1836), § 4 (Pamphl. Laws 589), providing that no commission shall issue unless the petition be accompanied by affidavits, a sworn petition without affidavits was refused (Metz's Case, 5 Pa. Dist. 132). The objection to the want of affidavits is waived by going to trial without objection (*In re* Lincoln, 1 Brewst. (Pa.) 392), and proceedings were held not void merely because the petition was not accompanied by affidavits (Bethea *v.* McLennon, 23 N. C. 523). For form of affidavit and subsequent proceedings by commission see Matter of Bischoff, 80 N. Y. App. Div. 326, 80 N. Y. Suppl. 917.

62. Owing's Case, 1 Bland (Md.) 370, 17 Am. Dec. 311; *In re* Clifford, 57 N. J. Eq. 14, 41 Atl. 356; *In re* Chattin, 16 N. J. Eq. 496; *Ex p.* Tomlinson, 1 Ves. & B. 57, 12 Rev. Rep. 191, 35 Eng. Reprint 22.

To inform his mind as to the propriety of issuing a commission, the chancellor may send physicians to visit the party and may consult with them in private. Morgan's Case, 3 Bland (Md.) 332; *Ex p.* Persse, 1 Molloy 219.

In Pennsylvania, although the law only provides for a commission to ascertain whether one charged with crime is a lunatic, it is not error to issue a commission to inquire into the lunacy of a person alleged to be insane, although the better practice would be to make the inquiry in the mode prescribed by Act (1836), § 51, which requires the court to hear and determine the question of insanity in the case of one imprisoned on civil process. Shenango Tp. *v.* Wayne Tp., 34 Pa. St. 184.

63. *In re* Watson, 31 La. Ann. 757 (a commission not being asked for by a relative of the party); *In re* Lindsley, 43 N. J. Eq. 9, 10 Atl. 549; Moffit *v.* Witherspoon, 32 N. C. 185; Com. *v.* Schneider, 59 Pa. St. 328; *In re* Cope, 7 Pa. Co. Ct. 406.

The Pennsylvania act of June 25, 1895, applies only where the subject of the proceeding has become or is "weak in mind"; where the condition is one of mental disease, either mania or dementia, the proceeding is under the act of June 13, 1836. *In re* Wood, 10 Pa. Dist. 374.

64. *In re* Cope, 7 Pa. Co. Ct. 406.

65. Malin *v.* Malin, 2 Johns. Ch. (N. Y.) 238; Matter of Barker, 2 Johns. Ch. (N. Y.) 232; Com. *v.* Schneider, 59 Pa. St. 328; *In re* J. B., 1 Myl. & C. 538, 40 Eng. Reprint 482; *Ex p.* Tomlinson, 1 Ves. & B. 57, 12 Rev. Rep. 191, 35 Eng. Reprint 22. And see *In re* Watson, 31 La. Ann. 757.

commission may issue to determine the sanity of an infant the same as in other cases.[66]

2. Who May Institute Proceedings. The proceedings may be instituted by a relative of the alleged lunatic,[67] or his legal guardian, if he has one;[68] but in the absence of enabling statutory provisions,[69] a mere stranger cannot sue out a commission, or be made a party to the proceedings.[70]

3. Notice and Appearance. Under the early English practice, notice of the commission in lunacy was not given as a matter of right to the party alleged to be insane, the proceedings being *ex parte* and not conclusive and the party having a right to traverse them; but on application notice might issue;[71] and since the general orders in lunacy of Nov. 7, 1853, an alleged lunatic is entitled to notice of proceedings as a matter of right.[72] In the United States, whatever the form of the proceedings for determining the direct issue of insanity, even though these be by an inquisition which the party may traverse, and whether or not the statute provides in terms for notice, it is said that "so important a proceeding as that of declaring a party a lunatic, and taking charge of his person and estate, should not be consummated without personal notice,"[73] and this view is sanctioned by the great weight of authority.[74] It is frequently required that notice

66. Francklyn *v.* Sprague, 121 U. S. 215, 7 S. Ct. 951, 30 L. ed. 936; Halse's Case [*cited* in *Ex p.* Southcote, Ambl. 111, 27 Eng. Reprint 71, 2 Ves. 401, 403, 28 Eng. Reprint 256]. A commission may issue against a minor without a guardian. *In re* Chattin, 16 N. J. Eq. 496.

67. See Insane Hospital *v.* Belgrade, 35 Me. 497.

The wife is a relative and entitled to institute proceedings (Insane Hospital *v.* Belgrade, 35 Me. 497), but in prosecuting the petition she must act through her next friend (Campbell *v.* Campbell, 39 Ala. 312).

Relation by marriage.— Where the right to sue out an inquisition is given by statute to a "relation by marriage," this intends only one who, because of the marriage, would be entitled to take the estate of the alleged lunatic under the statute of distribution. Com. *v.* Metz, 17 Pa. Co. Ct. 541.

68. *Ex p.* Rosenberg, 1 Leg. Gaz. (Pa.) 49.

69. Soules *v.* Robinson, (Ind. App. 1901) 60 N. E. 726; Jessup *v.* Jessup, 7 Ind. App. 573, 34 N. E. 1017; Cox *v.* Osage County, 103 Mo. 385, 15 S. W. 763.

70. *In re* Covenhoven, 1 N. J. Eq. 19.

Poor district.— Under the Pennsylvania act of June 13, 1836, proceedings cannot be instituted on petition of a poor district without proof that the relatives by blood or marriage of the alleged lunatic declined or refused to make the petition. *In re* Madden, 13 Pa. Dist. 658, 12 Luz. Leg. Reg. 38.

71. Shelford Lun. 101. See also *Ex p.* Hall, 7 Ves. Jr. 261, 32 Eng. Reprint 106; Rex *v.* Daly, 1 Ves. 269, 27 Eng. Reprint 1025.

In Canada it was held that notice of a motion to declare a person insane without a commission should be served on the lunatic personally if practicable without danger to his bodily or mental health, and that a physician other than the physician of the asylum where the party was confined should examine into his condition to determine whether service could be made on him. *In re* Mein, 2 Ch. Chamb. (U. C.) 429. And see *Re* Newman, 2 Ch. Chamb. (U. C.) 390.

72. Pope Lun. 55. So in Canada. *Re* McNulty, 13 Grant Ch. (U. C.) 463; *In re* Miller, 1 Ch. Chamb. (U. C.) 215.

73. *Ex p.* Dozier, 4 Baxt. (Tenn.) 81.

74. *Alabama.*— Molton *v.* Henderson, 62 Ala. 426.

California.— McGee *v.* Hayes, 127 Cal. 336, 59 Pac. 767, 78 Am. St. Rep. 57.

Connecticut.— Sears *v.* Terry, 26 Conn. 273.

Georgia.— Morton *v.* Sims, 64 Ga. 298, in the absence of notice to relatives or guardian *ad litem*.

Illinois.— Eddy *v.* People, 15 Ill. 386.

Maine.— Holman *v.* Holman, 80 Me. 139, 13 Atl. 576.

Missouri.— *In re* Marquis, 85 Mo. 615; Dutcher *v.* Hill, 29 Mo. 271, 77 Am. Dec. 572.

New Jersey.— *In re* Whitenack, 3 N. J. Eq. 252.

New York.— *In re* Blewitt, 131 N. Y. 541, 30 N. E. 587; Matter of Russell, 1 Barb. Ch. 38.

Pennsylvania.— Hetrick's Case, 23 Pa. Co. Ct. 522; May's Case, 10 Pa. Co. Ct. 283; *Ex p.* Isaacs, 1 Leg. Gaz. 17.

Vermont.— Shumway *v.* Shumway, 2 Vt. 339.

West Virginia.— Evans *v.* Johnson, 39 W. Va. 299, 19 S. E. 623, 45 Am. St. Rep. 912, 23 L. R. A. 737.

United States.— Smith *v.* Burlingame, 22 Fed. Cas. No. 13,017, 4 Mason 121, under Rhode Island statute.

See 27 Cent. Dig. tit. "Insane Persons," § 21.

Contra.— Martin *v.* Motsinger, 130 Ind. 555, 30 N. E. 523; Medlock *v.* Cogburn, 1 Rich. Eq. (S. C.) 477.

An ex parte inquisition is invalid (Stafford *v.* Stafford, 1 Mart. (La.) 551), even

must be served on the alleged lunatic's relatives, friends, guardian *ad litem*, or others.[75] In many states it is held that notice is a jurisdictional requisite of a

where no notice is required (Martin *v.* Hotsinger, 130 Ind. 555, 30 N. E. 523).

If the alleged lunatic is not present in court, want of notice to him renders the judgment void on direct attack (Arrington *v.* Arrington, 32 Ark. 674; Taylor *v.* Moore, 112 Ky. 330, 65 S. W. 612, 23 Ky. L. Rep. 1572), and this is so even though his personal presence has been dispensed with by the oath of two physicians as provided by statute (Stewart *v.* Taylor, 111 Ky. 247, 63 S. W. 783, 23 Ky. L. Rep. 577).

Although the party is not a resident of the state in which the commission issues, the court may require notice. Matter of Petit, 2 Paige (N. Y.) 174.

Presumption of notice.— On collateral attack it will be presumed that the court acquired jurisdiction of the person of the alleged incompetent, although the record does not show notice or appearance. Soules *v.* Robinson, 158 Ind. 97, 62 N. E. 999, 92 Am. St. Rep. 301 [*reversing* (App. 1901) 60 N. E. 726]; Gillespie *v.* Hauenstein, 72 Miss. 838, 17 So. 602; Gridley *v.* St. Francis Xavier College, 137 N. Y. 327, 33 N. E. 321; Willis *v.* Willis, 12 Pa. St. 159. *Contra*, McCurry *v.* Hooper, 12 Ala. 823, 46 Am. Dec. 280; Hathaway *v.* Clark, 5 Pick. (Mass.) 490.

Sufficiency of notice see Fore *v.* Fore, 44 Ala. 478; McGee *v.* Hayes, 127 Cal. 336, 59 Pac. 767, 78 Am. St. Rep. 57; Kelly *v.* Gardner, 76 S. W. 531, 25 Ky. L. Rep. 924; Oster *v.* Meyer, 112 Ky. 181, 67 S. W. 851, 23 Ky. L. Rep. 2455; Germon *v.* Dubois, 23 La. Ann. 26; Segur *v.* Pellerin, 16 La. 63; Gridley *v.* St. Francis Xavier College, 137 N. Y. 327, 33 N. E. 321; *In re* Blewitt, 131 N. Y. 541, 30 N. E. 587; Matter of Russell, 1 Barb. Ch. (N. Y.) 38; *In re* Lanwarne, 46 L. T. Rep. N. S. 668, 30 Wkly. Rep. 759.

Dispensing with notice.— Although in cases of confirmed and dangerous madness notice may be dispensed with, an order of court should be obtained dispensing with it. *In re* Vanauken, 10 N. J. Eq. 186. If notice is dispensed with, the reasons therefor must be fully spread upon the record. *In re* Marquis, 85 Mo. 615; Dutcher *v.* Hill, 29 Mo. 271, 77 Am. Dec. 572; State *v.* Jackson, 93 Mo. App. 516, 67 S. W. 880. The failure of the court to require notice to be given to the husband, wife, or one or more of the relatives of the lunatic, where sufficient reasons for dispensing therewith are not set forth in the petition or accompanying affidavit, does not deprive it of jurisdiction over the matter, but is a simple irregularity which may be cured or disregarded; and it is sufficient if, upon the hearing of a motion made by the alleged lunatic to set aside the order appointing the commission, all the parties interested have an opportunity to be heard. *In re* Demelt, 27 Hun (N. Y.) 480. Although the statute provides that production of the party in court may be dispensed with if the court is satisfied that he cannot be produced without injury to his health, it is still necessary that process be served on him in order to give the court jurisdiction. Jessup *v.* Jessup, 7 Ind. App. 573, 34 N. E. 1017. N. Y. Code Civ. Proc. § 2325, requiring notice to be given to the husband or wife of the party, or to one or more relatives, or to an officer named, unless reasons are shown for dispensing with it, does not do away with the necessity of notice to the party himself. *In re* Blewitt, 131 N. Y. 541, 30 N. E. 587, *semble*.

Subsequent notice after adjournments.— Where the party has due notice of the original proceedings and attends thereon and resists the application, and the case is adjourned from time to time, he is not entitled to further notice before passing a decree in the case. Davison *v.* Johonnot, 7 Metc. (Mass.) 388, 41 Am. Dec. 448.

Right to object to want of notice.— One who alleges that he is interested in lunacy proceedings by virtue of the fact that the alleged lunatic had transferred to him certain securities within the time overreached by the finding of lunacy cannot object to want of notice of the inquisition to the lunatic. Huidekoper's Case, 28 Pa. Co. Ct. 394.

A recital in a finding and judgment that "due notice" was given is sufficient, if nothing appears to show that the notice was defective. Crow *v.* Meyersieck, 88 Mo. 411.

Amendment of record.— Where, on the application for the appointment of a guardian of an imbecile, a judgment is entered finding imbecility and appointing the guardian, but omitting to show notice to such imbecile, the omission may be supplied by an order *nunc pro tunc*, even after the term. *In re* Dickson, 10 Ohio Dec. (Reprint) 6, 18 Cinc. L. Bul. 37, Ohio Prob. 118.

75. **In Georgia** notice must be given to the three nearest adult relatives of the alleged lunatic; if the three nearest relatives are themselves petitioners for the appointment of a guardian, notice should be given to three of the next nearest relatives; if there are no adult relatives within the state except petitioners, then the ordinary should either require notice to be given to the alleged lunatic himself or designate by order a guardian *ad litem* to receive the notice for him. Morton *v.* Sims, 64 Ga. 298.

In Maine, where proceedings may begin by written complaint addressed to the municipal officers of a town, notice to one of such officers is sufficient (Gray *v.* Houlton, 65 Me. 521), and the town need not be notified (Insane Hospital *v.* Belgrade, 35 Me. 497).

In Michigan both the alleged lunatic and his next of kin must have notice of the hearing, but the proceedings will not be void merely because notice is not given to nonresidents, or to the guardian of a minor heir,

valid inquisition of lunacy, and that the inquisition may accordingly be attacked in a collateral proceeding for want of notice;[76] but there are cases to the contrary.[77] It has been held that notice cannot be waived;[78] but want of notice is generally deemed cured where the party appears and contests the proceedings;[79] and an appearance of the party has been held to be a waiver of all irregularities in the proceedings.[80]

the minor himself being served with notice, and competent to understand it. Munger *v.* Kalamazoo County Prob. Judge, 86 Mich. 363, 49 N. W. 47. A brother of an alleged incompetent person who holds a mortgage belonging to the incompetent under an unrevoked power of attorney must be notified of an application for an appointment of a guardian for the incompetent. Partello *v.* Holton, 79 Mich. 372, 44 N. W. 619.

In New York the jurisdiction in lunacy of the county judge does not depend upon notice to all the next of kin of the party where there is no suggestion that he has suffered by want of such notice. *In re* Cook, 3 Silv. Sup. 2, 6 N. Y. Suppl. 720. Under Code Civ. Proc. § 2325, when the application for the appointment of a committee is made by the husband or wife of the party, notice to a relative need not be given. Matter of Parke, 15 Misc. 662, 37 N. Y. Suppl. 1067, 25 N. Y. Civ. Proc. 196.

In Pennsylvania, Act June 13, 1836, § 6, requiring notice either to the party or to some near relatives or friends not concerned in the application, is not complied with when only relatives known to be hostile to the party are present at the hearing and none others were notified (Matter of Hinchman, Brightly 181 note, 7 Pa. L. J. 268); and a notice served upon one who is a friend of the alleged lunatic but a stranger to the proceedings is insufficient (Com. *v.* Groh, 10 Pa. Co. Ct. 557). The act is mandatory in its requirement of notice to the party or to some other persons named, although it is discretionary with the court to decide whether notice other than to the party is necessary; but it is said that, when practicable, notice should be required to some of the next of kin or friends of the party. Brooks' Estate, 24 Pa. Super. Ct. 430.

In Utah all persons interested in the proceeding are to be notified in such manner as the probate court shall order, and the order must specify the manner in which notice is to be given. Moshy *v.* Gisborn, 17 Utah 257, 54 Pac. 121.

76. Molton *v.* Henderson, 62 Ala. 426; McCurry *v.* Hooper, 12 Ala. 823, 46 Am. Dec. 280; Behrensmeyer *v.* Kreitz, 135 Ill. 591, 26 N. E. 704; *In re* Wellman, 3 Kan. App. 100, 45 Pac. 726; Hathaway *v.* Clark, 5 Pick. (Mass.) 490.

If the alleged lunatic is not present in court, want of notice to him renders the inquisition void on collateral attack. Arnett *v.* Owens, 65 S. W. 151, 23 Ky. L. Rep. 1409.

77. Jordan *v.* Dickson, 10 Ohio Dec. (Reprint) 332, 20 Cinc. L. Bul. 360; Rogers *v.* Walker, 6 Pa. St. 371, 47 Am. Dec. 470.

Estoppel to attack.— Inquisition of lunacy cannot be objected to in a collateral proceeding as void for want of notice to the alleged lunatic after he has applied to the court to be relieved from the custody of the guardian appointed under the inquisition, on the ground that he has been restored to reason. Dutcher *v.* Hill, 2 Mo. 271, 77 Am. Dec. 572.

78. McGee *v.* Hayes, 127 Cal. 336, 59 Pac. 767, 78 Am. St. Rep. 57; Allen *v.* Barnwell, 120 Ga. 537, 48 S. E. 176; Yeomans *v.* Williams, 117 Ga. 800, 45 S. E. 73, holding that the required notice to the adult relatives of the party cannot be waived by them.

Waiver by appeal.— By executing a supersedeas bond and appealing to the circuit court from a judgment of the county court appointing a committee for a person found to be incompetent, the alleged lunatic waives invalidity of the process in the county court. Hendricks *v.* Settle, 107 Ky. 344, 53 S. W. 1051, 21 Ky. L. Rep. 1058. Although proceedings commenced before a clerk of the superior court for the appointment of a guardian for an alleged lunatic are void for want of notice, yet where the alleged lunatic appeals to the superior court, that court acquires jurisdiction to determine his incompetency and appoint a guardian. *In re* Anderson, 132 N. C. 243, 43 S. E. 609.

79. Nyce *v.* Hamilton, 90 Ind. 417; Hutts *v.* Hutts, 62 Ind. 214; Lackey *v.* Lackey, 8 B. Mon. (Ky.) 107; *In re* Blewitt, 131 N. Y. 541, 30 N. E. 587; *In re* Demelt, 27 Hun (N. Y.) 480; Huidekoper's Case, 28 Pa. Co. Ct. 394. *Contra,* McGee *v.* Hayes, 127 Cal. 336, 59 Pac. 767, 78 Am. St. Rep. 57; Morton *v.* Sims, 64 Ga. 298; North *v.* Joslin, 59 Mich. 624, 26 N. W. 810; *In re* Whitenack, 3 N. J. Eq. 252.

This is especially true on collateral attack. Crow *v.* Meyersieck, 88 Mo. 411; Jordan *v.* Dickson, 10 Ohio Dec. (Reprint) 332, 20 Cinc. L. Bul. 360; Rogers *v.* Walker, 6 Pa. St. 371, 47 Am. Dec. 470.

Appearance by counsel.— The appearance of a lunatic by attorney is sufficient, it not being claimed that the appearance was unauthorized; and even an unauthorized appearance by the alleged lunatic in the circuit court is binding on the lunatic until set aside. An alleged lunatic cannot, on appeal from the decree of lunacy wherein he was represented by counsel, claim that he was incompetent to employ counsel. The prosecuting attorney is unauthorized to represent a lunatic in lunacy proceedings. Martin *v.* Motsinger, 130 Ind. 555, 30 N. E. 523. *Compare* Morton *v.* Sims, 64 Ga. 298.

80. *In re* Lincoln, 1 Brewst. (Pa.) 392; Hambright's Estate, 10 Lanc. L. Rev. (Pa.) 161.

4. Death of Party Pending Proceedings. Proceedings to have a party declared a lunatic abate on his death.[81]

5. Provisional Orders as to Person or Property of Party. The court may make provisional interlocutory orders, pending lunacy proceedings, to protect the party's person[82] or property,[83] or to provide for his support pending the proceedings,[84] or to allow him the means of defending the inquisition.[85] It has been held that lunacy proceedings are "pending," within this rule, as soon as the complaint is filed, although process has not been served.[86] Affidavits upon which the lunacy proceedings are founded may be used in aid of an application for a provisional order;[87] but counter affidavits negativing the sworn allegations of the applicant will not be received.[88] Such a provisional order cannot coexist with an order prohibiting the prosecution of the lunacy proceedings.[89]

6. Hearing or Trial. Unless the proceeding is otherwise regulated by statute,[90] when a commission in lunacy issuing out of chancery is to be executed, the commissioners issue their precept to the sheriff requiring him to summon a jury of the county to come before them at a certain time and place to inquire upon oath into the matters and things which shall be given them in

81. Gensemer's Estate, 170 Pa. St. 96, 32 Atl. 561; Bartholomew's Appeal, 134 Pa. St. 227, 19 Atl. 847; Posey *v.* Posey, 113 Tenn. 588, 83 S. W. 1.

However, the court may still apportion costs. Matter of Lofthouse, 3 N. Y. App. Div. 139, 38 N. Y. Suppl. 39; *In re* Russell, 1 C. Pl. (Pa.) 34. *Contra*, Bartholomew's Appeal, 134 Pa. St. 227, 19 Atl. 847.

82. *In re* Harris, 7 Del. Ch. 42, 28 Atl. 329; State *v.* King, 113 La. 905, 37 So. 871; Owing's Case, 1 Bland (Md.) 370, 17 Am. Dec. 311; *In re* Lawler, Ir. R. 8 Eq. 506.

An order for the temporary detention of a person whom it is sought to have committed to an asylum is not void because it does not recite the affidavit of a physician that the party is insane. Porter *v.* Rich, 70 Conn. 235, 39 Atl. 169, 39 L. R. A. 353.

However, unless there is danger to the public or to the alleged lunatic or his estate, he should not be in duress pending the investigation. Com. *v.* Kirkbride, 2 Brewst. (Pa.) 419.

83. *Delaware.*— *In re* Harris, 7 Del. Ch. 42, 28 Atl. 329.

Kentucky.— Nailor *v.* Nailor, 4 Dana 339.

Louisiana.— State *v.* King, 113 La. 905, 37 So. 871.

Maryland.— Owing's Case, 1 Bland 290.

New Jersey.— *In re* Dey, 9 N. J. Eq. 181.

New York.— Matter of Wendell, 1 Johns. Ch. 600.

England.— *In re* Fountain, 37 Ch. D. 609, 57 L. J. Ch. 465, 59 L. T. Rep. N. S. 76; Matter of Heli, 3 Atk. 635, 26 Eng. Reprint 1165; *In re* Lawler, Ir. R. 8 Eq. 506.

See 27 Cent. Dig. tit. "Insane Persons," § 25.

The court may appoint a receiver of the alleged lunatic's property *pendente lite*. *In re* Hybart, 119 N. C. 359, 25 S. E. 963; Seddinger's Appeal, 177 Pa. St. 359, 35 Atl. 722; *In re* Kenton, 5 Binn. (Pa.) 613. And see *In re* Brown, [1894] 3 Ch. 412, 63 L. J. Ch. 729, 71 L. T. Rep. N. S. 365, 7 Reports 580, 43 Wkly. Rep. 175.

The court may make an order to restrain waste on the real estate of the lunatic. Matter of Hallock, 7 Johns. Ch. (N. Y.) 24. See also *In re* Chinnery, 6 Ir. Ch. 469, 1 J. & L. 90.

Where lunacy proceedings are begun in the wrong county a preliminary injunction to protect the alleged lunatic's property will nevertheless remain until plaintiff has had an opportunity to proceed in the proper jurisdiction. Pringle *v.* Wilkes-Barre Second Nat. Bank, 10 Pa. Dist. 674, 10 Kulp 312.

Evidence justifying order see *In re* Harris, 7 Del. Ch. 42, 28 Atl. 329.

It is a contempt of the court for a person to interfere with the property of a lunatic, etc., after he is informed of the institution of proceedings to declare his incompetency. L'Amoureux *v.* Crosby, 2 Paige (N. Y.) 422.

Expiration of order for receiver.— An order made by a master in lunacy under English Lunacy Act (1890), § 116, subs. 1 (c), appointing a receiver and manager of the property of a person of unsound mind not so found, who at the date of the order was "lawfully detained" under a reception order, does not necessarily come to an end when the reception order expires and the person to whom it refers ceases to be lawfully detained; but a further order of the court is required to discharge it, and the court will not make such order unless satisfied that the person in question is no longer subject to the delusions which may have led to the detention. *In re* B. A. S., [1898] 2 Ch. 392, 67 L. J. Ch. 453, 78 L. T. Rep. N. S. 638.

84. Nailor *v.* Nailor, 4 Dana (Ky.) 339.

85. Nailor *v.* Nailor, 4 Dana (Ky.) 339.

86. Porter *v.* Ritch, 70 Conn. 235, 39 Atl. 169, 39 L. R. A. 353.

87. *In re* Harris, 7 Del. Ch. 42, 28 Atl. 329

88. *In re* Harris, 7 Del. Ch. 42, 28 Atl. 329.

89. *In re* Lawler, Ir. R. 8 Eq. 506.

90. Laughinghouse *v.* Laughinghouse, 38 Ala. 257; State *v.* Baird, 47 Mo. 301; Pringle *v.* Wilkes-Barre Second Nat. Bank, 10 Pa. Dist. 674, 10 Kulp 312.

charge.[91] The commission must have a return-day named therein.[92] A commission to ascertain the lunacy of a non-resident cannot be executed out of the state.[93] The court or commissioners and jury have a right to examine the party and to compel those having him in charge to produce him.[94] The court is not, however, confined to a trial by inspection and examination of the person but may admit other

91. Matter of Wager, 6 Paige (N. Y.) 11. And see *In re* Bischoff, 80 N. Y. App. Div. 326, 80 N. Y. Suppl. 917.

This is substantially the English practice. Shelford Lun. 95.

Eligibility of commissioners.— Under a statute which provides that one of the commissioners appointed to examine an alleged insane person "shall be a physician," the physician must be one who has been licensed as such by the state board of physicians. Norwood *v.* Hardy, 17 Ga. 595.

Number of commissioners.— Under the act regulating proceedings de lunatico inquirendo, which requires the commission to be directed to eighteen persons, any twelve of whom shall execute it, the report of the commission is not vitiated by the fact that thirteen of the members act thereon. Field *v.* Lucas, 21 Ga. 447, 69 Am. Dec. 465.

The commission is subject to the direction of the court as to the manner in which it shall proceed. Matter of Baird, 8 N. Y. St. 493.

Practice in regard to jury.— The number of jurors is not limited to twelve. *In re* Comfort, 63 N. J. Eq. 377, 53 Atl. 133. If twelve out of a greater number concur, the verdict will be sufficient (*Ex p.* Wragg, 5 Ves. Jr. 450, 31 Eng. Reprint 677); but where proceedings are begun before a greater number of jurors than is necessary, it is irregular to continue them before a part of the jury only (Tebout's Case, 9 Abb. Pr. (N. Y.) 211). If one juror refuses to sign the report, this is equivalent to a disagreement. Marple's Case, 15 Pa. Co. Ct. 310. Where the statute prescribes a jury of six, but on appeal trial was had in the circuit court before a jury of twelve, according to the practice in that court, this was held not to be error. Neely *v.* Shephard, 190 Ill. 637, 60 N. E. 922. An inquisition was held to be not irregular because tried before a jury consisting in part of constables. *In re* Comfort, 63 N. J. Eq. 377, 53 Atl. 133. Where the probate judge, being authorized by statute to call in two others to sit with him as a jury, called in three, this was held not to make the resulting commitment void. State *v.* Kilbourne, 68 Minn. 320, 71 N. W. 396. The consent of counsel that the commissioners may be present with the jury while considering their finding is not a consent to their giving directions in the nature of a charge, in his absence. *In re* Kennedy, 55 N. J. Eq. 636, 38 Atl. 419. After a commissioner appointed to inquire into the alleged lunacy of a person issued his precept to the sheriff to summon the necessary jury, which the sheriff returned duly executed, the proceedings were stayed by the order of the court. It was held that on the termination of the stay the commissioner might obtain an order from the court directing him to issue his precept to the sheriff requiring him to notify the jurors previously summoned to attend before the commissioner at a certain time and place. *In re* Dunn, 14 N. Y. Suppl 14. Right to trial by jury and objections to jury see JURIES. Submission by chancellor to jury of issue of insanity see *supra*, I, D. Compensation of jurors see JURIES.

Evidence may be heard on depositions under the Pennsylvania act of June 13, 1836, without the appointment of a master, if due notice has been given the committee and next of kin. *Ex p.* Thompson, 17 Montg. Co. Rep. (Pa.) 183.

Return of evidence.— The evidence taken before a jury sitting under a commission of lunacy need not be taken in writing and returned with the inquisition. *In re* Covenhoven, 1 N. J. Eq. 19. See, however, Davis *v.* Norvell, 87 Tenn. 36, 9 S. W. 193.

Scope of inquiry.—In some jurisdictions the adjudication as to lunacy is limited to the fact as it exists at the time of the inquiry. Matter of Cook, 3 Silv. Sup. (N. Y.) 2, 6 N. Y. Suppl. 720; *In re* Danby, 30 Ch. D. 320, 55 L. J. Ch. 583, 53 L. T. Rep. N. S. 850, 34 Wkly. Rep. 125 [*disapproving In re* Sottomaior, L. R. 9 Ch. 677].

That the infant children of petitioner were day by day brought before the jury, and appeals as from them and in their behalf made to the jury, is no ground for exception. *In re* Dey, 9 N. J. Eq. 181.

92. *In re* Lincoln, 1 Brewst. (Pa.) 392; *Ex p.* Plank, 5 Pa. L. J. Rep. 35. See, however, State *v.* Third Judicial Dist. Ct., 17 Mont. 411, 43 Pac. 385.

Waiver.— The objection that no return-day is named in the commission is waived by the party's appearance before the jury and going to hearing, with counsel. *In re* Lincoln, 1 Brewst. (Pa.) 392.

93. Matter of Petit, 2 Paige (N. Y.) 174.

94. Jones *v.* Van Gundy, 16 Ind. 490; Matter of Russell, 1 Barb. Ch. (N. Y.) 38; *Ex p.* Southcot, Ambl. 111, 27 Eng. Reprint 71, 2 Ves. 401, 28 Eng. Reprint 256. And see *In re* Covenhoven, 1 N. J. Eq. 19; Fentress *v.* Fentress, 7 Heisk. (Tenn.) 428. See, however, Fiscus *v.* Turner, 125 Ind. 46, 24 N. E. 662.

Disobedience of an order to produce the party is a contempt. Wenman's Case, 1 P. Wms. 701, 24 Eng. Reprint 578. And see Matter of Russell, 1 Barb. Ch. (N. Y.) 38.

The fact that a part only of the jurors visit the party for personal examination of him does not render the proceedings invalid. De Hart *v.* Condit, 51 N. J. Eq. 611, 28 Atl. 603, 40 Am. St. Rep. 545.

evidence.[95] In some states it is necessary that the alleged lunatic be present at the trial,[96] except in certain cases when his presence may be dispensed with.[97] The party has a right to be present at the execution of the commission,[98] and make his defense by counsel,[99] and examine witnesses,[1] and testify in his own behalf.[2] The inquiry in some states is simply as to whether there is incompetency at the time of executing the commission.[3] One who has instituted a proceeding to declare another of unsound mind and to procure the appointment of a guardian is not entitled to dismiss the proceeding at his pleasure.[4]

7. Return and Finding. The commission, verdict, and return must be consistent on the face of the record, and so the verdict must be in the words of the commission or equivalent words.[5] The return should find distinctly in order to be valid that the party is *insanæ mentis*, either by the use of the generic words "unsound mind," or the specific words "lunatic," "idiot," or the like, or the defining words of the statute which confers the jurisdiction.[6] Whatever the statutory definitions of incapacity in different jurisdictions, in all cases in which the procedure is in the form of inquisition and jury finding thereon, it is essential that the verdict or finding shall define, substantially in accordance with the statutory definition, the disability with which the party is found to be

95. Brigham *v.* Brigham, 12 Mass. 505.

96. McAfee *v.* Com., 3 B. Mon. (Ky.) 305; *In re* Isaacs, 1 Leg. Gaz. (Pa.) 17; Reeves' Appeal, 6 Wash. 271, 33 Pac. 615.

The proceedings are not void merely because the party was not present. *In re* Child, 16 N. J. Eq. 498; Bethea *v.* McLennon, 23 N. C. 523.

97. Hutts *v.* Hutts, 62 Ind. 214; Oster *v.* Meyer, 113 Ky. 181, 67 S. W. 851, 23 Ky. L. Rep. 2455; Campbell's Case, 2 Bland (Md.) 209, 20 Am. Dec. 360.

In Missouri the reason why such attendance was not required must be fully specified in the record. State *v.* Jackson, 93 Mo. App. 516, 67 S. W. 880.

Presumption of regularity.— Although the record of a lunacy proceeding does not show whether the alleged lunatic was produced in court or whether on account of probable injury to his health his personal appearance was dispensed with, yet on collateral attack it will be presumed that he was either produced in court or that his personal appearance was duly dispensed with. Hutts *v.* Hutts, 62 Ind. 214.

98. Fiscus *v.* Turner, 125 Ind. 46, 24 N. E. 662; *In re* Vanauken, 10 N. J. Eq. 186; *Ex p.* Ogle, 15 Ves. Jr. 112, 33 Eng. Reprint 697; *Ex p.* Cranmer, 12 Ves. Jr. 455, 33 Eng. Reprint 168.

The presence of the party's friends at trial, they not being guilty of any misconduct, is permissible. Alvord *v.* Alvord, 109 Iowa 113, 80 N. W. 306.

99. *In re* Vanauken, 10 N. J. Eq. 186: Royston's Appeal, 53 Wis. 612, 11 N. W. 36.

In Indiana, when the party is incapable of desiring a defense, this is to be conducted by the prosecuting attorney. Chase *v.* Chase, 163 Ind. 178, 71 N. E. 485. See, however, Martin *v.* Motsinger, 130 Ind. 555, 30 N. E. 523.

Counsel for the alleged lunatic may sum up his case. Matter of Dickie, 7 Abb. N. Cas. (N. Y.) 417; Matter of Church, 64 How. Pr. (N. Y.) 393.

1. Segur *v.* Pellerin, 16 La. 63; Stafford *v.* Stafford, 1 Mart. N. S. (La.) 551; *In re* Vanauken, 10 N. J. Eq. 186.

2. Matter of Dickie, 7 Abb. N. Cas. (N. Y.) 417.

Testimony must be upon oath. *In re* Rush, 53 N. Y. Suppl. 581.

3. Matter of Schrodt, 32 Misc. (N. Y.) 540, 67 N. Y. Suppl. 244.

But the error of a finding extending back for a period of seven months before the inquisition will not prevent a confirmation of the other findings in the case, including the finding of incompetency at the date of the inquisition. Matter of Grote, 31 Misc. (N. Y.) 99, 64 N. Y. Suppl. 1035.

4. Galbreath *v.* Black, 89 Ind. 300.

5. *In re* Lindsley, 43 N. J. Eq. 9, 10 Atl. 549.

Form of return. — Formerly the return found that the party was either *lunaticus*, *non compos mentis*, or *insanæ mentis*, or, after proceedings were had in English, "of unsound mind." The technical definition of these words being insisted on, a return embodying any inconsistency in the use of such terms would be quashed. Matter of Bruges, 1 Myl. & C. 278, 13 Eng. Ch. 278, 40 Eng. Reprint 381; Shelford Lun. 108–111. Latterly it is held that words of definition used in their strict sense inconsistently with others may be treated as surplusage, and the use of them will not be reason for quashing the inquisition. *In re* Hill, 31 N. J. Eq. 203; Bethea *v.* McLennon, 23 N. C. 523; *Ex p.* Wragg, 5 Ves. Jr. 450, 31 Eng. Reprint 677.

6. Armstrong *v.* Short, 8 N. C. 11; Matter of Rogers, 9 Abb. N. Cas. (N. Y.) 141; Matter of Mason, 3 Edw. (N. Y.) 380; Matter of Morgan, 7 Paige (N. Y.) 236; Com. *v.* Reeves, 140 Pa. St. 258, 21 Atl. 315; *In re* Beaumont, 1 Whart. (Pa.) 52, 29 Am. Dec. 33; *Ex p.* Barnsley, 3 Atk. 168, 26 Eng. Reprint 899; Sherwood *v.* Sanderson, Coop.

affected.[7] In some states the return must state of what the lunatic's estate consists;[8] and in some cases the jury are required to return the inquisition under their hands and seals.[9] It has been held that a statute providing that the proceedings of the county court shall be kept and entered in separate books is only directory; and an order or judgment of said court in an inquisition of lunacy, entered in any of its books of record, is valid.[10]

8. Setting Aside Proceedings,[11] and Ordering New Commission or New Trial. Inquisition proceedings may be set aside,[12] and in a proper case a new commission or a new trial be ordered, where the original proceedings were void,[13] irregular,[14]

108, 35 Eng. Reprint 496, 19 Ves. Jr. 280, 13 Rev. Rep. 193, 34 Eng. Reprint 521.

7. *Kansas.*— Caple *v.* Drew, 70 Kan. 136, 78 Pac. 427.

Kentucky.— See Menifee *v.* Ends, 97 Ky. 388, 30 S. W. 881, 17 Ky. L. Rep. 280.

New Jersey.— *In re* Dayton, (Ch. 1904) 57 Atl. 871; Lindsley's Case, 44 N. J. Eq. 564, 15 Atl. 1, 6 Am. St. Rep. 913.

New York.— *In re* Clark, 175 N. Y. 139, 67 N. E. 212; Matter of Clark, 57 N. Y. App. Div. 5, 67 N. Y. Suppl. 631; Matter of Wendel, 33 Misc. 532, 68 N. Y. Suppl. 904.

Pennsylvania.— Com. *v.* Reeves, 140 Pa. St. 258, 21 Atl. 315; *In re* Heft, 8 Pa. Dist. 99.

See 27 Cent. Dig. tit. "Insane Persons," § 30.

Returns held sufficient see Munger *v.* Kalamazoo County Prob. Judge, 86 Mich. 363, 49 N. W. 47; Norton *v.* Sherman, 58 Mich. 549, 25 N. W. 510; *In re* James, 35 N. J. Eq. 58; *In re* Mason, 1 Barb. (N. Y.) 436. The return of an inquest of lunacy may be sufficient, although it does not recite the words of the statute. Smith *v.* Burnham, 1 Aik. (Vt.) 84.

The form of the return to the inquisition is important only in so far as it is necessary to satisfy the court that a case exists for the exercise of the discretion confided in it in regard to the care and custody of insane persons. *In re* Mason, 1 Barb. (N. Y.) 436. A defect of form in the precept or return will not render it a nullity, if the insanity of the party is made the subject of inquiry, and the selectmen make a distinct return as to that point. Kimball *v.* Fisk, 39 N. H. 110, 75 Am. Dec. 213.

8. Menifee *v.* Ends, 97 Ky. 388, 30 S. W. 881, 17 Ky. L. Rep. 280.

9. Lackey *v.* Lackey, 8 B. Mon. (Ky.) 107, holding, however, that this does not apply to inquests held in open court. And see Territory *v.* Sheriff, 6 Mont. 297, 12 Pac. 662.

10. Sprigg *v.* Stump, 8 Fed. 207, 7 Sawy. 280.

11. Restoration to sanity: As divesting court of jurisdiction to sell property see *infra*, IV, K, 1. As ground for discharge of: Former lunatic from asylum see *infra*, III, A, 6. Guardian see *infra*, II, D, 2, c.

12. *In re* Marquis, 85 Mo. 615.

On return of the inquisition the court may quash the commission and the inquisition, without putting the alleged lunatic to the expense and delay of a traverse. *In re* Milne, 11 Grant Ch. (U. C.) 153.

13. Matter of O'Brien, 1 Ashm. (Pa.) 82 (holding that where commissions have been issued and committees appointed successively in two courts of coördinate jurisdiction, the court which acted last will, on application of the committee first appointed, supersede the second commission and vacate its own proceedings as being void); Walker *v.* Russell, 10 S. C. 82.

Estoppel.— One who allows nearly six years to elapse without objection after having been adjudged an incompetent is not entitled to a writ of mandamus to compel the setting aside of such adjudication on jurisdictional grounds, thus affecting injuriously those who have acted in reliance upon the jurisdiction; but he is entitled to a hearing on the merits, as that he has since become competent. Coot *v.* Willett, 93 Mich. 304, 53 N. W. 395.

14. Asbury *v.* Frisz, 148 Ind. 513, 47 N. E. 328; *In re* Jewell, 26 N. J. Eq. 298 (holding that the refusal to adjourn an inquisition for a reasonable time so that the alleged lunatic may make the necessary preparation for trial, where he has been prevented from making that preparation by the day named in the notice, is good ground for setting aside the inquisition); *In re* Collins, 18 N. J. Eq. 253 (holding that the substitution of a new commissioner for one appointed by the chancellor, without his approval or confirmation, none of the commissioners being a master of the court, is a sufficient irregularity to set aside the inquisition, when the objection is taken at or before the motion for confirmation).

If substantial justice has been done, a new trial will not be ordered, although the proceedings were irregular. *Ex p.* Glen, 4 Desauss. (S. C.) 546.

Where there is no doubt of the fact of insanity, the proceedings will not be set aside for mere irregularity. Matter of Clark, 57 N. Y. App. Div. 5, 67 N. Y. Suppl. 631; *In re* Lamoree, 32 Barb. (N. Y.) 122; Matter of Rogers, 9 Abb. N. Cas. (N. Y.) 141.

The fact that only part of the jurors visited the alleged lunatic for personal examination of him is not sufficient ground for setting aside the inquisition. De Hart *v.* Condit, 51 N. J. Eq. 611, 28 Atl. 603, 40 Am. St. Rep. 545.

Although the affidavits do not come quite up to the rules and practice in a court of chancery, an inquisition under a writ de lunatico inquirendo by which the affidavits are entirely confirmed will not on that ac-

or unsatisfactory;[15] and the same is true where material error occurred in the admission or rejection of evidence,[16] where unavoidable casualty or misfortune has prevented the party from defending,[17] where the jury have disagreed,[18] or where, after the lapse of a reasonable time, an evident change appears in the subject's condition,[19] or where the original commission has been abandoned.[20] The refusal to grant a commission is no bar to an application for another commission on matters since appearing.[21] A person not interested in the proceedings cannot move to quash the inquisition.[22] A petition by an adjudged lunatic to set aside the adjudication will be dismissed, where he refuses to submit himself to the jurisdiction of the court.[23] In some states, on the granting of a new trial, the procedure may be changed from a trial before a commissioner and a jury to a trial by jury at a trial term of the court.[24]

9. Traverse of Inquisition. Where, as formerly in England, the proceedings

count be quashed. *In re* Dey, 9 N. J. Eq. 181.

Right to object to refusal to vacate proceedings.— The lunatic's motion to vacate proceedings adjudging him insane having asked for alternative relief, namely, that the proceedings should be vacated or that petitioner be permitted to traverse the inquisition, which latter relief or a relief more favorable was awarded him, he cannot object to the refusal of the court to vacate the proceedings. *In re* Blewitt, 131 N. Y. 541, 30 N. E. 587 [*affirming* 61 Hun 568, 16 N. Y. Suppl. 305].

15. Stevens *v.* Shannahan, 160 Ill. 330, 43 N. E. 350 (error of jury); *In re* Collins, 18 N. J. Eq. 253 (mistake of jury as to their duty); Tebout's Case, 9 Abb. Pr. (N. Y.) 211 (bias of jury or previously formed opinion); Matter of Shaul, 40 How. Pr. (N. Y.) 204; Matter of Lasher, 2 Barb. Ch. (N. Y.) 97 (error of jury).

Weight and sufficiency of evidence.— If a finding is against the weight of the evidence, the court may set it aside (*In re* Lindsley, (N. J. Ch. 1886) 3 Atl. 515; Lawrence's Case, 28 N. J. Eq. 331; *In re* Collins, 18 N. J. Eq. 253. *Contra, In re* Weaver, 116 Pa. St. 225, 9 Atl. 323), or refuse to confirm it (Matter of Preston, 43 Misc. (N. Y.) 550, 89 N. Y. Suppl. 517). If the testimony upon the question of insanity is contradictory, the finding will not be set aside as against the weight of the evidence, there being testimony which, if believed, would justify the finding. *In re* Davenport, 63 N. J. Eq. 342, 50 Atl. 441. In passing on the issue of interdiction the court will not be controlled by the opinions of experts, but, giving to them a respectful consideration, and to every fact bearing on the issue its legitimate weight, will form and decree its own conclusions; and the court will guard with peculiar care the alleged lunatic from interference springing from a hostile motive, and will weigh with more precision the evidence of lunacy if the person by whom it is tendered appears to be actuated by a sinister intent. Francke *v.* His Wife, 29 La. Ann. 302.

Where no change has taken place in the situation of the lunatic since the execution of the commission, it must be a very clear case of mistake or of undue prejudice on the part of the jury to authorize the court to discharge an inquisition. Matter of Russell, 1 Barb. Ch. (N. Y.) 38.

Necessity of traverse or feigned issue.— The court of chancery has a right to discharge an inquisition of lunacy upon a mere examination of the alleged lunatic in connection with the evidence produced before the jury, without subjecting him to the expense of an issue or a traverse, where, upon such an examination and evidence, it is evident that the jury erred. Matter of Russell, 1 Barb. Ch. (N. Y.) 38. But the court of common pleas cannot set aside an inquisition finding the fact of lunacy on the ground that the evidence is insufficient to sustain the finding; the only method by which the validity of the inquisition on such question may be contested is by a traverse and trial by jury. *In re* Weaver, 116 Pa. St. 225, 9 Atl. 323.

The court will not discharge an inquisition upon ex parte affidavits contradicting the finding of the jury, without any excuse being given by the party for neglecting to produce the deponents as witnesses before the commissioners. Matter of Russell, 1 Barb. Ch. (N. Y.) 38.

16. *In re* Dey, 9 N. J. Eq. 181; Miller's Case, 27 Pa. Co. Ct. 49.

Harmless error.— A court of chancery will not interfere with the verdict of a competent jury under a writ de lunatico inquirendo, even when unlawful evidence was adduced before them, provided that it appears that such evidence did not probably influence them in finding their verdict. *In re* Dey, 9 N. J. Eq. 181.

17. McCormick *v.* McCormick, 109 Iowa 700, 81 N. W. 172.

18. Marple's Case, 15 Pa. Co. Ct. 310.

19. *In re* Collins, 18 N. J. Eq. 253; *Ex p.* Atkinson, Jac. 333, 4 Eng. Ch. 333, 37 Eng. Reprint 877. And see Matter of Russell, 1 Barb. Ch. (N. Y.) 38.

20. Gensemer's Estate, 170 Pa. St. 102, 32 Atl. 563.

21. Donegal's Case, 2 Ves. 407, 28 Eng. Reprint 260.

22. *In re* Covenhoven, 1 N. J. Eq. 19.

23. *In re* Blewitt, 18 N. Y. Suppl. 607.

24. Matter of Mason, 51 Hun (N. Y.) 138, 4 N. Y. Suppl. 664.

upon the inquisition were *ex parte*, the alleged lunatic had the right to traverse the inquisition,[25] and it is held that any party in interest has the same right.[26] But generally in the United States, since the proceedings are not *ex parte* and the refusal of the traverse cannot abridge the constitutional rights of the party, it is within the discretion of the court to permit a traverse or feigned issue in lunacy proceedings,[27] the court being first satisfied, when the application for the traverse is in the name of the lunatic, that he is capable of understanding the nature and object of the application;[28] and when the traverse is petitioned for, whether by the alleged lunatic or another, the party is to be brought into court or examined by a master in order that the court may be satisfied that the application is made in good faith and that the traverse is desired by him.[29] Upon a traverse being granted, the court will proceed to inform its conscience, either by inspection of the lunatic or by ordering an issue to be made up for trial in a court of law, the latter being the most usual and proper course.[30] It is discretionary with the court,

25. *In re* Covenhoven, 1 N. J. Eq. 19; Walker *v.* Russell, 10 S. C. 82; Medlock *v.* Cogburn, 1 Rich. Eq. (S. C.) 477; Matter of Bridge, Cr. & Ph. 338, 6 Jur. 69, 10 L. J. Ch. 404 18 Eng. Ch. 338, 41 Eng. Reprint 520; Matter of Cumming, 1 De G. M. & G. 537, 16 Jur. N. S. 483, 21 L. J. Ch. 753, 50 Eng. Ch. 413, 42 Eng. Reprint 660.

26. Nailor *v.* Nailor, 4 Dana (Ky.) 339; Matter of Cumming, 1 De G. M. & G. 537, 16 Jur. N. S. 483, 21 L. J. Ch. 753, 50 Eng. Ch. 413, 42 Eng. Reprint 660.

Who may file traverse.—The right has been said to be within the discretion of the court to grant (Yauger *v.* Skinner, 14 N. J. Eq. 389); but a mere stranger has no right to traverse the inquisition (Rorback *v.* Van Blascom, 20 N. J. Eq. 461; *In re* Covenhoven, 1 N. J. Eq. 19; Armstrong *v.* Short, 8 N. C. 11). A brother of the party has been permitted to traverse (*In re* Dickinson, 1 Wkly. Notes Cas. (Pa.) 96), and so has one claiming as grantee of the lunatic whose title was overreached by the finding of insanity (Matter of Christie, 5 Paige (N. Y.) 242). By statute in Pennsylvania "every person aggrieved" may traverse the inquisition, and this has been held to include the lunatic's grantee whose title was affected by the finding (Wolf's Case, 195 Pa. St. 438, 46 Atl. 72; Davidson's Appeal, 170 Pa. St. 96, 32 Atl. 561; *In re* Gumaer, 5 Lanc. L. Rev. (Pa.) 73); and the wife of the lunatic is a party aggrieved, although the validity of her marriage will be affected by the determination of the case (Com. *v.* Pitcairn, 204 Pa. St. 514, 54 Atl. 328).

Death of lunatic.— Where a person, after having been adjudged a lunatic, conveys land, his subsequent death is no bar to a subsequent traverse of the inquisition by the grantee. *In re* Owens, 18 N. Y. Suppl. 850 [*affirmed* in 19 N. Y. Suppl. 472].

27. *In re* Lindsley, 46 N. J. Eq. 358, 19 Atl. 726; *In re* Vanauken, 10 N. J. Eq. 186; Matter of Sweeney, 81 N. Y. App. Div. 231, 81 N. Y. Suppl. 47; *In re* Mason, 1 Barb. (N. Y.) 436; Matter of Clapp, 20 How. Pr. (N. Y.) 385.

Although it is not a matter of course to allow a feigned issue in a lunacy case when asked for, it is proper to allow it whenever the court entertains a reasonable doubt as to the justice of the finding of the jury upon the execution of the commission. De Hart *v.* Condit, 51 N. J. Eq. 611, 28 Atl. 603, 40 Am. St. Rep. 545; Matter of Russell, 1 Barb. Ch. (N. Y.) 38.

Laches.— In proceedings by traverse of the inquisition (Hambright's Case, 10 Lanc. L. Rev. (Pa.) 161) the court may in its discretion allow it to be filed after the expiration of the time within which, under the statute, it may be filed as matter of right (*In re* Benedict, 3 Kulp (Pa.) 96); but a traverse will not be allowed on petition of respondent filed two years after the verdict and without satisfactory explanation of the delay in making the application (*In re* Slater, 33 Pittsb. Leg. J. (Pa.) 144).

The court of probate has no jurisdiction in cases of lunacy to give relief to persons aggrieved by the inquisition by granting leave to traverse the same. Such jurisdiction is in the court of common pleas. Walker *v.* Russell, 10 S. C. 82.

28. Matter of Christie, 5 Paige (N. Y.) 242.

In Indiana it is held that one having been found insane by a jury and a guardian appointed for him, he could not, upon his own application or that of his next friend, have the proceedings upon the inquisition opened, but that the inquiry must be instituted by some other person. Meharry *v.* Meharry, 59 Ind. 257.

29. *In re* Davenport, 63 N. J. Eq. 342, 50 Atl. 441; Matter of Christie, 5 Paige (N. Y.) 242; *Ex p.* Southcote, Ambl. 111, 27 Eng. Reprint 71, 2 Ves. 401, 28 Eng. Reprint 256; Matter of Heli, 3 Atk. 635, 26 Eng. Reprint 1165.

30. Matter of Wendell, 1 Johns. Ch. (N. Y.) 600.

Upon the trial of the traverse the issue is whether the party's mind is so deranged as to render him incapable of conducting himself with safety to himself and others, and of managing his affairs. Com. *v.* Meredith, 14 Wkly. Notes Cas. (Pa.) 188.

Right to open and close.— On the hearing of a traverse, as the burden of proof is on

pending the traverse, to let the original proceedings stand until the inquiry is finished.[31]

10. Conclusiveness and Effect of Adjudication — a. Adjudication of Sanity. A finding in lunacy proceedings that a person was sane on a particular day does not, in an action on a note subsequently made by that person wherein he pleads insanity as a defense, cast on him the burden of showing that he became insane after that day, since it is immaterial when the insanity commenced, the issue being whether the person was insane when he executed the note;[32] nor is a verdict finding that a person was sane when a petition for a guardian was filed and that he is sane at the time of the verdict conclusive evidence of his sanity in the interval.[33]

b. Adjudication of Insanity[34] — (I) *As Between Parties to Proceeding.* An inquisition of lunacy is conclusive proof, as between the parties to it, of the existence of insanity at the time of the finding;[35] but not of the existence of insanity at a later time.[36]

(II) *As Against Strangers to Proceeding* — (A) *Insanity at Time of Finding.* It has been both asserted[37] and denied[38] that an inquisition finding a person insane at the time thereof is conclusive, as against third persons, of the fact of insanity at that time.

(B) *Insanity Before Time of Finding.* An inquisition finding that a person is insane at the time of the finding has been held to afford no evidence that he was insane at a previous time.[39] In any event it raises no presumption of insanity at an earlier date.[40] If, however, the inquisition overreaches an anterior period of time during which the person is found to have been insane, it raises a presumption of the existence of insanity during that period,[41] which presumption,

the commonwealth and the presumption is in favor of sanity, relator has the right to open and close. Com. *v.* Haskell, 2 Brewst. (Pa.) 491.

31. *In re* Blewitt, 131 N. Y. 541, 30 N. E. 587 [*affirming* 61 Hun 568, 16 N. Y. Suppl. 305].

32. Emery *v.* Hoyt, 46 Ill. 258.

33. Gibson *v.* Soper, 6 Gray (Mass.) 279, 66 Am. Dec. 414, holding, however, that the verdict is admissible in evidence in an action to recover land conveyed by the alleged lunatic in the interval.

34. Conclusiveness as to incapacity: To commit crime see Criminal Law, 12 Cyc. 497. To contract marriage see Marriage. To make will see Wills.

Conclusiveness of: Appointment of guardian see *infra*, II, D, 1, d, (V), (B). Commitment to asylum see *infra*, III, A, 4. Inquisition of habitual drunkenness see Drunkards, 14 Cyc. 1098 *et seq.*

Effect as dissolving partnership see Partnership.

35. Lucas *v.* Pearsons, 23 Ga. 267; Soules *v.* Robinson, 15 Ind. 97, 62 N. E. 999, 92 Am. St. Rep. 301.

The petitioner in lunacy proceedings is not a party to the record in such sense that he is bound by the finding and precluded from showing that the alleged lunatic was sane at a particular time within the period overreached by the finding, in an action to set aside a conveyance executed by the alleged lunatic to petitioner within that period. Hughes *v.* Jones, 116 N. Y. 67, 22 N. E. 446, 15 Am. St. Rep. 386, 5 L. R. A. 637.

36. Lucas *v.* Pearsons, 23 Ga. 267.

37. Clark *v.* Trail, 1 Metc. (Ky.) 35 (*semble*); Southern Tier Masonic Relief Assoc. *v.* Laudenbach, 5 N. Y. Suppl. 901.

38. Hill *v.* Day, 34 N. J. Eq. 150.

An adjudication of insanity is evidence of the mental condition of the subject at the time of the adjudication, even if not conclusive. Small *v.* Champeny, 102 Wis. 61, 78 N. W. 407.

39. Shirley *v.* Taylor, 5 B. Mon. (Ky.) 99; Hébert's Succession, 33 La. Ann. 1099; Southern Tier Masonic Relief Assoc. *v.* Laudenbach, 5 N. Y. Suppl. 901; Rippy *v.* Gant, 39 N. C. 443. See, however Small *v.* Champeny, 102 Wis. 61, 78 N. W. 407.

40. Lilly *v.* Waggoner, 27 Ill. 395; Smali *v.* Champeny, 102 Wis. 61, 78 N. W. 407. *Contra*, Koons *v.* Benscoter, 2 Kulp (Pa.) 451.

41. Hughes *v.* Jones, 116 N. Y. 67, 22 N. E. 446, 15 Am. St. Rep. 386, 5 L. R. A. 637; Van Deusen *v.* Sweet, 51 N. Y. 378; Hicks *v.* Marshal, 8 Hun (N. Y.) 327; Goodell *v.* Harrington, 3 Thomps. & C. (N. Y.) 345; Davidson's Appeal, 170 Pa. St. 96, 32 Atl. 561; Noel *v.* Karper, 53 Pa. St. 97; *In re* Gangwere, 14 Pa. St. 417, 53 Am. Dec. 554; Rogers *v.* Walker, 6 Pa. St. 371, 47 Am. Dec. 470; Gresh *v.* Tamany, 2 Kulp (Pa.) 453. See, however, Tozer *v.* Saturlee, 3 Grant (Pa.) 162.

In any event the inquisition is admissible as evidence of his incompetency during the period mentioned. Hopson *v.* Boyd, 6 B. Mon. (Ky.) 296; Yauger *v.* Skinner, 14 N. J. Eq. 389; Osterhout *v.* Shoemaker, 3 Hill

however, is not conclusive but may be rebutted by evidence of sanity during the period overreached by the finding.[42]

(c) *Insanity After Time of Finding.*[43] An adjudication of insanity substitutes for the general presumption of sanity a presumption of insanity, and accordingly the party's subsequent civil acts are *prima facie* invalid.[44] This presumption is rebuttable at common law;[45] but in some states, by force of statute, evidence of sanity at a later time during the continuance of the adjudication is not admissible, and civil acts transacted by the lunatic before he has been adjudged to be restored to reason or allowed by court to resume control of

(N. Y.) 513; Hart *v.* Deamer, 6 Wend. (N. Y.) 497; Hutchinson *v.* Sandt, 4 Rawle (Pa.) 234, 26 Am. Dec. 127; Sergeson *v.* Sealey, 2 Atk. 412, 9 Mod. 370, 26 Eng. Reprint 648; Faulder *v.* Silk, 3 Campb. 126, 13 Rev. Rep. 771.

42. *New Jersey.*—Aber *v.* Clark, 10 N. J. L. 217, 18 Am. Dec. 417; Mott *v.* Mott, 49 N. J. Eq. 192, 22 Atl. 997; Hill *v.* Day, 34 N. J. Eq. 150; Hunt *v.* Hunt, 13 N. J. Eq. 161.

New York.— Hughes *v.* Jones, 116 N. Y. 67, 22 N. E. 446, 15 Am. St. Rep. 386, 5 L. R. A. 637; Person *v.* Warren, 14 Barb. 488; Reals *v.* Weston, 28 Misc. 67, 59 N. Y. Suppl. 807; Hirsch *v.* Trainer, 3 Abb. N. Cas. 274; Matter of Patterson, 4 How. Pr. 34; Osterhout *v.* Shoemaker, 3 Hill 513; Hart *v.* Deamer, 6 Wend. 497; L'Amoureux *v.* Crosby, 2 Paige 422, 22 Am. Dec. 655.

North Carolina.— Christmas *v.* Mitchell, 38 N. C. 535.

Pennsylvania.— Kneedler's Appeal, 92 Pa. St. 428; Lancaster County Nat. Bank *v.* Moore, 78 Pa. St. 407, 21 Am. Rep. 24; Klohs *v.* Klohs, 61 Pa. St. 245; *In re* Gangwere, 14 Pa. St. 417, 53 Am. Dec. 554; Hutchinson *v.* Sandt, 4 Rawle 234, 26 Am. Dec. 127; Tozer *v.* Saturlee, 3 Grant 162; Draper's Estate, 26 Wkly. Notes Cas. 218.

South Carolina.— Knox *v.* Knox, 30 S. C. 377, 9 S. E. 353.

See 27 Cent. Dig. tit. "Insane Persons," § 36.

Weight of inquisition as evidence.— While an act done in a lucid interval by one who is subsequently found to be a lunatic is binding on him, the proof of the lucid interval in which it was done must be clear. *In re* Gangwere, 14 Pa. St. 417, 53 Am. Dec. 554. See, however, Hopson *v.* Boyd, 6 B. Mon. (Ky.) 296, where it is said that an inquisition is entitled to very slight consideration as evidence of past insanity within the period overreached by it, especially where it does not expressly find the party to be an idiot from birth.

Conclusiveness as to title to lunatic's lands. — The title to lands is not involved in lunacy proceedings, and consequently an inquisition overreaching an anterior period which finds that the title to lands conveyed by the lunatic within that period remains in him is of no effect as against the grantee. Hughes *v.* Jones, 116 N. Y. 67, 22 N. E. 446, 15 Am. St. Rep. 386, 5 L. R. A. 637.

Necessity of traverse. — A third person against whom a retrospective inquisition of lunacy is received in evidence may impugn the finding by contrary evidence without first pursuing the procedure technically called a "traverse of the inquisition." Den *v.* Clark, 10 N. J. L. 217, 18 Am. Dec. 417.

43. **Restoration to sanity** see *supra*, note 11.

44. *District of Columbia.*— Blandy *v.* Blandy, 20 App. Cas. 535.

Illinois.— Lilly *v.* Waggoner, 27 Ill. 395.

Kentucky.— Clark *v.* Trail, 1 Metc. 35.

Pennsylvania.— Noel *v.* Karper, 53 Pa. St. 97.

Texas. — Herndon *v.* Vick, 18 Tex. Civ. App. 583, 45 S. W. 852.

West Virginia. — Eakin *v.* Hawkins, 52 W. Va. 124, 43 S. E. 211.

See 27 Cent. Dig. tit. "Insane Persons," § 36.

In any event the inquisition is admissible as evidence of insanity at a later time. McCreight *v.* Aikin, Rice (S. C.) 56; Small *v.* Champeny, 102 Wis. 61, 78 N. W. 407.

45. Field *v.* Lucas, 21 Ga. 447, 68 Am. Dec. 465; Clark *v.* Trail, 1 Metc. (Ky.) 35; Parker *v.* Davis, 53 N. C. 460; Armstrong *v.* Short, 8 N. C. 11.

Rebuttal of presumption.— It requires the clearest and most satisfactory proof to show that a person was of sound mind at a time subsequent to an inquisition declaring him insane. Field *v.* Lucas, 21 Ga. 447, 68 Am. Dec. 465. Where a man who has been adjudged of unsound mind afterward marries a woman with whom he lives for more than thirty years in the relation of husband and wife, the presumption of continued insanity will not prevail as against the presumption in favor of the legality of the marriage. Castor *v.* Davis, 120 Ind. 231, 22 N. E. 110. A presumption of continuance of lunacy arising from adjudication thereof may be rebutted by parol; there is no rule of evidence which requires another inquest to be found. Clark *v.* Trail, 1 Metc. (Ky.) 35. Where a person was adjudged a lunatic and a committee appointed to take charge of his estate, and five years later the committee resigned and the resignation was accepted by the court, and no other committee was appointed for ten years, it was held upon a bill to annul a deed made in the ten-year interval that the adjudication afforded no presumption of continuing insanity. Miller *v.* Rutledge, 82 Va. 863, 1 S. E. 202.

his property are void[46] and cannot be ratified either by his guardian or by himself on restoration to reason.[47]

(III) *FOREIGN ADJUDICATION.* An inquisition of lunacy found in a sister state[48] or a foreign country[49] is entitled to the same faith and credit as it receives in the state or country where it was found.

(IV) *COLLATERAL ATTACK.*[50] If jurisdiction of the subject-matter and of the person of the alleged lunatic attached in lunacy proceedings, the inquisition cannot be attacked collaterally for errors or irregularities in the proceedings.[51] But if lunacy proceedings are void on their face they are subject to collateral attack,[52]

46. *Indiana.*— Redden *v.* Baker, 86 Ind. 191; Musselman *v.* Cravens, 47 Ind. 1.

Kentucky.— Pearl *v.* McDowell, 3 J. J. Marsh. 658, 20 Am. Dec. 199.

Minnesota.— See Knox *v.* Haug, 48 Minn. 58, 50 N. W. 934.

Missouri.—Kiehne *v.* Wessell, 53 Mo. App. 667.

New York.—Carter *v.* Beckwith, 128 N. Y. 312, 28 N. E. 582; Wallace *v.* Frey, 27 Misc. 29, 56 N. Y. Suppl. 1051; Matter of Patterson, 4 How. Pr. 34.

Ohio.— Jordan *v.* Dickson, 10 Ohio Dec. (Reprint) 147, 19 Cinc. L. Bul. 64 [*distinguishing* Messenger *v.* Bliss, 35 Ohio St. 587].

Pennsylvania.— Klohs *v.* Klohs, 61 Pa. St. 245.

Texas.— Elston *v.* Jasper, 45 Tex. 409.

United States.— Cockrill *v.* Cockrill, 79 Fed. 143, Missouri statute.

See 27 Cent. Dig. tit. "Insane Persons," § 36.

See, however, Topeka Water-Supply Co. *v.* Root, 56 Kan. 187, 42 Pac. 715; Walker *v.* Coates, 5 Kan. App. 209, 47 Pac. 158, as to the necessity for a formal adjudication of restoration to reason.

There must have been a formal adjudication of insanity else the rule stated in the text does not apply. Wilder *v.* Weakley, 34 Ind. 181; Crouse *v.* Holman, 19 Ind. 30. However, the other party to the contract cannot object that the verdict of the jury of inquiry was informal and did not warrant the appointment of a guardian. Kiehne *v.* Wessell, 53 Mo. App. 667.

If no guardian was appointed for the lunatic the rule stated in the text does not apply. Matter of Newark Fidelity Trust Co., 27 Misc. (N. Y.) 118, 57 N. Y. Suppl. 361; Southern Tier Masonic Relief Assoc. *v.* Laudenbach, 5 N. Y. Suppl. 901. And see Topeka Water-Supply Co. *v.* Root, 56 Kan. 187, 42 Pac. 715; Walker *v.* Coates, 5 Kan. App. 209, 47 Pac. 158. *Contra*, Kiehne *v.* Wessell, 53 Mo. App. 667.

If the guardian is discharged, the rule stated in the text does not apply, although the adjudication of insanity remains in force. Willwerth *v.* Leonard, 156 Mass. 277, 31 N. E. 299. *Contra*, Redden *v.* Baker, 86 Ind. 191.

Effect of appeal from inquisition.— Where a person is adjudged a lunatic in a county court and a guardian is appointed for him, and he appeals to the district court and thereby suspends the operation of the judgment and prevents the guardian from qualifying, and in the district court he is again adjudged insane and the guardian is appointed and qualifies, the judgment of the county court is only *prima facie* evidence of his incompetency as against one to whom he conveyed lands in the interim between the taking of the appeal and the decision thereon. Grimes *v.* Shaw, 2 Tex. Civ. App. 20, 21 S. W. 718.

Consent of guardian to transaction with ward.— Those having notice of an adjudication of lunacy cannot trade with the ward without limitation even with the consent of the guardian. Coleman *v.* Farrar, 112 Mo. 54, 20 S. W. 441. The deed of one under guardianship as an insane person is wholly void, and the guardian's assent to it gives it no validity. Rannells *v.* Gerner, 80 Mo. 474 [*reversing* 9 Mo. App. 506].

Retrospectiveness of adjudication of restoration to reason.— A contract of a lunatic made at a time when it was found by subsequent proceedings that he was in reality sane is valid, although made subsequent to the inquisition at which it was determined that he was insane. *In re* Johnston, 8 Wkly. Notes Cas. (Pa.) 439.

47. Musselman *v.* Cravens, 47 Ind. 1 (ratification by party on restoration to reason); Fitzhugh *v.* Wilcox, 12 Barb. (N. Y.) 235 (ratification by guardian).

48. Com. *v.* Kirkbride, 2 Brewst. (Pa.) 419, 7 Phila. 8; Herndon *v.* Vick, 18 Tex. Civ. App. 583, 45 S. W. 852. *Compare* Matter of Perkins, 2 Johns. Ch. (N. Y.) 124.

49. *Ex p.* Gillam, 2 Cox Ch. 193, 30 Eng. Reprint 89, 2 Ves. Jr. 587, 30 Eng. Reprint 790.

50. For want of notice see *supra*, II, C, 3.

51. Craft *v.* Simon, 118 Ala. 625, 24 So. 380; Frazer *v.* Frazer, 76 S. W. 546, 25 Ky. L. Rep. 882.

The presumption is in favor of the regularity of lunacy proceedings had in a court of record having jurisdiction of the subject-matter and of the person of the alleged lunatic. Bible *v.* Wisecarver, (Tenn. Ch. App. 1898) 50 S. W. 670.

A defective inquisition in which the selectmen actually found insanity is not void on collateral attack. Kimball *v.* Fisk, 39 N. H. 110, 75 Am. Dec. 213.

52. McGee *v.* Hayes, 127 Cal. 336, 59 Pac. 767, 78 Am. St. Rep. 57.

If the record does not show the jurisdictional facts, the adjudication of a county judge on an inquisition of lunacy is a nullity,

and as the jurisdiction in such proceedings is special and limited no presumption in favor of the jurisdiction will be indulged on collateral attack.[53] Members of an inquest cannot be permitted to explain away the legal effect or to contradict the tenor of the report in which they joined.[54]

11. REVIEW. The mode of reviewing a finding of lunacy which has been confirmed by the court out of which the commission issued is governed by statute and varies in the different states.[55] It has been held accordingly that the adjudication may be reviewed on appeal,[56] writ of error,[57] certiorari,[58] or action to review the proceedings.[59] An appeal does not lie from the refusal of the commissioners to entertain a motion for rehearing in a case where they have adjudged a person insane;[60] and the refusal of the court to issue a commission

since his court is one of limited or special jurisdiction. Taylor *v.* Moore, 112 Ky. 330, 65 S. W. 612, 23 Ky. L. Rep. 1572.

53. Sears *v.* Terry, 26 Conn. 273.

54. Hutchinson *v.* Sandt, 4 Rawle (Pa.) 234, 26 Am. Dec. 127.

55. See the statutes of the several states.

In New York trials de lunatico inquirendo are to be reviewed in like manner and with like effect as ordinary trials of fact. Matter of Williams, 24 N. Y. App. Div. 247, 48 N. Y. Suppl. 475.

56. *In re* Chudek, 118 Mich. 361, 76 N. W. 757; *In re* Kane, 12 Mont. 197, 29 Pac. 424; Shumway *v.* Shumway, 2 Vt. 339.

Appeal from inferior to superior court.— Generally where inquisitions in insanity are had in the courts of common law of inferior jurisdiction, an appeal will lie to the court of final jurisdiction. Ayers *v.* Mussetter, 46 Ill. 472; Cuneo *v.* Bessoni, 63 Ind. 524; McGinnis *v.* Com., 74 Pa. St. 245; Cooper *v.* Summers, 1 Sneed (Tenn.) 453. In North Carolina, however, there is no right of appeal to the superior court from the order of the county court on the petition of an alleged lunatic to have the verdict of the inquest in his case set aside. Ray *v.* Ray, 33 N. C. 357.

Effect of pendency of proceeding for adjudication of restoration to reason.— The right of appeal is not affected by the pendency of a proceeding by an insane person to have the fact of his restoration to capacity judicially determined. *In re* Kane, 12 Mont. 197, 29 Pac. 424.

Who may appeal.— A person who is adjudged insane may appeal. Cueno *v.* Bessoni, 63 Ind. 524; *In re* Kane, 12 Mont. 197, 29 Pac. 424. But a wife cannot appeal from a decree adjudging her husband insane. Gannon *v.* Doyle, 16 R. I. 726, 19 Atl. 331, 5 L. R. A. 359.

Appointment of commission on appeal.— In the absence of abuse in the proceedings in the district court adjudging a person insane, the supreme court on appeal has no authority to appoint a commission to try the question of appellant's insanity. *In re* Bresee, 82 Iowa 573, 48 N. W. 991.

Saving questions for review.— Service of a copy of a petition praying for a writ of inquisition will be deemed waived on appeal, where a notice of the time, place, and object of the inquisition was served, and no objection was made below that a copy of the petition was not served. Davis *v.* Norvell, 87 Tenn. 36, 9 S. W. 193.

Death of lunatic pending appeal.— Where, pending an appeal from a judgment affirming an inquisition of lunacy, the alleged lunatic dies, and the appeal is abated by the judgment of the higher court, the judgment below remains in full force. Thomasson *v.* Kercheval, 10 Humphr. (Tenn.) 322.

Record as limiting scope of review.— The court may try an application to declare one a lunatic in part by inspection; and having so tried the case, it being impossible to put such evidence in a bill of exceptions, and the judge below having certified that it was impossible to report the lunatic's answers to questions, the reviewing court will not attempt to examine the weight of the evidence, as it is evident that all the evidence is not in the bill. Davison *v.* Tipton, 9 Ohio Dec. (Reprint) 60, 10 Cinc. L. Bul. 321.

57. Shapter *v.* Pillar, 28 Colo. 209, 63 Pac. 302; Haines *v.* Cearlock, 95 Ill. App. 203; Coot *v.* Willett, 93 Mich. 304, 53 N. W. 395; Davis *v.* Novell, 87 Tenn. 36, 9 S. W. 193.

In Pennsylvania a traverse of an inquisition of lunacy is a common-law proceeding, in which error will lie. McGinnis *v.* Com., 74 Pa. St. 245. But error does not lie to an inquisition of the court of common pleas finding one a lunatic. *In re* Gest, 9 Serg. & R. 317.

58. Coot *v.* Willett, 93 Mich. 304, 53 N. W. 395.

59. Meharry *v.* Meharry, 59 Ind. 257, holding, however, that a person who has been declared insane and is under guardianship cannot in person or by next friend bring an action to review such proceedings; but such action must be brought by the committee or guardian of his estate.

The complaint must set out a complete record of such proceedings. Meharry *v.* Meharry, 59 Ind. 257.

The issue in legal effect is as to the validity of such proceedings; and a verdict that plaintiff is a person of sound mind and capable of managing his estate is not responsive. Meharry *v.* Meharry, 59 Ind. 257.

60. Wilson *v.* State, 66 Iowa 487, 24 N. W. 9, since the statutes do not authorize the commissioners to grant such a rehearing.

cannot be reviewed by a court of appellate jurisdiction, in the absence of a statute providing for such a review;[61] nor can a petitioner in a proceeding to have a person adjudged insane appeal from a judgment of sanity,[62] although costs are taxed against him.[63] A judgment of the common pleas quashing an inquisition of lunacy is revisable on certiorari, but not on writ of error.[64] An order directing a new trial after a verdict in favor of the alleged lunatic will not be reversed on appeal where the evidence is conflicting.[65]

12. Costs.[66] In the absence of statutory regulation,[67] the matter of the allowance of costs in original lunacy proceedings rests in the equitable discretion of the court having jurisdiction,[68] and the same rule obtains in respect of costs upon a traverse[69] or supersedeas[70] of the inquisition. Where there is a finding of insanity, the costs of the inquiry are ordinarily to be paid by the insane person or his estate, it being considered that these are in the nature of necessary expenses incurred for the benefit of the party and for which he or his estate is impliedly bound.[71] Where the proceedings result in a finding of sanity, costs will not be allowed as of course against the prosecutor, if the proceedings were commenced in good faith and for the supposed benefit of the alleged lunatic;[72] but where

61. *In re* Colvin, 3 Md. Ch. 258.

62. State *v.* Branyan, 30 Ind. App. 502, 66 N. E. 464; Studabaker *v.* Markley, 7 Ind. App. 368, 34 N. E. 606.

63. State *v.* Branyan, 30 Ind. App. 502, 66 N. E. 464.

In any event, leave of court being necessary in order to dismiss lunacy proceedings, it will be presumed on appeal where the record shows a dismissal by petitioner and a judgment for costs against him, that the court granted the leave to dismiss on the terms indicated by the judgment, and, no objection appearing on petitioner's part, that he assented thereto. Ruhlman *v.* Ruhlman, 110 Ind. 314, 11 N. E. 294.

64. Com. *v.* Beaumont, 4 Rawle (Pa.) 366.

65. *In re* Abbey, 2 Silv. Sup. (N. Y.) 420, 6 N. Y. Suppl. 437.

66. Costs generally see Costs.

67. See the statutes of the several states.

68. *In re* Beckwith, 3 Hun (N. Y.) 443; Matter of Root, 8 Paige (N. Y.) 625; Com. *v.* Reeves, 140 Pa. St. 258, 21 Atl. 315; *In re* Johns, 5 Pa. Dist. 775; *Re* Bullock, 55 L. T. Rep. N. S. 722, 35 Wkly. Rep. 109.

Apportionment.— The court may apportion costs among the parties interested in such proportion as the justice of the case may require. *In re* Clark, 22 Pa. St. 466. Death of party as affecting power of court to apportion costs see *supra,* page 1127, note 81.

Costs of opposing issuance of commission. — The court does not as a general rule allow the costs of an unsuccessful opposition to the issuing of a commission of lunacy; but costs may be allowed in the discretion of the court where the question of lunacy is doubtful. *In re* Conklin, 8 Paige (N. Y.) 450.

69. Matter of Clapp, 20 How. Pr. (N. Y.) 385; Matter of McLean, 6 Johns. Ch. (N. Y.) 440; Matter of Folger, 4 Johns. Ch. (N. Y.) 169; Com. *v.* Quinter, 2 Woodw. (Pa.) 377.

Formerly the English courts held that the costs of a traverse could not be paid out of the lunatic's property (Sherwood *v.* Sanderson, Coop. 108, 35 Eng. Reprint 496, 19 Ves. Jr. 280, 13 Rev. Rep. 193, 34 Eng. Reprint 521; *Ex p.* Loveday, 1 De G. M. & G. 275, 16 Jur. 95, 21 L. J. Ch. 231, 50 Eng. Ch. 212, 42 Eng. Reprint 558; *In re* Crosbie, 11 Ir. Ch. 432), but now under 25 & 26 Vict. c. 86, § 9, the chancellor, in any lunacy proceeding, may award costs to be paid by either party, or out of the lunatic's estate, or partly in one way and partly in another.

Apportionment.— If the traverse is instituted in good faith by a party other than the lunatic, although it is unsuccessful, costs may be awarded both to the committee of the lunatic and to the traversing party. Matter of Tracy, 1 Paige (N. Y.) 580; Matter of Van Cott, 1 Paige (N. Y.) 489.

70. Carter *v.* Beckwith, 11 N. Y. Suppl. 170.

71. Breaux *v.* Francke, 30 La. Ann. 336; Hallett *v.* Oakes, 1 Cush. (Mass.) 296; Wier *v.* Myers, 34 Pa. St. 377; *In re* Meares, 10 Ch. D. 552, 48 L. J. Ch. 190, 40 L. T. Rep. N. S. 111, 27 Wkly. Rep. 369; Williams *v.* Wentworth, 5 Beav. 325, 49 Eng. Reprint 603; Matter of F., 2 De G. J. & S. 89, 33 L. J. Ch. 333, 9 L. T. Rep. N. S. 698, 67 Eng. Ch. 71, 46 Eng. Reprint 308; Matter of Cumming, 5 De G. M. & G. 30, 18 Jur. 181, 23 L. J. Ch. 261, 2 Wkly. Rep. 248, 54 Eng. Ch. 26, 43 Eng. Reprint 780; Chester *v.* Rolfe, 4 De G. M. & G. 798, 2 Eq. Rep. 19, 18 Jur. 114, 53 Eng. Ch. 625, 43 Eng. Reprint 720; Stedman *v.* Hart, 18 Jur. 744, Kay 607, 23 L. J. Ch. 908, 2 Wkly. Rep. 462.

However, where a party who had obtained a grant of land from a lunatic, dated a few days before the inquisition was found, petitioned for an issue to try the question of lunacy, on the determination of the issue against him he was ordered to pay the costs of petition and proceedings thereon. Matter of Folger, 4 Johns. Ch. (N. Y.) 169.

72. *In re* White, 17 N. J. Eq. 274; *In re* McAdams, 19 Hun (N. Y.) 292; Matter of Giles, 11 Paige (N. Y.) 638; Matter of Arnhout, 1 Paige (N. Y.) 497; Brower *v.* Fisher,

proceedings are promoted without probable cause or maliciously, the prosecutor will be held liable for costs.[73] Where a commission of lunacy has issued out of chancery, the costs must be adjusted in that court;[74] and on the decision of an appeal from the county court to the circuit court, the adjustment of costs should be left to the county court.[75] Where an alias commission is awarded on a disagreement of the jury, the question of costs will not be adjudged before final decree on application of petitioner.[76] Commissioners' fees[77] and attorneys' fees[78] are proper items of costs; but expenses incurred before[79] or after[80] the inquest

4 Johns. Ch. (N. Y.) 441; Com. *v.* Quinter, 2 Woodw. (Pa.) 377; *In re* C., L. R. 10 Ch. 75; *In re* E. S., 4 Ch. D. 301; *In re* Milne, 11 Grant Ch. (U. C.) 153. See, however, Campbell *v.* Campbell, 39 Ala. 312.

In Indiana the statute provides that the costs of an unsuccessful application shall be taxed to petitioner. Galbreath *v.* Black, 89 Ind. 300; State *v.* Branyan, 30 Ind. App. 502, 66 N. E. 464.

The alleged lunatic may be charged with costs in Pennsylvania (Hassenplug's Appeal, 106 Pa. St. 527. But see Com. *v.* O'Shea, 10 Pa. Dist. 580; *In re* Johns, 5 Pa. Dist. 775) and England (*In re* Cathcart, [1893] 1 Ch. 466, 62 L. J. Ch. 320, 68 L. T. Rep. N. S. 358, 2 Reports 268, 41 Wkly. Rep. 277. See also *In re* Cathcart, [1892] 1 Ch. 549, 61 L. J. Ch. 99, 66 L. T. Rep. N. S. 9, 40 Wkly. Rep. 257), but not in New Jersey (*In re* Farrell, 51 N. J. Eq. 353, 27 Atl. 813) or New York (Sander *v.* Larner, 101 N. Y. App. Div. 167, 91 N. Y. Suppl. 428; Butler *v.* Larner, 91 N. Y. Suppl. 1089).

Where the committee of a lunatic obtained a feigned issue to try the question whether at the time of the execution by virtue of which a judgment was entered against the lunatic he was of unsound mind, and the issue was determined against the committee, a rule was granted that the committee pay to plaintiff in the judgment, besides the taxable costs of the feigned issue, counsel fees and all other necessary expenses. Hart *v.* Deamer, 6 Wend. (N. Y.) 537.

Where the court permits a dismissal on complainant's motion, it may award costs against complainant. Ruhlman *v.* Ruhlman, 110 Ind. 314, 11 N. E. 294.

Apportionment.— Where the jury do not find that respondent is a lunatic, but by reason of age, ignorance, and feebleness of mind and body deem her unfit to manage her estate judiciously, no committee should be appointed, and it is not an abuse of the court's discretion to divide the costs between relator and respondent. Com. *v.* Reeves, 140 Pa. St. 258, 21 Atl. 315.

A finding of lunacy is prima facie evidence that petitioner proceeded in good faith, although a jury subsequently, upon the trial of a feigned issue, finds the other way; and the costs of the first proceeding will not be assessed against petitioner. Matter of Giles, 11 Paige (N. Y.) 638.

73. *In re* White, 17 N. J. Eq. 274; *In re* Johns, 5 Pa. Dist. 775; Com. *v.* Bright, 29 Pittsb. Leg. J. N. S. (Pa.) 18; *In re* Welch, 108 Wis. 387, 84 N. W. 550.

74. Conover *v.* Conover, 15 N. J. L. 420; Com. *v.* Quinter, 2 Woodw. (Pa.) 377.

75. Barbo *v.* Rider, 67 Wis. 598, 31 N. W. 155.

76. Marple's Case, 15 Pa. Co. Ct. 310.

77. White *v.* Dallas County, 87 Iowa 563, 54 N. W. 368, holding that Miller Code Iowa, § 3825, which provides that the commissioners of insanity shall be allowed "at the rate of three dollars per day, each, for all the time actually employed in the duties of their office," does not limit the compensation to the hours in fact occupied, but to the days on which they render services; and they are entitled to full compensation whenever they perform services on a given day, regardless of the number of hours spent in such employment.

78. *In re* Heft, 8 Pa. Dist. 351, 22 Pa. Co. Ct. 534; Burns' Case, 6 Pa. Co. Ct. 159, both holding that the estate of one who has been found to be a lunatic is liable for the fees of counsel for the lunatic.

Petitioner is entitled to counsel fees. Brownlee *v.* Switzer, 49 Ind. 221; *In re* Heft, 8 Pa. Dist. 351, 22 Pa. Co. Ct. 534; *In re* Hogg, 17 Pa. Co. Ct. 509; Burns' Case, 6 Pa. Co. Ct. 159.

Necessity for attorney's services.— To justify the recovery of attorney's fees incurred in defending against lunacy proceedings in behalf of an insane client, it must appear that such services were reasonably necessary. McKee *v.* Purnell, 38 S. W. 705, 18 Ky. L. Rep. 879.

Contract for services.— The property of the ward cannot be bound for anything more than the reasonable value of the services rendered by an attorney in procuring a verdict of insanity and the appointment of a guardian, without regard to any contract which may have been made in relation thereto before the inquest by the person subsequently appointed guardian. State *v.* Newlin, 69 Ind. 108. So a solicitor employed to oppose a commission of lunacy against his client is not entitled to have his fees paid out of the client's estate on the ground of contract, where the jury, notwithstanding the opposition, find that the client was a lunatic when the solicitor was employed by him. Matter of Conklin, 8 Paige (N. Y.) 450. And a note executed by the insane person for such services cannot be enforced as a contract. McKee *v.* Purnell, 38 S. W. 705, 18 Ky. L. Rep. 879. See *infra*, IV, F, 5.

79. Streeper's Estate, 119 Pa. St. 178, 13 Atl. 72.

80. *In re* Hogg, 17 Pa. Co. Ct. 509.

are not generally allowable, items of costs being restricted to those incurred in the lunacy proceeding.

D. Guardianship[81] — **1. Appointment, Eligibility, and Qualification of Guardian** — **a. Persons For Whom Guardian May Be Appointed.** Generally speaking the test of whether a guardian should be appointed for the estate of a person is whether mental unsoundness exists to such a degree that he is incapable of conducting the ordinary affairs of life, so that to leave his property in his possession and control would render him liable to become the victim of his own folly or of the fraud of others.[82] It is not necessary in most states that the person should be an idiot or a lunatic in the strict sense of those terms;[83] but in some states the law is otherwise.[84] The fact that a person is married does not prevent the appointment of a guardian for him or her on the ground of insanity.[85]

b. Eligibility and Qualification — (i) *Who May Be Appointed.*[86] Any competent person may be appointed guardian of an insane person.[87] In choosing a guardian there is no rule of law which prefers relatives over strangers, or the reverse, but the court will do whatever is best for the lunatic.[88] If it appears that

81. Guardianship generally see Guardian and Ward.

82. *Georgia.*— Griffin *v.* Collins, 122 Ga. 102, 49 S. E. 827.

Illinois.— Snyder *v.* Snyder, 142 Ill. 60, 31 N. E. 303.

Indiana.— McCammon *v.* Cunningham, 108 Ind. 545, 9 N. E. 455.

Iowa.— McGibbons *v.* McGibbons, 119 Iowa 140, 93 N. W. 55; Emerick *v.* Emerick, 83 Iowa 411, 49 N. W. 1017, 13 L. R. A. 757.

Michigan.— Partello *v.* Holton, 79 Mich. 372, 44 N. W. 619.

New York.— In the Matter of Barker, 2 Johns. Ch. 232.

Ohio.— *In re* Tempest, 10 Ohio Dec. (Reprint) 502, 21 Cinc. L. Bul. 301, Ohio Prob. 200.

Pennsylvania.— See Bryden's Estate, 12 Luz. Leg. Reg. 221.

Washington.— *In re* Wetmore, 6 Wash. 271, 33 Pac. 615.

Wisconsin.— *In re* Streiff, 119 Wis. 566, 97 N. W. 189, 100 Am. St. Rep. 903.

See 27 Cent. Dig. tit. "Insane Persons," § 43.

In the case of an infant lunatic an ordinary guardian of his person or estate is all that is required, and it is only after he becomes of age that a committee is needed. Francklyn *v.* Sprague, 121 U. S. 215, 7 S. Ct. 951, 30 L. ed. 936.

83. McCammon *v.* Cunningham, 108 Ind. 545, 9 N. E. 455; Jackson *v.* Jackson, 37 Hun (N. Y.) 306.

84. Caple *v.* Drew, 70 Kan. 136, 78 Pac. 427; Fairfield *v.* Gullifer, 49 Me. 360, 77 Am. Dec. 265; Darling *v.* Bennet, 8 Mass. 129; Com. *v.* Reeves, 140 Pa. St. 258, 21 Atl. 315; *In re* Beaumont, 1 Whart. (Pa.) 52, 29 Am. Dec. 33.

In Kentucky the custody of the estates of persons incompetent to manage their estates is limited to those whose incompetency is due to mental unsoundness or imbecility, and the fact that a woman "is by reason of great age and physical infirmity unable to control and manage her estate and care for same" does not authorize guardianship. Taylor *v.* Moore, 112 Ky. 330, 65 S. W. 612, 23 Ky. L. Rep. 1572. See, however, Lackey *v.* Lackey, 8 B. Mon. 107.

85. *In re* Fegan, 45 Cal. 176; Gardner *v.* Maroney, 95 Ill. 552.

86. Reviewing referee's selection of guardian see *infra*, page 1143, note 21.

87. See cases cited *infra*, this note.

A woman is authorized by statute to act as guardian of her husband in Louisiana. *In re* Bothick, 43 La. Ann. 547, 9 So. 477.

A partner of the lunatic may, under special circumstances, be appointed committee of his estate. *In re* Millington, 2 Ir. Eq. 158.

A public administrator is not empowered *ex officio* to act as guardian of a lunatic in Missouri. State *v.* Holman, 96 Mo. App. 193, 68 S. W. 965.

Attorney representing adverse interest.— It is held improper to appoint as guardian of a lunatic having a life-estate one of the attorneys of the residuary legatees of the same estate. *In re* Van Beuren, 13 N. Y. Suppl. 261.

The court need not appoint petitioner for letters of guardianship. Halett *v.* Patrick, 49 Cal. 590; *In re* Colvin, 3 Md. Ch. 278.

Recommendation of petitioner or other persons in interest.— Although the committee is usually appointed on the nomination of him who sues out the commission of lunacy, yet a caveat may be entered against such an appointment; and if this be done the recommendations of parties interested will be considered, and proof taken, to aid the court in the selection; and, other things being equal, the rule is to appoint him who is recommended by the greatest number of those entitled to be heard. *In re* Colvin, 3 Md. Ch. 278. So if the next of kin of a lunatic unite in a petition, and name a proper person as committee, or give their consent in writing to the appointment of a particular person, it is usual to select such person. *In re* Lamoree, 32 Barb. (N. Y.) 122. See *infra*, II, D, 1, d, (I), (B).

Capacity of corporation to act as guardian see Corporations, 10 Cyc. 1142.

88. Muse *v.* Muse, 76 Miss. 372, 24 So. 168; Matter of Cook, 3 Silv. Sup. (N. Y.) 2, 6

the heirs at law or next of kin of the party are most likely to protect his property from loss, one of these will be appointed;[89] but it is discretionary with the court to appoint a stranger.[90] Where the lunatic is a married woman and her husband is a suitable person for the office of guardian, he is usually preferred for the office to a third person,[91] and the same consideration will favor the appointment of the wife as guardian of her insane husband.[92] The father of the lunatic, having the custody of his estate, will be preferred.[93] Generally a person non-resident in the state of the lunatic's domicile will not be appointed his guardian or committee;[94] but this rule does not obtain when there are substantial reasons for making such an appointment, as where a foreign guardian seeks to obtain appointment as guardian of his ward's property within the state, and no objection appears.[95]

(II) *QUALIFICATION.* The appointee is generally required to file a bond as security,[96] and in some states he must take an oath of office.[97]

N. Y. Suppl. 720; Matter of Page, 7 Daly (N. Y.) 155, 56 How. Pr. 100.

Prospective devisee.— The fact that petitioner for letters of guardianship is the principal beneficiary under a will made by the lunatic when sane does not entitle him to the appointment. *In re* Colvin, 3 Md. Ch. 278.

89. *In re* Colvin, 3 Md. Ch. 278; Matter of Livingston, 1 Johns. Ch. (N. Y.) 436.

Heirs or next of kin are not disqualified for appointment as his committee if the court or its officers, in the exercise of a sound judicial discretion, deem it proper to appoint them. Plummer *v.* Gibson, 59 N. J. Eq. 68, 45 Atl. 284; Matter of Page, 7 Daly (N. Y.) 155, 56 How. Pr. 100; *Ex p.* Richards, 2 Brev. (S. C.) 375. It was formerly otherwise in England. *Ex p.* Ludlow, 2 P. Wms. 635, 24 Eng. Reprint 893.

"Among collaterals applying for the guardianship, the nearest of kin by blood, if otherwise unobjectionable, shall be preferred." Ga. Civ. Code, § 2518. And see Armor *v.* Moore, 104 Ga. 579, 30 S. E. 821. This provision does not apply in a contest for the guardianship of the person of an idiot who was a colored man, where one applicant was a white person and the other an only sister and next of kin of the idiot. Johnson *v.* Kelly, 44 Ga. 485.

Person liable for lunatic's support.—A relative making application for appointment need not belong to the class the members of which, under the local statute, might be charged with the lunatic's support. Wentz's Appeal, 76 Conn. 405, 56 Atl. 625.

90. Matter of Taylor, 9 Paige (N. Y.) 611; Matter of Owens, 47 How. Pr. (N. Y.) 150. And see *supra*, note 88.

Prerequisites to appointment of stranger: Notice to relatives see *infra*, page 1142, note 6. Request of relatives see *infra*, page 1141. Reference see *infra*, page 1143, note 21.

91. Drew's Appeal, 57 N. H. 181.

But there is no rule of law requiring the appointment of the husband in such a case (*In re* Fegan, 45 Cal. 176 [*affirming* Myr. Prob. 101]), and it will be refused if the husband is an unsuitable person (*In re* Fegan, *supra*; *In re* Davy, [1892] 3 Ch. 38, 61 L. J. Ch. 578, 67 L. T. Rep. N. S. 180, 41 Wkly. Rep. 96).

92. Robinson *v.* Frost, 54 Vt. 105, 41 Am. Rep. 835.

93. Coleman *v.* Lunatic Asylum Com'rs, 6 B. Mon. (Ky.) 239.

94. Morgan's Case, 3 Bland (Md.) 332; Boarman's Case, 2 Bland (Md.) 89.

Non-resident of county.— It is no objection to the appointment as committee of a lunatic of a person who is a resident of the state and within its jurisdiction that he is not a resident of the county in which the proceedings are had. Lamoree's Case, 32 Barb. (N. Y.) 122, 11 Abb. Pr. 274.

95. Henderson *v.* Harper, 111 Iowa 525, 82 N. W. 1000; Matter of Bartelme, 34 Misc. (N. Y.) 131, 69 N. Y. Suppl. 468, 9 N. Y. Annot. Cas. 448, statutes.

Foreign and ancillary guardianship see *infra*, II, D, 7.

Jurisdiction to appoint guardian for non-resident see *supra*, II, A, 2.

96. Nuetzel *v.* Nuetzel, 13 Ill. App. 542; Woodward *v.* Woodward, 15 La. Ann. 162 (applying the rule to the husband of a lunatic); *In re* Burroughs, 1 C. & L. 309, 2 Dr. & War. 207; *In re* Frank, 2 Russ. 450, 26 Rev. Rep. 148, 3 Eng. Ch. 450, 38 Eng. Reprint 405 (both so holding independent of statutory regulations).

A trust company appointed as guardian need not give bond in Minnesota. Minnesota L. & T. Co. *v.* Beebe, 40 Minn. 7, 41 N. W. 232, 2 L. R. A. 418.

Obligee.— In England such bonds run to the crown. *In re* Bull, 2 Coop. t. Cott. 63, 47 Eng. Reprint 1052. In New York they are made payable to the people of the state or to the register or clerk of the court in which they are filed. Matter of White, 1 Barb. Ch. 43. In Illinois the people of the state may be the obligee in a conservator's bond, instead of the county treasurer, as provided by statute, as it is then good as a common-law obligation. Richardson *v.* People, 85 Ill. 495.

Amount.— In Louisiana the court may fix a curator's bond, after first making it equal in amount to the active debts and movables, at a further sum to cover possible loss by maladministration. *In re* Rochon, 15 La. Ann. 6.

Liability on bond see *infra*, II, D, 8.

97. *In re* Rochon, 15 La. Ann. 6.

Presumption.— A curator appointed under

c. Appointment For Person or For Estate Only. Although it is usual to appoint the same person guardian of both the person and the estate of a lunatic, yet this is not always done.[98]

d. Procedure[99] — (I) *Conditions Precedent to Appointment* — (A) *Adjudication of Incompetency.* To authorize the appointment of a guardian for an alleged incompetent person, his incompetency must in most states first be adjudicated by the tribunal having jurisdiction in such cases.[1] Accordingly a motion to appoint a certain person committee of an alleged incompetent will be denied where it appears that a commission is in force at the time of the hearing.[2]

(B) *Family Meeting and Request of Relatives.* In Louisiana a curator can be appointed only on the recommendation of a family meeting.[3] The appoint-

the advice of a family meeting to an insane person, and after giving the required security, recognized as such throughout the proceedings, will be presumed to have taken the necessary oath, although not mentioned in the transcript. Ball *v.* Ball, 15 La. 173.

Where a trust company is appointed as guardian, its officers need file no oath. Minnesota L. & T. Co. *v.* Beebe, 40 Minn. 7, 41 N. W. 232, 2 L. R. A. 418.

98. *In re* Colvin, 3 Md. Ch. 278.

Appointment as guardian of estate only is authorized. Heckman *v.* Adams, 50 Ohio St. 305, 34 N. E. 155. And see Easley *v.* Bone, 39 Mo. App. 388, holding that the court has power, where no one can be found who will accept the office of guardian of the person, to appoint a guardian of the estate merely. *Contra,* see *In re* Burr, 17 Barb. (N. Y.) 9.

Appointment as guardian of person only is not authorized in Michigan. *In re* Bassett, 68 Mich. 348, 36 N. W. 97.

99. **Lunacy proceedings** see *supra,* II, C.

1. *Alabama.*— Moody *v.* Bibb, 50 Ala. 245; Eslava *v.* Lepretre, 21 Ala. 504, 56 Am. Dec. 266.

Arkansas.— Arrington *v.* Arrington, 32 Ark. 674.

Colorado.— Jones *v.* Learned, 17 Colo. App. 76, 66 Pac. 1071.

Kansas.— Caple *v.* Drew, 70 Kan. 136, 78 Pac. 427.

Louisiana.— Hansell *v.* Hansell, 44 La. Ann. 548, 10 So. 941.

Maine.— Coolidge *v.* Allen, 82 Me. 23, 19 Atl. 89; Hovey *v.* Harmon, 49 Me. 269, *semble.*

Maryland.— Hamilton *v.* Traber, 78 Md. 26, 27 Atl. 229, 44 Am. St. Rep. 258.

Massachusetts.— Conkey *v.* Kingman, 24 Pick. 115.

Michigan.— North *v.* Joslin, 59 Mich. 624, 26 N. W. 810.

New Hampshire.— Kimball *v.* Fisk, 39 N. H. 110, 75 Am. Dec. 213; H. *v.* S., 4 N. H. 60.

Ohio.— Cox *v.* Cox, 2 Ohio Dec. (Reprint) 20, 1 West. L. Month. 21.

Pennsylvania.— Halderman's Appeal, 104 Pa. St. 251.

United States.— Smith *v.* Burlingame, 22 Fed. Cas. No. 13,017, 4 Mason 121, decided under Rhode Island statute.

See 27 Cent. Dig. tit. "Insane Persons," § 45.

See, however, Bligh *v.* O'Connell, 38 L. T. Rep. N. S. 217, 26 Wkly. Rep. 311 [*following* Vane *v.* Vane, 2 Ch. D. 124, 45 L. J. Ch. 381, 34 L. T. Rep. N. S. 613, 24 Wkly. Rep. 602].

Deaf mutes.— The rule stated in the text applies to deaf and dumb persons in Louisiana (Babineau *v.* Bendy, 7 La. 248), but not in Ohio (Shroyer *v.* Richmond, 16 Ohio St. 455).

Foreign adjudication.— A guardian may be appointed upon proof of an inquisition of lunacy in another state. *In re* Linton, 29 Wkly. Notes Cas. (Pa.) 550. And see Hansell *v.* Hansell, 44 La. Ann. 548, 10 So. 941.

Sufficiency of adjudication.— A finding that a person is "mentally incapable" (*In re* Leonard, 95 Mich. 295, 54 N. W. 1082) or "of unsound mind" (Craft *v.* Simon, 118 Ala. 625, 24 So. 380, at least on collateral attack) is sufficient.

Presumption of adjudication see Guthrie *v.* Guthrie, 84 Iowa 372, 51 N. W. 13.

Amendment of record.— Although no decree of insanity appears of record, yet where the letters of guardianship recite that such a decree was rendered, the record may be amended on notice by entering the decree. Kimball *v.* Fisk, 39 N. H. 110, 75 Am. Dec. 213.

2. Matter of Parke, 15 Misc. (N. Y.) 662, 37 N. Y. Suppl. 1067, 25 N. Y. Civ. Proc. 196.

3. *In re* Bothick, 43 La. Ann. 547, 9 So. 477.

Appointment of successor.— Where the curator of an interdict has been removed, the judge must, at the instance of the undercurator, convoke a family meeting to recommend a fit person to appointment as a permanent curator to replace the removed curator. State *v.* King, 113 La. 905, 37 So. 871.

Women are not eligible as members of family meetings called for the purpose of recommending a curator for an interdict. *In re* Bothick, 44 La. Ann. 1037, 11 So. 712.

Conflicting interests as disqualifying relatives to act in family meetings see *In re* Bothick, 44 La. Ann. 1037, 11 So. 712.

Who may be recommended as curator.— In recommending persons for curatorship, family meetings are not limited to applicants for the position or to parties suggested by relations of the interdict. *In re* Bothick, 44 La. Ann. 1037, 11 So. 712.

ment of a stranger as guardian without the request of his relatives is unauthorized, where they are not notified of the proceeding and no reference is ordered.[4]

(c) *Notice.* One for whom a guardian is sought to be appointed as an incompetent person is entitled to notice of the application for the appointment,[5] and this is so in many jurisdictions even where the person in question has already been duly adjudged insane.[6] If the appointee fails to qualify, the court may, in the same proceeding, appoint another person as guardian without further notice;[7] but an appointment of a guardian of an insane person whose former guardian has died cannot be made without notice to the ward.[8]

(II) *WHO MAY APPLY.* A statute authorizing any relative to apply for the appointment of a guardian excludes a stranger,[9] and the husband or wife of

Concurrent claims of relatives to curatorship.— Where the wife and an adult son of an interdicted person raise a concurrent claim to the curatorship, the lower court cannot appoint either without the recommendation of the family meeting; and the supreme court on appeal is likewise powerless without such recommendation. *In re* Bothick, 43 La. Ann. 547, 9 So. 477.

4. Lamoree's Case, 32 Barb. (N. Y.) 122, 11 Abb. Pr. 274.

5. See *supra*, II, C, 3.

If no inquisition is had, the appointment of a guardian without notice to the alleged lunatic is invalid (Jones *v.* Learned, 17 Colo. App. 76, 66 Pac. 1071; North *v.* Joslin, 59 Mich. 624, 26 N. W. 810; Cox *v.* Cox, 2 Ohio Dec. (Reprint) 20, 1 West. L. Month. 21) and subject to collateral attack (Moody *v.* Bibb, 50 Ala. 245; Eslava *v.* Lepretre, 21 Ala. 504, 56 Am. Dec. 266; Winslow *v.* Troy, 97 Me. 130, 53 Atl. 1008; Coolidge *v.* Allen, 82 Me. 23, 19 Atl. 89).

Appearance in court.— Unless notice is given the lunatic of an application for the appointment of a guardian without inquisition, his presence in the probate court and consent to the proceedings are not sufficient to give the court jurisdiction. Winslow *v.* Troy, 97 Me. 130, 53 Atl. 1008.

A temporary guardian may be appointed without notice. Bumpus *v.* French, 179 Mass. 131, 60 N. E. 414.

6. Chase *v.* Hathaway, 14 Mass. 222; Kimball *v.* Fisk, 39 N. H. 110, 75 Am. Dec. 213; Matter of Bellenger, 32 Misc. (N. Y.) 414, 66 N. Y. Suppl. 531; Shumway *v.* Shumway, 2 Vt. 339. See, however, Heckman *v.* Adams, 50 Ohio St. 305, 34 N. E. 155; Davison *v.* Tipton, 9 Ohio Dec. (Reprint) 60, 10 Cinc. L. Bul. 321.

If the adjudication of lunacy has been had upon due notice, notice of the appointment of a committee is not necessary. Oster *v.* Meyer, 113 Ky. 181, 67 S. W. 851, 23 Ky. L. Rep. 2455; Swope *v.* Frazier, 37 S. W. 495, 18 Ky. L. Rep. 649. And see Brigham *v.* Boston, etc., R. Co., 102 Mass. 14, holding that the fact that a decree appointing a guardian of an insane person was entered without further notice to the ward nine months after the time named in the notice given him to appear for examination is no ground for vacating the decree.

Where no notice was given of the inquisition or of the proceedings for the appointment of a guardian, the appointment is void. Conkey *v.* Kingman, 24 Pick. (Mass.) 115 (on collateral attack); Shumway *v.* Shumway, 2 Vt. 339 (on direct attack).

Collateral attack.— Want of notice renders the appointment void on collateral attack. Hutchins *v.* Johnson, 12 Conn. 376, 30 Am. Dec. 622; Breed *v.* Pratt, 18 Pick. (Mass.) 115; Hathaway *v.* Clark, 5 Pick. (Mass.) 490; South Penn Oil Co. *v.* McIntyre, 44 W. Va. 296, 28 S. E. 922. *Contra*, Kingman *v.* Fisk, 39 N. H. 110, 75 Am. Dec. 213; Gridley *v.* St. Francis Xavier College, 137 N. Y. 327, 33 N. E. 321; Jordan *v.* Dickson, 10 Ohio Dec. (Reprint) 332, 22 Cinc. L. Bul. 360.

Court cannot presume that notice was given. Hutchins *v.* Johnson, 12 Conn. 376, 30 Am. Dec. 622; Hathaway *v.* Clark, 5 Pick. (Mass.) 490.

Relief in supreme court from appointment in county court without notice.— The supreme court, on a simple notice of motion and petition, cannot afford relief to an alleged lunatic claiming to have been deprived of the control of his property by proceedings begun in a county court to appoint a committee without notice to him. Matter of Bellenger, 32 Misc. (N. Y.) 414, 66 N. Y. Suppl. 531.

Notice of subsequent proceedings.— Where due notice was given of an application for the appointment of a guardian which was objected to because not noticed for the first day of the term, it was not necessary that notice of an order to show cause why the application should not be heard on the following day should have been served on the incompetent as well as on his counsel. Matter of Maginn, 100 N. Y. App. Div. 230, 91 N. Y. Suppl. 814.

Notice to relatives of appointment of strangers.— If the next of kin of the alleged lunatic have not assented to the appointment of a stranger as guardian or united in the petition therefor, there should be an order of reference, and then the next of kin are entitled to notice of the proceedings upon the reference. *In re* Lamoree, 32 Barb. (N. Y.) 122 [*distinguished* in Matter of Owens, 5 Daly (N. Y.) 288, 47 How. Pr. 150.].

7. Halett *v.* Patrick, 49 Cal. 590.

8. Allis *v.* Morton, 4 Gray (Mass.) 63.

9. Hayden *v.* Smith, 49 Conn. 83.

the alleged incompetent;[10] but authorizes any near heir presumptive to make the application.[11]

(III) *PETITION OR APPLICATION.* A petition for the appointment of a guardian must allege facts showing that the person in question is a proper subject for guardianship;[12] and in some states it must disclose who are the relatives and next of kin of the alleged incompetent.[13] It must be verified.[14] An amendment of the petition may be allowed in a proper case.[15] A petition in probate by a friend of a *non compos*, alleging an adjudication by the court of the person's insanity, and that the person appointed guardian refused to qualify, gives the court jurisdiction after notice and hearing to appoint another guardian.[16]

(IV) *HEARING OR TRIAL.*[17] A temporary guardian may be appointed without a hearing.[18] It is no objection to a petition for the appointment of a committee of a person confined in a state institution that it was not noted for the first day of the term.[19] In order to determine upon the choice of a guardian the court may take proof[20] or order a reference.[21] In proceedings to have a guardian appointed on account of extreme old age and incapacity to manage affairs, mental incapacity must be alleged and proved in order that the court may acquire jurisdiction; the jury must be directed to find upon the specific issues touching this question, and it is error in the court to instruct them to find a general verdict for or against the petition.[22]

(V) *ORDER OF APPOINTMENT*—(A) *In General.* The omission of the name of a guardian for the incompetent person in the decree appointing him is a mere clerical error, which may be corrected by the court at any time.[23] It is no ground for vacating a decree appointing a guardian of a wife as insane that her husband, after making the application and before the decree, joined with her in a conveyance of land, and represented in conversation that the application was abandoned;[24]

10. *In re* Howard, 31 Me. 552.

11. *In re* Bassett, 68 Mich. 348, 36 N. W. 97.

12. *In re* Brown, 45 Mich. 326, 7 N. W. 899; Gannon *v.* Doyle, 16 R. I. 726, 19 Atl. 331, 5 L. R. A. 359.

Allegations of incompetency held to be sufficient see *In re* Bassett, 68 Mich. 348, 36 N. W. 97; Norton *v.* Sherman, 58 Mich. 549, 25 N. W. 510.

13. *In re* Myers, 73 Mich. 401, 41 N. W. 334; *In re* Bassett, 68 Mich. 348, 36 N. W. 97.

14. Royston's Appeal, 53 Wis. 612, 11 N. W. 36.

Failure to verify the petition for the appointment of a guardian does not make it a nullity when the court has jurisdiction of the person against whom the proceeding was instituted. Guthrie *v.* Guthrie, 84 Iowa 372, 31 N. W. 13. *Contra*, Royston's Appeal, 53 Wis. 612, 11 N. W. 36. A wife having been regularly adjudged insane, the court of another county in which the husband has acquired a residence may assume jurisdiction of her estate, and appoint a guardian without a sworn information showing her to be insane. Schwartz *v.* West, (Tex. Civ. App. 1904) 84 S. W. 282.

15. Lord *v.* Walker, 61 N. H. 261.

16. Thompson *v.* Hall, 77 Me. 160. And see Halett *v.* Patrick, 49 Cal. 590.

17. **Setting aside inquisition on motion for appointment of guardian** see *supra*, II, C, 8.

A receiver for an insane person's estate should, under the North Carolina statutes, be appointed only on the motion of the solicitor, after the wife and one or more adult children, if there are such, or some near relative or friend, have been brought before the judge. *In re* Hybart, (N. C. 1896) 25 S. E. 963, 119 N. C. 359.

18. Bumpus *v.* French, 179 Mass. 131, 60 N. E. 414.

19. Matter of Maginn, 100 N. Y. App. Div. 230, 91 N. Y. Suppl. 814.

20. *In re* Colvin, 3 Md. Ch. 278.

21. See cases cited *infra*, this note.

Necessity for reference.— The appointment of a stranger as committee, without the request of the relatives, without an order of reference, and without notice to prospective heirs or distributees, is unauthorized and should be set aside, although the person appointed be entirely unexceptionable. *In re* Lamoree, 32 Barb. (N. Y.) 122, 11 Abb. Pr. 274.

Reviewing choice of referee.— The selection of a committee of a lunatic by a referee appointed for that purpose is a matter of judicial discretion with which the court will not interfere unless an improper person has been selected, or unless it appears that the interests confided to such committee may not be properly attended to. *In re* Page, 7 Daly (N. Y.) 155, 56 How. Pr. 100.

22. *In re* Storick, 64 Mich. 685, 31 N. W. 582.

23. Munger *v.* Kalamazoo County Prob. Judge, 86 Mich. 363, 49 N. W. 47.

24. Brigham *v.* Boston, etc., R. Co., 102 Mass. 14.

and a petition in the circuit court alleging that defendant, "by hook or crook," and "without her knowledge and consent," was appointed plaintiff's committee in the county court is insufficient to warrant the setting aside of the order of appointment.[25] An appeal lies from an order rescinding the appointment of a temporary administrator for an insane person.[26]

(B) *Conclusiveness and Effect*[27]—(1) GENERAL RULES. A decree appointing a guardian for an alleged incompetent person is a determination of his incompetency,[28] and is usually held conclusive as to the insanity[29] both at the time of the decree[30] and subsequent thereto.[31] The disability arising from a decree of appointment, so far as it depends upon the action of the court, begins only upon the qualification of the guardian.[32] A trustee holding funds for the benefit of an idiot is not *ipso facto* substituted by the appointment of a committee of such idiot.[33]

(2) COLLATERAL ATTACK.[34] The appointment of a guardian may be attacked in a collateral action on jurisdictional grounds,[35] but not on the ground of error or irregularity in the guardianship proceedings.[36]

(VI) *REVIEW*.[37] It has been held that an appeal lies from an order appointing a guardian for an alleged insane person,[38] but not from an order refusing to

25. Jacobs *v.* Smith, 32 S. W. 394, 17 Ky. L. Rep. 693.

26. State *v.* Judge Tenth Judicial Dist., 18 La. Ann. 523.

Appeal generally see APPEAL AND ERROR.

27. Conclusiveness of adjudication of insanity see *supra*, II, C, 10, b.

28. Ockendon *v.* Barnes, 43 Iowa 615.

Special guardian in collateral proceeding.— Appointment, on allegation of a petitioner in a proceeding for another purpose, of a special guardian for a party as a lunatic is not an adjudication of lunacy. Spencer *v.* Popham, 5 Redf. Surr. (N. Y.) 425.

29. Pavey *v.* Wintrode, 87 Ind. 379.

30. Jordan *v.* Dickson, 10 Ohio Dec. (Reprint) 147, 19 Cinc. L. Bul. 64. The law was formerly otherwise. Messenger *v.* Bliss, 35 Ohio St. 587.

31. Leonard *v.* Leonard, 14 Pick. (Mass.) 280; Jordan *v.* Dickson, 10 Ohio Dec. (Reprint) 147, 19 Cinc. L. Bul. 64. *Compare* Little *v.* Little, 13 Gray (Mass.) 264; White *v.* Palmer, 4 Mass. 147.

32. Baker *v.* Potter, 51 Conn. 78.

33. Canaday *v.* Hopkins, 7 Bush (Ky.) 108.

34. Collateral attack in action on guardian's bond see *infra*, II, D, 8, d.

35. McGee *v.* Hayes, 127 Cal. 336, 59 Pac. 767, 78 Am. St. Rep. 57; Sears *v.* Terry, 26 Conn. 273.

Estoppel.— Where one files an information alleging the insanity of another, receives an appointment as guardian, gives bond, and takes charge of the estate, he is estopped to deny the validity of the proceedings adjudging his ward insane. Coleman *v.* Farrar, 112 Mo. 54, 20 S. W. 441. So where one has acted as guardian of an insane person, and accounted in that capacity, he cannot, in an action of assumpsit brought by his ward after restoration to his right mind, deny that he was lawfully appointed. Shepherd *v.* Newkirk, 21 N. J. L. 302.

36. *California*.— Isaacs *v.* Jones, 121 Cal. 257, 53 Pac. 793, 1101; Warner *v.* Wilson, 4 Cal. 310.

Connecticut.— State *v.* Hyde, 29 Conn. 564.

Illinois.— Dodge *v.* Cole, 97 Ill. 338, 37 Am. Rep. 111; Schmidt *v.* Pierce, 17 Ill. App. 523.

Indiana.— Fiscus *v.* Guthrie, 125 Ind. 598, 25 N. E. 285.

Iowa.— Gates *v.* Carpenter, 43 Iowa 152.

Minnesota.— State *v.* Lawrence, 86 Minn. 310, 90 N. W. 769, 58 L. R. A. 951.

New Hampshire.— Kimball *v.* Fisk, 39 N. H. 110, 75 Am. Dec. 213.

Ohio.— Heckman *v.* Adams, 50 Ohio St. 305, 34 N. E. 155; Shroyer *v.* Richmond, 16 Ohio St. 455.

South Dakota.— Matson *v.* Swenson, 5 S. D. 191, 58 N. W. 570.

Texas.— Flynn *v.* Hancock, 35 Tex. Civ. App. 395, 80 S. W. 245.

See 27 Cent. Dig. tit. "Insane Persons," § 55.

Presumptions.— Probate courts have general jurisdiction of lunacy proceedings and they are entitled to all the presumptions in favor of their proceedings which are allowed other tribunals of general jurisdiction on collateral attack. Kimball *v.* Fisk, 39 N. H. 110, 75 Am. Dec. 213.

37. Appeal generally see APPEAL AND ERROR. And see *supra*, II, D, 1, d, (V), (A).

38. *In re* Moss, 120 Cal. 695, 53 Pac. 357 (holding that a statutory provision that mentally incompetent persons can take an appeal only by their general or *ad litem* guardian does not apply to an appeal taken directly from the order of guardianship itself); Wilson *v.* Shorick, 21 Iowa 332. *Contra*, Willis *v.* Lewis, 27 N. C. 14.

Waiver of right to appeal.— Neither the party nor his attorney can consent to the entry of an order appointing a guardian so as to deprive the party of his right to appeal. *In re* Sullivan, 143 Cal. 462, 77 Pac. 153; *In re* Moss, (Cal. 1903) 74 Pac. 546. Where on a petition for the appointment of a committee for an incompetent confined in a state institution the order appointing the committee provided that counsel for the incompetent should be provided with funds for expenses

make the appointment.[39] An appeal from the order appointing a guardian does not take away his right to act while the appeal is pending.[40]

2. Termination of Guardianship — a. Resignation of Guardian. While the court has power to accept the resignation of a guardian or committee,[41] yet he will not be discharged as a matter of course, upon his own application, merely because the execution of the trust has become unpleasant to him,[42] even though the parties in interest consent.[43] A guardian who wishes to resign his trust must give notice thereof.[44]

b. Removal of Guardian — (I) *Jurisdiction.* The probate court has original jurisdiction, in some jurisdictions, of an action for the removal of the guardian of an insane person.[45]

(II) *Grounds.* The committee or guardian of a lunatic may be removed for any reason which renders his retention in the trust harmful or dangerous to the person or estate of the ward, or inimical to his best interests.[46]

(III) *Procedure.* Where a guardian is sought to be removed, he must be

in a pending habeas corpus proceeding, and that the committee should pay costs of the proceedings in which the order was made, the acceptance of funds under such order by the counsel did not waive the right to appeal from the order. Matter of Magin, 100 N. Y. App. Div. 230, 91 N. Y. Suppl. 814.

The appeal must be taken in the name of the alleged lunatic. Castleman *v.* Castleman, 5 Dana (Ky.) 59.

Who may appeal.— One who claims the property of an alleged incompetent by virtue of a transfer from her is a person aggrieved by the appointment of a guardian for her, within Wis. Rev. St. (1898) § 4031, giving such persons an appeal from orders of the county court. Ziegler *v.* Bark, 121 Wis. 533, 99 N. W. 224. Where a sister appeals from a decree of the probate court appointing a guardian to her sister as a person of unsound mind, and does not allege that she is an heir of the ward, it not appearing affirmatively that she is interested in the ward's estate, she is not a person "aggrieved," and hence is not entitled to appeal. Briard *v.* Goodale, 86 Me. 100, 29 Atl. 946, 41 Am. St. Rep. 526. So a mere stranger to an alleged idiot, with no allegation of relationship to her or present or prospective interest in her property, cannot appeal from an order appointing her guardian. Rorback *v.* Van Blarcom, 20 N. J. Eq. 461.

Discretion of lower court.— The power to appoint a committee for a lunatic is a discretionary one, and its exercise by the chancellor is not reviewable, whether he regards the wishes of those interested in the lunatic's estate or not. *In re* Colvin, 3 Md. Ch. 278. The discretion vested in the district judge in relation to fixing the bonds of a curator of an interdicted person is a legal discretion, and may in a proper case be revised by the supreme court on appeal; but if parties wish to question the exercise of this discretionary power by the district judge, they should place on file testimony to show that the judge was governed by an unnecessary caution toward the party giving bond. *In re* Rochon, 15 La. Ann. 6.

A notice of appeal from the appointment by the county court of a general guardian for an incompetent, given by her guardian *ad litem*, which recited his appointment, and that the alleged incompetent was aggrieved by the order of the county court and desired to appeal, and that he himself was aggrieved and appealed to the circuit court, was sufficient to give the circuit court jurisdiction of the appeal. Ziegler *v.* Bark, 121 Wis. 553, 99 N. W. 224.

39. Nimblet *v.* Chaffee, 24 Vt. 628.

40. Harwood *v.* Boardman, 38 Vt. 554.

41. See Griffin *v.* Collins, 122 Ga. 102, 49 S. E. 827; Hovey *v.* Harmon, 49 Me. 269; Morgan's Case, 3 Bland (Md.) 332; *In re* Osborn, 74 N. Y. App. Div. 113, 77 N. Y. Suppl. 423, 11 N. Y. Annot. Cas. 211; Miller *v.* Rutledge, 82 Va. 853, 1 S. E. 202.

In West Virginia, prior to Code (1891), c. 118, § 1, a committee of an insane person could not resign. Evans *v.* Johnson, 39 W. Va. 299, 19 S. E. 623, 45 Am. St. Rep. 912, 23 L. R. A. 737.

42. Matter of Lytle, 3 Paige (N. Y.) 251.

43. Matter of Miller, 15 Abb. Pr. (N. Y.) 277.

44. Griffin *v.* Collins, 122 Ga. 102, 49 S. E. 827. See, however, Hovey *v.* Harmon, 49 Me. 269.

45. Tiffany *v.* Worthington, 96 Iowa 560, 65 N. W. 817.

46. *Alabama.*— Creagh *v.* Tunstall, 98 Ala. 249, 12 So. 713, neglect of duty.

Mississippi.— Watt *v.* Allgood, 62 Miss. 38, neglect of person and estate of ward.

New York.— Kettletas *v.* Gardner, 1 Paige 488, fixed habits of intemperance.

Pennsylvania.— *In re* Black, 18 Pa. St. 434, antipathy of ward to committee.

Tennessee.— Fincher *v.* Monteith, 5 Lea 144, holding that a guardian of a lunatic will be removed if he fails to renew his bond, or uses the ward's money to pay his own debts.

West Virginia.— Lance *v.* McCoy, 34 W. Va. 416, 12 S. E. 728.

England.— Lloyd *v.* ——, Dick, 460, 21 Eng. Reprint 348 (neglect to defend an action against the ward); *Ex p.* Jones, 13 Ves. Jr. 237, 33 Eng. Reprint 283 (contempt of court on the part of the committee).

See 27 Cent. Dig. tit. "Insane Persons," § 57.

notified thereof,[47] and be allowed to answer and contest the case on the hearing.[48] The court may in its discretion act on information given it by one who is not entitled to petition for the removal of a guardian.[49] It has been held that an appeal lies from an order removing a guardian,[50] but an order denying a motion to remove a guardian is not appealable.[51] One who petitions for the removal of a guardian may be allowed costs even though the petition is denied.[52]

c. Revocation of Letters on Restoration of Ward to Reason[53] — (i) *In General.* Restoration of an adjudged lunatic to reason is ground for revoking the letters of guardianship and discharging his committee or guardian and restoring to him his liberty and estate.[54] The disability imposed on a person by the appointment of a guardian for him as an incompetent is removed by an order discharging the guardian on proof of the ward's restoration to sanity;[55] and in some states the guardianship is terminated *ipso facto* by an adjudication of restoration to reason.[56]

Failure to file accounts and make settlements as required by statute is ground for removal. Matter of Arnold, 76 N. Y. App. Div. 126, 78 N. Y. Suppl. 772, 12 N. Y. Annot. Cas. 168; Matter of McCusker, 32 Misc. (N. Y.) 47, 66 N. Y. Suppl. 105; Fincher *v.* Monteith, 5 Lea (Tenn.) 144.

Insolvency of committee.— Where a committee of the person and estate of a lunatic gave a good bond for the faithful performance of his trust, the fact that he afterward became insolvent was not sufficient cause for his removal, but he was ordered to give additional security. *In re* Chew, 4 Md. Ch. 60.

Non-residence of guardian. — It is good cause for removing the trustee or committee of a lunatic that he is not a resident of the state, and was not at the time of his appointment, of which fact the court was not at that time aware. *In re* Morgan, 3 Bland (Md.) 332. So if a guardian removes to another state, he may be removed from office. Watt *v.* Allgood, 62 Miss. 38; *Ex p.* Ord, Jac. 94, 4 Eng. Ch. 94, 37 Eng. Reprint 786.

47. Sims *v.* Sims, 121 N. C. 297, 28 S. E. 407, 61 Am. St. Rep. 665, 40 L. R. A. 737. See, however, *Ex p.* Cottingham, 124 Ind. 250, 24 N. E. 750.

48. Ward *v.* Angevine, 46 Ind. 415.

49. *In re* Chapman, 43 N. Y. App. Div. 231, 59 N. Y. Suppl. 1025.

50. Ward *v.* Angevine, 46 Ind. 415; Hall *v.* Audrain County Ct., 27 Mo. 329. *Compare* Matter of Griffin, 5 Abb. Pr. N. S. (N. Y.) 96; *In re* Black, 18 Pa. St. 434.

Presumptions.— The record failing to show that any inventory had been filed when the order therefrom was made, it will be presumed on appeal from an order removing the guardian of an insane person for failure to file an inventory, in support of the judgment, that no inventory had been filed, and that a report was then due. *Ex p.* Cottingham, 124 Ind. 250, 24 N. E. 750.

51. Broadribb *v.* Tibbetts, 63 Cal. 614. *Compare* Dean's Appeal, 90 Pa. St. 106.

52. Matter of Lytle, 5 Paige (N. Y.) 251, if there was reasonable cause for the application.

53. **Restoration to reason:** As divesting court of jurisdiction to sell property see *infra*, IV, K, 1. As ground for discharge of former lunatic from asylum see *infra*, III, A, 6.

54. *Illinois.*— Ayers *v.* Mussetter, 46 Ill. 472.

New Jersey.— *In re* Rogers, 5 N. J. Eq. 46.

New York.— Matter of Giles, 11 Paige, 638.

South Carolina.— *Ex p.* Drayton, 1 Desauss. Eq. 144.

England.— *Ex p.* Bumpton, Moseley 78, 25 Eng. Reprint 281.

See 27 Cent. Dig tit. "Insane Persons," § 42.

Test of restoration to reason.— The guardianship of a person of unsound mind cannot be discontinued unless he is so far restored to reason as to be capable of understanding the ordinary affairs of life (Cochran *v.* Amsden, 104 Ind. 282, 3 N. E. 934; Matter of Brugh, 61 Hun (N. Y.) 193, 16 N. Y. Suppl. 551); and the burden is on petitioner to show such restoration (*Ex p.* Thompson, 17 Montg. Co. Rep. (Pa.) 183). A commission in lunacy will not be superseded where the testimony shows that petitioner is liable at any moment to be excited beyond his control, that he requires constant supervision and care, that his property may at any time be squandered, and that he is in fact an insane man with lucid intervals. Matter of Helmbold, 12 Phila. (Pa.) 424.

Rights of creditors of estate.— When an insane person regains his health and becomes capable of managing his affairs, the guardian may be discharged, and a settlement had between him and his ward, notwithstanding a pending claim against the estate; and the guardian need not retain any portion of the funds in his hands for the payment of the same. Lyster's Appeal, 54 Mich. 325, 20 N. W. 83. Where the disability of a lunatic is removed, the property remaining, or its proceeds, is to be delivered over to him; and a judgment creditor of the lunatic cannot object thereto, or obtain an order that his debt shall be first satisfied. *Ex p.* Latham, 41 N. C. 406.

55. Hovey *v.* Harmon, 49 Me. 269.

56. *In re* Scheuer, 31 Mont. 606, 79 Pac. 244.

(11) *Procedure.* The lunatic himself may institute a proceeding for revocation of the letters of guardianship on the ground that he is restored to reason.[57] Such an application is not a new proceeding; it is a continuation of the original guardianship proceeding;[58] but notice of the application must be given.[59] The mode of trial of the issue of restoration to sanity varies in different jurisdictions.[60] If the trial is before a jury, and they find against petitioner, they should state in their verdict that he is of unsound mind, and incapable of managing his estate.[61] If it appears that the former lunatic is restored to sanity, the court may restore his estate to him without superseding the commission;[62] and the court may in a proper case suspend the commission temporarily.[63] But a commission cannot be superseded as to the person of the lunatic on the ground of his restoration to sanity, and at the same time be continued in force as against persons accountable for the lunatic's estate;[64] and it has been held that where separate committees have been appointed for a lunatic's person and estate respectively, a petition does not lie to obtain a discharge of the committee of the person alone.[65] The death of a lunatic is a bar to a proceeding to supersede the commission on the ground of his recovery prior to his death;[66] and if such proceeding has been commenced before his death, it abates on that event.[67] An appeal lies from an order refusing to revoke letters of guardianship on the ground of restoration to sanity.[68] The costs of an application to supersede the commission on the ground of the ward's restoration to sanity may be allowed in the discretion of the court.[69]

57. McDonald *v.* Morton, 1 Mass. 543; Coot *v.* Willett, 93 Mich. 304, 53 N. W. 395. *Contra*, Gillespie *v.* Thompson, 7 Ind. 353.

A petition from the lunatic must be presented in order to obtain an order of reference to a master to inquire whether he is restored to reason; a petition by the committee alone is not sufficient. *In re* Price, 8 N. J. Eq. 533.

58. Ayers *v.* Mussetter, 46 Ill. 472; Matter of Osborn, 74 N. Y. App. Div. 113, 77 N. Y. Suppl. 423, 11 N. Y. Annot. Cas. 211.

59. Storms *v.* Allegan Cir. Judge, 99 Mich. 144, 57 N. W. 1074 (to the next of kin or presumptive heirs); *In re* Weis, 16 N. J. Eq. 318; Matter of Hanks, 3 Johns. Ch. (N. Y.) 567 (committee entitled to notice).

Notice to the family or guardian is not a prerequisite to jurisdiction, the want of it being at most only an irregularity, which cannot be taken advantage of in a collateral proceeding. Cockrill *v.* Cockrill, 79 Fed. 143.

Estoppel.— In Missouri one who has on his own application been discharged by the probate court from guardianship as an insane person cannot assail the judgment of discharge because no notice of the application was given to his family or former guardian, even if such notice were required. Cockrill *v.* Cockrill, 79 Fed. 143.

60. See *In re* Weis, 16 N. J. Eq. 318; *In re* Rogers, 5 N. J. Eq. 46; *In re* Blewitt, 138 N. Y. 148, 33 N. E. 820; Matter of Hanks, 3 Johns. Ch. 567.

Presence of lunatic in court.— The chancellor will not as a general rule supersede a commission of lunacy on the ground of restoration to reason unless the lunatic is personally present in court (Matter of Gordon, 2 Phil. 242, 22 Eng. Ch. 242, 41 Eng. Reprint 935), or at least in such a situation that he may be personally examined by the chancellor or someone under the chancellor's authority (Matter of Sombre, 1 Phil. 436, 19 Eng. Ch. 436, 41 Eng. Reprint 697). And see *In re* Weis, 16 N. J. Eq. 318; *In re* Rogers, 5 N. J. Eq. 46; *In re* Blewitt, 138 N. Y. 148, 33 N. E. 820; Matter of Hanks, 3 Johns. Ch. (N. Y.) 567. Where a committee of lunacy was appointed of the person and estate of one to whom no notice of the proceedings was given, and she subsequently petitioned for the removal of such committee, and the preponderance of the evidence was in favor of her sanity, it was error for the trial court not to permit her to appear in person and be examined as to her mental soundness. Matter of Lowe, 19 N. Y. Suppl. 245.

61. Cochran *v.* Amsden, 104 Ind. 282, 3 N. E. 934.

62. Matter of Gordon, 2 Phil. 242, 22 Eng. Ch. 242, 41 Eng. Reprint 935.

63. *Ex p.* Ferrars, Moseley 332, 25 Eng. Reprint 423.

64. Matter of Gordon, 2 Phil. 242, 22 Eng. Ch. 242, 41 Eng. Eng. Reprint 935.

65. *In re* Burr, 17 Barb. (N. Y.) 9.

66. *In re* Owens, 18 N. Y. Suppl. 850 [*affirmed* in 19 N. Y. Suppl. 472].

67. *In re* Beckwith, 87 N. Y. 503.

68. Hiett *v.* Nebergall, 45 Ohio St. 702, 17 N. E. 558. And see McDonald *v.* Morton, 1 Mass. 543.

Appellant need not give bond to prosecute the appeal. McDonald *v.* Morton, 1 Mass. 543.

69. Cochran *v.* Amsden, 104 Ind. 282, 3 N. E. 934 (holding that it is proper to render judgment for costs against one who unsuccessfully petitions for a discontinuance of the guardianship of an insane person); Palmer *v.* Palmer, 38 N. H. 418; Carter *v.* Beckwith, 128 N Y. 312, 28 N. W. 582

d. Death of Guardian. Where two or more persons are appointed a joint committee of a lunatic, their trust ceases on the death of any one of them.[70]

e. Death of Ward.[71] Upon the death of the insane person, the functions of his committee or guardian cease so far as the active management of his estate is concerned,[72] and no order or direction will thereafter be made by the court except as incidental to its authority to compel an accounting and take the fund into custody, if necessary.[73] Chancery will not administer the fund even for the benefit of creditors or opposing claimants,[74] but will order it to be paid over to the personal representative of the deceased lunatic.[75]

(holding that on an application, at the instance of a lunatic, to supersede the commission, where the court is convinced that there is probable cause, or even a doubtful case, it has discretionary power to award reasonable costs and expenses to be charged upon the lunatic's estate, although the application proves unsuccessful); Matter of McClean, 6 Johns. Ch. (N. Y.) 440 (where the court directed a feigned issue to try the question of lunacy, but, being convinced of the lunacy of petitioner, directed the expense to be paid by the lunatic or his friends, and not by his estate, principally acquired by the skill and industry of his wife and barely sufficient for the maintenance of herself and her children).

Attorney's fees.— The court may allow attorney's fees incurred on a hearing of the insane person's application to supersede the commission to be paid out of his estate. Kelly *v.* Kelly, 72 Minn. 19, 74 N. W. 899. But where an attorney was retained by a person who had been insane a number of years to institute proceedings to supersede a commission of lunacy, and the attorney, who had known the insane person for a long time and knew him to be insane and his mental condition not improved, commenced proceedings without consultation with the committee of the lunatic or any member of his family, and the proceedings were unsuccessful, the court refused to allow the attorney any sum in payment of his services. *In re* Beckwith, 3 Hun (N. Y.) 443, 6 Thomps. & C. 13.

70. Boarman's Case, 2 Bland (Md.) 89.

Accounting on death of guardian see *infra*, II, D, 4, c.

71. **As affecting proceeding to supersede commission** see *supra*, II, D, 2, c, (II).

Death of alleged lunatic pending inquisition see *supra*, page 1136, note 56.

Lien of guardian on estate of deceased ward see *infra*, II, D, 6.

72. *Connecticut.*— Norton *v.* Strong, 1 Conn. 65.

Indiana.— Masters *v.* Jones, 158 Ind. 647, 64 N. E. 213.

Maryland.— Cain *v.* Warford, 3 Md. 454.

New York.— *In re* Beckwith, 87 N. Y. 503; Downing *v.* Whitney, 46 N. Y. App. Div. 307, 61 N. Y. Suppl. 540; Killick *v.* Monroe County Sav. Bank, 1 N. Y. Suppl. 501.

Pennsylvania.— Stobert *v.* Smith, 184 Pa. St. 34, 38 Atl. 1019.

England.— *In re* Ferrior, L. R. 3 Ch. 175, 37 L. J. Ch. 571 note, 18 L. T. Rep. N. S. 65, 16 Wkly. Rep. 298; Foot *v.* Leslie, L. R. 16 Ir. 411; *In re* Fitzgerald, Ll. & G. t. Pl. 20, 2 Sch. & Lef. 439.

See 27 Cent. Dig. tit. "Insane Persons," § 69.

In some states, however, the guardian of a deceased lunatic is vested with the powers of an administrator. Jefferson *v.* Bowers, 33 Ga. 452; Lang *v.* Friesnecker, 213 Ill. 598, 73 N. E. 329.

73. Matter of Way, 3 De G. F. & J. 175, 30 L. J. Ch. 815, 5 L. T. Rep. N. S. 510, 2 Wkly. Rep. 563, 64 Eng. Ch. 138, 45 Eng. Reprint 845; *In re* Barry, 1 Molloy 414.

However, the control of the court over the committee is not determined by the death of the lunatic. *In re* Fitzgerald, Ll. & G. t. Pl. 20, 2 Sch. & Lef. 439.

Jurisdiction to adjust accounts.— The court retains jurisdiction until the accounts of the committee are finally adjusted (Matter of Grout, 83 Hun (N. Y.) 25, 31 N. Y. Suppl. 602; Matter of Hall, 8 N. Y. Civ. Proc. 56) and may determine the necessary allowances of the committee, his costs and counsel fees (*In re* Ferris, 176 N. Y. 607, 66 N. E. 1116 [*affirming* 86 N. Y. App. Div. 559, 84 N. Y. Suppl. 15, 13 N. Y. Annot. Cas. 365]). And the supreme court, as successor of the chancellor and the court of chancery, has, under its general authority over the persons and estates of lunatics, jurisdiction to compel the committee of a lunatic, on the latter's decease, to account to his administrator, although such committee was appointed by the court of common pleas of New York city; any jurisdiction that may have been conferred on the latter court by statute over the committee does not extend beyond the death of the lunatic. Butler *v.* Jarvis, 51 Hun (N. Y.) 248, 4 N. Y. Suppl. 137.

Ordinarily the committee may retain possession of the property until the court orders him to deliver it up. *In re* Colvin, 3 Md. Ch. 278; Guerard *v.* Gaillard, 15 Rich. (S. C.) 22; *In re* Fitzgerald, Ll. & G. t. Pl. 20, 2 Sch. & Lef. 439.

When delay is apprehended, a receiver may be appointed to take charge of the estate, on application of the parties in interest. *In re* Colvin, 3 Md. Ch. 278.

Accounting on death of ward see *infra*, II, D, 4, c.

74. Boarman's Case, 2 Bland (Md.) 89; *In re* Colvin, 3 Md. Ch. 278.

75. *Indiana.*— Stumph *v.* Pfeiffer, 58 Ind. 472.

3. Authority of Guardian.[76] The powers of a guardian of an insane person appointed by a court of probate are very generally assimilated, both by statute and judicial construction, to those of the guardian of an infant.[77] He generally becomes substituted for his ward, with reference to all his interests.[78] However, he cannot bind the ward by a personal contract.[79] A conservator has a right to enter the dwelling-house of his ward, without his permission and against his will, to take an inventory of the property of the ward, or to attend to any other duties of his office that require such entry.[80]

4. Accounting and Settlement by Guardian — a. Judicial Account and Settlement — (i) *General Rules.* The duty of a committee of an insane person appointed by a court of chancery in respect of accounting is generally like that of a receiver or trustee in equity,[81] and the liability of guardians, conservators, or curators appointed by the probate courts, in the matter of their accounts, is assimilated to that of guardians of minors.[82] In the settlement of accounts, whether in the courts of equity or of probate, equitable rules will be applied. The accounting party will not be allowed to make any profit, as such, out of his trust; nor will he be accountable for losses not arising out of his negligence, malversation, or fraud.[83] He may be charged simple interest upon balances found against him;[84] but not upon sums for the detention of which he is not responsible, as pending controversies between creditors as to their disposition.[85] A committee or guardian may, on the one hand, include in his account a debt due from the lunatic to himself,[86] and he must, on the other hand, return in his inventory a debt due from him to the ward.[87] The guardian should be allowed his proper disbursements,[88]

Maryland.— Cain *v.* Warford, 7 Md. 282, 3 Md. 454.

Missouri.— Coleman *v.* Farrar, 112 Mo. 54, 20 S. W. 441.

New York.— See Matter of Killick, 4 Silv. Sup. 89, 7 N. Y. Suppl. 360.

North Carolina.— *Ex p.* Latham, 41 N. C. 406.

See 27 Cent. Dig. tit. "Insane Persons," § 69.

76. Authority of guardian with reference to: Actions by or against ward see *infra*, VIII, C, 1. Contracts of ward see *infra*, V. Custody and support of ward see *infra*, III, E. Property and conveyances of ward see *infra*, IV. H.

Election by guardian of legatee or devisee as to taking under will see Wills.

Grant of letters of administration to guardian of ward entitled to administration see Executors and Administrators, 18 Cyc. 88.

77. Alexander *v.* Alexander, 8 Ala. 796; Stumph *v.* Pfeifler, 58 Ind. 472. See Guardian and Ward.

78. Anderson *v.* Anderson, 42 Vt. 350, 1 Am. Rep. 334.

79. Pearl *v.* McDowell, 3 J. J. Marsh. (Ky.) 658, 20 Am. Dec. 199.

80. State *v.* Hyde, 29 Conn. 564.

81. Story Eq. Jur. §§ 465, 512.

However, a committee of a lunatic may be appointed to take charge of him and his estate without an account, on condition of their maintaining him, returning an inventory, etc. Boarman's Case, 2 Bland (Md.) 89.

In the English court of chancery, a rule of court provides that accounts shall be rendered annually (Shelford Lun. 171), but the annual accounting may be dispensed with by special order when the expense of it would be burdensome (Anonymous, 1 Russ. & M. 113, 5 Eng. Ch. 113, 39 Eng. Reprint 44: *Ex p.* Pickard, 3 Ves. & B. 127, 35 Eng. Reprint 427).

82. Spack *v.* Long, 36 N. C. 426. See Guardian and Ward.

83. Story Eq. Jur. § 465.

The committee is accountable for profit made by him out of the labor of the lunatic. Ashley *v.* Holman, 15 S. C. 97.

The committee is accountable for loss of rents and profits of lands imprudently leased by the committee. De Treville *v.* Ellis, Bailey Eq. (S. C.) 35, 21 Am. Dec. 518.

84. *In re* Thomas, 26 Colo. 110, 56 Pac. 907; Crigler *v.* Alexander, 33 Gratt. (Va.) 674; *Ex p.* Hall, Jac. 160, 4 Eng. Ch. 160, 37 Eng. Reprint 811.

85. Bulows *v.* O'Neal, 4 Desauss. Eq. (S. C.) 394.

86. Carter *v.* Edmonds, 80 Va. 58.

However, a curator of an interdicted person cannot keep the funds of the interdict without accounting to the probate court, on the ground that the interdict is indebted to him. He must account for the moneys received; and the debt of the interdict, if it exists, must be settled and adjusted under the supervision of the court. Nor can such curator transfer his claim to another, and authorize him to collect the money of the interdict, and retain it in satisfaction of the debt so transferred, without proper judicial sanction. McKenzie *v.* Bacon, 40 La. Ann. 157, 4 So. 65.

87. Neill *v.* Neill, 31 Miss. 36; Matter of Killick, 4 Silv. Sup. (N. Y.) 89, 7 N. Y. Suppl. 360, even though barred by limitations.

88. Harwood *v.* Boardman, 38 Vt. 554 (although on appeal from the inquisition the

and receive credit for all proper payments;[89] but he is not entitled to an allowance for injuries occasioned to his own property by his ward's want of care.[90] The guardian must account for moneys received under an order of court, although it has been reversed.[91]

(II) *PROCEDURE.*[92] Where lunacy jurisdiction is vested in the probate court, that court has jurisdiction of an action to require the guardian to account,[93] even after he has gone out of office;[94] and where a minor's guardian becomes insane, his guardian may settle his accounts in the probate court.[95] A committee of the estate of a lunatic, like a receiver, is an officer of the court, and cannot, during the lifetime of the lunatic, be called upon to account in another court.[96] Where the commission has issued out of chancery, the proper mode of proceeding for an accounting is by petition.[97] The personal representative of a deceased lunatic is entitled to petition for an accounting by the guardian.[98] Heirs[99] or next of kin[1]

ward was found to be sane); Davidson *v.* Pope, 82 Va. 747, 1 S. E. 117.

Allowances for support of ward and family. — Where the committee, by authority of the court, applies the estate in support of the persons named in the finding as the wife and children, the fact that such persons are in reality the mistress and illegitimate children of the lunatic does not disentitle the committee to credit for the amounts so expended. Halsey's Appeal, 120 Pa. St. 209, 13 Atl. 934. So a charge made by a guardian for his ward's board at an insane asylum is proper if the ward's estate is sufficient to justify the expenditure; and such charge should not be disallowed because the asylum bill has not been paid, as the guardian is personally liable for such bill. Corcoran *v.* Allen, 11 R. I. 567. Where, however, on a mesne accounting, it appeared that a trust fund for the lunatic's support, in the hands of the committee, was not exhausted, a claim by the committee for the lunatic's support was disallowed. Clark *v.* Crout, 34 S. C. 417, 13 S. E. 602. And an account receipted for the board of the lunatic is not a sufficient voucher, without proving that the services were rendered, the money paid, and the charge reasonable. Alexander *v.* Alexander, 8 Ala. 796.

Disbursement before appointment. — Necessary and proper disbursements made by the guardian or committee before his appointment may be allowed upon his accounting. Matter of Forkel, 8 N. Y. App. Div. 397, 40 N. Y. Suppl. 847.

Resisting revocation of guardianship. — The reasonable expenses reasonably incurred in good faith by the guardian of an insane person in resisting the application for a revocation of the guardianship on the ground of his restoration to sanity are to be allowed to him in the settlement of his guardianship account. Palmer *v.* Palmer, 38 N. H. 418.

In transporting the lunatic from place to place, it is for the guardian to select the cheapest mode consistent with the comfort and safety of the lunatic. If the public conveyance is suitable, and cheaper than a private one, it is his duty to take it. Alexander *v.* Alexander, 8 Ala. 796.

The value of the board of a lunatic depends

upon his condition and the care, attention, and watchfulness necessary to be bestowed upon him, to be ascertained by proof. Declarations of persons "that they would not board him for five hundred dollars a year" is not proof that it was worth that sum. Alexander *v.* Alexander, 8 Ala. 796.

Sufficiency of evidence. — In an action to settle the account of the guardian of a lunatic, the facts as to each item must be shown, and it must appear that all expenditures were legal. McLean *v.* Breese, 109 N. C. 564, 13 S. E. 910.

89. See cases cited *infra*, this note.

Credits for payments by committee after lunatic's death. — Where the committee had paid one of the persons entitled his share out of the fund remaining on the lunatic's death, it was held, in an action by the lunatic's administrator against the committee, that the latter should be credited in his account with the sum so paid (Davidson *v.* Pope, 82 Va. 747, 1 S. E. 117); and so where a curator had paid out of the fund just debts incurred for his interdict (*In re* Onorato, 46 La. Ann. 73, 14 So. 299).

90. Brown *v.* Howe, 9 Gray (Mass.) 84, 69 Am. Dec. 276.

91. Matter of Cloud, Ohio Prob. 177.

92. Power to adjust accounts after death of ward see *supra*, II, D, 2, e.

93. Tiffany *v.* Worthington, 96 Iowa 560, 65 N. W. 817.

94. Nettleton's Appeal, 28 Conn. 268.

95. Modawell *v.* Holmes, 40 Ala. 391.

96. Matter of Butler, 8 N. Y. Civ. Proc. 56.

97. Tally *v.* Tally, 22 N. C. 385, 34 Am. Dec. 407, holding that a court of equity will not entertain a bill against a lunatic by his guardian for a settlement of the latter's accounts and for payment of what may be found to be due to him from the lunatic.

98. Holly *v.* Lockwood, 1 Conn. 180; Schultz *v.* Cookingham, 30 Hun (N. Y.) 443; Wigg *v.* Tiler, Dick. 552, 21 Eng. Reprint 385; Scammell *v.* Light, 4 Giff. 127, 5 Jur. N. S. 1122, 7 L. T. Rep. N. S. 414, 1 New Rep. 83, 11 Wkly. Rep. 83, 66 Eng. Reprint 648; Grosvenor *v.* Drax, 2 Knapp 82, 12 Eng. Reprint 410.

99. Holly *v.* Lockwood, 1 Conn. 180.

1. Schultz *v.* Cookingham, 30 Hun (N. Y.) 443.

are not entitled to file the petition, unless the personal representative refuses to do so.[2] They may be necessary parties to the accounting under some circumstances, however,[3] and they may except to the guardian's account.[4] The next of kin and creditors of a deceased lunatic are not entitled to representation on an application by the committee for an accounting, where an administrator of the lunatic's estate has been appointed.[5] Ordinarily the statute of limitations does not run against a proceeding by a guardian for an accounting and for the collection of moneys due him from the estate until he has been discharged from his trust.[6] An order of the court of equity appointing a committee for a lunatic and authorizing the committee to retain the entire annual interest of the lunatic's estate for his support and maintenance is no bar to an action to require the committee to account for profits subsequently made by the labor of his ward;[7] but an order of court made after judgment against an idiot directing the committee to pay it will prevent the judgment creditor from thereafter maintaining an action against the committee for an accounting as to the estate under his control.[8] An agreement in compromise of an action brought by the next friend of a lunatic against his committee for an accounting of the trust estate, which was not submitted to and approved by the court, is not a bar to an action by the administrator of the lunatic against the administrator of the committee involving the same matter.[9] Where the widow and children of a deceased insane person did not appeal from the settlement of the account of his guardian by the probate court, they cannot afterward, upon objection to the same person's account as administrator of the deceased, have it reopened.[10] In some states an order settling the accounts of a guardian or committee is appealable.[11] Ordinarily the costs of an accounting, even after the decease of the lunatic, are to be borne by his estate.[12]

(III) *Conclusiveness and Effect.*[13] It has been held that while the settlement of the final account of a committee or guardian is conclusive, in an action against him, of the amount in his hands,[14] it is not a judgment such as will support

2. Schultz *v.* Cookingham, 30 Hun (N. Y.) 443.

3. Clark *v.* Crout, 34 S. C. 417, 13 S. E. 602 (holding that the next friend, being one of the heirs of a lunatic, is a necessary party to an action by the administrator of the lunatic against the administrator of the committee for an accounting, where the amount of the recovery would be affected by the construction of an agreement by the next friend with the committee for a settlement of the account); Davidson *v.* Pope, 82 Va. 747, 1 S. E. 117.

4. Vinson *v.* Vinson, 1 Del. Ch. 120.

5. Matter of Grout, 83 Hun (N. Y.) 25, 31 N. Y. Suppl. 602.

6. Cauthen *v.* Cauthen, 70 S. C. 167, 49 S. E. 321.

Estoppel.— Heirs of a deceased lunatic who insisted on the committee, who was also administrator, retaining his offices and renting the lands of deceased and applying rents to his accounts, there being a balance due him, when he was about to bring an action for partition and accounting, are estopped from interposing the plea of the statute of limitations to a subsequent proceeding by the committee and administrator for an accounting and for the collection of the sum due him. Cauthen *v.* Cauthen, 70 S. C. 167, 49 S. E. 321.

7. Ashley *v.* Holman, 15 S. C. 97.

8. Ackerman *v.* Bethune, 3 Misc. (N. Y.) 126, 23 N. Y. Suppl. 805, since such accounting may be had in proceedings to enforce the order.

9. Clark *v.* Crout, 34 S. C. 417, 13 S. E. 602.

10. Cummings *v.* Cummings, 123 Mass. 270.

11. Coleman *v.* Farrar, 112 Mo. 54, 20 S. W. 441. *Contra*, Fuch's Case, 6 Whart. (Pa.) 191.

Who may appeal.— The children of a *non compos*, being presumptive heirs, may appeal from the allowance of a guardian's account. Boynton *v.* Dyer, 18 Pick. (Mass.) 1. An uncle of a *non compos* under guardianship cannot, as his next friend, maintain an appeal from a decree allowing an account of the guardian, without showing himself interested in the estate of the ward. Penniman *v.* French, 2 Mass. 140.

12. Matter of Forkel, 8 N. Y. App. Div. 397, 40 N. Y. Suppl. 847.

13. In action on guardian's bond see *infra*, II, D, 8, e.

14. Shepherd *v.* Newkirk, 21 N. J. L. 302.

Rights of guardian's sureties.— A decree regularly obtained on the merits in an action for the settlement of a committee's account will not be opened to enable the sureties on the committee's bond to defend, although they were not parties to the action. Forbell *v.* Denton, 53 N. Y. App. Div. 402, 65 N. Y. Suppl. 1120.

an action of debt;[15] that the settlement of the accounts of a person as guardian of his insane partner does not bar an action against him for a partnership accounting;[16] that an application by a creditor for an order requiring the successor of a former guardian to pay, as a preferred claim, a debt incurred by the former guardian is not barred by a settlement of the successor's account;[17] that the fact that the probate court, in passing on the account of a guardian on his removal, declared a loan by the guardian of his ward's funds unauthorized and charged the amount thereof to him does not bar an action by a subsequently appointed guardian against the borrower personally;[18] and that the account of the guardian of an insane widow was not admissible in evidence to determine the amount due him as against the executor of the husband, to whom an estate had been devised in trust for the support of the widow, the account having been settled without notice to the executor.[19] Interlocutory settlements of a committee or guardian are *prima facie* correct,[20] but are not conclusive.[21]

b. Account and Settlement With Ward. A settlement between the guardian and his ward on restoration to sanity may be *in pais*, the parties not being obliged to have their account passed by the probate court.[22]

c. Account and Settlement With Successor in Office. On the removal of a committee he must account to his successor in office,[23] and on the death of the

15. Spalding *v.* Butts, 5 Conn. 427.

16. Raymond *v.* Vaughn, 128 Ill. 256, 21 N. E. 566, 15 Am. St. Rep. 112, 4 L. R. A. 440 [*affirming* 17 Ill. App. 144].

17. London *v.* Patterson, 41 Ohio St. 206.

18. Hervey *v.* Rawson, 164 Mass. 501, 41 N. E. 682.

19. Pinkerton *v.* Sargent, 112 Mass. 110.

20. *Illinois.*— Wilcox *v.* Parker, 23 Ill. App. 429.

Iowa.— Warfield *v.* Warfield, 74 Iowa 184, 37 N. W. 144.

Louisiana.— *In re* Beecroft, 28 La. Ann. 824.

Missouri.— State *v.* Jones, 89 Mo. 470, 1 S. W. 355.

Virginia.— Carter *v.* Edmonds, 80 Va. 58.

See 27 Cent. Dig. tit. "Insane Persons," § 65.

21. Wilcox *v.* Parker, 23 Ill. App. 429; *In re* Beecroft, 28 La. Ann. 824; State *v.* Jones, 89 Mo. 470, 1 S. W. 355.

In New York the order of the court of common pleas, made on the referee's report, closing the accounts as they were found at that time, being a matter within the exclusive jurisdiction of that court, is binding and conclusive, and the accounting in the supreme court must be limited to the transactions of the committee subsequent to that order. Butler *v.* Jarvis, 51 Hun 248, 4 N. Y. Suppl. 137.

In Pennsylvania the confirmation of a committee's triennial statement is conclusive only as to the distribution then made; and the allowance, without objection, of a payment on a claim barred by limitation is not equivalent to a judgment of law, so as to prevent the lunatic, when restored to reason, from pleading the statute on audit of the committee's final account for distributing the funds on hand. *In re* Raeder, 7 Kulp 275.

In Virginia a confirmed report of an *ex parte* settlement of the accounts of a committee of a lunatic can be surcharged or falsified only by a direct action within the proper time for that purpose. Carter *v.* Edmonds, 80 Va. 58.

Fraud vitiates a settlement (Warfield *v.* Warfield, 74 Iowa 184, 37 N. W. 144, *semble*), but only so far as the fraud extends to the different items of the account (Bonner *v.* Evans, 89 Ga. 656, 15 S. E. 906).

Pleading.— A petition against a guardian of a lunatic attacking returns made by him to the court of ordinary which have been examined and allowed by the court should point out specifically the items of the returns on which the attack is made, and as to each should disclose the cause or ground of the attack, and not merely allege that the return for such and such a year is unlawful as to a specific amount. Bonner *v.* Evans, 89 Ga. 656, 15 S. E. 906.

Limitations.— In West Virginia there is no statute of limitations as to actions to falsify the report of the committee of a lunatic. Trowbridge *v.* Stone, 42 W. Va. 454, 26 S. E. 363.

22. Hooper *v.* Hooper, 26 Mich. 435; *Ex p.* Bumpton, Moseley 78, 25 Eng. Reprint 281.

However, a receipt by a ward acquitting the guardian in full of all claims against him is not valid if signed before the termination of the guardianship, even though the ward be at the time of sound mind. Griffin *v.* Collins, 122 Ga. 102, 49 S. E. 827. And where, in a settlement by the agent of a lunatic with her committee, a certain sum is found due the lunatic, and in less than three months thereafter the committee settles with the lunatic for a smaller sum, without a reasonable explanation for such settlement, the committee will be held accountable for the difference. Lyme *v.* Beall, 7 Dana (Ky.) 420.

23. Joyner *v.* Cooper, 2 Bailey (S. C.) 199.

Effect of settlement.— Where the appointment of a committee is revoked, and he

ward the committee must account to the ward's personal representative.[24] On the death of the committee his personal representative must account to the succeeding committee.[25]

d. Liability of Intermeddlers. Chancery has jurisdiction to compel an accounting by one who, without authority, assumes to act as guardian of an insane person.[26]

5. Compensation of Guardian[27] — a. General Rules. Under the English chancery practice, the committee of a lunatic received no compensation as such for his services, and any allowance made to him was for the benefit of the lunatic's estate.[28] In America, however, the committee or guardian is generally allowed compensation for his services in the discretion of the court,[29] although the ward

delivers to his successor a bond due to the lunatic's estate by the successor, he is discharged, by the latter's acceptance of the bond, from all liability for having originally taken insufficient security for or granted undue indulgence on the debt. Joyner *v.* Cooper, 2 Bailey (S. C.) 199.

24. Matter of Killick, 4 Silv. Sup. (N. Y.) 89, 7 N. Y. Suppl. 360, holding that it is the duty of the committee to turn over to the administrator of the ward his own notes found among the papers of the lunatic, although barred by limitation at the time of his appointment as such committee.

25. Asley *v.* Holman, 15 S. C. 97, holding also that if the committee of a lunatic becomes chargeable for profit made by the labor of such lunatic, and then dies, the succeeding committee may bring action against the executors of the deceased committee for the amount of such profits, without joining the lunatic as a party.

Laches.— Where the administrator of a deceased committee died eleven years after his appointment without demand having been made on him to file an account, and no demand is made upon his legal representative after his death, an administrator *de bonis non* of the deceased committee, appointed fourteen years after the death of the lunatic, and who is unable to obtain any knowledge of the affairs of said committee, will not be required to account for the lunatic's estate. Com. *v.* Stewart, 183 Pa. St. 269, 38 Atl. 597.

26. Moody *v.* Bibb, 50 Ala. 245; Robinson *v.* Burritt, 66 Miss. 356, 6 So. 206; Bailey *v.* Bailey, 67 Vt. 494, 32 Atl. 470, 48 Am. St. Rep. 826.

27. Claims in other capacity than guardian see *infra*, IV, F.

28. Matter of Annesley, Ambl. 78, 27 Eng. Reprint 49; *Re* Walker, 2 Phil. 630, 22 Eng. Ch. 630, 41 Eng. Reprint 1087; *Re* Westbrooke, 2 Phil. 631, 22 Eng. Ch. 631, 41 Eng. Reprint 1087; Anonymous, 10 Ves. Jr. 103, 32 Eng. Reprint 783. It was considered that a committee of the person was entitled to the savings out of the sum allowed for the lunatic's maintenance, and he was not ordinarily obliged to account for balances (*In re* Ponsonby, 5 Ir. Eq. 268, 2 C. & L. 30, 3 Dr. & War. 27; Grosvenor *v.* Drax, 2 Knapp 82, 12 Eng. Reprint 410); but an account might be ordered when fraud or malversation was suspected (*In re* French, L. R. 3 Ch. 317, 37 L. J. Ch. 537, 18 L. T. Rep. N. S. 139, 16 Wkly. Rep. 657; Latouche *v.* Danvers, Ll. & G. t. Pl. 503). Under special circumstances a salary might be allowed the committee (*Ex p.* Fermor, Jac. 404, 4 Eng. Reprint 404, 37 Eng. Reprint 903), and the committee might employ agents to superintend the details of the management of the lunatic's property at a fixed salary to be paid out of the rents (*In re* Brown, 1 Hall & T. 348, 47 Eng. Reprint 1445, 19 L. J. Ch. 96, 1 Macn. & G. 201, 47 Eng. Ch. 161, 41 Eng. Reprint 1240; Matter of Errington, 2 Russ. 567, 3 Eng. Ch. 567, 38 Eng. Reprint 448). And where no person could be found to act as committee, the court might appoint a receiver of the lunatic's property, to receive a salary. *Ex p.* Radcliffe, 1 Jac. & W. 639, 37 Eng. Reprint 512; *Ex p.* Warren, 10 Ves. Jr. 622, 32 Eng. Reprint 985.

29. Drinker's Estate, 3 Pa. Co. Ct. 489.

Compensation for carrying on the ward's business under authority of court may be allowed. State *v.* Jones, 89 Mo. 470, 1 S. W. 355. But where the committee had held the position of manager for the lunatic before he became insane, at a salary, it was held that this should not be increased without cause shown. *In re* Heft, 8 Pa. Dist. 351, 22 Pa. Co. Ct. 534.

A commission for the safe-keeping of either money or choses in action will not be allowed as a rule. Alexander *v.* Alexander, 8 Ala. 796; Gregory *v.* Parker, 87 Va. 451, 12 S. E. 801.

Unnecessary traveling expenses will not be allowed. May *v.* May, 109 Mass. 252; Drinker's Estate, 3 Pa. Co. Ct. 489.

Compensation to wife as guardian.—Where a wife is appointed custodian of her insane husband by the commissioners of insanity, she cannot recover compensation for her services in that capacity from his estate Grant *v.* Green, 41 Iowa 88.

Statutes governing the compensation of personal representatives, trustees, and guardians of minors have been held to be applicable to committees or guardians of insane persons. *In re* Livingston, 2 Den. (N. Y.) 575 [*affirming* 9 Paige 440]; Matter of Roberts, 3 Johns. Ch. (N. Y.) 43. And see *Ex p.* Lyde, Rich. Eq. Cas. (S. C.) 3. *Contra*, Matter of Colah, 6 Daly (N. Y.) 51. Now, under N. Y. Code Civ. Proc. § 2338,

had no notice of the guardianship proceedings,[30] and on appeal from the adjudication of insanity, he is found sane.[31] The guardian is usually allowed a commission on receipts and disbursements;[32] and where his duties involve the complicated management of a large estate and periodical accounting, commissions may be allowed on each statement of account.[33] Where the care of the person of the lunatic has been onerous or dangerous, the committee or guardian may be allowed special compensation therefor;[34] but special compensation will not be allowed for investing personal property of the lunatic in improvements of the real estate.[35] A lawyer acting as committee may receive compensation for professional services rendered the lunatic's estate in addition to his commission.[36] The court may refuse compensation to a committee or guardian who has been guilty of malversation or neglect of duty in the conduct of his office,[37] as by failing to make reports and accountings.[38]

the committee is entitled to the same commissions as an executor. *In re* Brayer, 57 N. Y. Suppl. 957.

30. Jessup *v.* Jessup, 17 Ind. App. 177, 46 N. E. 550.

31. Harwood *v.* Boardman, 38 Vt. 554.

32. *Ex p.* Lyde, Rich. Eq. Cas. (S. C.) 3

Commissions on receipts.— The committee is entitled to five per cent commission of the funds for services as committee for a period of five years, although the estate was chiefly the proceeds of the sale of real estate. Drinker's Estate, 3 Pa. Co. Ct. 489. Five per cent on the rents collected by the committee from prompt-paying tenants of the lunatic's estate, who were mostly in possession when he took charge of it, is a full compensation for his services. Gregory *v.* Parker, 87 Va. 451, 12 S. E. 801.

Commissions on the lunatic's income are allowed (May *v.* May, 109 Mass. 252), except under special circumstances (Cole's Appeal, 26 Colo. 110, 56 Pac. 907; Powell *v.* Bonner, 9 L. J. Ch. 139).

Commissions on interest received by the guardian are allowable. Gregory *v.* Parker, 87 Va. 451, 12 S. E. 801. So where the committee is charged in his account with the annual interest on money of the lunatic in his hands, he is entitled to his commission upon such interest. Bird *v.* Bird, 21 Gratt. (Va.) 712.

Commission for changing investments or making repairs.— The additional compensation, if any, allowed to a guardian for changing investments of the ward's property, or making repairs thereon, should not be by way of commissions on the amount invested or expended. May *v.* May, 109 Mass. 252.

Expenses as affecting commission.— Generally the committee or guardian will be allowed a commission for receiving and paying out the property without regard to the amount disbursed as expenses. Matter of Killick, 4 Silv. Sup. (N. Y.) 89, 7 N. Y. Suppl. 360; Drinker's Estate, 3 Pa. Co. Ct. 489; *Ex p.* Lyde, Rich. Eq. Cas. (S. C.) 3. The custom may yield for the benefit of the lunatic's estate when the responsibility of the committee having it in charge has been slight. Ritter's Estate, 2 Woodw. (Pa.) 306; Gregory *v.* Parker, 87 Va. 451, 12 S. E. 801.

33. Matter of Livingston, 9 Paige (N. Y.) 440 [*affirmed* in 2 Den. 575]. And see May *v.* May, 109 Mass. 252.

34. May *v.* May, 109 Mass. 252; Herbein's Estate, 2 Woodw. (Pa.) 132. For a case in which a special allowance was refused under the circumstances see Gibson *v.* Wild, 124 Iowa 152, 99 N. W. 569. Where the special committee of a lunatic was ordered to accompany his ward to India, of which country the lunatic was a native, the committee was allowed a reasonable compensation for this service. Parsee Merchant's Case, 11 Abb. Pr. N. S. (N. Y.) 209.

Where a large claim is made by the conservator of an insane person for services, the county court has inherent power to appoint counsel to represent the estate. *In re* Thomas, (Colo. 1899) 56 Pac. 907.

35. Matter of Livingston, 9 Paige (N. Y.) 440.

36. Drinker's Estate, 3 Pa. Co. Ct. 489.

37. *In re* Hall, 19 Ill. App. 295; Polis *v.* Tice, 28 N. J. Eq. 432.

If the committee permits great waste of the ward's property he will be allowed no compensation. Polis *v.* Tice, 28 N. J. Eq. 432.

If the committee fails to realize interest on large yearly balances he will not be allowed compensation. Matter of Gallagher, 17 N. Y. Suppl. 440.

Use of property by committee.— The fact that the committee, at the request of the lunatic's wife, occupied a part of the lunatic's real estate and farmed it "on the thirds" is no reason for depriving him of compensation. Pierce's Appeal, 13 Wkly. Notes Cas. (Pa.) 306.

38. *In re* Hall, 19 Ill. App. 295; Peterson *v.* Erwin, 28 Ind. App. 330, 62 N. E. 719; Crigler *v.* Alexander, 33 Gratt. (Va.) 674.

However, a committee who has devoted the entire annually accruing interest to the support of a lunatic, and held the principal of his estate unimpaired for distribution among the heirs, is entitled, in a suit brought by the administrator of the lunatic to recover the funds remaining in his hands, to the usual commissions, although he had hitherto failed to settle an account. Davidson *v.* Pope, 82 Va. 747, 1 S. E. 117.

Delay in accounting.— A guardian who failed to file his accounts till two and a

b. Procedure. The compensation of a committee for services rendered the lunatic's estate in an action prosecuted or defended is to be determined only upon the committee's accounting in the court which appointed him.[39] The general rules of evidence apply in regard to establishing the right to compensation.[40] The court has power to appoint counsel to represent the lunatic's estate where a large claim for compensation is presented by the guardian.[41]

6. Lien of Guardian For Disbursements and Compensation. A guardian or committee has no lien on the estate of the lunatic for disbursements or compensation.[42]

7. Foreign and Ancillary Guardians.[43] The appointment of a committee or guardian for an insane person has no extraterritorial force, and gives the appointee no legal status in another state[44] or power over property of the ward situate therein.[45] To entitle himself to the possession and control of such property as a matter of right he must, in the absence of statute to the contrary,[46] obtain an appointment as committee or guardian in the state where it is located.[47] The courts of the state in which the property is situated may, however, surrender it to a foreign appointee as a matter of comity.[48] Where a person was appointed guardian in one state for the person of the ward, and afterward in another state for his estate, the second appointment was ancillary to the first, although all the estate of the ward was situated in the state of the second appointment, and accordingly the guardian must account in the state where he was first appointed.[49]

half years after order to restore the property, without excuse for the delay, is not entitled to commissions. Polis *v.* Tice, 28 N. J. Eq. 432.

39. Matter of Bd. of Street Opening, 89 Hun (N. Y.) 525, 35 N. Y. Suppl. 409.

40. See Alexander *v.* Alexander, 8 Ala. 796; Lockwood *v.* Smith, 5 Day (Conn.) 309; State *v.* Jones, 89 Mo. 470, 1 S. W. 355.

41. Cole's Appeal, 26 Colo. 110, 56 Pac. 907.

42. Norton *v.* Strong, 1 Conn. 65; Jones *v.* Noyes, 4 Jur. N. S. 1033, 28 L. J. Ch. 47, 7 Wkly. Rep. 21.

Waiver.—If such a lien exists, the guardian loses it where on the ward's decease he surrenders the estate to the ward's administrator. Farr *v.* Putnam, 60 Vt. 54, 12 Atl. 212.

43. Application of property in state to support of non-resident lunatic see *infra*, III, G.

Foreign lunacy proceeding as barring appointment of conservator for resident lunatic see *supra*, II, A, 1.

Jurisdiction to appoint guardian for non-resident see *supra*, II, A, 2.

Sale of foreign property of resident lunatic see *infra*, IV, K, 1.

44. Weller *v.* Suggett, 3 Redf. Surr. (N. Y.) 249; Bayard *v.* Scanlon, 1 N. Y. City Ct. 487.

Right of foreign guardian to represent lunatic in actions see *infra*, VIII, C, 1.

45. Rogers *v.* McLean, 31 Barb. (N. Y.) 304; Matter of Colah, 6 Daly (N. Y.) 308; Weller *v.* Suggett, 3 Redf. Surr. (N. Y.) 249; Matter of Neally, 26 How. Pr. (N. Y.) 402.

In England, however, it has been held that if the courts of the country where the lunatic is resident have appointed a committee or curator for him with authority to sue for and give discharge for his property, the English court is bound to recognize such authority and to make an order for the recovery of the property. Didisheim *v.* London, etc., Bank, [1900] 2 Ch. 15, 69 L. J. Ch. 443, 82 L. T. Rep. N. S. 738, 48 Wkly. Rep. 501. And see Matter of Elias, 3 Macn. & G. 234, 49 Eng. Ch. 177, 42 Eng. Reprint 251. But in Thiery *v.* Chalmers, etc., Co., [1900] 1 Ch. 80, 69 L. J. Ch. 122, 81 L. T. Rep. N. S. 511, 48 Wkly. Rep. 148, Kakewich, J., said an application by the foreign *tuteur*, duly appointed under the French law, "properly may be and generally ought to be granted"; and in New York Security, etc., Co. *v.* Keyser, [1901] 1 Ch. 84, 70 L. J. Ch. 330, 84 L. T. Rep. N. S. 43, 49 Wkly. Rep. 371, Cozens-Hardy, J., held that the foreign committee cannot recover as of right personal property of the lunatic situated in England.

Right to appoint agent to receive payments.—A foreign guardian of a foreign insane ward may appoint an agent in Missouri to receive payment of a debt due the ward. Ferneau *v.* Whitford, 39 Mo. App. 311.

Right of foreign guardian to sell property of ward within the state see *infra*, IV, K, 1.

46. Langmuir *v.* Landes, 113 Ill. App. 134; *In re* Parker, 39 La. Ann. 333, 1 So. 891.

47. Matter of Petit, 2 Paige (N. Y.) 174.

Eligibility of foreign guardian to appointment as committee of property within the state see *supra*, II, D, 1, b, (I).

48. Watt *v.* Allgood, 62 Miss. 38; Matter of Colah, 6 Daly (N. Y.) 308; Taylor *v.* Nichols, 86 Tenn. 32, 5 S. W. 436; Clanton *v.* Wright, 2 Tenn. Ch. 342. *Contra*, Matter of Traznier, 2 Redf. Surr. (N. Y.) 171; McNeely *v.* Jamison, 55 N. C. 186.

49. Com. *v.* Rhoads, 37 Pa. St. 60.

If the appointment of a general guardian is unauthorized, the appointment of a special guardian as ancillary thereto must also be set aside.[50]

8. Guardianship Bonds[51] **— a. Requisites and Validity.** If a person signs, seals, and delivers a guardian's bond as surety, he is liable thereon, although his name does not appear in the body of the instrument.[52] Recovery can be had on a conservator's bond, although it was not filed by the clerk until after the conservator's removal, if it was delivered prior thereto.[53]

b. Construction and Effect. A guardian's bond should be construed in connection with the order requiring security.[54] Where one indebted by specialty to the estate of a lunatic is appointed committee of his estate, and the specialty is transferred and received by him as committee, the debt is extinguished, and the sureties on his bond as committee are liable as for so much money received by him.[55] The sureties may insist that a charge be made by the guardian for boarding the ward, where there would otherwise be a deficit for which they would be liable.[56] Sureties on the bond of a guardian are not liable for his failure to account for moneys which came into his hands unlawfully.[57] The renewal bonds required of a guardian on making his financial statements are cumulative.[58] The sureties on a new general bond are liable, not only for the failure of the guardian to account for all moneys and property received by him as such after the execution of the bond, but also for all money belonging to the ward which was in the hands of the guardian at the time the bond was executed.[59]

c. Discharge or Release of Sureties. The probate court may make a final decree discharging a guardian and his sureties from all liabilities already incurred, or to be thereafter incurred, except as to liability to persons laboring under some legal disability.[60] A discharge obtained by the guardian without giving the statutory notice does not bar an action against the sureties on his bond;[61] nor does an order revoking the guardianship upon condition that the guardian make a full settlement with the ward.[62] A receipt signed by a ward acquitting her guardian of all claims against him does not "increase the risk" of the sureties on the guardian's bond, so as to release them from liability.[63]

d. Conclusiveness of Appointment of Guardian. Neither the guardian of an insane person nor his sureties can escape liability on the bond by showing the invalidity of the guardian's appointment;[64] nor can they escape liability by show-

50. *In re* Bassett, 68 Mich. 348, 36 N. W. 97.

51. Necessity of giving bond see *supra*, II, D, 1, b, (II).

52. Joyner *v.* Cooper, 2 Bailey (S. C.) 199; Beery *v.* Homan, 8 Gratt. (Va.) 48.

53. Richardson *v.* People, 85 Ill. 495.

54. Beery *v.* Homan, 8 Gratt. (Va.) 48.

55. Joyner *v.* Cooper, 2 Bailey (S. C.) 199.

56. Hauser *v.* King, 76 Va. 731.

57. Johnson *v.* Ayres, 18 N. Y. App. Div. 495, 46 N. Y. Suppl. 132.

58. Tennessee Hospital *v.* Fuqua, 1 Lea (Tenn.) 608.

59. Brehm *v.* U. S. Fidelity, etc., Co., 124 Wis. 339, 102 N. W. 36.

Effect of special sale bond.— If a guardian who has sold his ward's real estate and received the price in cash subsequently gives a new general bond conditioned for the faithful discharge of all his duties, the sureties thereon are liable for his subsequent failure to account for the proceeds of the realty, although on selling it he gave the special bond required by statute. Tuttle *v.* Northrop, 44 Ohio St. 178, 5 N. E. 659.

What constitutes breach of bond see also *infra*, II, D, 8, f.

60. Racouillat *v.* Requena, 36 Cal. 651.

61. Griffin *v.* Collins, 122 Ga. 102, 49 S. E. 827.

62. Griffin *v.* Collins, 122 Ga. 102, 49 S. E. 827.

63. Griffin *v.* Collins, 122 Ga. 102, 49 S. E. 827.

64. Griffin *v.* Collins, 122 Ga. 102, 49 S. E. 827; Welch *v.* Van Arken, 76 Mich. 464, 43 N. W. 371; Gillespie *v.* Hauenstein, 72 Miss. 838, 17 So. 602; Shroyer *v.* Richmond, 16 Ohio St. 455. See, however, Hayden *v.* Smith, 49 Conn. 83.

Presumption of regularity.— Where a person was appointed and qualified as guardian of one who was an infant and a lunatic, but the record was silent as to the grounds of the appointment, and the ward was of unsound mind when she arrived of age and so continued, and for more than seven years after she came of age the guardian acted as such and was repeatedly so recognized by the court in settling his accounts, in requiring and approving a new bond, and in accepting his resignation and settling his

ing the invalidity of the appointment of a succeeding guardian who sues them on the bond.[65]

e. Conclusiveness of Settlement by Guardian. A decree settling the accounts of a guardian is ordinarily conclusive on his sureties as to the matters involved in the adjudication.[66]

f. Action on Bond. It has been held that no action can be maintained on a guardian's bond in the name of the ward while the guardianship subsists;[67] and that an accounting in the court having jurisdiction of the guardianship proceedings is also a condition precedent to an action on the bond.[68] However, the bond may be sued on without first obtaining a judgment at law against the guardian.[69] Where the final report of a conservator has been approved, and he has turned over to his ward, who has recovered, all property in his hands, and has been discharged, he is not liable to an action on his bond by a creditor of the ward for not paying the debt due such creditor.[70] The time within which suit must be brought on a guardian's bond varies in the different states.[71] Process in a suit on a guardian's bond must conform to the statutory requirements.[72] Where all the sureties are made parties in the summons and bill, and no process has

final account, it was held that as the court had jurisdiction to appoint a guardian on the ground of lunacy as well as infancy, the presumption was that the appointment covered both grounds, and that the court had authority to take the new bond after the ward arrived of age, but while still of unsound mind. King *v.* Bell, 36 Ohio St. 460.

65. Minnesota L. & T. Co. *v.* Beebe, 40 Minn. 7, 41 N. W. 232, 2 L. R. A. 418. *Contra,* Shrover *v.* Richmond, 16 Ohio St. 455.

66. McWilliams *v.* Kalbach, 55 Iowa 110, 7 N. W. 463; Com. *v.* Rhoads, 37 Pa. St. 60. See also Joyner *v.* Cooper, 2 Bailey (S. C.) 199, holding that a surety may look into the decree of a court of equity against his principal to see if he has been charged solely in his fiduciary capacity, but that he cannot examine the merits of the decree in a court of law, or call in question the propriety of his principal's having been charged in it in his trust capacity. *Contra,* Blair *v.* Gay, 33 Tex. 157.

Conclusiveness in general see *supra,* II, D, 4, a, (III).

Waiver of objections.— On final settlement of the account of a guardian he was charged with a certain sum, part of which was the proceeds of a sale of real estate and the balance having come from other sources, but the order did not specify the amounts of the respective portions. The surety on the special bond given on such sale was before the court, but made no objection to the form of the order. It was held that he could not defeat an action on the bond on the ground that the amount due on account of the sale was not determined. McWilliams *v.* Kalbach, 55 Iowa 110, 7 N. W. 463.

67. Eiland *v.* Chandler, 8 Ala. 781.

68. James *v.* Wallace, 4 McCord (S. C.) 121.

69. State *v.* Railsback, 7 Ind. 634.

70. Morgan *v.* Hoyt, 69 Ill. 489.

71. See the statutes of the several states.

In California the probate court may make a final decree discharging a guardian and his sureties from all liabilities already incurred, or to be thereafter incurred, except as to liability to those persons laboring under some legal disability, whose rights subsist until two years after their disability ceases, whether so expressed in the decree or not. Racouillat *v.* Requena, 30 Cal. 651.

In Georgia the period of limitation is twenty years; and this is not affected by Civ. Code (1895), § 565, the effect of which is to provide that in the absence of a full exhibit of the guardian's accounts and full knowledge by the ward of his rights, receipts in final settlement of the guardian's account will be *prima facie* binding upon the ward only after the lapse of four years. Griffin *v.* Collins, 122 Ga. 102, 49 S. E. 827.

In Montana, under Prob. Pr. Act, § 404, declaring that action against the sureties on a guardian's bond must be commenced within three years from the "discharge or removal" of the guardian, the statute commences to run from the death of the ward, not from the accounting by the guardian. But even if the cause of action does not accrue till accounting by the guardian, the administrator of the deceased ward is not for that reason under "disability" between the ward's death and such accounting, within Prob. Pr. Act, § 404, requiring action against the sureties on a guardian's bond to be commenced within three years from discharge of the guardian, unless at the time of the discharge the person entitled to bring the action is under "legal disability" to sue. Berkin *v.* Marsh, 18 Mont. 152, 44 Pac. 528, 56 Am. St. Rep. 565.

72. Fullor *v.* Wing, 17 Me. 222, holding also that where, in a suit on a guardian's bond to a judge of probate, it is not alleged in the writ for whose benefit it is instituted, and that it is sued out for his benefit in the name of the judge, as required by statute, there being merely an indorsement thereof on the back of the writ as required before the

been served on some of them, it is error to render a decree against the others.[73] The bond may be sued on by the guardian's successor in office,[74] and in some states by a creditor of the estate.[75] If sureties can maintain, in an action at law on the bond, an equitable cross action to surcharge and falsify the guardian's accounts, the cross complaint must point out the specific mistakes or errors in the account of which they complain, and also offer to pay what is correct.[76] In a suit on a guardian's bond for the benefit of a creditor, where the only breach is the guardian's neglect to return an inventory of the estate within three months, and the estate is not subject to the payment of debts, the damages are but nominal.[77] Upon the lapse of more than twenty years after the death of the ward and the filing of an account by the guardian, it may be presumed that liability on the guardian's bond was discharged.[78] Where questions of law and fact are submitted to an auditor in an action on the bond, and exceptions of fact are filed to the auditor's report, such exceptions should be submitted to a jury for determination.[79] A bond of a committee conditioned that the committee shall and do well and faithfully execute and perform all and singular the duties appertaining to said trust, and duly account, according to law, for all property and funds that may come into his hands, is not an instrument for the payment of money, within the meaning of a statute authorizing judgment for want of an affidavit of defense.[80] The estate of the sureties should not be resorted to on account of money for which the committee is liable until his estate has been exhausted therefor.[81]

III. CUSTODY AND SUPPORT.[82]

A. Commitment to Asylum[83] — **1. JURISDICTION.** Jurisdiction to commit an insane person to an asylum is conferred by statute upon different tribunals in the different states.[84]

2. PERSONS SUBJECT TO COMMITMENT. Generally speaking any insane person, using the term in its broadest sense, may be committed to an asylum for the insane where his welfare or the welfare of others requires it.[85] This rule is not

statute was enacted, and but nominal damages are recoverable, the court will not grant leave to set the writ right by amendment.

73. Hedrick *v.* Hopkins, 8 W. Va. 167.

74. Richardson *v.* People, 85 Ill. 495 (holding that where a conservator, on his removal from office and settlement with the court, is ordered to pay over the balance in his hands to his successor, and the latter is also removed before the money is paid and another person appointed in his place, the latter may maintain an action on the bond of the first for non-payment); Welch *v.* Van Auken, 76 Mich. 464, 43 N. W. 371 (action by administrator of deceased ward); Gillespie *v.* Hauenstein, 72 Miss. 838, 17 So. 602 (holding that a suit by a lunatic against the sureties on his deceased guardian's bond is properly brought by one acting as his guardian and next friend).

75. Raymond *v.* Sawyer, 37 Me. 406. *Contra*, Whitham *v.* People, 89 Ill. App. 103. And see Aldrich *v.* Williams, 13 Vt. 373.

76. Brodrib *v.* Brodrib, 56 Cal. 563.

77. Fuller *v.* Wing, 17 Me. 222.

78. Willingham *v.* Chick, 14 S. C. 93.

79. Griffin *v.* Collins, 122 Ga. 102, 49 S. E. 827.

80. Strock *v.* Com., 90 Pa. St. 272.

81. Pannill *v.* Calloway, 78 Va. 387.

82. **Compensation of sheriff for removing lunatic** see SHERIFFS AND CONSTABLES.

Confinement, support, and discharge of insane convicts and insane persons charged with crime see *infra*, VII, C, D.

Liability of estate of insane person for support see *infra*, IV, F, 2.

Pauper insane see PAUPERS.

Provisional orders for support of ward see *supra*, II, C, 5.

Requiring taxpayer to pay for support of insane wife or relative in asylum as double taxation see TAXATION.

83. **Deprivation of liberty without due process of law** see CONSTITUTIONAL LAW, 8 Cyc. 1093.

False imprisonment of person as insane see FALSE IMPRISONMENT, 19 Cyc. 337.

Insane asylum see ASYLUMS.

Insane hospital see HOSPITALS.

84. See Madison County *v.* Moore, 161 Ind. 426, 68 N. E. 905; Eastport *v.* Belfast, 40 Me. 262; Insane Hospital *v.* Belgrade, 35 Me. 497; Washer *v.* Slater, 67 N. Y. App. Div. 385, 73 N. Y. Suppl. 425; *In re* Gorry, 48 Hun (N. Y.) 29; Brickway's Case, 80 Pa. St. 65.

85. Brickway's Case, 80 Pa. St. 65; Shenango Tp. *v.* Wayne Tp., 34 Pa. St. 184.

An adjudication of insanity is a prerequisite to commitment (*In re* Bryant, 3 Mackey (D. C.) 489), save in extreme cases, where the public peace or morals or the interest of the patient requires immediate restriction (Com. *v.* Kirkbride, 2 Brewst. (Pa.) 400).

restricted to resident lunatics; it applies as well to non-resident lunatics found within the state.[86]

3. Proceedings and Review. The statutes usually authorize an application for the commitment of an insane person to an asylum to be made by a relative,[87] friend,[88] or guardian of the lunatic,[89] or his or her spouse,[90] and in some states by any respectable person.[91] The court or judge to whom the application is made may proceed by citation or rule to show cause to bring in the proper parties for a hearing;[92] but want of notice does not render the commitment subject to collateral attack,[93] although it is good ground for vacating the order of commitment.[94] The proceeding for commitment may be commenced by petition;[95] and a commission may issue to try the question of insanity.[96] There must be a public investigation of the question of insanity,[97] and in some states it is triable before a jury.[98]

Criminal insane.— The recital in an order of commitment of an insane person to the asylum for the insane that such person was a "resident" of the industrial home for girls does not show that the order was made without authority, although it purports to be made under Mich. Pub. Acts (1885), No. 135, § 23, which does not authorize the commitment of insane persons serving sentence in that or any other penal institution. Palmer *v.* Kalamazoo County Cir. Judge, 83 Mich. 528, 47 N. W. 355. Commitment of criminal insane see *infra*, VII, A, 3.

In the case of simple dotage, the person need not be restrained of his liberty. Owing's Case, 1 Bland (Md.) 370, 17 Am. Dec. 311.

Vagrants only, and not persons of rank, are within 17 Geo. II, c. 5, § 20, which empowers justices of peace to take care of lunatics. Anonymous, 2 Atk. 52, 26 Eng. Reprint 429.

Recognizance not to go at large.— Under R. I. Pub. Laws, c. 819, providing that where a person has been adjudged insane, unless recognizance be given that he shall not go at large till cured, the court shall commit him to the insane hospital or state insane asylum until cured or until the necessity of restraint be removed, a person cannot have his wife restrained in an insane hospital, where she has given such recognizance, although she be insane. Senft *v.* Carpenter, 18 R. I. 545, 28 Atl. 963.

86. Emmerich *v.* Thorley, 35 N. Y. App. Div. 452, 54 N. Y. Suppl. 791.

87. *Ex p.* Rosenberg, 1 Leg. Gaz. (Pa.) 49.

A parent may make the application. *In re* Cross, 16 R. I. 771, 19 Atl. 817; Hopkinton *v.* Waite, 6 R. I. 374.

88. Davis *v.* Merrill, 47 N. H. 208; *Ex p.* Rosenberg, 1 Leg. Gaz. (Pa.) 49.

89. *Ex p.* Rosenberg, 1 Leg. Gaz. (Pa.) 49; *In re* Cross, 16 R. I. 771, 19 Atl. 817; Hopkinton *v.* Waite, 6 R. I. 374.

Foreign committee.— An application signed by one who is committee of the alleged lunatic, duly appointed in another state, is not sufficient. *Ex p.* Rosenberg, 1 Leg. Gaz. (Pa.) 49.

90. Davis *v.* Merrill, 47 N. H. 208: Shenango Tp. *v.* Wagner Tp., 34 Pa. St. 184.

91. Brickway's Case, 80 Pa. St. 65.

92. Brickway's Case, 80 Pa. St. 65.

93. Merrimack County *v.* Concord, 39 N. H. 213 (holding that it is no defense to an action by a county against a town to recover moneys paid for the support, at an insane asylum, of a person committed by a judge of probate, that the town was not notified of the proceedings of the probate court); Juniata County *v.* Mifflintown Borough, 22 Pa. Super. Ct. 187 (holding that in the absence of a statutory requirement the persons or poor district chargeable with expense incurred for the support of an insane person in a public hospital are not entitled to notice of the proceedings for his commitment).

Deprivation of liberty without due process of law see Constitutional Law, 8 Cyc. 1093.

94. Matter of Egan, 36 N. Y. App. Div. 47, 55 N. Y. Suppl. 105.

95. Shenango Tp. *v.* Wayne Tp., 34 Pa. St. 184.

96. Brickway's Case, 80 Pa. St. 65; *In re* Cross, 16 R. I. 771, 19 Atl. 817; Hopkinton *v.* Waite, 6 R. I. 374.

Presumption of regularity.— As the Pennsylvania act of April 20, 1869, regulating the practice as to the commitment of insane persons to a state hospital, makes no provision as to the mode of proceeding by the commission to be appointed under the act or before it, the court is bound to presume that the court below was satisfied, when acting upon their report, that everything essential was properly done. Armstrong County *v.* Buffalo Tp., 33 Leg. Int. (Pa.) 5.

97. Van Deusen *v.* Newcomer, 40 Mich. 90.

98. State *v.* Billings, 55 Minn. 467, 57 N. W. 206, 794, 43 Am. St. Rep. 525; State *v.* Third Judicial Dist. Ct., 17 Mont. 411, 43 Pac. 385.

However, it is a question for the court whether the patient shall be restrained, even after a finding of lunacy. Com. *v.* Kirkbride, 2 Brewst. (Pa.) 400.

The jury should certify on oath that the charge of insanity is correct. Territory *v.* Gallatin County, 6 Mont. 297, 12 Pac. 662. Where, however, the jury, acting under oath, give their verdict declaring the person insane, it is equivalent to their certifying under oath that the charge of insanity is cor-

A physician's certificate of insanity is made the basis of the order of commitment in some states.[99] It has been held that the order of commitment need not be made in open court or be recorded,[1] but that the record must show the cause of commitment.[2] The commitment is not vitiated by irregularities or harmless errors.[3] The costs of the proceeding for commitment are not as a rule taxable against the estate of the insane person.[4] An order of commitment is not appealable.[5]

4. Conclusiveness and Effect of Commitment.[6] An order committing a person to an asylum as insane is not conclusive, in collateral proceedings, of his insanity at that time;[7] and it has been held that the commitment does not fix the person's status as a lunatic, so as to create, in collateral actions, a presumption of his subsequent incapacity.[8]

5. Restraint and Treatment in Asylum. The superintendent of an insane hospital, acting in good faith and with sole reference to the welfare of the patient, may, with the assent of the trustees of the hospital, permit a temporary removal of the patient from the state.[9] In New York the statutes create the office of commissioner of lunacy, and empower the commissioner to inquire into all cases of alleged or suspected wrongful confinement, neglect, cruelty, or lack of proper treatment of persons in institutions for the insane, and to order such remedy or change of treatment as is proper.[10] When an asylum superintendent has reasonable

rect. State *v.* Third Judicial Dist. Ct., 17 Mont. 411, 43 Pac. 385.

The verdict must be signed by qualified jurors. Territory *v.* Gallatin County, 6 Mont. 297, 12 Pac. 662.

99. Washer *v.* Slater, 67 N. Y. App. Div. 385, 73 N. Y. Suppl. 425; *In re* Cross, 16 R. I. 771, 19 Atl. 817; Hopkinton *v.* Waite, 6 R. I. 374.

Sufficiency of certificate.— In Maine it is essential to the validity of the commitment of an insane person to an asylum that the physicians' certificate should state that they have made due inquiry and personal examination of the patient. Kittery *v.* Dixon, 96 Me. 368, 52 Atl. 799. N. H. Gen. Laws, c. 10, § 18, requiring that the medical certificate for the commitment of a person to the insane asylum shall be accompanied by a certificate from a judge of the supreme court or court of probate, or mayor, or chairman of the selectmen, testifying to the genuineness of the signatures and the respectability of the signers, is directory. Horne *v.* Bancroft, 62 N. H. 362. In New York it is not essential that the certificate should state that the party exhibited dangerous symptoms at the very time of the examination and in the presence of the physicians, in order to justify a commitment. Emmerich *v.* Thorley, 35 N. Y. App. Div. 452, 54 N. Y. Suppl. 791. And the physicians may unite in one certificate, or each may make one, which need not be sworn to on the same day or before the same judge, it being a compliance with the statute if the certificates are approved of within five days. *In re* Medical Certificates, 7 N. Y. Suppl. 671.

1. Amherst *v.* Shelburne, 11 Gray (Mass.) 107. And see State *v.* Dunbar, 99 Mich. 99, 57 N. W. 1103.

2. Lower Augusta Tp. *v.* Northumberland County, 37 Pa. St. 143.

3. Palmer *v.* Kalamazoo County Cir. Judge, 83 Mich. 528, 47 N. W. 355; State *v.* Third Judicial Dist. Ct., 17 Mont. 411, 43 Pac. 385; Armstrong County *v.* Buffalo Tp., 33 Leg. Int. (Pa.) 5; Hopkinton *v.* Waite, 6 R. I. 374. See, however, State *v.* Billings, 55 Minn. 467, 57 N. W. 206, 794, 43 Am. St. Rep. 525, holding that where a warrant of commitment to an insane asylum shows that the party alleged to be insane was so found by the probate judge on the recommendation of "two examiners in lunacy," instead of by a "jury," as directed, the warrant is void.

4. Westlake *v.* Scott County, 125 Iowa 314, 101 N. W. 88.

Liability of public authorities for expenses of commitment see *infra*, III, F.

5. People *v.* Gilbert, 115 Ill. 59, 3 N. E. 744; Sparrow *v.* Ingham Cir. Judge, 109 Mich. 272, 67 N. W. 112; *In re* Brickway, 80 Pa. St. 65.

6. **Conclusiveness as to capacity to commit crime** see Criminal Law, 12 Cyc. 497.

Conclusiveness of adjudication of insanity see *supra*, II, C, 10, b.

7. Kellogg *v.* Cochran, 87 Cal. 192, 25 Pac. 677, 12 L. R. A. 104; Newton *v.* Mutual Ben. L. Ins. Co., 76 N. Y. 426, 32 Am. Rep. 335 [*affirming* 15 Hun 595].

8. Leggate *v.* Clark, 111 Mass. 308; Knox *v.* Haug, 48 Minn. 58, 50 N. W. 934.

If any such presumption arises, it is rebuttable, and the commitment may be overcome by other evidence than an adjudication of restoration to reason. See Breedlove *v.* Bundy, 96 Ind. 319; New York Mut. L. Ins. Co. *v.* Wiswell, 56 Kan. 765, 44 Pac. 996, 35 L. R. A. 258; Topeka Water-Supply Co. *v.* Root, 56 Kan. 187, 42 Pac. 715; Walker *v.* Coates, 5 Kan. App. 209, 47 Pac. 158. Conclusiveness and effect of discharge from asylum see *infra*, III, A, 6.

9. Rutter *v.* State, 38 Ohio St. 496.

10. Matter of Kings County Insane Asylum, 7 Abb. N. Cas. (N. Y.) 425 (holding

doubt as to the right to detain a patient after appearance of recovery, he may apply to the commissioner for a *melius inquirendum* to determine the doubt, and to decide whether such patient still continues a fit subject for confinement.[11] If a poor district is delinquent in the payment for the maintenance of a lunatic committed to an asylum, the asylum authorities should proceed against it by suit rather than return the patient.[12] After a finding of sanity by a commission issued to determine the condition of a patient, the patient cannot be detained on the authority of his guardian.[13]

6. Discharge From Asylum.[14] A person committed to an asylum as insane is entitled to be discharged on restoration to reason.[15] The procedure for obtaining a discharge varies in the different states.[16] The discharge of a person from an

that the powers of the commissioner are to be liberally construed); People *v.* New York Hospital, 3 Abb. N. Cas. (N. Y.) 229 (holding that the commissioner has jurisdiction in case of injuries to insane persons, either when the injured person is in an asylum and while in such custody the wrong to be remedied actually happens to him, or after the patient has left, when the charge is of generally impending injury or danger such as to constitute a constant menace to health and security and thus to form a part of the system of habitual misgovernment of the institution); Ayer's Case, 3 Abb. N. Cas. (N. Y.) 218 (holding that the commissioner may proceed to inquire, not only into the legality of the original commitment to an asylum, but also into the propriety of continued detention).

Proceedings to determine sanity and obtain discharge see *infra*, III, A, 6.

11. Ayer's Case, 3 Abb. N. Cas. (N. Y.) 218.

12. *In re* Danville Asylum, 29 Pa. Co. Ct. 122.

13. *In re* Cross, 16 R. I. 771, 19 Atl. 817.

14. **Habeas corpus to obtain discharge** see Habeas Corpus, 21 Cyc. 333.

15. Statham *v.* Blackford, 89 Va. 771, 17 S. E. 233, holding that where a lunatic who has been confined in an asylum is released temporarily for her improvement, and after such release completely recovers, mandamus will lie against the superintendent of the asylum to grant her a certificate of discharge, without her return to the asylum for examination. And see cases cited *infra*, note 16 *et seq.*

Sufficiency of restoration to reason.— Where the person restrained is imbecile and unable to take proper care of himself, the court will not discharge him. Com. *v.* Kirkbride, 3 Brewst. (Pa.) 586. See, however, Matter of Dickie, 7 Abb. N. Cas. (N. Y.) 417. And under R. I. Pub. Laws (1889), c. 819, § 2, one who has given the statutory recognizance can be released only upon restoration to mental soundness, although he may no longer be under necessity of restraint. *In re* Sherman, 17 R. I. 356, 22 Atl. 276. A person committed as a dangerous lunatic may be discharged, although he is not clearly within the rule of criminal responsibility for crimes with violence and including intent. Brush's Case, 3 Abb. N. Cas. (N. Y.) 225.

16. See the statutes of the several states.

Jurisdiction.— Cal. Code Civ. Proc. § 1766, authorizing the court to restore an incompetent to capacity, does not apply to persons committed to asylums, but only to those under guardianship. Aldrich *v.* Alameda County Super. Ct., 120 Cal. 140, 52 Pac. 148. The functions of the state commissioner in lunacy upon the formal inquest as to one's being wrongfully deprived of liberty are similar to those of a grand jury; and he may take both evidence obtained by compulsory process and evidence voluntarily laid before him. Matter of Kings County Insane Asylum, 7 Abb. N. Cas. (N. Y.) 425.

Venue.— A petition under the Pennsylvania act of June 15, 1897, for an issue to try the question of restoration to sanity must be made in the court which adjudged the person a lunatic and not in the court of the county in which he is confined. *In re* Hunt, 28 Pa. Co. Ct. 417.

An issue will be awarded, upon cause shown, under the Pennsylvania act of May 8, 1874 (Pamphl. Laws 122) to try the sanity of a person found to be insane under an inquisition conducted under the Pennsylvania act of April 20, 1869 (Pamphl. Laws 78) and committed to an asylum thereon. *In re* Miller, 7 Pa. Dist. 269.

Adjournment.— Where an alleged lunatic has been in confinement for upwards of three years, and has been visited principally by those who petitioned for his confinement and who are prosecuting the proceeding before the commissioners, and by physicians who were employed by them, the commission should be adjourned for a reasonable time to enable the alleged lunatic to procure evidence as to his present condition and competency to transact his own business. Matter of Baird, 8 N. Y. St. 493.

Verdict and finding.— On the trial of an inquisition as to the lunacy of a person who has been confined in an insane asylum, where the jury found the person sane, their verdict is not invalid by reason of a recommendation for a temporary guardianship, owing to said person having been out of the business world for so long. Matter of Dickie, 7 Abb. N. Cas. (N. Y.) 417. A finding of sanity by the commission annuls the effect of the physician's certificate of insanity upon which the commitment was based. *In re* Cross, 16 R. I. 771, 19 Atl. 817.

Necessity of order of court.— A lunatic

insane asylum by the officers thereof is *prima facie* evidence that the patient is restored to reason [17] or that he was improperly committed.[18]

B. Directing Removal of Lunatic From State.[19] A court clothed with the general power of care and custody of lunatics and their estates may direct an alien lunatic found within its jurisdiction to be returned to his home.[20]

C. Liability of Relatives For Support of Lunatic. The relatives of an indigent insane person, if they have ability to support him, are generally chargeable by statute with his support in an asylum [21] or elsewhere.[22]

kept in a county poorhouse or asylum by contract alone may be taken out without an order from a judge of competent jurisdiction. Alger *v.* Miller, 56 Barb. (N. Y.) 227. An indigent insane person committed to an asylum under an order of court may and should be discharged by the physician in charge of such asylum, without an order of court, upon his recovery of reason. Matter of Lukens, 18 Phila. (Pa.) 583.

Duty of court to issue warrant of removal. — Under the Ohio act of April 7, 1856, regulating state asylums and authorizing the board of trustees to discharge patients whenever they shall deem it expedient, the power of the trustees is plenary, and the probate judge is bound to issue a warrant for the removal of the patient on being notified of their order of discharge. State *v.* Burgoyne, 7 Ohio St. 153.

Discontinuance.— Where one who was adjudged to be an incompetent and ordered to be confined applied for release and discharge of her committee, she could not, after verdict against her, demand a discontinuance as a matter of right, before a final order was entered. Larner *v.* Goodwin, 75 N. Y. App. Div. 509, 78 N. Y. Suppl. 326.

17. Clements *v.* McGinn, (Cal. 1893) 33 Pac. 920 (although the certificate of discharge does not so state); Kellogg *v.* Cochran, 87 Cal. 192, 25 Pac. 677, 12 L. R. A. 104 (holding that the discharge of an inmate of an asylum over whom no guardian had been appointed restored him to legal capacity to sue without any further adjudication of his restoration to sanity); Haynes *v.* Swann, 6 Heisk. (Tenn.) 560. See also New York Mut. L. Ins. Co. *v.* Wiswell, 56 Kan. 765, 44 Pac. 996, 35 L. R. A. 258; Topeka Water-Supply Co. *v.* Root, 56 Kan. 187, 42 Pac. 715; Walker *v.* Coats, 5 Kan. App. 209, 47 Pac. 158.

18. Clements *v.* McGinn, (Cal. 1893) 33 Pac. 920.

19. Removal of lunatic from state by guardian see *infra*, III, E, 1.

20. Matter of Colah, 3 Daly (N. Y.) 529; Parsee Merchant's Case, 11 Abb. Pr. N. S. (N. Y.) 209; *In re* Maltby, 7 Q. B. D. 18, 14 Cox C. C. 609, 45 J. P. 681, 50 L. J. Q. B. 413, 44 L. T. Rep. N. S. 711, 29 Wkly. Rep. 678.

21. Watt *v.* Smith, 89 Cal. 602, 26 Pac. 1071; Washtenaw County *v.* Rabbitt, 99 Mich. 60, 57 N. W. 1084 (holding that the county need not, as against the persons chargeable, affirmatively show that the rate of the charges paid was fixed by the state asylum trustees in joint session); Franklin Tp. *v.* Pennsylvania State Lunatic Hospital, 30 Pa. St. 522; Richardson *v.* Stuesser, 25 Wis. 66, 103 N. W. 261, 69 L. R. A. 829.

A father is not liable for the support of an adult child (Sussex County *v.* Jacobs, 6 Houst. (Del.) 330; Monroe County *v.* Teller, 51 Iowa 670, 2 N. W. 533), in the absence of statute to the contrary (Napa State Hospital *v.* Flaherty, 134 Cal. 315, 66 Pac. 322; Bennet *v.* Canterbury, 23 Conn. 356; Hunlock Tp. *v.* Hufford, 8 Kulp (Pa.) 202); but he is liable if the child is an infant (Arlington *v.* Lyons, 131 Mass. 328).

A child of an insane person who is not a pauper is not liable for his support in the insane hospital. Richardson County *v.* Smith, 25 Nebr. 767, 41 N. W. 774.

Brothers and sisters of an insane person are not liable for his support in the insane hospital. Richardson County *v.* Frederick, 24 Nebr. 596, 39 N. W. 621.

Who may enforce liability.— An action against a father required by Cal. St. (1889) p. 330, § 8, to pay for the support of his insane son in the state hospital can be maintained only by the board of trustees of such hospital as authorized by section 9, and not by the treasurer of the hospital. Napa State Hospital *v.* Flaherty, 134 Cal. 315, 66 Pac. 322.

Pleading.— A town, having paid the expenses incurred for restraining and confining a destitute lunatic under proceedings instituted on a complaint to a justice of the peace founded on the thirteenth section of the statute concerning idiots, lunatics, and spendthrifts, brought an action against the father of the lunatic, who was of sufficient ability to pay the expenses, to recover therefor. The declaration alleged that complainant informed the justice of the peace that the lunatic then was a resident of the town, and that it was unsafe for him to go at large; and from the entire proceedings before the justice, set forth in the declaration, it appeared that they were founded on the thirteenth section of the act. It was held that the declaration was not insufficient either on the ground that it did not aver that the lunatic was going at large in the town, or because it did not state in terms under which section of the act such expenses were incurred. Bennett *v.* Canterbury, 23 Conn. 356.

22. House *v.* House, 6 Ind. 60, holding also that the moral obligation upon a father to support an adult idiot son is stronger than upon a brother, both being equally able.

D. Rights and Liabilities of Husband or Wife of Lunatic. The natural guardianship of an insane husband of full age and without a legal guardian is in the wife rather than in his father; and the wife may enter the father's dwelling, where the husband and wife have an exclusive temporary apartment, and remove her husband in spite of the father's opposition.[23] A wife put under the care of a committee by the county court as a lunatic will be restored to her husband by the superior court of chancery on his giving bond and security according to law.[24] In most states the husband of a lunatic is liable for her support in an asylum[25]

A widow, in the absence of an express agreement, is not chargeable to her daughter for the board of her imbecile son. Howe *v.* North, 69 Mich. 272, 37 N. W. 213.

Resident heirs of a deceased resident lunatic who have sold lands of decedent situate in another state and received the proceeds are not chargeable by a bill in equity with sums expended by the resident guardian, pursuant to order of the county court, in support of the lunatic. Allison *v.* Campbell, 21 N. C. 152.

23. Robinson *v.* Frost, 54 Vt. 105, 41 Am. Rep. 835.

24. *In re* Coleman, 4 Hen. & M. (Va.) 506.

25. *Alabama.*— Wray *v.* Wray, 33 Ala. 187. If a husband fails to maintain his insane wife, any person who contracts for her maintenance at an asylum may recover therefor from the husband. So if one person acting for another takes the insane wife of a third person to an asylum and contracts for her maintenance there, his principal may recover the expenses from the husband, although the authorities of the asylum gave credit to the agent. But if one person takes the insane wife of another to an asylum and contracts for her maintenance there, a third person who voluntarily pays therefor cannot recover the expenses from the husband. Wray *v.* Cox, 24 Ala. 337.

California.— St. Vincent's Insane Inst. *v.* Davis, 129 Cal. 20, 61 Pac. 477 (holding that the fact that a husband did not know that his insane wife was being cared for in an institution for the insane did not relieve him from liability for her board and clothing therein); Watt *v.* Smith, 89 Cal. 602, 26 Pac. 1071 (holding that the directors of the asylum may maintain an action for such recovery as trustees of an express trust).

Maine.— Bangor *v.* Wiscasset, 71 Me. 535 (holding that the husband is primarily liable for the wife's support "if able"); Alna *v.* Plummer, 4 Me. 258 (holding that where a husband well able to support his insane wife neglected to provide for her, and she wandered into an adjoining town, where she received support, the expenses of which were reimbursed in the first instance by the town where she was relieved and then repaid by the town of the husband's settlement and abode, the latter town might recover against the husband the expenses thus incurred, the payment not being voluntary but an enforceable charge against the town of the husband's settlement). However, in order to recover of a husband expenses paid by the town for the support of his insane wife in the insane hospital, plaintiff must show that in the commitment to the hospital the requirements of the statute were fully complied with. Kittery *v.* Dixon, 96 Me. 368, 52 Atl. 799.

Massachusetts.— Brookfield *v.* Allen, 6 Allen 585, holding that the husband is liable although he is in destitute circumstances.

New York.— Goodale *v.* Lawrence, 88 N. Y. 513, 42 Am. Rep. 259 [*reversing* 25 Hun 621], holding that it is no defense to an action by overseers of the poor for the support of an insane wife that the wife had in fact abandoned her husband, as she was incapable in law of so doing.

Tennessee.— Tennessee Insane Hospital *v.* McReynolds, 1 Tenn. Ch. App. 349.

United States.— Davis *v.* St. Vincent's Insane Inst., 61 Fed. 277, 9 C. C. A. 501, holding that an institution which supports an insane wife, abandoned by her husband, may maintain an action against him to recover the reasonable value of such support and care, without expressly averring that they were furnished on his credit.

See 27 Cent. Dig. tit. "Insane Persons," § 85.

Contra.— Noble County *v.* Schmoke, 51 Ind. 416; Marshall County *v.* Burkey, 1 Ind. App. 565, 27 N. E. 1108; Delaware County *v.* McDonald, 46 Iowa 170. And see Richardson *v.* Stuesser, 25 Wis. 66, 103 N. W. 261, 69 L. R. A. 829, holding that, there being no express statute extending the common-law liability of a husband to support his wife where she has been removed from his home by due process of law and maintained at an insane asylum, he is not liable under such circumstances.

Liability for support of insane pauper wife see PAUPERS.

Willingness to take charge of and support wife.— If the husband of an insane wife who is in an asylum demands that she shall be delivered into his custody by the authorities of the asylum, the authorities cannot recover of him for the subsequent maintenance of the wife; and the burden is on the authorities of the asylum, in an action by them against the husband to recover for the wife's subsequent maintenance, to show that the husband's demand was not made in good faith. St. Vincent's Inst. *v.* Davis, (Cal. 1900) 61 Pac. 476. So a county which pays the expenses of an insane wife's maintenance at an asylum cannot recover therefor from the husband, if he has at all times been able, ready, and willing to support her in a suitable manner at his own house or in the

or elsewhere;[26] and in some jurisdictions a similar liability is imposed on the wife of a lunatic.[27]

E. Powers, Duties, and Liabilities of Guardian — 1. As to Custody and Control of Ward. Unless the ward has been committed to an asylum by the court,[28] the guardian is entitled to his custody, and may care for and control him in any reasonable manner.[29] He may accordingly fix or change the domicile of the ward.[30]

2. As to Support of Ward.[31] It is the duty of the guardian to look after the wants and comforts of his ward and provide for his maintenance according to the condition of the ward's estate;[32] and he may make contracts for the care and support of the ward, and charge the estate of the latter therewith, either by the direction of the court or subject to its approval.[33] The extent of the provision to be made the ward is largely within the reasonable discretion of the guardian;[34] but ordinarily he has no authority to expend the principal of the estate for the maintenance of the ward without leave of court first obtained,[35] or, in Louisiana, the authority of a family meeting.[36] The guardian is not personally liable for the ward's support,[37] unless he makes himself so by contract.[38]

F. Liability of Public Authorities For Support of Lunatic and Expenses of Commitment. The duty of supporting insane persons is generally imposed

asylum, if it is necessary or proper that she should be sent there. Monroe County *v.* Budlong, 51 Barb. (N. Y.) 493.

26. St. Vincent's Inst. *v.* Davis, 129 Cal. 20, 61 Pac. 477 (holding that where a resident of the state left his demented wife in another state in a helpless condition, he was liable to a person who supplied her with necessaries, although such person did not know that the woman was married); Senft *v.* Carpenter, 18 R. I. 545, 28 Atl. 963 (holding that where an insane wife, with the consent of her bail, went to board with her sister, the fact that the husband shortly after provided a place for her among strangers would not relieve him from liability for her board and care at the sister's house, the wife being in an enfeebled condition and in need of relatives' care).

27. Watt *v.* Smith, 89 Cal. 602, 26 Pac. 1071.

28. Doyle, Petitioner, 17 R. I. 37, 19 Atl. 1083.

29. State *v.* Lawrence, 86 Minn. 310, 90 N. W. 769, 58 L. R. A. 931.

However, the guardian should not confine the ward except when authorized to do so by the court. Com. *v.* Kirkbride, 3 Brewst. (Pa.) 393. And see *In re* Cross, 16 R. I. 771, 19 Atl. 817.

30. Hill *v.* Horton, 4 Dem. Surr. (N. Y.) 88; Anderson *v.* Anderson, 42 Vt. 350, 1 Am. Rep. 334. And see Holyoke *v.* Haskins, 5 Pick. (Mass.) 20, 16 Am. Dec. 372.

The right is always subject to the power of a court of chancery to restrain an improper removal, and such a removal must always be made in good faith, and with a view to benefit the ward. State *v.* Lawrence, 86 Minn. 310, 90 N. W. 769, 58 L. R. A. 931.

Capacity of insane person: To acquire domicile see DOMICILE, 14 Cyc. 848. To choose settlement see PAUPERS.

Derivative settlement of insane children see PAUPERS.

Loss of settlement by insane pauper see PAUPERS.

31. Liability of estate of lunatic for his support see *infra*, IV, F, 2.

32. Creagh *v.* Tunstall, 98 Ala. 249, 12 So. 713.

33. Masters *v.* Jones, 158 Ind. 647, 64 N. E. 213; Potter *v.* Ivester, 1 Chest. Co. Rep. (Pa.) 411.

However, a contract between the county commissioners and the guardian of an insane ward stipulating that the guardian will pay the county, out of the ward's estate, a certain compensation for the care and support of the ward in the county asylum provided for the poor cannot be enforced, the county asylum being a charitable institution; nor can there be a recovery by the county on a *quantum meruit*, since a benevolent institution, while ostensibly dispensing charity, cannot create an obligation against one to whose necessities it administers. Montgomery County *v.* Ristine, 124 Ind. 242, 24 N. E. 990, 8 L. R. A. 461.

34. Creagh *v.* Tunstall, 98 Ala. 249, 12 So. 713.

35. Patton *v.* Thompson, 55 N. C. 411, 67 Am. Dec. 222; Kenuedy *v.* Johnston, 65 Pa. St. 451, 3 Am. Rep. 650; Hehn *v.* Hehn, 23 Pa. St. 415; Koenig's Estate, 1 Woodw. (Pa.) 265, holding that the appropriation of part of the principal without application to and sanction by the court, cannot subsequently be ratified so as to exonerate the committee, although it appears to have been necessary. See, however, Davidson *v.* Pope, 82 Va. 747, 1 S. E. 117.

Leave of court to expend principal see *infra*, III, G.

36. Webre's Succession, 36 La. Ann. 312.

37. Merrimack County *v.* Kimball, 62 N. H. 67.

38. Massachusetts Gen. Hospital *v.* Fairbanks, 132 Mass. 414; Hutchinson *v.* Hutchinson, 19 Vt. 437.

by statute upon various public authorities upon certain conditions. These statutes vary in the different states and must be looked to in order to determine what public authorities are liable and the conditions upon which their liability depends.[39]

39. **In Illinois,** Rev. St. c. 50, § 6, providing that the overseers of the poor in each county shall take charge of the body of any insane person or lunatic, and confine and support him, and make an account thereof and return the same to the county commissioners' court, whose duty it shall be to make an order requiring the treasurer of the county to pay the same out of any money in the treasury not otherwise appropriated, does not apply to insane persons who have adequate means of support. Hence where a city voluntarily supports an insane person possessed of means adequate to that purpose, there is no implied promise by the county to repay the city therefor, as no legal obligation rests on the city or county for the maintenance of such person. Alton *v.* Madison County, 21 Ill. 115.

In Indiana, Rev. St. (1881) § 2856, provides for the payment by the county auditor for clothing purchased by the clerk for insane persons, on presentation of the clerk's certificate. Morris *v.* State, 96 Ind. 597.

In Iowa, where an adult insane woman who should have been received as a public patient in the asylum was committed to her father's care, he is entitled to be remunerated by the county, notwithstanding informalities in his appointment as her custodian. Speedling *v.* Worth County, 68 Iowa 152, 26 N. W. 50.

In Maine, where the officers of a town have committed an insane person belonging to another town to the hospital, a right of action to recover the expenses for maintenance therein does not accrue until the sums due to the hospital are paid. Bangor *v.* Fairfield, 46 Me. 558.

In Massachusetts, if money paid by the commonwealth for the support of a lunatic at the state lunatic hospital on the mistaken supposition that he had no settlement within the commonwealth is retained by the commonwealth, on discovery of the mistake, out of money due to the hospital, the treasurer of the hospital may recover under Rev. St. c. 48, § 9, and St. (1837) c. 228, § 7, from the town in which the lunatic resided at the time of his commitment, unless defendant proves that he had no settlement in the commonwealth for such support during the six years previous to the commencement of the action, and for that only. Jennison *v.* Roxbury, 9 Gray 32. Where an insane person who is not able to pay for his own support is confined in a house of correction, under St. (1836) c. 223, the town in which he has a settlement is liable for his support in such house, if he has no parent, master, or kindred liable by law to maintain him. Watson *v.* Charlestown, 5 Metc. 54. The provision of Rev. St. c. 48, § 9, that expenses for the support of lunatics committed to the state lunatic hospital shall be paid by the town in which such lunatics have their settlement at the time of their commitment extends to cases where the commitment was made before the Revised Statutes or St. (1834) c. 150, went into operation. Foster *v.* Medfield, 3 Metc. 1. Without the knowledge of the trustees of the hospital, an agreement was made between A and the town in which a lunatic had his settlement that A should pay for the support of the lunatic, who had been committed to the hospital, and save the town harmless; and A afterward requested the treasurer of the hospital to send to him the bills for the lunatic's support as they should become due, and several bills were sent to him and paid by him, and he then declined to make any further payments. It was held that the town was not exempted by Rev. St. c. 48, § 9, from liability to pay for the subsequent support of the lunatic, "no other sufficient security, to the satisfaction of the trustees" having been taken for such support. Foster *v.* Medfield, *supra.* The repeal of St. (1833) c. 95, under which lunatics were committed to hospitals, did not operate as a discharge from their commitment, so as to relieve the town from their support. Foster *v.* Medfield, *supra.* Where, prior to the passage of St. 1832, regulating the state lunatic hospital, a lunatic was committed to the house of correction in a town in pursuance of St. 1797, and such lunatic was removed to the state lunatic hospital previous to St. 1834, no action could be maintained against the town by the treasurer of the hospital for the support of such lunatic, the statute of 1834 having repealed those of 1797 and 1832. Foster *v.* Worcester, 16 Pick. (Mass.) 71.

In Michigan, under 3 Howell Annot. St. § 1930, c. 8, providing that an unrecovered patient temporarily removed from the insane asylum shall forfeit his right to state support unless returned within a year, an indigent person removed from the asylum as an unrecovered patient, and not returned within one year, can only be returned as a county charge. Lockton *v.* Edwards, 118 Mich. 419, 76 N. W. 969. Persons not having a settlement become a state charge; but if the statute allows state maintenance "provided he is a citizen of the state," the effect is that the state refuses to care for any insane not citizens thereof. Porter *v.* Edwards, 114 Mich. 640, 72 N. W. 614.

In Missouri, Rev. St. (1879) § 5830, provides that the expense of confining a person who has been adjudged a lunatic "shall be paid by the guardian out of his estate, or by the person bound to provide for and support such insane person, or the same shall be paid out of the county treasury, upon the order of the county court, after the same shall be duly certified to them by the probate court." Section 5831 provides that the amount so paid

The town from which an insane person is legally committed to a hospital for the

out may be recovered by the county from the person bound to provide for the support of such lunatic, "if there be any of sufficient ability to pay the same." It was held that when the probate court certifies to the county court the expense of maintaining in confinement a person who has been adjudged a lunatic, and recites in its order that such lunatic is entirely without means, and that there is no one whose duty it is to support him, the county is bound to pay such expenses. Cox *v.* Osage County, 103 Mo. 385, 15 S. W. 763. Rev. St. § 4140, provides that pay patients in the state lunatic hospital shall become county patients if the county court shall so order. It was held that there need not be an express finding that the patient's estate is insufficient for his support, but an order that he become a county patient from the date of the order is enough to bind the county. State *v.* Cole County Ct., 80 Mo. 80.

In Nebraska a statute may constitutionally require a county to pay for the maintenance in an insane asylum of a person having a legal settlement in the county. But under Comp. St. c. 40, § 27, providing that if the insane person has no legal settlement, or if the settlement cannot be ascertained, he shall be supported at the expense of the state, and section 23, making it the duty of the commissioners of insanity of each county to ascertain the legal settlement of insane persons sent therefrom, a county is not chargeable with the support and maintenance of insane persons sent to the hospital therefrom, where the legal settlement is not found to be in such county. State *v.* Douglas County, 18 Nebr. 601, 26 N. W. 378.

In New Hampshire, under Gen. Laws, c. 10, §§ 16, 21, which provide that any insane person committed to the asylum shall be supported by the county from which he is committed, and that such county shall be entitled to recover the amount so paid of any town, county, or individual by law liable for his support, the liability of a town for the support of persons who have acquired a settlement therein is not absolute, but embraces only those who subsequently become destitute and unable to support themselves. Merrimack County *v.* Concord, 66 N. H. 389, 23 Atl. 87. A pauper notice is not required to sustain an action by a county against a town to recover sums paid for the support at the New Hampshire asylum for the insane of a person committed to the asylum by the judge of probate. Merrimack County *v.* Concord, 39 N. H. 213.

In New Jersey the county in which a lunatic not a pauper actually resides when he is sent to the asylum is primarily liable for his support, without reference to his settlement under the poor laws, and cannot look to any other county for reimbursement. Mercer County *v.* Warren County, 23 N. J. L. 415.

In New York the town of which an indigent insane person not a pauper is a resident when committed to the asylum on certificate of the county judge, acting under Laws (1874), c. 446, tit. 1, § 14, is not liable for his maintenance while there, under section 16 of title 1, and section 31 of title 3 of that act, providing that the expenses of a lunatic in a state asylum shall be defrayed by the town to which he is "chargeable," and that the expense of any patient received on the order of any court or officer shall be paid by the county from which he is sent, but such county may require the individual town that is "legally liable" for the support of such patient to reimburse the amount; for such indigent insane person not a pauper is not legally chargeable to the town of his residence. People *v.* Herkimer County, 122 N. Y. 652, 25 N. E. 853 [*reversing* 46 Hun 354 (*affirming* 20 Abb. N. Cas. 123)]; People *v.* Schoharie County, 121 N. Y. 345, 24 N. E. 830 [*reversing* 49 Hun 308, 2 N. Y. Suppl. 142]. Where a resident of a town is admitted to the state lunatic asylum on the certificate of the first judge of the county, pursuant to St. (1842) p. 148, § 26, providing for support in the asylum at the expense of the county, the county cannot charge the expense to the town, if the insane person, although in indigent circumstances, is not a "pauper" or "furiously mad." People *v.* Genesee County, 7 Hill 171. Where it appeared that all the estate of a lunatic had been expended in his necessary maintenance, the court, on petition of the committee and a report of a master, ordered the lunatic to be delivered to the overseers of the poor of the town. Matter of McFarlan, 2 Johns. Ch. 140. Under the direct provisions of Laws (1896), p. 508, c. 545, § 101, as amended by Laws (1899), p. 461, c. 260, when an insane inmate of a state hospital, committed thereto on the order of a court of criminal jurisdiction, is transferred to the Matteawan state hospital, his expenses are to be paid by the county in which the criminal charge arose, if he was then a resident of that county, and in other cases are a charge against the state. Jefferson County *v.* Oswego County, 102 N. Y. App. Div. 232, 92 N. Y. Suppl. 709. Where a county board of supervisors audited and caused to be paid, pursuant to express statutory liability of their county, a claim against the county for the care and maintenance of an indigent insane resident thereof confined in a hospital in another county, there was not such an admission of liability on the part of the county as affected its right to discontinue the payments on the repeal of the law under which payments had previously been made. Jefferson County *v.* Oswego County, *supra*. Laws (1874), p. 566, c. 446, § 14, imposed on counties the duty of caring for and maintaining resident indigent insane persons, but was repealed by Laws (1896), p. 471, c. 545, section 65 of which devised a new scheme whereby such persons were to be maintained at the expense of the state. Code Cr. Proc. § 662, provides that, when a person pleading insanity in criminal pro-

insane is expressly authorized by statute in some states to recover the expenses

ceedings is sent to a state lunatic asylum, the expenses incident thereto are in the first instance chargeable to the county from which he was sent, but that such county may recover from the estate of defendant, if he have any, or from a relative, town, city, or county bound to provide for and maintain him elsewhere. It was held that where an indigent resident of one county is chargeable with crime in another county, and is committed by the court to a state lunatic asylum on a plea of insanity, there is no general liability on the part of the county of his residence, under section 662, to reimburse the county from which he was sent for sums paid by it on account of his expenses while kept in a state asylum after the repeal of section 14, assuming that there was a liability under such section prior to its repeal. Jefferson County *v.* Oswego County, *supra*.

In North Carolina, under a statute providing for the support in an asylum of the "indigent insane," these words were held to intend insane persons who have no income over and above what is sufficient to maintain those who are legally dependent on them. *In re* Hybart, 119 N. C. 359, 25 S. E. 963.

In Ohio, Rev. St. § 700, providing that insane patients, after admission to the state asylums, should be clothed at the expense of the state, was so amended as to make the expense of their clothing chargeable to them. Section 632 provides that on failure of the proper parties to furnish clothing the institution may do so and charge the same to them. It was held that a steward of the institution so furnishing may recover from the state. State *v.* Kiesewetter, 37 Ohio St. 546.

In Pennsylvania, under Act 1861, § 4, the county from which an indigent insane person was sent to the state hospital was primarily liable for his support, with a right of recovery over against the township legally liable, when such liability was ascertained. It was held that this provision is applicable to one committed to the Danville hospital, and the commissioners of the county from which he was committed can recover from the township of his last legal residence. Clearfield County *v.* Cameron Tp. Poor Dist., 135 Pa. St. 86, 19 Atl. 952. Under Act 1861, the liability for the maintenance of an insane person as between the hospital and the district liable under existing laws for the whole cost was transferred to the county, and the county was given a remedy over against the district. It was held that Act 1883, which provides that the expense of the indigent insane in the state hospital shall be divided between the state and the county, the maximum charge to the county not to exceed two dollars a week per capita, thus reducing the amount to be paid by the county, reduces to the same extent the amount which the district has to pay. Danville *v.* State Hospital, 2 Pa. Cas. 409, 4 Atl. 380. Where a person abandons his settlement in the state and acquires a settlement in another state, and thereafter returns and resides in his old township without acquiring a new legal settlement, and becomes insane, the county in which he became insane is liable for his support, under Act 1854 (Pamphl. Laws 85), imposing the burden of supporting an insane person who has been committed to the state lunatic hospital, and who has no legal settlement in the commonwealth, on the county where he was found a lunatic. Juniata County *v.* Delaware Tp., 107 Pa. St. 68. The town where an insane person who has been committed by order of the quarter sessions to the state lunatic hospital has his settlement is liable for his maintenance. Franklin Tp. *v.* Pennsylvania State Lunatic Hospital, 30 Pa. St. 522. Suits may be brought, under the act of May 8, 1889, against poor districts which are delinquent in payment for maintenance of insane patients. *In re* Danville Asylum, 29 Pa. Co. Ct. 122. Where a patient is committed to the Norristown state hospital, and his friends or estate, under the order of the committing court, pay the cost of his maintenance to the directors of the poor of the county, he is not "indigent," and no cost of his maintenance should be charged to the state. *In re* Norristown Insane Hospital, 12 Pa. Co. Ct. 38. Where the court has committed an insane person to a state lunatic hospital, and notice has been given, under Act 1849, to the township or district alleged to be the place of settlement or residence of such person, such township or district may come into court, under Act 1854, and show that some other district was the true place of settlement of such lunatic, and thus escape liability, or that the lunatic was not settled in such district, but only resided therein, in which case the liability for care and maintenance falls upon the county. *Ex p.* Blewett, 11 Phila. 652.

In Tennessee a husband has the right to place his insane wife in a state hospital for the insane as a state or free patient, where he, by reason of his age or inability to pursue his calling, or from any cause, is unable to pay for her support in the institution and support himself and the other members of his family dependent upon him; it is not required that he be destitute of all property. Tennessee Insane Hospital *v.* McReynolds, 1 Tenn. Ch. App. 349. There being a statute for the admission from counties of state patients into the state hospitals for the insane upon the transfer of a patient from the pay list to the free list by the officials of the institution, the court will presume, there being no proof to the contrary, that at the date of the transfer the patient was properly admitted as a state patient, although there is no statute authorizing the officials of the hospitals to make the transfer on their own motion on mere personal information communicated to them. Tennessee Insane Hospital *v.* McReynolds, *supra*.

In Wisconsin, Laws (1881), c. 229, § 1, require the board of supervision of insane

legally incurred by it in the commitment from the town in which the insane person had his legal settlement at the time thereof.[40]

G. Judicial Allowances For Support.[41] A court of chancery jurisdiction has power to make allowances for the support of a lunatic found such by inquisition,[42] and an allowance so decreed cannot be exceeded without its sanction.[43] It has been held, however, that the court has no authority to make an order directing in advance how much the guardian shall expend annually for the support of the lunatic out of his estate;[44] and that a court can charge neither the lands of a lunatic in another state, nor its proceeds in the hands of his heir in the state where the court sits, for his support.[45] In the management of the lunatic's estate the paramount rule is that his health and comfort shall be provided for, and to this end a liberal application of the whole property may be made,[46] and the sum to be expended for his support is not necessarily limited to the amount of the annual income.[47] The mere question of expense is not controlling, but the court will direct that to be done

hospitals to determine on application whether an inmate has been improperly charged to a county or to the state. Section 2 provides that whenever any error is committed in the accounts between a state hospital and any county for the support of any inmate, and the error shall be made to appear from the certificate of the board of trustees of state insane hospitals, the secretary of state shall correct the error. It was held that section 2 imposes the duty on the board to grant the certificate to a county which has duly proved the existence of such an error; but that where the question is determined by appeal to the court, the board may not grant a certificate by which the county can recover costs of the appeal or interest on the sums erroneously advanced. State *v.* Wisconsin Charitable, etc., Insts., 72 Wis. 108, 39 N. W. 350. The "proper residence" of a person, within the meaning of a statute providing that the support of an insane person shall be charged to the proper county when his residence shall have been ascertained, is the place where he has voluntarily fixed his abode, not for a mere special or temporary purpose, but with the present intention of making it his home. State *v.* Dodge County, 56 Wis. 79, 13 N. W. 680.

Res judicata.— The court made an order committing a lunatic in proceedings therefor, and ruled P township to show cause why it should not pay expenses of the proceedings. Thereafter the court discharged the rule, the order reciting that it was made "without prejudice to the county as to proceedings against the township of last settlement, when ascertained." It was held a conclusive settlement that P township was not liable. Armstrong County *v.* Plumcreek Tp., 158 Pa. St. 92, 27 Atl. 842.

Review.— A proceeding by a wife against a town to compel it to support her lunatic husband, under Vt. Act, Nov. 10, 1870, relating to the relief of families of insane persons, is special, and not according to common law, and exceptions will not lie to the decision of the court therein. Stiles *v.* Windsor, 45 Vt. 520.

40. Jay *v.* Carthage, 48 Me. 353.

Presumptions.— In an action by one town against another to recover the expenses of committing to the asylum an insane person who was a resident of defendant town, it being customary to choose but three selectmen, it will be presumed, in support of the legality of the action of plaintiff, that this was the number chosen, unless the contrary appears. Jay *v.* Carthage, 48 Me. 353.

41. **Claims against lunatic's estate for support** see *infra*, IV, F, 2.

Right of guardian to credit for expenditures for support see *supra*, page 1150 note 88.

Sale of estate of lunatic to provide for his support see *infra*, IV, K, 2.

42. Yaple *v.* Titus, 41 Pa. St. 195, 80 Am. Dec. 604; Guthrie's Appeal, 16 Pa. St. 321.

Under the English Lunacy Acts, chancery cannot direct the application of the property of a lunatic, not so found, for his maintenance, unless there is money belonging to him in court, or the court has control of his property by reason of some pending action or proceeding relating to it (*In re* Grimmett, 56 L. J. Ch. 419), but the court in lunacy may apply the property of such a person for his maintenance in relief of rates in a pauper lunatic asylum (*In re* Tye, [1900] 1 Ch. 249, 69 L. J. Ch. 153, 81 L. T. Rep. N. S. 743, 48 Wkly. Rep. 276).

43. Guthrie's Appeal, 16 Pa. St. 321.

44. Potter *v.* Berry, 56 N. J. L. 454, 28 Atl. 668.

Who may question authority.— The heirs and next of kin having authority to require the guardian of a lunatic to render an account before the orphans' court during the life of the ward, a daughter of a lunatic may prosecute certiorari to test the validity of an order of the orphans' court allowing to the guardian in advance an annual amount for the support of the ward. Potter *v.* Berry, 56 N. J. L. 454, 28 Atl. 668.

45. Allison *v.* Campbell, 21 N. C. 152.

46. Deming *v.* Paynter, 42 S. W. 1112, 19 Ky. L. Rep. 1123; Matter of Nutting, 74 N. Y. App. Div. 468, 77 N. Y. Suppl. 696; Matter of Reed, 18 Misc. (N. Y.) 285, 41 N. Y. Suppl. 156; Weld *v.* Tew, Beatty 268; *Ex p.* Baker, Coop. 205, 35 Eng. Reprint 532, 6 Ves. Jr. 8, 31 Eng. Reprint 911.

47. Matter of Knapp, 18 Misc. (N. Y.)

which appears most for the advantage of the lunatic without regard to the interests of the next of kin.[48] The committee will generally be authorized to expend a sufficient amount of the lunatic's estate to maintain him and his house and to support him in the manner to which he has been accustomed,[49] or to permit him to travel under proper superintendence,[50] to reside abroad,[51] or to be conveyed, under the charge of a special committee, to his home in a foreign country.[52] An allowance may be directed not only for necessaries,[53] but also in a proper case for luxuries.[54] If a non-resident lunatic under guardianship has property within the state, the court may direct an allowance for the support of the ward to be paid to the foreign guardian out of such property.[55]

H. Criminal Liability For Ill-Treatment of Lunatic. In some jurisdictions criminal liability is imposed by statute on a person who ill-treats a lunatic of whom he has the care or charge.[56]

IV. PROPERTY AND CONVEYANCES.

A. Capacity to Take and Hold Property.[57] An insane person may, it seems, take property by inheritance,[58] and where a share of premises partitioned is set off to a lunatic, the title is vested in him, and not in his committee.[59] So a deed delivered to an insane grantee, if for a valid preëxisting consideration, as in

285, 41 N. Y. Suppl. 156; Hehn *v.* Hehn, 23 Pa. St. 415; Davidson *v.* Pope, 82 Va. 747, 1 S. E. 117; *In re* Persse, 3 Molloy 94.

Application of principal to support.— In applying the estate of a lunatic for the payment of expenses, the principal of the estate should be sacrificed only to necessity, and such necessity should be determined in each specific instance by the court itself, having before it all the circumstances, including the nature and value of the property, the age, condition of health, and situation in life of the lunatic, the effect of loss of accustomed comforts, the prospect of increasing infirmities, etc. It is the duty of the court to see that the future comfort of the lunatic should be made as secure as the circumstances permit, and for that purpose to keep present expenses within reasonable bounds. Equitable Trust Co. *v.* Garis, 190 Pa. St. 544, 42 Atl. 1022, 70 Am. St. Rep. 644.

Authority of guardian to expend principal of estate see *supra*, III, E, 2.

48. Matter of Colah, 3 Daly (N. Y.) 529.

This is so, although it becomes necessary to direct timber on the lunatic's land to be cut, or his real estate to be converted into personal, or his personal into real estate. *In re* Colvin, 3 Md. Ch. 278; Matter of Salisbury, 3 Johns. Ch. (N. Y.) 347.

49. Hambleton's Appeal, 102 Pa. St. 50.

50. May *v.* May, 109 Mass. 252; *In re* Hackett, 3 Ir. Ch. 375.

51. Matter of Jones, 1 Phil. 461, 19 Eng. Ch. 461, 41 Eng. Reprint 707.

52. Matter of Colah, 3 Daly (N. Y.) 529.

53. Richardson *v.* Strong, 35 N. C. 106, 55 Am. Dec. 430, holding that where a person is insane so as to attempt injury to himself and the destruction of his property, the services of a nurse and guard fall within the class of necessaries as defined by law.

Necessaries are not restricted to articles of the first necessity but include everything proper for a person's condition under the circumstances of the particular case. Lancaster County Nat. Bank *v.* Moore, 22 Pa. L. J. 189.

54. May *v.* May, 109 Mass. 252.

55. Matter of Taylor, 9 Paige (N. Y.) 611; McNeely *v.* Jamison, 55 N. C. 186; Volans *v.* Carr, 2 De G. & Sm. 242, 12 Jur. 643, 64 Eng. Reprint 109; *Re* Thompson, 19 Ont. Pr. 304.

56. Buchanan *v.* Hardy, 18 Q. B. D. 486; 51 J. P. 741, 56 L. J. M. C. 42, 35 Wkly. Rep. 453 [*questioning* Reg. *v.* Rundle, 3 C. L. R. 659, 6 Cox C. C. 549, Dears. C. C. 482, 1 Jur. N. S. 430, 24 L. J. M. C. 129, 3 Wkly. Rep. 403, which held that the statute does not apply to a person whose care or charge of a lunatic arises from natural duty, such as a husband] (holding that parents of a lunatic are liable to conviction); Reg. *v.* Smith, 44 J. P. 314, 14 Cox C. C. 398, 42 L. T. Rep. N. S. 160; Reg. *v.* Porter, 9 Cox C. C. 449, 10 Jur. N. S. 547, L. & C. 394, 33 L. J. M. C. 126, 10 L. T. Rep. N. S. 306, 12 Wkly Rep. 718 (both holding that brothers of a lunatic are liable to conviction).

57. **Adverse possession of guardian against ward** see ADVERSE POSSESSION, 1 Cyc. 1051.

Loss of title to easement of lunatic by prescription see EASEMENTS, 14 Cyc. 1153 note 99.

Loss of title to lands of lunatic by adverse possession see Cyc. Annot. 1907, ADVERSE POSSESSION, 1117 New.

Bill to discharge contract of purchase made by lunatic see QUIETING TITLE.

Capacity to take gift see GIFTS, 20 Cyc. 1194.

Validity of payment of deposit to insane depositor see BANKS AND BANKING, 5 Cyc. 609 note 4.

58. Anonymous, Jenk. 299.

59. Underhill *v.* Jackson, 1 Barb. Ch. (N. Y.) 73.

payment of a debt owing to the grantee, is valid unless avoided by the grantee or his heirs.[60]

B. Capacity to Convey Property.[61] If a person, at the time of making a conveyance, has sufficient capacity fully to comprehend the nature and effect of the act, the conveyance is valid;[62] but if the grantor has not capacity equal to a full and clear understanding of the nature and consequences of the act, the conveyance is invalid.[63] A conveyance is invalidated by monomania or specific delu-

60. Campbell *v.* Kuhn, 45 Mich. 513, 8 N. W. 523, 40 Am. Rep. 479, holding that the administrator of the grantee cannot avoid it.

Sufficiency of delivery.— A deed left unconditionally with a third person for the use of a grantee, insane but not under guardianship, and received by the grantee under circumstances indicating acceptance, is sufficiently delivered and conveys title. Campbell *v.* Kuhn, 45 Mich. 513, 8 N. W. 523, 40 Am. Rep. 479.

Presumption of acceptance of deed see DEEDS, 13 Cyc. 732.

A sale to a lunatic is void when the fact of lunacy existing at the time of the sale is established, whether or not the seller had knowledge of its existence. But this rule is subject to the qualification that where a sale is for the benefit of the lunatic or his estate, and is made in good faith without knowledge of his condition, and the party who has made it cannot be put *in statu quo*, a court of equity will not invalidate the transaction. Johnson *v.* Stone, 35 Hun (N. Y.) 380.

61. See also DEEDS, 13 Cyc. 573 *et seq.*

Conveyances by husband or wife of lunatic: Joinder of lunatic's husband in conveyance of wife's separate estate see HUSBAND AND WIFE, 21 Cyc. 1500. Conveyance of exempt property where one spouse is insane see Cyc. Annot. 1907, EXEMPTIONS, 18 Cyc. 1147; HOMESTEADS, 21 Cyc. 541. Power of husband over insane wife's separate estate see HUSBAND AND WIFE, 21 Cyc. 1414 *et seq.* Power of lunatic's wife to dispose of community property see HUSBAND AND WIFE, 21 Cyc. 1668 note 63. Presumption of authority of husband to represent insane wife in regard to her separate estate see HUSBAND AND WIFE, 21 Cyc. 1418.

Release of dower by insane wife see DOWER, 14 Cyc. 956.

Mental weakness as ground for avoiding deed see DEEDS, 13 Cyc. 573, 753; MORTGAGES.

Insanity as defense to suit for specific performance see SPECIFIC PERFORMANCE.

62. *Connecticut.*— Hale *v.* Hills, 8 Conn. 39; Brown *v.* Brown, 3 Conn. 299, 8 Am. Dec. 187.

Idaho.— Kelly *v.* Perrault, 5 Ida. 221, 48 Pac. 45.

Illinois.— Titcomb *v.* Vantyle, 84 Ill. 371. See also Lilly *v.* Waggoner, 27 Ill. 395, holding that a deed executed several years before the maker was, by inquest, found insane, has the legal presumption of validity in its favor.

Kansas.— The deed of one adjudged a lunatic, but in fact sane, is valid, although no adjudication has been made that he is restored to his right mind. Lower *v.* Schumacher, 61 Kan. 625, 60 Pac. 538.

Kentucky.— Carpenter *v.* Carpenter, 8 Bush 283; Spurlock *v.* Noe, 43 S. W. 231, 19 Ky. L. Rep. 1321, 39 L. R. A. 775.

Maine.— Hovey *v.* Hobson, 55 Me. 256.

Massachusetts.— Bond *v.* Bond, 7 Allen 1. See also Willwerth *v.* Leonard, 156 Mass. 277, 31 N. E. 299.

Minnesota.— Where one under guardianship as a lunatic was in fact of sound mind when he made the conveyance and the contract was a fair one, and the guardianship had been practically abandoned, the deed was held to be valid, although the guardian had not been formally discharged. Thorpe *v.* Hanscom, 64 Minn. 201, 66 N. W. 1.

New Hampshire.— Dennett *v.* Dennett, 44 N. H. 531, 84 Am. Dec. 97.

New York.— Wagener *v.* Harriott, 20 Abb. N. Cas. 283.

United States.— Parker *v.* Marco, 76 Fed. 510.

See 27 Cent. Dig. tit. "Insane Persons," § 93. See also *infra*, V, B, 1.

Old age of itself does not create incapacity to convey. Greer *v.* Greer, 9 Gratt. (Va.) 330. And see Walton *v.* Northington, 5 Sneed (Tenn.) 282; and *infra*, V, B, 1.

Deaf and dumb persons, although such from birth, are not necessarily incompetent to make valid conveyances, they having the capacity to understand the sole fact that they are parting with their estate. Brown *v.* Brown, 3 Conn. 299, 8 Am. Dec. 187. And see Elyot's Case, Carter 53; and *infra*, V, B, 2.

When the inquisition has been set aside, the party may give a valid title, although the inquisition is subsequently reinstated. Mitchell *v.* Spaulding, 206 Pa. St. 220, 55 Atl. 968.

Mortgages.— A person, although weak in body and feeble in mind, may make a valid mortgage. Hirsch *v.* Trainer, 3 Abb. N. Cas. (N. Y.) 274.

63. *Connecticut.*— Griswold *v.* Butler, 3 Conn. 227.

Georgia.— Dicken *v.* Johnson, 7 Ga. 484.

Indiana.— Harbison *v.* Lemon, 3 Blackf. 51, 23 Am. Dec. 376.

Kentucky.—Stapp *v.* Ward, 3 A. K. Marsh. 129.

Michigan.— Domling *v.* Domling, 128 Mich. 588, 87 N. W. 788.

Wisconsin.— Mohr *v.* Tulip, 40 Wis. 66.

See 27 Cent. Dig. tit. "Insane Persons," § 93.

Estoppel of grantee to deny insanity of grantor.— Where a husband is induced to execute a deed of property to his wife on ac-

sion of the grantor affecting the transaction in question;[64] but it has been held that the deed is valid if the delusion exists only with reference to an extraneous matter so that it cannot be reasonably supposed to have influenced the grantor in making the conveyances.[65] A person insane on all subjects may make a valid conveyance in a lucid interval.[66]

C. Validity of Conveyances.[67] A lunatic cannot bind himself absolutely by a conveyance of his property,[68] and the fact that the grantee was not aware of the insanity of the grantor does not validate the deed.[69] The weight of authority is in favor of the rule that the deeds of persons in fact insane, but not so adjudicated, in whatever form such deeds are made, are merely voidable and not abso-

count of the marital relations existing between them, and afterward the wife, on evidence furnished by herself, secures an annulment of the marriage on the ground that the husband was insane at the time the marriage contract was entered into, she cannot deny the insanity of the husband in an action brought to set aside the deed on account of such insanity. Warfield *v.* Warfield, 76 Iowa 633, 41 N. W. 383.

Burden of proof.— In an action by the guardian of an incompetent person to set aside his conveyance because of unsoundness of mind at the time of the conveyance, the burden is on plaintiff to show such mental condition. Paulus *v.* Reed, 121 Iowa 224, 96 N. W. 757.

64. Crowther *v.* Rowlandson, 27 Cal. 376; Lemon *v.* Jenkins, 48 Ga. 313; Bond *v.* Bond, 7 Allen (Mass.) 1; Alston *v.* Boyd, 6 Humphr. (Tenn.) 504. See *infra*, V, B, 4.

65. Jenkins *v.* Morris, 14 Ch. D. 674, 42 L. T. Rep. N. S. 817. See, however, Cook *v.* Parker, 4 Phila. (Pa.) 265; Alston *v.* Boyd, 6 Humphr. (Tenn.) 504; Creagh *v.* Blood, 8 Ir. Eq. 434, 2 J. & L. 509. See *infra*, V, B, 4.

66. Towart *v.* Sellars, 5 Dow. 231, 3 Eng. Reprint 1312. See also Matthiessen, etc., Refining Co. *v.* McMahon, 38 N. J. L. 536. See *infra*, V, B, 3.

Burden of proof.— The burden of showing that a conveyance was made by an insane person during a lucid interval is on the party claiming under the deed. Gingrich *v.* Rogers, (Nebr. 1903) 96 N. W. 156.

67. See, generally, DEEDS; LANDLORD AND TENANT; MORTGAGES; VENDOR AND PURCHASER.

Gifts see GIFTS, 20 Cyc. 1193.

Validity of conveyances between guardian and ward see DEEDS, 13 Cyc. 588.

Validity of deed made after adjudication of insanity see *supra*, II, C, 10, b, (II), (C).

68. See cases cited *supra*, note 63 *et seq.*

Power conferred on a lunatic, so found, to convey, his committee entering into covenants of title in his behalf, by the English Lunacy Act of 1890, § 122, see *in re* Ray, [1896] 1 Ch. 468, 60 J. P. 340, 63 L. J. Ch. 316, 73 L. T. Rep. N. S. 723, 44 Wkly. Rep. 353 [*explaining In re* Fox, 33 Ch. D. 37, 55 L. T. Rep. N. S. 39, 35 Wkly. Rep. 81].

Conveyance by matter of record.— By the common law the conveyance of an insane person, if made by matter of record, was neither void nor voidable (Snowden *v.* Dunlavey, 11 Pa. St. 522), as where an idiot, so found by inquisition, levied a fine; and it was further held that he might, by indenture, direct the uses of the fine (Murley *v.* Sherren, 8 A. & E. 754, 8 L. J. Q. B. 152, 1 P. & D. 126, 1 W. W. & H. 678, 35 E. C. L. 827), although the fine might be avoided in equity (Addison *v.* Dawson, 2 Vern. Ch. 678, 23 Eng. Reprint 1040; Wilkinson *v.* Brayfield, 2 Vern. Ch. 307, 23 Eng. Reprint 799, 1 Fonblanque Eq. 52). This rule was held to apply to titles acquired under judgments, statutes, recognizances, statutory acknowledgments, and the like. Pope Lun. 232; Snowden *v.* Dunlavey, 11 Pa. St. 522. It is apprehended that, at the present day, the liability of the insane person under an act of record is to be determined by the same considerations which would determine the question of his liability for an act *in pais*. Pope Lun. 233; Milner *v.* Turner, 4 T. B. Mon. (Ky.) 240. And in Pennsylvania a deed executed to bar an estate tail pursuant to statute is matter *in pais*, and for the purpose of avoiding it evidence is admissible to show that the grantor was *non compos mentis*. Wood *v.* Bayard, 63 Pa. St. 320.

69. Sullivan *v.* Flynn, 20 D. C. 396; Northwestern Mut. F. Ins. Co. *v.* Blankenship, 94 Ind. 535, 48 Am. Rep. 185; Gingrich *v.* Rogers, (Nebr. 1903) 96 N. W. 156. See also Seaver *v.* Phelps, 11 Pick. (Mass.) 304, 22 Am. Dec. 372, pledge. *Compare* Lack *v.* Brecht, 166 Mo. 242, 65 S. W. 976; Rhoades *v.* Fuller, 139 Mo. 179, 40 S. W. 760; Yauger *v.* Skinner, 14 N. J. Eq. 389 (a full and fair price having been paid); Elliot *v.* Ince, 7 De G. M. & G. 475, 3 Jur. N. S. 597, 26 L. J. Ch. 821, 5 Wkly. Rep. 465, 56 Eng. Ch. 369, 44 Eng. Reprint 186 (holding that dealings of sale and purchase by a person apparently sane, although subsequently found to be insane, will not be set aside against those who have dealt with him on the faith of his being a person of competent understanding, but that this doctrine is inapplicable to a case where the question is whether the deed of a lunatic altering the provisions of a settlement is valid); Campbell *v.* Hill, 23 U. C. C. P. 473 [*affirming* 22 U. C. C. P. 526].

Where a mortgage is executed by an agent at the time his principal is insane, and the mortgagee has no knowledge of such insanity, it is binding on the principal. Merritt *v.* Merritt, 43 N. Y. App. Div. 68, 59 N. Y. Suppl. 357.

lutely void,[70] although there are cases to the contrary.[71] In those jurisdictions

70. *Arkansas.*—Langley *v.* Langley, 45 Ark. 392.

Illinois.— Burnham *v.* Kidwell, 113 Ill. 425.

Indiana.— Ætna L. Ins. Co. *v.* Sellers, 154 Ind. 370, 56 N. E. 97, 77 Am. St. Rep. 481; Fay *v.* Burditt, 81 Ind. 433, 42 Am. Rep. 142; Schuff *v.* Ransom, 79 Ind. 458; Freed *v.* Brown, 55 Ind. 310; Nichol *v.* Thomas, 53 Ind. 42; Musselman *v.* Craven, 47 Ind. 1 [*overruling* Brown *v.* Freed, 43 Ind. 253]; Wilder *v.* Wakley, 34 Ind. 181; Somers *v.* Pumphrey, 24 Ind. 231; Crouse *v.* Holman, 19 Ind. 30. See also Ashmead *v.* Reynolds, 127 Ind. 441, 26 N. E. 80; Boyer *v.* Berryman, 123 Ind. 451, 24 N. E. 249.

Iowa.— Behrens *v.* McKenzie, 23 Iowa 333, 92 Am. Dec. 428.

Kansas.— Leavitt *v.* Files, 38 Kan. 26, 15 Pac. 891; Gribben *v.* Maxwell, 34 Kan. 8, 7 Pac. 584, 55 Am. Rep. 233; Brown *v.* Cory, 9 Kan. App. 702, 59 Pac. 1097.

Kentucky.— Breckenridge *v.* Ormsby, 1 J. J. Marsh. 236, 19 Am. Dec. 71; Arnett *v.* Owens, 65 S. W. 151, 23 Ky. L. Rep. 1409.

Maine.— Hovey *v.* Hobson, 53 Me. 451, 89 Am. Dec. 705.

Maryland.— Riley *v.* Carter, 76 Md. 581, 25 Atl. 667, 35 Am. St. Rep. 443, 19 L. R. A. 489; Evans *v.* Horan, 52 Md. 602; Long *v.* Long, 9 Md. 348; Key *v.* Davis, 1 Md. 32.

Massachusetts.— Allis *v.* Billings, 6 Metc. 415, 39 Am. Dec. 744; Seaver *v.* Phelps, 11 Pick. 304, 22 Am. Dec. 372; Wait *v.* Maxwell, 5 Pick. 217, 16 Am. Dec. 391.

Michigan.— Wolcott *v.* Connecticut Gen. L. Ins. Co., 137 Mich. 309, 100 N. W. 569 [*distinguishing* Rogers *v.* Blackwell, 49 Mich. 192, 13 N. W. 512].

Missouri.— Jamison *v.* Culligan, 151 Mo. 410, 52 S. W. 224; McAnaw *v.* Tiffin, 143 Mo. 667, 45 S. W. 656; Rhoades *v.* Fuller, 139 Mo. 179, 40 S. W. 760; Wells *v.* Covenant Mut. Ben. Assoc., 126 Mo. 630, 29 S. W. 607; Blount *v.* Spratt, 113 Mo. 48, 20 S. W. 967.

Nevada.— Robinson *v.* Kind, 25 Nev. 261, 59 Pac. 863, 62 Pac. 705.

New Jersey.— Matthiessen, etc., Refining Co. *v.* McMahon, 38 N. J. L. 536; Eaton *v.* Eaton, 37 N. J. L. 108, 18 Am. Rep. 716; Yauger *v.* Skinner, 14 N. J. Eq. 389.

New York.— Blinn *v.* Schwarz, 177 N. Y. 252, 69 N. E. 542, 101 Am. St. Rep. 806 [*affirming* 63 N. Y. App. Div. 25, 71 N. Y. Suppl. 343, and *explaining* Van Densen *v.* Sweet, 51 N. Y. 378]; Hughes *v.* Jones, 116 N. Y. 67, 22 N. E. 446, 15 Am. St. Rep. 386, 5 L. R. A. 637; Valentine *v.* Lunt, 115 N. Y. 496, 22 N. E. 209; Mutual L. Ins. Co. *v.* Hunt, 79 N. Y. 541; Ingraham *v.* Baldwin, 9 N. Y. 45; Merritt *v.* Merritt, 43 N. Y. App. Div. 68, 59 N. Y. Suppl. 357; Baldwin *v.* Golde, 88 Hun 115, 34 N. Y. Suppl. 587; Brown *v.* Miles, 61 Hun 453, 16 N. Y. Suppl. 251; Riley *v.* Albany Sav. Bank, 36 Hun 513 [*affirmed* in 109 N. Y. 669]; *In re* Beckwith, 3 Hun 443; Canfield *v.* Fairbanks, 63 Barb. 461; Fitzhugh *v.* Wilcox, 12 Barb. 235; Goodyear *v.* Adams, 1 Silv. Sup. 185, 5 N. Y. Suppl. 275 [*affirmed* in 119 N. Y. 650, 23 N. E. 1149; Jackson *v.* Gumaer, 2 Cow. 552; Jackson *v.* Burchin, 14 Johns. 124; L'Amoureux *v.* Crosby, 2 Paige 422.

North Carolina.— Riggan *v.* Green, 80 N. C. 236, 30 Am. Rep. 77.

Texas.— Elston *v.* Jasper, 45 Tex. 409. See also Pearson *v.* Cox, 71 Tex. 246, 9 S. W. 124, 10 Am. St. Rep. 740.

Wisconsin.— French Lumbering Co. *v.* Theriault, 107 Wis. 627, 83 N. W. 927, 81 Am. St. Rep. 856, 51 L. R. A. 910.

England.— Sergeson *v.* Sealey, 2 Atk. 412, 9 Mod. 370, 26 Eng. Reprint 648; Jacobs *v.* Richards, 18 Beav. 300, 2 Eq. Rep. 299, 18 Jur. 527, 23 L. J. Ch. 557, 2 Wkly. Rep. 174, 52 Eng. Reprint 118; Snooks *v.* Watts, 11 Beav. 105, 12 Jur. 444, 50 Eng. Reprint 757; Selby *v.* Jackson, 6 Beav. 192, 12 L. J. Ch. 249, 49 Eng. Reprint 799; Frank *v.* Mainwaring, 2 Beav. 115, 17 Eng. Ch. 115, 48 Eng. Reprint 1123; Bluvan *v.* McDonnell, 9 Exch. 309; Molton *v.* Camroux, 4 Exch. 17, 18 L. J. Exch. 356 [*affirming* 2 Exch. 487, 12 Jur. 800, 18 L. J. Exch. 68]; Niell *v.* Morley, 9 Ves. Jr. 478, 32 Eng. Reprint 687. See also Kirkwall *v.* Flight, 3 Wkly. Rep. 529. *Compare In re* Walker, [1905] 1 Ch. 160, 74 L. J. Ch. 86, 91 L. T. Rep. N. S. 713, 53 Wkly. Rep. 177.

Canada.— Campbell *v.* Hill, 23 U. C. C. P. 473 [*affirming* 22 U. C. C. P. 526]. See also McDonald *v.* McDonald, 14 Grant Ch. (U. C.) 545; Young *v.* Young, 10 Grant Ch. (U. C.) 365; Francis *v.* St. Germain, 6 Grant Ch. (U. C.) 636.

See 27 Cent. Dig. tit. "Insane Persons," § 93. See also as to contracts generally *infra*, V, A, 2.

Conveyance by feoffment and livery of seizin.— Sheffield's Case, Godb. 300; Thomson *v.* Leach, 12 Mod. 173. See Arnold *v.* Richmond Iron Works, 1 Gray (Mass.) 434; Wait *v.* Maxwell, 5 Pick. (Mass.) 217, 16 Am. Dec. 391.

71. Galloway *v.* Hendon, 131 Ala. 280, 31 So. 603; Wilkinson *v.* Wilkinson, 129 Ala. 279, 30 So. 578; Dougherty *v.* Powe, 127 Ala. 577, 30 So. 524; Elder *v.* Schumacher, 18 Colo. 433, 33 Pac. 175; Sullivan *v.* Flynn, 20 D. C. 396; Gingich *v.* Rogers, (Nebr. 1903) 96 N. W. 156; Wager *v.* Wagoner, 53 Nebr. 511, 73 N. W. 937; Dewey *v.* Allgire, 37 Nebr. 6, 55 N. W. 276, 40 Am. St. Rep. 468; Farley *v.* Parker, 6 Oreg. 105, 25 Am. Rep. 504; Rogers *v.* Walker, 6 Pa. St. 371, 47 Am. Dec. 470; *In re* Desilver, 5 Rawle (Pa.) 111, 28 Am. Dec. 645; Dexter *v.* Hall, 15 Wall. (U. S.) 9, 21 L. ed. 73; German Sav., etc., Soc. *v.* De Lashmutt, 67 Fed. 399. See also Thompson *v.* New England Mtg. Sec. Co., 110 Ala. 400, 18 So. 315, 55 Am. St. Rep. 29; Kennedy *v.* Marrast, 46 Ala. 161; Rawdon *v.* Rawdon, 28 Ala. 565; Boynton *v.* Reese, 112 Ga. 354, 37 S. E. 437, when both fraud of the grantee and insanity of the grantor were alleged.

where the committee or guardian of the insane person is considered as invested with the full legal estate of the ward, or where the ward is by statute made incapable of making a valid contract, all conveyances made by him after adjudication of insanity and the appointment of a guardian or committee are absolutely void.[72] Generally a lunatic's conveyance will be set aside when it was the result of undue influence, unfair advantage taken, or fraud on the part of the grantee, when the consideration was lacking or wholly inadequate,[73] or when the grantor was obviously or notoriously insane and incapable of managing his affairs and the grantee had notice of that fact.[74] Equity will set aside conveyances made without consideration by an insane person, although made to one dealing with him in good faith,[75] and by a parity of reasoning, in the absence of a statutory provision on the subject, it is held as a rule of the common law that a surrender or conveyance of lands by an insane person, executed without any consideration, or for an inadequate consideration, is absolutely void,[76] especially where the grantor had notice of the insanity,[77] so that even an innocent purchaser from the lunatic's

72. *Connecticut.*— Griswold *v.* Butler, 3 Conn. 227.

Indiana.— Nichol *v.* Thomas, 53 Ind. 42.

Kansas.— New England L. & T. Co. *v.* Spitler, 54 Kan. 560, 38 Pac. 799; St. John State Bank *v.* Norduff, 2 Kan. App. 55, 43 Pac. 312.

Maine.— Hovey *v.* Hobson, 53 Me. 451, 89 Am. Dec. 705.

Massachusetts.— Wait *v.* Maxwell, 5 Pick. 217, 16 Am. Dec. 391.

Missouri.— Rannells *v.* Gerver, 80 Mo. 474.

New York.—Van Deusen *v.* Sweet, 51 N. Y. 378; Griswold *v.* Miller, 15 Barb. 520; Fitzhugh *v.* Wilcox, 12 Barb. 235; L'Amoureux *v.* Crosby, 2 Paige 422, 22 Am. Dec. 655. See also Hughes *v.* Jones, 116 N. Y. 67, 22 N. E. 446, 15 Am. St. Rep. 386, 5 L. R. A. 637.

Pennsylvania.— Rogers *v.* Walker, 6 Pa. St. 371, 47 Am. Dec. 470. But *compare* Hutchinson *v.* Sandt, 4 Rawle 234, 26 Am. Dec. 127.

Texas.— Elston *v.* Jasper, 45 Tex. 409.

Virginia.— Cline *v.* Catron, 22 Gratt. 378.

England.— *In re* Walker, [1905] 1 Ch. 160, 74 L. J. Ch. 86, 91 L. T. Rep. N. S. 713, 53 Wkly. Rep. 177.

See 27 Cent. Dig. tit. "Insane Persons," § 36. And see *supra*, II, C, 10, b, (II), (C); *infra*, V, A, 3.

73. Cherbonnier *v.* Evitts, 56 Md. 276; Wright *v.* Proud, 13 Ves. Jr. 136, 33 Eng. Reprint 246. And see Evans *v.* Blood, 3 Bro. P. C. 632, 1 Eng. Reprint 1543.

74. Fecel *v.* Guinault, 32 La. Ann. 91; Curtis *v.* Brownell, 42 Mich. 165, 3 N. W. 936; Halley *v.* Troester, 72 Mo. 73; Carew *v.* Johnston, 2 Sch. & Lef. 280. In Campbell *v.* Hooper, 3 Eq. Rep. 727, 1 Jur. N. S. 670, 24 L. J. Ch. 644, 3 Smale & G. 153, 3 Wkly. Rep. 528, 65 Eng. Reprint 603, however, the rights of a mortgagee taking from an insane mortgagor for a sufficient consideration, although with constructive notice of the grantor's insanity, was upheld upon the apparent ground that the contract was analogous to an insane person's contract for necessaries.

A mortgagee of the grantee in a deed by an insane person, having actual knowledge of the grantor's insanity and the adjudication thereof, acquires no lien. New England L. & T. Co. *v.* Spitler, 54 Kan. 560, 38 Pac. 799.

An exchange of property made by a person of mind so unsound that the want of mental capacity is apparent to any one of ordinary prudence and observation is invalid. Halley *v.* Troester, 72 Mo. 73.

75. Pinkard *v.* Smith, Litt. Sel. Cas. (Ky.) 331; Potter *v.* Woodruff, 92 Mich. 8, 52 N. W. 83; Arnold *v.* Townsend, 14 Phila. (Pa.) 216; Elliot *v.* Ince, 7 De G. M. & G. 475, 3 Jur. N. S. 597, 26 L. J. Ch. 821, 5 Wkly. Rep. 465, 55 Eng. Ch. 369, 44 Eng. Reprint 186; Clerk *v.* Clerk, 2 Vern. Ch. 412, 23 Eng. Reprint 865.

76. *California.*— Maggini *v.* Pezzoni, 76 Cal. 631, 18 Pac. 687.

Iowa.— Alexander *v.* Haskins, 68 Iowa 73, 25 N. W. 935.

Kentucky.— Pinkard *v.* Smith, Litt. Sel. Cas. 331.

New York.— Sander *v.* Savage, 75 N. Y. App. Div. 333, 78 N. Y. Suppl. 189, 11 N. Y. Annot. Cas. 433; Valentine *v.* Richardt, 51 Hun 544, 3 N. Y. Suppl. 906.

Pennsylvania.— Arnold *v.* Townsend, 14 Phila. 216.

England.— Anonymous, Freem. K. B. 508; Thompson *v.* Leach, 1 Ld. Raym. 313, 2 Salk. 427; Leach *v.* Thomson, Show. 150, 1 Eng. Reprint 102.

See 27 Cent. Dig. tit. "Insane Persons," § 93.

Mortgages.— It is held that a mortgage executed by an insane person is valid and enforceable so far as the consideration was for the benefit of the grantor, but that the lien of the mortgage should be diminished by so much as the consideration of it had been used for other purposes. Mahoney *v.* Goepper, 8 Ohio Dec. (Reprint) 154, 6 Cinc. L. Bul. 33. Thus the mortgage will be valid so far as the consideration of it has been applied to the extinguishment of a former existing mortgage. McCracken *v.* Levi, 24 Ohio Cir. Ct. 584.

77. Alexander *v.* Haskins, 68 Iowa 73, 25 N. W. 935; Furry *v.* Bartling, (Iowa 1903) 94 N. W. 471.

grantee can take no title to the property conveyed, as against the grantor's heirs.[78] Since the material circumstance in such cases is the inadequacy of the consideration, the rule will be enforced, although in the transaction there was no fraud or undue advantage taken of the lunatic.[79] The facts that a conveyance from an insane person was obtained without fraud,[80] and was based on an adequate consideration,[81] do not prevent an avoidance thereof; neither does the fact that property conveyed by an insane person has passed into the hands of an innocent purchaser.[82] The conveyance of one who was actually insane at the time may be avoided after his death, although he was never judicially declared insane.[83]

D. Affirmance of Conveyances. The deed of an insane person, where it is voidable only, may be ratified by him upon his restoration to sanity;[84] but such ratification must be his intelligent act, he knowing that he is acting under the contract contained in the deed and intelligently availing himself of its provisions in his favor.[85] Proof of express and formal ratification is not, however, necessary, and such ratification may be inferred from the grantor's taking advantage of the agreements in the contract of conveyance beneficial to him, as by accepting either the agreed price or payment of notes given therefor while he was insane.[86] The guardian or committee cannot ratify the deed of the insane person under his guardianship,[87] unless by order of the court appointing him, acting under its inherent or statutory authority to make conveyances of the lunatic's property.[88]

E. Avoidance of Conveyances[89] — **1. Who May Avoid.** The voidable conveyance of an insane grantor may be avoided by himself on his restoration to reason,[90] or by his guardian or committee for him while he remains insane,[91]

78. Valentine *v.* Lunt, 51 Hun (N. Y.) 544, 3 N. Y. Suppl. 906. See also Hull *v.* Louth, 109 Ind. 315, 10 N. E. 270, 58 Am. Rep. 405; Goodyear *v.* Adams, 1 Silv. Sup. (N. Y.) 185, 5 N. Y. Suppl. 275 [*affirmed* in 119 N. Y. 650, 23 N. E. 1149].

79. Maggini *v.* Pezzoni, 76 Cal. 631, 18 Pac. 687.

80. Hovey *v.* Hobson, 53 Me. 451, 89 Am. Dec. 705.

81. Hovey *v.* Hobson, 53 Me. 451, 89 Am. Dec. 705.

82. Gates *v.* Carpenter, 43 Iowa 152 [*following* Jenkins *v.* Jenkins, 12 Iowa 195]; Hovey *v.* Hobson, 53 Me. 451, 89 Am. Dec. 705. See also Anglo-Californian Bank *v.* Ames, 27 Fed. 727. *Compare* Greenslade *v.* Dare, 20 Beav. 284, 1 Jur. N. S. 294, 24 L. J. Ch. 490, 3 Wkly. Rep. 220, 52 Eng. Reprint 612.

83. Northwestern Mut. F. Ins. Co. *v.* Blankenship, 94 Ind. 535, 48 Am. Rep. 185.

84. Allis *v.* Billings, 6 Metc. (Mass.) 415, 39 Am. Dec. 744. See also Boyce *v.* Warren, 19 N. C. 498, sale of a slave by the lunatic to his guardian. See *infra*, V, A, 2; V, C, 1.

Effect of ratification.— The ratification of a deed executed during the grantor's insanity will not make such deed effectual as against a prior deed of the grantor executed while he was sane and recorded after the formal execution, but before the ratification, of the second deed. Bond *v.* Bond, 7 Allen (Mass.) 1.

85. Beasly *v.* Beasly, 180 Ill. 163, 54 N. E. 187; Bond *v.* Bond, 7 Allen (Mass.) 1.

86. Jones *v.* Evans, 7 Dana (Ky.) 96; Arnold *v.* Richmond Iron Works, 1 Gray (Mass.) 434; Eaton *v.* Eaton, 37 N. J. L. 108, 18 Am. Rep. 716; Tucker *v.* Moreland, 10 Pet. (U. S.) 58, 9 L. ed. 345. See also *infra*, V, C, 1.

Mere possession of the grantee, with the acquiescence of the grantor after his restoration to sanity, will not amount to a ratification of a deed made without consideration. Beasley *v.* Beasley, 180 Ill. 163, 54 N. E. 187.

87. Rannells *v.* Gerner, 80 Mo. 474 [*reversing* 9 Mo. App. 506].

88. Funk *v.* Rentchler, 134 Ind. 68, 33 N. E. 364, 898. *Compare* Gingrich *v.* Rogers, (Nebr. 1903) 96 N. W. 156.

89. Right of creditors of insane assignor to set aside deed see Assignments For Benefit of Creditors, 4 Cyc. 277 note 86.

90. *Connecticut.*— Webster *v.* Woodford, 3 Day 90.

Maryland.— Turner *v.* Rusk, 53 Md. 65; Chew *v.* Baltimore Bank, 14 Md. 299.

New Hampshire.— Lang *v.* Whidden, 2 N. H. 435.

New York.— Ingraham *v.* Baldwin, 9 N. Y. 45 [*affirming* 12 Barb. 9].

North Carolina.— Ballew *v.* Clark, 24 N. C. 23.

Pennsylvania.— Bensell *v.* Chancellor, 5 Whart. 371, 34 Am. Dec. 561.

See 27 Cent. Dig. tit. "Insane Persons," § 103. See also *infra*, V, C, 1.

91. Warfield *v.* Fisk, 136 Mass. 219; Domling *v.* Domling, 128 Mich. 588, 87 N. W. 788; Tolson *v.* Garner, 15 Mo. 494; Hinchman *v.* Ballard, 7 W. Va. 152. See also Ledger Bldg. Assoc. *v.* Cook, 12 Phila. (Pa.) 434. See also *infra*, V, C, 1.

Facts not showing disaffirmance by guardian see McAnaw *v.* Tiffin, 143 Mo. 667, 45 S. W. 656.

and after his death it may be avoided by his personal representatives,[92] or his heirs or privies in blood.[93] But the right to avoid does not exist in favor of strangers,[94] or mere privies in estate of the lunatic.[95] During the lifetime of the grantor his deed cannot be attacked on the ground of insanity by his wife,[96] or his wife and children.[97]

2. Return of Consideration.[98] According to some authorities a conveyance of lands by an insane person, without fraud, or notice to the grantee of the grantor's incapacity, and for a fair consideration, will not be set aside, either at law or in equity, in favor of the grantor or his representatives, unless the consideration be restored and the parties reinstated in the condition in which they were before the transaction;[99] but other cases hold that the lunatic or his guardian

92. *Arkansas.*—Langley *v.* Langley, 45 Ark. 392.

Kentucky.— Breckinridge *v.* Armsby, 1 J. J. Marsh. 236, 19 Am. Dec. 71.

Michigan.— Hunt *v.* Rabitoay, 125 Mich. 137, 84 N. W. 59, 84 Am. St. Rep. 563.

New Hampshire.— Probate Jud *v.* Stone, 44 N. H. 593.

New York.— Ingraham *v.* Baldwin, 9 N. Y. 45 [*affirming* 12 Barb. 9]; Wagner *v.* Harriott, 10 N. Y. St. 709.

See 27 Cent. Dig. tit. "Insane Persons," § 96. See also *infra*, V, C, 1.

93. *Arkansas.*—Langley *v.* Langley, 45 Ark. 392.

Indiana.— Northwestern Mut. F. Ins. Co. *v.* Blankenship, 94 Ind. 535, 48 Am. Rep. 185 (although the grantor never disaffirmed in his lifetime); Brown *v.* Freed, 43 Ind. 253.

Kentucky.— Breckenridge *v.* Ormsby, 1 J. J. Marsh. 236, 19 Am. Dec. 71.

Maine.— Hovey *v.* Hobson, 53 Me. 451, 89 Am. Dec. 705.

Michigan.— Hunt *v.* Rabitoay, 125 Mich. 137, 84 N. W. 59, 84 Am. St. Rep. 563.

New York.—Van Deusen *v.* Sweet, 51 N. Y. 378.

See 27 Cent. Dig. tit. "Insane Persons," § 96. See also *infra*, V, C, 1.

A creditor of a devisee may attack a conveyance made by the testator while insane. Valpey *v.* Rea, 130 Mass. 384.

Estoppel of heir.— It seems that by acquiescing in and acting upon a family settlement voluntarily made by a lunatic, the heir may be estopped to dispute it on the ground of insanity. Roddy *v.* Williams, 3 J. & L. 1.

During the lifetime of the grantor, who has not been judicially declared t be insane, the deed cannot be avoided on the ground of his insanity by a person to whom, under the provisions of a will, the land would descend if not disposed of by the grantor during his lifetime. McMillan *v.* Deering, 139 Ind. 70, 38 N. E. 398.

94. Hunt *v.* Weir, 4 Dana (Ky.) 347; Hunt *v.* Rabitoay, 125 Mich. 137, 84 N. W. 59, 84 Am. St. Rep. 563; Ingraham *v.* Baldwin, 9 N. Y. 45 [*affirming* 12 Barb. 9]; Wagner *v.* Harriott, 10 N. Y. St. 709. See *infra*, V, C, 1.

95. Breckenridge *v.* Ormsby, 1 J. J. Marsh. (Ky.) 236, 19 Am. Dec. 71; Key *v.* Davis, 1 Md. 32, remainder-man.

A purchaser from the lunatic after his restoration to sanity is not included within the term "privies in estate," but may avoid a deed which his vendor might have avoided. Breckenridge *v.* Ormsby, 1 J. J. Marsh. (Ky.) 236, 19 Am. Dec. 71 [*followed* in Langley *v.* Langley, 45 Ark. 392]; Cates *v.* Woodson, 2 Dana (Ky.) 452.

96. Kilbee *v.* Myrick, 12 Fla. 419. *Compare* Millison *v.* Nicholson, 1 N. C. 549.

97. Baldwin *v.* Golde, 88 Hun (N. Y.) 115, 34 N. Y. Suppl. 587.

98. See Cancellation of Instruments, 6 Cyc. 314.

99. *Illinois.*— Eldredge *v.* Palmer, 185 Ill. 618, 57 N. E. 770, 76 Am. St. Rep. 59; Burnham *v.* Kidwell, 113 Ill. 425; Scanlan *v.* Cobb, 85 Ill. 296; Menkins *v.* Lightner, 18 Ill. 282.

Indiana.— Boyer *v.* Berryman, 123 Ind. 451, 24 N. E. 249; Copenrath *v.* Kienby, 83 Ind. 18; Fay *v.* Burditt, 81 Ind. 433, 42 Am. Rep. 142. Restoration is not a condition precedent to an action to avoid. Nichol *v.* Thomas, 53 Ind. 42.

Iowa.— Harrison *v.* Otley, 101 Iowa 652, 70 N. W. 724; Alexander *v.* Haskins, 68 Iowa 73, 25 N. W. 935; Abbott *v.* Creal, 56 Iowa 175, 9 N. W. 115; Ashcraft *v.* De Armond, 44 Iowa 229.

Kentucky.— Rusk *v.* Fenton, 14 Bush 490, 29 Am. Rep. 413. See also Stapp *v.* Ward, 3 A. K. Marsh. 129.

Michigan.— Davis Sewing Mach. Co. *v.* Barnard, 43 Mich. 379, 5 N. W. 411.

Missouri.— Jamison *v.* Culligan, 151 Mo. 410, 52 S. W. 224.

Nevada.— Robinson *v.* Kind, 25 Nev. 261, 59 Pac. 863, 62 Pac. 705.

New Jersey.— Eaton *v.* Eaton, 37 N. J. L. 108, 18 Am. Rep. 716; Yanger *v.* Skinner, 14 N. J. Eq. 389.

New York.— Hardy *v.* Berger, 76 N. Y. App. Div. 393, 78 N. Y. Supl. 709; Gilgallon *v.* Bishop, 46 N. Y. App. Div. 350, 61 N. Y. Suppl. 467; Canfield *v.* Fairbanks, 63 Barb. 461; Reals *v.* Weston, 28 Misc. 67, 59 N. Y. Suppl. 807.

North Carolina.—Riggan *v.* Green, 80 N. C. 236, 30 Am. Rep. 77.

Wisconsin.— Mohr *v.* Tulip, 40 Wis. 66.

England.— Price *v.* Berrington, 15 Jur. 999, 3 Macn. & G. 486, 49 Eng. Ch. 376, 42 Eng. Reprint 348; Addison *v.* Dawson, 2 Vern. Ch. 678, 23 Eng. Reprint 1040; Niell

or heirs may proceed to avoid the conveyance without placing the grantee *in statu quo*.[1]

F. Claims and Liabilities — 1. In General. In England and Canada the court of chancery, in managing the estates of lunatics, will have regard to the maintenance and comfort of the lunatic in preference to the claims of his creditors,[2] although the estate be insolvent;[3] but the court will not refuse to assist creditors where it can be done without prejudice to the lunatic.[4]

2. Support and Maintenance of Insane Person. The estate of an insane person is liable for necessaries furnished to him,[5] which are suitable to his means and station in life,[6] even though they are furnished under a contract with the guardian.[7] Thus if the lunatic has an estate sufficient for his support,[8] the estate is

v. Morley, 9 Ves. Jr. 478, 32 Eng. Reprint 687.

See 27 Cent. Dig. tit. "Insane Persons," § 105. See also *infra*, V, A, 4, c; V, C, 2.

Benefit of grantor.— Where, in a sale made by a vendor declared subsequently to have been notoriously insane, cash was stated to have been paid by the vendee, in decreeing the sale null on account of such notorious insanity, *restitutio ad integrum* will not be ordered without proof that the cash stated to have been paid inured to the benefit of the vendor. Lagay *v.* Marston, 32 La. Ann. 170.

Vendee entitled to compensation for improvements.— Brown *v.* Miles, 61 Hun (N. Y.) 453, 16 N. Y. Suppl. 251.

Where the specific property which was the consideration cannot be restored, the conveyance may still be avoided when the value of the consideration is otherwise credited to the grantee in an accounting. Burnham *v.* Mitchell, 34 Wis. 117.

Grantee must account for rents and profits. Price *v.* Berrington, 7 Hare 394, 27 Eng. Ch. 394.

1. *Arkansas.*— Henry *v.* Fine, 23 Ark. 417.

Massachusetts.—Brigham *v.* Fayerweather, 144 Mass. 48, 10 N. E. 735; Chandler *v.* Simmons, 97 Mass. 508, 93 Am. Dec. 117; Gibson *v.* Soper, 6 Gray 279, 66 Am. Dec. 414. *Compare* Arnold *v.* Richmond Iron Works, 1 Gray 434.

Mississippi.— Bates *v.* Hyman, (1900) 28 So. 567.

Nebraska.— Wager *v.* Wagoner, 53 Nebr. 511, 73 N. W. 937, where it does not appear that a return in specie is practicable.

New Hampshire.— Flanders *v.* Davis, 19 N. H. 139.

Pennsylvania.— Crawford *v.* Scoville, 94 Pa. St. 48, 39 Am. Rep. 766; Rogers *v.* Walker, 6 Pa. St. 371, 47 Am. Dec. 470.

Texas.— Williams *v.* Sapieha, 94 Tex. 430, 61 S. W. 115 [*certified* from (Civ. App. 1900) 59 S. W. 947], in the absence of proof that the imbecile still has the money paid for the land in his possession, or any property acquired with it, or that it was expended by or for him for necessaries.

See 27 Cent. Dig. tit. "Insane Persons," § 105. See also *infra*, V, A, 4, c; V, C, 2.

2. *In re* Pink, 23 Ch. D. 577, 52 L. J. Ch. 674, 49 L. T. Rep. N. S. 418, 31 Wkly. Rep. 728; *In re* Railton, 1 Jur. 574; *Re* Shaw, 1 Grant Ch. (U. C.) 524.

Moneys attached by a creditor of the lunatic have on the application of his committee been ordered paid into court for the lunatic's maintenance. *In re* Vernon, 20 Can. L. T. Occ. Notes 309.

3. *In re* Pink, 23 Ch. D. 577, 52 L. J. Ch. 674, 49 L. T. Rep. N. S. 418, 31 Wkly. Rep. 728. But see *infra*, note 21.

4. *Re* Shaw, 1 Grant Ch. (U. C.) 524.

5. Coleman *v.* Frazer, 3 Bush (Ky.) 300; Barnes *v.* Hattaway, 66 Barb. (N. Y.) 452; Skidmore *v.* Romaine, 2 Bradf. Surr. (N. Y.) 122; Dunn *v.* Dunn, 10 Ohio Dec. (Reprint) 765, 23 Cinc. L. Bul. 328; La Rue *v.* Gilkyson, 4 Pa. St. 375, 45 Am. Dec. 700.

Request of guardian not necessary.— Care, support, and nursing furnished to an insane ward by her sister, without a request from or an agreement with the guardian, are necessaries for which the ward's estate is chargeable. Dunn *v.* Dunn, 10 Ohio Dec. (Reprint) 765, 23 Cinc. L. Bul. 328.

Express promise to pay not necessary.— Palmer *v.* Hudson River State Hospital, 10 Kan. App. 98, 61 Pac. 506.

Committee not liable for necessaries purchased for lunatic by his parents.— Brashears *v.* Frazier, 102 Ky. 237, 43 S. W. 427, 19 Ky. L. Rep. 1284.

Committee liable for necessaries furnished by former committee.— Brashears *v.* Frazier, 102 Ky. 237, 43 S. W. 427, 19 Ky. L. Rep. 1284.

The action must be against the lunatic or his administrator and not against his guardian. Van Horn *v.* Hann, 39 N. J. L. 207.

Evidence sufficient to sustain claim see Ashley *v.* Holman, 44 S. C. 145, 21 S. E. 624.

6. Barnes *v.* Hathaway, 66 Barb. (N. Y.) 452; Skidmore *v.* Romaine, 2 Bradf. Surr. (N. Y.) 122.

The expenses of a pleasure trip on which the lunatic was taken at his request may be allowed where he was in a condition to enjoy such a trip and his income was such as to render such a trip proper. Kendall *v.* May, 10 Allen (Mass.) 59.

7. Miller *v.* Hart, 135 Ind. 201, 34 N. E. 1003.

Power of guardian to charge estate by contract for ward's support see *supra*, III, E, 2.

8. *Indiana.*— Miller *v.* Hart, 135 Ind. 201, 34 N. E. 1003.

Kentucky.— Humber *v.* Central Kentucky

liable for his support,[9] not only where he is cared for by private persons, but also

Lunatic Asylum, 100 Ky. 112, 29 S. W. 877, 30 S. W. 964, 16 Ky. L. Rep. 755.

Maine.— Bangor *v.* Wiscasset, 71 Me. 535.

Massachusetts.— Newton *v.* Feeley, 130 Mass. 12.

Ohio.— *In re* Dunn, 10 Ohio Dec. (Reprint) 765, 23 Cinc. L. Bul. 328.

See 27 Cent. Dig. tit. "Insane Persons," § 106.

Under the Maine statute providing that any town which has been made chargeable, and has paid, for the commitment and support of an insane person at the insane hospital, may recover the amount so paid of the insane person if he is able to pay the same, the town cannot recover any portion of the amount if such person is not able to pay the whole. Cape Elizabeth *v.* Lombard, 72 Me. 492.

9. *Iowa.*— Thode *v.* Shofford, 65 Iowa 294, 17 N. W. 561, 21 N. W. 647.

Kentucky.— Coleman *v.* Lunatic Asylum, 6 B. Mon. 239.

Massachusetts.— Newburyport *v.* Creedon, 148 Mass. 158, 19 N. E. 341, 146 Mass. 134, 15 N. E. 157.

Michigan.—Simons *v.* Van Benthuysen, 121 Mich. 697, 80 N. W. 790.

New York.— Oneida County *v.* Bartholomew, 82 Hun 80, 31 N. Y. Suppl. 106 [*affirmed* in 151 N. Y. 655, 46 N. E. 1150], holding that Laws (1890), c. 126, § 7, releasing a county from liability for the support of indigent insane persons transferred to state institutions after the first of October next succeeding the transfer, does not affect the right of the county, under Laws (1874), c. 446, tit. 3, § 31, to enforce against the lunatic's estate a claim for money advanced to the state institution for his support therein prior to that date.

Tennessee.— McNairy County *v.* McCoin, 101 Tenn. 74, 45 S. W. 1070, 41 L. R. A. 862.

Virginia.— Davidson *v.* Pope, 82 Va. 747, 1 S. E. 117.

Wisconsin.— Richardson *v.* Stuesser, 125 Wis. 66, 103 N. W. 261, 69 L. R. A. 829.

See 27 Cent. Dig. tit. "Insane Persons," § 106.

Where there is a trust estate in favor of the lunatic, the income of this is to be exhausted before the committee will be authorized to sell the separate estate of the lunatic for his support. *In re* Reed, 160 N. Y. 702, 57 N. E. 1123. See also *In re* Longenecker, 20 Lanc. L. Rev. (Pa.) 396.

The liability of an insane wife to pay for her support does not arise till after the death of the husband and upon her having or receiving means wherewith to pay. Bangor *v.* Wiscasset, 71 Me. 535. *Compare* Camden County *v.* Ritson, 68 N. J. L. 666, 54 Atl. 839.

One who voluntarily expends money in the support of a lunatic cannot recover for such expenditure either against the lunatic or his committee. Hehn *v.* Hehn, 23 Pa. St. 415. See also Creagh *v.* Tunstall, 98 Ala. 249, 12 So. 713.

Petition in suit for amounts paid for support.— Under Iowa Code, § 1433, authorizing the auditor, subject to direction of the board of supervisors, to collect from estates of insane persons sums paid by the county for their support, the auditor's petition need not allege that the board has authorized him to sue. Cedar County *v.* Sager, 90 Iowa 11, 57 N. W. 634.

Notice of direction to auditor to collect.— The estate being liable for the insane person's support unless relieved by action of the board of supervisors, no notice of the board's action in directing the auditor to collect the amount due need be served on the insane person or his guardian. Cedar County *v.* Sager, 90 Iowa 11, 57 N. W. 634.

A pension collected from the United States government may be subjected to payment of the board and maintenance of a lunatic. Western Kentucky Asylum *v.* White, 104 Ky. 751, 47 S. W. 864, 20 Ky. L. Rep. 904; Lancaster County Poor Directors *v.* Hartman, 9 Pa. Co. Ct. 177. *Compare* U. S. *v.* Frizzell, 19 App. Cas. (D. C.) 48.

The county has no lien, under Iowa Code, § 1433, on the estate of a lunatic for his support, without judgment. Thode *v.* Spofford, 65 Iowa 294, 17 N. W. 561, 21 N. W. 647.

To whom liable.—The liability of the estate of an insane person for the expense of his care in the state asylum is to the county, and not to the state. Harrison County *v.* Dunn, 84 Iowa 328, 51 N. W. 155. A decree for part payment of the expenses of maintaining a lunatic by the state should be directly in favor of the commonwealth. Coleman *v.* Lunatic Asylum, 6 B. Mon. (Ky.) 239. Where a duly appointed guardian of the person and estate of a lunatic was charged with goods bought by him for the maintenance of the lunatic, and before the account was paid the lunatic was declared of sound mind, and the guardian restored to him his property, without retaining any indemnity for the account, but the creditor did not participate in the change of circumstances, and had no transaction with the lunatic, the subsequent events did not make the lunatic legally liable to the creditor on an implied assumpsit, but he would be liable to reimburse the guardian should he pay the debt. Westmoreland *v.* Davis, 1 Ala. 299.

The probate court has jurisdiction to make an order directing the guardian of a lunatic to pay, as a preferred claim, a debt incurred by a former guardian for the support of the lunatic and his family. Loudon *v.* Patterson, 41 Ohio St. 206.

Property in another state.— A court of equity in one state can neither charge his land in another state, nor its proceeds in the hands of his heir within the state, for

when he is maintained in an asylum,[10] hospital,[11] or infirmary.[12] But it has been held that there can be no recovery for board and care furnished in a county poorhouse,[13] or where the lunatic has been supported at the county insane asylum as one of the county poor.[14] The estate is also liable for necessary

his support. Allison *v.* Campbell, 21 N. C. 152.

Jurisdiction of equity courts.— The superintendence and care of equity courts is exercised only during the period of mental incapacity, when the lunatic is unable to provide maintenance for himself and family. After the restoration of such person to a condition of sanity, the courts cannot properly allow the expense of past maintenance, although his capacity for self-support and the incidental expenses necessarily incurred during the lunacy had greatly diminished his estate, and the damages claimed were caused by him while he was a lunatic. An account ordered as to such damage cannot take the past maintenance of the lunatic into consideration, after the establishment of his sanity. Avery *v.* Wilson, 20 Fed. 856.

Evidence of amount expended.—Certificates of the superintendent of the state hospital, and notices of the state auditor, being presumptive evidence of the correctness of the sums stated, are competent evidence against the insane person's estate of the amount of the county's payments, although only recently certified for use in the action against the estate. Cedar County *v.* Sager, 90 Iowa 11, 57 N. W. 634.

Evidence insufficient to warrant recovery. — Although a city may recover of one the expenses incurred by it for his support in the county receptacle for the insane, yet as Mass. Pub. St. c. 87, § 49, provides that inmates of such receptacles shall be governed or employed as the county commissioners may deem best, and leaves it to the commissioners to fix the amount to be paid for such support, the city, to entitle it to recover, must first prove that the commissioners have so determined the amount to be paid; and evidence that for several years the city has paid a certain amount per week for each inmate, if admissible, does not require the reversal of a holding of the trial court that the city has failed to make such proof. Newburyport *v.* Creedon, 148 Mass. 158, 19 N. E. 341.

Support of lunatic takes precedence of pre-existing debts. Adams *v.* Thomas, 81 N. C. 296. But although the estate of a lunatic is first chargeable with his maintenance, yet where an asylum takes charge of a lunatic without any special order of court and before he has been declared a lunatic, it is not entitled to preference over other creditors of the estate. *In re* Woodward, 15 Phila. (Pa.) 222.

10. Cedar County *v.* Sager, 90 Iowa 11, 57 N. W. 634; Harrison County *v.* Dunn, 84 Iowa 328, 51 N. W. 155; Central Kentucky Asylum *v.* Penick, 102 Ky. 533, 44 S. W. 92, 19 Ky. L. Rep. 1583; Humber *v.* Central Kentucky Lunatic Asylum, 100 Ky. 112, 29 S. W. 877, 30 S. W. 964, 16 Ky. L. Rep. 755; Hopper *v.* Eastern Kentucky Lunatic Asylum, 85 S. W. 1187, 27 Ky. L. Rep. 649; Agricultural Ins. Co. *v.* Barnard, 96 N. Y. 525, 14 Abb. N. Cas. 502; *In re* Tye, [1900] 1 Ch. 249, 69 L. J. Ch. 153, 81 L. T. Rep. N. S. 743, 48 Wkly. Rep. 276, holding that a lunatic's property may be applied to his maintenance in a pauper lunatic asylum, although it is not more than sufficient to maintain his family.

Where the lunatic was admitted under a contract with others to pay his board and expenses he cannot be held liable therefor. Massachusetts Gen. Hospital *v.* Fairbanks, 129 Mass. 78, 37 Am. Rep. 303.

Jurisdiction of probate court over claim.— Under Howell Annot. St. Mich. § 6332, which authorizes a guardian to ask a probate judge to pass on a question whether a debt of the ward should be paid, the probate court has jurisdiction to pass on a claim by the state against the guardian of an insane person for his expenses at an asylum, where the guardian has stipulated that the claim should be heard before such court. State *v.* Dunbar, 99 Mich. 99, 57 N. W. 1103.

Where a lunatic was placed in a foreign asylum with the consent of her husband and her present committee, such asylum was entitled to recover from the lunatic's estate the sum of one hundred and fifty dollars per year for services rendered to such lunatic, as allowed by the Kentucky statutes for similar services. Manders *v.* Eastern State Hospital, 84 S. W. 761, 27 Ky. L. Rep. 254.

11. Cape Elizabeth *v.* Lombard, 72 Me. 492.

Transportation to hospital.—Iowa Code, § 2297, does not authorize taxing the estate of an insane person with the costs of transportation to the hospital where he was cared for. Westlake *v.* Scott County, 126 Iowa 314, 101 N. W. 88.

12. Infirmary Directors *v.* Merkle, 4 Ohio S. & C. Pl. Dec. 190, 3 Ohio N. P. 169, holding that where an insane person, upon discharge from the state asylum as incurable, is confined in the county infirmary, with the knowledge and consent of his guardian, there is an implied contract on the part of the guardian to pay from the estate of such insane person what his support and maintenance is reasonably worth.

13. Jones County *v.* Norton, 91 Iowa 680, 60 N. W. 200.

14. Oneida County *v.* Bartholomew, 82 Hun (N. Y.) 80, 31 N. Y. Suppl. 106 [*affirmed* in 151 N. Y. 655, 46 N. E. 1150], in the absence of an express agreement to pay. But where a lunatic asylum brought action against the trustee of an inmate to recover for his support, and the answer to plaintiff's petition stated that defendant applied to the assembly to pass a special act plac-

nursing[15] and care[16] furnished the lunatic in good faith under justifiable circumstances.[17] The reasonableness of the claim is a question for the court after hearing and considering the evidence.[18] Where the statute provides a special procedure for reimbursement out of the estate, there can be no reimbursement unless those formalities are complied with.[19]

3. Support of Family.[20] The estate of an insane person is liable for the support of his wife and family for whom, by law, he is bound to provide.[21] If allowances are made to adult children competent to support themselves, this will generally be on condition that such allowances shall be considered as advancements

ing the lunatic on the pauper list, that he had been advised to apply instead to the board of commissioners, and had been informed that the board had placed the lunatic on the pauper list, the answer was no defense to the action, where the lunatic had not been adjudged a pauper as provided by law, and in fact owned land worth ten thousand dollars. Humber *v.* Central Kentucky Lunatic Asylum, 100 Ky. 112, 29 S. W. 877, 30 S. W. 964, 16 Ky. L. Rep. 755.

15. Sawyer *v.* Lufkin, 56 Me. 308; *In re* Dunn, 10 Ohio Dec. (Reprint) 765, 23 Cinc. L. Bul. 328.

16. Miller *v.* Hart, 135 Ind. 201, 34 N. E. 1003; Sawyer *v.* Lufkin, 56 Me. 308; *In re* Dunn, 10 Ohio Dec. (Reprint) 765, 23 Cinc. L. Bul. 328.

Amount of compensation.— Where an insane person is cared for by plaintiff under a contract to care for her for one dollar per day till a week after notice of a refusal to keep her longer at such rate, plaintiff is entitled to a reasonable compensation for keeping the ward after terminating the contract by notice. Boldman *v.* Leng, 126 Mich. 698, 86 N. W. 148.

Fraudulent purpose.— The nephew of an insane person, who has charge of the latter, is not entitled to compensation from her estate for services rendered in carrying out a fraudulent purpose of acquiring her property for his own benefit. Lack *v.* Brecht, 166 Mo. 242, 65 S. W. 976.

Removal of lunatic.— Where a lunatic who has come within the jurisdiction of the court is by order of the court removed by a committee, the expenses of such removal and a proper compensation for the personal services of the special committee are chargeable upon the estate in the hands of the committee of the estate. Parsee Merchant's Case, 11 Abb. Pr. N. S. (N. Y.) 209.

17. Sawyer *v.* Lufkin, 56 Me. 308.

18. Miller *v.* Hart, 135 Ind. 207, 34 N. E. 1003.

The value of the board of a lunatic must depend upon his condition and the care, attention, and watchfulness necessary to be bestowed upon him, which is a matter of proof. Alexander *v.* Alexander, 8 Ala. 796, holding that statements of witnesses that they would not board him for less than five or six hundred dollars a year is not proof that it was worth that sum.

Where the estate of a lunatic is ample to maintain him and his household in the manner he has chosen for himself before his lunacy, and such maintenance is best adapted for his comfort and care after his lunacy, the court should authorize the committee to expend a sufficient amount of the lunatic's estate for that purpose. Hambleton's Appeal, 102 Pa. St. 50.

19. Montgomery County *v.* Ristine, 124 Ind. 242, 24 N. E. 990, 8 L. R. A. 461.

20. **Liability of lunatic for wife's necessaries** see Husband and Wife, 21 Cyc. 1217 *et seq.*

Allowance in action by wife against lunatic husband for separate maintenance see Husband and Wife, 21 Cyc. 1607.

21. *Illinois.*— *In re* Hall, 19 Ill. App. 295.

Indiana.— Booth *v.* Cottingham, 126 Ind. 431, 26 N. E. 84 (medical attendance on wife); Hallett *v.* Hallett, 8 Ind. App. 305, 34 N. E. 740.

Iowa.— Dutch *v.* Marvin, 72 Iowa 663, 34 N. W. 465.

Kentucky.— Pearl *v.* McDowell, 3 J. J. Marsh. 658, 20 Am. Dec. 199, surgical services to wife.

Louisiana.— *In re* Leech, 45 La. Ann. 194, 12 So. 126, wife without means entitled to an allowance from the income of the estate for her support and the support of her children without the intervention of a family meeting.

Missouri.— See Frost *v.* Redford, 127 Mo. 492, 30 S. W. 179.

New York.— *Ex p.* Heeney, 2 Barb. Ch. 326; Matter of Willoughby, 11 Paige 257.

North Carolina.— *In re* Latham, 39 N. C. 231.

Tennessee.— Farmer *v.* Farmer, 10 Lea 309, holding that under Code, § 3708, authorizing a guardian of a lunatic, "upon the coming of age or marriage of any child of the lunatic, in case of long standing or confirmed mental unsoundness," to make a provision for the child out of the lunatic's estate, provision could be made in case of such unsoundness, although the child came of age or married before the mental unsoundness occurred or became confirmed.

England.— Foster *v.* Marchant, 1 Vern. Ch. 262, 23 Eng. Reprint 457.

See 27 Cent. Dig. tit. "Insane Persons," § 107. And see *infra*, IV, F, 6.

Illegitimate children.— An allowance has been made to the lunatic's illegitimate children, but refused to their mother. *Ex p.* Haycock, 5 Russ. 154, 29 Rev. Rep. 16, 5 Eng. Ch. 154, 38 Eng. Reprint 985. But where, under an order of court for the support of persons named as the wife and children of

upon the final distribution on the lunatic's death.[22] Although the fact that the estate may be exhausted is not in itself a sufficient reason for refusing to make allowances,[23] the court will preserve, so far as possible, the interests of the succession,[24] and ordinarily will refuse an allowance from the principal of the estate when this would endanger an interest chargeable upon it.[25]

4. Debts of Insane Person. Subject to the reasonable maintenance of the lunatic[26] and of those whom he is bound to support,[27] his estate is liable for his just debts contracted when he was able to understand the transaction,[28] and it is

the lunatic, it appeared that these were in fact his mistress and illegitimate children, it was held that this fact was not of consequence to invalidate advances actually made. Halsey's Appeal, 120 Pa. St. 209, 13 Atl. 934.

Brothers and sisters and their children.— In England the general rule has been extended, with some reluctance, to include the brothers and sisters of the lunatic and their children (*In re* Frost, L. R. 5 Ch. 699, 39 L. J. Ch. 808, 23 L. T. Rep. N. S. 233, 18 Wkly. Rep. 986; Matter of Blair, 5 L. J. Ch. 150, 1 Myl. & C. 300, 13 Eng. Ch. 300, 40 Eng. Reprint 390; *Ex p.* Whitbread, 2 Meriv. 99, 16 Rev. Rep. 148, 35 Eng. Reprint 878; *In re* Clark, 2 Phil. 282, 22 Eng. Ch. 282, 41 Eng. Reprint 951), the amount of allowance being wholly discretionary with the court (*In re* Creagh, Dr. & Wal. 323).

Cousins.— The court has refused to make an allowance out of the lunatic's surplus income to his first cousins in indigent circumstances, although the lunatic was aged, and there was a large surplus of income, saying that different considerations would apply where the lunatic is entitled to landed property and the collateral is his heir at law. *In re* Darling, 39 Ch. D. 208, 57 L. J. Ch. 891, 59 L. T. Rep. N. S. 761.

Invalidity of marriage.— Where, in an action brought against the committee of a lunatic to recover for necessaries furnished to one claiming to be his wife, it appeared that a marriage was duly solemnized between the lunatic and a woman, which was followed by cohabitation continuing down to the appointment of the committee, when the woman was obliged to leave and live apart from him, the committee could not set up as a defense that the marriage was void because the husband was at the time of the marriage, and ever since had been, a lunatic without lucid intervals. Stuckey *v.* Mathes, 24 Hun (N. Y.) 461.

Where the estate is insolvent the Iowa statute does not authorize an allowance for the support of the lunatic's family to be made out of that portion of his estate which would be subject to execution for the satisfaction of his debts. Dutch *v.* Marvin, 72 Iowa 663, 34 N. W. 465. And in England it is now held that the lunatic's wife will not be allowed maintenance out of his property as against his creditors. *In re* Winkle, [1894] 2 Ch. 519, 63 L. J. Ch. 541, 70 L. T. Rep. N. S. 710, 7 Reports 255, 42 Wkly. Rep. 513. But in North Carolina the support of the family takes precedence of the debts of the lunatic. McLean *v.* Breece, 113 N. C. 390, 18 S. E. 694; Adams *v.* Thomas, 81 N. C. 296; *In re* Latham, 39 N. C. 231. See *supra*, IV, F, 1.

In chancery, a committee should be appointed before an allowance is made for the lunatic's wife and children. *In re* B——, 1 Ir. Eq. 181.

Payment of debts of heirs.— The court in lunacy has not jurisdiction to order an allowance to the lunatic's heir at law for the purpose of paying his debts, upon the application of a creditor of the heir at law. *Ex p.* Linehan, 1 J. & L. 29.

Debts incurred by son in supporting family.— The conservator of an insane person is not entitled, upon his accounting, to credit for money paid on debts incurred by his ward's eldest son, a man of full age, who took upon himself the care of the family. Wilcox *v.* Parker, 23 Ill. App. 429.

22. Matter of Willoughby, 11 Paige (N. Y.) 257. See also *In re* Frost, L. R. 5 Ch. 699, 39 L. J. Ch. 808, 23 L. J. Ch. 808, 23 L. T. Rep. N. S. 233, 18 Wkly. Rep. 986.

An allowance to the lunatic's daughter upon her marriage was disallowed, except upon terms of her making a settlement of all the property that might eventually come to her as heir at law and next of kin of the lunatic. *Ex p.* Fowler, 6 Jur. 431.

23. *In re* Brown, 1 Wkly. Notes Cas. (Pa.) 134; *Ex p.* Stonard, 18 Ves. Jr. 285, 34 Eng. Reprint 325.

24. *Ex p.* Tottenham, 11 Ir. Eq. 414.

25. *In re* Lanesborough, 7 Ir. Eq. 606.

26. Adams *v.* Thomas, 83 N. C. 521. And see *supra*, IV, F, 2.

27. Adams *v.* Thomas, 83 N. C. 521. And see *supra*, IV, F, 3.

28. Litchfield's Appeal, 28 Conn. 127, 73 Am. Dec. 662; Adams *v.* Thomas, 83 N. C. 521, debts anterior to lunacy. A guardian of a lunatic who in good faith pays just debts without prejudicing the ward's estate will be allowed credit therefor. McLean *v.* Breece, 113 N. C. 390, 18 S. E. 694.

Pension money.— The guardian of a person *non compos mentis* who is entitled to a pension from the United States is not bound to apply the pension money in his hands to the payment of preëxisting debts of his ward. Fuller *v.* Wing, 17 Me. 222.

Half-pay of retired officer.— Although the one-half pay of an officer of the government cannot be taken for his creditors, yet where such officer is a lunatic, the surplus not needed for his support may be applied with the sanction of the court to the payment

the duty of the committee to pay such debts.[29] Property of a lunatic in the hands of his guardian or committee is to be regarded as *in custodia legis*,[30] and no creditor can reach it except through the order of the proper court.[31] Neither the committee of an insane married woman nor a court of equity can charge her land with debts with which it would not be chargeable if she were sane.[32]

5. Counsel Fees and Costs. Reasonable counsel fees for services rendered the committee or guardian in defending and protecting the estate of his ward may properly be allowed against the estate,[33] and counsel fees may also be allowed for

of his debts. Elwyn's Appeal, 67 Pa. St. 367.

Exempt property.—The guardian of a lunatic is not bound to sell his ward's household furniture to pay debts where it is exempt from execution. Fuller *v.* Wing, 17 Me. 222.

After the finding of an inquisition declaring the incompetency of the lunatic, etc., the proper remedy of creditors is by an application to the court by petition for the payment of their debt. L'Amoureux *v.* Crosby, 2 Paige (N. Y.) 422, 22 Am. Dec. 655.

If the committee declines discharging debts of the lunatic without the direction of the court, and if the demands are disputed or doubtful, it may be referred to a master to ascertain whether they are equitably due. L'Amoureux *v.* Crosby, 2 Paige (N. Y.) 422, 22 Am. Dec. 655.

Redeeming property pawned to pay personal expenses.— Equity will require the guardian of a lunatic whose estate is ample for the purpose to redeem, for the benefit of the wife, her jewels, pawned by the husband while sane to pay his personal expenses, the proceeds being actually so applied. *In re* Harrall, 31 N. J. Eq. 101.

A demand for rent under a lease to an insane person, whether accruing before or after the appointment of a committee, will not, in the absence of a special equity, take precedence of other claims against the lunatic's estate. *In re* Otis, 101 N. Y. 580, 5 N. E. 571.

29. Boyer *v.* Marshall, 8 N. Y. St. 233.

The committee is under no obligation to personally give his notes for the payment of the debts of the lunatic. Boyer *v.* Marshall, 8 N. Y. St. 233.

The guardian may prefer certain creditors of the ward, as the latter might himself do, if sane. Frost *v.* Redford, 127 Mo. 492, 30 S. W. 179 [*reversing* 54 Mo. App. 345].

Suit against committee.— A committee of a lunatic appointed by the chancellor is a mere commissioner of the court, managing the person and estate of the lunatic, under the direction of the chancellor, and is responsible to the court as a receiver, removable in its discretion, and not liable to be sued at law on claims either against the lunatic himself or his estate, as in case of a committee appointed under the statute. Bolling *v.* Turner, 6 Rand. (Va.) 584.

The guardian has a right to appeal from an order directing him to pay a disputed claim against the estate of his ward. *In re* Breslin, 135 Cal. 21, 66 Pac. 962.

30. Adams *v.* Thomas, 81 N. C. 296.

Death of lunatic.— Where a lunatic's real estate is sold for the payment of his debts, in default of sufficient personal estate, and the lunatic dies pending the distribution of the fund realized from the sale, the personal representatives of the deceased lunatic cannot have the fund awarded to them, as it is a fund raised for a specific purpose, over which the court of common pleas has full jurisdiction to make distribution on the footing of that trust, and the personal representatives are entitled only to what remains after the trust is executed. Wheatland's Appeal, 125 Pa. St. 38, 17 Atl. 251.

31. Adams *v.* Thomas, 81 N. C. 296.

The superior courts have jurisdiction to hear and determine an action instituted by a creditor of a lunatic for the recovery of a debt contracted prior to the lunacy, and the court of probate cannot provide for the payment thereof. Blake *v.* Respass, 77 N. C. 193. See also Smith *v.* Pipkin, 79 N. C. 569.

32. Dickel *v.* Smith, 38 W. Va. 635, 18 S. E. 721.

33. Bradford *v.* MacKenzie, 89 Md. 763, 43 Atl. 923; *In re* Colvin, 4 Md. Ch. 126; *In re* Brayer, 57 N. Y. Suppl. 957; Yourie *v.* Nelson, 1 Tenn. Ch. 614.

Claims for counsel fees are to be presented to the court, as in the matter of the lunacy, and are not to be recovered in a common-law action. State *v.* Second Judicial Dist. Ct., 30 Mont. 8, 75 Pac. 516; Kent *v.* West, 33 N. Y. App. Div. 112, 53 N. Y. Suppl. 244.

The attorney must look to the committee by whom he was employed, for compensation, and not to the fund. Kowing *v.* Moran, 5 Dem. Surr. (N. Y.) 56. But *compare* Wier *v.* Myers, 34 Pa. St. 377, holding that assumpsit does not lie against the committee of a lunatic to recover compensation for professional services rendered by plaintiff as an attorney in conducting the proceedings in lunacy, since only the estate in the hands of such committee is liable for such services.

The supreme court may entertain a petition by an attorney for payment out of the estate of an insane person for services rendered in its behalf on the employment of the committee. Matter of Horton, 18 Misc. (N. Y.) 406, 42 N. Y. Suppl. 775.

Amount.— A guardian cannot charge his ward's estate with any counsel fees he may choose to pay; it must appear that the services were required, and the compensation such as is usual and customary for such services. Where no proof is made, it is competent for the chancellor to determine the

services rendered directly to the lunatic in good faith and on reasonable grounds, as in opposing[34] or attempting to supersede the inquisition of lunacy,[35] or prosecuting habeas corpus proceedings to investigate the grounds of the detention of one restrained as a lunatic.[36] Costs incurred by the guardian or committee of a lunatic in good faith in the prosecution and defense of suits on behalf of the lunatic may be charged upon the lunatic's estate.[37]

6. Gifts and Benefactions. The court of chancery, acting for the lunatic as it is supposed he would have done in like circumstances, may make allowances from the surplus income of his property for the support of persons whom the lunatic would naturally wish to support, although under no legal obligation to do so,[38] and may also permit the lunatic to make reasonable and proper gifts and contributions to charity, he being possessed of sufficient property and competent to understand the acts and form a reasonable purpose respecting them.[39]

value of counsel fees in his own court, and the supreme court will not revise his decision. Alexander *v.* Alexander, 8 Ala. 796.

Final settlement of accounts.— It is in the discretion of the court to allow counsel fees on the final settlement of the accounts of a committee of a lunatic. Matter of Killick, 4 Silv. Sup. (N. Y.) 89, 7 N. Y. Suppl. 360.

The necessity of the services rendered as for the benefit of the estate must appear affirmatively. Grove *v.* Reynolds, 100 Mo. App. 56, 71 S. W. 1103.

What fees not allowed.— Fees paid to counsel for conducting a controversy as to whether the lunacy of the lunatic commenced at an earlier date than the filing of the petition for the appointment of a committee cannot be allowed out of the estate, nor can counsel fees paid by the committee in carrying on a controversy after the death of the lunatic in regard to the appointment of an administrator be so allowed. *In re* Colvin, 4 Md. Ch. 126. Expenditures in legal proceedings adverse to a will by which an estate was devised in trust for the support of the lunatic will not be allowed to the guardian. Pinkerton *v.* Sargent, 112 Mass. 110.

34. Matter of Hardy, 26 N. Y. App. Div. 164, 49 N. Y. Suppl. 953, holding that N. Y. Code Civ. Proc. § 2336, providing that where a committee of the property of a person adjudged incompetent by a commission is appointed, the court "may in its discretion direct the committee to pay a sum not exceeding fifty dollars and disbursements to the attorney for any adverse party," does not attempt to regulate as between attorney and client the compensation of an attorney who opposes the petition in behalf of the lunatic so as to impose a limit of fifty dollars on the amount that may be paid out of the lunatic's estate for his attorney's services, but the court may award his attorneys such sum as seems reasonable and right under the circumstances of the case or permit the attorney to bring suit to establish his claim.

35. Carter *v.* Beckwith, 128 N. Y. 312, 28 N. E. 582.

36. Hallett *v.* Dakes, 1 Cush. (Mass.) 296; Matter of Larner, 39 Misc. (N. Y.) 377, 79 N. Y. Suppl. 836.

37. Bulows *v.* O'Neal, 4 Desauss. (S. C.) 394.

Discretion of court.—In proceedings to have a person declared a lunatic, or to traverse or supersede the commission, costs will not be granted unless the proceedings are instituted for the benefit of the lunatic, and are instituted and prosecuted fairly and in good faith. *In re* Beckwith, 3 Hun (N. Y.) 443, 6 Thomps. & C. 13.

Remedy of guardian who has paid costs.— Where the guardian of a lunatic gives a bond for the prosecution of a suit by him on behalf of his ward, and on failure in the action judgment for costs is collected out of his personal estate, he cannot recover from the ward the amount so collected, under N. C. Code, § 2093, giving one who pays money on the account of another for whom his is surety a summary remedy for its collection, but his remedy is to have the amount so paid allowed by the clerk of the superior court who issued the letters of guardianship in his settlement with his ward. Green *v.* Burgess, 117 N. C. 495, 23 S. E. 439.

38. *In re* Heeney, 2 Barb. Ch. (N. Y.) 326; Matter Carysfort, Cr. & Ph. 76, 18 Eng. Ch. 76, 41 Eng. Reprint 418. And see *supra*, note 21.

Stepdaughter.— A court of chancery has power to direct an allowance out of the estate of a lunatic for the support of his stepdaughter, if the income of his estate is sufficient after supporting those whom he is legally bound to support, and it appears to the satisfaction of the court that the lunatic would, if he had retained his reason, have provided for such stepdaughter's support. *In re* Willoughby, 11 Paige (N. Y.) 257, where, however, an allowance was refused because it did not appear probable that the lunatic, under the circumstances of his estate, would have continued to support such daughter of his wife if he had retained his reason and the control of his property.

The tendency of the later English decisions is to narrow rather than to extend the practice of granting allowances out of a lunatic's property to relations for whom he is under no legal obligation to provide. *In re* Evans, 21 Ch. D. 297, 46 L. T. Rep. N. S. 785, 30 Wkly. Rep. 645.

39. Matter of Reed, 18 Misc. (N. Y.) 285, 41 N. Y. Suppl. 156; Matter of Heeney, 2 Barb. Ch. (N. Y.) 326; Matter of Gilbert,

G. Expenditures. The guardian or committee may make reasonable and proper expenditures for the benefit of the lunatic;[40] but he cannot, without permission of the court, exceed the annual income of the estate in such expenditures.[41] Where an expenditure which could have been authorized by the court is made without permission, the court may afterward ratify it,[42] such ratification being equivalent to an order authorizing the expenditure.[43] Even persons other than the guardian or committee who have made proper expenditures for the benefit of the lunatic may be given credit or allowed to recover therefor.[44]

H. Rights, Duties, and Liabilities of Guardian or Committee — 1. Rights and Duties — a. In General. A guardian or committee of an insane person becomes substituted by his guardianship for his ward with reference to all his interests, to act for him in the management of his property,[45] and may in a

3 Abb. N. Cas. (N. Y.) 222. See also *In re* Strickland, L. R. 6 Ch. 226, 24 L. T. Rep. N. S. 530, 19 Wkly. Rep. 515, where, a lunatic having a surplus income, after providing him with every comfort, of about £900 a year, leave was given to the committee of the estate who was also heiress at law and sole next of kin, to contribute out of the lunatic's income £250 toward building a church and a like sum for parochial schools.

The committee will not be allowed personally to expend any part of the estate of the lunatic for general charity or objects of benevolence or of piety for which the lunatic himself had not been in the habit of contributing specifically and regularly while he was competent to manage his own affairs. Matter of Heeney, 2 Barb. Ch. (N. Y.) 326.

40. See Matter of Livingston, 9 Paige (N. Y.) 440, holding that the committee of a lunatic may, where the interest of the estate requires it, obtain the appointment of an agent or clerk by petition to the court, and pay him out of the income of the estate.

Funeral expenses of wife. — Where the guardian of a lunatic pays the funeral expenses of the latter's wife, he is entitled to reimbursement out of the proceeds of the sale of his ward's real estate, although the wife by will directed that such expenses should be paid from her separate estate. *In re* Stewart, (N. J. Ch. 1891) 22 Atl. 122.

Expenditures for stationery do not come within the range of disbursements which the committee of a lunatic is permitted to make at the expense of the estate. *In re* Colvin, 4 Md. Ch. 126.

Scaling payments made in Confederate money. — Where the committee of a lunatic received her estate, consisting partly of money, in 1836, and retained it in his own hands, and during the Civil war paid her expenses in Confederate currency, the payments should be scaled as of the date of payment. Bird *v.* Bird, 21 Gratt. (Va.) 712.

Allowance to guardian for rent. — The guardian of an insane person who had been engaged in a manufacturing business continued to carry on the same, either at the request or with the concurrence of all parties interested in the ward's estate, the result of which was advantageous thereto. The business required storage room, and the guardian erected a building for such purpose on land of the ward's wife. The probate court having disallowed a charge by him for the cost of such building, it was held, on appeal, that he was entitled to charge the estate a reasonable rent therefor. Murphy *v.* Walker, 131 Mass. 341.

41. Patton *v.* Thompson, 55 N. C. 411, 413, 67 Am. Dec. 222, where the court said, however: "We do not refer to an accidental expenditure, made necessary by an emergency — sickness, for instance — when the excess of expenditure in one year may be compensated for, by drawing upon the income of the next year or two." And see *supra*, III, E, 2; G.

42. *In re* Hain, 167 Pa. St. 55, 31 Atl. 337.

Exceeding amount authorized by court. — Where an order of court authorized the guardian of an insane person to expend ten thousand dollars in the erection of a stable on the ward's property, and the guardian built a stable costing over eighteen thousand dollars without further sanction, it was held that the limit of ten thousand dollars set in the decree did not import a prohibition to exceed it but only marked the extent of the authority conferred, leaving the guardian to justify any expenditure beyond that or make it good, and that, it appearing that the improvement was to the ward's interest, the expense reasonable, and that it was important to the ward's health to build without waiting for a further order of court, the additional expenditure should be allowed. May *v.* Skinner, 149 Mass. 375, 21 N. E. 870.

43. Frankenfeld's Appeal, 102 Pa. St. 589.

44. Kendall *v.* May, 10 Allen (Mass.) 59; Gilfillen's Estate, 170 Pa. St. 185, 32 Atl. 585, 50 Am. St. Rep. 760.

45. Anderson *v.* Anderson, 42 Vt. 350, 1 Am. Rep. 334. See also Johnson *v.* Chapman, 43 W. Va. 639, 28 S. E. 744.

Where a trust is already created by a lunatic, the committee of his person and estate has no right to the control of the property. *In re* Wilson, 2 Pa. St. 325.

Effect of payment to lunatic. — Where a person *non compos mentis* under a guardianship had in his possession a promissory note payable to himself, and received payment of it from the promisor, who had knowledge of the guardianship, such payment was of no effect. Leonard *v.* Leonard, 14 Pick. (Mass.) 280.

proper case make an election for his ward.[46] He is, however, the mere bailiff or servant of the court,[47] and as such is subject to its direction, approval, or disapproval in everything that pertains to the management of the lunatic's estate and the maintenance of him and his family.[48] Acts done by the guardian or committee without authority on account of the ward will not bind the ward, unless beneficial to him.[49] The committee may maintain ejectment against a stranger to secure possession of the lunatic's real estate,[50] but not against the lunatic's wife for the purpose of ejecting her and his children from the home he provided for them.[51] It is the duty of the committee to invest the funds of the lunatic and

A bill for discovery and delivery of a lunatic's property may be maintained by the committee against her husband, where he denies her title, or there is reason to apprehend that he will deal with it in any way adversely to her interest. Equitable Trust Co. *v.* Garis, 190 Pa. St. 544, 42 Atl. 1022, 70 Am. St. Rep. 644.

Action for reconveyance of land.— A guardian of an insane person may maintain a bill in equity for a reconveyance of land conveyed by his ward absolutely, although intended as a mortgage to indemnify the grantee on a bond conditioned to pay legacies given by the will of the ward in case the estate of the latter was not sufficient to pay them at his decease, when the land is necessary for the ward's support and a surrender of the bond is offered. Warfield *v.* Fisk, 136 Mass. 219.

Conservator may submit the claims of his ward to arbitration. Hutchins *v.* Johnson, 12 Conn. 376, 30 Am. Dec. 622.

Permitting management by others.— The guardian of an incompetent old man may properly permit the business affairs of the ward to be managed by others than himself, in exceptional cases, as where such others are relatives, conversant with the business, and the heirs at law approve, and no creditor appears to contest the account, but a practice of that kind is not to be encouraged. Racouillat *v.* Requena, 36 Cal. 651.

In Virginia the committee has absolute control and management of the lunatic's estate, and Code (1904), p. 1389, § 2700, authorizing the court to order money in the hands of any fiduciary to be invested, and section 492*b*, p. 254, relative to the payment of taxes on funds under the control of the court, have no application to funds in the hands of the committee of a lunatic. Hurt *v.* Bristol, (Va. 1905) 51 S. E. 223.

46. Kent *v.* Morrison, 153 Mass. 137, 26 N. E. 427, 25 Am. St. Rep. 616, 10 L. R. A. 756; Fitzwilliams *v.* Davie, 18 Tex. Civ. App. 81, 43 S. W. 840.

47. Shaffer *v.* List, 114 Pa. St. 486, 7 Atl. 80; Warden *v.* Eichbaum, 3 Grant (Pa.) 42.

The guardian is a mere curator, without title in his ward's property, and, aside from power to make necessary repairs and improvements, can exercise no control over the estate, unless authorized by statute. Cooper *v.* Wallace, 55 N. J. Eq. 192, 36 Atl. 575.

48. Shaffer *v.* List, 114 Pa. St. 486, 7 Atl. 80; Hinchman *v.* Ballard, 7 W. Va. 152.

The guardian may ask the court for instructions concerning the scope of his power to deal with the estate, or in case the power clearly exists but is discretionary, as to the wisdom of exercising it in a particular method. Cooper *v.* Wallace, 55 N. J. Eq. 192, 36 Atl. 575.

49. Alexander *v.* Alexander, 8 Ala. 796; Sallier *v.* St. Louis, etc., R. Co., 114 La. 1090, 38 So. 868; Wester *v.* Flygare, (Minn. 1905) 103 N. W. 1020; Jennings *v.* Bloomfield, 199 Pa. St. 638, 49 Atl. 135.

The committee of a lunatic can waive nothing which the law stipulates for security of the person represented, especially as to his freehold property. Warden *v.* Eichbaum, 14 Pa. St. 121, holding that the committee of a lunatic is not estopped from calling in question an illegal sheriff's sale of the lunatic's land by the fact that he or a previous committee received the lunatic's share of the purchase-money, and permitted large improvements to be made by the purchasers without objection.

Agreement in settlement of partnership.— Where an interdicted person was a member of a partnership, his administratrix *pro tem.*, having only power of administration, could not, without a decree of court, bind the interdict by an agreement with his partner to pay a certain sum in liquidation of partnership affairs. Espinola *v.* Blasco, 15 La. Ann. 426.

Purchase of property with ward's funds.— Where the committee of a lunatic purchased real estate, and took the conveyance to himself, in violation of his trust, and paid the consideration with money belonging to the lunatic, a trust resulted in favor of the lunatic, and this trust was retained by 1 N. Y. Rev. St. c. 728, § 53, and turned into a legal estate in the lunatic by the forty-fifth section of the same article, and was liable to be sold on execution, and descended to the heir at law, if not otherwise disposed of. Reid *v.* Fitch, 11 Barb. (N. Y.) 399.

50. Shaffer *v.* List, 114 Pa. St. 486, 7 Atl. 80; Warden *v.* Eichbaum, 14 Pa. St. 121, committee may maintain ejectment in his own name.

51. Shaffer *v.* List, 114 Pa. St. 486, 7 Atl. 80.

The proper course, if in the judgment of the committee the interest of the lunatic and his family would be best promoted by leasing a part of the homestead or the whole of it and providing for them elsewhere is to represent the fact to the court and ask its

keep them invested, for his benefit.[52] It is within the power of the court to direct and order the guardian to continue the business of the ward,[53] but without such authorization the guardian has no power to engage in business for the lunatic or to bind his estate by contracts relating to such business.[54] The guardian cannot by any promise which he may make render the ward liable to an action as on his own contract.[55] Where a testator leaves property in trust, the income to be paid to a certain person, who is or becomes insane, the committee is entitled to receive the income,[56] but not the *corpus* of the fund.[57] A conservator has no right to dispose of funds of his ward by paying them over to another person upon the latter's agreement to pay over to the heirs of the ward after her death what remains after supporting the ward and paying her funeral expenses.[58] A promise which may at any time be recalled by the promisor may likewise be recalled and revoked by his guardian on the promisor becoming *non compos mentis*.[59] The committee of the estate of a lunatic who has invested a portion of the estate in a mortgage may release a portion of the premises covered thereby without applying to the court for permission to do so.[60] The guardian or committee cannot bind the estate by covenants in a deed.[61] In Louisiana a curator of an interdicted person cannot borrow money for such person without the authority of the judge on the advice of a family meeting.[62] Where a lunatic died leaving but two heirs, and before the appointment of an administrator the committee of the late lunatic paid to one heir the whole of her distributive share, and to the other a part of hers, it was held that, in a suit subsequently brought by the administrator against the committee to settle his accounts, the distributees should be made parties and the committee should have credit for all that he had paid to or for such distributees.[63]

instruction. Shaffer *v.* List, 114 Pa. St. 486, 7 Atl. 80.

52. See Butler *v.* Jarvis, 51 Hun (N. Y.) 248, 4 N. Y. Suppl. 137.

Improvement of realty.— The committee of a lunatic may be allowed, in a proper case, to invest personal property of the lunatic in the improvement of unproductive real estate by the erection of buildings thereon. Matter of Livingston, 9 Paige (N. Y.) 440.

Purchase of annuity.— The guardian of an insane person may be authorized by the court to invest all the property of his ward in the purchase of an annuity upon his life. *In re* Hooper, 120 Mass. 102.

Circumstances not excusing failure to invest see *In re* Thomas, 26 Colo. 110, 56 Pac. 907; Butler *v.* Jarvis, 51 Hun (N. Y.) 284, 4 N. Y. Suppl. 137.

53. State *v.* Jones, 89 Mo. 470, 477, 1 S. W. 355 [*overruling* Michael *v.* Locke, 80 Mo. 548 (*affirming* 10 Mo. App. 582); Western Cement Co. *v.* Jones, 8 Mo. App. 373], where it is said, however: "The court should not, for any considerable length of time, continue a hazardous manufacturing or mercantile business." See also Isaacs *v.* Chinery, 74 L. T. Rep. N. S. 320.

54. Michael *v.* Locke, 80 Mo. 548 [*affirming* 10 Mo. App. 582]; Western Cement Co. *v.* Jones, 8 Mo. App. 373; Kent *v.* West, 33 N. Y. App. Div. 112, 53 N. Y. Suppl. 244.

55. Thacher *v.* Dinsmore, 5 Mass. 299, 4 Am. Dec. 61.

56. *In re* Earp, 2 Pars. Eq. Cas. (Pa.) 178. See also Royer *v.* Meixel, 19 Pa. St. 240, holding that where real estate was devised to a lunatic, the executors to take charge merely to prevent its alienation by the lunatic, and not in trust generally, a committee of the lunatic's person and estate had a right to receive its income.

Income to be expended by trustees.—Where a testator gave his estate to his sons in trust to pay the net income to his wife for life, or to expend the same for her benefit, support, or maintenance, with discretion to use the principal for this purpose, a guardian of the wife, appointed under Pa. Acts, June 25, 1895, and June 19, 1901, relating to weak-minded persons, was not entitled to the net income of the estate. Hancock's Estate, 12 Pa. Dist. 680.

57. *In re* Wilson, 2 Pa. St. 325, because the lunatic could not himself claim the fund if he were sane. See also Royer *v.* Meixel, 19 Pa. St. 240.

58. Sanford *v.* Hayes, 19 Conn. 591, holding that the ward's administrator could recover the amount due from the person receiving the money.

59. Buhler *v.* Trombly, (Mich. 1905) 102 N. W. 647.

60. Pickersgill *v.* Read, 5 Hun (N. Y.) 170, holding further that where such release was recorded, the fact that it was given without consideration did not render it invalid as against a *bona fide* purchaser of the premises for value.

61. Person *v.* Merrick, 5 Wis. 231.

62. Hardoin's Succession, 18 La. Ann. 24.

63. Davidson *v.* Pope, 82 Va. 747, 1 S. E. 117.

b. Right to Sell, Mortgage, or Lease Property.[64] The guardian or committee cannot, without leave of court, sell, mortgage, or lease the lunatic's real property,[65] and his acts, so long as they are unauthorized and unsanctioned by the court, can have no effect in divesting the lunatic's title to real estate.[66] In some states he may sell the ward's personalty without an order of court when such sale is necessary for the ward's support, or for the advantage of his estate.[67]

64. Sale, mortgage, or lease under order of court see *infra*, IV, K.

65. *Connecticut.*— Treat *v.* Peck, 5 Conn. 280.

Iowa.— Alexander *v.* Buffington, 66 Iowa 360, 23 N. W. 754 [*following* Bates *v.* Dunham, 58 Iowa 308, 12 N. W. 309].

New York.— Pharis *v.* Gere, 110 N. Y. 336, 18 N. E. 135, 1 L. R. A. 270; Corbin *v.* Dwyer, 30 Misc. 488, 63 N. Y. Suppl. 822.

North Carolina.— Patton *v.* Thompson, 55 N. C. 411, 67 Am. Dec. 222.

England.— *In re* Woodcock, L. R. 3 Ch. 229, 16 Wkly. Rep. 532; Foster *v.* Marchant, 1 Vern. Ch. 262, 23 Eng. Reprint 457; *Ex p.* Dikes, 8 Ves. Jr. 79, 32 Eng. Reprint 282; Knipe *v.* Palmer, 2 Wils. C. P. 130.

See 27 Cent. Dig. tit. "Insane Persons," § 111.

Partition deed.— Where a tenant in common is *non compos mentis* and under guardianship, a partition deed executed by the cotenants and by the guardian is good to pass the title of the ward, at least until it is avoided by the *non compos*, or by those claiming in privity of estate under him. Thomas *v.* Hatch, 23 Fed. Cas. No. 13,899, 3 Sumn. 170.

Release of dower.— Neither the court nor the committee of an insane wife has authority to execute a deed depriving her of her inchoate right of dower. Matter of Dunn, 64 Hun (N. Y.) 18, 18 N. Y. Suppl. 723, 22 N. Y. Civ. Proc. 118.

Promise of purchaser from lunatic to pay mortgage.— An invalid mortgage executed by the committee cannot be upheld by proof of a promise of a subsequent purchaser from the lunatic to pay it. Corbin *v.* Dwyer, 30 Misc. (N. Y.) 488, 63 N. Y. Suppl. 822.

Oil and gas being a part of the land in and under which they exist, the committee of a lunatic having an interest therein cannot lease or sell rights thereto except by order or decree of court properly obtained. South Penn Oil Co. *v.* McIntire, 44 W. Va. 296, 28 S. E. 922.

The committee may lease from year to year, the only restraint on his power being that he cannot bind the lunatic after his restoration to sanity. De Treville *v.* Ellis, Bailey Eq. (S. C.) 35, 21 Am. Dec. 518. See also Campau *v.* Shaw, 15 Mich. 226, where pending an appeal from the appointment of a guardian over a person *non compos mentis*, a special guardian was appointed, who leased land belonging to his ward for a term of years, and received from the lessees in advance the rent for eighteen months, although only six months' rent was due in advance, and about three months afterward, while the special guardian continued in office, the ward died, and the lessees applied to the heirs of the ward to confirm the lease, but the heirs refused, but did not expressly disaffirm it; and it was held that, the lease being void after the ward's death unless confirmed, the lessees had a right to recover of the ward's estate the amount they had paid the special guardian beyond the rent that had accrued at the ward's death, as the guardian, immediately on the receipt of the money, became accountable for it to the ward.

In Pennsylvania it appears that the committee may lease the realty. And it has been held that the fact that the committee of a lunatic occupies and farms the property of the lunatic is not a sufficient reason why the terms of his occupancy, which were based upon a lease of the same premises by a former committee, and were practically agreed to by the family, should not be carried out, the terms being such as were customary in leases, and the committee being found faithful in all respects. Pierce's Appeal, 13 Wkly. Notes Cas. 306.

66. Warden *v.* Eichbaum, 3 Grant (Pa.) 42.

67. Under the laws of Ohio he has such power. Strong *v.* Strauss, 40 Ohio St. 87; Holden *v.* Scudder, 58 Fed. 932.

In Massachusetts, previous to the statute of 1817, prohibiting guardians from selling stock without a license from a judge of probate, the guardian of a person *non compos mentis* had a general authority to sell any personal property of his ward; and although he might make a sale improperly, a *bona fide* purchaser would get a good title. Ellis *v.* Essex Merrimack Bridge Proprietors, 2 Pick. 243.

Assignment of chose in action.— The laws of Ohio, which authorize the guardian of an insane person to sell personal property without an order of court, "when for the interest of the ward," do not empower him to assign the ward's part interest in a chose in action then in course of litigation by the other part owner in consideration of the assignee's promise to pay all costs and expenses of such litigation, it appearing that the guardian has been made a defendant therein because he refused to join as plaintiff; for as the guardian would not be liable to costs, and would be entitled to share in any recovery, the assignment is without any consideration and against the interest of the ward. Holden *v.* Scudder, 58 Fed. 932.

Ratification of sale without order of court. — When the committee of a lunatic has sold personal property without obtaining an order of court for that purpose, a subsequent ratification of his action by the court gives it

c. Affirmance by Lunatic of Purchase by Guardian. Where the guardian of a lunatic purchased real estate for him, and the lunatic upon his restoration to reason took possession of the land and retained it for two years and then sold it to a third person and delivered possession, this was an affirmance of the purchase by the guardian.[68]

2. Liabilities[69] — a. In General. The guardian of a lunatic cannot be held personally liable for goods furnished him for the use of a lunatic's estate, where no misrepresentations were made, and the seller had full knowledge of all the facts;[70] but services rendered to a lunatic at the request of his guardian, or under a contract with the guardian, constitute a good cause of action against the guardian personally.[71] A bond given by the guardian of a lunatic, on a sale of the ward's real estate, against liens and encumbrances, must be binding on him, if at all, in his personal, and not in his representative, character.[72] Where the committee of a lunatic takes possession of land leased to the lunatic he becomes personally liable for the rent,[73] but he is not liable for the rent where he does not take possession of the demised premises.[74] The committee is not liable for losses caused without fault on his part,[75] but if he permits an agent to manage the estate in a negligent manner he must account for the money paid to the agent for the estate.[76] A conservator of an incompetent is liable on an express agreement made during his tenure after he is out of office, he having a remedy against the estate of the incompetent.[77] A committee appointed to carry on the business of a lunatic is not personally liable on contracts made in the course of such business, unless he has pledged his personal credit.[78]

b. For Interest. A guardian of an insane person is chargeable with interest where he allows his ward's money to lie idle in his hands for an unreasonable time,[79] or mingles the same with his own.[80] The guardian or committee is respon-

the same validity that a previous authorization would have given. Spaulding *v.* Bullock, 206 Pa. St. 224, 55 Atl. 965 [*affirming* 20 Pa. Super. Ct. 301].

68. Gurley *v.* Davis, 7 Ala. 315, so holding notwithstanding the late lunatic had successfully resisted an action against him by the vendor for the purchase-money, and holding further that the guardian could not recover from the late lunatic rent for the time the latter was in possession, but that the guardian could recover in equity from the late lunatic the purchase-money paid by him.

69. Personal liability of guardian for ward's support see *supra*, III, E, 2.

Liability for money received.— Where one is appointed a committee of an insane person, although without notice to the insane, and acts as such, he may be sued for money received by him as such by color of his appointment, although the appointment be void. Straight *v.* Ice, 56 W. Va. 60, 48 S. E. 837.

Liability for attorney's fees.— Where a guardian took certain stock as collateral security, and, shortly before suit against him as guardian was begun to enforce the payment of an unpaid balance on stock subscription, took the stock individually with the court's approval, he was not personally liable for attorney's fees expended in defending the action, unless he was negligent in receiving the stock originally, or in allowing it to stand on the books of the corporation in his name as guardian after he had taken it individually. *In re* Kimble, 127 Iowa 665, 103 N. W. 1009.

70. Western Cement Co. *v.* Jones, 8 Mo. App. 373.

71. Baker *v.* Groves, 1 Ind. App. 522, 27 N. E. 640.

Services rendered to the lunatic before he became insane constitute no cause of action against his guardian, although the latter has failed to pay for them on demand. Baker *v.* Groves, 1 Ind. App. 522, 27 N. E. 640.

72. Person *v.* Merrick, 5 Wis. 231.

73. *In re* Otis, 34 Hun (N. Y.) 542, 38 Hun 597 [*affirmed* in 101 N. Y. 580, 5 N. E. 571].

74. *In re* Otis, 38 Hun (N. Y.) 597 [*affirmed* in 101 N. Y. 580, 5 N. E. 571].

75. Pannill *v.* Calloway, 78 Va. 387, loss caused by war.

76. *In re* Gallagher, 17 N. Y. Suppl. 440.

77. Campbel *v.* Crandal, 2 Root (Conn.) 371; Thacher *v.* Dinsmore, 5 Mass. 299, 4 Am. Dec. 61, where one who gave a negotiable note as guardian to an insane person was held liable in his individual capacity after his guardianship was discharged.

78. Isaacs *v.* Chinery, 74 L. T. Rep. N. S. 320.

79. Stumph *v.* Pfeiffer, 58 Ind. 472; Butler *v.* Jarvis, 51 Hun (N. Y.) 248, 4 N. Y. Suppl. 137.

A committee who retains funds until the settlement of conflicting claims is not chargeable with interest. Bulows *v.* O'Neal, 4 Desauss. Eq. (S. C.) 394.

80. *In re* Thomas, 26 Colo. 110, 56 Pac. 907 (although he always has on hand an amount

sible for compound interest in the same manner and to the same extent as the guardian of an infant.[81] He will as a general rule be charged simple interest only upon balances found against him on settlement of his account,[82] and where a failure to make investments was not due to wilful neglect interest should not be computed with annual rests;[83] but where he has retained a portion of the funds in his hands for his own benefit he will be charged with compound interest.[84]

c. On Investments. The guardian or committee is responsible for the propriety of his investments,[85] and if he invests in a manner not authorized by the court or the statute he is liable for a resulting loss.[86] He is also liable for any loss due to his negligence.[87] But he is not liable for losses which occur without any fault, negligence, or violation of duty on his part.[88]

I. Jurisdiction of Courts.[89] The question as to what court has the supervision and care of the estates of lunatics is one depending entirely upon the constitution, statutes, and practice of the particular state or country.[90] This jurisdiction is vested sometimes in courts of equity,[91] sometimes in the courts of common pleas[92]

sufficient to pay the balance due to the estate); Stumph *v.* Pfeiffer, 58 Ind. 472.

81. Spack *v.* Long, 36 N. C. 426. See, generally, GUARDIAN AND WARD.

82. Crigler *v.* Alexander, 33 Gratt. (Va.) 674.

83. Butler *v.* Jarvis, 51 Hun (N. Y.) 248, 4 N. Y. Suppl. 137.

84. Knight *v.* Watts, 26 W. Va. 175.

85. Matter of Hathaway, 80 Hun (N. Y.) 186, 30 N. Y. Suppl. 171; Clark *v.* Crout, 34 S. C. 417, 13 S. E. 602; Cole *v.* Cole, 28 Gratt. (Va.) 365. See also *In re* Averill, (Cal. 1901) 66 Pac. 14.

A decree approving all loans previously made, without specification, will not relieve a guardian from personal responsibility. Shepherd *v.* Newkirk, 21 N. J. L. 302.

Discharge of liability.— Where the appointment of a committee is revoked, and he delivers to his successor a bond due to the lunatic's estate by the successor, he is discharged by the latter's acceptance of the bond from all liability for having originally taken insufficient security for, or granted undue indulgence on, the debt. Joyner *v.* Cooper, 2 Bailey (S. C.) 199.

86. State *v.* Washburn, 67 Conn. 187, 34 Atl. 1034; Garner *v.* Henry, 95 Iowa 44, 63 N. W. 359; Butler *v.* Jarvis, 51 Hun (N. Y.) 248, 4 N. Y. Suppl. 137.

87. Butler *v.* Jarvis, 51 Hun (N. Y.) 248, 4 N. Y. Suppl. 137.

88. Matter of Hathaway, 80 Hun (N. Y.) 186, 30 N. Y. Suppl. 171.

Deposit in individual name.—The mere fact that money belonging to the lunatic was deposited by the committee in his own name will not render him liable for its loss from the failure of the bank, which he had reason to believe was entirely solvent, and in which he had no other funds of his own, where he acted in entire good faith, and used the fund for trust purposes. Gregory *v.* Parker, 87 Va. 451, 12 S. E. 801.

89. Jurisdiction over lunatics and their estates in general see *supra*, II, A.

Protection of property before inquest.— Although a court cannot dispose of the person or estate of a lunatic without his first being found to be a lunatic on an inquisition, yet the court may, in a proper case, extend its protection to the property of the lunatic before inquest. Owing's Case, 1 Bland (Md.) 290. See *supra*, II, C, 5.

90. Iowa Code, § 2312, conferring jurisdiction of the estates of insane persons on the circuit court, does not exclude the jurisdiction of the district court on questions of right between insane persons and others. Flock *v.* Wyatt, 49 Iowa 466.

Missouri Act March 19, 1866, declaring that the probate court of St. Louis county should have jurisdiction in all cases arising under an act entitled "An act concerning insane and other persons incapable of managing their affairs," approved Feb. 19, 1866, did not divest the county court of St. Louis of its jurisdiction in such cases. State *v.* St. Louis County Ct., 38 Mo. 402.

91. *In re* Brent, 5 Mackey (D. C.) 352; McCord *v.* Ochiltree, 8 Blackf. (Ind.) 15; Tomlinson *v.* Devore, 1 Gill (Md.) 345; Taylor *v.* Nichols, 86 Tenn. 32, 5 S. W. 436.

Courts of chancery and common law have concurrent jurisdiction. Tomlinson *v.* Devore, 1 Gill (Md.) 345.

While lunacy proceedings are pending chancery has power to make a provisional order to protect a lunatic's property. *In re* Dey, 9 N. J. Eq. 181. See *supra*, II, C, 5.

The court of chancery has the sole control of the real estate of lunatics. Brasher *v.* Van Cortlandt, 2 Johns. Ch. (N. Y.) 400.

92. Yaple *v.* Titus, 41 Pa. St. 195, 80 Am. Dec. 604; Guthrie's Appeal, 16 Pa. St. 321; Matter of Eckstein, 1 Pars. Eq. Cas. (Pa.) 59; Walker *v.* Russell, 10 S. C. 82.

Where a distributee has been found to be a lunatic, and a committee appointed by the common pleas, the jurisdiction of the common pleas attaches to the distributive balance of such lunatic, although a traverse of the inquisition be pending, and the orphans' court cannot entertain a petition of said lunatic for an allowance. *In re* Frey, 12 Phila. (Pa.) 1, 3 Wkly. Notes Cas. 371.

Jurisdiction after death of lunatic.— The court of common pleas has jurisdiction over the estate of a lunatic after his death and an order to sell lands to pay debts made after his death is not void. Yaple *v.* Titus,

exercising chancery jurisdiction,[93] and sometimes in the probate courts.[94] The jurisdiction in lunacy is strictly territorial.[95] After the committee has been discharged and the property of the lunatic restored to him on his becoming able to manage his affairs, the court has no further authority over his property except to pass the accounts of the committee.[96]

J. Rule Against Alteration in Succession. It has been laid down as a rule not to vary or change the property of the lunatic so as to effect any alteration in the succession,[97] but this rule yields to the paramount rule which makes the lunatic's welfare the first consideration.[98] So ordinary repairs upon the realty may be paid for out of the personalty,[99] or the personalty may be applied to the improvement of unproductive real estate, as by the erection of buildings thereon.[1]

K. Sale, Mortgage, or Lease Under Order of Court — 1. Power of Courts to Order. As a general rule the courts have authority to order a sale,[2] mort-

41 Pa. St. 195, 80 Am. Dec. 604. *Compare* Carter *v.* Edmonds, 80 Va. 58.

93. Yaple *v.* Titus, 41 Pa. St. 195, 80 Am. Dec. 604.

94. Kelly *v.* Kelly, 72 Minn. 19, 74 N. W. 899; Blake *v.* Respass, 77 N. C. 193; Walker *v.* Russell, 10 S. C. 82.

Jurisdiction of probate court and court of common pleas concurrent.— Walker *v.* Russell, 10 S. C. 82.

Limits of jurisdiction.— In those states in which the lunacy jurisdiction is vested in the courts of probate and exercised through guardians or curators appointed by the court, the power of the court over the property of the ward is generally the same as that exercised over the property of minors and spendthrifts; that is, upon notice and for cause shown, the court may decree a sale of so much of the ward's property as is necessary for the payment of his debts or the maintenance of himself and his family. But this jurisdiction is purely legislative, limited and special; that is, so far as the statute confers jurisdiction the court may go, but no further. Modawell *v.* Holmes, 40 Ala. 391. And see State *v.* Wilcox, 24 Minn. 143; H—— *v.* S——, 4 N. H. 60.

The superior court sitting in probate has no jurisdiction, in the absence of statutory provisions conferring such jurisdiction, to hear and determine a disputed claim against the guardian or the estate of an insane person, such claim being the proper subject of a civil action, which can be legitimately brought before the court only by such action. *In re* Breslin, 135 Cal. 21, 66 Pac. 962.

95. Allison *v.* Campbell, 21 N. C. 152.

Transferring assets from one jurisdiction to another.— The courts of equity of the state in which the property of an idiot under guardianship is situated cannot transfer it to another state, to which the idiot and his relatives have removed, but they may direct the local guardian to pay over an annual allowance to the guardian where the idiot resides. McNeely *v.* Jamison, 55 N. C. 186. See *supra*, II, D, 7; III, G.

96. Matter of Dowd, 19 Misc. (N. Y.) 688, 44 N. Y. Suppl. 1094.

97. *Ex p.* Annandale, Ambl. 80, 27 Eng. Reprint 501.

98. *In re* Colvin, 4 Md. Ch. 126; Matter of Salisbury, 3 Johns. Ch. (N. Y.) 347.

99. Matter of Badcock, 3 Jur. 694, 8 L. J. Ch. 283, 4 Myl. & C. 440, 18 Eng. Ch. 440, 41 Eng. Reprint 170.

Any extraordinary outlay, however, will retain its character as personalty. Matter of Badcock, 3 Jur. 694, 8 L. J. Ch. 283, 4 Myl. & C. 440, 18 Eng. Ch. 440, 41 Eng. Reprint 170.

1. Matter of Livingston, 9 Paige (N. Y.) 440; *In re* Gist, [1904] 1 Ch. D. 398, 73 L. J. Ch. 251, 90 L. T. Rep. N. S. 35, 52 Wkly. Rep. 422.

2. *California.*— *In re* Hayden, 1 Cal. App. 75, 81 Pac. 668.

District of Columbia.— *In re* Brent, 5 Mackey 352.

Illinois.— Dodge *v.* Cole, 97 Ill. 338, 37 Am. Rep. 111; Gardner *v.* Maroney, 95 Ill. 552.

Maryland.— Hamilton *v.* Traber, 78 Md. 26, 27 Atl. 229, 44 Am. St. Rep. 258.

Massachusetts.— Smith *v.* Smith, 9 Mass. 374.

New York.— Agricultural Ins. Co. *v.* Barnard, 14 Abb. N. Cas. 502; Matter of Hoag, 7 Paige 312; Matter of Heller, 3 Paige 199; Matter of Pettit, 2 Paige 596; Brasher *v.* Van Cortlandt, 2 Johns. Ch. 400.

Pennsylvania.— Mitchell *v.* Spaulding, 206 Pa. St. 220, 55 Atl. 968; Yaple *v.* Titus, 41 Pa. St. 195, 80 Am. Dec. 604; Matter of Eckstein, 1 Pars. Eq. Cas. 59.

South Carolina.— *Ex p.* Drayton, 1 Desauss. Eq. 144.

Virginia.— Palmer *v.* Garland, 81 Va. 444.

United States.— Mohr *v.* Manierre, 17 Fed. Cas. No. 9,695, 7 Biss. 419 [*affirmed* in 107 U. S. 417, 25 L. ed. 1052].

See 27 Cent. Dig. tit. "Insane Persons," § 118.

The power to sell does not include the power to order an exchange of any portion of the lunatic's estate. Matter of Heller, 3 Paige (N. Y.) 199.

Pending a traverse of the inquisition, a sale will not be ordered unless in case of urgent necessity. Meredith's Estate, 40 Leg. Int. (Pa.) 484.

Contingent interest in land may be sold. Palmer *v.* Garland, 81 Va. 444.

gage,[3] or lease[4] of the property of a lunatic,[5] where a proper case for the exercise of this power is made out;[6] and it has been held that the restitution of a person adjudged to be of unsound mind to the control of his estate by a second inquest in which his restoration is adjudged does not divest the court of jurisdiction of the proceedings instituted by the committee appointed under the first inquest to sell the estate to pay debts.[7] An inquisition of lunacy and the appointment of a guardian or committee in one state or country will not authorize the courts of another state or country to order a sale of land of the lunatic situated in the latter jurisdiction;[8] and *a fortiori* the courts of the state where the lunatic resides have no power to order a sale of his land situated in another state.[9]

2. PURPOSES FOR WHICH SALE AUTHORIZED. A sale may be ordered for the purpose of paying the debts of the lunatic,[10] the support and maintenance of the

Land held in trust by lunatic.— Equity has no power to order the guardian of a lunatic, on a bill by the guardian to which his ward is not a party, to transfer real estate which the lunatic held in trust to the beneficiaries or their nominees. Cooper *v.* Wallace, 55 N. J. Eq. 192, 36 Atl. 575.

The chancellor has no inherent right to sell the lunatic's property for the payment of his debts, the creditor being remitted to his remedy at law. Berry *v.* Rogers, 2 B. Mon. (Ky.) 308. The earlier English cases held the same doctrine (*Ex p.* Dikes, 8 Ves. Jr. 79, 32 Eng. Reprint 282; *Ex p.* Smith, 5 Ves. Jr. 556, 31 Eng. Reprint 736; *Ex p.* Bradford, West t. Hardw. 133, 9 Eng. Reprint 858), but by the statute of 43 Geo. III, c. 75, the chancellor was authorized to order sales, leases, or encumbrances of the lunatic's property in certain cases, and this authority was further extended by the statutes 16 & 17 Vict. c. 70, § 124, and 23 & 24 Vict. c. 124, § 38.

3. Kent *v.* Morrison, 153 Mass. 137, 26 N. E. 427, 25 Am. St. Rep. 616, 10 L. R. A. 756; Agricultural Ins. Co. *v.* Barnard, 96 N. Y. 525.

Dispensing with security.— Although the statute requires that on an application to raise money for the lunatic's support from the disposition of his real estate the committee must give security for the proper disposition of the money, such security is unnecessary when the application is to mortgage such real estate for the purpose of paying the lunatic's debts. Agricultural Ins. Co. *v.* Barnard, 96 N. Y. 525, 14 Abb. N. Cas. 502 [*reversing* 26 Hun 302].

4. Taylor Landl. & Ten. § 136. And see De Treville *v.* Ellis, Bailey Eq. (S. C.) 35, 21 Am. Dec. 518.

Termination on restoration to sanity.— The court cannot authorize a lease which the lunatic may not, on his restoration to reason, terminate. *Ex p.* Dikes, 8 Ves. Jr. 79, 32 Eng. Reprint 282.

5. **Necessity for preliminary inquisition.**— The court has no jurisdiction to order the sale of lands of an alleged lunatic on petition of his immediate friends and relatives, without a preliminary inquisition as to his lunacy. Matter of Payn, 8 How. Pr. (N. Y.) 220.

6. Mohr *v.* Manierre, 17 Fed. Cas. No. 9,695, 7 Biss. 419 [*affirmed* in 101 U. S. 417, 25 L. ed. 1052].

7. Salter *v.* Salter, 6 Bush (Ky.) 624.

8. Matter of Perkins, 2 Johns. Ch. (N. Y.) 124; Kelsey *v.* Trisler, 32 Tex. Civ. App. 177, 74 S. W. 64; *In re* Chandos, 1 Sch. & Lef. 301. *Aliter* where the statute authorizes sales by non-resident guardians or committees under order of court. Wing *v.* Dodge, 80 Ill. 564.

9. Hotchkiss *v.* Middlekauf, 96 Va. 649, 32 S. E. 36, 43 L. R. A. 806, holding further that if a deed of the committee under such authority was to be considered as voidable and not void, it was not ratified by the heirs of the lunatic when they did not act with knowledge on their part of the existence of the deed and the circumstances attending its execution.

10. *Kentucky.*— German Nat. Bank *v.* Engeln, 14 Bush 708. See also Salter *v.* Salter, 6 Bush 624. *Compare* Berry *v.* Rogers, 2 B. Mon. 308.

New York.— Brasher *v.* Van Cortlandt, 2 Johns. Ch. 400.

North Carolina.— Howard *v.* Thompson, 30 N. C. 367. *Compare* Blake *v.* Respass, 77 N. C. 193.

Pennsylvania.— Yaple *v.* Titus, 41 Pa. St. 195, 80 Am. Dec. 604.

Virginia.— Carter *v.* Edmonds, 80 Va. 58.

See 27 Cent. Dig. tit. "Insane Persons," § 120.

When sale for debts improper.— Since in all cases the comfortable maintenance of the lunatic is the first consideration, a sale of his property to satisfy the claims of his creditors will not be ordered when the effect of it will be to reduce him to a condition of absolute want. *Ex p.* Hastings, 14 Ves. Jr. 182, 9 Rev. Rep. 272, 33 Eng. Reprint 490; *Ex p.* Dikes, 8 Ves. Jr. 79, 32 Eng. Reprint 282; Buswell Ins. § 107.

Setting aside fund for support.— The court may, before directing the property of a lunatic to be sold for the payment of his debts, set aside a sufficient fund for the support of himself and his family dependent on him. Adams *v.* Thomas, 83 N. C. 521, 81 N. C. 296; *Ex p.* Latham, 41 N. C. 406. Only the excess of the property over the amount necessary for the support of his family will be sold. McLean *v.* Breese, 109 N. C. 564, 13 S. E. 910.

lunatic[11] or his family,[12] or the payment of necessary expenses,[13] or when a sale is for the interest and advantage of the lunatic.[14] It has been held that the court cannot authorize a sale for purposes of investment.[15]

3. NOTICE OF APPLICATION. The alienation of the lunatic's property being solely for his benefit or that of his family, it is held that he is not strictly entitled to notice of the proceedings therefor;[16] but in some states notice to the lunatic[17] or to other persons interested in the property[18] is required. Where notice is required, it must be given for the time specified in the statute;[19] but as against the lunatic the proceedings are not rendered invalid by an imperfect publication of a notice required for other persons.[20]

4. PROCEEDINGS. The petition for an order of sale may be filed by the guardian or committee of the lunatic,[21] and in such case the appointment of a guardian *ad litem* for the lunatic is not necessary.[22] Where a reference is required by statute it cannot be dispensed with.[23] In a proceeding by a committee of an insane person to sell the undivided interest of such person in the oil and gas underlying a tract of land, the cotenants of such person are not necessary or proper parties.[24] The wife must be made a party to a proceeding under a statute

Staying execution.— Upon petition of the committee of a lunatic showing a great indebtedness of the lunatic and that his property would be sacrificed at sales on execution, a sale may be decreed, a receiver appointed, and the execution stayed. Latham *v.* Wiswall, 37 N. C. 294.

After death of the lunatic.— Va. Code, c. 82, § 49 *et seq.*, relating to the sale of real estate of an insane person for the payment of his debts, etc., do not apply where the real estate is sought to be subjected to the payment of debts after the death of the lunatic. Carter *v.* Edmonds, 80 Va. 58.

11. *California.*— *In re* Hayden, 1 Cal. App. 75, 81 Pac. 668.

District of Columbia.— *In re* Brent, 5 Mackey 352.

Kentucky.— Coleman *v.* Lunatic Asylum Com'rs, 6 B. Mon. 239.

Maryland.— Hamilton *v.* Traber, 78 Md. 26, 27 Atl. 229, 44 Am. St. Rep. 258, jurisdiction limited by statute.

Virginia.— Carter *v.* Edmonds, 80 Va. 53.

See 27 Cent. Dig. tit. "Insane Persons," § 120.

Insufficiency of income for support of lunatic must appear. Matter of Pettit, 2 Paige (N. Y.) 596.

12. Carter *v.* Edmonds, 80 Va. 58.

13. *In re* Dorney, 59 Md. 67, holding that taxes on the property of a lunatic are such necessary expenses as will warrant the court to order a sale of the property for their payment, without the formalities required by Md. Code, art. 16, § 83, for the sale of the property of lunatics.

14. Bennett *v.* Hayden, 145 Pa. St. 586, 23 Atl. 255, holding that Pa. Pamphl. Laws 503, providing for the sale of a lunatic's real estate when it was "for the interest and advantage" of the lunatic, did not authorize a sale for the payment of his debts, the support of his family, and the education of his minor children, these matters being provided for by an earlier statute.

15. Clark *v.* Mathewson, 7 App. Cas. (D. C.) 382. See also Lyman *v.* Conkey, 1 Metc. (Mass.) 317, holding that the guardian will not be authorized to sell his insane ward's estate and invest the proceeds, without the written consent of the overseers of the poor of the town in which the ward resides.

16. Dodge *v.* Cole, 97 Ill. 338, 37 Am. Rep. 111; Agricultural Ins. Co. *v.* Barnard, 96 N. Y. 525, 14 Abb. N. Cas. 502; Smith *v.* Burnham, 1 Aik. (Vt.) 84; Mohr *v.* Porter, 51 Wis. 487, 8 N. W. 364.

17. Willis *v.* Hobson, 79 Md. 327, 29 Atl. 604.

18. **In Pennsylvania notice** must be given to the next of kin. Mitchell *v.* Spaulding, 206 Pa. St. 220, 55 Atl. 968; Bennett *v.* Hayden, 145 Pa. St. 586, 23 Atl. 255.

Service on the father of a minor next of kin is insufficient where the father is not a guardian or of the blood of the alleged lunatic. Mitchell *v.* Spaulding, 206 Pa. St. 220, 55 Atl. 968.

19. Mitchell *v.* Spaulding, 206 Pa. St. 220, 55 Atl. 968; Mohr *v.* Tulip, 40 Wis. 66.

20. Mohr *v.* Porter, 51 Wis. 487, 8 N. W. 364 [*overruling* Mohr *v.* Tulip, 40 Wis. 66]: Mohr *v.* Manierre, 101 U. S. 417, 25 L. ed. 1052.

21. See *In re* Dorney, 59 Md. 67. It seems that the committee of a lunatic may proceed in equity to have the lunatic's estate sold for the payment of his debts, without using the name of the lunatic as a party plaintiff, although at law an action brought in the name of the committee, instead of in the name of the lunatic, would be improperly brought. Cathcart *v.* Sugenheimer, 18 S. C. 123.

Non-resident conservators may apply for an order of sale under the Illinois act of 1865 but not under the act of 1853. Wing *v.* Dodge, 80 Ill. 564.

22. *In re* Dorney, 59 Md. 67.

23. *In re* Valentine, 72 N. Y. 184 [*reversing* 10 Hun 83].

24. South Penn Oil Co. *v.* McIntire, 44 W. Va. 296, 28 S. E. 922.

providing that if a husband of an insane wife wishes to sell real estate and have her right of dower released he may petition the court for an order for the execution of such release.[25] On an application by the guardian of a lunatic for an order authorizing the sale of land to pay debts, it may be interposed as an affirmative defense that the guardian mismanaged the estate and should account to it for a certain sum lost through his negligence.[26] A claim of title adverse to the lunatic cannot be tried in proceedings for the sale of the lunatic's interest in land.[27]

5. By Whom Sale Made. The sale may be ordered to be made by the guardian or committee;[28] and a master in chancery or other person may be joined with the committee for that purpose,[29] or may be ordered to conduct the sale alone if the committee refuses to unite therein.[30]

6. Terms of Sale. A conservator, on selling land of his ward under order of the court, may reserve in favor of the estate damages awarded for the construction of a highway, although such reservation is not mentioned in the order of sale.[31]

7. Mode of Sale. Where the statute requires a public sale, a private sale is invalid;[32] but in the absence of any statutory prohibition the sale may be private if clearly for the best interest of the estate.[33] It has even been held that it is not necessary, in order to bind a lunatic, that the court should go through the form of a sale, if a result equally advantageous to the lunatic can be attained by adopting a fair and informal one already made.[34]

8. Who May Purchase. Where property of an insane person is sold under order of court the guardian or committee cannot become the purchaser, either directly or through a colorable purchase by a third person who in fact purchases for him.[35]

9. Confirmation. The approval of a sale of land of an insane person, made by his guardian under an order of the court, need not necessarily appear by formal entry of record, but it is sufficient if it appears from the clerk's minutes.[36] Where the order authorizes a mortgage only, and the committee makes a sale thereunder, such sale is void notwithstanding it has been confirmed by the court.[37] The county court has power to disapprove a conservator's sale made subject to approval, and order a resale of the property, where it appears that such resale is for the best interests of the estate.[38]

25. Hess *v.* Gale, 93 Va. 467, 25 S. E. 533.

26. *In re* Kimble, 127 Iowa 665, 103 N. W. 1009.

27. Ayer *v.* Breed, 110 Mass. 548.

28. Kelsey *v.* Trisler, 32 Tex. Civ. App. 177, 74 S. W. 64, holding that the probate court has no authority to order the sale of the property of a lunatic by a person who has not been appointed guardian of the lunatic.

Validating act.— The Pennsylvania act of April 28, 1876, validating certain sales made by persons in a fiduciary capacity in the event of any irregularity or defect existing in the appointment or qualifications of such trustees, cures only defects in the proceedings of such courts as have jurisdiction of the subject-matter, and does not validate a sale under order of court made by a trustee of an insane person who was irregularly and defectively appointed by a court which had no jurisdiction to make such appointment. Halderman *v.* Young, 107 Pa. St. 324.

29. Brasher *v.* Van Cortlandt, 2 Johns. Ch. (N. Y.) 242.

30. Brasher *v.* Van Cortlandt, 2 Johns. Ch. (N. Y.) 400.

31. Chandler *v.* Morey, 195 Ill. 596, 63 N. E. 512 [*affirming* 96 Ill. App. 278].

32. Bennett *v.* Hayden, 145 Pa. St. 586, 23 Atl. 255.

33. Palmer *v.* Garland, 81 Va. 444.

34. Warden *v.* Eichbaum, 3 Grant (Pa.) 42.

35. Gaylord *v.* Goodell, (Mass. 1899) 53 N. E. 275; Taylor *v.* Klein, 47 N. Y. App. Div. 343, 62 N. Y. Suppl. 4 [*affirmed* in 170 N. Y. 571, 62 N. E. 1101] (partition sale); Boyce *v.* Warren, 19 N. C. 498.

36. Moore *v.* Davis, 85 Mo. 464.

37. Reals *v.* Weston, 28 Misc. (N. Y.) 67, 59 N. Y. Suppl. 807, holding further that where the order confirming the sale recites that the committee had presented a report that he had sold the premises, making no reference to any order of sale, but referring to an order of a certain date, which was an order to mortgage, these recitals create no presumption that there was any order of sale.

38. Jennings *v.* Dunphy, 174 Ill. 86, 50 N. E. 1045, although the sale was regularly and fairly conducted and the amount bid was a fair price for the property.

10. Setting Aside. A person under guardianship as being of unsound mind cannot maintain an action to impeach sales of property made by his guardian;[39] but where after a commission of lunacy in his case was superseded, the ward, with the aid of counsel, examined his guardian's accounts and settled with him, and received and retained the balance, and these accounts and balance included proceeds of a sale of his land, which, however, was invalid, for the reason that sufficient publication of notice of application for an order of sale was not made, he was not estopped from impeaching the sale, although he could not impeach the settlement.[40] The sale will not be set aside merely because a third person has offered a trifling advance over the price realized;[41] but a sale made subject to the approval of the court may be disapproved before confirmation where it appears that a resale will be advantageous to the estate of the lunatic.[42] A bill to set aside a decree ratifying a sale of a lunatic's property is demurrable where it is apparent from the face of the proceedings in which the assailed decree was passed that the matters relied on for setting it aside were presented and considered in that case.[43]

11. Effect and Validity. A decree for the sale of the estate of a lunatic for the payment of debts is a decree *in rem*, and the creditors are bound by it, although not parties to the proceedings.[44] Where under order of court the guardian sells in fee simple an estate tail of his ward, during his life, for the payment of his debts, the estate tail is extinguished and the remainder legally barred.[45] Where the committee of an insane married woman files a petition to sell her land for debts with which it is not chargeable, he is guilty of constructive fraud, and all the proceedings of the court in relation thereto are void for want of jurisdiction of the subject-matter.[46] Where the committee of a lunatic sold his real estate under a decree of court, and diverted the proceeds to the payment of his own debt to the purchaser, the sale was held voidable.[47] Where the conservatrix of the estate of her insane husband, having obtained an order for the sale of real estate and sold the same, afterward made a written agreement with the purchaser for the borrowing of a sum of money, and with reference to the land being reconveyed to the estate, this agreement had no effect upon the sale, and a contention that it showed that the sale was merely colorable, and hence conveyed no title to the purchaser, was of no merit.[48] Where land of a lunatic is sold by his guardian under an order of court, and the lunatic, whose insanity does not then affect his capacity to transact business, knowingly accepts the proceeds of the sale or the benefit thereof, he is estopped from thereafter denying its validity.[49]

12. Title and Rights of Purchaser. A license to a guardian of a lunatic to sell real estate for payment of his debts is sufficient to protect the purchaser, although the record does not show by whom the debts were contracted.[50] The title of the lunatic passes to the purchaser at a sale by the guardian,[51] but the sale is subject to all existing liens or encumbrances.[52] Where the proceedings are defective, the purchaser may be allowed to have the title perfected on motion to amend the proceedings,[53] or to have the purchase-money refunded on the sale being set aside.[54]

39. Robeson *v.* Martin, 93 Ind. 420 [*citing* Meharry *v.* Meharry, 59 Ind. 257].
40. Mohr *v.* Tulip, 40 Wis. 66.
41. Leary's Case, 50 N. J. Eq. 383, 25 Atl. 197.
42. Jennings *v.* Dunphy, 174 Ill. 86, 50 N. E. 1045.
43. Payne *v.* Payne, 97 Md. 678, 55 Atl. 368.
44. Latham *v.* Wiswall, 37 N. C. 294.
45. Williams *v.* Hichborn, 4 Mass. 189.
46. Dickel *v.* Smith, 38 W. Va. 635, 18 S. E. 721.
47. Stone *v.* Cromie, 87 Ky. 173, 7 S. W. 920, 10 Ky. L. Rep. 19.
48. Madison *v.* Madison, 206 Ill. 534, 69 N. E. 625.
49. Searle *v.* Galbraith, 73 Ill. 269.
50. Smith *v.* Burnham, 1 Aik. (Vt.) 84.
51. Smith *v.* Burnham, 1 Aik. (Vt.) 84, holding that this is true notwithstanding the fact that it does not appear that any notice was given of the intention of the guardian to apply to the probate court for leave to make the sale.
52. Person *v.* Merrick, 5 Wis. 231.
53. *In re* Valentine, 72 N. Y. 184.
54. *In re* Valentine, 72 N. Y. 184.

An innocent purchaser is entitled to an equitable lien for the entire amount of pur-

13. Proceeds. Where land of a lunatic is sold the resulting fund is under the direction of the court,[55] and no creditor can claim a priority.[56] The proceeds of the sale of a lunatic's real estate are considered real estate until the incompetency is removed.[57] If the purchaser pays the purchase-money to a commissioner appointed to sell but who has not given bond as required by the decree, he does so at his own risk.[58]

14. Review. In Pennsylvania, contrary to what appears to be the general rule,[59] it is held that an appeal can be taken only from the decree confirming the sale, and not from the order of sale, this not being a final decree.[60] On a bill of review no presumption favorable to the court's action will be indulged.[61]

15. Collateral Attack. Where the court ordering the sale had jurisdiction the order or decree of sale cannot be collaterally attacked for errors or irregularities.[62]

L. Sale Under Special Statute. The legislature may by special statute authorize the guardian or committee of an insane person to sell his real estate or a part thereof.[63]

V. CONTRACTS.

A. Validity — 1. In General. Although it seems to have been formerly held that one could not plead insanity in avoidance of his contract, on the ground that he should not be allowed to thus stultify himself,[64] this, if it ever was the law, is no longer so; but it is well settled that, subject to limitations hereinafter explained, a contract entered into by a person who at the time is so insane as to be incapable of understanding what he is doing is at least voidable at his option, and in some jurisdictions absolutely void.[65] Nor can a third person other than a

chase-money paid. Reals *v.* Weston, 28 Misc. (N. Y.) 67, 59 N. Y. Suppl. 807.

55. *Ex p.* Latham, 41 N. C. 406.

56. *Ex p.* Latham, 41 N. C. 406.

57. Ford *v.* Livingston, 140 N. Y. 162, 35 N. E. 437 [*affirming* 70 Hun 178, 24 N. Y. Suppl. 412]; Walrath *v.* Abbott, 75 Hun (N. Y.) 445, 27 N. Y. Suppl. 529; Cutting *v.* Lincoln, 9 Abb. Pr. N. S. (N. Y.) 436 (partition sale); *Ex p.* Hinde, Ambl. 706 note; Matter of Wharton, 5 De G. M. & G. 33, 18 Jur. 299, 23 L. J. Ch. 522, 2 Wkly. Rep. 248, 54 Eng. Ch. 28, 43 Eng. Reprint 781; Dursley *v.* Berkley, 6 Ves. Jr. 251, 5 Rev. Rep. 285, 31 Eng. Reprint 1036.

58. Hess *v.* Rader, 26 Gratt. (Va.) 746.

59. The general rule would appear to be that such an order is appealable like an order for the sale of the real estate of a decedent (see Executors and Administrators, 18 Cyc. 754 text and note 40), or an infant under guardianship (see Guardian and Ward, 21 Cyc. 130 text and note 11).

60. *In re* Garvey, 13 Pa. Super. Ct. 277.

61. Kelsey *v.* Trisler, 32 Tex. Civ. App. 177, 74 S. W. 64.

62. Dodge *v.* Cole, 97 Ill. 338, 37 Am. Rep. 111; Dutcher *v.* Hill, 29 Mo. 271, 77 Am. Dec. 572; Cline *v.* Catron, 22 Gratt. (Va.) 378. See also Craft *v.* Simon, 118 Ala. 625, 24 So. 380; Evans *v.* Johnson, 39 W. Va. 299, 19 S. E. 623, 45 Am. St. Rep. 912, 23 L. R. A. 737.

63. Davison *v.* Johonnot, 7 Metc. (Mass.) 388, 41 Am. Dec. 448.

It is not necessary to appoint a committee in lunacy to legalize such a sale where the person and property of the lunatic, who is a minor, are in the custody of a guardian of his estate. Francklyn *v.* Sprague, 121 U. S. 215, 7 S. C. 951, 30 L. ed. 936.

Notice to the lunatic before the granting of such authority is not necessary. Davison *v.* Johonnot, 7 Metc. (Mass.) 388, 41 Am. Dec. 448.

Application of proceeds.— Where a part only of the insane person's real estate is to be sold the guardian may be authorized to apply the proceeds to discharge encumbrances on other parts. Davison *v.* Johonnot, 7 Metc. (Mass.) 388, 41 Am. Dec. 448.

Liability of persons appointed to sell see Holly *v.* Lockwood, 1 Conn. 180.

Constitutional prohibition of special statutes see Constitutional Law.

64. Beverley's Case, 4 Coke 123, 2 Coke Inst. 14, Fitzh. N. Br. 532, Reg. Brev. 267; Stroud *v.* Marshall, Cro. Eliz. 398; Thompson *v.* Leach, 1 Ld. Raym. 313; 2 Blackstone Comm. 292; Coke Litt. 147. And see Palmer *v.* Woolwich, Ch. Cas. 153, 22 Eng. Reprint 739; Palmer *v.* Parkhurst, Ch. Cas. 113, 22 Eng. Reprint 719; Anonymous, Jenk. 40. The disability did not extend to the heir or personal representative of a deceased lunatic as to acts not of record. Lazell *v.* Pinnick, 1 Tyler (Vt.) 247, 4 Am. Dec. 722; Anonymous, Jenk. 40.

65. *Alabama.*—Walker *v.* Winn, (1905) 39 So. 12; Page *v.* Louisville, etc., R. Co., 129 Ala. 232, 29 So. 676; Milligan *v.* Pollard, 112 Ala. 465, 20 So. 620; Davis *v.* Tarver, 65 Ala. 98; Hale *v.* Brown, 11 Ala. 87.

Connecticut.— Webster *v.* Woodford, 3 Day 90.

Delaware.—Allen *v.* Babcock, 1 Harr. 348.

regularly appointed guardian or committee make a contract for an insane person

District of Columbia.— Sullivan *v.* Flynn, 20 D. C. 396.

Georgia.— Orr *v.* Equitable Mortg. Co., 107 Ga. 499, 33 S. E. 708; Bunn *v.* Postell, 107 Ga. 490, 33 S. E. 707.

Illinois.— Burnham *v.* Kidwell, 113 Ill. 425; Menkins *v.* Lightner, 18 Ill. 282; Ellars *v.* Mossbarger, 9 Ill. App. 122.

Indiana.— Ætna L. Ins. Co. *v.* Sellers, 154 Ind. 370, 56 N. E. 97, 77 Am. St. Rep. 481; Musselman *v.* Cravens, 47 Ind. 1; Crouse *v.* Holman, 19 Ind. 30; Hickman *v.* Glazebrook, 18 Ind. 210; Jenners *v.* Howard, 6 Blackf. 240.

Iowa.— Lewis *v.* Arbuckle, 85 Iowa 335, 52 N. W. 237, 16 L. R. A. 677; Allen *v.* Berryhill, 27 Iowa 534, 1 Am. Rep. 309.

Kentucky.— Lee *v.* Morris, 3 Bush 210; Wilson *v.* Oldham, 12 B. Mon. 55; Taylor *v.* Dudley, 5 Dana 308; Pearl *v.* McDowell, 3 J. J. Marsh. 658, 20 Am. Dec. 199; McKee *v.* Purnell, 38 S. W. 705, 18 Ky. L. Rep. 879; McKee *v.* Ward, 38 S. W. 704, 18 Ky. L. Rep. 987.

Louisiana.— Schmidt *v.* Ittman, 46 La. Ann. 888, 15 So. 310; Fecel *v.* Guinault, 32 La. Ann. 91.

Maine.— Darby *v.* Hayford, 56 Me. 246; Hovey *v.* Hobson, 53 Me. 451, 89 Am. Dec. 705; Thornton *v.* Appleton, 29 Me. 298.

Maryland.— Chew *v.* Baltimore Bank, 14 Md. 299; Owing's Case, 1 Bland 370, 17 Am. Dec. 311. See Riley *v.* Carter, 76 Md. 581, 25 Atl. 667, 35 Am. St. Rep. 443, 19 L. R. A. 489.

Massachusetts.— Atwell *v.* Jenkins, 163 Mass. 362, 40 N. E. 178, 47 Am. St. Rep. 463, 28 L. R. A. 694; Bond *v.* Bond, 7 Allen 1; Seaver *v.* Phelps, 11 Pick. 304, 22 Am. Dec. 372; Mitchell *v.* Kingman, 5 Pick. 431.

Michigan.— Wolcott *v.* Connecticut Gen. L. Ins. Co., 137 Mich. 309, 100 N. W. 569; Reason *v.* Jones, 119 Mich. 672, 78 N. W. 899; Rogers *v.* Blackwell, 49 Mich. 192, 13 N. W. 512; Curtis *v.* Brownell, 42 Mich. 165, 3 N. W. 936; Gibbs *v.* Linabury, 22 Mich. 479, 7 Am. Rep. 675.

Minnesota.— Morris *v.* Great Northern R. Co., 67 Minn. 74, 69 N. W. 628.

Mississippi.— Bates *v.* Hyman, (1900) 28 So. 567; Ricketts *v.* Jolliff, 62 Miss. 440; Hines *v.* Potts, 56 Miss. 346; Hill *v.* McLaurin, 28 Miss. 288; Fitzgerald *v.* Reed, 9 Sm. & M. 94, holding that when the fact of an incapacity to make a legal contract is established, the contract, unless in certain excepted cases, is avoided, and that this is a legal consequence, depending upon the discretion of no court or judge.

Missouri.— Reando *v.* Misplay, 90 Mo. 251, 2 S. W. 405, 59 Am. Rep. 13; Collins *v.* Trotter, 81 Mo. 275; Halley *v.* Troester, 72 Mo. 73; Tolson *v.* Garner, 15 Mo. 494.

Nebraska.— Rea *v.* Bishop, 41 Nebr. 202, 59 N. W. 555.

New Hampshire.— Young *v.* Stevens, 48 N. H. 133, 2 Am. Rep. 202, 97 Am. Dec. 592; Burke *v.* Allen, 29 N. H. 106, 61 Am. Dec. 642; Lang *v.* Whidden, 2 N. H. 435.

New Jersey.— Matthiessen, etc., Refunding Co. *v.* McMahon, 38 N. J. L. 536; Den *v.* Moore, 5 N. J. L. 470.

New York.— Blinn *v.* Schwarz, 177 N. Y. 252, 69 N. E. 542, 101 Am. St. Rep. 806, Riggs *v.* American Tract Soc., 95 N. Y. 503; Van Deusen *v.* Sweet, 51 N. Y. 378: *In re* Livingston, 34 N. Y. 555 (holding that a court of equity will never interfere in favor of a party who takes under an instrument executed by a person who is *non compos*); Merritt *v.* Merritt, 27 N. Y. App. Div. 208, 50 N. Y. Suppl. 604; Bicknell *v.* Spear, 38 Misc. 389, 77 N. Y. Suppl. 920; Feigenbaum *v.* Howe, 32 Misc. 514, 66 N. Y. Suppl. 378; Westfield *v.* Jackson, 3 N. Y. St. 353; Jackson *v.* Gumaer, 2 Cow. 552; Rice *v.* Peet, 15 Johns. 503.

North Carolina.— Ducker *v.* Whitson, 112 N. C. 44, 16 S. E. 854; Surles *v.* Pipkin, 69 N. C. 513; Morris *v.* Clay, 53 N. C. 216.

Ohio.— Hosler *v.* Beard, 54 Ohio St. 398, 43 N. E. 1040, 56 Am. St. Rep. 720, 35 L. R. A. 161.

Pennsylvania.— Moore *v.* Hershey, 90 Pa. St. 196; Bensell *v.* Chancellor, 5 Whart. 371, 34 Am. Dec. 561; Pittsburgh Nat. Bank *v.* Palmer, 22 Pittsb. Leg. J. N. S. 189.

South Carolina.— Munday *v.* Mims, 5 Strobh. 132.

Tennessee.— Johnson *v.* Chadwell, 8 Humphr. 145; Alston *v.* Boyd, 6 Humphr. 504.

Texas.— Weis *v.* Ahrenbeck, 5 Tex. Civ. App. 542, 24 S. W. 356; Texas Pac. R. Co. *v.* Crow, 3 Tex. Civ. App. 266, 22 S. W. 928.

Vermont.— Lincoln *v.* Buckmaster, 32 Vt. 652; Bliss *v.* Connecticut, etc., R. Co., 24 Vt. 424; Conant *v.* Jackson, 16 Vt. 335; Lazell *v.* Pinnick, 1 Tyler 247, 4 Am. Dec. 722.

Virginia.— Boyce *v.* Smith, 9 Gratt. 704, 60 Am. Dec. 313; Samuel *v.* Marshall, 3 Leigh 567.

West Virginia.— Hanley *v.* National Loan, etc., Co., 44 W. Va. 450, 29 S. E. 1002; Knight *v.* Watts, 26 W. Va. 175.

Wisconsin.— Burnham *v.* Mitchell, 34 Wis. 117.

United States.— Dexter *v.* Hall, 15 Wall. 9, 21 L. ed. 73; Anglo-Californian Bank *v.* Ames, 27 Fed. 727; Edwards *v.* Davenport, 20 Fed. 756, 4 McCrary 34; Kilgore *v.* Cross, 1 Fed. 578, 1 McCrary 144.

England.— Baldwyn *v.* Smith, [1900] 1 Ch. 588, 69 L. J. Ch. 336, 82 L. T. Rep. N. S. 616, 48 Wkly. Rep. 346; Ball *v.* Mannin, 3 Bligh (N. S.) 1, 4 Eng. Reprint 1241, 1 Dow. & Cl. 380, 6 Eng. Reprint 568; Yates *v.* Boen, 2 Str. 1104. See Frost *v.* Beavan, 17 Jur. 369, 22 L. J. Ch. 638.

Canada.— Harper *v.* Cameron, 2 Brit. Col. 365; *Re* James, 9 Ont. Pr. 88; Goodfellow *v.* Robertson, 18 Grant Ch. (U. C.) 572; McDonald *v.* McDonald, 14 Grant Ch. (U. C.) 545.

See 27 Cent. Dig. tit. "Insane Persons," § 125 *et seq.*

which will bind the latter or his estate.[66] But if a person is sane when he enters into a contract, its validity is not affected by previous or subsequent insanity.[67]

2. WHETHER CONTRACTS ARE VOID OR VOIDABLE. Some of the courts have held that the deed of an insane person,[68] or his power of attorney or other appointment of an agent,[69] is absolutely void, and not merely voidable; and some courts have applied the same rule to other contracts.[70] Most courts, however, have held that

Whether voidable or void see *infra*, V, A, 2.

A release, compromise, or settlement made by a person while insane is within the rule. Weis *v.* Ahrenbeck, 5 Tex. Civ. App. 542, 24 S. W. 356; Texas, etc., R. Co. *v.* Crow, 3 Tex. Civ. App. 266, 22 S. W. 928 (holding that a person who has sustained injuries through another's negligence is not barred from suing therefor by accepting money in satisfaction of his claim for such injuries, and signing a release, where he was *non compos mentis* at the time he signed it); Knight *v.* Watts, 26 W. Va. 175 (compromise and release between trustee and insane *cestui que trust*). See also George *v.* St. Louis, etc., R. Co., 34 Ark. 613.

Mortgage for price of goods.— Where defendant purchased certain chattels, giving a note secured by trust deed on the chattels and on certain land, and it appeared that he was insane at the time of executing the note and the trust deed, it was held that the relief accorded the vendors thereunder should be limited to a decree for the sale of the chattels, and also that a stipulation in the note that the maker would pay an attorney's fee in case of suit on the note could not be enforced. Bates *v.* Hyman, (Miss. 1900) 28 So. 567.

Contract of suretyship or guaranty.— Edwards *v.* Davenport, 20 Fed. 756, 4 McCrary 34; *Re* James, 9 Ont. Pr. 88.

Transfer of note by insane payee.— Walker *v.* Winn, (Ala. 1905) 39 So. 12; Burke *v.* Allen, 29 N. H. 106, 61 Am. Dec. 642.

Agreement to renew lease.— In a suit to enforce specific performance of an agreement to renew a lease, the lessor may show that at the time fixed for such renewal he was incompetent by reason of insanity to select appraisers of the property as provided for in the agreement, although no committee had been appointed for him. Wurster *v.* Armfield, 175 N. Y. 256, 67 N. E. 584.

66. Page *v.* Louisville, etc., R. Co., 129 Ala. 232, 29 So. 676; Lee *v.* Morris, 3 Bush (Ky.) 210; Merritt *v.* Merritt, 27 N. Y. App. Div. 208, 50 N. Y. Suppl. 604; Surles *v.* Pipkin, 69 N. C. 513 (holding that one who has indorsed the notes of a self-constituted agent of a lunatic, to enable such agent to raise money ostensibly for the benefit of the family of such lunatic, which money was used by the agent in cultivating the farm of the lunatic, can only recover, in a suit against the lunatic upon the note signed by the agent, so much of his debt as he can show was actually expended for the necessary support of the lunatic and such of his family as were properly chargeable upon him); Richardson *v.* Du Bois, L. R. 5 Q. B. 51, 10 B. & S. 830, 39 L. J. Q. B. 69, 21 L. T. Rep. N. S. 635, 18 Wkly. Rep. 62 (agency of wife). See also *infra*, V, A, 2, text and notes 69, 72.

The next friend of a non compos mentis is wholly without authority to make a contract that is binding upon her or her estate, and it is only by a guardian regularly appointed that contracts can be made binding upon a *non compos mentis*. Page *v.* Louisville, etc., R. Co., 129 Ala. 232, 29 So. 676.

Power of attorney by insane person see PRINCIPAL AND AGENT.

67. Affleck *v.* Affleck, 3 Jur. N. S. 326, 26 L. J. Ch. 358, 3 Smale & G. 394, 5 Wkly. Rep. 425, 65 Eng. Reprint 709. See *infra*, V, B, 3.

A note indorsed as an accommodation, while the indorser was of sound mind, and left with the maker to be used in renewal of a similar note, and afterward presented and accepted by the bank for such purpose, is a valid charge on the estate of the indorser, although at the time of its acceptance by the bank he was in a comatose condition and incapable of transacting business. Bechtel's Appeal, 133 Pa. St. 367, 19 Atl. 412.

A mere offer, however, is revoked if the person making it becomes insane before its acceptance. Beach *v.* Lorenzo Beach First M. E. Church, 96 Ill. 177, where a subscription was held to be revoked by the subscriber's becoming insane before it was acted upon. See CONTRACTS, 9 Cyc. 293.

68. Dougherty *v.* Powe, 127 Ala. 577, 30 So. 524; Elder *v.* Schumacher, 18 Colo. 433, 33 Pac. 175; Farley *v.* Parker, 6 Oreg. 105, 25 Am. Rep. 504; German Sav., etc., Soc. *v.* De Lashmutt, 67 Fed. 399; and *supra*, IV, C.

69. Dexter *v.* Hall, 15 Wall. (U. S.) 9, 21 L. ed. 73. See also Marvin *v.* Inglis, 39 How. Pr. (N. Y.) 329; and, generally, PRINCIPAL AND AGENT.

70. Walker *v.* Winn, (Ala. 1905) 39 So. 12; Dougherty *v.* Powe, 127 Ala. 577, 579, 30 So. 524 (where it is said: "One of the essential elements to the validity of a contract is the concurring assent of two minds. If one of the parties to a contract is insane at the time of its execution, this essential element is wanting. The principle is the same whether the contract rests in parol or be by deed"); Milligan *v.* Pollard, 112 Ala. 465, 20 So. 620; Burke *v.* Allen, 29 N. H. 106, 61 Am. Dec. 642; Dexter *v.* Hall, 15 Wall. (U. S.) 9, 21 L. ed. 73; Edwards *v.* Davenport, 20 Fed. 756, 4 McCrary 34. See also Westerfield *v.* Jackson, 3 N. Y. St. 353.

Transfer of note.— According to this view it has been held that the transfer of a note

even the deed of an insane person[71] or his power of attorney or other appointment of an agent,[72] if he has not been judicially declared insane and placed under guardianship,[73] is not void, but merely voidable at the option of himself or those representing him;[74] and it is almost universally held that this is the rule as to simple contracts.[75] According to this view the contract is binding on the other party.[76] And it has been held that a statute providing that contracts of insane

by an insane payee, as it involves the making of a contract, is absolutely void, and may be impeached by the payer on the ground of the payee's insanity at the time of the transfer. Walker *v.* Winn, (Ala. 1905) 39 So. 12. See also Hannahs *v.* Sheldon, 20 Mich. 278; Burke *v.* Allen, 29 N. H. 106, 61 Am. Dec. 642. *Contra*, Carrier *v.* Sears, 4 Allen (Mass.) 336, 81 Am. Dec. 707.

71. Burnham *v.* Kidwell, 113 Ill. 425; Ætna L. Ins. Co. *v.* Sellers, 154 Ind. 370, 56 N. E. 97, 77 Am. St. Rep. 481; Riley *v.* Carter, 76 Md. 581, 25 Atl. 667, 35 Am. St. Rep. 443, 19 L. R. A. 489; Allis *v.* Billings, 6 Metc. (Mass.) 415, 39 Am. Dec. 744; Wolcott *v.* Connecticut Gen. L. Ins. Co., 137 Mich. 309, 100 N. W. 569 (assignment of contract for conveyance of land); Blinn *v.* Schwarz, 177 N. Y. 252, 69 N. E. 542, 101 Am. St. Rep. 806; Person *v.* Warren, 14 Barb. (N. Y.) 488 (bond and warrant of attorney to confess judgment); Loomis *v.* Spencer, 2 Paige (N. Y.) 153 (to the same effect); and other cases cited *supra*, IV, C, note 70.

72. Wamsley *v.* Darragh, 12 Misc. (N. Y.) 199, 33 N. Y. Suppl. 274; Williams *v.* Sapieha, 94 Tex. 430, 61 S. W. 115. See also Person *v.* Warren, 14 Barb. (N. Y.) 488; and, generally, PRINCIPAL AND AGENT.

73. See *infra*, V, A, 3.

74. Ratification and avoidance see *infra*, V, C.

75. *Arkansas.*— George *v.* St. Louis, etc., R. Co., 34 Ark. 613, release of liability for personal injuries.

Georgia.— Orr *v.* Equitable Mortg. Co., 107 Ga. 499, 33 S. E. 708; Bunn *v.* Postell, 107 Ga. 490, 33 S. E. 707.

Idaho.— Caldwell *v.* Ruddy, 2 Ida. (Hasb.) 1, 1 Pac. 339.

Illinois.— Burnham *v.* Kidwell, 113 Ill. 425; Mead *v.* Steagall, 77 Ill. App. 679.

Indiana.— Ætna L. Ins. Co. *v.* Sellers, 154 Ind. 370, 56 N. E. 97, 77 Am. St. Rep. 481; Teegaarden *v.* Lewis, 145 Ind. 98, 102, 40 N. E. 1047, 44 N. E. 9; Louisville, etc., R. Co. *v.* Herr, 135 Ind. 591, 35 N. E. 556; Ashmead *v.* Reynolds, 127 Ind. 441, 26 N. E. 80; Boyer *v.* Berryman, 123 Ind. 451, 24 N. E. 249; Copenrath *v.* Kienby, 83 Ind. 18; Fay *v.* Burditt, 81 Ind. 433, 42 Am. Rep. 142; McClain *v.* Davis, 77 Ind. 419; Hardenbrook *v.* Sherwood, 72 Ind. 403; Wray *v.* Chandler, 64 Ind. 146; Musselman *v.* Cravens, 47 Ind. 1; Wilder *v.* Weakley, 34 Ind. 181; Crouse *v.* Holman, 19 Ind. 30.

Iowa.— Allen *v.* Berryhill, 27 Iowa 534, 1 Am. Rep. 309.

Kansas.— Gribben *v.* Maxwell, 34 Kan. 8, 7 Pac. 584, 55 Am. Rep. 233. And see Leavitt *v.* Files, 38 Kan. 26, 15 Pac. 891; Brown *v.* Cory, 9 Kan. App. 702, 59 Pac. 1097.

Louisiana.— Arnous *v.* Lesassier, 10 La. 592, 29 Am. Dec. 470.

Maine.— Hovey *v.* Hobson, 53 Me. 451, 89 Am. Dec. 705.

Maryland.— Riley *v.* Carter, 76 Md. 581, 25 Atl. 667, 35 Am. St. Rep. 443, 19 L. R. A. 489; Chew *v.* Baltimore Bank, 14 Md. 318; Key *v.* Davis, 1 Md. 32. And see Evans *v.* Horan, 52 Md. 602. But *compare* Owing's Case, 1 Bland 370, 17 Am. Dec. 311.

Massachusetts.— Atwell *v.* Jenkins, 163 Mass. 362, 40 N. E. 178, 47 Am. St. Rep. 463, 28 L. R. A. 694; Carrier *v.* Sears, 4 Allen 336, 81 Am. Dec. 707; Arnold *v.* Richmond Iron Works, 1 Gray 434; Allis *v.* Billings, 6 Metc. 415, 39 Am. Dec. 744.

Michigan.— Wolcott *v.* Connecticut Gen. L. Ins. Co., 137 Mich. 309, 100 N. W. 569, assignment of contract to purchase land.

Minnesota.— Morris *v.* Great Northern R. Co., 67 Minn. 74, 69 N. W. 628, release of claim for personal injuries.

New Jersey.— Eaton *v.* Eaton, 37 N. J. L. 108, 18 Am. Rep. 716.

New York.— Blinn *v.* Schwarz, 177 N. Y. 252, 69 N. E. 542, 101 Am. St. Rep. 806; Ingraham *v.* Baldwin, 9 N. Y. 45; Person *v.* Warren, 14 Barb. 488; Wamsley *v.* Darragh, 12 Misc. 199, 33 N. Y. Suppl. 274; Wagner *v.* Harriott, 10 N. Y. St. 709, 20 Abb. N. Cas. 283.

North Carolina.— Riggan *v.* Green, 80 N. C. 236, 30 Am. Rep. 77.

Texas.— Elston *v.* Jasper, 45 Tex. 409; Navasota First Nat. Bank *v.* McGinty, 29 Tex. Civ. App. 539, 69 S. W. 495. And see Pearson *v.* Cox, 71 Tex. 246.

United States.— Harmon *v.* Harmon, 51 Fed. 113.

England.— Baldwyn *v.* Smith, [1900] 1 Ch. 588, 69 L. J. Ch. 336, 82 L. T. Rep. N. S. 616, 48 Wkly. Rep. 346.

See 27 Cent. Dig. tit. "Insane Persons," § 125 *et seq.*

76. Caldwell *v.* Ruddy, 2 Ida. (Hasb.) 1, 1 Pac. 339; Allen *v.* Berryhill, 27 Iowa 534, 1 Am. Rep. 309; Arnous *v.* Lesassier, 10 La. 592, 29 Am. Dec. 470; Atwell *v.* Jenkins, 163 Mass. 362, 40 N. E. 178, 47 Am. St. Rep. 463, 28 L. R. A. 694; Wamsley *v.* Darragh, 12 Misc. (N. Y.) 199, 33 N. Y. Suppl. 274; Harmon *v.* Harmon, 51 Fed. 113; and other cases in the two preceding notes. Thus in an action by the indorser against the maker of a promissory note it has been held no defense to prove that plaintiff procured the indorsement by undue influence from the payee when he was of unsound mind and incapable of making a valid indorsement, if the payee or his legal representatives have never disaffirmed it. Carrier *v.* Sears, 4 Allen (Mass.) 336, 81 Am. Dec. 707. And one who receives pay for his services on a

persons shall be void applies only to persons who have been adjudged insane in the manner prescribed by statute.[77]

3. Effect of Inquisition and Guardianship. In most states, generally by express statutory provision, the deeds or other contracts of a person who has been judicially declared insane and placed under guardianship are absolutely void and not merely voidable,[78] even, it has been held, although the adjudication of insanity

contract with an incompetent person cannot, after the death of the incompetent, recover for the services on the *quantum meruit*, on the ground of the invalidity of the contract; such contracts being voidable merely, and impeachable by the incompetent person, or those claiming under him, only. Mead *v.* Stegall, 77 Ill. App. 679. See also *infra*, V, C, 1, text and note 28.

77. Teegarden *v.* Lewis, 145 Ind. 98, 102, 40 N. E. 1047, 44 N. E. 9; Wilder *v.* Weakley, 34 Ind. 181; Crouse *v.* Holman, 19 Ind. 30; and other Indiana cases cited *supra*, this section, note 75.

78. *Connecticut.*— Griswold *v.* Butler, 3 Conn. 227.

Georgia.— American Trust, etc., Co. *v.* Boone, 102 Ga. 202, 29 S. E. 182, 66 Am. St. Rep. 167, 40 L. R. A. 250.

Illinois.— Burnham *v.* Kidwell, 113 Ill. 425. *Compare* McCormick *v.* Littler, 85 Ill. 62, 28 Am. Rep. 610.

Indiana.— Teegarden *v.* Lewis, 145 Ind. 98, 102, 40 N. E. 1047, 44 N. E. 9; Redden *v.* Baker, 86 Ind. 191; Copenrath *v.* Kienby, 83 Ind. 18; Freed *v.* Brown, 55 Ind. 310; Musselman *v.* Cravens, 47 Ind. 1; Devin *v.* Scott, 34 Ind. 67.

Kentucky.— Pearl *v.* McDowell, 3 J. J. Marsh. 658, 20 Am. Dec. 199. See also Lee *v.* Morris, 3 Bush 210.

Maine.— Bradbury *v.* Place, (1887) 10 Atl. 461; Hovey *v.* Hobson, 53 Me. 451, 89 Am. Dec. 705.

Massachusetts.— Willmerth *v.* Leonard, 156 Mass. 277, 31 N. E. 299; Leonard *v.* Leonard, 14 Pick. 280; Wait *v.* Maxwell, 5 Pick. 217, 16 Am. Dec. 391. And see Lynch *v.* Dodge, 130 Mass. 458, spendthrift under guardianship.

Minnesota.— Knox *v.* Haug, 48 Minn. 58, 50 N. W. 934.

Missouri.— Coleman *v.* Farrar, 112 Mo. 54, 20 S. W. 441; Rannells *v.* Gerner, 80 Mo. 474; Payne *v.* Burdette, 84 Mo. App. 332; Kiehne *v.* Wessell, 53 Mo. App. 667.

New York.— Carter *v.* Beckwith, 128 N. Y. 312, 28 N. E. 582; Hughes *v.* Jones, 116 N. Y. 67, 73, 22 N. E. 446, 15 Am. St. Rep. 386, 5 L. R. A. 637; Wadsworth *v.* Sharpsteen, 8 N. Y. 388, 59 Am. Dec. 499; Fitzhugh *v.* Wilcox, 12 Barb. 235; L'Amoureux *v.* Crosby, 2 Paige 422, 22 Am. Dec. 655.

Pennsylvania.— Imhoff *v.* Witmer, 31 Pa. St. 243 [*explaining* and *limiting In re* Gangwere, 14 Pa. St. 417, 53 Am. Dec. 554; and other earlier cases]; Clark *v.* Caldwell, 6 Watts (Pa.) 139; Tozer *v.* Saturlee, 3 Grant 162. *Compare In re* Johnston, 8 Wkly. Notes Cas. 439, holding that a contract of an alleged lunatic made at a time when it was found by subsequent proceedings she was in reality sane was valid, although made at a time subsequent to the holding of an inquisition at which it was determined that she was insane.

Texas.— Elston *v.* Jasper, 45 Tex. 409.

West Virginia.— Hanley *v.* National Loan, etc., Co., 44 W. Va. 450, 29 S. E. 1002.

Wisconsin.— Schramek *v.* Shepeck, 120 Wis. 643, 98 N. W. 213; Mohr *v.* Tulip, 40 Wis. 66.

See 27 Cent. Dig. tit. "Insane Persons," § 125 *et seq.*

Contra.— But in Ohio, where an insane person, after a guardian was appointed to obtain a pension for him, remained in the control of his property, and entered into a contract for repairs of the same — a mill, to operate which such repairs were necessary — and there was no fraud or misrepresentation in the transaction, and the repairs were done judiciously, and well worth the money, it was held that such contract would be enforced. Kimball *v.* Bumgardner, 16 Ohio Cir. Ct. 587, 9 Ohio Cir. Dec. 409.

After inquisition and before confirmation. — The contracts of an insane person after inquisition found and before its confirmation are void. Clark *v.* Caldwell, 6 Watts (Pa.) 139.

Contract by agent.— The rule applies to a contract by one acting as agent for an insane person. Thus a note executed by the son of an adjudged lunatic as the latter's agent is void. Lee *v.* Morris, 3 Bush (Ky.) 210. See also *supra*, V, A, 1, text and note 66.

Consent of guardian or committee.— Under Mo. Rev. St. (1879) § 5816, (Rev. St. (1889) § 5542), which provides that no contract of any person found to be of unsound mind, which shall be made without the consent of his guardian, shall be binding, a guardian cannot authorize his ward to transact business as if he were sane, nor can those who have notice of the adjudication obtain the consent of the guardian to trade with the ward without limitation. Coleman *v.* Farrar, 112 Mo. 54, 20 S. W. 441. *Compare*, however, Blaisdell *v.* Holmes, 48 Vt. 492.

Ratification by committee.— A contract of a lunatic, made after the appointment of a committee for his person and estate, cannot be ratified by any act of such committee, so as to enable the committee to bring suit thereon, since such a contract is void. Fitzhugh *v.* Wilcox, 12 Barb. (N. Y.) 235. *Compare*, however, Blaisdell *v.* Holmes, 48 Vt. 492.

Necessaries furnished adjudged lunatic see *infra*, V, A, 4, b, text and notes 89, 90.

was made in another state.[79] Elsewhere such adjudication and guardianship merely raise a presumption of incapacity to contract, which may be rebutted by clear proof of capacity.[80] It has been held that a mere adjudication of lunacy is not conclusive of incapacity to contract where no guardian or committee has been appointed,[81] or where, although appointed, he has been discharged or the guardianship has otherwise terminated;[82] but in some states there are decisions to the

79. American Trust, etc., Co. *v.* Boone, 102 Ga. 202, 29 S. E. 182, 66 Am. St. Rep. 167, 40 L. R. A. 250, holding that under Civ. Code, § 3652, which provides that a lunatic cannot contract, a bank will be liable in paying a check of a person who had been lawfully adjudged to be insane, although the fact was unknown to the bank, and although the adjudication of insanity was made in another state.

80. Parker *v.* Davis, 53 N. C. 460. And see Blaisdell *v.* Holmes, 48 Vt. 492, holding that defendant was liable to plaintiff where, being under guardianship as an insane person on account of some mismanagement of his property, he hired plaintiff to do his housework, and she did it for a year, and where defendant managed his farm, property, and household affairs in his own way, without interference on the part of his guardian; and soon after plaintiff commenced work, the guardian told her to stay, and he would see her paid.

Presumption of representation by guardian. — It has been held that, although a complaint shows that plaintiff was of unsound mind when the contract under which she claims was made, it will be presumed that she was efficaciously represented in the transaction by a guardian. Knight *v.* Knight, 113 Ala. 597, 21 So. 407.

81. See McCormick *v.* Littler, 85 Ill. 62, 28 Am. Rep. 610, holding that, although a person may have been adjudged insane, yet, if no conservator has been appointed, and he is in the management of his business, and there is nothing about his appearance to indicate his incapacity to contract, if he purchases an article at a fair and reasonable price, necessary and useful in his business, the seller having no notice of his being adjudged insane, he will be liable to pay the price he agreed to pay, and it will be error to enjoin a judgment on a note given for the price.

Inquisition for admission to hospital. — The rule that an adjudication of lunacy is conclusive does not apply to statutory proceedings merely to determine whether a person is insane and in need of care and treatment for the purpose of admitting him to a hospital for the insane, and not for the purpose of determining his status with respect to managing his own affairs. Knox *v.* Haug, 48 Minn. 58, 50 N. W. 934; Wagener *v.* Harriott, 20 Abb. N. Cas. (N. Y.) 283. And in Indiana, under Burns Annot. St. (1894) §§ 3209, 3211, 3216, 3233, 3234, relative to the examination by justices of the peace of persons alleged to be of unsound mind, to determine whether they shall be admitted to the state hospital for the insane, it is held that the fact that a person has been declared of unsound mind by two justices of the peace and sent to an insane asylum, from which he is discharged as cured, is not, after his discharge, and in the absence of conduct that would lead a prudent man to think him otherwise than sane, notice to persons dealing with him in good faith that he is incompetent. Leinss *v.* Weiss, 33 Ind. App. 344, 71 N. E. 254.

Necessity of adjudication as to restoration of sanity. — Where one was adjudged insane, but no guardian of her person and estate was appointed, and she was afterward discharged from the asylum in an improved condition, and thereafter recovered her reason, it was held that a contract subsequently made by her, seven years after the adjudication of insanity, was valid, without an adjudication of restoration to reason. Topeka Water-Supply Co. *v.* Root, 56 Kan. 187, 42 Pac. 715.

Adjudication in an action. — In an action for sick benefits claimed to be due on account of plaintiff's insanity, where there was a finding that plaintiff "was insane and disabled from following his usual business," and another that a release which he signed after the action was commenced was void because he was *non compos mentis*, it was held that such findings were not such a judicial determination of his insanity as to make his contract engaging the attorney to prosecute the action void, and thereby cause the action to fail. Runberg *v.* Johnson, 11 N. Y. Civ. Proc. 283.

82. Willwerth *v.* Leonard, 156 Mass. 277, 31 N. E. 299 (holding that the removal of a guardian by a decree of the supreme judicial court terminates the guardianship, and the sending of the case back to the probate court for further proceedings does not qualify the terminating effect of the removal, and that, when the guardianship of an insane person has terminated, and a controversy has arisen between third parties, one of whom claims under a contract made with the ward after the termination of the guardianship, the reason ceases for regarding the decree of the probate court as conclusive on the question of the ward's sanity); Elston *v.* Jasper, 45 Tex. 409 (holding that, although the deed of an insane person while actually under legal and subsisting guardianship is void, yet where, as an actual fact, the guardianship had been practically abandoned at the time of the sale, and the person who had been insane was of sound mind when the deed was executed, the contract, if fair, will be sustained).

contrary.[83] Where the appointment of a guardian for defendant is set up to escape liability on a contract, plaintiff may show that the proceedings were absolutely void.[84] A deed or other contract made prior to an inquisition of lunacy is not necessarily, but only *prima facie*, invalidated by a finding that the party was insane when it was made.[85]

4. Valid Contracts — a. Contracts Created by Law. The general rule that a person cannot be held liable on contracts entered into when he was insane does not prevent an insane person from being held liable *quasi ex contractu* — that is, on contracts implied or created by law, and for which the consent of the party is not necessary.[86]

83. Redden *v.* Baker, 86 Ind. 191 (holding that the disability of insanity once established by an adjudication under the statute continues and is conclusive until restoration to sanity is established in the manner prescribed by the statute, and that the adjudication has no less force before than after the appointment of a guardian, and is not affected by a discharge of the guardian upon a final settlement of his accounts); Kiehne *v.* Wessell, 53 Mo. App. 667 (holding that the adjudication of lunacy renders subsequent contracts by the lunatic invalid, whether he has a guardian or not; and while it stands, that is, in the absence of a decree of restoration, it is conclusive, so that its effect on the contracts of the insane person cannot be overcome by proof that he has become capable of managing his own affairs); Carter *v.* Beckwith, 128 N. Y. 312, 28 N. E. 582 (holding that, under the New York statute (2 Rev. St. p. 55, § 24), providing that, in case any lunatic against whom an inquisition has been found shall be restored to his right mind, and become capable of conducting his affairs, his estate shall be restored to him, has no effect on the status of the lunatic until the inquisition and commission are superseded).

84. Sears *v.* Terry, 26 Conn. 273. But it has been held that under a statute invalidating contracts of persons found to be of unsound mind, which are made without their guardian's consent, the other party to the contract cannot object that the verdict of the jury of inquiry was informal, and did not warrant the appointment of a guardian. Kiehne *v.* Wessell, 53 Mo. App. 667.

85. Hughes *v.* Jones, 116 N. Y. 67, 22 N. E. 446, 15 Am. St. Rep. 386, 5 L. R. A. 637; Hopson *v.* Boyd, 6 B. Mon. (Ky.) 296; Hart *v.* Deamer, 6 Wend. (N. Y.) 497; Kneedler's Appeal, 92 Pa. St. 428; *In re* Gangwere, 14 Pa. St. 417, 53 Am. Dec. 554; Rogers *v.* Walker, 6 Pa. St. 371, 47 Am. Dec. 470; Hutchinson *v.* Sadt, 4 Rawle (Pa.) 234, 26 Am. Dec. 127; Snook *v.* Watts, 11 Beav. 105, 12 Jur. 444, 50 Eng. Reprint 757; Hall *v.* Warren, 9 Ves. Jr. 605, 7 Rev. Rep. 306, 32 Eng. Reprint 738. *Compare* Jacobs *v.* Richards, 18 Beav. 300, 2 Eq. Rep. 299, 18 Jur. 527, 23 L. J. Ch. 557, 2 Wkly. Rep. 174, 52 Eng. Reprint 118. A bond and warrant of attorney executed by one who, by a subsequent inquisition, was found to have been a lunatic at the time, is not absolutely void, but may be set aside, on terms, in the discretion of the court, on hearing and considering all the facts of the case. Person *v.* Warren, 14 Barb. (N. Y.) 488.

In New York, under Code Civ. Proc. § 2335, limiting the question of insanity on an inquisition of lunacy to the time when the inquiry is being made, a finding on inquisition that a lunatic had been insane for eight months preceding cannot be used to attack the validity of mortgages executed by the lunatic within that time. Reals *v.* Weston, 28 Misc. (N. Y.) 67, 59 N. Y. Suppl. 807.

86. Reando *v.* Misplay, 90 Mo. 251, 2 S. W. 405, 59 Am. Rep. 13. Thus it has been held that if one enters into a contract with a lunatic without a knowledge of his lunacy, and, in pursuance of his contract, renders him important services, whereby he is greatly benefited, although the contract be void, the party rendering the services is entitled to just and reasonable compensation. Ballard *v.* McKenna, 4 Rich. Eq. (S. C.) 358. Although no contract, either express or implied, in the sense that both parties should assent thereto, can arise where one of the parties is *non compos*, yet a legal obligation, independent of contract, may exist, arising out of the duty of the committee to charge himself with the value of the services received by him at the hands of the ward, upon which an action may be sustained. Ashley *v.* Holman, 15 S. C. 97, 25 S. C. 394, 1 S. E. 13, 60 Am. Rep. 512. Where a committee having control of a *non compos*, who is unable to contract, yet able to render valuable services, enforces those services for his own benefit, he is liable to the ward for their value. But if the services have been enforced by the committee, not for his own profit, but for the proper discipline and healthful exercise and employment of the ward, although with incidental benefit to the committee, there is no ground for accountability, and the ward cannot recover. Ashley *v.* Holman, 25 S. C. 394, 1 S. E. 13, 60 Am. Rep. 512. But it has been held that the law will only imply a contract for a lunatic where it is necessary. Hines *v.* Potts, 56 Miss. 346. See also Bicknell *v.* Spear, 38 Misc. (N. Y.) 389, 77 N. Y. Suppl. 920. No action can be maintained against a lunatic for money received by his guardian, without an application of it to the use and benefit of the lunatic. Hines *v.* Potts, 56 Miss. 346.

b. Necessaries. So also an insane person, like an infant,[87] is liable for necessaries suitable to his state and condition in life furnished to himself or to his wife or children.[88] And it has been held that this rule applies notwithstanding the fact that he has been judicially declared insane and placed under guardianship, if the guardian consents or fails to provide him with necessaries,[89] but not

Contract with attorney.— Where an attorney made a contract with a party to bring a suit without knowledge of the party's insanity, and before he had been declared incompetent, and the attorney prepared a complaint, which was never served, and received his fee in advance, it was held that the committee of the lunatic, on rescinding the contract, had a cause of action to recover the fee as money received. Feigenbaum *v.* Howe, 32 Misc. (N. Y.) 514, 66 N. Y. Suppl. 378.

87. **Infant's liability for necessaries** see INFANTS, *ante*, p. 590.

88. *Alabama.*— Borum *v.* Hall, 132 Ala. 85, 31 So. 454; Milligan *v.* Pollard, 112 Ala. 465, 20 So. 620; Davis *v.* Tarver, 65 Ala. 98; *Ex p.* Northington, 37 Ala. 496, 79 Am. Dec. 67; Westmoreland *v.* Davis, 1 Ala. 299; Harris *v.* Davis, 1 Ala. 259.

Illinois.— McCormick *v.* Littler, 85 Ill. 62, 28 Am. Rep. 610; Fruitt *v.* Anderson, 12 Ill. App. 421.

Indiana.— Devin *v.* Scott, 34 Ind. 67.

Kentucky.— Pearl *v.* McDowell, 3 J. J. Marsh. 658, 20 Am. Dec. 199.

Maine.— Sawyer *v.* Lufkin, 56 Me. 308.

Massachusetts.— Kendall *v.* May, 10 Allen 59; Shaw *v.* Thompson, 16 Pick. 198, 26 Am. Dec. 655.

Michigan.— *In re* Renz, 79 Mich. 216, 44 N. W. 598.

Mississippi.— Fitzgerald *v.* Reed, 9 Sm. & M. 94.

Missouri.— Reando *v.* Misplay, 90 Mo. 251, 2 S. W. 405, 59 Am. Rep. 13; Darby *v.* Cabanne, 1 Mo. App. 127.

New Hampshire.— Sceva *v.* True, 53 N. H. 627; McCrillis *v.* Bartlett, 8 N. H. 569.

New Jersey.— Van Horn *v.* Hann, 39 N. J. L. 207.

New York.— Shaper *v.* Wing, 2 Hun 671. But it has been held that an action will not lie against an idiot from her birth on a contract for past maintenance. Bicknell *v.* Spear, 38 Misc. 389, 77 N. Y. Suppl. 920.

North Carolina.— Surles *v.* Pipkin, 69 N. C. 513; Richardson *v.* Strong, 35 N. C. 106, 55 Am. Dec. 430; Tally *v.* Tally, 22 N. C. 385, 34 Am. Dec. 407.

Ohio.— Hosler *v.* Beard, 54 Ohio St. 398, 43 N. E. 1040, 56 Am. St. Rep. 720, 35 L. R. A. 161.

Pennsylvania.— La Rue *v.* Gilkyson, 4 Pa. St. 375, 45 Am. Dec. 700.

South Carolina.— Johnson *v.* Ballard, 11 Rich. 178.

Texas.— Navasota First Nat. Bank *v.* McGinty, 29 Tex. Civ. App. 539, 69 S. W. 495.

Vermont.— Stannard *v.* Burns, 63 Vt. 244, 22 Atl. 460.

England.— *In re* Rhodes, 44 Ch. D. 94, 59 L. J. Ch. 298, 62 L. T. Rep. N. S. 342, 38 Wkly. Rep. 385; Baxter *v.* Portsmouth, 5 B. & C. 170, 11 E. C. L. 415, 2 C. & P. 178, 7 D. & R. 614, 12 E. C. L. 514; Read *v.* Legard, 6 Exch. 636, 15 Jur. 494, 20 L. J. Exch. 309. See also *In re* Gibson, L. R. 7 Ch. 53, 25 L. T. Rep. N. S. 551, 20 Wkly. Rep. 107; Drew *v.* Nunn, 4 Q. B. D. 661, 48 L. J. Q. B. 591, 40 L. T. Rep. N. S. 671, 27 Wkly. Rep. 810; Nelson *v.* Duncombe, 9 Beav. 211, 10 Jur. 399, 15 L. J. Ch. 296, 50 Eng. Reprint 323; Williams *v.* Wentworth, 5 Beav. 325, 49 Eng. Reprint 603; Stedman *v.* Hart, 18 Jur. 744, Kay 607, 23 L. J. Ch. 908, 2 Wkly. Rep. 462; Wentworth *v.* Tubb, 5 Jur. 115, 1 Y. & Coll. 171, 20 Eng. Ch. 171, 62 Eng. Reprint 840 [*affirmed* in 6 Jur. 980, 12 L. J. Ch. 61]. *Compare In re* Weaver, 21 Ch. D. 615, 47 J. P. 68, 48 L. T. Rep. N. S. 93, 31 Wkly. Rep. 224.

See 27 Cent. Dig. tit. "Insane Persons," § 128 *et seq.*

Necessaries furnished wife or family see Harris *v.* Davis, 1 Ala. 259; Pearl *v.* McDowell, 3 J. J. Marsh. (Ky.) 658, 20 Am. Dec. 199; Stuckey *v.* Mathes, 24 Hun (N. Y.) 461; Surles *v.* Pipkin, 69 N. C. 513; Drew *v.* Nunn, 4 Q. B. D. 661, 48 L. J. Q. B. 591, 40 L. T. Rep. N. S. 671, 27 Wkly. Rep. 810; Matter of Wood, 1 De G. J. & S. 465, 9 Jur. N. S. 589, 32 L. J. Ch. 400, 8 L. T. Rep. N. S. 476, 11 Wkly. Rep. 791, 66 Eng. Ch. 361; Read *v.* Ledgard, 6 Exch. 636, 15 Jur. 494, 20 L. J. Exch. 309. And see Shaw *v.* Thompson, 16 Pick. (Mass.) 198, 26 Am. Dec. 655. But where the wife of a lunatic was appointed as his committee, and directed to provide out of her husband's estate for her own as well as for his support, and during her term as committee she bought coal of plaintiff for her home, but during such time she received a considerable sum from her husband's estate and other sources, and also had some resources of her own, it was held that the husband, after his return to sanity, was not liable for the price of the coal, because of the creditor's failure to sustain the burden of showing that the wife was not otherwise provided for. Thedford *v.* Reade, 25 Misc. (N. Y.) 490, 54 N. Y. Suppl. 1007. See also Richardson *v.* Du Bois, L. R. 5 Q. B. 51, 10 B. & S. 830, 39 L. J. Q. B. 69, 21 L. T. Rep. N. S. 635, 18 Wkly. Rep. 62, holding that a wife could not render her insane husband liable for repairs to the dwelling, where she was supplied from his estate with sufficient means to make the repairs.

89. *Alabama.*— Westmoreland *v.* Davis, 1 Ala. 299, holding that where the guardian of an insane person pays a debt for goods furnished to the insane person and his family, such insane person, after regaining his reason, is liable to the guardian on an implied promise.

otherwise.[90] Such liability, however, is created by law, and therefore only *quasi ex contractu*, so that the amount to be recovered is the value of the necessaries furnished and not what the insane person may have promised to pay.[91] It has been held, however, that there may be a recovery on an express contract to pay for necessaries to the extent of their value,[92] and that one who lends an insane person money on his note or otherwise may recover thereon to the extent that the money is used for necessaries.[93] In determining the liability of insane persons for necessaries substantially the same rules apply as in the case of infants,[94] except that, unlike an infant,[95] he is liable for labor and materials furnished in the necessary preservation of his estate.[96] Whatever is reasonably necessary for the support, maintenance, care, and comfort of the insane person and his family according to their state and condition in life is to be regarded as necessaries.[97]

Illinois.— Fruitt *v.* Anderson, 12 Ill. App. 421.

Kentucky.— Cantrill *v.* Cecil, 60 S. W. 16, 22 Ky. L. Rep. 1121.

Maine.— Sawyer *v.* Lufkin, 56 Me. 308.

Missouri.— Reando *v.* Misplay, 90 Mo. 251, 2 S. W. 405, 59 Am. Rep. 13.

New Hampshire.— McCrillis *v.* Bartlett, 8 N. H. 569.

Vermont.— Maughan *v.* Burns, 64 Vt. 316, 23 Atl. 583; Stannard *v.* Burns, 63 Vt. 244, 22 Atl. 460. See also Motley *v.* Head, 43 Vt. 633.

Wisconsin.— Schramek *v.* Shepeck, 120 Wis. 643, 98 N. W. 213.

England.— Baxter *v.* Portsmouth, 5 B. & C. 170, 11 E. C. L. 415, 2 C. & P. 178, 7 D. & R. 614, 12 E. C. L. 514.

90. Devin *v.* Scott, 34 Ind. 67; Reando *v.* Misplay, 90 Mo. 251, 2 S. W. 405, 59 Am. Rep. 13; Schramek *v.* Shepeck, 120 Wis. 643, 98 N. W. 213, holding that plaintiff could not recover for services rendered to an insane person under guardianship as necessaries, where he knew that the guardian had contracted with another for the maintenance and support of the ward and such support and maintenance was being furnished. But where a lunatic, after the appointment of a committee, continued to reside with his family, and a grocer, in ignorance of such appointment, sold him groceries, which were necessary for himself and family, it was held that the claim of the grocer should be paid out of the lunatic's estate. Shaper *v.* Wing, 2 Hun (N. Y.) 671.

91. Milligan *v.* Pollard, 112 Ala. 465, 20 So. 620; *Ex p.* Northington, 37 Ala. 496, 79 Am. Dec. 67; Westmoreland *v.* Davis, 1 Ala. 299; Fruitt *v.* Anderson, 12 Ill. App. 421; Reando *v.* Misplay, 90 Mo. 251, 2 S. W. 405, 59 Am. Rep. 13; Sceva *v.* True, 53 N. H. 627; Johnson *v.* Ballard, 11 Rich. (S. C.) 178; *In re* Rhodes, 44 Ch. D. 94, 59 L. J. Ch. 298, 62 L. T. Rep. N. S. 342, 38 Wkly. Rep. 385; Nelson *v.* Duncombe, 9 Beav. 211, 10 Jur. 399, 15 L. J. Ch. 296, 50 Eng. Reprint 323; Williams *v.* Wentworth, 5 Beav. 325, 49 Eng. Reprint 603. And see INFANTS, *ante*, p. 591. A note in the hands of the payee, executed by an insane person, although given for necessaries, and without the payee's being aware of his insanity, is not binding on his estate. Milligan *v.* Pollard, 112 Ala. 465, 20 So. 620; Davis *v.* Tarver, 65 Ala. 98; McKee *v.* Purnell, 38 S. W. 705, 18 Ky. L. Rep. 879. See the cases to the contrary in the note following.

92. McCormick *v.* Littler, 85 Ill. 62, 28 Am. Rep. 610; Hosler *v.* Beard, 54 Ohio St. 398, 43 N. E. 1040, 56 Am. St. Rep. 720, 35 L. R. A. 161; Navasota First Nat. Bank *v.* McGinty, 29 Tex. Civ. App. 539, 69 S. W. 495. See the cases to the contrary in the preceding note.

93. Navasota First Nat. Bank *v.* McGinty, 29 Tex. Civ. App. 539, 69 S. W. 495. Where a person has advanced money for the treatment of an insane married woman, whose husband was unable to provide medical care for her, on the credit of a bequest which he was informed would be made, and afterward was made, to her, he can recover the advancements from the bequest. *In re* Renz, 79 Mich. 216, 44 N. W. 598.

94. Stannard *v.* Burns, 63 Vt. 244, 22 Atl. 460; Thompson *v.* Leach, 3 Mod. 301, 310.

Necessaries for infants see INFANTS, *ante*, p. 590.

95. See INFANTS, *ante*, p. 595.

96. McCormick *v.* Littler, 85 Ill. 62, 28 Am. Rep. 610; Navasota First Nat. Bank *v.* McGinty, 29 Tex. Civ. App. 539, 69 S. W. 495; Williams *v.* Wentworth, 5 Beav. 325, 49 Eng. Reprint 603. *Compare* Kimball *v.* Bumgardner, 16 Ohio Cir. Ct. 587, 9 Ohio Cir. Dec. 409. But the wife of an insane person cannot render him liable for the cost of necessary repairs upon his house, where she receives from his income sufficient means to pay for such repairs after paying for her own and the husband's support and maintenance. Richardson *v.* Du Bois, L. R. 5 Q. B. 51, 10 B. & S. 830, 39 L. J. Q. B. 69, 21 L. T. Rep. N. S. 635, 18 Wkly. Rep. 62.

97. Borum *v.* Bell, 132 Ala. 85, 31 So. 454; *Ex p.* Northington, 37 Ala. 496, 79 Am. Dec. 67; Baxter *v.* Portsmouth, 5 B. & C. 170, 11 E. C. L. 415, 2 C. & P. 178, 12 E. C. L. 514, 7 D. & R. 614, 16 E. C. L. 304. The cost of the erection of an addition to a dwelling-house, at an expense of six thousand dollars, for the comfort and convenience of a lunatic, was held a necessity, and recovery allowed therefor in Cantrill *v.* Cecil, 60 S. W. 16, 22 Ky. L. Rep. 1121. Where a person is so insane as to attempt injury to himself and the destruction of his property, the services

To render an insane person or his estate liable for necessaries furnished they must have been furnished with intent to charge therefor and not as a mere gratuity,[98] and the credit must have been extended to the insane person or his estate and not to a third person.[99]

c. Ignorance and Good Faith of Other Party. The contract of an insane person may be avoided so long as it is wholly executory, notwithstanding the fact that the other party entered into the same in good faith and in ignorance of his infirmity;[1] and some of the courts have applied the same rule in the case of contracts which have been executed by the other party, and even though the contract was fair and the parties cannot be placed *in statu quo*.[2] According to

of a nurse and guard fall within the class of necessaries, as defined by law. Richardson *v.* Strong, 35 N. C. 106, 55 Am. Dec. 430. An insane person is liable for tuition furnished his children (Harris *v.* Davis, 1 Ala. 259), and for medical and surgical services to his wife (Pearl *v.* McDowell, 3 J. J. Marsh. (Ky.) 658, 20 Am. Dec. 199).

Luxuries furnished in good faith to an insane person, as the expense of a pleasure journey, have been treated as necessaries. Kendall *v.* May, 10 Allen (Mass.) 59.

Services of counsel.— Where one who is restrained of his liberty against his will, and without legal process, as an insane person, employs counsel to prosecute a writ of habeas corpus for the purpose of investigating the grounds of the restraint, the counsel will be entitled to recover a reasonable compensation for his services, provided they be rendered in good faith and upon due inquiry into the causes of the confinement, and the condition of the party be such that an investigation before a judicial tribunal is proper. Hallett *v.* Oakes, 1 Cush. (Mass.) 296. And see Darby *v.* Cabanne, 1 Mo. App. 126, holding that a man of weak intellect from habitual drunkenness, and incapable of managing his own affairs, may contract with an attorney to procure the appointment of a guardian for his protection. But to authorize the recovery of attorney's fees under an employment by a person of unsound mind to defend him in proceedings to have a trustee and committee appointed for him, it must be shown that the services rendered were reasonably necessary for the proper protection of the rights of the client. McKee *v.* Ward, 38 S. W. 704, 18 Ky. L. Rep. 987.

98. Reando *v.* Misplay, 90 Mo. 251, 2 S. W. 405, 59 Am. Rep. 13; *In re* Rhodes, 44 Ch. D. 94, 59 L. J. Ch. 298, 62 L. T. Rep. N. S. 342, 38 Wkly. Rep. 385; Wentworth *v.* Tubb, 5 Jur. 1150, 1 Y. & Coll. 171, 20 Eng. Ch. 171, 62 Eng. Reprint 840 [*affirmed* in 6 Jur. 980, 12 L. J. Ch. 61]. Where a daughter rendered services to her insane mother in taking care of her, and waiting on her, and intended, while so doing, to charge for the same, and such services were necessary to the comfort and well being of the mother, the daughter may recover their value; but if the services were rendered as acts of gratuitous kindness, and as a member of the family, with no intention of charging for the same, the daughter cannot recover for them, and in such case it makes no difference how meritorious and valuable they may have been to the mother. Reando *v.* Misplay, 90 Mo. 251, 2 S. W. 405, 59 Am. Rep. 13. In the case of members of the same family living together as one household it will be presumed that services and support rendered to an insane member were intended as a gratuity, but the presumption may be rebutted. Fruitt *v.* Anderson, 12 Ill. App. 421.

An express contract need not be proved. Fruitt *v.* Anderson, 12 Ill. App. 421.

99. Massachusetts Gen. Hospital *v.* Fairbanks, 129 Mass. 78, 37 Am. Rep. 303; Wentworth *v.* Tubb, 5 Jur. 1150, 1 Y. & Coll. 171, 20 Eng. Ch. 171, 62 Eng. Reprint 840 [*affirmed* in 6 Jur. 980, 12 L. J. Ch. 61]. And see Westmoreland *v.* Davis, 1 Ala. 299. Where C, an insane person, was received into an asylum, and after he had been there two weeks an express contract in writing was made by A and B to pay his board and other expenses there from the time of entrance, differing in terms from the liability which the law would impose upon an insane person, it was held that no promise could be implied on the part of C to pay anything, although it was orally understood between A and B and the proprietors of the asylum that the board and supplies were to be furnished on his credit, and that their liability was to be only collateral to his, although the price of board was subsequently raised with the assent of A and C, and although C's guardian subsequently agreed to pay the debt out of the estate, and did pay it in part. Massachusetts Gen. Hospital *v.* Fairbanks, 132 Mass. 414. See also INFANTS, *ante*, p. 591.

1. Musselman *v.* Cravens, 47 Ind. 1; Corbit *v.* Smith, 7 Iowa 60, 71 Am. Dec. 431; and other cases in the notes following.

2. *Alabama.*— See the cases cited *supra*, V, A, 1 note 65, 2 note 70.

District of Columbia.— Sullivan *v.* Flynn, 20 D. C. 396.

Georgia.— Orr *v.* Equitable Mortg. Co., 107 Ga. 499, 33 S. E. 708. *Compare* Woolley *v.* Gaines, 114 Ga. 122, 39 S. E. 892, 88 Am. St. Rep. 22; American Trust, etc., Co. *v.* Boone, 102 Ga. 202, 29 S. E. 182, 66 Am. St. Rep. 167, 40 L. R. A. 250.

Maine.— Hovey *v.* Hobson, 53 Me. 451, 89 Am. Dec. 705.

Massachusetts.— Seaver *v.* Phelps, 11 Pick. 304, 306, 22 Am. Dec. 372, where it was said: "The fairness of the defendant's con-

the weight of authority, however, where the contract has been executed, so that the insane person has received a benefit from it, and the parties cannot be restored to their former positions, proof of the actual insanity of one of the parties at the time of making the contract, unaccompanied by any proof that the other knew or ought to have known of his condition, will not avoid the contract.[3]

duct cannot supply the plaintiff's want of capacity."

Michigan.— Rogers *v.* Blackwell, 49 Mich. 192, 13 N. W. 512.

Mississippi.— Fitzgerald *v.* Reed, 9 Sm. & M. 94.

United States.— Anglo-Californian Bank *v.* Ames, 27 Fed. 727; Edwards *v.* Davenport, 20 Fed. 756, 4 McCrary 34.

See 27 Cent. Dig. tit. "Insane Persons," § 125 *et seq.*

Illustration.— Thus in an action of trover for a note pledged to defendant by plaintiff while insane, it was held to be no defense to show that when defendant took the pledge he did not know that plaintiff was insane and had no reason to suspect it, and did not overreach him or practice any fraud or unfairness. Seaver *v.* Phelps, 11 Pick. (Mass.) 304, 22 Am. Dec. 372.

3. *Idaho.*— Caldwell *v.* Ruddy, 2 Ida. (Hasb.) 1, 1 Pac. 339.

Illinois.— Burnham *v.* Kidwell, 113 Ill. 425; Scanlan *v.* Cobb, 85 Ill. 296; McCormick *v.* Littler, 85 Ill. 62, 28 Am. Rep. 610.

Indiana.— Boyer *v.* Berryman, 123 Ind. 451, 24 N. E. 249; Physio-Medical College *v.* Wilkinson, 108 Ind. 314, 9 N. E. 167; Northwestern Mut. F. Ins. Co. *v.* Blankenship, 94 Ind. 535, 48 Am. Rep. 185; Copenrath *v.* Kienby, 83 Ind. 18; Fay *v.* Burditt, 81 Ind. 433, 42 Am. Rep. 142; Wilder *v.* Weakley, 34 Ind. 181.

Iowa.— Abbott *v.* Creal, 56 Iowa 175, 9 N. E. 115; Behrens *v.* McKenzie, 23 Iowa 333, 92 Am. Dec. 428; Corbit *v.* Smith, 7 Iowa 60, 71 Am. Dec. 431.

Kansas.— Myers *v.* Knabe, 51 Kan. 720, 33 Pac. 602; Gribben *v.* Maxwell, 34 Kan. 8, 7 Pac. 584, 55 Am. Rep. 233.

Maryland.— Flach *v.* Gottschalk Co., 88 Md. 368, 41 Atl. 908, 71 Am. St. Rep. 418, 42 L. R. A. 745. *Compare* Chew *v.* Baltimore Bank, 14 Md. 299.

Michigan.— Shoulters *v.* Allen, 51 Mich. 529, 16 N. W. 888.

Minnesota.— Morris *v.* Great Northern R. Co., 67 Minn. 74, 69 N. W. 628; Schaps *v.* Lehner, 54 Minn. 208, 55 N. W. 911.

New Hampshire.— Young *v.* Stevens, 48 N. H. 133, 2 Am. Rep. 202, 97 Am. Dec. 592.

New Jersey.— Matthiesson, etc., Refining Co. *v.* McMahon, 38 N. J. L. 536; Eaton *v.* Eaton, 37 N. J. L. 108, 18 Am. Rep. 716.

New York.— Mutual L. Ins. Co. *v.* Hunt, 79 N. Y. 541 [*affirming* 14 Hun 169]; Ingraham *v.* Baldwin, 9 N. Y. 45; Haines *v.* Scott, 35 N. Y. App. Div. 515, 54 N. Y. Suppl. 844; Riley *v.* Albany Sav. Bank, 36 Hun 513; Loomis *v.* Spencer, 2 Paige 153.

North Carolina.— Riggan *v.* Green, 80 N. C. 236, 30 Am. Rep. 77; Carr *v.* Holliday, 40 N. C. 167.

Ohio.— Hosler *v.* Beard, 54 Ohio St. 398, 43 N. E. 1040, 56 Am. St. Rep. 720, 35 L. R. A. 161; Kimball *v.* Bumgardner, 16 Ohio Cir. Ct. 587, 9 Ohio Cir. Dec. 409; Beckroege *v.* Schmidt, 6 Ohio Dec. (Reprint) 994, 5 Cinc. L. Bul. 788.

Pennsylvania.— Kneedler's Appeal, 92 Pa. St. 428; Lancaster County Nat. Bank *v.* Moore, 78 Pa. St. 407, 21 Am. Rep. 24; Beals *v.* See, 10 Pa. St. 56, 49 Am. Dec. 573. And see Snyder *v.* Lauback, 7 Wkly. Notes Cas. 464.

South Carolina.— Sims *v.* McLure, 8 Rich. Eq. 286, 70 Am. Dec. 196; Dodds *v.* Wilson, 3 Brev. 389, 1 Treadw. 448.

Tennessee.— Memphis Nat. Bank *v.* Sneed, 97 Tenn. 120, 36 S. W. 716, 56 Am. St. Rep. 788, 34 L. R. A. 274.

Vermont.— Lincoln *v.* Buckmaster, 32 Vt. 652.

United States.— Parker *v.* Marco, 76 Fed. 510.

England.— Moulton *v.* Camroux, 2 Exch. 487 [*affirmed* in 4 Exch. 17]. And see Imperial Loan Co. *v.* Stone, (1892) 1 Q. B. 599, 56 J. P. 436, 61 L. J. Q. B. 449, 66 L. T. Rep. N. S. 556; Danes *v.* Kirkwall, 8 C. & P. 679, 34 E. C. L. 958; Beavan *v.* McDonnell, 2 C. L. R. 474, 9 Exch. 309, 23 L. J. Exch. 94, 22 L. T. Rep. N. S. 243; Elliot *v.* Ince, 7 De G. M. & G. 475, 3 Jur. N. S. 597, 26 L. J. Ch. 821, 5 Wkly. Rep. 465, 56 Eng. Ch. 369, 44 Eng. Reprint 186; Campbell *v.* Hooper, 3 Eq. Rep. 727, 1 Jur. N. S. 670, 24 L. J. Ch. 644, 3 Smale & G. 153, 3 Wkly. Rep. 528, 65 Eng. Reprint 603; Moss *v.* Tribe, 3 F. & F. 297; Hazzard *v.* Smith, Ir. R. 6 Eq. 429; Niell *v.* Morley, 9 Ves. Jr. 478, 32 Eng. Reprint 687; Kirkwall *v.* Flight, 3 Wkly. Rep. 529.

Canada.— Robertson *v.* Kelly, 2 Ont. 163; Campbell *v.* Hill, 23 U. C. C. P. 473 [*affirming* 22 U. C. C. P. 526]; Eccles *v.* Lowry, 32 U. C. Q. B. 635. See *In re* McSherry, 10 Grant Ch. (U. C.) 390.

See 27 Cent. Dig. tit. "Insane Persons," § 125 *et seq.*

Illustration.— Thus where a lunatic had purchased annuities of a society, paid the money, and died, it was held that his administratrix could not recover back the money so paid on the ground that the contract was void, where the jury, although they found that the deceased was insane when he entered into the contract, also found that there was nothing to indicate this to defendant, and that the transaction was in good faith. Moulton *v.* Camroux, 2 Exch. 489 [*affirmed* in 4 Exch. 17].

Injunction bond.— Insanity is no defense to

It is otherwise if the sane party knew of the other's insanity,[4] or if the circumstances were such that as a reasonable and prudent person he should have known of it;[5] and it has been held that if the insane person has received no benefit under the contract, he may avoid it and recover what he has parted with, notwithstanding the other party's good faith.[6] So also, where the parties can be

an action for damages on an injunction bond, if plaintiff was ignorant thereof, defendant being in the habit of transacting his own business. Behrens *v.* McKenzie, 23 Iowa 333, 92 Am. Dec. 428.

The presumption, however, is that the contract is invalid and the other party has the burden of proving the facts to bring it within the rule stated in the text. Hosler *v.* Beard, 54 Ohio St. 398, 43 N. E. 1040, 56 Am. St. Rep. 720, 35 L. R. A. 161.

In Louisiana, by statute, an act done by a party prior to the petition for his interdiction cannot be annulled except on proof that the cause of such interdiction notoriously existed at the time when the act was done, or that the person who dealt with the party of unsound mind could not have been deceived as to the state of his mind. Wolf *v.* Edwards, 106 La. 477, 31 So. 58. See also Smith's Succession, 12 La. Ann. 24; Laloire *v.* Lacoste, 4 La. 114; Kenney *v.* Dow, 10 Mart. 577, 13 Am. Dec. 342; Louisiana Bank *v.* Debreuil, 5 Mart. 416. Under this statute (Civ. Code, art. 1788), which provides that where there has been no interdiction, a contract will not be void on the ground of insanity unless the party is notoriously insane, the evidence of five witnesses that a man is of feeble intellect, when contradicted by that of seven witnesses, there being no evidence that the purchaser knew of the vendor's incapacity, is not sufficient evidence of notorious insanity to avoid a contract. Martinez *v.* Moll, 6 Fed. 724.

Contestation after death.— In Louisiana, by statute, insanity, which of itself is sufficient to strike an act with nullity, cannot be set up unless the interdiction of the insane person had been pronounced or petitioned for previous to the death of such person, except in cases in which the mental alienation manifested itself within ten days previous to the decease, or when the want of reason results from the act itself which is contested. Chevalier *v.* Whatley, 12 La. Ann. 651. See also Daunoy *v.* Clyma, 11 Mart. 557. But although no sentence of interdiction may have been pronounced, yet it will be sufficient to vitiate a contract if it can be shown that insanity or imbecility of mind has been taken advantage of. Holland *v.* Miller, 12 La. Ann. 624. See also Chevalier *v.* Whatley, *supra.*

4. Fecel *v.* Guinault, 32 La. Ann. 91; Creekmore *v.* Baxter, 121 N. C. 31, 27 S. E. 994, holding that where a person contracts with a lunatic with knowledge of his disability, and the contract is set aside on that ground, the lunatic can be charged only with such benefits as he actually received. And see Harper *v.* Cameron, 2 Brit. Col. 365.

5. Halley *v.* Troester, 72 Mo. 73 (holding that where a person is of so unsound a mind that his want of mental capacity should be apparent to any one of ordinary prudence and observation conversing with him, an exchange of property made by him is invalid, and a guardian afterward appointed may recover his ward's property without tendering back that which was received in exchange for it); Matthiessen, etc., Refining Co. *v.* McMahon, 38 N. J. L. 536; Mutual L. Ins. Co. *v.* Hunt, 79 N. Y. 541 [*affirming* 14 Hun 169]; Lincoln *v.* Buckmaster, 32 Vt. 652 (holding that the sane party cannot recover even though he in good faith supposed the other to be sane, if the circumstances known to him in regard to the other's mental condition were such as to convince a reasonable and prudent man of his insanity, or even to put him on an inquiry by which he might, if reasonably prudent, have learned that fact); Hassard *v.* Smith, Ir. R. 6 Eq. 429.

6. Woolley *v.* Gaines, 114 Ga. 122, 39 S. E. 892, 88 Am. St. Rep. 22; Physio-Medical College *v.* Wilkinson, 108 Ind. 314, 9 N. E. 167; Van Patton *v.* Beals, 46 Iowa 62; Lincoln *v.* Buckmaster, 32 Vt. 652; *Re* James, 9 Ont. Pr. 88. But see *In re* McSherry, 10 Grant Ch. (U. C.) 390.

Contract of subscription.— Where to a complaint on a note given to erect and endow an institution of learning defendant pleaded that at the time of the execution of the note he was of unsound mind, and plaintiffs replied that at said time defendant was apparently of sound mind, and not to them known to be otherwise, and that in reliance upon his promise, before any disaffirmance by him, just debts and obligations had been incurred in purchasing property, erecting buildings, and endowing said institution, and thereby defendant was estopped from averring that he was not of sound mind, it was held that the reply was bad. Musselman *v.* Cravens, 47 Ind. 1.

Suretyship or guaranty.— An insane person is not bound by his contract of guaranty or suretyship even though the creditor accepted him as guarantor or surety without knowledge of his incapacity. Van Patten *v.* Beals, 46 Iowa 62. And see Edwards *v.* Davenport, 20 Fed. 756, 4 McCrary 34; *Re* James, 9 Ont. Pr. 88.

Renewal of note indorsed for accommodation while sane.— But it has been held that an accommodation indorser on a note given in renewal of a note on which he was also accommodation indorser, at its maturity, is not relieved of liability because of his insanity at the time of signing it, where the bank taking it in renewal had no notice of his insanity, and he was sane when the prior note was executed. Memphis Nat. Bank *v.*

placed *in statu quo*, the good faith of the sane party will not prevent the avoidance of the contract.[7]

B. Nature and Extent of Incapacity — 1. In General. The mental defect or disease necessary to entitle one to avoid his contracts on the ground of insanity need not be so great as to dethrone his reason or as to amount to an entire want of reason, but it is sufficient if he is insane to such an extent as to be incapable of comprehending or understanding the subject of the contract and its nature and probable consequences.[8] He must be insane at least to this extent; mere weakness of intellect not being enough.[9] The incapacity may result from

Sneed, 97 Tenn. 120, 36 S. W. 716, 56 Am. St. Rep. 788, 34 L. R. A. 274. See to the same effect Snyder *v.* Lauback, 7 Wkly. Notes Cas. (Pa.) 464.

7. Woolley *v.* Gaines, 114 Ga. 122, 39 S. E. 892, 88 Am. St. Rep. 22; Fulwider *v.* Ingels, 87 Ind. 414, holding that where one of the parties to a contract is insane, and the parties can by the action of the court, although not by the insane person, be placed *in statu quo*, the contract may be avoided, although the mental incapacity was not known to the other party when the contract was made.

8. Darb *v.* Hayford, 56 Me. 246 (holding that where the sanity of the grantor of lands in controversy is in issue, the question to be decided is substantially whether at the time of the conveyance the grantor was in possession of mental capacity sufficient to transact the business with intelligence, understanding rationally what he was doing, and that less than this would not suffice to make a valid contract or conveyance); Tolsons *v.* Garner, 15 Mo. 494 (holding that any man against whom a conveyance or contract is set up is at liberty to show that at the time of making it he was not possessed of sufficient reason to be capable of understanding the act he was performing); Mays *v.* Prewett, 98 Tenn. 474, 40 S. W. 483 (holding that an unconscionable contract may be set aside for such mental infirmity of a party as renders him unable to guard against imposition, although it does not amount to lunacy); Ball *v.* Mannin, 3 Bligh N. S. 1, 4 Eng. Reprint 1241, 1 Dow. & Cl. 380, 6 Eng. Reprint 568; Blachford *v.* Christian, 1 Knapp. 73, 12 Eng. Reprint 248; and cases cited in the note following. See also *supra*, IV, A, text and note 63.

9. *Alabama.*— White *v.* Farley, 81 Ala. 563, 8 So. 215. A legal capacity to make any contract is a capacity to make all contracts; hence, in an action on a note made by defendant, it is not error to refuse to charge that if defendant's mind was naturally weak and at the time the note was made had been so much weakened and destroyed as to render defendant incapable of making "such a contract," in that event the note was void. Hale *v.* Brown, 11 Ala. 87.

California.— Crowther *v.* Rowlandson, 27 Cal. 376.

Georgia.— Maddox *v.* Simmons, 31 Ga. 512; Dicken *v.* Johnson, 7 Ga. 484.

Illinois.— Perry *v.* Pearson, 135 Ill. 218, 25 N. E. 636; Guild *v.* Hull, 127 Ill. 523, 20 N. E. 665; Kimball *v.* Cuddy, 117 Ill. 213, 7 N. E. 589; Willemin *v.* Dunn, 93 Ill. 511; Titcomb *v.* Vantyle, 84 Ill. 371; Stone *v.* Wilbern, 83 Ill. 105; Baldwin *v.* Dunton, 40 Ill. 188; Miller *v.* Craig, 36 Ill. 109; Lilly *v.* Waggoner, 27 Ill. 395. Although one's mind may be impaired by age or disease, yet if he is capable of transacting ordinary business, can understand its nature and effect, and can exercise his will in relation to it, his acts are valid. English *v.* Porter, 109 Ill. 285.

Indiana.— Boyer *v.* Berryman, 123 Ind. 451, 24 N. E. 249; Musselmann *v.* Cravens, 47 Ind. 1; Somers *v.* Pumphrey, 24 Ind. 231.

Iowa.— Cocke *v.* Montgomery, 75 Iowa 259, 39 N. W. 386; Des Moines Nat. Bank *v.* Chisholm, 71 Iowa 675, 33 N. W. 234. A person may be of unsound mind to such an extent as not to be bound by contracts of intricacy and importance without being distracted and without being incapable of contracting some kinds of business. Seerley *v.* Sater, 68 Iowa 375, 27 N. W. 262. Where a person evinces the usual knowledge of affairs, and ordinary memory and tact and ability in matters of business, although affected by a stroke of paralysis, he is not so imbecile or unsound of mind as to be unable to make a contract. Peake *v.* Van Lewven, 59 Iowa 764, 13 N. W. 843.

Kentucky.— Where a person has mind enough to understand the subject, that is, deliberate upon the matter, and weigh the consequences with common reason, he is competent to contract, and no mere want of skill or inexperience or weakness of mind will destroy mental capacity to contract. Riley *v.* Albertson, 3 Ky. L. Rep. 391.

Maine.— Staples *v.* Wellington, 58 Me. 453; Hovey *v.* Hobson, 55 Me. 256. A person has sufficient mental capacity to contract if he can transact business with an intelligent understanding of what he is doing. Hovey *v.* Chase, 52 Me. 304, 83 Am. Dec. 514.

Maryland.— Worthington *v.* Worthington, (1890) 20 Atl. 911; Cain *v.* Warford, 33 Md. 23.

Massachusetts.— Brown *v.* Brown, 108 Mass. 386; Bond *v.* Bond, 7 Allen 1. No degree of physical or mental imbecility which does not deprive one of legal competency to act is of itself sufficient to avoid a contract or settlement with him. Farnam *v.* Brooks, 9 Pick. 212.

Michigan.— Milks *v.* Milks, 129 Mich. 164, 88 N. W. 402; Davis *v.* Phillips, 85 Mich. 198, 48 N. W. 513. The weakness of mind shown by vacillation, shiftlessness, improvi-

lunacy,[10] idiocy,[11] senile dementia or imbecility,[12] or any other defect or disease

dence, occasional despondency, and a religious hobby does not in itself render one incompetent in any such sense as to make business dealings with him *prima facie* fraudulent. West *v.* Russell, 48 Mich. 74, 11 N. W. 812.

Mississippi.— Simonton *v.* Bacon, 49 Miss. 582.

Missouri.— Cadwallader *v.* West, 48 Mo. 483; Tolson *v.* Garner, 15 Mo. 494.

Nebraska.— Dewey *v.* Allgire, 37 Nebr. 6, 55 N. W. 276, 40 Am. St. Rep. 468.

New Hampshire.— Young *v.* Stevens, 48 N. H. 133, 2 Am. Rep. 202, 97 Am. Dec. 592. Insanity, to disable one to contract, must be of such a nature, or of such severity, that he is incapable of exercising a rational judgment on the subject in question. Concord *v.* Rumney, 45 N. H. 423. Mere mental weakness will not incapacitate a party from contracting. There must be such a state of insanity as actually to disqualify him from transacting his business and managing his property. He must, it seems, be incapable of understanding the act which he performs. Dennett *v.* Dennett, 44 N. H. 531, 84 Am. Dec. 97.

New Jersey.— Lodge *v.* Hulings, 63 N. J. Eq. 159, 51 Atl. 1015; Lozear *v.* Shields, 23 N. J. Eq. 509. That the complainant, before the making of a contract, had a severe attack of illness, from which time he was a less active and enterprising business man than before; that he was a man of intemperate habits; that he was subject to occasional fits, arising from habits of intoxication; that his mind was less vigorous than when his habits were correct, does not show that he was deprived of his right reason, or incapable of managing his affairs or business. Doughty *v.* Doughty, 7 N. J. Eq. 643.

New York.— Bell *v.* Smith, 83 Hun 438, 32 N. Y. Suppl. 54; Siemon *v.* Wilson, 3 Edw. 36.

North Carolina.— Lawrence *v.* Willis, 75 N. C. 471; Suttles *v.* Hay, 41 N. C. 124; Smith *v.* Beatty, 37 N. C. 456, 40 Am. Dec. 435.

Pennsylvania.— Noel *v.* Karper, 53 Pa. St. 97; Aiman *v.* Stout, 42 Pa. St. 114.

Vermont.— That the intellectual capacity of one of the parties to a contract is below that of the average of mankind does not alone furnish sufficient ground for setting aside the contract. Mann *v.* Betterly, 21 Vt. 326. See also Conant *v.* Jackson, 16 Vt. 335.

Virginia.— Boyce *v.* Boyce, 9 Gratt. 704, 60 Am. Dec. 313.

Wisconsin.— Burnham *v.* Mitchell, 34 Wis. 117; Henderson *v.* McGregor, 30 Wis. 78.

England.— Manby *v.* Bewicke, 3 Kay & J. 342; Birkin *v.* Wing, 63 L. T. Rep. N. S. 80; Osmond *v.* Fitzroy, 3 P. Wms. 129, 24 Eng. Reprint 997.

Canada.— McDonald *v.* McDonald, 16 Grant Ch. (U. C.) 37; Emes *v.* Emes, 11 Grant Ch. (U. C.) 325.

See also *supra*, IV, A, text and note 62; and CONTRACTS, 9 Cyc. 459, 460.

Undue influence in connection with mental weakness see CONTRACTS, 9 Cyc. 460.

Presumption.— In the absence of evidence to the contrary the presumption is that a person not judicially determined to be insane was mentally competent when he made a contract. Knight *v.* Knight, 113 Ala. 597, 21 So. 407. See *infra*, VIII, F, 1.

First stage of paresis.— Where it appeared that a party to a contract was suffering from the first stages of paresis at the time the contract was made, this was held not to show his incompetency to contract, there being no evidence to show what effect the first stage of paresis has upon one's ability so to do. Haines *v.* Scott, 35 N. Y. App. Div. 515, 54 N. Y. Suppl. 844.

An unmarried woman of full age stands on the same footing as any other person able to contract. She will be presumed to have intended to bind herself as she actually has done, and will not be listened to when she simply alleges she acted unadvisedly, and without sufficient information. Dugat *v.* Comeau, 5 Rob. (La.) 475.

10. Jackson *v.* Gumaer, 2 Cow. (N. Y.) 552.

11. Burnham *v.* Kidwell, 113 Ill. 425; Ball *v.* Mannin, 3 Bligh N. S. 1, 4 Eng. Reprint 1241, 1 Dow. & Cl. 380, 6 Eng. Reprint 568.

12. *Illinois.*— Peabody *v.* Kendall, 145 Ill. 519, 32 N. E. 674; Argo *v.* Coffin, 142 Ill. 368, 32 N. E. 679, 34 Am. St. Rep. 86; Guild *v.* Hull, 127 Ill. 523, 20 N. E. 665; Stone *v.* Wilbern, 83 Ill. 105; Jeneson *v.* Jeneson, 66 Ill. 259.

Indiana.— Physio-Medical College *v.* Wilkinson, 108 Ind. 314, 9 N. E. 167.

Iowa.— Cocke *v.* Montgomery, 75 Iowa 259, 39 N. W. 386; Marshall *v.* Marsnall, 75 Iowa 132, 39 N. W. 230; Shaw *v.* Ball, 55 Iowa 55, 7 N. W. 413.

Kentucky.— Coleman *v.* Frazer, 3 Bush 300; Bussey *v.* Gross, 7 S. W. 150, 9 Ky. L. Rep. 843.

Michigan.— Lynch *v.* Doran, 95 Mich. 395, 54 N. W. 882; Arnold *v.* Whitcomb, 83 Mich. 19, 46 N. W. 1029.

Minnesota.— Trimbo *v.* Trimbo, 47 Minn. 389, 50 N. W. 350.

Missouri.— Crowe *v.* Peters, 63 Mo. 429.

Nebraska.— Cole *v.* Cole, 21 Nebr. 84, 31 N. W. 493.

New Jersey.— Clark *v.* Kirkpatrick, (Ch. 1888) 16 Atl. 309.

Tennessee.— Keeble *v.* Cummins, 5 Hayw. 43.

Vermont.— King *v.* Cummings, 60 Vt. 502, 11 Atl. 727; Stewart *v.* Flint, 59 Vt. 144, 8 Atl. 801.

Old age, however, is not of itself evidence of incapacity to enter into a binding contract. Suttles *v.* Hay, 41 N. C. 124; Buckey *v.* Buckey, 38 W. Va. 168, 18 S. E. 383. Nor is mere mental weakness accompanying old age ground for avoiding a contract, if it was

of the mind, whatever the cause,[13] including that resulting from habitual drunkenness.[14]

2. Deaf and Dumb Persons. A person is not rendered incapable of entering into a binding contract merely because he is deaf and dumb, even though he has been so from his birth, if it is shown that he actually has sufficient mental capacity;[15] but *prima facie* such a person is incompetent.[16]

3. Temporary and Periodical Insanity. The rule avoiding the contracts of an insane person applies to a contract entered into by one who is temporarily insane.[17] On the other hand a contract is binding if it is entered into in a lucid interval,[18]

not so great as to render the party incapable of understanding the subject, nature, and probable consequences of the contract, and if there was no fraud or undue influence. Guild *v.* Hull, 127 Ill. 523, 20 N. E. 665; Cocke *v.* Montgomery, 75 Iowa 259, 39 N. W. 386; Bell *v.* Smith, 83 Hun (N. Y.) 438, 32 N. Y. Suppl. 54; Suttles *v.* Hays, 41 N. C. 124; Birkin *v.* Wing, 63 L. T. Rep. N. S. 80; and other cases cited *supra* this section, note 9. Where it was objected to the validity of an agreement that one of the contracting parties was incapable of making a valid contract by reason of his faculties having become impaired through age, and it appeared that in making the agreement he was aided by his agent, who assisted and advised him in all his business transactions, the court refused to interfere to relieve against the contract. Hinchman *v.* Emans, 1 N. J. Eq. 100.

Contracts in anticipation of death.— Where a party, in anticipation of death, makes final disposition of his property by bill of sale, the test of mental capacity to do so is the same as that applicable in case of wills. Young *v.* Otto, 57 Minn. 307, 59 N. W. 199. The courts will jealously scrutinize contracts claimed to have been made by aged and infirm persons, to be enforced after their death, such as an alleged oral contract by a man ninety-six years old to give his property, worth nearly eight thousand dollars, to his brother's family if they would thenceforth support him, although he had made a will giving his property to his granddaughter, his only heir at law; and where the testimony is conflicting, the existence of such contract should be held not established. Shakespeare *v.* Markham, 72 N. Y. 400.

13. Hale *v.* Brown, 11 Ala. 87; Wilson *v.* Oldham, 12 B. Mon. (Ky.) 55; Somes *v.* Skinner, 16 Mass. 348; Johnson *v.* Chadwell, 8 Humphr. (Tenn.) 145; Conant *v.* Jackson, 16 Vt. 335; Brothers *v.* Kaukauna Bank, 84 Wis. 381, 54 N. W. 786, 36 Am. St. Rep. 932; Henderson *v.* McGregor, 30 Wis. 78.

14. Menkins *v.* Lightner, 18 Ill. 282; Bliss *v.* Connecticut, etc., R. Co., 24 Vt. 424. But it has been held that, although a person's mental faculties may be so far prostrated by long continued habits of intoxication as to render him, for a considerable part of the time, incompetent to make a contract, yet contracts made by him at intervals when he appears sober and rational cannot be avoided on the ground of imbecility alone, unless so unreasonable and unequal as to afford evidence that his appearance was deceptive, and his intellect really clouded and confused. Conant *v.* Jackson, 16 Vt. 335.

Contracts of drunken persons see Drunkards, 14 Cyc. 1103.

15. Brown *v.* Brown, 3 Conn. 299, 8 Am. Dec. 187; Collins *v.* Trotter, 81 Mo. 275; Brower *v.* Fisher, 4 Johns. Ch. (N. Y.) 441; Barnett *v.* Barnett, 54 N. C. 221.

A deaf, dumb, and blind person, however, has been said to be incompetent. Brown *v.* Brown, 3 Conn. 299, 8 Am. Dec. 187.

16. Brown *v.* Brown, 3 Conn. 299, 8 Am. Dec. 187; Collins *v.* Trotter, 81 Mo. 275. And see Brower *v.* Fisher, 4 Johns. Ch. (N. Y.) 441.

17. Jenners *v.* Howard, 6 Blackf. (Ind.) 240; Peaslee *v.* Robbins, 3 Metc. (Mass.) 164; Curtis *v.* Brownell, 42 Mich. 165, 3 N. W. 936.

Presumption and burden of proof.— But it has been held that one claiming to avoid a contract by reason of a temporary hallucination resulting from disease that existed prior to the making of the contract must show its continued existence when the contract was made, and that it was of a character affecting his capacity to make the contract. Staples *v.* Wellington, 58 Me. 453. So where defendant's insanity is only temporary, caused by drunkenness or excessive dissipation, the presumption is in favor of sanity, and in such case defendant must prove that insanity existed at the time of the contract. Pittsburgh Nat. Bank *v.* Palmer, 22 Pittsb. Leg. J. (Pa.) 189.

18. *Georgia.*— Norman *v.* Georgia L. & T. Co., 92 Ga. 295, 18 S. E. 27.

Illinois.— McCormick *v.* Littler, 85 Ill. 62, 28 Am. Rep. 610; Lilly *v.* Waggoner, 27 Ill. 395. And see Sands *v.* Potter, 59 Ill. App. 206 [*affirmed* in 165 Ill. 397, 46 N. E. 282, 56 Am. St. Rep. 253].

Kentucky.— Carpenter *v.* Carpenter, 8 Bush 283; Jones *v.* Perkins, 5 B. Mon. 222.

Maine.— Staples *v.* Wellington, 58 Me. 453.

Maryland.— Stewart *v.* Redditt, 3 Md. 67.

North Carolina.— Smith *v.* Smith, 108 N. C. 365, 12 S. E. 1045, 13 S. E. 113.

Pennsylvania.— *In re* Gangwere, 14 Pa. St. 417, 53 Am. Dec. 554; Aurentz *v.* Anderson, 3 Pittsb. 310; *In re* Johnston, 8 Wkly. Notes Cas. 439.

Tennessee.— Wright *v.* Market Bank, (Ch. App. 1900) 60 S. W. 623.

Virginia.— Beckwith *v.* Butler, 1 Wash. 224.

unless, in most jurisdictions, the party has been judicially determined to be insane and is under guardianship at the time of the contract.[19]

4. Monomania or Insane Delusions. A person may avoid a contract entered into by him when laboring under monomania or an insane delusion, although in other respects sane, provided the delusion is so connected with the subject-matter of the contract as to render him incapable of understanding its nature and probable consequences,[20] but not otherwise.[21]

C. Ratification and Avoidance — 1. In General. The void deed or other contract of a lunatic cannot be ratified by his guardian, or, it would seem, even by himself on restoration to sanity or by his heirs or personal representative.[22] But if the contract or deed is merely voidable,[23] it may be either ratified or disaffirmed by the party himself after he becomes sane or during a lucid interval,[24]

England.— Hall *v.* Warren, 9 Ves. Jr. 605, 7 Rev. Rep. 366, 32 Eng. Reprint 738. And see Frost *v.* Beavan, 17 Jur. 369, 22 L. J. Ch. 638.

See also *supra*, IV, A, text and note 66.

Presumption and burden of proof.— But where habitual insanity is shown its continuance is presumed, and the burden of proving that a contract was entered into at a lucid interval is on the other party seeking to enforce it. Ricketts *v.* Jolliff, 62 Miss. 440; *In re* Gangwere, 14 Pa. St. 417, 53 Am. Dec. 554; Aurentz *v.* Anderson, 3 Pittsb. (Pa.) 310. And proof of the lucid interval must be clear. *In re* Gangwere, *supra*. Proof of a lucid interval after derangement of the mind, adduced in support of a contract made in such interval, must be as strong and demonstrative as would be required to show insanity, and must go to the state and habit of the mind, and not merely to an accidental conversation, or behavior on a particular occasion. Ricketts *v.* Jolliff, 62 Miss. 440. In a suit upon a note, where it appeared that the maker was insane both before and after its execution, and that a very few hours only were left during which it was claimed that a lucid interval existed; an insane delusion being that if notes were not given the consequence would be death or the penitentiary, it was held that the note was void. Ellars *v.* Mossbarger, 9 Ill. App. 122.

19. Crouse *v.* Holman, 19 Ind. 30. See *supra*, V, A, 3.

20. *Illinois.*— Searle *v.* Galbraith, 73 Ill. 269; Ellars *v.* Mossbarger, 9 Ill. App. 122.

Indiana.— Teegarden *v.* Lewis, 145 Ind. 98, 40 N. E. 1047, 44 N. E. 9; Wray *v.* Wray, 32 Ind. 126.

Iowa.— Lewis *v.* Arbuckle, 85 Iowa 335, 52 N. W. 237, 16 L. R. A. 677; Burgess *v.* Pollock, 53 Iowa 273, 5 N. W. 179, 36 Am. Rep. 218.

Massachusetts.— Bond *v.* Bond, 7 Allen 1.

Michigan.— West *v.* Russell, 48 Mich. 74, 11 N. W. 812.

New Hampshire.— Dennett *v.* Dennett, 44 N. H. 531, 84 Am. Dec. 97.

New Jersey.— Lozear *v.* Shields, 23 N. J. Eq. 509.

New York.— Riggs *v.* American Tract Soc., 95 N. Y. 503.

Tennessee.— Alston *v.* Boyd, 6 Humphr. 504.

Virginia.— Boyce *v.* Smith, 9 Gratt. 704, 60 Am. Dec. 313; Samuel *v.* Marshall, 3 Leigh 567.

See also *supra*, IV, A, text and note 64.

21. *Alabama.*— *Ex p.* Northington, 37 Ala. 496, 79 Am. Dec. 67.

Indiana.— Teegarden *v.* Lewis, 145 Ind. 98, 40 N. E. 1047, 44 N. E. 9; Wray *v.* Wray, 32 Ind. 126; Crouse *v.* Holman, 19 Ind. 30.

Maine.— Staples *v.* Wellington, 58 Me. 453.

New Jersey.— Where a contract is impeached purely on the ground of alleged mental incapacity of the party to make it, unconnected with any charge that he was defraudcd into making it, the true test is whether he had the ability to comprehend, in a reasonable manner, the nature of the particular transaction. Proof of delusions upon independent subjects is not enough. Lozear *v.* Shields, 23 N. J. Eq. 509.

Virginia.— Boyce *v.* Smith, 9 Gratt. 704, 60 Am. Dec. 313.

United States.—Partial insanity, in the absence of fraud or imposition, will not avoid a contract unless it exists with reference to the subject of it at the time of its execution; but in cases of fraud it may be considered in determining whether a party has been imposed upon. McNett *v.* Cooper, 13 Fed. 586.

England.— Jenkins *v.* Morris, 14 Ch. D. 674, 42 L. T. Rep. N. S. 817; Birkin *v.* Wing, 63 L. T. Rep. N. S. 80.

Canada.— Robertson *v.* Kelly, 2 Ont. 163; McDonald *v.* McDonald, 16 Grant Ch. (U. C.) 37; Campbell *v.* Hill, 22 U. C. C. P. 526 [*affirmed* in 23 U. C. C. P. 473].

See also *supra*, IV, A, text and note 65.

22. Fitzhugh *v.* Wilcox, 12 Barb. (N. Y.) 235, contract by lunatic after appointment of guardian or committee. And see Sullivan *v.* Flynn, 20 D. C. 396, holding that the deed of an insane person is void and therefore cannot be ratified by acts *in pais*.

23. Whether a contract or deed is void, voidable, or binding see *supra*, V, A, 2–4.

24. *Arkansas.*— George *v.* St. Louis, etc., R. Co., 34 Ark. 613, ratification of release of claim for damages for personal injuries.

Indiana.— Ætna L. Ins. Co. *v.* Sellers, 154 Ind. 370, 56 N. E. 97, 77 Am. St. Rep. 481 (release of mortgage); Fay *v.* Burditt, 81 Ind. 433, 42 Am. Rep. 142; McClain *v.* Davis, 77 Ind. 419; Hardenbrook *v.* Sherwood, 72 Ind. 403; Musselman *v.* Cravens, 47 Ind. 1.

Maryland.— Turner *v.* Rusk, 53 Md. 65.

Massachusetts.— Allis *v.* Billings, 6 Metc.

or by his guardian or committee during the continuance of his infirmity,[25] or by his personal representative[26] or heirs[27] after his death; but it cannot be avoided by the other party to the contract or by third persons not representing the insane person.[28] The ratification or disaffirmance may, as in the case of an infant's contract,[29] be implied from conduct.[30] If the contract is an executed one the insane person, or his guardian or heirs or representatives, must disaffirm it, and must do so within a reasonable time after his becoming sane or after his death, as the case may be, or it will be held to have been ratified.[31]

2. Return of Consideration. In some jurisdictions it has been held that it is not a condition precedent to the avoidance of a deed or other contract entered into by an insane person that there shall be a return of or offer to return the consideration received by him,[32] except where he, or his guardian, heir, or representative still has the consideration and can restore it in specie.[33] Elsewhere it has

415, 39 Am. Dec. 744; Gibson *v.* Soper, 6 Gray 279, 66 Am. Dec. 414; Arnold *v.* Richmond Iron Works, 1 Gray 434.

Michigan.— Wolcott *v.* Connecticut Gen. L. Ins. Co., 137 Mich. 309, 100 N. W. 569.

Minnesota.— Morris *v.* Great Northern R. Co., 67 Minn. 74, 69 N. W. 628.

New York.— Rice *v.* Peet, 15 Johns. 503.

And see the other cases cited *supra*, V, A, 2, notes 71, 72, 75. See also *supra*, IV, D, E.

Consideration for promise to pay for supplies furnished promisor and family while he was insane see Contracts, 9 Cyc. 364.

25. Fay *v.* Burditt, 81 Ind. 433, 42 Am. Rep. 142; McClain *v.* Davis, 77 Ind. 419; Hardenbrook *v.* Sherwood, 72 Ind. 403; Halley *v.* Troester, 72 Mo. 73; Moore *v.* Hershey, 90 Pa. St. 196. See also *supra*, IV, E, 1, text and note 91.

26. Orr *v.* Equitable Mortg. Co., 107 Ga. 499, 33 S. E. 708; Bunn *v.* Postell, 107 Ga. 490, 33 S. E. 707; Schuff *v.* Ransom, 79 Ind. 458; Hovey *v.* Hobson, 53 Me. 451, 89 Am. Dec. 705; Campbell *v.* Kuhn, 45 Mich. 513, 8 N. W. 523, 40 Am. Rep. 479; Lazell *v.* Pinnick, 1 Tyler (Vt.) 247, 4 Am. Dec. 722; Beverley's Case, 4 Coke 123*b*, 2 Coke Inst. 14, Fitzh. N. Br. 532, Reg. Brev. 267. See also *supra*, IV, E, 1, text and note 92.

27. Physio-Medical College *v.* Wilkinson, 108 Ind. 314, 9 N. E. 167; Northwestern Mut. F. Ins. Co. *v.* Blankenship, 94 Ind. 535, 48 Am. Dec. 185; Schuff *v.* Ransom, 79 Ind. 458; Freed *v.* Brown, 55 Ind. 310; Somers *v.* Pumphrey, 24 Ind. 231; Allis *v.* Billings, 6 Metc. (Mass.) 415, 39 Am. Dec. 744; Rogers *v.* Blackwell, 49 Mich. 192, 13 N. W. 512. See also *supra*, IV, E, 1, text and note 93.

28. Caldwell *v.* Ruddy, 2 Ida. (Hasb.) 1, 1 Pac. 339; Allen *v.* Berryhill, 27 Iowa 534, 1 Am. Rep. 309; Carrier *v.* Sears, 4 Allen (Mass.) 336, 81 Am. Dec. 707; and other cases cited *supra*, V, A, 2, note 76. *Contra*, Burke *v.* Allen, 29 N. H. 106, 61 Am. Dec. 642. See also *supra*, IV, E, 1, text and notes 94, 95.

29. See Infants, *ante*, pp. 604, 612.

30. Thrash *v.* Starbuck, 145 Ind. 673, 44 N. E. 543; Gibson *v.* Soper, 6 Gray (Mass.) 279, 66 Am. Dec. 414; Arnold *v.* Richmond Iron Works, 1 Gray (Mass.) 434; Wolcott *v.* Connecticut Gen. L. Ins. Co., 137 Mich. 309, 100 N. W. 569, holding that the evidence showed ratification by an insane person after becoming sane of an assignment of a contract to purchase land. See also *supra*, IV, D.

A deed is sufficiently disaffirmed by a tender of the consideration received and demand of reconveyance. Thrash *v.* Starbuck, 145 Ind. 673, 44 N. E. 543.

Where the conduct of the administrator of a deceased person was such as clearly to indicate a purpose of ratification of a contract entered into by the deceased while insane, and the property thereby acquired was kept by the administrator until it had depreciated to such an extent as to become worthless, the estate will be liable in a suit for the purchase-price originally agreed on between the contracting parties. Bunn *v.* Postell, 107 Ga. 490, 33 S. E. 707.

31. Ætna L. Ins. Co. *v.* Sellers, 154 Ind. 370, 56 N. E. 97, 77 Am. St. Rep. 481 (release of mortgage); Louisville, etc., R. Co. *v.* Herr, 135 Ind. 591, 35 N. E. 556 (settlement and release of claim for personal injuries); Ashmead *v.* Reynolds, 127 Ind. 441, 26 N. E. 80 (deed); Schuff *v.* Ransom, 79 Ind. 458; Nichol *v.* Thomas, 53 Ind. 42; Morris *v.* Great Northern R. Co., 67 Minn. 74, 69 N. W. 628 (settlement and release of claim for personal injuries). "Until disaffirmed, the voidable executed contract, in respect to the property or benefits conveyed, passes the right or title as fully as an unimpeachable contract. By ratification, it becomes impervious; by disaffirmance, a nullity. And as such a contract may be ratified, whether the beneficiary was ignorant of the grantor's infirmity or obtained the benefit by means of his knowledge of the disability, so, in either case, disaffirmance is necessary in order to reduce the contract to nothingness." Ætna L. Ins. Co. *v.* Sellers, 154 Ind. 370, 372, 56 N. E. 97, 77 Am. St. Rep. 481.

Disaffirmance by action to avoid see Ashmead *v.* Reynolds, 127 Ind. 441, 26 N. E. 80; Hull *v.* Louth, 109 Ind. 315, 10 N. E. 270, 58 Am. Rep. 405; Gibson *v.* Soper, 6 Gray (Mass.) 279, 66 Am. Dec. 414.

32. Hovey *v.* Hobson, 53 Me. 451, 89 Am. Dec. 705; Gibson *v.* Soper, 6 Gray (Mass.) 279, 66 Am. Dec. 414; Bates *v.* Hyman, (Miss. 1900) 28 So. 567. See also *supra*, IV, E, 2.

33. Gibson *v.* Soper, 6 Gray (Mass.) 279, 66 Am. Dec. 414; Arnold *v.* Richmond Iron

been held that the voidable contract or deed of an insane person cannot be avoided, where the other party acted in good faith and in ignorance of his insanity, without restoration of the consideration,[34] at least where a beneficial consideration has been received by the insane person.[35] The consideration need not be restored if the other party knew of the insane person's infirmity and took advantage of it.[36]

3. Avoidance as Against Third Persons. The right of a person or his guardian, personal representative, or heir to avoid a contract entered into when he was insane cannot be defeated by the fact that a third person has in good faith and for value acquired an interest under the contract.[37]

VI. TORTS.[38]

A. In General. It is well settled that a lunatic or his estate is civilly liable for any tort which he may commit,[39] except perhaps those in which malice and

Works, 1 Gray (Mass.) 434; Ricketts *v.* Jolliff, 62 Miss. 440; Rea *v.* Bishop, 41 Nebr. 202, 59 N. W. 555; Williams *v.* Sapieha, 94 Tex. 430, 61 S. W. 115, with which *compare*, however, Pearson *v.* Cox, 71 Tex. 246, 9 S. W. 124, 10 Am. St. Rep. 740.

34. *Arkansas.*— George *v.* St. Louis, etc., R. Co., 34 Ark. 613.

Idaho.— Caldwell *v.* Ruddy, 2 Ida. (Hasb.) 1, 1 Pac. 339.

Indiana.—Boyer *v.* Berryman, 123 Ind. 451, 24 N. E. 249; Physio-Medical College *v.* Wilkinson, 108 Ind. 314, 9 N. E. 167; Fay *v.* Burditt, 81 Ind. 433, 42 Am. Rep. 142; Wilder *v.* Weakley, 34 Ind. 181.

Kansas.— Gribben *v.* Maxwell, 34 Kan. 8, 7 Pac. 584, 55 Am. Rep. 233.

Minnesota.— Morris *v.* Great Northern R. Co., 67 Minn. 74, 69 N. W. 628, holding that to entitle one to rescind an executed contract made while he was insane, with another having no notice of the insanity, he must return whatever consideration he has received; and it is immaterial that the contract was made and consideration paid by a third person for the benefit of the party seeking to rescind.

New York.— Loomis *v.* Spencer, 2 Paige 153.

North Carolina.— Carr *v.* Halliday, 21 N. C. 344.

And see *supra*, V, A, 4, c, text and note 3. See also *supra*, IV, E.

35. Physio-Medical College *v.* Wilkinson, 108 Ind. 314, 9 N. E. 167, holding that, although where a contract is honestly made with a person of unsound mind, not judicially so declared, in ignorance of such mental incapacity, and a fair consideration has been paid to him, and used for his benefit, there can be no rescission without an offer to restore the same; yet where no such beneficial consideration has been received, there is no necessity for any tender, in a suit by the heirs of such insane person to have the contract rescinded.

36. Thrash *v.* Starbuck, 145 Ind. 673, 680, 44 N. E. 543; Halley *v.* Troester, 72 Mo. 73.

37. *Illinois.*— Long *v.* Fox, 100 Ill. 43.

Indiana.— Hull *v.* Louth, 109 Ind. 315, 10 N. E. 270, 58 Am Rep. 405; McClain *v.* Davis, 77 Ind. 419; Somers *v.* Pumphrey, 24 Ind. 131.

Maine.— Hovey *v.* Hobson, 53 Me. 451, 89 Am. Dec. 705.

Michigan.— Rogers *v.* Blackwell, 49 Mich. 192, 13 N. W. 512.

Pennsylvania.— Wirebach *v.* Easton First Nat. Bank, 97 Pa. St. 543, 39 Am. Rep. 821.

United States.— Anglo-Californian Bank *v.* Ames, 27 Fed. 727.

But *compare* Odom *v.* Riddick, 104 N. C. 515, 10 S. E. 609, 17 Am. St. Rep. 686, 7 L. R. A. 118.

Conveyances see *supra*, IV, C, text and notes 78, 82; IV, E, 1, text and notes 94, 95.

Negotiable instruments see COMMERCIAL PAPER, 8 Cyc. 51.

38. Torts generally see TORTS.

39. *Alabama.*— White *v.* Farley, 81 Ala. 563, 8 So. 215.

Illinois.— McIntyre *v.* Sholty, 121 Ill. 660, 13 N. E. 239, 2 Am. St. Rep. 140 [*affirming* 24 Ill. App. 605].

Iowa.— Behrens *v.* McKenzie, 23 Iowa 333, 92 Am. Dec. 428.

Maryland.— Cross *v.* Kent, 32 Md. 581.

New Hampshire.— Jewell *v.* Colby, 66 N. H. 399, 24 Atl. 902, holding that an insane person is liable for causing the death of another by an act which would be felonious except for his insanity.

New York.— Williams *v.* Hays, 143 N. Y. 442, 38 N. E. 449, 42 Am. St. Rep. 743, 26 L. R. A. 153; Williams *v.* Hays, 2 N. Y. App. Div. 183, 37 N. Y. Suppl. 708; Krom *v.* Schoonmaker, 3 Barb. 647. See Williams *v.* Cameron, 26 Barb. 172.

Pennsylvania.— Beals *v.* See, 10 Pa. St. 56, 49 Am. Dec. 573; *In re* Wolf, 9 Kulp 523; Sheppard *v.* Wood, 1 Lanc. L. Rev. 175.

Tennessee.— Ward *v.* Conatser, 4 Baxt. 64.

Vermont.— Morse *v.* Crawford, 17 Vt. 499, 44 Am. Dec. 349.

United States.— See Avery *v.* Wilson, 20 Fed. 856.

England.— Cross *v.* Andrews, Cro. Eliz. 622; Haycraft *v.* Creasy, 2 East 92, 6 Rev. Rep. 380; Weaver *v.* Ward, Hob. 189; Bacon Abr. "Idiots and Lunatics" E; 1 Chitty Pl. *65; 2 Rolle Abr. 547.

therefore intention, actual or implied, is a necessary ingredient, as in the case of libel, slander, and malicious prosecution.[40] And this liability, it has been held, is not affected by the fact that plaintiff knew the mental condition of defendant and might have prevented the act,[41] or that defendant was under guardianship at the time.[42]

B. Liability For Libel or Slander.[43] The question whether or not an insane person is liable to an action for his libel or slander is somewhat unsettled. It has been held that he is liable for the actual damage done by his slanders and libels, the same as for his other torts.[44] On the other hand it has been held that in an action for slander insanity is a good plea in defense,[45] or might be shown under the general issue in such an action either in excuse or in mitigation of damages.[46]

C. Measure of Damages.[47] Since an insane defendant is supposed to be incapable of criminal intent, in an action against him for tort, the damages are limited to compensation for the acts or injury sustained by plaintiff, and punitive or vindictive damages cannot be recovered.[48] And this is so even in those jurisdictions where punitive damages are recoverable in actions of tort against sane defendants.[49]

VII. CRIMES.

A. Effect of Insanity in General[50] **— 1. As a Defense.** A person is not criminally responsible for an act committed when he was so insane, from defect

Canada.— Stanley *v.* Hayes, 8 Ont. L. Rep. 81 (in which it was intimated that a lunatic might not be civilly liable for his tort if he appeared to be "utterly blameless" in the matter. But this expression was not necessary to a decision of the case and is believed to be unsupported by authority); Taggard *v.* Innes, 12 U. C. C. P. 77.

See 27 Cent. Dig. tit. "Insane Persons," § 142.

If a lunatic sets fire to insured property of another, the insurer having paid the loss may recover the amount thereof from the lunatic. Mutual F. Ins. Co. *v.* Showalter, 3 Pa. Super. Ct. 452, 40 Wkly. Notes Cas. 80.

A committee or guardian of an insane person is entitled to compensation for damages to his own property caused by the insane tort of his ward, to be ascertained at the termination of the trust. Brown *v.* Howe, 9 Gray (Mass.) 84, 69 Am. Dec. 276.

The insanity of a co-conspirator at the time of the trial of an action to recover for injuries caused by the conspiracy is no defense to any of the guilty parties. Tucker *v.* Hyatt, 151 Ind. 332, 51 N. E. 469, 44 L. R. A. 129.

40. Jewell *v.* Colby, 66 N. H. 399, 24 Atl. 902; Williams *v.* Hays, 143 N. Y. 442, 38 N. E. 449, 42 Am. St. Rep. 743, 26 L. R. A. 153; Williams *v.* Hays, 2 N. Y. App. Div. 183, 37 N. Y. Suppl. 708. And see *infra*, VI, B.

41. Morse *v.* Crawford, 17 Vt. 499, 44 Am. Dec. 349.

42. Morain *v.* Devlin, 132 Mass. 87, 42 Am. Rep. 423, holding that a lunatic is civilly liable for an injury caused by the defective condition of his land under control of his guardian, and not in the exclusive occupancy and control of a tenant.

43. **Libel and slander** generally see LIBEL AND SLANDER.

44. Ullrich *v.* New York Press Co., 23 Misc. (N. Y.) 168, 50 N. Y. Suppl. 788, also holding that as he is incapable of malice, smart-money as damages cannot be given against him.

45. Bryant *v.* Jackson, 6 Humphr. (Tenn.) 199; Homer *v.* Marshall, 5 Munf. (Va.) 466, holding that it is ground in equity to enjoin a judgment in an action for slander that at the time of speaking the words complained of defendant was insane. See Dickinson *v.* Barber, 9 Mass. 225, 228, 6 Am. Dec. 58, in which the court said that "where the derangement was great and notorious, so that the speaking the words could produce no effect on the hearers, it was manifest no damage would be incurred. But where the degree of insanity was slight, or not uniform, the slander might have its effect; and it would be for the jury to judge upon the evidence before them, and measure the damages accordingly."

46. Yeates *v.* Reed, 4 Blackf. (Ind.) 463, 32 Am. Dec. 43.

47. **Damages** generally see DAMAGES.

48. *Illinois.*— McIntyre *v.* Sholty, 121 Ill. 660, 13 N. E. 239, 2 Am. St. Rep. 140 [*affirming* 24 Ill. App. 605], holding that punishment is not the object of the law when persons unsound in mind are wrong-doers.

Maryland.— Cross *v.* Kent, 32 Md. 581.

New Hampshire.— Jewell *v.* Colby, 66 N. H. 399, 24 Atl. 902.

New York.— Krom *v.* Schoonmaker, 3 Barb. 647.

Pennsylvania.— Sheppard *v.* Wood, 1 Lanc. L. Rev. 175.

Tennessee.— Ward *v.* Conatser, 4 Baxt. 64.

If greater damages are sought on account of the intent and malice of defendant, insanity is a good answer thereto. Jewell *v.* Colby, 66 N. H. 399, 24 Atl. 902.

49. Krom *v.* Schoonmaker, 3 Barb. (N. Y.) 647; Ullrich *v.* New York Press Co., 23 Misc. (N. Y.) 168, 50 N. Y. Suppl. 788; Ward *v.* Conatser, 4 Baxt. (Tenn.) 64.

50. **Insanity as affecting admissibility of confession** see CRIMINAL LAW, 12 Cyc. 477.

or disease of the mind, as to be incapable of understanding the nature and quality of the act, or of distinguishing between right and wrong, either generally or with respect to the particular act, or according to some of the decisions, as to be irresistibly impelled to the commission of the act.[51]

2. INSANITY AFTER COMMISSION OF ACT — a. In General. At common law, and in some jurisdictions by express statutory provision, if a person is insane when arraigned for a crime, he cannot be required to plead or to be tried, whether he was insane when he committed the act or not;[52] but the court, provided there are indications or a showing of probable insanity, should determine such issue, either

Right to release on bail see BAIL, 5 Cyc. 69 note 19.

Insanity of juror as ground for new trial see CRIMINAL LAW, 12 Cyc. 714.

Relevancy or materiality of expected evidence of insanity for which continuance is asked see CONTINUANCES IN CRIMINAL CASES, 9 Cyc. 177.

51. See CRIMINAL LAW, 12 Cyc. 164 *et seq.*; HOMICIDE, 21 Cyc. 663.

Admissibility of evidence of insanity see CRIMINAL LAW, 12 Cyc. 403.

Conviction as establishing sanity see CRIMINAL LAW, 12 Cyc. 510.

Degree of proof required to establish defense of insanity see CRIMINAL LAW, 12 Cyc. 496.

Evidence justifying or requiring instruction as to insanity see CRIMINAL LAW, 12 Cyc. 616.

Insanity as question for jury see CRIMINAL LAW, 12 Cyc. 592.

Necessity of specially pleading insanity as a defense see CRIMINAL LAW, 12 Cyc. 363.

Presumption of sanity in criminal cases see CRIMINAL LAW, 12 Cyc. 386 *et seq.*

Presumption of continuance of insanity in criminal cases see CRIMINAL LAW, 12 Cyc. 165, 389.

Rebuttal of defense of insanity see CRIMINAL LAW, 12 Cyc. 558.

52. *Alabama.*— Marler *v.* State, 67 Ala. 55, 42 Am. Rep. 95; Jones *v.* State, 13 Ala. 153.

Arkansas.— State *v.* Helm, 69 Ark. 167, 61 S. W. 915; Taffe *v.* State, 23 Ark. 34, incapacity by reason of intoxication.

California.— People *v.* Farrell, 31 Cal. 576.

Georgia.— Flanagan *v.* State, 103 Ga. 619, 30 S. E. 550.

Iowa.— State *v.* Arnold, 12 Iowa 479.

Louisiana.— State *v.* Reed, 41 La. Ann. 581, 7 So. 132.

Massachusetts.— Com. *v.* Hathaway, 13 Mass. 299; Com. *v.* Braley, 1 Mass. 103.

New Jersey.— State *v.* Peacock, 50 N. J. L. 34, 11 Atl. 270.

New York.— Freeman *v.* People, 4 Den. 9, 47 Am. Dec. 216. And see People *v.* McElvaine, 125 N. Y. 596, 26 N. E. 929.

North Carolina.— State *v.* Pritchett, 106 N. C. 667, 11 S. E. 357.

Ohio.— Rosselot *v.* State, 23 Ohio Cir. Ct. 370; Brock *v.* State, 22 Ohio Cir. Ct. 364, 12 Ohio Cir. Dec. 467.

Pennsylvania.— Webber *v.* Com., 119 Pa. St. 223, 13 Atl. 427, 4 Am. St. Rep. 634.

Tennessee.— Firby *v.* State, 3 Baxt. 358.

Texas.— Guagando *v.* State, 41 Tex. 626; Lermo *v.* State, (Cr. App. 1902) 68 S. W. 684.

Vermont.— State *v.* Kelley, 74 Vt. 278, 52 Atl. 434.

West Virginia.— State *v.* Harrison, 36 W. Va. 729, 15 S. E. 982, 18 L. R. A. 224.

Wisconsin.— French *v.* State, 93 Wis. 325, 67 N. W. 706; Crocker *v.* State, 60 Wis. 553, 19 N. W. 435.

United States.— Youtsey *v.* U. S., 97 Fed. 937, 38 C. C. A. 562 [*reversing* 91 Fed. 864]; U. S. *v.* Lancaster, 26 Fed. Cas. No. 15,555, 7 Biss. 440.

England.— Reg. *v.* Berry, 1 Q. B. D. 447, 45 L. J. M. C. 123, 13 Cox C. C. 189, 34 L. T. Rep. N. S. 590; Reg. *v.* Goode, 7 A. & E. 536, 34 E. C. L. 288; Reg. *v.* Dwerryhouse, 2 Cox C. C. 446; Rex *v.* Dyson, 7 C. & P. 305, 32 E. C. L. 627; Rex *v.* Pritchard, 7 C. & P. 303, 32 E. C. L. 626; Reg. *v.* Southey, 4 F. & F. 864; Frith's Case, 22 How. St. Tr. 307; Kinloch's Case, 18 How. St. Tr. 395, 411.

See 14 Cent. Dig. tit. "Criminal Law," § 1391 *et seq.*; 27 Cent. Dig. tit. "Insane Persons," § 146 *et seq.*

In Florida a plea in a criminal prosecution that at the time of the finding of the indictment defendant was and still is adjudged insane by a court of competent jurisdiction is properly overruled on demurrer, as Acts (1895), p. 125, c. 4357, § 6, provide that the provisions of the acts prescribing the mode of procedure in adjudging persons to be insane shall not apply to persons charged with criminal offenses who plead insanity. Reyes *v.* State, (1905) 38 So. 257.

The test of insanity, when it is set up to prevent a trial, is whether the accused is mentally competent to make a rational defense, and not whether he is able to distinguish between right and wrong. Freeman *v.* People, 4 Den. (N. Y.) 9, 47 Am. Dec. 216. See also *In re* Buchanan, 129 Cal. 330, 61 Pac. 1120, 50 L. R. A. 378; Guagando *v.* State, 41 Tex. 626; Youtsey *v.* U. S., 97 U. S. 937, 38 C. C. A. 562 [*reversing* 91 U. S. 864]; U. S. *v.* Lancaster, 26 Fed. Cas. No. 15,555, 7 Biss. 440; Reg. *v.* Berry, 1 Q. B. D. 447, 13 Cox C. C. 189, 45 L. J. M. C. 123, 34 L. T. Rep. N. S. 590. One capable of rightly comprehending his own condition in reference to the proceeding against him, and of conducting his defense in a rational manner, is not insane within the meaning of the rule,

itself or by a jury or commission, according to the statute or practice,[53] and if he is found to be insane, remand him to jail, or, when authorized by statute, commit him to an asylum or hospital until his recovery.[54] So also if the accused becomes insane during the trial, the proceeding must stop;[55] and if he becomes insane after conviction, judgment cannot be given or sentence pronounced so long as he is in such condition;[56] nor can he be executed if he becomes insane after judgment and sentence.[57]

b. Restoration to Sanity. Such insanity, however, does not abate or otherwise dispose of the prosecution, except to delay it, and the accused may be tried if he afterward becomes sane again.[58]

3. Arrest, Commitment, and Bail. The fact that a person is insane does not exempt him from liability to arrest if he commits an act which would be a crime if committed by a sane person,[59] unless he is exempted by express statutory provision.[60] And the fact that a person is in fact insane, where he has not been judicially adjudged insane and placed under guardianship or in an asylum or hospital, does not prevent his being committed or held to bail until he is tried or discharged according to law.[61] In some states by statute one who has been

although on some other subjects his mind may be deranged. Freeman *v.* People, *supra*.

53. See the cases cited in the preceding note; and CRIMINAL LAW, 12 Cyc. 509, 510.

When two persons are jointly indicted, and one of them has been adjudged insane on a separate trial of that issue, and ordered to be confined in the insane hospital and his trial postponed until he becomes sane, and the other is subsequently arraigned and tried alone, there is a severance of the cases of the two defendants. Marler *v.* State, 67 Ala. 55, 42 Am. Rep. 95.

54. See *infra*, VII, C.

55. State *v.* Reed, 41 La. Ann. 581, 7 So. 132; Rosselot *v.* State, 23 Ohio Cir. Ct. 370; Gruber *v.* State, 3 W. Va. 699; Youtsey *v.* U. S., 97 U. S. 937, 38 C. C. A. 562 [*reversing* 91 Fed. 864]; Kinloch's Case, 18 How. St. Tr. 395, 411.

56. *Alabama.*— State *v.* Brinyea, 5 Ala. 241.

Arkansas.— State *v.* Helm, 69 Ark. 167, 61 S. W. 915.

California.— People *v.* Farrell, 31 Cal. 576.

Louisiana.— State *v.* Reed, 41 La. Ann. 581, 7 So. 132.

North Carolina.— State *v.* Vann, 84 N. C. 722.

Tennessee.— Bonds *v.* State, Mart. & Y. 143, 17 Am. Dec. 795.

The test is whether the accused is "by reason of a disease of the mind unable to understand the nature of the indictment upon which he was convicted, his plea thereto, and the verdict thereon, when explained to him by the court, and is unable to comprehend his own condition in reference to such proceeding, and by reason thereof might not make known to the court or the attorneys in charge of his defense the facts within his knowledge, if any, which would show that judgment should not be pronounced against him," but "ignorance of the law is not competent or sufficient to show such incapacity." State *v.* Helm, 69 Ark. 167, 173, 61 S. W. 915, holding therefore that an instruction requiring such incapacity as not to be able to "intelligently comprehend" such matters was incorrect as requiring more intelligence than was necessary.

Trial or determination of issue see CRIMINAL LAW, 12 Cyc. 772.

57. Jones *v.* State, 13 Ala. 153; State *v.* Vann, 84 N. C. 722; Green *v.* State, 88 Tenn. 634, 14 S. W. 489; Nobles *v.* Georgia, 168 U. S. 398, 18 S. Ct. 87, 42 L. ed. 515. See also CRIMINAL LAW, 12 Cyc. 791.

58. *Alabama.*— Jones *v.* State, 13 Ala. 153.

California.— *In re* Buchanan, 129 Cal. 330, 61 Pac. 1120, 50 L. R. A. 378; People *v.* Geiger, 116 Cal. 440, 48 Pac. 389; People *v.* Farrell, 31 Cal. 576.

Kansas.— *In re* Kidd, 40 Kan. 644, 20 Pac. 526.

North Carolina.— State *v.* Pritchett, 106 N. C. 667, 11 S. E. 357.

England.— Reg. *v.* Dwerryhouse, 2 Cox C. C. 446.

Examination and determination as to restoration see *infra*, VII, B, 2.

Expiration of term of imprisonment see *infra*, note 79.

59. Lott *v.* Sweet, 33 Mich. 308, holding that it is just as competent for a magistrate, as conservator of the peace, to order into custody an insane man who is committing a breach of the peace in his presence, as to order the arrest of a sane person under like circumstances for, although an insane person may not be guilty of crime, he may lawfully be prevented from doing harm. See also Van Deusen *v.* Newcomer, 40 Mich. 90; U. S. *v.* Lawrence, 26 Fed. Cas. No. 15,577, 4 Cranch C. C. 518.

60. See *In re* Kidd, 40 Kan. 644, 20 Pac. 526.

61. See People *v.* Watson, 14 Misc. (N. Y.) 430, 35 N. Y. Suppl. 852; *Ex p.* Miller, 41 Tex. 213; Zembrod *v.* State, 25 Tex. 519; U. S. *v.* Lawrence, 26 Fed. Cas. No. 15,577, 4 Cranch C. C. 518; and CRIMINAL LAW, 12 Cyc. 164, 509.

judicially adjudged insane cannot be held to bail or imprisoned on a criminal charge.[62]

4. INDICTMENT. A grand jury, it has been held, has no authority by law to ignore a bill of indictment on the ground of insanity, but it is their duty to find the indictment, leaving the question of insanity to be properly raised and determined afterward.[63]

B. Examination and Determination as to Sanity — 1. IN GENERAL. Where, when a person charged with crime is arraigned, or after he has been convicted, but before judgment and sentence, it is suggested or appears to the court that he may be insane, the question of his sanity may be inquired into and determined by the judge himself or by aid of a jury summoned and impaneled for that purpose;[64] and so in the case of insanity after judgment and sentence and before execution thereof.[65] In most jurisdictions special provision for examination and determination of this question is now made by statute.[66] Provision is also made for examination into the sanity of persons charged with crime before their arraignment or after judgment and sentence,[67] as in the case of persons who have been indicted or who are in confinement under indictment, before or after conviction,[68] or who

Right to release on bail see BAIL, 5 Cyc. 69 note 19.

62. *In re* Kidd, 40 Kan. 644, 20 Pac. 526, holding that a person found to be insane on an inquisition by the verdict of a jury and placed under guardianship under the statute relating to lunatics and habitual drunkards is exempt from being held to bail and from imprisonment on a criminal charge, so long as such verdict is in force and operative, under a statute (Kan. Comp. Laws (1885), c. 60, § 35) providing that "no insane person or habitual drunkard shall be held to bail, nor shall his body be taken in execution on any civil or criminal action," and that an insane person committed by a magistrate in default of bail must be discharged from custody on habeas corpus on the application of the guardian of his person and estate.

63. Reg. *v.* Hodges, 8 C. & P. 195, 34 E. C. L. 686. See Reyes *v.* State, (Fla. 1905) 38 So. 257.

64. See CRIMINAL LAW, 12 Cyc. 509, 772, 791, and cases there cited.

Motion for new trial.— It has been held that the insanity of defendant at the time of his trial may be made the ground of a motion for a new trial, and an inquisition then had. U. S. *v.* Lancaster, 26 Fed. Cas. No. 15,555, 7 Biss. 440.

Practice in appellate court.— It has been held in Tennessee that where no plea of present insanity has been interposed in defendant's behalf in the lower court, and there is anything in the record or conduct of defendant to raise a just suspicion of his present insanity, the supreme court will, of its own motion, make inquiry into his present mental state; and if he is found to be insane will make proper recommendation for commutation of his sentence, and for his removal to the asylum for the insane. Green *v.* State, 88 Tenn. 634, 14 S. W. 489.

Burden and degree of proof.— Upon an inquisition as to the insanity of defendant at the time of trial, the burden of proof of insanity is upon defendant; but if the evidence, when all considered, leaves a reasonable doubt of his sanity, he should have the benefit of the doubt. U. S. *v.* Lancaster, 26 Fed. Cas. No. 15,555, 7 Biss. 440.

Test of insanity see *supra*, VII, A, 2, a, notes 52, 56.

Right to open and close.— Upon such an inquisition it has been held that the counsel for defendant should open and close the case to the jury. U. S. *v.* Lancaster, 26 Fed. Cas. No. 15,555, 7 Biss. 440.

Review of inquiry as to sanity see CRIMINAL LAW, 12 Cyc. 799.

65. See CRIMINAL LAW, 12 Cyc. 791.

66. See People *v.* Farrell, 31 Cal. 576; Sears *v.* Chandler, 112 Ga. 381, 37 S. E. 442; Flanagan *v.* State, 103 Ga. 619, 30 S. E. 550; State *v.* Chandler, 45 La. Ann. 696, 12 So. 884; People *v.* McElvaine, 125 N. Y. 596, 26 N. E. 929; Firby *v.* State, 3 Baxt. (Tenn.) 358; French *v.* State, 93 Wis. 325, 67 N. W. 706; and CRIMINAL LAW, 12 Cyc. 509, 510, 772, 791. See also Sears *v.* State, 112 Ga. 382, 37 S. E. 443.

67. See the statutes and cases referred to in the notes following.

68. See Devilbiss *v.* Bennett, 70 Md. 554, 17 Atl. 502; People *v.* McElvaine, 125 N. Y. 596, 26 N. E. 929; State *v.* O'Grady, 5 Ohio S. & C. Pl. Dec. 654, 3 Ohio N. P. 279.

Persons "in confinement."— A person indicted in the circuit court for a felony, and enlarged on bail to answer, is not in confinement, within the meaning of the Alabama statute, which authorizes the circuit judge to order an inquiry as to the sanity of persons "in confinement under indictment," etc., and to direct their discharge from imprisonment and removal to an insane asylum. *Ex p.* Trice, 53 Ala. 546.

Jurisdiction in court or in judge.— The jurisdiction given by the Alabama statute to the circuit judge to order an inquiry as to the sanity of persons in confinement under indictment, and direct their removal to an insane asylum, vests in the judge, and not in the court. *Ex p.* Trice, 53 Ala. 546.

have been arrested or charged with crime, but not indicted,[69] or who are under sentence of death or in prison in pursuance of judgment and sentence,[70] or who

Jurisdiction as between commissioners and court see Stone *v.* Conrad, 105 Iowa 21, 74 N. W. 910.

Petition and affidavits for inquisition see Lee *v.* State, 118 Ga. 5, 43 S. E. 994; Sears *v.* State, 112 Ga. 382, 37 S. E. 443.

Notice to the person affected by the proceeding is indispensable to its validity, and the record must recite the existence of every fact on which the jurisdiction is based; otherwise the judgment is a mere nullity. *Ex p.* Trice, 53 Ala. 546.

Discretion of court.— Under that portion of N. Y. Code Cr. Proc. § 658, which gives the court power "if a defendant in confinement under indictment appears to be at any time before or after conviction insane," to appoint a commission to examine him and report "as to his sanity at the time of the examination," it is only when the necessity of such an examination is made to appear that the court is bound to order an examination, and whether such necessity does appear is left to the discretion of the court. People *v.* McElvaine, 125 N. Y. 596, 26 N. E. 929. See also People *v.* Tobin, 176 N. Y. 278, 68 N. E. 359. The court may review the findings of the commission, and adopt or reject them, as the evidence and law requires. People *v.* Rhinelander, 2 N. Y. Cr. 335. Under the statutes of Georgia, however, where a petition and proper affidavits of defendant's insanity are presented to the judge, it is his imperative duty, and not merely a matter of discretion, to order a trial of the question. Sears *v.* State, 112 Ga. 382, 37 S. E. 443. And see Lee *v.* State, 118 Ga. 5, 43 S. E. 994.

Res adjudicata.— It is not error for the court to refuse to grant an application after conviction for an inquisition of lunacy involving, if granted, a consideration of the question of insanity at a time prior to the trial by the jury of a plea of insanity, and not involving a question of insanity arising after conviction. State *v.* Potts, 49 La. Ann. 1500, 22 So. 738. And see CRIMINAL LAW, 12 Cyc. 509 note 78. But the fact that after a conviction and sentence for murder a motion for a new trial on the ground that defendant was insane when the offense was committed and at the time of the trial has been overruled after a hearing of the same and the judgment has been affirmed on appeal does not bar an application for a trial of the question of defendant's insanity since conviction as provided for by statute. Sears *v.* State, 112 Ga. 382, 37 S. E. 443. And see Lee *v.* State, 118 Ga. 5, 43 S. E. 994.

69. In Maryland, under Code (1889), art. 59, §§ 4–11, providing for judicial proceedings to pass upon the alleged insanity of persons charged with crime, and requiring the court, or judge in vacation, to commit defendant, if found to be insane, to a suitable asylum, and to appoint a trustee of his estate, who shall give bond for his support, etc., and declaring that the statute shall apply "to the case of any person who may be arrested on any process issued by any Court or Judge of this State, founded on oath, requiring security to keep the peace, and who shall fail to give such security," it was held that where an application to a judge of the circuit court in vacation shows that the person alleged to be insane is in the custody of the sheriff under a peace warrant issued by a magistrate, the judge may proceed under the statute to ascertain the fact of insanity, commit the insane person to the asylum, and appoint a trustee of his estate, etc., without going through the useless formality of issuing a new process to the sheriff for the arrest of the person already in his custody, and ascertaining that no one would become his security to keep the peace. Devilbiss *v.* Bennett, 70 Md. 554, 17 Atl. 502.

In England see *In re* Maltby, 7 Q. B. D. 18, 14 Cox C. C. 609, 45 J. P. 681, 50 L. J. Q. B. 413, 44 L. T. Rep. N. S. 711, 29 Wkly. Rep. 678.

In Canada it was held in *Re* Sarault, 9 Can. Cr. Cas. 448, that a magistrate, on preliminary inquiry after an arrest upon a warrant, could not remand the accused for eight days for the purpose of a medical examination as to his sanity on the mere suggestion of the police officer and without the personal presence of the accused.

70. See Sears *v.* Candler, 112 Ga. 381, 37 S. E. 442 (under sentence of death); Clarion County *v.* Western Pennsylvania Hospital, 111 Pa. St. 339, 3 Atl. 97 (convict in prison).

In Pennsylvania, however, under the acts of May 14, 1874, and May 8, 1883, permitting an application to the courts on the part of the persons in charge of a penitentiary, prison, or hospital for the insane, to inquire into the sanity of any person convicted of a crime, have no application to the case of a person convicted of murder in the first degree, the remedy in such case being by application to the governor. Baranoski's Case, 9 Pa. Co. Ct. 264; *Ex p.* Wilson, 19 Wkly. Notes Cas. 37; *Ex p.* Briggs, 14 Wkly. Notes Cas. 341.

By whom application must be made. Under the Pennsylvania acts of May 14, 1874, and May 8, 1883, permitting an application to the courts on the part of the authorities of any prison, penitentiary, or hospital for the insane, to inquire into the sanity of any person convicted of a crime, such application must be made by the authorities named in the statute and not by counsel for the convict or others. Baranoski's Case, 9 Pa. Co. Ct. 264.

Judicial proceeding; review.— Under Ga. Pen. Code, § 1047, providing for an inquisition by a jury to determine the sanity of a convict sentenced to death, the proceeding is a judicial one, and the refusal of a judge

have been acquitted on the ground of insanity.[71] In the absence of a statute a court or judge has no authority to inquire into the sanity of a person who has been indicted and is at large on bail.[72]

2. As to Restoration to Sanity. Since the insanity of a defendant at the time of arraignment, during trial, after conviction, or after judgment, does not prevent his trial, sentence, or punishment, as the case may be, if he subsequently becomes sane,[73] the court may at any time, even without the aid of a statute, cause him to be brought before it for an inquiry as to his sanity with a view to further proceedings if he be found to be sane, and such inquiry may be had as often as the court may deem necessary.[74] In many jurisdictions provision for such inquiry is now made and the practice regulated by statute.[75]

to take any action upon an application therefor is reviewable by the supreme court. Sears *v.* Candler, 112 Ga. 381, 37 S. E. 442. Under the former statute it was held that the proceeding was not a judicial one, so that the verdict or finding therein could not be reviewed on certiorari (Carr *v.* State, 98 Ga. 89, 27 S. E. 148), and refusal of the judge to enter upon such investigation could not be reviewed (Baughn *v.* State, 100 Ga. 554, 28 S. E. 68, 38 L. R. A. 577).

71. See *infra*, VII, C, 3.

72. *Ex p.* Trice, 53 Ala. 546, holding also that such authority is not conferred by the fact that the property of persons in the neighborhood of the alleged insane person is in danger at his hands.

73. See *supra*, VII, A, 2, b.

74. State *v.* Pritchett, 106 N. C. 667, 11 S. E. 357.

In North Carolina, under Code (1883), § 2255, directing judges to commit insane persons charged with crime to an insane asylum, but making no provision for the discharge and bringing to trial of persons so confined when restored to sanity, it was held that the court did not lose jurisdiction of an insane defendant by committing him to an asylum until he should be restored to sanity, when the authorities of the asylum were directed to notify the court, that he might be returned for trial, and that the court had authority, without any discharge or other formal action on the part of such authorities, to cause him, by a writ of habeas corpus or order, to be brought before it from time to time for examination, and to put him on trial whenever it should be ascertained that he was competent to plead. And it was held that a defendant so committed could, after his escape from the asylum and recapture, be brought directly to trial, if found to be sane, without any certificate or action by the asylum authorities. State *v.* Pritchett, 106 N. C. 667, 11 S. E. 357. Since this decision special provision has been made for such cases by Laws (1899), c. 1, § 64 (Code (1906), § 4621).

The opinion of the superintendent of the asylum as to the mental condition of the prisoner while under his charge is competent evidence upon the question whether such insanity was feigned. State *v.* Pritchett, 106 N. C. 667, 11 S. E. 357.

75. See *In re* Buchanan, 129 Cal. 330, 61 Pac. 1120, 50 L. R. A. 378.

The superintendent of an insane asylum is not the sole and final judge of restoration to sanity under Cal. Pen. Code, §§ 1370, 1372, providing that when a defendant in a criminal case who is pronounced insane pending trial and committed to the state insane asylum becomes sane, the superintendent must give notice of that fact, and thereupon the sheriff shall take defendant into custody until he is brought to trial or judgment, and if the superintendent fails to give such notice, a prisoner may assert his right to a speedy trial by means of the writ of habeas corpus, and if the court, after a hearing, concludes that he is sane, it has the power, and it is its duty to order him into the custody of the court where the charge against him is pending in order that the court may bring him to trial or pronounce judgment. *In re* Buchanan, 129 Cal. 330, 61 Pac. 1120, 50 L. R. A. 378; Gardner *v.* Jones, 126 Cal. 614, 59 Pac. 126.

Test of restoration to sanity.— In determining whether one has become sane so that he may be tried for a crime, the question is not one of absolute sanity in the medical sense, but the test is whether he is sufficiently sane to make a rational defense. See *supra*, VII, A, 2, a, notes 52, 56. Under Cal. Pen. Code, §§ 1370, 1372, providing that a defendant in a criminal case who is pronounced insane pending trial shall be committed to the state insane asylum, and that upon his becoming "sane" the superintendent must give notice of that fact, whereupon the sheriff shall take defendant into custody until he is brought to trial or judgment, a defendant who has been thus committed to the asylum is to be deemed sane within the meaning of the statute when his memory is unimpaired, and he is in possession of every faculty requisite to the defense of the accusation against him, although suffering from a chronic and latent disease of the brain, which, under the excitement of intoxicating drink, to which he is predisposed, will lead him to the commission of criminal acts. *In re* Buchanan, 129 Cal. 330, 61 Pac. 1120, 50 L. R. A. 378.

Trial of question of insanity.— The fact that the accused had been in the insane asylum, and that his discharge as recovered was not entered till after his escape from the asylum is insufficient to warrant submitting to trial the question of his present insanity, under Cal. Pen. Code, § 1368, authorizing such submission "if a doubt arises as to the

C. Custody and Confinement — 1. In General. When it is determined before or during trial or after conviction that defendant is insane, so that he cannot be tried, sentenced, or punished, the only thing the court can do in the absence of a statute is to remand him to jail or prison.[76] In most jurisdictions, however, provision is now made by statute for his commitment to an asylum or hospital until recovery.[77] Statutes also provide for removal to an insane hospital or asylum of convicts who have become insane before execution or expiration of their sentence.[78]

2. On Restoration to Sanity. Provision is very generally made by statute for the transfer of insane persons under indictment or conviction from the asylum or hospital to the custody of the sheriff of the proper county for trial or judgment, or for the transfer of insane convicts to prison, on their restoration to sanity.[79]

sanity of the defendant." People *v.* Geiger, 116 Cal. 440, 48 Pac. 389.

Record.— Where it appears in the record of a criminal case that the accused has been regularly found by a jury to be insane and committed to an asylum, before he can be put upon trial on the indictment the record must be made to show by an entry of the court that the steps prescribed by statute (Ohio Rev. St. § 7243) have been taken by the superintendent having him in charge and the prosecuting attorney, in the matter of notice, issuance of a capias and commitment to jail, and that the condition of the accused has changed from insane to sane. It is not enough that this appears from the affidavit of the prosecuting attorney made after trial and conviction. Brock *v.* State, 22 Ohio Cir. Ct. 364, 12 Ohio Cir. Dec. 467.

76. Com. *v.* Hathaway, 13 Mass. 299; Com. *v.* Braley, 1 Mass. 103; U. S. *v.* Lawrence, 26 Fed. Cas. No. 15,577, 4 Cranch C. C. 518; Reg. *v.* Goode, 7 A. & E. 536, 34 E. C. L. 288.

77. See Marler *v.* State, 67 Ala. 55, 42 Am. Rep. 95; Stone *v.* Conrad, 105 Iowa 21, 74 N. W. 910; Devilbiss *v.* Bennett, 70 Md. 554, 17 Atl. 502; State *v.* Pritchett, 106 N. C. 667, 11 S. E. 357.

In Louisiana, where a party under indictment is found to be insane, and the judge of the criminal district court remands him to the parish prison, without a commitment to the insane asylum, the judge of the civil district court has authority, under Rev. St. § 1768, to inquire into the facts and circumstances of the case, and if, in his opinion, the prisoner is dangerous to the citizens and the peace of the state, to commit him to the state insane asylum. State *v.* Uniacke, 48 La. Ann. 1230, 20 So. 749.

In Maine, Rev. St. (1903) c. 144, § 19 (Rev. St. (1891) c. 143, § 15), providing that two justices of the peace may remove an insane person to the hospital on refusal of the municipal officers of the town to comply with section 16 (12) authorizing them, on the petition of any relative of an insane person, to examine into his condition, and send him to the insane hospital, does not give them jurisdiction so to make removal where such person is legally confined in jail. Gray *v.* Houlton, 63 Me. 566.

In Pennsylvania it was held that the fact that the state hospital for the insane was organized after the passage of the act of March 31, 1860, relating to the custody and control of the criminal insane, did not prevent the act from applying to such hospital, as the change of place of custody did not change the method of government. Clearfield County *v.* Cameron Tp. Poor Dist., 135 Pa. St. 86, 19 Atl. 952. The acts of April 14, 1845, and April 8, 1861, relating to the government and control of the criminal insane, would apply to the Danville hospital for the insane without reënactment by the act of March 27, 1873, organizing it; and their application was not affected by the fact that their reënactment was attempted in section 4 of the act of organization by a simple reference to them, contrary to the provisions of Const. (1874) art. 3, § 6. Clearfield County *v.* Cameron Tp. Poor Dist., *supra*. Under the act of May 14, 1874, giving jurisdiction to commit insane criminals to insane hospitals to any court having cognizance of the crime, or the court convicting the prisoner, only the courts of the county where the prisoner was tried have jurisdiction. Clarion County *v.* Western Pennsylvania Hospital, 111 Pa. St. 339, 3 Atl. 97. As to the authority of county commissioners to transfer insane prisoners from the county jail to a hospital see Allegheny County *v.* Western Pennsylvania Hospital, 48 Pa. St. 123, referred to *infra*, VII, D, note 90.

In Tennessee the act of 1871 (Code (1896), § 2631 *et seq.*), providing for confining in the asylum a defendant whom the jury "believe" to be insane, refers to his mental condition at the time of the trial, and not at the time of the offense. Firby *v.* State, 3 Baxt. 358.

78. See *supra*, VII, B, 1.

The governor is sometimes given the power to cause an insane convict to be removed to an asylum. See Shields *v.* Johnson County, 144 Mo. 76, 47 Mo. 107, referred to *infra*, VII, D, note 91.

79. See *In re* Buchanan, 129 Cal. 330, 61 Pac. 1120, 50 L. R. A. 378 (referred to *supra*, VII, B, 2, note 75); People *v.* Geiger, 116 Cal. 440, 48 Pac. 389.

Effect of recovery see *supra*, VII, A, 2, b.

Examination and determination as to sanity see *supra*, VII, B, 2.

Discharge as "recovered" after escape.— Where, shortly after the escape of a person from the insane asylum, the resident physi-

And even in the absence of such provision, where the court has committed a person under indictment or conviction to an asylum under statutory authority, it has the power, on his subsequently becoming sane, to order his discharge into the custody of the sheriff for the purpose of trial or judgment.[80]

3. AFTER ACQUITTAL ON GROUND OF INSANITY. Even when a defendant is acquitted by the verdict of a jury on the ground of insanity, the court may and should remand him to the custody of the sheriff or marshal on being satisfied that he is still insane and that it would be dangerous to permit him to be at large, unless some other provision for such cases is made by statute.[81] Express provision, however, is generally made for such cases by a statute authorizing the court to commit such a defendant to an asylum until he becomes sane, if his discharge shall be deemed dangerous to the public peace or safety.[82] A statute providing

cian, who had intended to discharge him in a few days, and who believed that the patient was then restored to reason, caused his discharge to be recorded as "recovered," it was held that this was a valid exercise of the physician's authority, under Cal. Acts (1875–1876), p. 135, to discharge such patients as, "in his opinion," have recovered. People *v.* Geiger, 116 Cal. 440, 48 Pac. 389.

Expiration of term of imprisonment.— Under N. H. Gen. Laws, c. 10, § 22 (Pub. St. (1901) c. 10, § 27), providing that any person committed to an insane asylum may be discharged when the cause of commitment ceases, but any person so discharged, who was under imprisonment when committed, and whose period of imprisonment has not expired, shall be remanded to prison, a person discharged from the asylum cannot be remanded to prison if at the time of his discharge the term of his imprisonment has expired. McQuinn's Petition, 65 N. H. 84, 18 Atl. 92.

80. State *v.* Pritchett, 106 N. C. 667, 11 S. E. 357, as to which see *supra*, VII, B, 2, note 74.

81. U. S. *v.* Lawrence, 26 Fed. Cas. No. 15,577, 4 Cranch C. C. 518. Where one who had committed a homicide had been sent to the house of correction, pursuant to a statute, as a person dangerous to go at large, and was then tried for murder, and acquitted on the ground of insanity, the court remanded him to the house of correction until he should be duly discharged. Com. *v.* Meriam, 7 Mass. 168.

In **Canada** it was held in Reg. *v.* Martin, 2 Nova Scotia 322, that it was the duty of the executive government of the province to assume the custody and care of persons acquitted of criminal charges on the ground of insanity, which by the common law of England was vested in the crown; and that a person acquitted of murder on the ground of insanity at the time of the deed, and kept in confinement by order of the governor would not be released by the court on habeas corpus.

82. See Gleason *v.* West Boylston, 136 Mass. 489; People *v.* Walsh, 21 Abb. N. Cas. (N. Y.) 299; Clearfield County *v.* Cameron Tp. Poor Dist., 135 Pa. St. 86, 19 Atl. 952; Com. *v.* Bennett, 15 Wkly. Notes Cas. (Pa.) 515.

Constitutionality.— Such a statute is not unconstitutional. *Ex p.* Brown, 39 Wash. 160, 81 Pac. 552, 1 L. R. A. N. S. 540. *Compare infra*, this section, text and notes 84, 85.

Jurisdiction.— In Pennsylvania the court or law judge of that county only in which there could be a lawful trial of the prisoner has jurisdiction to appoint a commission for the removal to the hospital of one acquitted of a crime on the ground of insanity. Clarion County *v.* Western Pennsylvania Hospital, 111 Pa. St. 339, 3 Atl. 97.

Periodical insanity; epilepsy.— Under Miss. Code, § 1468, providing that when any indicted person is acquitted on the ground of insanity, and the jury certify that he is still insane, and dangerous, he shall be confined in a state asylum for the insane, where defendant was acquitted of murder on the ground of insanity, and the jury so certified, the judgment sentencing him to the insane asylum should be affirmed, although he was an epileptic, and his fits and insanity occurred only at irregular intervals, he at other times being sane. Caffey *v.* State, 78 Miss. 645, 29 So. 396.

Effect of discharge as sane prior to trial.— Where an adjudication of present insanity against an indicted person and consequent commitment to an insane asylum under a statute is followed by a discharge as of sound mind and an order of court thereon to put the accused on trial, this determination that the accused is now sane does not preclude his commitment to the asylum again, on the ground that he is a dangerous person, as authorized by statute, if the verdict acquits him on the ground of insanity at the time of the offense. People *v.* Walsh, 21 Abb. N. Cas. (N. Y.) 299.

Order of commitment.— Under Ballinger Annot. Codes & St. Wash. § 6959, declaring that when any person is acquitted of an offense by reason of insanity the jury shall so state in their verdict, and, if the discharge of such insane person shall be deemed dangerous to the community, the court may order him to be committed to prison, an order of commitment "to await the further order of the court" is proper, and is not void for uncertainty. *Ex p.* Brown, 39 Wash. 160, 81 Pac. 552, 1 L. R. A. N. S. 540.

Restoration to sanity; discharge.— Where a person has been acquitted of a crime upon the ground of insanity and committed to a

for restraining prisoners who are acquitted on the ground of insanity contemplates insanity existing at the time of the trial or acquittal.[83] The legislature cannot constitutionally authorize confinement of a defendant who is acquitted on the ground of insanity when he committed the act, unless he is also insane at the time of his commitment.[84] The statute must also, to be constitutional, properly safeguard against restraint after restoration to sanity.[85] An order committing a defendant to an asylum under such a statute is not a judgment or sentence on

hospital for the insane, under the Pennsylvania acts of March 31, 1860, and May 14, 1874, and his sanity has been restored, the court has power under the latter act, upon petition filed on his behalf and after notice to the district attorney and the prosecutor and full investigation in open court, to discharge the prisoner from confinement; and it is not necessary to sue out a writ of habeas corpus. *In re* Lukens, 11 Pa. Dist. 146, 27 Pa. Co. Ct. 3.

Effect of verdict; subsequent inquiry.— In Pennsylvania, where the jury in a criminal case has found the prisoner not guilty by reason of insanity, the verdict is conclusive as to that fact; and a subsequent application by the prisoner to be discharged as no longer of unsound mind cannot be supported by mere evidence of experts or others that the prisoner is not now of unsound mind; there must be evidence of a change of mental condition. Com. *v.* Bennet, 15 Wkly. Notes Cas. (Pa.) 515. Where an application is made to discharge a prisoner who has been acquitted of homicide on the ground of insanity, the evidence must be sufficient to show not only that his mental condition has changed and his sanity been restored, but also, under the act of April 20, 1869, that he is now safe to be at large. Com. *v.* Bennet, *supra*.

83. State *v.* Klinger, 46 Mo. 224.

Presumption.— Where it was established in a prosecution for homicide by a verdict of the jury, rendered in accordance with 2 Ballinger Annot. Codes & St. Wash. § 6959, that defendant was insane at the time of the homicide, and he was acquitted on that ground, it will be presumed on a petition by defendant for a writ of habeas corpus to obtain a discharge from commitment for insanity under the statute that the same condition continues until the contrary is affirmatively proven by him. *Ex p.* Brown, 39 Wash. 160, 81 Pac. 552, 1 L. R. A. N. S. 540.

84. Underwood *v.* People, 32 Mich. 1, 20 Am. Rep. 633; *In re* Boyett, 136 N. C. 415, 48 S. E. 789, 103 Am. St. Rep. 944, 67 L. R. A. 972.

85. Underwood *v.* People, 32 Mich. 1, 20 Am. Rep. 633 (where a statute (Laws (1873), Act No. 168) providing for confinement in an insane hospital of the state prison of such persons as should be acquitted of crime on the ground of insanity until discharged by the governor on receiving the certificate of the judge of the circuit court where the trial was had and the medical superintendent of the state insane asylum, upon an examination made by them after having been summoned for that purpose by the prison inspectors that the prisoner was no longer insane, was held unconstitutional because it failed to furnish adequate means for the enforcement of the remedy provided against the restraint being continued beyond the necessity which alone could justify it, and also because it was in violation of the constitutional safeguard against restraints of personal liberty without due process of law, as the proceedings contemplated by it were not only inquisitorial and *ex parte*, but could not be set in motion except at the will of the prison inspectors, so that practically the liberty of the person confined was left to depend upon the uncontrolled pleasure of such inspectors); *In re* Boyett, 136 N. C. 415, 48 S. E. 789, 103 Am. St. Rep. 944, 67 L. R. A. 972 (holding that a statute (Acts (1899), c. 1, §§ 65, 67) providing that a judge might, when a person indicted for homicide should be acquitted on the ground of insanity, in his discretion commit such person to the hospital for the dangerous insane, to remain there until discharged by the legislature, was unconstitutional, both because it left the commitment to the discretion of the judge and because it left the duration of the confinement to the will of the legislature, instead of providing some means of determining the question of insanity at the time of the commitment, and providing means for determining the question of restoration to sanity and discharge on such restoration by due process of law). But 2 Ballinger Annot. Codes & St Wash. § 6959, providing that, when any person indicted for an offense is acquitted by reason of insanity, the jury shall so state in their verdict, and if his discharge be deemed dangerous to the community, the court may commit him to prison, does not prevent the insane person from demanding an investigation by the court at any time of the question of his restoration to sanity, so as to be held invalid on that ground. *Ex p.* Brown, 39 Wash. 160, 81 Pac. 552, 1 L. R. A. N. S. 540.

Discharge— Although N. C. Pub. Laws (1899), pp. 25, 26, c. 1, §§ 65, 67, authorizing the judge, in his discretion, to commit persons acquitted of a capital crime on the ground of insanity to the hospital for the dangerous insane and their confinement until released by an act of the legislature, is unconstitutional, a person confined pursuant to a commitment under the act cannot be released on habeas corpus if he is at the time of the return of the writ insane, but he must be restrained pending proceedings under section 15, providing the method of inquiry as to insanity. *In re* Boyett, 136 N. C. 415, 48 S. E. 789, 103 Am. St. Rep. 944, 67 L. R. A. 972.

the verdict.[86] The discretion given to officers of insane hospitals as to the liberty to be allowed patients must, in respect to a person committed by order of court, after being acquitted of a crime on the ground of insanity, be exercised in subordination to the terms of the order.[87]

D. Support and Maintenance — 1. In General. Where a statute authorizes commitment to an insane asylum or hospital of insane convicts or persons charged with crime, the county from which he is sent, or the county of his residence, is sometimes made liable to the asylum or hospital for his support and maintenance;[88] but is allowed to recover the amount paid for such maintenance, and for the removal, from any other county, town, city, or district, as the case may be, liable for his maintenance elsewhere under the poor laws.[89] To render a county, town,

86. Clearfield County *v.* Cameron Tp. Poor Dist., 135 Pa. St. 86, 19 Atl. 952.

87. Com. *v.* Bennet, 15 Wkly. Notes Cas. (Pa.) 515.

88. Shields *v.* Johnson County, 144 Mo. 76, 47 S. W. 107; Onondaga County *v.* Morgan, 4 Abb. Dec. (N. Y.) 335, 2 Keyes 277; Suffolk County *v.* Kingston, 50 Hun (N. Y.) 435, 3 N. Y. Suppl. 221 [*affirmed* in 115 N. Y. 650, 21 N. E. 1118]; *In re* Sharpe, 10 Kulp (Pa.) 509.

Retrospective operation of statute.— Mo. Rev. St. (1889) § 4247, making counties liable for the keeping of indigent insane convicts in the asylum, does not apply to convicts sentenced before its passage. Shields *v.* Johnson County, 144 Mo. 76, 47 S. W. 107.

89. Onondaga County *v.* Morgan, 4 Abb. Dec. (N. Y.) 335, 2 Keyes 277; *In re* Sharpe, 10 Kulp (Pa.) 509.

In Massachusetts, St. (1862) c. 223, providing that the support of lunatics in state hospitals shall be paid by themselves if able, and by the towns of their settlement if they are not able, does not apply to sane persons acquitted of homicide because of insanity at the time of the homicide and committed to a hospital for life under St. (1873) c. 227. Gleason *v.* West Boylston, 136 Mass. 489.

In New Hampshire the county from which a pauper prisoner is sentenced does not become liable for his support at the asylum for the insane after the expiration of his sentence, he having been transferred, as insane, from the state prison to the asylum, under N. H. Pub. St. c. 255, par. 4, providing that a prisoner may be transferred, when insane, to the asylum, to be kept there at the expense of the state, when it will be for the benefit of the person and the welfare of the public. New Hampshire Insane Asylum *v.* Belknap County, 69 N. H. 174, 44 Atl. 928.

In New York under Laws (1874), c. 446, tit. 1, art. 2, § 32, providing that when a poor insane criminal should be committed to a state lunatic asylum the expense should be paid by the county from which he should be sent, and might be recovered from any town, city, or county liable for his maintenance elsewhere, and under the charter of the city of Kingston, providing that the city shall not be liable for the support of paupers or lunatics of the residue of the county, and that the residue of the county shall not be burdened with the maintenance of those of the city, it was held that a county in whose jail a poor insane criminal, a resident of Kingston, was confined, and whence he was removed to an asylum for insane criminals by order of the county judge, might recover the expense of his removal and maintenance from the city. Suffolk County *v.* Kingston, 50 Hun 435, 3 N. Y. Suppl. 221 [*affirmed* in 115 N. Y. 650, 21 N. E. 1118]. But since Laws (1874), c. 446, § 14, imposing on counties the duty of caring for and maintaining resident indigent insane persons was repealed by Laws (1896), c. 545, § 65, devising a new scheme whereby such persons are to be maintained at the expense of the state, it has been held that where an indigent resident of one county is charged with crime in another county, and is committed by the court to an insane asylum on a plea of insanity, there is no general liability of the county of his residence to reimburse the county from which he was sent for sums paid by it for his maintenance in the asylum after such repeal, under Code Cr. Proc. § 662, providing that, when a person pleading insanity in criminal proceedings is sent to a state lunatic asylum, the expenses incident thereto are in the first instance chargeable to the county from which he was sent, but that such county may recover from the estate of defendant, if he have any, or from a relative, town, city, or county bound to provide for and maintain him elsewhere. Jefferson County *v.* Oswego County, 102 N. Y. App. Div. 232, 92 N. Y. Suppl. 709. Under the direct provisions of Laws (1896), c. 545, § 101, as amended by Laws (1899), c. 260, when an insane inmate of a state hospital, committed thereto on the order of a court of criminal jurisdiction, is transferred to the Matteawan state hospital, his expenses are to be paid by the county in which the criminal charge arose, if he was then a resident of that county, and in other cases are a charge against the state. Jefferson County *v.* Oswego County, *supra*.

In Pennsylvania, under the act of April 14, 1845, providing that where an insane person charged with an offense is committed to the asylum, the expenses shall be paid by the county to which he belongs by residence, and the poor district to which the insane person belongs be chargeable with his maintenance, when a lunatic is committed to the state lunatic hospital the county is primarily liable to the hospital for the expenses of maintenance,

city, or district liable for the removal, support, and maintenance of an insane person under the statutes, the commitment must have been authorized,[90] and the mandatory provisions of the statute must have been complied with.[91]

2. LIABILITY OF ESTATE OF INSANE PERSON. The statutes sometimes provide for the appointment of a trustee for the estate of persons charged with crime and found insane and for their support out of their estate,[92] or render their estate, if any, liable to the county, town, city, or district which has paid for their maintenance.[93]

VIII. ACTIONS BY OR AGAINST INSANE PERSONS OR THEIR REPRESENTATIVES.[94]

A. In General — 1. ACTIONS BY INSANE PERSONS. While anciently the rule was otherwise,[95] it is now well settled that an insane person for whom no guardian or committee has been appointed has, in the absence of a statute, the same right to sue as a sane person,[96] although generally suits are required to be brought in his

which the proper poor district must refund, the district to be reimbursed by the estate or relatives of the lunatic. Lower Augusta Tp. *v.* Northumberland County, 37 Pa. St. 143. See also Clearfield County *v.* Cameron Tp., 135 Pa. St. 86, 19 Atl. 952.

90. Gray *v.* Houlton, 63 Me. 566 (unauthorized removal to asylum by justices of the peace); Shields *v.* Johnston County, 144 Mo. 76, 47 S. W. 107; Clarion County *v.* Western Insane Hospital, 111 Pa. St. 339, 3 Atl. 97; Allegheny County *v.* Western Pennsylvania Hospital, 48 Pa. St. 123.

Although county commissioners have no express statutory authority to transfer insane prisoners from the county jail to a hospital, there to be supported at the expense of the county, yet, having no place to secure such persons properly, they may, under their general duties of providing for prisoners, exercise this power and render the county liable to the hospital for their support. Allegheny County *v.* Western Pennsylvania Hospital, 48 Pa. St. 123.

Authority to commit or remove to hospital or asylum see *supra*, VII, C.

91. Certificate of settlement or residence. — In Pennsylvania to render a poor district liable, under the acts of May 14, 1874, and June 25, 1895, to the county for the expense of the removal and maintenance of an insane criminal committed to a state hospital for the insane, it is necessary that the committing court should certify to the trustees of the hospital, on notice to the poor district, that such poor district was the legal settlement or place of residence of the insane criminal, as required by the act of April 14, 1845. Montour County *v.* Danville, etc., Poor Dist., 12 Pa. Dist. 357. Where one charged with a misdemeanor is acquitted upon the ground of insanity, an order committing him to an insane asylum is not a sentence; and it is competent for the court to certify his last place of legal settlement, after the expiration of the term at which such order was made. Clearfield County *v.* Cameron Tp. Poor Dist., 135 Pa. St. 86, 19 Atl. 952.

Power of governor. — Mo. Rev. St. (1889) § 4247, empowering the governor to order a convict who has become insane before execution or the expiration of his sentence to be conveyed to the asylum and there kept until restored to reason, and providing that the expenses shall be paid as provided in cases of the insane poor, does not require, as a condition to the liability of a county for the keeping of an indigent insane convict, that the county court of the county in which he was convicted shall first find as to his residence, lunacy, and insolvency, and enter an order making him a county patient. Shields *v.* Johnson County, 144 Mo. 76, 47 S. W. 107.

92. Devilbiss *v.* Bennett, 70 Md. 554, 17 Atl. 502.

93. See Onondaga County *v.* Morgan, 4 Abb. Dec. (N. Y.) 335, 2 Keyes 277; Lower Augusta Tp. *v.* Northumberland County, 37 Pa. St. 143.

94. Effect of insanity on: Laches see EQUITY, 16 Cyc. 168. Limitations see LIMITATIONS OF ACTIONS.

95. Coke Litt. 135*b*.

96. *Arkansas.* — Jetton *v.* Smead, 29 Ark. 372.

Illinois. — Speck *v.* Pullman Palace Car Co., 121 Ill. 33, 12 N. E. 213; Chicago, etc., R. Co. *v.* Munger, 78 Ill. 300; Leonard *v.* Chicago Times, 51 Ill. App. 427.

Kentucky. — Cameron *v.* Pottinger, 3 Bibb 11.

Tennessee. — Rankin *v.* Warner, 2 Lea 302.

Wisconsin. — Menz *v.* Beebe, 95 Wis. 383, 70 N. W. 468, 60 Am. St. Rep. 120.

United States. — Dudgeon *v.* Watson, 23 Fed. 161, 23 Blatchf. 161.

See 27 Cent. Dig. tit. 'Insane Persons," § 155.

Contra. — Kerwin *v.* Hibernia Ins. Co., 35 La. Ann. 33, *semble*. And see Clark *v.* Perkins, 3 N. H. 339.

Action against guardian. — A person who on inquisition has been found to be of unsound mind cannot sue to impeach sales of his property by his guardian. Robeson *v.* Martin, 93 Ind. 420. Defendant, as a relative of plaintiff, who had become insane and been removed to an asylum without her consent, took charge of her property, including certain notes, which he collected. He acted in good faith, and on being asked by plaintiff about her money, he replied that he had it

name by some person as next friend.[97] A judgment at law is neither void nor voidable merely because plaintiff is a lunatic.[98] Where, however, an insane person has a guardian or committee, every suit respecting his person or estate must, with certain exceptions, be brought by and in the name of the guardian or committee,[99] or in the name of the insane person by the guardian or committee.[1] But a petition may be filed by a next friend in the name of an insane person for removal of his guardian,[2] unless some other remedy is prescribed by statute.[3]

2. Actions in Behalf of Insane Persons.[4] Subject to some exceptions and limitations, the committee or guardian of an insane person is generally authorized to enforce, in behalf of the ward, any cause of action, whether legal or equitable, which the ward himself might enforce if sane.[5] An insane person's wife as such

and that he was saving it for her. There was no claim that defendant ever had any other money of plaintiff than that collected on the notes, and no objection was raised by plaintiff to his possession of the money. It was held that there was such a ratification of defendant's action that a demand on him was essential to the bringing of an action for the recovery of the money collected on the notes after plaintiff's restoration to reason. Biren *v.* Hall, 3 N. Y. Suppl. 747.

Bastardy proceeding.— It has been held that an unmarried woman who is an imbecile and incompetent to testify as a witness cannot institute and prosecute a proceeding in bastardy under a statute which requires that such a proceeding shall be instituted by a complaint on oath by the woman, and does not allow the proceeding to be instituted by any other person. State *v.* Jehlik, 66 Kan. 301, 71 Pac. 572, 61 L. R. A. 265.

Mere weak-mindedness.— Whether one absolutely *non compos mentis* can or cannot bring and maintain an action, in his own name, one who, although very weak in mind, has enough capacity to understand the nature of a particular cause of action and will enough to desire to bring suit thereon may do so without a next friend or guardian. Calhoun *v.* Mosley, 114 Ga. 641, 40 S. E. 714. See also Menz *v.* Beebe, 95 Wis. 383, 70 N. W. 468, 60 Am. St. Rep. 120.

97. *Arkansas.*— Jetton *v.* Smead, 29 Ark. 372.

Kansas.— Gustafison *v.* Ericksdotter, 37 Kan. 670, 16 Pac. 91.

North Carolina.— Smith *v.* Smith, 106 N. C. 498, 11 S. E. 188.

Tennessee.— Parsons *v.* Kinzer, 3 Lea 342.

Texas.— Pelham *v.* Moore, 21 Tex. 755; Holzheiser *v.* Gulf, etc., R. Co., 11 Tex. Civ. App. 677, 33 S. W. 887.

Virginia.— Bird *v.* Bird, 21 Gratt. 712.

See 27 Cent. Dig. tit. "Insane Persons," § 155; and see *infra*, VIII, C, 2, h, (I).

In whose name suits should be brought see *infra*, VIII, B, 2.

98. Speck *v.* Pullman Palace Car Co., 121 Ill. 33, 12 N. E. 213; and other cases in the preceding note.

99. Bird *v.* Bird, 21 Gratt. (Va.) 712. And see McClun *v.* McClun, 176 Ill. 376, 52 N. E. 928. See *infra*, VIII, B, 2.

1. Dixon *v.* Cardozo, 106 Cal. 506, 39 Pac. 857; Lincoln *v.* Thrail, 34 Vt. 110. See *infra*, VIII, B, 2.

2. Gray *v.* Parke, 155 Mass. 433, 29 N. E. 641.

3. See Tiffany *v.* Worthington, 96 Iowa 560, 65 N. W. 817.

4. Suit for divorce see Divorce, 14 Cyc. 654, text and notes 17, 18; 712, note 94.

Suit to annul marriage see Marriage.

5. See cases cited *infra*, this note.

An action of ejectment does not lie by the committee of a lunatic against the wife of the lunatic to recover possession of the lunatic's property, where the possession of the wife is claimed under her husband, and not adversely to him. Shaffer *v.* List, 114 Pa. St. 486, 7 Atl. 80.

Detinue.— Previous to the revisal of 1819, the committee of a lunatic could not maintain an action of detinue. Ashby *v.* Harrison, 1 Patt. & H. (Va.) 1.

Partition.— The action of the guardian of an insane person in bringing a partition suit as to the ward's interest in real estate binds the ward to everything which the partition suit could validly accomplish. Cowling *v.* Nelson, (Ark. 1905) 88 S. W. 913.

The committee may maintain trover for the taking of property from the ward under the terms of a mortgage executed before the appointment of the committee but within the time for which the lunatic's insanity was judicially determined, where the mortgagee had knowledge of the disability. Sander *v.* Savage, 75 N. Y. App. Div. 333, 78 N. Y. Suppl. 189, 11 N. Y. Annot. Cas. 433.

In an action to recover land conveyed by the lunatic to defendant, where the latter has made improvements, the court may, under appropriate pleadings, take equitable jurisdiction and direct such restitution as the case requires. Brown *v.* Miles, 61 Hun (N. Y.) 453, 16 N. Y. Suppl. 251.

Powers the same as guardians of infants.— The guardian of an insane person may sue at law, not only for the recovery of a debt, but in any case in which the guardian of an infant may sue. Dearman *v.* Dearman, 5 Ala. 202; Mosebach *v.* Hess, 16 Montg. Co. Rep. (Pa.) 16.

Recovery for injuries to estate.— Under W. Va. Code, c. 58, § 37, it is the duty of the committee of an insane person to sue for injuries done to the *corpus* or income of the real or personal estate of his ward. Johnson *v.* Chapman, 43 W. Va. 639, 28 S. E. 744.

Recovery of ward's will.— Cal. Code Civ.

has no authority to maintain an action on his behalf;[6] nor have his prospective heirs such authority.[7]

3. ACTIONS AGAINST INSANE PERSONS.[8] An insane person not under guardianship may be sued the same as a sane person.[9] At common law the rule was the same after inquisition of lunacy and the appointment of a guardian or committee;[10] but now if there be a committee or guardian it is generally necessary to join him as a party defendant,[11] and in some states plaintiff is required to obtain leave of

Proc. § 1800, providing that a guardian may recover "money, goods, or effects, or an instrument in writing, belonging to the ward or to his estate," from any person who has "concealed, embezzled, or conveyed away" the same, refers to such "instruments" only as the guardian is entitled to as assets or evidence of his ward's title to property; and it does not authorize the guardian of a lunatic to recover the will of his ward from a person in whose custody the ward had placed it before she was declared insane. Mastick *v.* San Francisco Super. Ct., 94 Cal. 347, 29 Pac. 869.

Right to avoid conveyances made before guardianship.— The committee or guardian may in a proper case sue to set aside conveyances made by the lunatic before the committee or guardian was appointed. Reason *v.* Jones, 119 Mich. 672, 78 N. W. 899; Mosebach *v.* Hess, 16 Montg. Co. Rep. (Pa.) 16; Hinchman *v.* Ballard, 7 W. Va. 152.

Effect of appeal in lunacy proceedings.— A bill for discovery and delivery of the property of a lunatic may be filed by the committee notwithstanding the removal of the record of the lunacy proceedings to the supreme court by appeal from the order of commitment. Equitable Trust Co. *v.* Garis, 190 Pa. St. 544, 12 Atl. 1022, 70 Am. St. Rep. 644.

Suit to set aside guardian's sale.— Equity has jurisdiction to set aside a colorable sale by a guardian of an incompetent of his ward's land, whereby the property passed into his own hands, although the sale was made under the jurisdiction of the probate court. Goodell *v.* Goodell, 173 Mass. 140, 53 N. E. 275.

Conditions precedent to bringing suit.—The committee of a lunatic cannot trench upon the *corpus* of the lunatic's estate for the bringing of a suit, unless he first obtains leave of court, or unless he shows that there was great necessity for bringing the suit, or advantage to accrue to his beneficiary from bringing it. Ashley *v.* Holman, 44 S. C. 145, 21 S. E. 624.

6. Kilbee *v.* Myrick, 12 Fla. 419 (action to set aside deed); Texas, etc., R. Co. *v.* Bailey, 83 Tex. 19, 18 S. W. 481 (action for personal injuries to husband). And see Byrnes *v.* Byrnes, 111 La. 403, 35 So. 617.

It has been held, however, that the wife of a lunatic not having a committee has implied authority to sue in his name for debts due him. Rock *v.* Slade, 1 Arn. 346, 7 Dowl. P. C. 22, 2 Jur. 993; Gleddon *v.* Trebble, 9 C. B. N. S. 367, 30 L. J. C. P. 160, 99 E. C. L. 367.

7. Bradford *v.* Mackenzie, 89 Md. 763, 43 Atl. 923, holding that no one is entitled to be recognized as an heir of a living person, so as to authorize him to maintain a suit or proceeding in respect to the property of such person, although the latter is insane and incapable of managing his estate. And see Byrnes *v.* Byrnes, 111 La. 403, 35 So. 617; Kerwin *v.* Hibernia Ins. Co., 35 La. Ann. 33.

8. **Liability of estate to garnishment** see GARNISHMENT, 20 Cyc. 1027.

Suit against insane person for divorce see DIVORCE, 14 Cyc. 654, text and notes 23–25.

9. *Alabama.*— *Ex p.* Northington, 37 Ala. 496, 79 Am. Dec. 67.

Illinois.— Maloney *v.* Dewey, 127 Ill. 395, 19 N. E. 848, 11 Am. St. Rep. 131.

New Jersey.— Van Horn *v.* Hann, 39 N. J. L. 207.

New York.— Livingston *v.* Livingston, 56 N. Y. App. Div. 484, 67 N. Y. Suppl. 789; Kent *v.* West, 16 N. Y. App. Div. 496, 44 N. Y. Suppl. 901; Prentiss *v.* Cornell, 31 Hun 167.

South Carolina.— See Amos *v.* Taylor, 2 Brev. 20.

See 27 Cent. Dig. tit. "Insane Persons," § 155.

Action on debt contracted before lunacy.— In the absence of a special statute to the contrary, a lunatic may be sued at law for a debt contracted before lunacy. Stigers *v.* Brent, 50 Md. 214, 33 Am. Rep. 317; Hines *v.* Potts, 56 Miss. 346.

Jurisdiction.— Iowa Code, § 2312, conferring jurisdiction of the estates of insane persons on the circuit court, does not exclude the jurisdiction of the district court on questions of right between insane persons and others. Flock *v.* Wyatt, 49 Iowa 466.

10. Van Horn *v.* Hann, 39 N. J. L. 207; Anonymous, 13 Ves. Jr. 590, 33 Eng. Reprint 415. And see Ingersoll *v.* Harrison, 48 Mich. 234, 12 N. W. 179.

A suit for divorce must abate, where it appears that defendant is and has been adjudged a lunatic, for the court can take no jurisdiction of or obtain service upon an insane person. Rhude *v.* Rhude, 8 Ohio S. & C. Pl. Dec. 684.

Suit by guardian against ward.— Equity will not entertain a bill against a lunatic by a person acting as his guardian *de facto* for payment of what may be found due him. The proper proceeding in such case is by petition. Tally *v.* Tally, 22 N. C. 385, 24 Am. Dec. 407.

11. See *infra*, VIII, B, 1, b; VIII, C, 1.

Foreign committee.— An appointment of a committee of the person and estate of a

court before instituting suit against an adjudged incompetent.[12] After restoration to sanity the former lunatic may of course be sued the same as any other person.[13]

4. Actions Against Representatives of Insane Persons.[14] The committee or guardian of an insane person is subject to suit for breach of his own duties and obligations,[15] but a guardian or committee cannot be sued on claims against the

lunatic by a court of competent jurisdiction of another state does not divest the courts of this state of their ordinary jurisdiction to proceed against the lunatic by action. Bayard *v.* Scanlon, 1 N. Y. City Ct. 487.

Reversal of order of appointment.— A decree of the probate court appointing a guardian for defendant as an insane person which has been reversed on appeal is not a sufficient objection to the maintenance of a suit commenced against him after the appeal but before the reversal. Smith *v.* Davis, 45 N. H. 566.

12. Smith *v.* Keteltas, 27 N. Y. App. Div. 279, 50 N. Y. Suppl. 471, 27 N. Y. Civ. Proc. 471 [*affirming* 22 Misc. 588, 50 N. Y. Suppl. 747]; Matter of Hopper, 5 Paige (N. Y.) 489; Soverhill *v.* Dickson, 5 How. Pr. (N. Y.) 109, 3 Code Rep. 162.

It is a contempt to begin an action at law against an adjudged lunatic without leave of court. Williams *v.* Cameron, 26 Barb. (N. Y.) 172; Swartwout *v.* Burr, 1 Barb. (N. Y.) 495; Niblo *v.* Harrison, 9 Bosw. (N. Y.) 668; Soverhill *v.* Dickson, 5 How. Pr. (N. Y.) 109, 3 Code Rep. 162; L'Amoureux *v.* Crosby, 2 Paige (N. Y.) 422, 22 Am. Dec. 655; Brasher *v.* Van Cortlandt, 2 Johns. Ch. (N. Y.) 242.

Injunction will issue to restrain prosecution of an action commenced against an adjudged lunatic without leave of court. Crippen *v.* Culver, 13 Barb. (N. Y.) 424; Sternbergh *v.* Schoolcraft, 2 Barb. (N. Y.) 153; Matter of Heller, 3 Paige (N. Y.) 199.

Failure to obtain leave of court is waived by defendant where he allows the action to proceed to judgment without seeking to enjoin its prosecution. Crippen *v.* Culver, 13 Barb. (N. Y.) 424; Sternbergh *v.* Schoolcraft, 2 Barb. (N. Y.) 153.

13. Harris *v.* Davis, 1 Ala. 259 (where a wife filed a bill for divorce and alimony on the ground that the husband was a lunatic, and the chancellor made an order allowing one thousand dollars per year for the support and maintenance of herself and children, and the husband was afterward restored to sanity, and the bill dismissed, and it was held that assumpsit would lie against the husband to recover the money due for the tuition of the children on a contract made by the wife during the pendency of the suit for divorce); Smith *v.* Davis, 45 N. H. 566 (where A, who had given a promissory note to B, had subsequently, as an insane person, been placed under the guardianship of the latter, but the guardianship had ceased, and the note was in no way connected therewith, and it was held that it was not necessary to the maintenance by B against A of an action on the note, commenced after the termination of the guardianship, for B to show that his account as such guardian had been settled in the probate court). See, however, Westmoreland *v.* Davis, 1 Ala. 299, holding that where the guardian of the person and estate of a lunatic is charged with goods bought by him for the maintenance of the lunatic, assumpsit cannot be maintained by the creditor against the lunatic after his restoration to reason.

14. **Action on guardian's bond** see *supra*, II, D, 8, f.

15. See cases cited *infra*, this note.

Failure to pay over estate.— If the committee or guardian fails to account for and pay over the estate to the person entitled to it he may be sued therefor. Straight *v.* Ice, 56 W. Va. 69, 48 S. E. 837. Thus on the restoration of a lunatic to his right mind, it is the duty of the guardian to restore to him the funds belonging to him, and if he fails to do so he is liable in an action of assumpsit. The bond given the guardian of an insane person is collateral merely, and does not preclude a remedy against the guardian himself. Shepherd *v.* Newkirk, 21 N. J. L. 302. And an order authorizing the committee of a lunatic to retain the interest of the estate for his support does not bar an action for profits made by the committee through the labor of the ward. Ashley *v.* Holman, 15 S. C. 97. Where a guardian fails to account for and pay over the estate of his deceased ward, the remedy of the person entitled to the estate is by an action against the guardian personally or on his bond. Stumph *v.* Pfeiffer, 58 Ind. 472. However, an action will not lie on a decree of the orphans' court to recover the balance declared by the decree to remain in the hands of the guardian of a lunatic, after the commission of lunacy has been superseded. Shepherd *v.* Newkirk, 20 N. J. L. 343. And an order of the probate court directing the guardian of an insolvent insane person to set apart one thousand dollars for the support of the ward and his family and the education of his children, if not attacked, is a sufficient defense to an action against the guardian for breach of duty in not distributing the fund among the ward's creditors, although the court had no power to make it. Frost *v.* Redford, 127 Mo. 492, 30 S. W. 179.

Action by wife for support.— An action by a wife against the guardian of her insane husband for support is in effect against her husband, and will not lie, as the common law gives no such right, and the statute gives it only where the husband has de-

ward[16] in the absence of statute to the contrary.[17] In some states a committee or guardian cannot be sued without leave of court first obtained.[18] If an insane defendant dies pending a suit against him in which he is represented by guardian or committee, the suit abates and all proceedings had before its revival are void.[19]

serted his wife, or is in the state prison, or is a habitual drunkard, or has renounced the marital relation and refused to live with his wife by joining a sect requiring such renunciation. Hallett *v.* Hallett, 8 Ind. App. 305, 34 N. E. 740.

Action for fund not a part of ward's estate. — Where the committee of an insane person has obtained and holds a fund, in his representative capacity, not belonging to his ward's estate, an action to determine the ownership thereof is maintainable against him in the same capacity. Dunham *v.* Fitch, 48 N. Y. App. Div. 321, 62 N. Y. Suppl. 905.

Action for waste. — If a next friend suing in behalf of the ward can maintain an action for waste committed by the guardian or recover money in his hands, it can be done only in connection with a proceeding to remove the guardian and revoke his letters. Bonner *v.* Evans, 89 Ga. 656, 15 S. E. 906.

The heir or administrator of the committee may be sued by the administrator of the lunatic in any county in which he may be found, and jurisdiction is not confined to the courts of the county where the custody of the lunatic belonged. Hardin *v.* Smith, 7 B. Mon. (Ky.) 390.

16. Raymond *v.* Sawyer, 37 Me. 406; *Ex p.* Leighton, 14 Mass. 207; Bolling *v.* Turner, 6 Rand. (Va.) 584. *Contra,* Aldrich *v.* Williams, 12 Vt. 413.

Debts contracted before guardianship. — An action will not lie against the conservator of an insane person for a debt due from the latter, contracted before the appointment of the conservator. Holdom *v.* James, 50 Ill. App. 376.

17. Morgan *v.* Hoyt, 69 Ill. 489; Bolling *v.* Turner, 6 Rand. (Va.) 584.

Petition for payment or leave to sue. — A claim against the estate of a lunatic under the care of a committee should be pursued by a petition for payment or leave to bring a suit. Williams *v.* Cameron, 26 Barb. (N. Y.) 172; Matter of Hopper, 5 Paige (N. Y.) 489. And see Brasher *v.* Van Cortlandt, 2 Johns. Ch. (N. Y.) 242, 400; Matter of Heller, 3 Paige (N. Y.) 199. If the chancellor is satisfied that the debt is justly due, the committee will be ordered to pay it, and in a case of doubt the claim will be referred to a master, or the claimant will be allowed to sue at law. Matter of Hopper, *supra.* Where there is a right of action, preference will be given to a reference under direction of court over a suit at law. Williams *v.* Cameron, *supra.*

Action to have proceeds of sale applied to debt.—Although N. Y. Code Civ. Proc. § 2361, requires the avails of a lunatic's property to be disposed of by the "order" of the court, yet an action to apply the proceeds of a sale of the lunatic's land to the satisfaction of plaintiff's mortgage may be maintained, because the judgment of the court will be as authoritative as its order. Parmerter *v.* Baker, 5 Silv. Sup. (N. Y.) 167, 8 N. Y. Suppl. 69, 24 Abb. N. Cas. 104.

Jurisdiction. — The court of probate being a court of limited jurisdiction, La. Code Pr arts. 924, 983, giving it jurisdiction of claims due by testamentary executors, administrators, and successions under the management of curators, does not vest it with jurisdiction of an action against the curators of an interdicted person to recover a claim against the person interdicted. Hyde *v.* Erwin, 12 Rob. (La.) 536.

18. See cases cited *infra,* this note. See also *supra,* note 17.

Committee appointed pendente lite. — If, pending suit against a lunatic, a committee is appointed for him, leave to substitute the committee as defendant must be applied for. Carter *v.* Burrall, 80 N. Y. App. Div. 395, 81 N. Y. Suppl. 30; Matter of Delahunty, 18 N. Y. Suppl. 395, 28 Abb. N. Cas. 245.

Granting leave nunc pro tunc. — Ordinarily leave to sue will not be granted *pendente lite nunc pro tunc.* Matter of Delahunty, 18 N. Y. Suppl. 395, 28 Abb. N. Cas. 245. See, however, Carter *v.* Burrall, 80 N. Y. App. Div. 395, 81 N. Y. Suppl. 30.

Presumption of leave. — Where it is not alleged that an action at law against the committee of a lunatic was authorized by the court granting leave to bring an action in the supreme court, such authority will not be presumed. Kent *v.* West, 33 N. Y. App. Div. 112, 53 N. Y. Suppl. 244.

Effect of leave.—Permission granted by the county court to bring an action against the committee of a lunatic in the supreme court is not a determination that petitioner has a cause of action. Kent *v.* West, 33 N. Y. App. Div. 112, 53 N. Y. Suppl. 244.

When granted. — Leave to sue the committee should be granted when the party applying shows a case in which a court of equity would grant relief if the claim should be established on the trial. And where the affidavits of the moving and opposing parties are conflicting and irreconcilable, it is not proper to decide the conflict upon a motion, and leave should be given to sue. *In re* Wing, 2 Hun (N. Y.) 671, 5 Thomps. & C. 205.

19. Paxton *v.* Stuart, 80 Va. 873.

Effect of revival. — Where an action is brought on a claim against an insane person who is represented by a guardian appointed in another state, and the insane person dies before judgment, and his executor is made defendant, the guardian ceases to be a party, and the district court has jurisdiction. Findley *v.* Cowles, 93 Iowa 389, 61 N. W. 998.

The administrator of the ward may be sued in a proper case instead of his guardian or committee.[20]

B. Parties[1] — **1. In General — a. Plaintiffs** — (I) *At Law.* In an action at law on behalf of an insane person to enforce his rights both the insane person[2] and his committee or guardian should be joined as plaintiffs.[3]

(II) *In Equity.* Where a bill is instituted on behalf of a lunatic it must be by his guardian or committee, if one has been appointed and is competent to act,[4] in which case the lunatic and not the guardian or committee is the real party plaintiff;[5] and although it is the general practice to join a lunatic with his guardian or committee on such bill,[6] yet such joining is merely a matter of form and in general it is immaterial whether or not the lunatic be made a party to the suit.[7] In some cases a relator[8] or the attorney-general[9] should be party plaintiff.

b. Defendants — (I) *At Law.* In actions at law to enforce rights against an insane person the lunatic should be made a party defendant,[10] and his guardian or committee should at least be notified of the action, so that he may appear and defend.[11] In an action by a guardian or committee other persons interested should be made parties defendant.[12]

(II) *In Equity.* In a suit in equity relating to an insane person's interests, his guardian or committee is a proper party defendant.[13] But the insane person

20. Reando *v.* Misplay, 90 Mo. 251, 2 S. W. 405, 59 Am. Rep. 13 (holding that the fact that plaintiff might have brought a suit against the guardian of an insane person cannot affect the right to sue the administrator, when the guardianship has been terminated on the death of the insane person); *Ex p.* McDougal, 12 Ves. 384 (where, pending a petition in equity for the allowance of a claim against a lunatic, the lunatic died, and the chancellor required petitioner to establish the claim by action at law against the administrator before allowing the claim).

1. Parties generally see Parties.

Capacity of insane person to sue and be sued in general see *supra*, VIII, A, 1, 3.

2. Griffin *v.* Griffin, 20 S. C. 486; Rodgers *v.* Ellison, Meigs (Tenn.) 88; Dennis *v.* Dennis, 2 Saund. 328, 333 note.

3. *New Hampshire.*— Lang *v.* Whidden, 2 N. H. 435.

Pennsylvania. — Uberoth *v.* Union Nat. Bank, 9 Phila. 83.

Rhode Island.— Hamilton *v.* Colwell, 10 R. I. 39.

South Carolina.— McCreight *v.* Aiken, 3 Hill 337.

Texas.— See Pelham *v.* Moore, 21 Tex. 755, holding that a lunatic cannot sue in his own name without at least having someone joined with him to be responsible for costs.

See 27 Cent. Dig. tit. "Insane Persons," § 161. And see *infra*, VIII, C, 1.

4. See *infra*, VIII, C, 1.

5. Demarest *v.* Vandenberg, 39 N. J. Eq. 130 [*affirmed* in 40 N. J. Eq. 356, 2 Atl. 647].

6. Ortley *v.* Messere, 7 Johns. Ch. (N. Y.) 139.

7. Koepke *v.* Bradley, 3 N. Y. App. Div. 391, 38 N. Y. Suppl. 707 [*affirmed* in 151 N. Y. 622, 45 N. E. 1132]; Gorham *v.* Gorham, 3 Barb. Ch. (N. Y.) 24; Ortley *v.* Messere, 7 Johns. Ch. (N. Y.) 139. See Palmer *v.* Woolrick, 1 Ch. Cas. 153, 22 Eng. Reprint 739; Palmer *v.* Parkhurst, 1 Ch. Cas. 112, 22 Eng. Reprint 719; Ridler *v.* Ridler, 1 Eq. Cas. Abr. 279, 21 Eng. Reprint 1045.

Where one committee dies, an action against his estate for the profits made by the labor of his insane ward may be maintained by the new committee without joining the ward. Ashley *v.* Holman, 15 S. C. 97.

8. Atty.-Gen. *v.* Tiler, Dick. 378, 21 Eng. Reprint 316; Atty.-Gen. *v.* Tyler, 2 Eden 230, 28 Eng. Reprint 886, holding that in an information on behalf of a lunatic a proper relator should be appointed who might be responsible for costs of the suit. See, generally, Informations in Civil Cases.

9. Leigh *v.* Wood, Rep. t. Finch, 135, 23 Eng. Reprint 73, holding that the attorney-general must be a party to a bill to avoid a lease on the ground that the lessor is a lunatic.

10. Justice *v.* Ott, 87 Cal. 530, 25 Pac. 691; Rodgers *v.* Ellison, Meigs (Tenn.) 88; Dennis *v.* Dennis, 2 Saund. 328, 333 note.

11. Justice *v.* Ott, 87 Cal. 530, 25 Pac. 691. And see *infra*, VIII, C, 1.

In Massachusetts notice of the pendency of the action should be given to the guardian, but he should not be made a party. Taylor *v.* Lovering, 171 Mass. 303, 50 N. E. 612.

Adjudication of insanity pendente lite.— Where, after commencement of the action against a lunatic and before judgment is rendered, defendant is adjudged a lunatic, and a committee is appointed, the committee should be made a party to the action. *Ex p.* Kibler, 53 S. C. 461, 31 S. E. 274.

12. Griffin *v.* Griffin, 20 S. C. 486, holding, however, that county commissioners from whom money of a lunatic had been recovered by a third person are not necessary parties in an action against such person by the lunatic's committee afterward appointed to recover such money.

13. Andrews *v.* O'Reilly, 22 R. I. 362, 48 Atl. 7. And see *infra*, VIII, C, 1.

himself, where properly represented,[14] is not in general a necessary party to the suit, although he may be properly made defendant.[15] But where his committee or guardian has a personal interest in the controversy antagonistic to that of the lunatic, the latter should also be a party to the suit in order that the court might assign him a guardian or other proper representative to appear and protect his rights against the committee.[16] Other persons interested in the subject-matter of the suit should also be joined.[17]

2. In Whose Name Action Should Be Brought — a. In General. In the absence of statute declaring otherwise, an action either at law or in equity to enforce the rights of an insane person under guardianship should in general be in the name of such insane person by his guardian or committee and not in the name of the guardian or committee,[18] or in his own name alone if no guardian or committee has been appointed.[19] Thus in the absence of statute a suit should be in the name of the insane person and not in the name of the guardian or committee, in ejectment,[20]

The guardian of a defendant declared a lunatic, after a bill has been filed, should be made a party to the suit. Search *v.* Search, 26 N. J. Eq. 110.

14. See Eslava *v.* Lepretre, 21 Ala. 504, 56 Am. Dec. 266.

15. Berry *v.* Rogers, 2 B. Mon. (Ky.) 308; Riddle *v.* Fannin, 72 S. W. 290, 24 Ky. L. Rep. 1737; Teal *v.* Woodworth, 3 Paige (N. Y.) 470; Brasher *v.* Van Cortlandt, 2 Johns. Ch. (N. Y.) 242, 400. See Harrison *v.* Rowan, 11 Fed. Cas. No. 6,143, 4 Wash. 202.

Foreclosure of mortgage.— An insane ward under guardianship is not a proper or necessary party to an action to foreclose a mortgage on his land. Jones *v.* Crowell, 143 Ind. 218, 42 N. E. 612.

An insane husband under guardianship cannot be joined in a suit with his wife. Hays *v.* Miller, 81 Mo. 424.

Even though he is a necessary party, the bill should not be dismissed absolutely on demurrer if he is not joined, but leave should be given to amend after hearing the demurrer. Berry *v.* Rogers, 2 B. Mon. (Ky.) 308.

16. Teal *v.* Woodworth, 3 Paige (N. Y.) 470; Snell *v.* Hyatt, Dick. 287, 21 Eng. Reprint 279. And see *infra*, VIII, C, 2, a.

17. Ryder *v.* Topping, 15 Ill. App. 216. See, generally, Parties.

18. *Alabama.*— West *v.* West, 90 Ala. 458, 7 So. 830, bill for partition.

Connecticut.— Riggs *v.* Zaleski, 44 Conn. 120; Hutchins *v.* Johnson, 12 Conn. 376, 30 Am. Dec. 622, action on an award.

Kentucky.— Crane *v.* Anderson, 3 Dana 119.

Massachusetts.— Taylor *v.* Lovering, 171 Mass. 303, 50 N. E. 612; Lombard *v.* Morse, 155 Mass. 136, 29 N. E. 205, 14 L. R. A. 273.

Missouri.— Reed *v.* Wilson, 13 Mo. 28, replevin.

New York.— Burnet *v.* Bookstaver, 10 Hun 481; McKillip *v.* McKillip, 8 Barb. 552; Lane *v.* Schermerhorn, 1 Hill 97, assumpsit. The committee of a lunatic is not a trustee of an express trust, within the meaning of Code, § 113, and cannot sue in his own name to recover possession of land which belonged to the lunatic prior to his appointment. Such action must be brought in the name of the lunatic. Burnet *v.* Bookstaver, *supra.*

Pennsylvania.— Arnold *v.* Townsend, 14 Phila. 216, bill to set aside conveyance.

Rhode Island.— Hamilton *v.* Colwell, 10 R. I. 39.

South Carolina.— McCreight *v.* Aiken, 3 Hill 337.

Texas.— See Flynn *v.* Hancock, 35 Tex. Civ. App. 395, 80 S. W. 245.

Wisconsin.— King *v.* Cutts, 24 Wis. 625, unlawful detainer.

England.— Cook *v.* Darston, Brownl. & G. 197.

See 27 Cent. Dig. tit. "Insane Persons," § 162.

Where an idiot is under guardianship, a suit may be maintained by the guardian in the name of his ward without any mention of the guardian, unless advantage be taken of the defect before pleading the general issue. Lang *v.* Whidden, 2 N. H. 435.

Where a plaintiff becomes insane after the commencement of an action, his guardian cannot be substituted as sole plaintiff, but the suit should be prosecuted in the name of plaintiff as an insane person, by his guardian. Dixon *v.* Cardozo, 106 Cal. 506, 39 Pac. 857.

The appointment of a guardian does not vest in him a cause of action in favor of the insane person, nor deprive the latter of his right or property therein. Dixon *v.* Cardozo, 106 Cal. 506, 39 Pac. 857.

An order substituting the guardian of an insane plaintiff, although erroneous, does not effect a dismissal of the action as to the incompetent plaintiff. Dixon *v.* Cardozo, 106 Cal. 506, 39 Pac. 857.

19. Ziegler *v.* Bark, 121 Wis. 533, 99 N. W. 224.

20. Allen *v.* Ranson, 44 Mo. 263, 100 Am. Dec. 282; Petrie *v.* Shoemaker, 24 Wend. (N. Y.) 85; Lane *v.* Schermerhorn, 1 Hill (N. Y.) 97; Brooks *v.* Brooks, 25 N. C. 389; Rankin *v.* Warner, 2 Lea (Tenn.) 302. See also Ejectment, 15 Cyc. 60.

Ejectment, where equitable relief is not demanded, is properly brought in the name of plaintiff, although he is a lunatic of whose person and estate a committee has been appointed. Skinner *v.* Tibbitts, 13 N. Y. Civ. Proc. 370.

or upon a contract or covenant made with the insane person.[21] But the committee or guardian may sue in his own name upon a contract made by him relating to the property of the insane person,[22] and may sue in trover in his own name to recover property converted since his appointment,[23] or even before.[24] In some jurisdictions the distinction is made that, although an action at law on behalf of a lunatic should be brought only in the name of the lunatic if of full age,[25] and if under age by his guardian or committee,[26] a suit in equity may be brought either in the name of the guardian or committee or in the name of the lunatic by his guardian or committee.[27]

b. Under Statutes. Under the statutes in some jurisdictions a suit on behalf of an insane person may, or in some cases must, be brought in the name of his guardian or committee, if one has been appointed and is competent to act.[28]

Under a Pennsylvania statute (Act (1836), § 20), ejectment for land belonging to a lunatic may be brought in the name of the lunatic as owner or in the name of the committee alone. Warden *v.* Eichbaum, 14 Pa. St. 121.

21. Cameron *v.* Pottinger, 3 Bibb (Ky.) 11.

22. Crane *v.* Anderson, 3 Dana (Ky.) 119.

Promissory notes given to a guardian of an insane person as guardian may be sued upon by such guardian in his own name. Nickerson *v.* Gilliam, 29 Mo. 456, 77 Am. Dec. 583; Davis *v.* Carpenter, 12 How. Pr. (N. Y.) 287.

Detinue may be maintained by the guardian or committee in his own name for personal property of his ward, hired from him by a third person, the contract and not the title to the property being the basis of the action. Crane *v.* Anderson, 3 Dana (Ky.) 119. See also DETINUE, 14 Cyc. 243.

23. Field *v.* Lucas, 21 Ga. 447, 68 Am. Dec. 465. *Compare* McCreight *v.* Aikin, Rice (S. C.) 56.

24. Sander *v.* Savage, 75 N. Y. App. Div. 333, 78 N. Y. Suppl. 189, 11 N. Y. Annot. Cas. 433, holding this to be true where his appointment was made in proceedings where the insanity of the insane person was judicially declared as before the time of such conversion.

Action against predecessor in office.— A second committee of an insane person may sue in his own name the estate of a deceased committee to recover from it money chargeable to the first committee as such. Straight *v.* Ice, 56 W. Va. 60, 48 S. E. 837.

25. Green *v.* Kornegay, 49 N. C. 66, 67 Am. Dec. 261; Shaw *v.* Burney, 36 N. C. 148; Brooks *v.* Brooks, 25 N. C. 389; McCreight *v.* Aikin, 1 Rice (S. C.) 56.

Trover for property of a lunatic must be brought in the name of a lunatic of full age. McCreight *v.* Aikin, Rice (S. C.) 56.

26. McCreight *v.* Aikin, Rice (S. C.) 56.

27. Latham *v.* Wiswall, 37 N. C. 294; Shaw *v.* Burney, 36 N. C. 148.

28. *Alabama.*— West *v.* West, 90 Ala. 458, 7 So. 830, holding, however, that Code, § 2582, does not apply to suits in equity.

Illinois.— McClun *v.* McClun, 176 Ill. 376, 52 N. E. 928, holding that where a bill filed in the name of a lunatic by his conservator is amended by making the conservator a co-complainant, it is a mere irregularity to let stand the name of the lunatic as a complainant.

Iowa.— Chavannes *v.* Priestly, 80 Iowa 316, 45 N. W. 766, 9 L. R. A. 193, holding that a person under guardianship as a lunatic cannot, under Code (1873), § 1400, maintain an action for slander in his own name.

New York.— McKillip *v.* McKillip, 8 Barb. 552; Wright *v.* Hayden, 31 Misc. 116, 63 N. Y. Suppl. 796, suit for distributive share. Under the exception contained in the code the committee of a lunatic must bring an action in his own name to set aside an act or deed executed by the lunatic (Person *v.* Warren, 14 Barb. 488), or to rescind the sale of land made to a lunatic and to annul the satisfaction of a mortgage given by him (Fields *v.* Fowler, 2 Hun 400). The word "may" contained in Code Civ. Proc. § 2340, providing that the committee of a lunatic may maintain in his own name, etc., is permissory and not mandatory (Skinner *v.* Tibbitts, 13 N. Y. Civ. Proc. 370), and does not prevent an action being brought in the name of the person of unsound mind before he has been judicially declared such (Runberg *v.* Johnson, 11 N. Y. Civ. Proc. 283).

Ohio.— Wageman *v.* Brown, 1 Ohio Dec. (Reprint) 69, 1 West. L. J. 454.

Vermont.— Lincoln *v.* Thrall, 34 Vt. 110; Holden *v.* Scanlin, 30 Vt. 177; Collard *v.* Crane, Brayt. 18.

Virginia.— Bird *v.* Bird, 21 Gratt. 712. See Cole *v.* Cole, 28 Gratt. 365.

Compare Looby *v.* Redmund, 66 Conn. 444, 34 Atl. 102; Treat *v.* Peck, 5 Conn. 280.

See 27 Cent. Dig. tit. "Insane Persons," § 162.

A committee appointed for an incompetent infant after the latter has commenced an action by guardian *ad litem* may properly be substituted as plaintiff under N. Y. Code Civ. Proc. §§ 468, 469, 2340 (Callahan *v.* New York Cent., etc., R. Co., 99 N. Y. App. Div. 56, 90 N. Y. Suppl. 657); and since such action was properly commenced, it is unnecessary to make the appointment of the committee *nunc pro tunc* as of the time of the commencement of the action, or to allow the substituted plaintiff to generally amend his complaint (Callahan *v.* New York Cent., etc., R. Co., *supra*).

C. Representation by Guardian or Guardian Ad Litem or Next Friend — 1. General Guardian or Committee. In proceedings on behalf of or against an insane person under guardianship, subject to some exceptions,[29] his interests whether as plaintiff or defendant should be represented by his general guardian or committee, who should conduct the proceedings on his behalf,[30] and it is not essential to his appearance for the lunatic that personal service should first have been made upon the latter.[31] Such guardian or committee may do or consent to any act in the course of the proceedings in protecting his ward's interests which does not change the nature or condition of his estate.[32] Thus it has been held that he may with the sanction of the court compromise a doubtful claim,[33]

29. See *infra*, VIII, C, 2, a.

30. *California.*— Mullen *v.* Dunn, 134 Cal. 247, 66 Pac. 209.

District of Columbia.—Mackey *v.* Peters, 22 App. Cas. 341.

Florida.— Kilbee *v.* Myrick, 12 Fla. 419, holding that it is for a lunatic's guardian to institute proceedings to set aside a deed executed when the grantor was insane.

Illinois.— Isle *v.* Cranby, 199 Ill. 39, 64 N. E. 1065, 64 L. R. A. 513 [*reversing* 101 Ill. App. 221, and *overruling* so far as conflicting Covington *v.* Neftzger, 140 Ill. 608, 30 N. E. 764, 33 Am. St. Rep. 261]; Ryder *v.* Topping, 15 Ill. App. 216.

Indiana.— Yount *v.* Turnpaugh, 33 Ind. 46; Symmes *v.* Major, 21 Ind. 443 (holding that a general guardian is a proper party to appear for an insane person without any special order of the court); Aldridge *v.* Montgomery, 9 Ind. 302.

Kansas.— Gustafison *v.* Ericksdotter, 37 Kan. 670, 16 Pac. 91.

Louisiana.— Byrnes *v.* Byrnes, 111 La. 403, 35 So. 617.

Maryland.— Hewitt's Case, 3 Bland 184.

Missouri.— Hays *v.* Miller, 81 Mo. 424.

Nebraska.— McAllister *v.* Lancaster County Bank, 15 Nebr. 295, 18 N. W. 57.

New Jersey.— Palmer *v.* Sinnickson, 59 N. J. Eq. 530, 46 Atl. 517; Demarest *v.* Vandenberg, 39 N. J. Eq. 130 [*affirmed* in 40 N. J. Eq. 341]; Dorsheimer *v.* Roorback, 18 N. J. Eq. 438; Norcom *v.* Rogers, 16 N. J. Eq. 484.

New York.— Rankert *v.* Rankert, 105 N. Y. App. Div. 37, 93 N. Y. Suppl. 399.

Ohio.— Row *v.* Row, 53 Ohio St. 249, 41 N. E. 239.

South Carolina.— See McCreight *v.* Aikin, Rice 56.

Texas.— Texas, etc., R. Co. *v.* Bailey, 83 Tex. 19, 18 S. W. 481.

Virginia.— Bird *v.* Bird, 21 Gratt. 712.

England.— See In re Manson, 21 L. J. Ch. 249.

See 27 Cent. Dig. tit. "Insane Persons," § 163. And see 1 Daniell Ch. Pr. 82; and cases cited in the following notes.

Appointment by some competent court is essential to a guardian by which a lunatic may sue. Palmer *v.* Sinnickson, 59 N. J. Eq. 530, 46 Atl. 517.

The appointment of a guardian or committee may be made ex parte; it is without effect as an adjudication of insanity, in other proceedings, and upon proof that lunacy does not in fact exist the order of appointment may be vacated. Hunter *v.* Hatfield, 12 Hun (N. Y.) 381; Spencer *v.* Popham, 5 Redf. Surr. (N. Y.) 425.

Where the committee of a lunatic dies after a decree in a suit in which the lunatic and his committee are defendants and a new committee is appointed, the latter should be named as such in all future proceedings in the cause. Lyon *v.* Mercer, 1 Sim. & St. 356, 1 Eng. Ch. 356, 57 Eng. Reprint 143.

Stipulation of an idiot's guardian to abide the result of an action under a defense interposed by another defendant is not a compliance with Ballinger Annot. Codes & St. Wash. § 6432, requiring such a guardian to defend actions brought against his ward. Mattson *v.* Mattson, 29 Wash. 417, 69 Pac. 1087.

Right to plead ward's infancy.— The committee or guardian of an infant lunatic may set up the ward's infancy as a ground of avoidance of a mortgage made by the ward. Ledger Bldg. Assoc. *v.* Cook, 12 Phila. (Pa.) 434.

Consent to suit.— A suit in the interest of an interdict cannot be prosecuted against the consent of the curator. Byrnes *v.* Byrnes, 111 La. 403, 35 So. 617.

The right of a committee of a lunatic to maintain the suit may be raised by a plea in abatement, or possibly taken advantage of under the general issue, but not upon a rule to quash or abate the summons. Buck *v.* Ehrgood, 4 Pa. Co. Ct. 312.

31. Taylor *v.* Ellenberger, (Cal. 1901) 65 Pac. 832 [*modified* in 134 Cal. 31, 66 Pac. 4]. And see *infra*, VIII, D, 1.

32. Jones *v.* Jones, 45 N. H. 123, motion to discontinue suit.

Negligence of a guardian in defending a suit is imputable to his ward to the same extent at least as that of a trustee is visited upon the *cestui que trust*. Weems *v.* Weems, 73 Ala. 462.

Estoppel.— Where a committee of a lunatic consents to have the rights of the parties litigated when the other party might have obtained relief upon a summary application to the court at much less expense, he cannot afterward object to the manner of proceeding. Outtrin *v.* Graves, 1 Barb. Ch. (N. Y.) 49.

Right of guardian to appeal or bring error see *infra*, VIII, H, 2.

33. Johnson's Appeal, 71 Conn. 590, 42 Atl. 662; Hinckman *v.* Ballard, 7 W. Va. 152,

and waive objections to the admissibility of evidence.[34] A foreign guardian may under some statutes maintain or defend an action in the local courts,[35] or may exercise his office by an agent or attorney in fact.[36]

2. Guardian Ad Litem or Next Friend[37] — a. In General. It follows from the rule stated in the preceding section that where a general guardian or committee has been appointed for an insane person, an action on behalf of or against such person should be brought or defended by such guardian or committee and cannot be prosecuted or defended by his next friend or guardian *ad litem*,[38] except where the appointment of a special guardian, guardian *ad litem*, or next friend for that purpose is permitted by statute;[39] and except where the interests of the general guardian or committee are adverse to those of his ward,[40] the guardian fails to act,[41] or the insane person is a non-resident.[42]

b. Where There Is No General Guardian or Committee — (i) *By Next Friend.* But where no guardian or committee has been appointed, or if appointed refuses to qualify or has been removed, the action may be prosecuted or defended in his name, with the sanction of the court, by any competent person as the insane person's next friend,[43] even though the lunatic has not been judicially declared

but not so as to change the nature and condition of the estate of the insane person.

34. Collins *v.* Trotter, 81 Mo. 275. But see Huling *v.* Huling, 32 Ill. App. 519.

35. Campbell *v.* Millar, 84 Ill. App. 208.

36. Vick *v.* Volz, 47 La. Ann. 42, 16 So. 568.

37. Suit on guardianship bond see *supra*, II, D, 8, f.

38. Covington *v.* Neftzger, 140 Ill. 608, 30 N. E. 764, 33 Am. St. Rep. 261; Tiffany *v.* Worthington, 96 Iowa 560, 65 N. W. 817; Row *v.* Row, 53 Ohio St. 249, 41 N. E. 239. And see *supra*, VIII, C, 1.

Requiring the next friend to file bond for costs will not authorize him to sue as next friend of the lunatic. Covington *v.* Neftzger, 140 Ill. 608, 30 N. E. 764, 33 Am. St. Rep. 261.

It is a matter of course to appoint the guardian or committee as guardian ad litem, to appear and answer for a lunatic, if the guardian or committee has no adverse interest in the controversy. New *v.* New, 6 Paige (N. Y.) 237 (holding also that an order for that purpose made upon the *ex parte* application of the guardian or committee is regular); Westcomb *v.* Westcomb, Dick. 233, 21 Eng. Reprint 257.

39. Justice *v.* Ott, 87 Cal. 530, 25 Pac. 691; Covington *v.* Neftzger, 140 Ill. 608, 30 N. E. 764, 33 Am. St. Rep. 261; Ryder *v.* Topping, 15 Ill. App. 216; Plympton *v.* Hall, 55 Minn. 22, 56 N. W. 351, 21 L. R. A. 675; Hicks *v.* Hicks, 79 Wis. 465, 48 N. W. 495.

40. *Illinois.*— Isle *v.* Cranby, 199 Ill. 39, 64 N. E. 1065, 64 L. R. A. 513 [*reversing* 106 Ill. App. 221, and *overruling* so far as conflicting Covington *v.* Neftzger, 140 Ill. 608, 30 N. E. 764, 33 Am. St. Rep. 261].

Kentucky.— Cates *v.* Woodson, 2 Dana 452.

Maryland.— Hewitt's Case, 3 Bland 184.

New Jersey.— Norcom *v.* Rogers, 16 N. J. Eq. 484, by attorney-general or next friend in such a case.

Virginia.— Hinton *v.* Hinton, 81 Va. 588; Bird *v.* Bird, 21 Gratt. 712.

Wisconsin.— Marx *v.* Rowlands, 59 Wis. 110, 17 N. W. 687, holding that where the guardian of an insane woman is executor and residuary legatee of her deceased sister, his interests are too antagonistic to permit the rights of his ward to be trusted to him; and on petition alleging facts which if true would avoid the will, an order may be made appointing a guardian *ad litem*, and permitting him to appeal from the order admitting the will to probate.

See 27 Cent. Dig. tit. "Insane Persons," § 164.

A new committee or guardian should be appointed to commence an action for an insane person where the general guardian or committee is disqualified by interest or refuses to act. Rankert *v.* Rankert, 105 N. Y. App. Div. 37, 93 N. Y. Suppl. 399.

41. Taylor *v.* Lovering, 171 Mass. 303, 50 N. E. 612, holding that where a guardian fails to appear and defend after having notice of the pendency of an action against his insane ward, a guardian *ad litem* should be appointed.

42. Sturges *v.* Longworth, 1 Ohio St. 544, holding that where a lunatic defendant is a non-resident of the state, and has been brought into court by publication, it is competent for the court to appoint a guardian *ad litem* to defend the suit, who may be a different person from the general guardian or committee of the lunatic.

Under a Louisiana statute, where an absent insane person has property in Louisiana he must be considered and proceeded against as an absentee, and if no curator has been appointed to represent him and to take charge of his property and he has no known representative in the state, the court before whom the suit is pending must appoint a curator *ad hoc* to represent him, and since the statute does not so require, such curator need not take oath. Hansell *v.* Hansell, 44 La. Ann. 548, 10 So. 941.

43. *Arkansas.*— Jetton *v.* Smead, 29 Ark. 372.

Delaware.— Allen *v.* Babcock, 1 Harr. 348.

Georgia.— La Grange Mills *v.* Kener, 121

insane, if it otherwise appears that he is insane.[44] A next friend may prosecute a

Ga. 429, 49 S. E. 300; Dent *v.* Merriam, 113 Ga. 83, 38 S. E. 334; Reese *v.* Reese, 89 Ga. 645, 15 S. E. 846.

Illinois.— Isle *v.* Cranby, 199 Ill. 39, 64 N. E. 1065, 64 L. R. A. 513 [*reversing* 101 Ill. App. 221, and *overruling* so far as conflicting Covington *v.* Neftzger, 140 Ill. 608, 30 N. E. 764, 33 Am. St. Rep. 261]; Speck *v.* Pullman Palace Car Co., 121 Ill. 33, 12 N. E. 213; Chicago, etc., R. Co. *v.* Munger, 78 Ill. 300; Leonard *v.* Chicago Times, 51 Ill. App. 427, holding that a suit begun before a plaintiff is adjudged insane can properly be prosecuted in the name of the lunatic after he is so adjudged. See Ronan *v.* Bluhm, 173 Ill. 277, 50 N. E. 694; Brown *v.* Riggin, 94 Ill. 560.

Kentucky.— Howard *v.* Howard, 87 Ky. 616, 9 S. W. 411, 10 Ky. L. Rep. 478, 1 L. R. A. 610; Newcomb *v.* Newcomb, 13 Bush 544, 26 Am. Rep. 222.

Massachusetts.— Gray *v.* Parke, 155 Mass. 433, 29 N. E. 641.

Minnesota.— Plympton *v.* Hall, 55 Minn. 22, 56 N. W. 351, 21 L. R. A. 675.

Mississippi.— Gillespie *v.* Hauenstein, 72 Miss. 838, 17 So. 602.

New Jersey.— Dorsheimer *v.* Roorback, 18 N. J. Eq. 438.

North Carolina.— Abbott *v.* Hancock, 123 N. C. 99, 31 S. E. 268 (holding that a wife may sue as next friend of her insane husband); Smith *v.* Smith, 106 N. C. 498, 11 S. E. 188.

Texas.— Cooke *v.* Thornhill, 16 Tex. 177; Hughey *v.* Mosby, 31 Tex. Civ. App. 76, 71 S. W. 395; Harris *v.* Schlinke, (Civ. App. 1901) 62 S. W. 72 [*reversed* on other grounds in 95 Tex. 88, 65 S. W. 172].

Virginia.— Bird *v.* Bird, 21 Gratt. 712.

England.— Beall *v.* Smith, L. R. 9 Ch. 85, 45 L. J. Ch. 245, 29 L. T. Rep. N. S. 625, 22 Wkly. Rep. 121; Jones *v.* Lloyd, L. R. 18 Eq. 265, 43 L. J. Ch. 826, 30 L. T. Rep. N. S. 487, 22 Wkly. Rep. 785; Light *v.* Light, 25 Beav. 248, 52 Eng. Reprint 631; Clay *v.* Bowler, 5 A. & E. 400, 31 E. C. L. 664 (by wife as next friend of insane husband); Nelson *v.* Duncombe, 9 Beav. 211, 10 Jur. 399, 15 L. J. Ch. 296, 50 Eng. Reprint 323. *Compare* Halfhide *v.* Robinson, L. R. 9 Ch. 373, 43 L. J. Ch. 398, 30 L. T. Rep. N. S. 216, 22 Wkly. Rep. 448.

See 27 Cent. Dig. tit. "Insane Persons," § 164.

A "person of unsound mind" within the meaning of a statute permitting a person of unsound mind having no committee to sue by his next friend embraces not only lunatics but persons whose minds have become so impaired by disease or other cause as to be unable to take care of their own interests. Howard *v.* Howard, 87 Ky. 616, 9 S. W. 411, 10 Ky. L. Rep. 478, 1 L. R. A. 610.

A "next friend" does not mean a committee or trustee of a lunatic but one who, without being a regularly appointed guardian, acts for the benefit of such lunatic. Mackey *v.* Peters, 22 App. Cas. (D. C.) 341.

An actual appointment is not necessary to authorize one as a next friend to prosecute a suit for an insane person, and until removal such prosecution is valid. Gray *v.* Parke, 155 Mass. 433, 29 N. E. 641.

A failure to allege that the lunatic has no guardian nor any sufficient reason why she does not appear by guardian if she has one does not prevent a suit by a next friend for a lunatic from being maintained unless the failure to allege this fact is made a ground for objection in special demurrer or raised by plea in abatement; but if such demurrer or plea is not met by appropriate amendment the action should be dismissed. Stanley *v.* Stanley, 123 Ga. 122, 51 S. E. 287; Le Grange Mills *v.* Kener, 121 Ga. 429, 49 S. E. 300.

Collateral impeachment.— Where the next friend of an insane person is regularly appointed, the appointment cannot be impeached collaterally by demurrer in an action by the next friend. Abbott *v.* Hancock, 123 N. C. 99, 31 S. E. 268.

If a suit is brought in the name of a lunatic by her next friend, without the sanction of the court against her former committee, who has been removed, for an account, and he objects to the parties, the court may make an order for the cause to proceed in the name of the lunatic by some fit person as her next friend, if the one named in the bill is not such a one; or the court may direct the appointment of a committee, and the amendment of the bill by making such committee a co-plaintiff or defendant in the suit. Bird *v.* Bird, 21 Gratt. (Va.) 712.

Where an aged and feeble-minded complainant not an idiot or lunatic is permitted to proceed with her suit until her testimony is all produced before any objections are made for want of proper parties, the bill will not be dismissed and a next friend will then be appointed. Lamb *v.* Lamb, (N. J. Ch. 1892) 23 Atl. 1009.

Whether a plaintiff can sue by his next friend because of his mental unsoundness should be raised before the trial and cannot properly be submitted to the jury. Worthington *v.* Mencer, 96 Ala. 310, 11 So. 72, 17 L. R. A. 407.

44. *Alabama.*— Whetstone *v.* Whetstone, 75 Ala. 495.

Delaware.— Penington *v.* Thompson, 5 Del. Ch. 328, holding that a proceeding to cancel a conveyance by a person of unsound mind not found so by inquisition should be by his next friend and not in the name of the attorney-general at the relation of others.

Illinois.— Isle *v.* Cranby, 199 Ill. 39, 64 N. E. 1065, 64 L. R. A. 513 [*reversing* 101 Ill. App. 221, and *overruling* so far as conflicting Covington *v.* Neftzger, 140 Ill. 608, 30 N. E. 764, 33 Am. St. Rep. 261].

Kentucky.— Newcomb *v.* Newcomb, 13 Bush 544, 26 Am. Rep. 222.

Maryland.— See Owing's Case, 1 Bland 290.

Nebraska.— Wager *v.* Wagoner, 53 Nebr. 511, 73 N. W. 937.

writ of error in his insane defendant's behalf,[45] or may bring a suit to protect the lunatic's estate through a receivership until a guardian can be appointed;[46] but a suit brought by a next friend is substantially that of the insane person,[47] and he has no authority to bind the lunatic or his estate,[48] and is subject to removal at any time by order of the court.[49]

(II) *BY GUARDIAN AD LITEM.* Likewise where a guardian or committee has not been appointed, or if appointed refuses to qualify or has been removed, a guardian *ad litem* should, upon a proper suggestion or petition, be appointed to defend in the name of the insane person,[50] even though defendant has not been

New Jersey.— Kroehl *v.* Taylor, (Ch. 1905) 61 Atl. 257; Collins *v.* Toppin, 63 N. J. Eq. 381, 51 Atl. 933.

North Carolina.—Abbott *v.* Hancock, 123 N. C. 99, 31 S. E. 268; Smith *v.* Smith, 106 N. C. 498, 11 S. E. 188.

Tennessee.— Parsons *v.* Kinzer, 3 Lea 342.

Texas.— Mills *v.* Cook, (Civ. App. 1900) 57 S. W. 81; Holzheiser *v.* Gulf, etc., R. Co., 11 Tex. Civ. App. 677, 33 S. W. 887.

England.— Jones *v.* Lloyd, L. R. 18 Eq. 265, 43 L. J. Ch. 826, 30 L. T. Rep. N. S. 487, 22 Wkly. Rep. 785; Nelson *v.* Duncombe, 9 Beav. 211, 10 Jur. 399, 15 L. J. Ch. 296, 50 Eng. Reprint 323. See also *Re* Macfarlane, 2 Johns. & H. 673, 8 Jur. N. S. 208, 31 L. J. Ch. 335, 6 L. T. Rep. N. S. 154, 10 Wkly. Rep. 369.

See 27 Cent. Dig. tit. "Insane Persons," § 165.

Where a nominal plaintiff is mentally incapacitated by disease, decrepitude, or other infirmity, a court of equity has jurisdiction to entertain an action brought by next friends in his name and behalf, although he is not in such condition as to be adjudged a lunatic by a special tribunal provided by law for such purpose, and although he denies the insanity and repudiates the acts of those bringing the suit. Edwards *v.* Edwards, 14 Tex. Civ. App. 87, 36 S. W. 1080.

If the party alleged to be insane repudiates or moves to dismiss a suit brought by a next friend, the court is not thereby ousted of jurisdiction, but it has a right to determine for itself the question whether it should retain jurisdiction by investigating the mental condition of complainant. Isle *v.* Cranby, 199 Ill. 39, 64 N. E. 1065, 64 L. R. A. 513 [*reversing* 101 Ill. App. 221]; Howell *v.* Lewis, 61 L. J. Ch. 89, 65 L. T. Rep. N. S. 672, 40 Wkly. Rep. 88.

Stay of proceedings.— Pending proceedings under a commission of lunacy a suit by a next friend of an alleged lunatic may be stayed. Hartley *v.* Gilbert, 13 Sim. 596, 36 Eng. Ch. 596, 60 Eng. Reprint 232.

45. Iago *v.* Iago, 168 Ill. 339, 48 N. E. 30, 61 Am. St. Rep. 120, 39 L. R. A. 115 [*reversing* 66 Ill. App. 462]. And see *infra*, VIII, H, 2, note 55.

46. Roughan *v.* Morris, 87 Ill. App. 642.

47. Dent *v.* Merriam, 113 Ga. 83, 38 S. E. 334.

48. Covington *v.* Neftzger, 140 Ill. 608, 30 N. E. 764, 33 Am. St. Rep. 261.

A next friend is a mere volunteer, clothed with no authority from any court. He may be liable for costs, but he does not control the lunatic or his estate in any manner whatever. He must be prepared to vindicate the necessity and propriety of his proceedings if they are called in question, and to bear the consequences of any unnecessary and improper proceedings. He takes the risk moreover of having his proceedings wholly repudiated by the lunatic, if he should recover his reason. Whetstone *v.* Whetstone, 75 Ala. 495; Covington *v.* Neftzger, 140 Ill. 608, 30 N. E. 764, 33 Am. St. Rep. 261; Dorsheimer *v.* Roorback, 18 N. J. Eq. 438; Craighead *v.* Smith, 10 Pa. Co. Ct. 359; Beall *v.* Smith, L. R. 9 Ch. 91, 43 L. J. Ch. 245, 29 L. T. Rep. N. S. 625, 22 Wkly. Rep. 121. See also Howard *v.* Howard, 87 Ky. 616, 9 S. W. 411, 10 Ky. L. Rep. 478, 1 L. R. A. 610; *In re* Armstrong, [1896] 1 Ch. 536, 65 L. J. Ch. 258, 74 L. T. Rep. N. S. 134, 44 Wkly. Rep. 281.

49. Abbott *v.* Hancock, 123 N. C. 99, 31 S. E. 268.

50. *California.*— Security L. & T. Co. *v.* Kauffman, 108 Cal. 214, 41 Pac. 467.

Illinois.— Pyott *v.* Pyott, 90 Ill. App. 210 [*affirmed* in 191 Ill. 280, 61 N. E. 88]; Fietsan *v.* Kropp, 6 Ill. App. 144, holding that where after answer filed and before a hearing a defendant has been adjudged insane and her conservator fails to act, it is error to proceed to a hearing and decree without the appointment of a guardian *ad litem*.

Louisiana.— Sallier *v.* Rosteet, 108 La. 378, 32 So. 383, holding that where a curator is appointed for an insane coöwner, who is interdicted, and he refuses to qualify, the other coöwners of the property may, for the purpose of partition, provoke the appointment of a special curator to represent his interests.

Massachusetts.— Denny *v.* Denny, 8 Allen 311; Davenport *v.* Davenport, 5 Allen 464; Com. *v.* Cooley, 1 Allen 358; Mansfield *v.* Mansfield, 13 Mass. 412.

Minnesota.— Plympton *v.* Hall, 55 Minn. 22, 56 N. W. 351, 21 L. R. A. 675. See also Wilson *v.* Wilson, (1905) 104 N. W. 300.

Missouri.— Bensieck *v.* Cook, 110 Mo. 173, 19 S. W. 642, 33 Am. St. Rep. 422, holding that in ejectment against an insane defendant the court may appoint a guardian *ad litem* and may render judgment binding on the lunatic.

Nebraska.— Kuhn *v.* Kilmer, 16 Nebr. 699, 21 N. W. 443.

judicially declared insane, if the fact of insanity is shown by affidavit or otherwise.[51] A guardian *ad litem* so appointed is under the direct control of the

New York.— Montgomery *v.* Montgomery, 3 Barb. Ch. 132 (holding that in any suit against an idiot complainant must procure the appointment of a guardian *ad litem* to appear for the idiot); Markle *v.* Markle, 4 Johns. Ch. 168; Copous *v.* Kauffman, 3 Edw. 370.

Ohio.— Sturges *v.* Longworth, 1 Ohio St. 544, holding that it is error to decree against a lunatic without an answer from his guardian *ad litem*.

South Carolina.— *Ex p.* Roundtree, 51 S. C. 405, 29 S. E. 66, holding a judgment against an insane person void where she was not represented by a guardian *ad litem*, although an attorney appeared for her.

Tennessee.— Steifel *v.* Clark, 9 Baxt. 466; Speak *v.* Metcalf, 2 Tenn. Ch. 214.

Virginia.— Hinton *v.* Bland, 81 Va. 588.

West Virginia.— Eakin *v.* Hawkins, 52 W. Va. 124, 43 S. E. 211, holding that it is reversible error to proceed in a suit against an insane person and enter a decree against him without the appointment of a guardian *ad litem* for him and the filing of an answer by such guardian.

United States.— Harrison *v.* Rowan, 11 Fed. Cas. No. 6,143, 4 Wash. 202.

England.— Nelson *v.* Duncombe, 9 Beav. 211, 10 Jur. 399, 15 L. J. Ch. 296, 50 Eng. Reprint 323; Brooks *v.* Jobling, 2 Hare 155, 8 Jur. 186, 24 Eng. Ch. 155, holding that a solicitor may be appointed guardian *ad litem* of a lunatic.

See 27 Cent. Dig. tit. "Insane Persons," § 164.

Service of process as prerequisite to appointment of guardian ad litem see *infra*, VIII, D, 1.

Appearance by attorney of insane defendant of full age see *infra*, VIII, D, 3.

It is within the discretion of the court whether or not to appoint a guardian *ad litem* for an insane person. King *v.* Robinson, 33 Me. 114, 54 Am. Dec. 614.

The court may supersede a next friend by a guardian ad litem and in its discretion stay proceedings instituted by the former. King *v.* McLean Asylum, 64 Fed. 331, 12 C. C. A. 145.

Where the insane person is not a party to the action a guardian *ad litem* cannot be appointed for him. Boyd *v.* Dodson, 66 Cal. 360, 5 Pac. 617.

A near relative or close friend should be appointed guardian *ad litem* rather than some person nominated by complainant. Frieseke *v.* Frieseke, (Mich. 1904) 101 N. W. 632.

It is too late for the appointment of a guardian *ad litem* for an insane execution defendant where the fact of insanity is called to the attention of the court for the first time upon the hearing of a motion to confirm a sale of real estate made on execution. Kuhn *v.* Kilmer, 16 Nebr. 699, 21 N. W. 443.

A guardian ad litem may be appointed upon motion without notice in the discretion of the court if no one can be prejudiced by want of notice (Boyce *v.* Lake, 17 S. C. 481, 43 Am. Rep. 618), and without a commission (Piddocke *v.* Smith, 9 Hare 395, 15 Jur. 1120, 21 L. J. Ch. 359, 41 Eng. Ch. 395). And it is a matter of course to appoint such guardian if the fact of unsoundness of mind be averred in the bill, and if not so averred the appointment will be made only upon the fact being shown by affidavit or other satisfactory evidence. Speak *v.* Metcalf, 2 Tenn. Ch. 214.

The application for such appointment may be made in the name of an insane defendant within the time allowed for appearance and defense (Speak *v.* Metcalf, 2 Tenn. Ch. 214), and after that time by the complainant (Speak *v.* Metcalf, *supra*; Piddocke *v.* Smith, 9 Hare 395, 15 Jur. 1120, 21 L. J. Ch. 359, 41 Eng. Ch. 395; Howlett *v.* Wilbraham, 5 Madd. 423, 56 Eng. Reprint 957; Estcourt *v.* Ewington, 9 Sim. 252, 16 Eng. Ch. 252, 59 Eng. Reprint 354).

Where a guardian ad litem dies, a special application is necessary to obtain the appointment of a new guardian, and an appointment by an order of course is irregular. Needham *v.* Smith, 6 Beav. 130, 49 Eng. Reprint 774.

Plaintiff must suggest the insanity of defendant to the court in order that a guardian *ad litem* may be appointed, where he knows at the time of service on and rendition of judgment against defendant that he is *non compos mentis*. Townsend *v.* Price, 19 Wash. 415, 53 Pac. 668.

51. *Maryland.*— Post *v.* Mackall, 3 Bland 486.

New York.— Hunter *v.* Hatfield, 12 Hun 381 (holding that a guardian *ad litem* may be appointed where the unsoundness of mind is shown by affidavit; and on proof that the lunacy does not exist the court may vacate the order making such appointment); Hawley *v.* Brennan, 9 N. Y. St. 505. *Compare* O'Brien *v.* O'Brien, 38 N. Y. Suppl. 157, 2 N. Y. Annot. Cas. 117.

Texas.— Abrahams *v.* Vollbaum, 54 Tex. 226, appointment upon oral evidence of insanity.

Virginia.— Campbell *v.* Bowen, 1 Rob. 241, holding that the court should institute an inquiry as to the state of defendant's mind at that time and ascertain whether it is such as to require for him the protection of a guardian *ad litem*, and that it is error for the court to appoint such guardian without instituting such inquiry.

Wisconsin.— Gerster *v.* Hilbert, 38 Wis. 609.

England.— Nelson *v.* Duncombe, 9 Beav. 211, 10 Jur. 399, 15 L. J. Ch. 296, 50 Eng. Reprint 323.

See 27 Cent. Dig. tit. "Insane Persons," § 165.

court,[52] and may make any defense either by way of answer or cross bill or both that occasion may require or the court may order.[53]

D. Process and Appearance[54]**— 1. In General.** Where an insane defendant has been judicially declared insane and is under guardianship, actual service of notice or process on such defendant is unnecessary; service upon or appearance by his guardian or committee is generally sufficient,[55] except where the guardian is a foreign one.[56] In some jurisdictions, however, it is held that in the absence of statute permitting the service of process against an insane person under guardianship to be made on the guardian, such service is insufficient,[57] although the

An inquisition of insanity is not necessary before the appointment of a guardian *ad litem*, but the issue of insanity may be determined as one of the issues in the case. Pyott *v.* Pyott, 90 Ill. App. 210 [*affirmed* in 191 Ill. 280, 61 N. E. 88]. It is within the power of the court apart from any statutory provision to appoint a guardian *ad litem* for a defendant who is *non compos mentis*, although he is of age, has not been judicially declared insane, and no committee has been appointed, where the court has jurisdiction of the subject of the action and has acquired jurisdiction over the person of defendant by a personal service of process. Hanley *v.* Brennan, 19 Abb. N. Cas. (N. Y.) 186.

Effect of appointment.— The appointment by the court, under Mass. Rev. St. c. 76, § 18, of a guardian *ad litem* for a respondent to a libel on the ground of insanity is *prima facie* evidence of respondent's insanity in any subsequent stage of the cause. Little *v.* Little, 13 Gray (Mass.) 264.

52. Austin *v.* Bean, 101 Ala. 133, 16 So. 41.

53. Pyott *v.* Pyott, 90 Ill. App. 210 [*affirmed* in 191 Ill. 280, 61 N. E. 88].

54. See, generally, Appearances; Process.

Notice to insane officer to give additional bond as condition precedent to removal see Officers.

55. *California.*— Redmond *v.* Peterson, 102 Cal. 595, 36 Pac. 923, 41 Am. St. Rep. 204; Taylor *v.* Ellenberger, (1901) 65 Pac. 832. But see Justice *v.* Ott, 87 Cal. 530, 25 Pac. 691.

Indiana.— Jones *v.* Crowell, 143 Ind. 218, 42 N. E. 612.

Iowa.— Shoemake *v.* Smith, 80 Iowa 655, 45 N. W. 744.

Kentucky.— Cates *v.* Woodson, 2 Dana 452.

Michigan.— Ingersoll *v.* Harrison, 48 Mich. 234, 12 N. W. 179, holding that one's legal capacity to be served with summons is not taken away by the mere circumstance of his being under guardianship as an insane person.

New York.— Agricultural Ins. Co. *v.* Barnard, 96 N. Y. 525.

Pennsylvania.— Hulings *v.* Laird, 21 Pa. St. 265; Snowden *v.* Dunlavey, 11 Pa. St. 522. Under the act of 1836, authorizing a writ for the commencement of an action against a lunatic to be served on his committee, before the writ issues there must be a suggestion of record of the inquisition of lunacy and of the name of the committee, and without such suggestion the writ is irregular and the service void, although made on the committee. Hulings *v.* Laird, *supra*.

United States.— Sullivan *v.* Andoe, 6 Fed. 641, 4 Hughes 290.

England.— Matter of Saumarez, 8 De G. M. & G. 390, 25 L. J. Ch. 575, 4 Wkly. Rep. 658, 57 Eng. Ch. 303, 44 Eng. Reprint 440.

See 27 Cent. Dig. tit. "Insane Persons," § 166.

In England it has been held that a petition in the matter of a person found an idiot by inquisition must be served on the attorney-general. *Ex p.* Watson, Jac. 161, 37 Eng. Reprint 811.

Time of serving citation.— If a person under the care of a conservator is sued, and the court orders the action continued that the conservator may be notified, the law does not require the same time to be observed in the service of a citation on the conservator as in the case of original process. If the conservator is given reasonable notice it is sufficient. If the notice is too short to enable him to fully prepare for trial the court may grant a continuance. Snow *v.* Antrim, Kirby (Conn.) 174.

Process is not necessary to bring an insane defendant into court where guardians come in and defend for him and afterward defendant recovers his sanity and his guardians are discharged. Winston *v.* Moffet, 9 Port. (Ala.) 518.

Service upon the insane person alone, his guardian or committee not being a party to the suit, although erroneous, is not void. Allison *v.* Taylor, 6 Dana (Ky.) 87, 32 Am. Dec. 68.

Where a subpœna is issued against a committee of an insane person without styling them a committee, and they enter their appearance, they cannot, after suffering plaintiff to take a bill *pro confesso* and go on to a final decree, object that the subpœna was made against them personally. Brasher *v.* Van Cortlandt, 2 Johns. Ch. (N. Y.) 242.

56. Rogers *v.* McLean, 34 N. Y. 536, 31 How. Pr. 279 [*affirming* 11 Abb. Pr. 440 (*reversing* 31 Barb. 304, 10 Abb. Pr. 306)], holding that the mere voluntary appearance of a guardian of an infant idiot appointed in Ohio in a proceeding in New York relating to lands in the latter state in which his ward has an interest, and his appointment *ad litem* therein, does not give the court jurisdiction of the infant so as to make the decree binding on him, since a foreign guardian has no extraterritorial power.

57. Scott *v.* Winningham, 79 Ga. 492, 4

appearance of the guardian in the name of his insane ward cures a want of service on the latter.[58] But where defendant has not been judicially declared insane or has no lawful guardian or committee, process must be served on him personally;[59] and under some statutes additional service must also be made upon, or there must be an appearance by, certain persons enumerated by statute[60] or by order of court.[61] Personal service of process on an insane defendant is necessary as a prerequisite to the appointment and appearance of a special guardian or guardian *ad litem*.[62]

2. Manner of Service. In the absence of statute providing otherwise, service of process on an insane defendant or his guardian or committee must be made in the same manner as on other persons,[63] as by exhibiting or leaving a copy at the place where he resides,[64] or if he is a non-resident by publication[65] or by delivering to him personally a copy of the process without the state.[66] If the insane defend-

S. E. 390; Taylor *v.* Lovering, 171 Mass. 303, 50 N. E. 612; Potts *v.* Hines, 57 Miss. 735, holding that both lunatic and guardian must be served with process under Miss. Code (1871), § 705.

Where a resident of another state becomes insane pending a suit in equity against him in Massachusetts, the appointment by the court of his counsel to be his guardian *ad litem* justifies proceedings without notice to a guardian previously appointed in the state of his domicile. Emery *v.* Parrott, 107 Mass. 95.

58. Taylor *v.* Lovering, 171 Mass. 303, 50 N. E. 612.

59. *California.*— Sacramento Sav. Bank *v.* Spencer, 53 Cal. 737.

Kentucky.— Norman *v.* Central Kentucky Asylum, 79 S. W. 189, 25 Ky. L. Rep. 1846, 80 S. W. 781, 26 Ky. L. Rep. 71.

New York.— Heller *v.* Heller, 6 How. Pr. 194, 1 Code Rep. N. S. 309; Matter of Cortwright, 3 Dem. Surr. 13.

Wisconsin.— Gerster *v.* Hilbert, 38 Wis. 609.

England.— Doe *v.* Roe, 9 Dowl. P. C. 844, 3 M. & G. 87, 3 Scott N. R. 363, 42 E. C. L. 54

See 27 Cent. Dig. tit. "Insane Persons," § 166.

60. Norman *v.* Central Kentucky Asylum, 79 S. W. 189, 25 Ky. L. Rep. 1846, 80 S. W. 781, 26 Ky. L. Rep. 71; Brink *v.* Wolf, 24 Pa. Co. Ct. 197 (next of kin); Harris *v.* Schlinke, (Tex. Civ. App. 1901) 62 S. W. 72 [*reversed* on other grounds in 95 Tex. 88, 65 S. W. 172].

61. American Mortg. Co. *v.* Dewey, 106 N. Y. App. Div. 389, 94 N. Y. Suppl. 808, 35 N. Y. Civ. Proc. 48; Matter of Cortwright, 3 Dem. Surr. (N. Y.) 13.

62. *Iowa.*— *In re* Hunter, 84 Iowa 388, 51 N. W. 20.

Kentucky.—Newcomb *v.* Newcomb, 13 Bush 544, 26 Am. Rep. 222.

Massachusetts.— Taylor *v.* Lovering 171 Mass. 303, 50 N. E. 612.

New Jersey.— See Anonymous, 10 N. J. L. J. 142.

New York.— Smith *v.* Keteltas, 27 N. Y. App. Div. 279, 50 N. Y. Suppl. 471, 27 N. Y. Civ. Proc. 209 [*affirming* 22 Misc. 588, 50 N. Y. Suppl. 747]; Hanley *v.* Brennen, 19 Abb. N. Cas. 186.

Tennessee.— Speak *v.* Metcalf, 2 Tenn. Ch. 214.

England.— Brooks *v.* Jobling, 2 Hare 155, 8 Jur. 186, 24 Eng. Ch. 155. See *In re* Dawson, 41 Ch. D. 415, 58 L. J. Ch. 734, 37 Wkly. Rep. 733.

See 27 Cent. Dig. tit. "Insane Persons," § 166.

But see Granger *v.* Sherriff, 133 Cal. 416, 65 Pac. 873, holding that notice of a motion for the appointment of a guardian *ad litem* for an insane defendant need not be served upon either the insane person or his attorney.

63. Taylor *v.* Lovering, 171 Mass. 303, 50 N. E. 612. See, generally, Process.

Under Mo. Rev. St. (1889) §§ 2017, 5544, process must be personally served on the guardian of an insane person in order that the court may acquire jurisdiction of his person. Citizens' State Bank *v.* Berry, 79 Mo. App. 472.

64. Stigers *v.* Brent, 50 Md. 214, 33 Am. Rep. 317 (holding service upon the son of the lunatic who managed the lunatic's estate was sufficient where the lunatic was not allowed to be seen); Than *v.* Smith, 27 Wkly. Rep. 617. See Doe *v.* Roe, 9 Dowl. P. C. 844, 3 M. & G. 87, 3 Scott N. R. 363, 42 E. C. L. 54. *Compare* Heller *v.* Heller, 6 How. Pr. (N. Y.) 194, Code Rep. N. S. 309 (holding that summons against an insane married woman is not well served by a delivery to a relative at her residence); Doe *v.* Roe, 6 Dowl. P. C. 270.

A distringas may be served upon the wife of a lunatic defendant where the keeper of an asylum in which the lunatic is confined refuses to permit service upon him. Limbert *v.* Hayward, 2 D. & L. 406, 14 L. J. Exch. 46, 13 M. & W. 481.

65. Carter *v.* Burrall, 80 N. Y. App. Div. 395, 81 N. Y. Suppl. 30; Matter of Cortwright, 3 Dem. Surr. (N. Y.) 13; Sturges *v.* Longworth, 1 Ohio St. 544.

The necessity of publication is waived by the appearance of the insane defendant by his general guardian. Symmes *v.* Major, 21 Ind. 443.

66. Matter of Cortwright, 3 Dem. Surr. (N. Y.) 13.

ant is in an asylum, service should generally be made upon him personally in the presence of the keeper or physician of the asylum,[67] but substituted service may be made on such keeper or physician where he refuses to permit service on the lunatic,[68] or where it appears from the certificate of the physician having him in charge, attested by the officer serving the summons, that a personal service would be injurious to the lunatic.[69]

3. Appearance and Representation by Attorney. In the absence of statute, at least where there has been no adjudication of insanity and no guardian or committee appointed, an insane defendant of full age must, in an action at law, appear by attorney, to be appointed by the court if necessary, and the failure to appoint a guardian *ad litem* is immaterial;[70] and it has been held that an insane adult plaintiff may bring an action in his own name and appear by attorney therein.[71] In equity, however, it is held that an insane person of full age cannot answer by attorney without the appointment of a guardian *ad litem*.[72]

4. Discharge From Arrest in Civil Cases. At common law a defendant cannot be discharged from arrest and imprisonment in a civil suit on the ground that he was insane at the time of the arrest or became so afterward;[73] but under some statutes the court may discharge an insane defendant from the civil arrest and order him sent to an asylum for the insane.[74]

67. Morgan *v.* Jones, 4 Wkly. Rep. 381.

68. Raine *v.* Wilson, L. R. 16 Eq. 576, 43 L. J. Ch. 469, 29 L. T. Rep. N. S. 51; Than *v.* Smith, 27 Wkly. Rep. 617.

69. Dinkelspiel *v.* Central Kentucky Asylum, 73 S. W. 771, 24 Ky. L. Rep. 2240.

70. *Alabama.*— *Ex p.* Northington, 37 Ala. 496, 79 Am. Dec. 67. See Hollingsworth *v.* Chapman, 50 Ala. 23, holding that upon a suggestion that defendant has become insane pending an action, the court may continue the action in order to have the question of insanity adjudicated, and that an attorney will not be appointed until such adjudication has been had.

Kentucky.—Cameron *v.* Pottinger, 3 Bibb 11.

Maine.— King *v.* Robinson, 33 Me. 114, 54 Am. Dec. 614.

Maryland.— Stigers *v.* Brent, 50 Md. 214, 33 Am. Rep. 317.

Massachusetts.— Cunningham *v.* Davis, 175 Mass. 213, 56 N. E. 2.

Michigan.— See Stoner *v.* Riggs, 128 Mich. 129, 87 N. W. 109, holding that in a suit against an incompetent, process may be served on defendant, and his guardian may enter his appearance as attorney and guardian.

New Jersey.— Van Horn *v.* Hann, 39 N. J. L. 207, holding that the court will grant a rule for the appointment of an attorney to appear for an insane defendant.

New York.— Livingston *v.* Livingston, 56 N. Y. App. Div. 484, 67 N. Y. Suppl. 789; Faulkner *v.* McClure, 18 Johns. 134, holding that the court will on motion appoint an attorney for an insane adult defendant.

South Carolina.— McCreight *v.* Aikin, Rice 56.

England.— Beverley's Case, 4 Coke 123*b*, 2 Coke Inst. 14, Fitzh. N. Br. 532, Reg. Brev. 267.

See 27 Cent. Dig. tit. "Insane Persons," § 168.

A mandamus may issue to compel the appointment of an attorney for an insane adult defendant. *Ex p.* Northington, 37 Ala. 496, 79 Am. Dec. 67.

Under a Kentucky statute, where the insane defendant is a non-resident and the clerk enters a warning order and appoints an attorney to defend for him, he is duly summoned and before the court. Harlammert *v.* Moody, 26 S. W. 2, 15 Ky. L. Rep. 839.

Substitution of attorneys.— Under Mont. Civ. Code Proc. § 799, permitting a change of attorneys in an action, an insane person's guardian is entitled to have a different attorney substituted for the firm which had represented the insane person prior to the guardian's appointment. State *v.* Silver Bow County, 30 Mont. 8, 75 Pac. 516.

Where a party becomes insane while indebted to an attorney who is representing him at the time with respect to his property interests, it does not give such attorney the right *per se* to appear as attorney for the party's guardian. State *v.* Silver Bow County, 30 Mont. 8, 75 Pac. 516.

71. Buchanan *v.* Rout, 2 T. B. Mon. (Ky.) 114; Menz *v.* Beebe, 95 Wis. 383, 70 N. W. 468, 60 Am. St. Rep. 120. But see Jelly *v.* Elliott, 1 Ind. 119.

72. Cunningham *v.* Davis, 175 Mass. 213, 56 N. E. 2; Mitchell *v.* Kingman, 5 Pick. (Mass.) 431. See Wilson *v.* Grace, 14 Ves. Jr. 172, 33 Eng. Reprint 486.

73. Bush *v.* Pettibone, 4 N. Y. 300; Steel *v.* Alan, 2 B. & P. 362; Nutt *v.* Verney, 4 T. R. 121; Kernot *v.* Norman, 2 T. R. 390. See Pillop *v.* Sexton, 3 B. & P. 550. See, generally, Arrest.

74. Bush *v.* Pettibone, 4 N. Y. 300.

A direction that the prisoner be sent to an asylum must be contained in the order of discharge or else it will be void. Bush *v.* Pettibone, 4 N. Y. 300.

On being restored to sanity after such a discharge and commitment to an asylum the prisoner may be rearrested. Bush *v.* Pettibone, 4 N. Y. 300.

E. Pleading[75] — **1. Complaint.** A complaint by one who has been adjudged insane must contain allegations showing that he has regained his capacity to sue.[76] So a complaint filed by one as guardian of a lunatic must allege plaintiff's appointment and qualification as guardian.[77] Where the guardian of an insane person sues in his own name, the complaint should show that the right of action is in the insane person, and should not allege the cause of action to be in the guardian.[78] In some states a complaint against an adjudged insane person should allege that leave of court has been obtained to sue him.[79] A petition by the committee of a lunatic in relation to the estate, although signed by the committee, should describe him as petitioner.[80] An allegation in a petition against a person of unsound mind which declares that a co-defendant is the duly appointed, qualified, and acting guardian, is sufficient as to the appointment.[81] Where the act of a person is sought to be avoided on the ground of his insanity, the complaint must allege his incapacity,[82] and negative subsequent affirmance of the act.[83] A bill filed by the guardian of a lunatic heir to an entire tract, part of which has been assigned to the widow as dower, praying a partition of the residue and a sale of his ward's undivided interest in the reversion, is multifarious;[84] but a bill for partition filed by the guardian of a lunatic is not repugnant in seeking an

75. **Pleading** generally see PLEADING.

76. Robeson *v.* Martin, 93 Ind. 420.

77. Dixon *v.* Cardozo, 106 Cal. 506, 39 Pac. 857 (holding that where a plaintiff becomes insane after the action is begun, an amended complaint bringing in his guardian must allege plaintiff's insanity and the appointment of such guardian); Hardenbrook *v.* Sherwood, 72 Ind. 403; Palmer *v.* Sinnickson, 59 N. J. Eq. 530, 46 Atl. 517 (holding that a lunatic must sue by guardian who has been appointed by the order of some competent court, and hence a bill which avers the lunacy of a complainant, and that she sues by her next friend, without any averment of appointment, etc., is demurrable).

Allegation of adjudication of insanity.— In an action by a guardian of an insane person, the complaint need not allege that such person has been adjudged insane. Hoke *v.* Applegate, 88 Ind. 530, 92 Ind. 570 [*distinguishing* Hardenbrook *v.* Sherwood, 72 Ind. 403].

78. Bearss *v.* Montgomery, 46 Ind. 544.

79. Kent *v.* West, 33 N. Y. App. Div. 112, 53 N. Y. Suppl. 244.

80. Matter of Hopper, 5 Paige (N. Y.) 489.

81. Wisdom *v.* Shanklin, 74 Mo. App. 428.

82. Hardenbrook *v.* Sherwood, 72 Ind. 403. See, however, Fulwider *v.* Ingels, 87 Ind. 414, holding that a complaint by a guardian to annul a contract, averring that the ward at the time "was of unsound mind, and incapable from mental incapacity to transact business," and that he was soon afterward adjudged insane by the probate court, sufficiently shows his incapacity to contract.

Issues.— A complaint alleging that a person, "being of unsound mind, and incompetent to manage herself or her affairs, in consequence of the influence exerted over her" by another, executed certain conveyances, does not allege that the grantor was of unsound mind, but the issuable fact is the "influence exerted over her." Valentine *v.* Lunt, 115 N. Y. 496, 22 N. E. 209.

83. Ætna L. Ins. Co. *v.* Sellers, 154 Ind. 370, 56 N. E. 97, 77 Am. St. Rep. 481 (holding that a complaint by an insane person not under guardianship for the foreclosure of a mortgage, alleging that a release thereof was procured from him without consideration while he was of unsound mind and wholly incapable of understanding its nature, and that it was procured with notice of his disability, when no disaffirmance was pleaded, was demurrable for want of sufficient facts); Ashmead *v.* Reynolds, 127 Ind. 441, 26 N. E. 80 (holding that a complaint in an action to set aside a deed by plaintiff's ancestor on the ground that the grantor was of unsound mind should allege disaffirmance of the deed by plaintiff before beginning the action); Hoke *v.* Applegate, 88 Ind. 530 (holding that a complaint alleging that defendant obtained a large sum of money from plaintiff's ward while of unsound mind by fraudulent contract, and after the appointment of plaintiff as guardian refused to repay is bad in not alleging that the ward continued of unsound mind, and did not affirm his contract); Hardenbrook *v.* Sherwood, 72 Ind. 403 (holding that a complaint by a guardian of an insane person to have an act of such person set aside as void must aver that the unsoundness of mind existed at the time of the commission of the act sought to be set aside, and was a continuing disability, or that upon removal of the disability the act had not been ratified). And see cases cited *infra*, VIII, E, 3, note 3. See, however, Sheets *v.* Bray, 125 Ind. 33, 24 N. E. 357.

Aider by verdict.— In an action by heirs to annul a conveyance made by their ancestor on the ground of insanity at the time of its execution, he not having been under guardianship at that time, a complaint which does not allege any act in disaffirmance of the deed is good after verdict and against a motion in arrest of judgment. Lange *v.* Dammier, 119 Ind. 567, 21 N. E. 749.

84. West *v.* West, 90 Ala. 458, 7 So. 830.

account of the rents and profits, and also a sale of his ward's interest.[85] A petition to set aside the appointment of a guardian for plaintiff and regain possession of her property which alleges that defendant was in possession of the property under an order of court appointing him her committee, but containing no showing that would warrant an adjudication that the order was void, is bad on demurrer.[86]

2. Answer. The incapacity of a person to maintain an action independently because of insanity is properly raised by plea in abatement.[87] Where an insane person sues by his guardian, a plea in abatement alleging the pendency of a prior suit between the same parties for the same cause of action but not denying the guardianship is insufficient in that it does not allege either that the first action was commenced before plaintiff was placed under guardianship, or, if after, that it was commenced by the procurement of the assent of the guardian.[88] Want of authority to maintain an action as guardian must be specially pleaded.[89] The answer of a defendant of unsound mind should be by committee,[90] and he has power to make admissions in the answer.[91] An answer by a guardian admitting that a note sued on was executed by his wards but alleging that they were then insane is equivalent to a plea of *non est factum*.[92] In some states the execution of an instrument by a lunatic is not admitted by the failure of the guardian to deny its execution under oath.[93] An answer that the maker of the contract sued on was insane when he made it need not allege that the disability was a continuing one.[94] Where, in error to reverse a default judgment on the ground of insanity of plaintiff in error, defendant in error relies upon the fact that the suit was brought to recover for necessaries, he should plead it in bar of the action;[95] and the fact that necessaries were furnished by a city to an insane person as an insane pauper is a matter of defense to be pleaded by his guardian when his estate is sued therefor by the city.[96] In a suit against a lunatic's committee for services, the lunatic being a ward of the court and her committee subject to its control, it is the duty of the court, in case of a formal defect in the pleading

85. West *v.* West, 90 Ala. 458, 7 So. 830.

86. Jacobs *v.* Smith, 32 S. W. 394, 17 Ky. L. Rep. 693.

87. Jetton *v.* Smead, 29 Ark. 372 (holding that a plea that plaintiff was *non compos mentis* presents matter in abatement only); Lang *v.* Whidden, 2 N. H. 435 (holding that if a ward sues in his own name without mention of his guardian, his being under guardianship can be excepted to only by plea in abatement); Buck *v.* Ehrgood, 4 Pa. Co. Ct. 312 (holding that the right of the committee of a lunatic to be substituted as plaintiff may be raised by plea in abatement); Collard *v.* Crane, Brayt. (Vt.) 18.

Sufficiency of plea.— N. Y. Code Civ. Proc. § 55, provides that a party who is of full age may sue in person or by an attorney, unless he has been judicially declared to be incompetent to manage his affairs. Section 2320 provides for the appointment of a committee of such person, and that after the appointment such person shall be designated an "incompetent person." It was held that an answer which alleges that plaintiff is now, and was when the action was commenced, "of unsound mind, and totally and utterly incapable of understanding or transacting any business whatever, and is utterly incapable of maintaining this action," will be stricken out as frivolous. Williams *v.* Empire Woolen Co., 7 N. Y. App. Div. 345, 39 N. Y. Suppl. 941. It is not necessary to set forth in the plea the proceedings previous to the guardian's appointment. Collard *v.* Crane, Brayt. (Vt.) 18.

88. Lincoln *v.* Thrall, 34 Vt. 110.

89. Campbell *v.* Millar, 84 Ill. App. 208; Gates *v.* Carpenter, 43 Iowa 152.

90. Aldridge *v.* Montgomery, 9 Ind. 302.

91. Wisdom *v.* Shanklin, 74 Mo. App. 428. See, however, Calloway *v.* Dinsmore, 83 Va. 309, 2 S. E. 517, holding that a committee's answer in a creditor's suit that the amount due his ward upon a lien was a particular sum does not relieve the court from afterward taking an account, or of correcting the error upon his petition that a much larger sum was due.

In England it is considered an open question whether an answer by committee is binding upon the estate of the lunatic. Stanton *v.* Percival, 5 H. L. Cas. 257, 24 L. J. Ch. 369, 3 Wkly. Rep. 391, 10 Eng. Reprint 898.

92. Collins *v.* Trotter, 81 Mo. 275.

Necessity of specially pleading lunacy as a defense to action on bill or note see Commercial Paper, 8 Cyc. 157.

93. Collins *v.* Trotter, 81 Mo. 275; Wisdom *v.* Shanklin, 74 Mo. App. 428.

94. Sheets *v.* Bray, 125 Ind. 33, 24 N. E. 357. See, however, cases cited *supra*, note 83; *infra*, VIII, E, 3, note 3.

95. Leach *v.* Marsh, 47 Me. 548, 74 Am. Dec. 503.

96. St. Louis *v.* Hollrah, 175 Mo. 79, 74 S. W. 996.

of the committee, to order an amendment, and to find the facts according to the proof.[97] Judgment will not be entered in scire facias on a mortgage for want of a sufficient affidavit of defense, it being averred that the mortgagor was insane before the date of the mortgage as shown by an inquisition, although no fraud is charged.[98] If a guardian interposes in behalf of the ward a complete answer to a petition for payment of a claim incurred by the ward before guardianship, judgment cannot be rendered against the guardian on his electing to stand on a demurrer previously interposed by him and overruled.[99]

3. Reply. A reply is bad if it constitutes a departure.[1] In some states the allegations of the answer are not admitted by a failure to reply.[2] So far as matter of substance goes the reply is generally governed by the rules applicable to complaint and answer.[3]

F. Evidence[4] — 1. Burden of Proof.[5] The burden is on one suing as guardian to prove his appointment[6] and qualification.[7] Where the defense of insanity is proved in an action on a note, the burden is on plaintiff to prove the consideration for the note, and other facts necessary to overcome the defense;[8] but one who

97. Manders *v.* Eastern State Hospital, 84 S. W. 761, 27 Ky. L. Rep. 254.

98. Philadelphia Trust Co. *v.* Kneedler, 12 Phila. (Pa.) 421.

99. Bently *v.* Torbert, 68 Iowa 122, 25 N. W. 939.

1. Bearss *v.* Montgomery, 46 Ind. 544, holding that where the guardian of an insane person sues on a note, and alleges in the complaint that the note was indorsed to plaintiff, a reply showing that the note was indorsed to the deceased ancestor of his ward, and that his ward's only claim to the note grows out of a division made by the heirs of the notes held by the deceased, is a departure.

2. Sharp *v.* Stephens, 52 S. W. 977, 21 Ky. L. Rep. 687.

3. Louisville, etc., R. Co. *v.* Herr, 135 Ind. 591, 35 N. E. 556 (holding that in an action for personal injuries, where defendant pleads a settlement, a reply that plaintiff was *non compos mentis* when the settlement was procured, and that the consideration had been returned, is faulty, since it alleges neither that plaintiff was restored to reason and then disaffirmed the contract, nor that his unsoundness continued and that the settlement was disaffirmed by a guardian; and that an allegation in the reply that defendant knew of plaintiff's mental unsoundness at the time the settlement was procured does not render a disaffirmance unnecessary); Hoke *v.* Applegate, 92 Ind. 570 (holding that where in replevin by a guardian of an insane person the answer alleged that the ward gave the property to defendant, a reply that the ward was insane, and that the guardian had demanded the property and revoked the gift was bad, as it failed to allege a continuance of insanity, and a judicial determination thereof, and that the guardian was lawfully appointed and qualified); Louchheim *v.* Gill, 17 Ind. 139 (holding that where in an action for the possession of personal property defendant answered by general denial, and also set up a claim under a chattel mortgage, which was not made a part of the answer, a reply alleging that plaintiff was, at the time of executing the mortgage, of weak and imbecile mind, and so far insane as to be incapable of understanding the nature of the same, and was unable and unfit to do business, and incapable of assenting to any contract was good on demurrer); Voris *v.* Harshbarger, 11 Ind. App. 555, 39 N. E. 521 (holding that where, in an action on a note, the answer alleged that defendant was of unsound mind at the time of its execution, a reply which alleged that with the mind which he had when he executed the note defendant had done business for more than thirty years and made a large amount of money; that he had received full value for the note, and used the consideration so received in his lifetime; that he well understood the transaction; that he never offered or attempted to rescind the contract; and that he was never adjudged to be a person of unsound mind, and never so considered by his family or friends, was not sufficient); Holden *v.* Scanlin, 30 Vt. 177 (holding that where a plea in abatement alleged that plaintiff had been adjudged insane by the probate court, and a guardian appointed for him, and that such guardian was not named in the writ, such allegations were of material facts, on which depended the jurisdiction of the court to appoint the guardian, and a replication denying that plaintiff had been adjudged insane, and that a guardian had been appointed for him as an insane person, was sufficient).

Allegations as to continuance of insanity and disaffirmance see also *supra*, VIII, E, 1, 2.

4. Evidence generally see Evidence.

Exemption of insane defendant from order for examination see Discovery, 14 Cyc. 341.

5. Burden of proof and presumptions as to insanity see *supra*, I, B, C.

6. Hutchins *v.* Johnson, 12 Conn. 376, 30 Am. Dec. 622; Royston *v.* Wilson, 53 Wis. 625, 11 N. W. 41.

7. *In re* Parker, 39 La. Ann. 333, 1 So. 891, action by foreign guardian.

8. Hosler *v.* Beard, 54 Ohio St. 398, 43 N. E. 1040, 56 Am. St. Rep. 720, 35 L. R. A. 161.

seeks to set aside a contract on the ground of insanity must show that the contract was the result of such insanity.[9] The recital of the facts necessary to give the court jurisdiction in an order for the disposition of the real estate of a lunatic is *prima facie* evidence of their existence.[10]

2. ADMISSIBILITY.[11] The admissibility of evidence in actions by or against insane persons or their representatives is governed by the same rules that apply in civil actions generally.[12]

3. WEIGHT AND SUFFICIENCY. The rules governing the weight and sufficiency of evidence in civil actions in general apply in actions by or against insane persons or their representatives.[13]

9. Wray *v.* Wray, 32 Ind. 126; Campbell *v.* Hill, 22 U. C. C. P. 526.

10. Agricultural Ins. Co. *v.* Barnard, 14 Abb. N. Cas. (N. Y.) 502.

11. Admissions of insane persons as evidence see EVIDENCE, 16 Cyc. 940 note 22.

12. *Arkansas.*—Henry *v.* Fine, 23 Ark. 417, holding that in an action by the administrator of an insane person to recover property sold by him, it is competent for plaintiff, in rebuttal of testimony upon the consideration paid, to show that the vendee had knowledge of the vendor's incapacity, and to prove that the price of the property was less than its value, and a part of the consideration fictitious.

Connecticut.— Lockwood *v.* Smith, 5 Day 309, holding that in an action against a board of selectmen on an alleged joint promise to compensate plaintiff for services rendered as trustee of an incompetent at the request of the board, the statement of the debits and credits of the trust estate rendered by plaintiff to a former board of selectmen, accompanied with a certificate of approval by the succeeding board, signed by only one of defendants, was not admissible, as it did not show a promise on the part of defendants composing the board against whom the action was brought.

Kentucky.— Hendrix *v.* Money, 1 Bush 306 (holding that in an action to set aside a conveyance of real and personal property on the ground of the imbecility of the grantor and the undue influence of the grantees, evidence showing the character and progress of the decay of the faculties of the grantor from the time of such conveyance to the date of his death is admissible); Prather *v.* Naylor, 1 B. Mon. 244 (holding that while a record of another court finding plaintiff's intestate to be of unsound mind which had been quashed for irregularity is not competent to prove incapacity to contract, yet if a contract is entered into with the knowledge of such proceedings by one contracting with such person, it is competent to show his knowledge of testator's state of mind).

Missouri.— Reando *v.* Misplay, 90 Mo. 251, 2 S. W. 405, 59 Am. Rep. 13, where, in an action brought by a daughter against the administrator of the estate of her deceased mother to recover for care and nursing alleged to have been rendered by her to her mother while she was insane, defendant offered in evidence an order of the county court — which court had jurisdiction over the property of insane persons — appointing one M guardian of the mother, and also the settlement of M as her guardian, for the purpose of showing that the mother had been cared for by her guardian, and it was held that the order was not competent to go to the jury to affect the implied contract between plaintiff and her mother for compensation for her services, but it might go to the jury for the purpose of showing that M had authority to and did furnish, as *de facto* guardian, the mother with necessaries.

Nebraska.— Buck *v.* Hogeboom, (1902) 90 N. W. 635, holding that where an action is carried on by a guardian, it is not error to allow evidence of his appointment and of a finding that plaintiff is insane, to account for the latter's absence at the trial.

Pennsylvania.— Lancaster County Nat. Bank *v.* Moore, 78 Pa. St. 407, 21 Am. Rep. 24, where plaintiff discounted the note of defendant, who was then and for nearly three years previous had been a lunatic, and there was no fraud in the transaction, and plaintiff had no notice of defendant's insanity, and proceedings in lunacy were not commenced until after the note was discounted, and it was held error to admit evidence of reports in the neighborhood of defendant's insanity, as if the same were offered to affect plaintiff with notice of defendant's insanity, it was not competent for the reason that the reports were not brought home to plaintiff.

Texas.— Williams *v.* Sapieha, (Civ. App. 1901) 62 S. W. 72, holding that where a guardian suing to set aside a deed of his ward's land given under a power of attorney executed by the ward alleges that the ward has always been an incompetent and so treated by the family, it is proper to allow defendant to meet the allegations by showing his treatment by his relatives, and the taking of a judgment against him by his mother.

England.— Stanton *v.* Percival, 5 H. L. Cas. 257, 24 L. J. Ch. 369, 3 Wkly. Rep. 391, 10 Eng. Reprint 898, holding a former answer of the committee admissible in evidence against him.

See 27 Cent. Dig. tit. "Insane Persons," § 173.

13. *California.*— *In re* Hayden, 1 Cal. App. 75, 81 Pac. 668.

Connecticut.— Hutchins *v.* Johnson, 12 Conn. 376, 30 Am. Dec. 622, holding that in an action by a conservator, averring that he

G. Trial[14] — **1. In General.** Where the defense is that complainant was at the time of the commencement of the suit *non compos mentis*, the proper practice is by an application to the court to strike the bill from the files because filed without authority, or to apply for a stay of proceedings until a committee or next friend may be appointed.[15] A bill filed by the next friend of a lunatic will not be stricken from the files on motion of the lunatic accompanied by affidavits of restoration to reason, but the chancellor will require the lunatic to appear before him for examination as to his intelligent desire to withdraw the bill or select a master to make such examination.[16] An irregular trial will not bind a lunatic defendant in the absence of the consent of his guardian.[17] It is proper to refuse an instruction intimating that the plea of insanity has led to abuse in the administration of justice, and advising the jury that it must be examined with care.[18] Where insanity is urged as a defense in a civil action based on a crime of defendant, the issue is the same as if defendant were being prosecuted by the state for the offense, and instructions thereon applicable in the latter case are applicable in the former.[19] In an action for money received, which defendants claim for services under a contract which plaintiff alleges was made when he was insane, error in the instructions as to the effect of insanity is not fatal to a verdict for defendants, where the question of the reasonable worth of the services was properly submitted to the jury.[20] If the evidence on an issue of fact is conflicting, or inconclusive, the issue should be submitted to the jury.[21] If error in the trial is cured, it affords no ground for objection.[22]

2. Trial of Issue of Insanity. When the suggestion of the respondent's insanity is made in an equitable proceeding, the court may order a reference to a master to report as to his condition, and physicians may be called in to assist in the inquiry,[23] or the court may order an inquisition.[24] In a suit to enjoin an

was legally appointed, he must prove his appointment by the record of the county court, and such record must show a finding by the court that notice of his application for the appointment was given, as required by statute; the officer's return on the writ showing the requisite notice, although a part of the files accompanying the record, is not sufficient without such finding.

Kentucky.— Woolfolk *v.* Ashby, 2 Metc. 288.

Missouri.— Lack *v.* Brecht, 166 Mo. 242, 65 S. W. 976.

New York.— Hardy *v.* Berger, 76 N. Y. App. Div. 393, 78 N. Y. Suppl. 709, 12 N. Y. Annot. Cas. 118; Aspell *v.* Campbell, 64 N. Y. App. Div. 393, 72 N. Y. Suppl. 76.

Canada.— Campbell *v.* Hill, 22 U. C. C. P. 526.

See 27 Cent. Dig. tit. "Insane Persons," § 174.

14. Trial generally see Trial.

15. Dudgeon *v.* Watson, 23 Fed. 161, 23 Blatchf. 161.

16. Kroehl *v.* Taylor, (N. J. Ch. 1905) 61 Atl. 257.

17. Cox *v.* Gress, 51 Ark. 224, 11 S. W. 416.

18. Marceau *v.* Travelers' Ins. Co., 101 Cal. 338, 35 Pac. 856, 36 Pac. 813.

19. State *v.* Geddis, 42 Iowa 264.

20. Dean *v.* Shattuck, 56 Vt. 512.

21. Mohr *v.* Porter, 51 Wis. 487, 8 N. W. 364; Moss *v.* Tribe, 3 F. & F. 297.

Province of court and jury as to issue of insanity see *supra*, I, D.

22. Finzer *v.* Nevin, 18 S. W. 367, 13 Ky. L. Rep. 773, where, in an action for partition of lands to which a lunatic and his committee were defendants, the averments of the petition as to the ownership of the lands were admitted by defendants, and no proof thereof was offered, as required by Ky. Civ. Code, § 126, which provides that material averments, although not denied, cannot be taken as true against a person under disability, and it was held that the defect, if any, was, as to the purchaser of the lands, cured by evidence showing such ownership, afterward produced in court on exceptions taken by him to the sale.

The introduction of incompetent evidence against an insane defendant is not cured by the admission of his testimony without objection. Huling *v.* Huling, 32 Ill. App. 519.

23. Campbell *v.* Bowen, 1 Rob. (Va.) 241.

Necessity of determining question of sanity.— In a suit against a trustee and his *cestui que trust*, a bare suggestion in the bill that the trustee has become a lunatic does not render it incumbent on the chancellor to ingraft upon the suit an inquiry into the lunacy. Campbell *v.* Brannin, 8 B. Mon. (Ky.) 478.

24. Yourie *v.* Nelson, 1 Tenn. Ch. 275, holding that pending a bill by a guardian to set aside conveyances on the ground that the ward at the time they were made was of unsound mind, the court, upon application of the parties properly verified, and security given for costs, will, even after argument, order a writ of inquisition to issue to ascer-

action on a note, an assignment of which was procured from an insane person by undue influence and fraud, the question of sanity or insanity may be tried, irrespective of whether a commission of lunacy has been issued.[25] A plea that plaintiff has become insane, filed on the day set for trial, will not be allowed to delay the trial while the question of insanity is being investigated.[26] A court of equity may submit the case to the jury on a feigned issue.[27] In a suit by a lunatic by his next friend, where defendant relies on a power of attorney given by plaintiff to dismiss the suit, the court may, at the same time the issues raised in the suit are submitted, submit the issue whether plaintiff was *compos mentis* when the power of attorney was executed.[28] In a suit by a guardian to set aside his ward's deed on the ground of insanity, although the impression made upon the jury by the appearance of the ward may be slight, still, in connection with other evidence in relation thereto, it should be allowed to have its effect.[29]

H. Judgment,[30] Review, and Costs — 1. Judgment Against Insane Person[31] — a. Validity in General. A judgment may properly be rendered against an insane person.[32]

tain whether the ward is still of unsound mind.

25. Reese *v.* Reese, 89 Ga. 645, 15 S. E. 846.

26. Allen *v.* Pannell, 51 Tex. 165.

27. Matter of Giles, 11 Paige (N. Y.) 243, holding further that where the court has directed a feigned issue to try the question of lunacy, and a third person whose conveyance was overreached by the inquisition has consented to join the issue and to be bound by the result thereof, counsel for the respective parties to the suit are not authorized to abandon the trial of the issue without the sanction of the court, and leave the validity of the lunatic's conveyance to be decided in some other mode. See also *supra*, I, D.

Necessity of feigned issue.—It is not necessary, in a suit in equity to avoid a lunatic's conveyance, that the question of the party's sanity be first submitted to a jury on a feigned issue, such an issue being merely to inform the conscience of the court. Smith *v.* Carll, 5 Johns. Ch. (N. Y.) 118.

28. Smith *v.* Smith, 106 N. C. 498, 11 S. E. 188.

29. Koile *v.* Ellis, 16 Ind. 301.

30. Judgment generally see Judgments.

31. Lien of judgment against insane person see Judgments.

32. *Indiana.*— Woods *v.* Brown, 93 Ind. 164, 47 Am. Rep. 369.

Maine.— King *v.* Robinson, 33 Me. 314, 54 Am. Dec. 614.

New Jersey.— Weber *v.* Weitling, 18 N. J. Eq. 441, *semble*.

Pennsylvania.— Henry *v.* Brothers, 48 Pa. St. 70.

Washington.— Pollock *v.* Horn, 13 Wash. 626, 43 Pac. 885, 52 Am. St. Rep. 66.

Wyoming.— White *v.* Hinton, 3 Wyo. 753, 30 Pac. 953, 17 L. R. A. 66.

See 27 Cent. Dig. tit. "Insane Persons," § 179. And see Shelford Lun. 395, 407.

Contra.— White *v.* Palmer, 4 Mass. 147 (where the guardian was not made a party); Lamprey *v.* Nudd, 29 N. H. 299 (*semble*); *Ex p.* Kibler, 53 S. C. 461, 31 S. E. 274 (holding that a judgment against a person who was of unsound mind at the commencement of the action, and who so remained until after judgment, is void for want of jurisdiction); *Ex p.* Roundtree, 51 S. C. 405, 29 S. E. 66 (holding that a judgment against a person of unsound mind, incapable of managing her affairs, is void for want of jurisdiction, although an attorney appeared for her, where no guardian *ad litem* was appointed or represented her).

Judgment against guardian.— In a suit against a lunatic, the judgment is properly rendered against the lunatic, and not against his guardian. Walker *v.* Clay, 21 Ala. 797; Stigers *v.* Brent, 50 Md. 214, 33 Am. Rep. 317.

Judgment against guardian and ward.— In Illinois, where defendant in ejectment becomes insane, and his conservator is not substituted as an administrator or executor would be, but his name is added with the defendant in the title of the case, the court cannot render judgment against defendant and his conservator, and award a writ of possession against both, with costs against the conservator alone. Scott *v.* Bassett, 194 Ill. 602, 62 N. E. 914.

Failure of guardian to act.— If one be appointed by the court a guardian *ad litem* of a lunatic, and accept the trust, a judgment against the lunatic will be good, notwithstanding the guardian fails to act. Foster *v.* Jones, 23 Ga. 168.

Insanity after verdict.— Where a case has been tried, and a verdict returned, it is no objection to the signing of the findings and judgment that at that time one of the parties is insane. San Luis Obispo County *v.* Simas, 1 Cal. App. 175, 81 Pac. 972.

Revival of judgment.— A judgment obtained against a person subsequently found to be of unsound mind may be revived by an action against defendant and his committee. McNees *v.* Thompson, 5 Bush (Ky.) 686.

Insanity of defendant: As ground for collateral attack see *infra*, VIII, H, 1, d. As ground for opening or vacating judgment see

b. Judgment by Consent, Confession, or Default.[33] It has been held that a default judgment should not be rendered against an insane defendant,[34] and that a judgment rendered against him by consent is also improper.[35]

c. Relief Against Judgment — (I) *In General.* If a person is of sufficient capacity to transact rationally the ordinary affairs of life, a judgment against him will not be vacated or set aside on the ground of his mental unsoundness at the time it was rendered.[36]

(II) *Motion to Open or Vacate.* A judgment against a lunatic may be vacated on motion for good cause[37] in the discretion of the court,[38] but not after the term at which the judgment was rendered.[39] It has been held that the fact that defendant was insane when a judgment at law was rendered against him affords no ground for setting aside the judgment on motion, the remedy being in equity,[40] but that it is otherwise under the codes.[41]

infra, VIII, H, 1, c, (II). As ground for setting aside judgment see *infra*, VIII, H, 1, c, (III).

33. Power of wife of insane person to consent to judgment against the community see HUSBAND AND WIFE, 21 Cyc. 1692.

34. *Kentucky.*— South *v.* Carr, 7 T. B. Mon. 419, no committee having been appointed.

Maine.— Leach *v.* Marsh, 47 Me. 548, 74 Am. Dec. 503.

Massachusetts. — Taylor *v.* Lovering, 171 Mass. 303, 50 N. E. 612, no committee having been appointed.

Nebraska.—McAllister *v.* Lancaster County Bank, 15 Nebr. 295, 18 N. W. 57, holding, however, that while a judgment obtained by default against a lunatic, he and his guardian having been duly served with process, is erroneous, it is neither void nor voidable.

Ohio.— Sturges *v.* Longworth, 1 Ohio St. 544, a guardian *ad litem* having been appointed.

Pennsylvania. — Alexander *v.* Ticknor, 1 Phila. 120, holding that judgment for want of an affidavit of defense will not he entered against an insane man, or, if he have a committee, against the latter.

West Virginia. — Eakin *v.* Hawkins, 52 W. Va. 124, 43 S. E. 211.

England. — Carew *v.* Johnson, 2 Sch. & Lef. 300.

See 27 Cent. Dig. tit. "Insane Persons," § 180.

An order to take a bill pro confesso against the guardian *ad litem* of a lunatic was made on the terms of serving notice of the motion therefor upon the lunatic and his guardian. Crawford *v.* Kernaghan, Dr. & Wal. 195. And see Swift *v.* Swift, 11 Ir. Eq. 557; Peto *v.* Atty.-Gen., 1 Y. & J. 509.

35. Glasscock *v.* Tate, 107 Tenn. 486, 64 S. W. 715; Denni *v.* Elliott, 60 Tex. 337, both holding such a judgment voidable. See, however, McAden *v.* Hooker, 74 N. C. 24, holding that judgment may be entered to bind an insane person on confession by guardian.

It is no objection to signing judgment on a warrant of attorney under fifteen years old, that defendant is insane. Piggot *v.* Killick, 4 Dowl. P. C. 287, 1 Hurl. & W. 518.

36. Titcomb *v.* Vantyle, 84 Ill. 371; Garretson *v.* Hubbard, 110 Iowa 7, 81 N. W. 174; Spurlock *v.* Noe, 43 S. W. 231, 19 Ky. L. Rep. 1321, 39 L. R. A. 775. And see Paterson *v.* Squires, Chamb. Rep. (U. C.) 234.

37. Ammon *v.* Wiebold, 61 N. J. L. 351, 48 Atl. 950 (where the court opened a decree of foreclosure obtained upon a mortgage the assignment of which had been obtained from an insane mortgagor, without a guardian, and without the knowledge of her relatives); Ash *v.* Conyers, 2 Miles (Pa.) 94 (holding that where a judgment has been entered against a defendant while proceedings were pending on a writ de lunatico inquirendo in the common pleas, on which, a few days after the entry of the judgment, inquisition was found that defendant was *non compos mentis*, the court will open the judgment so as to let in a defense, and set aside the execution issued on it); Bond *v.* Neuschwander, 86 Wis. 391, 57 N. W. 54 (holding that under Wis. Rev. St. § 2832, providing that the court may relieve a party from a judgment against him through his mistake, surprise, or excusable neglect, it is proper to open a judgment by default against a garnishee and allow her to answer, if she was insane when the summons was served on her).

Jurisdiction.— That a county court has appointed a committee for and acquired jurisdiction of the person and property of a lunatic does not preclude the supreme court, in an action properly brought before it against the lunatic and his committee, from making an order opening a default judgment against the lunatic, and permitting his committee to appear for him in the action without an order first obtained from the county court. Kent *v.* West, 22 Misc. (N. Y.) 403, 50 N. Y. Suppl. 339.

38. Kneedler's Appeal, 92 Pa. St. 428, holding that a motion to open a judgment entered on a warrant of attorney is an appeal to the equitable powers of the court.

39. Leonard *v.* Chicago Times, 51 Ill. App. 427.

40. Clarke *v.* Dunham, 4 Den. (N. Y.) 262; Robertson *v.* Lain, 19 Wend. (N. Y.) 649.

41. Demilt *v.* Leonard, 11 Abb. Pr. (N. Y.) 252, 19 How. Pr. 140.

(III) *SUIT TO SET ASIDE.* Equity has jurisdiction in a proper case to afford relief against a judgment against an insane person,[42] and in some states a statutory action is provided to set aside the judgment.[43]

d. Collateral Attack. The fact that a judgment defendant was insane when

42. Karr *v.* Creveling, 2 N. J. L. J. 119 (where judgments were entered against a lunatic by default in suits on contracts, some made by him while incompetent and others before he became insane, without the appointment of a guardian *ad litem* or any one to represent him, and a guardian in lunacy was afterward appointed and sought to restrain the sale of his ward's estate under the judgments, and it was held that the sale should be allowed to proceed only to pay the debts contracted prior to his incompetency, no question being made as to their validity); Mabry *v.* Churchwell, 1 Lea (Tenn.) 416 (holding that where defendant to a bill in equity for the sale of land proves to be of so weak a mind as to be incompetent to guard himself from the importunity of complainant, files an unresisting answer, and consents to a decree of sale without advertisement, the decree will be set aside); Lee *v.* Heuman, 10 Tex. Civ. App. 666, 32 S. W. 93. And see Eckstein's Estate, 1 Pars. Eq. Cas. (Pa.) 59, 2 Pa. L. J. 137, 1 Pa. L. J. Rep. 224 (where, on petition of the committee of a lunatic, supported by special affidavit, an injunction was granted by the common pleas to restrain an execution creditor of the lunatic from levying on and selling the personal estate in the hands of his committee); Tabb *v.* Gist, 23 Fed. Cas. No. 13,719, 1 Brock 33, 6 Call (Va.) 279 (holding that, although one may not be so insane as to avoid his contracts, yet if he labors under melancholy, this may authorize relief against a judgment obtained against him while in such a state of mind).

However, where process was served on an insane defendant and his personal guardians, none of whom appeared or answered, a judgment thereupon rendered by default is neither void nor voidable, but merely erroneous, to correct which proceedings in error should be had, instead of an action to declare the judgment void. McAllister *v.* Lancaster County Bank, 15 Nebr. 295, 18 N. W. 57. And after the appointment of a committee of a lunatic, the lunatic cannot object to a judgment recovered against him that he was not sufficiently recovered to attend to business, without showing that his committee were out of commission. Henderson *v.* Mitchell, 1 Bailey Eq. (S. C.) 113, 21 Am. Dec. 526.

Lunacy is no sufficient ground in equity for declaring a judgment at law against a lunatic a nullity. Stigers *v.* Brent, 50 Md. 214, 33 Am. Rep. 317. In any event, where a judgment is obtained against a lunatic, and an execution issued and levied upon his property, before the institution of proceedings in lunacy in the court of chancery, the court will not set aside the judgment and execution upon a summary application of the committee, although such judgment and execution are overreached by the finding of the jury upon the commission of lunacy. Matter of Hopper, 5 Paige (N. Y.) 489.

The negligence of the guardian in a suit is imputable to the ward on a bill to set aside the judgment. Weems *v.* Weems, 73 Ala. 462.

43. Dickerson *v.* Davis, 111 Ind. 433, 12 N. E. 145 (holding that where a judgment by default is taken against a person of unsound mind, presumably after due service of process, by a *bona fide* holder of a note obtained by fraud and without consideration by the original payee, defendant never having been judicially declared of unsound mind and plaintiff having no knowledge thereof, it will be set aside, and the guardian or administrator let in to defend, by simply showing that defendant was of unsound mind when the note was executed and the judgment taken, and that it was without consideration); Hawley *v.* Griffin, 121 Iowa 667, 92 N. W. 113, 97 N. W. 86 (where a decree in a suit to quiet title by grantees in tax deeds against the owner, who was insane and did not appear and for whom no guardian was appointed, entered in favor of plaintiff without any cognizance of the insanity of defendant, was vacated, although it had not been judicially found that defendant was insane and he was not confined in a state hospital). See, however, Woods *v.* Brown, 93 Ind. 164, 47 Am. St. Rep. 369 (holding that it is no ground for setting aside a judgment that it was rendered on default, without service of process, at a time when defendant therein was insane); Carroll Imp. Co. *v.* Engleman, (Iowa 1904) 99 N. W. 514 (holding that where, on foreclosure, personal service has been had on an insane person and her guardian, failure to appoint a guardian *ad litem* for the insane person was a mere irregularity, not affecting the judgment); White *v.* Hinton, 3 Wyo. 753, 30 Pac. 953, 17 L. R. A. 66.

Bill of review distinguished.— Proceedings to vacate a decree in favor of plaintiffs in a suit to quiet title by grantees in tax deeds against the owner, who was insane and did not appear and for whom no guardian was appointed, instituted by the heirs of the deceased owner under Iowa Code (1873), § 3154 *et seq.*, authorizing the court to vacate a decree for erroneous proceedings against an insane person, differ from proceedings in equity in the nature of a bill of review, the former being governed by the conditions and limitations contained in the statute, and the latter by the ordinary rules of procedure. Hawley *v.* Griffin, 121 Iowa 667, 92 N. W. 113, 97 N. W. 86.

the judgment was rendered against him cannot be urged in derogation of the judgment in a collateral proceeding.[44]

e. Execution.[45] In some states execution may issue on a judgment against an insane person, and his property be seized and sold;[46] but execution cannot be levied on the lunatic's property after a decree ordering it to be sold,[47] or on personal property in the possession of the committee,[48] the remedy of the creditor in such cases being by application to the court having jurisdiction, which will order the committee to raise and pay over the funds necessary to satisfy the judgment.[49] However, a sale of the lunatic's property on execution cannot be collaterally attacked because of his lunacy,[50] and the rights of the purchaser will be protected.[51]

2. Review.[52] An order denying a motion for judgment by default against plaintiff as guardian of an insane person as prayed by the cross complaint is not appealable.[53] An insane person may appeal in a lucid interval, although a guardian *ad litem* has been appointed.[54] A guardian may appeal or bring error in

44. *Alabama.*— White *v.* Farley, 81 Ala. 563, 8 So. 215.

California.— Dunn *v.* Dunn, 114 Cal. 210, 46 Pac. 5. See, however, Gillespie *v.* Gouly, 120 Cal. 515, 52 Pac. 816.

Georgia.— Foster *v.* Jones, 23 Ga. 168.

Illinois.— Noel *v.* M. W. of A., 61 Ill. App. 597. And see Maloney *v.* Dewey, 127 Ill. 395, 19 N. E. 848, 11 Am. St. Rep. 131.

Kentucky.— Allison *v.* Washburn, 6 Dana 87, 32 Am. Dec. 68.

New Hampshire.— Lamprey *v.* Nudd, 29 N. H. 299.

North Carolina.— Thomas *v.* Hunsucker, 108 N. C. 720, 13 S. E. 221; Brittain *v.* Mull, 99 N. C. 483, 6 S. E. 382. And see Chamblee *v.* Broughton, 120 N. C. 170, 27 S. E. 111.

Ohio.— Johnson *v.* Pomeroy, 31 Ohio St. 247 [*affirming* 5 Ohio Dec. (Reprint) 518, 6 Am. L. Rec. 379]; Neff *v.* Cox, 5 Ohio S. & C. Pl. Dec. 377, 5 Ohio N. P. 413.

Oregon.— See Harper *v.* Harding, 3 Oreg. 361, holding that in an action to recover land sold in a foreclosure suit, it is not a sufficient showing of a want of jurisdiction to allege that defendant was insane at the time of trial.

Texas.— Ewing *v.* Wilson, 63 Tex. 88; Denni *v.* Elliott, 60 Tex. 337.

West Virginia.— Withrow *v.* Smithson, 37 W. Va. 757, 17 S. E. 316, 19 L. R. A. 762.

See 27 Cent. Dig. tit. "Insane Persons," § 184.

45. **Execution** generally see EXECUTIONS.

Body execution see EXECUTIONS, 17 Cyc. 1490 *et seq.*

Attachment of lunatic's property see ATTACHMENT, 4 Cyc. 409.

46. *Ex p.* Leighton, 14 Mass. 207; Thacher *v.* Dinsmore, 5 Mass. 299, 4 Am. Dec. 61; *In re* Clarke, [1898] 1 Ch. 336, 67 L. J. Ch. 234, 78 L. T. Rep. N. S. 275, 46 Wkly. Rep. 337; *In re* Grant, 28 Grant Ch. (U. C.) 457. And see Salter *v.* Salter, 6 Bush (Ky.) 624. *Contra*, after inquisition, McNees *v.* Thompson, 5 Bush (Ky.) 686; Saunders *v.* Mitchell, 61 Miss. 321.

In North Carolina property of a lunatic in the hands of a committee is to be regarded as *in custodia legis*, and no creditor can reach it for a debt preëxisting the inquisition of lunacy, except through the order of the superior court; and that order is never made until a sufficiency for the support of the lunatic and that of his family, if minors, is first ascertained and set apart. Adams *v.* Thomas, 81 N. C. 296, 83 N. C. 521.

Necessity for presenting claim against estate.— The lands of the insane ward being subject to execution, the creditor is not obliged to present his claim for settlement in the administration of defendant's estate. Morgan *v.* Hoyt, 69 Ill. 489; Adriance *v.* Brooks, 13 Tex. 279; Pollock *v.* Horn, 13 Wash. 626, 43 Pac. 885, 52 Am. St. Rep. 66.

47. Latham *v.* Wiswall, 37 N. C. 294.

48. Guthrie's Appeal, 16 Pa. St. 321; Matter of Eckstein, 1 Pars. Eq. Cas. (Pa.) 59, 2 Pa. L. J. 137, 1 Pa. L. J. Rep. 224.

49. Matter of Eckstein, 1 Pars. Eq. Cas. 59, 2 Pa. L. J. 137, 1 Pa. L. J. Rep. 224; Bolling *v.* Turner, 6 Rand. (Va.) 584.

50. White *v.* Farley, 81 Ala. 563, 8 So. 215; Allison *v.* Taylor, 6 Dana (Ky.) 87, 32 Am. Dec. 68; Thomas *v.* Hunsucker, 108 N. C. 720, 13 S. E. 221.

51. Foster *v.* Jones, 23 Ga. 168; Crawford *v.* Thomson, 161 Ill. 161, 43 N. E. 617; Tomlinson *v.* Devore, 1 Gill (Md.) 345.

Fraud.— Where an action for a debt was brought with knowledge that defendant was mentally unsound and incapable of acting for herself, and she was not represented by a guardian, and there was a judgment for plaintiff and an execution sale thereunder, the sale passed no title to purchasers with knowledge. Gillespie *v.* Gouly, 120 Cal. 515, 52 Pac. 816. And where the father of a lunatic had the property of the lunatic in his hands, and had purchased a portion of it on execution against the lunatic, but at a very reduced price, he was not allowed to retain it, but was allowed for his advance of the purchase. Coleman *v.* Lunatic Asylum Com'rs, 6 B. Mon. (Ky.) 239.

52. **Review** generally see APPEAL AND ERROR.

Audita querela to review judgment against insane person see AUDITA QUERELA, 4 Cyc. 1061 note 18.

53. Broadribb *v.* Tibbetts, 62 Cal. 614.

54. Formby *v.* Wood, 19 Ga. 581.

behalf of the ward.[55] The guardian *ad litem* is guardian for the case, and will be presumed to act as such in the appellate court.[56] An insane person's appeal need not await the removal of his disability,[57] and the statutes limiting the time for appealing do not as a rule apply to insane persons.[58] Service of notice of appeal on an insane person's guardian *ad litem*, who also appeared as his attorney in the court below, is sufficient.[59] Objections cannot be taken for the first time on appeal.[60] The propriety of rendering judgment against an insane person is reviewable on writ of error.[61] The appointment of a guardian *ad litem* rests in the discretion of the lower court.[62] Questions of fact will not ordinarily be reviewed on appeal.[63] A judgment will not be reversed for harmless error.[64]

3. COSTS.[65] A guardian will not ordinarily be personally charged with costs.[66] In suits in equity, where the matter of the allowance of costs rests generally in the sound discretion of the court, such discretion will be exercised in favor of or against insane parties, their guardians or committees, as justice may require.[67] Security for costs is not required in the absence of statute.[68]

INSANUS EST QUI ABJECTA RATIONE, OMNIA CUM IMPETU ET FURORE FACIT. A maxim meaning "He is insane who, reason being thrown away, does everything with violence and rage."[1]

55. *In re* Breslin, 135 Cal. 21, 66 Pac. 962; Taylor *v.* Lovering, 171 Mass. 303, 50 N. E. 612.

Error by next friend.— Where defendant in a divorce suit is insane, and a decree is rendered against him for a cause committed before he became insane, his next friend may prosecute a writ of error to reverse the decree; and it is not essential that the person who represented defendant as guardian *ad litem* should appear as next friend in the writ of error. Iago *v.* Iago, 168 Ill. 339, 48 N .E. 30, 61 Am. St. Rep. 120, 39 L. R. A. 115.

56. Cunningham *v.* Davis, 175 Mass. 213, 56 N. E. 2.

57. Finney *v.* Speed, 71 Miss. 32, 14 So. 465.

58. Anderson *v.* Layton, 3 Bush (Ky.) 87; Finney *v.* Speed, 71 Miss. 32, 14 So. 465; Witte *v.* Gilbert, 10 Nebr. 539, 7 N. W. 288.

59. Shoemake *v.* Smith, 80 Iowa 655, 45 N. W. 744.

60. Yount *v.* Turnpaugh, 33 Ind. 46; Bird *v.* Bird, 21 Gratt. (Va.) 712.

61. Leach *v.* Marsh, 47 Me. 548, 74 Am. Dec. 503; White *v.* Palmer, 4 Mass. 147; Lamprey *v.* Nudd, 29 N. H. 299.

62. King *v.* Robinson, 33 Me. 114, 54 Am. Dec. 614.

63. Lack *v.* Brecht, 166 Mo. 242, 65 S. W. 976; Bishop *v.* Hunt, 24 Mo. App. 373.

64. Walker *v.* Clay, 21 Ala. 797 (holding that the appointment of a guardian *ad litem* for a lunatic defendant is not prejudicial error, where defendant appeared and pleaded by his guardian *ad litem* and by attorney, especially where the guardian was appointed at the instance of defendant's attorney); Wampler *v.* Wolfinger, 13 Md. 337; Atwood *v.* Lester, 20 R. I. 660, 40 Atl. 866 (holding that the failure to appoint a guardian *ad litem* is not sufficient ground to set aside a verdict against an insane defendant where he is not prejudiced by the verdict).

65. Costs generally see COSTS.

66. Alexander *v.* Alexander, 5 Ala. 517: Sanford *v.* Phillips, 68 Me. 431. And see Seaman *v.* Porter, 16 Nova Scotia 292, 495. But where an action was promoted by one designating himself next friend, it was held, on adverse termination of the action, that he was primarily liable for costs, but that he should be reimbursed if the action was in good faith. Nance *v.* Stockburger, 112 Ga. 90, 37 S. E. 125, 81 Am. St. Rep. 22; Young *v.* Heron, 14 Grant Ch. (U. C.) 580.

67. Edwards *v.* Edwards, 14 Tex. Civ. App. 87, 36 S. W. 1080; Lynch *v.* Skerrett, 2 Jones Exch. 508; Masters *v.* Masters, 2 N. Brunsw. Eq. 486.

Illustrations.— Where the committee of a lunatic, under the direction of the vice-chancellor, had improperly presented a petition to the chancellor in reference to the estate, he was held not to be charged with costs on the petition being dismissed (Matter of Hopper, 5 Paige (N. Y.) 489), and an incompetent person who is made a party to a suit to determine the construction of a will will not be left to pay his own costs out of property not derived under the will or from testator (King *v.* Strong, 9 Paige (N. Y.) 94). Where costs are directed to be paid out of the estate of a lunatic, if the litigation is unnecessarily protracted for the purpose of vexation the court will tax the party so acting with the costs. Alexander *v.* Alexander, 8 Ala. 796.

Attorney's fees.— Where an attorney, in ignorance of his client's insanity, drew a complaint for him, which was not served, and received his fee in advance, it was held that the lunatic's committee might recover the amount of the fee, as money received. Feigenbaum *v.* Howe, 32 Misc. (N. Y.) 514, 66 N. Y. Suppl. 378.

68. Kelly *v.* Kelly, 77 N. Y. App. Div. 519, 78 N. Y. Suppl. 918; Steel *v.* Allan, 2 B. & P. 437, 5 Rev. Rep. 647.

1. Bouvier L. Dict.

Applied in Beverley's Case, 4 Coke 123*b*,

IN SATISFACTIONIBUS NON PERMITTITUR AMPLIUS FIERI QUAM SEMEL FACTUM EST. A maxim meaning "In payments, more must not be received than has been received once for all."[2]

INSCRUTABLE FAULT. See COLLISION.

INSENSIBLE BOND. A term applied to a bond when the terms and conditions thereof are so unintelligently expressed as to render an ascertainment of the intention of the parties impossible.[3] (See, generally, BONDS.)

INSERT. To set within something; to put or thrust in; to introduce; to cause to enter, or be included or contained.[4]

IN SESSION.[5] As applied to a court, a term which may mean in actual session;[6] that the court has convened and has not adjourned;[7] that the court is open by its own order for the transaction of business.[8] (See, generally, CONTEMPT; COURTS.)

IN SIGHT. See MINES AND MINERALS.

INSIMUL COMPUTASSENT. Literally, "they accounted together; he accounted together." In pleading, the emphatic name given to one of the common counts, (otherwise called a count upon an account stated,) those being the two emphatic words of the count when framed in Latin.[9] Also a writ that lies between two merchants or other persons upon an account stated between them.[10] (See, generally, ACCOUNTS AND ACCOUNTING.)

INSIMUL TENUIT. One species of the writ of *formedon* brought against a stranger by a coparcener on the possession of the ancestor, etc.[11] (See FORMEDON.)

INSINUATION OF A WILL. In the civil law, the first production of a will, or the leaving it with the registrar, in order to its probate.[12] (See, generally, WILLS.)

INSIST. To be urgent in action; proceed persistently; persevere.[13]

IN SO DOING. As used in an indictment, a term which may be equivalent to the words "then and there."[14] (See, generally, INDICTMENTS AND INFORMATIONS.)

INSOLENT. Rude, saucy, insulting, abusive, offensive.[15]

IN SOLIDUM, or IN SOLIDO. In civil law, for the whole; as a whole.[16]

INSOLUBLE PHOSPHORIC ACID. As used in connection with manures and fertilizers, a term meaning phosphoric acid in any form or combination which requires the action of an acid upon it to become soluble in pure cold water.[17]

128*a*, Fitzh. N. Br. 532, 2 Inst. 14, Reg. Brev. 267.

2. Bouvier L. Dict.

Applied in Hickmot's Case, 9 Coke 52*b*, 53*a*.

3. Union Sewer Pipe Co. *v.* Olson, 82 Minn. 187, 189, 84 N. W. 756.

4. Webster Unabr. Dict. [*quoted* in New Albany *v.* Iron Substructure Co., 141 Ind. 500, 512, 40 N. E. 44].

To write or transcribe.— New Albany *v.* Iron Substructure Co., 141 Ind. 500, 512, 40 N. E. 44.

Using a sticker is a method of "inserting" the name of a candidate in an electoral ballot. Fletcher *v.* Wall, 172 Ill. 426, 434, 50 N. E. 230, 233, 40 L. R. A. 617.

5. As applied to a legislature see People *v.* Fancher, 50 N. Y. 288, 291.

6. See Com. *v.* Gove, 151 Mass. 392, 24 N. E. 211. But *compare* U. S. *v.* Pitman, 147 U. S. 669, 13 S. Ct. 425, 37 L. ed. 324, construing U. S. Rev. St. § 828 [U. S. Comp. St. (1901) p. 635].

7. State *v.* Root, 5 N. D. 487, 503, 67 N. W. 590, 57 Am. St. Rep. 568.

"Not in session" has been held to include a temporary adjournment. Com. *v.* Gove, 151 Mass. 392, 24 N. E. 211.

8. McMullen *v.* U. S., 146 U. S. 360, 361, 13 S. Ct. 127, 36 L. ed. 1007.

9. Burrill L. Dict. See also Loventhal *v.* Morris, 103 Ala. 332, 337, 15 So. 672; Sawkill *v.* Warman, 10 Mod. 104; 1 Cyc. 390 note 26, 498 note 96; Mass. Pub. St. (1882) c. 167, § 94.

10. Fraley *v.* Bispham, 10 Pa. St. 320, 325, 51 Am. Dec. 486.

11. Jacob L. Dict.

12. Black L. Dict.

13. Century Dict. See also Greaves *v.* Wilson, 25 Beav. 290, 294, 4 Jur. N. S. 271, 27 L. J. Ch. 546, 6 Wkly. Rep. 482, 53 Eng. Reprint 647.

14. State *v.* Murphy, 35 La. Ann. 622, 623.

15. State *v.* Bill, 35 N. C. 373, 376 [*citing* Worcester Dict.].

16. Bouvier L. Dict. See also Pfirmann *v.* Henkel, 1 Ill. App. 145, 149; Finney *v.* Apgar, 31 N. J. L. 266, 270; Mead *v.* Case, 33 Barb. (N. Y.) 202, 208; Passaic Mfg. Co. *v.* Hoffman, 3 Daly (N. Y.) 495, 504; Crookshank *v.* Burrell, 18 Johns. (N. Y.) 57, 59, 9 Am. Dec. 187; Fairchild *v.* Dunbar Furnace Co., 128 Pa. St. 485, 497, 18 Atl. 443, 444; Liverpool, etc., Nav. Co. *v.* Agar, 14 Fed. 613, 615, 4 Woods 201; 11 Cyc. 1181.

An obligation or contract is said to be *in solido* or *in solidum* when each party thereto is liable for the whole. Bouvier L. Dict. [*citing* Bird *v.* Randall, 3 Burr. 1345, 1 W. Bl. 373, 387].

17. Md. Pub. Gen. L. (1888) p. 972, art. 61, § 8; Va. Code (1887), § 1895. See also 56 & 57 Vict. c. 56, § 8.

INSOLVENCY

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* Author of "Brandenburg on Bankruptcy," "Digest of Bankruptcy Decisions," etc.

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I. TERMINOLOGY.

A. Insolvency.[1] "Insolvency" has been differently defined by different courts,[2] and it may be said to have two distinct and well defined significations;[3] as popularly understood, the term denotes the state of one whose assets are insufficient to pay his debts;[4] or his general inability to pay his

1. "Voluntary proceedings" in insolvency defined see *infra*, III, C, 1.
"Involuntary proceedings" in insolvency defined see *infra*, III, D, 1.
2. French *v.* Andrews, 81 Hun (N. Y.) 272, 274, 30 N. Y. Suppl. 796; Toof *v.* Martin, 13 Wall. (U. S.) 40, 47, 20 L. ed. 481 [*quoted* in Ring *v.* Chas. Vogel Paint, etc., Co., 44 Mo. App. 111, 115].
3. Ruggles *v.* Cannedy, (Cal. 1898) 53 Pac. 911, 916.
4. *Alabama.*—Smith *v.* Collins, 94 Ala. 394, 403, 10 So. 334.
California.— Ruggles *v.* Cannedy, (1898) 53 Pac. 911, 916; French Bank Case, 53 Cal. 495, 506 [*quoting* Bouvier L. Dict.; Brown L. Dict.; Wharton L. Lex.].
Colorado.— Walton *v.* Silverton First Nat. Bank, 13 Colo. 265, 272, 22 Pac. 440, 16 Am. St. Rep. 200, 5 L. R. A. 765.
Dakota.— Sioux Falls First Nat. Bank *v.* Dickson, 5 Dak. 286, 40 N. W. 351, 352.
Georgia.— Clarke *v.* Ingram, 107 Ga. 565, 582, 33 S. E. 802; Cohen *v.* Parish, 100 Ga. 335, 338, 28 S. E. 122.
Indiana.— Herald *v.* Scott, 2 Ind. 55, 57.
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Iowa.— State *v.* Cadwell, 79 Iowa 432, 448, 44 N. W. 700; McKown *v.* Furgason, 47 Iowa 636, 637.
Kansas.— See State *v.* Myers, 54 Kan. 206, 215, 28 Pac. 296.
Maine.— Morey *v.* Milliken, 86 Me. 464, 474, 30 Atl. 102.
Montana.— Stadler *v.* Helena First Nat. Bank, 22 Mont. 190, 217, 56 Pac. 111, 74 Am. St. Rep. 582.
Nebraska.— David Adler, etc., Clothing Co. *v.* Hillman, 55 Nebr. 266, 291, 75 N. W. 877.
New Jersey.— Ft. Wayne Electric Corp. *v.* Franklin Electric Light Co., 57 N. J. Eq. 7, 12, 41 Atl. 217.
New York.— Van Riper *v.* Poppenhausen, 43 N. Y. 68, 75; Curtis *v.* Leavitt, 15 N. Y. 9, 199; Leitch *v.* Hollister, 4 N. Y. 211, 215; Higgins *v.* Worthington, 12 N. Y. App. Div. 361, 364, 42 N. Y. Suppl. 737; French *v.* Andrews, 81 Hun 272, 274, 30 N. Y. Suppl. 796; Market Nat. Bank *v.* Pacific Nat. Bank, 30 Hun 50, 54; Marsh *v.* Dunckel, 25 Hun 167, 169; People *v.* Halsey, 53 Barb. 547;

debts.[5] But it is, however, frequently used in the more restricted sense to express the inability of a party to pay his debts as they become due in the ordinary course of business.[6] The question of insolvency, however, under any

Lodi Chemical Co. *v.* Charles H. Pleasants Co., 25 Misc. 97, 100, 54 N. Y. Suppl. 668; Herrick *v.* Borst, 4 Hill 650, 652.

Oregon.— Sabin *v.* Columbia Fuel Co., 25 Oreg. 15, 34 Pac. 692, 42 Am. St. Rep. 756.

Pennsylvania.— Mueller *v.* Monongahela Fire Clay Co., 183 Pa. St. 450, 457, 38 Atl. 1009; Bowersox's Appeal, 100 Pa. St. 434, 438, 45 Am. Rep. 387.

South Carolina.— Miller *v.* Southern Land, etc., Co., 53 S. C. 364, 366, 31 S. E. 281; Mitchell *v.* Mitchell, 42 S. C. 475, 483, 20 S. E. 405; Akers *v.* Rowan, 33 S. C. 451, 456, 12 S. E. 165, 10 L. R. A. 705.

Texas.— See Mensing *v.* Atchison, (Civ. App. 1894) 26 S. W. 509.

Vermont.— Dewey *v.* St. Albans Trust Co., 56 Vt. 475, 480, 48 Am. Rep. 803.

Virginia.— McArthur *v.* Chase, 13 Gratt. 683, 692.

West Virginia.— Weigand *v.* Alliance Supply Co., 44 W. Va. 133, 156, 28 S. E. 803.

Wisconsin.— Marvin *v.* Anderson, 111 Wis. 387, 390, 87 N. W. 226.

United States.— Toof *v.* Martin, 13 Wall. 40, 47, 20 L. ed. 481; Lansing Boiler, etc., Works *v.* Ryerson, 128 Fed. 701, 704, 63 C. C. A. 253; Citizens' Bank, etc., Co. *v.* Union Min., etc., Co., 106 Fed. 97, 100; *In re* Rome Planing Mill, 96 Fed. 812, 814; *In re* Bininger, 3 Fed. Cas. No. 1,420, 7 Blatchf. 262, 264; *In re* Randall, 20 Fed. Cas. No. 11,551, Deady 557, 562.

Canada.— Rae *v.* McDonald, 13 Ont. 352, 358. See also Toronto Bank *v.* Hall, 6 Ont. 653, 658.

As absence of property.— Insolvency does not mean a total want of property. Citizens' Nat. Bank *v.* Greensburg Third Nat. Bank, 19 Ind. App. 69, 49 N. E. 171, 176; Teitig *v.* Boesman, 12 Mont. 404, 436, 31 Pac. 371.

"Poverty" and "insolvency" are not synonymous terms. Bowersox's Appeal, 100 Pa. St. 434, 438, 45 Am. Rep. 387.

Without debts there can be no insolvency. Teitig *v.* Boesman, 12 Mont. 404, 31 Pac. 371; *In re* Blain, 16 York Leg. Rec. (Pa.) 167.

Where an alleged insolvent is not a trader or a merchant, the term "insolvency" is ordinarily held to have a less restricted meaning than when applied to bankers, traders, etc. Williamson *v.* Hatch, 55 Minn. 344, 57 N. W. 56.

Debtor's insolvency depends not upon the nominal value of his property but upon whether enough can be realized therefrom on sale thereof to discharge his liabilities. Churchill *v.* Wells, 7 Coldw. (Tenn.) 364.

Where a person's debts exceed his estate he is said to be insolvent. French Bank Case, 53 Cal. 495, 506 [*citing* Bell L. Dict.; Holthouse L. Dict.].

5. *California.*— French Bank Case, 53 Cal. 495, 506 [*citing* Jacob L. Dict.].

Connecticut.— Rogers *v.* Thomas, 20 Conn. 53, 69.

Indiana.— Herald *v.* Scott, 2 Ind. 55, 57.

Iowa.— McKown *v.* Furgason, 47 Iowa 636, 637.

New Jersey.— Ft. Wayne Electric Corp. *v.* Franklin Electric Light Co., 57 N. J. Eq. 7, 13, 41 Atl. 217.

New York.— Kunzler *v.* Kohaus, 5 Hill 317, 320; Herrick *v.* Borst, 4 Hill 650, 652.

United States.— Cunningham *v.* Norton, 125 U. S. 77, 8 S. Ct. 804, 31 L. ed. 624; *Ex p.* Randall, 20 Fed. Cas. No. 11,550.

England.— Biddlecombe *v.* Bond, 4 A. & E. 332, 335, 5 L. J. K. B. 47, 5 N. & M. 621, 31 E. C. L. 158.

"Insolvency" and "inability to pay" are synonymous, but solvency does not mean ability to pay at all times, under all circumstances, and everywhere on demand, nor does it require that a person should have in his possession the amount of money necessary to pay all claims against him. Difficulty in paying particular demands is not insolvency. Walkenshaw *v.* Perzel, 4 Rob. (N. Y.) 426, 433, 32 How. Pr. 233. See also Ferry *v.* Central New York Bank, 15 How. Pr. (N. Y.) 445, 451.

6. *California.*— Ruggles *v.* Cannedy, (1898) 53 Pac. 911, 916; *In re* Ramazzina, 110 Cal. 488, 489, 42 Pac. 970; Clarke *v.* Mott, (1893) 33 Pac. 884. *Compare* Sacry *v.* Lobree, 84 Cal. 41, 46, 23 Pac. 1088; French Bank Case, 53 Cal. 495, 506; Bell *v.* Ellis, 33 Cal. 620, 625.

Colorado.— Walton *v.* Silverton First Nat. Bank, 13 Colo. 265, 272, 22 Pac. 440, 16 Am. St. Rep. 200.

Georgia.— Clarke *v.* Ingram, 107 Ga. 565, 582, 33 S. E. 802 [*citing* Anderson L. Dict.].

Illinois.— Best *v.* Fuller, etc., Co., 185 Ill. 43, 48, 56 N. E. 1077; Atwater *v.* American Exch. Nat. Bank, 152 Ill. 605, 612, 32 N. E. 1017.

Indian Territory.— Foster *v.* McAlester, 3 Indian Terr. 307, 318, 58 S. W. 679; Noble *v.* Worthy, 1 Indian Terr. 458, 467, 45 S. W. 137.

Iowa.— Bloomfield Woolen Mills *v.* Bloomfield State Bank, 101 Iowa 181, 185, 70 N. W. 115; State *v.* Cadwell, 79 Iowa 432, 448, 449, 44 N. W. 700; McKown *v.* Furgason, 47 Iowa 636, 637.

Kansas.— State *v.* Myers, 54 Kan. 206, 215, 38 Pac. 296.

Kentucky.— Hull *v.* Evans, 59 S. W. 851, 852, 22 Ky. L. Rep. 1118.

Maine.— Morey *v.* Milliken, 86 Me. 464, 474, 30 Atl. 102.

Maryland.— Strouse *v.* American Credit Indemnity Co., 91 Md. 244, 260, 46 Atl. 328, 1063; Willison *v.* Frostburg First Nat. Bank, 80 Md. 196, 213, 30 Atl. 749; Castleberg *v.* Wheeler, 68 Md. 266, 277, 12 Atl. 3.

Massachusetts.— Chipman *v.* McClellan, 159 Mass. 363, 368, 34 N. E. 379; Vennard *v.* McConnell, 11 Allen 555, 561; Barnard *v.* Crosby, 6 Allen 327, 331; Hazelton *v.* Allen, 3 Allen

of the different definitions must necessarily depend upon the facts and attend-

114, 117; Lee *v.* Kilburn, 3 Gray 594, 600; Thompson *v.* Thompson, 4 Cush. 127, 134.

Michigan.— Stone *v.* Dodge, 96 Mich. 514, 524, 56 N. W. 75; Munson *v.* Ellis, 58 Mich. 331, 335, 25 N. W. 305.

Minnesota.— Corliss *v.* Jewett, 36 Minn. 364, 365, 31 N. W. 362; Daniels *v.* Zumbrota Bank, 35 Minn. 351, 29 N. W. 165; Daniels *v.* Palmer, 35 Minn. 347, 349, 29 N. W. 162; Brackett *v.* Rich, 23 Minn. 485, 489, 23 Am. Rep. 703.

Missouri.— State *v.* Darrah, 152 Mo. 522, 528, 54 S. W. 226; State *v.* Burlingame, 146 Mo. 207, 214, 48 S. W. 72; Mitchell *v.* Bradstreet Co., 116 Mo. 226, 240, 22 S. W. 358, 724, 38 Am. St. Rep. 592, 20 L. R. A. 138 [*citing* Bouvier L. Dict.]; Eads *v.* Orcutt, 79 Mo. App. 511, 524; Mocre *v.* Carr, 65 Mo. App. 64, 70; Ring *v.* Chas. Vogel Paint, etc., Co., 44 Mo. App. 111, 116.

Montana.— Stadler *v.* Helena First Nat. Bank, 22 Mont. 190, 217, 56 Pac. 111, 74 Am. St. Rep. 582.

Nebraska.— David Alder, etc., Clothing Co. *v.* Hellman, 55 Nebr. 266, 291 75 N. W. 877.

New Jersey.— Regina Music Box Co. *v.* Otto, 65 N. J. Eq. 582, 587, 56 Atl. 715; Skirm *v.* Eastern Rubber Mfg. Co., 57 N. J. Eq. 179, 185, 40 Atl. 769; Metropolis Nat. Bank *v.* Sprague, 21 N. J. Eq. 530, 538 [*followed* in Sewell *v.* Cape May, etc., R. Co., (N. J. Ch. 1887) 9 Atl. 785, and *quoted* in Miller *v.* Gourley, 65 N. J. Eq. 237, 253, 55 Atl. 1083].

New York.— Brown *v.* Montgomery, 20 N. Y. 287, 75 Am. Dec. 404; Brouwer *v.* Harbeck, 9 N. Y. 589, 593; Joseph *v.* Raff, 82 N. Y. App. Div. 47, 50, 81 N. Y. Suppl. 546; Horrock Desk Co. *v.* Fangel, 71 N. Y. App. Div. 313, 315, 75 N. Y. Suppl. 967; Higgins *v.* Worthington, 12 N. Y. App. Div. 361, 363, 42 N. Y. Suppl. 737; Baker *v.* Emerson, 4 N. Y. App. Div. 348, 351, 38 N. Y. Suppl. 576; French *v.* Andrews, 81 Hun 272, 274, 30 N. Y. Suppl. 796; Sterrett *v.* Buffalo Third Nat. Bank, 46 Hun 22, 26; Market Nat. Bank *v.* Pacific Nat. Bank, 30 Hun 50, 54; Lodi Chemical Co. *v.* Charles H. Pleasants Co., 25 Misc. 97, 99, 54 N. Y. Suppl. 668; Herrick *v.* Borst, 4 Hill 650, 652; People *v.* Excelsior Gaslight Co., 3 How. Pr. N. S. 137, 138; Ferry *v.* Central New York Bank, 15 How. Pr. 445, 451.

Ohio.— Mitchell *v.* Gazzam, 12 Ohio 315, 336.

Oregon.— Sabin *v.* Columbia Fuel Co., 25 Oreg. 15, 28, 34 Pac. 692, 42 Am. St. Rep. 756.

Pennsylvania.— Levan's Appeal, 112 Pa. St. 294, 297, 3 Atl. 804.

South Carolina.— Akers *v.* Rowan, 33 S. C. 451, 468, 12 S. E. 165, 10 L. R. A. 705.

Tennessee.— Minton *v.* Stahlman, 96 Tenn. 98, 108, 34 S. W. 222.

Texas.— Langham *v.* Lanier, 7 Tex. Civ. App. 4, 7, 26 S. W. 255.

Vermont.— Amsden *v.* Fitch, 67 Vt. 522, 524, 32 Atl. 478; Dewey *v.* St. Albans Trust Co., 56 Vt. 476, 480, 48 Am. Rep. 803.

Virginia.— McArthur *v.* Chase, 13 Gratt. 683, 692.

Wisconsin.— Barnes *v.* Oshkosh Nat. Bank, 97 Wis. 16, 21, 71 N. W. 602.

United States.— Cunningham *v.* Norton, 125 U. S. 77, 90, 8 S. Ct. 804, 31 L. ed. 624; Dutcher *v.* Wright, 94 U. S. 553, 557, 24 L. ed. 130; Mayer *v.* Hellman, 91 U. S. 496, 500, 23 L. ed. 377; Wager *v.* Hall, 16 Wall. 584, 599, 21 L. ed. 504; Buchanan *v.* Smith, 16 Wall. 277, 308, 21 L. ed. 280; Toof *v.* Martin, 13 Wall. 40, 47, 20 L. ed. 481 [*affirming* 16 Fed. Cas. No. 9,167, 1 Dill. 203]; Citizens' Bank, etc., Co. *v.* Union Min., etc., Co., 106 Fed. 97, 100; Hayden *v.* Chemical Nat. Bank, 84 Fed. 874, 876, 28 C. C. A. 548; Roberts *v.* Hill, 24 Fed. 571, 573, 23 Blatchf. 312, 23 Fed. 311, 312, 23 Blatchf. 191; May *v.* Le Claire, 18 Fed. 164, 166; Dolge *v.* Mastin, 17 Fed. 660, 665, 5 McCrary 404; Swan *v.* Robinson, 5 Fed. 287, 297; Anshutz *v.* Hoerr, 1 Fed. 592, 593; *In re* Bininger, 3 Fed. Cas. No. 1,420, 7 Blatchf. 262, 264; Case *v.* Louisiana Citizens' Bank, 5 Fed. Cas. No. 2,489, 2 Woods 23, 25; *In re* Dibblee, 7 Fed. Cas. No. 3,884, 3 Ben. 283, 291; Jackson *v.* McCulloch, 13 Fed. Cas. No. 7,140, 1 Woods 433, 434; Mayer *v.* Hermann, 16 Fed. Cas. No. 9,344, 10 Blatchf. 256, 260; *In re* Randall, 20 Fed. Cas. No. 11,551, Deady 557, 562; Rison *v.* Knapp, 20 Fed. Cas. No. 11,861, 1 Dill. 187, 193; *In re* Schoenenberger, 21 Fed. Cas. No. 12,473; *In re* Shoenberger, 21 Fed. Cas. No. 12,802; Warren *v.* Tenth Nat. Bank, 29 Fed. Cas. No. 17,202, 10 Blatchf. 493, 497; Webb *v.* Sachs, 29 Fed. Cas. No. 17,325, 4 Sawy. 158, 160; Wilson *v.* Brinkman, 30 Fed. Cas. No. 17,794; *In re* Woods, 30 Fed. Cas. No. 17,990.

England.—Reg. *v.* Saddlers' Co., 4 B. & S. 1059, 1066, 116 E. C. L. 1059; Shone *v.* Lucas, 3 D. & R. 218, 16 E. C. L. 166.

Canada.— McKenzie *v.* Quebec Bank, 3 Rev. Lég. 457; Rae *v.* McDonald, 13 Ont. 352, 358; Sirois *v.* Beaulieu, 13 Quebec 293; Ontario Bank *v.* Foster, 6 Montreal Leg. N. 398; Corcoran *v.* Montreal Abattoir Co., 6 Montreal Leg. N. 135.

The test of a trader's insolvency is his inability to pay his debts in the ordinary course, not inability to raise money for them in the ordinary course. Stadler *v.* Helena First Nat. Bank, 22 Mont. 190, 217, 56 Pac. 111, 119, 74 Am. St. Rep. 582. The test is whether the trader is able, as the debts mature and become payable and due, to pay them as traders usually do. Chipman *v.* McClellan, 159 Mass. 363, 368, 34 N. E. 379.

Other definitions of insolvency see BANKRUPTCY, 5 Cyc. 238 note 8, 286 *et seq.*; BANKS AND BANKING, 5 Cyc. 559; BUILDING AND LOAN SOCIETIES, 6 Cyc. 163 note 73; CORPORATIONS, 10 Cyc. 724; FRAUDULENT CONVEYANCES, 20 Cyc. 457. See also 6 L. R. A. 108 note, 5 L. R. A. 765 note; Merrick La. Civ. Code, art. 3556; 2 Mont. Civ. Code, § 4511;

ant circumstances of the particular case,[7] as well as upon the context of the statute or instrument in which the term is used;[8] thus the word may be employed in a restricted and technical sense as importing "legal insolvency,"[9] or proceedings in insolvency;[10] or again, as meaning some overt and notorious act of insolvency which the law recognizes as insolvency.[11] Sometimes the word

S. D. Civ. Code, §§ 2164, 2373; 2 Wis. St. (1898) § 2909.

7. See Fountain *v.* Anderson, 33 Ga. 372; Helfrich *v.* Stein, 17 Pa. St. 143; Snyder *v.* Snyder, 6 Binn. (Pa.) 483, 6 Am. Dec. 493. See also cases cited *supra*, note 4 *et seq.*, and *infra*, this and succeeding notes.

Sufficient facts and circumstances to show insolvency see McCormick *v.* Joseph, 77 Ala. 236; Chinette *v.* Conklin, 105 Cal. 465, 38 Pac. 1107; Clarke *v.* Mott, (Cal. 1893) 33 Pac. 884; Wells *v.* Morrison, 91 Ind. 51; Metcalf *v.* Munson, 10 Allen (Mass.) 491; *In re* Bissell, 57 Minn. 78, 58 N. W. 828; Brown *v.* Montgomery, 20 N. Y. 287, 75 Am. Dec. 404; Sterrett *v.* Buffalo Third Nat. Bank, 46 Hun (N. Y.) 22; Buckley *v.* Artcher, 21 Barb. (N. Y.) 585; Levy *v.* Ley, 6 Abb. Pr. (N. Y.) 89, 15 How. Pr. 395; Mitchell *v.* Mitchell, 42 S. C. 475, 20 S. E. 405; Wilson *v.* Miller, Harp. (S. C.) 437.

Insufficient facts and circumstances to show insolvency see Hunt *v.* His Creditors, 9 Cal. 45; Knox *v.* Bates, 79 Ga. 425, 5 S. E. 61; Daniels *v.* Kyle, 5 Ga. 245; McKown *v.* Furgason, 47 Iowa 636; Gustine *v.* Phillips, 38 Mich. 674; Daniels *v.* Palmer, 35 Minn. 347, 29 N. W. 162; Teitig *v.* Boesman, 12 Mont. 404, 21 Pac. 371; Cutler *v.* Dunn, 68 N. H. 394, 44 Atl. 536; Ottman *v.* Cooper, 81 Hun (N. Y.) 530, 30 N. Y. Suppl. 1086; American Water Works Co. *v.* Venner, 18 N. Y. Suppl. 379; Perkins *v.* Scott, 9 Ohio Cir. Ct. 207, 6 Ohio Cir. Dec. 226; Mensing *v.* Atchison, (Tex. Civ. App. 1894) 26 S. W. 509.

Failure to pay one just and admitted debt is probably sufficient evidence of insolvency. Chicago, etc., R. Co. *v.* Kenney, 159 Ind. 72, 80, 62 N. E. 26; Sahlien *v.* Lonoke Bank, 90 Tenn. 221, 232, 16 S. W. 373; Jeffris *v.* Fitchburg, 93 Wis. 250, 256, 67 N. W. 424, 57 Am. St. Rep. 919, 33 L. R. A. 351.

Stoppage of payment as evidence of see Sahlien *v.* Lonoke Bank, 90 Tenn. 221, 232, 16 S. W. 373. Where it is shown that a corporation has suffered the foreclosure of a mortgage against it, and that there are unpaid judgments, under which levies have been made, and unpaid taxes and outstanding notes, the existence of such unpaid obligation shows insolvency. Ft. Wayne Electric Corp. *v.* Franklin Electric Light Co., (N. J. Ch. 1898) 40 Atl. 441, 442.

Mere refusal to pay is not insolvency, but evidence of it. Heroy *v.* Kerr, 21 How. Pr. (N. Y.) 409, 421.

The refusal of a corporation to pay its debts, notes, or obligations at maturity is generally a suggestion of "insolvency"; but whether such refusal results from disability of the corporation to meet its obligations, or is based on other reasons, will be ordinarily best known to the officers and stock-holders. New Britain Nat. Bank *v.* A. B. Cleveland Co., 91 Hun (N. Y.) 447, 454, 36 N. Y. Suppl. 387.

Presumption of insolvency.— A judgment and execution unsatisfied are evidence of insolvency or inability to collect. Reynolds *v.* Pharr, 9 Ala. 560; Terry *v.* Tubman, 92 U. S. 156, 23 L. ed. 537. This is sufficient to raise a presumption of insolvency. Ansley *v.* Carlos, 9 Ala. 973. When a person is unable to meet his obligations, and allows his property to be taken under an attachment on the charge of fraud, which he does not deny, he is legally if not actually insolvent. Harris *v.* Hanover Nat. Bank, 15 Fed. 786, 21 Blatchf. 255.

Presumption of prior insolvency.— The fact that one is insolvent to-day may be considered in connection with the disparity existing between his assets and his liabilities, as showing that he was insolvent a week prior thereto. McCormick *v.* Joseph, 77 Ala. 236. In order to show that the debtor was not insolvent at a certain previous period when he asked and obtained an extension of credit, he cannot introduce evidence that persons engaged in the same business had at the same time invariably obtained a similar extension and that there was a general understanding that the asking for such an extension at that period was no sign of an inability to pay debts in full. Vennard *v.* McConnell, 11 Allen (Mass.) 555. The existence of an outstanding note is admissible, with evidence of other indebtedness, to show the insolvency of the maker at a given date, although such note is afterward disallowed by the court of insolvency. Metcalf *v.* Munson, 10 Allen (Mass.) 491.

8. See cases cited *supra*, note 4 *et seq.*, and *infra*, note 9 *et seq.*

9. U. S. *v.* Barker, 2 Wheat. (U. S.) 395, 425, 4 L. ed. 271. See also Hayden *v.* Allyn, 55 Conn. 280, 11 Atl. 31; Horrocks Desk Co. *v.* Fangel, 71 N. Y. App. Div. 313, 75 N. Y. Suppl. 967; People *v.* Mercantile Credit Guarantee Co., 55 N. Y. App. Div. 594, 599, 67 N. Y. Suppl. 447; Goodman *v.* Mercantile Credit Guarantee Co., 17 N. Y. App. Div. 474, 45 N. Y. Suppl. 508; Thelusson *v.* Smith, 2 Wheat. (U. S.) 396, 4 L. ed. 271 [*affirming* 23 Fed. Cas. No. 13,878, Pet. C. C. 195]; *In re* Birmingham Ben. Soc., 3 Sim. 421, 423, 6 Eng. Ch. 421, 57 Eng. Reprint 1056.

10. Hayden *v.* Allyn, 55 Conn. 280, 291, 11 Atl. 31. See also Delaware, etc., R. Co. *v.* Oxford Iron Co., 33 N. J. Eq. 192, 195.

11. Bartlet *v.* Prince, 9 Mass. 431, 435, as used in certain federal statutes. *Compare* Conard *v.* Atlantic Ins. Co., 1 Pet. (U. S.) 386, 7 L. ed. 189.

is used as synonymous with bankruptcy,[12] but oftener in a sense distinguished from the meaning of the latter term.[13]

B. Insolvent. Similarly the term "insolvent" may be employed to designate (1) a debtor whose assets are not sufficient to pay his debts;[14] (2) a debtor who is not able to pay all his debts from his own means,[15] or whose property is not in such a situation that all his debts may be collected out of it by legal process;[16] or, as is more frequently the case, (3) a debtor who is not able to pay his debts in the usual course of business[17] or meet his pecuniary engage-

"Act of insolvency" defined see 1 Cyc. 760. See also *infra*, III, D, 2.

12. Higgins *v.* Worthington, 12 N. Y. App. Div. 361, 42 N. Y. Suppl. 737; Phipps *v.* Harding, 70 Fed. 468, 470, 17 C. C. A. 203, 30 L. R. A. 513.

13. Higgins *v.* Worthington, 12 N. Y. App. Div. 361, 363, 42 N. Y. Suppl. 737; Sackett *v.* Andross, 5 Hill (N. Y.) 327, 344; Phipps *v.* Harding, 70 Fed. 468, 470, 17 C. C. A. 203, 30 L. R. A. 513; *In re* Black, 3 Fed. Cas. No. 1,457, 2 Ben. 196; *In re* Hanibel, 11 Fed. Cas. No. 6,023; Reg. *v.* Chandler, 12 N. Brunsw. 556, 560. See also BANKRUPTCY, 5 Cyc. 238 note 8, 240 note 15, 286 *et. seq.*

14. French Bank Case, 53 Cal. 495, 506 [*quoting* Bell L. Dict.; Burrill L. Dict.; Hethouse L. Dict.]; Hunt *v.* His Creditors, 9 Cal. 45. See Rogers *v.* Thomas, 20 Conn. 53, 68; Bloomfield Woolen Mills *v.* Bloomfield State Bank, 101 Iowa 181, 185, 70 N. W. 115; State *v.* Cadwell, 79 Iowa 432, 449, 44 N. W. 700; Friesenhahn *v.* Merrill, 52 Minn. 55, 58, 53 N. W. 1024; Van Riper *v.* Pappenhausen, 43 N. Y. 68, 75; Brown *v.* Guichard, 37 Misc. (N. Y.) 78, 74 N. Y. Suppl. 735; Kunzler *v.* Kohaus, 5 Hill (N. Y.) 317, 320; Silver Valley Min. Co. *v.* North Carolina Smelting Co., 119 N. C. 417, 418, 26 S. E. 954; Miller *v.* Southern Land, etc., Co., 53 S. C. 364, 31 S. E. 281; Akers *v.* Rowan, 33 S. C. 451, 470, 12 S. E. 165, 10 L. R. A. 705; State *v.* King County Super. Ct., 20 Wash. 545, 56 Pac. 35, 45 L. R. A. 177; Weigand *v.* Alliance Supply Co., 44 W. Va. 133, 28 S. E. 803. See also Ruggles *v.* Cannedy, 127 Cal. 290, 302, 53 Pac. 911, 59 Pac. 827, 46 L. R. A. 371; Sacry *v.* Lobree, 84 Cal. 41, 23 Pac. 1088; Washburn *v.* Huntington, 78 Cal. 573, 21 Pac. 305; French Bank Case, 53 Cal. 495, 506; Noble *v.* Worthy, 1 Indian Terr. 458, 468, 45 S. W. 137; Cullinane *v.* Waverly State Bank, 123 Iowa 340, 342, 98 N. W. 887; McKown *v.* Furgason, 47 Iowa 636, 637; Morey *v.* Milliken, 86 Me. 464, 474, 30 Atl. 102; People's Nat. Bank *v.* Duchscherer, 57 N. Y. App. Div. 515, 68 N. Y. Suppl. 103; Marsh *v.* Dunckel, 25 Hun (N. Y.) 167, 169; Herrick *v.* Borst, 4 Hill (N. Y.) 650, 652; Reg. *v.* Saddlers' Co., 4 B. & S. 1059, 1066, 116 E. C. L. 1059; *Re* Muggeridge, Johns. 625, 6 Jur. N. S. 192, 29 L. J. Ch. 288, 1 L. T. Rep. N. S. 436, 8 Wkly. Rep. 234; Shaw *v.* Gilbert, 111 Wis. 165, 178, 86 N. W. 188; Cunningham *v.* Norton, 125 U. S. 77, 8 S. Ct. 804, 31 L. ed. 624; *In re* Doscher, 9 Am. Bankr. Rep. 547, 554; Biddlecomb *v.* Bond, 4 A. & E. 332, 333, 5 L. J. K. B. 47, 5 N. & M. 621, 31 E. C. L. 158. See also cases cited *supra*, note 3. *Compare* Thompson *v.* Paige, 16 Cal. 77.

Nevertheless this is but a general rule, modified more or less by the habits and usages of the place where the debtor resides and of the particular branch of business in which he is engaged. Lee *v.* Kilburn, 3 Gray (Mass.) 594, 600.

15. Lamberton *v.* Windom, 18 Minn. 506, 515; *Ex p.* Randall, 20 Fed. Cas. No. 11,550. *Compare* Thompson *v.* Paige, 16 Cal. 77.

One who is utterly without means comes within the meaning of the term. Van Riper *v.* Poppenhausen, 43 N. Y. 68, 75.

16. Smith *v.* Collins, 94 Ala. 394, 403, 10 So. 334; State *v.* Harper, 120 Ind. 23, 25, 22 N. E. 80; McKown *v.* Furgason, 47 Iowa 636, 637; Camp *v.* Thompson, 25 Minn. 175; Lamberton *v.* Windom, 18 Minn. 506, 515; Marsh *v.* Durckel, 25 Hun (N. Y.) 167, 170; Herrick *v.* Borst, 4 Hill (N. Y.) 650, 652.

A man may be fully able to pay his debts if he will, and yet in the eye of the law he is "insolvent" if his property is so situated that it cannot be reached by process of law, and subjected, without his consent, to the payment of his debts. Mitchell *v.* Bradstreet Co., 116 Mo. 226, 240, 22 S. W. 358, 38 Am. St. Rep. 592, 20 L. R. A. 138; Schwabacher *v.* Kane, 13 Mo. Ap. 126, 132.

It is not necessary that he should be able to pay at all times, and under all circumstances. Kock *v.* Bringier, 19 La. Ann. 183; Lea *v.* Bringier, 19 La. 197; Walkenshaw *v.* Perzel, 4 Rob. (N. Y.) 426.

The question depends, not upon the nominal value of the debtor's property, but upon whether enough can be realized from a sale of it to discharge his liabilities. Churchill *v.* Wells, 7 Coldw. (Tenn.) 364.

17. See Daniels *v.* Palmer, 35 Minn. 347, 29 N. W. 162; Inslee *v.* Lane, 57 N. H. 454, 458; Oakley *v.* Paterson Bank, 2 N. J. Eq. 173, 177; State *v.* Stevens, 16 S. D. 309, 92 N. W. 420. See also Ruggles *v.* Cannedy, 127 Cal. 290, 302, 53 Pac. 911, 59 Pac. 827, 46 L. R. A. 371; Sacry *v.* Labree, 84 Cal. 41, 23 Pac. 1088; French Bank Case, 53 Cal. 495, 506; Bell *v.* Ellis, 33 Cal. 620; Morey *v.* Milliken, 86 Me. 464, 474, 30 Atl. 102; Lee *v.* Kilburn, 3 Gray (Mass.) 594, 600; Munson *v.* Ellis, 58 Mich. 331, 335, 25 N. W. 305; Moore *v.* Carr, 65 Mo. App. 64, 70; Singer *v.* National Bedstead Mfg. Co., 65 N. J. Eq. 290, 303, 55 Atl. 868; Joseph *v.* Raff, 82 N. Y. App. Div. 47, 50, 81 N. Y. Suppl. 546; Akers *v.* Rowan, 33 S. C. 451, 470, 12 S. E. 165, 10 L. R. A. 705; Case *v.* Citizens' Bank, 5 Fed. Cas. No. 2,489, 2 Woods 23, 25; *In re* Louis, 15 Fed.

ments.[18] So too the term may be used as referring only to one who has been judicially declared to be insolvent,[19] but only, it seems, when so limited by the context.[20] An "insolvent corporation" has been defined to be one whose property is insufficient to satisfy its creditors;[21] also one which is not able to pay its debts.[22] An "insolvent partnership" has been defined both as one which has not sufficient property and effects to pay all of its debts[23] and as one which is unable to pay its debts in the ordinary course of business.[24] An "insolvent

Cas. No. 8,527, 3 Ben. 153, 156; Rison *v.* Knapp, 20 Fed. Cas. No. 11,861, 1 Dill. 187, 193; Shone *v.* Lucas, 3 D. & R. 218, 16 E. C. L. 166; Reg. *v.* Saddlers' Co., 10 H. L. Cas. 404, 425, 9 Jur. N. S. 1081, 32 L. J. Q. B. 337, 9 L. T. Rep. N. S. 60, 11 Wkly. Rep. 1004, 11 Eng. Reprint 1083; Douglas *v.* Atlantic Mut. L. Ins. Co., 25 Grant Ch. (U. C.) 379, 381. See also cases cited *supra*, note 6.

When it relates to the right of stoppage in transitu, the term "insolvent" means a general inability to satisfy obligations, evidenced by stopping payment. Inslee *v.* Lane, 57 N. H. 454, 458. See also Rogers *v.* Thomas, 20 Conn. 53, 68.

18. Alexander *v.* Gibson, 1 Nott & M. (S. C.) 480, 496; *In re* Woods, 30 Fed. Cas. No. 17,990.

Request for time.— An allegation that the purchaser furnished by a broker had requested an extension of time on a draft drawn against the first shipment of the goods sold, because he was "not able to pay at the time," was not equivalent to an allegation that at such time the purchaser was insolvent. Fairly *v.* Wappoo Mills, 44 S. C. 227, 247, 22 S. E. 108, 29 L. R. A. 215.

Other definitions of "insolvent" see 10 L. R. A. 711 brief; 5 L. R. A. 765 note.

Within the meaning of national bankruptcy act who is an insolvent see BANKRUPTCY, 5 Cyc. 286 *et seq.*

19. Smally *v.* Chisenhall, 108 Ala. 683, 18 So. 739; *In re* Birmingham Ben. Soc., 3 Sim. 421, 423, 6 Eng. Ch. 421, 57 Eng. Reprint 1056. See also cases cited *supra*, note 9.

20. Biddlecomb *v.* Bond, 4 A. & E. 332, 5 L. J. K. B. 47, 5 N. & M. 621, 31 E. C. L. 158. See also Rogers *v.* Thomas, 20 Conn. 53, 68.

21. *In re* Glen Iron Works, 17 Fed. 324, 327. See also Singer *v.* National Bedstead Mfg. Co., 65 N. J. Eq. 290, 55 Atl. 868; People's Nat. Bank *v.* Duchscherer, 57 N. Y. App. Div. 515, 518, 68 N. Y. Suppl. 103; Silver Valley Min. Co. *v.* North Carolina Smelting Co., 119 N. C. 417, 418, 26 S. E. 954; Case *v.* Citizens' Bank, 5 Fed. Cas. No. 2,489, 2 Woods 23, 25; Douglas *v.* Atlantic Mut. L. Ins. Co., 25 Grant Ch. (U. C.) 379, 381.

22. Brouwer *v.* Harbeck, 9 N. Y. 589, 594 [*quoted* in Baker *v.* Emerson, 4 N. Y. App. Div. 348, 351, 38 N. Y. Suppl. 576]. See Joseph *v.* Paff, 82 N. Y. App. Div. 47, 50, 81 N. Y. Suppl. 546; Mueller *v.* Monongahela Fire Clay Co., 183 Pa. St. 450, 456, 38 Atl. 1009. But *compare* Corey *v.* Wadsworth, 99 Ala. 68, 78, 11 So. 350, 42 Am. St. Rep. 29, 23 L. R. A. 618 [*quoted* in Lyons-Thomas Hardware Co. *v.* Perry Stove Mfg. Co., 86 Tex. 143, 165, 24 S. W. 16, 22 L. R. A. 802]; Sabin *v.* Columbia Fuel Co., 25 Oreg. 15, 34 Pac. 692, 42 Am. St. Rep. 756. See also CORPORATIONS, 10 Cyc. 1236 *et seq.*

An "insolvent bank" has been defined to be one which has not the present ability to pay depositors as banks usually do and meet all liabilities as they become due in the ordinary course of business. State *v.* Stevens, 16 S. D. 309, 320, 92 N. W. 420. See also State *v.* Myers, 54 Kan. 206, 38 Pac. 296; Stone *v.* Dodge, 96 Mich. 524, 56 N. W. 75, 21 L. R. A. 280; Oakley *v.* Paterson Bank, 2 N. J. Eq. 173, 177. See BANKS AND BANKING, 5 Cyc. 559 *et seq.*

An "insolvent building and loan society" has been defined to be one which is unable to pay back to its members the amounts paid in by them respectively, dollar for dollar. Johnston *v.* Grosvenor, 105 Tenn. 353, 59 S. W. 1028. See also Continental Nat. Bldg., etc., Assoc. *v.* Miller, 44 Fla. 757, 33 So. 404; Bingham *v.* Marion Trust Co., 27 Ind. App. 247, 61 N. E. 29; Boice *v.* Rabb, 24 Ind. App. 368, 55 N. E. 880; People *v.* Empire Loan, etc., Co., 15 N. Y. App. Div. 69, 44 N. Y. Suppl. 308. See BUILDING AND LOAN SOCIETIES, 6 Cyc. 160 *et seq.*

An "insolvent mutual insurance company" means one which has not the financial ability to carry out the agreement of members, and a mutual insurance company, the assets of which greatly exceed the value of its indebtedness to its general creditors, was not "insolvent" in the ordinary meaning, but was insolvent in that it could not accomplish its purpose and pay its certificates in full. *In re* Youths' T. of H., 73 Minn. 319, 76 N. W. 59.

23. McArthur *v.* Chase, 13 Gratt. (Va.) 683, 692, under a statute concerning limited partnerships.

24. Vaccaro *v.* Memphis Security Bank, 103 Fed. 436, 443, 43 C. C. A. 279. See also Munson *v.* Ellis, 58 Mich. 331, 335, 25 N. W. 305.

In determining the insolvency of a partnership, the debtor consists of the partnership as well as the partners individually. If collectively there was property subject to partnership debts, the partnership was not insolvent, although the partnership itself may not have had sufficient means to pay its debts. Vaccaro *v.* Memphis Security Bank, 103 Fed. 436, 443, 43 C. C. A. 279.

By the statement that a firm is "insolvent" is meant that, if they had been forced into liquidation and the business wound up, they would not have been able to meet and pay all their obligations, and their assets were insufficient, and would have been at any

trader" is one who cannot pay his debts in the ordinary course of trade and business.[25] Whenever the adjective "insolvent" is used to define the condition of a decedent's estate it has the same signification as when used with respect to the financial status of a living person.[26]

C. Insolvent Circumstances. By being "in insolvent circumstances" is meant that the whole property and credits are not equal in amount, at a fair appraisement, to the debts due by the party.[27]

D. In Contemplation of Insolvency. The words "in contemplation of insolvency" as used in insolvent laws has been held to intend not only contemplation solely of being an insolvent, but also contemplation of actually stopping business because of insolvency and incapacity to carry it on; the contemplation of something more than a state of insolvency — an act of insolvency, or an application to be declared an insolvent.[28]

E. Insolvent Law. An "insolvent law" is a positive regulation made by the legislature to exonerate the person or property of a debtor and to relieve him from the pressure of creditors.[29]

time during the period contemplated, when sold out and collected and fully realized upon, to pay all their obligations. Rome Furniture, etc., Co. *v.* Walling, (Tenn. Ch. App. 1900) 58 S. W. 1094, 1096.

Although one or more of the individuals composing it are solvent, a partnership may be insolvent. Ransom *v.* Wardlaw, 99 Ga. 540, 27 S. E. 158. See also Moore *v.* Carr, 65 Mo. App. 64.

25. Wilson *v.* Brinkman, 30 Fed. Cas. No. 17,794. See also Sacry *v.* Lobree, 84 Cal. 41, 23 Pac. 1088; Bell *v.* Ellis, 33 Cal. 620; Noble *v.* Worthy, 1 Indian Terr. 458, 468, 45 S. W. 137; Chipman *v.* McClellan, 159 Mass. 363, 368, 34 N. E. 379; Lee *v.* Kilburn, 3 Gray (Mass.) 594, 600; Moore *v.* Carr, 65 Mo. App. 64, 70; Joseph *v.* Raff, 82 N. Y. App. Div. 47, 50, 81 N. Y. Suppl. 546; Jackson *v.* McCulloch, 13 Fed. Cas. No. 7,140, 1 Woods 433; Sawyer *v.* Turpin, 21 Fed. Cas. No. 12,410, 2 Lowell 29; *In re* Schoenenberger, 21 Fed. Cas. No. 12,473; Wilson *v.* Brinkman, 30 Fed. Cas. No. 17,794; Shone *v.* Lucas, 3 D. & R. 218, 16 E. C. L. 166; Reg. *v.* Saddlers' Co., 10 H. L. Cas. 404, 425, 9 Jur. N. S. 1081, 32 L. J. Q. B. 337, 9 L. T. Rep. N. S. 60, 11 Wkly. Rep. 1004, 11 Eng. Reprint 1083; and cases cited *supra*, note 17.

26. Silver Valley Min. Co. *v.* North Carolina Smelting Co., 119 N. C. 417, 418, 25 S. E. 954.

27. State Nat. Bank *v.* New Orleans Brewing Assoc., 49 La. Ann. 934, 22 So. 48; Kennedy *v.* New Orleans Sav. Inst., 36 La. Ann. 1, 8. See also De Tastet *v.* Le Tavernier, 1 Keen 161, 15 Eng. Ch. 161, 48 Eng. Reprint 268; Chitty Bills 120; 2 Harrison Dig. 802. See also Dominion Bank *v.* Cowan, 14 Ont. 465.

"In failing circumstances" see Millard's Appeal, 62 Conn. 184, 25 Atl. 658.

28. Anderson L. Dict. See also Hall *v.* Gaylor, 37 Conn. 550; Matthews *v.* Lloyd, 89 Ky. 625, 13 S. W. 106, 11 Ky. L. Rep. 843; Syester *v.* Brewster, 27 Md. 288; Williams *v.* Cohen, 25 Md. 486; McColgan *v.* Hopkins, 17 Md. 395; Cole *v.* Albers, 1 Gill 412; Hickley *v.* Farmers', etc., Bank, 5 Gill & J. 377; Faringer *v.* Ramsay, 4 Md. Ch. 33; Brooks *v.* Thomas, 4 Md. Ch. 15; Falconer *v.* Clark, 3 Md. Ch. 151; Powles *v.* Dilley, 2 Md. Ch. 119; Glenn *v.* Baker, 1 Md. Ch. 73; Mundo *v.* Shepard, 166 Mass. 323, 44 N. E. 244; Jones *v.* Howland, 8 Metc. (Mass.) 377, 41 Am. Dec. 525; Penney *v.* Haugan, 61 Minn. 279, 63 N. W. 728; Paulding *v.* Chrome Steel Co., 94 N. Y. 334, 338; Robinson *v.* Attica Bank, 21 N. Y. 406, 411; New Britain Nat. Bank *v.* A. B. Cleveland Co., 91 Hun (N. Y.) 447, 36 N. Y. Suppl. 387; Heroy *v.* Kerr, 8 Bosw. (N. Y.) 194, 200; Holbrook *v.* Basset, 5 Bosw. (N. Y.) 147, 171; Brown *v.* Husted, 21 N. Y. Suppl. 324; Haxton *v.* Bishop, 3 Wend. (N. Y.) 13, 17; Taylor *v.* Whitthorn, 5 Humphr. (Tenn.) 340; Barnes *v.* Oshkosh Nat. Bank, 97 Wis. 16, 71 N. W. 602; Anstedt *v.* Bentley, 61 Wis. 629, 21 N. W. 807; Buckingham *v.* McLean, 13 How. (U. S.) 151, 167, 14 L. ed. 91; Hayden *v.* Chemical Nat. Bank, 84 Fed. 874, 876, 28 C. C. A. 548; Arnold *v.* Maynard, 1 Fed. Cas. No. 561, 2 Story 349; *In re* Dibblee, 7 Fed. Cas. No. 3,884, 3 Ben. 283; Everett *v.* Stone, 8 Fed. Cas. No. 4,577, 3 Story 453; Morse *v.* Godfrey, 17 Fed. Cas. No. 9,856, 3 Story 364; Davidson *v.* Ross, 24 Grant Ch. (U. C.) 22, 87. See 28 Cent. Dig. tit. "Insolvency," § 87. See also *infra*, IV, C, 1, e, (II), (A), (2). But *compare* Gorham *v.* Stearns, 1 Metc. (Mass.) 366, where debtor had no knowledge of the statute.

29. Cook *v.* Rogers, 31 Mich. 391, 396; Haijek *v.* Luck, 96 Tex. 517, 74 S. W. 305.

A law cannot be termed an "insolvent law" which does not compel, or in terms even authorize, assignments for the benefit of creditors, but assumes that such instruments were conveyances previously known, and only prescribes a mode by which the trust created shall be enforced, providing for the security of the creditors by exacting a bond from the trustees for the discharge of their duties, requiring them to file statements showing what they have done with the property, and affording in various ways the means of compelling them to carry out

F. Adjudication of Insolvency. "Adjudication of insolvency" is the term usually applied to the order of court adjudging the party against whom or by whom the petition has been filed as an insolvent.[30]

II. STATUTORY PROVISIONS.[31]

A. In General. Subject to the conditions and restrictions elsewhere noticed[32] a state has the power by general laws to regulate the conveyance and disposition of all property, personal or real, within its limits and jurisdiction.[33]

B. Retroactive Operation. A state cannot introduce into an insolvency law a clause which provides for the discharge of an obligation or debt which an insolvent entered into prior to the enactment of such law,[34] whether such

the purposes of the conveyance. Patty-Joiner, etc., Co. *v.* Cummins, (Tex. Civ. App. 1900) 59 S. W. 297, 299. See also Prentice *v.* Richards, 74 Mass. 226, 227; Cook *v.* Rogers, 31 Mich. 391, 396; Wood *v.* Malin, 10 N. J. L. 208; Sharp *v.* Teese, 9 N. J. L. 352, 17 Am. Dec. 479; Olden *v.* Hallet, 5 N. J. L. 466; Hale *v.* Ross, 3 N. J. L. 807; Alexander *v.* Gibson, 1 Nott & M. (S. C.) 480; Minton *v.* Stahlman, 96 Tenn. 98, 100, 34 S. W. 222.

Contrasted with "bankrupt law" see BANKRUPTCY, 5 Cyc. 240.

Respite laws are not insolvent laws. Miller *v.* Rasch, 3 Rob. (La.) 410; Rasch *v.* His Creditors, 3 Rob. (La.) 407.

30. Black L. Dict.

Adjudication in: Involuntary proceedings see *infra*, III, D, 10. Voluntary proceedings see *infra*, III, C, 3, g.

Distinguished from "petition in insolvency" see Roberts *v.* Edie, 85 Md. 181, 36 Atl. 820.

31. **Amendment and repeal.**— An insolvent law may be amended or repealed in whole or in part in like manner as any other statute. Mechanics', etc., Bank's Appeal, 31 Conn. 63; Jaquith *v.* Fuller, 167 Mass. 123, 45 N. E. 54; Yurkman's Case, 5 Lack. Jur. (Pa.) 301. See also Quimper *v.* Bierra, 8 Rob. (La.) 204; Bijotat *v.* His Creditors, 1 Rob. (La.) 272; McCoy *v.* His Creditors, 4 Mart. N. S. (La.) 67; Kelsey *v.* His Creditors, 2 Mart. N. S. (La.) 36; Ray *v.* Cannon, 2 Mart. N. S. (La.) 26; Shreve *v.* His Creditors, 11 Mart. (La.) 30; Smith *v.* Sullivan, 71 Me. 150; Gates *v.* Campbell, 8 Cush. (Mass.) 104; Sanderson *v.* Taylor, 1 Cush. (Mass.) 87; Eastman *v.* Hillard, 7 Metc. (Mass.) 420; Carter *v.* Sibley, 4 Metc. (Mass.) 298; People *v.* O'Brien, 3 Abb. Dec. (N. Y.) 552, 6 Abb. Pr. N. S. 63; Torrens *v.* Hammond, 10 Fed. 900, 4 Hughes 596. Amendment or repeal of a statute generally see STATUTES.

32. See BANKRUPTCY, 5 Cyc. 240; CONSTITUTIONAL LAW, 8 Cyc. 773 note 3.

Constitutionality of an insolvent law see CONSTITUTIONAL LAW, 8 Cyc. 826 note 65, 897, 919, 990, 1003.

Extraterritorial effect of insolvent laws see *infra*, II, C.

33. Brown *v.* Smart, 145 U. S. 454, 12 S. Ct. 958, 36 L. ed. 773; Crapo *v.* Kelly, 16 Wall. (U. S.) 610, 21 L. ed. 430; Smith *v.* Union Bank, 5 Pet. (U. S.) 518, 8 L. ed. 212; Sloane *v.* Chiniquy, 22 Fed. 213. See also Cross *v.* Brown, 19 R. I. 220, 33 Atl. 147; Rider-Wallis Co. *v.* Fogo, 102 Wis. 536, 78 N. W. 767.

Thus it has full power and authority to enact insolvency laws binding persons and property within its jurisdiction. Butler *v.* Goreley, 146 U. S. 303, 13 S. Ct. 84, 36 L. ed. 981; Brown *v.* Smart, 145 U. S. 454, 12 S. Ct. 958, 36 L. ed. 773; Tua *v.* Carriere, 117 U. S. 201, 6 S. Ct. 565, 29 L. ed. 855; Gilman *v.* Lockwood, 4 Wall. (U. S.) 409, 18 L. ed. 432; Baldwin *v.* Hale, 1 Wall. (U. S.) 223, 17 L. ed. 531; Tennessee Bank *v.* Horn, 17 How. (U. S.) 157, 15 L. ed. 70; Cook *v.* Moffat, 5 How. (U. S.) 295, 12 L. ed. 159; Boyle *v.* Zacharie, 6 Pet. (U. S.) 348, 8 L. ed. 423; Ogden *v.* Saunders, 12 Wheat. (U. S.) 213, 6 L. ed. 606; Sturges *v.* Crowninshield, 4 Wheat. (U. S.) 122, 4 L. ed. 529. See Peabody *v.* Stetson, 88 Me. 273, 34 Atl. 74, where a person was a nonresident, but his property was within the state.

State insolvent laws are not repugnant to the federal constitution. Clarke *v.* Ray, 6 Cal. 600; Anonymous, 1 Ohio Dec. (Reprint) 360, 8 West. L. Month. 267; Merrill *v.* Bowler, 20 R. I. 226, 38 Atl. 114; Hempsted *v.* Wisconsin M. & F. Ins. Co. Bank, 78 Wis. 375, 47 N. W. 627; Torrens *v.* Hammond 10 Fed. 900, 4 Hughes 596. In Ray *v.* Cannon, 2 Mart. N. S. (La.) 26, it was held that the Spanish insolvent laws in force before the federal constitution took effect in Louisiana are not affected by that instrument. See also Hull's Estate, 10 Pa. Dist. 661, 25 Pa. Co. Ct. 353.

Release of all other claims.— A law which requires a creditor, as a condition to sharing in the distribution of the debtor's estate, to release him from all claims other than such as may be paid under the provisions of the act, although the courts of the state have no power to reach property of the debtor situated in other states, has been held not to be objectionable. Wendell *v.* Lebon, 30 Minn. 234, 15 N. W. 109.

34. Upham *v.* Raymond, 132 Mass. 186; Sullings *v.* Ginn, 131 Mass. 479; Kempton *v.* Saunders, 130 Mass. 236; O'Neil *v.* Harrington, 129 Mass. 591; Bigelow *v.* Pritchard, 21 Pick. (Mass.) 169; Baldwin *v.* Hale, 1 Wall. (U. S.) 223, 17 L. ed. 531; Tennessee Bank *v.* Horn, 17 How. (U. S.) 157, 15 L. ed. 70; Farmers, etc., Bank *v.* Smith, 6 Wheat.

retroactive effect is sought to be given either by implication or express terms.[35]

C. Extraterritorial Effect.[36] Insolvency statutes have no extraterritorial force or effect, and proceedings instituted thereunder are limited to the particular jurisdiction in which they are brought.[37] One state will not enforce the provisions of the insolvency laws of another state or in any wise give effect thereto.[38]

(U. S.) 131, 5 L. ed. 224; Sturgess *v.* Crowninshield, 4 Wheat. (U. S.) 122, 4 L. ed. 529. See also McAllister *v.* Strode, 7 Cal. 428; Levois *v.* Gerke, 12 La. Ann. 828; Matthews *v.* His Creditors, 11 La. Ann. 36; Cassidy *v.* His Creditors, 18 La. 402; Poe *v.* Duck, 5 Md. 1; Austin *v.* Caverly, 10 Metc. (Mass.) 332; Booth *v.* Eddy, 38 Mich. 245; Leavitt *v.* Lovering, 64 N. H. 607, 15 Atl. 414, 1 L. R. A. 58; Pannebaker *v.* Bitting, 11 Pa. Dist. 537; Smith *v.* Speakman, 10 Pa. Dist. 699; *In re* Shonk, 19 Lanc. L. Rev. (Pa.) 14; Bierver *v.* Blurock, 9 Wash. 63, 36 Pac. 975; Mansfield *v.* Whatcom First Nat. Bank, 5 Wash. 665, 32 Pac. 789, 999; Mather *v.* Nesbit, 13 Fed. 872, 4 McCrary 505; Low *v.* Durfee, 5 Fed. 256; Cook *v.* Fenton, 6 Fed. Cas. No. 3,156, 4 Cranch C. C. 200. In Washburn *v.* Bump, 10 Metc. (Mass.) 392, it was held that a debt founded on a contract made before the act went into operation, although after the act passed, would not be released by a discharge granted pursuant to its provisions.

Impairment of obligation of contract generally see CONSTITUTIONAL LAW, 8 Cyc. 929 *et seq.*

35. *Connecticut.*— Mechanics', etc., Bank's Appeal, 31 Conn. 63.

Louisiana.— Desorme's Succession, 10 Rob. 479; Yard *v.* His Creditors, 2 Rob. 400; Thomas *v.* Bourgeat, 1 Rob. 403.

Maine.— Chipman *v.* Peabody, 88 Me. 282, 34 Atl. 77; Palmer *v.* Hixon, 74 Me. 447.

Maryland.— Gable *v.* Scott, 56 Md. 176.

Massachusetts.— *Ex p.* Bartlett, 8 Metc. 72. See Eastman *v.* Hillard, 7 Metc. 420.

New Hampshire.— Nichols *v.* Cass, 65 N. H. 212, 23 Atl. 430.

New York.— Roosevelt *v.* Kellogg, 20 Johns. 208; Bryar *v.* Willcocks, 3 Cow. 159.

Pennsylvania.— *In re* McMullen, 26 Pa. Co. Ct. 157, 32 Pittsb. Leg. J. N. S. 304.

Vermont.— Conway *v.* Summons, 55 Vt. 8, 45 Am. Rep. 579.

Qualification of rule.— Where the original claim or cause of action accrued prior to the adoption of an insolvent law, but its character was changed or merged, as for instance by being reduced to judgment after the passage of the insolvent law, the debt in its new form becomes subject to the operation of the insolvent law, and if it be one which would be released by the discharge, the discharge can be pleaded in bar thereof. Pierce *v.* Eaton, 11 Gray (Mass.) 398; Bangs *v.* Watson, 9 Gray (Mass.) 211. But see Wilson *v.* Bunker, 78 Me. 313, 4 Atl. 861; Ross *v.* Tozier, 78 Me. 312, 4 Atl. 860. See also Wyman *v.* Mitchell, 1 Cow. (N. Y.) 316. *Compare* State *v.* Shinn, 5 N. J. L. 553, as to the rule where an insolvent law is repealed after an insolvent had applied for a discharge and before it was granted. So too an action by an indorsee of a note made subsequent to the adoption of an insolvent law, although it was in renewal of a note made prior thereto, would be barred by the maker's discharge in insolvency. Snow *v.* Foster, 79 Me. 558, 11 Atl. 602.

36. Non-residents not concluded by discharge see *infra*, VI, C, 5, e, (III).

37. King *v.* Cross, 175 U. S. 396, 20 S. Ct. 131, 44 L. ed. 211; Security Trust Co. *v.* Dodd, 173 U. S. 624, 19 S. Ct. 545, 43 L. ed. 835; Brown *v.* Smart, 145 U. S. 454, 12 S. Ct. 958, 36 L. ed. 773; Cook *v.* Moffat, 5 How. (U. S.) 295, 12 L. ed. 159. See also Security Sav., etc., Co. *v.* Rogers, 6 Ida. 526, 57 Pac. 316; Very *v.* McHenry, 29 Me. 206; Larrabee *v.* Talbott, 5 Gill (Md.) 426, 46 Am. Dec. 637; Proctor *v.* Moore, 1 Mass. 198; Carbee *v.* Mason, 64 N. H. 10, 4 Atl. 791; New Brunswick State Bank *v.* Plainfield First Nat. Bank, 34 N. J. Eq. 450; Donnelly *v.* Corbett, 7 N. Y. 500; Whittemore *v.* Adams, 2 Cow. (N. Y.) 626; Satterthwaite *v.* Abercrombie, 24 Fed. 543, 23 Blatchf. 308; Woodhull *v.* Wagner, 30 Fed. Cas. No. 17,975, Baldw. 296; and *infra*, VI, E, 5, e, f.

A law of a foreign country which secures privileges and advantages to domestic creditors which it does not extend to creditors of other countries should not be regarded, as national comity does not require that they should be. Very *v.* McHenry, 29 Me. 206. Nor will such foreign laws be deemed to operate beyond the jurisdiction where they were made. Prentiss *v.* Savage, 13 Mass. 20. A transfer made by operation of the bankruptcy law in the United States will not transfer immovable property in Canada. Macdonald *v.* Georgian Bay Lumber Co., 2 Can. Sup. Ct. 364. Canadian insolvency proceedings do not affect property of insolvent in Michigan. Wood *v.* Parsons, 27 Mich. 159.

38. See Finnell *v.* Burt, 2 Handy (Ohio) 202, 12 Ohio Dec. (Reprint) 404; Butler *v.* Goreley, 146 U. S. 303, 13 S. Ct. 84, 36 L. ed. 98 [*affirming* 147 Mass. 8, 16 N. E. 734]. It has been held that an assignment to trustees by an insolvent debtor in one state does not pass either the legal or equitable title to land in another state. Hutcheson *v.* Peshine, 16 N. J. Eq. 167; Rogers *v.* Allen, 3 Ohio 488. *Contra*, Lamb *v.* Fries, 2 Pa. St. 83. See also 65 L. R. A. 353 note.

One state will not enforce the insolvency laws of another state by giving effect to a statutory assignment by a debtor residing in such other state. Rhawn *v.* Pearce, 110 Ill. 350, 51 Am. Rep. 691; Catlin *v.* Wilcox Silver-Plate Co., 123 Ind. 477, 24 N. E. 250,

D. Interpretation. Statutes for the relief of insolvent debtors are to be construed liberally.[39]

E. Effect of Federal Bankruptcy Law.[40] There is nothing to prevent the enactment by a state of an insolvent law during the life of a bankruptcy act, although its provisions would be inoperative during the existence of the bankruptcy law, such enactment simply being tantamount to a provision that the former should take effect upon the repeal of the latter.[41] Upon the repeal of a federal bankruptcy law, the state insolvency statutes again become operative without the necessity for reënactment,[42] and apply to debts contracted during the period of suspension of the insolvency law,[43] the effect of the repeal being merely to remove the existence of the obstacle to the operation of the insolvency law.[44]

III. PROCEEDINGS FOR DECLARATION OF INSOLVENCY.

A. Courts Having Jurisdiction.[45] Proceedings in insolvency not being *stricti juris* either proceedings in law or equity, but a new remedy or proceeding, created by the statutes of the several states,[46] their administration has been vested in certain state courts, independent of their common-law or chancery powers as courts of general jurisdiction.[47]

18 Am. St. Rep. 333, 8 L. R. A. 62; Brent *v.* Shouse, 15 La. Ann. 110; Frazier *v.* Fredericks, 24 N. J. L. 162; Mosselman *v.* Caen, 34 Barb. (N. Y.) 66, 21 How. Pr. 248; Johnson *v.* Hunt, 23 Wend. (N. Y.) 87; Rogers *v.* Allen, 3 Ohio 488.

39. Mims *v.* Lockett, 20 Ga. 474; Terrill *v.* Jennings, 1 Metc. (Ky.) 450.

Remedial statute how construed see STATUTES.

Strict construction to be applied when see McAllister *v.* Strode, 7 Cal. 428; Chever *v.* Hays, 3 Cal. 471; Bainbridge *v.* Clay, 3 Mart. N. S. (La.) 262; Campbell *v.* His Creditors, 16 La. 348.

The legislature and not the courts are to judge what shall be at any particular period the policy of the insolvent system, and the courts should interpret such laws without regard to their individual views as to the policy of their provisions. Stewart *v.* Union Bank, 7 Gill (Md.) 439.

40. Effect of federal bankruptcy law upon state insolvency law. See BANKRUPTCY, 5 Cyc. 240.

41. Palmer *v.* Hixon, 74 Me. 447; Damon's Appeal, 70 Me. 153; Baldwin *v.* Buswell, 52 Vt. 57; Tua *v.* Carriere, 117 U. S. 201, 6 S. Ct. 565, 29 L. ed. 855. See also 45 L. R. A. 186 *et seq.*

42. Palmer *v.* Hixon, 74 Me. 447; Damon's Appeal, 70 Me. 153; Lavender *v.* Gosnell, 43 Md. 153; Lothrop *v.* Highland Foundry Co., 128 Mass. 120; Atkins *v.* Spear, 8 Metc. (Mass.) 490; Butler *v.* Goreley, 146 U. S. 303, 13 S. Ct. 84, 36 L. ed. 981; Tua *v.* Carriere, 117 U. S. 201, 6 S. Ct. 565, 29 L. ed. 855; Sturges *v.* Crowninshield, 4 Wheat. (U. S.) 122, 4 L. ed. 529.

43. Smith *v.* His Creditors, 59 Cal. 267; Lewis *v.* Santa Clara County Clerk, 55 Cal. 604; Boedefeld *v.* Reed, 55 Cal. 299; Austin *v.* Caverly, 10 Metc. (Mass.) 332. See also Atkins *v.* Spear, 8 Metc. (Mass.) 490.

44. Butler *v.* Goreley, 146 U. S. 303, 13 S. Ct. 84, 36 L. ed. 981.

45. Jurisdiction as to administration of estate see *infra*, IV, D, 1.

Conflicting jurisdiction between courts generally see COURTS, 11 Cyc. 982 *et seq.*

46. Williams *v.* Williams, 5 Gill (Md.) 88; *In re* Negus, 10 Wend. (N. Y.) 34; Tadlock *v.* Texas Monumental Committee, 21 Tex. 166. See also ACTIONS, 1 Cyc. 720 *et seq.* But see People *v.* Rosborough, 29 Cal. 415, under the California constitution of 1863.

In insolvency proceedings against a corporation in a federal court of equity, the rules in bankruptcy proceedings should be followed so far as applicable, especially where the corporation is one which might, under the present law, have been adjudged a bankrupt. Conklin *v.* U. S. Shipbuilding Co., 136 Fed. 1006.

47. Cohen *v.* Barrett, 5 Cal. 195; Castner *v.* Twitchell-Champlin Co., 91 Me. 524, 40 Atl. 558; Chadwick *v.* Old Colony R. Co., 171 Mass. 239, 50 N. E. 629. *Compare In re* Schumacher, 6 Ohio S. & C. Pl. Dec. 125, 5 Ohio N. P. 387. See also Brewster *v.* Ludekins, 19 Cal. 162 (district court); Harper *v.* Freelon, 6 Cal. 76 (concurrent jurisdiction of district and county courts); Donovan's Appeal, 41 Conn. 551 (court of probate); Cox *v.* Zeringue, 4 Mart. (La.) 261 (superior court of the territory of Orleans and district court); Syester *v.* Brewer, 27 Md. 288 (county court without jurisdiction); Carter *v.* Dennison, 7 Gill (Md.) 157 (Baltimore county court); *In re* Sarmiento, 2 Browne (Pa.) 61 appendix (district court of Philadelphia without jurisdiction).

Extent and application of rule.— While such right is committed to a court even of original jurisdiction, such court is *quoad hoc* an inferior court and must pursue the statute strictly. Cohen *v.* Barrett, 5 Cal. 195; Pur-

B. Record of Proceedings.[48] The contents of the records required to be kept are governed entirely by statute.[49] The records of an insolvency proceeding have the same evidentiary effect as those of other proceeding in court.[50]

C. Voluntary Proceedings — 1. Nature of Proceedings. When the debtor institutes the proceedings and is desirous of availing himself of the insolvency laws and files a petition for that purpose, the proceedings are voluntary.[51]

2. Persons Entitled.[52] Insolvency laws are frequently restricted to merchants or traders,[53] although this restriction is not uniform and there is nothing to prevent such a law from being general and applicable to all classes of persons.[54] The benefit of such laws are also otherwise frequently restricted.[55]

viance *v.* Glenn, 8 Md. 202; Bowie *v.* Jones, 1 Gill (Md.) 208. This has been held to be true, although the petition has been addressed to the court and not to the judge, as required by statute (Brewster *v.* Ludekins, 19 Cal. 162), and *vice versa* (Borthwick *v.* Howe, 27 Hun (N. Y.) 505). The court of insolvency has sole jurisdiction, in the first instance, over the distribution of funds in the hands of an assignee in insolvency. Castner *v.* Twitchell-Champlin Co., 91 Me. 524, 40 Atl. 558.

Dependent upon residence of insolvent see Coggill *v.* Botsford, 29 Conn. 439 (in district); Sawyer *v.* Levy, 162 Mass. 190, 30 N. E. 365 (in state); Hassam *v.* Hodges, 12 Gray (Mass.) 208 (in county); Claflin *v.* Beach, 4 Metc. (Mass.) 392 (in state); Ayer *v.* Weeks, 65 N. H. 248, 18 Atl. 1108, 23 Am. St. Rep. 37, 6 L. R. A. 716 (in state); Phillips *v.* Newton, 12 R. I. 489 (in state).

The judge to whom the application was made must entertain all orders and proceedings. Connelly's Case, 6 Fed. Cas. No. 3,111, 2 Cranch C. C. 415.

48. **Record on appeal** see *infra*, VII, C.

49. Hanscom *v.* Tower, 17 Cal. 518; Randall *v.* Barton, 6 Metc. (Mass.) 518. See also the statutes of the several states.

50. Pargoud *v.* Morgan, 2 La. 99; Semple *v.* Fletcher, 3 Mart. N. S. (La.) 382; Jordan *v.* Palmer, 165 Mass. 317, 43 N. E. 122; Lothrop *v.* Tilden, 8 Cush. (Mass.) 375; Leigh *v.* Arnold, 5 Cush. (Mass.) 615; Allison *v.* Cockran, Quincy (Mass.) 94; Wilt *v.* Schreiner, 4 Yeates (Pa.) 352. See Evidence, 17 Cyc. 296 *et seq.*

Evidence other than the record of the proceedings in insolvency when admissible as showing insolvency see Crawford *v.* Berry, 6 Gill & J. (Md.) 63; Willard *v.* Wickham, 7 Watts (Pa.) 292; Cates *v.* Kittrell, 7 Heisk. (Tenn.) 606. See Evidence, 17 Cyc. 465 *et seq.*, 567 *et seq.*

Proof of discharge see *infra*, VI, C, 7, c.

51. Bouvier L. Dict.

Extent of rule.— If the proceedings are instituted by the debtor, they are still voluntary, although he may have been forced to apply for relief. Ward *v.* Brandt, 9 Mart. (La.) 625; Gardner *v.* Clark, 17 Barb. (N. Y.) 538.

52. See *infra*, III, D, 4.

53. See statutes of the several states. See also *infra*, III, D, 4.

A banker and exchange and money broker, and a dealer in foreign and uncurrent money, and buying and selling stocks was held a trader within the Insolvent Act of 1769. Duncan *v.* Smart, 35 U. C. Q. B. 532. See also Bagwell *v.* Hamilton, 10 Can. L. J. 305.

Lumberman.—A person who purchased timber land, cut and removed the growth therefrom, and manufactured it into barrels, was held to be a trader. *In re* Merrifield, 80 Me. 233, 13 Atl. 891. But one who owned a sawmill and brick yard appurtenant to a plantation, and sold bricks and plank was held not to be a trader. Foucher *v.* His Creditors, 7 La. 425. *Contra*, Huston *v.* Goudy, 90 Me. 128, 37 Atl. 881.

54. Keystone Driller Co. *v.* San Francisco Super. Ct., 138 Cal. 738, 72 Pac. 398 (corporations are entitled); Grow *v.* His Creditors, 31 Cal. 328 (gambler is entitled); Cohen *v.* Barrett, 5 Cal. 195 (banker not entitled under the circumstances); Montesquieu *v.* Heil, 4 La. 51, 23 Am. Dec. 471; Brown's Case, 1 Mart. (La.) 158 (thief not entitled); *In re* Tolman, 83 Me. 253, 22 Atl. 244 (milkman entitled); *Ex p.* Conant, 77 Me. 275, 52 Am. Rep. 759 (stock-broker not entitled under the circumstances); Sylvester *v.* Edgecomb, 76 Me. 499 (purchaser of cattle entitled); Groves *v.* Kilgore, 72 Me. 489 (livery-stable keeper entitled).

55. See the statutes of the several states. See Frankel *v.* His Creditors, 20 Nev. 49, 14 Pac. 775, depositaries of public funds and other persons of a fiduciary character excepted from the benefit of the act.

A married woman separated in property from her husband, although not a public trader or merchant, may take advantage of the law. Gottschalk *v.* His Creditors, 7 La. 436. In Maryland they were held not entitled to the privileges of the law. Clark *v.* Manko, 80 Md. 78, 30 Atl. 621; Relief Bldg. Assoc. *v.* Schmidt, 55 Md. 97.

Non-resident.— In Massachusetts an inhabitant may take advantage of the law if he owes debts which were contracted since he became an inhabitant. Breed *v.* Lyman, 4 Allen (Mass.) 170. And this is true, although he may have moved into the state in order to avail himself of its laws. McConnell *v.* Kelley, 138 Mass. 372. But see Moore *v.* McMillan, 54 Vt. 27. A non-resident who, in connection with a partner, buys, sells, improves, and leases lands within the state, carries on business within the state in the sense of the insolvency laws of Minnesota. Rollins *v.* Rice, 60 Minn. 358, 62 N. W. 325.

3. Procedure[56] **— a. In General.** In the institution of proceedings for relief under the insolvency laws, the petitioner should comply directly and not by attorney or proxy with the essential forms of the law.[57] Unless it is by statute otherwise provided,[58] subsequent proceedings may be conducted through a duly authorized attorney.[59]

b. Notice to Creditors.[60] Creditors of an insolvent are as a rule entitled to notice of the institution of proceedings,[61] and under some statutes also to notice of certain subsequent proceedings, such as meetings of creditors and the like.[62] Whether the notice should be by personal service[63] or by publication[64] is gov-

Compare Mertz's case, 1 Lehigh Co. L. J. (Pa.) 71. See also Judd *v.* Lawrence, 1 Cush. (Mass.) 531, where resident alien was entitled. Unless it appears that the parties seeking relief are within the jurisdiction of the court, the proceedings are void and should be dismissed. Keystone Driller Co. *v.* San Francisco Super. Ct., 138 Cal. 738, 72 Pac. 398; McConnell *v.* Kelley, 138 Mass. 372; Smith *v.* Stanley, 67 N. H. 328, 36 Atl. 254; Ayer *v.* Weeks, 65 N. H. 248, 18 Atl. 1108, 23 Am. St. Rep. 37, 6 L. R. A. 716. The statute providing that the insolvency of the firm shall render such partner insolvent, and that his property shall pass to the assignee in the insolvency proceedings, is applicable to such partners only as reside outside the state. Schmidt *v.* Ellis, 69 N. H. 98, 38 Atl. 382.

Partners.— In California the law does not apply to a partnership. *In re* Baker, 55 Cal. 302. The contrary is true in many other states. Adams Bank *v.* Rice, 2 Allen (Mass.) 480; Hanson *v.* Paige, 3 Gray (Mass.) 239; Thompson *v.* Thompson, 4 Cush. (Mass.) 127; Lafollye *v.* Carriere, 24 Fed. 346. In New Hampshire the insolvency of the firm renders each partner insolvent, and his property passes to the assignee in the insolvency proceedings, but it is inapplicable as to non-resident partners. Schmidt *v.* Ellis, 69 N. H. 98, 38 Atl. 382.

That the petitioner is not actually insolvent does not affect the validity of his discharge nor oust the court of jurisdiction of the insolvent. Weaver *v.* Leiman, 52 Md. 708. See also *In re* Chope, 112 Cal. 630, 44 Pac. 1066.

56. Composition, respite, or discontinuance see *infra*, V.

Deposit of security for costs see *infra*, VIII, A.

Appeal and review see *infra*, VII.

57. Foucher *v.* His Creditors, 7 La. 425. See also Newton *v.* Bronson, 13 N. Y. 587, 67 Am. Dec. 89; Berger *v.* Duft, 4 Johns. Ch. (N. Y.) 368. But *compare* Vernon *v.* Morton, 8 Dana (Ky.) 247; Hatch *v.* Smith, 5 Mass. 42.

58. It has been held that an absconding debtor cannot make a surrender and take the required oath through an attorney in fact. Foucher *v.* His Creditors, 7 La. 425.

59. Frankel *v.* His Creditors, 20 Nev. 49, 14 Pac. 775.

The debtor cannot delegate to an agent, by power of attorney or otherwise, authority to decide for him the question of his insolvency, and to select an assignee and make such assignment for him, at the pleasure of such agent. Minneapolis Trust Co. *v.* Pine County School Dist. No. 5, 68 Minn. 414, 71 N. W. 679.

60. In involuntary proceedings see *infra*, III, D, 8.

61. *California.*— Dean *v.* Grimes, 72 Cal. 442, 14 Pac. 178.

Connecticut.—Colbourn *v.* Rossiter, 2 Conn. 503.

Georgia.— Cheeseborough *v.* Van Ness, 12 Ga. 380.

Louisiana.— Thornton *v.* Mansker, 10 La. 121; Moore *v.* Jacobs, 3 La. 524.

Ohio.— Commissioner of Insolvents *v.* Way, 3 Ohio 103.

See 28 Cent. Dig. tit. "Insolvency," § 23.

Notice not considered process.— Brewster *v.* Ludekins, 19 Cal. 162.

Presumption of notice after many years see Bell *v.* Hardy, 9 La. Ann. 547.

Notice to attorney of non-resident creditor in a suit pending against the insolvent at the time of the cession is unnecessary, as all creditors residing out of the state at the time of the surrender are represented by attorney of absent creditors. Olney *v.* Walker, 12 La. 244.

62. Wilson *v.* His Creditors, 55 Cal. 476. See also Pope *v.* Kirchner, 77 Cal. 152, 19 Pac. 264, immaterial error in insolvent's name.

63. Pomeroy *v.* Gregory, 66 Cal. 572, 574, 6 Pac. 492, 493; Thomas *v.* Breedlove, 6 La. 573; Ludeling *v.* Poydras, 4 Mart. N. S. (La.) 637.

Leaving notice with hostler in a livery stable kept by a person to whom it was directed is insufficient. Dyre's Case, 1 Browne (Pa.) 299.

64. Dean *v.* Grimes, 72 Cal. 442, 14 Pac. 178; Steele *v.* His Creditors, 58 Cal. 244; Hernandez *v.* His Creditors, 57 Cal. 333.

In Canada a notice published on the nineteenth of a meeting held on the twenty-ninth of the same month was held to be insufficient where "at least ten days' notice" was required. Parker *v.* Kenny, 17 Nova Scotia 457.

Sufficiency of published notice see Steele *v.* His Creditors, 58 Cal. 244 (publication in Woodland Daily Democrat, where order directed publication in "Woodland Democrat," not material error); Cheeseborough *v.* Van Ness, 12 Ga. 380 (signature of insolvent or his attorney not necessary).

Notice for several purposes may sometimes be combined in a single publication. Lange-

erned by statute, and where provision is made for the time and character of notice, it should be complied with.[65]

c. Petition and Schedules.[66] In order that the benefits of the law may be obtained, it is as a rule necessary for the debtor to file a petition which should comply with the statute in the specification of all the facts,[67] especially in the specification of the date when the debts were contracted.[68] As a rule the petition should be verified by the party seeking relief.[69] In many jurisdictions the petition must be accompanied with a schedule or inventory setting forth in detail and under oath the assets and liabilities.[70] A mere omission in the inventory or

nour *v.* French, 34 Cal. 92. See Flint *v.* Wilson, 36 Cal. 24.

The date of publication of the notice is the first day on which the notice is published. Clarke *v.* Ray, 6 Cal. 600.

Proof of service of notice, whether made personally or by publication, see Barrett *v.* Carney, 33 Cal. 530; Schloss *v.* His Creditors, 31 Cal. 201. See also Pope *v.* Kirchner, 77 Cal. 152, 19 Pac. 264; Stanton *v.* Ellis, 16 Barb. (N. Y.) 319, where affidavit of publication, sworn to before a master in chancery, was held to be invalid.

65. While a default in compliance might not operate to defeat the entire proceedings, it is frequently made grounds for opposition to the discharge and may operate to defeat the right to plead the discharge as a release of the indebtedness affected by such default. See cases cited *supra*, note 61 *et seq.*

Sufficiency of affidavit of mailing see Pope *v.* Kirchner, 77 Cal. 152, 19 Pac. 264.

66. See *infra*, III, D, 5.

Failure to file or defects in schedule as affecting discharge see *infra*, VI, C, 2, f.

67. Schiff *v.* Solomon, 57 Md. 572; Baker's Case, 1 Binn. (Pa.) 462; *In re* Callahan, 102 Wis. 557, 78 N. W. 750.

An application by a partnership must show the surrender of all of applicant's property, not merely of the partnership property. Meyer *v.* Kohlman, 8 Cal. 44. Application by a partnership must allege the individual insolvency of all the partners. Hanson *v.* Paige, 3 Gray (Mass.) 239. See Parker *v.* Phillips, 2 Cush. (Mass.) 175; Pierce *v.* Stockwell, 11 Cush. (Mass.) 236, construing Mass. St. (1838) c. 163, § 21, as to proceedings by one partner after a dissolution of the partnership to obtain warrant against a separate property and against the property of the partnership. Partnership may be shown in a petition otherwise than by a direct allegation thereof. *In re* Ramazzina, 110 Cal. 488, 42 Pac. 970.

Petition of a corporation must show on its face such facts to give the court jurisdiction. Keystone Driller Co. *v.* San Francisco Super. Ct., 138 Cal. 738, 72 Pac. 398.

It is not necessary to allege in the petition that the debts were created within the state (Sharp *v.* His Creditors, 10 Cal. 418); or that the residence of the insolvent was within the county at the time (Tromans *v.* Mahlman, 111 Cal. 646, 44 Pac. 327; Barrett *v.* Carney, 33 Cal. 530; Ryan *v.* Merriam, 4 Allen (Mass.) 77. See Langenour *v.* French, 34 Cal. 92); or the character of the debts (Brewster *v.* Ludekins, 19 Cal. 162); or to conclude with a formal prayer for discharge (*In re* Chope, 112 Cal. 630, 44 Pac. 1066). It has been held unnecessary to have the petition show the cause of the debtor's insolvency. David's Case, 1 Browne (Pa.) 377.

Petition should show that assets exceed liabilities, but it has been held sufficient where the other necessary facts are alleged. *In re* Chope, 112 Cal. 630, 44 Pac. 1066; Weaver *v.* Leiman, 52 Md. 708.

Although the petition fails to name him, a creditor has the right to be made a party. Lambert *v.* Slade, 4 Cal. 337.

Petition may be amended before hearing. *In re* Brown, 5 Phila. (Pa.) 473. Amendment by reference to record where petition and order for creditors to show cause vary as to date see Smith *v.* His Creditors, 59 Cal. 267; Hastings *v.* Cunningham, 39 Cal. 137.

Refiling of petition.— A petition served in a proceeding but subsequently dismissed cannot be withdrawn from the files and reissued after alteration and made the basis of a new proceeding. *In re* Marson, 70 Me. 513.

68. Goodell *v.* His Creditors, 1 Ida. 215.

69. See Strueven *v.* His Creditors, 62 Cal. 45; Ely *v.* Cooke, 28 N. Y. 365, 2 Abb. Dec. 14.

70. The character of those schedules is dependent upon the statute, but the general rule is that they should be sufficiently definite to fairly apprise parties concerned of the true state of the debtor's affairs. Downey *v.* Kenner, 42 La. Ann. 1129, 8 So. 302; Burdon *v.* His Creditors, 20 La. Ann. 364; *In re* Billings, 10 Abb. Pr. (N. Y.) 258, 21 How. Pr. 448; Russell, etc., Mfg. Co. *v.* Armstrong, 10 Abb. Pr. (N. Y.) 258 note; Taylor *v.* Williams, 20 Johns. (N. Y.) 21; Slidell *v.* McCrea, 1 Wend. (N. Y.) 156; Woodward's Case, 1 Ashm. (Pa.) 107; Oliver's Case, 1 Ashm. (Pa.) 112; *In re* Callahan, 102 Wis. 557, 78 N. W. 750. *Compare* Com. *v.* Snavely, 28 Pa. Co. Ct. 488.

Petitioner must comply with all the requirements of the law in annexing to his petition a sworn schedule, etc. Burdon *v.* His Creditors, 20 La. Ann. 364.

Substantial compliance with statute sufficient see Barrett *v.* Carney, 33 Cal. 530.

The summary statement of an insolvent's affairs may be given in his statement, instead of his schedules. Wilson *v.* His Creditors, 32 Cal. 406.

In the case of an insolvent firm, it has been

schedule of an insolvent, if it occurs innocently,[71] of an asset deemed to be worthless,[72] or of the name of a creditor whose claim is believed to be barred by the statute of limitations or otherwise, will not operate to defeat the petition. Where, however, the insolvent fails to specify either assets or liabilities with the intent to conceal the same, it will operate either to defeat the petition or as a ground for refusing to discharge.[73]

d. Proceedings to Contest.[74] Creditors are as a rule entitled to an opportunity to show cause why the prayer of a petitioner should not be granted, the length of the notice and the grounds of opposition being generally provided by statute.[75]

held that the schedule should show both the firm and individual property. Meyer *v.* Kohlman, 8 Cal. 44.

Failure to file schedule immaterial on collateral attack see Brewster *v.* Ludekins, 19 Cal. 162. Failure to file with his petition a schedule has been held in Maryland would not have the effect of rescinding the appointment of a trustee made upon such application. Teackle *v.* Crosby, 14 Md. 14.

Insufficiency of schedule affects the sufficiency of the pleadings but not the jurisdiction over the proceedings. Bennett *v.* His Creditors, 22 Cal. 38.

Sufficient schedules see Pope *v.* Kirchner, 77 Cal. 152, 19 Pac. 264; Barrett *v.* Carney, 33 Cal. 530; Brewster *v.* Ludekins, 19 Cal. 162; Schaeffer *v.* Soule, 23 Hun (N. Y.) 583; Soule *v.* Chase, 1 Abb. Pr. N. S. (N. Y.) 48.

Insufficient schedules.— McAllister *v.* Strode, 7 Cal. 428; Raymond's Appeal, 28 Conn. 47; Deslix *v.* Schmidt, 18 La. 464; Thomas *v.* Breedlove, 6 La. 573; White *v.* Lobre, 7 Mart. N. S. (La.) 564; Bainbridge *v.* Clay, 3 Mart. (La.) 262; *In re* Cohen, 16 Daly (N. Y.) 69, 9 N. Y. Suppl. 498, 18 N. Y. Civ. Proc. 156; Slacum *v.* Simms, 5 Cranch (U. S.) 363, 3 L. ed. 126.

Oath before notary public does not fulfil the requirement that the schedule be sworn to "before a judge having jurisdiction." Baker *v.* Everhart, 65 Cal. 27, 2 Pac. 495.

Verification unnecessary see *In re* Green, 96 Cal. 162, 31 Pac. 15.

Variance between schedule and evidence of debt described therein immaterial see Brewster *v.* Ludekins, 19 Cal. 162.

Insolvent is presumed to tell the truth and not to commit perjury. Hewlett *v.* Hewlett, 4 Edw. (N. Y.) 7.

Insolvent cannot falsify his own schedule. — Barker's Case, 1 Browne (Pa.) 298.

Duty to produce accounts and title deeds. See Schloss *v.* His Creditors, 31 Cal. 201; Moore *v.* His Creditors, 19 Cal. 691; *Ex p.* McAllister, T. U. P. Charlt. (Ga.) 222; Wilson *v.* His Creditors, 19 La. 33; Porter *v.* His Creditors, 18 La. 495; Bell *v.* His Creditors, 13 La. 199; Boismare *v.* His Creditors, 8 La. 315.

71. Mattison *v.* Demarest, 4 Rob. (N. Y.) 161. See also Butt *v.* Peck, 1 Daly (N. Y.) 83.

72. Widmier's Case, 10 Phila. (Pa.) 81.

73. *Ex p.* Johnson, 1 Ashm. (Pa.) 157; McNair *v.* Gilbert, 3 Wend. (N. Y.) 344.

Where property has not been scheduled, the court has in some instances required it to be placed therein. Cosgrave *v.* His Creditors, 41 La. Ann. 274, 6 So. 585.

Effect on discharge see *infra*, VI, C, 2, f; VI, C, 5, c, (IV).

Amendment of schedule.— Unless the statute provides to the contrary, a schedule may ordinarily be amended, upon a showing satisfactory to the court that omissions therein arose from ignorance, mistake, or inability at the time it was filed to make it more perfect. May *v.* Dawson, 12 Ga. 118. Inventory may be enlarged or diminished at pleasure between the filing and final hearing upon a petition. Loines *v.* Phillips, 4 Ohio 172.

74. See *infra*, III, D, 3.

75. McDonald *v.* Katz, 31 Cal. 167.

Persons entitled to oppose petition.— Lambert *v.* Slade, 4 Cal. 337 (any creditor whether named in the assignment or not); Deslix *v.* Schmidt, 18 La. 464 (creditors not notified of prior proceedings cannot be made a proper party by supplemental petition); Tourne *v.* His Creditors, 6 La. 459 (wife of insolvent cannot oppose unless authorized by him or the judge); Cosgrove *v.* His Creditors, 38 La. Ann. 974 (wife of insolvent); Northern Bank *v.* Squires, 8 La. Ann. 318, 58 Am. Dec. 682 (attorney to represent absent creditors); Cougot *v.* Fournier, 4 Rob. (La.) 420 (surety of an insolvent curator who fails to pay over funds).

Attaching creditors cannot impeach an adjudication in insolvency and claim a distributive share of the insolvent estate at the same time. Gottschalk *v.* Smith, 74 Md. 560, 22 Atl. 401.

The proper method is to proceed by direct action in the same court which entered the order contradictorily with the ceding debtor, and also with the creditors, by notice to the syndic elected by them. Jeffries *v.* Belleville Iron Works Co., 15 La. Ann. 19, where a creditor seeks to have annulled as alleged an order of court accepting a surrender of property by an insolvent.

Citation to the insolvent is unnecessary in an opposition to an insolvent's cession and discharge on the ground of fraud. Mayewski *v.* His Creditors, 40 La. Ann. 94, 4 So. 9.

Time of making objections.— Creditors objecting to a proceeding should do so within the time allowed by law. Cappel *v.* Creditors, 50 La. Ann. 318, 23 So. 319; Romano *v.* Creditors, 46 La. Ann. 1176, 15 So. 395; Spears *v.* Creditors, 40 La. Ann. 650, 4 So. 567; Burdon *v.* His Creditors, 20 La. Ann. 364; Nimick *v.* Ingram, 17 La. Ann. 85; Beste *v.* His Creditors, 14 La. Ann. 516;

Fraud is a frequent ground of such a contest,[76] but insolvency proceedings are not necessarily invalidated by the fraudulent intent of the debtor in instituting the same.[77] Creditors who neglect to appear and raise objections are concluded, if the requisite jurisdiction exist in the officer, except as to matters which the law declares shall avoid the proceeding.[78]

e. Creditors' Meeting.[79] In some jurisdictions the statutes require the calling of a creditors' meeting for the acceptance of the insolvent's surrender and for other purposes, although this rule is not general.[80]

f. Trial.[81] The usual rules of law with reference to the trial of cases prevails,[82] except that the time within which prosecutions may be had is as a rule limited

Montilly *v.* His Creditors, 18 La. 383; Blunt *v.* Conn, 3 La. 217; Gouy *v.* His Creditors, 2 La. 357. Where the fraud was subsequent to the application, which could not have been charged within the time allowed, it is permitted subsequent thereto. Robinson *v.* His Creditors, 1 Rob. (La.) 452.

An opposition filed on Monday is in time where the last day for opposition falls on Sunday. Allen *v.* His Creditors, 8 La. 221.

Until a syndic is appointed a creditor cannot oppose an insolvent debtor's petition. Morgan *v.* Creditors, 7 La. 60.

Insolvent is a competent witness in his own behalf on the trial of an opposition. Mayeski *v.* Creditors, 40 La. Ann. 94, 4 So. 9.

76. See the statutes of the several states; and cases cited *infra*, this note.

Fraud as a ground for opposition see Marx *v.* Creditors, 48 La. Ann. 1340, 20 So. 685; Brown *v.* His Creditors, 17 La. Ann. 113; Bennett *v.* Denny, 33 Minn. 530, 24 N. W. 193 [*affirmed* in 128 U. S. 489, 9 S. Ct. 134, 32 L. ed. 491] (collateral attack on jurisdiction of court denied); North. Star Boot, etc., Co. *v.* Lovejoy, 33 Minn. 229, 22 N. W. 388 (fraudulent intent of the assignor in making an assignment does not invalidate the same under Minn. Laws (1881), c. 148, which gives the assignee power to attack fraudulent preferences and conveyances and provides for criminal punishment of fraudulent debtors); Simon *v.* Mann, 32 Minn. 65, 19 N. W. 347; *In re* Mann, 32 Minn. 60, 19 N. W. 347.

Specific acts of fraud alleged must be clearly established. Turpin *v.* Maury, 18 La. Ann. 698.

Where a party withholds his books of account, a fraudulent intention to conceal evidence from his creditors will be presumed. Poultney *v.* Cecil, 8 La. 321.

The bare assertion of fraud is not sufficient to warrant the sending of the case to the jury; affidavits of the facts should be filed. Fabre *v.* Zylstra, 2 Bay (S. C.) 147.

Where insolvent's statements are not sufficiently definite as to the losses and assets, the proper mode to reach such defects is by a charge of fraud and an examination of the insolvent under oath, and not by demurrer to the petition and a motion requiring him to amend. Wilson *v.* His Creditors, 32 Cal. 406.

Burden of proof.— The opposition to a cession must allege and prove on a charge of fraud against an insolvent an intent to defraud and injury resulting therefrom. Marx *v.* Creditors, 48 La. Ann. 1340, 20 So. 685.

Amendment.— The court may, on the trial of an issue upon the suggestion of fraud, refuse leave to amend the suggestion by charging that effects had come into the possession of an applicant since the making of the issue, knowledge of which came to the creditors during the trial. Morein *v.* Solomons, 7 Rich. (S. C.) 97.

77. For the statutes as a general rule afford ample opportunity to parties interested to attack fraudulent preferences, conveyances, and the like, and provide for the criminal punishment of the fraudulent debtor. Bennett *v.* Denny, 33 Minn. 530, 24 N. W. 193 [*affirmed* in 128 U. S. 489, 9 S. Ct. 134, 32 L. ed. 491]; Simon *v.* Mann, 32 Minn. 65, 19 N. W. 347; *In re* Mann, 32 Minn. 60, 19 N. W. 347.

Finding an insolvent guilty of fraud does not revest in him the property surrendered by him. Gumbel *v.* Andrus, 45 La. Ann. 1081, 13 So. 633; McGraw *v.* Andrus, 45 La. Ann. 1073, 13 So. 630; Andrus *v.* His Creditors, 45 La. Ann. 1067, 13 So. 635.

78. People *v.* Stryker, 24 Barb. (N. Y.) 649; Soule *v.* Chase, 39 N. Y. 342; *In re* Bradstreet, 13 Johns (N. Y.) 385.

Persons concluded by discharge see *infra*, VI, C. 5, e.

79. Creditors' meeting: For election of trustee or assignee see IV, A, 1. On administration of estate see *infra*, IV, D, 3. On question of consent or discharge see *infra*, VI, 6, 3, d.

80. Spears *v.* His Creditors, 40 La. Ann. 650, 4 So. 567; Stewart *v.* His Creditors, 7 Mart. N. S. (La.) 604; Harper *v.* His Creditors, 3 Mart. (La.) 322.

81. See *infra*, III, D, 9.

82. See, generally, TRIAL.

Burden of proving petitioner's insolvency is on the petitioner. *In re* Callahan, 102 Wis. 557, 78 N. W. 750.

Change of venue.— It has been held that allegations by a creditor against a petitioner for the benefit of the insolvent laws cannot be removed under a suggestion to an adjoining county for trial. Michael *v.* Schroeder, 4 Harr. & J. (Md.) 227.

Hearing before judge at chambers may not be objectionable. Clarke *v.* Ray, 6 Cal. 600.

Stay of proceedings.— Judge cannot stay proceedings against the debtor's person or

by the insolvency statute.[83] A debtor charged with fraud in connection with his insolvency proceedings is entitled to a trial by jury.[84]

g. Adjudication of Insolvency.[85] An order adjudicating one an insolvent, or accepting the surrender of his property and convoking his creditors, cannot be collaterally attacked unless the proceedings are nullities on their face.[86]

D. Involuntary Proceedings — 1. In General. Where the proceedings are instituted by the creditors *in invitum* and the debtor is thus forced into insolvency, the proceedings are denominated as involuntary.[87]

2. Acts of Insolvency. The grounds upon which involuntary proceedings may be instituted against an insolvent are determined by the statutes of the several states.[88] Absconding or concealment to avoid payment of debts,[89] fraudulent concealing of property from creditors,[90] making a general assignment for the benefit of creditors,[91] permitting property to be taken under attachment without dissolving

property and accept the cession so as to bind the creditors without the debtor's compliance directly and not by proxy with the essential forms prescribed by law. Foucher *v.* His Creditors, 7 La. 425. The clerk of the district court has no power in the absence of the judge to make a decree accepting the cession and staying proceedings against an insolvent and his property. State *v.* Green, 34 La. Ann. 1027.

83. Marx *v.* Creditors, 48 La. Ann. 1340, 20 So. 685.

Sunday being appointed as a day for hearing the application the case must stand over until Monday without any formal meeting or adjournment for that purpose. Cheeseborough *v.* Van Ness, 12 Ga. 380.

An attorney must state for which of several creditors he appears when requested so to do by the court. Cheeseborough *v.* Van Ness, 12 Ga. 380.

84. Romano *v.* Creditors, 46 La. Ann. 1176, 15 So. 395; Campbell *v.* His Creditors, 16 La. 348; Purvis *v.* Robinson, 49 N. C. 96.

A verdict on a charge of fraud against the insolvent finding the facts as charged but negativing the fraudulent intent is substantially one of acquittal authorizing a judgment accordingly. Campbell *v.* His Creditors, 16 La. 348.

85. See *infra*, III, D, 10.

Adjudication of insolvency defined see *supra*, I, F.

86. Pehrson *v.* Hewitt, 79 Cal. 594, 21 Pac. 950; Buhrs *v.* Kelly, 67 Cal. 289, 7 Pac. 696; Bajourin *v.* Ramelli, 35 La. Ann. 783; People *v.* Stryker, 24 Barb. (N. Y.) 649.

Collateral attack of discharge see *infra*, VI, C, 8.

Method of attacking.— It has been held that the only way in which the legality of such proceedings can be questioned must be by a direct action to that effect (Hanney *v.* Healy, 14 La. Ann. 424), and not by a proceeding in equity (Pehrson *v.* Hewitt, 79 Cal. 594, 21 Pac. 950).

Stay of proceedings.— A notice to creditors of a judgment accepting a surrender made by an insolvent cannot, in case of informality in the return of the officer as to the mode of making the service, prejudice or affect the stay of proceedings granted by the court. Hanney *v.* Healy, 14 La. Ann. 424.

Whether an appeal lies from an order adjudging a petitioner insolvent depends upon the statute. *In re* Chope, 112 Cal. 630, 44 Pac. 1066; *In re* Gilbert, 94 Wis. 108, 68 N. W. 863. See also *infra*, VII, C.

87. Bouvier L. Dict.

88. While they vary to some extent in different localities, as a rule the presumed insolvency of the debtor is the foundation of them all. See the statutes of the several states. See also Ward *v.* Brandt, 9 Mart. (La.) 625; Morewood *v.* Hallister, 6 N. Y. 309, 323 [*citing* Conard *v.* Atlantic Ins. Co., 1 Pet. (U. S.) 386, 7 L. ed. 189; Shone *v.* Lucas, 3 D. & R. 218, 16 E. C. L. 166; Bouvier L. Dict.].

What constitutes insolvency: In general see *supra* I, A. Within the meaning of the national bankruptcy law see Bankruptcy, 5 Cyc. 237 *et seq.*

Who is an "insolvent" see *supra*, I, B.

Evidence of insolvency: Generally see *supra*, note 7, p. 1259. In creditor's suit see Creditors' Suits, 12 Cyc. 52. To set aside fraudulent conveyance see *infra*, IV, E, 7; and Fraudulent Conveyances, 20 Cyc. 767, 794.

Presumption of continuance of insolvency see Evidence, 16 Cyc. 1054.

In Massachusetts it has been held that the doing by a debtor of any of the fraudulent acts enumerated in the statute is ground for proceedings in insolvency against him, without alleging or proving that he is insolvent. O'Neil *v.* Glover, 5 Gray 144.

89. See Thompson *v.* Newton, 2 La. 411; Thorp *v.* Porter, 70 Vt. 570, 41 Atl. 657.

90. Blake *v.* Sawin, 10 Allen (Mass.) 340, holding this to be true, although the debtor's property is actually sufficient to pay his debts.

91. Merrill *v.* Bowler, 20 R. I. 226, 38 Atl. 114; Calvin *v.* Tranchemontagne, 14 L. C. Jur. 210. See *infra*, IV, C, 1, c.

In Canada while there is nothing to prevent an insolvent debtor from transferring or assigning his property to one or more persons, in trust for the benefit of them all (Lanouette *v.* Tougas, 6 Montreal Leg. N. 123), still, such transfer will be inoperative as to dissenting creditors (Tourangeau *v.* Dubeau, 10 Quebec 92), and may be docketed, not only in the hands of the assignees them-

the same within the time allowed for such purpose,[92] preferring creditors[93] and the like[94] usually constitute acts of insolvency.

3. GROUNDS OF OPPOSITION AND WHO MAY OPPOSE.[95] The alleged insolvent[96] or his creditors, other than those who filed the petition,[97] may oppose the relief sought, either upon the ground of irregularity in the proceedings, or because they are not warranted by law.

4. WHO MAY BE ADJUDGED INSOLVENT[98] — a. In General. As the benefits of voluntary proceedings are sometimes restricted to certain persons, so too involuntary insolvency proceedings are by statute often restricted to merchants or traders.[99]

selves, but also in the hands of the vendee of the holder of a portion of the estate (Macfarlane *v.* McKenzie, 5 L. C. Jur. 106; Withal *v.* Young, 10 L. C. Rep. 149). A creditor assenting to such assignment cannot avail himself of it as a ground to obtain the compulsory liquidation of a debtor. Whyte *v.* Cohen, 14 L. C. Jur. 83. An abandonment of property under the common law, made by a debtor in favor of his creditors, without a discharge from them, has been held not to deprive the debtor of his rights of ownership (Rivard *v.* Belle, 1 Rev. Lég. 571); but it is in fact an irrevocable mandate, the effect of which is to deprive the debtor of the right of disposing otherwise of the property so assigned (Jacob *v.* Jacob, 2 Montreal Super. Ct. 258).

92. Taunton Nat. Bank *v.* Stetson, 145 Mass. 366, 14 N. E. 349; Kimball *v.* Morris, 2 Metc. (Mass.) 573; Wheeler *v.* Bacon, 4 Gray (Mass.) 550; Maxfield *v.* Edwards, 38 Minn. 539, 38 N. W. 701; Platt *v.* New York, etc., R. Co., 26 Conn. 544. See *infra*, IV, C, 2, c, (I), (B).

93. In some states the transfer or conveyance of property by a debtor while insolvent to one or more of his creditors, whereby such creditors obtain a preference over other creditors of a like class, constitutes sufficient ground for the institution of insolvency proceedings against such debtor. *In re* Strock, 128 Cal. 658, 61 Pac. 282; Brown *v.* Smart, 145 U. S. 454, 12 S. Ct. 958, 36 L. ed. 773 [*affirming* 69 Md. 320, 14 Atl. 468, 17 Atl. 1101]. See also Willison *v.* Frostburg First Nat. Bank, 80 Md. 196, 30 Atl. 749; Lothrop *v.* Highland Foundry Co., 128 Mass. 120; *In re* Jordan, 9 Metc. (Mass.) 292; New Orleans Water-Works Co. *v.* Louisiana Sugar Refining Co., 125 U. S. 18, 8 S. Ct. 741, 31 L. ed. 607. See *infra*, IV, C, 1, e.

This has been held true where the purpose, natural tendency, and effect of the transfer would be to give one creditor a preference over others; and it is not necessary that such preference should have been actually given and consummated. *In re* Kollmann, 34 Minn. 282, 25 N. W. 602.

94. Savage *v.* Jeter, 13 La. Ann. 239; Dyson *v.* Brandt, 9 Mart. (La.) 493 (failure to comply with the conditions of a respite); Ensign *v.* Briggs, 6 Gray (Mass.) 329 (failure to dissolve an attachment when it does not constitute act of insolvency); O'Neil *v.* Glover, 5 Gray (Mass.) 144 (any act by which his true title and ownership is concealed from his creditors); Dennis *v.* Sayles, 11 Metc. (Mass.) 233 (under Mass. St. (1838) c. 163, § 19); Harris *v.* Hanover Nat. Bank, 15 Fed. 786, 21 Blatchf. 255 (firm unable to meet its obligations and allowing its property to be taken under an attachment for fraud, which it does not deny).

95. See *supra*, III, C, 3, d.

96. Rollins *v.* Rice, 60 Minn. 358, 62 N. W. 325, holding that a person against whom insolvency proceedings have been instituted may oppose the same on the ground that he is not insolvent or that he has not committed the act or offense charged. See also Hyde *v.* Weitzner, 45 Minn. 35, 47 N. W. 311.

An absent debtor sued for a forced surrender may upon his return disapprove the affidavit and set aside the proceedings. Kennedy *v.* Develin, 8 Mart. N. S. (La.) 150.

97. Brewster *v.* Shelton, 24 Conn. 140; Letchford *v.* Dannequin, 16 La. Ann. 149; Planters' Bank *v.* Lanusse, 10 Mart. (La.) 690; Wikoff *v.* Duncan, 10 Mart. (La.) 667.

Immaturity of creditor's claim.— The right to petition to have a debtor adjudged insolvent arises at the time the act of insolvency is committed, and as a rule this right is held to exist, although the claim upon which the petition is based is not due (Fisk *v.* Chandler, 7 Mart. (La.) 24; Schiff *v.* Solomon, 57 Md. 572. But see Rice *v.* Dodd, 94 Ga. 414, 20 S. E. 339), unless the statute specifically provides that the liability must be matured (Sperry's Appeal, 47 Conn. 87).

That all the creditors except the petitioner are secured is held not to constitute grounds of opposition to the institution of proceedings against the insolvent. O'Neil *v.* Glover, 5 Gray (Mass.) 144.

98. See *supra*, III, C, 2.

99. See the statutes of the several states. See also Meinhard *v.* People's Nat. Bank, 99 Ga. 654, 26 S. E. 68.

Who are not "merchants," "traders," etc., within the statutes see Gardner *v.* Gambrill, 86 Md. 658, 39 Atl. 318. And see *supra*, note 53.

Who are "merchants," "traders," etc., within the statutes see Hobbs *v.* Sheffield, 87 Ga. 455, 13 S. E. 686; Coates *v.* Allen, 71 Ga. 787. See Mercer *v.* Houston Guano, etc., Co., 95 Ga. 359, 22 S. E. 638; Blanchard *v.* Vansyckle, 70 Ga. 278; Foucher *v.* His Creditors, 7 La. 425 (sawmill owner not a trader); Clark *v.* Manko, 80 Md. 78, 30 Atl. 621 (married woman trading as *feme sole*

There may also be other restrictions, such as residence of the alleged insolvent and the like.[1]

b. Partnerships. The statutes generally provide for the involuntary insolvency of a partnership upon the same grounds and conditions as in the case of an individual.[2] The period within which such proceedings may be instituted varies in the different states. In some it is restricted to the life of the firm;[3] but in others proceedings may be instituted even after the dissolution, if there are partnership assets to be administered and partnership debts remaining unpaid.[4]

5. Petition[5] — a. In General. The petition of creditors seeking to have their debtor adjudged insolvent cannot be in general terms, but must specify in detail the names of the petitioning creditors and the debtor, the act claimed to have been committed which rendered the debtor amenable to the law,[6] together with its date,[7] the residence of the debtor[8] and the petitioners, the nature and amount of their several claims or demands,[9] and such other facts as may be required by the statute of the state in which the proceedings are instituted.[10] There is no reason why several creditors may not unite in one petition.[11] And there seems to be no reason why a petition may not be amended, provided one is not guilty of laches.[12]

not a trader). *Compare* Ball *v.* Lastinger, 71 Ga. 678. See *supra*, note 53.

1. Dolhenty's Case, 11 Pa. Dist. 187, 26 Pa. Co. Ct. 34, 18 Montg. Co. Rep. 21. *Compare* Rollins *v.* Rice, 60 Minn. 358, 62 N. W. 325, holding that a non-resident who, in connection with a partner, buys, sells, improves, etc., land within the state, carries on business in the state within the meaning of the insolvency laws.

The insolvent must either be an actual inhabitant of the state, or his acts of insolvency must have accrued just before, or just as he was about, leaving the state, and then his creditors are given ninety days thereafter to proceed against him; and there is nothing to permit one who has ceased to be an inhabitant, but continues to carry on business in the state, and while so residing out of the state commits acts of bankruptcy, to be adjudged an insolvent on petition of his creditors. Thorp *v.* Porter, 70 Vt. 570, 41 Atl. 657.

2. See the statutes of the several states; and *supra*, III, D, 4, a.

Creditors of a member of a firm may institute insolvency proceedings against him. Jaquith *v.* Fuller, 167 Mass. 123, 45 N. E. 54.

Including persons who are not partners does not invalidate proceedings against the partnership so far as the actual partners are concerned. Hanson *v.* Paige, 3 Gray (Mass.) 239.

Joint proceedings against several as partners will not lie under the insolvent laws, but the proceedings must be taken against each separately. Cator *v.* Martin, 57 Md. 397; Schiff *v.* Solomon, 57 Md. 572.

Although an insolvency court has no jurisdiction of a non-resident partner and of his individual property, still such court would have jurisdiction over a resident partner, his individual property, and the partnership property in his possession. Schmidt *v.* Ellis, 69 N. H. 98, 38 Atl. 382.

In Massachusetts it was held that proceedings might be instituted by a creditor against a partnership, one of the members of which has resided within the state within one year, but has removed therefrom, although neither one of the other partners ever resided within the state. McDaniel *v.* King, 5 Cush. 469.

3. Stillwell *v.* Savannah Grocery Co., 88 Ga. 100, 13 S. E. 963. *Compare* Kimbrel *v.* Walters, 86 Ga. 99, 12 S. E. 305.

4. Parker *v.* Phillips, 2 Cush. (Mass.) 175.

5. See *supra*, III, C, 3, c.

Security for costs see *infra*, VIII, A.

Sufficiency of prayer of petition see Fogg *v.* Providence Lumber Co., 15 R. I. 15, 23 Atl. 31.

6. See *In re* Mealy, 127 Cal. 103, 59 Pac. 313; *In re* Patton, 110 Cal. 33, 42 Pac. 459; Meinhard *v.* People's Nat. Bank, 99 Ga. 654, 26 S. E. 68; Castleberg *v.* Wheeler, 68 Md. 266, 12 Atl. 3; O'Neil *v.* Glover, 5 Gray (Mass.) 144; *In re* Stevens, 38 Minn. 432, 38 N. W. 111; *In re* Graeff, 30 Minn. 476, 16 N. W. 363.

7. Gross *v.* Potter, 15 Gray (Mass.) 556.

8. *In re* Barnard, 30 Minn. 512, 16 N. W. 403; Russell, etc., Mfg. Co. *v.* Armstrong, 12 Abb. Pr. (N. Y.) 472.

9. *In re* Close, 106 Cal. 574, 39 Pac. 1067; *In re* Dennery, 89 Cal. 101, 26 Pac. 639; *In re* Roberts, 71 Me. 390. *Compare* Meinhard *v.* People's Nat. Bank, 99 Ga. 654, 26 S. E. 68.

In order that the debtor may contest the adjudication, it has been held that the petition should present such facts with reference to the indebtedness with the same degree of certainty and fulness as is necessary in an ordinary action to recover the indebtedness. *In re* Russell, 70 Cal. 132, 11 Pac. 622.

10. Meinhard *v.* People's Nat. Bank, 99 Ga. 654, 26 S. E. 68.

In Louisiana it was held necessary to allege that an absconding debtor was a merchant or trader. Shakespeare *v.* Saunders, 19 La. 97.

11. Pecquet *v.* Golis, 1 Mart. N. S. (La.) 438.

12. Merriam *v.* Sewall, 8 Gray (Mass.) 316. But see *In re* Whipple, 129 Cal. 426, 62 Pac. 65; Anderson *v.* Lassen County Super. Ct., 122 Cal. 210, 54 Pac. 829; *In re* Visalia City Water Co., 119 Cal. 561, 51 Pac. 856.

b. Who May Petition[13]—(i) *In General.* The persons qualified to file a petition are determined by the statutes.[14]

(ii) *Non-Resident.* In some jurisdictions it is held that it is no defense to such proceedings that they are instituted by a non-resident creditor,[15] but in such case the non-resident instituting the proceedings will be bound thereby and his demand canceled by the debtor's discharge.[16]

(iii) *Number and Amount of Claims.* There is no fixed rule with reference to the number and amount of claims necessary to give the court jurisdiction, but this also varies in the different states.[17]

(iv) *Signature and Verification.* The petition should be signed and verified by the petitioners or by their authorized attorney.[18]

6. Intervention and Joinder of New Petitioners.[19] After a petition seeking the adjudication of a person insolvent has been filed, other creditors may as a rule intervene or join in it and aid in its prosecution.[20]

13. See *supra*, III, C, 2.

14. See the statutes of the several states. And see Taunton Nat. Bank *v.* Stetson, 145 Mass. 366, 14 N. E. 349; Joy *v.* Cossart, 1 Yeates (Pa.) 50, 2 Dall. 126, 1 L. ed. 316.

Creditor who has committed his debtor on execution cannot petition. Beaty *v.* Beaty, 2 Johns. Ch. (N. Y.) 430.

Creditor whose claim is secured cannot as to such claim become a petitioning creditor, although there would seem to be no reason why he might not surrender his security and then as unsecured creditor petition. *In re* Brainard, 69 Vt. 459, 38 Atl. 71. See also Meinhard *v.* People's Nat. Bank, 99 Ga. 654, 26 S. E. 68.

Trustees appointed upon the dissolution of an insurance company cannot petition without assent of the *cestui que trust*. Matter of Sherryd, 2 Paige (N. Y.) 602.

Estoppel.—While a person who was a party to the creation of the act of insolvency upon which the petition was based would be thereby estopped from signing a petition based upon such act, the mere filing of a claim with the trustee under a general assignment would not have that effect. Castleberg *v.* Wheeler, 68 Md. 266, 12 Atl. 3; Whyte *v.* Cohen, 14 L. C. Jur. 83.

By agent.—A creditor's petition in insolvency may be executed by one specially authorized to act for him. Hinds *v.* Heath, 68 N. H. 551, 38 Atl. 382.

Maturity of claim.—The general rule is that a petitioner must be a creditor holding a matured claim. *In re* Baum, 68 Cal. 238, 9 Pac. 90; Emberson's Case, 16 Abb. Pr. (N. Y.) 457. Immaturity of claims immaterial see Schiff *v.* Solomon, 57 Md. 572. In making up the requisite amount of claims to be owing by the debtor, a claim payable in the future has been allowed to be included. Hinds *v.* Heath, 68 N. H. 551, 38 Atl. 382. And *compare* Blain's Petition, 16 York Leg. Rec. (Pa.) 167.

15. Mechanic's, etc., Bank *v.* Versailles Woolen Co., 59 Conn. 347, 22 Atl. 318.

16. Brown *v.* Smart, 69 Md. 320, 14 Atl. 468, 17 Atl. 1101 [*affirmed* in 145 U. S. 454, 12 S. Ct. 958, 36 L. ed. 773]. See *infra*, VI, C, 5, e, (III.)

17. Seghers *v.* Courcelle, 17 La. 551; O'Neil *v.* Glover, 5 Gray (Mass.) 144; *In re* Bradstreet, 13 Johns. (N. Y.) 385. In estimating the amount owing to petitioners in involuntary insolvency proceedings, a note made by a firm, since dissolved, of which the debtor was a member, may be included. Hinds *v.* Heath, 68 N. H. 551, 38 Atl. 382. Where the claim of one of the requisite number of petitioners to adjudge a debtor insolvent was paid before the petition was filed, the petition gave the court no jurisdiction. *In re* Whipple, 129 Cal. 426, 62 Pac. 65.

Inclusion of claims payable in futuro see Hinds *v.* Heath, 68 N. H. 551, 38 Atl. 382.

Inclusion of costs see Woodard, etc., Co. *v.* Milnes, 101 Wis. 329, 77 N. W. 163.

18. O'Neil *v.* Glover, 5 Gray (Mass.) 144; Hinds *v.* Heath, 68 N. H. 551, 38 Atl. 382.

The want of an authorized signature to the petition of a creditor is ground for setting aside the proceedings. Merriam *v.* Sewall, 8 Gray (Mass.) 316.

An amended petition should be verified. *In re* Whipple, 129 Cal. 426, 62 Pac. 65. Where some of the creditors verified the petition, but the names and claims of additional creditors were inserted therein before it was filed, the verification was held to be a nullity. *In re* Visalia City Water Co., 119 Cal. 561, 51 Pac. 856.

Verification based upon petitioner's best knowledge and belief is sufficient. Wright *v.* Cohn, 88 Cal. 328, 26 Pac. 600; American Carpet-Lining Co. *v.* Chipman, 146 Mass. 385, 16 N. E. 1; O'Neil *v.* Glover, 5 Gray (Mass.) 144.

19. **Parties** generally see Parties.

20. Clay *v.* Towle, 78 Me. 86, 2 Atl. 852; *In re* Hawkes, 70 Me. 213. But see *In re* Pawcatuck Nat. Bank, 17 R. I. 567, 23 Atl. 855, where application to intervene made sixty days after the filing of a petition was too late.

After withdrawal or dismissal of petition.—Where the petition is in behalf of a sole creditor, unless the statute provides to the contrary, there seems to be no reason why such creditor might not withdraw the petition, in which event the original proceedings could not be revived in order to allow other creditors to intervene. Fayerweather *v.* Monson, 61 Conn. 431, 23 Atl. 878. Where,

7. Statute of Limitations.[21] The statutes as a rule place a limitation upon the time within which proceedings must be instituted when founded upon some act of the insolvent.[22]

8. Process or Notice.[23] In the absence of a statutory provision to the contrary, process may be served either personally, by leaving it at the insolvent's residence or place of business, or by publication.[24] Creditors other than the petitioners should have an opportunity to be heard, and for that purpose should have notice of the institution of proceedings.[25]

9. Hearing and Determination.[26] The same rules with reference to hearings or the trial of issues generally prevail in the case of proceedings in insolvency.[27] The facts stated in the petition must be proved by legal and competent evidence,[28] and whether the issues shall be tried by court or jury is determined by the statutes of the particular state in which the proceedings are pending.[29]

10. Adjudication of Insolvency.[30] An adjudication of insolvency in a proceeding conducted conformable to law and in a court having jurisdiction is final, unless an appeal is allowed by statute, and cannot be collaterally attacked.[31]

however, the proceedings were fraudulently dismissed, this rule would probably not hold good. Foster *v.* Goulding, 9 Gray (Mass.) 50.

21. **Statute limitations** generally see Limitations of Actions.

22. In order to sustain insolvency proceedings, based upon such act, the petition should be filed within the period fixed by the statute. Wintersmith *v.* Pointer, 2 Metc. (Ky.) 457; Bates *v.* Chapin, 8 Cush. (Mass.) 99.

23. See *supra*, III, C, 3, b.

24. See cases cited *infra*, this note. See also Guirot *v.* His Creditors, 12 Mart. (La.) 654; Weimprender *v.* Weimprender, 11 Mart. (La.) 17; *In re* Roberts, 71 Me. 390.

Appearance of the insolvent, either personally or by attorney, in the proceedings instituted by creditors against him will give the court jurisdiction over both the insolvent and his property (Lyon *v.* Crosby, 64 Cal. 34, 27 Pac. 786; Frankel *v.* Their Creditors, 20 Nev. 49, 14 Pac. 775), and he cannot thereafter complain of want of citation or the like (Dyson *v.* Brandt, 9 Mart. (La.) 493).

Notice to insolvent on petition of his creditors see Buck *v.* Sayles, 9 Metc. (Mass.) 459, construing St. (1844) c. 178, § 9.

25. See People *v.* Southerland, 81 N. Y. 1.

In California it has been held that an adjudication of a person as an insolvent is a proceeding *in rem*, so far as it concerns the status of the debtor, and the service of notice required by law upon the creditors by publication is sufficient. Arnold *v.* Kahn, 67 Cal. 472, 8 Pac. 36.

26. See *infra*, III, C, 3, f.

27. New York Cent. Trust Co. *v.* Thurman, 94 Ga. 735, 20 S. E. 141; Ripley *v.* Griggs, 52 Vt. 460.

28. Merriam *v.* Sewall, 8 Gray (Mass.) 316; Stearns *v.* Kellogg, 1 Cush. (Mass.) 449.

Although the debtor makes default evidence must be produced in support of the petition. Rider-Wallis Co. *v.* Fogo, 102 Wis. 536, 78 N. W. 767.

Burden of proof.— Where the court has made an *ex parte* order commanding the insolvent to file a schedule of his creditors and the insolvent traverses the truth of the allegations of the petition, he must make out a *prima facie* case in order to throw on the petitioner the burden of establishing its allegations, which upon affidavit to the petition are to be taken as *prima facie* true. Thompson *v.* Muller, 36 La. Ann. 728. It has been held that the burden is on the petitioner to show that his stoppage is only temporary, and that his assets are sufficient to meet his liabilities. McCready *v.* Leamy, 11 L. C. Jur. 193.

Sufficiency of evidence see *In re* Blain, 16 York Leg. Rec. (Pa.) 167. Creditor's oath alone is not sufficient to authorize a judge to grant a forced surrender. Wikoff *v.* Duncan, 10 Mart. (La.) 667; Ward *v.* Brandt, 9 Mart. (La.) 625.

29. Castleberg *v.* Wheeler, 68 Md. 266, 12 Atl. 3; Rosario Straits Packing Co. *v.* Sunset Packing Co., 30 Wash. 50, 70 Pac. 252.

30. See *supra*, III, C, 3, g.

Adjudication of insolvency defined see *supra*, I, F.

31. Riego *v.* Foster, 125 Cal. 178, 57 Pac. 896; Luhrs *v.* Kelly, 67 Cal. 289, 7 Pac. 696; Vogler *v.* Rosenthal, 85 Md. 37, 36 Atl. 650, 60 Am. St. Rep. 298.

Appeal and review see *infra*, VII.

Cannot be collaterally attacked.— Riego *v.* Foster, 125 Cal. 178, 57 Pac. 896.

Conclusive from date of entry see Newton's Estate, 18 Montg. Co. Rep. (Pa.) 101.

Failure of the clerk of the court to properly enter an adjudication of insolvency will not render it invalid. *In re* Clarke, 125 Cal. 388, 58 Pac. 22.

In a subsequent suit by the assignee to recover certain property for the benefit of creditors, an objection that a petition in insolvency did not sufficiently state the necessary facts cannot be raised by defendant. Mogk *v.* Peterson, 75 Cal. 496, 17 Pac. 446.

Where general creditors are not made parties to a proceeding, they are not concluded by any judgment or decree entered in it. Weir *v.* Mowe, 81 Ill. App. 287.

E. Seizure and Custody of Insolvent's Property — 1. Restraining Transfer and Disposition.[32] Unless an insolvent is guilty of some fraud or has violated some statute with reference to the transfer or disposition of his property,[33] he cannot be restrained by his creditors under the general law from disposing of his property as he may desire, unless the demands of such creditors have been reduced to judgment, or they have some lien thereon.[34]

2. Restraining Interference by Third Persons.[35] The courts have the power to restrain third persons from interfering with the property of the insolvent after the filing of the petition.[36]

3. Receivership[37] **Pending Proceedings.** The court may appoint a receiver at the instance of the insolvent[38] or his creditors[39] to take charge of the assets of the former after the filing of the petition in insolvency and pending the appointment of a trustee or assignee. Such a receiver may be appointed *ex parte* in chambers[40] or in open court. The powers, duties, and liabilities of receivers appointed in an insolvency proceeding are determined by statute;[41] and the same may be said

Sufficiency.— An adjudication of insolvency in involuntary proceedings, stating that all the allegations of the creditors' petition are true, and that the debtor was on a certain day, ever since has been, and still is, insolvent, is sufficient, without formal findings. *In re* Clarke, 125 Cal. 388, 58 Pac. 22. See also Bowland *v.* Wilson, 71 Md. 307, 18 Atl. 536; Randall *v.* Barton, 6 Metc. (Mass.) 518; *In re* Bradstreet, 13 Johns. (N. Y.) 385.

The court has power to not only adjudge the debtor an insolvent but also to set aside the conveyance to the grantee as giving him an unlawful preference. Dumler *v.* Bergmann, (Md. 1894) 29 Atl. 826.

32. **Injunction** generally see Injunctions.

33. See *infra*, IV, C, 1. See also *supra*, note 91.

After institution of proceedings, right to dispose of his property see *infra*, III, E, 4; and Bankruptcy. Whether title passes upon initiation of proceedings or remains in insolvent till adjudication depends upon the local statutes.

34. Kimbrell *v.* Walters, 86 Ga. 99, 12 S. E. 305.

An order restraining the debtor has been made where, by confessing judgment, a levy was made upon all his stock, upon the ground that such confessions were in violation of the assignment law forbidding preferences. Wagener *v.* Pape, 46 S. C. 245, 24 S. E. 340.

35. **Injunction** generally see Injunctions.

36. Taffts *v.* Manlove, 14 Cal. 47, 73 Am. Dec. 610; Andrus *v.* His Creditors, 45 La. Ann. 1067, 13 So. 635.

Insolvency laws often authorize the enjoining of actions whereby one creditor is attempting to gain an unfair advantage or preference over others. Gay *v.* Strickland, 112 Ala. 567, 20 So. 919; Commercial Soap Works *v.* F. A. Lambert Co., 49 La. Ann. 459, 21 So. 639; Galway *v.* U. S. Steam Sugar Refining Co., 21 How. Pr. (N. Y.) 313; Sexton *v.* Mann, 15 Wis. 162. When a Massachusetts creditor is proceeding by attachment in New York to secure certain property of a Massachusetts debtor, contrary to the Massachusetts insolvency laws, he may be enjoined at suit of the assignee. Cole *v.* Cunningham, 133 U. S. 107, 10 S. Ct. 269, 33 L. ed. 538.

Issuance of an execution on a judgment against a petitioner to sell his property within the time limited for the lien of the judgment will not violate an order staying all the proceedings against a petitioner under the insolvent law. Isaac *v.* Swift, 10 Cal. 71, 70 Am. Dec. 698.

37. **Receivership** generally see Receivers.

38. Lammon *v.* Giles, 3 Wash. Terr. 117, 13 Pac. 417, holding, however, that a receiver should not be appointed where the property in his custody is no more than sufficient to pay the debt secured upon it.

Where it appeared that there were valid, subsisting mortgages, covering all of the property belonging to the debtor, more than sufficient to exhaust his assets, it would be error to appoint a receiver to administer the same. Atlanta Brewing, etc., Co. *v.* Blumenthal, 101 Ga. 541, 28 S. E. 1003.

39. Von Roun *v.* San Francisco Super. Ct., 58 Cal. 358.

The oath of an insolvent that he has no property is held not to be conclusive evidence to prevent the appointment of a receiver. Journeay *v.* Brown, 26 N. J. L. 111.

40. Real Estate Associates *v.* San Francisco Super. Ct., 60 Cal. 223; Wheelock *v.* Hastings, 4 Metc. (Mass.) 504; Kimball *v.* Morris, 2 Metc. (Mass.) 573. See Rider-Wallis Co. *v.* Fogo, 102 Wis. 536, 78 N. W. 767.

41. See the statutes of the several states.

As a rule they are required, upon their appointment and qualification, to take possession and control of the assets of the insolvent and preserve them, pending the appointment of the permanent trustee or assignee, pursuant to the statute. See Hulme *v.* San Francisco Super. Ct., 63 Cal. 239. In Taylor *v.* Hill, 115 Cal. 143, 44 Pac. 336, 46 Pac. 922, it was held that where the statute makes the sheriff, as receiver of an insolvent, a mere custodian for safe-keeping of the tangible property pending the appointment of the assignee, he does not represent the insolvent in litigated matters, and notice to the sheriff is not notice to the insolvent.

He would not have the right to sue to recover property, as that authority is as a rule vested in the assignee. Tibbets *v.* Cohn, 116 Cal. 365, 48 Pac. 372.

to be true with respect to the powers, duties, and liabilities of a provisional trustee.[42]

4. Warrant and Seizure Pending Proceedings. Upon the appointment of a messenger, trustee, or assignee to take possession of an insolvent's estate, and the issuance of a warrant or writ to take possession thereof, it is the duty of such person to take immediate possession of the property;[43] and if under the laws of the state it is essential that the insolvent should make a conveyance of his property, this should likewise be done.[44] After the issuance of such warrant, the insolvent's power over the estate ceases.[45]

IV. Assignment, Administration, and Distribution of Insolvent's Estate.

A. Appointment, Qualification, and Tenure of Assignee or Trustee[46]

1. In General. The statutes provide for the appointment of an officer generally designated as an "assignee" or a "trustee," to take charge of a debtor's estate upon the institution of insolvency proceedings.[47]

2. Election by Creditors.[48] The trustee or assignee is as a rule elected at a meeting of creditors duly called.[49] If the claim is partially secured, the creditor

In Minnesota it has been held that the receiver might avoid a conveyance, and payments made, and securities given by the insolvent, within four months. Bliss *v.* Doty, 36 Minn. 168, 30 N. W. 465; Weston *v.* Loyhed, 30 Minn. 221, 14 N. W. 892.

So in Washington it was held that such receiver was to every intent an assignee. Ewing *v.* Van Wagener, 6 Wash. 39, 32 Pac. 1009.

Sale or disposition of property.— While it is the general rule that a receiver, or provisional trustee, or assignee should hold the property intact, pending the appointment of a permanent trustee or assignee (Pitcher *v.* Creditors, 40 La. Ann. 782, 6 So. 98; Brown *v.* Brice, 2 Harr. & G. (Md.) 24), yet in cases where there is a likelihood of deterioration or danger of serious loss, or emergency warrants it, the court would be justified in authorizing the disposition of such property (Calder *v.* His Creditors, 44 La. Ann. 454, 10 So. 930).

42. He is a mere recipient of the insolvent's property, which the law contemplates his receiving immediate possession of from the insolvent himself and not by suit against third persons. Brown *v.* Brice, 2 Harr. & G. (Md.) 24. It has been held that he cannot maintain an action of trover for promissory notes which are delivered by the insolvent himself to defendant to discharge a debt due him (Kennedy *v.* Boggs, 5 Harr. & J. (Md.) 403); nor bring suit to set aside a fraudulent conveyance by the insolvent (Kennedy *v.* Boggs, *supra*).

The provisional trustee failing to deliver up an estate on demand of the permanent trustee has been held liable for interest and entitled to no commission for his services. Williams *v.* Ellicott, 6 Harr. & J. (Md.) 427.

43. Milliken *v.* Hathaway, 148 Mass. 69, 19 N. E. 16, 1 L. R. A. 510; Stevens *v.* Palmer, 12 Metc. (Mass.) 464.

The warrant may be issued, although there is pending a proposition for a composition. Jordan *v.* Palmer, 165 Mass. 317, 43 N. E. 122.

The want of a seal to the warrant to a messenger has been held sufficient to invalidate the proceedings. Jordan *v.* Palmer, 165 Mass. 317, 43 N. E. 122.

The messenger would have no authority to take in his possession the debtor's personal property which is under a valid attachment. Cutter *v.* Gay, 8 Allen (Mass.) 134.

When a messenger has not been lawfully appointed, it has been held that an insolvent may refuse to deliver to him books and papers. *In re* Brainerd, 56 Vt. 495.

In Massachusetts it is held not necessary to the validity of the proceedings that there should be a formal adjudication before the issuance of the warrant of the debtor's inability to pay his debts and of his willingness to assign all his property for the benefit of creditors. Holbrook *v.* Jackson, 7 Cush. 136.

44. See *infra*, IV, B, 1.

45. King *v.* Cross, 175 U. S. 396, 20 S. Ct. 131, 44 L. ed. 211 [*affirming* 19 R. I. 220, 33 Atl. 147]; Perry Mfg. Co. *v.* Brown, 19 Fed. Cas. No. 11,015, 2 Woodb. & M. 449.

46. Mandamus to compel admission to office generally see Mandamus.

Qualification and appointment of other officers see *infra*, IV, D, 2.

47. See the statutes of the several states.

Permanent trustee or assignee supersedes the provisional trustee or assignee. Phelps *v.* Phelps, 17 Md. 120.

48. Meeting of creditors: On administration of estate see *infra*, IV, D, 3. On question of consent to discharge see *infra*, VI, C, 3, d.

Preliminary meeting of creditors in insolvency proceeding see *supra*, III, C, 3, e.

49. See *infra*, this and succeeding notes.

All creditors holding claims which are not otherwise secured may vote at such an election, upon submitting proof of their claims.

may vote on the amount of such claim in excess of the security.[50] In some jurisdictions the majority in number and amount of claims is necessary to an election,[51] while in others the majority in amount of claims is sufficient.[52]

3. Appointment by Court. Where, however, there is no election by the creditors,[53] either because of the neglect,[54] or the refusal of the creditors, or because of their inability to agree,[55] the court should make the appointment.

4. Conclusiveness of Appointment. The appointment of a trustee or assignee is so far final and conclusive that it cannot be collaterally questioned.[56] Objection thereto must be made in the immediate proceedings or on appeal and within the time allowed by statute.[57]

And it has been held that the oath of a creditor is *prima facie* proof which would entitle such creditor to vote. Blake *v.* Hall, 19 La. Ann. 49; Mercadal *v.* His Creditors, 16 La. Ann. 82. See Pandelly *v.* His Creditors, 9 La. 387.

Agent or attorney.— Unless specifically forbidden, there is no reason why an attorney or agent with knowledge of the facts might not act for his principal. Cassidy *v.* His Creditors, 18 La. 402; Pandelly *v.* His Creditors, 9 La. 387. See Jones *v.* Horsey, 4 Md. 306, 59 Am. Dec. 81. An attorney may make a sworn statement of the demand and also vote as a creditor's proxy at the election of an assignee. Menke *v.* Lyndon, 124 Cal. 160, 56 Pac. 883. Where the knowledge of the agent of the amount due is derivative, it is not such evidence of the debt as would entitle him to vote. Planters' Bank *v.* Lanusse, 10 Mart. (La.) 690.

An indorsee who has not paid his indorser would not be entitled to vote for a trustee for his prior indorser. Terry *v.* His Creditors, 38 La. Ann. 15; Planters' Bank *v.* Lanusse, 10 Mart. (La.) 690.

A tutor cannot vote for a syndic on a debt due by himself as tutor, where he becomes insolvent. Major *v.* Creditors, 46 La. Ann. 367, 15 So. 8.

The wife of an insolvent may vote for syndics under certain circumstances. Tourne *v.* His Creditors, 6 La. 459; Planters' Bank *v.* Lanusse, 12 Mart. (La.) 157.

Creditor having several claims is entitled to only one vote in the election of a syndic. Conery *v.* His Creditors, 115 La. 316, 38 So. 1005, under La. Rev. St. §§ 1797, 1799.

The appointment of an assignee has been held invalid where it appeared that at the meeting of creditors there was only one person who had filed a claim which was not properly made, and instead of abandoning the meeting as a failure and calling another after due notice, the meeting was adjourned to another day, on which the assignee was appointed. Brown *v.* Pearman, Russ. Eq. Dec. (Nova Scotia) 491.

Confirmation.— Where by the laws of a state, the election by creditors of a trustee or assignee must be confirmed by the court, until such confirmation, the assignee or trustee has no authority or power to administer the insolvent's estate or to institute suit in its behalf. Dukeylus *v.* Dumontel, 4 Mart. (La.) 466. See Goodale *v.* His Creditors, 8 La. 125; Gouy *v.* His Creditors, 2 La. 357; Seghers *v.* His Creditors, 10 Mart. (La.) 54.

50. Widber *v.* San Joaquin County Super. Ct., 94 Cal. 430, 29 Pac. 870; Murphy *v.* Connolly, 4 Quebec 368.

In Louisiana it has been held that a creditor of an insolvent bank who holds in pledge certain security or property as guarantee of his claim may still prove his claim and vote. Richardson *v.* Turner, 52 La. Ann. 1613, 28 So. 158.

51. Winkler *v.* His Creditors, 34 La. Ann. 1221. See Lesseps *v.* His Creditors, 7 La. Ann. 624; Pandelly *v.* His Creditors, 9 La. 387; Planters' Bank *v.* Lanusse, 10 Mart. (La.) 690; Enet *v.* His Creditors, 4 Mart. (La.) 307. *Compare* Conery *v.* His Creditors, 115 La. 316, 38 So. 1005.

52. Menke *v.* Lyndon, 124 Cal. 160, 56 Pac. 883; O'Neill *v.* Reynolds, 116 Cal. 264, 48 Pac. 57.

53. See *supra*, III, A, 2.

54. See Harrison *v.* Creditors, 42 La. Ann. 1054, 8 So. 268.

55. Tucker *v.* Chick, 67 N. H. 77, 37 Atl. 672.

Under the statutes of Massachusetts it has been held that where the proceedings are suspended pending a proposition for a composition, an assignee may be appointed thereafter by the court, if he deems that it will be to the interest of the parties concerned. Jordan *v.* Palmer, 165 Mass. 317, 43 N. E. 122.

Appointment of a trustee without notice will be reversed on appeal of a creditor to whom no notice was given. Commercial Nat. Bank's Appeal, 59 Conn. 25, 21 Atl. 1021. *Contra*, Southworth *v.* The A. E. Douglass, 22 Fed. Cas. No. 13,195. Appeal generally see *infra*, VII, C.

56. Ohleyer *v.* Bunce, 65 Cal. 544, 4 Pac. 549; Gallup *v.* Smith, 59 Conn. 354, 22 Atl. 334, 12 L. R. A. 353; Bajourin *v.* Ramelli, 35 La. Ann. 783; Cloutier *v.* Lemée, 33 La. Ann. 305. But see Richardson *v.* Turner, 52 La. Ann. 1613, 28 So. 158.

The insolvent has no right to interfere in the appointment nor to have the proceedings set aside for mere error in the notice to creditors. Janin *v.* His Creditors, 8 La. 467; Seghers *v.* His Creditors, 8 Mart. (La.) 136.

57. Henry *v.* Creditors, 46 La. Ann. 1428, 16 So. 400; Smith *v.* De Lalande, 1 Rob.

5. Qualification — a. In General. Whether the assignee or trustee must be a resident of the jurisdiction in which the proceedings are pending,[58] or a creditor,[59] or be possessed of any particular qualification,[60] is dependent upon the statute.

b. Bond. The trustee or assignee must qualify for the office by giving bond with good and sufficient surety for the faithful performance of his duties.[61] He can neither sue nor be sued,[62] nor in any manner intermeddle with the property of an insolvent until he does give such bond.[63]

6. Removal and Appointment of Successor.[64] An assignee or trustee may be removed from office for good cause, such as fraud or neglect of the estate resulting in injury thereto,[65] but his acts prior to his removal are not thereby

(La.) 384; Pandelly *v.* His Creditors, 9 La. 387; Dreux *v.* His Creditors, 2 Mart. N. S. (La.) 57; Seghers *v.* His Creditors, 10 Mart. (La.) 54.

The burden of proof rests upon a party opposing the appointment. Gwartney *v.* His Creditors, 13 La. Ann. 188.

On the trial of objections to an appointment other grounds cannot be urged than the ones originally filed. Bierra *v.* His Creditors, 2 Mart. N. S. (La.) 47; Desbois *v.* Segher, 8 Mart. (La.) 67. See also Kocke *v.* Creditors, 51 La. Ann. 937, 25 So. 985.

Where an election was made by a majority in number and amount of claims, as required by statute, the court has no authority to set aside the action of such majority, and upon his own motion to appoint an assignee of his own selection. Gaffney *v.* Piper, 4 Ida. 728, 44 Pac. 552.

58. Simon *v.* Mann, 33 Minn. 412, 23 N. W. 856.

59. Clamageran *v.* Degruy, 2 Mart. N. S. (La.) 156; Enet *v.* His Creditors, 4 Mart. (La.) 307. It has also been held that the insolvent may be syndic. Turcas *v.* Leglise, 4 Mart. N. S. (La.) 462.

60. See the statutes of the several states; and *infra*, IV, A, 5, b. In the case of Ryan *v.* Merriam, 4 Allen (Mass.) 77, it was held that prior to the act of 1856 the same person might be clerk and assignee in the same case in insolvency.

Disqualification and removal see *infra*, IV, A, 6.

61. See the statutes of the several states.

Assignees may voluntarily give separate bonds of the proper amount, although the statute contemplates a joint bond. Chittenden Dist. Insolvency Ct. *v.* Alexander, 72 Vt. 15, 47 Atl. 102.

Qualification of sureties.— See German-American Bank *v.* Devlin, 96 Wis. 155, 71 N. W. 108.

Time of approval.— Where the bond of the assignee was given to the judge within the time fixed by statute, the fact that his approval was not indorsed upon it until after the expiration of such time will not prejudice the rights of the assignee by delay. Johnson *v.* Bray, 35 Minn. 248, 28 N. W. 504.

In a scire facias brought upon a judgment after the discharge in insolvency of the original defendant, notice to him is sufficient without notice to his assignees in insolvency if they have never qualified by giving bond. Com. *v.* Lelar, 13 Pa. St. 22.

62. Stewart *v.* Stone, 3 Gill & J. (Md.) 510; Power *v.* Hollman, 2 Watts (Pa.) 218; Immel *v.* Stoever, 1 Penr. & W. (Pa.) 262. See also Fitzgerald *v.* Neustadt, 91 Cal. 600, 27 Pac. 936; Winchester *v.* Union Bank, 2 Gill & J. (Md.) 79, 19 Am. Dec. 255; Dean *v.* Patton, 1 Penr. & W. (Pa.) 437.

63. Winchester *v.* Union Bank, 2 Gill & J. (Md.) 79, 19 Am. Dec. 255.

Until the bond has been given, although the appointment has been made, the trustee has no right to institute ejectment proceedings. Willis *v.* Row, 3 Yeates (Pa.) 520.

64. **Discharge of assignee** or trustee see *infra*, IV, G.

65. Hughes *v.* His Creditors, 15 La. 446; Rogers *v.* Jackman, 12 Gray (Mass.) 144; Colt *v.* Sears Commercial Co., 20 R. I. 323, 38 Atl. 1056, 78 Am. St. Rep. 837. *Compare* Merrill *v.* Bowler, 20 R. I. 226, 38 Atl. 114.

Because of his insolvency, a trustee may be removed but not necessarily so. Matter of Paddock, 6 How. Pr. (N. Y.) 215.

Appointment will not be rescinded and the assignee or trustee removed because the person appointed did not represent any of the creditors, but was counsel for the applicant (Teackle *v.* Crosby, 14 Md. 14), because a creditor was not personally notified and furnished a schedule (Shepard *v.* Abbott, 137 Mass. 224), because he was temporarily absent from the jurisdiction (Hughes *v.* His Creditors, 15 La. 446), or because the application did not allege that it is prosecuted for the benefit of all the creditors (Menke *v.* Lyndon, 124 Cal. 160, 56 Pac. 883).

A court of chancery has no jurisdiction in the removal of trustees of insolvents, as that matter by statute is vested in the courts of law. Powles *v.* Dilley, 9 Gill (Md.) 222.

In Canada it has been held that an assignment made by a copartnership vests in the assignee the separate estate of the partners, as well as the partnership estate, and the removal of the assignee has the effect of removing him with respect to both estates. *In re* Macfarlane, 12 L. C. Jur. 239. The power given to a court or a judge by the insolvent act of Canada of 1875 to remove an assignee is confined to the case of an assignee disobeying the order made under that act, and does not extend to other misconduct

avoided.[66] Upon the refusal[67] or failure of an assignee or trustee to qualify after his appointment,[68] or upon his death,[69] a new trustee or assignee should be appointed, or elected as required by statute.

B. Assignment and Title, Rights and Remedies of Assignee or Trustee in General — 1. Assignment or Transfer to Trustee by Insolvent. The procedure necessary on the part of an insolvent in order to invest his assignee or trustee with a title to his property is not uniform. Under some statutes the title vests in the assignee or trustee by operation of law without the necessity of a deed or conveyance,[70] while under others an assignment or conveyance by the clerk of the court,[71] or a deed of assignment for the benefit of creditors made by the insolvent is necessary.[72]

2. Property and Rights Vesting in Assignee or Trustee — a. In General. All of the property and rights of property of an insolvent, whether included in the schedule or not, pass to his assignee or trustee for the benefit of his creditors, unless exempt under the laws of the state in which the proceedings are pending;[73]

on the part of the assignee, the general power of removing being committed to the creditors. *In re* Evans, 13 Nova Scotia 326.

66. Pilie *v.* Dreux, 4 Mart. N. S. (La.) 75; Saulet *v.* Dreux, 3 Mart. N. S. (La.) 615, 15 Am. Dec. 173.

67. Cooper *v.* Henderson, 6 Binn. (Pa.) 189.

68. Glenn *v.* Karthaus, 4 Gill & J. (Md.) 385; Feather's Appeal, 1 Penr. & W. (Pa.) 322. See also Glasgow *v.* Sands, 3 Gill & J. (Md.) 96. *Compare* Talhaud *v.* His Creditors, 6 Rob. (La.) 317.

It will be presumed that a court having power to appoint assignees acted within its jurisdiction in appointing a second without any order appearing of record discharging the first. Freeman *v.* Spencer, 128 Cal. 394, 60 Pac. 979.

69. Haugh *v.* Maulsby, 68 Md. 423, 14 Atl. 65; Jamison *v.* Chesnut, 8 Md. 34; Bassett *v.* Washburn, 9 Allen (Mass.) 197; *In re* Sessions, 6 R. I. 17.

70. Phelps *v.* Phelps, 17 Md. 120. See also McAllister *v.* Samuel, 17 Pa. St. 114.

Upon the due appointment and qualification of the trustee or assignee by giving bond, he becomes entitled to all of the insolvent's property except such as may be exempt. Gilmour *v.* Ewing, 50 Fed. 656; Tourville *v.* Valentine, 2 Quebec 588.

In Louisiana the rights of property of an insolvent are vested by law in a syndic of his creditors. Duhois *v.* Xiques, 14 La. Ann. 427.

In Canada the assignee of an estate is merely the mandatory of the parties; the abandonment of his estate by an insolvent does not deprive him of an interest in his property, since he still remains liable for his debts; and he has an interest with his creditors in seeing that the estate is managed to the best advantage. *In re* Dinning, 4 Quebec 37; Lemay *v.* Martel, 1 Quebec Q. B. 160.

The court may enforce the surrender by fine and imprisonment where the statute requires the insolvent to surrender his property to the trustee. Cochrane *v.* Bridendolph, 72 Md. 275, 19 Atl. 604.

71. Mogk *v.* Peterson, 75 Cal. 496, 17 Pac. 446.

72. Clark *v.* Manko, 80 Md. 78, 30 Atl. 621; Smith *v.* Bean, 46 Minn. 138, 48 N. W. 687; Moncure *v.* Hanson, 15 Pa. St. 385; Watson *v.* Hall, 29 Fed. Cas. No. 17,283, 2 Cranch C. C. 154.

Seal.— An assignment under the insolvent laws of Maine need not be under seal. Milliken *v.* Houghton, 97 Me. 447, 54 Atl. 1075.

Filing with clerk.— An assignment for the benefit of creditors, under the Minnesota insolvent law of 1881, does not take effect or become operative for any purpose until filed in the office of the clerk of the district court. Gridley *v.* Myers, 73 Minn. 308, 76 N. W. 41.

73. *California.*— Poehlmann *v.* Kennedy, 48 Cal. 201.

Louisiana.— Gumbel *v.* Andrus, 45 La. Ann. 1081, 13 So. 633; McGraw *v.* Andrus, 45 La. Ann. 1073, 13 So. 630; Andrus *v.* His Creditors, 45 La. Ann. 1067, 13 So. 635; Dwight *v.* Simon, 4 La. Ann. 490; Dwight *v.* Smith, 9 Rob. 32; West *v.* His Creditors, 8 Rob. 123; Baldwin *v.* Union Ins. Co., 2 Rob. 133; Levy *v.* Jacobs, 12 La. 109; Muse *v.* Yarborough, 11 La. 521.

Maryland.— Plater *v.* Scott, 6 Gill & J. 116.

New Hampshire.— Gignoux *v.* Bilbruck, 63 N. H. 22.

New York.— Borthwick *v.* Howe, 27 Hun 505. See also Roseboom *v.* Mosher, 2 Den. 61.

Pennsylvania.— Cooper *v.* Henderson, 6 Binn. 189; Shuman *v.* Reigart, 7 Watts & S. 168.

Vermont.— Sowles *v.* Lewis, 75 Vt. 59, 52 Atl. 1073; Hazen *v.* Lyndonville Nat. Bank, 70 Vt. 543, 41 Atl. 1046, 67 Am. St. Rep. 680.

Virginia.— Shirley *v.* Long, 6 Rand. 735.

United States.— Tennessee Bank *v.* Horn, 17 How. 157, 15 L. ed. 70.

See 28 Cent. Dig. tit. "Insolvency," § 68.

Exemptions see *infra*, VI, A, 2.

The debtor must surrender all his property and cannot allege that he has surrendered enough to pay his debts and be excused from surrendering any more. Duncan *v.* Duncan, 3 Mart. (La.) 230. And it makes no difference where the property is situated. Gard-

and this is not affected by the fact that, as to certain of the property, it was not the intention of the insolvent to make a surrender.[74] Thus there would pass interests in letters patent,[75] a trade-mark which is not personal but used to designate the place or establishment at which goods are manufactured,[76] the good-will of a business,[77] books of account[78] and the like.[79] Where property is held jointly or in common with others, the insolvent's property only would pass.[80] Property which is onerous or burdensome to the estate may be rejected by the assignee or trustee, in which event the title thereto would remain in the insolvent.[81]

b. Choses in Action. All claims and demands due the insolvent, although contested by the party from whom claimed to be due, pass to the trustee or assignee with the right to sue therefor in his name as assignee or trustee.[82]

ner *v.* Lewis, 7 Gill (Md.) 377; Hazen *v.* Lyndonville Nat. Bank, 70 Vt. 543, 41 Atl. 1046, 67 Am. St. Rep. 680. Property held under a deed from an insolvent, which is in fact a mortgage, passes to the trustee. Waters *v.* Riggin, 19 Md. 536. See also as to a remainder interest in lands (Pierce *v.* Lee, 9 Gray (Mass.) 42); the value of a homestead estate in land in excess of the limit allowed as exempt (Copeland *v.* Sturtevant, 156 Mass. 114, 30 N. E. 475), or a life-estate bequeathed to one with the proviso that it shall not be subject to his debts (Verdier *v.* Youngblood, Rich. Eq. Cas. (S. C.) 220, 24 Am. Dec. 417).

Estate tail of an infant tenant in tail, taking benefit of the Insolvent Act, does not pass to his assignees. Burton *v.* Haworth, 5 Madd. 50, 56 Eng. Reprint 813.

74. Geilinger *v.* Philippi, 133 U. S. 246, 10 S. Ct. 266, 33 L. ed. 614.

75. Barton *v.* White, 144 Mass. 281, 10 N. E. 840, 59 Am. Rep. 84. *Contra*, Ashcroft *v.* Walworth, 2 Fed. Cas. No. 580, Holmes 152. See also Murphy *v.* Philbrook, 57 N. Y. Super. Ct. 204, 6 N. Y. Suppl. 543.

76. Warren *v.* Warren Thread Co., 134 Mass. 247. See Bradley *v.* Norton, 33 Conn. 157, 87 Am. Dec. 200.

77. *In re* Lang, 5 Ohio S. & C. Pl. Dec. 572, 7 Ohio N. P. 556.

78. *In re* Trudeau, 7 Montreal Super. Ct. 451.

79. Property placed in the debtor's hands for the purpose of giving him a false credit, although some of his creditors may have been defrauded thereby, it has been held would not pass to his assignee. Audenried *v.* Betteley, 5 Allen (Mass.) 382, 81 Am. Dec. 755.

80. Laird *v.* Perry, 74 Vt. 454, 52 Atl. 1040.

81. Wadlow *v.* Markey, 95 Ill. App. 484, a lease. See also Smalley *v.* Harding, 7 Q. B. D. 524, 50 L. J. Q. B. 367, 44 L. T. Rep. N. S. 503, 29 Wkly. Rep. 554.

82. Hunter *v.* U. S., 5 Pet. (U. S.) 173, 8 L. ed. 86. Thus a claim for supplies furnished within the United States to a military expedition against a foreign power with whom the United States are at peace passes to an assignee in insolvency. Gill *v.* Oliver, 11 How. (U. S.) 529, 13 L. ed. 799. So will a claim for damages for a collision on a navigable river (Murdock *v.* The Emma Graham, 17 Fed. Cas. No. 9,940), an amount paid as margin on the purchase of stock which is subsequently held to be void (Rued *v.* Cooper, 109 Cal. 682, 34 Pac. 98), all choses in action owned by the insolvent at the time of his assignment, whether they would be under other statutes negotiable or not and whether they stand in the name of such debtor or any other person (Stanton *v.* Lewis, 26 Conn. 444), a right of action for injuries to an insolvent's property (Lovell *v.* Hammond Co., 66 Conn. 500, 34 Atl. 511), a claim, although not disclosed by the insolvent in his schedule or statement (Dwight *v.* Smith, 9 Rob. (La.) 32; West *v.* His Creditors, 8 Rob. (La.) 123), a claim for damages by reason of a wrongful attachment (Flaspoller *v.* Sittig, 35 La. Ann. 992), a right to recover the penalty for a usurious payment or contract (Pearson *v.* Gooch, 69 N. H. 571, 45 Atl. 406; Gathercole *v.* Young, 61 N. H. 121; Newbury Bank *v.* Sinclair, 60 N. H. 100, 49 Am. Rep. 307; Ladd *v.* Wiggin, 35 N. H. 421, 69 Am. Dec. 551; Tamplin *v.* Wentworth, 99 Mass. 63; Gray *v.* Bennett, 3 Metc. (Mass.) 522), a right of action for waste upon the debtor's estate (Bullock *v.* Hayward, 10 Allen (Mass.) 460), or a sum payable under a life-insurance policy to the insured, absolutely or in a contingency, after such sum becomes payable (Bassett *v.* Parsons, 140 Mass. 169, 2 N. E. 547; McElroy *v.* John Hancock Mut. L. Ins. Co., 88 Md. 137, 41 Atl. 112, 71 Am. St. Rep. 400. See also 50 L. R. A. 33 note).

Commercial paper see Sowles *v.* Lewis, 75 Vt. 59, 52 Atl. 1073; Maclellan *v.* Davidson, 20 N. Brunsw. 338; Campbell *v.* Gilbert, 10 N. Brunsw. 420.

A right of action for the excessive distress does not pass by an assignment under the Insolvent Debtor Act. O'Donnel *v.* Seybert, 13 Serg. & R. (Pa.) 54.

Claims for injuries to the person or character of the insolvent, in the absence of a statutory provision to the contrary, would not pass to his assignee or trustee unless reduced to judgment prior to the assignment. Stone *v.* Boston, etc., R. Co., 7 Gray (Mass.) 539.

An action on a demand arising from a tort cannot be maintained by an assignee. Shoemaker *v.* Keeley, 1 Yeates (Pa.) 245, 2 Dall. 213, 1 L. ed. 353.

c. Claims Against United States. A claim or demand against the United States based upon a contract, express or implied, passes to the trustee or assignee with the right to maintain suit therefor.[83]

d. Equitable Estates — (I) *In General.* An insolvent's equitable interest in property which might be subjected to sale under execution would pass to his assignees or trustee for the benefit of his creditors with the right to maintain proceedings to reduce the same to money.[84] So too, on the other hand, property in which others have some rights, either legal or equitable, the legal title to which is in the insolvent, will pass to the trustee in insolvency.[85]

(II) *Trust Estates.* Property held by an insolvent merely in trust for others would not pass to an assignee or trustee upon his insolvency.[86] Where, however, such property is held in trust by another for the benefit of the insolvent, if by the laws of the state, it is subject to execution, it would pass to his assignee or trustee.[87]

e. Partnership and Individual Property. Upon the insolvency of a partnership, the assignee or trustee of the firm takes all of its assets and the surplus of the separate estate of the members of the firm, above the amount necessary to pay their individual debts.[88] The adjudication of the surviving partner as insolvent debtor operates to vest in his trustee the firm assets.[89] Upon the insolvency of a member of the firm, his assignee or trustee takes all of his individual assets and

Stock held by insolvent in foreign company see Hazen *v.* Lyndonville Nat. Bank, 70 Vt. 543, 41 Atl. 1046.

83. For example a claim for sugar bounty due from the United States under the act of Oct. 1, 1890, would pass to the assignee or trustee of an insolvent. Calder *v.* Henderson, 54 Fed. 802, 4 C. C. A. 584. Also a claim found due by the Alabama Claims Commission. Goreley *v.* Butler, 147 Mass. 8, 16 N. E. 734. Also an interest in a claim, liability for which was assumed by Mexico, which was subsequently paid through negotiations by the United States (Mayer *v.* White, 24 How. (U. S.) 317, 16 L. ed. 657), or claim for services rendered the government (Milnor *v.* Metz, 16 Pet. (U. S.) 221, 10 L. ed. 943).

84. Kip *v.* State Bank, 10 Johns. (N. Y.) 63.

A trustee may redeem the land of a debtor of whose estate he has charge from a sale under execution. Phyfe *v.* Riley, 15 Wend. (N. Y.) 248, 30 Am. Dec. 55.

Insolvent's equity of redemption in mortgaged premises will pass to the trustee. Sowles *v.* Lewis, 75 Vt. 59, 52 Atl. 1073.

In case of a mortgagee who parts with the beneficial interest in a mortgage, but does not transfer the legal title, and who afterward obtains his discharge under the insolvent laws, the mortgage would not pass to his assignees. Hosford *v.* Nichols, 1 Paige (N. Y.) 220.

85. McElroy *v.* John Hancock Mut. L. Ins. Co., 88 Md. 137, 41 Atl. 112, 71 Am. St. Rep. 400. *Compare In re* George, (R. I. 1896) 35 Atl. 676.

86. Low *v.* Welch, 139 Mass. 33, 29 N. E. 216; Kip *v.* State Bank, 10 Johns. (N. Y.) 63: *In re* George, (R. I. 1896) 35 Atl. 676.

87. Gardner *v.* Hooper, 3 Gray (Mass.) 398; Tillinghast *v.* Bradford, 5 R. I. 205. But see Kennedy *v.* Strong, 10 Johns. (N. Y.) 289; Kip *v.* State Bank, 10 Johns. (N. Y.) 63.

In Massachusetts it was held that the debtor's interest in property held in trust for him under a will which declared that such interest could not be liable in any way for his debts would not pass title. Billings *v.* Marsh, 153 Mass. 311, 26 N. E. 1000, 25 Am. St. Rep. 635, 10 L. R. A. 764.

88. Judd *v.* Gibbs, 3 Gray (Mass.) 539. In line with this see also Reid *v.* Bisset, 15 Quebec 108; Hamilton *v.* Roy, 1 Montreal Leg. N. 592. *Compare* Conary *v.* Sawyer, 92 Me. 463, 43 Atl. 27, 69 Am. St. Rep. 525, infant partner's share passes.

The assignee of the estates of both members of the firm, under distinct proceedings in insolvency, it has been held, would administer the estate of the partnership. Harmon *v.* Clark, 13 Gray (Mass.) 114.

Where a member of the firm is a non-resident, while the assignment by the partnership may be good as to the firm it would not vest the individual property in the assignee. Smith *v.* Hammond, 68 N. H. 363, 44 Atl. 519.

Where one of two partners has absconded and left the state, it has been held that the remaining partner cannot file a petition in his own name to procure for the partnership the benefit of the insolvent law, and thereby transfer the separate and individual property of the other partner for distribution to a trustee among the creditors of the partnership. Baltimore Second Nat. Bank *v.* Willing, 66 Md. 314, 78 Atl. 558.

89. Pinckney *v.* Lanahan, 62 Md. 447; Howard *v.* Priest, 5 Metc. (Mass.) 582; Burnside *v.* Merrick, 4 Metc. (Mass.) 537.

The surrender of assets by the surviving partners of an insolvent firm in Louisiana, although ineffectual to carry the interest of the deceased partner, which upon his death vested in his heirs, is valid as to the interest

whatever may be due him as his share of the partnership assets after the payment of the firm debts.[90]

f. After-Acquired Property.[91] All property of the insolvent acquired subsequent to the filing of the petition or the adjudication of insolvency, as the case may be,[92] remains the property of the insolvent.[93]

3. Title Acquired by Assignee or Trustee.[94] The assignee or trustee of an insolvent immediately becoming vested with all the rights at law or in equity[95] stands in the same position with reference to the title to property as that possessed by the insolvent, except as to property which has been fraudulently transferred by him,[96] and may enforce any right or make any defense which the insolvent could have maintained or enforced at the time of his insolvency.[97] He takes

of the survivors. Tua *v.* Carriere, 117 U. S. 201, 6 S. Ct. 565, 29 L. ed. 855 [*affirming* 24 Fed. 346].

90. California Furniture Co. *v.* Halsey, 54 Cal. 315; Russell *v.* Cole, 167 Mass. 6, 44 N. E. 1057, 57 Am. St. Rep. 432. *Compare* Jaquith *v.* Fuller, 167 Mass. 123, 45 N. E. 54.

In Canada an assignment under the act by one member only of a copartnership cannot operate as an assignment of the partnership estate. Cournoyer *v.* Tranchemontagne, 5 Rev. Lég. 327, 18 L. C. Jur. 335 [*reversing* 4 Rev. Lég. 717].

91. Property acquired after discharge see *infra*, VI, C, 5, b.

92. See the statutes of the several states.

93. Consequently property acquired either by gift, inheritance, devise, or otherwise, subsequent to the institution of the proceedings may be retained by the insolvent. Culbreth *v.* Banks, 87 Md. 444, 40 Atl. 170; Hall *v.* Gill, 10 Gill & J. (Md.) 325; Seely *v.* State, 11 Ohio 501, 12 Ohio 496. See also Quebec Bank *v.* Cormier, 7 Montreal Super. Ct. 283.

The future earnings of a public officer do not constitute an estate in expectancy, and may be retained by the insolvent. Grow *v.* His Creditors, 31 Cal. 328.

In Louisiana, under the old code, property acquired after the cession by a debtor prior to his discharge was liable for his debts. Gurlie *v.* Flood, 11 Rob. 166; Morgan *v.* Dalton, 3 La. 333; Fitzgerald *v.* Phillips, 4 Mart. 290. To reach property acquired after the cession, its proceedings must be opened and an order had from the court seized of them for a new cession. This may be done by any of the old creditors. Quimper *v.* Bierra, 8 Rob. 204; Beck *v.* Howard, 3 La. Ann. 501.

94. Action by foreign assignee or trustee see *infra*, note 39, p. 1305.

Foreign assignments and their extraterritorial effect see *supra*, II, C.

Operation and effect of foreign discharge see *infra*, VI, C, 5, f.

Pending actions see *infra*, VI, A, 1, a.

What law governs in questions of preference or fraudulent transfer see *infra*, IV, C, 1, a, (II).

95. See *supra*, IV, B, 2.

Exemptions see *infra*, VI, A, 2.

96. See *infra*, IV, C.

97. *Connecticut.*— Palmer *v.* Thayer, 28 Conn. 237; Freeman *v.* Perry, 22 Conn. 617.

Maine.— Ballantyne *v.* Appleton, 82 Me. 570, 20 Atl. 235.

Maryland.— McElroy *v.* John Hancock L. Ins. Co., 88 Md. 137, 41 Atl. 112, 71 Am. St. Rep. 400.

Massachusetts.— Pratt *v.* Wheeler, 6 Gray 520.

Minnesota.— Donohue *v.* Ladd, 31 Minn. 244, 17 N. W. 381.

Mississippi.— Abbey *v.* Commercial Bank, 34 Miss. 571, 69 Am. Dec. 401.

New Hampshire.— Ætna Ins. Co. *v.* Thompson, 68 N. H. 20, 40 Atl. 396, 73 Am. St. Rep. 552; Adams *v.* Lee, 64 N. H. 421, 13 Atl. 786.

New Jersey.— Shaw *v.* Glen, 37 N. J. Eq. 32.

Rhode Island.— Wilson *v.* Esten, 14 R. I. 621.

South Carolina.— Cohen *v.* Gibbes, 1 Hill 206.

United States.— Brent *v.* Washington Bank, 10 Pet. 596, 9 L. ed. 547; Thomas *v.* Watson, 23 Fed. Cas. No. 13,913, Taney 297.

Canada.— La Societe Canadienne-Francaise De Constructione, etc. *v.* Davelny, 22 Can. Sup. Ct. 449.

See 28 Cent. Dig. tit. "Insolvency," § 74 *et seq.*

An unrecorded conditional contract of sale of personal property in the vendee's possession will be considered an absolute sale as to the trustee of the vendee in insolvency, and the fact that he had notice of the lien prior to his appointment will not impute notice to the creditors whom he also represents. National Cash Register Co. *v.* Woodbury, 70 Conn. 321, 39 Atl. 168.

Where the insolvency proceedings are void, the assignee in insolvency acquires no title under the conveyance from the insolvent. Rockwell *v.* McGovern, 69 N. Y. 294 [*affirming* 40 N. Y. Super. Ct. 118]; Joy *v.* Wager, 3 Yeates (Pa.) 138.

In Louisiana an acceptance of the cession vests the property in the creditors, so far as to be no longer liable to seizure or execution, but they require no real ownership in it. It is vested in them only to a certain extent and for certain purposes. They cannot hold it in common nor partition it in kind. It is in their hands only as a pledge which they

the assets as a mere trustee for the creditors and not for value without notice,[98] and, in the absence of a statute to the contrary, subject to all claims and defenses that might have been interposed as against the insolvent,[99] such as set-offs, counterclaims,[1] or other rights and equities in favor of third persons;[2] and property coming into the hands of the assignee subject to such equities should be disposed of according to the rights of the parties interested therein.[3] The assignee also takes the assigned property subject to every equity belonging to foreign creditors and subject to the laws of the state in which the debt is due.[4]

must have sold according to law, to divide the proceeds among themselves. Smalley *v.* His Creditors, 3 La. Ann. 386; Lawrence *v.* Gnice, 9 Rob. 219; Rivas *v.* Hunstock, 2 Rob. 187; Fitzgerald *v.* Philips, 4 Mart. 559. But the real ownership of the property remains in the debtor who may take it back on depositing in court a sum sufficient to pay his debts and is entitled to the residuum after the payment of his debts. Walling *v.* Morefield, 33 La. Ann. 1174; Remy *v.* Municipality No. 2, 11 La. Ann. 148; Rivas *v.* Hunstock, 2 Rob. 187. The cession, if accepted by the creditors, transfers the property to them as completely as any other mode of alienation. Schroeder *v.* Nicholson, 2 La. 350.

Pending actions see *infra*, VI, A, 1, a.

98. Farmers' Exch. Bank *v.* Purdy, 130 Cal. 455, 62 Pac. 738; Scott *v.* Armstrong, 146 U. S. 499, 13 S. Ct. 148, 36 L. ed. 1059.

99. Scott *v.* Armstrong, 146 U. S. 499, 13 S. Ct. 148, 36 L. ed. 1059.

1. **Set-off or counter-claim** see Godwin *v.* McGehee, 19 Ala. 468; Carroll *v.* Weaver, 65 Conn. 76, 31 Atl. 489; Mack *v.* Woodruff, 87 Ill. 570; Crain *v.* Baillio, 2 La. 82; Kenner *v.* Sims, 6 Mart. N. S. (La.) 66; Boissier *v.* Belair, 1 Mart. N. S. (La.) 481; Aldrich *v.* Campbell, 4 Gray (Mass.) 284; Bemis *v.* Smith, 10 Metc. (Mass.) 194; Morrow *v.* Bright, 20 Mo. 298; Pigeon *v.* Dickey, 11 Pa. Co. Ct. 353; Allen *v.* U. S., 17 Wall. (U. S.) 207, 21 L. ed. 553 [*affirming* 8 Ct. Cl. 90]; Banks *v.* King, 2 Fed. Cas. No. 960, 1 Cranch C. C. 543. See 28 Cent. Dig. tit. "Insolvency," § 75.

Defendant cannot, however, set off against an insolvent a debt purchased by him after the insolvency. Conroy *v.* Dunlap, 104 Cal. 133, 37 Pac. 887; Case *v.* Cannon, 23 La. Ann. 36; Boissier *v.* Belair, 1 Mart. N. S. (La.) 481; Northern Trust Co. *v.* Hiltgen, 62 Minn. 361, 64 N. W. 909; Smith *v.* Brinckerhoff, 8 Barb. (N. Y.) 519 [*affirmed* in 6 N. Y. 305]; Hall *v.* Holland House Co., 9 Misc. (N. Y.) 245, 30 N. Y. Suppl. 263; Hegerman *v.* Hyslop, Anth. N. P. (N. Y.) 269; Long *v.* Penn Ins. Co., 6 Pa. St. 421. Nor can he set off a joint note of plaintiff and another in a suit by the trustee (Banks *v.* King, 2 Fed. Cas. No. 960, 1 Cranch C. C. 543); nor a claim due from a corporation to a firm of which defendant is a member (Howe *v.* Snow, 3 Allen (Mass.) 111). A stockholder of an insolvent corporation, who has been compelled to pay debts of the corporation after the commencement of the proceedings in insolvency, cannot use the amount so paid as a set-off in an action by the assignee (Howe *v.* Snow, 3 Allen (Mass.) 111); nor a debt due from one partner in an action by the assignee in insolvency of a partnership on a debt due to the partnership (Williams *v.* Brimhall, 13 Gray (Mass.) 462).

A note may be set off, although not due. Aldrich *v.* Campbell, 4 Gray (Mass.) 284; *In re* Hatch, 155 N. Y. 401, 50 N. E. 49, 40 L. R. A. 664 [*reversing* 22 N. Y. App. Div. 16, 47 N. Y. Suppl. 850]; Pigeon *v.* Dickey, 11 Pa. Co. Ct. 353. *Contra*, Hicks *v.* McGrorty, 2 Duer (N. Y.) 295; Keep *v.* Lord, 2 Duer (N. Y.) 78.

A debt purchased with a knowledge of the debtor's insolvency, although before he actually filed the petition, cannot be used as a set-off. Smith *v.* Hill, 8 Gray (Mass.) 572.

Proceedings to establish claims see *infra*, IV, F, 4, 5.

2. **Rights and equities of third persons.**— Kirk *v.* Roberts, (Cal. 1892) 31 Pac. 620; Marvin *v.* Bushnell, 36 Conn. 353; Baldwin *v.* McDonald, 48 La. Ann. 1460, 21 So. 48; Sibley *v.* Quinsigamond Nat. Bank, 133 Mass. 515; Holmes *v.* Winchester, 133 Mass. 140; Eastman *v.* Foster, 8 Metc. (Mass.) 19. Property held by an insolvent debtor under an unrecorded conditional sale was held to pass to his assignee in insolvency. Collender Co. *v.* Marshall, 57 Vt. 232. So property paid for but not yet shipped was held to pass to the shipper's assignee. Brunswick-Balke-Collender Co. *v.* Herrick, 63 Vt. 286, 21 Atl. 918.

A check received by a commission merchant in payment of goods consigned to him for sale is not an asset of his estate, and upon his subsequent assignment in insolvency the assignee must turn such check over to the consignors. Doran *v.* Hodson, 43 Ill. App. 411. See Mortee *v.* Roach, 8 La. 81.

Merchandise stored with a storekeeper who afterward becomes insolvent and surrenders his property, including that stored, may be recovered by the owner from the syndic. Rose *v.* Smith, 20 La. Ann. 218.

Merchandise sold on credit and shipped to a buyer who becomes insolvent subsequent to the sale becomes a part of the estate and passes to the trustee where it was not stopped *in transitu*. McElroy *v.* Seery, 61 Md. 389, 48 Am. Rep. 110.

3. See Ritchie *v.* White, 11 Mart. (La.) 239.

4. Rhawn *v.* Pearce, 110 Ill. 350, 51 Am. Rep. 691. See *supra*, II, C; and *infra*, VI, C, 5, e, f.

C. Transfers and Preferences by Insolvents, Attachments, and Other Liens — 1. Transfers and Preferences[5] — a. In General — (i) *Rule Stated.* The general rule is that preferences created by the transfer or conveyance of property by the insolvent within a limited period prior to the insolvency are invalid[6] and may be avoided by his trustee or assignee.[7] Whether the transfer constituting the preference may be avoided or not is determined by the state statute.[8] The question of intent of the insolvent,[9] knowledge on the part of the creditor receiving the preference,[10] and the time within which the transfer was made[11] are elements which usually determine the validity of the transfer, and as to whether or not it can be avoided.

(ii) *What Law Governs.* The validity of a transfer of property resulting in a preference to a creditor, and the rights of the trustee or assignee thereto, is determined by the laws of the state in which the property is located.[12]

b. Fraudulent Transfer. Conveyances and transfers of property made to a person by one who is insolvent at the time, in the absence of a *bona fide* consideration therefor or with the intent to defraud creditors, being as a rule fraud-

Where property is taken from one state, without objection of creditors from that state, by an assignee appointed in another state, the title of the assignee will be regarded as good. Upton *v.* Hubbard, 28 Conn. 274, 73 Am. Dec. 670.

In New Hampshire it was held that an assignment under the Massachusetts laws is a valid transfer of moneys collected and in the hands of the attorney of the insolvent in the former state. Hall *v.* Boardman, 14 N. H. 38.

Debts due an insolvent who has his domicile in the state where the proceedings are taken will be deemed to have a *situs* therein. *In re* Dalpay, 41 Minn. 532, 43 N. W. 564, 16 Am. St. Rep. 667, 6 L. R. A. 108.

5. **Transfer or preference:** Affecting release of claims see *infra*, IV, F, 6, c. Affecting discharge see *infra*, VI, C, 2, c, (II). As act of bankruptcy see Bankruptcy, 5 Cyc. 294. As act of insolvency see *supra*, III, D, 2. As fraudulent conveyance see Fraudulent Conveyances, 20 Cyc. 22 *et seq.* By insolvent bank see Banks and Banking, 5 Cyc. 559 *et seq.* By insolvent corporation see Corporations, 10 Cyc. 1246 *et seq.*

6. *Kentucky.*— Applegate *v.* Murrill, 4 Metc. 22.

Maine.— Nason *v.* Hobbs, 75 Me. 396.

Maryland.— Maro *v.* Gittings, 1 Harr. & J. 492; Dulaney *v.* Hoffman, 7 Gill & J. 170, 28 Am. Dec. 207; Westminster Bank *v.* Whyte, 3 Md. Ch. 508.

Massachusetts.— Chipman *v.* McClellan, 159 Mass. 363, 34 N. E. 379; Judd *v.* Gibbs, 3 Gray 539.

Minnesota.— Clarke *v.* National Citizens' Bank, 74 Minn. 58, 76 N. W. 965, 1125; Daniels *v.* Palmer, 41 Minn. 116, 42 N. W. 855.

Rhode Island.— Colt *v.* Sears Commercial Co., 20 R. I. 64, 37 Atl. 311.

See 28 Cent. Dig. tit. "Insolvency," § 79 *et seq.*

By depositing the money in another jurisdiction one to whom a conveyance is made in fraud of the insolvent laws cannot escape liability to the assignee in insolvency. Cunningham *v.* Seavey, 171 Mass. 341, 50 N. E. 545.

7. **Action to set aside fraudulent transfer** see *infra*, IV, E, 1, b.

8. See the statutes of the several states.

9. **Intent of insolvent** see *infra*, IV, C, 1, e, (II), (A).

10. **Intent of creditor** see *infra*, IV, C, 1, e, (II), (B).

11. **Time of transfer** as affecting validity of transfer see *infra*, IV, C, 1, f.

The distinction between voluntary and involuntary transfers by a debtor are recognized by the English insolvent system, as well as in the statutes of some of the states, and to avoid such transfer for fraud pursuant to those systems, they must be shown to be voluntary, as well as made with a view and under an expectation of taking the benefit of the insolvent laws. Crawfords *v.* Taylor, 6 Gill & J. (Md.) 323, 26 Am. Dec. 579; Falconer *v.* Clark, 3 Md. Ch. 151; Powles *v.* Dilley, 2 Md. Ch. 119; Malsom *v.* Hall, 1 Md. Ch. 172; Artisans' Bank *v.* Treadwell, 34 Barb. (N. Y.) 553. A payment made as a preference is invalid, although it was made to relieve the debtor's property from attachment levied by the creditor receiving the payment (Merrill *v.* McLaughlin, 75 Me. 64); or the giving of a mortgage in order to obtain release of an attachment, where the attaching creditor had reasonable cause to believe the mortgagor was insolvent (Denny *v.* Dana, 2 Cush. (Mass.) 160, 48 Am. Dec. 655). So a default judgment against a debtor, entered shortly before the debtor made an assignment, is a security given under the statute prohibiting a preference by an insolvent. Yanish *v.* Pioneer Fuel Co., 60 Minn. 321, 62 N. W. 387. See *infra*, note 74.

12. Koster *v.* Merritt, 32 Conn. 246; Chipman *v.* Peabody, 159 Mass. 420, 34 N. E. 563, 38 Am. St. Rep. 437. See also Brown *v.* Early, 2 Duv. (Ky.) 369; Sawyer *v.* Levy, 162 Mass. 190, 38 N. E. 365 (non-resident debtor giving preference); Michigan Trust Co. *v.* Bennett, 106 Mich. 381, 64 N. W. 330; *In re* Kahn, 55 Minn. 509, 57 N. W. 154; Toof *v.* Miller, 73 Miss. 756, 19 So. 577.

ulent and void [13] as to his creditors, are also void as against the trustee or assignee of the insolvent and may be avoided by him,[14] where the grantee had reasonable cause to believe that his vendor was insolvent.[15] Such conveyances create no equity in the fraudulent grantee but may be valid and binding between the grantor and the grantee.[16]

c. Assignment For Benefit of Creditors.[17] The right of an insolvent debtor to make a general assignment of his property for the benefit of his creditors, the rights and title acquired by his assignee, and the general operation of and effect of such an assignment are elsewhere treated.[18]

d. Right to Transfer or Give Preference.[19] Under the rules of the common law, an embarrassed or insolvent debtor may make a transfer of his property to or prefer one or more of his creditors to the exclusion of the others,[20] especially

13. **Intent of grantor** see *infra*, IV, C, 1, e, (II), (A).

Conveyances not fraudulent see Staples *v.* Somerville, 176 Mass. 237, 57 N. E. 380; Proctor *v.* Republic Nat. Bank, 152 Mass. 223, 25 N. E. 81, 9 L. R. A. 122; King *v.* Nichols, 138 Mass. 18; Broderick *v.* Richardson, 70 N. H. 573, 49 Atl. 92.

14. *California.*— Ballou *v.* Andrews Banking Co., 128 Cal. 562, 61 Pac. 102. See also Matthews *v.* Chaboya, 111 Cal. 435, 44 Pac. 169.

Connecticut.— Berkeley Divinity School *v.* Jarvis, 32 Conn. 412; Shipman *v.* Ætna Ins. Co., 29 Conn. 245; Palmer *v.* Thayer, 28 Conn. 237.

Maine.— Stuart *v.* Redman, 89 Me. 435, 36 Atl. 905.

Maryland.— Triebert *v.* Burgess, 11 Md. 452; Ward *v.* Morris, 4 Harr. & M. 330.

Massachusetts.— Rayner *v.* Whicher, 6 Allen 292. Where the wife releases her dower in land on a parol agreement by the husband to convey other land to her, which is the fair and equivalent for her dower interest, and her husband, after becoming insolvent, but before proceedings in insolvency are begun, conveys the land to her through a third person, the husband's assignee can avoid the conveyance. Holmes *v.* Winchester, 135 Mass. 299.

Minnesota.— Kells *v.* Webster, 71 Minn. 276, 73 N. W. 962. But *compare* Fishel *v.* Burt, 69 Minn. 250, 72 N. W. 109.

Virginia.— Shirley *v* Long, 6 Rand. 735.

United States.— McClellan *v.* Chipman, 164 U. S. 347, 17 S. Ct. 85, 41 L. ed. 461.

See 28 Cent. Dig. tit. "Insolvency," § 83.

Fraudulent grantee cannot escape liability to the assignee by depositing the money in another jurisdiction. Cunningham *v.* Seavey, 171 Mass. 341, 50 N. E. 545.

To allow a judgment to be taken before the expiration of the time allowed for answering has been held to operate as an unlawful transfer of property in contemplation of insolvency. Kingsley *v.* Bath First Nat. Bank, 31 Hun (N. Y.) 329.

Subsequent bona fide mortgagee.— Where land was conveyed by an insolvent debtor in fraud of his creditors to one who thereafter mortgaged it to an innocent third person for a consideration, the mortgage cannot be declared void, but the parties to the fraud have been held responsible for the amount of the mortgage. Hubbell *v.* Currier, 10 Allen (Mass.) 333.

Validity of the sale of articles which were exempt from attachment cannot be questioned by the assignee. Rayner *v.* Whicher, 6 Allen (Mass.) 292.

15. Abbott *v.* Shepard, 142 Mass. 17, 6 N. E. 826. *Compare* Brandon First Nat. Bank *v.* Briggs, 70 Vt. 594, 41 Atl. 580.

Knowledge or intent of grantee see *infra*, IV, C, 1, e, (II), (B).

16. See cases cited *supra*, note 14.

17. **Assignment for benefit of creditors as an act of:** Bankruptcy see BANKRUPTCY, 5 Cyc. 290. Insolvency see *supra*, III, D, 2.

18. See ASSIGNMENTS FOR BENEFIT OF CREDITORS, 4 Cyc. 113 *et seq.* See also Dana *v.* Stanford, 10 Cal. 269; McColgan *v.* Hopkins, 17 Md. 395 (trustee in insolvency takes only debtor's contingent interest in surplus against assignee for benefit of creditors); Malcolm *v.* Hall, 9 Gill (Md.) 177, 52 Am. Dec. 688 [*affirming* 1 Md. Ch. 172] (*bona fide* assignment for conditions without preferences is rendered invalid by subsequent insolvency proceedings); Bronaugh *v.* Mason, 4 Fed. Cas. No. 1,923, 1 Hayw. & H. 39 (deed to trustee in insolvency revokes prior deed to assign rule for creditors).

A voluntary assignment made by the debtor subsequent to the commencement of insolvency proceedings cannot defeat such proceedings. Birdsey *v.* Vansands, 24 Conn. 176.

19. **What constitutes a preference** see *infra*, IV, C, 1, e.

20. *California.*— Randall *v.* Buffington, 10 Cal. 491; Dana *v.* Stanford, 10 Cal. 269. See also *In re* Strock, 128 Cal. 658, 61 Pac. 282, under Civ. Code, § 3432.

District of Columbia.— See Hume *v.* Riggs, 12 App. Cas. 355.

Georgia.— McWhorter *v.* Wright, 5 Ga. 555.

Iowa.— Lampson *v.* Arnold, 19 Iowa 479.

Louisiana.— See Coddington *v.* Tupper, 4 La. 126; Canfield *v.* Maher, 4 Mart. N. S. 174; Ritchie *v.* Sands, 10 Mart. 704; Roussel *v.* Dukeylus, 4 Mart. 218; Brown *v.* Kenner, 3 Mart. 270; Debon *v.* Bache, 1 Mart. 240. See also Brashear *v.* Alexandria Cooperage Co., 50 La. Ann. 587, 23 So. 540.

Maryland.— Cole *v.* Albers, 1 Gill 412.

where he does not do so with intent to delay, hinder, or defraud his creditors,[21] or in contemplation of insolvency.[22] In many states this is now expressly forbidden by statute.[23]

e. What Constitutes a Preference — (I) *In General.* Under statutes prohibiting preferences, a preference usually occurs where one or more creditors receives from the insolvent a greater proportion of his indebtedness than other creditors of a like class, and this may occur either through payment of money or the conveyance of property. While a preference thus created is as a rule made invalid when given with the intent of violating the insolvent acts, it is fraudulent in law without regard to the existence of actual fraud on the part of the transferee.[24]

New York.— Williams *v.* Brown, 4 Johns. Ch. 682.

South Carolina.— Moffat *v.* McDowall, 1 McCord Eq. 434; Niolon *v.* Douglas, 2 Hill Eq. 443, 30 Am. Dec. 368.

United States.— Cary, etc., Co. *v.* McKey, 40 Fed. 858.

See 28 Cent. Dig. tit. "Insolvency," § 84; and ASSIGNMENTS FOR BENEFIT OF CREDITORS, 4 Cyc. 163 *et seq.*

Where a corporation assigns certain accounts receivable, being only a small proportion of its assets, to a trustee, to certain creditors, and on the same day a receiver was appointed in a suit brought to wind up the corporation, it has been held that the secured creditors should be first paid out of the proceeds of the assigned accounts collected by the receiver, since such an assignment was enforceable in equity. Chicago Title, etc., Co. *v.* Smith, 158 Ill. 417, 41 N. E. 1076 [*affirming* 54 Ill. App. 517].

An agreement between a solvent debtor and some of his creditors for the sale of certain property belonging to the debtor and for a *pro-rata* distribution of the proceeds among the creditors is not invalid as an act to prefer such creditors. Cumberland Valley Bank *v.* Citizens' Nat. Bank, 78 S. W. 889, 25 Ky. L. Rep. 1807.

21. *In re* Strock, 128 Cal. 658, 61 Pac. 282.

Intent of grantor or debtor see *infra*, IV, C, 1, e, (II), (A).

Bona fides of insolvent.— A sale by an insolvent of his property on credit is valid as against creditors, if made in good faith and for a good consideration, and without any intent to hinder or defraud creditors. Scheitlin *v.* Stone, 43 Barb. (N. Y.) 634. An assignee has no standing to maintain an action to set aside an absolute deed made without consideration by the insolvent at a time when he had no creditors, there being no allegations of fraud or any evidence upon which to found an express or implied trust. Babcock *v.* Chase, 111 Cal. 351, 43 Pac. 1105. Where an agreement for the purchase and sale of real estate has been made in good faith, but the giving of the deed postponed merely for the convenience of the parties, the subsequent insolvency of the vendor will not prevent him from giving a good title to a purchaser by a deed executed before the insolvency proceedings. Smythe *v.* Sprague, 149 Mass. 310, 21 N. E. 383, 3 L. R. A. 822; Nickerson *v.* Baker, 5 Allen (Mass.) 142; Hughitt *v.* Hayes, 136 N. Y. 163, 32 N. E. 706 [*affirming* 20 N. Y. Suppl. 270]. So where a guardian executes to his ward a mortgage to secure a portion of his indebtedness to her, but retains possession of the mortgage until after the institution of the insolvency proceedings, the ward may recover the mortgage. Moore *v.* Hazelton, 9 Allen (Mass.) 102. A *bona fide* sale for a valuable consideration by one partner to another of all the partnership and effects is valid, and the property so conveyed becomes the separate estate of the purchaser, although the firm and both partners are at the time insolvent. Howe *v.* Lawrence, 9 Cush. (Mass.) 553, 57 Am. Dec. 68.

Deeds of trust.— A statute which exempts from the operation of the insolvent law *bona fide* deeds of trust for the benefit of creditors does not bar insolvency proceedings against such grantor. Gardner *v.* Gambrill, 86 Md. 658, 39 Atl. 318.

22. *In re* Strock, 128 Cal. 658, 61 Pac. 282.

"In contemplation of insolvency" see *infra*, IV, C, 1, c, (II), (A), (2).

23. *Iowa.*— McGowan *v.* Myers, 66 Iowa 99, 23 N. W. 282.

Maryland.— Hickley *v.* Farmers', etc., Bank, 5 Gill & J. 377; Malcom *v.* Hall, 1 Md. Ch. 172.

Massachusetts.— Beals *v.* Clark, 13 Gray 18.

Minnesota.— MacDonald *v.* Corunna First Nat. Bank, 47 Minn. 67, 49 N. W. 395, 28 Am. St. Rep. 328, 13 L. R. A. 462; Weston *v.* Loyhed, 30 Minn. 221, 14 N. W. 892.

United States.— Cary, etc., Co. *v.* McKey, 40 Fed. 858.

See 28 Cent. Dig. tit. "Insolvency," § 84.

Non-residence of preferred creditor does not prevent the application of the rule, as the law is effectual as to non-resident creditors so far as to control the disposition of property within the state. Macdonald *v.* Corunna First Nat. Bank, 47 Minn. 67, 49 N. W. 395, 28 Am. St. Rep. 328, 13 L. R. A. 462.

Partnerships.— The statute forbids all preference through transfers by partners or by collusive judgments by a limited partnership after actual insolvency or contemplation of insolvency. Artisans' Bank *v.* Treadwell, 34 Barb. (N. Y.) 553. See also Burtus *v.* Tisdall, 4 Barb. (N. Y.) 571.

24. *In re* Strock, 128 Cal. 658, 61 Pac. 258; Riego *v.* Foster, 125 Cal. 178, 57 Pac. 896;

(II) *Intent of Parties*—(A) *Of Insolvent Debtor*—(1) To Prefer. The statutes generally provide that a preference created through a transfer[25] made

Matthews *v.* Chaboya, 111 Cal. 435, 44 Pac. 169. See also Weston *v.* Jordan, 168 Mass. 401, 47 N. E. 133; Cumbey *v.* Ueland, 72 Minn. 453, 75 N. W. 727.

Canadian statutes and their construction see Stephens *v.* McArthur, 19 Can. Sup. Ct. 446; Molsom Bank *v.* Halter, 18 Can. Sup. Ct. 88; Long *v.* Hancock, 12 Can. Sup. Ct. 532; Colquhoun *v.* Scagram, 11 Manitoba 339; Fisher *v.* Brock, 8 Manitoba 137; Roe *v.* Massey Mfg. Co., 8 Manitoba 126; Ashley *v.* Brown, 17 Ont. App. 500; Coats *v.* Kelly, 15 Ont. App. 81; Smith *v.* Fair, 11 Ont. App. 755; Boyd *v.* Glass, 8 Ont. App. 632; Gibbons *v.* Wilson, 7 Ont. App. 1; Gurofski *v.* Harris, 27 Ont. 201; Goulding *v.* Deeming, 15 Ont. 201; River Stave Co. *v.* Rill, 12 Ont. 557; McRoberts *v.* Steinoff, 11 Ont. 369; Burns *v.* Mackay, 10 Ont. 167; Powell *v.* Calder, 8 Ont. 505; Tidey *v.* Craib, 4 Ont. 696; Segsworth *v.* Meriden Silver Plating Co., 3 Ont. 413; Labatt *v.* Bixel, 28 Grant Ch. (U. C.) 593; Clemmow *v.* Converse, 16 Grant Ch. (U. C.) 547; Montreal Bank *v.* McTavish, 13 Grant Ch. (U. C.) 395; Toronto Bank *v.* McDougall, 15 U. C. C. P. 475; Ferrie *v.* Cleghorn, 19 U. C. Q. B. 241. See also Armstrong *v.* Johnston, 32 Ont. 15.

Illustrations of preferences.—An assignment of accounts to a creditor to pay himself in full and other creditors, so far as there is any surplus, is deemed a preference (Lamb *v.* Radcliff, 28 Ga. 520); and so is an assignment by an insolvent debtor of goods to a creditor for sale, with authority to the creditor to apply the proceeds on his account (Burpee *v.* Sparhawk, 97 Mass. 342), or to prevent the property from coming into the hands of the assignee (Doe *v.* Roe, 89 Me. 523, 36 Atl. 1001).

A mortgage given to deter the mortgage creditors from attaching the mortgaged property has been held to be void as to those creditors, although the principal purpose of the parties is to secure a *bona fide* debt. Crowninshield *v.* Kittridge, 7 Metc. (Mass.) 520. The fact that the person to whom a preferential mortgage was given assumed a new liability by taking the mortgage is immaterial if the mortgage was also given as a security for a preëxisting liability. Whipple *v.* Bond, 164 Mass. 182, 41 N. E. 203.

In California the assignee of an insolvent who makes a mortgage to evade the provisions of the act may recover the property, if given within one month of his insolvency. Perkins *v.* Maier, etc., Brewery, 133 Cal. 496, 65 Pac. 1030. But the assignee cannot attack a mortgage on the ground that the acknowledgment was defective, since he is not a subsequent purchaser for value. Farmers' Exch. Bank *v.* Purdy, 130 Cal. 455, 62 Pac. 738.

In part cancellation of secured indebtedness.—While it may be that a deed executed by an insolvent debtor, to the extent that it was in consideration of the cancellation of his indebtedness to the grantee, which was amply secured, could not be a preference, within the meaning of the statute, yet, to the extent that it was in cancellation of other indebtedness which was unsecured, the chancellor, under the evidence, was authorized to conclude that it was a preference. Scherer *v.* Christian-Moerlein Brewing Co., 65 S. W. 448, 23 Ky. L. Rep. 1613.

Renewal of an existing security is not a preference. St. Clair *v.* Cleveland, 83 Me. 559, 22 Atl. 474; Porter *v.* Welton, (Conn. 1892) 23 Atl. 868. See Simpson *v.* Carleton, 1 Allen (Mass.) 109, 79 Am. Dec. 707; Brackett *v.* Harvey, 91 N. Y. 214.

Substitution of securities.—It has been held in Massachusetts that where a bank holds property as a collateral security for a debt of an insolvent, and at his request releases it and takes in substitution property of the insolvent, having reasonable cause to believe the substitution is for the purpose of giving a fraudulent preference, the assignee can recover the substituted security, although nothing was gained by the substitution. Jaquith *v.* Winnisimmet Nat. Bank, 182 Mass. 53, 64 N. E. 723.

Exchanging of one security for another of equal value is not a preference. Hutchinson *v.* Murchie, 74 Me. 187; Stevens *v.* Blanchard, 3 Cush. (Mass.) 169.

The exchanging of a note against an insolvent firm for the note of the individual members of the firm within four months of the commencement of insolvency proceedings by a debtor, the result of which would give the creditor a larger dividend on his debt than he would otherwise obtain, operates as a preference. Chadbourne *v.* Harding, 80 Me. 580, 16 Atl. 248.

The reservation of a reasonable fee for the draftsman of a deed for its preparation has been held to be such a preference in a deed for the benefit of creditors as is forbidden. Wolfsheimer *v.* Rivinus, 64 Mo. 230, 1 Atl. 128, 54 Am. Rep. 769.

Fraud purged.—The fraud of purchasing property of an insolvent in contravention of the insolvency law is purged by a subsequent agreement with the seller under which the price is paid to one of the seller's creditors, without notice of the fraud, before insolvency proceedings are commenced. Enright *v.* Amsden, 70 Vt. 183, 40 Atl. 37.

Perjury committed by an insolvent to aid a mortgagee to increase the value of his mortgage at the expense of a prior mortgagee, and not affecting the distribution of his estate among his creditors, is not a preference, or attempted preference of a creditor, within the meaning of Vt. St. c. 102, relating to insolvents. *In re* Chapman, 71 Vt. 368, 45 Atl. 232.

25. The term "transfer" would comprehend the payment of money. See cases cited *infra*, note 26.

by a person while insolvent, with the intent on his part to create a preference, is invalid and may be avoided by the assignee or trustee on the institution of insolvency proceedings against the debtor.[26] This intent may be inferred either from the fact of the preference or from other circumstances.[27]

(2) In Contemplation of Insolvency. In order to avoid a transfer or preference made by a debtor "in contemplation of insolvency"[28] within the usual inhibition of the statutes,[29] the debtor must have been in fact insolvent under the terms of the law at the time of the transfer, and there must have been in his mind an expectation or design that he would make an assignment or commence proceedings in insolvency and by this means circumvent the statute against preferences;[30]

26. *Maryland.*— Powles *v.* Dilley, 9 Gill 222; Gardner *v.* Lewis, 7 Gill 377; Kennedy *v.* Boggs, 5 Harr. & J. 403; Malcom *v.* Hall, 1 Md. Ch. 172.

Massachusetts.— Smith *v.* Merrill, 9 Gray 144; Denny *v.* Dana, 2 Cush. 160, 48 Am. Dec. 655.

Minnesota.—Fisher *v.* Utendorfer, 68 Minn. 226, 71 N. W. 29; Baumann *v.* Cunningham, 48 Minn. 292, 51 N. W. 611; Wright *v.* Fergus Falls Nat. Bank, 48 Minn. 120, 50 N. W. 1030; Hastings Malting Co. *v.* Heller, 47 Minn. 71, 49 N. W. 400. But *compare* Davis *v.* Cobb, 81 Minn. 167, 83 N. W. 505; Grant *v.* Minneapolis Brewing Co., 68 Minn. 86, 70 N. W. 868.

New York.— George *v.* Grant, 20 Hun 372.

United States.— Moore *v.* American L. & T. Co., 80 Fed. 49.

See 28 Cent. Dig. tit. "Insolvency," § 86.

But see National Bank of Commerce *v.* Gettinger, 68 Ohio St. 389 [*reversing* 23 Ohio Cir. Ct. 77].

An honest belief that he would be able to go on in business is no defense to a petition by his other creditors to have him declared insolvent when a person knows himself to be insolvent at the time of showing a preference to his creditors. Castleberg *v.* Wheeler, 68 Md. 266, 12 Atl. 3.

Concurring intent of both parties.— In California it has been held that the conveyance or payment must be both made and received with the intent to give a preference, and it is not void because received by a creditor intending to obtain a preference. Hass *v.* Whittier, 87 Cal. 613, 25 Pac. 917; Moore *v.* American L. & T. Co., 80 Fed. 49. See Salisbury *v.* Burr, (1896) 44 Pac. 461.

In Massachusetts, under the act of 1844, authorizing the issuance of a warrant to seize the estate of a debtor on the ground of his having made a fraudulent conveyance by way of preference, it must be shown: (1) That the debtor was insolvent, or contemplated proceedings in insolvency, at the time of making the conveyance and that he made it with a view of giving a preference to a preëxisting creditor; (2) that he then had no reasonable cause to believe himself solvent; and (3) that the creditor, at the time of receiving the conveyance, had reasonable cause to believe the debtor was insolvent. And the burden of proving the first and third of these propositions was on the creditor who petitioned for the issuing of the warrant. *In re* Jordan, 9 Metc. 292.

27. Beals *v.* Clark, 13 Gray (Mass.) 18. See also Bloodgood *v.* Beecher, 35 Conn. 469; Utley *v.* Smith, 24 Conn. 290, 63 Am. Dec. 163; Fishel *v.* Burt, 69 Minn. 250, 72 N. W. 109; Fisher *v.* Utendorfer, 68 Minn. 226, 71 N. W. 29.

Failure to defend an action properly brought, founded on an actual debt, is not in itself evidence of an intent to prefer; such intent is essential under the act. *In re* Eck, 10 Kulp (Pa.) 560.

Retention of possession by vendor.— The question of the sufficiency of a transfer constituting a preference most frequently arises in the case of property, the title to which has been transferred to a creditor, but the possession of which has been retained by the vendor, the rule generally prevailing that such property passes to the assignee or trustee. Brown *v.* Napa Bank, 77 Cal. 544, 20 Pac. 71; *In re* Eck, 10 Kulp (Pa.) 560. And *compare* Baldwin *v.* McDonald, 48 La. Ann. 1460, 21 So. 48. But see Nicolopulo *v.* His Creditors, 37 La. Ann. 472.

Where an insolvent trading firm, which is unable to pay its debts in the usual course of business, sells its stock and immediately returns part of the price to the purchaser to cancel a prior debt due him, such repayment is an illegal preference which constitutes an act of insolvency. Willison *v.* Frostburg First Nat. Bank, 80 Md. 196, 30 Atl. 749.

28. "In contemplation of insolvency" defined see *supra*, I, D.

29. See the statutes of the several states.

30. Barnes *v.* Oshkosn Nat. Bank, 97 Wis. 16, 71 N. W. 602. See also Croswell *v.* Allis, 25 Conn. 301; Story *v.* Graham, 4 Metc. (Ky.) 319; Millett *v.* Pottinger, 4 Metc. (Ky.) 213; Applegate *v.* Murrill, 4 Metc. (Ky.) 22; Goodloe *v.* Buckner, 32 S. W. 135, 17 Ky. L. Rep. 552; McClure *v.* Clark, 24 S. W. 434, 15 Ky. L. Rep. 580; Hempkin *v.* Bowmar, 16 La. 363; Henderson *v.* Morgan, 4 Mart. N. S. (La.) 649; Brandt *v.* Shamburgh, 2 Mart. N. S. (La.) 329; Meeker *v.* Williamson, 4 Mart. (La.) 625; Stuart *v.* Redman, 89 Me. 435, 36 Atl. 905; Vogler *v.* Rosenthal, 85 Md. 37, 36 Atl. 659, 60 Am. St. Rep. 298; Mundo *v.* Shepard, 166 Mass. 323, 44 N. E. 244; Bridges *v.* Miles, 152 Mass. 249, 25 N. E. 461; Eastman *v.* Eveleth, 4 Metc. (Mass.) 137; Phœnix *v.* Dey, 5 Johns. (N. Y.) 412. But *compare* Bobilya *v.* Priddy, 68 Ohio St. 373, 67 N. E. 736, under Ohio statute relating to innocent purchasers for value from an insolvent debtor.

and moreover the insolvency proceedings must in fact have been subsequently instituted.[31]

(B) *Of Creditor or Transferee.* The rule is almost universal that in order to avoid a preference under the insolvency laws, a person to whom a preference has been given must have had reasonable cause to believe that the debtor was insolvent at the time.[32] A creditor who fails to investigate or inquire as to facts and

A transfer in contemplation of existing insolvency is as much within the statute as one in contemplation of anticipated insolvency. Robinson *v.* Attica Bank, 21 N. Y. 406.

A fraudulent devise to prefer creditors in contemplation of insolvency will not stand. Chestnut *v.* Russell, 69 S. W. 965, 24 Ky. L. Rep. 704.

31. Wheeler *v.* Stone, 4 Gill (Md.) 38; Powles *v.* Dilley, 2 Md. Ch. 119.

32. *Alabama.*— Wiley *v.* Knight, 27 Ala. 336.

California.— Smith *v.* Fratt, (1894) 37 Pac. 1033; Haskins *v.* James, 96 Cal. 258, 31 Pac. 36. See also Ballou *v.* Andrews Banking Co., 128 Cal. 562, 61 Pac. 102; Garton *v.* Stern, 121 Cal. 347, 53 Pac. 904; Matthews *v.* Chaboya, 111 Cal. 435, 44 Pac. 169.

Connecticut.— Robertson *v.* Todd, 31 Conn. 555.

Louisiana.— Chapoton *v.* Her Creditors, 45 La. Ann. 451, 12 So. 495.

Maine.— *In re* Partridge, 96 Me. 52, 51 Atl. 239; Stuart *v.* Redman, 89 Me. 435, 36 Atl. 905; Morey *v.* Milliken, 86 Me. 464, 30 Atl. 102; Meserve *v.* Weld, 75 Me. 483; King *v.* Storer, 75 Me. 62; Porter *v.* Bullard, 26 Me. 448.

Maryland.— Willison *v.* Frostburg First Nat. Bank, 80 Md. 196, 30 Atl. 749; Preston *v.* Leighton, 6 Md. 88; Gardner *v.* Lewis, 7 Gill 377; Cole *v.* Albers, 1 Gill 412.

Massachusetts.— Jaquith *v.* Winnisimmet Nat. Bank, 182 Mass. 53, 64 N. E. 723; Weston *v.* Jordan, 168 Mass. 401, 47 N. E. 133; Whipple *v.* Bond, 164 Mass. 182, 41 N. E. 203; Cozzens *v.* Holt, 136 Mass. 237; Bush *v.* Moore, 133 Mass. 198; Crafts *v.* Belden, 99 Mass. 535; Everett *v.* Stowell, 14 Allen 32; Bartholomew *v.* McKinstry, 6 Allen 567; Coburn *v.* Proctor, 15 Gray 38; Leonard *v.* Strong, 11 Gray 186.

Minnesota.— Kells *v.* Webster, 71 Minn. 276, 73 N. W. 962; Williamson *v.* Hatch, 55 Minn. 344, 57 N. W. 56; Weston *v.* Sumner, 31 Minn. 456, 18 N. W. 149.

Vermont.— Brandon First Nat. Bank *v.* Briggs, 70 Vt. 594, 41 Atl. 580.

United States.— See Moore *v.* American L. & T. Co., 80 Fed. 49, construing Minnesota statute.

Canada.— Long *v.* Hancock, 12 Can. Sup. Ct. 532; Ross *v.* Laird, (1889) Cassell Dig. 352; Forrest *v.* Muir, 12 Nova Scotia 457; Gibbons *v.* Wilson, 17 Ont. App. 1; Segsworth *v.* Meriden Silver Plating Co., 3 Ont. 413. See also Coats *v.* Kelly, 15 Ont. App. 81.

See 28 Cent. Dig. tit. "Insolvency," § 89.

The criterion as to what constitutes such reasonable cause is not actual knowledge or even actual belief of the debtor's insolvency, but whether as a reasonable man acting with ordinary prudence and discretion and in view of all the facts and circumstances known to him at the time of the conveyance, the creditor had reasonable cause to believe that the debtor was insolvent. Buffum *v.* Jones, 144 Mass. 29, 10 N. E. 471; Kells *v.* Webster, 71 Minn. 276, 73 N. W. 962; Daniels *v.* Palmer, 35 Minn. 347, 29 N. W. 162; Larkin *v.* Batchelder, 56 Vt. 416. In Kells *v.* Webster, *supra* [*citing* with approval Stuckey *v.* Masonic Sav. Bank, 108 U. S. 74, 2 S. Ct. 219, 27 L. ed. 640; Grant *v.* Monmouth First Nat. Bank, 97 U. S. 80, 24 L. ed. 971], the court stated that, while on the one hand it is not necessary, in order to avoid a conveyance as a forbidden preference, that the purchaser shall actually know that the vendor is insolvent, yet, on the other hand, it is not sufficient that he entertains a mere suspicion that the vendor may be insolvent. While he cannot shut his eyes to suspicious circumstances which have put him on inquiry, yet he must have reasonable cause to believe that his vendor is insolvent. The court added that this was the construction given to this provision in the federal bankruptcy act, from which it borrowed. See also Cutler *v.* Dunn, 68 N. H. 394, 44 Atl. 536.

In California it has been held that where the insolvent, with intent to prefer one creditor over another, sells his property a few days before filing a petition in insolvency to one who knows such intent, the sale is void, although the purchaser paid his full value and the proceeds are applied to the payment of an honest debt. Tapscott *v.* Lyon, 103 Cal. 297, 37 Pac. 225.

In New York it has been held that payments and transfers of property made by a moneyed corporation when insolvent, or in contemplation of insolvency, with intent to give a preference to the creditors, are void, although the party receiving the payments or transfers had no knowledge of the insolvency of the company. Brouwer *v.* Harbeck, 5 Seld. 589 [*reversing* 1 Duer 114].

A sale by a merchant made in the regular course of business to a customer has been held valid, although the merchant was at the time insolvent and the purchaser knew of his insolvency. Xiques *v.* Rivas, 16 La. Ann. 402.

Where the purchaser bought in good faith and for value, a sale made by an insolvent in contemplation of insolvency has been held valid. Bobilya *v.* Priddy, 68 Ohio St. 373, 67 N. E. 736, under Ohio Laws (1898), p. 290.

circumstances clearly sufficient to put a person of ordinary prudence and discretion upon inquiry is chargeable with the knowledge which such investigation or inquiry would have furnished.[33] The knowledge of the agent will be deemed the knowledge of the principal.[34] Under the laws of some states a transfer not in the usual and ordinary course of business of the debtor is *prima facie* evidence that the purchaser, assignee, or transferee had reasonable cause to believe the debtor insolvent.[35]

(III) *Security For Current Loan or Credit.* In the statutes prohibiting preferences, it is generally provided that a lien or deed given to secure an insolvent person on a contemporaneous *bona fide* advance, payment, or loan, and not a preëxisting debt, will be deemed valid and cannot be avoided by the subsequent institution of insolvency proceedings against the party to whom the advance is made;[36] and where a security is given for a present advance and a preëxisting debt, it will be held valid so far as the present advance is concerned and invalid as to the prior advance.[37]

f. Time of Transfer. The general rule is that as a condition precedent to the right of an assignee or trustee to avoid a preference created through a transfer of property by one adjudged an insolvent, the preference must have been given or created within a limited period prior to the institution of the insolvency proceedings, this period as a rule varying in the different states from one to six months;[38] and that if the preference was created prior to the period fixed by statute,

33. Holcombe *v.* Ehrmanntraut, 46 Minn. 397, 49 N. W. 191; Daniels *v.* Zumbrota Bank, 35 Minn. 351, 29 N. W. 165; Enright *v.* Amsden, 70 Vt. 183, 40 Atl. 37; Read *v.* Moody, 60 Vt. 668, 15 Atl. 345. See also Goldsworthy *v.* Roger Williams Nat. Bank, 15 R. I. 586, 589, 10 Atl. 632 [*citing* Grant *v.* Monmouth First Nat. Bank, 97 U. S. 80, 81, 24 L. ed. 971 [*approved* in Stucky *v.* Masonic Sav. Bank, 108 U. S. 74, 75, 2 S. Ct. 219, 27 L. ed. 640; Barbour *v.* Priest, 103 U. S. 293, 297, 26 L. ed. 478)].

34. Mathews *v.* Riggs, 80 Me. 107, 13 Atl. 48; Corbin *v.* Boies, 34 Fed. 692; Witters *v.* Sowles, 32 Fed. 762. But see Cowell *v.* Daggett, 97 Mass. 434.

35. *California.*— Washburn *v.* Huntington, 78 Cal. 573, 21 Pac. 305; Ohleyer *v.* Bunce, 65 Cal. 544, 4 Pac. 549. See also Matthews *v.* Chaboya, 111 Cal. 435, 44 Pac. 169.

Louisiana.— Canfield *v.* Maher, 4 Mart. N. S. 174.

Maine.— Meserve *v.* Weld, 75 Me. 483.

Massachusetts.— Metcalf *v.* Munson, 10 Allen 491; Nary *v.* Merrill, 8 Allen 451. See Pearson *v.* Goodwin, 9 Allen 482.

New Hampshire.— Perkins *v.* Labrecque, 70 N. H. 210, 47 Atl. 541.

United States.— McClellan *v.* Chipman, 164 U. S. 347, 17 S. Ct. 85, 41 L. ed. 461, construing Minnesota statute.

See 28 Cent. Dig. tit. "Insolvency," § 89.

It must appear, however, that the transaction was not according to the usual and ordinary course of business of the particular person whose conveyance is the subject of investigation, and not that such transactions are unusual in the general conduct of business throughout the community. Bliss *v.* Crosier, 159 Mass. 498, 34 N. E. 1075.

36. *Louisiana.*— Brashear *v.* Alexandria Cooperage Co., 50 La. Ann. 587, 23 So. 540; Baldwin *v.* McDonald, 48 La. Ann. 1460, 21 So. 48; Byrne *v.* His Creditors, 33 La. Ann. 198.

Maine.—Hutchinson *v.* Murchie, 74 Me. 187.

Maryland.— Hinkleman *v.* Fey, 79 Md. 112, 28 Atl. 886.

Massachusetts.— Chipman *v.* McClellan, 159 Mass. 363, 34 N. E. 379; Bush *v.* Boutelle, 156 Mass. 167, 30 N. E. 607, 32 Am. St. Rep. 442; James *v.* Newton, 142 Mass. 366, 8 N. E. 122, 56 Am. Rep. 692; Judd *v.* Flint, 4 Gray 557.

New York.— George *v.* Grant, 28 Hun 69 [*affirmed* in 97 N. Y. 262].

Ohio.— Gettinger *v.* National Bank of Commerce, 23 Ohio Cir. Ct. 77.

Pennsylvania.— *In re* Eck, 10 Kulp 560.

United States.— Moore *v.* American L. & T. Co., 80 Fed. 49.

See 28 Cent. Dig. tit. "Insolvency," § 90.

For continuance of business or extension of credit.— A conveyance made only with the view of enabling the debtor to continue his business has been held not to be fraudulent. Baumann *v.* Cunningham, 48 Minn. 292, 51 N. W. 611. A debtor had made a *bona fide* mortgage with a view to continuing and extending his business, in ignorance of his insolvency, and it was held that this was not a conveyance made with a view of insolvency. Utley *v.* Smith, 24 Conn. 290, 63 Am. Dec. 163. But the transfer of property by an insolvent to one of his creditors to secure an existing debt may constitute an unlawful preference, although the debtor was induced to make the transfer for the purpose of obtaining an extension of credit in the hope of being thereby enabled to continue his business. Penney *v.* Haugan, 61 Minn. 279, 63 N. W. 728.

37. Joseph Schlitz Brewing Co. *v.* Childs, 65 Minn. 409, 68 N. W. 65.

38. *Connecticut.*— Greenthal *v.* Lincoln, 68 Conn. 384, 36 Atl. 813.

it cannot be avoided by reason of the institution of the insolvency proceedings.[39] Also under the laws of some states a payment made by an insolvent debtor to his creditors within a limited period prior to the institution of insolvency proceedings with the intent of giving a preference may be recovered by the assignee or trustee, if the debtor was insolvent at the time and the creditor had reasonable cause to so believe and that a preference was thereby intended.[40]

g. Who May Question Validity. The trustee or assignee not only standing in the place and stead of the insolvent debtor but also representing the creditors is in duty bound to institute the proceedings necessary to avoid all preferential conveyances made in fraud of the statute,[41] if in his judgment such conveyances are

Louisiana.— Seixas *v.* Citizens' Bank, 38 La. Ann. 424; Lefebvre *v.* De Montilly, 1 La. Ann. 42. *Compare* Baldwin *v.* McDonald, 48 La. Ann. 1460, 21 So. 48.

Massachusetts.—Harriman *v.* Woburn Electric Light Co., 163 Mass. 85, 39 N. E. 1004; Holmes *v.* Winchester, 135 Mass. 299; Lynde *v.* McGregor, 13 Allen 182, 90 Am. Dec. 188. See also Staples *v.* Somerville, 176 Mass. 237, 57 N. E. 380; Hall *v.* Haskell, 169 Mass. 291, 47 N. E. 882.

Minnesota.—Beardslee *v.* Beaupre, 44 Minn. 1, 46 N. W. 137. *Compare* Clark *v.* National Citizens' Bank, 74 Minn. 58, 76 N. W. 965, 1125.

Rhode Island.— Colt *v.* Sears Commercial Co., 20 R. I. 64, 37 Atl. 311, voidable, not void.

Vermont.— Gilbert *v.* Vail, 60 Vt. 261, 14 Atl. 542. *Compare* Preston *v.* Russell, 71 Vt. 151, 44 Atl. 115.

United States.—Greaves *v.* Neal, 57 Fed. 816.

In California it has been held that a transfer made by a debtor within thirty days before the filing of an insufficient petition in insolvency is not made void by the filing of a sufficiently amended petition more than thirty days after the transfer. La Point *v.* Boulware, 104 Cal. 264, 37 Pac. 927.

In Maine it is held that the adjudication of a petition against an insolvent takes effect from the date of the filing of the petition, and the validity of all transfers by the debtor is determined with reference to that date. Clay *v.* Towle, 78 Me. 86, 2 Atl. 852.

After-acquired property, taken under a mortgage containing a provision covering after-acquired property before proceedings in insolvency are instituted against the mortgagor, may be held by the mortgagee as against the mortgagor, although he was insolvent when the possession was taken. Deering *v.* Cobb, 74 Me. 332, 43 Am. Rep. 596; Chase *v.* Denny, 130 Mass. 566.

39. Witters *v.* Sowles, 32 Fed. 762.

Under a prior valid contract.— If the transfer or conveyance is made within the prohibited period in pursuance of a valid and enforceable contract legally obligating the debtor to make the conveyance, entered into prior to the statutory period, it will not be affected by the subsequent institution of insolvency proceedings and cannot be avoided by the assignee or trustee of the insolvent. Marvin *v.* Bushnell, 36 Conn. 353; Nickerson *v.* Baker, 5 Allen (Mass.) 142; Williams *v.* Clark, 47 Minn. 53, 49 N. W. 398; Rice *v.* Hulett, 63 Vt. 321, 22 Atl. 75.

40. *Louisiana.*— See State Nat. Bank *v.* Monroe Cotton Press Co., 39 La. Ann. 834, 2 So. 605.

Maine.— Merrill *v.* McLaughlin, 75 Me. 64.

Minnesota.— Tripp *v.* Northwestern Nat. Bank, 45 Minn. 383, 48 N. W. 4. But *compare* Duluth Trust Co. *v.* Clark, 69 Minn. 324, 72 N. W. 127. And see *In re* Kelley, (1900) 83 N. W. 505.

New York.— Robinson *v.* Attica Bank, 21 N. Y. 406.

Vermont.— Preston *v.* Russell, 71 Vt. 151, 44 Atl. 115.

See 28 Cent. Dig. tit. "Insolvency," § 91.

Under some statutes, however, it has been held that the preference prohibition does not extend to the recovery of money paid by the debtor, although paid with the intent to prefer. Stewart *v.* Union Bank, 7 Gill (Md.) 439; Cushman *v.* Libbey, 15 Gray (Mass.) 358; Wall *v.* Lakin, 13 Metc. (Mass.) 167; Thompson *v.* Tetley, 68 N. H. 481, 41 Atl. 179; National Bank of Commerce *v.* Gettinger, 68 Ohio St. 389, 67 N. E. 739; Armstrong *v.* Johnston, 32 Ont. 15, where an insolvent buys goods, and under contract pays part of the price in cash, such payment will not be deemed a preference. H. B. Claflin Co. *v.* Levitch, 29 S. W. 452, 16 Ky. L. Rep. 866.

Payment of a mortgage debt by an insolvent debtor, although within four months of the filing of his petition, where the mortgage is full of security for the debt, is not a preference within the meaning of the law, although the mortgage was not recorded (Stewart *v.* Hopkins, 30 Ohio St. 502); nor is the payment of a debt out of the proceeds of the collateral security itself (Duluth Trust Co. *v.* Clark, 69 Minn. 324, 72 N. W. 127).

Where a firm gave a note indorsed by one of the members of the firm, in contemplation of insolvency, but without actual fraud or connivance between the parties, it has been held that such indorsement does not constitute an actual fraud under the common law and was not a payment or security constituting an unlawful preference under the statute. *In re* Kelley, (Minn. 1900) 83 N. W. 505.

41. Quinnipiac Brewing Co. *v.* Fitzgibbons, 71 Conn. 80, 40 Atl. 913; Filley *v.* King, 49 Conn. 211; Applegarth *v.* Wagner, 86 Md. 468, 38 Atl. 940; Diggs *v.* McCullough, 69

voidable.[42] While neither the insolvent[43] nor a creditor not a party to the proceedings[44] would be competent to institute such action, a creditor who is a party should act only through the trustee or assignee, unless the latter declines to act, in which case the creditors may proceed; but they should allege the demand and refusal of the trustee to act.[45]

2. Liens[46] — a. In General. The property of an insolvent passes to his trustee or assignee subject to all valid subsisting liens at the time of the institution of the proceedings except such as were created within a period forbidden or contrary to the statute.[47]

b. Mortgages — (i) *In General.* While a mortgage given for a present valuable consideration will not as a rule be impaired by the subsequent insolvency of the mortgagor[48] nevertheless, like any other transfer or preference, under the

Md. 592, 16 Atl. 453; Haugh *v.* Maulsby, 68 Md. 423, 14 Atl. 65; Harding *v.* Stevenson, 6 Harr. & J. (Md.) 264; Rossman *v.* Mitchell, 73 Minn. 198, 75 N. W. 1053; Fisher *v.* Utendorfer, 68 Minn. 226, 71 N. W. 29; Richardson *v.* Day, 23 Fed. 227.

Action to set aside fraudulent conveyance see *infra*, IV, E, 1, b.

Cannot permit creditor to retain preference. — The law making it the duty of the trustee or assignee of the insolvent to avoid all fraudulent preferences, he would have no authority without the consent of all the creditors concerned, to waive objections to and permit a preferred creditor to retain his preference. Morey *v.* Milliken, 86 Me. 464, 30 Atl. 102.

The trustee may be compelled to attack a preference, and if he refuses on the petition of creditors he may be removed by the court. Colt *v.* Sears Commercial Co., 20 R. I. 323, 38 Atl. 1056.

Necessity of showing insufficiency of assets. — See Sanborn *v.* Wilder, 68 N. H. 471, 41 Atl. 172.

42. Colt *v.* Sears, 20 R. I. 323, 38 Atl. 1056.

43. See Haugan *v.* Sunwall, 60 Minn. 367, 62 N. W. 398; Brown *v.* Smart, 145 U. S. 454, 12 S. Ct. 958, 36 L. ed. 773.

44. Smith *v.* Brainerd, 37 Minn. 479, 35 N. W. 271.

45. Haugh *v.* Maulsby, 68 Md. 423, 14 Atl. 65; *In re* Leiman, 32 Md. 225, 3 Am. Rep. 132; Richardson *v.* Day, 23 Fed. 227; Grant *v.* Wheeler,, Russ. Eq. Dec. (Nova Scotia) 388; *In re* Dinning, 4 Quebec 37. See Quinnipiac Brewing Co. *v.* Fitzgibbons, 71 Conn. 80, 40 Atl. 913. See *infra*, IV, D, 5, a.

46. **Operation of discharge** on judgment or lien see *infra*, VI, C, 5, d, (VI).

Priority in distribution of estate see *infra*, IV, F, 5, g.

47. Hutchinson *v.* Murchie, 74 Me. 187; Elliott *v.* Saufley, 89 Ky. 52, 11 S. W. 200, 10 Ky. L. Rep. 958. See Nimick *v.* Ingram, 17 La. Ann. 85. See also *infra*, IV, C, 2, b, c.

A valid lien is not divested by the mere fact that the holder of it subsequently takes a transfer of the equity of redemption, made to him with a view of giving him a preference, and in violation of W. Va. Code, c, 74, § 2. Carr *v.* Summerfield, 47 W. Va. 155, 34 S. E. 804.

A person who holds an equity which may ripen into a fixed lien by filing a bill to enforce satisfaction of his note out of the land, but fails to do so until suggestion of debtor's insolvency, he becomes a simple creditor of the estate, without any fixed or specific lien such as will give him priority over other general creditors. Watson *v.* Watson, 1 Baxt. (Tenn.) 387.

Lien of mechanic or material-man. — Empire Lumber Co. *v.* Kiser, 91 Ga. 643, 17 S. E. 972; Boisot Mech. Liens, § 344. See also Laughlin *v.* Reed, 89 Me. 226, 36 Atl. 131; Hart *v.* Globe Iron Works, 37 Ohio St. 75. The time for instituting proceedings to enforce the lien is not, however, thereby extended. Boisot Mech. Liens, § 344. See also Bradford *v.* Dorsey, 63 Cal. 122.

Pledge. — Webre *v.* Beltran, 47 La. Ann. 195, 16 So. 860; Partee *v.* Corning, 9 La. Ann. 539; Clark *v.* Sawyer, 151 Mass. 64, 23 N. E. 726; Bell *v.* Hanover Nat. Bank, 57 Fed. 821. But *compare* Hackett *v.* Leominster Nat. Bank, 68 N. H. 274, 44 Atl. 393, pledge made within prohibited time. The assignee or trustee would have the right, however, to redeem the property for the benefit of the estate, and have it sold in order to obtain the amount received from the sale in excess of the amount advanced on the property. Haynes *v.* Their Creditors, (La. 1888) 5 So. 68; Renshaw *v.* His Creditors, 40 La. Ann. 37, 3 So. 403.

48. *California.* — Perkins *v.* Maier, etc., Brewery, 133 Cal. 496, 65 Pac. 1030; Farmers' Exch. Bank *v.* Purdy, 130 Cal. 455, 62 Pac. 738.

Iowa. — Bloomfield Woolen Mills *v.* Allender, 101 Iowa 181, 70 N. W. 115.

Louisiana. — Marcelin *v.* His Creditors, 21 La. Ann. 423; Skipwith *v.* His Creditors, 19 La. 198. *Compare* Brashear *v.* Alexandria Cooperage Co., 50 La. Ann. 587, 23 So. 540.

Maine. — Brown *v.* Gould, 93 Me. 512, 45 Atl. 505.

Minnesota. — Hanson *v.* White, 75 Minn. 523, 78 N. W. 111.

New Hampshire. — Broderick *v.* Richardson, 70 N. H. 573, 49 Atl. 92.

Ohio. — See Gettinger *v.* National Bank of Commerce, 23 Ohio Cir. Ct. 77.

Pennsylvania. — See Pierce *v.* Mower, 32 Pittsb. Leg. J. 415, 16 York Leg. Rec. 65.

rules already discussed,[49] it may be avoided when it constitutes a fraudulent transfer[50] or an unlawful preference,[51] as for example when it is given for the purpose of hindering or defrauding creditors,[52] or made within the period prohibited by the insolvency statutes.[53] In the event of a sale under the mortgage, the trustee takes whatever surplus there may be over and above the amount sufficient to pay the mortgage.[54]

(II) *Failure to Record.* The failure to record the mortgage prior to the institution of insolvency proceedings against the mortgagor, if by law record is necessary, will as a rule operate to defeat the lien of the mortgagee, and his claim is placed upon the same footing as other unsecured creditors.[55] In some jurisdictions a mortgage may be avoided by the assignee or trustee of the insolvent when not recorded a certain length of time fixed by statute prior to the insolvency proceedings.[56]

c. Liens Acquired by Legal Proceedings — (I) *Prior to Assignment* — (A) *In General.* The rule is not uniform with reference to the effect of an

Rhode Island.— Coates *v.* Wilson, 20 R. I. 106, 37 Atl. 537.

Vermont.— Enright *v.* Amsden, 70 Vt. 183, 40 Atl. 37; Citizens' Sav. Bank, etc., Co. *v.* Graham, 68 Vt. 306, 35 Atl. 318.

West Virginia.— Bartles *v.* Dodd, 56 W. Va. 383, 49 S. E. 414.

See 28 Cent. Dig. tit. "Insolvency," § 99.

An honest mortgage to secure an attorney a reasonable compensation for services to be rendered by him in obtaining the discharge of the mortgagor in insolvency is not as a rule invalid. *In re* Parsons, 150 Mass. 343, 23 N. E. 50; Citizens' Sav. Bank, etc., Co. *v.* Graham, 68 Vt. 306, 35 Atl. 318.

Mortgagee's taking possession of mortgaged chattels does not have the effect of preferring the mortgagees to other creditors within the meaning of a statute prohibiting preferences by insolvent persons. The statute applies to acts of the debtor, not of the creditor. Hamilton Bank *v.* Tamblyn, 16 Ont. 247.

A mortgagee cannot collect usurious interest from an insolvent debtor to the prejudice of other creditors. Burgwyn Bros. Tobacco Co. *v.* Bentley, 90 Ga. 508, 16 S. E. 216.

Where a mortgagee has attached mortgaged property and after the insolvency of the mortgagor waives his attachments and allows the property to be taken into the custody of the messenger, it was held that the mortgagee was not thereby precluded from availing himself of his mortgage. Barnard *v.* Eaton, 2 Cush. (Mass.) 294.

49. See *supra*, IV, C, 1.

50. See *In re* Partridge, 96 Me. 52, 51 Atl. 239; Dyson *v.* St. Paul Nat. Bank, 74 Minn. 439, 77 N. W. 236, 73 Am. St. Rep. 358; Wimpfheimer *v.* Perrine, (N. J. 1901) 50 Atl. 356 [*affirming* 61 N. J. Eq. 126, 47 Atl. 769]; Omwake *v.* Jackson, 7 Ohio S. & C. Pl. Dec. 238, 5 Ohio N. P. 119; Desany *v.* Thorp, 70 Vt. 31, 39 Atl. 309; Baer Sons Grocer Co. *v.* Williams, 43 W. Va. 323, 27 S. E. 345. See *supra*, IV, C, 1. *Compare* Sowles *v.* Lewis, 75 Vt. 59, 52 Atl. 1073.

51. See Renouf *v.* Yates, 94 Me. 77, 46 Atl. 784; Saunders *v.* Russell, 171 Mass. 74, 50 N. E. 463; Grant *v.* Minneapolis Brewing Co., 68 Minn. 86, 70 N. W. 868; Feely *v.* Bryan, 55 W. Va. 586, 47 S. E. 307; Armstrong *v.* Oil-Well Supply Co., 47 W. Va. 455, 35 S. E. 967. See *supra*, IV, C, 1, e.

52. *In re* Partridge, 96 Me. 52, 51 Atl. 239; Gettinger *v.* National Bank of Commerce, 23 Ohio Cir. Ct. 77.

53. *In re* Partridge, 96 Me. 52, 51 Atl. 239; Brown *v.* Gould, 93 Me. 512, 45 Atl. 505. See *supra*, IV, C, 1, f.

54. Marcelin *v.* His Creditors, 21 La. Ann. 423; White *v.* Malcolm, 15 Md. 529; Labbe *v.* Hadfield, 180 Mass. 219, 62 N. E. 262.

Where a party holds two notes, one secured by a mortgage and the other not, under a sale, the surplus above the mortgage note cannot be applied to the unsecured note. Tallman *v.* New Bedford Five Cents Sav. Bank, 138 Mass. 330.

55. *Connecticut.*— Newtown Sav. Bank *v.* Lawrence, 71 Conn. 358, 41 Atl. 1054, 42 Atl. 225.

Massachusetts.— Bingham *v.* Jordan, 1 Allen 373, 79 Am. Dec. 748; Briggs *v.* Parkman, 2 Metc. 258, 37 Am. Dec. 89.

Minnesota.— Perkins *v.* Hanson, 71 Minn. 487, 74 N. W. 135; Shay *v.* Duluth Security Bank, 67 Minn. 287, 69 N. W. 920.

New Jersey.— Wimpfheimer *v.* Perrine, (1901) 50 Atl. 356.

Tennessee.— Langley *v.* Vaughn, 10 Heisk. 553.

Vermont.— Desany *v.* Thorp, 70 Vt. 31, 39 Atl. 309.

See 28 Cent. Dig. tit. "Insolvency," § 99.

Contra.— Thompson-Hiles Co. *v.* Dodd, 95 Ga. 754, 22 S. E. 673.

A deed given to a prior existing creditor, which has not been recorded at least three months prior to the insolvency proceedings, has been held in Maryland to be dissolved, notwithstanding the fact that it has passed into the hands of a *bona fide* purchaser. Boyd *v.* Partridge, 94 Me. 440, 47 Atl. 911.

56. *California.*— Farmers' Exch. Bank *v.* Purdy, 130 Cal. 455, 62 Pac. 738.

Iowa.— Bloomfield Woolen Mills *v.* Allender, 101 Iowa 181, 70 N. W. 115.

Maine.— Renouf *v.* Yates, 94 Me. 77, 46

assignment in insolvency upon liens acquired by legal proceedings when such liens were created prior to the assignment. The general rule seems to be that liens created within certain periods fixed by statute which result in giving the creditors a preference will be avoided by the assignment;[57] and that this rule will hold good, although the proceedings are at the instance of a citizen of another state, since a non-resident creditor can claim no greater rights than the resident, when he invokes the resident jurisdiction.[58] And it seems that the general rules above stated relating to fraudulent transfers and illegal preferences,[59] particularly as regards the intent of the parties,[60] may be invoked when applicable under the facts and circumstances.

(B) *Attachment or Garnishment Lien.*[61] Under some statutes an attachment levied prior to the institution of insolvency proceedings will be deemed valid,[62] under others, all attachments of the debtor's property are avoided by the institution of insolvency proceedings when made within a certain period prior

Atl. 784. See also Boyd *v.* Partridge, 94 Me. 440, 47 Atl. 911.

Maryland.— Baker *v.* Kunkel, 70 Md. 392, 17 Atl. 383.

Massachusetts.— Pratt *v.* Mackey, 172 Mass. 384, 52 N. E. 534; Copeland *v.* Barnes, 147 Mass. 388, 18 N. E. 65.

Minnesota.— Grant *v.* Minneapolis Brewing Co., 68 Minn. 86, 70 N. W. 868.

See 28 Cent. Dig. tit. "Insolvency," § 99.

57. *Alabama.*— Lamar *v.* Gunter, 39 Ala. 324.

California.— Vermont Marble Co. *v.* San Francisco Super. Ct., 99 Cal. 579, 34 Pac. 326; Cerf *v.* Oaks, 59 Cal. 132; Baum *v.* Raphael, 57 Cal. 361.

Connecticut.— Miner *v.* Goodyear India Rubber Glove Mfg. Co., 62 Conn. 410, 26 Atl. 643; Fowler *v.* Bishop, 31 Conn. 560; Curtis *v.* Barnum, 25 Conn. 370.

Illinois.— See Templeton *v.* Bender, 59 Ill. App. 327.

Louisiana.— Plassan *v.* Titus, 20 La. Ann. 345; Hemphill *v.* Braun, McGloin 326.

Maine.— Owen *v.* Roberts, 81 Me. 439, 17 Atl. 403, 4 L. R. A. 229; Wright *v.* Huntress, 77 Me. 179.

Massachusetts.— Place *v.* Washburn, 163 Mass. 530, 40 N. E. 853; Wright *v.* Morley, 150 Mass. 513, 23 N. E. 232; Wright *v.* Dawson, 147 Mass. 384, 18 N. E. 1, 9 Am. St. Rep. 724; Shumway *v.* Carpenter, 13 Allen 68; Cutter *v.* Gay, 8 Allen 134; Edwards *v.* Sumner, 4 Cush. 393; Shelton *v.* Codman, 3 Cush. 318; Stetson *v.* Hayden, 8 Metc. 29; Ward *v.* Proctor, 7 Metc. 318, 39 Am. Dec. 782; Grant *v.* Lyman, 4 Metc. 470; Sprague *v.* Wheatland, 3 Metc. 416. See also Fish *v.* Fiske, 154 Mass. 302, 28 N. E. 278; Squire *v.* Lincoln, 137 Mass. 399.

New York.— See Corning *v.* White, 2 Paige 567, 22 Am. Dec. 659.

Vermont.— Baldwin *v.* Russell, 52 Vt. 57.

United States.— Lafollye *v.* Carriere, 24 Fed. 346; Keene *v.* Jackson, 14 Fed. Cas. No. 7,643, 2 Cranch C. C. 166.

See 28 Cent. Dig. tit. "Insolvency," §§ 100 *et seq.*, 105. See also *infra*, III, C, 2, c, (I), (B), (C).

58. Hemphill *v.* Braun, McGloin (La.) 326; Owen *v.* Roberts, 81 Me. 439, 17 Atl. 403, 4 L. R. A. 229. See also Torrens *v.* Hammond, 10 Fed. 900, 4 Hughes 596. *Compare infra*, VI, C, 5, e, (III).

59. See *supra*, IV, C, 1.

60. See *supra*, IV, C, 1, e, (II). See also Levy *v.* Irvine, 134 Cal. 664, 66 Pac. 953.

61. See also ATTACHMENT, 4 Cyc. 668.

62. Claflin *v.* Beach, 4 Metc. (Mass.) 392. This rule applies to voluntary as well as to involuntary proceedings. Gottschalk *v.* Smith, 74 Md. 560, 22 Atl. 401. And includes an attachment on mesne process before the filing of the petition. Thomas *v.* Brown, 67 Md. 512, 10 Atl. 713.

An attachment against a national bank will not be dissolved, dismissed, or abated or the levy quashed because the bank had committed an act of insolvency before institution of the suit and its charter had afterward been dissolved and its franchises forfeited by a decree of the United States district court and a receiver had been properly appointed to take charge of the assets of the bank, under act of congress. Selma First Nat. Bank *v.* Colby, 46 Ala. 435.

An attachment, based upon a right which particular facts personal to the creditor gave him in the property of a third person, is dissolved by the debtor's assignment for the benefit of creditors, and the assignee cannot prosecute such attachment for the benefit of creditors. Sibley *v.* Quinsigamond Nat. Bank, 133 Mass. 515.

An attachment of the property of a partnership by trustee process is not dissolved by the subsequent insolvency of one of the partners after the dissolution of the partnership. Fern *v.* Cushing, 4 Cush. (Mass.) 357.

Property of an insolvent bank is not exempt from attachment by a creditor if the attachment is laid prior to the appointment of the receiver, or the assumption of possession by the sheriff in pursuance to an order of the court. Arnold *v.* Globe Inv. Co., 40 Nebr. 225, 58 N. W. 712; Arnold *v.* Weimer, 40 Nebr. 216, 58 N. W. 709.

Where a creditor attaches property in the hands of an assignee for the benefit of creditors, and the assignment is set aside, and the assets turned over to the trustee in insolvency, the attaching creditor's inchoate lien will be protected by the insolvent courts

thereto,[63] while under still others they will be deemed valid even if made after the filing of the petition in insolvency, but not if made after the actual assignment under the insolvency proceedings[64] or after the first publication of notice that a warrant has issued against the estate of the owner of the property.[65] Nevertheless the rules against fraud and illegal preferences may govern when the facts warrant their application.[66]

(c) *Judgment or Execution Lien.* Similarly the rule with reference to the effect of an adjudication of insolvency upon a judgment and execution levied upon the insolvent's property prior thereto is not uniform. It is generally true, however, that a judgment and execution entered with the connivance of a debtor resulting in a fraudulent preference may be avoided by the assignee or trustee of the insolvent's estate,[67] but that in the absence of fraud and statutory provisions to the contrary,[68] an execution upon a judgment will not be affected

in the insolvency proceedings. Buschman *v.* Hanna, 72 Ind. 1, 18 Atl. 962.

Where an insolvent has made a fraudulent conveyance of property, and before proceedings in insolvency are taken a creditor attaches the property, such creditor cannot hold the property against the assignee in the insolvency proceedings after they are begun, as such property passes to the assignee. Penniman *v.* Cole, 8 Metc. (Mass.) 496.

63. *California.*— Levy *v.* Irvine, 134 Cal. 664, 66 Pac. 953; Hefner *v.* Herron, 117 Cal. 473, 49 Pac. 586; Wilhoit *v.* Cunningham, 87 Cal. 453, 25 Pac. 675. *Compare* Bertz *v.* Turner, 102 Cal. 672, 36 Pac. 1014; Taffts *v.* Manlove, 14 Cal. 47, 73 Am. Dec. 610.

Connecticut.— Palmer *v.* Woodward, 28 Conn. 248, applying rule only to pending proceeding.

Minnesota.— Johnson *v.* Bray, 35 Minn. 248, 28 N. W. 504.

New Hampshire.— Berry *v.* Flanders, 69 N. H. 626, 45 Atl. 591; Bernard *v.* Martel, 68 N. H. 466, 41 Atl. 183; Whittredge *v.* Maxam, 68 N. H. 323, 44 Atl. 491; Hurlbutt *v.* Currier, 68 N. H. 94, 38 Atl. 502.

Rhode Island.— *In re* Sweet, 20 R. I. 398, 39 Atl. 757; *In re* Bowler, 20 R. I. 251, 38 Atl. 497.

Tennessee.— Bacchus *v.* Peters, 85 Tenn. 678, 4 S. W. 833, where the decedent insolvent was a non-resident and left property in this state.

See 28 Cent. Dig. tit. "Insolvency," § 101.

An attachment to enforce a lien in favor of a mechanic or material-man is not dissolved by proceedings in insolvency. Laughlin *v.* Reed, 89 Me. 226, 36 Atl. 131.

Failure of syndic to defend.— Muser *v.* Kern, 55 Fed. 916.

Nothing would prevent a creditor from foreclosing prior liens on the same property as that which has been attached, although the latter is avoided by the insolvency proceedings. Desany *v.* Thorp, 70 Vt. 31, 39 Atl. 309.

Property not considered in custodia legis.— Hogue *v.* Frankfort, 62 Fed. 1006.

The court may direct the release of the property on a motion made by an assignee. Von Roun *v.* San Francisco Super. Ct., 58 Cal. 358.

64. Robinson Bros. Shoe Co. *v.* Knapp, 82 Wis. 343, 52 N. W. 431; Mowry *v.* White, 21 Wis. 417. See also *infra* IV, C, 2, c, (II).

The mere pendency of a petition in insolvency and for a discharge does not debar the creditor of the insolvent debtor from pursuing the ordinary remedy against him for the collection of the debts by attachment. Mowry *v.* White, 21 Wis. 417.

65. Butler *v.* Mullen, 100 Mass. 453; Gallup *v.* Robinson, 11 Gray (Mass.) 20; Wheelock *v.* Hastings, 4 Metc. (Mass.) 504.

Attachment before but taking after notice.— If the goods are attached on mesne process before, but not taken in execution until after, the first publication of notice that the warrant under the insolvent law has issued against the debtor whose goods are attached, the attachment is dissolved. Andrews *v.* Southwick, 13 Metc. (Mass.) 535.

66. See *supra*, IV, C, 1. See also Hazen *v.* Lyndonville Nat. Bank, 70 Vt. 543, 41 Atl. 1046, 67 Am. St. Rep. 680; Guldermann *v.* Lerdall, 99 Wis. 495, 75 N. W. 172.

67. See *supra*, IV, C, 1, e.

A judgment recovered adversely is not within the class of preferences mentioned in the act of June 4, 1901. McCurdy *v.* Gantz, 11 Pa. Dist. 534, 26 Pa. Co. Ct. 417, 8 Del. Co. 439.

The words "all executions" in the Insolvent Act of June 4, 1901, embrace only such executions as give preferences forbidden by the act. Lobach *v.* Riegel, 11 Pa. Dist. 533, 26 Pa. Co. Ct. 145.

68. **In the absence of any statutory provision,** a levy upon property by virtue of an attachment or execution creates an interest in the property superior to the rights of the assignee in insolvency, and only an express provision to that effect will make the proceedings in insolvency paramount to such lien. Elliott *v.* Warfield, 122 Cal. 632, 55 Pac. 409; Hefner *v.* Herron, 117 Cal. 473, 49 Pac. 586; Vermont Marble Co. *v.* San Francisco Super. Ct., 99 Cal. 579, 34 Pac. 326.

Stay of proceedings.— Where execution is issued and a levy made, prior to an assignment under the act of June 4, 1901, further proceedings will be stayed, without prejudice to whatever preference the execution creditor may be entitled to on distribution. Zacharias *v.* Imperial Stain, etc., Co., 11 Pa. Dist. 171. Where an action for a tort was brought

by the commencement of insolvency proceedings,[69] although at the time the creditor may have known that his debtor was insolvent.[70] In some jurisdictions, however, a levy made upon the debtor's property within a fixed period prior to the proceedings will be dissolved.[71]

(II) *After Assignment.* The general rule is that a judgment or other lien obtained or created subsequent to the institution of insolvency proceedings and assignment by the insolvent will be inoperative as against the trustee or assignee of the insolvent.[72]

(III) *Proceedings in Other States.* An insolvent law having no extra-territorial force or effect,[73] the title acquired by the trustee or assignee pursuant to a conveyance under the insolvent laws of one state will not prevail against the rights of local attaching creditors under the laws of a different state where the

and prosecuted to judgment pending a proceeding in insolvency against defendant, under Gen. Laws, c. 274, the issuing of an execution on such judgment, prior to the determination of his right to a discharge, was illegal, as section 25 provides for a stay of execution in case the debtor is adjudged insolvent. *In re* Bowler, 20 R. I. 251, 38 Atl. 497.

Waiver of execution on personalty.— A creditor who has accepted a judgment note with a waiver of execution on personalty is not thereby barred from proceeding against his debtor under the act of June 4, 1901, where the debtor has committed an act of insolvency in assigning personalty with intent to defraud creditors. Norristown Trust, etc., Co. *v.* Larzelere, 29 Pa. Co. Ct. 12.

69. *California.*— Elliott *v.* Warfield, 122 Cal. 632, 55 Pac. 409; Hefner *v.* Herron, 117 Cal. 473, 49 Pac. 586; Ward *v.* Healy, 114 Cal. 191, 45 Pac. 1065; Vermont Marble Co. *v.* San Francisco Super. Ct., 99 Cal. 579, 34 Pac. 326; Howe *v.* Union Ins. Co., 42 Cal. 528.

Maine.— Nason *v.* Hobbs, 75 Me. 396.

Maryland.— Selby *v.* Magruder, 6 Harr. & J. 454.

Minnesota.— Bean *v.* Schmidt, 43 Minn. 505, 46 N. W. 72.

New Hampshire.— Fellows *v.* Hoyt, 69 N. H. 179, 44 Atl. 929; Hurlbutt *v.* Currier, 68 N. H. 94, 38 Atl. 502.

New York.— Bailey *v.* Burton, 8 Wend. 339.

Rhode Island.— White *v.* Murray, 20 R. I. 40, 37 Atl. 350.

Vermont.— Sheldon *v.* Clemmons, 72 Vt. 185, 47 Atl. 796; Goss *v.* Cardell, 53 Vt. 447.

United States.— Towne *v.* Smith, 24 Fed. Cas. No. 14,115, 1 Woodb. & M. 115.

See 28 Cent. Dig. tit. "Insolvency," § 102.

Compare Freeman *v.* His Creditors, 15 La. Ann. 397; Tyler *v.* His Creditors, 9 Rob. (La.) 372.

A judgment lien is in the nature of a statutory mortgage rather than that of an attachment, and when placed upon land attached in a suit in which the judgment is rendered is not to be regarded as a mere continuance of the attachment. Beardsley *v.* Beecher, 47 Conn. 408.

If issued before the first publication of the messenger appointed to take possession of the debtor's property the execution is valid. Eastman *v.* Eveleth, 4 Metc. (Mass.) 137.

Land subject to the lien of a judgment, conveyed by the debtor prior to the insolvency proceedings, will not pass to the assignee. Tayloe *v.* Thomson, 5 Pet. (U. S.) 358, 8 L. ed. 154. *Compare* Hoar *v.* Tilden, 178 Mass. 157, 59 N. E. 641.

70. Hurlbutt *v.* Currier, 68 N. H. 94, 38 Atl. 502.

71. Whittredge *v.* Maxam, 68 N. H. 323, 44 Atl. 491; *In re* Sweet, 20 R. I. 398, 39 Atl. 757; White *v.* Murray, 20 R. I. 40, 37 Atl. 350.

Rule applies to non-resident, as well as resident, creditors. *In re* Sweet, 20 R. I. 398, 39 Atl. 757.

72. Notwithstanding the suit in which the judgment was obtained was pending at the time of the institution of insolvency proceedings, the judgment creditor will not be entitled to priority over unsecured creditors, but will share with them in the distribution of the estate.

Georgia.— Lubroline Oil Co. *v.* Athens Sav. Bank, 104 Ga. 376, 30 S. E. 409.

Louisiana.— Jacobs *v.* Bogart, 7 Rob. 162; Shaumburg *v.* Torry, 10 Mart. 178.

Maryland.— Fox *v.* Merfeld, 81 Md. 80, 31 Atl. 583; Pinckney *v.* Lanahan, 62 Md. 447; Manahan *v.* Sammon, 3 Md. 463; Selby *v.* Magruder, 6 Harr. & J. 454.

Massachusetts.— Merrick *v.* Bragg, 102 Mass. 437; Hubbard *v.* Lyman, 8 Allen 520; Hall *v.* Whiston, 5 Allen 126.

New York.— Marsh *v.* Wendover, 3 Cow. 69.

North Dakota.— Elton *v.* O'Connor, 6 N. D. 1, 68 N. W. 84, 33 L. R. A. 524.

Pennsylvania.— Moncure *v.* Hanson, 15 Pa. St. 385; Gillespie *v.* Keating, 17 Pa. Co. Ct. 418.

Washington.— Traders' Bank *v.* Van Wagenen, 2 Wash. 172, 26 Pac. 253.

See 28 Cent. Dig. tit. "Insolvency," § 103.

Foreign or non-resident creditors.— Funds in the hands of the assignee appointed under the state insolvent laws are not attachable by non-resident creditors. Pinckney *v.* Lanahan, 62 Md. 447; Torrens *v.* Hammond, 10 Fed. 900, 4 Hughes 596. See also Geilinger *v.* Phillippi, 133 U. S. 246, 10 S. Ct. 266, 33 L. ed. 614.

73. See *supra*, II, C; *infra*, VI, C, 5, f.

property is actually situated.[74] On the other hand, a creditor who is a citizen and resident of the same state as his debtor against whom insolvency proceedings have been instituted in said state is bound by the assignment of the debtor's property in such proceedings, and if he attempts to seize or attach the personal property of the debtor, situated in another state and embraced in the assignment, he may be restrained by injunction by the courts of the state in which he and his debtor reside.[75] The fact that the provisions of the statutes of one state operate to retroactively vacate attachments does not control attachments levied in other states at a time when under the statute of the former state the insolvent had not been deprived, by operation of law, of the dominion and control over his property and assets.[76]

d. Remedies to Enforce[77] — (i) *In General.* A lien created through legal proceedings, or otherwise, not avoided by the insolvency proceedings, may as a rule be enforced by the creditor holding the lien;[78] although in some jurisdic-

74. *Louisiana.*— Lichtenstein *v.* Gillett, 37 La. Ann. 522.

Maine.— Felch *v.* Bugbee, 48 Me. 9, 77 Am. Dec. 203.

Massachusetts.— Chipman *v.* Manufacturers' Nat. Bank, 153 Mass. 147, 30 N. E. 610; Ingraham *v.* Geyer, 13 Mass. 146, 7 Am. Dec. 132.

New Hampshire.— Crippen *v.* Rogers, 67 N. H. 207, 30 Atl. 346, 25 L. R. A. 821; Sturtevant *v.* Armsby Co., 66 N. H. 557, 23 Atl. 368, 49 Am. St. Rep. 627. See also Thompson *v.* Tetley, 68 N. H. 481, 41 Atl. 179; Dunlap *v.* Rogers, 47 N. H. 281, 93 Am. Dec. 433.

New York.— Kelly *v.* Crapo, 45 N. Y. 86, 6 Am. Rep. 35; Willetts *v.* Waite, 13 How. Pr. 34.

Ohio.— Finnell *v.* Burt, 2 Handy 202, 12 Ohio Dec. (Reprint) 403.

Rhode Island.— Cross *v.* Brown, 19 R. I. 220, 33 Atl. 147 [*affirmed* in 175 U. S. 396, 20 S. Ct. 131, 44 L. ed. 211].

Washington.— Neufelder *v.* North British, etc., Ins. Co., 10 Wash. 393, 39 Pac. 110, 45 Am. St. Rep. 793.

Wisconsin.—Guldemann *v.* Lerdall, 99 Wis. 495, 75 N. W. 172.

United States.— Reynolds *v.* Adden, 136 U. S. 348, 10 S. Ct. 843, 34 L. ed. 360.

See 28 Cent. Dig. tit. "Insolvency," § 104.

"While the authorities are not altogether harmonious, the prevailing American doctrine is that a conveyance under a state insolvent law operates only upon property within the territory of that State, and that with respect to property in other States it is given only such effect as the laws of such State permit; and that, in general, it must give way to claims of creditors pursuing their remedies there. It passes no title to real estate situated in another State. Nor, as to personal property, will the title acquired by it prevail against the rights of attaching creditors under the laws of the State where the property is actually situated." Security Trust Co. *v.* Dodd, 173 U. S. 624, 629, 19 S. Ct. 545, 43 L. ed. 835, citing numerous authorities and distinguishing voluntary or common-law assignments from statutory assignments in insolvency. See *supra*, note 11.

Rule applied.— See Crapo *v.* Kelly, 16 Wall. (U. S.) 610, 21 L. ed. 430 [*reversing* 45 N. Y. 86, 6 Am. Rep. 35].

Insolvency proceedings in state court dissolve attachment from federal court.— Insolvency proceedings in a state court will dissolve an attachment made in a suit in a federal court under the same circumstances where by state statute an attachment in a suit in a state court would be dissolved. For otherwise the creditor suing in the federal court would have an advantage, which is contrary to the intent of U. S. Rev. St. (1878) § 915 [U. S. Comp. St. (1901) p. 684] and U. S. Rev. St. (1878) § 933 [U. S. Comp. St. (1901) p. 689]. Shwartz *v.* H. B. Claflin Co., 60 Fed. 676, 9 C. C. A. 204; Neufeld *v.* Neufeld, 37 Fed. 560, 13 Sawy. 604. But it has been held that an attachment issued by a federal court upon a state law adopted by congress, in an action on a contract made with the citizens of another state, is not dissolved by defendants taking advantage of a subsequent insolvent law of the state. Springer *v.* Foster, 22 Fed. Cas. No. 13,266, 2 Story 383.

75. *Alabama.*— Wilson *v.* Matthews, 32 Ala. 332.

Massachusetts.— Dehon *v.* Foster, 7 Allen 57.

Pennsylvania.— Mulliken *v.* Aughinbaugh, 1 Penr. & W. 117.

Vermont.— Hazen *v.* Lyndonville Nat. Bank, 70 Vt. 543, 41 Atl. 1046, 67 Am. St. Rep. 680.

United States.— Cole *v.* Cunningham, 133 U. S. 107, 10 S. Ct. 269, 33 L. ed. 538.

See 28 Cent. Dig. tit. "Insolvency," § 104.

But see Rhawn *v.* Pearce, 110 Ill. 350, 51 Am. Rep. 691. See also *supra*, III, E, 1, 2.

76. King *v.* Cross, 175 U. S. 396, 20 S. Ct. 131, 44 L. ed. 211. See also Lawrence *v.* Batcheller, 131 Mass. 504.

77. Establishment of priority in distribution of estate see *infra*, IV, F, 5, j.

Priority of secured claim or lien see *infra*, IV, F, 5, g.

78. Rogers *v.* Heath, 62 Vt. 101, 18 Atl. 1043; Berryman *v.* Stern, 14 Nev. 415.

Creditors having elected to surrender property purchased by the trustee for the benefit of creditors in violation of his duties, and by misapplication of the law having obtained

tions the rule is for the trustee or assignee to dispose of the property and bring the proceeds into court for distribution among the lien creditors and others according to their legal priorities.[79]

(11) *Rights of Mortgagee.* In some states the fact that the mortgagor is adjudged insolvent after executing the mortgage does not affect the right of the mortgagee to foreclose,[80] while in others the trustee or assignee in insolvency is the only person empowered to sell the mortgaged premises, although the mortgage contains a power of sale.[81]

D. Administration of Estate[82] — **1. Jurisdiction of Courts.** The jurisdiction to hear and determine insolvency proceedings is by statute delegated to one or more courts, which as a general rule are given full, ample, and exclusive power[83] over the insolvent and his estate to the end that it may be fully administered and distributed to the persons entitled thereto. This supervision continues from term to term until the final disposition of the matter.[84]

2. Officers in General. The officers to be appointed in an insolvency proceeding, including commissioners[85] and referees,[86] their number and designation, and their qualifications, duties, and liabilities, are determined by provisions of the

an erroneous judgment requiring much expense to correct the error, rendering it likely that changes may have occurred in the meantime, and there being no real benefits recoverable, it is proper to regard their rights as foreclosed. Harrigan *v.* Gilchrist, 121 Wis. 127, 99 N. W. 909.

The consent of the court appointing a receiver for an insolvent debtor is not necessary to the bringing of a petition by a creditor for an issue to determine the validity of a judgment claiming priority in the distribution. Boll *v.* Boll, 11 York Leg. Rec. (Pa.) 20.

79. Sullivan *v.* McDonald, 86 Ga. 78, 12 S. E. 215; Crocker *v.* Hopps, 78 Md. 260, 28 Atl. 99. See *infra*, IV, D, 5, c, (II), (C), (3).

80. Montgomery *v.* Merrill, 62 Cal. 385; Martinez *v.* Layton, 4 Mart. N. S. (La.) 368; *In re* Church, etc., Mfg. Co., 40 Minn. 39, 41 N. W. 241.

A chattel mortgagee whose mortgage covers the household furniture of an insolvent is not required, as against the assignee of the insolvent, to resort to such property in preference to other property covered by the mortgage. Labbe *v.* Hadfield, 180 Mass. 219, 62 N. E. 262.

Jurisdiction.— Foreclosure being an action *in rem*, jurisdiction of such an action, when once obtained by the court of common pleas, will not be transferred to the court of insolvency on a subsequent general assignment being made by the mortgagor. Omwake *v.* Jackson, 15 Ohio Cir. Ct. 615, 8 Ohio Cir. Dec. 235.

Effect of judgment for deficiency.— In an action by a vendor against the assignee in insolvency of the vendee, a lien in favor of the vendor was declared on the property sold the vendee. It was held that a judgment for a deficiency after a foreclosure sale would not estop the assignee or creditors from disputing the validity of such claim. Clark *v.* B. B. Richards Lumber Co., 72 Minn. 397, 75 N. W. 605.

81. Crocker *v.* Hopps, 78 Md. 260, 28 Atl. 99; Mackubin *v.* Boarman, 54 Md. 384. See also Labbe *v.* Hadfield, 180 Mass. 219, 62 N. E. 262.

82. **Action:** By or against insolvent see *infra*, VI, A, 1. To establish claim see *infra*, IV, F, 4. To establish priority see *infra*, IV, F, 5, j.

83. Cross *v.* Hecker, 75 Md. 574, 24 Atl. 99. See, generally, Courts.

Courts having jurisdiction of insolvency proceedings see *supra*, III, A.

The court of insolvency has sole jurisdiction in the first instance over the distribution of the funds in the hands of an assignee of an insolvent. Castner *v.* Twitchell-Champlin Co., 91 Me. 524, 40 Atl. 558.

84. Seiter *v.* Mowe, 81 Ill. App. 346. *Compare* Wallace *v.* Glasgow Inv. Co., 68 N. H. 188, 44 Atl. 175; Sowles *v.* Bailey, 69 Vt. 515, 38 Atl. 237.

85. A commissioner of insolvency does not stand in relation to the parties interested in the same condition as an executor or administrator, nor can he, in relation to the effects of the insolvent, sue or be sued in the same manner as the personal representatives of the deceased person (State *v.* Sherman, 3 Ohio 507); but that he may bring a suit on the bond of the insolvent for the benefit of creditors (Mason *v.* Montgomery, Wright (Ohio) 722).

Appointment mandatory see Sowles *v.* Bailey, 69 Vt. 515, 38 Atl. 237.

Who may apply for see Sowles *v.* Bailey, 69 Vt. 515, 38 Atl. 237.

Sufficiency of application see Sowles *v.* Bailey, 69 Vt. 515, 38 Atl. 237.

Who may be appointed.— The creditor of an insolvent estate cannot be a commissioner (Barker *v.* Wales, 1 Root (Conn.) 265); nor a relative of the creditor (Sturges *v.* Peck, 12 Conn. 139; Stoddard *v.* Moulthrop, 9 Conn. 502); nor a resident of a town beneficially interested in a claim against the estate (Hawley *v.* Baldwin, 19 Conn. 584); nor one who holds a claim as an assignee against the estate (Blanchard *v.* Young, 11 Cush. (Mass.) 341).

86. Sowles *v.* Lewis, 75 Vt. 59, 52 Atl. 1073.

A referee has no jurisdiction of a question

statutes of the several states and in consequence of the lack of uniformity in such provisions no general rule with reference thereto can be laid down.[87]

3. MEETINGS OF CREDITORS.[88] The statutes generally provide for such meetings of creditors as may become necessary from time to time for the proper administration of the estate.[89] There appears no reason why a meeting may not be adjourned from day to day for the transaction of such business as may arise.[90]

4. EXAMINATION OF INSOLVENT AND OTHERS. It is as a general rule within the power of a court of insolvency or commissioner having charge of the proceedings to order an insolvent to appear and be sworn, and submit to an examination touching his estate and its disposition.[91] And by the statutes of some states persons other than the debtor who are charged with having fraudulently received, concealed, embezzled, and conveyed away property belonging to the insolvent's estate may be cited to appear to submit to an examination.[92] The conduct of the examination is governed by the ordinary rules of law with reference to the examination of witnesses.[93]

as to whether the court's action in granting leave to his assignees to compromise a claim was proper. Sowles *v.* Lewis, 75 Vt. 59, 52 Atl. 1073.

87. See the statutes of the several states.

88. **Meeting of creditors:** For election of trustee or assignee see *supra*, IV, A, 2. On question of consent to discharge see *infra*, VI, C, 3, d. Preliminary to voluntary proceedings see *supra*, III, C, 3, e.

89. See the statutes of the several states. See also Pinsky *v.* Resweber, 49 La. Ann. 246, 21 So. 251.

Failure to attend.— Where a meeting of creditors is called those who do not attend are regarded as assenting to the resolution of those who are present, and that the advice of the creditors who are personally present is deemed to be the advice of all the creditors. Cloys *v.* Darling, 16 Rev. Lég. 649.

90. Rice *v.* Wallace, 7 Metc. (Mass.) 431. See Greenough *v.* Whittemore, 8 Gray (Mass.) 193.

New notices need not be sent in the case of such adjournment. *In re* McFarlane, 12 L. C. Jur. 239. But a meeting adjourned at the call of the assignee is adjourned *sine die*, and new notices are necessary before meeting again. Consolidated Bank *v.* Davidson, 2 Montreal Leg. N. 348 [*confirmed* in 3 Montreal Leg. N. 56].

91. Clement *v.* Bullens, 159 Mass. 193, 34 N. E. 173; Matter of Stonebridge, 53 Hun (N. Y.) 545, 6 N. Y. Suppl. 311; *In re* Brainerd, 56 Vt. 495. See also Burr *v.* Booth, 67 Conn. 368, 35 Atl. 267.

Officers of insolvent corporation.— Under Mass. Pub. St. c. 157, §§ 70, 135, the court in its discretion could require the officers of an insolvent corporation to be examined at any time. Davis *v.* Bunker, 168 Mass. 82, 46 N. E. 405.

At whose instance made.— Such an order has been made for the purpose of an examination to be conducted by a single creditor who is not the assignee (Chamberlain *v.* Hall, 3 Gray (Mass.) 250), or of the receiver (Goodday *v.* Butte County Super. Ct., 65 Cal. 580, 4 Pac. 626).

A person disqualified as a witness on account of the commission of a crime may be examined upon his application as an insolvent debtor. Anonymous, 11 N. J. L. 93.

The refusal to permit a creditor to examine an insolvent debtor will not avoid a discharge. The remedy if any is by application to the supreme court. Blanchard *v.* Young, 11 Cush. (Mass.) 341.

Cross-examination of insolvent.—In Canada an insolvent examined to testify touching his estate and effects cannot be cross-examined by his own counsel. *In re* Lamontagne, 2 Quebec 156; *In re* Fraser, 12 L. C. Jur. 272.

Until an assignee has been appointed a judge has no power to compel an insolvent debtor to appear before him for examination concerning his property. *In re* Brainerd, 56 Vt. 495.

Refusal to sign examination does not authorize the imprisonment of a debtor, who has appeared and submitted to the examination required. Burr *v.* Booth, 67 Conn. 368, 35 Atl. 267, under Conn. Gen. St. § 526.

92. Sawin *v.* Martin, 11 Allen (Mass.) 439. See Clement *v.* Bullens, 159 Mass. 193, 34 N. E. 173.

Competency of a wife to testify see Church *v.* Choate, 9 Allen (Mass.) 573.

The petition for the examination of witnesses should state satisfactory reasons for the order. *In re* Lusk, 17 L. C. Jur. 47.

The period within which an examination of the insolvent and others may be ordered and such matters varies in the several states. See the statutes of the several states. See also Kimball *v.* Morris, 2 Metc. (Mass.) 573, at any time before granting of certificate of discharge.

Second examination ordered where first examination was deficient see Bergen County Bank Case, 4 N. J. L. J. 119.

The examination will merely serve as the basis for other proceedings in the proper court, and the court having charge of the insolvency proceedings cannot on the facts elicited decree that such person deliver over the property. Scott *v.* Knight, 67 N. H. 500, 38 Atl. 120.

93. See, generally, TRIAL; WITNESSES.

5. Authority and Functions of Assignee or Trustee — a. In General. As has been seen,[94] the trustee or assignee of an insolvent represents the creditors of an insolvent[95] as well as the insolvent,[96] and must show due diligence in the discharge of his duties and render full and complete account thereof.[97] And the right to institute proceedings in behalf of an insolvent's estate is primarily and in the first instance in the assignee or trustee, but where he refuses the creditor may proceed.[98] But in that event it should appear that a request has first been made upon him to act and been refused.[99] As a rule the assignee or trustee is authorized to compromise and settle controversies with the permission of the court, and when so authorized the court's action cannot be questioned by the insolvent.[1]

b. Discovery and Collection of Assets. It is the duty of the trustee or assignee of an insolvent to collect all of the assets either by a suit or otherwise, and hold them for the parties in interest.[2]

c. Custody and Management of Estate — (i) *In General.* It is the duty of the trustee or assignee to take into his possession all of the estate and effects to which the insolvent had the right of possession at the time of his application or adjudication as an insolvent, according to the laws of the state. To him is intrusted the entire management of the estate, subject to the control of the court by whom he is appointed.[3]

The right to refuse to testify because the evidence may tend to incriminate the witness is preserved to him by the constitution of the United States. See U. S. Const. Amendm. V. See also Sawin *v.* Martin, 11 Allen (Mass.) 439.

The same rule applies in Canada as in the United States, which relieves the insolvent from answering a question which may tend to incriminate him. *In re* Beaudry, 21 L. C. Jur. 196.

94. See *supra*, IV, B, 3; IV, C, 1, g.

95. Nouvet *v.* Bollinger, 15 La. Ann. 293; Hughes *v.* His Creditors, 15 La. 446.

96. The assignee represents the insolvent as well as the creditors (Taylor *v.* Taylor, 74 Me. 582) but not in matters exclusively personal to the former (Morgan *v.* Davis, 4 La. 141). See also Alexandria Bank *v.* Herbert, 8 Cranch (U. S.) 36, 3 L. ed. 479.

Extent and limits of authority see Chaffe *v.* Scheen, 34 La. Ann. 684; Hughes *v.* His Creditors, 15 La. 446; Saul *v.* His Creditors, 7 Mart. N. S. (La.) 425; Walton *v.* Watson, 1 Mart. N. S. (La.) 347.

97. Desorme's Succession, 10 Rob. (La.) 474; Prieur *v.* His Creditors, 2 Rob. (La.) 541; Meilleur *v.* His Creditors, 3 La. 532.

98. See *supra*, IV, C, 1, g.

99. See *infra*, IV, C, 1, g. See also Filley *v.* King, 49 Conn. 211; Lindauer *v.* Lang, 29 Ill. App. 188; Richardson *v.* Day, 23 Fed. 227.

A fraudulent conveyance by one who has since gone into insolvency can be set aside upon a suit of the creditors, the trustee being joined therein as a defendant, as well as in an action brought by the trustee, the latter's rights not being prejudiced in a court of equity. Haugh *v.* Maulsby, 68 Md. 423, 14 Atl. 65.

Actions by or against insolvents see *infra*, VI, A, 1.

Actions to establish priorities see *infra*, IV, F, 5, j.

Proceedings by creditors to establish claims see *infra*, IV, F, 4.

1. Sowles *v.* Lewis, 75 Vt. 59, 52 Atl. 1073.

Compromise generally see Compromise and Settlement, 8 Cyc. 499 *et seq.*

2. Ohleyer *v.* Bunce, 65 Cal. 544, 4 Pac. 549; Davis *v.* Newton, 6 Metc. (Mass.) 537.

Concealed property.— He should pursue property withdrawn or concealed by the insolvent in order that it may be applied to the satisfaction of the claims of his creditors. Harlow *v.* Tufts, 4 Cush. (Mass.) 448. If property has been concealed by the insolvent and subsequently sold, the proceeds may be taken from the insolvent, or, on failure to turn the same over, he may be punished for contempt. *Ex p.* Clark, 110 Cal. 405, 42 Pac. 905.

Debts due from assignee or trustee.— The assignee or trustee of an insolvent, if indebted to the estate, stands on no different plane from any other debtor to the estate. Like other creditors he should account for the full amount of his indebtedness to the insolvent. Benchley *v.* Chapin, 10 Cush. (Mass.) 173.

The liability under a bond given by an assignee in insolvency is not an asset of the estate. Appellate Div. of Sup. Ct. *v.* Lawyers' Surety Co., 21 R. I. 454, 44 Atl. 594.

3. Alexander *v.* Ghiselin, 5 Gill (Md.) 138. See also cases cited *infra*, note 4 *et seq.*

Continuing insolvent's business.— For the purpose of preserving the estate or preventing a sacrifice, there seems to be no reason why the business may not be conducted as a going concern, with the approval of the court. *In re* St. James Hotel Co., 4 Ohio S. & C. Pl. Dec. 209, 3 Ohio N. P. 42. In Canada the court or judge has power to authorize an insolvent to continue his business, pending the contestation of the writ or pending proceedings for a review, upon giving security for the value of his assets. *In re* La-

(II) *Sale of Assets*[4] — (A) *In General.* The assignee or trustee should sell or make such other disposition of the insolvent's property as will result to the best interests of the creditors, subject to the direction of the court.[5] If the trustee declines or refuses to sell, a creditor should apply to the court for an order directing the sale.[6]

(B) *Proceedings For Sale.* Before any proceedings can be taken looking to the sale, the trustee or assignee must first have qualified and then secured an order of court for the sale.[7] Some statutes require, as a condition precedent to the sale, that the creditors should have had notice of the proposed sale,[8] and that there must also have been a meeting of the creditors to pass upon the terms and conditions of sale.[9]

(C) *Mode of Sale* — (1) Public or Private Sale. Unless a private sale is by statute authorized, the property of an insolvent should be disposed of at public auction.[10]

(2) Claims of Doubtful Creditors. Claims of a doubtful creditor may be sold for less than their face value.[11]

(3) Property Subject to Lien.[12] Property which is encumbered or subject to a lien may either be sold free of all liens or encumbrances, reserving the settlement or adjustment of priorities until the final distribution of the fund,[13] or else

montagne, 2 Quebec 160; Anderson *v.* Gervais, 22 L. C. Jur. 277, 1 Montreal Leg. N. 579; Fisher *v.* Malo, 22 L. C. Jur. 276.

4. Composition proceedings see *infra*, V, A. **Sale or other disposition pending appointment of trustee** see *supra*, note 41, p. 1277.

5. Zeigler *v.* King, 9 Md. 330; Jamison *v.* Chestnut, 8 Md. 34; Bemis *v.* Wilder, 100 Mass. 446 (may assign lease, although not recorded); Gignoux *v.* Bilbruck, 63 N. H. 22 (liquor, although the insolvent himself could not lawfully have sold it); Nichols *v.* Bingham, 70 Vt. 320, 40 Atl. 827 (perishable property subject to a mortgage).

In case of a fraudulent conveyance of realty by the debtor the assignee may sell and convey his interest as such in real estate without first bringing an action therefor against the grantee. Freeland *v.* Freeland, 102 Mass. 475; Gibbs *v.* Thayer, 6 Cush. (Mass.) 30.

After an assignee has purchased property of the estate, there being no fraud, the remedy of the insolvent, if he would seek to avoid the transaction, is in chancery. Sowles *v.* Lewis, 75 Vt. 59, 52 Atl. 1073.

The trustee is responsible for the whole proceeds of property sold, where it appears that he did not exercise diligence in collecting the sums still owing. Desorme's Succession, 10 Rob. (La.) 474.

6. Laforest *v.* His Creditors, 18 La. Ann. 292.

7. Lange *v.* His Creditors, 2 Rob. (La.) 539; Rivas *v.* Hunstock, 2 Rob. (La.) 187; Gable *v.* Scott, 56 Md. 176.

8. Saul *v.* His Creditors, 7 Mart. N. S. (La.) 425. See Coiron *v.* Millaudon, 3 La. Ann. 664.

The mortgagee of personal property of an insolvent has been held not to be affected by a sale of such property by the assignee without notice to such mortgagee. Olcott *v.* Davis, 67 Vt. 685, 32 Atl. 813.

9. Spears *v.* Creditors, 40 La. Ann. 650, 4 So. 567; Laforest *v.* His Creditors, 18 La. Ann. 292; Mayfield *v.* Comeau, 7 Mart. N. S. (La.) 180.

Creditors meeting for other purposes see *supra*, III, C, 3, e; IV, A, 2; IV, D, 3; and *infra*, VI, C, 3, d.

Creditors who hold claims payable in the future are upon the same footing as those whose claims are payable at present, and entitled to a voice in passing upon the terms of sale. Leger *v.* Arceneaux, 5 Rob. (La.) 513.

Silence of a creditor who is present at a creditors' meeting precludes him from subsequently objecting to the terms. Frere *v.* Robertson, 23 La. Ann. 541.

10. Sloan *v.* Apgar, 24 N. J. L. 608; Robins *v.* Bellas, 4 Watts (Pa.) 255.

Perishable property, however, or that which is likely to deteriorate by reason of delay, might be disposed of at private sale with the approval of the court. See Vt. St. § 2108, which provides that, where the title to perishable property in the hands of an assignee in insolvency is disputed, it may be sold. Nichols *v.* Bingham, 70 Vt. 320, 40 Atl. 827.

Where a bidder fails to complete his purchase, the syndic may resell without advertising anew. New Orleans Mut. Ins. Co. *v.* Ruddock, 22 La. Ann. 46.

11. Shaeffer *v.* Child, 7 Watts (Pa.) 84.

12. Property partly subject to lien.—Where the messenger of an insolvent sells the property without separating the mortgaged property from the unmortgaged, and does not follow the terms of the mortgage in selling the mortgaged property, the act of the assignee in knowingly demanding and receiving the proceeds of such sale constitutes an affirmance thereof. Labbe *v.* Hadfield, 180 Mass. 219, 62 N. E. 262.

13. Williamson *v.* His Creditors, 5 Mart. (La.) 618; Eschbach *v.* Pitts, 6 Md. 71; Westminster Bank *v.* Whyte, 1 Md. Ch. 536; Ives *v.* Commissioner of Insolvents, Wright

be sold subject to the lien or encumbrance upon proper notice of the existence of such lien or encumbrance.[14]

(4) Discretion of Assignee or Trustee. The assignee or trustee may like other agents exercise his discretion and, under proper circumstances, suspend the sale if the property is likely to be sacrificed.[15]

(D) *Payment of Purchase-Price.* The purchase-price of property sold by the insolvent should be paid to the assignee or trustee.[16]

(E) *Setting Aside Sale.* In order to set aside a sale it must be because of irregularity,[17] illegality,[18] or unfair conduct,[19] or because more could have been obtained for the property.[20] Otherwise it will be ratified.[21] A sale illegally made can be set aside only on motion of proper parties;[22] the insolvent will not be permitted to question it.[23]

(F) *Title and Rights of Purchaser.* The trustee or assignee being vested with the title which the insolvent had,[24] with like rights with respect thereto, except as to property fraudulently transferred by the insolvent,[25] a purchaser

(Ohio) 626; Nichols *v.* Bingham, 70 Vt. 320, 40 Atl. 827. See *supra*, IV, C, 2, d, (II).

Property subject to a lien or mortgage may be disposed of subject to or free of the lien, and on terms to be fixed by the creditors or the court. Spears *v.* Creditors, 40 La. Ann. 650, 4 So. 567.

If sold free of the liens, the funds would be deemed to stand in lieu of the property sold. Nichols *v.* Bingham, 70 Vt. 320, 40 Atl. 827. See also cases cited *supra*, this note.

Interest in favor of a mortgage creditor ceases from the sale of the mortgaged property. Collier *v.* His Creditors, 12 Rob. (La.) 398.

Where leasehold property subject to a mortgage is sold, the taxes and ground-rent due thereon are payable out of the proceeds of sale, although such proceeds are insufficient to satisfy the mortgage. Stewart *v.* Clark, 60 Md. 310.

14. New Prague Milling Co. *v.* Schreiner, 70 Minn. 125, 72 N. W. 963. See also Nicholl *v.* Nicholl, 8 Paige (N. Y.) 349.

The syndic has no authority to release a mortgage existing on property of the insolvent when he became the owner, as the mortgagee is not the insolvent's creditor. Foley *v.* Dufour, 17 La. 521.

15. Egerton *v.* His Creditors, 2 Rob. (La.) 201.

16. See *supra*, IV, B, 2, 3; and statutes of the several states.

Where the purchaser fails to comply with his bid and the court orders a resale, the original sale is not thereby vacated so as to release the purchaser, who will still be liable for any deficiency on the second sale. Gordon *v.* Matthews, 30 Md. 235. See Shropshire *v.* His Creditors, 15 La. Ann. 705.

In an action by an assignee to enforce payment of a bid for property of the insolvent at a constable's sale, defendant may set off his claim for money borrowed from him by the insolvent, which had been filed and proved against the insolvent's estate. Meherin *v.* Saunders, (Cal. 1889) 56 Pac. 1110.

17. Murphy *v.* Philbrook, 57 N. Y. Super. Ct. 204, 6 N. Y. Suppl. 543.

The buying off of a higher bidder in order that a lower tender be accepted will be deemed a fraud. Jacobs *v.* Ransom, 5 Quebec 260.

18. See Coombs *v.* Persons Unknown, 82 Me. 326, 19 Atl. 826.

Certain creditors combined to puff the price, but there was no evidence that they were employed or acting on behalf of the assignee, or that their conduct was known to him. In such case the purchaser could not have the sale vacated by reason of the acts of such creditors. Rowley *v.* D'Arcy, 184 Mass. 550, 69 N. E. 325, 64 L. R. A. 190.

19. McCullough Export Lumber, etc., Co. *v.* Brunswick Nat. Bank, 111 Ga. 132, 36 S. E. 465.

Inconsistent conduct.— Ouliber *v.* His Creditors, 16 La. Ann. 287.

20. *In re* Leger, 17 L. C. Jur. 84. See also *In re* Nichols, (Cal. 1897) 50 Pac. 1072.

Failure to sell in parcels.— An assignee of an insolvent cannot be charged with the difference between what the property brought and what the court held it would have brought if sold in parcels, if he acted in good faith and with reasonable care. *In re* Nichols, (Cal. 1897) 50 Pac. 1072.

The proper remedy, where personal property is sold by an assignee of an insolvent *en masse*, and would have brought a larger price if sold in parcels, is to move the court to set aside the sale. *In re* Nichols, (Cal. 1897) 50 Pac. 1072.

21. McHenry *v.* McVeigh, 56 Md. 578; Thomas *v.* Beals, 154 Mass. 51, 27 N. E. 1004.

Where the assignee has purchased property of the estate, there being no fraud, the remedy of the insolvent, if he would seek to avoid the transaction, is in chancery. Sowles *v.* Lewis, 75 Vt. 59, 52 Atl. 1073.

22. Arcenaux *v.* His Creditors, 6 La. 6.

One who is not a creditor would have no right to interfere with the sale. Beatty *v.* Wright, 7 Mart. N. S. (La.) 285.

23. Mayfield *v.* Comeau, 7 Mart. N. S. (La.) 180; Steib *v.* Keiser, 23 La. Ann. 337.

24. Campbell *v.* Slidell, 5 La. Ann. 274.

25. See *supra*, IV, C.

from the assignee or trustee, as the case may be, is as a rule subrogated to the rights of such person.[26]

(III) *Contracts, Investments, and Expenditures.*[27] Necessary expenditures incurred in the care and preservation of the estate,[28] including counsel fees, will be allowed the trustees or assignee of an insolvent.[29] He may enter into contracts or agreements for the settlement of claims against or in favor of the estate when for its best interests.[30]

6. Accounts, Statements, and Reports of Assignee or Trustee.[31] The trustee or assignee of an insolvent is required to keep such accounts and submit such reports and statements as are called for by statute.[32]

7. Liability of Assignee or Trustee in General — a. Rules of Liability Stated. The trustee or assignee of an insolvent will be personally liable for losses resulting to an estate by reason of his negligence, fault, or misconduct in the administration of the estate.[33] Depreciation in the value of the property after coming into the

26. Hence a chose in action belonging to an assigned estate sold by the assignee or trustee may properly be prosecuted by the purchaser in the name of the trustee or assignee. Hart *v.* Stone, 30 Conn. 94.

A purchaser of mortgaged property from an assignee in insolvency of the mortgagor has the same right as the assignee to avoid the mortgage for fraud. Shay *v.* Duluth Security Bank, 67 Minn. 287, 69 N. W. 920.

A purchaser from an assignee who fails to record his deed cannot complain if the property is subjected to an attachment on a claim against the insolvent, since the unrecorded deed will have no effect as against the party attaching the property without knowledge. Theall *v.* Disbrow, 39 Conn. 318. See also Campbell *v.* Slidell, 5 La. Ann. 274.

Actions enforceable only in right of creditors.— See Minnesota Thresher Mfg. Co. *v.* Langdon, 44 Minn. 37, 46 N. W. 310.

Failure to avoid fraudulent conveyance.— Where a conveyance made by an insolvent in fraud, which the trustee fails to avoid, has been assigned, an action cannot be maintained by a party in his own name to recover the value of the property conveyed. Morgan *v.* Abbott, 148 Mass. 507, 20 N. E. 165.

Unindorsed paper.— A purchaser from the assignee in insolvency of a note payable to the insolvent or his order, and not indorsed either by the insolvent or his assignee, may maintain an action thereon in the name of the insolvent against the maker, if the insolvent interposes no objection. Stone *v.* Hubbard, 7 Cush. (Mass.) 595.

A deed given by the sheriff, purporting to convey all the property of an insolvent, but without specifying it, only conveys the property surrendered by the insolvent in his schedule, where there is no evidence that the sheriff ever set up any claim to the land in dispute, as a fraudulent conveyance by the insolvent. Taylor *v.* Mallory, 96 Va. 18, 30 S. E. 472.

Warranty of title by official assignee see Johnston *v.* Barker, 20 U. C. C. P. 228.

27. Liability of assignee or trustee generally see *infra*, IV, D, 7.

28. Spiller *v.* His Creditors, 16 La. Ann. 292; Pandelly *v.* His Creditors, 1 La. Ann. 21. Taxes should be paid and charged to the estate. Loud *v.* Holden, 14 Gray (Mass.) 154.

29. Girard *v.* His Creditors, 1 Rob. (La.) 455; Kittredge *v.* Miller, 12 Ohio Cir. Ct. 128, 5 Ohio Cir. Dec. 391; Wooster *v.* Trowbridge, 120 Fed. 667, 57 C. C. A. 129 [*affirming* 115 Fed. 722]. See *infra*, VIII, C, 3.

Although he is himself an attorney he may employ counsel. Wilcox *v.* His Creditors, 11 Rob. (La.) 346.

Counsel fees not allowable.— Where the fee was for services rendered necessary by the neglect of the trustee it cannot be charged to the estate (Meilleur *v.* His Creditors, 3 La. 532); nor where it is for services of an attorney for non-resident creditors and not for all creditors (Pandelly *v.* His Creditors, 1 La. Ann. 21).

In Maryland it has been held that for prosecuting or defending the interests of the creditors, attorneys' fees will be allowed; but the trustee cannot employ a professional adviser and charge it to the estate. Nelson *v.* Pierson, 8 Md. 300.

30. International Trust Co. *v.* Boardman, 149 Mass. 158, 21 N. E. 239; Pierson *v.* Thompson, 1 Edw. (N. Y.) 212; Wooster *v.* Trowbridge, 115 Fed. 722 [*affirmed* in 120 Fed. 667, 57 C. C. A. 129].

31. Accounting and discharge of assignee or trustee see *infra*, IV, G.

32. See the statutes of the several states.

Provisional account conclusive.— See Conery *v.* His Creditors, 113 La. 420, 37 So. 14.

Upon the failure to render the necessary accounts or reports application should be made to the court for a rule to show cause. McAuley *v.* His Creditors, 4 La. Ann. 52; Canfield *v.* Walton, 9 Mart. (La.) 189; Harth *v.* Gibbes, 4 McCord (S. C.) 8.

33. Wadlow *v.* Markey, 95 Ill. App. 484; Chapoton *v.* Her Creditors, 47 La. Ann. 822, 17 So. 316; De Gruy *v.* His Creditors, 9 Rob. (La.) 458; Montilly *v.* His Creditors, 4 Rob. (La.) 142; Patin *v.* Her Creditors, 9 La. 64; Fitzgerald *v.* Philips, 4 Mart. (La.) 559.

An assignee advancing money from the dividends which may be declared on the borrower's claim does so at his own risk. Bedard *v.* Robitaille, 12 Quebec 308; *In re* Henault, (Quebec 1879) Consol. Dig. 671; *Re* Gareau, 23 L. C. Jur. 64.

hands of the trustee, when not the result of his fault, must be borne by the estate.[34] Likewise he will not be liable for mistakes when acting in good faith and pursuant to the advice of counsel.[35]

b. Liability of Co-Assignee or Co-Trustee. The liabilities and responsibilities of two or more trustees or assignees is joint, and not joint and several,[36] unless by statute it is otherwise provided.

c. Liability of Successive Assignee or Trustee. One trustee or assignee succeeding another will be substituted to the rights and liabilities of the person originally appointed to such position.[37]

E. Actions By or Against Assignee or Trustee[38] — **1. By Assignee or Trustee**[39] — **a. In General.** The trustee or assignee of an insolvent may bring any action that is necessary either for the protection of the estate or to recover property belonging to it.[40]

Continuing business beyond time authorized.—See Chinic *v.* Garneau, 7 Montreal Leg. N. 210.

Liability for rent.— See Hoyt *v.* Stoddard, 2 Allen (Mass.) 442.

Where the trustee misuses the funds belonging to the estate, or uses it in his own business, he will be chargeable with the principal and interest thereon. Davis *v.* Swedish-American Nat. Bank, 78 Minn. 408, 80 N. W. 953, 81 N. W. 210, 79 Am. St. Rep. 400; Swedish-American Nat. Bank *v.* Davis, 71 Minn. 508, 74 N. W. 286.

34. Montilly *v.* His Creditors, 4 Rob. (La.) 142.

Where a loss results from a deposit of funds in a trust company, it was held that there was no liability. McCollister *v.* Bishop, 78 Minn. 228, 80 N. W. 1118.

35. During's Appeal, 13 Pa. St. 224.

36. Yard *v.* His Creditors, 2 Rob. (La.) 400; Percy *v.* Millaudon, 3 La. 568; Meilleur *v.* His Creditors, 3 La. 532; Preval *v.* Moulon, 11 Mart. (La.) 530.

In Louisiana it has been held that a syndic cannot sue his co-syndics for funds of the estate in the latter's hands, but the remedy should be exercised by the creditors. Preval *v.* Moulon, 11 Mart. (La.) 530.

They should unite in all judicial proceedings and other matters, unless the interests of one or more are antagonistic, when the court may properly authorize the remaining trustees to act. Hoffman *v.* Armstrong, 90 Md. 123, 44 Atl. 1012.

37. Bach *v.* Miller, 16 La. Ann. 44; International Trust Co. *v.* Boardman, 149 Mass. 158, 21 N. E. 239.

38. Action by creditor in aid of proceedings see *supra*, IV, D, 5, a.

Action by or against insolvent see *infra*, VI, A, 1.

Death of assignee as ground for abatement see Abatement and Revival, 1 Cyc. 69.

Rights as to pending actions see *supra*, VI, A, 1, a.

39. By foreign assignee.— The English courts hold that a foreign assignee in insolvency can sue in their courts as if he were an assignee under their own law; but the courts of this country have generally refused their assent to this doctrine and class foreign assignees or trustees with foreign executors, administrators, and guardians, whose title and power being created by law, have no legal existence beyond the limits of the particular sovereignty by which created, hence the assignee or trustee in insolvency cannot, as a rule, maintain a suit in any other state than the one in which appointed. Upton *v.* Hubbard, 28 Conn. 274, 73 Am. Dec. 670; Metcalf *v.* Yeaton, 51 Me. 198; Fisk *v.* Brackett, 32 Vt. 798, 78 Am. Dec. 612; Betton *v.* Valentine, 3 Fed. Cas. No. 1,370, 1 Curt. 168. *Contra*, Hooper *v.* Tuckerman, 3 Sandf. (N. Y.) 311. See also Executors and Administrators, 18 Cyc. 1237 *et seq.*; Guardian and Ward, 21 Cyc. 269 *et seq.*

40. Stanton *v.* Lewis, 26 Conn. 444; Duncan *v.* Duncan, 3 Mart. (La.) 230; Randon *v.* Toby, 11 How. (U. S.) 493, 13 L. ed. 784. See also Porteous *v.* Reynar, 13 App. Cas. 120, 57 L. J. P. C. 28, 57 L. T. Rep. N. S. 891, 32 L. C. Jur. 55, 11 Montreal Leg. N. 9 [*reversing* 11 Quebec 297]; Dion *v.* Plante, 19 Rev. Lég. 184 [*confirming* 18 Rev. Lég. 509]; Brown *v.* Smith, 13 L. C. Jur. 288.

Extent and limits of rule see Davis *v.* Winona Wagon Co., 120 Cal. 244, 52 Pac. 487 (may sue for conversion of personalty sold to defraud creditors); Boyd *v.* Partridge, 94 Me. 440, 47 Atl. 911 (may sue to cancel and discharge a mortgage not recorded within statutory period); Doe *v.* Roe, 89 Me. 523, 36 Atl. 1001 (recovery of proceeds of claims transferred by the debtor in contemplation of insolvency); Rossman *v.* Mitchell, 73 Minn. 198, 75 N. W. 1053 (replevin of personalty sold); Miller *v.* Condit, 52 Minn. 455, 55 N. W. 47 (may enforce mechanic's lien). In Flagg *v.* Reed, 157 Mass. 468, 32 N. E. 665, it was held that a statute giving an assignee in insolvency the same right to recover the assigned estate as the debtor would have had did not allow an action of contract to be brought by the assignee against the debtor for assets which have not been turned over, or any other remedy than that mentioned.

Doubtful claims.— It is the duty of an assignee or trustee in insolvency of an insolvent corporation to prosecute meritorious claims to judgment, but he is not required to prosecute a doubtful claim. Wooster *v.* Trowbridge, 115 Fed. 722.

b. To Set Aside Fraudulent Conveyance[41] — (i) *In General.* The trustee or assignee in insolvency after he has qualified may maintain an action to set aside a conveyance or preference made by the insolvent debtor with the purpose of unlawfully defrauding or preferring his creditors.[42]

Property fraudulently concealed by the debtor may be recovered. Dunlap *v.* O'Connor, 9 La. Ann. 558; Chamberlain *v.* O'Brien, 46 Minn. 80, 48 N. W. 447.

Restraining interference with assets.— The trustee in insolvency is the proper person to institute the proceedings for the purpose of restraining any interference with the assets of the insolvent. Lynch *v.* Roberts, 57 Md. 150; Bigelow *v.* Smith, 2 Allen (Mass.) 264. See INJUNCTIONS; and *supra*, III, E, 1, 2.

That a firm prefers a creditor through a corporation, formation of which was a mere device to give the preference, does not affect the right of the firm's assignee to recover the preference. Jaquith *v.* Winnisimmet Nat. Bank, 182 Mass. 53, 64 N. E. 723.

Trustee process.— Under a statute avoiding conveyances and transfers in contemplation of insolvency, an action by an assignee in insolvency to recover goods transferred by the insolvent shortly before adjudication, or their value, may be commenced by trustee process. Rothschild *v.* Knight, 184 U. S. 334, 22 S. Ct. 391, 46 L. ed. 573 [*affirming* 176 Mass. 48, 57 N. E. 337].

Respective rights of individual assignee and firm assignee.— See Jaquith *v.* Winnisimmet Nat. Bank, 182 Mass. 53, 64 N. E. 723.

Intervention.— While an assignee may intervene in an action by the receiver in insolvency, and join in seeking a recovery against defendant, his prayer that plaintiff, as receiver, may be compelled to account to him, as assignee, for any recovery, is at least superfluous, as the assignee, without resorting to a separate action, may call the receiver to account before the court in insolvency. One intervening as assignee in insolvency must aver and prove the assignment to him. Ward *v.* Healy, 114 Cal. 191, 45 Pac. 1065.

Joinder of assignees or trustees.— See Hoffman *v.* Armstrong, 90 Md. 123, 44 Atl. 1012.

The trustee under an assignment for the benefit of creditors has no right to vacate deeds made in fraud of his creditors by the assignor before the assignment, while a trustee in insolvency, representing all the creditors, has such power. Gardner *v.* Gambrill, 86 Md. 658, 39 Atl. 318.

41. Fraudulent conveyance generally see FRAUDULENT CONVEYANCES.

42. *California.*— Ruggles *v.* Cannedy, (1898) 53 Pac. 911. But *compare* McNeil *v.* Hansen, 115 Cal. 214, 46 Pac. 1065.

Connecticut.— Gaylor *v.* Harding, 37 Conn. 508.

Louisiana.— Gogreve *v.* Dehon, 41 La. Ann. 244, 6 So. 31; Keane *v.* Goldsmith, 14 La. Ann. 349; Ingham *v.* Thomas, 6 La. 82.

Maine.— Taylor *v.* Taylor, 74 Me. 582. *Compare* Boyd *v.* Partridge, 94 Me. 440, 47 Atl. 911.

Maryland.— Applegarth *v.* Wagner, 86 Md. 468, 38 Atl. 940; Manning *v.* Carruthers, 83 Md. 1, 34 Atl. 254; Diggs *v.* McCullough, 69 Md. 592, 16 Atl. 453; Waters *v.* Dashiell, 1 Md. 455; Gardner *v.* Lewis, 7 Gill 377; Dulaney *v.* Hoffman, 7 Gill & J. 170, 28 Am. Dec. 207.

Massachusetts.— Hubbel *v.* Currier, 10 Allen 333; Bartholomew *v.* McKinstry, 2 Allen 448; Butler *v.* Hildreth, 5 Metc. 49. See also Jaquith *v.* Winnisimmet Nat. Bank, 182 Mass. 53, 64 N. E. 723. *Compare* Cunningham *v.* Seavey, 71 Mass. 341, 50 N. E. 545.

Minnesota.— Hawkins *v.* Ireland, 64 Minn. 339, 67 N. W. 73, 58 Am. St. Rep. 534; Baker *v.* Pottle, 48 Minn. 479, 51 N. W. 383; Gallagher *v.* Rosenfeld, 47 Minn. 507, 50 N. W. 696; *In re* Church, etc., Mfg. Co., 40 Minn. 39, 41 N. W. 241; Chamberlain *v.* O'Brien, 46 Minn. 80, 48 N. W. 447; Parsons *v.* George, 44 Minn. 151, 46 N. W. 325. *Compare* Fisher *v.* Utendorfer, 68 Minn. 226, 71 N. W. 29.

New Jersey.— Thompson *v.* Esby, 69 N. H. 55, 45 Atl. 566.

New York.— Southard *v.* Benner, 72 N. Y. 424.

Pennsylvania.— Tams *v.* Bullitt, 35 Pa. St. 308; Moncure *v.* Hanson, 15 Pa. St. 385; Thomas *v.* Phillips, 9 Pa. St. 355; Huntsecker *v.* Heiney, 11 Serg. & R. 250; Englebert *v.* Blanjot, 2 Whart. 240; Sullivan *v.* Hieskell, 4 Pa. L. J. 171.

Rhode Island.— Colt *v.* Sears Commercial Co., 20 R. I. 323, 38 Atl. 1056.

See 28 Cent. Dig. tit. "Insolvency," § 133.

Failure of a trustee to sue to set aside will not preclude creditors from proceeding against the property covered by such fraudulent conveyance. Quinnipiac Brewing Co. *v.* Fitzgibbons, 71 Conn. 80, 40 Atl. 913.

In Maryland the trustee has the right to file a bill to set aside a conveyance made by his insolvent as fraudulent, at common law or under the statutes of Elizabeth, against creditors. Atkinson *v.* Phillips, 1 Md. Ch. 507. See, generally, FRAUDULENT CONVEYANCES.

Bona fide third person.— Where a party to whom property has been fraudulently transferred conveys it for value to third persons, the trustee cannot institute suit against such third persons for the purpose of setting aside the conveyance. Clark *v.* Jones, 5 Allen (Mass.) 379.

Compelling assignee.— Where it is the plain duty of an assignee of an insolvent estate to attack a preference by the assignor, he may be compelled to do so, on petition of the creditors, or be removed by the court. Colt *v.* Sears Commercial Co., 20 R. I. 323, 38 Atl. 1056.

Discretion of assignee.— Under the statute giving the assignee of an insolvent estate the

(II) *Conditions Precedent.*[43] Demand,[44] tender,[45] or leave of court obtained[46] has been decided to be unnecessary as a condition precedent to action by the assignee to set aside a fraudulent transfer or preference.

c. Authority to Sue.[47] In most jurisdictions a certified copy of the assignment is conclusive evidence of the assignee's authority to sue or defend proceedings instituted against the insolvent or his estate.[48]

2. Against Assignee or Trustee.[49] The trustee or assignee may be sued in his representative capacity to recover property claimed to have been illegally withheld or for the purpose of foreclosing a mortgage secured on assigned property.[50]

3. Defenses. The same general defenses applicable in the case of an individual are available in suits brought by an assignee or trustee in insolvency,[51] or in suits brought against them.[52]

authority to avoid a preference by the assignor it is within his discretion whether he will attempt to avoid a preference or not. Colt *v.* Sears Commercial Co., 20 R. I. 323, 38 Atl. 1056.

43. **Conditions precedent** generally see Actions, 1 Cyc. 692 *et seq.*

44. Hill *v.* Buechler, 73 Conn. 227, 47 Atl. 123, so held under Gen. St. c. 52, providing that all transfers of property by a person in failing circumstances shall be void which are not in writing and for the benefit of all creditors and recorded in the proper court, but no transfer otherwise valid shall be thus made void unless proceedings in insolvency are instituted within six months, in an action by a trustee in insolvency under the statute to set aside a transfer of property by an insolvent.

45. Tender need not as a rule first be made to defendant of the money paid by him to the insolvent at the time the fraudulent agreement was entered into as a consideration therefor. Gardner *v.* Lewis, 7 Gill (Md.) 377; Tapley *v.* Forbes, 2 Allen (Mass.) 20. See also Larkin *v.* Hapgood, 56 Vt. 597.

46. Moore *v.* Hayes, 35 Minn. 205, 28 N. W. 238, holding that the receiver of an insolvent may maintain an action to avoid a preference to a creditor without first obtaining leave of court.

47. **Necessity of alleging fact of assignment** see *infra*, IV, E, 6.

Necessity for bond see *supra*, IV, A, 5, b.

48. Riego *v.* Foster, 125 Cal. 178, 57 Pac. 896; Luhrs *v.* Kelly, 67 Cal. 289, 7 Pac. 696; Palmer *v.* Jordan, 163 Mass. 350, 40 N. E. 110; Howes *v.* Burt, 130 Mass. 368; Doane *v.* Russell, 3 Gray (Mass.) 382; Wheelock *v.* Hastings, 4 Metc. (Mass.) 504; Partridge *v.* Hannum, 2 Metc. (Mass.) 569; Cutler *v.* Dunn, 68 N. H. 394, 44 Atl. 536; Rockwell *v.* Brown, 54 N. Y. 210; Rockwell *v.* McGovern, 40 N. Y. Super. Ct. 118.

Bringing of a suit by a trustee in insolvency has been held conclusive evidence of his having accepted the trust and *prima facie* evidence that he has duly qualified. Taylor *v.* Atwood, 47 Conn. 498.

Trustee's authority cannot be impeached by proof that the signers of the insolvency petition were not actual creditors of the insolvent in the amount required by the statute (Riego *v.* Foster, 125 Cal. 178, 57 Pac. 896), or that there were other irregularities in the preliminary proceedings (Wheelock *v.* Hastings, 4 Metc. (Mass.) 504).

In Louisiana where one who claims to be a syndic of the transferee of a mortgage note applies for an order of seizure and sale of the note he must prove the assignment and his appointment. Chaffe *v.* Carroll, 34 La. Ann. 122.

49. **Compelling necessary accounts and reports** see *supra*, IV, F, 6.

50. Carney *v.* Dewing, 10 Cush. (Mass.) 498; Niantic Mills Co. *v.* Riverside, etc., Mills, 19 R. I. 34, 31 Atl. 432; Penn Mut. L. Ins. Co. *v.* Fife, 15 Wash. 605, 47 Pac. 27.

Suit will not be dismissed merely because the assignee was not sued in his representative capacity. Stein *v.* Swensen, 44 Minn. 218, 46 N. W. 360.

Ordinary suit, and not summary proceeding is method of holding syndic personally liable. Clossman *v.* Barbancey, 2 Rob. (La.) 346; Seghers *v.* Phillips, 3 Mart. (La.) 646.

Leave of court to sue.— See Penn Mut. L. Ins. Co. *v.* Fife, 15 Wash. 605, 47 Pac. 27.

51. See Mogk *v.* Peterson, 75 Cal. 496, 17 Pac. 446 (holding that a defendant, in an action by an assignee of an insolvent estate to recover certain property for the benefit of creditors, cannot raise the question whether the assignee's bond was filed properly within the time allowed by statute, the creditors and debtor having acquiesced therein); Rodriguez *v.* Dubertrand, 1 Rob. (La.) 535; Cochrane *v.* Bridendolph, 72 Md. 275, 19 Atl. 604; Clarke *v.* Springfield Second Nat. Bank, 177 Mass. 257, 59 N. E. 121.

Set-off or counter-claim.— In an action by a receiver of an insolvent, a demand due from the insolvent to defendant before appointment of the receiver may be set off in a case otherwise proper. Sheafe *v.* Hastie, 16 Wash. 563, 48 Pac. 246. See also Northern Trust Co. *v.* Hiltgen, 62 Minn. 361, 64 N. W. 909.

52. See Dow *v.* Sutphin, 47 Minn. 479, 50 N. W. 604 (setting up fraudulent preference in action against him by creditor for conversion of mortgaged property); Whitmore *v.*

4. Jurisdiction.[53] Actions by an assignee or trustee against some third person[54] or against the assignee or trustee by some third person[55] may be brought in the same court as if by an ordinary plaintiff or against an ordinary defendant, unless by statute the court having jurisdiction of the insolvency proceedings is given exclusive jurisdiction with reference to all matters concerning the insolvent's estate.

5. Parties.[56] In proceedings either at law or in equity, the real parties in interest must be made parties plaintiff or defendant.[57] After the institution of insolvency proceedings, in an action commenced prior thereto by the insolvent, his trustee or assignee should be substituted as party plaintiff,[58] and where the insolvent is defendant, his trustee or assignee should be substituted as defendant.[59] The insolvent is not a necessary party in proceedings against his estate.[60] An action brought in behalf of the insolvent's estate, after the institution of insolvency proceedings, should be in the name of the assignee or trustee.[61]

6. Pleading.[62] With the exception of an averment of the capacity in which the assignee or trustee sues or is sued,[63] the same general rules of pleading apply in proceedings in insolvency as in other litigations.[64]

7. Evidence — a. In General. The reception or rejection of evidence,[65] as

Murdock, 29 Fed. Cas. No. 17,509, 3 Woodb. & M. 380 (failure of consideration for notes).

53. Right of assignee to sue in federal court see Courts.

54. Meader *v.* Root, 11 Ohio Cir. Ct. 81, 5 Ohio Cir. Dec. 61.

55. Church *v.* St. Paul Title Ins., etc., Co., 58 Minn. 472, 59 N. W. 1103.

56. Parties generally see Parties.

57. Traders' Deposit Bank *v.* Hoffman, 99 Ky. 240, 35 S. W. 631, 18 Ky. L. Rep. 148; Lawrence *v.* Batcheller, 131 Mass. 504; Whittemore *v.* Cowell, 7 Allen (Mass.) 446; Warren *v.* Howard, 99 N. C. 190, 5 S. E. 424.

Creditors when not necessary parties.— *In re* George, (R. I. 1896) 35 Atl. 676.

58. Merrill *v.* McLaughlin, 75 Me. 64; Movan *v.* Hays, 1 Johns. Ch. (N. Y.) 339; Cleverly *v.* McCullough, 6 Rich. (S. C.) 517; Zane *v.* Fink, 18 W. Va. 693.

Trustee is a necessary party to the bill filed by the creditors to vacate a fraudulent conveyance made by an insolvent before his application. Swan *v.* Dent, 2 Md. Ch. 111.

59. Pround *v.* Foisy, 21 Rev. Lég. 515; Roche *v.* Words, 8 Quebec 122.

60. Brattleboro First Nat. Bank *v.* Waite, 57 Vt. 608; Page *v.* Olcott, 28 Vt. 465.

61. Prevost *v.* Walther, 48 La. Ann. 227, 19 So. 249; Williamson *v.* Selden, 53 Minn. 73, 54 N. W. 1035; Van Valkenburg *v.* Elmendorf, 13 Johns (N. Y.) 314.

That suit is instituted in trustee's representative capacity should appear. See White *v.* Sergeant Ct. of App., 1 T. B. Mon. (Ky.) 52.

An assignment not under the Insolvent Act, for the benefit of the general creditors, it has been held, does not entitle the assignee to sue in his own name for anything connected with such assignment. Prevost *v.* Drolet, 18 L. C. Jur. 300.

62. Pleading generally see Pleading.

63. The fact of the assignment should properly be averred in the complaint in an action instituted by the trustee or assignee. Farnsworth *v.* Sutro, 136 Cal. 241, 68 Pac. 705; King *v.* Felton, 63 Cal. 66; Dukeylus *v.* Dumontel, 4 Mart. (La.) 466; Northern Trust Co. *v.* Jackson, 60 Minn. 116, 61 N. W. 908. In some states in an action by a trustee it cannot be objected that he has not shown that he is the assignee, unless the fact is put in issue by a special plea. Kane *v.* Fisher, 2 Watts (Pa.) 246; Cooper *v.* Henderson, 6 Binn. (Pa.) 189. In other states plaintiff must prove the character in which he sues, although only the general issue is pleaded. Winchester *v.* Union Bank, 2 Gill & J. (Md.) 73, 19 Am. Dec. 253; Best *v.* Strong, 2 Wend. (N. Y.) 319, 20 Am. Dec. 607.

When intervening as assignee in insolvency, the assignee must aver and prove the assignment to him. Ward *v.* Healy, 114 Cal. 191, 45 Pac. 1065.

64. See, generally, Pleading.

Trover.— Under an insolvent law, providing that when any transfer of property has been made contrary to the provisions of the act the assignee may recover the property, "or the value thereof," an assignee in insolvency is entitled to sue for the value of the property without averring that a redelivery cannot be had. Perkins *v.* Maier, etc., Brewery, 134 Cal. 372, 66 Pac. 482.

65. Hill *v.* Buechler, 73 Conn. 227, 47 Atl. 123 (evidence tending to show condition of one making alleged fraudulent transfer of goods); Belden *v.* Edwards, 2 Day (Conn.) 246 (parol evidence of specific act of bankruptcy not shown by the declaration in bankruptcy); Canfield *v.* Maher, 4 Mart. N. S. (La.) 174 (insolvent's books as showing regularity of transfer by him on eve of insolvency); Clarke *v.* Second Nat. Bank, 177 Mass. 257, 59 N. E. 121 (assignor's assets, conduct, etc., as showing his intent).

To show reasonable cause for believing grantor or debtor to be insolvent see Jaquith *v.* Winnisimmet Nat. Bank, 182 Mass. 53, 64 N. E. 723; Chipman *v.* McClellan, 159 Mass. 363, 34 N. E. 379; Killam *v.* Peirce, 153 Mass. 502, 27 N. E. 520 (common repute as to

well as the weight of the evidence and the sufficiency of the proof,[66] in actions by or against assignees or trustees in insolvency, is subject to the general rules of evidence,[67] except in cases where by statute a different rule is provided.[68]

doing business on borrowed money); Alden *v.* Marsh, 97 Mass. 160 (reputation of neglecting and mismanaging business); Marsh *v.* Hammond, 11 Allen (Mass.) 483 (prior representations of inability to pay debts at maturity); Bartholomew *v.* McKinstry, 6 Allen (Mass.) 567; Whitcher *v.* Shattuck, 3 Allen (Mass.) 319 (want of good credit); Simpson *v.* Carleton, 1 Allen (Mass.) 109, 79 Am. Dec. 707 (debtor's expensive habits and non-attention to business); Denny *v.* Dana, 2 Cush. (Mass.) 160, 48 Am. Dec. 655 (general state of trade where both debtor and creditor are engaged in relative occupations). On the question of reasonable cause, however, it is inadmissible to show that the mortgagee, before he took the mortgage, was himself indebted to other persons who were pressing him for payment (Purinton *v.* Chamberlin, 131 Mass. 589); that insolvent made certain statements as to the value of property sold by him and of his other property (Heywood *v.* Reed, 4 Gray (Mass.) 574); that the purchaser did not believe the vendor insolvent (Coburn *v.* Proctor, 15 Gray (Mass.) 38). Nor can the transferee testify as to his own acts or declarations. Hazelton *v.* Allen, 3 Allen (Mass.) 114. Declarations of an insolvent that he received full consideration for the mortgage are inadmissible. Bicknell *v.* Mellett, 160 Mass. 328, 35 N. E. 1130. Certified copies of the schedules of debts and lists of claims filed in the insolvency proceedings are incompetent to prove that the debtor was insolvent at the time of the conveyance. Simpson *v.* Carleton, 1 Allen (Mass.) 109, 79 Am. Dec. 707. But see Heywood *v.* Reed, 4 Gray (Mass.) 574.

Evidence of good faith and to rebut inference of reasonable cause see Perry *v.* Hadley, 148 Mass. 48, 18 N. E. 575; Metcalf *v.* Munson, 10 Allen (Mass.) 491; Carpenter *v.* Leonard, 3 Allen (Mass.) 32 (previous representations made to a mortgagee as to debtor's financial condition); Heywood *v.* Reed, 4 Gray (Mass.) 574 (pecuniary standing of debtor among his neighbors); Amsden *v.* Fitch, 67 Vt. 522, 32 Atl. 478.

Usual course of business.— Where a mortgage covered practically all an insolvent's property, whether it was in the usual and ordinary course of business of the debtor is a question of fact for the jury, and the opinion of witnesses upon the question is inadmissible. Buffum *v.* Jones, 144 Mass. 29, 10 N. E. 471. Where a retail dealer with an unencumbered stock mortgages it, it was held proper to submit all the facts to the jury. Alden *v.* Marsh, 97 Mass. 160. Where the evidence shows that the mortgagor was a millwright, with no other occupation, and made a mortgage upon his homestead to secure a preëxisting debt, the jury has been instructed that the mortgage was not in the usual and ordinary course of business. Nary *v.* Merrill, 8 Allen (Mass.) 451. Where an insolvent sold his stock, taking notes in payment, and late at night, following close upon the sale, he indorses the notes to defendant's agents in payment of his indebtedness to them, it has been held that the court would have been warranted in finding as a fact that the payment was not made in the ordinary course of business. Killam *v.* Peirce, 153 Mass. 502, 27 N. E. 520.

Insolvent is a competent witness as to his own intent. Stearns *v.* Gosselin, 58 Vt. 38, 3 Atl. 193.

66. See cases cited *infra*, this note. See also Quinebaug Bank *v.* Brewster, 30 Conn. 599, holding that in determining whether a conveyance was made with the view to insolvency, the ordinary rules of evidence are to be applied and the parties are not to be charged with knowledge which by a fair and legal application of those rules they cannot be found to have possessed. See also Dunn *v.* Train, 125 Fed. 221, 60 C. C. A. 113.

A sale, although prima facie fraudulent, will not be disturbed on evidence, although conflicting, where the vendee had no knowledge of the vendor's insolvency, and the price agreed upon was the fair value of the property. Grunsky *v.* Parlin, 110 Cal. 179, 42 Pac. 575.

A mortgage given by an insolvent will not be annulled, where the creditor denied that he had any knowledge that his debtor was insolvent at the time the mortgage was given. Chapoton *v.* Her Creditors, 45 La. Ann. 451, 12 So. 495.

The intent to prefer may be shown by facts and circumstances as well as by direct proof. Powles *v.* Dilley, 9 Gill (Md.) 222; Jaquith *v.* Winnisimmet Nat. Bank, 182 Mass. 53, 64 N. E. 723. But when, by answering the evidence, the debtor denies the intent attributed, very strong evidence is necessary to countervail such answer or evidence. Brooks *v.* Thomas, 4 Md. Ch. 15. The fact that a party preferring his creditors, when he executed the deed could not apply for the benefit of the insolvent laws for want of the residence required to bring him within their provisions is a strong circumstance to show that it was not in his view and expectation at that time to take the benefit of such laws. Glenn *v.* Baker, 1 Md. Ch. 73. Evidence is insufficient to show that a conveyance was voluntary and with a view to taking advantage of the Insolvency Act, where it was made in consideration of payments made by the grantee for the grantor, which, with advances made, amounted to the full value of the real estate conveyed. Syester *v.* Brewer, 27 Md. 288.

67. See, generally, EVIDENCE.

A discharged debtor is a competent witness for his assignee, on releasing the latter from all claims against him as such. Greene *v.* Durfee, 6 Cush. (Mass.) 362.

68. See the statutes of the several states.

b. Presumptions and Burden of Proof. A conveyance made by an insolvent to his assignee in the insolvency proceedings is *prima facie* evidence of title.[69] The intent of an insolvent to give a preference may be inferred from the fact that a preference has been given.[70] In some states it is specifically provided by statute that a transfer of property by an insolvent not made in the ordinary course of business shall be made *prima facie* evidence of fraud.[71] The *onus probandi* is upon the party who seeks to disturb such preference to show that it is prohibited by the insolvent system of the state.[72]

8. Trial. The general rules applicable in ordinary litigation with reference to the trial[73] and submission of issues to a jury[74] apply with equal force in proceedings in insolvency.[75]

9. Damages. In respect to the recovery of damages in actions by or against an assignee or trustee in insolvency the usual rules relating to damages are applicable.[76]

F. Claims Against, and Distribution Of, Estate[77] — 1. In General. The general rule is that the party in whom is vested the title to a claim should present and prove it in the insolvency proceedings.[78]

69. Rockwell *v.* Brown, 54 N. Y. 210; Rockwell *v.* McGovern, 40 N. Y. Super. Ct. 118.

70. Jaquith *v.* Winnisimmet Nat. Bank, 182 Mass. 53, 64 N. E. 723.

A sale by an insolvent, even within three months before his failure, is presumed legal until it be shown that the purchaser knew of the insolvency or was a creditor. McManus *v.* Jewett, 6 La. 530. See Gilbert *v.* His Creditors, 6 La. 145.

71. Haas *v.* Whittier, 97 Cal. 411, 32 Pac. 449.

Fraud will not be presumed, but must be clearly established. Cassidy *v.* His Creditors, 2 Rob. (La.) 47.

72. Sanborn *v.* Wilder, 68 N. H. 471, 41 Atl. 172; Cutler *v.* Dunn, 68 N. H. 394, 44 Atl. 536; Dunn *v.* Train, 125 Fed. 221, 60 C. C. A. 113. But see Lefebvre *v.* De Montilly, 1 La. Ann. 42.

The reason for this is because at common law a debtor in failing circumstances has the right to secure one creditor to the exclusion of others either by payment or a *bona fide* transfer of his property. Stewart *v.* Union Bank, 2 Md. Ch. 58.

73. **A finding** that transferees knew that a transfer was being made with intent to prefer creditors, and to prevent the property from coming to the assignee in insolvency, is not inconsistent with a finding that they were free from actual fraud, and believed their conduct lawful; actual fraud not being essential to avoid a transfer in violation of the Insolvency Act. Riego *v.* Foster, 125 Cal. 178, 57 Pac. 896.

Judgment.— In conversion against a certain person, individually and as assignee in insolvency, he cannot complain that the judgment is against him in his representative capacity, where the jury found that he converted the property to his own use. Rutan *v.* Wolters, 116 Cal. 403, 48 Pac. 385.

74. See Jaquith *v.* Winnisimmet Nat. Bank, 182 Mass. 53, 64 N. E. 723.

Proper instructions see Clarke *v.* Springfield Second Nat. Bank, 177 Mass. 257, 59 N. E. 121; Winchester *v.* Charter, 97 Mass. 140; Tapley *v.* Forbes, 2 Allen (Mass.) 20; Leonard *v.* Strong, 11 Gray (Mass.) 186.

Improper instructions see Dietus *v.* Fuss, 8 Md. 148; Clarke *v.* Springfield Second Nat. Bank, 177 Mass. 257, 59 N. E. 121; Clark *v.* Sawyer, 151 Mass. 64, 23 N. E. 726.

Directing verdict.— See Riggs *v.* Steele, 112 Ga. 241, 37 S. E. 379.

75. See, generally, Trial.

76. See, generally, Damages. See also Hazen *v.* Lyndonville Nat. Bank, 70 Vt. 543, 41 Atl. 1046, 67 Am. St. Rep. 680.

In an action by an assignee to recover the value of goods assigned in fraud of the insolvent law by the insolvent to one of his creditors, the measure of damages is the value of the goods at the time when the unlawful preference is made, and not at the time when the assignee might avail himself of their proceeds. Burpee *v.* Sparhawk, 97 Mass. 342.

In the case of a mortgage plaintiff may recover the amount of the mortgage rather than the value of the mortgage premises. Lewis *v.* Burlington Sav. Bank, 64 Vt. 626, 25 Atl. 835.

In tort for the conversion by the assignee of an insolvent debtor, of property claimed by plaintiff under a conveyance from the debtor, if the jury find the conveyance void as a preference not in payment of a pre-existing debt, plaintiff cannot recover cash paid by him to debtor for the difference in value between such property and the debt which the conveyance was made to secure. Bartlett *v.* Decreet, 4 Gray (Mass.) 111.

77. **Claim against:** Insolvent bank, see Banks and Banking. Insolvent corporation, see Corporations. Insolvent estate of decedent, see Executors and Administrators.

78. See *infra*, IV, F, 2.

It is not necessary to present to the assignee a claim to a trust fund, such presentation being in fact an election to stand as a general creditor. Haseltine *v.* McAfee, (Kan. App. 1897) 48 Pac. 886.

2. Creditors Entitled to Prove and Claims Provable — a. Creditors Entitled to Prove. Among the creditors who are entitled to prove their claims against the estate of an insolvent[79] are non-resident creditors; and as a rule they are entitled to participate in the assets according to the rank and classification of their claims the same as resident creditors.[80] Unless the statute provides to the contrary, a creditor who has received a preference may surrender the preference and prove for the full amount, or if he is preferred as to a part only, he may prove as to the balance.[81]

b. Claims Provable — (i) *In General.* Broadly stated all debts of the debtor which are due and payable may be proved and allowed against his estate.[82]

79. See the statutes of the several states. See also Reg. *v.* Henry, 21 Ont. 113 [*citing* Wood *v.* De Mattos, L. R. 1 Exch. 91; Grave *v.* Bishop, 25 L. J. Exch. 58]; Hall *v.* Lannin, 30 U. C. C. P. 204; Doyle *v.* Lasher, 16 U. C. C. P. 263.

Holders of notes see Mercantile Nat. Bank *v.* Macfarlane, 71 Minn. 497, 74 N. W. 287, 70 Am. St. Rep. 352; *In re* Rochette, 3 Quebec 97; *In re* Bessett, 15 L. C. Jur. 126 [*reversing* 14 L. C. Jur. 21]. See *infra*, note 82.

Payments by third party of sums due an insolvent, without transfer or subrogation, creating a debt subsequent to the insolvency, will not give to such party a right to rank on the insolvent estate of the debtor. Bryson *v.* Dickson, 3 L. C. Rep. 65, 3 Quebec Rev. Jud. Rep. 426.

Surety's right to prove see Sowles *v.* Lewis, 75 Vt. 59, 52 Atl. 1073.

The wife of an insolvent may prove a claim against her husband's estate, unless there is some statutory provision to the contrary. *In re* Doyle, (Cal. 1900) 59 Pac. 993; Rea *v.* Jaffray, 82 Iowa 231, 48 N. W. 78; Weeks *v.* Elliott, 93 Me. 286, 45 Atl. 29, 74 Am. St. Rep. 348.

Where the estate of a deceased creditor has not been settled and the claim or demand transferred by the executor to the next of kin, such next of kin are not entitled to prove the claim against an insolvent debtor or join in the petition for his discharge. Duer *v.* Hunt, 41 N. Y. App. Div. 581, 58 N. Y. Suppl. 742.

80. Tyler *v.* Thompson, 44 Tex. 497, 23 Am. Rep. 600.

81. Smith *v.* American Linen Co., 172 Mass. 227, 51 N. E. 1085; Black *v.* Mitchell, 15 Gray (Mass.) 381; Howland *v.* Mosher, 12 Cush. (Mass.) 357; *In re* Kahn, 55 Minn. 509, 57 N. W. 154.

Transferee of creditor.— A creditor who has received a preference cannot, by transferring his claim, put his transferee in any better position in this respect than himself in a state which forbids the proof of a claim by one who has received a preference. *In re* Kahn, 55 Minn. 509, 57 N. W. 154.

82. Taylor *v.* Wilcox, 167 Mass. 572, 46 N. E. 115 (under St. (1884) c. 293, allowing equitable liabilities to be proved in insolvency as debts, one having the right, by payment of a tax on property of the insolvent, to prove it as a privileged claim, may do so in her own name); Barker *v.* Mann, 4 Metc. (Mass.) 302 (debt of an insolvent debtor); Chemical Nat. Bank *v.* Hartford Deposit Co., 161 U. S. 1, 16 S. Ct. 439, 40 L. ed. 595 (rent due).

Claims against several insolvents.—A claim held by a creditor upon which several insolvents are liable may prove it against both estates, but cannot recover through one or both of such proceedings more than sufficient to satisfy his claim. Chaveaux *v.* Hagan, 4 La. 281; Morgan *v.* His Creditors, 4 La. 5; Armor *v.* His Creditors, 2 La. 376; Sohier *v.* Loring, 6 Cush. (Mass.) 537.

Credit for payments from others.— A creditor claiming against the estate of an insolvent must first allow credit for such amounts as may have been received from other persons either primarily or secondarily liable for the indebtedness. Ontario Bank *v.* Chaplin, 20 Can. Sup. Ct. 152 [*confirming* 17 Rev. Leg. 246, 15 Rev. Leg. 435, 5 Montreal Q. B. 407]; Thibaudeau *v.* Benning, 17 Rev. Leg. 173, 5 Montreal Q. B. 425, 33 L. C. Jur. 39 [*confirmed* in 20 Can. Sup. Ct. 110]; *In re* Bessette, 15 L. C. Jur. 126 [*reversing* 14 L. C. Jur. 21].

Dower was released by a wife in her husband's land at his request and in consideration of his oral agreement to convey over land to her while insolvent. It was held that the assignee after his insolvency could not be compelled to reimburse her out of her husband's estate. Winchester *v.* Holmes, 138 Mass. 540.

Promissory notes may be proved against the maker, although the accommodation indorser holds security which he has not surrendered and the proof is offered at the indorser's request. Meed *v.* Nelson, 9 Gray (Mass.) 55. The holder of notes indorsed by one who has become insolvent himself need not surrender them to the receiver of an insolvent as a condition to participating in dividends. The holder of notes indorsed by one who has become insolvent must, in arriving at a basis on which payments from the insolvent's estate will be made, subtract from the amount of the notes the sums collected thereon from the makers after the insolvency. Mercantile Nat. Bank *v.* Macfarlane, 71 Minn. 497, 74 N. W. 287, 70 Am. St. Rep. 352. A wife may prove against her husband's estate a note received by her as heir at law of her grandfather's estate in the distribution of the latter's estate. Purdy *v.* Purdy, 67 Vt. 50, 30 Atl. 695. Creditors of the insolvent, holding indorsed notes, and

(II) *Claims Maturing After Institution of Proceedings.* In the absence of statutory provision to the contrary,[83] the rule is that claims not due but accruing or maturing after the institution of insolvency proceedings will not be allowed against the insolvent's estate.[84]

(III) *Contingent or Unliquidated Claims.* The rule with reference to the provability of a contingent or unliquidated claim is not uniform. In some cases such claims are provable against the insolvent's estate,[85] while in others they are not, depending upon the particular circumstances.[86]

holding no security from the maker may prove against his estate after first having recourse to the indorser whose liability to them is not changed by such proof. Viles *v.* Harris, 130 Mass. 300. See also Weeks, etc., Co. *v.* Elliott, 93 Me. 286, 45 Atl. 29, 74 Am. St. Rep. 348.

Rent to accrue after insolvency proceedings cannot be proved. Bell's Estate, 85 Cal. 119, 24 Pac. 633. But see *In re* Reading Iron Works, 150 Pa. St. 369, 24 Atl. 617. Claims maturing after institution of proceedings see *infra*, IV, F, 2, b, (II).

Where an assignee occupies premises without an order of court, a claim for rent is a claim against him personally, and whether allowable or not is dependable upon the court. Reynolds *v.* Fuller, 64 Ill. App. 134.

A creditor of an insolvent corporation is entitled to a dividend only on what is actually due him, and has no right to an allowance on account of negotiable bonds of the company representing no indebtedness, which he claims to hold as collateral security. International Trust Co. *v.* Union Cattle Co., 3 Wyo. 803, 31 Pac. 408, 19 L. R. A. 640.

Qualified liability of a member of a corporation for the debts of the corporation has been held not to be a debt that can be proved against the estate of the insolvent. Bangs *v.* Lincoln, 10 Gray (Mass.) 600; Kelton *v.* Phillips, 3 Metc. (Mass.) 61.

The death or insolvency of the creditor does not extinguish the debt due from the insolvent estate. West *v.* His Creditors, 1 La. Ann. 365.

Operation of statute of limitations.— After the institution of insolvency proceedings, the statute of limitations ceases to run on a claim against the insolvent. If the claim is not barred at the time of the institution of the proceedings, it may be proved at a meeting of the creditors held after it would otherwise have been barred. See LIMITATIONS OF ACTIONS. See also BANKRUPTCY, 5 Cyc. 323.

83. Citizens' Nat. Bank *v.* Minge, 49 Minn. 454, 52 N. W. 44, holding that claims against an insolvent are allowable, although not yet due, and is secured by the liability of a third person as surety.

84. Spurr *v.* Dean, 139 Mass. 84, 28 N. E. 452. *Compare* McIntire *v.* Cottrell, 185 Mass. 178, 69 N. E. 1091. Valid claim against after acquired property see *supra*, IV, B, 2, f.

Liability not fixed until after close of the insolvency proceedings is not provable. McDermott *v.* Hall, 177 Mass. 224, 58 N. E. 695.

Action commenced before and judgment after.— Where an action is commenced against an insolvent before the filing of a petition, but judgment is not obtained until subsequent thereto, or in some jurisdictions until after the discharge, it will not be allowed. In this case the original claim is merged in the judgment which was rendered subsequent to the institution of the proceedings or the discharge, which operates to defeat the allowance. Boardman *v.* De Forest, 5 Conn. 1; *In re* Emery, 89 Me. 544, 36 Atl. 992, 56 Am. St. Rep. 440; Sampson *v.* Clark, 2 Cush. (Mass.) 173; Crouch *v.* Gridley, 6 Hill (N. Y.) 250; Fisk *v.* Keseville Woolen, etc., Mfg. Co., 10 Paige (N. Y.) 592; Hunter *v.* U. S., 5 Pet. (U. S.) 173, 8 L. ed. 86.

A promissory note is not provable against the estate of an indorser before its maturity. Stowell *v.* Richardson, 3 Allen (Mass.) 64.

Where an assignee disclaimed the lease of the premises held by an insolvent, after the assignee had occupied the place for some time, a reasonable sum may be allowed for such occupation. Abbott *v.* Stearns, 139 Mass. 168, 29 N. E. 379. See Wales *v.* Chase, 139 Mass. 538, 2 N. E. 109.

In Louisiana mere insolvency does not mature a debt by its terms due at a future date. An actual surrender, voluntary or forced, is required to annihilate the term fixed by the contract for the payment of the debt. Carillo *v.* U. S. Bank, 10 Rob. 533; Millaudon *v.* Foucher, 8 La. 582.

85. A claim for damages not liquidated, which arises from a breach of contract to deliver goods, is provable in insolvency. Lothrop *v.* Reed, 13 Allen (Mass.) 294.

A note executed and delivered by a firm as collateral security for a guaranty, on which the guarantor is still responsible, may be proved against the insolvent estate of the makers. Moseley *v.* Ames, 5 Allen (Mass.) 163.

86. See cases cited *infra*, this note.

A claim of a ward against her guardian for funds held by him as such is not provable against the insolvent's estate where the amount due has not been determined by the probate court and judgment has not been recovered on the guardian's bond. Murray *v.* Wood, 144 Mass. 195, 10 N. E. 822.

A contract by one partner to another to assume all the debts of the firm and save him harmless therefrom is not such a claim as may be proved against the estate of the obligor in insolvency until there has been a breach. It is not a contingent debt nor a contingent liability, for until the breach there is no liability. Fernald *v.* Johnson, 71 Me. 437.

(IV) *CLAIMS AGAINST PARTNERS.* The general rule is that where there are both partnership and individual assets for distribution, the firm assets will be first applied to the payment of partnership debts and the individual assets to the payment of the individual debts of the partners. If there is any surplus in either fund, it will be carried to the other and distributed as a part thereof.[87] Where both the firm and individual members are insolvent, the holder of a joint and several note given by the partners in the partnership name is entitled to prove his notes against the joint estate of the firm as well as against the several estates of the individual members and to receive a dividend from both estates, but under no condition can he receive more than the face of the claim.[88]

Bonds.— A bond of indemnity given for the protection of an attaching officer who has not been compelled to pay or sue for his acts does not constitute a debt which is provable in insolvency against the obligor. Kingman *v.* Fowle, 5 Allen (Mass.) 133. The liability of a surety on a bond does not constitute a debt until after there has been a breach of the bond. McIntire *v.* Cottrell, 185 Mass. 178, 69 N. E. 1091; Conklin *v.* U. S. Shipbuilding Co., 136 Fed. 1006.

The lessor's claim for the balance of the term, where the lessee became insolvent and the lessor reëntered, and where the lease authorized the renting of the premises, in which case credit should be given for the amount received, was contingent and could not be proved. Bowditch *v.* Raymond, 146 Mass. 109, 15 N. E. 285.

87. Hawkins *v.* Mahoney, 71 Minn. 155, 73 N. W. 720. See Gates *v.* Mack, 5 Cush. (Mass.) 613; Agawam Bank *v.* Morris, 4 Cush. (Mass.) 99; Barclay *v.* Phelps, 4 Mete. (Mass.) 397.

However, there is nothing to prevent a firm creditor from proving his claim against an individual partner's estate. Clarke *v.* Stanwood, 166 Mass. 379, 44 N. E. 537, 34 L. R. A. 378.

Interest-bearing claims.— Where there is a surplus of the private estate of one member of an insolvent firm after payment of claims as filed, but there is a deficiency of the firm estate, the firm creditors cannot claim the surplus of the private creditors who hold interest-bearing claims, until they have been paid their interest. *In re* Mulholland, 6 Montreal Leg. N. 171.

Resort to mortgage on partner's property. — A creditor of an insolvent partnership is not obliged to resort to a mortgage held by him on the property of an individual partner, but can claim a distributive share in the partnership assets. *In re* Levin, 139 Cal. 350, 63 Pac. 335, 73 Pac. 159; Morrison *v.* Kurtz, 15 Ill. 193.

Assumption of liability.—A partner who sells his interest in the partnership property to his copartner, who agrees, as part of the consideration, to pay partnership debts and hold his partner harmless therefrom, and the selling partner afterward in good faith pays a debt of the firm, he may prove the claim as an individual claim of his own against the private estate of the copartnership, who after such payment has gone into insolvency. *In re* Burgess, 83 Me. 339, 22 Atl. 222; Wild *v.* Dean, 3 Allen (Mass.) 579. But see Morton *v.* Richards, 13 Gray (Mass.) 15. Where the old firm is dissolved and a new one organized, which assumes the assets and liabilities of the old firm, on the insolvency of the new firm, the debts of the old may be proved against it. Clark *v.* Lindeke, 43 Minn. 463, 45 N. W. 863. *Contra,* Scull *v.* Alter, 16 N. J. L. 147.

The rule in England, compelling the creditor who has a joint security of insolvent copartners and also the separate security of the several partners to elect between them, is not the law in Massachusetts. Borden *v.* Cuyler, 10 Cush. (Mass.) 476.

88. *Ex p.* Nason, 70 Me. 363. Where a party holds a note for money loaned to a firm, signed by the firm and the individual partners, the creditor is entitled to a dividend from the firm assets, and a dividend from the individual assets of such partner on the balance only, after deducting the firm dividend. Roger Williams Nat. Bank *v.* Hall, 160 Mass. 171, 35 N. E. 666; Hawkins *v.* Mahoney, 71 Minn. 155, 73 N. W. 720; Mechanics' Nat. Bank *v.* Aldrich, 69 N. H. 478, 45 Atl. 247.

Where the note is made by an individual partner and is indorsed by the firm, it may be proved against the estate of both maker and indorser. Reed *v.* Bacon, 175 Mass. 407, 56 N. E. 716.

Where the note is signed by one partner as maker and by the other as payee and indorser, and taken without knowledge that a partnership existed between them, the note being made for partnership purposes, upon the insolvency of the partnership and its members, the holder may prove against either estate but not both. *Ex p.* Portland First Nat. Bank, 70 Me. 369.

Proof against either estate.— *Ex p.* Portland First Nat. Bank, 70 Me. 369; Reed *v.* Bacon, 175 Mass. 407, 56 N. E. 716; Roger Williams Nat. Bank *v.* Hall, 160 Mass. 171, 35 N. E. 666; Fuller *v.* Hooper, 3 Gray (Mass.) 334; Hawkins *v.* Mahoney, 71 Minn. 155, 73 N. W. 720.

Proof against firm.— *Ex p.* Nason, 70 Me. 363; Moseley *v.* Ames, 5 Allen (Mass.) 163; Harmon *v.* Clark, 13 Gray (Mass.) 114; Tremlett *v.* Hooper, 10 Gray (Mass.) 254. Holders of firm notes having proved their claims against the insolvent estate of a deceased partner after the survivor had made

(v) *Costs and Legal Expenses.* The general rule seems to be that expenses incurred as costs or counsel fees in proceedings which are for the benefit of a particular creditor or class of creditors should not be borne by an estate but are chargeable to those in whose favor instituted.[89] If, however, it is for the benefit of the entire estate, it would be chargeable to the estate.[90]

(vi) *Secured Claims*[91] — (a) *Necessity For Proof.* The rule with reference to the proof of a claim by one holding a security or lien on the property of the debtor is not uniform. The better rule seems to be that such creditor may rest on his security and not prove his claim,[92] although on the other hand it has been held that the fact that he holds a security affords no excuse for a failure to make proof of his claim.[93]

(b) *Right to Prove and Effect of Proving Claim.* Under some statutes a creditor holding a security for his claim is required to exhaust his security or surrender it to the assignee before he will be permitted to participate in the distribution of the assets,[94] while under other statutes he may prove his whole claim

an assignment, supposing that they could also prove against the partnership estate, may withdraw them and prove against the latter estate, even though when they took the notes they thought they were taking individual and not partnership obligations. Colwell *v.* Weyhosset Nat. Bank, 16 R. I. 288, 15 Atl. 80, 17 Atl. 913.

Proof against individual estate.— Dwight *v.* Mudge, 12 Gray (Mass.) 23; Barclay *v.* Phelps, 4 Metc. (Mass.) 397; Mechanics' Nat. Bank *v.* Aldrich, 69 N. H. 478, 45 Atl. 247. Where a claim through a mistake has been proved against a partnership estate instead of against the private estate of one of the partners, it may be withdrawn in the discretion of the court and be presented to the other estate. *In re* Burgess, 83 Me. 339, 22 Atl. 222.

Assignee of an insolvent firm can prove a claim against another insolvent firm which is composed of two of the members of the claimant firm, where all dividends recovered are for the benefit of such claimant firm's creditors. Crampton *v.* Kent, 69 Vt. 228, 39 Atl. 197.

89. *In re* Harvey, (Cal. 1893) 32 Pac. 567; Pandelly *v.* His Creditors, 1 La. Ann. 21; Cullen *v.* Cerras, 2 Mart. N. S. (La.) 157; Swedish-American Nat. Bank *v.* Davis, 71 Minn. 508, 74 N. W. 286. *Compare* Reynolds *v.* Fuller, 64 Ill. App. 134. But *compare In re* Trafton, 94 Me. 579, 48 Atl. 113.

Where the attaching creditor refuses to surrender attached property to the assignee in insolvency, expenses subsequently incurred by the attaching officer in keeping the property are not provable by the attaching officer. Russell Paper Co. *v.* Smith, 135 Mass. 588.

A general assignment being void, legal expenses incurred in connection therewith cannot be recovered from the estate. Clark *v.* Sawyer, 151 Mass. 64, 23 N. E. 726.

90. *In re* Leiman, 32 Md. 225, 3 Am. Rep. 132; *In re* American Sav., etc., Assoc., (Minn. 1899) 81 N. W. 218; Fitterling *v.* Welch, 76 Minn. 441, 79 N. W. 500; Swedish-American Nat. Bank *v.* Davis, 71 Minn. 508, 74 N. W. 286. See also Salaun *v.* Their Creditors, 106 La. 217, 30 So. 696; and *infra*, VIII, C, 2.

91. See *infra*, IV, F, 5, g.

92. Massachusetts Iron Co. *v.* Hooper, 7 Cush. (Mass.) 183; Pohl *v.* Lynah, 3 McCord (S. C.) 385, judgment creditor.

A mortgage not recorded more than three months before insolvency proceedings, being invalid as against the mortgagor's assignee in insolvency, the creditor is not obliged to cancel it before proving his debt in insolvency. And the fact that the assignee in insolvency sued to cancel the mortgage does not make such cancellation a condition precedent to proving the creditor's claim. *In re* Partridge, 96 Me. 52, 51 Atl. 239.

93. *In re* Toff, 6 N. J. L. J. 181; Bell *v.* Fleming, 12 N. J. Eq. 13. See also Porteus *v.* Sullivan, 1 McCord (S. C.) 397, mortgage creditor.

Where a debtor is liable on a note as indorser, the holder is entitled to file it as a claim against the insolvent estate, although such note is secured by a mortgage on the maker's property, and he need not part with the security until the note is paid in full. Hale *v.* Leatherbee, 175 Mass. 547, 56 N. E. 562.

94. *Alabama.*— Philadelphia Warehouse Co. *v.* Anniston Pipe Works, 106 Ala. 357, 18 So. 43.

California.— *In re* Levin, 139 Cal. 350, 63 Pac. 335, 73 Pac. 159; *In re* Harvey, (1893) 32 Pac. 567; Bradford *v.* Dorsey, 63 Cal. 122.

Connecticut.— *In re* Greeley, 70 Conn. 494, 40 Atl. 233.

Maine.— *In re* Fickett, 72 Me. 266.

Massachusetts.— Washburn *v.* Tisdale, 143 Mass. 376, 9 N. E. 741; Franklin County Nat. Bank *v.* Greenfield First Nat. Bank, 138 Mass. 515; Bristol County Sav. Bank *v.* Woodward, 137 Mass. 412; Wilson *v.* Bryant, 134 Mass. 291; Richardson *v.* Wyman, 4 Gray 553; Lanckton *v.* Wolcott, 6 Metc. 305.

Minnesota.— Mankato First Nat. Bank *v.* Pope, 85 Minn. 433, 89 N. W. 318; Swedish-American Nat. Bank *v.* Davis, 64 Minn. 250, 66 N. W. 986 [*approved* in Swedish-American Nat. Bank *v.* Davis, 69 Minn. 181, 72 N. W. 62]. See also First Nat. Bank *v.* Pope, 85 Minn. 433, 89 N. W. 318.

against the estate without regard to any collateral security he may hold.[95] Similarly the proving of a secured claim as unsecured under some statutes operates as a waiver of the security and is equivalent to an election to stand as a general creditor;[96] while under other statutes the mere proving of a secured demand as a claim against the estate of the insolvent does not work a release or surrender of the collateral security.[97]

New Jersey.— Bell *v.* Fleming, 12 N. J. Eq. 13.

Pennsylvania.— Graff's Estate, 139 Pa. St. 69, 21 Atl. 233; Wetzler's Estate, 16 Pa. Co. Ct. 260.

South Carolina.— Wheat *v.* Dingle, 32 S. C. 473, 11 S. E. 394, 8 L. R. A. 375; Ravenel *v.* Lyles, Speers Eq. 281.

Tennessee.— Gwynne *v.* Estes, 14 Lea 662; Winton *v.* Eldridge, 3 Head 361.

Washington.— *In re* Frasch, 5 Wash. 344, 31 Pac. 755, 32 Pac. 771.

United States.— King *v.* Thompson, 13 Pet. 128, 10 L. ed. 91.

See 28 Cent. Dig. tit. "Insolvency," § 166.

The rule does not apply to the case where the security is in the nature of a mortgage on real estate situated out of the state, such not being a part of the assigned estate. Mechanics', etc., Bank's Appeal, 31 Conn. 63.

In Minnesota before examining his security or surrendering it to the assignee the creditor is entitled to file his secured claim and have the amount and validity of the same determined by the assignee or the court, but he is not entitled to share in the distribution of the insolvent's estate until he has so exhausted or surrendered his security. Swedish-American Nat. Bank *v.* Davis, 64 Minn. 250, 66 N. W. 986.

What constitutes exhausting security.—See Swedish-American Nat. Bank *v.* Davis, 69 Minn. 181, 72 N. W. 62 [*approving* Swedish-American Nat. Bank *v.* Davis, 64 Minn. 250, 66 N. W. 986].

The holder of notes indorsed by one who becomes insolvent need not surrender them to the receiver of the insolvent as a condition to participating in dividends. Mercantile Nat. Bank *v.* Macfarlane, 71 Minn. 497, 74 N. W. 287, 70 Am. St. Rep. 352.

Where security held by guarantor or indorser.— See Provident Sav. Inst. *v.* Stetson, 12 Gray (Mass.) 27; Richardson *v.* City Bank, 11 Gray (Mass.) 261.

Where a firm creditor held a mortgage on the homestead of one of the individual partners as partial security for the debt, he was not thereby deprived of the right to prove his entire claim against the assets of the firm in insolvency without releasing such security, since the security, being on exempt property, if released, would be unavailable to other creditors. *In re* Levin, 139 Cal. 350, 63 Pac. 335, 73 Pac. 159.

One claim preferred and one not preferred. — Mass. Pub. St. c. 157, § 33, declaring that a person who has accepted a preference "shall not prove the debt or claim on account of which the preference was made or given," does not prevent the proving of one claim merely because the claimant has been given a preference on another claim. Smith *v.* American Linen Co., 172 Mass. 227, 51 N. E. 1085.

95. *Arkansas.*— Taylor *v.* Moore, 64 Ark. 23, 40 S. W. 258.

Illinois.— Levy *v.* Chicago Nat. Bank, 158 Ill. 88, 42 N. E. 129, 30 L. R. A. 380; Furness *v.* Union Nat. Bank, 147 Ill. 570, 35 N. E. 624.

Kentucky.— Hibler *v.* Davis, 13 Bush 20. But see German Security Bank *v.* Jefferson, 10 Bush 326.

Massachusetts.— See Cabot Bank *v.* Bodman, 11 Gray 134.

New Hampshire.— Bank Com'rs *v.* Security Trust Co., 70 N. H. 536, 49 Atl. 113, 85 Am. St. Rep. 646; Moses *v.* Ranlet, 2 N. H. 488.

New York.— People *v.* Remington, 121 N. Y. 328, 24 N. E. 793, 8 L. R. A. 458 [*affirming* 54 Hun 505, 8 N. Y. Suppl. 34]; Jervis *v.* Smith, Sheld. 189; Wilder *v.* Keeler, 3 Paige 167, 23 Am. Dec. 781.

Vermont.— West *v.* Rutland Bank, 19 Vt. 403.

Wisconsin.— See Harrigan *v.* Gilchrist, 121 Wis. 127, 99 N. W. 909.

United States.— New York Security, etc., Co. *v.* Lombard Inv. Co., 73 Fed. 537; Wheeler *v.* Walton, etc., Co., 72 Fed. 966; Tod *v.* Kentucky Union Land Co., 57 Fed. 47.

See 28 Cent. Dig. tit. "Insolvency," § 166.

96. Hazeltine *v.* McAfee, 5 Kan. App. 119, 48 Pac. 886.

In Canada, where a judgment creditor files his claim for the whole amount of the judgment without putting a value upon it, he abandons his security. Sherlock *v.* McLellan, Russ. Eq. Dec. (Nova Scotia) 165.

97. Richardson *v.* Turner, 52 La. Ann. 1613, 28 So. 158; Mead *v.* Randall, 68 Minn. 233, 71 N. W. 31; Mershon *v.* Moors, 76 Wis. 502, 45 N. W. 95. See Bell *v.* Fleming, 12 N. J. Eq. 13.

Where a secured creditor inadvertently, by mistake either of law or fact, proves his whole debt without disclosing his security, he would doubtless be authorized to withdraw his proof as an unsecured creditor, before the general creditors have suffered any detriment from his acts, and pursue his rights as against the security. Nichols *v.* Smith, 143 Mass. 455, 9 N. E. 810.

In Minnesota the proof of the whole claim without a release would not of itself operate to discharge or release the security; hence a mortgagee who has proved his debt against the estate of a mortgagor without discharging his mortgage is not thereby estopped to claim under it against a subsequent attaching creditor who has not proved his debt. Smith *v.* Brainard, 37 Minn. 479, 35 N. W. 271.

3. Amount of Claims — a. In General. Claims against the insolvent's estate can be proved only for the amount actually due,[98] and are allowable as of the date of the institution of insolvency proceedings.[99]

b. Interest. In the distribution of the estate of an insolvent interest should be computed to the time of the institution of insolvency proceedings upon all debts drawing interest either by agreement of the parties or as legal damages for non-payment.[1] If there be a surplus after paying the principal and interest thus computed, interest should also be allowed on all the debts from the date of the institution of the proceedings.[2]

c. Set-Off and Counter-Claim.[3] A right of set-off between an insolvent debtor and his creditor accrues at the time of the institution of insolvency proceedings, unless by statute a different time is provided.[4] In the case of two insolvent estates, each indebted to the other, a dividend to one should be set off as against the dividend to the other.[5]

4. Presentation and Proof of Claims — a. Presentation of Claims — (i) *In General.* The form in which a claim against an insolvent's estate should be presented is governed by statute.[6]

98. Miller's River Nat. Bank *v.* Jefferson, 138 Mass. 111; Boston Third Nat. Bank *v.* Eastern R. Co., 122 Mass. 240. See also *supra*, IV, F, 2, b.

Claim partly paid.— A creditor who has received payment on account is entitled to prove and receive a dividend from the insolvent for the balance only. Union Bank *v.* Cochran, 7 Gill & J. (Md.) 138; Sochier *v.* Loring, 6 Cush. (Mass.) 537.

Claims bought at a discount.— In the absence of a statutory provision to the contrary, one who purchases a claim against an insolvent at a discount may prove the same for its full value. Green *v.* Hood, 42 Ill. App. 652. See Emberson's Case, 16 Abb. Pr. (N. Y.) 457; Slidell *v.* McCrea, 1 Wend. (N. Y.) 156, where the statutes create a rule to the contrary.

99. Bank Com'rs *v.* New Hampshire Trust Co., 69 N. H. 621, 44 Atl. 130.

The holder of notes indorsed by one who becomes insolvent must, in arriving at a basis upon which payments from the insolvent estate will be made, subtract from the amount of the notes the sums collected thereon from the makers after the insolvency. Mercantile Nat. Bank *v.* Macfarlane, 71 Minn. 497, 74 N. W. 287, 70 Am. St. Rep. 352.

1. Desorme's Succession, 10 Rob. (La.) 474; Prichett *v.* Newbold, 1 N. J. Eq. 571; Matter of Murray, 6 Paige (N. Y.) 204.

Reception of dividend greater than claim as proved.— Where the holder of a note received a dividend from the maker and indorser amounting to more than the claim as proved, but less than the principal and interest, it was held that he cannot receive a further dividend until the other creditors had received the full amount as proved. Blake *v.* Ames, 8 Allen (Mass.) 318.

Where both the firm and its members were insolvent under one commission, and the separate estate of one partner is more than enough to pay his separate debts, the surplus of that estate is to be added to that of the partnership estate and applied to the payment of joint debts before paying interest on the separate debts. Thomas *v.* Minot, 10 Gray (Mass.) 263.

Where money due is not wrongfully withheld, but the failure to pay is due to the insolvency only, interest will not necessarily be allowed on claims against the insolvent. American Casualty Ins. Co.'s Case, 82 Md. 535, 34 Atl. 778, 38 L. R. A. 97.

2. Matter of Murray, 6 Paige (N. Y.) 204; Clemons *v.* Clemons, 69 Vt. 545, 38 Atl. 314.

In Louisiana it has been held that interest continues to run after the cession. Even conventional interest is due, although there be not sufficient to meet all. Caldwell *v.* His Creditors, 9 La. 265. Also that stipulated interest must be allowed on the tableau. Patin *v.* Her Creditors, 9 La. 64.

3. Set-off and counter-claim generally see Recoupment, Set-Off, and Counter-Claim.

Proceedings to collect property of insolvent see *supra*, IV, D, 5, b; IV, E, 1.

4. Accordingly, where a claim proved against an insolvent is subject to a set-off, the amount so set off will be deducted from the claim and the dividend computed on the balance only. Moulon *v.* His Creditors, 4 Mart. N. S. (La.) 29; Demmon *v.* Boylston Bank, 5 Cush. (Mass.) 194; Blumenthal *v.* Einstein, 81 Hun (N. Y.) 415, 30 N. Y. Suppl. 1126 [*affirmed* in 146 N. Y. 399, 42 N. E. 542]. See also *In re* Hatch, 155 N. Y. 401, 50 N. E. 49, 40 L. R. A. 664 [*reversing* 22 N. Y. App. Div. 16, 47 N. Y. Suppl. 850].

Debt must exist at date of insolvency. See Matter of Arkell Pub. Co., 29 Misc. (N. Y.) 145, 60 N. Y. Suppl. 832.

5. Blumenthal *v.* Einstein, 81 Hun (N. Y.) 415, 30 N. Y. Suppl. 1126 [*affirmed* in 146 N. Y. 399, 42 N. E. 542]; Rue *v.* Miller, 124 Fed. 208, 59 C. C. A. 676.

6. See the statutes of the several states; and cases cited *infra*, this note.

In general it consists of a statement under oath setting forth in detail the claim, the consideration paid therefor, and substantially such other facts as would be found in a dec-

(II) *TIME OF PRESENTATION.* Likewise the time within which a claim should be exhibited or filed against the estate of an insolvent is determined by the statute of the particular jurisdiction in which the proceedings are pending.[7]

(III) *EFFECT OF LACHES.* A creditor failing to file or present his claim within the period fixed by the statute will be deemed guilty of laches and will not thereafter be permitted to file his claim or share in the distribution of the assets.[8] The fact that a claim is in litigation during the time for filing claims will

laration for the same cause of action at law. Holder *v.* Hillson, 168 Mass. 514, 47 N. E. 417; *In re* Dinning, 4 Quebec 26. The statement of the mere evidence of a debt, such as a promissory note, is not sufficient. Mitchell *v.* Powers, 17 Oreg. 491, 21 Pac. 451.

The claim should be presented to the assignee or other person designated by law to receive the same. The naming of a creditor in an insolvent's schedule is not a presentation or proof of his claim and does not entitle him to a share of the trust fund. Matter of Bailey, 58 How. Pr. (N. Y.) 446. *Contra, In re* Currier, 8 Daly (N. Y.) 119.

Presentation of a claim in the form of a judgment and action on it by them in that form was held not to be error on the part of the commissioners in the absence of objection on the part of the trustee. Cothren's Appeal, 59 Conn. 545, 22 Atl. 297.

7. See Murdock *v.* Rousseau, 32 Ala. 611; Taylor *v.* Moore, 64 Ark. 23, 40 S. W. 258; Hussey *v.* Crawford, 152 Mass. 596, 26 N. E. 424; Minot *v.* Thacher, 7 Metc. (Mass.) 348, 41 Am. Dec. 444.

A claim filed prior to the institution of the proceedings is insufficient, and in order that such claim may come within the statute it should be refiled. Brewer *v.* Moseley, 49 Ala. 79; Clement *v.* Nelson, 46 Ala. 634.

In Louisiana a creditor may bring forward at any time before the tableau all claims acquired since a former judgment in his favor, and he may do it by a supplemental petition. Franklin *v.* Warfield, 2 La. 126.

In Maryland the creditor is allowed to prove and share in any fund in court for distribution among the creditors at any time before actual distribution has been made. Ohio L. Ins., etc., Co. *v.* Winn, 4 Md. Ch. 253.

8. *Alabama.*— Murdock *v.* Rousseau, 32 Ala. 611.

Connecticut.—Woodbury's Appeal, 70 Conn. 455, 39 Atl. 791.

Illinois.— H. B. Claflin Co. *v.* Kelley, 64 Ill. App. 525; Rassieur *v.* Jenkins, 64 Ill. App. 336; Winona Paper Co. *v.* Kalamazoo First Nat. Bank, 33 Ill. App. 630.

Minnesota.— Clark *v.* Squier, 62 Minn. 364, 64 N. W. 908.

New Hampshire.—Nichols *v.* Cass, 65 N. H. 212, 23 Atl. 430.

New Jersey.— *In re* Marley, 7 N. J. L. J. 48. In this state the court has power, independently of any statutory provision, to limit by order the time within which claims must be proved.

Pennsylvania.— *In re* Mitchell, 2 Watts 87.

South Carolina.— State *v.* Spartanburg, etc., R. Co., 8 S. C. 129.

See 28 Cent. Dig. tit. "Insolvency," § 176.

Contra.— Carpenter *v.* Dick, 41 Ohio St. 295.

That a creditor is prevented by the fraudulent means of an assignee from filing his claim within the statutory period does not extend the time for filing it, but may render the assignee personally liable. H. B. Claflin Co. *v.* Kelley, 64 Ill. App. 525.

The court may, in its discretion, in some jurisdictions, permit a creditor to share in the assets, although the claim was not filed within the time which was by general order limited for the presentation of claims. State *v.* Bank of Commerce, 61 Nebr. 22, 84 N. W. 406; McNeal Pipe, etc., Co. *v.* Woltman, 114 N. C. 178, 19 S. E. 109.

If there are sufficient assets to pay all claims, a creditor who fails to file his claim within the statutory period would doubtless be permitted to participate in such surplus. Rassieur *v.* Jenkins, 64 Ill. App. 336; Marder *v.* Wright, 70 Iowa 42, 29 N. W. 799.

It appearing that a claim was just and that no creditor would be thereby prejudiced by its allowance except as it reduced dividends, and that the allowance would not delay the settlement of the estate, and that there was sufficient excuse for not filing it in time, the court permitted the same to be filed. Richter *v.* Merchants' Nat. Bank, 65 Minn. 237, 67 N. W. 995.

While a court of equity, in administering the affairs of an insolvent corporation, will allow a claim to be proved after the expiration of the time limited by a general order for the proof of claims, and before distribution, provided it is an equitable one and the claimant is not chargeable with laches, it will not postpone the distribution indefinitely for the mere purpose of insuring against loss parties whose contractual relations with the corporation give rise to no present ascertainable debts. Conklin *v.* U. S. Shipbuilding Co., 136 Fed. 1006.

A petition for the allowance of a belated claim against an insolvent bank, which in apt language charged that defendant was indebted to plaintiff in a sum named, was not demurrable because it also alleged that the ownership of the claim was disputed and in litigation between plaintiff and another party. State *v.* Bank of Commerce, 61 Nebr. 22, 84 N. W. 406.

A bill for an order directing a special meeting to be held, in which to prove claims against the insolvent, will be dismissed, where it fails to allege a good excuse for neglecting to prove the claims at the regular meetings, which were held before the bill was

not save it from being barred, unless there is some provision of statute for its liquidation or its reduction to judgment.[9]

b. Proof of Claims. While the degree of proof required to support a claim after it is properly filed is dependent upon the statute, as a general rule it should be the equivalent of that ordinarily required in an action at law.[10]

c. Objections to Claims[11] — (I) *Who May Object.* Objections to a claim presented for allowance should be made by the trustee or assignee,[12] except where by statute all creditors interested in the proceedings are made competent for this purpose.[13]

(II) *Form of Objection.* The form in which the objections should be filed and the stage of the proceedings in which they may be filed is regulated by statute.[14]

filed. Holder *v.* Hillson, 170 Mass. 466, 49 N. E. 643.

9. Murdock *v.* Rousseau, 32 Ala. 611; H. B. Claflin Co. *v.* Kelley, 64 Ill. App. 525. *Contra*, Suppiger *v.* Gruaz, 36 Ill. App. 60 [*affirmed* in 137 Ill. 216, 27 N. E. 22]. See also Needham *v.* Long, 75 Vt. 117, 53 Atl. 326.

10. *Iowa.*— Rea *v.* Jaffray, 82 Iowa 231, 48 N. W. 78.

Louisiana.— Calder *v.* His Creditors, 47 La. Ann. 1538, 18 So. 520; Johnson *v.* His Creditors, 16 La. Ann. 177; Hernandez *v.* His Creditors, 15 La. Ann. 87; Guerin *v.* His Creditors, 3 La. 558; Sabatier *v.* His Creditors, 6 Mart. N. S. 585; Boissier *v.* Belair, 1 Mart. N. S. 481; Walton *v.* Watson, 1 Mart. N. S. 347.

Maryland.— Brydon *v.* Gemmell, 73 Md. 530, 21 Atl. 712.

Massachusetts.— Holder *v.* Hillson, 168 Mass. 514, 47 N. E. 417; Peabody *v.* Harmon, 3 Gray 113.

Minnesota.— Townsend *v.* Johnson, 34 Minn. 414, 26 N. W. 395.

New Jersey.— See Todd *v.* Meding, 56 N. J. Eq. 83, 38 Atl. 349.

Canada.— Watson *v.* Samson, 4 Quebec 365; *In re* Cote, 1 Quebec 200; Hagar *v.* Seath, 6 Montreal Q. B. 394; Davidson *v.* Ridel, 3 Montreal Leg. N. 55 [*confirming* 2 Montreal Leg. N. 348].

See 28 Cent. Dig. tit. "Insolvency," § 177.

An admission of a debtor in favor of his creditor should be carefully scrutinized, and although fraud will not ordinarily be presumed, such an admission is usually deemed to be fictitious, upon which presumption courts should act, when supported by corroborative evidence. Marigny *v.* Union Bank, 12 Rob. (La.) 283; Blackstone *v.* His Creditors, 3 Rob. (La.) 219; Cassidy *v.* His Creditors 2 Rob. (La.) 47; Canfield *v.* Maher, 4 Mart. N. S. (La.) 174; Macarty *v.* Foucher, 12 Mart. (La.) 11; Dromgoole *v.* Gardner, 10 Mart. (La.) 433; Mitchel *v.* McMillan, 3 Mart. (La.) 676, 6 Am. Dec. 690; Menendez *v.* Larionda, 3 Mart. (La.) 256. See Bryson *v.* Dickson, 3 Quebec Rev. Jud. Rep. 426, 3 L. C. Rep. 65.

11. Time of making objection.— Since N. H. Pub. St. c. 201, §§ 15, 17, 18, requiring parties in interest to make objections within a certain time after commencement of insolvent proceedings, do not apply to a creditor of a claimant in such proceedings, such creditor is not concluded by an allowance of a claim, and a decree of distribution. Stillings *v.* Haley, 68 N. H. 541, 44 Atl. 701.

Burden of proof.— Where the objection to a claim is not made until after its allowance, the burden of showing its invalidity rests upon the objecting creditor. *In re* Knight, 21 R. I. 287, 43 Atl. 540; Youngstown Bridge Co. *v.* North Galveston, etc., R. Co., (Tex. Civ. App. 1895) 31 S. W. 420.

12. Byrne *v.* His Creditors, 33 La. Ann. 198; Walling *v.* His Creditors, 14 La. Ann. 670. See Freeland *v.* Mechanics' Bank, 16 Gray (Mass.) 137.

13. See Stillings *v.* Haley, 68 N. H. 541, 44 Atl. 701.

An objection made by one creditor to a particular claim will avail all the other opponents interested to defeat it. Adams *v.* His Creditors, 14 La. 454.

Creditors called in to present and establish their claims in an action for the settlement of the affairs of the insolvent have the same right of exception, appeal, and odjection, as creditors who were made parties to the action by name. State *v.* Spartanburg, etc., R. Co., 8 S. C. 129.

A third party cannot interfere in a suit by a laborer against an insolvent company for the purpose of determining whether or not one is indebted to the other and the amount of said indebtedness. Western Stone Co. *v.* Carver, 93 Ill. App. 150, under a statute where labor claims are treated as preferred.

14. See the statutes of the several states.

As a rule objection should be made in writing and in the nature of a petition setting forth the grounds thereof, duly verified hy the oath of the contestant. Western Stone Co. *v.* Carver, 93 Ill. App. 150; Ludeling *v.* His Creditors, 4 Mart. N. S. (La.) 601; Tibbets *v.* Trafton, 80 Me. 264, 14 Atl. 71.

Persons interested in contesting claims of employees or laborers, under Ill. Rev. St. c. 38*a*, providing that such claims against an insolvent shall be treated as preferred, must do so by filing exceptions supported by affidavit in the manner provided in said act. There is no authority in the act for interfering in suits by employees against their employers. Western Stone Co. *v.* Carver, 93 Ill. App. 150.

Amendments.—The county court has power to order joint exceptions to claims of cred-

d. Allowance or Disallowance of Claims. It is the duty of the assignee, trustee, court, or officer designated by the statute to pass upon claims duly presented and proved, allowing or disallowing them in accordance with the proof presented. The action thus taken is final and conclusive unless the same may be reviewed by way of exception or appeal.[15]

5. PRIORITIES — a. In General. Certain claims against an insolvent's estate may be entitled to priority of payment over others the statutes fixing the order of priority.[16]

b. Expenses of Administration. The expenses incurred in the administration of an insolvent's estate are entitled to priority of payment out of the assets prior to the payment of general and other creditors.[17]

c. Claims in Favor of United States. The right of priority of payment of debts due to the government is a prerogative of the crown based upon motives of public policy well known to the common law.[18] The claim of the United States to priority, however, does not stand upon a sovereign prerogative, but is founded upon an express statutory provision;[19] and the statute applies to equitable as well

itors of an insolvent estate separated, and to allow amendments to such exceptions. Beifeld *v.* International Cement Co., 79 Ill. App. 318.

15. *Alabama.*— Coffin *v.* McCullough, 30 Ala. 107.

Connecticut.— Cadwell *v.* Smith, 2 Root 187.

Louisiana.— Ventress *v.* His Creditors, 20 La. Ann. 359; Gardiner *v.* Brashear, 9 Rob. 61; Morgan *v.* His Creditors, 4 La. 173, 19 La. 84; Kenner *v.* Their Creditors, 1 La. 370; Mayfield *v.* Comeau, 7 Mart. N. S. 180; Avart *v.* His Creditors, 6 Mart. N. S. 652; Louisiana Ins. Co. *v.* Campbell, 6 Mart. N. S. 131; Dussuau *v.* Bredeaux, 4 Mart. 450.

Minnesota.—*In re* Minnehaha Driving Park Assoc., 53 Minn. 423, 55 N. W. 598.

New Hampshire.— Lomas *v.* Hilliard, 60 N. H. 148.

Oregon.— Rockwell *v.* Portland Sav. Bank, 39 Oreg. 241, 64 Pac. 388.

See 28 Cent. Dig. tit. "Insolvency," § 179.

Appeal and review see *infra*, VII.

A creditor who has not been deprived of any legal right by the allowance of a belated claim against an insolvent bank cannot complain of the order of the court allowing such claim. State *v.* Bank of Commerce, 61 Nebr. 22, 84 N. W. 406.

In Illinois the court has such equity jurisdiction as to enable it to modify or vacate a final order dismissing a claim, after the term, for cause shown, if the insolvency proceedings are still pending. Weil *v.* Hart, 73 Ill. App. 364.

In Minnesota a claim once disallowed cannot be subsequently allowed, the power of the assignee being exhausted. Robitshek *v.* Swedish-American Nat. Bank, 68 Minn. 206, 71 N. W. 7.

16. See *infra*, III, F, 5, b, *et seq.*

While courts of equity usually seek to put all the creditors of an insolvent estate on the same footing as to payment of their claims, and in general allow no preferences between them, justice often requires preferences; the equality to be sought being generally equality between members of a class rather than between different classes of individuals. Gilbert *v.* Washington Ben. Endowment Assoc., 21 App. Cas. (D. C.) 344.

After-acquired property.— In Louisiana it has been held that creditors whose claims accrued before the insolvency proceedings were instituted cannot avail themselves of property acquired after the cession was made, except for the amount that may remain after satisfying creditors whose claims accrued after the cession and an allowance for the support of the debtor and his family. Gurlie *v.* Flood, 11 Rob. (La.) 166; Quimper *v.* Bierra, 8 Rob. (La.) 204; Fitzgerald *v.* Philips, 4 Mart. (La.) 559. See *supra*, IV, B, 2, f.

17. See cases cited *infra*, this note.

Expenses entitled to priority.— Expenses of liquidating. Robinson *v.* Darien Bank, 18 Ga. 65; Goforth *v.* His Creditors, 6 Mart. (La.) 519. Attorney's fees in liquidating. Salaun *v.* Their Creditors, 106 La. 217, 30 So. 696; Goforth *v.* His Creditors, 6 Mart. (La.) 519. Expenses of continuing business to prevent a sacrifice. *In re* St. James Hotel Co., 4 Ohio S. & C. Pl. Dec. 209, 3 Ohio N. P. 42.

If the personalty be insufficient to pay the privileged charges they must be borne by the encumbered realty. Caseaux *v.* His Creditors, 6 Rob. (La.) 268; Janin *v.* His Creditors, 10 La. 554.

The rule applies only to those services made necessary by law and which accrue to third persons who are bound to perform the services, and not to persons who advance money for the insolvent, at his request, to pay his fees. Dayton *v.* Nichols, 10 Johns. (N. Y.) 469.

A person holding a claim against the assignee, incurred by the latter while administering the trust, may present the same by petition on motion to the court in which the proceedings are pending, for allowance and payment. Fitterling *v.* Welch, 76 Minn. 441, 79 N. W. 500.

18. U. S. *v.* North Carolina Bank, 6 Pet. (U. S.) 29, 8 L. ed. 308.

19. U. S. Rev. St. (1878) §§ 3466, 3467 [U. S. Comp. St. (1901) p. 2314]; 1 U. S. St. at L. §§ 5, 65, pp. 515, 676. See also

as legal debts.[20] It should receive a fair and reasonable interpretation,[21] and should not be so construed as to destroy prior legal liens.[22] Where a surety for a debt due to the United States pays the same, the right of priority of payment belonging to the government, it has been held, attaches to the claim of the surety as against the principal debtor.[23]

d. Claims in Favor of State. While under the common law the state has the sovereign right to priority of payment,[24] still there are states which do not recognize this common-law prerogative.[25] Those states which do recognize this prior right nevertheless make it subject to an antecedent lien of a creditor.[26]

e. Taxes. Taxes are entitled to priority of payment out of the estate.[27]

f. Wages. Wages due to clerks, laborers, and employees are usually given priority of payment,[28] a maximum amount of wages and the period within which they must have been earned to entitle the employee to priority being fixed by statute.[29]

g. Secured Claims and Liens[30] — (I) *In General.* A claim secured by a mortgage or other lien is entitled to priority of payment over the general creditors.[31]

U. S. *v.* Clason, 2 Brev. (S. C.) 118; Cook County Nat. Bank *v.* U. S., 107 U. S. 445, 2 S. Ct. 561, 27 L. ed. 537; Bayne *v.* U. S., 93 U. S. 642, 23 L. ed. 997; Hunter *v.* U. S., 5 Pet. (U. S.) 173, 8 L. ed. 86 [*affirming* 26 Fed. Cas. No. 15,427, 5 Mason 229]; Thelusson *v.* Smith, 2 Wheat. (U. S.) 396, 4 L. ed. 271 [*affirming* 23 Fed. Cas. No. 13,878, Pet. C. C. 195]; U. S. *v.* Cochran, 25 Fed. Cas. No. 14,821, 2 Brock. 274; U. S. *v.* Wood, 28 Fed. Cas. No. 16,755.

20. Howe *v.* Sheppard, 12 Fed. Cas. No. 6,772, 2 Sumn. 133.

21. U. S. *v.* North Carolina Bank, 6 Pet. (U. S.) 29, 8 L. ed. 308.

22. U. S. *v.* Hawkins, 4 Mart. N. S. (La.) 317; Brent *v.* Washington Bank, 10 Pet. (U. S.) 596, 9 L. ed. 547; Conard *v.* Atlantic Ins. Co., 1 Pet. (U. S.) 386, 7 L. ed. 189; U. S. *v.* Charleston, 27 Fed. Cas. No. 16,276, Bee 196.

Priority over judgment creditors see *infra*, IV, F, 5, g, (II).

23. Hunter *v.* U. S., 5 Pet. (U. S.) 173, 8 L. ed. 86 [*affirming* 26 Fed. Cas. No. 15,427, 5 Mason 229].

24. Robinson *v.* Darien Bank, 18 Ga. 65; Bent *v.* Hubbardston, 138 Mass. 99.

Taxes entitled to priority see *infra*, IV, F, 5, e.

25. Middlesex County *v.* New Brunswick State Bank, 30 N. J. Eq. 311; State *v.* Harris, 2 Bailey (S. C.) 598; State *v.* Cleary, 2 Hill (S. C.) 600; Keckley *v.* Keckley, 2 Hill Eq. (S. C.) 250.

26. Robinson *v.* Darien Bank, 18 Ga. 65.

27. Belfast *v.* Fogler, 71 Me. 403.

The city of Halifax has no preferential claim for taxes under the Insolvent Act of 1875. *In re* Marter, 15 Nova Scotia 412.

28. *Illinois.*— Heckman *v.* Tammen, 184 Ill. 144, 56 N. E. 361 [*affirming* 84 Ill. App. 537]; Western Stone Co. *v.* Carver, 93 Ill. App. 150; Willard *v.* World's Fair Encampment Co., 59 Ill. App. 336.

Maryland.— Roberts *v.* Edie, 85 Md. 181, 36 Atl. 820.

New Jersey.— Mingin *v.* Alva Glass Mfg. Co., 55 N. J. Eq. 463, 37 Atl. 450.

Pennsylvania.— Jacoby's Appeal, 1 Walk. 346; Purefoy *v.* Brown, 13 Pa. Co. Ct. 281; Brindle *v.* Lichtenberger, 1 Chest. Co. Rep. 485; Evans' Estate, 1 Chest. Co. Rep. 112; Ramsey's Estate, 14 Lanc. Bar 60; Zug's Estate, 2 Lanc. L. Rev. 108.

Washington.— Davis *v.* Foster, 29 Wash. 363, 69 Pac. 1102.

See 28 Cent. Dig. tit. "Insolvency," § 185.

Judgment for wages entitled to priority see Western Stone Co. *v.* Carver, 93 Ill. App. 150.

Labor performed by the creditor's wife may come within the rule. Thayer *v.* Mann, 2 Cush. (Mass.) 371.

Traveling agents are not within rule. Davis *v.* Greenlee, 13 Ohio Cir. Ct. 229, 7 Ohio Cir. Dec. 111.

Sums credited in a pass-book of employees according to rules printed therein, for distribution of share of the earnings, were held not to be within the rule. Dolge *v.* Dolge, 70 N. Y. App. Div. 517, 75 N. Y. Suppl. 386.

Salaries of clerks before insolvency, which were not recorded, were held not to be secured on the immovable property of the insolvent. Smith *v.* W. J. Athens Lumber Co., 49 La. Ann. 663, 21 So. 854.

Waiver of lien see Montgomery's Appeal, 3 Pa. Cas. 31, 6 Atl. 125.

Apprentices and workmen who have allowed their wages to accumulate, upon an agreement that they should be paid at the end of their apprenticeship, have no more extensive right to a preference than have any unpaid workman in the employ of the debtor. Mingin *v.* Alva Glass Mfg. Co., 55 N. J. Eq. 463, 37 Atl. 450.

29. Roberts *v.* Edie, 85 Md. 181, 36 Atl. 820; Zug's Estate, 2 Lanc. L. Rev. (Pa.) 108. See *In re* Mitchell, 11 Nova Scotia 379.

For any excess, or for wages earned anterior to such time, the employee shares *pro rata* with the general creditors. Buckwalter's Estate, 3 Pa. Co. Ct. 315.

30. See *supra*, IV, F, 2, b, (VI).

31. *Alabama.*— Donald *v.* Hewitt, 33 Ala. 534, 73 Am. Dec. 431.

Louisiana.— Searcy *v.* His Creditors, 46

But if the fund on which a creditor has a specific lien proves inadequate to satisfy his debt, he has no priority in the distribution of the remainder of the estate but comes in as a general creditor for the balance.[32]

(II) *Liens Acquired by Legal Proceedings.* A lien acquired through legal proceedings unless avoided by statutory provision, as when acquired within a limited period anterior to the insolvency proceedings,[33] will be binding upon the insolvent's estate and entitled to preference in the distribution of his assets.[34] A judgment gives a creditor a lien upon the debtor's land and a preference over all subsequent judgment creditors except the United States.[35]

h. Costs and Expenses of Legal Proceedings.[36] The costs and expenses of legal proceedings incurred by the trustee or assignee of an insolvent in preserving the estate or in recovering the assets are uniformly allowed as a preferred claim against the estate.[37] In some jurisdictions, on the dissolution of an attachment of the debtor's property by reason of the commencement of insolvency proceedings,

La. Ann. 376, 14 So. 910; Butler *v.* Clarke, 44 La. Ann. 148, 10 So. 499; Garretson *v.* His Creditors, 1 Rob. 445.

Maryland.— Swift *v.* Smith, 65 Md. 428, 5 Atl. 534, 57 Am. Rep. 336.

Massachusetts.— Dillaway *v.* Butler, 135 Mass. 479.

New Hampshire.—Bank Com'rs *v.* Security Trust Co., 70 N. H. 536, 49 Atl. 113.

North Carolina.— Huffman *v.* Fry, 58 N. C. 415.

Pennsylvania.— Steiner's Appeal, 27 Pa. St. 313.

See 28 Cent. Dig. tit. "Insolvency," § 186.

An equitable mortgage takes precedence of subsequently acquired rights of creditors in a judicial administration of property of the mortgagor for the benefit of his creditors. Harrigan *v.* Gilchrist, 121 Wis. 127, 99 N. W. 909.

Creditor as bona fide purchaser from insolvent.— Where a debtor sells his property in contemplation of insolvency and the creditor becomes the *bona fide* purchaser, he is entitled to stand as a preferred creditor to the extent of his actual payment therefor beyond his demand against the debtor. Southworth *v.* Casey, 78 Ky. 395.

A foreign creditor claiming a vendor's privilege must prove a contract entitling him to it, and identify the goods. Hamilton *v.* His Creditors, 51 La. Ann. 1035, 25 So. 965.

It would be superior to the rights of attaching creditors in a foreign state, in the absence of fraud or special equities. Donald *v.* Hewitt, 33 Ala. 534, 73 Am. Dec. 431.

Although different properties are covered by two mortgages, the general privileges must be borne by the junior mortgage, if the proceeds of unencumbered property are not sufficient to satisfy the general privilege. Smith *v.* W. J. Athens Lumber Co., 49 La. Ann. 663, 21 So. 854.

Waiver of right see Retzsch *v.* Retzsch Printing Co., 5 Ohio S. & C. Pl. Dec. 574, 7 Ohio N. P. 605.

32. Anderson *v.* Anderson, 1 Hen. & M. (Va.) 12; Field *v.* U. S., 9 Pet. (U. S.) 182, 9 L. ed. 94.

33. See *supra*, IV, C, 2, c.

34. Tufts *v.* Casey, 15 La. Ann. 258; Bethany *v.* His Creditors, 7 Rob. (La.) 61; Jones *v.* Myrick, 8 Gratt. (Va.) 179. See also Cohen *v.* Grier, 4 McCord (S. C.) 509.

The mere placing of an execution in the hands of a sheriff is not sufficient to give a preference, but there must be an actual levy. Patton's Estate, 2 Pars. Eq. Cas. (Pa.) 103.

35. Thelusson *v.* Smith, 2 Wheat. (U. S.) 396, 4 L. ed. 271 [*affirming* 23 Fed. Cas. No. 13,878, Pet. C. C. 195]. But see Hall *v.* Kellogg, 12 N. Y. 325. See also *supra*, IV, F, 5, c.

A judgment after failure gives no preference. Oddie *v.* His Creditors, 6 Mart. N. S. (La.) 473.

Failure to record judgment as defeating the preference see Freeman *v.* His Creditors, 15 La. Ann. 397.

Costs considered as merged in judgment see Hussey *v.* Crawford, 152 Mass. 596, 26 N. E. 424.

36. See *supra*, IV, D, 5, c, (III); IV, F, 2, b, (V); and *infra*, VIII.

37. Armstrong *v.* Wagner, 45 S. W. 356, 20 Ky. L. Rep. 142; Shropshire *v.* His Creditors, 15 La. Ann. 705; Rousseau *v.* His Creditors, 17 La. 206; U. S. *v.* Hunter, 26 Fed. Cas. No. 15,427, 5 Mason 229 [*affirmed* in 5 Pet. 173, 8 L. ed. 86].

Where the movables are insufficient to pay the costs the mortgaged creditors must contribute *pro rata*. Dreux *v.* His Creditors, 7 Mart. N. S. (La.) 635. See Delor *v.* Montegut, 5 Mart. (La.) 468.

Where a creditor acting alone and independently of the receiver or assignee takes proceedings for the purpose of securing and obtaining for the estate property which might otherwise become lost, to charge the estate with the expense of the proceedings it must appear that the services of such creditor in that behalf were not only necessary and resulted beneficially, but that property of value was thereby secured. Lane *v.* Hale, 78 Minn. 421, 81 N. W. 218.

Costs of suit instituted by the insolvent before insolvency proceedings are not entitled to preference. Dey *v.* Lovett, 7 Johns. (N. Y.) 374.

the attaching creditor is allowed a priority of payment as to the amount of his costs accruing before the appointment of the trustee or assignee.[38]

i. Claims Against Partnership.[39] Partnership creditors must in the first instance be satisfied from the partnership estate and the separate or private creditors of the individual partners from the separate and private estates of the partners by whom the separate or private debts were respectively contracted; and the private and individual property of the partners should not be applied in the extinguishment of partnership debts until the separate and individual creditors of the respective partners shall be paid.[40] In some jurisdictions the fact that there is no joint estate and no solvent partner places the firm creditors on a footing with the individual creditors and they are permitted to share the separate estate concurrently with the separate creditors.[41]

j. Proceedings to Establish. The better practice would seem to be that where a creditor claims a preference in the distribution of the insolvent's estate he should assert his claim in the insolvency proceedings, unless by statute a different mode is provided.[42] In some jurisdictions, however, a proceeding in equity may be instituted for the purpose of determining the priority of various creditors or to establish a lien on the fund.[43]

38. Cothren's Appeal, 59 Conn. 545, 22 Atl. 297; Boughton *v.* Crosby, 47 Conn. 577. See Rousseau *v.* His Creditors, 17 La. 206. But *compare* Hussey *v.* Crawford, 152 Mass. 596, 26 N. E. 424, where a judgment was rendered and the costs were considered as merged in the judgment.

These costs are to be paid before the expenses or compensation of the trustee or the fees of the probate court. Emerson's Appeal, 56 Conn. 98, 14 Atl. 295.

Where an attachment of one partner is dissolved by assignment of the estate of the partner the attachment creditor, upon proving his debt and the cost of his suit against the estate, is entitled to be paid such cost before the payment of the partners' individual debts. Buck *v.* Burlingame, 13 Gray (Mass.) 307.

39. See *supra*, IV, F, 2, b, (IV).

40. *California.*— *In re* Straut, 125 Cal. 415, 58 Pac. 62.

Delaware.— Bailey *v.* Kennedy, 2 Del. Ch. 12, 29 Am. Dec. 351.

Louisiana.— Guéringer *v.* His Creditors, 33 La. Ann. 1279.

Massachusetts.— Clarke *v.* Stanwood, 166 Mass. 379, 44 N. E. 537, 34 L. R. A. 378; Richards *v.* Manson, 101 Mass. 482; Catskill Bank *v.* Hooper, 5 Gray 574; Somerset Potters Works *v.* Minot, 10 Cush. 592; Fall River Whaling Co. *v.* Borden, 10 Cush. 458; Howe *v.* Lawrence, 9 Cush. 553, 57 Am. Dec. 68. *Compare* Jewett *v.* Phillips, 5 Allen 150.

United States.— Murrill *v.* Neill, 8 How. 414, 12 L. ed. 1135.

Canada.— See Mackintosh *v.* Almon, 6 Can. L. T. 541, 18 Nova Scotia 498.

See 28 Cent. Dig. tit. "Insolvency," § 161.

A bona fide transfer of partnership property to one partner upon consideration of his assuming partnership debts makes it his separate property, and any liability on the insolvency of the firm to creditors of the partnership, who having agreed to accept him individually as their debtor until his individual creditors are paid. Robb *v.* Mudge, 14 Gray (Mass.) 534. See also Ashmead's Appeal, 27 Conn. 241.

Real estate of one partner attached by firm creditors before the institution of insolvency proceedings against the firm and taken on execution by the assignee in insolvency of such partner and of the partnership, after the order that the attachment should survive a permission granted to the assignee to proceed with the suit in which it was made, is to be deemed part of the separate estate of such partner and distributed among his separate creditors. Purple *v.* Cooke, 4 Gray (Mass.) 120.

41. Harris *v.* Peabody, 73 Me. 262. See also *In re* Straut, 125 Cal. 415, 58 Pac. 62. *Contra*, Howe *v.* Lawrence, 9 Cush. (Mass.) 553, 57 Am. Dec. 68.

That the remaining partner alone asked a discharge, the other partners having retired, has been held not to authorize individual creditors to compete with the partnership creditors. Guéringer *v.* His Creditors, 33 La. Ann. 1279.

42. Vail's Appeal, 37 Conn. 185; Ashmead's Appeal, 27 Conn. 241; Seiter *v.* Mowe, 81 Ill. App. 346; Spears *v.* His Creditors, 40 La. Ann. 650, 4 So. 567; Posey *v.* Weems, 4 La. Ann. 195; Clapp *v.* Huron County Banking Co., 50 Ohio St. 528, 35 N. E. 308; Simpson *v.* Sayler, 2 Ohio Cir. Ct. 73, 1 Ohio Cir. Dec. 370.

43. Shaver Wagon, etc., Co. *v.* Halsted, 78 Iowa 730, 43 N. W. 623; Dillaway *v.* Butler, 135 Mass. 479; Ives *v.* Commissioner of Insolvents, Wright (Ohio) 626; Field *v.* U. S., 9 Pet. (U. S.) 182, 9 L. ed. 94; Hunter *v.* U. S., 5 Pet. (U. S.) 173, 8 L. ed. 86.

Cannot be raised by demurrer.— Security Trust Co. *v.* Sullivan, 77 Fed. 778, 23 C. C. A. 458.

Claims in favor of United States.— Where an assignee or trustee of an insolvent distributes the assets without first paying the claim of the United States, he becomes per-

6. Distribution and Release of Claims — a. In General. The procedure to be pursued in the distribution of an insolvent's estate, the meeting for such purpose, and the character of notice if required, is governed by the practice in the particular jurisdiction in which the proceedings are pending.[44]

b. Payment of Dividends — (I) *In General.* The dividend is based upon the claim as proved and allowed and the stage of the proceedings and the frequency with which it is declared is dependent upon the local practice.[45]

(II) *Interest.* If the estate is more than sufficient to pay all claims, interest will be allowed on all debts from the date of the institution of proceedings.[46] The neglect of an assignee or trustee to declare a dividend as soon as the greater part of the assets have been realized and the amount of the claims ascertained would doubtless render him personally liable for interest from the time when he might have declared a dividend.[47]

c. Release by Creditor. In the settlement of an insolvent's estate it is usually provided that his creditors shall receive no benefit therefrom unless they file a release from further liability upon claims held against the estate.[48] Should the

sonally liable and may be subjected to an action for the amount of the claim. U. S. Rev. St. (1878) §§ 3466, 3467 [U. S. Comp. St. (1901) p. 2314]. See also Field *v.* U. S., 9 Pet. (U. S.) 182, 9 L. ed. 94. Assignee is a necessary party to a bill to enforce a preference in favor of the United States. U. S. *v.* Couch, 25 Fed. Cas. No. 14,874.

44. See the statutes of the several states. See also *In re* Lord, etc., Chemical Co., 7 Del. Ch. 248, 44 Atl. 775 (after paying taxes); Ford *v.* Kelley, 64 Ill. App. 194 (after realty sold subject to all valid liens); Williamson *v.* His Creditors, 6 Mart. (La.) 431; Labbe *v.* Hadfield, 180 Mass. 219, 62 N. E. 262; Hawkins *v.* Mahoney, 71 Minn. 155, 73 N. W. 720; Dobbins *v.* Coles, 59 N. J. Eq. 30, 45 Atl. 444; Simpson *v.* Sayler, 2 Ohio Cir. Ct. 73, 1 Ohio Cir. Dec. 370; Ogilvie *v.* Knox Ins. Co., 2 Black (U. S.) 539, 17 L. ed. 349.

An agreement entered into between the mortgagee of a debtor and others, unsecured creditors of the debtor and sureties for him, by which provision was made for the application of certain assets of the debtor to the payment of his debts, controls the whole matter, fixes the rule of distribution, and makes the law for the case. Hall *v.* Farmers' Nat. Bank, 53 Md. 120.

The court may restrain the improper distribution of an insolvent's estate. Mason *v.* Montgomery, Wright (Ohio) 723.

The court may compel assignee to pay claims where it appears that he has failed to properly conduct his trust and failed to account for property which came into his hands. Clark *v.* Burke, 172 Ill. 109, 49 N. E. 551.

Trustee has no right to apply to a court of equity to distribute the funds in his hands. Pierson *v.* Trail, 1 Md. 142.

The estate and effects of an insolvent are the common security of all his creditors. Cumming *v.* Smith, 5 L. C. Jur. 1.

Pro-rata distribution.— Under the assignment act, requiring distribution *pro rata* of an insolvent's assets, the county court has no authority to order a distribution otherwise than *pro rata*, unless upon a showing that prior liens exist, or that there are some controlling equities in favor of a claimant. Seiter *v.* Mowe, 81 Ill. App. 346.

45. See the statutes of the several states. See also *In re* Levin, 139 Cal. 350, 73 Pac. 159, 63 Pac. 335; Hems *v.* Arnold, 188 Ill. 527, 59 N. E. 421 [*affirming* 89 Ill. App. 313].

In Illinois a creditor is entitled in the distribution of assets to a dividend on the full amount due when he files his claim, without regard to collections on collaterals after that time but before distribution. State Sav., etc., Co. *v.* Stewart, 65 Ill. App. 391.

In Indiana distribution among creditors of an insolvent estate must be postponed until all claims are adjusted. Henderson *v.* Bliss, 8 Ind. 100.

The personal estate is the primary fund from which to make the payment. Scott's Appeal, (Pa. 1887) 8 Atl. 402.

Correction of error.— The declaration and payment of a dividend upon an erroneous basis may be corrected before the final distribution. State Sav., etc., Co. *v.* Stewart, 65 Ill. App. 391.

Payment should be made to the creditor or a duly authorized agent, and if made otherwise the assignee or trustee will become personally liable. See Boardman *v.* De Forest, 5 Conn. 1; Todd *v.* Meding, 56 N. J. Eq. 83, 38 Atl. 349.

46. Consolidated Bank *v.* Moat, 6 Montreal Leg. N. 358.

Interest generally see Interest. See also *supra*, IV, F, 3, b.

47. Manhattan Cloak, etc., Co. *v.* Dodge, 120 Ind. 1, 21 N. E. 344, 6 L. R. A. 369.

Where payment is delayed by order of the court pending litigation as to the amount of indebtedness on which the dividend is to be computed, the creditor is entitled to interest on such dividend. Matter of Ilion Nat. Bank, 59 Hun (N. Y.) 307, 12 N. Y. Suppl. 829.

48. Barnard *v.* Crosby, 6 Allen (Mass.) 327; Adamson *v.* Cheney, 35 Minn. 474, 29 N. W. 71; National German-American Bank *v.* Wilder, 35 Minn. 94, 27 N. W. 201.

In Minnesota a creditor may share in the estate of an insolvent without filing a release

insolvent be guilty of a fraud,[49] or the assignment be adjudged void,[50] the release will not operate as a discharge of the claims, but the dividends received will be treated merely as payment *pro tanto* of such claims.

d. Effect on Creditor's Rights — (i) *In General.* No uniform rule can be laid down with reference to the effect of the proof of a claim and the receipt of a dividend thereon as respects the rights of creditors.[51] It may be stated, however, that a creditor who receives a dividend after proving his claim will be estopped from asserting that the insolvent law in question is unconstitutional.[52]

(ii) *Creditor Who Fails to Prove Claim.*[53] The claim of a creditor who

where the debtor has fraudulently concealed, encumbered, or disposed of any of his property with intent to defraud any of his creditors, but this would not apply where the insolvent was merely negligent or lived beyond his means, or is honestly unable to show how his property has been expended. *In re* Welch, 43 Minn. 7, 44 N. W. 667. In order to entitle a creditor to share in the assets without filing a release, the act must have been committed with an actual corrupt and dishonest intent to cheat and defraud creditors; the withholding of property to which he has no right is not sufficient (*In re* Shotwell, 43 Minn. 389, 45 N. W. 842); nor would the taking of a sum of money to be used for the immediate wants of the family and as a sum charged against him on the books (*In re* Shotwell, *supra*); the contracting of a debt through false representations (John V. Farwell Co. *v.* Dickinson, 60 Minn. 528, 63 N. W. 109), the refusal of an insolvent to answer questions before the referee under the advice of counsel as to the statement of their assets made to a commercial agency (*In re* Shotwell, *supra; In re* Lyons, 42 Minn. 19, 43 N. W. 568), the purchase of a homestead by the insolvent and placing the title in his wife's name (*In re* Welch, *supra*), that he lost large sums of money in dealing in options (*In re* Miller, 42 Minn. 96, 43 N. W. 840), or that the insolvent has given a preference to one of his creditors (*In re* Gazett, 35 Minn. 532, 29 N. W. 347). He may also share, without giving a release, where the insolvent failed to keep proper books of account. Work *v.* Holmboe, 64 Minn. 383, 67 N. W. 205; Ekberg *v.* Schloss, 62 Minn. 427, 64 N. W. 922. See John V. Farwell Co. *v.* Dickinson, 60 Minn. 528, 62 N. W. 109.

49. Phettiplace *v.* Sayles, 19 Fed. Cas. No. 11,083, 4 Mason 312; Barnard *v.* Crosby, 6 Allen (Mass.) 327. See also Minnesota cases cited *supra*, note 48.

50. *In re* Walker, 37 Minn. 243, 33 N. W. 852, 34 N. W. 591.

51. See the statutes of the several states; and cases cited *infra*, this note.

No bar to action for balance.— Johnson *v.* Somerville Dyeing, etc., Co., 15 Gray (Mass.) 216; Coburn *v.* Boston Papier Maché Mfg. Co., 10 Gray (Mass.) 243. *Compare* Priesing *v.* Crampton, 181 Mass. 492, 63 N. E. 936.

No bar to action of deceit.— Merchants' Nat. Bank *v.* Taylor, 66 Vt. 574, 29 Atl. 1012.

The indorsee of a note, the indorser of which is secured by mortgage, who proves it against the estate of the insolvent indorser and votes for his discharge, cannot thereafter withdraw his name and have the mortgage assigned to him. New Bedford Sav. Inst. *v.* Fairhaven Bank, 9 Allen (Mass.) 175, where the maker was also insolvent.

Acceptance of a dividend on the entire amount of proved claim does not estop the creditor from setting off such claim in an action by the assignee to enforce payment on a debt on property of the insolvent sold at public sale. Meherin *v.* Saunders, (Cal. 1899) 56 Pac. 1110. After the assignee had disbursed most of an insolvent's estate in dividends to creditors who had proved their claims, the assignment was declared void at the instance of an attaching creditor and another non-assenting creditor also attached. The court held that the creditors who had proved and received dividends were not estopped from asking for a receiver. *In re* Walker, 37 Minn. 243, 33 N. W. 852, 34 N. W. 591.

Creditors who elect to prove the interest due on bonds in insolvency proceedings thereby make election as to the bonds, and, by proving on such bonds as collateral, they elect to prove on the note secured by them, and cannot thereafter bring attachment proceedings to reach the principal of the debt in another state. Gerding *v.* East Tennessee Land Co., 185 Mass. 380, 70 N. E. 206.

Where a contract of reinsurance included a promise to assume and pay the losses of the policy-holders of the reinsured company, by filing claims in insolvency proceedings against one company, the policy-holders were not deprived of their right of action against the other. Barnes *v.* Hekla F. Ins. Co., 56 Minn. 38, 57 N. W. 314, 45 Am. St. Rep. 438.

An allowance of the claim of a non-resident assignee of a non-resident insolvent against the assignee of an insolvent in New Hampshire, and a decree of distribution to the former assignee, is not such a reduction of possession by him as to entitle him to the fund as against a resident attaching creditor. Stillings *v.* Haley, 68 N. H. 541, 44 Atl. 701.

52. Fogler *v.* Clark, 80 Me. 237, 14 Atl. 9. But see Kimberly *v.* Ely, 6 Pick. (Mass.) 440, where it was held that acceptance of a dividend will be considered payment *pro tanto* of a creditor's claim proved under an unconstitutional statute.

53. **Laches in proof of claim** see *supra*, IV, F, 4, a, (III).

resides in the state in which his debtor is adjudged insolvent, which is not proved within the time limited by the statutes of such state, is as a rule barred,[54] although in some jurisdictions such creditor may reach undistributed assets in the hands of the assignee upon showing payment of all claims filed.[55]

G. Accounting and Discharge of Assignee or Trustee[56] — **1. Duty to Account.** It is the duty of an assignee or trustee of an insolvent to keep careful and accurate account of the estate coming into his hands.[57]

2. Proceedings to Compel Accounting. In some jurisdictions a proceeding in equity will lie at the instance of a creditor to compel him to execute his trust and account for the assets,[58] while in others, where the insolvency statutes provide a remedy in the insolvency proceeding itself, such an action will not lie.[59]

3. Charges and Credits. The assignee or trustee will be charged with all of

Operation of discharge on claims not filed or proved see *infra*, VI, C, 5, c, (IV).

54. See McDonald *v.* Webster, 2 Mass. 498; McCollum *v.* Hinckley, 9 Vt. 143.

Extent of rule.— This has been held true, although the claimant had no actual knowledge of the pendency of the insolvency proceedings. Matter of Harmony Ins. Co., 9 Abb. Pr. N. S. (N. Y.) 347. It is no answer to the bar that the creditor delayed proof because of the fraudulent concealment of property by the insolvent, so that the assets appeared so small that it would not be worth while to present his claim. Smith *v.* Talbot, 18 Tex. 774. Where on application of a creditor of an insolvent, whose claim was secured by mortgage, and had not been presented and allowed in the insolvency proceeding, a citation was issued, the debtor was examined regarding part of the property included in the mortgage, and the court found that the insolvent had disposed of a part of said property, and ordered him to account therefor to the mortgagee. It was held that the court had no jurisdiction to make such order. Madison *v.* Piper, 8 Ida. 137, 53 Pac. 395.

A non-resident who does not file his claim might still prosecute his claim by suit. White *v.* McCaughey, 20 R. I. 1, 36 Atl. 840, 37 Atl. 350.

55. Rassieur *v.* Jenkins, 64 Ill. App. 336; Marder *v.* Wright, 70 Iowa 42, 29 N. W. 799.

A syndic is bound to administer any surplus in his hands for the benefit of newly discovered creditors, and until all the creditors are paid the assets in the hands of the syndic must be applied to the payment of the debts of the insolvent. Gottschalk *v.* His Creditors, 12 La. Ann. 70.

56. **Accounting** generally see Accounts and Accounting.

Accounts, statements, etc., see *supra*, IV, D, 6.

Liability of assignee or trustee see *supra*, IV, D, 7.

Reference generally see References.

57. See the statutes of the several states.

Any creditor may call for the account and the burden of proving its correctness will be on the syndic. Meilleur *v.* His Creditors, 3 La. 532.

The form of a trustee's accounts and its contents varies in the several states, but generally speaking it should conform to the local practice and contain an accurate presentation of the estate under his administration. Shropshire *v.* His Creditors, 15 La. Ann. 705. In Massachusetts it has been held that the account and memoranda of the doings of an assignee may be kept on blank leaves of an account-book. Hoard *v.* Bassett, 11 Allen (Mass.) 213.

Itemized account.— The assignee of an insolvent may be required by the court to more specifically itemize his account. *In re* Raley, 123 Cal. 38, 55 Pac. 790.

58. Sanderson *v.* McIntosh, 65 Cal. 36, 2 Pac. 728.

It is no defense to a bill for an accounting for the trustee to say that the books of the insolvent firm have always been open to interested parties and that the complainant has been invited to inspect them, but refused to make such inspection. Kellogg *v.* Cooke, 6 Mackey (D. C.) 433.

59. *Illinois.*—Doran *v.* Hodson, 43 Ill. App. 411.

New York.— Hynes *v.* Alexander, 2 N. Y. App. Div. 109, 37 N. Y. Suppl. 527.

Pennsylvania.— It was held that the court has no power to compel an assignee to exhibit his accounts on the application of the insolvent, but that the *cestui que trust* is left to his appropriate common-law remedy. Mylin *v.* Mylin, 10 Lanc. Bar 129.

Vermont.— Sowles *v.* Lewis, 75 Vt. 59, 52 Atl. 1073; Sowles *v.* Flinn, 63 Vt. 563, 22 Atl. 620.

Canada.— L'Heureux *v.* Lamarche, 12 Can. Sup. Ct. 460.

See 28 Cent. Dig. tit. "Insolvency," § 200 *et seq.*

In Canada an insolvent has no action against an assignee of his insolvent estate to compel him to render an account. His recourse is by petition or motion and that he claims under a deed of composition or discharge, these must first have been deposited with the assignee, in order that he may give notice of the same. Fraser *v.* Patterson, 1 Rev. Crit. 248.

Imprisonment for refusal.— An assignee who refuses or neglects to conform to a judgment ordering him to pay over money in his hands may be compelled to do so by imprisonment. Bates *v.* Beaudry, 1 Rev. de Lég. 360.

the insolvent's assets and the proceeds therefrom coming into his hands[60] and be given credit for necessary expenditures.[61]

4. Compensation. The trustee or assignee of an insolvent is usually compensated for his services in the shape of a commission on the estate coming into his hands.[62] He is entitled to no commissions, however, where he has been guilty of fraud and mismanagement of the estate,[63] or on moneys coming into his hands which did not belong to the trust fund.[64]

5. Approval or Disapproval of Account. The approval or disapproval of the account of a trustee or assignee by the court, if final and no effort is made to obtain a review of the same,[65] operates, as a rule, to discharge the trustee or assignee from further liability to the estate and the creditors.[66] An objection to

60. See the statutes of the several states.

An assignee who erroneously charged himself with the full face value of certain accounts which he turned over to an attorney for collection and credited himself with the items expended in making the collections will not render him personally liable for such attorney's fees. *In re* Raley, 123 Cal. 38, 55 Pac. 790.

Movables will not be charged to a syndic on a provisional account, but he may account for them in another accounting. Andrus *v.* His Creditors, 46 La. Ann. 1351, 16 So. 215.

To hold trustee liable for not collecting the assigned debts, there should be distinct proof of neglect or positive forbearance on his part toward the debtors without the concurrence of the assignor and of consequent loss, and also that such debts were of actual value. Collins *v.* Reid, 2 Nova Scotia 252.

La. Civ. Code, art. 1150, requiring all moneys collected by syndics, as soon as they shall come into their hands, to be deposited in a chartered bank of the state allowing interest on deposits, under a penalty of twenty per cent interest on the amount not deposited, is imperative, and leaves no discretion in the courts to reduce the rate of interest. Conery *v.* His Creditors, 13 La. 420, 37 So. 14.

61. Deladurantaye *v.* Beausoleil, 3 Montreal Leg. N. 355, entitled to costs of obtaining his discharge, even where the insolvent has obtained from his creditors a deed of composition and discharge.

Expenses and expenditures see *supra*, IV, D, 5, c, (III); IV, F, 2, b, (V); IV, F, 5, b.

An assignee for creditors is properly charged with an item representing costs paid to and collected by his attorney on an appeal, where the amount was collected on a judgment in favor of assignee for his costs and disbursements, and it does not appear that assignee cannot collect such claim against his attorney. Davis *v.* Swedish-American Nat. Bank, 78 Minn. 408, 80 N. W. 953, 81 N. W. 210, 79 Am. St. Rep. 400.

62. *In re* Raley, 123 Cal. 38, 55 Pac. 790; Brady *v.* His Creditors, 43 La. Ann. 165, 9 So. 59; *In re* Louisiana Sav. Bank, etc., Co., 40 La. Ann. 514, 4 So. 301; Gaillard *v.* His Creditors, 19 La. Ann. 87; Northern Bank *v.* Squires, 8 La. Ann. 318, 58 Am. Dec. 682, Hollander *v.* His Creditors, 6 La. Ann. 668; Pandelly *v.* His Creditors, 1 La. Ann. 21; Maxan *v.* His Creditors, 1 Rob. (La.) 560; Gordon *v.* Matthews, 30 Md. 235; *In re* Commercial Bank, 4 Ohio S. C. Pl. Dec. 440, 3 Ohio N. P. 193.

An assignee whose costs remain unpaid may in Canada contest the insolvent's petition for discharge. *In re* Arsenault, 2 Quebec 89.

Whenever the compensation is to be computed by a percentage and there is no sum realized from the estate by which it is borne, the compensation fails. Bijotat *v.* His Creditors, 1 Rob. (La.) 272.

Where the original trustee is removed and a new trustee is appointed, the latter will not be entitled to commissions on sums paid over to him by the original trustee. Gordon *v.* Matthews, 30 Md. 235.

63. Prieur *v.* His Creditors, 2 Rob. (La.) 541; Gordon *v.* Matthews, 30 Md. 235; Davis *v.* Swedish-American Nat. Bank, 78 Minn. 408, 80 N. W. 953, 81 N. W. 210, 79 Am. St. Rep. 400. See also Gallagher *v.* Walsh, 60 Minn. 527, 62 N. W. 108.

64. *In re* Commercial Bank, 4 Ohio S. & C. Pl. Dec. 440, 3 Ohio N. P. 193.

In Louisiana the syndic is entitled to a commission on the proceeds of mortgaged property, although purchased by the mortgagee who retains the price in discharge of his claims. Delogny *v.* Her Creditors, 48 La. Ann. 488, 19 So. 614; Maxan *v.* His Creditors, 1 Rob. 560.

In Canada the trustee is entitled to the commissions on amount of the mortgage, as well as the portion of the purchase-money paid in cash, where real estate is sold subject to a mortgage. *In re* David, 25 L. C. Jur. 156.

65. **Appeal and review** see *infra*, VII.

Irregularities in the filing of objections should be taken advantage of in the court below and cannot for the first time be urged on appeal. *In re* Murray, 31 Oreg. 173, 49 Pac. 961.

66. Sembre *v.* Sembre, 45 La. Ann. 117, 11 So. 942; Levy *v.* Jacobs, 12 La. 109.

The judge has the right in an insolvency proceeding, on petition of creditors and after hearing of the parties, to revise the assignee's bill for taxation. Fraser *v.* Darling, Dorion (L. C.) 217.

Sufficiency of findings and order.— An order allowing the account of receiver in insolvency, and refusing to surcharge the same

the account,[67] if sustained, which results in an advantage to the estate, inures to the benefit of all creditors who have not waived their rights to attack it.[68]

6. CLOSING ESTATE. Upon the closing of an estate the duties and functions of the trustee or assignee are at an end.[69]

7. LIABILITY ON BOND.[70] For any breach of the conditions of the bond given by the trustee or assignee for the faithful performance of his duty as such, whether it be an act of commission or omission on his part, he and his sureties are liable in an action upon the bond.[71] In order to maintain a suit on the bond, the party bringing the same must be a creditor whose claim has been allowed and ordered to be paid.[72]

under the claim that the receiver was guilty of positive fraud, involves the conclusion of fact that the receiver's conduct was in good faith, without more specific findings. Minneapolis Trust Co. *v.* Menage, 86 Minn. 1, 90 N. W. 3.

67. **Objections to account.**— Upon the filing of the account of the trustee or assignee, objections thereto should be urged in the insolvency proceedings in accordance with the requirement of the particular practice of the jurisdiction in which pending. See the statutes of the several states.

68. *In re* Shea, 57 Minn. 415, 59 N. W. 494.

69. Laforest *v.* His Creditors, 11 La. Ann. 714; Beauvais *v.* Morgan, 2 La. 287; Bernard *v.* Vignaud, 1 Mart. N. S. (La.) 1.

Reopening estate.— Should property belonging to the insolvent be subsequently discovered, there seems to be no reason why the estate should not be reopened and the discharge of the assignee set aside or a new assignee be appointed for the purpose of administering such additional estate. Rued *v.* Cooper, 109 Cal. 682, 34 Pac. 98.

70. Bond generally see BONDS.

Liability of assignee generally see *supra*, IV, D, 7.

71. *Connecticut.*— Clark *v.* Mix, 15 Conn. 152.

Idaho.— Moscow First Nat. Bank *v.* Martin, 6 Ida. 204, 55 Pac. 302.

Louisiana.— Rochereau *v.* Harvey, 18 La. Ann. 391; David's Succession, 14 La. Ann. 730; Seghers *v.* Visivier, 4 Mart. (La.) 30. See Louisiana cases cited *infra*, this note.

Maryland.— State *v.* Williams, 3 Md. 163.

Massachusetts.— Chapin *v.* Avery, 4 Gray 286.

Ohio.— Hall *v.* Brown, 4 Ohio Dec. (Reprint) 80, 1 Clev. L. Rep. 9.

United States.— Adams *v.* Hyams, 8 Fed. 417, 19 Blatchf. 487.

Canada.— Delisle *v.* Letourneux, 3 Montreal Leg. N. 207.

See 28 Cent. Dig. tit. "Insolvency," § 209.

Compare Armstrong *v.* Wagner, 43 S. W. 478, 19 Ky. L. Rep. 1508.

Where assignees voluntarily give separate bonds for the required amount under the order of court, which does not require separate bonds, and afterward they are directed to pay certain sums to certain creditors, and one having sole possession makes default, the creditors may pursue either bond until satisfaction is obtained. Insolvency Ct. *v.* Alexander, 72 Vt. 15, 47 Atl. 102.

In Louisiana it has been held that the syndic cannot be held personally responsible to a creditor who has obtained an *ex parte* order for the payment of his claim by a refusal to comply with the order, as a syndic is personally responsible for misconduct only. Seghers *v.* Visinier, 4 Mart. 30. And a claim against him for malfeasance must be brought against him individually and not by opposition to a tableau of distribution. Blake *v.* His Creditors, 6 Rob. 520; Lillard *v.* Tarbe, 15 La. 421; Pimpinella *v.* Lanusse, 6 Mart. N. S. 124. Nor can he be made liable by mere motion. Bachemain *v.* His Creditors, 2 La. 346. He cannot be harassed by suits by individual creditors for mismanagement, but if guilty thereof, he can, in due course of law, be removed and made individually liable. Lillard *v.* Tarbe, 15 La. 421.

In Canada, under the Canadian practice, where an official assignee has taken possession of an insolvent's estate in that capacity and subsequently creditors continued him as assignee to the estate without seeking further security, for default occurring while acting as assignee of the creditors the creditors have recourse upon the bond given as the official assignee. Letourneux *v.* Dansereau, 12 Can. Sup. Ct. 307 [*confirming* 1 Montreal Q. B. 357].

Obtaining leave to sue.— It is not ground for general demurrer to sue on the bond of an assignee in insolvency without first obtaining leave of court. McCollister *v.* Bishop, 78 Minn. 228, 80 N. W. 1118.

Sufficiency of complaint.— See McCollister *v.* Bishop, 78 Minn. 228, 80 N. W. 1118.

72. State *v.* Mayugh, 13 Md. 371; State *v.* Williams, 3 Md. 163.

A second assignee in insolvency is not a person interested or aggrieved by the default of his predecessor so as to make him a proper relator in a suit on his predecessor's bond brought under the statute providing that the bond of an assignee in insolvency may be sued on in any proper court as the relation of any person interested or aggrieved. Appellate Div. Sup. Ct. *v.* Lawyers' Surety Co., 21 R. I. 454, 44 Atl. 594.

Before the insolvent debtor can maintain an appeal against his assignee for misconduct, he must first apply to the court of insolvency for relief. Lincoln *v.* Bassett, 9 Gray (Mass.) 355.

V. COMPOSITION, RESPITE, OR DISCONTINUANCE.

A. Composition[73] — **1. In General.** After a composition has been duly signed and approved,[74] and the percentage paid, it operates as a discharge of all claims of which the court had jurisdiction.[75] As soon as the composition deed has been

73. Composition defined see 5 Cyc. 356; 8 Cyc. 412. See also 4 Cyc. 282; 1 Cyc. 325.

74. As a rule the composition must be approved by a majority in number and amount of claims. See the statutes of the several states. See also Cobbossee Nat. Bank *v.* Rich, 81 Me. 164, 16 Atl. 506; Fenton *v.* Graham, 161 Mass. 554, 37 N. E. 745.

All creditors.— Where a deed of composition stipulates that it should be signed by all creditors, it is not valid or binding upon any unless they all do sign. Cuvillier *v.* Buteau, 1 Rev. de Légis. 109.

Assent of a creditor cannot be given by a clerk unless the authority of such clerk to bind his employer is of an express and unequivocal character. Vineberg *v.* Beaulieu, 4 Montreal Super. Ct. 328.

Amount of deposit by the insolvent to pay the claims should be large enough to cover all unproved claims computed on the amount set forth in the schedule as well as those already allowed. Claflin *v.* Lowe, 157 Mass. 252, 32 N. E. 158, where the decree was permitted to be amended to cure a defect in this particular.

A creditor who fails to prove his claim as required cannot object if the balance of the deposit is refunded to the insolvent or the person depositing the same after the payment of the proved claims. Holder *v.* Hillson, 170 Mass. 466, 49 N. E. 643.

Fraudulent misrepresentations inducing signature to the deed of composition are grounds for setting it aside. Girard *v.* Hall, 1 L. C. L. J. 58.

Hearings on proposal of composition.— A judge of insolvency should not be compelled against his judgment to order a hearing on a proposal of composition where the amount is insignificant, especially where the statute provides that the court shall order confirmation only after the composition appears to be duly assented to and to be consistent with justice and for the interests of creditors. Hill *v.* McKim, 168 Mass. 100, 46 N. E. 427, holding that mandamus will not lie to compel the judge of a court of insolvency to order a hearing on a proposal for composition made by an insolvent, but the proper remedy is by bill or petition under the statute. The error of a judge in such matters cannot be corrected by a writ of prohibition. Fairweather *v.* McKim, 168 Mass. 103, 46 N. E. 427. In Maine a creditor who is not a party to the agreement of composition is limited in his rights of examination of the debtor to the question whether the agreement was signed by the required proportion of the creditors and whether the debtor has paid or secured his creditors the percentage agreed upon. Messer *v.* Storer, 79 Me. 512, 11 Atl. 275.

Assignee need not be appointed solely to represent creditors in proof of claims, where the composition is offered, so that unless there are other reasons for appointment the judge of insolvency should himself proceed and determine whether doubtful claims presented should be allowed. Van Ingen *v.* Bead, 165 Mass. 582, 43 N. E. 516.

Payment in part of his claim by sale of notes of the insolvent to parties outside of the state, for the amount of which he was not accountable to the assignee, does not prevent a creditor from proving other notes of the insolvent in court without having to account for what he has received already on his claim, although he thereby receives a greater percentage than was provided by the terms of the composition. Batcheller *v.* National Bank of Republic, 157 Mass. 33, 31 N. E. 481.

Surrender of security.—A creditor who consents without reserve to a composition with his debtor cannot retain collateral securities given by the latter, or a pledge, unless it be for the purpose of a guarantee of the unsecured amount of the composition. Heney *v.* Primeau, 18 Rev. Lég. 271; Roy *v.* Faucher, 17 Rev. Lég. 287.

75. Perkins *v.* Quint, 69 N. H. 428, 45 Atl. 143.

Although the insolvent fails to pay the instalments a discharge has been held to be absolute in effect. *In re* Piton, 6 Quebec 33.

Payment into court, by an insolvent who has obtained his discharge in composition proceedings, of the percentage due creditors, with interest from the time of demand by the creditors, and costs, operates as a tender precluding the creditor from recovering on his original claim. W. L. Blake Co. *v.* Lowell, 88 Me. 424, 34 Atl. 264, holding, however, that the insolvent cannot plead the discharge where he holds the percentage due on the creditor's claim, so long as the creditor is not chargeable with laches.

The record showing the proper facts and findings, viz., that the agreement presented to the judge was on its face sufficient, and the judge having adjudged it to be so the discharge cannot be invalidated by proof that creditors holding the requisite amount of claims did not consent to the composition under which the discharge was obtained. Cobbossee Nat. Bank *v.* Rich, 81 Me. 164, 16 Atl. 506. So, where the original payee of a note proves it in insolvency under composition proceedings and receives a receipt for the percentage paid by the insolvent and makes no objection to his discharge, the grounds for which appear by the records of proceedings in the court of insolvency, he waives his right to object to the discharge being invalid as to

signed or executed, the assignee should reconvey the estate remaining in his hands to the insolvent.[76] The terms of the composition must be strictly complied with by the insolvent.[77] A discharge in composition proceedings becomes invalid for fraud or materially false statements in the affidavit or schedule filed by the insolvent,[78] and is therefore ineffective as a bar to the recovery of any balance due on the claims of creditors from the insolvent.[79]

2. REVOCATION OF COMPOSITION DEED. Where a composition debtor fails to comply with the terms thereof within a reasonable time the composition may be revoked;[80] and if he fails to make payment according to its terms a creditor is entitled to sue for the whole amount of his debt.[81]

B. Respite — 1. IN GENERAL. Under the law in some jurisdictions a respite,[82] voluntary[83] or forced,[84] may be secured by the debtor from proceedings against him by his creditors.

2. PROCEEDINGS TO OBTAIN. To secure a forced respite it is necessary that the

him, and the same is true of a subsequent indorsee who takes the note after the discharge with full knowledge of the facts. Wright *v.* Worthley, 84 Me. 182, 24 Atl. 811. See Eustis *v.* Bolles, 146 Mass. 413, 16 N. E. 286, 4 Am. St. Rep. 327.

Composition between creditor and indorser of a note does not free the promisor. Banque Nationale *v.* Bétournay, 18 Rev. Lég. 175.

Showing preference.— An insolvent who compounds with his creditors, and in order to obtain the signature of one of them to the deed of composition offers him better terms than the rest, cannot plead the fraudulent preference to escape such creditor's claim. Chapleau *v.* Lemay, 14 Rev. Lég. 198; Greenshields *v.* Plamondon, 8 L. C. Jur. 192. *Contra*, Sinclair *v.* Henderson, 9 L. C. Jur. 306.

Payment by notes as a release.— Where a party sends his creditor by letter the notes of third parties as a composition of the debts he owes, and the creditor retains them, he is bound by the composition, although the notes may not be paid at maturity. Roy *v.* Turcotte, 7 L. C. Jur. 53.

The indorser of a composition note given by a debtor to his creditor in carrying out a settlement for a certain percentage on the dollar has been held not to be released by reason of the fact that the debtor simply gives the creditor his own notes for and pays the balance of creditor's claim. Arpin *v.* Poulin, 22 L. C. Jur. 331, 1 Montreal Leg. N. 290. And especially where the indorser has as the consideration for his indorsement obtained a transfer of the insolvent's entire stock in trade and assets which he still holds. But the indorser is entitled to a deduction of all sums that the creditor has received in excess of the composition notes. Martin *v.* Poulin, 1 Dorion (L. C.) 75, 4 Montreal Leg. N. 20.

76. Ross *v.* Bertrand, 9 Montreal Leg. N. 314.

77. *In re* Fabre, 8 Rev. Lég. 629; *In re* Hachette, 22 L. C. Jur. 245, 1 Montreal Leg. N. 532; Beattie *v.* Riddell, 2 Montreal Leg. N. 302.

78. Thaxter *v.* Johnson, 79 Me. 348, 10 Atl. 46.

Mere irregularities in the composition proceedings will not render the discharge void. Cobbossee Nat. Bank *v.* Rich, 81 Me. 164, 16 Atl. 506.

79. Thaxter *v.* Johnson, 79 Me. 348, 10 Atl. 46.

80. Bolt *v.* Lee, 16 Rev. Lég. 53.

81. Beaudry *v.* Barrille, 1 Rev. de Légis. 33 (holding this to be true notwithstanding the debtor tendered the amount of the composition before the creditor instituted an action for his debt); Brown *v.* Hartigan, 5 L. C. Jur. 41; Rolland *v.* Seymour, 2 Montreal Leg. N. 324.

A surrender to the debtor of the note which constituted the principal evidence of the original debt does not affect the creditor's right to recover the full amount of his claim after the debtor has failed to comply with the terms of the composition. Brown *v.* Hartigan, 5 L. C. Jur. 41.

82. A respite is a privilege granted to a debtor, and always derogatory to the rights of the creditors who are in the minority, by changing their contracts without consent on their part. Dauphin *v.* Soulie, 3 Mart. N. S. (La.) 446. Another definition see La. Rev. Civ. Code (1900), art. 3084.

The respite and insolvency laws are perfectly distinct. The former rests on the apparent solvency, the latter on the conceded insolvency of the debtor. In the first case the property remains in the possession and absolute ownership of the applicant, in the latter it passes with qualifications to the creditors. Anderson *v.* His Creditors, 33 La. Ann. 1155.

83. A respite is voluntary when all the creditors consent to the proposal which the debtor makes to pay in a limited time the whole or a part of his debt. La. Rev. Civ. Code (1900), art. 3085.

The agreement granting a voluntary respite must be signed by all the creditors, and such a respite does not bind even those creditors who have signed it when the others who it was contemplated should become parties, do not sign. Faures *v.* Coincon, 15 La. 436.

84. A respite is forced when a part of the creditors refuse to accept the debtor's proposal and when the latter is obliged to compel them by judicial authority to consent to what the others have determined in

debtor should make an application therefor,[85] and should file in the office of the clerk of the court to whom he presents his petition a schedule of his assets and liabilities,[86] after which there must be a properly called and advertised meeting of the creditors,[87] at which the creditors in order to vote thereat must appear and make a sworn statement of their debts,[88] and a majority in number and amount of the *bona fide* creditors who appear on the schedule or at the meeting must by vote give their consent to the respite.[89] After the creditors' vote has been taken it must be homologated by the judge who ordered the meeting and a judgment of homologation of the respite signed by him.[90]

3. Stay Pending Application. On an application for a respite a stay of pro-

the cases directed by law. La. Rev. Civ. Code (1900), art. 2085.

85. La. Rev. Code (1900), art. 3087; Anderson *v.* His Creditors, 32 La. Ann. 892; Haydel *v.* Girod, 10 Pet. (U. S.) 283, 9 L. ed. 426.

The theory of the application is that the applicant is plaintiff and the creditors defendants; there is issue joined between them by the filing of oppositions to the application; and the oppositions should be tried whenever legally fixed for trial without citation to either the applicant debtor or the assenting creditors to answer the oppositions. Anderson *v.* His Creditors, 32 La. Ann. 892.

86. Drew *v.* His Creditors, 49 La. Ann. 690, 22 So. 780; Lay *v.* His Creditors, 48 La. Ann. 1053, 20 So. 162; Phillips *v.* Her Creditors, 36 La. Ann. 904, holding that a failure to file such schedule is a ground for refusing the respite.

A failure to make a substantial compliance with the requirements to furnish a sworn schedule of the assets, and also the debtor's failure to respond when called upon in respect to such assets, is ground for setting aside his respite. Lay *v.* His Creditors, 48 La. Ann. 1053, 20 So. 162.

Placing parties who are not his creditors on the schedule is no good ground of opposition; because by so doing the debtor cannot prejudice the real creditors, any of whom, although not on the schedule, can by making oath vote at the creditors' meeting. Anderson *v.* His Creditors, 33 La. Ann. 1155.

87. Janin *v.* His Creditors, 8 La. 467, holding, however, that a debtor who applies for a respite cannot avail himself of an irregularity resulting from his own error in asking his creditors to be convened at too early a day.

Notice of proceedings must be given to every creditor and one not receiving proper notice will not be bound by the respite. Block *v.* Jefferies, 46 La. Ann. 1104, 15 So. 366; McHenry *v.* Burnett, 1 Phila. (Pa.) 297 (notice of application); Haydel *v.* Girod, 10 Pet. (U. S.) 283, 9 L. ed. 426. Notice will be presumed where the record shows a decree granting a respite. McHenry *v.* Burnett, *supra*.

Whether or not the preliminary orders in proceedings for respite were providently issued may be tested by rule to show cause and if found not to be so it is proper for the judge to seasonably revoke the same.

Schminke *v.* Their Creditors, 50 La. Ann. 511, 23 So. 712.

88. Phillips *v.* Her Creditors, 36 La. Ann. 904; Anderson *v.* His Creditors, 33 La. Ann. 1155.

Through properly appointed proxies creditors may appear at a meeting. Phillips *v.* Her Creditors, 36 La. Ann. 904.

The oath to their debts of creditors who appear by proxy may be made either by the creditors before any proper officer or by their proxies before the notary holding the meeting, provided the proxies swear of their own knowledge. Phillips *v.* Her Creditors, 36 La. Ann. 904.

Creditors domiciled out of the state, although not summoned, have the right to appear and vote at a meeting of creditors. Phillips *v.* Her Creditors, 36 La. Ann. 904.

89. Anderson *v.* His Creditors, 33 La. Ann. 1155; Morgan *v.* Nye, 14 La. Ann. 30 (a bare majority sufficient since the statute of 1843); Rouanet *v.* Castel, 12 La. Ann. 520. See also McHenry *v.* Burnett, 1 Phila. (Pa.) 297.

Three fourths in number and amount of the creditors on the schedule have been held necessary to a forced respite (Young *v.* Gilly, 3 Mart. N. S. (La.) 504; Dauphin *v.* Soulie, 3 Mart. N. S. (La.) 446; Clavier *v.* His Creditors, 9 Mart. (La.) 390), including hypothecary as well as ordinary creditors (Janin *v.* His Creditors, 8 La. 467).

After the creditors' meeting is closed, the notary who conducted the meeting cannot receive the votes of creditors who were not present (Broussard *v.* His Creditors, 5 Mart. N. S. (La.) 82); nor can creditors who have voted withdraw or change their vote without legal cause assigned, after the *procès verbal* of the meeting has been returned into court and during the pendency of proceedings for its homologation. (Phillips *v.* Her Creditors, 36 La. Ann. 904).

Proceedings of the creditors may be opposed at any time before homologation. Nichols *v.* His Creditors, 11 La. Ann. 447.

The vote of a single creditor for a respite is not a mere offer to make a new contract between the creditor and debtor but is a quasi-judicial act by which the rights of other creditors are to be affected. Vicksburg Liquor, etc., Co. *v.* Jefferies, 45 La. Ann. 621, 12 So. 743; Morgan *v.* Nye, 14 La. Ann. 30.

90. Abat *v.* Michel, 1 Mart. N. S. (La.) 240.

ceedings against the debtor or his property is usually ordered.[91] This order is equivalent to an injunction,[92] but ceases upon the granting of the respite.[93]

4. Operation and Effect. A respite if granted under a strict observance of the law[94] is a judicial contract between the debtor and the creditors and among the creditors by which the debtor is allowed a delay for the payment of the sums which he owes,[95] and which protects him against all anterior debts,[96] and holds in abeyance suits standing at issue when it is granted.[97] Thereafter a creditor cannot make any agreement or contract with the debtor or do any act by which he may secure an undue advantage over the others,[98] and the debtor must so conduct his affairs as to preserve equality among the creditors.[99] If the respite has expired each creditor may sue for his claim;[1] but if it has not, the debtor by pleading and proving it may have the action dismissed.[2] A respite, however, is not binding on privileged creditors whose privileges result from the nature of the debts and not from seizure.[3] Creditors who have not consented to the respite obtained without hypothecation of property have a right to demand security from the debtor; and the exercise of this right is not limited to any precise period after the respite.[4]

91. De St. Romes *v.* Her Creditors, 35 La. Ann. 801.

An order staying proceedings is neither entirely nor partially revoked by the subsequent granting by the same judge of an attachment to a creditor who pending the stay and utterly ignoring it and the respite proceedings in his pleadings brings a suit for his individual benefit alleging that the respite debtor is insolvent and that he has or is about to defraud his creditors; and the order for the attachment having been improvidently granted the attachment will be dissolved. Mitchell *v.* Dalton, 44 La. Ann. 823, 11 So. 276.

92. De St. Romes *v.* Her Creditors, 35 La. Ann. 801.

93. Abat *v.* Michel, 1 Mart. N. S. (La.) 240.

94. Young *v.* Gilly, 3 Mart. N. S. (La.) 504 (holding also that absentees cannot be regarded as assenting nor those who fail to appear as not creditors); Dauphin *v.* Soulie, 3 Mart. N. S. (La.) 446; Haydel *v.* Girod, 10 Pet. (U. S.) 283, 9 L. ed. 426.

95. Block *v.* Jefferies, 46 La. Ann. 1104, 15 So. 366; Vicksburg Liquor, etc., Co. *v.* Jefferies, 45 La. Ann. 621, 12 So. 743; Prager *v.* Micas, 36 La. Ann. 75.

Where the debtor dies after a respite and before maturity of the first instalment due thereunder, his estate, if vacant, will be considered insolvent and the debts all due and demandable. Poultney *v.* Cecil, 8 La. 321.

96. Davis *v.* Mitchell, 2 Mart. (La.) 115, holding that an insolvent who has obtained a respite cannot be held to bail for an anterior debt.

97. St. Louis Nat. Bank *v.* Bloch, 44 La. Ann. 893, 11 So. 466.

Such stay of proceedings cannot bar an action for a breach of the conditions of the respite. Ward *v.* Brandt, 10 Mart. (La.) 641.

An order suspending proceedings on a reconventional demand until the expiration of a respite cannot and must not be considered as fettering the future ruling of the judge over the same, as he is entitled to revoke or modify it if future events should justify such action. St. Louis Nat. Bank *v.* Bloch, 44 La. Ann. 893, 11 So. 466.

98. Block *v.* Jefferies, 46 La. Ann. 1104, 15 So. 366.

A mortgage secured after a respite is an unlawful preference. Ward *v.* Brandt, 11 Mart. (La.) 331, 13 Am. Dec. 352.

Any action by one of the creditors to have property returned to the debtor's estate inures to the benefit of all the creditors. Block *v.* Jefferies, 46 La. Ann. 1104, 15 So. 366.

99. Block *v.* Jefferies, 46 La. Ann. 1104, 15 So. 366.

Where the debtor makes an assignment for the benefit of certain creditors another creditor who is not a party to the assignment can sue immediately to enforce his claim, although he is a party to the respite. McBride *v.* Crocberon, 5 Mart. (La.) 105.

1. Kelley-Goodfellow Shoe Co. *v.* Fluker, 51 La. Ann. 193, 25 So. 131; Peyroux *v.* Dubertrand, 11 La. 32.

2. Peyroux *v.* Dubertrand, 11 La. 32.

An exception to the jurisdiction of the court in which two joint debtors are sued on the ground that a respite has been granted will be overruled where the proceedings on the respite were obtained by one of them to which the other was not a party in another court. Peyroux *v.* Dubertrand, 11 La. 32.

3. Block *v.* Jefferies, 46 La. Ann. 1104, 15 So. 366; De St. Romes *v.* Her Creditors, 35 La. Ann. 801; Huppenbauer *v.* Durlin, 24 La. Ann. 359.

Creditors having a privilege or special mortgage on the property of the insolvent cannot be deprived of their right of seizure by a forced respite, but if this property is insufficient they are restrained by the respite from proceeding against any other for the balance unpaid. Janin *v.* His Creditors, 8 La. 467.

4. Eyrick *v.* His Creditors, 44 La. Ann. 183, 10 So. 502; Hufty *v.* His Creditors, 11 La. Ann. 26.

The amount of the security to which a cred-

5. Breach of Conditions. Any act of the debtor in violation of the contract resulting from the respite is a fraud and *ipso facto* turns the respite into insolvent proceedings and the cession of goods for the benefit of the creditors as though it had been offered in the first instance,[5] and upon proof of his failure to comply with the terms of the respite,[6] his creditors may cause the respite to be set aside by direct action,[7] provided the opposition to arrest the respite is made within the prescribed time.[8]

6. Effect of Refusal of Respite. Where the creditors refuse a respite prayed for a cession of the debtor's property *ipso facto* ensues and creditors may proceed at once to vote for syndics and prescribe the terms for selling the property.[9] But where the respite is refused by the court on the ground of defect in the proceedings, although not refused by the creditors, the cession of property does not follow.[10]

C. Discontinuance.[11] Upon the discontinuance of,[12] or other termination of, the insolvency proceedings before the final winding up and administration of the estate by the assignee or trustee,[13] the title of the assignee is divested and the

itor who has not given his consent is entitled should be proportioned to the claim of the creditor. Hufty *v.* His Creditors, 11 La. Ann. 26, holding that a bond for one third more than the amount of his claim is sufficient.

5. Block *v.* Jefferies, 46 La. Ann. 1104, 15 So. 366.

A debtor suspected of meditating a removal after obtaining a respite may be arrested and his goods be seized and when brought before the judge his person and goods may be secured notwithstanding a formal defect in the arrest. Pecquet *v.* Golis, 1 Mart. N. S. (La.) 438.

A failure to comply with a voluntary respite to which the consent of all the creditors was not obtained does not make the debtor liable to a forced surrender. State *v.* Judge Iberville Parish Fourteenth Jud. Dist. Ct., 48 La. Ann. 660, 19 So. 666.

6. Marx *v.* His Creditors, 46 La. Ann. 1271, 15 So. 622, holding also that proof of such failure is not dispensed with because the debtor when ruled to show cause why the respite should not be set aside fails to do so and files a frivolous exception.

7. Anderson *v.* Duson, 35 La. Ann. 915, holding that an enforced respite resulting from a judgment can be set aside only in a direct action and not collaterally.

Defect in proceedings as ground for setting aside see *supra*, note 86.

Any creditor interested may proceed summarily by rule to show cause why the respite should not be vacated, where the debtor fails to make payment according to its terms. State *v.* Judge Third Dist. Ct., 45 La. Ann. 1349, 14 So. 57.

One creditor alone has not the right of annulling the respite without judicial process on the ground of its violation by the debtor and of applying the property to his individual claims; all the other creditors should be made parties to any proceedings brought for that purpose. Vicksburg Liquor, etc., Co. *v.* Jefferies, 45 La. Ann. 621, 12 So. 743.

8. Block *v.* Jefferies, 46 La. Ann. 1104, 15 So. 366, ten days.

9. Arcenaux *v.* His Creditors, 3 La. 37.

A homologation of the creditors' refusal is not required by the law, but it orders the proceedings to continue as if the cession had taken place in the first instance. Arcenaux *v.* His Creditors, 3 La. 37.

10. Drew *v.* His Creditors, 49 La. Ann. 690, 22 So. 780; Phillips *v.* Her Creditors, 36 La. Ann. 904.

The appointment of a provisional syndic before refusal of the debtor's application for a respite is premature and he is entitled to mandamus for a suspensive appeal. State *v.* Judge Third Dist. Ct., 31 La. Ann. 800.

11. **Discontinuance** generally see Dismissal and Nonsuit.

12. McIntire *v.* Robinson, 81 Me. 583, 18 Atl. 292 (notice to all parties interested necessary after adjudication and issuance of warrants); *In re* Stoddart, 30 Minn. 553, 16 N. W. 452 (no notice necessary to creditors who have been joined as parties to the proceeding); Ripley *v.* Griggs, 52 Vt. 460 (sufficient notice of new petition where first petition of insolvency was discontinued).

For unreasonable delay in prosecution proceedings in insolvency may be dismissed. Kornahrens *v.* His Creditors, 64 Cal. 492, 3 Pac. 126.

A petitioning creditor cannot have his name stricken from the petition without leave of court, after the petition has been made and proceedings commenced in the court of insolvency. *In re* Hawkes, 70 Me. 213.

In a bill in equity under the statutes to vacate proceedings in insolvency, a judge of the court of insolvency should not be joined as a defendant. Winchester *v.* Thayer, 129 Mass. 129.

Insolvent cannot discontinue his proceedings after cession where his creditors refuse to accept it on a suggestion of fraud. Clague *v.* Lewis, 4 Mart. (La.) 673.

13. See State *v.* Young, 44 Minn. 76, 46 N. W. 204.

Raising assignment.— Under the insolvency laws of Ohio, the probate court in which an assignment is filed has jurisdiction, upon the consent of all creditors, to make an

trust created by the assignment brought to an end,[14] all parties being remitted to the same rights and duties as existed at the date of the assignment, except in so far as the estate has been administered and disposed.[15]

VI. RIGHTS, REMEDIES, AND DISCHARGE OF INSOLVENT.

A. Status of Insolvent in General — 1. Actions By or Against — a. Pending Actions — (I) *Against Insolvent.* The statutes usually provide that all pending actions against the insolvent for debts provable in insolvency shall be stayed until the question of his discharge is determined;[16] but where the insolvent neglects to ask for a continuance on the ground of the pendency of the insolvency proceedings, and permits judgment to be entered against himself by default, such default will not subsequently be set aside in order to allow him to plead his discharge to the action.[17]

(II) *By Insolvent.* A suit instituted by an insolvent will not abate upon his subsequent insolvency, it will either proceed in his name for the benefit of his estate, or his assignee or trustee will be substituted as party plaintiff, as the local practice may require.[18]

order raising the assignment, and directing the assignees to reconvey the property. State Nat. Bank *v.* Ellison, 75 Fed. 354.

Acquiescence and estoppel of creditor.— Where a firm creditor was notified of an order of the probate court, raising the assignment of one of the partners, and did not object thereto for two years, but continued to do business with the firm, such creditor was thereby barred from subsequently objecting to the validity of the order, and hence from questioning, on that ground, a subsequent conveyance, for full consideration, of real estate owned by such partner. State Nat. Bank *v.* Ellison, 75 Fed. 354.

14. Warren *v.* Howe, 44 Ill. App. 157.

15. Stoddard *v.* Gilbert, 62 Ill. App. 79 [*affirmed* in 163 Ill. 131, 45 N. E. 542].

16. Reed *v.* Penrose, 2 Grant (Pa.) 472. See also Warfield *v.* His Creditors, 2 La. 188; Simmons *v.* Lander, 85 Me. 197, 27 Atl. 100.

It was formerly held discretionary with the judge whether the insolvent should have a stay of proceedings. Schwartz *v.* Drinkwater, 70 Me. 409; Barker *v.* Haskell, 9 Cush. (Mass.) 218.

Foreign creditors, as well as home creditors, are bound by the stay. Orr *v.* Lisso, 33 La. Ann. 476.

Rule does not apply to suits brought for enforcement of prior liens or mortgages, as such suits are not affected by the insolvency proceedings. Rix *v.* McHenry, 7 Cal. 89.

Where a decree of sale is passed in a suit to enforce a vendor's lien before insolvency proceedings are begun by the vendee, a sale under the decree may be made after the insolvency proceedings are instituted. Hurt *v.* Stull, 4 Md. Ch. 391.

A stay of proceedings against one debtor *in solido* does not stay them against others. Hyde *v.* Wolff, 8 Mart. N. S. (La.) 703; Martinstein *v.* Wolff, 8 Mart. N. S. (La.) 679.

Suit does not abate by the discharge of defendant in insolvency, but it becomes defective and cannot proceed until the defect is removed. Hall *v.* McPherson, 3 Bland (Md.) 529.

In Louisiana, where, pending suit against him, defendant goes into insolvency, the suit should be transferred to the court having jurisdiction of the insolvency proceedings and cumulated with them. Bajourin *v.* Ramelli, 34 La. Ann. 1216; Fabre *v.* McRae, 14 La. Ann. 648; Clark *v.* Oddie, 4 Mart. N. S. (La.) 625; Cox *v.* Zeringue, 4 Mart. (La.) 261.

In Canada it has been held that notwithstanding an assignment under the law by a defendant in a suit he may still continue to act in the suit in his own name. Morin *v.* Henderson, 21 L. C. Jur. 83.

17. Simmons *v.* Lander, 85 Me. 197, 27 Atl. 100. This has been held true, although a motion for a continuance to await the result of the insolvency proceedings is pending. Dalton-Ingersoll Co. *v.* Fiske, 175 Mass. 15, 55 N. E. 468.

Where, pending an appeal, the debtor is adjudged insolvent by the court of another county, a motion to stay proceedings without a proper showing of adjudication of insolvency, or of the order staying proceedings issued therein, does not divest the court in which the appeal is taken of its authority to proceed so as to make its subsequent action void. State *v.* Nye County Fifth Dist. Ct., 18 Nev. 286, 3 Pac. 417.

18. Raymond *v.* Johnson, 11 Johns. (N. Y.) 488; Peshine *v.* Shepperson, 17 Gratt. (Va.) 472, 94 Am. Dec. 468. See Cleverly *v.* McCullough, 6 Rich. (S. C.) 517; Wells *v.* Atkins, 68 Vt. 191, 34 Atl. 694, 54 Am. St. Rep. 880.

The general rule is that the assignee or trustee may be substituted as party plaintiff for the insolvent and prosecute for the benefit of the estate a suit commenced by the insolvent. Newbert *v.* Fletcher, 84 Me. 408, 24 Atl. 889; Bacon *v.* Lincoln, 2 Cush. (Mass.) 124; Denny *v.* Lincoln, 13 Metc. (Mass.) 200.

b. Actions Begun After Proceedings in Insolvency — (I) *AGAINST INSOLVENT.* A creditor cannot maintain an action on a debt which would be barred by a discharge,[19] and if commenced against the insolvent during the pendency of the insolvency proceedings it will be stayed.[20]

(II) *BY INSOLVENT.* After assignment the trustee or assignee is the proper party to bring suits on causes of action in favor of the insolvent,[21] except as to such as by statute are retained by the insolvent, as for example a right of action for a tort.[22]

2. EXEMPTIONS.[23] Insolvency statutes uniformly preserve for the insolvent as exempt certain personal property, and in some jurisdictions they preserve for him a homestead, the amount and character of which vary in the different states.[24] The property thus set apart is retained by the insolvent and can neither be taken upon execution in satisfaction of a debt of the insolvent,[25] nor be applied by the

19. See Greene *v.* Breck, 32 Barb. (N. Y.) 73 [*reversing* 10 Abb. Pr. 42], insolvency of special partnership.

Non-resident creditor not within the rule see Ruszits *v.* Hilliard, 57 Vt. 60.

One holding a mechanic's lien on the debtor's property may properly institute proceedings to foreclose the same after the institution of insolvency proceedings. Bradford *v.* Dorsey, 63 Cal. 122.

Sureties who have paid a note during the pendency of insolvency proceedings against the maker of a note, but have not presented their claim to the assignee, may commence an action against the maker for the amount so paid. Thomas *v.* Carter, 63 Vt. 609, 22 Atl. 720, 14 L. R. A. 82.

In Louisiana the *cessio bonorum* is not a peremptory bar to a suit on a judgment rendered contradictorily with the conceding debtor in another state after the cession has been accepted, even though the debt upon which the foreign judgment was obtained was put upon the debtor's bilan. Scott *v.* Bogart, 14 La. Ann. 261. If a creditor place upon the bilan and duly notified sues the debtor for the same debt and the default is regularly confirmed, it will not be absolutely null, but defendant should have pleaded the cession, and cannot thereafter avail himself of it. Miller *v.* Marigny, 10 La. Ann. 338. The order for a stay of proceedings only stays those against persons by creditors placed on the schedule. Clarke *v.* Wright, 5 Mart. N. S. 122.

Cancellation of fraudulent conveyance.— Creditors may sue in their own behalf to cancel fraudulent conveyances made by the debtor to his trustee in insolvency before he became insolvent. Preston *v.* Horwitz, 85 Md. 164, 36 Atl. 710.

Matters not connected with insolvency.— In an action by creditors against an insolvent and others in a matter not connected with the insolvent proceedings, some of defendants being strangers to the insolvent proceedings, plaintiffs cannot be forced to litigate questions involved in said insolvent proceedings. Baldwin *v.* Cappel, 50 La. Ann. 315, 23 So. 303.

20. Batchelder *v.* Batchelder, 66 N. H. 31, 20 Atl. 728; Cosh-Murray Co. *v.* Bothell, 10 Wash. 314, 38 Pac. 1118.

21. *Louisiana.*— Louisiana Bank *v.* Wilson, 19 La. Ann. 1.

Maryland.— Kirwan *v.* Latour, 1 Harr. & J. 289, 2 Am. Dec. 519.

Massachusetts.— See Williams *v.* Fowle, 132 Mass. 385; Gay *v.* Kingsley, 11 Allen 345.

Ohio.— Johns *v.* Johns, 6 Ohio 271.

Pennsylvania.— Stoever *v.* Stoever, 9 Serg. & R. 434; Young *v.* Willing, 2 Dall. 276, 1 L. ed. 380.

See 28 Cent. Dig. tit. "Insolvency," § 221.

In Maryland suit may be maintained in the name of the insolvent, unless the trustee or assignee has been appointed. Kirwan *v.* Latour, 1 Harr. & J. 289, 2 Am. Dec. 519.

Where the creditors never accepted the assignment, nor in fact was an assignment actually made, insolvent may maintain the action. Tunno *v.* Edwards, 3 Brev. (S. C.) 510.

22. Stanly *v.* Duhurst, 2 Root (Conn.) 52.

In Massachusetts an insolvent debtor may bring an action in his own name, with the consent of the assignee, on a contract entered into by him before his insolvency. Herring *v.* Downing, 146 Mass. 10, 15 N. E. 116.

23. **Exemptions** generally see EXEMPTIONS; HOMESTEADS.

24. Demartin *v.* Demartin, 85 Cal. 71, 24 Pac. 594; *In re* Bowman, 69 Cal. 244, 10 Pac. 412; Bowman *v.* Norton, 16 Cal. 213; Goudy *v.* Werbe, 117 Ind. 154, 19 N. E. 764, 3 L. R. A. 114; Schonwald *v.* Capps, 48 N. C. 342; Emeigh's Estate, 2 Blair Co. Rep. (Pa.) 363; Kochenour's Estate, 17 York Leg. Rec. (Pa.) 116; Mummert's Estate, 17 York Leg. Rec. (Pa.) 115.

A formal claim by the assignor for the exemption is no longer required. Kochenour's Estate, 17 York Leg. Rec. (Pa.) 116.

Waiver of exemptions see Bier *v.* His Creditors, 15 La. Ann. 167; Nason *v.* Hobbs, 75 Me. 396.

25. *In re* Kaeppler, 7 N. D. 435, 75 N. W. 789.

Where an allowance has become excessive by reason of a change in the insolvent's family after the allowance, the creditors' remedy is by an application to open the decree granting such allowance, and not by attachment. Brimblecom *v.* O'Brien, 69 N. H. 370, 46 Atl. 187.

assignee or trustee as a part of the assets in the settlement and winding up of the estate.[26]

3. Refusal of Discharge. If a discharge is refused, the amount received by the creditors will be deemed a payment *pro tanto* on the amount of the claim and the insolvent will be liable in an action for the balance.[27]

4. Death of Insolvent. The statutes do not appear uniform with reference to the effect of the death of the insolvent upon the proceedings. In some states they abate,[28] while in others the assignee's control of the assigned estate is preserved and the representative of the deceased can only claim the surplus, if any.[29]

B. Effect of Release From Arrest or Imprisonment[30] — **1. Divesting Estate.** The estate of an insolvent is fully divested by his discharge under the Insolvent Debtors Act.[31]

2. Effect on Action Against or By Insolvent. Whether an insolvent debtor, discharged under an Insolvent Debtors Act, may maintain suit upon a cause of action which accrued before his discharge, is governed by particular statutory provisions[32] and the same may be said to be true with respect to actions against such an insolvent.[33]

3. Discharge of Debts. The statutes relating to the release from arrest or imprisonment of poor debtors as a rule provide that the discharge of a poor debtor from arrest or imprisonment upon his past obligations does not impair any right of the creditor to obtain satisfaction of his claims out of the debtor's estate,[34]

26. Dascey *v.* Harris, 65 Cal. 361, 4 Pac. 205; Barrett *v.* Simms, 62 Cal. 440. *Compare In re* Knepfle, 6 Ohio S. & C. Pl. Dec. 417, 4 Ohio N. P. 213.

Insolvent may maintain ejectment to recover possession of the homestead during the pendency of an application on his part to be discharged from his debts and liabilities under the insolvent laws. Moore *v.* Morrow, 28 Cal. 551.

27. In California it has been held that the court cannot distribute the debtor's estate among his creditors when the discharge is refused. Sanborn *v.* His Creditors, 37 Cal. 609. While in Washington the statutes provide that after the surrender of the debtor's property it becomes fully vested in the assignee and cannot be divested or affected by his failure to receive a discharge. Traders' Bank *v.* Van Wagenen, 2 Wash. 172, 26 Pac. 253.

Where no dividends whatever are declared, the insolvent will still be liable for the full amount of his obligations. See cases cited *supra*, note 27.

28. Vermont Marble Co. *v.* San Francisco Super. Ct., 99 Cal. 579, 34 Pac. 326; Bartlett *v.* Walker, 65 Vt. 594, 27 Atl. 496. See also 1 Cyc. 69.

29. Gardner *v.* Letcher, 29 S. W. 868, 16 Ky. L. Rep. 778; Lawrence *v.* Guice, 9 Rob. (La.) 219.

30. Discharge from arrest on mesne process see Arrest.

Discharge from imprisonment on execution see Executions.

Imprisonment for debt, prohibition of, see Constitutional Law, 8 Cyc. 879 *et seq.*

31. Gibbs *v.* Smith, 2 Phila. (Pa.) 84, where it is held that this is true regardless of whether the assignee accepts or not, or whether the assignment is executed; and that a conveyance made by the insolvent thereafter of property held at the time of his discharge is a nullity.

32. Turner *v.* Fendall, 1 Cranch (U. S.) 116, 2 L. ed. 53 [*affirming* 8 Fed. Cas. No. 4,727, 1 Cranch C. C. 35]. See also Ardrey *v.* Wadsworth, 1 Fed. Cas. No. 512, 1 Cranch C. C. 109 (holding that under the insolvent act of Maryland, a discharged insolvent debtor may maintain an action); Nevitt *v.* Maddox, 18 Fed. Cas. No. 10,139, 4 Cranch C. C. 107 (holding that under the insolvent act of the District of Columbia neither the insolvent debtor nor his administrator can maintain a suit in his own name upon such a cause of action); Ridgway *v.* Pancost, 20 Fed. Cas. No. 11,818, 1 Cranch C. C. 38 (holding that under the law of Virginia such a discharged insolvent may maintain action on a note).

33. See Honeywell *v.* Burns, 8 Cow. (N. Y.) 121 (holding that plaintiff may discontinue against a discharged insolvent debtor, even though defendant stipulates not to avail himself of the discharge as a defense to the suit); Oakley *v.* Steddiford, 3 Johns. (N. Y.) 253 (where the court refused a motion to set aside default against two defendants, one of whom was a discharged insolvent, for the reason that plaintiff stipulated to enter a verdict for the discharged defendant); Green *v.* Foskett, 11 Rich. (S. C.) 332 (where plaintiff was allowed to prosecute his action to recovery, notwithstanding the discharge of defendant as an insolvent debtor); Crane *v.* Martin, 4 Rich. (S. C.) 251 (where a judgment obtained against the discharged insolvent debtor, pending proceedings under the Insolvent Debtors Act, was set aside).

34. *Georgia.*—Phillips *v.* Wesson, 16 Ga. 137.

Louisiana.—Union Bank *v.* Bagley, 10 Rob. 43.

although it may be noticed in this connection that some of the earlier statutes provided otherwise.[35]

4. Exemption From Subsequent Arrest — a. In General. As a rule a discharge in insolvency exempts the insolvent from subsequent arrest or imprisonment on account of a debt or demand which was provable against his estate,[36] but debts which are not provable are not released by the discharge and the insolvent may be arrested thereon in those jurisdictions where the right of arrest exists.[37] The debtor, however, will not be exempt from arrest even in the state where the discharge was had upon a suit instituted by a non-resident creditor who was not a party to the original proceedings.[38]

b. Arrest in Another State. A discharge from arrest under the insolvent laws of a state of which both the parties were citizens will not exempt the debtor from arrest in another state at the instance of the same creditor on the same cause of action.[39]

Maine.— Jones *v.* Jones, 87 Me. 117, 32 Atl. 779.

Maryland.— Gordon *v.* Tunier, 5 Harr. & J. 369.

New York.— Wright *v.* Paton, 10 Johns. 300; People *v.* Rossiter, 4 Cow. 143. But see Roosevelt *v.* Kellogg, 20 Johns. 208, under the act of April 12, 1883.

North Carolina.— Burton *v.* Dickens, 7 N. C. 103.

Pennsylvania.— Brolaskey *v.* Landers, 2 Miles 371.

United States.— King *v.* Riddle, 7 Cranch 168, 3 L. ed. 304; Owen *v.* Glover, 2 Fed. Cas. No. 10,630, 2 Cranch C. C. 578.

See 28 Cent. Dig. tit. "Insolvency," § 228.

35. Hunt *v.* Simons, 2 Bay (S. C.) 104; Wall *v.* Wardens Ct., 1 Bay (S. C.) 434; Quinling *v.* Com., 2 Va. Cas. 494. See also Dufau *v.* Massicot, 6 Mart. N. S. (La.) 182, construing the Louisiana act of 1817. But see U. S. *v.* Wilson, 8 Wheat. (U. S.) 253, 5 L. ed. 610, execution at suit of the United States.

36. *California.*— Cohen *v.* Barrett, 5 Cal. 195.

Maryland.— State *v.* Walsh, 2 Gill & J. 406; Andrews *v.* Scotton, 2 Bland 629.

Massachusetts.— Bennett *v.* Justices Boston Municipal Ct., 166 Mass. 126, 44 N. E. 121; Hall *v.* Justices Boston Municipal Ct., 164 Mass. 155, 41 N. E. 64; Everett *v.* Henderson, 150 Mass. 411, 23 N. E. 318.

New York.— Russell *v.* Packard, 9 Wend. 431.

North Carolina.— Burton *v.* Dickens, 7 N. C. 103.

Pennsylvania.— George *v.* Hoover, 3 Serg. & R. 559; Bassett *v.* Davis, 1 Pa. L. J. Rep. 310.

United States.— Anderson's Case, 1 Fed. Cas. No. 353, 2 Cranch C. C. 243; Campbell *v.* Claudius, 4 Fed. Cas. No. 2,356, Pet. C. C. 484; Read *v.* Chapman, 20 Fed. Cas. No. 11,605, Pet. C. C. 404.

See 28 Cent. Dig. tit. "Insolvency," § 229.

It was formerly held that a defendant might be held to bail in an action for a debt from which his person had been discharged under an insolvent law, where a *prima facie* case of fraud is made out against him by affidavit. Reynolds *v.* Manning, 1 Cow. (N. Y.) 228; Man *v.* Lowden, 4 McCord (S. C.) 485.

In North Carolina it was formerly held that the discharge of a debtor does not protect him from arrest at the instance of any other creditor than the one at whose suit he was in prison. Griffin *v.* Simmons, 50 N. C. 145; Crain *v.* Long, 14 N. C. 371.

Where the discharge was of the person and not of after-acquired property, the person will be exempt from arrest, but the debt may be recovered. Pugh *v.* Bussel, 2 Blackf. (Ind.) 394; Robertson *v.* Crowell, 3 Cow. (N. Y.) 13.

Second discharge.— A discharge in later insolvency proceedings will exempt the insolvent from arrest on a debt provable under the former insolvency proceedings in which a discharge was denied the insolvent. Van Ingen *v.* Justices Municipal Ct., 166 Mass. 128, 44 N. E. 121.

37. Zinn *v.* Ritterman, 2 Abb. Pr. N. S. (N. Y.) 261 (action for fraud and deceit); Com. *v.* Dee, 30 Pittsb. Leg. J. (Pa.) 117 (action for fornication and bastardy).

38. Woodhull *v.* Wagner, 30 Fed. Cas. No. 17,975, Baldw. 296.

39. *Louisiana.*— Morris *v.* Eves, 11 Mart. 730.

Maine.— Judd *v.* Porter, 7 Me. 337.

Massachusetts.— Coffin *v.* Coffin, 16 Pick. 323; Boston Type, etc., Foundery *v.* Wallack, 8 Pick. 186.

New Jersey.— Wood *v.* Malin, 10 N. J. L. 208. But see Rowland *v.* Stevenson, 6 N. J. L. 149.

New York.— Whittemore *v.* Adams, 2 Cow. 626; Sicard *v.* Whale, 11 Johns. 194.

South Carolina.— Ayres *v.* Audubon, 2 Hill 601.

See 28 Cent. Dig. tit. "Insolvency," § 231.

Compare Hauptman *v.* Nelson, 11 Fed. Cas. No. 6,225, 4 Cranch C. C. 341.

Contra.— Pugh *v.* Bussel, 2 Blackf. (Ind.) 366, 394; McKim *v.* Marshall, 1 Harr. & J. (Md.) 101; Com. *v.* Riddle, 1 Serg. & R. (Pa.) 311; Boggs *v.* Teackle, 5 Binn. (Pa.) 332; Carey *v.* Conrad, 2 Miles (Pa.) 92.

Comity.— It seems that the debtor will be released because of a foreign discharge only in case the state where the debt was discharged extends the same courtesy to citizens

C. Discharge[40] — **1. Right to Discharge.** The conditions upon which a discharge will be granted vary in the different states. In general any debtor who has been adjudged insolvent and complied with the requirements of the statute in the surrender of his property and the rendition of an account of his assets and liabilities and who has not been guilty of any fraud will be entitled to a discharge.[41]

2. Grounds For Refusal of Discharge[42] — **a. In General.** The insolvency laws as a rule provide for the refusal of a discharge upon a finding of the existence of certain facts, more specifically hereinafter noticed.[43]

b. Second Insolvency.[44] In some jurisdictions a discharge will not be granted to a debtor who is a second time adjudged insolvent, unless he has paid a certain percentage of the outstanding claims, and has obtained the consent of a specified proportion of his creditors.[45]

c. Fraud[46] — (I) *In General.* The statutes as a rule provide that a discharge will be refused where the debtor is guilty of fraud,[47] or has sworn falsely in relation to any material fact concerning his assets or liabilities, in connection with his insolvency proceedings.[48]

of Pennsylvania. Walsh *v.* Nourse, 5 Binn. (Pa.) 381; Smith *v.* Brown, 3 Binn. (Pa.) 201.

40. Definition.— It is not the filing of a release in an insolvency proceeding under the law of 1881 that discharges the insolvent debtor, but the judgment of the court entered thereon so discharging him. Megins *v.* Pary, 72 Minn. 113, 75 N. W. 120. A discharge is a decree, order, or certificate issued to an insolvent upon his compliance with the requirements of the statutes with reference to the surrender of his property and the like, which may be pleaded by him in bar to an action upon certain claims due and owing at the time of the insolvency proceedings. See also 14 Cyc. 294.

41. *In re* Ruffin, 168 Mass. 232, 46 N. E. 626; Baker's Case, 8 Cush. (Mass.) 109; Harrison *v.* Kellogg, 46 Minn. 331, 48 N. W. 1132; *In re* Bradstreet, 13 Johns. (N. Y.) 385.

42. Effect of refusal of discharge see *supra*, VI, A, 3.

43. See *infra*, VI, C, 2, 5, b *et seq.*

44. Operation of discharge on debts proved in prior proceedings which have failed see *infra*, VI, C, 5, c, (v).

45. If the insolvent has paid all the debts owing by him at the time of his previous insolvency or been voluntarily released therefrom by his creditors, there would of course be no objection to his second discharge. See the statutes of the several states.

Effect of discharge or refusal of discharge in bankruptcy.— It has been held under such a statute that a debtor who is insolvent for the second time and since his first insolvency has obtained a discharge in bankruptcy is within neither the letter nor the policy of the exceptions stated. Whitney *v.* Weed, 156 Mass. 224, 30 N. E. 1023. In California one who has refused a discharge in bankruptcy, it has been held, cannot in insolvency proceedings be discharged from the same debts. *In re* Smith, 68 Cal. 203, 8 Pac. 881.

Under the insolvent act of 1880 one whose petition for a discharge has been denied, on the ground that his debts did not exceed the sum of three hundred dollars, as required by the act (section 2) before a debtor could claim its benefits, is not within section 49, providing that no discharge shall be granted if the debtor has received "the benefits of any act of insolvency" within three years next preceding his application for discharge in insolvency. *In re* Marsh, 115 Cal. 230, 46 Pac. 1072.

46. Fraud as invalidating discharge see *infra*, VI, C, 4.

47. See statutes of the several states; and cases cited *infra*, note 48.

Opportunity to refute charge of fraud.— See *In re* Corcoran, 8 Pa. Dist. 298.

The burden of proving such fraud as would bar the insolvent's discharge was held in California to be on the contestants. *In re* Harris, 81 Cal. 350, 22 Pac. 867.

48. *California.*— Demartin *v.* Demartin, 85 Cal. 76, 24 Pac. 596; Estudillo *v.* Meyerstein, 72 Cal. 317, 13 Pac. 869. See Smith *v.* His Creditors, 59 Cal. 267.

Maine.— Jones *v.* First Nat. Bank, 79 Me. 191, 9 Atl. 22.

Massachusetts.— Clark *v.* Stanwood, 166 Mass. 379, 44 N. E. 537, 34 L. R. A. 378.

Minnesota.— *In re* Rees, 39 Minn. 401, 40 N. W. 370.

New Jersey.— Berry *v.* Arthur, 13 N. J. L. 308.

Wisconsin.— See *In re* Mabbett, 73 Wis. 351, 41 N. W. 531.

Canada.— *In re* Freer, 12 L. C. Jur. 315; *Ex p.* Tempest, 11 L. C. Jur. 57.

See 28 Cent. Dig. tit. "Insolvency," § 235.

Perjury to prevent the discharge must have been committed in the insolvency proceeding, as Vt. St. § 2135 provides. *In re* Chapman, 71 Vt. 368, 45 Atl. 232.

That one debt was created by fraud is no ground for refusing a discharge to other debts. Where a statute refers to frauds, it means those which affect the mass of his creditors. Siegel *v.* His Creditors, 95 Cal. 409, 30 Pac. 559; Dyer *v.* Bradley, 89 Cal. 557, 26 Pac. 1103; Dyer *v.* Martin, (Cal. 1891) 26 Pac. 1105; *In re* McEachran, 82 Cal. 219, 23 Pac. 46; Hempsted *v.* Wisconsin

(II) *Fraudulent Transfers or Preferences.*[49] It is usually provided that a debtor who has made a preference or transfer of his property with intent to defraud his creditors will be denied a discharge, if made within a certain period prior to the insolvency proceedings.[50]

d. Mistake. An unintentional or innocent mistake will not prevent the debtor's discharge.[51]

e. Failure of Trader to Keep Books.[52] The failure of a merchant or trader to keep proper books of account and records from which his true financial condition may be ascertained is often made a ground for refusing him a discharge in the insolvency proceedings.[53]

f. Failure to File or Defects in Schedule.[54] The statutes usually provide that an insolvent who has sworn falsely in his schedule with reference to his assets or liabilities,[55] or who has failed to file a schedule thereof as required by law, will be refused a discharge.[56] And in some jurisdictions, where the claim is not properly scheduled to enable its identification, it will not be released by the discharge.[57]

M. & F. Ins. Co. Bank, 78 Wis. 375, 47 N. W. 627.

Refusal of an insolvent to answer an accusation of fraud will warrant the court in dismissing his petition. Sanborn *v.* His Creditors, 37 Cal. 609.

49. Invalidating the discharge granted see *infra*, VI, C, 4.

50. *California.*— Fisk *v.* His Creditors, 12 Cal. 281. An assignment for the benefit of creditors would not preclude the debtor from claiming the discharge under the insolvent laws. Dresbach *v.* His Creditors, 63 Cal. 187.

Connecticut.— Middlebrook *v.* French, 4 Conn. 1.

Georgia.— Johnson *v.* Martin, 25 Ga. 268.

Louisiana.— Burdeau *v.* His Creditors, 44 La. Ann. 11, 10 So. 395. See Kallman *v.* Creditors, 39 La. Ann. 1089, 3 So. 382.

Maine.— Huston *v.* Goudy, 90 Me. 128, 37 Atl. 881.

Massachusetts.— *In re* Fletcher, 136 Mass. 340; *In re* Phillips, 132 Mass. 233; *In re* Lane, 3 Metc. 213.

Missouri.— Talbot *v.* Jones, 5 Mo. 217.

New Jersey.— Reford *v.* Cramer, 30 N. J. L. 250.

New York.— Morewood *v.* Hollister, 6 N. Y. 309; Matter of Watson, 2 E. D. Smith 429; Cohen's Case, 10 Abb. Pr. 257.

United States.— Eckle *v.* Fitzgerald, 8 Fed. Cas. No. 4,267, 4 Cranch C. C. 90.

Canada.— *Ex p.* Thurber, 11 L. C. Jur. 35.

See 28 Cent. Dig. tit. "Insolvency," § 236; and *supra*, IV, C, 1, 2.

The mere giving of a preference is sufficient under some statutes to defeat a discharge, although there was no intent to defraud. Fernald *v.* Gay, 12 Cush. (Mass.) 596. This has been held to be true, although the debtor made the preference without the intent of committing a fraud, where it was shown that he had traded extensively without capital. *Ex p.* Watt, 2 L. C. L. J. 284.

If the property has been reconveyed to the insolvent before proceedings, it has been held that the preference originally given would not defeat the discharge. Middlebrook *v.* French, 4 Conn. 1.

51. Demartin *v.* Demartin, 85 Cal. 76, 24 Pac. 596; Weeks *v.* Buderus, 39 N. J. L. 448.

52. Invalidating discharge see *infra*, VI, C, 4.

53. Sullivan *v.* Washburn, etc., Mfg. Co., 139 Cal. 257, 72 Pac. 992; *In re* Clark, 128 Cal. 147, 60 Pac. 663; Siegel *v.* His Creditors, 95 Cal. 409, 30 Pac. 559; *In re* Good, 78 Cal. 399, 20 Pac. 860; *In re* Lukes, 71 Cal. 113, 12 Pac. 390; Huston *v.* Goudy, 90 Me. 128, 37 Atl. 881; *In re* Mooers, 86 Me. 484, 30 Atl. 109; *In re* Patten, 85 Me. 154, 27 Atl. 89; *In re* Tolman, 83 Me. 353, 22 Atl. 244; Jones *v.* First Nat. Bank, 79 Me. 191, 9 Atl. 22; Dunham *v.* Messing, 68 Minn. 257, 70 N. W. 1128; Pilon *v.* Foucault, 6 Montreal Leg. N. 358; Donovan *v.* McCormick, 2 Montreal Leg. N. 322.

The motive in influencing a debtor in not keeping books of account is immaterial. Jones *v.* First Nat. Bank, 79 Me. 191, 9 Atl. 22.

Improper books of account.— For illustrations see Sullivan *v.* Washburn, etc., Mfg. Co., 139 Cal. 257, 72 Pac. 992; *In re* Good, 78 Cal. 399, 20 Pac. 860; *In re* Tolman, 83 Me. 353, 22 Atl. 244; Dunham *v.* Messing, 68 Minn. 257, 70 N. W. 1128; Donovan *v.* McCormick, 2 Montreal Leg. N. 322.

54. Invalidating discharge see *infra*, VI, C, 4.

55. See *In re* Bregard, 84 Cal. 322, 24 Pac. 317.

Fraud generally as ground for refusal of discharge see *supra*, VI, C, 2, c.

That the schedule is imperfect does not affect the general validity of the proceedings, but only limits the effect of the discharge, which covers only such debts as are well set out. Slade *v.* His Creditors, 10 Cal. 483.

An insolvent who innocently places on his schedule claims which do not exist and amounts which to some extent are exaggerated commits no fraud against other creditors. Romano *v.* His Creditors, 46 La. Ann. 1176, 15 So. 395.

56. Teackle *v.* Crosby, 14 Md. 14.

57. Duhamel *v.* Payette, 1 Montreal Leg. N. 162.

3. Proceedings For Discharge and Revocation[58] — a. Jurisdiction and Venue. The application for a discharge of the insolvent or the petition for its revocation should be addressed to the court in which the insolvency proceedings are pending, that court alone having jurisdiction of the matter.[59]

b. Application.[60] The statutes not being uniform with reference to the application and proceedings thereon necessary to obtain a discharge,[61] no general rule can be laid down. Where the schedule or affidavit is required, it should contain all the particulars specified by the statute, and conform to its requirements.[62]

c. Process and Notice. As preliminary to the granting of a discharge in insolvency, it is frequently required by the provisions of the statutes that the insolvent as well as his creditors should be served with notice of such application.[63]

58. Power of judge when not sitting as a court to discharge see Judges.

59. Muzzy *v.* Whitney, 10 Johns. (N. Y.) 226; Conroe *v.* Bull, 7 Wis. 408.

A contention that the court lost jurisdiction to make an order discharging an insolvent debtor because it had previously discharged the assignee is without force where the contestant, having an opportunity to object to the discharge, failed to do so. Boston Nat. Bank *v.* Hammond, 21 Wash. 158, 57 Pac. 365.

Relinquishment of security.— Under the laws of New York a creditor who petitions for the discharge of the debtor must relinquish any security held by him. Morewood *v.* Hollister, 6 N. Y. 309; Philips' Case, 43 Barb. (N. Y.) 108, 19 Abb. Pr. 281; Soule *v.* Chase, 1 Rob. (N. Y.) 222; Elsworth *v.* Caldwell, 18 Abb. Pr. (N. Y.) 20, 27 How. Pr. 188. But a failure so to do is a mere irregularity which does not deprive the court of its jurisdiction. *In re* Phillips, *supra.*

60. An application for discharge is a special proceeding in the nature of an action. Kohlman *v.* Wright, 6 Cal. 230.

61. See statutes of the several states; and cases cited *infra,* note 62.

62. Hale *v.* Sweet, 40 N. Y. 97; Merry *v.* Sweet, 43 Barb. (N. Y.) 475; Small *v.* Wheaton, 4 E. D. Smith (N. Y.) 306, 2 Abb. Pr. 175; Warrin's Case, 16 Abb. Pr. (N. Y.) 457; Young *v.* Stephens, 9 Mich. 500.

The petition, schedule, and affidavit are the pleadings on the part of the petitioner, who is plaintiff, and if they are sufficient to entitle him to a discharge, any irregularity or defect in form must be taken advantage of before judgment by his creditors, who are defendants in the proceedings. Kohlman *v.* Wright, 6 Cal. 230.

Affidavit.— Under N. Y. Code, § 2160, see Duer *v.* Hunt, 41 N. Y. App. Div. 581, 58 N. Y. Suppl. 742.

By attorney in fact.— Where the petition is not signed by the creditor but by one who is described as an attorney in fact, and the affidavit is made by one as attorney in fact, and there is no proof that he was attorney in fact, it is not sufficient. Duer *v.* Hunt, 41 N. Y. App. Div. 581, 58 N. Y. Suppl. 742.

In Maine, where the statute provides that the debtor must produce at the meeting of the creditors an affidavit signed by him, to the effect that his assets and liabilities are correctly stated in the schedule thereto annexed, it was held that where the affidavit produced was not in due form, but from inadvertence the schedules and affidavit were filed away without being annexed, the discharge was not thereby rendered void. Cobbossee Nat. Bank *v.* Rich, 81 Me. 164, 16 Atl. 506.

In Maryland, before a final discharge can be obtained, the trustee must certify to the court that he has received all the property contained in the schedule of the insolvent. Kennedy *v.* Boggs, 5 Harr. & J. 403.

63. *Illinois.*— People *v.* Wilkinson, 13 Ill. 660.

Louisiana.— Mohr *v.* Marks, 39 La. Ann. 575, 2 So. 540.

Maryland.— Baylies *v.* Ellicott, 9 Gill 452.

New York.— American Flask, etc., Co. *v.* Son, 7 Rob. 233, 3 Abb. Pr. N. S. 333; Soule *v.* Chase, 1 Rob. 222; Lewis *v.* Page, 8 Abb. Pr. N. S. 200.

Washington.— Boston Nat. Bank *v.* Hammond, 21 Wash. 158, 57 Pac. 365.

Canada.— *Ex p.* Poulin, 5 Rev. Lég. 254.

See 28 Cent. Dig. tit. "Insolvency," § 241.

Foreign creditors should also be notified. *In re* Esinhart, 5 Rev. Lég. 436, 18 L. C. Jur. 73.

Transferee of debt.— Insolvent is not obliged to give notice of his application for a discharge to a person who has become transferee of the scheduled debt subsequent to the date of the assignment. Girouard *v.* Dufort, 2 Montreal Super. Ct. 179.

Order to show cause.— Under Wis. Rev. St. (1898) § 4285, providing that on the filing of an insolvent petition and schedules the court shall make an order requiring creditors to show cause why a discharge should not be granted, which order shall also fix a day for the hearing thereof, the fixing of the day is a necessary jurisdictional step. German American Bank *v.* Powell, 121 Wis. 575, 99 N. W. 222. The written order is merely evidence, the actual order being the announcement from the bench, and the statute is satisfied if an announcement fixing the day is made, although the date as it appears in the written order is left blank. German American Bank *v.* Powell, *supra.*

Besides personal service of such notice, a service may as a rule also be made by mail [64] or by publication.[65]

d. Meetings of Creditors and Consent to Discharge.[66] The statutes usually provide that there must be a meeting of creditors to pass upon the application for discharge, at which a certain proportion of the creditors, generally three fourths, must consent thereto.[67] It is also frequently provided that the creditors thus consenting must hold a certain proportion in amount of the claims.[68]

e. Opposition of Creditors [69] — (i) *Who May Oppose.* Any creditor holding a claim provable in the insolvency proceedings may oppose the discharge of the insolvent.[70] It has even been held that this right exists, although the creditor has failed to file his claim in the proceedings.[71]

(ii) *Grounds of Opposition.* The grounds of opposition are given by the statutes of the several states and are not uniform.[72]

64. Billinge *v.* Pickert, 39 Hun (N. Y.) 504; O'Connell *v.* Sutherland, 16 Abb. Pr. (N. Y.) 460 note.

65. Soule *v.* Chase, 1 Rob. (N. Y.) 222. See also German American Bank *v.* Powell, 121 Wis. 575, 99 N. W. 222.

66. **Meeting of creditors:** For election of trustee see *supra*, IV, A, 2. On administration of estate see *supra*, IV, D, 3. Preliminary to voluntary proceedings see *supra*, III, C, 3, e.

Release of claim by creditor see *supra*, IV, F, 6, c.

67. Angelovich *v.* His Creditors, 43 La. Ann. 1161, 10 So. 244; Kelman *v.* Sheen, 11 Allen (Mass.) 566; Wills *v.* Prichard, 10 Gray (Mass.) 327; Gifford *v.* Barker, 9 Gray (Mass.) 364; Williams *v.* Coggeshall, 8 Cush. (Mass.) 377; Crocker *v.* Stone, 7 Cush. (Mass.) 341; Tebbetts *v.* Pickering, 5 Cush. (Mass.) 83, 51 Am. Dec. 48; Rice *v.* Wallace, 7 Metc. (Mass.) 431; Morrow *v.* Freeman, 61 N. Y. 515; Stanton *v.* Ellis, 12 N. Y. 575, 64 Am. Dec. 512; Gillies *v.* Crawford, 2 Hilt. (N. Y.) 338; Matter of Dimock, 4 N. Y. App. Div. 301, 39 N. Y. Suppl. 501; Emberson's Case, 16 Abb. Pr. (N. Y.) 457; Salters *v.* Tobias, 3 Paige (N. Y.) 338. See also *In re* Ruffin, 168 Mass. 232, 46 N. E. 626.

Authority to vote.—Angelovich *v.* His Creditors, 43 La. Ann. 1161, 10 So. 244, general power of attorney held insufficient. In Massachusetts that an attorney may consent in the name of his principal to the discharge of a debtor in insolvency without written evidence of authority. Clarke *v.* Stanwood, 166 Mass. 379, 44 N. E. 537, 34 L. R. A. 378.

Method of assent.— The consent to a discharge is valid, although signed upon the back of the claim before it was approved. Producers' Bank *v.* Farnum, 5 Allen (Mass.) 10.

Accepting a dividend from the assignee does not operate as a discharge of the insolvent. Megins *v.* Pary, 72 Minn. 113, 75 N. W. 120. *Compare* Boston Nat. Bank *v.* Hammond, 21 Wash. 158, 57 Pac. 365.

Where insolvent law is unconstitutional.— A creditor who proves a claim in proceedings where the insolvent has received a discharge under the law which is subsequently declared unconstitutional, he will not be considered as having assented to or ratified the discharge. Kimberly *v.* Ely, 6 Pick. (Mass.) 440.

Withdrawal of consent.— A written assent to a discharge becomes part of the insolvency proceedings and cannot be withdrawn without notice to debtor and the consent of the court. Merriam *v.* Richards, 3 Gray (Mass.) 252.

68. Tebbetts *v.* Pickering, 5 Cush. (Mass.) 83, 51 Am. Dec. 48. *Compare* Duer *v.* Hunt, 41 N. Y. App. Div. 581, 58 N. Y. Suppl. 742.

What is a majority in number and amount. — It has been held that those alone are to be reckoned who appear at the meeting and prove their claims. No others can be considered, whether they appear or not. Herwig *v.* Their Creditors, 36 La. Ann. 760; Toussaint *v.* Wurtele, 1 Quebec 89, 127.

69. **An assignee** may oppose a discharge. Hinkel *v.* His Creditors, 63 Cal. 328.

70. Davenport *v.* His Creditors, 62 Cal. 29.

A creditor who appears in the proceedings and accepts a dividend under the assignment cannot subsequently object to his debtor's discharge. Boston Nat. Bank *v.* Hammond, 21 Wash. 158, 57 Pac. 365. *Compare* Megins *v.* Parry, 72 Minn. 113, 75 N. W. 120.

Barred claims.— The fact that a claim barred by the statute of limitations is placed in the schedule annexed to the petition of the insolvent for his discharge, with the statement that the claim is so barred, is not an admission that he is still a creditor and entitled to appear and oppose without proof. Avery's Case, 6 Abb. Pr. (N. Y.) 144. The fact that a debtor has waived the statute of limitations in order to qualify holders of a demand to give their consent to his discharge may be considered in determining whether the consents were given by persons to whom petitioner was justly and truly indebted. Matter of Dimock, 4 N. Y. App. Div. 301, 39 N. Y. Suppl. 501.

71. *In re* Bauer, 15 Nova Scotia 149 [*overruling In re* Creighton, 13 Nova Scotia 211].

72. See statutes of the several states. And see Dyer *v.* Bradley, 89 Cal. 557, 26 Pac. 1103; *In re* Harris, 81 Cal. 350, 22 Pac. 867; Dyer *v.* Martin, (Cal. 1891) 26 Pac. 1105; *In re* Harrison, 46 Minn. 331, 48 N. W.

f. Evidence and Trial of Issues. The general rules governing the evidence and the trial of issues in other litigation apply with reference to the discharge of an insolvent, unless made inapplicable by some statutory provision.[73]

g. Order or Decree. While the statutes are not uniform with reference to the form or contents of this order or decree of discharge, it should be made conformable to statutory requirements,[74] and be sufficiently full to show jurisdiction not only of the subject-matter but also of the person.[75]

h. Revocation of Discharge. As a rule a petition will lie to revoke a discharge where the insolvent has been guilty of fraud in the insolvency proceedings;[76]

1132; Talbot *v.* Jones, 5 Mo. 217; State Bank *v.* Ballard, 12 Rich. (S. C.) 259. *Compare* Lambert *v.* Scandinavian-American Bank, 66 Minn. 185, 68 N. W. 834.

Failure to keep proper books.— See *In re* Clark, 128 Cal. 147, 60 Pac. 663. See also *supra*, VI, C, 2, e; *infra*, VI, C, 4.

Appearance by a creditor in order to object to the discharge should be entered in the time fixed by the statute. Dow *v.* Young, (Me. 1887) 9 Atl. 893. The appearance to oppose a discharge will not be implied from an appearance for other purposes. *In re* Butterfield, 80 Me. 594, 16 Atl. 247.

Failure to file objections within the time prescribed by statute will prove ineffective. Crocker *v.* Stone, 7 Cush. (Mass.) 341; Revere *v.* Newell, 4 Cush. (Mass.) 584; Gardner *v.* Nute, 2 Cush. (Mass.) 333; Rice *v.* Wallace, 7 Metc. (Mass.) 431.

Opposition by other creditors.— The facts that creditors agree not to object to the discharge of the insolvent, and that a final adjudication is made upon that basis, do not bar any other creditor from objecting to such discharge. Gottschalk *v.* Smith, 74 Md. 560, 22 Atl. 401.

Withdrawal of opposition.— In California a party who has appeared in opposition to a discharge of an insolvent may withdraw his opposition at any time, without the consent of the other creditors. Brangon *v.* His Creditors, 64 Cal. 394, 1 Pac. 477. But in Massachusetts a dissent cannot be withdrawn without the consent of the master in chancery after notice to creditors. Beverly Bank *v.* Wilkinson, 2 Gray (Mass.) 519.

73. See, generally, EVIDENCE; TRIAL; and the statutes of the several states.

Under Cal. St. (1895) p. 148, § 54, providing that any creditor opposing the discharge of a debtor shall file specifications in writing of the grounds of the opposition, and after the debtor has filed and served his answers thereto the court shall try the issues raised, it is error to grant a debtor his discharge on motion, where, after two specifications of an opposition have been stricken out on motion as irrelevant, and a demurrer sustained to others because of uncertainty, there remain six specifications unanswered, any one of which, if undisputed, or if established on issue joined, states facts sufficient to deprive the insolvent of his discharge. *In re* Rich, 129 Cal. 494, 62 Pac. 56. An order sustaining a demurrer to an opposition to the petition of an insolvent for a discharge only upon the grounds mentioned in certain paragraphs indicated, which attacked only three out of ten specifications contained in the opposition, cannot be regarded as sustaining the demurrer to the entire opposition, although the order is silent as to the grounds of demurrer to the entire opposition. *In re* Rich, *supra*.

74. See the statutes of the several states. See also Witter *v.* Latham, 12 Conn. 392 (need not be recorded); Wright *v.* Huntress, 75 Me. 303.

Not the filing of a release in insolvency but the judgment of the court entered thereon discharges the insolvent. Megins *v.* Pary, 72 Minn. 113, 75 N. W. 120.

75. Sellick *v.* Keeler, 1 N. Y. St. 594. Where a written order in insolvency proceedings recited that the matter was heard "on the 14th day of September, 1897, the day fixed in said order to show cause," it sufficiently appeared that creditors were ordered to show cause on September 14, although the written order on creditors recited that they were to show cause on the "—— day of September, 1897." German American Bank *v.* Powell, 121 Wis. 575, 99 N. W. 222.

76. Tevis *v.* Hicks, 41 Cal. 123; Jaeger *v.* Requardt, 25 Md. 231; Smith *v.* Smith, 19 Wis. 103. See White *v.* Dakin, 70 N. H. 632, 47 Atl. 611, insufficient showing of fraud.

Only at the instance of a creditor will the proceeding to annul the discharge lie. Wagner *v.* Los Angeles County Super. Ct., 100 Cal. 359, 34 Pac. 820. But he must have been a creditor who held a provable claim at the time of the proceedings, and not one who purchased claims after the discharge. Sanborn *v.* Doe, 92 Cal. 152, 28 Pac. 105, 27 Am. St. Rep. 101.

Estoppel.— A creditor who has knowledge of a fraud on the part of the insolvent and permits the debtor to obtain a discharge cannot thereafter file a petition to annul the discharge. Goodwin *v.* Selby, 77 Md. 444, 26 Atl. 872.

An independent action may be maintained in California for this purpose. Estudillo *v.* Meyerstein, 72 Cal. 317, 13 Pac. 869. This is contrary to the ordinary rule that a discharge cannot be impeached in a collateral proceeding. J. I. Case Threshing-Mach. Co. *v.* Sires, 21 Wash. 322, 58 Pac. 209.

In Louisiana judgment of a court awarding an insolvent a discharge does not bar an action to have the same annulled because the majority in number and amount of creditors did not in fact vote for his discharge as therein recited. Mohr *v.* Marks, 39 La. Ann. 575, 2 So. 540. A creditor who has appeared

in such a case, however, the fraudulent act should be specifically averred and set forth in the petition.[77]

4. VALIDITY OF DISCHARGE. A discharge granted by a court having jurisdiction of the proceedings after compliance with the requirements of the statute as to the method and form of procedure will be deemed valid,[78] unless fraud has been practised by the insolvent.[79] A discharge obtained by an insolvent through the payment of a consideration or promise of consideration will be deemed void.[80] The fraudulent omission of material facts from an insolvent's schedule will under some statutes prevent the debtor from subsequently availing himself of the discharge.[81] So too under some statutes the failure of a merchant or tradesman to keep proper books of account will operate to invalidate the discharge.[82] Again the conveyance of property by one who is insolvent to another, with intent to give a preference or to defraud creditors, will in some jurisdictions, render the discharge obtained in such proceedings ineffectual, if such conveyance or transfer was made within the time limited by statutes prior to the insolvency proceedings.[83]

in and claimed the benefit of the cession cannot sue to annul the proceeding for errors of form. Croft *v.* Kirkland, 2 La. 155.

Appeal.— For defects or irregularities in the proceedings, a creditor cannot petition to vacate it on those grounds, but should appeal from the order of discharge. Waters *v.* Momenthy, 68 Md. 171, 11 Atl. 763. See *infra*, VII, C.

If the record of the insolvency court shows that a decree was entered in due form for the issue of a discharge, the court cannot pass an order annulling the discharge without notice to the parties interested. Marsh *v.* McKenzie, 99 Mass. 64.

77. Goodwin *v.* Selby, 77 Md. 444, 26 Atl. 872.

78. Kohlman *v.* Wright, 6 Cal. 230. See also Journeay *v.* Gardner, 11 Cush. (Mass.) 355; Cox *v.* Austin, 11 Cush. (Mass.) 32.

Under N. Y. Code, § 2186, providing that, when the insolvent debtor is guilty of certain specified offenses, a discharge that is granted shall be void, does not apply to objections to the jurisdiction of the court to entertain the proceeding. Duer *v.* Hunt, 41 N. Y. App. Div. 581, 58 N. Y. Suppl. 742.

Where there is no question of fraud, the fact that the owner, who was adjudged insolvent, was not in fact so, will not affect the discharge after it is granted. State *v.* Culler, 18 Md. 418.

79. See Slacum *v.* Simms, 22 Fed. Cas. No. 12,935, 1 Cranch C. C. 242 [*reversed* in 3 Cranch 300, 2 L. ed. 446].

80. Phelps *v.* Thomas, 6 Gray (Mass.) 327.

81. Dean *v.* Baker, 64 Cal. 232, 30 Pac. 806; Whiton *v.* Nichols, 3 Allen (Mass.) 583; Merry *v.* Sweet, 43 Barb. (N. Y.) 475; Ayres *v.* Scribner, 17 Wend. (N. Y.) 407; Duncan *v.* Duboys, 3 Johns. Cas. (N. Y.) 125; Read *v.* Bennett, 23 Wis. 372.

As ground for refusal of discharge see *supra*, VI, C, 2, c, (II).

In order to vitiate the discharge because of the omission of the names of creditors and of the addresses of others, it must have been wilfully and fraudulently done. Williams *v.* Coggeshall, 11 Cush. (Mass.) 442; Small *v.* Graves, 7 Barb. (N. Y.) 576; American Flask, etc., Co. *v.* Son, 7 Rob. (N. Y.) 233, 3 Abb. Pr. N. S. (N. Y.) 333. Although in some jurisdictions the insolvent is held still liable for debts not appearing in the list of creditors. Bergeron *v.* Roy, 7 Montreal Leg. N. 414; Royal Inst. for Advancement of Learning *v.* Simpson, 3 Montreal Leg. N. 413. He has also been held liable where he describes a note by a different date from that which it actually bears. Arpin *v.* Roy, 28 L. C. Jur. 38.

An omission of worthless and barred debts will not avoid the discharge. Pope *v.* Kirchner, 77 Cal. 152, 19 Pac. 264.

Debt due tutrix.— The discharge will not be invalidated by the omission to state in the list that the debt was due the creditor in the quality of tutrix. Levy *v.* Barbeau, 23 L. C. Jur. 216.

82. Wilkins *v.* Jenkins, 136 Mass. 38.

As ground for refusal of discharge see *supra*, VI, C, 2, e.

83. *In re* Hurst, 7 Wend. (N. Y.) 239. See White *v.* Dakin, 70 N. H. 632, 47 Atl. 611.

The transfer must have been made out of the usual course of business to constitute a fraud which will avoid the discharge. Dean *v.* Grimes, 72 Cal. 442, 14 Pac. 178.

Preference given within six months before the time of filing the petition in insolvency, at a time when the debtor knew himself to be insolvent, will operate to defeat the discharge. Barnard *v.* Crosby, 6 Allen (Mass.) 327; Sullivan *v.* Hunt, 5 Allen (Mass.) 124; Williams *v.* Coggeshall, 8 Cush. (Mass.) 377; Hayden *v.* Palmer, 24 Wend. (N. Y.) 364. This has been held to be true, although the creditor had no reasonable cause to believe the debtor to be insolvent. Thompson *v.* Stone, 8 Cush. (Mass.) 103. A mortgage given to secure borrowed money, made at the time of the loan, will not avoid the discharge. Williams *v.* Coggeshall, 11 Cush. (Mass.) 442. Although the security was promised at the time the debt was contracted, if it was not given until afterward, it will avoid the discharge. Blodg-

5. Operation and Effect of Discharge[84] — **a. In General.** After the discharge of a debtor in insolvency proceedings, he can neither sue nor be sued in respect to the property transferred in pursuance thereof to his trustee or assignee for the benefit of his creditors, in the jurisdiction where such insolvency proceedings were conducted.[85] Whether the effect of a discharge in insolvency is to be determined by the law in force when the discharge was obtained or when the insolvency proceedings were instituted depends upon the statute of the jurisdiction in which the proceedings are pending.[86]

b. After-Acquired Property.[87] The discharge of a debtor in insolvency proceedings operates to protect the debtor's person as well as his property thereafter acquired from liability for debts previously contracted in the jurisdiction where the discharge was granted, and elsewhere as to creditors who were resident of the same jurisdiction of the debtor with notice of the insolvency proceedings, or who were parties thereto.[88]

c. Debts and Liabilities Discharged[89] — (I) *In General.* All debts and liabilities absolutely due and existing at the time of the adjudication of insolvency, or publication of the first notice in accordance with the statutes of the particular jurisdiction, which were provable, are released by a discharge.[90]

ett *v.* Hildreth, 11 Cush. (Mass.) 311. An agreement to surrender the property received as a preference, made before the commencement of the insolvency proceedings, but not consummated until afterward, was held not to purge the illegality so as to invalidate the discharge. Blodgett *v.* Hildreth, *supra*.

84. Supplementary proceedings as affected by discharge of defendant under insolvency law see Executions.

85. Hall *v.* McPherson, 3 Bland (Md.) 529; Young *v.* Willing, 2 Dall. (Pa.) 276, 1 L. ed. 380.

Effect of a discharge in insolvency depends upon the authority of the court which granted it, and not upon the conduct of the parties. Swift *v.* Winchester, 96 Me. 480, 52 Atl. 1017, 90 Am. St. Rep. 414.

A creditor is not liable for an action for false imprisonment for the arrest of the debtor on capias ad satisfaciendum on a judgment therein, where suit was brought to recover a debt due before the insolvency proceedings. Deal *v.* Harris, 8 Md. 40, 63 Am. Dec. 686.

86. See the statutes of the several states.

The law in force when the discharge was obtained, and not when the proceedings were begun, must govern. Batten *v.* Sisson, 133 Mass. 557.

The discharge relates to the time of presenting the petition, and does not affect the debts contracted after that time. Bannister *v.* Miller, 54 N. J. Eq. 121, 32 Atl. 1066; McNeilly *v.* Richardson, 4 Cow. 607.

87. Proceedings to subject after-acquired property see *supra*, note 93, page 1283.

Right of assignee to property acquired after assignment but before discharge see *supra*, IV, B, 2, f.

88. Mitchel *v.* McMillan, 3 Mart. (La.) 676, 6 Am. Dec. 690; Pollitt *v.* Parsons, 2 Harr. & J. (Md.) 61. See Goicochea *v.* Ricarte, 4 La. 44. But *compare* Com. *v.* Dee, 14 Pa. Super. Ct. 640; *supra*, II, C.

Persons concluded by discharge see *infra*, VI, C, 5, e.

89. Claims not filed or proved see *infra*, VI, C, 5, c, (IV).

Claims of residents see *infra*, VI, C, 5, e, (I).

90. Pomeroy *v.* Gregory, 66 Cal. 572, 574, 6 Pac. 492, 493; McDermott *v.* Hall, 177 Mass. 224, 58 N. E. 695; Wyman *v.* Fabens, 111 Mass. 77; Anonymous, 1 Edm. Sel. Cas. (N. Y.) 188. See Clinton *v.* Hart, 1 Johns. (N. Y.) 375. See also Mooney *v.* Detrick, 85 Cal. 549, 26 Pac. 280, (1889) 22 Pac. 1111 (contract of hire); Reynolds *v.* Mutual F. Ins. Co., 34 Md. 280, 6 Am. Rep. 337 (insurance premium note); State *v.* Culler, 18 Md. 418 (bond); Shieffelin *v.* Wheaton, 21 Fed. Cas. No. 12,783, 1 Gall. 441 (debts and contracts not yet due).

Liability on attachment bond.— A debtor's discharge in insolvency proceedings, instituted after judgment against him in an attachment suit, releases him from liability on the attachment bond. White *v.* Murray, 20 R. I. 40, 37 Atl. 350.

Liability as surety or indorser see Sleeper *v.* Miller, 7 Cush. (Mass.) 594 note; Mechanic's, etc., Bank *v.* Capron, 15 Johns. (N. Y.) 407.

Non-provable liabilities in general see Berry *v.* McLean, 11 Md. 92; McDermott *v.* Hall, 177 Mass. 224, 58 N. E. 695; French *v.* Morse, 2 Gray (Mass.) 111.

Costs.— Where, before his discharge in insolvency, an insolvent brought suit in which he was nonsuited, but the costs were not taxed until after his discharge, the liability for costs was not released by the discharge (Cone *v.* Whitaker, 2 Johns. Cas. (N. Y.) 280), although the opposite position seems to have also been taken (Warne *v.* Constant, 5 Johns. 135). See also *infra*, VIII.

Lease.— A discharge in insolvency proceedings of one who has leased land for a term of years and covenanted to pay rent at stated periods is no bar to an action for rent accruing subsequent to his insolvency. Rodick *v.* Bunker, 84 Me. 441, 24 Atl. 897, 30 Am. St. Rep. 364; Lansing *v.* Prendergast, 9 Johns.

(II) *Debts Due United States*[91] *or State.*[92] A debt due from the insolvent to the United States,[93] to the state, or to the people unless it is expressly so specified in the statute[94] will not be discharged or released.

(III) *Partnership and Individual Debts.* The discharge of a member of a firm under the state insolvency laws operates as a release of liability on his personal debts as well as on his individual liability for the debts of the firm, unless there is some statutory enactment to the contrary.[95]

(IV) *Debts Not Scheduled or Defectively Scheduled.*[96] The effect of a discharge upon a debt which is imperfectly scheduled or not scheduled at all is not uniform in the different states.[97] In some jurisdictions a discharge is available as a plea in bar to an action upon a claim, although not scheduled in the absence of fraud on the part of the insolvent,[98] while in others such debt is not released.[99]

(V) *Debts Proved in Prior Proceedings Which Failed.*[1] Unless there is some statutory provision to the contrary, a debt proved in a proceeding in insolvency which has failed may be proved in subsequent proceedings in insolvency and will be released by a discharge in the subsequent proceedings.[2]

d. Debts and Liabilities Not Discharged[3]—(I) *In General.* The insol-

(N. Y.) 127; Hamilton *v.* Atherton, 1 Ashm. (Pa.) 67.

91. Priority of such debts see *supra*, IV, F, 5, c.

92. Priority of such debts see *supra*, IV, F, 5, d.

93. Glenn *v.* Humphreys, 10 Fed. Cas. No. 5,480, 4 Wash. 424.

While the preference given to the United States is extended to a surety, yet it gives him only the right to be first satisfied out of the effects of the insolvent in the hands of his assignee himself. Aikin *v.* Dunlap, 16 Johns. (N. Y.) 77, holding that principal may plead his discharge against his surety who paid money to the United States.

94. People *v.* Herkimer, 4 Cow. (N. Y.) 345, 15 Am. Dec. 379; Pawlet *v.* Kelley, 69 Vt. 398, 38 Atl. 92.

In Maryland a discharge under its insolvent laws released the debtor from a judgment previously rendered against him on behalf of the state. State *v.* Walsh, 2 Gill & J. 406.

Taxes due to the United States, state, county, or municipality are not released by a discharge of the debtor under the state insolvent laws. Dunlap *v.* Gallatin County, 15 Ill. 7; Cape Elizabeth *v.* Skillin, 79 Me. 593, 12 Atl. 543. Priority of claims for taxes see *supra*, IV, F, 5, e.

95. Woodland Bank *v.* Schwab, 130 Cal. 282, 62 Pac. 520; Hawley *v.* Campbell, 62 Cal. 442. But see Freeman *v.* Campbell, 56 Cal. 639; Glenn *v.* Arnold, 56 Cal. 631; *In re* Rice, 7 Allen (Mass.) 112; Lothrop *v.* Tilden, 8 Cush. (Mass.) 375. See Chase *v.* Henry, 166 Mass. 577, 4 N. E. 988, 55 Am. St. Rep. 423; Bucklin *v.* Bucklin, 97 Mass. 256; Willson *v.* Gomparts, 11 Johns. (N. Y.) 193; Chinic *v.* Compagnie Minière de Coloraine, 14 Quebec 53.

Priority of claims against partnership see *supra*, IV, F, 5, i.

96. See *supra*, IV, F, 6, d, (II).

97. See the statutes of the several states.

98. Hewins *v.* Whitney, 99 Me. 37, 58 Atl. 59; Hall *v.* Robbins, 61 Barb. (N. Y.) 33, 4 Lans. 463; Cadmus *v.* Beman, 4 Fed. Cas. No. 2,281; Lee *v.* Gamble, 15 Fed. Cas. No. 8,189, 3 Cranch C. C. 374.

Although imperfectly scheduled, if the description of the claim is sufficiently clear to enable the creditor to whom it is due to identify it, it is as a rule a sufficient compliance with the statute as will operate as a discharge of the debt. Barrett *v.* Carney, 33 Cal. 530; Schaeffer *v.* Soule, 23 Hun (N. Y.) 583 [*affirmed* in 85 N. Y. 645]. See McCarty *v.* Christie, 13 Cal. 79; Judson *v.* Atwill, 9 Cal. 477.

99. Vauquelin *v.* Platet, 12 Rob. (La.) 381; Russel *v.* Rogers, 9 Mart. (La.) 588, 13 Am. Dec. 326; Hutt *v.* Sutherland, 1 Can. L. T. 664, 4 Nova Scotia 191; Knaut *v.* Sponagle, 16 Nova Scotia 193; De Wolf *v.* Neilly, 13 Nova Scotia 243.

1. Right to discharge in second insolvency proceedings by or against the same insolvent see *infra*, VI, C, 5, c, (V).

2. See the statutes of the several states.

In Massachusetts a different rule applies, in view of a statutory provision. In that state a certificate of discharge obtained upon second proceedings in insolvency is no bar to an action upon a debt which may have been proved in the first proceedings. Whitney *v.* Willard, 13 Gray 203; Gardner *v.* Way, 8 Gray 189. Where the debt was provable under the earlier proceedings and a discharge refused, it was held that unless those to whom such debts were due elect to prove them under the new proceedings, which it seems they may do, they will not be released. Gilbert *v.* Hebard, 8 Metc. 129. See Van Ingen *v.* Justices Boston Municipal Ct., 166 Mass 128, 44 N. E. 121.

3. Claims of non-residents see *infra*, VI, C, 5, e, (III).

Contracts made or to be performed without the state see *infra*, VI, C, 5, e, (II).

Obligations of co-debtors, guarantors, or sureties not discharged see *infra*, V, C, 5, e, (II).

vency statutes uniformly provide that certain debts are not released by a discharge.[4]

(II) *DEBTS CREATED IN FIDUCIARY CAPACITY.* A discharge will not release an insolvent from a debt created while acting in a fiduciary capacity, the insolvent being liable thereon in an action brought either before or after the discharge.[5]

(III) *DEBTS CREATED BY FRAUD.* Debts created through the fraud of a debtor are not as a rule released by a discharge in proceedings in insolvency.[6]

(IV) *LIABILITY FOR TORTS.* The discharge of a debtor will not as a rule release him from liability for a tort.[7]

(V) *DEBTS FOR NECESSARIES.* Under some statutes a claim for necessaries is not released by a discharge.[8]

(VI) *JUDGMENTS OR OTHER LIENS.* The discharge in insolvency releases the

4. See the statutes of the several states. See also *infra*, VI, C, 5, d, (II) *et seq.* See also McDermott *v.* Hall, 177 Mass. 224, 58 N. E. 695; Lambert *v.* Scandinavian-American Bank, 66 Minn. 185, 68 N. W. 834.

5. Citizens' Bank *v.* Rucker, 138 Cal. 606, 72 Pac. 46; Tallant *v.* Stedman, 176 Mass. 460, 57 N. E. 683.

Illustrations.— The debt of a factor who fails to account for goods delivered to him by sale for the account of the owner or consignor (Mayberry *v.* Cook, 121 Cal. 588, 54 Pac. 95; Tate *v.* Laforest, 25 La. Ann. 187; Kennedy *v.* Strong, 10 Johns. (N. Y.) 289. *Contra*, Slayton *v.* Wells, 66 Vt. 62, 28 Atl. 632), a broker who purchased stock and subsequently sold the same, but failed to account for the stock and dividends received thereon, or the proceeds of the sale (Herrlich *v.* McDonald, 80 Cal. 472, 22 Pac. 299); failure of a guardian to account for the funds of his ward (*In re* Corcoran, 8 Pa. Dist. 298), or for a trust fund (Raphael *v.* Mullen, 171 Mass. 111, 50 N. E. 515) is not released. See also Major *v.* Her Creditors, 46 La. Ann. 367, 15 So. 8; Halpine *v.* May, 100 Mass. 498.

Change of character of debt.— The fact that an account has been stated does not change the character of the indebtedness under a statute which provides that no debt created by one in a fiduciary capacity shall be charged because not filed. Mayberry *v.* Cook, 121 Cal. 588, 54 Pac. 95.

Defalcation of officer.— A tax-collector is within Vt. St. § 2139, providing that a debt created by the defalcation of "a public officer" shall not be discharged under proceedings in insolvency. Pawlet *v.* Kelley, 69 Vt. 398, 38 Atl. 92.

6. Citizens' Bank *v.* Rucker, 138 Cal. 606, 72 Pac. 46; *In re* McEachran, 82 Cal. 219, 23 Pac. 46; Carit *v.* Williams, 74 Cal. 183, 15 Pac. 751; Grocers' Nat. Bank *v.* Clark, 31 How. Pr. (N. Y.) 115; *In re* Kaeppler, 7 N. D. 435, 75 N. W. 789.

Contrary to the ordinary doctrine of merger, the fact that a claim has been reduced to judgment will not prevent the court from going behind the judgment and examining the pleadings in order to determine whether the original claim was created by fraud and not released by a discharge. Carit *v.* Williams, 74 Cal. 183, 15 Pac. 751.

The pledge to one's own use of stock held as collateral, under contract with the pledgor authorizing such a pledge, is not a fraudulent disposition of the stock. Wilson *v.* Hawley, 158 Mass. 250, 33 N. E. 522.

Where the statute provides for the discharge of all provable claims, and a claim for goods bought by one when insolvent with the intent not to pay for them, and which claim has been proved in the insolvency proceedings, cannot object to the discharge. *In re* Brouillard, 20 R. I. 617, 40 Atl. 762.

7. *Connecticut.*— Betts *v.* Lockwood, 8 Conn. 487.

Massachusetts.— Hapgood *v.* Blood, 11 Gray 400. But see Bickford *v.* Barnard, 8 Allen 314.

New York.— Kennedy *v.* Strong, 14 Johns. 128. But see Deyo *v.* Van Valkenburgh, 5 Hill 242; Luther *v.* Deyo, 19 Wend. 629.

Pennsylvania.— Com. *v.* Dee, 14 Pa. Super. Ct. 640. See Com. *v.* Snyder, 4 Pa. Co. Ct. 261.

Vermont.— Paterson *v.* Smith, 72 Vt. 288, 47 Atl. 1088.

See 28 Cent. Dig. tit. "Insolvency," § 265.

8. Lincoln *v.* Dunbar, 7 Allen (Mass.) 264; Bangs *v.* Watson, 9 Gray (Mass.) 211; Rindge *v.* Breck, 10 Cush. (Mass.) 43.

Extent and limitations of rule.— It has been held, however, that if the character of the indebtedness is changed by taking a note in lieu thereof (Rindge *v.* Breck, 10 Cush. (Mass.) 43), or the claim reduced to judgment (Bangs *v.* Watson, 9 Gray (Mass.) 211), it loses its privilege and the discharge would operate as a bar to the claim in its changed form.

What are necessaries.— The rent of a boarding-house kept by a single woman without a family was held not to be a claim for necessaries against her within the meaning of a statute which provided that such claims shall not be barred by a discharge in insolvency. Prentice *v.* Richards, 8 Gray (Mass.) 226. Where several persons held a lease as joint lessees, a claim for rent in the case of those who received a discharge in insolvency was held not to be for necessaries. Plympton *v.* Roberts, 12 Allen (Mass.) 366. A claim for articles delivered to a firm cannot be excepted from the operation of a certificate of discharge on the ground that the articles were necessaries actually used in the families of the debtors. Drake *v.* Bailey, 5 Allen (Mass.) 210.

debtor from the personal liability arising from a judgment rendered against him,[9] unless it be a debt expressly excepted from a discharge, such as for alimony,[10] a tort,[11] or a fine;[12] but does not affect any lien that may have been thereby created and made valid by statutes of the state.[13] Similarly the personal liability of the maker of a note secured by a mortgage, deed of trust, or other lien is released by a discharge, but the security for the obligation is not impaired.[14]

e. Persons Concluded — (i) *In General.* It may be said as a general rule that all parties to the proceedings in insolvency,[15] whether aliens,[16] residents,[17] or

9. See cases cited *infra*, note 10 *et seq.*

10. Menzie *v.* Anderson, 65 Ind. 239; Noyes *v.* Hubbard, 64 Vt. 302, 23 Atl. 727, 33 Am. St. Rep. 928, 15 L. R. A. 394. See Audubon *v.* Shufeldt, 181 U. S. 575, 21 S. Ct. 735, 45 L. ed. 1009.

11. See *supra*, VI, C, 5, d, (IV).

12. Com. *v.* Snyder, 4 Pa. Co. Ct. 261.

13. *California.*— Hundley *v.* Chaney, 65 Cal. 363, 4 Pac. 238; Imlay *v.* Carpentier, 14 Cal. 173.

Massachusetts.— Bowditch Mut. F. Ins. Co. *v.* Jackson, 12 Gray 114.

New York.— Deyo *v.* Van Valkenburgh, 5 Hill 242; Stebbins *v.* Willson, 14 Johns. 403.

Pennsylvania.— Clark *v.* Israel, 6 Binn. 391.

South Carolina.— Mayrant *v.* Myers, 2 Mill 419.

See 28 Cent. Dig. tit. "Insolvency," § 268.

Contra.— Percy *v.* Foote, 36 Conn. 102.

While a creditor cannot have a personal judgment against a debtor discharged in insolvency proceedings, he is entitled, in case he has a valid property attachment, to a judgment *in rem* against the property for the amount of his debt. Ives *v.* Sturgis, 12 Metc. (Mass.) 462; Whittredge *v.* Maxam, 68 N. H. 323, 44 Atl. 491; Batcheler *v.* Putnam, 54 N. H. 84, 20 Am. Rep. 115.

Waiver of lien.— Where proof of a debt is made in insolvency without disclosing that it is secured, a dividend is accepted, and a release filed in accordance with the statute, and a judgment discharging the insolvent, it is conclusively established that the creditor has elected to waive his lien, and release a mortgage, if that be his security. Mankato First Nat. Bank *v.* Pope, 85 Minn. 433, 89 N. W. 318.

Costs.— An insolvent would be liable for costs in an action instituted by him before his insolvency, in which the judgment was rendered against him subsequent to a discharge (Mann *v.* Houghton, 7 Cush. (Mass.) 592); but costs in an action against the insolvent in which judgment was rendered prior to the discharge would fall with the judgment (Warne *v.* Vonstant, 5 Johns. (N. Y.) 135).

14. Luning *v.* Brady, 10 Cal. 265; Albany Loan Officers *v.* Capron, 17 Johns. (N. Y.) 44; Wisconsin State Grange O. of P. of H. *v.* Kniffen, 90 Wis. 14, 62 N. W. 943. See also Childs *v.* Childs, 10 Ohio St. 339, 75 Am. Dec. 512; Hamilton *v.* Bredeman, 12 Rich. (S. C.) 464; Leisure *v.* Kneeland, 2 Wash. 537, 27 Pac. 176, 26 Am. St. Rep. 888.

15. Boston Nat. Bank *v.* Hammond, 21 Wash. 158, 57 Pac. 365; German American Bank *v.* Powell, 121 Wis. 575, 99 N. W. 222. *Compare* Parke *v.* Day, 24 U. C. C. P. 619.

What does not constitute participation.— Where a creditor brought suit against an insolvent estate in a state court having jurisdiction to enforce the vendor's lien on goods sold and then went into the insolvency court, where a rule was taken to have certain goods delivered up to him, which it was alleged belonged to him, it will not be held that there is an implied assent to defendant's discharge. Sylvester *v.* Danziger, 32 Fed. 1. The contesting of a discharge under the insolvent laws was held not to bar a non-resident creditor from contesting the discharge, nor would the appearance of the creditor for such purpose bar him of his action. Collins *v.* Rudolph, 3 Greene (Iowa) 299; McCarty *v.* Gibson, 5 Gratt. (Va.) 307. Nor the laying of an attachment in the hands of a trustee before the trustee actually receives the insolvent's property. Glenn *v.* Boston, etc., Glass Co., 7 Md. 287. Nor will the proving of a claim against one of two firms consisting in part of the same members, and who are included in the same insolvency proceedings, operate to bar the claim against the other firm. Pattee *v.* Paige, 163 Mass. 352, 40 N. E. 108, 47 Am. St. Rep. 459, 28 L. R. A. 451.

16. The Vincennes, 28 Fed. Cas. No. 16,944. Aliens generally see ALIENS.

17. Deslix *v.* Schmidt, 18 La. 464; Thomas *v.* Breedlove, 6 La. 573; Caldwell *v.* Bloomfield, 2 La. 503; Clarke *v.* Wright, 5 Mart. N. S. (La.) 122; Herring *v.* Levy, 4 Mart. N. S. (La.) 383; Bainbridge *v.* Clay, 3 Mart. N. S. (La.) 262; Russel *v.* Rogers, 9 Mart. (La.) 588, 13 Am. Dec. 326; Cox *v.* Zeringue, 4 Mart. (La.) 261; People *v.* Stryker, 24 Barb. (N. Y.) 649; *In re* Brouillard, 20 R. I. 617, 40 Atl. 762; Denton *v.* Buckingham, 1 Overt. (Tenn.) 76. *Compare* Lambert *v.* Scandinavian-American Bank, 66 Minn. 185, 68 N. W. 834.

Notice to residents.— Under some statutes, although not parties to the proceedings, if residents of the state in which the proceedings were pending, they will be concluded, if shown to have had notice (White *v.* Lobre, 7 Mart. N. S. (La.) 564; Wetherbee *v.* Martin, 16 Gray (Mass.) 518; Barker *v.* Mann, 4 Metc. (Mass.) 302; W. W. Kimball Co. *v.* Coon, 45 Minn. 45, 47 N. W. 315; People *v.* Stryker, 24 Barb. (N. Y.) 649. See Bell *v.* Tuttle, 1 Allen (Mass.) 219; Safford

non-residents,[18] are concluded by the discharge granted to an insolvent debtor in insolvency proceedings.

(II) *Co-Debtors, Guarantors, and Sureties.*[19] The discharge of a debtor in insolvency will not release or discharge any other person liable for the same debt as co-debtor, guarantor, or surety.[20] A guarantor, surety, or co-debtor of an insolvent who is obliged to pay or contribute to the payment of an obligation of his principal subsequent to the discharge of a principal in insolvency proceedings may obtain contribution from his co-debtor or recover such payment from the principal notwithstanding his previous discharge.[21]

v. Slade, 11 Cush. (Mass.) 29; Perkins *v.* Quint, 69 N. H. 428, 45 Atl. 143; Duncan *v.* Brown, 1 McCord (S. C.) 375, 10 Am. Dec. 679. But see Lowenburg *v.* Levine, 93 Cal. 215, 28 Pac. 941, 16 L. R. A. 159; Odell *v.* Hartsfield, 29 Ga. 221; Deslix *v.* Schmidt, 18 La. 464; Thomas *v.* Breedlove, 6 La. 573), while under other statutes the mere residence in the jurisdiction is held sufficient to conclude a creditor in subsequent proceedings (Hale *v.* Ross, 3 N. J. L. 807).

Failure to prove claims or participate see *supra*, IV, F, 6, d, (II).

18. A creditor of one state who either personally or through attorneys voluntarily becomes a party to a proceeding by a debtor under the insolvency laws of another state, which discharges the contract, abandons his extraterritorial immunity and will be bound by the discharge.

Florida.— Rosenheim *v.* Morrow, 37 Fla. 183, 20 So. 243.

Maryland.— Jones *v.* Horsey, 4 Md. 306, 59 Am. Dec. 81.

Massachusetts.— Gerding *v.* East Tennessee Land Co., 185 Mass. 380, 70 N. E. 206; Columbia Falls Brick Co. *v.* Glidden, 157 Mass. 175, 31 N. E. 801; Murray *v.* Roberts, 150 Mass. 353, 23 N. E. 208, 15 Am. St. Rep. 209, 6 L. R. A. 346.

New Hampshire.— Perley *v.* Mason, 64 N. H. 6, 3 Atl. 629.

New York.— Matter of Coates, 3 Abb. Dec. 231, 12 How. Pr. 344; Van Hook *v.* Whitlock, 7 Paige 373.

Ohio.— Anonymous, 1 Ohio Dec. (Reprint) 360, 8 West. L. J. 267.

United States.— Brest *v.* Smith, 4 Fed. Cas. No. 1,843, 5 Biss. 62; Brook *v.* Brown, 4 Fed. Cas. No. 1,931, 5 Cranch C. C. 486.

See 28 Cent. Dig. tit. "Insolvency," § 271.

Recommendation of a trustee for the insolvent by a non-resident creditor or his attorney has been held to be such acquiescence in the proceedings as will place such creditor on the same footing as the domestic creditors. Jones *v.* Horsey, 4 Md. 306, 59 Am. Dec. 81.

Residence acquired during pendency of proceedings put the creditor on the basis of a domestic creditor. Brown *v.* Bridge, 106 Mass. 563; Beal *v.* Burchstead, 10 Cush. (Mass.) 523.

Voluntarily calling in aid the insolvent laws of the state by a foreign creditor to avoid a deed of trust, valid but for such laws, places the foreign creditor on the same footing as that of a domestic creditor. Jones *v.* Horsey, 4 Md. 306, 59 Am. Dec. 81.

Non-residents not concluded see *infra*, VI, C, 5, e, (III).

19. **Surety on bail in civil action** see BAIL, 5 Cyc. 32.

Surety on bail in criminal prosecution see BAIL, 5 Cyc. 115.

20. Allers *v.* Forbes, 59 Md. 374, 43 Am. Rep. 557; White *v.* McCaughey, 20 R. I. 1, 36 Atl. 840, 37 Atl. 350. See also Rosenheim *v.* Morrow, 37 Fla. 183, 20 So. 243; Bennett *v.* Court, 166 Mass. 126; Nicolay *v.* Mallery, 62 Minn. 119, 64 N. W. 108.

For example the discharge of the principal or maker will not discharge or release his indorser (Wharton *v.* Callan, 2 Gill (Md.) 173; Pine River Bank *v.* Swazey, 47 N. H. 154. See Holton *v.* Bent, 122 Mass. 278. But see Columbia Falls Brick Co. *v.* Glidden, 157 Mass. 175, 31 N. E. 801), his surety (New England Steam, etc., Pipe Co. *v.* Parker, 10 Gray (Mass.) 333; Andrus *v.* Waring, 20 Johns. (N. Y.) 153; White *v.* McCaughey, 20 R. I. 1, 36 Atl. 840, 37 Atl. 350; Pawlet *v.* Kelley, 69 Vt. 398, 38 Atl. 92; Whereatt *v.* Ellis, 103 Wis. 348, 79 N. W. 416, 74 Am. St. Rep. 865. See Loring *v.* Eager, 3 Cush. (Mass.) 188) or co-debtor (Sigourney *v.* Williams, 1 Gray (Mass.) 623; Elsworth *v.* Caldwell, 18 Abb. Pr. (N. Y.) 20, 27 How. Pr. 188; Tooker *v.* Bennett, 3 Cai. (N. Y.) 4; National Lead Co. *v.* Montpelier Hardware Co., 73 Vt. 119, 50 Atl. 809; Paterson *v.* Smith, 72 Vt. 288, 47 Atl. 1088).

21. *California.*— Stone *v.* Hammell, (1889) 22 Pac. 203.

Maine.— Danforth *v.* Robinson, 80 Me. 466, 15 Atl. 27, 6 Am. St. Rep. 224.

Massachusetts.— Thayer *v.* Daniels, 110 Mass. 345. But *compare* Rand *v.* King, 156 Mass. 515, 31 N. E. 650.

New Jersey.— Paxson *v.* Haster, 11 N. J. L. 410.

New York.— Elsworth *v.* Caldwell, 18 Abb. Pr. 20, 27 How. Pr. 188; Ford *v.* Andrews, 9 Wend. 312; Frost *v.* Carter, 1 Johns. Cas. 73, 2 Cai. Cas. 311. But see Lynch *v.* Reynolds, 16 Johns. 41.

Pennsylvania.— Haddon *v.* Chambers, 1 Yeates 529, 2 Dall. 236, 1 L. ed. 363; Austin *v.* Slough, 1 Yeates 524, 2 Yeates 15.

South Carolina.— Duncan *v.* Brown, 1 McCord 375, 10 Am. Dec. 679.

See 28 Cent. Dig. tit. "Insolvency," § 267. See also 9 Cyc. 795 note 8, 803 note 65.

A partner who assumed the debts of a firm and who received a discharge from the same in proceedings in insolvency, in which

(III) *NON-RESIDENTS.* In the absence of participation by a non-resident creditor in the insolvency proceedings,[22] the discharge of a debtor under the state insolvent laws does not extinguish a debt due to such non-resident creditor,[23] even

the creditors proved their claims and received a dividend, is not liable to his copartner who was subsequently compelled to pay the balance, the latter being in effect a surety. Fernald *v.* Clark, 84 Me. 234, 24 Atl. 823.

22. See *supra*, VI, C, 6, e, (I).

Suit by foreign creditor.— The fact that the foreign creditor brings suit upon his contract in the courts of a state in which the insolvent lives does not subject his contract, or the judgment obtained upon it, to the operation of the insolvent laws of the debtor's state. Poe *v.* Duck, 5 Md. 1; Larrabee *v.* Talbott, 5 Gill (Md.) 426, 46 Am. Dec. 637.

The fact that an attorney appears for the non-resident creditor without his knowledge or authority does not make the non-resident a party to the insolvency proceedings so as to preclude him from subsequently suing the debtor on his claim. Fish *v.* Hobart, 69 N. H. 596, 45 Atl. 479.

Such a discharge is no bar to an action by an ancillary administrator of a judgment creditor appointed in the state where insolvency proceedings are pending on a judgment obtained in a foreign state, since the appointment as ancillary administrator did not affect the residence of the appointee who resided in the foreign state. Adams *v.* Batchelder, 173 Mass. 258, 53 N. E. 824, 73 Am. St. Rep. 282.

23. *California.*— Scamman *v.* Bonslett, 118 Cal. 93, 50 Pac. 272, 62 Am. St. Rep. 226.

Connecticut.— Easterly *v.* Goodwin, 35 Conn. 279, 95 Am. Dec. 237. But see Barber *v.* Minturn, 1 Day 136.

Idaho.— Security Sav., etc., Co. *v.* Rogers, 6 Ida. 526, 57 Pac. 316.

Iowa.— Collins *v.* Rodolph, 3 Greene 299.

Kentucky.— West *v.* Saunders, 1 A. K. Marsh. 108.

Louisiana.— Mitchell *v.* McMillan, 3 Mart. 676, 6 Am. Dec. 690; August *v.* Brown, McGloin 261. See also Marz *v.* Creditors, 48 La. Ann. 1340, 20 So. 685.

Maine.— Swift *v.* Winchester, 96 Me. 480, 52 Atl. 1017, 90 Am. St. Rep. 414; Silverman *v.* Lessor, 88 Me. 599, 34 Atl. 526; Hills *v.* Carlton, 74 Me. 156; Very *v.* McHenry, 29 Me. 206. Although such non-resident creditor had notice of the proceedings. Hammond Beef, etc., Co. *v.* Best, 91 Me. 431, 40 Atl. 338, 42 L. R. A. 528.

Maryland.— Downes *v.* Fisher, (1893) 27 Atl. 121; Pinckney *v.* Lanahan, 62 Md. 447; Poe *v.* Duck, 5 Md. 1; Owens *v.* Bowie, 2 Md. 457; Frey *v.* Kirk, 4 Gill & J. 509, 23 Am. Dec. 581; Potter *v.* Kerr, 1 Md. Ch. 275.

Massachusetts.— Bergner, etc., Brewing Co. *v.* Dreyfus, 172 Mass. 154, 51 N. E. 531, 70 Am. St. Rep. 251; Regina Flour Mills Co. *v.* Holmes, 156 Mass. 11, 30 N. E. 176; Maxwell *v.* Cochran, 136 Mass. 73; Murphy *v.* Manning, 134 Mass. 488; Choteau *v.* Richardson, 12 Allen 365; Houghton *v.* Maynard, 5 Gray 552; Dinsmore *v.* Bradley, 5 Gray 487; Clark *v.* Hatch, 7 Cush. 455; Tebbetts *v.* Pickering, 5 Cush. 83, 51 Am. Dec. 48; Woodbridge *v.* Allen, 12 Metc. 470; Fiske *v.* Foster, 10 Metc. 597; Tappan *v.* Poor, 15 Mass. 419; Watson *v.* Bourne, 10 Mass. 337, 6 Am. Dec. 129. See also Adams *v.* Batcheldor, 173 Mass. 258, 53 N. E. 824, 73 Am. St. Rep. 282; Haman *v.* Brennan, 170 Mass. 405, 49 N. E. 655; Chase *v.* Henry, 166 Mass. 577, 44 N. E. 988, 55 Am. St. Rep. 423; Proctor *v.* Moore, 1 Mass. 198.

Mississippi.— Beer *v.* Hooper, 32 Miss. 246.

Missouri.— Crow *v.* Coons, 27 Mo. 512; Fareira *v.* Keevil, 18 Mo. 186.

New Hampshire.— Stirn *v.* McQuade, 66 N. H. 403, 22 Atl. 451; Norris *v.* Atkinson, 64 N. H. 87, 5 Atl. 710, 49 Am. St. Rep. 623; Whitney *v.* Whiting, 35 N. H. 457. See also Fish *v.* Hobart, 69 N. H. 596, 45 Atl. 479; Carbee *v.* Mason, 64 N. H. 10, 4 Atl. 791.

New Jersey.— Ballantine *v.* Haight, 16 N. J. L. 196; New Brunswick State Bank *v.* Plainfield First Nat. Bank, 34 N. J. Eq. 450.

New York.— Donnelly *v.* Corbett, 7 N. Y. 500; Lester *v.* Christalar, 1 Daly 29; McNeilly *v.* Richardson, 4 Cow. 607; Whittemore *v.* Adams, 2 Cow. 626. But see Hamersly *v.* Lambert, 2 Johns. Ch. 508.

Oregon.— Main *v.* Messner, 17 Oreg. 78, 20 Pac. 255.

Pennsylvania.— Hobblethwaite *v.* Batturs, 1 Miles 82. But see Millar *v.* Hall, 1 Dall. 229, 1 L. ed. 113.

Rhode Island.— Goodsell *v.* Benson, 13 R. I. 225. See also White *v.* McCaughey, 20 R. I. 1, 36 Atl. 840, 37 Atl. 350.

Texas.— Beers *v.* Rhea, 5 Tex. 349.

Vermont.— Bedell *v.* Scruton, 54 Vt. 493.

Virginia.— McCarty *v.* Gibson, 5 Gratt. 307.

Washington.— Weber *v.* Yancy, 7 Wash. 84, 34 Pac. 473.

United States.— Denny *v.* Bennett, 128 U. S. 489, 9 S. Ct. 134, 32 L. ed. 491; Gilman *v.* Lockwood, 4 Wall. 409, 18 L. ed. 432; Boyle *v.* Zacharie, 6 Pet. 635, 8 L. ed. 527; Ogden *v.* Saunders, 12 Wheat. 213, 6 L. ed. 606; Satterthwaite *v.* Abercrombie, 24 Fed. 543, 23 Blatchf. 308; Newton *v.* Hagerman, 22 Fed. 525, 10 Sawy. 460; Mather *v.* Nesbit, 13 Fed. 872, 4 McCrary 505; Byrd *v.* Badger, 4 Fed. Cas. No. 2,265, McAllister 263; Stevenson *v.* King, 23 Fed. Cas. No. 13,417, 2 Cliff. 1; Woodhull *v.* Wagner, 30 Fed. Cas. No. 17,975, Baldw. 296; Worthington *v.* Jerome, 30 Fed. Cas. No. 18,054, 5 Blatchf. 279.

See 28 Cent. Dig. tit. "Insolvency," § 271; and FOREIGN CORPORATIONS, 19 Cyc. 1220.

The reason why a discharge in insolvency is ineffective as against the debt of a non-

though the debt is payable in the state in which such proceedings took place,[24] or the contract upon which the claim is based was made in such state,[25] and to be

resident creditor is that the insolvency court has no jurisdiction over him. Swift *v.* Winchester, 96 Me. 480, 52 Atl. 1017, 90 Am. St. Rep. 414.

The theory upon which it is held that such law cannot operate upon a citizen not within its jurisdiction is that the judgment of the court discharging a debtor from his obligation is, as to the creditors residing in another state, an *ex parte* judgment; if, however, he comes within the state and submits himself to the jurisdiction of the court, it has never been held that the contract should be discharged. Sloane *v.* Chiniquy, 22 Fed. 213.

Place of payment not mentioned.— See Rhodes *v.* Borden, 67 Cal. 7, 6 Pac. 850; Fessenden *v.* Willey, 2 Allen (Mass.) 67, 79 Am. Dec. 762; Houghton *v.* Maynard, 5 Gray (Mass.) 552. See also McKim *v.* Willis, 1 Allen (Mass.) 512).

Preference of non-resident.— The discharge of a defendant under the insolvent laws does not impair the right of non-resident judgment creditors to obtain by attachment or execution on their judgment a preference over domestic creditors. Glenn *v.* Boston, etc., Glass Co., 7 Md. 287; Owens *v.* Bowie, 2 Md. 457; Potter *v.* Kerr, 1 Md. Ch. 275.

Transfer of claim after discharge.— A discharge in insolvency is a good defense to an action on a note made in the state where the insolvency proceedings were instituted, to a citizen of such state, which was indorsed to a citizen of another state after the discharge was granted. Thomas *v.* Crow, 65 Cal. 470, 4 Pac. 448; Baker *v.* Wheaton, 5 Mass. 509, 4 Am. Dec. 71. A discharge would bar an action on a judgment on notes held by a non-resident firm, but were assigned to an attorney in the state where the insolvency proceedings were conducted for collection, the attorney recovering judgment in his own name. French *v.* Robinson, 86 Me. 142, 29 Atl. 960, 41 Am. St. Rep. 533.

Transfer of claim before proceedings.— A note which is indorsed to a non-resident before maturity and before proceedings in insolvency are begun will not be affected by the discharge in insolvency. Anderson *v.* Wheeler, 25 Conn. 603; Chase *v.* Flagg, 48 Me. 182; Felch *v.* Bugbee, 48 Me. 9, 77 Am. Dec. 203; Fessenden *v.* Willey, 2 Allen (Mass.) 67, 79 Am. Dec. 762; Savoye *v.* Marsh, 10 Metc. (Mass.) 594, 43 Am. Dec. 451; Smith *v.* Gardner, 4 Bosw. (N. Y.) 54.

Where the debt was contracted with a corporation, the name and seal of which did not disclose its identity or residence, and by which defendant was led to believe that he was dealing with a resident concern, his discharge in insolvency was no bar, when as a matter of fact plaintiff was a non-resident. Swift *v.* Winchester, 96 Me. 480, 52 Atl. 1017. 90 Am. St. Rep. 414. Although a foreign corporation established offices, procured a license, and appointed the commissioner of corporations its attorney, upon whom all lawful process might be served in the state in which the insolvency proceedings were instituted, a discharge of a debtor in said proceedings would not bar an action against an insolvent by such corporation. Bergner, etc., Brewing Co. *v.* Dreyfus, 172 Mass. 154, 51 N. E. 531, 70 Am. St. Rep. 251.

Such a discharge cannot be pleaded in bar of an action brought against the insolvent by a citizen of another state in any other state than the one in which the discharge was granted. Mason *v.* Wash, 1 Ill. 39, 12 Am. Dec. 138; Palmer *v.* Goodwin, 32 Me. 535; Agnew *v.* Platt, 15 Pick. (Mass.) 417; Baker *v.* Wheaton, 5 Mass. 509, 4 Am. Dec. 71; James *v.* Allen, 1 Dall. (Pa.) 188, 1 L. ed. 93; Urton *v.* Hunter, 2 W. Va. 83; Mason *v.* Haile, 12 Wheat. (U. S.) 370, 6 L. ed. 660; Ogden *v.* Saunders, 12 Wheat. (U. S.) 213, 6 L. ed. 606. See 28 Cent. Dig. tit. "Insolvency," § 274.

24. *Iowa.*— Hawley *v.* Hunt, 27 Iowa 303, 1 Am. Rep. 273.

Massachusetts.— Phœnix Nat. Bank *v.* Batcheller, 151 Mass. 589, 24 N. E. 917, 8 L. R. A. 644; Kelley *v.* Drury, 9 Allen 27; Producers' Bank *v.* Farnum, 5 Allen 10; Braynard *v.* Marshall, 8 Pick. 194. But see Blanchard *v.* Russell, 13 Mass. 1, 7 Am. Dec. 106; Scribner *v.* Fisher, 2 Gray 43; Capron *v.* Johnson, 5 Gray 539 note; Burrall *v.* Rice, 5 Gray 539.

New Hampshire.— Newmarket Bank *v.* Butler, 45 N. H. 236.

New York.— Pratt *v.* Chase, 44 N. Y. 597, 4 Am. Rep. 718 [*reversing* 19 Abb. Pr. 150, 29 How. Pr. 296]. But see Pratt *v.* Chase, 19 Abb. Pr. 150, 29 How. Pr. 296; Parkinson *v.* Scoville, 19 Wend. 150; Sherrill *v.* Hopkins, 1 Cow. 103.

United States.— Hale *v.* Baldwin, 11 Fed. Cas. No. 5,913, 1 Cliff. 511 [*affirmed* in 1 Wall. 223, 17 L. ed. 531]; Worthington *v.* Jerome, 30 Fed. Cas. No. 18,054, 5 Blatchf. 297.

See 28 Cent. Dig. tit. "Insolvency," § 271.

Contra.— Kentucky Northern Bank *v.* Squires, 8 La. Ann. 318, 58 Am. Dec. 682.

Although the debt is a judgment recovered in the state where the proceedings are pending, the insolvent laws would not affect a creditor residing out of the state at the time of the application of the debtor for his discharge, where such creditor does not participate in the proceedings under such laws. Murphy *v.* Manning, 134 Mass. 488; Donnelly *v.* Corbett, 7 N. Y. 500; Lester *v.* Christalar, 1 Daly (N. Y.) 29; Worthington *v.* Jerome, 30 Fed. Cas. No. 18,054, 5 Blatchf. 279.

25. Anderson *v.* Wheeler, 25 Conn, 603; Atwater *v.* Townsend, 4 Conn. 47, 10 Am. Dec. 97; Chase *v.* Flagg, 48 Me. 182; Felch *v.* Bugbee, 48 Me. 9, 77 Am. Dec. 203; Poe *v.* Duck, 5 Md. 1; Regina Flour Mills Co. *v.* Holmes, 156 Mass. 11, 30 N. E. 176; Braynard *v.* Marshall, 8 Pick. (Mass.) 194;

performed in such state.[26] A discharge under a state insolvency law has no effect upon a contract with a non-resident made or to be performed out of the state and cannot be pleaded in bar to an action thereon.[27] The same is true of a contract made and to be executed in a foreign country.[28] Nor would a state have authority by statute to give a court jurisdiction to discharge an insolvent from a debt due a resident of another state, even though at the time the debt was contracted the creditor was a resident of the state in which the proceedings were instituted and the debt was payable there.[29] Such a non-resident creditor may proceed either against the person or property of the insolvent in accordance with the laws of such foreign state.[30]

f. Effect in Other Jurisdiction. A debt or claim released by a discharge in insolvency proceedings under the laws of the state where the contract was made,

Mather *v.* Nesbit, 13 Fed. 872, 4 McCrary 505.

The indorsee of a bill will not be affected by a foreign discharge, although granted where the contract was originally made. Bancher *v.* Fisk, 33 Me. 316; Poe *v.* Duck, 5 Md. 1; Frey *v.* Kirk, 4 Gill & J. (Md.) 509, 23 Am. Dec. 581; Houghton *v.* Maynard, 5 Gray (Mass.) 552; Whitney *v.* Whiting, 35 N. H. 457; Donnelly *v.* Corbett, 7 N. Y. 500; Monroe *v.* Guilleaume, 3 Abb. Dec. (N. Y.) 334, 3 Keyes 30; Urton *v.* Hunter, 2 W. Va. 83; Gilman *v.* Lockwood, 4 Wall. (U. S.) 409, 18 L. ed. 432; Baldwin *v.* Hale, 1 Wall. (U. S.) 223, 17 L. ed. 531; Woodhull *v.* Wagner, 30 Fed. Cas. No. 17,975, Baldw. 296; Novelli *v.* Rossi, 2 B. & Ad. 757, 9 L. J. K. B. O. S. 307, 22 E. C. L. 317.

26. Guernsey *v.* Wood, 130 Mass. 503.

Contract made by agent or attorney.— The fact that the foreign creditor made his contract on which the indebtedness was based through an agent in the state in which the insolvency proceedings were instituted does not alter the rule of law that the discharge will not release the claim of such non-resident creditor. Regina Flour Mill Co. *v.* Holmes, 156 Mass. 11, 30 N. E. 176; Guernsey *v.* Wood, 130 Mass. 503; Ilsley *v.* Merriam, 7 Cush. (Mass.) 242, 54 Am. Dec. 721. The giving of a new note by a debtor in lieu of an old one to the attorney for a non-resident creditor, and payable to the attorney of the non-resident, will not prevent the creditor from suing the debtor, notwithstanding the discharge. Crow *v.* Coons, 27 Mo. 512.

27. *Louisiana.*— Spear *v.* Peabody, 10 La. Ann. 145.

Maryland.— Frey *v.* Kirk, 4 Gill & J. 509, 23 Am. Dec. 581.

Massachusetts.— Haman *v.* Brennan, 170 Mass. 405, 49 N. E. 655.

New Jersey.— Vanuxen *v.* Hazlehursts, 4 N. J. L. 192, 7 Am. Dec. 582.

New York.— Soule *v.* Chase, 39 N. Y. 342 [*reversing* 1 Rob. 222]; Witt *v.* Follett, 2 Wend. 457; Wyman *v.* Mitchell, 1 Cow. 316; Hicks *v.* Hotchkiss, 7 Johns. Ch. 297, 11 Am. Dec. 472. *Contra,* Penniman *v.* Meigs, 9 Johns. 325.

Texas.— Beers *v.* Rhea, 5 Tex. 349.

Vermont.— Blackman *v.* Green, 24 Vt. 17.

United States.— Cook *v.* Moffat, 5 How. 295, 12 L. ed. 159; Adams *v.* Storey, 1 Fed. Cas. No. 66, 1 Paine 79; Banks *v.* Greenleaf, 2 Fed. Cas. No. 959, 1 Hughes 261, 6 Call (Va.) 271; Kendall *v.* Badger, 14 Fed. Cas. No. 7,691, McAllister 523; Towne *v.* Smith, 24 Fed. Cas. No. 14,115, 1 Woodb. & M. 115.

See 28 Cent. Dig. tit. "Insolvency," § 255.

Extent and limits of rule.— The discharge was held not to be a bar to an obligation of a contract made in another state between persons not residing in the state when the contract was made, although they became residents before the petition for the discharge was presented. Witt *v.* Follett, 2 Wend. (N. Y.) 457. It is a good plea in bar to an action on a contract made and to be performed in another state, if the parties thereto were citizens of the state where the discharge was obtained or became parties to such proceedings. Marsh *v.* Putnam, 3 Gray (Mass.) 551. See also *supra,* VI, C, 5, e, (I).

A discharge by a state law has no operation out of the state over contracts not made and to be carried into effect within the state, nor over the citizens of other states, who do not make themselves parties to the proceedings under the law. Norton *v.* Cook, 9 Conn. 314, 23 Am. Dec. 342; Pugh *v.* Bussel, 2 Blackf. (Ind.) 394; Bradford *v.* Farrand, 13 Mass. 18; Van Raugh *v.* Van Arsdaln, 3 Cai. (N. Y.) 154, 2 Am. Dec. 259; Smith *v.* Smith, 2 Johns. (N. Y.) 235, 3 Am. Dec. 410; Emory *v.* Greenough, 3 Dall. (U. S.) 369, 1 L. ed. 640, 8 Fed. Cas. No. 4,471.

28. Clarke *v.* Van Riemsdyk, 9 Cranch (U. S.) 153, 3 L. ed. 688; Van Reimsdyk *v.* Kane, 28 Fed. Cas. No. 16,871, 1 Gall. 371.

29. Pullen *v.* Hillman, 84 Me. 129, 24 Atl. 795, 30 Am. St. Rep. 340; Roberts *v.* Atherton, 60 Vt. 563, 15 Atl. 159, 6 Am. Rep. 133. *Contra,* see Stoddard *v.* Harrington, 100 Mass. 87, 97 Am. Dec. 801, 1 Am. Rep. 92; Brigham *v.* Henderson, 1 Cush. (Mass.) 430, 48 Am. Dec. 610.

30. Prentiss *v.* Savage, 13 Mass. 20; Whittemore *v.* Adams, 2 Cow. (N. Y.) 626; White *v.* Canfield, 7 Johns. (N. Y.) 117, 5 Am. Dec. 249; Hinkley *v.* Marean, 12 Fed. Cas. No. 6,523, 3 Mason 88; Titus *v.* Hobart, 23 Fed. Cas. No. 14,063, 5 Mason 378; Webster *v.* Massey, 29 Fed. Cas. No. 17,336, 2 Wash. 157.

and where both the parties thereto resided at the time of entering into the contract, is also released or discharged in another state,[31] provided all the requirements of the law have been complied with.[32]

6. New Promise — a. In General. The liability on a debt which has been released by a discharge in insolvency will be revived by a valid new promise to pay.[33] The action should be upon the new and not upon the original promise.[34] A new promise given to the payee of a note inures to the benefit of subsequent indorsees.[35]

b. Requisites and Validity. To be valid such promise must be express, unequivocal, and unconditional.[36] The original indebtedness, notwithstanding

31. *Connecticut.*— Hempstead *v.* Reed, 6 Conn. 480.

Maine.— Manufacturers' Nat. Bank *v.* Hall, 86 Me. 107, 29 Atl. 952; Clark *v.* Cousins, 65 Me. 42; Stone *v.* Tibbetts, 26 Me. 110.

Massachusetts.— Agnew *v.* Platt, 15 Pick. 417; Betts *v.* Bagley, 12 Pick. 572; Braynard *v.* Marshall, 8 Pick. 194; Walsh *v.* Ferrand, 13 Mass. 19; Watson *v.* Bourne, 10 Mass. 337, 6 Am. Dec. 129; Baker *v.* Wheaton, 5 Mass. 509, 4 Am. Dec. 71. See also Bergner, etc., Brewing Co. *v.* Dreyfus, 172 Mass. 154, 51 N. E. 531, 70 Am. St. Rep. 251; Stoddart *v.* Harrington, 100 Mass. 87, 97 Am. Dec. 80, 1 Am. Rep. 92.

Mississippi.— Williams *v.* Guignard, 2 How. 722.

New Hampshire.— Hall *v.* Boardman, 14 N. H. 38. See Brown *v.* Collins, 41 N. H. 405.

New York.— Matter of Coates, 3 Abb. Dec. 231, 12 How. Pr. 344; Murphy *v.* Philbrook, 57 N. Y. Super. Ct. 204, 6 N. Y. Suppl. 543.

Ohio.— Utica Bank *v.* Card, 7 Ohio, Pt. II, 170.

Pennsylvania.— Jeffries *v.* Thompson, 2 Yeates 482.

South Carolina.— Brown *v.* Wallen, 4 McCord 364.

United States.— Babcock *v.* Weston, 2 Fed. Cas. No. 703, 1 Gall. 168.

See 28 Cent. Dig. tit. "Insolvency," § 273; *supra*, IV, C, 2, c, (III); and Foreign Corporations, 19 Cyc. 1220.

A discharge in insolvency in a state where the contract was to be performed will operate as a bar thereof, although it is represented by a judgment obtained in another state. Betts *v.* Bagley, 12 Pick. (Mass.) 572.

Where a bill payable to a foreign payee is after non-acceptance discharged as to the foreign drawer by the law of his place of contract, it will operate as a discharge of him in an action brought against him by the payee in England. Potter *v.* Brown, 5 East 124, 1 Smith K. B. 351, 7 Rev. Rep. 663. See also Hicks *v.* Brown, 12 Johns. (N. Y.) 142.

Comity.— In Pennsylvania, under the rule of comity, it was held that a decree in another state which also recognized a Pennsylvania discharge would also release the debtor in Pennsylvania. Hilliard *v.* Greenleaf, 2 Yeates (Pa.) 533; Hare *v.* Moultrie, 2 Yeates (Pa.) 435; Donaldson *v.* Chambers, 2 Dall. (Pa.) 100, 1 L. ed. 306; Thompson *v.* Young, 1 Dall. (Pa.) 294, 1 L. ed. 143; Miller *v.* Hall, 1 Dall. (Pa.) 229, 1 L. ed. 113. But the contrary was held true where the foreign state refused to recognize the insolvent law of Pennsylvania. Fisher *v.* Hyde, 3 Yeates (Pa.) 256.

In a federal court the same effect will be given a discharge when pleaded in an action as when pleaded in a state court. Channing *v.* Reiley, 5 Fed. Cas. No. 2,596, 4 Cranch C. C. 528; Shieffelin *v.* Wheaton, 21 Fed. Cas. No. 12,783, 1 Gall. 441.

32. Proctor *v.* Moore, 1 Mass. 198.

Failure to record in other state.— Where a debtor obtains a discharge in one state, after an assignment purporting to convey all his property, but such assignment is not recorded in another state, a creditor there can enforce his claim against an interest of the debtor in real estate in the other state. Tappan *v.* Poor, 15 Mass. 419.

33. Lambert *v.* Schmalz, 118 Cal. 33, 50 Pac. 13. See *infra*, VI, A, 6, b.

34. Chabot *v.* Tucker, 39 Cal. 434; Depuy *v.* Swart, 3 Wend. (N. Y.) 135, 20 Am. Dec. 673; Earnest *v.* Parke, 4 Rawle (Pa.) 452, 27 Am. Dec. 280. But see Smith *v.* Richmond, 19 Cal. 476, where it was held that the cause of action should be upon the original demand, as the new promise is evidence merely of a waiver of the defense furnished by the discharge.

If the new debt created by the promise is conditional, the condition must be observed. Glenn *v.* Dunbar, 10 La. Ann. 253; Beck *v.* Howard, 3 La. Ann. 501; Scouton *v.* Eislord, 7 Johns. (N. Y.) 36. See Wait *v.* Morris, 6 Wend. (N. Y.) 394.

While the declaration should be based upon the new promise when made subsequent to a discharge in insolvency, still if suit is brought upon the original obligation, plaintiff may set up the new promise by way of replication. Hildreth *v.* Shillaber, 2 Hall (N. Y.) 231; Fitzgerald *v.* Alexander, 19 Wend. (N. Y.) 402.

Proving promise in absence of replication. — In a suit upon a note in which a discharge is pleaded in bar of the action, and no replication is ordered by the court, plaintiff may prove a new promise without having alleged it. Cook *v.* Shearman, 103 Mass. 21.

35. Smith *v.* Richmond, 19 Cal. 476.

Note payable to "bearer" see Depuy *v.* Swart, 3 Wend. (N. Y.) 135, 20 Am. Dec. 673.

36. *California.*— Lambert *v.* Schmalz, 118 Cal. 33, 50 Pac. 13; Chaffee *v.* Browne, 109 Cal. 211, 41 Pac. 1028.

the discharge, is regarded as a sufficient consideration to support a promise to pay the debt released by the discharge.[37] A partial payment of a debt in some jurisdictions is held not to be the equivalent of a new promise and will not revive the balance of the debt.[38] The promise may be in writing or oral, in accordance with the statutes of the particular jurisdiction,[39] but cannot be established by implication or inference.[40]

7. PLEADING, EVIDENCE, AND DETERMINATION[41] — a. Pleading[42] — (I) *RIGHT TO PLEAD.* An insolvent discharged in a proceeding in insolvency if subsequently sued for any obligation which was released thereby[43] may plead the discharge in bar of such action, unless by giving a new promise or the doing of some other act he has estopped himself from making such plea,[44] as by a showing that the discharge had been obtained by fraud.[45]

(II) *NECESSITY OF PLEADING.* A debtor who has obtained a discharge in an insolvency proceeding, in order to avail himself of the discharge as a defense to an action on a debt existing at the time of the discharge, must plead it.[46]

Louisiana.— Beck *v.* Howard, 3 La. Ann. 501.

Maryland.— Knight *v.* House, 29 Md. 194, 96 Am. Dec. 515; Baltimore, etc., R. Co. *v.* Clark, 19 Md. 509.

Massachusetts.— Pierce *v.* Mann, 130 Mass. 14; Cook *v.* Shearman, 103 Mass. 21; Lerow *v.* Wilmarth, 7 Allen 463, 83 Am. Dec. 701; Merriam *v.* Bayley, 1 Cush. 77, 48 Am. Dec. 591.

New York.— Fitzgerald *v.* Alexander, 19 Wend. 402.

Pennsylvania.— Earnest *v.* Parke, 4 Rawle 452, 27 Am. Dec. 280.

Rhode Island.— Kenyon *v.* Worsley, 2 R. I. 341.

See 28 Cent. Dig. tit. "Insolvency," § 276.

37. *California.*— Feeny *v.* Daly, 8 Cal. 84.

Louisiana.— Beck *v.* Howard, 3 La. Ann. 501.

Maryland.— Baltimore, etc., R. Co. *v.* Clark, 19 Md. 509.

Massachusetts.— Maxim *v.* Morse, 8 Mass. 127.

New York.— Stafford *v.* Bacon, 1 Hill 532, 37 Am. Dec. 366; Erwin *v.* Saunders, 1 Cow. 249, 13 Am. Dec. 520; Shippey *v.* Henderson, 14 Johns. 178, 7 Am. Dec. 458; Scouton *v.* Eislord, 7 Johns. 36.

See 28 Cent. Dig. tit. "Insolvency," § 276.

38. Ames *v.* Storer, 80 Me. 243, 14 Atl. 67; Merriam *v.* Bayley, 1 Cush. (Mass.) 77, 48 Am. Dec. 591.

39. Lambert *v.* Schmalz, 118 Cal. 33, 50 Pac. 13.

40. Baltimore, etc., R. Co. *v.* Clark, 19 Md. 509.

Insufficient evidence to establish new promise see Glenn *v.* Dunbar, 10 La. Ann. 253; Dennan *v.* Gould, 141 Mass. 16, 6 N. E. 222; Kenney *v.* Brown, 139 Mass. 345, 1 N. E. 547; Randidge *v.* Lyman, 124 Mass. 361; Reed *v.* Frederick, 8 Gray (Mass.) 230; Kelley *v.* Pike, 5 Cush. (Mass.) 484; Tooker *v.* Doane, 2 Hall (N. Y.) 570; Scouton *v.* Eislord, 7 Johns. (N. Y.) 36; Wait *v.* Morris, 6 Wend. (N. Y.) 394.

41. **Audita querela** to release from judgment against insolvent see AUDITA QUERELA.

42. **Pleading** generally see PLEADING.

43. See *supra*, VI, C, 5, c.

44. McAlpin *v.* Newell, 2 Miles (Pa.) 339; Kensington Bank *v.* Wilkinson, 2 Miles (Pa.) 166. See also 9 Cyc. 692; 3 Cyc. 409 note 9.

Case pending on appeal.— Where a discharge in insolvency proceedings was given a party against whom a judgment had been rendered in a case then before the supreme court on exceptions, he would be permitted to avail himself of that defense on waiving his exceptions. Paterson *v.* Smith, 72 Vt. 288, 47 Atl. 1088.

45. Godkin *v.* Beech, 10 Nova Scotia 261.

46. *California.*— Rahm *v.* Minis, 40 Cal. 421.

Maryland.— State *v.* Culler, 18 Md. 418.

Massachusetts.— Pettee *v.* Coggeshall, 5 Gray 51.

New Jersey.— Ackerman *v.* Van Houten, 10 N. J. L. 332; Mills *v.* Sleght, 5 N. J. L. 565.

New York.— Price *v.* Peters, 15 Abb. Pr. 197; Spencer *v.* Beebe, 17 Wend. 557; Sessions *v.* Phinney, 11 Johns. 162; Cross *v.* Hobson, 2 Cai. 102. See also Bradley *v.* Field, 3 Wend. 272, where it was held the discharge might be given in evidence under the general issue.

Pennsylvania.— Boyer *v.* Rees, 4 Watts 201.

See 28 Cent. Dig. tit. "Insolvency," § 279 *et seq.*

One who neglects to plead his discharge in defense of an action cannot thereafter obtain relief from a judgment entered therein. Waggle *v.* Worthy, 74 Cal. 266, 15 Pac. 831, 5 Am. St. Rep. 440; Katz *v.* Moore, 13 Md. 566; Ackerman *v.* Van Houten, 10 N. J. L. 332; Mills *v.* Sleght, 5 N. J. L. 565; Price *v.* Peters, 15 Abb. Pr. (N. Y.) 197; Mechanics' Bank *v.* Hazard, 9 Johns. (N. Y.) 392; Valkenburgh *v.* Dederick, 1 Johns. Cas. (N. Y.) 133; Wallace *v.* Bossom, 2 Can. Sup. Ct. 488. See 28 Cent. Dig. tit. "Insolvency," § 289.

If discharge was not obtained in time to be pleaded, defendant may be relieved on motion. Parkinson *v.* Scoville, 19 Wend. (N. Y.) 150; Baker *v.* Taylor, 1 Cow. (N. Y.) 165; Palmer *v.* Hutchins, 1 Cow. (N. Y.) 42;

(III) *Requisites and Sufficiency of Plea.* The form and requisites of a plea of discharge are not uniform in the several states, but must conform to the requirements of the statute of the particular jurisdiction in which it is pleaded.[47]

(IV) *Time For Pleading.* In the absence of a statutory provision to the contrary an insolvent who has not been guilty of laches will be permitted to plead his discharge at any stage of the proceeding.[48]

(V) *Replication to Plea.* The replication filed by a plaintiff to a plea of discharge obtained under the insolvent law should specify in detail the grounds for avoiding the discharge.[49]

b. Determination of Issues Raised. While the procedure and method of determining the issue raised by a plea of discharge filed by the debtor in an action against him is governed by the statutes of the several states,[50] the prac-

Baker *v.* Ulster, 4 Johns. (N. Y.) 191; Mabbott *v.* Van Beuren, 1 Wheel. Cr. (N. Y.) 320.

Ignorance of the law will not excuse a neglect to plead a discharge at the proper time. Ackerman *v.* Van Houten, 10 N. J. L. 332.

Whether a person can avail himself in equity of a discharge he has failed to plead at law *quære.* Reily *v.* Lamar, 2 Cranch (U. S.) 344, 2 L. ed. 300.

Audita querela to set up defense of insolvency not made at trial see AUDITA QUERELA.

47. See the statutes of the several states. See also Whitney *v.* Rhoades, 3 Allen (Mass.) 471 (reference made to annexed copy of discharge); Philipe *v.* James, 1 Abb. Pr. N. S. (N. Y.) 311 (pleading foreign discharge); Smith *v.* Bennett, 17 Wend. (N. Y.) 479; Roosevelt *v.* Kellogg, 20 Johns. (N. Y.) 208; Cruger *v.* Cropsey, 3 Johns. (N. Y.) 242; Westgate *v.* Healy, 4 R. I. 523.

Facts conferring jurisdiction on the officer who granted it need not be stated. Livingston *v.* Oaksmith, 13 Abb. Pr. (N. Y.) 183. But see Porter *v.* Miller, 3 Wend. (N. Y.) 329; Salters *v.* Tobias, 3 Paige (N. Y.) 338.

Setting forth the certificate verbatim without reciting the provisions previous to the discharge is sufficient. Peebles *v.* Kittle, 2 Johns. (N. Y.) 363.

The residence of the insolvent should be shown to give the court jurisdiction. Morgan *v.* Dyer, 10 Johns. (N. Y.) 161.

The jurisdiction of the officer who granted the discharge should be shown. Wyman *v.* Mitchell, 1 Cow. (N. Y.) 316; Roosevelt *v.* Kellogg, 20 Johns. (N. Y.) 208; Lapham *v.* Barrett, 1 Vt. 247.

Merely setting up the adjudication is not sufficient. White *v.* McCaughey, 20 R. I. 1, 26 Atl. 840, 37 Atl. 350.

Special plea in bar.— The discharge may be pleaded in bar by a special plea in bar, as well as by a simple averment with a copy of the discharge. Bradbury *v.* Tarbox, 95 Me. 519, 50 Atl. 710.

Waiver of objection to plea.— After issue has been joined and evidence received thereunder it is too late to object that the plea of discharge did not set forth a copy thereof as required by the statute. Jordan *v.* Pulsifer, 84 Me. 137, 24 Atl. 655. After the verdict it is too late to object that the plea did not conform to the statutory requirements. Smith *v.* Bennett, 17 Wend. (N. Y.) 479.

48. Desobry *v.* Morange, 18 Johns. (N. Y.) 336; Snyder *v.* Hall, 1 Browne (Pa.) 215; Wallace *v.* Bossom, 2 Can. Sup. Ct. 488; Harrington *v.* Nitter, 1 Can. L. T. 663, 14 Nova Scotia 183. Thus an insolvent who has obtained a discharge in a proceeding in insolvency, since an action against him on some obligation was commenced, may plead the discharge by way of a supplemental answer, if his plea has already been filed (Rahm *v.* Minis, 40 Cal. 421; Morgan *v.* Dyer, 9 Johns. (N. Y.) 255; Shawe *v.* Wilmerden, 2 Cai. (N. Y.) 380; Anonymous, Hopk. (N. Y.) 30), or if judgment has been rendered and the suit is pending in an appellate court, in some jurisdictions, he will be permitted by way of exceptions to plead his discharge (Swan *v.* Easterbrooks, 16 Gray (Mass.) 520; Lewis *v.* Shattuck, 4 Gray (Mass.) 572; Paterson *v.* Smith, 72 Vt. 288, 47 Atl. 1088).

Not unreasonable delay see La Farge *v.* Carrier, 1 Wend. (N. Y.) 89.

49. Bell *v.* Lamprey, 52 N. H. 41; Service *v.* Heermance, 2 Johns. (N. Y.) 96.

Only the specifications filed setting forth the grounds upon which plaintiff seeks to avoid the discharge can be raised at the trial. Williams *v.* Coggeshall, 8 Cush. (Mass.) 377.

Setting up three distinct and independent grounds for avoiding the discharge, which would require several distinct points to be put in issue has been held to render a replication bad. Cooper *v.* Heermance, 3 Johns. (N. Y.) 315.

50. See the statutes of the several states.

Supplementary proceedings founded on a judgment obtained prior to an insolvent's discharge will be vacated on an application to the court. Smith *v.* Paul, 20 How. Pr. (N. Y.) 97.

Where a creditor has levied execution and a motion is made to set it aside because of the defense in insolvency proceedings, the court will not try the validity of the discharge on affidavits. Cramer *v.* ——, 3 Sandf. (N. Y.) 700; Noble *v.* Johnson, 9 Johns. (N. Y.) 259. In California an insolvent who has obtained a discharge cannot have execution against him enjoined, as

tice pursued in other litigations as to questions of fact and of law as a rule prevails.[51]

c. Evidence of Discharge — (I) *Presumption and Burden of Proof.* Unless the statute provides to the contrary, a certificate of discharge is at least *prima facie* evidence of the regularity of the proceeding, and the jurisdiction of the court;[52] and while it is generally conclusive of the proceedings and the facts therein contained,[53] the burden of showing that a debt is released by the discharge rests upon the party pleading it as a release.[54]

(II) *Admissibility, and Weight and Sufficiency.* In receiving or rejecting evidence which is offered to show a valid discharge of an insolvent,[55] the

his release should be by motion to have the execution dismissed. Green *v.* Thomas, 17 Cal. 86. See also Imlay *v.* Carpentier, 14 Cal. 173.

51. See, generally, Trial.

Questions of fact properly submitted to the jury see Dean *v.* Grimes, 72 Cal. 442, 14 Pac. 178 (whether the insolvent had concealed any part of his property or estate, or made a false schedule, or committed any fraud under the statute to defeat the discharge); Downs *v.* Lewis, 11 Cush. (Mass.) 76 (where the validity of discharge was denied because of some question of fact); Soule *v.* Chase, 1 Rob. (N. Y.) 222, 1 Abb. Pr. N. S. 48 (whether the names in the schedule were intended to designate plaintiffs; or whether their names were omitted, and if so, whether the omission was fraudulent).

52. Herrlich *v.* McDonald, 80 Cal. 472, 22 Pac. 299; Porter *v.* Imus, 79 Cal. 183, 21 Pac. 729 (*prima facie* evidence of the regularity of the discharge); Cobbossee Nat. Bank *v.* Rich, 81 Me. 164, 16 Atl. 506 (conclusive evidence in favor of the fact and regularity of the discharge); Lerian *v.* Rohr, 66 Md. 95, 5 Atl. 867 (sufficient evidence of the discharge); Jay *v.* Slack, 4 N. J. L. 77 (*prima facie* evidence of the due discharge and all the proceedings under the act); Hayton *v.* Wilkinson, 11 Fed. Cas. No. 6,272, Brunn. Col. Cas. 247 (not conclusive evidence that the discharge was duly obtained); Buller N. P. 173 (*prima facie* evidence of a due discharge and of all the proceedings under the insolvent act); Ladbroke *v.* Gyles, Willes 199 (sufficient evidence of the discharge).

It will be presumed that the discharge was properly secured, and the question of its validity will not be tried on affidavits. Stuart *v.* Salhinger, 14 Abb. Pr. (N. Y.) 291.

Proof aliunde.— The discharge itself held sufficient evidence of the facts stated therein to give the commissioner jurisdiction without proof *aliunde* of those facts. Jenks *v.* Stebbins, 11 Johns. (N. Y.) 224. It seems, however, that notwithstanding the facts recited in the discharge, it is competent for the opposing party to show that the officer did not have jurisdiction. Barber *v.* Winslow, 12 Wend. (N. Y.) 102. Although the discharge is made evidence of the facts therein contained, it is not the only evidence that can be received to show the regularity of the proceedings, and the omission to state in the discharge an act required by the statute to be done cannot even raise a presumption that such act was not performed. Salters *v.* Tobias, 3 Paige (N. Y.) 338.

In Massachusetts the certificate of an insolvent debtor's discharge is not conclusive evidence of the facts therein stated; but when offered in evidence, the court may look into the record of the proceedings in insolvency, in order to determine whether the certificate was properly granted. Gardner *v.* Nute, 2 Cush. 333. See also Cox *v.* Austin, 11 Cush. 32, holding that a recital that the debtor has "in all things conformed himself to the directions" of the insolvent law is not *prima facie* evidence that he made and subscribed the oath required of him by that law.

In an action on an insolvent's bond the breach assigned being that the insolvent did not give the notice of hearing to his creditors required by law, the record of the insolvent's discharge is not conclusive evidence that the insolvent did give such notice. Berens *v.* Rasch, 9 Phila. (Pa.) 45.

53. Stanton *v.* Ellis, 12 N. Y. 575, 64 Am. Dec. 512; Lester *v.* Thompson, 1 Johns. (N. Y.) 300. *Compare* Manhattan Oil Co. *v.* Thorn, 14 Abb. Pr. (N. Y.) 291 note, holding that the court will not try the validity of an insolvent's discharge on affidavits, and on motion the recitals of the discharge are conclusive.

Except as to jurisdictional matters a discharge is conclusive evidence of the statutory proceedings and facts therein stated. The facts upon which the jurisdiction of the officer depends may be inquired into by the party seeking to impeach it in a collateral proceeding. Stanton *v.* Ellis, 12 N. Y. 575, 64 Am. Dec. 512.

54. Herrlich *v.* McDonald, 80 Cal. 472, 22 Pac. 299. *Compare* Vauquelin *v.* Platet, 12 Rob. (La.) 381.

55. See Betts *v.* Bagley, 12 Pick. (Mass.) 572 (to show jurisdiction of officer granting discharge); Goodhue *v.* Hitchcock, 8 Metc. (Mass.) 62 (to show fraud); Ayres *v.* Scribner, 17 Wend. (N. Y.) 407 (to show fraud); Rindge *v.* Breck, 10 Cush. (Mass.) 43 (to show consideration for insolvent's note was necessary); Soule *v.* Chase, 1 Rob. (N. Y.) 222 (to show that creditor was a non-resident). See also Billinge *v.* Pickert, 39 Hun (N. Y.) 504.

The certificate of a discharge in insolvency is of itself evidence of the facts it contains,

general rules governing and controlling the admissibility of evidence in other civil actions apply.[56]

3. Collateral Attack of Discharge. The discharge obtained by an insolvent under the insolvency statutes is not subject to collateral attack, except for matters going to the jurisdiction.[57]

D. Reversion of Property or Surplus to Debtor. In case of the discontinuance of insolvency proceedings, the parties thereto are remitted to their respective rights as they existed at the time of the institution of proceedings, except in so far as the estate shall have been administered. The undistributed assets should be returned to the insolvent while dividends received by the creditors are to be treated as so much payment on account.[58] After the debts of the insolvent are extinguished, either through a composition proceeding,[59] or by being satisfied by the assignee,[60] the latter becomes trustee for the benefit of the insolvent, and the estate remaining in the assignee's hands reverts to the insolvent or should be administered for his benefit, as required by the law of the particular jurisdiction in which the proceedings are pending.

VII. APPEAL AND REVISION OF PROCEEDINGS.

A. In General. The review and revision of insolvency proceedings is usually provided for by statute.[61] Depending upon the local practice, this review may be by certiorari,[62] by appeal,[63] or by general superintendence of certain courts given this jurisdiction by special statutory provision.[64]

and a party claiming thereunder is not required to prove such facts by evidence *aliunde*. Winingder *v.* Diffenderffer, 5 Harr. & J. (Md.) 181; Sheets *v.* Hawk, 14 Serg. & R. (Pa.) 173, 16 Am. Dec. 486. A discharge in insolvency may be proved by the ordinary certificate, as well as by a certified copy of the record. Greene *v.* Durfee, 6 Cush. (Mass.) 362. The certificate is the best evidence of such discharge, and parol evidence of the discharge is not admissible until the non-production of the certificate is accounted for. Regan *v.* Regan, 72 N. C. 195. But under an act of the legislature providing for a discharge of insolvents, but not making such discharge an act of record, it was competent to prove a discharge by the warrant under hand and seal of the magistrates; and parol evidence by persons other than the magistrates themselves that the signers of the warrant were magistrates at the date of the discharge was admissible. Turner *v.* Fendall, 1 Cranch (U. S.) 116, 2 L. ed. 53.

56. Admissibility and weight and sufficiency of evidence generally see Evidence.

57. *California.*— Friedlander *v.* Loucks, 34 Cal. 18.

Maryland.— State *v.* Culler, 18 Md. 418; Bowie *v.* Jones, 1 Gill 208.

New York.— Rusher *v.* Sherman, 28 Barb. 416; Pratt *v.* Chase, 19 Abb. Pr. 150, 29 How. Pr. 296; Russell, etc., Mfg. Co. *v.* Armstrong, 10 Abb. Pr. 258 note; Reed *v.* Gordon, 1 Cow. 50.

North Carolina.— Jordan *v.* James, 10 N. C. 110.

Pennsylvania.— Sheets *v.* Hawk, 14 Serg. & R. 173, 16 Am. Dec. 486; McKinney *v.* Crawford, 8 Serg. & R. 351.

Washington.— J. I. Case Threshing-Mach. Co. *v.* Sires, 21 Wash. 322, 58 Pac. 209; Rosenthal *v.* Schneider, 2 Wash. Terr. 144, 3 Pac. 837.

Wisconsin.— German American Bank *v.* Powell, 121 Wis. 575, 99 N. W. 222.

Canada.—Beulair *v.* Gilliatt, 3 Nova Scotia Dec. 525.

See 28 Cent. Dig. tit. "Insolvency," § 290.

In proceedings supplemental to the execution, the validity of a discharge cannot be attacked, but in order to test its validity the creditor must have recourse to an action. Coursen *v.* Dearborn, 7 Rob. (N. Y.) 143; Dresser *v.* Shufeldt, 7 How. Pr. (N. Y.) 85.

58. Stoddard *v.* Gilbert, 163 Ill. 131, 45 N. E. 542 [*affirming* 62 Ill. App. 70].

59. See Wilson *v.* Boylston Nat. Bank, 170 Mass. 9, 48 N. E. 836.

60. Atlantic Delaine Co. *v.* James, 94 U. S. 207, 24 L. ed. 112; Weaver *v.* Leiman, 52 Md. 708; Williams *v.* Savage Mfg. Co., 1 Md. Ch. 306; Jones *v.* Dexter, 125 Mass. 469; Brown *v.* Lamb, 6 Metc. (Mass.) 203; *In re* Randall, 1 Cai. (N. Y.) 513.

If new debts are discovered, the balance of the estate should not be returned to the insolvent. Gottschalk *v.* His Creditors, 12 La. Ann. 70.

61. See the statutes of the several states.

62. See *infra*, VII, B.

63. See *infra*, VII, C.

64. Chadwick *v.* Old Colony R. Co., 171 Mass. 239, 50 N. E. 629, under Mass. Pub. St. c. 157, § 15, giving the supreme judicial court general superintendence and jurisdiction of cases arising in insolvency, the remedy for an erroneous decision of the court of insolvency. See also Tadlock *v.* Texas Monumental Committee, 21 Tex. 166.

Appeal to the superior court will be dismissed. Chadwick *v.* Old Colony R. Co., 171 Mass. 239, 50 N. E. 629.

B. Certiorari. Where no other remedy exists and the record discloses errors of law certiorari will lie to review the proceedings of inferior insolvency tribunals.[65]

C. Appeal — 1. In General.[66] As a rule the statutes provide an adequate remedy by way of appeal for the review of decisions of courts of insolvency.[67] The proper court to which the appeal should be taken as well as the scope and extent of its appellate jurisdiction in such matters is regulated by statute or governed by the local practice.[68]

2. Decisions Reviewable.[69] Notwithstanding the impossibility of laying down any general or uniform rule by reason of the lack of uniformity in the various statutory provisions,[70] among the decisions rendered by insolvency courts or by insolvency judges which have been held to be reviewable[71] may be enumerated orders or decrees: Allowing or disallowing a claim;[72] appointing a

By proper process the proceedings, orders, and decrees of the insolvency court may usually be revised by appellate courts. Harris *v.* Peabody, 73 Me. 262; Proctor *v.* Public Nat. Bank, 152 Mass. 223, 25 N. E. 81, 9 L. R. A. 122; Binney *v.* Globe Nat. Bank, 150 Mass. 574, 23 N. E. 380, 6 L. R. A. 379. *Compare* McIntire *v.* Robinson, 81 Me. 583, 18 Atl. 292; Glenn *v.* Fowler, 8 Gill & J. (Md.) 340; Van Ingen *v.* Beal, 165 Mass. 582, 43 N. E. 516.

A bill in equity to revise the acts of courts in insolvency, under the general statutory supervisory jurisdiction of the supreme judiciary court in Massachusetts is not technically an appeal, and its purpose is to review and correct decisions of the court of insolvency. Winchester *v.* Thayer, 129 Mass. 129; Lancaster *v.* Choate, 5 Allen (Mass.) 530; Harlow *v.* Tufts, 4 Cush. (Mass.) 448; Barnard *v.* Eaton, 2 Cush. (Mass.) 294; Eastman *v.* Foster, 8 Metc. (Mass.) 19.

65. See Certiorari, 6 Cyc. 741. See also *In re* Negus, 10 Wend. (N. Y.) 34.

Certiorari proceedings generally see Certiorari, 6 Cyc. 730 *et seq.*

Notice should be given to the debtor. State *v.* Gilberson, 14 N. J. L. 388.

Parties.— The magistrate whose record is questioned as well as the debtor should be made parties. McPheters *v.* Morrill, 66 Me. 123.

66. **Appeal and error** generally see Appeal and Error.

67. See the statutes of the several states and cases cited *infra*, note 71 *et seq.*

The right of appeal may be authorized either by special statutory provision or by reference to the general practice in civil actions. *In re* Sullivan, 139 Cal. 257, 72 Pac. 992. See Paul *v.* Locust Point Co., 70 Md. 288, 17 Atl. 77. No appeal lies unless specially authorized or the case comes within the general provision relating to appeals. Tadlock *v.* Texas Monumental Committee, 21 Tex. 166. See also Pierce *v.* Keene, 173 Mass. 431, 53 N. E. 900. That no appeal shall lie in any case of insolvency unless specially provided for is the provision in some states. *In re* Trafton, 94 Me. 579, 48 Atl. 113, construing Rev. St. c. 70, § 12. See also Williams *v.* Williams, 5 Gill (Md.) 88; *In re* Negus, 10 Wend. (N. Y.) 34. However, under the constitutional statutory provisions insolvency cases are sometimes considered as ordinary civil actions in which an appeal will lie to the proper superior court under its general appellate jurisdiction. People *v.* Rosborough, 29 Cal. 415.

68. See *In re* Trafton, 94 Me. 579, 48 Atl. 113 (appeal from judge of insolvency to supreme court); Holder *v.* Hillson, 168 Mass. 514, 47 N. E. 417 (appeal from court of insolvency to superior court under Mass. Pub. St. c. 157, § 37); Browne *v.* Wallace, 60 Ohio St. 177, 53 N. E. 957 (appeal from probate court to court of common pleas); *In re* Chapman, 71 Vt. 368, 45 Atl. 232 (appeal from court of insolvency to court of chancery and from court of chancery to supreme court). See also cases cited *infra*, note 70 *et seq.*

Appellate jurisdiction generally see Appeal and Error; Courts.

69. **Decisions reviewable** generally see Appeal and Error, 2 Cyc. 538 *et seq.*

70. See the statutes of the several states.

Amount in controversy.— Only when the claim is of a certain amount does an appeal lie under the provisions of some statutes. Whiting *v.* Gray, 9 Metc. (Mass.) 291. In insolvency the test of the appellate jurisdiction of the supreme court is, not the amount actually distributed under a provisional account, but the amount of the fund to be distributed in the case. *In re* New Iberia Cotton Mills Co., 113 La. 404, 37 So. 8.

71. **From any order of the court** in insolvency proceedings an appeal may lie when expressly authorized by statute. Paul *v.* Locust Point Co., 70 Md. 288, 17 Atl. 77. And *compare* People *v.* Rosborough, 29 Cal. 415, holding that any decision in an insolvency case is appealable under the general rules relating to appeals where under the constitution or statute of the particular jurisdiction such cases are considered as ordinary civil cases and not special cases.

72. *Connecticut.*— Coit's Appeal, 68 Conn. 184, 35 Atl. 1124.

Louisiana.— Grainer *v.* Devlin, 1 La. 169; Marigny *v.* Johnston, 3 Mart. N. S. 551; Blois *v.* Denesse, 2 Mart. 175.

Maine.— *In re* Trafton, 94 Me. 579, 48 Atl. 113.

Massachusetts.— Woodward *v.* Spurr, 138 Mass. 592.

receiver;[73] confirming a sale of real estate made by an assignee at private sale;[74] discharging an insolvent;[75] dissolving a creditor's attachment and concluding his rights thereunder;[76] homologating quarterly settlements or the final accounts of a receiver;[77] placing a valuation upon securities held by creditors;[78] overruling exceptions to a claim;[79] refusing to extend time to present claim;[80] requiring an insolvent to give bond to the creditor for the amount of his claim where the insolvent is carrying on his business and disposing of his property;[81] setting aside to insolvent his exemptions;[82] refusal of a trustee or assignee to administer on property adjudged to be conveyed in fraud of creditors;[83] the action of commissioners in making a valuation of a creditor's security.[84] On the other hand among decisions held not to be reviewable[85] may be enumerated orders or decrees: Confirming an order dismissing a petition for an adjudication of insolvency;[86] directing the trustee to sell insolvent's certificates of stock mentioned in his schedule of effects;[87] expunging a claim proved;[88] for the election of a new trustee;[89] for the syndic to produce his book;[90] granting an allowance to an insolvent

Minnesota.— *In re* Minnehaha Driving Park Assoc., 53 Minn. 423, 55 N. W. 598.

New Hampshire.— Parsons *v.* Parsons, 67 N. H. 296, 29 Atl. 451; Souhegan Nat. Bank *v.* Wallace, 60 N. H. 354.

Rhode Island.— *In re* Eddy, 15 R. I. 474, 8 Atl. 694.

Tennessee.— Peacock *v.* Wilson, 9 Lea 398; Estell *v.* Metcalf, 3 Baxt. 240.

See 28 Cent. Dig. tit. "Insolvency," § 178.

Effect of not appealing.— A judgment disallowing a claim will be final on all parties who do not appeal. Beer *v.* Their Creditors, 12 La. Ann. 774.

A bill in equity by a creditor to compel an allowance will not lie. Julien *v.* Riley, 61 Cal. 242.

Disallowance of claim of attorney for compensation for services rendered the assignee is not appealable at the instance of the attorney. *In re* Stoll, (Minn. 1899) 80 N. W. 953. See also *In re* Trafton, 94 Me. 579, 48 Atl. 113.

In the exercise of its special jurisdiction over the estates of insolvents an order of the county court settling and allowing claims against an insolvent is not appealable. Carter *v.* Dennison, 7 Gill (Md.) 157.

73. *In re* Jones, 33 Minn. 405, 23 N. W. 835; *In re* Graeff, 30 Minn. 358, 16 N. W. 395. See State *v.* Severance, 29 Minn. 269, 13 N. W. 48. See also Wendell *v.* Lebon, 30 Minn. 234, 15 N. W. 109; Weston *v.* Loyhed, 30 Minn. 221, 14 N. W. 892.

74. Browne *v.* Wallace, 60 Ohio St. 177, 53 N. E. 957.

Decree confirming a sale but not involving other matters is not appealable. *In re* Norwood Park Co., 6 Ohio S. & C. Pl. Dec. 341, 4 Ohio N. P. 240, construing Ohio Rev. St. § 6407.

75. Paul *v.* Costello, 177 Mass. 580, 59 N. E. 451; *In re* Chapman, 71 Vt. 368, 45 Atl. 232; Boston Nat. Bank *v.* Hammond, 21 Wash. 158, 57 Pac. 365. *Contra*, Donnelly *v.* Whitney, 4 Yerg. (Tenn.) 475; McKenzie *v.* Hackney, 3 Yerg. (Tenn.) 417.

Decree on the question of fraud arising on a petition for discharge is appealable. Fisk *v.* His Creditors, 12 Cal. 281.

Granting or overruling a motion for a new trial of the issues raised on a petition for discharge is reviewable. Sullivan *v.* Washburn, etc., Mfg. Co, 139 Cal. 257, 72 Pac. 992.

Appeal will not lie from an order or decree upon a petition to annul a discharge. Pierce *v.* Keene, 173 Mass. 431, 53 N. E. 900, holding that Pub. St. c. 157, § 36, does not authorize such an appeal.

76. Norway Plains Sav. Bank *v.* Young, 67 N. H. 499, 38 Atl. 119.

77. Barry *v.* American White Lead, etc., Works, 107 La. 236, 31 So. 733.

78. Coit's Appeal, 68 Conn. 184, 35 Atl. 1124.

79. Levy *v.* Chicago Nat. Bank, 158 Ill. 88, 42 N. E. 129, 30 L. R. A. 380.

80. Walker *v.* Lyman, 6 Pick. (Mass.) 458. *Contra*, Richter *v.* Merchants' Nat. Bank, 65 Minn. 237, 67 N. W. 995.

81. Coleman *v.* His Creditors, 36 La. Ann. 113.

82. Noble *v.* Fresno County Super. Ct., 109 Cal. 523, 42 Pac. 155.

83. *In re* Schumacher, 6 Ohio S. & C. Pl. Dec. 125, 5 Ohio N. P. 387.

84. Nowell's Appeal, 51 Conn. 107.

85. See *In re* Abbott, 74 Cal. 381, 16 Pac. 21 (holding that a supplemental order requiring an insolvent to verify his schedule and inventory is not appealable); *In re* Montgomery Spool, etc., Co., 68 Vt. 29, 33 Atl. 766 (holding that an appeal will not lie where the only question is whether a certain person was or can be a petitioner).

86. Sullivan *v.* Washburn, etc., Mfg. Co., 139 Cal. 257, 72 Pac. 992; *In re* Montgomery Spool, etc., Co., 68 Vt. 29, 33 Atl. 766; *In re* Sowles, 57 Vt. 385.

87. Williams *v.* Williams, 5 Gill (Md.) 88, holding that the trustee cannot appeal from such an order.

88. Woodward *v.* Spurr, 138 Mass. 592. But see White *v.* Haskins, 59 Vt. 555, 9 Atl. 553.

89. Bassett *v.* Hutchinson, 9 Allen (Mass.) 199.

90. Perrault *v.* His Creditors, 4 Rob. (La.) 396; Bargebur *v.* Creditors, 2 Mart. N. S.

debtor;[91] on a petition for the removal of an assignee;[92] overruling a demurrer to a petition in insolvency which adjudicated simply the sufficiency of the petition and the affidavit;[93] overruling exceptions to the right of a creditor to file in opposition to the proceedings;[94] reducing or refusing fee of attorney or assignee;[95] refusing to associate another trustee with a permanent trustee;[96] refusing to confirm the election of an assignee and ordering a new election;[97] refusing to extend the time for the presentation of claims;[98] refusing to remove an assignee or trustee;[99] sustaining for the purpose of further investigation the opposition of the attorney of an absent creditor to the fairness and honesty of the surrender of the property by the insolvent.[1]

3. WHO MAY APPEAL.[2] In general it may be said that any person may appeal if directly interested in the matter to which exception was taken.[3]

(La.) 496. But see Canfield *v.* Walton, 9 Mart. (La.) 189.

91. Kaffenburg *v.* Assner, 163 Mass. 295, 39 N. E. 1020.

92. *In re* Goldsmith, 12 Oreg. 414, 7 Pac. 97, 9 Pac. 565.

93. Tawes *v.* Tyler, 71 Md. 506, 18 Atl. 887.

94. Garcie *v.* His Creditors, 9 La. 93.

95. Pandelly *v.* His Creditors, 1 La. Ann. 21; *In re* Trafton, 94 Me. 579, 48 Atl. 113.

96. Williams *v.* Williams, 5 Gill (Md.) 88.

97. Twitchell *v.* Blaney, 75 Me. 577.

98. Woodbury's Appeal, 70 Conn. 455, 39 Atl. 791.

99. Lyman-Eliel Drug Co. *v.* Spencer, 70 Minn. 183, 72 N. W. 1066.

The assignee, however, cannot appeal from an order removing himself. Gunn *v.* Smith, 71 Minn. 281, 73 N. W. 842.

An order upon a motion of an insolvent for rule on his trustee to show cause why his appointment should not be revoked is not appealable. Chase *v.* Green, 1 Harr. & G. (Md.) 160.

1. Riker *v.* His Creditors, 9 La. 160.

2. Parties to an appeal generally see APPEAL AND ERROR, 2 Cyc. 756 *et seq.*

Right of assignee or trustee to appeal from order of removal see *supra*, note 99. See also 2 Cyc. 638.

Right of bankrupt or insolvent to appeal see 2 Cyc. 630.

Who entitled to take an appeal generally see APPEAL AND ERROR, 2 Cyc. 626 *et seq.*

3. See the statutes of the several states; and cases cited *infra*, this note.

Person not injured or aggrieved cannot appeal. Woodbury's Appeal, 70 Conn. 455, 39 Atl. 791 (trustee); Chattanooga First Nat. Bank *v.* American Sugar Refining Co., 120 Ga. 717, 48 S. E. 326; Salmon *v.* Pierson, 8 Md. 297; Norway Plains Sav. Bank *v.* Young, 67 N. H. 499, 38 Atl. 119; *In re* Schumacher, 6 Ohio S. & C. Pl. Dec. 125, 5 Ohio N. P. 387 (assignee, trustee, or commissioner). See also cases cited *infra*, this note.

Persons entitled have been held to include the following: Persons who prove their claims before the master, although they have not been acted upon by the court. Heidrich *v.* Silva, 89 Ky. 422, 12 S. W. 770, 11 Ky. L. Rep. 645. A creditor of an insolvent firm, one of the partners of which is insolvent, from the allowance of a claim of an individual creditor against the estate of the insolvent partner. Chadbourne *v.* Harding, 80 Me. 580, 16 Atl. 248. One creditor, from an order allowing the claim of another creditor. Tibbetts *v.* Trafton, 80 Me. 264, 14 Atl. 71. A creditor who has proved his claim from an order directing the sale of an insolvent's property and also from the order confirming such sale. Hospes *v.* Northwestern Mfg., etc., Co., 41 Minn. 256, 43 N. W. 180. One of two co-assignees, from a decree granting a debtor a discharge from his debts, although the other co-assignee refuses to join therein and objects thereto. Paul *v.* Costello, 177 Mass. 580, 59 N. E. 451.

Persons not entitled have been held to include the following: An attaching creditor, from a decree adjudging a debtor insolvent (*In re* Hubbard, 85 Me. 542, 27 Atl. 464), although the adjudication would result in defeating the attachment (Commercial Nat. Bank's Appeal, 59 Conn. 25, 21 Atl. 1021). The syndic, from an order reducing the amount of claims carried on the tableau of distribution, to which the creditors took no exception (Chapoton *v.* His Creditors, 46 La. Ann. 412, 14 So. 882), nor where there is a conflict between creditors in which the syndic is without interest (Beer *v.* Their Creditors, 12 La. Ann. 774). One creditor, from the allowance of the claim of another creditor against the estate of a debtor who makes settlement by composition proceedings. Huston *v.* Worthly, 83 Me. 352, 22 Atl. 243. The debtor, in composition proceedings from the allowance of a claim against his estate. Thomson *v.* Poor, 163 Mass. 26, 39 N. E. 407. An assignee who has been removed. Campbell *v.* Miner, 4 Ohio S. & C. Pl. Dec. 96, 3 Ohio N. P. 138. A creditor, although a party to the proceedings, who does not prove his claim nor oppose the debtor's discharge in the lower court. Jacobs *v.* Bogart, 7 Rob. (La.) 162. A creditor from a discharge unless at the proper time he has filed objections thereto. *In re* Butterfield, 80 Me. 594, 16 Atl. 247. An attorney who rendered services to the assignee of an insolvent, and whose claim therefor has been denied. *In re* Trafton, 94 Me. 579, 48 Atl. 113.

4. Presentation and Reservation of Grounds.[4] The general rule that unless an objection is made or an exception reserved at the proper stage of the proceedings, advantage of such objection cannot be taken for the first time on appeal[5] applies.[6]

5. Taking and Perfecting.[7] The practice as to taking and perfecting an appeal or the time within which it may be taken varies according to the several provisions of the different states.[8] It is generally provided, however, that an undertaking or bond must be given as a condition to the granting of the appeal.[9]

6. Matters Reviewable and Extent of Review.[10] What will be considered by the court on review is governed by the rules and statutes of the several states.[11] Generally speaking, where it is a question of fact or the exercise of a discretion,

4. **Presentation and reservation of errors** generally see APPEAL AND ERROR, 2 Cyc. 660 *et seq.*

Bill of exceptions generally see APPEAL AND ERROR, 2 Cyc. 505 *et seq.*; 3 Cyc. 23 *et seq.*

Certificate of judge.— Where proceedings by creditors for the removal of an assignee of an insolvent are by motion based upon the files, records, and all of the proceedings theretofore had in the matter of the insolvent estate, it is unnecessary to settle a case or prepare a bill of exceptions as a basis for an appeal, the proper practice being to procure a certificate of the trial judge. Lyman-Eliel Drug Co. *v.* Spencer, 70 Minn. 183, 72 N. W. 1066.

Certification of questions to appellate court see APPEAL AND ERROR, 2 Cyc. 740 *et seq.* See also Waters *v.* Momenthy, 68 Md. 171, 11 Atl. 763; Wright *v.* Kuhn, 20 Md. 421.

5. See APPEAL AND ERROR, 2 Cyc. 660.

6. See *In re* McEachran, 82 Cal. 219, 23 Pac. 46; Tiernan *v.* His Creditors, 62 Cal. 286; Strueven *v.* His Creditors, 62 Cal. 45; *In re* Greeley, 70 Conn. 494, 40 Atl. 233; Jacobs *v.* Bogart, 7 Rob. (La.) 162; *In re* Brockway Mfg. Co., 87 Me. 477, 32 Atl. 1015; *In re* Butterfield, 80 Me. 594, 16 Atl. 247; Stout *v.* Quinn, 9 Pa. Super. Ct. 179, 43 Wkly. Notes Cas. 418. *Compare* Wheeler *v.* Emmeluth, 58 Hun (N. Y.) 369, 12 N. Y. Suppl. 58 [*affirmed* in 125 N. Y. 750, 27 N. E. 408]; McLaughlin *v.* McLaughlin, 47 N. C. 319.

Where the judge erroneously permits an amendment so as to present a claim not submitted to an insolvency court, the justice before whom the appeal comes for a hearing may refuse to try the case on the issues made by such amendment. Holder *v.* Hillson, 168 Mass. 514, 47 N. E. 417.

Where joint exceptions to claims of creditors of an insolvent have been filed, the court has power to order them separated and to allow amendments to such exceptions. Beifeld *v.* International Cement Co., 79 Ill. App. 318.

7. **Taking and perfecting appeal** generally see APPEAL AND ERROR, 2 Cyc. 789 *et seq.*

8. See the statutes of the several states; and cases cited *infra*, this note. See also Coit's Appeal, 68 Conn. 184, 35 Atl. 1124; Tuttle *v.* Fletcher, 93 Me. 249, 44 Atl. 903.

The time for taking an appeal is limited by statute, and if not taken within the time fixed it will not be heard. Tuttle *v.* Fletcher, 93 Me. 249, 44 Atl. 903; Sparks' Appeal, 18 Md. 417; Glenn *v.* Chesapeake Bank, 3 Md. 475; Palmer *v.* Dayton, 4 Cush. (Mass.) 270; Mitchell *v.* Powers, 17 Oreg. 491, 21 Pac. 451. *Compare* Sullivan *v.* Washburn, etc., Mfg. Co., 139 Cal. 257, 72 Pac. 992. See also 2 Cyc. 789 *et seq.*

Consent of parties that an appeal disallowing a claim against the estate of an insolvent may be entered at a term of court different from that fixed by law for such entry is not sufficient to give the court jurisdiction of an appeal. *In re* Eddy, 6 Cush. (Mass.) 28.

Notice of appeal or citation see *In re* Chope, 112 Cal. 630, 44 Pac. 1066; Wood *v.* His Creditors, 35 La. Ann. 257; Jacobs *v.* Jacobs, 110 Mass. 229; Batty *v.* Fitch, 11 Gray (Mass.) 184; Keels *v.* Nelson Tenney Lumber Co., 74 Minn. 8, 76 N. W. 790. *Compare* Lambert *v.* Scandinavian-American Bank, 66 Minn. 185, 68 N. W. 834. See also Henry *v.* Miller, 61 Me. 105; 2 Cyc. 862 *et seq.*

Notice of the appeal should be given to the creditor whose claim is appealed. Waterman *v.* Pulsifer, 73 Me. 34; Varrell *v.* Varrell, 57 N. H. 208; Rand *v.* Rand, 4 N. H. 267.

9. Barnum's Appeal, 33 Conn. 122. See also 2 Cyc. 818 *et seq.*, 885 *et seq.*

Creditors whose claims have been disallowed cannot make themselves parties to an appeal without giving bond as the appeal-bond given by the syndic will not suffice. Beer *v.* Their Creditors, 12 La. Ann. 774.

Filing of notice of appeal and the undertaking stays all further proceedings in matters embraced in the order appealed from. Dennery *v.* Sacramento Super. Ct., 84 Cal. 7, 24 Pac. 147. Such bond would not act as a stay bond to prevent the court from committing an assignee for contempt for refusing to obey its order. Buhlert *v.* San Francisco Super. Ct., 72 Cal. 97, 13 Pac. 155.

Security for costs see *infra*, VIII.

10. **Hearing on appeal** generally see 3 Cyc. 210 *et seq.*

Matters reviewable on appeal generally see 3 Cyc. 220 *et seq.*

11. See the statutes of the several states. **Decisions reviewable** see *supra*, VII, C, 2.

Pleadings, trial, and determination of the case on appeal are to be the same as in an action at law. Clemons *v.* Clemons, 69 Vt. 545, 38 Atl. 314, by statute in Vermont. See also *In re* Chapman, 71 Vt. 368, 45 Atl. 232.

the reviewing court will approve the action of the lower court unless there is an abuse of such discretion [12] or a gross disregard of the evidence.[13]

VIII. COSTS AND FEES.

A. Costs.[14] The allowance and taxation of costs in insolvency proceedings depend upon the local practice, being regulated either by special provision in the insolvency statutes themselves, or by general provision relating to costs.[15] This applies to costs in the court below [16] as well as to costs upon appeal;[17] also to security for costs whether in the court below [18] or upon appeal.[19]

B. Fees of Officers. Provision is generally made either by statute or rule of court for the fees of the officers in connection with the administration of an insolvent's estate.[20]

12. Twitchell *v.* Blaney, 75 Me. 577; Longnecker *v.* His Creditors, (Cal. 1888) 17 Pac. 220.

13. See 3 Cyc. 345 *et seq.* *Compare* Lyman-Eliel Drug Co. *v.* Spencer, 70 Minn. 183, 72 N. W. 1066, holding that on an appeal from an order denying a motion made by certain creditors of an insolvent partnership to remove an assignee in insolvency, where such assignee failed to object in any manner to the introduction, at the hearing of the motion, of testimony taken when the insolvents disclosed in another matter pertaining to the assignment, such testimony must be regarded precisely as if the facts therein testified to had appeared in an affidavit introduced without objection.

14. Costs generally see COSTS, 6 Cyc. 1.

Priority of costs and expenses in distribution of estate see *supra*, IV, F, 5, h.

15. See the statutes of the several states; and, generally, COSTS, 11 Cyc. 1 *et seq.* See cases cited *infra*, note 16 *et seq.* See also Matter of Currier, 8 Daly (N. Y.) 119, holding that under the general assignment acts neither costs nor counsel fees, allowable out of the assigned estate, can be allowed to parties other than the assignee.

16. See Olcott *v.* Maclean, 11 Hun (N. Y.) 394 (proper method of applying for modification of refusal of clerk to tax costs); Schoolcraft *v.* Lathrop, 5 Cow. (N. Y.) 17 (assignees' liability for costs of suit carried on for their benefit).

If plaintiff takes issue on defendant's plea of discharge, and the issue is found for defendant, plaintiff is subject to costs of the trial. Lupton *v.* Conklin, 1 Wend. (N. Y.) 30.

Upon a discontinuance of an action by an assignee he has neither power nor authority to bind creditors personally for the costs of the action. Crepeau *v.* Glover, 5 Quebec 235.

Where a capias ad satisfaciendum issues, and defendant is discharged under the insolvent laws, the costs cannot be taxed against plaintiff, but must be taxed with the other costs in the cause. Roberts *v.* Shell, 4 Yerg. (Tenn.) 160.

17. See Henry *v.* Miller, 61 Me. 105 (costs awarded against appellant, although amount recovered against him is less than that awarded below); Stevens *v.* Hale, 7 Metc. (Mass.) 85 (prevailing party on appeal entitled to costs).

Where a lienholder appealed to the court of common pleas from a probate court's decree determining the priority of liens against an insolvent's estate, it was proper for the latter court to adjudge costs of such appeal against the appellant, and not against the proceeds of the assigned estate. Mutual Aid Bldg., etc., Co. *v.* Gashe, 18 Ohio Cir. Ct. 681, 6 Ohio Cir. Dec. 779.

18. Ripley *v.* Griggs, 52 Vt. 460, want of recognizance for costs not ground for dismissal of petition in insolvency where the statute does not require such a recognizance.

In California the Insolvency Act contemplates the filing of a bond with two sureties, and all the petitioning creditors as principals. *In re* Visalia City Water Co., 119 Cal. 561, 51 Pac. 856.

In Vermont the statutes provide that the security given for costs on appeal from the court of insolvency upon the question of the insolvency of the debtor shall be the same as the security given on appeal on questions of disallowance of claims, as provided by statute relating to other appeals. Insolvency Ct. *v.* Meldon, 69 Vt. 510, 38 Atl. 167.

Filing of bond required by statute is essential (*In re* Visalia City Water Co., 119 Cal. 561, 51 Pac. 856), and an attempt to proceed without the bond is in excess of jurisdiction (Anderson *v.* Lassen County Super. Ct., 122 Cal. 216, 54 Pac. 829). *Compare* Schoolcraft *v.* Lathrop, 5 Cow. (N. Y.) 17. But see *In re* Clarke, 125 Cal. 388, 58 Pac. 22 (failure to file bond unobjected to does not invalidate insolvency proceedings); Creditors *v.* Consumer's Lumber Co., 98 Cal. 318, 33 Pac. 196 (failure to file bond with petition is not a jurisdictional defect); Baker *v.* Jones, 61 Vt. 549, 17 Atl. 723 (where it was held that the failure to require a deposit for costs as provided by law was a waiver of the deposit for the time being, and that it was error to dismiss the proceedings for such irregularity).

19. Henry *v.* Miller, 61 Me. 105 (necessity of appellant giving bond to secure costs on appeal); Insolvency Ct. *v.* Meldon, 69 Vt. 510, 38 Atl. 167 (necessity for security for costs on appeal).

20. See the statutes of the several states. See also Hardwick *v.* Burke, 113 Ga. 999, 39

C. Fees of Attorneys and Counsel — 1. Of Insolvent. As a rule the attorney for an insolvent is entitled to a reasonable fee out of the estate for conducting the proceedings in his behalf,[21] but not for services performed in resisting proceedings by his creditors to have him adjudged insolvent.[22]

2. Of Creditors. While the attorney representing a creditor as a rule is expected to look to him for his compensation, especially where the litigation is in the interest of the creditor only,[23] still if he renders services resulting in a benefit to the estate, a reasonable fee may be allowed him out of such estate.[24]

3. Of Assignee or Trustee. Where the counsel is employed by the assignee or trustee to aid in the administration of the estate a reasonable fee should be paid such attorney out of such estate.[25]

IX. Offenses Against Insolvent Laws.[26]

What constitutes an offense against the insolvency laws as well as the punishment therefor[27] is determined by the particular statutes.[28] But in general any fraud on the part of the insolvent,[29] whether in the giving of false testimony,[30]

S. E. 433 (holding that officers of the supreme court have no lien or claim, on account of the insolvent costs due them in cases transferred from the superior court to the county court, on fines in the county treasury arising in the county courts on other cases transferred from the superior courts); Insolvency Ct. *v.* Meldon, 69 Vt. 510, 38 Atl. 167 (bondsmen for costs on appeal by debtor from decision declaring him insolvent not liable for the messenger's fees).

21. Dunbar *v.* His Creditors, 39 La. Ann. 589, 2 So. 543; Dorsey *v.* His Creditors, 5 Mart. N. S. (La.) 399; Goforth *v.* His Creditors, 6 Mart. (La.) 519; Morel *v.* Misotiere, 3 Mart. (La.) 363.

The charge should be in proportion to the results of the liquidation. McIntosh *v.* Merchants', etc., Ins. Co., 12 La. Ann. 533.

22. *In re* Close, 106 Cal. 574, 39 Pac. 1067.

23. Jaffray *v.* Steedman, 38 S. C. 557, 17 S. E. 38. See *supra*, IV, F, 2, b, (v); IV, F, 5, h.

24. Ohio Valley Nat. Bank *v.* Cummings, 21 Ohio Cir. Ct. 782, 12 Ohio Cir. Dec. 330. But see Jones *v.* Spencer, 79 Ill. App. 349, holding that an attorney employed by a creditor to collect his claim from an insolvent estate who institutes proceedings to increase the assets of such estate, and is successful in so doing, in the absence of an employment, express or implied, by the assignee, cannot recover from the estate.

In fixing the amount to be allowed, where attorneys are employed by general and unsecured creditors of a firm to set aside a mortgage given in the firm-name by a partner, and are successful, it should be taken into consideration that the attorneys for whom the allowance is to be made represented the general creditors, who are also liable to them for fees in the matter, and also the amount of the fund in the hands of the receiver for distribution, the amount of the chattel mortgages declared invalid, and the sum allowed to the receiver and his attorneys for fees. Ohio Valley Nat. Bank *v.* Cummings, 21 Ohio Cir. Ct. 782, 12 Ohio Cir. Dec. 330.

25. Kittredge *v.* Miller, 12 Ohio Cir. Ct. 128, 5 Ohio Cir. Dec. 391. But *compare* Genesee Bank *v.* Denning, 5 Ida. 482, 51 Pac. 406, holding that reasonable and necessary attorney's fees incurred by the assignee in protecting the insolvent estate should be allowed to the assignee, and not to the attorney. See *supra*, IV, D, 5, c, (III).

Orders made upon ex parte application of the attorney allowing attorney's fees for services rendered the assignee are unauthorized. Genesee Bank *v.* Denning, 5 Ida. 482, 51 Pac. 406.

26. **Criminal law** generally see Criminal Law.

Indictment or information generally see Indictments and Informations.

27. **Imprisonment for failure to obey an order to surrender property** or to disclose the whereabouts of concealed property would not be considered imprisonment for debt. Mueller *v.* Nugent, 184 U. S. 1, 22 S. Ct. 269, 46 L. ed. 405. See also Brandenburg Bankr. (3d ed.) § 62; U. S. Rev. St. (1878) § 990 [U. S. Comp. St. (1901) p. 709].

Imprisonment and sequestration of insolvent's property, at the instance of a single creditor, inures to the benefit of all the creditors. Ratti *v.* His Creditors, 9 La. 22.

More than one trial for the same offense cannot be had. Leland *v.* Rose, 11 La. Ann. 268.

28. See the statutes of the several states.

29. Mayesski *v.* His Creditors, 40 La. Ann. 94, 4 So. 9; Leland *v.* Rose, 11 La. Ann. 69; Com. *v.* Cronin, 41 Leg. Int. (Pa.) 145; Leclaire *v.* Fauteux, 10 Rev. Lég. 109; Gault *v.* Fauteux, 10 Rev. Lég. 62; Rogers *v.* Sancer, 18 L. C. Jur. 57; Stevenson *v.* McOwan, 3 L. C. L. J. 38; Wilkes *v.* Beaudry, 2 Montreal Leg. N. 157.

The fact that the insolvent purchases on credit and does not divulge to the seller the condition of his affairs is not of itself sufficient from which to presume an intention to defraud. Convey *v.* Renouf, 5 Quebec 224.

30. Respublica *v.* Wright, 1 Yeates (Pa.) 205, holding that an insolvent may be committed for perjury in his examination before the examination is finished.

in the concealing of his assets,[31] or the like, have been made punishable offenses by most of the insolvency statutes.

IN SPECIE. In the same form.[1] (See CURRENCY.)

INSPECT. To look on, to view or oversee for the purpose of examination; to look into; to view and examine for the purpose of ascertaining the quality or condition of a thing; to view and examine for the purpose of discovering and correcting errors;[2] to look upon; to examine for the purpose of determining quality, detecting what is wrong, and the like; to view narrowly and critically.[3] (See, generally, INSPECTION.)

31. Ratti *v.* His Creditors, 9 La. 22; Com. *v.* Martin, 130 Mass. 465.

1. Bouvier L. Dict. [*citing* Allen *v.* Sugrue, 8 B. & C. 561, 7 L. J. K. B. O. S. 53, 3 M. & R. 9, 15 E. C. L. 279; Arnould Ins. 1012]. See also Somerby *v.* Buntin, 118 Mass. 279, 284, 19 Am. Rep. 459; Heebner *v.* Eagle Ins. Co., 10 Gray (Mass.) 131, 148, 69 Am. Dec. 308; Stranaghan *v.* Youmans, 65 Barb. (N. Y.) 392, 395; Trebilcock *v.* Wilson, 12 Wall. (U. S.) 687, 695, 20 L. ed. 460.

"In specie or its equivalent" see 7 Cyc. 591 note 48.

2. Webster Dict. [*quoted* in People *v.* General Committee Republican Party, 25 N. Y. App. Div. 339, 347, 49 N. Y. Suppl. 723].

3. Webster Dict. [*quoted* in Fairchild *v.* Ada County, 6 Ida. 340, 344, 55 Pac. 654].

INSPECTION

By Edward C. Ellsbree

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- Commerce Generally, see Commerce.
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I. DEFINITION.

Inspection is the examination of certain articles made by law subject to such examination, so that they may be declared fit for commerce.[1]

II. PURPOSE OF INSPECTION LAWS AND POWER TO ENACT.

The object of inspection laws is to protect the community so far as they apply to domestic sales, from frauds and impositions; and in relation to articles designed for exportation, to preserve the character and reputation of the state in foreign markets.[2] They are also incidentally designed to protect manufacturers and vendors themselves against unfounded and unjust claims of vendees and consumers.[3] The right to pass inspection laws is not granted to congress, and consequently remains subject to state legislation,[4] as an incident of the police power;[5] but it is subject to the paramount right of congress to regulate commerce with foreign nations, and among the several states.[6]

1. Bouvier L. Dict.; People *v.* Compagnie Generale Transatlantique, 10 Fed. 357, 362, 20 Blatchf. 296; Neilson *v.* Garza, 17 Fed. Cas. No. 10,091, 2 Woods 287, 290.

Other definitions are: "Official view or examination of commodities or manufactures, to ascertain their quality, under some statute requiring it." Burrill L. Dict.

"An official examination of articles of food or of merchandise, to determine whether they are suitable for market or commerce." Anderson L. Dict.

"Something which can be accomplished by looking at or weighing or measuring the thing to be inspected, or applying to it at once some crucial test." State *v.* McGough, 118 Ala. 159, 167, 24 So. 395; People *v.* Compagnie Generale Transatlantique, 107 U. S. 59, 2 S. Ct. 87, 27 L. ed. 383.

2. *Maryland.*— Turner *v.* State, 55 Md. 240.

New Mexico.— Territory *v.* Denver, etc., R. Co., (1904) 78 Pac. 74.

New York.—Clintsman *v.* Northrop, 8 Cow. 45.

Ohio.— Cincinnati Gas Light, etc., Co. *v.* State, 18 Ohio St. 237.

United States.— Neilson *v.* Garza, 17 Fed. Cas. No. 10,091, 2 Woods 287. See also Gibbons *v.* Ogden, 9 Wheat. 1, 6 L. ed. 23. And see People *v.* Harper, 91 Ill. 357.

3. Cincinnati Gas Light, etc., Co. *v.* State, 18 Ohio St. 237.

4. Gibbons *v.* Ogden, 9 Wheat. (U. S.) 1, 6 L. ed. 23; U. S. *v.* Boyer, 85 Fed. 425; Patapsco Guano Co. *v.* Board of Agriculture, 52 Fed. 690 (holding that a state has the right, under the general powers reserved from the grant of other powers to the federal government, and in the regulation of its internal commerce, and to protect its citizens from fraud, to say that certain articles shall not be sold within its limits without inspection, and also to charge the cost of such inspection upon those offering such articles for sale); Neilson *v.* Garza, 17 Fed. Cas. No. 10,091, 2 Woods 287.

"The enactment of laws for the inspection of commodities is the exercise of a legislative power recognized and sanctioned by long and unquestioned usage here and elsewhere; and is included in the general grant of legislative power conferred by the constitution upon the general assembly. Cincinnati Gas Light, etc., Co. *v.* State, 18 Ohio St. 237, 244.

5. People *v.* Harper, 91 Ill. 357; Territory *v.* Denver, etc., R. Co., (N. M. 1904) 78 Pac. 74.

6. Neilson *v.* Garza, 17 Fed. Cas. No. 10,091, 2 Woods 287.

The power to regulate commerce is not the source from which the right to pass inspection laws is derived (Gibbons *v.* Ogden, 9 Wheat. (U. S.) 1, 203, 6 L. ed. 23); but congress may interpose, if at any time any statute, under the guise of an inspection law, goes beyond the limit prescribed by the constitution, in imposing duties or imposts on

III. CONSTITUTIONALITY OF INSPECTION LAWS.

A statute providing for the appointment of inspectors and authorizing the charging of inspection fees is held not to violate either the constitutional provision that taxes shall be uniform,[7] or the provision of the federal constitution prohibiting any state, without the consent of congress, to lay duties on exports, where no burden is placed on commerce with foreign countries.[8] Nor is an inspection law rendered unconstitutional by the fact that it interferes with the right of a patentee to sell a certain brand of merchandise which has been patented under the laws of the United States,[9] or that its purpose is not to improve the quality of the article, but to aid in the detection and punishment of crime or fraud,[10] or that the cost of inspection is much less than the amount authorized to be charged.[11]

IV. SUBJECTS OF INSPECTION.

Inspection laws include nothing but personal property as a subject of their operation.[12] Their scope, however, is very large, and is not confined to articles of domestic produce or manufacture, or to articles intended for exportation, but applies to articles imported, and to those intended for domestic use as well.[13] Quantity is as legitimate a subject of inspection as quality.[14]

imports or exports. Turner *v.* Marylands, 107 U. S. 38, 2 S. Ct. 44, 27 L. ed. 370; Neilson *v.* Garza, 17 Fed. Cas. No. 10,091, 2 Woods 287.

7. Addison *v.* Saulnier, 19 Cal. 82; Willis *v.* Standard Oil Co., 50 Minn. 290, 52 N. W. 652; Territory *v.* Denver, etc., R. Co., (N. M. 1904) 78 Pac. 74; Cincinnati Gas Light, etc., Co. *v.* State, 18 Ohio St. 237. But see State *v.* Eby, 170 Mo. 497, 71 S. W. 52.

When fees reasonable, no judicial question presented.— So long as an inspection fee is not so much in excess of what appears to be reasonably required for inspection as to make it appear to be an act designed for revenue instead of regulation, it presents no judicial question. People *v.* Harper, 91 Ill. 357; Willis *v.* Standard Oil Co., 50 Minn. 290, 52 N. W. 652; Territory *v.* Denver, etc., R. Co., (N. M. 1904) 78 Pac. 74; Patapsco Guano Co. *v.* Board of Agriculture, 171 U. S. 345, 18 S. Ct. 862, 43 L. ed. 191. But see State *v.* Eby, 170 Mo. 497, 71 S. W. 52.

8. Territory *v.* Denver, etc., R. Co., (N. M. 1904) 78 Pac. 74.

9. Patterson *v.* Kentucky, 97 U. S. 501, 24 L. ed. 1115.

10. Territory *v.* Denver, etc., R. Co., (N. M. 1904) 78 Pac. 74.

11. Territory *v.* Denver, etc., R. Co., (N. M. 1904) 78 Pac. 74.

12. People *v.* Compagnie Generale Transatlantique, 107 U. S. 59, 2 S. Ct. 87, 27 L. ed. 383 [*affirming* 10 Fed. 357, 20 Blatchf. 296].

13. State *v.* McGough, 118 Ala. 159, 24 So. 395; Neilson *v.* Garza, 17 Fed. Cas. No. 10,091, 2 Woods 287.

Recognized elements of inspection laws have always been: A quality of the article, form, capacity, dimensions and weight of package, mode of putting up, and marking and branding of various kinds, all these matters being supervised by a public officer having authority to pass or not pass the article as lawful merchandise, according as it did or did not answer the prescribed requirements. It has never been regarded as necessary, and it is manifestly not necessary, that all of these elements should coexist in order to make a valid inspection law. Turner *v.* Maryland, 107 U. S. 38, 2 S. Ct. 44, 27 L. ed. 370 [*affirming* 55 Md. 240].

Hides.— N. M. Laws (1900), c. 45, §§ 3, 4, providing for the inspection of hides, do not apply to pelts and skins. Territory *v.* Denver, etc., R. Co., (N. M. 1904) 78 Pac. 74.

Hoops.— Me. Rev. St. c. 41, § 20, applies to hogshead hoops and does not require barrel hoops to be culled and branded (Fitch *v.* Wood, 85 Me. 284, 27 Atl. 148), but where hoops are required to be culled and branded a sale thereof without such culling and branding is void (Durgin *v.* Dyer, 68 Me. 143).

Hoop-poles are not required by statute to be surveyed before sale. Lewis *v.* Soper, 44 Me. 72.

Staves.— Me. Rev. St. c. 66, requiring staves to be surveyed or culled previous to sale, does not apply to pine staves, but only to certain descriptions of oak staves. Gilman *v.* Perkins, 32 Me. 320.

Salted beef.— Under the Pennsylvania act of March 12, 1789, salted beef or pork offered in barrels for sale was not subject to inspection. Garrigues *v.* Reynolds, 6 Binn. (Pa.) 330.

Gasoline.— Under a statute providing for the inspection of oils and fluids, the products of coal, petroleum, or other bituminous substances, by what other name called, which may or can be used for illuminating purposes, gasoline is subject to inspection. Burkhardt *v.* Striger, 113 Ky. 111, 67 S. W. 270, 24 Ky. L. Rep. 69; Blaco *v.* State, 58 Nebr. 557, 78 N. W. 1056.

14. State *v.* Pittsburg, etc., Coal Co., 41 La. Ann. 465, 6 So. 220.

V. CHANGE OF PACKAGE AND REINSPECTION.

Statutes providing that a certain article manufactured in or brought into the state shall be inspected and the package containing the same branded before sale does not require a second inspection after the bulk has been broken for purposes of sale.[15]

VI. INTERSTATE AND FOREIGN SHIPMENTS OR SALES.

A. In General. The application of inspection laws to foreign shipments or sales depends entirely upon their language and intent. The statutes of some states apply only to merchandise offered for sale or distribution, or to be consumed, within the state;[16] others require inspection only when the merchandise is intended for export,[17] while a third class make it a misdemeanor to sell certain articles without inspection whether the sale be for consumption within the state or elsewhere.[18] Merchandise in transit through a state or municipality is not subject to the inspection laws of such state or municipality.[19]

B. Inspection in State of Export. Foreign produce, inspected and branded in the state from which it is shipped, is exempt from reinspection.[20]

C. Extraterritorial Force of Inspection Laws. State inspection laws have no extraterritorial operation.[21]

VII. MODE OF INSPECTION.

The manner in which the inspection shall be made depends entirely upon the requirements of the statute and the nature of the merchandise.[22] The statutes

15. *Arkansas.*— Waters-Pierce Oil Co. *v.* State, 55 Ark. 300, 18 S. W. 57.

Illinois.— Chicago *v.* Hobson, 52 Ill. 482.

Minnesota.— State *v.* Finch, 37 Minn. 433, 34 N. W. 904.

Missouri.— State *v.* Baggott, 96 Mo. 63, 8 S. W. 737.

Ohio.— Woodworth *v.* State, 4 Ohio St. 487; Cheadle *v.* State, 4 Ohio St. 477.

Pennsylvania.— Com. *v.* Reefer, 30 Pittsb. Leg. J. 161.

Texas.— *Ex p.* Robinson, 29 Tex. App. 186, 15 S. W. 603.

See 28 Cent. Dig. tit. "Inspection," § 4.

Flour intended for export, once exported and shipped, and afterward damaged at sea, need not be again inspected before being exported. Griswold *v.* New York Ins. Co., 1 Johns. (N. Y.) 205.

16. Atlantic Phosphate Co. *v.* Ely, 82 Ga. 438, 9 S. E. 170; Martin *v.* Upshur Guano Co., 77 Ga. 257; State *v.* White, 75 Mo. 465; State *v.* Waters, 5 Mo. App. 578.

Refilling branded oil barrels is none the less an offense because of the intention to send the barrels out of the state. State *v.* Parsons, 12 Mo. App. 205.

The term "domestic distilled spirits" includes only spirits distilled within the state; liquor manufactured in another state is not within the law, although rectified here. Com. *v.* Giltinan, 64 Pa. St. 100.

17. Ferris *v.* Coles, 3 Cai. (N. Y.) 207; Wright *v.* Lilly, 18 Wash. 77, 50 Pac. 786. See also Nicholls *v.* Johnston, 14 Pa. St. 279, holding that a miller is only required to file his brand or mark with the clerk of the quarter sessions when the merchandise is intended for exportation out of the state by some other way than the Delaware and Susquehanna rivers, and the question of intent is for the jury.

18. Coffin *v.* State, 2 Lea (Tenn.) 559.

19. Georgetown *v.* Davidson, 6 D. C. 278; Great Northern R. Co. *v.* Walsh, 47 Fed. 406. See also Hancock *v.* Sturges, 13 Johns. (N. Y.) 331. *Compare* Com. *v.* King, 1 Whart. (Pa.) 448.

20. Hancock *v.* Sturges, 13 Johns. (N. Y.) 331; Com. *v.* Riddle, 3 Pa. L. J. 487; *Ex p.* Robinson, 28 Tex. App. 511, 13 S. W. 786, 29 Tex. App. 126, 15 S. W. 603.

21. Stokes *v.* Culver, 57 Ala. 412; Atlantic Phosphate Co. *v.* Ely, 82 Ga. 438, 9 S. E. 170; Martin *v.* Upshur Guano Co., 77 Ga. 257; Van Camp *v.* Aldrich, 5 Ohio Dec. (Reprint) 92, 2 Am. L. Rec. 454.

22. Beer.— Under the Missouri act of May 4, 1899, sections 7, 8, providing for the inspection of beer and other malt liquors, the inspector is not restricted to an examination or analysis of the finished product after it is bottled or barreled, but is authorized to go to the brewery and take samples of the malt and of the beer in the vats in the process of fermentation. State *v.* Bixman, 162 Mo. 1, 62 S. W. 828.

Flour.— An inspector of flour is bound to inspect by boring through the head of the barrel with an auger not exceeding one-half inch in diameter. Delaplane *v.* Crenshaw, 15 Gratt. (Va.) 457.

Milk.— Under the Massachusetts statute of 1884, chapter 310, section 4, providing that a sample of the milk seized by an inspector shall be "sealed up," to be delivered to defendant or his attorney, in case a complaint is made, it is not enough to place

generally require the inspector or subinspector to make inspection personally, and have the brand or stamp affixed under his immediate supervision.[23]

VIII. MARKS AND BRANDS.[24]

"Brand" is equivalent to "stamp" or "mark."[25] Hay pressed and put up for sale must be branded with the name of the person pressing.[26] The inspector's mark is not conclusive evidence of the quality of the article,[27] unless the purchaser expressly stipulates in his contract that it shall have that effect.[28]

IX. CERTIFICATES.

A certificate must be required from inspectors in order to hold them liable as warrantors.[29] Such certificate is presumptive evidence of the fact of inspection, and such other facts as inspectors are required to state.[30]

X. INSPECTION OFFICERS.

The power of appointing inspection officers is vested in the legislature,[31] which body may delegate it to the governor of the state,[32] to counties or municipalities,[33] to mayors of cities,[34] to courts of common pleas,[35] or to boards of trade.[36] Where

sealing wax upon the top of the cork, and not extend it over the mouth of the bottle. The bottle should be made air tight. Com. *v.* Lockhardt, 144 Mass. 132, 10 N. E. 511.

Oil.— Under the Minnesota laws of 1889, chapter 246, section 4, providing that the inspector of illuminating oils "may inspect and test illuminating oils in a tank railroad car," the inspection is to be made in such tank cars, without reference to the will of the owner; and, if he removes the oil from such tank cars without inspection, the inspector may follow and inspect in the storage tanks or in any other place to which it is taken. Willis *v.* Standard Oil Co., 50 Minn. 290, 52 N. W. 652.

Wheat.— Maryland statute of 1858, chapter 256, providing for the inspection of wheat, and that the public inspector shall weigh "all wheat," is satisfied if one bushel in sixty is weighed, that being the long established and reasonable custom. Frazier *v.* Warfield, 13 Md. 279.

23. Pacific Guano Co. *v.* Dawkins, 57 Ala. 115; Wragg *v.* State, 14 Ala. 492 (holding that an act prohibiting any slave or any free person of color to sample any cotton is not violated by the employment of a slave or free person of color to perform the manual labor of drawing a sample from the bale and carrying it to an office under the superintendence of a white man); *Ex p.* Bailey, 39 Fla. 734, 23 So. 552; Com. *v.* Smith, 141 Mass. 135, 6 N. E. 89 (holding that an inspector of milk cannot appoint an agent who shall have the right, in the absence of the inspector, and without his immediate personal direction and control, to take by force, and against the will of the owner, samples of milk from the carriages used for the conveyance of milk).

24. For brands on fertilizers see AGRICULTURE, 2 Cyc. 70 *et seq.*

25. Dibble *v.* Hathaway, 11 Hun (N. Y.) 571, holding that a mark by a stencil plate and chisel is sufficient; it not being necessary that the mark should be actually burned in. See also Cloud *v.* Hewitt, 5 Fed. Cas. No. 2,904, 3 Cranch C. C. 199, holding that under a statute providing that unmerchantable flour shall be marked "condemned" by the inspector, the word "condemned" must be branded on the barrels, and such word written on the barrels with red chalk is not sufficient.

26. Pickard *v.* Bayley, 46 Me. 200.

27. Clintsman *v.* Northrop, 8 Cow. (N. Y.) 45.

28. Wiggins *v.* Cleghorn, 61 Ga. 364.

29. Foster *v.* Baer, 6 La. Ann. 442, holding that the usage of trade to regard the mere receipt from the inspector's warehouse as equivalent to a certificate of inspection is not sufficiently established to bind the inspectors as warrantors upon such receipt.

30. Williams *v.* Merle, 11 Wend. (N. Y.) 80, 25 Am. Dec. 604, holding that, as the inspector is not authorized to certify who is the owner of the property, his certificate does not determine the title so as to protect a *bona fide* purchaser.

31. East St. Louis Bd. of Trade *v.* People, 105 Ill. 382; Chicago *v.* Quimby, 38 Ill. 274; Dutcher *v.* People, 11 Ill. App. 312; State *v.* Casey, 38 Ohio St. 555.

32. Davis *v.* State, 7 Md. 151, 61 Am. Dec. 331; Com. *v.* Bussier, 5 Serg. & R. (Pa.) 451.

33. State *v.* McGough, 118 Ala. 159, 24 So. 395. For inspection by municipalities see MUNICIPAL CORPORATIONS.

34. Com. *v.* Bradley, 210 Pa. St. 66, 59 Atl. 433.

35. Com. *v.* Bradley, 210 Pa. St. 66, 59 Atl. 433.

36. Chicago *v.* Quimby, 38 Ill. 274; State *v.* Casey, 38 Ohio St. 555.

The action of inspectors appointed by a board of trade, however, is binding only upon the members of such corporation, and others

a vacancy occurs before the expiration of a term fixed by law, the new inspector is appointed only for the balance of the unexpired term.[37] An inspector has authority to appoint deputies,[38] and is bound to take out a license.[39]

XI. FEES.

A. In General. The right to pass inspection laws involves the power to enforce such laws by adequate provision for the remuneration, in the form of fees or salary,[40] of the officers charged with the duty of inspection.[41] The fixing of the amount of such fees is a legislative power,[42] which may be delegated when it seems advantageous to do so.[43] No charge beyond the amount so fixed can be made;[44] nor can the inspector recover at all, where his authority is denied, and his services are not required or requested.[45] A substantial performance of the service is a condition precedent to the right of compensation therefor.[46] The expenses of inspection are required to be borne by those presumably benefited thereby.[47] An inspection charge is not a tax.[48]

B. Actions For Fees. Where two inspectors have power jointly, and not severally, to appoint deputies, an action for services performed by a deputy is properly brought in the name of both inspectors.[49] In an action by a sheep inspector for his fees, an order appointing him inspector and approving his bond is admissible.[50]

XII. EFFECT OF FAILURE TO INSPECT.[51]

The sale of merchandise, without compliance with inspection laws, is void,

requiring or assenting to the employment of such inspectors. East St. Louis Bd. of Trade *v.* People, 105 Ill. 382; Dutcher *v.* People, 11 Ill. App. 312.

37. Tansey *v.* Stringer, 76 S. W. 537, 25 Ky. L. Rep. 916, holding further that a delayed reappointment of an oil inspector after the expiration of his term, fixed by law at four years, does not extend the second term to four years from the reappointment, but is for the unexpired portion of the new term only.

38. Bailey *v.* Wood, 114 Ky. 27, 69 S. W. 1103, 24 Ky. L. Rep. 801, holding that under Tenn. Code, §§ 3388, 3389, relative to inspectors of tobacco, and making warehousemen inspectors of tobacco with authority to appoint deputies, it is not necessary that the deputies should be warehousemen, and the same deputy may be appointed by several warehousemen.

39. Davis *v.* State, 7 Md. 151, 61 Am. Dec. 331.

40. **Salary excludes fees.**— When the compensation of an inspector is provided for by salary, he is not entitled to fees. Brophy *v.* Marble, 118 Mass. 548.

41. Addison *v.* Saulnier, 19 Cal. 82.

42. People *v.* Harper, 91 Ill. 357.

The amount of compensation may be changed by the legislature as they think proper. Riley *v.* Willis, 5 Whart. (Pa.) 145.

43. People *v.* Harper, 91 Ill. 357; Louisiana St. Bd. of Health *v.* Standard Oil Co., 107 La. 713, 31 So. 1015.

44. Kernion *v.* Hills, 1 La. Ann. 419; Delaplane *v.* Crenshaw, 15 Gratt. (Va.) 457, holding that the custom of a flour inspector to take the draft flour as a part of his perquisites in addition to his compensation is invalid.

Additional fees for repacking and cooperage cannot be charged under an act establishing fees for the inspecting and branding of salt provisions. Bussier *v.* Pray, 7 Serg. & R. (Pa.) 447. But see Com. *v.* Genther, 17 Serg. & R. (Pa.) 135, holding that an inspector of beef is entitled to a fee of a shilling on each cask repacked, but a charge for coopering is allowed only when a cask is defective and not for merely replacing the head.

Inspectors of tobacco are entitled to an allowance of fifty dollars for each hand, over two, kept by virtue of an order of court, as laborers in their warehouses. Branch *v.* Com., 1 Hen. & M. (Va.) 479.

45. Hanson *v.* Maverick Oil Co., 67 N. H. 201, 29 Atl. 459.

46. Priest *v.* Consolidated Tank Line Co., 51 Mo. App. 205.

47. People *v.* Harper, 91 Ill. 357; Louisiana St. Bd. of Health *v.* Standard Oil Co., 107 La. 713, 31 So. 1015; Catherwood *v.* Collins, 48 Pa. St. 480, holding that under an act providing that where an inspection of domestic distilled liquors is had, if the liquors should come up to proof, purchasers shall be liable for the fees, where an owner of liquors asks to have them inspected, he will be deemed the purchaser, and therefore liable for the inspector's fees. See also Burkhardt *v.* Striger, 113 Ky. 111, 67 S. W. 270, 24 Ky. L. Rep. 69.

48. Louisiana St. Bd. of Health *v.* Standard Oil Co., 107 La. 713, 31 So. 1015; State *v.* Bixman, 162 Mo. 1, 62 S. W. 828.

49. Catherwood *v.* Collins, 48 Pa. St. 480.

50. Abbott *v.* Stanley, 77 Tex. 309, 14 S. W. 62.

51. **Effect of loss of tags after shipment** see *supra*, VIII.

and no recovery can be had for the price,[52] except where no inspector has been appointed.[53]

XIII. PENALTIES.

The penalty given for the violation of an inspection law may be recovered in an action *qui tam*.[54] The public at large, the dealers in the merchandise, are the ones intended to be protected, and an inspector cannot sustain an action for the penalty.[55] In an action for the penalty for altering inspectors' marks, it is necessary to set out the marks, and how altered.[56] Penalties do not attach to a sale of liquors, which are pure but not inspected, made before an inspector has been appointed.[57]

XIV. CRIMINAL RESPONSIBILITY FOR VIOLATION OF INSPECTION LAW.

A. In General. Refilling branded oil barrels without erasing the brand is a criminal offense, although no inspection was made before the brand was placed thereon.[58] An indictment or information for violation of the inspection laws must bring the accused strictly within the terms of the offense as described in the statute and should leave nothing to conjecture or inference.[59] On the trial of an information for selling liquors not inspected, the state is bound to give some evidence in support of the negative averment of the want of inspection.[60]

B. Of Officers. Indictment for misdemeanor lies against an inspector for refusing to perform his duty.[61]

XV. CIVIL LIABILITY OF OFFICERS.

An inspector is personally responsible in damages for all injury caused by his want of requisite skill and diligence in the performance of his duty.[62] He is

52. Woods *v.* Armstrong, 54 Ala. 150, 25 Am. Rep. 671; Hammond *v.* Wilcher, 79 Ga. 421, 5 S. E. 113; Leman *v.* Saunders, 72 Ga. 202; Conley *v.* Sims, 71 Ga. 161; Kleckley *v.* Leyden, 63 Ga. 215; Durgin *v.* Dyer, 68 Me. 143; Baker *v.* Burton, 31 Fed. 401.

53. Smith *v.* Kibbee, 9 Ohio St. 563.

54. Cloud *v.* Hewitt, 5 Fed. Cas. No. 2,904, 3 Cranch C. C. 199, holding that in an action for a penalty under the statute regulating the inspection of flour and bread in the District of Columbia, it is not necessary that the United States should be nominally plaintiff.

55. Hatch *v.* Robinson, 26 Vt. 737.

56. Cloud *v.* Hewitt, 5 Fed. Cas. No. 2,904, 3 Cranch C. C. 199.

Cutting out brand marks is an alteration, within the meaning of the statute, and that it is done ignorantly is no excuse. Smith *v.* Brown, 1 Wend. (N. Y.) 231.

57. Smith *v.* Kibbee, 9 Ohio St. 563.

58. State *v.* Parsons, 12 Mo. App. 205.

59. State *v.* Broeder, 90 Mo. App. 156, holding that under the beer inspection act, making it an offense to sell any beer within the state which has not been inspected, or contained in packages which have not on them a certificate of the state inspector, an information alleging that the package did not, then and there, at the time and place of sale, have on it a certificate of the state inspector certifying that the beer had then and there been inspected, is insufficient, as such allegations do not negative in direct terms the fact that the package did not have on it an official certificate of the inspector.

Surplusage.— Under the beer inspection act making it an offense to sell any beer in the state which has not been inspected, where an information alleges that the package did not then and there, at the time and place of sale, have on it the certificate of the state inspector certifying that the beer had then and there been inspected, the words "then and there" at the conclusion cannot be rejected as surplusage, as they go to the substance of the offense. State *v.* Broeder, 90 Mo. App. 156.

Matter of defense.— Under the beer inspection act making it an offense to sell any beer in the state which has not been inspected, an information need not negative the fact that the beer was sold for exportation, as the exception in respect to beer for exportation is not contained in the section creating the offense, and is matter of defense. State *v.* Broeder, 90 Mo. App. 156.

60. Cheadle *v.* State, 4 Ohio St. 477.

61. Com. *v.* Genther, 17 Serg. & R. (Pa.) 135.

62. Hatcher *v.* Dunn, (Iowa 1896) 66 N. W. 905 (holding that an inspector, made liable for falsely branding oil, is liable, irrespective of whether he actually knew that the branding was false); Tardos *v.* Bozant, 1 La. Ann. 199 (holding that where an inspector certifies that merchandise is of a certain quality, he is responsible, not only for its being of such quality at the date of his certificate, but for its remaining of such quality for the length of time during which the article is usually expected to continue in that

likewise liable for lack of care and skill on the part of his deputies;[63] but not for mere errors of judgment,[64] and an action lies against him in the first instance.[65] In a suit against an inspector for the unskilful and unfaithful performance of his duties, it is not competent for him to prove the customary mode pursued by other inspectors.[66] Evidence that the merchandise passed inspection at the foreign market to which it was shipped is not conclusive against the inspector's liability.[67]

XVI. LIABILITY ON OFFICER'S BONDS.

Sureties on an inspector's official bond are liable for any breach of duty by him[68] or his deputy,[69] while acting officially.[70] An action may be maintained on an inspector's bond in the name of the governor for the benefit of the person injured;[71] and judgment against the inspector is not a condition precedent to an action on the bond.[72]

condition if properly taken care of); Nickerson *v.* Thompson, 33 Me. 433; Hayes *v.* Porter, 22 Me. 371 (holding that a person injured by an inspector's negligence may recover damages, although the owner employs the men by whom the work is done, and furnishes the barrels, and there is no collusion between the parties, where the defects could have been discovered by a careful examination); McKennan *v.* Bodine, 6 Phila. (Pa.) 582. But see Gordon *v.* Livingston, 12 Mo. App. 267 (holding that an inspector is not liable for a false certificate given to one with whom he has not contracted); Fath *v.* Koeppel, 72 Wis. 289, 39 N. W. 539, 7 Am. St. Rep. 867 (holding that a fish inspector has judicial duties and powers, and while acting within his jurisdiction, is not liable for the careless, improper, or erroneous performance of his duties, although he knew his unfitness for the office).

Penalty does not exclude civil action.— Although an inspection law imposes a penalty upon the inspector for neglect of duty, one moiety thereof to the use of the town wherein the offense shall have been committed, and another moiety to the use of the person suing for the same, yet a person injured by the inspector's neglect of official duty may recover damages sustained thereby in an action on the case. Hayes *v.* Porter, 22 Me. 371.

Measure of damages.— In an action for damages for default in branding fish prepared for exportation, the measure of damages is the difference between the actual value of the fish in the foreign market and the value which the fish would have had at the same time and place if they had been of the quality and in the condition indicated by the inspection, provided that they are exported within the usual and reasonable time after the inspection, that they are exposed to no extraordinary heat or other damage, and that they are exported to no remote or unusual place. Pearson *v.* Purkett, 15 Pick. (Mass.) 264.

Loss not occasioned by inspector's negligence.— In an action for damages caused by the explosion of oil falsely branded as up to the required test, the inspector is not liable if the explosion was caused by the defective condition of the lamp in which the oil was burned, although the oil was below the required test, and an instruction that the sole cause of the explosion was because the oil was not up to the required test, and that the burden was upon plaintiff to establish his claim, does not sufficiently submit the issue whether the cause of the explosion was the defective condition of the lamp in which the oil was burned. Hatcher *v.* Dunn, (Iowa 1896) 66 N. W. 905.

Reckless disregard of duty.— An inspector is liable for a reckless disregard of his duty that results in danger to another, but not for an honest mistake. McKennan *v.* Bodine, 6 Phila. (Pa.) 582.

63. Pearson *v.* Purkett, 15 Pick. (Mass.) 264.

Liability not limited by amount of deputy's bond.— The liability of an inspector for the default of a deputy is not limited to the amount of the penalty prescribed by law as the extent of the deputy's bond. Pearson *v.* Purkett, 15 Pick. (Mass.) 264.

64. Pearson *v.* Purkett, 15 Pick. (Mass.) 264.

65. Pearson *v.* Purkett, 15 Pick. (Mass.) 264.

66. Nickerson *v.* Thompson, 33 Me. 433.

67. Pearson *v.* Purkett, 15 Pick. (Mass.) 264.

68. People *v.* Harper, 91 Ill. 357 (holding that where one of the duties of an inspector is to pay over to his successor the residue of the inspector's fees that he has collected, the sureties on his official bond are liable for any default on his part so to pay over. It does not lie with them to say that such surplusage is larger than it ought to be); St. Louis County Ct. *v.* Fassett, 65 Mo. 418.

69. Verratt *v.* McAuley, 5 Ont. 313.

70. Witte *v.* Weinstein, 115 Iowa 247, 88 N. W. 349, holding that the act relating to an inspection of linseed oil contains no provision authorizing the secretary of state to require inspectors to collect samples to be sent to him for analysis, and hence a libel published by an inspector while procuring such samples was a trespass done in his private capacity, and not as a public officer, for which the sureties on his official bond are not liable.

71. Page *v.* Peyton, 2 Hen. & M. (Va.) 566.

72. People *v.* Harper, 91 Ill. 357.

INSPECTOR. In manufacturing, a name given to a person whose duty it is to make tests of machinery.[1] (See, generally, INSPECTION.)

INSPECTOR TICKETS. Tickets in the nature of receipts issued for wheat or grain received for storage in an elevator.[2] (See ELEVATOR; and, generally, WAREHOUSEMEN.)

INSPEXIMUS. Literally, "We have inspected." The first word of an ancient charter, or a royal grant.[3] (See, generally, CORPORATIONS; RELIGIOUS SOCIETIES.)

INSTALLATION. The ceremony of inducting or investing with any charge, office, or rank.[4] (See, generally, OFFICERS.)

INSTALMENT. Different portions of the same debt payable at different successive periods as agreed.[5] (Instalment: Accrual of Action on, see ACTIONS; Actions — For Separate Instalments of Same Claim, see ABATEMENT AND REVIVAL; ACTIONS; On Claims Payable in Instalments, Aggregation to Make up Jurisdictional Amount, see APPEAL AND ERROR; Of Debt For Money Payable in Instalments, see DEBT, ACTION OF. Award Payable in, see ARBITRATION AND AWARD. Bounty Payable in, see BOUNTIES. Conditional Sales and Payment of Instalments Thereon, see SALES. Instalment Mortgage, see CHATTEL MORTGAGES; MORTGAGES. Interest on Instalments, see INTEREST. Of Special Assessment, see DRAINS; MUNICIPAL CORPORATIONS. Payment of Instalments of Debt Under Agreement of Accord, see ACCORD AND SATISFACTION. Promissory Notes Payable in Instalments, see COMMERCIAL PAPER. Recovery of, see ASSUMPSIT, ACTION OF. See also DEBT.)

INSTANCE. In pleading and practice, solicitation, properly of an earnest or urgent kind.[6]

INSTANCE COURT. In England, the division of the admiralty court which takes cognizance of contracts made and injuries committed on the high seas.[7] (See, generally, ADMIRALTY; COURTS.)

INSTANCES. Specified cases — enumerated cases.[8]

INSTANS EST FINIS UNIUS TEMPORIS ET PRINCIPIUM ALTERIUS. A maxim meaning "An instant is the end of one time, and the beginning of another."[9]

INSTANT. IMMEDIATE, *q. v.*; with no interval intervening; INSTANTANEOUS,[10] *q. v.* (See FORTHWITH; IMMEDIATELY; INSTANTANEOUS; INSTANTER; INSTANTLY.)

1. Fidelity, etc., Co. *v.* Seattle, 16 Wash. 445, 448, 47 Pac. 963.

2. Lewis *v.* St. Paul, etc., R. Co., 20 Minn. 260, where the court said: "The tickets are mere receipts — symbolical evidence of property. They have a value, and pass from hand to hand, but only as representing and calling for the quantities of wheat therein specified. The transfer of such tickets is a usual way of transferring the property in the wheat called for by the same."

3. Wharton L. Lex. See Page's Case, 5 Coke 51*b*, 54*a*.

"Inspeximus charter" see Malcomson *v.* O'Dea, 10 H. L. Cas. 593, 595, 9 Jur. N. S. 1135, 8 L. T. Rep. N. S. 93, 12 Wkly. Rep. 178, 11 Eng. Reprint 1157.

4. Wharton L. Lex.

"Installation implies an act to be performed by the outgoing Governor and one to be performed by the Legislature. That to be performed by the outgoing Governor consists in placing in the hands of the incoming Governor the public property and insignia attached to the office of Governor; that to be performed by the Legislature consists in the recognition of the new Governor by acting with him in the conduct of public business." *Ex p.* Norris, 8 S. C. 408, 493.

5. Black L. Dict.

6. Black L. Dict.

"At its instance and request" see Columbus, etc., R. Co. *v.* Gaffney, 65 Ohio St. 104, 118, 61 N. E. 152.

7. Percival *v.* Hickey, 18 Johns. (N. Y.) 257, 265, 271, 9 Am. Dec. 210, where it is said: "The Court of Admiralty consists of two courts; the instance court, and the prize court."

In American law the term is sometimes used for purposes of explanation, but has no proper application to admiralty courts in the United States, where the powers of both instance and prize courts are conferred without any distinction. Black L. Dict. [*citing* 3 Kent Comm. 355, 378]. See also Glass *v.* The Betsey, 3 Dall. (U. S.) 6, 16, 1 L. ed. 485; The Emulous, 8 Fed. Cas. No. 4,479, 1 Gall. 563, 574.

8. Padelfor *v.* Savannah, 14 Ga. 438, 477, as used in the federal constitution.

9. Cyclopedic L. Dict. [*citing* Coke Litt. 185].

10. Century Dict. See also Hemmer *v.* Wolfer, 124 Ill. 435, 439, 16 N. E. 652; Kellow *v.* Central Iowa R. Co., 68 Iowa 470, 481, 23 N. W. 740, 27 N. W. 466, 56 Am. Rep. 858.

INSTANTANEOUS.[11] Done or occurring in an instant or without any perceptible portion of time.[12] (See INSTANT, and Cross-References Thereunder.)

INSTANTER. FORTHWITH,[13] *q. v.*; INSTANTLY,[14] *q. v.*; IMMEDIATELY,[15] *q. v.*; without delay;[16] without any delay or the allowance of any time;[17] without any intervention of time; it allows not a particle of delay; it marks an interval too small to be appreciated.[18] In practice it is sometimes said to mean "within twenty-four hours."[19] (See INSTANT, and Cross-References Thereunder.)

INSTANTLY.[20] Immediately after; without any intervening time.[21] (See INSTANT, and Cross-References Thereunder.)

IN STATU QUO. In the condition in which a person or thing was formerly.[22]

INSTEAD OF.[23] IN LIEU OF, *q. v.*; in the place or room of.[24]

11. **Distinguished from "immediate"** see Sawyer *v.* Perry, 88 Me. 42, 48, 33 Atl. 660. See also IMMEDIATE; IMMEDIATELY.

12. Sawyer *v.* Perry, 88 Me. 42, 48, 33 Atl. 660.

"Instantaneous crime" is a crime which is consummated when the act is completed. U. S. *v.* Owens, 32 Fed. 534, 537, 13 Sawy. 53.

Instantaneous death see 1 Cyc. 291.

Not valid trade-mark see Bennett *v.* McKinley, 65 Fed. 505, 506, 13 C. C. A. 25.

13. Burrill L. Dict. [*quoted* in Northrop *v.* McGee, 20 Ill. App. 108, 110; Kleinschmidt *v.* McAndrews, 4 Mont. 8, 12, 223, 5 Pac. 281, 2 Pac. 286].

14. Smith *v.* Little, 53 Ill. App. 157, 160; Burrill L. Dict. [*quoted* in Northrop *v.* McGee, 20 Ill. App. 108, 110].

15. Smith *v.* Little, 53 Ill. App. 157, 160; Kleinschmidt *v.* McAndrews, 4 Mont. 8, 12, 223, 5 Pac. 281, 2 Pac. 286.

16. Burrill L. Dict. [*quoted* in Kleinschmidt *v.* McAndrews, 4 Mont. 8, 12, 223, 5 Pac. 281, 2 Pac. 286].

17. Burrill L. Dict. [*quoted* in Northrop *v.* McGee, 20 Ill. App. 108, 110].

18. Borrego *v.* Territory, 8 N. M. 446, 469, 46 Pac. 349.

But as often used the term does not import an absolutely instantaneous succession, but only that which is comparatively so (Burrill L. Dict. [*quoted* in Kleinschmidt *v.* McAndrews, 4 Mont. 8, 12, 223, 5 Pac. 281, 2 Pac. 286]); as for example as meaning "some time after, that is, instantly, upon, and immediately following, but not at the same moment" (Reg. *v.* Brownlow, 11 A. & E. 119, 126, 8 Dowl. P. C. 157, 4 Jur. 103, 9 L. J. M. C. 15, 3 P. & D. 52, 39 E. C. L. 87).

19. Sabin *v.* Johnson, 7 Cow. (N. Y.) 421; Jackson *v.* Eddy, 2 Cow. (N. Y.) 598, 601 note; Champlin *v.* Champlin, 2 Edw. (N. Y.) 328, 329; Burrill L. Dict. [*quoted* in Northrop *v.* McGee, 20 Ill. App. 108, 110].

When it does not mean this it means within a reasonable time under the circumstances of the case with reference to which it is used. Fentress *v.* State, 16 Tex. App. 79, 83 [*citing* Abbott L. Dict.; Bouvier L. Dict.; Burrill L. Dict.; Wharton L. Lex.].

The signification of the word "instanter," which seems to be more in accordance with the practice which has uniformly prevailed in Illinois, is the one suggested in the note to Rex *v.* Johnson, 6 East 583, 2 Smith K. B. 591, 8 Rev. Rep. 550, viz., "before the rising of the court," when the act is to be done in court, or "before the shutting of the office on the same night," when the act is to be done there. The same definition is adopted by Mr. Wharton in his law dictionary. He there lays down the rule that when a party is ordered to plead instanter he must plead the same day. Northrop *v.* McGee, 20 Ill. App. 108, 110. See also Smith *v.* Little, 53 Ill. App. 157, 160.

"Paid instanter" see Jackson *v.* Pell, 19 Johns. (N. Y.) 270.

"Particulars instanter" see Harman *v.* Glover, 10 Wend. (N. Y.) 617, 618.

Used with the term "in open court" see 5 Cyc. 129 note 58.

20. **Distinguished from: "Then,** *adtunc*" see Reg. *v.* Brownlow, 11 A. & E. 119, 126, 8 Dowl. P. C. 157, 4 Jur. 103, 9 L. J. M. C. 15, 3 P. & D. 52, 39 E. C. L. 87. "Then and there" (Lester *v.* State, 9 Mo. 666, 667 [*quoted* in State *v.* Lakey, 65 Mo. 217, 218]).

21. Century Dict. See also State *v.* Lakey, 65 Mo. 217, 218; Rex *v.* Brownlow, 11 A. & E. 119, 126, 8 Dowl. P. C. 157, 4 Jur. 103, 9 L. J. M. C. 15, 3 P. & D. 52, 39 E. C. L. 87.

"Instantly on demand" see Massey *v.* Sladen, L. R. 4 Exch. 13, 14, 38 L. J. Exch. 34.

22. Anderson L. Dict. See also Evans' Appeal, 51 Conn. 435, 439; Hudson *v.* Wadsworth, 8 Conn. 348, 358; Lane *v.* Lane, 106 Ky. 530, 532, 50 S. W. 857, 21 Ky. L. Rep. 9; Zielly *v.* Warren, 17 Johns. (N. Y.) 192, 194; Clute *v.* Robison, 2 Johns. (N. Y.) 595, 601; Wild *v.* Serpell, 10 Gratt. (Va.) 405, 415; State *v.* Whitford, 54 Wis. 150, 154, 11 N. W. 424; Philips *v.* Bury, 1 Ld. Raym. 5, 10; 1 Cyc. 339, 431.

23. **"Instead," and the phrase "in its stead"** are given the same meaning in Cruikshank *v.* Cruikshank, 39 Misc. (N. Y.) 401, 406, 80 N. Y. Suppl. 8.

24. Cruikshank *v.* Cruikshank, 39 Misc. (N. Y.) 401, 406, 80 N. Y. Suppl. 8; Southport Plank Road Co. *v.* Russell, 7 N. Y. St. 596, 597. See also Sloan's Appeal, 168 Pa. St. 422, 430, 32 Atl. 42, 47 Am. St. Rep. 889 [*quoting* 1 Jarman Wills 178]; Doe *v.* Marchant, 8 Jur. 21, 13 L. J. C. P. 59, 6 M. & G. 813, 7 Scott N. R. 644, 46 E. C. L. 813 [*quoted* in *In re* Wilcock, [1898] 1 Ch. 95, 98]; 67 L. J. Ch. 154, 77 L. T. Rep. N. S. 679, 46 Wkly. Rep. 153. See *Ex p.* Drew, [1871] W. N. 184; *In re* Wilcock, [1898]

INSTIGATE. To stimulate or goad to an action, especially a bad action.[25] (See ENCOURAGE; INCITE; and, generally, CRIMINAL LAW.)

IN STIPULATIONIBUS CUM QUÆRITUR QUOD ACTUM SIT, VERBA CONTRA STIPULATOREM INTERPRETANDA SUNT. A maxim meaning "In stipulations (or obligations), when any question arises as to the obligation undertaken, the words of the stipulation (or obligation) are to be interpreted against the creditor in the obligation."[26]

IN STIPULATIONIBUS ID TEMPUS SPECTATUR QUO CONTRAHIMUS. A maxim meaning "In agreements, reference is had to the time at which they were made."[27]

INSTITUTE. To COMMENCE,[28] *q. v.*; to begin; to set in operation.[29] (See ESTABLISH; INSTITUTION. See, generally, ACTIONS; APPEAL AND ERROR.)

INSTITUTES. A name sometimes given to text-books containing the elementary principles of jurisprudence, arranged in an orderly and systematic manner.[30]

INSTITUTION.[31] The commencement or inauguration of anything; the first establishment of a law, rule, rite, etc.; any custom, system, organization, etc., firmly established; an elementary rule or principle;[32] a system, plan, or society, established either by law, or by the authority of individuals, for promoting any

1 Ch. 95, 99, 67 L. J. Ch. 154, 77 L. T. Rep. N. S. 679, 46 Wkly. Rep. 153 [*citing* Doe *v.* Marchant, 13 L. J. C. P. 59, 6 M. & G. 813, 7 Scott N. R. 644, 46 E. C. L. 813].

25. Standard Dict. [*quoted* in State *v.* Fraker, 148 Mo. 143, 165, 49 S. W. 1017], where it is said to be one of the synonyms of "to abet."

"**Instigation**" see Mara *v.* Browne, [1895] 2 Ch. 69, 75, 64 L. J. Ch. 594, 72 L. T. Rep. N. S. 765; *In re* Somerset, [1894] 1 Ch. 231, 237, 63 L. J. Ch. 41, 70 L. T. Rep. N. S. 541, 7 Reports 34, 42 Wkly. Rep. 274; Griffith *v.* Hughes, [1892] 3 Ch. 105, 109, 62 L. J. Ch. 135, 66 L. T. Rep. N. S. 760, 40 Wkly. Rep. 524.

26. Trayner Leg. Max.

27. Bouvier L. Dict. [*citing* Dig. 50, 17, 144, 1].

28. Thorpe *v.* Priestwell, [1897] 1 Q. B. 159, 162, 60 J. P. 821, 66 L. J. Q. B. 248, 45 Wkly. Rep. 223; Webster Dict. [*quoted* in Franks *v.* Chapman, 61 Tex. 576, 581].

"**Instituted**" therefore means "commenced." Hood Barrs *v.* Heriot, [1897] A. C. 177, 179, 66 L. J. Q. B. 356, 76 L. T. Rep. N. S. 299, 45 Wkly. Rep. 507; Hood Barrs *v.* Cathcart, [1894] 3 Ch. 376, 380; *In re* Lumley, [1894] 3 Ch. 135, 142, 63 L. J. Ch. 897, 71 L. T. Rep. N. S. 7, 7 Reports 400, 42 Wkly. Rep. 633; *In re* Godfrey, 63 L. J. Ch. 854, 855, 71 L. T. Rep. N. S. 86, 568, 13 Reports 36. See also State *v.* Robertson, 55 Nebr. 41, 50, 75 N. W. 37 (information instituted); Blain *v.* Blain, 45 Vt. 538, 543 (suit instituted); Post *v.* U. S., 161 U. S. 583, 587, 16 S. Ct. 611, 40 L. ed. 816 (criminal proceedings instituted); Blackborne *v.* Blackborne, L. R. 1 P. & D. 563, 37 L. J. P. & M. 73, 18 L. T. Rep. N. S. 450 (proceeding instituted).

A caveat is not a proceeding "instituted." Moran *v.* Place, [1896] P. 214, 217, 219, 65 L. J. P. & Adm. 83, 74 L. T. Rep. N. S. 661, 44 Wkly. Rep. 593.

A counter-claim is a "proceeding instituted." Hood Barrs *v.* Cathcart, [1895] 1 Q. B. 873, 874, 64 L. J. Q. B. 520, 72 L. T. Rep. N. S. 427, 15 Reports 331, 43 Wkly. Rep. 560.

29. Webster Dict. [*quoted* in Franks *v.* Chapman, 61 Tex. 576, 581].

"**Instituting**" an action, means bringing an action. Com. *v.* Duane, 1 Binn. (Pa.) 61, 608, 2 Am. Dec. 497.

30. For example, the Institutes of Justinian, of Gaius, of Lord Coke. Black L. Dict.

Institutes of Justinian comprise "one of the four component parts or principal divisions of the *Corpus Juris Civilis*, being an elementary treatise on the Roman law, in four books. This work was compiled from earlier sources, (resting principally on the Institutes of Gaius,) by a commission composed of Tribonian and two others, by command and under direction of the emperor Justinian, and was first published November 21, A. D. 533." Black L. Dict. See also 10 Cyc. 1365.

Institutes of Lord Coke comprise "the . . . four volumes by Lord Coke, published A. D. 1628. The first is an extensive comment upon a treatise on tenures, compiled by Littleton, a judge of the common pleas, temp. Edward IV. This comment is a rich mine of valuable common-law learning, collected and heaped together from the ancient reports and Year Books, but greatly defective in method. It is usually cited by the name of Co. Litt., or as 1 Inst. The second volume is a comment upon old acts of parliament, without systematic order; the third a more methodical treatise on the pleas of the crown; and the fourth an account of the several species of courts. These are cited as 2, 3, or 4 Inst., without any author's name." Black L. Dict.

31. In **jurisprudence** the plural form of this word "institutions" is sometimes used as the equivalent of "institutes," to denote an elementary text book of the law. Black L. Dict. See INSTITUTES.

32. Black L. Dict.

object, public or social;[33] a corporate body or establishment instituted and organized for public use;[34] an established or organized society;[35] an ESTABLISHMENT,[36] *q. v.*, especially of a public character, affecting a community;[37] a permanent establishment, as contradistinguished from an enterprise of a temporary character;[38] an organization which is permanent in its nature, as contradistinguished from an undertaking which is transient and temporary.[39] Although sometimes the term is used as descriptive of the establishment or place where a business is carried on,[40] properly it means an association or society organized or established for promoting some specific purpose.[41] Both in legal and colloquial use, the word

33. Manchester *v.* McAdam, [1896] A. C. 500, 507, 511, 61 J. P. 100, 65 L. J. Q. B. 672, 75 L. T. Rep. N. S. 229.

It may include the government of a state. Speer *v.* Blairsville School Directors, 50 Pa. St. 150, 176.

34. Standard Dict. [*quoted* in U. S. *v.* Payne, 20 App. Cas. (D. C.) 606, 614].

"The terms 'corporations,' 'associations,' or 'institutions' . . . are large terms, and they embrace every person except private individuals." Speer *v.* Blairsville School Directors, 50 Pa. St. 150, 176. See also Engstad *v.* Grand Forks County, 10 N. D. 54, 57, 84 N. W. 577.

In legal parlance, the term implies foundation by law, by enactment, or by prescription (Dodge *v.* Williams, 46 Wis. 70, 101, 1 N. W. 92, 50 N. W. 1103); an undertaking formed to promote some defined purpose having in view generally the instruction or education of the public; it is the body (so to speak) called into existence to translate the purpose as conceived in the mind of the founders into a living and active principle (Manchester *v.* McAdams, [1896], A. C. 500, 511, 61 J. P. 100, 65 L. J. Q. B. 672, 75 L. T. Rep. N. S. 229.

According to the context the word may be synonymous with "university," and both words have been used as referring to a corporate body. Noble County *v.* Hameline University, 46 Minn. 316, 317, 48 N. W. 1119.

35. Webster Dict. [*quoted* in U. S. *v.* Payne, 20 App. Cas. (D. C.) 606, 614].

36. Webster Dict. [*quoted* in U. S. *v.* Payne, 20 App. Cas. (D. C.) 604, 614; Richmond County Academy *v.* Bohler, 80 Ga. 159, 162, 7 S. E. 633]; Nuttall's Standard Dict. [*quoted* in Atty.-Gen. *v.* Toronto, 20 Ont. 19, 24].

37. Webster Unabr. Dict. [*quoted* in U. S. *v.* Payne, 20 App. Cas. (D. C.) 606, 614; Richmond County Academy *v.* Bohler, 80 Ga. 159, 162, 7 S. E. 633].

"Erected for the use of a literary or scientific institution . . . implies more than the application of the property for the time being, merely, to educational uses." Indianapolis *v.* Sturdevant, 24 Ind. 391, 395. See also Manchester *v.* McAdam, [1896] A. C. 500, 507, 61 J. P. 100, 65 L. J. Q. B. 672, 75 L. T. Rep. N. S. 229 (per Lord Herschell); *In re* Musgrave, [1898] W. N. 127, 129.

The word "institutions" has been employed to distinguish between such corporations or societies as were established as asylums or homes for benevolent or charitable purposes, and such corporations as were private in their character, and were organized for literary or religious objects. New York Bible Soc. *v.* Budlong, 25 N. Y. Suppl. 68, 70, 30 Abb. N. Cas. 139.

"Institutions of purely public charity" see Cleveland Library Assoc. *v.* Pelton, 36 Ohio St. 253, 259; Gerke *v.* Purcell, 25 Ohio St. 229, 242; Philadelphia *v.* Ladies' United Aid Soc., 154 Pa. St. 12, 14, 25 Atl. 1042.

"Public charitable institution" see Dilworth *v.* Stamps Com'rs, [1899] A. C. 99, 110, 68 L. J. P. C. 1, 79 L. T. Rep. N. S. 473, 47 Wkly. Rep. 337.

38. Indianapolis *v.* Sturdevant, 24 Ind. 391, 395.

39. Humphries *v.* Little Sisters of Poor, 29 Ohio St. 201, 206.

40. **Two-fold use of term.**— The term is sometimes used as descriptive of the establishment or place where the business or operations of a society or association is carried on; at other times it is used to designate the organized body (Richmond County Academy *v.* Bohler, 80 Ga. 159, 162, 7 S. E. 633 [*citing* Indianapolis *v.* Sturdevant, 24 Ind. 391; Abbott L. Dict.]; Kentucky Female Orphan School *v.* Louisville, 100 Ky. 470, 484; 36 S. W. 921, 19 Ky. L. Rep. 1916, 40 L. R. A. 119; Baltimore *v.* St. Peter's Academy, 50 Md. 321, 345; Gerke *v.* Purcell, 25 Ohio St. 229, 244), and sometimes it is used in both of these senses (Gerke *v.* Purcell, 25 Ohio St. 229, 244). Sometimes the word is used to denote merely the local habitation or the headquarters of the institution; sometimes it comprehends everything that goes to make up the institution — everything belonging to the undertaking in connection with the purpose which informs and animates the whole. Manchester *v.* McAdam, [1896] A. C. 500, 511, 512, 61 J. P. 100, 65 L. J. Q. B. 672, 75 L. T. Rep. N. S. 229.

The term comprehends not only a building, and the ground covered by it, but adjacent ground which is reasonably necessary or appropriate to the purposes and objects in view, and which is used directly for the promotion and accomplishment of the same. Hennepin County *v.* Gethsemane Church, 27 Minn. 460, 462, 8 N. W. 595, 38 Am. Rep. 298.

41. Nobles County *v.* Hamline University, 46 Minn. 316, 417, 48 N. W. 1119 [*citing* Webster Dict., and *quoted* in Kentucky Female Orphan School *v.* Louisville, 100 Ky. 470, 486, 36 S. W. 921, 19 Ky. L. Rep. 1916, 40 L. R. A. 119]; Morris *v.* Lone Star Chap-

admits of application to physical things.[42] In practice, the commencement of an action or prosecution.[43] (Institution: In General, see Asylums; Charities; Colleges and Universities; Hospitals; Schools and School-Districts. Exemption From Taxation, see Taxation. Of Action, see Actions. Of Criminal Proceeding, see Criminal Law; Indictments and Informations.)

INSTITUTION OF LEARNING. A term which includes every description of enterprise undertaken for educational purposes which is of a higher grade than the public schools.[44]

INSTRUCT.[45] To convey information to; to inform as to the law.[46] (See Enjoin; Instructions; and, generally, Criminal Law; Trial.)

INSTRUCTION.[47] Some degree of education as taught in the schools.[48] In practice, any direction given to the jury by the court,[49] in reference to the law of the case.[50] (Instruction: In Civil Action, see Trial. In Criminal Prosecution, see Criminal Law.)

INSTRUMENT.[51] A word most frequently used to denote something reduced to writing, as a means of evidence,[52] and by elision also often used for written

ter No. 6, R. A. M., 67 Tex. 698, 701, 5 S. W. 519 [*quoting* Webster Dict.].

It is not a complete definition to define the word as simply a building or a plant, or a body-corporate; it may be all these, but, more broadly speaking, it is that which is set up, provided, ordained, established, or set apart for a particular end, especially of a public character or affecting the community. Com. *v.* Gray, 115 Ky. 665, 668, 74 S. W. 702, 25 Ky. L. Rep. 52 [*quoted* in Louisville College of Pharmacy *v.* Louisville, 82 S. W. 610, 611, 26 Ky. L. Rep. 825].

42. Richmond County Academy *v.* Bohler, 80 Ga. 159, 161, 7 S. E. 633.

Illustration.—"Hospitals, almshouses, asylums for the insane, for the deaf and dumb, or the blind, orphan asylums, homes of the various kinds, soup-houses, etc., permanently established and open, without charge, to the whole public, or to the whole of the classes for whose relief they are intended or adapted, are instiutions . . . irrespective of their ownership, and without regard to whether they have behind them, or connected with them, any institution in the personal or ideal sense of the term, or not." Richmond County Academy *v.* Bohler, 80 Ga. 159, 161, 7 S. E. 633.

43. Black L. Dict. See also Zanesville *v.* Zanesville Tel., etc., Co., 64 Ohio St. 67, 83, 59 N. E. 781, 83 Am. St. Rep. 725, 52 L. R. A. 150; Com. *v.* Duane, 1 Binn. (Pa.) 601, 608, 2 Am. Dec. 497; Thorpe *v.* Priestnall, [1897] 1 Q. B. 159, 162, 60 J. P. 821, 66 L. J. Q. B. 248, 45 Wkly. Rep. 223, as used in the phrase "the institution of the prosecution."

44. McCullough *v.* Peoria County, 183 Ill. 373, 376, 55 N. E. 685. See also Sargent *v.* Board of Education, 35 Misc. (N. Y.) 321, 324, 71 N. Y. Suppl. 954; White *v.* Smith, 189 Pa. St. 222, 232, 42 Atl. 125, 43 L. R. A. 498; U. S. *v.* Payne, 20 App. Cas. (D. C.) 606, 613.

Term may include a gymnastic association (German Gymnastic Assoc. *v.* Louisville, 80 S. W. 201, 25 Ky. L. Rep. 2105, 65 L. R. A. 120), the historical club of a county (*In re* Montgomery County Historical Soc., 13 Montg. Co. Rep. (Pa.) 205, 206), or a library company (Philadelphia Library Co. *v.* Dunohugh, 12 Phila. (Pa.) 284, 285).

45. Distinguished from "advise" see 1 Cyc. 1155 note 11.

"Advise" used instead of "instruct" see People *v.* Horn, 70 Cal. 17, 18, 11 Pac. 470 [*cited* in People *v.* Daniels, 105 Cal. 262, 266, 38 Pac. 720].

46. English L. Dict.

47. "These words 'charge' and 'instruction' [as used in a will] express more than hope or wish, advice or recommendation." Condit *v.* Reynolds, 66 N. J. L. 242, 245, 49 Atl. 540.

48. St. John's Parish *v.* Bronson, 40 Conn. 75, 76, 16 Am. Rep. 17.

49. Lehman *v.* Hawks, 121 Ind. 541, 23 N. E. 670.

50. Lawler *v.* McPheeters, 73 Ind. 577, 579. See also Bouvier I. Dict. [*quoted* in Dodd *v.* Moore, 91 Ind. 522, 523], where it is defined as "the exposition by the court to a petit jury of those principles of the law which the latter are bound to apply in order to render such a verdict as will, in the state of facts proved at the trial to exist, establish the rights of the parties to the suit."

"Directions" and "instructions" are sometimes used as synonymous. Simmons *v.* Sisson, 26 N. Y. 264, 275. See Direction.

51. "Instrument inter partes" is an instrument of writing which is expressed to be made between certain parties, between the persons who are named in it as executing it. Smith *v.* Emery, 12 N. J. L. 53, 60. See also 15 Cyc. 412; 11 Cyc. 1045.

52. Abbott L. Dict. [*quoted* in State *v.* Phillips, 157 Ind. 481, 483, 484, 62 N. E. 12; Patterson *v.* Churchman, 122 Ind. 379, 387, 22 N. E. 662, 23 N. E. 1082; State *v.* Kelsey, 44 N. J. L. 1, 34]; Anderson L. Dict. [*quoted* in Patterson *v.* Churchman, 122 Ind. 379, 385, 22 N. E. 662, 23 N. E. 1082]. See also Century Dict. [*quoted* in State *v.* Phillips, 157 Ind. 481, 484, 62 N. E. 12], defining an instrument to be "a writing given as the means of creating, securing, modifying, or terminating a right, or affording evidence."

instrument;[53] a writing as the means of giving formal expression to some act;[54] a writing expressive of some act, contract, process or proceeding;[55] a writing,—a writing containing any contract or order;[56] a contract in writing;[57] a formal legal writing, e. g., a record, charter, deed or written agreement;[58] anything reduced to writing; more particularly, a document of formal or solemn character;[59] a writing which contains some agreement, and is so called because it has been prepared as a memorial of what has taken place or been agreed upon.[60] It is *nomen generalissimum* for bills, bonds, conveyances, leases, mortgages, promissory notes, wills, and the like;[61] but scarcely includes accounts, letters in ordinary correspondence,

It includes not only written instruments and writings, but also engraved or printed instruments. People *v.* Rhoner, 4 Park. Cr. (N. Y.) 166, 174; Benson *v.* McMahon, 127 U. S. 457, 470, 471, 8 S. Ct. 1240, 32 L. ed. 234.

53. Abbott L. Dict. [*cited* in Hoag *v.* Howard, 55 Cal. 564, 566 (*cited* in Warnock *v.* Harlow, 96 Cal. 298, 307, 31 Pac. 166, 31 Am. St. Rep. 209)]. See also Tolman *v.* Smith, 74 Cal. 345, 350, 16 Pac. 189.

"The word 'instrument' imports a writing." Abbott *v.* Campbell, (Nebr. 1903) 95 N. W. 591, 592 [*citing* Hoag *v.* Howard, 55 Cal. 564].

"Instrument in writing" see *In re* Tahiti Cotton Co., L. R. 17 Eq. 273, 43 L. J. Ch. 425, 22 Wkly. Rep. 815. See also Patterson *v.* Churchman, 122 Ind. 379, 385, 22 N. E 662, 23 N. E. 1082.

54. Webster Int. Dict. [*quoted* in State *v.* Phillips, 157 Ind. 481, 484, 62 N. E. 12]. See also Allcard *v.* Walker, [1896] 2 Ch. 369, 379, 65 L. J. Ch. 660, 74 L. T. Rep. N. S. 487, 44 Wkly. Rep. 661; *In re* Elcom, [1894] 1 Ch. 303, 308.

55. Webster Int. Dict. [*quoted* in State *v.* Phillips, 157 Ind. 481, 484, 62 N. E. 12; Patterson *v.* Churchman, 122 Ind. 379, 387, 22 N. E. 662, 23 N. E. 1082; State *v.* Kelsey, 44 N. J. L. 1, 34; Reg. *v.* Riley, [1896] 1 Q. B. 309, 314, 18 Cox C. C. 285, 60 J. P. 519, 65 L. J. M. C. 74, 74 L. T. Rep. N. S. 254, 44 Wkly. Rep. 318]. See Adams *v.* Coulliard, 102 Mass. 167.

56. Johnson Dict. [*quoted* in Reg. *v.* Riley, [1896] 1 Q. B. 309, 314, 18 Cox C. C. 285, 60 J. P. 519, 65 L. J. M. C. 74, 74 L. T. Rep. N. S. 254, 44 Wkly. Rep. 318.

57. National Tel. Co. *v.* Internal Revenue Com'rs, [1899] 1 Q. B. 250, 259, 47 Wkly. Rep. 247.

"Instrument for the payment of money" see Kratzenstein *v.* Lehman, 19 N. Y. App. Div. 228, 235, 46 N. Y. Suppl. 71; Alder *v.* Bloomingdale, 1 Duer (N. Y.) 601, 602, 10 N. Y. Leg. Obs. 363, 364; Andrews *v.* Wynn, 4 S. D. 40, 43, 54 N. W. 1047; Taylor *v.* Coon, 79 Wis. 76, 82, 48 N. W. 123; Veeder *v.* Lima, 11 Wis. 419, 421; Coe *v.* Straus, 11 Wis. 72, 73.

"Instruments of writing for the payment of money" see Vulcanite Pav. Co. *v.* Philadelphia Traction Co., 115 Pa. St. 280, 287, 8 Atl. 777.

"Instruments payable in money" see Mobile Bank *v.* Brown, 42 Ala. 108, 111.

"The agreement and the instrument in which it is contained are very different things —the latter being only evidence of the former. The instrument or form of the contract may be valid, but a contract itself may be void on account of fraud." Patterson *v.* Churchman, 122 Ind. 379, 386, 22 N. E. 662, 23 N. E. 1082.

58. Rapalje & L. L. Dict. [*quoted* in State *v.* Phillips, 157 Ind. 481, 484, 62 N. E. 12].

59. Anderson L. Dict. [*quoted* in State *v.* Phillips, 157 Ind. 481, 484, 62 N. E. 12; Patterson *v.* Churchman, 122 Ind. 379, 385, 22 N. E. 662, 23 N. E. 1082].

"The . . . words 'instrument of foundation or statutes,' point with great distinctness to written instruments." Matter of Endowed Schools Act, 10 App. Cas. 304, 307, 54 L. J. P. C. 30, 51 L. T. Rep. N. S. 305, 33 Wkly. Rep. 756.

60. Bouvier L. Dict. [*quoted* in Patterson *v.* Churchman, 122 Ind. 379, 385, 386, 22 N. E. 662, 23 N. E. 1082].

"Instrument of dissolution" see Dennison *v.* Jefts, [1896] 1 Ch. 611, 615, 65 L. J. Ch. 435, 74 L. T. Rep. N. S. 270, 44 Wkly. Rep. 476; Batten *v.* City, etc., Permanent Bldg. Soc., [1895] 2 Ch. 441, 445, 64 L. J. Ch. 609, 72 L. T. Rep. N. S. 722, 13 Reports 591, 44 Wkly. Rep. 12; Kemp *v.* Wright, [1895] 1 Ch. 121, 125, 59 J. P. 133, 64 L. J. Ch. 59, 71 L. T. Rep. N. S. 650, 7 Reports 631, 43 Wkly. Rep. 213.

"Instrument . . . whereby real estate, or the title to land, may be affected" see Arnold *v.* Stevenson, 2 Nev. 234, 239 [*citing* Williams *v.* Birbeck, Hoffm. (N. Y.) 359].

61. Cardenas *v.* Miller, 108 Cal. 250, 256, 39 Pac. 783, 41 Pac. 472, 49 Am. St. Rep. 84; Lytle *v.* Lytle, 37 Ind. 281, 283; Abbott L. Dict.; Anderson L. Dict. [*quoted* in Patterson *v.* Churchman, 122 Ind. 379, 385, 22 N. E. 662, 23 N. E. 1082].

According to the context or circumstances attending its use the term may include a bill (Anderson L. Dict. [*quoted* in Patterson *v.* Churchman, 122 Ind. 379, 385, 22 N. E. 662, 23 N. E. 1082]), bond (Cardenas *v.* Miller, 108 Cal. 250, 256, 39 Pac. 783, 41 Pac. 472, 49 Am. St. Rep. 84), chattel mortgage (Cardenas *v.* Miller, *supra*), contract (Cardenas *v.* Miller, *supra*); conveyance (Anderson L. Dict. [*quoted* in Patterson *v.* Churchman, 122 Ind. 379, 385, 22 N. E. 662, 23 N. E. 1082]), deed (Cardenas *v.* Miller, *supra*), deed of settlement (*In re* Reversionary Interest Soc., [1892] 1 Ch. 615, 620, 61 L. J. Ch. 379, 66 L. T. Rep. N. S. 460, 40 Wkly. Rep. 389), document of the same nature as a bond or covenant for the payment of money (London, etc., Bank *v.* In-

memoranda, and similar writings, where the creation of evidence to bind the party, or the establishment of an obligation or title, is not the primary motive.[62] In the law of evidence it has a still wider meaning, and includes not merely documents, but witnesses and things, animate and inanimate, which may be presented for inspection.[63] It has also the more general sense of a means of accomplishing something; a thing useful in the execution of a purpose,[64] and is applied to one who, or that which, is made a means or caused to serve a purpose;[65] a tool used for any work or purpose.[66] (Instrument: Alteration of, see ALTERATIONS OF INSTRUMENTS. As Evidence — In Civil Action, see EVIDENCE; In Criminal Prosecution, see CRIMINAL LAW. Best and Secondary Evidence — In Civil Action, see EVIDENCE; In Criminal Prosecution, see CRIMINAL LAW. Cancellation of, see CANCELLATION OF INSTRUMENTS. Conveyance or Transfer of Property by, see CHATTEL MORTGAGES;

ternal Revenue Com'rs, [1900] 1 Q. B. 166, 169, 69 L. J. Q. B. 102, 81 L. T. Rep. N. S. 630, 48 Wkly. Rep. 195; Jones *v.* Inland Revenue Com'rs, [1895] 1 Q. B. 484, 494, 495, 64 L. J. Q. B. 84, 71 L. T. Rep. N. S. 763, 15 Reports 136, 43 Wkly. Rep. 318; Thames River Conservators *v.* Inland Revenue Com'rs, 18 Q. B. D. 279, 285, 56 L. J. Q. B. 181, 56 L. T. Rep. N. S. 198, 35 Wkly. Rep. 274; Limmer Asphalte Pav. Co. *v.* Inland Revenue Com'rs, L. R. 7 Exch. 211, 217, 41 L. J. Exch. 106, 26 L. T. Rep. N. S. 633, 20 Wkly. Rep. 610), forged telegram (Reg. *v.* Riley, [1896] 1 Q. B. 309, 321, 18 Cox C. C. 285, 60 J. P. 519, 65 L. J. M. C. 74, 74 L. T. Rep. N. S. 254, 44 Wkly. Rep. 318), lease (Cardenas *v.* Miller, *supra*), mechanic's lien notice (State *v.* Phillips, 157 Ind. 481, 483, 62 N. E. 12), mortgage (Arthur *v.* Screven, 39 S. C. 77, 80, 17 S. E. 640), mortgage by a married woman (Tolman *v.* Smith, 74 Cal. 345, 350, 16 Pac. 189), promissory note (Anderson L. Dict. [*quoted* in Patterson *v.* Churchman, 122 Md. 379, 385, 22 N. E. 662, 23 N. E. 1082]), railroad ticket issued to an individual specifically by name, and providing that it should be void if presented by another (Way *v.* Chicago, etc., R. Co., 64 Iowa 48, 53, 19 N. W. 828, 52 Am. Rep. 431), warrant or writ (Clough *v.* U. S., 47 Fed. 791, 795), or will (Cardenas *v.* Miller, *supra*; Smith *v.* Adkins, L. R. 14 Eq. 402, 405, 41 L. J. Ch. 628, 27 L. T. Rep. N. S. 90, 20 Wkly. Rep. 717; Anderson L. Dict. [*quoted* in Patterson *v.* Churchman, 122 Ind. 379, 385, 22 N. E. 662, 23 N. E. 1082]).

As defined by statute, the term includes any letters patent, letters close, writ, commission, and grant, and any document requiring to be passed under the great seal, etc. St. 47 & 48 Vict. c. 30, § 4. See also 37 & 38 Vict. c. 94, § 3; 21 & 22 Vict. c. 76, § 36.

In the statute regulating stamp duties the term includes every written document. St. 54 & 55 Vict. c. 38, § 27.

As used in the negotiable instruments law, the word means negotiable instrument. Mass. Rev. L. (1902) p. 653, c. 73, § 207; N. D. Rev. Code (1889), § 1060; Bates Annot. St. Ohio (1904), § 3178; Oreg. Annot. Codes & St. (1901) § 4592; Pa. Laws (1901), 222; Va. Code Suppl. (1898) § 2841*a*.

62. Abbott L. Dict.

Does not properly include a duplicate in taxation proceedings (Patterson *v.* Churchman, 122 Ind. 379, 386, 22 N. E. 662, 23 N. E. 1082), a judgment (Lytle *v.* Lytle, 37 Ind. 281, 283 [*quoted* in Patterson *v.* Churchman, *supra*]. See Wilson *v.* Vance, 55 Ind. 584), an order of court (Jodrell *v.* Jodrell, L. R. 7 Eq. 461, 463, 38 L. J. Ch. 507, 20 L. T. Rep. N. S. 349, 17 Wkly. Rep. 602), a return of births, marriages, and deaths (Patterson *v.* Churchman, *supra*), the record of proceedings annexing real estate to a city (Patterson *v.* Churchman, *supra*), a writ of attachment (Warnock *v.* Harlow, 96 Cal. 298, 307, 31 Pac. 166, 31 Am. St. Rep. 209 [*citing* Hoag *v.* Howard, 55 Cal. 564]).

63. Cardenas *v.* Miller, 108 Cal. 250, 256, 39 Pac. 783, 41 Pac. 472, 49 Am. St. Rep. 84 [*citing* Black L. Dict.].

64. Abbott L. Dict.

65. U. S. *v.* Magnon, 71 Fed. 293, 294, 18 C. C. A. 43, where it is said: "These snakes are clearly instruments within this definition. They are instruments with which she practices her profession, and are her professional instruments."

"Instrument of gaming" see Tollet *v.* Thomas, L. R. 6 Q. B. 514, 518, 40 L. J. M. C. 209, 24 L. T. Rep. N. S. 508, 19 Wkly. Rep. 890; Hirst *v.* Molesbury, L. R. 6 Q. B. 130, 131, 40 L. J. M. C. 76, 23 L. T. Rep. N. S. 55, 19 Wkly. Rep. 246; Watson *v.* Martin, 10 Cox C. C. 56, 11 Jur. N. S. 321, 34 L. J. M. C. 50, 11 L. T. Rep. N. S. 372, 13 Wkly. Rep. 144.

"Instrument or device" for catching fish see 28 & 29 Vict. c. 121, § 36.

66. Worcester Dict. [*quoted* in Hurst *v.* State, 79 Ala. 55, 58].

Compared with "tool" see State *v.* Bowman, 6 Vt. 594, 596; 12 Cyc. 984 note 33.

"Instruments and tools" or "tools and instruments" see Holden *v.* Stranahan, 48 Iowa 70, 71; Hanna *v.* Bry, 5 La. Ann. 651, 655, 52 Am. Dec. 606; Farmers', etc., Bank *v.* Franklin, 1 La. Ann. 393, 394; Lambeth *v.* Milton, 2 Rob. (La.) 81; Cronfeldt *v.* Arrol, 50 Minn. 327, 330, 52 N. W. 857, 36 Am. St. Rep. 648.

"Instrument, adapted . . . for coining" see Com. *v.* Kent, 6 Metc. (Mass.) 221, 223.

"Instrument of the trade" see Danforth *v.* Woodward, 10 Pick. (Mass.) 423, 424, 20 Am. Dec. 531; Simpson *v.* Hartopp, Willes 512, 513.

DEEDS; MORTGAGES; SALES. Forgery of, see FORGERY. Incorporating—In Bill of Exceptions, see APPEAL AND ERROR; In Record on Appeal, see APPEAL AND ERROR. Loss of, see LOST INSTRUMENTS. Production and Inspection of—Appealability of Orders Directing, see APPEAL AND ERROR; Before Trial, see DISCOVERY; For Use on Trial, see EVIDENCE; TRIAL. Recording and Registration of, see CHATTEL MORTGAGES; DEEDS; MORTGAGES; RECORDS; SALES; VENDOR AND PURCHASER. Reformation of, see REFORMATION OF INSTRUMENTS. Use by Witness to Explain Testimony, see WITNESSES.)

INSTRUMENTA DOMESTICA SEU ADNOTATIO, SI NON ALIIS QUOQUE ADMINICULIS ADJUVENTUR, AD PROBATIONEM SOLA NON SUFFICIUNT. A maxim meaning "Private, or family documents, or a memorandum, if not supported by other evidence, are not of themselves sufficient proof."[67]

INSTRUMENTALITY. The quality or condition of being instrumental; that which is instrumental; anything used as a means or an agency.[68] (See, generally, MASTER AND SERVANT.)

INSTRUMENT OF SASINE. Under the former practice in Scotland, as well as in England, in the case of a feoffment, to give seisin, the instrument, attested by a notary and witness, which evidenced the act of going upon the land and delivering to the person to whom the conveyance was made either actual or symbolical possession.[69]

INSTRUMENT OF WRITING (*escritura*). In the civil law, every deed that is made by the hand of a public *escribano*, or notary of a corporation, or council (*concejo*), or sealed with the seal of the king, or other authorized "person."[70] (See INSTRUMENT.)

INSUFFICIENCY. In general, the state or quality of being insufficient; inadequacy.[71] In pleading, a term sometimes used in a looser sense as synonymous with "immateriality" or "irrelevancy."[72] (Insufficiency: In Pleading, see PLEADING. Of Evidence, see CRIMINAL LAW; EVIDENCE. Of Street or Highway, see MUNICIPAL CORPORATIONS; STREETS AND HIGHWAYS.)

INSUFFICIENT.[73] Inadequate for some need, purpose or use; wanting in needful amount.[74] In pleading, a term sometimes construed to mean a failure of

67. Tayler L. Gloss.

68. Webster Int. Dict. See also *In re* Wadsworth, 29 Ch. D. 517, 520, 54 L. J. Ch. 638, 52 L. T. Rep. N. S. 613, 33 Wkly. Rep. 558, construing the phrase "'through the instrumentality' of such solicitor."

"Instrumentalities" is a term employed in manufacturing to embrace not only machinery, premises and all the implements, of every kind, but also the persons employed to operate them. Wood M. & S. § 394 [*quoted* in McDermott *v.* Hannibal, etc., R. Co., 87 Mo. 285, 297].

"Instrumentalities in fishing and hunting" see *In re* Mullen, 140 Fed. 206, 207.

69. Eglinton *v.* Inland Revenue Com'rs, 3 H. & C. 871, 887, 11 Jur. N. S. 676, 34 L. J. Exch. 225, 12 L. T. Rep. N. S. 707, 13 Wkly. Rep. 902.

70. U. S. *v.* King, 7 How. (U. S.) 833, 887, 12 L. ed. 934.

71. Standard Dict. See also Helena First Nat. Bank *v.* Roberts, 9 Mont. 323, 334, 23 Pac. 718; Schultz *v.* Milwaukee, 49 Wis. 254, 258, 5 N. W. 342, 35 Am. Rep. 779; Wheeler *v.* Westport, 30 Wis. 392, 396.

72. Hill *v.* Fair Haven, etc., R. Co., 75 Conn. 177, 180, 52 Atl. 725.

"In common law pleadings the word [insufficiency] was sometimes used. A pleading was said to be defective, uncertain, or bad, but it was not generally called insufficient. In chancery, however, the word was extensively used, in connection with answers which were called insufficient, when they did not distinctly and fully respond to the allegations or interrogatories in the bill." Salinger *v.* Lusk, 7 How. Pr. (N. Y.) 430, 435.

73. Distinguished from "unreasonable" see Mansfield *v.* Butterworth, [1898] 2 Q. B. 274, 281, 282, 62 J. P. 500, 67 L. J. Q. B. 709, 78 L. T. Rep. N. S. 527, 46 Wkly. Rep. 650, per Willis, J. [*citing* Sheffield *v.* Anderson, 64 L. J. M. C. 44].

74. Standard Dict. See also State *v.* Hull, 53 Miss. 626, 644.

"Insufficient evidence."—"By a loose use of language, it may be said that a verdict 'contrary to the evidence' or 'against the weight of evidence' was rendered upon 'insufficient evidence;' and on the other hand, that a verdict upon insufficient evidence is one contrary to or against the weight of evidence." Stewart *v.* Elliot, 2 Mackey (D. C.) 307, 315 [*quoted* in Metropolitan R. Co. *v.* Moore, 121 U. S. 558, 567, 7 S. Ct. 1334, 30 L. ed. 1022. See Gunn *v.* Union R. Co., (R. I. 1905) 62 Atl. 118, 121; Inland, etc., Coasting Co. *v.* Hall, 124 U. S. 121, 122, 8 S. Ct. 397, 31 L. ed. 369. See also Emmons *v.* Sheldon, 26 Wis. 648, 649, "for insufficient evidence".

the reply to state facts constituting a good answer to the facts stated in the answer of the defendant;[75] and sometimes equivalent to "irrelevant" and applicable to a pleading which has no substantial relation to the controversy between the parties to the suit.[76] (See INSUFFICIENCY, and Cross-References Thereunder.)

INSULATION. See ELECTRICITY.

INSULT. To leap upon; to treat with abuse, insolence, or contempt; to commit an indignity upon;[77] to treat with insolence and contumely.[78] (See INDECOROUS; INSULTING, and Cross-References Thereunder.)

INSULTING. Conveying or inflicting insult; tending or intending to insult; insolent.[79] (Insulting: Language —[80] In General, see DISORDERLY CONDUCT; OBSCENITY; Actionable Words, see LIBEL AND SLANDER; As Excuse or Justification, see ASSAULT AND BATTERY; HOMICIDE; Provoking Breach of the Peace, see BREACH OF THE PEACE.)

IN SUO HACTENUS FACERE LICET QUATENUS NIHIL IN ALIENUM IMMITTIT. A maxim meaning "One may use what is his own as he pleases, so long as he does not invade the rights of others."[81]

IN SUO QUISQUE NEGOTIO HEBETIOR EST QUAM IN ALIENO. A maxim meaning "Every one is more dull in his own business than in another's."[82]

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75. White *v.* Joy, 13 N. Y. 83, 89. See DEPARTURE.

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76. Goodman *v.* Robb, 41 Hun (N. Y.) 605, 606 [*citing* Moak Van Santvoord Pl. (3d ed.) p. 772].

77. Webster Dict. [*quoted* in Chaffin *v.* Lynch, 83 Va. 106, 116, 1 S. E. 803].

78. Ford *v.* State, 7 Ind. App. 567, 35 N. E. 34, 35.

79. Standard Dict. See 12 Cyc. 572.

80. See 3 Cyc. 1022 note 4.

81. Trayner Leg. Max.

82. Black L. Dict.

INSURANCE

By Emlin McClain
Chief Justice Supreme Court of Iowa *

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I. TERMINOLOGY.[1]

A. Insurance. Insurance is a contract[2] by which the one party, in consideration of a price paid to him adequate to the risk, becomes security to the other that he shall not suffer loss, prejudice, or damage by the happening of the

1. For definitions of agents and brokers see *infra*, V, A.

2. Funke *v.* Minnesota Farmers' Mut. F. Ins. Co., 29 Minn. 347, 354, 13 N. W. 164, 43 Am. Rep. 216. See also cases cited *infra*, this and succeeding notes.

A contract of insurance contains five necessary ingredients: (1) The subject-matter; (2) the risks insured against; (3) the amount; (4) duration of the risk; and (5) the premium of insurance. A contract of insurance which wants any of these ingredients is incomplete. Tyler *v.* New Amsterdam F. Ins. Co., 4 Rob. (N. Y.) 151, 155.

Distinguished from contracts to pay money on marriage.—An agreement between an association and its members that the association will pay a stipulated amount to the wife of the member on the event of his marriage, in consideration of the agreement by him to pay stipulated dues so long as he remains single, and not to marry within two years, is not a contract of insurance, and does not fall within the supervision of the insurance commissioner. State *v.* Towle, 80 Me. 287, 14 Atl. 195.

Distinguished from sanitation contracts.—The business of inspecting and certifying as to the sanitary condition of buildings and premises is not an insurance business. People *v.* Rosedale, 142 N. Y. 126, 36 N. E. 806 [*reversing* 5 Misc. 378, 25 N. Y. Suppl. 769].

Distinguished from statutory protective societies.—An association contracting with its members for a stipulated annual payment to repair bicycles in case of accident and to replace those destroyed or stolen, but not agreeing to pay any money in the event of injury, loss, or destruction, is not an insurance company but is within the statutory provisions as to societies for protective purposes. Com. *v.* Provident Bicycle Assoc., 178 Pa. St. 636, 36 Atl. 197, 36 L. R. A. 589.

Distinguished from guaranty.—A contract by a lightning-rod dealer to pay damages resulting to a building on which a rod is erected within the given time, resulting from lightning, is a contract of guaranty and not a contract of insurance. Cole *v.* Haven, (Iowa 1880) 7 N. W. 383. So a stipulation by contractors to indemnify the owner of property for damages to others resulting from the performance of work on such property is not a contract of insurance. French *v.* Vix, 2 Misc. (N. Y.) 312, 21 N. Y. Suppl. 1016, 30 Abb. N. Cas. 158 [*affirmed* in 143 N. Y. 90, 37 N. E. 612].

perils specified to certain things which may be exposed to them;[3] a contract whereby one party undertakes to indemnify or guarantee[4] the other against loss by certain specified risks;[5] an act or system of insuring or assuring against loss; specifically, the system by or under which indemnity or pecuniary payment is guaranteed by one party or several parties to another party, in certain contingencies, upon specified terms.[6]

B. Insurance Companies. An insurance company is a corporation or association whose business is to make contracts of insurance.[7]

C. Insured. An insured is the person indemnified by a contract of insurance.[8]

D. Insurer. This term means the underwriter or insurance company with whom a contract of insurance is made.[9]

Distinguished from other contracts generally see New York L. Ins. Co. *v.* Clopton, 7 Bush (Ky.) 179, 185, 3 Am. Rep. 290; Com. *v.* Provident Bicycle Assoc. 178 Pa. St. 636, 639, 36 Atl. 197, 36 L. R. A. 589.

Contract, generally, see CONTRACTS.

A contract to procure insurance is not a contract of insurance. The City of Clarksville, 94 Fed. 201, 205.

3. Lucena *v.* Crawford, 3 B. & P. 75, 2 B. & P. N. R. 269, 6 Rev. Rep. 623 [*quoted* in People *v.* Rose, 174 Ill. 310, 312, 51 N. E. 246, 44 L. R. A. 124].

4. An insurance contract is a contract of indemnity. Davis *v.* Phœnix Ins. Co., 111 Cal. 409, 415, 43 Pac. 1115; Macon Exch. Bank *v.* Loh, 104 Ga. 446, 31 S. E. 459, 44 L. R. A. 373; Whitehouse *v.* Cargill, 88 Me. 479, 34 Atl. 276; Hunt *v.* New Hampshire, Fire Underwriters' Assoc., 68 N. H. 305, 308, 38 Atl. 145, 38 L. R. A. 514, 73 Am. St. Rep. 602; Lahiff *v.* Ashuelot Ins. Co., 60 N. H. 75; Annely *v.* De Saussure, 26 S. C. 497, 505, 2 S. E. 490, 4 Am. St. Rep. 725; Plimpton *v.* Farmers' Mut. F. Ins. Co., 43 Vt. 497, 500, 5 Am. Rep. 297; Carpenter *v.* Providence Washington Ins. Co., 16 Pet. (U. S.) 495, 10 L. ed. 1044; Northern Trust Co. *v.* Snyder, 76 Fed. 34, 37, 22 C. C. A. 47; Western Assur. Co. *v.* Redding, 68 Fed. 708, 714, 15 C. C. A. 619; Kohne *v.* Insurance Co. of North America, 14 Fed. Cas. No. 7,920, 1 Wash. 93.

Strict insurance is indemnity. Campbell *v.* Supreme Conclave I. O. of H., 66 N. J. L. 274, 279, 49 Atl. 550, 54 L. R. A. 576.

Indemnity generally see INDEMNITY.

Guaranty generally see GUARANTY.

5. Webster Dict. [*quoted* in People *v.* Rose, 174 Ill. 310, 313, 51 N. E. 246, 44 L. R. A. 124].

6. Standard Dict. [*quoted* in People *v.* Rose, 174 Ill. 310, 313, 51 N. E. 246, 44 L. R. A. 124].

For other and similar definitions see Davis *v.* Phœnix Ins. Co., 111 Cal. 409, 414, 43 Pac. 1115; Barnes *v.* People, 168 Ill. 425, 429, 48 N. E. 91; State *v.* Vigilant Ins. Co., 30 Kan. 585, 587, 2 Pac. 840; State *v.* Citizens' Ben. Assoc., 6 Mo. App. 163, 169; Com. *v.* Provident Bicycle Assoc., 178 Pa. St. 636, 639, 36 Atl. 197, 36 L. R. A. 589; Paterson *v.* Powell, 9 Bing. 320, 323, 620, 2 L. J. C. P. 13, 2 Moore & S. 399, 773, 23 E. C. L. 598, 731; People *v.* Rose, 174 Ill. 310, 312, 313, 51 N. E. 246, 44 L. R. A. 124 [*quoting* Century Dict.; May Ins. § 1; Phillips Ins. § 1; Smith Com. L. 299].

A "contract of insurance" is defined as an agreement by which one party, for a consideration, which is usually paid in money, either in one sum or at different times during the continuance of the risk, promises to make a certain payment of money upon the destruction or injury of something in which the other party has an interest. Supreme Commandery K. of G. R. *v.* Ainsworth, 71 Ala. 436, 448, 46 Am. Rep. 332; Claflin *v.* U. S. Credit System Co., 165 Mass. 501, 43 N. E. 293, 52 Am. St. Rep. 528; Com. *v.* Wetherbee, 105 Mass. 149, 160; State *v.* Citizens' Ben. Assoc., 6 Mo. App. 163, 169.

Insurance "is a purely business adventure, in which one, for a stipulated consideration or premium per cent, engages to make up, wholly or in part, or in a certain agreed amount, any specific loss which another may sustain, and it may apply to loss of property, to personal injury, or to the loss of life. To grant indemnity or security against loss, for a consideration . . . is . . . the dominant and characteristic feature of the contract of insurance." Com. *v.* Equitable Beneficial Assoc., 137 Pa. St. 412, 419, 18 Atl. 1112. See also State *v.* Pittsburgh, etc., R. Co., 68 Ohio St. 9, 36, 67 N. E. 93, 96 Am. St. Rep. 635, 64 L. R. A. 405.

7. Black L. Dict.

Statutory definitions.— See Ala. Civ. Code (1896), § 2575; Ky. St. (1903) § 641; Mass. Rev. Laws (1902), p. 1120, c. 118, § 1; Shannon Code Tenn. (1896) § 3274; Tex. Rev. St. (1895) art. 3096*a*; Ballinger Annot. Codes & St. Wash. (1897) § 2838.

8. Mont. Civ. Code (1895), § 3390; N. D. Rev. Codes (1899), § 4445; S. D. Civ. Codes (1903), § 1797.

Legal representative of insured. — Whenever the word "insured" occurs in a standard fire-insurance policy it shall be held to include the legal representative of the insured. Wis. Rev. St. (1898) §§ 1941–1960.

Agent of insured.— Under the statutes providing that the word "insured" shall include the legal representative of the insured, the term does not include a mere agent, such as the husband of the insured. Metzger *v.* Manchester F. Assur. Co., 102 Mich. 334, 63 N. W. 650.

9. Black L. Dict.

II. KINDS OF INSURANCE.

The circumstances or contingencies under which loss, damage, or liability may arise being practically unlimited, the kinds of insurance in vogue are numerous.[10] The following nomenclature includes many of the common forms of insurance: Accident insurance,[11] benefit insurance,[12] benevolent insurance,[13] boiler insurance,[14] casualty insurance,[15] credit insurance,[16] cyclone insurance,[17] employers' liability insurance,[18] endowment insurance,[19] fidelity insurance,[20] fire insurance,[21] guaranty insurance,[22] hail insurance,[23] life insurance,[24] lightning insurance,[25] live-stock insurance,[26] Lloyds' insurance,[27] marine insurance,[28] passenger insurance,[29] plate-glass insurance,[30] rent insurance,[31] theft or burglary insurance,[32] and title insurance.[33]

III. REGULATION AND CONTROL OF THE BUSINESS.[34]

A. In General— 1. Restrictions to Corporations.[35] The legislature may, if it sees fit, restrict the right to carry on the insurance business to corporations, and deny it to individuals or unincorporated associations;[36] but in the absence of a statute requiring incorporation, citizens of the state acting as individuals or associations may conduct insurance business in the state without being incorporated, and a like privilege inures under the constitution of the United States to citizens of other states.[37] A statute regulating the business of insurance applies to individuals and associations as well as to corporations.[38]

2. As Interstate Commerce. The claim has sometimes been made that so far as the business of insurance involves contracts between a corporation authorized to do business in one state and the insured in another state it is interstate commerce, and therefore subject to federal regulation and free from regulation by

Statutory definitions.— See Cal. Civ. Code, § 2538; Mont. Civ. Code (1895), § 3390; N. D. Rev. Codes (1899), § 4445; S. D. Civ. Code (1903), § 1797.

10. See State *v.* Hogan, 8 N. D. 301, 78 N. W. 1051, 73 Am. St. Rep. 759, 45 L. R. A. 166.

Drought insurance.— See State *v.* Hogan, 8 N. D. 301, 78 N. W. 1051, 73 Am. St. Rep. 759, 45 L. R. A. 166.

Frost insurance.— See State *v.* Hogan, 8 N. D. 301, 78 N. W. 1051, 73 Am. St. Rep. 759, 45 L. R. A. 166.

Insect insurance.— See State *v.* Hogan, 8 N. D. 301, 78 N. W. 1051, 73 Am. St. Rep. 759, 45 L. R. A. 166.

Wind insurance.— See State *v.* Hogan, 8 N. D. 301, 78 N. W. 1051, 73 Am. St. Rep. 759, 45 L. R. A. 166.

11. See Accident Insurance.
12. See Mutual Benefit Insurance.
13. See Mutual Benefit Insurance.
14. See Boiler Insurance.
15. See Casualty Insurance.
16. See Credit Insurance.
17. See Cyclone Insurance.
18. See Employers' Liability Insurance.
19. See Endowment Insurance.
20. See Fidelity Insurance.
21. See Fire Insurance.
22. See Guaranty Insurance.
23. See Hail Insurance.
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25. See Lightning Insurance.
26. See Live-Stock Insurance.
27. See Lloyds' Insurance.
28. See Marine Insurance.
29. See Passenger Insurance.
30. See Plate-Glass Insurance.
31. See Rent Insurance.
32. See Theft Insurance.
33. See Title Insurance.
34. For constitutionality of statutes relating to misrepresentations in obtaining life-insurance policy see Constitutional Law, 8 Cyc. 1067.
35. For constitutionality of statutes providing that a fire-insurance policy shall be a liquidated claim in case of total loss see Constitutional Law, 8 Cyc. 1067.

For constitutionality of statutes relating to payment of attorney's fees in addition to loss see Constitutional Law, 8 Cyc. 1067.

For constitutionality of statutes of this character see Constitutional Law, 8 Cyc. 1067.

36. People *v.* Loew, 19 Misc. (N. Y.) 248, 44 N. Y. Suppl. 42, 26 N. Y. Civ. Proc. 132; Weed *v.* Cumming, 198 Pa. St. 442, 48 Atl. 409; Com. *v.* Vrooman, 164 Pa. St. 306, 30 Atl. 217, 44 Am. St. Rep. 603, 25 L. R. A. 250; Arrott *v.* Walker, 118 Pa. St. 249, 12 Atl. 280.

37. Hoadley *v.* Purifoy, 107 Ala. 276, 18 So. 220, 30 L. R. A. 351. A state cannot forbid contracts of insurance relating to risks within its limits from being made between a citizen and a corporation in another state. Allgeyer *v.* Louisiana, 165 U. S. 578, 17 S. Ct. 427, 41 L. ed. 832.

38. State *v.* Stone, 118 Mo. 388, 24 S. W. 164, 40 Am. St. Rep. 388, 25 L. R. A. 243.

the states; but the decisions of the supreme court of the United States have been against this claim.[39]

3. Power to Compel Adoption of Level Rate. The legislature has no power to compel the adoption of a level rate or compel a company to abandon the terms on which it is willing to underwrite risks in certain sections. A discrimination in insurance rates for different geological sections of the state, established by the underwriters' association, is not contrary to law.[40]

B. Statutory Regulation of Corporations — 1. To What Applicable. General statutory provisions regulating the insurance business are applicable to all companies, associations, partnerships, or individuals engaging in the business;[41] but the statutes are frequently so drawn as not to apply to unincorporated associations or assessment companies which are governed by provisions applicable to them alone.[42]

2. Regulation of Contracts, Policies, or Business — a. Power.[43] It is within the power of the state to regulate the terms of the contract of insurance. The subject-matter being a franchise the state may prescribe the condition on which it shall be granted.[44] So the extent of the risk assumed in any one contract may

39. New York L. Ins. Co. *v.* Cravens, 178 U. S. 389, 20 S. Ct. 962, 44 L. ed. 1116; Hooper *v.* California, 155 U. S. 648, 15 S. Ct. 207, 39 L. ed. 297; Paul *v.* Virginia, 8 Wall. (U. S.) 168, 19 L. ed. 357.

"The business of insurance is not commerce. The control of insurance is not an instrumentality of commerce. The making of such a contract is a mere incident of commercial intercourse, and in this respect there is no difference whatever between insurance against fire and insurance against the 'perils of the sea.' And we may add, or against the uncertainty of man's mortality." New York L. Ins. Co. *v.* Cravens, 178 U. S. 389, 401, 20 S. Ct. 962, 44 L. ed. 1116.

40. *In re* Insurance Companies' Rates, 12 Pa. Dist. 664, in which it was said: "No one can be compelled to enter into a contract with another against his own consent or on terms which he is unwilling to adopt."

41. State *v.* Beardsley, 88 Minn. 20, 92 N. W. 472. And see *supra*, III, A, 1.

Effect of voluntary assignment.— A company cannot by making a voluntary assignment withdraw itself from the control of the insurance department of the state. Williams *v.* Commercial Ins. Co., 75 Mo. 388; Relfe *v.* Commercial Ins. Co., 5 Mo. App. 173.

Life insurance.— Such general regulations apply to life-insurance companies. Mutual L. Ins. Co. *v.* Boyle, 82 Fed. 705; Metropolitan L. Ins. Co. *v.* McNall, 81 Fed. 888.

42. *Alabama.*— Hoadley *v.* Purifoy, 107 Ala. 276, 18 So. 220, 30 L. R. A. 351.

California.— Murray *v.* Los Angeles County Superior Ct., 129 Cal. 628, 62 Pac. 191.

Kentucky.— Louisville, etc., Mut. F. Ins. Assoc. *v.* Com. 9 Bush 394.

Missouri.— Aloe *v.* Fidelity Mut. L. Assoc., (1899) 55 S. W. 993.

North Carolina.— Commonwealth Mut. F. Ins. Co. *v.* Edwards, 123 N. C. 116, 32 S. E. 404.

United States.— Jarman *v.* Knights Templars', etc., Life Indemnity Co., 75 Fed. 70.

Canada.— Ballagh *v.* Royal Mut. Ins. Co., 5 Ont. App. 87 [*approved* in Wellington County Mut. F. Ins. Co. *v.* Frey, 5 Can. Supreme Ct. 82].

Under a New York statute a distinction exists between an insurance company having "capital stock" and one having only assets or capital, and the provisions as to the latter apply to mutual insurance companies. People *v.* Payn, 26 N. Y. App. Div. 584, 50 N. Y. Suppl. 334.

43. For delegation of power to insurance commissioners to fix standard policy see Constitutional Law, 8 Cyc. 834.

44. *Maine.*— *In re* Opinion of Justices, 97 Me. 590, 55 Atl. 828.

Missouri.— Goodson *v.* National Masonic Acc. Assoc., 91 Mo. App. 339.

New York.— People *v.* Loew, 19 Misc. 248, 44 N. Y. Suppl. 42, 26 N. Y. Civ. Proc. 132.

Ohio.— John Hancock L. Ins. Co. *v.* Warren, 59 Ohio St. 45, 51 N. E. 546 [*affirmed* in 181 U. S. 73, 21 S. Ct. 535, 45 L. ed. 755].

Wisconsin.— Welch *v.* Philadelphia Fire Assoc., 120 Wis. 456, 98 N. W. 227.

United States.— John Hancock Mut. L. Ins. Co. *v.* Warren, 181 U. S. 73, 21 S. Ct. 535, 45 L. ed. 755 [*affirming* 59 Ohio St. 45, 51 N. E. 546]; Orient Ins. Co. *v.* Daggs, 172 U. S. 557, 19 S. Ct. 281, 43 L. ed. 552; Jarman *v.* Knights Templars', etc., Life Indemnity Co., 95 Fed. 70.

Applications of rule.— The state may impose, as a condition of doing business, the obligation to pay damages and attorney's fees in case of default in the payment of a loss. Fidelity Mut. L. Assoc. *v.* Mettler, 185 U. S. 308, 22 S. Ct. 662, 46 L. ed. 922; Merchants' L. Assoc. *v.* Yoakum, 98 Fed. 251, 39 C. C. A. 56.

Constitutionality.— Regulations of the insurance business are not unconstitutional. People *v.* Formosa, 131 N. Y. 478, 30 N. E. 492, 27 Am. St. Rep. 612 [*affirming* 61 Hun 272, 16 N. Y. Suppl. 753]; New York Bd. of Fire Underwriters *v.* Metropolitan Lloyds, 11 Misc. (N. Y.) 646, 33 N. Y. Suppl. 547, 24 N. Y. Civ. Proc. 307 [*affirmed* in 87 Hun 619, 33 N. Y. Suppl. 1131], even as applied to companies already engaged in the business.

be limited, and the courts in construing the contract are bound to give effect thereto according to its terms.[45]

b. Effect Upon Contract. Executory contracts of insurance made in violation of statutory regulations, or by companies not authorized to transact business, are invalid.[46]

3. STATE SUPERVISION — a. License by Superintendent or Commissioner. The superintendent or commissioner of insurance provided for by statute may be given extensive authority in investigating the affairs and management of companies or associations,[47] and he may be authorized to refuse a certificate to a company or association which has not complied with the requirements of law, or revoke such certificate if the business is conducted in violation of the law.[48] By statute the proceedings against an insurance company for failure or refusal to comply with the statutory regulations may be limited to an action by the attorney-general and such action cannot be brought by any other person.[49]

b. Deposit of Bonds or Securities — (i) *IN GENERAL.* Companies may be required to give bond for payment of losses,[50] or to have a paid-up capital of not less than a specified sum invested in such securities as the statute may require,[51]

Butler *v.* Walker, 80 Ill. 345; Hager *v.* Kentucky Title Co., 85 S. W. 183, 27 Ky. L. Rep. 346; Com. *v.* Hock Age Mut. Ben. Assoc., 10 Phila. (Pa.) 554; Eagle Ins. Co. *v.* Ohio, 153 U. S. 446, 14 S. Ct. 868, 38 L. ed. 778 [*affirming* 50 Ohio St. 252, 33 N. E. 1056]. A requirement that a life-insurance company shall deposit a special fund with the superintendent of the insurance company, for the security of its policy-holders, is not in violation of a constitutional provision prohibiting the giving or loaning of the credit of the state in aid of any individual association or corporation. Atty.-Gen. *v.* North America L. Ins. Co., 82 N. Y. 172.

45. Industrial, etc., Trust *v.* Tod, 56 N. Y. App. Div. 39, 67 N. Y. Suppl. 362; Ulmer *v.* Phœnix F. Ins. Co., 61 S. C. 459, 39 S. E. 712.

46. Swing *v.* Regina Flour Mill Co., 77 Mo. App. 398; Swing *v.* Clarksville Cider, etc., Co., 77 Mo. App. 391. Thus a coöperative insurance company authorized to do business in one county only and attempting to do business in another county cannot enforce payment of dues from the insured under such contract. Patrons of Industry F. Ins. Co. *v.* Plum, 84 N. Y. App. Div. 96, 82 N. Y. Suppl. 550.

47. Spruance *v.* Farmers', etc., Ins. Co., 9 Colo. 73, 10 Pac. 285; Liverpool, etc., Ins. Co. *v.* Clunie, 88 Fed. 160.

During a vacancy in the office of superintendent the deputy may exercise his authority. Smyth *v.* Lombardo, 75 Hun (N. Y.) 415. His acts are to all intents and purposes those of superintendent and he is entitled to the salary of that office while he continues so to act. People *v.* Hopkins, 55 N. Y. 74.

Authority to punish for contempt.—A statute authorizing the insurance commissioner to investigate the financial condition of any insurance company, and summon his officers before him and compel their attendance and the production of papers, and to examine them under oath, does not authorize him to punish for contempt in refusing to submit to such examination. Noyes *v.* Byxbee, 45 Conn. 382.

48. *California.*— Palache *v.* Pacific Ins. Co., 42 Cal. 418.

Michigan.— Citizens' L. Ins. Co. *v.* Insurance Com'rs, 128 Mich. 85, 87 N. W. 126.

New York.— People *v.* Payn, 26 N. Y. App. Div. 584, 50 N. Y. Suppl. 334.

Ohio.— Vorys *v.* State, 67 Ohio St. 15, 65 N. E. 150.

Tennessee.— North British, etc., Ins. Co. *v.* Craig, 106 Tenn. 621, 62 S. W. 155.

Extraterritorial operation.—Such statutory provisions can have no extraterritorial force. Carlile *v.* Hurd, 3 Colo. App. 11, 31 Pac. 952.

A review of the action of the superintendent or commissioner in refusing or canceling certificates to do business may be authorized. Kansas Home Ins. Co. *v.* Wilder, 43 Kan. 731, 23 Pac. 1061.

49. Lowery *v.* State L. Ins. Co., 153 Ind. 100, 54 N. E. 442; Knickerbocker Inv. Co. *v.* Voorhees, 100 N. Y. App. Div. 414, 91 N. Y. Suppl. 816. And see North American Ins. Co. *v.* Yates, 214 Ill. 272, 73 N. E. 423.

Notice to commissioner.—The commissioner should have notice of a proceeding in court as to a matter within his control. *In re* Fidelity Mut. Aid Assoc., 12 Wkly. Notes Cas. (Pa.) 269.

50. Union Cent. L. Ins. Co. *v.* Skipper, 115 Fed. 69, 52 C. C. A. 663. Such a bond to cover claims arising and accruing to any person during the term of said bond, by virtue of any policy issued by the company, covers loss accruing during the term of both instruments, although such loss does not become payable under the terms of the policy until after the bond has expired. Union Cent. L. Ins. Co. *v.* Skipper, 115 Fed. 69, 52 C. C. A. 663.

51. State *v.* King, 44 Mo. 283; *In re* Babcock, 21 Nebr. 500, 32 N. W. 641; *In re* Colonial Mut. L. Assur. Soc., 21 Ch. D.

or to deposit with the designated officers of the state securities for the protection of claims under its policies.[52] The securities thus deposited constitute a trust fund for the payment of the claims of the policy-holders.[53] Policy-holders having claims for losses, or for return of premiums paid, have priority as to such funds.[54] The income arising from such securities is to be added to the fund unless permission is granted to the company to collect it,[55] and even though the aggregate amount of the securities deposited exceeds the minimum required by law, the state officer is not bound to surrender the surplus, nor will a court require such surrender save as authorized by law.[56] After the satisfaction of the claims for which the funds are held as security, the remaining funds are held for the company;[57] but so far as the securities are required for payment of claims the state officer is not subject to defenses which might be urged as against the company.[58]

(II) *Assignment of Funds.* The company depositing the fund may make an assignment thereof to another company succeeding it in business;[59] but such an assignment by an insolvent company to a foreign company does not defeat the claims to the fund on behalf of the citizens of the state for whose security it

837, 46 L. T. Rep. N. S. 282, 30 Wkly. Rep. 458.

Computation.— Where the statute required that life-insurance companies have a specified capital, and assets equal to outstanding liabilities, reckoning the premium reserve on life risks, based on the actuaries' table of mortality, with interest at four per cent as a liability, it was held that its reserve liability under the statute was the "premium reserve" or "net value" based on the specified tables of mortality. Bankers' L. Ins. Co. *v.* Fleetwood, 76 Vt. 297, 57 Atl. 239.

Unincorporated associations or companies doing business on the assessment plan are frequently excused from compliance with such conditions. Moadley *v.* Purifoy, 107 Ala. 276, 18 So. 220, 30 L. R. A. 351; Dwinnell *v.* Minneapolis F. & M. Mut. Ins. Co., 90 Minn. 383, 97 N. W. 110; People *v.* American Steam Boiler Ins. Co., 147 N. Y. 25, 41 N. E. 423; People *v.* Loew, 23 Misc. (N. Y.) 574, 52 N. Y. Suppl. 799; Mutual Ben. L. Ins. Co. *v.* Marye, 85 Va. 643, 8 S. E. 481.

52. Employers' Liability Assur. Co. *v.* Insurance Commissioner, 64 Mich. 614, 31 N. W. 542; State *v.* Ætna L. Ins. Co., 69 Ohio St. 317, 69 N. E. 608.

53. Relfe *v.* Columbia L. Ins. Co., 10 Mo. App. 150.

An assignee of a claim for a loss has the same right of priority as the original holder in the distribution of the funds thus deposited. Kitchen *v.* Conklin, 51 How. Pr. (N. Y.) 308.

A citizen making a contract with a foreign company through an agent residing and doing business out of the state has no claim on the deposit in the state treasury under some statutes. Piedmont, etc., L. Ins. Co. *v.* Wallin, 58 Miss. 1. But under the Nebraska statute which provides for the filing by a foreign insurance company of a statement showing the deposit in some one of the states or territories of such fund, it was held that a deposit in that state was not held for the special benefit of policy-holders in the state. State *v.* Benton, 25 Nebr. 834, 41 N. W. 793.

54. *Minnesota.*— Smith *v.* National Credit Ins. Co., 65 Minn. 283, 68 N. W. 28, 33 L. R. A. 511.

Ohio.— Falkenbach *v.* Patterson, 43 Ohio St. 359, 1 N. E. 757.

Tennessee.— Pennebaker *v.* Tomlinson, 1 Tenn. Ch. 594.

Virginia.— Universal L. Ins. Co. *v.* Cogbill, 30 Gratt. 72.

United States.— Firemen's Ins. Co. *v.* Hemingway, 9 Fed. Cas. No. 4,797.

See 28 Cent. Dig. tit. "Insurance," § 7.

55. Moies *v.* Economical Mut. L. Ins. Co., 12 R. I. 259.

Effect of dissolution on right to collect.— Under a statute providing that the companies making such deposit may, as long as they remain solvent, collect the interest or dividends thereon, it was held that a corporation which had been judicially dissolved had no right to collect such interest or dividends. People *v.* American Steam Boiler Ins. Co., 147 N. Y. 25, 41 N. E. 423 [*reversing* 87 Hun 229, 33 N. Y. Suppl. 834].

56. Imperial L. Ins. Co. *v.* State Treasurer, 95 Mich. 513, 55 N. W. 365; Hayne *v.* Metropolitan Trust Co., 67 Minn. 245, 69 N. W. 916; Lancashire Ins. Co. *v.* Maxwell, 131 N. Y. 286, 30 N. E. 192 [*affirming* 61 Hun 360, 16 N. Y. Suppl. 53 (*reversing* 5 N. Y. Suppl. 399)].

57. Falkenbach *v.* Patterson, 43 Ohio St. 359, 1 N. E. 757.

58. Smyth *v.* Munroe, 84 N. Y. 354. The fact that a mortgage which is assigned as security is not on property worth more than fifty per cent of the amount represented by the mortgage does not constitute a defense on the part of the mortgagee to the enforcement of such mortgage. Washington L. Ins. Co. *v.* Clason, 162 N. Y. 305, 56 N. E. 755 [*affirming* 16 N. Y. App. Div. 434, 45 N. Y. Suppl. 27].

59. Firemen's Ins. Co. *v.* Hemingway, 9 Fed. Cas. No. 4,797.

was given.[60] Such an assignment, however, has priority over claims not yet accrued.[61]

c. Insolvency of Company. When the company becomes insolvent the claims for which the fund is held as security take priority over the general debts of the company;[62] but as between policy-holders the fund is to be distributed *pro rata* and one of them cannot secure priority by legal proceedings.[63] Taxes due from the company are payable from such funds,[64] but the state has no priority over policy-holders as to any general claim it may have upon such funds.[65] The expense of winding up the affairs of the company may be chargeable proportionately to the funds in the hands of the state officer.[66]

d. Receiverships. As against a receiver appointed for an insolvent company, the state officer is entitled to retain the securities deposited with him;[67] unless the statute provides that on the appointment of a receiver the fund shall be transferred to him.[68] But even in the hands of the receiver the policy-holders are entitled to their priority.[69]

e. Liability of State Officer For Funds. The state officer is not personally liable for moneys paid out of funds deposited with him, for the protection of policy-holders, where he acts in good faith, and under the advice of the law officers of the state.[70]

4. License-Tax. A franchise, license, or excise tax may properly be imposed by the state in the exercise of its taxing power on the insurance business,[71] and this tax may be additional to the tax on the property of the corporation,[72] or

60. Lovell *v.* St. Louis Mut. L. Ins. Co., 111 U. S. 264, 4 S. Ct. 390, 28 L. ed. 423.

61. Smith *v.* National Credit Ins. Co., 65 Minn. 283, 68 N. W. 28, 33 L. R. A. 511.

62. Falkenbach *v.* Patterson, 43 Ohio St. 359, 1 N. E. 757; Firemen's Ins. Co. *v.* Hemingway, 9 Fed. Cas. No. 4,797; *Re* Briton Medical, etc., Assoc., 12 Ont. 441; Matter of Ætna Ins. Co., 17 Grant Ch. (U. C.) 160.

63. Smith *v.* Maine Mut. Acc. Assoc., 86 Me. 229, 29 Atl. 991; Pennebaker *v.* Tomlinson, 1 Tenn. Ch. 111.

Where the fund is for the security of registered policy-holders, unregistered, paid-up policy-holders are not entitled to participate, although they had accepted their policies in exchange for registered policies, there being no showing of fraud or mistake. Atty.-Gen. *v.* North America L. Ins. Co., 82 N. Y. 172.

Respective rights of claimants for losses and claimants for unearned premiums.— Where the deposit was made to secure "any loss insured against," it was held that claimants for losses under policies were entitled to priority over claimants for unearned premiums. Kelsey *v.*, Cogswell, 112 Fed. 599.

Adjustment of claims of policy-holders and creditors.— Under a bill filed by policy-holders and creditors of an insolvent company to impound the funds of the company in the hands of the state officer, it was held that the rights of all claimants to the fund who were made parties to the bill might be adjudicated. Smith *v.* St. Louis Mut. L. Ins. Co., 3 Tenn. Ch. 151.

64. *In re* Life Assoc. of America, 12 Mo. App. 40.

65. Maritime Bank *v.* Reg., 17 Can. Supreme Ct. 657.

66. Atty.-Gen. *v.* North American L. Ins. Co., 26 Hun (N. Y.) 294.

67. Cooke *v.* Warner, 56 Conn. 234, 14 Atl. 798; People *v.* Chapman, 64 N. Y. 557; Ruggles *v.* Chapman, 59 N. Y. 163 [*affirming* 1 Hun 324, 2 Thomps. & C. 600]; People *v.* Chapman, 5 Hun (N. Y.) 222.

68. People *v.* American Steam Boiler Ins. Co., 147 N. Y. 25, 41 N. E. 423; Atty.-Gen. *v.* North American L. Ins. Co., 85 N. Y. 485; Atty.-Gen. *v.* North American L. Ins. Co., 80 N. Y. 152; People *v.* American Steam Boiler Ins. Co., 81 Hun (N. Y.) 498, 31 N. Y. Suppl. 155; *In re* Guardian Mut. L. Ins. Co., 13 Hun (N. Y.) 115.

69. Kitchen *v.* Conklin, 51 How. Pr. (N. Y.) 308; Falkenbach *v.* Patterson, 43 Ohio St. 359, 1 N. E. 757; Clarke *v.* Union F. Ins. Co., 6 Ont. 640. The court proceeding to wind up the affairs of an insolvent company may make an order directing the disposition of the funds deposited with the state officer, although they are still in the custody of such officer. Atty.-Gen. *v.* North America L. Ins. Co., 92 N. Y. 654.

70. State *v.* Thomas, 88 Tenn. 491, 12 S. W. 1034; Firemen's Ins. Co. *v.* Hemingway, 10 Fed. Cas. No. 4,797.

Where, by law, the state treasurer was ex officio insurance commissioner, it was held that an official bond as treasurer did not cover his liability to individuals for his acts as commissioner. State *v.* Thomas, 88 Tenn. 491, 12 S. W. 1034.

71. Coite *v.* Connecticut Mut. L. Ins. Co., 36 Conn. 512; Connecticut Mut. L. Ins. Co. *v.* Com., 133 Mass. 161; St. Joseph *v.* Metropolitan L. Ins. Co., 110 Mo. App. 124, 84 S. W. 97; People *v.* Miller, 88 N. Y. App. Div. 218, 85 N. Y. Suppl. 468.

72. Fidelity, etc., Co. *v.* Louisville, 106 Ky. 207, 50 S. W. 35, 20 Ky. L. Rep. 1785;

on its receipts from its business.[73] Such a license-tax may be authorized to be imposed by municipal corporations,[74] or it may be required to be paid to the municipality for the benefit of its fire department,[75] or for a firemen's benefit fund.[76] So the tax may be required to be paid to a hospital.[77] The license-tax may be based on the aggregate amount of premiums received during the year,[78] or on the premiums received on new policies issued;[79] but premiums unearned by a domestic insurance company and paid in advance and refunded upon the cancellation of policies should not be included in "the gross amount of premiums received for purposes" of taxation.[80] The tax may be in proportion to the net earnings.[81] The license may be exacted either from the company or from the agent transacting the business, as the statute may require.[82] But it cannot be exacted from a person taking insurance in a foreign company having no agent in the state.[83]

C. Regulation of Foreign Corporations[84]**— 1. Right to Do Business.**[85] A foreign insurance company may transact its business within the limits of a state unless prohibited by some statutory regulation;[86] but a foreign corporation has no constitutional right to engage in such business,[87] and must comply with the requirements of the state where it seeks to do business. If there are no special provisions as to foreign companies, such a company must comply with the general

German Nat. Ins. Co. *v.* Louisville, 54 S. W. 732, 21 Ky. L. Rep. 1179.

73. Springfield *v.* Hubbel, 89 Mo. App. 379; Travellers' Ins. Co. *v.* Fricke, 94 Wis. 248, 68 N. W. 958.

74. Van Inwagen *v.* Chicago, 61 Ill. 31; Illinois Mut. F. Ins. Co. *v.* Peoria, 29 Ill. 180; Kansas City *v.* Oppenheimer, 100 Mo. App. 527, 75 S. W. 174; Farmington *v.* Rutherford, 94 Mo. App. 328, 68 S. W. 83; Lamar *v.* Adams, 90 Mo. App. 35; Hunter *v.* Memphis, 93 Tenn. 571, 26 S. W. 828.

A company cannot be compelled to pay more than one license for permission to carry on its business within the municipality, although it may have established more than one office therein. Merchants' Mut. Ins. Co. *v.* Blandin, 24 La. Ann. 112.

75. Kunz *v.* National F. Ins. Co., 169 Ill. 577, 48 N. E. 682; New York City Fire Dept. *v.* Stanton, 159 N. Y. 225, 54 N. E. 28 [*affirming* 28 N. Y. App. Div. 334, 51 N. Y. Suppl. 242]; Exempt Firemen's Benev. Fund *v.* Roome, 93 N. Y. 313, 45 Am. Rep. 217; Troy Fire Dept. *v.* Bacon, 2 Abb. Dec. (N. Y.) 127, 3 Keyes 402, 2 Transcr. App. 222; Milwaukee Fire Dept. *v.* Helfenstein, 16 Wis. 136.

76. Exempt Firemen's Benev. Fund *v.* Roome, 93 N. Y. 313, 44 Am. Rep. 217.

77. Massachusetts Gen. Hospital *v.* State Mut. L. Assur. Co., 4 Gray (Mass.) 227.

78. State *v.* Philadelphia Underwriters, 112 La. 47, 50, 36 So. 221, 222; State *v.* Liverpool, etc., Ins. Co., 40 La Ann. 463, 4 So. 504; State *v.* Hibernia Ins. Co., 38 La. Ann. 465; New Orleans *v.* The Salamander Ins. Co., 25 La. Ann. 650; Com. *v.* Germania L. Ins. Co., 11 Phila. (Pa.) 553.

79. Metropolitan L. Ins. Co. *v.* Darenkamp, 66 S. W. 1125, 23 Ky. L. Rep. 2249.

80. People *v.* Miller, 177 N. Y. 515, 70 N. E. 10 [*modifying* 88 N. Y. App. Div. 218, 85 N. Y. Suppl. 468].

81. Idaho Mut. Co-Operative Ins. Co. *v.* Myer, 10 Ida. 294, 77 Pac. 628; Chicago *v.* James, 114 Ill. 479, 2 N. E. 475.

82. Mutual Reserve Fund L. Assoc. *v.* Augusta, 109 Ga. 73, 35 S. E. 71; State *v.* New England Mut. Ins. Co., 43 La. Ann. 133, 8 So. 888; Kansas City *v.* Oppenheimer, 100 Mo. App. 527, 75 S. W. 174.

83. State *v.* Williams, 46 La. Ann. 922, 15 So. 290.

84. See, generally, Foreign Corporations.

Power to enforce restrictions and regulations on foreign companies see Foreign Corporations, 19 Cyc. 1260.

Reciprocal and retaliatory statutes see Foreign Corporations, 19 Cyc. 1264.

Validity of policy as against non-complying foreign corporation see Foreign Corporations, 19 Cyc. 1302.

Situs of contracts for purpose of application of statutes relating to foreign insurance companies see Foreign Corporations, 19 Cyc. 1309 *et seq.*

Venue in actions against foreign insurance companies see Venue.

Questions relating to process see Process.

For power of agent of foreign corporation to waive conditions in policy see Corporations, 10 Cyc. 1069.

85. For what constitutes doing business see Foreign Corporations, 19 Cyc. 1269, 1271.

For personal responsibility of officers or agents of non-complying foreign corporations in case of loss see Corporations, 10 Cyc. 885; Foreign Corporations, 19 Cyc. 1311.

86. People *v.* New York Fidelity, etc., Ins. Co., 153 Ill. 25, 38 N. E. 752, 26 L. R. A. 295; Kennebec Co. *v.* Augusta Ins., etc., Co., 6 Gray (Mass.) 204; Clarke *v.* Union F. Ins. Co., 10 Ont. Pr. 313.

87. Hickman *v.* State, 62 N. J. L. 499, 41 Atl. 942 [*affirmed* in 63 N. J. L. 636, 44 Atl. 1099]; Paul *v.* Virginia, 8 Wall. (U. S.) 168, 19 L. ed. 357. And see *infra*, III, C, 2.

statutes of the state relating to the insurance business;[88] and if there are specific provisions as to foreign companies, such companies may do business in the state only on compliance with such conditions.[89] The requirement that foreign companies comply with the laws of the state of their residence relates not only to the statute laws but also to the common law of such state.[90] On compliance with the laws of a state a foreign company is entitled to carry on business in that state;[91] but it can only do such business as is authorized by the statute, although its charter authorizes a greater scope of business.[92]

2. STATE LICENSE — a. Issuance. Compliance with regulations prescribed by statute is a condition precedent to the right to a license.[93] But where the condi-

88. *Illinois.*— People *v.* New York Fidelity, etc., Ins. Co., 153 Ill. 25, 38 N. E. 752, 26 L. R. A. 295; Mutual F. Ins. Co. *v.* Swigert, 120 Ill. 36, 11 N. E. 410; Rothschild *v.* New York L. Ins. Co., 97 Ill. App. 547.

Indiana.— Rising Sun Ins. Co. *v.* Slaughter, 20 Ind. 520.

Massachusetts.— Abraham *v.* Mutual Reserve Fund Life Assoc., 183 Mass. 116, 66 N. E. 605.

Missouri.— State *v.* Beazley, 60 Mo. 220; Brassfield *v.* K. of M., 92 Mo. App. 102; Goodson *v.* National Masonic Acc. Assoc., 91 Mo. App. 339.

New York.— Glens Falls Portland Cement Co. *v.* Travelers' Ins. Co., 11 N. Y. App. Div. 411, 42 N. Y. Suppl. 285.

Ohio.— State *v.* Moore, 42 Ohio St. 103.

However, foreign companies may, by way of comity, be allowed to transact business in the state without complying with the laws regulating the business of domestic companies. Wheeler *v.* Mutual Reserve Fund Life Assoc., 102 Ill. App. 48; Palatine Ins. Co. *v.* Crittenden, 18 Mont. 413, 45 Pac. 555.

Name.— The discretion authorized to be exercised by the superintendent of insurance as to domestic companies in rejecting the name or title applied for, if so similar to one already appropriated as to be likely to mislead, may not be exercised as to a foreign company applying for a license to do business. People *v.* Van Cleave, 183 Ill. 330, 55 N. E. 698, 47 L. R. A. 795.

Classes of insurance.— Statutes regulating the doing of business by certain classes of foreign companies are to be construed as permitting other foreign companies to do business without other restrictions than those applicable to the business in general. Daly *v.* National L. Ins. Co., 64 Ind. 1; State *v.* Rotwitt, 17 Mont. 41, 41 Pac. 1004.

Associations and assessment companies.— The statutes subjecting foreign companies to specific regulations are frequently so drawn as expressly or by implication to exempt unincorporated mutual associations and assessment companies from their provisions.

Alabama.— Hoadley *v.* Purifoy, 107 Ala. 276, 18 So. 220, 30 L. R. A. 351.

Illinois.— Mutual F. Ins. Co. *v.* Swigert, 120 Ill. 36, 11 N. E. 410.

Massachusetts.— Atlantic Mut. F. Ins. Co. *v.* Concklin, 6 Gray 73; Williams *v.* Cheney, 3 Gray 215.

Michigan.— People *v.* Howard, 50 Mich. 239, 15 N. W. 101.

Minnesota.— Seamans *v.* Christian Bros. Mill Co., 66 Minn. 205, 68 N. W. 1065.

Ohio.— State *v.* Western Union Mut. L. Ins. Co., 47 Ohio St. 167, 24 N. E. 392, 8 L. R. A. 129.

See 28 Cent. Dig. tit. "Insurance," § 16 *et seq.* And see *supra*, III, B, 1.

89. *Illinois.*— People *v.* Van Cleave, 187 Ill. 125, 58 N. E. 422.

Indiana.— Farmers', etc., Ins. Co. *v.* Harrah, 47 Ind. 236.

Massachusetts.— Atlantic Mut. F. Ins. Co. *v.* Concklin, 6 Gray 73.

Michigan.— People *v.* State Ins. Com'rs, 25 Mich. 321.

Montana.— State *v.* Rotwitt, 17 Mont. 41, 41 Pac. 1004.

Nebraska.— State *v.* Northwestern Mut. Live-Stock Assoc., 16 Nebr. 549, 20 N. W. 852.

Ohio.— State *v.* Ackerman, 51 Ohio St. 163, 37 N. E. 828, 24 L. R. A. 298.

Pennsylvania.— Thorne *v.* Travellers' Ins. Co., 80 Pa. St. 15, 21 Am. Rep. 89.

Tennessee.— State *v.* Phœnix F. Ins. Co., 92 Tenn. 420, 21 S. W. 893; Mutual F. Ins. Co. *v.* House, 89 Tenn. 438, 14 S. W. 927.

Vermont.— Granite State Mut. Aid Assoc. *v.* Porter, 58 Vt. 581, 3 Atl. 545.

West Virginia.— Virginia Acc. Ins. Co. *v.* Dawson, 53 W. Va. 619, 46 S. E. 51.

Canada.— Palmer *v.* Ocean Mar. Ins. Co., 29 N. Brunsw. 501; Allison *v.* Robinson, 15 N. Brunsw. 103; Glasgow, etc., Ins. Co. *v.* Lord, 34 L. C. Jur. 142; Cie de Nav. du Richelieu *v.* Phœnix Ins. Co., 2 Montreal Super. Ct. 192.

See 28 Cent. Dig. tit. "Insurance," § 18 *et seq.*

Domestication of foreign company.— Compliance with the conditions, however, does not make the foreign company a domestic company. Clark *v.* Mutual Reserve Fund Life Assoc., 14 App. Cas. (D. C.) 154, 43 L. R. A. 390.

90. Lycoming Ins. Co. *v.* Wright, 60 Vt. 515, 12 Atl. 103.

91. People *v.* New York Fidelity, etc., Ins. Co., 153 Ill. 25, 38 N. E. 752, 26 L. R. A. 295.

92. U. S. Fidelity, etc., Co. *v.* Linehan, 70 N. H. 395, 47 Atl. 611.

93. American Ins. Co. *v.* Pettijohn, 62 Ind. 382. Under a statute requiring payment of a fee before the issuance of a license it was

tions imposed by statute are complied with, the foreign company is entitled to a license to do business and may enforce the issuance of such license by the state officers as a right,[94] unless as is the case in some jurisdictions the state officer is given a discretion in the issuance of a certificate, in which case his action cannot be controlled.[95] The license when issued authorizes the company to do only such business in the state as it is authorized to do under the statute.[96] The state only may contest the right of a company to have a license.[97] And no one can question the right of a company to do business without a license, unless he shows special damage.[98]

b. Revocation. By statutes in the several states authority has been conferred upon some state officer to revoke the license of a foreign insurance company authorizing it to transact business in the state, and the right to revoke includes the right to refuse to issue or renew the license.[99] An officer may refuse to issue or revoke such licenses for any cause prescribed by statute, such as a refusal to pay taxes,[1] or fees,[2] and even for the non-payment of fees for past years, the collection of which are barred by limitations,[3] or for the violation of an agreement

held that the payment of the fee was a jurisdictional requirement and a certificate issued without such payment was a nullity, although the money was afterward paid into the state treasury. Hartford F. Ins. Co. *v.* State, 9 Kan. 210.

Time of payment.— A statute requiring payment of an annual license-fee in the month of January of each year is directory only and the license may be issued at any time during the year on payment of the tax. Georgia Home Ins. Co. *v.* Boykin, 137 Ala. 350, 34 So. 1012. And see American Ins. Co. *v.* Pettijohn, 62 Ind. 382.

Evidence of issuance.— Parol evidence is admissible to prove that a license had been issued by the secretary of state to a foreign insurance company to do insurance business, when the loss of the license was shown, and there was no law requiring it, or the fact that it had been issued, to be recorded. Lycoming F. Ins. Co. *v.* Wright, 60 Vt. 515, 12 Atl. 103.

94. State *v.* Fidelity, etc., Ins. Co., 39 Minn. 538, 41 N. W. 108; State *v.* Vorys, 69 Ohio St. 56, 68 N. E. 580; Continental Ins. Co. *v.* Riggen, 31 Oreg. 336, 48 Pac. 476; Bankers' L. Ins. Co. *v.* Howland, 73 Vt. 1, 48 Atl. 435, 57 L. R. A. 374. Thus the commissioner cannot refuse a license to a company complying with statutory requirements on the ground that he regards it as unsafe for a company to do two kinds of business. U. S. Fidelity, etc., Co. *v.* Linehan, (N. H. 1904) 58 Atl. 956.

See, generally, on the right of a foreign corporation to compel issuance of license FOREIGN CORPORATIONS, 19 Cyc. 1287.

License-tax.— Under a statute requiring foreign companies to pay a percentage of gross premiums the state officers are not authorized to collect such tax by suit, the payment of the tax being a condition merely of the right to do business in the state. Manchester F. Ins. Co. *v.* Herriott, 91 Fed. 711.

Failure to pay fees already due.— In view of Wis. Rev. St. § 1955, requiring the insurance commissioner to revoke the license of a foreign accident insurance company for failure to comply with the laws applicable to it, mandamus will not lie to compel him to issue a license to such a company which has failed to pay the annual fees for past years required by Wis. Rev. St. (1878) § 1220, although limitations would preclude a recovery of such fees. State *v.* Fricke, 102 Wis. 107, 77 N. W. 732, 78 N. W. 455.

95. Dwelling-House Ins. Co. *v.* Wilder, 40 Kan. 561, 20 Pac. 265; Matter of Hartford L., etc., Ins. Co., 63 How. Pr. (N. Y.) 54; State *v.* Carey, 2 N. D. 36, 49 N. W. 164. Unless he has acted in wilful disregard of his duty. State *v.* Benton, 25 Nebr. 834, 41 N. W. 793.

96. State *v.* Union Cent. L. Ins. Co., 8 Ida. 240, 67 Pac. 647; Employers' Liability Assur. Corp. *v.* Merrill, 155 Mass. 404, 29 N. E. 529; State *v.* Fricke, 102 Wis. 107, 77 N. W. 107, 78 N. W. 455.

No presumption of the insolvency of a foreign corporation arises from the fact that it has not been authorized to do business in the state. Jones *v.* Horn, 104 Mo. App. 705, 78 S. W. 638.

97. Wisconsin I. O. of F. *v.* Insurance Com'rs, 98 Wis. 94, 73 N. W. 326.

Under statutes of Illinois the superintendent of insurance may maintain a bill in equity to restrain a foreign company from doing business in the state on the ground that it has not complied with statutory requirements. North American Ins. Co. *v.* Yates, 214 Ill. 272, 73 N. E. 423.

98. Employers' Liability Assur. Corp. *v.* Employers' Liability Ins. Co., 78 Hun (N. Y.) 446, 29 N. Y. Suppl. 217.

99. State *v.* Matthews, 58 Ohio St. 1, 49 N. E. 1034, 40 L. R. A. 418.

1. State *v.* Matthews, 58 Ohio St. 1, 49 N. E. 1034, 40 L. R. A. 418. But a license cannot be revoked for refusal to pay an invalid tax. Liverpool, etc., Ins. Co. *v.* Clunie, 88 Fed. 160.

2. State *v.* Fricke, 102 Wis. 107, 77 N. W. 732, 78 N. W. 455 [*following* Travelers' Ins. Co. *v.* Fricke, 99 Wis. 367, 74 N. W. 372, 78 N. W. 407, 41 L. R. A. 557, 94 Wis. 258, 68 N. W. 958].

3. State *v.* Fricke, 102 Wis. 107, 77 N. W.

not to remove a case from a state to a federal court, made as a condition precedent to doing business in the state,[4] or for violation of a statute prohibiting combinations between insurance companies.[5] While the officer in refusing to issue or in revoking a license acts ministerially, and not judicially,[6] and ordinarily the exercise of the discretion vested in him will not be reviewed,[7] he cannot exercise such authority except for causes specifically prescribed by the statute. Hence in the absence of statutory authority he cannot revoke a license for refusal to pay a loss which is contested in good faith,[8] for failure to pay a judgment from which an appeal has been taken,[9] for failing to use the prescribed form of policy,[10] for the issuance of a class of insurance authorized by the laws of the home state and not expressly prohibited by the local law,[11] or for becoming a member of an illegal combination.[12] But if the company is doing business in a manner prohibited by statute, a revocation of its license on that account will not be relieved against, although the revocation is made without statutory authority.[13]

3. Supervision; Reports.[14] Foreign companies may be required to publish statements of their affairs,[15] and to make reports to the state superintendent.[16]

D. Regulation of Agents and Brokers[17] — **1. License-Tax on Agents or Brokers.** Statutes requiring insurance brokers to obtain licenses are a proper exercise of the police power;[18] and an agent or broker who transacts business in violation of a statute requiring a license cannot recover compensation for such business.[19] One employed by a single company to represent it in soliciting applications for insurance and writing policies is not an insurance broker within

732, 78 N. W. 455 [*following* Travelers' Ins. Co. *v.* Fricke, 99 Wis. 367, 74 N. W. 372, 78 N. W. 407, 41 L. R. A. 557, 94 Wis. 258, 68 N. W. 958].

4. State *v.* Doyle, 40 Wis. 175, 24 Am. St. Rep. 692; Doyle *v.* Continental Ins. Co., 94 U. S. 535, 24 L. ed. 148. A statute imposing such condition was held valid and the agreement binding in the following cases: Home Ins. Co. *v.* Davis, 29 Mich. 238; People *v.* Judge Jackson Cir. Ct., 21 Mich. 577, 4 Am. Rep. 500; Morse *v.* Home Ins. Co., 30 Wis. 496, 11 Am. Rep. 580. On appeal to the United States supreme court the last case was reversed and the statute declared violative of the federal constitution and the agreement void. 20 Wall. (U. S.) 445, 22 L. ed. 365. But in State *v.* Doyle, 40 Wis. 175, 22 Am. Rep. 692, the Wisconsin court limited the decision in Home Ins. Co. *v.* Morse, *supra*, reiterated its declaration of the constitutionality of the statute and mandamused the secretary of state to revoke a license for the violation of the agreement. Thereafter the United States supreme court, standing by its decision that the statute was unconstitutional, announced the doctrine that the state could revoke the license of an insurance company, with or without a cause, and neither the cause nor motive was the subject of judicial inquiry, and refusing to enjoin the revocation of the license. Doyle *v.* Continental Ins. Co., 94 U. S. 535, 24 L. ed. 148. In Barron *v.* Burnside, 121 U. S. 186, 7 S. Ct. 931, 30 L. ed. 915, a similar Iowa statute was declared unconstitutional and Doyle *v.* Continental Ins. Co., *supra*, was limited. And see, generally, on this subject Foreign Corporations, 19 Cyc. 1259.

5. Hartford F. Ins. Co. *v.* Raymond, 70 Mich. 485, 38 N. W. 474.

6. American Ins. Co. *v.* Stoy, 41 Mich. 385, 1 N. W. 877; State *v.* Doyle, 40 Wis. 175, 22 Am. Rep. 692.

7. Dwelling-House Ins. Co. *v.* Wilder, 40 Kan. 561, 20 Pac. 265; Hartford F. Ins. Co. *v.* Raymond, 70 Mich. 485, 38 N. W. 474; American Ins. Co. *v.* Stoy, 41 Mich. 385, 1 N. W. 877; State *v.* Carey, 2 N. D. 36, 49 N. W. 164; Liverpool, etc., Ins. Co. *v.* Clunie, 88 Fed. 160. But see Metropolitan L. Ins. Co. *v.* McNall, 81 Fed. 888.

By Massachusetts statutes of 1890, c. 304, the right is given to appeal from the ruling of the insurance commissioner. Employers' Liability Assur. Corp. *v.* Merrill, 155 Mass. 404, 29 N. E. 529.

8. Metropolitan L. Ins. Co. *v.* McNall, 81 Fed. 888.

9. State *v.* Spooner, 47 Wis. 438, 24 N. W. 555.

10. People *v.* State Insurance Com'rs, 25 Mich. 321.

11. Employers' Liability Assur. Corp. *v.* Merrill, 155 Mass. 404, 29 N. E. 529; Equitable L. Assur. Co. *v.* Host, 124 Wis. 657, 102 N. W. 579.

12. Liverpool, etc., Ins. Co. *v.* Clunie, 88 Fed. 160.

13. People *v.* State Insurance Com'rs, 25 Mich. 321.

14. See, generally, Foreign Corporations, 19 Cyc. 1258.

15. Washington County Mut. Ins. Co. *v.* Dawes, 6 Gray (Mass.) 376.

16. State *v.* Reinmund, 45 Ohio St. 214, 13 N. E. 30.

17. Further as to agents and brokers see *infra*, V.

18. Com. *v.* Roswell, 173 Mass. 119, 53 N. E. 132.

19. Black *v.* Security Mut. L. Assoc., 95 Me. 35, 49 Atl. 51, 54 L. R. A. 939; Pratt *v.* Burdon, 168 Mass. 596, 47 N. E. 419.

statutory provisions for the licensing of such brokers.[20] But under a statutory provision for a license-tax on each agent of a company transacting business in the state, the tax may be enforced as against each such agent.[21]

2. REQUIREMENT AS TO PROCURING CERTIFICATE. It is sometimes required that any agent doing business in the state shall have a certificate or license under state authority, for the transaction of such business.[22] Statutes also sometimes provide for revocation by public authority of the certificate of license of an agent.[23] Where the agent fails to procure such certificate or license, as is required, the policy issued by him is not rendered invalid,[24] nor is his failure to comply with the statute any defense to him or his bondsman in an action brought against him by his company.[25]

3. PROVISIONS AS TO PERSONAL LIABILITY OF AGENT.[26] It is sometimes provided that an agent acting for a foreign company, which has not complied with statutory regulations so as to be entitled to do business in the state, shall be personally liable on risks written in such unlicensed company.[27] Ordinarily this liability arises only where the agent acts for a company which has not complied with the

20. Bernheimer *v.* Leadville, 14 Colo. 518, 24 Pac. 332; East St. Louis *v.* Brenner, 59 Ill. App. 604.

One furnishing agents' names of persons desiring insurance for the purpose of aiding such agents to effect insurance, for the consideration of a stipulated share in the commission, is a broker. Pratt *v.* Burdon, 168 Mass. 596, 47 N. E. 419.

An agent for soliciting and placing insurance is not a person conducting an insurance business under a statutory provision imposing a license-fee. State *v.* Woods, 40 La. Ann. 175, 3 So. 543.

Amount payable.— A broker may be required to pay a specified amount with each company with which he does business. Wilcox *v.* Atlanta, 103 Ga. 320, 30 S. E. 40.

Insurance on property outside of state.— The requirement as to broker's license is applicable to the negotiation within the state of insurance on property outside of the state. Com. *v.* Roswell, 173 Mass. 119, 53 N. E. 132.

21. Taylor *v.* Ashby, 3 Mont. 248; New York Fire Dept. *v.* Stanton, 28 N. Y. App. Div. 334, 51 N. Y. Suppl. 242; Co-operative F. Ins. Order *v.* Lewis, 12 Lea (Tenn.) 136.

22. See cases cited *infra*, this note.

Application of statutes.— These statutes have been held applicable to branch offices of foreign companies, and not to mere transient or traveling agents to solicit applications to be sent to the company. Thornton *v.* Western Reserve Farmers' Ins. Co., 1 Grant (Pa.) 472. The statutes prohibiting any agent of a company incorporated by any other state from doing business without filing a certificate of authority has been held applicable to a company incorporated in the District of Columbia. State *v.* Briggs, 116 Ind. 55, 18 N. E. 395. Statutes of this character apply to agents of mutual companies. General Mut. Ins. Co. *v.* Phillips, 13 Gray (Mass.) 90. The statutes do not apply to an attorney for an applicant to a foreign company. People *v.* Imlay, 20 Barb. (N. Y.) 68. Nor to a foreign company doing business in the state without any authorized agent. New Orleans *v.* Rhenish Westphalian Lloyds, 31 La. Ann. 781. They have also been held applicable only to incorporated companies. State *v.* Campbell, 17 Ind. App. 442, 46 N. E. 944. A single act of examining property in the state with a view to its insurance has been held not to come within the provisions of a statute requiring a license of the agents of foreign insurance companies. Jackson *v.* State, 50 Ala. 141.

Limiting duration of agency.— A requirement that an agent of a foreign insurance company shall procure an annual license to do business in the state has been held not to limit his agency to one year. Scottish Commercial Ins. Co. *v.* Plummer, 70 Me. 540.

Requiring bond.— It may be provided by statute that one who acts as agent of a foreign company must give bond for an accounting as to the payment of a tax on premiums. Troy Fire Dept. *v.* Bacon, 2 Abb. Dec. (N. Y.) 127, 3 Keyes 402, 2 Transcr. App. 222.

Effect on law of principal and agent.— Such statutory provisions as to agents do not change the rules of law as to principal and agent between the company and the policyholder. Barry, etc., Lumber Co. *v.* Citizens' Ins. Co., 136 Mich. 42, 98 N. W. 761; United Firemen's Ins. Co. *v.* Thomas, 92 Fed. 127, 34 C. C. A. 240, 47 L. R. A. 450.

23. Maxwell *v.* Church, 62 Kan. 487, 63 Pac. 738; Vorys *v.* State, 67 Ohio St. 15, 65 N. E. 150.

24. Lamb *v.* Bowser, 14 Fed. Cas. No. 8,009, 7 Biss. 372.

25. Washington County Ins. Co. *v.* Colton, 26 Conn. 42; Manhattan Ins. Co. *v.* Ellis, 32 Ohio St. 388; U. S. Life Ins. Co. *v.* Adams, 28 Fed. Cas. No. 16,792, 7 Biss. 30. But see to the contrary Mutual Ben. L. Ins. Co. *v.* Bales, 92 Pa. St. 352.

26. For personal liability of agents of non-complying foreign corporations generally see FOREIGN CORPORATIONS, 19 Cyc. 1311 *et seq.*

27. Noble *v.* Mitchell, 100 Ala. 519, 14 So. 581, 25 L. R. A. 238; Webster *v.* Ferguson, 94 Minn. 86, 102 N. W. 213; Lauck *v.* Myers, 5 Pa. Dist. 377; Price *v.* Garvin, (Tex. Civ. App. 1902) 69 S. W. 985.

law.[28] The liability is statutory and not upon the policy,[29] and the conditions of the policy as to proofs of loss are not applicable in an action against the agent.[30]

4. Penalties For Not Complying With Requirements — a. Punishment by Penalty or Criminally. It is competent for the state to provide a punishment for acting as agent for a foreign insurance company which has not complied with the statutory regulations under which the company is authorized to do business,[31] and the state may likewise punish the agent for engaging in the insurance business without himself complying with the statutory provisions as to procuring a license.[32] In a prosecution for the violation of such a provision it is immaterial whether the company has a license to do business in the state.[33] And on the other hand if the offense charged is acting for an unlicensed company, the want of the requisite certificate on the part of the agent is immaterial.[34] If the charge is of acting as agent of a company organized under the laws of another state, without having secured the agent's license required by statute, it must appear that the company for which the agent acted was incorporated under the laws of some other state.[35] The agent may also be punished for violation of statutory provisions prohibiting discriminations in insurance.[36] An indictment for an offense against a statute prohibiting any person from acting as agent of an insurance company, without first obtaining a license, must positively aver that defendant

What agents liable.— Such a statute regulation imposes personal liability not only on the general agent of the company but also upon any person who acts for the company in the particular transaction. McBride *v.* Rinard, 172 Pa. St. 542, 33 Atl. 750.

The agent may be personally liable for conspiracy to defraud the insured, by inducing him to enter into a contract of insurance with an unauthorized company. Price *v.* Garvin, (Tex. Civ. App. 1902) 69 S. W. 985.

28. Hudson *v.* Compere, 94 Tex. 449, 61 S. W. 389. But without specific statutory provision the agent may be liable to the insured for inducing him to take insurance in an insolvent foreign company which has not complied with the law so as to entitle it to do business in the state. Hartman *v.* Hollowell, 126 Iowa 643, 102 N. W. 524.

29. Adler-Weinberger Steamship Co. *v.* Rothschild Steamship Co., 130 Fed. 866 [*reversing* 123 Fed. 145], holding that a provision of the policy limiting the time for bringing action thereon has no application to an action against the agent.

30. Noble *v.* Mitchell, 100 Ala. 519, 14 So. 581, 25 L. R. A. 238; McBride *v.* Rinard, 172 Pa. St. 542, 33 Atl. 750.

31. *Illinois.*— Pierce *v.* People, 106 Ill. 11, 46 Am. Rep. 683.

Massachusetts.— Com. *v.* Nutting, 175 Mass. 154, 55 N. E. 895, 78 Am. St. Rep. 483.

Mississippi.— Moses *v.* State, 65 Miss. 56, 3 So. 140.

Missouri.— Farmington *v.* Rutherford, 94 Mo. App. 328, 68 S. W. 83; State *v.* New York L. Ins. Co., 10 Mo. App. 580; State *v.* Charter Oak L. Ins. Co., 9 Mo. App. 364.

New Jersey.— Hickman *v.* State, 62 N. J. L. 499, 41 Atl. 942 [*affirmed* in 63 N. J. L. 666, 44 Atl. 1099]; Fay *v.* Brewster, 45 N. J. L. 432.

United States.— Hooper *v.* California, 155 U. S. 648, 15 S. Ct. 207, 39 L. ed. 297.

See 28 Cent. Dig. tit. "Insurance," § 34.

Situs of contract as affecting liability.— The agent may be liable to such penalty for acting within the state as agent of an unauthorized company, whether the contract of insurance is made in the state or elsewhere. Pierce *v.* People, 106 Ill. 11, 46 Am. Rep. 683.

Liability of insured.— The state cannot punish an individual for insuring his own property in a company not licensed to do business in the state. Com. *v.* Biddle, 139 Pa. St. 605, 21 Atl. 134, 11 L. R. A. 561. *A fortiori* such a prohibition cannot apply to a contract made outside of the state between a resident of the state and a foreign company. Allgeyer *v.* Louisiana, 165 U. S. 578, 17 S. Ct. 427, 41 L. ed. 832.

32. *Kentucky.*— Sims *v.* Com., 114 Ky. 827, 71 S. W. 929, 24 Ky. L. Rep. 1591.

Missouri.— State *v.* Matthews, 44 Mo. 523; State *v.* Phelan, 66 Mo. App. 548.

North Dakota.— State *v.* Hogan, 8 N. D. 301, 78 N. W. 1051, 73 Am. St. Rep. 759, 45 L. R. A. 166.

Texas.— Eichlitz *v.* State, 39 Tex. Cr. 486, 46 S. W. 643.

Canada.— Reg. *v.* Stapleton, 21 Ont. 679.

See 28 Cent. Dig. tit. "Insurance," § 35.

33. State *v.* Johnson, 43 Minn. 350, 45 N. W. 711.

34. Indiana Millers' Mut. F. Ins. Co. *v.* People, 65 Ill. App. 355.

35. Fort *v.* State, 92 Ga. 8, 18 S. E. 14, 23 L. R. A. 86; People *v.* Fesler, 145 Ill. 150, 34 N. E. 146; State *v.* Campbell, 17 Ind. App. 442, 46 N. E. 944; Com. *v.* Reinoehl, 163 Pa. St. 287, 29 Atl. 896, 25 L. R. A. 247.

36. Metropolitan L. Ins. Co. *v.* People, 209 Ill. 42, 70 N. E. 643 [*affirming* 106 Ill. App. 516]; People *v.* Formosa, 131 N. Y. 478, 30 N. E. 492, 27 Am. St. Rep. 612 [*affirming* 61 Hun 272, 16 N. Y. Suppl. 753]. But under a statute prohibiting discriminations it was held that the offense was not consummated

acted as agent for an insurance company,[37] and the name of the person from whom an application was solicited or obtained.[38] Where the statute forbids an insurer to discriminate between insurants of the same class, and requires the terms of insurance to be set out in the policy, an indictment charging the granting of a rebate must aver that it was not stipulated for in the policy.[39]

b. Who Are Deemed Agents Within Prohibition. The provision as to acting as agent without compliance with the statutory requirements is usually applicable to the soliciting as well as the issuance of policies of insurance,[40] and a stipulation by the company that the person thus soliciting insurance shall be deemed the agent of the insured cannot affect his liability to the statutory penalty.[41] Indeed under some statutes it is immaterial whether or not the person prosecuted for soliciting insurance or engaged in the transaction of the business is an agent.[42] To adjust a loss within the state does not constitute the offense of acting as agent without complying with statutory requirements.[43] But an agent designated as an inspector, who after inspection of the property forwards applications to a foreign company, is acting as an agent.[44] So an agent in another state addressing communications to residents of the state, with reference to effecting insurance, is doing business within the state in violation of the statute.[45] And it has been held that to notify a foreign company of facts which constitute insurance within the state is the effecting of insurance within the state under a statutory prohibition.[46]

IV. INSURANCE COMPANIES.

A. Stock Companies — 1. ORGANIZATION. Specific requirements as to the formation of a stock company, such as that its articles shall state the capital actually subscribed which shall be of a specified amount, must be complied with in order that the company shall come into existence,[47] and the articles must be filed as provided by statute.[48] For the purpose of ascertaining whether a com-

until the issuance of the policy. Com. *v.* Morningstar, 2 Pa. Dist. 41, 12 Pa. Co. Ct. 34.

37. State *v.* Hosmer, 81 Me. 506, 17 Atl. 578, 81 Me. 510, 17 Atl. 579; Brown *v.* State, 26 Tex. App. 540, 10 S. W. 112; Slaughter *v.* Com., 13 Gratt. (Va.) 767. An averment that the principal "was engaged in the transaction of insurance business" is sufficient. State *v.* Phelan, 66 Mo. App. 548.

38. State *v.* Hosmer, 81 Me. 506, 17 Atl. 578; State *v.* Hover, 58 Vt. 496, 4 Atl. 226.

39. State *v.* Schwarzchild, 83 Me. 261, 22 Atl. 164.

40. *Illinois.*— People *v.* People's Ins. Exch., 126 Ill. 466, 18 N. E. 774, 2 L. R. A. 340.

Kentucky.— Com. *v.* Gaither, 107 Ky. 572, 54 S. W. 956, 21 Ky. L. Rep. 1284.

Michigan.— People *v.* Howard, 50 Mich. 239, 15 N. W. 101.

Minnesota.— State *v.* Beardsley, 88 Minn. 20, 92 N. W. 472.

Wisconsin.— State *v.* Farmer, 49 Wis. 459, 5 N. W. 892.

See 28 Cent. Dig. tit. "Insurance," §§ 34, 35.

41. Pierce *v.* People, 106 Ill. 11, 46 Am. Rep. 683; Hooper *v.* California, 155 U. S. 648, 15 S. Ct. 207, 39 L. ed. 297.

42. People *v.* People's Ins. Exch., 126 Ill. 466, 18 N. E. 774, 2 L. R. A. 340; Smith *v.* State, 18 Tex. App. 69. But merely to solicit a company not authorized to do business in the state, to consent to the assignment of an existing policy, is not a violation of statute. Ottawa First Nat. Bank *v.* Renn, 63 Kan. 334, 65 Pac. 698.

43. People *v.* Gilbert, 44 Hun (N. Y.) 522; Com. *v.* Hammer, 11 Pa. Super. Ct. 138. And even a statutory prohibition of acting as agent for an unlicensed company in adjusting a loss within the state does not apply to the act of the company in sending into the state a professional adjuster to ascertain the amount of the loss preparatory to an adjustment in a foreign state. French *v.* People, 6 Colo. App. 311, 40 Pac. 463.

44. List *v.* Com., 118 Pa. St. 322, 12 Atl. 277. But one who inspects a risk already taken is not liable to the punishment prescribed for acting as agent in the making of contracts of insurance. *Ex p.* Robinson, 86 Ala. 622, 5 So. 827.

45. Com. *v.* Long, 1 Pa. Co. Ct. 190.

46. State *v.* Allgeyer, 48 La. Ann. 104, 18 So. 904.

47. People *v.* Flint, 64 Cal. 49, 28 Pac. 495.

48. Johns *v.* People, 25 Mich. 499.

The executing and filing of the articles do not complete the incorporation, but it is essential that the required stock has been subscribed and paid in, and the directors chosen. State *v.* Fidelity, etc., Ins. Co., 49 Ohio St. 440, 31 N. E. 658, 34 Am. St. Rep. 573, 16 L. R. A. 611. But the fact that a subscriber has not paid for his stock in cash, but by transfer of securities, does not

pany has complied with the conditions of the statute relative to its organization, an examination under state authority may be provided for.[49]

2. ARTICLES AND BY-LAWS. The charter of a company may be modified under legislative authority, and its business subsequent to such modification, if authorized, is to be conducted according to the modified charter.[50] So the directors may be authorized to establish by-laws, and such authority may be exercised under statutory provisions, although not given in the articles of incorporation.[51]

3. STOCK SUBSCRIPTIONS AND NOTES. The capital stock of an insurance company is not the primary fund for the payment of losses accruing upon property insured, and is only to be resorted to when the premiums received and the other income of the company are found to be insufficient.[52] But the capital stock and the notes representing subscriptions to such stock constitute a trust fund for the benefit of creditors, and the subscribers to the stock cannot be relieved from their liability by the action of the company's officers in fraud of the interest of such creditors.[53] Where the secretary, acting as trustee for the company, although in his own name, subscribed for stock after the requisite amount of stock required by the statute had been subscribed, and his act was subsequently recognized and ratified by the company as done for it, it was held that his estate could not be held individually liable on his subscription.[54]

4. LIABILITY OF STOCK-HOLDERS. Where by statute stock-holders in insurance companies are made individually liable beyond the amount of their stock subscriptions, the claims of policy-holders as well as other creditors are debts toward the payment of which the stock-holders may be required to contribute under such statutory liability.[55] Such liability does not arise on contract but by way of statutory penalty.[56] But the action to enforce such liability may be brought in

affect the validity of the incorporation of the company. Com. *v.* Manufacturers' Mut. F. Ins. Co., 11 Phila. (Pa.) 550.

Name.— A statute providing that a company shall not be organized under a name or title which at the time of its organization had been used to designate a company already existing under the laws of the state does not prohibit a life company from adopting a name previously used by a fire company. Commercial Union Assur. Co. *v.* Smith, 2 N. Y. Suppl. 296.

49. *In re* World's Safe Ins. Co., 40 Barb. (N. Y.) 499; Hart *v.* Achilles, 28 Barb. (N. Y.) 576; American Exch. F. Ins. Co. *v.* Britton, 8 Bosw. (N. Y.) 148.

50. Drake *v.* Amicable Soc., 4 L. T. Rep. N. S. 439.

51. Houdeck *v.* Merchants', etc., Ins. Co., 102 Iowa 303, 71 N. W. 354.

52. De Peyster *v.* American F. Ins. Co., 6 Paige (N. Y.) 486.

Surplus fund from profits.— It is the duty of the directors of an insurance company to retain out of the profits a surplus fund in addition to the capital stock sufficient to meet the probable losses. Scott *v.* Eagle F. Ins. Co., 7 Paige (N. Y.) 198.

53. Burnham *v.* Northwestern Ins. Co., 36 Iowa 632; Regener *v.* Phillips, 26 Misc. (N. Y.) 311, 56 N. Y. Suppl. 174; Com. *v.* Manufacturers' Mut. F. Ins. Co., 11 Phila. (Pa.) 550; Jenkins *v.* Armour, 13 Fed. Cas. No. 7,260, 6 Biss. 312.

A subscriber to the capital stock after the formation of the company cannot avoid liability on his subscription on the ground that he was not required to pay cash, inasmuch as the company was already in existence and might make its own contract as to the method of payment of stock subscriptions. Com. *v.* Manufacturers' Mut. F. Ins. Co., 11 Phila. (Pa.) 550. So a stock subscriber who has received the benefit of a subscription in the form of a policy of insurance cannot afterward deny the legal existence of the company for the purpose of avoiding payment of his note. Raegener *v.* McDougall, 33 N. Y. App. Div. 231, 53 N. Y. St. Rep. 234].

54. Russell *v.* Bristol, 49 Conn. 251.

55. McDonnell *v.* Alabama Gold L. Ins. Co., 85 Ala. 401, 5 So. 120; Metcalf *v.* Miller, 107 Fed. 223, 46 C. C. A. 248.

The appointment of a receiver does not diminish the individual liability of the stock-holder for the debts of the company. Arenz *v.* Weir, 89 Ill. 25.

The holder of a tontine policy under the provision of which he is entitled to share in reserve funds and surplus is not a stock-holder. Pierce *v.* Equitable Assur. Soc., 145 Mass. 56, 12 N. E. 858, 1 Am. St. Rep. 433.

Member a stock-holder.— Under a statute providing that an insurance company may sue or be sued by any of its members or stock-holders, the word "members" is synonymous with "stock-holders." People *v.* Security L. Ins., etc., Co., 78 N. Y. 114, 34 Am. Rep. 522, 7 Abb. N. Cas. 198.

56. Gridley *v.* Barnes, 103 Ill. 211; Junker *v.* Kuhnen, 18 Ill. App. 478; Davis *v.* Stewart, 26 Ohio St. 643; Halket *v.* Merchant Traders' Ship., etc., Assoc., 13 Q. B. 960, 14 Jur. 222, 19 L. J. Q. B. 59, 66 E. C. L. 960.

the name of the creditor.[57] There may also be an individual liability of stockholders for debts of the company contracted before it is authorized to transact business.[58]

5. DEPOSIT AND INVESTMENT OF FUNDS — a. General Funds. For the purpose of protecting policy-holders it is usual for the state to specifically provide how the funds of insurance companies shall be invested.[59] And after completion of organization and the making of the required investment or deposit of funds, a company may lawfully transact business.[60] Such investment is not engaging in the banking business.[61] Without regard to statutory provisions as to the method in which funds may be invested, the corporation has the implied power to collect debts due it by purchasing bills of exchange or other obligations,[62] and it may thus for the purpose of securing payment of a doubtful debt subscribe for stock in a bank, although such subscription is not under the conditions authorized by statute as to investment of funds.[63] It cannot, however, buy up the notes of one who has insured, for the purpose of using them as a set-off against liability on the policy.[64]

b. Special Funds. An insurance company, although not required by statute to make a deposit as security for payment of policies, may make such deposit with a state officer and it becomes a trust fund not subject to the claims of general creditors until the policy-holders have been satisfied.[65] So by contract with a class of policy-holders, a portion of the premiums paid on their policies may be set aside in trust for the payment of losses under such policies.[66] Where the obligation of the company is to create a reserve fund, surplus assets which are to be considered as part of such reserve fund are capital and not income.[67]

c. Guaranty Obligations. Guaranty notes may be taken by the company for

57. Gulliver *v.* Baird, 9 Ill. App. 421.

58. Gulliver *v.* Roelle, 100 Ill. 141; Arenz *v.* Weir, 89 Ill. 25; Shufeldt *v.* Carver, 8 Ill. App. 545.

59. *Indiana.*— Daly *v.* National L. Ins. Co., 64 Ind. 1.

Kansas.— Life Assoc. of America *v.* Cook, 20 Kan. 19.

Missouri.—St. Joseph F. & M. Ins. Co. *v.* Hauck, 63 Mo. 112.

New York.— Home Ins. Co. *v.* Head, 30 Hun 405; Beekman F. Ins. Co. *v.* New York First M. E. Church, 29 Barb. 658, 18 How. Pr. 431; Mann *v.* Eckford, 15 Wend. 502; Utica Ins. Co. *v.* Cadwell, 3 Wend. 296; Farmers L. & T. Co. *v.* Perry, 3 Sandf. Ch. 339.

Ohio.— Washington Nat. Bank *v.* Continental L. Ins. Co., 41 Ohio St. 1.

See 28 Cent. Dig. tit. "Insurance," § 44.

Investment in stock of other corporations. — The directors of a company having power to invest its funds in the stock of other corporations may exercise such power to the extent of acquiring a controlling interest in such a corporation, if the act is in good faith as an investment of funds and not as a scheme to pervert the funds of the company to an unauthorized purpose; but the statutory provisions as to investments in corporate stocks and securities usually limit such investments to stocks in companies which are already incorporated and established, and do not authorize the subscription to stock in a company which is being formed. Robotham *v.* Prudential Ins. Co., 64 N. J. Eq. 673, 53 Atl. 842.

60. Blinn *v.* Riggs, 110 Ill. App. 37 [*affirmed* in 208 Ill. 473, 70 N. E. 704, 100 Am. St. Rep. 234].

61. Life Assoc. of America *v.* Levy, 33 La. Ann. 1203.

62. White's Bank *v.* Toledo F. & M. Ins. Co., 12 Ohio St. 601.

63. Fidelity Ins. Co. *v.* German Sav. Bank, 127 Iowa 591, 103 N. W. 958.

64. Kansas Ins. Co. *v.* Craft, 18 Kan. 283; Straus *v.* Eagle Ins. Co., 5 Ohio St. 59.

65. American Casualty Ins. Co.'s Case, 82 Md. 535, 34 Atl. 778, 38 L. R. A. 97.

Plan of distribution.— Under term, life, and endowment policies, on the reserve dividend plan, the obligation assumed is to distribute at the end of the last period the fund accumulated to the surviving holders of policies in force, deducting costs and expenses chargeable to these policies and providing for continuing insurance on the policies thus remaining in force. Fuller *v.* Metropolitan L. Ins. Co., 70 Conn. 647, 41 Atl. 4. Further as to endowment and tontine policies see *infra*, IV, A, 8, b.

In an action to compel transfer of funds policy-holders need not be made parties. Lancashire Ins. Co. *v.* Maxwell, 5 N. Y. Suppl. 399.

66. Babcock Printing Press Mfg. Co. *v.* Ranous, 164 N. Y. 440, 58 N. E. 529 [*affirming* 31 N. Y. App. Div. 629, 54 N. Y. Suppl. 1048]. But where the company retains control over the funds thus set apart, no enforceable trust in favor of the policy-holders is established. Pierson *v.* Drexel, 11 Abb. N. Cas. (N. Y.) 150.

67. Nicholson *v.* Nicholson, 30 L. J. Ch. 617, 9 Wkly. Rep. 676.

the security of policy-holders, which shall not be liable to seizure for the benefit of general creditors,[68] and such guaranty will remain valid, although the company changes its manner of doing business and decreases the cash assets.[69] A bond given by the company to indemnify policy-holders, although made payable to the state, may be sued on by the beneficiary of a policy covered by such bond.[70]

6. Powers — a. Contracts of Insurance. The capacity of the company to make contracts of insurance depends upon the scope of power which it has under its charter and legislation regulating its business, and it cannot transact any other kind of insurance business or take any other kind of risks than that authorized.[71] Under a charter for transacting the insurance business in one locality, a company cannot be established for the transaction of business in another locality.[72] But the company is not to be presumed to be limited in its powers of contracting to the state within which it is organized.[73]

b. Other Contracts. As to other contracts than those strictly of insurance the company has only such powers as are expressly or impliedly given to it. Thus in the absence of express power it cannot loan or borrow money or discount notes;[74] but in the general conduct of its authorized business and as incident thereto, it may take, hold, and transfer negotiable paper.[75] It cannot engage in the banking business,[76] nor conduct the business of a building and loan association,[77] nor purchase shares in another corporation,[78] nor engage in

68. McIntosh *v.* Merchants', etc., Ins. Co., 9 La. Ann. 403, 12 La. Ann. 533.

69. Osgood *v.* Toole, 60 N. Y. 475 [*affirming* 1 Hun 167, 3 Thomps. & C. 701].

70. Union Guaranty, etc., Co. *v.* Robinson, 79 Fed. 420, 24 C. C. A. 650.

71. People *v.* Van Cleave, 187 Ill. 125, 58 N. E. 422; Rochester Ins. Co. *v.* Martin, 13 Minn. 59; State *v.* Pioneer Live Stock Co., 38 Ohio St. 347; *In re* Norwich Provident Ins. Soc., 8 Ch. D. 334, 47 L. J. Ch. 601, 38 L. T. Rep. N. S. 267, 26 Wkly. Rep. 441; *Re* Phœnix L. Assur. Co., 2 Johns. & H. 441, 31 L. J. Ch. 749, 10 Wkly. Rep. 816.

Policy against damage already accrued.— It is *ultra vires* for an insurance company to issue a policy against loss or damage which to its knowledge has already taken place. Henshaw *v.* New York Ins. Co., 36 Misc. (N. Y.) 405, 73 N. Y. Suppl. 1.

When defense of ultra vires inadmissible.— It has been said that a fire company insuring against loss from hail cannot set up the offense of *ultra vires* when sued for the loss, after having received a premium for such insurance. Denver F. Ins. Co. *v.* McClelland, 9 Colo. 11, 9 Pac. 771, 59 Am. Rep. 134.

72. Wonderly *v.* Booth, 36 N. J. L. 250.

73. Eureka Ins. Co. *v.* Parks, 1 Cinc. Super. Ct. 574.

74. Ætna Nat. Bank *v.* Charter Oak L. Ins. Co., 50 Conn. 167; New York Firemen Ins. Co. *v.* Bennett, 5 Conn. 574, 13 Am. Dec. 109; New York Firemen Ins. Co. *v.* Ely, 5 Conn. 560, 13 Am. Dec. 100; Fulton Bank *v.* Benedict, 1 Hall (N. Y.) 529; North River Ins. Co. *v.* Lawrence, 3 Wend. (N. Y.) 482; New York Firemen Ins. Co. *v.* Ely, 2 Cow. (N. Y.) 678; Straus *v.* Eagle Ins. Co., 5 Ohio St. 59; Ohio L. Ins., etc., Co. *v.* Merchants' Ins., etc., Co., 11 Humphr. (Tenn.) 1, 53 Am. Dec. 742. But see Furniss *v.* Gilchrist, 1 Sandf. (N. Y.) 53; New York Firemen Ins. Co. *v.* Sturges, 2 Cow. (N. Y.) 664.

75. McIntire *v.* Preston, 10 Ill. 48, 48 Am. Dec. 321; Alexander *v.* Rollins, 14 Mo. App. 109 [*affirmed* in 84 Mo. 657]; Barker *v.* Mechanics' F. Ins. Co., 3 Wend. (N. Y.) 94, 20 Am. Dec. 664; Clowes *v.* Farmers' L. & T. Co., 8 N. Y. Leg. Obs. 249; Alexander *v.* Horner, 1 Fed. Cas. No. 169, 1 McCrary 634. But a loan in violation of a statute prohibiting loans on policies of more than the reserve value thereof is void, and the indebtedness thus attempted to be created as against the policy-holder cannot be set up as a defense to an action on the policy. Hoover *v.* Union Cent. L. Ins. Co., 6 S. & C. Pl. Dec. 432, 7 Ohio N. P. 369.

76. Blair *v.* Perpetual Ins. Co., 10 Mo. 559, 47 Am. Dec. 129; People *v.* Utica Ins. Co., 15 Johns. (N. Y.) 358, 8 Am. Dec. 243; Memphis *v.* Memphis City Bank, 91 Tenn. 574, 19 S. W. 1045.

Defense of ultra vires.— An insurance company dealing in exchanges in excess of its power was held not entitled to interpose its want of authority as a defense in an action growing out of such a transaction, the other party having no knowledge that the specific act was not one properly incident to its general business. Ohio L. Ins., etc., Co. *v.* Merchants' Ins., etc., Co., 11 Humphr. (Tenn.) 1, 53 Am. Dec. 742.

77. Huter *v.* Union Trust Co., (Ind. 1898) 51 N. E. 1071.

78. Robotham *v.* Prudential Ins. Co., 64 N. J. Eq. 673, 53 Atl. 842; Gilbert *v.* Finch, 72 N. Y. App. Div. 38, 76 N. Y. Suppl. 143; Berry *v.* Yates, 24 Barb. (N. Y.) 199.

Limitations of rule.— It may acquire shares in another corporation, although the investment is not such as is authorized with reference to investment of funds, if the acquisition of such shares is incident to the general transaction of its business for the pur-

the business of conveyancing. Such an act is an usurpation on the commonwealth.[79]

7. Officers and Directors — a. Powers. Notwithstanding specific provisions in the articles or by-laws of the company as to how contracts of insurance can be made, it has been held that an officer, such as a secretary or manager, may bind the company by an oral agreement with reference to insurance.[80] He does not, however, bind the company nor himself by an attempt to contract insurance which is clearly outside of his authority as manager.[81] Nor does he render the company liable by acting as agent of an applicant to secure insurance in another company.[82] So a secretary procuring policies from other companies covering a part of a risk has no power to guarantee the solvency of such other companies.[83] The directors have the general authority to determine the liability of the company and obligate it to pay the amount thus determined, but such power is in the nature of a personal trust which cannot be delegated.[84]

b. Liability of Officers to Company. Directors or other officers may render themselves liable to the company in violating their duty to it in the management of its business.[85]

c. Liability to Third Persons. The officers or directors of a company may become personally liable to persons who are injured by reason of their fraudulent acts in representing the company to be solvent or entitled to do business, such representations being made with knowledge of their falsity.[86] Officers may also be subjected to a statutory penalty for their unlawful acts.[87] And by the terms of the contract the directors may be rendered personally liable to the insured.[88]

pose of securing itself from loss. Fidelity Ins. Co. *v.* German Sav. Bank, 127 Iowa 591, 103 N. W. 958.

79. Gauler *v.* Solicitors' L. & T. Co., 9 Pa. Co. Ct. 634. But a corporation engaged in the business of insuring titles to real estate may bind itself by representations in regard to the title to land insured under one of its policies. Nash *v.* Minnesota Title Ins., etc., Co., 159 Mass. 437, 34 N. E. 625.

80. Emery *v.* Boston Mar. Ins. Co., 138 Mass. 398. And see Fire Insurance. III D

81. Hornbro *v.* Hull, etc., F. Ins. Co., 3 H. & N. 789, 28 L. J. Exch. 62; Montreal Assur. Co. *v.* McGillivray, 13 Moore P. C. 87, 8 Wkly. Rep. 165, 15 Eng. Reprint 33.

82. Hutchinson *v.* State Inv., etc., Co., 53 Cal. 622.

83. Constant *v.* Allegheny Ins. Co., 6 Fed. Cas. No. 3,136, 3 Wall. Jr. 313.

84. Hurlbut *v.* Carter, 21 Barb. (N. Y.) 221. Within the general scope of their powers the directors may exercise a discretion, and acts within the scope of such discretion are binding on the company. Manby *v.* Gresham L. Assur. Soc., 29 Beav. 439, 7 Jur. N. S. 383, 31 L. J. Ch. 94, 4 L. T. Rep. N. S. 397, 9 Wkly. Rep. 547, 54 Eng. Reprint 697; Taunton *v.* Royal Ins. Co., 2 Hem. & M. 135, 10 Jur. N. S. 291, 33 L. J. Ch. 406, 10 L. T. Rep. N. S. 156, 12 Wkly. Rep. 549; *In re* Joint-Stock Co's Winding-Up Acts, 4 Jur. N. S. 1140, 4 Kay & J. 549, 27 L. J. Ch. 829, 6 Wkly. Rep. 779. But an act outside of the scope of their power will not be upheld as an exercise of discretionary authority. Athenæum L. Assur. Soc. *v.* Pooley, 3 De G. & J. 294, 5 Jur. N. S. 129, 28 L. J. Ch. 119, 7 Wkly. Rep. 167, 60 Eng. Ch. 229, 44 Eng. Reprint 1281.

85. New Haven Trust Co. *v.* Doherty, 75 Conn. 555, 54 Atl. 209, 96 Am. St. Rep. 239, 74 Conn. 348, 353, 50 Atl. 887, 890; Kane *v.* Schuylkill F. Ins. Co., 199 Pa. St. 205, 48 Atl. 989; *Re* Dominion Provident Benev., etc., Assoc., 25 Ont. 619.

86. Salmon *v.* Richardson, 30 Conn. 360, 79 Am. Dec. 255; Warfield *v.* Clark, 118 Iowa 69, 91 N. W. 883; Belding *v.* Floyd, 17 Hun (N. Y.) 208; Scott *v.* Eagle Fire Co., 7 Paige (N. Y.) 198; Pontifex *v.* Bignold, 9 Dowl. P. C. 860, 10 L. J. C. P. 259, 3 M. & G. 63, 3 Scott N. R. 390, 42 E. C. L. 42. Thus the directors of a company authorized to do business in one locality only were held personally liable to one who was injured by the attempt to transact business where the company was not authorized to transact such business. Wonderly *v.* Booth, 36 N. J. L. 250.

Liability irrespective of good faith.—Directors paying out funds of the company for reinsurance after the company was insolvent were held to have transferred the effects of the company in contemplation of insolvency and to have thus rendered themselves liable to other policy-holders under statutory provisions, regardless of their good faith and want of knowledge of the insolvency of their company. Casserly *v.* Manners, 9 Hun (N. Y.) 695.

87. Gridley *v.* Barnes, 103 Ill. 211. But an action for such penalty can be maintained by a policy-holder only after first recovering a judgment against the company fixing the amount of the loss. Kinsley *v.* Rice, 10 Gray (Mass.) 325.

88. Andrews *v.* Ellison, 6 Moore C. P. 199, 17 E. C. L. 468. But see Alchorne *v.* Saville, 6 Moore C. P. 199 note, 17 E. C. L. 469.

8. Dividends; Distribution of Profits, or Surplus[89] — a. In General. Under the general rule applicable to all corporations that dividends to stock-holders cannot be declared out of the capital stock but only out of the profits or surplus, an insurance corporation cannot treat premiums received on unexpired risks or unearned premiums as profits or surplus subject to distribution, there being no independent fund aside from the capital stock out of which the liability of such policies may be met.[90] If by the charter or articles of the company, or by the terms of the policies issued, the company is to distribute profits by way of dividends to policy-holders, the discretion as to declaring such a dividend or the method in which it shall be applied rests with the company, and the policy-holder's right to a dividend cannot be asserted by an action in the courts.[91] The right to participate in a dividend cannot be limited to holders of policies which shall be continued in force by the payment of a future premium.[92] And where a dividend is declared on certain classes of policies, the officers or directors cannot afterward deprive the policy-holder of his right thereto.[93] An unpaid assessment on stock may be offset as against the right to a dividend.[94]

b. Endowment and Tontine Policies. It may be provided that dividends shall be declared after maturity of policies in which a period is fixed, at the end of which distribution of profits by way of dividends shall be made. Under such contracts the policy-holder is entitled to participate in profits realized by way of dividends apportioned to them by the officers or directors; but they have no right of action at law for their respective shares, being dependent upon the declaration of dividends made in pursuance of the plan fixed by the contract.[95]

89. See, generally, Corporations.

90. Lexington L., etc., Ins. Co. *v.* Page, 17 B. Mon. (Ky.) 412, 66 Am. Dec. 165; Scott *v.* Eagle Fire Ins. Co., 7 Paige (N. Y.) 198.

A guaranty fund raised by subscription of stock-holders and not to be resorted to until the resources of the company have been exhausted cannot be treated as an asset in determining whether there is a surplus from which a dividend may be declared. Russell *v.* Bristol, 49 Conn. 251.

The surplus of earnings accumulated in the operations of the stock department of a company run upon the stock and mutual principles belongs to the stock department, and in winding up the affairs of the company should be distributed among the shareholders of that department. Traders', etc., Ins. Co. *v.* Brown, 142 Mass. 403, 8 N. E. 134.

91. Eastman *v.* New York L. Ins. Co., 62 N. H. 1; Hudson *v.* Knickerbocker L. Ins. Co., 28 N. J. Eq. 167; Fisher *v.* Charter Oak L. Ins. Co., 52 N. Y. Super. Ct. 179 [*affirming* 14 Abb. N. Cas. 32]; Taylor *v.* Charter Oak L. Ins. Co., 9 Daly (N. Y.) 489; Equitable L. Assur. Soc. *v.* Host, 124 Wis. 657, 102 N. W. 579.

92. Mutual Ben. L. Ins. Co. *v.* Davis, 115 Ky. 404, 73 S. W. 1020, 24 Ky. L. Rep. 2291.

93. Heusser *v.* Continental L. Ins. Co., 20 Fed. 222.

94. Rhodes *v.* Equitable Acc. Ins. Co., 5 Ohio Cir. Ct. 501, 2 Ohio Cir. Dec. 288.

95. Romer *v.* Equitable L. Assur. Co., 102 Ill. App. 621; Greeff *v.* Equitable L. Assur. Soc., 24 Misc. (N. Y.) 96, 52 N. Y. Suppl. 503; Equitable L. Assur. Soc. *v.* Host, 124 Wis. 657, 102 N. W. 579; Fuller *v.* Knapp, 24 Fed. 100. An accounting for the profits cannot be had in an action brought by the policy-holder, but only in a general action on application of the attorney-general under the authority of the state. Greeff *v.* Equitable L. Assur. Soc., *supra*.

Under the endowment participating plan the policy-holder is bound by the discretion of the actuaries and directors exercised in good faith, and the divisible profits in which he is entitled to participate are profits which the officers of the company after taking reasonable and proper provision for its safety and prosperity divide among the policy-holders. Bain *v.* Ætna L. Ins. Co., 21 Ont. 233 [*affirming* 20 Ont. 6].

Under the reserve dividend plan the policy-holder is not entitled to participate in the management of the company or dictate the amount of the dividend to be declared, or question the result after the discretion of the officers or directors has been exercised. Fuller *v.* Knapp, 24 Fed. 100.

Operation of tontine plan.— The tontine plan contemplates a participation by the holders of policies remaining in force after a stated period, of the profits accruing from the lapse of policies of the same class, and in case of maturity of a policy by the death of the insured within the tontine period the beneficiary is entitled only to the insurance provided for by the policy and not to the participation in the profits. Romer *v.* Equitable L. Ins. Co., 102 Ill. App. 621; Pierce *v.* Equitable Assur. Soc., 145 Mass. 56, 12 N. E. 858, 1 Am. St. Rep. 433; Simons *v.* New York L. Ins. Co., 38 Hun (N. Y.) 309.

Distribution of surplus by mutual companies.— Under the Wisconsin statute (Rev. St. (1898) § 1952) providing for distribution of surplus by mutual companies a policy

9. Reorganization, Consolidation, and Transfer of Business. In the absence of express authority an insurance company cannot transfer its business, policy-holders, and assets to another company;[96] nor may a company without express authority take over or amalgamate with another.[97] When a transfer is illegally attempted a policy-holder may enjoin the act.[98] But after transfer a policy-holder cannot sue the retiring company on his policy for breach of the contract of insurance.[99] Where authority exists to take over another company it must be exercised in strict conformity with the law conferring it; otherwise the transfer is void and no right or liability accrues thereunder.[1] A lawful transfer of its business and assets by one company to another operates to bind policy-holders to the transferee company in the same manner as they were bound to the transferrer.[2] If the policy-holders, after notice of the transfer, acquiesce therein they cannot afterward look to the original company for payment of their policies but must rely upon the new company.[3] However, assent or acquiescence will not be presumed from the payment of premiums to,[4] or the taking of receipts therefor from, the new company,[5] even after receipt of an ambiguous circular giving notice of the transfer.[6] Nor will acceptance of annuities from the transferee operate to make a novation of the contract.[7] Where the policy-holder expressly refuses his assent he may still hold the company insuring him for the value of his policy.[8]

deferring distribution of surplus for more than five years is not invalid. Equitable L. Assur. Soc. *v.* Host, 124 Wis. 657, 102 N. W. 579.

96. Temperance Mut. Ben. Assoc. *v.* Home Friendly Soc., 187 Pa. St. 38, 40 Atl. 1100; *In re* Sovereign L. Assur. Co., 42 Ch. D. 540, 58 L. J. Ch. 811, 61 L. T. Rep. N. S. 455, 38 Wkly. Rep. 58.

In New York it was held that the power to reinsure or to discontinue business did not confer the right to turn over the policy-holders to another company without their consent; and not having given such consent they were entitled to claim the value of their policies out of the assets of the transferrer company. People *v.* Empire Mut. L. Ins. Co., 92 N. Y. 105.

97. Era Assur. Co., 2 Johns. & H. 400, 6 Jur. N. S. 1334, 30 L. J. Ch. 137, 30 L. T. Rep. N. S. 314, 9 Wkly. Rep. 67.

98. Kearns *v.* Leaf, 1 Hem. & M. 681, 10 L. T. Rep. N. S. 185, 12 Wkly. Rep. 462.

99. Rex *v.* Accumulative Life Fund, etc., Assur. Co., 3 C. B. N. S. 151, 2 Jur. N. S. 1264, 27 L. J. C. P. 57, 6 Wkly. Rep. 12, 91 E. C. L. 151.

1. *In re* European Soc. Arbitration Acts, 8 Ch. D. 679, 48 L. J. Ch. 18, 39 L. T. Rep. N. S. 136, 27 Wkly. Rep. 88.

2. Solvency Mut. Guarantee Co. *v.* York, 3 H. & N. 588, 27 L. J. Exch. 487.

3. Davitt *v.* National L. Assoc., 36 N. Y. App. Div. 632, 56 N. Y. Suppl. 839; *In re* National Provincial, etc., L. Assur. Soc., L. R. 6 Ch. 393, 19 Wkly. Rep. 663 [*affirming* 23 L. T. Rep. N. S. 770]; *In re* Medical, etc., L. Assur. Soc., L. R. 6 Ch. 362, 40 L. J. Ch. 455, 24 L. T. Rep. N. S. 455, 19 Wkly. Rep. 491; *In re* Anchor Assur. Co., L. R. 5 Ch. 632, 18 Wkly. Rep. 1183; *In re* Times L. Assur., etc., Co., L. R. 5 Ch. 381, 39 L. J. Ch. 527, 23 L. T. Rep. N. S. 181, 18 Wkly. Rep. 559; *In re* European Assur. Soc., 3 Ch. D. 391; *In re* European Assur. Soc., 3 Ch. D. 384, 46 L. J. Ch. 402, 35 L. T. Rep. N. S. 653; *In re* European Assur. Soc. Arbitration Acts, 3 Ch. D. 1, 45 L. J. Ch. 822, 35 L. T. Rep. N. S. 290; *In re* European Assur. Soc., 1 Ch. D. 326, 45 L. J. Ch. 332, 33 L. T. Rep. N. S. 760; *In re* European Assur. Soc., 1 Ch. D. 307, 45 L. J. Ch. 321, 33 L. T. Rep. N. S. 766; *In re* United Ports, etc., Ins. Co., L. R. 16 Eq. 354, 29 L. T. Rep. N. S. 22; *In re* Merchant's, etc., Assur. Soc., L. R. 9 Eq. 694, 22 L. T. Rep. N. S. 264, 18 Wkly. Rep. 725; *In re* International L. Assur. Soc., L. R. 9 Eq. 316, 39 L. J. Ch. 295, 22 L. T. Rep. N. S. 467, 18 Wkly. Rep. 370; *In re* National Provincial L. Assur. Soc., L. R. 9 Eq. 306, 39 L. J. Ch. 250, 22 L. T. Rep. N. S. 465, 18 Wkly. Rep. 398; *Re* Waterloo L., etc., Assur. Co., 33 Beav. 542, 55 Eng. Reprint 479.

Conditions of new policy controlling.— An insurance company which offers to issue, free of charge, to the policy-holders of an insolvent company, its own policies for the period for which premiums have been paid in the old company, is bound, on acceptance of its offer, only by the stipulations in its own substituted policy, and not by those in the original policy of the insolvent company. Brown *v.* U. S. Casualty Co., 88 Fed. 38.

4. Reese *v.* Smyth, 95 N. Y. 645.

5. *In re* Manchester, etc., L. Assur., etc., Assoc., L. R. 5 Ch. 640, 23 L. T. Rep. N. S. 332, 8 Wkly. Rep. 1185 [*affirming* L. R. 9 Eq. 643, 39 L. J. Ch. 595].

6. *In re* European Assur. Soc. Arbitration Acts, 1 Ch. D. 334, 45 L. J. Ch. 336, 33 L. T. Rep. N. S. 762.

7. *In re* India, etc., L. Assur. Co., L. R. 7 Ch. 651, 41 L. J. Ch. 601, 27 L. T. Rep. N. S. 191, 20 Wkly. Rep. 790; *In re* Family Endowment Soc., L. R. 5 Ch. 118, 39 L. J. Ch. 306, 21 L. T. Rep. N. S. 775, 18 Wkly. Rep. 266.

8. *In re* Medical, etc., L. Assur. Soc., L. R. 6 Ch. 374, 40 L. J. Ch. 464, 24 L. T. Rep. N. S. 455, 19 Wkly. Rep. 491.

Where the statute provides for the sanction of a court to be given to the transfer after notice to the policy-holders, such sanction will not be given until the notices are actually issued, although the policy-holders may consent thereto.[9] But such notices may be issued after filing the petition and before the hearing thereof,[10] and the court's sanction may be given, notwithstanding less than one tenth of the policy-holders could not have received the notices in time to give their consent or express their dissent on the hearing.[11] If the transferee company guarantees the performance of the contracts of the transferrer company the latter is entitled to look to the aggregate assets of both companies in the hands of the former for the satisfaction of demands against it, although the transfer may have been *ultra vires*;[12] and if its contract was guaranteed by a third party, the guaranty may be enforced against him.[13] In the absence of fraud a transfer by one company to another of a part of its policy-holders, and a corresponding portion of its assets, will not be avoided at the instance of the receiver of the transferrer company.[14]

10. Insolvency and Dissolution — a. Determination of Question of Solvency. Solvency of an insurance company means that its assets shall at least equal its liabilities, whether matured or not;[15] and the rule for determining its solvency is generally fixed by statute.[16] In determining the solvency of a company, it is improper to consider its unavailable or uncollected assets or dues,[17] or its good-will,[18] or securities or property purchased but not paid for.[19]

b. Effect of Insolvency in General. The insolvency of an insurance company constitutes a breach of contract on its part,[20] and on dissolution of the company claims of policy-holders are debts due *in præsenti*.[21] On a decree dissolving the company and appointing a receiver to wind up its affairs, the policies of the company are canceled and losses thereafter accruing are not recoverable;[22] but it has been held that the cancellation of policies does not result from an

9. *In re* Briton L. Assoc., 56 L. J. Ch. 988, 35 Wkly. Rep. 803.

10. *In re* Briton L. Assoc., 56 L. J. Ch. 988, 35 Wkly. Rep. 803.

11. *Re* London, etc., Ins. Corp., 42 L. T. Rep. N. S. 247, 28 Wkly. Rep. 565.

12. Anglo-Australian L. Assur. Co. *v.* British Provident L., etc., Soc., 3 Giff. 521, 8 Jur. N. S. 299, 6 L. T. Rep. N. S. 68.

13. Mason *v.* Cronk, 125 N. Y. 496, 28 N. E. 224.

14. Alexander *v.* Williams, 14 Mo. App. 13.

15. Chicago L. Ins. Co. *v.* Auditor Public Accounts, 101 Ill. 82.

16. See the statutes of the various states.

17. State *v.* Equitable Indemnity Assoc., 18 Wash. 514, 52 Pac. 234.

18. Chicago L. Ins. Co. *v.* Auditor Public Accounts, 101 Ill. 82.

19. Chicago L. Ins. Co. *v.* Auditor Public Accounts, 101 Ill. 82.

20. People *v.* Security L. Ins., etc., Co., 78 N. Y. 114, 34 Am. Rep. 522, 7 Abb. N. Cas. 198.

The fact that the company was insolvent when the policy was issued does not render the contract void in the absence of fraud. Clark *v.* Middleton, 19 Mo. 53; Ewing *v.* Coffman, 12 Lea (Tenn.) 79.

A policy-holder entering into a contract of reinsurance with another company on learning of the insolvency of his company may lose his remedy under his original policy. Ewing *v.* Coffman, 12 Lea (Tenn.) 79.

21. McDonnell *v.* Alabama Gold L. Ins. Co., 85 Ala. 401, 5 So. 120; People *v.* Security L. Ins., etc., Co., 78 N. Y. 114, 34 Am. Rep. 522, 7 Abb. N. Cas. 198; Com. *v.* American L. Ins. Co., 162 Pa. St. 586, 29 Atl. 660, 707, 42 Am. St. Rep. 844.

22. American Casualty Ins. Co.'s Case, 82 Md. 535, 34 Atl. 778, 38 L. R. A. 97; Relfe *v.* Commercial Ins. Co., 10 Mo. App. 393; Dean's Appeal, 98 Pa. St. 101; *In re* Albert L. Assur. Co., L. R. 9 Eq. 703, 39 L. J. Ch. 257, 22 L. T. Rep. N. S. 92, 18 Wkly. Rep. 426. *Contra*, Insurance Commissioner *v.* People's F. Ins. Co., 68 N. H. 51, 44 Atl. 82, holding that the appointment of a receiver for a stock insurance company does not affect legal contracts of the company previously made. Both parties to a policy retain the right given thereby to terminate the contract, and losses occurring while policies are outstanding are provable against the company. And *compare In re* Northern Counties of England F. Ins. Co., 17 Ch. D. 337, 50 L. J. Ch. 273, 44 L. T. Rep. N. S. 299, in which it is said that in a proceeding to wind up a company under the English statutes, a claim accruing by reason of a loss under the policy between the institution of the proceedings and the winding up order is thus provable.

Assignment for creditors.— It has been held that a policy is terminated when a company assigns for the benefit of creditors. Smith *v.* National Credit Ins. Co., 65 Minn. 283, 68 N. W. 28, 33 L. R. A. 511.

assignment by the company for the benefit of creditors, nor from the institution of proceedings against the company by the superintendent of insurance.[23] As to any losses accruing under the policy before insolvency the company is liable, although the amount of the loss has not been ascertained or paid.[24] A company cannot recover premiums for the portion of the term of insurance after insolvency has taken place.[25] Nor can it maintain an action against an agent for the recovery of premiums received by him, the consideration for which has thus failed.[26] The insolvency of the company being a breach of its contract as to an existing policy-holder, the latter is entitled to recover the portion of the premium paid which is unearned at the time of the insolvency,[27] and this is so even though there is no provision for refunding premiums paid.[28] The interest of policy-holders in the assets of an insurance company cannot be enlarged by any event occurring after the institution of proceedings to have it declared insolvent;[29] or the date of the order of dissolution;[30] or the date on which the insolvency occurred as determined by the decree of dissolution.[31]

c. Dissolution — (i) *Grounds For Dissolution and Constitutionality of Statutes Providing Therefor.*[32] An insurance company is subject to dissolution where it becomes insolvent,[33] or ceases for the time designated by statute to

23. Relfe *v.* Commercial Ins. Co., 10 Mo. App. 393.

24. American Casualty Co.'s Case, 82 Md. 535, 34 Atl. 778, 38 L. R. A. 97; Gray *v.* Reynolds, 55 N. J. Eq. 501, 37 Atl. 461. An assignment for the benefit of creditors is a breach of the contract as to the policy-holder who becomes entitled to recover damages by way of *quantum meruit* without making proof of loss as required by the policy. Smith *v.* National Credit Ins. Co., 65 Minn. 283, 68 N. W. 28, 33 L. R. A. 511.

25. Farmers', etc., Ins. Co. *v.* Smith, 63 Ill. 187; Bostick *v.* Maxey, 5 Sneed (Tenn.) 173.

26. Smith *v.* Binder, 75 Ill. 492.

27. American Casualty Ins. Co.'s Case, 82 Md. 535, 34 Atl. 778, 38 L. R. A. 97; Smith *v.* National Credit Ins. Co., 65 Minn. 283, 68 N. W. 28, 33 L. R. A. 511; Dean's Appeal, 98 Pa. St. 101. On this claim for return of unearned premium the policy-holder is to be paid *pro rata* with other creditors of the insolvent company. Fogerty *v.* Philadelphia Trust, etc., Co., 75 Pa. St. 125.

The policy-holder is not entitled to rescind the entire contract on the insolvency of the company and recover back the whole premium, but he can recover only the unearned premium. Smith *v.* National Credit Ins. Co., 65 Minn. 283, 68 N. W. 28, 33 L. R. A. 511.

Computation of value.— The value of the unearned premium is to be computed from the time demand is made for such return. Relfe *v.* Commercial Ins. Co., 10 Mo. App. 393.

28. People *v.* Security L. Ins., etc., Co., 78 N. Y. 114, 34 Am. Rep. 522, 7 Abb. N. Cas. 198.

29. Atty.-Gen. *v.* Equitable Acc. Assoc., 175 Mass. 196, 55 N. E. 890; Williams *v.* United Reserve Fund Assoc., 166 Mass. 450, 44 N. E. 342; Fogg *v.* Supreme Lodge U. O. of G. L., 159 Mass. 9, 33 N. E. 692; Burdon *v.* Massachusetts Safety Fund Assoc., 147 Mass. 360, 17 N. E. 874, 1 L. R. A. 146; People *v.* Commercial Alliance L. Ins. Co., 154 N. Y. 95, 47 N. E. 968 [*affirming* 17 N. Y. App. Div. 376, 45 N. Y. Suppl. 223, and in effect *overruling* Atty.-Gen. *v.* Continental L. Ins. Co., 88 N. Y. 77 (*reversing* 64 How. Pr. 73); Atty.-Gen. *v.* Guardian Mut. L. Ins. Co., 82 N. Y. 336; People *v.* Security L. Ins., etc., Co., 78 N. Y. 114, 34 Am. Rep. 522 (*affirming* 23 Hun 601); People *v.* Knickerbocker L. Ins. Co., 40 Hun (N. Y.) 44); People *v.* Knickerbocker L. Ins. Co., 34 Hun (N. Y.) 476]; People *v.* Life, etc., Assoc., 150 N. Y. 94, 45 N. E. 8; *In re* Equitable Reserve Fund Life Assoc., 131 N. Y. 354, 30 N. E. 114; People *v.* Mercantile Credit Guaranty Co., 35 Misc. (N. Y.) 755, 72 N. Y. Suppl. 373; *In re* Great Britain Mut. L. Assur. Soc., 20 Ch. D. 551, 51 L. J. Ch. 506, 46 L. T. Rep. N. S. 73, 616, 37 Reports 374; Evans *v.* Coventry, 8 De G. M. & G. 835, 3 Jur. N. S. 1225, 26 L. J. Ch. 400, 5 Wkly. Rep. 436, 57 Eng. Ch. 645, 44 Eng. Reprint 612.

30. *In re* Educational Endowment Assoc., 56 Minn. 171, 57 N. W. 463; Com. *v.* American L. Ins. Co., 162 Pa. St. 586, 29 Atl. 660, 707, 42 Am. St. Rep. 844; Dean's Appeal, 98 Pa. St. 101; Com. *v.* Niagara Mut. F. Ins. Co., 6 Pa. Dist. 666; Carr *v.* Hamilton, 129 U. S. 252, 9 S. Ct. 295, 32 L. ed. 669.

31. Mayer *v.* Atty.-Gen., 32 N. J. Eq. 815.

32. See, generally, Insolvency; Constitutional Law.

33. *California.*— State Inv., etc., Co. *v.* San Francisco Super. Ct., 101 Cal. 135, 35 Pac. 549.

Illinois.— Chicago L. Ins. Co. *v.* Auditor of Public Accounts, 101 Ill. 82.

Maryland.— Monumental Mut. L. Ins. Co. *v.* Wilkinson, 100 Md. 31, 59 Atl. 125.

New York.— Garrett *v.* Morton, 35 Misc. 10, 71 N. Y. Suppl. 17; Atty.-Gen. *v.* Continental L. Ins. Co., 53 How. Pr. 16.

Washington.— State *v.* Equitable Indemnity Assoc., 18 Wash. 514, 52 Pac. 234.

England.— *In re* Great Britain Mut. L. Assur. Soc., 16 Ch. D. 246, 51 L. J. Ch. 10, 43 L. T. Rep. N. S. 684, 29 Wkly. Rep. 202;

do business,[34] or is fraudulently conducting its business.[35] Statutes which provide for the dissolution of insurance companies under the circumstances named are not unconstitutional as impairing the obligation of contracts,[36] or as depriving the company of its property without due process of law;[37] and where it applies to all insurance companies, it is not invalid as class legislation.[38]

(II) *Proceedings to Compel Dissolution.* The statutory mode for the dissolution of an insurance company is exclusive, and must be pursued;[39] and when it confers upon a state officer the right to institute the proceedings a stockholder cannot take such action.[40] The legislature has the right to alter the remedy for the dissolution of insolvent insurance companies;[41] and where several modes are provided by different statutes, the officer may pursue any one of them.[42] Where a state officer is authorized to file a bill to enjoin the transaction of any future business, and to dissolve the company, he may file a cross bill for such purposes to a suit by the company seeking to enjoin him from declaring it not legally engaged in business.[43] The offer of an insurance company to reinsure its policy-holders is no defense to a suit to declare it insolvent and have it dissolved.[44] And an attempt by the directors of an insolvent insurance company to transfer its business and assets is void and will not prevent proceedings for dissolution.[45] Suits pending against a company are not affected by proceedings for its dissolution;[46] and a judgment obtained within the time allowed for the winding up of its business after dissolution is valid.[47]

d. Appointment of Receiver.[48] When the company becomes insolvent the stock-holders are usually entitled to have a receiver appointed to wind up its affairs,[49] and policy-holders may enforce the termination of their contracts and the payment of the present value of their policies.[50] Statutory provisions for dissolution of the company and discontinuing business when its capital or funds are impaired do not authorize the appointment of a receiver unless there is a condition of insolvency.[51]

In re European Assur. Co., 19 Wkly. Rep. 881. An unregistered company which becomes insolvent may be wound up (*In re* Bank of London, etc., Assoc., L. R. 6 Ch. 421, 40 L. J. Ch. 562, 19 Wkly. Rep. 484), but not on its own petition (*In re* Waterloo, etc., Assur. Co., 31 Beav. 586, 9 Jur. N. S. 291, 32 L. J. Ch. 370, 11 Wkly. Rep. 134, 54 Eng. Reprint 1266).

See 28 Cent. Dig. tit. "Insurance," § 54.

34. Yates *v.* Continental L. Ins. Co., 207 Ill. 512, 59 N. E. 779; Yates *v.* People, 207 Ill. 316, 69 N. E. 775; Treat *v.* Pennsylvania Mut. L. Ins. Co., 203 Pa. St. 21, 52 Atl. 60. But see Streit *v.* Citizens' F. Ins. Co., 29 N. J. Eq. 21.

35. Monumental Mut. L. Ins. Co. *v.* Wilkinson, 100 Md. 31, 59 Atl. 125.

36. Chicago L. Ins. Co. *v.* Auditor of Public Accounts, 101 Ill. 82.

37. Monumental Mut. L. Ins. Co. *v.* Wilkinson, 100 Md. 31, 59 Atl. 125.

38. Chicago L. Ins. Co. *v.* Auditor Public Accounts, 101 Ill. 82.

39. Garrett *v.* Morton, 35 Misc. (N. Y.) 10, 71 N. Y. Suppl. 17; Atty.-Gen. *v.* Continental L. Ins. Co., 53 How. Pr. (N. Y.) 16.

40. Atty.-Gen. *v.* Continental L. Lns. Co., 53 How. Pr. (N. Y.) 16.

41. Chicago L. Ins. Co. *v.* Auditor of Public Accounts, 101 Ill. 82.

42. Chicago L. Ins. Co. *v.* Auditor of Public Accounts, 101 Ill. 82.

43. Yates *v.* Continental L. Ins. Co., 207 Ill. 512, 59 N. E. 779.

44. Chicago L. Ins. Co. *v.* Auditor of Public Accounts, 101 Ill. 82.

45. Garrett *v.* Morton, 35 Misc. (N. Y.) 10, 71 N. Y. Suppl. 17. See also Monumental Mut. L. Ins. Co. *v.* Wilkinson, 100 Md. 31, 59 Atl. 125. But where authorized by statute, an insurance company, on becoming insolvent, may, like any other moneyed corporation, make a general assignment without preferences for the benefit of creditors. Hill *v.* Reed, 16 Barh. (N. Y.) 280.

46. Whritner *v.* Universal L. Ins. Co., 4 Abb. N. Cas. (N. Y.) 23.

47. Malicki *v.* Bulkley, 107 Ill. App. 595 [*affirmed* in 206 Ill. 249, 69 N. E. 87].

48. See, generally, Receivers.

49. Treat *v.* Pennsylvania Mut. L. Ins. Co., 203 Pa. St. 21, 52 Atl. 60. If there are grounds for proceedings to dissolve and appoint a receiver, the company cannot avoid such action by making a voluntary assignment or taking new risks, for it will be considered as still doing business within statutory provisions. Relfe *v.* Commercial Ins. Co., 5 Mo. App. 173 [*affirmed* in 75 Mo. 388].

50. Ingersoll *v.* Missouri Valley L. Ins. Co., 37 Fed. 530.

51. State Inv., etc., Co. *v.* San Francisco Super. Ct., 101 Cal. 135, 35 Pac. 549; Streit *v.* Citizens' F. Ins. Co., 29 N. J. Eq. 21; Bewley *v.* Equitable L. Assur. Soc., 61 How. Pr. (N. Y.) 344.

e. Powers of Receiver.[52] The receiver when appointed represents primarily the corporation, although he is the trustee for the policy-holders, and he may maintain an action against the directors to make good losses caused by their misconduct, although the policy-holder could have proceeded under such circumstances only in equity.[53] He is clothed with power to prosecute and defend suits for the company.[54] And may be authorized to compromise doubtful claims either in favor of or against the company.[55] He may claim possession of funds deposited with a public officer for the protection of policy-holders only so far as such funds are not necessary for that purpose.[56] But the court appointing a receiver acquires the right to distribute the securities of the company in payment of its debts, and that power does not remain with the state officer with whom the securities have been deposited.[57]

f. Proceedings by Receiver; Levy of Assessments. The proceedings of the receiver should be governed in general by the rules applicable to other receiverships in the case of insolvency.[58] Policy-holders may be allowed to appear and be made parties.[59] Creditors will be bound by the orders of the court in relation to the receiver's duties in winding up the company's affairs.[60] The receiver has authority to sue for assessments or premium notes.[61] It is not necessary to first determine the claims against the company and pass upon their validity before ordering an assessment.[62] The validity and amount of the assessment as fixed by the court in the proceeding in which the receiver is appointed cannot be questioned in the action on the assessment.[63]

g. Presentation and Payment of Claims and Distribution of Funds. When an insurance company has been dissolved and its assets have been placed in the hands of a receiver, creditors cannot maintain suits against it or its receiver; they must submit their claim to the tribunal charged with the distribution of its assets;[64] and where the evidence is conflicting, its decision, in the absence of

52. See, generally, RECEIVERS.

53. Mason *v.* Henry, 152 N. Y. 529, 46 N. E. 837; Gifford *v.* Clapp, 44 N. Y. App. Div. 192, 60 N. Y. Suppl. 856. The receiver represents the policy-holders, the creditors, and the shareholders. New Haven Trust Co. *v.* Doherty, 74 Conn. 353, 50 Atl. 887; Raymond *v.* Security Trust, etc., Co., 44 Misc. (N. Y.) 31, 89 N. Y. Suppl. 753.

54. Atty.-Gen. *v.* North America L. Ins. Co., 82 N. Y. 172; Pickersgill *v.* Myers, 99 Pa. St. 602.

It is no defense in an action by the receiver to recover assets belonging to the company, that he was appointed in a proceeding brought by the insurance commissioner instead of in the name of the state. Smith *v.* Hopkins, 10 Wash. 77, 38 Pac. 854.

55. Matter of Croton Ins. Co., 3 Barb. Ch. (N. Y.) 642. A compromise of claims against an insolvent life-insurance company in process of liquidation will not be made binding on the non-assenting creditors, unless the assenting creditors are of the class prescribed by the statute. *In re* Albert L. Assur. Co., L. R. 6 Ch. 381, 40 L. J. Ch. 505, 24 L. T. Rep. N. S. 768, 19 Wkly. Rep. 670.

56. Hayne *v.* Metropolitan Trust Co., 67 Minn. 245, 69 N. W. 916; Raymond *v.* Security Trust, etc., Ins. Co., 44 Misc. (N. Y.) 31, 89 N. Y. Suppl. 753; State *v.* Matthews, 64 Ohio St. 419, 60 N. E. 605.

57. Relfe *v.* Spear, 6 Mo. App. 129.

58. Com. *v.* Hide, etc., Ins. Co., 119 Mass. 155.

59. Atty.-Gen. *v.* North American L. Ins. Co., 77 N. Y. 297.

60. *Ex p.* Globe Ins. Co., 6 Paige (N. Y.) 102.

61. Walker *v.* Johnson, 17 App. Cas. (D. C.) 144; Dwinnell *v.* Felt, 90 Minn. 9, 95 N. W. 579; Meley *v.* Whitaker, 61 N. J. L. 602, 40 Atl. 593, 68 Am. St. Rep. 719 [*affirming* 61 N. J. L. 1, 38 Atl. 840]; Richards *v.* Hale, 24 Ohio Cir. Ct. 468.

62. Com. *v.* People's Mut. Live Stock Ins. Co., 22 Pa. Co. Ct. 257.

63. Moore *v.* Reifsnyder, 22 Pa. Super. Ct. 326; Snader *v.* Bomberger, 21 Pa. Super. Ct. 629.

Limitations.— Where the stock-holder has given a note which is to remain as security for losses and claims, the statute of limitations does not begin to run against an action to recover an assessment on such note until an assessment has been levied. Raegener *v.* Tynberg, 32 Misc. (N. Y.) 658, 66 N. Y. Suppl. 462.

In the absence of some provision in the policy or statute, a stock-holder is not liable at the suit of the receiver beyond the amount remaining unpaid upon his shares. Matter of Athenæum L. Assur. Soc., 3 De G. & J. 660, 5 Jur. N. S. 558, 28 L. J. Ch. 335, 7 Wkly. Rep. 300, 60 Eng. Ch. 511, 44 Eng. Reprint 1423.

64. *Ex p.* Globe Ins. Co., 6 Paige (N. Y.) 102; Com. *v.* Niagara Mut. F. Ins. Co., 6 Pa. Dist. 666.

Enjoining actions by policy-holders.— Ac-

error of law, is conclusive.[65] The value of the policy-holder's claim is to be determined by the mortality tables in general use,[66] and the state of his health is not to be considered.[67] He may demand the sum necessary to purchase a new similar policy in a solvent company at the same premium,[68] or the court may order the receiver to reinsure the policy-holder in another company;[69] and in so doing will prefer a domestic to a foreign company, even against the petition of the policy-holders.[70] Claims are payable only from the particular fund credited with the premiums paid by the policy-holders.[71] If no special funds are kept, all policies, whether mutual or stock, are payable ratably from the general assets.[72] When a company is dissolved, stipulations in its policies as to the time in which proofs of loss must be filed or suits brought are no longer of binding force.[73] But claims not presented within the time prescribed in a notice published by the receiver in accordance with statutory requirements are precluded from sharing in the assets,[74] and the receiver cannot enlarge the time fixed by the court for the filing of claims.[75] However, a claim for taxes due the state may be filed and enforced after the expiration of the time specified in the notice.[76]

h. Priority. In the absence of statute providing otherwise[77] claims of beneficiaries under policies which have matured prior to insolvency and dissolution have no preference over the claims of holders of unmatured policies.[78] When

tions by policy-holders against the receiver may be enjoined. Atty.-Gen. *v.* North American L. Ins. Co., 6 Abb. N. Cas. (N. Y.) 293.

65. Betts *v.* Connecticut L. Ins. Co., 76 Conn. 367, 56 Atl. 617.

66. McDonnell *v.* Alabama Gold L. Ins. Co., 85 Ala. 401, 5 So. 120; People *v.* Security L. Ins., etc., Co., 78 N. Y. 114, 34 Am. Rep. 522, 7 Abb. N. Cas. 198; *Re* Merchants' Life Assoc., 2 Ont. L. Rep. 682, 1 Ont. L. Rep. 256.

67. People *v.* Security L. Ins., etc., Co., 78 N. Y. 114, 34 Am. Rep. 522, 7 Abb. N. Cas. 198; Com. *v.* American L. Ins. Co., 162 Pa. St. 586, 29 Atl. 660, 707, 42 Am. St. Rep. 844.

68. Universal L. Ins. Co. *v.* Binford, 76 Va. 103; *In re* English Assur. Co., L. R. 14 Eq. 72, 42 L. J. Ch. 612, 26 L. T. Rep. N. S. 415, 20 Wkly. Rep. 567; *In re* Albert L. Assur. Co., L. R. 9 Eq. 706, 39 L. J. Ch. 539, 22 L. T. Rep. N. S. 697, 18 Wkly. Rep. 688; *In re* International L. Assur. Co., 39 L. J. Ch. 736, 18 Wkly. Rep. 1097; *Re* Merchants' Life Assoc., 1 Ont. L. Rep. 256, 2 Ont. L. Rep. 682.

69. Mooney *v.* British Commercial L. Ins. Co., 9 Abb. Pr. N. S. (N. Y.) 103. But see Matter of Croton Ins. Co., 3 Barb. Ch. (N. Y.) 642, where it was held that the receiver would not be authorized to reinsure, but might return unearned premium. See also Le Roy *v.* Globe Ins. Co., 2 Edw. (N. Y.) 657.

70. Mooney *v.* British Commercial L. Ins. Co., 9 Abb. Pr. N. S. (N. Y.) 103.

71. Fogg *v.* Supreme Lodge U. O. of G. L., 159 Mass. 9, 33 N. E. 692.

72. Com. *v.* American L. Ins. Co., 162 Pa. St. 586, 29 Atl. 660, 42 Am. St. Rep. 844.

73. Pennell *v.* Lamar Ins. Co., 73 Ill. 303; *In re* St. Paul German Ins. Co., 58 Minn. 163, 59 N. W. 996, 49 Am. St. Rep. 497, 26 L. R. A. 737; Com. *v.* Niagara Mut. F. Ins. Co., 6 Pa. Dist. 666.

74. People *v.* Security L. Ins., etc., Co., 78 N. Y. 114, 34 Am. Rep. 522, 7 Abb. N. Cas. 198.

75. Fogg *v.* Supreme Lodge U. O. of G. L., 159 Mass. 9, 33 N. E. 692.

76. *In re* Life Assoc. of America, 12 Mo. App. 40.

77. Relfe *v.* Columbia L. Ins. Co., 76 Mo. 594.

78. Relfe *v.* Columbia L. Ins. Co., 76 Mo. 594; People *v.* Security L. Ins., etc., Co., 78 N. Y. 114, 34 Am. Rep. 522, 7 Abb. N. Cas. 198; People *v.* Security L. Ins. Co., 71 N. Y. 222; *In re* Security L. Ins., etc., Co., 11 Hun (N. Y.) 96; Kitchen *v.* Conklin, 51 How. Pr. (N. Y.) 308; De Peyster *v.* American F. Ins. Co., 6 Paige (N. Y.) 486; Lowne *v.* American F. Ins. Co., 6 Paige (N. Y.) 482; Com. *v.* American L. Ins. Co., 170 Pa. St. 170, 32 Atl. 405; *In re* International L. Assur. Soc., L. R. 5 Ch. 424, 23 L. T. Rep. N. S. 38, 18 Wkly. Rep. 794; Matter of Joint-Stock Co.'s Winding-Up Acts, 1 De G. J. & S. 634, 1 Hem. & M. 457, 33 L. J. Ch. 123, 2 New Rep. 565, 11 Wkly. Rep. 1011, 66 Eng. Ch. 493, 46 Eng. Reprint 251; *In re* English, etc., Church, etc., Assur. Soc., 1 Hem. & M. 85, 8 L. T. Rep. N. S. 724, 11 Wkly. Rep. 681. But by contract the policy-holders may be given priority over general creditors. *In re* Professional L. Assur. Co., L. R. 3 Ch. 167, 17 L. T. Rep. N. S. 631, 16 Wkly. Rep. 295; *Re* Athenæum L. Assur. Soc., 1 Johns. 633, 6 Jur. N. S. 12; *In re* British Imperial Ins. Corp., 47 L. J. Ch. 318; *In re* International L. Assur. Soc., 47 L. J. Ch. 88, 36 L. T. Rep. N. S. 914.

As to the relative liability of participating policy-holders and shareholders under the English statutes see Hallett *v.* Dowdall, 18 Q. B. 2, 16 Jur. 462, 21 L. J. Q. B. 98, 83 E. C. L. 2; *In re* Albion L. Assur. Soc., 18 Ch. D. 639, 50 L. J. Ch. 714, 45 L. T. Rep. N. S. 269, 30 Wkly. Rep. 30; *In re*

the corporation is dissolved all the policy-holders are creditors of the company, and are therefore entitled to share ratably in the assets of the company with those whose claims have matured.[79] Where a special fund is provided for the payment of losses, policy-holders have a priority over general creditors.[80] So far as the claims of policy-holders are not satisfied out of such fund, they become general creditors in regard to the assets of the company.[81] Under a statute providing that clerks, etc., are preferred creditors in the distribution of the property and estate of an insolvent corporation, the wages of clerks of an insolvent insurance company are a prior lien only on the general assets, and not on a special trust fund created for the benefit of the policy-holders.[82]

i. Rights of Set-Off. An accrued claim for a loss may be set off by the beneficiaries against a debt due from the assured to the company.[83] And a policy-holder who is entitled to reimbursement on the insolvency of the company may set off the equitable value of his policy as against the liability on a mortgage given to the company.[84] The receiver may offset amounts due upon notes given by policy-holders against the value of the policies and pay a dividend on the balance only.[85] Where a foreign insurance company makes an assignment in another state, such assignment having no extraterritorial effect, its agents in the state may take assignments of the claims of the policy-holders for unearned premiums, and set them off against their own liabilities to the company.[86]

j. Expenses of the Receivership. Attorney's claims for services in defending

Albion L. Assur. Soc., 16 Ch. D. 83, 43 L. T. Rep. N. S. 523, 29 Wkly. Rep. 109; *In re* Norwich Provident Ins. Soc., 8 Ch. D. 334, 47 L. J. Ch. 601, 38 L. T. Rep. N. S. 267, 26 Wkly. Rep. 441; *In re* European Assur. Soc., 3 Ch. D. 388, 46 L. J. Ch. 411, 35 L. T. Rep. N. S. 654, 25 Wkly. Rep. 279; *In re* Bank of London Assur. Assoc., L. R. 10 Eq. 622, 23 L. T. Rep. N. S. 350, 18 Wkly. Rep. 977; *Re* Norwich Equitable F. Assur. Soc., 58 L. T. Rep. N. S. 35.

A bill of exchange or check drawn in payment of a loss occurring before dissolution, but not against any particular fund, is not an assignment *pro tanto* of assets, and the payee is not entitled to any preference. Fogg *v.* Supreme Lodge U. O. of G. L., 159 Mass. 9, 33 N. E. 692; Com. *v.* American L. Ins. Co., 162 Pa. St. 586, 29 Atl. 660, 707, 42 Am. St. Rep. 844.

79. Relfe *v.* Columbia L. Ins. Co., 76 Mo. 594.

80. *California.*— San Francisco Sav. Union *v.* Long, (1898) 53 Pac. 907.

Maryland.— American Casualty Ins. Co.'s Case, 82 Md. 535, 34 Atl. 778, 38 L. R. A. 97.

Minnesota.— Smith *v.* National Credit Ins. Co., 78 Minn. 214, 80 N. W. 966.

New York.— People *v.* Security L. Ins. Co., 78 N. Y. 114, 34 Am. Rep. 522, 7 Abb. N. Cas. 198; People *v.* Family Fund Soc., 31 N. Y. App. Div. 166, 52 N. Y. Suppl. 867; Greeff *v.* Equitable L. Assur. Soc., 24 Misc. 96, 52 N. Y. Suppl. 503.

Wisconsin.— Hughes *v.* Hunner, 91 Wis. 116, 64 N. W. 887.

81. American Casualty Ins. Co.'s Case, 82 Md. 535, 34 Atl. 778, 38 L. R. A. 97; Reese *v.* Smyth, 95 N. Y. 645; Atty.-Gen. *v.* North American L. Ins. Co., 85 N. Y. 485; People *v.* Universal L. Ins. Co., 42 Hun (N. Y.) 616.

82. American Casualty Ins. Co.'s Case, 82 Md. 535, 34 Atl. 778, 38 L. R. A. 97, holding further that an adjuster employed on a salary, but whose employment is not continuous, is not included in the classes of clerks, servants, and employees whose wages shall be a preferred lien on the assets.

83. Com. *v.* Shoe, etc., Dealers' F. & M. Ins. Co., 112 Mass. 131; Osgood *v.* De Groot, 36 N. Y. 348; Holbrook *v.* American F. Ins. Co., 6 Paige (N. Y.) 220; Swords *v.* Blake, 3 Edw. (N. Y.) 112; Matter of Globe Ins. Co., 2 Edw. (N. Y.) 625; Carr *v.* Hamilton, 129 U. S. 252, 9 S. Ct. 295, 32 L. ed. 669; Drake *v.* Rollo, 7 Fed. Cas. No. 4,066, 3 Biss. 273; *In re* Progress Assur. Co., 39 L. J. Ch. 496, 22 L. T. Rep. N. S. 430, 18 Wkly. Rep. 722. But see Pardo *v.* Osgood, 2 Abb. Pr. N. S. (N. Y.) 365 [*reversing* 5 Rob. 348] (where company was insolvent); *In re* Albert L. Assur. Co., 40 L. J. Ch. 340, 24 L. T. Rep. N. S. 226, 19 Wkly. Rep. 615.

84. Carr *v.* Hamilton, 129 U. S. 252, 9 S. Ct. 295, 32 L. ed. 669; Scammon *v.* Kimball, 92 U. S. 362, 23 L. ed. 483. But it is said that in an action by the receiver to recover from a stock-holder dividends which have been improperly paid to such stock-holder, the latter cannot set off claims for return premiums and loss, as the receiver represents not the company but the creditors (Osgood *v.* Ogden, 3 Abb. Dec. (N. Y.) 425, 4 Keyes 70); and the same conclusion has been reached as to the obligation of the insured on his premium note with reference to setting off a claim on the company for a loss after insolvency (Pardo *v.* Osgood, 2 Abb. Pr. N. S. (N. Y.) 365).

85. People *v.* Security L. Ins., etc., Co., 78 N. Y. 114, 34 Am. Rep. 522, 7 Abb. N. Cas. 198; Com. *v.* American L. Ins. Co., 162 Pa. St. 586, 29 Atl. 660, 707, 42 Am. St. Rep. 844.

86. Franzen *v.* Hutchinson, 94 Iowa 95, 62 N. W. 698.

actions by policy-holders may be allowed and paid out of the receivership funds,[87] but the receivership is not chargeable with attorney's fees in a separate proceeding by a state officer to wind up the company.[88] A receiver appointed in a proceeding by a state officer to wind up the company is entitled to compensation out of the funds deposited with the state.[89]

B. Mutual Companies — 1. Nature. Mutual insurance companies are usually organized to insure their members on the assessment plan and without capital. The security of those having insurance in a mutual company is provided for by requiring that before engaging in business it have a certain number of members who have paid cash premiums or given premium notes, constituting a common fund out of which the member is entitled to indemnity in case of loss.[90] Such a company does not have stock-holders, but the term "stock-holder" may, under statutory provisions, be applicable as referring to a member of such company.[91] The form of the certificate does not determine whether or not the company is of the character described by the statute as a mutual company.[92] An association may be a mutual company within statutory provisions, although it is benevolent and not speculative in its purposes.[93] While a stock company is not usually permitted to do business on the assessment plan, yet a company organized under the laws of one state permitted to transact business both as a stock company and on the assessment plan, may be permitted in another state which prohibits the same company transacting business in both methods, to carry on the business on the assessment plan.[94] General statutory provisions as to insurance, such as a valued policy law, may be applicable to mutual companies.[95]

2. Authority to Do Business. Until the company has complied with the statutory requirements so as to be authorized to do business it cannot make valid and binding contracts.[96] But before full compliance with the requirement as to the

87. Ross *v.* American Employers' Liability Ins. Co., 56 N. J. Eq. 41, 38 Atl. 22; People *v.* Manhattan F. Ins. Co., 77 N. Y. App. Div. 517, 79 N. Y. Suppl. 11.

88. Relfe *v.* Life Assoc. of America, 9 Mo. App. 586; Atty.-Gen. *v.* Continental L. Ins. Co., 88 N. Y. 571 [*reversing* 62 How. Pr. 130].

89. People *v.* McCall, 94 N. Y. 587; Atty.-Gen. *v.* North American L. Ins. Co., 89 N. Y. 94 [*affirming* 26 Hun 294].

90. *California.*— Stevens *v.* Reeves, 138 Cal. 678, 72 Pac. 346.

Colorado.— Spruance *v.* Farmers', etc., Ins. Co., 9 Colo. 73, 10 Pac. 285.

Maryland.— International Fraternal Alliance *v.* State, 86 Md. 550, 39 Atl. 512, 40 L. R. A. 187.

Minnesota.— Taylor *v.* North Star Mut. Ins. Co., 46 Minn. 198, 48 N. W. 772.

Nebraska.— State *v.* Moore, 48 Nebr. 870, 67 N. W. 876.

New York.— Howland *v.* Edmonds, 24 N. Y. 307 [*reversing* 33 Barb. 433]; Caryl *v.* McElrath, 3 Sandf. 176.

See 28 Cent. Dig. tit. "Insurance," § 64.

91. Sugg *v.* Farmers' Mut. Ins. Assoc., (Tenn. Ch. App.) 63 S. W. 226.

92. State *v.* Northwestern Mut. Live-Stock Assoc., 16 Nebr. 549, 20 N. W. 852. And see McDonald *v.* Bankers' Life Assoc., 154 Mo. 618, 55 S. W. 999, holding that whether a foreign insurance company is or is not an assessment company is to be determined by the character of the policy issued, and not by the certificate of the superintendent of insurance, which fixes only the character of the business which the company is licensed to transact.

93. Bolton *v.* Bolton, 73 Me. 299.

94. State *v.* Matthews, 58 Ohio St. 1, 49 N. E. 1034, 40 L. R. A. 418.

95. Farmers' Mut. Ins. Co. *v.* Cole, 4 Nebr. (Unoff.) 130, 93 N. W. 730.

96. *Illinois.*— Gent *v.* Manufacturers', etc., Mut. Ins. Co., 107 Ill. 652 [*affirming* 13 Ill. App. 308].

New Hampshire.— Unity Ins. Co. *v.* Cram, 43 N. H. 636.

New York.—Williams *v.* Babcock, 25 Barb. 109.

North Dakota.— Montgomery *v.* Whitbeck, 12 N. D. 385, 96 N. W. 327.

South Carolina.— Farmers' Mut. F. Ins. Assoc. *v.* Bunch, 46 S. C. 550, 24 S. E. 503; Lagrone *v.* Timmerman, 46 S. C. 372, 24 S. E. 290.

See 28 Cent. Dig. tit. "Insurance," § 64.

Bond.— Under a statute providing for the organization and control of mutual life associations, the bond required is an official bond, the obligation of which does not extend beyond the official year for which it was given or the term of the officers giving it. Kaw Life Assoc. *v.* Lemke, 40 Kan. 661, 20 Pac. 512.

Filing copy of statement.— Under a statute requiring a coöperative company organized to do business in one county to extend its business into other counties by filing with the clerk of such county a duly certified copy of the statement filed by it in the office of the

amount of insurance to be subscribed, the company may issue certificates and receive cash premiums or premium notes, its engagements being regarded as in nature preliminary to its complete organization, and these engagements will be binding when its organization is completed.[97] A member cannot question the regularity of the organization of the company.[98] The fact that the company has used a premium note of an applicant for membership as a part of the fund to secure the certificate of the state auditor will not estop the company from resisting liability for the loss on the part of such member, which has occurred before it has received its certificate.[99]

3. Articles, By-Laws, and Regulations — a. With Respect to Powers. By the statutes or by provisions in the articles the board of directors or members of mutual companies are usually given authority to make by-laws which constitute rules and regulations as to the method of transacting the business of the company, and such by-laws are binding upon the members within the scope of the authority given by such statutes and articles to make by-laws.[1] So far as the company is concerned, however, the provisions of its by-laws may be waived.[2]

b. As Constituting Part of the Contract of Insurance. The members of the company being bound by the provisions of its by-laws, such by-laws enter into and form a part of the contract of insurance as between the member and the company, whether formally incorporated into the contract of insurance or not, and knowledge on the part of the members of the provisions of such by-laws is presumed.[3] The fact that some of the by-laws are incorporated into the policy will not justify

secretary of state, the company does not become authorized to do business in such other county by filing a copy of such statement which does not contain the by-laws of the company which are required to be embodied in the statement filed in the state office. Patrons of Industry F. Ins. Co. *v.* Plum, 84 N. Y. App. Div. 96, 82 N. Y. Suppl. 550.

97. Clark *v.* Spafford, 47 Ill. App. 160; Williams *v.* Babcock, 25 Barb. (N. Y.) 109; Elwell *v.* Crocker, 4 Bosw. (N. Y.) 22.

98. Sands *v.* Hill, 42 Barb. (N. Y.) 651; Cooper *v.* Shaver, 41 Barb. (N. Y.) 151; Mansfield *v.* Woods, 11 Ohio Dec. (Reprint) 761, 29 Cinc. L. Bul. 111. But one who has attempted to enter a mutual insurance association which had no legal existence at the time his policy was issued, and did so on mistaken misrepresentations of its agents, is not estopped from denying its corporate existence. Lagrone *v.* Timmerman, 46 S. C. 372, 24 S. E. 290.

99. Manufacturers', etc., Mut. Ins. Co. *v.* Gent, 13 Ill. App. 308 [*affirmed* in 107 Ill. 652].

1. *District of Columbia.*— Walker *v.* Johnson, 17 App. Cas. 144.

Indiana.— German Mut. F. Ins. Co. *v.* Franck, 22 Ind. 364.

Massachusetts.— Long Pond Mut. F. Ins. Co. *v.* Houghton, 6 Gray 77.

Michigan.—Borgards *v.* Farmers' Mut. Ins. Co., 79 Mich. 440, 44 N. W. 856.

Nebraska.— Farmers' Mut. Ins. Co. *v.* Kinney, 64 Nebr. 808, 90 N. W. 926.

New York. — Grobe *v.* Erie County Mut. Ins. Co., 169 N. Y. 613, 62 N. E. 1096 [*affirming* 39 N. Y. App. Div. 183, 57 N. Y. Suppl. 290].

Pennsylvania. — Com. *v.* Manufacturers' Mut. F. Ins. Co., 11 Phila. 550.

Wisconsin.— Davis *v.* Oshkosh Upholstery Co., 82 Wis. 488, 52 N. W. 771.

See 28 Cent. Dig. tit. "Insurance," § 66.

Number necessary to enact.— In the absence of express authority, a number less than one half of the members does not constitue a quorum with authority to make by-laws. Farmers' L. & T. Co. *v.* Aberle, 18 Misc. (N. Y.) 257, 41 N. Y. Suppl. 638.

Necessity of formal adoption.— By-laws published and acted upon during the existence of the company may be binding, although not formally adopted by the board of directors. Smith *v.* Sherman, 113 Iowa 601, 85 N. W. 747.

Notice of intent to exercise power conferred by by-laws.— Notice to members of the intention of the board of directors to exercise the power conferred by the articles to enact by-laws is not necessary. Farmers' Mut. Hail Ins. Assoc. *v.* Slattery, 115 Iowa 410, 88 N. W. 949.

2. Stoehlke *v.* Hahn, 158 Ill. 79, 42 N. E. 150 [*affirming* 55 Ill. App. 497]; Morrison *v.* Wisconsin Odd Fellows' Mut. L. Ins. Co., 59 Wis. 162, 18 N. W. 13.

3. *Connecticut.*— Treadway *v.* Hamilton Mut. Ins. Co., 29 Conn. 68.

Illinois.— Protection L. Ins. Co. *v.* Foote, 79 Ill. 361.

Iowa.— Corey *v.* Sherman, (1894) 60 N. W. 232; Coles *v.* Iowa State Mut. Ins. Co., 18 Iowa 425; Simeral *v.* Dubuque Mut. F. Ins. Co., 18 Iowa 319.

Maryland.— Cecil County Mut. F. Ins. Co. *v.* Miller Lodge I. O. O. F., 58 Md. 463.

New Jersey.— Miller *v.* Hillsborough Mut. F. Assur. Assoc., 44 N. J. Eq. 224, 10 Atl. 106, 14 Atl. 278; Belleville Mut. Ins. Co. *v.* Van Winkle, 12 N. J. Eq. 333.

North Carolina.— Boyle *v.* North Carolina

the supposition that others not so incorporated are not a part of the contract.[4] A member is estopped from questioning the validity of a by-law, which to his knowledge has been generally acted upon in transacting the business of the company during the time he has been such member.[5] A member is also bound by amendments to or changes in the by-laws regularly adopted, although he may have no actual notice thereof.[6] But so far as the articles and by-laws constitute a part of the contract between the member and the association, they may not be so amended without the consent of the member as to affect the validity or terms of the contract already entered into;[7] nor will orders or resolutions of the governing body affect the rights of a member as against the company, unless he has had notice of their passage.[8]

4. Members — a. In General. The membership of a mutual company is usually composed of those who are insured in it,[9] but one does not become a mem-

Mut. Ins. Co., 52 N. C. 373; Woodfin *v.* Asheville Mut. Ins. Co., 51 N. C. 558.

Pennsylvania.— Mitchell *v.* Lycoming Mut. Ins. Co., 51 Pa. St. 402; Standard Mut. Live Stock Ins. Co. *v.* Madara, 2 Pa. Dist. 600, 13 Pa. Co. Ct. 555; Lycoming F. Ins. Co. *v.* Buck, 1 Luz. Leg. Reg. 351.

United States.— Mutual Assur. Soc. *v.* Korn, 7 Cranch 396, 3 L. ed. 383; Fry *v.* Charter Oak L. Ins. Co., 31 Fed. 197; Davis *v.* Life Assoc. of America, 11 Fed. 781.

See 28 Cent. Dig. tit. "Insurance," § 69.

By-law held not obligatory.— A by-law of a mutual insurance company, providing that a policy may, at the request of the insured, be indorsed payable to the mortgagee as his interest may appear, is not obligatory, and hence a failure to do so does not relieve the insurer from liability. Loomis *v.* Jefferson County Patrons' Fire Relief Assoc., 92 N. Y. App. Div. 601, 87 N. Y. Suppl. 5.

4. Miller *v.* Hillsborough Fire Assoc., 42 N. J. Eq. 459, 7 Atl. 895.

5. Pfister *v.* Gerwig, 122 Ind. 567, 23 N. E. 1041; Lycoming F. Ins. Co. *v.* Newcomb, 4 Leg. Gaz. (Pa.) 409.

Extent and limits of rule.— Thus where some action of the company in accepting the terms of statutory provisions is necessary, the member is estopped from contending that such statutory provisions have not been accepted. Traders' Mut. F. Ins. Co. *v.* Stone, 9 Allen (Mass.) 483; Citizens' Mut. F. Ins. Co. *v.* Sortwell, 8 Allen (Mass.) 217; Doane *v.* Millville Mut. Mar., etc., Ins. Co., 43 N. J. Eq. 522, 11 Atl. 739. So a member is estopped from resisting payment of a premium note on the ground that the charter of the company is invalid. White *v.* Coventry, 29 Barb. (N. Y.) 305. But a member is not estopped to deny the validity of amendments of the constitution or by-laws not made known to him when the contract was entered into. Day *v.* Mill-Owners' Mut. F. Ins. Co., 75 Iowa 694, 38 N. W. 113.

6. Montgomery County Farmers' Mut. Ins. Co. *v.* Milner, 90 Iowa 685, 57 N. W. 612; Allen *v.* Life Assoc. of America, 8 Mo. App. 52. A member renewing his policy is chargeable with notice of changes in the charter or by-laws made before such renewal. Lycoming F. Ins. Co. *v.* Buck, 1 Luz. Leg. Reg. (Pa.) 351.

Change prior to issuance of policy.— A member is not chargeable with notice of a change in a by-law not brought to his attention prior to the issuance of his policy. Given *v.* Rettew, 162 Pa. St. 638, 29 Atl. 703.

7. *Maine.*— New England Mut. F. Ins. Co. *v.* Butler, 34 Me. 451.

Michigan.— Becker *v.* Farmers' Mut. F. Ins. Co., 48 Mich. 610, 12 N. W. 874.

Mississippi.— Stewart *v.* Lee Mut. F. Ins. Assoc., 64 Miss. 499, 1 So. 743.

New Hampshire.— Great Falls Mut. F. Ins. Co. *v.* Harvey, 45 N. H. 292.

New Jersey.— Cox *v.* Farmers' Mut. F. Assur. Assoc., 48 N. J. L. 53, 3 Atl. 122.

Pennsylvania.— Given *v.* Rettew, 162 Pa. St. 638, 29 Atl. 703; Bradfield *v.* Union Mut. Ins. Co., 9 Wkly. Notes Cas. 436.

Wisconsin.— Van Slyke *v.* Trempealeau County Farmers' Mut. F. Ins. Co., 48 Wis. 683, 5 N. W. 236.

See 28 Cent. Dig. tit. "Insurance," § 69.

8. Farmers' Mut. Hail Ins. Assoc. *v.* Slattery, 115 Iowa 410, 88 N. W. 949; American Ins. Co. *v.* Schmidt, 19 Iowa 502; Martin *v.* Mutual F. Ins. Co., 45 Md. 51.

9. *Connecticut.*— Treadway *v.* Hamilton Mut. Ins. Co., 29 Conn. 68.

Indiana.— Pfister *v.* Gerwig, 122 Ind. 567, 23 N. E. 1041.

Iowa.— Coles *v.* Iowa State Mut. Ins. Co., 18 Iowa 425; Simeral *v.* Dubuque Mut. F. Ins. Co., 18 Iowa 319.

Maryland.— Cecil County Mut. F. Ins. Co. *v.* Miller Lodge I. O. O. F., 58 Md. 463.

Michigan.— Douville *v.* Farmers' Mut. F. Ins. Co., 113 Mich. 158, 71 N. W. 517.

Minnesota.— Taylor *v.* North Star Mut. Ins. Co., 46 Minn. 198, 48 N. W. 772.

New York.— Reagener *v.* Willard, 44 N. Y. App. Div. 41, 60 N. Y. Suppl. 478; Cooper *v.* Shaver, 41 Barb. 151; Lawrence *v.* Nelson, 4 Bosw. 240.

Ohio.— Richards *v.* Swaim, 9 Ohio S. & C. Pl. Dec. 70, 7 Ohio N. P. 68.

Pennsylvania.— Koehler *v.* Beeber, 122 Pa. St. 291, 16 Atl. 354; Eilenberger *v.* Protective Mut. F. Ins. Co., 89 Pa. St. 464; Mitchell *v.* Lycoming Mut. Ins. Co., 51 Pa. St. 402; Columbia Ins. Co. *v.* Cooper, 50 Pa. St. 331; Standard Mut. Live Stock Ins. Co. *v.* Madara, 2 Pa. Dist. 600, 13 Pa. Co. Ct. 555.

Virginia.— Monger *v.* Rockingham Home

ber until he has received his policy.[10] If the company is authorized to do business both on a cash and an assessment basis one who insures on a cash basis is not a member but simply an insured.[11] So contributors to a guaranty fund for the payment of losses are not members.[12] Membership may continue during the entire term of the policy of insurance, although the property insured has been destroyed before the term expires.[13] It terminates on the termination of the insurance and the payment of liabilities incurred under the contract of insurance.[14] Until the conditions on which withdrawals are permitted have been complied with the member continues to be liable as such.[15]

b. Eligibility to Membership. Non-residents may be excluded from membership,[16] and conditions of membership may be imposed excluding those not belonging to a particular class or description of persons.[17] One mutual company cannot become a member in another company, such assumption of authority being *ultra vires*.[18] But a corporation may be insured in a mutual company, although its charter indicates that natural persons only may become members.[19]

c. Rights and Liabilities Incident to Membership.[20] A member of a mutual company is at the same time insurer and insured. His rights as insured are determined by his contract, but his rights and liabilities as member are defined by the contract, the statutes relating to such corporations, and the by-laws of the company.[21] He impliedly consents that the company shall be represented by such officers and agents as shall be duly elected, and that they shall possess the powers and perform the duties ordinarily possessed and performed by such officers and agents, and he cannot question their acts done within the scope of their authority,[22] and he cannot set up, as against the company, illegal acts of the com-

Mut. F. Ins. Co., 96 Va. 442, 31 S. E. 609; Shirley *v.* Mutual Assur. Soc., 2 Rob. 705.

See 28 Cent. Dig. tit. "Insurance," § 67.

A stock-holder in a mutual company is simply a member who has paid premiums into the capital of the company. Carlton *v.* Southern Mut. Ins. Co., 72 Ga. 371.

By continuing to pay assessments the relation of members to the company is recognized, although there is a controversy as to the validity of an attempted change in the contract of insurance. Rockland, etc., Town F. Ins. Co. *v.* Bussey, 48 N. Y. App. Div. 359, 63 N. Y. Suppl. 86.

10. Russell *v.* Detroit Mut. F. Ins. Co., 80 Mich. 407, 45 N. W. 356; Raegener *v.* Brockway, 171 N. Y. 629, 63 N. E. 1121 [*affirming* 58 N. Y. App. Div. 166, 68 N. Y. Suppl. 712]; Eilenberger *v.* Protective Mut. F. Ins. Co., 89 Pa. St. 464; Columbia Ins. Co. *v.* Cooper, 50 Pa. St. 331; Cumberland Valley Mut. Protection Co. *v.* Schell, 29 Pa. St. 31.

One having existing insurance in the company is a member thereof on applying for insurance on other property. Farmers' Mut. Ins. Co. *v.* Mylin, (Pa. 1888) 15 Atl. 710.

11. Mutual Guaranty F. Ins. Co. *v.* Barker, 107 Iowa 143, 77 N. W. 868, 70 Am. St. Rep. 149; Osius *v.* O'Dwyer, 127 Mich. 244, 86 N. W. 831; *In re* Minneapolis Mut. F. Ins. Co., 49 Minn. 291, 51 N. W. 921; Howard *v.* Franklin M. & F. Ins. Co., 9 How. Pr. (N. Y.) 45.

12. Berry *v.* Anchor Mut. F. Ins. Co., 94 Iowa 135, 62 N. W. 681.

13. Bangs *v.* Scidmore, 24 Barb. (N. Y.) 29 [*affirmed* in 21 N. Y. 136].

14. Commonwealth Mut. F. Ins. Co. *v.* Hayden, 60 Nebr. 636, 83 N. W. 922, 83 Am. St. Rep. 545, (1901) 85 N. W. 443.

Effect of termination.— The termination of insurance in a mutual company does not defeat the members' right to participate in the profits already accrued. Carlton *v.* Southern Mut. Ins. Co., 72 Ga. 371.

15. Cumings *v.* Sawyer, 117 Mass. 30; Schroeder *v.* Farmers' Mut. F. Ins. Co., 87 Mich. 310, 49 N. W. 536; Hyatt *v.* Wait, 37 Barb. (N. Y.) 29; Manitoba Farmers' Mut. Hail Ins. Co. *v.* Fisher, 14 Manitoba 157.

16. State *v.* Manufacturers' Mut. Fire Assoc., 50 Ohio St. 145, 33 N. E. 401, 24 L. R. A. 252.

17. Holterhoff *v.* Mutual Ben. L. Ins. Co., 5 Ohio Dec. (Reprint) 141, 3 Am. L. Rec. 272.

18. *In re* Security Mut. L. Assur. Soc., 6 Wkly. Rep. 431.

19. French *v.* Millville, 67 N. J. L. 349, 5 Atl. 1109.

20. As to assessments on members after insolvency see *infra*, IV, B, 9, e.

21. Com. *v.* Massachusetts Mut. F. Ins. Co., 112 Mass. 116. The stipulations of a contract of insurance with a member of a mutual company are no less binding than upon a stranger. Willcuts *v.* Northwestern Mut. L. Ins. Co., 81 Ind. 300.

22. Protection L. Ins. Co. *v.* Foote, 79 Ill. 361; People's Mut. F. Ins. Co. *v.* Groff, 154 Pa. St. 200, 26 Atl. 63; Koehler *v.* Beeber, 122 Pa. St. 291, 16 Atl. 354.

The annual meeting of the members of a mutual insurance company has no authority to pass upon claims for losses, where the charter provides that the business and affairs of the company shall be under the control of

pany itself, as he is a party to such illegal acts by reason of his membership.[23] A mutual company is not a partnership so as to render the members liable for the debts of the company as partners,[24] and the liability of the member exists under his contract for membership only, so that only those obligations which attach during his membership can be enforced against him.[25]

5. Officers — a. Eligibility For Office and Election. Officers may be required to be members of the association.[26] Under a statutory provision that trustees or directors cannot at the same time be officers of the association receiving a salary, trustees are not disqualified because they acted as agents in effecting insurance.[27] In reviewing the validity of an election of directors, at which cash-paying policy-holders were not allowed to vote, a court may properly order a new election so that the votes may be counted on the proper basis.[28]

b. Powers of Officers and Directors. In general the powers of officers are as fixed by the articles and by-laws,[29] and they can exercise no powers except those so conferred.[30] The powers conferred upon the directors cannot be delegated, in the absence of authority for such delegation,[31] and in general their powers are limited by the statutes regulating the business of such companies.[32] But the presumption will be, in the absence of evidence to the contrary, that a by-law or resolution giving authority to the directors was lawfully adopted.[33]

c. Liability of Officers and Directors. Officers or directors who divert the funds of the association are usually liable to the holders of claims which should have been paid out of such funds.[34] So officers or directors may become person-

a board of directors. Stoehlke *v.* Hahn, 158 Ill. 79, 42 N. E. 150; People's Mut. Ins. Co. *v.* Westcott, 14 Gray (Mass.) 440.

23. Trenton Mut. L., etc., Ins. Co. *v.* McKelway, 12 N. J. Eq. 133; Lycoming F. Ins. Co. *v.* Newcomb, 1 Leg. Chron. (Pa.) 9. Thus a member cannot hold the company liable on *ultra vires* stipulations of absolute indemnity in his certificate for membership. Manufacturers' Fire Assoc. *v.* Lynchburg Drug Mills, 8 Ohio Cir. Ct. 112, 4 Ohio Cir. Dec. 350.

24. Mutual Guaranty F. Ins. Co. *v.* Barker, 107 Iowa 143, 77 N. W. 868, 70 Am. St. Rep. 149; Hammerstein *v.* Parsons, 38 Mo. App. 332; Mutual Ben. L. Ins. Co. *v.* Hillyard, 37 N. J. L. 444, 18 Am. Rep. 741; Cohen *v.* New York Mut. L. Ins. Co., 50 N. Y. 610, 10 Am. Rep. 522. But it is said that members of an unincorporated mutual association are liable as partners for its debts. Krugh *v.* Lycoming F. Ins. Co., 77 Pa. St. 15; Shubrick *v.* Fisher, 2 Desauss. Eq. (S. C.) 148.

25. Raegener *v.* Willard, 44 N. Y. App. Div. 41, 60 N. Y. Suppl. 478. And see *supra*, IV, B, 4, a. But an assessment may be made against one who has been a policy-holder, for losses and expenses incurred prior to the cancellation of his policy. Pioneer Furniture Co. *v.* Langworthy, 84 Ill. App. 594.

26. State *v.* Manufacturers' Mut. Fire Assoc., 50 Ohio St. 145, 33 N. E. 401, 24 L. R. A. 252.

27. Com. *v.* McBride, 4 Leg. Gaz. (Pa.) 338.

28. *In re* Albany Mut. F. Ins. Co., 164 N. Y. 10, 58 N. E. 29 [*modifying* 51 N. Y. App. Div. 163, 64 N. Y. Suppl. 646 (*reversing* 30 Misc. 633, 64 N. Y. Suppl. 351)].

29. Litchfield *v.* Dyer, 46 Me. 31; Brouwer *v.* Harbeck, 1 Duer (N. Y.) 114.

The president of a mutual company is usually the proper officer to indorse negotiable securities payable to the company, and transact its business. Caryl *v.* McElrath, 3 Sandf. (N. Y.) 176.

30. In the absence of power given in the charter or by-laws, the officers cannot fix their own compensation. Quintance *v.* Farmers' Mut. Aid Assoc., 77 S. W. 1121, 25 Ky. L. Rep. 1379.

31. Farmers' L. & T. Co. *v.* Aberle, 18 Misc. (N. Y.) 257, 41 N. Y. Suppl. 638.

32. Levy *v.* Mutual Ben. L., etc., Ins. Co., 8 La. Ann. 380; Beers *v.* New York L. Ins. Co., 66 Hun (N. Y.) 75, 20 N. Y. Suppl. 788; New Hanover Mut. F. Ins. Co. *v.* Scholl, 12 Montg. Co. Rep. (Pa.) 78.

33. Citizens' Mut. F. Ins. Co. *v.* Sortwell, 8 Allen (Mass.) 217.

34. Sherman *v.* Harbin, 124 Iowa 643, 100 N. W. 622; Lyman *v.* Bonney, 101 Mass. 562; Stewart *v.* Lee Mut. F. Ins. Assoc., 64 Miss. 499, 1 So. 743; Hammerstein *v.* Parsons, 38 Mo. App. 332; Richards *v.* New Hampshire Ins. Co., 43 N. H. 263. The decree in such a case should be against the officers jointly, if it appears that they acted jointly in the misappropriation. McCarty's Appeal, 110 Pa. St. 379, 4 Atl. 925.

The company is a necessary party to a bill in equity against officers, who have neglected and refused to pay a claim for a loss. Lyman *v.* Bonney, 101 Mass. 562.

Individual liability.— Officers of a mutual company issuing a stock policy in violation of statutory provisions do not become individually liable under such policy. Smith *v.* Sherman, 113 Iowa 601, 85 N. W. 747.

Liability of officer to company.— The company in the collection of assessments for the benefit of beneficiaries acts as trustee only,

ally liable for failure to make an assessment when a claim for a loss is presented.[35] By statutory provisions directors are in some states made personally liable for failing to make an assessment for the purpose of paying the loss under a policy,[36] and this liability cannot be abrogated by contract.[37]

6. Powers of the Company — a. In General. A company may exercise the powers given to it by statute, and those which may have been added under provisions for reincorporation or extension of charter.[38] It may divide its business into distinct classes and make the risks of each class primarily liable for losses occurring therein.[39] But if necessary the premium notes of one class may be assessed to meet losses occurring in another.[40] It may transfer notes received by it for premiums,[41] unless this will impair the trust fund of which they form a part,[42] and may borrow money to pay losses and give notes therefor.[43] A mutual company may, if authorized by statute, change to the stock plan.[44]

b. To Make Contracts of Insurance — (i) *In General.* A mutual company can enter into a valid contract of insurance as against such casualties as it is authorized to insure against by its charter, or articles, or the statutes under which it is created, but against no others.[45] By statute the authority of the company to

and the president is liable on his bond to the company for such sum as unpaid beneficiaries are entitled to receive from the association. Sherman *v.* Harbin, 124 Iowa 643, 100 N. W. 622.

35. Jordan *v.* Union Mut. F. Ins. Co., 13 Fed. Cas. No. 7,522, Brunn. Col. Cas. 608. But to establish such personal liability plaintiff must show that he has suffered damage from such failure. Shoun *v.* Armstrong, (Tenn. Ch. App. 1900) 59 S. W. 790.

36. Raber *v.* Jones, 40 Ind. 436; Decker *v.* Righter, 9 Kan. App. 431, 58 Pac. 1009; Upton *v.* Pratt, 106 Mass. 344; Upton *v.* Pratt, 103 Mass. 551; Shoun *v.* Armstrong, (Tenn. Ch. App. 1900) 59 S. W. 790. But a general statute rendering the trustees of a corporation, created for a purpose other than profit, personally liable for the debts of the corporation contracted by them, does not apply to mutual insurance companies. Kelley *v.* Bender, 22 Ohio Cir. Ct. 144, 12 Ohio Cir. Dec. 181; Manufacturers' Fire Assoc. *v.* Lynchburg Drug Mills, 8 Ohio Cir. Ct. 112, 4 Ohio Cir. Dec. 350.

Estoppel.— Under a Minnesota statute (Laws (1895), c. 175, § 47), requiring the directors of a mutual company to execute an agreement before the company is organized rendering them liable to policy-holders, the directors of such a company were held estopped by their representations from denying their liability to holders of policies issued on their representations. Dwinnell *v.* Minneapolis F. & M. Mut. Ins. Co., 90 Minn. 383, 97 N. W. 110.

37. Greene *v.* Walton, 59 Hun (N. Y.) 102, 13 N. Y. Suppl. 147.

38. Harding *v.* Littlehale, 150 Mass. 100, 22 N. E. 703; Citizens' Mut. F. Ins. Co. *v.* Sortwell, 8 Allen (Mass.) 217; People *v.* Rensselaer Ins. Co., 38 Barb. (N. Y.) 323; Hyatt *v.* McMahon, 25 Barb. (N. Y.) 457.

Acquiescence by the members in a modification of the charter may arise by implication from their acts in exercising the additional powers given. Lycoming F. Ins. Co. *v.* Buck, 1 Leg. Chron. (Pa.) 235, 4 Leg. Gaz. 182, 1 Luz. Leg. Reg. 351; Bowditch *v.* New England Mut. L. Ins. Co., 141 Mass. 292, 296, 4 N. E. 798, 55 Am. Rep. 474, in which it was said that "if the investing committee loans to an officer in violation of the duty imposed by the statute upon it, all who participate in the act would be liable for all losses occasioned thereby, and thus the main purpose of protecting the policy-holders would be subserved."

39. Sands *v.* Boutwell, 26 N. Y. 233; White *v.* Ross, 4 Abb. Dec. (N. Y.) 589, 15 Abb. Pr. 66; White *v.* Coventry, 29 Barb. (N. Y.) 305 [*construing* Sheldon *v.* Roseboom, 29 Barb. (N. Y.) 309 note, which declared erroneous the decision in Thomas *v.* Achilles, 16 Barb. (N. Y.) 491, holding such division into classes to be *ultra vires*].

40. Sands *v.* Sanders, 26 N. Y. 239; White *v.* Ross, 4 Abb. Dec. (N. Y.) 589, 15 Abb. Pr. 66; Cooper *v.* Shaver, 41 Barb. (N. Y.) 151; White *v.* Coventry, 29 Barb. (N. Y.) 305. *Contra*, Sands *v.* Shoemaker, 4 Abb. Dec. (N. Y.) 149, 2 Keyes 268.

41. Brookman *v.* Metcalf, 32 N. Y. 591 [*affirming* 5 Bosw. 429]; Wood *v.* Wellington, 30 N. Y. 218; Howland *v.* Myer, 3 N. Y. 290 [*affirming* 2 Sandf. 180]; Great Western Ins. Co. *v.* Thayer, 4 Lans. (N. Y.) 459, 60 Barb. 633; Merchants' Bank *v.* McColl, 6 Bosw. (N. Y.) 473; Elwell *v.* Crocker, 4 Bosw. (N. Y.) 22.

42. Home Ins. Co. *v.* Shultz, 30 Mo. App. 91.

43. Orr *v.* Mercer County Mut. F. Ins. Co., 114 Pa. St. 387, 6 Atl. 696; Lycoming F. Ins. Co. *v.* Newcomb, 1 Leg. Chron. (Pa.) 9, 4 Leg. Gaz. 409.

44. See *infra*, IV, B, 8.

45. Knapp *v.* North Wales Mut. Live Stock Ins. Co., 11 Montg. Co. Rep. (Pa.) 119.

Applications of rule.— A company authorized to insure "dwelling houses, also furniture, farm buildings, and other property," may insure a sawmill or the contents of a printing office. Thompson Lumber Co. *v.* Mutual F. Ins. Co., 66 Ill. App. 254. So

transact business may be limited to certain specified territory, such as certain counties named, and policies issued on risks outside of such counties will be invalid.[46] But in the absence of any special provision as to the territory within which business may be transacted, a mutual company may insure property outside the state.[47] Insurance in a mutual company is usually restricted to members, and when this is the case policies issued to persons who are not members are void.[48] But such a company may be authorized to insure those who are not members.[49] It may issue paid-up policies or policies for a term of years,[50] unless inhibited by statute,[51] or a policy which provides that the payment of premiums shall cease after a given number of years;[52] or providing for a cash surrender value, or extension insurance at the end of a stipulated period;[53] or policies on the joint lives of two or more persons.[54] It cannot issue policies on the stock plan.[55] Officers of a mutual company have the same power to waive defects or ratify

authority to insure any kind of property against loss by fire includes personal as well as real property. Allen *v.* Hartford Mut. F. Ins. Co., 2 Md. 111. And under live-stock insurance loss of animals by fire may be covered. O'Grady *v.* New York Mut. Live Stock Ins. Co., 16 N. Y. App. Div. 567, 44 N. Y. Suppl. 946. On the other hand a corporation authorized to insure against fire, whether caused by "accident, lightning, or any other means," cannot insure against lightning not resulting in fire. Andrews *v.* Union Mut. Ins. Co., 37 Me. 256. And under authority to insure detached dwellings, farm buildings, etc., a mutual company has no power to insure an incubator building. O'Neil *v.* Pleasant Prairie Mut. F. Ins. Co., 71 Wis. 621, 38 N. W. 345. So authority to insure farm buildings, live-stock, and grain against loss by fire does not cover the power to insure growing grain against hail. Delaware Farmers' Mut. F. Ins. Co. *v.* Knuppel, 56 Minn. 243, 57 N. W. 656; Delaware Farmers' Mut. F. Ins. Co. *v.* Wagner, 56 Minn. 240, 57 N. W. 656. And authority to insure furniture, goods, wares, merchandise, and effects does not cover live-stock insurance. Knapp *v.* North Wales Mut. Live Stock Ins. Co., 11 Montg. Co. Rep. (Pa.) 119. It has also been held under authority to issue policies payable on the death of insured that a policy payable on the occurrence of total disability is unauthorized. Preferred Masonic Mut. L. Ins. Co. *v.* Giddings, 112 Mich. 401, 70 N. W. 1026. And under a statute restricting casualty insurance on the assessment plan to cases of accidental death or disability such a company has no power to insure against disability from sickness. Knowlton *v.* Bay State Beneficiary Assoc., 171 Mass. 455, 50 N. E. 929.

Statute requiring majority vote of members.— Under a special statutory provision prohibiting town insurance companies from insuring school-houses without a majority vote of the members, it was held that a policy on a school-house, issued without such votes, was void. Luthe *v.* Farmers' Mut. F. Ins. Co., 55 Wis. 543, 13 N. W. 490.

46. Eddy *v.* Merchants', etc., Mut. F. Ins. Co., 72 Mich. 651, 40 N. W. 775; Eddy *v.* Farmers' Mut. Ins. Co., 20 N. Y. App. Div. 109, 46 N. Y. Suppl. 695 [*affirming* 18 Misc. 297, 41 N. Y. Suppl. 854]. But under such a policy there may be a recovery for a loss of live stock insured within the specified territory, although at the time of loss it is temporarily for a proper purpose outside of the state. Eddy *v.* Farmers' Mut. Ins. Co., *supra*; Coventry Mut. Live Stock Ins. Assoc. *v.* Evans, 102 Pa. St. 281.

47. Kansas Home Ins. Co. *v.* Wilder, 43 Kan. 731, 23 Pac. 1061; Western *v.* Genesee Mut. Ins. Co., 12 N. Y. 258.

48. Mutual Guaranty F. Ins. Co. *v.* Barker, 107 Iowa 143, 77 N. W. 868, 70 Am. St. Rep. 149; Corey *v.* Sherman, (Iowa 1894) 60 N. W. 232; People *v.* Industrial Ben. Assoc., 92 Hun (N. Y.) 311, 36 N. Y. Suppl. 963 [*affirmed in* 149 N. Y. 606, 44 N. E. 1127]; Jacobs *v.* Mutual Ins. Co., 52 S. C. 110, 29 S. E. 533.

Further as to membership see *supra*, IV, B, 4.

Application of rule.— Thus a policy taken in such a company by the husband who is a member, or on the property of the wife who is not a member, or *vice versa*, is invalid. Froehly *v.* North St. Louis Mut. F. Ins. Co., 32 Mo. App. 302; Pearson *v.* Greenville Mut. Ins. Co., 61 S. C. 321, 39 S. E. 512.

49. Hannibal Sav., etc., Co. *v.* Pipe, 43 Mo. 407.

50. Home L. Assur. Co. *v.* Atty.-Gen., 112 Mich. 497, 70 N. W. 1031; Com. *v.* Provident L., etc., Co., 9 Pa. Dist. 479.

51. Where a mutual insurance company is inhibited by statute from issuing endowment policies, it cannot, by taking over all business of another company, render its members liable for losses on endowment policies legally issued by such other company. Dishong *v.* Iowa Life, etc., Assoc., 92 Iowa 163, 60 N. W. 505.

52. Home L. Assur. Co. *v.* Atty.-Gen., 112 Mich. 497, 70 N. W. 1031.

53. Haydell *v.* Mutual Reserve Fund Life Assoc., 104 Fed. 718, 44 C. C. A. 169.

54. Home L. Assur. Co. *v.* Atty.-Gen., 112 Mich. 497, 70 N. W. 1031.

55. Smith *v.* Sherman, 113 Iowa 601, 85 N. W. 747; Corey *v.* Sherman, 96 Iowa 114, 64 N. W. 828, 32 L. R. A. 514; State *v.* Manufacturers' Mut. Fire Assoc., 50 Ohio St. 145, 33 N. E. 401, 24 L. R. A. 252.

policies as the corresponding officers in stock companies,[56] but the company is not estopped from pleading *ultra vires* as to a policy which is beyond the powers given to it by its charter.[57]

(II) *To Issue Policies For Cash Premiums.* In the absence of statutory prohibition a mutual insurance company may issue policies for cash premiums, which under its by-laws form a part of its general fund from which all losses are to be paid.[58] But the company cannot provide that on the payment of such cash premium the policy-holders shall be exempted from assessment to pay losses occurring during the period for which it was paid;[59] and the continued liability to assessment, under the statute, will operate to make valid a stock policy issued for such cash premium.[60] The cash premiums, like the assessments, must be applied to losses occurring during the period for which they are paid.[61] A mutual company may be expressly authorized by statute to issue policies for cash premiums to persons other than members,[62] and authority to issue such policies for cash premiums does not preclude the right to take notes for such premiums.[63]

c. To Provide a Guaranty Fund. A mutual fire-insurance company cannot as incident to the exercise of its general powers and functions create or provide a capital or guaranty fund, unless authority is specially given by its charter or a statute.[64] A mutual company may, however, be authorized by statute to receive guaranty notes constituting a fund to secure payment to its creditors,[65] or the company may be authorized to receive notes to constitute a fund which shall be the

56. Pratt *v.* Dwelling-House Mut. F. Ins. Co., 130 N. Y. 206, 29 N. E. 117. If the company's charter prohibits insuring more than two thirds of the value of any property, a policy voluntarily issued without fraud or misrepresentation for more than two thirds of the value is not invalid. Williams *v.* New England Mut. F. Ins. Co., 31 Me. 219. A policy issued by mistake may be corrected so as to cover a liability which the company has the power to assume. Ford *v.* U. S. Mutual Acc. Relief Co., 148 Mass. 153, 19 N. E. 169, 1 L. R. A. 700.

57. Mutual Guaranty F. Ins. Co. *v.* Barker, 107 Iowa 143, 77 N. W. 868, 70 Am. St. Rep. 149; Dishong *v.* Iowa Life, etc., Assoc., 92 Iowa 163, 60 N. W. 505; Otis *v.* Harrison, 36 Barb. (N. Y.) 210; Knapp *v.* North Wales Mut. Live Stock Ins. Co., 11 Montg. Co. Rep. (Pa.) 119.

58. *Colorado.*— Spruance *v.* Farmers', etc., Ins. Co., 9 Colo. 73, 10 Pac. 285.

Michigan.— Home L. Assur. Co. *v.* Atty.-Gen., 112 Mich. 497, 70 N. W. 1031.

Minnesota.— *In re* Minneapolis Mut. F. Ins. Co., 49 Minn. 291, 51 N. W. 921.

Missouri.—State *v.* Manufacturers' Mut. F. Ins. Co., 91 Mo. 311, 3 S. W. 383; Graham *v.* Mercantile Town Mut. Ins. Co., 110 Mo. App. 95, 84 S. W. 93.

New York.— Mygatt *v.* New York Protection Ins. Co., 21 N. Y. 52, 19 How. Pr. 61.

Pennsylvania.— Given *v.* Rettew, 162 Pa. St. 638, 29 Atl. 703; Schimpf *v.* Lehigh Valley Mut. Ins. Co., 86 Pa. St. 373 [*affirming* 13 Phila. 515]; Lycoming F. Ins. Co. *v.* Buck, 4 Leg. Gaz. 182, 1 Luz. Leg. Reg. 351.

United States.— Union Ins. Co. *v.* Hoge, 21 How. 35, 16 L. ed. 61.

See 28 Cent. Dig. tit. "Insurance," § 75.

59. State *v.* Manufacturers' Mut. Fire Assoc., 50 Ohio St. 145, 33 N. E. 401, 24 L. R. A. 252; State *v.* Monitor Fire Assoc., 42 Ohio St. 555.

60. Rundle *v.* Kennan, 79 Wis. 492, 48 N. W. 516.

61. Ohio Mut. Ins. Co. *v.* Marietta Woolen Factory, 3 Ohio St. 348.

62. *In re* Minneapolis Mut. F. Ins. Co., 49 Minn. 291, 51 N. W. 921.

63. Carey *v.* Nagle, 5 Fed. Cas. No. 2,403, 2 Abb. 156, 2 Biss. 244.

64. Goss *v.* Peters, 98 Mich. 112, 57 N. W. 28; Dwinnell *v.* Minneapolis F. & M. Mut. Ins. Co., 87 Minn. 59, 91 N. W. 266, 1098; Barriclo *v.* Trenton Mut. L., etc., Ins. Co., 13 N. J. Eq. 154; Trenton Mut. L., etc., Ins. Co. *v.* McKelway, 12 N. J. Eq. 133; Kennan *v.* Rundle, 81 Wis. 212, 51 N. W. 426. But to the contrary it is said that a charter empowering a mutual company to issue policies impliedly gives it the power to establish a guaranty fund (Hope Mut. L. Ins. Co. *v.* Weed, 28 Conn. 51), and that the creation of such a fund to be resorted to when the assessments are insufficient to pay the losses is valid (Berry *v.* Anchor Mut. F. Ins. Co., 94 Iowa 135, 62, 91 N. W. 681; Hope Mut. L. Ins. Co. *v.* Perkins, 38 N. Y. 404 [*affirming* 4 Rob. 182]).

Reason for rule.— "To permit it to do so would be to change wholly the character of the corporation and destroy the mutuality principle upon which it is founded." Dwinnell *v.* Minneapolis F., etc., Mut. Ins. Co., 87 Minn. 59, 62, 91 N. W. 266, 1098. "The one thing absolutely essential to a mutual company is the obligation of the members to pay their *pro-rata* share of the necessary expenses and losses of the company, and that they are bound to so contribute." Kennan *v.* Rundle, 81 Wis. 212, 221, 51 N. W. 426.

65. Neale *v.* Head, 133 Cal. 42, 65 Pac. 131, 576; Ainley *v.* American Mut. F. Ins. Co.,

capital stock of the company,[66] or to receive premium notes in advance, assessments on which shall be made to meet its losses.[67] Such notes are supported by a sufficient consideration.[68] Liability thereon may be made conditional, on the full amount necessary for the organization of the company being subscribed;[69] but in the absence of such condition or when insurance has been effected for the full amount of such notes, they are binding without regard to the subscription of the balance.[70] If such premium notes are given to constitute a part of the fund necessary to enable the company to do business, they are subject to assessment,[71] or the makers may be absolutely liable thereon without assessment, depending on the conditions on which the note is given.[72] If the note is simply an advanced premium note, the maker is liable only to the extent of the benefit of insurance enjoyed by him thereunder.[73] The officers of the company have no power to

113 Iowa 709, 84 N. W. 504; Smith *v.* Sherman, 113 Iowa 601, 85 N. W. 747; Corey *v.* Sherman, 96 Iowa 114, 64 N. W. 828, 32 L. R. A. 490; Hope Mut. L. Ins. Co. *v.* Perkins, 38 N. Y. 404, 2 Abb. Dec. 383 [*affirming* 4 Rob. 182]; Osgood *v.* Toole, 1 Hun (N. Y.) 167; Bell *v.* Yates, 33 Barb. (N. Y.) 627; Howland *v.* Edmonds, 33 Barb. (N. Y.) 433. But the makers of such notes are liable only as sureties to the creditors. Neale *v.* Head, *supra*; Smith *v.* Sherman, *supra*.

66. Raegener *v.* Hubbard, 167 N. Y. 301, 60 N. E. 633 [*affirming* 40 N. Y. App. Div. 359, 57 N. Y. Suppl. 1018]; Dana *v.* Munro, 38 Barb. (N. Y.) 528; Hill *v.* Reed, 16 Barb. (N. Y.) 280; Merchants' Bank *v.* McColl, 6 Bosw. (N. Y.) 473; Hone *v.* Allen, 1 Sandf. (N. Y.) 171 note; Toll *v.* Whitney, 18 How. Pr. (N. Y.) 161.

A note given to increase the capital stock cannot be treated as a premium note. Pennsylvania Cent. Ins. Co. *v.* Gayman, 7 Leg. Gaz. (Pa.) 234.

If the cash funds are insufficient for the payment of losses and expenses it is the duty of the board to make and collect assessments on stock notes to make good its reserve. Western Manufacturers' Mut. Ins. Co. *v.* Hutchinson Cooperage Co., 92 Ill. App. 1.

67. Jackson *v.* Van Slyke, 52 N. Y. 645; Dana *v.* Munson, 23 N. Y. 564; Osgood *v.* Toplitz, 3 Lans. (N. Y.) 184; Cheshrough *v.* Wright, 41 Barb. (N. Y.) 28; Sands *v.* St. John, 36 Barb. (N. Y.) 628, 23 How. Pr. 140; Crooke *v.* Mali, 11 Barb. (N. Y.) 205; Elwell *v.* Crocker, 4 Bosw. (N. Y.) 22; Aspinwall *v.* Meyer, 2 Sandf. (N. Y.) 180 [*affirmed* in 3 N. Y. 290]; Brouwer *v.* Hill, 1 Sandf. (N. Y.) 629; Merchants' Mut. Ins. Co. *v.* Rey, 1 Sandf. (N. Y.) 184.

Rights of receiver on insolvency.— Advance premium notes available to the company are equally available to the receiver in case of insolvency. Howard *v.* Hinckley, etc., Iron Co., 64 Me. 93; Hone *v.* Folger, 1 Sandf. (N. Y.) 177; Brouwer *v.* Appleby, 1 Sandf. (N. Y.) 158.

A premium note is not converted into a capital stock note by any use of it made by the company without the knowledge of the maker. Dana *v.* Munson, 23 N. Y. 564.

68. Hope Mut. L. Ins. Co. *v.* Weed, 28 Conn. 51; Hope Mut. L. Ins. Co. *v.* Perkins, 38 N. Y. 404 [*affirming* 4 Rob. 182]; Brown *v.* Crooke, 4 N. Y. 51; Cruikshank *v.* Brouwer, 11 Barb. (N. Y.) 228.

69. Berry *v.* Yates, 24 Barb. (N. Y.) 199.

70. New York Exch. Co. *v.* De Wolf, 5 Bosw. (N. Y.) 593 [*reversed* in 31 N. Y. 273]; Brookman *v.* Metcalf, 5 Bosw. (N. Y.) 429 [*affirmed* in 32 N. Y. 591]; Holbrook *v.* Basset, 5 Bosw. (N. Y.) 147; Holbrook *v.* Wilson, 4 Bosw. (N. Y.) 64.

71. Maine Mut. Mar. Ins. Co. *v.* Neal, 50 Me. 301.

72. Maine Mut. Mar. Ins. Co. *v.* Farrar, 66 Me. 133; Howard *v.* Palmer, 64 Me. 86; Maine Mut. Mar. Ins. Co. *v.* Swanton, 49 Me. 448; Shawmut Mut. F. Ins. Co. *v.* Stevens, 9 Allen (Mass.) 332; Nashua F. Ins. Co. *v.* Moore, 55 N. H. 48; Tuckerman *v.* Brown, 33 N. Y. 297, 88 Am. Dec. 386 [*affirming* 11 Abb. Pr. 389, 23 How. Pr. 109]; Sands *v.* Campbell, 31 N. Y. 345; Howland *v.* Edmonds, 24 N. Y. 307; White *v.* Haight, 16 N. Y. 310; Deraismes *v.* Merchants' Mut. Ins. Co., 1 N. Y. 371; Osgood *v.* Strauss, 65 Barb. (N. Y.) 383 [*affirmed* in 55 N. Y. 672]; Sands *v.* St. John, 36 Barb. (N. Y.) 628, 23 How. Pr. 140; Dana *v.* Munroe, 38 Barb. (N. Y.) 528; Hart *v.* Achilles, 28 Barb. (N. Y.) 576; Lawrence *v.* McCready, 6 Bosw. (N. Y.) 329; Elwell *v.* Crocker, 4 Bosw. (N. Y.) 22; Hone *v.* Folger, 1 Sandf. (N. Y.) 177; Hone *v.* Allen, 1 Sandf. (N. Y.) 171 note; White *v.* Foster, 18 How. Pr. (N. Y.) 151; Bell *v.* McElwain, 18 How. Pr. (N. Y.) 150.

Limitation of action on note.— If assessment is required, the cause of action on the note accrues only after assessment (Hope Mut. L. Ins. Co. *v.* Weed, 28 Conn. 51; Howland *v.* Edmonds, 33 Barb. (N. Y.) 433 [*reversed* on other grounds in 24 N. Y. 307, 23 How. Pr. 152]); but if the obligation is absolute, the cause of action on the note accrues in accordance with the terms of the instrument (Howland *v.* Edmonds, 24 N. Y. 307, 23 How. Pr. 152 [*reversing* 33 Barb. 433]; Colgate *v.* Buckingham, 39 Barb. (N. Y.) 177; Sands *v.* St. John, 36 Barb. (N. Y.) 628, 23 How. Pr. 140).

73. Pendergast *v.* Commercial Mut. Mar. Ins. Co., 15 Gray (Mass.) 257; Elwell *v.* Crocker, 4 Bosw. (N. Y.) 22; Brouwer *v.* Hill, 1 Sandf. (N. Y.) 629. But he is entitled to credit on the note for any premiums

release the maker of such note from his liability.[74] Makers of guaranty notes are liable for the full amount thereof, standing as general creditors of the company after such payments.[75]

7. Profits, Dividends, and Special Funds. The accumulated profits of a mutual company may be distributed among those who are members when such distribution is ordered,[76] and an accumulated surplus may thus be distributed by way of dividends.[77] A provision made by statute or contract for distribution of surplus among policy-holders by way of dividends does not necessitate such distribution of the entire surplus.[78] Until the time for distribution under the terms of the contract has arrived, the policy-holder has no right to require an accounting in regard to the surplus fund.[79] In the distribution of a reserve fund those who are policy-holders at the time of distribution will participate,[80] and representatives of deceased members whose certificates have not been paid in full out of the mortuary fund will also participate to the extent of their unpaid claims, but will have no priority.[81] Funds held for beneficiaries cannot be used to pay expenses;[82] but in the absence of some special provision to that effect the funds of one department are not reserved for the benefit of a particular department, but go for the benefit of any claim against the association.[83] And an action in equity may be maintained by policy-holders to restrain the officers from appropriating funds to the benefit of one claim which belongs to all.[84]

8. Reorganization, Consolidation, and Transfer. A new company may be formed to which members of a former company may be admitted by action of such new company; but such members must be eligible as to age, etc., to membership

paid. Emmet *v.* Reed, 4 Sandf. (N. Y.) 229 [*affirmed* in 8 N. Y. 229]; Merchants' Mut. Ins. Co. *v.* Leeds, 1 Sandf. (N. Y.) 183.

74. Maine Mut. Mar. Ins. Co. *v.* Pickering, 66 Me. 130; Hope Mut. L. Ins. Co. *v.* Perkins, 38 N. Y. 404, 2 Abb. Dec. 383 [*affirming* 4 Rob. 182]; Tuckerman *v.* Brown, 33 N. Y. 297, 88 Am. Dec. 386 [*affirming* 11 Abb. Pr. 389, 23 How. Pr. 109]; Brouwer *v.* Hill, 1 Sandf. (N. Y.) 629; Fell *v.* McHenry, 42 Pa. St. 41.

75. Hope Mut. L. Ins. Co. *v.* Weed, 28 Conn. 51; Culbertson *v.* Hall, 11 La. Ann. 204; Hinkley, etc., Iron Co. *v.* Maine Mut. Mar. Ins. Co., 66 Me. 118; Maine Mut. Mar. Ins. Co. *v.* Swanton, 49 Me. 448; Hone *v.* Ballin, 1 Sandf. (N. Y.) 181.

76. Carlton *v.* Southern Mut. Ins. Co., 72 Ga. 371.

77. McKean *v.* Biddle, 181 Pa. St. 361, 37 Atl. 528.

78. Rothschild *v.* New York L. Ins. Co., 97 Ill. App. 547; Greeff *v.* Equitable L. Assur. Soc., 160 N. Y. 19, 54 N. E. 712, 73 Am. St. Rep. 659, 46 L. R. A. 288 [*reversing* 40 N. Y. App. Div. 180, 57 N. Y. Suppl. 871]. Such a distribution under a policy providing therefor is in fact a dividend and no debt to the policy-holder arises until the dividend is declared, and as to the method of computation the policy-holder is subject to the rules and methods adopted by the directors. Fuller *v.* Metropolitan L. Ins. Co., 70 Conn. 647, 41 Atl. 4.

As to participation under endowment life policies see *supra*, IV, A, 8, b.

Method of distribution.— The distribution may be made by crediting policy-holders with the respective amounts to which they are entitled, and if the contract so provides the amount thus credited will be forfeited by a forfeiture of the policy. Laing *v.* Penn Mut. Ins. Co., 5 Pa. L. J. Rep. 122.

79. Fry *v.* Provident Sav. L. Assur. Soc., (Tenn. Ch. App. 1896) 38 S. W. 116.

An action to compel readjustment of dividends, and correct errors therein, may be maintained by a portion of the stock-holders on their own behalf and on behalf of other stock-holders who are interested, and who may elect to come in and contribute to the expenses of the suit. Luling *v.* Atlantic Mut. Ins. Co., 45 Barb. (N. Y.) 510.

80. Farmers' L. & T. Co. *v.* Aberle, 18 Misc. (N. Y.) 257, 41 N. Y. Suppl. 638.

81. Kentucky Mut. Security Fund Co. *v.* Turner, 93 Ky. 461, 20 S. W. 386, 14 Ky. L. Rep. 461.

Limitation of actions.— If the policy limits action thereon to two years, an assignee of the policy cannot recover a distributive share of the surplus which has become payable to the policy-holder more than two years before suit brought. Sommer *v.* New England Mut. L. Ins. Co., 11 Pa. Dist. 100, 27 Pa. Co. Ct. 221.

82. Sherman *v.* Harbin, 125 Iowa 174, 100 N. W. 629.

83. Taylor *v.* Life Assoc. of America, 13 Fed. 493; Davis *v.* Life Assoc. of America, 11 Fed. 781.

84. Carmien *v.* Cornell, 148 Ind. 83, 47 N. E. 216. But if the statute prohibits an action restraining or interfering with the business of an insurance company, except upon the application of the attorney-general, then the policy-holders cannot sue in their own name. Swan *v.* Mutual Reserve Fund Life Assoc., 155 N. Y. 9, 49 N. E. 258 [*affirming* 20 N. Y. App. Div. 255, 46 N. Y. Suppl. 841 (*reversing* 17 Misc. 722, 41 N. Y. Suppl. 444)].

in the new company,[85] and a member of the old company becomes a member of the new only on his assent to membership in the new company.[86] In the absence of statutory authority, a mutual company cannot, however, sell and transfer its business to another company.[87] But it may change the nature of its business within the scope of its charter.[88] A mutual company may, under statutory authority, be changed into a joint stock company.[89]

9. Insolvency and Dissolution[90] — a. What Constitutes Insolvency. A mutual company is insolvent when its resources, including capital stock notes subject to assessment, are not sufficient to meet its obligations.[91] It cannot, however, be said to be insolvent, or to act in contemplation of insolvency, merely because the sums insured greatly exceed its capital; nor when its assets are more than sufficient to meet all losses of which the company has any notice, information, or suspicion.[92]

b. Voluntary Liquidation. Provisions may be made by which a company may close up its business on payment of its debts, and reinsuring its risks;[93] and it may, under general statutory provisions, make an assignment for the benefit of its creditors, and the assignee may sue to recover any debts to the company,[94] but the assignee is not vested with the judicial power to make assessments.[95]

c. Grounds and Proceedings For Dissolution. Insolvency is a ground for dissolution.[96] So the misapplication of the funds of the company[97] or mismanagement of the business[98] are sufficient grounds for winding up a company. In the absence of some other method provided by statute, the members may institute proceedings to have an insolvent company wound up.[99] But provisions are usually made

85. Swett *v.* Citizens' Mut. Relief Soc., 78 Me. 541, 7 Atl. 394. But see Seymour *v.* Chicago Guaranty Fund Life Soc., 54 Minn. 147, 55 N. W. 907.

86. Cotton *v.* Southwestern Mut. L. Ins. Co., 115 Iowa 729, 87 N. W. 675; Hamilton Mut. Ins. Co. *v.* Hobart, 2 Gray (Mass.) 543; Gardner *v.* Hamilton Mut. Ins. Co., 33 N. Y. 421. Where the new company assumed the indebtedness of the old, and was secured by a bond of members in the old company to cover such indebtedness, it was held that those who signed the bond could not, after it had been acted on for many years, object that a condition that the bond should be signed by all the members of the company had not been complied with. But it was further held that a right of action on the bond vested in the new company and not in its members. Planters' Ins. Co. *v.* Wicks, 3 Tenn. Cas. 301, 4 S. W. 172.

87. Meade *v.* St. Louis Mut. L. Ins. Co., 51 How. Pr. (N. Y.) 1; *In re* Argus L. Assur. Co., 39 Ch. D. 571, 58 L. J. Ch. 166, 59 L. T. Rep. N. S. 689, 37 Wkly. Rep. 215.

88. *Re* Norwich Equitable F. Assur. Soc., 57 L. T. Rep. N. S. 241.

89. Scharzwaelder *v.* German Mut. F. Ins. Co., 59 N. J. Eq. 589, 44 Atl. 769 [*affirming* 58 N. J. Eq. 319, 43 Atl. 587]; Grobe *v.* Erie County Mut. Ins. Co., 169 N. Y. 613, 62 N. E. 1096 [*affirming* 39 N. Y. App. Div. 183, 57 N. Y. Suppl. 290 (*affirming* 24 Misc. 462, 53 N. Y. Suppl. 628)]; Manhattan F. Ins. Co. *v.* Fox, 74 N. Y. App. Div. 271, 77 N. Y. Suppl. 657.

90. See, generally, Insolvency.

For effect of voluntary dissolution of solvent corporation see Corporations, 10 Cyc. 1327; Escheat, 16 Cyc. 550 note 14.

91. Enterprise F. Ins. Co.'s Receiver *v.* Enterprise F. Ins. Co., 79 S. W. 1180, 25 Ky. L. Rep. 1630; People *v.* Equitable Mut. F. Ins. Corp., 1 N. Y. App. Div. 84, 37 N. Y. Suppl. 80, 25 N. Y. Civ. Proc. 210 [*affirming* 12 Misc. 556, 33 N. Y. Suppl. 708]; Com. *v.* Textile Mut. F. Ins. Co., 8 Pa. Dist. 664, 23 Pa. Co. Ct. 127. Under a statute providing for the appointment of a receiver where a corporation is in imminent danger of insolvency, it was held that a receiver was properly appointed for a mutual company, which, by reason of wrongful conduct of its officers, was unable to make and enforce assessments on its premium notes sufficient to meet its liabilities. Howard *v.* Whitman, 29 Ind. 557.

92. Holbrook *v.* Basset, 5 Bosw. (N. Y.) 147.

93. Alliance Mut. L. Assur. Soc. *v.* Welch, 26 Kan. 632.

94. Hurlbut *v.* Carter, 21 Barb. (N. Y.) 221.

95. Hurlbut *v.* Carter, 21 Barb. (N. Y.) 221; Schimpf *v.* Lehigh Valley Mut. Ins. Co., 86 Pa. St. 373.

96. See cases cited in subsequent notes in this section.

97. State *v.* Standard Life Assoc., 38 Ohio St. 281; State *v.* Monitor Fire Assoc., 42 Ohio St. 555.

98. Com. *v.* Textile Mut. F. Ins. Co., 8 Pa. Dist. 664, 23 Pa. Co. Ct. 127; Com. *v.* Fidelity Ben. Soc., 1 Dauph. Co. Rep. (Pa.) 255.

99. *In re* Oshkosh Mut. F. Ins. Co., 77 Wis. 366, 46 N. W. 441, 9 L. R. A. 273. One or more policy-holders can maintain an action against the company and its assignee to set aside an assignment, and for other relief.

by which some public officer, such as the attorney-general or the insurance commissioner, is required to institute proceedings for the winding up of a mutual company which has become insolvent, or otherwise has forfeited its right to exercise its corporate franchise.[1] The suit need not be in the nature of a criminal proceeding nor quo warranto, but may be a special civil proceeding.[2] Personal notice to the members is not necessary, nor need they be made parties.[3] The statute may make the proceeding by the public officer exclusive of any proceeding by members.[4]

d. Rights of Members on Insolvency and Dissolution. Upon the appointment of a receiver on the ground of insolvency, the outstanding policies of the company are canceled by operation of law,[5] and subsequent losses under such policies are not liabilities which may be enforced against the receiver.[6] This

Corey *v.* Sherman, 96 Iowa 114, 64 N. W. 828, 32 L. R. A. 490.

Suit by judgment creditor.— Policy-holders of the company are not necessary parties to a proceeding by a judgment creditor for appointment of a receiver. Eichman *v.* Hersker, 170 Pa. St. 402, 33 Atl. 229.

1. *Connecticut.*— Mansfield *v.* Mutual Ben. L. Ins. Co., 63 Conn. 579, 29 Atl. 137; Stedman *v.* American Mut. L. Ins. Co., 45 Conn. 377.

Illinois.— Chicago Mut. Life Indemnity Assoc. *v.* Hunt, 127 Ill. 257, 20 N. E. 55, 2 L. R. A. 549; Rand *v.* Mutual F. Ins. Co., 58 Ill. App. 528.

Massachusetts.— Merrill *v.* Com. Mut. F. Ins. Co., 166 Mass. 238, 44 N. E. 144.

Minnesota.— State *v.* Educational Endowment Assoc., 49 Minn. 158, 51 N. W. 908.

New York.— Atty.-Gen. *v.* Atlantic Mut. L. Ins. Co., 77 N. Y. 336; People *v.* Atlantic Mut. L. Ins. Co., 74 N. Y. 177; People *v.* Equitable Mut. F. Ins. Corp., 1 N. Y. App. Div. 84, 25 N. Y. Civ. Proc. 210, 37 N. Y. Suppl. 80; People *v.* Rensselaer Ins. Co., 38 Barb. 323; People *v.* Manhattan Mut. F. Ins. Co., 12 N. Y. Suppl. 264; People *v.* Mutual Trust Fund Life Assoc., 21 Abb. N. Cas. 279; People *v.* Globe Mut. L. Ins. Co., 60 How. Pr. 82; People *v.* Globe Mut. L. Ins. Co., 60 How. Pr. 57; Matter of Atlantic Mut. L. Ins. Co., 55 How. Pr. 77; Atty.-Gen. *v.* Atlantic Mut. L. Ins. Co., 53 How. Pr. 227.

Wisconsin.— *In re* Oshkosh Mut. F. Ins. Co., 77 Wis. 366, 46 N. W. 441, 9 L. R. A. 273.

See 28 Cent. Dig. tit. "Insurance," § 92.

2. Chicago Mut. L. Indemnity Assoc. *v.* Hunt, 127 Ill. 257, 20 N. E. 55, 2 L. R. A. 549.

3. West, etc., Towns St. R. Co. *v.* McKay, 80 Ill. App. 529; Wardle *v.* Cummings, 86 Mich. 395, 49 N. W. 212, 538; Langworthy *v.* Garding, 74 Minn. 325, 77 N. W. 207. But one whose liability as a member of the company has not terminated is not so represented by the receiver appointed in the proceeding as to give the court jurisdiction to render judgment against him. Wilhelm *v.* Parker, 17 Ohio Cir. Ct. 234, 9 Ohio Cir. Dec. 724.

4. Murray *v.* Los Angeles County Super. Ct., 129 Cal. 628, 62 Pac. 191; Fisher *v.* World Mut. L. Ins. Co., 15 Abb. Pr. N. S. (N. Y.) 363. Where proceedings are instituted in one state, in accordance with the laws thereof, the members in another state are not, in the absence of statutory authority in the latter, entitled to have an independent proceeding entertained therein. Weingartner *v.* Charter Oak L. Ins. Co., 32 Fed. 314; Fry *v.* Charter Oak L. Ins. Co., 31 Fed. 197. And see *supra*, III, B, 3, f.

5. *Indiana.*— Reliance Lumber Co. *v.* Brown, 4 Ind. App. 92, 30 N. E. 625.

Massachusetts.— Com. *v.* Massachusetts Mut. F. Ins. Co., 119 Mass. 45.

Minnesota.— Taylor *v.* North Star Mut. Ins. Co., 46 Minn. 198, 48 N. W. 772.

New York.— *In re* Bangs, 15 Barb. 264; *Compare* People *v.* Highland Mut. F. Ins. Co., 26 Misc. 205, 56 N. Y. Suppl. 83, in which it is said that a non-assessable policy is not terminated by the appointment of a receiver.

Rhode Island.— Insurance Com'rs *v.* Commercial Mut. Ins. Co., 20 R. I. 7, 36 Atl. 930.

Wisconsin.— Boyd *v.* Eau Claire Mut. Fire Assoc., 116 Wis. 155, 90 N. W. 1086, 94 N. W. 171, 96 Am. St. Rep. 948, 61 L. R. A. 918; Davis *v.* Shearer, 90 Wis. 250, 62 N. W. 1050.

Holders of endowment policies, the terms of which have not expired, are not creditors after insolvency of the company, although all the premiums which may be called for under the policies have been paid. Mayer *v.* Atty.-Gen., 32 N. J. Eq. 815 [*reversing* 31 N. J. Eq. 15].

Forfeiture of the charter for failing to comply with statutory requirements does not work a cancellation of outstanding policies so as to relieve the liability of the company thereon. Manlove *v.* Commercial Mut. F. Ins. Co., 47 Kan. 309, 27 Pac. 979.

6. *Indiana.*— Reliance Lumber Co. *v.* Brown, 4 Ind. App. 92, 30 N. E. 625.

Massachusetts.— Knowlton *v.* Massachusetts Ben. Life Assoc., 171 Mass. 193, 50 N. E. 520.

Minnesota.— Taylor *v.* North Star Mut. Ins. Co., 46 Minn. 198, 48 N. W. 772.

New Jersey.— Doane *v.* Millville Mut. M. & F. Ins. Co., 43 N. J. Eq. 522, 11 Atl. 739.

New York.— Merchants' Mut. Ins. Co. *v.* Underwood, 1 Sandf. 474.

rule is not changed even though by the terms of the policy the company is required to give notice to the insured in case it desires to cancel the policy.[7] Holders of policies on which premiums have been paid for a term extending beyond the insolvency have valid claims against the company for unearned premiums.[8] A statute making the officers personally liable on policies issued by them when they knew the company to be insolvent does not render a policy issued under such condition void; the policy is binding on the company with the individual liability of the directors superadded.[9] The right of holders of unmatured policies is to share in the assets after payment of debts, while the holders of matured policies are regarded as creditors.[10]

e. Liability of Members on Insolvency and Dissolution. On the other hand the insolvency of the company does not terminate the obligation of policy-holders to contribute to the payment of losses which have occurred prior to insolvency,[11] and those giving premium notes are also liable to assessment for the payment of unearned premiums on business done under the cash plan.[12] Assessments cannot be collected from holders of policies which are issued in violation of law.[13] And they can only be made on existing members, that is, members whose policies are still in force at the time of insolvency. Assessments cannot be made on persons who having had policies in the company have surrendered and canceled them;[14]

Pennsylvania.— Coston *v.* Alleghany County Mut. Ins. Co., 1 Pa. St. 322.

See 28 Cent. Dig. tit. "Insurance," § 86.

7. Reliance Lumber Co. *v.* Brown, 4 Ind. App. 92, 30 N. E. 625; Atlas Paper Co. *v.* Seamans, 82 Wis. 504, 52 N. W. 775; Dewey *v.* Davies, 82 Wis. 500, 52 N. W. 774.

8. *Indiana.*— Clark *v.* Manufacturers' Mut. F. Ins. Co., 130 Ind. 332, 30 N. E. 212.

Minnesota.— *In re* Minneapolis Mut. F. Ins. Co., 49 Minn. 291, 51 N. W. 921.

Missouri.— Carr *v.* Union Mut. F. Ins. Co., 28 Mo. App. 215.

Tennessee.— Smith *v.* St. Louis Mut. L. Ins. Co., 2 Tenn. Ch. 727.

United States.— Lovell *v.* St. Louis Mut. L. Ins. Co., 111 U. S. 264, 4 S. Ct. 390, 28 L. ed. 423.

See 28 Cent. Dig. tit. "Insurance," §§ 85, 86.

And see *supra*, IV, A, 10, b.

Suit to recover premiums paid.— Where the company by transferring its assets to another company and ceasing to do business incapacitates itself for carrying out its contract, the policy-holders may sue to recover the premium paid. Meade *v.* St. Louis Mut. L. Ins. Co., 51 How. Pr. (N. Y.) 1.

9. Clark *v.* Brown, 12 Gray (Mass.) 355.

10. Gray *v.* Merriman, 56 Minn. 171, 57 N. W. 463.

11. *Iowa.*— Corey *v.* Sherman, 96 Iowa 114, 64 N. W. 828, 32 L. R. A. 490.

Maine.— Howard *v.* Palmer, 64 Me. 86.

Massachusetts.— Com. *v.* Massachusetts Mut. F. Ins. Co., 112 Mass. 116; Alliance Mut. Ins. Co. *v.* Swift, 10 Cush. 433.

North Carolina.— North Carolina Mut. L. Ins. Co. *v.* Powell, 71 N. C. 389; Conigland *v.* North Carolina Mut. L. Ins. Co., 62 N. C. 341, 93 Am. Dec. 89.

Pennsylvania.— Sterling *v.* Mercantile Mut. Ins. Co., 32 Pa. St. 75, 72 Am. Dec. 773; Sparks *v.* Vitale, 44 Wkly. Notes Cas. 150; Standard Mut. Live Stock Ins. Co. *v.* Madara, 2 Pa. Dist. 600, 13 Pa. Co. Ct. 555; Solly *v.* Potts, 6 Montg. Co. Rep. 209.

Contra.— Mayer *v.* Atty.-Gen., 32 N. J. Eq. 815 [*reversing* 31 N. J. Eq. 15].

The guaranty of the officers that the liability of the member will not exceed a certain amount will not relieve the member from further assessment. Moore *v.* Lupfer, 32 Pittsb. Leg. J. (Pa.) 366.

Under a policy limiting the liability of the member to the amount of a cash deposit he cannot be made further liable to an assessment for losses. Swing *v.* Humbird, 94 Minn. 1, 101 N. W. 938.

12. *In re* Minneapolis Mut. F. Ins. Co., 49 Minn. 291, 51 N. W. 921; Raegener *v.* Willard, 44 N. Y. App. Div. 41, 60 N. Y. Suppl. 478; Regoner *v.* Phillips, 26 Misc. (N. Y.) 311, 56 N. Y. Suppl. 174; Lehigh Valley F. Ins. Co. *v.* Schimpf, 13 Phila. (Pa.) 515. But the statutory liability of the incorporators of a mutual fire company cannot be resorted to for raising money to repay unearned premiums, until the deposit notes have been exhausted (Com. *v.* Monitor Mut. F. Ins. Co., 112 Mass. 150); and it is said even the premium notes cannot be resorted to for the repayment of unearned premiums (Davis *v.* Shearer, 90 Wis. 250, 62 N. W. 1050; Atlas Paper Co. *v.* Seamans, 82 Wis. 504, 52 N. W. 775; Dewey *v.* Davis, 82 Wis. 500, 52 N. W. 774).

If a loss by fire is such as to require the entire funds of the company for its payment, an assessment may be made on premium notes on account of such loss. Rhinehart *v.* Alleghany County Mut. Ins. Co., 1 Pa. St. 359.

13. *In re* United Mut. F. Ins. Co., 22 R. I. 108, 46 Atl. 273.

14. Tolford *v.* Church, 66 Mich. 431, 33 N. W. 913; Moore *v.* Frey, 29 Pa. Co. Ct. 298; Knipe *v.* Scholl, 16 Montg. Co. Rep. (Pa.) 209.

and the receiver is bound by the prior action of the officers of the company in settling with policy-holders and canceling their policies so as to relieve them from assessment.[15] A member may also be relieved from liability on showing that he became such through fraud or mistake.[16]

f. Rights of Third Persons. A transfer of notes and securities by the officers of the company is not invalid as to the transferee in the absence on his part of knowledge of insolvency.[17]

g. Assessments — (I) *Necessity.* The receiver of an insolvent company cannot recover against members on their premium notes until an assessment has been made, declaring the extent of their liability;[18] but the statute of limitations does not begin to run in favor of the member liable to assessment until the assessment has been made.[19]

(II) *Proceedings For an Assessment; Notice.* It is essential to the validity of an assessment that there be a strict compliance with the statutory provisions relating thereto.[20] The amount of claims which will be allowed as just demands against the company must be ascertained before an assessment can be made to pay such indebtedness.[21] The court appointing a receiver will direct assessments to be made under its authority, with its approval to pay the liabilities of the company,[22] and the allowance of claims by the receiver which is made the

The holders of policies matured before insolvency cannot be called upon to share *prorata* losses occurring after their claims matured. Mayer *v.* Atty.-Gen., 32 N. J. Eq. 815.

A policy-holder whose policy has expired after insolvency, but before assessment, may be assessed for losses occurring before the expiration of his policy. Stockley *v.* Pollock, 10 Kulp (Pa.) 83.

15. Cavanagh *v.* Connon, 123 Mich. 685, 82 N. W. 523; Sands *v.* Hill, 55 N. Y. 18; Hyde *v.* Lynde, 4 N. Y. 387; *In re* Bangs, 15 Barb. (N. Y.) 264 [*reversed* in 12 N. Y. 477]; Wadsworth *v.* Davis, 13 Ohio St. 123; Backenstoe *v.* Jones, 12 Pa. Dist. 239, 27 Pa. Co. Ct. 565; Mitcheson's Estate, 11 Pa. Dist. 196; McCurdy *v.* Heitler, 19 Lanc. L. Rev. (Pa.) 331; Backenstoe *v.* Morgan, 18 Montg. Co. Rep. (Pa.) 145; Newton's Estate, 18 Montg. Co. Rep. (Pa.) 101. But a release which is without consideration (Doane *v.* Milville Mut. M. & F. Ins. Co., 43 N. J. Eq. 522, 11 Atl. 739; Knipe *v.* Scholl, 16 Montg. Co. Rep. (Pa.) 209) or not in accordance with the method provided for canceling policies (Russell *v.* Berry, 51 Mich. 287, 16 N. W. 651; Backenstoe *v.* Brown Creamery Co., 2 Blair Co. Rep. (Pa.) 324; Knipe *v.* Scholl, 16 Montg. Co. Rep. (Pa.) 209; Seamans *v.* Millers' Mut. Ins. Co., 90 Wis. 490, 63 N. W. 1059) will be void; and after insolvency the company cannot declare forfeitures on account of non-payment of premium notes or assessments, and members whose policies have not been forfeited prior to insolvency remain liable to assessment (Com. *v.* Massachusetts Mut. F. Ins. Co., 112 Mass. 116; Atty.-Gen. *v.* Guardian Mut. L. Ins. Co., 82 N. Y. 336; North Carolina Mut. L. Ins. Co. *v.* Powell, 71 N. C. 389; Conigland *v.* North Carolina Mut. L. Ins. Co., 62 N. C. 341, 98 Am. Dec. 89).

16. Macklem *v.* Bacon, 57 Mich. 334, 24 N. W. 91; Raegener *v.* Hubbard, 40 N. Y. App. Div. 359, 57 N. Y. Suppl. 1018 [*affirming* 56 N. Y. Suppl. 173]; Mansfield *v.* Cincinnati Ins. Co., 11 Ohio Dec. (Reprint) 617, 28 Cinc. L. Bul. 113; Capital City Mut. F. Ins. Co. *v.* Boggs, 172 Pa. St. 91, 33 Atl. 349; Backenstoe *v.* Williams, 26 Pa. Co. Ct. 283. But fraudulent representations of officers or agents cannot be set up to defeat liability on assessment where other persons have subsequently become members of the company in reliance on the liability of such member. Eichman *v.* Hersker, 170 Pa. St. 402, 33 Atl. 229; Dettra *v.* Lock, 5 Pa. Dist. 200; Backenstoe *v.* Brown Creamery Co., 2 Blair Co. Rep. (Pa.) 324; McCurdy *v.* Nelson, 19 Lanc. L. Rev. (Pa.) 332.

17. Litchfield *v.* Dyer, 46 Me. 31; Brouwer *v.* Harbeck, 1 Duer (N. Y.) 114 [*reversed* in 9 N. Y. 589]; Furniss *v.* Sherwood, 3 Sandf. (N. Y.) 521.

18. Savage *v.* Medbury, 19 N. Y. 32; Devendorf *v.* Beardsley, 23 Barb. (N. Y.) 656; Shaughnessy *v.* Rensselaer Ins. Co., 21 Barb. (N. Y.) 605; Williams *v.* Lakey, 15 How. Pr. (N. Y.) 206.

19. Peake *v.* Fuller, 123 Mich. 684, 82 N. W. 847; Wardle *v.* Hudson, 96 Mich. 432, 55 N. W. 992; Backenstoe *v.* Jones, 12 Pa. Dist. 239, 27 Pa. Co. Ct. 565; Backenstoe *v.* Schroenk 18 Montg. Co. Rep. (Pa.) 181, 16 York Leg. Rec. 101; Newton's Estate, 18 Montg. Co. Rep. (Pa.) 101.

20. Appleton Mut. F. Ins. Co. *v.* Jesser, 5 Allen (Mass.) 446.

21. Embree *v.* Shideler, 36 Ind. 423. And such ascertainment may be by a reference. Matter of Campbell, 13 How. Pr. (N. Y.) 481.

22. Western Manufacturers' Mut. Ins. Co. *v.* Hutchinson Cooperage Co., 92 Ill. App. 1; Sanford *v.* Hampden Paint, etc., Co., 179 Mass. 10, 60 N. E. 399; Com. *v.* Massachusetts Mut. F. Ins. Co., 112 Mass. 116; Schofield *v.* Lafferty, 17 Pa. Super. Ct. 8; Sparks *v.* Estbrooks, 72 Vt. 101, 47 Atl. 394.

Second assessment.— After an assessment

basis of the assessment is at least *prima facie* sufficient to support the order for an assessment including such claim.[23] All the members are not necessary parties to a proceeding to make an assessment upon them.[24] Notice of the proceeding to levy an assessment should be given, if required by statute.[25] It has been held, however, that statutory notice of such proceeding is not a condition precedent to the recovery of an assessment from a member.[26] The order authorizing an assessment must be strictly followed by the receiver.[27]

(III) *Amount of Assessment and Conclusiveness of Order.* While the members are liable on their own premium notes only for their respective share of the losses or damages sustained by members,[28] yet, to the extent of the liability of the company for such losses and damages, they may be assessed to satisfy the company's entire indebtedness.[29] The receiver may include in the amount for which assessments should be made all just and equitable claims against the company,[30] and the assessment may be large enough to cover probable deficiencies due to uncollectable assessments.[31] The assessment may be made large enough to cover the expenses of collection, and winding up of the affairs of the company.[32] The action of the court in ordering the receiver to make an assessment is not in itself a determination of the amounts for which assessments shall be made, or the ratio of the assessments.[33] But the determination by the court of the amount of indebtedness and the rate of assessment is conclusive on the members, and not subject to collateral attack.[34] While the decree is conclusive as to the validity

by the directors which has proved inadequate, the court will not make a second assessment unless such action would be equitable under the circumstances. Merrill *v.* Colony Mut. Ins. Co., 169 Mass. 408, 48 N. E. 279.

23. Sands *v.* Hill, 42 Barb. (N. Y.) 651; Sands *v.* Graves, 1 Thomps. & C. (N. Y.) addenda 13; Lehigh Valley F. Ins. Co. *v.* Dryfoos, 6 Pa. Cas. 219, 9 Atl. 262.

24. Western Manufacturers' Mut. Ins. Co. *v.* Hutchinson Cooperage Co., 92 Ill. App. 1; Ross *v.* Knapp, 77 Ill. App. 424; Mallen *v.* Langworthy, 70 Ill. App. 376; Parker *v.* Central Ohio Paper Co., 4 Ohio S. & C. Pl. Dec. 250, 3 Ohio N. P. 207.

25. Sands *v.* Graves, 58 N. Y. 94; Sands *v.* Sanders, 26 N. Y. 239; Bangs *v.* Duckinfield, 18 N. Y. 592; Bangs *v.* McIntosh, 23 Barb. (N. Y.) 591; Com. *v.* Chalfont Mut. Wind, etc., Ins. Co., 18 Montg. Co. Rep. (Pa.) 74. It has been said in a New York decision that it is no more than just that the member have notice of such proceeding to levy an assessment on which he may be liable. Matter of Campbell, 13 How. Pr. (N. Y.) 481.

Statement of losses.— Where the by-laws forming a part of the policy require a statement of losses to be sent with each assessment, it is said that a receiver cannot collect an assessment directed to be levied, unless he sends such statement with notice of the assessment. Annan *v.* Hill Union Brewery Co., 59 N. J. Eq. 414, 46 Atl. 563; Koehler *v.* Beeber, 122 Pa. St. 291, 16 Atl. 354.

26. Cooper *v.* Shaver, 41 Barb. (N. Y.) 151.

27. Thomas *v.* Whallon, 31 Barb. (N. Y.) 172; Shaughnessy *v.* Rensselaer Ins. Co., 21 Barb. (N. Y.) 605; Snyder *v.* Groff, 8 Pa. Dist. 291.

28. Shaughnessy *v.* Rensselaer Ins. Co., 21 Barb. (N. Y.) 605.

29. Sands *v.* Boutwell, 26 N. Y. 233; Cooper *v.* Shaver, 41 Barb. (N. Y.) 151; Tobey *v.* Russell, 9 R. I. 58.

30. Sands *v.* Hill, 42 Barb. (N. Y.) 651; Regeber *v.* Phillips, 26 Misc. (N. Y.) 311, 56 N. Y. Suppl. 174; Stockley *v.* Hartley, 12 Pa. Super. Ct. 628.

Claims may be included which are not yet matured, so as to form the basis of an action if the liability has already become established. Wyman *v.* Kimberly-Clark Co., 93 Wis. 554, 67 N. W. 932.

31. Wardle *v.* Townsend, 75 Mich. 385, 42 N. W. 950, 4 L. R. A. 511; Insurance Com'rs *v.* Commercial Mut. Ins. Co., 20 R. I. 7, 36 Atl. 930; Tobey *v.* Russell, 9 R. I. 58; Seamans *v.* Millers' Mut. Ins. Co., 90 Wis. 490, 63 N. W. 1059; Davis *v.* Shearer, 90 Wis. 250, 62 N. W. 1050.

32. *Indiana.*— Howard *v.* Whitman, 29 Ind. 557.

Minnesota.— Langworthy *v.* C. C. Washburn Flouring Mills Co., 77 Minn. 256, 79 N. W. 974.

New York.— Sands *v.* Boutwell, 26 N. Y. 233.

Pennsylvania.— McCurdy *v.* Nelson, 19 Lanc. L. Rev. 332; Lycoming F. Ins. Co. *v.* Buck, 1 Luz. Leg. Reg. 351.

England.— Lethbridge *v.* Adams, L. R. 13 Eq. 547, 41 L. J. Ch. 710, 26 L. T. Rep. N. S. 547, 20 Wkly. Rep. 352.

See 28 Cent. Dig. tit. "Insurance," § 95.

33. Thomas *v.* Whallon, 31 Barb. (N. Y.) 172.

34. *Illinois.*— Rand *v.* Mutual F. Ins. Co., 58 Ill. App. 528.

Indiana.— Howard *v.* Whitman, 29 Ind. 557.

Maryland.— Lycoming F. Ins. Co. *v.* Langley, 62 Md. 196.

and amount of the assessment, it does not preclude a policy-holder from defending on any ground peculiar to himself;[35] and a grossly excessive assessment may be corrected on appeal, if it appears that the discretion of the court has been improvidently exercised.[36] When money is paid under an assessment, it will be deemed voluntary and cannot be recovered back, although the assessment is void.[37]

(IV) *Action to Recover Assessments.* In a proceeding by the receiver to enforce payment of assessments made, the essential facts, such as the indebtedness of the company, the appointment of a receiver, the levy of the assessment, and notice to the member of the amount thereof should be alleged.[38] It must also be shown that the losses included in the assessment occurred during the time that the member's policy was in force,[39] and that either the court or the receiver under its authority has examined and determined the validity of the claims for which assessments have been made.[40] If the receiver has acted under authority of the court, determining the facts necessary to authorize the assessment, these facts may be put in issue in an action on the assessment.[41] Defendant cannot, as a defense to an action by the receiver for an assessment on his note, set up the fact that before the commencement of the action, but after the dissolution of the company, the claim against him has been attached in another state by a creditor of the company.[42]

(V) *Setting Off Claims Against Assessments.*[43] The member cannot set off, as against his liability on a premium note, any claim he may have against

New Jersey.— French *v.* Millville Mfg. Co., 70 N. J. L. 699, 59 Atl. 214; Whitaker *v.* Meley, 61 N. J. L. 1, 38 Atl. 840.

New York.— Sands *v.* Sanders, 26 N. Y. 239; Cooper *v.* Shaver, 41 Barb. 151; Matter of Campbell, 13 How. Pr. 481.

Pennsylvania.— Capital City Mut. F. Ins. Co. *v.* Boggs, 172 Pa. St. 91, 33 Atl. 349; Eichman *v.* Hersker, 170 Pa. St. 402, 33 Atl. 229; Wood *v.* Standard Mut. Live Stock Ins. Co., 154 Pa. St. 157, 26 Atl. 103; Moore *v.* Reifsnyder, 22 Pa. Super. Ct. 326; Snader *v.* Bomberger, 21 Pa. Super. Ct. 629; Stockley *v.* Schwerdfeger, 19 Pa. Super. Ct. 289; Schofield *v.* Leach, 15 Pa. Super. Ct. 354; Stockley *v.* Riebenack, 12 Pa. Super. Ct. 169; Backenstoe *v.* Jones, 12 Pa. Dist. 239, 27 Pa. Co. Ct. 565; Backenstoe *v.* Schwenk, 18 Montg. Co. Rep. 181, 16 York Leg. Rec. 101; Newton's Estate, 18 Montg. Co. Rep. 101; Stockley *v.* Hartley, 30 Pittsb. Leg. J. 55.

Wisconsin.— Seamans *v.* Millers' Mut. Ins. Co., 90 Wis. 490, 63 N. W. 1059; Davis *v.* Oshkosh Upholstery Co., 82 Wis. 488, 52 N. W. 771.

See 28 Cent. Dig. tit. "Insurance," §§ 94, 96.

One who is in fact not liable to assessment is not concluded by the action of the court in directing an assessment by the receiver. Thompson Lumber Co. *v.* Mutual F. Ins. Co., 66 Ill. App. 254; Swing *v.* Humbird, 94 Minn. 1, 101 N. W. 938; *In re* Protection L. Ins. Co., 20 Fed. Cas. No. 11,444, 9 Biss. 188.

35. Snyder *v.* Groff, 8 Pa. Dist. 291; Backenstoe *v.* Schwenk, 18 Montg. Co. Rep. (Pa.) 181, 16 York Leg. Rec. 101; Newton's Estate, 18 Montg. Co. Rep. (Pa.) 101.

36. Stockley *v.* Hartley, 12 Pa. Super. Ct. 628.

37. Wilde *v.* Baker, 14 Allen (Mass.) 349.

38. *Illinois.*—Western Manufacturers' Mut. Ins. Co. *v.* Rowell Elevator Co., 94 Ill. App. 16.

Indiana.— Manlove *v.* Burger, 38 Ind. 211.

Minnesota.— Dwinnell *v.* Felt, 90 Minn. 9, 95 N. W. 579.

New York.— Sands *v.* Shoemaker, 4 Abb. Dec. 149, 2 Keyes 268; Devendorf *v.* Beardsley, 23 Barb. 656; Hurlbut *v.* Root, 12 How. Pr. 511.

Pennsylvania.— Solly *v.* Moore, 11 Pa. Co. Ct. 333; Snader *v.* Baker, 16 Lanc. L. Rev. 102, 7 Northam. Co. Rep. 49; Stockley *v.* Hartley, 30 Pittsb. Leg. J. 55.

See 28 Cent. Dig. tit. "Insurance," § 92.

Record and decree.— The receiver should in his action set out a copy of the record of the proceedings leading up to the order for assessment. Schofield *v.* Lafferty, 17 Pa. Super. Ct. 8. But it is not necessary for him to attach a copy of the decree appointing him receiver. Stockley *v.* Cook, 30 Pittsb. Leg. J. (Pa.) 101.

39. Downs *v.* Hammond, 47 Ind. 131; Whitman *v.* Mason, 40 Ind. 189; Manlove *v.* Bender, 39 Ind. 371, 13 Am. Rep. 280; Manlove *v.* Naw, 39 Ind. 289; Manlove *v.* Naylor, 38 Ind. 424; Peake *v.* Yule, 123 Mich. 675, 82 N. W. 514; Jackson *v.* Roberts, 31 N. Y. 304; Commonwealth Mut. F. Ins. Co. *v.* Edwards, 124 N. C. 116, 32 S. E. 404.

40. Hashagan *v.* Manlove, 42 Ind. 330; Heller *v.* McCormick, 38 Ind. 30; Embree *v.* Shideler, 36 Ind. 423.

41. Wardle *v.* Townsend, 75 Mich. 385, 42 N. W. 950, 4 L. R. A. 511; Thomas *v.* Whallon, 31 Barb. (N. Y.) 172.

42. Osgood *v.* Maguire, 61 Barb. (N. Y.) 54 [*affirmed* in 61 N. Y. 524].

43. See, generally, Set-Off and Counter-Claim.

the company for a loss under his policy;[44] nor for damages or unearned premiums to which he is entitled by reason of the cancellation of his policy, due to the insolvency of the company.[45] The member cannot set off the reserve value of an endowment policy,[46] nor a dividend declared in his favor.[47] He cannot set off against an assessment made under order of court, the amount which he has paid under a former assessment by the officers of the company.[48] He must pay the assessment and look to the dividends by the receiver on claims established against the company for reimbursement.[49]

10. Collection and Distribution of Assets. The receiver, when appointed, stands in the place of the company as to collection of assessments and payment of claims.[50] The funds coming into his hands are to be distributed *pro rata* to those having claims against the company.[51] Previously accrued profits which have been credited to the policies, do not belong to policy-holders, but are funds for payment of losses.[52] Holders of claims already accrued prior to insolvency have no priority over other claimants.[53] Judgment creditors have no priority unless their judgments are liens on specific property.[54] The dissolution of the

44. Lawrence *v.* Nelson, 21 N. Y. 158 [*affirming* 4 Bosw. 240]; Hillier *v.* Allegheny County Mut. Ins. Co., 3 Pa. St. 470, 45 Am. Dec. 656; Schofield *v.* Lafferty, 17 Pa. Super. Ct. 8; Gain's Estate, 5 Pa. Dist. 350; Dettra *v.* Spielberger, 5 Pa. Dist. 262; Standard Mut. Live Stock Ins. Co. *v.* Crawford, 2 Pa. Dist. 601; Care *v.* Brown, 31 Wkly. Notes Cas. (Pa.) 501.

Counter-claim.— A statute providing that no order for an accounting, or to enjoin the prosecution of the business of an insurance company, or for the appointment of a receiver shall be made otherwise than on the application of the attorney-general, does not bar the consideration of a counter-claim pleaded by an individual member in an action brought against him by the company. Muller *v.* State L. Ins. Co., 27 Ind. App. 45, 60 N. E. 958.

45. Allen *v.* Thompson, 108 Ky. 476, 56 S. W. 823, 22 Ky. L. Rep. 164; Com. *v.* Massachusetts Mut. F. Ins. Co., 112 Mass. 116; Vanatta *v.* New Jersey Mut. L. Ins. Co., 31 N. J. Eq. 15; North Carolina Mut. L. Ins. Co. *v.* Powell, 71 N. C. 389; Conigland *v.* North Carolina Mut. L. Ins. Co., 62 N. C. 341, 93 Am. Dec. 89. But it is said that the insured in a mutual company who under the provisions of the charter is not a member may, in a suit against him on his notes, offset any claim which he has for a loss. Berry *v.* Brett, 6 Bosw. (N. Y.) 627 [*distinguishing* Lawrence *v.* Nelson, 21 N. Y. 158].

Demands payable prior to receiver's appointment.— In the absence of an allegation of insolvency defendant in an action for an assessment on a premium note brought by a receiver may set off a demand due from the company and payable prior to the receiver's appointment. Solly *v.* Scheetz, 6 Montg. Co. Rep. (Pa.) 112.

46. Newcomb *v.* Almy, 96 N. Y. 308.

47. Gain's Estate, 5 Pa. Dist. 350.

48. Snader *v.* Bomberger, 21 Pa. Super. Ct. 629.

49. Lawrence *v.* McCready, 6 Bosw. (N. Y.) 329.

50. Rand *v.* Mutual F. Ins. Co., 58 Ill. App. 528; Stockley *v.* Thomas, 89 Md. 663, 43 Atl. 766; Savage *v.* Medbury, 19 N. Y. 32; Gray *v.* Haviland, 42 N. Y. App. Div. 626, 58 N. Y. Suppl. 1060; Sands *v.* Hill, 42 Barb. (N. Y.) 651; Shaughnessy *v.* Rensselaer Ins. Co., 21 Barb. (N. Y.) 605. But the receiver should not be directed to continue the business, if it is apparent that such continuance is impracticable. Atty.-Gen. *v.* Atlantic Mut. L. Ins. Co., 77 N. Y. 336; People *v.* Atlantic Mut. L. Ins. Co., 15 Hun (N. Y.) 84.

The right of action to recover assets of the corporation illegally diverted vests in the receiver. Atty.-Gen. *v.* Guardian Mut. L. Ins. Co., 77 N. Y. 272.

Funds of one beneficiary paid to another.— But the receiver has no authority to recover on the fidelity bond of the president, for funds wrongfully paid by him to one beneficiary which in fact belonged to another, where the latter has subsequently been paid in full from funds subsequently accrued The receiver can only represent the claims of unpaid beneficiaries. Sherman *v.* Harbin, 124 Iowa 643, 100 N. W. 622.

51. Ellerbe *v.* United Masonic Ben. Assoc. 114 Mo. 501, 21 S. W. 843; Ellerbe *v* Farmers', etc., Mut. Aid Assoc., 106 Mo. 13, 16 S. W. 683; Carr *v.* Union Mut. F. Ins. Co., 33 Mo. App. 291. But the policy-holder is not a copartner and is not entitled to share *pro rata* in the assets. Grobe *v.* Erie County Mut. Ins. Co., 24 Misc. (N. Y.) 462, 53 N. Y. Suppl. 628.

The date of insolvency as adjudged by the decree fixes the time to which the several claims must be referred for adjustment. Taylor *v.* North Star Mut. Ins. Co., 46 Minn. 198, 48 N. W. 772; Mayer *v.* Atty.-Gen., 32 N. J. Eq. 815.

52. Com. *v.* Massachusetts Mut. F. Ins. Co., 112 Mass. 116.

53. *In re* Equitable Reserve Fund L. Assoc., 131 N. Y. 354, 30 N. E. 114. *Compare* Mayer *v.* Atty.-Gen., 32 N. J. Eq. 815.

54. Doane *v.* Millville Mut. M. & F. Ins. Co., 45 N. J. Eq. 274, 17 Atl. 625; Atty.-

company and the appointment of a receiver does not, however, destroy a trust fund created for certain purposes.[55] But the expenses of the receivership are to be paid *pro rata* out of the reserve fund which the receiver administers.[56] The receiver and his sureties are liable for his refusal to comply with an order of the court as to the distribution of the funds.[57] If a surplus is realized it will be distributed as assets to those from whom the assessment was collected.[58]

V. AGENTS AND BROKERS.[59]

A. Definition of Terms. An insurance agent is one employed by an insurance company to solicit risks and effect insurance.[60] An insurance broker is one who acts as a middleman between the insured and the insurer; one who solicits contracts from the public under no employment from any special company; but having secured an order places the insurance with the company selected by the insured, or in the absence of any selection by him, then with the company selected by such broker.[61] An insurance broker is ordinarily the agent of the person seeking insurance.[62]

B. Agency For Company[63] — 1. APPOINTMENT OR EMPLOYMENT. A person may become authorized to bind the company as its agent not only by formal appointment as such agent, but also by being authorized by implication to act on behalf of the company in relation to its business; and in general persons who with the knowledge and assent of the company act for it in soliciting or procuring or contracting for insurance are held to be agents without formal appointment.[64] The authority of the agent is often sufficiently indicated by the general course of business in which he acts for the company, such course of business being known to the company and not objected to.[65] So one who acts with authority for the com-

Gen. *v.* Guardian Mut. L. Ins. Co., 5 N. Y. Suppl. 84. A creditor entitled to a lien on a particular fund may abandon his lien and resort to other remedies. Atty.-Gen. *v.* Massachusetts Ben. L. Assoc., 173 Mass. 378, 53 N. E. 879.

55. San Francisco Sav. Union *v.* Long, 123 Cal. 107, 55 Pac. 708; *In re* California Mut. L. Ins. Co., 81 Cal. 364, 22 Pac. 869; Smith *v.* Hunterdon County Mut. F. Ins. Co., 41 N. J. Eq. 473, 4 Atl. 652; Farmers' L. & T. Co. *v.* Aberle, 19 N. Y. App. Div. 79, 46 N. Y. Suppl. 10 [*modifying* 18 Misc. 257, 41 N. Y. Suppl. 638].

56. *In re* Equitable Reserve Fund Life Assoc., 131 N. Y. 354, 30 N. E. 114.

57. Wilde *v.* Baker, 14 Allen (Mass.) 349.

58. Howard *v.* Whitman, 29 Ind. 557; Com. *v.* Massachusetts Mut. F. Ins. Co., 119 Mass. 45.

59. See, generally, PRINCIPAL AND AGENT.

60. Black L. Dict.

The term "agent" or "agents" has been defined by statute, and some of the definitions are broad enough to include brokers. See Ga. Civ. Code (1895), § 2054; Continental Ins. Co. *v.* Ruckman, 127 Ill. 364, 20 N. E. 77, 11 Am. St. Rep. 121; People *v.* People's Ins. Exch., 126 Ill. 466, 18 N. E. 774, 2 L. R. A. 340; McKinney *v.* Alton, 41 Ill. App. 508; Hartford Live Stock Ins. Co. *v.* Matthews, 102 Mass. 221; People *v.* Howard, 50 Mich. 239, 15 N. W. 101; Romberg *v.* Kouther, 27 Misc. (N. Y.) 227, 57 N. Y. Suppl. 729; Co-operative Fire Ins. Order *v.* Lewis, 12 Lea (Tenn.) 136; State *v.* U. S. Mutual Acc. Assoc., 67 Wis. 624, 31 N. W. 229.

61. Arff *v.* Star F. Ins. Co., 125 N. Y. 57, 25 N. E. 1073, 21 Am. St. Rep. 721, 10 L. R. A. 609.

Statutory definition see Edwards *v.* Home Ins. Co., 100 Mo. App. 695, 73 S. W. 881; 1 Pepper & L. Dig. Laws Pa. (1894) col. 2397, § 125.

62. Arff *v.* Star F. Ins. Co., 125 N. Y. 57, 25 N. E. 1073, 21 Am. St. Rep. 721, 10 L. R. A. 609; Romberg *v.* Kouther, 27 Misc. (N. Y.) 227, 57 N. Y. Suppl. 729; Mechem Agency, § 931. *Compare* definition in Anderson L. Dict., in which an insurance broker is defined as "a person who negotiates contracts of insurance. He is agent for both parties."

63. For statutory regulations as to agents and brokers see *supra*, III, D.

64. See cases *infra*, in following notes.

Designation in policy.— One recognized in the policy as agent is sufficiently appointed in writing as required by the policy. Wilson *v.* Commercial Union Assur. Co., 51 S. C. 540, 29 S. E. 245, 64 Am. St. Rep. 700.

65. *Illinois.*— Keith *v.* Globe Ins. Co., 52 Ill. 518, 4 Am. Rep. 634.

Indiana.— Indiana Ins. Co. *v.* Hartwell, 123 Ind. 177, 24 N. E. 100.

New York.— Peck *v.* Washington L. Ins. Co., 91 N. Y. App. Div. 597, 87 N. Y. Suppl. 210; Globe, etc., F. Ins. Co. *v.* Robbins, etc., Co., 43 Misc. 65, 86 N. Y. Suppl. 493.

Pennsylvania.— McGonigie *v.* Susquehanna Mut. F. Ins. Co., 168 Pa. St. 1, 31 Atl. 868.

United States.— Mannheim Ins. Co. *v.* Chipman, 124 Fed. 950; Sias *v.* Roger Williams Ins. Co., 8 Fed. 183.

pany in one particular instance is an agent of the company as to that transaction by whose acts it is bound.[66]

2. EVIDENCE AS TO AGENCY.[67] Agency may be established by evidence that the person alleged to be agent was intrusted with blank policies ready for execution and delivery, or other blanks suitable for the use of an agent,[68] or that the company has acted upon applications forwarded or information given by such person;[69] by evidence of a course of dealing known to and approved by the company;[70] or by evidence that the company has recognized such person as its agent in other transactions.[71] So the fact that one who claims to represent the company answers a letter addressed by the insured to the company is some evidence of his agency;[72] and mere representations of one claiming to act as agent that he is authorized to so act do not constitute any evidence of his agency.[73] Acts and declarations of the agent in the particular transaction are not admissible to prove his agency.[74] But testimony of the agent himself as to his authority is admissible.[75]

3. CONTINUANCE AND TERMINATION OF AUTHORITY. The authority of the agent to bind the company by his acts and contracts may in general be terminated as any other agency.[76] But termination of authority to make further contracts of insur-

England.— Brockelbank *v.* Sugrue, 5 C. & P. 21, 24 E. C. L. 433.

See 28 Cent. Dig. tit. "Insurance," § 99.

66. National Mut. Church Ins. Co. *v.* Bentley M. E. Church, 105 Ill. App. 143; Rockford Ins. Co. *v.* Boirum, 40 Ill. App. 129.

67. See, generally, PRINCIPAL AND AGENT.

68. *Maryland.*— Hartford F. Ins. Co. *v.* Keating, 86 Md. 130, 38 Atl. 29, 63 Am. St. Rep. 499.

Minnesota.— Newman *v.* Springfield F. & M. Ins. Co., 17 Minn. 123.

New York.— Loomis *v.* Jefferson County Patrons' Fire Relief Assoc., 92 N. Y. App. Div. 601, 87 N. Y. Suppl. 5.

Ohio.— Stacy *v.* Norwich Union F. Ins. Soc., 25 Ohio Cir. Ct. 67.

Virginia.— Hardin *v.* Alexandria Ins. Co., 90 Va. 413, 18 S. E. 911.

West Virginia.— Bell *v.* Peabody Ins. Co., 49 W. Va. 437, 38 S. E. 541.

United States.— Mohr, etc., Distilling Co. *v.* Ohio Ins. Co., 13 Fed. 74.

See 28 Cent. Dig. tit. "Insurance," § 101.

Compare Dickerman *v.* Quincy Mut. F. Ins. Co., 67 Vt. 609, 32 Atl. 489.

The possession of blanks and supplies obtained without authority of the company is not evidence of agency. Rahr *v.* Manchester F. Assur. Co., 93 Wis. 355, 67 N. W. 725.

69. Citizens' Ins. Co. *v.* Stoddard, 197 Ill. 330, 64 N. E. 355; State Ins. Co. *v.* Schreck, 27 Nebr. 527, 43 N. W. 340, 20 Am. St. Rep. 696, 6 L. R. A. 524; North American Acc. Ins. Co. *v.* Sickles, 23 Ohio Cir. Ct. 594; Hilliard *v.* Caledonia Ins. Co., 5 Ohio S. & C. Pl. Dec. 576, 7 Ohio N. P. 561. And see Chapman *v.* Providence Washington Ins. Co., 23 N. Brunsw. 105.

70. U. S. Life Ins. Co. *v.* Lesser, 126 Ala. 568, 28 So. 646; Foste *v.* Standard L., etc., Ins. Co., 34 Oreg. 125, 54 Pac. 811; Ætna L. Ins. Co. *v.* Smith, 88 Fed. 440, 31 C. C. A. 575. *Compare* Boogher *v.* Maryland L. Ins. Co., 6 Mo. App. 592, holding that a special agent's authority cannot be made out by proof of custom alone.

71. *Alabama.*— Capital City Ins. Co. *v.* Caldwell, 95 Ala. 77, 10 So. 355.

California.— Hurgren *v.* Union Mut. L. Ins. Co., 141 Cal. 585, 75 Pac. 168.

Georgia.— Continental Ins. Co. *v.* Wickham, 110 Ga. 129, 35 S. E. 287.

Indiana.— German F. Ins. Co. *v.* Columbia Encaustic Tile Co., 15 Ind. App. 623, 43 N. E. 41.

Kentucky.— New York Mut. F. Ins. Co. *v.* Hammond, 106 Ky. 386, 50 S. W. 545, 20 Ky. L. Rep. 1944.

Massachusetts.— Sanford *v.* Orient Ins. Co., 174 Mass. 416, 54 N. E. 883, 75 Am. St. Rep. 358; Markey *v.* Mutual Ben. L. Ins. Co., 163 Mass. 78.

Minnesota.— Ames-Brooks Co. *v.* Ætna Ins. Co., 83 Minn. 346, 86 N. W. 344.

Missouri.— Grady *v.* American Cent. Ins. Co., 60 Mo. 116.

Oregon.— Hahn *v.* Guardian Assur. Co., 23 Oreg. 576, 32 Pac. 683, 27 Am. St. Rep. 709; Hardwick *v.* State Ins. Co., 23 Oreg. 290, 31 Pac. 656.

Pennsylvania.— Parker *v.* Citizens' F. Ins. Co., 129 Pa. St. 583, 18 Atl. 524.

See 28 Cent. Dig. tit. "Insurance," § 122.

Question of fact.— Whether the agent has authority in the particular case to charge the company by his act is a question of fact. Firemen's Ins. Co. *v.* Horton, 170 Ill. 258, 48 N. E. 955; Slobodisky *v.* Phenix Ins. Co., 53 Nebr. 816, 74 N. E. 270.

72. Enos *v.* St. Paul F. & M. Ins. Co., 4 S. D. 639, 57 N. W. 919, 46 Am. St. Rep. 796.

73. Gude *v.* New York Exch. F. Ins. Co., 53 Minn. 220, 54 N. W. 1117; Guernsey *v.* American Ins. Co., 17 Minn. 104; Dickerman *v.* Quincy Mut. F. Ins. Co., 67 Vt. 609, 32 Atl. 489.

74. Baldwin *v.* Connecticut Mut. L. Ins. Co., 182 Mass. 389, 65 N. E. 837. And see PRINCIPAL AND AGENT.

75. See PRINCIPAL AND AGENT.

76. An assignment of the company for the benefit of creditors revokes the authority of its agents. Frenzen *v.* Zimmer, 90 Hun (N. Y.) 103, 35 N. Y. Suppl. 612.

ance does not necessarily terminate the authority of the agent to represent the company with reference to existing insurance. Such agent may bind the company by his acts until notice of the revocation of his authority is brought home to the insured.[77] But a local custom permitting agents after the termination of their agency to cancel policies and transfer their insurance to other companies is in contravention of the principles governing the relation of principal and agent and is of no effect as conferring authority upon such agent.[78]

4. Scope of Authority[79] — a. General Agents — (I) *Who Are.* Agents authorized to accept risks and issue policies by filling out blank instruments which are placed in their hands for that purpose and to renew policies already issued are general agents of the company.[80]

(II) *Power to Bind Company* — (A) *In General.* The company is bound by the acts, representations, and knowledge of its general agent within the scope of his agency.[81]

Termination of special agency.— Appointing one as general agent terminates his authority under a special agency. Rapier *v.* Louisiana Equitable L. Ins. Co., 57 Ala. 100.

Death of the agent terminates the agency and his executor cannot recover commissions on premiums subsequently paid on policies procured by the agent. Mills *v.* Union Cent. L. Ins. Co., 77 Miss. 327, 28 So. 954, 78 Am. St. Rep. 522. Where an agency is given to two persons as partners, the death of one of them terminates the agency and it cannot be exercised by the survivor. Martine *v.* International L. Assur. Co., 62 Barb. (N. Y.) 181.

Particular facts showing termination.— When the company, after having complained to the agent that it was not receiving any new business from him, wrote to him that it was unwilling to continue the agency, and subsequently through its general office collected renewal premiums on policies previously issued by him, it was held that the agency had been terminated. Andrews *v.* Traveler's Ins. Co., 70 S. W. 43, 24 Ky. L. Rep. 844.

Presumption as to continuance.— A general agency being shown to have existed is presumed to continue until a policy-holder who has dealt with such agent has been notified of its termination. Wilson *v.* Commercial Union Assur. Co., 51 S. C. 540, 29 S. E. 245, 64 Am. St. Rep. 700.

77. *Alabama.*— Continental F. Ins. Co. *v.* Brooks, 131 Ala. 614, 30 So. 876.

Arkansas.— Burlington Ins. Co. *v.* Threlkeld, 60 Ark. 539, 31 S. W. 265.

Illinois.— Merchants Ins. Co. *v.* Oberman, 99 Ill. App. 357.

Kentucky.— Springfield F. & M. Ins. Co. *v.* Davis, 37 S. W. 582, 18 Ky. L. Rep. 654; New Orleans Ins. Co. *v.* O'Brian, 8 Ky. L. Rep. 785.

Louisiana.— *In re* Pelican Ins. Co., 47 La. Ann. 935, 17 So. 427.

South Carolina.— Wilson *v.* Commercial Union Assur. Co., 51 S. C. 540, 29 S. E. 245, 64 Am. St. Rep. 700.

See 28 Cent. Dig. tit. "Insurance," § 104.

78. Merchants' Ins. Co. *v.* Prince, 50 Minn. 53, 52 N. W. 131, 36 Am. St. Rep. 626.

79. Further as to the scope of authority of agents see in general Principal and Agent, and in particular the headings relating to agents under Fire Insurance; Life Insurance; and Marine Insurance.

80. *Indiana.*— German F. Ins. Co. *v.* Columbia Encaustic Tile Co., 15 Ind. App. 623, 43 N. E. 41.

Iowa.— King *v.* Council Bluffs Ins. Co., 72 Iowa 310, 33 N. W. 690.

Kentucky.— Howard Ins. Co. *v.* Owens, 13 Ky. L. Rep. 237.

Maryland.— Hartford F. Ins. Co. *v.* Keating, 86 Md. 130, 38 Atl. 29, 63 Am. St. Rep. 499.

Massachusetts.— Fogg *v.* Griffin, 2 Allen 1.

Missouri.— London Guaranty, etc., Co. *v.* Missouri, etc., Coal Co., 103 Mo. App. 530, 78 S. W. 306; King *v.* Phœnix Ins. Co., 101 Mo. App. 163, 76 S. W. 55.

New York.— Devendorf *v.* Beardsley, 23 Barb. 656.

Ohio.— Scottish Union, etc., Ins. Co. *v.* Brown, 24 Ohio Cir. Ct. 52.

Pennsylvania.— Lycoming F. Ins. Co. *v.* Woodworth, 83 Pa. St. 223.

South Dakota.— Harding *v.* Norwich Union F. Ins. Soc., 10 S. D. 64, 71 N. W. 755; South Bend Toy Mfg. Co. *v.* Dakota F. & M. Ins. Co., 3 S. D. 205, 52 N. W. 866, 2 S. D. 17, 48 N. W. 310.

Tennessee.— Ætna L. Ins. Co. *v.* Fallow, 110 Tenn. 720, 77 S. W. 937.

Virginia.— Goode *v.* Georgia Home Ins. Co., 92 Va. 392, 23 S. E. 744, 53 Am. St. Rep. 817, 30 L. R. A. 842; Georgia Home Ins. Co. *v.* Kinnier, 28 Gratt. 88.

Canada.— Ansley *v.* Watertown Ins. Co., 14 Quebec 183.

See 28 Cent. Dig. tit. "Insurance," § 103.

Evidence.— The fact that one acting as agent occupied the company's general office and made use of stationery on which he was described as general agent was held sufficient to show his agency. Flynn *v.* Equitable L. Ins. Co., 78 N. Y. 568, 34 Am. Rep. 561 [*affirming* 15 Hun 521].

81. *Illinois.*— Phœnix Ins. Co. *v.* Hart, 149 Ill. 513, 36 N. E. 990 [*affirming* 39 Ill. App. 517]; Philadelphia County F. Ins. Co. *v.* Sinsabaugh, 101 Ill. App. 55.

Maryland.— Washington F. Ins. Co. *v.* Davison, 30 Md. 91.

(B) *Contrary to Instructions.* General agents have authority to bind the company within the apparent scope of their authority, although they act in disregard of instructions not known to the persons contracting with them.[82]

(C) *Notice of Limitations on Authority.* While restrictions or limitations of which the insured has no notice are not binding on him,[83] authority of the agent may be limited by notice brought home to the insured, as for instance by an express limitation in the policy.[84] Nevertheless such a limitation is not notice to the insured of the agent's want of power to bind his principal as to transactions before delivery of the policy.[85] Restrictions in the application as to the power of the general agent to make a contract that the insurance will take effect on receipt of application and premium pending acceptance were held not to affect his authority, the applicant being authorized to believe he had the right to make such

Massachusetts.— Fogg *v.* Griffin, 2 Allen 1.

Missouri.— Lingenfelter *v.* Phœnix Ins. Co., 19 Mo. App. 252.

Pennsylvania.— Susquchanna Mut. F. Ins. Co. *v.* Brown, 42 Leg. Int. 307.

See 28 Cent. Dig. tit. "Insurance," § 116

And see FIRE INSURANCE.

Agent for another company.— A company which authorizes an agent to act for it who is alone agent for another company is bound to know that such agent may select the one of the companies represented by him with which he will place insurance and cannot after loss assert that he had no authority to select it. Philadelphia County F. Ins. Co. *v* Sinsabaugh, 101 Ill. App. 55. But where one company issues a policy at the instance of another company to whom the original application was made, the former is not chargeable with notice of facts known to the latter company and its agent but not communicated to the former. Solms *v.* Rutgers Ins. Co., 8 Bosw. (N. Y.) 578. But to the contrary see Masterman *v.* Home Mut. Ins. Co., 5 Wash. 524, 32 Pac. 458, 34 Am. St. Rep. 877.

82. *Alabama.*— Robinson *v.* Ætna Ins. Co., 128 Ala. 477, 30 So. 665; Commercial F. Ins. Co. *v.* Morris, 105 Ala. 498, 18 So. 34.

Illinois.— U. S. Life Ins. Co. *v.* Advance Co., 80 Ill. 549; Rockford Ins. Co. *v.* Nelson, 65 Ill. 415.

Kentucky.— Germania Ins. Co. *v.* Rudwig, 80 Ky. 223, 3 Ky. L. Rep. 712; Howard Ins. Co. *v.* Owens, 13 Ky. L. Rep. 237; Insurance Co. of North America *v.* Forwood Cotton Co., 12 Ky. L. Rep. 846.

Massachusetts.— Eastern R. Co. *v.* Relief F. Ins. Co., 105 Mass. 570.

Mississippi.— Rivara *v.* Queen's Ins. Co., 62 Miss. 720.

Missouri.— Breckinridge *v.* American Cent. Ins. Co., 87 Mo. 62; Van Cleave *v.* Union Casualty, etc., Co., 82 Mo. App. 668.

Nebraska.— Fidelity Mut. F. Ins. Co. *v.* Lowe, 4 Nebr. (Unoff.) 159, 93 N. W. 749.

New York.— Forward *v.* Continental Ins. Co., 142 N. Y. 382, 27 N. E. 615, 25 L. R. A. 637 [*affirming* 66 Hun 546, 21 N. Y. Suppl. 664]; Ruggles *v.* American Cent. Ins. Co., 114 N. Y. 415, 21 N. E. 1000, 11 Am. St. Rep. 674 [*affirming* 1 N. Y. St. 572]; Hicks *v.* British America Assur. Co., 13 N. Y. App. Div. 444, 43 N. Y. Suppl. 623; New York Cent. Ins. Co. *v.* National Protection Ins. Co., 20 Barb. 468.

Virginia.— Georgia Home Ins. Co. *v.* Kinnier, 28 Gratt. 88.

West Virginia.— Medley *v.* German Alliance Ins. Co., 55 W. Va. 342, 47 S. E. 101.

United States.— Union Mut. L. Ins. Co. *v.* Wilkinson, 13 Wall. 222, 20 L. ed. 617; Mohr, etc., Distilling Co. *v.* Ohio Ins. Co., 13 Fed. 74.

See 28 Cent. Dig. tit. "Insurance," § 120.

83. Germania Ins. Co. *v.* Rudwig, 80 Ky. 223, 3 Ky. L. Rep. 712; Burdick *v.* Security Life Assoc., 77 Mo. App. 629; Kendrick *v.* Mutual Ben. L. Ins. Co., 124 N. C. 315, 32 S. E. 728, 70 Am. St. Rep. 592.

84. *California.*— Westerfeld *v.* New York L. Ins. Co., 129 Cal. 68, 61 Pac. 667.

Georgia.— Porter *v.* Home Friendly Soc., 114 Ga. 937, 41 S. E. 45.

New Jersey.— Dimick *v.* Metropolitan L. Ins. Co., 69 N. J. L. 384, 55 Atl. 291, 62 L. R. A. 774.

New York.— Ruggles *v.* American Cent. Ins. Co., 114 N. Y. 415, 21 N. E. 1000, 11 Am. St. Rep. 674.

Ohio.— Travelers' Ins. Co. *v.* Myers, 62 Ohio St. 529, 57 N. E. 458, 49 L. R. A. 760.

Pennsylvania.— Schofield *v.* Hayes, 17 Pa. Super. Ct. 110.

West Virginia.— Medley *v.* German Alliance Ins. Co., 55 W. Va. 342, 47 S. E. 101.

United States.—Teutonia Ins. Co. *v.* Ewing, 90 Fed. 217, 32 C. C. A. 583.

Knowledge of custom limiting authority.— Where a party contracts with a general agent of an insurance company, with knowledge of a custom prohibiting the agent from making such a contract, he cannot hold the company bound under the contract. U. S. Life Ins. Co. *v.* Advance Co., 80 Ill. 549.

85. Fidelity Mut. Fire Ins. Co. *v.* Lowe, 4 Nebr. (Unoff.) 159, 93 N. W. 749; Medley *v.* German Alliance Ins. Co., 55 W. Va. 342, 47 S. E. 101; Hartford F. Ins. Co. *v.* Wilson, 187 U. S. 467, 23 S. Ct. 189, 47 L. ed. 261; Mutual L. Ins. Co. *v.* Logan, 87 Fed. 637, 31 C. C. A. 172; Manhattan L. Ins. Co. *v.* Carder, 82 Fed. 986, 27 C. C. A. 344. Restrictions inserted in a policy of insurance upon the power of the agent to waive any conditions, except in a particular manner, as by indorsing the waiver on the policy, do

contract.[86] So the limitations in the policy on the authority of the agent may be shown to have been waived by the company.[87]

b. Agents For Specified Territory. As to the authority of an agent acting within the general limits of his agency it is immaterial that he is described as a local agent and his authority is limited to particular territory.[88] While the authority of an agent may be limited to specified territory it is a question of fact whether his action in accepting risks was within the scope of his territory as reasonably understood by the insured.[89] Acts of agents outside of the scope of their territory may be ratified by acquiescence in general or by issuing a policy with knowledge of the fact.[90]

c. Soliciting Agents. There may be agents who have authority only to solicit insurance and submit applications to the company and who have not the authority to bind the company by any attempted acts or contracts in its behalf, not relating to the taking of the application.[91] The company is not bound by fraudulent representations of a soliciting agent as to the value of a policy, such agent having no authority with reference to procuring surrender of policies;[92] nor will the company be bound by the acts of such agent in taking and negotiating a note payable to himself individually for a policy.[93]

d. Subagents and Clerks.[94] A general agent, the exercise of whose power involves discretion, cannot delegate his authority to a subagent, unless so authorized by the company, and in the absence of such authorization the acts of such subagent or notice to him are not binding on the company.[95] But a general man-

not apply to those conditions which relate to the inception of the contract. Medley *v.* German Alliance Ins. Co., 55 W. Va. 342, 47 S. E. 101.

86. Halle *v.* New York L. Ins. Co., 58 S. W. 822, 22 Ky. L. Rep. 740.

87. Bini *v.* Smith, 36 N. Y. App. Div. 463, 55 N. Y. Suppl. 842.

88. *Illinois.*— Continental Ins. Co. *v.* Ruckman, 127 Ill. 364, 20 N. E. 77, 11 Am. Rep. 121 [*affirming* 29 Ill. App. 404].

Iowa.— Miller *v.* Phœnix Ins. Co., 27 Iowa 203, 1 Am. Rep. 262.

Massachusetts.— Baldwin *v.* Connecticut Mut. L. Ins. Co., 182 Mass. 389, 65 N. E. 837.

New Jersey.— Millville Mut. M. & F. Ins. Co. *v.* Mechanics', etc., Bldg., etc., Assoc., 43 N. J. L. 652.

Virginia.— Continental Ins. Co. *v.* Kasey, 25 Gratt. 268, 18 Am. Rep. 681.

West Virginia.— Sheppard *v.* Peabody Ins. Co., 21 W. Va. 368.

See 28 Cent. Dig. tit. "Insurance," §§ 103, 117.

A general manager within the state for a foreign company may bind the company by his acts and knowledge. Van Werden *v.* Equitable L. Assur. Soc., 99 Iowa 621, 68 N. W. 892.

The fact that the authority of a general agent is restricted to a single state does not limit his authority to bind the company as general agent. Southern L. Ins. Co. *v.* Booker, 9 Heisk. (Tenn.) 606, 24 Am. Rep. 344.

89. Insurance Co. of North America *v.* Thornton, 130 Ala. 222, 30 So. 614, 89 Am. St. Rep. 30, 55 L. R. A. 547; Howard Ins. Co. *v.* Owens, 13 Ky. L. Rep. 237; St. Paul F. & M. Ins. Co. *v.* Parsons, 47 Minn. 352, 50 N. W. 240; Lightbody *v.* North American Ins. Co., 23 Wend. (N. Y.) 18.

90. Howard Ins. Co. *v.* Owens, 94 Ky. 197, 21 S. W. 1037, 14 Ky. L. Rep. 881; Hahn *v.* Guardian Assur. Co., 23 Oreg. 576, 32 Pac. 683, 37 Am. St. Rep. 709; Mohr, etc., Distilling Co. *v.* Ohio Ins. Co., 13 Fed. 74.

Further as to ratification see *infra*, V, B, 4.

91. *Georgia.*— Fireman's Fund Ins. Co. *v.* Rogers, 108 Ga. 191, 33 S. E. 954.

Illinois.— American Ins. Co. *v.* Walston, 111 Ill. App. 133; Rockford Ins. Co. *v.* Boirum, 40 Ill. App. 129.

Iowa.— Martin *v.* Farmers' Ins. Co., 84 Iowa 516, 51 N. W. 29.

New York.— Northrup *v.* Piza, 167 N. Y. 578, 60 N. E. 1117 [*affirming* 43 N. Y. App. Div. 284, 60 N. Y. Suppl. 363]; Brown *v.* Dutchess County Mut. Ins. Co., 64 N. Y. App. Div. 9, 71 N. Y. Suppl. 670; Perkins *v.* Washington Ins. Co., 6 Johns. Ch. 485.

Ohio.— Eureka F. & M. Ins. Co. *v.* Baldwin, 62 Ohio St. 368, 57 N. E. 57.

England.— Linford *v.* Provincial Horse, etc., Ins. Co., 34 Beav. 291, 10 Jur. N. S. 1066, 11 L. T. Rep. N. S. 330, 55 Eng. Reprint 647.

Canada.— Baillie *v.* Provincial Ins. Co., 21 L. C. Jur. 274. See further on this subject FIRE INSURANCE, III, B, 1.

92. Gardner *v.* Fidelity Mut. Life Assoc., 67 Minn. 207, 69 N. W. 895.

93. Jackson *v.* Mut. Ben. L. Ins. Co., 79 Minn. 43, 81 N. W. 545, 82 N. W. 366.

94. **As to liability of company for acts of subagents** see *infra*, V, B, 4, e, (I).

95. Phœnix Ins. Co. *v.* Spiers, 87 Ky. 285, 8 S. W. 453, 8 Ky. L. Rep. 254; Gore *v.* Canada L. Assur. Co., 119 Mich. 136, 77 N. W. 650; McClure *v.* Mississippi Valley Ins. Co.,

ager or other officer whose authority involves the management of the general business of the company within a large territory may appoint subagents, who are agents of the company.[96] By general custom known to and approved by the company a general agent may have authority to appoint subagents.[97] And in the discharge of his general duties a regularly appointed agent may employ clerks whose acts in carrying on the business of the agency will be binding on the company, and notice to whom will be notice to the company.[98] Neither the agent nor the company will be liable for the criminal act of such clerks in the absence of such negligence as will operate as an estoppel to repudiate such acts.[99]

e. Liability For Acts of Agents — (i) *Acting Within Scope of Authority.* A company is bound by any act or contract of its agent within the scope of his authority.[1] Thus a general agent may waive the performance of the conditions

4 Mo. App. 148; Summers *v.* Commercial Union Assur. Co., 6 Can. Sup. Ct. 19.

Illustrations of rule.— Thus an adjusting agent has no power to delegate his authority to another. Heusinkveld *v.* St. Paul F. & M. Ins. Co., 106 Iowa 229, 76 N. W. 696; Albers *v.* Phœnix Ins. Co., 68 Mo. App. 543; McCollum *v.* North British, etc., Ins. Co., 65 Mo. App. 304. And a soliciting agent has no power to delegate his authority by the appointment of a subagent. Flynn *v.* Equitable L. Ins. Co., 78 N. Y. 568, 34 Am. Rep. 561 [*affirming* 15 Hun 521].

Knowledge by the state agent of acts by the local agent beyond the scope of his authority will not be imputed to the company where such acts are also beyond the scope of the state agent's authority. Jackson *v.* Mutual Ben. L. Ins. Co., 79 Minn. 43, 81 N. W. 545, 82 N. W. 366.

96. *Alabama.*— Insurance Co. of North America *v.* Thornton, 130 Ala. 222, 30 So. 614, 89 Am. St. Rep. 30, 55 L. R. A. 547.

Colorado.— Employers' Liability Assur. Co. *v.* Morris, 14 Colo. App. 354, 60 Pac. 21.

Minnesota.— Otte *v.* Hartford L. Ins. Co., 88 Minn. 423, 93 N. W. 608, 97 Am. St. Rep. 532.

Mississippi.— New York Mut. L. Ins. Co. *v.* Herron, 79 Miss. 381, 30 So. 691.

Nebraska.— Equitable L. Assur. Soc. *v.* Brobst, 18 Nebr. 526, 26 N. W. 204.

New York.— More *v.* New York Bowery F. Ins. Co., 130 N. Y. 537, 29 N. E. 757 [*reversing* 55 Hun 540, 10 N. Y. Suppl. 44]; Kuney *v.* Amazon Ins. Co., 36 Hun 66; Robinson *v.* International L. Assur. Soc., 52 Barb. 450.

Ohio.— Krumm *v.* Jefferson F. Ins. Co., 40 Ohio St. 225; Massachusetts L. Ins. Co. *v.* Eshelman, 30 Ohio St. 647; Continental L. Ins. Co. *v.* Goodall, 5 Ohio Dec. (Reprint) 160, 3 Am. L. Rec. 338.

South Dakota.— Harding *v.* Norwich Union F. Ins. Soc., 10 S. D. 64, 71 N. W. 755.

Tennessee.— Ætna L. Ins. Co. *v.* Fallow, 110 Tenn. 720, 77 S. W. 937.

See 28 Cent. Dig. tit. "Insurance," § 118.

Evidence.— A solicitor claiming appointment by a general agent may show that blank policies were delivered to him by the general agent and that the latter received reports of his business. Foste *v.* Standard L., etc., Ins. Co., 34 Oreg. 125, 54 Pac. 311.

97. Woodbury Sav. Bank, etc., Assoc. *v.* Charter Oak F. & M. Ins. Co., 31 Conn. 517; Ætna L. Ins. Co. *v.* Fallow, 110 Tenn. 720, 77 S. W. 937; Rossiter *v.* Trafalgar L. Assur. Assoc., 27 Beav. 377, 54 Eng. Reprint 148.

98. *Delaware.*— Weisman *v.* Commercial F. Ins. Co., 3 Pennew. 224, 50 Atl. 93.

Illinois.— Manufacturers', etc., Mut. Ins. Co. *v.* Armstrong, 45 Ill. App. 217.

Iowa.— Mayer *v.* Mutual L. Ins. Co., 38 Iowa 304, 18 Am. Rep. 34.

Kentucky.— Teutonic Ins. Co. *v.* Howell, 54 S. W. 852, 21 Ky. L. Rep. 1245.

Minnesota.— Hamm Realty Co. *v.* New Hampshire F. Ins. Co., 84 Minn. 336, 87 N. W. 933.

New York.— More *v.* New York Bowery F. Ins. Co., 55 Hun 540, 10 N. Y. Suppl. 44 [*reversed* in 130 N. Y. 537, 29 N. E. 757]; Chase *v.* People's F. Ins. Co., 14 Hun 456; Cullinan *v.* Bowker, 40 Misc. 439, 82 N. Y. Suppl. 707.

Tennessee.— Ætna L. Ins. Co. *v.* Fallow, 110 Tenn. 720, 77 S. W. 937.

Texas.— Hartford F. Ins. Co. *v.* Josey, 6 Tex. Civ. App. 290, 25 S. W. 685.

Virginia.— Goode *v.* Georgia Home Ins. Co., 92 Va. 392, 23 S. E. 744, 53 Am. St. Rep. 817, 30 L. R. A. 842.

Wisconsin.— Sheanon *v.* Pacific Mut. L. Ins. Co., 83 Wis. 507, 53 N. W. 878.

United States.— International Trust Co. *v.* Norwich Union F. Ins. Soc., 71 Fed. 81, 17 C. C. A. 608.

See 28 Cent. Dig. tit. "Insurance," §§ 118, 119.

And see Fire Insurance, XIV, E, 2, d, (II).

99. Bradford *v.* Hanover F. Ins. Co., 102 Fed. 48 [*reversing* 102 Fed. 45, 43 C. C. A. 310, 49 L. R. A. 530].

1. Vezina *v.* Canada F. & M. Ins. Co., 9 Quebec 65; Cie. d'Assur. Provinciale *v.* Roy, 10 Rev. Lég. 643.

Fraudulent or wrongful act of agent.— The company is liable for the fraud or wrong of its agent within the scope of his authority. La Marche *v.* New York York L. Ins. Co., 126 Cal. 498, 58 Pac. 1053; Seabrook *v.* Underwriters' Agency, 43 Ga. 583; Devendorf *v.* Beardsley, 23 Barb. (N. Y.) 656.

A mutual company is bound by acts of its agents during negotiation of a contract in the same way as a stock company. Fidelity Mut. F. Ins. Co. *v.* Lowe, 4 Nebr. (Unoff.) 159, 93 N. W. 749.

in the policy,[2] or renew a policy,[3] or may bind his principal by parol contract to insure or renew existing insurance,[4] or may extend time of payment of premiums.[5] Even a soliciting agent may bind the company by agreements properly made in connection with the application for insurance,[6] and a local agent has been held to have power to renew a loan.[7]

(II) *ACTING WITHOUT AUTHORITY.* On the other hand the company is not bound by acts even of a general agent which are beyond the scope of his authority as known to the insured,[8] nor is it bound to respond in damages for his wrongful acts outside the scope of his authority.[9]

(III) *ACTING WITHIN APPARENT SCOPE OF AUTHORITY.* The power of the agent whether general or special is determined by the nature of the business

2. Manchester *v.* Guardian Assur. Co., 151 N. Y. 88, 45 N. E. 381, 56 Am. St. Rep. 600; Van Allen *v.* Farmers' Joint-Stock Ins. Co., 4 Hun (N. Y.) 413; Cullinan *v.* Bowker, 40 Misc. (N. Y.) 439, 82 N. Y. Suppl. 707; Scottish Union, etc., Ins. Co. *v.* Brown, 24 Ohio Cir. Ct. 52; Kauffman *v.* Standard F. Ins. Co., 21 Lanc. L. Rev. (Pa.) 249.

3. Klein *v.* Liverpool, etc., Ins. Co., 57 S. W. 250, 22 Ky. L. Rep. 301; Squier *v.* Hanover F. Ins. Co., 162 N. Y. 552, 57 N. E. 93, 76 Am. St. Rep. 349; McCabe *v.* Ætna Ins. Co., 9 N. D. 19, 81 N. W. 426, 47 L. R. A. 641; McCullough *v.* Hartford F. Ins. Co., 2 Pa. Super. Ct. 233, 38 Wkly. Notes Cas. 567. But an agent having only power to bind his company by contract of insurance cannot reinsure it in another company upon an outstanding risk. Timberlake *v.* Beardsley, 22 N. Y. App. Div. 439, 47 N. Y. Suppl. 1123.

4. Klein *v.* Liverpool, etc., Ins. Co., 57 S. W. 250, 22 Ky. L. Rep. 301; Sanford *v.* Orient Ins. Co., 174 Mass. 416, 54 N. E. 883, 75 Am. St. Rep. 358; Squier *v.* Hanover F. Ins. Co., 162 N. Y. 552, 57 N. E. 93, 76 Am. St. Rep. 349; McCabe *v.* Ætna Ins. Co., 9 N. D. 19, 81 N. W. 426, 47 L. R. A. 641.

5. U. S. Life Ins. Co. *v.* Lesser, 126 Ala. 568, 28 So. 646.

6. Fitchner *v.* Fidelity Mut. Fire Assoc., (Iowa, 1896) 68 N. W. 710; Nute *v.* Hartford F. Ins. Co., 109 Mo. App. 585, 83 S. W. 83.

7. Union Mut. L. Ins. Co. *v.* Slee, 110 Ill. 35.

8. *California.*— Westerfeld *v.* New York L. Ins. Co., 129 Cal. 68, 58 Pac. 92, 61 Pac. 667.

Colorado.—Merchants' Ins. Co. *v.* New Mexico Lumber Co., 10 Colo. App. 223, 51 Pac. 174.

Kentucky.— Hartford F. Ins. Co. *v.* Trimble, 117 Ky. 583, 78 S. W. 462, 25 Ky. L. Rep. 1497; London, etc., F. Ins. Co. *v.* Turnbull, 86 Ky. 230, 5 S. W. 542, 9 Ky. L. Rep. 544.

Michigan.— Meister *v.* People, 31 Mich. 99.

Pennsylvania.— Greene *v.* Lycoming F. Ins. Co., 91 Pa. St. 387; Christman *v.* Ins. Co., 1 Lehigh Co. L. J. 57, 18 York Leg. Rec. 61.

England.— Montreal Assur. Co. *v.* McGillivray, 13 Moore P. C. 87, 8 Wkly. Rep. 165, 15 Eng. Reprint 33.

Canada.— Pigott *v.* Employers' Liability Assur. Corp., 31 Ont. 666.

And see *supra*, V, B, 4, a, (II), (C).

For instance the company is not bound by the acts of an agent of another company (Keystone Mattress, etc., Co. *v.* Pittsburg Underwriters, 21 Pa. Super. Ct. 38), nor by the acts of one who is ostensibly and in reality the agent for the insured (Commonwealth Mut. F. Ins. Co. *v.* Fairbank Canning Co., 173 Mass. 161, 53 N. E. 373; Parker *v.* Knights Templars', etc., Life Indemnity Co., (Nebr. 1903) 97 N. W. 281; Arff *v.* Star F. Ins. Co., 125 N. Y. 57, 25 N. E. 1073, 21 Am. St. Rep. 721, 10 L. R. A. 609; Allen *v.* German-American Ins. Co., 123 N. Y. 6, 25 N. E. 309; Northrup *v.* Piza, 43 N. Y. App. Div. 284, 60 N. Y. Suppl. 363; United Firemen's Ins. Co. *v.* Thomas, 92 Fed. 127, 34 C. C. A. 240, 47 L. R. A. 450).

Rent of office.— A general agent to make contracts of insurance was held not to have any implied authority to bind the company for the rent of a leased office. Brander *v.* Columbia Ins. Co., 2 Grant (Pa.) 470.

Purchase of good-will.— A general agent with reference to insurance cannot bind the company by conduct or representations respecting the purchase of the good-will of a local agency. Barber *v.* Connecticut Mut. L. Ins. Co., 15 Fed. 312.

Loans.— A general agent with reference to insurance cannot bind the company with reference to loans. Cox *v.* Massachusetts Mut. L. Ins. Co., 113 Ill. 382.

Modification of policy.— A general manager for specified territory does not have authority to modify the provisions of a policy where such authority is expressly vested in the president, vice-president, and actuary. Westerfeld *v.* New York L. Ins. Co., 129 Cal. 68, 58 Pac. 92, 61 Pac. 667.

Execution of contracts.— The general agent of a foreign company appointed under a statute requiring the designation of such an agent for services of process is not necessarily the general agent as to execution of contracts with the company. Whitcomb *v.* Phœnix Mut. L. Ins. Co., 29 Fed. Cas. No. 17,530.

Issuing policy without consideration.— One dealing with an insurance agent has no right to presume that he had authority to biud his principal to issue a life policy without receiving any consideration therefor. Maher *v.* Moore, (Del. 1898) 42 Atl. 721.

9. Underwriters' Agency *v.* Seahrook, 49 Ga. 563; Merchants' Bank *v.* Prudential Ins. Co., 110 Mo. App. 62, 84 S. W. 101; Bradford *v.* Hanover F. Ins. Co., 102 Fed. 48, 43 C. C. A. 310, 49 L. R. A. 530; Norman *v.*

intrusted to him and is *prima facie* coextensive with its requirements and the company is therefore bound by the acts of the agent within the apparent scope of his authority.[10] But one contracting with an agent apparently having but limited authority is bound to inquire as to and take notice of the limitations imposed by the company on his authority to act for it.[11]

f. Notice to Agent. The company is bound by knowledge of or notice to its agent within the general scope of his authority,[12] and this rule applies as well to mutual as to stock companies.[13]

g. Ratification and Estoppel.[14] By accepting the benefits of the action of an assumed agent the company becomes bound by his acts as fully as though he had authority,[15] and by accepting the premium and issuing a policy upon an applica-

Insurance Co. of North America, 18 Fed. Cas. No. 10,299.

10. *Alabama.*— Robinson *v.* Ætna Ins. Co., 128 Ala. 477, 30 So. 665.

Iowa.— Cornelius *v.* Farmers' Ins. Co., (1899) 81 N. W. 236; Miller *v.* Phœnix Ins. Co., 27 Iowa 203, 1 Am. Rep. 262.

Minnesota.— Otte *v.* Hartford L. Ins. Co., 88 Minn. 423, 93 N. W. 608, 97 Am. St. Rep. 532.

Nebraska.— Bankers' L. Ins. Co. *v.* Robbins, 55 Nebr. 117, 75 N. W. 585.

Texas.— Insurance Co. of North America *v.* Bell, 25 Tex. Civ. App. 129, 60 S. W. 262.

Virginia.— Continental Ins. Co. *v.* Kasey, 25 Gratt. 268, 18 Am. Rep. 681.

West Virginia.— Sheppard *v.* Peabody Ins. Co., 21 W. Va. 368.

And see *supra*, V, B, 4, a, (II).

Effect of requirement of appointment in writing.— Acts within apparent scope of authority will bind the company notwithstanding a provision in the policy requiring appointment in writing. American F. Ins. Co. *v.* Brooks, 83 Md. 22, 34 Atl. 373.

Evidence.— The act of the agent may be shown to be within his apparent authority notwithstanding the provision of the policy that the appointment must be in writing. American F. Ins. Co. *v.* Brooks, 83 Md. 22, 34 Atl. 373.

11. Sun Fire Office *v.* Wich, 6 Colo. App. 103, 39 Pac. 587; Murphy *v.* Royal Ins. Co., 52 La. Ann. 775, 27 So. 143; Merchants' Mut. Ins. Co. *v.* Excelsior Ins. Co., 4 Mo. App. 579; McClure *v.* Mississippi Valley Ins. Co., 4 Mo. App. 148; Perkins *v.* Washington Ins. Co., 6 Johns. Ch. (N. Y.) 485. Parties dealing with a district agent of a life company are bound to ascertain his authority. Raub *v.* New York L. Ins. Co., 14 N. Y. St. 573. And see *supra*, V, B, 4, a, (II), (C).

Applications of rule.— A medical examiner of a life-insurance company is not its agent to fill out applications. Flynn *v.* Equitable L. Assur. Soc., 67 N. Y. 500, 23 Am. Rep. 134 [*reversing* 7 Hun 387].

12. *Alabama.*— Robinson *v.* Ætna Ins. Co., 128 Ala. 477, 30 So. 66[illegible]

Kentucky.— London, etc., Ins. Co. *v.* Gerteisen, 106 Ky. 815, 51 S. W. 617, 21 Ky. L. Rep. 471.

Maine.— Bigelow *v.* Granite State F. Ins. Co., 94 Me. 39, 46 Atl. 808.

Pennsylvania.— Pittsburg Clay Pot Co. *v.* Pittsburg Ins. Co., 34 Pittsh. Leg. J. 231.

South Carolina.— Norris *v.* Hartford F. Ins. Co., 57 S. C. 358, 35 S. E. 572.

Texas.— Collins, etc., Co. *v.* U. S. Insurance Co., 7 Tex. Civ. App. 579, 27 S. W. 147.

Vermont.— Weed Sewing Mach. Co. *v.* Boutelle, 56 Vt. 570, 48 Am. Rep. 821.

See 28 Cent. Dig. tit. "Insurance," § 125.

And see FIRE INSURANCE.

Notice to a mere broker acting for the insured is not notice to the company. Northrup *v.* Piza, 43 N. Y. App. Div. 284, 60 N. Y. Suppl. 363.

An agent is not charged with notice of facts which he has previously acquired while acting in some other capacity than that as agent of the company and not present in his mind at the time he acted for the company. Shaffer *v.* Milwaukee Mechanics' Ins. Co., 17 Ind. App. 204, 46 N. E. 557.

13. Power *v.* Monitor Ins. Co., 121 Mich. 364, 80 N. W. 111; Fidelity Mut. F. Ins. Co. *v.* Lowe, 4 Nebr. (Unoff.) 159, 93 N. W. 749.

14. See, generally, ESTOPPEL; PRINCIPAL AND AGENT.

15. *Illinois.*— Continental Ins. Co. *v.* Ruckman, 127 Ill. 364, 20 N. E. 77, 11 Am. St. Rep. 121 [*affirming* 29 Ill. App. 404]; Ætna Ins. Co. *v.* Maguire, 51 Ill. 342; Larsen *v.* Thuringia American Ins. Co., 108 Ill. App. 420.

Iowa.— Cameron *v.* Mutual L. & T. Co., 121 Iowa 477, 96 N. W. 961; McArthur *v.* Home Life Assoc., 73 Iowa 336, 35 N. W. 430, 5 Am. St. Rep. 684.

Kansas.— Kansas Farmers' F. Ins. Co. *v.* Saindon, 52 Kan. 486, 35 Pac. 15, 39 Am. St. Rep. 356.

Missouri.— Gibson *v.* German-American Town Mut. Ins. Co., 85 Mo. App. 41.

Nebraska.— Farmers', etc., Ins. Co. *v.* Wiard, 59 Nebr. 451, 81 N. W. 312.

New York.— Mowry *v.* World Mut. L. Ins. Co., 7 Daly 321 [*affirmed* in 74 N. Y. 360].

Oregon.— Thompson *v.* New York L. Ins. Co., 21 Oreg. 466, 28 Pac. 628.

Pennsylvania.— Kister *v.* Lebanon Mut. Ins. Co., 128 Pa. St. 553, 18 Atl. 447, 15 Am. St. Rep. 696, 5 L. R. A. 646.

Vermont.— Farmers' Mut. F. Ins. Co. *v.* Marshall, 29 Vt. 23.

Virginia.— New York L. Ins. Co. *v.* Taliaferro, 95 Va. 522, 28 S. E. 879.

United States.— De Camp *v.* New Jersey Mut. L. Ins. Co., 7 Fed. Cas. No. 3,719.

See 28 Cent. Dig. tit. "Insurance," § 124.

And see FIRE INSURANCE.

tion purporting to be taken by a person acting as its agent the company estops itself from denying such agency.[16] Where the company retains the premium it is chargeable with any fraud or mistake of its agent in the making of the contract regardless of the knowledge of such fraud, as it is bound by his wrongful acts within the scope of his authority.[17] The company may estop itself by ratifying an unauthorized course of conduct on the part of its agent from afterward objecting in a particular case that an act of the agent in accordance with such course of conduct is not binding upon it.[18] But proof of custom alone, without knowledge on the part of the company, is not sufficient.[19]

5. Relations Between Company and Agent — a. Interests Adverse to Company — (i) *Acting in Own Interest.*[20] As between the agent and the company the acts of the agent will not be binding where they are in his own interest and contrary to the interests of the company for which he has attempted to act.[21]

16. *Delaware.*— Weisman *v.* Commercial F. Ins. Co., 3 Pennew. 224, 50 Atl. 93.

Iowa.— Young *v.* Hartford F. Ins. Co., 45 Iowa 377, 24 Am. Rep. 784.

Kentucky.— London, etc., Ins. Co. *v.* Gerteisen, 106 Ky. 815, 51 S. W. 617, 21 Ky. L. Rep. 471; Germania Ins. Co. *v.* Wingfield, 57 S. W. 456, 22 Ky. L. Rep. 455.

Pennsylvania.— Landes *v.* Safety Mut. F. Ins. Co., 190 Pa. St. 536, 42 Atl. 961.

Virginia.— Wytheville Ins., etc., Co. *v.* Teiger, 90 Va. 277, 18 S. E. 195.

United States.— Queen Ins. Co. *v.* Union Bank, etc., Co., 111 Fed. 697, 49 C. C. A. 555; McElroy *v.* British America Assur. Co., 94 Fed. 990, 36 C. C. A. 615; Abraham *v.* North German Ins. Co., 40 Fed. 717.

See 28 Cent. Dig. tit. "Insurance," § 124.

Contract of agent disqualified by interest.— A contract which is voidable because made by an agent who is disqualified by his interest from representing the company nevertheless becomes binding if acquiesced in with knowledge of the facts. Valley Glass Co. *v.* American Cent. Ins. Co., 197 Pa. St. 254, 47 Atl. 232; Georgia Home Ins. Co. *v.* Smithville, (Tex. Civ. App. 1899) 49 S. W. 412.

An act done by an agent in violation of restrictions contained in the policy will be binding on the company if not repudiated. Niagara Ins. Co. *v.* Lee, 73 Tex. 641, 11 S. W. 1024.

To bind the company by oral representations of one not authorized to act as agent, which representations are not embodied in the written proposal, it must appear that the terms of the oral agreement were communicated to the company. Fowler *v.* Scottish Equitable L. Ins. Soc., 4 Jur. N. S. 1169, 26 L. J. Ch. 225, 7 Wkly. Rep. 5.

17. Steinbach *v.* Prudential Ins. Co., 62 N. Y. App. Div. 133, 70 N. Y. Suppl. 809. But acceptance of the premium in ignorance of the fact that the contract of insurance is not executed by one authorized to make it will not constitute a ratification. Planters', etc., Mut. Fire Assoc. *v.* De Loach, 113 Ga. 802, 39 S. E. 466.

18. McCabe *v.* Dutchess County Mut. Ins. Co., 14 Hun (N. Y.) 599; Farmers' Mut. Ins. Co. *v.* Taylor, 73 Pa. St. 342. And see *supra*, V, B, 4, e, (III).

19. Wilkinson *v.* Travelers' Ins. Co., (Tex. Civ. App. 1903) 72 S. W. 1016.

20. See, generally, Principal and Agent.

21. See cases cited *infra*, this note.

Insurance of agent's property or property in which he has interest.— According to well recognized principles of agency an agent cannot act for himself as insured and for the company as insurer at the same time, and a policy issued by an agent for the company on his own property is invalid. Spare *v.* Home Mut. Ins. Co., 19 Fed. 14, 9 Sawy. 148; White *v.* Lancashire Ins. Co., 27 Grant Ch. (U. C.) 61. Authority to an agent to issue policies on his own property does not amount to a ratification of policies thus issued which are antedated so as to cover a loss which had already occurred before the authority was given. Glens Falls Ins. Co. *v.* Hopkins, 16 Ill. App. 220. And likewise a policy is invalid which is secured by an agent on property in which he has an interest under an application forwarded by him without the company being advised as to his relations to the property. Ritt *v.* Washington M. & F. Ins. Co., 41 Barb. (N. Y.) 353; Bentley *v.* Columbia Ins. Co., 19 Barb. (N. Y.) 595. In such case the insurance is not avoided on account of materiality of the agent's relations to the risk but because such a contract is against public policy. Ritt *v.* Washington M. & F. Ins. Co., 41 Barb. (N. Y.) 353. But by failing to disaffirm with knowledge of the facts the company ratifies such contract and is bound by it.

Cancellation of policies.— Where an agent learning that his authority was about to be revoked canceled policies which he had already issued on behalf of the company which he then represented, such act not being on the request of either the company or the assured nor for the interests of the company, it was held that he was bound to account to the company for the premiums. German-American Ins. Co. *v.* Tribble, 86 Mo. App. 546; Northern Assur. Co. *v.* Hamilton, 50 Nebr. 248, 69 N. W. 781. But after the relations of the agent with the company have terminated he may acquire by assignment claims for unearned premiums arising from the cancellation at his instigation of policies which he as agent has issued. Scottish Union, etc., Ins. Co. *v.* Dangaix, 103 Ala. 388,

(II) *Acting Also For Insured.*[22] The rule that one cannot be the agent at the same time of both parties to a transaction renders invalid any agreement on behalf of the company by an agent who is at the same time acting as agent for the insured,[23] unless the relation of the agent to the insured is known to the company.[24] It is held, however, that the mere fact that the agent through whom the insurance is procured has previously been the agent of the insured for some other purpose with relation to the property does not make void the insurance.[25]

b. Rights of Agent Under Contract of Agency.[26] If the contract of employment is for an indefinite period, it is terminable at will;[27] and the right to terminate it is not affected by the agent's right to commissions on renewal premium;[28] nor by the fact that he has given notes payable out of the proceeds of the agency;[29] nor by stipulation in the contract that the agency may be terminated for specified causes, none of which occur.[30] It is not absolutely necessary for the contract to expressly name a definite period for its continuation, but a fixed time may be implied.[31] But for the wrongful termination of an agency, before the expiration thereof under the contract, the company is liable in damages.[32] So the company is liable for the breach of a contract by which it obligates itself not to raise the rates during the agent's employment. And he is entitled to recover what he would have earned at the old rates.[33] But where it issues several classes of insurance, it does not violate an agency contract by insisting on giving preference to a particular class.[34] The company is liable for a

15 So. 956. It has been held, however, that where during the agency the agent had collected premiums deducting therefrom thirty per cent as compensation, and after termination of the agency induced the policy-holders to surrender such policies to the company and take policies in other companies represented by him it was held that the company could recover from the agent thirty per cent of the return premiums which it was compelled to pay on such cancellation. American Steam Boiler Ins. Co. *v.* Anderson, 130 N. Y. 134, 29 N. E. 231 [*affirming* 57 N. Y. Super. Ct. 179, 6 N. Y. Suppl. 507].

22. See, generally, Principal and Agent.

23. *Georgia.*— Ramspeck *v.* Pattillo, 104 Ga. 772, 30 S. E. 962, 69 Am. St. Rep. 197, 42 L. R. A. 197.

Iowa.— Harle *v.* Council Bluffs Ins. Co., 71 Iowa 401, 32 N. W. 396.

Kansas.— Rockford Ins. Co. *v.* Winfield, 57 Kan. 576, 47 Pac. 511.

Missouri.— Merchants' Mut. Ins. Co. *v.* Excelsior Ins. Co., 4 Mo. App. 579.

Canada.— Frazer *v.* Gore Dist. Mut. F. Ins. Co., 2 Ont. 416; Citizens' Ins. Co. *v.* Bourguignon, 2 Montreal Q. B. 22.

24. Glasco Bank *v.* Springfield F. & M. Ins. Co., 5 Kan. App. 388, 49 Pac. 329.

25. British America Assur. Co. *v.* Cooper, 26 Colo. 452, 58 Pac. 592. A contract of fire insurance is not avoided as to the owner of property by the fact that the agent through whom the insurance was procured was also without the company's knowledge acting as agent for the mortgagee of the property to whom the policy was payable. Fiske *v.* Royal Exch. Assur. Co., 100 Mo. App. 545, 75 S. W. 382.

26. For right of agent to compensation see *infra*, V, B, 5, e.

27. Davis *v.* Fidelity F. Ins. Co., 208 Ill. 375, 70 N. E. 359; North Carolina State L. Ins. Co. *v.* Williams, 91 N. C. 69, 49 Am. Rep. 637; St. Paul F. & M. Ins. Co. *v.* Ulbright, (Tenn. Ch. App. 1898) 48 S. W. 131; Pellet *v.* Manufacturers', etc., Ins. Co., 104 Fed. 502, 43 C. C. A. 669; Davis *v.* Niagara F. Ins. Co., 12 Fed. 281, 11 Biss. 165; Laberge *v.* Equitable L. Assur. Soc., 24 Can. Sup. Ct. 595.

28. Stier *v.* Imperial L. Ins. Co., 58 Fed. 843.

29. Ballard *v.* Travellers' Ins. Co., 119 N. C. 187, 25 S. E. 956.

30. Stier *v.* Imperial L. Ins. Co., 58 Fed. 843. *Contra*, Newcomb *v.* Imperial L. Ins. Co., 51 Fed. 725.

31. Macgregor *v.* Union L. Ins. Co., 121 Fed. 493, 57 C. C. A. 613.

32. *Indiana.*— Ætna L. Ins. Co. *v.* Nexsen, 84 Ind. 347, 43 Am. Rep. 91; Niagara F. Ins. Co. *v.* Greene, 77 Ind. 590.

Missouri.— Ehrlich *v.* Ætna L. Ins. Co., 103 Mo. 231, 15 S. W. 530.

Ohio.— Jakowenko *v.* Des Moines Life Assoc., 21 Ohio Cir. Ct. 199, 11 Ohio Cir. Dec. 576.

United States.— Partridge *v.* Phœnix Mut. L. Ins. Co., 15 Wall. 573, 21 L. ed. 229; Macgregor *v.* Union L. Ins. Co., 121 Fed. 493, 57 C. C. A. 613; Wells *v.* National Life Assoc., 99 Fed. 222, 39 C. C. A. 476; Newcomb *v.* Imperial L. Ins. Co., 51 Fed. 725; Ensworth *v.* New York L. Ins. Co., 8 Fed. Cas. No. 4,496, 1 Flipp. 92.

England.— Stirling *v.* Maitland, 5 B. & S. 840, 34 L. J. Q. B. 1, 11 L. T. Rep. N. S. 337, 13 Wkly. Rep. 76, 117 E. C. L. 840.

33. Life Assoc. of America *v.* Ferrill, 60 Ga. 414.

34. Stier *v.* Imperial L. Ins. Co., 58 Fed. 843. *Contra*, Newcomb *v.* Imperial L. Ins. Co., 51 Fed. 725.

refusal to comply with its contract to surrender its local business and agencies to the agent on the dissolution of the company and termination of the agency.[35] A contract to appoint a person as agent for certain territory whenever the company is authorized to do business therein is not necessarily broken by mere delay in procuring such authority.[36] The established business of an insurance agent has a well recognized value, and is the subject of sale,[37] the benefits to the purchaser may be defeated by the company's refusal to appoint him as its agent;[38] and if, after purchase made, on the faith of representations of the general agent, he is denied the agency and the right to resell, the general agent, but not the company, is liable to him for the losses sustained.[39]

c. Liability of Agent to Company — (I) *In General.* Where the agent agrees to devote his entire time and energy to the company's business, he is bound to devote his time and energy with that degree of diligence and attention usual among industrious business men engaged in like business and pursuing no other avocation.[40]

(II) *Duty to Account For Funds.* The agent is bound to account to the company for funds such as premiums collected by him.[41] No demand for money collected by the agent and due to the company is necessary where the contract of agency requires an immediate payment of money coming into the agent's hands.[42] A settlement will not be conclusive as to items of money received by the agent and not reported by him prior to such settlement.[43]

(III) *To Respond in Damages For Breach of Duty.* The agent must respond in damages for any breach of duty arising out of his relations as agent which has resulted in injury to the company.[44] Thus if the agent violates

35. Appelman *v.* Broadway Ins. Co., 18 Colo. App. 110, 70 Pac. 451; Stowell *v.* Manufacturers', etc., Ins. Co., 61 N. Y. App. Div. 58, 70 N. Y. Suppl. 80.

36. Clark *v.* National Ben., etc., Co., 67 Fed. 222. And if the proof shows such delay as warrants a finding that the contract has been violated, the prospective agent can only recover nominal damages. Clark *v.* National Ben., etc., Co., 67 Fed. 222.

37. National F. Ins. Co. *v.* Sullard, 97 N. Y. App. Div. 233, 89 N. Y. Suppl. 934; Barber *v.* Connecticut Mut. L. Ins. Co., 15 Fed. 312.

38. National F. Ins. Co. *v.* Sullard, 97 N. Y. App. Div. 233, 89 N. Y. Suppl. 934.

39. Barber *v.* Connecticut Mut. L. Ins. Co., 15 Fed. 312.

40. Ehrlich *v.* Ætna L. Int. Co., 103 Mo. 231, 15 S. W. 530; Ehrlich *v.* Ætna L. Ins. Co., 88 Mo. 249 [*affirming* 15 Mo. App. 579].

41. Monitor Mut. F. Ins. Co. *v.* Young, 111 Mass. 537; Albany City F. Ins. Co. *v.* Devendorf, 43 Barb. (N. Y.) 444.

Where the company agrees to advance a certain sum per month to be used in forwarding its business, and to be repaid out of the commissions of the agent, there is no personal liability on the part of the agent to repay such advances. Arbaugh *v.* Shockney, 34 Ind. App. 268, 71 N. E. 232, 72 N. E. 668; North Western Mut. L. Ins. Co. *v.* Mooney, 108 N. Y. 118, 15 N. E. 303; Mixsell's Estate, 7 Pa. Co. Ct. 443.

Set-off.— The agent is entitled to offset returned premiums paid by him on policies canceled in the usual course of business and his commission on such premiums. German-American Ins. Co. *v.* Tribble, 86 Mo. App. 546. However, after his authority as agent has been terminated he cannot cancel policies and pay rebates on the premiums so as to be entitled to set off the amounts so paid. Franzen *v.* Zimmer, 90 Hun (N. Y.) 103, 35 N. Y. Suppl. 612; American Casualty Ins., etc., Co. *v.* Arrott, 180 Pa. St. 1, 36 Atl. 319.

In case of the death and insolvency of an insurance broker a court of equity will not compel his administrator to sequester for the benefit of the company sums received by the administrator from the insured on account of premiums for which the broker has already given his note. Union Ins. Co. *v.* Grant, 68 Me. 229, 28 Am. Rep. 42.

Inspection of agent's accounts.— Under a written contract of agency providing that the state of the agent's accounts shall be determined by an inspection of his books by an authorized agent of the company and that the inspection shall be binding on him, he cannot question the result of such inspection. Owiter *v.* Metropolitan L. Ins. Co., 4 Misc. (N. Y.) 543, 24 N. Y. Suppl. 731.

42. Frankel *v.* Michigan Mut. L. Ins. Co., 158 Ind. 304, 62 N. E. 703.

43. Frankel *v.* Michigan Mut. L. Ins. Co., 158 Ind. 304, 62 N. E. 703.

44. Continental Ins. Co. *v.* Clark, 126 Iowa 274, 100 N. W. 524; State L. Ins. Co. *v.* Schwarzkopf, 109 Mo. App. 383, 84 S. W. 353; Connecticut F. Ins. Co. *v.* Kavanagh, 7 Montreal Q. B. 323 [*affirmed* in [1892] A. C. 473, 57 J. P. 21, 61 L. J. P. C. 50, 67 L. T. Rep. N. S. 508].

Liable for acts of subagents.— The agent will be liable for breach of duty on the part of subagents acting for him, although their

instructions as to the class of risks which he is to insure and thereby renders the company liable for a loss on a risk which would not have been accepted had the instructions been observed, the agent will be liable to the company for the amount of loss which it has been compelled to pay on account of such risk.[45] And if the agent fails to charge the amount of premium which he is required by his instructions to collect on such risks he will be liable not only for the amount of loss but for the amount of premium which he should have collected in excess of the premium collected and accounted for.[46] So if the agent is directed by the company to cancel a policy and neglects to do so, and there has been a loss, he is liable to the company for the amount which the company has had to pay on such loss,[47] notwithstanding contributory negligence of the company in failing to cancel the policy itself.[48] Nevertheless unless the agent is chargeable with some duty as to cancellation of policies he is not liable to the company for failure to cancel.[49] And where he was directed to cancel a policy, but as the result of correspondence was led to believe that the company had become satisfied with the risk, and loss afterward occurred he is not liable for failure to cancel.[50] The agent may be liable for failure to comply with the direction of his company to reduce the amount of insurance under a policy, and such liability will be for the difference between what the company has been compelled to pay and what it would have had to pay had the policy been reduced as directed.[51] Where he is under no contractual restraint, and no violation of business secrets reposed in him by reason of his agency is involved, he has the right, after the termination of such agency, to influence policy-holders of his former company to forfeit or transfer their poli-

acts are without his immediate knowledge. Tillinghast *v.* Craig, 17 Ohio Cir. Ct. 531, 9 Ohio Cir. Dec. 459; Franklin F. Ins. Co. *v.* Bradford, 201 Pa. St. 32, 50 Atl. 286, 55 L. R. A. 408; Sun Fire Office *v.* Ermentrout, 2 Pa. Dist. 77, 11 Pa. Co. Ct. 21; Franklin Ins. Co. *v.* Sears, 21 Fed. 290.

45. Continental Ins. Co. *v.* Clark, 126 Iowa 274, 100 N. W. 524; Hanover F. Ins. Co. *v.* Ames, 39 Minn. 150, 39 N. W. 300; Sun Fire Office *v.* Ermentrout, 2 Pa. Dist. 77, 11 Pa. Co. Ct. 21. The acceptance of the premium in such a case without notice of the fact that the agent has violated his instructions will not constitute a ratification of the agent's conduct. Continental Ins. Co. *v.* Clark, 126 Iowa 274, 100 N. W. 524.

When only nominal damages recoverable.— But where the agent in good faith accepted a risk which was other than that described in his report but not subject to greater hazard than as reported, and it appeared that the question as to the propriety of his action was as to rate only it was held that the company could not recover more than nominal damages without showing the damages as to the rate. State Ins. Co. *v.* Richmond, 71 Iowa 519, 32 N. W. 496.

46. Continental Ins. Co. *v.* Clark, 126 Iowa 274, 100 N. W. 524.

47. *Illinois.*— Germania F. Ins. Co. *v.* Harraden, 90 Ill. App. 250.

Massachusetts.— Phœnix Ins. Co. *v.* Frissell, 142 Mass. 513, 8 N. E. 348.

Minnesota.— Phœnix Ins. Co. *v.* Pratt, 36 Minn. 409, 31 N. W. 454.

Nebraska.— Northern Assur. Co. *v.* Borgelt, 67 Nebr. 282, 93 N. W. 226.

Pennsylvania.— Kraber *v.* Union Ins. Co., 129 Pa. St. 8, 18 Atl. 491.

United States.— Washington F. & M. Ins. Co. *v.* Chesebro, 35 Fed. 477; Franklin Ins. Co. *v.* Sears, 21 Fed. 290.

See 28 Cent. Dig. tit. "Insurance," § 108.

As to cancellation by notice to agent see FIRE INSURANCE.

On the other hand it has been held that negligent delay of the company in ordering a cancellation of a policy which the agent has improperly issued may relieve the agent of liability. Merchants', etc., Ins. Co. *v.* Rion, (Tenn. Ch. App. 1901) 62 S. W. 44.

The measure of damages is the sum which the company has been compelled to pay without deducting the return premium which would have been allowed had the policy been canceled as directed. London Assur. Corp. *v.* Russell, 1 Pa. Super. Ct. 320.

Loss resulting from failure to report policy.— Where the agent fails to report the policy as required to do by his instructions and a loss occurs before such policy is reported, evidence is admissible to show that if the policy had been correctly reported the company would have canceled it as it had a right to do under its terms and the agent will be liable. State Ins. Co. *v.* Jamison, 79 Iowa 245, 44 N. W. 371.

48. London Assur. Corp. *v.* Russell, 1 Pa. Super. Ct. 320.

49. Norwood *v.* Alamo F. Ins. Co., 13 Tex. Civ. App. 475, 35 S. W. 717.

50. American Cent. Ins. Co. *v.* Hagerty, 92 Hun (N. Y.) 26, 36 N. Y. Suppl. 558; American Cent. Ins. Co. *v.* Hagerty, 21 Misc. (N. Y.) 213, 45 N. Y. Suppl. 617.

51. Halsey *v.* Adams, 63 N. J. L. 330, 43 Atl. 708 [*reversed* in 64 N. J. L. 724, 46 Atl. 773].

cies in such company to other companies, regardless of whether such policies were obtained as the fruits of his own energies or otherwise.[52]

d. Liability on Agent's Bond. Under a bond given to the company for the faithful discharge of his duties by the agent the sureties on the bond are not only liable for moneys received by the agent for which it is his duty to account,[53] but also for damages resulting from his negligent failure to cancel a policy as directed.[54] The liability of the surety will be determined in general by the contract of suretyship, taking into account also the contract of agency as brought home to the surety.[55] An action on a bond given to the directors of the company may be brought in the name of the company.[56]

e. Compensation — (I) *Of Agents* — (A) *In General.* An agent whose application is rejected is not entitled to commissions on a policy afterward issued on an application procured from the same person by another agent;[57] nor can he claim commissions on an increase, procured by another agent, in the application filed by him,[58]

52. American Ins. Co. *v.* France, 111 Ill. App. 382. But in such a case he may be liable to the company for his commissions retained out of premiums collected which the company is compelled to return to the insured on account of such cancellation. American Steam Boiler Ins. Co. *v.* Anderson, 130 N. Y. 134, 29 N. E. 231 [*affirming* 57 N. Y. Super. Ct. 179, 6 N. Y. Suppl. 507].

53. Byrne *v.* Ætna Ins. Co., 56 Ill. 321; Farragut F. Ins. Co. *v.* Shepley, 78 Minn. 284, 80 N. W. 976. The bond covers money for which the agent becomes liable to account during the period of the bond, although the business may have been previously transacted (British American Assur. Co. *v.* Neil, 76 Iowa 645, 41 N. W. 382); but not a liability of the agent already existing prior to the execution of the bond (Byington *v.* Sherman, 64 Ark. 189, 41 S. W. 423; Ball *v.* Watertown F. Ins. Co., 44 Mich. 137, 6 N. W. 232).

If the agent is liable under his contract for moneys received by subagents the sureties on his bond are likewise liable therefor (Phœnix Mut. L. Ins. Co. *v.* Holloway, 51 Conn. 310, 50 Am. Rep. 21; Foster *v.* Franklin L. Ins. Co., (Tex. Civ. App. 1903) 72 S. W. 91); and the fact that the general agent appointing a subagent is liable for the default of the subagent does not relieve the liability of the sureties on the subagent's bond (Foster *v.* Franklin L. Ins. Co., (Tex. Civ. App. 1903) 72 S. W. 91); but notice to a state agent by a subagent of the termination of the contract of the latter is sufficient notice to the company to terminate the liability of the sureties on the subagent's bond (Union Cent. L. Ins. Co. *v.* Smith, 105 Mich. 353, 63 N. W. 438); if the company appoints a cashier who is not accountable to the agent, the sureties on the agent's bond are not responsible for the default of such cashier (Equitable L. Assur. Soc. *v.* Coats, 44 Mich. 260, 6 N. W. 648).

Acts in violation of law.— The surety on the bond will not be liable with reference to the acts of the agent which are a violation of law or outside of the scope of the agent's authority, but the territorial limitations within which the agent is authorized to act will not be controlling as to the liability for moneys actually received. Fidelity, etc., Co. *v.* Brown, 69 Kan. 550, 77 Pac. 111; Norwich Union F. Ins. Assoc. *v.* Buchalter, 102 Mo. App. 332, 76 S. W. 484.

Advancements.—Under a contract of agency providing for advancements to the agent of money to be used in promoting the interests of the company it was held that the agent not being personally liable for the money so advanced, the sureties on his bond were not liable for his failure to repay such advancements. North Western Mut. L. Ins. Co. *v.* Mooney, 108 N. Y. 118, 15 N. E. 303. And in an action for commissions received and not accounted for to the satisfaction of the company it was held that since the commissions claimed could not be regarded as advancements or payments to the agent the sureties were not chargeable. Hancock Mut. L. Ins. Co. *v.* Lowenberg, 4 N. Y. St. 699.

Want of authority to issue policy.— It is no defense to an action on the bond that the company had no authority to issue the policy for which moneys sued for were collected. Rockford Ins. Co. *v.* Rogers, 9 Colo. App. 121, 47 Pac. 848.

54. Royal Ins. Co. *v.* Clark, 61 Minn. 476, 63 N. W. 1029; Northern Assur. Co. *v.* Borgelt, 67 Nebr. 282, 93 N. W. 226; American Cent. Ins. Co. *v.* Burkert, 11 Pa. Super. Ct. 427.

55. Western New York L. Ins. Co. *v.* Clinton, 66 N. Y. 326 [*reversing* 5 Hun 118].

56. Bayley *v.* Onondaga County Mut. Ins. Co., 6 Hill (N. Y.) 476, 41 Am. Dec. 759.

Admissibility of evidence.— Where the agent's books are made conclusive against him as to premiums received, they are admissible in evidence against a surety on his bond. Metropolitan L. Ins. Co. *v.* Callen, 4 N. Y. Suppl. 833.

Burden of proof.— It is for defendant to show in an action on the bond that the agent had no legal authority by reason of the want of a license to transact business. Scottish Commercial Ins. Co. *v.* Plummer, 70 Me. 540; Thorne *v.* Travellers' Ins. Co., 80 Pa. St. 15, 21 Am. Rep. 89.

57. Leviness *v.* Kaplan, 99 Md. 683, 59 Atl. 127.

58. Leviness *v.* Kaplan, 99 Md. 683, 59 Atl. 127; Brackett *v.* Metropolitan L. Ins.

especially where the custom is to pay the commissions to the agent procuring the accepted application.[59] So where his commissions are payable on the net balance in a certain department, carried over on a specified day after payment of all losses and expenses, he is not entitled to commissions on accounts unsettled on the date named.[60] But an agent cannot be deprived of commissions by an arbitrary rejection of applications submitted through him,[61] nor by the company's wrongfully refusing to deliver policies for which notes were given;[62] nor by its failure to deliver policies because of the refusal of the persons insured to pay a rate largely in excess of that at which the agent was expressly authorized to take the application;[63] nor by its wrongfully recalling a policy sent the insured by mail which was not promptly delivered;[64] nor by its recovering a policy from the insured on the faith of a promise to issue another of a different class, which was not done;[65] nor by its negligent failure to collect notes given for premiums, which it requires to be sent to it;[66] nor by claiming that the risk was undesirable, or that the applicant has failed to procure insurance in another company.[67] If the company surrenders a premium note and repurchases the policy, the agent is entitled to commission, although the insured was insolvent, and the note uncollectable.[68] But where the agent's right to commission depends upon the validity of the policy, a compromise of a claim based on the policy will not constitute such recognition of its validity as will entitle him to commissions.[69] If the agent has the right of election between two means or sources of compensation, and no time is fixed for the exercise thereof, he may make his election after the dissolution of the company and the appointment of a receiver.[70]

(B) *Commissions on Canceled Policies.* The rights of an agent to compensation as to canceled policies must be determined according to the contract, express or implied, under which he is employed,[71] and it may be competent to show the course of dealing between him and the company in order to fix his compensation.[72] He is generally entitled to commissions on the whole premium paid, and cannot be limited to the portion earned up to the time of cancellation.[73] But where, after termination of the contract, he induces the insured to surrender the policy and take the unearned premium, he should refund the commissions received by him on such part of the premium.[74] He cannot retain from the company's funds the sum paid out by him under verbal guaranty made to the insured in refunding unearned premium, such guaranty being void under the statute of frauds.[75] Nor can he recover unearned premiums paid by him to policy-holders whom he induces to return their policies in violation of the company's instruction; and for premiums repaid on policies voluntarily returned, he is entitled to recover only the portion of the original premium remaining after the deduction of the short-rate premium.[76]

Co., 18 Misc. (N. Y.) 239, 41 N. Y. Suppl. 375.

59. Leviness *v.* Kaplan, 99 Md. 683, 59 Atl. 127.

60. Rawlings *v.* Citizens' Ins., etc., Co., 8 Rev. Lég. 398.

61. Madden *v.* Equitable L. Assur. Soc., 11 Misc. (N. Y.) 540, 32 N. Y. Suppl. 752.

62. Currier *v.* Mutual Reserve Fund Life Assoc., 108 Fed. 737, 47 C. C. A. 651.

63. Currier *v.* Mutual Reserve Fund Life Assoc., 108 Fed. 737, 47 C. C. A. 651.

64. Lea *v.* Union Cent. L. Ins. Co., 17 Tex. Civ. App. 451, 43 S. W. 927.

65. Wheatfield *v.* Beal, 17 Misc. (N. Y.) 61, 39 N. Y. Suppl. 834.

66. Lea *v.* Union Cent. L. Ins. Co., 17 Tex. Civ. App. 451, 43 S. W. 927.

67. Reed *v.* Union Cent. L. Ins. Co., 21 Utah 295, 61 Pac. 21.

68. Reed *v.* Union Cent. L. Ins. Co., 21 Utah 295, 61 Pac. 21.

69. New York L. Ins. Co. *v.* Goodrich, 74 Mo. App. 355.

70. Hepburn *v.* Montgomery, 5 N. Y. Civ. Proc. 244.

71. Insurance Commissioner *v.* People's F. Ins. Co., 68 N. H. 51, 44 Atl. 82.

72. Insurance Commissioner *v.* People's F. Ins. Co., 68 N. H. 51, 44 Atl. 82.

73. Garfield *v.* Rutland Ins. Co., 69 Vt. 549, 38 Atl. 235.

74. American Steam Boiler Ins. Co. *v.* Anderson, 130 N. Y. 134, 29 N. E. 231 [*affirming* 57 N. Y. Super. Ct. 179, 6 N. Y. Suppl. 507].

75. Garfield *v.* Rutland Ins. Co., 69 Vt. 549, 38 Atl. 235.

76. Equitable F. Ins. Co. *v.* Wildberger, 74 Miss. 375, 20 So. 858.

(c) *Commissions on Renewal Premiums.* In the absence of express stipulation to the contrary, an agent is not entitled to commissions on renewal premiums paid after the termination of the agency,[77] and the forfeiture of his right thereto is not affected by stipulating in the contract specific grounds of forfeiture, none of which occurred.[78] But where the contract provides that an agent shall receive commissions on renewal premiums, he is entitled thereto, although the renewal was procured at the instance of another agent;[79] and the company cannot deprive him thereof by inducing policy-holders to change their policies,[80] or to transfer them to another company,[81] or by causing policies to lapse.[82] His right to such commissions is not lost by termination of the contract on notice in pursuance to the stipulations thereof,[83] nor by his withdrawal from the service of the company with its consent;[84] but it is lost by his unconditional resignation.[85] In an action for breach of contract to pay commission on renewal, the agent may recover, as on an indivisible contract, the full value of his commissions, to be estimated by the actuary tables in general use, and by which the value of policies is determined.[86]

(d) *Commissions on Business Done by Subagents.* If he is entitled to commissions on the business done by his subagents, and subagents in the territory at the time of his appointment are made his agents by the company, he is entitled to commissions on the business done by them.[87]

(e) *Right as Affected by Modification of Contract.* Where a contract is modified by a reduction of commissions, the conditions of the original contract attaches to the commissions payable under the modification.[88] And if the time for the payment of commissions on renewal be modified by a circular from the company, and the agent acts thereunder, he cannot claim commissions beyond the period limited therein.[89]

(f) *Right as Affected by Breach of Duty.* The misconduct or infidelity of an agent which operates to forfeit his right to compensation must be gross and

77. *Connecticut.*— Phœnix Mut. L. Ins. Co. *v.* Holloway, 51 Conn. 310, 50 Am. Rep. 21.

Georgia.— Park *v.* Piedmont, etc., L. Ins. Co., 48 Ga. 601.

Indiana.—Frankel *v.* Michigan Mut. L. Ins. Co., 158 Ind. 304, 62 N. E. 703.

Maine.— Spaulding *v.* New York L. Ins. Co., 61 Me. 329.

Minnesota.— Jacobson *v.* Connecticut Mut. L. Ins. Co., 61 Minn. 330, 63 N. W. 740.

Mississippi.— Mills *v.* Union Cent. L. Ins. Co., 77 Miss. 327, 28 So. 954, 78 Am. St. Rep. 522.

Missouri.— King *v.* Raleigh, (App. 1902) 70 S. W. 251.

North Carolina.—Ballard *v.* Travellers' Ins. Co., 119 N. C. 187, 25 S. E. 956; North Carolina State L. Ins. Co. *v.* Williams, 91 N. C. 69, 49 Am. Rep. 637.

Ohio.— Trimble *v.* Connecticut Mut. L. Ins. Co., 9 Ohio Dec. (Reprint) 414, 13 Cinc. L. Bul. 109, 10 Ohio Dec. (Reprint) 533, 22 Cinc. L. Bul. 37; Moses *v.* Union Cent. L. Ins. Co., 7 Ohio Dec. (Reprint) 609, 4 Cinc. L. Bul. 214.

United States.— Mutual Ben. L. Ins. Co. *v.* Charles, 17 Fed. Cas. No. 9,975.

See 28 Cent. Dig. tit. "Insurance," § 112.

78. Ballard *v.* Travellers' Ins. Co., 119 N. C. 187, 25 S. E. 956.

79. Employers' Liability Assur. Co. *v.* Morris, 14 Colo. App. 354, 60 Pac. 21.

Such a contract is not void for unreasonableness, and a company taking over the business of the company for which the agent acts, and assuming the obligation to pay his commission, is bound thereby, even though accepting the transfer, and assuming the obligation, it acts *ultra vires.* Schrimplin *v.* Farmer's Life Assoc., 123 Iowa 102, 98 N. W. 613.

80. Newcomb *v.* Imperial L. Ins. Co., 51 Fed. 725.

81. Hahn *v.* North American L. Ins. Co., 13 Hun (N. Y.) 195.

82. Hahn *v.* North American L. Ins. Co., 13 Hun (N. Y.) 195.

83. Hercules Mut. L. Assur. Soc. *v.* Brinker, 77 N. Y. 435.

84. Hale *v.* Brooklyn L. Ins. Co., 120 N. Y. 294, 24 N. E. 317.

85. Moses *v.* Union Cent. L. Ins. Co., 7 Ohio Dec. (Reprint) 609, 4 Cinc. L. Bul. 214.

86. Ætna L. Ins. Co. *v.* Nexsen, 84 Ind. 347, 43 Am. Rep. 91; Partridge *v.* Phœnix Mut. L. Ins. Co., 15 Wall. (U. S.) 573, 21 L. ed. 229; Wells *v.* National Life Assoc., 99 Fed. 222, 39 C. C. A. 476; Ensworth *v.* New York L. Ins. Co., 8 Fed. Cas. No. 4,496, 1 Flipp. 92.

87. North Western Mut. L. Ins. Co. *v.* Mooney, 108 N. Y. 118, 15 N. E. 303.

88. Burleson *v.* Northwestern Mut. Ins. Co., 86 Cal. 342, 24 Pac. 1064; Jacobson *v.* Connecticut Mut. L. Ins. Co., 61 Minn. 330, 63 N. W. 740.

89. Stagg *v.* Connecticut Mut. L. Ins. Co., 10 Wall. (U. S.) 589, 19 L. ed. 1038.

aggravated; ordinary or slight misconduct will not work a forfeiture.[90] If the company, with knowledge of the facts, acquiesces in the breach of duty, it is liable for commissions on renewals.[91] But gross misconduct or infidelity will justify a termination of the agency and a forfeiture of the right of the agent to claim commissions or compensation,[92] and on the termination of the agency the agent or his assignee may recover only commissions on premiums collected up to the happening of the breach for which the contract was terminated, less any sums owing by the agent to the company.[93]

(G) *Right as Affected by Agreement For Division of Commissions.* In order to bind a general agent to observe an agreement between local agents for a division of commissions, the rule requiring the agreement to be in writing and filed with the application must be strictly observed.[94] Such agreement, to which the company is not a party, will not prevent an agent from recovering against it his full commissions.[95] And where a company has notice that its agent reserves certain commissions on taking another into partnership with him, it is liable to him for such commissions subsequently accruing.[96]

(H) *Actions to Recover Compensation.* In an action to recover compensation, the complaint is not subject to demurrer for failing to allege that defendant, a foreign insurance company, has complied with the provisions of the local insurance law.[97] Nor is such complaint, based on an express contract, subject to general demurrer for praying for an assessment of damages on a *quantum meruit*.[98] If the company approves of a sale by its general agent of an interest in his business, and afterward directs a dissolution of the partnership, it is a proper party to a suit for an accounting brought by the retiring partner.[99] Where the written contract does not specify the compensation, the agreement therefor may be shown by parol.[1] But if the contract is express as to the compensation, it cannot be varied by proof of custom,[2] or of a contemporaneous verbal agreement.[3] In an action for commissions on renewal premiums the burden is on the company to show that the premiums had not been paid as presumption is against lapses and cancellation,[4] and the agent may show that the company negligently failed to

90. Ensworth *v.* New York L. Ins. Co., 8 Fed. Cas. No. 4,496, 1 Flipp. 92. Refusal of agent to pay over money of the company may not operate to deprive him of his compensation, where he acts on the advice of counsel. Lorillard F. Ins. Co. *v.* Meshural, 7 Rob. (N. Y.) 308.

91. Sterling *v.* Metropolitan L. Ins. Co., 2 N. Y. Suppl. 84 [*affirmed* in 130 N. Y. 632, 29 N. E. 150].

92. *Connecticut.*— Phœnix Mut. L. Ins. Co. *v.* Holloway, 51 Conn. 310, 50 Am. Rep. 21.

Georgia.— Sibley *v.* Mutual Reserve Fund Life Assoc., 87 Ga. 738, 13 S. E. 838.

Illinois.—Ballance *v.* Vanuxem, 90 Ill. App. 232.

Indiana.— Frankel *v.* Michigan Mut. L. Ins. Co., 158 Ind. 304, 62 N. E. 703.

Missouri.— Ehrlich *v.* Ætna L. Ins. Co., 103 Mo. 231, 15 S. W. 530.

Virginia.— Brooklyn Ins. Co. *v.* Bidgood, 28 Gratt. 290.

United States.— Ensworth *v.* New York L. Ins. Co., 8 Fed. Cas. No. 4,496, 1 Flipp. 92.

93. Burleson *v.* Northwestern Mut. Ins. Co., 86 Cal. 342, 24 Pac. 1064.

94. Lane *v.* Raney, 129 N. C. 64, 39 S. E. 728.

95. Gray *v.* Farmers' Mut. Live Stock Ins. Assoc., 97 Iowa 175, 66 N. W. 98.

96. Thomson *v.* Massachusetts Mut. L. Ins. Co., 105 Mich. 358, 63 N. W. 643.

97. Crichton *v.* Columbia Ins. Co., 81 N. Y. App. Div. 614, 81 N. Y. Suppl. 363.

98. Newcomb *v.* Imperial L. Ins. Co., 51 Fed. 725.

99. Houghton *v.* State Mut. L. Assur. Co., 110 Mich. 308, 68 N. W. 142.

1. Employers' Liability Assur. Co. *v.* Morris, 15 Colo. App. 354, 60 Pac. 21.

2. Park *v.* Piedmont, etc., L. Ins. Co., 48 Ga. 601; Castleman *v.* Southern Mut. L. Ins. Co., 14 Bush (Ky.) 197; Partridge *v.* Phœnix Mut. L. Ins. Co., 15 Wall. (U. S.) 573, 21 L. ed. 229 [*affirming* 17 Fed. Cas. No. 10,786, 1 Dill. 139]; Stagg *v.* Connecticut Mut. L. Ins. Co., 10 Wall. (U. S.) 589, 19 L. ed. 1038.

3. Castleman *v.* Southern Mut. L. Ins. Co., 14 Bush (Ky.) 197. But it has been held that evidence of a custom to pay commissions only on premiums actually collected (Miller *v.* Insurance Co. of North America, 1 Abb. N. Cas. (N. Y.) 470) or to give the agent a property in lists of policies procured by them (Ensworth *v.* New York L. Ins. Co., 8 Fed. Cas. No. 4,496, 1 Flipp. 92) is admissible. And see 12 Cyc. 1095.

4. Schrimplin *v.* Farmers' L. Assoc., 123 Iowa 102, 98 N. W. 613; Hercules Mut. L. Assur. Soc. *v.* Brinker, 77 N. Y. 435. *Contra*, Manning *v.* John Hancock Mut. L. Ins. Co., 100 U. S. 693, 25 L. ed. 761.

collect notes given therefor or to allow him to do so. This evidence should not be excluded as varying the terms of a written contract.[5]

(II) *Of Subagents.* The general agent having power to appoint subagents, in the absence of express prohibition, has authority to fix their compensation and bind the company;[6] and where the general agent, by the charter of the company, has the management of state agencies, the appointment of agents, and the direction of their work, he may bind the company by contract with a subagent, although he may exceed powers given him by private contract with the company, not brought to the notice of the subagent.[7] But an inspector or superintendent of agencies will not be presumed to have the authority to appoint and make a contract with subagents on behalf of the company.[8] Where the subagent is chargeable with notice of the terms of the contract between the company and the general agent, he is bound thereby;[9] and if the contract between a general and a special agent expressly denies the latter all right to make any claim thereunder against the company, it is not liable for any breach thereof.[10]

f. Lien of Agent or Broker. As a general rule an insurance broker has a lien on all policies in his hands, procured by him for his principals, for the payment of the sums due to him for commissions, disbursements, advances, and services, in and about the same,[11] even when he knows that the person employing him is only the agent of the owner,[12] and his subagent is invested with the same right.[13] If the broker is not informed that the person employing him is not the owner, he has a lien on the policies for any balance of an insurance account between him and such person.[14] But where he knows his employer is merely agent of another, he has no such lien.[15] Neither of them have any lien for the payment of the balance of a general account, embracing items wholly disconnected from the agency.[16] However, the lien is not destroyed by merely intermixing charges in respect to the insurance, with other items of a distinct nature in a general account.[17] But whenever the credits on such account, not appropriated by either party to the payment of any specific items, balance or exceed all items in the account down to and including those growing out of the agency, charges on account thereof will be considered paid, and the lien lost.[18] And in such event, the insured may recover from the subagent any money received by him on account of the policy.[19] The broker's lien is lost by parting with the possession of the policy;[20] and if he has paid the premium, he cannot be subro-

5. Lea *v.* Union Cent. L. Ins. Co., 17 Tex. Civ. App. 451, 43 S. W. 927.

6. Employers' Liability Assur. Co. *v.* Morris, 14 Colo. App. 354, 60 Pac. 21; New York Mut. L. Ins. Co. *v.* Lewis, 13 Colo. App. 528, 58 Pac. 787.

7. Cotton States L. Ins. Co. *v.* Mallard, 57 Ga. 64.

8. Gore *v.* Canada L. Assur. Co., 119 Mich. 136, 77 N. W. 650.

9. Vail *v.* Northwestern Mut. L. Ins. Co., 192 Ill. 567, 61 N. E. 651 [*affirming* 92 Ill. App. 655]; U. S. Life Ins. Co. *v.* Hessberg, 27 Ohio St. 393.

10. Moore *v.* New York L. Ins. Co., (Tenn. Ch. App. 1898) 51 S. W. 1021; Lester *v.* New York L. Ins. Co., 84 Tex. 87, 19 S. W. 356.

11. McKenzie *v.* Nevius, 22 Me. 138, 38 Am. Dec. 291; Cranston *v.* Philadelphia Ins. Co., 5 Binn. (Pa.) 538; Spring *v.* South Carolina Ins. Co., 8 Wheat. (U. S.) 268, 5 L. ed. 614; Fisher *v.* Smith, 4 App. Cas. 1, 48 L. J. Exch. 411, 39 L. T. Rep. N. S. 430, 27 Wkly. Rep. 113.

12. Sharp *v.* Whipple, 1 Bosw. (N. Y.) 557; Fisher *v.* Smith, 4 App. Cas. 1, 48 L. J. Exch. 411, 39 L. T. Rep. N. S. 430, 27 Wkly. Rep. 113; Snook *v.* Davidson, 2 Campb. 218, 11 Rev. Rep. 696.

13. McKenzie *v.* Nevius, 22 Me. 138, 38 Am. Dec. 291.

14. Sharp *v.* Whipple, 1 Bosw. (N. Y.) 557; Foster *v.* Hoyt, 2 Johns. Cas. (N. Y.) 327.

15. Foster *v.* Hoyt, 2 Johns. Cas. (N. Y.) 327; Snook *v.* Davidson, 2 Campb. 218, 11 Rev. Rep. 696; Levy *v.* Barnard, 2 Moore C. P. 34, 8 Taunt. 149, 4 E. C. L. 84, 19 Rev. Rep. 484.

16. McKenzie *v.* Nevius, 22 Me. 138, 38 Am. Dec. 291.

17. McKenzie *v.* Nevius, 22 Me. 138, 38 Am. Dec. 291.

18. McKenzie *v.* Nevius, 22 Me. 138, 38 Am. Dec. 291; Levy *v.* Barnard, 2 Moore C. P. 34, 8 Taunt. 149, 4 E. C. L. 84, 19 Rev. Rep. 484.

19. McKenzie *v.* Nevius, 22 Me. 138, 38 Am. Dec. 291.

20. Sharp *v.* Whipple, 1 Bosw. (N. Y.) 557; Cranston *v.* Philadelphia Ins. Co., 5 Binn. (Pa.) 538.

gated to the right of the underwriter to deduct it from the sum due for a loss occurring under the policy.[21] The lien is revived by the policy coming again into the broker's hands, from the person against whom the lien originally attached,[22] unless the manner of his parting with it manifested an intention to abandon the lien,[23] or it is received from one not his employer, or not known to him as the assured at the time of effecting the insurance.[24] In case of the revival of the lien, an intermediate assignee will be held to have taken the policy subject thereto.[25] If there is no lien when the insurance is effected, no subsequent transaction between the broker and the agent who employed him can create it as against the owner.[26] The insurance broker who receives premiums and pays losses, taking the policies as vouchers for such payments, has a lien on the policies and abandonments in his hands, for a general balance against the underwriter.[27]

C. Agency For Insured — 1. When Deemed Agent For Insured — a. In General. A person appointed or employed by an insurance company to solicit applications to it for insurance is its agent;[28] and so is an insurance broker employed to act in its behalf.[29] The rule applies to mutual as well as stock companies.[30] Such person does not become the agent of the insured where, as the representative of several companies, he is authorized to place the insurance in one or more of them, as he may elect.[31] Nor by being the rental agent of the insured, in charge of the property on which the policy is issued.[32] On the other hand if the insured employs another to procure insurance for him, such person is his agent, and not that of the insurer.[33] The business of insurance broker or agent involving the procuring of insurance for persons who desire to have it procured for them from insurance companies or their agents and in which the broker or agent represents the applicant for insurance and not the company is well recognized and acts or knowledge of such broker or agent will be binding on or imputed to the insured and not to the company.[34] And payment of the broker's commission

21. Cranston *v.* Philadelphia Ins. Co., 5 Binn. (Pa.) 538.

22. Sharp *v.* Whipple, 1 Bosw. (N. Y.) 557; Spring *v.* South Carolina Ins. Co., 8 Wheat. (U. S.) 268, 5 L. ed. 614; Levy *v.* Barnard, 2 Moore C. P. 34, 8 Taunt. 149, 4 E. C. L. 84, 19 Rev. Rep. 484.

23. Spring *v.* South Carolina Ins. Co., 8 Wheat. (U. S.) 268, 5 L. ed. 614.

24. Sharp *v.* Whipple, 1 Bosw. (N. Y.) 557.

25. Spring *v.* South Carolina Ins. Co., 8 Wheat. (U. S.) 268, 5 L. ed. 614.

26. Sharp *v.* Whipple, 1 Bosw. (N. Y.) 557.

27. Moody *v.* Webster, 3 Pick. (Mass.) 424.

28. *Illinois.*— Metropolitan L. Ins. Co. *v.* Larson, 85 Ill. App. 143.

Indiana.— Commercial Union Assur. Co. *v.* State, 113 Ind. 331, 15 N. E. 518.

Massachusetts.— Westfield Cigar Co. *v.* Insurance Co. of North America, 169 Mass. 382, 47 N. E. 1026.

Michigan.— Russell *v.* Detroit Mut. F. Ins. Co., 80 Mich. 407, 45 N. W. 356.

Minnesota.— Otte *v.* Hartford L. Ins. Co., 88 Minn. 423, 93 N. W. 608, 97 Am. St. Rep. 532.

New York.— Brown *v.* German-American Ins. Co., 10 N. Y. St. 412.

United States.— Brugger *v.* State Inv. Ins. Co., 4 Fed. Cas. No. 2,051, 5 Sawy. 304.

See 28 Cent. Dig. tit. "Insurance," § 127.

29. Brown *v.* German-American Ins. Co., 10 N. Y. St. 412; Teutonia Ins. Co. *v.* Ewing, 90 Fed. 217, 32 C. C. A. 583; Mohr, etc., Distilling Co. *v.* Ohio Ins. Co., 13 Fed. 74.

30. Russell *v.* Detroit Mut. F. Ins. Co., 80 Mich. 407, 45 N. W. 356.

31. British-America Assur. Co. *v.* Cooper, 6 Colo. App. 25, 40 Pac. 147; Commercial Union Assur. Co. *v.* State, 113 Ind. 331, 15 N. E. 518.

32. British-America Assur. Co. *v.* Cooper, 6 Colo. App. 25, 40 Pac. 147.

33. Westfield Cigar Co. *v.* Insurance Co. of North America, 169 Mass. 382, 47 N. E. 1026; Bradley *v.* German American Ins. Co., 90 Mo. App. 369; Mannheim Ins. Co. *v.* Hollander, 112 Fed. 549; Mohr, etc., Distilling Co. *v.* Ohio Ins. Co., 13 Fed. 74. The rule is not changed by the fact that the person so employed is the agent of the company for the collection of the premium. Mannheim Ins. Co. *v.* Hollander, 112 Fed. 549.

Where the insured merely permits another to procure insurance for him, he does not thereby constitute the other his agent. Hartman *v.* Hollowell, 126 Iowa 643, 102 N. W. 524; Teutonia Ins. Co. *v.* Ewing, 90 Fed. 217, 32 C. C. A. 583.

34. *District of Columbia.*— Wilson *v.* Hartford F. Ins. Co., 17 App. Cas. 14.

Illinois.— Fame Ins. Co. *v.* Mann, 4 Ill. App. 485.

Maryland.—American F. Ins. Co. *v.* Brooks, 83 Md. 22, 34 Atl. 373.

Massachusetts.— Faulkner *v.* Manchester F. Assur. Co., 171 Mass. 349, 50 N. E. 529.

by the agent of the company out of his commission on the premium does not make the broker the agent of the company.[35]

b. Dual Agency. A contract of insurance procured by an agent acting in his own interest without the knowledge of the company,[36] or acting in the interest of one whom he in fact represents, without the knowledge of the company which regards him as its own agent acting in its interest, may be avoided; for the policy of the law is against a person acting as agent for both the parties to a contract.[37] But the fact that the agent of the company is an employee of the insured as to matters having no relation to the insurance of the property does not give rise to a dual agency such as to invalidate the transaction.[38] But the same person may act for different purposes as agent of the different parties to the contract so that for one purpose he may be the agent for the insured, although as to the procuring of the insurance he also represents the company.[39] So it has been held that where an agent represents several companies and is authorized by the insured to place with other companies insurance which he does not procure in his own company, there is not such dual agency as to invalidate insurance which he does place in his own companies.[40]

c. Provisions in Policy. The company cannot, by stipulation in its policies that the persons who procure them shall be deemed to be the agents of the

Michigan.— Hartford F. Ins. Co. *v.* Reynolds, 36 Mich. 502.

Missouri.— Bradley *v.* German-American Ins. Co., 90 Mo. App. 369.

New York.— Manhattan F. Ins. Co. *v.* Harlem River Lumber, etc., Co., 26 Misc. 394, 56 N. Y. Suppl. 186.

Pennsylvania.— Kauffman *v.* Western Ins. Co., 21 Lanc. L. Rev. 252.

South Dakota.— Fromherz *v.* Yankton F. Ins. Co., 7 S. D. 187, 63 N. W. 784.

Tennessee.— Duluth Nat. Bank *v.* Knoxville F. Ins. Co., 85 Tenn. 76, 1 S. W. 689, 4 Am. St. Rep. 744.

Texas.— Philadelphia Fire Assoc. *v.* American Cement Plaster Co., (Civ. App. 1905) 84 S. W. 1115.

United States.— Mahon *v.* Royal Union Mut. L. Ins. Co., 134 Fed. 732, 67 C. C. A. 636; Scranton Steel Co. *v.* Ward's Detroit, etc., Line, 40 Fed. 866; Hamblet *v.* City Ins. Co., 36 Fed. 118.

England.— Legge *v.* Byas, 7 Com. Cas. 16; Bancroft *v.* Heath, 5 Com. Cas. 110.

Canada.— Montreal F. Ins. Co. *v.* Stanstead, etc., R. Co., 13 L. C. Rep. 233.

See 28 Cent. Dig. tit. "Insurance," §§ 126, 127.

Further as to insurance brokers see FIRE INSURANCE.

Statutory provisions.— A statute defining "insurance brokers" was held applicable to persons who procured the insurance for insured and deducted their compensation from the premiums paid to the agents of the company in which the insurance was procured. Edwards *v.* Home Ins. Co., 100 Mo. App. 695, 73 S. W. 881. A statute forbidding companies or their agents from including any fee in the premium charged was held to refer to soliciting agents of companies and not to brokers. Romberg *v.* Kouther, 27 Misc. (N. Y.) 227, 57 N. Y. Suppl. 729.

35. Commonwealth Mut. F. Ins. Co. *v.* William Knabe, etc., Mfg. Co., 171 Mass. 265, 50 N. E. 516; Penniston *v.* Union Cent. L. Ins. Co., 7 Ohio Dec. (Reprint) 678, 4 Cinc. L. Bul. 935.

36. See *supra*, IV, C, 1, a.

37. British-America Assur. Co. *v.* Cooper, 6 Colo. App. 25, 40 Pac. 147; People's Ins. Co. *v.* Paddon, 8 Ill. App. 447; Phœnix Ins. Co. *v.* Hamilton, 110 Ga. 14, 35 S. E. 305; J. C. Smith, etc., Co. *v.* Prussian Nat. Ins. Co., 68 N. J. L. 674, 54 Atl. 458.

Ratification.— Ratification of the transaction after knowledge of the dual agency will make it binding on the party who has thus ratified. The transaction is merely voidable and not void. Huggins *v.* Cracker, etc., Co. *v.* People's Ins. Co., 41 Mo. App. 530. And see *supra*, V, B, 4, g.

38. British-America Assur. Co. *v.* Cooper, 6 Colo. App. 25, 40 Pac. 147; Northrup *v.* Germania F. Ins. Co., 48 Wis. 420, 4 N. W. 350, 33 Am. Rep. 815.

39. *Michigan.*— Hartford F. Ins. Co. *v.* Reynolds, 36 Mich. 502.

Minnesota.— Hamm Realty Co. *v.* New Hampshire F. Ins. Co., 80 Minn. 139, 83 N. W. 41.

Nebraska.— Parker *v.* Knights Templars', etc., Life Indemnity Co., (1903) 97 N. W. 281.

New York.— Jellinghaus *v.* New York Ins. Co., 6 Duer 1.

Oregon.— North British, etc., F. Ins. Co. *v.* Lambert, 26 Oreg. 199, 37 Pac. 909.

Wisconsin.— John R. Davis Lumber Co. *v.* Hartford F. Ins. Co., 95 Wis. 226, 70 N. W. 84, 37 L. R. A. 131.

See 28 Cent. Dig. tit. "Insurance," § 127.

40. Marsh Oil Co. *v.* Ætna Ins. Co., 79 Mo. App. 21. But such an agent has no authority to substitute for his policy those of other companies without the knowledge and consent of the parties to the policies originally issued. London, etc., F. Ins. Co. *v.* Turnbull, 86 Ky. 230, 5 S. W. 542, 9 Ky. L. Rep. 544.

insured for whose acts and knowledge the company shall not be responsible, convert those whom they recognize as their agents acting for them into agents of the insured.[41] But such a stipulation is operative where the person who procures the insurance in fact acts for the insured,[42] and will be construed as referring to one who could be the agent of the applicant and not to one who is in fact the agent of the company. Such stipulation in the policy will not be binding on an applicant for insurance who has no knowledge thereof.[43]

d. Statutory Provisions. For the purpose of preventing companies from stipulating that acts of persons who solicit or contract for insurance shall be regarded as acting for the insured and not for the company and thus avoiding any contention that the acts and knowledge of such persons are not to be imputed to the company, it is usually provided by statute that such persons are to be deemed the agents of the company. Under such a provision any person who acts with reference to the procuring of insurance is an agent of the company in which the insurance is procured, although he is not otherwise recognized as its agent.[44] Under such a statute one who acts in aid of the company's adjuster in an examination as to the loss is the agent of the company.[45] But such a statute

41. *Georgia.*— Massachusetts Ben. Life Assoc. *v.* Robinson, 104 Ga. 256, 30 S. E. 918, 42 L. R. A. 261.

Illinois.— R. N. of A. *v.* Boman, 177 Ill. 27, 52 N. E. 264, 69 Am. St. Rep. 201 [*affirming* 75 Ill. App. 566]; Lumberman's Mut. F. Ins. Co. *v.* Bell, 166 Ill. 400, 45 N. E. 130, 57 Am. St. Rep. 140; Newark F. Ins. Co. *v.* Sammons, 110 Ill. 166; Union Ins. Co. *v.* Chipp, 93 Ill. 96; Commercial Ins. Co. *v.* Ives, 56 Ill. 402.

Michigan.— Robinson *v.* U. S. Benevolent Soc., 132 Mich. 695, 94 N. W. 211, 102 Am. St. Rep. 436.

Mississippi.— Planters' Ins. Co. *v.* Myers, 55 Miss. 479, 30 Am. Rep. 521.

Missouri.— Rosencrans *v.* North American Ins. Co., 66 Mo. App. 352.

New Hampshire.— Clark *v.* Union Mut. F. Ins. Co., 40 N. H. 333, 77 Am. Dec. 721.

New York.— Masters *v.* Madison County Mut. Ins. Co., 11 Barb. 624; Andes F. Ins. Co. *v.* Loehr, 6 Daly 105; Bernard *v.* United L. Ins. Assoc., 12 Misc. 10, 33 N. Y. Suppl. 22 [*reversing* 11 Misc. 441, 32 N. Y. Suppl. 223].

Pennsylvania.— Kister *v.* Lebanon Mut. Ins. Co., 128 Pa. St. 553, 18 Atl. 447, 15 Am. St. Rep. 696, 5 L. R. A. 646; Nassauer *v.* Susquehanna Mut. F. Ins. Co., 109 Pa. St. 507.

Tennessee.— Endowment Rank K. of P. *v.* Cogbill, 99 Tenn. 28, 41 S. W. 340.

West Virginia.— Coles *v.* Jefferson Ins. Co., 41 W. Va. 261, 23 S. E. 732.

See 28 Cent. Dig. tit. "Insurance," § 128.

Stipulations in applications for life insurance that the person filling out the application and the medical examiner are agents of the insured and not of the company have been upheld. Dimick *v.* Metropolitan L. Ins. Co., 69 N. J. L. 384, 55 Atl. 291, 62 L. R. A. 774; Hubbard *v.* Mutual Reserve Fund Life Assoc., 80 Fed. 681.

42. Hamburg-Bremen F. Ins. Co. *v.* Lewis, 4 App. Cas. (D. C.) 66; Davis *v.* Ætna Mut. F. Ins. Co., 67 N. H. 335, 39 Atl. 902; Allen *v.* German-American Ins. Co., 123 N. Y. 6, 25 N. E. 309 [*affirming* 3 N. Y. Suppl. 170]; Alexander *v.* Germania F. Ins. Co., 2 Hun (N. Y.) 655, 5 Thomps. & C. 208 [*reversed* in 66 N. Y. 464, 23 Am. Rep. 76]; Bushaw *v.* Women's Mut. Ins., etc., Co., 3 Silv. Sup. (N. Y.) 591, 8 N. Y. Suppl. 423; Bassell *v.* American F. Ins. Co., 2 Fed. Cas. No. 1,094, 2 Hughes 531.

43. Boetcher *v.* Hawkeye Ins. Co., 47 Iowa 253; Robinson *v.* U. S. Benevolent Soc., 132 Mich. 695, 94 N. W. 211, 102 Am. St. Rep. 436; Planters' Ins. Co. *v.* Myers, 55 Miss. 479, 30 Am. Rep. 521; Eilenberger *v.* Protective Mut. F. Ins. Co., 89 Pa. St. 464.

44. *Alabama.*— Noble *v.* Mitchell, 100 Ala. 519, 14 So. 581, 25 L. R. A. 238.

Illinois.— John Hancock Mut. L. Ins. Co. *v.* Schlink, 175 Ill. 284, 51 N. E. 795 [*affirming* 74 Ill. App. 181]; Continental Ins. Co. *v.* Ruckman, 127 Ill. 364, 20 N. E. 77, 11 Am. St. Rep. 121 [*affirming* 29 Ill. App. 404].

Iowa.— Fred Miller Brewing Co. *v.* Council Bluffs Ins. Co., 95 Iowa 31, 66 N. W. 565; St. Paul, etc., Ins. Co. *v.* Shaver, 76 Iowa 282, 41 N. W. 19.

Michigan.— Bliss *v.* Potomac F. Ins. Co., 134 Mich. 212, 95 N. W. 1083; Pollock *v.* German F. Ins. Co., 127 Mich. 460, 86 N. W. 1017.

Nebraska.— Bankers' L. Ins. Co. *v.* Robbins, 55 Nebr. 117, 75 N. W. 585.

South Carolina.—Norris *v.* Hartford F. Ins. Co., 57 S. C. 358, 35 S. E. 572.

Texas.— Southern Ins. Co. *v.* Wolverton Hardware Co., (1892) 19 S. W. 615.

Wisconsin.— Wisconsin Cent. R. Co. *v.* Phœnix Ins. Co., 123 Wis. 313, 101 N. W. 703; Welch *v.* Philadelphia Fire Assoc., 120 Wis. 456, 98 N. W. 227; Zell *v.* Herman Farmers' Mut. Ins. Co., 75 Wis. 521, 44 N. W. 828; Schomer *v.* Hekla F. Ins. Co., 50 Wis. 575, 7 N. W. 544.

United States.— McMaster *v.* New York L. Ins. Co., 78 Fed. 33; Mutual Ben. L. Ins. Co. *v.* Robinson, 54 Fed. 580 [*affirmed* in 58 Fed. 723, 7 C. C. A. 444, 22 L. R. A. 325].

See 28 Cent. Dig. tit. "Insurance," § 100.

45. Norris *v.* Hartford F. Ins. Co., 57 S. C. 358, 35 S. E. 572.

does not preclude a solicitor for the company from acting as agent of the insured in some particulars.[46]

2. Scope of Authority — a. To Make and Modify Contracts. The insured is bound by the acts of his agent authorized to contract for insurance in accepting delivery of a policy,[47] and by representations made by the agent in procuring such policy.[48] So the insured is bound by knowledge coming to his agent in the course of his employment or by notice given to him.[49] But a broker authorized only to procure a specific policy does not bind the insured by accepting a policy differing from that which he is specially authorized to procure;[50] and the authority of the broker with reference to the insurance which he is specifically authorized to procure terminates with the completion of the contract.[51] If the insured leaves his policy with the broker for the purpose of having a change made therein the broker has authority to consent to the change in the contract by the company.[52]

b. To Cancel and Renew Policies. A special agent authorized only to procure specific policies of insurance has no authority to cancel such policies and notice to him of cancellation thereof provided for in the contract will not be binding on the insured.[53] So it seems that an agent with general authority to insure cannot cancel a policy procured by him with the effect of leaving his client without insurance,[54] but a general agent with authority to insure property and to keep it insured may accept notice of cancellation and procure substituted insurance or renewal of insurance in another company.[55] It has also been held that a course of dealing between the insured and the broker may be shown for the purpose of establishing authority on the part of the broker to cancel or renew policies.[56]

46. John R. Davis Lumber Co. *v.* Hartford F. Ins. Co., 95 Wis. 226, 70 N. W. 84, 37 L. R. A. 121.

47. Holmes *v.* Thomason, 25 Tex. Civ. App. 389, 61 S. W. 504. And see Fire Insurance.

48. Lennox *v.* Greenwich Ins. Co., 2 Pa. Super. Ct. 431, 39 Wkly. Notes Cas. 188. But the insured is not liable for misrepresentations which are outside the scope of his authority and without the knowledge of the insured. Ottawa Agricultural Ins. Co. *v.* Boutige, 2 Montreal Leg. N. 394.

49. Holbrook *v.* Baloise F. Ins. Co., 117 Cal. 561, 49 Pac. 555; Smith *v.* Continental Ins. Co., 6 Dak. 433, 43 N. W. 810; Tasker *v.* Kenton Ins. Co., 59 N. H. 438; Ætna Ins. Co. *v.* Holcomb, 89 Tex. 404, 34 S. W. 915.

Applications of rule.— Where the policy was delivered to a broker upon condition that it should not take effect until approved at the home office of the company it was held that the broker continued to be the agent of the insured until the policy had been acted upon and that notice to the broker of its rejection was notice to the insured. Young *v.* Newark F. Ins. Co., 59 Conn. 41, 22 Atl. 32. Where the insured knew that companies generally refused to take a second line of policies on the same property it was held that he was bound by a contract made by his broker that a second line of policies would not be procured from other agencies of the same company and that policies thus procured were not valid, although the insured had no knowledge of such agreement on the part of his broker. John R. Davis Lumber Co. *v.* Hartford F. Ins. Co., 95 Wis. 226, 70 N. W. 84, 37 L. R. A. 131.

50. Maryland Casualty Co. *v.* Peoples, 26 Pa. Super. Ct. 142; Wisconsin Cent. R. Co. *v.* Phœnix Ins. Co., 123 Wis. 313, 101 N. W. 703.

An agent authorized to insure generally has no authority to insure in a mutual company, as such a contract of insurance subjects the insured to liability for loss under other policies. Annan *v.* Hill Union Brewery Co., 59 N. J. Eq. 414, 46 Atl. 563.

51. Wilson *v.* Hartford F. Ins. Co., 17 App. Cas. (D. C.) 14; American F. Ins. Co. *v.* Brooks, 83 Md. 22, 34 Atl. 373.

52. Belt *v.* American Cent. Ins. Co., 163 N. Y. 555, 57 N. E. 1104.

53. Wilson *v.* Hartford F. Ins. Co., 17 App. Cas. (D. C.) 14; American F. Ins. Co. *v.* Brooks, 83 Md. 22, 34 Atl. 373; Wisconsin Cent. R. Co. *v.* Phœnix Ins. Co., 123 Wis. 313, 101 N. W. 703.

54. McCartney *v.* State Ins. Co., 45 Mo. App. 373; Birnstein *v.* Stuyvesant Ins. Co., 39 Misc. (N. Y.) 808, 81 N. Y. Suppl. 306 [*reversed* in 82 N. Y. Suppl. 140]; Martin *v.* Palatine Ins. Co., 106 Tenn. 523, 61 S. W. 1024.

55. Buick *v.* Mechanics' Ins. Co., 103 Mich. 75, 61 N. W. 337; Hamm Realty Co. *v.* New Hampshire F. Ins. Co., 80 Minn. 139, 83 N. W. 41, 84 Minn. 336, 87 N. W. 933; Miller *v.* Home Ins. Co., 71 N. J. L. 175, 58 Atl. 98; Standard Oil Co. *v.* Triumph Ins. Co., 64 N. Y. 85 [*affirming* 3 Hun 591, 6 Thomps. & C. 300]; Ikeller *v.* Hartford F. Ins. Co., 24 Misc. (N. Y.) 136, 53 N. Y. Suppl. 323. And see Fire Insurance.

56. Hamm Realty Co. *v.* New Hampshire F. Ins. Co., 80 Minn. 139, 83 N. W. 41, 84

There is no presumption that an agent employed to procure a policy has authority after delivery to receive notice of cancellation or to surrender or discharge the policy.[57]

c. Ratification. The action of a broker or agent for the insured in contracting with reference to insurance may be ratified by the insured so that he shall be bound thereby.[58] But knowledge is essential to constitute a valid ratification.[59]

3. Relation Between Insured and Agent — a. Liability of Agent — (i) *Of Company.* As between the insured and the agent of the company there is in general no relation which imposes any obligation upon the agent to the insured, the remedy of the insured being against the company for which the agent acts.[60] But there may be such false and fraudulent representations on the part of the company's agent relied upon as made on his own responsibility as to render him liable to the insured for damages resulting.[61] In such an action the company may be made a party defendant.[62]

(ii) *Of Insured.* As between the insured and his own agent or broker authorized by him to procure insurance there is the usual obligation on the part of the latter to carry out the instructions given him and faithfully discharge the trust imposed in him, and he may become liable in damages for breach of duty. If he is instructed to procure specific insurance and fails to do so he is liable to his principal for the damage suffered by reason of the want of such insurance;[63]

Minn. 336, 87 N. W. 933; Snyder *v.* Commercial Union Assur. Co., 67 N. J. Eq. 7, 50 Atl. 509; Wisconsin Cent. R. Co. *v.* Phœnix Ins. Co., 123 Wis. 313, 101 N. W. 703.

57. Johnson *v.* North British, etc., Ins. Co., 66 Ohio St. 6, 63 N. E. 610; John R. Davis Lumber Co. *v.* Home Ins. Co., 65 Wis. 542, 70 N. W. 59.

58. German Ins. Co. *v.* Emporia Mut. Loan, etc., Assoc., 9 Kan. App. 803, 59 Pac. 1092; Annan *v.* Hill Union Brewery Co., 59 N. J. Eq. 414, 46 Atl. 563; Belt *v.* American Cent. Ins. Co., 163 N. Y. 555, 57 N. E. 1104; Manhattan F. Ins. Co. *v.* Harlem River Lumber, etc., Co., 26 Misc. (N. Y.) 394, 56 N. Y. Suppl. 186; John R. Davis Lumber Co. *v.* Hartford F. Ins. Co., 95 Wis. 226, 70 N. W. 84, 37 L. R. A. 131.

The bringing of suit by a party claiming the benefit of a policy is a ratification of the acts and agreements of the person by whom the policy was procured. Motley *v.* Manufacturers' Ins. Co., 29 Me. 337, 50 Am. Dec. 591; Watson *v.* Southern Ins. Co., (Miss. 1902) 31 So. 904; Arnold *v.* St. Paul F. & M. Ins. Co., 106 Tenn. 529, 61 S. W. 1032.

Acceptance of the benefit of a policy procured by a subagent is a ratification of the acts of such subagent in procuring the policy by the direction of the agent authorized to procure it. Hamilton *v.* Phœnix Ins. Co., 106 Mass. 395.

One who seeks to avail himself of the benefit of a policy issued "for whom it may concern" or "in trust" is bound by the acts and representations of the person procuring the issuance of such policy. Augusta Ins., etc., Co. *v.* Abbott, 12 Md. 348; Stillwell *v.* Staples, 19 N. Y. 401.

59. Godfrey *v.* New York L. Ins. Co., 70 Minn. 224, 73 N. W. 1; Northern Assur. Co. *v.* Goelet, 31 Misc. (N. Y.) 361, 65 N. Y. Suppl. 403; Johnson *v.* North British, etc., Ins. Co., 66 Ohio St. 6, 63 N. E. 610.

60. *Maine.*— Gilmore *v.* Bradford, 82 Me. 547, 20 Atl. 92; Farrow *v.* Cochran, 72 Me. 309.

Missouri.— Jones *v.* Horn, 104 Mo. App. 705, 78 S. W. 638.

New York.— Bryan *v.* Viele, 4 N. Y. St. 872.

Pennsylvania.— Frauenthal *v.* Derr, 13 Wkly. Notes Cas. 485.

Wisconsin.— Stadler *v.* Trever, 86 Wis. 42, 56 N. W. 187.

Canada.— Picard *v.* La Cie. d'Assurance, etc., 2 Montreal Super. Ct. 117.

See 28 Cent. Dig. tit. "Insurance," § 110.

Applications of rule.— Thus the insured cannot maintain an action against an agent of the company to recover back the premium paid on the ground that the insurance has not gone into effect. Rice *v.* Barnard, 127 Mass. 241; Bleau *v.* Wright, 110 Mich. 183, 68 N. W. 115. Nor can the insured sue the agent for premiums paid to him on the ground that the policy was not in conformity with his application in the absence of an offer to return the policy or of proof that it was worthless. Farrow *v.* Cochran, 72 Me. 309.

61. Hedden *v.* Griffin, 136 Mass. 229, 49 Am. Rep. 25; Kroeger *v.* Pitcairn, 101 Pa. St. 311, 47 Am. Rep. 718; Machette's Estate, 8 Wkly. Notes Cas. (Pa.) 201. Thus where the agent agreed not to send the check given to him for the premium to the company until it should be ascertained whether the policy was satisfactory to the insured, he was held liable to the insured for the breach of such agreement. Dobson *v.* Jordan, 124 Mass. 542.

62. New York L. Ins. Co. *v.* Baese, (Tex. Civ. App. 1895) 31 S. W. 824; New York L. Ins. Co. *v.* Rohrbough, 2 Tex. App. Civ. Cas. § 216.

63. Criswell *v.* Riley, 5 Ind. App. 496, 30 N. E. 1101, 32 N. E. 814; Barton *v.* Anthony,

and a general undertaking to keep the property of the principal insured will render the agent liable for negligence in not securing or renewing insurance on the property.[64] In either case the liability of the agent with respect to a loss is that which would have fallen upon the company had the insurance been effected as contemplated;[65] any negligence or wrongful act of the agent defeating in whole or in part the insurance which he is directed to secure or maintain will render him liable to his principal for the resulting loss,[66] and such agent is also liable if he places the insurance in companies not authorized by law to do business in the state, the policies being void on that account.[67]

b. Compensation; Lien. The insured dealing with the agent of the company is not liable to the agent for his services in making out the policy.[68] But an insurance broker may recover from the insured commissions and expenses for procuring the insurance.[69] The insured is also liable to the broker for premiums advanced in procuring the insurance,[70] or the broker has a lien on all policies in his hands for commissions and other charges in connection with such insurance;[71] but not

2 Fed. Cas. No. 1,084, 1 Wash. 317; Manny *v.* Dunlap, 16 Fed. Cas. No. 9,047, Woolw. 372.

If unable to place the insurance as directed it is the agent's duty to seasonably notify his principal, but the duty to give such notice does not begin until after a reasonable time for ascertaining in the exercise of ordinary diligence whether the insurance can be placed. Backus *v.* Ames, 79 Minn. 145, 81 N. W. 766.

If insurance directed to be procured would have been void there is no liability on the part of the agent for failure to procure it. Alsop *v.* Coit, 12 Mass. 40.

64. Thomas *v.* Funkhouser, 91 Ga. 478, 18 S. E. 312; Backus *v.* Ames, 79 Minn. 145, 81 N. W. 766; Veley *v.* Clinger, 18 Pa. Super. Ct. 125.

65. Lindsay *v.* Pettigrew, 5 S. D. 500, 59 N. W. 726; Morris *v.* Summerl, 17 Fed. Cas. No. 9,837, 2 Wash. 203.

Factors.— A factor by charging a specific rate for insurance may become the insurer of the property and liable as such. Miller *v.* Tate, 12 La. Ann. 160. But an agent agreeing to procure insurance in specified companies at specified rates does not make a contract of insurance but only a contract to procure insurance and such contract is valid. Tanenbaum *v.* Rosenthal, 44 N. Y. App. Div. 431, 60 N. Y. Suppl. 1092.

66. *New Jersey.*— Milliken *v.* Woodward, 64 N. J. L. 444, 45 Atl. 796.

New York.— Sharp *v.* Whipple, 1 Bosw. 557; Rundle *v.* Moore, 3 Johns. Cas. 36.

Pennsylvania.— French *v.* Reed, 6 Binn. 308; Haight *v.* Kremer, 9 Phila. 50.

United States.— Manny *v.* Dunlap, 16 Fed. Cas. No. 9,047, Woolw. 372.

Canada.— Baxter *v.* Jones, 4 Ont. L. Rep. 541.

See 28 Cent. Dig. tit. "Insurance," § 131.

Failure to ascertain responsibility of company.— An agent contracting to procure valid insurance is liable in damages for loss occasioned by want of care in making inquiries or obtaining information concerning the responsibility of the company with which the risk is placed. Mallery *v.* Frye, 21 App. Cas. (D. C.) 105. But such agent is not liable on account of the insolvency of the company in the absence of negligence. Gettins *v.* Scudder, 71 Ill. 86; Shepard *v.* Davis, 42 N. Y. App. Div. 462, 59 N. Y. Suppl. 456; Vann *v.* Downing, 20 Phila. (Pa.) 348.

67. Hartman *v.* Hollowell, 126 Iowa 643, 102 N. W. 524; Webster *v.* Ferguson, 94 Minn. 86, 102 N. W. 213; Landusky *v.* Beirne, 178 N. Y. 551, 70 N. E. 1101 [*affirming* 80 N. Y. App. Div. 272, 80 N. Y. Suppl. 238]; Burges *v.* Jackson, 162 N. Y. 632, 57 N. E. 1105 [*affirming* 18 N. Y. App. Div. 296, 46 N. Y. Suppl. 326]; Morton *v.* Hart, 88 Tenn. 427, 12 S. W. 1026.

68. Townsend *v.* Tompkins, 57 Hun (N. Y.) 591, 10 N. Y. Suppl. 797.

69. Ward *v.* Tucker, 7 Wash. 399, 35 Pac. 126, 1086. A statute making it unlawful for a company or its agent or representative to include in the charge for insurance any other fee or compensation than that named in the policy as premium does not apply to brokers acting only as agents for the insured. Tanenbaum *v.* Rosenthal, 44 N. Y. App. Div. 431, 60 N. Y. Suppl. 1092.

The broker may recover from the insured for breach of a contract by which the broker has the exclusive right to procure insurance for his principal. Tanenbaum *v.* Eiseman, 178 N. Y. 594, 70 N. E. 1110 [*affirming* 83 N. Y. App. Div. 639, 82 N. Y. Suppl. 76]; Tanenbaum *v.* Simon, 84 N. Y. App. Div. 642, 82 N. Y. Suppl. 1116 [*affirming* 40 Misc. 174, 81 N. Y. Suppl. 655]; Tanenbaum *v.* Freundlich, 39 Misc. (N. Y.) 819, 81 N. Y. Suppl. 292.

70. Holmes *v.* Thomason, 25 Tex. Civ. App. 389, 61 S. W. 504. But if the broker pays the premium after notice from the insured that the risk has not attached he cannot recover from the insured and remit him to a suit against the company for return of the premium. Shoemaker *v.* Smith, 2 Binn. (Pa.) 239.

71. McKenzie *v.* Nevius, 22 Me. 138, 38 Am. Dec. 291.

If the broker parts with the policy his lien is gone and he is not entitled to stand in the place of the principal and recover against the

for the balance of a general account against the insured covering items not connected with the insurance.[72] The mere fact, however, that the broker has intermixed charges not relating to the effecting of insurance does not defeat his right to assert a lien on the policy for such charges as come properly within the scope of his lien.[73]

INSURANCE BINDER. A technical term applied to a slip of paper attached to a policy whereby the same is renewed under the stipulations of the original policy.[1]

INSURANCE BUSINESS. The business of insuring lives, property, credits, fidelity of conduct, etc.[2] (See, generally, INSURANCE; and the Insurance Titles.)

INSURANCE CLERK. A term compounded with the term "insurance," of well understood meaning, and suggestive of a person engaged in insurance business.[3] (See INSURANCE; and the Insurance Titles.)

INSURANCE COMMISSIONER. A state officer who in behalf of the public maintains a supervision over the affairs of insurance companies.[4] (See, generally, INSURANCE.)

INSURE.[5] To engage to indemnify a person against pecuniary loss from specified perils; to act as an insurer.[6] The word is sometimes used in the sense of "to secure" or "to attain."[7] (See, generally, INSURANCE; and the Insurance Titles.)

INSURGENT. One who participates in an insurrection.[8] (See, generally, INSURRECTION.)

company. Cranston *v.* Philadelphia Ins. Co., 5 Binn. (Pa.) 538.

72. McKenzie *v.* Nevius, 22 Me. 138, 38 Am. Dec. 291; Sharp *v.* Whipple, 1 Bosw. (N. Y.) 557.

73. McKenzie *v.* Nevius, 22 Me. 138, 38 Am. Dec. 291.

1. Underwood *v.* Greenwich Ins. Co., 54 N. Y. App. Div. 386, 388, 66 N. Y. Suppl. 651; Van Tassel *v.* Greenwich Ins. Co., 72 Hun (N. Y.) 141, 145, 25 N. Y. Suppl. 301, where it is called a "binding slip." See also 19 Cyc. 595, 631.

2. People *v.* Loew, 19 Misc. (N. Y.) 248, 250, 251, 44 N. Y. Suppl. 42. See also Baltimore City O. of I. F. A. *v.* State, 77 Md. 547, 565, 26 Atl. 1040.

3. Insurance Oil Tank Co. *v.* Scott, 33 La. Ann. 946, 951, 39 Am. Rep. 286. See also Grant *v.* Shaw, L. R. 7 Q. B. 700, 701, 41 L. J. Q. B. 305, 27 L. T. Rep. N. S. 602.

4. Century Dict. See also Hamilton Ins. L. N. Y. (1904) c. 690, § 2, where the term "superintendent of insurance" is defined.

5. "Insuring his property" see Warwick *v.* Monmouth County Mut. F. Ins. Co., 44 N. J. L. 83, 86, 43 Am. Rep. 343.

6. Black L. Dict.

7. Leonard *v.* Brooklyn Heights R. Co., 57 N. Y. App. Div. 125, 132, 67 N. Y. Suppl. 985.

8. Black L. Dict.

A distinction is often taken between "insurgent" and "rebel," in this: that the former term is not necessarily to be taken in a bad sense, inasmuch as an insurrection, though extralegal, may be just and timely in itself; as where it is undertaken for the overthrow of tyranny or the reform of gross abuses. According to Webster, an insurrection is an incipient or early stage of a rebellion. Black L. Dict.

INSURRECTION

By George B. Davis
Judge-Advocate General of the United States War Department*

I. WHAT CONSTITUTES, 1451
II. CIVIL LIABILITY, 1452
A. *Status of Insurgents*, 1452
B. *Remedy For Injury*, 1452
III. SUPPRESSION BY CIVIL AUTHORITY, 1453

CROSS-REFERENCES

For Matters Relating to:
Blockade, see War.
Civil War, see War.
Commercial Intercourse With Persons and Districts in Rebellion, see War.
Confiscation, see War.
Conscript Laws, see Army and Navy.
Conspiracy, see Conspiracy.
Criminal Liability, see Conspiracy; Treason.
Effect of Insurrection on:
Claim Against United States, see United States.
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Running of Statute of Limitations, see Limitations of Actions.
Status, Rights, and Powers of Insurrectionary States, see States.
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Extradition of Participant in Insurrection, see Extradition (International).
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Mutiny Against:
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Officers and Official Acts in Seceding States, see States.
Pardon or Amnesty of Person Engaged in Rebellion, see Pardons.
Rights of Insurgents as Belligerents, see War.
Secession, see States.
Seditious Conspiracy, see Conspiracy.
Suppression of Insurrection by Military Power, see War.
Treason, see Treason.

I. WHAT CONSTITUTES.

In its broadest sense the term "insurrection" applies to a rising against governmental restraint; specifically it applies to an organized and armed resistance by numbers to the enforcement of the laws.[1] Hence any open and active opposition

1. Anderson L. Dict.; Bouvier L. Dict.; Century Dict.; Standard Dict.; Lieber Instructions for Government of Armies of the United States in the Field (1863), par. 149.

* Author of "Davis' Elements of Constitutional and Military Law," "Davis' Elements of International Law," "A Treatise on the Military Law of the United States," etc.

of a number of persons to the execution of the laws of the United States of so formidable a character as to defy for the time being the authority of the government constitutes an insurrection, even though not accompanied by bloodshed and not of sufficient magnitude to render success probable.[2]

II. CIVIL LIABILITY.

A. Status of Insurgents. In localities where the insurrectionary movement has become so formidable as to make it necessary to resort to armed force with a view to its suppression, all residents of the territory in insurrection become liable to be treated as enemies.[3]

B. Remedy For Injury. When the law charges municipalities or the state itself with the duty of protecting citizens against acts of unlawful violence, the remedy which the statute provides may be resorted to.[4]

2. Allegheny County *v.* Gibson, 90 Pa. St. 397, 417, 35 Am. Rep. 670; The Three Friends, 166 U. S. 1, 17 S. Ct. 495, 41 L. ed. 897; *In re* Charge to Grand Jury, 62 Fed. 828, 830 (where it is said: "If, therefore, it shall appear to you that any person or persons have wilfully obstructed or retarded the mails, and that their attempted arrest for such offense has been opposed by such a number of persons as would constitute a general uprising in that particular locality, and as threatens for the time being the civil and political authority, then the fact of an insurrection . . . has been established; and he who by speech, writing, or other inducement assists in setting it on foot, or carrying it along, or gives it aid or comfort, is guilty of a violation of law"); The Ambrose Light, 25 Fed. 408.

Rebellion distinguished.—Insurrection closely resembles rebellion, of which in fact it is an incipient form, in that it is a movement directed against the existence of the government. It is distinguished from rebellion in that the movement is less extensive and its political or military organization is less highly developed. Prize Cases, 2 Black (U. S.) 635, 17 L. ed. 459; The Ambrose Light, 25 Fed. 408; Lieber Instructions for Government of Armies of the United States in the Field (1863), par. 157. The recognition of the insurgents by foreign powers, or by the government against which the insurrectionary movement is directed, gives to the undertaking the legal and political character of a rebellion. The Three Friends, 166 U. S. 1, 17 S. Ct. 495, 41 L. ed. 897; Page *v.* U. S., 11 Wall. (U. S.) 268, 20 L. ed. 135; Prize Cases, *supra*; Rose *v.* Himely 4 Cranch (U. S.) 272, 2 L. ed. 608; The Ambrose Light, *supra*; Adlay's Wheaton 27*b*; Dana's Wheaton 23 note 15; Hall Int. L. 5. Rebellion defined see REBELLION.

Riot and rout distinguished.— Insurrection is distinguished from rout, riot, and offenses connected with mob violence by the fact that in insurrection there is an organized and armed uprising against authority or operations of government, while crimes growing out of mob violence, however serious they may be and however numerous the participants, are simply unlawful acts in disturbance of the peace which do not threaten the stability of the government or the existence of political society. U. S. *v.* Fries, 9 Fed. Cas. No. 5,126, 3 Dall. (Pa.) 515, 1 L. ed. 701; U. S. *v.* Hanway, 26 Fed. Cas. No. 15,299, 2 Wall. Jr. 139; U. S. *v.* Hoxie, 26 Fed. Cas. No. 15,407, Wharton St. Tr. 458, 1 Paine 265; *In re* Charge to Grand Jury, 30 Fed. Cas. No. 18,263, 1 Sprague 593, 30 Fed. Cas. No. 18,274, 2 Sprague 292; Reg. *v.* Frost, 9 C. & P. 129, 38 E. C. L. 87. Riot defined see RIOT. Rout defined see ROUT.

Sedition distinguished.—Insurrection is distinguished from sedition, which is a form of discontent against government caused by inflammatory speeches or writings or by acts or language tending to a breach of public order, by the fact that such acts are offenses against the peace and fall short of treason on account of the absence of an overt act. Hardie Case, 1 St. Tr. N. S. 751; Abbott L. Dict.; Anderson L. Dict.; Century Dict. See also 1 Hale P. C. 77; 1 Hume 553; 33 St. Tr. O. S. 342, 394; Cockburn Exam. Trials For Sedition, 1, 3, 36. Sedition defined see SEDITION.

Insurgent defined.— One who in combination with others takes part in active and forcible opposition to the constitutional authorities, where there has been no recognition of belligerency, is an insurgent. Bouvier L. Dict.; Standard Dict.

Insurrection as constituting treason see TREASON.

3. Rice *v.* Shook, 27 Ark. 137, 11 Am. Rep. 783; Knœfel *v.* Williams, 30 Ind. 1; Prize Cases, 2 Black (U. S.) 635, 17 L. ed. 459; The Amy Warwick, 1 Fed. Cas. No. 341, 2 Sprague 123; The D. Sargeant, 7 Fed. Cas. No. 4,098. "The fact that the number of insurgents in a state is so great that they carry on a civil war against the government does not entitle the government set up by such insurgents to the privileges of sovereignty." U. S. *v.* Smith, 27 Fed. Cas. No. 16,318.

Insurgency as disqualification for office see OFFICERS.

Rights of insurgents as belligerents see WAR.

4. Orr *v.* New York, 64 Barb. (N. Y.) 106; Greer *v.* New York, 3 Rob. (N. Y.) 406; St. Micheal's Church *v.* Philadelphia County, Brightly (Pa.) 121.

III. SUPPRESSION BY CIVIL AUTHORITY.[5]

Insurrection being an offense highly prejudicial to the public peace, it may be suppressed by civil authority.[6]

INT. An abbreviation of the word "interest."[1] (See INTEREST.)

INTAKE. That which is taken in.[2]

INTANGIBLE. Incapable of being touched; not perceptible to the touch.[3]

INTEGRAL. Constituting a completed whole; containing all the parts.[4]

INTEGRITY. Freedom from every biasing or corrupt influence or motive.[5]

INTELLIGENCE. The quality of being intelligent; understanding; intellect; power of cognition.[6] (Intelligence: In General, see INSANE PERSONS. Of Juror, see JURIES. Of Witness, see WITNESSES. See also INTELLIGIBLE; INTELLIGIBLY.)

INTELLIGENCE OFFICE. An office for the obtaining of employment for female domestic servants or other laborers.[7] (Intelligence Office: Regulation and License of, see LICENSES; MUNICIPAL CORPORATIONS.)

INTELLIGIBLE. That can be understood; capable of being apprehended by the intellect or understanding; comprehensible.[8]

INTEMPERANCE. A term which does not necessarily imply drunkenness, but the use of anything beyond moderation.[9] (Intemperance: See INTOXICATION, and Cross-References Thereunder. See also, generally, DRUNKARDS.)

Liability of county for injury done by mob see COUNTIES, 11 Cyc. 501.

5. Suppression by military authority see WAR.

6. *In re* Boyle, 6 Ida. 609, 57 Pac. 706, 45 L. R. A. 832 (holding that the governor may declare martial law in a certain county on the ground that it is in a state of rebellion, although he has not been applied to by any officer of the county, where the county officers were either in league with the insurrectionists or refrained from doing their duty through fear); Luther *v.* Borden, 7 How. (U. S.) 1, 12 L. ed. 581 (holding that the executive may by proclamation command the insurgents to disperse and retire peaceably to their homes within a limited time stated in such proclamation, and that it will then be lawful for a peace officer to arrest one whom he has reasonable grounds to believe is engaged in the insurrection and to order a town to be forcibly entered); *In re* Charge to Grand Jury, 30 Fed. Cas. No. 18,256, 2 Sprague 279 (where it was said: "Until belligerent rights are accorded by the political department to the state or people in rebellion, the judiciary must regard them as rebels and lawless aggressors, and apply to them the penal law").

1. Belford *v.* Beatty, 145 Ill. 414, 418, 34 N. E. 254.

2. Standard Dict.

"Intake measure of quantity delivered" see Spaight *v.* Farnworth, 5 Q. B. D. 115, 116, 4 Aspin, 251, 40 L. J. Q. B. 213, 346, 42 L. T. Rep. N. S. 296, 28 Wkly. Rep. 508.

"Intaken" as used in a charter-party has been construed as of the same meaning as "delivered." The Froguer, 29 Fed. 876, 877.

"Intake weight" see Harrison *v.* One Thousand Bags of Sugar, 50 Fed. 116, 117 [*citing* Strickland *v.* Maxwell, 2 Cr. & M. 539, 3 L. J. Exch. 161, 4 Tyrw. 346]; Harrison *v.* One Thousand Bags of Sugar, 44 Fed. 686, 687.

3. Standard Dict.

"Intangible property" includes not only the value of franchises, but also any other property rights which the companies or associations may own and which are taxable. Western Union Tel. Co. *v.* Norman, 77 Fed. 13, 26.

4. Standard Dict. See also Holtzer *v.* Consolidated Electric Mfg. Co., 60 Fed. 748, 749.

5. Webster Dict. [*quoted* in Root *v.* Davis, 10 Mont. 228, 266, 25 Pac. 105], where the court said: "Its meaning should not be restricted to what is generally understood by the word 'honesty,' although the last is properly deemed by lexicographers a synonym."

It means soundness of moral principle and character, as shown by a person's dealing with others in the making and performance of contracts, in fidelity and honesty in the discharge of trusts; in short, it is used as a synonym for probity, honesty, and uprightness in business relations with others. *In re* Gordon, 142 Cal. 125, 131, 132, 75 Pac. 672; Bauquier's Estate, 88 Cal. 302, 307, 26 Pac. 178, 532.

6. Century Dict.

7. Keim *v.* Chicago, 46 Ill. App. 445, 446.

8. Century Dict. See also Merrill *v.* Everett, 38 Conn. 40, 48; Jennings *v.* State, 7 Tex. App. 350, 358; Davis *v.* Trump, 43 W. Va. 191, 195, 27 S. E. 397, 64 Am. St. Rep. 849.

"Intelligibly designating" see Ash *v.* Purnell, 16 Daly (N. Y.) 189, 191, 11 N. Y. Suppl. 54.

9. Mullinix *v.* People, 76 Ill. 211, 213.

INTEMPERATE. See DRUNKARDS.

INTEMPERATE HABIT. A habit pursued to excess.[10] (See DRUNKARDS.)

INTEND.[11] To fix the mind upon; to have a design; to purpose;[12] to design, or to contemplate.[13] (See INTENT; INTENTION.)

INTENDMENT. Understanding; judgment; intention.[14]

INTENT.[15] A term in common use defined as meaning an emotion or operation of the mind;[16] the quality of the mind with which an act is done;[17] a

10. Ziegler *v.* Com., 10 Pa. Cas. 404, 407, 14 Atl. 237.

11. **Compared with and distinguished from "about."**— The word "about" expresses the present purpose of fulfilment, while "intend" merely imports an inclination to do an act, the performance of which, depending on circumstances, implies no fixed design. Guilleaume *v.* Miller, 14 Rich. (S. C.) 118, 120. So too "intends" refers to future contemplated action (Greeley *v.* Greeley, 12 Okla. 659, 665, 73 Pac. 295) and is not equivalent to "about" (3 Cyc. 946 note 32).

"Intended" definition of "contemplated" see 8 Cyc. 1145.

"Intended for public uses" see Com. *v.* Alburger, 1 Whart. (Pa.) 469, 480.

"Intended for sale" see State *v.* Learned, 47 Me. 426, 428.

"Intended husband" see Hawkes *v.* Hubback, L. R. 11 Eq. 5, 40 L. J. Ch. 49, 23 L. T. Rep. N. S. 642, 19 Wkly. Rep. 117.

"Intended to annoy or injure" see Harbison *v.* White, 46 Conn. 106, 108.

"Intended to be conveyed by post" see U. S. *v.* Matthews, 35 Fed. 890, 895, 1 L. R. A. 104; U. S. *v.* Deniche, 35 Fed. 407, 408.

"Intended to be located" see McBarron *v.* Gilbert, 42 Pa. St. 268, 278.

"Intended to navigate" see Joyce Ins. § 2060.

"Designed or intended for the prevention of conception or procuring of abortion" see U. S. *v.* Bott, 24 Fed. Cas. No. 14,626, 11 Blatchf. 346, 348.

"For anything done or intended to be done" see Jolliffe *v.* Wallasey Local Bd., L. R. 9 C. P. 62, 86, 43 L. J. C. P. 41, 29 L. T. Rep. N. S. 582.

"It is intended" see Mackenzie *v.* Childers, 43 Ch. D. 265, 273, 59 L. J. Ch. 188, 62 L. T. Rep. N. S. 98, 38 Wkly. Rep. 243.

12. People *v.* Vanderpool, 1 Mich. N. P. 264, 267. See also 1 Bishop Cr. L. §§ 511–512 [*quoted* in Prince *v.* State, 35 Ala. 367, 369 (*citing* Johnson *v.* State, 14 Ga. 55, 2 Bishop. Cr. L. § 363)].

"Intended to be recorded" is a term sometimes used in referring to a deed or instrument in writing not yet recorded. English L. Dict. See also Penn *v.* Preston, 2 Rawle (Pa.) 14, 18.

13. State *v.* McDonald, 4 Port. (Ala.) 449, 458.

"A person may 'intend' to do what there is no likelihood that he will do. And one person may safely swear that he has reason to believe that another intends to do an act which he has no reason to believe it is likely that the other will do." Wood *v.* Melius, 8 Allen (Mass.) 434.

14. Burrill L. Dict. See Coke Litt. 78*b*.

15. **Distinguished from "attempt"** (State *v.* Marshall, 14 Ala. 411, 414, 415; State *v.* Bullock, 13 Ala. 413, 416; Hollister *v.* State, 156 Ind. 255, 258, 59 N. E. 847 [*citing* Clark Cr. L. § 56]; State *v.* Hearsey, 50 La. Ann. 373, 374, 23 So. 372; State *v.* Martin, 14 N. C. 329, 330; 4 Cyc. 887 note 10), "motive" (Whedbee *v.* Stewart, 40 Md. 414, 424; People *v.* Molineux, 168 N. Y. 264, 297, 61 N. E. 286, 62 L. R. A. 193; Baker *v.* State, 120 Wis. 135, 145, 97 N. W. 566; Warren *v.* Tenth Nat. Bank, 29 Fed. Cas. No. 17,202, 10 Blatchf. 493, 494; 1 Cyc. 650).

As used in connection with other words see the following phrases: "Charitable intent" (6 Cyc. 954); "fraudulent intent" (4 Cyc. 510); "general intent" or "particular intent" (Fraser *v.* Chene, 2 Mich. 81, 91); "intent and purpose" (2 Dyer 163*a*); "intent to assign" (4 Cyc. 121 note 7); "intent . . . to defeat or delay . . . creditors" (Morris *v.* Morris, [1895] A. C. 625, 626, 64 L. J. P. C. 136, 72 L. T. Rep. N. S. 879, 11 Reports 554, 44 Wkly. Rep. 65); "intent to defraud" (Starey *v.* Chilworth Gunpowder Co., 24 Q. B. D. 90, 97, 17 Cox C. C. 55, 54 J. P. 436, 59 L. J. M. C. 13, 62 L. T. Rep. N. S. 73, 38 Wkly. Rep. 204; 10 Cyc. 1289; 2 Cyc. 327); "intent to defraud creditors" (Astor *v.* Wells, 4 Wheat. (U. S.) 466, 4 L. ed. 616); "intent to depart" (4 Cyc. 481); "intent to evade or defraud" (Twelve Hundred and Nine Quarter Casks of Wine, 24 Fed. Cas. No. 14,279, 2 Ben. 249, 264); "'intent to hinder' or 'delay . . . creditors'" (Smith *v.* Wells Mfg. Co., 148 Ind. 333, 344, 46 N. E. 1000); "intent to injure or defraud" (U. S. *v.* Taintor, 28 Fed. Cas. No. 16,428, 11 Blatchf. 374, 377); "intent to remove" (State *v.* Quick, 2 N. J. L. 413*e*, 414*e*); "to the intent" (Robertson *v.* Liddell, 9 East 487, 495, 3 Smith K. B. 347, 9 Rev. Rep. 596); "without intent to defraud" (Wood *v.* Burgess, 24 Q. B. D. 162, 164, 16 Cox C. C. 729, 54 J. P. 325, 59 L. J. M. C. 11, 61 L. T. Rep. N. S. 593, 38 Wkly. Rep. 331); "with the intent then and there" (Com. *v.* Raymond, 97 Mass. 567, 569).

16. Babcock *v.* Eckler, 24 N. Y. 623, 632 [*quoted* in State *v.* Musick, 101 Mo. 260, 271, 14 S. W. 212].

17. State *v.* Marshall, 14 Ala. 411, 414, 415; Hollister *v.* State, 156 Ind. 255, 258, 59 N. E. 847 [*citing* Clark Cr. L. § 56]; *In re* Shotwell, 43 Minn. 389, 393, 45 N. W. 842; State *v.* Tom, 47 N. C. 414, 416; State

DESIGN,[18] *q. v.*; an INTENTION,[19] *q. v.*; a purpose;[20] an aim;[21] a drift;[22] that which is intended;[23] the fixed purpose of the mind in connection with a given act;[24] the purpose of the mind, including such knowledge as is essential to such intent;[25] the purpose to use a particular means to effect a certain result.[26] In criminal law, the presence of will in the act, which consummates a crime.[27] (Intent: Affecting — Adverse Possession, see ADVERSE POSSESSION; Application of Statute of Frauds, see FRAUDS, STATUTE OF; Boundary, see BOUNDARIES; Construction and Operation of Marriage Settlement, see HUSBAND AND WIFE; Determination Whether Contract Provides For Liquidated Damages or Penalty, see DAMAGES; Determination Whether Transaction Is a Mortgage or Sale, see CHATTEL MORTGAGES; Establishment of Highway by Prescription or User, see STREETS AND HIGHWAYS; Estoppel, see ESTOPPEL; Liability For False Imprisonment, see FALSE IMPRISONMENT; Validity of Assignment, see ASSIGNMENTS FOR BENEFIT OF CREDITORS. Criminal Intent — In General, see CRIMINAL LAW; Allegation of, see INDICTMENTS AND INFORMATIONS; and the Particular Criminal Law Titles; As Element of Particular Offense or Crime, see Particular Criminal Law Titles Such as Abduction, Abortion, Adultery, Etc. Evidence of — in General, see CRIMINAL LAW; EVIDENCE; as Affecting Damages, see DAMAGES; other Offense to Show Intent, see CRIMINAL LAW. Fraudulent Intent — Affecting Contract, see CONTRACTS; DEEDS; As Element of Fraud, see FRAUD; To Hinder and Delay Creditors, see ASSIGNMENTS FOR BENEFIT OF CREDITORS; ATTACHMENT; BANKRUPTCY; FRAUDULENT CONVEYANCES. In Abandonment of — Homestead, see HOMESTEADS; Of Property, see ABANDONMENT. In Acquisition of Property as Affecting Exemption, see EXEMPTIONS. In Agreements of Accord and Satisfaction, see ACCORD AND SATISFACTION. In Alteration of Instrument, see ALTERATIONS OF INSTRUMENTS. In Annexing Fixture, see FIXTURES. In Assault and Battery, see ASSAULT AND BATTERY. In Change of Domicile, see DOMICILE. In Conspiracy, see CONSPIRACY. In Dedication, see DEDICATION. In Delivery of Deed, see DEEDS. In Enactment of Statute, see STATUTES. In Infringement — Of Copyright, see COPYRIGHT; Of Trade-Mark, see TRADE-MARKS AND TRADE-NAMES. In Libel or Slander, see LIBEL AND SLANDER. In Making — Advancement, see DESCENT AND DISTRIBUTION; Contract, see CONTRACTS; Escrow, see ESCROWS; Gift Causa Mortis, see GIFTS; Will, see WILLS. In Violation of Injunction, see INJUNCTIONS. Of Par-

v. Martin, 14 N. C. 329, 330. See also 1 Cyc. 650, 663, 668.

18. *Alabama.*— State *v.* McDonald, 4 Port. 449, 458.

Iowa.— State *v.* Grant, 86 Iowa 216, 223, 53 N. W. 120.

North Carolina.— State *v.* Tom, 47 N. C. 414, 417 [*quoting* Walker Dict.].

Tennessee.— Smith *v.* State, 2 Lea 614, 619.

Wisconsin. — Perugi *v.* State, 104 Wis. 230, 242, 80 N. W. 593, 76 Am. St. Rep. 865 [*quoting* Century Dict.].

Wyoming.— Cheyenne First Nat. Bank *v.* Swan, 3 Wyo. 356, 360, 23 Pac. 743.

19. State *v.* Tom, 47 N. C. 414, 417; Century Dict. [*quoted* in Perugi *v.* State, 104 Wis. 230, 242, 80 N. W. 593, 76 Am. St. Rep. 865]; Webster Dict. [*quoted* in Smith *v.* State, 2 Lea (Tenn.) 614, 619].

20. *Indiana.*— Carder *v.* State, 17 Ind. 307, 308.

Louisiana.— See State *v.* Hearsey, 50 La. Ann. 373, 374, 23 So. 372.

North Carolina.— State *v.* Tom, 47 N. C. 414, 417 [*quoting* Walker Dict.].

Tennessee.— Smith *v.* State, 2 Lea 614, 619 [*quoting* Webster Dict.].

Wisconsin. — Perugi *v.* State, 104 Wis. 230, 242, 80 N. W. 593, 76 Am. St. Rep. 865.

Wyoming.— Cheyenne First Nat. Bank *v.* Swan, 3 Wyo. 356, 360, 23 Pac. 743.

21. Perugi *v.* State, 104 Wis. 230, 242, 80 N. W. 593, 76 Am. St. Rep. 865; Cheyenne First Nat. Bank *v.* Swan, 3 Wyo. 356, 360, 23 Pac. 743; Webster Dict. [*quoted* in Smith *v.* State, 2 Lea (Tenn.) 614, 619].

22. Webster Dict. [*quoted* in Smith *v.* State, 2 Lea (Tenn.) 614, 619].

23. Century Dict. [*quoted* in Perugi *v.* State, 104 Wis. 230, 242, 80 N. W. 593, 76 Am. St. Rep. 865].

24. State *v.* Goldston, 103 N. C. 323, 325, 9 S. E. 580.

25. Powe *v.* State, 48 N. J. L. 34, 36, 2 Atl. 662.

"It is the exercise of intelligent will, the mind being fully aware of the nature and consequences of the act which is about to be done, and with such knowledge and with full liberty of action willing and electing to do it." Smith *v.* State, 2 Lea (Tenn.) 614, 619.

26. People *v.* Molineux, 168 N. Y. 264, 297, 61 N. E. 286, 62 L. R. A. 193.

27. Burrill L. Dict. [*quoted* in Smith *v.* State, 2 Lea (Tenn.) 614, 619].

ties — Effect of Custom to Show, see CUSTOMS AND USAGES; To Contract, see CONTRACTS; To Deed, see DEEDS. To Charge Wife's Separate Estate, see HUSBAND AND WIFE. To Occupy Property as Homestead, see HOMESTEADS. To Prefer Creditor, see ASSIGNMENTS FOR BENEFIT OF CREDITORS; BANKRUPTCY; INSOLVENCY. To Remove Fence, see FENCES.)

INTENTIO INSERVIRE DEBET LEGIBUS, NON LEGES INTENTIONI. A maxim meaning "The intention [of a party] ought to be subservient to [or in accordance with] the laws, not the laws to the intention."[28]

INTENTIO LEGITIME COGNITA ET LEGIBUS CONSENTANEA MAXIME HABENDA. A maxim meaning "An intention legitimately known and agreeable to the laws is to be especially regarded."[29]

INTENTIO MEA IMPONIT NOMEN OPERI MEO. A maxim meaning "My intent gives a name to my act."[30]

INTENTION.[31] The fixed direction of the mind to a particular object, or a determination to act in a particular manner;[32] the purpose a man forms in his own mind;[33] A DESIGN (*q. v.*), resolve, or determination of the mind.[34] In legal contemplation, it means the purpose or design with which a wilful act is done, characterizing the act.[35] The term may be used as equivalent to intent,[36] *q. v.* (See INTENT, and Cross-References Thereunder.)

INTENTIONAL.[37] Done by intention or design; intended; designed.[38] (See INTENT; INTENTION; and, generally, CRIMINAL LAW.)

28. Black L. Dict. [*citing* Coke Litt. 314*a*, 314*b*]. See also Merrill *v.* Nichols, 2 Bulstr. 176, 179.

29. Morgan Leg. Max.

30. Black L. Dict.

31. **Compared with and distinguished from "promise"** see Stewart *v.* Reckless, 24 N. J. L. 427, 430. See also Shockey *v.* Mills, 71 Ind. 288, 292, 36 Am. Rep. 196; Shaw *v.* Burney, 86 N. C. 331, 333, 41 Am. Rep. 461.

32. Webster Dict. [*quoted* in Willis *v.* Jolliffe, 11 Rich. Eq. (S. C.) 447, 489].

"Intentions," when used in a will, does not necessarily imply a command. Meehan *v.* Brennan, 16 N. Y. App. Div. 395, 398, 45 N. Y. Suppl. 57.

The words "act" and "intention" mean the same as the word "act" alone, for act implies intention. Chapman *v.* Republic L. Ins. Co., 5 Fed. Cas. No. 2,606, 6 Biss. 238, 240.

33. Stewart *v.* Reckless, 24 N. J. L. 427, 430; Shaw *v.* Burney, 86 N. C. 331, 333, 41 Am. Rep. 461.

"Intention to return" see Jericho *v.* Burlington, 66 Vt. 529, 534, 29 Atl. 801.

34. Bouvier L. Dict. [*quoted* in State *v.* Ah Mook, 12 Nev. 369, 381].

"Immediate intention" see Lynch *v.* State, 24 Tex. App. 350, 365, 6 S. W. 190, 5 Am. St. Rep. 888.

"'Intention of the Legislature' is a common but very slippery phrase, which, popularly understood, may signify anything from intention embodied in positive enactment to speculative opinion as to what the Legislature probably would have meant, although there has been an omission to enact it. In a Court of Law or Equity, what the Legislature intended to be done or not to be done can only be legitimately ascertained from that which it has chosen to enact, either in express words or by reasonable and necessary implication." Salomon *v.* Salomon, [1897] A. C. 22, 38, 66 L. J. Ch. 35, 75 L. T. Rep. N. S. 426, 4 Manson 89, 45 Wkly. Rep. 193.

35. Webster Dict. [*quoted* in Willis *v.* Jolliffe, 11 Rich. Eq. (S. C.) 447, 489.

36. State *v.* Broussard, 107 La. 189, 192, 31 So. 637 [*citing* 2 Bishop New Cr. Proc. p. 81].

As synonymous with "meant" see Studdard *v.* Linville, 10 N. C. 474, 477, where it is said that the difference between the two words "is scarcely perceptible."

37. **Distinguished from "gross," "reckless," and "wanton"** in Cleveland, etc., R. Co. *v.* Tartt, 64 Fed. 823, 826, 12 C. C. A. 618.

Distinguished from "with premeditated design" in State *v.* Hoyt, 13 Minn. 132.

The equivalent of "wilful" see 12 Cyc. 151.

38. Webster Int. Dict.

It implies the exercise of the reasoning faculties, consciousness, and violation. Berger *v.* Pacific Mut. L. Ins. Co., 88 Fed. 241, 242.

When used in connection with the doing of a wrongful act, it means not only that the party intended to do the particular act, but to do it knowing at the time that it was wrongful. Ickenroth *v.* St. Louis Transit Co., 102 Mo. App. 597, 614, 77 S. W. 162. See also Trauerman *v.* Lippincott, 39 Mo. App. 478, 488 [*citing* Goetz *v.* Ambs, 27 Mo. 28].

"Every intentional act is necessarily a wilful one. The one implies the other." Com. *v.* Green, 1 Ashm. (Pa.) 289, 299.

"Intentional and premeditated design are very far apart." Cupps *v.* State, 120 Wis. 504, 542, 97 N. W. 210, 98 N. W. 546, 102 Am. St. Rep. 996.

"Intentional injuries" see Orr *v.* Travelers' Ins. Co., 120 Ala. 647, 651, 24 So. 997; Fischer *v.* Travelers' Ins. Co., 77 Cal. 246, 247, 19 Pac. 425, 1 L. R. A. 572; American Acc. Co. *v.* Carson, 99 Ky. 441, 446, 36 S. W. 169,

INTENTIONAL FRAUD. CRAFT (*q. v.*), deceit, and trickery resorted to for the purpose of entrapping, circumventing, and cheating another.[39] (See, generally, FRAUD.)

INTENTIONALLY.[40] In an intentional manner; with intention; by design; of purpose;[41] wilfully.[42] (See INTENT; INTENTION; INTENTIONAL; and, generally, CRIMINAL LAW; NEGLIGENCE.)

INTER. To bury in the ground; to cover with earth; to inhume.[43] (See DISINTER; and, generally, CEMETERIES.)

INTER ALIAS CAUSAS ACQUISITIONES MAGNA, CELEBRIS, ET FAMOSA, EST CAUSA DONATIONIS. A maxim meaning "Among other modes of acquiring property, a great, celebrated and famous method is that of gift."[44]

INTER ALIOS RES GESTAS ALIIS NON POSSE PRÆJUDICIUM FACERE SÆPE CONSTITUTUM EST. A maxim meaning "It has been often settled that things which took place between other parties cannot prejudice."[45]

INTERCALATION. A term applied to the process employed by the Romans of inserting days to make the year agree with the solar period.[46] (See CALENDAR; DATE; DAY; and, generally, TIME.)

INTERCEPT. To take or seize by the way or before the end is reached.[47] (See DELAY; HINDER, and Cross-References Thereunder.)

INTERCHANGEABLY. In the way, mode or form of exchange.[48]

INTERCOURSE. COMMUNICATION, *q. v.*; COMMERCE,[49] *q. v.* (Intercourse: Between States and Nations, see COMMERCE. Sexual, see ABDUCTION; ADULTERY; FORNICATION; LEWDNESS; RAPE; SEDUCTION.)

INTER CUNCTA LEGES ET PERCUNCTABERE DOCTOS. A maxim meaning "Among many things, you will even question laws and learned men."[50]

INTERDICTION. A prohibition of commercial intercourse between the citizens or subjects of the country enacting or proclaiming it and some other specified country or port.[51] (Interdiction: Of Exercise of Civil Rights, see INSANE PERSONS.[52])

18 Ky. L. Rep. 308, 59 Am. St. Rep. 473, 34 L. R. A. 301; De Graw *v.* National Acc. Soc., 51 Hun (N. Y.) 142, 144, 4 N. Y. Suppl. 912; Travelers' Ins. Co. *v.* McConkey, 127 U. S. 661, 667, 8 S. Ct. 1360, 32 L. ed. 308; 1 Cyc. 257. See also Cleveland, etc., R. Co. *v.* Tartt, 64 Fed. 823, 826, 12 C. C. A. 618 [*reversed* in 99 Fed. 369, 39 C. C. A. 568, 49 L. R. A. 98]; Joyce Ins. § 2882.

"Intentional neglect" see Van Etten *v.* Eaton, 19 Mich. 187, 195.

"Intentional negligence" see Lockwood *v.* Belle City St. R. Co., 92 Wis. 97, 113, 65 N. W. 866; and, generally, NEGLIGENCE.

"Intentional violation" see Knoxville *v.* King, 7 Lea (Tenn.) 441, 446.

39. Douglas *v.* Sander, [1902] App. Cas. 437, 438, 71 L. J. P. C. 91, 86 L. T. Rep N. S. 633, 50 Wkly. Rep. 676.

40. Distinguished from "premeditated design" see Hoyt, 13 Minn. 132, 149; State *v.* Brown, 12 Minn. 538, 543. See also HOMICIDE.

"Intentionally and wantonly" should be construed as synonymous with purposely and recklessly or without proper regard for the rights of another person. Wright *v.* Clark, 50 Vt. 130, 136, 28 Am. Rep. 496.

"Intentionally neglect" see Breitung *v.* Lindauer, 37 Mich. 217, 222.

41. Webster Int. Dict.

42. Chicago City R. Co. *v.* Olis, 192 Ill. 514, 516, 61 N. E. 459; Gillett *v.* Wiley, 126 Ill. 310, 323, 19 N. E. 287, 9 Am. St. Rep. 587; Bindbeutal *v.* Street R. Co., 43 Mo. App. 463, 470 [*citing* Bouvier L. Dict.].

When used in penal laws, it imports wilfulness, evil intent, or unlawful purpose. State *v.* Zillman, 121 Wis. 472, 476, 98 N. W. 543.

"Willfully or intentionally" see Shumacher *v.* St. Louis, etc., R. Co., 39 Fed. 174, 180.

43. Worcester Dict. [*quoted* in People *v.* Baumgartner, 135 Cal. 72, 74, 66 Pac. 974].

44. Peloubet Leg. Max. [*citing* Bracton 11].

45. Bouvier L. Dict.

46. Rives *v.* Guthrie, 46 N. C. 84, 86.

47. French *v.* Ware, 65 Vt. 338, 357, 26 Atl. 1096 [*citing* Century Dict.; Richardson Dict.; Webster Dict.; Worcester Dict.].

48. Burrill L. Dict. [*cited* in Roosevelt *v.* Smith, 17 Misc. (N. Y.) 323, 325, 326, 40 N. Y. Suppl. 381]. See also Maule *v.* Weaver, 7 Pa. St. 329, 332; and 8 Cyc. 398.

Business "interchanged" see Gulf, etc., R. Co. *v.* Texas, etc., R. Co., 93 Tex. 482, 486, 56 S. W. 328.

49. Black L. Dict. See also 7 Cyc. 413.

50. Peloubet Leg. Max. [*citing* Coke Litt. 232*b*].

51. Bouvier L. Dict. See also The Edward, 1 Wheat. (U. S.) 261, 272, 4 L. ed. 86, where it is said: "Interdiction or suspension of commercial intercourse . . . *ex vi termini*, means an entire cessation, for the time being, of all trade whatever."

52. See also EXECUTIONS, 17 Cyc. 1138 note 41.

INTERDUM VENIT UT EXCEPTIO QUÆ PRIMA FACIE JUSTA VIDETUR, TAMEN INIQUE NOCEAT. A maxim meaning "It sometimes happens that a plea which seems *prima facie* just, nevertheless is injurious and unequal." [53]

INTERESSE TERMINI. The right to the possession of a term at a future time.[54] (See, generally, LANDLORD AND TENANT.)

53. Bouvier L. Dict. [*citing* Inst. 4, 14; 1, 2].

54. Morrison *v.* Chicago, etc., R. Co., 117 Iowa 587, 589, 91 N. W. 793; Austin *v.* Huntsville Coal, etc., Co., 72 Mo. 535, 542, 37 Am. Rep. 446 [*citing* 4 Kent Comm. (11th ed.) 106]. See also Barker *v.* Keat, 2 Mod. 249, 252, where the court said: "If a lease be made for years, and the lessor releaseth all his right to the lessee before entry, such release is void, because the lessee had only a right, and not the possession, which my Lord Coke, in his comment upon it, calls an *interesse termini*."

The phrase relates to the interest which the termor has before he has taken possession by force of his lease. Ecclesiastical Com'rs *v.* Treemer, [1893] 1 Ch. 166, 171, 62 L. J. Ch. 119, 68 L. T. Rep. N. S. 11, 3 Reports 136, 41 Wkly. Rep. 166. See also Mitchell *v.* Reed, 61 N. Y. 123, 134, 19 Am. Rep. 252; Saltern *v.* Melhuish, Ambl. 247, 250, 27 Eng. Reprint 165; Lock *v.* Furze, C New Rep. 340, 344.

INTEREST

By John W. Daniel
United States Senator from Virginia *
and Fred Harper

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* Author of "A Treatise on the Law of Negotiable Instruments."

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Parties Embarking in Joint Adventure, see JOINT ADVENTURES.
Partner, see PARTNERSHIP.
Pledgee Holding Excessive Security, see PLEDGES.
Principal to Surety, see PRINCIPAL AND SURETY.
Purchaser of:
Mortgaged Property, see MORTGAGES.
School Land, see PUBLIC LANDS.
Railroads:
For Injury to Stock, see RAILROADS.
On Construction Contract, see RAILROADS.
Receiptor of Attached Property, see ATTACHMENT.
Receiver, see RECEIVERS.
Remainder-Man, see ESTATES.
Servant, see MASTER AND SERVANT.
Sheriff, see SHERIFFS AND CONSTABLES.
State, see STATES.
Stock-Holder to Creditor of Corporation For Interest on Debts, see CORPORATIONS.
Surety, see PRINCIPAL AND SURETY.
Tax-Collector, see TAXATION.
Tenant, see LANDLORD AND TENANT.
Tenant in Common, see TENANCY IN COMMON.
Town, see TOWNS.
Trustee, see TRUSTS.
United States, see UNITED STATES.
United States Marshal, see UNITED STATES MARSHALS.
Maturity of Interest on Commercial Paper, see COMMERCIAL PAPER.
Memorandum on Written Instrument as to Rate of Interest, see ALTERATIONS OF INSTRUMENTS.
Money Receivable in Payment of Interest, see PAYMENT.
Non-Payment of:
Instalment of Interest as Affecting Negotiability of Corporate Bond, see CORPORATIONS.
Interest on Notice of Dishonor of Instrument, see COMMERCIAL PAPER.
Payment of Interest:
As Consideration For Contract, see CONTRACTS.
On Shares of Corporate Stock, see CORPORATIONS.
Payment of Principal Without Interest as Accord and Satisfaction, see ACCORD AND SATISFACTION.
Power of Arbitrator to Allow Interest, see ARBITRATION AND AWARD.
Promise to Pay Interest as Consideration For Extension of Negotiable Instrument, see COMMERCIAL PAPER.
Rate of:
Discount to Be Charged by Bank, see BANKS AND BANKING.
Interest on Unpaid Interest Coupons, see COMMERCIAL PAPER.
Receipt of Interest as Evidence of Agreement to Extend Time For Payment, see COMMERCIAL PAPER.
Right of:
Attorney to Interest on Unliquidated Demand For Fees and Costs, see ATTORNEY AND CLIENT.
Building Association to Reserve Interest, see BUILDING AND LOAN SOCIETIES.

For Matters Relating to — (*continued*)
Right of — (*continued*)
Holder of Circulating Bank-Note Upon Insolvency of Bank, see BANKS AND BANKING.
Right to Interest on Money Forming Part of Life-Estate, see ESTATES.
Running of Interest as Against Insolvent Bank, see BANKS AND BANKING.
Usage as Affecting Allowance of Interest, see CUSTOMS AND USAGES.
Usury, see USURY.
Waiver of:
Forfeiture of Insurance Policy by Acceptance of Interest on Premium Note, see INSURANCE.
Objections to Allowance of Interest, see APPEAL AND ERROR.
Whether Constitutional Provision as to Interest Self-Executing, see CONSTITUTIONAL LAW.

I. DEFINITIONS.

A. Interest Generally. Interest is the compensation allowed by law, or fixed by the parties, for the use or forbearance of money, or as damages for its detention.[1]

1. Anderson L. Dict.; Black L. Dict.; Bouvier L. Dict. See also the following cases:

Colorado.— Hawley *v.* Barker, 5 Colo. 118.

Connecticut. — Hubbard *v.* Callahan, 42 Conn. 524, 528, 19 Am. Rep. 564; Selleck *v.* French, 1 Conn. 32, 6 Am. Dec. 185.

Michigan.— McGuire *v.* Galligan, 53 Mich. 453, 456, 19 N. W. 142.

New York.— Rodman *v.* Munson, 13 Barb. 63, 76; Rensselaer Glass Factory *v.* Reid, 5 Cow. 587, 609.

Pennsylvania.— Kelsey *v.* Murphy, 30 Pa. St. 340, 341.

United States. — Redfield *v.* Ystalyfera Iron Co., 110 U. S. 174, 176, 3 S. Ct. 570, 28 L. ed. 109; Loudon *v.* Shelby County Taxing Dist., 104 U. S. 771, 774, 26 L. ed. 923; New Orleans Ins. Assoc. *v.* Piaggio, 16 Wall. 378, 386, 21 L. ed. 358; Hiatt *v.* Brown, 15 Wall. 177, 185, 21 L. ed. 128.

Other definitions.— "A compensation taken for the loan or use of money." Turner *v.* Turner, 80 Va. 379, 381.

"A compensation for the detention or use of money." Stokely *v.* Thompson, 34 Pa. St. 210, 211. See also Whittemore *v.* Beekman, 2 Dem. Surr. (N. Y.) 275, 280.

"The compensation allowed for the use or forbearance or detention of money, or its equivalent." Davey *v.* Deadwood First Nat. Bank, 10 S. D. 148, 149, 72 N. W. 83; Parks *v.* Lubbock, 92 Tex. 635, 638, 51 S. W. 322. See also Granger *v.* Pierce, 112 Mass. 244, 246.

"Money to be paid for the use of capital, on a loan of money, or the forbearance of a debt, and becomes part of and incident to a debt; or it is damages for the detention of a debt due, and fixed by law at a given rate, in proportion to the amount of money lent, or detained, and the time for which it is thus lent or detained." Corcoran *v.* Henshaw, 8 Gray (Mass.) 267, 278.

"The compensation which may be demanded by the lender from the borrower, or by the creditor from the debtor, for the use of money." Ward *v.* Brandon, 1 Heisk. (Tenn.) 490, 492. See also Davis *v.* Rider, 53 Ill. 416, 417; Wilson *v.* Morgan, 4 Rob. (N. Y.) 58, 72; Gardner *v.* Gardner, 23 S. C. 588, 593; Stone River Nat. Bank *v.* Walter, 104 Tenn. 11, 15, 55 S. W. 301.

"A legal and uniform rate of damages allowed in the absence of any express contract when payment is withheld after it has become the duty of the debtor to discharge his debt." Waller *v.* Kingston Coal Co., 191 Pa. St. 193, 201, 43 Atl. 235; Minard *v.* Beans, 64 Pa. St. 411, 413. See also Farmers' Bank *v.* Reynolds, 4 Rand. (Va.) 186, 188.

"The price agreed to be paid for the use of money." Bledsoe *v.* Nixon, 69 N. C. 89, 91, 12 Am. Rep. 642.

"The compensation allowed by law or fixed by the parties to a contract for the use or forbearance or detention of money." Parks *v.* Lubbock, 92 Tex. 635, 637, 51 S. W. 322.

"The premium allowed by law for the use of money." Garr *v.* Louisville Banking Co., 11 Bush (Ky.) 180, 189, 21 Am. Rep. 209.

"The compensation which the borrower pays to the lender for the profit which he has an opportunity of making by the use of the money." Hammond *v.* Hammond, 2 Bland (Md.) 306, 307.

"A certain profit for the use of the loan." Dry Dock Bank *v.* American L. Ins., etc., Co., 3 N. Y. 344, 355.

"A compensation allowed to the creditor for delay of payment by the debtor." Kelsey *v.* Murphy, 30 Pa. St. 340, 341.

"A profit or recompense allowed to be taken from the borrower by the lender." State *v.* Multnomah County, 13 Oreg. 287, 294, 10 Pac. 635.

"The compensation which is paid by the borrower of money to the lender for its use and, generally, by a debtor to his creditor in recompense for his detention of the debt." Bouvier L. Dict. [*quoted* in Hubbard *v.* Callahan, 42 Conn. 524, 528, 19 Am. Rep. 564;

B. Simple Interest. Simple interest is interest computed solely upon the principal.[2]

C. Compound Interest. Compound interest is interest upon interest;[3] where accrued interest is added to the principal sum and the whole treated as a new principal for the calculation of the interest for the next period.[4] It is to be observed, however, that there are two distinct methods of computing what is loosely termed compound interest. By the first method periodical rests are made and at each rest the principal and the accrued interest thereon is combined into a new principal which bears interest until the next rest and so on; this method results in giving interest not only upon the principal and upon the interest on the principal, but also in giving interest upon the interest on the interest and so on *ad infinitum* until payment, and this is what is meant by "compound interest" when the term is used in its strict sense. By the other method, the accrued interest is not combined with the principal but each instalment of interest on the principal becomes itself a new principal which bears simple interest, but no interest is allowed upon the interest on the interest;[5] and although this method is also sometimes called compound interest, it has been more correctly described as a middle course between simple and compound interest.[6]

D. Legal Interest.[7] Legal interest is that rate of interest prescribed by the law of the state or country which will prevail in the absence of any special agreement between the parties.[8]

Sorenson *v.* Central Lumber Co., 98 Ill. App. 581, 582; Williams *v.* Scott, 83 Ind. 405, 408; Hale *v.* Forbis, 3 Mont. 395, 405].

The words "interest on money" are equivalent to the words "interest for the loan or forbearance of money." Kittle *v.* Shervin, 11 Nebr. 65, 72, 7 N. W. 861.

Statute interest may properly be defined to be the legal damages or penalty for the unjust detention of money. Madison County *v.* Bartlett, 2 Ill. 67, 70.

2. Anderson L. Dict.; Black L. Dict.

3. Wilson *v.* Davis, 1 Mont. 183; Ross *v.* Pleasants, Wythe (Va.) 10, 33; Perley Int. 157; Black L. Dict.

4. Anderson L. Dict.; Black L. Dict. See also Hovey *v.* Edmison, 3 Dak. 449, 22 N. W. 594; Thorn *v.* Alvord, 32 Misc. (N. Y.) 456, 66 N. Y. Suppl. 587; Stokely *v.* Thompson, 34 Pa. St. 210; Koshkonong *v.* Burton, 104 U. S. 668, 26 L. ed. 886. "The term, compound interest, has but one meaning. It signifies the adding of the growing interest of any sum, to the sum itself, and then the taking of interest upon this accumulation." Camp *v.* Bates, 11 Conn. 487, 501.

Compounding interest is the charging of interest against a debtor upon a sum which has accrued as interest upon the principal debt. Woods *v.* Rankin, 2 Heisk. (Tenn.) 46, 48.

5. See Vaughan *v.* Kennan, 38 Ark. 114, 117, where a note was given "with interest from date at the rate of 10% per annum" in which it was stipulated that "if interest be not paid annually to become principal and to bear same rate of interest"; and the court said "we think, therefore, that the note itself continued to bear interest at the rate of ten per cent. after maturity as before, and that the unpaid interest due at maturity became interest-bearing at the same rate, together with the successive annual installments of interest as the failure to pay them occurred on each anniversary of the maturity of the note; not, however, so as to compound the interest on the amounts in default, which should each bear interest alone at the contractual rate. It is only the interest on the principal which is to become principal. This is the course adopted by the court in North Carolina. Bledsoe *v.* Nixon, 69 N. C. 89, 12 Am. Rep. 642. Each unpaid sum of annual interest stands alone, as if a new note had been given for it, bearing like interest." See also Morgan *v.* Michigan Air-Line R. Co., 57 Mich. 430, 25 N. W. 161, 26 N. W. 865; Peirce *v.* Rowe, 1 N. H. 179; Guernsey *v.* Rexford, 63 N. Y. 631; Wilson *v.* Wilson, 16 Wkly. Notes Cas. (Pa.) 439.

Difference in the two systems.— A simple mathematical calculation will show the difference in the result of the two systems. If the principal be one thousand dollars and the interest ten per cent, at the end of five years the amount due under the first system will be one thousand six hundred and ten dollars and fifty-one cents, while under the second system it will be only sixteen hundred dollars. And this difference becomes larger when a longer time elapses.

6. Bledsoe *v.* Nixon, 69 N. C. 89, 12 Am. Rep. 642.

7. As used in pleading see *infra*, VII, E, 1.

8. See Fowler *v.* Smith, 2 Cal. 568; Black L. Dict. By the words "legal interest," found in a statute, is to be understood the rate per cent prescribed by law, in the absence of special agreement, at the date of the passage of the act. Beals *v.* Amador County, 35 Cal. 624.

Under the Spanish law such interest was known as judicial interest. Caisergues *v.* Dujarreau, 1 Mart. (La.) 7.

E. Lawful Interest. The term "lawful interest" as distinguished from "legal interest" means any rate of interest up to that fixed by statute as the maximum rate at which interest can be contracted for. Where, however, there is no express stipulation as to a named rate the term "lawful interest" is synonymous with legal interest.[9]

F. Conventional Interest. Conventional interest is that rate of interest agreed upon by the parties.[10] It may be greater or less than the legal rate, provided it does not exceed the highest rate which the laws of the state or country allow parties to contract for.[11]

II. ORIGIN AND HISTORY.

A. Origin. The custom of taking interest for the use of money is lost in antiquity. It was known from the earliest historical times, and under the name of "usury" is frequently mentioned in the Bible.[12]

B. History — 1. In Early Times. The taking of interest, or as it was then called, "usury,"[13] was looked upon in early times with great disfavor; and actually prohibited, not only by the Mosaic law among the Jews, but also under severe penalties by the old English laws.[14] The church uttered its anathema and the state leveled its forfeitures, against the taking of any interest, great or small.[15] But notwithstanding the denunciations and punishments to which it was subjected, it could not be suppressed,[16] and it was finally, in 1545, sanctioned in England by 37 Henry VIII, chapter 9.[17]

2. Growth and Development of the Law. From the enactment of this earliest English statute permitting the taking of interest, the prejudice against the custom gradually gave way before the assaults made upon it by additional statutes and the decisions of the courts; and the allowance of interest has now

The provision of the banking law of Michigan that banks shall not take or receive "more than the legal rate of interest in advance" refers to the rate permitted under agreement and not to the rate fixed where the contract is silent as to the rate. Cameron *v.* Merchants', etc., Bank, 37 Mich. 239.

9. Daniel *v.* Gibson, 72 Ga. 367, 369, 53 Am. Rep. 845, where it is said: "The words 'lawful interest,' in the Code mean interest at seven per cent, if the contract stipulates no other rate; but they mean the contract rate, if stipulated and within the lawful limit. In the case where no rate is agreed upon, seven per cent is the lawful interest meant by the Code; in cases where another rate is agreed upon by the contract sued on, the contract rate is the lawful interest in those cases, if not beyond the limit fixed by the statute of force when the contract was made."

10. See Caisergues *v.* Dujarreau, 1 Mart. (La.) 7; Black L. Dict.; Bouvier L. Dict.

Customary rate.— In Fowler *v.* Smith, 2 Cal. 568, 570, in defining the kinds of interest allowed by the Spanish law, the court defined conventional interest as the "rate general, and usual by custom, at a given time, in a given place; and which may be greater or less than legal interest."

11. See USURY.

12. Exodus, xxii, 25; Leviticus, xxv, 36, 37; Nehemiah, v, 7, 10; Proverbs, xxviii, 8; Psalms, xv, 5.

13. Adriance *v.* Brooks, 13 Tex. 279.

14. Houghton *v.* Page, 2 N. H. 42, 9 Am. Dec. 30; New York Nat. Bank *v.* Mechanics Nat. Bank, 94 U. S. 437, 24 L. ed. 176; Chesterfield *v.* Jansen, 1 Wils. C. P. 290.

15. Adriance *v.* Brooks, 13 Tex. 279, 281, where it was said: "In criminality it was considered next to murder; and if one, after his death, were found to have been a habitual usurer, his goods were forfeited to the King." "It seems to have been held by the church to have been actually sinful as against the laws of God and morality, and by the courts to have been unlawful, from the political reason that money was only a medium of exchange, and naturally barren and unproductive." Mason *v.* Callender, 2 Minn. 350, 361, 72 Am. Dec. 102.

16. Adriance *v.* Brooks, 13 Tex. 279, 281, where it is said: "The community, instead of being benefitted by these prohibitory laws was seriously aggrieved, the lenders of money being forced to charge the most exorbitant rates by way of compensation for the risks incurred."

17. Mason *v.* Callender, 2 Minn. 350, 361, 72 Am. Dec. 102; New York Nat. Bank *v.* Mechanics Nat. Bank, 94 U. S. 437, 24 L. ed. 176.

Object of statute.— It may be questioned whether this statute was the result of more enlightened views as to the justice, honesty, or advantages of letting money at interest, or whether it was not rather the dictate of policy, that as the vice could not be suppressed it should be tolerated, but with many and severe restrictions. Adriance *v.* Brooks, 13 Tex. 279.

become quite general in all matters of contract and in many cases of tort.[18] This growth and development of the law concerning interest has been attended by many conflicts in the decisions of the courts; and it is difficult, and sometimes impossible, to reconcile them.[19] Among the earlier cases are found many that hold that interest should be allowed only where there is a contract to pay it, or where there is a contract to pay a certain sum of money on a day certain, as in cases of bills of exchange, promissory notes, and other mercantile securities.[20] This rule as to the allowance of interest was not limited to express contracts for payment, but extended to such contracts as might be implied from the usage of trade, the custom of dealing between the parties, or otherwise.[21] In many cases where such a contract for the payment of interest, or for the specific payment of money to which the implied contract might attach, could not be established, interest was refused,[22] but in other cases a more liberal doctrine was announced; and interest, as damages, was allowed from the time of default in paying over money due,[23] and in still other cases interest was permitted to be given in the discretion

18. Cartmill *v.* Brown, 1 A. K. Marsh. (Ky.) 576, 10 Am. Dec. 763; Dodge *v.* Perkins, 9 Pick. (Mass.) 368; Mason *v.* Callender, 2 Minn. 350, 72 Am. Dec. 102; Rensselaer Glass Factory *v.* Reid, 5 Cow. (N. Y.) 587.

19. *Colorado.*— Hawley *v.* Barker, 5 Colo. 118.

Florida.— Milton *v.* Blackshear, 8 Fla. 161.

Georgia.— Anderson *v.* State, 2 Ga. 370.

Kentucky.— Cartmill *v.* Brown, 1 A. K. Marsh. 576, 10 Am. Dec. 763.

Maine.— Doe *v.* Warren, 7 Me. 48.

New York.— Wilson *v.* Troy, 135 N. Y. 96, 32 N. E. 44, 31 Am. St. Rep. 817, 18 L. R. A. 449; White *v.* Miller, 78 N. Y. 393, 34 Am. Rep. 544; Van Rensselaer *v.* Jones, 2 Barb. 643.

Pennsylvania.— Richards *v.* Citizens' Natural Gas Co., 130 Pa. St. 37, 18 Atl. 600; Plymouth Tp. *v.* Graver, 125 Pa. St. 24, 17 Atl. 249, 11 Am. St. Rep. 867.

United States.— Nashua, etc., R. Corp. *v.* Boston, etc., R. Corp., 61 Fed. 237, 9 C. C. A. 468.

Discrepancies explained.— "Perhaps the discrepancies of opinion on this subject [of what was the common law doctrine of interest] may be accounted for in this way. At an early period in England the chancellors were generally churchmen, and not lawyers. As the catholic church has always set its face against usury, and been disposed to condemn the practice of exacting interest as immoral . . . it is probable that the chancellors held all interest usurious and illegal; whilst the common law courts, presided over by lawyers, better acquainted with the commercial necessities of the country . . . may have held that reasonable interest was not unlawful." Cox *v.* Smith, 1 Nev. 161, 168, 90 Am. Dec. 476.

20. See Selleck *v.* French, 1 Conn. 32, 6 Am. Dec. 185; Caledonian R. Co. *v.* Carmichael, L. R. 2 H. L. Sc. 56; Hill *v.* South Staffordshire R. Co., L. R. 18 Eq. 154, 43 L. J. Ch. 566; Page *v.* Newman, 9 B. & C. 378, 7 L. J. K. B. O. S. 267, 4 M. & R. 305, 17 E. C. L. 174; Tappenden *v.* Randall, 2 B. & P. 467, 5 Rev. Rep. 662; Gordon *v.* Swan, 2 Campb. 429 note, 12 East 419, 11 Rev. Rep. 758 note; De Bernales *v.* Fuller, 2 Campb. 426, 14 East 590 note, 11 Rev. Rep. 755; De Havilland *v.* Bowerbank, 1 Campb. 50; Hicks *v.* Mareco, 5 C. & P. 498, 24 E. C. L. 674; Calton *v.* Bragg, 15 East 223, 13 Rev. Rep. 451; Carr *v.* Edwards, 3 Stark. 132, 3 E. C. L. 624; Lowndes *v.* Collens, 17 Ves. Jr. 27, 34 Eng. Reprint 11; Parker *v.* Hutchinson, 3 Ves. Jr. 133, 30 Eng. Reprint 933.

The law merchant was held to be authority for the allowance of interest in *In re* Gosman, 17 Ch. D. 771, 50 L. J. Ch. 624, 45 L. T. Rep. N. S. 267, 29 Wkly. Rep. 793.

21. See Rensselaer Glass Factory *v.* Reid, 5 Cow. (N. Y.) 587; Page *v.* Newman, 9 B. & C. 378, 7 L. J. K. B. O. S. 267, 4 M. & R. 305, 17 E. C. L. 174; Shaw *v.* Picton, 4 B. & C. 715, 7 D. & R. 201, 4 L. J. K. B. O. S. 29, 28 Rev. Rep. 455, 10 E. C. L. 771; Higgins *v.* Sargent, 2 B. & C. 348, 3 D. & R. 613, 2 L. J. K. B. O. S. 33, 26 Rev. Rep. 379, 9 E. C. L. 158; Foster *v.* Weston, 6 Bing. 709, 8 L. J. C. P. O. S. 295, 4 M. & P. 589, 19 E. C. L. 319; De Bernales *v.* Fuller, 2 Campb. 426, 14 East 590 note, 11 Rev. Rep. 755; De Havilland *v.* Bowerbank, 1 Campb. 50; Calton *v.* Bragg, 15 East 223, 13 Rev. Rep. 451.

Deposit in bank.— Prior to 3 & 4 Wm. IV, c. 42, § 28, a banker was not liable to pay interest upon money deposited with him, although at the time of the deposit it had been declared that interest should not be payable upon a certain event, which did not happen. Edwards *v.* Vere, 5 B. & Ad. 282, 2 L. J. K. B. 190, 2 N. & M. 120, 27 E. C. L. 125.

22. See White *v.* Miller, 78 N. Y. 393, 34 Am. Rep. 544; Lloyd *v.* Williams, 2 Atk. 108, 26 Eng. Reprint 468; Page *v.* Newman, 9 B. & C. 378, 7 L. J. K. B. O. S. 267, 4 M. & R. 305, 17 E. C. L. 174; Hogan *v.* Page, 1 B. & P. 337; Gordon *v.* Swan, 2 Campb. 429 note, 12 East 419, 11 Rev. Rep. 758 note; Calton *v.* Bragg, 15 East 223, 13 Rev. Rep. 451; Rhodes *v.* Rhodes, Johns. 653, 6 Jur. N. S. 600, 29 L. J. Ch. 418, 8 Wkly. Rep. 204; Harris *v.* Benson, 2 Str. 910; Bell *v.* Free, 1 Swanst. 90, 36 Eng. Reprint 310, 1 Wils. Ch. 51, 37 Eng. Reprint 24, 18 Rev. Rep. 153.

23. Boddam *v.* Ryley, 1 Bro. Ch. 239, 28 Eng. Reprint 1104, 2 Bro. Ch. 2, 29 Eng. Reprint 1; Trelawney *v.* Thomas, 1 H. Bl.

of the jury, as damages for the detention or withholding by the debtor of the amount due to the creditor.[24]

3. Modern English Rule. St. 3 and 4 Wm. IV, c. 42, which was a general enactment on the subject of interest, provided that the jury might give interest in all cases in which interest was then recoverable by law, and upon all debts for an ascertained amount, payable by virtue of a written contract at a certain time, from the date when such debts were due and payable;[25] and that if the debt was not evidenced by such written instrument, interest was recoverable from the time when written demand for payment was made, such demand giving notice of an intention to claim interest.[26]

4. Doctrine in the United States. The general doctrine respecting the allowance of interest in the United States is much more liberal than that which prevails in England; and interest is generally allowed upon all ascertained demands in the nature of debts, even though there be no express promise to pay,[27] and

303; Lowndes *v.* Collens, 17 Ves. Jr. 27, 34 Eng. Reprint 11; Parker *v.* Hutchinson, 3 Ves. Jr. 133, 30 Eng. Reprint 933; Craven *v.* Tickell, 1 Ves. Jr. 60, 30 Eng. Reprint 230; Blaney *v.* Hendricks, 2 W. Bl. 761, 3 Wils. C. P. 205.

Where one by wrong takes from another either money, or goods in order to turn them into money, he ought to answer in interest. Ekins *v.* East-India Co., 1 P. Wms. 395, 24 Eng. Reprint 441.

24. Cameron *v.* Smith, 2 B. & Ald. 305, 20 Rev. Rep. 444; Arnott *v.* Redfern, 3 Bing. 353, 11 E. C. L. 177, 2 C. & P. 88, 12 E. C. L. 466, 4 L. J. C. P. O. S. 89, 11 Moore C. P. 209; Bann *v.* Dalzel, 3 C. & P. 376, 14 E. C. L. 618, M. & M. 229, 22 E. C. L. 514; Eddowes *v.* Hopkins, 1 Dougl. (3d ed.) 376. See Webster *v.* British Empire Mut. L. Assur. Co., 15 Ch. D. 169, 49 L. J. Ch. 769, 43 L. T. Rep. N. S. 229, 28 Wkly. Rep. 818.

25. London, etc., R. Co. *v.* South Eastern R. Co., [1893] A. C. 429, 58 J. P. 36, 63 L. J. Ch. 93, 69 L. T. Rep. N. S. 637, 1 Reports 275 [*affirming* [1892] 1 Ch. 120, 61 L. J. Ch. 294, 65 L. T. Rep. N. S. 722, 40 Wkly. Rep. 194]; Merchant Shipping Co. *v.* Armitage, L. R. 9 Q. B. 99, 43 L. J. Q. B. 24, 29 L. T. Rep. N. S. 809; Harper *v.* Williams, 4 Q. B. 219, 12 L. J. Q. B. 227, 45 E. C. L. 219; *In re* Horner, [1896] 2 Ch. 188, 65 L. J. Ch. 694, 74 L. T. Rep. N. S. 686, 44 Wkly. Rep. 556; Phillips *v.* Homfray, 44 Ch. D. 694, 59 L. J. Ch. 547, 62 L. T. Rep. N. S. 897, 39 Wkly. Rep. 45; Mackintosh *v.* Great Western R. Co., 4 Giff. 683, 6 New Rep. 336; Taylor *v.* Holt, 3 H. & C. 452, 34 L. J. Exch. 1, 11 L. T. Rep. N. S. 347, 13 Wkly. Rep. 78.

Statute declaratory of the common law.— Webster *v.* British Empire Mut. L. Assur. Co., 15 Ch. D. 169, 49 L. J. Ch. 769, 43 L. T. Rep. N. S. 229, 28 Wkly. Rep. 818.

The debt must be certain and payable at a time certain, in order that it may come within the terms of the statute. It is not sufficient that it may be made certain by some process of calculation or some act to be performed in the future. Sinclair *v.* Preston, 31 Can. Sup. Ct. 408 [*affirming* 13 Manitoba 228]. *Compare* Duncombe *v.* Brighton Club, etc., Co., L. R. 10 Q. B. 371, 44 L. J. Q. B. 216, 32 L. T. Rep. N. S. 863, 23 Wkly. Rep. 795.

26. Harper *v.* Williams, 4 Q. B. 219, 12 L. J. Q. B. 227, 45 E. C. L. 219; Ward *v.* Eyre, 15 Ch. D. 130, 49 L. J. Ch. 657, 43 L. T. Rep. N. S. 525, 28 Wkly. Rep. 712; Hill *v.* South Staffordshire R. Co., L. R. 18 Eq. 154, 43 L. J. Ch. 566; *In re* Overend, L. R. 4 Eq. 184, 36 L. J. Ch. 510, 16 L. T. Rep. N. S. 228, 15 Wkly. Rep. 617; Hull, etc., R. Co. *v.* North-Eastern R. Co., 5 De G. M. & G. 872, 24 L. J. Ch. 109, 3 Wkly. Rep. 129, 54 Eng. Ch. 683, 43 Eng. Reprint 1109; Berrington *v.* Phillips, 4 Dowl. P. C. 758, 5 L. J. Exch. 127, 1 M. & W. 48, 1 Tyrw. & G. 322; Mildmay *v.* Methuen, 3 Drew. 91, 61 Eng. Reprint 837; *In re* Edwards, 61 L. J. Ch. 22, 65 L. T. Rep. N. S. 453; Geake *v.* Ross, 44 L. J. C. P. 315, 32 L. T. Rep. N. S. 666, 23 Wkly. Rep. 658. See also Inglis *v.* Wellington Hotel Co., 29 U. C. C. P. 387. See *infra*, V, A, 4, g, (1).

27. *Alabama.*— Hollingsworth *v.* Hammond, 30 Ala. 668.

Connecticut.— Healy *v.* Fallon, 69 Conn. 228, 37 Atl. 495; Selleck *v.* French, 1 Conn. 32, 6 Am. Dec. 185.

Florida.— Sullivan *v.* McMillan, 37 Fla. 134, 19 So. 340, 53 Am. St. Rep. 239; Milton *v.* Blackshear, 8 Fla. 161.

Georgia.— Hoyle *v.* Jones, 35 Ga. 40, 89 Am. Dec. 273; Doonan *v.* Mitchell, 26 Ga. 472; Huff *v.* McDonald, 22 Ga. 131, 68 Am. Dec. 487; Robinson *v.* Darien Bank, 18 Ga. 65.

Illinois.— Keeler *v.* Herr, 157 Ill. 57, 41 N. E. 750; Palmer *v.* Meriden Britannia Co., 88 Ill. App. 485 [*affirmed* in 188 Ill. 508, 59 N. E. 247)]; Morris *v.* Taliaferro, 75 Ill. App. 182.

Kentucky.— Goodloe *v.* Clay, 6 B. Mon. 236; Miles *v.* Bacon, 4 J. J. Marsh. 457; Cartmill *v.* Brown, 1 A. K. Marsh. 576, 10 Am. Dec. 763; Colston *v.* Chenault, 45 S. W. 664, 20 Ky. L. Rep. 226.

Massachusetts.— Barnard *v.* Bartholomew, 22 Pick. 291; Dodge *v.* Perkins, 9 Pick. 368; Cole *v.* Trull, 9 Pick. 325; Etheridge *v.* Binney, 9 Pick. 272; Winthrop *v.* Carleton, 12 Mass. 4; Wood *v.* Robbins, 11 Mass. 504, 6 Am. Dec. 182.

Missouri.— Laming *v.* Peters Shoe Co., 71

in many cases interest has been allowed to be recovered by the creditor on unliquidated demands.[28]

5. Doctrine in Canada. A like tendency toward a more liberal doctrine respecting the allowance of interest has been commented on in Canada.[29]

III. Right to Interest.

A. In General — 1. Nature and Grounds — a. In General. The law allows interest only upon the ground of a contract, express or implied, for its payment, or as damages for the detention of money, or for the breach of some contract, or the violation of some duty.[30]

Mo. App. 646; McCormack *v.* Lynch, 69 Mo. App. 524.

New Hampshire.— Thompson *v.* Boston, etc., R. Co., 58 N. H. 524; McIlvaine *v.* Wilkins, 12 N. H. 474; Houghton *v.* Page, 2 N. H. 42, 9 Am. Dec. 30.

New York.— Woerz *v.* Schumacher, 161 N. Y. 530, 56 N. E. 72 [*affirming* 37 N. Y. App. Div. 374, 56 N. Y. Suppl. 8]; Wilson *v.* Troy, 135 N. Y. 96, 32 N. E. 44, 31 Am. St. Rep. 817, 18 L. R. A. 449; Ledyard *v.* Bull, 119 N. Y. 62, 23 N. E. 444; White *v.* Miller, 78 N. Y. 393, 34 Am. Rep. 544; De Lavallette, *v.* Wendt, 75 N. Y. 579, 34 Am. Rep. 494; Van Rensselaer *v.* Jewett, 2 N. Y. 135, 51 Am. Dec. 275; Van Rensselaer *v.* Jones, 2 Barb. 643; Fake *v.* Eddy, 15 Wend. 76; Feeter *v.* Heath, 11 Wend. 477; Greenly *v.* Hopkins, 10 Wend. 96; Doyle *v.* St. James' Church, 7 Wend. 178; Williams *v.* Sherman, 7 Wend. 109; Tucker *v.* Ives, 6 Cow. 193; Rensselaer Glass Factory *v.* Reid, 5 Cow. 587; People *v.* New York County, 5 Cow. 331; Walden *v.* Sherburne, 15 Johns. 409; People *v.* Gasherie, 9 Johns. 71, 6 Am. Dec. 263; Pease *v.* Barber, 3 Cai. 266; Hunn *v.* Norton, Hopk. 344; Campbell *v.* Mesier, 3 Johns. Ch. 21.

North Carolina.— Bledsoe *v.* Nixon, 69 N. C. 89, 12 Am. Rep. 642.

Pennsylvania.— Emerson *v.* Schoonmaker, 135 Pa. St. 437, 19 Atl. 1025; Richards *v.* Citizens' Natural Gas Co., 130 Pa. St. 37, 18 Atl. 600; Reading, etc., R. Co. *v.* Balthaser, 126 Pa. St. 1, 17 Atl. 518; Emlen *v.* Lehigh Coal, etc., Co., 47 Pa. St. 76, 86 Am. Dec. 518; Dilworth *v.* Sinderling, 1 Binn. 488, 2 Am. Dec. 469; Crawford *v.* Willing, 4 Dall. 286, 289, 1 L. ed. 836.

Rhode Island.— Durfee *v.* O'Brien, 16 R. I. 213, 14 Atl. 857; Spencer *v.* Pierce, 5 R. I. 63.

South Carolina.—Southern R. Co. *v.* Greenville, 49 S. C. 449, 27 S. E. 652; Doig *v.* Barkley, 3 Rich. 125, 45 Am. Dec. 762; Bulow *v.* Goddard, 1 Nott & M. 45, 9 Am. Dec. 663; Simpson *v.* Feltz, 1 McCord Eq. 213, 16 Am. Dec. 602.

Texas.— Heidenheimer *v.* Ellis, 67 Tex. 426, 3 S. W. 666; Houston, etc., R. Co. *v.* Jackson, 62 Tex. 209; Fowler *v.* Davenport, 21 Tex. 626; Close *v.* Fields, 13 Tex. 623.

Virginia.— Tidball *v.* Shenandoah Nat. Bank, 100 Va. 741, 42 S. E. 867; Craufurd *v.* Smith, 93 Va. 623, 23 S. E. 235, 25 S. E. 657; Roberts *v.* Cocke, 28 Gratt. 207; Chapman *v.* Shepherd, 24 Gratt. 377; Mickie *v.* Wood, 5 Rand. 571; Dow *v.* Adam, 5 Munf. 21; Newton *v.* Wilson, 3 Hen. & M. 470; Cooke *v.* Wise, 3 Hen. & M. 463.

United States.— Redfield *v.* Ystalyfera Iron Co., 110 U. S. 174, 3 S. Ct. 570, 28 L. ed. 109; New Orleans Ins. Assoc. *v.* Piaggio, 16 Wall. 378, 21 L. ed. 358; Aurora *v.* West, 7 Wall. 82, 19 L. ed. 42; Jourolmon *v.* Ewing, 80 Fed. 604, 26 C. C. A. 23; Nashua, etc., R. Corp. *v.* Boston, etc., R. Corp., 61 Fed. 237, 9 C. C. A. 468; White *v.* E. P. Gleason Mfg. Co., 8 Fed. 917.

See *infra*, III, C, 1, a.

"Interest follows the principal as the shadow does the substance." Hatcher *v.* Lewis, 4 Rand. (Va.) 152, 157. See also McVeigh *v.* Howard, 87 Va. 599, 13 S. E. 31; Jones *v.* Williams, 2 Call (Va.) 102.

Similarity to rent.— "In this country interest is the natural growth, or incident, of money, and bears the same relation to it that rent does to land." Woerz *v.* Schumacher, 161 N. Y. 530, 536, 56 N. E. 72 [*affirming* 37 N. Y. App. Div. 374, 56 N. Y. Suppl. 8].

28. Wabash R. Co. *v.* Williamson, 3 Ind. App. 190, 29 N. E. 455; Mote *v.* Chicago, etc., R. Co., 27 Iowa 22, 1 Am. Rep. 212; Wilson *v.* Troy, 135 N. Y. 96, 32 N. E. 44, 31 Am. St. Rep. 817, 18 L. R. A. 449; Van Rensselaer *v.* Jewett, 2 N. Y. 135, 51 Am. Dec. 275; Graham *v.* Chrystal, 1 Abb. Pr. N. S. (N. Y.) 121. See *infra*, III, C, 3, a, h.

The distinction is practically obliterated between liquidated and unliquidated demands. Sullivan *v.* McMillan, 37 Fla. 134, 19 So. 340, 53 Am. St. Rep. 239.

29. Spence *v.* Hector, 24 U. C. Q. B. 277, 281, where it is said: "Interest is in practice much more frequently allowed by our juries than English authority would seem to warrant."

30. *Connecticut.*— Healy *v.* Fallon, 69 Conn. 228, 37 Atl. 495; Jones *v.* Mallory, 22 Conn. 386; Selleck *v.* French, 1 Conn. 32, 6 Am. Dec. 185.

Delaware.— Black *v.* Reybold, 3 Harr. 528.

Florida.— Milton *v.* Blackshear, 8 Fla. 161.

Massachusetts.— Dodge *v.* Perkins, 9 Pick. 368.

New York.— Rensselaer Glass Factory *v.* Reid, 5 Cow. 587 [*affirming* 3 Cow. 393].

South Carolina.— Shoolbred *v.* Elliott, 1 Brev. 423.

Texas.— Wolfe *v.* Lacy, 30 Tex. 349.

b. In Equity. The courts of equity, in decreeing or refusing interest, generally follow the law;[31] but interest is sometimes allowed by courts of equity, in the exercise of a sound discretion, when it would not be recoverable at law.[32] On the other hand courts of law are sometimes affected by equitable considerations in the allowance of interest.[33] The English rule concerning the allowance of interest in equity seems to be not so broad as the rule in America at law.[34]

c. Interest as the Creature of Statute. It has frequently been said that interest is of purely statutory origin and not the creature of the common law; and interest has been refused except in such cases as come within the terms of the statute.[35] But contractual interest may be allowed of course, even though the

United States.— Harmanson *v.* Wilson, 11 Fed. Cas. No. 6,074, 1 Hughes 207.

England.— Webster *v.* British Empire Mut. L. Assur. Co., 15 Ch. D. 169, 49 L. J. Ch. 769, 43 L. T. Rep. N. S. 229, 28 Wkly. Rep. 818; Frankfort *v.* Thorpe, 2 Ball & B. 381; Dent *v.* Dunn, 3 Camph. 296, 13 Rev. Rep. 809; Willis *v.* Commissioners of Appeals, 5 East 22.

See 29 Cent. Dig. tit. "Interest," § 1.

31. *Alabama.*— Chambers *v.* Wright, 52 Ala. 444; Crocker *v.* Clements, 23 Ala. 296.

California.— Pujol *v.* McKinlay, 42 Cal. 559.

Illinois.— Morrison *v.* Smith, 130 Ill. 304, 23 N. E. 241.

Kentucky.— Taylor *v.* Knox, 5 Dana 466; Stewart *v.* Wilson, 5 Dana 50; Lair *v.* Jelf, 3 Dana 181; Hughes *v.* Standford, 3 Dana 285; Moore *v.* Pendergrast, 6 J. J. Marsh. 534; McMillen *v.* Scott, 1 T. B. Mon. 150; McAlexander *v.* Lee, 3 A. K. Marsh. 483; Samuel *v.* Minter, 3 A. K. Marsh. 480; Heydle *v.* Hazlehurst, 4 Bibb 19.

New Hampshire.— Hollister *v.* Barkley, 11 N. H. 501.

New York.— Campbell *v.* Mesier, 6 Johns. Ch. 21.

South Carolina.— Hunt *v.* Smith, 3 Rich. Eq. 465.

United States.— Nashua, etc., R. Corp. *v.* Boston, etc., R. Corp., 61 Fed. 237, 9 C. C. A. 468.

England.—Anonymous, 2 Eq. Cas. Abr. 470, 22 Eng. Reprint 400; Lowndes *v.* Collens, 17 Ves. Jr. 27, 34 Eng. Reprint 11.

See 29 Cent. Dig. tit. "Interest," § 1.

32. *Delaware.*— Beeson *v.* Elliott, 1 Del. Ch. 368.

Massachusetts.— Williams *v.* American Bank, 4 Metc. 317.

New York.— Woerz *v.* Schumacher, 161 N. Y. 530, 56 N. E. 72 [*affirming* 37 N. Y. App. Div. 374, 56 N. Y. Suppl. 8].

Oregon.— Hoehler *v.* McGlinchy, 20 Oreg. 360, 25 Pac. 1067.

South Carolina.— Craig *v.* Pervis, 14 Rich. Eq. 150.

England.— Phillips *v.* Homfray, [1892] 1 Ch. 465, 61 L. J. Ch. 210, 66 L. T. Rep. N. S. 657; Law *v.* East-India Co., 4 Ves. Jr. 824, 31 Eng. Reprint 427; Spartali *v.* Constatinidi, 20 Wkly. Rep. 823, 21 Wkly. Rep. 116.

Interest will or will not be allowed according to equity of case. Hunt *v.* Smith, 3 Rich. Eq. (S. C.) 465. See also Beeson *v.* Elliott, 1 Del. Ch. 368; Pettus *v.* Clawson, 4 Rich. Eq. (S. C.) 92.

Where the court of appeal orders the payment of money and says nothing as to any antecedent interest thereon, such interest cannot afterward be added by the court of chancery, at all events in cases in which although interest is usually given it is not a matter of strict legal right but of discretion. Box *v.* Provincial Ins. Co., 19 Grant Ch. (U. C.) 48.

33. Mayo *v.* Wahlgreen, 9 Colo. App. 506, 50 Pac. 40; Dyer *v.* Elderkin, 1 Root (Conn.) 412; O'Donnell *v.* Omaha, etc., R. Co., 31 Nebr. 846, 48 N. W. 880.

34. Hollister *v.* Barkley, 11 N. H. 501.

Rate.— Where it is customary for courts of equity to allow interest after maturity of a debt and default in payment at the rate of four per cent, it will not depart from that rule, even though the demand presented be a legal demand, and the rule of the law courts is to allow five per cent. Smith *v.* Copleston, 11 Beav. 482, 50 Eng. Reprint 903; Lechmere *v.* Carlisle, 3 P. Wms. 211, 24 Eng. Reprint 1033. But see Knapp *v.* Burnaby, 30 L. J. Ch. 844, 5 L. T. Rep. N. S. 52, 9 Wkly. Rep. 765.

35. *California.*— Osborn *v.* Hendrickson, 8 Cal. 31.

Colorado.— Corson *v.* Neatheny, 9 Colo. 212, 11 Pac. 82; Denver, etc., R. Co. *v.* Conway, 8 Colo. 1, 5 Pac. 142, 54 Am. Rep. 537; Keys *v.* Morrison, 3 Colo. App. 441, 34 Pac. 259; Pettit *v.* Thalheimer, 3 Colo. App. 355, 33 Pac. 277.

Illinois.— Firemen's Fund Ins. Co. *v.* Western Refrigerating Co., 162 Ill. 322, 44 N. E. 746; Harvey *v.* Hamilton, 155 Ill. 377, 40 N. E. 592; Fowler *v.* Harts, 149 Ill. 592, 36 N. E. 996; Chicago *v.* Allcock, 86 Ill. 384; Illinois Cent. R. Co. *v.* Cobb, 72 Ill. 148; Aldrich *v.* Dunham, 16 Ill. 403; Sanderson *v.* Read, 75 Ill. App. 190.

Michigan.— Kermott *v.* Ayer, 11 Mich. 181.

Minnesota.— Mason *v.* Callender, 2 Minn. 350, 72 Am. Dec. 102.

Mississippi.— Warren County *v.* Klein, 51 Miss. 807; Hamer *v.* Kirkwood, 25 Miss. 95.

Montana.— Palmer *v.* Murray, 8 Mont. 312, 21 Pac. 126; Randall *v.* Greenhood, 3 Mont. 506; Isaacs *v.* McAndrew, 1 Mont. 437.

New Hampshire.— Houghton *v.* Page, 2 N. H. 42, 9 Am. Dec. 30.

New York.— Woerz *v.* Schumacher, 161 N. Y. 530, 56 N. E. 72 [*affirming* 37 N. Y. App. Div. 374, 56 N. Y. Suppl. 8]. See also

statute makes no specific provision for such interest;[36] and it has been held that where interest is recoverable as damages, and not *eo nomine*, it is properly assessable even in the absence of any statute providing for its allowance.[37]

2. What Law Governs — a. Contracts — (i) *Express Contracts.* Where there is an express contract for the payment of interest, the general rule is that both the allowance of interest and the rate to be paid must be governed by the law of the country or state with reference to which the contract therefor was made.[38] The parties to the contract may stipulate for the payment of interest according to the law of the place of performance or the place of execution, although the rate in one jurisdiction may be usurious in the other,[39] provided

Rensselaer Glass Factory *v.* Reid, 5 Cow. 587.

Texas.— Davis *v.* Thorn, 6 Tex. 482; Close *v.* Fields, 2 Tex. 232.

United States.— New York Nat. Bank *v.* Mechanics' Nat. Bank, 94 U. S. 437, 24 L. ed. 176; Pacific Coast Steamship Co. *v.* U. S., 33 Ct. Cl. 36.

36. Denver, etc., R. Co. *v.* Conway, 8 Colo. 1, 5 Pac. 142, 54 Am. Rep. 537.

37. Watkins *v.* Wassell, 20 Ark. 410; Davis *v.* Greely, 1 Cal. 422. See also Barnard *v.* Bartholomew, 22 Pick. (Mass.) 291; Dodge *v.* Perkins, 9 Pick. (Mass.) 368.

Interest cannot be allowed eo nomine unless specially provided for by statute; but in many instances it may be assessed as damages, although the statute be silent on the subject. Heidenheimer *v.* Ellis, 67 Tex. 426, 3 S. W. 666; Houston, etc., R. Co. *v.* Jackson, 62 Tex. 209.

38. *Illinois.*— Richman *v.* South Omaha Nat. Bank, 76 Ill. App. 637.

Iowa.— Bigelow *v.* Burnham, 90 Iowa 300, 57 N. W. 865, 48 Am. St. Rep. 442; Arnold *v.* Potter, 22 Iowa 194; Butters *v.* Olds, 11 Iowa 1.

Maine.— Stickney *v.* Jordan, 58 Me. 106, 4 Am. Rep. 251.

Massachusetts.—Pine *v.* Smith, 11 Gray 38.

Missouri.— Long *v.* Long, 141 Mo. 352, 44 S. W. 341.

Nebraska.— Coad *v.* Home Cattle Co., 32 Nebr. 761, 49 N. W. 757, 29 Am. St. Rep. 465.

New York.— Curtis *v.* Leavitt, 15 N. Y. 9; Berrien *v.* Wright, 26 Barb. 208; Scofield *v.* Day, 20 Johns. 102; Fanning *v.* Consequa, 17 Johns. 511, 8 Am. Dec. 442; Thompson *v.* Ketcham, 4 Johns. 285; Smith *v.* Smith, 2 Johns. 235, 3 Am. Dec. 410; Van Schaick *v.* Edwards, 2 Johns. Cas. 355; Chapman *v.* Robertson, 6 Paige 627, 31 Am. Dec. 264.

North Carolina.— Morris *v.* Hockaday, 94 N. C. 286, 55 Am. Rep. 607; Arrington *v.* Gee, 27 N. C. 590.

Pennsylvania.— Irvine *v.* Barrett, 2 Grant 73.

South Carolina.— Thornton *v.* Dean, 19 S. C. 583, 45 Am. Rep. 796.

Tennessee.— Johnson City First Nat. Bank *v.* Mann, 94 Tenn. 17, 27 S. W. 1015, 27 L. R. A. 565.

United States.— Cairo *v.* Zane, 149 U. S. 122, 13 S. Ct. 803, 37 L. ed. 673; Coghlan *v.* South Carolina R. Co., 142 U. S. 101, 12 S. Ct. 150, 35 L. ed. 951; Fowler *v.* Equitable Trust Co., 141 U. S. 384, 12 S. Ct. 1, 35 L. ed. 786; Pana *v.* Bowler, 107 U. S. 529, 2 S. Ct. 704, 27 L. ed. 424; Walnut *v.* Wade, 103 U. S. 683, 25 L. ed. 526; Cromwell *v.* Sac County, 96 U. S. 51, 24 L. ed. 681; Miller *v.* Tiffany, 1 Wall. 298, 17 L. ed. 540; Gelpcke *v.* Dubuque, 1 Wall. 175, 17 L. ed. 520; De Wolf *v.* Johnson, 10 Wheat. 367, 6 L. ed. 343; Kroegher *v.* Calivada Colonization Co., 119 Fed. 641, 56 C. C. A. 257; Dakota Bldg., etc., Assoc. *v.* Logan, 66 Fed. 827, 14 C. C. A. 133; Kellogg *v.* Miller, 13 Fed. 198, 2 McCrary 395; Evans *v.* White, 8 Fed. Cas. No. 4,572*a*, Hempst. 296; Jaffray *v.* Dennis, 13 Fed. Cas. No. 7,171, 2 Wash. 253.

See 29 Cent. Dig. tit. "Interest," §§ 2, 55.

The mere naming of a particular place for payment of a debt is not of itself conclusive proof that the parties contracted with reference to the law of such place so as to provide for the allowance of interest according to the law of that jurisdiction. Thornton *v.* Dean, 19 S. C. 583, 45 Am. Rep. 796. And see Hanrick *v.* Andrews, 9 Port. (Ala.) 9.

Mortgage of foreign property.— The fact that the security for money loaned is a mortgage on lands in a different state will not of itself serve to alter the rule of *lex loci contractus* as to interest. De Wolf *v.* Johnson, 10 Wheat. (U. S.) 367, 6 L. ed. 343. See Taylor *v.* Simpkins, 38 Misc. (N. Y.) 246, 77 N. Y. Suppl. 591. *Compare* Faison *v.* Grandy, 128 N. C. 438, 38 S. E. 897, 83 Am. St. Rep. 693.

39. *Colorado.*— McKay *v.* Belknap Sav. Bank, 27 Colo. 50, 59 Pac. 745; Eccles *v.* Herrick, 15 Colo. App. 350, 62 Pac. 1040.

Georgia.— Jackson *v.* American Mortg. Co., 88 Ga. 756, 15 S. E. 812.

Iowa.— Bigelow *v.* Burnham, 90 Iowa 300, 57 N. W. 865, 48 Am. St. Rep. 442; Arnold *v.* Potter, 22 Iowa 194.

Louisiana.— Depau *v.* Humphreys, 8 Mart. N. S. 1.

Michigan.— Mott *v.* Rowland, 85 Mich. 561, 48 N. W. 638.

Missouri.— Long *v.* Long, 141 Mo. 352, 44 S. W. 341.

New Hampshire.— Jones *v.* Rider, 60 N. H. 452; Chase *v.* Dow, 47 N. H. 405; Townsend *v.* Riley, 46 N. H. 300.

New Jersey.— Healy *v.* Gorman, 15 N. J. L. 328.

New York.— Staples *v.* Nott, 128 N. Y. 403, 28 N. E. 515, 26 Am. St. Rep. 480 [*affirming* 11 N. Y. Suppl. 924].

Tennessee.— Bolton *v.* Street, 3 Coldw. 31.

such contract for interest be made in good faith and not merely as a cover for usury.[40] If a contract stipulates generally for interest without fixing the rate, the rate will be determined according to the law of the place of payment.[41]

(II) *Implied Contracts.* The same rule governs in cases of implied contracts for the payment of interest that controls in cases of express contract; and the true intent of the parties, when properly ascertained, will control as to the law to be applied.[42]

b. Interest as Damages — (I) *In General.* Where interest is recoverable as damages, and not by reason of a contract for its payment according to the laws of a particular jurisdiction, it is quite generally held that the law of the place of performance will control its allowance.[43] In the absence of any stipula-

Vermont.— Peck *v.* Mayo, 14 Vt. 33, 39 Am. Dec. 205.

Wisconsin.— Vliet *v.* Camp, 13 Wis. 198; Richards *v.* Globe Bank, 12 Wis. 692; Newman *v.* Kershaw, 10 Wis. 333.

United States.— U. S. Mortgage Co. *v.* Sperry, 138 U. S. 313, 11 S. Ct. 321, 34 L. ed. 969; Cromwell *v.* Sac County, 96 U. S. 51, 24 L. ed. 681; Miller *v.* Tiffany, 1 Wall. 298, 17 L. ed. 540; Andrews *v.* Pond, 13 Pet. 65, 10 L. ed. 61; Porter *v.* Price, 80 Fed. 655, 26 C. C. A. 70; Van Vleet *v.* Sledge, 45 Fed. 743; New England Mortg. Security Co. *v.* Vader, 28 Fed. 265; Kellogg *v.* Miller, 13 Fed. 198, 2 McCrary 395; Bradley *v.* Lill, 3 Fed. Cas. No. 1,783, 4 Biss. 473.

England.— Anonymous, 3 Bing. 193, 11 E. C. L. 93.

The rule applies to guarantors as well as to the principals in an obligation for the payment of money. Wilson *v.* Rose Clare Lead, etc., Co., 7 Ohio Dec. (Reprint) 223, 1 Cinc. L. Bul. 314.

40. *Missouri.*— Long *v.* Long, 141 Mo. 352, 44 S. W. 341.

Nebraska.— Coad *v.* Home Cattle Co., 32 Nebr. 761, 49 N. W. 757, 29 Am. St. Rep. 465.

New Hampshire.— Jones *v.* Rider, 60 N. H. 452; Townsend *v.* Riley, 46 N. H. 300.

New York.— Berrien *v.* Wright, 26 Barb. 208; Van Schaick *v.* Edwards, 2 Johns. Cas. 355.

North Carolina.— Roberts *v.* McNeely, 52 N. C. 506, 78 Am. Dec. 261; Arrington *v.* Gee, 27 N. C. 590.

Tennessee.— Bolton *v.* Street, 3 Coldw. 31.

Virginia.— Ware *v.* Bankers' Loan, etc., Co., 95 Va. 680, 29 S. E. 744, 64 Am. St. Rep. 826.

Wisconsin.— Richards *v.* Globe Bank, 12 Wis. 692.

United States.— Miller *v.* Tiffany, 1 Wall. 298, 17 L. ed. 540; Andrews *v.* Pond, 13 Pet. 65, 10 L. ed. 61; De Wolf *v.* Johnson, 10 Wheat. 367, 6 L. ed. 343; Dakota Bldg., etc., Assoc. *v.* Logan, 66 Fed. 827, 14 C. C. A. 133; Kellogg *v.* Miller, 13 Fed. 198, 2 McCrary 395.

England.— Stapleton *v.* Conway, 3 Atk. 727, 26 Eng. Reprint 1217, 1 Ves. 427, 27 Eng. Reprint 1122.

Where rate not lawful in either state.— A contract made in one state for the payment of interest in another state, at a rate higher than is allowed by the law of either, will be dealt with according to the law of the place where the contract is made. Adams *v.* Robertson, 37 Ill. 45. And see Andrews *v.* Pond, 13 Pet. (U. S.) 65, 10 L. ed. 61.

41. Thornton *v.* Dean, 19 S. C. 583, 45 Am. Rep. 796; Summers *v.* Mills, 21 Tex. 77. See also Trott *v.* Patton, Dall. (Tex.) 522.

42. *Alabama.*— Moore *v.* Davidson, 18 Ala. 209.

Connecticut.— Smith *v.* Mead, 3 Conn. 253, 8 Am. Dec. 183.

Iowa.— Bigelow *v.* Burnham, 90 Iowa 300, 57 N. W. 865, 48 Am. St. Rep. 442.

New York.— Curtis *v.* Leavitt, 15 N. Y. 9; Fanning *v.* Consequa, 17 Johns. 511, 8 Am. Dec. 442.

Vermont.— Porter *v.* Munger, 22 Vt. 191.

United States.— Bainbridge *v.* Wilcocks, 2 Fed. Cas. No. 755, Baldw. 536.

Construction of contract.— Property of a mining company in Colorado was purchased at execution sale by two creditors of the company, who entered into an agreement in Massachusetts that one of them should manage the property until he realized the amount of his debt and interest, after which he should convey to his associate. It was held that the laws of Massachusetts should govern as to interest, although the property was to be managed in Colorado. French *v.* French, 126 Mass. 360.

The residence of the parties, while not decisive, is proper to be considered in determining their intent as to the law which should control their contract for interest. Van Schaick *v.* Edwards, 2 Johns. Cas. (N. Y.) 355; Chapman *v.* Robertson, 6 Paige (N. Y.) 627, 31 Am. Dec. 264. See Kellogg *v.* Miller, 13 Fed. 198, 2 McCrary 395.

43. *Alabama.*— McGarry *v.* Nicklin, 110 Ala. 559, 17 So. 726, 55 Am. St. Rep. 40; Cubbedge *v.* Napier, 62 Ala. 518; Hunt *v.* Hall, 37 Ala. 702; Moore *v.* Davidson, 18 Ala. 209; Dickinson *v.* Mobile Branch Bank, 12 Ala. 54; Bazemore *v.* Wilder, 10 Ala. 773; Hanrick *v.* Andrews, 9 Port. 9; Crawford *v.* Simonton, 7 Port. 110; Ely *v.* McClung, 4 Port. 128; Evans *v.* Clark, 1 Port. 388.

Arkansas.— Clarke *v.* Taylor, 69 Ark. 612, 65 S. W. 110; Harrison Bank *v.* Gibson, 60 Ark. 269, 30 S. W. 39.

Connecticut.— Adams *v.* Way, 33 Conn. 419.

tion to the contrary, the place where the contract is made is held to be also the place of performance and interest as damages for its breach will be governed by

Georgia.— Odom *v.* New England Mortg. Security Co., 91 Ga. 505, 18 S. E. 131; Vinson *v.* Platt, 21 Ga. 135.

Illinois.— Morris *v.* Wibaux, 159 Ill. 627, 43 N. E. 837.

Indiana. — Kopelke *v.* Kopelke, 112 Ind. 435, 13 N. E. 695; Gray *v.* State, 72 Ind. 567; Lines *v.* Mack, 19 Ind. 223; Lefler *v.* Dermotte, 18 Ind. 246; Butler *v.* Myer, 17 Ind. 77.

Iowa.— Butters *v.* Olds, 11 Iowa 1.

Kentucky.—Thomas *v.* Beckman, 1 B. Mon. 29; Pawling *v.* Sartain, 4 J. J. Marsh. 238; Cocke *v.* Conigmaker, 1 A. K. Marsh. 254.

Louisiana.— Hawley *v.* Sloo, 12 La. Ann. 815; Ballister *v.* Hamilton, 3 La. Ann. 401; Bent *v.* Lauve, 3 La. Ann. 88; Lesesne *v.* Cook, 16 La. 58; Lapice *v.* Smith, 13 La. 91, 33 Am. Dec. 555; Ory *v.* Winter, 6 Mart. N. S. 606; Wakeman *v.* Marquand, 5 Mart. N. S. 265.

Maine.— Stickney *v.* Jordan, 58 Me. 106, 4 Am. Rep. 251.

Maryland.—Pearce *v.* Wallace, 1 Harr. & J. 48.

Massachusetts.— French *v.* French, 126 Mass. 360; Ives *v.* Farmers' Bank, 2 Allen 236; Pine *v.* Smith, 11 Gray 38; Von Hemert *v.* Porter, 11 Metc. 210. See also Eaton *v.* Mellus, 7 Gray 566.

Mississippi. — Grangers' L. Ins. Co. *v.* Brown, 57 Miss. 308, 34 Am. Rep. 446; Swett *v.* Dodge, 4 Sm. & M. 667.

Missouri.— Louisville Bank *v.* Young, 37 Mo. 398. See also Baltzer *v.* Kansas Pac. R. Co., 3 Mo. App. 574.

Montana.— Isaacs *v.* McAndrew, 1 Mont. 437.

Nevada.— Sutro Tunnel Co. *v.* Segregated Belcher Min. Co., 19 Nev. 121, 7 Pac. 271.

New Hampshire.— Little *v.* Riley, 43 N. H. 109.

New Jersey. — Campbell *v.* Nichols, 33 N. J. L. 81; Healy *v.* Gorman, 15 N. J. L. 328; Varick *v.* Crane, 4 N. J. Eq. 128.

New York. — Pomeroy *v.* Ainsworth, 22 Barb. 118; Smith *v.* Smith, 2 Johns. 235, 3 Am. Dec. 410; Stewart *v.* Ellice, 2 Paige 604; Hosford *v.* Nichols, 1 Paige 220.

North Carolina.— Roberts *v.* McNeely, 52 N. C. 506, 78 Am. Dec. 261; Davis *v.* Coleman, 33 N. C. 303.

Ohio.— See Findlay *v.* Hall, 12 Ohio St. 610.

Pennsylvania.— Clark *v.* Searight, 135 Pa. St. 173, 19 Atl. 941, 20 Am. St. Rep. 868; Wood *v.* Kelso, 27 Pa. St. 241; Mullen *v.* Morris, 2 Pa. St. 85; Irvine *v.* Barrett, 2 Grant 73; Archer *v.* Dunn, 2 Watts & S. 327.

Rhode Island. — Kavanaugh *v.* Day, 10 R. I. 393, 14 Am. Rep. 691.

South Carolina.— Stepp *v.* National Life, etc., Assoc., 37 S. C. 417, 16 S. E. 134; Ball *v.* Gaillard, 1 Nott & M. 67; Quince *v.* Callender, 1 Desauss. Eq. 160.

Tennessee.— Frierson *v.* Galbraith, 12 Lea 129; Bolton *v.* Street, 3 Coldw. 31.

Texas. — Pauska *v.* Daus, 31 Tex. 67; Whitlock *v.* Castro, 22 Tex. 108; Summers *v.* Mills, 21 Tex. 77; Bailey *v.* Heald, 17 Tex. 102; Raymond *v.* Holmes, 11 Tex. 54; Able *v.* McMurray, 10 Tex. 350; Wheeler *v.* Pope, 5 Tex. 262; Andrews *v.* Hoxie, 5 Tex. 171; Cook *v.* Crawford, 4 Tex. 420; Trott *v.* Patton, Dall. 522.

Vermont.— Austin *v.* Imus, 23 Vt. 286; Peck *v.* Mayo, 14 Vt. 33, 39 Am. Dec. 205.

Virginia.— National Mut. Bldg., etc., Assoc. *v.* Ashworth, 91 Va. 706, 22 S. E. 521; Roberts *v.* Cocke, 28 Gratt. 207.

United States.— Coghlan *v.* South Carolina R. Co., 142 U. S. 101, 12 S. Ct. 150, 35 L. ed. 951; U. S. Mortgage Co. *v.* Sperry, 138 U. S. 313, 11 S. Ct. 321, 34 L. ed. 969; Scotland County *v.* Hill, 132 U. S. 107, 10 S. Ct. 26, 33 L. ed. 261; Ft. Worth City Nat. Bank *v.* Hunter, 129 U. S. 557, 9 S. Ct. 346, 32 L. ed. 752; Pana *v.* Bowler, 107 U. S. 529, 2 S. Ct. 704, 27 L. ed. 424; Cockle *v.* Flack, 93 U. S. 344, 23 L. ed. 949; Cook *v.* Moffat, 5 How. 295, 12 L. ed. 159; Andrews *v.* Pond, 13 Pet. 65, 10 L. ed. 61; De Wolf *v.* Johnson, 10 Wheat. 367, 6 L. ed. 343; Lanusse *v.* Barker, 3 Wheat. 101, 4 L. ed. 343; Kroegher *v.* Calivada Colonization Co., 119 Fed. 641, 56 C. C. A. 257; Columbus, etc., R. Co.'s Appeal, 109 Fed. 177, 48 C. C. A. 275; Dakota Bldg., etc., Assoc. *v.* Logan, 66 Fed. 827, 14 C. C. A. 133; Wittkowski *v.* Harris, 64 Fed. 712; Illinois Bank *v.* Brady, 2 Fed. Cas. No. 888, 3 McLean 268; Bradley *v.* Lill, 3 Fed. Cas. No. 1,783, 4 Biss. 473; Bushby *v.* Camac, 4 Fed. Cas. No. 2,226, 4 Wash. 296; Cowqua *v.* Lauderbrun, 6 Fed. Cas. No. 3,299, 1 Wash. 521; Rogers *v.* Lee County, 20 Fed. Cas. No. 12,013, 1 Dill. 529.

England.— Stapleton *v.* Conway, 3 Atk. 727, 26 Eng. Reprint 1217, 1 Ves. 427, 27 Eng. Reprint 1122; Connor *v.* Bellamont, 2 Atk. 382, 26 Eng. Reprint 631; Cooper *v.* Waldegrave, 2 Beav. 282, 17 Eng. Ch. 282, 48 Eng. Reprint 1189; Fergusson *v.* Fyffe, 8 Cl. & F. 121, 8 Eng. Reprint 49; Gibbs *v.* Fremont, 9 Exch. 25, 17 Jur. 820, 22 L. J. Exch. 302, 1 Wkly. Rep. 482; Champant *v.* Ranelagh, Prec. Ch. 128, 24 Eng. Reprint 62; Ekins *v.* East-India Co., 1 P. Wms. 395, 24 Eng. Reprint 441. See Anonymous, 1 Eq. Cas. Abr. 288*e*, 21 Eng. Reprint 1051.

Canada.— Reg. *v.* Henderson, 28 Can. Sup. Ct. 425; Reg. *v.* Grand Trunk R. Co., 2 Can. Exch. 132; Souther *v.* Wallace, 1 Can. L. T. 556, 11 Nova Scotia 548; Bradburn *v.* Edinburgh L. Assur. Co., 5 Ont. L. Rep. 657.

See 29 Cent. Dig. tit. "Interest," § 55.

The rule applies only where the parties have failed to stipulate as to the rate of interest. Bolton *v.* Street, 3 Coldw. (Tenn.) 31.

A bond given as collateral to secure a debt in another state is controlled by the law which controls the principal indebtedness as

the law of such place;[44] but this is merely a *prima facie* presumption, and may be rebutted by parol evidence that the contract is in fact to be performed elsewhere.[45] In some cases the law of the place where suit is brought has been held to control the allowance of interest as damages.[46] Thus the *lex fori* will govern the allowance of interest, where the contract does not disclose the place of performance nor the place where the contract was made, or if it insufficiently describes such place, it being assumed in such case that the place of execution is within the jurisdiction of the forum.[47]

to the rate of interest. Irvine *v.* Barrett, 2 Grant (Pa.) 73.

A marriage settlement made in another state upon land in South Carolina draws interest according to the law of the latter state. Quince *v.* Collender, 1 Desauss. Eq. (S. C.) 160.

Where recourse is had upon the drawee of a bill of exchange interest is recoverable according to the law of the place where the bill was drawn. Bailey *v.* Heald, 17 Tex. 102.

Change of place of payment.— Where a debt is payable in Great Britain, and it is agreed, to accommodate the debtor, that it may be paid here, the creditor is entitled to the legal rate of interest in this country from the time of such agreement. Pearce *v.* Wallace, 1 Harr. & J. (Md.) 48.

Indian interest when made principal in England bears English interest. Bodily *v.* Bellamy, 2 Burr. 1094, 1 W. Bl. 267.

44. *Alabama.*— Moore *v.* Davidson, 18 Ala. 209.

Connecticut.— Smith *v.* Mead, 3 Conn. 253, 8 Am. Dec. 183.

Iowa.— Bigelow *v.* Burnham, 90 Iowa 300, 57 N. W. 865, 48 Am. St. Rep. 442; Arnold *v.* Potter, 22 Iowa 194; Butters *v.* Olds, 11 Iowa 1.

Kentucky.— Thomas *v.* Beckman, 1 B. Mon. 29; Pawling *v.* Sartain, 4 J. J. Marsh. 238; Holley *v.* Holley, Litt. Sel. Cas. 505, 12 Am. Dec. 342; Templeton *v.* Sharp, 9 S. W. 507, 696, 10 Ky. L. Rep. 499.

Louisiana.— Nalle *v.* Ventress, 19 La. Ann. 373; Depau *v.* Humphreys, 8 Mart. N. S. 1.

Maine.— Stickney *v.* Jordan, 58 Me. 106, 4 Am. Rep. 251.

Maryland.— See Costigan *v.* Sewall, 6 Gill 232.

Massachusetts.— See Ayer *v.* Tilden, 15 Gray 178, 77 Am. Dec. 355; Von Hemert *v.* Porter, 11 Metc. 210; Winthrop *v.* Carleton, 12 Mass. 4; Jones *v.* Belcher, Quincy 9.

New Jersey.— Hoppins *v.* Miller, 17 N. J. L. 185.

New York.— Staples *v.* Nott, 128 N. Y. 403, 28 N. E. 515, 26 Am. St. Rep. 480 [*affirming* 11 N. Y. Suppl. 924]; Lewis *v.* Ingersoll, 3 Abb. Dec. 55, 1 Keyes 347; Pomeroy *v.* Ainsworth, 22 Barb. 118; Van Schaick *v.* Edwards, 2 Johns. Cas. 355; Chapman *v.* Robertson, 6 Paige 627, 31 Am. Dec. 264; Stewart *v.* Ellice, 2 Paige 604; Hosford *v.* Nichols, 1 Paige 220.

North Carolina.— Morris *v.* Hockaday, 94 N. C. 286, 55 Am. Rep. 607; Hilliard *v.* Outlaw, 92 N. C. 266; Davis *v.* Coleman, 29 N. C. 424; Arrington *v.* Gee, 27 N. C. 590; Anonymous, 3 N. C. 5.

Ohio.— Nez Percies Silver Min. Co. *v.* Winsor, 7 Ohio Dec. (Reprint) 16, 1 Cinc. L. Bul. 23.

Pennsylvania.— Clark *v.* Searight, 135 Pa. St. 173, 19 Atl. 941, 20 Am. St. Rep. 868; Ralph *v.* Brown, 3 Watts & S. 395.

Rhode Island.— Kavanaugh *v.* Day, 10 R. I. 393, 14 Am. Rep. 692.

South Carolina.— Ball *v.* Gaillard, 1 Nott & M. 67.

Texas.— Bailey *v.* Heald, 17 Tex. 102; Burton *v.* Anderson, 1 Tex. 93.

Vermont.— Churchill *v.* Cole, 32 Vt. 93; Porter *v.* Munger, 22 Vt. 191.

United States.— Lanusse *v.* Barker, 3 Wheat. 101, 4 L. ed. 343; Wittkowski *v.* Harris, 64 Fed. 712; Sturdivant *v.* Memphis Nat. Bank, 60 Fed. 730, 9 C. C. A. 256; Courtois *v.* Carpentier, 6 Fed. Cas. No. 3,286, 1 Wash. 376; Cowqua *v.* Lauderbrun, 6 Fed. Cas. No. 3,299, 1 Wash. 521; Evans *v.* White, 8 Fed. Cas. No. 4,572*a*, Hempst. 296.

See 29 Cent. Dig. tit. "Interest," § 55.

45. Moore *v.* Davidson, 18 Ala. 209; Hoppins *v.* Miller, 17 N. J. L. 185; Johnson City First Nat. Bank *v.* Mann, 94 Tenn. 17, 27 S. W. 1015, 27 L. R. A. 565; Austin *v.* Imus, 23 Vt. 286. *Contra*, Arrington *v.* Gee, 27 N. C. 590, holding that in order that the law of a place different from that of the place of execution shall apply, it must appear from the face of the instrument itself that it is payable elsewhere.

46. *Connecticut.*— Temple *v.* Belding, 1 Root 314.

Illinois.—Chumasero *v.* Gilbert, 24 Ill. 293, 651; Forsyth *v.* Baxter, 3 Ill. 9.

Indiana.— Kopelke *v.* Kopelke, 112 Ind. 435, 13 N. E. 695.

Iowa.— Burrows *v.* Stryker, 47 Iowa 477.

Maryland.— See Costigan *v.* Sewall, 6 Gill 232.

Massachusetts.— Ayer *v.* Tilden, 15 Gray 178, 77 Am. Dec. 355; Eaton *v.* Mellus, 7 Gray 566; Barringer *v.* King, 5 Gray 9; Wood *v.* Corl, 4 Metc. 203.

New Hampshire.— Lougee *v.* Washburn, 16 N. H. 134.

Pennsylvania.— Sime *v.* Norris, 8 Phila. 84.

Wisconsin.— Fisher *v.* Otis, 3 Pinn. 78.

United States.— Goddard *v.* Foster, 17 Wall. 123, 21 L. ed. 589; Fauntleroy *v.* Hannibal, 8 Fed. Cas. No. 4,692, 5 Dill. 219.

England.— Finch *v.* Finch, 45 L. J. Ch. 816, 35 L. T. Rep. N. S. 235.

See 29 Cent. Dig. tit. "Interest," § 56.

47. Smith *v.* Robinson, 11 Ala. 270; Richardson *v.* Williams, 2 Port. (Ala.) 239; Whitlock *v.* Castro, 22 Tex. 108; Cook *v.*

(II) *Damages For Torts.* Where damages are recovered for a tort, and interest is sought as an element of such damages, its recovery is governed by the law of the place where the tort was committed.[48]

(III) *Sales and Consignments.* Where a sale of property is made and there is no contract as to interest on the sum due from such sale, the general rule will prevail, and its allowance will be governed by the law of the place of performance.[49] Where property is consigned for the purpose of sale to a commission merchant or factor in another state, and advances are made by such commission merchant or factor upon such consignments, the allowance of interest, in an accounting between the parties, is governed by the law of the place to which the property is consigned.[50]

(IV) *Merger of Foreign Contract Into Judgment.* Whatever law may be applied in determining the rate of interest to be allowed on a debt prior to the recovery of judgment thereon, it is quite generally held that after the recovery of such judgment interest is to be allowed thereon according to the law of the place where the judgment was rendered.[51] But on the other hand there is authority for the view that where there is a stipulation for a certain rate of interest, which is lawful where the debt is contracted or payable, until the debt is paid, a judgment for the debt in another state should continue to bear interest at the contract rate.[52]

(V) *Foreign Judgments.* The allowance of interest upon judgments recovered in one jurisdiction and sued on in another jurisdiction has frequently been held to depend upon the law of the place where the original judgment was rendered;[53]

Crawford, 4 Tex. 420. See Chumasero *v.* Gilbert, 24 Ill. 293.

The court will take judicial notice of the fact that "the City of New York" is not in Alabama. Dickinson *v.* Mobile Branch Bank, 12 Ala. 54.

48. New York, etc., R. Co. *v.* Estill, 147 U. S. 591, 13 S. Ct. 444, 37 L. ed. 292; Bischoffsheim *v.* Baltzer, 21 Fed. 531; Ekins *v.* East-India Co., 1 P. Wms. 395, 24 Eng. Reprint 441.

49. Morris *v.* Wibaux, 159 Ill. 627, 43 N. E. 837 [*affirming* 47 Ill. App. 630].

50. Cartwright *v.* Greene, 47 Barb. (N. Y.) 9; Fanning *v.* Consequa, 17 Johns. (N. Y.) 511, 8 Am. Dec. 442; Peyton *v.* Heinekin, 131 U. S. appendix ci, 20 L. ed. 679; Ft. Worth City Nat. Bank *v.* Hunter, 129 U. S. 557, 9 S. Ct. 346, 32 L. ed. 752.

Where a factor makes advances as a loan to his principal in America, on goods to be consigned the factor for sale in Australia, the rate of interest is that allowed at the place where the loan is made, in the absence of an express provision that it be repaid in Australia with the interest allowed in that country. Wittkowski *v.* Harris, 64 Fed. 712.

51. *Kentucky.*— Gordon *v.* Phelps, 7 J. J. Marsh. 619.

New Jersey.— Wilson *v.* Marsh, 13 N. J. Eq. 289.

New York.— Taylor *v.* Simpkins, 38 Misc. 246, 77 N. Y. Suppl. 591.

Ohio.— Neil *v.* Idaho First Nat. Bank, 50 Ohio St. 193, 33 N. E. 720.

Tennessee.— Cocke *v.* Hatcher, (1887) 4 S. W. 170.

United States.— Scotland County *v.* Hill, 132 U. S. 107, 10 S. Ct. 26, 33 L. ed. 261; Rogers *v.* Lee County, 20 Fed. Cas. No. 12,013, 1 Dill. 529.

See 29 Cent. Dig. tit. "Interest," § 57; Commercial Paper, 8 Cyc. 309 notes 69, 70; and *infra*, IV, F, 1, 2.

Judgment for sale of land to pay debts.— Where a decree was made for the sale of the land of a lunatic to pay his debts on petition of the trustees and certain creditors of the lunatic who held as claims against him certain notes made by him in the District of Columbia, drawing interest at ten per cent until paid, these claims were not merged in the decree until the sale was ratified and a final decree made by which the claims of each creditor were determined, and the notes bore interest at ten per cent until the sale. Jackson *v.* Wilson, 76 Md. 567, 25 Atl. 980.

The reversal of a judgment leaves the claim for interest precisely where it was, before the rendition of such judgment, dependent upon the laws of the state where the contract was made and was to be performed. Insurance Co. of North America *v.* Forcheimer, 86 Ala. 541, 5 So. 870.

52. Lockwood *v.* Lindsey, 6 App. Cas. (D. C.) 396; Shipman *v.* Bailey, 20 W. Va. 140. And see *infra*, IV, F, 2.

53. Clarke *v.* Pratt, 20 Ala. 470; Murray *v.* Cone, 8 Port. (Ala.) 250; Crawford *v.* Simonton, 7 Port. (Ala.) 110; Hunt *v.* Mayfield, 2 Stew. (Ala.) 124; Thompson *v.* Monrow, 2 Cal. 99, 56 Am. Dec. 318; Reynolds *v.* Powers, 96 Ky. 481, 29 S. W. 299, 17 Ky. L. Rep. 1059; Schell *v.* Stetson, 12 Phila. (Pa.) 187. And see Harrison *v.* Harrison, 20 Ala. 629, 56 Am. Dec. 227; Cavender *v.* Guild, 4 Cal. 250.

Presumption that common law prevails.— As a rule of law interest will not be allowed

but in many other cases it has been held that interest upon a foreign judgment is recoverable only as damages, not *eo nomine*, and the recovery will be controlled by the law of the place where suit on such judgment is brought,[54] even though such judgment in terms provides for a rate different from that authorized by the *lex fori*.[55]

3. Constitutional and Statutory Provisions — a. In General. A constitutional provision requiring all laws of a general nature to have a uniform operation applies to a statute respecting interest.[56] In England and in some of the United States the statutes prescribe the character of demands upon which interest is recoverable, but the statutes more generally merely fix a legal rate of interest and prohibit the taking of interest beyond a specified rate, without affirmatively declaring what character of demands shall draw interest.[57] The legislature has the power to impose on debtors the obligation of paying interest after the passage of the act on obligations already due, and such a statute is not objectionable as being retrospective.[58]

b. Construction and Operation. The ordinary rules governing the interpretation of statutes apply to legislative enactments concerning interest.[59] Interest statutes, being in derogation of the common law, must be strictly construed;[60] and the doctrine of *expressio unius* applies to restrict the operation of statutes regulating interest to the recited instances.[61] Statutory provisions respecting the

on foreign judgments, the common-law doctrine that judgments do not bear interest being presumed to apply thereto. Harrison *v.* Harrison, 20 Ala. 629, 56 Am. Dec. 227; Thompson *v.* Monrow, 2 Cal. 99, 56 Am. Dec. 318. See Atkinson *v.* Braybrooke, 4 Campb. 380, 1 Stark. 219, 2 E. C. L. 89.

Where the judgment in terms bears interest, it may be allowed without proof of the foreign law. Hudson *v.* Daily, 13 Ala. 722; Arnott *v.* Redfern, 3 Bing. 353, 11 E. C. L. 177, 2 C. & P. 88, 12 E. C. L. 466, 4 L. J. C. P. O. S. 89, 11 Moore C. P. 209. And see Stewart *v.* Spaulding, 72 Cal. 264, 13 Pac. 661; Douglass *v.* Forrest, 4 Bing. 686, 6 L. J. C. P. O. S. 157, 1 M. & P. 663, 29 Rev. Rep. 695, 13 E. C. L. 693.

54. *Colorado.*— Bruckman *v.* Taussig, 7 Colo. 561, 5 Pac. 152.

Illinois.— Warren *v.* McCarthy, 25 Ill. 95; Prince *v.* Lamb, 1 Ill. 378.

Massachusetts.— Clark *v.* Child, 136 Mass. 344; Hopkins *v.* Shepard, 129 Mass. 600; Barringer *v.* King, 5 Gray 9; Williams *v.* American Bank, 4 Metc. 317.

Missouri.— Shickle *v.* Watts, 94 Mo. 410, 7 S. W. 274. *Compare* Crone *v.* Dawson, 19 Mo. App. 214.

New Hampshire.— Mahurin *v.* Bickford, 6 N. H. 567.

South Carolina.— Nelson *v.* Felder, 7 Rich. Eq. 395.

Tennessee.— Gatewood *v.* Palmer, 10 Humphr. 466.

Washington.— Olson *v.* Veazie, 9 Wash. 481, 37 Pac. 677, 43 Am. St. Rep. 855.

England.— Bann *v.* Dalzell, 3 C. & P. 376, 14 E. C. L. 618, M. & M. 229, 22 E. C. L. 514.

Canada.— Montreal Bank *v.* Cornish, Manitoba t. Wood 272; Chapman *v.* Logan, 8 L. C. Jur. 196.

See 29 Cent. Dig. tit. "Interest," §§ 46, 58.

55. Clark *v.* Child, 136 Mass. 344; Wells *v.* Davis, 105 N. Y. 670, 12 N. E. 42.

Limitation of the rule.— The application of the *lex fori* to foreign judgments which in terms bear a stated rate of interest has been limited to cases where the rate authorized by the law of the forum does not exceed the rate specified in the judgment itself. Ritchie *v.* Carpenter, 2 Wash. 512, 28 Pac. 380, 26 Am. St. Rep. 877.

56. Vermont L. & T. Co. *v.* Whithed, 2 N. D. 82, 49 N. W. 318. See also Hotchkiss *v.* Marion, 12 Mont. 218, 29 Pac. 821.

57. Mason *v.* Callender, 2 Minn. 350, 72 Am. Dec. 102. See also Watkins *v.* Wassell, 20 Ark. 410.

58. Dunne *v.* Mastick, 50 Cal. 244.

59. Watkins *v.* Wassell, 20 Ark. 410. And see Woodbury *v.* District of Columbia, 19 D. C. 157.

60. Raum *v.* Reynolds, 11 Cal. 14; Graveson *v.* Odd Fellows Temple Co., 6 Ohio S. & C. Pl. Dec. 287, 4 Ohio N. P. 112.

Illustration.— A statute specifying the rate of interest which contracts and obligations shall bear has reference to obligations of individuals alone and not to contracts of states or counties. Warren County *v.* Klein, 51 Miss. 807.

61. *Arkansas.*— Watkins *v.* Wassell, 20 Ark. 410.

Colorado.— Hawley *v.* Barker, 5 Colo. 118.

Illinois.— Sammis *v.* Clark, 13 Ill. 544.

Mississippi.— Warren County *v.* Klein, 51 Miss. 807.

Nevada.— Douglass *v.* Virginia City, 5 Nev. 147.

See 29 Cent. Dig. tit. "Interest," § 3.

Illustration.— A statute providing for the recovery of interest upon the breach of contracts "for the payment of money" has no application to a promissory note payable in Confederate treasury notes. Toulmin *v.* Sager, 42 Ala. 127.

allowance of interest operate only upon after-acquired rights and are not permitted to have a retroactive effect.[62]

4. When Interest Accrues — a. In General. The general rule is that interest becomes due and payable at the same time that the principal becomes due and not before;[63] but this rule is subject to be varied by the contract of the parties, and interest may become due and payable at any time, irrespective of the maturity of the principal, according to the true intendment of the contract therefor.[64]

62. *California.*— Dunne *v.* Mastick, 50 Cal. 244.

Louisiana.— Regan's Succession, 12 La. Ann. 116; Barnes *v.* Crandell, 12 La. Ann. 112.

Montana.— Stanford *v.* Coran, 26 Mont. 285, 67 Pac. 1005.

New York.— Bailey *v.* New York, 7 Hill 146.

Oregon.— Besser *v.* Hawthorn, 3 Oreg. 129.

South Carolina.— *Ex p.* Mann, 1 McCord 589; Righton *v.* Blake, 1 Brev. 159.

Texas.— McCormick *v.* Bush, 47 Tex. 191.

See 29 Cent. Dig. tit. "Interest," § 3; and *infra*, IV, A, 2.

Illustration.— A statute providing that debts shall bear interest at a certain rate from the time they become due does not apply to debts which became due before its passage. Gordon *v.* Zacharie, 15 La. Ann. 17; Saunders *v.* Carroll, 12 La. Ann. 793; Cooper *v.* Harrison, 12 La. Ann. 631.

Reversal of prior decree.— Ky. Act Feb. 16, 1837, which declared that decrees thereafter rendered should carry interest until paid, did not apply to decrees rendered before its passage; but where a decree was rendered subsequent to 1837, reversing a decree prior to 1837, for error in allowing interest, such subsequent decree came within the act and bore interest. Taylor *v.* Knox, 5 Dana (Ky.) 466.

Items of account.— Where an account stated after a statutory provision respecting the interest on money went into effect, included items arising before, interest might be computed in the manner directed, upon the prior, as well as upon the subsequent items, from the passage of the act. Bullock *v.* Boyd, Hoffm. (N. Y.) 294.

Judgment on antecedent contract.— A statute providing that judgments shall bear interest at a certain rate applies to judgments on contracts made before its passage. Coles *v.* Kelsey, 13 Tex. 75.

63. *Connecticut.*— Brooks *v.* Holland, 21 Conn. 388. And see Hubbard *v.* Callahan, 42 Conn. 524, 19 Am. Rep. 564.

Illinois.— Illinois Nat. Bank *v.* School Trustees, 111 Ill. App. 189 [*affirmed* in 211 Ill. 500, 71 N. E. 1070], holding that Rev. St. c. 74, § 9, authorizing the calculation of interest at six per cent per annum or by the year merely fixes the time when interest shall be computed, and does not supply an omission in the note to make interest payable annually or otherwise.

Kansas.— Motsinger *v.* Miller, 59 Kan. 573, 53 Pac. 869; Ramsdell *v.* Hulett, 50 Kan. 440, 31 Pac. 1092.

Maryland.— Roberts *v.* Morsell, 10 Md. 32.

Missouri.— Kœhring *v.* Muemminghaff, 61 Mo. 403, 21 Am. Rep. 402.

New Jersey.— Cooper *v.* Wright, 23 N. J. L. 200.

New York.— Bander *v.* Bander, 7 Barb. 560, 5 How. Pr. 41; French *v.* Kennedy, 7 Barb. 452.

Pennsylvania.— Sparks *v.* Garrigues, 1 Binn. 152.

Texas.— Roberts *v.* Smith, 64 Tex. 94, 53 Am. Rep. 744.

Vermont.— Catlin *v.* Lyman, 16 Vt. 44.

Virginia.— Kent *v.* Kent, 28 Gratt. 840; Waller *v.* Long, 6 Munf. 71.

United States.— Tanner *v.* Dundee Land Inv. Co., 12 Fed. 646, 8 Sawy. 187.

See 29 Cent. Dig. tit. "Interest," § 4.

Where the debt is payable in instalments, each instalment is, in this connection, considered a principal debt, the interest upon which comes due and payable at the same time with the instalment. Turner *v.* Roby, 7 J. J. Marsh. (Ky.) 209; Roberts *v.* Morsell, 10 Md. 32; Saunders *v.* McCarthy, 8 Allen (Mass.) 42; Bander *v.* Bander, 7 Barb. (N. Y.) 560, 5 How. Pr. (N. Y.) 41; French *v.* Kennedy, 7 Barb. (N. Y.) 452.

64. *Alabama.*— Ely *v.* Witherspoon, 2 Ala. 131.

Illinois.— Illinois Nat. Bank *v.* School Trustees, 111 Ill. App. 189 [*affirmed* in 211 Ill. 500, 71 N. E. 1070].

Iowa.— Jurgensen *v.* Carlsen, 97 Iowa 627, 66 N. W. 877.

Kentucky.— Radford *v.* Southern Mut. L. Ins. Co., 12 Bush 434; Masonic Sav. Bank *v.* Bangs, 10 S. W. 633, 10 Ky. L. Rep. 743.

Massachusetts.— Ferry *v.* Ferry, 2 Cush. 92; Wilcox *v.* Howland, 23 Pick. 167; Gardiner *v.* Corson, 15 Mass. 500; Greenleaf *v.* Kellogg, 2 Mass. 568.

Michigan.— Cook *v.* Wiles, 42 Mich. 439, 4 N. W. 169.

Missouri.— Kœhring *v.* Muemminghoff, 61 Mo. 403, 21 Am. Rep. 402.

New Jersey.— Cooper *v.* Wright, 23 N. J. L. 200.

New York.— Cook *v.* Clark, 68 N. Y. 178 [*affirming* 3 Hun 247]; Smith *v.* Holmes, 19 N. Y. 271; Mowry *v.* Bishop, 5 Paige 98.

North Carolina.— Bledsoe *v.* Nixon, 69 N. C. 89, 12 Am. Rep. 642.

Vermont.— Baxter *v.* Blodgett, 63 Vt. 629, 22 Atl. 625.

West Virginia.— Bowman *v.* Duling, 39 W. Va. 619, 20 S. E. 567.

United States.— Tanner *v.* Dundee Land Inv. Co., 12 Fed. 646, 8 Sawy. 187.

See 29 Cent. Dig. tit. "Interest," § 4.

Where the contract provides for the payment of a certain rate of interest "per annum," it only fixes the rate to be paid and has no reference to the time when such interest shall be paid, and consequently interest so reserved becomes due and payable only with the principal;[65] but where the contract provides for the payment of "annual interest," interest must be paid annually, without reference to the date fixed for the payment of the principal.[66] Where the contract provides for the payment of interest periodically, but is silent as to such payments after the maturity of the principal debt, the interest will not thereafter accrue periodically;[67] but if the contract provides that interest shall be paid periodically after maturity of the principal debt, as well as before, such stipulation will control and the interest will be recoverable in accordance with its terms.[68]

b. Interest in Advance.[69] The payment of interest in advance may be provided for by contract between private parties, without rendering such contract subject to the usury laws.[70] It has been held that the mere fact that interest is paid in advance does not of itself establish an agreement to forbear the collection of the principal until the expiration of the time for which such interest is paid.[71]

65. Ramsdell *v.* Hulett, 50 Kan. 440, 31 Pac. 1092; Leonard *v.* Phillips, 39 Mich. 182, 33 Am. Rep. 370; Kœhring *v.* Muemminghoff, 61 Mo. 403, 21 Am. Rep. 402. See also Cooper *v.* Wright, 23 N. J. L. 200.

Stipulation for interest upon unpaid interest.— Even when there is a stipulation that if the interest is not paid annually it shall become principal and bear interest, it accrues only with the maturity of the debt. Motsinger *v.* Miller, 59 Kan. 573, 53 Pac. 869. *Compare* Meyer *v.* Graeber, 19 Kan. 165.

66. *Arkansas.*— Vaughan *v.* Kennan, 38 Ark. 114.

Connecticut.— Edgerton *v.* Aspinwall, 3 Conn. 445.

Illinois.— Kurz *v.* Suppiger, 18 Ill. App. 630.

Indiana.— English *v.* Smock, 34 Ind. 115, 7 Am. Rep. 215.

Iowa.— Failing *v.* Clemmer, 49 Iowa 104.

Maine.— Bannister *v.* Roberts, 35 Me. 75.

Michigan.— Cook *v.* Wiles, 42 Mich. 439, 4 N. W. 169.

South Carolina.— De Brubl *v.* Neuffer, 1 Strobh. 426.

Vermont.— In legal contemplation, a contract for "annual interest" is the same as if written for "interest annually." Austin *v.* Imus, 23 Vt. 286; Catlin *v.* Lyman, 16 Vt. 44.

See 29 Cent. Dig. tit. "Interest," § 4.

But *compare* Patterson *v.* McNeeley, 16 Ohio St. 348, where "interest annually" was construed to mean "per annum."

67. *New Hampshire.*— Ashuelot R. Co. *v.* Elliot, 57 N. H. 397.

Ohio.— Hunter *v.* Hall, 14 Ohio Cir. Ct. 425, 6 Ohio Cir. Dec. 366.

Rhode Island.— Wheaton *v.* Pike, 9 R. I. 132, 98 Am. Dec. 377, 11 Am. Rep. 227.

South Carolina.— Wilson *v.* Kelly, 19 S. C. 160; Westfield *v.* Westfield, 19 S. C. 85.

United States.— *In re* Bartenbach, 2 Fed. Cas. No. 1068.

See 29 Cent. Dig. tit. "Interest," § 4.

68. Miller *v.* Hall, 18 S. C. 141; Watkins *v.* Lang, 17 S. C. 13; Sharpe *v.* Lee, 14 S. C. 341. A note payable in one year, with interest thereon payable annually, calls for annual interest even after maturity. Westfield *v.* Westfield, 19 S. C. 85.

69. Bank discounts see BANKS AND BANKING, 5 Cyc. 526 note 25.

70. *Illinois.*— Telford *v.* Garrels, 132 Ill. 550, 24 N. E. 573.

Indiana.— Vinton *v.* Baldwin, 95 Ind. 433; English *v.* Smock, 34 Ind. 115, 7 Am. Rep. 215; Haas *v.* Flint, 8 Blackf. 67.

Kentucky.— Preston *v.* Henning, 6 Bush 556; Robinson *v.* Miller, 2 Bush 179.

Massachusetts.— Agricultural Bank *v.* Bissell, 12 Pick. 586; Lyman *v.* Morse, 1 Pick. 295 note.

New York.— Marvine *v.* Hymers, 12 N. Y. 223; Utica Ins. Co. *v.* Bloodgood, 4 Wend. 652; New York Firemen Ins. Co. *v.* Ely, 2 Cow. 678; New York Firemen Ins. Co. *v.* Sturges, 2 Cow. 664. But see Utica Bank *v.* Wager, 2 Cow. 712.

Texas.— Tucker *v.* Coffin, 7 Tex. Civ. App. 415, 26 S. W. 323.

United States.— Fowler *v.* Equitable Trust Co., 141 U. S. 384, 12 S. Ct. 1, 35 L. ed. 786.

England.— Barnes *v.* Worlich, Cro. Jac. 25.

See 29 Cent. Dig. tit. "Interest," § 5.

Nature of instruments.— Such contracts being permitted for the benefit of trade, the taking of interest in advance must be upon such instruments as will, and usually do, circulate or pass in the course of trade, and are payable at no very distant day. Marvine *v.* Hymers, 12 N. Y. 223; Utica Bank *v.* Wager, 2 Cow. (N. Y.) 712; New York Firemen Ins. Co. *v.* Ely, 2 Cow. (N. Y.) 678; Marsh *v.* Martindale, 3 B. & P. 154.

In England the privilege of taking interest in advance is confined to bankers, and those who deal in bills of exchange or promissory notes by way of trade. Utica Bank *v.* Wager, 2 Cow. (N. Y.) 712.

71. Abel *v.* Alexander, 45 Ind. 523, 15 Am. Rep. 270; Agricultural Bank *v.* Bishop, 6 Gray (Mass.) 317; Central Bank *v.* Willard, 17 Pick. (Mass.) 150, 28 Am. Dec. 284;

But where interest has been paid in advance and the principal sum is subsequently paid prior to the expiration of the period for which interest has been paid, the unearned interest must be deducted from the principal.[72]

5. Apportionment of Interest. The general rule that sums of money payable periodically at fixed times are not apportionable during the intervening periods[73] has been held to apply in the absence of statute or express agreement to interest payable at stated times, on government, state, county, or municipal bonds, or bonds of a railroad or other public or quasi-public corporation, not issued separately for the payment of a specific debt but usually bought and held by way of investment, and in such cases the interest is not apportionable between the days of payment thereof.[74] But interest upon bonds and notes of individuals and private corporations, such as are usually given for money lent, whether or not secured by mortgage or pledge, is apportionable between the days upon which it is stipulated to be paid, being held to accrue *de die in diem*.[75]

6. Waiver or Estoppel[76] — a. In General. Where a person is barred from recovering the principal of a debt, he is equally barred from recovering interest thereon;[77] but the fact that a plaintiff recovers less than the amount for which he sued does not deprive him of the right to interest upon the amount recovered.[78] Interest may not only be waived or barred absolutely, but it may also be suspended during a particular period of time, and this waiver or suspension of interest may be affected either by act of the parties, which will estop them from claiming it,[79]

Blackstone Bank *v.* Hill, 10 Pick. (Mass.) 129; Oxford Bank *v.* Lewis, 8 Pick. (Mass.) 458. See also Gahn *v.* Niemcewicz, 11 Wend. (N. Y.) 312. But see Skelly *v.* Bristol Sav. Bank, 63 Conn. 83, 26 Atl. 474, 38 Am. St. Rep. 340, 19 L. R. A. 599; Drew *v.* Towle, 30 N. H. 531, 64 Am. Dec. 309. See, generally, Principal and Surety.

72. Illinois Steel Co. *v.* O'Donnell, 156 Ill. 624, 41 N. E. 185, 47 Am. St. Rep. 245, 31 L. R. A. 265; Freeman's Bank *v.* Rollins, 13 Me. 202. But *compare* Skelly *v.* Bristol Sav. Bank, 63 Conn. 83, 26 Atl. 474, 38 Am. St. Rep. 340, 19 L. R. A. 599. And see Crowley *v.* Kolsky, (Tenn. Ch. App. 1900) 57 S. W. 386.

Provision for future interest to fall due on default.— Where a note with interest coupon notes attached provided that if any interest should remain unpaid after it is due the principal note and interest coupons should become due and payable at once at the option of the holder, on default of payment of one of the coupons, the holder was permitted to recover the face of the note, with the interest coupon as to which default was made, but he was not permitted to recover on the coupons not due. Cloud *v.* Rivord, 6 Wash. 555, 34 Pac. 136.

73. Dexter *v.* Phillips, 121 Mass. 178, 23 Am. Rep. 261; Sherrard *v.* Sherrard, 3 Atk. 502, 26 Eng. Reprint 1089; Pearly *v.* Smith, 3 Atk. 260, 26 Eng. Reprint 952; Campbell *v.* Campbell, 7 Beav. 482, 29 Eng. Ch. 482, 49 Eng. Reprint 1152; Michell *v.* Michell, 4 Beav. 549, 7 Jur. 887, 49 Eng. Reprint 452; Rashleigh *v.* Master, 3 Bro. Ch. 99, 29 Eng. Reprint 432, 1 Ves. Jr. 201, 30 Eng. Reprint 301; Warden *v.* Ashburner, 2 De G. & Sm. 366, 12 Jur. 784, 17 L. J. Ch. 440, 64 Eng. Reprint 164; O'Brien *v.* Fitzgerald, 1 Ir. Ch. 290; Matter of Longworth, 1 Kay & J. 1, 23 L. J. Ch. 104, 2 Wkly. Rep. 124.

74. Dexter *v.* Phillips, 121 Mass. 178, 23 Am. Rep. 261. *Contra*, as to municipal bonds. Wilson's Appeal, 108 Pa. St. 344, 56 Am. Rep. 214 [*overruling* Earp's Will, 1 Pars. Eq. Cas. (Pa.) 453].

Interest payable on coupons to debentures, although payable half yearly, was held apportionable in *In re* Rogers, 1 Dr. & Sm. 338, 62 Eng. Reprint 408. See also Banner *v.* Lowe, 13 Ves. Jr. 135, 33 Eng. Reprint 245.

75. Chafoin *v.* Rich, 92 Cal. 471, 28 Pac. 488; Dexter *v.* Phillips, 121 Mass. 178, 23 Am. Rep. 261; *In re* Foote, 22 Pick. (Mass.) 299; Wilson's Appeal, 108 Pa. St. 344, 56 Am. Rep. 214; Wertz's Appeal, 65 Pa. St. 306; Sweigart *v.* Frey, 8 Serg. & R. (Pa.) 299; Ibbotson *v.* Elam, L. R. 1 Eq. 188, 35 Beav. 594, 12 Jur. N. S. 114, 14 Wkly. Rep. 241, 55 Eng. Reprint 1027; Edwards *v.* Warwick, 1 Bro. P. C. 207, 1 Eng. Reprint 518, 2 P. Wms. 171, 24 Eng. Reprint 687; Hay *v.* Palmer, 2 P. Wms. 501, 24 Eng. Reprint 835. But see Ing *v.* Roberts, 1 N. Y. City Ct. 371.

76. Receiving payment of principal see *infra*, VII, C, 4.

77. Stevens *v.* Barringer, 13 Wend. (N. Y.) 639; Moore *v.* Fuller, 47 N. C. 205; Hoare *v.* Allen, 2 Dall. (Pa.) 102, 1 L. ed. 307; Parkes *v.* Smith, 15 Q. B. 297, 14 Jur. 761, 19 L. J. Q. B. 405, 69 E. C. L. 297; Clark *v.* Alexander, 13 L. J. C. P. 133, 8 Scott N. R. 147.

78. St. Louis Gaslight Co. *v.* St. Louis, 12 Mo. App. 573; Malone *v.* Philadelphia, 12 Phila. (Pa.) 323.

79. *Arkansas.*— Pillow *v.* Brown, 26 Ark. 240.

Illinois.— White *v.* Walker, 31 Ill. 422, consent of postponement of payment.

Massachusetts.— Rice *v.* Clark, 10 Metc. 500.

by an order of or an injunction from a court of competent jurisdiction,[80] or by force of law.[81]

b. Delay in Demanding or Enforcing Payment of Principal. Where interest is claimed as damages, and not by reason of any contract therefor, it will not be allowed if the delay in the payment of the principal debt is the result of the neglect of the creditor to demand and enforce such payment.[82] But the mere

Missouri.— Stone *v.* Bennett, 8 Mo. 41.

Nebraska.— West *v.* Omaha, 48 Nebr. 466, 67 N. W. 439.

Pennsylvania.— Delaware Ins. Co. *v.* Delauuie, 3 Binn. 295; Cunnius *v.* Reading School Dist., 25 Pa. Co. Ct. 17.

United States.— Dodge *v.* Tulleys, 144 U. S. 451, 12 S. Ct. 728, 36 L. ed. 501. See also Smith *v.* Shaw, 22 Fed. Cas. No. 13,107, 2 Wash. 167.

See 29 Cent. Dig. tit. "Interest," § 7.

Acceptance of less interest than stipulated for.— An acceptance by the payee, from time to time after maturity until the maker's death, of interest at ten per cent per annum, is a waiver of a condition in the note requiring, if it be not paid at maturity, five per cent per month thereafter. Bradford *v.* Hoiles, 66 Ill. 517. But *compare* Thompson *v.* Gorner, 104 Cal. 168, 37 Pac. 900, 43 Am. St. Rep. 81, 36 Pac. 434.

A waiver of any claim beyond a certain sum, against an estate by stipulation in writing, is a waiver of interest on that sum. *In re* Bleakley, Myr. Prob. (Cal.) 235. *Compare* Masonic Sav. Bank *v.* Bangs, 10 S. W. 633, 10 Ky. L. Rep. 743.

A release of interest which is never delivered to the releasee, but merely indorsed upon the note, is inoperative. Davis *v.* Haywood, 54 N. C. 253.

Suit.— A receiver of a national bank who institutes suit against the trustees in a deed of assignment, in which the bank is preferred, to set the deed aside, is not thereby estopped from claiming the preferred debt or the interest thereon. Bain *v.* Peters, 44 Fed. 307. See Cheek *v.* Waldrum, 25 Ala. 152.

80. See *infra*, V, C, 4.

81. See *infra*, VII, D.

82. *Arkansas.*— Brinkley *v.* Willis, 22 Ark. 1.

Illinois.— Thompson *v.* Fullinwider, 5 Ill. App. 551.

Kentucky.— Adams Express Co. *v.* Milton, 11 Bush 49; Grundy *v.* Grundy, 12 B. Mon. 269; Meriwether *v.* Lewis, 9 B. Mon. 163; Morford *v.* Ambrose, 3 J. J. Marsh. 688.

New York.— Denise *v.* Swett, 68 Hun 188, 22 N. Y. Suppl. 950 [*reversed* on other grounds in 142 N. Y. 602, 37 N. E. 627]; North American F. Ins. Co. *v.* Mowatt, 2 Sandf. Ch. 108.

South Carolina.— Hunt *v.* Smith, 3 Rich. Eq. 465.

Vermont.— Brainerd *v.* Champlain Transp. Co., 29 Vt. 154; Newel *v.* Keith, 11 Vt. 214.

Virginia.— Mulliday *v.* Machir, 4 Gratt. 1.

United States.— Sanborn *v.* U. S., 135 U. S. 271, 10 S. Ct. 812, 34 L. ed. 112; Redfield *v.* Ystalyfera Iron Co., 110 U. S. 174, 3 S. Ct. 570, 28 L. ed. 109; Stewart *v.* Schell, 31 Fed. 65; Mitchell *v.* Kelsey, 17 Fed. Cas. No. 9,664.

England.— Cameron *v.* Smith, 2 B. & Ald. 305, 20 Rev. Rep. 444; Bann *v.* Dalzell, 3 C. & P. 376, 14 E. C. L. 618, M. & M. 229, 22 E. C. L. 514; Depcke *v.* Munn, 3 C. & P. 112, 14 E. C. L. 477; Du Belloix *v.* Waterpark, 1 D. & R. 16, 16 E. C. L. 12; Merry *v.* Ryves, 1 Eden 1, 28 Eng. Reprint 584; Purcell *v.* Blennerhassett, 9 Ir. Eq. 103, 3 J. & L. 24.

See 29 Cent. Dig. tit. "Interest," § 9.

Where the debtor requests the delay, laches will not be imputed to the creditor on account of his compliance with the request. Funk *v.* Buck, 91 Ill. 575. See Fritz's Estate, 5 Pa. Co. Ct. 566.

Neglect to draw full salary.— A county superintendent of schools who neglects to draw the full salary to which he is entitled by law is not entitled to any interest upon the unpaid balance. O'Herrin *v.* Milwaukee County, 67 Wis. 142, 30 N. W. 239. *Compare* Butler *v.* Kirby, 53 Wis. 188, 10 N. W. 373.

Delay in issuing execution.— Where judgment has been obtained, and the issuing of execution has been delayed, if plaintiff afterward recover judgment against bail, he is not entitled to interest on the original judgment during the time he neglected to proceed against bail. Constable *v.* Colden, 2 Johns. (N. Y.) 480.

Subsequent demand.— Where a note was payable at a future date at a particular place, with interest from that date, if not punctually paid, and no demand for its payment was made on the date it was due, a demand subsequently made at the place of payment, after the note had matured, will not entitle the holder to interest. Glover *v.* Doty, 1 Rob. (La.) 130.

Interest on rent in arrear.— Interest will not be recoverable on rent in arrear where it appears that there were always effects on the premises liable to distress, sufficient to have satisfied the rent, although such rent was demanded by the landlord. Dow *v.* Adam, 5 Munf. (Va.) 21.

Delay in bringing to hearing suit seasonably begun.— A railroad company will not be relieved from liability to pay interest on the damages due to the owner of land appropriated by it for a right of way, because such owner delays the bringing to a hearing of a petition for damages seasonably filed. Drury *v.* Midland R. Co., 127 Mass. 571.

Interest on a verdict is to be regarded as compensation for delay in payment of the

fact that the creditor awaits the decision of a test case, involving the same question of liability, will not effect a waiver of interest upon his claim,[83] although if the hearing and decision of the test case be itself unreasonably delayed, the creditor will not be protected in his own delay awaiting its conclusion.[84]

c. Compound Interest. Compound interest, or interest upon interest, is not favored by the courts, and it will not be allowed where the conduct of the party claiming it makes it inequitable that such claim should be enforced.[85] The acceptance of simple interest upon a debt will constitute a waiver of a claim for compound interest thereon.[86]

7. Payment Without Legal Liability. Where a debtor voluntarily pays interest on his debt, if such payment of interest be not unlawful he cannot recover such interest, even though the creditor could not have enforced such payment by action at law.[87]

B. Contracts For Interest — 1. Power to Contract — a. In General. Subject to statutory regulations, usually relating simply to the rate,[88] persons occupying or intending to assume the relation of debtor and creditor have at the present time full power to contract for the payment of interest upon the indebtedness,[89] and such contracts are governed by the same principles as other contracts with reference to the powers and capacities of the parties thereto.[90]

b. Compound Interest. Compound interest or interest upon interest is not favored either at law or in equity;[91] and while it is competent for parties to contract for the payment of such interest[92] this right is rather strictly limited. It is undisputed that after interest has accrued it is perfectly competent for the parties to the obligation to agree to add the accrued interest to the principal, thus making a new principal upon which interest is to be allowed.[93] So also if after interest has

sum found due, and it will not be allowed on a merely formal verdict taken by consent, subject to the opinion of the court, where the delay in the submission of the case for final decision is due to the laches of the party claiming the interest. Redfield *v.* Ystalyfera Iron Co., 110 U. S. 174, 3 S. Ct. 570, 28 L. ed. 109.

83. Frazer *v.* Bigelow Carpet Co., 141 Mass. 126, 4 N. E. 620.

84. Redfield *v.* Bartels, 139 U. S. 694, 11 S. Ct. 683, 35 L. ed. 310 [*reversing* 27 Fed. 286, 23 Blatchf. 486].

85. See Wofford *v.* Wyly, 72 Ga. 863; Gray *v.* Bate, 8 B. Mon. (Ky.) 573, holding that where persons interested in an estate agreed to set apart a fund out of the residuum thereof, the interest of which was to be paid to one person until the death of his mother, and the undevised residuum was sufficient, after the payment of debts, to raise such fund, but it was not done, partly through the fault of the person entitled to the interest thereon, he might recover the unpaid interest but not interest on such interest.

86. Henry *v.* Flagg, 13 Metc. (Mass.) 64; Wetherbee *v.* Kusterer, 41 Mich. 359, 2 N. W. 45.

87. Sims *v.* Squires, 80 Ind. 42; Reed *v.* Boston Loan Co., 160 Mass. 237, 35 N. E. 677; Church *v.* Kidd, 3 Hun (N. Y.) 254; Higbie *v.* Heath, 3 Thomps. & C. (N. Y.) 783; Stewart *v.* Ferguson, 31 Ont. 112. See also Davis Provision Co. *v.* Fowler, 20 N. Y. App. Div. 626, 47 N. Y. Suppl. 205.

88. See *infra*, III, A, 3, a; IV, A.

89. Esterly *v.* Cole, 3 N. Y. 502; Hart *v.* Dewey, 2 Paige (N. Y.) 207; Knight *v.* Mitchell, 2 Treadw. (S. C.) 668; Willard *v.* Pinard, 65 Vt. 160, 26 Atl. 67.

90. See Brewster *v.* Wakefield, 1 Minn. 352, 69 Am. Dec. 343; Roberts *v.* Cocke, 28 Gratt. (Va.) 207.

91. See Von Hemert *v.* Porter, 11 Metc. (Mass.) 210.

92. *Alabama.*— Paulling *v.* Creagh, 54 Ala. 646.

Arkansas.— Vaughan *v.* Kennan, 38 Ark. 114.

California.— Page *v.* Williams, 54 Cal. 562; Fisk *v.* Lee, (1886) 12 Pac. 255.

Maine.— Bradley *v.* Merrill, 91 Me. 340, 40 Atl. 132; Farwell *v.* Sturdivant, 37 Me. 308.

Massachusetts.— Wilcox *v.* Howland, 23 Pick. 167. See Von Hemert *v.* Porter, 11 Metc. 210.

Nebraska.— Hallam *v.* Telleren, 55 Nebr. 255, 75 N. W. 560.

Construction of contract.— A stipulation in a note that if the interest is not paid at the end of a year from the date of the note it shall become part of the principal and bear interest relates only to the first year's interest and not to subsequent interest. Finger *v.* McCaughey, 114 Cal. 64, 45 Pac. 1004.

93. *Alabama.*— Paulling *v.* Creagh, 54 Ala. 646; Eslava *v.* Lepretre, 21 Ala. 504, 56 Am. Dec. 266.

Connecticut.— Camp *v.* Bates, 11 Conn. 487 [*followed* in Meeker *v.* Hill, 23 Conn. 574].

become due an account is stated making rests this is lawful;[94] and one who has paid interest on interest or compound interest cannot recover it back.[95] But it has been frequently held that in the absence of any statute expressly providing for the compounding of interest,[96] it is not competent for parties to contract in advance for the compounding of interest or the payment of interest upon overdue and unpaid instalments of interest;[97] that is to say, interest cannot be com-

Illinois.— Drury *v.* Wolfe, 134 Ill. 294, 25 N. E. 626 [*citing* Gilmore *v.* Bissell, 124 Ill. 488, 16 N. E. 925; McGovern *v.* Union Mut. L. Ins. Co., 109 Ill. 151]. See also Telford *v.* Garrels, 132 Ill. 550, 24 N. E. 573; Thayer *v.* Wilmington Star Min. Co., 105 Ill. 540; Haworth *v.* Huling, 87 Ill. 23.

Indiana.— Niles *v.* Sinking Fund Com'rs, 8 Blackf. 158.

Louisiana.— Compton *v.* Compton, 5 La. Ann. 615; White *v.* Henderson, 2 La. Ann. 241.

Maine.— Otis *v.* Lindsey, 10 Me. 315.

Maryland.— Banks *v.* McClellan, 24 Md. 62, 87 Am. Dec. 594.

Massachusetts.— Ferry *v.* Ferry, 2 Cush. 92; Henry *v.* Flagg, 13 Metc. 64; Von Hemert *v.* Porter, 11 Metc. 210; Wilcox *v.* Howland, 23 Pick. 167.

Michigan.— Hoyle *v.* Page, 41 Mich. 533, 2 N. W. 665.

Minnesota.— Mason *v.* Callender, 2 Minn. 350, 72 Am. Dec. 102.

Mississippi.— Perkins *v.* Coleman, 51 Miss. 298.

Missouri.— Gunn *v.* Head, 21 Mo. 432.

Nevada.— See Cox *v.* Smith, 1 Nev. 161, 90 Am. Dec. 476.

New York.— Young *v.* Hill, 67 N. Y. 162, 23 Am. Rep. 99; Guernsey *v.* Rexford, 63 N. Y. 631; Stewart *v.* Petree, 55 N. Y. 621; Townsend *v.* Corning, 1 Barb. 627; Mowry *v.* Bishop, 5 Paige 98; Van Benschooten *v.* Lawson, 6 Johns. Ch. 313, 10 Am. Dec. 333. See also Jones *v.* Ennis, 18 Hun 452; Forman *v.* Forman, 17 How. Pr. 255; Kellogg *v.* Hickok, 1 Wend. 521; Toll *v.* Hiller, 11 Paige 228.

Ohio.— Mueller *v.* McGregor, 28 Ohio St. 265.

Oregon.— Hathaway *v* Meads, 11 Oreg. 66, 4 Pac. 519.

Pennsylvania.— Stokely *v.* Thompson, 34 Pa. St. 210.

Tennessee.— Sinclair *v.* Peebles, 5 Coldw. 584; Hale *v.* Hale, 1 Coldw. 233, 78 Am. Dec. 490. *Compare* Ward *v.* Brandon, 1 Heisk. 490.

Virginia.— Childers *v.* Deane, 4 Rand. 406.

West Virginia.— Barbour *v.* Tompkins, 31 W. Va. 410, 7 S. E. 1; Craig *v.* McCulloch, 20 W. Va. 148; Genin *v.* Ingersoll, 11 W. Va. 549.

Wisconsin.— Case *v.* Fish, 58 Wis. 56, 15 N. W. 808.

England.— Ossulston *v.* Yarmouth, 2 Salk. 449; Waring *v.* Cunliffe, 1 Ves. Jr. 99, 1 Rev. Rep. 88, 30 Eng. Reprint 249.

94. *Louisiana.*— Allen *v.* Nettles, 39 La. Ann. 788, 2 So. 602. See also Millaudon *v.* Sylvestre, 8 La. 262.

Massachusetts.— Ferry *v.* Ferry, 2 Cush. 92; Wilcox *v.* Howland, 23 Pick. 167.

Wisconsin.— Case *v.* Fish, 58 Wis. 56, 15 N. W. 808.

United States.— Porter *v.* Price, 80 Fed. 655, 26 C. C. A. 70; Bainbridge *v.* Wilcocks, 2 Fed. Cas. No. 755, Baldw. 536. See also Sayward *v.* Dexter, 72 Fed. 758, 19 C. C. A. 176.

England.— Eaton *v.* Bell, 5 B. & Ald. 34, 7 E. C. L. 30; Fergusson *v.* Fyffe, 8 Cl. & F. 121, 8 Eng. Reprint 49; *Ex p.* Bevan, 9 Ves. Jr. 223, 32 Eng. Reprint 588. See also Stewart *v.* Stewart, L. R. 27 Ir. 351.

95. Ritter *v.* Phillips, 53 N. Y. 586; Higbie *v.* Heath, 3 Thomps. & C. (N. Y.) 783; Mowry *v.* Bishop, 5 Paige (N. Y.) 98. See also Townsend *v.* Corning, 1 Barb. (N. Y.) 627.

96. Hoyle *v.* Page, 41 Mich. 533, 2 N. W. 665.

Under the Missouri statute (1 Rev. St. [1899] § 3711) parties may contract, in writing, for the payment of interest upon interest; but the interest shall not be compounded oftener than once in a year. Moore *v.* Macon Sav. Bank, 22 Mo. App. 684. See also Stoner *v.* Evans, 38 Mo. 461. It was formerly held that parties could not make a valid prospective agreement that interest might bear interest. Gunn *v.* Head, 21 Mo. 432.

Under the Oregon statute of 1854 parties could stipulate for the compounding of interest annually but not oftener. Murray *v.* Oliver, 3 Oreg. 539. This statute is no longer in force. See Levens *v.* Briggs, 21 Oreg. 333, 28 Pac. 15, 14 L. R. A. 188.

Under the Wisconsin statute (Rev. St. (1898) § 1689) compound interest or interest on interest may be stipulated for in the original agreement. Gibson *v.* Southwestern Land Co., 89 Wis. 49, 61 N. W. 282. See also Case *v.* Fish, 58 Wis. 56, 15 N. W. 808.

97. *Alabama.*— Eslava *v.* Lepretre, 21 Ala. 504, 56 Am. Dec. 266, such agreement cannot be supported in equity.

Connecticut.— Rose *v.* Bridgeport, 17 Conn. 243 [*following* Camp *v.* Bates, 11 Conn. 487], such a contract will not, unless in special cases, be enforced either at law or in equity.

Illinois.— Bowman *v.* Neely, 137 Ill. 443, 27 N. E. 758 [*reversing* 32 Ill. App. 356]; Drury *v.* Wolfe, 134 Ill. 294, 25 N. E. 626 [*citing* Harris *v.* Bressler, 119 Ill. 467, 10 N. E. 188; Galesburg First Nat. Bank *v.* Davis, 108 Ill. 633; Leonard *v.* Patton, 106 Ill. 99; Peddicord *v.* Connard, 85 Ill. 102; Leonard *v.* Villars, 23 Ill. 377].

pounded by virtue of any provision in the obligation on which the interest accrues.[98] The reason of this distinction is not, however, very obvious,[99] and there is considerable authority for the view that it is perfectly competent for the parties to agree at the time a loan is made or a debt contracted, that if interest be not paid at the time stipulated it shall be treated as principal and bear interest, and such agreement is valid.[1] In addition to this there are to be found in

Indiana.— Niles *v.* Sinking Fund Com'rs, 8 Blackf. 158.

Kentucky.— Breckenridge *v.* Brooks, 2 A. K. Marsh. 335, 12 Am. Dec. 401, such an agreement is held to be iniquitous and oppressive and a court of chancery will not enforce it.

Louisiana.— Compton *v.* Compton, 5 La. Ann. 615.

Maine.— Parkhurst *v.* Cummings, 56 Me. 155.

Maryland.— See Banks *v.* McClellan, 24 Md. 62, 87 Am. Dec. 594.

Massachusetts.— Henry *v.* Flagg, 13 Metc. 64 [*citing* Wilcox *v.* Howland, 23 Pick. 167; Barrell *v.* Joy, 16 Mass. 221; Hastings *v.* Wiswall, 8 Mass. 455]; Von Hemert *v.* Porter, 11 Metc. 210.

Michigan.— Hoyle *v.* Page, 41 Mich. 533, 2 N. W. 665. *Compare* Morgan *v.* Michigan Air-Line R. Co., 57 Mich. 430, 25 N. W. 161, 26 N. W. 865.

Minnesota.— Mason *v.* Callender, 2 Minn. 350, 72 Am. Dec. 102.

Mississippi.— Perkins *v.* Coleman, 51 Miss. 298.

Missouri.— Gunn *v.* Head, 21 Mo. 432. But such contracts are now permitted by statute. See *supra*, note 96.

Montana.— Wilson *v.* Davis, 1 Mont. 183, contract not enforceable in equity.

Nevada.— Cox *v.* Smith, 1 Nev. 161, 90 Am. Dec. 476.

New York.— Young *v.* Hill, 67 N. Y. 162, 23 Am. Rep. 99; Stewart *v.* Petree, 55 N. Y. 621, 14 Am. Rep. 352; Ritter *v.* Phillips, 53 N. Y. 586; Van Rensselaer *v.* Jones, 2 Barb. 643; Townsend *v.* Corning, 1 Barb. 627; Higbie *v.* Heath, 3 Thomps. & C. 783; Quackenbush *v.* Leonard, 9 Paige 334; Mowry *v.* Bishop, 5 Paige 98; Van Benschooten *v.* Lawson, 6 Johns. Ch. 313, 10 Am. Dec. 333; Connecticut *v.* Jackson, 1 Johns. Ch. 13, 7 Am. Dec. 471.

Oregon.— Levens *v.* Briggs, 21 Oreg. 333, 28 Pac. 15, 14 L. R. A. 188.

Vermont.— Catlin *v.* Lyman, 16 Vt. 44.

Virginia.— Fultz *v.* Davis, 26 Gratt. 903; Childers *v.* Deane, 4 Rand. 406.

West Virginia.—Genin *v.* Ingersoll, 11 W. Va. 549.

England.— An antecedent contract or promise for compound interest is not available (Fergusson *v.* Fyffe, 8 Cl. & F. 121, 8 Eng. Reprint 49; Ossulston *v.* Yarmouth, 2 Salk. 449; Chambers *v.* Goldwin, 9 Ves. Jr. 254, 7 Rev. Rep. 181, 32 Eng. Reprint 600; *Ex p.* Bevan, 9 Ves. Jr. 223, 32 Eng. Reprint 588. *Compare* Morgan *v.* Mather, 2 Ves. Jr. 15, 2 Rev. Rep. 163, 30 Eng. Reprint 500) except perhaps as to mercantile accounts current for mutual transactions (Fergusson *v.* Fyffe, *supra*).

See COMMERCIAL PAPER, 8 Cyc. 315 note 5.

Reason of the rule.— The principle of not giving effect to a stipulation for the compounding of future interest upon a debt does not arise from the usury laws. It is merely adopted as a rule of public policy to prevent an accumulation of compound interest in favor of negligent creditors who do not collect their interest when it becomes due; which negligence is found, in the end, to be an injury rather than a benefit to the debtor. Quackenbush *v.* Leonard, 9 Paige (N. Y.) 334. See also Young *v.* Hill, 67 N. Y. 162, 23 Am. Rep. 99.

An exception to this rule is made in respect to interest-bearing coupons attached to bonds or other securities for the payment of money. Bowman *v.* Neely, 137 Ill. 443, 27 N. E. 758. See also Drury *v.* Wolfe, 134 Ill. 294, 25 N. E. 626; Benneson *v.* Savage, 130 Ill. 352, 22 N. E. 838.

The rule is not applicable to a case where one person advances money to purchase property for the benefit of himself and another, such advances to be refunded to him with compound interest out of the proceeds of the sale of the property, but he having no right to demand payment of either interest or principal until the same can be realized out of the proceeds of the land when sold. Quackenbush *v.* Leonard, 9 Paige (N. Y.) 334.

A retroactive agreement made after interest has become due that it shall bear interest previous to such agreement will not be permitted. Childers *v.* Deane, 4 Rand. (Va.) 406; Genin *v.* Ingersoll, 11 W. Va. 549.

98. Hoyle *v.* Page, 41 Mich. 533, 2 N. W. 665.

99. Hale *v.* Hale, 1 Coldw. (Tenn.) 233, 78 Am. Dec. 490.

1. *Georgia.*— Merck *v.* American Freehold Land Mortg. Co., 79 Ga. 213, 7 S. E. 265 [*followed* in Ellard *v.* Scottish-American Mortg. Co., 97 Ga. 329, 22 S. E. 893].

Nebraska.— A contract providing for interest on overdue interest is valid when the whole amount so reserved does not exceed the highest rate allowed by law as simple interest. Hallam *v.* Telleren, 55 Nebr. 255, 75 N. W. 560; Lewis Inv. Co. *v.* Boyd, 48 Nebr. 604, 67 N. W. 456; Richardson *v.* Campbell, 34 Nebr. 181, 51 N. W. 753, 33 Am. St. Rep. 633; Murtaugh *v.* Thompson, 28 Nebr. 358, 44 N. W. 451. See also Mathews *v.* Toogood, 25 Nebr. 99, 41 N. W. 130 [*overruling* 23 Nebr. 536, 37 N. W. 265. 8 Am. St. Rep. 131]. *Compare* Hager *v.* Blake, 16 Nebr. 12, 19 N. W. 780.

the reports a number of cases where contracts made in advance for compound interest or interest on interest have been construed and enforced without any question being raised as to their validity.[2] A distinction has also been drawn between law and equity, it being set forth that a promise to pay interest on interest is valid at law even though made at the time of the original contract, but that in equity an agreement made at the time of the original contract to pay interest on interest is discountenanced and will not be enforced.[3]

2. Express Contracts — a. General. Interest is created expressly when the parties to a contract agree in terms that interest shall be paid, which is usually done in written contracts by inserting therein the words, "bearing interest," "with interest," or some expression of like import; and such express contracts for interest have been universally upheld and enforced ever since interest has been recoverable under legal sanction.[4]

b. Consideration. A contract for the payment of interest, like other contracts, requires a valuable consideration to support it.[5] But the past use of money lent[6] or the forbearance to enforce the collection of the principal will support an agreement to pay interest.[7] An extension of the time of payment of

New Hampshire.— See Dow *v.* Drew, 3 N. H. 40.

Pennsylvania.— Pawling *v.* Pawling, 4 Yeates 220. See also Stokely *v.* Thompson, 34 Pa. St. 210.

Tennessee.— Woods *v.* Rankin, 2 Heisk. 46; Hale *v.* Hale, 1 Coldw. 233, 236, 78 Am. Dec. 490, where it is said: "This is surely nothing more than justice to the lender."

Texas.— Yaws *v.* Jones, (1892) 19 S. W. 443. See also Miner *v.* Paris Exch. Bank, 53 Tex. 559; Lewis *v.* Paschal, 37 Tex. 315; Andrews *v.* Hoxie, 5 Tex. 171.

United States.— See New England Mortg. Security Co. *v.* Vader, 28 Fed. 265.

Canada.— Campbell *v.* Bell, 11 Montreal Leg. N. 346.

Statutes permitting such contracts see *supra*, note 96.

2. See Vaughan *v.* Kennan, 38 Ark. 114; Fisk *v.* Lee, (Cal. 1886) 12 Pac. 255; Page *v.* Williams, 54 Cal. 562; Morgan *v.* Michigan Air-Line R. Co., 57 Mich. 430, 25 N. W. 161, 26 N. W. 865; Bowen *v.* Barksdale, 33 S. C. 142, 11 S. E. 640.

3. Paulling *v.* Creagh, 54 Ala. 646.

4. *Connecticut.*— Selleck *v.* French, 1 Conn. 32, 6 Am. Dec. 185.

Illinois.— Beach *v.* Peabody, 188 Ill. 75, 58 N. E. 679; Sammis *v.* Clark, 13 Ill. 544.

Kansas.— Tootle *v.* Wells, 39 Kan. 452, 18 Pac. 692.

Kentucky.— Carr *v.* Robinson, 8 Bush 269; West *v.* McCord, 4 J. J. Marsh. 173.

Maine.— Amee *v.* Wilson, 22 Me. 116.

Massachusetts.— Barnard *v.* Bartholomew, 22 Pick. 291; Dodge *v.* Perkins, 9 Pick. 368.

New York.— Meech *v.* Smith, 7 Wend. 315.

Texas.— Tucker *v.* Coffin, 7 Tex. Civ. App. 415, 26 S. W. 323.

England.— Harrison *v.* Allen, 2 Bing. 4, 9 E. C. L. 456, 1 C. & P. 235, 12 E. C. L. 142, 2 L. J. C. P. O. S. 97, 9 Moore C. P. 28; Gordon *v.* Swan, 2 Campb. 429 note, 12 East 419, 11 Rev. Rep. 758 note; De Bernales *v.* Fuller, 2 Campb. 426, 14 East 590 note, 11 Rev. Rep. 755; De Havilland *v.* Bowerbank, 1 Campb. 50.

Canada.— Young *v.* Fluke, 15 U. C. C. P. 360; Crouse *v.* Park, 3 U. C. Q. B. 458.

See 29 Cent. Dig. tit. "Interest," § 13.

5. *Maine.*— Milliken *v.* Southgate, 26 Me. 424.

New York.— Young *v.* Hill, 67 N. Y. 162, 23 Am. Rep. 99; Scott *v.* Young, 4 Paige 542.

Ohio.— Andrews *v.* Campbell, 36 Ohio St. 361.

South Carolina.— Sanders *v.* Bagwell, 37 S. C. 145, 15 S. E. 714, 16 S. E. 770.

Tennessee.— See Ward *v.* Brandon, 1 Heisk. 490.

See 29 Cent. Dig. tit. "Interest," § 14.

Failure of consideration.— Where plaintiff agreed to secure two tracts of land for defendant at a certain price, and in consideration thereof defendant agreed to pay plaintiff interest on certain notes which did not bear interest, the obligation rested upon plaintiff to secure both tracts of land in accordance with his agreement; and upon his failure to do so the consideration for the promise to pay such interest failed and no recovery could be had on the agreement to pay it, although defendant did purchase both tracts of land, but upon other terms than those stipulated in the agreement. Haynesworth *v.* Adler, 139 Ala. 168, 36 So. 513.

6. Garland *v.* Lockett, 5 Mart. N. S. (La.) 40.

A promise to pay interest upon interest already accrued which is without consideration except the mere moral obligation to compensate the creditor for the loss of his interest is not valid. Young *v.* Hill, 67 N. Y. 162, 23 Am. Rep. 99.

7. *Alabama.*— Henry *v.* Thompson, Minor 209.

Georgia.— Stewart *v.* Slocumb, 120 Ga. 762, 48 S. E. 311.

New York.— Young *v.* Hill, 67 N. Y. 162, 23 Am. Rep. 99; Kelley *v.* Phenix Nat.

a debt admitted to be due will support a promise to pay back interest on such debt,[8] even though the debt was originally non-interest bearing.[9]

c. Contracts in Writing. In the absence of statutory requirement,[10] it is not necessary that a contract for the payment of interest should be in writing, but it may be verbal.[11] But where a contract for the payment of interest is in writing, the general rule excluding parol evidence from being used for the purpose of varying the terms of a written contract[12] is applicable thereto,[13] although an oral agreement, made after the maturity of the debt, relating to a new engagement to pay interest[14] or to a change of rate or method of payment,[15] is valid and binding.

d. Construction and Operation — (I) *In General.* Contracts in writing for the payment of interest are governed by the same rules that apply to other written contracts, as to their construction and operation.[16] Thus the contract should be so construed as to give it some operation rather than none at all,[17] and the true intent of the parties, when it has been properly ascertained, will control.[18] If the terms of the contract render its meaning doubtful, it is to be construed most strongly against the party contracting to pay the interest.[19]

(II) *Abbreviations and Omissions.* Abbreviations used in a contract for the payment of interest are to be construed according to their usual and generally

Bank, 17 N. Y. App. Div. 496, 45 N. Y. Suppl. 533.

Ohio.— Mueller *v.* McGregor, 28 Ohio St. 265.

Tennessee.—Ward *v.* Brandon, 1 Heisk. 490.

England.— Dodd *v.* Ponsford, 6 C. B. N. S. 324, 95 E. C. L. 324.

See 29 Cent. Dig. tit. "Interest," § 14.

8. Murdock *v.* Lewis, 26 Mo. App. 234.

9. Harrell *v.* Parrott, 50 S. C. 16, 27 S. E. 521; Hutton *v.* Edgerton, 6 S. C. 485.

10. See *infra*, IV, C, 2, c.

11. Cartmill *v.* Brown, 1 A. K. Marsh. (Ky.) 576, 10 Am. Dec. 763; Cox *v.* Mitchell, 7 La. 520; Delacroix *v.* Prevost, 6 Mart. (La.) 276; Adriance *v.* Brooks, 13 Tex. 279; Pridgen *v.* Hill, 12 Tex. 374. See also Young *v.* Hill, 67 N. Y. 162, 23 Am. Rep. 99.

Interest may be recovered on arrears of rent reserved under a lease from year to year, and made payable on a day certain, even though the lease be by parol. Stockton *v.* Guthrie, 5 Harr. (Del.) 204. *Compare* West Chicago Alcohol Works *v.* Sheer, 104 Ill. 586.

12. See Evidence.

13. Dance *v.* Dance, 56 Md. 433.

14. Dudley *v.* Reynolds, 1 Kan. 285.

15. Sharp *v.* Wyckoff, 39 N. J. Eq. 376.

16. *Illinois.*— Martin *v.* Murphy, 16 Ill. App. 283.

Iowa.— Webb *v.* Bailey, 89 Iowa 747, 56 N. W. 530; Bradley *v.* Palen, 78 Iowa 126, 42 N. W. 623; Higley *v.* Newell, 28 Iowa 516.

Minnesota.— Brewster *v.* Wakefield, 1 Minn. 352, 69 Am. Dec. 343.

North Carolina.— Oxford Bank *v.* Bobbitt, 108 N. C. 525, 13 S. E. 177.

South Carolina.— See Sharpe *v.* Lee, 14 S. C. 341.

United States.— See U. S. Mortgage Co. *v.* Sperry, 138 U. S. 313, 11 S. Ct. 321, 34 L. ed. 969.

See 29 Cent. Dig. tit. "Interest," § 16.

A promise to pay a sum of money, "with three dollars per month interest, after due, until paid," is a promise to pay three dollars interest per month for the use of the principal, and not at the rate of three per cent per month. Latham *v.* Darling, 2 Ill. 203.

17. Evans *v.* Sanders, 8 Port. (Ala.) 497, 33 Am. Dec. 297; Thompson *v.* Hoagland, 65 Ill. 310.

The words "past due interest" used in a contract mean interest which has matured and which is collectable on demand. Coquard *v.* Kansas City Bank, 12 Mo. App. 261.

18. *Alabama.*— Evans *v.* Sanders, 8 Port. 497, 33 Am. Dec. 297.

Connecticut.— McClellan *v.* Morris, Kirby 145.

Florida.— Harrell *v.* Durrance, 9 Fla. 499.

Illinois.— Cisne *v.* Chidester, 85 Ill. 523; Chicago *v.* People, 56 Ill. 327; Latham *v.* Darling, 2 Ill. 203.

Iowa.— De Wolfe *v.* Taylor, 71 Iowa 648, 33 N. W. 154; Davis *v.* Fish, 2 Greene 447.

Maine.— Porter *v.* Porter, 51 Me. 376.

Minnesota.— Brewster *v.* Wakefield, 1 Minn. 352, 69 Am. Dec. 343.

Mississippi.— Loury *v.* Loury, Walk. 207.

New York.— Trask *v.* Hazazer, 4 N. Y. Suppl. 635.

South Carolina.— Sharpe *v.* Lee, 14 S. C. 341.

See 29 Cent. Dig. tit. "Interest," § 16.

19. *Alabama.*— Evans *v.* Sanders, 8 Port. 497, 33 Am. Dec. 297.

California.— Halleck *v.* Guy, 9 Cal. 181, 70 Am. Dec. 643.

Colorado.— See Willard *v.* Mellor, 19 Colo. 534, 36 Pac. 148.

Minnesota.— Brewster *v.* Wakefield 1 Minn. 352, 69 Am. Dec. 343.

New York.— See Chouteau *v.* Suydam, 21 N. Y. 179.

Tennessee.— See Rollman *v.* Baker, 5 Humphr. 406.

See 29 Cent. Dig. tit. "Interest," § 16.

accepted meaning.[20] The omission of the word "interest" from a contract purporting to stipulate for the payment of interest is supplied by the law, where the intent is so disclosed by the contract,[21] and where the contract contains no stipulation as to the period to which the rate agreed upon shall apply, it is construed so as to make the interest computable *per annum*.[22]

3. Implied Contracts — a. In General. It has been held that an implied contract to pay interest arises when the parties make no express agreement therefor, but from the circumstances the law infers that they contracted with reference thereto, and interest may be recovered upon a contract thus implied as well as upon an express contract to pay it.[23] An agreement that a debt or obligation shall not bear interest may be implied as well as an agreement to pay interest.[24]

20. Durant *v.* Murdock, 3 App. Cas. (D. C.) 114; Belford *v.* Beatty, 145 Ill. 414, 34 N. E. 254, holding that "Int. @ 6% p. a.," means interest at the rate of six per centum per annum.

21. Thompson *v.* Hoagland, 65 Ill. 310; Davis *v.* Rider, 53 Ill. 416; Ohm *v.* Yung, 63 Ind. 432; Higley *v.* Newell, 28 Iowa 516; Loury *v.* Loury, Walk. (Miss.) 207. But *compare* Griffith *v.* Furry, 30 Ill. 251, 83 Am. Dec. 186.

22. Rogers *v.* Jones, 92 Cal. 80, 28 Pac. 97, 488; Durant *v.* Murdock, 3 App. Cas. (D. C.) 114; Loury *v.* Loury, Walk. (Miss.) 207.

23. *California.*— Backus *v.* Minor, 3 Cal. 231.

Connecticut.— Selleck *v.* French, 1 Conn. 32, 6 Am. Dec. 185.

Illinois.—Ayers *v.* Metcalf, 39 Ill. 307; Sammis *v.* Clark, 13 Ill. 544.

Iowa.—Isett *v.* Oglevie, 9 Iowa 313; Veiths *v.* Hagge, 8 Iowa 163.

Kentucky.— White *v.* Curd, 86 Ky. 191, 5 S. W. 553, 9 Ky. L. Rep. 505.

Louisiana.— Soulie *v.* Brown, 13 La. Ann. 521; Shaw *v.* Oakey, 3 Rob. 361.

Massachusetts.— Foote *v.* Blanchard, 6 Allen 221, 83 Am. Dec. 624; Fisher *v.* Sargent, 10 Cush. 250; Barnard *v.* Bartholomew, 22 Pick. 291; Dodge *v.* Perkins, 9 Pick. 368.

Mississippi.— Carson *v.* Alexander, 34 Miss. 528.

Nebraska.— Savage *v.* Aiken, 21 Nebr. 605, 33 N. W. 241.

New York.— Gillet *v.* Van Rensselaer, 15 N. Y. 397; Esterly *v.* Cole, 1 Barb. 235; Reab *v.* McAlister, 8 Wend. 109 [*affirming* 4 Wend. 483]; Meech *v.* Smith, 7 Wend. 315; Wood *v.* Hickok, 2 Wend. 501; Rensselaer Glass Factory *v.* Reid, 5 Cow. 587; Stevenson *v.* Maxwell, 2 Sandf. Ch. 273.

Pennsylvania.— Adams *v.* Palmer, 30 Pa. St. 346; Knox *v.* Jones, 2 Dall. 193, 1 L. ed. 345.

South Carolina.— Knight *v.* Mitchell, 3 Brev. 506.

Vermont.— Willard *v.* Pinard, 65 Vt. 160, 26 Atl. 67; Vermont, etc., Co. *v.* Vermont Cent. R. Co., 34 Vt. 1; Gleason *v.* Briggs, 28 Vt. 135; Wood *v.* Smith, 23 Vt. 706; Raymond *v.* Isham, 8 Vt. 258.

Virginia.— McVeigh *v.* Howard, 87 Va. 599, 13 S. E. 31; Roberts *v.* Cocke, 28 Gratt. 207; Cecil *v.* Deyerle, 28 Gratt. 775; Kent *v.* Kent, 28 Gratt. 840; Chapman *v.* Shepherd, 24 Gratt. 377. See Cecil *v.* Hicks, 29 Gratt. 1, 26 Am. Rep. 391.

United States.—Atlantic Phosphate Co. *v.* Grafflin, 114 U. S. 492, 5 S. Ct. 967, 29 L. ed. 221; Young *v.* Godbe, 15 Wall. 562, 21 L. ed. 250; Curtis *v.* Innerarity, 6 How. 146, 12 L. ed. 380; Bainbridge *v.* Wilcocks, 2 Fed. Cas. No. 755, Baldw. 536; Barclay *v.* Kennedy, 2 Fed. Cas. No. 976, 3 Wash. 350; Bispham *v.* Pollock, 3 Fed. Cas. No. 1,442, 1 McLean 411. See Crescent Min. Co. *v.* Wasatch Min. Co., 151 U. S. 317, 14 S. Ct. 348, 38 L. ed. 177 [*affirming* 7 Utah 8, 24 Pac. 586].

England.— *In re* Anglesey, [1901] 2 Ch. 548, 70 L. J. Ch. 810, 85 L. T. Rep. N. S. 179, 49 Wkly. Rep. 708; Page *v.* Newman, 9 B. & C. 378, 7 L. J. K. B. O. S. 267, 4 M. & R. 305, 17 E. C. L. 174; Shaw *v.* Picton, 4 B. & C. 715, 7 D. & R. 201, 4 L. J. K. B. O. S. 29, 28 Rev. Rep. 455, 10 E. C. L. 771; Higgins *v.* Sargent, 2 B. & C. 348, 3 D. & R. 613, 2 L. J. K. B. O. S. 33, 26 Rev. Rep. 379, 9 E. C. L. 158; Rhoades *v.* Selsey, 2 Beav. 359, 17 Eng. Ch. 359, 48 Eng. Reprint 1220; Nichol *v.* Thompson, 1 Campb. 52 note; De Havilland *v.* Bowerbank, 1 Campb. 50; Calton *v.* Bragg, 15 East 223, 13 Rev. Rep. 451; Carey *v.* Doyne, 5 Ir. Ch. 104; Rhodes *v.* Rhodes, Johns. 653, 6 Jur. N. S. 600, 29 L. J. Ch. 418, 8 Wkly. Rep. 204; *In re* Edwards, 61 L. J. Ch. 22, 65 L. T. Rep. N. S. 453.

Canada.— Bannerman *v.* Fullerton, 5 Nova Scotia 200.

See 29 Cent. Dig. tit. "Interest," § 17.

The words, "without interest from date till the payments become due," in a contract for the payment of sums of money, implies a contract to pay interest on such sums from the maturity thereof. Rice *v.* Ahern, 6 L. C. Jur. 201, 12 L. C. Rep. 280.

Notice in invoice of terms of credit subject to interest.— Where invoices, headed, "Bills Bear Interest After Maturity; . . . terms, 60 days," are sent at the times goods are shipped, and are received without objection, this constitutes a contract for interest. Braun *v.* Hess, 187 Ill. 283, 58 N. E. 371, 79 Am. St. Rep. 221 [*affirming* 86 Ill. App. 544]. But *compare In re* Edwards, 61 L. J. Ch. 22, 65 L. T. Rep. N. S. 453, where a similar notice in a stated account was held to be insufficient evidence of a contract to pay the interest according to the terms of the notice.

24. *Maryland.*— Robertson *v.* Mowell, 66 Md. 530, 8 Atl. 273.

b. Breach of Contract to Pay Money. It has been held in a number of cases that where a definite contract exists for the payment of money at a fixed date, and there is a breach of such contract, the law raises an implied promise to pay interest on the sum due;[25] but the great majority of cases hold that upon a breach of a contract to pay money interest is allowed as damages and not by reason of any implied contract to pay it.[26]

c. Custom or Usage of Trade.[27] A contract to pay interest may be implied from the custom or usage of trade governing the business in which the parties are engaged,[28] but such custom or usage to charge interest must be of the same

Minnesota.— Brown *v.* Gurney, 20 Minn. 527.

New York.— Ledyard *v.* Bull, 119 N. Y. 62, 23 N. E. 444; Eldred *v.* Eames, 48 Hun 253.

Pennsylvania.— Beaver *v.* Slear, 182 Pa. St. 213, 37 Atl. 991.

Vermont.— Vermont, etc., R. Co. *v.* Vermont Cent. R. Co., 34 Vt. 1.

Wisconsin.— Ryan Drug Co. *v.* Hvambsahl, 92 Wis. 62, 65 N. W. 873.

United States.— See Bain *v.* Peters, 44 Fed. 307.

See 29 Cent. Dig. tit. "Interest," § 17.

Where an agreement is void, and recovery is had on an implied assumpsit, plaintiff is not bound by an implied condition in the void agreement that the obligation shall not draw interest. Matter of Sherman, 24 Misc. (N. Y.) 65, 53 N. Y. Suppl. 376.

25. *Massachusetts.*— Foote *v.* Blanchard, 6 Allen 221, 83 Am. Dec. 624; Dodge *v.* Perkins, 9 Pick. 368.

New York.—Stevenson *v.* Maxwell, 2 Sandf. Ch. 273.

South Carolina.— State Bank *v.* Bowie, 3 Strobh. 439; Simpson *v.* McMillion, 1 Nott & M. 192. *Compare* Shoolbred *v.* Elliott, 1 Brev. 423.

Vermont.— Vermont, etc., R. Co. *v.* Vermont Cent. R. Co., 34 Vt. 1; Gleason *v.* Briggs, 28 Vt. 135; Wood *v.* Smith, 23 Vt. 706. *Compare* Brainerd *v.* Champlain Transp. Co., 29 Vt. 154.

Virginia.— McVeigh *v.* Howard, 87 Va. 599, 13 S. E. 31; Cecil *v.* Hicks, 29 Gratt. 1, 26 Am. Rep. 397; Roberts *v.* Cocke, 28 Gratt. 207; Chapman *v.* Shepherd, 24 Gratt. 377.

United States.—Atlantic Phosphate Co. *v.* Grafflin, 114 U. S. 492, 5 S. Ct. 967, 29 L. ed. 221; Young *v.* Godbe, 15 Wall. 562, 21 L. ed. 250. See also Lincoln *v.* Claflin, 7 Wall. 132, 19 L. ed. 106.

England.— See Calton *v.* Bragg, 15 East 223, 13 Rev. Rep. 451.

See 29 Cent. Dig. tit. "Interest," § 17.

Reason stated.— "Every one who contracts to pay money on a certain day knows, that, if he fails to fulfil his contract, he must pay the established rate of interest as damages for his non-performance. Hence it may correctly be said, that such is the implied contract of the parties." Curtis *v.* Innerarity, 6 How. (U. S.) 146, 154, 12 L. ed. 380. See also Elliott *v.* Gibson, 10 B. Mon. (Ky.) 438.

A distinction has been made in this connection between written and parol contracts for the payment of money, it being held that a breach of a written contract raises an implication to pay interest while upon a breach of a parol contract no such implication arises. Farr *v.* Farr, 1 Hill (S. C.) 393; Ryan *v.* Baldrick, 3 McCord (S. C.) 498.

26. See *infra*, III, C, 1.

27. See, generally, CUSTOMS AND USAGES.

28. *Arkansas.*— Rogers *v.* Yarnell, 51 Ark. 198, 10 S. W. 622.

Connecticut.— Crosby *v.* Mason, 32 Conn. 482; Selleck *v.* French, 1 Conn. 32, 6 Am. Dec. 185.

Delaware.— Black *v.* Reybold, 3 Harr. 528.

Illinois.— Turner *v.* Dawson, 50 Ill. 85; Ayers *v.* Metcalf, 39 Ill. 307; Rayburn *v.* Day, 27 Ill. 46; Hitt *v.* Allen, 13 Ill. 592; Sammis *v.* Clark, 13 Ill. 544.

Iowa.— Isett *v.* Oglevie, 9 Iowa 313; Veiths *v.* Hagge, 8 Iowa 163. *Contra*, Webb *v.* Bailey, 89 Iowa 747, 56 N. W. 530.

Massachusetts.— Fisher *v.* Sargent, 10 Cush. 250; Barnard *v.* Bartholomew, 22 Pick. 291.

New York.— Esterly *v.* Cole, 3 N. Y. 502; Salter *v.* Parkhurst, 2 Daly 240; Meech *v.* Smith, 7 Wend. 315; McAllister *v.* Reab, 4 Wend. 483; Wood *v.* Hickok, 2 Wend. 501. *Contra*, New York *v.* Tradesmen's Nat. Bank, 11 N. Y. Suppl. 95.

Pennsylvania.— Watt *v.* Hoch, 25 Pa. St. 411; Koons *v.* Miller, 3 Watts & S. 271; Knox *v.* Jones, 2 Dall. 193, 1 L. ed. 345; Williams *v.* Craig, 1 Dall. 313, 1 L. ed. 153; Grosh *v.* Sponsler, 2 Lanc. L. Rev. 397.

South Carolina.— Knight *v.* Mitchell, 3 Brev. 506.

Vermont.— Wood *v.* Smith, 23 Vt. 706; Raymond *v.* Isham, 8 Vt. 258.

United States.— Bainbridge *v.* Wilcocks, 2 Fed. Cas. No. 755, Baldw. 536; Barclay *v.* Kennedy, 2 Fed. Cas. No. 976, 3 Wash. 350; Denniston *v.* Imbrie, 6 Fed. Cas. No. 3,802, 3 Wash. 396.

England.— *Ex p.* Bishop, 15 Ch. D. 400, 50 L. J. Ch. 18, 43 L. T. Rep. N. S. 165, 2 Wkly. Rep. 144; Higgins *v.* Sargent, 2 B. & C. 348, 3 D. & R. 613, 2 L. J. K. B. O. S. 33, 26 Rev. Rep. 379, 9 E. C. L. 158; Hitchman *v.* Stewart, 3 Drew. 271, 61 Eng. Reprint 907; Calton *v.* Bragg, 15 East 223, 13 Rev. Rep. 451; Petre *v.* Duncombe, 15 Jur. 86, 20 L. J. Q. B. 242, 2 L. M. & P. 107; Moore *v.* Voughton, 1 Stark. 487, 2 E. C. L. 186.

Canada.—Bannerman *v.* Fullerton, 5 Nova Scotia 200.

See 29 Cent. Dig. tit. "Interest," § 18.

Contra.— Segond *v.* Thomas, 10 La. 295; Harrod *v.* Lafarge, 12 Mart. (La.) 21; Amee *v.* Wilson, 22 Me. 116.

character as other customs; it must be therefore legal, uniform, well known, long established, and generally acquiesced in.[29] Where the custom is shown to be one generally adopted among merchants, the parties will be presumed to have knowledge thereof and to have contracted with reference thereto;[30] but knowledge on the part of the debtor of a usage of a particular trade will not be presumed but must be established in order to raise the implication of a contract with reference to such usage.[31]

d. Course of Dealing Between Parties. A contract to pay interest may also be implied from the course of dealing between the particular parties,[32] and an agreement that interest shall not be paid even in cases where it is usual may be implied in the same manner.[33] Where the custom of a creditor to charge interest is relied on to establish the implied contract, evidence must be adduced of the knowledge of such custom on the part of the debtor, or of prior dealings from which such knowledge will be presumed.[34]

e. Accounts. If, in an account stated, a party charges himself with interest, such admission implies a contract to pay it,[35] and where an account, containing items of interest charges, is rendered to a debtor, and he accepts the account or

Compound interest will not be allowed although claimed by virtue of a custom or agreement. Marr *v.* Southwick, 2 Port. (Ala.) 351.

29. Turner *v.* Dawson, 50 Ill. 85; Wood *v.* Smith, 23 Vt. 706. And see Glasgow *v.* Stevenson, 6 Mart. N. S. (La.) 567, holding that a charge for interest is not supported by evidence of its being customary, without proof that it is authorized by law.

30. Selleck *v.* French, 1 Conn. 32, 6 Am. Dec. 185; Adams *v.* Palmer, 30 Pa. St. 346; Watt *v.* Hoch, 25 Pa. St. 411; Koons *v.* Miller, 3 Watts & S. (Pa.) 271; Wood *v.* Smith, 23 Vt. 706.

31. *Massachusetts.*— Fisher *v.* Sargent, 10 Cush. 250.

New York.— Esterly *v.* Cole, 1 Barb. 235.

South Carolina.— Heyward *v.* Searson, 1 Speers 249.

England.— Moore *v.* Voughton, 1 Stark. 487, 2 E. C. L. 186.

Canada.— De Hertel *v.* Supple, 14 Grant Ch. (U. C.) 421.

See 29 Cent. Dig. tit. "Interest," § 18.

But see Adams *v.* Palmer, 30 Pa. St. 346; Watt *v.* Hoch, 25 Pa. St. 411; Koons *v.* Miller, 3 Watts & S. (Pa.) 271.

The testimony of one witness that it is the uniform practice of grocers to charge interest on goods sold after ninety days, unless a special agreement to the contrary is made, does not amount to proof of the usage of a particular trade, of which all dealers in that line are bound to take notice and are presumed to be informed. Wood *v.* Hickok, 2 Wend. (N. Y.) 501.

32. *California.*— Auzerais *v.* Naglee, 74 Cal. 60, 15 Pac. 371.

Connecticut.— Selleck *v.* French, 1 Conn. 32, 6 Am. Dec. 185.

Illinois.— Ayers *v.* Metcalf, 39 Ill. 307; Rayburn *v.* Day, 27 Ill. 46; Hitt *v.* Allen, 13 Ill. 592; Sammis *v.* Clark, 13 Ill. 544.

Iowa.— Isett *v.* Oglevie, 9 Iowa 313; Veiths *v.* Hagge, 8 Iowa 163.

Massachusetts.— Fisher *v.* Sargent, 10 Cush. 250.

Michigan.— Emerson *v.* Atwater, 12 Mich. 314.

Mississippi.—Carson *v.* Alexander, 34 Miss. 528.

New York.— Young *v.* Hill, 67 N. Y. 162, 23 Am. Rep. 99; Esterly *v.* Cole, 3 N. Y. 502 [*affirming* 1 Barb. 235]; Reab *v.* McAlister, 8 Wend. 109 [*affirming* 4 Wend. 483]; Meech *v.* Smith, 7 Wend. 315; Rensselaer Glass Factory *v.* Reid, 5 Cow. 587; Liotard *v.* Graves, 3 Cai. 226.

South Carolina.— Dickson *v.* Surginer, 3 Brev. 417.

Texas.— But see Adriance *v.* Brooks, 13 Tex. 279.

Vermont.— Raymond *v.* Isham, 8 Vt. 258.

United States.— Barclay *v.* Kennedy, 2 Fed. Cas. No. 976, 3 Wash. 350.

England.— *In re* Anglesey, [1901] 2 Ch. 548, 70 L. J. Ch. 810, 85 L. T. Rep. N. S. 179, 49 Wkly. Rep. 708; Clancarty *v.* Latouche, 1 Ball & B. 420; Mosse *v.* Salt, 32 Beav. 269, 55 Eng. Reprint 106; Nichol *v.* Thompson, 1 Campb. 52 note; Newell *v.* Jones, 4 C. & P. 124, 19 E. C. L. 437; *Ex p.* Williams, 1 Rose 399.

See 29 Cent. Dig. tit. "Interest," § 18.

33. Chandler *v.* People's Sav. Bank, 61 Cal. 401; Ryan Drug Co. *v.* Hvambsahl, 92 Wis. 62, 65 N. W. 873.

34. *Illinois.*— Rayburn *v.* Day, 27 Ill. 46.

New York.— Esterly *v.* Cole, 3 N. Y. 502; Trotter *v.* Grant, 2 Wend. 413.

Pennsylvania.— See Knox *v.* Jones, 2 Dall. 193, 1 L. ed. 345.

South Carolina.— Dickson *v.* Surginer, 3 Brev. 417.

England.— Mosse *v.* Salt, 32 Beav. 269, 55 Eng. Reprint 106; Moore *v.* Voughton, 1 Stark. 487, 2 E. C. L. 186.

See 29 Cent. Dig. tit. "Interest," § 18.

Knowledge presumed from prior dealings. — Reab *v.* McAlister, 8 Wend. (N. Y.) 109 [*affirming* 4 Wend. 483]; Meech *v.* Smith, 7 Wend. (N. Y.) 315.

35. Savage *v.* Aiken, 21 Nebr. 605, 33 N. W. 241.

promises to pay the same without objection, a promise to pay such interest is implied from his acceptance.[36]

f. Particular Acts of Parties. The particular acts of the parties, irrespective of any established course of dealing between them, will sometimes raise an implied promise to pay interest.[37]

g. Compound Interest. An agreement to pay interest upon interest may be implied, where the circumstances are such as to justify the implication; and such an implied contract will be as effective as if it were express.[38] Such a contract may be implied from the established course of dealing between the parties, or from the general custom or usage of trade to charge interest upon interest,[39] or the striking of a balance may be regarded as evidence of an agreement to pay interest upon the interest which is included in such balance.[40]

36. *California.*— Auzerais *v.* Naglee, 74 Cal. 60, 15 Pac. 371; Backus *v.* Minor, 3 Cal. 231.

Mississippi.— Carson *v.* Alexander, 34 Miss. 528.

New York.— Reddington *v.* Gilman, 1 Bosw. 235.

South Carolina.— Furman *v.* Peay, 2 Bailey 394; Inglis *v.* Nutt, 2 Desauss. Eq. 623.

United States.— Barclay *v.* Kennedy, 2 Fed. Cas. No. 976, 3 Wash. 350.

England.— *In re* Anglesey, [1901] 2 Ch. 548, 70 L. J. Ch. 810, 85 L. T. Rep. N. S. 179, 49 Wkly. Rep. 708.

See 29 Cent. Dig. tit. "Interest," § 17.

37. Savage *v.* Aiken, 21 Nebr. 605, 33 N. W. 241; Patterson *v.* Whitlock, 14 Daly (N. Y.) 497, 1 N. Y. Suppl. 2; Hoehler *v.* McGlinchy, 20 Oreg. 360, 25 Pac. 1067; Bainbridge *v.* Wilcocks, 2 Fed. Cas. No. 755, Baldw. 536.

Illustrations.— One who guarantees the payment of a bill is liable upon the guaranty for interest on the bill (Martin *v.* Hazzard Powder Co., 2 Colo. 596; Soulie *v.* Brown, 13 La. Ann. 521; Ackermann *v.* Ehrensperger, 16 L. J. Exch. 3, 16 M. & W. 99), and the assignee of a portion of an interest-bearing demand can recover interest thereon, although such interest is not mentioned in the assignment (Godbold *v.* Kirkpatrick, 26 S. C. 607, 1 S. E. 156. But see Fruhling *v.* Schroeder, 2 Bing. N. Cas. 77, 4 L. J. C. P. 290, 2 Scott 143, 29 E. C. L. 445).

An agreement to pay more than the legal rate of interest on certain advances raises no implication of a promise to pay a like rate on subsequent advances. Marziou *v.* Pioche, 8 Cal. 522.

38. *Maryland.*— Fitzhugh *v.* McPherson, 9 Gill & J. 51.

Missouri.— St. Louis Gas-Light Co. *v.* St. Louis, 11 Mo. App. 55 [*affirmed* in 84 Mo. 202].

New York.— Young *v.* Hill, 67 N. Y. 162, 23 Am. Rep. 99 [*reversing* 6 Hun 613].

South Carolina.— Doig *v.* Barkley, 3 Rich. 125, 45 Am. Dec. 762.

Tennessee.— Woods *v.* Rankin, 2 Heisk. 46.

Virginia.— Pindall *v.* Marietta Bank, 10 Leigh 481.

Wisconsin.— Gibson *v.* Southwestern Land Co., 89 Wis. 49, 61 N. W. 282.

United States.— Bainbridge *v.* Wilcocks, 2 Fed. Cas. No. 755, Baldw. 536.

England.— Fergusson *v.* Fyffe, 8 Cl. & F. 121, 8 Eng. Reprint 49; Morgan *v.* Mather, 2 Ves. Jr. 15, 2 Rev. Rep. 163, 30 Eng. Reprint 500.

Canada.— Jackson *v.* Richardson, 1 N. Brunsw. Eq. 325.

See 29 Cent. Dig. tit. "Interest," § 19.

Contra.— Aspinwall *v.* Blake, 25 Iowa 319; Bradley *v.* Merrill, 91 Me. 340, 40 Atl. 132; Whitcomb *v.* Harris, 90 Me. 206, 38 Atl. 138; Doe *v.* Warren, 7 Me. 48; Van Husan *v.* Kanouse, 13 Mich. 303. See also Rose *v.* Bridgeport, 17 Conn. 243.

Crediting interest.— Where the person with whom money was deposited wrote the depositor that he had given him credit for the amount of interest due on the debt to a particular time, such letter did not have the effect of adding such interest to the principal so as to cause it to bear interest thereafter. Sullivan *v.* Fosdick, 10 Hun (N. Y.) 173.

39. Bayly *v.* Becnel, 36 La. Ann. 496; Thompson *v.* Mylne, 4 La. Ann. 206; Young *v.* Hill, 67 N. Y. 162, 23 Am. Rep. 99; Wood *v.* Smith, 23 Vt. 706. *Contra*, Marr *v.* Southwick, 2 Port. (Ala.) 351; Averill Coal, etc., Co. *v.* Verner, 22 Ohio St. 372.

Limits of usage.— Although it is a legal usage of merchants to cast interest on the items of their mutual accounts, and strike a balance at the end of a year, and make that balance the first item of principal for the ensuing year, yet neither the usage nor the law allows this to be done, except under a specific agreement, after the mutual dealings of the parties have ceased. Von Hemert *v.* Porter, 11 Metc. (Mass.) 210. But *compare* Newell *v.* Jones, 4 C. & P. 124, 19 E. C. L. 437, holding that if a party shows in an action for money lent that it was the course of dealing between him and defendant to calculate the interest every year and add that to the principal, and the next year to calculate upon the total, he may recover interest calculated in the same way for the years subsequent to the striking of the last balance between them.

40. St. Louis Gas-Light Co. *v.* St. Louis, 11 Mo. App. 55 [*affirmed* in 84 Mo. 202]; Young *v.* Hill, 6 Hun (N. Y.) 613; Barclay *v.* Kennedy, 2 Fed. Cas. No. 976, 3 Wash.

C. Interest as Damages — 1. Breach of Contract to Pay Money — a. In General. Although in some cases of breach of contract to pay money interest has been allowed thereon on the ground of an implied contract to pay interest that arises from the failure to pay the principal,[41] the general rule established by the great weight of authority is that where there is a contract, express or implied, to pay money, even though such contract be silent as to interest, interest will be allowed upon its breach, as damages, and not because of any promise to pay it.[42]

350; *Ex p.* Bevan, 9 Ves. Jr. 223, 32 Eng. Reprint 588.

41. See *supra*, III, B, 3, b.

42. *Alabama.*— Moore *v.* Patton, 2 Port. 451.

Colorado.— Browne *v.* Steck, 2 Colo. 70.

Connecticut.— Healy *v.* Fallon, 69 Conn. 228, 37 Atl. 495; Hubbard *v.* Callahan, 42 Conn. 524, 19 Am. Rep. 564; Selleck *v.* French, 1 Conn. 32, 6 Am. Dec. 185.

District of Columbia.— District of Columbia *v.* Metropolitan R. Co., 8 App. Cas. 322.

Florida.— Sullivan *v.* McMillan, 37 Fla. 134, 19 So. 340, 53 Am. St. Rep. 239.

Georgia.— Whaley *v.* Broadwater, 78 Ga. 336.

Illinois.— Beach *v.* Peabody, 188 Ill. 75, 58 N. E. 679; Phillips *v.* South Park Com'rs, 119 Ill. 626, 10 N. E. 230; Heiman *v.* Schrœder, 74 Ill. 158; Maltman *v.* Williamson, 69 Ill. 423. See also Home Ins., etc., Co. *v.* Myer, 93 Ill. 271.

Indiana.— Kopelke *v.* Kopelke, 112 Ind. 435, 13 N. E. 695; Killian *v.* Eigenmann, 57 Ind. 480.

Kentucky.— Henderson Cotton Mfg. Co. *v.* Lowell Mach. Shops, 86 Ky. 668, 7 S. W. 142, 9 Ky. L. Rep. 831; Elkin *v.* Moore, 6 B. Mon. 462; Honore *v.* Murray, 3 Dana 31. See Guthrie *v.* Wickliffs, 4 Bibb 541, 7 Am. Dec. 746.

Louisiana.— Gay *v.* Kendig, 2 Rob. 472; Hepp *v.* Ducros, 3 Mart. N. S. 185.

Maine.— Paine *v.* Caswell, 68 Me. 80, 28 Am. Rep. 21; Eaton *v.* Boissonnault, 67 Me. 540, 24 Am. Rep. 52. See American Bible Soc. *v.* Wells, 68 Me. 572, 28 Am. Rep. 82.

Massachusetts.— Foote *v.* Blanchard, 6 Allen 221, 83 Am. Dec. 624; Dodge *v.* Perkins, 9 Pick. 368.

Minnesota.— Mason *v.* Callender, 2 Minn. 350, 72 Am. Dec. 102.

Missouri.— Risley *v.* Andrew County, 46 Mo. 382.

New Hampshire.— Peirce *v.* Rowe, 1 N. H. 179.

New Jersey.— Scudder *v.* Morris, 3 N. J. L. 419, 4 Am. Dec. 382.

New York.— Ledyard *v.* Bull, 119 N. Y. 62, 23 N. E. 444; O'Brien *v.* Young, 95 N. Y. 428, 47 Am. Rep. 64; Cutter *v.* New York, 92 N. Y. 166; Ritter *v.* Phillips, 53 N. Y. 586; Hamilton *v.* Van Rensselaer, 43 N. Y. 244; Adams *v.* Ft. Plain Bank, 36 N. Y. 255; Purdy *v.* Philips, 11 N. Y. 406; Van Rensselaer *v.* Jewett, 2 N. Y. 135, 51 Am. Dec. 275; Southern Cent. R. Co. *v.* Moravia, 61 Barb. 180; Van Rensselaer *v.* Jones, 2 Barb. 643; Crane *v.* Hardman, 4 E. D. Smith 448; Bronner Brick Co. *v.* M. M. Canda Co., 18 Misc. 681, 42 N. Y. Suppl. 14; Peetsch *v.* Quinn, 7 Misc. 6, 27 N. Y. Suppl. 323; Furber *v.* McCarthy, 12 N. Y. Suppl. 794; U. S. Bank *v.* Chapin, 9 Wend. 471; Macomber *v.* Dunham, 8 Wend. 550; Clark *v.* Barlow, 4 Johns. 183; Mower *v.* Kip, 6 Paige 88, 29 Am. Dec. 748.

North Carolina.— Pass *v.* Shine, 113 N. C. 284, 18 S. E. 251; King *v.* Phillips, 95 N. C. 245, 59 Am. Rep. 238; Bledsoe *v.* Nixon, 69 N. C. 89, 12 Am. Rep. 642.

Pennsylvania.— West Republic Min. Co. *v.* Jones, 108 Pa. St. 55; Minard *v.* Beans, 64 Pa. St. 411; Fasholt *v.* Reed, 16 Serg. & R. 266; *In re* Sugar Notch Borough, 10 Kulp 429; Gravenstine's Estate, 18 Phila. 9; Chew's Estate, 4 Phila. 186.

Rhode Island.— Spencer *v.* Pierce, 5 R. I. 63.

South Carolina.— Southern R. Co. *v.* Greenville, 49 S. C. 449, 27 S. E. 652; Schmidt *v.* Limehouse, 2 Bailey 276.

Texas.— McElyea *v.* Faires, 79 Tex. 243, 14 S. W. 1059; Heidenheimer *v.* Ellis, 67 Tex. 426, 3 S. W. 666; Roberts *v.* Smith, 64 Tex. 94, 53 Am. Rep. 744; Houston, etc., R. Co. *v.* Jackson, 62 Tex. 209; Fowler *v.* Davenport, 21 Tex. 626; Close *v.* Fields, 13 Tex. 623.

Vermont.— Sumner *v.* Beebe, 37 Vt. 562; Vermont, etc., R. Co. *v.* Vermont Cent. R. Co., 34 Vt. 1; Wood *v.* Smith, 23 Vt. 706; Abbott *v.* Wilmot, 22 Vt. 437.

Virginia.— Farmers' Bank *v.* Reynolds, 4 Rand. 186.

Wisconsin.— Marsh *v.* Fraser, 37 Wis. 149; Atkinson *v.* Richardson, 15 Wis. 594.

United States.— Stewart *v.* Barnes, 153 U. S. 456, 14 S. Ct. 849, 38 L. ed. 781; Crescent Min. Co. *v.* Wasatch Min. Co., 151 U. S. 317, 14 S. Ct. 348, 38 L. ed. 177; Holden *v.* Freeman's Sav., etc., Co., 100 U. S. 72, 25 L. ed. 567; Bernhisel *v.* Firman, 22 Wall. 170, 22 L. ed. 766; Young *v.* Godbe, 15 Wall. 562, 21 L. ed. 250; Brewster *v.* Wakefield, 22 How. 118, 16 L. ed. 301; Farmer's L. & T. Co. *v.* Northern Pac. R. Co., 94 Fed. 454; Blewett *v.* Front St. Cable R. Co., 51 Fed. 625, 2 C. C. A. 415; Bain *v.* Peters, 44 Fed. 307.

England.—Arnott *v.* Redfern, 3 Bing. 353, 11 E. C. L. 177, 2 C. & P. 88, 12 E. C. L. 466, 4 L. J. C. P. O. S. 89, 11 Moore C. P. 209; Skerry *v.* Preston, 2 Chit. 245, 18 E. C. L. 614; Paine *v.* Pritchard, 2 C. & P. 558, 12 E. C. L. 731; Knapp *v.* Burnaby, 30 L. J. Ch. 844, 5 L. T. Rep. N. S. 52, 9 Wkly. Rep. 765; Upton *v.* Ferrers, 5 Ves. Jr. 801, 5 Rev. Rep. 167, 31 Eng. Reprint, 866.

Canada.— Peoples Loan, etc., Co. *v.* Grant, 18 Can. Sup. Ct. 262; St. John *v.* Rykert, 10

Interest in such cases is merely the measure of the damages to be allowed,[43] and this measure is a fixed and invariable standard, not subject to be varied because of peculiar or unusual damages sustained in any particular case, as the law contemplates no damages for the detention of money beyond the interest on such money.[44] In some cases it has been held that, even where interest is provided for by contract, in case of breach of the contract to pay the principal sum when due, such interest is recoverable only as damages which have been liquidated by such agreement.[45]

b. Default. Before interest, as damages, will be allowed for the breach of a contract to pay money, there must in general be a default in the payment of the principal debt, but interest is usually allowed from the time of such default.[46]

Can. Sup. Ct. 278; Reg. *v.* Grand Trunk R. Co., 2 Can. Exch. 132; Mennie *v.* Leitch, 8 Ont. 397; Phillips *v.* Hanna, 3 Ont. L. Rep. 558; Secor *v.* Gray, 3 Ont. L. Rep. 34.

Reason stated.— "This rule of allowing interest as damages originated in the desire of the courts to adhere to certain technical rules, and at the same time do justice to the parties. Interest could only be allowed on the ground of an express or an implied contract to pay it. In case therefore of an express written contract covering the subject-matter, but which was silent as to interest, the express contract could not be enlarged by adding a promise to pay interest, and there was no ground or right to imply such a promise. But as it was extremely unjust to allow the defendant to have the use of the money loaned without compensation, interest was allowed, in the nature of damages, for the detention of the money." Hubbard *v.* Callahan, 42 Conn. 524, 530, 19 Am. Rep. 564.

43. *Alabama.*— Cooke *v.* Farinholt, 3 Ala. 384.

California.— Heyman *v.* Landers, 12 Cal. 107; Guy *v.* Franklin, 5 Cal. 416.

Connecticut.— Fisher *v.* Bidwell, 27 Conn. 363.

Illinois.— Hoblit *v.* Bloomington, 71 Ill. App. 204; Place *v.* Dodge, 54 Ill. App. 167.

Indiana.— Thayer *v.* Hedges, 23 Ind. 141; Brown *v.* Maulsby, 17 Ind. 10.

Iowa.— Vennum *v.* Gregory, 21 Iowa 326.

Louisiana.— Compton *v.* Compton, 5 La. Ann. 615; Mann's Succession, 4 La. Ann. 28.

Minnesota.— Mason *v.* Callender, 2 Minn. 350, 72 Am. Dec. 102.

Missouri.— Kamerick *v.* Castleman, 29 Mo. App. 658; Sturgess *v.* Crum, 29 Mo. App. 644.

Nevada.— Cox *v.* Smith, 1 Nev. 161, 90 Am. Dec. 476.

Rhode Island.— Sessions *v.* Richmond, 1 R. I. 298.

Tennessee.— Morrison *v.* Searight, 4 Baxt. 476.

Texas.—Commercial, etc., Bank *v.* Jones, 18 Tex. 811.

Utah.— Perry *v.* Taylor, 1 Utah 63.

Virginia.— Bethel *v.* Salem Imp. Co., 93 Va. 354, 25 S. E. 304, 57 Am. St. Rep. 808, 33 L. R. A. 602.

Washington.— Arnott *v.* Spokane, 6 Wash. 442, 33 Pac. 1063.

United States.— Loudon *v.* Shelby County Taxing Dist., 104 U. S. 771, 26 L. ed. 923.

England.— Fletcher *v.* Tayleur, 17 C. B. 21, 25 L. J. C. P. 65, 84 E. C. L. 21.

Canada.— Mennie *v.* Leitch, 8 Ont. 397; Leduc *v.* Gourdine, 10 Montreal Leg. N. 161.

Interest and damages distinguished.— Interest, being the creature of contract, is recoverable strictly as interest only during the continuation of the contract, and as provided by its terms, before breach, and not after. When the agreement is once violated, the promisee has sustained a wrong for which the law gives him redress by way of damages. And although in many cases the term "interest" has been used indiscriminately to designate the accession to the principal by the terms of the contract, and also the amount allowed in consequence of the breach of the contract, yet the distinction is perfect in law, and the synonymous use of the expression "interest" with the term "damages" has arisen from the fact that whenever the law regulates the amount of interest, that rate becomes the standard of damages on the breach of all money contracts; the result being the same, it is quite natural that the same name should frequently be employed in both cases. Mason *v.* Callender, 2 Minn. 350, 72 Am. Dec. 102.

44. *Illinois.*— Place *v.* Dodge, 54 Ill. App. 167.

Louisiana.— Hutchinson *v.* Sparks, 3 La. Ann. 548.

Minnesota.— Mason *v.* Callender, 2 Minn. 350, 72 Am. Dec. 102.

Tennessee.— Morrison *v.* Searight, 4 Baxt. 476.

Texas.— Good *v.* Caldwell, 11 Tex. Civ. App. 515, 33 S. W. 243.

Virginia.— Bethel *v.* Salem Imp. Co., 93 Va. 354, 25 S. E. 304, 57 Am. St. Rep. 808, 33 L. R. A. 602.

United States.— Loudon *v.* Shelby County Taxing Dist., 104 U. S. 771, 26 L. ed 923. See also Curtis *v.* Innerarity, 6 How. 146, 154, 12 L. ed. 380.

Canada.— Mennie *v.* Leitch, 8 Ont. 397.

Compare Graham *v.* McCoy, 17 Wash. 63, 48 Pac. 780, 49 Pac. 235.

45. Buckingham *v.* Orr, 6 Colo. 587 (rate specified *prima facie* sufficient to establish measure of damages); Reeves *v.* Stipp, 91 Ill. 609; Mason *v.* Callender, 2 Minn. 350, 72 Am. Dec. 102.

46. *Arkansas.*— Rogers *v.* Yarnell, 51 Ark. 198, 10 S. W. 622.

Obviously a party cannot be in default in the payment of a debt until the debt is ascertained in amount, or capable of ascertainment, and hence default, so as to render a party liable for interest, cannot occur unless the sum due is certain.[47] There must also be certainty as to the time of payment, before there can be a default in payment for which interest as damages will be allowed;[48] but the time of payment is sufficiently certain if it is capable of being fixed by implication or by the nature of the transaction.[49]

California.— Cox *v.* McLaughlin, 76 Cal. 60, 18 Pac. 100, 9 Am. St. Rep. 164.

Illinois.— Beach *v.* Peabody, 188 Ill. 75, 58 N. E. 679; North, etc., Rolling Stock Co. *v.* Nowland, 73 Ill. App. 689.

Kentucky.— Henderson Cotton Mfg. Co. *v.* Lowell Macb. Shops, 86 Ky. 668, 7 S. W. 142, 9 Ky. L. Rep. 831.

Louisiana.— Burns *v.* Thompson, 39 La. Ann. 377, 1 So. 913; Fogle *v.* Delmas, 11 La. Ann. 200; Faucette *v.* New Orleans, 11 La. Ann. 199; State *v.* Breed, 10 La. Ann. 491; Reid *v.* Duncan, 1 La. Ann. 265.

Maine.— Gay *v.* Gardiner, 54 Me. 477.

Massachusetts.— Hubbard *v.* Charlestown Branch R. Co., 11 Metc. 124; Dodge *v.* Perkins, 9 Pick. 368.

Michigan.— Fredenburg *v.* Turner, 37 Mich. 402; Beardslee *v.* Horton, 3 Mich. 560.

Missouri.— Shinn *v.* Wooderson, 95 Mo. App. 6, 75 S. W. 687.

New Jersey.— North Hudson R. Co. *v.* Booraem, 28 N. J. Eq. 593.

New York.— Ledyard *v.* Bull, 119 N. Y. 62, 23 N. E. 444; Van Rensselaer *v.* Jewett, 2 N. Y. 135, 51 Am. Dec. 275; Peck *v.* Granite State Provident Assoc., 21 Misc. 84, 46 N. Y. Suppl. 1042; Hanley *v.* Crowe, 3 N. Y. Suppl. 154; Still *v.* Hall, 20 Wend. 51; U. S. Bank *v.* Chapin, 9 Wend. 471.

North Carolina.— Hunt *v.* Jucks, 2 N. C. 173, 1 Am. Dec. 555; State *v.* Blount, 2 N. C. 4.

Pennsylvania.— Wormley's Estate, 137 Pa. St. 101, 20 Atl. 621; Richards *v.* Citizens' Natural Gas Co., 130 Pa. St. 37, 18 Atl. 600; *In re* Sugar Notch Borough, 10 Kulp 429.

Rhode Island.— Durfee *v.* O'Brien, 16 R. I. 213, 14 Atl. 857; Spencer *v.* Pierce, 5 R. I. 63.

Vermont.— Brainerd *v.* Champlain Transp. Co., 29 Vt. 154.

Washington.— Cloud *v.* Rivord, 6 Wash. 555, 34 Pac. 136.

United States.— Aurora *v.* West, 7 Wall. 82, 19 L. ed. 42; Curtis *v.* Innerarity, 6 How. 146, 12 L. ed. 380; Bowman *v.* Wilson, 12 Fed. 864, 2 McCrary 394.

See 29 Cent. Dig. tit. "Interest," § 25.

Under the Louisiana act of 1855 default is unnecessary to enable the holder of an accepted draft to recover interest thereon from the time it became due. Collins *v.* Sabatier, 19 La. Ann. 299.

47. *California.*— Cox *v.* McLaughlin, 76 Cal. 60, 18 Pac. 100, 9 Am. St. Rep. 164.

Delaware.— Black *v.* Reybold, 3 Harr. 528.

Illinois.— Ditch *v.* Vollhardt, 82 Ill. 134.

Kentucky.— Adams Express Co. *v.* Milton, 11 Bush 49; Burnham *v.* Best, 10 B. Mon. 227.

Massachusetts.— Needham *v.* Wellesley, 139 Mass. 372, 31 N. E. 732.

New York.— Gray *v.* New Jersey Cent. R. Co., 89 Hun 477, 35 N. Y. Suppl. 378; Holmes *v.* Rankin, 17 Barb. 454; Still *v.* Hall, 20 Wend. 51.

Pennsylvania.— Richards *v.* Citizens' Natural Gas Co., 130 Pa. St. 37, 18 Atl. 600; Kelsey *v.* Murphy, 30 Pa. St. 340; *In re* Sugar Notch Borough, 10 Kulp 429.

Rhode Island.— Durfee *v.* O'Brien, 16 R. I. 213, 14 Atl. 857; Spencer *v.* Pierce, 5 R. I. 63.

South Carolina.— Greer *v.* Latimer, 47 S. C. 176, 25 S. E. 136.

Virginia.— Waggoner *v.* Gray, 2 Hen. & M. 603.

England.— Caledonian R. Co. *v.* Carmichael, L. R. 2 H. L. Sc. 56.

See 29 Cent. Dig. tit. "Interest," § 25; and *infra*, III, D, 10, a.

Failure to liquidate a debt in accordance with his duty may, however, constitute a default on the part of the debtor, so as to render him liable for interest on the sum ultimately found due (Scroggs *v.* Cunningham, 81 Ill. 110; Smith *v.* Velie, 60 N. Y. 106; McMahon *v.* New York, etc., R. Co., 20 N. Y. 463. And see Ansley *v.* Peters, 6 N. Brunsw. 339), but a mere loose mode of dealing will not constitute such default as will charge the party guilty thereof with interest (*Re* Kirkpatrick, 10 Ont. Pr. 4). So also a failure on the part of the creditor to liquidate a debt will relieve the debtor from liability to pay interest thereon, if he be ready and willing to meet the demand against him. Caledonian R. Co. *v.* Carmichael, L. R. 2 H. L. Sc. 56.

48. *New York.*— Still *v.* Hall, 20 Wend. 51.

Pennsylvania.— Richards *v.* Citizens' Natural Gas Co., 130 Pa. St. 37, 18 Atl. 600; Kelsey *v.* Murphy, 30 Pa. St. 340; *In re* Sugar Notch Borough, 10 Kulp 429. See Minard *v.* Beans, 64 Pa. St. 411.

South Carolina.— See State Bank *v.* Bowie, 3 Strobh. 439.

Washington.— Western Mill, etc., Co. *v.* Blanchard, 1 Wash. 230, 23 Pac. 839.

England.— Calton *v.* Bragg, 15 East 223, 13 Rev. Rep. 451.

See 29 Cent. Dig. tit. "Interest," § 25.

49. *Connecticut.*— Selleck *v.* French, 1 Conn. 32, 6 Am. Dec. 185.

Kansas.— Wyandotte, etc., Gas Co. *v.* Schliefer, 22 Kan. 468.

South Carolina.— Greer *v.* Latimer, 47 S. C. 176, 25 S. E. 136.

Vermont.— Spencer *v.* Woodbridge, 38 Vt. 492.

Wisconsin.— Marsh *v.* Fraser, 27 Wis. 596.

c. Unreasonable and Vexatious Delay. Where there has been an unreasonable and vexatious delay in the payment of a debt, although such debt is not payable at any fixed date, if it appears to be payable within a reasonable time, interest will be allowed as damages for such delay.[50] In order to bring a case within this principle there must be something more than mere delay in payment,[51] and the

England.— Hellier *v.* Franklin, 1 Stark. 291, 2 E. C. L. 116.

See 29 Cent. Dig. tit. "Interest," § 25.

50. *Arkansas.*— Watkins *v.* Wassell, 20 Ark. 410.

California.— Sanderson's Estate, 74 Cal. 199, 15 Pac. 753; Pfister *v.* Wade, 69 Cal. 133, 10 Pac. 369.

Colorado.— Filmore *v.* Reithman, 6 Colo. 120; Hawley *v.* Barker, 5 Colo. 118; Keys *v.* Morrison, 3 Colo. App. 441, 34 Pac. 259.

Connecticut.— Selleck *v.* French, 1 Conn. 32, 6 Am. Dec. 185. See also Loomis *v.* Gillett, 75 Conn. 298, 53 Atl. 581.

Illinois.— Imperial Hotel Co. *v.* H. B. Claflin Co., 175 Ill. 119, 51 N. E. 610; Franklin County *v.* Layman, 145 Ill. 138, 33 N. E. 1094; West Chicago Alcohol Works *v.* Sheer, 104 Ill. 586; Jassoy *v.* Horn, 64 Ill. 379; Davis *v.* Kenaga, 51 Ill. 170; Myers *v.* Walker, 24 Ill. 133; Aldrich *v.* Dunham, 16 Ill. 403; McCormick *v.* Elston, 16 Ill. 204; Sammis *v.* Clark, 13 Ill. 544; Pieser *v.* Minkota Milling Co., 94 Ill. App. 595; Carlin *v.* Brown, 80 Ill. App. 541; Hoblit *v.* Bloomington, 71 Ill. App. 204; Phillips *v.* Rehm, 64 Ill. App. 477; Patrick *v.* Perryman, 52 Ill. App. 514; Springfield First Nat. Bank *v.* Coleman, 11 Ill. App. 508.

Indiana.— Rend *v.* Boord, 75 Ind. 307; Killian *v.* Eigenmann, 57 Ind. 480; Rogers *v.* West, 9 Ind. 400; McKinney *v.* Springer, 3 Ind. 59, 54 Am. Dec. 470.

Massachusetts.— See Barnard *v.* Bartholomew, 22 Pick. 291.

Michigan.— Youmans *v.* Heartt, 34 Mich. 397.

Missouri.— Risley *v.* Andrew County, 46 Mo. 382; McLean *v.* Thorp, 4 Mo. 256.

Montana.— Nixon *v.* Cutting Fruit Packing Co., 17 Mont. 90, 42 Pac. 108; Jefferson County *v.* Lineberger, 3 Mont. 231, 35 Am. Rep. 462; Ruff *v.* Rader, 2 Mont. 211; Isaacs *v.* McAndrew, 1 Mont. 437.

Nebraska.— Mullally *v.* Dingman, 62 Nebr. 702, 87 N. W. 543.

New Jersey.— Burlington County *v.* Fennimore, 1 N. J. L. 190.

Pennsylvania.— McQuesney *v.* Hiester, 33 Pa. St. 435; Christie *v.* Woods, 2 Yeates 213; Fritz's Estate, 5 Pa. Co. Ct. 566.

South Carolina.— Bulow *v.* Goddard, 1 Nott & M. 45, 9 Am. Dec. 663.

Vermont.— Carpenter *v.* Welch, 40 Vt. 251; Bates *v.* Starr, 2 Vt. 536, 21 Am. Dec. 568.

United States.— Chicago *v.* Tebbetts, 104 U. S. 120, 26 L. ed. 655; Young *v.* Godbe, 15 Wall. 562, 21 L. ed. 250; Aurora *v.* West, 7 Wall. 82, 19 L. ed. 42; Thomas *v.* Peoria, etc., R. Co., 36 Fed. 808.

England.— Meredith *v.* Bowen, 1 Keen 270, 48 Eng. Reprint 310.

See 29 Cent. Dig. tit. "Interest," § 26.

Excessive charges on account of slow payment.— Where excessive prices are charged for work, on account of slow and precarious payment, no interest ought to be allowed, for interest is only allowed to supply the want of prompt payment. Marlborough *v.* Strong, 4 Bro. P. C. 539, 2 Eng. Reprint 367.

A memorandum check for borrowed money, although such as it is the custom of tradesmen to take as convenient means for short settlements, and on which it is not usual to charge interest, draws interest where there is an unusual or unreasonable delay in payment. Glover *v.* Graeser, 10 Rich. Eq. (S. C.) 441.

Appointment of receiver for debtor's property.— If a creditor has been delayed in the recovery of his debt by the procurement by another creditor of the appointment of a receiver over the debtor's property such delay will not give him a right to interest. Stirling *v.* Wynne, 1 Jones Exch. 51.

51. *Colorado.*— Corson *v.* Neatheny, 9 Colo. 212, 11 Pac. 82; Hawley *v.* Barker, 5 Colo. 118; Keys *v.* Morrison, 3 Colo. App. 441, 34 Pac. 259.

Illinois.— Mueller *v.* Northwestern University, 195 Ill. 236, 63 N. E. 110, 88 Am. St. Rep. 194 [*affirming* 95 Ill. App. 258]; Franklin County *v.* Layman, 145 Ill. 138, 33 N. E. 1094; Devine *v.* Edwards, 101 Ill. 138; Aldrich *v.* Dunham, 16 Ill. 403; Hitt *v.* Allen, 13 Ill. 592; Sammis *v.* Clark, 13 Ill. 544; Pieser *v.* Minkota Milling Co., 94 Ill. App. 595; Levinson *v.* Sands, 74 Ill. App. 273; Hoblit *v.* Bloomington, 71 Ill. App. 204.

Montana.— Nixon *v.* Cutting Fruit Packing Co., 17 Mont. 90, 42 Pac. 108.

United States.— Thomas *v.* Peoria, etc., R. Co., 36 Fed. 808.

England.— Scott *v.* Sandeman, 1 Macq. H. L. 293.

See 29 Cent. Dig. tit. "Interest," § 27.

Delay must be both unreasonable and vexatious. West Chicago Alcohol Works *v.* Sheer, 104 Ill. 586; Devine *v.* Edwards, 101 Ill. 138; Sammis *v.* Clark, 13 Ill. 544. And see Pieser *v.* Minkota Milling Co., 94 Ill. App. 595.

Refusal to pay in good faith.— The Illinois statute allowing interest on money "withheld by an unreasonable and vexatious delay of payment" does not apply where it is not shown that the refusal to pay was not made in good faith, with an honest belief that no liability existed. Franklin County *v.* Layman, 145 Ill. 138, 33 N. E. 1094. See also Moshier *v.* Shear, 15 Ill. App. 342.

Accrual of right of action.— Money is unreasonably and vexatiously delayed from the time plaintiff's right of action accrues. Benton *v.* Craig, 2 Mo. 198.

debtor must have thrown obstacles in the way of collection, or by some circumvention, contrivance, or management must have induced the creditor to prolong the time of proceeding to recover payment longer than he otherwise would have done.[52] The mere defense of an action at law will not render a debtor liable for interest, for that is a right the exercise of which cannot be construed into an unreasonable or vexatious delay.[53] In determining what constitutes unreasonable and vexatious delay in the payment of a debt each case must necessarily depend to some extent upon its own circumstances.[54]

d. Compound Interest.[55] As a general rule compound interest or interest upon interest is not allowable as damages in the absence of any agreement to pay it.[56]

2. Breach of Contract Other Than to Pay Money. While interest on damages for a breach of contract other than to pay money has been frequently denied on the ground that such demand is unliquidated,[57] interest on such damages has been allowed in a number of cases.[58]

52. Hitt *v.* Allen, 13 Ill. 592; Sammis *v.* Clark, 13 Ill. 544.

53. Imperial Hotel Co. *v.* H. B. Claflin Co., 175 Ill. 119, 51 N. E. 610; Aldrich *v.* Dunham, 16 Ill. 403; Seymour *v.* O. S. Richardson Fueling Co., 103 Ill. App. 625; Pieser *v.* Minkota Milling Co., 94 Ill. App. 595; Hoblit *v.* Bloomington, 71 Ill. App. 204; American Surety Co. *v.* Lawrenceville Cement Co., 110 Fed. 717; Royal Inst. for Advancement of Learning *v.* Barsalou, 11 Quebec Super. Ct. 345.

Interest for delay of debt by audita querela not recoverable on bond.— Smith *v.* Canfield, 1 Root (Conn.) 372.

54. Watkins *v.* Wassell, 20 Ark. 410.

Illustrations of unreasonable and vexatious delay see Daniels *v.* Osborn, 75 Ill. 615; Newlan *v.* Shafer, 38 Ill. 379; Mullally *v.* Dingman, 62 Nebr. 702, 87 N. W. 543; Blair's Estate, 178 Pa. St. 582, 36 Atl. 179; Chicago *v.* Tebbetts, 104 U. S. 120, 26 L. ed. 655; Thomas *v.* Peoria, etc., R. Co., 36 Fed. 808.

Illustrations of delay held not unreasonable or vexatious see McCormick *v.* Elston, 16 Ill. 204; Palmer *v.* Bennett, 96 Ill. App. 281; Hoblit *v.* Bloomington, 71 Ill. App. 204; Patrick *v.* Perryman, 52 Ill. App. 514; State *v.* Porter, 86 Ind. 404; Cobbey *v.* Knapp, 28 Nebr. 158, 44 N. W. 104; Houghteling *v.* Walker, 100 Fed. 253.

Refusal to reassess damages.— Where a property-owner in whose favor an assessment of damages has been made refuses to accept the assessment on the ground of its inadequacy, and applies to a board of supervisors for a reassessment, which that board refuses to make, on the ground that the statute authorizing the reassessment is unconstitutional, such owner is entitled to interest during the delay caused by such refusal, although he might have applied to another board of supervisors, which he failed to do. Clark *v.* Miller, 54 N. Y. 528.

55. **Interest upon unpaid interest coupons or instalments of interest** see *infra*, III, D, 8.

Charging fiduciaries with compound interest see Executors and Administrators; Guardian and Ward; Trusts.

56. *Illinois.*— Thayer *v.* Wilmington Star Min. Co., 105 Ill. 540; Barker *v.* Chicago International Bank, 80 Ill. 96.

Indiana.— Niles *v.* Sinking Fund Com'rs, 8 Blackf. 158.

Iowa.— Aspinwall *v.* Blake, 25 Iowa 319.

Massachusetts.— Ferry *v.* Ferry, 2 Cush. 92; Henry *v.* Flagg, 13 Metc. 64; Von Hemert *v.* Porter, 11 Metc. 210; Wilcox *v.* Howland, 23 Pick. 167; Barrell *v.* Joy, 16 Mass. 221; Hastings *v.* Wiswall, 8 Mass. 455.

Missouri.— St. Louis Gas-Light Co. *v.* St. Louis, 11 Mo. App. 55 [*affirmed* in 84 Mo. 202].

New York.— Forman *v.* Forman, 17 How. Pr. 255; Toll *v.* Hiller, 11 Paige 228; Van Benschooten *v.* Lawson, 6 Johns. Ch. 313, 10 Am. Dec. 333; Connecticut *v.* Jackson, 1 Johns. Ch. 13, 7 Am. Dec. 471. See also Jones *v.* Ennis, 18 Hun 452.

North Carolina.— Kennon *v.* Dickins, 1 N. C. 435, 2 Am. Dec. 642.

Pennsylvania.— Stokely *v.* Thompson, 34 Pa. St. 210; Sparks *v.* Garrigues, 1 Binn. 152.

Virginia.— Pindall *v.* Marietta Bank, 10 Leigh 481.

57. See *infra*, III, D, 10, a.

Upon a breach of contract to deliver a chattel already paid for, the purchaser must rescind the contract and sue for the purchase-price in order to recover interest. If he sue for damages for the breach no interest will be allowed. Dobenspeck *v.* Armel, 11 Ind. 31; Harvey *v.* Myer, 9 Ind. 391.

58. *Florida.*— Sullivan *v.* McMillan, 37 Fla. 134, 19 So. 340, 53 Am. St. Rep. 239.

Illinois.— Murray *v.* Doud, 167 Ill. 368, 47 N. E. 717, 59 Am. St. Rep. 297; Driggers *v.* Bell, 94 Ill. 223.

Maine.— McKenney *v.* Haines, 63 Me. 74.

Maryland.— Andrews *v.* Clark, 72 Md. 396, 20 Atl. 429.

Massachusetts.— Thomas *v.* Wells, 140 Mass. 517, 5 N. E. 485.

Minnesota.— Brown *v.* Doyle, 69 Minn. 543, 72 N. W. 814.

Mississippi.— Bickell *v.* Colton, 41 Miss. 368.

Missouri.— Goodman *v.* Missouri, etc., R. Co., 71 Mo. App. 460.

3. Damages For Torts — a. Torts to the Person. The general rule against the allowance of interest on unascertained demands is followed in cases where damages are sought for a tort to the person, and interest on such damages is usually denied;[59] but it has been provided by statute in some of the states that interest may be recovered on the damages assessed in such cases of tort.[60]

b. Torts to Property. While it has been laid down in many cases that interest will not be allowed on damages recovered for torts to property,[61] unless defendant has derived some benefit from his tort,[62] or has been guilty of gross

New Hampshire.— Pinkerton *v.* Manchester, etc., R. Co., 42 N. H. 424.

New York.— Dana *v.* Fiedler, 12 N. Y. 40, 62 Am. Dec. 130; Livingston *v.* Miller, 11 N. Y 80; Van Rensselaer *v.* Jewett, 2 N. Y. 135, 51 Am. Dec. 275; Fishell *v.* Winans, 38 Barb. 228; Hamilton *v.* Ganyard, 34 Barb. 204; Clark *v.* Dales, 20 Barb. 42; Dox *v.* Dey, 3 Wend. 356.

South Carolina.— Ryan *v.* Baldrick, 3 McCord 498.

Texas.— Arlington First Nat. Bank *v.* Lynch, 6 Tex. Civ. App. 590, 25 S. W. 1042.

Vermont.— Newell *v.* Smith, 49 Vt. 255.

Virginia.— Enders *v.* Board of Public Works, 1 Gratt. 364.

Wyoming.— Kuhn *v.* McKay, 7 Wyo. 42, 49 Pac. 473, 51 Pac. 205.

United States.— Barrow *v.* Reab, 9 How. 366, 13 L. ed. 177.

59. *Georgia.*— Western, etc., R. Co. *v.* Young, 81 Ga. 397, 7 S. E. 912, 12 Am. St. Rep. 320; Ratteree *v.* Chapman, 79 Ga. 574, 4 S. E. 684; Central R. Co. *v.* Sears, 66 Ga. 499. But see Georgia R., etc., Co. *v.* Garr, 57 Ga. 277, 24 Am. Rep. 492, where interest was allowed as part of the damages recovered for the death of a person caused by the tort of the railroad company.

Maine.— Sargent *v.* Hampden, 38 Me. 581.

Pennsylvania.— Pittshurgh Southern R. Co. *v.* Taylor, 104 Pa. St. 306, 49 Am. Rep. 580.

Tennessee.— Louisville, etc., R. Co. *v.* Wallace, 91 Tenn. 35, 17 S. W. 882, 14 L. R. A. 548.

Texas.— Texas, etc., R. Co. *v.* Carr, 91 Tex. 332, 43 S. W. 18.

Utah.— Nichols *v.* Union Pac. R. Co., 7 Utah 510, 27 Pac. 693.

United States.—Burrows *v.* Lownsdale, 133 Fed. 250, 66 C. C. A. 650.

Lapse of time since the injury is proper to be considered in estimating the damages to be allowed. Smith *v.* East Mauch Chunk, 3 Pa. Super. Ct. 495.

60. Salter *v.* Utica, etc., R. Co. 86 N. Y. 401; Erwin *v.* Neversink Steamboat Co., 23 Hun (N. Y.) 578; Ell *v.* Northern Pac. R. Co., 1 N. D. 336, 48 N. W. 222, 26 Am. St. Rep. 621, 12 L. R. A. 97.

Such a statute is not unconstitutional. Cornwall *v.* Mills, 44 N. Y. Super. Ct. 45.

61. *Colorado.*— Denver, etc., R. Co. *v.* Moynahan, 8 Colo. 56, 5 Pac. 811; Denver, etc., R. Co. *v.* Conway, 8 Colo. 1, 5 Pac. 142, 54 Am. Rep. 537.

Illinois.— Chicago *v.* Allcock, 86 Ill. 384; Toledo, etc., R. Co. *v.* Johnston, 74 Ill. 83 (characterizing as mere *dictum* the statement to the contrary in Chicago, etc., R. Co. *v.* Shultz, 55 Ill. 421); Illinois Cent. R. Co. *v.* Cobb, 72 Ill. 148; Chicago, etc., R. Co. *v.* Davis, 54 Ill. App. 130; Kelderhouse *v.* Saveland, 1 Ill. App. 65.

Kentucky.— Ormsby *v.* Johnson, 1 B. Mon. 80.

Louisiana.— Robertson *v.* Green, 18 La. Ann. 28; Wright *v.* Abbott, 6 La. Ann. 569; Green *v.* Garcia, 3 La. Ann. 702; Goldenbow *v.* Wright, 13 La. 371. *Compare* Holmes *v.* Barclay, 4 La. Ann. 63.

Missouri.— Gerst *v.* St. Louis, 185 Mo. 191, 84 S. W. 34, 105 Am. St. Rep. 580; Kimes *v.* St. Louis, etc., R. Co., 85 Mo. 611; Wade *v.* Missouri Pac. R. Co., 78 Mo. 362; De Steiger *v.* Hannibal, etc., R. Co., 73 Mo. 33; Meyer *v.* Atlantic, etc., R. Co., 64 Mo. 542; Kenney *v.* Hannibal, etc., R. Co., 63 Mo. 99; Sonnenfeld Millinery Co. *v.* People's R. Co., 59 Mo. App. 668; Flannery *v.* St. Louis, etc., R. Co., 44 Mo. App. 396; Damhorst *v.* Missouri Pac. R. Co., 32 Mo. App. 350; Brink *v.* Kansas City, etc., R. Co., 17 Mo. App. 177; Fisher *v.* New Orleans Anchor Line, 15 Mo. App. 577.

Montana.— Palmer *v.* Murray, 8 Mont. 312, 21 Pac. 126; Randall *v.* Greenhood, 3 Mont. 506.

Virginia.— Lewis *v.* Arnold, 13 Gratt. 454; Hepburn *v.* Dundas, 13 Gratt. 219; Brugh *v.* Shanks, 5 Leigh 598.

Canada.— Leak *v.* Toronto, 3 Can. Sup. Ct. 321; Upper Canada Bank *v.* Bradshaw, 17 L. C. Rep. 273.

See 29 Cent. Dig. tit. "Interest," § 36.

Where property has been wrongfully taken or converted into money and an action of trespass or trover may be maintained interest may properly be recovered by virtue of the statute authorizing interest where there has been an unreasonable and vexatious delay of payment. Tucker *v.* Parks, 7 Colo. 62, 1 Pac. 427, 7 Colo. 298, 3 Pac. 486; Hanauer *v.* Bartels, 2 Colo. 514; Machette *v.* Wanless, 2 Colo. 169; Chicago *v.* Allcock, 86 Ill. 384; Northern Transp. Co. *v.* Sellick, 52 Ill. 249; Chicago, etc., R. Co. *v.* Ames, 40 Ill. 249; Bradley *v.* Geiselman, 22 Ill. 494 [*followed* in Chicago, etc., R. Co. *v.* Schultz, 55 Ill. 421]. See also Illinois Cent. R. Co. *v.* Cobb, 72 Ill. 148, 153, where it is said: "There can be no difference between the delay of payment of a moneyed demand and one where property has been wrongfully taken, or taken and converted into money or its equivalent — the two rest upon the same principle."

62. Atchison, etc., R. Co. *v.* Ayers, 56 Kan. 176, 42 Pac. 722; Atkinson *v.* Atlantic,

negligence,[63] the general rule, supported by the great weight of authority, is that in cases of torts to property interest on the damages may be allowed,[64] as a part

etc., R. Co., 63 Mo. 367; Marshall *v.* Schricker, 63 Mo. 308; State *v.* Harrington, 44 Mo. App. 297; Eagan *v.* Missouri Pac. R. Co., 6 Mo. App. 594; Weir *v.* Allegheny County, 95 Pa. St. 413. See also New York, etc., R. Co. *v.* Estill, 147 U. S. 591, 13 S. Ct. 444, 37 L. ed. 292.

63. Dunn *v.* Hannibal, etc., R. Co., 68 Mo. 268; Gray *v.* Missouri River Packet Co., 64 Mo. 47. See also Edwards *v.* Beebe, 48 Barb. (N. Y.) 106.

Accident without negligence.— Where goods are lost by a common carrier by accident, and without any negligence on its part, interest is not to be computed on the value of the goods, even from the commencement of the suit. Lakeman *v.* Grinnell, 5 Bosw. (N. Y.) 625.

64. *Alabama.*— Georgia Pac. R. Co. *v.* Fullerton, 79 Ala. 298; Alabama Great Southern R. Co. *v.* McAlpine, 75 Ala. 113; Borden *v.* Bradshaw, 68 Ala. 362; Fail *v.* Presley, 50 Ala. 342. *Compare* Glidden *v.* Street, 68 Ala. 600; Murphy *v.* Andrews, 13 Ala. 708.

Arkansas.—St. Louis, etc., R. Co. *v.* Phelps, 46 Ark. 485; St. Louis, etc., R. Co. *v.* Mudford, 44 Ark. 439.

California.— Schmidt *v.* Nunan, 63 Cal. 371; Hamer *v.* Hathaway, 33 Cal. 117.

Connecticut.— Healy *v.* Fallon, 69 Conn. 228, 37 Atl. 495; Regan *v.* New York, etc., R. Co., 60 Conn. 124, 22 Atl. 503, 25 Am. St. Rep. 306; Parrott *v.* Housatonic R. Co., 47 Conn. 575; Oviatt *v.* Pond, 29 Conn. 479.

District of Columbia.— Moore *v.* Langdon, 6 Mackey 6; Hetzel *v.* Baltimore, etc., R. Co., 6 Mackey 1.

Florida.— Jacksonville, etc., R. Co. *v.* Peninsular Land, etc., Co., 27 Fla. 1, 157, 9 So. 661, 17 L. R. A. 33, 65; Skinner *v.* Pinney, 19 Fla. 42, 45 Am. Rep. 1.

Georgia.— Gress Lumber Co. *v.* Coody, 104 Ga. 611, 30 S. E. 810; East Tennessee, etc., R. Co. *v.* Johnson, 85 Ga. 497, 11 S. E. 809; Western, etc., R. Co. *v.* McCauley, 68 Ga. 818; Macon, etc., R. Co. *v.* Meador, 67 Ga. 672; Brown *v.* South Western R. Co., 36 Ga. 377; Collier *v.* Lyons, 18 Ga. 648.

Indiana.— Pittsburgh, etc., R. Co. *v.* Swinney, 97 Ind. 586; Wabash R. Co. *v.* Williamson, 3 Ind. App. 190, 29 N. E. 455; Kavanaugh *v.* Taylor, 2 Ind. App. 502, 28 N. E. 553; Chicago, etc., R. Co. *v.* Barnes, 2 Ind. App. 213, 28 N. E. 328.

Iowa.— Burdick *v.* Chicago, etc., R. Co., 87 Iowa 384, 54 N. W. 439; Johnson *v.* Chicago, etc., R. Co., 77 Iowa 666, 42 N. W. 512; Daniels *v.* Chicago, etc., R. Co., 41 Iowa 52; Mote *v.* Chicago, etc., R. Co., 27 Iowa 22, 1 Am. Rep. 212.

Maine.— Brannin *v.* Johnson, 19 Me. 361.

Massachusetts.— Frazer *v.* Bigelow Carpet Co., 141 Mass. 126, 4 N. E. 620.

Michigan.— Kendrick *v.* Towle, 60 Mich. 363, 27 N. W. 567, 1 Am. St. Rep. 526; Cook *v.* Perry, 43 Mich. 623, 5 N. W. 1054; Snow *v.* Nowlin, 43 Mich. 383, 5 N. W. 443.

Minnesota.— Varco *v.* Chicago, etc., R. Co., 30 Minn. 18, 13 N. W. 921; Cowley *v.* Davidson, 13 Minn. 92.

Mississippi.— Illinois Cent. R. Co. *v.* Haynes, 64 Miss. 604, 1 So. 765.

Nebraska.— Union Pac. R. Co. *v.* Ray, 46 Nebr. 750, 65 N. W. 773; Fremont, etc., R. Co. *v.* Marley, 25 Nebr. 138, 40 N. W. 948, 13 Am. St. Rep. 482.

New Hampshire.— Adams *v.* Blodgett, 47 N. H. 219, 90 Am. Dec. 569; Fenton *v.* Fuller, 35 N. H. 226.

New York.— Wilson *v.* Troy, 135 N. Y. 96, 32 N. E. 44, 31 Am. St. Rep. 817, 18 L. R. A. 449; Mairs *v.* Manhattan Real Estate Assoc., 89 N. Y. 498; Mailler *v.* Express Propeller Line, 61 N. Y. 312; Schwerin *v.* McKie, 51 N. Y. 180, 10 Am. Rep. 581; McCormick *v.* Pennsylvania Cent. R. Co., 49 N. Y. 303; Parrott *v.* Knickerbocker Ice Co., 46 N. Y. 361; Andrews *v.* Durant, 18 N. Y. 496; Walrath *v.* Redfield, 18 N. Y. 457; Jamieson *v.* New York, etc., R. Co., 11 N. Y. App. Div. 50, 42 N. Y. Suppl. 915; Brush *v.* Long Island R. Co., 10 N. Y. App. Div. 535, 42 N. Y. Suppl. 103; Hodge *v.* New York Cent., etc., R. Co., 27 Hun 394; Lackin *v.* Delaware, etc., Canal Co., 22 Hun 309; Ludlow *v.* Yonkers, 43 Barb. 493; Sherman *v.* Wells, 28 Barb. 403; Reiss *v.* New York Steam Co., 59 N. Y. Super. Ct. 57, 12 N. Y. Suppl. 557; Greer *v.* New York, 3 Rob. 406; Wehle *v.* Butler, 43 How. Pr. 5; Stevens *v.* Low, 2 Hill 132; Hyde *v.* Stone, 7 Wend. 354, 22 Am. Dec. 582; Beals *v.* Guernsey, 8 Johns. 446, 5 Am. Dec. 348. *Compare* Sayre *v.* State, 123 N. Y. 291, 25 N. E. 163; Ryckman *v.* Parkins, 5 Paige 543.

North Carolina.— Patapsco Guano Co. *v.* Mahee, 86 N. C. 350; Rippey *v.* Miller, 46 N. C. 479, 63 Am. Dec. 177.

Ohio.— Lawrence R. Co. *v.* Cobb, 35 Ohio St. 94; Erie R. Co. *v.* Lockwood, 28 Ohio St. 358; Hogg *v.* Zanesville Canal, etc., Co., 5 Ohio 410; Toledo *v.* Grasser, 12 Ohio Cir. Ct. 520, 6 Ohio Cir. Dec. 782.

Pennsylvania.— Allegheny *v.* Campbell, 107 Pa. St. 530, 52 Am. Rep. 478; Bare *v.* Hoffman, 79 Pa. St. 71, 21 Am. Rep. 42; Delaware, etc., R. Co. *v.* Burson, 61 Pa. St. 369; Philadelphia, etc., R. Co. *v.* Gesner, 20 Pa. St. 240.

Texas.— Gulf, etc., R. Co. *v.* McCarty, 82 Tex. 608, 18 S. W. 716; Gulf, etc., R. Co. *v.* Holliday, 65 Tex. 512; Texas, etc., R. Co. *v.* Tankersley, 63 Tex. 57; Houston, etc., R. Co. *v.* Jackson, 62 Tex. 209; Grimes *v.* Watkins, 59 Tex. 133; Sabine, etc., R. Co. *v.* Joachimi, 58 Tex. 456; Rio Grande R. Co. *v.* Cross, 5 Tex. Civ. App. 454, 23 S. W. 529; International, etc., R. Co. *v.* Dimmit County Pasture Co., 5 Tex. Civ. App. 186, 23 S. W. 754.

Utah.— Rhemke *v.* Clinton, 2 Utah 230.

Vermont.— Blumenthal *v.* Brainerd, 38 Vt. 402, 91 Am. Dec. 350.

Wisconsin.— Wadleigh *v.* Buckingham, 80 Wis. 230, 49 N. W. 745; Arpin *v.* Burch, 68

of the damages and as an approximately uniform measure of compensation.[65] In many cases it is held that interest *eo nomine* is not recoverable on damages assessed for torts to property,[66] but the lapse of time since the tort was committed is proper to be considered in estimating the damages to be allowed.[67] Where one

Wis. 619, 32 N. W. 681; Graham *v.* Chicago, etc., R. Co., 53 Wis. 473, 10 N. W. 609; Dean *v.* Chicago, etc., R. Co., 43 Wis. 305; Whitney *v.* Chicago, etc., R. Co., 27 Wis. 327.

United States.— Mobile, etc., R. Co. *v.* Jurey, 111 U. S. 584, 4 S. Ct. 566, 28 L. ed. 527; National Steam Nav. Co. *v.* Dyer, 105 U. S. 24, 26 L. ed. 1001; Western Mfg. Co. *v.* The Guiding Star, 37 Fed. 641; The Rabboni, 53 Fed. 952; The Nith, 36 Fed. 86, 13 Sawy. 368; Bazin *v.* Liverpool, etc., Steamship Co., 2 Fed. Cas. No. 1,152, 3 Wall. Jr. 229; The Gold Hunter, 10 Fed. Cas. No. 5,513, Blatchf. & H. 300; King *v.* Shepherd, 14 Fed. Cas. No. 7,804, 3 Story 349; The Morning Star, 17 Fed. Cas. No. 9,817, 4 Biss. 62; Woodward *v.* Illinois Cent. R. Co., 30 Fed. Cas. No. 18,006, 1 Biss. 403. See also The M. Kalbfleisch, 59 Fed. 198.

England.— Dreyfus *v.* Peruvian Guano Co., 42 Ch. D. 66, 58 L. J. Ch. 758, 61 L. T. Rep. N. S. 180; British Columbia Lumber, etc., Co. *v.* Nettleship, L. R. 3 C. P. 499, 37 L. J. C. P. 235, 18 L. T. Rep. N. S. 604, 16 Wkly. Rep. 1046.

Where the damages are in the nature of a penalty fixed by statute without any reference to fault or neglect on the part of defendant, interest should not be allowed. Jean *v.* Sandiford, 39 Ala. 317.

Where exemplary or punitive damages are awarded interest should not be allowed thereon.

Georgia.— Ratteree *v.* Chapman, 79 Ga. 574, 4 S. E. 684.

Indiana.— Wabash R. Co. *v.* Williamson, 3 Ind. App. 190, 29 N. E. 455; Chicago, etc., R. Co. *v.* Barnes, 2 Ind. App. 213, 28 N. E. 328.

Maine.— Skowhegan Bank *v.* Cutler, 52 Me. 509.

Minnesota.— See Varco *v.* Chicago, etc., R. Co., 30 Minn. 18, 13 N. W. 921.

Missouri.— Wade *v.* Missouri Pac. R. Co., 78 Mo. 362.

Pennsylvania.— McCloskey *v.* Powell, 8 Pa. Co. Ct. 22.

See 29 Cent. Dig. tit. "Interest," § 36.

Where the amount of the recovery is limited by statute interest will not be allowed on such amount. Atchison, etc., R. Co. *v.* Gabbert, 34 Kan. 132, 8 Pac. 218.

Allowance a question for the jury.— Reading, etc., R. Co. *v.* Balthaser, 24 Wkly. Notes Cas. (Pa.) 9.

Allowance limited to cases where property is of easily ascertainable value.— Arthur *v.* Chicago, etc., R. Co., 61 Iowa 648, 17 N. W. 24; Greer *v.* New York, 3 Roh. (N. Y.) 406. See also Regan *v.* New York, etc., R. Co., 60 Conn. 124, 22 Atl. 503, 25 Am. St. Rep. 306.

Plaintiff's refusal to accept as damages a sum greater than he recovered in his action, which defendant offered to pay as damages, will deprive him of the right to interest. Thompson *v.* Boston, etc., R. Co., 58 N. H. 524.

65. *California.*— Schmidt *v.* Nunan, 63 Cal. 371.

Connecticut.— Parrott *v.* Housatonic R. Co., 47 Conn. 575.

Florida.— Jacksonville, etc., R. Co. *v.* Peninsular Land, etc., Co., 27 Fla. 1, 157, 9 So. 661, 17 L. R. A. 33, 65.

Minnesota.— Varco *v.* Chicago, etc., R. Co., 30 Minn. 18, 13 N. W. 921.

New York.— Mairs *v.* Manhattan Real Estate Assoc., 89 N. Y. 498; Wilson *v.* Troy, 60 Hun 183, 14 N. Y. Suppl. 721; Reiss *v.* New York Steam Co., 59 N. Y. Super. Ct. 57, 12 N. Y. Suppl. 557.

Ohio.— Lawrence *v.* Cobb, 35 Ohio St. 94; Hogg *v.* Zanesville Canal, etc., Co., 5 Ohio 410.

Pennsylvania.— Richards *v.* Citizens' Natural Gas Co., 130 Pa. St. 37, 18 Atl. 600.

Texas.— Gulf, etc., R. Co. *v.* Holliday, 65 Tex. 512.

Wisconsin.— Ingram *v.* Rankin, 47 Wis. 406, 2 N. W. 755, 32 Am. Rep. 762.

66. *Georgia.*— Western, etc., R. Co. *v.* Brown, 102 Ga. 13, 29 S. E. 130; Chattanooga, etc. R. Co. *v.* Palmer, 89 Ga. 161, 15 S. E. 34; Western, etc., R. Co. *v.* McCauley, 68 Ga. 818.

Kansas.— Atchison, etc., R. Co. *v.* Ayers, 56 Kan. 176, 42 Pac. 722.

Missouri.— Dozier *v.* Jerman, 30 Mo. 216.

Pennsylvania.— Klages *v.* Philadelphia, etc., Terminal Co., 160 Pa. St. 386, 28 Atl. 862; Emerson *v.* Schoonmaker, 135 Pa. St. 437, 19 Atl. 1025; Richards *v.* Citizens' Natural Gas Co., 130 Pa. St. 37, 18 Atl. 600; Reading, etc., R. Co. *v.* Balthaser, 126 Pa. St. 1, 17 Atl. 518; Plymouth Tp. *v.* Graver, 125 Pa. St. 24, 17 Atl. 249, 11 Am. St. Rep. 867; Pennsylvania Schuylkill Valley R. Co. *v.* Ziemer, 124 Pa. St. 560, 17 Atl. 187.

Texas.— Houston, etc., R. Co. *v.* Muldrow, 54 Tex. 233; Wolfe *v.* Lacy, 30 Tex. 349.

Virginia.— Hepburn *v.* Dundas, 13 Gratt. 219.

United States.— Littlefield *v.* Perry, 21 Wall. 205, 22 L. ed. 577; Bates *v.* St. Johnsbury, etc., R. Co., 32 Fed. 628.

See 29 Cent. Dig. tit. "Interest," § 36.

Contra.— Mote *v.* Chicago, etc., R. Co., 27 Iowa 22, 1 Am. Rep. 212 [*recognized* in Richmond *v.* Dubuque, etc., R. Co., 33 Iowa 422, where, however, the court refused to apply the rule and allow interest *eo nomine*]; Rhemke *v.* Clinton, 2 Utah 230. And see Hogg *v.* Zanesville Canal, etc., Co., 5 Ohio 410.

67. Western, etc., R. Co. *v.* McCauley, 68 Ga. 818; Hogg *v.* Zanesville Canal, etc., Co., 5 Ohio 410; Emerson *v.* Schoonmaker, 135 Pa. St. 437, 19 Atl. 1025; Richards *v.* Citi-

has been temporarily deprived of the use of property by the wrongful act of another, it has been held that he may recover interest on the value of the property during the period of such deprivation.[68]

D. Particular Obligations Bearing Interest[69] — **1. Loans and Advances.** As a general rule one who lends money to[70] or makes advances for the benefit of[71] any person is entitled to interest upon the amount so lent or advanced. And while there are a few cases in which interest on advances has been refused,

zens' Natural Gas Co., 130 Pa. St. 37, 18 Atl. 600; Reading, etc., R. Co. *v.* Balthaser, 126 Pa. St. 1, 17 Atl. 518; Plymouth Tp. *v.* Graver, 125 Pa. St. 24, 17 Atl. 249, 11 Am. St. Rep. 867.

68. *Colorado.*— Johnson *v.* Bailey, 17 Colo. 59, 28 Pac. 81.

Georgia.— Brown *v.* South Western R. Co., 36 Ga. 377.

North Dakota.— Hegar *v.* De Groat, 3 N. D. 354, 56 N. W. 150.

Texas.— Sabine, etc., R. Co. *v.* Joachimi, 58 Tex. 456.

Wisconsin.— Wadleigh *v.* Buckingham, 80 Wis. 230, 49 N. W. 745.

Canada.— Malo *v.* Gravel, 11 Quebec Super. Ct. 336.

Where no conversion alleged.— Where goods wrongfully withheld from plaintiff were returned, and damages were allowed for their injury and depreciation, and no conversion was alleged, it was error to allow interest for the period of detention of such goods. Wilson *v.* Sullivan, 17 Utah 341, 53 Pac. 994.

69. **Gift.**— Where a father, in consideration of love and affection, assigned a certain proportion of an amount involved in litigation to his son, it was held to be a gift and interest thereon was refused. Palmer *v.* Palmer, 15 N. Y. App. Div. 609, 44 N. Y. Suppl. 808.

70. *Illinois.*— Casey *v.* Carver, 42 Ill. 225.

New Hampshire.— Pierce *v.* Rowe, 1 N. H. 179.

Rhode Island.— Hodges *v.* Hodges, 9 R. I. 32.

South Carolina.— Witte *v.* Clarke, 17 S. C. 313; Bulow *v.* Goddard, 1 Nott & M. 45, 9 Am. Dec. 663.

Virginia.— Craufurd *v.* Smith, 93 Va. 623, 23 S. E. 235, 25 S. E. 657.

England.— Ekins *v.* East-India Co., 1 P. Wms. 395, 24 Eng. Reprint 441.

See 29 Cent. Dig. tit. "Interest," § 21.

71. *Alabama.*— Reynolds *v.* Mardis, 17 Ala. 32.

Arkansas.— Rogers *v.* Yarnell, 51 Ark. 198, 10 S. W. 622; Viser *v.* Bertrand, 19 Ark. 487.

District of Columbia.— District of Columbia *v.* Baltimore, etc., R. Co., 1 Mackey 314.

Georgia.— Knight *v.* Mantz, Ga. Dec. 22.

Illinois.— Harvey *v.* Drew, 82 Ill. 606; Cease *v.* Cockle, 76 Ill. 484.

Kentucky.— Goodloe *v.* Clay, 6 B. Mon. 236; Breckinridge *v.* Taylor, 5 Dana 110; Miles *v.* Bacon, 4 J. J. Marsh. 457; Colston *v.* Chenault, 45 S. W. 664, 20 Ky. L. Rep. 226; Boughner *v.* Brooks, 7 Ky. L. Rep. 599.

Massachusetts.— Haven *v.* Grand Junction R., etc., Co., 109 Mass. 88; Winsor *v.* Savage, 9 Metc. 346; Ilsley *v.* Jewett, 2 Metc. 168; Gibbs *v.* Bryant, 1 Pick. 118; Weeks *v.* Hasty, 13 Mass. 218.

Missouri.— Chamberlain *v.* Smith, 1 Mo. 718; McFall *v.* Dempsey, 43 Mo. App. 369; Newman *v.* Newman, 29 Mo. App. 649.

New York.— Rodgers *v.* Clement, 162 N. Y. 422, 56 N. E. 901, 76 Am. St. Rep. 342; Woerz *v.* Schumacher, 161 N. Y. 530, 56 N. E. 72; Beach *v.* Colles, 85 N. Y. 511; Gillet *v.* Van Rensselaer, 15 N. Y. 397; Foley *v.* Foley, 15 N. Y. App. Div. 276, 44 N. Y. Suppl. 588; Eldred *v.* Eames, 48 Hun 253; Hadley *v.* Ayres, 12 Abb. Pr. N. S. 240; Trotter *v.* Grant, 2 Wend. 413; Rensselaer Glass Factory *v.* Reid, 5 Cow. 587 [*affirming* 3 Cow. 387]; People *v.* Gasherie, 9 Johns. 71, 6 Am. Dec. 263; Pease *v.* Barber, 3 Cai. 266; Liotard *v.* Graves, 3 Cai. 226; Hastie *v.* De Peyster, 3 Cai. 190.

Pennsylvania.— Sims *v.* Willing, 8 Serg. & R. 103; Dilworth *v.* Sinderling, 1 Binn. 488, 2 Am. Dec. 469; Milne *v.* Rempublicam, 3 Yeates 102.

South Carolina.— Walters *v.* McGirt, 8 Rich. 287; Sollee *v.* Meugy, 1 Bailey 620; Thompson *v.* Stevens, 2 Nott & M. 493; Barr *v.* Haseldon, 10 Rich. Eq. 53.

Texas.— Taylor *v.* Coleman, 20 Tex. 772.

Vermont.— Drake *v.* Sharon, 40 Vt. 35.

Wisconsin.— See Phelan *v.* Fitzpatrick, 84 Wis. 240, 54 N. W. 614, although no time be specified for repayment.

United States.— Wittkowski *v.* Harris, 64 Fed. 712; Allen *v.* Fairbanks, 45 Fed. 445.

England.— Trelawney *v.* Thomas, 1 H. Bl. 303; Petre *v.* Duncombe, 15 Jur. 86, 20 L. J. Q. B. 242, 2 L. M. & P. 107; Anderton *v.* Arrowsmith, 2 P. & D. 408; Fergus *v.* Gore, 1 Sch. & Lef. 107; Craven *v.* Tickell, 1 Ves. Jr. 60, 30 Eng. Reprint 230.

Canada.— Secor *v.* Gray, 3 Ont. L. Rep. 34; Wellington County *v.* Widmot Tp., 17 U. C. Q. B. 82.

See 29 Cent. Dig. tit. "Interest," § 21.

Where several persons agree to pay equal proportions of particular expenditures, if one advances more money than his proportion, he is entitled to interest on the excess. Buckmaster *v.* Grundy, 8 Ill. 626.

Where a surety on an administrator's bond pays costs decreed against the administrator, the amount paid becomes a debt due the surety from the administrator and bears interest as any other debt against him. Garland *v.* Garland, (Va. 1896) 24 S. E. 505.

this has been because of some peculiar circumstances in the particular cases and not because of any doubt as to the general rule being as stated.[72]

2. Money Received to Use of Another. One who has received money for the use of another, but is charged merely with the duty of holding the money and paying it over to the proper person, is not generally chargeable with interest unless he be guilty of bad faith or unreasonable delay in dealing with it.[73] And so where money in a person's possession is retained in good faith and without fraud or misconduct on his part, he will not be chargeable with interest for such detention.[74]

72. See Kennedy *v.* Gibbs, 15 Ill. 406; Sprague *v.* Sprague, 30 Vt. 483 (support); Tappenden *v.* Randall, 2 B. & P. 467, 5 Rev. Rep. 662; Hicks *v.* Mareco, 5 C. & P. 498, 24 E. C. L. 674; Carr *v.* Edwards, 3 Stark. 132, 3 E. C. L. 624.

Where drafts are drawn with exchange added no interest will be allowed, the exchange being presumed a sufficient compensation for the time consumed in the transmission of the money. Sullivan *v.* Owens, (Tex. Civ. App. 1904) 78 S. W. 373.

Bonus upon advances.— Where it was agreed that persons advancing money should receive a bonus of fifty per cent on their advances besides interest, they were not permitted, in the absence of a special promise, to recover interest on the bonus. Church *v.* Kidd, 3 Hun (N. Y.) 254, 5 Thomps. & C. 454.

Advances applied to debt.— A vendee who advances money to his vendor to pay for patenting the land will not be allowed interest on such advances, where they were subsequently applied on the purchase-money. Gower *v.* Sterner, 2 Whart. (Pa.) 75.

Joint enterprise.— Where one agrees to advance money and another to furnish his services and skill in the prosecution of a joint enterprise, interest will not be allowed on the advances. Tirrell *v.* Jones, 39 Cal. 655.

73. *Colorado.*— Corson *v.* Neatheny, 9 Colo. 212, 11 Pac. 82.

Connecticut.— Bassett *v.* Kinney, 24 Conn. 267, 63 Am. Dec. 161; Selleck *v.* French, 1 Conn. 32, 6 Am. Dec. 185.

Georgia.— Johnson *v.* Moon, 82 Ga. 247, 10 S. E. 193.

Illinois.— Mueller *v.* Northwestern University, 195 Ill. 236, 63 N. E. 110, 88 Am. St. Rep. 194; Mathewson *v.* Davidson, 191 Ill. 391, 61 N. E. 68 [*reversing* 91 Ill. App. 153]; Sampson *v.* Neely, 106 Ill. App. 129.

Kentucky.— Taylor *v.* Knox, 1 Dana 391.

Massachusetts.— Wood *v.* Robbins, 11 Mass. 504, 6 Am. Dec. 182.

New York.— Davidson *v.* Mexican Nat. R. Co., 11 N. Y. App. Div. 28, 42 N. Y. Suppl. 1015; Ruckman *v.* Pitcher, 13 Barb. 556; Matter of Smith, 1 Misc. 253, 22 N. Y. Suppl. 1085; New York *v.* Tradesmen's Nat. Bank, 11 N. Y. Suppl. 95; Crane *v.* Dygert, 4 Wend. 675; Williams *v.* Storrs, 6 Johns. Ch. 353, 10 Am. Dec. 340.

Pennsylvania.— Schneider's Estate, 11 Leg. Int. 122.

Vermont.— Haswell *v.* Farmers', etc., Bank, 26 Vt. 100.

Virginia.— Dilliard *v.* Tomlinson, 1 Munf. 183.

United States.— U. S. *v.* Denvir, 106 U. S. 536, 1 S. Ct. 481, 27 L. ed. 264.

England.— Harrington *v.* Hoggart, 1 B. & Ad. 577, 9 L. J. K. B. O. S. 14, 20 E. C. L. 606; Lee *v.* Munn, 1 Moore C. P. 481, 8 Taunt. 45, 19 Rev. Rep. 452, 4 E. C. L. 34.

Canada.— *Re* O'Donohoe, 12 Ont. Pr. 612. See 29 Cent. Dig. tit. "Interest," § 22.

Use of stake money.— The mere fact that a stakeholder makes a profit by the use of the money in his hands will not render him liable for interest on such money. Jones *v.* Mallory, 22 Conn. 386. *Compare* Williams *v.* Storrs, 6 Johns. Ch. (N. Y.) 353, 10 Am. Dec. 340.

An agent entitled to retain property for his indemnity, although he disposes of it without authority, is not chargeable with interest on the avails of that property during the continuance of his lien. Thompson *v.* Stewart, 3 Conn. 171, 8 Am. Dec. 168.

Withdrawal of money deposited pursuant to agreement.— Where an agreement was made between two claimants of money in the hands of the sheriff that the money should be deposited in bank to await the settlement of their claims, and after the sheriff had so deposited it he drew it out again, he was held liable for interest from the time of such withdrawal. Com. *v.* Crevor, 3 Binn. (Pa.) 121.

Repurchase of property under option.— A buyer who is entitled to return the property as provided in the contract of sale, by which the seller agrees to repurchase it at the end of a certain time, if desired by the buyer, cannot recover interest on the purchase-money paid to the seller in the absence of any stipulation therefor. Kildea *v.* Washington Liquor Co., 22 Wash. 385, 60 Pac. 1118.

Money deposited for speculation.— Interest cannot be recovered on money voluntarily placed in the hands of another for illegal speculation in stocks. Baldwin *v.* Zadig, 104 Cal. 594, 38 Pac. 363, 722. See also House *v.* McKenney, 46 Me. 94.

74. Chicago Macaroni Mfg. Co. *v.* Boggiano, 202 Ill. 312, 67 N. E. 17 [*affirming* 99 Ill. App. 509]; Mueller *v.* Northwestern University, 195 Ill. 236, 63 N. E. 110, 88 Am. St. Rep. 194 [*affirming* 95 Ill. App. 258]; Boys' Home *v.* Lewis, 3 Ont. L. Rep. 208.

Refusal of purchaser to accept deed.— Where a purchaser is justified at the time for closing the title in refusing to accept a

3. Money Wrongfully Withheld or Used. Where money belonging to another is not paid over to the person entitled to receive it at the time it should be paid over, interest is generally allowed as damages for such wrongful withholding thereof,[75] and interest will likewise be allowed where a person conceals the receipt of money from the person to whom he should pay it,[76] or fails to promptly apply such money in accordance with his duty,[77] or makes use of it for his own profit.[78]

deed for an apparent defect in the title he should not, upon being subsequently required to perform, be charged with interest. Faile *v.* Crawford, 30 N. Y. App. Div. 536, 52 N. Y. Suppl. 353.

75. *Connecticut.*— Thompson *v.* Stewart, 3 Conn. 171, 8 Am. Dec. 168; Selleck *v.* French, 1 Conn. 32, 6 Am. Dec. 185.

Illinois.— Mathewson *v.* Davis, 191 Ill. 391, 61 N. E. 68; Cassady *v.* School Trustees, 105 Ill. 560; Stern *v.* People, 102 Ill. 540.

Indiana.— Hazzard *v.* Duke, 64 Ind. 220; Killian *v.* Eigenmann, 57 Ind. 480; Miller *v.* Billingsly, 41 Ind. 489.

Iowa.— Howe *v.* Jones, 71 Iowa 92, 32 N. W. 187.

Maryland.— Melvin *v.* Aldridge, 81 Md. 650, 32 Atl. 389; McShane *v.* Howard Bank, 73 Md. 135, 20 Atl. 776, 10 L. R. A. 552; Rappanier *v.* Bannon, (1887) 8 Atl. 555.

Massachusetts.— Moors *v.* Washburn, 159 Mass. 172, 34 N. E. 182; Mason *v.* Waite, 17 Mass. 560; Wood *v.* Robbins, 11 Mass. 504, 6 Am. Dec. 182; Fowler *v.* Shearer, 7 Mass. 14.

Missouri.— Jefferson City Sav. Assoc. *v.* Morrison, 48 Mo. 273.

Nebraska.— Hazelet *v.* Holt County, 51 Nebr. 716, 71 N. W. 717; Capital Nat. Bank *v.* Coldwater Nat. Bank, 49 Nebr. 786, 69 N. W. 115, 59 Am. St. Rep. 572.

New Hampshire.— Hudson *v.* Tenney, 6 N. H. 456.

New Jersey,— Board of Justices *v.* Fennimore, 1 N. J. L. 242.

New York.— Monroe County *v.* Clarke, 25 Hun 282; Greenly *v.* Hopkins, 10 Wend. 96; Gillet *v.* Maynard, 5 Johns. 85, 4 Am. Dec. 329; Pease *v.* Barber, 3 Cai. 266; Lynch *v.* De Viar, 3 Johns. Cas. 303; Lawrence *v.* Murray, 3 Paige 400; Williams *v.* Storrs, 6 Johns. Ch. 353, 10 Am. Dec. 340.

Pennsylvania.— Com. *v.* Crevor, 3 Binn. 121; Rapelie *v.* Emory, 1 Dall. 349, 1 L. ed. 170.

South Carolina.— Southern R. Co. *v.* Greenville, 49 S. C. 449, 27 S. E. 652; Greer *v.* Latimer, 47 S. C. 176, 25 S. E. 136; Kimbrel *v.* Glover, 13 Rich. 191; Ancrum *v.* Slone, 2 Speers 594; Black *v.* Goodman, 1 Bailey 201; Bulow *v.* Goddard, 1 Nott & M. 45, 9 Am. Dec. 663; Simpson *v.* Feltz, 1 McCord Eq. 213, 16 Am. Dec. 602.

Texas.— Close *v.* Fields, 13 Tex. 623.

Vermont.— Blodgett *v.* Converse, 60 Vt. 410, 15 Atl. 109; Abbott *v.* Wilmot, 22 Vt. 437.

Wisconsin.— Land, etc., Co. *v.* Oneida County, 83 Wis. 649, 53 N. W. 491.

United States.— U. S. *v.* Curtis, 100 U. S. 119, 25 L. ed. 571; Bischoffsheim *v.* Baltzer, 21 Fed. 531.

England.— Webster *v.* British Empire Mut. L. Assur. Co., 15 Ch. D. 169, 49 L. J. Ch. 769, 43 L. T. Rep. N. S. 229, 28 Wkly. Rep. 818; Arnott *v.* Redfern, 3 Bing. 353, 11 E. C. L. 177, 2 C. & P. 88, 12 E. C. L. 466, 4 L. J. C. P. O. S. 89, 11 Moore C. P. 209; *Ex p.* Story, 4 Deac. & C. 504, 2 Mont. & A. 54; Pearse *v.* Green, 1 Jac. & W. 135, 20 Rev. Rep. 258, 37 Eng. Reprint 327; Harsant *v.* Blaine, 56 L. J. Q. B. 511; Ekins *v.* East-India Co., 1 P. Wms. 395, 24 Eng. Reprint 441; Orford *v.* Churchill, 3 Ves. & B. 59, 35 Eng. Reprint 401.

Canada.— Michie *v.* Reynolds, 24 U. C. Q. B. 303.

See 29 Cent. Dig. tit. "Interest," § 23.

Unpaid purchase-money.— Unless special equities are shown, where a purchaser under an executory contract has recovered damages for the wrongful withholding of possession of premises by the vendor, he will be required to pay interest on the unpaid purchase-money during such time before he is entitled to a deed. Abrahamson *v.* Lamberson, 68 Minn. 454, 71 N. W. 676.

76. *Georgia.*— Nisbet *v.* Lawson, 1 Ga. 275.

Illinois.— Currier *v.* Kretzinger, 58 Ill. App. 288 [*affirmed* in 162 Ill. 511, 44 N. E. 882].

Indiana.— Hawkins *v.* Johnson, 4 Blackf. 21.

New York.— Lawrence *v.* Leake, etc., Orphan House, 2 Den. 577.

Pennsylvania.— Matter of Merrick, 1 Ashm. 305.

See 29 Cent. Dig. tit. "Interest," § 23.

Erroneous report of sales.— An agent who makes sales at prices greater than reported and accounted for by him is liable for interest on the amount thus wrongfully retained, although under the contract he is not liable for interest on general balances. *In re* Hovey, 198 Pa. St. 385, 48 Atl. 311.

77. Hazzard *v.* Duke, 64 Ind. 220; Dodge *v.* Perkins, 9 Pick. (Mass.) 368; Wood *v.* Robbins, 11 Mass. 504, 6 Am. Dec. 182; Fowler *v.* Shearer, 7 Mass. 14; Tarpley *v.* Wilson, 33 Miss. 467; Crane *v.* Dygert, 4 Wend. (N. Y.) 675.

A person receiving money in trust to pay certain debts, who only pays a portion of them, refusing to pay the others, claiming the balance in his hands as compensation, to which he fails to establish his right, is chargeable with interest on the sums so withheld. Jenkins *v.* Doolittle, 69 Ill. 415.

78. *Alabama.*— Lewis *v.* Bradford, 8 Ala. 632.

4. Money Wrongfully Obtained. An implied contract is raised by law for the immediate repayment of money wrongfully obtained, and interest from the date of the wrongful act is allowed as damages for the breach of the implied contract.[79]

5. Money Paid and Received Through Mistake. It has been held that interest will not be allowed on money paid and received through a mutual mistake of the parties, without fraud or misconduct on the part of either, until after discovery of the mistake and the ascertainment of the person to whom the money is rightly due;[80]

Connecticut.— Thompson *v.* Stewart, 3 Conn. 171, 8 Am. Dec. 168.

Illinois.— Beach *v.* Peabody, 188 Ill. 75, 58 N. E. 679; Atchison, etc., R. Co. *v.* Chicago, etc., R. Co., 162 Ill. 632, 44 N. E. 823, 35 L. R. A. 167; Cassady *v.* School Trustees, 105 Ill. 560; Stern *v.* People, 102 Ill. 540; Robbins *v.* Laswell, 58 Ill. 203.

Kentucky.— Taylor *v.* Knox, 1 Dana 391; Kenton Ins. Co. *v.* First Nat. Bank, (1892) 19 S. W. 841.

Massachusetts.— Dunlap *v.* Watson, 124 Mass. 305; Hill *v.* Hunt, 9 Gray 66.

Mississippi.— Tarpley *v.* Wilson, 33 Miss. 467.

New Jersey.— Coddington *v.* Idell, 30 N. J. Eq. 540.

New York.— Griggs *v.* Griggs, 56 N. Y. 504; People *v.* Gasherie, 9 Johns. 71, 6 Am. Dec. 263.

Oregon.— Baker *v.* Williams Banking Co., 42 Oreg. 213, 70 Pac. 711.

Vermont.— Blodgett *v.* Converse, 60 Vt. 410, 15 Atl. 109.

England.— De Havilland *v.* Bowerbank, 1 Campb. 50; Willis *v.* Commissioners of Appeals, 5 East 22; Rogers *v.* Boehm, 2 Esp. 702.

See 29 Cent. tit. "Interest," § 23.

Interest received from bank in which money deposited.— A person to whom money is intrusted, to be paid over to a designated recipient, and who deposits the money in bank for some time, afterward paying it over to the person entitled to receive it, is liable to such person for the interest paid to him on the money while deposited in the bank, although such interest is paid after the money has been turned over. Bassett *v.* Kinney, 24 Conn. 267, 63 Am. Dec. 161.

Presumption of profit.— Where one improperly retains the property of another, he will be presumed to have kept it for the purposes of profit to himself and will be charged with interest. Simpson *v.* Feltz, 1 McCord Eq. (S. C.) 213, 16 Am. Dec. 602. See also Marvin *v.* McRae, Cheves (S. C.) 61.

79. *Connecticut.*— Thompson *v.* Stewart, 3 Conn. 171, 8 Am. Dec. 168; Selleck *v.* French, 1 Conn. 32, 6 Am. Dec. 185.

Georgia.— Clayton *v.* O'Connor, 35 Ga. 193; Riley *v.* Martin, 35 Ga. 136; Hoyle *v.* Jones, 35 Ga. 40, 89 Am. Dec. 273; Anderson *v.* State, 2 Ga. 370.

Illinois.— Deimel *v.* Brown, 136 Ill. 586, 27 N. E. 44; Steere *v.* Hoagland, 50 Ill. 377. See also Pungs *v.* American Brake Beam Co., 102 Ill. App. 76 [*affirmed* in 200 Ill. 306, 65 N. E. 645].

Louisiana.— Burham *v.* Hart, 15 La. Ann. 517.

Maryland.— Andrews *v.* Clark, 72 Md. 396, 20 Atl. 429.

Massachusetts.—Manufacturers' Nat. Bank *v.* Perry, 144 Mass. 313, 11 N. E. 81; Atlantic Nat. Bank *v.* Harris, 118 Mass. 147; Hubbard *v.* Charlestown Branch R. Co., 11 Metc. 124; Winslow *v.* Hathaway, 1 Pick. 211; Wood *v.* Robbins, 11 Mass. 504, 6 Am. Dec. 182.

Michigan.— Hack *v.* Norris, 46 Mich. 587, 10 N. W. 104.

Missouri.— Arthur *v.* Wheeler, etc., Mfg. Co., 12 Mo. App. 335.

New York.— Holden *v.* New York, etc., Bank, 72 N. Y. 286; New York *v.* Sands, 39 Hun 519; Reid *v.* Rensselaer Glass Factory, 3 Cow. 393; Leake, etc., Orphan House *v.* Lawrence, 11 Paige 80.

North Carolina.— Silver Valley Min. Co. *v.* Baltimore Gold, etc., Min., etc., Co., 99 N. C. 445, 6 S. E. 735.

South Carolina.— Bulow *v.* Goddard, 1 Nott & M. 45, 9 Am. Dec. 663.

Virginia.— Beall *v.* Silver, 2 Rand. 401.

England.— *In re* Metropolitan Coal Consumers' Assoc., 59 L. J. Ch. 281, 62 L. T. Rep. N. S. 30, 1 Meg. 463; Ekins *v.* East-India Co., 1 P. Wms. 395, 24 Eng. Reprint 441. But see Crockford *v.* Winter, 1 Campb. 124.

See 29 Cent. tit. "Interest," § 23.

False representations as to value of judgment.— One who by false representations as to the solvency of a judgment debtor induces the judgment creditors to transfer the judgment to him for less than its value is liable for the difference between what he paid for the judgment and its fair value, with interest thereon. Ellis *v.* Barlow, (Tex. Civ. App. 1894) 26 S. W. 908.

Where money is illegally exacted from a person who afterward recovers it in an action, interest will be allowed on the sum so exacted. Boston, etc., R. Co. *v.* State, 63 N. H. 571, 4 Atl. 571; Southern R. Co. *v.* Greenville, 49 S. C. 449, 27 S. E. 652; Graham *v.* Chicago, etc., R. Co., 53 Wis. 473, 10 N. W. 609. See also Columbia Sav. Bank *v.* Los Angeles County, 137 Cal. 467, 70 Pac. 308. *Contra*, as to duty illegally exacted at the treasury. Hammond *v.* Robinson, 4 N. Brunsw. 295.

Where plaintiff in an attachment proceeding receives money which properly belongs to interveners, he is chargeable with interest, from the time he received it. Heidenheimer *v.* Johnson, 76 Tex. 200, 13 S. W. 46.

80. Watkins *v.* Wassell, 20 Ark. 410; Ashhurst *v.* Potter, 29 N. J. Eq. 625; King *v.*

but in other cases interest has been allowed notwithstandng such mistake.[81] After the mistake is discovered and the person receiving the money has had a reasonable time to satisfy himself as to the proper person to whom he should pay it, interest will be allowed in case of further delay in paying it over.[82]

6. WRITTEN INSTRUMENTS.[83] As a general rule interest is allowed on all written instruments stipulating for the payment of money.[84]

7. INSTALMENTS OF PRINCIPAL. Whenever interest would be recoverable upon the principal debt, and by agreement the debt is to be paid in instalments, interest will be allowed on such instalments, in the absence of contract varying the rule, as if each were a principal debt.[85]

8. COUPONS AND INSTALMENTS OF INTEREST — a. In General — (I) *COUPONS.* Interest coupons or interest notes attached to bonds or similar instruments, being in them-

Diehl, 9 Serg. & R. (Pa.) 409; Jacobs *v.* Adams, 1 Dall. (Pa.) 52, 1 L. ed. 33; Craufurd *v.* Smith, 93 Va. 623, 23 S. E. 235, 25 S. E. 657. *Compare* Ross *v.* McLauchlan, 7 Gratt. (Va.) 86.

An erroneous belief on the part of defendants that they had a right to retain the money in their hands to meet costs for which they deemed themselves liable on behalf of plaintiff is not such a mistake as will relieve them from the payment of interest on the sum so retained. Shipman *v.* Miller, 2 Root (Conn.) 405.

81. Goodnow *v.* Plumbe, 64 Iowa 672, 21 N. W. 133; Goodnow *v.* Litchfield, 63 Iowa 275, 19 N. W. 226; Cummings *v.* Bradford, 22 S. W. 548, 15 Ky. L. Rep. 155; Bulow *v.* Goddard, 1 Nott & M. (S. C.) 45, 9 Am. Dec. 663; Porter *v.* Russek, (Tex. Civ. App. 1895) 29 S. W. 72.

Improvements under mistake of title.— Interest will be allowed on the enhanced value of realty improved through mistake of title. McKibbon *v.* Williams, 24 Ont. App. 122; Munsie *v.* Lindsay, 11 Ont. 520; Fawcett *v.* Burwell, 27 Grant Ch. (U. C.) 445.

82. See Northrop *v.* Graves, 19 Conn. 548, 50 Am. Dec. 264; Smith *v.* Conrad, 15 La. Ann. 579; Craufurd *v.* Smith, 93 Va. 623, 23 S. E. 235, 25 S. E. 657.

83. **Loss or destruction of instrument** see *infra*, V, C, 2, a, (IV).

84. *Alabama.*— Marr *v.* Southwick, 2 Port. 351.

Arizona.— Simms *v.* Hampson, 2 Ariz. 233, 12 Pac. 686.

California.— D. O. Mills, etc., Nat. Bank *v.* Greenlaw, 134 Cal. 673, 66 Pac 962.

Illinois.— A. B. Dick Co. *v.* Sherwood Letter File Co., 157 Ill. 325, 42 N. E. 440; Railway Passenger, etc., Mut. Aid, etc., Assoc. *v.* Tucker, 157 Ill. 194, 42 N. E. 398, 44 N. E. 286; Whittaker *v.* Crow, 132 Ill. 627, 24 N. E. 57; Heissler *v.* Stose, 131 Ill. 393, 23 N. E. 347 [*affirming* 33 Ill. App. 39]; Plumb *v.* Campbell, 129 Ill. 101, 18 N. E. 790; Downey *v.* O'Donnell, 92 Ill. 559; Scroggs *v.* Cunningham, 81 Ill. 110; Goodwin *v.* Goodwin, 65 Ill. 497; Hitt *v.* Allen, 13 Ill. 592; Knights Templars, etc., Life Indemnity Co. *v.* Crayton, 110 Ill. App. 648 [*affirmed* in 209 Ill. 550, 70 N. E. 1066]; Peoria Malting Co. *v.* Davenport Grain, etc., Co., 68 Ill. App. 104; Consumers' Pure Ice Co. *v.* Jenkins, 58 Ill. App. 519; Keeler *v.* Herr, 54 Ill. App. 468.

New Hampshire.— Buzzell *v.* Snell, 25 N. H. 474.

New York.— Purdy *v.* Philips, 11 N. Y. 406 [*affirming* 1 Duer 369].

Pennsylvania.— Port Royal *v.* Graham, 84 Pa. St. 426.

United States.— Goodwin *v.* Fox, 129 U. S. 601, 9 S. Ct. 367, 32 L. ed. 805; Thomas *v.* Peoria, etc., R. Co., 36 Fed. 808.

See 29 Cent. Dig. tit. "Interest," § 28.

Court orders for money.— Orders absolute given by the inferior courts of the several counties for the payment of money to persons in liquidation of debts due by said courts draw interest just as other liquidated demands do. State *v.* Speer, 33 Ga. Suppl. 93.

Custom.—.Where by the law or custom of a country where notes are given payable in sugar no interest is payable upon them until judgment is obtained upon them in the courts of the United States, interest before judgment will not be allowed. Courtois *v.* Carpentier, 6 Fed. Cas. No. 3,286, 1 Wash. 376.

Instrument not bearing interest.— An instrument in the following form "Received of I the sum of $493.79 to be remitted to him at L" was not an instrument bearing interest within the meaning of Tenn. Code, § 1945. Williams *v.* Inman, 5 Coldw. (Tenn.) 267.

85. *Georgia.*— Hoyle *v.* Jones, 35 Ga. 40, 89 Am. Dec. 273.

Illinois.— Dobbins *v.* Higgins, 78 Ill. 440; Heiman *v.* Schrœder, 74 Ill. 158.

Louisiana.— Daigle *v.* Bruzzé, 6 Rob. 418; Jiovellina *v.* Minor, 1 La. 72.

Missouri.— Neosho City Water Co. *v.* Neosho, 136 Mo. 498, 38 S. W. 89; Lancaster *v.* Elliot, 55 Mo. App. 249.

New Jersey.— Lang *v.* Moole, 31 N. J. Eq. 413.

New York.— Southern Cent. R. Co. *v.* Moravia, 61 Barb. 180.

South Carolina.— Watkins *v.* Lang, 17 S. C. 13.

Tennessee.— Cocke *v.* Trotter, 10 Yerg. 213.

Vermont.— Vermont, etc., R. Co. *v.* Vermont Cent. R. Co., 63 Vt. 1, 21 Atl. 262, 731, 10 L. R. A. 562.

selves obligations in writing for the payment of a sum certain on a day certain, have all the qualities of commercial paper and are in the nature of a principal debt, and interest thereon is generally held to be recoverable as upon other money debts.[86]

England.— Kildare *v.* Hopson, 4 Bro. P. C. 550, 2 Eng. Reprint 374; Parker *v.* Hutchinson, 3 Ves. Jr. 133, 30 Eng. Reprint 933.

Canada.— Biggs *v.* Freehold Loan, etc., Co., 31 Can. Sup. Ct. 136 [*reversing* 26 Ont. App. 232]. But see Crooks *v.* Dickson, 1 Can. L. J. N. S. 211.

See 29 Cent. Dig. tit. "Interest," § 28.

Compare Nettleton *v.* Caryl, 3 Lack. Leg. N. (Pa.) 207.

86. *Alabama.*— Stickney *v.* Moore, 108 Ala. 590, 19 So. 76.

Colorado.— Lake County *v.* Linn, 29 Colo. 446, 68 Pac. 839.

Florida.— Jefferson County *v.* Hawkins, 23 Fla. 223, 2 So. 362.

Illinois.— Humphreys *v.* Morton, 100 Ill. 592; Harper *v.* Ely, 70 Ill. 581; Cook *v.* Illinois Trust, etc., Bank, 68 Ill. App. 478.

Kentucky.— Kentucky Title Co. *v.* English, 50 S. W. 968, 20 Ky. L. Rep. 2024.

Maryland.— See Virginia *v.* State, 32 Md. 501.

Michigan.— Hoyle *v.* Page, 41 Mich. 533, 2 N. W. 665.

Minnesota.— Holbrook *v.* Sims, 39 Minn. 122, 39 N. W. 74, 140; Welsh *v.* St. Paul, etc., R. Co., 25 Minn. 314.

Nebraska.— See Richardson *v.* Campbell, 34 Nebr. 181, 51 N. W. 753, 33 Am. St. Rep. 633.

New Hampshire.— Ashuelot R. Co. *v.* Elliot, 57 N. H. 397.

New York.— Connecticut Mut. L. Ins. Co. *v.* Cleveland, etc., R. Co., 41 Barb. 9.

Pennsylvania.— Philadelphia, etc., R. Co. *v.* Smith, 105 Pa. St. 195; North Pennsylvania R. Co. *v.* Adams, 54 Pa. St. 94, 93 Am. Dec. 677; Philadelphia, etc., R. Co. *v.* Knight, 23 Wkly. Notes Cas. 215; Moody *v.* Philadelphia, etc., R. Co. 13 Wkly. Notes Cas. 48.

Rhode Island.— National Exch. Bank *v.* Hartford, etc., R. Co., 8 R. I. 375, 91 Am. Dec. 237, 5 Am. Rep. 582.

Tennessee.— Hale *v.* Hale, 1 Coldw. 233, 78 Am. Dec. 490.

Texas.— San Antonio *v.* Lane, 32 Tex. 405.

Vermont.— North Bennington First Nat. Bank *v.* Mt. Tabor, 52 Vt. 87, 36 Am. Rep. 734.

Wisconsin.— Mills *v.* Jefferson, 20 Wis. 50.

United States.— Cairo *v.* Zane, 149 U. S. 122, 13 S. Ct. 803, 37 L. ed. 673; U. S. Mortgage Co. *v.* Sperry, 138 U. S. 313, 11 S. Ct. 321, 34 L. ed. 969 [*reversing* on other grounds 26 Fed. 727, 24 Fed. 838]; Scotland County *v.* Hill, 132 U. S. 107, 10 S. Ct. 26, 33 L. ed. 261; Pana *v.* Bowler, 107 U. S. 529, 2 S. Ct. 704, 27 L. ed. 424; Koshkonong *v.* Burton, 104 U. S. 668, 26 L. ed. 886; Walnut *v.* Wade, 103 U. S. 683, 26 L. ed. 526; Cromwell *v.* Sac County, 96 U. S. 51, 24 L. ed. 681; Genoa *v.* Woodruff, 92 U. S. 502, 23 L. ed. 586; Clark *v.* Iowa City, 20 Wall. 583, 22 L. ed. 427; Aurora *v.* West, 7 Wall. 82, 19 L. ed. 42; Gelpcke *v.* Dubuque, 1 Wall. 175, 17 L. ed. 520; Ouray County *v.* Geer, 108 Fed. 478, 47 C. C. A. 450; Farmers' L. & T. Co. *v.* Northern Pac. R. Co., 94 Fed. 454; Huey *v.* Macon County, 35 Fed. 481; New England Mortg. Security Co. *v.* Vader, 28 Fed. 265; Nash *v.* El Dorado County, 24 Fed. 252; Rich *v.* Seneca Falls, 8 Fed. 852, 19 Blatchf. 558; Hollingsworth *v.* Detroit, 12 Fed. Cas. No. 6,613, 3 McLean 472. *Compare* Graves *v.* Saline County, 104 Fed. 61, 43 C. C. A. 414.

Canada.— London, etc., Loan, etc., Co. *v.* Morris, 7 Manitoba 128.

See 29 Cent. Dig. tit. "Interest," § 30.

Contra.— Johnson *v.* Norwich, etc., R. Co., 37 Conn. 433; Rose *v.* Bridgeport, 17 Conn. 243; Doe *v.* Warren, 7 Me. 48; Shaw *v.* Norfolk County R. Co., 16 Gray (Mass.) 407; Force *v.* Elizabeth, 28 N. J. Eq. 403 [*reversed* on other grounds in 29 N. J. Eq. 587]. See also Jones *v.* Guttenberg, 66 N. J. L. 659, 51 Atl. 274.

Interest coupons attached to a bond given by a guardian, which bond expressly stipulates that the guardian and his estate are not liable for the money borrowed, do not bear interest. U. S. Mortgage Co. *v.* Sperry, 138 U. S. 313, 11 S. Ct. 321, 34 L. ed. 969 [*reversing* on other grounds 26 Fed. 727, 24 Fed. 838].

Separate bonds or notes given for interest bear interest. Gilbert *v.* Washington City, etc., R. Co., 33 Gratt. (Va.) 586; Graeme *v.* Cullen, 23 Gratt. (Va.) 266. *Contra*, Compton *v.* Compton, 5 La. Ann. 615.

The total interest thus recovered should not exceed the maximum rate allowed by law on the principal debt. Murtagh *v.* Thompson, 28 Nebr. 358, 44 N. W. 451; Mathews *v.* Toogood, 23 Nebr. 536, 37 N. W. 265, 8 Am. St. Rep. 131. See also Columbia County *v.* King, 13 Fla. 451.

An interest coupon remaining in the hands of the bond owner, although detached from the bond, does not bear interest. Williamsburgh Sav. Bank *v.* Solon, 136 N. Y. 465, 32 N. E. 1058 [*modifying* 65 Hun 166, 20 N. Y. Suppl. 27, *following* Bailey *v.* Buchanan County, 115 N. Y. 297, 32 N. E. 155, 6 L. R. A. 562 (*reversing* 54 N. Y. Super. Ct. 237), and *followed* in Stanton *v.* Taylor, 136 N. Y. 664, 32 N. E. 1063 (*modifying* 19 N. Y. Suppl. 43); Chapman *v.* Taylor, 136 N. Y. 663, 32 N. E. 1063 (*modifying* 19 N. Y. Suppl. 44); Armfield *v.* Solon, 136 N. Y. 663, 32 N. E. 1063 (*modifying* 19 N. Y. Suppl. 44); Beattys *v.* Solon, 136 N. Y. 662, 32 N. E. 1062 (*modifying* 19 N. Y. Suppl. 37)]. See also Klein *v.* East River Electric Light Co., 33 Misc. (N. Y.) 596, 67 N. Y. Suppl. 922 [*reversing* 32 Misc. 774, 66 N. Y.

(II) *Periodical Instalments of Interest.* Where interest is by agreement payable at stated periodical times, and is not paid at such times, it is generally held that interest on such instalments of interest will be allowed from the time they became due and payable,[87] but in some jurisdictions the courts refuse to allow interest upon such unpaid interest.[88]

Suppl. 472]. But *compare* Rich *v.* Seneca Falls, 8 Fed. 852, 853, 19 Blatchf. 558, where it is said: "As the owner of the bond can transfer the coupons, and the transferee would be entitled to interest from the time of maturity, there seems to be no sound reason why he should not also be entitled to like interest if he retains the coupons."

87. *Alabama.*— Turrentine *v.* Perkins, 46 Ala. 631. See also Ware *v.* Owens, 42 Ala. 212, 94 Am. Dec. 672, annual payments in lieu of dower.

Georgia.— Calhoun *v.* Marshall, 61 Ga. 275, 34 Am. Rep. 99. See also Scott *v.* Saffold, 37 Ga. 384. *Compare* Wofford *v.* Wyly, 72 Ga. 863.

Iowa.— Burrows *v.* Stryker, 47 Iowa 477; Preston *v.* Walker, 26 Iowa 205, 96 Am. Dec. 140; Aspinwall *v.* Blake, 25 Iowa 319; Mann *v.* Cross, 9 Iowa 327.

Kentucky.— Hall *v.* Scott, 90 Ky. 340, 13 S. W. 249, 11 Ky. L. Rep. 819; Radford *v.* Southern Mut. L. Ins. Co., 12 Bush 434; Talliaferro *v.* King, 9 Dana 331, 35 Am. Dec. 140; Mastin *v.* Cochran, 76 S. W. 343, 25 Ky. L. Rep. 712; Shanks *v.* Stephens, 4 Ky. L. Rep. 838.

Louisiana.— Mudd *v.* Stille, 6 La. 17.

Michigan.— Wallace *v.* Glaser, 82 Mich. 190, 46 N. W. 227, 21 Am. St. Rep. 556; McVicar *v.* Denison, 81 Mich. 348, 45 N. W. 659; Rix *v.* Strauts, 59 Mich. 364, 26 N. W. 638; Voigt *v.* Beller, 56 Mich. 140, 22 N. W. 270; Morris *v.* Hoyt, 11 Mich. 9. But see Van Husan *v.* Kanouse, 13 Mich. 303.

New Hampshire.— Where there is an agreement to pay interest annually, the rule is that for the detention of the annual interest simple interest is to be computed from the time such annual interest becomes due. Townsend *v.* Riley, 46 N. H. 300; Little *v.* Riley, 43 N. H. 109; Peirce *v.* Rowe, 1 N. H. 179. But there is no authority for the allowance of interest on any surplus of interest that may have accrued at other times than at the end of the year because payments have thus been made. Townsend *v.* Riley, *supra.*

New York.— Howard *v.* Farley, 3 Bosw. 308, especially where payment has been demanded. *Contra,* Henderson *v.* Hamilton, 1 Hall 350.

North Carolina.— Bledsoe *v.* Nixon, 69 N. C. 89, 92, 12 Am. Rep. 642 (where it is said: "By computing interest in this way effect is given to the stipulation to pay interest at fixed times; whereas, if simple interest be computed no effect whatever is given to the stipulation in regard to interest, and the Court assumes the power to expunge it as surplusage, although it is manifest that the parties intended it to have some effect"); Kennon *v.* Dickins, 1 N. C. 435, 2 Am. Dec. 642 (particularly where payment of the principal sum is postponed to a very distant period, upon the faith of a regular and punctual discharge of the interest).

Ohio.— Anketel *v.* Converse, 17 Ohio St. 11, 91 Am. Dec. 115; Dunlap *v.* Wiseman, 2 Disn. 398.

Rhode Island.— Wheaton *v.* Pike, 9 R. I. 132, 98 Am. Dec. 377, 11 Am. Rep. 227.

South Carolina.— O'Neall *v.* Bookman, 9 Rich. 80; Doig *v.* Barkley, 3 Rich. 125, 45 Am. Dec. 762; O'Neall *v.* Sims, 1 Strobh. 115; Singleton *v.* Lewis, 2 Hill 408; Gibbs *v.* Chisolm, 2 Nott & M. 38, 10 Am. Dec. 560; Wright *v.* Eaves, 10 Rich. Eq. 582; Bowels *v.* Drayton, 1 Desauss. Eq. 489, 1 Am. Dec. 689.

Tennessee.— House *v.* Tennessee Female College, 7 Heisk. 128.

Texas.— Lewis *v.* Paschal, 37 Tex. 315; De Cordova *v.* Galveston, 4 Tex. 470.

Vermont.— Flannery *v.* Flannery, 58 Vt. 576, 5 Atl. 507; Austin *v.* Imus, 23 Vt. 286; Catlin *v.* Lyman, 16 Vt. 44.

Washington.— Reed *v.* Miller, 1 Wash. 426, 25 Pac. 334.

See 29 Cent. Dig. tit. "Interest," § 30.

Agreement for annual payments with interest.— An agreement to pay a certain sum of money in four equal annual payments with interest is such an agreement for periodical interest as will justify the allowance of interest thereon. Watkinson *v.* Root, 4 Ohio 373.

88. *Illinois.*— Leonard *v.* Villars, 23 Ill. 377.

Indiana.— Grimes *v.* Blake, 16 Ind. 160.

Maine.— Bradley *v.* Merrill, 91 Me. 340, 40 Atl. 132; Whitcomb *v.* Harris, 90 Me. 206, 38 Atl. 138; Stickney *v.* Jordan, 58 Me. 106, 4 Am. Rep. 251 (holding the law of Maine to be as stated in the text but the law of New Hampshire to be otherwise); Bannister *v.* Roberts, 35 Me. 75; Doe *v.* Warren, 7 Me. 48. *Contra,* Farwell *v.* Sturdivant, 37 Me. 308.

Massachusetts.— Ferry *v.* Ferry, 2 Cush. 92; Hastings *v.* Wiswall, 8 Mass. 455. *Compare* Greenleaf *v.* Kellogg, 2 Mass. 568.

Minnesota.— Dyar *v.* Slingerland, 24 Minn. 267.

Missouri.— Stoner *v.* Evans, 38 Mo. 461.

New Jersey.— Force *v.* Elizabeth, 28 N. J. Eq. 403.

Pennsylvania.— Stokely *v.* Thompson, 34 Pa. St. 210; Sparks *v.* Garrigues, 1 Binn. 152. See also Sherman *v.* Philadelphia, etc., R. Co., 13 Wkly. Notes. Cas. 238. *Compare* Knettle *v.* Crouse, 6 Watts 123.

Virginia.— Fultz *v.* Davis, 26 Gratt. 903; Pindall *v.* Marietta Bank, 10 Leigh 481.

b. After Maturity of Principal Debt. After the maturity of the principal debt upon which interest is payable in periodical instalments, no instalments of interest will be considered as coming due, in the absence of a specific contract to that effect, for both the principal and the interest are due on every day thereafter until paid,[89] and interest will not be allowed on interest that accrues merely by lapse of time after the maturity of the principal debt.[90] But where there is an agreement for the payment of interest periodically after the maturity of the principal debt as well as before, interest will be allowed on instalments of interest falling due after maturity of the principal and unpaid.[91]

9. Accounts[92] — a. Open and Unliquidated Accounts. As a general rule interest is not allowed on running accounts so long as they remain open and unliquidated, unless there is some statutory provision that permits it, or some contract between the parties, express or implied, that interest shall be paid.[93] In some

West Virginia.— Genin *v.* Ingersoll, 11 W. Va. 549.

See 29 Cent. Dig. tit. "Interest," § 30.

Annual payments in lieu of dower, although in the nature of interest, draw interest from the time they become due. Seitzinger's Estate, 170 Pa. St. 531, 32 Atl. 1101; Stewart *v.* Martin, 2 Watts (Pa.) 200; Van Syckle *v.* Pennsylvania Co., 5 Leg. & Ins. Rep. (Pa.) 107. See also Addams *v.* Heffernan, 9 Watts (Pa.) 529.

Arrears of annuity.— No interest is allowable upon arrears of an annuity except under peculiar circumstances of hardship. Goldsmith *v.* Goldsmith, 17 Grant Ch. (U. C.) 213. See also Snarr *v.* Badenach, 10 Ont. 131; Crone *v.* Crone, 27 Grant Ch. (U. C.) 425.

Waiver.— It has been held that the creditor's failure to enforce the payment of interest when due is in effect a waiver of his right to have the interest converted into principal. Kittredge *v.* McLaughlin, 38 Me. 513; Bannister *v.* Roberts, 35 Me. 75; Doe *v.* Warren, 7 Me. 48; Ferry *v.* Ferry, 2 Cush. (Mass.) 92; Wilcox *v.* Howland, 23 Pick. (Mass.) 167; Hastings *v.* Wiswall, 8 Mass. 455; Genin *v.* Ingersoll, 11 W. Va. 549.

89. Wheaton *v.* Pike, 9 R. I. 132, 98 Am. Dec. 377, 11 Am. Rep. 227. See *supra*, III, A, 4, a.

90. *Illinois.*— Smith *v.* Luse, 30 Ill. App. 37.

Michigan.— Wallace *v.* Glaser, 82 Mich. 190, 46 N. W. 227, 21 Am. Rep. 556; McVicar *v.* Denison, 81 Mich. 348, 45 N. W. 659; Buchtel *v.* Mason, 67 Mich. 605, 35 N. W. 172; Rix *v.* Strauts, 59 Mich. 364, 26 N. W. 638; Boigt *v.* Beller, 56 Mich. 140, 22 N. W. 270.

Rhode Island.— Wheaton *v.* Pike, 9 R. I. 132, 98 Am. Dec. 377, 11 Am. Rep. 227.

South Carolina.— De Bruhl *v.* Neuffer, 1 Strobh. 426; O'Neall *v.* Sims, 1 Strobh. 115.

United States.— *In re* Bartenbach, 2 Fed. Cas. No. 1,068.

See 29 Cent. Dig. tit. "Interest," § 31.

91. O'Neall *v* Bookman, 9 Rich. (S. C.) 80; Wright *v.* Eaves, 10 Rich. Eq. (S. C.) 582.

92. Unreasonable and vexatious delay see *supra*, III, C, 1, c.

93. *Arkansas.*— Rogers *v.* Yarnell, 51 Ark. 198, 10 S. W. 622.

California.— Heald *v.* Hendy, 89 Cal. 632, 27 Pac. 67; State Bank *v.* Northam, 51 Cal. 387.

Connecticut.— Clark *v.* Clark, 46 Conn. 586; Crosby *v.* Mason, 32 Conn. 482; Day *v.* Lockwood, 24 Conn. 185; Selleck *v.* French, 1 Conn. 32, 6 Am. Dec. 185; Temple *v.* Belding, 1 Root 314; Brown *v.* Henman, 1 Root 248; Phenix *v.* Prindle, Kirby 207.

Illinois.— Imperial Hotel Co. *v.* H. B. Claflin Co., 175 Ill. 119, 51 N. E. 616; Flake *v.* Carson, 33 Ill. 518; Myers *v.* Walker, 24 Ill. 133; Aldrich *v.* Dunham, 16 Ill. 403; McCormick *v.* Elston, 16 Ill. 204; Clement *v.* McConnel, 14 Ill. 154, Pieser *v.* Minkota Milling Co., 94 Ill. App. 595; Bassett *v.* Noble, 15 Ill. App. 360.

Indiana.— Shewel *v.* Givan, 2 Blackf. 312.

Iowa.— Raymond *v.* Williams, 40 Iowa 117.

Kansas.— Williams *v.* Hersey, 17 Kan. 18.

Kentucky.— Henderson Cotton Mfg. Co. *v.* Lowell Mach. Shops, 86 Ky. 668, 7 S. W. 142, 9 Ky. L Rep. 831; Adams Express Co. *v.* Milton, 11 Bush 49; Neal *v.* Keel, 4 T. B. Mon. 162; Dozier *v.* Edwards, 3 Litt. 67; Murray *v.* Ware, 1 Bibb 325, 4 Am. Dec. 637; Harrison *v.* Handley, 1 Bibb 443; South *v.* Leavy, Hard. 518; Morrison *v.* Winn, Hard. 480; Bale *v.* Mudd, 63 S. W. 451, 23 Ky. L. Rep. 594; Tobin *v.* South, 36 S. W. 1039, 18 Ky. L. Rep. 350; Hays *v.* Williams, 10 Ky. L. Rep. 319.

Louisiana.— Buckner *v.* Chapman, 2 Rob. 360; Ory *v.* Winter, 6 Mart. N. S. 606.

Massachusetts.— Freeman *v.* Freeman, 142 Mass. 98, 7 N. E. 710; Stimpson *v.* Green, 13 Allen 326; Palmer *v.* Stockwell, 9 Gray 237; Fisher *v.* Sargent, 10 Cush. 250; Goff *v.* Rehoboth, 2 Cush. 475; Brewer *v.* Tyringham, 12 Pick. 547.

Michigan.— Sweeney *v.* Neely, 53 Mich. 421, 19 N. W. 127; Davis *v.* Walker, 18 Mich. 25.

Mississippi.— Houston *v.* Crutcher, 31 Miss. 51.

Nevada.— Flannery *v.* Anderson, 4 Nev. 437.

New Jersey.— Polhemus *v.* Annin, 1 N. J. L. 176.

New York.— Ledyard *v.* Bull, 119 N. Y.

cases, however, interest has been allowed upon cash items of an account,[94] and interest has been allowed upon open and unliquidated accounts in some cases where the circumstances were such as to justify it upon equitable principles.[95]

b. Settled Accounts. After an account has been liquidated and settled and the balance due has been adjusted and agreed upon between the parties, interest on the balance thus shown will be allowed as upon other debts of specific amounts.[96]

62, 23 N. E. 444; Smith *v.* Velie, 60 N. Y. 106; Esterly *v.* Cole, 3 N. Y. 502; James *v.* Post, 40 N. Y. App. Div. 162, 57 N. Y. Suppl. 834; Benedict *v.* Sliter, 82 Hun 190, 31 N. Y. Suppl. 413; Pursell *v.* Fry, 19 Hun 595; Godfrey *v.* Moser, 3 Hun 218, 5 Thomps. & C. 677; Mygatt *v.* Willcox, 1 Lans. 55; McKnight *v.* Dunlop, 4 Barb. 36; Farmers' L. & T. Co. *v.* Mann, 4 Rob. 356; Salter *v.* Parkhurst, 2 Daly 240; Spencer *v.* Hall, 30 Misc. 75, 62 N. Y. Suppl. 826; Matter of Strickland, 5 N. Y. Suppl. 851, 1 Conolly Surr. 435; Hadley *v.* Ayres, 12 Abb. Pr. N. S. 240; Doyle *v.* St. James' Church, 7 Wend. 178; Wood *v.* Hickok, 2 Wend. 501; Tucker *v.* Ives, 6 Cow. 193; Rensselaer Glass Factory *v.* Reid, 5 Cow. 587 [*affirming* 3 Cow. 393]; Van Beuren *v.* Van Gaasbeck, 4 Cow. 496; Newell *v.* Griswold, 6 Johns. 45; Liotard *v.* Graves, 3 Cai. 226; Consequa *v.* Fanning, 3 Johns. Ch. 587.

North Carolina.— Holden *v.* Peace, 39 N. C. 223, 45 Am. Dec. 514.

Oregon.— Pengra *v.* Wheeler, 24 Oreg. 532, 34 Pac. 354, 21 L. R. A. 726; Catlin *v.* Knott, 2 Oreg. 321.

Pennsylvania.— Grubb's Appeal, 66 Pa. St. 117; McClintock's Appeal, 29 Pa. St. 360; Graham *v.* Williams, 16 Serg. & R. 257, 16 Am. Dec. 569; Williams *v.* Craig, 1 Dall. 313, 1 L. ed. 153; Henry *v.* Risk, 1 Dall. 265, 1 L. ed. 130.

South Carolina.— Edwards *v.* Dargan, 30 S. C. 177, 8 S. E. 858; Bennett *v.* Johnson, 1 Speers 209; Fairfield *v.* Bonner, 2 Hill 468; Farrand *v.* Bouchell, Harp. 83; Chisolm *v.* Neyle, Harp. 274; Knight *v.* Mitchell, 3 Brev. 506; Righton *v.* Blake, 1 Brev. 159; Skirving *v.* Stobo, 2 Bay 233.

Tennessee.— Stamps *v.* Tennessee Producers' Marble Co., (Ch. App. 1900) 59 S. W. 769.

Texas.— Finley *v.* Carothers, 9 Tex. 517, 60 Am. Dec. 179; Close *v.* Fields, 2 Tex. 232; Cloud *v.* Smith, 1 Tex. 102.

Virginia.— Stearns *v.* Mason, 24 Gratt. 484; Waggoner *v.* Gray, 2 Hen. & M. 603; McConnico *v.* Curzen, 2 Call 358, 1 Am. Dec. 540; Kerr *v.* Love, 1 Wash. 172.

Washington.— Baxter *v.* Waite, 2 Wash. Terr. 228, 6 Pac. 429.

Wisconsin.— Ryan Drug Co. *v.* Hvambsahl, 92 Wis. 62, 65 N. W. 873; Yates *v.* Shepardson, 39 Wis. 173; Marsh *v.* Fraser, 37 Wis. 149.

United States.— South Carolina *v.* Port Royal, etc., R. Co., 89 Fed. 565.

England.— Hill *v.* South Staffordshire R. Co., L. R. 18 Eq. 154, 43 L. J. Ch. 566; Rishton *v.* Grissell, L. R. 10 Eq. 393, 18 Wkly. Rep. 821; Nichol *v.* Thompson, 1 Campb. 52 note; Chalie *v.* York, 6 Esp. 45; Milsom *v.* Hayward, 9 Price 134.

Canada.— *Re* Ross, 29 Grant Ch. (U. C.) 385; Charlebois *v.* Montreal, 15 Quebec Super. Ct. 96.

See 29 Cent. Dig. tit. "Interest," §§ 32, 33.

In Vermont interest is allowed on the annual balances of running accounts. Holt *v.* Howard, 77 Vt. 49, 58 Atl. 797; Hammond *v.* Hammond, 76 Vt. 437, 58 Atl. 724; Willard *v.* Pinard, 65 Vt. 160, 26 Atl. 67; Davis *v.* Smith, 48 Vt. 52; Catlin *v.* Aiken, 5 Vt. 177. See also Carpenter *v.* Welch, 40 Vt. 251; Bates *v.* Starr, 2 Vt. 536, 21 Am. Dec. 568. But a debtor should not be charged with interest on items of account not brought into an annual settlement, of the existence of which items he was ignorant, and the nonpayment of which was not due to his own fault. Langdon *v.* Castleton, 30 Vt. 285.

Accounts secured by mechanics' liens are unliquidated and do not bear interest. Devereux *v.* Taft, 20 S. C. 555.

The question is whether the demand itself is liquidated. Rensselaer Glass Factory *v.* Reid, 5 Cow. (N. Y.) 587.

Partnership accounts.— While it is a general rule that interest is not allowed on partnership accounts until a balance is struck between the partners, yet this rule will not apply where one partner has drawn greatly more than he was entitled to from the firm assets, applying it to his own use to the detriment of his copartners. Masonic Sav. Bank *v.* Bangs, 10 S. W. 633, 10 Ky. L. Rep. 743.

94. Rogers *v.* Yarnell, 51 Ark. 198, 10 S. W. 622; Farmers' L. & T. Co. *v.* Mann, 4 Rob. (N. Y.) 356; Rensselaer Glass Factory *v.* Reid, 5 Cow. (N. Y.) 587 [*affirming* 3 Cow. 393]; Smetz *v.* Kennedy, Riley (S. C.) 218.

95. Crawford *v.* Osmun, 90 Mich. 77, 51 N. W. 356; Van Beuren *v.* Van Gaasbeck, 4 Cow. (N. Y.) 496; Tompkins *v.* Tompkins, 18 S. C. 1; Omichund *v.* Barker, Ridg. t. Hardw. 285, 27 Eng. Reprint 831.

In mutual running accounts, where interest is allowed by one party, it must be allowed by the other. Bell's Appeal, 4 Pa. Cas. 423, 8 Atl. 927.

96. *Connecticut.*— McKeon *v.* Byington, 70 Conn. 429, 39 Atl. 853; Selleck *v.* French, 1 Conn. 32, 6 Am. Dec. 185.

Georgia.— Hicks *v.* Thomas, Dudley 218.

Illinois.— Luetgert *v.* Volker, 153 Ill. 385, 39 N. E. 113; Hartshorn *v.* Byrne, 147 Ill. 418, 35 N. E. 622 [*affirming* 45 Ill. App. 250]; Haight *v.* McVeagh, 69 Ill. 624; Underhill *v.* Gaff, 48 Ill. 198; Bishop Hill Colony *v.*

The mere act of striking a balance between the parties does not, however, render the account a settled one upon which interest will be allowed;[97] but there must be some acknowledgment of the correctness of the balance thus shown, or some acquiescence in the account stated.[98]

10. Unliquidated Demands[99] — a. In General. As a general rule interest is not recoverable upon unliquidated demands.[1]

Edgerton, 26 Ill. 54; Hitt *v.* Allen, 13 Ill. 592; Lurton *v.* Gilliam, 2 Ill. 577, 33 Am. Dec. 430; Cougblin *v.* Gutta Percha, etc., Mfg. Co., 33 Ill. App. 71; Thomlinson *v.* Earnshaw, 14 Ill. App. 593.

Indiana.— Ross *v.* Smith, 113 Ind. 242, 15 N. E. 268.

Iowa.— David *v.* Conard, 1 Greene 336.

Kansas.— Tootle *v.* Wells, 39 Kan. 452, 18 Pac. 692.

Kentucky.— Henderson Cotton Mfg. Co. *v.* Lowell Mach. Shops, 86 Ky. 668, 7 S. W. 142, 9 Ky. L. Rep. 831.

Louisiana.— Shaw *v.* Oakey, 3 Rob. 361.

Maine.— Crosby *v.* Otis, 32 Me. 256.

Michigan.—Graham *v.* Myers, 67 Mich. 277, 34 N. W. 710.

Mississippi.— Thompson *v.* Matthews, 56 Miss. 368.

New York.— Case *v.* Hotchkiss, 1 Abb. Dec. 324, 3 Keyes 334, 1 Transcr. App. 285, 3 Abb. Pr. N. S. 381, 37 How. Pr. 283; Patterson *v.* Choate, 7 Wend. 441; Walden *v.* Sherburne, 15 Johns. 409.

North Carolina.— Overby *v.* Fayetteville Bldg., etc., Assoc., 81 N. C. 56.

Pennsylvania.— Porter *v.* Patterson, 15 Pa. St. 229.

South Carolina.— Minott *v.* Elliott, 2 McCord 125; Barelli *v.* Brown, 1 McCord 449, 10 Am. Dec. 683; Dickinson *v.* Legare, 1 Desauss. Eq. 537.

Texas.— Heidenheimer *v.* Ellis, 67 Tex. 426, 3 S. W. 666.

Vermont.— Williams *v.* Finney, 16 Vt. 297.

Wisconsin.— Morawetz *v.* McGovern, 68 Wis. 312, 32 N. W. 290.

United States.— Cooper *v.* Coates, 21 Wall. 105, 22 L. ed. 481; Young *v.* Godbe, 15 Wall. 562, 21 L. ed. 250; Bainbridge *v.* Wilcocks, 2 Fed. Cas. No. 755, Baldw. 536.

England.— Blaney *v.* Hendricks, 2 W. Bl. 761, 3 Wils. C. P. 205.

See 29 Cent. Dig. tit. "Interest," § 34.

Account against government.— A district attorney is not entitled to interest on his accounts for a period intervening between the time of their allowance by the treasury department and the time of their payment. Baxter *v.* U. S., 51 Fed. 671, 2 C. C. A. 411.

97. Loose *v.* Wood, 17 Ill. App. 26; Davis *v.* Walker, 18 Mich. 25; Ledyard *v.* Bull, 119 N. Y. 62, 23 N. E. 444; Patterson *v.* Choate, 7 Wend. (N. Y.) 441; Chalie *v.* York, 6 Esp. 45. See also Fergusson *v.* Fyffe, 8 Cl. & F. 121, 8 Eng. Reprint 49.

It is not sufficient that the account is capable of accurate statement or of liquidation from the facts which it contains, or that its payment may be presently enforced. Ledyard *v.* Bull, 119 N. Y. 62, 23 N. E. 444. *Compare* Walden *v.* Sherburne, 15 Johns. (N. Y.) 409.

98. *Illinois.*— Lusk *v.* Throop, 189 Ill. 127, 59 N. E. 529 [*affirming* 89 Ill. App. 509]; Luetgert *v.* Volker, 153 Ill. 385, 39 N. E. 113; Daniels *v.* Osborn, 75 Ill. 615; Haight *v.* McVeagh, 69 Ill. 624; Underhill *v.* Gaff, 48 Ill. 198.

Iowa.—Raymond *v.* Williams, 40 Iowa 117.

Kentucky.— Henderson Cotton Mfg. Co. *v.* Lowell Mach. Shops, 86 Ky. 668, 7 S. W. 142, 9 Ky. L. Rep. 831.

Massachusetts.— Lambeth Rope Co. *v.* Brigham, 170 Mass. 518, 49 N. E. 1022.

New York.— Pollock *v.* Ehle, 2 E. D. Smith 541.

South Carolina.— Minott *v.* Elliott, 2 McCord 125.

Texas.—Heidenheimer *v.* Ellis, 67 Tex. 426, 3 S. W. 666; Neyland *v.* Neyland, 19 Tex. 423.

Washington.— Stickler *v.* Giles, 9 Wash. 147, 37 Pac. 293.

Wisconsin.— Morawetz *v.* McGovern, 68 Wis. 312, 32 N. W. 290.

See 29 Cent. Dig. tit. "Interest," § 34.

Acknowledgment by letter sufficient.—Hicks *v.* Thomas, Dudley (Ga.) 218.

Approval of a treasurer's account by the county board to whom it is submitted is a liquidation of such account so as to justify the allowance of interest thereon. Stern *v.* People, 102 Ill. 540.

99. Demands based on tort see *supra*, III, C, 3.

1. *Alabama.*— Glidden *v.* Street, 68 Ala. 600.

Arkansas.— Tatum *v.* Mohr, 21 Ark. 349.

California.— Ferrea *v.* Chabot, 121 Cal. 233, 53 Pac. 689, 1092; Swinnerton *v.* Argonaut Land, etc., Co., 112 Cal. 375, 44 Pac. 719; Cox *v.* McLaughlin, 76 Cal. 60, 18 Pac. 100, 9 Am. St. Rep. 164; Brady *v.* Wilcoxson, 44 Cal. 239.

Connecticut.— Loomis *v.* Gillett, 75 Conn. 298, 53 Atl. 581.

Georgia.— See Roberts *v.* Prior, 20 Ga. 561.

Illinois.— Dady *v.* Condit, 209 Ill. 488, 70 N. E. 1088 [*affirming* 104 Ill. App. 507]; Buckmaster *v.* Grundy, 8 Ill. 626; Griggs *v.* Ganford, 50 Ill. App. 172.

Kentucky.— Moore *v.* Calvert, 6 Bush 356; Conner *v.* Clark, 15 Ky. L. Rep. 126.

Louisiana.— Goldenbow *v.* Wright, 13 La. 371; Bertrand *v.* Frazier, 11 La. 236; Beal *v.* McKiernan, 8 La. 569; Featherstone *v.* Robinson, 7 La. 596; Dyer *v.* Seals, 7 La. 131; Cline *v.* Caldwell, 4 La. 137; Pressas *v.* Mendiburn, 4 La. 128; Nicolet *v.* New Orleans Ins. Co., 3 La. 366, 23 Am. Dec. 458; Parker *v.* Walden, 6 Mart. N. S. 713; Buquoi

b. Demands Readily Ascertainable by Computation. Where, however, although a demand is unliquidated, the amount thereof can be readily ascertained by mere computation, interest thereon will be allowed.[2]

v. Hampton, 6 Mart. N. S. 8; Lafon *v.* Riviere, 1 Mart. N. S. 130; Pierce *v.* Flower, 5 Mart. 388; Foster *v.* Dupre, 5 Mart. 6, 12 Am. Dec. 466.

Michigan.— Coburn *v.* Muskegon Booming Co., 72 Mich. 134, 40 N. W. 198.

Minnesota.— Bull *v.* Rich, 92 Minn. 481, 100 N. W. 213, 101 N. W. 490.

Missouri.— Dozier *v.* Jerman, 30 Mo. 216; Laming *v.* Peters Shoe Co., 71 Mo. App. 646; McCormack *v.* Lynch, 69 Mo. App. 524; Fisher *v.* New Orleans Anchor Line, 15 Mo. App. 577.

Montana.— Randall *v.* Greenhood, 3 Mont. 506.

Nebraska.— Wittenberg *v.* Mollyneaux, 59 Nebr. 203, 80 N. W. 824.

Nevada.— Vietti *v.* Nesbitt, 22 Nev. 390, 41 Pac. 151.

New Jersey.—Speer *v.* Vanorden, 3 N. J. L. 652.

New York.— Delafield *v.* Westfield, 169 N. Y. 582, 62 N. E. 1095 [*affirming* 41 N. Y. App. Div. 24, 58 N. Y. Suppl. 277]; Gray *v.* New Jersey Cent. R. Co., 157 N. Y. 483, 52 N. E. 555; Coxe *v.* State, 144 N. Y. 396, 39 N. E. 400; McMaster *v.* State, 108 N. Y. 542, 15 N. E. 417; Excelsior Terra Cotta Co. *v.* Harde, 90 N. Y. App. Div. 4, 85 N. Y. Suppl. 732; Crawford *v.* Mail, etc., Pub. Co., 22 N. Y. App. Div. 54, 47 N. Y. Suppl. 747; Sloan *v.* Baird, 12 N. Y. App. Div. 481, 42 N. Y. Suppl. 38; Button *v.* Kinnetz, 88 Hun 35, 34 N. Y. Suppl. 522; Doctor *v.* Darling, 68 Hun 70, 22 N. Y. Suppl. 594; De Witt *v.* De Witt, 46 Hun 258; Pursell *v.* Fry, 19 Hun 595; Gallup *v.* Perne, 10 Hun 525; Duffy *v.* Duncan, 32 Barb. 587; Holmes *v.* Rankin, 17 Barb. 454; Riss *v.* Messmore, 58 N. Y. Super. Ct. 23, 9 N. Y. Suppl. 320; Matter of Hartman, 13 Misc. 486, 35 N. Y. Suppl. 495; Bagley *v.* Stern, 92 N. Y. Suppl. 244; *In re* Merchant, 6 N. Y. Suppl. 875; People *v.* Delaware County, 9 Abb. Pr. N. S. 408; Chase *v.* Union Stone Co., 63 How. Pr. 336; Still *v.* Hall, 20 Wend. 51; Doyle *v.* St. James' Church, 7 Wend. 178; Rensselaer Glass Factory *v.* Reid, 5 Cow. 587 [*affirming* 3 Cow. 393]; Holliday *v.* Marshall, 7 Johns. 211; Anonymous, 1 Johns. 315; Ryckman *v.* Parkins, 5 Paige 543.

Oregon.— Poppleton *v.* Jones, 42 Oreg. 24, 69 Pac. 919; Smith *v.* Turner, 33 Oreg. 379, 54 Pac. 166; Pengra *v.* Wheeler, 24 Oreg. 532, 34 Pac. 354, 21 L. R. A. 726; Hawley *v.* Dawson, 16 Oreg. 344, 18 Pac. 592.

Pennsylvania.—Greenwalt's Estate, 9 Lanc. Bar 50.

South Carolina.— Sullivan *v.* Susong, 30 S. C. 305, 9 S. E. 156; Conyers *v.* Magrath, 4 McCord 392.

Tennessee.— Cole *v.* Sands, 1 Overt. 106; Gribble *v.* Ford, (Ch. App. 1898) 52 S. W. 1007.

Texas.— Fowler *v.* Davenport, 21 Tex. 626.

Virginia.— Auditor of Public Accounts *v.* Dugger, 3 Leigh 241.

Wisconsin.— Marsh *v.* Fraser, 37 Wis. 149.

Wyoming.— Kuhn *v.* McKay, 7 Wyo. 42, 49 Pac. 473, 51 Pac. 205.

United States.— Mowry *v.* Whitney, 14 Wall. 620, 20 L. ed. 860; Lincoln *v.* Claflin, 7 Wall. 132, 19 L. ed. 106; Pacific Postal Tel. Cable Co. *v.* Fleischner, 66 Fed. 899, 14 C. C. A. 166; Gilpins *v.* Consequa, 10 Fed. Cas. No. 5,452, Pet. C. C. 85, 3 Wash. 184; Willings *v.* Consequa, 30 Fed. Cas. No. 17,766, Pet. C. C. 172.

Canada.— Burpee *v.* Carvill, 16 N. Brunsw. 235.

Sec 29 Cent. Dig. tit. "Interest," § 35.

Damages on protested bill.— Interest is not allowable upon damages recovered upon a protested bill of exchange. Murphy *v.* Andrews, 13 Ala. 708; Crosby *v.* Morton, 13 La. 357. *Contra*, U. S. Bank *v.* Merle, 2 Rob. (La.) 117, 38 Am. Dec. 201. And see Lake *v.* Tyree, 90 Va. 719, 19 S. E. 787.

Rent in arrear.— Although rent is reserved in produce and labor, and is thus merely estimated and uncertain in amount, interest thereon may be recovered. Livingston *v.* Miller, 11 N. Y. 80; Van Rensselaer *v.* Jewett, 2 N. Y. 135, 51 Am. Dec. 275; Bolling *v.* Lersner, 26 Gratt. (Va.) 36. *Compare* Roper *v.* Wren, 6 Leigh (Va.) 38; Payne *v.* Graves, 5 Leigh (Va.) 561; Skipwith *v.* Cinch, 2 Call (Va.) 253.

Damages recovered in lieu of rent.— Although interest is permitted on rent in arrear by statute, it will not be allowed on damages recovered in lieu of rent. Moore *v.* Calvert, 6 Bush (Ky.) 356.

Provision in lease for forfeiture of part of rent.— Where a lease of water-power provides for the payment of a fixed sum quarterly unless the supply of water be deficient, when a *pro-rata* proportion of the rents is to be forfeited, the amount of rent in case of an insufficient supply is unliquidated, and hence, in such case, interest on the rent, unless expressly stipulated for, cannot be allowed. Pengra *v.* Wheeler, 24 Oreg. 532, 34 Pac. 354, 21 L. R. A. 726.

When the demand has been liquidated by the report of a master or a decree of the court it is the usual course to allow interest from that time. Ryckman *v.* Parkins, 5 Paige (N. Y.) 543.

Where a railroad company takes possession of land for its right of way under an agreement with the owner of the land, and the railroad company repudiates the agreement, interest does not run on the amount of damages to be recovered by the owner until it is liquidated by proceedings for condemnation or otherwise. Day *v.* New York Cent. R. Co., 22 Hun (N. Y.) 412.

2. *California.*— Swinnerton *v.* Argonaut Land, etc., Co., 112 Cal. 375, 44 Pac. 719;

c. Market Values. Even though a demand be not specifically pecuniary, so as to be accurately ascertainable by mere computation, yet if, by reference to established market values, the amount due may be approximately ascertained, interest will be allowed as upon a liquidated demand.[3] But where the computation is based on market values, such values must be well established and knowledge thereof must be accessible to the debtor,[4] and the proof of such values must be clear and certain.[5]

d. Existence of Set-Off or Counter-Claim.[6] Where the amount of the demand is sufficiently certain to justify the allowance of interest thereon the existence of a set-off or counter-claim which is itself unliquidated will not prevent the

Martin *v.* Ede, 103 Cal. 157, 37 Pac. 199; Cox *v.* McLaughlin, 76 Cal. 60, 18 Pac. 100, 9 Am. St. Rep. 164.

Georgia.— Bartee *v.* Andrews, 18 Ga. 407.

Illinois.— Murray *v.* Doud, 167 Ill. 368, 47 N. E. 717, 59 Am. St. Rep. 297.

Kentucky.— Burnham *v.* Best, 10 B. Mon. 227.

New York.— Excelsior Terra Cotta Co. *v.* Harde, 181 N. Y. 11, 73 N. E. 494, 106 Am. St. Rep. 493; Gray *v.* New Jersey Cent. R. Co., 157 N. Y. 483, 52 N. E. 555 [*affirming* 82 Hun 523, 31 N. Y. Suppl. 704]; Mansfield *v.* New York Cent., etc., R. Co., 114 N. Y. 331, 21 N. E. 735, 1037, 4 L. R. A. 566; De Lavallette *v.* Wendt, 75 N. Y. 579, 31 Am. Rep. 494; McMahon *v.* New York, etc., R. Co., 20 N. Y. 463; Braas *v.* Springville, 100 N. Y. App. Div. 197, 91 N. Y. Suppl. 599; Graham *v.* Chrystal, 1 Abb. Pr. N. S. 121, 32 How. Pr. 287. See also Coxe *v.* State, 144 N. Y. 396, 39 N. E. 400; Smith *v.* Velie, 60 N. Y. 106.

Pennsylvania.— Kelsey *v.* Murphy, 30 Pa. St. 340.

Wisconsin.— Graham *v.* Chicago, etc., R. Co., 53 Wis. 473, 10 N. W. 609; School Dist No. 1 *v.* Dreutzer, 51 Wis. 153, 6 N. W. 610; Shipman *v.* State, 44 Wis. 458.

Wyoming.— Kuhn *v.* McKay, 7 Wyo. 42, 49 Pac. 473, 51 Pac. 205.

See 29 Cent. Dig. tit. "Interest," § 37.

Stipulated salary.— Where plaintiff worked for several years at a stipulated salary per month, but did not collect it when due, the monthly balances being readily ascertainable by mere computation, he was entitled to interest on each balance from the time when it fell due. Butler *v.* Kirby, 53 Wis. 188, 10 N. W. 373. *Compare* O'Herrin *v.* Milwaukee County, 67 Wis. 142, 30 N. W. 239.

Quantum meruit for services.— It is not error in an action on a *quantum meruit* for services to allow interest on the yearly balances found due. Tucker *v.* Preston, 60 Vt. 473, 11 Atl. 726.

A contract for the hire of a negro at a stipulated price to be paid at the end of each year is a liquidated demand bearing interest. Roberts *v.* Prior, 20 Ga. 561.

Where premises are leased, the rent to be paid monthly, the amount thus stipulated becomes a liquidated account on which interest is allowable as the monthly sums become due. West Chicago Alcohol Works *v.* Sheer, 8 Ill. App. 367.

A claim for a certain number of cubic yards of excavation under a contract fixing the price per cubic yard is a liquidated claim upon which it is proper to allow interest. Becker *v.* New York, 77 N. Y. App. Div. 635, 78 N. Y. Suppl. 1064.

3. *Alabama.*— Stoudenmeier *v.* Williamson, 29 Ala. 558.

California.— Swinnerton *v.* Argonaut Land, etc., Co., 112 Cal. 375, 44 Pac. 719; Cox *v.* McLaughlin, 76 Cal. 60, 18 Pac. 100, 9 Am. St. Rep. 164.

Florida.— Sullivan *v.* McMillan, 37 Fla. 134, 19 So. 340, 53 Am. St. Rep. 239.

Illinois.— Harvey *v.* Hamilton, 155 Ill. 377, 40 N. E. 592.

Mississippi.— Bickell *v.* Colton, 41 Miss. 368.

Nebraska.— Missouri, etc., Trust Co. *v.* Clark, 60 Nebr. 406, 83 N. W. 202.

New York.— Dana *v.* Fiedler, 12 N. Y. 40, 62 Am. Dec. 130; Van Rensselaer *v.* Jewett, 2 N. Y. 135, 51 Am. Dec. 275; Van Rensselaer *v.* Jones, 2 Barb. 643; Lush *v.* Druse, 4 Wend. 313; Spencer *v.* Tilden, 5 Cow. 144.

Pennsylvania.— Richards *v.* Citizens' Natural Gas Co., 130 Pa. St. 37, 18 Atl. 600.

South Carolina.— Ryan *v.* Baldrick, 3 McCord 498.

Texas.— Calvit *v.* McFadden, 13 Tex. 324.

Virginia.— Enders *v.* Board of Public Works, 1 Gratt. 364.

Wyoming.— Kuhn *v.* McKay, 7 Wyo. 42, 49 Pac. 473, 51 Pac. 205.

Market values are so well established and so easily obtained that it is easy for the debtor to obtain some proximate knowledge of how much he is to pay. Cox *v.* McLaughlin, 76 Cal. 60, 18 Pac. 100, 9 Am. St. Rep. 164; Sipperly *v.* Stewart, 50 Barb. (N. Y.) 62.

An annuity payable in agricultural produce at a particular place, the value of which must be ascertained by testimony, does not bear interest. Philips *v.* Williams, 5 Gratt. (Va.) 259.

4. Hewes *v.* Germain Fruit Co., 106 Cal. 441, 39 Pac. 853; Gray *v.* New Jersey Cent. R. Co., 157 N. Y. 483, 52 N. E. 555; Sloan *v.* Baird, 12 N. Y. App. Div. 481, 42 N. Y. Suppl. 38.

5. Kuhn *v.* McKay, 7 Wyo. 42, 49 Pac. 473, 51 Pac. 205. See also Stearns *v.* Mason, 24 Gratt. (Va.) 484.

6. Accounts see *supra*, III, D, 9.

recovery of interest on the balance of the demand found due from the time it became due.[7]

e. Where Right to Recover or Amount of Debt Disputed. It has been held that where the amount of the demand is disputed on reasonable grounds and in good faith, or the right to recover is in good faith denied, interest will not be allowed on the demand prior to its liquidation by verdict or otherwise.[8]

f. Agreements Respecting Liquidation. Where the amount of a demand is definitely agreed upon by the parties, interest will be allowed on such amount from the date of such liquidation;[9] but where the parties agree to submit the amount of the demand to the decision of others, or to be determined by the court, interest will not be allowed prior to the date of such decision.[10]

11. Verdicts, Findings, and Awards. In some jurisdictions interest will be allowed on an amount found due by the verdict of a jury from the date of its rendition until the entry of judgment thereon,[11] especially where the entry of judgment

7. *Connecticut.*— Healy *v.* Fallon, 69 Conn. 228, 37 Atl. 495. *Compare* Tucker *v.* Jewett, 32 Conn. 563.

Georgia.— Howard *v.* Behn, 27 Ga. 174.

Louisiana.— Martin *v.* Overton, 1 Mart. N. S. 584.

Missouri.— Stephens *v.* Burgess, 69 Mo. 168.

New York.— Greenly *v.* Hopkins, 10 Wend. 96.

Oregon.— Smith *v.* Turner, 33 Oreg. 379, 54 Pac. 166.

South Carolina.— Tappan *v.* Harwood, 2 Speers 536.

Texas.— See Watkins *v.* Junker, 90 Tex. 584, 40 S. W. 11.

See 29 Cent. Dig. tit. "Interest," § 38.

Where a non-interest bearing claim is set off against a demand bearing interest, plaintiff is entitled to interest on his whole demand up to the time of the verdict. Rogers *v.* Russell, 1 Nott & M. (S. C.) 24. See also Morse *v.* Ellerbe, 4 Rich. (S. C.) 600. *Contra*, Meriwether *v.* Bird, 9 Ga. 594.

8. *Illinois.*— Myers *v.* Walker, 24 Ill. 133; Griggs *v.* Ganford, 50 Ill. App. 172; Mosbier *v.* Shear, 15 Ill. App. 342.

Michigan.— Coburn *v.* Muskegon Booming Co., 72 Mich. 134, 40 N. W. 198; People *v.* Wexford Tp., 37 Mich. 351.

Ohio.— Burkhardt *v.* Cincinnati, 7 Ohio Cir. Ct. 260, 4 Ohio Cir. Dec. 586.

Wisconsin.— Shipman *v.* State, 44 Wis. 458. *Contra*, Vaughan *v.* Howe, 20 Wis. 497.

United States.— The Isaac Newton, 13 Fed. Cas. No. 7,090, Abb. Adm. 588.

See 29 Cent. Dig. tit. "Interest," § 39.

Contra.— Loomis *v.* Gillett, 75 Conn. 298, 53 Atl. 581; Schmidt *v.* Louisville, etc., R. Co., 95 Ky. 289, 25 S. W. 494, 26 S. W. 547, 15 Ky. L. Rep. 785; Louisville *v.* Henderson, 13 S. W. 111, 11 Ky. L. Rep. 796; West Republic Min. Co. *v.* Jones, 108 Pa. St. 55. But see Delaware Ins. Co. *v.* Delaunie, 3 Binn. (Pa.) 295; Williams Tp. *v.* Williamstown, 9 Pa. Co. Ct. 65; *In re* Schneider, 11 Leg. Int. (Pa.) 122; *In re* Greenawalt, 9 Lanc. Bar (Pa.) 50.

Where the dispute is as to the right to recover, and not as to the amount, which is liquidated, the arbitrary reduction of the amount by the jury will not prevent the allowance of interest on the sum actually recovered. Martin *v.* Silliman, 53 N. Y. 615. *Compare* Easton *v.* Houston, etc., R. Co., 38 Fed. 784.

9. Clark *v.* Dutton, 69 Ill. 521; Bishop Hill Colony *v.* Edgerton, 26 Ill. 54; Thomas *v.* Wells, 140 Mass. 517, 5 N. E. 485; Hoagland *v.* Segur, 38 N. J. L. 230.

An agreement that one-fifth part of a crop is to be paid to defendant when it is made constitutes a liquidated demand which will bear interest. Bartee *v.* Andrews, 18 Ga. 407.

Stipulation as to amount in event of finding for plaintiff.— Where parties to an action have stipulated that, in the event of a finding in favor of plaintiff, his damages shall amount to a fixed sum, the court, in entering judgment for plaintiff, will not add interest from the date of the stipulation. Easton *v.* Houston, etc., R. Co., 38 Fed. 784.

10. Easterbrook *v.* Farquharson, 110 Cal. 311, 42 Pac. 811; Trask *v.* Peekskill Plow Works, 6 Hun (N. Y.) 236; Binsse *v.* Wood, 47 Barb. (N. Y.) 624; Greer *v.* Latimer, 47 S. C. 176, 25 S. E. 136; Evans *v.* Beckwith, 37 Vt. 285.

11. *California.*— Golden Gate Mill, etc., Co. *v.* Joshua Hendy Mach. Works, 82 Cal. 184, 23 Pac. 45. *Compare* Atherton *v.* Fowler, 46 Cal. 323.

Iowa.— Swails *v.* Cissna, 61 Iowa 693, 17 N. W. 39. But see Shephard *v.* Brenton, 20 Iowa 41.

Missouri.— Oliver *v.* Love, 104 Mo. App. 73, 78 S. W. 335.

Nebraska.— Hilton *v.* State, 60 Nebr. 421, 83 N. W. 354.

New Hampshire.— Johnson *v.* Atlantic, etc., R. Co., 43 N. H. 410.

New York.— See Vredenberg *v.* Hallett, 1 Johns. Cas. 27.

South Carolina.— State Bank *v.* Bowie, 3 Strobh. 439.

Utah.— Sandberg *v.* Victor Gold, etc., Min. Co., 24 Utah 1, 66 Pac. 360.

Virginia.— Fry *v.* Leslie, 87 Va. 269, 12 S. E. 671; Lewis *v.* Arnold, 13 Gratt. 454; Hepburn *v.* Dundas, 13 Gratt. 219.

United States.— Quebec Steamship Co. *v.* Merchant, 133 U. S. 375, 10 S. Ct. 397, 33 L. ed. 656; Griffith *v.* Baltimore, etc., R. Co.,

is delayed by the act of defendant, as by motion for new trial or otherwise;[12] but in others no interest is allowed on verdicts prior to judgment thereon.[13] An award of arbitrators, or a master's report finding money to be due, is generally held to carry interest;[14] but if the amount found and reported be merely estimated, and not definite and exact,[15] or if the award be *ex parte*, or not in conformity with the terms of submission to the arbitrators,[16] interest will not be allowed prior to confirmation.

12. JUDGMENTS — a. In General. It has been frequently stated in the decisions that judgments do not bear interest as matter of legal right, or by the common law, so that interest may be collected by an execution thereon;[17] but in actions of debt upon judgments, interest is generally allowed as damages, as in other cases

44 Fed. 574; Fowler *v.* Redfield, 9 Fed. Cas. No. 5,003.

Canada.— Gordon *v.* Victoria, 7 Brit. Col. 339; Sproule *v.* Wilson, 15 Ont. Pr. 349.

See 29 Cent. Dig. tit. "Interest," § 42.

Delay of plaintiff.— Delay on the part of plaintiff, due to a motion for a new trial, after obtaining a verdict in his favor, will deprive him of interest on the verdict. Williams *v.* Smith, 2 Cai. (N. Y.) 253.

A verdict not for a debt or sum certain does not carry interest. Woodruff *v.* Canada Guarantee Co., 8 Ont. Pr. 532.

12. Missouri Pac. R. Co. *v.* Fox, 60 Nebr. 531, 83 N. W. 744; Fremont, etc., R. Co. *v.* Root, 49 Nebr. 900, 69 N. W. 397; Lord *v.* New York, 3 Hill (N. Y.) 426; People *v.* Gaine, 1 Johns. (N. Y.) 343; Vredenberg *v.* Hallett, 1 Johns. Cas. (N. Y.) 27; Equitable L. Assur. Soc. *v.* Trimble, 83 Fed. 85, 27 C. C. A. 404. See also New Brunswick R. Co. *v.* Murray, 18 N. Brunsw. 412.

Where delay is caused by both parties plaintiff will be allowed interest only during the delay caused by defendant. Bull *v.* Ketchum, 2 Den. (N. Y.) 188.

Allowance of interest discretionary.— McKay *v.* Commercial Bank, 15 N. Brunsw. 324, where interest was refused.

13. *Colorado.*— Cody *v.* Filley, 5 Colo. 124; Hawley *v.* Barker, 5 Colo. 118.

Georgia.— See Whaley *v.* Broadwater, 78 Ga. 336.

Louisiana.— Trimble *v.* Moore, 2 La. 577, no interest on verdict finding a specified sum in damages.

New Jersey.— National Docks, etc., R. Co. *v.* Pennsylvania R. Co., 54 N. J. Eq. 142, 33 Atl. 860.

Pennsylvania.— Kelsey *v.* Murphy, 30 Pa. St. 340. See Irvin *v.* Hazleton, 37 Pa. St. 465.

West Virginia.— Fowler *v.* Baltimore, etc., R. Co., 18 W. Va. 579.

See 29 Cent. Dig. tit. "Interest," § 42.

Interest as condition to grant of new trial. — Although interest is not a necessary incident of a verdict until judgment thereon, yet the court may impose it as one of the conditions upon which a new trial is granted. Irvin *v.* Hazleton, 37 Pa. St. 465.

14. *Alabama.*— Pettit *v.* Pettit, 32 Ala. 288.

Florida.— Fuller *v.* Fuller, 23 Fla. 236, 2 So. 426.

Illinois.— Seely *v.* Pelton, 63 Ill. 101.

Indiana.— Russell *v.* Smith, 87 Ind. 457.

Kentucky.— Shockey *v.* Glasford, 6 Dana 9.

Maine.— Kendall *v.* Lewiston Water Power Co., 36 Me. 19.

New York.— Littell *v.* Ellison, 17 N. Y. Suppl. 294; Hunn *v.* Norton, Hopk. 344.

Ohio.— Sproat *v.* Cutler, Wright 157.

Pennsylvania.— Buckman *v.* Davis, 28 Pa. St. 211; Jones *v.* Ringold, 1 Yeates 480.

United States.— Hepburn *v.* Dunlop, 1 Wheat. 179, 4 L. ed. 65; Whitney *v.* New Orleans, 54 Fed. 614, 4 C. C. A. 521.

England.— See Hilhouse *v.* Davis, 1 M. & S. 169.

See 29 Cent. Dig. tit. "Interest," § 42; and ARBITRATION AND AWARD, 3 Cyc. 287 note 53.

Contra.— Janes *v.* Richard, 3 La. 486.

Liquidation of non-interest bearing accounts.— Where a report of a commissioner liquidated certain accounts by stating them, but such accounts were not themselves interest bearing, interest was not permitted to be calculated from the date of the report. Creuze *v.* Lowth, 4 Bro. Ch. 316, 29 Eng. Reprint 911, 2 Cox Ch. 242, 30 Eng. Reprint 113, 2 Ves. Jr. 157, 30 Eng. Reprint 570, 2 Rev. Rep. 38.

Referee or arbitrators may award interest. Atty.-Gen. *v.* Ætna Ins. Co., 13 Ont. Pr. 459; Stewart *v.* Webster, 20 U. C. Q. B. 469.

The jury may give interest in a suit upon the award but it is not recoverable as of right. Bentley *v.* West, 4 U. C. Q. B. 98.

15. Shields *v.* Anderson, 3 Leigh (Va.) 729; Baird *v.* Bland, 5 Munf. (Va.) 492.

16. Easterbrook *v.* Farquharson, 110 Cal. 311, 42 Pac. 811; Holliday *v.* Marshall, 7 Johns. (N. Y.) 211.

17. *California.*— Thompson *v.* Monrow, 2 Cal. 99, 56 Am. Dec. 318.

Kentucky.— McMurtry *v.* Kentucky Cent. R. Co., 84 Ky. 462, 1 S. W. 815, 8 Ky. L. Rep. 455; Guthrie *v.* Wickliffs, 4 Bibb 541, 7 Am. Dec. 746. See also Hundley *v.* Webb, 3 J. J. Marsh. 643, 20 Am. Dec. 189.

Louisiana.— Le Blanc *v.* Victor, 3 La. 44; Baudin *v.* Conway, 2 La. 512; Saunders *v.* Taylor, 7 Mart. N. S. 14.

Maine.— How *v.* Codman, 4 Me. 79.

Michigan.— Schroeder *v.* Boyce, 127 Mich. 33, 86 N. W. 387.

Mississippi.— Hamer *v.* Kirkwood, 25 Miss. 95; Easton *v.* Vandorn, Walk. 214.

of detention of money;[18] and at the present time interest on judgments as a matter of right is almost universally allowed under statutory provisions in the various jurisdictions, and may be collected on execution.[19]

Nevada.— See Hastings *v.* Johnson, 1 Nev. 613 [*followed* in Solen *v.* Virginia, etc., R. Co., 15 Nev. 313, 14 Nev. 405].

New Hampshire.— Barron *v.* Morrison, 44 N. H. 226; French *v.* Eaton, 15 N. H. 337; Rogers *v.* McDearmid, 7 N. H. 506; Mahurin *v.* Bickford, 6 N. H. 567; Hodgdon *v.* Hodgdon, 2 N. H. 169. But see Sanborn *v.* Steele, 20 N. H. 34.

New Jersey.— Walton *v.* Vanderhoof, 2 N. J. L. 73. *Compare* Cox *v.* Marlatt, 36 N. J. L. 389, 13 Am. Rep. 454.

New York.— Todd *v.* Botchford, 86 N. Y. 517; Watson *v.* Fuller, 6 Johns. 283. See also Lansing *v.* Kattoone, 6 Johns. 43.

North Carolina.— Collais *v.* McLeod, 30 N. C. 221, 49 Am. Dec. 376; Deloach *v.* Worke, 10 N. C. 36; Anonymous, 3 N. C. 26.

Ohio.— Neil *v.* Idaho First Nat. Bank, 50 Ohio St. 193, 33 N. E. 720.

Pennsylvania.— Wither's Appeal, 16 Pa. St. 151; Berryhill *v.* Wells, 5 Binn. 56. But see Fitzgerald *v.* Caldwell, 4 Dall. 251, 1 L. ed. 821.

South Carolina.— State *v.* Sarratt, 14 Rich. 177; Gourdin *v.* Read, 10 Rich. 217; St. Paul's Church *v.* Washington, 3 Rich. 380; Trenholm *v.* Bumpfield, 3 Rich. 376; Pinckney *v.* Singleton, 2 Hill 343; Williamson *v.* Broughton, 4 McCord 212; *Ex p.* Mann, 1 McCord 589; Mann *v.* Taylor, 1 McCord 171; Cohen *v.* Thomson, 2 Mill 146; Glover *v.* Holmes, 1 Brev. 454. But see Crowther *v.* Sawyer, 2 Speers 573.

Virginia.— Mercer *v.* Beale, 4 Leigh 189.

United States.— Washington, etc., R. Co. *v.* Tobriner, 147 U. S. 571, 13 S. Ct. 557, 37 L. ed. 284; Perkins *v.* Fourniquet, 14 How. 328, 14 L. ed. 441; The New York, 108 Fed. 102, 47 C. C. A. 232; People's Bank *v.* Ætna Ins. Co., 76 Fed. 548. But see National Steamship Co. *v.* Tugman, 82 Fed. 246, 27 C. C. A. 116.

England.— Atkinson *v.* Brazbrooke, 4 Campb. 380, 1 Stark. 219, 2 E. C. L. 89. See also Doran *v.* O'Reilly, 5 Dow. 133, 3 Eng. Reprint 1278, 3 Price 250, 7 Taunt. 244, 2 E. C. L. 345.

Canada.— Fleiger *v.* Taylor, 2 Nova Scotia 137.

See 29 Cent. Dig. tit. "Interest," § 43.

Compare Ijams *v.* Rice, 17 Ala. 404; Crawford *v.* Simonton, 7 Port. (Ala.) 110.

A judgment that does not bear interest is not aided in that particular by a scire facias. Mower *v.* Kip, 2 Edw. (N. Y.) 165.

Prior to the enactment of special statutes for that purpose, courts of chancery could not grant interest subsequent to the date of the decree on debts of simple contract, not bearing interest in terms. Dilliard *v.* Tomlinson, 1 Munf. (Va.) 183; Brewer *v.* Hastie, 3 Call (Va.) 22; Deans *v.* Scriba, 2 Call (Va.) 415.

18. *Kentucky.*— Guthrie *v.* Wickliffs, 4 Bibb 541, 7 Am. Dec. 746; Walker *v.* Kendall, Hard. 404.

New York.— Sayre *v.* Austin, 3 Wend. 496.

North Carolina.— Collais *v.* McLeod, 30 N. C. 221, 49 Am. Dec. 376.

Pennsylvania.— Berryhill *v.* Wells, 5 Binn. 56; Crawford *v.* Willing, 4 Dall. 286, 1 L. ed. 836. *Compare* Benton *v.* Burgot, 10 Serg. & R. 240.

South Carolina.— St. Paul's Church *v.* Washington, 3 Rich. 380; Trenholm *v.* Bumpfield, 3 Rich. 376; Smith *v.* Vanderhorst, 1 McCord 328, 10 Am. Dec. 674; Stevens *v.* Simmons, 1 McCord 28; Manning *v.* Norwood, 2 Nott & M. 395; Fishburne *v.* Sanders, 1 Nott & M. 242.

Virginia.— Tazewell *v.* Saunders, 13 Gratt. 354; Mercer *v.* Beale, 4 Leigh 189; Beall *v.* Silver, 2 Rand. 401; Newton *v.* Wilson, 3 Hen. & M. 483.

United States.— Perkins *v.* Fourniquet, 14 How. 328, 14 L. ed. 441; Downs *v.* Allen, 22 Fed. 805, 23 Blatchf. 54.

England.— See Doran *v.* O'Reilly, 5 Dow. 133, 3 Eng. Reprint 1278, 3 Price 250, 7 Taunt. 244, 2 E. C. L. 345; *Ex p.* Lewis, 36 Wkly. Rep. 653.

Canada.— Thibaudeau *v.* Pauze, 2 Quebec Super. Ct. 470.

See 29 Cent. Dig. tit. "Interest," § 43.

The form of recovery in an action of debt on a judgment should be in debt for the amount of the original judgment, and for the amount of the interest accrued thereon as damages. Spooner *v.* Warner, 2 Ill. App. 240.

19. *Alabama.*— Ijams *v.* Rice, 17 Ala. 404.

California.— Clark *v.* Dunnam, 46 Cal. 204; Himmelman *v.* Oliver, 34 Cal. 246.

Georgia.— Houston *v.* Mossman, T. U. P. Charlt. 138.

Illinois.— Harding *v.* Harding, 180 Ill. 481, 54 N. E. 587 [*affirming* 79 Ill. App. 621]; Epling *v.* Dickson, 170 Ill. 329, 48 N. E. 1001; Gage *v.* Thompson, 161 Ill. 403, 43 N. E. 1062; Illinois, etc., R. Co. *v.* McClintock, 68 Ill. 296; Stevens *v.* Coffeen, 39 Ill. 148; Connecticut Mut. L. Ins. Co. *v.* Stinson, 86 Ill. App. 668; Hughes *v.* Hartford F. Ins. Co., 17 Ill. App. 518.

Indiana.— Morrow *v.* Geeting, 23 Ind. App. 494, 55 N. E. 787.

Kansas.— Grund *v.* Tucker, 5 Kan. 70.

Kentucky.— McMurtry *v.* Kentucky Cent. R. Co., 84 Ky. 462, 1 S. W. 815, 8 Ky. L. Rep. 455; Com. *v.* Bosley, 5 Bush 221; Brigham *v.* Vanbuskirk, 6 B. Mon. 197; Young *v.* Pate, 3 J. J. Marsh. 100; Louisville Water Co. *v.* Clark, 29 S. W. 309, 16 Ky. L. Rep. 585.

Louisiana.— Barnard *v.* Erwin, 2 Rob. 467.

Maryland.— Gwinn *v.* Whitaker, 1 Harr. & J. 754.

Massachusetts.— East Tennessee Land Co.

b. Judgments of Federal Courts. It is now provided by federal statute[20] that interest shall be recoverable upon all judgments in civil cases recovered in the circuit or district courts, in all cases where, by the law of the state in which such court is held, interest is allowed on judgments in the state courts.[21]

c. Judgments Silent as to Interest. As a general rule the fact that a judgment is silent as to interest will not prevent the recovery of interest thereon by proper action or by execution where the statute allows interest on judgments.[22]

v. Leeson, 185 Mass. 4, 69 N. E. 351; Johnson *v.* Boudry, 116 Mass. 196.

Michigan.— Warner *v.* Juif, 38 Mich. 662.

Minnesota.— Martin County Bank *v.* Bird, 90 Minn. 336, 96 N. W. 915.

Mississippi.— Hamer *v.* Kirkwood, 25 Miss. 95.

Missouri.— Lack *v.* Brecht, 166 Mo. 242, 65 S. W. 976; Catron *v.* Lafayette County, 125 Mo. 67, 28 S. W. 331; Crook *v.* Tull, 111 Mo. 283, 20 S. W. 8; Allen *v.* Smith, 63 Mo. 103; Evans *v.* Fisher, 26 Mo. App. 541; State *v.* Vogel, 14 Mo. App. 187.

Nebraska.— Stuart *v.* Burcham, 62 Nebr. 84, 86 N. W. 898, 89 Am. St. Rep. 739.

New Jersey.— Johnson *v.* O. of C. F., 10 N. J. L. 346.

New York.— Dunn *v.* Arkenburgh, 166 N. Y. 600, 59 N. E. 1122 [*affirming* 48 N. Y. App. Div. 518, 62 N. Y. Suppl. 861]; Todd *v.* Botchford, 86 N. Y. 517, 1 N. Y. Civ. Proc. 402 [*affirming* 24 Hun 495]; Klock *v.* Robinson, 22 Wend. 157; Sayre *v.* Austin, 3 Wend. 496; People *v.* Onondaga Ct. C. Pl., 3 Wend. 331.

North Carolina.— Deloach *v.* Worke, 10 N. C. 36.

Ohio.— Neil *v.* Idaho First Nat. Bank, 50 Ohio St. 193, 33 N. E. 720; State *v.* Parker, 25 Ohio Cir. Ct. 237.

Oregon.— Baker *v.* Williams Banking Co., 42 Oreg. 213, 70 Pac. 711.

Pennsylvania.— Com. *v.* Vanderslice, 8 Serg. & R. 452; Crawford *v.* Willing, 4 Dall. 286, 1 L. ed. 836; Fitzgerald *v.* Caldwell, 4 Dall. 251, 1 L. ed. 821; Leiper *v.* Baltimore, etc., R. Co., 5 Pa. Co. Ct. 60, 3 Del. Co. 373; White Haven School Dist. *v.* Wasser, 1 Kulp 78.

South Carolina.— Mann *v.* Poole, 48 S. C. 154, 26 S. E. 229; Crowther *v.* Sawyer, 2 Speers 573 [*overruling* Dinkins *v.* Vaughan, 1 McCord 554].

Texas.— Finley *v.* Carothers, 9 Tex. 517, 60 Am. Dec. 179; Ramsey *v.* Thomas, 14 Tex. Civ. App. 431, 38 S. W. 259.

Virginia.— Snickers *v.* Dorsey, 2 Munf. 505.

United States.— The New York, 108 Fed. 102, 47 C. C. A. 232; Henry *v.* Travelers' Ins. Co., 42 Fed. 363 (stating law of Colorado); Jerome *v.* Rio Grande County Com'rs, 18 Fed. 873, 5 McCrary 639; Pacific Coast Steamship Co. *v.* U. S., 33 Ct. Cl. 36.

England.— *Ex p.* Lewis, 36 Wkly. Rep. 653.

See 29 Cent. Dig. tit. "Interest," § 43.

Sums decreed to be paid to the trustee and his solicitors by a decree of foreclosure cannot draw interest. Heffron *v.* Gage, 44 Ill. App. 147.

In reviving a judgment interest is to be counted on it for the time it has been dormant, as well as for the rest of the time. Williams *v.* Price, 21 Ga. 507; Wilcher *v.* Hamilton, 15 Ga. 435.

Judgment on verdict "without interest."— Where the statute provides that judgments shall bear interest and shall be rendered accordingly, it is proper for a judgment to provide for interest even though the verdict be given for a certain sum "without interest." Stephens *v.* Koonce, 103 N. C. 266, 9 S. E. 315.

A judgment rendered on an accounting between partners bears interest at the rate of seven per cent per annum. Clark *v.* Dunnam, 46 Cal. 204.

Compromise decree.— A decree directing the payment of sums agreed to be accepted in a compromise and settlement of a will contest is not a judgment within the terms of N. C. Code, § 530, so as to bear interest. Moore *v.* Pullen, 116 N. C. 284, 21 S. E. 195.

A judgment allowing the claims of creditors against an insolvent does not bear interest from the date of rendition, where it only fixes the right to have the claims allowed or the right of priority and not the amount of recovery. *Ex p.* Brown, 18 S. C. 87. See also Baker *v.* Williams Banking Co., 42 Oreg. 213, 70 Pac. 711.

20. U. S. Rev. St. (1878) § 966 [U. S. Comp. St. (1901) p. 700].

Statute not applicable to cases arising in District of Columbia.— Washington, etc., R. Co. *v.* Tobriner, 147 U. S. 571, 13 S. Ct. 557, 37 L. ed. 284. See also Gray *v.* District of Columbia, 1 App. Cas. (D. C.) 20.

21. People's Bank *v.* Ætna Ins. Co., 76 Fed. 548; Moran *v.* Hagerman, 69 Fed. 427.

By the act of congress of 1789 judgments and decrees of the inferior federal courts, affirmed in the supreme court of the United States, carried interest as damages for the delay as might be provided by that court in its discretion. Hemmenway *v.* Fisher, 20 How. (U. S.) 255, 15 L. ed. 799; Perkins *v.* Fourniquet, 14 How. (U. S.) 328, 14 L. ed. 441. See also Mitchell *v.* Harmony, 13 How. (U. S.) 115, 14 L. ed. 75.

Prior to the act of congress providing therefor, judgments of the federal courts did not bear interest. Saunders *v.* Taylor, 7 Mart. N. S. (La.) 14; Perkins *v.* Fourniquet, 14 How. (U. S.) 328, 14 L. ed. 441.

22. *California.*— San Joaquin Land, etc., Co. *v.* West, 99 Cal. 345, 33 Pac. 928; Dougherty *v.* Miller, 38 Cal. 548; Burke *v.* Carruthers, 31 Cal. 467.

Illinois.— Dooley *v.* Stipp, 26 Ill. 86.

d. Judgments on Obligations Not Bearing Interest. Even though the obligation upon which a judgment is recovered was not interest bearing in its character, interest will generally be recoverable on the judgment.[23]

e. Judgments Sounding in Damages. As a general rule the statutes allow interest on judgments for damages for torts as well as upon other judgments,[24] but under some statutes interest on such judgments has been denied.[25]

f. Judgments Against Fiduciaries. Interest is recoverable on judgments rendered against persons in their fiduciary capacities, and affecting the funds in their hands, as upon other judgments;[26] and any proper order or decree of court requir-

Kentucky.— Brigham *v.* Vanbuskirk, 6 B. Mon. 197.

Nebraska.— Stuart *v.* Burcham, 62 Nebr. 84, 86 N. W. 898, 89 Am. St. Rep. 739.

New York.— Lord *v.* New York, 3 Hill 426; Ryckman *v.* Parkins, 5 Paige 543.

See 29 Cent. Dig. tit. "Interest," § 47.

Compare Factors', etc., Ins. Co. *v.* New Harbor Protection Co., 39 La. Ann. 583, 2 So. 407; Anderson's Succession, 33 La. Ann. 581; Regan's Succession, 12 La. Ann. 116; Barnes *v.* Crandell, 12 La. Ann. 112; Durnford's Succession, 1 La. Ann. 92; Hastings *v.* Johnson, 1 Nev. 613 [*followed* in Solen *v.* Virginia, etc., R. Co., 15 Nev. 313, 14 Nev. 405]; Box *v.* Provincial Ins. Co., 19 Grant Ch. (U. C.) 48.

Computation of rents under judgment.— It is erroneous to allow interest on rents decreed by the court to be ascertained by commissioners, where nothing is said about interest in the decree. Sibert *v.* Kelly, 5 J. J. Marsh. (Ky.) 81.

Decree on mandate of affirmance from supreme court.— Where neither the report of the master, the decree of the court of chancery, nor the mandate from the supreme court affirming the decree below said anything on the subject of interest, it was error for the chancellor in making a final decree to allow interest from the date of the original decree, for the appeal vacated the decree and there was no enforceable debt or claim under a decree was made under the mandate. Sortwell *v.* Montpelier, etc., R. Co., 56 Vt. 180.

23. *Alabama.*— Billingsley *v.* Billingsley, 24 Ala. 518.

California.— Olvera's Estate, 70 Cal. 184, 11 Pac. 624.

Kentucky.— See Brigham *v.* Vanbuskirk, 6 B. Mon. 197. But *compare* West *v.* Patrick, 1 J. J. Marsh. 95; Cobb *v.* Thompson, 1 A. K. Marsh. 507.

Louisiana.— See Robertson *v.* Green, 18 La. Ann. 28. But *compare* Bonner *v.* Copley, 15 La. Ann. 504.

New York.— Klock *v.* Robinson, 22 Wend. 157.

South Carolina.— Crowther *v.* Sawyer, 2 Speers 573; Harrington *v.* Glenn, 1 Hill 79. See also Kirk *v.* Richbourg, 2 Hill 352; Lambkin *v.* Nana, 2 Brev. 99. *Contra,* Thomas *v.* Wilson, 3 McCord 166.

Texas.— Finley *v.* Carothers, 9 Tex. 517, 60 Am. Dec. 179.

See 29 Cent. Dig. tit. "Interest," § 48.

Compare Dilliard *v.* Tomlinson, 1 Munf. (Va.) 183.

24. *Alabama.*— Murphy *v.* Andrews, 13 Ala. 708.

California.— Atherton *v.* Fowler, 46 Cal. 320.

Kentucky.— St. (1903) § 2220, provides that a judgment shall bear legal interest from its date, and the court has clearly intimated its opinion that under this statute judgments for damages for torts bear interest. See Louisville, etc., R. Co. *v.* Sharp, 91 Ky. 411, 16 S. W. 86, 12 Ky. L. Rep. 973. Prior to 1888 this statute contained an exception as to judgments "for malicious prosecution, libel, slander, or injury to the person" (Louisville, etc., R. Co. *v.* Sharp, *supra*; McMurtry *v.* Kentucky Cent. R. Co., 84 Ky. 462, 1 S. W. 815, 8 Ky. L. Rep. 455; Adams *v.* Rankin, 1 Duv. 58) and the amendment of March 1, 1888, striking out the exception was not retrospective (Louisville, etc., R. Co. *v.* Sharp, *supra*). For early decisions not important as the law now stands see Marshall *v.* Dudley, 4 J. J. Marsh. 244; Smith *v.* Todd, 3 J. J. Marsh. 306; West *v.* Patrick, 1 J. J. Marsh. 95.

Nevada.— See Solen *v.* Virginia, etc., R. Co., 15 Nev. 313.

North Carolina.— Stephens *v.* Koonce, 103 N. C. 266, 9 S. E. 315, although the verdict is for a certain sum "without interest."

See 29 Cent. Dig. tit. "Interest," § 49.

25. Daub *v.* Martin, 2 Bay (S. C.) 193; Washington, etc., R. Co. *v.* Tobriner, 147 U. S. 571, 13 S. Ct. 557, 37 L. ed. 284, except judgments of justices of the peace not exceeding one hundred dollars. See also Keller *v.* Ashford, 133 U. S. 610, 10 S. Ct. 494, 33 L. ed. 667; District of Columbia *v.* Gannon, 130 U. S. 227, 9 S. Ct. 508, 32 L. ed. 922; Baltimore, etc., R. Co. *v.* Trook, 100 U. S. 112, 25 L. ed. 571. *Contra,* Hellen *v.* Metropolitan R. Co., 4 Mackey (D. C.) 519.

Damages on affirmance of judgment.— Interest does not run on the amount of a judgment in the supreme court rendered pursuant to statute on affirmance of a judgment in a lower court for ten per cent of the original judgment as damages. Hamer *v.* Kirkwood, 25 Miss. 95.

Where a master is directed to ascertain the amount due on a judgment in tort he is not authorized to allow interest without a special direction to that effect in the decree. Stafford *v.* Mott, 3 Paige (N. Y.) 100. See also Ryckman *v.* Parkins, 5 Paige (N. Y.) 543.

26. St. Andre *v.* Rachal, 3 La. Ann. 574; Desorme's Succession, 10 Rob. (La.) 479; Smith *v.* Hurd, 8 Sm. & M. (Miss.) 682;

ing a fiduciary to make payments of funds in his hands is generally considered a judgment under statutes providing for interest to be recovered thereon.[27]

g. Judgments For Fines. A judgment rendered for a fine does not ordinarily bear interest.[28]

h. Judgments on Penal Bonds. Where a judgment has been recovered upon a penal bond even to the full amount of the penalty, interest is generally allowed thereon as upon other judgments for money.[29]

i. Judgments For Costs. It has been frequently held that when a judgment has been rendered for a specific sum and costs of the suit, interest is not recoverable on that portion of the judgment representing the costs,[30] even though the allowance of interest upon judgments generally is provided by statute,[31] unless the party recovering costs has actually paid them, in which case interest is allowed,[32] but only from the time of such payment.[33] In other jurisdictions, however, interest has been allowed upon judgments made up partly or entirely of costs.[34]

Long *v.* Long, 85 N. C. 415; *In re* Brinton, 10 Pa. St. 408.

27. See Randolph *v.* People, 40 Ill. App. 174, order requiring administrator to pay over certain moneys found due from him.

Adjudication upon accounts.— When an adjudication upon executors' accounts has been confirmed absolutely, the awards, whether to creditors or legatees, become final judgments, and, if not promptly paid, bear interest from that date. Wainwright's Estate, 27 Leg. Int. (Pa.) 274.

Allowance of account against estate.— An account against an estate, after being allowed by the administrator and approved by the probate court, bears interest. Finley *v.* Carothers, 9 Tex. 517, 60 Am. Dec. 179.

A widow's award, where she elects to receive money in lieu of personalty, is not a judgment within the meaning of the statute allowing interest on judgments. Stunz *v.* Stunz, 131 Ill. 210, 23 N. E. 407.

28. People *v.* Sutter St. R. Co., 129 Cal. 545, 62 Pac. 104, 79 Am. St. Rep. 137; State *v.* Steen, 14 Tex. 396; Heller *v.* Alvarado, 1 Tex. Civ. App. 409, 20 S. W. 1003.

Judgment for penalty in United States district court bears interest. Booth *v.* Ableman, 20 Wis. 602.

29. *Alabama.*— Kyle *v.* Mays, 22 Ala. 692.

Kentucky.— Chandler *v.* Thornton, 4 B. Mon. 360.

Louisiana.— State *v.* Sullivan, 12 La. Ann. 720.

New York.— People *v.* Birdsall, 20 Johns. 297.

South Carolina.— State *v.* Wylie, 2 Strobh. 113; Ryan *v.* Baldrick, 3 McCord 498; Bonsall *v.* Taylor, 1 McCord 503; Smith *v* Vanderhorst, 1 McCord 328, 10 Am. Dec. 674; Stevens *v.* Simmons, 1 McCord 28; Winslow *v.* Ancrum, 1 McCord Eq. 100.

Virginia.— Tazewell *v.* Saunders, 13 Gratt. 354.

England.— McClure *v.* Dunkin, 1 East 436; Anonymous, 1 Salk. 154.

See 29 Cent. Dig. tit. "Interest," § 52.

30. *Louisiana.*— De Lizardi *v.* Hardaway, 8 Rob. 20.

Maine.— Whittaker *v.* Berry, 64 Me. 236.

Nebraska.— O'Donnell *v.* Omaha, etc., R. Co., 31 Nebr. 846, 48 N. W. 880.

New Jersey.— Hill *v.* White, 1 N. J. Eq. 435.

Pennsylvania.— Galbraith *v.* Walker, 95 Pa. St. 481 (holding that a sheriff cannot recover interest on costs due him for services in a cause); Baum *v.* Reed, 74 Pa. St. 320; Rogers *v.* Burns, 27 Pa. St. 525; McCausland *v.* Bell, 9 Serg. & R. 388; Parrott *v.* Thompson, 19 Wkly. Notes Cas. 548; Miller *v.* Hottenstein, 1 Woodw. 236.

South Carolina.— See Lambkin *v.* Nance, 2 Brev. 99.

Tennessee.— Gatewood *v.* Palmer, 10 Humphr. 466.

Texas.— Ghent *v.* Boyd, 18 Tex. Civ. App. 88, 43 S. W. 891.

United States.— People's Bank *v.* Ætna Ins. Co., 76 Fed. 548, construing South Carolina statute.

See 29 Cent. Dig. tit. "Interest," § 53.

In an action upon a foreign judgment for a gross sum in which costs are included interest is recoverable upon the whole. Wetherell *v.* Stillman, 65 Pa. St. 105.

31. Rogers *v.* Burns, 27 Pa. St. 525; Gatewood *v.* Palmer, 10 Humphr. (Tenn.) 466.

32. Baum *v.* Reed, 74 Pa. St. 320; Rogers *v.* Burns, 27 Pa. St. 525; McCausland *v.* Bell, 9 Serg. & R. (Pa.) 388; Miller *v.* Hottenstein, 1 Woodw. (Pa.) 236; Ghent *v.* Boyd, 18 Tex. Civ. App. 88, 43 S. W. 891.

33. Rogers *v.* Burns, 27 Pa. St. 525; McCausland *v.* Bell, 9 Serg. & R. (Pa.) 388; Miller *v.* Hottenstein, 1 Woodw. (Pa.) 236.

34. *California.*— Kennedy's Estate, 94 Cal. 22, 29 Pac. 412.

Illinois.— Linck *v.* Litchfield, 31 Ill. App. 104.

Indiana.— Palmer *v.* Glover, 73 Ind. 529.

Michigan.— Hayden *v.* Hefferan, 99 Mich. 262, 58 N. W. 59; Whelpley *v.* Nash, 46 Mich. 25, 8 N. W. 570.

Missouri.— See Padley *v.* Catterlin, 64 Mo. App. 629.

New York.— Klock *v.* Robinson, 22 Wend. 157.

Ohio.— Emmitt *v.* Brophy, 42 Ohio St. 82.

Virginia.— Laidley *v.* Merrifield, 7 Leigh 346.

Washington.— Ritchie *v.* Carpenter, 2

j. Judgments For Attorney's Fees. Where attorney's fees are included in a judgment they bear interest at the same rate as the principal sum.[35]

IV. RATE.[36]

A. Statutory Regulations — 1. Power to Regulate. The legislature has entire control over the subject of interest, restricted only by constitutional limitations, and it may enact such laws as it deems wise, regulating the rate to be allowed in any given case.[37]

2. Changes in Statutory Rate — a. In General. The general rule that statutes operate prospectively only and not retrospectively applies to statutes changing the rate of interest on debts, obligations, etc.[38]

b. Effect on Contracts Fixing Rate. Where parties to a contract have stipulated for the payment of a specified rate of interest, lawful at the date of the con-

Wash. 512, 28 Pac. 380, 26 Am. St. Rep. 877.

England.— Bickham *v.* Cross, 2 Ves. 471, 28 Eng. Reprint 301.

Canada.— Gibsone *v.* Quebec, etc., R. Co., 17 Quebec Super. Ct. 74. See also Trinity College *v.* Hill, 8 Ont. 286.

See 29 Cent. Dig. tit. "Interest," § 53.

Costs regularly taxed.— In some cases the recovery of interest has been held to depend upon the fact that the costs have been regularly taxed as a part of the judgment. Mumford *v.* Hawkins, 5 Den. (N. Y.) 355; Lawrence *v.* Murray, 3 Paige (N. Y.) 400; Cameron *v.* Heighs, 14 Ont. Pr. 56. *Compare* Palmer *v.* Glover, 73 Ind. 529.

35. Washington *v.* Denton First Nat. Bank, 64 Tex. 4; Carver *v.* J. S. Mayfield Lumber Co., 29 Tex. Civ. App. 434, 68 S. W. 711; Lyons *v.* Iron City Nat. Bank. (Tex. Civ. App. 1893) 24 S. W. 304; Llano Imp., etc., Co. *v.* Eubanks, 5 Tex. Civ. App. 108, 23 S. W. 613.

36. **What law governs** as to rate see *supra*, III, A, 2.

Rates prohibited by law see Usury.

37. *California.*— Cummings *v.* Howard, 63 Cal. 503; Dunne *v.* Mastick, 50 Cal. 244.

New York.— Cornwall *v.* Mills, 44 N. Y. Super. Ct. 45.

Pennsylvania.— Kehler *v.* Miller, 1 Leg. Chron. 30, 4 Leg. Gaz. 125.

South Carolina.— State *v.* Harrison, Harp. 88.

Tennessee.— See Caruthers *v.* Andrews, 2 Coldw. 378.

See 29 Cent. Dig. tit. "Interest," § 54.

The provision of U. S. Const. art. 1, § 8, giving congress the power to coin money and regulate the value thereof, has no reference to the rate of interest to be charged for the use of money, and does not deprive the states of the power to regulate the same by statute. Beach *v.* Peabody, 188 Ill. 75, 58 N. E. 679.

Construction and effect of statutes see the following cases:

California.— Baun *v.* Reynolds, 11 Cal. 14.

Connecticut.— Simpson *v.* Hall, 47 Conn. 417.

Indiana.— Smith *v.* Thomas, 31 Ind. 280.

Louisiana.— Gautreau *v.* Verret, 11 La. Ann. 78.

Mississippi.— Warren County *v.* Klein, 51 Miss. 807.

Missouri.— Louisville Bank *v.* Young, 37 Mo. 398.

Ohio.— Sawyer *v.* Phillips, 15 Ohio St. 218.

Pennsylvania.— Kehler *v.* Miller, 1 Leg. Chron. 357, 4 Leg. Gaz. 125.

Washington.— Spokane, etc., Trust Co. *v.* Young, 19 Wash. 122, 52 Pac. 1010.

United States.— U. S. Mortgage Co. *v.* Sperry, 138 U. S. 313, 11 S. Ct. 321, 34 L. ed. 969.

See 29 Cent. Dig. tit. "Interest," § 60.

In Texas prior to the acts of January 18 and 20, 1840, adopting the common law, and regulating interest, the legal rate of interest was five per cent on contracts made in Texas. Chevallier *v.* Buford, 1 Tex. 503.

38. *California.*— White *v.* Lyons, 42 Cal. 279.

Illinois.— Bauer Grocer Co. *v.* Zelle, 172 Ill. 407, 50 N. E. 238, holding that a statute reducing the rate of interest to be paid by a party desiring to redeem property sold under execution did not apply to a sale made before it took effect.

Kansas.— Pounds *v.* Rodgers, 52 Kan. 558, 35 Pac. 223, 39 Am. St. Rep. 360, holding that a statute reducing the interest to be paid on redemption from a tax-sale did not apply to a sale made before it took effect.

Mississippi.— Sadler *v.* Murrah, 3 How. 195.

New Jersey.— North River Meadow Co. *v.* Christ Church, 22 N. J. L. 424, 53 Am. Rep. 258.

Texas.— Austin *v.* Townes, 10 Tex. 24, holding that in an action upon a bond which was forfeited prior to the act of the Texan congress fixing the rate of interest at ten per cent, only five per cent interest could be recovered.

Virginia.— Thornton *v.* Fitzhugh, 4 Leigh 209, holding the interest on arrears of an annuity to be governed by the rate in force when the will was made, although the rate was changed by statute before the annuity fell in arrear.

United States.— Texas, etc., R. Co. *v.* Anderson, 149 U. S. 237, 13 S. Ct. 843, 37 L. ed. 717.

See 29 Cent. Dig. tit. "Interest," § 61.

tract, such contract rate will not be affected by a subsequent statute changing the rate permitted to be contracted for.[39] The parties may, however, enter into a contract, by which the rate of interest to be paid shall change whenever the legal rate changes.[40]

c. Effect on Contracts For Interest Silent as to Rate. Where a contract provides for the payment of interest but specifies no particular rate the legal rate at the date of the contract will attach thereto as a part thereof and a subsequent statute changing the legal rate will not change the rate payable on such obligation.[41]

39. *Alabama.*— Bryan *v.* Moore, Minor 377.
California.— Ellis *v.* Polhemus, 27 Cal. 350; Aguirre *v.* Packard, 14 Cal. 171, 73 Am. Dec. 645.
Connecticut.— Seymour *v.* Continental L. Ins. Co., 44 Conn. 300, 26 Am. Rep. 469.
Florida.— Myrick *v.* Battle, 5 Fla. 345.
Illinois.— Drake *v.* Latham, 50 Ill. 270; Prairie State Loan, etc., Assoc. *v.* Nubling, 64 Ill. App. 329; Supreme Lodge K. & L. of H. *v.* Portingall, 64 Ill. App. 283.
Indiana.— Sims *v.* Squires, 80 Ind. 42.
Iowa.— Kassing *v.* Ordway, 100 Iowa 611, 69 N. W. 1013.
Kentucky.— Foard *v.* Grinter, (1892) 18 S. W. 1034; Fenley *v.* Kendall, 12 Ky. L. Rep. 422, 18 S. W. 637, 13 Ky. L. Rep. 836.
Louisiana.— Gautreau *v.* Verret, 11 La. Ann. 78; White *v.* McQuillan, 12 La. 530.
Missouri.— Corley *v.* McKeag, 57 Mo. App. 415.
Nebraska.— Richardson *v.* Campbell, 34 Nebr. 181, 51 N. W. 753, 33 Am. St. Rep. 633.
New Jersey.— Jones *v.* Guttenberg, 66 N. J. L. 659, 51 Atl. 274; State *v.* Dwyer, 42 N. J. L. 327; Jersey City *v.* O'Callaghan, 41 N. J. L. 349; Cox *v.* Marlatt, 36 N. J. L. 389, 13 Am. Rep. 454; Wyckoff *v.* Wyckoff, 44 N. J. Eq. 56, 13 Atl. 662.
New York.— Taylor *v.* Wing, 84 N. Y. 471; Wilcox *v.* Van Voorhis, 58 Hun 575, 12 N. Y. Suppl. 617; Respectable Aged Indigent Females' Relief Assoc. *v.* Eagleson, 60 How. Pr. 9.
Ohio.— See Mueller *v.* McGregor, 28 Ohio St. 265.
Oregon.— Besser *v.* Hawthorn, 3 Oreg. 129.
South Dakota.— Guild *v.* Deadwood First Nat. Bank, 4 S. D. 566, 57 N. W. 499.
Texas.— Landa *v.* Obert, 5 Tex. Civ. App. 620, 25 S. W. 342.
Virginia.— Strayer *v.* Long, 83 Va. 715, 3 S. E. 372; Cecil *v.* Hicks, 29 Gratt. 1, 26 Am. Rep. 391, change in constitutional provision. See also Barksdale *v.* Fitzgerald, 76 Va. 892.
Wyoming.— Wyoming Nat. Bank *v.* Brown, 7 Wyo. 494, 53 Pac. 291, 75 Am. St. Rep. 935.
United States.— Morley *v.* Lake Shore, etc., R. Co., 146 U. S. 162, 13 S. Ct. 54, 36 L. ed. 925; Koshkonong *v.* Burton, 104 U. S. 668, 26 L. ed. 886; Jourolmon *v.* Ewing, 80 Fed. 604, 26 C. C. A. 23.
See 29 Cent. Dig. tit. "Interest," § 62.
Such a result would impair the obligation of the contract. Hubbard *v.* Callahan, 42 Conn. 524, 19 Am. Rep. 564; Pounds *v.* Rodgers, 52 Kan. 558, 35 Pac. 223, 39 Am. St. Rep. 360.

Contract fixing rate after maturity.— A contract for a certain lawful rate of interest to be paid after maturity of the principal debt will bear that rate after maturity, although a statute enacted prior to such maturity, but after the contract was made, reduced the rate permitted below the agreed rate. Hubbard *v.* Callahan, 42 Conn. 524, 19 Am. Rep. 564.
New promise.— Inasmuch as a new promise revives or extends the original liability, creating no new liability (Ga. Code, § 2936), the rate of conventional interest borne by a note is part of the liability revived or extended by a new promise, and such rate continues in force as fully after the making of the new promise as it was at the date of the creation of the debt. Nor does it make any difference that, by a change in the law of usury made in the interval between the execution of the note and the date of the new promise, such conventional rate was largely in excess of any conventional rate allowed by the new law, it having been legal at the time the note was executed. Vines *v.* Tift, 79 Ga. 301, 7 S. E. 227. See also Sadler *v.* Hoover, 31 Miss. 260.
Judgment on contract.— Where the statute provides that judgments on contracts providing for a fixed rate of interest shall bear the same rate as is provided for in the contract, a judgment rendered on a contract providing for a rate of interest lawful at the time it was entered into bears interest at the rate specified in the contract, although such rate be in excess of that permitted by statute at the time the judgment is rendered. Hagood *v.* Aikin, 57 Tex. 511.
Repeal of validating act.— A contract for a rate of interest, illegal at the time of the contract, but which is validated by a subsequent statute, will not be affected by the repeal of the statute. Simpson *v.* Hall, 47 Conn. 417.
Agreed rate as to future dealings.— Where parties make a contract that a certain rate of interest then lawful shall apply to all future dealings between them, and afterward the lawful rate is reduced below such agreed rate, transactions subsequent to such change cannot carry the agreed rate. Norcum *v.* Lum, 33 Miss. 299.

40. Mucklar *v.* Cross, 32 N. J. L. 423; Wyckoff *v.* Wyckoff, 44 N. J. Eq. 56, 13 Atl. 662, holding, however, that executors could not make such a contract with reference to a fund which they were directed to invest.

41. O'Brien *v.* Young, 95 N. Y. 428, 47 Am. Rep. 64; Wyoming Nat. Bank *v.* Brown, 7 Wyo. 494, 53 Pac. 291, 75 Am. St. Rep.

d. Effect on Contracts Not Stipulating For Interest. It has been held that where there is a simple undertaking to pay money with no stipulation as to interest the law implies a contract for the payment of interest at the legal rate then existing, and interest will continue to run at such rate until the debt is paid, notwithstanding a subsequent statute changing the rate.[42]

e. Effect on Interest Awarded as Damages. In cases where interest is allowed as damages, and not by reason of a contract, express or implied, for its payment, the interest for each period must be computed at the rate which was legal during that period, and statutes changing the rate will operate prospectively only.[43]

f. Effect on Interest Allowed on Judgments. The rate of interest recoverable on a judgment is generally determined by the law in force at the date of its rendition.[44] It has been held in some cases that such rate will not be varied by an

935. See also Michigan University *v.* Auditor-Gen., 109 Mich. 134, 66 N. W. 956 (statute providing for payment of interest on university and school funds); Jersey City *v.* O'Callaghan, 41 N. J. L. 349; Wyckoff *v.* Wyckoff, 44 N. J. Eq. 56, 13 Atl. 662.

42. Aguirre *v.* Packard, 14 Cal. 171, 73 Am. Dec. 645; Myrick *v.* Battle, 5 Fla. 345; Lee *v.* Davis, 1 A. K. Marsh. (Ky.) 397, 10 Am. Dec. 746; Landa *v.* Obert, 5 Tex. Civ. App. 620, 25 S. W. 342. See also Chevallier *v.* Buford, 1 Tex. 503.

State and county warrants if not paid when presented draw interest at the then legal rate until paid, notwithstanding a subsequent statutory change in the legal rate. State *v.* Bowen, 11 Wash. 432, 39 Pac. 648; Union Sav. Bank, etc., Co. *v.* Gelbach, 8 Wash. 497, 36 Pac. 467, 24 L. R. A. 359.

43. *California.*— Cummings *v.* Howard, 63 Cal. 503; Dunne *v.* Mastick, 50 Cal. 244; Atherton *v.* Fowler, 46 Cal. 323; Randolph *v.* Bayue, 44 Cal. 366; White *v.* Lyons, 42 Cal. 279. But see Macoleta *v.* Packard, 14 Cal. 178.

Connecticut.— Clement's Appeal, 49 Conn. 519.

Illinois.— Firemen's Fund Ins. Co. *v.* Western Refrigerating Co., 162 Ill. 322, 44 N. E. 746.

New Jersey.— Jersey City *v.* O'Callaghan, 41 N. J. L. 349; Gilmore *v.* Tuttle, 34 N. J. Eq. 45; Wilson *v.* Cobb, 31 N. J. Eq. 91.

New York.— Sanders *v.* Lake Shore, etc., R. Co., 94 N. Y. 641; Reese *v.* Rutherfurd, 90 N. Y. 644; Meadville First Nat. Bank *v.* New York Fourth Nat. Bank, 89 N. Y. 412; Hewett *v.* Chadwick, 8 N. Y. App. Div. 23, 40 N. Y. Suppl. 144; Erwin *v.* Neversink Steamboat Co., 23 Hun 573. See also O'Brien *v.* Young, 95 N. Y. 428, 47 Am. Rep. 64. *Compare* Salter *v.* Utica, etc., R. Co., 86 N. Y. 401.

Ohio.— See Samyn *v.* Phillips, 15 Ohio St. 218.

Oregon.— Thompson *v.* Hibbs, 45 Oreg. 141, 76 Pac. 778; Graham *v.* Merchant, 43 Oreg. 294, 72 Pac. 1088; Stark *v.* Olney, 3 Oreg. 88.

Texas.— Watkins *v.* Junker, 90 Tex. 584, 40 S. W. 11; Ellis *v.* Barlow, (Civ. App. 1894) 26 S. W. 908; Gulf, etc., R. Co. *v.* Gray, (Civ. App. 1894) 24 S. W. 921; Rio Grande R. Co. *v.* Cross, 5 Tex. Civ. App. 454, 23 S. W. 529; Gulf, etc., R. Co. *v.* Humphries, 4 Tex. Civ. App. 333, 23 S. W. 556.

Washington.— See State *v.* Whittlesey, 17 Wash. 447, 50 Pac. 119.

Wisconsin.— State *v.* Guenther, 87 Wis. 673, 58 N. W. 1105.

See 29 Cent. Dig. tit. "Interest," § 61.

44. *Indiana.*— Smith *v.* Thomas, 31 Ind. 280.

Kansas.— Lacy *v.* Dunn, 5 Kan. 567.

Kentucky.— Wagers *v.* Irvine, 103 Ky. 544, 45 S. W. 872, 20 Ky. L. Rep. 234.

New York.— Salter *v.* Utica, etc., R. Co., 86 N. Y. 401.

Ohio.— Claypool *v.* Sturges, 10 Ohio St. 440.

Texas.— Coles *v.* Kelsey, 13 Tex. 75; Gulf, etc., R. Co. *v.* Gray, (Civ. App. 1894) 24 S. W. 921. But see Hagood *v.* Aikin, 57 Tex. 511.

United States.— Texas, etc., R. Co. *v.* Anderson, 149 U. S. 237, 13 S. Ct. 843, 37 L. ed. 717.

See 29 Cent. Dig. tit. "Interest," § 63.

Change of rate between verdict and judgment.— The law in force at the time of the rendering of a verdict governs as to the interest to be allowed upon the sum found by the verdict, and not the law in force at the time of the rendition of the judgment, it not clearly appearing that the later law is intended to operate retrospectively. Murdock *v.* Franklin Ins. Co., 33 W. Va. 407, 10 S. E. 777, 7 L. R. A. 572. But see Alliance Milling Co. *v.* Eaton, (Tex. Civ. App. 1896) 33 S. W. 588, where the legal rate at the time of final judgment was allowed instead of the rate allowed at the time of an interlocutory judgment.

Change of rate pending writ of error.— Where at the time when a judgment was recovered the rate allowed by the statute was eight per cent, but pending a writ of error the rate was changed to six per cent on judgments thereafter obtained, interest at the rate of eight per cent should be recovered, on affirmance of the judgment. Brauer *v.* Portland, 35 Oreg. 471, 58 Pac. 861, 59 Pac. 117, 60 Pac. 378; Texas, etc., R. Co. *v.* Anderson, 149 U. S. 237, 13 S. Ct. 843, 37 L. ed. 717. See also Rogers *v.* Stokes, 87 Tenn. 294, 11 S. W. 215.

alteration of the legal rate by subsequent statute,[45] but in other cases it has been held that interest on judgments must be computed according to the varying rates prescribed by the changing laws, the legal rate during each period governing.[46] A like conflict in the decisions is to be found in cases when the judgment in terms provides for interest; in some cases the rate is held to be fixed by the terms of the judgment, and not to be affected by subsequent legislation,[47] while in others it is held to vary with the statutes changing the rate, notwithstanding the terms of the judgment.[48] Where a statute provides that the rate of interest fixed by a contract shall be recoverable upon a judgment rendered on such contract, it is generally held that such rate will not be affected by subsequent statutes changing the legal rate.[49]

g. Effect of General Statute Changing Rate on Special Statute. The rule that where a general law and a special statute come in conflict the general law yields to the special without regard to priority in date and a special law will not be repealed by a general statute unless by express words or necessary implication applies in the case of interest statutes.[50]

B. Interest as Damages — 1. In General. Where interest is not recoverable *eo nomine*, under some contract express or implied, but is allowed as damages, the general rule is that the legal rate of interest governs in the computation,[51]

45. Sharpe *v.* Morgan, 44 Ill. App. 346 [*affirmed* in 144 Ill. 382, 33 N. E. 22]; Cox *v.* Marlatt, 36 N. J. L. 389, 13 Am. Rep. 454; Brooke *v.* Roane, 1 Call (Va.) 205.

46. *Montana.*— Stanford *v.* Coram, 28 Mont. 288, 72 Pac. 655, 98 Am. St. Rep. 566.

New York.— O'Brien *v.* Young, 95 N. Y. 428, 47 Am. Rep. 64. *Compare* Prouty *v.* Lake Shore, etc., R. Co., 26 Hun 546.

Washington.—Palmer *v.* Laberee, 23 Wash. 409, 63 Pac. 216.

Wyoming.—Wyoming Nat. Bank *v.* Brown, 7 Wyo. 494, 53 Pac. 291, 75 Am. St. Rep. 935.

United States.— Morley *v.* Lake Shore, etc., R. Co., 146 U. S. 162, 13 S. Ct. 54, 36 L. ed. 925. See also Texas, etc., R. Co. *v.* Anderson, 149 U. S. 237, 13 S. Ct. 843, 37 L. ed. 717.

See 29 Cent. Dig. tit. "Interest," § 63.

47. Missouri Pac. R. Co. *v.* Patton, (Tex. Civ. App. 1896) 35 S. W. 477, unless the statute so provides. See also Burns *v.* Woolery, 15 Wash. 134, 45 Pac. 894.

48. Prouty *v.* Lake Shore, etc., R. Co., 95 N. Y. 667; O'Brien *v.* Young, 95 N. Y. 428, 47 Am. Rep. 64.

49. *Kansas.*— Getto *v.* Friend, 46 Kan. 24, 26 Pac. 473.

Missouri.— Corley *v.* McKeag, 57 Mo. App. 415.

Nebraska.— Bond *v.* Dolby, 17 Nebr. 491, 23 N. W. 351.

Ohio.— See Campbell *v.* Campbell, 3 Ohio Cir. Ct. 449, 2 Ohio Cir. Dec. 256.

Wyoming.— See Wyoming Nat. Bank *v.* Brown, 7 Wyo. 495, 53 Pac. 291, 75 Am. St. Rep. 935.

See 29 Cent. Dig. tit. "Interest," § 63.

50. State *v.* Dwyer, 42 N. J. L. 327, where a special act authorized certain commissioners to improve a road, the work to be let by contract and certificates of indebtedness to be issued in payment therefor bearing interest at seven per cent, the then legal rate of interest, but subsequently a general statute changed the legal rate of interest to six per cent, and after the passage of this statute a contract for the work was made providing that payment should be made in certificates of indebtedness bearing interest at the rate of seven per cent, and it was held that such contract was legal.

51. *Alabama.*— Farley Nat. Bank *v.* Henderson, 118 Ala. 441, 24 So. 428.

California.— Randall *v.* Duff, 107 Cal. 33, 40 Pac. 20; Falkner *v.* Hendy, 80 Cal. 636, 22 Pac. 401; White *v.* Lyons, 42 Cal. 279; Smith *v.* Johnson, 23 Cal. 63; Godfrey *v.* Rogers, 3 Cal. 101.

Colorado.—Cheyenne County *v.* Bent County, 15 Colo. 320, 25 Pac. 508; Neuman *v.* Dreifurst, 9 Colo. 228, 11 Pac. 98; Midland Fuel Co. *v.* Schuesler, 18 Colo. App. 386, 71 Pac. 894.

Florida.— Moore *v.* Felkel, 7 Fla. 44.

Georgia.— Gray *v.* Conyers, 70 Ga. 349.

Illinois.— Firemen's Fund Ins. Co. *v.* Western Refrigerating Co., 162 Ill. 322, 44 N. E. 746; Morrison *v.* Smith, 130 Ill. 304, 23 N. E. 241; Edgmon *v.* Ashelby, 76 Ill. 161; Snell *v.* Warner, 58 Ill. 42; Steere *v.* Hoagland, 50 Ill. 377; Ford *v.* Hixon, 49 Ill. 142; Sutphen *v.* Cushman, 35 Ill. 186; Place *v.* Dodge, 54 Ill. App. 167; Cooper *v.* McNeill, 14 Ill. App. 408.

Indiana.— Tucker *v.* State, 163 Ind. 403, 71 N. E. 140; Godfrey *v.* Craycraft, 81 Ind. 476.

Iowa.— Munson *v.* Plummer, 59 Iowa 136, 12 N. W. 796.

Kentucky.— Elliott *v.* Gibson, 10 B. Mon. 438.

Louisiana.— Gilmer *v.* Winter, 47 La. Ann. 37, 16 So. 588; Buckley *v.* Seymour, 30 La. Ann. 1341; Stewart *v.* Buard, 23 La. Ann. 201; Stephens *v.* Beard, 17 La. Ann. 145; Flower *v.* Downs, 6 La. Ann. 538; Segur *v.* Brown, 3 Mart. 91.

Massachusetts.— West *v.* White, 165 Mass.

even though at the time money might easily have been lent out at a higher rate,[52] or although on account of the improper retention of the money due him the creditor was compelled to borrow money at a rate exceeding the legal rate.[53] But it has been held that if money be lent or advanced to take up an obligation bearing a particular rate of interest, the person making such loan or advancement, in the absence of contract, will be subrogated to the rights of the original creditor, and may recover the particular rate provided for in such obligation,[54] and also that where an overpayment is made by a debtor on a contract bearing a conventional rate of interest, the debtor is entitled to recover such rate on the amount of the overpayment and not merely the legal rate.[55] And under equitable principles a higher rate of interest than the legal rate is sometimes allowed in cases of breach of trust or fraud.[56]

2. Coupons and Periodical Instalments of Interest. When interest at a specific rate is payable periodically, or is evidenced by coupons, the instalments of interest, where interest is permitted to be recovered thereon, will bear interest at the legal rate from the date of their maturity, in the absence of special contract to the contrary,[57] even though the original obligation bears a higher rate of interest.[58]

3. In Absence of Legal Rate. The fact that there is no fixed legal rate of interest in the jurisdiction where, under general principles, interest is due, will not prevent its recovery; but in such case interest at a reasonable rate, conform-

258, 43 N. E. 103; Clark *v.* Child, 136 Mass. 344; Granger *v.* Pierce, 112 Mass. 244.

Michigan.— Hodges *v.* Phinney, 106 Mich. 537, 64 N. W. 477; McBride *v.* McIntyre, 100 Mich. 302, 58 N. W. 994.

Minnesota.— Thoreson *v.* Minneapolis Harvester Works, 29 Minn. 341, 13 N. W. 156; Mason *v.* Callender, 2 Minn. 350, 72 Am. Dec. 102.

Mississippi.— Weaver *v.* Williams, 75 Miss. 945, 23 So. 649; Berry *v.* Folkes, 60 Miss. 576; Thompson *v.* Matthews, 56 Miss. 368; Carson *v.* Alexander, 34 Miss. 528; Tarpley *v.* Wilson, 33 Miss. 467; Nebbett *v.* Cunningham, 27 Miss. 292.

Missouri.— York *v.* Farmers' Bank, 105 Mo. App. 127, 79 S. W. 968; Compton *v.* Johnson, 19 Mo. App. 88.

Nebraska.— Bell *v.* Arndt, 24 Nebr. 261, 38 N. W. 750; Lepin *v.* Paine, 15 Nebr. 326, 18 N. W. 79.

New Jersey.— Jersey City *v.* O'Callaghan, 41 N. J. L. 349; *In re* Doremus, 33 N. J. Eq. 234; Wilson *v.* Cobb, 31 N. J. Eq. 91.

New York.— Govin *v.* De Miranda, 140 N. Y. 474, 35 N. E. 626; Ferris *v.* Hard, 135 N. Y. 354, 32 N. E. 129; O'Brien *v.* Young, 95 N. Y. 428, 47 Am. Rep. 64; Sanders *v.* Lake Shore, etc., R. Co., 94 N. Y. 641; Reese *v.* Rutherfurd, 90 N. Y. 644; Meadville First Nat. Bank *v.* New York Fourth Nat. Bank, 89 N. Y. 412; Salter *v.* Utica, etc., R. Co., 86 N. Y. 401; Hamilton *v.* Van Rensselaer, 43 N. Y. 244; Hewett *v.* Chadwick, 8 N. Y. App. Div. 23, 40 N. Y. Suppl. 144; Jermain *v.* Lake Shore, etc., R. Co., 31 Hun 558; Macomber *v.* Dunham, 8 Wend. 550.

North Carolina.— Pass *v.* Shine, 113 N. C. 284, 18 S. E. 251.

Ohio.— Colston *v.* Hastings, 11 Ohio S. & C. Pl. Dec. 125, 8 Ohio N. P. 154.

Pennsylvania.— Boker's Estate, 7 Phila. 479.

South Carolina.— Ball *v.* Gaillard, 1 Nott & M. 67.

Texas.— Houston, etc., R. Co. *v.* Jackson, 62 Tex. 209; Worsham *v.* Vignal, 5 Tex. Civ. App. 471, 24 S. W. 562; Rio Grande R. Co. *v.* Cross, 5 Tex. Civ. App. 454, 23 S. W. 529; Gulf, etc., R. Co. *v.* Humphries, 4 Tex. Civ. App. 333, 23 S. W. 556; Mills *v.* Haas, (Civ. App. 1894) 27 S. W. 263.

Utah.— Perry *v.* Taylor, 1 Utah 63.

Wisconsin.— State *v.* Guenther, 87 Wis. 673, 58 N. W. 1105; Wegner *v.* Second Ward Sav. Bank, 76 Wis. 242, 44 N. W. 1096.

United States.— Fauntleroy *v.* Hannibal, 8 Fed. Cas. No. 4,692, 5 Dill. 219.

Canada.— People's Loan, etc., Co. *v.* Grant, 18 Can. Sup. Ct. 262; St. John *v.* Rykert, 10 Can. Sup. Ct. 278.

See 29 Cent. Dig. tit. "Interest," § 65.

52. Rochester *v.* Levering, 104 Ind. 562, 4 N. E. 203.

53. Parker *v.* Nickerson, 137 Mass. 487. *Compare* Capen *v.* Crehore, 23 Pick. (Mass.) 496.

54. Simpson *v.* Gardiner, 97 Ill. 237; Braden *v.* Graves, 85 Ind. 92; Stanfield *v.* Tucker, 4 La. Ann. 413. *Contra*, Memphis, etc., R. Co. *v.* Dow, 120 U. S. 287, 7 S. Ct. 482, 30 L. ed. 595.

55. Boon *v.* Miller, 16 Mo. 457.

56. Munson *v.* Plummer, 59 Iowa 136, 12 N. W. 796; Rogers *v.* Priest, 74 Wis. 538, 43 N. W. 510.

57. Jefferson County *v.* Hawkins, 23 Fla. 223, 2 So. 362; Angel *v.* Miller, 90 Tex. 505, 39 S. W. 916; Cromwell *v.* Sac County, 96 U. S. 51, 24 L. ed. 681; Nash *v.* El Dorado County, 24 Fed. 252; Northwestern Mut. L. Ins. Co. *v.* Perrill, 18 Fed. Cas. No. 10,339. See also Cook *v.* Courtright, 40 Ohio St. 248, 48 Am. Rep. 681; Cramer *v.* Leppen, 26 Ohio St. 59, 20 Am. Rep. 756.

58. *Iowa.*— Mann *v.* Cross, 9 Iowa 327.

ing to the customs prevailing in the community in dealings of like character, will be allowed.[59]

C. Contracts as to Rate — 1. Power to Contract — a. In General. There is no restriction as to the rate of interest the parties to a contract may agree to be paid, except such as may be imposed by the various statutes,[60] or such as grow out of the doctrine that the rate agreed upon must not be so great as to be unconscionable,[61] and must be intended as compensation for the use of money, and not as a penalty for non-payment when due.[62]

b. For Increased Rate After Maturity. As a general rule a contract which provides that interest shall be paid at a given rate until maturity, and in case of default, at a higher lawful rate thereafter, will be enforced according to its terms, such increased rate being regarded as a liquidation of the damages and not as a penalty.[63]

Kentucky.— Graves *v.* Waller, 4 Ky. L. Rep. 452.

Ohio.— Cramer *v.* Lepper, 26 Ohio St. 59, 20 Am. Rep. 756; Dunlap *v.* Wiseman, 2 Disn. 398.

Texas.— Angel *v.* Miller, 90 Tex. 505, 39 S. W. 916.

United States.— Cromwell *v.* Sac County, 96 U. S. 51, 24 L. ed. 681; Nash *v.* El Dorado County, 24 Fed. 252.

See 29 Cent. Dig. tit. "Interest," § 67.

59. *Alabama.*— Tate *v.* Innerarity, 1 Stew. & P. 33.

California.— Davis *v.* Greely, 1 Cal. 422.

Colorado.— See Browne *v.* Steck, 2 Colo. 70.

Minnesota.— Mason *v.* Callender, 2 Minn. 350, 72 Am. Dec. 102.

United States.— Young *v.* Godbe, 15 Wall. 562, 21 L. ed. 250.

England.— Burnell *v.* Brown, 1 Jac. & W. 168, 21 Rev. Rep. 136, 37 Eng. Reprint 339. See also Swinisen *v.* Scawen, Dick. 117, 21 Eng. Reprint 213, 1 Ves. 99, 27 Eng. Reprint 916.

60. *California.*— Coleman *v.* Commins, 77 Cal. 548, 20 Pac. 77.

Georgia.— Taylor *v.* Thomas, 61 Ga. 472.

Illinois.— Phinney *v.* Baldwin, 16 Ill. 108, 61 Am. Dec. 62; McGill *v.* Ware, 5 Ill. 21; Tindall *v.* Meeker, 2 Ill. 137; Edler *v.* Uchtmann, 10 Ill. App. 488. See also Roberts *v.* Carter, 31 Ill. App. 142.

Iowa.— See Bennett *v.* First Nat. Bank, (1905) 102 N. W. 129.

Louisiana.— Anderson *v.* Coxe, 11 La. Ann. 638; Reynolds *v.* Yarborough, 7 La. 188; Bludworth *v.* Sompeyrac, 3 Mart. 719.

Massachusetts.— Lamprey *v.* Mason, 148 Mass. 231, 19 N. E. 350.

Michigan.— Vereycken *v.* Vanden Brooks, 102 Mich. 119, 60 N. W. 687; Curtis *v.* Sheldon, 91 Mich. 390, 51 N. W. 1057; Tousey *v.* Moore, 79 Mich. 564, 44 N. W. 958.

Minnesota.—Brewster *v.* Wakefield, 1 Minn. 352, 69 Am. Dec. 343.

New Hampshire.— Houghton *v.* Page, 2 N. H. 42, 9 Am. Dec. 30.

Rhode Island.— Draper *v.* Horton, 22 R. I. 592, 48 Atl. 945.

Virginia.— Strayer *v.* Long, 83 Va. 715, 3 S. E. 372; Cecil *v.* Hicks, 29 Gratt. 1, 26 Am. Dec. 391.

Washington.— Reed *v.* Miller, 1 Wash. 426, 25 Pac. 334.

United States.— New England Mortg. Security Co. *v.* Vader, 28 Fed. 265.

Canada.— Young *v.* Fluke, 15 U. C. C. P. 360; Montgomery *v.* Boucher, 14 U. C. C. P. 45; Howland *v.* Jennings, 11 U. C. C. P. 272.

See 29 Cent. Dig. tit. "Interest," § 68.

61. *Iowa.*— Palmer *v.* Leffler, 18 Iowa 125; Shuck *v.* Wight, 1 Greene 128.

Louisiana.— Caisergues *v.* Dujarreau, 1 Mart. 7.

New Hampshire.— Houghton *v.* Page, 2 N. H. 42, 9 Am. Dec. 30.

Pennsylvania.— Sime *v.* Norris, 8 Phila. 84, holding that, although a contract to pay monthly two and one-half per cent interest, and to compound it, may be lawful under the law of the state where made, it is not only unconscionable but deceptive, and a court of law in Pennsylvania will not enforce it, but will enter judgment for the amount of the principal and simple interest at ten per cent.

England.— Howley *v.* Cook, Ir. R. 8 Eq. 571.

Canada.— Goodhue *v.* Widdifield, 8 Grant Ch. (U. C.) 531. See also Teeter *v.* St. John, 10 Grant Ch. (U. C.) 85. *Compare* Young *v.* Fluke, 15 U. C. C. P. 360.

See 29 Cent. Dig. tit. "Interest," § 68.

Contra.— Dudley *v.* Reynolds, 1 Kan. 285.

62. Buckingham *v.* Orr, 6 Colo. 587; Brockway *v.* Clark, 6 Ohio 45; Montgomery *v.* Boucher, 14 U. C. C. P. 45.

63. *Arkansas.*— Miller *v.* Kempner, 32 Ark. 573.

California.— Thompson *v.* Gorner, 104 Cal. 168, 37 Pac. 900, 43 Am. St. Rep. 81.

Connecticut.— Hubbard *v.* Callahan, 42 Conn. 524, 19 Am. Rep. 564.

Indiana.— Wernwag *v.* Mothershead, 3 Blackf. 401.

Kansas.— Holmes *v.* Dewey, 66 Kan. 441, 71 Pac. 836; Sheldon *v.* Pruessner, 52 Kan. 579, 35 Pac. 201, 22 L. R. A. 709; Pawtucket Mut. F. Ins. Co. *v.* Landers, 5 Kan. App. 623, 47 Pac. 621.

Louisiana.—Denton *v.* Reading, 22 La. Ann. 607.

Maine.— Capen *v.* Crowell, 66 Me. 282.

Michigan.— Flanders *v.* Chamberlain, 24 Mich. 305.

c. For Increased Rate From Date in Case of Default. In a number of cases it has been held that a provision for the payment of a greater rate of interest than that originally provided for, from the date of the contract, in case of failure to meet periodical interest payments when due or to pay the principal at maturity, is valid and enforceable;[64] but other cases hold that such a provision is in the nature of a penalty and cannot be enforced.[65] Even where the latter doctrine prevails it is, however, held that a provision for interest at a stipulated rate with an agreement to take a smaller rate if interest payments are met promptly or the debt paid promptly at maturity, is perfectly valid, and if the debtor fails to pay either principal or interest promptly he cannot be relieved against the higher rate.[66]

Montana.— Davis *v.* Hendrie, 1 Mont. 499.

Nebraska.— Sanford *v.* Litchenberger, 62 Nebr. 501, 87 N. W. 305; Hallam *v.* Telleren, 55 Nebr. 255, 75 N. W. 560; Crapo *v.* Hefner, 53 Nebr. 251, 73 N. W. 702; Home F. Ins. Co. *v.* Fitch, 52 Nebr. 88, 71 N. W. 940; Omaha L. & T. Co. *v.* Hanson, 46 Nebr. 870, 65 N. W. 1058; Havemeyer *v.* Paul, 45 Nebr. 373, 63 N. W. 932 [*overruling* Richardson *v.* Campbell, 34 Nebr. 181, 51 N. W. 753, 33 Am. St. Rep. 633].

New York.— Ritter *v.* Phillips, 53 N. Y. 586.

North Carolina.— Pass *v.* Shine, 113 N. C. 284, 18 S. E. 251.

Washington.—Haywood *v.* Miller, 14 Wash. 660, 45 Pac. 307.

United States.— Vermont L. & T. Co. *v.* Dygert, 89 Fed. 123; Scottish-American Mortg. Co. *v.* Wilson, 24 Fed. 310.

England.— Herbert *v.* Salisbury, etc., R. Co., L. R. 2 Eq. 221.

See 29 Cent. Dig. tit. "Interest," § 69.

Contra.— White *v.* Iltis, 24 Minn. 43; Newell *v.* Houlton, 22 Minn. 19; Kent *v.* Bown, 3 Minn. 347; Talcott *v.* Marston, 3 Minn. 339; Mason *v.* Callender, 2 Minn. 350, 72 Am. Dec. 102.

What is meant by maturity.— An agreement for an increased rate of interest after maturity refers to the time fixed by the note when the money will become due and not a maturity declared on account of default in the payment of an instalment of interest. Cloud *v.* Rivord, 6 Wash. 555, 34 Pac. 136. See also Sbelden *v.* Barlow, 108 Mich. 375, 66 N. W. 338. *Compare* Pennsylvania Mortg. Trust Co. *v.* Bach, 69 Kan. 749, 77 Pac. 545; Klingenfeld *v.* Houghton, 1 Nebr. (Unoff.) 868, 96 N. W. 76.

64. *California.*—Finger *v.* McCaughey, 114 Cal. 64, 45 Pac. 1004.

Indiana.— Bailey *v.* McClure, 73 Ind. 275; Brown *v.* Maulsby, 17 Ind. 10; Hackenberry *v.* Shaw, 11 Ind. 392; Horner *v.* Hunt, 1 Blackf. 213.

Iowa.— Wilkerson *v.* Daniels, 1 Greene 179. See also Parvin *v.* Hoopes, Morr. 294, holding that on default in payment of a note providing for "ten per cent interest if not paid when due" interest was properly computed from the date of the note.

Louisiana.— Lalande *v.* Breaux, 5 La. Ann. 505. See also Glover *v.* Doty, 1 Rob. 130.

Michigan.— See Flanders *v.* Chamberlain, 24 Mich. 305, 316, holding a provision in a note bearing no interest that if it was not paid at maturity it should draw interest at ten per cent from date was enforceable when the note was given for property sold on these specific terms, the court saying, however: "In an ordinary case, when a note is given for a precedent debt, I am strongly inclined to think such a provision for interest from date, at ten per cent, if not paid when due, ought to be treated as a penalty rather than stipulated damages, for non-payment at the day."

South Carolina.— Wakefield *v.* Beckley, 3 McCord 480; Satterwhite *v.* McKie, Harp. 397.

United States.— Scottish-American Mortg. Co. *v.* Wilson, 24 Fed. 310.

65. *Alabama.*— Henry *v.* Thompson, Minor 209; Fugua *v.* Carriel, Minor 170, 12 Am. Dec. 46; Dinsmore *v.* Hand, Minor 126. See also Ely *v.* Witherspoon, 2 Ala. 131.

Kansas.— Holmes *v.* Dewey, 66 Kan. 441, 442, 71 Pac. 836 (where it is said: "We think section 3594, General Statutes of 1901, above quoted, was intended to relieve the maker from a penalty of an excess rate running back to the date of the paper); Young *v.* Thompson, 2 Kan. 83. *Compare* Ansel *v.* Olson, 39 Kan. 767, 18 Pac. 939, where the court considered such a provision to be in its nature a penalty, but appeared to be of the opinion that such a provision might be enforced, although it was held that the debtor had exercised sufficient diligence in trying to ascertain where the note was kept so as to pay it at maturity to relieve him of the penalty.

Kentucky.— Smithers *v.* Gough, 2 Ky. Dec. 346.

Massachusetts.— Daggett *v.* Pratt, 15 Mass. 177.

Nebraska.— Hallam *v.* Telleren, 55 Nebr. 255, 75 N. W. 560. See also Upton *v.* O'Donahue, 32 Nebr. 565, 49 N. W. 267.

North Carolina.— Gales *v.* Buchanan, 6 N. C. 145.

Virginia.— Waller *v.* Long, 6 Munf. 71.

England.— Herbert *v.* Salisbury, etc., R. Co., L. R. 2 Eq. 221; Nicholls *v.* Maynard, 3 Atk. 519, 26 Eng. Reprint 1100.

66. Ely *v.* Witherspoon, 2 Ala. 131 (agreement to remit the interest if principal paid punctually); Waller *v.* Long, 6 Munf. (Va.) 71; Herbert *v.* Salisbury, etc., R. Co., L. R. 2 Eq. 221; Nicholls *v.* Maynard, 3 Atk. 519, 26

d. Power of Corporations. A corporation is restricted in its power to make contracts relating to the payment of interest, as in case of other contracts, by the terms of its corporate charter; but in the absence of any charter provision restricting its power, a corporation may contract for the payment of any rate of interest allowed by law.[67]

2. Requisites and Validity of Contracts — a. In General. In the absence of any statutory provision requiring contracts for the payment of other than the legal rate of interest to be express or to be in writing, any rate of interest permitted to be contracted for by law may be provided for by implied contract, arising from acquiescence in a statement or act, consent to the charge of a particular rate, or from other acts of the parties evidencing such an agreement.[68] And even where the rule is that a higher rate of interest than the legal will not be allowed unless there is an express contract therefor,[69] the existence of such a contract may be inferred from the circumstances.[70]

b. Consideration.[71] There must be a sufficient consideration to support a contract for a higher rate of interest than that originally contracted for;[72] but it has been held that an extension of the time of payment is a sufficient consideration for a promise to pay an increased rate in the future,[73] or even for a promise to pay

Eng. Reprint 1100; Brown *v.* Barkham, 1 P. Wms. 652, 24 Eng. Reprint 555; Seton *v.* Slade, 7 Ves. Jr. 265, 6 Rev. Rep. 124, 32 Eng. Reprint 108. But *compare* Boddie *v.* Ely, 3 Stew. (Ala.) 182; Longworth *v.* Askren, 15 Ohio St. 370, holding that where a note for one thousand dollars payable in instalments provided that eight hundred dollars would be accepted in full payment if each instalment were paid punctually, the larger sum was in the nature of a penalty and the payment of the smaller amount discharged the obligation, although there had been defaults in paying the instalments.

67. *Indiana.*— Morrison *v.* Eaton, etc., R. Co., 14 Ind. 110.

Missouri.— Louisville Bank *v.* Young, 37 Mo. 398.

New York.— Union Nat. Bank *v.* Wheeler, 60 N. Y. 612; U. S. Bank *v.* Chapin, 9 Wend. 471; Macomber *v.* Dunham, 8 Wend. 550.

Ohio.— Kilbreth *v.* Wright, 5 Ohio Dec. (Reprint) 320, 4 Am. L. Rec. 449.

United States.— U. S. Mortgage Co. *v.* Sperry, 138 U. S. 313, 11 S. Ct. 321, 34 L. ed. 969 [*reversing* 26 Fed. 727].

See 29 Cent. Dig. tit. "Interest," § 70.

Special provision as to rate.— A statute permitting parties to agree upon any rate of interest not exceeding ten per cent and fixing six per cent as the legal rate in the absence of any contract does not apply to a chartered corporation empowered to receive loans at three per cent. Tuffli *v.* Ohio L. Ins., etc., Co., 2 Disn. (Ohio) 121.

68. *California.*— Auzerais *v.* Naglee, 74 Cal. 60, 15 Pac. 371.

Colorado.— Willard *v.* Mellor, 19 Colo. 534, 36 Pac. 148.

Georgia.— Crockett *v.* Mitchell, 88 Ga. 166, 14 S. E. 118.

Michigan.— Curtiss *v.* Sheldon, 91 Mich. 390, 51 N. W. 1057.

Mississippi.—Carson *v.* Alexander, 34 Miss. 528.

Nebraska.— Savage *v.* Aiken, 21 Nebr. 605, 33 N. W. 241.

Pennsylvania.— *In re* Gilmor, 158 Pa. St. 186, 27 Atl. 845.

Wisconsin.—See Mosher *v.* Chapin, 12 Wis. 453.

United States.—Sayward *v.* Dexter, 72 Fed. 758, 19 C. C. A. 176; Van Vleet *v.* Sledge, 45 Fed. 743. See Marye *v.* Strouse, 5 Fed. 483, 6 Sawy. 204.

England.— Petre *v.* Duncombe, 15 Jur. 86, 20 L. J. Q. B. 242, 2 L. M. & P. 107.

See 29 Cent. Dig. tit. "Interest," § 73.

In notes given to banks, if no rate of interest be specified, it will be implied that the contract was made in reference to the charter of the bank and it will be governed by the rate fixed therein. Consolidated Assoc. Bank *v.* Foucher, 9 La. 476; Boismarre *v.* Jourdan, 1 Mart. N. S. (La.) 304.

The payment of a rate higher than the legal rate for some time will not be construed into a promise to continue payments of interest at such rate in the future. Western Union R. Co. *v.* Smith, 75 Ill. 496; New York L. Ins., etc., Co. *v.* Manning, 3 Sandf. Ch. (N. Y.) 58; Adriance *v.* Brooks, 13 Tex. 279; Cook *v.* Fowler, L. R. 7 H. L. 27, 43 L. J. Ch. 855. See also Lalande *v.* Breaux, 5 La. Ann. 505.

69. Warren *v.* Tyler, 81 Ill. 15; Western Union R. Co. *v.* Smith, 75 Ill. 496; Turner *v.* Dawson, 50 Ill. 85.

70. Warren *v.* Tyler, 81 Ill. 15.

71. See *supra*, III, B, 2, b.

72. Andrews *v.* Campbell, 36 Ohio St. 361. See also Hunt *v.* Hall, 37 Ala. 702.

In a suit upon the original note it is not allowable to prove a subsequent change of its terms and recover upon the contract thus modified. Hunt *v.* Hall, 37 Ala. 702.

73. *California.*— Adams *v.* Hastings, 6 Cal. 126, 65 Am. Dec. 496.

Georgia.— Taylor *v.* Thomas, 61 Ga. 472.

Indiana.— Harden *v.* Wolf, 2 Ind. 31.

Kansas.— Royal *v.* Lindsay, 15 Kan. 591.

Michigan.— Smith *v.* Graham, 34 Mich. 302; Burchard *v.* Frazer, 23 Mich. 224.

an increased rate from a date anterior to the agreement.[74] An agreement made after maturity that, on the payment of a part of the principal, the rate of interest on the balance shall be less than that stated in the note has been held to be without consideration and not binding.[75]

c. Necessity For Written Contract. In the absence of statutory requirement an agreement for any rate of interest allowed by law may be by parol;[76] but it is provided by statute in many of the states that any contract for the payment of a higher rate of interest than the legal rate, in order to be valid, must be in writing, signed by the party to be charged, and must specify the rate agreed upon.[77]

New Hampshire.— See Havens *v.* Jones, 45 Mich. 253, 7 N. W. 818.

New York.— Ritter *v.* Phillips, 53 N. Y. 586; Kelly *v.* Phenix Nat. Bank, 17 N. Y. App. Div. 496, 45 N. Y. Suppl. 533.

Ohio.— Andrews *v.* Campbell, 36 Ohio St. 361; Mueller *v.* McGregor, 28 Ohio St. 265.

South Carolina.— Utley *v.* Cavender, 31 S. C. 282, 9 S. E. 957.

See 29 Cent. Dig. tit. "Interest," § 74.

The promise to give time must be so definite in its terms as to be enforceable by the debtor. Andrews *v.* Campbell, 36 Ohio St. 361.

74. Taylor *v.* Thomas, 61 Ga. 472; Burchard *v.* Frazer, 23 Mich. 224; Utley *v.* Cavender, 31 S. C. 282, 9 S. E. 957. *Contra,* Adams *v.* Hastings, 6 Cal. 126, 65 Am. Dec. 496.

Where a note provided for interest, without specifying the rate, an agreement subsequently indorsed thereon for the payment of interest at ten per cent from a date in the past was not void for want of consideration, it being a part of the original note and supported by the original consideration. Harrell *v.* Parrott, 50 S. C. 16, 27 S. E. 521. See also Sloan *v.* Latimer, 41 S. C. 217, 19 S. E. 491, 691.

75. Dudley *v.* Reynolds, 1 Kan. 285. See also Warren *v.* Johnson, 38 Kan. 768, 17 Pac. 592; Mowry *v.* Mosher, 16 Wis. 46. *Compare* Roberts *v.* Carter, 31 Ill. App. 142; Vereycken *v.* Vanden Brooks, 102 Mich. 119, 60 N. W. 687; Tousey *v.* Moore, 79 Mich. 564, 44 N. W. 958.

76. Pridgen *v.* Hill, 12 Tex. 374. See *supra,* III, B, 2, *c.*

77. *Alabama.*— Henry *v.* Thompson, Minor 209.

Arkansas.— Johnson *v.* Hull, 57 Ark. 550, 22 S. W. 176.

California.—Dunne *v.* Mastick, 50 Cal. 244; Hill *v.* Eldred, 49 Cal. 398; Pratalongo *v.* Larco, 47 Cal. 378; Atherton *v.* Fowler, 46 Cal. 323; Goldsmith *v.* Sawyer, 46 Cal. 209; Smith *v.* Johnson, 23 Cal. 63; Crosby *v.* McDermitt, 7 Cal. 146.

Colorado.— Beckwith *v.* Beckwith, 11 Colo. 568, 19 Pac. 510.

Connecticut.—Rosenbluth *v.* Dunn, 41 Conn. 619.

District of Columbia.— May *v.* Shepherd, 1 Mackey 430.

Georgia.— Stewart *v.* Slocumb, 120 Ga. 762, 48 S. E. 311; Mohr-Weil Lumber Co. *v.* Russell, 109 Ga. 579, 34 S. E. 1005; Green *v.* Equitable Mortg. Co., 107 Ga. 536, 33 S. E. 869; Neel *v.* Young, 78 Ga. 342; Tribble *v.* Anderson, 63 Ga. 31.

Illinois.—Friend *v.* Engel, 43 Ill. App. 386.

Indiana.— Douglass *v.* State, 44 Ind. 67.

Iowa.— Brockway *v.* Haller, 57 Iowa 368, 13 N. W. 752; Vennum *v.* Gregory, 21 Iowa 326; Burrows *v.* Cook, 17 Iowa 436.

Kansas.— Wenger *v.* Taylor, 39 Kan. 754, 18 Pac. 911.

Kentucky.— Commercial Bank *v.* Trimble, 5 Ky. L. Rep. 520.

Louisiana.— Duruty *v.* Musacchia, 42 La. Ann. 357, 7 So. 555; Crowley *v.* Louisiana Sav. Bank, etc., Co., 38 La. Ann. 74; Buckley *v.* Seymour, 30 La. Ann. 1341; Bayly *v.* Stacey, 30 La. Ann. 1210; Byrne *v.* Grayson, 15 La. Ann. 457; White *v.* Jones, 14 La. Ann. 681; Lalande *v.* Breaux, 5 La. Ann. 505; Thompson *v.* Mylne, 4 La. Ann. 206; Mourain *v.* Delamre, 4 La. Ann. 78; Hepp *v.* Ducros, 3 Mart. N. S. 185.

Maine.— Bunker *v.* Barron, 93 Me. 87, 44 Atl. 372. *Compare* Lindsay *v.* Hill, 66 Me. 212, 22 Am. Rep. 564.

Massachusetts.—Winchester *v.* Glazier, 152 Mass. 316, 25 N. E. 728, 9 L. R. A. 424; Haydenville Sav. Bank *v.* Parsons, 138 Mass. 53; Stults *v.* Newhall, 118 Mass. 98.

Michigan.— Harris *v.* Creveling, 80 Mich. 249, 45 N. W. 85; Tousey *v.* Moore, 79 Mich. 564, 44 N. W. 958; Eaton *v.* Truesdail, 40 Mich. 1; Cameron *v.* Merchants', etc., Bank, 37 Mich. 240; Swift *v.* Barber, 28 Mich. 503.

Minnesota.— Staughton *v.* Simpson, 72 Minn. 536, 75 N. W. 744; Allen *v.* Jones, 8 Minn. 202.

Mississippi.— Van Vleet *v.* Sledge, 45 Fed. 743.

Missouri.— Stephens *v.* Burgess, 69 Mo. 168; Dinsmore *v.* Livingston County, 60 Mo. 241; Robison *v.* Colvin, 5 Mo. App. 588.

Nevada.— Williams *v.* Glasgow, 1 Nev. 533.

Ohio.— Andrews *v.* Campbell, 36 Ohio St. 361.

South Carolina.— Witte *v.* Weinberg, 37 S. C. 579, 17 S. E. 681.

South Dakota.— Davey *v.* Deadwood First Nat. Bank, 10 S. D. 148, 72 N. W. 83; Tucker *v.* Randall, 10 S. D. 581, 74 N. W. 1036, writing must be signed by parties or their duly authorized agents.

Tennessee.— Rickman *v.* Rickman, 6 Lea 483; McGhee *v.* Trotter, 1 Heisk. 453.

Texas.— Gammage *v.* Alexander, 14 Tex. 414; Wetmore *v.* Woodhouse, 10 Tex. 33.

Washington.— Stickler *v.* Giles, 9 Wash. 147, 37 Pac. 293.

Where such statutes obtain, a verbal contract is valid to the extent of the legal rate, but only such rate is chargeable thereon.[78] It has been held that a contract reducing the rate of interest provided for in a written contract must likewise be in writing.[79] Under some statutes the rate need not be expressed in the written contract;[80] but if the interest has been calculated and included in the principal sum named in the written contract this is sufficient.[81]

3. Effect of Order For Sale of Property on Contract Rate. Where notes specify a particular rate of interest higher than the legal rate an order for a sale of the debtor's property to satisfy claims against him does not have the effect of stopping interest at the contract rate and making interest run thereafter at the legal rate only, but the creditor is entitled to the contract rate certainly to the day of sale.[82]

D. Contracts Silent as to Rate. Where no specific rate of interest is named in a contract for the payment of money interest will be computed at the legal rate.[83]

Wisconsin.— Case *v.* Fish, 58 Wis. 56, 15 N. W. 808.

United States.—Sayward *v.* Dexter, 72 Fed. 758, 19 C. C. A. 176; Marye *v.* Strouse, 5 Fed. 483, 6 Sawy. 204.

See 29 Cent. Dig. tit. "Interest," § 72.

"Agreement" synonymous with "promise." — Taylor *v.* Meek, 4 Blackf. (Ind.) 388.

Note need not express that it is for money lent. Luckett *v.* Henderson, 12 Sm. & M. (Miss.) 334.

Promise to pay interest may be in supplemental contract. Mueller *v.* McGregor, 28 Ohio St. 265 [*followed* in Andrews *v.* Campbell, 36 Ohio St. 361].

A parol trust can be enforced only by the payment of the stipulated sum with the agreed rate of interest, although that be in excess of the legal rate. Hiddon *v.* Jordan, 28 Cal. 301 [*followed* in Pujol *v.* McKinlay, 42 Cal. 559].

The mere indorsement of payments of interest at a higher than the legal rate upon a note which is itself silent as to interest does not satisfy the statutory requirement of an agreement in writing to bind the maker to pay that rate in the future. Haydenville Sav. Bank *v.* Parsons, 138 Mass. 53. See also Durnford's Succession, 8 Rob. (La.) 488; Defau *v.* Pelane, 15 La. 273.

An entry upon the execution docket of a promise to pay interest on a judgment at the rate of ten per cent is not a contract for interest "in writing and expressed in the face of the instrument creating the debt or obligation," within the meaning of the Tennessee statute. Rickman *v.* Rickman, 6 Lea (Tenn.) 483.

78. *Arkansas.*— Johnson *v.* Hull, 57 Ark. 550, 22 S. W. 176.

Georgia.— Williams *v.* Griffin Banking Co., 64 Ga. 178.

Iowa.— Brockway *v.* Haller, 57 Iowa 368, 10 N. W. 752.

Minnesota.— Staughton *v.* Simpson, 72 Minn. 536, 75 N. W. 744.

Missouri.— See Filley *v.* McHenry, 71 Mo. 417.

Wisconsin.— Lamb *v.* Klaus, 30 Wis. 94.

See 29 Cent. Dig. tit. "Interest," § 72.

79. Harris *v.* Creveling, 80 Mich. 249, 45 N. W. 85; Tousey *v.* Moore, 79 Mich. 564, 44 N. W. 958.

80. Davey *v.* Deadwood First Nat. Bank, 10 S. D. 148, 72 N. W. 83.

81. *California.*— Auzerais *v.* Naglee, 74 Cal. 60, 15 Pac. 371; Pratalongo *v.* Larco, 47 Cal. 378.

Georgia.—Tribble *v.* Anderson, 63 Ga. 31.

Indiana.— Taylor *v.* Meek, 4 Blackf. 388.

Michigan.— Cameron *v.* Merchants', etc., Bank, 37 Mich. 240.

South Dakota.— Davey *v.* Deadwood First Nat. Bank, 10 S. D. 148, 72 N. W. 83.

United States.— Porter *v.* Price, 80 Fed. 655, 26 C. C. A. 70; Sayward *v.* Dexter, 72 Fed. 758, 19 C. C. A. 176; Marye *v.* Strouse, 5 Fed. 483, 6 Sawy. 204.

See 29 Cent. Dig. tit. "Interest," § 72.

Compare Rosenbluth *v.* Dunn, 41 Conn. 619.

82. Jackson *v.* Wilson, 76 Md. 567, 25 Atl. 980.

83. *Alabama.*— Moore *v.* Patton, 2 Port. 451; Clay *v.* Drake, Minor 164.

California.— Smith *v.* Johnson, 23 Cal. 63 (implied contract); Fisher *v.* Dennis, 6 Cal. 577, 65 Am. Dec. 534; Kohler *v.* Smith, 2 Cal. 597, 56 Am. Dec. 369.

Colorado.— Salazar *v.* Taylor, 18 Colo. 538, 33 Pac. 369; Neuman *v.* Dreifurst, 9 Colo. 228, 11 Pac. 98.

Illinois.— Ford *v.* Hixon, 49 Ill. 142; Bond *v.* Lockwood, 33 Ill. 212; Prevo *v.* Lathrop, 2 Ill. 305; Convey *v.* Sheldon, 1 Ill. App. 555.

Indiana.— Gale *v.* Corey, 112 Ind. 39, 13 N. E. 108, 14 N. E. 362; Godfrey *v.* Craycraft, 81 Ind. 476.

Iowa.— De Wolfe *v.* Taylor, 71 Iowa 648, 33 N. W. 154; Myers *v.* Smith, 15 Iowa 181; Easley *v.* Redpath, 9 Iowa 300.

Kansas.— Everett *v.* Dilley, 39 Kan. 73, 17 Pac. 661; Guthrie *v.* Merrill, 4 Kan. 187.

Louisiana.—*In re* Immanuel Presb. Church, 112 La. 348, 36 So. 408; Stephens *v.* Beard, 17 La. Ann. 145; Rousseau *v.* His Creditors, 8 Mart. N. S. 384.

Maine.—Eaton *v.* Boissonnault, 67 Me. 540, 24 Am. Rep. 52.

Massachusetts.— Pearson *v.* Treadwell, 179 Mass. 462, 61 N. E. 44.

E. Rate After Maturity of Debt — 1. By Express Contract.[84] Where the parties have contracted for the payment of a particular lawful rate of interest, to be paid after the maturity of the debt and upon default in payment, such contract controls and the rate thus fixed is recoverable;[85] and if the contract provides for a certain rate of interest until the principal sum be paid, such contract will control the recovery as to the rate after maturity.[86]

Minnesota.—Brewster *v.* Wakefield, 1 Minn. 352, 69 Am. Dec. 343.

Mississippi.— Effinger *v.* Richards, 35 Miss. 540; Nebbett *v.* Cunningham, 27 Miss. 292.

Missouri.— Williams *v.* Williams, 67 Mo. 661; Way *v.* Priest, 13 Mo. App. 555.

New Hampshire.— Peirce *v.* Rowe, 1 N. H. 179.

New Jersey.— Jersey City *v.* O'Callaghan, 41 N. J. L. 349; Bowne *v.* Ritter, 26 N. J. Eq. 456; Ackens *v.* Winston, 22 N. J. Eq. 444.

New York.— O'Brien *v.* Young, 95 N. Y. 428, 47 Am. Rep. 64; Guggenheimer *v.* Geiszler, 81 N. Y. 293; Hewett *v.* Chadwick, 8 N. Y. App. Div. 23, 40 N. Y. Suppl. 144; Levy *v.* Shellsey, 30 Misc. 789, 63 N. Y. Suppl. 150; Archibald *v.* Thomas, 3 Cow. 284.

North Carolina.— Trimble *v.* Hunter, 104 N. C. 129, 10 S. E. 291.

Ohio.— Bunn *v.* Kinney, 15 Ohio St. 40.

South Carolina.— Columbia Loan, etc., Bank *v.* Miller, 39 S. C. 175, 17 S. E. 592.

Texas.— Daniel *v.* Henry, 30 Tex. 26.

Washington.— Tazard *v.* Maxon, 1 Wash. Terr. 584.

United States.— Scotland County *v.* Hill, 132 U. S. 107, 10 S. Ct. 26, 33 L. ed. 261; Ogden *v.* Saunders, 12 Wheat. 213, 6 L. ed. 606; Farmers' L. & T. Co. *v.* Northern Pac. R. Co., 94 Fed. 454.

See 29 Cent. Dig. tit. "Interest," § 75.

A contract to pay the usual interest will carry the legal rate. Segur *v.* His Creditors, 1 Mart. (La.) 74.

A note payable "with interest at the rate of one and one quarter," and containing nothing more to indicate the rate, bears interest at the legal rate. Salazar *v.* Taylor, 18 Colo. 538, 33 Pac. 369.

84. Contract for increased rate after maturity see *supra*, IV, C, 1, b.

85. *Arkansas.*— Casteel *v.* Walker, 40 Ark. 117, 48 Am. Rep. 5; Vaughan *v.* Kennan, 38 Ark. 114; Portis *v.* Merrill, 33 Ark. 416; Badgett *v.* Jordan, 32 Ark. 154.

Colorado.— Browne *v.* Steck, 2 Colo. 70.

Connecticut.— Hubbard *v.* Callahan, 42 Conn. 524, 19 Am. Rep. 564.

Illinois.— Reeves *v.* Stipp, 91 Ill. 609; Latham *v.* Darling, 2 Ill. 203.

Kansas.— Young *v.* Thompson, 2 Kan. 83; Small *v.* Douthitt, 1 Kan. 335; Dudley *v.* Reynolds, 1 Kan. 285.

Kentucky.—Crosthwait *v.* Misener, 13 Bush 543; Evans *v.* Chapel, 13 Bush 121; Holland *v.* Holman, 50 S. W. 1102, 21 Ky. L. Rep. 105.

Louisiana.— Bermudez *v.* Union Bank, 7 La. Ann. 62.

Maine.— Augusta Nat. Bank *v.* Hewins, 90 Me. 255, 38 Atl. 156; Paine *v.* Caswell, 68 Me. 80, 28 Am. Rep. 21; Eaton *v.* Boissonnault, 67 Me. 540, 24 Am. Rep. 52; Capen *v.* Crowell, 66 Me. 282.

Massachusetts.—French *v.* Bates, 149 Mass. 73, 21 N. E. 237, 4 L. R. A. 268; Lamprey *v.* Mason, 148 Mass. 231, 19 N. E. 350; Daggett *v.* Pratt, 15 Mass. 177.

Minnesota.— Holbrook *v.* Sims, 39 Minn. 122, 39 N. W. 74, 140.

Montana.— Davis *v.* Hendrie, 1 Mont. 499.

Nebraska.— Crapo *v.* Hefner, 53 Nebr. 251, 73 N. W. 702; Bond *v.* Dolby, 17 Nebr. 491, 23 N. W. 351; Hager *v.* Blake, 16 Nebr. 12, 19 N. W. 780.

Nevada.— Cox *v.* Smith, 1 Nev. 161, 90 Am. Dec. 476.

New York.— Taylor *v.* Wing, 84 N. Y. 471.

North Carolina.— Pass *v.* Shine, 113 N. C. 284, 18 S. E. 251.

Oregon.— Close *v.* Riddle, 40 Oreg. 592, 67 Pac. 932, 91 Am. St. Rep. 580.

Rhode Island.— Pearce *v.* Hennessy, 10 R. I. 223.

South Carolina.— Smith *v.* Smith, 33 S. C. 210, 11 S. E. 761; Bowen *v.* Barksdale, 33 S. C. 142, 11 S. E. 640; Miller *v.* Hall, 18 S. C. 141; Maner *v.* Wilson, 16 S. C. 469; Mobley *v.* Davega, 16 S. C. 73, 42 Am. Rep. 632; Sharpe *v.* Lee, 14 S. C. 341.

Wisconsin.— Spaulding *v.* Lord, 19 Wis. 533.

United States.— Scottish-American Mortg. Co. *v.* Wilson, 24 Fed. 310.

England.— *Ex p.* Fewings, 25 Ch. D. 338, 53 L. J. Ch. 545, 50 L. T. Rep. N. S. 109, 32 Wkly. Rep. 352.

Canada.— Credit Foncier *v.* Schultz, 9 Manitoba 70 [*distinguishing* People's Loan, etc., Co. *v.* Grant, 18 Can. Sup. Ct. 262; Manitoba, etc., Loan Co. *v.* Barker, 8 Manitoba 296; Freehold Loan Co. *v.* McLean, 8 Manitoba 116].

See 29 Cent. Dig. tit. "Interest," § 77.

Extension for limited time at lower rate.— When a note called for ten per cent after maturity, and the time of payment was extended by agreement for a certain time at nine per cent, after the expiration of the extended time the note bore interest at the rate of ten per cent. North *v.* Walker, 66 Mo. 453.

86. *District of Columbia.*— See Lockwood *v.* Lindsey, 6 App. Cas. 396.

Kentucky.—Crosthwait *v.* Misener, 13 Bush 543.

Maine.— Augusta Nat. Bank *v.* Hewins, 90 Me. 255, 38 Atl. 156.

Massachusetts.— Lamprey *v.* Mason, 148 Mass. 231, 19 N. E. 350.

Nebraska.— Bond *v.* Dolby, 17 Nebr. 491, 23 N. W. 351.

New York.— O'Brien *v.* Young, 95 N. Y. 428, 47 Am. Rep. 64.

2. By Implied Contract. The rate after the maturity of the debt may also be fixed by an implied contract, and such contract will generally be enforced.[87] Thus, where a loan is made for a short period of time with a provision that interest shall be paid annually,[88] or a debt payable on demand on its face bears interest at a particular rate,[89] interest will generally be held recoverable at the rate specified until the debt is paid or becomes merged in judgment.

3. In the Absence of Contract. The decisions of the various courts are not in accord as to what rate shall be computed upon a debt after its maturity and in default of payment, when there is a contract for the payment of a particular rate of interest on the debt, but no agreement as to the rate after its maturity.[90] It has been held in many cases that the legal rate governs after maturity and default in payment of a debt, whether the rate fixed by the contract before maturity be greater or less than the legal rate;[91] but what has been termed the

Ohio.— Hydraulic Co. *v.* Chatfield, 38 Ohio St. 575.

Rhode Island.— Lanahan *v.* Ward, 10 R. I. 299.

Wisconsin.—See Spaulding *v.* Lord, 19 Wis. 533.

United States.— Northwestern Mut. L. Ins. Co. *v.* Perrill, 18 Fed. Cas. No. 10,339.

See 29 Cent. Dig. tit. "Interest," § 77.

Contra.— People's Loan, etc., Co. *v.* Grant, 18 Can. Sup. Ct. 262 [*affirming* 17 Ont. App. 85, and *following* St. John *v.* Rykert, 10 Can. Sup. Ct. 278]; Manitoba, etc., Loan Co. *v.* Barker, 8 Manitoba 296; Freehold Loan Co. *v.* McLean, 8 Manitoba 116.

87. *Arkansas.*— Casteel *v.* Walker, 40 Ark. 117, 48 Am. Rep. 5.

Georgia.— Crockett *v.* Mitchell, 88 Ga. 166, 14 S. E. 118.

Maine.— Paine *v.* Caswell, 68 Me. 80, 28 Am. Rep. 21.

Michigan.— See Abrey *v.* Schellenberg, 125 Mich. 42, 83 N. W. 998.

South Carolina.— Miller *v.* Edwards, 18 S. C. 600; Mobley *v.* Davega, 16 S. C. 73, 42 Am. Rep. 632.

Virginia.— See Cecil *v.* Hicks, 29 Gratt. 1, 26 Am. Rep. 391.

See 29 Cent. Dig. tit. "Interest," § 77.

88. Wilcox *v.* Van Voorhis, 58 Hun (N. Y.) 575, 12 N. Y. Suppl. 617; Westfield *v.* Westfield, 19 S. C. 85; Mobley *v.* Davega, 16 S. C. 73, 42 Am. Rep. 632.

Notes payable one day after date, bearing interest at a particular rate, are generally held to come within the rule, and interest as stipulated in the note will be recoverable after maturity. Casteel *v.* Walker, 40 Ark. 117, 48 Am. Rep. 5; White *v.* Curd, 86 Ky. 191, 5 S. W. 553, 9 Ky. L. Rep. 505; Gray *v.* Briscoe, 6 Bush (Ky.) 687; Fenley *v.* Kendall, 18 S. W. 637, 13 Ky. L. Rep. 836; McCrocklin *v.* Hiatt, 6 Ky. L. Rep. 742; Piester *v.* Piester, 22 S. C. 139, 53 Am. Rep. 711; Sharpe *v.* Lee, 14 S. C. 341. But see Smith *v.* Smith, 33 S. C. 210, 11 S. E. 761.

89. Casteel *v.* Walker, 40 Ark. 117, 48 Am. Rep. 5; Seymour *v.* Continental L. Ins. Co., 44 Conn. 300, 26 Am. Rep. 469; Colby *v.* Bunker, 68 Me. 524; Paine *v.* Caswell, 68 Me. 80, 28 Am. Rep. 21.

90. Meaders *v.* Gray, 60 Miss. 400, 45 Am. Rep. 414; Cecil *v.* Hicks, 29 Gratt. (Va.) 1, 26 Am. Rep. 391; Cromwell *v.* Sac County, 96 U. S. 51, 24 L. ed. 681.

The question is one of local law, dependent upon the established rule in each particular jurisdiction. Holden *v.* Freedman's Sav., etc., Co., 100 U. S. 72, 25 L. ed. 567.

91. *Alabama.*— Kitchen *v.* Mobile Branch Bank, 14 Ala. 233; Lester *v.* Mobile Bank, 7 Ala. 490; Ellis *v.* Bibb, 2 Stew. 63. But see Montgomery Branch Bank *v.* Harrison, 1 Ala. 9.

Arkansas.— Johnson *v.* Meyer, 54 Ark. 437, 16 S. W. 121; Casteel *v.* Walker, 40 Ark. 117, 48 Am. Rep. 5; Vaughan *v.* Kennan, 38 Ark. 114; Woodruff *v.* Webb, 32 Ark. 612; Pettigrew *v.* Summers, 32 Ark. 571; Newton *v.* Kennerly, 31 Ark. 626, 25 Am. Rep. 592.

Colorado.— Clark *v.* Russell, 1 Colo. 52.

District of Columbia.— Sullivan *v.* Snell, 1 MacArthur 585.

Kentucky.— White *v.* Curd, 86 Ky. 191, 5 S. W. 553, 9 Ky. L. Rep. 505; Evans *v.* Chapel, 13 Bush 121; Rilling *v.* Thompson, 12 Bush 310; Lucking *v.* Gegg, 12 Bush 298; Rushing *v.* Sebree, 12 Bush 198; Gray *v.* Briscoe, 6 Bush 687; Thomas *v.* Bruce, 50 S. W. 63, 20 Ky. L. Rep. 1818; Sinton *v.* Greer, 11 S. W. 366, 10 Ky. L. Rep. 1011; McNeil *v.* Watkins, 15 Ky. L. Rep. 780; Sanford *v.* Cairo City Nat. Bank, 15 Ky. L. Rep. 607; Joseph *v.* Lyon, 9 Ky. L. Rep. 324; McDonald *v.* Green, 4 Ky. L. Rep. 890; Robertson *v.* Waltrip, 4 Ky. L. Rep. 627; Posey *v.* Mayer, 3 Ky. L. Rep. 613; Cunningham *v.* Carrico, 2 Ky. L. Rep. 310; Cottrell *v.* Barnes, 1 Ky. L. Rep. 422. But see Graves *v.* Waller, 4 Ky. L. Rep. 452. After the death of the obligor and the maturity of the contract only legal interest runs. McClure *v.* Bigstaff, 37 S. W. 294, 18 Ky. L. Rep. 601; Fenley *v.* Kendall, 18 S. W. 637, 13 Ky. L. Rep. 836. Under Ky. St. (1903) § 2219, which prohibits contracts for more than legal interest, the question is unimportant as a practical matter.

Louisiana.— See Weaver *v.* Cox, 15 La. Ann. 463.

Maine.— Paine *v.* Caswell, 68 Me. 80, 28 Am. Rep. 21; Eaton *v.* Boissonnault, 67 Me. 540; 24 Am. Rep. 52; Duran *v.* Ayer, 67 Me. 145.

Maryland.— Brown *v.* Hardcastle, 63 Md. 484.

weight of opinion, both as to number and authority of the cases,[92] is to the effect that the stipulated rate, whether it be greater or less than the legal rate, will attend the contract until payment of the debt or until its merger in a judgment.[93]

Minnesota.— Moreland *v.* Lawrence, 23 Minn. 84; McCutchen *v.* Freedom, 15 Minn. 217; Chapin *v.* Murphy, 5 Minn. 474; Hollinshead *v.* Von Glahn, 4 Minn. 190; Daniels *v.* Bradley, 4 Minn. 158; Kent *v.* Bown, 3 Minn. 347; Talcott *v.* Marston, 3 Minn. 339. See also Newell *v.* Houlton, 22 Minn. 19. But *compare* Mason *v.* Callender, 2 Minn. 350, 72 Am. Dec. 102.

Montana.— Gillette *v.* Hibbard, 3 Mont. 412; Rader *v.* Ervin, 1 Mont. 632; Collier *v.* Field, 1 Mont. 612.

New York.— Ferris *v.* Hard, 135 N. Y. 354, 32 N. E. 129; O'Brien *v.* Young, 95 N. Y. 428, 47 Am. Rep. 64; Bennett *v.* Bates, 94 N. Y. 354; Hewett *v.* Chadwick, 8 N. Y. App. Div. 23, 40 N. Y. Suppl. 144; Lawrence *v.* Leake, etc., Orphan House, 2 Den. 577; U. S. Bank *v.* Chapin, 9 Wend. 471. But see *infra*, note 93.

Pennsylvania.— Ludwick *v.* Huntzinger, 5 Watts & S. 51.

Rhode Island.— Pearce *v.* Hennessy, 10 R. I. 223.

South Carolina.— Bell *v.* Bell, 25 S. C. 149; Thatcher *v.* Massey, 20 S. C. 542; Maner *v.* Wilson, 16 S. C. 469; Mobley *v.* Davega, 16 S. C. 73, 42 Am. Rep. 632; Langston *v.* South Carolina R. Co., 2 S. C. 248; Ball *v.* Gaillard, 1 Nott & M. 67; Henderson *v.* Laurens, 2 Desauss. Eq. 170.

Utah.— Perry *v.* Taylor, 1 Utah 63.

United States.— Ewell *v.* Daggs, 108 U. S. 143, 2 S. Ct. 408, 27 L. ed. 682; Holden *v.* Freedman's Sav., etc., Co., 100 U. S. 72, 25 L. ed. 567; Brewster *v.* Wakefield, 22 How. 118, 16 L. ed. 301; Farmers' L. & T. Co. *v.* Northern Pac. R. Co., 94 Fed. 454; Sherwood *v.* Moore, 35 Fed. 109; Nash *v.* El Dorado County, 24 Fed. 252; Hunneman *v.* Milwaukee, 12 Fed. Cas. No. 6,878; *In re* Bartenhach, 3 Fed. Cas. No. 1,068. But see *infra*, note 93.

England.— Cook *v.* Fowler, L. R. 7 H. L. 27, 43 L. J. Ch. 855; Ward *v.* Morrison, C. & M. 368, 41 E. C. L. 204; Financial Corp. *v.* Jervis, 17 L. T. Rep. N. S. 324. But see *infra*, note 93.

Canada.— St. John *v.* Rykert, 10 Can. Sup. Ct. 278; Reg. *v.* Grand Trunk R. Co., 2 Can. Exch. 132; Delaney *v.* Canadian Pac. R. Co., 21 Ont. 11; Archbold *v.* Building, etc., Assoc., 15 Ont. 237 [*affirmed* in 16 Ont. App. 1]; Powell *v.* Peck, 12 Ont. 492 [*affirmed* in 19 Ont. App. 138]; Dalby *v.* Humphrey, 37 U. C. Q. B. 514; Royal Canadian Bank *v.* Shaw, 21 U. C. C. P. 455. But see *infra*, note 93.

See 29 Cent. Dig. tit. "Interest," § 77.

92. Jefferson County *v.* Lewis, 20 Fla. 980; Meaders *v.* Gray, 60 Miss. 400, 45 Am. Rep. 414; Cromwell *v.* Sac County, 96 U. S. 51, 24 L. ed. 681.

93. *Arizona.*— Greenhaw *v.* Holmes, (1902) 68 Pac. 537.

California.— Casey *v.* Gibbons, 136 Cal. 368, 68 Pac. 1032 [*distinguishing* Malone *v.* Roy, 107 Cal. 518, 40 Pac. 1040, and *citing* Civ. Code, § 3289]; Corcoran *v.* Doll, 32 Cal. 82; Guy *v.* Franklin, 5 Cal. 416; Kohler *v.* Smith, 2 Cal. 597, 56 Am. Dec. 369.

Connecticut.— Seymour *v.* Continental L. Ins. Co., 44 Conn. 300, 26 Am. Rep. 469; Adams *v.* Way, 33 Conn. 419; Beckwith *v.* Hartford, etc., R. Co., 29 Conn. 268, 76 Am. Dec. 599. But see Suffield First Ecclesiastical Soc. *v.* Loomis, 42 Conn. 570; Fisher *v.* Bidwell, 27 Conn. 363.

Florida.— Jefferson County *v.* Hawkins, 23 Fla. 223, 2 So. 362; Jefferson County *v.* Lewis, 20 Fla. 980.

Illinois.— Etnyre *v.* McDaniel, 28 Ill. 201; Phinney *v.* Baldwin, 16 Ill. 108, 61 Am. Dec. 62; Starne *v.* Farr, 17 Ill. App. 491.

Indiana.— Gale *v.* Corey, 112 Ind. 39, 13 N. E. 108, 14 N. E. 362; Soice *v.* Huff, 102 Ind. 422, 26 N. E. 89; Kerr *v.* Haverstick, 94 Ind. 178; Holmes *v.* Boyd, 90 Ind. 332; Hume *v.* Mazelin, 84 Ind. 574; Shaw *v.* Rigby, 84 Ind. 375, 48 Am. Rep. 96; Kimmell *v.* Burns, 84 Ind. 370; Kilgore *v.* Powers, 5 Blackf. 22; Bates *v.* Wernwag, 4 Blackf. 272; Wernwag *v.* Mothershead, 3 Blackf. 401. But see Richards *v.* McPherson, 74 Ind. 158; Burns *v.* Anderson, 68 Ind. 202, 34 Am. Rep. 250.

Iowa.— Thompson *v.* Pickel, 20 Iowa 490; Hand *v.* Armstrong, 18 Iowa 324.

Kansas.— Getto *v.* Friend, 46 Kan. 24, 26 Pac. 473 [*citing* Comp. Laws (1885), c. 51, § 6]. *Compare* Robinson *v.* Kinney, 2 Kan. 184 [*followed* in Robinson *v.* Jordan, 2 Kan. 192].

Massachusetts.— McDonald *v.* Faulkner, 154 Mass. 34, 27 N. E. 883; Schmidt *v.* People's Nat. Bank, 153 Mass. 550, 27 N. E. 595; Lamprey *v.* Mason, 148 Mass. 231, 19 N. E. 350; Downer *v.* Whittier, 144 Mass. 448, 11 N. E. 585; Bowers *v.* Hammond, 139 Mass. 360, 31 N. E. 729; Forster *v.* Forster, 129 Mass. 559; Pierce *v.* Boston Five Cents Sav. Bank, 129 Mass. 425, 37 Am. Rep. 371; Union Sav. Inst. *v.* Boston, 129 Mass. 82, 37 Am. Rep. 305; Brannon *v.* Hursell, 112 Mass. 63.

Michigan.— Rix *v.* Strauts, 59 Mich. 364, 26 N. W. 638; Warner *v.* Juif, 38 Mich. 662.

Mississippi.— Tishimingo Sav. Inst. *v.* Buchanan, 60 Miss. 496; Meaders *v.* Gray, 60 Miss. 400, 45 Am. Rep. 414. *Compare* Hamer *v.* Rigby, 65 Miss. 41, 3 So. 137.

Missouri.— Macon County *v.* Rodgers, 84 Mo. 66; Borders *v.* Barber, 81 Mo. 636; Broadway Sav. Bank *v.* Forbes, 79 Mo. 226; Moore *v.* Macon Sav. Bank, 22 Mo. App. 684; Briscoe *v.* Kinealy, 8 Mo. App. 76.

Nebraska.— Richardson *v.* Campbell, 34 Nebr. 181, 51 N. W. 753, 33 Am. St. Rep. 633; Allendorph *v.* Ogden, 28 Nebr. 201, 44 N. W. 220; Hager *v.* Blake, 16 Nebr. 12, 19 N. W. 780.

4. INSTALMENTS OF PRINCIPAL. Where a debt is payable in instalments, with interest at an agreed rate upon such instalments, such rate will generally be recoverable after the instalment becomes due and payable, as well as before its maturity.[94]

F. Judgments — 1. IN GENERAL. Where a judgment is given for damages for a tort or breach of a contract other than to pay money, or for a breach of a contract to pay money in which the rate of interest is not stipulated, the legal rate is recoverable thereon.[95]

Nevada.— Cox *v.* Smith, 1 Nev. 161, 90 Am. Dec. 476.

New Hampshire.— Ashuelot R. Co. *v.* Elliot, 57 N. H. 397.

New Jersey.— Jersey City *v.* O'Callaghan, 41 N. J. L. 349; Wyckoff *v.* Wyckoff, 44 N. J. Eq. 56, 13 Atl. 662.

New York.— Ritter *v.* Phillips, 53 N. Y. 586; Corning *v.* Pond, 29 Hun 129; Andrews *v.* Keeler, 19 Hun 87; Sullivan *v.* Fosdick, 10 Hun 173; Genet *v.* Kissam, 53 N. Y. Super. Ct. 43; Elmira Iron, etc., Rolling Mill Co. *v.* Elmira, 5 Misc. 194, 25 N. Y. Suppl. 657; Van Beuren *v.* Van Gaasbeck, 4 Cow. 496; Miller *v.* Burroughs, 4 Johns. Ch. 436. See also De Crano *v.* Moore, 50 N. Y. App. Div. 361, 63 N. Y. Suppl. 585, 64 N. Y. Suppl. 3; Respectable Aged Indigent Females' Relief Assoc. *v.* Eagleson, 60 How. Pr. 9. But see *supra*, note 91.

North Carolina.— Wadesboro Cotton Mills Co. *v.* Burns, 114 N. C. 353, 19 S. E. 238; Womble *v.* Little, 74 N. C. 255.

Ohio.— Hydraulic Co. *v.* Chatfield, 38 Ohio St. 575; Marietta Iron Works *v.* Lottimer, 25 Ohio St. 621; Monnett *v.* Sturges, 25 Ohio St. 384; Cincinnati Hotel Co. *v.* Central Trust, etc., Co., 11 Ohio Dec. (Reprint) 255, 25 Cinc. L. Bul. 375. But see Samyn *v.* Phillips, 15 Ohio St. 218; Tuffli *v.* Ohio L. Ins., etc., Co., 2 Disn. 121.

Tennessee.— Wade *v.* Pratt, 12 Heisk. 231; Overton *v.* Bolton, 9 Heisk. 762, 24 Am. Rep. 367. *Compare* Duncan *v.* Ewing, 3 Tenn. Ch. 29.

Texas.— Roberts *v.* Smith, 64 Tex. 94, 53 Am. Rep. 744; Hopkins *v.* Crittenden, 10 Tex. 189; Prigden *v.* Andrews, 7 Tex. 461. See also Labbe *v.* Corbett, 69 Tex. 503, 6 S. W. 808.

Virginia.— Evans *v.* Rice, 96 Va. 50, 30 S. E. 463; Cecil *v.* Hicks, 29 Gratt. 1, 26 Am. Rep. 391.

West Virginia.— Barbour *v.* Tompkins, 31 W. Va. 410, 7 S. E. 1; Pickens *v.* McCoy, 24 W. Va. 344; Shipman *v.* Bailey, 20 W. Va. 140.

Wisconsin.— Thorn *v.* Smith, 71 Wis. 18, 36 N. W. 707; Wiswell *v.* Baxter, 20 Wis. 680; Pruyn *v.* Milwaukee, 18 Wis. 367; Spencer *v.* Maxfield, 16 Wis. 178, 541; Mowry *v.* Mosher, 16 Wis. 46. See also Fuller *v.* May, 19 Wis. 140. But see Wegner *v.* Second Ward Sav. Bank, 76 Wis. 242, 44 N. W. 1096; Spaulding *v.* Lord, 19 Wis. 533.

United States.— Ohio *v.* Frank, 103 U. S. 697, 26 L. ed. 531; Cromwell *v.* Sac County, 96 U. S. 51, 24 L. ed. 681; New England Mortg. Security Co. *v.* Vader, 28 Fed. 265; Burgess *v.* Southbridge Sav. Bank, 2 Fed. 500. But see *supra*, note 91.

England.— Keene *v.* Keene, 3 C. B. N. S. 144, 27 L. J. C. P. 88; Morgan *v.* Jones, 8 Exch. 620, 22 L. J. Exch. 232; Price *v.* Great Western R. Co., 16 L. J. Exch. 87, 16 M. & W. 244, 4 R. & Can. Cas. 707. See also Cook *v.* Fowler, L. R. 7 H. L. 27, 43 L. J. Ch. 855. But see *supra*, note 91.

Canada.— O'Connor *v.* Clarke, 18 Grant Ch. (U. C.) 422; Montgomery *v.* Boucher, 14 U. C. C. P. 45; Howland *v.* Jennings, 11 U. C. C. P. 272. But see *supra*, note 91.

See 29 Cent. Dig. tit. "Interest," § 77.

Where interest to maturity added to principal.— Where the interest on a mortgage loan is computed to the time it will be due at a greater than the statutory rate, and added to the principal, the loan, after maturity, will bear only the legal rate. Malone *v.* Roy, 107 Cal. 518, 40 Pac. 1040.

An agreement as to interest on balances on a business contract terminates with the contract. Falkner *v.* Hendy, 80 Cal. 636, 22 Pac. 401.

The rate of interest on a state contract after its maturity is the rate fixed in the statute authorizing the contract and not the legal rate fixed by the general law. Carr *v.* State, 127 Ind. 204, 26 N. E. 778, 22 Am. St. Rep. 624, 11 L. R. A. 370.

94. Ellis *v.* Sanders, 32 S. C. 584, 10 S. E. 824; Miller *v.* Hall, 18 S. C. 141. But see Ferris *v.* Hard, 135 N. Y. 354, 32 N. E. 129.

95. *Arkansas.*— Craig *v.* Price, 23 Ark. 633.

District of Columbia.— Woodbury *v.* District of Columbia, 19 D. C. 157; Fifth Baptist Church *v.* Baltimore, etc., R. Co., 2 Mackey 458.

Illinois.— Palmer *v.* Harris, 100 Ill. 276; Dinet *v.* Eigenmann, 80 Ill. 274; Haas *v.* Chicago Bldg. Soc., 80 Ill. 248; Stokes *v.* Frazier, 72 Ill. 428; Hough *v.* Harvey, 71 Ill. 72; Canisius *v.* Merrill, 65 Ill. 67.

Kansas.— Sharp *v.* Barker, 11 Kan. 381; Simmons *v.* Garrett, McCahon 82.

Missouri.— Ransom *v.* Cobb, 67 Mo. 375; St. Louis *v.* Allen, 53 Mo. 44; State *v.* Hart, 38 Mo. 44; Benjamin *v.* Bartlett, 3 Mo. 86. See also Buchan *v.* Broadwell, 88 Mo. 31.

Ohio.— Calahan *v.* Babcock, 21 Ohio St. 281, 8 Am. Rep. 63.

Texas.— Gunn *v.* Miller, (Civ. App. 1894) 26 S. W. 278. See also Lyons *v.* Iron City Nat. Bank, (Civ. App. 1893) 24 S. W. 304.

United States.— Chicago, etc., R. Co. *v.* Turrill, 101 U. S. 836, 25 L. ed. 1009. See

2. Judgments on Contracts Fixing Rate. In some jurisdictions judgments and decrees are held to bear a fixed statutory rate of interest, notwithstanding the contracts upon which they are founded provide for a different rate;[96] but in others it is held that the rate fixed by the contract, provided it be lawful, should be allowed on the judgment rendered thereon.[97]

3. Judgment Silent as to Rate. It has been held that where a judgment or

also Washington, etc., R. Co. *v.* Harmon, 147 U. S. 571, 13 S. Ct. 557, 37 L. ed. 284.

See 29 Cent. Dig. tit. "Interest," § 82.

Effect of statutory changes in legal rate see *supra*, IV, A, 2, f.

A judgment on a contract which provided for usurious interest and on which all the interest has been therefore forfeited should be treated the same as though no rate of interest had been agreed upon in the contract, and hence legal interest is allowed on such judgment. Shafer *v.* Russell First Nat. Bank, 53 Kan. 614, 36 Pac. 998.

Judgment on foreign judgment fixing rate. — A provision in a judgment allowing interest on the amount thereof at a specified rate does not control where suit is brought upon the judgment in another state; but as the increase is allowed, not as interest but as damages, its measure must be that of the state where the action for the recovery is brought. Wells *v.* Davis, 105 N. Y. 670, 12 N. E. 42.

96. *Arkansas.*— Harbison *v.* Vaughan, 42 Ark. 539; Miller *v.* Kempner, 32 Ark. 573; Badgett *v.* Jordan, 32 Ark. 154; Byrd *v.* Gasquet, 4 Fed. Cas. No. 2,268*a*, Hempst. 261; Evans *v.* White, 8 Fed. Cas. No. 4,572*a*, Hempst. 296. But see Henry *v.* Ward, 4 Ark. 150.

California.— Taylor *v.* Ellenberger, 134 Cal. 31, 66 Pac. 4; Hill *v.* Eldred, 49 Cal. 393. But see Corcoran *v.* Doll, 32 Cal. 82; Raun *v.* Reynolds, 11 Cal. 14; Mount *v.* Chapman, 9 Cal. 294; Emeric *v.* Tams, 6 Cal. 155; Guy *v.* Franklin, 5 Cal. 416.

Illinois.— Chandler *v.* Ward, 188 Ill. 322, 58 N. E. 919; Wayman *v.* Cochrane, 35 Ill. 152; Etnyre *v.* McDaniel, 28 Ill. 201; White *v.* Haffaker, 27 Ill. 349; Aldrich *v.* Sharp, 4 Ill. 261; Mason *v.* Eakle, 1 Ill. 83.

Kentucky.— Marshall *v.* Green, 1 S. W. 602, 8 Ky. L. Rep. 346; Gordon *v.* Phelps, 7 J. J. Marsh. 619. See also Crosthwait *v.* Misener, 13 Bush 543.

Massachusetts.— Bowers *v.* Hammond, 139 Mass. 360, 31 N. E. 729 [*citing* Union Sav. Inst. *v.* Boston, 129 Mass. 82, 37 Am. Rep. 305; Brannon *v.* Hursell, 112 Mass. 63].

Nebraska.— Connecticut Mut. L. Ins. Co. *v.* Westerhoff, 58 Nebr. 379, 78 N. W. 724, 79 N. W. 731, 76 Am. St. Rep. 101; Havemeyer *v.* Paul, 45 Nebr. 373, 63 N. W. 932. See also Allendorph *v.* Ogden, 28 Nebr. 201, 44 N. W. 220. *Compare* Bond *v.* Dolby, 17 Nebr. 491, 23 N. W. 351.

New Jersey.— Verree *v.* Hughes, 11 N. J. L. 91; Wilson *v.* Marsh, 13 N. J. Eq. 289.

New York.— O'Brien *v.* Young, 95 N. Y. 428, 47 Am. Rep. 64; Taylor *v.* Wing, 84 N. Y. 471.

Tennessee.— Wade *v.* Pratt, 12 Heisk. 231; Ward *v.* Kenner, (Ch. App. 1896) 37 S. W. 707.

Washington.— Roeder *v.* Brown, 1 Wash. Terr. 112.

United States.— See Massachusetts *v.* Western Union Tel. Co., 141 U. S. 40, 11 S. Ct. 889, 35 L. ed. 628, holding that a penal rate of twelve per cent interest on unpaid taxes ran only until the amount to be recovered was judicially ascertained, and after the date of the decree interest was to be computed thereon at the rate of six per cent only.

See 29 Cent. Dig. tit. "Interest," § 81; and Commercial Paper, 8 Cyc. 309 notes 69, 70.

A report of commissioners allowing claims against a decedent's estate is not such a judgment as will reduce the rate of interest from the greater contract rate to the legal rate. Bowers *v.* Hammond, 139 Mass. 360, 31 N. E. 729.

Foreclosure decree.— The statute providing for the rate of interest on judgments has no application, except as to the deficiency after sale, to a decree of foreclosure fixing the amount due plaintiff, on payment of which the decree is not to take effect, as the contract is not merged in such decree. Shepherd *v.* Pepper, 133 U. S. 626, 10 S. Ct. 438, 33 L. ed. 706.

A joint maker of a note who is in reality a surety for his co-maker is liable to pay interest at the stipulated rate until a judgment against himself, and the note does not cease to draw the stipulated interest against him on the rendition of a judgment against the co-maker. Chafoin *v.* Rich, 92 Cal. 471, 28 Pac. 488.

97. *Arizona.*— Daggs *v.* Bolton, (1899) 57 Pac. 611.

Georgia.— Neal *v.* Brockhan, 87 Ga. 130, 13 S. E. 283; Daniel *v.* Gibson, 72 Ga. 367, 53 Am. Rep. 845.

Indiana.— Kerr *v.* Haverstick, 94 Ind. 178; Burns *v.* Anderson, 68 Ind. 202, 34 Am. Rep. 250. But see Wernwag *v.* Brown, 3 Blackf. 457, 26 Am. Dec. 433.

Iowa.— Rand *v.* Barrett, 66 Iowa 731, 24 N. W. 530; Wilson *v.* King, Morr. 106. But see Burkhardt *v.* Sappington, 1 Greene 66.

Kansas.— Getto *v.* Friend, 46 Kan. 24, 26 Pac. 473; Lacy *v.* Dunn, 5 Kan. 567.

Michigan.— Warner *v.* Juif, 38 Mich. 662.

Mississippi.— Meaders *v.* Gray, 60 Miss. 400, 45 Am. Rep. 414; Robison *v.* Miller, 57 Miss. 237. See also McCutchen *v.* Dougherty, 44 Miss. 419.

Missouri.— Corley *v.* McKeag, 57 Mo. App. 415. But see Hawkins *v.* Ridenhour, 13 Mo. 125.

decree is silent as to the rate of interest to be computed thereon, it will bear the legal rate, although the judgment might properly have been rendered for a different rate;[98] but, under a statute providing that judgments shall bear the same rate of interest that is stipulated for in the contract upon which the judgment is rendered, it has been held that if the judgment shows that it was rendered upon an obligation bearing a particular rate, such rate will be computed on the judgment, although it is silent as to the rate.[99]

V. TIME DURING WHICH INTEREST RUNS.

A. Time From Which Interest Runs — 1. In General. The general rule is that interest on money runs from the time when the money became due and payable.[1] A creditor seeking to recover interest must show when the debtor's liability became fixed so as to establish the time from which the interest is to be computed,[2] and in the absence of such a showing interest should be allowed only from the commencement of the action.[3] In addition to this a number of cases have arisen in which, usually owing to some peculiar circumstances connected

Nevada.— Cox *v.* Smith, 1 Nev. 161, 90 Am. Dec. 476.

Ohio.— Hydraulic Co. *v.* Chatfield, 38 Ohio St. 575; Emmitt *v.* Penisten, 33 Ohio St. 380; Sutton *v.* Kautsman, 6 Ohio Dec. (Reprint) 910, 8 Am. L. Rec. 657; Stoppel *v.* Kraus, 4 Ohio Dec. (Reprint) 106, 1 Clev. L. Rec. 31. *Compare* Guernsey Branch State Bank *v.* Kelley, 14 Ohio St. 367; Belmont Branch Bank *v.* Durbin, 2 Ohio Dec. (Reprint) 372, 2 West. L. Month. 543.

Texas.— Washington *v.* Denton First Nat. Bank, 64 Tex. 4; Hagood *v.* Aikin, 57 Tex. 511 (even though the rate specified in the contract, which was lawful when contract was made, be in excess of the highest rate permissible at the time judgment is entered); Jewett *v.* Thompson, 8 Tex. 437; Sheldon *v.* Martin, (1888) 8 S. W. 61; Williams *v.* New York Nat. Park Bank, (Civ. App. 1894) 26 S. W. 171; Llano Imp., etc., Co. *v.* Eubanks, 5 Tex. Civ. App. 108, 23 S. W. 613; Llano Imp. Co. *v.* Watkins, 4 Tex. Civ. App. 428, 23 S. W. 612. See also Chowning *v.* Chowning, 3 Tex. App. Civ. Cas. § 150.

West Virginia.— Pickens *v.* McCoy, 24 W. Va. 344; Shipman *v.* Bailey, 20 W. Va. 140.

See 29 Cent. Dig. tit. "Interest," § 81.

Absence of showing as to rate on debt.— Where there is nothing in the bill or exhibits or proof to show that the debt bore a greater rate of interest than six per cent a decree providing that the amount ascertained to be due shall bear interest at ten per cent is erroneous. Robison *v.* Miller, 57 Miss. 237.

Where a note is for a principal sum which includes the interest, a judgment thereon will bear the legal rate, notwithstanding the statute which provides that judgments shall bear the same rate that the contract bears. Ewell *v.* Daggs, 108 U. S. 143, 2 S. Ct. 408, 27 L. ed. 682.

Parts of a decree may draw different rates of interest, if part of the debts therein included drew one rate and part another. Burrows *v.* Stryker, 47 Iowa 477.

98. *California.*— Randolph *v.* Bayue, 44 Cal. 366. See Stewart *v.* Spaulding, 72 Cal. 264, 13 Pac. 661.

Illinois.— Noyes *v.* McLaflin, 62 Ill. 474.

Iowa.— Rice *v.* Hulbert, 67 Iowa 724, 25 N. W. 897.

Mississippi.— McCutchen *v.* Dougherty, 44 Miss. 419.

Oregon.— Duzan *v.* Meserve, 24 Oreg. 523, 34 Pac. 548.

South Carolina.— Moore *v.* Holland, 16 S. C. 15.

Texas.— Labbe *v.* Corbett, 69 Tex. 503, 6 S. W. 808; Townsend *v.* Smith, 20 Tex. 465, 70 Am. Dec. 400.

See 29 Cent. Dig. tit. "Interest," § 80.

99. Crook *v.* Tull, 111 Mo. 283, 20 S. W. 8; State *v.* Vogel, 14 Mo. App. 187; Fish *v.* White, 2 Ohio Dec. (Reprint) 141, 1 West. L. Month. 520.

1. *Florida.*— Milton *v.* Blackshear, 8 Fla. 161.

Massachusetts.— Dodge *v.* Perkins, 9 Pick. 368.

New York.— Hand *v.* Church, 39 Hun 303; McKeon *v.* Wendelken, 25 Misc. 711, 55 N. Y. Suppl. 626. See also Waddington *v.* United Ins. Co., 17 Johns. 23.

United States.— Barrow *v.* Reab, 9 How. 366, 13 L. ed. 177, time when debtor is put in default.

England.— Roddam *v.* Ryley, 1 Bro. Ch. 239, 28 Eng. Reprint 1104.

See 29 Cent. Dig. tit. "Interest," § 83.

Right dependent upon election.— Where property is converted and sold the owner has no right to the proceeds of sale until he elects to waive the tort and sue in assumpsit and hence he is not entitled to interest upon such proceeds prior to such election. Dougherty *v.* Chapman, 29 Mo. App. 233.

2. Hall *v.* Virginia, 91 Ill. 535.

3. Hubenthal *v.* Kennedy, 76 Iowa 707, 39 N. W. 694; Leisman *v.* Otto, 1 Bush (Ky.) 225. See also Milton *v.* Blackshear, 8 Fla. 161.

In an action on a claim due on demand where no date of demand is alleged interest can be recovered only from the date of the

with a claim for money, interest has been allowed only from the commencement of an action to recover the money, although it should have been paid at an earlier time.[4] When a claim is liquidated and should have been paid before action brought and the auditor while allowing interest has computed it only to the date of the writ, it is proper that for the judgment interest should be made up from the date of the writ and not merely from the filing of the auditor's report.[5]

2. Interest Under Contracts — a. Express Contracts. The power to make contracts for the payment of interest includes the power to fix the date from which interest shall be computed, and when the contract expressly provides that interest shall run from a certain date, such provision will control.[6]

commencement of the action. Hall *v.* Farmer's, etc., Sav. Bank, 55 Iowa 612, 8 N. W. 448. See *infra*, V, A, 4, b; V, A, 4, g, (II).

Where the date of a previous demand is not shown interest runs from the commencement of the suit. Brion *v.* Kennedy, 47 Mich. 499, 11 N. W. 288.

4. *Kentucky.*— Goodloe *v.* Clay, 6 B. Mon. 236 (claim of surety against cosurety for contribution, where the debt was paid under such circumstances that the cosurety might not have expected to be called upon); Henderson *v.* Haldeman, (1890) 14 S. W. 957 (claim against decedent's estate not in condition to be paid until commencement of action).

Louisiana.— Blymer Ice Mach. Co. *v.* McDonald, 48 La. Ann. 439, 19 So. 459 (claim in an unsettled state); Pecquet *v.* Pecquet, 17 La. Ann. 204; Northern Bank *v.* Leverich, 8 Rob. 207 (draft not protested).

Maryland.— Rayner *v.* Bryson, 29 Md. 473 (pledgee retaining possession after debt paid); Trump *v.* Baltzell, 3 Md. 295.

Massachusetts.— Freeman *v.* Freeman, 142 Mass. 98, 7 N. E. 710 (accounting for profits); Whitehead *v.* Varnum, 14 Pick. 523 (action of debt for an escape).

Ohio.— Magruder *v.* McCandlis, 3 Ohio Dec. (Reprint) 269, 5 Wkly. L. Gaz. 188.

Tennessee.— Lishey *v.* Lishey, 6 Lea 418 (suit by wife against husband for money belonging to her separate estate received by him); McCartney *v.* Wade, 2 Heisk. 369 (promise to pay without interest); Laura Jane *v.* Hagen, 10 Humphr. 332 (suit for money legacy).

Virginia.— Carter *v.* Carter, 5 Munf. 108.

Washington.— See Edison Gen. Electric Co. *v.* Canadian Pac. Nav. Co., 8 Wash. 370, 36 Pac. 260, 40 Am. St. Rep. 910, 24 L. R. A. 315.

United States.— Kittel *v.* Augusta, etc., R. Co., 84 Fed. 386, 28 C. C. A. 437; Nashua, etc., R. Corp. *v.* Boston, etc., R. Corp., 61 Fed. 237, 9 C. C. A. 468. See also The Isaac Newton, 13 Fed. Cas. No. 7,090, Abb. Adm. 588, interest recoverable at least from commencement of action.

Canada.— Montreal Gas Co. *v.* Vasey, 8 Quebec Q. B. 412.

See 29 Cent. Dig. tit. "Interest," § 106.

Where the debt is not payable at an earlier time interest upon the amount found due is to be allowed from the commencement of the action. Quin *v.* Bay State Distilling Co., 171 Mass. 283, 50 N. E. 637.

On a simple acknowledgment of indebtedness not amounting to a promise to pay, interest should be computed only from the demand made by service of the writ, where there was no contract or usage requiring the payment of interest, and defendant was not a wrong-doer in acquiring or detaining the money. Gay *v.* Rooke, 151 Mass. 115, 23 N. E. 835, 21 Am. St. Rep. 434, 7 L. R. A. 392.

5. Jackson *v.* Brockton, 182 Mass. 26, 64 N. E. 418, 94 Am. St. Rep. 635.

6. *Illinois.*— Cruikshank *v.* Comyns, 24 Ill. 602.

Indiana.— Stayner *v.* Knowler, 82 Ind. 157.

New York.— Farmers' L. & T. Co. *v.* Hunt, 16 Barb. 514; Fake *v.* Eddy, 15 Wend. 76.

Pennsylvania.— Robbins *v.* Westmoreland Coal Co., 198 Pa. St. 301, 47 Atl. 873.

South Carolina.— Ellis *v.* Sanders, 32 S. C. 584, 10 S. E. 824.

United States.— Jourolmon *v.* Ewing, 80 Fed. 604, 26 C. C. A. 23.

Canada.— Ramsay *v.* Carruthers, 23 U. C. Q. B. 21.

See 29 Cent. Dig. tit. "Interest," § 83.

Construction of contracts.— A written instrument acknowledging receipt, on a stated prior date, of a specified sum of money, and promising to pay thereon "interest from this date," draws interest from the date the money was received, and not from the date on which the instrument was executed. Kincaid *v.* Archibald, 73 N. Y. 189. An agreement to pay money "with interest from the —— day of October," draws interest from the last day of October. Hume *v.* Bell, 1 Bibb (Ky.) 402. See also Pollard *v.* Yoder, 2 A. K. Marsh. (Ky.) 264. A note dated Jan. 8, 1838, with the words "with interest from the first day of January last," has been held to provide for interest from Jan. 1, 1837. Calhoun *v.* Reynolds, 1 McMull. (S. C.) 304. A note without date, providing for payment of interest from date, bears interest from the time of delivery, which may be proved. Richardson *v.* Ellett, 10 Tex. 190. See also Van Norman *v.* Wheeler, 13 Tex. 316.

Days of grace.— Where days of grace are allowed by law for the payment of a promissory note, such days of grace are disregarded in the calculation of interest, if the

b. Implied Contracts. A contract fixing the particular time from which interest is to run may be implied from the terms of the agreement of the parties or otherwise; and when so established the contract will be as effective as if it were in express terms.[7]

c. Contracts Silent as to Time. Where a contract for the payment of money contains a stipulation for the payment of interest, but does not, either expressly or impliedly, fix the time from which such interest is to run, it is generally held that interest is to be allowed from the date of the contract.[8] But where the payment of interest is conditioned upon default in payment of the principal at maturity, without any stipulation as to the date from which the interest is to run, it is sometimes held that interest is to be computed only from maturity and default.[9]

3. Interest as Damages — a. For Breach of Contract — (i) *In General.* Where interest is recoverable as damages for the breach of a contract, it should be computed from the date of the breach.[10]

note provides for the payment of principal on a day certain with interest after maturity. Litchford *v.* Starns, 16 La. Ann. 252; Weems *v.* Ventress, 14 La. Ann. 267.

Delay in paying money to borrower.— Where money is lent, but is not paid to the borrower for some days after the date of the mortgage securing the loan, which calls for interest from date, it will be assumed, in the absence of an agreement to the contrary, that the borrower, knowing that there would be some short delay in perfecting title, intended and agreed that such delay should work no change as to the time at which interest was to commence to run. But a delay of several months by the lender in paying the money to the borrower will prevent the accruing of interest except from the date when the money was paid. Dodge *v.* Tulleys, 144 U. S. 451, 12 S. Ct. 728, 36 L. ed. 501.

7. *Florida.*— First Nat. Bank *v.* Savannah, etc., R. Co., 36 Fla. 183, 18 So. 345.

Louisiana.— Goss Printing Press Co. *v.* Daily States Pub. Co., 109 La. 759, 33 So. 760.

Michigan.— Foley *v.* Comstock, 122 Mich. 349, 81 N. W. 96.

Pennsylvania.— Kistler *v.* Mosser, 140 Pa. St. 367, 21 Atl. 357.

Canada.— Rice *v.* Ahern, 6 L. C. Jur. 201, 12 L. C. Jur. 280.

See 29 Cent. Dig. tit. "Interest," § 83.

When several instruments bear upon the contract for the payment of interest, they must all be considered in determining upon the true intent of the parties as to the time when such interest is to begin to run. Goss Printing Press Co. *v.* Daily States Pub. Co., 109 La. 759, 33 So. 760; Ware *v.* Starkey, 80 Va. 191.

8. *Alabama.*—Campbell Printing-Press, etc., Co. *v.* Jones, 79 Ala. 475.

Arkansas.— Inglish *v.* Watkins, 4 Ark. 199; Dickinson *v.* Tunstall, 4 Ark. 170.

California.— Dewey *v.* Bowman, 8 Cal. 145.

Colorado.— Salazar *v.* Taylor, 18 Colo. 538, 33 Pac. 369.

Illinois.— New Boston Presb. Church *v.* Emerson, 66 Ill. 269.

Iowa.— Elwood *v.* McDill, 105 Iowa 437, 75 N. W. 340.

Kentucky.— Miller *v.* Cavanaugh, 99 Ky. 377, 35 S. W. 920, 59 Am. St. Rep. 463, 18 Ky. L. Rep. 183; Winn *v.* Young, 1 J. J. Marsh. 51, 19 Am. Dec. 52; Posey *v.* Mayer, 3 Ky. L. Rep. 613; Moore *v.* Miller, 1 Ky. L. Rep. 322.

Louisiana.— Luzenberg *v.* Cleveland, 19 La. Ann. 473.

Missouri.— Pittman *v.* Barret, 34 Mo. 84. *Contra*, Ayres *v.* Hayes, 13 Mo. 252.

Nebraska.— Jewett *v.* McGillicuddy, 55 Nebr. 588, 75 N. W. 1099.

New York.— Lanning *v.* Cole, 8 How. Pr. 148.

North Carolina.— Gholson *v.* King, 79 N. C. 162.

Tennessee.— Smith *v.* Goodlett, 92 Tenn. 230, 21 S. W. 106; McNairy *v.* Bell, 1 Yerg. 502, 24 Am. Dec. 454.

Virginia.— Ware *v.* Starkey, 80 Va. 191.

England.— Doman *v.* Dibden, R. & M. 381, 27 Rev. Rep. 761, 21 E. C. L. 774; Kennerly *v.* Nask, 1 Stark. 452, 2 E. C. L. 174.

See 29 Cent. Dig. tit. "Interest," § 83.

Instalments of principal.— Upon a contract to pay a sum in instalments, the payments to begin at a future time, "with interest," the interest begins to run from the making of the contract. Adairs *v.* Wright, 14 Iowa 22; Conners *v.* Holland, 113 Mass. 50. *Compare* Fellows *v.* Harrington, 3 Barb. Ch. (N. Y.) 652.

An undertaking to discharge an attachment, conditioned to pay the amount of any judgment recovered "with interest," means interest from the date of such judgment and not the date of the undertaking. Sooysmith *v.* American Surety Co., 28 N. Y. App. Div. 346, 51 N. Y. Suppl. 313.

9. Billingsly *v.* Cahoon, 7 Ind. 184; Wernwag *v.* Mothershead, 3 Blackf. (Ind.) 401.

Where a note provides for its payment "on or before" a certain day, and stipulates that if it is not paid when due it shall bear twenty-five per cent interest, the interest is to be computed from the date of the note and not from its maturity. Horn *v.* Nash, 1 Iowa 204, 63 Am. Dec. 437.

10. *Alabama.*— Whitworth *v.* Hart, 22 Ala. 343.

Connecticut.— Wells *v.* Abernethy, 5 Conn. 222.

(II) *Contracts to Pay Money*—(A) *On a Day Certain.* Where there is a contract to pay money on a day certain, whether such contract be express or implied, and the money is not paid when due, interest is recoverable on the amount in default from the day when it should have been paid.[11]

Delaware.— Waples *v.* Waples, 1 Harr. 392.
District of Columbia.— District of Columbia *v.* Metropolitan R. Co., 8 App. Cas. 322.
Illinois.— Dobbins *v.* Higgins, 78 Ill. 440.
Indiana.— Chicago, etc., R. Co. *v.* McEwen, (App. 1904) 71 N. E. 926.
Iowa.— Dubuque Lumber Co. *v.* Kimball, 111 Iowa 48, 82 N. W. 458; Mote *v.* Chicago, etc., R. Co., 27 Iowa 22, 1 Am. Rep. 212.
Kentucky.— Royal *v.* Miller, 3 Dana 55; Meagher *v.* Puckett, 42 S. W. 737, 44 S. W. 389, 19 Ky. L. Rep. 879.
Louisiana.— Reid *v.* Duncan, 1 La. Ann. 265; Marr *v.* Hyde, 8 Rob. 13; Brownson *v.* Fenwick, 19 La. 431.
Maine.— McKenney *v.* Haines, 63 Me. 74.
Massachusetts.— Spring *v.* Haskell, 4 Allen 112; Dodge *v.* Perkins, 9 Pick. 368; Weeks *v.* Hasty, 13 Mass. 218.
Michigan.— Fredenburg *v.* Turner, 37 Mich. 402; Beardslee *v.* Horton, 3 Mich. 560.
Mississippi.— Bickell *v.* Colton, 41 Miss. 368.
Nebraska.— Omaha Carpet Co. *v.* Clapp, 2 Nebr. (Unoff.) 406, 89 N. W. 246.
New Hampshire.— Pinkerton *v.* Manchester, etc., R. Co., 42 N. H. 424; Buzzell *v.* Snell, 25 N. H. 474.
New York.— Adams *v.* Ft. Plain Bank, 36 N. Y. 255. *Compare* Day *v.* New York Cent. R. Co., 22 Hun 412.
Texas.— Roberts *v.* Smith, 64 Tex. 94, 53 Am. Rep. 744; Houston, etc., R. Co. *v.* Jackson, 62 Tex. 209; Calvit *v.* McFadden, 13 Tex. 324; Arlington First Nat. Bank *v.* Lynch, 6 Tex. Civ. App. 590, 25 S. W. 1042.
Virginia.— Merryman *v.* Criddle, 4 Munf. 542.
England.— Marsh *v.* Jones, 40 Ch. D. 563, 60 L. T. Rep. N. S. 610.
See 29 Cent. Dig. tit. "Interest," § 83.

Failure to return stock certificates.— Where the bolder of corporate stock lent the same, to be returned in kind in four equal instalments, and interest to be paid on the dividends received, and the borrower failed to return the stock or its equivalent, but paid to the lender the dividends received thereon, the lender was entitled to interest on the value of the stock only from the time that the borrower ceased to pay over the dividends. Enders *v.* Board of Public Works, 1 Gratt. (Va.) 364.

11. *Alabama.*— Cheek *v.* Waldrum, 25 Ala. 152; Moore *v.* Patton, 2 Port. 451.
Arkansas.— Joyner *v.* Turner, 19 Ark. 690; Wilson *v.* Anthony, 19 Ark. 16.
California.— Knowles *v.* Baldwin, 125 Cal. 224, 57 Pac. 988; Jones *v.* Gardner, 57 Cal. 641; Mix *v.* Miller, 57 Cal. 356.
District of Columbia.—Burke *v.* Claughton, 12 App. Cas. 182.
Georgia.— Van Winkle *v.* Wilkins, 81 Ga. 93, 7 S. E. 644, 12 Am. St. Rep. 290; Roberts *v.* Prior, 20 Ga. 561.
Illinois.— Whittaker *v.* Crow, 132 Ill. 627, 24 N. E. 57 [*affirming* 32 Ill. App. 29]; Ditch *v.* Vollhardt, 82 Ill. 134; Dobbins *v.* Higgins, 78 Ill. 440.
Kansas.— Sturges *v.* Green, 27 Kan. 235.
Kentucky.—Richardson *v.* Flournoy, 7 J. J. Marsh. 155.
Louisiana.— Burton *v.* Chaney, 3 La. Ann. 338.
Maine.— Maine Cent. Inst. *v.* Haskell, 73 Me. 140; Gay *v.* Gardiner, 54 Me. 477.
Maryland.— Lee *v.* Pindle, 12 Gill & J. 288.
Massachusetts.— Foote *v.* Blanchard, 6 Allen 221, 83 Am. Dec. 624. See also Dodge *v.* Perkins, 9 Pick. 368.
Nebraska.— Murphy *v.* Omaha, 33 Nebr. 402, 50 N. W. 265.
New Jersey.— Ruckman *v.* Bergholz, 38 N. J. L. 531; Van Giesen *v.* Van Houten, 5 N. J. L. 822; North Hudson R. Co. *v.* Booraem, 28 N. J. Eq. 593.
New York.— Gould *v.* Oneonta, 71 N. Y. 298; Hamilton *v.* Van Rensselaer, 43 N. Y. 244; Adams *v.* Ft. Plain Bank, 36 N. Y. 255; Gillet *v.* Van Rensselaer, 15 N. Y. 397; Stacy *v.* Graham, 14 N. Y. 492; Weber *v.* Hearn, 49 N. Y. App. Div. 213, 63 N. Y. Suppl. 41; Kelley *v.* Phenix Nat. Bank, 17 N. Y. App. Div. 496, 45 N. Y. Suppl. 533; Carpenter *v.* Brand, 40 N. Y. Super. Ct. 551; Stuart *v.* Binsse, 10 Bosw. 436; Sans *v.* New York, 31 Misc. 559, 64 N. Y. Suppl. 681; Howard *v.* Farley, 19 Abb. Pr. 126; Still *v.* Hall, 20 Wend. 51; Williams *v.* Sherman, 7 Wend. 109.
North Carolina.— McKinlay *v.* Blackledge, 3 N. C. 28.
Pennsylvania.— Wilson *v.* County, 1 Del. Co. Rep. 422; Noblit *v.* Briggs, 8 Phila. 275.
South Carolina.— Suber *v.* Richards, 61 S. C. 393, 39 S. E. 540; Kennedy *v.* Barnwell, 7 Rich. 124; Simpson *v.* McMillion, 1 Nott & M. 192.
Tennessee.— Thompson *v.* French, 10 Yerg. 452.
Texas.— Galveston, etc., R. Co. *v.* Henry, 65 Tex. 685; Roberts *v.* Smith, 64 Tex. 94, 53 Am. Rep. 744.
Vermont.— Vermont, etc., R. Co. *v.* Vermont Cent. R. Co., 34 Vt. 1; Dickenson *v.* Gould, 2 Tyler 32.
Virginia.— Buchanan *v.* Leeright, 1 Hen. & M. 211.
United States.— Armstrong *v.* American Exch. Nat. Bank, 133 U. S. 433, 10 S. Ct. 450, 33 L. ed. 747; Potter *v.* Gardner, 5 Pet. 718, 8 L. ed. 285; Milburn *v.* Thirty-Five Thousand Boxes of Oranges and Lemons, 57 Fed. 236, 6 C. C. A. 317; Bain *v.* Peters, 44 Fed. 307.
England.— Upton *v.* Ferrers, 5 Ves. Jr. 801, 5 Rev. Rep. 167, 31 Eng. Reprint 866.

On a note payable one day after date, interest has been allowed from such date, al-

(B) *On a Day Capable of Ascertainment.* Although the exact date for the payment of the money be not fixed by the contract, yet if it can be ascertained with reasonable certainty from the terms of the contract, interest will be allowed from the date so ascertained.[12]

(C) *Payment to Be Made by Note.* Where a debtor agrees with his creditor to pay his debt by giving a note therefor, payable on a day certain, and fails to deliver such note, interest will be allowed upon the debt from the date such note would have fallen due.[13]

(D) *Contracts For Payment Upon Happening of Event or Condition.* Where a contract provides for the payment of money upon the happening of an event, or upon a certain condition, interest is to be computed only from the happening of such event, or the compliance with such condition.[14] This rule applies where money is payable at the death of a party,[15] the final settlement of a

though there was an indorsement on the note that it should be paid after the maker's death. Powell *v.* Guy, 20 N. C. 55; Carter *v.* King, 11 Rich. (S. C.) 125. See also Foster *v.* Harris, 10 Pa. St. 457.

Contingent attorney's fee.— It was error to allow interest on the agreed amount of an attorney's contingent fee from the date of the agreement; it being apparent that payment was not to be made until the recovery by the attorney. Chester *v.* Jumel, 2 Silv. Sup. (N. Y.) 159, 5 N. Y. Suppl. 809 [*reversed* on other grounds in 125 N. Y. 237, 26 N. E. 297].

In an action on a note not protested at maturity, where defendants have not been put in default before suit, and there is no evidence of any promise to pay interest, it will be allowed only from judicial demand. Pawling *v.* Howren, 1 Rob. (La.) 229; McGuire *v.* Mead, 9 La. 311.

12. Lackawanna Mills *v.* Weil, 162 N. Y. 642, 57 N. E. 1114 [*affirming* 21 N. Y. App. Div. 492, 47 N. Y. Suppl. 585]; Howard *v.* Johnston, 82 N. Y. 271; Craig *v.* Dumars, 7 Tex. Civ. App. 28, 26 S. W. 743.

Interest on a broker's claim for commissions begins from the time when the contract between the seller and the purchaser procured by the agent was made. Ruckman *v.* Bergholz, 37 N. J. L. 437.

13. *Illinois.*— Clark *v.* Dutton, 69 Ill. 521.

Kentucky.— See Steele *v.* Moxley, 9 Dana 137.

Maryland.— Chase *v.* Manhardt, 1 Bland 333.

New York.—Patterson *v.* Whitlock, 14 Daly 497, 1 N. Y. Suppl. 2; Lutz *v.* Ey, 3 E. D. Smith 621, 3 Abb. Pr. 475. But see Stuart *v.* Binsse, 10 Bosw. 436, where interest was allowed from the date when the notes should have been delivered.

North Carolina.— McKay *v.* Melvin, 36 N. C. 73.

England.— Rhoades *v.* Selsey, 2 Beav. 359, 17 Eng. Ch. 359, 48 Eng. Reprint 1220; Boyce *v.* Warburton, 2 Campb. 480; Porter *v.* Palsgrave, 2 Campb. 472; Becher *v.* Jones, 2 Campb. 428 note; Farr *v.* Ward, 6 Dowl. P. C. 163, M. & H. 274, 3 M. & W. 25; Marshall *v.* Poole, 13 East 98, 12 Rev. Rep. 310; Davis *v.* Smyth, 10 L. J. Exch. 473, 8 M. & W. 399; Slack *v.* Lowell, 3 Taunt. 157.

Where one gives a receipt for notes which he is to deliver to another, he is liable for interest upon their true value, if detained beyond the time for their delivery. Stark *v.* Price, 5 Dana (Ky.) 140.

14. *Alabama.*— Folmar *v.* Carlisle, 117 Ala. 449, 23 So. 551.

California.— Rogers *v.* Manhattan L. Ins. Co., 138 Cal. 285, 71 Pac. 348; Link *v.* Jarvis, (1893) 33 Pac. 206.

Illinois.— Loose *v.* Wood, 17 Ill. App. 26.

Kentucky.— Wilhite *v.* Roberts, 4 Dana 172; Hodges *v.* Holeman, 2 Dana 396; Whitehead *v.* Brothers Lodge No. 132, I. O. O. F., 71 S. W. 933, 24 Ky. L. Rep. 1633.

Louisiana.— Begue *v.* Hubert, 108 La. 119, 32 So. 333.

Massachusetts.— Lewin *v.* Folsom, 171 Mass. 188, 50 N. E. 523.

New York.— Howard *v.* Johnston, 82 N. Y. 271; Palmer *v.* North, 35 Barb. 282.

Pennsylvania.— Booth *v.* Pittsburgh, 154 Pa. St. 482, 25 Atl. 803; Beetim *v.* Buchanan, 4 Watts 59.

Texas.— Hutchins *v.* Wade, 20 Tex. 7.

But see Washband *v.* Washband, 24 Conn. 500, where such a contract containing a provision for annual interest was held to carry interest from its date.

Payment on collection of claims.— A contract in the following form: "Due H. $717.68, to be paid as soon as it can be collected by bringing suits on the notes and accounts that were taken for flour and provisions," drew interest not from the time such claims were collected but from the time they might have been collected. Weirick *v.* Hoover, 8 Blackf. (Ind.) 379.

15. *Kentucky.*— Carr *v.* Robinson, 8 Bush 269.

Maryland.— Robertson *v.* Mowell, 66 Md. 530, 8 Atl. 273.

Pennsylvania.—Troubat *v.* Hunter, 5 Rawle 257.

Vermont.— Sumner *v.* Beebe, 37 Vt. 562.

England.— *In re* Horner, [1896] 2 Ch. 188, 65 L. J. Ch. 694, 74 L. T. Rep. N. S. 686, 44 Wkly. Rep. 556; Knapp *v.* Burnaby, 5 L. T. Rep. N. S. 52, 9 Wkly. Rep. 765.

A person entitled to money in remainder after a life-estate is entitled to interest thereon from the death of the life-tenant. McCook *v.* Harp, 81 Ga. 229, 7 S. E. 174.

decedent's estate,[16] the completion of certain work,[17] or the delivery of certain articles.[18]

(E) *Contracts Silent as to Time.* It has been frequently held that where a contract for the payment of money fixes no time when it shall be paid, the amount is payable immediately and interest runs from the date of the contract.[19]

(F) *Goods Sold and Delivered.* As a general rule, when goods are sold and delivered without special agreement as to the time of payment therefor, the purchase-price is due upon delivery of the goods, and interest thereon is recoverable from that date,[20] although it has been held that in such case interest runs from the time of a demand for payment.[21] Of course if there is a special contract that the goods shall be paid for at a particular time, interest is payable only from such time.[22] It has been held that where goods are sold for cash interest is recoverable from the date of the sale,[23] but other cases hold that even on sale for cash interest should be allowed only from the time of the actual delivery of the goods.[24]

(G) *Loans and Advances.* Where one person lends money to or pays money at the request and to the use of another, interest is to be allowed on the sum lent or advanced from the date of the transaction in the absence of any agreement to the contrary.[25]

16. Kinard *v.* Glenn, 29 S. C. 590, 8 S. E. 203.

17. Bassett *v.* Sanborn, 9 Cush. (Mass.) 58, thirty days from completion of work.

18. Ryland *v.* Heney, 130 Cal. 426, 62 Pac. 616, one year from date of average delivery of grapes.

19. *California.*— Lambert *v.* Schmalz, 118 Cal. 33, 50 Pac. 13; Haines *v.* Stilwell, (1895) 40 Pac. 332.

Georgia.— See Thomson *v.* Ocmulgee Bldg., etc., Assoc., 56 Ga. 350.

Kentucky.— Francis *v.* Castleman, 4 Bibb 282.

Minnesota.— Horn *v.* Hansen, 56 Minn. 43, 57 N. W. 315, 22 L. R. A. 617.

New York.— Chester *v.* Jumel, 125 N. Y. 237, 26 N. E. 297; Purdy *v.* Philips, 1 Duer 369 [*affirmed* in 11 N. Y. 406]; Gaylord *v.* Van Loan, 15 Wend. 308.

North Carolina.— Freeland *v.* Edwards, 3 N. C. 49, 2 Am. Dec. 620.

Tennessee.— Collier *v.* Gray, 1 Overt. 110.

Virginia.—McVeigh *v.* Howard, 87 Va. 599, 13 S. E. 31.

Wisconsin.— Hushbrook *v.* Wilder, 1 Pinn. 643.

England.— Farquhar *v.* Morris, 7 T. R. 124.

See 29 Cent. Dig. tit. "Interest," § 89; and COMMERCIAL PAPER, 8 Cyc. 317 note 15.

20. *Alabama.*— Shields *v.* Henry, 31 Ala. 53; Waring *v.* Henry, 30 Ala. 721.

Arkansas.— Roberts *v.* Wilcoxson, 36 Ark. 355.

Illinois.— New Boston Presb. Church *v.* Emerson, 66 Ill. 269.

Kansas.— Wyandotte, etc., Gas Co. *v.* Schliefer, 22 Kan. 468.

New York.— Peetsch *v.* Quinn, 7 Misc. 6, 27 N. Y. Suppl. 323.

Wisconsin.— Case Plow Works *v.* Niles, etc., Co., 107 Wis. 9, 82 N. W. 568.

United States.— Atlantic Phosphate Co. *v.* Grafflin, 114 U. S. 492, 5 S. Ct. 967, 29 L. ed. 221; Yellow Poplar Lumber Co. *v.* Daniel, 109 Fed. 39, 48 C. C. A. 204.

Readiness to deliver.— Where the seller was ready to deliver goods sold, according to agreement as to the date of delivery, and the goods were refused, interest was allowed from the time when the seller was so ready to deliver. Lackawanna Mills *v.* Weil, 162 N. Y. 642, 57 N. E. 1114 [*affirming* 21 N. Y. App. Div. 492, 47 N. Y. Suppl. 585].

21. McIlvaine *v.* Wilkins, 12 N. H. 474; Beers *v.* Reynolds, 11 N. Y. 97. See also Houghton *v.* Hagan, Brayt. (Vt.) 133.

22. *Alabama.*— Shields *v.* Henry, 31 Ala. 53; Waring *v.* Henry, 30 Ala. 721.

Arkansas.— Roberts *v.* Wilcoxson, 36 Ark. 355.

Florida.— Milton *v.* Blackshear, 8 Fla. 161.

Iowa.— Bradley *v.* Palen, 78 Iowa 126, 42 N. W. 623.

Kentucky.— Henderson Cotton Mfg. Co. *v.* Lowell Mach. Shops, 86 Ky. 668, 7 S. W. 142, 9 Ky. L. Rep. 831.

Massachusetts.— Foote *v.* Blanchard, 6 Allen 221, 83 Am. Dec. 624.

New Hampshire.— National Lancers *v.* Lovering, 30 N. H. 511.

South Carolina.— Kinard *v.* Glenn, 29 S. C. 590, 8 S. E. 203.

Texas.— Howard *v.* Emerson, (Civ. App. 1901) 65 S. W. 382.

Vermont.— Porter *v.* Munger, 22 Vt. 191; Raymond *v.* Isham, 8 Vt. 258.

England.— Mountford *v.* Willes, 2 B. & P. 337. But see Chalie *v.* York, 6 Esp. 45.

Canada.— Bannerman *v.* Fullerton, 5 Nova Scotia 200.

23. Sturges *v.* Green, 27 Kan. 235; Schuwirth *v.* Thumma, (Tex. Civ. App. 1902) 66 S. W. 691. A cash sale of property bears interest from date, although the day of payment be postponed until a particular event transpires. Parke *v.* Foster, 26 Ga. 465, 71 Am. Dec. 221.

24. Maltman *v.* Williamson, 69 Ill. 423; Smith *v.* Shaffer, 50 Md. 132; Foote *v.* Blanchard, 6 Allen (Mass.) 221, 83 Am. Dec. 624.

25. *Iowa.*— Warren *v.* Ewing, 34 Iowa 168.

(H) *Accounts.* Interest is generally allowed upon the balance due upon an account from the date of the liquidation of such account and the acknowledgment of such balance,[26] or from the date of the demand for payment of such balance, the demand operating as a liquidation so as to start the running of interest.[27] The presentation of an account showing a balance due, when no objection is made by the debtor, has been held a sufficient demand and liquidation to start the running of interest.[28] Of course if the parties have expressly fixed upon a term of credit interest will be allowed on such balance only from the date of the expiration of the credit.[29] So also where a term of credit is fixed by usage or

Massachusetts.— Gibbs *v.* Bryant, 1 Pick. 118. See also Somers *v.* Wright, 115 Mass. 292.

New York.— Gillet *v.* Van Rensselaer, 15 N. Y. 397; Woerz *v.* Schumacher, 37 N. Y. App. Div. 374, 56 N. Y. Suppl. 8; Trotter *v.* Grant, 2 Wend. 413; Reid *v.* Rensselaer Glass Factory, 3 Cow. 387 [*affirmed* in 5 Cow. 587]; People *v.* Gasherie, 9 Johns. 71, 6 Am. Dec. 263; Pease *v.* Barber, 3 Cai. 266; Liotard *v.* Graves, 3 Cai. 226.

Pennsylvania.— Sims *v.* Willing, 8 Serg. & R. 103.

Texas.— Grimes *v.* Hagood, 19 Tex. 246.

United States.— Goodwin *v.* Fox, 129 U. S. 601, 9 S. Ct. 367, 32 L. ed. 805. See also White *v.* Van Horn, 159 U. S. 3, 15 S. Ct. 1027, 40 L. ed. 55.

Canada.— Edmonds *v.* Hamilton Provident, etc., Soc., 18 Ont. App. 347.

See 29 Cent. Dig. tit. "Interest," § 88.

26. *Connecticut.*— McKeon *v.* Byington, 70 Conn. 429, 39 Atl. 853.

Illinois.— Haight *v.* McVeagh, 69 Ill. 624.

Montana.— See Priest *v.* Eide, 19 Mont. 53, 47 Pac. 206, 958.

Nevada.— Skinker *v.* Clute, 9 Nev. 342.

New York.— Wood *v.* Belden, 59 Barb. 549; Salter *v.* Parkhurst, 2 Daly 240, in the absence of proof as to when the account was rendered or that the amounts of the items were specifically agreed on, or of a custom to charge interest.

South Carolina.— Dickinson *v.* Legare, 1 Desauss. Eq. 537.

United States.— Cooper *v.* Coates, 21 Wall. 105, 22 L. ed. 481; Young *v.* Godbe, 15 Wall. 562, 21 L. ed. 250.

Canada.— Sinclair *v.* Chisholm, 5 Ont. Pr. 270.

See 29 Cent. Dig. tit. "Interest," § 87.

27. *Colorado.*— Patten *v.* American Nat. Bank, 15 Colo. App. 479, 63 Pac. 424, 53 L. R. A. 693.

Connecticut.— Clark *v.* Clark, 46 Conn. 586.

Illinois.— Myers *v.* Walker, 24 Ill. 133.

Louisiana.— Merieult *v.* Austin, 3 Mart. 318. In an action on an open account, against the heirs amongst whom a succession has been partitioned, for articles furnished to their ancestor, interest will be allowed from judicial demand, and not from the death of the ancestor. Burney *v.* Brown, 3 Rob. 270.

Massachusetts.— Stimpson *v.* Green, 13 Allen 326.

Missouri.— Dempsey *v.* Schawacker, 140 Mo. 680, 38 S. W. 954, 41 S. W. 1100; Wolff *v.* Matthews, 98 Mo. 246, 11 S. W. 563; Phillips *v.* Laclede County, 76 Mo. 68; Southgate *v.* Atlantic, etc., R. Co., 61 Mo. 89; Henderson *v.* Davis, 74 Mo. App. 1; Newman *v.* Newman, 29 Mo. App. 649. See also Thompson *v.* School Dist. No. 4, 71 Mo. 495.

Montana.— Hefferlin *v.* Karlman, 29 Mont. 139, 74 Pac. 201; Knatz *v.* Wise, 16 Mont. 555, 41 Pac. 710.

New Hampshire.— Livermore *v.* Rand, 26 N. H. 85.

New York.— Robbins *v.* Carll, 93 N. Y. 656; Mygatt *v.* Wilcox, 45 N. Y. 306, 6 Am. Rep. 90 [*affirming* 1 Lans. 55]; Rexford *v.* Comstock, 3 N. Y. Suppl. 876.

Pennsylvania.— Gray *v.* Van Amringe, 2 Watts & S. 128.

Wisconsin.— Remington *v.* Eastern R. Co., 109 Wis. 154, 84 N. W. 898, 85 N. W. 321.

See 29 Cent. Dig. tit. "Interest," § 87.

When the amount due is unliquidated and uncertain, dependent upon an adjustment of debits and credits between the parties at the time of the demand for payment, interest should be allowed on the balance found due, not from the time of such demand, but from the date of the writ only. Palmer *v.* Stockwell, 9 Gray (Mass.) 237. See also Brewer *v.* Tyringham, 12 Pick. (Mass.) 547.

In California interest on an open account runs from the commencement of an action to recover the amount due. Lane *v.* Turner, 114 Cal. 396, 46 Pac. 290; Pacific Mut. L. Ins. Co. *v.* Fisher, 106 Cal. 224, 39 Pac. 758; McFadden *v.* Crawford, 39 Cal. 662.

28. *Georgia.*— Field *v.* Reid, 21 Ga. 314.

Iowa.— David *v.* Conard, 1 Greene 336.

Louisiana.— Vance *v.* Shreveport First Nat. Bank, 51 La. Ann. 89, 24 So. 607; Conrad *v.* Burbank, 24 La. Ann. 17; Shaw *v.* Oakey, 3 Rob. 361; Wakeman *v.* Marquand, 5 Mart. N. S. 265.

New York.— Beers *v.* Reynolds, 11 N. Y. 97 [*affirming* 12 Barb. 288]; Patterson *v.* Choate, 7 Wend. 441. See also Kane *v.* Smith, 12 Johns. 156.

United States.— Cooper *v.* Coates, 21 Wall. 105, 22 L. ed. 481; Bainbridge *v.* Wilcocks, 2 Fed. Cas. No. 755, Baldw. 536. *Compare* U. S. *v.* Fitzsimmons, 50 Fed. 381.

29. *Alabama.*— Moore *v.* Patton, 2 Port. 451.

Arkansas.— Rogers *v.* Yarnell, 51 Ark. 198, 10 S. W. 622.

Delaware.— Bate *v.* Burr, 4 Harr. 130.

Illinois.— Heegaard *v.* Hess, 86 Ill. App. 544 [*affirmed* in (1900) 58 N. E. 371].

custom of dealing, or by statute, interest will be computed from the expiration of such credit;[30] and it has even been held that interest is to be computed from the expiration of a reasonable term of credit.[31] In some cases it has been held that interest should be allowed from the date of the last item of the account on the debit side.[32]

(I) *Work Done and Materials Furnished.* It has been held that, in the absence of a contract fixing the time of payment for work done and materials furnished, payment should be made upon the completion of the work, and interest is to be allowed from such time.[33] But it has also been held that in suits for wages or for work done and materials furnished interest is to be allowed from the time of a demand proved,[34] and in the absence of a previous demand interest is to be allowed only from institution of the suit.[35] Where the right of a party to compensation for work and materials furnished under a contract is doubtful and contested on reasonable grounds, and the amount due him requires to be adjusted by proceedings in the suit, interest is recoverable only after the right of the party to recover and the amount of his recovery have been determined.[36]

(J) *Penal Bonds.* According to some authorities where the condition of a penal bond is broken interest is recoverable from the date of the breach of the condition;[37] but other cases hold that interest should be allowed only from demand,[38]

Kansas.— Wyandotte, etc., Gas Co. *v.* Schliefer, 22 Kan. 468.

New York.— Wood *v.* Hickok, 2 Wend. 501.

Pennsylvania.— Cone *v.* Donaldson, 47 Pa. St. 363.

South Carolina.— Knight *v.* Mitchell, 2 Treadw. 668.

Vermont.— Raymond *v.* Isham, 8 Vt. 258; Catlin *v.* Aiken, 5 Vt. 177.

Virginia.— Dabneys *v.* Knapp, 2 Gratt. 354.

See 29 Cent. Dig. tit. "Interest," § 87.

30. *Colorado.*— Florence, etc., R. Co. *v.* Tennant, 32 Colo. 71, 75 Pac. 410; Baldwin Coal Co. *v.* Davis, 15 Colo. App. 371, 62 Pac. 1041.

Georgia.— Bell *v.* Morton, 68 Ga. 831; Woodfield *v.* Colzey, 47 Ga. 121.

Indiana.— Kellenberger *v.* Foresman, 13 Ind. 475.

Nebraska.— Garneau *v.* Omaha Printing Co., 52 Nebr. 383, 72 N. W. 360; Staker *v.* Begole, 34 Nebr. 107, 51 N. W. 468; Lepin *v.* Paine, 15 Nebr. 326, 18 N. W. 79.

Pennsylvania.— Koons *v.* Miller, 3 Watts & S. 271; Graham *v.* Williams, 16 Serg. & R. 257, 16 Am. Dec. 569; Knox *v.* Jones, 2 Dall. 193, 1 L. ed. 345.

Texas.— Ft. Worth, etc., R. Co. *v.* White, (1889) 14 S. W. 1068; Mills *v.* Haas, (Civ. App. 1894) 27 S. W. 263.

United States.— Mine, etc., Supply Co. *v.* Parke, etc., Co., 107 Fed. 881, 47 C. C. A. 34.

Canada.— McCullough *v.* Newlove, 27 Ont. 627.

See 29 Cent. Dig. tit. "Interest," § 87.

31. Young *v.* Dickey, 63 Ind. 31; Wills *v.* Brown, 3 N. J. L. 548; Wood *v.* Smith, 23 Vt. 706; Bates *v.* Starr, 2 Vt. 536, 21 Am. Dec. 568; Bainbridge *v.* Wilcocks, 2 Fed. Cas. No. 755, Baldw. 536.

32. *Alabama.*—Prestridge *v.* Irwin, 46 Ala. 653.

Colorado.— Bergundthal *v.* Bailey, 15 Colo. 257, 25 Pac. 86.

Connecticut.— McKeon *v.* Byington, 70 Conn. 429, 39 Atl. 853.

Georgia.— Reynolds *v.* Atlanta Nat. Bldg., etc., Assoc., 101 Ga. 596, 29 S. E. 13.

Minnesota.— Bell *v.* Mendenhall, 78 Minn. 57, 80 N. W. 843. See also Taylor *v.* Parker, 17 Minn. 469; Leyde *v.* Martin, 16 Minn. 38.

See 29 Cent. Dig. tit. "Interest," § 87.

33. Sullivan *v.* Nicoulin, 113 Iowa 76, 84 N. W. 978; Louisville *v.* Henderson, 13 S. W. 111, 11 Ky. L. Rep. 796. *Compare* Swails *v.* Cissna, 61 Iowa 693, 695, 17 N. W. 39, where it is said that such a claim "would at least draw interest from the date of the filing of the petition."

Interest from audit of account for work done.— Smith *v.* Buffalo, 39 N. Y. Suppl. 881; Peters *v.* Quebec Harbour Com'rs, 19 Can. Sup. Ct. 685.

34. Ford *v.* Tirrell, 9 Gray (Mass.) 401, 69 Am. Dec. 297; Gammell *v.* Skinner, 9 Fed. Cas. No. 5,210, 2 Gall. 45.

35. *California.*— McFadden *v.* Crawford, 39 Cal. 662.

Massachusetts.— Barstow *v.* Robinson, 2 Allen 605; Ford *v.* Tirrell, 9 Gray (Mass.) 407, 69 Am. Dec. 297.

New York.— Rawson *v.* Grow, 4 E. D. Smith 18. See also Feeter *v.* Heath, 11 Wend. 477; Case *v.* Osborn, 60 How. Pr. 187.

Wisconsin.— See Lowe *v.* Ring, 123 Wis. 370, 101 N. W. 698.

United States.— Gammell *v.* Skinner, 9 Fed. Cas. No. 5,210, 2 Gall. 45.

36. The Isaac Newton, 13 Fed. Cas. No. 7,090, Abb. Adm. 588.

37. Steinbock *v.* Evans, 122 N. Y. 551, 25 N. E. 929; U. S. *v.* Arnold, 24 Fed. Cas. No. 14,469, 1 Gall. 348. See also Carter *v.* Carter, 4 Day (Conn.) 30, 4 Am. Dec. 177.

38. Harris *v.* Clap, 1 Mass. 308, 2 Am. Dec. 27; Murray *v.* Aiken Min., etc., Co., 39 S. C. 457, 18 S. E. 5; Union Bank *v.* Sollee, 2 Strobh. (S. C.) 390.

or from the institution of a suit on the bond where there has been no previous demand.[39]

b. Money Wrongfully Obtained or Used. According to some authorities interest is recoverable upon money wrongfully obtained from another or wrongfully used by the person having possession of it from the date it was so obtained or used,[40] or from the earliest date that it can be proved to have been obtained or used;[41] but other cases hold that interest should be allowed only from the date of demand for payment or restoration.[42]

c. Money Held to Use of Another. It has been held that where one person holds money to the use of another, and is charged with a certain duty with regard thereto, and fails to make such application thereof as his duty requires, interest is to be computed on the sum so held from the date of his failure to make the required application;[43] but it has also been held that, in the absence of any misconduct on

39. Vaughan *v.* Goode, Minor (Ala.) 417; Frink *v.* Southern Express Co., 82 Ga. 33, 8 S. E. 862, 3 L. R. A. 482; Warner *v.* Thurlo, 15 Mass. 154; U. S. Bank *v.* Magill, 16 Fed. Cas. No. 929, 1 Paine 661, if there has not been a previous demand of the penalty or an acknowledgment that the whole is due. U. S. *v.* Curtis, 100 U. S. 119, 123, 25 L. ed. 571, where the court said: "The earliest moment at which any one became liable on account of the breach of the condition of the bond now sued on was the service of the writ on the defendants."

40. *Alabama.*— Comer *v.* Lehman, 87 Ala. 362, 6 So. 264; Wright *v.* Wright, 37 Ala. 420. See also Andrews *v.* Huckabee, 30 Ala. 143.

Georgia.— Anderson *v.* State, 2 Ga. 370; Nisbet *v.* Lawson, 1 Ga. 275.

Kansas.— Cummins *v.* Heald, 24 Kan. 600, 36 Am. Rep. 264.

Massachusetts.— Manufacturers' Nat. Bank *v.* Perry, 144 Mass. 313, 11 N. E. 81; Atlantic Nat. Bank *v.* Harris, 118 Mass. 147; Wood *v.* Robbins, 11 Mass. 504, 6 Am. Dec. 182.

Michigan.— Boyce *v.* Boyce, 124 Mich. 696, 83 N. W. 1013.

Minnesota.— Corse *v.* Minnesota Grain Co., 94 Minn. 331, 102 N. W. 728.

Missouri.— Arthur *v.* Wheeler, etc., Mfg. Co., 12 Mo. App. 335.

New York.— James Reynolds Elevator Co. *v.* Merchants' Nat. Bank, 55 N. Y. App. Div. 1, 67 N. Y. Suppl. 397; Leake, etc., Orphan House *v.* Lawrence, 11 Paige 80. See also Robinson *v.* Stewart, 10 N. Y. 189; People *v.* Gasherie, 9 Johns. 71, 6 Am. Dec. 263.

North Carolina.— State *v.* Boone, 108 N. C. 78, 12 S. E. 897; Horne *v.* Allen, 27 N. C. 36.

Texas.— Bennett *v.* Latham, 18 Tex. Civ. App. 403, 45 S. W. 934.

Wisconsin.— Webster *v.* Douglass County, 102 Wis. 181, 77 N. W. 885, 78 N. W. 451, 72 Am. St. Rep. 870.

United States.—Doggett *v.* Emerson, 7 Fed. Cas. No. 3,962, 1 Woodb. & M. 195.

See 29 Cent. Dig. tit. "Interest," § 85.

Interest on money wrongfully taken from the person of a decedent can only be awarded from the date of death. Weaver *v.* Williams, 75 Miss. 945, 23 So. 649.

When a person sold property which he did not own the vendor was liable for interest from the time he received the money if he was guilty of fraud, but if there was no fraud he was liable only from the time a demand was made for the return of the money, or a plea of set-off filed in an action brought by him. Phillips *v.* O'Neal, 85 Ga. 142, 11 S. E. 581.

41. Silver Valley Min. Co. *v.* Baltimore Min. Co., 101 N. C. 679, 8 S. E. 361; Silver Valley Min. Co. *v.* Baltimore Gold, etc., Min. etc., Co., 99 N. C. 445, 6 S. E. 735. See also Andrews *v.* Clark, 72 Md. 396, 20 Atl. 429.

42. *California.*— Buttner *v.* Smith, (1894) 36 Pac. 652.

Kentucky.— Sharp *v.* Pike, 5 B. Mon. 155, holding that interest on money paid as usury can be recovered only from the date of its reclamation.

Maine.— House *v.* McKenney, 46 Me. 94.

New Hampshire.— Peterborough Sav. Bank *v.* Hodgdon, 62 N. H. 300.

United States.— Pope *v.* Barrett, 19 Fed. Cas. No. 11,273, 1 Mason 117.

See 29 Cent. Dig. tit. "Interest," § 100.

In an action against a warehouseman for failure to deliver goods interest upon the value of the goods from the time of demand and refusal to deliver may be recovered. Schwerin *v.* McKie, 51 N. Y. 180, 10 Am. Rep. 581.

Where defendant was not guilty of any wrong until it refused to pay the money to plaintiff when demanded interest runs only from the demand. Rice *v.* Ashland County, 114 Wis. 130, 89 N. W. 908 [*distinguishing* Sanborn *v.* U. S., 135 U. S. 271, 10 S. Ct. 812, 34 L. ed. 112; Redfield *v.* Ystalyfera Iron Co., 110 U. S. 174, 3 S. Ct. 570, 28 L. ed. 109].

Where money illegally demanded is paid without protest no interest thereon can be allowed until after demand or action commenced. Atwell *v.* Zeluff, 26 Mich. 118.

43. *Louisiana.*— Graves *v.* Barnes, 7 La. Ann. 69; Sargent *v.* Davis, 3 La. Ann. 353.

Maine.— Hall *v.* Huckins, 41 Me. 574.

New Jersey.— Halsted *v.* Meeker, 18 N. J. Eq. 136.

Oregon.— Graham *v.* Merchant, 43 Oreg. 294, 72 Pac. 1088.

Texas.— Evans *v.* State, 36 Tex. 323.

Virginia.— Strother *v.* Hull, 23 Gratt. 652.

the part of the person holding money to another's use, interest will be allowed only from demand for its delivery to the person entitled thereto.[44] Where the person holding the money is entitled to hold it until a certain time interest cannot run against him until such time.[45]

d. Judgments, Verdicts, and Awards.[46] Interest is generally held to commence running on judgments from the date of their entry,[47] and where a judgment is entered *nunc pro tunc*, interest is to be computed from the day on which

See also Rosser *v.* Depriest, 5 Gratt. 6, 50 Am. Dec. 94.

United States.— Vose *v.* Philbrook, 28 Fed. Cas. No. 17,010, 3 Story 335.

See 29 Cent. Dig. tit. "Interest," § 86.

44. *Alabama.*— Tyree *v.* Parham, 66 Ala. 424 [*explaining* and *limiting* Williams *v.* McConnico, 44 Ala. 627]; Ingersoll *v.* Campbell, 46 Ala. 282, money held on deposit to keep until demanded.

California.— Barrere *v.* Somps, 113 Cal. 97, 45 Pac. 177; Hellman *v.* Merz, 112 Cal. 661, 44 Pac. 1079; Anderson *v.* Pacific Bank, 112 Cal. 598, 44 Pac. 1063, 53 Am. St. Rep. 228, 32 L. R. A. 479.

Indiana.— Walpole *v.* Bishop, 31 Ind. 156; Hackleman *v.* Moat, 4 Blackf. 164; Hawkins *v.* Johnson, 4 Blackf. 21. See also Smith *v.* Blair, 133 Ind. 367, 32 N. E. 1123.

Iowa.— Johnson *v.* Semple, 31 Iowa 49, holding that an attorney is not liable for interest on money collected by him until a demand to pay over the same is made.

Kentucky.— Cord *v.* Taylor, 5 Ky. L. Rep. 852.

Maine.— Wheeler *v.* Haskins, 41 Me. 432, holding that where one having money of a decedent did not know that an administratrix had been appointed until a demand was made upon him, he was liable for interest only from the time of the demand.

Massachusetts.— Talbot *v.* Commonwealth Nat. Bank, 129 Mass. 67, 37 Am. Rep. 302; Ordway *v.* Colcord, 14 Allen 59; Ellery *v.* Cunningham, 1 Metc. 112. See also Hunt *v.* Nevers, 15 Pick. 500, 26 Am. Dec. 616; Stevens *v.* Goodell, 3 Metc. 34.

New Hampshire.— Clement *v.* Little, 42 N. H. 563.

New York.— Walsh *v.* Meyer, 3 N. Y. St. 579 (money deposited with auctioneer on sale not consummated); Hudson *v.* Hudson, Sheld. 386 (funds of principal in hands of agent). See also Williams *v.* Storrs, 6 Johns. Ch. 353, 10 Am. Dec. 340. *Compare* Hover *v.* Heath, 3 Hun 283, 5 Thomps. & C. 488; People *v.* Gasherie, 9 Johns. 71, 6 Am. Dec. 263.

North Carolina.—Neal *v.* Freeman, 85 N. C. 441; Hyman *v.* Gray, 49 N. C. 155.

Pennsylvania.— Shafer *v.* McIlhaney, 154 Pa. St. 58, 26 Atl. 213 [*affirming* 1 Pa. Dist. 765, 12 Pa. Co. Ct. 27]; Brown *v.* Campbell, 1 Serg. & R. 176. *Aliter* in case of unreasonable and vexatious delay. Cone *v.* Donaldson, 47 Pa. St. 363.

South Carolina.— State *v.* Bird, 2 Rich. 99; Scofield *v.* Kinsler, 2 Strobh. 481; Union Bank *v.* Sollee, 2 Strobh. 390; Cheeseborough *v.* Hunter, 1 Hill 400; Newman *v.* Wilbourne, 1 Hill Eq. 10.

Vermont.— Hauxhurst *v.* Hovey, 26 Vt. 544.

West Virginia.— Parkersburg Nat. Bank *v.* Als, 5 W. Va. 50.

United States.— Leete *v.* Pacific Mill, etc., Co., 89 Fed. 480 (construing Nev. St. (1887) p. 82, § 1); Sneed *v.* Hanly, 22 Fed. Cas. No. 13,136, Hempst. 659.

See 29 Cent. Dig. tit. "Interest," §§ 86, 100.

45. Lessenich *v.* Sellers, 119 Iowa 314, 93 N. W. 348.

46. See *infra*, V, A, 4, e.

47. *Alabama.*— Florence Cotton, etc., Co. *v.* Louisville Banking Co., 138 Ala. 588, 36 So. 456, 100 Am. St. Rep. 50.

California.— Bibend *v.* Liverpool, etc., F., etc., Ins. Co., 30 Cal. 78.

Georgia.— Guernsey *v.* Phinizy, 113 Ga. 898, 39 S. E. 402, 84 Am. St. Rep. 270; Houston *v.* Mossman, T. U. P. Charlt. 138.

Illinois.— Healy *v.* Protection Mut. F. Ins. Co., 107 Ill. App. 632.

Indiana.— Hull *v.* Butler, 7 Ind. 267.

Kansas.— Grund *v.* Tucker, 5 Kan. 70; Simmons *v.* Garrett, McCahon 82.

Kentucky.— Young *v.* Pate, 3 J. J. Marsh. 100.

Louisiana.— Barnard *v.* Erwin, 2 Rob. 407. See also Keenan *v.* Whitehead, 15 La. Ann. 333.

Maryland.— Baltimore City Pass. R. Co. *v.* Sewell, 37 Md. 443; Gwinn *v.* Whitaker, 1 Harr. & J. 754.

Massachusetts.— See Fowler *v.* Shearer, 7 Mass. 14.

Missouri.— Schaeffer *v.* Siegel, 9 Mo. App. 594.

New York.— Hunn *v.* Norton, Hopk. 344.

North Carolina.— Deloach *v.* Worke, 10 N. C. 36.

Pennsylvania.— Kistler *v.* Mosser, 140 Pa. St. 367, 21 Atl. 357; White Haven School Dist. *v.* Wasser, 1 Kulp 78.

South Carolina.— Mann *v.* Poole, 48 S. C. 154, 26 S. E. 229.

Vermont.— Sturges *v.* Knapp, 36 Vt. 439.

West Virginia.— Hawker *v.* Baltimore, etc., R. Co., 15 W. Va. 628, 36 Am. Rep. 825.

United States.— Mitchell *v.* Harmony, 13 How. 115, 14 L. ed. 75.

See 29 Cent. Dig. tit. "Interest," § 84.

Compare Kimball *v.* Connally, 2 Ohio Dec. (Reprint) 113, 1 West. L. Month. 402.

Foreign judgments.— Where suit is brought on a foreign judgment interest, where allowed thereon, is generally computed from the date of the judgment sued on. Reynolds *v.* Powers, 96 Ky. 481, 29 S. W. 299, 17 Ky. L. Rep. 1059. See also Clark *v.* Child, 136

it is to be considered as entered.[48] Interest on the sum found due by a verdict, award, or report of a master is generally allowed from the date when the sum is payable by the terms of such verdict, award, or report,[49] although it is sometimes held that interest is to be computed from the confirmation of the report, or of the award, where such confirmation is necessary to give it effect.[50] Under statute in some of the states, interest is allowed from the date of the report or award.[51]

e. **Damages For Torts.** Where damages are recovered for the commission of a tort, and interest on such damages is allowed as a part thereof, the general rule is that such interest is to be computed from the date when the tort was committed;[52]

Mass. 344; Hopkins *v.* Shepard, 129 Mass. 600.

48. *Alabama.*— Clemens *v.* Judson, Minor 395.

California.— Cutting Fruit Packing Co. *v.* Canty, 141 Cal. 692, 75 Pac. 564.

Montana.— Barber *v.* Briscoe, 9 Mont. 341, 23 Pac. 726.

Nebraska.— See Rawlings *v.* Anheuser-Busch Brewing Assoc., (1903) 94 N. W. 1001.

New York.— Earle *v.* Earle, 73 N. Y. App. Div. 300, 76 N. Y. Suppl. 851.

Pennsylvania.— See Irvin *v.* Hazleton, 37 Pa. St. 465.

See 29 Cent. Dig. tit. "Interest," § 84.

49. *Illinois.*— Pearson *v.* Sanderson, 128 Ill. 88, 21 N. E. 200 [*affirming* 28 Ill. App. 571]; Noyes *v.* McLaflin, 62 Ill. 474; Florsheim *v.* Illinois Trust, etc., Bank, 93 Ill. App. 297; Rogan *v.* Illinois Trust, etc., Bank, 93 Ill. App. 39.

Indiana.— Hamilton *v.* Wort, 7 Blackf. 348.

Ohio.— See *In re* Easton, 11 Ohio Dec. (Reprint) 759, 29 Cinc. L. Bul. 61.

England.—Pinhorn *v.* Tuckington, 3 Campb. 468.

Canada.— See Towsley *v.* Wythes, 16 U. C. Q. B. 139.

See 29 Cent. Dig. tit. "Interest," § 84.

When allowed from prior date.— Wherever a verdict liquidates a claim and fixes it as of a prior date interest should be allowed from that date. Sullivan *v.* McMillan, 37 Fla. 134, 19 So. 340, 53 Am. St. Rep. 239.

Where a verdict is given subject to an award interest on the sum awarded cannot be charged from the time of taking the verdict. Hope *v.* Beatty, 7 Ont. Pr. 39.

50. *Georgia.*—Guernsey *v.* Phinizy, 113 Ga. 898, 39 S. E. 402, 84 Am. St. Rep. 270.

Michigan.— Match *v.* Hunt, 38 Mich. 1.

Ohio.— Berger *v.* Commercial Bank, 5 Ohio S. & C. Pl. Dec. 277, 5 Ohio N. P. 176.

Pennsylvania.— Norris *v.* Philadelphia, 70 Pa. St. 332; *In re* Sugar Notch Borough, 10 Kulp 429. See also Wainwright's Estate, 13 Phila. 336.

South Carolina.— Richardson *v.* Richardson, McMull. Eq. 103.

England.— Atty.-Gen. *v.* Brewers' Co., 1 P. Wms. 376, 24 Eng. Reprint 432.

See 29 Cent. Dig. tit. "Interest," § 84.

51. Jackson *v.* Brockton, 182 Mass. 26, 64 N. E. 418, 94 Am. St. Rep. 635; Speirs *v.* Union Drop Forge Co., 180 Mass. 87, 61 N. E. 825; Hunn *v.* Norton, Hopk. (N. Y.) 344.

Interest from making of report, not from its date.— Fuller *v.* Squire, 8 How. Pr. (N. Y.) 121. See also Fuller *v.* Fuller, 23 Fla. 236, 2 So. 426.

52. *Alabama.*— Alabama Great Southern R. Co. *v.* McAlpine, 75 Ala. 113; Fail *v.* Presley, 50 Ala. 342.

Georgia.— Collier *v.* Lyons, 18 Ga. 648.

Illinois.— Chicago, etc., R. Co. *v.* Shultz, 55 Ill. 421.

Iowa.— Mote *v.* Chicago, etc., R. Co., 27 Iowa 22, 1 Am. Rep. 212.

Maine.— Brannin *v.* Johnson, 19 Me. 361.

Maryland.— Andrews *v.* Clark, 72 Md. 396, 20 Atl. 429.

Massachusetts.— Frazer *v.* Bigelow Carpet Co., 141 Mass. 126, 4 N. W. 620; Dunlap *v.* Watson, 124 Mass. 305; Hill *v.* Hunt, 9 Gray 66.

Minnesota.— Varco *v.* Chicago, etc., R. Co., 30 Minn. 18, 13 N. W. 921.

Mississippi.— Illinois Cent. R. Co. *v.* Haynes, 64 Miss. 604, 1 So. 765; Tarpley *v.* Wilson, 33 Miss. 467.

Nebraska.— Union Pac. R. Co. *v.* Ray, 46 Nebr. 750, 65 N. W. 773.

New York.— Ludlow *v.* Yonkers, 43 Barb. 493. *Compare* Greer *v.* New York, 3 Rob. 406.

North Carolina.— Patapsco Guano Co. *v.* Magee, 86 N. C. 350; Rippey *v.* Miller, 46 N. C. 479, 63 Am. Dec. 177.

Ohio.— Toledo *v.* Grasser, 12 Ohio Cir. Ct. 520, 6 Ohio Cir. Dec. 782.

Texas.— Gulf, etc., R. Co. *v.* Holliday, 65 Tex. 512; Texas, etc., R. Co. *v.* Tankersley, 63 Tex. 57; Worsham *v.* Vignal, 5 Tex. Civ. App. 471, 24 S. W. 562.

Wisconsin.— Arpin *v.* Burch, 68 Wis. 619, 32 N. W. 681, conversion of chattels. But *compare* Allen *v.* Murray, 87 Wis. 41, 57 N. W. 979. See also Dean *v.* Chicago, etc., R. Co., 43 Wis. 305, 309, where it is said: "In Chapman *v.* Chicago, etc., R. Co., 26 Wis. 295, 7 Am. Rep. 81, which was a case like this, a direction to the jury to allow interest from the commencement of the action, on the immediate damages suffered by the plaintiff, was upheld. We do not understand that the authority of that ruling has been shaken by any subsequent decision of this court. In the present case the direction was to compute interest on the immediate damages from the time the cow was killed. This may have been an unjustifiable extension of the rule of Chapman *v.* Chicago, etc., R. Co., *supra*. We do not say whether it is so or not. If it is so, it may be that the improper allowance of inter-

but some cases hold that in such case interest is to be computed only from the date of judicial demand or institution of the suit for damages.[53]

4. Demand For Payment of Principal — a. In General. In many cases it is laid down as a general rule that, in the absence of a special agreement as to interest, or as to the time the debt is to be paid, interest should be allowed on such debt only from the time the principal is demanded.[54]

est on an insignificant sum for the few months intermediate the injury and the commencement of the action presents a case for the application of the maxim, *de minimis non curat lex*. However that may be, we think no sufficient exception was taken to the instruction to enable us to review it on this appeal."

England.— The Northumbria, L. R. 3 A. & E. 6, 39 L. J. P. & M. 3, 21 L. T. Rep. N. S. 681, 18 Wkly. Rep. 188; The Gertrude, 13 P. D. 105, 6 Aspin. 315, 59 L. T. Rep. N. S. 251, 36 Wkly. Rep. 616; The Kong Magnus, [1891] P. 223, 65 L. T. Rep. N. S. 231; The Jones Brothers, 46 L. J. P. & Adm. 75, 37 L. T. Rep. N. S. 164.

Canada.— See Drury *v.* Reg., 6 Can. Exch. 204.

An insurance company, which has been subrogated to the rights of the insured by payment of the loss and an assignment of the insured's right of action, is entitled to interest on the amount of the loss paid from the time of payment, upon recovery of damages from the party who is liable for the loss. Texarkana, etc., R. Co. *v.* Hartford Ins. Co., 17 Tex. Civ. App. 498, 44 S. W. 533.

Where the only damage is decreasing the selling value of property by obstructing the street in front of it interest should be allowed only from the time when an attempt to sell was made. Hetzel *v.* Baltimore, etc., R. Co., 6 Mackey (D. C.) 1.

53. Wabash R. Co. *v.* Williamson, 3 Ind. App. 190, 29 N. E. 455; Lucas *v.* Wattles, 49 Mich. 380, 13 N. W. 782. See also Clines *v.* Frisbee, 5 Rob. (La.) 192.

Where the tort is waived in a case of conversion of property, and plaintiff sues in assumpsit for money had and received, interest will be allowed only from the commencement of the action. Dougherty *v.* Chapman, 29 Mo. App. 233. See Bresnahan *v.* Nugent, 97 Mich. 359, 56 N. W. 765.

54. *Florida.*— Milton *v.* Blackshear, 8 Fla. 161.

Illinois.— Northern Transp. Co. *v.* Sellick, 52 Ill. 249; Derby *v.* Gage, 38 Ill. 27; North, etc., Rolling Stock Co. *v.* Nowland, 73 Ill. App. 689.

Indiana.— Sithin *v.* Shelby County Com'rs, 66 Ind. 109; Frazer *v.* Boss, 66 Ind. 1.

Kentucky.— Lackey *v.* Richmond, etc., Turnpike Road Co., 17 B. Mon. 43.

Louisiana.— Minor *v.* Alexander, 6 Rob. 166; Gas Bank *v.* Desha, 19 La. 459; Cain *v.* Morris, 15 La. 494; Barker *v.* Banks, 15 La. 453; Consolidated Assoc. Bank *v.* Foucher, 9 La. 476; Franklin *v.* Verbois, 6 La. 727; Daquin *v.* Coiron, 8 Mart. N. S. 608; O'Conner *v.* Bernard, 6 Mart. N. S. 572.

Maine.— Whitcomb *v.* Rarris, 90 Me. 206, 38 Atl. 138.

Massachusetts.— Soule *v.* Soule, 157 Mass. 451, 32 N. E. 663; Taft *v.* Stoddard, 142 Mass. 545, 8 N. E. 586; Pierce *v.* Charter Oak L. Ins. Co., 138 Mass. 151; Talbot *v.* Commonwealth Nat. Bank, 129 Mass. 67, 37 Am. Rep. 302; Stone *v.* Framingham, 109 Mass. 303; Cushing *v.* Wells, 98 Mass. 550; Ordway *v.* Colcord, 14 Allen 59; Harrison *v.* Conlan, 10 Allen 85; Palmer *v.* Stockwell, 9 Gray 237; Hubbard *v.* Charlestown Branch R. Co., 11 Metc. 124; Hunt *v.* Nevers, 15 Pick. 500, 26 Am. Dec. 616; Etheridge *v.* Binney, 9 Pick. 272; Walker *v.* Bradley, 3 Pick. 261; Heath *v.* Gay, 10 Mass. 371. See also Thomas *v.* Wells, 140 Mass. 517, 5 N. E. 485.

Michigan.— Beardslee *v.* Horton, 3 Mich. 560. See also Beardsley *v.* Webber, 104 Mich. 88, 62 N. W. 173.

Missouri.— Burgess *v.* Cave, 52 Mo. 43; Eyermann *v.* Provenchere, 15 Mo. App. 256. See also Nelson *v.* Hirsch, etc., Iron, etc., Co., 102 Mo. App. 498, 77 S. W. 590.

Nebraska.— Bell *v.* Rice, 50 Nebr. 547, 70 N. W. 25.

New Hampshire.— National Lancers *v.* Lovering, 30 N. H. 511; Quigg *v.* Kittredge, 18 N. H. 137.

New Jersey.— Ruckman *v.* Bergholz, 38 N. J. L. 531; Adams *v.* Adams, 55 N. J. Eq. 42, 35 Atl. 827; Ware *v.* Lippincott, 45 N. J. Eq. 220, 16 Atl. 684 [*reversing* (Ch. 1887) 10 Atl. 404].

New York.— Lawrence *v.* Church, 128 N. Y. 324, 28 N. E. 499 [*reversing* 57 Hun 585, 10 N. Y. Suppl. 566]; White *v.* Miller, 78 N. Y. 393, 34 Am. Rep. 544; Ruckman *v.* Pitcher, 20 N. Y. 9, 13 Barb. 556; Richmond County Soc. *v.* New York, 73 N. Y. App. Div. 607, 77 N. Y. Suppl. 41; Chenango Valley Sav. Bank *v.* Dunn, 40 N. Y. App. Div. 552, 58 N. Y. Suppl. 38; Howard *v.* Farley, 3 Rob. 308, 19 Abb. Pr. 126; Rawson *v.* Grow, 4 E. D. Smith 18; Peck *v.* Granite State Provident Assoc., 21 Misc. 84, 46 N. Y. Suppl. 1042; Peetsch *v.* Quinn, 7 Misc. 6, 27 N. Y. Suppl. 323; Rexford *v.* Comstock, 3 N. Y. Suppl. 876; Hanley *v.* Crowe, 3 N. Y. Suppl. 154; Schureman *v.* Withers, Anth. N. P. 230; Case *v.* Osborn, 60 How. Pr. 187; Phillips *v.* Cudlipp, 50 How. Pr. 363; People *v.* Canal Com'rs, 5 Den. 401; Bank Com'rs *v.* La Fayette Bank, 4 Edw. 287.

North Carolina.— Porter *v.* Grimsley, 98 N. C. 550, 4 S. E. 529; McRae *v.* Malloy, 87 N. C. 196; Neal *v.* Freeman, 85 N. C. 441; Charlotte Bank *v.* Hart, 67 N. C. 264; Crawford *v.* Wilmington Bank, 61 N. C. 136.

Ohio.— Miller *v.* Elder, 7 Ohio Cir. Ct. 97, 3 Ohio Cir. Dec. 681.

Pennsylvania.— Pennsylvania L. Ins., etc., Co. *v.* Swain, 189 Pa. St. 626, 42 Atl. 297; *In re* Second St., 66 Pa. St. 132; Gaskins *v.*

b. Debts Payable on Demand.[55] The general rule is that interest on a debt payable on demand runs only from the time when a demand is made;[56] but it has been held in some jurisdictions that an obligation to pay money on demand is payable immediately, and that interest is recoverable from its date.[57]

Gaskins, 17 Serg. & R. 390; Jacobs *v.* Adams, 1 Dall. 52, 1 L. ed. 33; Koch *v.* Schuylkill County, 12 Pa. Super. Ct. 567; U. S. *v.* Poulson, 19 Wkly. Notes Cas. 500. See also Rapelie *v.* Emory, 1 Dall. 349, 1 L. ed. 170.

Rhode Island.— Bicknall *v.* Waterman, 5 R. I. 43; Gardiner *v.* Woodmansee, 2 R. I. 558.

South Carolina.— Wright *v.* Hamilton, 2 Bailey 51, 21 Am. Dec. 513; Ash *v.* Brewton, 1 Bay 243; Lang *v.* Brailsford, 1 Bay 222; Fowl *v.* Todd, 1 Bay 176.

Vermont.— Stevens *v.* Pillsbury, 57 Vt. 205, 52 Am. Rep. 121; Evans *v.* Beckwith, 37 Vt. 285.

Washington.— Seattle Trust Co. *v.* Pitner, 18 Wash. 401, 51 Pac. 1048.

Wisconsin.— Ehrlich *v.* Brucker, 121 Wis. 495, 99 N. W. 213; Tucker *v.* Grover, 60 Wis. 233, 19 N. W. 92; Marsh *v.* Fraser, 37 Wis. 149.

United States.— New York Nat. Bank *v.* Mechanics' Nat. Bank, 94 U. S. 437, 24 L. ed. 176; Andrus *v.* Bradley, 102 Fed. 54; U. S. *v.* Poulson, 30 Fed. 231 (claim against surety on official bond); Williams *v.* Baxter, 29 Fed. Cas. No. 17,715, 3 McLean 471 (balance in hands of agent); U. S. Bank *v.* Magill, 2 Fed. Cas. No. 929, 1 Paine 661 [*affirmed* in 12 Wheat. 511, 6 L. ed. 711] (demand or acknowledgment of indebtedness); Gammell *v.* Skinner, 9 Fed. Cas. No. 5,210, 2 Gall. 45.

England.— Shaw *v.* Picton, 4 B. & C. 715, 7 D. & R. 201, 4 L. J. K. B. O. S. 29, 28 Rev. Rep. 455, 10 E. C. L. 771; Walker *v.* Constable, 1 B. & P. 306, 2 Esp. 659; Calton *v.* Bragg, 15 East 223, 13 Rev. Rep. 451.

See 29 Cent. Dig. tit. "Interest," § 95.

Special agreement as to interest not complied with.— When a certificate of deposit provides for the payment of interest if the deposit is left for a specified time, and suit is brought for the recovery of the deposit before such time, interest should be allowed only from the date of the commencement of the suit. Beardsley *v.* Webber, 104 Mich. 88, 62 N. W. 173.

Debts of government or large corporation.— A government or a great corporation cannot be charged with the duty of seeking its creditors, and must be presumed to have funds ready to meet its obligations when they fall due, and therefore a demand for payment of a debt due by such a debtor is necessary to start the running of interest against it. People *v.* Canal Com'rs, 5 Den. (N. Y.) 401; Emlen *v.* Lehigh Coal, etc., Co., 47 Pa. St. 76, 86 Am. Dec. 518. See also Langston *v.* South Carolina R. Co., 2 S. C. 248.

55. Demand notes see COMMERCIAL PAPER, 8 Cyc. 316, 317.

56. *Alabama.*— Ragland *v.* Wood, 71 Ala. 145, 46 Am. Rep. 305; Vaughan *v.* Goode, Minor 417.

Florida.— See Ross *v.* Walker, 44 Fla. 704, 32 So. 934.

Indiana.— Culver *v.* Marks, 122 Ind. 554, 23 N. E. 1086, 17 Am. St. Rep. 377, 7 L. R. A. 489.

Iowa.— See Hall *v.* Farmer's, etc., Sav. Bank, 55 Iowa 612, 8 N. W. 448.

Kentucky.— Patrick *v.* Clay, 4 Bibb 246. See also Lackey *v.* Richmond, etc., Turnpike Road Co., 17 B. Mon. 43, where interest was allowed from a reasonable time after demand, upon instalments of a stock subscription payable on demand.

Louisiana.— Millaudon *v.* Percy, 9 La. 441.

Massachusetts.— Hunt *v.* Nevers, 15 Pick. 500, 26 Am. Dec. 616.

Minnesota.— Horn *v.* Hansen, 56 Minn. 43, 57 N. W. 315, 22 L. R. A. 617.

Nebraska.— Morse *v.* Rice, 36 Nebr. 212, 54 N. W. 308.

New Jersey.— Scudder *v.* Morris, 3 N. J. L. 419, 4 Am. Dec. 382.

New York.— Ledyard *v.* Bull, 119 N. Y. 62, 23 N. E. 444; Irlbacker *v.* Roth, 25 N. Y. App. Div. 290, 49 N. Y. Suppl. 538; Rensselaer Glass Factory *v.* Reid, 5 Cow. 587.

North Carolina.— Brem *v.* Covington, 104 N. C. 589, 10 S. E. 706; Freeland *v.* Edwards, 3 N. C. 49, 2 Am. Dec. 620.

Vermont.— Gleason *v.* Briggs, 28 Vt. 135.

England.— *In re* Herefordshire Banking Co., L. R. 4 Eq. 250, 36 L. J. Ch. 806, 17 L. T. Rep. N. S. 58, 15 Wkly. Rep. 1056; Lowndes *v.* Collens, 17 Ves. Jr. 27, 34 Eng. Reprint 11.

Canada.— Jones *v.* Brown, 9 U. C. C. P. 201.

See 29 Cent. Dig. tit. "Interest," § 99.

Where due-bills are given for money lent specifying no time of payment and with no mention of interest therein, and from written correspondence between the parties at the time of the loan and the giving of the due-bills it appears that the parties did not regard the due-bills as due immediately or as bearing interest until a demand for payment of the sum loaned, interest should be computed upon such loan from the time of such demand of payment and not from the date of the due-bills. Ross *v.* Walker, 44 Fla. 704, 32 So. 934.

57. *Arkansas.*— Pullen *v.* Chase, 4 Ark. 210 [*followed* in Biscoe *v.* Ringo, 13 Ark. 563; Walker *v.* Wills, 5 Ark. 166; Causin *v.* Taylor, 4 Ark. 408]. *Compare* Parker *v.* Gaines, (1889) 11 S. W. 693, holding that where stock is lent to be returned with earnings on demand, interest on the value of the stock on failure to deliver runs only from demand.

Connecticut.— Curtis *v.* Smith, 75 Conn. 429, 53 Atl. 902.

Ohio.— Darling *v.* Wooster, 9 Ohio St. 517.

Virginia.— Omohundro *v.* Omohundro, 21

e. Money Received and Held Through Mistake. Where money is paid to a person through mistake, without fraud or misconduct on his part, such person is liable for interest on such money only from the discovery of the mistake and demand for repayment.[58]

d. Effect of Demand on Unliquidated Damages. A claim for damages, unliquidated in amount, will not generally be made to bear interest simply because a demand for payment of such claim has been made.[59]

e. Judgments and Awards. No demand is generally necessary to start the running of interest on judgments duly entered,[60] but it has been held that awards directing the payment of money bear interest only from the date of demand for payment thereunder.[61]

f. Coupons or Instalments of Interest. Coupons or instalments of interest bear interest only from the time of a demand made after their maturity.[62]

Gratt. 626. See also Kent *v.* Kent, 28 Gratt. 840.

West Virginia.— Kuykendall *v.* Ruckman, 2 W. Va. 332.

See 29 Cent. Dig. tit. "Interest," § 99.

58. *Arkansas.*— Watkins *v.* Wassell, 20 Ark. 410.

Connecticut.— See Northrop *v.* Graves, 19 Conn. 548, 50 Am. Dec. 264.

Georgia.— Phillips *v.* O'Neal, 85 Ga. 142, 11 S. E. 581; Georgia R., etc., Co. *v.* Smith, 83 Ga. 626, 10 S. E. 235.

Louisiana.— See Davis *v.* Glenn, 3 La. Ann. 444.

Massachusetts.— Gould *v.* Emerson, 160 Mass. 438, 35 N. E. 1065, 39 Am. St. Rep. 501; Haven *v.* Foster, 9 Pick. 112, 19 Am. Dec. 353.

Minnesota.— Sibley *v.* Pine County, 31 Minn. 201, 17 N. W. 337.

New Jersey.— Ashurst *v.* Field, 28 N. J. Eq. 315.

New York.— Leach *v.* Vining, 18 N. Y. Suppl. 822; Robinson *v.* Corn Exch., etc., Ins. Co., 1 Abb. Pr. (N. S.) 186.

Pennsylvania.— Second St., etc., Pass. R. Co. *v.* Philadelphia, 51 Pa. St. 465; King *v.* Diehl, 9 Serg. & R. 409; Brown *v.* Campbell, 1 Serg. & R. 176; Jacobs *v.* Adams, 1 Dall. 52, 1 L. ed. 33; Blair County Poor Directors *v.* Kline, 8 Pa. Dist. 67.

South Carolina.— Simons *v.* Walter, 1 McCord 97.

Vermont.— Brainerd *v.* Champlain Transp. Co., 29 Vt. 154.

Virginia.— Craufurd *v.* Smith, 93 Va. 623, 23 S. E. 235, 25 S. E. 657.

United States.— Sanborn *v.* U. S., 135 U. S. 271, 10 S. Ct. 812, 34 L. ed. 112.

See 29 Cent. Dig. tit. "Interest," § 102.

In Iowa it is held that interest is recoverable from the date that the money is paid, notwithstanding the mistake. Goodnow *v.* Plumbe, 64 Iowa 672, 21 N. W. 133; Goodnow *v.* Litchfield, 63 Iowa 275, 19 N. W. 226.

59. Milton *v.* Blackshear, 8 Fla. 161; Robertson *v.* Green, 18 La. Ann. 128; Andry *v.* Foy, 6 Mart. (La.) 689; Morgan *v.* Bell, 4 Mart. (La.) 615; Thorndike *v.* Wells Memorial Assoc., 146 Mass. 619, 16 N. E. 747; Kamerick *v.* Castleman, 29 Mo. App. 658. *Compare* Carricarti *v.* Blanco, 121 N. Y. 230, 24 N. E. 284 [*followed* in Carricarti *v.* Lastres, 121 N. Y. 662, 24 N. E. 285]; White *v.* Miller, 78 N. Y. 393, 34 Am. Dec. 544; Dwyer *v.* U. S., 93 Fed. 616, 35 C. C. A. 488.

When interest may be allowed.— A court of admiralty may allow interest from the time of demand for damages, although unliquidated, where the liability is admitted but payment has been contested throughout a lengthy litigation, and no offer of any amount has been made. New Zealand Ins. Co. *v.* Earnmoor Steamship Co., 79 Fed. 368, 24 C. C. A. 644.

Damages for breach of contract.— In Louisiana, under statute, interest has been allowed from the date of judicial demand for damages for breach of contract, although such damages were unliquidated. Petrie *v.* Wofford, 3 La. Ann. 562; Ryder *v.* Thayer, 3 La. Ann. 149; Sullivan *v.* Williams, 2 La. Ann. 876; Shaw *v.* Oakey, 3 Rob. (La.) 361; Barrow *v.* Reab, 9 How. (U. S.) 366, 13 L. ed. 177. See also Porter *v.* Barrow, 3 La. Ann. 140.

60. Edwards *v.* Moody, 60 Me. 255; Hopkins *v.* Shepard, 129 Mass. 600. *Compare* Natchitoches *v.* Redmond, 28 La. Ann. 274; Murison *v.* Butler, 18 La. Ann. 296; Baudin *v.* Pollock, 2 La. 184.

Decree for contribution.— Where contribution toward the expense of a party-wall was decreed against one of the owners, he was charged with interest on the sum decreed from the time when contribution was demanded and refused. Campbell *v.* Mesier, 6 Johns. Ch. (N. Y.) 21.

61. Tucker *v.* Page, 69 Ill. 179; Devlin *v.* New York, 131 N. Y. 123, 30 N. E. 45.

62. *Connecticut.*— Fox *v.* Hartford, etc., R. Co., 70 Conn. 1, 38 Atl. 871.

District of Columbia.— Corcoran *v.* Chesapeake, etc., Canal Co., 1 MacArthur 358.

Maryland.— Virginia *v.* State, 32 Md. 501.

New York.— Howard *v.* Farley, 19 Abb. Pr. 126.

North Carolina.— Burroughs *v.* Richmond County Com'rs, 65 N. C. 234. *Compare* McLendon *v.* Anson County Com'rs, 71 N. C. 38.

Pennsylvania.— Beaver County *v.* Armstrong, 44 Pa. St. 63.

Rhode Island.— Whitaker *v.* Hartford, etc., R. Co., 8 R. I. 47, 86 Am. Dec. 614, 5 Am. Rep. 547.

g. Form and Sufficiency of Demand — (I) *In General.* In the absence of statute or agreement, no specific form of demand is essential in order to start the running of interest on a debt, but it is only necessary that the debtor be notified that immediate payment of the debt is requested.[63] Where, however, the statute requires a demand to be made in writing, as in England,[64] there must be a substantial compliance with its requirements in order to start the running of interest.[65] A written acknowledgment by the debtor that a demand has been made upon him is sufficient to start the running of interest from the date of such acknowledgment,[66] and part payment of a debt has been said to be sufficient evidence of a demand for payment to justify the allowance of interest on the balance due, as upon a demand made therefor.[67]

(II) *Institution of Suit.* The institution of legal proceedings to collect a debt is a sufficient demand for its payment to start the running of interest thereon from the time suit is begun,[68] and this has been held to be true even

United States.— Phelps *v.* Lewiston, 19 Fed. Cas. No. 11,076, 15 Blatchf. 131.

See 29 Cent. Dig. tit. "Interest," § 98.

Contra.— Langston *v.* South Carolina R. Co., 2 S. C. 248.

63. *Illinois.*— Casey *v.* Carver, 42 Ill. 225.

Kentucky.— See Commonwealth Bank *v.* Thornsberry, 3 B. Mon. 519.

Maine.— Patten *v.* Hood, 40 Me. 457.

Massachusetts.— Goff *v.* Rehoboth, 2 Cush. 475; Barnard *v.* Bartholomew, 22 Pick. 291; Etheridge *v.* Binney, 9 Pick. 272.

Missouri.— Linn County *v.* Farmers', etc., Bank, 175 Mo. 539, 75 S. W. 393. See also Mahan *v.* Waters, 60 Mo. 167.

Washington.— Western Mill, etc., Co. *v.* Blanchard, 1 Wash. 230, 23 Pac. 839.

Wisconsin.— Remington *v.* Eastern R. Co., 109 Wis. 154, 84 N. W. 898, 85 N. W. 321.

United States.— Cooper *v.* Coates, 21 Wall. 105, 22 L. ed. 481.

See 29 Cent. Dig. tit. "Interest," § 96.

Production of note not necessary.— Where a note was payable on demand, a demand for the payment thereof without the production of the note was sufficient to start the running of interest. Sanford *v.* Crocheron, 8 N. Y. Civ. Proc. 146.

Circumstances not amounting to demand.— Where there was a request to settle and the debtor expressed his willingness to do so, but the settlement was neglected because neither party was quite ready to attend to it, there was no such demand as would start the running of interest. Blodgett *v.* Converse, 60 Vt. 410, 15 Atl. 109.

64. See *supra*, II, B, 3.

65. Rhymney R. Co. *v.* Rhymney Iron Co., 25 Q. B. D. 146, 59 L. J. Q. B. 414, 63 L. T. Rep. N. S. 407, 38 Wkly. Rep. 764; Londesborough *v.* Mowatt, 2 E. L. R. 1181, 4 E. & B. 1, 18 Jur. 1094, 23 L. J. Q. B. 38, 2 Wkly. Rep. 568, 82 E. C. L. 1; Geake *v.* Ross, 44 L. J. C. P. 315, 32 L. T. Rep. N. S. 666, 23 Wkly. Rep. 658.

66. Levistones *v.* Marigny, 13 La. Ann. 353; Barnard *v.* Bartholomew, 22 Pick. (Mass.) 291.

67. Bayliss *v.* Pearson, 15 Iowa 279; Crane *v.* Hardman, 4 E. D. Smith (N. Y.) 339; Peck *v.* Granite State Provident Assoc., 21 Misc. (N. Y.) 84, 46 N. Y. Suppl. 1042; Hard *v.* Palmer, 21 U. C. Q. B. 49.

68. *Alabama.*— Hunter *v.* Wood, 54 Ala. 71; Vaughan *v.* Goode, Minor 417.

Colorado.— Mulligan *v.* Smith, 32 Colo. 404, 76 Pac. 1063.

Indiana.— Smith *v.* Blair, 133 Ind. 367, 32 N. E. 1123.

Iowa.— Hubenthal *v.* Kennedy, 76 Iowa 707, 39 N. W. 694; Hall *v.* Farmer's, etc., Bank, 55 Iowa 612, 8 N. W. 448.

Kentucky.— Gore *v.* Buck, 1 T. B. Mon. 209; Patrick *v.* Clay, 4 Bibb 246; Brown *v.* Lapp, 77 S. W. 194, 25 Ky. L. Rep. 1134.

Maine.— House *v.* McKenney, 46 Me. 94.

Massachusetts.— Gay *v.* Rooke, 151 Mass. 115, 23 N. E. 835, 21 Am. St. Rep. 434, 7 L. R. A. 392; Talbot *v.* Commonwealth Nat. Bank, 129 Mass. 67, 37 Am. Rep. 302; Thwing *v.* Great Western Ins. Co., 111 Mass. 93; Stone *v.* Framingham, 109 Mass. 303; Ordway *v.* Colcord, 14 Allen 59; Stimpson *v.* Green, 13 Allen 326; Harrison *v.* Conlan, 10 Allen 85; Hunt *v.* Nevers, 15 Pick. 500, 26 Am. Dec. 616. See also Pierce *v.* Charter Oak L. Ins. Co., 138 Mass. 151.

Michigan.— Nye *v.* Lothrop, 94 Mich. 411, 54 N. W. 178; Brion *v.* Kennedy, 47 Mich. 499, 11 N. W. 288.

Missouri.— Trimble *v.* Kansas City, etc., R. Co., 180 Mo. 574, 79 S. W. 678; Dempsey *v.* Schawacker, 140 Mo. 680, 38 S. W. 954, 41 S. W. 1100 (from service of process or in the absence of proof of date of service from the commencement of the suit); Thompson *v.* School Dist. No. 4, 71 Mo. 495 (interest allowed from time defendant against whom judgment was rendered was made a party to the action); Patterson *v.* Missouri Glass Co., 72 Mo. App. 492; Dougherty *v.* Chapman, 29 Mo. App. 233; Shockley *v.* Fischer, 21 Mo. App. 551; Berner *v.* Bagnell, 20 Mo. App. 543; Eyermann *v.* Provenchere, 15 Mo. App. 256. See also Nelson *v.* Hirsch, etc., Iron, etc., Co., 102 Mo. App. 498, 77 S. W. 590.

Montana.— Hefferlin *v.* Karlman, 29 Mont. 139, 74 Pac. 201.

Nebraska.— Bell *v.* Rice, 50 Nebr. 547, 70 N. W. 25; Morse *v.* Rice, 36 Nebr. 212, 54 N. W. 308.

though the suit is dismissed, if in a subsequent suit a recovery be had.[69] So also the presentation of a set-off or counter-claim in an answer or cross bill is held to be such a demand as to start the running of interest on the claim from the date of service of such pleading on the opposite party.[70]

(III) *Excessive Demand.* A demand for an excessive sum, where the debtor offers to pay all that is due, will not support a claim for interest on the balance found due later, from the time of the demand to the time of the trial.[71]

h. When Demand Not Necessary. When the debtor knows what he is to pay, and when he is to pay it, no demand is necessary to start the running of interest from the day the payment should have been made;[72] and where the law makes it the duty of a person to pay money to the owner without any previous demand, interest will be allowed without a demand for payment of such money.[73] So also a demand is not necessary to establish a right to recover interest where the debtor

New Hampshire. — McIlvaine *v.* Wilkins, 12 N. H. 474.

New Jersey.—Scudder *v.* Morris, 3 N. J. L. 419, 4 Am. Dec. 382.

New York. — White *v.* Miller, 78 N. Y. 393, 34 Am. Rep. 544; Buckman *v.* Pitcher, 20 N. Y. 9, 13 Barb. 556; Howard *v.* Farley, 3 Rob. 308, 19 Abb. Pr. 126; Rawson *v.* Grow, 4 E. D. Smith 18; Case *v.* Osborn, 60 How. Pr. 187; Feeter *v.* Heath, 11 Wend. 477.

North Carolina.— Porter *v.* Grimsley, 98 N. C. 550, 4 S. E. 529. See also Neal *v.* Freeman, 85 N. C. 441.

Ohio.— Miller *v.* Elder, 7 Ohio Cir. Ct. 97, 3 Ohio Cir. Dec. 681.

Oregon.— Baker *v.* Williams Banking Co., 42 Oreg. 213, 70 Pac. 711.

Pennsylvania.— Donath *v.* Insurance Co. of North America, 4 Dall. 463, 1 L. ed. 910; U. S. *v.* Poulson, 19 Wkly. Notes Cas. 500.

South Carolina.— See Davis *v.* Richardson, 1 Bay 105.

Vermont.— See Houghton *v.* Hagar, Brayt. 133.

Wisconsin.— Hawley *v.* Tesch, 88 Wis. 213, 59 N. W. 670; Hewitt *v.* John Week Lumber Co., 77 Wis. 548, 46 N. W. 822; Tucker *v.* Grover, 60 Wis. 240, 19 N. W. 62.

United States.— Kaufman *v.* Tredway, 195 U. S. 271, 25 S. Ct. 33, 49 L. ed. 190 [*reversing* 21 Pa. Super. Ct. 256]; U. S. *v.* Curtis, 100 U. S. 119, 25 L. ed. 571; Dwyer *v.* U. S., 93 Fed. 616, 35 C. C. A. 488; U. S. *v.* Poulson, 30 Fed. 231; U. S. Bank *v.* Magill, 2 Fed. Cas. No. 929, 1 Paine 661 [*affirmed* in 12 Wheat. 511, 6 L. ed. 711]; Gammell *v.* Skinner, 9 Fed. Cas. No. 5,210, 2 Gall. 45; Williams *v.* Baxter, 29 Fed. Cas. No. 17,715, 3 McLean 471.

England.— Pierce *v.* Fothergill, 2 Bing. N. Cas. 167, 1 Hodges 251, 2 Scott 334, 29 E. C. L. 485. But see Rhymney R. Co. *v.* Rhymney Iron Co., 25 Q. B. D. 146, 59 L. J. Q. B. 414, 63 L. T. Rep. N. S. 407, 38 Wkly. Rep. 764.

See 29 Cent. Dig. tit. "Interest," §§ 106–112.

The commencement of an action by an insane person, without a guardian, is not such a demand for the payment of money as will start the running of interest, although the money is not paid into court by defendant. Fuchs *v.* Germania L. Ins. Co., 23 Wkly. Notes Cas. (Pa.) 29.

69. Conway *v.* Erwin, 1 La. Ann. 391.

70. Brown *v.* Brown, 124 Mo. 79, 27 S. W. 552; Sickels *v.* Herold, 149 N. Y. 332, 43 N. E. 852 [*reversing* 15 Misc. 116, 36 N. Y. Suppl. 488]; Leach *v.* Vining, 18 N. Y. Suppl. 822.

71. Lusk *v.* Smith, 21 Wis. 27. See also Goff *v.* Rehoboth, 2 Cush. (Mass.) 475; Shipman *v.* State, 44 Wis. 458.

72. *California.*— Whitcher *v.* Webb, 44 Cal. 127.

Georgia.— Anderson *v.* State, 2 Ga. 370.

Illinois.— Chapman *v.* Burt, 77 Ill. 337.

Indiana.— Marion, etc., R. Co. *v.* Hodge, 9 Ind. 163; Harden *v.* Wolf, 2 Ind. 31.

Maine.— Whitcomb *v.* Harris, 90 Me. 206, 38 Atla. 138; Sweet *v.* Hooper, 62 Me. 54.

Massachusetts.— Ilsley *v.* Jewett, 2 Metc. 168.

Minnesota.— Perine *v.* Grand Lodge A. O. U. W., 51 Minn. 224, 53 N. W. 367.

Missouri. — Fields *v.* Baum, 35 Mo. App. 511.

Nebraska.— Hazelet *v.* Holt County, 51 Nebr. 716, 71 N. W. 717.

New York.— Blakely *v.* Jacobson, 9 Bosw. 140; People *v.* New York County, 5 Cow. 331.

North Carolina.— Lewis *v.* Rountree, 79 N. C. 122, 28 Am. Rep. 309.

Pennsylvania.— Adams *v.* Palmer, 30 Pa. St. 346.

West Virginia. — Blue *v.* Campbell, 57 W. Va. 34, 49 S. E. 909.

Wisconsin.— Zautcke *v.* North Milwaukee Townsite Co. No. 3, 95 Wis. 21, 69 N. W. 978; Rogers *v.* Priest, 74 Wis. 538, 43 N. W. 510.

Canada. — Towsley *v.* Wythes, 16 U. C. Q. B. 139.

See 29 Cent. Dig. tit. "Interest," § 97.

Contra.— Pinborn *v.* Tuckington, 3 Campb. 468.

73. *California.*— Dickinson *v.* Owen, 11 Cal. 71.

Illinois.— Chapman *v.* Burt, 77 Ill. 337.

Massachusetts.— Dodge *v.* Perkins, 9 Pick. 368.

Nebraska.— Hazelet *v.* Holt County, 51 Nebr. 716, 71 N. W. 717.

prevents the creditor from making such demand,[74] or where the conditions are such as to render it a mere useless formality.[75]

B. Time to Which Interest Runs — 1. In General. Interest is generally computed to the time when the debt is paid or merged in a judgment,[76] unless, by some act of the parties or by operation of law, a suspension of the interest is caused.[77] Interest upon a judgment continues to run until the judgment debt is paid,[78] and when a judgment is satisfied by an execution, it is generally held that interest should be computed on the judgment to the day the levy is completed.[79]

2. Sales of Property to Satisfy Debts — a. Judicial Sales. A judicial sale of property for the purpose of paying debts which are liens thereon does not stop the running of interest on such debts prior to the confirmation of the sale.[80] In

New Jersey.— Board of Justices *v.* Fennimore, 1 N. J. L. 281.

Pennsylvania.— West Republic Min. Co. *v.* Jones, 108 Pa. St. 55.

See 29 Cent. Dig. tit. "Interest," § 97.

74. Graham *v.* Chrystal, 2 Abb. Dec. (N. Y.) 263, 2 Keyes 21, 37 How. Pr. 279.

75. Culver *v.* Marks, 122 Ind. 554, 23 N. E. 1086, 17 Am. St. Rep. 377, 7 L. R. A. 489; Skinker *v.* Butler County, 112 Mo. 332, 20 S. W. 613; Richmond *v.* Irons, 121 U. S. 27, 7 S. Ct. 788, 30 L. ed. 864. Since a national bank, by defaulting, and thus initiating proceedings by the controller to wind up its affairs, thereby disables itself from paying a deposit, no demand is necessary to entitle the depositor to recover interest on the deposit from the time the controller intervened. Chemical Nat. Bank *v.* Bailey, 5 Fed. Cas. No. 2,635, 12 Blatchf. 480.

76. *Illinois.*— Williamson County *v.* Farson, 199 Ill. 71, 64 N. E. 1086 [*affirming* 101 Ill. App. 328].

Massachusetts. — Lamprey *v.* Mason, 148 Mass. 231, 19 N. E. 350; Williams *v.* American Bank, 4 Metc. 317. See also Glidden *v.* Chamberlin, 167 Mass. 486, 46 N. E. 103, 57 Am. St. Rep. 479.

Tennessee.— Champlin *v.* Memphis, etc., R. Co., 9 Heisk. 683.

Wisconsin.— Thorn *v.* Smith, 71 Wis. 18, 36 N. W. 707.

England. — Robinson *v.* Bland, 2 Burr. 1077.

See 29 Cent. Dig. tit. "Interest," § 90.

Time at which debt would have been paid but for creditor's fault.— Where plaintiffs recover damages for breach of a contract under which they were to pay for certain machinery sold to them by defendants by sawing logs, which defendants were bound but failed to supply, an agreement of plaintiffs to pay interest on the purchase-price is to be reckoned as an agreement to pay interest till the purchase-price is paid out of the profits of the contract, and not to pay interest during the entire period of the contract; and, in case of defendants' failure to furnish plaintiffs with logs to saw, the interest to be deducted from plaintiffs' damages will run only for the probable period it would have taken plaintiffs to pay the purchase-price out of the contract, had they been allowed to enter upon it. Jones *v.* Foster, 67 Wis. 296, 30 N. W. 697.

Debt to be deducted from debtor's share of creditor's estate.— Where a note payable with interest provides that instead of the maker's paying the same in the payee's lifetime the amount of the note may be deducted from the share of the payee's estate to be left to the maker at his death, the interest on the note ceases to run on the death of the payee, where the rights of creditors are not involved. *In re* Newcomb, 98 Iowa 175, 67 N. W. 587.

Sale on credit of security given.— Where a note stipulated that a stock of goods mortgaged to the payee as security might be sold at his option before the maturity of the note, and the payee exercised this option but at the demand of the maker sold the property on twelve months' credit and took sale notes bearing interest after six months, it was held that as against the maker of the original note the payee was entitled to interest to the date of the maturity of the sale of the notes, he allowing credit for the amount of interest received on the sale notes. State Bank *v.* Stickney, 5 Ill. 4.

Interest to first day of the term during which the judgment on the debt was rendered was allowed in Kimball *v.* Connally, 2 Ohio Dec. (Reprint) 113, 1 West. L. Month. 402.

Where judgment is rendered nunc pro tunc, interest should be calculated to the time when judgment should have been entered. Clemens *v.* Judson, Minor (Ala.) 395.

77. See *infra*, V, C.

78. Stenger *v.* Carrig, 61 Nebr. 753, 86 N. W. 475; Trompen *v.* Hammond, 61 Nebr. 446, 85 N. W. 436; State *v.* Parker, 25 Ohio Cir. Ct. 237; Graham *v.* Newton, 12 Ohio 210; State Bank *v.* Bowie, 3 Strobh. (S. C.) 439; Bonsall *v.* Taylor, 1 McCord (S. C.) 503.

79. Buckman *v.* Lothrop, 9 Allen (Mass.) 147; Taylor *v.* Robinson, 2 Allen (Mass.) 562; Gray *v.* Griswold, 7 How. Pr. (N. Y.) 44. *Compare* Brown *v.* Lunt, 37 Me. 423; Strohecker *v.* Farmers' Bank, 6 Watts (Pa.) 96.

80. Lombard Invest. Co. *v.* Burton, 5 Kan. App. 197, 47 Pac. 154; Tomlinson's Appeal, 90 Pa. St. 224; Carver's Appeal, 89 Pa. St. 276; Marsh's Estate, 5 Pa. Co. Ct. 159; Wilson's Estate, 1 Chest. Co. Rep. (Pa.) 60; Lang's Estate, 1 Chest. Co. Rep. (Pa.) 287;

Pennsylvania the rule is that where the debtor or his estate is solvent, interest continues to run until the proceeds of the sale are actually applied to the payment of the debt;[81] but if the debtor or his estate be insolvent interest ceases when the sale is confirmed,[82] although even in such case if the fund arising from the sale, instead of being paid out to the creditors whose liens have been divested by the sale and who are entitled to be paid, is so kept or invested afterward as to draw interest, the creditors are entitled to this interest because it is produced by the money to which they are entitled.[83] In Maryland if the sale is made for cash interest is allowed up to the day of sale whether the estate be solvent[84] or insolvent;[85] and if the sale is on credit and consequently the purchase-money bears interest the creditor is entitled to interest until the amount is collected.[86] In other states it has been held that where there has been a sale of the whole of mortgaged premises under a decree of foreclosure, in a case where only a part of the debt had become due, interest should not be allowed on the part not due beyond the time when the proceeds of the sale become applicable to the payment of such part,[87] and that interest ceased to run on a mortgage debt from the time of the sale of the mortgaged property by the executor of the mortgagor, although the executor failed to pay the mortgage debt and retained the funds uninvested in his hands.[88]

b. Sheriff's Sales. Where property is sold at sheriff's sale, interest on liens is allowed to the date of the sale only.[89]

c. Sales Under Deed of Trust. Where land was sold under a deed of trust, one half of the purchase-price to be paid in cash and the remainder in twelve months, and was purchased by the beneficiaries in the deed, who paid nothing, the purchase simply extinguishing their claims, it was held proper to charge interest on the whole amount of the secured debts up to the time of the sale and on one half of the amount for twelve months thereafter.[90]

C. Suspension — 1. By Contract. If a contract makes provision for the suspension of interest for any particular period of time, or upon a certain contingency, such provision will be permitted to control, and the running of interest will be governed by its terms;[91] but a mere agreement not to sue for a certain

Sweeten's Estate, 4 Lanc. L. Rev. (Pa.) 54; Kier's Estate, 29 Pittsb. Leg. J. (Pa.) 372; McLean *v.* Lafayette Bank, 16 Fed. Cas. No. 8,889, 4 McLean 430.

81. Yeatman's Appeal, 102 Pa. St. 297; Wissel's Appeal, 4 Pennyp. (Pa.) 236. *Contra*, Passmore's Estate, 1 Chest. Co. Rep. (Pa.) 508. And see Dutton *v.* Horne, 1 Del. Co. (Pa.) 33.

82. Yeatman's Appeal, 102 Pa. St. 297; Brownsville Deposit, etc., Bank's Appeal, 96 Pa. St. 347; Tomlinson's Appeal, 90 Pa. St. 224; Carver's Appeal, 89 Pa. St. 276; Ramsey's Appeal, 4 Watts (Pa.) 71 (return-day of order of sale); McCruden *v.* Jonas, 6 Pa. Dist. 146; Marsh's Estate, 5 Pa. Co. Ct. 159; Smith's Estate, 2 Chest. Co. Rep. (Pa.) 212; Wanger's Appeal, 2 Chest. Co. Rep. (Pa.) 197, 14 Wkly. Notes Cas. 429; Passmore's Estate, 1 Chest. Co. Rep. (Pa.) 508; Branson's Estate, 1 Chest. Co. Rep. (Pa.) 281; Wilson's Estate, 1 Chest. Co. Rep. (Pa.) 60; Sweeten's Estate, 4 Lanc. L. Rev. (Pa.) 54; O'Hara's Estate, 4 Leg. Gaz. (Pa.) 130; Matter of Strickler, 13 Phila. (Pa.) 504; Kier's Estate, 29 Pittsb. Leg. J. (Pa.) 372 (to extent of proceeds derived). *Compare* Haverstick *v.* Swarr, 9 Lanc. Bar (Pa.) 9; McCay *v.* Black, 14 Phila. (Pa.) 635; Meals' Estate, 13 Phila. (Pa.) 558.

Nisi and absolute confirmation.— Interest is not allowable during the time elapsing between confirmation *nisi* and the absolute confirmation of the sale. Wainwright's Estate, 13 Phila. (Pa.) 336.

83. Yeatman's Appeal, 102 Pa. St. 297; Brownsville Deposit, etc., Bank's Appeal, 96 Pa. St. 347; Lang's Estate, 1 Chest. Co. Rep. (Pa.) 287. See also Stearn's Estate, 1 Susq. Leg. Chron. (Pa.) 4.

84. Ellicott *v.* Ellicott, 6 Gill & J. (Md.) 35.

85. Strike *v.* McDonald, 2 Harr. & G. (Md.) 191.

86. Ellicott *v.* Ellicott, 6 Gill & J. (Md.) 35; Barnum *v.* Raborg, 2 Md. Ch. 516.

87. Greenman *v.* Pattison, 8 Blackf. (Ind.) 465.

88. Matter of Babcock, 9 N. Y. Suppl. 554, 2 Connoly Surr. (N. Y.) 82.

89. Allen *v.* Oxnard, 152 Pa. St. 621, 25 Atl. 568; Potter *v.* Langstrath, 151 Pa. St. 216, 25 Atl. 76; Bachdell's Appeal, 56 Pa. St. 386; Siter's Appeal, 26 Pa. St. 178; Strohecker *v.* Farmers' Bank, 6 Watts (Pa.) 96; McCruden *v.* Jonas, 6 Pa. Dist. 146.

90. Stanford *v.* Andrews, 12 Heisk. (Tenn.) 664.

91. Gale *v.* Corey, 112 Ind. 39, 13 N. E. 108, 14 N. E. 362. See also McNeil *v.* Call,

period will not have the effect of suspending the running of interest on the debt or obligation during such period.[92]

2. By Act of Parties — a. Act of Creditor — (i) *In General.* If the failure to make payment of the principal debt is due to any improper act of the creditor, or to such conduct on his part as prevents the debtor from complying with his contract to pay, interest on such debt is generally suspended during the time the debtor is so prevented from making payment.[93] Mere delay to make valid title on the part of a vendor of property will not suspend the running of interest on the amount of the purchase-price due, where the vendee is in possession of the property;[94] but if the vendee has kept the money idle awaiting demand for it upon perfection of title, or if the vendor's delay is due to wilful neglect, interest will be suspended during such period.[95]

(ii) *Absence or Concealment of Creditor.* If the creditor absents himself from the country and leaves no person to represent him, to whom payment of the debt may be made, or conceals his whereabouts, so as to prevent payment by the debtor, no interest will be allowed on the debt during such absence or concealment.[96]

19 N. H. 403, 51 Am. Dec. 188; Daves *v.* Haywood, 54 N. C. 253.

92. Shaller *v.* Brand, 6 Binn. (Pa.) 435, 6 Am. Dec. 482; Rollman *v.* Baker, 5 Humphr. (Tenn.) 406. *Compare* Fitzgerald *v.* Caldwell, 4 Dall. (Pa.) 251, 1 L. ed. 821.

93. *Alabama.*— Pinkard *v.* Ingersoll, 12 Ala. 441.

Arkansas.— Pillow *v.* Brown, 26 Ark 240.

Illinois.— Union Mut. L. Ins. Co. *v.* Chicago, etc., R. Co., 146 Ill. 320, 34 N. E. 948.

Iowa.— Southern White Lead Co. *v.* Haas, 76 Iowa 432, 41 N. W. 63.

Kentucky.— Morford *v.* Ambrose, 3 J. J. Marsh. 688; Hart *v.* Brand, 1 A. K. Marsh. 159, 10 Am. Dec. 715.

Massachusetts.— Suffolk Bank *v.* Worcester Bank, 5 Pick. 106.

New Hampshire.— Thompson *v.* Boston, etc., R. Co., 58 N. H. 524.

New Jersey.— Lebranthwait *v.* Halsey, 9 N. J. L. 3.

New York.— Stevens *v.* Barringer, 13 Wend. 639; Reid *v.* Rensselaer Glass Factory, 3 Cow. 393 [*affirmed* in 5 Cow. 587].

Pennsylvania.— Cunnius *v.* Reading School Dist., 25 Pa. Co. Ct. 17. See also Richards *v.* Citizens' Natural Gas Co., 130 Pa. St. 37, 18 Atl. 600.

Tennessee.— Laura Jane *v.* Hagen, 10 Humphr. 332.

Vermont.— Brainerd *v.* Champlain Transp. Co., 29 Vt. 154. See also Sumner *v.* Beebe, 37 Vt. 562.

United States.— Davidson *v.* Mexican Nat. R. Co., 58 Fed. 653; Bain *v.* Peters, 44 Fed. 307; Bowman *v.* Wilson, 12 Fed. 864, 2 McCrary 394.

England.— London, etc., R. Co. *v.* South Eastern R. Co., [1892] 1 Ch. 120, 61 L. J. Ch. 294, 65 L. T. Rep. N. S. 722, 40 Wkly. Rep. 194; Webster *v.* British Empire Mut. L. Assur. Co., 15 Ch. D. 169, 49 L. J. Ch. 769, 43 L. T. Rep. N. S. 229, 28 Wkly. Rep. 818; Laing *v.* Stone, 2 M. & R. 561, 17 E. C. L. 725; Anderton *v.* Arrowsmith, 2 P. & D. 408.

See 29 Cent. Dig. tit. "Interest," § 113.

Failure to give notice of dishonor.— Interest upon a dishonored bill of exchange was suspended between the date of the maturity and the date of notice of dishonor to the drawer. Walker *v.* Barnes, 1 Marsh. 36, 5 Taunt. 240, 15 Rev. Rep. 655, 1 E. C. L. 131.

Contest between claimants.— Where an award in condemnation proceedings is due to two claimants, and they litigate between themselves as to the proportion of the award due to each, a notification by one of the litigants not to pay the award is sufficient to suspend the running of interest during the pendency of such litigation. Gillespie *v.* New York, 3 Edw. (N. Y.) 512. *Compare* King *v.* Kelley, 51 Pa. St. 36, where a notice from each of two partners not to pay a partnership debt to the other was held not to suspend the running of interest on the debt.

Contest of will.— A legatee, by contesting the will, refuses the legacy, so that she is not entitled to interest thereon, until she makes a demand for its payment. Vandergrift's Appeal, 80 Pa. St. 116. See also Com. *v.* Turley, 4 Bush (Ky.) 398.

94. Bates *v.* Wynn, 7 Pa. Cas. 190, 11 Atl. 448; Selden *v.* James, 6 Rand. (Va.) 465; Stevenson *v.* Davis, 23 Can. Sup. Ct. 629 [*affirming* 19 Ont. App. 591 (*affirming* 21 Ont. 642)]. See also Hayes *v.* Elmsley, 23 Can. Sup. Ct. 623.

95. Selden *v.* James, 6 Rand. (Va.) 465; *In re* Strafford, [1896] 1 Ch. 235, 65 L. J. Ch. 124, 73 L. T. Rep. N. S. 586, 44 Wkly. Rep. 259; Stevenson *v.* Davis, 23 Can. Sup. Ct. 629 [*affirming* 19 Ont. App. 591 (*affirming* 21 Ont. 642)]. See also Conwell *v.* Claypool, 8 Blackf. (Ind.) 124; Steenrod *v.* Wheeling, etc., R. Co., 27 W. Va. 1.

96. Child *v.* Devereux, 5 N. C. 398; Ryan *v.* Baldrick, 3 McCord (S. C.) 498; Laura Jane *v.* Hagen, 10 Humphr. (Tenn.) 332; McCall *v.* Turner, 1 Call (Va.) 133. *Contra,* Bouillou's Estate, 9 Wkly. Notes Cas. (Pa.) 14. See also *In re* Schaeffer, 9 Serg. & R. (Pa.) 263.

Departure from country after maturity of debt.— Where a creditor was in the country

But the debtor must not himself be in default for not making reasonable effort to seek his creditor and pay the debt when due.[97]

(III) *Neglect to Present Commercial Paper For Payment.*[98] Neglect to present commercial paper for payment at such time and place as is designated in the instrument has been held sufficient to defeat the recovery of interest thereon after its maturity.[99] But in order to relieve himself from payment of interest on account of the creditor's failure to make presentment for payment, the debtor must show that he had the money ready to make payment on the date and at the place designated in the instrument.[1] If the instrument does not designate a particular place of payment, interest thereon will not be affected by failure to present for payment.[2] It has been held that the failure to present interest coupons for payment does not prevent the allowance of interest thereon.[3]

(IV) *Loss or Destruction of Instrument.* The mere fact that an instrument evidencing a debt has been lost or destroyed will not generally cause a suspension of interest, where the amount of the debt and interest thereon and its non-payment, can be shown, and no tender of payment has been made.[4] But where a note payable on demand is lost, the debtor must offer a bond of indemnity, upon making demand, in order to start the running of interest.[5]

b. Act of Debtor[6] — (I) *Tender of Principal*[7] — (A) *In General.* A tender of the amount due under a contract to pay money will prevent the running of interest subsequent to such tender.[8] But in order to have this effect the ten-

when a debt became due, and thereafter lived abroad, interest will run on the debt, although he left no agent. Ogden *v.* King, 1 N. C. 446.

97. Pillow *v.* Brown, 26 Ark. 240. See also *In re* Schaeffer, 9 Serg. & R. (Pa.) 263.

98. See Commercial Paper, 8 Cyc. 304.

99. Friend *v.* Pittsburgh, 131 Pa. St. 305, 18 Atl. 1060, 17 Am. St. Rep. 811, 6 L. R. A. 636; Emlen *v.* Lehigh Coal, etc., Co., 47 Pa. St. 76, 46 Am. Dec. 518; Miller *v.* New Orleans Bank, 5 Whart. (Pa.) 503, 34 Am. Dec. 571; Cheney *v.* Libby, 134 U. S. 68, 10 S. Ct. 498, 33 L. ed. 818; Ward *v.* Smith, 7 Wall. (U. S.) 447, 19 L. ed. 207. But see Westcott *v.* Patton, 10 Colo. App. 544, 51 Pac. 1021.

1. Skinker *v.* Butler County, 112 Mo. 332, 20 S. W. 613; Mahan *v.* Waters, 60 Mo. 167; Kelley *v.* Phenix Nat. Bank, 17 N. Y. App. Div. 496, 45 N. Y. Suppl. 533; North Pennsylvania R. Co. *v.* Adams, 54 Pa. St. 94, 93 Am. Dec. 677; Cox *v.* New York Nat. Bank, 100 U. S. 704, 25 L. ed. 739. See *infra*, V, C, 2, b, (II).

2. Westcott *v.* Patton, 10 Colo. App. 544, 51 Pac. 1021. See also Pillow *v.* Brown, 26 Ark. 240.

3. Walnut *v.* Wade, 103 U. S. 683, 26 L. ed. 526; Huey *v.* Macon County, 35 Fed. 481; Nash *v.* El Dorado County, 24 Fed. 252.

4. *Indiana.*— Bloomington *v.* Smith, 123 Ind. 41, 23 N. E. 972, 18 Am. St. Rep. 310.

Kentucky.— Fisher *v.* Mershon, 3 Bibb 527.

Louisiana.— Citizens' Bank *v.* Baltz, 27 La. Ann. 106; New Orleans *v.* Caldwell, 14 La. 499.

Missouri.— Rector *v.* Mark, 1 Mo. 288, 13 Am. Dec. 500.

New York.— Bishop *v.* Sniffen, 1 Daly 155.

Ohio.— Citizens' Nat. Bank *v.* Brown, 45 Ohio St. 39, 11 N. E. 799, 4 Am. St. Rep. 526.

Pennsylvania.— Fitchett *v.* North Pennsylvania R. Co., 5 Phila. 132.

Texas.— Gray *v.* Thomas, 83 Tex. 246, 18 S. W. 721; Allerkamp *v.* Gallagher, (Civ. App. 1893) 24 S. W. 372; Wiedenfeld *v.* Gallagher, (Civ. App. 1893) 24 S. W. 333.

See 29 Cent. Dig. tit. "Interest," § 118.

5. Bishop *v.* Sniffen, 1 Daly (N. Y.) 155; Fitchett *v.* North Pennsylvania R. Co., 5 Phila. (Pa.) 132; Wiedenfeld *v.* Gallagher, (Tex. Civ. App. 1893) 24 S. W. 333; Farmers' Bank *v.* Reynolds, 4 Rand. (Va.) 186. *Compare* Little *v.* Planters Consol. Assoc., 2 La. Ann. 1012.

6. Deposit in court see *infra*, V, C, 4, b.

7. See, generally, Tender.

8. *Alabama.*— Steele *v.* Hanna, 91 Ala. 190, 9 So. 174; Park *v.* Wiley, 67 Ala. 310; Rudulph *v.* Wagner, 36 Ala. 698.

Arkansas.— Turner *v.* Watkins, 31 Ark. 429; Hamlett *v.* Tallman, 30 Ark. 505; Woodruff *v.* Trapnall, 12 Ark. 640.

California.— Ferrea *v.* Tubbs, 125 Cal. 687, 58 Pac. 308; Patterson *v.* Sharp, 41 Cal. 133; Hidden *v.* Jordan, 39 Cal. 61.

Colorado.— See Westcott *v.* Patton, 10 Colo. App. 544, 51 Pac. 1021.

Connecticut.— Loomis *v.* Knox, 60 Conn. 343, 22 Atl. 771.

Georgia.— Crocker *v.* Green, 54 Ga. 494.

Illinois.— Allen *v.* Woodruff, 96 Ill. 11; Wood *v.* Merchants' Sav., etc., Co., 41 Ill. 267; Stow *v.* Russell, 36 Ill. 18. See also Thayer *v.* Meeker. 86 Ill. 470.

Iowa.— Metropolitan Nat. Bank *v.* Commercial State Bank, 104 Iowa 682, 74 N. W. 26.

Kentucky.— Fenwick *v.* Ratcliff, 6 T. B. Mon. 154; Ogle *v.* Ship, 1 A. K. Marsh. 287; Hart *v.* Brand, 1 A. K. Marsh. 159, 10 Am. Dec. 715; January *v.* Martin, 1 Bibb 586. See also Kercheval *v.* Swope, 6 T. B. Mon. 362.

der must be a legal one, made at the proper time and place, and must be kept good.[9] It has been held in a number of cases, however, that where the debtor

Louisiana.— Frey *v.* Fitzpatrick-Cromwell Co., 108 La. 125, 32 So. 437; Zimmerman *v.* Langles, 36 La. Ann. 65; Liddell *v.* Rucker, 13 La. Ann. 569.

Maryland.— Columbian Bldg. Assoc. *v.* Crump, 42 Md. 192.

Massachusetts.— Lewin *v.* Folsom, 171 Mass. 188, 50 N. E. 523; Lamprey *v.* Mason, 148 Mass. 231, 19 N. E. 350; Davis *v.* Parker, 14 Allen 94; Corcoran *v.* Henshaw, 8 Gray 267; Suffolk Bank *v.* Worcester Bank, 5 Pick. 106.

Michigan.— Crawford *v.* Osmun, 94 Mich. 533, 54 N. W. 284; Cowles *v.* Marble, 37 Mich. 158.

Minnesota.— Lamprey *v.* St. Paul. etc., R. Co., 89 Minn. 187, 94 N. W. 555; Balme *v.* Wambaugh, 16 Minn. 116.

Missouri.— Berthold *v.* Reyburn, 37 Mo. 586; Cockrill *v.* Kirkpatrick, 9 Mo. 697; Raymond *v.* McKinney, 58 Mo. App. 303.

Nebraska.— Clark *v.* Colfax County, 2 Nebr. (Unoff.) 133, 96 N. W. 607; Chapman *v.* Wagner, 1 Nebr. (Unoff.) 492, 96 N. W. 412.

New Hampshire.—McNeil *v.* Call, 19 N. H. 403, 51 Am. Dec. 188; March *v.* Portsmouth, etc., R. Co., 19 N. H. 372.

New Jersey.— Shields *v.* Lozear, 22 N. J. Eq. 447.

New York.— Tuthill *v.* Morris, 81 N. Y. 94; Harris *v.* Jex, 55 N. Y. 421, 14 Am. Rep. 285; Hill *v.* Place, 7 Rob. 389; Czech *v.* Beau, 35 Misc. 729, 72 N. Y. Suppl. 402; Haxton *v.* Bishop, 3 Wend. 13; Morgan *v.* Valentine, 6 Dem. Surr. 18, 19 N. Y. St. 515. See also Wheelock *v.* Tanner, 39 N. Y. 481.

North Carolina.— Charlotte Bank *v.* Davidson, 70 N. C. 118 [*followed* in Tate *v.* Smith, 70 N. C. 685].

Pennsylvania.— Vandergrift's Appeal, 80 Pa. St. 116; Thompson *v.* McKinley, 47 Pa. St. 353; Graham *v.* Keys, 29 Pa. St. 189; Hummel *v.* Brown, 24 Pa. St. 310; Delaware Ins. Co. *v.* Delauuie, 3 Binn. 295; Hughes *v.* Antill, 23 Pa. Super. Ct. 290; Merrell *v.* Merrell, 5 Kulp 125.

South Carolina.— Ryan *v.* Baldrick, 3 McCord 498; Hood *v.* Huff, 2 Mill 159.

Tennessee.— Williams *v.* Willhite, 3 Head 344; Gracy *v.* Potts, 4 Baxt. 395.

Texas.— Riley *v.* McNamara, 83 Tex. 11, 18 S. W. 141; Moore *v.* Perry, (Civ. App. 1898) 46 S. W. 878.

Utah.— McCauley *v.* Leavitt, 10 Utah 91, 37 Pac. 164.

Virginia.— Ross *v.* Keewood, 2 Munf. 141.

West Virginia.— Thompson *v.* Lyon, 40 W. Va. 87, 20 S. E. 812; Shepherd *v.* Wysong, 3 W. Va. 46.

Wisconsin.— Mankel *v.* Belscamper, 84 Wis. 218, 54 N. W. 500; Lusk *v.* Smith, 21 Wis. 27.

United States.— Cheney *v.* Libby, 134 U. S. 68, 10 S. Ct. 498, 33 L. ed. 818; Peugh *v.* Davis, 113 U. S. 542, 5 S. Ct. 622, 28 L. ed. 1127.

England.— Dent *v.* Dunn, 3 Campb. 296, 13 Rev. Rep. 809.

See 29 Cent. Dig. tit. "Interest," § 114.

A tender is considered as payment, so far as the running of interest is concerned. Hidden *v.* Jordan, 39 Cal. 61.

9. *Illinois.*— Atchison, etc., R. Co. *v.* Chicago, etc., R. Co., 162 Ill. 632, 44 N. E. 823, 35 L. R. A. 167; Aulger *v.* Clay, 109 Ill. 487; Allen *v.* Woodruff, 96 Ill. 11; Thayer *v.* Meeker, 86 Ill. 470; Wood *v.* Merchants' Sav., etc., Co., 41 Ill. 267.

Indiana.— King *v.* Finch, 60 Ind. 420; Hunter *v.* Bales, 24 Ind. 299.

Kentucky.— Shackleford *v.* Helm, 1 Dana 338; Woodland Cemetery Co. *v.* Ellison, 80 S. W. 169, 25 Ky. L. Rep. 2069; Dils *v.* Hatcher, 76 S. W. 514, 25 Ky. L. Rep. 891; Lloyd *v.* O'Rear, 59 S. W. 483, 22 Ky. L. Rep. 1000. See also Nantz *v.* Lober, 1 Duv. 304.

Louisiana.— Blouin *v.* Hart, 30 La. Ann. 714; Collins *v.* Sabatier, 19 La. Ann. 299.

Massachusetts.— Town *v.* Trow, 24 Pick. 168.

Minnesota.— Balm *v.* Wambaugh, 16 Minn. 116.

Missouri.— Berthold *v.* Reyburn, 37 Mo. 586.

New York.— Nelson *v.* Loder, 132 N. Y. 288, 30 N. E. 369; Tuthill *v.* Morris, 81 N. Y. 94; Harris *v.* Jex, 55 N. Y. 421, 14 Am. Rep. 285.

North Carolina.— Charlotte Bank *v.* Davidson, 70 N. C. 118.

Pennsylvania.— Miller *v.* New Orleans Bank, 5 Whart. 503, 34 Am. Dec. 571.

Utah.— McCauley *v.* Leavitt, 10 Utah 91, 37 Pac. 164.

United States.— Peugh *v.* Davis, 113 U. S. 542, 5 S. Ct. 622, 28 L. ed. 1127.

See 29 Cent. Dig. tit. "Interest," § 114.

Debtor must tender exact amount due. Thayer *v.* Meeker, 86 Ill. 470.

Tender of payment before maturity at the bank where the note was payable did not constitute a valid tender, nor stop the running of interest thereon. Kelly *v.* Collins, (Tex. Civ. App. 1900) 56 S. W. 997.

A mere offer to pay off a judgment, made by a person who is ready to purchase the property, is not a sufficient tender to the judgment creditor to vary the running of interest. Jones *v.* Moore, 1 Edw. (N. Y.) 632.

Subsequent contest of claim.— A tender will not stop interest where the debtor, after making the tender, assails the validity of the claim. Tishimingo Sav. Inst. *v.* Buchanan, 60 Miss. 496.

The debtor must keep the money ready at all times to pay the creditor if he shall conclude to receive it and demand its payment. Thayer *v.* Meeker, 86 Ill. 470.

Payment into court of the amount is necessary to support a plea of tender in an action brought by the creditor. Westcott *v.* Patton, 10 Colo. App. 544, 51 Pac. 1021. Otherwise

has not made a technical legal tender, but has made such offer of payment as amounts in effect to a tender, interest will not be recoverable after such offer.[10]

(B) *Tender of Less Than Principal.* A tender of a less sum than is actually due will not prevent the running of interest thereafter on the whole principal, as though tender had been made.[11]

(C) *Conditional Tender.* While it has been flatly laid down that a conditional tender is not good to stop the running of interest,[12] the better rule appears to be that the tender of the principal sum due upon a condition reasonable in itself and which the debtor has a right to impose will suspend the running of interest from the date of such tender;[13] but it is otherwise if the condition be unreasonable, or one which the debtor has no right to impose.[14]

(II) *Holding Funds in Readiness to Pay Principal.* Where a debt is payable at a particular time and place, and the debtor provides sufficient funds at such time and place to pay the debt, it is generally held that such readiness to make payment, if maintained, amounts to a legal tender, and interest is accordingly denied during the time the funds are so held for the purpose of making such payment.[15] But if the debtor withdraws the funds and appropriates them to a different purpose, interest will be recoverable from maturity of the debt.[16]

interest runs from the commencement of the action. Charlotte Bank *v.* Davidson, 70 N. C. 118 [*followed* in Charlotte Bank *v.* Stenhouse, 70 N. C. 703].

10. Adams *v.* Greig, 126 Mich. 582, 85 N. W. 1078; Crawford *v.* Osmun, 94 Mich. 533, 54 N. W. 284; Donohue *v.* Chase, 139 Mass. 407, 2 N. E. 84; Goff *v.* Rehoboth, 2 Cush. (Mass.) 475; Suffolk Bank *v.* Worcester Bank, 5 Pick. (Mass.) 106; Lusk *v.* Smith, 21 Wis. 27; Dent *v.* Dunn, 3 Campb. 296, 13 Rev. Rep. 809. *Compare* De Wolfe *v.* Taylor, 71 Iowa 648, 33 N. W. 154.

11. West Republic Min. Co. *v.* Jones, 108 Pa. St. 55; San Antonio *v.* Campbell, (Tex. Civ. App. 1900) 56 S. W. 130; Shobe *v.* Carr, 3 Munf. (Va.) 10; Kidd *v.* Walker, 2 B. & Ad. 705, 1 Dowl. P. C. 331, 22 E. C. L. 295. *Compare* Metropolitan Nat. Bank *v.* Commercial State Bank, 104 Iowa 682, 74 N. W. 26; Drew *v.* Towle, 30 N. H. 531, 64 Am. Dec. 309.

A tender by an executor to a residuary legatee, about a year after the granting of letters testamentary, of so much of his share of the residuary estate as the executor was able to distribute at the time, which the legatee refused to receive until he should be paid his full share, deprives the legatee of any right to interest on the sum so tendered. Burtis *v.* Dodge, 1 Barb. Ch. (N. Y.) 77.

12. Nantz *v.* Lober, 1 Duv. (Ky.) 304.

13. Atchison, etc., R. Co. *v.* Chicago, etc., R. Co., 162 Ill. 632, 44 N. E. 823, 35 L. R. A. 167; Dorsey *v.* Smith, 7 Harr. & J. (Md.) 345; Thompson *v.* McKinley, 47 Pa. St. 353; Williams *v.* Willhite, 3 Head (Tenn.) 344.

14. Lynch *v.* De Viar, 3 Johns. Cas. (N. Y.) 303; Fidelity L. & T. Co. *v.* Engleby, 99 Va. 168, 37 S. E. 957. See also Glen *v.* Fisher, 6 Johns. Ch. (N. Y.) 33, 10 Am. Dec. 310; Bates *v.* Wynn, 7 Pa. Cas. 190, 11 Atl. 448.

15. *Arkansas.*— Ringo *v.* Biscoe, 13 Ark. 563.

California.— Pujol *v.* McKinlay, 42 Cal. 559.

Massachusetts.— Lamprey *v.* Mason, 148 Mass. 231, 19 N. E. 350.

Missouri.— Mahan *v.* Waters, 60 Mo. 167.

Nebraska.— Chapman *v.* Wagner, 1 Nebr. (Unoff.) 492, 96 N. W. 412.

New York.— Locklin *v.* Moore, 57 N. Y. 360; Hills *v.* Place, 48 N. Y. 520, 8 Am. Rep. 568; Watts *v.* Garcia, 40 Barb. 656.

Pennsylvania.— Emlen *v.* Lehigh Coal, etc., Co., 47 Pa. St. 76, 86 Am. Dec. 518; Miller *v.* New Orleans Bank, 5 Whart. 503, 34 Am. Dec. 571; Lieber's Estate, 5 Pa. Dist. 187, 17 Pa. Co. Ct. 557, 12 Montg. Co. Rep. 112.

South Carolina.— McAlister *v.* Brice, McMull. Eq. 275.

Tennessee.— McNairy *v.* Bell, 1 Yerg. 502, 24 Am. Dec. 454.

United States.— Ward *v.* Smith, 7 Wall. 447, 19 L. ed. 207.

Canada.— McDonald *v.* Great Western R. Co., 21 U. C. Q. B. 223.

See 29 Cent. Dig. tit. "Interest," § 116.

Mere readiness to pay a debt will not excuse the debtor from payment of interest thereon. Hummel *v.* Brown, 24 Pa. St. 310.

Notice of appropriation.— To save interest by an appropriation of the purchase-money the money should be separated from the purchaser's general bank-account, and notice of the appropriation must be given to the vendor. Great Western R. Co. *v.* Jones, 13 Grant Ch. (U. C.) 355. *Compare* Emlen *v.* Lehigh Coal, etc., Co., 47 Pa. St. 76, 86 Am. Dec. 518.

Funds in possession of creditor.— Where an accountant holds in his hand sufficient money to repay advances made by him, he will not be allowed interest on such advances during the time that he might have applied the money in his hands to payment thereof. Coit *v.* Tracy, 9 Conn. 15; *In re* Richmond, 2 Pick. (Mass.) 567; Andrews *v.* Andrews, 3 Bradf. Surr. (N. Y.) 99.

16. Locklin *v.* Moore, 57 N. Y. 360; Hills *v.* Place, 48 N. Y. 520, 8 Am. Rep. 568;

3. Death or Incapacity of Parties. Interest having once started to run on a debt will not be suspended by the death,[17] or during the legal incapacity of either party,[18] even though no legal representative of such a party has been appointed.

4. Pendency of Litigation — a. In General. The pendency of litigation between the parties to an existing debt concerning the same will not of itself suspend interest on such debt during such litigation, where the money is not paid into court.[19] It has been held that where there is a legal contest between persons other than the debtor, rendering it doubtful to whom the debt should be paid, the debtor is not generally chargeable with interest during such contest,[20] although if the fund in such cases has been used by the debtor and has earned

Watts *v.* Garcia, 40 Barb. (N. Y.) 656; McConnell *v.* Nolan, 4 Wkly. Notes Cas. (Pa.) 509.

Interest from the date of withdrawal was allowed in Miller *v.* New Orleans Bank, 5 Whart. (Pa.) 503, 34 Am. Dec. 571.

17. *Illinois.*— Reeves *v.* Stipp, 91 Ill. 609.

Indiana.— Gale *v.* Corey, 112 Ind. 39, 13 N. E. 108, 14 N. E. 362.

New York.— Robinson *v.* McGregor, 16 Barb. 531. See also Watts *v.* Garcia, 40 Barb. 656.

Pennsylvania.— Reber's Estate, 143 Pa. St. 308, 22 Atl. 880; Bouillon's Estate, 9 Wkly. Notes Cas. 14.

Texas.— Huddleston *v.* Kempner, 1 Tex. Civ. App. 211, 21 S. W. 946.

West Virginia.— Steenrod *v.* Wheeling, etc., R. Co., 27 W. Va. 1.

Canada.— Stevenson *v.* Hodder, 15 Grant Ch. (U. C.) 570.

See 29 Cent. Dig. tit. "Interest," § 117.

Contra.— McCann *v.* Bell, 79 Ky. 112.

Where an executor or administrator dies with funds in his hands interest is suspended until someone is authorized to receive it. Griffin *v.* Bonham, 9 Rich. Eq. (S. C.) 71; Davis *v.* Wright, 2 Hill (S. C.) 560.

Debt to be deducted from debtor's share of creditor's estate.— Where a note payable with interest provides that instead of the maker paying the same in the payee's lifetime, the amount of the note may be deducted from the share of the payee's estate to be left the maker, the interest on the note ceases to run on the death of the payee, the rights of his creditors not being involved. *In re* Newcomb, 98 Iowa 175, 67 N. W. 587.

18. Pierce *v.* Dustin, 24 N. H. 417; Philadelphia, etc., R. Co. *v.* Gesner, 20 Pa. St. 240.

19. *Illinois.*— Knapp *v.* Marshall, 56 Ill. 362.

Louisiana.— Finley *v.* Mallard, 12 La. Ann. 833; Duncan *v.* Hampton, 6 Mart. N. S. 31; Duplantier *v.* Pigman, 3 Mart. 236.

Massachusetts.— Donahue *v.* Partridge, 160 Mass. 336, 35 N. E. 1071.

Michigan.— Anderson *v.* Smith, 108 Mich. 69, 65 N. W. 615; Michigan, etc., Plaster Co. *v.* White, 44 Mich. 25, 5 N. W. 1086.

New Jersey.— King *v.* Marvin, 51 N. J. L. 298, 17 Atl. 162.

New York.— *In re* Myers, 131 N. Y. 409, 30 N. E. 135; Cowing *v.* Howard, 46 Barb. 579; Hunn *v.* Norton, Hopk. 344.

Ohio.— Robb's Estate, 5 Ohio S. & C. Pl. Dec. 227, 5 Ohio N. P. 52. See also Gest *v.* Cincinnati, 26 Ohio St. 275.

Texas.— Yaws *v.* Jones, (1892) 19 S. W. 443.

Vermont.— Sampson *v.* Warner, 48 Vt. 247. See also Dennison *v.* Slason, 39 Vt. 606.

Virginia.— Strayer *v.* Long, 83 Va. 715, 3 S. E. 372.

See 29 Cent. Dig. tit. "Interest," § 120.

The fact that the claimant is a bank, in which funds of the debtor were deposited during the pendency of the suit, will not affect its right to interest. People *v.* Remington, 59 Hun (N. Y.) 307, 12 N. Y. Suppl. 829.

Where payment of a dividend to a creditor has been delayed through objections by other creditors or the trustee, interest should be allowed from the time it became payable. *In re* Kitzinger, 14 Fed. Cas. No. 7,862. But see Hersey *v.* Fosdick, 20 Fed. 44.

Receivership.— In a suit on a demand due from a bank, plaintiff is entitled to receive interest thereon from the time of action brought, although the bank afterward goes into the hands of a receiver. Watson *v.* Phœnix Bank, 8 Metc. (Mass.) 217, 41 Am. Dec. 500.

Where interest is not allowed on verdicts delay incident to legal proceedings subsequent to the verdict does not give the creditor any right to interest. Hawley *v.* Barker, 5 Colo. 118; Kelsey *v.* Murphy, 30 Pa. St. 340.

20. *Iowa.*— Southern White Lead Co. *v.* Haas, 76 Iowa 432, 41 N. W. 63.

Kentucky.— Adams *v.* Bement, 29 S. W. 22, 16 Ky. L. Rep. 676.

Louisiana.— Rowlett *v.* Shepherd, 4 La. 86; Miles *v.* Oden, 8 Mart. N. S. 214, 19 Am. Dec. 177.

Missouri.— See Hilton *v.* St. Louis, 99 Mo. 199, 12 S. W. 657.

New Jersey.— See North Hudson R. Co. *v.* Booraem, 28 N. J. Eq. 593.

New York.— Gillespie *v.* New York, 3 Edw. 512.

South Carolina.— Wightman *v.* Reside, 2 Desauss. Eq. 578.

Virginia.— Daniel *v.* Wharton, 90 Va. 584, 19 S. E. 170. *Contra*, Com. *v.* Ricks, 1 Gratt. 416.

See 29 Cent. Dig. tit. "Interest," § 120.

Contra.— Bonner *v.* Continental L. Ins. Co.,

interest the court will allow interest thereon notwithstanding the pendency of the litigation.[21]

b. Deposit in or Subject to Order of Court. Where a fund in litigation or the amount of a disputed claim is deposited in court, or subject to its order, interest is not recoverable thereon during the time it remains so deposited.[22]

c. Attachment or Garnishment — (I) *In General.* Where interest upon a debt is recoverable as damages, and not by reason of a contract to pay it, the debtor is not usually liable for interest during a period in which he is prevented from making payment by reason of the debt being attached or garnished in his hand by some third person, or by the debtor being summoned as a trustee of the creditor under trustee process.[23] But if the contract on which the debt is founded

8 Ohio Dec. (Reprint) 697, 9 Cinc. L. Bul. 219.

21. Smith *v.* Alexander, 87 Ala. 387, 6 So. 51; Kenton Ins. Co. *v.* First Nat. Bank, 93 Ky. 129, 19 S. W. 185, 14 Ky. L. Rep. 32; Hersey *v.* Fosdick, 20 Fed. 44.

22. *Florida.*— Sherrell *v.* Shepard, 19 Fla. 300.

Iowa.— Van Gordon *v.* Ormsby, 60 Iowa 510, 15 N. W. 306.

Kentucky.— Louisville Water Co. *v.* Clark, 29 S. W. 309, 16 Ky. L. Rep. 585.

Louisiana.— Brother *v.* Cronan, 15 La. Ann. 256.

Michigan.— Lilley *v.* Mutual Ben. L. Ins. Co., 92 Mich. 153, 52 N. W. 631; Sager *v.* Tupper, 35 Mich. 134.

Mississippi.— Anderson *v.* Wilkinson, 10 Sm. & M. 601.

Missouri.— Rector *v.* Mark, 1 Mo. 288, 13 Am. Dec. 500.

New York.— Hills *v.* Place, 48 N. Y. 520, 8 Am. Rep. 568; Morton *v.* Ludlow, 1 Edw. 639.

Pennsylvania.— Oliphant *v.* Frost, 9 Pa. St. 308; Sulger *v.* Dennis, 2 Binn. 428.

Vermont.— Haswell *v.* Farmers', etc., Bank, 26 Vt. 100.

Virginia.— Daniel *v.* Wharton, 90 Va. 584, 19 S. E. 170.

United States.— Potter *v.* Gardner, 5 Pet. 718, 8 L. ed. 285; Spring *v.* South Carolina Ins. Co., 8 Wheat. 268, 5 L. ed. 614; Himely *v.* Rose, 5 Cranch 313, 3 L. ed. 111; Groves *v.* Sentell, 66 Fed. 179, 13 C. C. A. 386; Bowman *v.* Wilson, 12 Fed. 864, 2 McCrary 394. But see The Grapeshot, 10 Fed. Cas. No. 5,703, 2 Woods 42.

Canada.— Wilkins *v.* Geddes, 3 Can. Sup. Ct. 203 [*affirming* 12 Nova Scotia 367]; Hutton *v.* Federal Bank, 9 Ont. Pr. 568; Matter of Foster, 32 U. C. Q. B. 503.

See 29 Cent. Dig. tit. "Interest," §§ 115, 120.

Where money is paid into court in compliance with a decree, it ceases to bear interest from the date of decree. Cloud's Estate, 4 Leg. Gaz. (Pa.) 369.

Where a sheriff collected money upon an execution, and failed to bring it into court on the return-day, interest is recoverable, although the money was paid into court after the commencement of a suit to recover the sum so collected. Crane *v.* Dygert, 4 Wend. (N. Y.) 675.

A deposit with the clerk of the court of the sum claimed, with interest and costs, to abide the result of a controversy between plaintiff and interveners claiming the amount, not being a tender and not entitling plaintiff to take the amount, does not release defendant from further interest. De Goer *v.* Kellar, 2 La. Ann. 496.

Guaranty deposit.— Where bidders for a municipal bond issue make a deposit as guaranty of good faith, but afterward sue to recover it because of the invalidity of the bonds, they are not entitled to interest. Denver *v.* Hayes, 28 Colo. 110, 63 Pac. 311.

Deposit at interest.— Where the claimant of the fund secures an order of court for the deposit of the fund with a trust company, he will be allowed, upon recovering the fund, only such interest as the fund has actually drawn while so deposited. Warren *v.* Banning, 140 N. Y. 227, 35 N. E. 428.

Where a trust fund is being administered by the court, a receiver of a national bank which is a preferred creditor in the deed of assignment is not estopped from claiming interest on the preferred debt, although the fund is for a time deposited by order of the court in a depositary which pays no interest on the fund. Bain *v.* Peters, 44 Fed. 307. See also Cloud's Estate, 4 Leg. Gaz. (Pa.) 369.

23. *Alabama.*— Gunn *v.* Howell, 35 Ala. 144, 73 Am. Dec. 484.

Massachusetts.— Norris *v.* Massachusetts Mut. L. Ins. Co., 131 Mass. 294; Smith *v.* Flanders, 129 Mass. 322; Huntress *v.* Burbank, 111 Mass. 213; Bickford *v.* Rich, 105 Mass. 340; Remell *v.* Kimball, 5 Allen 356; Oriental Bank *v.* Tremont Ins. Co., 4 Metc. 1; Adams *v.* Cordis, 8 Pick. 260; Prescott *v.* Parker, 4 Mass. 170.

Missouri.— Cohen *v.* St. Louis Perpetual Ins. Co., 11 Mo. 374; Stevens *v.* Gwathmey, 9 Mo. 636.

New Hampshire.— Swamscot Mach. Co. *v.* Partridge, 25 N. H. 369; Quigg *v.* Kittredge, 18 N. H. 137. *Contra,* Drew *v.* Towle, 27 N. H. 412, 50 Am. Dec. 380. See also Nevins *v.* Rockingham Mut. F. Ins. Co., 25 N. H. 22.

Pennsylvania.— Jones *v.* Manufacturers' Nat. Bank, 99 Pa. St. 317; Jackson *v.* Lloyd, 44 Pa. St. 82; Irwin *v.* Pittsburgh, etc., R. Co., 43 Pa. St. 488; Miller *v.* Rhodes, 3 Montg. Co. Rep. 133. *Compare* O'Connor *v.*

draws interest during the time payment is thus delayed interest will not be suspended.[24] If a debtor against whom trustee or garnishment proceedings are issued causes unreasonable delay in making his answer thereto or otherwise for the purpose of obtaining a longer use of the money,[25] or falsely denies his indebtedness,[26] he will be liable for interest during the pendency of the proceedings.

(II) *Use of Funds by Garnishee.* If a garnishee, during the pendency of the proceedings, employs the funds in his hands so as to derive a profit therefrom, he will generally be held to account for interest.[27]

(III) *Failure to Pay Funds Into Court.* It has been held in several states that interest will be recoverable from the garnishee upon funds attached in his hands, even though he makes no use of such funds and derives no profit therefrom, unless he pays the funds into court.[28]

d. Injunction. Where a debtor is restrained by an injunction from using money in his hands, or from paying the same to his creditor, he will not generally be chargeable with interest thereon while the injunction is in force;[29] but if an injunction be procured by the debtor restraining the collection of the debt due by him and the injunction be afterward discharged interest will be allowed on the debt, even during the time when the injunction was in force;[30] and when the injunction is procured by the creditor, against the use or disposition of

American Iron Mountain Co., 56 Pa. St. 234.

Tennessee.— Merrill *v.* Elam, 4 Baxt. 235.

Vermont.— Platt *v.* Continental Ins. Co., 62 Vt. 166, 19 Atl. 637.

United States.— Willings *v.* Consequa, 30 Fed. Cas. No. 17,767, Pet. C. C. 301.

See 29 Cent. Dig. tit. "Interest," § 121.

If a debtor pays into court a larger sum than is necessary to cover the demand in the garnishment proceedings, he is liable for interest upon the excess. Jackson *v.* Lloyd, 44 Pa. St. 82; Sickman *v.* Lapsley, 13 Serg. & R. (Pa.) 224, 15 Am. Dec. 596.

When the attachment is laid by the creditor in his own hands, interest continues to run during the pendency of the attachment proceedings. Willings *v.* Consequa, 30 Fed. Cas. No. 17,767, Pet. C. C. 301.

Payment of claim on which garnishment based.— A debtor who has paid part of his debt in satisfaction of a judgment rendered against him as garnishee is liable for interest on the residue from the date of the judgment. Berry *v.* Davis, 77 Tex. 191, 13 S. W. 978, 19 Am. St. Rep. 748.

24. Abbott *v.* Stinchfield, 71 Me. 213; Baker *v.* Central Vermont R. Co., 56 Vt. 302. See also Norris *v.* Hall, 18 Me. 332.

25. Oriental Bank *v.* Tremont Ins. Co., 4 Metc. (Mass.) 1; Guild *v.* Guild, 2 Metc. (Mass.) 229; Jones *v.* Manufacturers' Nat. Bank, 99 Pa. St. 317. See also Albion Lead Works *v.* Citizens' Ins. Co., 3 Fed. 197.

26. Stevens *v.* Gwathmey, 9 Mo. 636; Parker *v.* Oil Well Supply Co., 30 Pittsb. Leg. J. (Pa.) 306.

27. Woodruff *v.* Bacon, 35 Conn. 97; Abbott *v.* Stinchfield, 71 Me. 213; Blodgett *v.* Gardiner, 45 Me. 542. See also Candee *v.* Skinner, 40 Conn. 464.

The mere mingling of such funds with the debtor's general funds will not constitute such use as to justify the allowance of interest, where he had the whole amount always at command and ready to be paid if required. Candee *v.* Skinner, 40 Conn. 464; Mustard *v.* Union Nat. Bank, 86 Me. 177, 29 Atl. 977.

28. *Kentucky.*— Shackleford *v.* Helm, 1 Dana 338.

Maine.— Chase *v.* Manhardt, 1 Bland 333.

Mississippi.— Work *v.* Glaskins, 33 Miss. 539.

North Carolina.— Rice *v.* Jones, 103 N. C. 226, 9 S. E. 571, 14 Am. St. Rep. 801.

Ohio.— Candee *v.* Webster, 9 Ohio St. 452.

See 29 Cent. Dig. tit. "Interest," § 122.

29. *California.*— Newport Wharf, etc., Co. *v.* Drew, 141 Cal. 103, 74 Pac. 697.

Maryland.— Clagett *v.* Hall, 9 Gill & J. 80.

New Jersey.— Le Branthwait *v.* Halsey, 9 N. J. L. 3.

New York.— Warren *v.* Banning, 140 N. Y. 227, 35 N. E. 428; Stevens *v.* Barringer, 13 Wend. 639.

Pennsylvania.— Stewart *v.* Stocker, 13 Serg. & R. 199, 15 Am. Dec. 589.

United States.— Davis *v.* Gray, 16 Wall. 203, 21 L. ed. 447; Osborn *v.* U. S. Bank, 9 Wheat. 738, 6 L. ed. 204.

England.— Farmer *v.* Farmer, 15 Wkly. Rep. 371.

See 29 Cent. Dig. tit. "Interest," § 123.

Compare Heck *v.* Bulkley, (Tenn. 1886) 1 S. W. 612.

An injunction as to part of a debt will not prevent the recovery of interest on the balance not affected. Copeland *v.* Reese, Wright (Ohio) 728.

The funds should be brought into court in order to relieve the party enjoined from the payment of interest. Bullock *v.* Ferguson, 30 Ala. 227; Kirkman *v.* Vanlier, 7 Ala. 217; Curd *v.* Letcher, 3 J. J. Marsh. (Ky.) 443; Tohin *v.* Wilson, 3 J. J. Marsh. (Ky.) 63; McKnight *v.* Chauncey, Seld. (N. Y.) 97.

30. Wallis *v.* Dilley, 7 Md. 237; Hosack *v.* Rogers, 9 Paige (N. Y.) 461; Shipman *v.* Fletcher, 95 Va. 585, 29 S. E. 325. See

the fund by his own debtor, interest is usually recoverable during the period the debtor is so enjoined.[31]

e. Appeal and Proceedings For Review.[32] The question of the suspension of interest pending an appeal is one largely determined by the character of the case, and by the result of the appeal.[33] If the judgment appealed from be affirmed by the appellate court, interest is generally allowed on the judgment below from its date, notwithstanding the appeal,[34] and a mere modification of the judgment below does not suspend the running of interest pending the appeal, if such judgment be substantially affirmed.[35] If the judgment appealed from be reversed and the case remanded, interest is not generally computed during the pendency of the appeal, but is suspended until the entry of final judgment.[36] Where the entry

also Anderson *v.* Smith, 108 Mich. 69, 65 N. W. 615.

31. New York, etc., R. Co. *v.* Carbart, 1 N. Y. St. 426; Tazewell *v.* Barrett, 4 Hen. & M. (Va.) 259.

32. **Reasonable time for appeal.**— A reasonable time should be permitted for the prosecution and determination of an appeal from commissioners' report apportioning real estate, before interest should be charged. Williams Tp. *v.* Williamstown, 9 Pa. Co. Ct. 65.

33. Metler *v.* Easton, etc., R. Co., 37 N. J. L. 222; Henning *v.* Van Tyne, 19 Wend. (N. Y.) 101; Trainer *v.* Skein, 10 Yerg. (Tenn.) 369; Doak *v.* Ridley, 2 Yerg. (Tenn.) 495; Scott *v.* Trents, 4 Hen. & M. (Va.) 356.

Delay of execution.— Interest as a matter of course will be given for the time that execution has been delayed by the proceedings in error. Lancashire, etc., R. Co. *v.* Gidlow, L. R. 7 H. L. 517, 45 L. J. Exch. 625, 32 L. T. Rep. N. S. 573, 24 Wkly. Rep. 144. See also Baker *v.* Pittsburgh Exch. Bank, 24 Pa. St. 391.

Interest runs from the final decree of an orphans' court, without regard to subsequent appeal to the supreme court, on an account finally adjudicated. Noble's Estate, 34 Pittsb. Leg. J. (Pa.) 441.

Condemnation proceedings.— If a railroad company appeals from an award in condemnation proceedings, the power of the owner to enforce payment is superseded, and interest is not suspended pending the appeal. Becbe *v.* Newark, 24 N. J. L. 47. *Compare* Metler *v.* Easton, etc., R. Co., 37 N. J. L. 222.

A party who appeals from a decree in his favor is not entitled to interest on the original recovery pending the appeal. Rouse *v.* Zeigle, 1 Browne (Pa.) 329; New York, etc., Mail Steamship Co. *v.* The Empress, 59 Fed. 476, 8 C. C. A. 182.

New evidence on appeal.— Where the libellant in admiralty proceedings introduces new evidence on appeal, materially changing the case as presented below, interest will be allowed only from the date of filing the mandate from the appellate court. The Switzerland, 67 Fed. 617.

34. *California.*— Columbia Sav. Bank *v.* Los Angeles County, 137 Cal. 467, 70 Pac. 308.

Maryland.— Butcher *v.* Norwood, 1 Harr. & J. 485; Contee *v.* Findley, 1 Harr. & J. 331.

Massachusetts.— Com. *v.* Boston, etc., R. Co., 3 Cush. 25.

New Hampshire.— Shattuck *v.* Wilton R. Co., 23 N. H. 269; March *v.* Portsmouth, etc., R. Co., 19 N. H. 372.

New Jersey.— Metler *v.* Easton, etc., R. Co., 37 N. J. L. 222.

New York.— Van Valkenburgh *v.* Fuller, 6 Paige 10.

Pennsylvania.— Respublica *v.* Nicholson, 2 Dall. 256, 1 L. ed. 371; Heydrick's Estate, 1 Montg. Co. Rep. 106.

South Carolina.— *Ex p.* Vance, 1 McCord 493.

United States.— The Umbria, 59 Fed. 475, 8 C. C. A. 181; The Blenheim, 18 Fed. 47. *Contra,* Deems *v.* Albany, etc., Line, 7 Fed. Cas. No. 3,736, 14 Blatchf. 474.

See 29 Cent. Dig. tit. "Interest," § 125.

Actions for tort.— Where a writ of error was brought on a judgment for plaintiff, in an action for tort, and the judgment was affirmed, defendant in error was not allowed interest on the judgment. Gelston *v.* Hoyt, 13 Johns. (N. Y.) 561.

Judgment including interest.— Where the court of appeals affirms the judgment of the lower court, without awarding interest as the lower court did, in an action on the appeal-bond, interest can only be recovered from the time of the affirmance. Contee *v.* Findley, 1 Harr. & J. (Md.) 331; Butcher *v.* Norwood, 1 Harr. & J. (Md.) 485.

35. Barnhart *v.* Edwards, (Cal. 1899) 57 Pac. 1004; Beckman *v.* Skaggs, 61 Cal. 362; Clark *v.* Dunnam, 46 Cal. 204; Dougherty *v.* Miller, 38 Cal. 548; Black *v.* Carrollton R. Co., 10 La. Ann. 33, 63 Am. Dec. 586; Wilson's Appeal, 8 Pa. Cas. 579, 11 Atl. 678; Kneeland *v.* American L. & T. Co., 138 U. S. 509, 11 S. Ct. 426, 34 L. ed. 1052. *Compare* Illinois Cent. R. Co. *v.* Turrill, 110 U. S. 301, 4 S. Ct. 5, 28 L. ed. 154.

Modification of order of distribution.— Where one receives money under an order of distribution, and the order of distribution is changed on appeal, he will be liable for interest on the sum received by him in excess of the amount to which he is finally adjudged entitled. Whitall *v.* Cressman, 18 Nebr. 508, 26 N. W. 245.

36. *Alabama.*— Insurance Co. of North America *v.* Forcheimer, 86 Ala. 541, 5 So. 870.

of judgment is delayed by an unsuccessful motion for rehearing or new trial, it is generally held that interest will not be suspended pending the hearing of such motion, but will be computed as if no such motion had been made.[37]

5. War.[38] While in the absence of special statute, the running of interest is not affected by the existence of war, where both parties to the contract are citizens and residents of the same country,[39] it is a general rule of law that when the creditor and debtor are citizens and residents of different countries interest on the debt existing between them will be suspended during the period that their respective countries are at war with each other.[40] This rule is, however, restricted

Kentucky.— Beall *v.* Beall, 6 Ky. L. Rep. 516.

Virginia.— See Auditor of Public Accounts *v.* Dugger, 3 Leigh 241.

Washington.— Johnston *v.* Gerry, 34 Wash. 524, 76 Pac. 258, 77 Pac. 503.

United States.— See The Grapeshot, 10 Fed. Cas. No. 5,703, 2 Woods 42.

See 29 Cent. Dig. tit. "Interest," § 125.

Where the court refused to receive a verdict in favor of plaintiff until ordered to do so by the supreme court, interest did not accrue thereon until the verdict was actually received. Kansas City, etc., R. Co. *v.* Berry, 55 Kan. 186, 40 Pac, 288. *Compare* Com. *v.* Boston, etc., R. Co., 3 Cush. (Mass.) 25.

Cross appeals.— Where both parties appealed from a judgment of the court of claims, and the mandate of the supreme court stated: "The judgment is hereby reversed, and it is ordered that this cause be remanded with directions to enter a judgment for the full amount claimed," no interest could be allowed under a statute providing that interest should be allowed only upon an affirmance of a judgment. Pacific R. Co. *v.* U. S., 26 Ct. Cl. 564.

37. *Connecticut.*— Weed *v.* Weed, 25 Conn. 494.

Iowa.— Carson *v.* German Ins. Co., 62 Iowa 433, 17 N. W. 650.

Maryland.— Baltimore City Pass. R. Co. *v.* Sewell, 37 Md. 443.

Massachusetts.— Vail *v.* Nickerson, 6 Mass. 262.

New Jersey.— Erie R. Co. *v.* Ackerson, 33 N. J. L. 33.

New York.— Bull *v.* Ketchum, 2 Den. 188; Williams *v.* Smith, 2 Cai. 253, Col. Cas. 403, Col. & C. Cas. 239.

Pennsylvania.— Irvin *v.* Hazleton, 37 Pa. St. 465; Com. *v.* Lintner, 8 Lanc. Bar 25.

United States.— Griffith *v.* Baltimore, etc., R. Co., 44 Fed. 574; Dowell *v.* Griswold, 7 Fed. Cas. No. 4,040, 5 Sawy. 23.

See 29 Cent. Dig. tit. "Interest," § 126.

Action on review.— The jury, in computing interest on the trial of an action on review, should reckon the interest up to, but not beyond, the date of the former verdict. Shepard *v.* Hatch, 54 N. H. 96.

Exceptions to report of referee.— If a report of referees, fixing the amount due the libellant, is ultimately confirmed, he will be entitled to interest from the filing of the report, although both parties have excepted to the report, and prosecuted their exceptions to a hearing, with a view to have it set aside. The Isaac Newton, 13 Fed. Cas. No. 7,090, Abb. Adm. 588. See also Cary *v.* Whitney, 50 Me. 337. *Compare* Southard *v.* Smyth, 19 Me. 458.

38. See Commercial Paper, 8 Cyc. 314.

39. Williams *v.* State, 37 Ark. 463.

Under statute courts and juries have been given power to remit interest during the war period, if in their discretion it seemed proper. Lacy *v.* Stamper, 27 Gratt. (Va.) 42. Such a statute did not contravene the constitution of the United States, with respect to the impairment of the obligation of contracts. Harmanson *v.* Wilson, 11 Fed. Cas. No. 6,074, 1 Hughes 207. And see Hutchinson *v.* Landcraft, 4 W. Va. 312.

Debts due subject of neutral state.— Interest on a debt due from a citizen of a belligerent state to a citizen of a neutral state will be enforced for the time the war is in progress, if a remittance can be safely made. Crawford *v.* Willing, 4 Dall. (Pa.) 286, 1 L. ed. 836.

40. *Alabama.*— Bean *v.* Chapman, 62 Ala. 58.

Arkansas.— Williams *v.* State, 37 Ark. 463; Pillow *v.* Brown, 26 Ark. 240.

Connecticut.— Borland *v.* Sharp, 1 Root 178.

Georgia.— Mayer *v.* Reed, 37 Ga. 482.

Kentucky.— Selden *v.* Preston, 11 Bush 191.

Maryland.— Thomas *v.* Hunter, 29 Md. 406; Bordley *v.* Eden, 3 Harr. & M. 167; Chase *v.* Manbardt, 1 Bland 333.

Pennsylvania.— Foxcraft *v.* Nagle, 2 Dall. 132, 1 L. ed. 319; Hoare *v.* Allen, 2 Dall. 102, 1 L. ed. 307.

South Carolina.— Ryan *v.* Baldrick, 3 McCord 498; Blake *v.* Quash, 3 McCord 340; Dickinson *v.* Legare, 1 Desauss. Eq. 537; Higginson *v.* Air, 1 Desauss. Eq. 427.

Tennessee.— Gates *v.* Union Bank, 12 Heisk. 325; McGaughy *v.* Berg, 4 Heisk. 695. *Compare* Greenlaw *v.* Williams, 2 Lea 533.

Virginia.— Roberts *v.* Cocke, 28 Gratt. 207; Lacy *v.* Stamper, 27 Gratt. 42; Fred *v.* Dixon, 27 Gratt. 541; Walker *v.* Beauchler, 27 Gratt. 511; Kirby *v.* Goodykoontz, 26 Gratt. 298; McVeigh *v.* Old Dominion Bank, 26 Gratt. 188; Brewer *v.* Hastie, 3 Call 22; Tucker *v.* Watson, 6 Am. L. Reg. N. S. 220.

West Virginia.— Tracey *v.* Shumate, 22 W. Va. 474.

United States.— Hiatt *v.* Brown, 15 Wall. 177, 21 L. ed. 128; Ward *v.* Smith, 7 Wall. 447, 19 L. ed. 207; Bainbridge *v.* Wilcocks,

in its operation to cases where interest is recoverable merely as damages, interest provided for by the terms of a voluntary contract between the parties being unaffected by the existence of a state of war.[41] So also where the creditor, although a subject of the enemy, is in the debtor's country, or has an authorized agent residing in such country, to whom payment can be made by the debtor, interest on the debt will not be suspended during the existence of the war.[42] Nor is interest suspended where one of several joint debtors resides in the country with the creditor or his authorized agent,[43] or where, although the principal debtor is an alien enemy, his surety, against whom suit is brought, resides in the country with the creditor.[44] If, after the termination of the war, the parties enter into a new agreement concerning the debt, and the debtor assumes the payment of interest for the period during which the war continued, he cannot afterward relieve himself from its payment.[45]

VI. COMPUTATION.

A. In General. Interest is generally to be so computed as to avoid the payment of compound interest,[46] and to secure a calculation of interest upon the actual amount due[47] for the actual period during which interest should run.[48]

2 Fed. Cas. No. 755, Baldw. 536; Chappelle *v.* Olney, 5 Fed. Cas. No. 2,613, 1 Sawy. 401; Conn *v.* Penn, 6 Fed. Cas. No. 3,104, Pet. C. C. 496; Denniston *v.* Imbrie, 7 Fed. Cas. No. 3,802, 3 Wash. 396; Jackson Ins. Co. *v.* Stewart, 13 Fed. Cas. No. 7,152, 1 Hughes 310.

England.— Du Belloix *v.* Waterpark, 1 D. & R. 16, 16 E. C. L. 12.

See 29 Cent. Dig. tit. "Interest," § 128.

41. Yeaton *v.* Berney, 62 Ill. 61; Lash *v.* Lambert, 15 Minn. 416, 2 Am. Rep. 142; Neilson *v.* Rutledge, 1 Desauss. Eq. (S. C.) 194. See Shortridge *v.* Macon, 61 N. C. 392, 22 Fed. Cas. No. 12,812, 1 Abb. 58, Chase 136; *In re* Schaeffer, 9 Serg. & R. (Pa.) 263. *Contra*, Hiatt *v.* Brown, 15 Wall. (U. S.) 177, 21 L. ed. 128.

42. *Illinois.*— Yeaton *v.* Berney, 62 Ill. 61.

Iowa.— See Griffith *v.* Lovell, 26 Iowa 226.

Kentucky.— Haggard *v.* Conkwright, 7 Bush 16, 3 Am. Rep. 297.

Maryland.— Thomas *v.* Hunter, 29 Md. 406.

Minnesota.— Lash *v.* Lambert, 15 Minn. 416, 2 Am. Rep. 142.

Pennsylvania.— See *In re* Schaeffer, 9 Serg. & R. 263.

Tennessee.— Gates *v.* Union Bank, 12 Heisk. 325.

Virginia.— Roberts *v.* Cocke, 28 Gratt. 207; Crenshaw *v.* Seigfried, 24 Gratt. 272.

United States.— Ward *v.* Smith, 7 Wall. 447, 19 L. ed. 207; Conn *v.* Penn, 6 Fed. Cas. No. 3,104, Pet. C. C. 496; Denniston *v.* Imbrie, 7 Fed. Cas. No. 3,802, 3 Wash. C. C 396.

See 29 Cent. Dig. tit. "Interest," § 128.

Temporary residence.— Where, owing to the late rebellion, interest was suspended on a debt due by a debtor in the territory of either belligerent to a creditor in the territory of the other, the debt did not begin to bear interest by reason of the presence of the creditor at the residence of the debtor and a demand for payment, unless he had abandoned his residence in the hostile territory and taken such measures as the debtor's government prescribed to change his status as an enemy. Tucker *v.* Watson, 6 Am. L. Reg. N. S. (Va.) 220.

43. Yeaton *v.* Berney, 62 Ill. 61; Paul *v.* Christie, 4 Harr. & M. (Md.) 161. See also Coltrane *v.* Worrell, 30 Gratt. (Va.) 434.

44. Bean *v.* Chapman, 62 Ala. 58; Paul *v.* Christie, 4 Harr. & M. (Md.) 161.

45. Inglis *v.* Nutt, 2 Desauss. Eq. (S. C.) 623; Bainbridge *v.* Wilcocks, 2 Fed. Cas. No. 755, Baldw. 536. But see Borland *v.* Sharp, 1 Root (Conn.) 178.

Where a judgment had been recovered upon the debt, both for principal and interest, it was error, in an action on the judgment, to abate the interest upon the principal debt for the period of the war. Rowe *v.* Hardy, 97 Va. 674, 34 S. E. 625, 75 Am. St. Rep. 811.

46. Hart *v.* Dorman, 2 Fla. 445, 50 Am. Dec. 285. See also Crone *v.* Crone, 26 Grant Ch. (U. C.) 459. And see *infra*, VI, F.

Inclusion of interest in new note.— It is error to render judgment for interest on a note, where the interest had been included in another note on which judgment is also rendered. Myers *v.* Mathews, 53 S. W. 23, 21 Ky. L. Rep. 807.

47. *Alabama.*— Stow *v.* Bozeman, 29 Ala. 397.

Arkansas.— Worthington *v.* Curd, 22 Ark. 277.

Connecticut.— Tucker *v.* Jewett, 32 Conn. 563.

Georgia.— McCall *v.* Wilkes, 121 Ga. 722, 49 S. E. 722.

Kentucky.— Lee *v.* Reed, 4 Dana 109; Miles *v.* Bacon, 4 J. J. Marsh. 457.

Massachusetts.— Edes *v.* Goodridge, 4 Mass. 103.

North Carolina.— Dowd *v.* North Carolina R. Co., 70 N. C. 468.

See 29 Cent. Dig. tit. "Interest," § 129.

48. Utica Bank *v.* Wager, 2 Cow. (N. Y.) 712; New York Fireman Ins. Co. *v.* Ely, 2 Cow. (N. Y.) 678.

Months of thirty days see Pool *v.* White,

B. Under Special Statutes. The method of computing interest is sometimes prescribed by statute, by the adoption of interest tables, or otherwise;[49] but such statutes do not apply to contracts made prior to their adoption.[50]

C. Rests in Computation. The computation of interest with periodical rests to ascertain the balance due, carrying the accrued interest over as part of the new principal, is not generally permitted, as this results in compounding interest;[51] but it has been frequently held that such rests should be made, whenever the custom of dealing between the parties, the known usages of trade, or the peculiar circumstances of the case require it.[52]

D. Partial Payments — 1. Application. Where partial payments are made the rule is to apply the payments in the first place to the discharge of the interest then due. If a payment exceeds the interest then due, the surplus goes toward discharging the principal, and interest is to be computed thereafter on the balance of the principal. If the payment is less than the interest, the surplus of interest must not be taken to augment the principal, but interest continues on the former principal until the payments, taken together, exceed the interest due, and then the surplus is to be applied toward discharging the principal, and interest is

175 Pa. St. 459, 34 Atl. 801; Parker *v.* Cousins, 2 Gratt. (Va.) 372, 44 Am. Dec. 388.

The day on which a note is discounted is to be excluded in the computation of interest; but a day's interest has accrued at any time of the next day. Burlington Bank *v.* Durkee, 1 Vt. 399. See also French *v.* Kennedy, 7 Barb. (N. Y.) 452.

49. See Slaughter *v.* Slaughter, 21 Ind. App. 641, 52 N. E. 994; Duncan *v.* Maryland Sav. Inst., 10 Gill & J. (Md.) 299; Duvall *v.* Farmers' Bank, 7 Gill & J. (Md.) 44.

50. Troxwell *v.* Fugate, Hard. (Ky.) 2; Huxford *v.* Eslow, 53 Mich. 179, 18 N. W. 630; Fosdick *v.* Van Husan, 21 Mich. 567. *Compare* Yancy *v.* Mutter, 1 N. C. 560.

51. *Alabama.* — Noble *v.* Moses, 81 Ala. 530, 1 So. 217, 60 Am. Rep. 175; Marr *v.* Southwick, 2 Port. 351.

Iowa.— Rew *v.* Sioux City Independent School Dist., 125 Iowa 28, 98 N. W. 802, 106 Am. St. Rep. 282.

Michigan.— Grover *v.* Fox, 36 Mich. 461.

Minnesota.— Brewster *v.* Wakefield, 1 Minn. 352, 69 Am. Dec. 343.

New Hampshire.— Ashuelot R. Co. *v.* Elliot, 57 N. H. 397; Townsend *v.* Riley, 46 N. H. 300; Folsom *v.* Plumer, 43 N. H. 469; Drew *v.* Towle, 30 N. H. 531, 64 Am. Dec. 309.

New York.— Seymour *v.* Spring Forest Cemetery Assoc., 157 N. Y. 697, 51 N. E. 1094 [*affirming* 4 N. Y. App. Div. 359, 38 N. Y. Suppl. 726]; Bennett *v.* Cook, 2 Hun 526, 5 Thomps. & C. 134; Hosack *v.* Rogers, 9 Paige 461.

Ohio.— Marietta Iron Works *v.* Lottimer, 25 Ohio St. 621; Averill Coal, etc., Co. *v.* Verner, 22 Ohio St. 372; Hunter *v.* Hall, 14 Ohio Cir. Ct. 425, 6 Ohio Cir. Dec. 366; Stoppel *v.* Kraus, 4 Ohio Dec. (Reprint) 106, 1 Clev. L. Rep. 31; Stuart *v.* Day, 2 Ohio Dec. (Reprint) 477, 3 West. L. Month. 214.

Utah.— Jones *v.* Galigher, 9 Utah 126, 33 Pac. 417.

See 29 Cent. Dig. tit. "Interest," § 131.

52. *California.*— Sanderson's Estate, 74 Cal. 199, 15 Pac. 753.

Dakota.— Hovey *v.* Edmison, 3 Dak. 449, 22 N. W. 594.

Iowa.— Islett *v.* Oglevie, 9 Iowa 313.

Kentucky.— Farmers Bank *v.* Calk, 4 Ky. L. Rep. 617.

Massachusetts.— Hayward *v.* Cain, 110 Mass. 273.

Michigan.— Ruloff *v.* Hazen, 124 Mich. 570, 83 N. W. 370; Emerson *v.* Atwater, 12 Mich. 314.

New Hampshire.— Hollister *v.* Barkley, 11 N. H. 501.

New Jersey.— Updike *v.* Ten Broeck, 32 N. J. L. 105.

New York.— Barrow *v.* Rhinelander, 1 Johns. Ch. 550; Andrews *v.* Andrews, 3 Bradf. Surr. 99.

Tennessee.— Woods *v.* Rankin, 2 Heisk. 46.

Vermont.— Yearteau *v.* Bacon, 65 Vt. 516, 27 Atl. 198; Flannery *v.* Flannery, 58 Vt. 576, 5 Atl. 507; Spencer *v.* Woodbridge, 38 Vt. 492; Goodnow *v.* Parsons, 36 Vt. 46; Langdon *v.* Castleton, 30 Vt. 285.

England.— Bruce *v.* Hunter, 3 Campb. 467.

Canada.— Landman *v.* Crooks, 4 Grant Ch. (U. C.) 353.

See 29 Cent. Dig. tit. "Interest," § 131.

Rests in charging interest against fiduciaries see Executors and Administrators; Guardian and Ward; Trusts.

On an accounting by a mortgagee in possession in an action to redeem, where the annual rents exceeded the annual interest on the mortgage, annual rests should be made, and interest allowed to the mortgagor on the surplus. Green *v.* Wescott, 13 Wis. 606. See also Reed *v.* Reed, 10 Pick. (Mass.) 398.

Time for making rests.— In the absence of any evidence of a different understanding between the parties, the first rest is to be made at the end of one year from the commencement of the account, and so from year to year, and not necessarily on the first day of January next after the account accrued. Carpenter *v.* Welch, 40 Vt. 251.

to be computed on the balance of the principal as before.[53] Where interest is payable in periodical instalments which themselves bear interest from maturity,

53. *Alabama.*— Vaughan *v.* Smith, 69 Ala. 92.

Arkansas.— Rogers *v.* Yarnell, 51 Ark. 198, 10 S. W. 622.

California.— Moss *v.* Odell, 141 Cal. 335, 74 Pac. 999; Den's Estate, 35 Cal. 692; Backus *v.* Minor, 3 Cal. 231.

Florida.— Hart *v.* Dorman, 2 Fla. 445, 50 Am. Dec. 285.

Georgia.—Wade *v.* Powell, 31 Ga. 1.

Illinois.— Heartt *v.* Rhodes, 66 Ill. 351; Steere *v.* Hoagland, 50 Ill. 377; McFadden *v.* Fortier, 20 Ill. 509.

Indiana.— Jacobs *v.* Ballenger, 130 Ind. 231, 29 N. E. 782, 15 L. R. A. 169; McCormick *v.* Mitchell, 57 Ind. 248; Markel *v.* Spitler, 28 Ind. 488; Wasson *v.* Gould, 3 Blackf. 18; Harvey *v.* Crawford, 2 Blackf. 43.

Iowa.— Fockler *v.* Beach, 32 Iowa 187; Smith *v.* Coopers, 9 Iowa 376; Huner *v.* Doolittle, 3 Greene 76, 54 Am. Dec. 489.

Kentucky.— Riddle *v.* Lewis, 7 Bush 193; Taylor *v.* Knox, 5 Dana 466; Guthrie *v.* Wickliffe, 1 A. K. Marsh. 584.

Louisiana.— Coco's Succession, 32 La. Ann. 325; Bird *v.* Lobdell, 10 La. Ann. 159; Union Bank *v.* Lobdell, 10 La. Ann. 130; Estebene *v.* Estebene, 5 La. Ann. 738.

Maine.— Pierce *v.* Faunce, 53 Me. 351; Leonard *v.* Wildes, 36 Me. 265.

Maryland.— Williar *v.* Baltimore Butchers' Loan, etc., Assoc., 45 Md. 546; Lamott *v.* Sterett, 1 Harr. & J. 42; Chapline *v.* Scott, 4 Harr. & M. 91.

Massachusetts.— Downer *v.* Whittier, 144 Mass. 448, 11 N. E. 585; Reed *v.* Reed, 10 Pick. 398; Fay *v.* Bradley, 1 Pick. 194; Dean *v.* Williams, 17 Mass. 417.

Michigan.— Wallace *v.* Glaser, 82 Mich. 190, 46 N. W. 227, 21 Am. St. Rep. 556; Payne *v.* Avery, 21 Mich. 524.

Minnesota.— Betcher *v.* Hodgman, 63 Minn. 30, 65 N. W. 96, 56 Am. St. Rep. 447; Whittacre *v.* Fuller, 5 Minn. 508.

Mississippi.— Brooks *v.* Robinson, 54 Miss. 272; Martin *v.* Harden, 52 Miss. 694; Houston *v.* Crutcher, 31 Miss. 51; Stewart *v.* Stebbins, 30 Miss. 66; Bond *v.* Jones, 8 Sm. & M. 368.

Missouri.— Way *v.* Priest, 87 Mo. 180; Riney *v.* Hill, 14 Mo. 500, 55 Am. Dec. 119.

Nebraska.— Dickson *v.* Stewart, (1904) 98 N. W. 1085; Davis *v.* Neligh, 7 Nebr. 78; Mills *v.* Saunders, 4 Nebr. 190.

New Hampshire.— Ross *v.* Russell, 31 N. H. 386; Drew *v.* Towle, 30 N. H. 531, 64 Am. Dec. 309.

New Jersey.— Baker *v.* Baker, 28 N. J. L. 13, 75 Am. Dec. 243; Meredith *v.* Banks, 6 N. J. L. 408; Stark *v.* Hunton, 3 N. J. Eq. 300.

New York.— French *v.* Kennedy, 7 Barb. 452; Bathgate *v.* Haskin, 5 Daly 361; Smith *v.* Fox, 2 N. Y. City Ct. 339; Stoughton *v.* Lynch, 2 Johns. Ch. 209.

North Carolina.— Reade *v.* Street, 122 N. C. 301, 30 S. E. 124; Garrett *v.* Love, 90 N. C. 368; Overby *v.* Fayetteville Bldg., etc., Assoc., 81 N. C. 56; North *v.* Mallett, 3 N. C. 151; Anonymous, 3 N. C. 17; Bunn *v.* Moore, 2 N. C. 279.

Ohio.— Miami Exporting Co. *v.* U. S. Bank, 5 Ohio 260; Hammer *v.* Nevill, Wright 169.

Pennsylvania.— Bell's Appeal, 115 Pa. St. 88, 8 Atl. 177, 2 Am. St. Rep. 532; Spires *v.* Hamot, 8 Watts & S. 17.

South Carolina.— Manning *v.* Norwood, 2 Nott & M. 395; Singleton *v.* Allen, 2 Strobh. Eq. 166; Teague *v.* Dendy, 2 McCord Eq. 207, 16 Am. Dec. 643; Wright *v.* Wright, 2 McCord Eq. 185.

Tennessee.— Curd *v.* Davis, 1 Heisk. 574; Mills *v.* Mills, 3 Head 705; Scanland *v.* Houston, 5 Yerg. 310.

Texas.— Tooke *v.* Bonds, 29 Tex. 419.

Virginia.— Fultz *v.* Davis, 26 Gratt. 903; Lightfoot *v.* Price, 4 Hen. & M. 431; De Ende *v.* Wilkinson, 2 Patt. & H. 663; Ross *v.* Pleasants, Wythe 10.

West Virginia.— Ward *v.* Ward, 21 W. Va. 262; Hurst *v.* Hite, 20 W. Va. 183.

Wisconsin.— Hill *v.* Durand, 58 Wis. 160, 15 N. W. 390; Case *v.* Fish, 58 Wis. 56, 15 N. W. 808; Reed *v.* Jones, 15 Wis. 40.

United States.— Story *v.* Livingston, 13 Pet. 359, 10 L. ed. 200; Russell *v.* Lucas, 21 Fed. Cas. No. 12,156*a*, Hempst. 91; Smith *v.* Shaw, 22 Fed. Cas. No. 13,107, 2 Wash. 167.

Canada.— Barnum *v.* Turnbull, 13 U. C. Q. B. 277; McGregor *v.* Gaulin, 4 U. C. Q. B. 378; Bettes *v.* Farewell, 15 U. C. C. P. 450.

See 29 Cent. Dig. tit. "Interest," § 132; and COMMERCIAL Paper, 8 Cyc. 314 note 99.

Where a reference is ordered to ascertain the amount of a debt by stating an account between the parties, interest on the items will be allowed on the principle of partial payments, unless another method of computation was established by an agreement between the parties. Clift *v.* Moses, 75 Hun (N. Y.) 517, 27 N. Y. Suppl. 728; Reed *v.* Jones, 15 Wis. 40. See also Houston *v.* Crutcher, 31 Miss. 51.

Rule applies to payments made on judgments. *Massachusetts.*— Fay *v.* Bradley, 1 Pick. 194.

Nebraska.— Rawlings *v.* Anheuser-Busch Brewing Assoc., (1903) 94 N. W. 1001; Mills *v.* Saunders, 4 Nebr. 190.

New Hampshire.— Hodgdon *v.* Hodgdon, 2 N. H. 169.

Pennsylvania.— Com. *v.* Vanderslice, 8 Serg. & R. 452.

Virginia.— De Ende *v.* Wilkinson, 2 Patt. & H. 663.

Canada.— Cummings *v.* Usher, 1 Ont. Pr. 15.

See 29 Cent. Dig. tit. "Interest," § 132.

partial payments are to be first applied to the discharge of the interest accrued upon interest, then to the discharge of the interest upon the principal, and lastly to the discharge of the principal itself.[54] Where interest on a bond payable in instalments, although running from its date, is not payable until the principal is payable, a partial payment made before the principal falls due is to be applied to the extinguishment of principal and such proportion of interest as has accrued on the principal so extinguished.[55]

2. INTEREST ON PARTIAL PAYMENTS. In the absence of some agreement providing for such method of computation, interest is not generally allowed upon partial payments made upon the principal debt, and it is error to compute interest on the principal to some day subsequent to the partial payment, and on that day to apply the payment, with interest thereon, to the principal and accrued interest.[56]

3. MERCANTILE RULE. Some cases have adopted a method known as the mercantile rule, in conformity with the custom of the parties, or the usage of the trade in which they are engaged. By this method the account is stated, calculating interest upon each item of the debt on the one side, and allowing interest upon each payment on the other.[57]

E. Application of Set-Off. It has been held that if a debtor whose obligation bears interest becomes entitled to set off a non-interest-bearing claim against the creditor, the original debt is deemed to be acquitted to the extent of the set-off and thereafter interest runs only on the balance.[58]

F. Compound Interest — 1. IN GENERAL.[59] The general rule is that in the absence of contract therefor, express or implied, or of some statute requiring it, compound interest is not allowed to be computed upon a debt;[60] but this rule is

Payment before debt due see Jacobs *v.* Ballenger, 130 Ind. 231, 29 N. E. 782, 15 L. R. A. 169.

54. *Arkansas.*— Vaughan *v.* Kennan, 38 Ark. 114.

New Hampshire.— Townsend *v.* Riley, 46 N. H. 300; Little *v.* Riley, 43 N. H. 109.

North Carolina.—Bratton *v.* Allison, 70 N. C. 498.

Ohio.— Anketel *v.* Converse, 17 Ohio St. 11, 91 Am. Dec. 115.

Wyoming.— Farm Inv. Co. *v.* Wyoming College, etc., 10 Wyo. 240, 68 Pac. 561.

See 29 Cent. Dig. tit. "Interest," § 132.

55. Williams *v.* Houghtaling, 3 Cow. (N. Y.) 86.

56. *Alabama.*— Handley *v.* Dobson, 7 Ala. 359.

Illinois.— Heartt *v.* Rhodes, 66 Ill. 351.

Kentucky.— Henderson Cotton Mfg. Co. *v.* Lowell Mach. Shops, 86 Ky. 668, 7 S. W. 142, 9 Ky. L. Rep. 831.

Maine.— See Parker *v.* Moody, 58 Me. 70.

Maryland.— Hopper *v.* Williams, 95 Md. 734, 51 Atl. 167.

Minnesota.— Barnes *v.* Mendenhall, 80 Minn. 383, 83 N. W. 391.

New Hampshire.— Drew *v.* Towle, 30 N. H. 531, 64 Am. Dec. 309.

New Jersey.— Horner *v.* Delaware, etc., Canal Co., 16 N. J. L. 265.

South Carolina.— Killian *v.* Herndon, 4 Rich. 609. But see De Bruhl *v.* Neuffer, 1 Strobh. 426.

Virginia.— Fultz *v.* Davis, 26 Gratt. 903; De Ende *v.* Wilkinson, 2 Patt. & H. 663.

United States.— McGill *v.* U. S. Bank, 12 Wheat. 511, 6 L. ed. 711.

See 29 Cent. Dig. tit. "Interest," § 133.

Contra.— Tracy *v.* Wickoff, 1 Dall. (Pa.) 124, 1 L. ed. 65.

Such a method of computation is too favorable to the debtor, and might eventuate in a reversed relationship, the creditor becoming the debtor. Hart *v.* Dorman, 2 Fla. 445, 50 Am. Dec. 285; Henderson Cotton Mfg. Co. *v.* Lowell Mach. Shops, 86 Ky. 668, 7 S. W. 142, 9 Ky. L. Rep. 831; Stoughton *v.* Lynch, 2 Johns. Ch. (N. Y.) 210; McGregor *v.* Gaulin, 4 U. C. Q. B. 378. See also Townsend *v.* Riley, 46 N. H. 300.

Where interest is allowed on sums paid on a note before maturity, an amount allowed by arbitration as a reduction of the principal by reason of a partial failure of consideration, and indorsed on the note is not to be taken as a part payment entitled to the allowance of interest, but merely as so much stricken from the face of the note. Russell *v.* Klink, 53 Mich. 161, 18 N. W. 627.

57. Pearson *v.* Grice, 8 Fla. 214; Gay *v.* Berkey, (Mich. 1904) 100 N. W. 920; Hart *v.* Dewey, 2 Paige (N. Y.) 207; Stoughton *v.* Lynch, 2 Johns. Ch. (N. Y.) 210. See also Backus *v.* Minor, 3 Cal. 321. *Contra*, Averill Coal, etc., Co. *v.* Verner, 22 Ohio St. 372; Lewis *v.* Bacon, 3 Hen. & M. (Va.) 89.

58. Meriwether *v.* Bird, 9 Ga. 594.

59. See COMMERCIAL PAPER, 8 Cyc. 314.

60. *Alabama.*— Hunt *v.* Stockton Lumber Co., 113 Ala. 387, 21 So. 454.

Arkansas.— Vaughan *v.* Kennan, 38 Ark. 114.

California.— Finger *v.* McCaughey, 114 Cal. 64, 45 Pac. 1004.

Colorado.— Denver Brick, etc., Co. *v.* McAllister, 6 Colo. 261.

Georgia.— Wade *v.* Powell, 31 Ga. 1.

subject to the exceptions growing out of peculiar relations between the parties, or the fraudulent conduct of the debtor; and courts of equity sometimes allow the compounding of interest, in order to accomplish a just and equitable settlement.[61]

2. ACCOUNTS. In stating or settling accounts it is not permissible to make

Illinois.— Darst *v.* Bates, 95 Ill. 493; Barker *v.* International Bank, 80 Ill. 96; Baker *v.* Scott, 62 Ill. 86; Leonard *v.* Villar, 23 Ill. 377.

Indiana.— Niles *v.* Sinking Fund Com'rs, 8 Blackf. 158.

Iowa.— Dubuque Lumber Co. *v.* Kimball, 111 Iowa 48, 82 N. W. 458.

Kentucky.— Rodes *v.* Blythe, 2 B. Mon. 335; Carpenter *v.* Rice, 78 S. W. 458, 25 Ky. L. Rep. 704.

Louisiana.— Lee *v.* Goodrich, 21 La. Ann. 278; Desorme's Succession, 10 Rob. 474; New Orleans *v.* Commercial Bank, 5 Rob. 234; Nerault *v.* Dodd, 3 La. 430.

Maine.— Bradley *v.* Merrill, 91 Me. 340, 40 Atl. 132; Whitcomb *v.* Harris, 90 Me. 206, 38 Atl. 138; Lewis *v.* Small, 75 Me. 323; Stone *v.* Locke, 46 Me. 445; Kittredge *v.* McLaughlin, 38 Me. 513; Greenleaf *v.* Hill, 31 Me. 562.

Massachusetts.— Parker *v.* Simpson, 180 Mass. 334, 62 N. E. 401; Hodgkins *v.* Price, 141 Mass. 162, 5 N. E. 502.

Missouri.— Williams *v.* Carroll County, 167 Mo. 9, 66 S. W. 955; Clemens *v.* Dryden, 6 Mo. App. 597.

Montana.— Wilson *v.* Davis, 1 Mont. 183.

New Jersey.— Borce *v.* Elizabeth, 28 N. J. Eq. 403.

New York.— Forman *v.* Forman, 17 How. Pr. 255; Barrow *v.* Rhinelander, 1 Johns. Ch. 550; Connecticut *v.* Jackson, 1 Johns. Ch. 13, 7 Am. Dec. 471.

Ohio.— Cook *v.* Courtright, 40 Ohio St. 248, 48 Am. Rep. 681; Averill Coal, etc., Co. *v.* Verner, 22 Ohio St. 372; Mattocks *v.* Humphrey, 17 Ohio 336; Goodhart *v.* Rastert, 10 Ohio S. & C. Pl. Dec. 40, 7 Ohio N. P. 534; Rosenbaum *v.* Pendleton, 9 Ohio S. & C. Pl. Dec. 642, 7 Ohio N. P. 364.

Pennsylvania.— Stokely *v.* Thompson, 34 Pa. St. 210; Biggs *v.* Funk, 5 Watts 478; Millick *v.* Philadelphia, 11 Phila. 354.

Tennessee.—Union Bank *v.* Williams, 3 Coldw. 579; Cocke *v.* Trotter, 10 Yerg. 213.

Vermont.— Smith *v.* Rogers, 35 Vt. 140.

Virginia.— Pindall *v.* Marietta Bank, 10 Leigh 481.

Washington.— Cullen *v.* Whitham, 33 Wash. 366, 74 Pac. 581.

United States.— Gaines *v.* New Orleans, 17 Fed. 16, 4 Woods 213.

England.— Crosskill *v.* Bower, 32 Beav. 86, 32 L. J. Ch. 540, 9 Jur. N. S. 267, 8 L. T. Rep. N. S. 135, 11 Wkly. Rep. 411, 55 Eng. Reprint 34; Wilkinson *v.* Charlesworth, 2 Beav. 470, 17 Eng. Ch. 470, 48 Eng. Reprint 1263; Fergusson *v.* Fyffe, 8 Cl. & F. 121, 8 Eng. Reprint 49; Rigby *v.* Macnamara, 2 Cox Ch. 415, 2 Rev. Rep. 92, 30 Eng. Reprint 192; Combe *v.* Acland, Dick. 436, 21 Eng. Reprint 339; Turner *v.* Turner, 1 Jac. & Walk. 39, 37 Eng. Reprint 290; Tompson *v.* Leith, 4 Jur. N. S. 1091; Gowland *v.* De Farria, 17 Ves. Jr. 20, 11 Rev. Rep. 9, 34 Eng. Reprint 8; Waring *v.* Cunliffe, 1 Ves. Jr. 99, 1 Rev. Rep. 88, 30 Eng. Reprint 240.

See 29 Cent. Dig. tit. "Interest," §§ 134, 136.

Interest upon interest cannot bear interest. Anketel *v.* Converse, 17 Ohio St. 11, 91 Am. Dec. 115.

Inclusion of interest in note.— The including in a note, payable a year after date, with ten per cent interest until paid, of a year's interest, is not compounding interest. Foard *v.* Grinter, (Ky. 1892) 18 S. W. 1034.

61. *Connecticut.*— Sanford *v.* Bulkley, 30 Conn. 344.

Georgia.— Wofford *v.* Wyly, 72 Ga. 863.

Maryland.— Rayner *v.* Bryson, 29 Md. 473.

New York.— *In re* Kernochan, 104 N. Y. 618, 11 N. E. 149; Forman *v.* Forman, 17 How. Pr. 255; Jackson *v.* Campbell, 5 Wend. 572.

North Carolina.— Little *v.* Anderson, 71 N. C. 190.

Pennsylvania.— Roberts' Appeal, 92 Pa. St. 407; Fink's Estate, 4 Phila. 191.

South Carolina.— Street *v.* Laurens, 5 Rich. Eq. 227; McCauley *v.* Heriot, Riley Eq. 19.

Tennessee.— Woods *v.* Rankin, 2 Heisk. 46.

Texas.— See Robertson *v.* Parrish, (Civ. App. 1897) 39 S. W. 646.

England.— Burdick *v.* Garrick, L. R. 5 Ch. 233, 39 L. J. Ch. 369, 18 Wkly. Rep. 387; Nightingale *v.* Lawson, 1 Bro. Ch. 440, 28 Eng. Reprint 1227.

See 29 Cent. Dig. tit. "Interest," §§ 134, 136.

Allowance in equity.— The allowance of compound interest is often essential to carry into complete effect the principle of the court of equity that no profit or gain or advantage shall be derived by a trustee from the use of trust funds. Schieffelin *v.* Stewart, 1 Johns. Ch. (N. Y.) 620, 7 Am. Dec. 507.

Where a sale of solvent decedent's estate is made on credit for payment of debts, the creditors are entitled to interest compounded from the date of the sale. Ellicott *v.* Ellicott, 6 Gill & J. (Md.) 35.

Acceptance of less than debt with interest. —Where a debtor tenders to his creditor an amount which does not include interest, and the creditor receives the same under protest, it is not error to allow interest on the balance found due, although it consists wholly of interest. Thomson's Estate, 12 Phila. (Pa.) 131. *Compare* Dunbar *v.* Woodcock, 10 Leigh (Va.) 628.

In computing the amount due on a replevin bond, it is proper to add interest to the principal and allow the aggregate sum to draw interest from the date of the bond. Hatcher *v.* Kelly, 1 Bibb (Ky.) 282.

periodical rests, striking a balance at each rest, including interest, and to make such balance a new principal, and compute interest thereon for the next period, and so on;[62] but where an account is settled and a balance struck, interest is properly computed thereafter on such balance, although it includes interest up to date.[63] It has been held, however, in some cases that where it was the custom of the creditor, known to and acquiesced in by the debtor, to strike periodical balances, including interest, and compute interest thereon for the next period, such mode of computation may be permitted.[64]

3. JUDGMENTS. A judgment bears interest upon the whole amount thereof although such amount is made up partly of interest on the original debt.[65]

62. *Alabama.*— Hunt *v.* Stockton Lumber Co., 113 Ala. 387, 21 So. 454; Marr *v.* Southwick, 2 Port. 351.

Louisiana.— Ledoux *v.* Goza, 4 La. Ann. 160.

Massachusetts.— Von Hemert *v.* Porter, 11 Metc. 210.

Ohio.— Averill Coal, etc., Co. *v.* Verner, 22 Ohio St. 372.

Pennsylvania.— Graham *v.* Williams, 16 Serg. & R. 257, 16 Am. Dec. 569.

Utah.— See Jones *v.* Galigher, 9 Utah 126, 33 Pac. 417.

Virginia.— Lewis *v.* Bacon, 3 Hen. & M. 89.

England.— Page *v.* Broom, 4 Cl. & F. 436, 7 Eng. Reprint 168. See also Dawes *v.* Pinner, 2 Campb. 486 note.

See 29 Cent. Dig. tit. "Interest," § 135.

In Vermont the rule as to book-accounts is to make annual rests and allow interest thereafter to the party to whom the balance is found to be due. Flannery *v.* Flannery, 58 Vt. 576, 5 Atl. 507; Davis *v.* Smith, 48 Vt. 52; Goodnow *v.* Parsons, 36 Vt. 46; Langdon *v.* Castleton, 30 Vt. 285; Williams *v.* Finney, 16 Vt. 297; Raymond *v.* Isham, 8 Vt. 258; Bates *v.* Starr, 2 Vt. 536, 21 Am. Dec. 568. But the extent to which this doctrine is carried is to cast simple interest on the yearly balances up to the time of final adjustment, but not to allow interest on such interest. Flannery *v.* Flannery, *supra*; Birchard *v.* Knapp, 31 Vt. 679; Langdon *v.* Castleton, 30 Vt. 285; Wheelock *v.* Moulton, 13 Vt. 430.

At the close of an administration account, the interest due from the administrator is not to bear interest. Morris *v.* Morris, 4 Gratt. (Va.) 293. The same is true of a guardian's account. Cunningham *v.* Cunningham, 4 Gratt. (Va.) 43.

63. *Arkansas.*— Crary *v.* Carradine, 4 Ark. 216.

Florida.— See Pearson *v.* Grice, 8 Fla. 214.

Louisiana.— Brodnak *v.* Steinhardt, 48 La. Ann. 682, 19 So. 572; Keane *v.* Branden, 12 La. Ann. 20; Sentell *v.* Kennedy, 29 La. Ann. 679; Thompson *v.* Mylne, 4 La. Ann. 206 [*followed* in Pickersgill *v.* Brown, 7 La. Ann. 297].

New York.— Connecticut *v.* Jackson, 1 Johns. Ch. 13, 7 Am. Dec. 471.

Ohio.— Goodhart *v.* Rastert, 10 Ohio S. & C. Pl. Dec. 40, 7 Ohio N. P. 534.

Pennsylvania.— McClelland *v.* West, 70 Pa. St. 183.

United States.— Bainbridge *v.* Wilcocks, 2 Fed. Cas. No. 755, Baldw. 536; York *v.* Wistar, 30 Fed. Cas. No. 18,141.

See 29 Cent. Dig. tit. "Interest," § 135.

64. Isett *v.* Oglevie, 9 Iowa 313; Barclay *v.* Kennedy, 2 Fed. Cas. No. 976, 3 Wash. 350. See also Eaton *v.* Bell, 5 B. & Ald. 34, 7 Exch. 30, 7 E. C. L. 30; Morgan *v.* Mather, 2 Ves. Jr. 15, 2 Rev. Rep. 163, 30 Eng. Reprint 500.

65. *Arkansas.*— Norris *v.* State, 22 Ark. 524.

California.— Corcoran *v.* Doll, 32 Cal. 82; Bibend *v.* Liverpool, etc., Ins. Co., 30 Cal. 78; Lane *v.* Gluckauf, 28 Cal. 288, 87 Am. Dec. 121; Mount *v.* Chapman, 9 Cal. 294; Emeric *v.* Tams, 6 Cal. 155; Guy *v.* Franklin, 5 Cal. 416. *Compare* Quivey *v.* Hall, 19 Cal. 97.

Florida.— Fuller *v.* Fuller, 23 Fla. 236, 2 So. 426.

Illinois.— Barker *v.* International Bank, 80 Ill. 96; Stevens *v.* Coffeen, 39 Ill. 148. See also Phillips *v.* Edsall, 127 Ill. 535, 20 N. E. 801.

Indiana.— Stanton *v.* Woodcock, 19 Ind. 273.

Massachusetts.— East Tennessee Land Co. *v.* Leeson, 185 Mass. 4, 69 N. E. 351. *Compare* McKim *v.* Blake, 139 Mass. 593, 2 N. E. 157.

Missouri.— Corley *v.* McKeag, 57 Mo. App. 415.

Montana.— Palmer *v.* Murray, 8 Mont. 312, 21 Pac. 126.

Ohio.— Campbell *v.* Campbell, 3 Ohio Cir. Ct. 449, 2 Ohio Cir. Dec. 256.

Pennsylvania.— Flanagin *v.* Wetherill, 5 Whart. 280; Mohn *v.* Hiester, 6 Watts 53; McCausland *v.* Bell, 9 Serg. & R. 388.

South Carolina.— Lambkin *v.* Nance, 2 Brev. 99.

Texas.— Washington *v.* Denton First Nat. Bank, 64 Tex. 4; Heidenheimer *v.* Johnson, 76 Tex. 200, 13 S. W. 46; Hagood *v.* Aikin, 57 Tex. 511; International, etc., R. Co. *v.* Dimmit County Pasture Co., 5 Tex. Civ. App. 186, 23 S. W. 754; Llano Imp. Co. *v.* Watkins, 4 Tex. Civ. App. 428, 23 S. W. 612.

Virginia.— Stuart *v.* Hurt, 88 Va. 343, 13 S. E. 438; Kraker *v.* Shields, 20 Gratt. 377; Laidley *v.* Merrifield, 7 Leigh 346. But see Cunningham *v.* Cunningham, 4 Gratt. 43.

West Virginia.— Barbour *v.* Tompkins, 31 W. Va. 410, 7 S. E. 1; Lamb *v.* Cecil, 25 W. Va. 288; Pickens *v.* McCoy, 24 W. Va. 344; Ruffner *v.* Hewitt, 14 W. Va. 737.

G. Errors in Computation. Where interest has been paid in accordance with a computation found to be erroneous, the intention being to pay the correct sum, the party injured by the error may recover the excess or deficit.[66] Error in the allowance of interest in a judgment, when ascertainable by mere computation, will generally be corrected by permitting the prevailing party to remit the excess of interest, without a reversal of the judgment.[67] Such an error has been corrected by the appellate court itself and judgment for the proper amount entered, without remanding the case to the court below;[68] but in other instances the appel-

See 29 Cent. Dig. tit. "Interest," § 137.

Contra.— Chamberlain *v.* Maitland, 5 B. Mon. (Ky.) 448; De Lizardi *v.* Hardaway, 8 Rob. (La.) 20; Hyde *v.* Brown, 5 La. 33; Nerault *v.* Dodd, 3 La. 430; Mobray *v.* Leckie, 42 Md. 474; Boarman *v.* Patterson, 1 Gill (Md.) 372; Stricklin *v.* Cooper, 55 Miss. 624. See also Kelly *v.* Smith, 1 Metc. (Ky.) 313.

The fact that the interest is separately stated in the judgment does not prevent the whole judgment from bearing interest. Coles *v.* Kelsey, 13 Tex. 75.

Where a judgment is revived by several writs of scire facias, plaintiff has a right to charge interest due on the aggregate amount of principal and interest at the time of rendering judgment on each scire facias. Fries *v.* Watson, 5 Serg. & R. (Pa.) 220 [*followed* in *In re* Meason, 5 Watts (Pa.) 464, 4 Watts 341]. See also Cathcart's Appeal, 13 Pa. St. 416.

In an action upon a judgment interest upon the first judgment should be allowed, although that included interest on the debt, and the new judgment will bear interest upon its entire amount. Corley *v.* McKeag, 57 Mo. App. 415. *Contra,* Pinckney *v.* Singleton, 2 Hill (S. C.) 343.

Compound interest on judgment.— Where the statute provides that judgments shall bear the same rate of interest as the contract sued on, a judgment rendered on a contract providing for compound interest will bear compound interest. Catron *v.* Lafayette County, 125 Mo. 67, 28 S. W. 331.

Interest on award.— Interest is allowed from the time of an award of arbitrators, although made up partly of interest. Hepburn *v.* Dunlop, 1 Wheat. (U. S.) 179, 4 L. ed. 65.

Exceptional cases sometimes arise where it is inequitable that interest, by way of damages, should be given. Thus in an action on a judgment, the amount of which was doubled by eight per cent interest, a portion of which was compounded, the court may refuse to allow interest on the judgment. Downs *v.* Allen, 22 Fed. 805, 23 Blatchf. 54.

Judgment as security.— Where plaintiff obtained a verdict and the parties agreed that judgment should be entered as security for whatever might be ultimately recovered in a new trial granted by the court, interest ought not to be calculated on the amount of the judgment, which included principal and interest, but only on the sum originally due. Roberts *v.* Wheelen, 3 Dall. (Pa.) 506, 1 L. ed. 698.

Subsequent decree in same cause.— Where there has been an aggregation of principal and interest and a decree entered for the same with interest thereon from date, there cannot be a second aggregation of the same debt in the same cause in a subsequent decree providing for the payment of the first decree. Tiernan *v.* Minghini, 28 W. Va. 314.

66. Robinson *v.* Walker, 50 Mo. 19; Boon *v.* Miller, 16 Mo. 457; Thompson *v.* Otis, 42 Barb. (N. Y.) 461.

67. *Alabama.*— Evans *v.* Irvin, 1 Port. 390; Hunt *v.* Mayfield, 2 Stew. 124.

Arkansas.— Joyner *v.* Turner, 19 Ark. 690.

Illinois.— Cooper *v.* Johnson, 27 Ill. App. 504.

Indiana.— Richards *v.* McPherson, 74 Ind. 158.

Michigan.— Bresnahan *v.* Nugent, 97 Mich. 359, 56 N. W. 765.

Missouri.— State *v.* Hope, 121 Mo. 34, 25 S. W. 893; Kimes *v.* St. Louis, etc., R. Co., 85 Mo. 611.

New York.— Jamieson *v.* New York, etc., R. Co., 11 N. Y. App. Div. 50, 42 N. Y. Suppl. 915; Day *v.* New York Cent. R. Co., 22 Hun 412; Home Ins. Co. *v.* Pennsylvania R. Co., 11 Hun 182.

North Dakota.— Johnson *v.* Northern Pac. R. Co., 1 N. D. 354, 48 N. W. 227.

Ohio.— Averill Coal, etc., Co. *v.* Verner, 22 Ohio St. 372.

Pennsylvania.— Emerson *v.* Schoonmaker, 135 Pa. St. 437, 19 Atl. 1025; Richards *v.* Citizen Natural Gas Co., 130 Pa. St. 37, 18 Atl. 600; U. S. *v.* Poulson, 19 Wkly. Notes Cas. 500.

South Carolina.— Holmes *v.* Misroon, 3 Brev. 209.

Tennessee.— Louisville, etc., R. Co. *v.* Wallace, 91 Tenn. 35, 17 S. W. 882, 17 L. R. A. 548.

Texas.— Texas, etc., R. Co. *v.* Carr, 91 Tex. 332, 43 S. W. 18.

United States.— Washington, etc., R. Co. *v.* Tobriner, 147 U. S. 571, 13 S. Ct. 557, 37 L. ed. 284.

Contra.— Dyer *v.* Seals, 7 La. 131; Frank *v.* Morrison, 55 Md. 399.

The court below cannot require a remission of interest erroneously allowed in a judgment, at a subsequent term of the court when the power of the court over the case is at an end. Nelson *v.* Cartmel, 6 Dana (Ky.) 7.

68. Insurance Co. of North America *v.* Forcheimer, 86 Ala. 541, 5 So. 870; Jean *v.* Sandiford, 39 Ala. 317; Atherton *v.* Fowler,

late court has remanded the case with a direction to the trial court to correct the error and enter judgment for the proper amount.[69] Where the amount of interest erroneously allowed is insignificant, it has been held, under the doctrine of *de minimis*, not to require correction.[70]

VII. RECOVERY.[71]

A. Nature and Form of Remedy. It is optional with a party whether he will claim the whole, part, or none of the interest allowed by law; but when he sues for it the claim for interest must stand or fall with the principal debt.[72] The general count for money had and received, in an action brought upon an interest-bearing demand, is generally held to carry interest,[73] although the declaration contains no specific count for interest;[74] but it has been held that interest will not be recoverable on the general count for goods sold and delivered.[75] Where rent is collected by distress, no interest can be recovered in the distress proceeding.[76]

B. Interest as Incident to Principal. While in a number of cases interest is stated generally to be an incident of the debt, apparently without regard to the distinction between interest as damages and contractual interest,[77] the proper distinction is that where interest is payable by virtue of a contract, it is an integral part of the debt, as much so as the principal debt itself;[78] but where it is

46 Cal. 320; Randall *v.* Greenhood, 3 Mont. 506; Crawford *v.* Mail, etc., Pub. Co., 22 N. Y. App. Div. 54, 47 N. Y. Suppl. 747.

69. Chattanooga, etc., R. Co. *v.* Palmer, 89 Ga. 161, 15 S. E. 34; Wilson *v.* Sullivan, 17 Utah 341, 53 Pac. 994; Hepburn *v.* Dundas, 13 Gratt. (Va.) 219; Pacific Postal Tel. Cable Co. *v.* Fleischner, 66 Fed. 899, 14 C. C. A. 166.

Where the judgment is for a lump sum and the interest item is not apparent, the judgment will be remanded to the lower court for correction. King *v.* Southern Pac. Co., 109 Cal. 96, 41 Pac. 786, 29 L. R. A. 755.

70. Milton *v.* Blackshear, 8 Fla. 161; Mercer *v.* Vose, 67 N. Y. 56; Plymouth Tp. *v.* Graver, 125 Pa. St. 24, 17 Atl. 249, 11 Am. St. Rep. 867. See also Dean *v.* Chicago, etc., R. Co., 43 Wis. 305.

71. Interest on judgments see *supra*, III, D, 12, a.

72. *Alabama.*— Boddie *v.* Ely, 3 Stew. 182.

Illinois.— Bates *v.* Bulkley, 7 Ill. 389.

Indiana.— McClure *v.* Cole, 6 Blackf. 290.

Pennsylvania.— Evans *v.* Hall, 45 Pa. St. 235.

Vermont.— Paige *v.* Morgan, 28 Vt. 565.

See 29 Cent. Dig. tit. "Interest," § 138.

73. *Alabama.*— Porter *v.* Nash, 1 Ala. 452.

Illinois.— Tucker *v.* Page, 69 Ill. 179.

Indiana.— Hawkins *v.* Johnson, 4 Blackf. 21.

Massachusetts.— Hall *v.* Foster, 114 Mass. 18.

New Jersey.— Mott *v.* Pettit, 1 N. J. L. 298. But see North River Meadow Co. *v.* Christ Church, 22 N. J. L. 424, 53 Am. Rep. 258.

New York.— People *v.* Gasherie, 9 Johns. 71, 6 Am. Dec. 263; Pease *v.* Barber, 3 Cai. 266.

South Carolina.— Kimbrel *v.* Glover, 13 Rich. 191; Marvin *v.* McRae, Cheves 61.

Texas.— Houston *v.* Lubbock, 35 Tex. Civ. App. 106, 79 S. W. 851.

Vermont.— Baker *v.* Central Vermont R. Co., 56 Vt. 302.

England.— Robinson *v.* Bland, 2 Burr. 1077. See also Tappenden *v.* Randall, 2 B. & P. 467, 5 Rev. Rep. 662; Walker *v.* Constable, 1 B. & P. 306, 2 Esp. 659; Moses *v.* Macferlan, 2 Burr. 1005, 1 W. Bl. 219.

Canada.— Young *v.* Fluke, 15 U. C. C. P. 360; Bleakley *v.* Easton, 22 U. C. Q. B. 348.

See 29 Cent. Dig. tit. "Interest," § 138.

Nature of transaction must be stated.— Interest cannot be recovered on a general indebitatus count in assumpsit for money due and received, without stating the nature of the transaction. Brooks *v.* Holland, 21 Conn. 388.

In a special action on the case interest cannot be allowed. Holmes *v.* Misroon, 3 Brev. (S. C.) 209.

74. Tucker *v.* Page, 69 Ill. 179; Hall *v.* Foster, 114 Mass. 18.

75. Rice *v.* Hancock, Harp. (S. C.) 393.

76. Lansing *v.* Rattoone, 6 Johns. (N. Y.) 43.

77. *Illinois.*— McConnel *v.* Thomas, 3 Ill. 313.

Louisiana.— Anderson's Succession, 12 La. Ann. 95.

Maine.— Howe *v.* Bradley, 19 Me. 31.

North Carolina.— Moore *v.* Fuller, 47 N. C. 205.

Pennsylvania.— Heath *v.* Page, 63 Pa. St. 108, 3 Am. Rep. 533.

United States.— Todd *v.* U. S., Dev. Ct. Cl. 96, 97.

See 29 Cent. Dig. tit. "Interest," § 139.

78. Davis *v.* Harrington, 160 Mass. 278, 35 N. E. 771; Southern Cent. R. Co. *v.* Moravia, 61 Barb. (N. Y.) 180; Ohio *v.* Cleveland, etc.,

recoverable as damages it is merely an incident of the principal debt, and follows the principal as such incident, until it is separated and set apart in some manner as a particular debt.[79]

C. Interest as Distinct Cause of Action — 1. In General. Where interest is recoverable as damages, it does not constitute a distinct claim and can only be recovered with the principal by action;[80] but where the interest is provided for by contract and is due and payable it constitutes a specific claim for which an independent action may be brought.[81]

2. Before Maturity of Principal. Interest that becomes due and payable by virtue of a contract before the principal falls due may be recovered in a separate action therefor, even prior to the maturity of the principal debt;[82] and a stipulation in the contract that upon the non-payment of the interest when due it shall become a part of the principal and bear interest does not render the principal

R. Co., 6 Ohio St. 489; Wood *v.* Smith, 23 Vt. 706.

79. *Alabama.* — Hollingsworth *v.* Hammond, 30 Ala. 668.

Mississippi.— Washington *v.* Planters' Bank, 1 How. 230, 28 Am. Dec. 333.

New York.— Southern Cent. R. Co. *v.* Moravia, 61 Barb. 180; Bronner Brick Co. *v.* M. M. Canda Co., 18 Misc. 681, 42 N. Y. Suppl. 14; Price *v.* Holman, 2 N. Y. Suppl. 184.

North Carolina.— Stafford *v.* Jones, 91 N. C. 189.

Ohio.— Ohio *v.* Cleveland, etc., R. Co., 6 Ohio St. 489.

Texas.— Fisk *v.* Holden, 17 Tex. 408.

Virginia.— Cecil *v.* Hicks, 29 Gratt. 1, 26 Am. Rep. 391; Roberts *v.* Cocke, 28 Gratt. 207.

See 29 Cent. Dig. tit. "Interest," § 139.

80. *Illinois.*— McDonald *v.* Holden, 208 Ill. 128, 70 N. E. 21 [*affirming* 108 Ill. App. 449]; Hoblit *v.* Bloomington, 71 Ill. App. 204.

Iowa.— Jamison *v* Burlington, etc., R. Co., 78 Iowa 562, 43 N. W. 529.

Louisiana.— Anderson's Succession, 12 La. Ann. 95; Mann's Succession, 4 La. Ann. 28; Harty *v.* Harty, 2 La. 518; Saul *v.* His Creditors, 7 Mart. N. S. 425; Faurie *v.* Pitot, 2 Mart. 83.

Missouri.— Wickersham *v.* Whedon, 33 Mo. 561.

New York.— Cutter *v.* New York, 92 N. Y. 166; Johnson *v.* Brannan, 5 Johns. 268.

England.— Florence *v.* Drayson, 1 C. B. N. S. 584, 87 E. C. L. 584. *Compare* Dickenson *v.* Harrison, 4 Price 282.

See 29 Cent. Dig. tit. "Interest," § 140.

Compare New York Nat. Bank *v.* Mechanics' Nat. Bank, 94 U. S. 437, 24 L. ed. 176; Chemical Nat. Bank *v.* Bailey, 5 Fed. Cas. No. 2,635, 12 Blatchf. 480.

81. *Arkansas.*— Inglish *v.* Watkins, 4 Ark. 199.

Illinois.— Wehrly *v.* Morfoot, 103 Ill. 183.

Massachusetts.— Andover Sav. Bank *v.* Adams, 1 Allen 28.

Pennsylvania.— Heath *v.* Page, 63 Pa. St. 108, 3 Am. Rep. 533; Fitchett *v.* North Pennsylvania R. Co., 5 Phila. 132.

United States.— Butterfield *v.* Ontario, 44 Fed. 171.

See 29 Cent. Dig. tit. "Interest," § 140.

82. *Arkansas.*— Walker *v.* Bird, 15 Ark. 33.

Connecticut.— Brooks *v.* Holland, 21 Conn. 388.

Georgia.— Calhoun *v.* Marshall, 61 Ga. 275, 34 Am. Rep. 99.

Illinois.— Dulaney *v.* Payne, 101 Ill. 325, 40 Am. Rep. 205; Goodwin *v.* Goodwin, 65 Ill. 497; Walker *v.* Kimball, 22 Ill. 537; Kurz *v.* Suppiger, 18 Ill. App. 630.

Indiana.— Cicero *v.* Clifford, 53 Ind. 191.

Iowa.— Failing *v.* Clemmer, 49 Iowa 104; Hershey *v.* Hershey, 18 Iowa 24.

Kentucky.— Shanks *v.* Stephens, 6 Ky. L. Rep. 516.

Maine.— Bannister *v.* Roberts, 35 Me. 75. See also Jackson *v.* York, etc., R. Co., 48 Me. 147.

Massachusetts.— Andover Sav. Bank *v.* Adams, 1 Allen 28; Sparhawk *v.* Wills, 6 Gray 163; Stearns *v.* Brown, 1 Pick. 530; Cooley *v.* Rose, 3 Mass. 221; Greenleaf *v.* Kellogg, 2 Mass. 568.

Missouri.— Waples *v.* Jones, 62 Mo. 440; Castlio *v.* Martin, 11 Mo. App. 251.

New Hampshire.— Kimball *v.* Cotton, 58 N. H. 515.

Pennsylvania.— Knettle *v.* Crouse, 6 Watts 123; Sparks *v.* Garrigues, 1 Binn. 152. See also Philadelphia, etc., R. Co. *v.* Smith, 105 Pa. St. 195; U. S. Bank *v.* Macalester, 9 Pa. St. 475.

Rhode Island.— Sessions *v.* Richmond, 1 R. I. 298.

Vermont.— North Bennington First Nat. Bank *v.* Mt. Tabor, 52 Vt. 87, 36 Am. Rep. 734; Catlin *v.* Lyman, 16 Vt. 44.

United States.— Amy *v.* Dubuque, 98 U. S. 470, 25 L. ed. 228; Genoa *v.* Woodruff, 92 U. S. 502, 23 L. ed. 586; Clark *v.* Iowa City, 20 Wall. 583, 22 L. ed. 427; Lexington *v.* Butler, 14 Wall. 282, 20 L. ed. 809; Kenosha *v.* Lamson, 9 Wall. 477, 19 L. ed. 725; Gelpcke *v.* Dubuque, 1 Wall. 175, 17 L. ed. 520; Knox County *v.* Aspinwall, 21 How. 539, 16 L. ed. 208; Griffin *v.* Macon County, 36 Fed. 885, 2 L. R. A. 353; Huey *v.* Macon County, 35 Fed. 481; Nash *v.* El Dorado County, 24 Fed. 252.

See 29 Cent. Dig. tit. "Interest," § 141.

Contra.— Lyall *v.* London, 8 U. C. C. P. 365.

and several instalments of interest an entire demand so as to prevent a separate recovery on each instalment of interest.[83]

3. After Maturity of Principal. In the absence of a specific contract, and where interest is allowed only as damages after the maturity of the debt, it is not recoverable in a separate action;[84] but if the contract provides for the payment of interest at one time and the principal debt at another, a separate action may be brought to recover the interest, although the principal is then due.[85]

4. Effect of Payment of Principal — a. In General. Where interest is provided for by contract the payment of the principal debt will not defeat the right to recover accrued interest by a subsequent suit.[86] But where interest is recoverable only as damages, and payment of the principal as such is made and accepted, no interest can be recovered, the payment of the debt extinguishing the right to recover interest thereon.[87] This rule, however, applies only to the payment and

83. Wehrly *v.* Morfoot, 103 Ill. 183; Carter *v.* Carter, 76 Iowa 474, 41 N. W. 168 [*distinguishing* Wood *v.* Whisler, 67 Iowa 676, 25 N. W. 847]; Rowe *v.* Schertz, 74 Mo. App. 602.

84. Ellerbe *v.* Troy, 58 Ala. 143; Howe *v.* Bradley, 19 Me. 31.

85. Dulaney *v.* Payne, 101 Ill. 325, 40 Am. Rep. 205; Presstman *v.* Beach, 61 Md. 203; French *v.* Bates, 149 Mass. 73, 21 N. E. 237, 4 L. R. A. 268; Andover Sav. Bank *v.* Adams, 1 Allen (Mass.) 28; Sparhawk *v.* Wills, 6 Gray (Mass.) 163.

86. *Connecticut.*— Canfield *v.* New-Milford Eleventh School Dist., 19 Conn. 529.

Indiana.— Robbins *v.* Cheek, 32 Ind. 328, 2 Am. Rep. 348. *Contra,* Comparet *v.* Ewing, 8 Blackf. 328.

Maine.— Robbins Cordage Co. *v.* Brewer, 48 Me. 481; Milliken *v.* Southgate, 26 Me. 424; Howe *v.* Bradley, 19 Me. 31.

Maryland.— Steiger *v.* Hillen, 5 Gill & J. 121; Chase *v.* Manhardt, 1 Bland 333.

Massachusetts.— Davis *v.* Harrington, 160 Mass. 278, 35 N. E. 771; Eames *v.* Cushman, 135 Mass. 573.

Missouri.— Stone *v.* Bennett, 8 Mo. 41.

New York.— Southern Cent. R. Co. *v.* Moravia, 61 Barb. 180; Watts *v.* Garcia, 40 Barb. 656; Smith *v.* Buffalo, 39 N. Y. Suppl. 881; Fake *v.* Eddy, 15 Wend. 76.

North Carolina.—King *v.* Phillips, 95 N. C. 245, 59 Am. Rep. 238.

Ohio.— Graveson *v.* Odd Fellows Temple Co., 6 Ohio S. & C. Pl. Dec. 287, 4 Ohio N. P. 112.

Pennsylvania.— Waller *v.* Kingston Coal Co., 191 Pa. St. 193, 43 Atl. 235.

Vermont.— Catlin *v.* Lyman, 16 Vt. 44.

United States.— Hobbs *v.* U. S., 19 Ct. Cl. 220.

See 29 Cent. Dig. tit. "Interest," § 143.

Mistake in suit.— Where there was a contract for interest at five per cent per month, and the payee brought suit by mistake for the note with five per cent per annum, in which suit he recovered, he cannot afterward bring suit for the difference upon a mortgage which was given as collateral security. Darlow *v.* Cooper, 34 Beav. 281, 55 Eng. Reprint 643; Watkins *v.* Morgan, 6 C. & P. 661, 25 E. C. L. 626; McKay *v.* Fee, 20 U. C. Q. B. 268. *Compare* Thompson *v.* Gorner, 104 Cal. 168, 37 Pac. 900, 43 Am. St. Rep. 81, (1894) 36 Pac. 435.

87. *California.*—Valentine *v.* Donohoe-Kelly Banking Co., 133 Cal. 191, 65 Pac. 381; Chandler *v.* People's Sav. Bank, 61 Cal. 401.

Connecticut.— Canfield *v.* New-Milford Eleventh School Dist., 19 Conn. 529.

Illinois.— Vider *v.* Chicago, 60 Ill. App. 595.

Indiana.— Robbins *v.* Cheek, 32 Ind. 328, 2 Am. Rep. 348. But see Marks *v.* Purdue University, 56 Ind. 288.

Iowa.— Jamison *v.* Burlington, etc., R. Co., 87 Iowa 265, 54 N. W. 242; Hayes *v.* Chicago, etc., R. Co., 64 Iowa 753, 19 N. W. 245.

Kentucky.— Ward *v.* Everett, 1 Dana 429. See also Jett *v.* Cockrill, 85 Ky. 348, 3 S. W. 422, 9 Ky. L. Rep. 16.

Louisiana.— Anderson's Succession, 12 La. Ann. 95.

Maine.— American Bible Soc. *v.* Wells, 68 Me. 572, 28 Am. Rep. 82; Robbins Cordage Co. *v.* Brewer, 48 Me. 481; Milliken *v.* Southgate, 26 Me. 424; Howe *v.* Bradley, 19 Me. 31.

Maryland.— Chase *v.* Manhardt, 1 Bland 333. *Compare* Snowden *v.* Thomas, 4 Harr. & J. 335.

Massachusetts.— Davis *v.* Harrington, 160 Mass. 278, 35 N. E. 771; Simmons *v.* Almy, 103 Mass. 33; Dearth *v.* Hide, etc., Nat. Bank, 100 Mass. 540; Gage *v.* Gannett, 11 Mass. 217.

Michigan.— Talbot *v.* Bay City, 71 Mich. 118, 38 N. W. 890.

Missouri.— Stone *v.* Bennett, 8 Mo. 41; Arnold *v.* Sedalia Nat. Bank, 100 Mo. App. 474, 74 S. W. 1038.

New Jersey.— Somerset County *v.* Veghte, 7 N. J. L. J. 145.

New Mexico.— Maloy *v.* Bernalillo County, 10 N. M. 638, 62 Pac. 1106, 52 L. R. A. 126.

New York.— Cutter *v.* New York, 92 N. Y. 166; Hamilton *v.* Van Rensselaer, 43 N. Y. 244; Brady *v.* New York, 14 N. Y. App. Div. 152, 43 N. Y. Suppl. 452; Roberts *v.* Brandies, 44 Hun 468; Middaugh *v.* Elmira, 23 Hun 79; Tenth Nat. Bank *v.* New York, 4 Hun 429; Southern Cent. R. Co. *v.* Moravia, 61 Barb. 180; Ludington *v.* Miller, 38 N. Y. Super. Ct. 478; Bronx Gas, etc., Co. *v.* New York, 29 Misc. 402, 60 N. Y. Suppl. 548; Peck *v.* Granite State Provident Assoc., 21

acceptance of the principal debt as such. Where a payment of less than principal and interest is made without being specifically applied to the principal it will be applied according to the rule of partial payments, first extinguishing the interest, even though such payment exceeds the principal.[88] And of course the parties may agree that the acceptance of the principal sum only will not affect the creditor's right to recover interest subsequently.[89]

b. Acceptance of Principal Only Under Protest. Even where the creditor accepts the payment of the principal sum only under protest, or otherwise claims interest thereon, such acceptance will prevent his recovery of interest on such debt thereafter.[90]

c. Payment of Principal Pending Suit For Principal and Interest. It has been held that the payment of the principal debt will defeat the recovery of interest thereon, when such interest is recoverable only as damages, even though such payment be made pending a suit for such principal and interest;[91] but other cases hold that when an action is once begun, plaintiff's right to interest on the debt sued for cannot be defeated by subsequent payment of the debt.[92]

Misc. 84, 46 N. Y. Suppl. 1042; Bronner Brick Co. *v.* M. M. Canda Co., 18 Misc. 681, 42 N. Y. Suppl. 14, 3 N. Y. Annot. Cas. 318; Matter of Smith, 1 Misc. 253, 22 N. Y. Suppl. 1085; Smith *v.* Buffalo, 39 N. Y. Suppl. 881; Fake *v.* Eddy, 15 Wend. 76; Stevens *v.* Barringer, 13 Wend. 639; People *v.* New York County, 5 Cow. 331; Johnson *v.* Brannan, 5 Johns. 268; Tillotson *v.* Preston, 3 Johns. 229; Jacot *v.* Emmett, 11 Paige 142; Consequa *v.* Fanning, 3 Johns. Ch. 587; Gillespie *v.* New York, 3 Edw. 512. But see Price *v.* Holman, 2 N. Y. Suppl. 184.

North Carolina.—King *v.* Phillips, 95 N. C. 245, 59 Am. Rep. 238; Moore *v.* Fuller, 47 N. C. 205.

Ohio.— Graveson *v.* Odd Fellows Temple Co., 6 Ohio S. & C. Pl. Dec. 287, 4 N. P. 112.

Pennsylvania.— Waller *v.* Kingston Coal Co., 191 Pa. St. 193, 43 Atl. 235.

Vermont.—Childs *v.* Millville Mut. M. & F. Ins. Co., 56 Vt. 609; Abbott *v.* Wilmot, 22 Vt. 437.

Wisconsin.— Ryan Drug Co. *v.* Hvambsahl, 92 Wis. 62, 65 N. W. 873.

United States.— Stewart *v.* Barnes, 153 U. S. 456, 14 S. Ct. 849, 38 L. ed. 781; Graves *v.* Saline County, 104 Fed. 61, 43 C. C. A. 414; Southern R. Co. *v.* Dunlop Mills, 76 Fed. 505, 22 C. C. A. 302; Potomac Co. *v.* Union Bank, 19 Fed. Cas. No. 11,318, 3 Cranch C. C. 101; U. S. *v.* Collier, 25 Fed. Cas. No. 14,833, 3 Blatchf. 325.

England.— Florence *v.* Drayson, 1 C. B. N. S. 584, 87 E. C. L. 584; Dixon *v.* Parkes, 1 Esp. 110; Hellier *v.* Franklin, 1 Stark. 291, 2 E. C. L. 116. See also East *v.* Thornbury, 3 P. Wms. 126, 24 Eng. Reprint 996.

Canada.— McKay *v.* Fee, 20 U. C. Q. B. 268.

See 29 Cent. Dig. tit. "Interest," §§ 8, 143.

Rule applies where the principal extinguished by statute.— Johnson *v.* District of Columbia, 31 Ct. Cl. 395.

Payment of the principal due upon a judgment is not a bar to a supplementary proceeding to collect the interest. Johnson *v.* Tuttle, 17 Abb. Pr. (N. Y.) 315. *Compare* Brady *v.* New York, 14 N. Y. App. Div. 152, 43 N. Y. Suppl. 452.

88. Henderson Cotton Mfg. Co. *v.* Lowell Mach. Shops, 86 Ky. 668, 7 S. W. 142, 9 Ky. L. Rep. 831; Southern Cent. R. Co. *v.* Moravia, 61 Barb. (N. Y.) 180; People *v.* New York County, 5 Cow. (N. Y.) 331; Price *v.* Holman, 2 N. Y. Suppl. 184.

89. *Colorado.*— Hall *v.* King, 2 Colo. 711.

Maryland.— Chase *v.* Manhardt, 1 Bland 333.

Massachusetts.— Eames *v.* Cushman, 135 Mass. 573.

New York.— Bronner Brick Co. *v.* M. M. Canda Co., 18 Misc. 681, 42 N. Y. Suppl. 14.

United States.— Burr *v.* Burch, 4 Fed. Cas. No. 2,187, 5 Cranch C. C. 506.

England.— Lumley *v.* Hudson, 4 Bing. N. Cas. 15, 5 Scott 238, 33 E. C. L. 573; Lumley *v.* Musgrave, 4 Bing. N. Cas. 9, 3 Hodges 247, 1 Jur. 799, 5 Scott 230, 33 E. C. L. 569.

See 29 Cent. Dig. tit. "Interest," § 143.

90. Tuttle *v.* Tuttle, 12 Metc. (Mass.) 551, 46 Am. Dec. 701; Cutter *v.* New York, 92 N. Y. 166; Middaugh *v.* Elmira, 23 Hun (N. Y.) 79; Graveson *v.* Odd Fellows Temple Co., 6 Ohio S. & C. Pl. Dec. 287, 4 N. P. 112; Graves *v.* Saline County, 104 Fed. 61, 43 C. C. A. 414. *Contra,* Devlin *v.* New York, 131 N. Y. 123, 30 N. E. 45.

Agreement to arbitrate as to interest.— Where the obligor in a bond denied his liability for interest and paid the principal, agreeing to submit the question of interest to arbitration, the acceptance of the principal by the obligee, even though the arbitrators found in his favor, prevented his recovery of interest in a suit on the bond thereafter, the obligor refusing to abide the award. Moore *v.* Fuller, 47 N. C. 205.

91. Canfield *v.* New-Milford Eleventh School Dist., 19 Conn. 529; Davis *v.* Harrington, 160 Mass. 278, 35 N. E. 771; Potomac Co. *v.* Union Bank, 19 Fed. Cas. No. 11,318, 3 Cranch C. C. 101. See also Clement *v.* Grant, 2 N. Y. City Ct. 438.

92. Pinckney *v.* Singleton, 2 Hill (S. C.) 343; Fishburne *v.* Sanders, 1 Nott & M. (S. C.) 242.

5. Effect of Compromise. An agreement by the creditor to accept a certain sum by way of compromise and settlement of his debt, and as an extinguishment of his entire claim, will extinguish any claim he may have for interest.[93]

D. Limitation of Actions.[94] Where no time for the payment of interest is fixed, it is deemed payable with the principal, and the statute does not run against the interest until the debt is barred;[95] but if the principal debt is barred by the statute of limitations interest thereon is equally barred.[96] Where interest is payable annually, so much of the interest as accrued more than the statutory period before action brought is barred, notwithstanding the principal debt may not be barred.[97] The revival of a barred debt by an acknowledgment or new promise also revives the claim for interest on such debt for the whole period;[98] but where the debtor revives the debt by paying the amount into court and at the same time refuses to pay interest, the claim for interest is not revived.[99] It is sometimes provided by statute that a specific limitation shall apply to claims for interest, regardless of that applying to the principal debt.[1]

E. Pleadings — 1. Construction of Terms. The term "legal interest," used in pleadings, may mean the rate fixed by law in the absence of contract, or the highest rate of interest which the law allows the parties to contract for; and the true meaning depends upon the context and the facts. It will be understood as it appears that the pleader intended it should be.[2] A claim of interest at a certain "per cent" will be construed to mean such per cent per annum.[3]

2. Complaint or Petition — a. Demanding Interest. Where interest is recoverable as damages, and as a legal incident of the debt sued on,[4] or where the allowance is required under equitable principles,[5] interest should be allowed,

93. Tuttle *v.* Tuttle, 12 Metc. (Mass.) 551, 46 Am. Dec. 701; Tenth Nat. Bank *v.* New York, 4 Hun (N. Y.) 429; Pacific R. Co. *v.* U. S., 158 U. S. 118, 15 S. Ct. 766, 39 L. ed. 918; Stewart *v.* Barnes, 153 U. S. 456, 14 S. Ct. 849, 38 L. ed. 781.

94. See, generally, Limitations of Actions.

95. Greenwood *v.* Fenton, 54 Nebr. 573, 74 N. W. 843; Bander *v.* Bander, 7 Barb. (N. Y.) 560; French *v.* Kennedy, 7 Barb. (N. Y.) 452; De Cordova *v.* Galveston, 4 Tex. 470; Grafton Bank *v.* Doe, 19 Vt. 463, 47 Am. Dec. 697. See also Scott *v.* Sloan, 3 Tex. Civ. App. 302, 23 S. W. 42.

96. Clark *v.* Alexander, 13 L. J. C. P. 133, 8 Scott N. R. 147.

97. Dearborn *v.* Parks, 5 Me. 81, 17 Am. Dec. 206. *Compare* De Cordova *v.* Galveston, 4 Tex. 470.

98. Vines *v.* Tift, 79 Ga. 301, 7 S. E. 227; Williams *v.* Finney, 16 Vt. 297.

99. Collyer *v.* Willock, 4 Bing. 313, 5 L. J. C. P. O. S. 181, 12 Moore C. P. 557, 13 E. C. L. 519.

1. **Ontario statute** see Colquhoun *v.* Murray, 26 Ont. App. 204; McMicking *v.* Gibbons, 24 Ont. App. 586 [*overruling* Delaney *v.* Canadian Pac. R. Co., 21 Ont. 11].

2. Towslee *v.* Durkee, 12 Wis. 480.

3. Hayes *v.* Hammond, 162 Ill. 133, 44 N. E. 422 [*affirming* 61 Ill. App. 310].

4. *Alabama.*— Godwin *v.* McGehee, 19 Ala. 468; McWhorter *v.* Standifer, 2 Port. 519.

Arkansas.— Texas, etc., R. Co. *v.* Donnelly, 46 Ark. 87; Mitchell *v.* Conley, 13 Ark. 414; State Bank *v.* Clark, 2 Ark. 375.

California.— Cassacia *v.* Phœnix Ins. Co., 28 Cal. 628; Lane *v.* Gluckauf, 28 Cal. 288, 87 Am. Dec. 121.

Illinois.— McConnel *v.* Thomas, 3 Ill. 313.

Kansas.— Wyandotte, etc., Gas Co. *v.* Schliefer, 22 Kan. 468.

Kentucky.— Meek *v.* Lacy, 6 Ky. L. Rep. 516.

Louisiana.— Sentell *v.* Hewitt, 49 La. Ann. 1021, 22 So. 242.

Michigan.— Stanley *v.* Anderson, 107 Mich. 384, 65 N. W. 247.

Mississippi.— Washington *v.* Planters' Bank, 1 How. 230, 28 Am. Dec. 333.

Missouri.— Harwood *v.* Larramore, 50 Mo. 414.

Nebraska.— Petersen *v.* Mannix, 2 Nebr. (Unoff.) 795, 90 N. W. 210.

Pennsylvania.— McGarr *v.* Lloyd, 3 Pa. St. 474; Hubbard *v.* Jackson, 29 Wkly. Notes Cas. 66.

Rhode Island.— Weeden *v.* Berry, 10 R. I. 288.

South Carolina.— Lindsey *v.* Bland, 2 Speers 30; Kincaid *v.* Neall, 3 McCord 201.

Texas.— See San Antonio, etc., R. Co. *v.* Addison, 96 Tex. 61, 70 S. W. 200; Ross *v.* McGuffin, 2 Tex. App. Civ. Cas. § 458.

Vermont.— Allen *v.* Lyman, 27 Vt. 20.

United States.— Whitaker *v.* Pope, 29 Fed. Cas. No. 17,528, 2 Woods 463. See also Chinn *v.* Hamilton, 5 Fed. Cas. No. 2,685, Hempst. 438.

England.— Paine *v.* Pritchard, 2 C. & P. 558, 12 E. C. L. 731.

See 29 Cent. Dig. tit. "Interest," § 147.

Interest from the commencement of the action may be allowed, although not claimed in the petition. Whitaker *v.* Pope, 29 Fed. Cas. No. 17,528, 2 Woods 463. *Compare* Caldwell *v.* Richards, 2 Bibb (Ky.) 331.

5. Glenn *v.* Cockey, 16 Md. 446; Kohn *v.* Schuldenfrei, 84 N. Y. Suppl. 870; Slaughter

although no demand therefor is made in the bill or declaration; but otherwise, as in the case of interest due by virtue of a contract therefor, interest must be demanded in the declaration, or it cannot be recovered.[6]

b. Setting Forth Rate and Time. A substantial averment of the facts, when interest is claimed in the pleading, from which the actual interest claimed may be clearly understood, is all that is necessary.[7] Thus it has been held that in order to recover interest at the rate specified in the written instrument sued on it is not necessary to make demand for that specific rate in the declaration.[8] But in order to entitle a party to recover interest at the rate allowed in another state such rate must be alleged in the pleadings; it is not sufficient to prove it at the trial under the prayer for damages for the detention of the principal sum due.[9] Interest will not generally be allowed from a time prior to the date from which plaintiff claims it in his pleadings.[10]

v. Coke County, 34 Tex. Civ. App. 598, 79 S. W. 863; Howeren *v.* Bradhurn, 22 Grant Ch. (U. C.) 96.

6. *Alabama.*— Butler *v.* Limerick, Minor 115.

District of Columbia.— District of Columbia *v.* Metropolitan R. Co., 8 App. Cas. 322.

Florida.— Indian River State Bank *v.* Hartford F. Ins. Co., 46 Fla. 283, 35 So. 228.

Illinois.— Hanford *v.* Blessing, 60 Ill. 352; Prescott *v.* Maxwell, 48 Ill. 82; Mills *v.* Heeney, 35 Ill. 173; Carter *v.* Lewis, 29 Ill. 500; Phillips *v.* Kerr, 26 Ill. 213; March *v.* Wright, 14 Ill. 248.

Indiana.— Marsteller *v.* Crapp, 62 Ind. 359.

Iowa.— Krause *v.* Hampton, 11 Iowa 457; Cameron *v.* Armstrong, 8 Iowa 212; David *v.* Conard, 1 Greene 336.

Kentucky.— Adams Express Co. *v.* Milton, 11 Bush 49; Booton *v.* Floyd County, 13 Ky. L. Rep. 877; Graves *v.* Waller, 4 Ky. L. Rep. 452.

Louisiana.— Brown *v.* Bessou, 30 La. Ann. 734; Babin *v.* Nolan, 6 La. Ann. 295.

Minnesota.— Daniels *v.* Bradley, 4 Minn. 158.

Missouri.— Ashby *v.* Shaw, 82 Mo. 76; Van Riper *v.* Morton, 61 Mo. App. 440; Shockley *v.* Fischer, 21 Mo. App. 551.

Nebraska.— South Omaha *v.* Ruthjen, (1904) 99 N. W. 240.

New York.— Denise *v.* Swett, 68 Hun 188, 22 N. Y. Suppl. 950; Matter of Sherman, 24 Misc. 65, 53 N. Y. Suppl. 376.

Pennsylvania.— Reichart *v.* Beidleman, 17 Serg. & R. 41.

South Carolina.— Schermerhorn *v.* Perman, 2 Bailey 173.

Texas.— McElyea *v.* Faires, 79 Tex. 243, 14 S. W. 1059; Crook *v.* McGreal, 3 Tex. 487, Hubbard First Nat. Bank *v.* Cleland, 36 Tex. Civ. App. 478, 82 S. W. 337; Sullivan *v.* Owens, (Civ. App. 1904) 78 S. W. 373; Wentworth *v.* King, (Civ. App. 1899) 49 S. W. 696; Sanger *v.* Thomasson, (Civ. App. 1898) 44 S. W. 408; Goggan *v.* Evans, 12 Tex. Civ. App. 256, 33 S. W. 891.

Virginia.— Baird *v.* Peter, 4 Munf. 76; Hubbard *v.* Blow, 4 Call 224; Brooke *v.* Gordon, 2 Call 212.

United States.— Chinn *v.* Hamilton, 5 Fed. Cas. No. 2,685, Hempst. 438.

England.— Lawless *v.* Bryce, Ir. R. 5 C. L. 190; Weymouth *v.* Boyer, 1 Ves. Jr. 416, 30 Eng. Reprint 414.

Canada.— Mills *v.* Vail, 9 N. Brunsw. 629. See also McKenzie *v.* Harris, 10 Can. L. J. 213; Wiley *v.* Ledyard, 10 Ont. Pr. 182.

See 29 Cent. Dig. tit. "Interest," § 147.

Where interest is payable before the debt falls due the effect of a failure to demand and negative its payment is that plaintiff can only recover the debt and interest from the maturity of the note. Chinn *v.* Hamilton, 5 Fed. Cas. No. 2,685, Hempst. 438. See also Richmond *v.* Milne, 17 La. 328; Daquin *v.* Coiron, 8 Mart. N. S. (La.) 608.

Where plaintiff asks judgment for a certain amount and interest interest should be allowed only from the commencement of the action, notwithstanding it might have been properly allowed from an earlier date if asked for in the pleadings. Anderson *v.* Ken, 10 Iowa 236; Lyon *v.* Byington, 10 Iowa 124; Stadler *v.* Parmlee, 10 Iowa 23.

Setting forth interest-bearing note.— Where a petition on a note drawing interest set forth in full a copy of the note and alleged that the amount specified therein was wholly due and unpaid, and asked "judgment for the amount due by said note," it was proper to include in the judgment the interest accrued on the note at the date of its rendition. Smith *v.* Watson, 28 Iowa 218. See also Bentzen *v.* Zierlein, 4 Mo. 417.

7. Watkins *v.* Weaver, 4 Ark. 556; Dunham *v.* Holloway, 3 Okla. 244, 41 Pac. 140; McVicar *v.* McLaughlin, 16 Ont. Pr. 450. See also Gottfried *v.* German Nat. Bank, 91 Ill. 75.

8. McConnel *v.* Thomas, 3 Ill. 313; Leverich *v.* Walden, 1 Rob. (La.) 469. *Compare* Gautier *v.* English, 29 Cal. 165.

Interest after commencement of action.— If the prayer for judgment asks for interest to accrue after the complaint is filed, but neither the prayer nor the summons mentions the rate of interest, judgment should be entered for interest at the legal rate. Lamping *v.* Hyatt, 27 Cal. 99.

9. Hill *v.* George, 5 Tex. 87.

10. Gage *v.* Rogers, 20 Cal. 91; Shepard *v.* Pratt, 16 Kan. 209; Turnbull *v.* Watkins, 2 Mo. App. 235; Shreve *v.* Holbrook, 34 N. Y. Suppl. 317.

c. Setting Forth Specific Contract For Interest. Where interest is sought under a special contract for its payment, such contract must be set forth in the declaration, in order to support the allowance of such interest.[11]

d. Negativing Payment of Interest. The non-payment of interest must be specially alleged, where the right to its recovery is based upon a contract for its payment.[12]

e. Averment as to Law of Foreign State. In order to support the recovery of interest according to the law of another state, such law must be specifically averred and proved.[13]

3. Answer or Plea. Where, in an action upon a debt, interest is demanded in the declaration, a plea which avers that the contract for interest was at a greater rate than allowed by law except upon an instrument in writing, and that the contract was not in writing, presents no defense to the action;[14] and where the complaint alleges an express agreement to pay interest on the debt, a denial in the answer that defendant agreed in writing to pay interest is not responsive to the allegation in the complaint, and presents no issue.[15] When failure to demand interest due on daily bank balances is relied upon as a defense to a claim for interest on such balances prior to commencement of suit, such want of demand must be set up in the plea.[16]

4. Amendment. A complaint may be amended at any time, so as to cover interest accruing after the commencement of the suit in which it is sought to be recovered;[17] and it will be presumed to have been so amended as to cover a judgment at a subsequent term, which includes such after accrued interest.[18]

5. Issues, Proof, and Variance. An averment of the substantial facts upon which the claim for interest is based will generally be sufficient to admit proof of such facts so as to support a recovery of the interest claimed;[19] but the vari-

Interest from commencement of action.— Where plaintiff claims a certain sum as due, and prays judgment for the amount, with interest, he may take judgment for the amount claimed with interest from the time of the commencement of the action. Swails *v.* Cissna, 61 Iowa 693, 17 N. W. 39; Ferry *v.* Page, 8 Iowa 455; Hefferman *v.* Burt, 7 Iowa 320, 71 Am. Dec. 445; Barton *v.* Smith, 7 Iowa 85; Haven *v.* Baldwin, 5 Iowa 503.

11. *Alabama.*— Hunt *v.* Hall, 37 Ala. 702.
Arkansas.— Matlock *v.* Purefoy, 18 Ark. 492.
Kentucky.— Varnon *v.* Moore, 1 T. B. Mon. 213.
Missouri.— Ashby v. Shaw, 82 Mo. 76.
Pennsylvania.— Adams *v.* Palmer, 30 Pa. St. 346.
Texas.— Whittaker *v.* Wallace, 2 Tex. App. Civ. Cas. § 558; Newcomb *v.* Stuart, 1 Tex. App. Civ. Cas. § 72.
Washington.— Titus *v.* Larsen, 18 Wash. 145, 51 Pac. 351.
England.— Bignell *v.* Harpur, 7 D. & L. 243, 4 Exch. 773.
Canada.— Allan *v.* Caswell, 5 Nova Scotia 405.
See 29 Cent. Dig. tit. "Interest," § 149.

12. Louisiana Bank *v.* Watson, 4 Ark. 518; Pelham *v.* Oakey, 4 Ark. 71; Sumner *v.* Ford, 3 Ark. 389; Clary *v.* Morehouse, 3 Ark. 261; Wernwag *v.* Mothershead, 3 Blackf. (Ind.) 401. *Contra*, Cail *v.* Brookfield, 4 Ark. 554; Causin *v.* Taylor, 4 Ark. 408.

An allegation that the obligor had no funds at the time and place designated for the payment of interest coupons will support a recovery of interest thereon from their maturity. Jeffersonville *v.* Patterson, 26 Ind. 15, 89 Am. Dec. 448.

13. *Alabama.*— Peacock *v.* Banks, Minor 387.
Illinois.— Chumasero *v.* Gilbert, 24 Ill. 651.
Indiana.— Brackenridge *v.* Baxton, 5 Ind. 501.
Kentucky.— Surlott *v.* Pratt, 3 A. K. Marsh. 174; Templeton *v.* Sharp, 9 S. W. 507, 696, 10 Ky. L. Rep. 499.
Oklahoma.— Dunham *v.* Holloway, 3 Okla. 244, 41 Pac. 140.
Tennessee.— Cummings *v.* Wagstaff, 1 Baxt. 399.
Texas.— Whitlock *v.* Castro, 22 Tex. 108; Ingram *v.* Drinkard, 14 Tex. 351; Wheeler *v.* Pope, 5 Tex. 262; Hill *v.* George, 5 Tex. 87; Ramsay *v.* McCauley, 2 Tex. 189.
See 29 Cent. Dig. tit. "Interest," § 151.
Proof at trial in absence of such averment not sufficient.— Hill *v.* George, 5 Tex. 87.

14. Hall *v.* King, 2 Colo. 711.

15. Crane Bros. Mfg. Co. *v.* Morse, 49 Wis. 368, 5 N. W. 815.

16. Linn County *v.* Farmers', etc., Bank, 175 Mo. 539, 75 S. W. 393.

17. Billingsley *v.* Dean, 11 Ind. 331.

18. Carpenter *v.* Sheldon, 22 Ind. 259.

19. *Colorado.*— Keys *v.* Morrison, 3 Colo. App. 441, 34 Pac. 259.
Illinois.— Stowell *v.* Moore, 89 Ill. 563; Crittenden *v.* French, 21 Ill. 598.
Maine.— Chadbourne *v.* Hanscom, 56 Me. 554.

ance between a note bearing interest and a declaration thereon, which made no mention of interest, has been held to be fatal;[20] and where the declaration described the note as being for a certain sum, "with interest," and the note offered in evidence was silent as to interest, this was held to be a fatal variance.[21]

F. Evidence. Where interest is sought upon a contract to pay it, the evidence must satisfactorily establish such contract.[22] The burden of proving a demand, so as to start the running of interest thereon, is upon the party who sues upon it,[23] while if an agreement or the existence of any facts absolving the debtor from further payments of interest is relied upon, the burden is on the debtor to prove the same.[24] The legal rate of interest of one state is not presumed to be within the knowledge of the courts of another, but must be proved by the party claiming the benefit of such rate.[25] In some states it is held that in the absence of such proof interest on a debt governed by the laws of another state is recoverable at the legal rate of the state in which suit is brought,[26] the presump-

Ohio.— Haskins *v.* Alcott, 13 Ohio St. 210.
Tennessee.— Thompson *v.* French, 10 Yerg. 452.
Texas.— Tryon *v.* Rankin, 9 Tex. 595.
See 29 Cent. Dig. tit. "Interest," § 154.

Where no mention of interest is made in the declaration and the note sued on discloses no contract for interest it cannot be shown by evidence that the note was to be drawn payable with interest and that payments thereon had been applied to interest. Reichart *v.* Beidleman, 17 Serg. & R. (Pa.) 41.

20. Sawyer *v.* Patterson, 11 Ala. 523; Gragg *v.* Frye, 32 Me. 283; De Groot *v.* Darby, 7 Rich. (S. C.) 118; Blue *v.* Russell, 3 Fed. Cas. No. 1,568, 3 Cranch C. C. 102; Coyle *v.* Gozzler, 6 Fed. Cas. No. 3,312, 2 Cranch C. C. 625. *Contra*, Wilson *v.* King, Morr. (Iowa) 106; Beach *v.* Curle, 15 Mo. 107. See also Hubbard *v.* Blow, 4 Call (Va.) 224.

21. Cooper *v.* Guy, Tapp. (Ohio) 148. See also Patch *v.* Lyon, 9 Q. B. 147, 15 L. J. Q. B. 393, 58 E. C. L. 147.

22. See Bennett *v.* Johnson, 1 Speers (S. C.) 209.

In an action on an open account, an agreement to pay interest must be established by written evidence; parol evidence not being admissible for such purpose in Louisiana. Forgay *v.* Hamlin, 3 La. Ann. 697. See also McLaughlin *v.* Sauve, 13 La. Ann. 99.

Sufficiency of evidence see Phenix *v.* Prindle, Kirby (Conn.) 207.

23. Crapp *v.* Dodd, 92 Ga. 405, 17 S. E. 666; Compton *v.* Johnson, 19 Mo. App. 88; Baker *v.* Williams Banking Co., 42 Oreg. 213, 70 Pac. 711.

24. *Alabama.*— Park *v.* Wiley, 67 Ala. 310.
Louisiana.— Andrews *v.* Rhodes, 10 Rob. 52.
New York.—Watts *v.* Garcia, 40 Barb. 656.
Texas.— Gray *v.* Thomas, 83 Tex. 246, 18 S. W. 721.
Virginia.— McVeigh *v.* Howard, 87 Va. 599, 13 S. E. 31.
See 29 Cent. Dig. tit. "Interest," § 156.

25. *Alabama.*— Richardson *v.* Williams, 2 Port. 239.
Kentucky.— Pawling *v.* Sartain, 4 J. J. Marsh. 238; Morgan *v.* Froth, 1 J. J. Marsh. 94; Holley *v.* Holley, Litt. Sel. Cas. 505, 12 Am. Dec. 342; Thomas *v.* Bruce, 50 S. W. 63, 20 Ky. L. Rep. 1818; Templeton *v.* Sharp, 9 S. W. 507, 696, 10 Ky. L. Rep. 499.
Louisiana.— Mason *v.* Mason, 12 La. 589.
Massachusetts.—Wood *v.* Corl, 4 Metc. 203.
Michigan.— Kermott *v.* Ayer, 11 Mich. 181.
Minnesota.— Desnoyer *v.* McDonald, 4 Minn. 515; Cooper *v.* Reaney, 4 Minn. 528.
Missouri.— Hall *v.* Woodson, 13 Mo. 462.
North Carolina.— Hilliard *v.* Outlaw, 92 N. C. 266.
Texas.— Randall *v.* Meredith, (1889) 11 S. W. 170; Pauska *v.* Daus, 31 Tex. 67; Ingram *v.* Drinkard, 14 Tex. 351; Able *v.* McMurray, 10 Tex. 350; Wheeler *v.* Pope, 5 Tex. 262; Burton *v.* Anderson, 1 Tex. 93; Cooke *v.* Crawford, 1 Tex. 9, 46 Am. Dec. 93.
See 29 Cent. Dig. tit. "Interest," § 156.
Compare Browning *v.* Merritt, 61 Ind. 425.

Mode of proof.— Interest laws are within the rule that foreign statutes cannot be proved by parol without some showing why secondary evidence becomes necessary. Kermott *v.* Ayer, 11 Mich. 181.

A table of interest prepared by the secretary of state of one state and appended to the acts of the legislature is not admissible in another state as proof of the rate of interest in the first state. Clarke *v.* Pratt, 20 Ala. 470.

26. *Illinois.*— Hall *v.* Kimball, 58 Ill. 58; Deem *v.* Crume, 46 Ill. 69; Chumasero *v.* Gilbert, 26 Ill. 39; Warren *v.* McCarthy, 25 Ill. 95; Prince *v.* Lamb, 1 Ill. 378.
Iowa.— David *v.* Porter, 51 Iowa 254, 1 N. W. 528; Crafts *v.* Clark, 38 Iowa 237.
Louisiana.— Booty *v.* Cooper, 18 La. Ann. 565.
Missouri.— Crone *v.* Dawson, 19 Mo. App. 214, where the state in which the debt is payable was never subject to the laws of England and hence it cannot be presumed that the common law is in force there.
Washington.— Olson *v.* Veazie, 9 Wash. 481, 37 Pac. 677, 43 Am. St. Rep. 855.
United States.— Huey *v.* Macon County, 35 Fed. 481.

tion being that the legal rates are the same;[27] but in other states it is held that in the absence of proof of the interest law of another state no interest will be allowed upon a demand governed by the law of such state.[28] Where money was received upon evidences of debt, it will be presumed to have been received in accordance with their terms, and interest will be calculated accordingly.[29] In an action against a defaulter for failure to turn over money received by him, he will be presumed, in the absence of testimony, to have converted it immediately upon his receipt thereof, so as to fix such date as the time from which interest should be calculated.[30] The note upon which interest is claimed is pertinent and competent evidence to support such claim, even after the principal of the note has been paid;[31] and in England it has been held that a bill of exchange must be produced in evidence, when suit is brought thereon after its maturity, otherwise interest thereon will not be allowed.[32] Evidence is admissible of the mercantile usage of another state to charge interest on an open account from the time it became due.[33]

G. Province of Court and Jury — 1. In General. When interest on judgments is given by statute its allowance is not a matter of discretion with the court or jury.[34] A court may render judgment for the interest on a single bill without the intervention of a jury.[35] Where interest is sought to be recovered on money due and withheld by unreasonable and vexatious delay of payment, the question whether there has been such delay is for the jury.[36] The rate of interest permitted by law in another state is for the jury to determine,[37] but the rate to be charged on a given principal brought into question by exceptions to an auditor's report is for the court.[38] It is for the jury to determine whether the parties contracted with reference to a custom allowing interest,[39] and generally

See 29 Cent. Dig. tit. "Interest," § 156.

27. Deem *v.* Crume, 46 Ill. 69; Thomas *v.* Beckman, 1 B. Mon. (Ky.) 29; Templeton *v.* Sharp, 9 S. W. 507, 696, 10 Ky. L. Rep. 499; Cooper *v.* Reaney, 4 Minn. 528; Desnoyer *v.* McDonald, 4 Minn. 515; Moseby *v.* Burrow, 52 Tex. 396; Pauska *v.* Daus, 31 Tex. 67. *Contra*, Kermott *v.* Ayer, 11 Mich. 181. And see *infra*, note 28.

28. Harrison *v.* Harrison, 20 Ala. 629, 56 Am. Dec. 227; Dickinson *v.* Mobile Branch Bank, 12 Ala. 54; Cavender *v.* Guild, 4 Cal. 250; Thompson *v.* Monrow, 2 Cal. 99, 56 Am. Dec. 318; Schroeder *v.* Boyce, 127 Mich. 33, 86 N. W. 387; Ingram *v.* Drinkard, 14 Tex. 351; Able *v.* McMurray, 10 Tex. 350; Wheeler *v.* Pope, 5 Tex. 262; Huff *v.* Folger, Dall. (Tex.) 530. See also Dunn *v.* Clement, 2 Ala. 392. *Compare* Garner *v.* Tiffany, Minor (Ala.) 167. And see *supra*, notes 26, 27.

29. McCauley *v.* Heriot, Riley Eq. (S. C.) 19.

30. State *v.* Boone, 108 N. C. 78, 12 S. E. 897.

31. Mensing *v.* Ayres, 2 Tex. App. Civ. Cas. § 562. See also Davis *v.* Smyth, 10 L. J. Exch. 473, 8 M. & W. 399.

32. Doe *v.* Walker, 15 Q. B. 28, 19 L. J. Q. B. 293, 69 E. C. L. 28; Hutton *v.* Ward, 15 Q. B. 26, 14 Jur. 372, 19 L. J. Q. B. 293, 69 E. C. L. 26; Fryer *v.* Brown, R. & M. 145, 21 E. C. L. 720.

33. Lesesne *v.* Cook, 16 La. 58; Wakeman *v.* Marquand, 5 Mart. N. S. (La.) 265. See also Smith *v.* Butler, 176 Mass. 38, 57 N. E. 322.

Knowledge of the usage of trade to charge interest may be established by presumptive as well as by direct evidence. Esterly *v.* Cole, 3 N. Y. 502.

34. Brigham *v.* Vanbuskirk, 6 B. Mon. (Ky.) 197.

35. Chambers *v.* Querey, Ky. Dec. 272, since the act of 1779.

36. *Arkansas.*— Tatum *v.* Mohr, 21 Ark. 349; Watkins *v.* Wassell, 20 Ark. 410.

Illinois.— Davis *v.* Kenaga, 51 Ill. 170; Kennedy *v.* Gibbs, 15 Ill. 406; Seymour *v.* O. S. Richardson Fueling Co., 103 Ill. App. 625; Levinson *v.* Sands, 74 Ill. App. 273; Board of Education *v.* Hoag, 25 Ill. App. 558.

Indiana.— Rogers *v.* West, 9 Ind. 400.

Kansas.— Stettauer *v.* Carney, 20 Kan. 474.

Missouri.— McLean *v.* Thorp, 4 Mo. 256.

Pennsylvania.—Corby's Estate, 4 Kulp 169.

See 29 Cent. Dig. tit. "Interest," § 157.

Where facts not controverted.—Where facts creating a liability to pay at a specified time are not denied, and no evidence is offered to show ground for refusal, there is no controversy for the jury, and the court will determine the question of unreasonable delay. Sanderson *v.* Read, 75 Ill. App. 190. See also Stern *v.* People, 9 Ill. App. 411.

37. Clarke *v.* Pratt, 20 Ala. 470; Hunt *v.* Mayfield, 2 Stew. (Ala.) 124; Johnson *v.* Williams, 1 J. J. Marsh. (Ky.) 489; Ingraham *v.* Arnold, 1 J. J. Marsh. (Ky.) 406; Holley *v.* Holley, Litt. Sel. Cas. (Ky.) 505, 12 Am. Dec. 342; Davidson *v.* Gohagin, 2 Bibb (Ky.) 634; Russell *v.* Shepherd, Hard. (Ky.) 44.

38. Arthur *v.* Gordon County, 67 Ga. 220.

39. Veiths *v.* Hagge, 8 Iowa 163.

to determine whether the circumstances of any particular case raise an implied contract for the payment of interest.[40] Where interest is allowable in the discretion of the jury, and a general verdict therefor is rendered, it is presumed that sufficient circumstances exist to justify such verdict. But if the jury state the circumstances in a special verdict, the court will determine the sufficiency of such circumstances and allow or disallow interest as it shall deem proper.[41]

2. Interest by Contract. Interest provided for by a valid contract, express or implied, is recoverable as matter of right, and is not subject to the discretion of the court or jury;[42] but a court of equity may, in a suit for the specific performance of a contract, grant relief only upon the abatement of the interest, where the circumstances render this equitable.[43]

3. Interest as Damages — a. In General. It has been frequently laid down in the decisions, as a general rule of law, that, where interest is recoverable only as damages, it is within the discretion of the jury to allow or disallow it;[44] but even if this be recognized as the general rule it is subject to limitations and exceptions.[45]

b. Breach of Contract to Pay Money. If the amount due under a contract to pay money is unliquidated or if the time of payment is not definitely fixed, the allowance of interest as damages for the breach of the contract is within the discretion of the jury.[46] But in the United States it has been frequently held that

40. Bell *v.* Logan, 7 J. J. Marsh. (Ky.) 593; Beaver *v.* Slear, 182 Pa. St. 213, 37 Atl. 991; Petre *v.* Duncombe, 15 Jur. 86, 20 L. J. Q. B. 242, 2 L. M. & P. 107. See also Norris *v.* Taylor, 1 Nova Scotia Dec. 491.

41. Dow *v.* Adam, 5 Munf. (Va.) 21. See also Lewis *v.* Rountree, 79 N. C. 122, 28 Am. Rep. 309.

42. *Maryland.*— Newson *v.* Douglass, 7 Harr. & J. 417, 16 Am. Dec. 317.

New Hampshire.— See McIlvaine *v.* Wilkins, 12 N. H. 474.

New York.— Richmond *v.* Bronson, 5 Den. 55.

United States.— Redfield *v.* Ystalyfera Iron Co., 110 U. S. 174, 3 S. Ct. 570, 28 L. ed. 109; Jourolmon *v.* Ewing, 80 Fed. 604, 26 C. C. A. 23. See also Lincoln *v.* Claflin, 7 Wall. 132, 19 L. ed. 106.

Canada.— Montgomery *v.* Boucher, 14 U. C. C. P. 45.

See 29 Cent. Dig. tit. "Interest," § 157.

43. Jourolmon *v.* Ewing, 80 Fed. 604, 26 C. C. A. 23.

44. *District of Columbia.*— Hetzel *v.* Baltimore, etc., R. Co., 6 Mackey 1.

Kentucky.— Henderson Cotton Mfg. Co. *v.* Lowell Mach. Shops, 86 Ky. 668, 7 S. W. 142, 9 Ky. L. Rep. 831; Jackson *v.* Holliday, 3 T. B. Mon. 363.

Louisiana.— Porter *v.* Barrow, 3 La. Ann. 140.

Maryland.— Curtis *v.* Gibney, 59 Md. 131; Newson *v.* Douglass, 7 Harr. & J. 417, 16 Am. Dec. 317.

Massachusetts.— Frazer *v.* Bigelow Carpet Co., 141 Mass. 126, 4 N. E. 620.

New Hampshire.— Thompson *v.* Boston, etc., R. Co., 58 N. H. 524.

New York.— Jamieson *v.* New York, etc., R. Co., 162 N. Y. 630, 57 N. E. 1113; Woerz *v.* Schumacher, 161 N. Y. 530, 56 N. E. 72; Home Ins. Co. *v.* Pennsylvania R. Co., 11 Hun 182; Van Rensselaer *v.* Jones, 2 Barb. 643; Robinson *v.* Corn Exch. F., etc., Ins. Co., 1 Rob. 14, 1 Abb. Pr. N. S. 186; Richmond *v.* Bronson, 5 Den. 55; Rensselaer Glass Factory *v.* Reid, 5 Cow. 587; Johnson *v.* Brannan, 5 Johns. 268. But see Mansfield *v.* New York Cent., etc., R. Co., 114 N. Y. 331, 21 N. E. 735, 1037, 4 L. R. A. 566.

Pennsylvania.— Richards *v.* Citizens' Natural Gas Co., 130 Pa. St. 37, 18 Atl. 600; Smyser *v.* Smyser, 3 Watts & S. 437; McCormick *v.* Crall, 6 Watts 207; Fuchs *v.* Germania L. Ins. Co., 23 Wkly. Notes Cas. 29.

Texas.— Heidenheimer *v.* Ellis, 67 Tex. 426, 35 S. W. 666; Close *v.* Fields, 13 Tex. 623. *Compare* Houston, etc., R. Co. *v.* Jackson, 62 Tex. 209.

Virginia.— Dow *v.* Adam, 5 Munf. 21.

United States.— Redfield *v.* Bartels, 139 U. S. 694, 11 S. Ct. 683, 35 L. ed. 310; Sanborn *v.* U. S., 135 U. S. 271, 10 S. Ct. 812, 34 L. ed. 112; Redfield *v.* Ystalyfera Iron Co., 110 U. S. 174, 3 S. Ct. 570, 28 L. ed. 109; Jourolmon *v.* Ewing, 80 Fed. 604, 26 C. C. A. 23; Willings *v.* Consequa, 30 Fed. Cas. No. 17,766, Pet. C. C. 172.

See 29 Cent. Dig. tit. "Interest," § 157.

45. See *infra*, VII, G, 3, b, d.

46. *Arkansas.*— Tatum *v.* Mohr, 21 Ark. 349; Wright *v.* Morris, 15 Ark. 444.

Delaware.— Black *v.* Reybold, 3 Harr. 528.

Florida.— Sullivan *v.* McMillan, 37 Fla. 134, 19 So. 340, 53 Am. St. Rep. 239.

Kentucky.— Schamberg *v.* Auxier, 101 Ky. 292, 40 S. W. 911, 19 Ky. L. Rep. 548; Henderson Cotton Mfg. Co. *v.* Lowell Mach. Shops, 86 Ky. 668, 7 S. W. 142, 9 Ky. L. Rep. 831; Bell *v.* Logan, 7 J. J. Marsh. 593; Morford *v.* Ambrose, 3 J. J. Marsh. 688; Brown *v.* McClelland, 1 A. K. Marsh. 43; Gaylord *v.* Nelson, 7 Ky. L. Rep. 821.

Maryland.— Bernei *v.* Baltimore, 56 Md. 351; Frank *v.* Morrison, 55 Md. 399; Musgrave *v.* Morrison, 54 Md. 161; Carter *v.* Cross, 7 Gill 43.

interest as damages for the breach of a contract to pay money, where the amount due and the time of payment are certain, is recoverable as matter of right, and that it is not within the discretion of the court or jury to refuse it,[47] although in England and Canada the allowance of interest in such cases also is held to be within the discretion of the court or the jury.[48]

c. **Breach of Contract Other Than to Pay Money.** Where damages are sought for the breach of a contract other than to pay money, the allowance of interest on the amount recovered, as a part of the damages, is within the discretion of the jury.[49]

d. **Damages For Tort.** In many cases it is laid down that the allowance or refusal of interest as an element of the damages recoverable for a tort is within the discretion of the jury;[50] but in actions of trover and conversion, or for injury

Mississippi.—Houston *v.* Crutcher, 31 Miss. 51; Howcott *v.* Collins, 23 Miss. 398; Wiltburger *v.* Randolph, Walk. 20.

New York.— Anonymous, 1 Johns. 315.

South Carolina.— Siter *v.* Robinson, 2 Bailey 274.

Virginia.— Mickie *v.* Wood, 5 Rand. 571.

United States.— Hugg *v.* Augusta Ins., etc., Co., 12 Fed. Cas. No. 6,838, Taney 159.

Canada.— *Re* Kirkpatrick, 10 Ont. Pr. 4.

See 29 Cent. Dig. tit. "Interest," § 157.

If the court be substituted by consent to determine the case, it may exercise the same discretion as the jury as to the allowance of interest. Marshall *v.* Dudley, 4 J. J. Marsh. (Ky.) 244.

47. *Alabama.*— Broughton *v.* Mitchell, 64 Ala. 210.

Illinois.— Murray *v.* Doud, 63 Ill. App. 247.

Kentucky.— Henderson Cotton Mfg. Co. *v.* Lowell Mach. Shops, 86 Ky. 668, 7 S. W. 142, 9 Ky. L. Rep. 831; Taul *v.* Moore, Hard. 90.

New York.— De Lavallette *v.* Wendt, 75 N. Y. 579, 31 Am. Rep. 494; McAfee *v.* Dix, 101 N. Y. App. Div. 69, 91 N. Y. Suppl. 464.

Pennsylvania.— Emerson *v.* Schoonmaker, 135 Pa. St. 437, 19 Atl. 1025; Reading, etc., R. Co. *v.* Balthaser, 126 Pa. St. 1, 17 Atl. 518.

Tennessee.—Stumps *v.* Cooper, 3 Baxt. 223. See also Williams *v.* Inman, 5 Coldw. 267.

Virginia.— Tidball *v.* Shenandoah Nat. Bank, 100 Va. 741, 42 S. E. 867; Chapman *v.* Shepherd, 24 Gratt. 377.

See 29 Cent. Dig. tit. "Interest," § 157.

48. Cook *v.* Fowler, L. R. 7 H. L. 27, 43 L. J. Ch. 855; Miller *v.* Barlow, L. R. 3 P. C. 733, 8 Moore P. C. N. S. 127, 17 Eng. Reprint 260; Cameron *v.* Smith, 2 B. & Ald. 305, 20 Rev. Rep. 444; Du Belloix *v.* Waterpark, 1 D. & R. 16, 16 E. C. L. 12; *Re* Unsworth, 2 Dr. & Sm. 337, 13 Wkly. Rep. 448, 62 Eng. Reprint 649; Gibbs *v.* Fremont, 9 Exch. 25, 17 Jur. 820, 22 L. J. Exch. 302, 1 Wkly. Rep. 482; Knapp *v.* Burnaby, 30 L. J. Ch. 844, 4 L. T. Rep. N. S. 52, 9 Wkly. Rep. 765; Financial Corp. *v.* Jervis, 17 L. T. Rep. N. S. 324; Dalby *v.* Humphrey, 37 U. C. Q. B. 514.

49. *Kentucky.*— Stark *v.* Price, 5 Dana 140; Gatewood *v.* Gatewood, 3 J. J. Marsh. 117; Brown *v.* McClelland, 1 A. K. Marsh. 43; Guthrie *v.* Wickliffs, 4 Bibb 541, 7 Am. Dec. 746; Henderson *v.* Stainton, Hard. 118.

New York.— Walrath *v.* Redfield, 18 N. Y. 457; Richmond *v.* Bronson, 5 Den. 55; Dox *v.* Dey, 3 Wend. 356; Rawson *v.* Dole, 2 Johns. 454. See also Mansfield *v.* New York Cent., etc., R. Co., 114 N. Y. 331, 21 N. E. 735, 1037, 4 L. R. A. 566. *Compare* Dana *v.* Fiedler, 12 N. Y. 40, 62 Am. Dec. 130.

Pennsylvania.— Kester *v.* Rockel, 2 Watts & S. 365; Uhland *v.* Uhland, 17 Serg. & R. 265.

Texas.— See Houston, etc., R. Co. *v.* Jackson, 62 Tex. 209.

Wisconsin.— Allen *v.* Murray, 87 Wis. 41, 57 N. W. 979; Hinckley *v.* Beckwith, 13 Wis. 31.

United States.— Gilpins *v.* Consequa, 10 Fed. Cas. No. 5,452, Pet. C. C. 85, 3 Wash. 184; Letcher *v.* Woodson, 15 Fed. Cas. No. 8,280, 1 Brock. 212; Willings *v.* Consequa, 30 Fed. Cas. No. 17,766, Pet. C. C. 172.

See 29 Cent. Dig. tit. "Interest," § 157.

50. *California.*—King *v.* Southern Pac. Co., 109 Cal. 96, 41 Pac. 786, 29 L. R. A. 755.

Georgia.— Gress Lumber Co. *v.* Coody, 104 Ga. 611, 30 S. E. 810; Western, etc., R. Co. *v.* Brown, 102 Ga. 13, 29 S. E. 130; Western, etc., R. Co. *v.* McCauley, 68 Ga. 818; Central R. Co. *v.* Sears, 66 Ga. 499.

Indiana.— Pittsburgh, etc., R. Co. *v.* Swinney, 97 Ind. 586; Wabash R. Co. *v.* Williamson, 3 Ind. App. 190, 29 N. E. 455; Kavanaugh *v.* Taylor, 2 Ind. App. 502, 28 N. E. 553; Chicago, etc., R. Co. *v.* Barnes, 2 Ind. App. 213, 28 N. E. 328.

Kentucky.— Adams Express Co. *v.* McDonald, 1 Bush 32.

Maryland.— Karthaus *v.* Owings, 2 Gill & J. 430.

Massachusetts.— Frazer *v.* Bigelow Carpet Co., 141 Mass. 126, 4 N. E. 620.

Michigan.— Lucas *v.* Wattles, 49 Mich. 380, 13 N. W. 782.

New York.— Wilson *v.* Troy, 135 N. Y. 96, 32 N. E. 44, 31 Am. St. Rep. 817, 18 L. R. A. 449; Moore *v.* New York El. R. Co., 126 N. Y. 671, 27 N. E. 791; Mairs *v.* Manhattan Real Estate Assoc., 89 N. Y. 498; Walrath *v.* Redfield, 18 N. Y. 457; Jamieson *v.* New York, etc., R. Co., 11 N. Y. App. Div. 50, 42 N. Y. Suppl. 915; Brush *v.* Long Island R. Co., 10 N. Y. App. Div. 535, 42 N. Y. Suppl. 103; Hodge *v.* New York Cent., etc., R. Co., 27

to property, it has been frequently held that the allowance of interest by the jury is not discretionary, but that it is recoverable as of right.[51]

4. Instructions. When interest is recoverable as matter of right, it is the duty of the court to instruct the jury to allow it;[52] but where the allowance of interest is discretionary with the jury, it is error for the court to instruct the jury either to award or refuse it.[53] Where interest is not recoverable at all, it is error for the court to instruct the jury that it may in its discretion allow it,[54] or to refuse to instruct the jury not to allow it.[55]

INTEREST. Concern (*q. v.*), Advantage (*q. v.*), Good[1] (*q. v.*); share, portion;[2]

Hun 394; Black *v.* Camden, etc., R., etc., Co., 45 Barb. 40; Reiss *v.* New York Steam Co., 59 N. Y. Super. Ct. 57, 12 N. Y. Suppl. 557.

Pennsylvania.— Richards *v.* Citizens' Natural Gas Co., 130 Pa. St. 37, 18 Atl. 600; Reading, etc., R. Co. *v.* Balthaser, 126 Pa. St. 1, 17 Atl. 518; Plymouth Tp. *v.* Graver, 125 Pa. St. 24, 17 Atl. 249, 11 Am. St. Rep. 867; Pennsylvania Schuylkill Valley R. Co. *v.* Ziemer, 124 Pa. St. 560, 17 Atl. 187.

United States.— Lincoln *v.* Claflin, 7 Wall. 132, 19 L. ed. 106.

See 29 Cent. Dig. tit. "Interest," § 157.

51. *Alabama.*— Alabama Great Southern R. Co. *v.* McAlpine, 75 Ala. 113.

Arkansas.— St. Louis, etc., R. Co. *v.* Biggs, 50 Ark. 169, 6 S. W. 724.

California.— Hamer *v.* Hathaway, 33 Cal. 117.

Minnesota.— Varco *v.* Chicago, etc., R. Co., 30 Minn. 18, 13 N. W. 921.

Missouri.— Watson *v.* Harmon, 85 Mo. 443; Spencer *v.* Vance, 57 Mo. 427; State *v.* Smith, 31 Mo. 566; Walker *v.* Borland, 21 Mo. 289.

New York.— Wilson *v.* Troy, 135 N. Y. 96, 32 N. E. 44, 31 Am. St. Rep. 817, 18 L. R. A. 449; McCormick *v.* Pennsylvania Cent. R. Co., 49 N. Y. 303; Andrews *v.* Durant, 18 N. Y. 496; Greer *v.* New York, 3 Rob. 406; Wehle *v.* Butler, 43 How. Pr. 5.

Pennsylvania.— Allegheny *v.* Campbell, 107 Pa. St. 530, 52 Am. Rep. 478.

Utah.— Rhemke *v.* Clinton, 2 Utah 230.

United States.— Gelston *v.* Hoyt, 3 Wheat. 246, 4 L. ed. 381; The Anna Maria, 2 Wheat. 327, 4 L. ed. 252; Murray *v.* The Charming Betsy, 2 Cranch 64, 2 L. ed. 208.

See 29 Cent. Dig. tit. "Interest," § 157.

Compare Patapsco Guano Co. *v.* Magee, 86 N. C. 350.

52. *Alabama.*— Alabama Great Southern R. Co. *v.* McAlpine, 75 Ala. 113.

Arkansas.— St. Louis, etc., R. Co. *v.* Biggs, 50 Ark. 169, 6 S. W. 724.

Connecticut.— People's Sav. Bank *v.* Norwalk, 56 Conn. 547, 16 Atl. 257.

Illinois.— Murray *v.* Doud, 63 Ill. App. 247.

Minnesota.— Varco *v.* Chicago, etc., R. Co., 30 Minn. 18, 13 N. W. 921.

Mississippi.— Thompson *v.* Matthews, 56 Miss. 368.

Missouri.— Watson *v.* Harmon, 85 Mo. 443; Spencer *v.* Vance, 57 Mo. 427; McCormack *v.* Lynch, 69 Mo. App. 524.

Pennsylvania.— Allegheny *v.* Campbell, 107 Pa. St. 530, 52 Am. Rep. 478.

Texas.— Gulf, etc., R. Co. *v.* McCarty, 82 Tex. 608, 18 S. W. 716.

Utah.— Rhemke *v.* Clinton, 2 Utah 230.

53. *California.*— King *v.* Southern Pac. Co., 109 Cal. 96, 41 Pac. 786, 29 L. R. A. 755.

Georgia.— Central R. Co. *v.* Sears, 66 Ga. 499.

Kentucky.— Stark *v.* Price, 5 Dana 140; Young *v.* Pate, 3 J. J. Marsh. 100; Brown *v.* McClelland, 1 A. K. Marsh. 43; Guthrie *v.* Wickliffs, 4 Bibb 541, 7 Am. Dec. 746.

Missouri.— Carson *v.* Smith, 133 Mo. 606, 34 S. W. 855; State *v.* Hope, 121 Mo. 34, 25 S. W. 893; Eagle Constr. Co. *v.* Wabash R. Co., 71 Mo. App. 626.

New York.— Jamieson *v.* New York, etc., R. Co., 162 N. Y. 630, 57 N. E. 1113; Moore *v.* New York El. R. Co., 126 N. Y. 671, 27 N. E. 791; Black *v.* Camden, etc., R. Co., 45 Barb. 40; Home Ins. Co. *v.* Pennsylvania R. Co., 11 Hun 182; Reiss *v.* New York Steam Co., 59 N. Y. Super. Ct. 57, 12 N. Y. Suppl. 557.

North Dakota.— Johnson *v.* Northern Pac. R. Co., 1 N. D. 354, 48 N. W. 227; Ell *v.* Northern Pac. R. Co., 1 N. D. 336, 48 N. W. 222, 26 Am. St. Rep. 621, 12 L. R. A. 97.

Pennsylvania.— Holmes *v.* Frost, 125 Pa. St. 328, 17 Atl. 424; Plymouth Tp. *v.* Graver, 125 Pa. St. 24, 17 Atl. 249, 11 Am. St. Rep. 867.

South Dakota.— Uhe *v.* Chicago, etc., R. Co., 3 S. D. 563, 54 N. W. 601.

Texas.— Close *v.* Fields, 13 Tex. 623.

54. *Iowa.*— Brentner *v.* Chicago, etc., R. Co., 68 Iowa 530, 23 N. W. 245, 27 N. W. 605.

Missouri.— Wade *v.* Missouri Pac. R. Co., 78 Mo. 362; De Steiger *v.* Hannibal, etc., R. Co., 73 Mo. 33.

Pennsylvania.— Pittsburgh Southern R. Co. *v.* Taylor, 104 Pa. St. 306, 49 Am. Rep. 580.

Tennessee.— Louisville, etc., R. Co. *v.* Wallace, 91 Tenn. 35, 17 S. W. 882, 17 L. R. A. 548.

Texas.— Texas, etc., R. Co. *v.* Carr, 91 Tex. 332, 43 S. W. 18. See also Randall *v.* Meredith, (1889) 11 S. W. 170.

55. Murray *v.* Ware, 1 Bibb (Ky.) 325, 4 Am. Dec. 637.

1. Webster Dict. [*quoted* in Fitch *v.* Bates, 11 Barb. (N. Y.) 471, 473].

2. Pearson *v.* Pearson, 135 Ind. 377, 381, 35 N. E. 288; Webster Dict. [*quoted* in An-

part;[3] participation;[4] some of the parts, but not all;[5] the legal concern of a person in the thing or property, or in the right to some of the benefits or uses from which the property is inseparable;[6] such a right in or to a thing capable of being possessed or enjoyed as property which can be enforced by judicial proceedings;[7] a word sometimes used as the equivalent of BONUS,[8] *q. v.* The word is capable of different meanings, according to the context in which it is used or the subject-matter to which it is applied.[9] Thus the word is also frequently used by the legislature in respect to real estate,[10] or a right or title held in or to it;[11] and it may have even the same meaning as the phrase "right, title, and interest";[12] but it

drews *v.* Burdick, 62 Iowa 714, 722, 16 N. W. 275; Fitch *v.* Bates, 11 Barb. (N. Y.) 471, 473].

As applied to a cropper, the term is equivalent to "share." Philips *v.* Douglass, 53 Miss. 175.

3. Webster Dict. [*cited* in Andrews *v.* Burdick, 62 Iowa 714, 722, 16 N. W. 275, and *quoted* in Fitch *v.* Bates, 11 Barb. (N. Y.) 471, 473].

4. Webster Dict. [*quoted* in Fitch *v.* Bates, 11 Barb. (N. Y.) 471, 473].

5. Pearson *v.* Pearson, 135 Ind. 377, 381, 35 N. E. 288. See also Stainbank *v.* Fenning, 11 C. B. 51, 72, 15 Jur. 1082, 20 L. J. C. P. 226, 73 E. C. L. 50 [*quoting* 1 Arnould Ins. p. 230].

6. Century Dict. [*quoted* in McDonald *v.* Bayard Sav. Bank, 123 Iowa 413, 416, 98 N. W. 1025].

Its chief use seems to designate some right attaching to property which either cannot or need not be defined with precision. Abbott L. Dict. [*quoted* in East Texas F. Ins. Co. *v.* Clarke, 79 Tex. 23, 25, 15 S. W. 166, 11 L. R. A. 293].

7. Ontario *v.* Canada, 25 Can. Sup. Ct. 434, 538, where the court said: "One may be interested in a property but have no legal interest in it. If he has a legal interest he can enforce it against the property."

The term in its legal and purely technical sense is defined and distinct, and applies to some ascertained and tangible right. Sherwood *v.* Ray, 1 Moore P. C. 353, 388, 12 Eng. Reprint 848.

As applied to jurisdiction it has a wider meaning, and extends to moral as well as legal obligations — is merely such as will give a party a *locus standi.* Sherwood *v.* Ray, 1 Moore P. C. 353, 388, 12 Eng. Reprint 848.

8. Myers *v.* Elliott, 16 Q. B. D. 526, 529, 55 L. J. Q. B. 233, 54 L. T. Rep. N. S. 552, 34 Wkly. Rep. 338.

9. Atty.-Gen. *v.* Heywood, 19 Q. B. D. 326, 331, 56 L. J. Q. B. 572, 57 L. T. Rep. N. S. 271, 35 Wkly. Rep. 772.

"Any interest in the disclaimed property" see *In re* Finley, 21 Q. B. D. 475, 484; *In re* Cock, 20 Q. B. D. 343, 347, 57 L. J. Q. B. 169, 58 L. T. Rep. N. S. 586, 5 Morr. Bankr. Cas. 14, 36 Wkly. Rep. 187; *In re* Parker, 14 Q. B. D. 405, 406, 51 L. T. Rep. N. S. 667, 1 Morr. Bankr. Cas 275, 33 Wkly. Rep. 752.

The term may include a share of a fund secured by mortgage (*In re* Watts, 29 Ch. D. 947, 952), or a legacy payable out of personalty and the proceeds of the sale of real estate (Brook *v.* Badley, L. R. 3 Ch. 672, 676, 36 L. J. Ch. 741, 16 L. T. Rep. N. S. 762, 16 Wkly. Rep. 947).

The term does not include corporation debenture stock (*In re* Pickard, [1894] 3 Ch. 704, 711, 64 L. J. Ch. 92, 71 L. T. Rep. N. S. 558, 7 Reports 479), a mortgage of its waterworks by a municipal corporation (*In re* Parker, [1891] 1 Ch. 682, 693, 694, 60 L. J. Ch. 195, 64 L. T. Rep. N. S. 257, 39 Wkly. Rep. 346), or railway stock (*Re* Hallon, 68 L. T. Rep. N. S. 160, 162). *Compare In re* Crossley, [1897] 1 Ch. 928, 933, 61 J. P. 390, 66 L. J. Ch. 558, 76 L. T. Rep. N. S. 419, 45 Wkly. Rep. 615; *In re* Christmas, 33 Ch. D. 332, 345, 50 J. P. 759, 55 L. J. Ch. 878, 55 L. T. Rep. N. S. 197, 34 Wkly. Rep. 779.

10. New York *v.* Stone, 20 Wend. (N. Y.) 139, 142.

It is the broadest term applicable to claims in or upon real estate, in its ordinary signification among the men of all classes. It is broad enough to include any right, title, or estate in or lien upon real estate. Ormsby *v.* Ottman, 85 Fed. 492, 497, 29 C. C. A. 295.

"Interest in fee," as used in a statute providing that every grant of an interest in fee shall be subscribed and sealed by the grantor or his agent, includes the grant in fee of the right to bring water through pipes across the land of one for the benefit of another. Nellis *v.* Munson, 108 N. Y. 453, 460, 15 N. E. 739.

"Interest in land" does not include shares in a mine worked on the cost-book principle (Powell *v.* Jessopp, 18 C. B. 336, 354, 25 L. J. C. P. 199, 4 Wkly. Rep. 465, 86 E. C. L. 335 [*citing* Watson *v.* Spratley, 2 C. L. R. 1434, 10 Exch. 222, 24 L. J. Exch. 53, 2 Wkly. Rep. 627] or a railway debenture (Attree *v.* Howe, 9 Ch. D. 337, 351, 47 L. J. Ch. 863, 38 L. T. Rep. N. S. 733, 26 Wkly. Rep. 871). *Compare In re* Harris, 15 Ch. D. 561, 563, 45 J. P. 173, 49 L. J. Ch. 687, 43 L. T. Rep. N. S. 116, 29 Wkly. Rep. 119. See DEBENTURE.

11. Andrews *v.* Burdick, 62 Iowa 714, 722, 16 N. W. 275 [*citing* Bouvier L. Dict.; Coke Litt. 245, 246].

12. Stenzel *v.* Pennsylvania F. Ins. Co., 110 La. 1019, 1023, 35 So. 271, 98 Am. St. Rep. 481.

The term is broader than "title," and includes both equitable and legal rights. Gibb *v.* Philadelphia F. Ins. Co., 59 Minn 267, 273, 61 N. W. 137, 50 Am. St. Rep. 405 [*quoted* in Skinner, etc., Ship-Building, etc., Co. *v.* Houghton, 92 Md. 68, 96 Atl. 85, 84

has been said also to mean any right in the nature of property, but less than title.[13] The word is sometimes employed as synonymous with estate,[14] or property.[15] (Interest: Agency Coupled With, see PRINCIPAL AND AGENT. As Damages, see BANKRUPTCY; INTEREST. As Earnings on Money, see INTEREST. Assignable, see

Am. St. Rep. 485]; Southern Cotton Oil Co. *v.* Prudential Fire Assoc., 78 Hun (N. Y.) 373, 376, 29 N. Y. Suppl. 128.

Distinguished from "title" in Loventhal *v.* Home Ins. Co., 112 Ala. 108, 116, 20 So. 419, 57 Am. St. Rep. 17, 33 L. R. A. 258; Hough *v.* City F. Ins. Co., 29 Conn. 10, 20, 76 Am. Dec. 581; Hanover F. Ins. Co. *v.* Bohn, 48 Nebr. 743, 748, 67 N. W. 774, 58 Am. St. Rep. 719. *Compare* Arkansas F. Ins. Co. *v.* Wilson, 67 Ark. 553, 559, 560, 55 S. W. 933, 77 Am. St. Rep. 129, 48 L. R. A. 510.

13. Abbott L. Dict. [*quoted* in East Texas F. Ins. Co. *v.* Clarke, 79 Tex. 23, 25, 15 S. W. 166, 11 L. R. A. 293].

14. Andrews *v.* Burdick, 62 Iowa 714, 722, 16 N. W. 275; New York *v.* Stone, 20 Wend. (N. Y.) 139, 142 [*citing* 2 Blackstone Comm. 103]; Hurst *v.* Hurst, 7 W. Va. 289, 297; Ladd *v.* Ladd, 8 How. (U. S.) 10, 29, 12 L. ed. 967.

The word embraces the estate of lessee, which is quite commonly denominated a leasehold interest. Sanford *v.* Johnson, 24 Minn. 172, 173.

15. Ladd *v.* Ladd, 8 How. (U. S.) 10, 29, 12 L. ed. 967.

"Interest" as used in connection with other words see the following phrases: "All my interest" (Manton *v.* Tabois, 30 Ch. D. 92, 98, 54 L. J. Ch. 1008, 53 L. T. Rep. N. S. 289, 33 Wkly. Rep. 832); "any interest or title" (Zerbe *v.* Reigart, 42 Iowa 229, 231); "any interest therein" (State *v.* McKellop, 40 Mo. 184, 185; Leathwhite *v.* Bennet, (N. J. Ch. 1887) 11 Atl. 29, 30); "any pecuniary interest" (Nell *v.* Longbottom, [1894] 1 Q. B. 767, 769, 63 L. J. Q. B. 490, 70 L. T. Rep. N. S. 499, 10 Reports 193); "estate and interest in real property descendible to heirs" (Upington *v.* Corrigan, 151 N. Y. 143, 149, 45 N. E. 359, 37 L. R. A. 794); "estate or interest" (Whiting *v.* Butler, 29 Mich. 122, 144; Davidson *v.* Fox, 65 N. Y. App. Div. 262, 263, 73 N. Y. Suppl. 533; Dalrymple *v.* Security L. & T. Co., 9 N. D. 306, 314, 83 N. W. 245; Clark *v.* Darlington, 7 S. D. 148, 150, 63 N. W. 771, 58 Am. St. Rep. 835; Powell *v.* Jessopp, 18 C. B. 336, 348, 25 L. J. C. P. 199, 4 Wkly. Rep. 465, 86 E. C. L. 336); "interest concerning lands" (Mumford *v.* Whitney, 15 Wend. (N. Y.) 380, 386, 30 Am. Dec. 60); "interest . . . for good-will" (*Ex p.* Farlow, 2 B. & Ad. 341, 345, 9 L. J. K. B. O. S. 255, 22 E. C. L. 147); "interest in land" (Globe Lumber Co. *v.* Lockett, 106 La. 414, 417, 30 So. 902; Detroit *v.* Michigan Cent. R. Co., 90 Mich. 385, 389, 51 N. W. 447; Kingsley *v.* Holbrook, 45 N. H. 313, 319, 86 Am. Dec. 173; Howard *v.* Easton, 7 Johns. (N. Y.) 205; Green *v.* Armstrong, 1 Den. (N. Y.) 550, 553; Ragsdale *v.* Mays, 65 Tex. 255, 257; Williams *v.* Papworth, [1900] A. C. 563, 568, 69 L. J. P. C. 129, 83 L. T. Rep. N. S. 184; Webber *v.* Lee, 9 Q. B. D. 315, 319, 47 J. P. 4, 51 L. J. Q. B. 485, 47 L. T. Rep. N. S. 215, 30 Wkly. Rep. 866; Miller *v.* Collins, [1896] 1 Ch. 573, 591, 65 L. J. Ch. 353, 74 L. T. Rep. N. S. 122, 44 Wkly. Rep. 466; Jervis *v.* Lawrence, 22 Ch. D. 202, 216, 52 L. J. Ch. 242, 47 L. T. Rep. N. S. 428, 31 Wkly. Rep. 267; Lewis *v.* Lewis, L. R. 13 Eq. 218, 227, 41 L. J. Ch. 195, 25 L. T. Rep. N. S. 555, 20 Wkly. Rep. 141; Tyler *v.* Bennett, 5 A. & E. 377, 379, 31 E. C. L. 655; Fleming *v.* Buchanan, 3 De G. M. & G. 976, 980, 22 L. J. Ch. 886, 52 Eng. Ch. 758, 43 Eng. Reprint 382; Thomas *v.* Cross, 2 Dr. & Sm. 423, 426, 11 Jur. N. S. 384, 34 L. J. Ch. 580, 12 L. T. Rep. N. S. 293, 13 Wkly. Rep. 647, 62 Eng. Reprint 682; Taylor *v.* Waters, 7 Taunt. 374, 378, 2 E. C. L. 405); "interest [in land] by debt" (Owings *v.* Norwood, 5 Cranch (U. S.) 344, 347, 3 L. ed. 120); "interest in or concerning lands" (Haviland *v.* Sammis, 62 Conn. 44, 46, 25 Atl. 394, 33 Am. St. Rep. 330; Chicago Attachment Co. *v.* Davis Sewing Mach. Co., 142 Ill. 171, 181, 31 N. E. 438, 15 L. R. A. 754; Mechelen *v.* Wallace, 7 A. & E. 49, 57, 6 L. J. K. B. 217, 2 N. & P. 224, 34 E. C. L. 51; Donellan *v.* Read, 3 B. & Ad. 898, 904, 1 L. J. K. B. 269, 23 E. C. L. 391; Evans *v.* Roberts, 5 B. & C. 829, 841, 8 D. & R. 611, 4 L. J. K. B. O. S. 313, 11 E. C. L. 700; Smart *v.* Harding, 15 C. B. 652, 654, 3 C. L. R. 351, 1 Jur. N. S. 311, 24 L. J. C. P. 76, 3 Wkly. Rep. 245, 80 E. C. L. 652); "interest . . . in possession" (Atty.-Gen. *v.* Wood, [1897] 2 Q. B. 102, 105, 66 L. J. Q. B. 522, 76 L. T. Rep. N. S. 654, 45 Wkly. Rep. 663); "interest in property" (Glendon Co. *v.* Townsend, 120 Mass. 346, 348); "interest in real estate" (Vorebeck *v.* Roe, 50 Barb. (N. Y.) 302, 306); "interest in the cause" (Heacock *v.* Stoddard, 1 Tyler (Vt.) 344, 345); "interest in the event" (Booth *v.* Hart, 43 Conn. 480, 486); "interest in the husband" (Low *v.* Porter, 14 N. J. L. 516); "interest in the matter in litigation" (McClurg *v.* State Bindery Co., 3 S. D. 362, 363, 55 N. W. 428, 44 Am. St. Rep. 799; Yetzer *v.* Young, 3 S. D. 263, 267, 52 N. W. 1054); "interest in the vessel and her freight" (Place *v.* Norwich Transp. Co., 118 U. S. 468, 493, 6 S. Ct. 1150, 30 L. ed. 134); "interest of any judgment debtor" (Dixon *v.* Wrench, L. R. 4 Exch. 154, 155, 38 L. J. Exch. 113, 20 L. T. Rep. N. S. 492, 17 Wkly. Rep. 591); "interest of a stockholder" (State *v.* Mitchell, 104 Tenn. 336, 342, 58 S. W. 365); "interest" of widow (Matter of Tipple, 13 N. Y. Suppl. 263, 264, 2 Connoly Surr. 508); "interest or title in the land" (Bray *v.* Ragsdale, 53 Mo. 170, 172; Bruce *v.* Ailesbury, [1892] A. C. 356, 359, 62 L. J. Ch. 95, 67 L. T. Rep. N. S. 490, 1 Reports 37, 41 Wkly. Rep. 318); "interest therein" (Godman *v.* Simmons, 113 Mo. 122, 130, 20 S. W. 972); "lien or other interest in real property"

ASSIGNMENTS. By Deseent, see DESCENT AND DISTRIBUTION. Community, see HUSBAND AND WIFE. Curtesy, see CURTESY. Dower, see DOWER. Exemption, see EXEMPTIONS. Fund in Court, see DEPOSITS IN COURT. Homestead, see HOMESTEADS. In Bill, Note, or Other Negotiable Instrument, see COMMERCIAL PAPER. In Charitable Bequests or Gifts, see CHARITIES. In Common Lands, see COMMON LANDS. In Copyright, see COPYRIGHT. In Crops, see CROPS; LAND-

(Becker *v.* Cherry Creek, 70 Hun (N. Y.) 6, 8, 24 N. Y. Suppl. 19); "on account of his interest" (Dunes *v.* Grand Junction Canal, 3 H. L. Cas. 759, 784, 17 Jur. 73, 10 Eng. Reprint 301); "owner or person having or claiming an interest" (Williams *v.* Santa Clara Min. Assoc., 66 Cal. 193, 200, 5 Pac. 85); "party in interest" (Johnson *v.* Johnson, 81 Me. 202, 204, 16 Atl. 661); "right, title and interest" (Scofield *v.* Moore, 31 Iowa 241, 245; Parks *v.* Watson, 29 Mo. 108, 113); "share or interest in any contract" (Reg. *v.* Francis, 18 Q. B. 526, 16 Jur. 1046, 21 L. J. Q. B. 304, 83 E. C. L. 526; Le Feurse *v.* Lankester, 3 E. & B. 530, 536, 77 E. C. L. 530); "united in interest" (Benner *v.* Benner, 12 N. Y. Suppl. 472); "vested interest" (Den *v.* Hillman, 7 N. J. L. 180, 187).

"Interested" as used in connection with other words see the following phrases: "Concerned or interested in" (Reg. *v.* Ramsgate, 23 Q. B. D. 66, 71, 53 J. P. 740, 58 L. J. Q. B. 352, 61 L. T. Rep. N. S. 333, 37 Wkly. Rep. 781; Whiteley *v.* Barley, 21 Q. B. D. 154, 52 J. P. 595, 57 L. J. Q. B. 643, 60 L. T. Rep. N. S. 86, 36 Wkly. Rep. 823; Todd *v.* Robinson, 14 Q. B. D. 739, 741, 49 J. P. 278, 54 L. J. Q. B. 47, 52 L. T. Rep. N. S. 120; Burgess *v.* Clark, 14 Q. B. D. 735, 736, 49 J. P. 388, 33 Wkly. Rep. 269; Hunnings *v.* Williamson, 11 Q. B. D. 533, 536, 52 L. J. Q. B. 416, 46 L. T. Rep. N. S. 361, 32 Wkly. Rep. 267; Woolley *v.* Kay, 1 H. & N. 307, 309); "directly or indirectly interested" (U. S. *v.* Burton, 131 Fed. 552, 557); "in any way entitled or interested" (Carson *v.* Smith, 12 Minn. 546); "interested, as a party or otherwise" (McGrath *v.* People, 100 Ill. 464); "interested in" (Gilbert *v.* Havemeyer, 2 Sandf. (N. Y.) 506, 509; Reg. *v.* Gaskaith, 5 Q. B. D. 321, 324; Gophier Diamond Co. *v.* Wood, [1902] 1 Ch. 950, 952, 71 L. J. Ch. 550, 86 L. T. Rep. N. S. 801, 50 Wkly. Rep. 603; Smith *v.* Hancock, [1894] 2 Ch. 377, 387, 58 J. P. 638, 63 L. J. Ch. 477, 70 L. T. Rep. N. S. 578, 7 Reports 200, 42 Wkly. Rep. 456); "interested" in a business enterprise (Fleckenstein Bros. Co. *v.* Fleckenstein, 66 N. J. Eq. 252, 254, 57 Atl. 1025); "interested" in a patent (Moore *v.* Marsh, 7 Wall. (U. S.) 515, 522, 19 L. ed. 37); "interested in a petition to the Legislature" (Connolly *v.* Beverly, 151 Mass. 437, 438, 24 N. E. 404); "interested in the case" (Browning *v.* Bancroft, 5 Metc. (Mass.) 88, 89); "interested in the 'cause or proceeding'" (Ellis *v.* Smith, 42 Ala. 349, 353); "interested in the estate" (Chicago, etc., R. Co. *v.* Gould, 64 Iowa 346, 348, 20 N. W. 464; Yeomans *v.* Brown, 8 Metc. (Mass.) 51, 57; Balch *v.* Hooper, 32 Minn. 158, 161, 20 N. W. 124; *In re* Killan, 172 N. Y. 547, 550, 65 N. E. 561, 63 L. R. A. 95; Russell *v.* Hartt, 87 N. Y. 19, 22; Matter of Hunt, 83 N. Y. App. Div. 159, 162, 82 N. Y. Suppl. 538; Matter of Kreischer, 30 N. Y. App. Div. 313, 325, 51 N. Y. Suppl. 802; Matter of Bradley, 70 Hun (N. Y.) 104, 107, 23 N. Y. Suppl. 1127, 1129; Mohr *v.* Porter, 51 Wis. 487, 492, 8 N. W. 364); "interested in the event" (Eisenlord *v.* Chun, 126 N. Y. 552, 558, 27 N. E. 1024, 12 L. R. A. 836; Crampton *v.* Foster, 29 N. Y. App. Div. 215, 223, 51 N. Y. Suppl. 883); "'interested in the event' of the action" (Perine *v.* Grand Lodge A. O. U. W., 48 Minn. 82, 90, 50 N. W. 1022, 1024); "interested in the event of the cause" (Call *v.* Pike, 66 Me. 350, 353); "interested in the event thereof" (Pitzl *v.* Winter, (Minn. 1905) 105 N. W. 673, 674; Lowe *v.* Lowe, 83 Minn. 206, 207, 86 N. W. 11; Bowers *v.* Schuler, 54 Minn. 99, 103, 55 N. W. 817); "interested in the minerals" (Devonshire *v.* Stokes, 61 J. P. 406, 76 L. T. Rep. N. S. 424, 426); "interested" in the reversion (Peck *v.* Peck, 35 Conn. 390, 391); "interested in the suit" (Kansas *v.* Knotts, 78 Mo. 356, 359); "interested or prejudiced" (Hungerford *v.* Cushing, 2 Wis. 397, 400); "interested person" (Lockard *v.* Stephenson, 120 Ala. 641, 644, 24 So. 996, 74 Am. St. Rep. 63); "interested therein" (Lockard *v.* Stephenson, 120 Ala. 641, 644, 24 So. 996, 74 Am. St. Rep. 63); "parties interested" (Chandler *v.* Railroad Com'rs, 141 Mass. 208, 209, 5 N. E. 509; Acer *v.* Merchants' Ins. Co., 57 Barb. (N. Y.) 68, 83); "party interested" (Fitch *v.* San Francisco, 122 Cal. 285, 287, 54 Pac. 901; Shepard's Estate, 170 Pa. St. 323, 327, 32 Atl. 1040; Pennsylvania R. Co. *v.* Eby, 107 Pa. St. 166, 172); "party really interested" (Yerby *v.* Sexton, 48 Ala. 311, 316); "person interested" (Jele *v.* Lemberger, 163 Ill. 338, 345, 45 N. E. 279; Davies *v.* Leete, 111 Ky. 659, 666, 64 S. W. 441, 23 Ky. L. Rep. 899; McKee *v.* Scobee, 80 Ky. 124, 127; Meservey *v.* Kalloch, 97 Me. 91, 94, 58 Atl. 876; Greene *v.* Borland, 4 Metc. (Mass.) 330, 332; National R. Co. *v.* Easton, etc., R. Co., 36 N. J. L. 181, 184; Donlon *v.* Kimhall, 61 N. Y. App. Div. 31, 34, 70 N. Y. Suppl. 252; Matter of Wolfe, 66 Hun (N. Y.) 389, 394, 21 N. Y. Suppl. 515, 522; Creamer *v.* Waller, 2 Dem. Surr. (N. Y.) 351, 353; Drexel *v.* Berney, 1 Dem. Surr. (N. Y.) 163, 166; Carr *v.* Metropolitan Bd. Works, 14 Ch. D. 807, 810 note, 811, 49 L. J. Ch. 272, 42 L. T. Rep. N. S. 354); "person interested in any estate" (*Ex p.* Gfeller, 178 Mo. 248, 263, 77 S. W. 552); "person interested in a will" (Lewis *v.* Cook, 150 N. Y. 163, 165, 44 N. E. 778); "persons interested in the estate" (Phillips *v.* Smith, 62 Ala. 575, 578; Smith *v.* Phillips, 54 Ala. 8, 11); "person inter-

LORD AND TENANT. In Easement, see EASEMENTS. In Escrow, see ESCROWS. In Fence, see FENCES. In Fixtures, see FIXTURES. In Goods Intermingled, see CONFUSION OF GOODS. In Literary Property, see LITERARY PROPERTY. In Improvement, see IMPROVEMENTS. In Mine, see MINES AND MINERALS. In Party-Wall, see PARTY-WALLS. In Patent, see PATENTS. In Property Assigned, see ASSIGNMENTS; ASSIGNMENT FOR BENEFIT OF CREDITORS; BANKRUPTCY; INSOLVENCY; Dedicated, see DEDICATION. In Public Land, see PUBLIC LANDS. In Realty — Generally, see ESTATES, and Cross-References Thereunder; Sought to Be Condemned, see EMINENT DOMAIN. In Subscription, see SUBSCRIPTIONS. In Trade-Mark or Trade-Name, see TRADE-MARKS AND TRADE-NAMES. Insurable Interest, see the Insurance Titles. Interference With, see INJUNCTIONS. Of Amicus Curiae, see AMICUS CURIÆ. Of Arbitrator, see ARBITRATION AND AWARD. Of Assured or Insured, see the Insurance Titles. Of Attorney, see ATTORNEY AND CLIENT; CHAMPERTY AND MAINTENANCE. Of Bailor or Bailee, see BAILMENT, and Cross-References Thereunder. Of Banker or Depositor, see BANKS AND BANKING. Of Depositor or Depositary, see BANKS AND BANKING; DEPOSITARIES. Of Donor or Donee, see GIFTS. Of Grand Juror, see GRAND JURIES. Of Grantor or Grantee, see DEEDS. Of Husband or Wife, see HUSBAND AND WIFE. Of Innkeeper or Guest, see INNKEEPERS. Of Interpleader, see INTERPLEADER. Of Joint Tenant, see JOINT TENANCY. Of Judge, see JUDGES. Of Juror, Generally, see JURIES; Grand Juror, see GRAND JURIES. Of Landlord or Tenant, see GROUND-RENTS; LANDLORD AND TENANT. Of Licensee, see LICENSES. Of Lienor or Lienee, see LIENS, and Cross-References Thereunder. Of Member of — Association, see ASSOCIATIONS; Building and Loan Association, see BUILDING AND LOAN SOCIETIES; Club, see CLUBS; Corporation, see CORPORATIONS; Firm, see PARTNERSHIP; Joint Stock Company, see JOINT STOCK COMPANIES. Of Mortgagor or Mortgagee, see CHATTEL MORTGAGES; MORTGAGES. Of Officer — Generally, see OFFICERS; Of Municipality, see MUNICIPAL CORPORATIONS; Sheriff, Constable, or the Like, see ATTACHMENT; EXECUTIONS; GARNISHMENT; SHERIFFS AND CONSTABLES; Taking Acknowledgment, see ACKNOWLEDGMENTS. Of Party, see PARTIES. Of Plaintiff — Generally, see ACTIONS, and Cross-References Thereunder; In Detinue, see DETINUE; In Ejectment, see EJECTMENT; In Forcible Entry and Detainer, see FORCIBLE ENTRY AND DETAINER; In Replevin, see REPLEVIN; In Trespass, see TRESPASS; In Trover, see TROVER AND CONVERSION. Of Pledgor or Pledgee, see PLEDGES. Of Receiver, see RECEIVERS. Of Stock-Holder, see CORPORATIONS. Of Tenant in Common, see TENANCY IN COMMON. Of Trustee or Beneficiary, see TRUSTS. Of Vendor or Purchaser — Of Personalty, see SALES; Of Realty, see VENDOR AND PURCHASER. Of Witness, see EVIDENCE; WITNESSES. Power Coupled With, see POWERS. Real Party in, see PARTIES. Riparian, see WATERS. Subject to Levy — Under Attachment Process, see ATTACHMENT; Under Execution Process, see EXECUTIONS; Under Garnishment or Like Process, see GARNISHMENT. Subrogation, see SUBROGATION, and Cross-References Thereunder. Taxable, see TAXATION. Under Contract Generally, see CONTRACTS. Under Will, see WILLS. Vested, see CONSTITUTIONAL LAW.)

INTEREST COUPONS. A term sometimes applied to coupons attached to municipal bonds, which are evidences of debt in the nature of promissory notes, so that a national bank may deal in them.[16] (See COUPONS; INTEREST; and, generally, COMMERCIAL PAPER; MUNICIPAL CORPORATIONS.)

ested in the event" (Rosseau *v.* Rouss, 91 N. Y. App. Div. 230, 236, 86 N. Y. Suppl. 497); "person interested therein" (Montgomery *v.* Foster, 91 Ala. 613, 614, 8 So. 349); "the State is interested" (McGrath *v.* People, 100 Ill. 464); "those interested" (Shelton *v.* Derby, 27 Conn. 414, 421).

"'To be inserted in' or 'to have an interest in.'" Lucena *v.* Craufurd, 2 B. & P. N. L. 269, 271.

16. Newport Nat. Bank *v.* Newport Bd. of Education, 114 Ky. 87, 91, 70 S. W. 186, 24 Ky. L. Rep. 876 [*citing* North Bennington First Nat. Bank *v.* Bennington, 9 Fed. Cas. No. 4,807, 16 Blatchf. 53]. See also 8 Cyc. 997 note 18, 309; 7 Cyc. 860 note 53.

INTEREST POLICY. A policy which shows by its form that the assured has a real, substantial interest; in other words, that the contract of insurance, embodied by the policy, is a contract of indemnity, and not a wager.[17] (See, generally, the Insurance Titles.)

INTEREST REIPUBLICÆ NE MALEFICIA REMANEANT IMPUNITA. A maxim meaning "It concerns the commonwealth that crimes do not remain unpunished."[18]

INTEREST REIPUBLICÆ, NE QUIS RE SUA MALE UTATUR. A maxim meaning "It is for the interest of the state that no one shall use his property improperly."[19]

INTEREST REIPUBLICÆ QUOD HOMINES CONSERVENTUR. A maxim meaning "It concerns the commonwealth that men be preserved."[20]

INTEREST REIPUBLICÆ RES JUDICATAS NON RESCINDI. A maxim meaning "It concerns the commonwealth that things adjudged be not rescinded."[21]

INTEREST REIPUBLICÆ SUPREMA HOMINUM TESTAMENTA RATA HABERI. A maxim meaning "It concerns the commonwealth that men's last wills be sustained."[22]

INTEREST REIPUBLICÆ UT BONIS BENE SIT, ET MALE MALIS, ET SUUM CUIQUE. A maxim meaning "It is to the interest of the state that it may be well with the good, ill with the wicked, and that every one may have his own."[23]

INTEREST REIPUBLICÆ UT CARCERESSINT SINT IN TUTO. A maxim meaning "It concerns the commonwealth that prisons be secure."[24]

INTEREST REIPUBLICÆ UT PAX IN REGNO CONSERVETUR, ET QUÆCUNQUE PACI ADVERSENTUR PROVIDE DECLINENTUR. A maxim meaning "It benefits the state to preserve peace in the kingdom, and prudently to decline whatever is adverse to it."[25]

INTEREST REIPUBLICÆ UT QUILIBED RE SUA BENE UTATUR. A maxim meaning "It concerns the commonwealth that every one use his property properly."[26]

INTEREST REIPUBLICÆ UT SIT FINIS LITIUM. A maxim meaning "It concerns the commonwealth that there be a limit to litigation."[27]

"Interest coupons are instruments of a peculiar character. The title to them passes from hand to hand by mere delivery. A transfer of possession is presumptively a transfer of title. And especially is this true when the transfer is made to one who is not a debtor, to one who is under no obligation to receive them or to pay them." Ketchum *v.* Duncan, 96 U. S. 659, 662, 24 L. ed. 868 [*quoted* in Curtiss *v.* McCune, 4 Nebr. (Unoff.) 483, 94 N. W. 984, 986].

17. Arnould Ins. 17 [*quoted* in Sawyer *v.* Dodge County Mut. Ins. Co., 37 Wis. 503, 539], where the term "wager policy" is defined.

18. Bouvier L. Dict. [*citing* Jenkins Cent. 30, 31].

19. Trayner Leg. Max.

Applied in Worcester's Case, 6 Coke 37*a*.

20. Bouvier L. Dict.

Applied in Mouse's Case, 12 Coke 63.

21. Bouvier L. Dict.

22. Bouvier L. Dict. [*citing* Coke Litt. 236].

23. Morgan Leg. Max.

24. Bouvier L. Dict. [*citing* 2 Inst. 587].

25. Bouvier L. Dict. [*citing* 2 Inst. 158].

26. Bouvier L. Dict.

27. Bouvier L. Dict. [*citing* Broom Leg. Max. 331, 343, 893 note; Coke Litt. 303].

Applied or quoted in the following cases:

Connecticut.— Burritt *v.* Belfy, 47 Conn. 323, 329, 36 Am. Rep. 79; Shields *v.* State, 45 Conn. 266, 270; Belknap *v.* Gleason, 11 Conn. 160, 164, 27 Am. Dec. 721; Watson *v.* Watson, 10 Conn. 75, 89; Sheldon *v.* Kibbe, 3 Conn. 214, 222, 8 Am. Dec. 176.

Georgia.— Central R., etc., Co. *v.* Kent, 91 Ga. 687, 693, 18 S. E. 850.

Louisiana.—Chadwick *v.* Gulf States Land, etc., Co., 49 La. Ann. 757, 762, 22 So. 237.

Maine.— Bean *v.* Ayers, 70 Me. 421, 433; Atkinson *v.* Conner, 56 Me. 546, 550; Hewey *v.* Nourse, 54 Me. 256, 262; Brackett *v.* Unknown Persons, 53 Me. 228, 238.

Massachusetts.— Burlen *v.* Shannon, 99 Mass. 200, 203, 96 Am. Dec. 733; Com. *v.* Whalen, 16 Gray 25, 27; Com. *v.* Anthes, 5 Gray 185, 197; Bigelow *v.* Winsor, 1 Gray 299, 302; Wilbur *v.* Gilmore, 21 Pick. 250, 253; Miller *v.* Baker, 20 Pick. 285, 290; Com. *v.* Pejepscut Proprietors, 7 Mass. 399, 432; Kent *v.* Kent, 2 Mass. 338, 355, 356.

Missouri.— Halpin *v.* Manny, 57 Mo. App. 59, 60; State *v.* Benedict, 51 Mo. App. 642, 651; Skeen *v.* Springfield Engine, etc., Co., 42 Mo. App. 158, 164.

New Jersey.— Davenport *v.* Elizabeth, 41 N. J. L. 362, 365; Riker *v.* Jersey City, 38 N. J. L. 225, 226, 20 Am. Rep. 386; Den *v.* Richards, 15 N. J. L. 347, 356; Buchannan *v.* Rowland, 5 N. J. L. 721, 728; Deshler *v.* Holmes, 44 N. J. Eq. 581, 588, 18 Atl. 75; Hendrickson *v.* Hendrickson, 42 N. J. Eq. 657, 661, 9 Atl. 742; Chapin *v.* Wright, 41 N. J. Eq. 438, 443, 5 Atl. 574.

New Mexico.— Texas, etc., R. Co. *v.* Saxton, 7 N. M. 302, 303, 34 Pac. 532.

INTERESTS. A term sometimes used as synonymous with INTEREST,[28] *q. v.*

INTERFERE. To prevent some action; to interpose; sometimes in a bad sense, to intermeddle.[29] (See INTERFERENCE; INTERMEDDLE.)

INTERFERENCE. A word often used in the sense of intermeddling.[30] (Interference: In Patent Law, see PATENTS. With Contract Relations — In General, see ACTIONS; LABOR UNIONS; MASTER AND SERVANT; TORTS; By Conspiracy, see CONSPIRACY; By Slander of Title, see LIBEL AND SLANDER; Constitutional Protection of Right to Contract, see CONSTITUTIONAL LAW.)

INTERIM CURATOR BONIS. In the law of Scotland, a provisional committee of the estate of a person of unsound mind.[31] (See, generally, INSANE PERSONS.)

New York.— Boller *v.* New York, 40 N. Y. Super. Ct. 523, 532; Birckhead *v.* Brown, 5 Sandf. 134, 140; People *v.* Neidhart, 35 Misc. 191, 192, 71 N. Y. Suppl. 591, 15 N. Y. Cr. 475; Allen *v.* Beloved Disciple Church, 16 Misc. 584, 585, 38 N. Y. Suppl. 805; Dearing *v.* Pearson, 8 Misc. 269, 274, 28 N. Y. Suppl. 715; Cahill *v.* Cahill, 9 N. Y. Civ. Proc. 241, 242; Mulcahy *v.* Devlin, 2 N. Y. City Ct. 218, 222; Humbert *v.* Trinity Church, 24 Wend. 587, 615.

North Carolina.— Farrar *v.* Staton, 101 N. C. 78, 85, 7 S. E. 753; Dupree *v.* Virginia Home Ins. Co., 93 N. C. 237, 246; Bledsoe *v.* Nixon, 69 N. C. 81, 86; Atkinson *v.* Cox, 64 N. C. 576, 577; Peebles *v.* Horton, 64 N. C. 374, 376; Teague *v.* Perry, 64 N. C. 39, 41.

Ohio.— Smith *v.* Ramsey, 27 Ohio St. 339, 341; Pendleton *v.* Galloway, 9 Ohio 178, 180, 34 Am. Dec. 434.

Pennsylvania.— Third Reformed Dutch Church's Appeal, 88 Pa. St. 503, 506; *In re* Porter Tp. Road, 1 Walk. 10, 21; Love *v.* Jones, 4 Watts 465, 473; Bellas *v.* Leran, 4 Watts 294, 296; Mussina *v.* Herzog, 5 Binn. 387, 389; Mahon *v.* Luzerne County, 10 Kulp 108, 111; Com. *v.* Casey, 6 Kulp 161, 163; Burk *v.* Bear, 5 Pa. L. J. 304, 324.

Rhode Island.— Gunn *v.* Union R. Co., (1905) 62 Atl. 118, 125.

Vermont.— Gray *v.* Pingry, 17 Vt. 419, 425, 44 Am. Dec. 345.

Virginia.— Findlay *v.* Trigg, 83 Va. 539, 543, 3 S. E. 142.

West Virginia.—Bias *v.* Vickers, 27 W. Va. 456, 462.

Wisconsin.— Pennoyer *v.* Allen, 50 Wis. 308, 310, 6 N. W. 887.

United States.— U. S. *v.* Throckmorton, 98 U. S. 61, 67, 25 L. ed. 93; Andrews *v.* Dole, 1 Fed. Cas. No. 373; Greely *v.* Smith, 10 Fed. Cas. No. 5,749, 1 Woodb. & M. 181.

England.— *In re* May, 25 Ch. D. 231, 234; Imperial Gas-light, etc., Co. *v.* London Gas-light Co., 2 C. L. R. 1230, 10 Exch. 39, 18 Jur. 497, 498, 23 L. J. Exch. 303, 2 Wkly. Rep. 527, 26 Eng. L. & Eq. 425; Worcester's Case, 6 Coke 37*a*; Cholmondeley *v.* Clinton, 2 Jac. & W. 1, 140, 22 Rev. Rep. 84, 48 Eng. Reprint 527; Ruckmahoye *v.* Lullobhoy Mottichund, 5 Moore Indian App. 234, 251, 18 Eng. Reprint 884, 8 Moore P. C. 4, 14 Eng. Reprint 2; Rex *v.* Burridge, 3 P. Wms. 439, 484. 24 Eng. Reprint 1133; Rex *v.* Walker, 1 W. Bl. 286, 287.

Canada.— Reg. *v.* St. Louis, 5 Can. Exch. 330, 354; Inch *v.* Flewelling, 30 N. Brunsw. 19, 42; Leckie *v.* Stuart, 34 Nova Scotia 140, 176; Keating *v.* Graham, 26 Ont. 361, 376; Forsyth *v.* Hall, Draper (U. C.) 291, 296; Gordon *v.* Robinson, 14 U. C. C. P. 566, 572; Bigelow *v.* Staley, 14 U. C. C. P. 276, 283; Gardiner *v.* Gardiner, 2 U. C. Jur. O. S. 554, 601, 1 U. C. Jur. O. S. 193; Connolly *v.* McLeod, 2 Hasz. & W. (Pr. Edw. I.) 373, 387.

28. Luce *v.* Dunham, 69 N. Y. 36, 44, where the term is used in the expression "as shall best serve the 'interests' of his estate."

"Interests of all parties entitled" see Sutherland *v.* Sutherland, [1893] 3 Ch. 169, 180, 62 L. J. Ch. 946, 69 L. T. Rep. N. S. 186, 3 Reports 650, 42 Wkly. Rep. 13.

29. Standard Dict. See also Van Buren County *v.* Mattox, 30 Ark. 566, 567; Specht *v.* Com., 8 Pa. St. 312, 321, 49 Am. Dec. 518; Gibbons *v.* Vouillon, 8 C. B. 483, 498, 7 D. & L. 266, 14 Jur. 66, 19 L. J. C. P. 74, 65 E. C. L. 483.

"The words 'interfere with or affect any settlement' mean invalidate or render inoperative any settlement." *In re* Armstrong, 21 Q. B. D. 264, 270, 57 L. J. Q. B. 553, 59 L. T. Rep. N. S. 806, 5 Morr. Bankr. Cas. 200, 36 Wkly. Rep. 772, per Lindley, L. J. See also *In re* Onslow, 39 Ch. D. 622, 625, 57 L. J. Ch. 940, 59 L. T. Rep. N. S. 308, 36 Wkly. Rep. 883.

30. Lapham *v.* Noble, 54 Fed. 108, 109.

Modes of interference.—"Every man's business is liable to be 'interfered with' by the action of another, and yet no action lies for such interference. Competition represents 'interference,' and yet it is in the interest of the community that it should exist. A new invention utterly ousting an old trade would certainly 'interfere with' it. Every organiser of a strike, in order to obtain higher wages, 'interferes with' the employer carrying on his business; also every member of an employers' federation who persuades his co-employer to lock out his workmen must 'interfere with' those workmen. Yet I do not think it will be argued that an action can be maintained in either case on account of such interference." Allen *v.* Flood, [1898] A. C. 1, 179, 67 L. J. Q. B. 119, 77 L. T. Rep. N. S. 717, 46 Wkly. Rep. 258.

31. Dickson *v.* Graham, 4 Bligh N. S. 492, 493, 5 Eng. Reprint 175.

INTERIOR DEPARTMENT. See UNITED STATES.

INTERLINE. To write between lines already written, for the purpose of adding to or correcting what is written.[32] (See INTERLINEATION.)

INTERLINEATION. The act of writing between the lines of an instrument;[33] also what is written between lines.[34] (Interlineation: In Deed, see DEEDS. In Indictment or Information, see INDICTMENTS AND INFORMATIONS. In Instrument in General, see ALTERATIONS OF INSTRUMENTS. In Note, see COMMERCIAL PAPER. In Pleading, see PLEADING. In Will, see WILLS.)

INTERLOCK. To unite, embrace, communicate with; to flow into one another; to unite by locking together; to lock one with another.[35] (See, generally, RAILROADS.)

INTERLOCUTIO PRINCIPIS. A term applied to the habit of a prince of interpreting his own laws for particular occasions.[36]

INTERLOCUTORY. Provisional; temporary; not final.[37] In law, a term meaning not that which decides the cause, but that which only settles some intervening matter relating to the cause.[38] (Interlocutory: Costs, see COSTS. Decree, see APPEAL AND ERROR; EQUITY; JUDGMENTS. Injunction, see INJUNCTIONS. Judgment, see JUDGMENTS. Order, see APPEAL AND ERROR; JUDGMENTS; ORDERS.)

INTERLOCUTORY APPLICATION. A request made to the court, or to a judge in chambers, for its interference in a matter arising in the progress of a cause or proceeding.[39] (See INTERLOCUTORY.)

INTERLUDE. A short dramatic piece, and generally accompanied with music, though usually represented or performed between the acts of a longer performance.[40] (See DRAMA; DRAMATIC PERFORMANCE.)

INTERMEDDLE. To meddle with the affairs of others in which one has no concern; to meddle officiously; to interpose or interfere in property; to intermix.[41] (See INTERFERENCE and Cross-References Thereunder.)

INTERMEDIARY. A person who is employed to negotiate a matter between two parties, and who, for that reason, is considered as the mandatary of both.[42]

INTERMEDIATE. Lying or being in the middle place or degree, or between

32. Webster Dict. [*quoted* in Russell *v.* Eubanks, 84 Mo. 82, 88].

33. Morris *v.* Vanderen, 1 Dall. (Pa.) 64, 67, 1 L. ed. 38.

34. Black L. Dict.

35. Lake Shore, etc., R. Co. *v.* Cleveland R. Co., 7 Ohio S. & C. Pl. Dec. 558, 561, 5 Ohio N. P. 83.

The "interlocking signal system" is a tower built near the point of crossing of two roads, and in that tower are placed wires connected by levers with signals each way at a distance sufficient to insure the stoppage of a train before it reaches the point of crossing. The interlocking feature consists in a wire connection, by which a signal movement necessarily shows a signal on each road on each side of the crossing. Jersey City, etc., R. Co. *v.* New York, etc., R. Co., 62 N. J. Eq. 390, 393, 53 Atl. 709.

"There are two systems."— There is an interlocking signal system and the interlocking signal and derailing system. In the one reliance is placed entirely upon signals given at a long distance on the steam railroad and at a short distance on the street railway. The signal and derailing system provides, not only a signal, but also a derailment on both tracks, so that if a signal is overlooked by the engineer or motorman the train will be derailed before it reaches the point of crossing." Jersey City, etc., R. Co. *v.* New York, etc., R. Co., 62 N. J. Eq. 390, 395, 53 Atl. 709.

36. Dash *v.* Van Kleeck, 7 Johns. (N. Y.) 477, 5 Am. Dec. 291.

37. Black L. Dict.

Distinguished from "final."— The word, although most frequently employed to designate steps in action intermediate between the initial and final proceeding, and merely leading toward the proceeding which finally terminates the litigation, is not inaptly used in contradistinction to the word "final" with reference to the actual adjudication of the substantial matter in dispute. Whiting *v.* Hovey, 12 Ont. App. 119, 125.

38. Mora *v.* Sun Mut. Ins. Co., 13 Abb. Pr. (N. Y.) 304, 310.

39. Wooster *v.* Handy, 23 Fed. 49, 53, 23 Blatchf. 112 [*citing* 2 Daniell Ch. Pr. c. 35, § 1].

40. Juvenile Delinquents Reformation Soc. *v.* Diers, 10 Abb. Pr. N. S. (N. Y.) 216, 220.

41. Webster Dict. [*quoted* in McQueen *v.* Babcock, 41 Barb. (N. Y.) 337, 339. *Compare* Shinn's Estate, 166 Pa. St. 121, 129, 30 Atl. 1026, 1030, 45 Am. St. Rep. 656; Rex *v.* Moreley, 2 Burr. 1040, 1041.

"Attempt to intermeddle with or interfere in" see Adams *v.* Adams, [1892] 1 Ch. 369, 375, 61 L. J. Ch. 237, 66 L. T. Rep. N. S. 98, 40 Wkly. Rep. 261.

42. La. Civ. Code (1900), art. 3016.

two extremes; coming or done between; intervening; interposed; interjacent.[43] (Intermediate Court: In General, see COURTS. Jurisdiction and Procedure on Appeal, see APPEAL AND ERROR. Order, see Cross-References Under INTERLOCUTORY DECREE.)

INTERMENT, see CEMETERIES; DEAD BODIES.

IN TERMINUS TERMINANTIBUS. In terms of determination; exactly in point; in express or determinate terms.[44]

INTERMITTENT EASEMENT. An easement which is usable or used only at times.[45] (See, generally, EASEMENTS.)

INTERMIXTURE OF GOODS. See CONFUSION OF GOODS.

INTERNAL. A term which means merely interior, or within any limit.[46] (See EXTERNAL.)

INTERNAL COMMERCE. Commerce which is wholly carried on within the limits of a state;[47] commerce which is carried on between man and man in a state, or between different parts of the same state, and which does not extend to or affect other states.[48] (See, generally, CARRIERS; COMMERCE; RAILROADS.)

INTERNAL IMPROVEMENTS. A term sometimes used as synonymous with "public improvements," in other words, improvements in which the government, state or federal, has embarked,[49] as for instance the improvement of rivers and harbors,[50] and of highways and channels to travel and commerce;[51] and the term includes

43. Webster Int. Dict.

"Intermediate account" defined see Stover Code Civ. Proc. N. Y. (1898) § 2514, subd. 9.

"Intermediate examination" see 61 & 62 Vict. c. 17, § 4; 40 & 41 Vict. c. 25, § 4.

"Intermediate toll" is the toll for travel on a toll road, paid or to be collected from persons who pass thereon at points between the toll gates; the person so traveling not passing by, through, or around such toll gates." Hollingworth *v.* State, 29 Ohio St. 552, 553.

44. Bouvier L. Dict. See also Metcalfe's Case, 11 Coke 38*a*, 40*b*.

45. Eaton *v.* Boston, etc., R. Co., 51 N. H. 504, 514, 12 Am. Rep. 147.

46. Rippe *v.* Becker, 56 Minn. 100, 113, 57 N. W. 331, 22 L. R. A. 857.

"Internal affairs" see Lewis *v.* Pima County, 155 U. S. 54, 57, 15 S. Ct. 22, 39 L. ed. 67.

"Internal management."—Schmitz *v.* Metallic Condenser Co., 11 Pa. Dist. 442, 443.

"Internal means are causes occurring and operating within the body of the insured, and effecting death by unapparent and invisible means or causes. Hill *v.* Hartford Acc. Ins. Co., 22 Hun (N. Y.) 187, 191.

47. St. Clair County *v.* Interstate Sand, etc., Transfer Co., 192 U. S. 454, 458, 24 S. Ct. 300, 48 L. ed. 518.

Comprehends all that navigation where the termini of the voyage are both within the same state. North River Steam Boat Co. *v.* Livingston, 3 Cow. (N. Y.) 713, 748.

48. Lehigh Valley R. Co. *v.* Com., 145 U. S. 192, 200, 12 S. Ct. 806, 36 L. ed. 672.

49. Rippe *v.* Becker, 56 Minn. 100, 113, 57 N. W. 331, 22 L. R. A. 857.

"Nearly all the State Constitutions adopted between 1830 and 1850 either gave the legislature permission, or made it mandatory to 'encourage internal improvements within the State.'" Atty.-Gen. *v.* Pingree, 120 Mich. 550, 555, 79 N. W. 814, 46 L. R. A. 407.

"The phrase 'internal improvements' has, in our political dialect, a variable signification, dependent on the agency by which the work is performed. Internal improvements by the Federal government comprehend all works of that description within the territorial limits of the United States. Internal improvements by State authority are, of necessity, those improvements which are within the boundaries of the State." Wetumpka *v.* Winter, 29 Ala. 651, 660 [*cited* in Wetumpka *v.* Wetumpka Wharf Co., 63 Ala. 611, 629, and *quoted* in Union Pac. R. Co. *v.* Colfax County, 4 Nebr. 450, 456].

The term does not include a beet sugar manufactory, which does not manufacture sugar from beets for toll. Getchell *v.* Benton, 30 Nebr. 870, 876, 47 N. W. 468.

"'Works of internal improvement' . . . [means] only those works within the state in which the whole body of the people are supposed to be more or less interested, and by which they may be benefited." Dawson County *v.* McNamar, 10 Nebr. 276, 281, 4 N. W. 991 [*citing* Union Pac. R. Co. *v.* Colfax County, 4 Nebr. 450, and *quoted* in Blair *v.* Cuming County, 111 U. S. 363, 371, 4 S. Ct. 449, 28 L. ed. 457].

50. Rippe *v.* Becker, 56 Minn. 100, 113, 57 N. W. 331, 22 L. R. A. 857.

Thus the term may include the improvement of a river (Sloan *v.* State, 51 Wis. 623, 631, 632, 8 N. W. 393), or the act of dredging sand flats from a river (Ryerson *v.* Utley, 16 Mich. 269, 276), deepening and straightening a river (Anderson *v.* Hill, 54 Mich. 477, 486, 20 N. W. 549), or straightening and opening the channel of a river (Sparrow *v.* State Land Office Com'rs, 56 Mich. 567, 574, 23 N. W. 315 [*cited* in Atty.-Gen. *v.* Pingree, 120 Mich. 550, 557, 79 N. W. 814, 46 L. R. A. 407]).

51. Rippe *v.* Becker, 56 Minn. 100, 113, 114, 57 N. W. 331, 22 L. R. A. 857; Dawson County *v.* McNamar, 10 Nebr. 276, 281, 4

any kind of public works, except those used by and for the state in the performance of its governmental functions.[52] Broadly speaking, and sometimes in a more local sense, the term may, according to the connection,[53] include: A public bridge;[54] a canal;[55] a county court house;[56] a ferry;[57] irrigation reservoirs;[58] an irrigation system;[59] a jail, or a penitentiary;[60] levees;[61] levees and drains;[62] a mill run by water,[63] or a gristmill, whether run by water[64] or steam,[65] which is subject to state regulation;[66] a petroleum pipe line;[67] public buildings;[68] a railroad;[69] a railroad entering a city;[70] a state-house;[71] telephone or telegraph lines;[72] a turnpike;[73] waterworks, sewers, and light plants.[74] And it has been said that the term may refer to such public improvements as may legitimately be aided by taxation.[75]

N. W. 991; Yesler *v.* Seattle, 1 Wash. 308, 311, 25 Pac. 1014.

"Internal improvement" does not signify the making and repairing of highways by town authorities, nor the improvements of streets in cities and villages, but the building and carrying on of railroads, canals, and the like, forming great continuous highways throughout the length and breadth of the state, and which, uniting with similar works in sister or adjoining states, make up the grand channels of commerce, travel, and intercourse. Clark *v.* Janesville, 10 Wis. 136, 148. But *compare infra,* text and note 53 *et seq.*

52. Rippe *v.* Becker, 56 Minn. 100, 109, 110, 57 N. W. 331, 22 L. R. A. 857.

"They must be improvements of a fixed and permanent nature, as improvements of real property; and, furthermore, they must be such improvements as are designed and intended for the benefit of the public." *In re* Internal Improvements, 18 Colo. 317, 319, 320, 32 Pac. 611, holding that the current expense of carrying on state institutions is in no sense an internal improvement.

53. Broadly speaking, the term may include roads, highways, bridges, ferries, streets, sidewalks, pavements, wharves, levees, drains, waterworks, gas works. Leavenworth County Com'rs *v.* Miller, 7 Kan. 479, 493, 12 Am. Rep. 425.

54. State *v.* Babcock, 23 Nebr. 179, 185, 36 N. W. 474; State *v.* Keith County, 16 Nebr. 508, 509, 20 N. W. 856; South Platte Land Co. *v.* Buffalo County, 7 Nebr. 253, 260; Freemont Bldg. Assoc. *v.* Sherwin, 6 Nebr. 48, 52; U. S. *v.* Dodge County, 110 U. S. 156, 162, 3 S. Ct. 590, 28 L. ed. 103; Dodge County *v.* Chandler, 96 U. S. 205, 208, 24 L. ed. 625; Burlington Tp. *v.* Beasley, 94 U. S. 310, 313, 24 L. ed. 161.

55. Burlington Tp. *v.* Beasley, 94 U. S. 310, 313, 24 L. ed. 161. See also Rippe *v.* Becker, 56 Minn. 100, 113, 57 N. W. 331, 22 L. R. A. 857.

56. Burlingto Tp. *v.* Beasley, 94 U. S. 310, 313, 24 L. ed. 161; Lewis *v.* Sherman County, 5 Fed. 269, 271, 2 McCrary 464.

57. Burlington Tp. *v.* Beasley, 94 U. S. 310, 313, 24 L. ed. 161.

58. *In re* Senate Resolution, 12 Colo. 285, 286, 21 Pac. 483.

59. *In re* Internal Imp. Fund, 24 Colo. 247, 250, 48 Pac. 807.

60. Burlington Tp. *v.* Beasley, 94 U. S. 310, 313, 24 L. ed. 161.

61. Alcorn *v.* Hamer, 38 Miss. 652, 760.

62. State *v.* Hastings, 11 Wis. 448, 453.

63. Burlington Tp. *v.* Beasley, 94 U. S. 310, 313, 24 L. ed. 161.

64. Traver *v.* Merrick County, 14 Nebr. 327, 334, 15 N. W. 690, 45 Am. Rep. 111, a water grist-mill erected by public use. See also GRIST-MILL.

65. Burlington Tp. *v.* Beasley, 94 U. S. 310, 313, 24 L. ed. 161. But *compare* State *v.* Adams County, 15 Nebr. 568, 569, 20 N. W. 96; Osborne *v.* Adams County, 109 U. S. 1, 2, 3 S. Ct. 150, 27 L. ed. 835.

66. Burlington Tp. *v.* Beasley, 94 U. S. 310, 313, 24 L. ed. 161 [*quoted* in Traver *v.* Merrick County, 14 Nebr. 327, 334, 15 N. W. 690, 45 Am. Rep. 111 (*cited* and *explained* in Blair *v.* Cuming County, 111 U. S. 363, 372, 4 S. Ct. 449, 28 L. ed. 457)], where the court said: "It would require great nicety of reasoning to give a definition of the expression 'internal improvement,' which should include a grist-mill run by water, and exclude one operated by steam."

So the term may include the work of improving the water power of a river for the purpose of propelling grist-mills. Blair *v.* Cuming County, 111 U. S. 363, 373, 4 S. Ct. 449, 28 L. ed. 457.

67. West Virginia Transp. Co. *v.* Volcanic Oil, etc., Co., 5 W. Va. 382, 388.

68. *In re* Senate Resolution, 12 Colo. 285, 21 Pac. 483 [*citing* Leavenworth County Com'rs *v.* Miller, 7 Kan. 479, 12 Am. Rep. 425; Rippe *v.* Becker, 56 Minn. 100, 57 N. W. 331, 22 L. R. A. 857]. *Compare* Dawson County *v.* McNamar, 10 Nebr. 276, 281, 4 N. W. 991.

69. Burlington Tp. *v.* Beasley, 94 U. S. 310, 313, 24 L. ed. 161.

So the term may include the work of constructing or operating railways. Atty-Gen. *v.* Pingree, 120 Mich. 550, 566, 79 N. W. 814, 46 L. R. A. 407.

70. Savannah *v.* Kelly, 108 U. S. 184, 2 S. Ct. 468, 27 L. ed. 696.

71. Burlington Tp. *v.* Beasley, 94 U. S. 310, 313, 24 L. ed. 161.

72. Northwestern Tel. Exch. Co. *v.* Chicago, etc., R. Co., 76 Minn. 334, 345, 79 N. W. 315.

73. Rippe *v.* Becker, 56 Minn. 100, 113, 57 N. W. 331, 22 L. R. A. 857.

74. Yesler *v.* Seattle, 1 Wash. 308, 311, 25 Pac. 1014.

75. Guernsey *v.* Burlington, 11 Fed. Cas. No. 5,855, 4 Dill. 372, 374, "internal improvement of the township."

Applies governmentally, not territorially.— "The constitutional prohibition of special

(Internal Improvements: Grants of Lands to State in Aid, see PUBLIC LANDS. Prohibition Against State Engaging in or Aiding Improvement, see STATES.)

legislation is absolute with respect to that which 'regulates the internal affairs of municipalities.' But the word 'internal' here means governmentally, not territorially internal. Such matters of local government as are confided to the municipalities at once become, and until recalled remain, their 'internal affairs.' But it is not every matter of governmental regulation, local in its effect when territorially considered, that is an 'internal affair' of the municipality within the meaning of the constitutional interdict." Van Cleve *v.* Passaic Valley Sewerage Com'rs, 71 N. J. L. 183, 198, 58 Atl. 571.

"Internal improvement and local concern" of the respective counties, relates to public internal improvements and local concerns for general county purposes, which appertain to the county at large as a body politic, and not to improvements for special local purposes, where the funds expended in making the improvement are raised by assessments imposed only on the particular property improved. McGehee *v.* Mathis, 21 Ark. 40, 54.

INTERNAL REVENUE

By J. B. T. Tupper
Chief of the Law Division of the Office of the Commissioner of Internal Revenue

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CROSS-REFERENCES

For Matters Relating to:
Customs Duties, see CUSTOMS DUTIES.
Intoxicating Liquor Generally, see INTOXICATING LIQUORS.
Jurisdiction of Courts, see COURTS.
Post-Office, see POST-OFFICE.
Taxation Generally, see TAXATION.
United States Generally, see UNITED STATES.

I. TERMINOLOGY.[1]

A. Revenue Law. The term "revenue law," when used in connection with the jurisdiction of the courts of the United States, means a law imposing duties on imports or tonnage, or a law providing in terms for revenue; that is to say, a law which is directly traceable to the power granted to congress by the constitution "to lay and collect taxes, duties, imposts, and excises."[2] The words "revenue laws," used broadly and generally, include internal revenue as well as customs laws.[3]

B. Excise. "Excise" is defined to be an inland imposition, sometimes upon consumption of the commodity and sometimes upon retail sale, sometimes upon the manufacturer, and sometimes upon the vendor.[4]

1. For definition of distiller see X, A.
For definition of distilled spirits see *infra*, X, A.
Who are rectifiers see *infra*, IX, E.
Who are wholesale liquor dealers see *infra*, IX, C.
Who are retail liquor dealers see *infra*, IX, D.

2. U. S. *v.* Hill, 123 U. S. 681, 8 S. Ct. 308, 31 L. ed. 275.

3. U. S. *v.* Dustin, 28 Fed. Cas. No. 15,012, 15 Int. Rev. Rec. 30; U. S. *v.* Wright, 28 Fed. Cas. No. 16,770, 11 Int. Rev. Rec. 22.

4. Union Bank *v.* Hill, 3 Coldw. (Tenn.) 325, 328 [*citing* 1 Blackstone Comm. 318; 1 Story Const. §§ 950, 969] (where the word is distinguished from "taxes," "duties," and "imports"); Patton *v.* Brady, 184 U. S. 608, 617, 22 S. Ct. 493, 46 L. ed. 713; Pollock *v.* Farmers' L. & T. Co., 157 U. S. 429, 592, 15 S. Ct. 673, 39 L. ed. 759; Pacific Ins. Co. *v.* Soule, 7 Wall. (U. S.) 433, 445, 19 L. ed. 95. See also Minot *v.* Winthrop, 162 Mass. 113, 119, 38 N. E. 512, 26 L. R. A. 259; Portland Bank *v.* Apthorp, 12 Mass. 252, 256; Hancock *v.* Singer Mfg. Co., 62 N. J. L. 289, 341, 41 Atl. 846, 42 L. R. A. 852; Black *v.* State, 113 Wis. 205, 218, 89 N. W. 522, 90 Am. St. Rep. 853; Scholey *v.* Rew, 23 Wall. (U. S.) 331, 347, 23 L. ed. 99.
Compared with "duty."—"What is the natural and common, or technical and appropriate, meaning of the words, duty and excise, it is not easy to ascertain; they present no clear and precise idea to the mind; different persons will annex different significations to the terms." Hylton *v.* U. S., 3 Dall. (U. S.) 171, 176, 1 L. ed. 556, per Patterson, J.
Distinguished from "tax" in Oliver *v.* Washington Mills, 11 Allen (Mass.) 268, 274 [*citing* Portland Bank *v.* Apthorp, 12 Mass. 252, 255; Com. *v.* People's Five Cent Sav. Bank, 5 Allen (Mass.) 428, 431]. See also Pollock *v.* Farmers' L. & T. Co., 158

C. Excise Law. An "excise law" is a law imposing excise duties on specified commodities and providing for the collection of revenue therefrom.[5]

D. Corporation — Person. The word "corporation" as used in a revenue law does not include a state.[6] The word "person" includes corporations,[7] but does not include a state.[8] Such terms as "person" and "corporation" are broad enough in statutory construction to include the corporate side of a government and municipalities.[9]

E. Objects Charged With Tax. The words "objects charged with internal revenue tax" do not necessarily mean objects which are tangible and material in form. The words are comprehensive enough to include gross receipts of express companies.[10]

F. Manufactured Goods. "Manufactured goods" means goods the manufacture of which is completed so that they are in a condition to be sold.[11]

II. HISTORY AND SUMMARY OF INTERNAL REVENUE LEGISLATION.

The first internal revenue measure after the constitution went into operation was the act of March 3, 1791, levying a tax on distilled spirits. Other internal revenue laws were passed during Washington's administration.[12] These taxes were repealed by the act of April 6, 1802, entitled "An Act to Repeal the Internal Taxes." The War of 1812 required additional revenue and internal revenue taxation was again resorted to. Various acts were passed in 1813, 1814, and 1815, imposing taxes on distilled spirits, sugar, and other articles.[13] These acts were repealed when the exigencies requiring them ceased to exist, by the act of Dec. 23, 1817, taking effect from and after December 31. The country depended upon customs duties as a source of revenue from that time until 1861.[14]

U. S. 601, 625, 15 S. Ct. 912, 39 L. ed. 1108 [*quoting* 7 Hamilton Works 848, where it is said: "Duties, imposts and excises appear to be contradistinguished from taxes"].

5. Black L. Dict.

6. Georgia *v.* Atkins, 10 Fed. Cas. No. 5,350, 1 Abb. 22, 35 Ga. 315.

7. 15 Op. Atty.-Gen. 230.

8. 12 Op. Atty.-Gen. 176. There, however, are many state authorities for the proposition that the word "person" in a statute may include a state (Indiana *v.* Woram, 6 Hill (N. Y.) 33, 40 Am. Dec. 378; Martin *v.* State, 24 Tex. 61); and that the United States (State *v.* Herold, 9 Kan. 194) or a foreign government (Honduras *v.* Soto, 112 N. Y. 310, 19 N. E. 845, 8 Am. St. Rep. 744, 2 L. R. A. 642) is a person. And it has been also held in a state court that a county is a person (Lancaster County *v.* Trimble, 34 Nebr. 752, 52 N. W. 711).

9. South Carolina *v.* U. S., 39 Ct. Cl. 257.

10. Wells *v.* Shook, 29 Fed. Cas. No. 17,406, 8 Blatchf. 254.

11. U. S. *v.* Quantity of Tobacco, 27 Fed. Cas. No. 16,105, 5 Ben. 112. The phrase "goods, wares and merchandise" includes a team of mules. Pilcher *v.* Faircloth, 135 Ala. 311, 33 So. 545. The term "goods" includes money. 22 Op. Atty.-Gen. 178.

12. March 3, 1791, c. 15, §§ 14, 15, on distilled spirits. No tax on country distilleries using home-made materials. May 8, 1792, c. 22, § 1, on distilled spirits; country distillers taxed differently from those in cities, towns, and villages. June 5, 1794, c. 45, § 1, on carriages (discussed in Hylton *v.* U. S., 3 Dall. (U. S.) 171, 1 L. ed. 556). June 5, 1794, c. 48, on licenses for making certain sales of wines or foreign distilled spirituous liquors. June 5, 1794, c. 51, §§ 1, 2, on snuff and refined sugar (discussed in Pennington *v.* Coxe, 2 Cranch (U. S.) 33, 2 L. ed. 199). June 9, 1794, c. 65, § 1, on auction sales. March 3, 1795, c. 43, § 1, on mortars and pestles, etc., in snuff mills; § 8, no drawback on any exports of snuff less than three hundred pounds. May 28, 1796, c. 37, § 1, on carriages, with exemptions.

13. July 24, 1813, c. 21, § 1, on refined sugar. July 24, 1813, c. 24, § 1, on carriages, with exemptions. July 24, 1813, c. 25, § 1, on licenses for distilling liquors. July 24, 1813, c. 26, § 1, on auction sales; one fourth of one per cent on sales of vessels; one per cent on other sales of goods, etc., with exemptions. Aug. 2, 1813, c. 39, § 4, on licenses for retailing wines, etc. Aug. 2, 1813, c. 53, §§ 1, 2, on bank-notes, etc., graduated but not *ad valorem*; commutable at one and one-half per cent on dividends. Dec. 15, 1814, c. 12, § 1, on carriages, graduated but not *ad valorem*. Dec. 21, 1814, c. 15, § 1, on distilled spirits. Dec. 23, 1814, c. 16, § 1, on auction sales; § 3, on retailers' licenses. Jan. 18, 1815, c. 22, § 1, on domestic manufactures. Jan. 18, 1815, c. 23, § 1, on household furniture kept for use (annual duty) with minimum of two hundred dollars, graduated but not *ad valorem*. Feb. 27, 1815, c. 61, on plate. April 19, 1816, c. 58, § 4, on licenses for distilling liquors.

14. Internal taxation, in the form of excises, was introduced into England by a par-

The act of July 1, 1862, created the office of internal revenue and is largely the basis of the present system of internal revenue taxation.[15] The act of June 30, 1864, reënacted to a great extent the act of 1862, with additions and modifications. The act of July 13, 1866, was the first act to reduce taxation after the close of the Civil war. It required the tax on fermented liquors to be paid by stamps, which was the beginning of the stamp system on liquors. The acts of March 2, 1867, and March 31, 1868, reduced taxation. The act of Feb. 3, 1868, repealed the tax on cotton. The act of July 20, 1868, revised the law in regard to spirits and tobacco and made the taxes thereon payable by stamps, and also reduced taxes. The act of July 14, 1870, repealed taxes on gross receipts, legacies, and successions, and extended the income tax till Dec. 31, 1871, when it expired. The act of June 6, 1872, repealed stamp duties on instruments except bank checks. The act of Dec. 24, 1872, abolished the offices of assessor and assistant assessor. The act of March 3, 1875, increased the tax on spirits from seventy cents to ninety cents per gallon. The act of March 1, 1879, reduced the tax on tobacco to sixteen cents per pound. The act of March 3, 1883, repealed taxes on capital and deposits of banks; also, after July 1, 1883, the stamp tax on bank checks and articles under schedule A (medicinal preparations, etc.), and reduced the tax on tobacco to eight cents per pound. The act of Aug. 2, 1886, imposed a tax on oleomargarine. The act of Oct. 1, 1890 (McKinley bill) imposed a tax on opium (not productive of revenue) and swept away petty special taxes on dealers, peddlers, and manufacturers of tobacco, snuff, and cigars, and reduced the tax on tobacco to six cents per pound. The act of Aug. 28, 1894 (Wilson bill) imposed a tax on incomes, since declared unconstitutional, and reimposed the tax on playing cards. It increased the tax on distilled spirits to one dollar and ten cents per gallon. The act of June 6, 1896, imposed a tax of one cent per pound on filled cheese, not intended as a revenue measure. The act of June 13, 1898 (30 U. S. St. at L. 448), known as the "War Revenue Act," taking effect July 1, 1898, imposed additional taxes on fermented liquors, tobacco, and cigars; special taxes on bankers and other occupations; stamp duties upon various documents, and on medicinal articles, cosmetics, chewing gum, and wines; a tax of one-fourth of one per cent on annual gross receipts in excess of two hundred and fifty thousand dollars of persons engaged in refining petroleum or sugar, or owning or controlling pipe-lines for transporting oil or products; a tax on legacies and distributive shares of personal property; and a tax on mixed flour. The act of March 2, 1901 (31 U. S. St. at L. 938), partially repealed the war taxes on and after July 1, 1901. The act of April 12, 1902 (32 U. S. St. at L. 96), repealed the remaining war taxes, taking effect July 1, 1902, except the tax on mixed flour not intended as a revenue measure. The act of May 9, 1902, taking effect July 1, 1902, changed the tax on oleomargarine, and imposed taxes on adulterated butter and renovated butter. The act of June 7, 1906, provided for alcohol free of tax for use in the arts and industries.

III. THE TAXING POWER AND ITS CONSTITUTIONAL LIMITATIONS.

A. Introductory Statement. The power vested in congress by the constitution to levy and collect taxes, duties, imposts, and excises, with the authority to make all laws necessary and proper to carry that power into effect, is absolute, except the restriction that no rights secured by other provisions of the constitution shall be violated.[16] Power is given to lay and collect taxes of every kind or nature,[17]

liamentary resolution passed on March 28, 1643, and carried into effect by an ordinance of the same date. 2 Dowell Hist. Tax. 9.

15. U. S. Rev. St. (1878) § 319 [U. S. Comp. St. (1901) p. 186].

16. U. S. Const. art. 1, § 8; McCray *v.* U. S., 195 U. S. 27, 24 S. Ct. 769, 49 L. ed. 78; Pacific Ins. Co. *v.* Soule, 7 Wall. (U. S.) 433, 19 L. ed. 95; Mason *v.* Rollins, 16 Fed. Cas. No. 9,252, 2 Biss. 99.

17. Scholey *v.* Rew, 23 Wall. (U. S.) 331, 23 L. ed. 99; U. S. *v.* Singer, 15 Wall. (U. S.)

and extends to all usual objects of taxation.[18] The only limitations imposed are that the taxes must be uniform and that direct taxes including the capitation tax shall be apportioned, and that no duties shall be imposed upon articles exported.[19] No power of supervision or control is lodged in either of the other departments of the government.[20] The courts cannot inquire into the reasonableness of a tax,[21] nor set it aside on the ground that it is excessive or that congress has abused its authority by levying a tax which is unwise or oppressive.[22] No contract between persons, or states and persons, can be set up to defeat a tax which is within the limits of the constitution.[23] Taxation cannot, however, extend beyond the jurisdiction of the taxing power, and the objects of taxation must be within the territorial limits of the taxing power.[24]

B. Rule as to Uniformity. Taxes must be uniform throughout the United States.[25] This clause of the constitution relates only to geographical uniformity, requiring the same plan and the same method to be operative throughout the United States.[26] It does not require uniformity in the manner of collection.[27] A law which lays a uniform tax is not open to the objection that it is not uniform throughout the United States because its execution is forcibly delayed in certain sections.[28]

C. Prohibition Against Tax on Exports. The true construction of the provision prohibiting a tax on articles exported is that no burden by way of tax or duty can be cast upon the exportation of articles. It does not mean that articles which are exported are relieved from the prior ordinary burdens of taxation which rest upon all property similarly situated.[29]

111, 21 L. ed. 49; Buffington *v.* Day, 11 Wall. (U. S.) 113, 20 L. ed. 122; Pervear *v.* Massachusetts, 5 Wall. (U. S.) 475, 18 L. ed. 608; License Tax Cases, 5 Wall. (U. S.) 462, 18 L. ed. 497; McGuire *v.* Massachusetts, 3 Wall. (U. S.) 387, 18 L. ed. 226; Hylton *v.* U. S., 3 Dall. (U. S.) 171, 1 L. ed. 556.

18. Knowlton *v.* Moore, 178 U. S. 41, 20 S. Ct. 747, 44 L. ed. 969.

19. Nicol *v.* Ames, 173 U. S. 509, 19 S. Ct. 522, 43 L. ed. 786 [*affirming* 89 Fed. 144]; Ward *v.* Maryland, 12 Wall. (U. S.) 418, 20 L. ed. 449; Pacific Ins. Co. *v.* Soule, 7 Wall. (U. S.) 433, 19 L. ed. 95.

20. Pacific Ins. Co. *v.* Soule, 7 Wall. (U. S.) 433, 19 L. ed. 95.

21. Patton *v.* Brady, 184 U. S. 608, 22 S. Ct. 493, 46 L. ed. 713; Treat *v.* White, 181 U. S. 264, 21 S. Ct. 611, 45 L. ed. 853; U. S. *v.* Brown, 24 Fed. Cas. No. 14,662, Deady 566.

22. McCray *v.* U. S., 195 U. S. 27, 24 S. Ct. 769, 49 L. ed. 78; Veazie Bank *v.* Fenno, 8 Wall. (U. S.) 533, 19 L. ed. 482.

23. The restriction upon the passage by the states of laws impairing the obligations of contracts is not applicable to the federal government. Michigan Cent. R. Co. *v.* Slack, 17 Fed. Cas. No. 9,527*a*, 22 Int. Rev. Rec. 337. The government having power to tax can exercise it upon ordinary subjects of taxation, either property or business, which are under contractual relations to the government. 22 Op. Atty.-Gen. 192.

24. Ruckgaber *v.* Moore, 104 Fed. 947; Jackson *v.* Northern Cent. R. Co., 13 Fed. Cas. No. 7,142, Chase 268; Michigan Cent. R. Co. *v.* Slack, 17 Fed. Cas. No. 9,527*a*, 22 Int. Rev. Rec. 337.

State tax on foreign-held bonds.— Cleveland, etc., R. Co. *v.* Pennsylvania, 15 Wall. (U. S.) 300, 21 L. ed. 179.

The power of taxation by any state is limited to persons, property, or business within its jurisdiction. Tappan *v.* Merchants' Nat. Bank, 19 Wall. (U. S.) 490, 22 L. ed. 189.

25. U. S. Const. art. 1, § 8; Edye *v.* Robertson, 112 U. S. 580, 5 S. Ct. 247, 28 L. ed. 798.

26. Moore *v.* Miller, 5 App. Cas. (D. C.) 413; Knowlton *v.* Moore, 178 U. S. 41, 20 S. Ct. 747, 44 L. ed. 969. The tax on distilled spirits is uniform in its operation (U. S. *v.* Singer, 15 Wall. (U. S.) 111, 21 L. ed. 49); the tax on interest on bonds of corporations (Michigan Cent. R. Co. *v.* Slack, 17 Fed. Cas. No. 9,527*a*, 22 Int. Rev. Rec. 337 [*affirmed* in 100 U. S. 595, 25 L. ed. 647]) and the stamp tax on sales at an exchange or board of trade were uniform (Nicol *v.* Ames, 173 U. S. 509, 19 S. Ct. 522, 43 L. ed. 786 [*affirming* 89 Fed. 144]).

27. Tappan *v.* Merchants' Nat. Bank, 19 Wall. (U. S.) 490, 22 L. ed. 189.

28. U. S. *v.* Riley, 27 Fed. Cas. No. 16,164, 5 Blatchf. 204.

29. U. S. Const. art. 1, § 9, par. 5; Coe *v.* Errol, 116 U. S. 517, 6 S. Ct. 475, 29 L. ed. 715.

What are not taxes on exports illustrated. — A tax on filled cheese manufactured for export, and in fact exported, is not unconstitutional, the tax being the same as that upon other filled cheese (Cornell *v.* Coyne, 192 U. S. 418, 29 S. Ct. 383, 48 L. ed. 504); and a tax laid on tobacco before its removal from the factory is constitutional, although the tobacco is intended for exportation (Turpin *v.* Burgess, 117 U. S. 504, 6 S. Ct.

D. Tax on Instrumentalities of a State. The federal government cannot tax the property, or the agencies of a state, or the means necessary to the exercise of its functions any more than the states can tax the powers, the operations, or the property of the United States, or the means which they employ to carry their powers into execution.[30] Each is sovereign in its sphere of action, and exempt from the interference or control of the other.[31] But if a state engages in commercial business for a profit, it is liable to the same taxes which are imposed upon individuals engaged in the same business. The exemptions of sovereignty extend no further than the attributes of sovereignty.[32]

E. Double Taxation. Duplicate taxation is not open to legal objection when it is plainly intended or when it naturally and unavoidably results from the law.[33] The presumption, however, is against duplicate taxation.[34]

IV. CONSTRUCTION AND OPERATION OF INTERNAL REVENUE LAWS.

A. Legislative Intent. Revenue laws are not, like penal acts, to be construed strictly in favor of the defendants. They are rather to be regarded as remedial in their character, passed to promote the public good, and should be so construed as to carry out the intention of the legislature in passing them.[35]

835, 29 L. ed. 988); so a charge which is not excessive for stamps to be placed on packages of tobacco intended for exportation to identify the tobacco is not a duty on exports (Pace *v.* Burgess, 92 U. S. 372, 23 L. ed. 657).

What are taxes on exports illustrated.— A stamp tax imposed on foreign bills of lading is equivalent to a tax on the articles included in the bill of lading, and therefore a tax on exports, and unconstitutional (Fairbank *v.* U. S., 181 U. S. 283, 21 S. Ct. 648, 45 L. ed. 862); and stamp taxes on manifests for the clearance of cargoes for foreign ports are also unconstitutional, upon the same principle (New York, etc., Mail Steamship Co. *v.* U. S., 125 Fed. 320).

30. Pollock *v.* Farmers' L. & T. Co., 157 U. S. 429, 15 S. Ct. 673, 39 L. ed. 759; McNally *v.* Field, 119 Fed. 445; 12 Op. Atty.-Gen. 282.

The doctrine applied.— A railroad owned by a state and operated by it is not taxable under the United States revenue laws (Georgia *v.* Atkins, 10 Fed. Cas. No. 5,350, 1 Abb. 22, 35 Ga. 315); so the United States cannot tax the salary of state officers (Buffington *v.* Day, 11 Wall. (U. S.) 113, 20 L. ed. 122 [*affirming* 7 Fed. Cas. No. 3,675, 3 Cliff. 376]; Freedman *v.* Sigel, 9 Fed. Cas. No. 5,080, 10 Blatchf. 327); nor impose a tax on their official bonds (State *v.* Garton, 32 Ind. 1, 2 Am. Rep. 315; Bettman *v.* Warwick, 108 Fed. 46, 47 C. C. A. 185 [*affirming* 102 Fed. 127]. *Contra,* Muscatine *v.* Sterneman, 30 Iowa 526, 6 Am. Rep. 685); nor on bonds given by saloon-keepers under state laws (Ambrosini *v.* U. S., 187 U. S. 1, 23 S. Ct. 1, 47 L. ed. 49 [*reversing* 105 Fed. 239]; U. S. *v.* Owens, 100 Fed. 70, the bond is a part of the license); it cannot impose a stamp tax on the writs and processes of state courts (Craig *v.* Dimock, 47 Ill. 308; Jones *v.* Keep, 19 Wis. 369. See also on this subject, *infra,* VIII, A, 5. A municipal corporation it has been held is not subject to taxation by congress upon its municipal revenues. U. S. *v.* Baltimore, etc., R. Co., 17 Wall. (U. S.) 322, 21 L. ed. 597 [*affirming* 24 Fed. Cas. No. 14,511, 13 Int. Rev. Rec. 117]. A tax upon income derived from the interest of bonds issued by a municipal corporation is a tax upon the power of the state and its instrumentalities to borrow money and therefore repugnant to the constitution. Pollock *v.* Farmers' L. & T. Co., 157 U. S. 429, 15 S. Ct. 673, 39 L. ed. 759).

31. New York *v.* New York City Tax Com'rs, 2 Black (U. S.) 620, 17 L. ed. 451.

32. South Carolina *v.* U. S., 199 U. S. 437 [*affirming* 39 Ct. Cl. 257].

Municipal corporations engaged in distilling spirits are liable to the tax, whether its acts in that respect are or are not *ultra vires.* Salt Lake City *v.* Hollister, 118 U. S. 256, 6 S. Ct. 1055, 30 L. ed. 176.

33. Patton *v.* Brady, 184 U. S. 608, 22 S. Ct. 493, 46 L. ed. 713 (additional tax on tobacco); Moore *v.* Miller, 5 App. Cas. (D. C.) 413; Cooley Tax. (3d. ed.) 392; 1 Desty Tax. 203. An additional tax on imported spirits in bond at the time the act takes effect was held legal. Westfall *v.* Shook, 29 Fed. Cas. No. 17,448, 5 Blatchf. 383, 5 Int. Rev. Rec. 54. A tax can be imposed upon beer in barrels and an additional stamp tax can be imposed when it is put up in bottles and labeled a tonic. U. S. *v.* J. D. Iler Brewing Co., 121 Fed. 41, 57 C. C. A. 681.

Taxation by state and United States.— The power to tax may be exercised at the same time upon the same objects of private property by the state and by the United States without inconsistency or repugnancy, except the power of a state to tax does not extend to those means which are employed by congress to carry into execution the powers conferred in the federal constitution. Savings Soc. *v.* Coite, 6 Wall. (U. S.) 594, 18 L. ed. 897; Providence Bank *v.* Billings, 4 Pet. (U. S.) 514, 563, 7 L. ed. 939.

34. Cooley Tax. (3d ed.) 398.

35. U. S. *v.* Stowell, 133 U. S. 1, 10 S. Ct.

Legislative intention is the guide to true judicial interpretation,[36] and should be followed, although contrary to the letter.[37] The intent of the legislature is gathered from the language used.[38] Where the words are not explicit the intention may be gathered from the context, and from the general purpose of the law.[39] Congress is bound to express its intention to tax in clear and unambiguous language,[40] and if the language is clear there is no room for presumptions,[41] and it is immaterial what was intended so long as what the law-makers actually did is free from doubt.[42] In relation to the United States Revised Statutes the original statute may be resorted to for the purpose of ascertaining the meaning of doubtful language used in the revision.[43] Words spoken in debate or the motives of members are not to be considered in construing a statute, but the court may, with propriety, recur to the history of the times when it was passed.[44] Punctuation is no part of the statute.[45] Where the intention is in some particular ambiguously expressed, it is the duty of the court to construe the act so it will harmonize in such particular with the general purpose, plainly expressed.[46]

B. Necessity of Giving Effect to Each Word and Clause. Effect should be given if possible to every clause and word of a statute. If different portions seem to conflict, the courts must harmonize them if practicable, and must lean in favor of a construction which will render every word operative,[47] so that one section will explain and support and not defeat or destroy another section.[48] The whole and every part of a statute should be considered in determining the meaning of any of its parts.[49]

C. Necessity For Reasonable Construction. Revenue laws are to have a

244, 33 L. ed. 555; Cliquot *v.* U. S., 3 Wall. (U. S.) 114, 18 L. ed. 116; U. S. *v.* Twenty-Eight Casks of Wine, 24 Fed. Cas. No. 14,281, 2 Ben. 63; U. S. *v.* Hodson, 26 Fed. Cas. No. 15,376, 14 Int. Rev. Rec. 100; U. S. *v.* Thirty-Six Barrels of High Wines, 28 Fed. Cas. No. 16,469, 7 Blatchf. 469, 12 Int. Rev. Rec. 41. Revenue laws should not be construed by the courts so as to become odious or oppressive to the people. U. S. *v.* Howell, 20 Fed. 718.

36. Davy *v.* Morgan, 56 Barb. (N. Y.) 218; U. S. *v.* One Hundred Barrels of Spirits, 27 Fed. Cas. No. 15,948, 2 Abb. 305, 1 Dill. 49, 12 Int. Rev. Rec. 153. The main purpose of construction is to give effect to legislative intent. U. S. *v.* Crosley, 196 U. S. 327, 25 S. Ct. 261, 49 L. ed. 497.

37. Treat *v.* White, 181 U. S. 267, 21 S. Ct. 611, 45 L. ed. 853; U. S. *v.* Buchanan, 9 Fed. 689, 4 Hughes 487. A thing may be within the letter of the statute and yet not within the statute. The intention of the lawmaker is the law. Holy Trinity Church *v.* U. S., 143 U. S. 457, 12 S. Ct. 511, 36 L. ed. 226; Smythe *v.* Fiske, 23 Wall. (U. S.) 374, 23 L. ed. 47.

38. Hubbard *v.* Brainard, 35 Conn. 563; U. S. *v.* Wiltberger, 5 Wheat. (U. S.) 76, 5 L. ed. 37; U. S. *v.* Buchanan, 9 Fed. 689, 4 Hughes 487. A legislative act is to be interpreted according to the intention of the legislature apparent upon its face. Wilkinson *v.* Leland, 2 Pet. (U. S.) 627, 7 L. ed. 542. Where the language is plain and free of all uncertainty the statute speaks its own construction. Barnes *v.* Philadelphia, etc., R. Co., 17 Wall. (U. S.) 294, 21 L. ed. 544.

39. Saunders *v.* Howard, 21 Fed. Cas. No. 12,375.

40. Eidman *v.* Martinez, 184 U. S. 578, 22 S. Ct. 515, 46 L. ed. 697.

41. Pickering *v.* Day, 3 Houst. (Del.) 474, 95 Am. Dec. 291. Equitable construction is not admissible. Partington *v.* Atty.-Gen., L. R. 4 H. L. 100, 38 L. J. Exch. 205, 21 L. T. Rep. N. S. 370, per Lord Cairns, L. C.

42. New York Tel. Co. *v.* Treat, 130 Fed. 340, 64 C. C. A. 586.

43. U. S. *v.* Bowen, 100 U. S. 508, 25 L. ed. 631.

44. U. S. *v.* Union Pac. R. Co., 91 U. S. 72, 23 L. ed. 224.

The journals and records of proceedings in congress may be considered to ascertain the intention of that body. Blake *v.* New York City Nat. Bank, 23 Wall. (U. S.) 307, 23 L. ed. 119.

45. Hammock *v.* Farmers' L. & T. Co., 105 U. S. 77, 28 L. ed. 1111. In construing the revenue act of 1864, the court inserted a hyphen for a comma in "memorandum-check," where stamp on "check" had already been provided for. U. S. *v.* Isham, 17 Wall. (U. S.) 496, 21 L. ed. 728, 8 Rose Notes U. S. Rep. 84.

46. Cardinel *v.* Smith, 5 Fed. Cas. No. 2,395, Deady 197, the Internal Revenue Act is a piece of patchwork, and it is sometimes difficult to reconcile its various provisions with each other.

47. Chicago, etc., R. Co. *v.* U. S., 127 U. S. 406, 8 S. Ct. 1194, 32 L. ed. 180; U. S. *v.* Landram, 118 U. S. 81, 6 S. Ct. 954, 30 L. ed. 58; Montclair Tp. *v.* Ramsdell, 107 U. S. 147, 2 S. Ct. 391, 27 L. ed. 431.

48. Bernier *v.* Bernier, 147 U. S. 242, 13 S. Ct. 244, 37 L. ed. 152.

49. Georgia *v.* Atkins, 10 Fed. Cas. No. 5,350, 1 Abb. 22, 35 Ga. 315.

fair and reasonable construction to carry out the intention of congress,[50] and such as will not endanger public interests.[51] They should be construed with reasonable fairness to the citizen.[52] Words of common use are to be taken in their natural, plain, and ordinary meaning, in the sense in which they are understood by the public in which they take effect.[53] When, taking the words just as they are written, doubt remains respecting their meaning, that meaning must be adopted which the words most obviously express and which best comports with the nature of the subject and right reason.[54]

D. Construction of Statutes In Pari Materia. Various laws on the same subject-matter must be construed in connection with each other.[55] And the construction should be such as to harmonize and give effect to all their provisions.[56] All statutes *in pari materia*, whether repealed or not, should be taken into view in resolving a doubt as to the meaning of any one of them.[57]

E. Doctrine of Liberal Construction. Laws for the raising of revenue ought to be construed liberally in favor of the government [58] against all who attempt to commit fraud.[59] They should receive a liberal construction to carry out the purposes of their enactment,[60] but not so loosely as to permit evasions on merely fanciful and unsubstantial distinctions.[61] There is a difference between those provisions of the revenue laws which point out the subjects to be taxed, and indicate the time and manner of assessment and collection and those which impose penalties for obstructions and evasions. There is no reason for peculiar strictness in construing the former, neither is there reason for liberality.[62] They are to be construed fairly for the government and justly for the citizen.[63] There is no reason requiring a statute imposing special internal revenue taxes to be construed liberally in favor of the government, but it should be construed fairly and judicially with reference to both parties.[64] A remedial statute must be construed liberally.[65] And it is very generally held that laws providing for

50. U. S. *v.* Cole, 134 Fed. 697; U. S. *v.* Kenton, 26 Fed. Cas. No. 15,526, 2 Bond 97; U. S. *v.* Thirty-Six Barrels of High Wines, 28 Fed. Cas. No. 16,468, 7 Blatchf. 459.

51. Pickering *v.* Day, 3 Houst. (Del.) 474, 95 Am. Dec. 291.

52. U. S. *v.* One Thousand Four Hundred and Twelve Gallons of Distilled Spirits, 27 Fed. Cas. No. 15,960, 10 Blatchf. 428. The intention of the enactments is to be gathered from the words used, to which a fair and reasonable construction must be given, not leaning in favor of one side or the other. Coltness Iron Co. *v.* Black, 6 App. Cas. 315, 46 J. P. 20, 51 L. J. Q. B. 626, 45 L. T. Rep. N. S. 145, 29 Wkly. Rep. 717, 1 Tax Cas. 316; Colquhoun *v.* Brooks, 14 App. Cas. 493, 54 J. P. 277, 59 L. J. Q. B. 53, 61 L. T. Rep. N. S. 518, 38 Wkly. Rep. 289, 2 Tax Cas. 490; Gilbertson *v.* Ferguson, 7 Q. B. D. 562, 46 L. T. Rep. N. S. 10, 1 Tax Cas. 501.

53. U. S. *v.* Isham, 17 Wall. (U. S.) 496, 21 L. ed. 728; U. S. *v.* Buchanan, 9 Fed. 689, 4 Hughes 487; Equitable Trust Co. *v.* Seldon, 8 Fed. Cas. No. 4,508; Scriefer *v.* Wood, 21 Fed. Cas. No. 12,481, 5 Blatchf. 215. Every act of parliament must be construed according to the natural construction of its words. Parke, B., in Matter of Mickelthwait, 11 Exch. 452, 25 L. J. Exch. 19.

54. U. S. *v.* Smock, 27 Fed. Cas. No. 16,348, 4 Int. Rev. Rec. 202.

55. Harrington *v.* U. S., 11 Wall. (U. S.) 356, 20 L. ed. 167; Converse *v.* U. S., 21 How. (U. S.) 463, 16 L. ed. 192, 5 Rose Notes U. S. Rep. 878. Statutes *in pari materia* are to be read and construed together. Christie St. Comm. Co. *v.* U. S., 136 Fed. 326, 69 C. C. A. 464.

56. U. S. *v.* Sapinkow, 90 Fed. 654. The successive acts on the subject of taxing incomes were acts *in pari materia* and considered as one continuing act. U. S. *v.* Smith, 27 Fed. Cas. No. 16,341, 1 Sawy. 277, 12 Int. Rev. Rec. 135.

57. 17 Op. Atty.-Gen. 646.

58. U. S. *v.* Vinson, 8 Fed. 507; U. S. *v.* Wittig, 28 Fed. Cas. No. 16,748, 2 Lowell 466, 22 Int. Rev. Rec. 98.

59. Hartzell *v.* U. S., 83 Fed. 1002.

60. U. S. *v.* Hodson, 10 Wall. (U. S.) 395, 19 L. ed. 937; U. S. *v.* Belding, 24 Fed. Cas. No. 14,562, 12 Int. Rev. Rec. 39; U. S. *v.* Mynderse, 27 Fed. Cas. No. 15,850, 7 Blatchf. 483; U. S. *v.* Olney, 27 Fed. Cas. No. 15,918, 1 Abb. 275, Deady 461, 8 Int. Rev. Rec. 177. There is no liberal interpretation in favor of the individual to be indulged in. 18 Op. Atty.-Gen. 246.

61. U. S. *v.* Kallstrom, 30 Fed. 184.

62. Cooley Tax. (3d ed.) 460.

63. Cornwall *v.* Todd, 38 Conn. 443; Hubbard *v.* Brainard, 35 Conn. 563.

64. De Bary *v.* Souer, 101 Fed. 425, 41 C. C. A. 417. The special tax acts are not to be strictly construed. U. S. *v.* Howard, 26 Fed. Cas. No. 15,402, 1 Sawy. 507, 13 Int. Rev. Rec. 118.

65. Johnston *v.* U. S., 17 Ct. Cl. 157.

If a statute is penal even though it is also

redemption of property from sales for taxes should be construed favorably to the owner of the land.[66]

F. Construction of Laws Imposing Penalties. Revenue laws inflicting penalties for their violation are not to be construed with great strictness or with excess of liberality, but in such a manner, looking at their policy, purpose, spirit, and language as will best effectuate the legislative intent.[67] Thus revenue laws which impose forfeitures for fraud are not technically penal so as to call for a strict construction, but are to be so construed as effectually to accomplish the intention of their makers.[68] But highly penal statutes providing for the punishment of offenders should be strictly construed in accordance with the general rule and ought not to be extended by implication so as to include acts not clearly within their terms.[69]

G. Construction Favorable to Taxpayer in Doubtful Cases. The internal revenue laws should not be construed so as to extend their meaning beyond the clear import of the words used. The courts are not at liberty, by construction or legal fiction, to enlarge their scope to include subjects of taxation not within the terms of the law.[70] When a statute providing for taxation is of doubtful construction, the doubt is to be resolved in favor of the taxpayer.[71] This is the tenor of both American and English decisions.[72] A liberal construction should be given to words of exception confining the operation of the duty.[73] Before the property of the citizen can be taken under the exercise of the taxing power, it is necessary that the statute be clear and unambiguous.[74]

remedial it must be construed strictly. Abbott *v.* Wood, 22 Me. 541.

66. Corbett *v.* Nutt, 10 Wall. (U. S.) 464, 19 L. ed. 976 [*affirming* 18 Gratt. (Va.) 624].

67. *In re* Leszynsky, 15 Fed. Cas. No. 8,279, 16 Blatchf. 9, 25 Int. Rev. Rec. 71; U. S. *v.* One Hundred Barrels of Spirits, 27 Fed. Cas. No. 15,948, 2 Abb. 305, 12 Int. Rev. Rec. 153. While these statutes, like any other penal statutes, ought not to be administered so as to make them unnecessarily harsh and severe, it must nevertheless be kept in mind that they are designed to raise a revenue for the support of the government. U. S. *v.* Giller, 54 Fed. 656.

A statute which is of doubtful or double meaning should not be construed in its harshest possible sense, when persons to whom it applies may have been led to trust in a less severe construction, but one equally satisfying in its terms. U. S. *v.* One Thousand Four Hundred and Twelve Gallons of Distilled Spirits, 27 Fed. Cas. No. 15,960, 10 Blatchf. 428, 17 Int. Rev. Rec. 86.

68. U. S. *v.* One Black Horse, 129 Fed. 167; U. S. *v.* 246½ Pounds of Tobacco, 103 Fed. 791; U. S. *v.* Laeseki, 29 Fed. 699; U. S. *v.* Willetts, 28 Fed. Cas. No. 16,699, 5 Ben. 220.

69. U. S. *v.* Stege, 87 Fed. 553; U. S. *v.* Jenkinson, 15 Fed. 903; U. S. *v.* Veazie, 6 Fed. 867; *In re* Brown, 4 Fed. Cas. No. 1,977, 3 Int. Rev. Rec. 134.

70. U. S. *v.* Watts, 28 Fed. Cas. No. 16,653, 1 Bond 580, 1 Int. Rev. Rec. 17. Revenue laws should not be strained to embrace acts not fairly within their scope. U. S. *v.* Kenton, 26 Fed. Cas. No. 15,526, 2 Bond 97.

71. American Net, etc., Co. *v.* Worthington, 141 U. S. 468, 12 S. Ct. 55, 35 L. ed. 821; U. S. *v.* Isham, 17 Wall. (U. S.) 496, 21 L. ed. 728; Wright *v.* Michigan Cent. R. Co., 130 Fed. 843, 65 C. C. A. 327; McNally *v.* Field, 119 Fed. 445; U. S. *v.* Mullins, 119 Fed. 334, 56 C. C. A. 238; Equitable Trust Co. *v.* Seldon, 8 Fed. Cas. No. 4,508.

72. Powers *v.* Barney, 19 Fed. Cas. No. 11,361, 5 Blatchf. 202 (customs duty); U. S. *v.* Wigglesworth, 28 Fed. Cas. No. 16,690, 2 Story 369. In Tomkins *v.* Ashby, 6 B. & C. 541, 542, 9 D. & R. 543, 5 L. J. K. B. O. S. 246, 13 E. C. L. 247, case of stamp duty, Lord Tenterden, Ch. J., says: "Acts of parliament imposing duties are so to be construed as not to make any instruments liable to them unless manifestly within the intention of the legislature." In Chandos *v.* Inland Revenue Com'rs, 6 Exch. 464, 479, 20 L. J. Exch. 269, 2 L. M. & P. 311, Pollock, C. B., says: "It is a well-established rule in the construction of Revenue Acts, that a duty cannot be imposed upon the subject, except by clear words."

73. Eidman *v.* Martinez, 184 U. S. 578, 46 L. ed. 697. It is an old rule of the English courts, applicable to all forms of taxation, that the sovereign is bound to express its intention to tax in clear and unambiguous language, and that a liberal construction be given to words of exception confining the operation of duty. Denn *v.* Diamond, 4 B. & C. 243, 10 E. C. L. 561; Doe *v.* Snaith, 8 Bing. 146, 21 E. C. L. 482; Wroughton *v.* Turtle, 1 D. & L. 413, 13 L. J. Exch. 57, 11 M. & W. 561; Williams *v.* Sangar, 10 East 66; Warrington *v.* Furbor, 8 East 242, 6 Esp. 89; Gurr *v.* Scudds, 11 Exch. 190, 3 Wkly. Rep. 457. Exemptions from general laws imposing taxes must be strictly construed. *In re* Enston, 113 N. Y. 174, 21 N. E. 87, 3 L. R. A. 464; Erie R. Co. *v.* Pennsylvania, 21 Wall. (U. S.) 492, 22 L. ed. 595.

74. Pennsylvania L. Ins., etc., Co. *v.* McClain, 105 Fed. 367. No burden is to be

H. Weight Given to Departmental Construction. While it is the duty of the judiciary to determine for itself the construction of all laws involved in a case, it may, with propriety, consult the action of other departments.[75] The courts give great weight to departmental construction of the statute,[76] and where there is doubt, it will be followed unless there are cogent reasons to the contrary.[77] This doctrine has been recognized and declared in many cases.[78] Nevertheless the rule which gives determining weight to contemporaneous construction, put upon a statute by those charged with its execution, applies only in cases of ambiguity and doubt,[79] and in order to be binding upon the courts, it must be long continued and unbroken.[80]

I. Obsolete and Repealed Laws. Before a court will hold an act of congress obsolete it must appear conclusively that it was totally inoperative for any lawful or useful purpose.[81] Repeals by implication are not favored, particularly in revenue laws, and will only be held to exist when the repugnance is positive, and then only to the extent of such repugnance.[82] But when the only reasonable interpretation of a later statute shows a necessarily implied intent which is clearly repugnant to an earlier statute, a repeal by implication is the inevitable result.[83] When a later statute is a complete revision of the subject to which the earlier statute related and the new legislation was manifestly intended as a substitute for the former legislation, the prior act must be held to have been repealed.[84] Under U. S. Rev. St. § 13 [U. S. Comp. St. (1901) p. 6] the repeal of any statute shall not have the effect to release or extinguish any penalty, forfeiture, or liability incurred under such statute, unless the repealing act shall so expressly provide.[85]

taken as imposed upon the citizen which the government has not clearly made it his duty to assume. Philadelphia, etc., R. Co. *v.* Kenney, 19 Fed. Cas. No. 11,088, 9 Phila. (Pa.) 403, 18 Int. Rev. Rec. 92; Wroughton *v.* Turtle, 1 D. & L. 473, 13 L. J. Exch. 57, 11 M. & W. 561.

75. Dunlap *v.* U. S., 33 Ct. Cl. 135.

76. The construction of a revenue statute by the treasury department, "though not controlling, is not without weight, and is entitled to respectful consideration." Smythe *v.* Fiske, 23 Wall. (U. S.) 374, 382, 23 L. ed. 47.

77. U. S. *v.* Moore, 95 U. S. 760, 763, 24 L. ed. 588; Nunn *v.* William Gerst Brewing Co., 99 Fed. 939, 40 C. C. A. 190.

78. U. S. *v.* Finnell, 185 U. S. 236, 22 S. Ct. 633, 46 L. ed. 890; Pennoyer *v.* McConnaughy, 140 U. S. 1, 11 S. Ct. 699, 35 L. ed. 363; Schell *v.* Fauche, 138 U. S. 562, 11 S. Ct. 376, 34 L. ed. 1040; U. S. *v.* Johnston, 124 U. S. 236, 8 S. Ct. 446, 31 L. ed. 389; U. S. *v.* Hill, 120 U. S. 169, 7 S. Ct. 510, 30 L. ed. 627; Brown *v.* U. S., 113 U. S. 568, 5 S. Ct. 648, 28 L. ed. 1079; Peabody *v.* Draughn, 16 Wall. (U. S.) 240, 21 L. ed. 311; U. S. *v.* National Surety Co., 122 Fed. 904, 59 C. C. A. 130; 19 Op. Atty.-Gen. 177.

The construction given to an act by the commissioner cannot have the force of a judicial construction. Smith *v.* Waters, 25 Ind. 397; Mercer *v.* Mercer, 29 Iowa 557.

The construction given to the Internal Revenue Act by commissioners of internal revenue, even though published in an Internal Revenue Record, is not a construction of so much dignity that a reënactment of the statute subsequent to the construction having been made and published, is to be regarded as a legislative adoption of that construction. Dollar Sav. Bank *v.* U. S., 19 Wall. (U. S.) 227, 22 L. ed. 80.

79. Swift, etc., Co. *v.* U. S., 105 U. S. 691, 26 L. ed. 1108. Practical construction relied upon only in cases of doubt. Fairbank *v.* U. S., 181 U. S. 283, 21 S. Ct. 283, 45 L. ed. 862.

80. Merritt *v.* Cameron, 137 U. S. 542, 11 S. Ct. 174, 34 L. ed. 772.

81. U. S. *v.* One Hundred and Thirty-Two Packages of Spirituous Liquors, etc., 76 Fed. 364, 22 C. C. A. 228.

82. U. S. *v.* One Hundred Barrels of Spirits, 27 Fed. Cas. No. 15,948, 2 Abb. 305, 1 Dill. 49, 12 Int. Rev. Rec. 153. To create a repeal by implication there must be a positive repugnancy between the old and the new law, so that they cannot stand together. 14 Op. Atty-Gen. 101. Special and general laws stand together unless clearly repugnant. Christie St. Comm. Co. *v.* U. S., 136 Fed. 326, 69 C. C. A. 464.

83. Haymes *v.* Brown, 132 Fed. 525.

84. U. S. *v.* Ranlett, 172 U. S. 133, 19 S. Ct. 114, 43 L. ed. 393; New Jersey Steamboat Co. *v.* Pleasanton, 18 Wall. (U. S.) 478, 21 L. ed. 769; U. S. *v.* Henderson, 11 Wall. (U. S.) 652, 20 L. ed. 235; U. S. *v.* Cheeseman, 25 Fed. Cas. No. 14,790, 3 Sawy. 424, 21 Int. Rev. Rec. 340.

85. Sackett *v.* McCaffrey, 131 Fed. 219, 65 C. C. A. 205; U. S. *v.* Ulrici, 28 Fed. Cas. No. 16,594, 3 Dill. 532. Nevertheless, in the absence of a saving clause, the repeal would operate as a bar to a proceeding for the recovery of a penalty, or to enforce a forfeiture

J. Retrospective Legislation. The power of congress to pass laws on subjects within the scope of its constitutional power is not restricted to laws prospective in their operation. Congress may pass retrospective statutes provided they are not *ex post facto*.[86] But they should be construed to apply only to future cases, unless they are made by clear and explicit language to embrace past transactions.[87]

K. Time When Statutes Take Effect. A law of congress which contains no provision as to the time when it shall take effect commences and takes effect as a law from the moment it receives the approbation of the president. As a general rule it is not competent to go into the division of a day.[88] There is a presumption that the act was signed on the first minute of the day when it took effect, but it is competent to show by proof the exact time when the law is approved by the president.[89] When necessary to determine conflicting rights courts of justice will take cognizance of the fractions of a day.[90]

L. Revenue Laws of Foreign Countries. Revenue laws of foreign countries are usually disregarded. No country ever takes notice of the revenue laws of another.[91]

M. Territorial Extent of Operation of Revenue Laws. The internal revenue laws imposing taxes on distilled spirits, fermented liquors, tobacco, snuff, and cigars, extend to such articles produced anywhere within the exterior boundaries of the United States, whether the same be within a collection district or not.[92] The Indian Territory is included in the general terms of the above provision notwithstanding any prior treaty.[93] The establishment of a distillery in the Indian Territory on land to which the Indian title was extinct would be in contravention of law.[94] The internal revenue laws extend over Alaska as well as other portions of the country.[95] The laws of the United States not locally inap-

pending at the time of the repeal, or instituted after the repeal. U. S. *v.* Finlay, 25 Fed. Cas. No. 15,099, 1 Abb. 364; U. S. *v.* Six Fermenting Tubs, 27 Fed. Cas. No. 16,296, 1 Abb. 268, 8 Int. Rev. Rec. 9. See also Kimbro *v.* Colgate, 14 Fed. Cas. No. 7,778, 15 Blatchf. 229.

86. Schenck *v.* Peay, 21 Fed. Cas. No. 12,450, Woolw. 175, 11 Int. Rev. Rec. 12, 21 Fed. Cas. No. 12,451, 1 Dill. 267, 10 Int. Rev. Rec. 54, 11 Int. Rev. Rec. 22; Hanger *v.* U. S., 23 Ct. Cl. 293.

87. *In re* Brown, 4 Fed. Cas. No. 1,977, 3 Int. Rev. Rec. 134. An act to give construction to existing acts will operate *in futuro* only. Home Mutual Ins. Co. *v.* Stockdale, 12 Fed. Cas. No. 6,662, 16 Int. Rev. Rec. 30 [*affirmed* in 20 Wall. (U. S.) 323, 22 L. ed. 348].

88. 3 Op. Atty.-Gen. 82.

89. Nunn *v.* William Gerst Brewing Co., 99 Fed. 939, 40 C. C. A. 190.

90. Louisville *v.* Portsmouth Sav. Bank, 104 U. S. 469, 26 L. ed. 775. The act of March 3, 1875, took effect from the time it was approved and not at the commencement of the day. Burgess *v.* Salmon, 97 U. S. 381, 24 L. ed. 1104. The tariff act of 1897 took effect at the moment the president signed it — that is to say, at six minutes past four o'clock on the afternoon of July 24, 1897. U. S. *v.* Iselin, 95 Fed. 1007, 36 C. C. A. 681 [*affirming* 87 Fed. 194]; U. S. *v.* Stoddard, 91 Fed. 1005, 34 C. C. A. 175 [*affirming* 89 Fed. 699].

91. Holman *v.* Johnson, Cowp. 341, per Lord Mansfield. The courts in Great Britain do not take notice of the revenue laws of another country unless where the contract itself is made void by them, and therefore is no contract at all in the place where it was made, so that it could not be sued on anywhere. Bristow *v.* Secqueville, 5 Exch. 275, 14 Jur. 674, 19 L. J. Exch. 289; Alves *v.* Hodgson, 7 T. R. 241, 2 Esp. 528, 4 Rev. Rep. 433. Livingston, J., in Ludlow *v.* Van Rensselaer, 1 Johns. (N. Y.) 94, 96, observed: "As we do not sit here to enforce the revenue laws of other countries, it is perfectly immaterial, in a suit before us, whether or not the note was stamped according to the laws of France."

92. U. S. Rev. St. (1878) § 3448 [U. S. Comp. St. (1901) p. 2277]. Federal jurisdiction must be everywhere the same under the same circumstances. U. S. *v.* Lariviere, 93 U. S. 188, 23 L. ed. 846.

93. Boudinot *v.* U. S., 11 Wall. (U. S.) 616, 20 L. ed. 227 [*affirming* 28 Fed. Cas. No. 16,528, 1 Dill. 264, 13 Int. Rev. Rec. 91; Boudinot *v.* U. S., 18 Ct. Cl. 716. Property belonging to an Indian may be seized in the Indian Territory for a violation of the internal revenue laws. Dwight's Case, 13 Op. Atty.-Gen. 546. The internal revenue laws are operative in the territory of Oklahoma. 19 Op. Atty.-Gen. 569.

94. 22 Op. Atty.-Gen. 232; U. S. Rev. St. (1878) § 2141.

95. U. S. *v.* Seveloff, 27 Fed. Cas. No. 16,252, 2 Sawy. 311, 17 Int. Rev. Rec. 20. Section 477 of an act to define and punish

plicable have been extended over the territory of Hawaii, which constitutes a district for the collection of internal revenue.[96] Porto Rico is excepted from the operation of the internal revenue laws, but a tax is imposed upon articles of merchandise of Porto Rican manufacture coming into the United States and withdrawn for consumption or sale equal to the internal revenue tax imposed in the United States upon like articles of merchandise of domestic manufacture.[97] Articles subject to internal revenue tax may be shipped to the Philippine Islands without payment of tax the same as to foreign countries.[98] No internal revenue tax is imposed under the laws of the United States on goods shipped from the Philippine Islands to this country.[99]

V. DIRECT TAXES.[1]

A. Rule of Apportionment. Direct taxes must be apportioned among the several states according to population.[2]

B. What Are Direct Taxes. Capitation or poll taxes are direct taxes by the express words of the constitution. Taxes on land and on rents or income from investment in real estate are within the same category.[3] Taxes on personal property or on the income of personal property are likewise direct taxes.[4] As a mere abstract, scientific, or economical problem, a particular tax might possibly be regarded as a direct tax, when as a practical matter pertaining to the actual operation of the tax it might quite plainly appear to be indirect.[5] The following taxes are not direct taxes and may be laid without apportionment: viz, a tax on carriages;[6] legacy taxes;[7] succession taxes;[8] a tax on bank circula-

crimes in the district of Alaska, act of March 3, 1899 (30 U. S. St. at L. 1340) provides: "That nothing in this Act shall in any way repeal, conflict, or interfere with the public general laws of the United States imposing taxes on the manufacture and sale of intoxicating liquors for the purpose of revenue and known as the 'Internal-Revenue laws.'"

96. Act April 30, 1900 (31 U. S. St. at L. 141); The Kawailani, 128 Fed. 879, 63 C. C. A. 347 (forfeiture of vessel for violating the internal revenue laws); Makainai *v.* Goo Wan Hoy, 14 Hawaii 683 (stamps on instruments).

97. Act April 12, 1900, § 14 (31 U. S. St. at L. 77). An act temporarily to provide revenues and a civil government for Porto Rico, and for other purposes (The Foraker Act). Downes *v.* Bidwell, 182 U. S. 244, 21 S. Ct. 770, 45 L. ed. 1088. This act is constitutional.

98. Act March 8, 1902 (32 U. S. St. at L. 54 [U. S. Comp. St. Suppl. (1905) p. 388]).

99. Act July 1, 1902 (32 U. S. St. at L. 691). An act temporarily to provide for the administration of the affairs of civil government in the Philippine Islands, and for other purposes. 24 Op. Atty.-Gen. 120 (the provisions of U. S. Rev. St. (1878) § 3448 [U. S. Comp. St. (1901) p. 2277] inoperative in the Philippines since the act of July 1, 1902).

1. Direct taxes have been levied four times. (1) Act of July 14, 1798 (1 U. S. St. at L. 597), tax of two million dollars. (2) Act of Aug. 2, 1813 (3 U. S. St. at L. 53), three million dollars. (3) Act of Jan. 9, 1815 (3 U. S. St. at L. 164), six million dollars. (4) Act of Aug. 5, 1861 (12 U. S. St. at L. 292), twenty million dollars. Statutes of the United States relating to direct taxes from 1798 to 1868. Ex Doc. No. 24, 46th Cong. 1st Sess. (Sen.) Appendix.

2. U. S. Const. art. 1, § 9; Nicol *v.* Ames, 173 U. S. 509, 19 S. Ct. 522, 43 L. ed. 786; License Tax Cases, 5 Wall. (U. S.) 462, 18 L. ed. 497. Census is to furnish a standard by which direct taxes are to be apportioned. Loughborough *v.* Blake, 5 Wheat. (U. S.) 317, 5 L. ed. 98.

3. Pollock *v.* Farmers' L. & T. Co., 157 U. S. 429, 15 S. Ct. 673, 39 L. ed. 759; Springer *v.* U. S., 102 U. S. 586, 26 L. ed. 253; Scholey *v.* Rew, 23 Wall. (U. S.) 331, 23 L. ed. 99; Veazie Bank *v.* Fenno, 8 Wall. (U. S.) 533, 19 L. ed. 482; Hylton *v.* U. S., 3 Dall. (U. S.) 171, 1 L. ed. 556.

4. Pollock *v.* Farmers' L. & T. Co., 158 U. S. 601, 15 S. Ct. 912, 39 L. ed. 1108 (prior to this decision the opinion of the supreme court tended to narrow the definition of direct taxes to capitation or poll taxes and taxes on land. It had held that an income tax was not a direct tax); Springer *v.* U. S., 102 U. S. 586, 26 L. ed. 253; Pacific Ins. Co. *v.* Soule, 7 Wall. (U. S.) 433, 19 L. ed. 95.

Income taxes have always been classified by the law of Great Britain as direct taxes. Pollock *v.* Farmers' L. & T. Co., 158 U. S. 601, 15 S. Ct. 912, 39 L. ed. 1108.

5. Nicol *v.* Ames, 173 U. S. 509, 19 S. Ct. 522, 43 L. ed. 786.

6. Hylton *v.* U. S., 3 Dall. (U. S.) 171, 1 L. ed. 556.

7. Knowlton *v.* Moore, 178 U. S. 41, 20 S. Ct. 747, 44 L. ed. 969.

8. Scholey *v.* Rew, 23 Wall. (U. S.) 331, 23 L. ed. 99.

tion;[9] a tax upon the business of an insurance company;[10] the tax on tobacco;[11] and stamp taxes.[12]

C. Act of 1861 and Amendments — 1. **In General.** The act of Aug. 5, 1861, levied a direct tax of twenty million dollars "upon the United States," and apportioned it to the several states of the Union, the tax to be assessed and paid on the value of all lands and lots of ground, with their improvements and dwelling-houses.[13] The object of the law was the raising of revenue by a tax on land.[14] Another act was passed in 1862 for the collection of the direct tax in the insurrectionary districts, the tax to be collected by a board of tax commissioners to be appointed for each insurrectionary state.[15] These two acts should be construed together, that is, construed as if passed at the same time, and effect must be given to all the provisions of the first act not in conflict with the later one.[16] There was no liability on the part of the states to pay the tax. The liability was upon the individual landowners,[17] but the states could voluntarily assume payment.[18]

2. **Constitutionality of Statutes.** The law was not unconstitutional on account of the penalty of fifty per cent charged for default of voluntary payment.[19]

3. **Forfeiture of Land For Non-Payment of Tax.** The land was forfeited for non-payment of taxes, and all interests connected with it passed with the sale to the purchaser, subject to the right of redemption.[20] Nevertheless the non-payment of taxes did not work divestiture of title, but the title became subject to be vested in the United States or other purchaser upon public sale.[21]

4. **Sale of Land.** When lands were sold for unpaid taxes the tax-sale certificate was *prima facie* evidence not only of a regular sale, but of all the antecedent facts which were essential to its validity and to that of the purchaser's title.[22] The certificate of sale was not void because signed by only two commissioners.[23] The act did not contemplate a sale until the military power had been so firmly

9. Veazie Bank *v.* Fenno, 8 Wall. (U. S.) 533, 19 L. ed. 482.

10. Pacific Ins. Co. *v.* Soule, 7 Wall. (U. S.) 433, 19 L. ed. 95.

11. Patton *v.* Brady, 184 U. S. 608, 22 S. Ct. 493, 46 L. ed. 713.

12. Thomas *v.* U. S., 192 U. S. 363, 24 S. Ct. 305, 48 L. ed. 481 [*affirming* 115 Fed. 207] (stamp taxes on sales of stock); Treat *v.* White, 181 U. S. 264, 21 S. Ct. 611, 45 L. ed. 853 (on agreements to sell or "calls"); Nicol *v.* Ames, 173 U. S. 509, 19 S. Ct. 522, 43 L. ed. 786 [*affirming* 89 Fed. 144] (on sales at exchanges or boards of trade).

13. 12 U. S. St. at L. 292. The tax was limited to one year. Act July 1, 1862, 12 U. S. St. at L. 489, § 119.

14. Turner *v.* Smith, 14 Wall. (U. S.) 553, 20 L. ed. 724 [*reversing* 18 Gratt. (Va.) 830]; Bennett *v.* Hunter, 9 Wall. (U. S.) 326, 19 L. ed. 672.

15. 12 U. S. St. at L. 422; Corbett *v.* Nutt, 10 Wall. (U. S.) 464, 19 L. ed. 976.

16. Bennett *v.* Hunter, 9 Wall. (U. S.) 326, 19 L. ed. 672.

17. U. S. *v.* Alabama, 123 U. S. 39, 8 S. Ct. 21, 31 L. ed. 73; U. S. *v.* Louisiana, 123 U. S. 32, 8 S. Ct. 17, 31 L. ed. 69 [*affirming* 22 Ct. Cl. 284].

18. Rhode Island *v.* U. S., 37 Ct. Cl. 141; New Hampshire *v.* U. S., 36 Ct. Cl. 563 (amount due New Hampshire); Maine *v.* U. S., 36 Ct. Cl. 531, 37 Ct. Cl. 123 (adjustment of the state of Maine); Pennsylvania *v.* U. S., 36 Ct. Cl. 507 (the assumption of the direct tax by Pennsylvania in 1862 was a payment on the indebtedness of the general government to the state). Act June 30, 1864 (13 U. S. St. at L. 223, § 49) authorized internal revenue officers to perform necessary duties in collecting the direct tax where payment had not been assumed by the states.

19. De Treville *v.* Smalls, 98 U. S. 517, 25 L. ed. 174. The direct tax apportioned to the state of Maryland was constitutional. Wailes *v.* Smith, 76 Md. 469, 25 Atl. 922.

20. Turner *v.* Smith, 14 Wall. (U. S.) 553, 20 L. ed. 724 [*reversing* 18 Gratt. (Va.) 830].

Forfeitures not favored.— Forfeitures for non-payment of taxes are not favored in law. Schenck *v.* Peay, 21 Fed. Cas. No. 12,450, Woolw. 175, 10 Int. Rev. Rec. 12.

21. Bennett *v.* Hunter, 9 Wall. (U. S.) 326, 19 L. ed. 672. There was no effectual forfeiture until sale had been made pursuant to the act. Soutter *v.* Miller, 15 Fla. 625; Dickerson *v.* Acosta, 15 Fla. 614.

22. Hill *v.* Vanderpool, 15 Fla. 128; Billings *v.* McDermott, 15 Fla. 60; Sherry *v.* McKinley, 99 U. S. 496, 25 L. ed. 330; Keely *v.* Sanders, 99 U. S. 441, 25 L. ed. 327; De Treville *v.* Smalls, 98 U. S. 517, 25 L. ed. 174.

A certificate of the clerk of the direct tax commissioners is not evidence of a sale by them. Billings *v.* Stark, 15 Fla. 297.

23. Cooley *v.* O'Connor, 12 Wall. (U. S.) 391, 20 L. ed. 446, validity of sales in South Carolina.

established that citizens could go to headquarters and pay the tax.[24] The sale was void when the penalty of fifty per cent in case of delinquency was imposed simultaneously with the apportionment of the taxes, and no property-owner was permitted to pay his taxes without also paying the penalty.[25]

5. Validity of Titles. An agent has the right to pay taxes for his principal, and if the officers adopted a rule that they would not receive taxes from an agent, this excused the agent from making tender and rendered sales invalid.[26] It was a sufficient tender if a relative of the owner went to the office of the commissioners to see about the payment of the taxes, although he made no formal tender and rendered a sale void.[27] Irregularities did not affect the validity of the title, provided the proceedings were colorable and free from fraud, accident, or mistake.[28] The government did not guarantee the title it gave upon tax-sale.[29] Purchasers who bought land at tax-sales and who lost the land by failure of title were repaid their purchase-money by a special relief act, but the purchaser must defend in good faith. It was necessary to show an eviction without collusion on his part.[30] This was a revenue law, and therefore cases arising under it involving the validity of titles were removable from state courts to United States circuit courts.[31]

6. Owner Entitled to Surplus. In case of the sale of land for taxes, the owner was entitled to the surplus proceeds of the sale, after satisfying the tax, costs, charges, and commissions, to be paid to him or his legal representatives, or if he or they could not be found, or refused to receive the money, then it was required to be deposited in the treasury of the United States and there held for the use of the owner or his legal representatives, until such time as he or they should make application therefor to the treasurer of the United States.[32] Prior to his application to the treasurer of the United States for such surplus, the owner had no claim thereto which could be enforced by suit against the United States.[33]

24. Buck *v.* Williams, 10 Heisk. (Tenn.) 264.

25. Schenck *v.* Peay, 21 Fed. Cas. No. 12,451, 1 Dill. 267, 10 Int. Rev. Rec. 54.

26. U. S. *v.* Lee, 106 U. S. 196, 27 L. ed. 171 [*affirming* 15 Fed. Cas. Nos. 8,191, 8,192, 3 Hughes 36, 139, 24 Int. Rev. Rec. 90] (Arlington case); Atwood *v.* Weems, 99 U. S. 183, 25 L. ed. 471; Bennett *v.* Hunter, 9 Wall. (U. S.) 326, 19 L. ed. 672 [*affirming* 18 Gratt. (Va.) 100]; Lee *v.* Chase, 15 Fed. Cas. No. 8,185, 1 Hughes 402.

27. Tacey *v.* Irwin, 18 Wall. (U. S.) 549, 21 L. ed. 786.

28. Sharpleigh *v.* Surdam, 21 Fed. Cas. No. 12,711, 1 Flipp. 472.

29. U. S. *v.* Cooper, 120 U. S. 124, 7 S. Ct. 459, 30 L. ed. 606. And see State *v.* Pinckney, 22 S. C. 484, property of the state, and therefore not taxable under the act of congress, did not pass, and evidence could be introduced to show the state's ownership.

30. Act June 8, 1872 (17 U. S. St. at L. 332); Bliss *v.* U. S., 27 Ct. Cl. 388; Beaumont *v.* U. S., 25 Ct. Cl. 349.

31. Smith *v.* McNeal, 109 U. S. 426, 3 S. Ct. 319, 27 L. ed. 986 (dismissal of suit for want of jurisdiction no bar to a second suit for the same cause of action); *Ex p.* Smith, 94 U. S. 455, 24 L. ed. 165 (a mandamus to compel circuit court to take jurisdiction was denied); Peyton *v.* Bliss, 19 Fed. Cas. No. 11,055, Woolw. 170. *Contra*, Martin *v.* Snowden, 18 Gratt. (Va.) 100.

32. U. S. *v.* Taylor, 104 U. S. 216, 26 L. ed. 721.

"Owner."—The term "owner" under the Direct Tax Act of 1861, was intended to include every kind of estate or equity which should rightly entitle a person to the whole or a portion of the surplus (Wilson *v.* U. S., 21 Ct. Cl. 135; Rodgers *v.* U. S., 21 Ct. Cl. 130); or a purchaser in possession under a title bond (Rodgers *v.* U. S., *supra*; Wilson *v.* U. S., *supra*). Thus it was held to include a tenant for life in possession. Cuthbert *v.* U. S., 20 Ct. Cl. 172.

Evidence of ownership.—In a suit for a surplus under the direct tax acts, it is sufficient evidence of ownership that the claimant was in actual, undisturbed possession under color of title at the time of sale. Where actual possession cannot be shown he must show either a complete title or that the property was assessed to him or to those under whom he held, and that he or they paid the taxes thereon for a period covered by the statute of limitations. Wilson *v.* U. S., 21 Ct. Cl. 135.

Legal representatives.—It has been held in a decision of the court of claims if the owner of real property, sold for a direct national tax, was sole owner in fee, the surplus money derived from the sale was personalty which passed to the executors, and that they are the "legal representatives" within the meaning of Act Aug. 5, 1861 (12 U. S. St. at L. 304, § 36), and the proper parties to maintain an action therefor. Chaplin *v.* U. S., 19 Ct. Cl. 424.

33. U. S. *v.* Taylor, 104 U. S. 216, 26 L. ed. 721.

But if his application were refused he might then bring an action in the court of claims to recover the money.[34] This was a trust fund and the owner might allow it to remain in the treasury for an indefinite period without losing his right to demand it.[35] But the statute of limitations ran from the date of his application to the secretary of the treasury.[36] In case the tax title failed the owner could not hold the land and at the same time claim the surplus money of the sale.[37] So also if the land was redeemed he had no claim to the surplus.[38]

7. Redemption of Land Sold. The statute relative to redemption of land from taxes was construed favorably to the owners.[39] A lien creditor of the owner of the fee is an "owner of the land," and could redeem the land from the tax-sale.[40] In the absence of a provision in the act as to the right of a minor on redemption to recover rents and profits the state law applies.[41]

8. Refund of Tax. Taxes illegally collected could be recovered back;[42] also interest exacted for a period anterior to a legal assessment, and the person entitled to a refund could allow it to remain in the treasury for an indefinite period without losing his right to it.[43] The entire tax collected under these acts was ultimately refunded to the states and territories.[44] The law contemplated that the tax should be refunded to the person on whose property the tax was collected, and not necessarily to the person who paid the tax.[45]

VI. The Income Tax and Miscellaneous Repealed Taxes.

A. The Income Tax of 1862 and Amendments — 1. In General. The system of taxing incomes, earnings, and profits was adopted during the Civil war, and abandoned as soon after that war ended as it could be done safely.[46] The tax was to be collected annually upon the gains, profits, and income for the preceding

34. U. S. *v.* Taylor, 104 U. S. 216, 26 L. ed. 721; Cromwell *v.* U. S., 23 Ct. Cl. 303; Ravenel *v.* U. S., 23 Ct. Cl. 192; Paynter *v.* U. S., 21 Ct. Cl. 221; Wilson *v.* U. S., 21 Ct. Cl. 135; Rodgers *v.* U. S., 21 Ct. Cl. 130; Elliott *v.* U. S., 20 Ct. Cl. 328; Cuthbert *v.* U. S. 20 Ct. Cl. 172; Fripp *v.* U. S., 19 Ct. Cl. 667; Kidder *v.* U. S., 19 Ct. Cl. 561; White *v.* U. S., 19 Ct. Cl. 436; Chisholm *v.* U. S., 19 Ct. Cl. 435; Chaplin *v.* U. S., 19 Ct. Cl. 424.

Land bid in by government.— The right of the owner to claim and recover the surplus was not affected by the fact that the land was bought in by the tax commissioners for the United States and no money was actually paid into the treasury. U. S. *v.* Lawton, 110 U. S. 146, 3 S. Ct. 545, 28 L. ed. 100.

35. Fripp *v.* U. S., 19 Ct. Cl. 667.

36. U. S. *v.* Taylor, 104 U. S. 216, 26 L. ed. 721.

37. Beaumont *v.* U. S., 25 Ct. Cl. 349.

38. The obligation of the government to pay over a surplus in the treasury derived from the sale of property sold for taxes must grow out of a liability imposed by statute; and it is not the intent of the statute to give the owner both the land and its representative — the surplus. Rhett *v.* U. S., 20 Ct. Cl. 338.

39. Corbett *v.* Nutt, 10 Wall. (U. S.) 464, 19 L. ed. 976 [*affirming* 18 Gratt. (Va.) 624], the validity of the redemption of lands sold does not depend on the return of the purchase-money into the treasury by the commissioners.

40. Schenck *v.* Peay, 21 Fed. Cas. No. 12,451, 1 Dill. 267, 10 Int. Rev. Rec. 54, 11 Int. Rev. Rec. 22.

41. Shelton *v.* Sears, 10 Heisk. (Tenn.) 303.

42. Hanger *v.* U. S., 23 Ct. Cl. 293; Lawton *v.* U. S., 21 Ct. Cl. 44; Seabrook *v.* U. S., 21 Ct. Cl. 39; Harrison *v.* U. S., 20 Ct. Cl. 175, interest on unpaid taxes.

43. Simons *v.* U. S., 19 Ct. Cl. 601.

44. Act March 2, 1891 (26 U. S. St. at L. 822); U. S. *v.* Elliott, 164 U. S. 373, 17 S. Ct. 140, 41 L. ed. 474; Glover *v.* U. S., 164 U. S. 294, 17 S. Ct. 95, 41 L. ed. 440; McKee *v.* U. S., 164 U. S. 287, 17 S. Ct. 92, 41 L. ed. 437; 20 Op. Atty.-Gen. 241, 363 (set-off of indebtedness of states); 20 Op. Atty.-Gen. 134. Decisions under the provision in Act March 2, 1891 (26 U. S. St. at L. 822), giving compensation to owners of land sold in South Carolina. Sams *v.* U. S., 35 Ct. Cl. 151 (secretary's duties in payment of claims under this act are ministerial and not judicial); Chisolm *v.* U. S., 31 Ct. Cl. 328; Means *v.* U. S., 31 Ct. Cl. 245; Hogarth *v.* U. S., 30 Ct. Cl. 346; Murray *v.* U. S., 29 Ct. Cl. 366; Glover *v.* U. S., 29 Ct. Cl. 236 (the law of South Carolina governs in determining who was the owner of land sold for taxes in that state); Barnwell *v.* U. S., 28 Ct. Cl. 246; Sams *v.* U. S., 27 Ct. Cl. 266.

45. Herbert *v.* Harbert, (Tex. Civ. App. 1894) 28 S. W. 250.

46. Michigan Cent. R. Co. *v.* Slack, 100 U. S. 595, 25 L. ed. 647. The income tax imposed in 1862 remained in existence until Dec. 31, 1871, when it expired by limitation.

year.[47] Its constitutionality was sustained.[48] It was not a direct tax requiring to be apportioned.[49] Income received in gold coin was taxable on the amount reduced to its equivalent market value in legal tender currency.[50] A *bona fide* exchange of stocks for other property was not a sale, and profits derived therefrom were not taxable as income.[51] Advance in value of government bonds did not constitute gains, profits, or income, but constituted increase of capital.[52] Salaries of judicial officers of a state or a city were not taxable as income.[53] The death of a person before the appointed time for making his return did not discharge his estate. The tax was to be paid by his executor or administrator.[54]

2. Tax on Dividends, Earnings, and Interest on Bonds — a. In General. The tax on interest, dividends, and profits of railroads and other corporations was entirely distinct and separate from the income tax proper.[55] It was of the same character as the tax on income of individuals but the mode of assessing and collecting was different.[56] The tax on interest and dividends was an excise tax on

Under Act July 1, 1862 (12 U. S. St. at L. 432), the tax was three per cent on incomes over six hundred dollars and not over ten thousand dollars; over ten thousand dollars five per cent. No income tax was collected under the act of June 30, 1864, as it was amended by the act of March 3, 1865, before it was collectable. By the act of March 3, 1865, the tax on incomes over six hundred dollars and not over five thousand dollars was five per cent; over five thousand dollars, ten per cent on excess over five thousand dollars; by the act of March 2, 1867, the tax on incomes over one thousand dollars was five per cent; by the act of July 14, 1870, the tax on incomes over two thousand dollars was two and one-half per cent. The tax imposed by the act of Aug. 5, 1861 (12 U. S. St. at L. 309), was not collected, being superseded by Act July 1, 1862. Bennett *v.* Hunter, 9 Wall. (U. S.) 326, 19 L. ed. 672; U. S. *v.* Tilden, 28 Fed. Cas. No. 16,519, 9 Ben. 368, 24 Int. Rev. Rec. 99.

Salary of officers subject to tax.— Galm *v.* U. S., 39 Ct. Cl. 55.

47. Gray *v.* Darlington, 15 Wall. (U. S.) 63, 21 L. ed. 45.

48. Springer *v.* U. S., 102 U. S. 586, 26 L. ed. 253.

49. Clark *v.* Sickel, 5 Fed. Cas. No. 2,862, 14 Int. Rev. Rec. 6; Smedberg *v.* Bentley, 22 Fed. Cas. No. 12,964, 24 Int. Rev. Rec. 38.

50. Pacific Ins. Co. *v.* Soule, 7 Wall. (U. S.) 433, 19 L. ed. 95.

51. U. S. *v.* Smith, 27 Fed. Cas. No. 16,341, 1 Sawy. 277, 12 Int. Rev. Rec. 135.

52. Gray *v.* Darlington, 15 Wall. (U. S.) 63, 21 L. ed. 45.

53. Buffington *v.* Day, 11 Wall. (U. S.) 113, 20 L. ed. 122 [*affirming* 7 Fed. Cas. No. 3,675, 3 Cliff. 376, 11 Int. Rev. Rec. 205] (state officer); Freedman *v.* Sigel, 9 Fed. Cas. No. 5,080, 10 Blatchf. 327, 17 Int. Rev. Rec. 28 (city officer); U. S. *v.* Ritchie, 27 Fed. Cas. No. 16,168, 15 Int. Rev. Rec. 43.

54. Mandell *v.* Pierce, 16 Fed. Cas. No. 9,008, 3 Cliff. 134, 7 Int. Rev. Rec. 193.

Income decisions.— Brainard *v.* Hubbard, 12 Wall. (U. S.) 1, 20 L. ed. 272 [*reversing* 35 Conn. 563] (annual gains of corporation whether divided or not are taxable as part of income of shareholders); *Ex p.* Ives, 13 Fed. Cas. No. 7,114, 1 Int. Rev. Rec. 145 (undivided earnings of incorporated companies not taxable as income in the returns of stock-holders); Magee *v.* Denton, 16 Fed. Cas. No. 8,943, 5 Blatchf. 130 (dividends should be included); Reynolds *v.* Williams, 20 Fed. Cas. No. 11,734, 4 Biss. 108 (the passage of a trust fund from an old to a new corporation on consolidation was not gains, profits, or income accruing to stockholders, liable to tax); U. S. *v.* Frost, 25 Fed. Cas. No. 15,172, 9 Int. Rev. Rec. 41 (whether promissory notes, book-accounts, etc., due, during the year were gains, profits, or income for that year depended on their value intrinsically or their convertibility into money, or available assets); U. S. *v.* Mayer, 26 Fed. Cas. No. 15,735, Deady 127 (indictment for perjury in swearing to income return); U. S. *v.* Schillinger, 27 Fed. Cas. No. 16,228, 14 Blatchf. 71 (the amount of a promissory note received on a sale of property was not taxable as income of the year when the sale was made, but of the year in which it was paid); U. S. *v.* Tilden, 28 Fed. Cas. Nos. 16,520, 16,521, 16,522, 10 Ben. 170, 547, 566, 25 Int. Rev. Rec. 352 (income tax cases of Samuel J. Tilden).

Decisions under the English income tax laws.— Dowell Inc. Tax Laws (Piper 5th ed. 1902).

55. Concord R. Corp. *v.* Topliff, 6 Fed. Cas. No. 3,093, 21 Int. Rev. Rec. 74.

56. Sioux City, etc., R. Co. *v.* U. S., 110 U. S. 205, 3 S. Ct. 565, 28 L. ed. 120 (interest on subsidy bonds loaned by the government); Memphis, etc., R. Co. *v.* U. S., 108 U. S. 228, 2 S. Ct. 482, 27 L. ed. 711 (tax due on dividends paid during the war in Confederate notes within the Confederate lines); Lake Shore, etc., R. Co. *v.* Rose, 95 U. S. 78, 24 L. ed. 376 (the duty on dividends and interest on bonds of railroad companies, and profits carried to the account of any fund, or used in construction was in force from 1862 to 1870); Metropolitan R Co. *v.* Slack, 17 Fed. Cas. No. 9,506, Holmes 375 (tax on the dividends and earnings of a railway corporation for the first six months of 1870 is not an income tax but an excise); Philadelphia, etc., R. Co. *v.* Barnes, 19 Fed.

the business of corporations to be paid by the corporations out of their earnings, income, and profits, and not a tax on the incomes of the bond or stock-holders.[57] Congress intended to hold the railroad company absolutely and solely liable for the tax, although railroads were empowered to withhold the amount of the tax from the dividends due stock-holders or interest payable to bondholders.[58] The provision that the amount of the tax might be withheld from any stock-holder or bondholder who is a subject of any foreign government did not impair the validity of the tax.[59] Earnings were taxable whether divided or undivided.[60] Earnings carried to a fund were not taxable unless the operations of the company showed a profit. Earnings used to pay interest or dividends were taxable whether they were actual profits or not.[61] No tax accrues upon a fund except for the year in which the fund itself accrues.[62] That cannot be regarded as net income or profits which is required to keep the property up in its usual condition proper for operation.[63] Estimated depreciation of assets may be included in losses.[64] Interest paid and dividends declared during the last five months of the year 1870 were taxable, as well as those declared during the year 1871, there being no apparent reason why income derived through corporations should not be taxed like income generally.[65] The income tax or duties imposed upon the amounts insured, renewed, or continued by insurance companies upon the gross amounts of premiums received, and also upon dividends, undistributed sums and income, was not a direct tax but a duty or excise.[66]

Cas. No. 11,087, 12 Int. Rev. Rec. 112; Schuylkill Nav. Co. *v.* Elliott, 21 Fed. Cas. No. 12,497, 21 Int. Rev. Rec. 342.

57. U. S. *v.* Erie R. Co., 106 U. S. 327, 1 S. Ct. 223, 27 L. ed. 151, 107 U. S. 1, 2 S. Ct. 83, 27 L. ed. 385 [*reversing* 25 Fed. Cas. No. 15,056, 9 Ben. 67, 24 Int. Rev. Rec. 76] (interest paid to non-resident alien bondholders taxable); Michigan Cent. R. Co. *v.* Slack, 100 U. S. 595, 25 L. ed. 647 [*affirming* 17 Fed. Cas. No. 9,527*a*, 22 Int. Rev. Rec. 337] (constitutionality of the act sustained). *Contra,* U. S. *v.* Baltimore, etc., R. Co., 17 Wall. (U. S.) 322, 21 L. ed. 597 [*affirming* 24 Fed. Cas. No. 14,511, 13 Int. Rev. Rec. 117] (the tax was upon the creditor and not upon the corporation. The corporation is made use of as a convenient means of collecting the tax); Haight *v.* Pittsburg, etc., R. Co., 6 Wall. (U. S.) 15, 18 L. ed. 818 (the tax was a tax upon the bondholder).

58. Barnes *v.* Philadelphia, etc., R. Co., 17 Wall. (U. S.) 294, 21 L. ed. 544 [*reversing* 19 Fed. Cas. No. 11,087, 12 Int. Rev. Rec. 112].

59. Michigan Cent. R. Co. *v.* Slack, 100 U. S. 595, 25 L. ed. 647 [*followed* in U. S. *v.* Erie R. Co., 106 U. S. 327, 1 S. Ct. 223, 27 L. ed. 151]. No income tax was imposed on citizens of foreign countries whether from interest on bonds or any other source. Northern Cent. R. Co. *v.* Jackson, 7 Wall. (U. S.) 262, 19 L. ed. 88 [*affirming* 13 Fed. Cas. No. 7,142, Chase 268, 2 Int. Rev. Rec. 174], the decision of the court in this case rested upon the phraseology of the act of June 30, 1864. A tax was imposed on alien non-resident bondholders by the acts of March 10, 1866, and July 13, 1866.

60. Stockdale *v.* Atlantic Ins. Co., 20 Wall. (U. S.) 323, 22 L. ed. 348 [*reversing* 12 Fed. Cas. No. 6,662, 16 Int. Rev. Rec. 30]. Discussing opinions of the court as to whether the tax was on the corporation or the stockholder.

61. Little Miami, etc., R. Co. *v.* U. S., 108 U. S. 277, 2 S. Ct. 627, 27 L. ed. 724 [*reversing* 1 Fed. 700] (taxable profits of a railroad corporation); Missouri River, etc., R. Co. *v.* U. S., 19 Fed. 66 (company can deduct overpayment of tax on gross receipts from amount due on net earnings).

62. A dividend declared and paid is a dividend earned. Bailey *v.* New York Cent., etc., R. Co., 106 U. S. 109, 1 S. Ct. 62, 27 L. ed. 81; Bailey *v.* New York Cent., etc., R. Co., 22 Wall. (U. S.) 604, 22 L. ed. 840 [*reversing* 18 Fed. Cas. No. 10,203, 20 Int. Rev. Rec. 25], definition of scrip dividend.

63. Marquette, etc., R. Co. *v.* U. S., 123 U. S. 722, 8 S. Ct. 319, 31 L. ed. 302 [*reversing* 17 Fed. 719] (construction of the act of July 14, 1870; profits used for construction not taxable); Grant *v.* Hartford, etc., R. Co., 93 U. S. 225, 23 L. ed. 878 [*affirming* 11 Fed. Cas. No. 6,159, 9 Blatchf. 542].

64. Little Miami, etc., R. Co. *v.* U. S., 108 U. S. 277, 2 S. Ct. 627, 27 L. ed. 724 [*reversing* 1 Fed. 700].

65. Blake *v.* National City Banks, 23 Wall. (U. S.) 307, 321, 23 L. ed. 119. "The ambiguous terms of the statute prevent the possibility of a satisfactory solution of the question presented," and the court adopted "the construction practically placed upon it by the administrative department of the government;" and declared in favor of the tax. Kenny *v.* Philadelphia, etc., R. Co., 154 U. S. 616, 14 S. Ct. 1196, 23 L. ed. 121 [*reversing* 19 Fed. Cas. No. 11,088, 18 Int. Rev. Rec. 92]; Missouri River, etc., R. Co. *v.* U. S., 19 Fed. 66. *Contra,* Metropolitan R. Co. *v.* Slack, 17 Fed. Cas. No. 9,506, Holmes 375.

66. Pacific Ins. Co. *v.* Soule, 7 Wall. (U. S.) 433, 19 L. ed. 95; Merchants' Ins. Co. *v.* McCartney, 17 Fed. Cas. No. 9,443, 1 Lowell

b. Tax on Dividends of Banks. The tax was on dividends and on undistributed sums or excess over dividends carried to a surplus fund.[67] "Profits" meant net profits, after deducting expenses and losses. Losses of whatever nature incurred by a bank in the legitimate prosecution of its business might be deducted.[68] The act of a bank in declaring a dividend was conclusive as to its liability, and it could not avoid paying the tax by showing that the dividends were in fact ignorantly paid out of the capital and accumulated surplus of former years.[69] The bank was not entitled to an exemption from the tax on dividends on account of a state tax, since the state tax was not a tax on the bank but a tax on the stock-holder.[70]

B. Income Tax of 1894. An income tax was again imposed in 1894.[71] The tax was two per cent on incomes above four thousand dollars. The United States supreme court declared the law unconstitutional on the ground that the tax was a direct tax requiring it to be apportioned among the states according to population.[72]

C. Miscellaneous Repealed Taxes — 1. On Gross Receipts. The tax on gross receipts of railroads, advertisements, bridges, canals, express companies, ferries, lotteries, ships, barges, stages, steamboats, telegraphs and insurance companies, and museums, operas, circuses, etc., was repealed in 1870.[73]

2. On Sales. The tax on sales at auction and sales of apothecaries, butchers, brokers, dealers, manufacturers, etc., was in operation nine years.[74]

447, 12 Int. Rev. Rec. 122, profits earned previous to the passage of the act could not be taxed as annual income.

Decisions relative to railroad companies.— U. S. *v.* Philadelphia, etc., R. Co., 123 U. S. 113, 8 S. Ct. 77, 31 L. ed. 138 (acquiescence by the government in former adjustment raises presumption against claim); U. S. *v.* Indianapolis, etc., R. Co., 113 U. S. 711, 5 S. Ct. 716, 28 L. ed. 1140 (interest on bonds earned in 1871 but payable Jan. 1, 1872, not taxable); Western Union R. Co. *v.* U. S., 101 U. S. 543, 25 L. ed. 1068 (the tax on the coupons paid on bonds is a tax on the interest, not as it accrues, but when it is paid); Eastern Kentucky R. Co. *v.* Slack, 100 U. S. 659, 25 L. ed. 611 [*affirming* 14 Fed. Cas. No. 7,718, 22 Int. Rev. Rec. 246]; Kentucky Imp. Co. *v.* Slack, 100 U. S. 648, 25 L. ed. 609 (a company building a railroad to transport its own products liable); U. S. *v.* Louisville, etc., R. Co., 33 Fed. 829 (where two roads consolidate); Chicago, etc., R. Co. *v.* Page, 5 Fed. Cas. No. 2,668, 1 Biss. 461 (certificates not dividends within the meaning of section 81, subjecting dividends of railroad companies to a three per cent tax, and not subject to the tax); Eastern Kentucky R. Co. *v.* Slack, 8 Fed. Cas. No. 4,253, 22 Int. Rev. Rec. 247 (railroad company purchasing a railroad subject to an existing mortgage, liable for tax on coupons of mortgage bonds).

67. Dollar Sav. Bank *v.* U. S., 19 Wall. (U. S.) 227, 22 L. ed. 80 [*affirming* 25 Fed. Cas. No. 14,979, 15 Int. Rev. Rec. 193]; U. S. *v.* Minneapolis State Nat. Bank, 27 Fed. Cas. No. 16,380; U. S. *v.* Minneapolis State Nat. Bank, 27 Fed. Cas. No. 16,381, 1 McCrary 183 (tax for the last five months of 1870).

68. U. S. *v.* Central Nat. Bank, 10 Fed. 612; a loss by embezzlement is deductible.

Where depositors contracted for a share of the profits, a division of the same produced dividends subject to taxation. Cary *v.* San Francisco Sav. Union, 22 Wall. (U. S.) 38, 22 L. ed. 779 [*reversing* 21 Fed. Cas. No. 12,317, 2 Sawy. 333, 17 Int. Rev. Rec. 109].

69. Central Nat. Bank *v.* U. S., 137 U. S. 355, 11 S. Ct. 126, 34 L. ed. 703 [*affirming* 24 Fed. 577].

70. U. S. *v.* Central Nat. Bank, 24 Fed. 577.

71. Act Aug. 28, 1894 (28 U. S. St. at L. 509); Moore *v.* Miller, 5 App. Cas. (D. C.) 413, denying injunction.

72. Pollock *v.* Farmers' L. & T. Co., 157 U. S. 429, 15 S. Ct. 673, 39 L. ed. 759, 158 U. S. 601, 15 S. Ct. 912, 39 L. ed. 1108.

73. Imposed by Act July 1, 1862 (12 U. S. St. at L. 432); Act March 3, 1863 (12 U. S. St. at L. 713); Act June 30, 1864 (13 U. S. St. at L. 223); Act July 13, 1866 (14 U. S. St. at L. 98). Repealed, Act July 14, 1870 (16 U. S. St. at L. 256). Black *v.* Sixth Ave. R. Co., 1 Daly (N. Y.) 536 (if the rate of fare to which a company is limited by law is so small that the proportionate amount of the tax is but an insignificant fraction of a cent, the company is not entitled to add anything to the fare); Retzer *v.* Wood, 109 U. S. 185, 3 S. Ct. 164, 27 L. ed. 900 ("express business" Act of 1864 construed); New Jersey Steamboat Co. *v.* Pleasonton, 18 Wall. (U. S.) 478, 21 L. ed. 769 [*affirming* 18 Fed. Cas. No. 10,166, 8 Blatchf. 259 (tax on steamboat receipts, repeal of exemption); Wells *v.* Shook, 29 Fed. Cas. No. 17,406, 8 Blatchf. 254 (gross receipts of express companies).

74. The last assessment of these taxes was made in 1871, the law having been repealed by Act July 14, 1870 (16 U. S. St. at L. 256). Stockdale *v.* Doswell, 16 Wall. (U. S.) 156, 21 L. ed. 350 (sales by brokers); U. S. *v.* Fisk, 3 Wall. (U. S.) 445, 18 L. ed. 243; U. S. *v.* Cutting, 3 Wall. (U. S.) 441, 18 L. ed. 241 (sales made by brokers for

3. On Manufactured Articles and Products. In 1862 a general *ad valorem* rate of three per cent was imposed upon manufactured articles. In 1864 the rate was increased to five per cent, and additional articles made taxable. In 1865 these rates were advanced.[75] Any person engaged in the manufacture or preparation for sale of any article or compound was regarded as a manufacturer.[76]

4. Tax on Sugar Refiners. The tax imposed by the act of June 13, 1898, upon persons, companies, and corporations carrying on the business of refining sugar, whose gross annual receipts exceeded two hundred and fifty thousand dollars, was constitutional, not being a direct tax but an excise.[77] The tax was payable annually and on annual receipts, and a regulation of the commissioner requiring the assessment and collection of the tax monthly was unauthorized.[78] Money earned previous to the passage of the act but received thereafter was not properly included in the taxable receipts.[79] The tax was imposed only upon receipts in the business of refining sugar, not receipts from independent sources; consequently interest on funds deposited in banks and dividends received on stock of other corporations were not subject to the tax.[80] Receipts of a sugar refining company from wharves owned by it and used almost exclusively for the unloading of sugar consigned to it were properly included in the gross

themselves); *In re* Whipple File Co., 29 Fed. Cas. No. 17,522, 1 Lowell 477, 12 Int. Rev. Rec. 98 (assignee of a bankrupt manufacturer not bound to pay the tax on sales).

75. Act July 1, 1862 (12 U. S. St. at L. 432); Act June 30, 1864 (13 U. S. St. at L. 223); Act March 3, 1865 (13 U. S. St. at L. 469).

76. Pittsburg Gas Company *v.* Pittsburg, 101 U. S. 219, 25 L. ed. 789 (a gas company which furnished a city gas "free of charge" under a contract made for a valuable consideration and paid the tax could not recover from the city the amount so paid); Philadelphia *v.* Diehl, 5 Wall. (U. S.) 720, 18 L. ed. 614 (tax on illuminating gas manufactured and furnished to the city of Philadelphia to be used in the public lamps); Hendy *v.* Soule, 11 Fed. Cas. No. 6,359, Deady 400; Saunders *v.* Howard, 21 Fed. Cas. No. 12,375 (a merchant tailor who made clothes exceeding one thousand dollars per annum in value, to order for individual customers, and not for resale, was a manufacturer within the meaning of the law imposing a tax on manufactures of wool).

Tax on cotton.— Hamilton *v.* Dillin, 21 Wall. (U. S.) 73, 22 L. ed. 528. The act of 1862 imposed a tax of one and one-half cents per pound on cotton, which was subsequently raised to two and again to three cents per pound. Act July 1, 1862 (12 U. S. St. at L. 432); March 7, 1864 (13 U. S. St. at L. 14); June 30, 1864 (13 U. S. St. at L. 223); July 13, 1866 (14 U. S. St. at L. 98); March 2, 1867 (14 U. S. St. at L. 471); Feb. 3, 1868 (15 U. S. St. at L. 34). Tax repealed on cotton grown after 1867.

Decisions under repealed laws relative to tax on manufactured articles. Bennett *v.* Keith, 44 Pa. St. 291, 3 Grant 396; Slack *v.* Tucker, 23 Wall. (U. S.) 321, 23 L. ed. 143 [*reversing* 24 Fed. Cas. No. 14,266, 1 Holmes 485, 19 Int. Rev. Rec. 149] (sale by manufacturer at place of business); Cheney *v.* Van Arsdale, 15 Wall. (U. S.) 68, 21 L. ed. 46 (manufactured goods); Boylan *v.* U. S., 10 Wall. (U. S.) 58, 19 L. ed. 859 (tax on manufactured articles. Market value of goods, how determined); U. S. *v.* Dewitt, 9 Wall. (U. S.) 41, 19 L. ed. 593; U. S. *v.* Smith, 8 Wall. (U. S.) 587, 19 L. ed. 506; De Casse *v.* Spader, 7 Fed. Cas. No. 3,720, 3 Int. Rev. Rec. 163; Dike *v.* Howe, 7 Fed. Cas. No. 3,906, 4 Cliff. 132 (tax on goods removed "for delivery" to be stored until after the act reducing the tax took effect); Onondaga Salt Co. *v.* Wilkinson, 21 Fed. Cas. No. 12,269, 8 Blatchf. 30 (the word "place" was not used as an equivalent for town, city, county, or state); Schriefer *v.* Wood, 21 Fed. Cas. No. 12,481, 5 Blatchf. 215; U. S. *v.* Stevens, 27 Fed. Cas. No. 16,393*a*; U. S. *v.* Washington Mills, 28 Fed. Cas. No. 16,647, 2 Cliff. 601, 6 Int. Rev. Rec. 146.

77. 30 U. S. St. at L. 464, § 27; Spreckels Sugar Refining Co. *v.* McClain, 192 U. S. 397, 24 S. Ct. 376, 48 L. ed. 496 [*reversing* on other grounds 113 Fed. 244, 51 C. C. A. 201 (*reversing* 109 Fed. 76)].

Persons engaged in boiling molasses, by which process the molasses is advanced in value, are "sugar refiners," within the meaning of the acts of March 3, 1863, June 30, 1864, and July 13, 1866. The definition of the term by the statute is conclusive. Zimmerling *v.* Harding, 99 Fed. 270, 39 C. C. A. 506 [*affirming* 95 Fed. 129].

78. Spreckels Sugar Refining Co. *v.* McClain, 113 Fed. 244, 51 C. C. A. 201 [*reversing* 109 Fed. 76, and *reversed* on other grounds in 192 U. S. 397, 24 S. Ct. 376, 48 L. ed. 496].

79. Spreckels Sugar-Refining Co. *v.* McClain, 109 Fed. 76 [*reversed* on other grounds in 192 U. S. 397, 24 S. Ct. 376, 48 L. ed. 496].

80. Spreckels Sugar Refining Co. *v.* McClain, 192 U. S. 397, 24 S. Ct. 376, 48 L. ed. 496 [*reversing* upon this point, 113 Fed. 244, 51 C. C. A. 201. But see American Sugar Refining Co. *v.* Rutan, 123 Fed. 979].

annual receipts upon which the amount of the tax was computed.[81] The law was repealed to take effect on and after July 1, 1902.[82]

VII. LEGACY AND SUCCESSION TAXES.

A. Nature of Tax. A legacy tax is not a tax upon property in the ordinary sense of the term, but upon the right to dispose of it.[83] A succession tax is a tax on the privilege of acquiring property by inheritance.[84] The imposition of these taxes is the exercise of the power, which every state and sovereignty possesses, of regulating the manner and terms under which property, real and personal, within its dominion may be transferred by last will or testament, or by inheritance, and of prescribing who shall and who shall not be capable of taking it.[85]

B. Legacy and Succession Taxes During the Civil War Period. A legacy tax was imposed by the act of July 1, 1862. The duties imposed greatly resembled those then existing in England;[86] the act of 1864 added a succession tax or a duty on the passing of real estate, in substantial harmony with the principle of the English Succession Duty Act.[87] A retroactive operation was not given so as to subject persons to a tax upon interests acquired before the act was passed.[88] The succession tax was imposed on every devolution of title to any real estate. It was not a direct tax, and the law was constitutional.[89] The act made legacy and succession taxes a lien on the decedent's property and directed the executor or administrator to pay the same to the collector.[90] In case the administrator or executor did not pay the tax the statute provided that the lien should be enforced by suit against any one having possession of the property. There was no provision for a suit against the executor or administrator.[91] A legatee was not liable *in personam* for the legacy tax.[92] The person liable to pay the succession tax was the person beneficially interested in the property.[93] The legacy tax was not applicable to legacies paid out of proceeds of real estate,[94] nor to legacies payable in pursuance of a compromise.[95] Where real estate was devised before the act was passed to one for life, remainder to another, the tax accrued on the

81. Spreckels Sugar Refining Co. *v.* McClain, 192 U. S. 397, 24 S. Ct. 376, 48 L. ed. 496 [*reversing* on other grounds 113 Fed. 244, 51 C. C. A. 201].

82. Act April 12, 1902 (32 U. S. St. at L. 97, § 7).

Gross receipts.— Transporting natural gas to consumers by means of pipes did not constitute the company a transporting company liable under section 27 of the act of June 13, 1898. U. S. *v.* Consumers' Gas Trust Co., 142 Fed. 134; U. S. *v.* Northwestern Ohio Natural Gas Co., 141 Fed. 198.

83. Knowlton *v.* Moore, 178 U. S. 41, 20 S. Ct. 747, 44 L. ed. 969; U. S. *v.* Perkins, 163 U. S. 625, 16 S. Ct. 1073, 41 L. ed. 287.

84. Wallace *v.* Myers, 38 Fed. 184, 4 L. R. A. 171.

85. U. S. *v.* Fox, 94 U. S. 315, 24 L. ed. 192; Mager *v.* Grima, 8 How. (U. S.) 490, 12 L. ed. 1168.

An inheritance may be taxed as a privilege, although the property may also be taxed. Eyre *v.* Jacob, 14 Gratt. (Va.) 422, 73 Am. Dec. 367.

86. 12 U. S. St. at L. 485. As early as 1797 congress imposed a legacy tax (1 U. S. St. at L. 527), which was repealed in 1802.

87. Act June 30, 1864 (13 U. S. St. at L. 223), which in effect reënacted the legacy tax, and was amended by Act July 13, 1866 (14 U. S. St. at L. 140).

88. Folsom *v.* U. S., 21 Fed. 37. The grantor having by the state law "no estate in law or in equity" in the property transferred and not being possessed thereof at the time of his death, no tax accrued. U. S. *v.* Leverich, 9 Fed. 586.

89. Scholey *v.* Rew, 23 Wall. (U. S.) 331, 23 L. ed. 99; U. S. *v.* Banks, 17 Fed. 322 (a deed or gift to a son made as an advancement); Brune *v.* Smith, 4 Fed. Cas. No. 2,053, 13 Int. Rev. Rec. 54 (acceleration of a succession by an amicable agreement); Ransom *v.* U. S., 20 Fed. Cas. No. 11,574 (property bought and paid for by the husband and deeded to the wife).

90. U. S. *v.* Trucks, 27 Fed. 541.

91. U. S. *v.* Trucks, 28 Fed. 846.

92. U. S. *v.* Allen, 24 Fed. Cas. No. 14,430, 9 Ben. 154, 23 Int. Rev. Rec. 192.

93. U. S. *v.* Tappan, 28 Fed. Cas. No. 16,431, 10 Ben. 284.

A purchaser of land upon the descent of which a succession tax was due took the title subject to the lien but incurred no personal liability. Wilhelmi *v.* Wade, 65 Mo. 39.

94. U. S. *v.* Watts, 28 Fed. Cas. No. 16,653, 1 Bond 580, 1 Int. Rev. Rec. 17.

95. Page *v.* Rives, 18 Fed. Cas. No. 10,666, 1 Hughes 297.

death of the life-tenant.[96] The tax was payable when the beneficiaries became entitled to possession or enjoyment of the property. It became a lien on the succession after assessment.[97] There was no liability on the person having charge of the property until there had been a neglect or refusal to pay after demand.[98] The tax became a lien from the time it accrued and it did not accrue until it was made payable.[99] These taxes were repealed on and after October 1, 1870.[1] No tax was due on successions to which the successors became entitled in possession after October 1, 1870,[2] nor on legacies payable after October 1, 1870.[3]

C. Legacy Tax Under the War Revenue Act — 1. Provisions and Constitutionality of Act. A legacy tax was again imposed by the War Revenue Act of 1898, practically a reënactment of the act of June 30, 1864, without the amendments, and was in force until July 1, 1902.[4] The act imposed the tax on the death of the testator or of the intestate and made it a lien for twenty years. Legacies not exceeding ten thousand dollars were not taxable, and the rate of tax was progressively increased, according to the net amount of the separate legacies or distributive shares to be distributed. The passing of personal property was subjected to the tax. The personal property left after paying debts made up legacy which passed.[5] The tax was constitutional, not being a direct tax, but a duty or excise, and its operation being uniform throughout the United States.[6]

2. Legacies Subject to Tax. In the case of property passing to a legatee by virtue of a power of appointment granted under the will of one dying prior to the act and exercised by the donor subsequent thereto no tax was due.[7] Legacies of bonds of the United States and the income therefrom were taxable.[8] Legacies to municipal corporations were taxable. Congress has power to tax the transmission

96. Wright *v.* Blakeslee, 101 U. S. 174, 25 L. ed. 1048 [*reversing* 30 Fed. Cas. No. 18,073, 13 Blatchf. 421]; Blake *v.* McCartney, 2 Fed. Cas. No. 1498, 4 Cliff. 101, 10 Int. Rev. Rec. 131.

No succession tax accrued against a devisee of real estate in fee, after a life-estate in another, until the termination of the life-estate. Mason *v.* Clapp, 16 Fed. Cas. No. 9,233, Holmes 417, 21 Int. Rev. Rec. 268 [*affirmed* in 94 U. S. 589, 24 L. ed. 212].

97. U. S. *v.* Hazard, 8 Fed. 380, 14 Phila. (Pa.) 486; Mason *v.* Clapp, 16 Fed. Cas. No. 9,233, Holmes 417, 21 Int. Rev. Rec. 268.

98. U. S. *v.* Pennsylvania Co., 27 Fed. 539.

99. Mason *v.* Sargent, 104 U. S. 689, 26 L. ed. 894 [*reversing* 16 Fed. Cas. No. 9,253, 23 Int. Rev. Rec. 155]; Clapp *v.* Mason, 94 U. S. 589, 24 L. ed. 212 [*affirming* 16 Fed. Cas. No. 9,233, Holmes 417, 21 Int. Rev. Rec. 268]; U. S. *v.* Rankin, 8 Fed. 872, 3 McCrary 113; U. S. *v.* Brice, 8 Fed. 381; U. S. *v.* Hazard, 8 Fed. 380. Earlier cases held that the tax accrued at the death of the testator, although it was not payable until the legatee became entitled to possession and enjoyment. U. S. *v.* Townsend, 8 Fed. 306; May *v.* Slack, 16 Fed. Cas. No. 9,336, 16 Int. Rev. Rec. 134; Hellman *v.* U. S., 11 Fed. Cas. No. 6,341, 15 Blatchf. 13 [*affirming* 26 Fed. Cas. No. 15,343, 23 Int. Rev. Rec. 387], under the act of 1862 the legacy tax imposed accrued at the death of the testator or intestate.

1. Act July 14, 1870 (16 U. S. St. at L. 256).

2. Clapp *v.* Mason, 94 U. S. 589, 24 L. ed. 212 [*affirming* 16 Fed. Cas. No. 9,233, Holmes 417, 21 Int. Rev. Rec. 268].

3. Sturges *v.* U. S., 117 U. S. 363, 6 S. Ct. 767, 29 L. ed. 920; Mason *v.* Sargent, 104 U. S. 689, 26 L. ed. 894 [*reversing* 16 Fed. Cas. No. 9,253, 23 Int. Rev. Rec. 155]; U. S. *v.* Kelley, 28 Fed. 845 (related to the personal property of an intestate); U. S. *v.* New York L. Ins., etc., Co., 27 Fed. Cas. No. 15,873, 9 Ben. 413, 24 Int. Rev. Rec. 118.

4. Act June 13, 1898 (30 U. S. St. at L. 448), amended by Act March 2, 1901 (31 U. S. St. at L. 946); Vanderbilt *v.* Eidman, 196 U. S. 480, 25 S. Ct. 331, 49 L. ed. 563 [*reversing* 121 Fed. 590].

5. Brown *v.* Kinney, 128 Fed. 310.

6. High *v.* Coyne, 178 U. S. 111, 20 S. Ct. 747, 44 L. ed. 997 [*affirming* 93 Fed. 450 (*followed* in Fidelity Ins., etc., Co. *v.* McClain, 178 U. S. 113, 20 S. Ct. 774, 44 L. ed. 998)]; Knowlton *v.* Moore, 178 U. S. 41, 20 S. Ct. 747, 44 L. ed. 969.

7. Fidelity Trust Co. *v.* McClain, 113 Fed. 152. The donor of a power, rather than the donee, must be regarded as the decedent whose estate is subject to the tax. Balch *v.* Shaw, 174 Mass. 144, 54 N. E. 490; Emmons *v.* Shaw, 171 Mass. 410, 50 N. E. 1033.

8. Sherman *v.* U. S., 178 U. S. 150, 20 S. Ct. 779, 44 L. ed. 1014; Murdock *v.* Ward, 178 U. S. 139, 20 S. Ct. 775, 44 L. ed. 1009. The state may lawfully fix the amount of the tax by referring to the value of the property passing; and the incidental fact that such property is composed, in whole or in part, of federal securities does not invalidate the tax. *In re* Cullum, 145 N. Y. 593, 40 N. E. 163; Plummer *v.* Coler, 178 U. S. 115, 20 S. Ct. 829, 44 L. ed. 998; Wallace *v.* Myers, 38 Fed. 184, 4 L. R. A. 171.

of property by legacy to states or municipalities.[9] A legacy to a son-in-law was taxed as to a stranger in blood.[10] The legacy tax does not apply to estates of aliens or persons domiciled abroad.[11] The former legacy tax was chargeable only on estates of those who were domiciled in the United States at the time of death.[12] Where a testator removed his residence to Europe and died there, the legacies were not subject to the tax.[13]

3. When the Tax Accrued and Was Payable. No tax accrued where the testator died prior to the passage of the act.[14] A trustee who at the time of the passage of the act held personal property in trust to be distributed at a future date was not "a person possessed" of such property, within the meaning of the statute, so as to render it subject to the tax when it passed from him to the distributees.[15] The lien attached upon the property bequeathed when the tax became due and payable.[16] By the terms of the amendment of March 2, 1901, the tax was due and payable in one year after the death of the testator. The tax was to be deducted from a beneficial interest before payment or distribution. The tax on reversionary interests was payable when the beneficiaries entered into the possession and enjoyment of the legacies.[17]

4. The Repealing Act and Its Effect. The tax was repealed to take effect July 1, 1902.[18] The effect of the repeal was to exempt from taxation after July 1, 1902, all legacies except such as should have become previously taxable. A tax not demandable at the time the repeal took effect could not thereafter be exacted by the government.[19] Legacy taxes, which were due and payable one year after the death of the testator were not collectable on the estates of persons who died within one year prior to July 1, 1902.[20]

5. Act of 1902. The law provided for refunding legacy taxes collected on contingent beneficial interests not vested prior to July 1, 1902, and no tax was assessable on any such interests not vested prior to that date.[21] Where property was bequeathed in trust the income therefrom to be paid to the testator's widow for life, with remainder to the testator's children living at the time of her death and the lawful issue of deceased children, the remainder so created was contin-

9. Snyder *v.* Bettman, 190 U. S. 249, 23 S. Ct. 803, 47 L. ed. 1035, holding that the exercise of this power does not conflict with the proposition that neither the state nor the federal government can tax the property of the agencies of the other.

10. King *v.* Eidman, 128 Fed. 815.

11. There was no provision in the law evidencing an intention to give property, for the purpose of the tax, a *situs* separate from that of the owner; and it must be presumed that it was intended to apply only in cases where the persons and property had a recognized legal *situs* within the United States, and not in cases where the transmission of the property was governed by the law of a foreign country, owing to the domicile there of the decedent, although the property itself was within this country. Moore *v.* Ruckgaber, 184 U. S. 593, 22 S. Ct. 521, 46 L. ed. 705, 114 Fed. 1020, 52 C. C. A. 587 [*affirming* 104 Fed. 947] (no legacy duty accrues under the English law on personal property bequeathed by a testator domiciled abroad); Eidman *v.* Martinez, 184 U. S. 578, 22 S. Ct. 515, 46 L. ed. 697; Thomson *v.* Advocate-Gen., 12 Cl. & F. 1, 8 Eng. Reprint 1294, 9 Jur. 217, 13 Sim. 153, 36 Eng. Ch. 153, 60 Eng. Reprint 59 (if the testator died domiciled in England, legacy tax was payable on his personalty, although not situated in that country); Atty.-Gen. *v.* Napier, 6 Exch. 217, 15 Jur. 253, 20 L. J. Exch. 173.

12. U. S. *v.* Hunnewell, 13 Fed. 617.

13. U. S. *v.* Morris, 27 Fed. 341.

14. 22 Op. Atty.-Gen. 298.

The legacy tax is payable from the income and not from the principal. Brown's Estate, 208 Pa. St. 161, 57 Atl. 360.

15. Ryan's Estate, 9 Pa. Dist. 339 (where distribution was postponed by the terms of the will until after the passage of the act, no tax was imposed); McClain *v.* Pennsylvania L. Ins., etc., Co., 108 Fed. 618, 47 C. C. A. 529 [*affirming* 105 Fed. 367].

16. Eidman *v.* Tilghman, 136 Fed. 141 [*affirming* 131 Fed. 651, 69 C. C. A. 139 (*following* Mason *v.* Sargent, 104 U. S. 689)].

17. Vanderbilt *v.* Eidman, 196 U. S. 480, 25 S. Ct. 331, 49 L. ed. 563.

18. Act April 12, 1902 (32 U. S. St. at L. 96), repealing war revenue taxation (§ 7). Vanderbilt *v.* Eidman, 196 U. S. 480, 25 S. Ct. 331, 49 L. ed. 563.

19. Eidman *v.* Tilghman, 136 Fed. 141 [*affirming* 131 Fed. 651, 69 C. C. A. 139].

20. Philadelphia Trust, etc., Co. *v.* McCoach, 135 Fed. 866 [*affirmed* in 142 Fed. 120].

21. Act July 27, 1902 (32 U. S. St. at L. 406); 24 Op. Atty.-Gen. 98; Vanderbilt *v.*

gent and not vested, and no tax was assessable.[22] A remainder interest given to children surviving the widow who has a life use is contingent.[23] A legacy left to a daughter "when she is eighteen years old" is contingent.[24]

VIII. STAMP TAXES.[25]

A. Stamp Taxes on Instruments Under Former Laws — 1. Purpose, Construction, and Operation. Former acts of congress required stamps to be affixed to certain instruments, such as conveyances, leases, manifests, probates, powers of attorney, checks, drafts, bills of exchange, bills of lading, bonds, certificates of stocks, insurance policies, etc.[26] The object of the law was to raise revenue and not to invalidate contracts or inflict penalties, and courts should give it a liberal construction.[27] Stamp laws are in restraint of common right and not to be extended by construction to cases that do not come clearly within their terms.[28] The liability of an instrument to stamp duty, as well as the amount of such duty, is determined by the form and face of the instrument, and cannot be affected by proof of facts outside of the instrument itself.[29] Congress intended to exempt from the stamp tax instruments or documents executed for or in behalf of a state, county, town, or other municipal corporation, to enable it to perform its ordinary governmental or municipal functions.[30]

2. Validity and Admissibility in Evidence of Unstamped Instruments — a. In General. Many questions arose as to the validity of instruments, or their admissibility as evidence, when not stamped as provided, and conflicting decisions were rendered. There were authorities holding that instruments were inadmissible as

Eidman, 196 U. S. 480, 25 S. Ct. 331, 49 L. ed. 563, 121 Fed. 590.

22. Land Title, etc., Co. *v.* McCoach, 129 Fed. 901, 64 C. C. A. 333 [*reversing* 127 Fed. 381].

23. Philadelphia Trust, etc., Co. *v.* McCoach, 129 Fed. 906, 64 C. C. A. 338 [*reversing* 127 Fed. 386]. *Contra*, the remainder was vested and not contingent. Peck *v.* Kinney, 128 Fed. 313.

24. Heberton *v.* McClain, 135 Fed. 226. Decisions are not harmonious upon the character of legacies of this description. When personal property was held in trust to the use of testator's children, such interests, however, only to become "absolutely vested in such of them as shall have attained, or as shall thereafter live to attain the age of 25 years," it was held that it vested immediately upon the death of the testator in the trustee, in trust, and was not exempt under the act of June 27, 1902. Brown *v.* Kinney, 128 Fed. 310.

Other legacy tax decisions under this act.— Reversionary remainder interests not taxable. Shanley *v.* Herold, 141 Fed. 423. The legacy tax is imposed only by assessment and is not imposable until the event of distribution arrives. U. S. *v.* Marion Trust Co., 143 Fed. 301. Life-estates were taxable and the annuity tables used by the commissioner of internal revenue in making computations were lawfully adopted. Disston *v.* McClain, 143 Fed. 191. Distinction between income and an annuity. Peck *v.* Kinney, 143 Fed. 76.

25. See also Contracts, 9 Cyc. 302 *et seq.*

Presumptions on appeal as to stamping of instrument see Appeal and Error, 2 Cyc. 274 note 7.

For stamps on bonds see Bonds, 5 Cyc. 738.

26. Act July 1, 1862, Schedule B following section 110 (12 U. S. St. at L. 479); Act March 3, 1863 (12 U. S. St. at L. 720, § 6); Act June 30, 1864 (13 U. S. St. at L. 291, § 151); Act March 3, 1865 (13 U. S. St. at L. 469, § 1); Act July 13, 1866 (14 U. S. St. at L. 141); act providing for stamping of unstamped instruments (Act June 23, 1874 (18 U. S. St. at L. 250, § 1). Act June 6, 1872 (17 U. S. St. at L. 256, § 36), provided for the repeal, on and after Oct. 31, 1872, of stamp taxes on instruments, except the tax of two cents on bank checks, drafts, and orders, which was repealed by Act March 3, 1883 (22 U. S. St. at L. 488).

27. Day *v.* Baker, 36 Mo. 125. The object of the law was revenue, not to embarrass or impose terms on parties contracting. Dorris *v.* Grace, 24 Ark. 326.

28. Hugus *v.* Strickler, 19 Iowa 413; Vail *v.* Knapp, 49 Barb. (N. Y.) 299; New Haven, etc., Co. *v.* Quintard, 37 How. Pr. (N. Y.) 29; Boyd *v.* Hood, 57 Pa. St. 98; Celley *v.* Gray, 37 Vt. 136. The stamp tax on instruments should be strictly construed. Conroy *v.* Warren, 3 Johns. Cas. (N. Y.) 259, 2 Am. Dec. 156.

29. U. S. *v.* Isham, 17 Wall. (U. S.) 496, 21 L. ed. 728.

For decisions under the English laws relative to stamp duties see Highmore's stamp laws.

30. Green *v.* Holway, 101 Mass. 243, 3 Am. Rep. 339; Carpenter *v.* Snelling, 97 Mass. 452; Noble *v.* Citizens' Bank, 63 Nebr. 847, 89 N. W. 400; Stirneman *v.* Smith, 100 Fed. 600, 40 C. C. A. 581.

evidence in state courts unless stamped as prescribed by law.[31] In other cases, however, it was held that it belongs to the states exclusively to declare what shall be received as evidence in their own courts, and the preponderance of decisions was to the effect that the provision of the law that certain papers not stamped should not be received as evidence must be limited in their operations to the federal courts;[32] and according to the great weight of authority, omission to attach the required stamp to an instrument did not render it invalid or inadmissible in evidence, either in a federal or a state court, unless such omission was fraudulent or designed to evade the duty.[33] It has also been held that an instrument executed in England where the revenue laws require it to be stamped, and

31. Turner *v.* State, 48 Ala. 549; Mobile, etc., R. Co. *v.* Edwards, 46 Ala. 267; Hoops *v.* Atkins, 41 Ga. 109; Janvrin *v.* Fogg, 49 N. H. 340; Chartiers, etc., Turnpike Co. *v.* McNamara, 72 Pa. St. 278, 13 Am. Rep. 673. For other decisions to the same effect see Ash Annot. Int. Rev. Laws 380 *et seq.* note.

32. *California.*— Duffy *v.* Hobson, 40 Cal. 240, 6 Am. Rep. 617.

Connecticut.— Griffin *v.* Ranney, 35 Conn. 239.

Illinois.— Craig *v.* Dimock, 47 Ill. 308.

Kentucky.— Hunter *v.* Cobb, 1 Bush 239.

Massachusetts.— Green *v.* Holway, 101 Mass. 243, 3 Am. Rep. 339.

Michigan.— Clemens *v.* Conrad, 19 Mich. 170.

New York.— Moore *v.* Moore, 47 N. Y. 467, 7 Am. Rep. 466.

North Carolina.— Haight *v.* Grist, 64 N. C. 739.

Virginia.— Hale *v.* Wilkinson, 21 Gratt. 75.

See 29 Cent. Dig. tit. "Internal Revenue," § 89.

For other decisions in this line see Ash Annot. Int. Rev. Laws 380 *et seq.*

Where this view obtains a defendant who is sued on a note cannot object to its being unstamped. He cannot be allowed to take advantage of his own wrong (Jacquin *v.* Warren, 40 Ill. 459; Mogelin *v.* Westhoff, 33 Tex. 788); and the obligor in a bond or his sureties cannot allege his neglect to affix the stamp in avoidance of the bond (McGovern *v.* Hoesback, 53 Pa. St. 176; Wayne *v.* Commercial Nat. Bank, 52 Pa. St. 343. *Contra*, Maynard *v.* Johnson, 2 Nev. 16).

A subsequent holder in good faith for value is not affected by original failure to stamp a note. Sperry *v.* Horr, 32 Iowa 184; Robinson *v.* Lair, 31 Iowa 9.

It is no defense to the collection of a judgment that it was obtained on a note which was not duly stamped. Mogelin *v.* Westhoff, 33 Tex. 788.

33. *Alabama.*— Bibb *v.* Bondes, 57 Ala. 509; Perryman *v.* Greenville, 51 Ala. 507; Oxford Iron Co. *v.* Spradley, 51 Ala. 171.

California.— Hallock *v.* Jaudin, 34 Cal. 167.

Illinois.— Craig *v.* Dimock, 47 Ill. 308.

Iowa.— Collins *v.* Valleau, 79 Iowa 626, 43 N. W. 284, 44 N. W. 904; Morgan *v.* Graham, 35 Iowa 213; Ogden *v.* Forney, 33 Iowa 205; Ricord *v.* Jones, 33 Iowa 26; Mitchell *v.* Home Ins. Co., 32 Iowa 421 [*overruling* Muscatine *v.* Sterneman, 30 Iowa 526, 6 Am. Rep. 685; Hugus *v.* Strickler, 19 Iowa 413].

Maine.— Emery *v.* Hobson, 63 Me. 33; Dudley *v.* Wells, 55 Me. 145.

Maryland.— Black *v.* Woodrow, 39 Md. 194.

Massachusetts.— Moore *v.* Quirk, 105 Mass. 49, 7 Am. Rep. 499; Green *v.* Holway, 101 Mass. 243, 3 Am. Rep. 339; Tobey *v.* Chipman, 13 Allen 123; Trull *v.* Moulton, 12 Allen 396.

Missouri.— Whitehill *v.* Schickle, 43 Mo. 537.

New York.— Redlick *v.* Doll, 54 N. Y. 234, 13 Am. Rep. 573; Frink *v.* Thompson, 4 Lans. 489; Vaughan *v.* O'Brien, 57 Barb. 491; Schermerhorn *v.* Burgess, 55 Barb. 422; Howe *v.* Carpenter, 53 Barb. 382; Beebe *v.* Hutton, 47 Barb. 187.

Ohio.— Harper *v.* Clark, 17 Ohio St. 190; Harris *v.* Trimble, 1 Cinc. Super. Ct. 108.

Pennsylvania.— McGovern *v.* Hoesback, 53 Pa. St. 176; Corry Nat. Bank *v.* Rouse, 3 Pittsb. 18.

Texas.— Dailey *v.* Coker, 33 Tex. 815, 7 Am. Rep. 279.

Virginia.— Hale *v.* Wilkinson, 21 Gratt. 75.

Wisconsin.— Fenelon *v.* Hogoboom, 31 Wis. 172; Timp *v.* Dockham, 29 Wis. 440.

United States.— Campbell *v.* Wilcox, 10 Wall. 421, 19 L. ed. 973, the penalty of the statute was aimed at the fraudulent, and not the accidental, omission of a stamp; it attaches only when there is an intent to evade the statute.

See 29 Cent. Dig. tit. "Internal Revenue," § 89.

Contra.— Wayman *v.* Torreyson, 4 Nev. 124; Maynard *v.* Johnson, 2 Nev. 16; Miller *v.* Morrow, 3 Coldw. (Tenn.) 587.

The forfeiture of the penalty and the forfeiture of the instrument both rest on the same facts, the omission of the stamp with intent to evade the provisions of the act. Atkins *v.* Plympton, 44 Vt. 21; Wilson *v.* Carey, 40 Vt. 179; Hitchcock *v.* Sawyer, 39 Vt. 412.

In Colorado it is held that an instrument not duly stamped is not absolutely void, but only voidable by proof that the stamp was omitted with intent to defraud the revenue. Trowbridge *v.* Addoms, 23 Colo. 518, 48 Pac. 535; Patterson *v.* Gile, 1 Colo. 200.

make it inadmissible in evidence until it is stamped but do not avoid it for lack of a stamp, is not inadmissible in the courts of the United States on that account.[34]

b. Admissibility as Evidence For Collateral Purposes. The statute cannot be regarded as prohibiting the use as evidence of unstamped instruments for collateral purposes.[35] The prohibition was upon their offer as evidence when relied upon as valid instruments for the purpose for which they were drawn.[36] When an unstamped instrument is the subject of a crime, it is immaterial whether it is stamped or not.[37]

3. Presumption and Burden of Proof as to Invalidity of Unstamped Instrument. Fraudulent intent will not be presumed, but must be affirmatively shown.[38] When an instrument has the required stamp and is offered in evidence, the presumption will prevail that it was stamped at the proper time, by the proper person, and in the proper sum.[39] The burden is on the party disputing the validity of an instrument, because unstamped, to show that the stamp was omitted with intent to evade the law.[40]

4. Admissibility to Record of Unstamped Documents. It was not lawful to record an instrument not properly stamped.[41] But the provision that no unstamped instrument required to be stamped shall be recorded applied only to

34. Linton *v.* National L. Ins. Co., 104 Fed. 584, 44 C. C. A. 54.

35. State *v.* Young, 47 N. H. 402; Hellman *v.* Reis, 1 Cinc. Super. Ct. 30 [*affirmed* in 25 Ohio St. 180].

36. Unstamped checks may be used in evidence where they are not offered to sustain plaintiff's claim or defendant's defense. Bryan *v.* McKees Rocks First Nat. Bank, 205 Pa. St. 7, 54 Atl. 480 [*distinguishing* Chartiers, etc., Turnpike Co. *v.* McNamara, 72 Pa. St. 278, 13 Am. Rep. 673]. A note inadmissible in evidence for want of a stamp may be used to explain a deposition. Israel *v.* Redding, 40 Ill. 362.

37. *California.*— People *v.* Tomlinson, 35 Cal. 503; People *v.* Frank, 28 Cal. 507.

Illinois.— Cross *v.* People, 47 Ill. 152, 95 Am. Dec. 474, forgery of a bank check.

Minnesota.— State *v.* Mott, 16 Minn. 472, 10 Am. Rep. 152.

Tennessee.— State *v.* Haynes, 6 Coldw. 550.

Texas.— Thomas *v.* State, 40 Tex. Cr. 562, 51 S. W. 242, 76 Am. St. Rep. 740, 46 L. R. A. 454.

Wisconsin.— State *v.* **Hill,** 30 Wis. 416 [*overruling* John *v.* State, 23 Wis. 504, indictment for forgery of a note].

In an indictment for forgery the fact that the instrument is unstamped is no defense. State *v.* Shields, 112 Iowa 27, 83 N. W. 807; Laird *v.* State, 61 Md. 309; Miller *v.* People, 52 N. Y. 304, 11 Am. Rep. 706; Horton *v.* State, 32 Tex. 79.

38. Whigham *v.* Pickett, 43 Ala. 140; Baker *v.* Baker, 6 Lans. (N. Y.) 509; Dowell *v.* Applegate, 7 Fed. 881, 7 Sawy. 232.

Penal statutes are strictly construed, and presumptions of guilt not indulged upon facts consistent with the opposite hypothesis or that of innocence. These are general rules, and it might be, notwithstanding the omission to stamp, that the presumption of innocence would prevail until the contrary, or the existence of the fraudulent intent, was clearly established in evidence. Rheinstrom *v.* Cone, 26 Wis. 163, 7 Am. Rep. 48.

39. *Iowa.*— Collins *v.* Valleau, 79 Iowa 626, 43 N. W. 284, 44 N. W. 904; Union Agricultural, etc., Assoc. *v.* Neill, 31 Iowa 95; Iowa, etc., R. Co. *v.* Perkins, 28 Iowa 281.

Louisiana.— Grand *v.* Cox, 24 La. Ann. 462.

Minnesota.—Owsley *v.* Greenwood, 18 Minn. 429; Cabbott *v.* Radford, 17 Minn. 320; Smith *v.* Jordan, 13 Minn. 264, 97 Am. Dec. 232; Thayer *v.* Barney, 12 Minn. 502.

Mississippi.— Frazer *v.* Robinson, 42 Miss. 121.

Oklahoma.— Glaser *v.* Glaser, 13 Okla. 389, 74 Pac. 944.

West Virginia.—Myers *v.* McGraw, 5 W. Va. 30.

See 29 Cent. Dig. tit. "Internal Revenue," § 92.

40. *Iowa.*— Harvey *v.* Wieland, 115 Iowa 564, 88 N. W. 1077.

Massachusetts.— Rowe *v.* Bowman, 183 Mass. 488, 67 N. E. 636.

New York.— Cagger *v.* Lansing, 57 Barb. 421; New Haven, etc., Co. *v.* Quintard, 1 Sweeny 89, 6 Abb. Pr. N. S. 128. *Contra,* Howe *v.* Carpenter, 53 Barb. 382.

Pennsylvania.— Markel *v.* Marx, 33 Pittsb. Leg. J. 420.

Rhode Island.— Cassidy *v.* St. Germain, 22 R. I. 53, 46 Atl. 35.

Wisconsin.— Grant *v.* Connecticut Mut. L. Ins. Co., 29 Wis. 125.

See 29 Cent. Dig. tit. "Internal Revenue," § 92.

41. U. S. *v.* Griswold, 8 Fed. 556, 7 Sawy. 311. The fact that a conveyance was made by a master commissioner under a decree of forfeiture did not affect the requirement that the instrument shall have the required stamps affixed, to be receivable for record. Farmers' L. & T. Co. *v.* Council Bluffs Gas, etc., Co., 90 Fed. 806.

records pursuant to United States statutes.[42] The government cannot forbid the recording by state officers of unstamped instruments.[43]

5. Stamps on Instruments Used in Legal Proceedings.[44] The internal revenue acts requiring stamps on writs and other processes of state courts were generally held an unconstitutional interference with their proceedings, it being beyond the power of the federal government to impose any burden on the procedure of state courts.[45] The provisions of the act of 1898 requiring stamps to be attached to certain instruments did not apply to instruments used in legal proceedings in state courts.[46]

6. Subsequent Stamping of Instruments. Instruments not stamped in accordance with law could, in the absence of fraud, be stamped subsequently, and then given in evidence.[47] The instruments could be stamped in open court,[48] during

42. People *v.* Fromme, 35 N. Y. App. Div. 459, 54 N. Y. Suppl. 833. A deed not stamped must be recorded by the county recorder, in the absence of any other objection to recording it. Hoffecker *v.* New Castle County Mut. Ins. Co., 5 Houst. (Del.) 101. There being no pretense that the omission of a stamp from a mortgage is fraudulent, it should not be refused record on that account. Bates *v.* Bailey, 57 Ala. 73.

43. Moore *v.* Quirk, 105 Mass. 49, 7 Am. Rep. 499.

Record as evidence.— The fact that the record of a deed does not show that any stamps were placed thereon does not render such record incompetent evidence. Bennett *v.* Morris, (Cal. 1894) 37 Pac. 929.

Record as notice.— The record of an insufficiently stamped instrument does not import constructive notice to third parties. McBride *v.* Doty, 23 Iowa 122.

44. By the act of July 1, 1862, legal documents, such as wills, warrants, and cognovits, were made subject to tax. The provision was repealed by act of March 2, 1867.

Necessity of stamp on bond to discharge attachment see Attachment, 4 Cyc. 680 note 89.

45. *Alabama.*— Smith *v.* Short, 40 Ala. 385.

Illinois.— Craig *v.* Dimock, 47 Ill. 308.

Indiana.— Warren *v.* Paul, 22 Ind. 276.

Iowa.— Ford *v.* Clinton, 25 Iowa 157; Botkins *v.* Spurgeon, 20 Iowa 598; Mussellman *v.* Mauk, 18 Iowa 239.

Michigan.— Fifield *v.* Close, 15 Mich. 505.

New York.— Lewis *v.* Randall, 30 How. Pr. 378; Walton *v.* Bryenth, 24 How. Pr. 357. *Contra,* Jackson *v.* Allen, 26 How. Pr. 119; German Liederkranz *v.* Schiemann, 25 How. Pr. 388.

Ohio.— Harper *v.* Clark, 17 Ohio St. 190; State *v.* Taylor, 15 Ohio St. 137.

Tennessee.— Union Bank *v.* Hill, 3 Coldw. 325.

Wisconsin.— Jones *v.* Keep, 19 Wis. 369.

See 29 Cent. Dig. tit. "Internal Revenue," § 2.

And see Hinchman *v.* Rutan, 31 N. J. L. 496.

Contra.— Hoyt *v.* Benner, 22 La. Ann. 353.

The act of June 30, 1864, did not require a stamp to be affixed to a notarial certificate authenticating depositions because they were legal documents, and constituted a part of a legal proceeding. Prather *v.* Pritchard, 26 Ind. 65.

If the writ was stamped it was not necessary that a copy left with defendant should contain a copy or memorandum of the stamp. Tucker *v.* Potter, 35 Conn. 43.

46. Dawson *v.* McCarty, 21 Wash. 314, 57 Pac. 816, 75 Am. St. Rep. 841.

47. *Alabama.*— Foster *v.* Holley, 49 Ala. 593; McElvain *v.* Mudd, 44 Ala. 48, 4 Am. Rep. 106.

Indiana.— Wright *v.* McFadden, 25 Ind. 483.

Louisiana.— Pavy *v.* Bertinot, 25 La. Ann. 469.

Maryland.— Carson *v.* Phelps, 40 Md. 73.

Massachusetts.— Holyoke Mach. Co. *v.* Franklin Paper Co., 97 Mass. 150.

Michigan.— Peoria Mar., etc., Ins. Co. *v.* Perkins, 16 Mich. 380.

Mississippi.— New Orleans, etc., R. Co. *v.* Pressley, 45 Miss. 66; Morris *v.* McMorris, 44 Miss. 441, 7 Am. Rep. 695.

Missouri.— Boly *v.* Lake, 54 Mo. 201.

Nevada.—Carpenter *v.* Johnson, 1 Nev. 331.

New Hampshire.— Garland *v.* Lane, 46 N. H. 245.

New York.— Frink *v.* Thompson, 4 Lans. 489; Beehe *v.* Hutton, 47 Barb. 187; Jackson *v.* Allen, 26 How. Pr. 119.

Pennsylvania.— Walsh *v.* Carroll, 6 Phila. 590; Gay *v.* Comstock, 2 Wkly. Notes Cas. 532.

Texas.— Dailey *v.* Coker, 33 Tex. 815, 7 Am. Rep. 279; Van Alstyne *v.* Sorley, 32 Tex. 518.

See 29 Cent. Dig. tit. "Internal Revenue," § 931.

48. *Arkansas.*— Bumpass *v.* Taggart, 26 Ark. 398, 7 Am. Rep. 623.

Indiana.— Teagarden *v.* Garver, 24 Ind. 399.

Maine.— Patterson *v.* Eames, 54 Me. 203.

Massachusetts.— Tobey *v.* Chipman, 13 Allen 123.

Mississippi.— Waterbury *v.* McMillan, 46 Miss. 635.

Missouri.— Day *v.* Baker, 36 Mo. 125.

New York.— Parks *v.* Comstock, 59 Barb. 16; Coppernoll *v.* Ketcham, 56 Barb. 111.

Texas.— Roundtree *v.* Thomas, 32 Tex. 286.

See 29 Cent. Dig. tit. "Internal Revenue," § 93.

trial,[49] or after verdict in court.[50] Deeds or other instruments executed during the civil war were valid and admissible as evidence, although not stamped at the time of their execution, provided that, after the close of the war, they were stamped by the proper revenue officer.[51] The court will take judicial notice of the existence of the conditions referred to during the Civil war.[52] Under the act of 1898 a stamp could be affixed at any time before the instrument was offered in evidence.[53]

7. CANCELLATION OF STAMPS. Stamps were required to be canceled to prevent their use a second time, either by the maker or by the party for whose use and benefit the instrument was made.[54] A stamp on a note may be canceled by the initials of the payee or by those of the maker.[55] A stamp is effectually canceled when it is so defaced that it cannot be used a second time.[56] The sufficiency of the cancellation is not affected by the failure to affix the initials of the party's name.[57] An instrument duly stamped could be read in evidence, although the stamp was not canceled.[58] Irregularity in canceling did not affect its validity as evidence.[59] The question of cancellation is one for the jury.[60]

B. Stamp Tax on Commodities or Specific Articles Under Former Laws. Under former laws stamp taxes were imposed on matches;[61] on canned goods;[62] on perfumery and cosmetics;[63] proprietary medicinal preparations; and other articles.[64] Dealers under certain circumstances were deemed "manufacturers" within the meaning of the statutes and held liable as such.[65] These laws were repealed

49. Sioux City First Nat. Bank *v.* Stone, (Iowa 1902) 91 N. W. 1076; Belger *v.* Dinsmore, 51 N. Y. 166, 10 Am. Rep. 575.

50. Plessinger *v.* Depuy, 25 Ind. 419; Janvrin *v.* Fogg, 49 N. H. 340.

When congress has provided for rendering an instrument valid courts cannot authorize it to be made valid in any other way. Davy *v.* Morgan, 56 Barb. (N. Y.) 218.

51. Frazer *v.* Robinson, 42 Miss. 121. An instrument executed in Alabama in 1864 was not invalid because of the omission of the stamp required, since no provision had been made for the enforcement of those laws in the Confederate states. McElvain *v.* Mudd, 44 Ala. 48, 4 Am. Rep. 106.

52. Susong *v.* Williams, 1 Heisk. (Tenn.) 625; Lewis *v.* Hearne, 34 Tex. 382; Dailey *v.* Coker, 33 Tex. 815, 7 Am. Rep. 279; Van Alstyne *v.* Sorley, 32 Tex. 518.

53. Harvey *v.* Wicland, 115 Iowa 564, 88 N. W. 1077; Jones *v.* Western Mfg. Co., 27 Wash. 136, 67 Pac. 586.

54. Teagarden *v.* Garver, 24 Ind. 399; Voight *v.* McKaim, 2 Pittsb. (Pa.) 522.

55. Schultz *v.* Herndon, 32 Tex. 390.

56. Taylor *v.* Duncan, 33 Tex. 440.

57. Foster *v.* Holley, 49 Ala. 593.

58. Union Agricultural, etc., Assoc. *v.* Neill, 31 Iowa 95; Schultz *v.* Herndon, 32 Tex. 390.

59. *Colorado.*— Patterson *v.* Gile, 1 Colo. 200.

Indiana.— Doffin *v.* Guyer, 39 Ind. 215; Adams *v.* Dale, 29 Ind. 273; Goodwine *v.* Wands, 25 Ind. 101.

Iowa.— St. Louis, etc., R. Co. *v.* Eakins, 30 Iowa 279.

Louisiana.— Browne *v.* Bennett, 24 La. Ann. 618; D'Armond *v.* Dubose, 22 La. Ann. 131, 2 Am. Rep. 718.

Massachusetts.— Desmond *v.* Norris, 10 Allen 250.

Pennsylvania.— Corry Nat. Bank *v.* Rouse, 3 Pittsb. 18; Audress *v.* Thomas, 6 Wkly. Notes Cas. 414.

Texas.— Jacobs *v.* Cunningham, 32 Tex. 774.

Vermont.— Chaplin *v.* Horton, 36 Vt. 684.

See 29 Cent. Dig. tit. "Internal Revenue," § 91.

60. Rees *v.* Jackson, 64 Pa. St. 486, 3 Am. Rep. 608.

61. Schmitt *v.* Trowbridge, 21 Fed. Cas. No. 12,468, 24 Int. Rev. Rec. 381; U. S. *v.* Goldback, 25 Fed. Cas. No. 15,222, 1 Hughes 529, 23 Int. Rev. Rec. 129 (friction matches in parcels or packages containing one hundred matches or less shall be stamped with a one-cent stamp on each parcel or package); U. S. *v.* Walsh, 28 Fed. Cas. No. 16,635, 1 Abb. 66, Deady 281, 6 Int. Rev. Rec. 212.

62. U. S. *v.* Abbott, 24 Fed. Cas. No. 14,416, 9 Int. Rev. Rec. 186.

63. U. S. *v.* Fenelon, 25 Fed. Cas. No. 15,085, 14 Int. Rev. Rec. 182; U. S. *v.* Two Hundred and Thirty-six Dozen Boxes of Cosmetics, 28 Fed. Cas. No. 16,584, 6 Ben. 543, cosmetics required to be stamped, although intended for exportation.

64. Act July 1, 1862, Schedule C following section 110 (12 U. S. St. at L. 432); Act June 30, 1864, Schedule C following section 170 (13 U. S. St. at L. 223).

65. Cardinal *v.* Smith, 5 Fed. Cas. No. 2,395, Deady 197.

Commissions on proprietary stamps under former acts.— Swift, etc., Co. *v.* U. S., 105 U. S. 691, 26 L. ed. 1108 [*affirmed* in 111 U. S. 22, 4 S. Ct. 244, 28 L. ed. 341 (*reversing* 14 Ct. Cl. 481)] (commissions on sale of stamps to manufacturers of friction matches); Folger *v.* U. S., 103 U. S. 30, 26 L. ed. 364; Bechtel *v.* U. S., 101 U. S. 597, 25 L. ed. 1019; Diamond Match Co. *v.* U. S., 31 Fed. 271 [*affirming* 30 Fed. 108, 24 Blatchf. 442]; U. S. *v.* Fielding, 17 Fed. 572, 3 McCrary

in 1883, together with the stamp tax on bank checks, drafts, orders, and vouchers.[66]

C. Stamp Taxes Under the War Revenue Act[67] — **1. What Instruments Included — a. In General.** The war revenue act imposed a tax on telephone messages;[68] telegraphic despatches;[69] sales of stocks;[70] "calls" or agreements to sell stocks;[71] sales of products or merchandise at exchanges or boards of trade, or other similar places, and agreements to sell;[72] conveyances;[73] bills of lading;[74] manifests;[75] charter-parties;[76] express receipts;[77] tax and notary's certificates;[78] bonds;[79] powers of attorney;[80] warehouse receipts;[81] insurance policies;[82] orders for the payment of money;[83] and other instruments of various kinds. Official documents were exempt.[84] Some of these taxes were repealed on and after July 1, 1901, and the rest on and after July 1, 1902.[85]

479; U. S. *v.* Weedon, 3 Fed. 623, 4 Hughes 450; Daily *v.* U. S., 7 Ct. Cl. 383.

66. Act March 3, 1883 (22 U. S. St. at L. 488 [U. S. Comp. St. (1901) p. 2247]; U. S. *v.* Houghton, 26 Fed. Cas. No. 15,396, 14 Int. Rev. Rec. 126 (indictment for selling or exposing for sale certain articles unstamped mentioned in Schedule C, Act June 30, 1864). If an article requiring stamps was sold unstamped, the presumption may be overcome by showing that the stamps had been lost or removed by accident. U. S. *v.* Brown, 24 Fed. Cas. No. 14,662, Deady 566.

67. For necessity of affixing stamp to certificate of qualification of sureties on appeal-bond see Appeal and Error, 2 Cyc. 842 note 50.

68. New York Tel. Co. *v.* Treat, 130 Fed. 340, 64 C. C. A. 586.

69. Kirk *v.* Western Union Tel. Co., 90 Fed. 809.

70. Thomas *v.* U. S., 192 U. S. 363, 24 S. Ct. 305, 48 L. ed. 481 [*affirming* 115 Fed. 207] (the tax on sales of stock was constitutional); Christie-St. Comm. Co. *v.* U. S., 129 Fed. 506, 126 Fed. 991; 23 Op. Atty.-Gen. 53, 616 (stock pledged on security for loans).

71. White *v.* Treat, 181 U. S. 264, 21 S. Ct. 611, 45 L. ed. 853 [*reversing* 100 Fed. 290].

72. Nicol *v.* Ames, 173 U. S. 509, 19 S. Ct. 522, 43 L. ed. 786 [*affirming* 89 Fed. 144], the Union Stock Yards of Chicago come within the act as being an "exchange or board of trade or other similiar place."

73. Chesebrough *v.* U. S., 192 U. S. 253, 24 S. Ct. 262, 48 L. ed. 432; Mastin *v.* Mastin, 99 Fed. 435 (deed of release executed by a receiver not liable); New York Cent. Trust Co. *v.* Columbus, etc., R. Co., 92 Fed. 919 (the deed requires stamps in proportion to the "consideration of value" of the interest transferred, and not to the entire value of the property, where it is conveyed subject to encumbrances).

74. Fairbank *v.* U. S., 181 U. S. 283, 21 S. Ct. 648, 45 L. ed. 862 (export bills of lading not taxable); Wright *v.* Michigan Cent. R. Co., 130 Fed. 843, 65 C. C. A. 327 (duplicates).

75. The stamp tax on manifests was a tax on exports and unconstitutional. U. S. *v.* New York, etc., Mail Steamship Co., 200 U. S. 488, 26 S. Ct. 327 (conceding the principle but reversing the judgment on the ground that stamps were purchased and affixed without protest); New York, etc., Mail Steamship Co. *v.* U. S., 125 Fed. 320.

76. Simpson *v.* Treat, 126 Fed. 1003 (where charter-parties were executed in a foreign country and left there, but copies were made and brought into the United States to be used in their place for the benefit of one or both of the parties, such copies are subject to the tax); Waterhouse *v.* Rock Island Alaska Min. Co., 97 Fed. 466, 38 C. C. A. 281.

77. Dinsmore *v.* Southern Express Co., 183 U. S. 115, 22 S. Ct. 45, 46 L. ed. 111 [*affirming* 102 Fed. 794, 42 C. C. A. 623 (*reversing* 92 Fed. 714)]; Crawford *v.* Hubbell, 177 U. S. 419, 20 S. Ct. 701, 44 L. ed. 829 [*affirming* 89 Fed. 961]; American Express Co. *v.* Maynard, 177 U. S. 404, 20 S. Ct. 695, 44 L. ed. 823; U. S. *v.* Wells, 96 Fed. 835.

78. U. S. *v.* Trimble, 14 App. Cas. (D. C.) 414 (tax certificates); Sackett *v.* McCaffrey, 131 Fed. 219, 65 C. C. A. 205 (notary's certificates); Stirneman *v.* Smith, 100 Fed. 600, 40 C. C. A. 581 (the certificate authenticating the official acts of a notary in taking depositions to be used as evidence, not taxable).

79. Ambrosini *v.* U. S., 187 U. S. 1, 23 S. Ct. 1, 47 L. ed. 49 [*reversing* 105 Fed. 239] (dramshop bonds under state laws not taxable); McNally *v.* Field, 119 Fed. 445; Bettmann *v.* Warwick, 108 Fed. 46, 47 C. C. A. 185 [*affirming* 102 Fed. 127] (bond of a notary as a qualification for office exempt); U. S. *v.* Owens, 100 Fed. 70 (saloon-keepers' bonds under the laws of Missouri not taxable).

80. Treat *v.* Tolman, 113 Fed. 892, 51 C. C. A. 522 [*affirming* 106 Fed. 679], warrant to promissory note for attorney to confess judgment not a power of attorney.

81. McClain *v.* Merchants' Warehouse Co., 115 Fed. 295, 53 C. C. A. 155 [*affirming* 112 Fed. 787], postal cards notifying consignee of the receipt of goods not warehouse receipts.

82. 23 Op. Atty.-Gen. 210; 22 Op. Atty.-Gen. 318, 376; Buckalew *v.* U. S., 102 Fed. 320, 42 C. C. A. 373.

83. Granby Mercantile Co. *v.* Webster, 98 Fed. 604.

84. 22 Op. Atty.-Gen. 134.

85. Act March 2, 1901 (31 U. S. St. at L. 942 [U. S. Comp. St. (1901) p. 2305]); Act

b. Memoranda of Speculative Stock Transactions. In the case of speculative transactions conducted on margins where no actual delivery was contemplated, it was the duty of persons conducting such business to give to parties with whom transactions were had stamped memoranda.[86] Where deals were made through an agent, only one transaction was taxable.[87] Corporations engaged in conducting transactions respecting the purchase and sale of stocks to be settled with reference to the public market quotation of prices, through correspondents, whose orders represented orders from their own customers, were required to give memoranda and pay the stamp tax thereon, as such transactions were transactions between principals.[88] Where after an agreement to sell stock for future delivery there was no actual delivery but a settlement was made by payment of differences such settlement did not require new memoranda to be made and stamped.[89]

c. Deeds Under Judicial Sales. Deeds of masters in chancery under decree of a federal court, and sale thereunder, were required to be stamped; the stamps may be paid for, as expenses, out of the funds in the hands of the receiver.[90] Congress has no power to impose a stamp tax on a certificate of sale of land for taxes issued by state authority,[91] nor to require a revenue stamp on a tax deed executed under the laws of a state.[92]

2. Admissibility in Evidence of Unstamped Instruments. Unstamped instruments were not ordinarily competent evidence in United States courts under the Revenue Act of 1898.[93] This act was substantially identical with that of 1864 in respect to the inadmissibility of unstamped instruments as evidence, and it appeared to be the prevailing opinion that congress had no power to prescribe rules of evidence for state courts and that the provisions of the Stamp Act in this respect were not intended to govern such tribunals, but were applicable to federal courts only.[94] In any event the act applied only to instruments where the stamp

April 12, 1902 (32 U. S. St. at L. 96 [U. S. Comp. St. Suppl. (1905) p. 444]).

86. Sec. 8, Act March 2, 1901 (31 U. S. St. at L. 942 [U. S. Comp. St. (1901) p. 2305]), amending Act June 13, 1898.

87. U. S. *v.* Clawson, 119 Fed. 994.

88. Municipal Tel., etc., Co. *v.* Ward, 133 Fed. 70 [*affirmed* in 138 Fed. 1006 (*distinguishing* U. S. *v.* Clawson, 119 Fed. 994)].

89. McClain *v.* Fleshman, 106 Fed. 880, 46 C. C. A. 15 [*affirming* 105 Fed. 610].

90. Farmers' L. & T. Co. *v.* Council Bluffs Gas, etc., Co., 90 Fed. 806. It has been decided that a purchaser at a judicial sale is entitled to a deed which will be a defense to his title in any tribunal where it may be attacked, and consequently he can compel the referee to affix the stamps required, since without the stamps the deed would not be competent evidence in the federal courts. Loring *v.* Chase, 26 Misc. (N. Y.) 318, 56 N. Y. Suppl. 312.

91. Barden *v.* Columbia County Sup'rs, 33 Wis. 445, 14 Am. Rep. 762.

92. Delorme *v.* Ferk, 24 Wis. 201; Sayles *v.* Davis, 22 Wis. 225.

93. Sackett *v.* McCaffrey, 131 Fed. 219, 65 C. C. A. 205 (the repeal of the act requiring instruments to be stamped did not authorize the admission as evidence in a federal court of an unstamped instrument); Wheaton *v.* Weston, 128 Fed. 151.

94. *Alabama.*— Hooper *v.* Whitaker, 130 Ala. 324, 30 So. 355.

Connecticut.— Garland *v.* Gaines, 73 Conn. 662, 49 Atl. 19, 84 Am. St. Rep. 185.

Georgia.— Small *v.* Slocumb, 112 Ga. 279, 37 S. E. 481, 81 Am. St. Rep. 50, 53 L. R. A. 130.

Illinois.— Richardson *v.* Roberts, 195 Ill. 27, 62 N. E. 840; Pierpont *v.* Johnson, 104 Ill. App. 27; Masterofsky *v.* Hellman, 99 Ill. App. 214; Mullin *v.* Johnson, 98 Ill. App. 621.

Indiana.— Dillingham *v.* Parks, 30 Ind. App. 61, 65 N. E. 300.

Iowa.— Bottorff *v.* Lewis, 121 Iowa 27, 95 N. W. 262 (a quitclaim deed, although not stamped as required by law, was admissible); State *v.* Glucose Sugar Refining Co., 117 Iowa 524, 91 N. W. 794 [*overruling* Hugus *v.* Stickler, 19 Iowa 413; Muscatine *v.* Sternemann, 30 Iowa 526, 6 Am. Rep. 685]; Harvey *v.* Wieland, 115 Iowa 564, 88 N. W. 1077.

Maine.— Wade *v.* Curtis, 96 Me. 309, 52 Atl. 762; Wade *v.* Foss, 96 Me. 230, 52 Atl. 640.

Mississippi.— Griffin Lumber Co. *v.* Myer, 80 Miss. 435, 31 So. 787.

Nebraska.— Sulpho-Saline Bath Co. *v.* Allen, 66 Nebr. 295, 92 N. W. 354, certificate of notary.

Nevada.— Knox *v.* Rossi, 25 Nev. 96, 57 Pac. 179, 83 Am. St. Rep. 566, 48 L. R. A. 305, collection of decisions in note.

New York.— Gregory *v.* Hitchcock Pub. Co., 31 Misc. 173, 63 N. Y. Suppl. 975.

North Carolina.— Davis *v.* Evans, 133 N. C. 320, 45 S. E. 643.

South Carolina.— Kennedy *v.* Roundtree, 59 S. C. 324, 37 S. E. 942, 82 Am. St. Rep. 841.

Tennessee.— Insurance Cos. *v.* Estes, 106 Tenn. 472, 62 S. W. 149, 82 Am. St. Rep. 892, 52 L. R. A. 915.

had been fraudulently omitted. It was essential that the omission to stamp the instrument was with the intent to evade payment of revenue.[95]

3. Medicinal Preparations. Patent medicines and other proprietary articles were taxable under the War Revenue Act.[96] Uncompounded medicinal drugs or chemicals were exempt.[97] Plasters put up in style or manner similar to that of patent, trade-mark, or proprietary medicines in general, and advertised as remedies, or as having a special claim to merit, were taxable.[98] These taxes were repealed on and after July 1, 1902.[99]

D. Who Required to Affix Stamps. The person executing a document is the one to affix the stamp,[1] or the party for whose use or benefit the instrument was issued.[2] In the case of telegraphic despatches the sender of the message was required to affix the stamp.[3] Carriers were required to affix stamps to receipts given to shippers, but they were not forbidden to shift the burden of the tax by an increase of rates which were not unreasonable.[4]

Texas.— Watson *v.* Mirike, 25 Tex. Civ. App. 527, 61 S. W. 538.

Washington.— Foster *v.* Pacific Clipper Line, 30 Wash. 515, 71 Pac. 48.

Contra.— Dornenhower *v.* Stevens, 44 Wkly. Notes Cas. (Pa.) 264.

It is not necessary that it appear from the record of a deed that there was a stamp on the original to make it competent as evidence. Ratliff *v.* Ratliff, 131 N. C. 425, 42 S. E. 887, 63 L. R. A. 963.

Failure to stamp an instrument does not render it void. Steeley *v.* Steeley, 64 S. W. 642, 23 Ky. L. Rep. 996.

95. *Alabama.*— Hooper *v.* Whitaker, 130 Ala. 324, 30 So. 355.

Iowa.— Harvey *v.* Wieland, 115 Iowa 564, 88 N. W. 1077. A transcript of a judgment of a justice of the peace in a foreign jurisdiction is not inadmissible because it has no revenue stamp. Tomlin *v.* Woods, 125 Iowa 367, 101 N. W. 135.

Maryland.— Ebert *v.* Gitt, 95 Md. 186, 52 Atl. 900.

Massachusetts.— Rowe *v.* Bowman, 183 Mass. 488, 67 N. E. 636 [*following* Green *v.* Holway, 101 Mass. 243, 3 Am. Rep. 339, relating to the act of 1866].

Minnesota.— Spoon *v.* Frambach, 83 Minn. 301, 86 N. W. 106.

Rhode Island.— Cassidy *v.* St. Germain, 22 R. I. 53, 46 Atl. 35.

96. Act June 13, 1898, Schedule B, following section 25 (30 U. S. St. at L. 448); U. S. *v.* J. D. Iler Brewing Co., 121 Fed. 41, 57 C. C. A. 381, tonics. Meaning of the term "medicinal preparation." Fink *v.* U. S., 170 U. S. 584, 18 S. Ct. 770, 42 L. ed. 1153.

97. U. S. *v.* Stubbs, 91 Fed. 608. The following articles are uncompounded drugs or chemicals, viz.: Aristol, europhen, piperazine, protargol, losophen, lycetol, phenacetine, sulfonal, tannigen, tannopine, trional, and salophen, and therefore not liable to tax. The word "compounded" in the act was used in a pharmaceutical sense. But see J. Ellwood Lee Co. *v.* McClain, 106 Fed. 164, holding that the word "compounded" was used in its ordinary not technical sense.

98. J. Ellwood Lee Co. *v.* McClain, 106 Fed. 164. But medicinal plasters which are in composition exactly the same as other plasters bearing the same name, put up by others and sold in competition with them, and based on the same well known medical formulas, without any claim to special merit except with respect to the care exercised in the selection of ingredients and the manner in which they were compounded, were not taxable as "medicinal proprietary articles." Johnson *v.* Herold, 123 Fed. 409; Johnson *v.* Rutan, 122 Fed. 993.

99. Act April 12, 1902.

1. Myers *v.* Smith, 48 Barb. (N. Y.) 614 (the duty of placing stamps on a conveyance appears to be upon the grantor); Farmers' L. & T. Co. *v.* Council Bluffs Gas, etc., Co., 90 Fed. 806.

2. Granby Mercantile Co. *v.* Webster, 98 Fed. 604.

Either party to an instrument may affix the stamp. Adams *v.* Dale, 29 Ind. 273; Voight *v.* McKaim, 2 Pittsb. (Pa.) 522.

Agents.—Affixing and canceling stamps may be done by agents. Cedar Rapids, etc., R. Co. *v.* Stewart, 25 Iowa 115.

3. Kirk *v.* Western Union Tel. Co., 90 Fed. 809. The penalty imposed on the telegraph company for sending an unstamped message was merely to aid the government in compelling the sender to stamp the same. Gray *v.* Western Union Tel. Co., 85 Mo. App. 123.

4. People *v.* Wells, 135 Cal. 503, 64 Pac. 702 [*following* American Express Co. *v.* Maynard, 177 U. S. 404, 20 S. Ct. 695, 44 L. ed. 823]; U. S. Express Co. *v.* People, 195 Ill. 155, 62 N. E. 825 [*reversing* 80 Ill. App. 446]; Crawford *v.* Hubbell, 177 U. S. 419, 20 S. Ct. 701, 44 L. ed. 829 [*affirming* 89 Fed. 961]; American Express Co. *v.* Maynard, *supra* [*reversing* 118 Mich. 682, 77 N. W. 317]; U. S. *v.* Wells, 96 Fed. 835. The provision of the War Revenue Act of 1898, imposing a stamp tax on express receipts, neither authorizes nor prohibits an increase of rates by an express company to cover the cost of the stamp required. Trammell *v.* Dinsmore, 102 Fed. 794, 42 C. C. A. 623 [*reversing* 92 Fed. 714]. The repeal of the law rendered it unnecessary for the United States supreme court to consider the ques-

E. Number of Stamps Required. Only one stamp was required upon two separate papers which constituted one transaction.[5]

F. Validating Unstamped Instruments. The war revenue law provides for the validating of instruments subject to stamp tax which were unstamped at the time they were issued. The party can appear before the collector and pay a penalty and the collector makes a notation which validates the document so that it can be used in court as if originally stamped.[6] Prior stamp acts contained a similar provision.[7] The subsequent stamping by the collector and remission of penalties does not cure the defect in such a sense as to interfere with intervening rights.[8] It has been held that deputy collectors have the same power as collectors to validate unstamped instruments,[9] although there are decisions to the contrary.[10] The object of the penal provisions of the Stamp Act was to secure observance of its requirements, and since the law is no longer in force there is not the same necessity for literal compliance with the form prescribed for supplying omissions. If the full price of the stamp is paid and the penalty it is not necessary that the collector should affix and cancel the stamp.[11]

IX. SPECIAL TAXES OR TAXES ON OCCUPATIONS.

A. General Principles — 1. INTRODUCTORY STATEMENT. No person, firm, or corporation can lawfully engage in any business for which a special tax is imposed without payment of the required tax.[12] A person or corporation doing an

tions involved in this case. Dinsmore *v.* Southern Express Co., 183 U. S. 115, 22 S. Ct. 45, 46 L. ed. 111.

5. Act Feb. 28, 1899; 22 Op. Atty.-Gen. 531.

6. Sec. 13, Act June 13, 1898, as amended by Act March 2, 1901 (31 U. S. St. at L. 941 [U. S. Comp. St. (1901) p. 2296]); Green *v.* McCracken, 64 Kan. 330, 67 Pac. 857; Makainai *v.* Goo Wan Hoy, 14 Hawaii 683; Sackett *v.* McCaffrey, 131 Fed. 219, 65 C. C. A. 205; Waterhouse *v.* Rock Island Alaska Min. Co., 97 Fed. 466, 38 C. C. A. 281.

7. *Alabama.*— Miller *v.* Underwood, 51 Ala. 453; Mobile, etc., R. Co. *v.* Edwards, 46 Ala. 267.

Arkansas.— Dorris *v.* Grace, 24 Ark. 326.

Colorado.— Browne *v.* Steck, 2 Colo. 70.

Connecticut.— Corbin *v.* Tracy, 34 Conn. 325.

Iowa.— Doud *v.* Wright, 22 Iowa 336.

Louisiana.— Levy *v.* Loeb, 25 La. Ann. 496; Pavy *v.* Bertinot, 25 La. Ann. 460; Bernard's Succession, 24 La. Ann. 402; Corrie *v.* Billiu, 23 La. Ann. 250.

Maryland.— Wingert *v.* Zeigler, 91 Md. 318, 46 Atl. 1074, 80 Am. St. Rep. 453, 51 L. R. A. 316; Cooke *v.* England, 27 Md. 14, 92 Am. Dec. 618.

Massachusetts.— Holyoke Mach. Co. *v.* Franklin Paper Co., 97 Mass. 150.

Michigan.— Peoria M. & F. Ins. Co. *v.* Perkins, 16 Mich. 380.

Nevada.— Wayman *v.* Torreyson, 4 Nev. 124.

New Jersey.— Disbrow *v.* Johnson, 18 N. J. Eq. 36.

New York.— Schermerhorn *v.* Burgess, 55 Barb. 422; Myers *v.* Smith, 48 Barb. 614; Edeck *v.* Ranuer, 2 Johns. 423.

Pennsylvania.— Miller *v.* Wentworth, 82 Pa. St. 280 (as to what kind of a copy may be stamped); Long *v.* Spencer, 78 Pa. St. 303; Tripp *v.* Bishop, 56 Pa. St. 424; Hetzell *v.* Gregory, 7 Phila. 148; Corry Nat. Bank *v.* Rouse, 3 Pittsb. 18.

Vermont.— Green Mountain Cent. Inst. *v.* Britain, 44 Vt. 13.

West Virginia.— Logan *v.* Dils, 4 W. Va. 397.

Wisconsin.— Knox *v.* Huidekoper, 21 Wis. 527.

See 29 Cent. Dig. tit. "Internal Revenue," § 93.

8. McBride *v.* Doty, 23 Iowa 122.

9. Deskin *v.* Graham, 19 Iowa 533; Stolte *v.* Herndon, 32 Tex. 392.

10. A deputy collector cannot remit penalties and stamp, or authorize the stamping of instruments left unstamped from inadvertence or mistake, except when from inability or sickness of the collector he acts by special authority in his place, or the act of the deputy is authenticated with the official seal of the collector. Muscatine *v.* Sterneman, 30 Iowa 526, 6 Am. Rep. 685; McAfferty *v.* Hale, 24 Iowa 355; Brown *v.* Crandal, 23 Iowa 112.

11. Lerch *v.* Snyder, 112 Pa. St. 161, 4 Atl. 336.

12. U. S. *v.* Schneider, 35 Fed. 107, 13 Sawy. 295; U. S. *v.* Angell, 11 Fed. 34; U. S. *v.* Clare, 2 Fed. 55, 14 Phila. (Pa.) 543. This requirement has been modified by 26 U. S. St. at L. 624, § 53 [U. S. Comp. St. (1901) p. 2092] superseding U. S. Rev. St. (1878) § 3237, whereby every special taxpayer is given the entire month in which his liability begins for making his sworn return, form 11, and paying his special tax.

State agents.— Persons who sell spirits are not relieved from liability by the fact that they have no interest in the property and are simply agents of a state. The exemption of state agencies from national taxation is lim-

interstate business can no more escape it than those doing business wholly within one state.[13]

2. Constitutionality of Laws. Congress has power to pass a law imposing special tax on occupations which are subject to police regulations by states.[14] Such law is constitutional and entirely consistent with the right of the states to tax, or regulate any business carried on within its limits.[15]

3. Payment of Tax No Defense For Violating Other Liquor Laws. The stamp issued in payment of the special tax is merely a receipt for the tax. It is not a license and cannot afford any protection to the holder from prosecution for doing business in violation of state or local laws.[16] The payment of special tax is no defense to a prosecution for illegally selling liquors in Alaska,[17] nor for the introduction of liquors into the Indian country in violation of law.[18]

4. Payment Not Retroactive to Condone Offense. After the offense of carrying on business without payment of special tax has been committed its payment does not condone the offense and is not a bar to prosecution.[19]

B. Special Taxes Now in Force — 1. In General. The law now in force imposes special taxes upon brewers, rectifiers, wholesale and retail liquor dealers, wholesale and retail dealers in malt liquors, manufacturers of oleomargarine, wholesale and retail dealers in oleomargarine artificially colored, wholesale and retail dealers in oleomargarine free from artificial coloration, wholesale and retail dealers in filled cheese, manufacturers of filled cheese, manufacturers of adulterated butter, wholesale and retail dealers in adulterated butter, manufacturers of renovated butter, manufacturers of mixed flour, and manufacturers of stills.[20] Special taxpayers are required to place and keep conspicuously in their places of

ited to these which are of a strictly governmental character. South Carolina *v.* U. S., 199 U. S. 437, 26 S. Ct. 410, — L. ed. — [*affirming* 39 Ct. Cl. 257] (dispensary case).

13. U. S. *v.* Adams Express Co., 119 Fed. 240.

14. U. S. *v.* Riley, 27 Fed. Cas. No. 16,164, 5 Blatchf. 204.

15. License Tax Cases, 5 Wall. (U. S.) 462, 18 L. ed. 497.

16. Com. *v.* Crane, 158 Mass. 218, 33 N. E. 388; State *v.* Newton, 50 N. J. L. 534, 14 Atl. 604; Com. *v.* Sheckels, 78 Va. 36; Pervear *v.* Massachusetts, 5 Wall. (U. S.) 475, 18 L. ed. 608; License Tax Cases, 5 Wall. (U. S.) 462, 18 L. ed. 497; McGuire *v.* Massachusetts, 3 Wall. (U. S.) 387, 18 L. ed. 226; *In re* Jordan, 49 Fed. 238.

"Special tax" is used in place of the word "license" in former act. U. S. *v.* Glab, 99 U. S. 225, 25 L. ed. 273.

17. Endleman *v.* U. S., 86 Fed. 456, 30 C. C. A. 186; U. S. *v.* Ash, 75 Fed. 651.

18. U. S. *v.* Forty-three Gallons of Whiskey, 108 U. S. 491, 2 S. Ct. 906, 27 L. ed. 803; 21 Op. Atty.-Gen. 25; 19 Op. Atty.-Gen. 306, Oklahoma.

19. U. S. *v.* Angell, 11 Fed. 34; U. S. *v.* Devlin, 25 Fed. Cas. No. 14,953, 6 Blatchf. 71, 7 Int. Rev. Rec. 94; U. S. *v.* Van Horn, 20 Int. Rev. Rec. 145; U. S. *v.* Ellis, 15 Int. Rev. Rec. 43.

Revenue officers are not required to give notice of the expiration of a manufacturer's license (special tax). U. S. *v.* Truesdell, 28 Fed. Cas. No. 16,543, 2 Bond 78, 5 Int. Rev. Rec. 102.

20. Special tax decisions under repealed laws.— U. S. *v.* Vinson, 8 Fed. 507 (employers liable as dealers in manufactured tobacco who buy tobacco and deal it out to employees at cost); U. S. *v.* Damiani, 25 Fed. Cas. No. 14,915, 11 Int. Rev. Rec. 5 (single sale sufficient to fix the liability as dealer in leaf tobacco); U. S. *v.* Pressy, 27 Fed. Cas. No. 16,086, 1 Lowell 319 (peddler); *In re* Wilson, 19 D. C. 341, 12 L. R. A. 624 (definition of peddler); U. S. *v.* Howard, 26 Fed. Cas. No. 15,402, 1 Sawy. 507, 13 Int. Rev. Rec. 118 (billiard-table proprietors); Yellow Jacket Silver Min. Co. *v.* Gage, 30 Fed. Cas. No. 18,134, 1 Sawy. 494, 13 Int. Rev. Rec. 116 (assayers); U. S. *v.* Hornibrook, 26 Fed. Cas. No. 15,390, 2 Dill. 229; *In re* Lindauer, 15 Fed. Cas. No. 8,358, 7 Blatchf. 249 (lotteries); Size *v.* Curtis, 22 Fed. Cas. No. 12,920, 1 Lowell 110 (shipbuilders); U. S. *v.* Buffalo Park, 24 Fed. Cas. No. 14,681, 16 Blatchf. 189, 25 Int. Rev. Rec. 359; U. S. *v.* Colchester, 25 Fed. Cas. No. 14,831, 2 Int. Rev. Rec. 70 (jugglers or proprietors of shows); Warren *v.* Shook, 91 U. S. 704, 23 L. ed. 421 (business of banker and broker defined); U. S. *v.* Fisk, 3 Wall. (U. S.) 445, 18 L. ed. 243 [*affirming* 25 Fed. Cas. No. 15,104, 2 Int. Rev. Rec. 10] (brokers and bankers doing business as brokers); U. S. *v.* Cutting, 3 Wall. (U. S.) 441, 18 L. ed. 241; Clark *v.* Gilbert, 5 Fed. Cas. No. 2,822, 5 Blatchf. 330, 4 Int. Rev. Rec. 42; Northrup *v.* Shook, 18 Fed. Cas. No. 10,329, 10 Blatchf. 243, 16 Int. Rev. Rec. 196 (definition of broker); Peabody *v.* Gilbert, 19 Fed. Cas. No. 10,868, 5 Blatchf. 334 note; U. S. *v.* Simons, 27 Fed. Cas. No. 16,291, 1 Abb. 470, 12 Int. Rev. Rec. 10, 7 Phila. (Pa.) 607 (market gardener selling his produce liable as produce broker).

business stamps denoting the payment of special tax.[21] And every collector is required to keep a record in his office of all persons who have paid special taxes in his district, which is open to public inspection.[22]

2. CHANGE OF FIRM. Additional special tax is not required in case of a change of firm, one or more of its members succeeding to and carrying on the business at the same place,[23] or at the place to which the business may be transferred.[24]

C. Wholesale Liquor Dealers — 1. WHO ARE WHOLESALE LIQUOR DEALERS. Persons who sell or offer for sale spirits or wines in quantities of five gallons or over are required to pay a special tax as wholesale liquor dealears.[25] The words "sells or offers for sale" are used in their legal sense.[26] Legally qualified distillers or brewers who sell only distilled spirits or malt liquors of their own production at the place of manufacture, in the original casks or packages, are not required to pay special tax as wholesale dealers.[27] Commission merchants who, at the request of foreign correspondents, purchase liquors in quantity, and take charge of shipping the same, and charge costs and their commissions, are liable as "wholesale liquor dealers."[28] If spirits are sold in wholesale quantities the seller is a wholesale dealer, although the spirits are delivered in retail quantities.[29] A retail liquor dealer may sell different packages of different liquors at the same time, aggregating over five gallons, without being liable as a wholesale dealer, provided no single package equals that amount.[30] It is the actual quantity sold and not the pretended or nominal quantity that determines the liability.[31]

2. PLACE OF SALE AND PAYMENT OF TAX. The place where the delivery, either actual or constructive, which transfers ownership from the vendor to the vendee is made, is the place of sale, at which the person selling should pay the tax. Goods are offered for sale at the place where they are kept for sale. They are not offered for sale elsewhere by sending abroad an agent with samples, or by establishing an office for the purpose of taking orders.[32]

3. SEIZURE AND PROSECUTION FOR FAILURE TO PAY SPECIAL TAX. The wine and distilled spirits owned by a wholesale liquor dealer are not forfeited by reason of

21. *In re* Lamberton, 124 Fed. 446.

22. State *v.* Gorham, 65 Me. 270, holding that the original or a copy duly certified may be admitted as evidence on trial of an indictment in a state court.

23. U. S. *v.* Glab, 99 U. S. 225, 25 L. ed. 273 [*affirming* 25 Fed. Cas. No. 15,213, 1 McCrary 166].

24. U. S. *v.* Davis, 37 Fed. 468; U. S. *v.* Daniels, 25 Fed. Cas. No. 14,916, 20 Int. Rev. Rec. 136, death of one partner.

25. *In re* Wangerien, 29 Fed. Cas. No. 17,141, 11 Int. Rev. Rec. 181, the words "five gallons" refer to wine gallons. This does not apply to the case of an isolated sale. Rahter *v.* Lancaster First Nat. Bank, 92 Pa. St. 393; U. S. *v.* Feigelstock, 25 Fed. Cas. No. 15,084, 14 Blatchf. 321.

26. De Bary *v.* Souer, 101 Fed. 425, 41 C. C. A. 417.

27. New York Rectifying Co. *v.* U. S., 18 Fed. Cas. No. 10,214, 14 Blatchf. 549; Underhill *v.* Pleasonton, 24 Fed. Cas. No. 14,337, 8 Blatchf. 260.

28. Quinn *v.* Dimond, 72 Fed. 993, 19 C. C. A. 336.

29. U. S. *v.* Clare, 2 Fed. 55; U. S. *v.* Shouse, 31 Int. Rev. Rec. 120.

30. U. S. *v.* James, 13 Int. Rev. Rec. 29.

31. When a retail liquor dealer received at different times seventeen orders for five gallons of alcohol, but filled the orders by sending four and seven-eighths gallons in each case, although receiving pay for five gallons, there was neither a sale nor an offer to sell five gallons, and defendant was not liable as wholesale liquor dealer. U. S. *v.* Hart, 28 Int. Rev. Rec. 226.

32. U. S. *v.* Chevalier, 107 Fed. 434, 46 C. C. A. 402 [*affirming* 102 Fed. 125], defendant, a wholesale liquor dealer in San Francisco, maintained a branch house in Portland, where samples of his trade were kept. The sales were made at San Francisco, notwithstanding the agent may have been authorized to make binding contracts and collected the purchase-money at the office in Portland.

A dealer can fill orders at his place of business for which he has paid special tax and send the liquor to persons at a distance, but cannot legally make sales along the road. U. S. *v.* Durham, 33 Fed. 834.

Constructive delivery.— Where orders for spirits are received at a place of business where the requisite special-tax stamps are held, and they are duly accepted there, the subsequent delivery of the spirits from a place of storage elsewhere does not necessitate the payment of special tax at such storage house. A sale by a wholesale liquor dealer in New York of liquors stored in New Orleans and there delivered to the purchaser does not subject the seller to a second tax as wholesale liquor dealer at New Orleans. De Bary *v.* Souer, 101 Fed. 425, 41 C. C. A. 417.

failure to pay special tax.[33] In prosecutions for selling at wholesale, without payment of special tax, it is not incumbent upon the government to prove that the gallon measure used conformed to the legal standard; nor to prove that each gallon contained a gallon of proof spirits.[34]

D. Retail Liquor Dealers[35] — **1. In General.** Retail liquor dealers are those who sell or offer to sell spirits or wines in quantities less than five gallons. One is liable if he has liquor on hand to be sold to any one who applies for it.[36] He need not keep a shop or store or carry on the business for a livelihood.[37] It makes no difference if the proceeds of the sale are to be used for a charitable purpose.[38]

2. Clubs Selling to Members. Any class of selling, although to a restricted class of persons, and without a view to profit, is within the meaning of the law. Clubs owning liquors and selling to members are liable to the tax,[39] but not canteens or post exchanges under the complete control of the secretary of war as governmental agencies.[40]

3. Physicians and Druggists. The law does not treat distilled spirits as a drug or medicine, and neither physicians nor druggists can sell it even on prescription without payment of the special tax as liquor dealer.[41] The tax is not imposed upon apothecaries as to wines or liquors used exclusively in the preparation or making up of medicines which cannot be used as beverages.[42]

4. Sale of Medicinal Preparations. Medicinal preparations like "tonic bitters" may be sold by a druggist or other person without incurring liability.[43] The fact that a compound may be used as a medicine, and may be so intended by the person making it, does not relieve the seller from the liability to the tax, if the compound is intoxicating, and is not sold as medicine. The true intent in all such cases is: Was the compound sold in good faith for medicinal purposes only, or was it sold as a beverage, or sold knowingly to persons who bought for use as a beverage?[44] The law is not to be avoided by mere deceptive names, and if beverages in which the essential ingredient is distilled spirits, disguised by aromatic or other drugs, are commonly bought and sold as and for intoxicating beverages the seller is liable to the tax as a retail liquor dealer.[45] A party selling brandy peaches or like preparations is liable as a liquor dealer, if the fruit is added as a

33. *In re* Two Thousand Bottles of Liquors, 24 Fed. Cas. No. 14,302, 5 Ben. 265.

34. United States *v.* Hart, 28 Int. Rev. Rec. 226.

35. Retail dealers in malt liquors see Malt Liquors.

36. U. S. *v.* Rennecke, 28 Fed. 847; U. S. *v.* Dodge, 25 Fed. Cas. No. 14,974, Deady 186.

37. U. S. *v.* Harbison, 26 Fed. Cas. No. 15,300, 13 Int. Rev. Rec. 118, holding that it is enough that he sells whisky in small quantities on several occasions.

38. U. S. *v.* Dodge, 25 Fed. Cas. No. 14,971, Deady 186.

39. U. S. *v.* Alexis Club, 98 Fed. 725; U. S. *v.* Kallstrom, 30 Fed. 184 (retail liquor dealers who joined together under the style of a "protective union" and purchased beer in quantities of a brewery and sold it to members of the association); U. S. *v.* Wittig, 28 Fed. Cas. No. 16,748, 2 Lowell 466, 22 Int. Rev. Rec. 98; U. S. *v.* Woods, 28 Fed. Cas. No. 16,759, 24 Int. Rev. Rec. 150 (janitor of club liable).

40. Dugan *v.* U. S., 34 Ct. Cl. 458.

41. U. S. *v.* Smith, 45 Fed. 115 (a practising physician who prescribed whisky for his patients furnishing the liquor himself and charging the usual price is liable); U. S. *v.* Stafford, 20 Fed. 720.

42. U. S. Rev. St. (1878) § 3246, amended by 20 U. S. St. at L. 334 [U. S. Comp. St. (1901) p. 2103]; U. S. *v.* Calhoun, 39 Fed. 604.

In determining whether sales by a druggist come within this exempting provision of the statute, it is held that his conduct is to be tested by his good faith. U. S. *v.* White, 42 Fed. 138.

43. U. S. *v.* Stubblefield, 40 Fed. 454.

44. U. S. *v.* Starnes, 37 Fed. 665; U. S. *v.* Stafford, 20 Fed. 270; U. S. *v.* Cota, 17 Fed. 734; U. S. *v.* Bibb, 33 Int. Rev. Rec. 391.

45. U. S. *v.* Morfew, 136 Fed. 491, holding a druggist liable for selling a medicinal preparation which was eighty-eight per cent proof spirits; U. S. *v.* Bray, 113 Fed. 1008 (if a preparation labeled as an appetizer containing a large per cent of alcohol, combined with other ingredients, is sold under the pretext of being a medicinal preparation, the vendor must pay special tax); U. S. *v.* Wilson, 69 Fed. 144; U. S. *v.* Foster, 39 Int. Rev. Rec. 9 (the fact that the bitters were labeled patent medicine and that defendant was advised that he might sell the same was no excuse).

mere disguise, and the spirits and not the ingredients contained in the package is the inducement to the sale.[46]

5. Persons Negotiating Sales For Others. A party who sells spirits cannot escape liability on the ground that he is acting as agent of a distilling company if he purchases the goods and they are charged to him by the company, and the company looks to him for payment.[47] The seller is liable irrespective of the manner or mode in which the liquors are procured from the manufacturers. It is not necessary that he should be the owner.[48] If a person buys spirits in his own name, and has the same billed to him in his own name, and deals it out from time to time as called for, he is a retail liquor dealer, although the liquor was disposed of without profit to himself, and he purchased it with money advanced by others.[49]

6. Occasional or Single Sales. Proof of a single act of selling or offering for sale has been held sufficient;[50] but in case of a single sale it may be a good defense to show that it was exceptional, accidental, or made under circumstances which indicate that it was not the business of the vendor.[51] It is for the jury to decide how many sales and what appointments are necessary to constitute the business.[52]

7. Spirits Shipped to Be Paid For on Delivery. According to the weight of authority where a seller accepts an order for goods at his place of business, by delivering the goods to a carrier to be transported and delivered to the purchaser, at another place, on payment of the price in accordance with the terms of the order, the sale is made and the title passes at the time and place of such delivery to the carrier, subject to the seller's right of stoppage *in transitu*, and the seller is not liable to pay a special tax at the place of delivery.[53] The carrier is simply the agent of the seller for the purpose of collecting the purchase-price, and is not subject to indictment for making a sale at the place of delivery.[54] The order to the carrier to collect on delivery is a mere provision for the retention of the seller's lien.[55] A delivery to the carrier is a delivery to the buyer and the title then and there passes.[56] But there are cases holding that a sale of goods to be paid for on delivery is not complete until the goods are actually delivered to the buyer and paid for, and the seller and the express agent, if he acts knowingly in

46. U. S. *v.* Stafford, 20 Fed. 720.

47. U. S. *v.* Rose, 28 Int. Rev. Rec. 274.

48. U. S. *v.* Allen, 38 Fed. 736, where the evidence failed to show that defendant bought specific quantities of liquor to correspond with special orders, but showed that he bought beer by the case, and paid for it, and sold it to any one desiring it.

49. U. S. *v.* Angell, 11 Fed. 34.

50. U. S. *v.* Barnhardt, 24 Fed. Cas. No. 14,526, 20 Int. Rev. Rec. 137; U. S. *v.* Dodge, 25 Fed. Cas. No. 14,974, Deady 186. *Compare* U. S. *v.* Logan, 26 Fed. Cas. No. 15,624, 12 Int. Rev. Rec. 146.

51. Ledbetter *v.* U. S., 170 U. S. 606, 18 S. Ct. 774, 42 L. ed. 1162 (such as supplying a friend with liquor on hand for private use, merely as a matter of accommodation); U. S. *v.* Bonham, 31 Fed. 808; U. S. *v.* Rennecke, 28 Fed. 847.

Dealer defined.— A dealer is one who makes successive sales as a business. Overall *v.* Bezeau, 37 Mich. 506.

Application of rule.— A grocer who does not deal in liquors, purchasing a barrel of spirits for a customer from a liquor dealer who sent it directly to the customer, and charging it to the customer for the price at which it was actually obtained from the liquor dealer, is not liable as a liquor dealer on account of such transaction. U. S. *v.* Howell, 20 Fed. 718.

52. U. S. *v.* Jackson, 26 Fed. Cas. No. 15,455, 1 Hughes 531, holding that the selling an occasional drink out of a bottle not in a bar-room where no intention of defrauding the revenue is apparent, is not carrying on the business in contemplation of the law.

53. *Arkansas.*— State *v.* Carl, 43 Ark. 353, 51 Am. Rep. 565.

Maine.— State *v.* Peters, 91 Me. 31, 39 Atl. 342; State *v.* Intoxicating Liquors, 73 Me. 278.

Pennsylvania.— Com. *v.* Fleming, 130 Pa. St. 138, 18 Atl. 622, 17 Am. St. Rep. 763, 5 L. R. A. 470.

Wisconsin.— Sarbecker *v.* State, 65 Wis. 171, 26 N. W. 541, 56 Am. Rep. 624.

United States.— U. S. *v.* Orene Parker Co., 121 Fed. 596; U. S. *v.* Adams Express Co., 119 Fed. 240.

54. U. S. *v.* Adams Express Co., 119 Fed. 240.

55. Com. *v.* Fleming, 130 Pa. St. 138, 18 Atl. 622, 17 Am. St. Rep. 763, 5 L. R. A. 470.

56. Pilgreen *v.* State, 71 Ala. 368; State *v.* Carl, 43 Ark. 353, 51 Am. Rep. 565; Sar-

completing the sale, are liable under the laws of the place of delivery to the buyer.[57]

E. Rectifiers. A rectifier is not merely a person who runs spirits through charcoal but any one who rectifies or purifies spirits in any manner whatever, or who makes any mixture of spirits with anything else, and sells it under any name is a rectifier.[58] A retail liquor dealer who mixes whisky with water and sugar or other substances and keeps the same in stock for sale is subject to tax as a rectifier.[59] The addition to spirits of water only does not change the spirits into a spurious imitation or compound liquor, and the special tax of a rectifier is not required to be paid on this account.[60]

F. Dealers in Malt Liquors. A wholesale dealer in malt liquors is one who sells or offers for sale malt liquors in quantities of five gallons or over at one time, but who does not deal in spirituous liquors at wholesale.[61] A brewer can sell his original stamped packages of malt liquor anywhere in the United States without incurring liability to special tax as a wholesale dealer.[62] A retail dealer in malt liquors is one who sells or offers for sale malt liquors in less quantity than five gallons at one time, but who does not deal in spirituous liquors.[63]

G. Dealers in Oleomargarine. Parties selling oleomargarine are liable to a special tax, although they are ignorant that the substance is oleomargarine.[64] One sale is sufficient to constitute the party making it a dealer. A merchant does not become a dealer by permitting packages to be shipped in his name simply as an accommodation and a guarantee that the price would be paid when he derived no profit therefrom.[65]

X. DISTILLED SPIRITS.

A. Distilled Spirits and Distillers Defined. The term "distilled spirits" is confined to the product of distillation.[66] A "distiller" is one who produces distilled spirits, or who brews or makes mash, wort, or wash, fit for distillation or for the production of spirits, or who, by any process of evaporation, separates alcoholic spirit from any fermented substance, or who, making or keeping mash, wort, or wash, has also in his possession or use a still.[67] A manufacturer of apple

becker *v.* State, 65 Wis. 171, 26 N. W. 541, 56 Am. Rep. 624.

57. Crabb *v.* State, 88 Ga. 584, 15 S. E. 455; State *v.* Wingfield, 115 Mo. 428, 22 S. W. 363, 37 Am. St. Rep. 406; State *v.* O'Neil, 58 Vt. 140, 2 Atl. 586, 56 Am. Rep. 557 [*dismissed* in United States supreme court for want of jurisdiction, 144 U. S. 323, 12 S. Ct. 693, 36 L. ed. 450]; U. S. *v.* Cline, 26 Fed. 515; U. S. *v.* Shriver, 23 Fed. 134.

Where goods are not separated from the stock in pursuance of any order, it has been held that the title does not pass on delivery to the carrier but remains in the seller of the goods. U. S. *v.* Ott, 31 Int. Rev. Rec. 79.

58. Quantity of Distilled Spirits, 20 Fed. Cas. No. 11,494, 3 Ben. 70.

59. Michel *v.* Nunn, 101 Fed. 423.

60. U. S. *v.* Thirty-two Barrels of Distilled Spirits, 5 Fed. 188.

As to requirements of wholesale liquor dealers and rectifiers see *infra*, X, D, H.

61. U. S. *v.* Ducournau, 54 Fed. 138; U. S. *v.* Clare, 2 Fed. 55.

Liability of an express company as retail or wholesale dealer in malt liquors.— The statute attaches to him the office of a dealer when "he sell or offers for sale malt liquors." The actual ownership of the property is not essential. Western Express Co. *v.* U. S., 141 Fed. 28.

62. U. S. Rev. St. (1878) § 3244, amended by 16 U. S. St. at L. 256 [U. S. Comp. St. (1901) p. 2096].

63. U. S. *v.* Giller, 54 Fed. 656, holding that an association is liable to special tax for selling to its members tickets entitling the holder at a picnic to a glass of beer or other refreshment, or to participate in some amusement, at his option.

64. Eagle *v.* Nowlin, 94 Fed. 646.

An indictment for retailing oleomargarine without having paid the special tax will not be sustained against one who peddles it from a wagon through the streets of a town, where he had paid the special tax as retail dealer in that town, and the stamp did not specify the street or number. U. S. *v.* Dubé, 40 Fed. 576.

65. Hartzell *v.* U. S., 83 Fed. 1002.

66. U. S. *v.* Anthony, 24 Fed. Cas. No. 14,460, 14 Blatchf. 92. Spirits manufactured from the ti root in Hawaii, subsequent to the taking effect in that territory of the revenue laws of the United States, are subject to tax. The Kawailani, 128 Fed. 879, 63 C. C. A. 347.

67. U. S. Rev. St. (1878) § 3247 [U. S. Comp. St. (1901) p. 2107]; *In re* Vaporizer,

brandy is included in the meaning of the word "distiller."[68] It is not necessary that the spirits produced should be of any particular degree of strength.[69] To make one in possession of a still a distiller because he keeps mash, wort, or wash, the mash, wort, or wash must be such as will produce spirits on distillation.[70] All persons having an interest in the business are considered distillers and subject to the provisions of the law.[71] It is not necessary that the party should carry on the business personally,[72] but a direct interest in the business must be shown.[73] Corporations may carry on the business of distilling. The stock-holders are individually liable for taxes due, notwithstanding any state statute regulating the liability of stock-holders in a corporation organized under state laws.[74]

B. General Superintendence of Business of Distillers Authorized. The complete superintending control of the business of distillers is exercised by the government, and when they enter the business they contract to submit to this governmental surveillance.[75] Revenue officers are vested with a power of visitation for the purpose of inspecting the operations of distillers, wholesale liquor dealers, and rectifiers.[76] The stringent provisions of the law requiring the apparatus at distilleries to be constructed so as to prevent abstraction of spirits were intended to prevent fraud and to secure the tax.[77]

C. Tax on Distilled Spirits — 1. Constitutionality. The tax imposed on distilled spirits is in the nature of an excise, and being uniform in its operation is constitutional.[78]

2. When It Attaches and How Paid. The tax of one dollar and ten cents on each proof gallon attaches as soon as the spirits are produced,[79] and must be paid

18 Fed. Cas. No. 10,537, 2 Ben. 438; U. S. *v.* Mathoit, 26 Fed. Cas. No. 15,740, 1 Sawy. 142, 11 Int. Rev. Rec. 158; U. S. *v.* One Still, 27 Fed. Cas. No. 15,956, 6 Int. Rev. Rec. 220; U. S. *v.* Two Barrels, 28 Fed. Cas. No. 16,575, 6 Int. Rev. Rec. 44.

A person who manufactures spirits from fruits or berries, from saloon washings containing fermented substances, or from sour beer, becomes a distiller. U. S. *v.* Marshall, 26 Fed. Cas. No. 15,726.

68. U. S. *v.* Ridenour, 119 Fed. 411.

69. U. S. *v.* Bagwell, 24 Fed. Cas. No. 14,494, 20 Int. Rev. Rec. 121.

70. U. S. *v.* Frerichs, 25 Fed. Cas. No. 15,166, 16 Blatchf. 547, 25 Int. Rev. Rec. 319 [*affirmed* in 106 U. S. 160, 1 S. Ct. 169, 27 L. ed. 128], as to refusal to grant certificate reasonable cause.

71. U. S. *v.* Howard, 25 Fed. Cas. No. 15,401, 11 Int. Rev. Rec. 119.

72. U. S. *v.* Harbison, 26 Fed. Cas. No. 15,300, 13 Int. Rev. Rec. 118.

73. A lessee is a proprietor but the lessor is not. U. S. *v.* Van Slyke, 28 Fed. Cas. No. 16,610, 8 Biss. 227.

74. Richter *v.* Henningsan, 110 Cal. 530, 42 Pac. 1077; Salt Lake City *v.* Hollister, 118 U. S. 256, 6 S. Ct. 1055, 30 L. ed. 176 [*affirming* 3 Utah 200, 2 Pac. 200]; U. S. *v.* Wolters, 46 Fed. 509; Kissinger *v.* Bean, 14 Fed. Cas. No. 7,853, 7 Biss. 60; 15 Op. Atty.-Gen. 230, 559.

75. U. S. *v.* Simmons, 96 U. S. 360, 24 L. ed. 819 (distillers must take proper pains to ascertain what the rules and regulations are); U. S. *v.* Dutcher, 25 Fed. Cas. No. 15,013, 7 Int. Rev. Rec. 122; U. S. *v.* Three Tons of Coal, 28 Fed. Cas. No. 16,515, 6 Biss. 379, 21 Int. Rev. Rec. 251.

76. Flagler *v.* Kidd, 78 Fed. 341, 24 C. C. A. 123; U. S. *v.* Patrick, 54 Fed. 338 (indictment under U. S. Rev. St. (1878) § 5508 [U. S. Comp. St. (1901) p. 3712]; U. S. Rev. St. (1878) § 5509 [U. S. Comp. St. (1901) p. 3712]); U. S. *v.* Distillery No. 28, 25 Fed. Cas. No. 14,966, 6 Biss. 483, 21 Int. Rev. Rec. 366 (the authority of the government to exercise surveillance over the manufacture and sale of distilled spirits has been generally recognized); U. S. *v.* Mason, 26 Fed. Cas. No. 15,735, 6 Biss. 350, 21 Int. Rev. Rec. 245.

77. Felton *v.* U. S., 96 U. S. 699, 24 L. ed. 875.

78. U. S. *v.* Singer, 15 Wall. (U. S.) 111, 21 L. ed. 49; Mason *v.* Rollins, 16 Fed. Cas. No. 9,252, 2 Biss. 99.

79. Thompson *v.* U. S., 142 U. S. 471, 12 S. Ct. 299, 35 L. ed. 1084; Farrell *v.* U. S., 99 U. S. 221, 25 L. ed. 321 [*affirming* 25 Fed. Cas. No. 15,073, 8 Biss. 259, 24 Int. Rev. Rec. 231]; U. S. *v.* National Surety Co., 122 Fed. 904, 59 C. C. A. 130; Clay *v.* Swope, 38 Fed. 396; Mason *v.* Peabody, 16 Fed. Cas. No. 9,250, 13 Int. Rev. Rec. 142. The capacity tax stands on different grounds from the deficiency tax. U. S. *v.* Bicket, 24 Fed. Cas. No. 14,590, 16 Int. Rev. Rec. 85.

Under Act July 20, 1868 (15 U. S. St. at L. 125), the tax was fifty cents per gallon, but there was an additional tax of four dollars per barrel of forty proof gallons, also a capacity tax, and a requirement of reimbursement by the distiller of the sums paid by the government for gagers' fees and storekeepers' salaries. By the act of June 6, 1872, taking effect Aug. 1, 1872, the barrel tax and capacity tax and the reimbursement provision were repealed, and a tax of

by the manufacturer, even in the case of their destruction, unless the circumstances on which he relies for exemption come within the particular description in some one of the remedial statutes.[80] The tax is payable by stamps issued by collectors which are nothing more than receipts, and are worthless as receipts to other parties than those to whom they are issued.[81]

3. Lien For Tax and Its Operation.[82] There is a special provision for a lien for the tax upon distilled spirits, by virtue of which the spirits, stills, distillery, and the lot or tract of land on which it is situated are made liable from the moment the spirits come into existence.[83] The lien is absolute and unconditional and good against innocent purchasers for value.[84] The lien follows the spirits everywhere, and any person into whose possession they come, without the tax thereon having been paid, is bound to pay it.[85] The tax is a first lien on spirits deposited in a warehouse.[86] The purchaser takes the property subject to the lien not only of the tax levied pursuant to the report of the distiller, but to any additional tax that may be assessed by the commissioner under the law.[87] The lien on the land means a lien on the interest of the distiller in the land and the interest of the party signing the consent.[88] If distillery property is sold it remains liable to the lien. The purchaser is bound to take notice of the use which had been made of the premises before he acquired title.[89] The lien is valid against subsequent judgments on the distiller's real and personal estate. Personal property of a distiller, not located on the distillery premises nor used in the process of distilling, is not subject to this lien.[90] When spirits are forfeited and sold, the proceeds should be first applied to the payment of the tax.[91] When the property is sold under decree of forfeiture without reservation, the marshal's deed to the purchaser conveys whatever interest the United States had therein, and the government is estopped from setting up the lien.[92]

4. Exceptions to Operation of Tax. The act of Aug. 28, 1894, made a provision for exemption from tax of alcohol to be used in the arts or medicinal compounds under regulations to be prescribed by the secretary of the treasury.[93]

seventy cents per gallon imposed. By the act of March 3, 1875, the tax was increased to ninety cents per gallon. Aug. 28, 1894, the tax was increased to one dollar and ten cents per gallon, the present rate.

80. Greenbrier Distilling Co. *v.* Johnson, 88 Fed. 638, 32 C. C. A. 74; Mason *v.* Peabody, 16 Fed. Cas. No. 9,250, 13 Int. Rev. Rec. 142.

81. Woolner *v.* U. S., 13 Ct. Cl. 355.

Who may sell stamps.— A deputy collector appointed for a particular county has no authority to sell stamps to brewers, distillers, etc., residing in parts of the collection district outside of his county. Schuster *v.* Weissman, 63 Mo. 552.

Stamps were first required in payment of tax by the act of congress of July 20, 1868 (15 U. S. St. at L. 125), and went into use Nov. 2, 1868.

82. Lien for taxes generally see *infra*, XIV, B, 3.

83. U. S. Rev. St. (1878) § 3251 [U. S. Comp. St. (1901) p. 2108]; U. S. *v.* Pacific R. Co., 27 Fed. Cas. No. 15,984, 4 Dill. 71, 23 Int. Rev. Rec. 384. Owing to the greater definiteness of this lien there is rarely occasion when it applies for calling in the general provision for a lien for taxes. 16 Op. Atty.-Gen. 634.

84. U. S. *v.* Turner, 28 Fed. Cas. No. 16,548, 18 Int. Rev. Rec. 5.

85. Alkan *v.* Bean, 1 Fed. Cas. No. 202, 8 Biss. 83, 23 Int. Rev. Rec. 351 (where proceedings were instituted for forfeiture of a distillery, followed by the release of the property on bond, and proceedings were afterward discontinued without any judicial declaration of forfeiture, the lien was not lost by such bonding and release, and a subsequent purchaser takes the property encumbered by the lien); *In re* Quantity of Distilled Spirits, 20 Fed. Cas. No. 11,494, 3 Ben. 70, 9 Int. Rev. Rec. 9.

86. U. S. *v.* Ulrici, 111 U. S. 38, 4 S. Ct. 288, 28 L. ed. 344.

87. Hartman *v.* Bean, 99 U. S. 393, 25 L. ed. 455.

88. Gudger *v.* Bates, 52 Ga. 285.

89. Milan Distilling Co. *v.* Tillson, 17 Fed. Cas. No. 9,539, 26 Int. Rev. Rec. 5.

90. U. S. *v.* Black, 3 Brewst. (Pa.) 166.

91. U. S. *v.* Ulrici, 111 U. S. 38, 4 S. Ct. 288, 28 L. ed. 344.

Where a distillery is sold on execution issuing out of a state court, the lien for taxes must be first paid out of the proceeds. The priority of the claim of the United States for taxes will be recognized in the state court. Dungan's Appeal, 68 Pa. St. 204, 8 Am. Rep. 169.

92. U. S. *v.* Mackoy, 26 Fed. Cas. No. 15,696, 2 Dill. 299.

93. 28 U. S. St. at L. 509, 567, § 61.

This act was never carried into execution, being repealed before any regulations were issued.[94] The making of regulations was a condition precedent, and the secretary having found it impracticable to make proper regulations without further legislation, no right of rebate arose under the statute.[95] A vinegar manufacturer may make mash, wort, or wash, and employ vaporizing process under certain restrictions.[96]

D. Regulations and Requirements in Regard to Distillers — 1. Bonds — a. In General. The distiller must before commencing business and annually thereafter execute a bond in the form prescribed.[97] The condition of the bond is that the principal shall in all respects comply with the law in relation to his business.[98] It is an obligation to pay all penalties incurred or fines imposed[99] as well as the tax on spirits distilled.[1] The execution of a warehousing bond covering spirits placed in a warehouse does not release liability on the annual bond.[2] Stock-holders of a corporation engaged in distilling cannot be accepted as sureties.[3] The laws in regard to bonds are not to be regarded as penal but remedial, to be liberally construed to give full effect to the purposes of their enactment.[4] A bond is not invalid because it contains conditions in excess of the statutory requirements. If voluntarily given it is binding.[5] Where a bond contains conditions, some of which are legal and others illegal, and they are severable and separable, the latter may be disregarded and the former enforced.[6] Any private agreement made by an officer which in any way changes the terms of the bond is as to the government inoperative and void. He cannot in any way change the terms of the bond required by law.[7] A married woman authorized by the state law to carry

94. Act June 3, 1896 (29 U. S. St. at L. 195).

95. Dunlap *v.* U. S., 173 U. S. 65, 19 S. Ct. 319, 43 L. ed. 616 [*affirming* 33 Ct. Cl. 135].

The Act of June 7, 1906, providing for the use of alcohol free of tax, when denatured and rendered unfit for beverage or liquid medicinal uses, goes into effect Jan. 1, 1907.

96. U. S. Rev. St. (1878) § 3282, amended by Act March 1, 1879 (20 U. S. St. at L. 335 [U. S. Comp. St. (1901) p. 2128]); *In re* One Vaporizer, 18 Fed. Cas. No. 10,537, 2 Ben. 438 (vinegar manufacturer not a distiller); U. S. *v.* Distillery, 25 Fed. Cas. No. 14,960, 23 Int. Rev. Rec. 147; U. S. *v.* Two Barrels, 28 Fed. Cas. No. 16,575, 6 Int. Rev. Rec. 44 (information brought under the act of March 2, 1867). The act of July 20, 1868, prohibited the manufacture of vinegar by the vaporization of alcohol. It was the intent of congress to prohibit the fermentation of any compound whereby alcohol was evolved unless done in an authorized distillery. U. S. *v.* Prussing, 27 Fed. Cas. No. 16,095, 2 Biss. 344; U. S. *v.* Steen, etc., Factory, etc., 27 Fed. Cas. No. 16,383, 6 Ben. 172. The joint resolution of March 3, 1871, which amended the act of July 20, 1868, provided that it should not apply to fermented liquids used exclusively for the manufacture of vinegar.

97. Mason *v.* Rollins, 17 Fed. Cas. No. 9,252, 2 Biss. 99 (congress has the power to require a bond as a condition precedent to commencing business); U. S. *v.* Carpenter, 25 Fed. Cas. No. 14,727, 20 Int. Rev. Rec. 137 (collector proper custodian of the bond); U. S. *v.* Thirty-Five Barrels of High Wines, 28 Fed. Cas. No. 16,460, 2 Biss. 88, 9 Int. Rev. Rec. 67.

98. U. S. *v.* Black, 24 Fed. Cas. No. 14,600, 11 Blatchf. 538, 19 Int. Rev. Rec. 116.

99. U. S. *v.* Thompson, 45 Fed. 468.

In a suit on a distiller's bond to recover penalty for not keeping a book, the act prescribing the penalty should be set forth with reasonable certainty; also the act authorizing the commissioner to make regulations, and the fact that they were made and the specific regulations which were violated. U. S. *v.* Zemel, 137 Fed. 989.

1. U. S. *v.* Rindskopf, 105 U. S. 418, 26 L. ed. 1131; U. S. *v.* Bicket, 24 Fed. Cas. No. 14,590, 16 Int. Rev. Rec. 85.

2. U. S. *v.* Richardson, 127 Fed. 893; U. S. *v.* National Surety Co., 122 Fed. 904, 59 C. C. A. 130 [*reversing* 112 Fed. 336], annual bond liable when the warehousing bond is insolvent.

3. 16 Op. Atty.-Gen. 10.

4. U. S. *v.* National Surety Co., 122 Fed. 904, 59 C. C. A. 130.

5. U. S. *v.* Mynderse, 27 Fed. Cas. No. 15,851, 11 Blatchf. 1, 12 Int. Rev. Rec. 104 [*affirmed* in 154 U. S. 580, 14 S. Ct. 1213, 20 L. ed. 241].

If the statute declares that it shall be in prescribed form and in no other, a recovery cannot be had, if it varies from the statute, or if the condition contains more than the statute requires. U. S. *v.* Brown, 24 Fed. Cas. No. 14,663, Gilp. 155. See also *infra*, XIII, H.

6. U. S. *v.* Hodson, 10 Wall. (U. S.) 395, 19 L. ed. 937.

7. U. S. *v.* Bicket, 24 Fed. Cas. No. 14,590, 16 Int. Rev. Rec. 85.

A bond which is extorted without color of right and given under protest is void. Boehm *v.* U. S., 20 Ct. Cl. 241.

on the business of a distiller for her sole and separate benefit has legal capacity to bind herself by such bond.[8]

b. Irregularities in the Execution. Sureties signing a bond, having an understanding with the principal that other sureties were to be obtained before its delivery, cannot, if the bond is regular upon its face, be relieved from liability on account of such private understanding, the government having no notice of the condition.[9] A bond delivered by the surety to the principal on condition was held an escrow till the condition be performed.[10] A bond, executed in blank as to the quantity of spirits and amount secured, is not binding unless ratified after the blanks are filled. A ratification for a firm may be made by one member. It is not invalid when signed by a clerk in the name of the principal with his authority.[11] Any objection to form should be made when the bond is presented for execution.[12]

c. Scope of Obligation. The liability is not to be extended beyond the terms of the contract, and sureties are not liable when the business is carried on at a place other than that mentioned in the bond.[13] Sureties are liable for what was fairly contemplated by the parties at the time of the execution of the bond.[14] They are presumed to know the law and to contract with reference to all of its provisions.[15] The liability on the bond is only to the extent of the damage sustained.[16] The bond covers not merely duties imposed by existing law, but duties belonging to and naturally connected with the business imposed by subsequent law.[17] They are within the reasonable contemplation and evident intention of the parties to such a contract.[18]

d. Defenses on Suits on Bonds. Although the law declares that no suit shall be maintained for the recovery of any tax illegally assessed, until an appeal has first been made to the commissioner of internal revenue, this does not prevent defendant in a suit brought by the government for taxes from setting up as a defense the erroneous assessment or illegality of the tax.[19] If property is bid in by the government for the tax it extinguishes the debt, and suit cannot afterward be maintained on the bond for its collection.[20] The laches of officers or agents of the government does not relieve sureties.[21] The negligence of officers in failing to collect the tax at the proper time does not preclude the United States from recovering the tax in a suit upon the bond.[22] Alteration of the bond by substituting a surety for one given in the bond discharges the other sureties, where the substitution was without their knowledge or consent.[23]

2. Obtaining Consent of Owner of Fee to Lien. If the distiller is not the

8. U. S. *v.* Garlinghouse, 25 Fed. Cas. No. 15,189, 4 Ben. 194, 11 Int. Rev. Rec. 11.

9. Butler *v.* U. S., 21 Wall. (U. S.) 272, 22 L. ed. 614; Dair *v.* U. S., 16 Wall. (U. S.) 1, 21 L. ed. 491 [*overruling* U. S. *v.* Dair, 25 Fed. Cas. No. 14,913, 4 Biss. 280].

10. U. S. *v.* Hammond, 26 Fed. Cas. No. 15,292, 4 Biss. 283.

11. U. S. *v.* Turner, 28 Fed. Cas. No. 16,547, 2 Bond 379.

12. U. S. *v.* Hodson, 10 Wall. (U. S.) 395, 19 L. ed. 937.

13. U. S. *v.* Boecker, 21 Wall. (U. S.) 652, 22 L. ed. 472.

14. U. S. *v.* Singer, 27 Fed. Cas. No. 16,292, 2 Biss. 226, 12 Int. Rev. Rec. 98.

15. U. S. *v.* National Surety Co., 122 Fed. 904, 59 C. C. A. 130.

16. U. S. *v.* Chouteau, 102 U. S. 603, 26 L. ed. 246.

17. U. S. *v.* Singer, 15 Wall. (U. S.) 111, 21 L. ed. 49; U. S. *v.* Powell, 14 Wall. (U. S.) 493, 20 L. ed. 726.

18. National Surety Co. *v.* U. S., 129 Fed. 70, 63 C. C. A. 512; Chadwick *v.* U. S., 3 Fed. 750; U. S. *v.* McCartney, 1 Fed. 104.

19. Clinkenbeard *v.* U. S., 21 Wall. (U. S.) 65, 22 L. ed. 477.

20. U. S. *v.* Triplett, 28 Fed. Cas. No. 16,539, 22 Int. Rev. Rec. 207.

21. Hart *v.* U. S., 95 U. S. 316, 24 L. ed. 479; Osborne *v.* U. S., 19 Wall. (U. S.) 577, 22 L. ed. 208 [*affirming* 18 Fed. Cas. No. 10,599, 16 Int. Rev. Rec. 141 (when the distillery was encumbered and the bond was approved without consent to postpone liens being given through neglect of the officer who took the bond); U. S. *v.* Guest, 143 Fed. 456 (where spirits were lost by negligence of officer after seizure).

22. U. S. *v.* Mullins, 119 Fed. 334, 56 C. C. A. 238; U. S. *v.* Grant, 26 Fed. Cas. No. 15,247 (collector failing to collect tax from spirits seized or distrained); U. S. *v.* Hosmer, 26 Fed. Cas. No. 15,394, 17 Int. Rev. Rec. 38.

23. U. S. *v.* O'Neill, 19 Fed. 567.

Forfeiture of spirits for fraud does not re-

owner of the fee unencumbered, the written consent of the owner of the fee, and of any person having a lien thereon, must be given, stipulating that the lien of the United States shall have priority.[24]

3. DISTILLERY WAREHOUSES. The distiller must provide a warehouse for the storage of spirits, and must give a bond conditioned that he will pay the tax upon the spirits deposited therein before removal, and within eight years from date of entry.[25] Distillery warehouses are deemed bonded warehouses of the United States,[26] and are in the joint custody of the internal revenue storekeeper and the proprietor.[27] The court will take judicial notice that the statute requires every distiller to provide such a warehouse; and a jury may legally act on the presumption that the distiller has a warehouse, as required by the statute.[28] Depositing spirits in the warehouse does not make them the property of the government.[29] They remain the property of the distiller,[30] but are virtually in the possession of the United States held for the tax.[31] The government assumes no responsibility for their security except what is necessary for its own purposes. The deposit is solely for the benefit of the distiller, and to enable him to give a bond for the tax instead of paying it at once.[32] The spirits are in the custody and control of the owner so as to make them liable to forfeiture for fraudulent acts.[33] The party placing spirits in the warehouse has an insurable interest to the amount of the value of the spirits and the tax.[34] An insurance policy without reference to the tax entitles the assured to include the tax in his recovery in case of loss, if the assured is liable.[35] The destruction of spirits by fire in a warehouse constitutes a removal so as to make the tax payable before expiration of the bonded period.[36] No spirits can be legally removed from the warehouse at any other time than after sunrise and before sunset, but in case of a fire at night it would be the duty of the warehouseman to disregard the statute, when its observance would inevitably result in the destruction of the property.[37] Spirits cannot remain on storage in warehouse after payment of the tax.[38] These warehouses being agencies of the United States are subject to their exclusive regulation. The provisions of state laws are inoperative as against spirits held therein.[39] Spirits

lieve bondsmen from liability to pay the tax. U. S. *v.* U. S. Fidelity, etc., Co., 144 Fed. 866.

24. U. S. Rev. St. (1878) § 3262, amended by 21 U. S. St. at L. 145 [U. S. Comp. St. (1901) p. 2115]; Mansfield *v.* Excelsior Refinery Co., 135 U. S. 326, 10 S. Ct. 825, 34 L. ed. 162; U. S. *v.* Spring Valley Distillery, 25 Fed. Cas. No. 14,963, 11 Blatchf. 255, 18 Int. Rev. Rec. 59.

A leaseholder's bond may be accepted in lieu of the written consent when the distillery was erected prior to July 20, 1868, in certain cases provided by the statute. The proceeds of personal property sold as forfeited for fraud of distiller cannot be applied to reduce the amount due on this bond, which is given as a substitute for the real estate. U. S. *v.* Loeb, 14 Fed. 688, 21 Blatchf. 196.

25. Van Schoonhoven *v.* Curley, 86 N. Y. 187; U. S. *v.* South Branch Distilling Co., 27 Fed. Cas. No. 16,359, 8 Biss. 162. The period was extended from three to eight years by section 49 of the act of Aug. 28, 1894. 28 U. S. St. at L. 409.

26. U. S. *v.* Powell, 14 Wall. (U. S.) 493, 20 L. ed. 726.

27. U. S. *v.* Witten, 143 U. S. 76, 12 S. Ct. 372, 36 L. ed. 81.

28. U. S. *v.* Harries, 26 Fed. Cas. No. 15,309, 2 Bond 311.

29. Farrell *v.* U. S., 99 U. S. 221, 25 L. ed. 321 [*affirming* 25 Fed. Cas. No. 15,073, 8 Biss. 259, 24 Int. Rev. Rec. 231].

30. Thayer *v.* U. S., 4 Ct. Cl. 95.

31. McCullough *v.* Large, 20 Fed. 309.

32. U. S. *v.* Witten, 143 U. S. 76, 79, 12 S. Ct. 372, 36 L. ed. 81.

33. U. S. *v.* Eighteen Barrels of High Wines, 25 Fed. Cas. No. 15,033, 8 Blatchf. 475; U. S. *v.* Quantity of Distilled Spirits, 27 Fed. Cas. No. 16,100, 6 Int. Rev. Rec. 188; U. S. *v.* Thirty-Six Barrels of High Wines, 28 Fed. Cas. No. 16,468, 7 Blatchf. 459, 12 Int. Rev. Rec. 40.

34. Germania F. Ins. Co. *v.* Thompson, 95 U. S. 547, 24 L. ed. 487.

35. Hedger *v.* Union Ins. Co., 17 Fed. 498.

36. Farrell *v.* U. S., 99 U. S. 221, 25 L. ed. 321 [*affirming* 25 Fed. Cas. No. 15,073, 8 Biss. 259, 24 Int. Rev. Rec. 231]; Germania F. Ins. Co. *v.* Thompson, 95 U. S. 547, 24 L. ed. 487; U. S. *v.* Peace, 53 Fed. 999, 4 C. C. A. 148 [*reversing* 48 Fed. 714].

37. Macklin *v.* Frazier, 9 Bush (Ky.) 3.

38. George *v.* Louisville Fourth Nat. Bank, 41 Fed. 257.

39. George *v.* Louisville Fourth Nat. Bank, 41 Fed. 257 (Kentucky acts relative to warehousemen and warehouse receipts do not apply); 21 Op. Atty.-Gen. 73 (South Carolina dispensary law).

in warehouse are not liable to seizure by a sheriff under state process.[40] A sheriff under an execution may sell the spirits without entering the warehouse and making a seizure, and the purchaser will acquire the title of the owner.[41]

4. WAREHOUSING BONDS. The warehousing bond taken for the express purpose of securing the payment of the tax on the spirits deposited in warehouses is not a substitute for the distiller's annual bond, but is cumulative.[42] An annual bond may be given or a monthly warehousing bond, as the distiller elects. Stock-holders of a corporation engaged in distilling cannot be accepted as sureties on these bonds.[43] If spirits are stolen from the warehouse through neglect of the internal revenue officers to provide sufficient locks, it is no defense to a suit on the bond to recover the tax.[44] An abatement of the tax on spirits destroyed in the warehouse operates as a cancellation of the bond and it is not revived by a revocation of the order of abatement.[45] The bond is not liable for the tax on spirits which are forfeited and sold subject to tax. If the tax is paid, the object of the bond is accomplished, and it becomes *functus officio*.[46]

5. SURVEY OF DISTILLERIES. A survey of the distillery is required for the purpose of determining its true spirit-producing capacity, a copy of which should be delivered to the distiller to fix his liability.[47] The survey and estimate of producing capacity are conclusive, while they remain, although subject to revision, under the direction of the commissioner of internal revenue.[48] The commissioner may at any time direct a new survey, if he is satisfied that the one already made is in any way incorrect or needs revision.[49] But if an assessor changes the capacity of a distillery, without a new survey, the assessment based thereon is illegal.[50]

6. METERS. Congress has the power to compel distillers to affix certain meters to their stills as a condition precedent to carrying on their business.[51]

7. SIGNS. Every distiller is required to keep conspicuously on his distillery a sign, showing the name or firm of the distiller, with the words, "registered distillery,"[52] and it is an offense to work in a distillery on which no sign is placed.[53]

40. Sherley *v.* McCormick, 135 Mass. 126 (contract for the sale of whisky); McCullough *v.* Large, 20 Fed. 309.

41. Kiel *v.* Harris, 31 Int. Rev. Rec. 408.

42. U. S. *v.* Richardson, 127 Fed. 893.

43. 16 Op. Atty.-Gen. 10.

44. U. S. *v.* Witten, 143 U. S. 76, 79, 12 S. Ct. 372, 36 L. ed. 81.

45. U. S. *v.* Alexander, 110 U. S. 325, 4 S. Ct. 99, 28 L. ed. 166.

46. U. S. *v.* Sutton, 111 U. S. 42, 4 S. Ct. 291, 28 L. ed. 346; U. S. *v.* Ulrici, 111 U. S. 38, 4 S. Ct. 288, 28 L. ed. 344. *Contra*, U. S. *v.* South Branch Distilling Co., 27 Fed. Cas. No. 16,359, 8 Biss. 162.

47. Wright *v.* U. S., 108 U. S. 281, 2 S. Ct. 633, 27 L. ed. 727; U. S. *v.* Ferrary, 93 U. S. 625, 23 L. ed. 832; Pahlman *v.* Raster, 20 Wall. (U. S.) 189, 22 L. ed. 342; Stevenson *v.* Beggs, 17 Wall. (U. S.) 182, 21 L. ed. 624; Peabody *v.* Draughn, 16 Wall. (U. S.) 240, 21 L. ed. 311. It will not suffice that the distiller has actual notice of the results of the survey if not furnished with a certified copy. Mason *v.* Peabody, 16 Fed. Cas. No. 9,250, 13 Int. Rev. Rec. 142.

Waiver of formal delivery.— An indorsement by a distiller on the survey accepting it and acknowledging it as binding, made at the time his bond is executed, is a waiver of a formal delivery of a copy. Wright *v.* U. S., 108 U. S. 281, 2 S. Ct. 633, 27 L. ed. 727.

Presumption as to delivery.— In an action on a distiller's bond it is not necessary for the government in making its *prima facie* case to prove affirmatively delivery of survey. The court will presume that the survey was made and a copy served on the distiller. U. S. *v.* Black, 24 Fed. Cas. No. 14,600, 11 Blatchf. 538, 19 Int. Rev. Rec. 116.

48. Stevenson *v.* Beggs, 17 Wall. (U. S.) 182, 21 L. ed. 624.

The distiller has the right to appeal to the commissioner.— If he does not, or if on appeal the survey is sustained, his liability as to the tax thereunder is fixed. It is not in the province of the court to revise the survey. U. S. *v.* Bicket, 24 Fed. Cas. No. 14,590, 16 Int. Rev. Rec. 85.

49. Stoll *v.* Pepper, 97 U. S. 438, 24 L. ed. 1070.

50. U. S. *v.* King, 26 Fed. Cas. No. 15,533, 4 Ben. 476, 13 Int. Rev. Rec. 12.

51. Finch *v.* U. S., 102 U. S. 269, 26 L. ed. 165, 12 Ct. Cl. 364; Tice *v.* U. S., 99 U. S. 286, 25 L. ed. 352; Nusbaum *v.* Emery, 18 Fed. Cas. No. 10,380, 3 Biss. 469, 18 Int. Rev. Rec. 85; Sausser *v.* U. S., 9 Ct. Cl. 338, 11 Ct. Cl. 538. By Act June 6, 1872 (17 U. S. St. at L. 239), all the provisions of Act July 20, 1868, touching meters were repealed.

52. Terry *v.* U. S., 120 Fed. 483, 56 C. C. A. 633; U. S. *v.* Thompson, 45 Fed. 468; U. S. *v.* Burgess, 33 Fed. 833.

53. U. S. *v.* Flynn, 25 Fed. Cas. No. 15,123, 15 Blatchf. 302.

8. Distillers Books. Distillers are required to keep books according to the form prescribed by the commissioner of internal revenue.[54] They can be seized and used as evidence on the trial of a libel for forfeiture filed against the distillery.[55] In proceedings *in rem* against the distillery, the private books of the distiller are proper subjects of examination under the orders of the court.[56] The distiller cannot be allowed to say that he has kept a private record of his transactions. The government has a right to see any record kept by him of his business.[57]

9. Exemptions in Favor of Fruit Distillers. A distiller of brandy from fruit is exempted from certain requirements but not from payment of tax on the spirits produced.[58] The regulations providing exemption from the requirement to provide a bonded warehouse were authorized.[59]

E. Withdrawal of Spirits From Warehouse — 1. In General. In case of excessive loss of spirits in warehouse the commissioner has authority to order their withdrawal before the bonded period has expired, and to require payment of the tax on the quantity originally entered.[60] Distilled spirits may be exported to a foreign country free of tax, under a through bond, or for shipment to a port of export under a transportation bond.[61] The execution of the bond frees the spirits for the time being from obligation to pay the tax, and from the operation of the distiller's warehousing bond.[62] Spirits can be shipped to the Philippine Islands under the same regulations that apply to exportation to a foreign country.[63] The withdrawal of spirits from a bonded warehouse for consumption on a foreign war vessel is not an exportation.[64] It is a criminal offense to intentionally reland within the jurisdiction of the United States spirits shipped for export, and the spirits relanded are liable to forfeiture.[65] Spirits purchased by the United States while in a bonded warehouse, and withdrawn "free of tax," are thereby withdrawn from the operation of the internal revenue laws, and there is no occasion for the regaging and adjustment of the tax thereon.[66]

2. Transportation Bonds. If the government prevents the performance of the condition of a transportation bond by the seizure of the spirits, it is estopped from recovering upon such a breach.[67] Bonds given to secure removals are valid to secure the performance of their conditions after repeal of the law allowing removals under bond. The repeal of the law cannot destroy the contract and put an end to the right of the government to the tax.[68]

54. Brown *v.* Harkins, 131 Fed. 63, 65 C. C. A. 301.

When the commissioner prescribes a form it must be followed. U. S. *v.* Thirty-Five Barrels of High Wines, 28 Fed. Cas. No. 16,460, 2 Biss. 88, 9 Int. Rev. Rec. 67.

55. U. S. *v.* Petersburg Distillery, 25 Fed. Cas. No. 14,961, 1 Hughes 533, 22 Int. Rev. Rec. 195.

Penalties and forfeitures for failure to keep the book see *infra*, XV, F, G.

56. U. S. *v.* Mason, 26 Fed. Cas. No. 15,735, 6 Biss. 350, 21 Int. Rev. Rec. 245.

57. U. S. *v.* Distillery No. 28, 25 Fed. Cas. No. 14,966, 6 Biss. 483, 21 Int. Rev. Rec. 366.

Production of books and papers see *infra*, XV, J, 6.

58. U. S. *v.* Ridenour, 119 Fed. 411; U. S. *v.* Hermance, 26 Fed. Cas. No. 15,355, 15 Blatchf. 6.

59. U. S. *v.* Thirty-seven Barrels of Apple Brandy, 28 Fed. Cas. No. 16,466, 11 Int. Rev. Rec. 125.

60. Crystal Springs Distillery Co. *v.* Cox, 49 Fed. 555, 1 C. C. A. 365 [*affirming* 47 Fed. 693].

61. Thompson *v.* U. S., 142 U. S. 471, 12 S. Ct. 299, 35 L. ed. 1084; U. S. *v.* Grotenkemper, 26 Fed. Cas. No. 15,267, 2 Bond 140.

62. 18 Op. Atty.-Gen. 92.

63. Act March 8, 1902 (32 U. S. St. at L. 54, § 6).

64. 23 Op. Atty.-Gen. 418, 420. So the shipment of domestic spirits to a foreign country and their subsequent return to the United States do not constitute an exportation and reimportation within the contemplation of law, where the spirits were shipped abroad with the intention of being returned to this country. 17 Op. Atty.-Gen. 579.

65. Flagler *v.* Kidd, 78 Fed. 341, 24 C. C. A. 123 [*reversing* 54 Fed. 367].

66. U. S. *v.* Mullins, 119 Fed. 334, 56 C. C. A. 238.

67. U. S. *v.* Stewart, 27 Fed. Cas. No. 16,399, 2 Biss. 412.

68. U. S. *v.* Dutcher, 25 Fed. Cas. No. 15,014, 2 Biss. 51, 8 Int. Rev. Rec. 161; *In re* Callicot, 4 Fed. Cas. No. 2,323, 3 Blatchf. 89.

Spirits withdrawn for transportation under a repealed act.— U. S. *v.* Bennett, 15 Wall. (U. S.) 660, 21 L. ed. 104.

F. Assessments Against Distillers — 1. For Deficiency in Production. The producing capacity of a distillery, and not the amount of spirits produced, is made the measure of taxation.[69] The distiller must pay a tax on eighty per cent of the estimated producing capacity of the distillery, whether the spirits are actually produced or not, and assessments are made for deficiencies.[70] A regular suspension of work by a distiller relieves him from assessment for taxation during the interval between the time he so regularly suspends work and the time he actually resumes.[71] The commissioner has power to prescribe the mode and time when a legal suspension can take place in a distillery.[72]

2. For Excess of Materials Used. In cases where material for distillation is used in excess of the quantity allowed by the survey the distiller is liable to an assessment for tax on spirits that should have been produced from the material used in excess, whether the quantity reported made equals or exceeds eighty per cent of the producing capacity of the distillery.[73] The statute does not make the average daily capacity the standard, but merely the capacity of the distillery. The distiller cannot be assessed for an excess of material used over his surveyed capacity in one month when such excess will be balanced by a corresponding deficiency in the next month.[74] The object was to secure payment of the tax and not to impose a penalty for over-production. Double taxation was not intended.[75] To sustain the theory that a given amount of material will produce a certain quantity of spirits, it must be shown that this is a necessary and unavoidable inference from the facts proved.[76]

3. Relief From Assessments. In case there has been a failure to produce the quantity of spirits required by the survey where such failure was not occasioned by want of diligence or by any fraudulent purpose, but was the result of a misunderstanding of the law and regulations, or was occasioned by unavoidable accident, the commissioner is authorized to allow claims for abatement or refund. The courts themselves do not possess the power.[77] This power, it has been said,

69. U. S. *v.* Halloran, 26 Fed. Cas. No. 15,286, 14 Blatchf. 1, 22 Int. Rev. Rec. 321.

70. U. S. *v.* Ferrary, 93 U. S. 625, 23 L. ed. 832; Stevenson *v.* Beggs, 17 Wall. (U. S.) 182, 21 L. ed. 624; U. S. *v.* Singer, 15 Wall. (U. S.) 111, 21 L. ed. 49 [*reversing* 27 Fed. Cas. No. 16,292, 2 Biss. 226]; Daley *v.* U. S., 6 Fed. Cas. No. 3,542, 16 Int. Rev. Rec. 147; Mason *v.* Peabody, 16 Fed. Cas. No. 9,250, 13 Int. Rev. Rec. 142; Stowell *v.* Williams, 23 Fed. Cas. No. 13,515, 17 Int. Rev. Rec. 38 (assessment for five days during which the distiller was prevented from running by reason of an explosion); U. S. *v.* Nissley, 27 Fed. Cas. No. 15,893, 1 Dill. 586; U. S. *v.* Reed, 27 Fed. Cas. No. 16,135, 13 Int. Rev. Rec. 148. An assessment of tax on spirits based upon estimates is lawful and a correction of errors cannot defeat the assessment. U. S. *v.* U. S. Fidelity, etc., Co., 144 Fed. 866.

71. Daniels *v.* Tarbox, 6 Fed. Cas. No. 3,568, 9 Blatchf. 176, irregular notice of suspension.

72. Stowell *v.* Williams, 23 Fed. Cas. No. 13,515, 17 Int. Rev. Rec. 38. If the government directs that the distillery be run only a certain number of hours, it reduces *pro tanto* the productive capacity of the distillery and can only collect a *pro-rata* tax. U. S. *v.* Park, 27 Fed. Cas. No. 15,991.

73. Weitzel *v.* Rabe, 103 U. S. 340, 26 L. ed. 320; Stoll *v.* Pepper, 97 U. S. 438, 24 L. ed. 1070; Caldwell *v.* Weitzel, 4 Fed. Cas. No. 2,306, 23 Int. Rev. Rec. 383. The liability to tax is not the actual product but what should have been the product of the materials used. Stevenson *v.* Beggs, 17 Wall. (U. S.) 182, 21 L. ed. 624.

74. Chicago Distilling Co. *v.* Stone, 140 U. S. 647, 11 S. Ct. 862, 35 L. ed. 532.

75. Stoll *v.* Pepper, 97 U. S. 438, 24 L. ed. 1070; Runkle *v.* Citizens' Ins. Co., 6 Fed. 143.

76. U. S. *v.* Furlong, 25 Fed. Cas. No. 15,178, 2 Biss. 97, 9 Int. Rev. Rec. 35. When a fruit distiller has received pomace, in the absence of any explanation otherwise accounting for it, it is justifiable to infer that the material was used in the production of spirits at the rate of one gallon to fourteen gallons of pomace. U. S. *v.* Cole, 134 Fed. 697.

77. Turner *v.* Williams, 24 Fed. Cas. No. 14,265, 18 Int. Rev. Rec. 6, loss of mash by bursting of a fermenting tub. A distiller should not be charged with tax on spirits he did not distill on account of accident. U. S. *v.* Miller, 26 Fed. Cas. No. 15,770, 5 Biss. 128, action on distiller's bond.

Defective still.— A deficiency assessment is erroneous where the deficiency of production was caused by a defective still, and was not the result of "culpable neglect, default, or mismanagement of the owners." U. S. *v.* Nebraska Distilling Co., 80 Fed. 285, 25 C. C. A. 418.

is essentially identical with that relating to the abatement and refund of taxes in general.[78]

G. Allowance For Tax on Spirits Destroyed. The distiller is released from payment of tax upon spirits destroyed by accident while in process of manufacture, and before being placed in the distillery warehouse, and when destroyed in the distillery warehouse.[79] The secretary of the treasury has jurisdiction of claims for refund founded on the destruction by casualty of spirits in the custody of an officer of internal revenue, and his decision is final.[80] Allowance for losses by leakage or evaporation rests upon the express provisions of the statutes, and when none is provided for in the law the courts can make none no matter how strong the equity may be.[81] It is the general policy of the law to allow loss by leakage in transportation.[82] Where distillers ship spirits to points within the United States under bond for foreign exportation and then change their minds and put the spirits on the home market, they will not be entitled to the allowance for leakage in transportation.[83] An allowance may be made for leakage or loss by unavoidable accident occurring during transportation from a distillery warehouse to the port of export, but not for loss in the warehouse after filing the export bond and before withdrawal.[84] Allowance is made for loss in warehouse under certain conditions and limitations.[85] In any assessment growing out of the regage or claim for loss an appeal lies to the commissioner of internal revenue whose decisions are final.[86]

H. Wholesale Liquor Dealers and Rectifiers — 1. Books to Be Kept. Wholesale liquor dealers and rectifiers are required to keep a book, and to make a monthly return under oath to the collector.[87] The record must show from whom the spirits were purchased or received,[88] and to whom the spirits are to be sent. It is required to be kept by dealers in foreign as well as domestic spirits.[89] Where parties are both wholesale and retail liquor dealers at the same place, spirits received should be entered in the book and entry made of transfer to them-

78. Barnett *v.* U. S., 16 Ct. Cl. 515. The distiller against whom an assessment has been made for a tax is not entitled to have the proceeds of forfeited goods applied to reduce the assessment. U. S. *v.* U. S. Fidelity, etc., Co., 144 Fed. 866.

79. U. S. Rev. St. (1878) § 3321, amended by 20 U. S. St. at L. 341 [U. S. Comp. St. (1901) p. 2087] (21 U. S. St. at L. 145); Greenbrier Distillery Co. *v.* Johnson, 88 Fed. 638, 32 C. C. A. 74; Barnett *v.* U. S., 16 Ct. Cl. 515.

The statutory provision to this effect being remedial in its nature should be liberally construed. 18 Op. Atty.-Gen. 379.

80. Hoffheimer *v.* U. S., 20 Ct. Cl. 371. No allowance can be made for a loss of spirits in warehouse occasioned by the warping of barrels from unusual and excessive summer heat, abnormal evaporation caused by such heat, or the existence of undiscoverable wormholes in the barrels. Crystal Spring Distillery Co. *v.* Cox, 49 Fed. 555, 1 C. C. A. 365 [*affirming* 47 Fed. 693].

81. Louisville Public Warehouse Co. *v.* Collector of Customs, 49 Fed. 561, 1 C. C. A. 371.

82. Thayer *v.* U. S., 4 Ct. Cl. 95.

83. Gregg *v.* U. S., 4 Ct. Cl. 103.

84. Act Dec. 20, 1879 (21 U. S. St. at L. 59 [U. S. Comp. St. (1901) p. 2179]); Thompson *v.* U. S., 142 U. S. 471, 12 S. Ct. 299, 35 L. ed. 1084.

85. Act Aug. 28, 1894 (28 U. S. St. at L. 509); Act March 3, 1899 (30 U. S. St. at L. 1349 [U. S. Comp. St. (1901) p. 2147]); Act Jan. 13, 1903 (32 U. S. St. at L. 770 [U. S. Comp. St. Suppl. (1905) p. 429]). The tax is not collectable on spirits which had been lost by leakage, soaking, or evaporation prior to act of July 20, 1868. Burrough *v.* Able, 100 Fed. 66, 102 Fed. 131. The question involved was whether the act of July 20, 1868, had a retroactive effect and could be construed to relate to the time of manufacture and to impose a tax or duty upon the whole amount of spirits distilled prior to that act.

86. Corning *v.* U. S., 34 Ct. Cl. 271.

87. *In re* Leszynsky, 15 Fed. Cas. No. 8,279, 16 Blatchf. 9, 25 Int. Rev. Rec. 71; U. S. *v.* Miller, 26 Fed. Cas. No. 15,771, 14 Blatchf. 93 (indictment under U. S. Rev. St. (1878) § 3318 [U. S. Comp. St. (1901) p. 2164]).

The duty of keeping the book may be delegated to a clerk, but the dealers and rectifiers are responsible if the proper entries are not made. U. S. *v.* Amann, 24 Fed. Cas. No. 14,438; U. S. *v.* Fifty Barrels of Whiskey, 25 Fed. Cas. No. 15,091, 11 Int. Rev. Rec. 94. *Contra*, a rectifier must himself make the entries in the book. *In re* Quantity of Distilled Spirits, 20 Fed. Cas. No. 11,495, 3 Ben. 552, 11 Int. Rev. Rec. 3.

88. U. S. *v.* One Water Cask, 27 Fed. Cas. No. 15,966, 10 Int. Rev. Rec. 93.

89. U. S. *v.* McCullough, 26 Fed. Cas. No. 15,665, 22 Int. Rev. Rec. 202.

selves as retail liquor dealers.[90] A wholesale dealer in malt liquors is not required to keep the book.[91] Penalties are provided for the refusal or neglect to keep the book,[92] without regard to the question of intent.[93] Ambiguous entries in the book are to be taken most strongly against the rectifier where discrepancies are not explained.[94]

2. RECOVERING SPIRITS FROM EMPTY PACKAGES. The recovery of distilled spirits from empty distiller's packages by the use of steam or hot water is tantamount to the production of spirits, and the person who recovers such spirits is held liable as a distiller.[95] A rectifier may recover from charcoal used in the purification or rectification of spirits, the spirits remaining in it.[96]

3. MARKS AND BRANDS ON RECTIFIERS' AND WHOLESALE LIQUOR DEALERS' PACKAGES. Packages of spirits put up by rectifiers and wholesale liquor dealers, containing five gallons or more, are required to be stamped and branded.[97]

4. REGULATIONS AUTHORIZED. The marks and stamps required by the regulations to be placed on wholesale liquor dealers' packages are marks and stamps required by law.[98] The regulations in regard to rectifiers and prescribing the form of notice of intention to rectify are authorized.[99]

I. Penalties and Forfeitures[1] — 1. SETTING UP A STILL WITHOUT PERMIT OR GIVING BOND. The law provided penalty and forfeiture for setting up a still to be used for the purpose of distilling without first obtaining a permit from the collector.[2] If parties commence distilling without giving a bond or before complying with the preliminary requirements of the law, they commit the offense of carrying on an illicit distillery.[3] The act makes it an offense to carry on the business without first giving the bond. An intention to defraud need not be proved.[4]

2. DISTILLING ON CERTAIN PROHIBITED PREMISES. Distilling on premises where vinegar is manufactured is prohibited.[5] The prohibition of a distillery within six

90. U. S. *v.* Malone, 26 Fed. Cas. No. 15,713, 8 Ben. 574, 22 Int. Rev. Rec. 114.

91. U. S. *v.* Reagan, 27 Fed. Cas. No. 16,128, 15 Int. Rev. Rec. 8.

92. *In re* Leszynsky, 15 Fed. Cas. No. 8,279, 16 Blatchf. 9, 25 Int. Rev. Rec. 71; U. S. *v.* Dutcher, 25 Fed. Cas. No. 15,013, 7 Int. Rev. Rec. 122.

93. *In re* Quantity of Distilled Spirits, 25 Fed. Cas. No. 11,495, 3 Ben. 552, 11 Int. Rev. Rec. 3. *Compare* U. S. *v.* Amann, 24 Fed. Cas. No. 14,438, holding that the omission to make entries must be from carelessness or design.

94. *In re* Quantity of Distilled Spirits, 20 Fed. Cas. No. 11,494, 3 Ben. 70, 9 Int. Rev. Rec. 9.

95. Hunter *v.* Corning, 86 Fed. 913, 30 C. C. A. 483.

96. U. S. *v.* Marshall, 26 Fed. Cas. No. 15,726.

97. U. S. *v.* Thirty-two Barrels of Distilled Spirits, 5 Fed. 188; U. S. *v.* Ninety-five Barrels of Distilled Spirits, 27 Fed. Cas. No. 15,889, 12 Int. Rev. Rec. 123, 27 Fed. Cas. No. 15,890, 14 Int. Rev. Rec. 6.

The rectifying vat is not a package within the meaning of the law required to be branded. U. S. *v.* Eight Barrels of Whiskey, 25 Fed. Cas. No. 15,028, 6 Int. Rev. Rec. 124.

98. U. S. *v.* Seven Barrels of Whiskey, 131 Fed. 806.

99. Thacher *v.* U. S., 103 U. S. 679, 26 L. ed. 535 [*affirming* 23 Fed. Cas. No. 13,851, 15 Blatchf. 15 (*affirming* 27 Fed. Cas. No. 15,944, 22 Int. Rev. Rec. 187)].

1. For jurisdiction of proceedings to enforce penalties and forfeitures see *infra*, XV, D.

For method of recovery of penalties see *infra*, XV, F, 2.

For seizure of property forfeited see *infra*, XV, H.

Requisites of indictments to enforce penalties or forfeitures see *infra*, XV, I.

2. U. S. *v.* Craft, 43 Fed. 374.

3. U. S. *v.* Dobbs, 25 Fed. Cas. No. 14,972, 15 Int. Rev. Rec. 9; U. S. *v.* McKim, 26 Fed. Cas. No. 15,693, 10 Int. Rev. Rec. 74, requirements relative to construction of a distillery not complied with.

A distiller who carries on business after the time stated in notice of suspension, as the time of suspension, incurs the forfeitures provided for distilling without having given the bond required. U. S. *v.* Spring Valley Distillery, 25 Fed. Cas. No. 14,963, 11 Blatchf. 255, 18 Int. Rev. Rec. 59.

Where an assessor approved a distiller's bond, and so notified the distiller, he was justified in proceeding with his business on the belief that the preliminaries required by the statute had been complied with. U. S. *v.* Thirty-Five Barrels of High Wines, 28 Fed. Cas. No. 16,460, 2 Biss. 88, 9 Int. Rev. Rec. 67, neglect to file plans and specifications.

4. U. S. *v.* Davis, 25 Fed. Cas. No. 14,928. 15 Int. Rev. Rec. 10, it is immaterial whether he was the owner, partner, or agent of the owners.

5. U. S. *v.* Simmons, 96 U. S. 360, 24 L. ed. 819; U. S. *v.* Malone, 9 Fed. 897, 20 Blatchf. 137.

hundred feet of a rectifying establishment is not an unwarrantable interference with the use and disposition of property.[6]

3. DEFRAUDING OR ATTEMPTING TO DEFRAUD — a. In General. Carrying on the business of a distiller without having given bond, or with intent to defraud the United States of the tax, is punishable by fine and imprisonment, and forfeiture of the distillery and of all distilled spirits owned by such person, wherever found, and of the right, title, and interest of such person, in the land on which such distillery is situated.[7] The punishment is not simply for intent to defraud, but for the act of engaging in and carrying on the business with that intent.[8] All things which are part of the unlawful business and are found within the same inclosure, whether inside or outside the building, are forfeited, and all articles appropriated to such business so found are *prima facie* presumed to be connected with the fraud.[9] The connivance of a government storekeeper with the frauds committed does not exempt the property from forfeiture.[10] Whoever aids in the act of illegal distilling is amenable to the penal provisions of the law without regard to ownership of the still or its product.[11] All who knowingly aid are alike guilty.[12] One employed as laborer in a distillery is not carrying on the business of a distiller.[13] A part owner is liable if he knows that the law is being transgressed by his coöwner or any other person with the still; and it is immaterial that he does not share in the spirits produced, or in the profits.[14]

b. Forfeiture of Real Estate. The law forfeiting the distillery and real estate for frauds committed is constitutional.[15] The land which is connected with the distillery, and used to facilitate the carrying on of the business is forfeited, but not pastures, orchards, and vineyards which are not connected with the distillery, otherwise than that they are contiguous and under the same ownership.[16] The forfeiture of real estate does not reach beyond the interest of the distiller, or of such persons as have consented to the carrying on of the business upon the premises.[17] The interest of an innocent mortgagee or other person having a lien on the lot or tract of land on which the distillery is situated is not included in a forfeiture for acts of the owner only.[18] A mortgage given by the distiller before the unlawful acts were committed is good as against the United States, if the business was not carried on by the mortgagee's permission or connivance.[19]

c. Forfeiture of Personal Property — (I) *IN GENERAL.* All personal property employed in the business of illicit distilling is subject to forfeiture irrespective of ownership.[20] Spirits found on the premises are forfeited and spirits owned by

6. Mason *v.* Rollins, 16 Fed. Cas. No. 9,252, 2 Biss. 99.

7. U. S. Rev. St. (1878) § 3257 [U. S. Comp. St. (1901) p. 2112]; U. S. Rev. St. (1878) § 3281 [U. S. Comp. St. (1901) p. 2127]; 19 U. S. St. at L. 307; U. S. *v.* Stowell, 133 U. S. 1, 10 S. Ct. 244, 33 L. ed. 555; Dobbins Distillery *v.* U. S., 96 U. S. 395, 24 L. ed. 637; Gregory *v.* U. S., 10 Fed. Cas. No. 5,803, 17 Blatchf. 325, 26 Int. Rev. Rec. 27; U. S. *v.* One Copper Still, 27 Fed. Cas. No. 15,928, 8 Biss. 270, 24 Int. Rev. Rec. 317.

8. U. S. *v.* Simmons, 96 U. S. 360, 24 L. ed. 819.

9. U. S. *v.* Thirty-Three Barrels of Spirits, 28 Fed. Cas. No. 16,470, 1 Abb. 311, 1 Lowell 239, 7 Int. Rev. Rec. 75.

10. U. S. *v.* Spring Valley Distillery, 25 Fed. Cas. No. 14,962, 8 Ben. 473, 22 Int. Rev. Rec. 218.

11. U. S. *v.* Carpenter, 25 Fed. Cas. No. 14,727, 20 Int. Rev. Rec. 137.

12. U. S. *v.* Harbison, 26 Fed. Cas. No. 15,300, 13 Int. Rev. Rec. 118.

13. U. S. *v.* Cooper, 25 Fed. Cas. No. 14,863, 12 Int. Rev. Rec. 145; U. S. *v.* Logan, 26 Fed. Cas. No. 15,624, 12 Int. Rev. Rec. 146.

14. U. S. *v.* Bagwell, 24 Fed. Cas. No. 14,494, 20 Int. Rev. Rec. 121.

15. U. S. *v.* McKinley, 4 Brewst. (Pa.) 246; U. S. *v.* West Front Street Distillery, 25 Fed. Cas. No. 14,965, 2 Abb. 192, 11 Int. Rev. Rec. 174.

16. U. S. *v.* Certain Piece of Land, 25 Fed. Cas. No. 14,767, 1 Sawy. 84, 11 Int. Rev. Rec. 126.

17. U. S. *v.* Spring Valley Distillery, 25 Fed. Cas. No. 14,963, 11 Blatchf. 255, 18 Int. Rev. Rec. 59. *Contra*, Heidritter *v.* Elizabeth Oil-Cloth Co., 6 Fed. 138, real estate forfeited without regard to ownership.

18. Glenn *v.* Winstead, 116 N. C. 451, 21 S. E. 393.

19. U. S. *v.* Stowell, 133 U. S. 1, 10 S. Ct. 244, 33 L. ed. 555.

20. U. S. *v.* Spring Valley Distillery, 25 Fed. Cas. No. 14,963, 11 Blatchf. 255, 18 Int. Rev. Rec. 59; U. S. *v.* One Copper Still, 27

the distiller wherever found.[21] The removal of distilled spirits from a distillery to a bonded warehouse with intent to defraud forfeits the spirits even though the fraudulent intent was never carried out.[22]

(II) *Personal Property Mortgaged.* Personal property mortgaged, which remains in the possession of the owner, becomes forfeited by illegal acts of the owner, although the mortgagee is not shown to have been concerned in such acts.[23] Forfeiture of spirits at a distillery, fraudulently operated extends to the interest of a mortgagee, although ignorant of the frauds.[24] The forfeiture is of the thing itself, and not the interest of the mortgagor; and the mortgagee has no right to intervene to prevent forfeiture.[25] In the case of materials furnished a distillery in the erection of buildings and where mechanics' liens are filed in compliance with the state law, the court will allow their amount out of the proceeds of forfeiture in the registry of the court.[26]

d. Forfeiture of Leased Property. Where the owner leases a distillery for the purpose of distilling, the acts of the lessees in carrying on the business with intent to defraud subject the property to forfeture, although the owner be innocent. The owner who knowingly permits his land to be used for a distillery is responsible for its unlawful use.[27]

e. Liens on Spirits Not Subject of Illicit Operations. Forfeiture does not attach to spirits which have not been the subject of illicit operations, and have been disposed of to innocent parties for value. A *bona fide* mortgagee will be protected to the extent of his lien. The word "owner" is used in the popular sense.[28] *Bona fide* liens are protected, provided the liens are subsisting at the date of the seizure, and also at the time when the claims thereunder are passed upon by the court.[29] The fact that a person has, in good faith, made advances upon distilled spirits is no defense to an action for their forfeiture for not being properly marked and branded, or found elsewhere than in a distillery or a distillery warehouse, not having been removed therefrom according to law.[30]

f. Penalty of Double Amount of Tax. Whenever any person evades or

Fed. Cas. No. 15,928, 8 Biss. 270, 24 Int. Rev. Rec. 317. It is forfeited, although the distiller had sold it before he began to violate the law to a person ignorant of his illegal acts. U. S. *v.* Stowell, 133 U. S. 1, 10 S. Ct. 244, 33 L. ed. 555.

When a person permits or suffers his premises to be used for egress and ingress to and from an illicit distillery, it is necessary in order to forfeit the personal property found in the yard or inclosure that the person should know of the existence of the still. Gregory *v.* U. S., 10 Fed. Cas. No. 5,803, 17 Blatchf. 325, 26 Int. Rev. Rec. 27.

21. U. S. *v.* Three Hundred and Ninety-Six Barrels of Distilled Spirits, 28 Fed. Cas. No. 16,502, 3 Int. Rev. Rec. 114.

The phrase, "owned by such person, wherever found," does not mean spirits which may have at any time during the illicit operations been owned by him, but those spirits which are owned by him when found. U. S. *v.* Mathoit, 26 Fed. Cas. No. 15,740, 1 Sawy. 142, 11 Int. Rev. Rec. 158 (presumption of ownership, when unstamped spirits are found on premises with appliances for distilling); U. S. *v.* Three Hundred and Seventy-Two Pipes of Distilled Spirits, 28 Fed. Cas. No. 16,505, 5 Sawy. 421.

22. U. S. *v.* One Hundred Barrels of Distilled Spirits, 14 Wall. (U. S.) 44, 20 L. ed. 815 [*reversing* 27 Fed. Cas. No. 15,948, 2 Abb. 305, 1 Dill. 49, 12 Int. Rev. Rec. 153].

Liability for acts of agents and employees see *infra*, XV, A, 4.

When forfeiture attaches see *infra*, X, I.

Forfeitures for fraud generally see *infra*, X, I, 3, 5, 6.

23. U. S. *v.* Seven Barrels of Distilled Oil, 27 Fed. Cas. No. 16,253, 6 Blatchf. 174.

24. U. S. *v.* Twenty Barrels of Distilled Spirits, 28 Fed. Cas. No. 16,558, 9 Int. Rev. Rec. 4.

25. *In re* Distilled Spirits, 7 Fed. Cas. No. 3,923, 2 Ben. 486, 8 Int. Rev. Rec. 81, the mortgagee who suffers the property to be in such a position that the offense can be committed is in no better position than the mortgagor who commits the offense.

26. U. S. *v.* J. C. McCoy's Distillery, 25 Fed. Cas. No. 14,964, 21 Int. Rev. Rec. 165.

27. Dobbins *v.* U. S., 96 U. S. 395, 24 L. ed. 637; U. S. *v.* Blair, 24 Fed. Cas. No. 14,607, 3 Int. Rev. Rec. 67.

28. U. S. *v.* Three Hundred and Seventy-Two Pipes of Spirits, 28 Fed. Cas. No. 16,505, 5 Sawy. 421.

29. U. S. *v.* Three Hundred and Ninety-Six Barrels of Distilled Spirits, 28 Fed. Cas. No. 16,504, 3 Int. Rev. Rec. 135.

30. Boyd *v.* U. S., 3 Fed. Cas. No. 1,749, 14 Blatchf. 317 [*following* U. S. *v.* One Hundred Barrels Distilled Spirits, 14 Wall. 44, 20 L. ed. 815, and *distinguishing* U. S. *v.* One Hundred Barrels of High Wines, 27 Fed. Cas. No. 15,947, 23 Int. Rev. Rec. 10].

attempts to evade the payment of the tax on distilled spirits, he shall forfeit and pay double the amount of the tax so evaded or attempted to be evaded.[31]

4. Failing to Keep Books. Penalties are incurred, and the distillery, the land upon which it is located, and the personal property on the premises used in the business, are liable to forfeiture for failure to keep the required books, or for making false entries therein. Forfeiture does not include the interests of innocent third persons.[32] In a proceeding to enforce a forfeiture of property because of failure to keep the books, the burden is on the government to show that such failure or omission was with intent to defraud.[33]

5. Fraudulently Removing or Concealing Spirits.[34] The law provides a penalty for removing spirits on which the tax has not been paid to a place other than a distillery warehouse, or concealing spirits so removed, or aiding or abetting in the removal.[35] The statute was intended to punish the distiller and any one else who violated its provisions.[36] There must be a wilful purpose to defraud the government.[37] Conviction may be had if removal is proved, although concealment is not shown.[38] Any person having an interest in a distillery, who orders or sets on foot the removal of spirits illicitly, is liable, although not personally present at the time.[39] A person personally concerned in the removal may be guilty, whether he is interested in the spirits or not.[40] The aiding and abetting in the removal is a distinct offense, but does not prevent a person aiding and abetting from being convicted as a principal in the unlawful removal.[41] A removal procured by a false and fraudulent bond, although accepted by the collector, is not a removal according to law.[42] Rectifiers are liable to a penalty for receiving or rectifying distilled spirits produced at and removed from an illicit distillery or fraudulently removed from a registered distillery.[43]

6. Mixture of Fraudulent Spirits With Others. When distilled spirits forfeited to the United States are mixed with other spirits belonging to the same person (ignorant of the forfeiture), they are not lost to the government by such mixture. The government will be entitled to its proportion of the result.[44] If spirits liable to forfeiture are mixed with others and the identity of the goods destroyed the entire quantity is forfeited.[45] The forfeiture of goods not unlaw-

31. U. S. *v.* Grotenkemper, 26 Fed. Cas. No. 15,267, 2 Bond 140; U. S. *v.* McKee, 26 Fed. Cas. No. 15,688, 4 Dill. 128, 23 Int. Rev. Rec. 338.

32. U. S. *v.* Stowell, 133 U. S. 1, 10 S. Ct. 244, 33 L. ed. 555; U. S. *v.* Eighteen Barrels of High Wines, 25 Fed. Cas. No. 15,033, 8 Blatchf. 475; U. S. *v.* Forty-eight Hundred Gallons of Spirits, 25 Fed. Cas. No. 15,153, 4 Ben. 471, 13 Int. Rev. Rec. 52, the words "personal property on the premises" are qualified by the words "used in the business."

33. U. S. *v.* Thirty-Five Barrels of High Wines, 26 Fed. Cas. No. 15,460, 2 Biss. 88, 9 Int. Rev. Rec. 67. *Compare* Heidritter *v.* Elizabeth Oil-Cloth Co., 6 Fed. 138. There was no authority under Act June 30, 1864 (13 U. S. St. at L. 218), for the seizure of the distillery and the lot on which it is situated. U. S. *v.* One Barrel of Whiskey, 27 Fed. Cas. No. 15,921, 4 Int. Rev. Rec. 146.

34. For indictment for removing and concealing spirits see *infra*, XV, I, 3.

35. Pilcher *v.* U. S., 113 Fed. 248, 51 C. C. A. 205 (error in admission of testimony); U. S. *v.* Three Copper Stills, 47 Fed. 495; U. S. *v.* Anthony, 24 Fed. Cas. No. 14,460, 14 Blatchf. 92; U. S. *v.* McKee, 26 Fed. Cas. No. 15,688, 4 Dill. 128, 23 Int. Rev. Rec. 338.

36. Pounds *v.* U. S., 171 U. S. 35, 18 S. Ct. 729, 43 L. ed. 62.

37. U. S. *v.* Smith, 27 Fed. 854.

38. U. S. *v.* Nunnemacher, 27 Fed. Cas. No. 15,902, 7 Biss. 111.

39. U. S. *v.* Blaisdell, 24 Fed. Cas. No. 14,608, 3 Ben. 132, 9 Int. Rev. Rec. 82; U. S. *v.* Nunnemacher, 27 Fed. Cas. No. 15,902, 7 Biss. 111.

40. U. S. *v.* Blaisdell, 24 Fed. Cas. No. 14,608, 3 Ben. 132, 9 Int. Rev. Rec. 82.

41. U. S. *v.* Sykes, 58 Fed. 1000. *Compare* U. S. *v.* Blaisdell, 24 Fed. Cas. No. 14,608, 3 Ben. 132, 9 Int. Rev. Rec. 82.

42. Harrington *v.* U. S., 11 Wall. (U. S.) 356, 20 L. ed. 167 [*affirming* 28 Fed. Cas. No. 16,580, 3 Cliff. 261, 10 Int. Rev. Rec. 164].

43. U. S. *v.* Byrne, 7 Fed. 455, 19 Blatchf. 259.

44. Harrington *v.* U. S., 11 Wall. (U. S.) 356, 20 L. ed. 167.

45. U. S. *v.* Fifty-Four Barrels of Distilled Spirits, 25 Fed. Cas. No. 15,093, 9 Int. Rev. Rec. 121; U. S. *v.* Fifty-Six Barrels of Whiskey, 25 Fed. Cas. No. 15,095, 1 Abb. 93, 4 Int. Rev. Rec. 106; U. S. *v.* Two Hundred and Seventy-Eight Barrels of Distilled Spir-

fully stamped because found with other guilty goods is a proceeding highly penal in its character.[46]

7. Unlawful Purchase of Spirits. It is unlawful for any rectifier or wholesale or retail liquor dealer to purchase or receive spirits in quantities greater than twenty gallons from any person other than an authorized rectifier, distiller, or wholesale liquor dealer.[47] The word "receive" means receive for sale. Where a retail dealer receives spirits from any person other than one authorized to sell for storage only and not for sale, he does not incur the penalty.[48]

8. Non-Compliance With Requirements as to Marks and Brands — a. Absence of Stamps and Brands. The absence of any stamp or brand required by law from a package of distilled spirits containing five gallons or more works a forfeiture, the presumption being that the spirits are illicit.[49] This provision applies to portable casks and not to stand casks in a retail liquor dealer's saloon forming part of the fixtures.[50] The law does not forfeit spirits properly stamped, marked, and branded packed inside of a barrel which contained no brand,[51] nor where the stamps and brands are temporarily obscured by tacking a piece of newspaper over them.[52]

b. Discrepancy Between the Marks and Contents of Packages. If after packages have been stamped, branded, and marked so as to indicate the proof and quality of the contents other spirits are put into the packages the spirits are subject to forfeiture, irrespective of the question of frauds upon private individuals.[53] Spirits are forfeited if the stamps indicate a larger quantity of spirits than the capacity of the casks would permit to be placed therein;[54] also if the stamps are without date. If the dates have been removed through accidental causes, their absence is no ground of forfeiture.[55] A mere discrepancy in proof between the contents of a package and the proof marked thereon is not in itself sufficient evidence of fraud to justify forfeiture;[56] but if there is a wide difference between the marks and stamps and the contents of the package, irregularity or fraud is presumed.[57] Where packages containing spirits have once been properly stamped and marked, and the proper duties paid thereon, and after a sale of a portion of the contents and the residue is diluted with water only, the spirits are not liable to

its, 28 Fed. Cas. No. 16,580, 3 Cliff. 261, 10 Int. Rev. Rec. 164 [*affirmed* in 11 Wall. 356, 20 L. ed. 167].

46. U. S. *v.* One Hundred and Seventeen Packages of Plug Tobacco, 27 Fed. Cas. No. 15,936, 10 Ben. 243.

47. U. S. Rev. St. (1878) § 3319 [U. S. Comp. St. (1901) p. 2165]; New York Rectifying Co. *v.* U. S., 18 Fed. Cas. No. 10,214, 14 Blatchf. 549.

48. U. S. *v.* Fridenberg, 25 Fed. Cas. No. 15,168, 11 Int. Rev. Rec. 5.

49. U. S. *v.* Two Hundred Barrels of Whiskey, 95 U. S. 571, 24 L. ed. 491; U. S. *v.* Three Packages of Distilled Spirits, 125 Fed. 52; U. S. *v.* Sykes, 58 Fed. 1000. The law provides a complete system of marks and brands on spirits in order to enable them to be traced from the distillery or rectifying establishment into the hands of the consumer or retail dealer; U. S. *v.* Bardenheier, 49 Fed. 846.

Rectified spirits are included in the term "distilled spirits." Boyd *v.* U. S., 3 Fed. Cas. No. 1,749, 14 Blatchf. 317.

50. U. S. *v.* Four Stand Casks, 5 Fed. 438; U. S. *v.* Cask of Gin, 3 Fed. 20; U. S. *v.* Mooney, 26 Fed. Cas. No. 15,800*a*, 14 Phila. (Pa.) 564, 26 Int. Rev. Rec. 267.

The regulations of the commissioner forbid the use of stand casks. Reg. No. 7.

51. U. S. *v.* Sandefuhr, 149 Fed. 49; U. S. *v.* Stege, 87 Fed. 553.

52. U. S. *v.* Three Barrels of Whisky, 77 Fed. 963, suit for forfeiture based on a regulation of commissioner.

53. U. S. *v.* 9 Casks, etc., of Distilled Spirits, 51 Fed. 191.

54. U. S. *v.* Seven Barrels of Whisky, 131 Fed. 806, forfeiture irrespective of the question of fraud.

55. U. S. *v.* 9 Casks, etc., of Distilled Spirits, 51 Fed. 191.

56. Perkins *v.* Schneider, 54 Minn. 368, 56 N. W. 39; U. S. *v.* One Package of Distilled Spirits, 88 Fed. 856; U. S. *v.* Fourteen Packages of Whisky, 66 Fed. 984, 14 C. C. A. 220, discrepancy caused by the addition of sugar.

57. U. S. *v.* Three Packages of Distilled Spirits, 14 Fed. 569.

Addition of coloring matter to packages of spirits see Three Packages of Distilled Spirits *v.* U. S., 129 Fed. 329, 63 C. C. A. 263 [*reversing* 125 Fed. 52]. New Trial. U. S. *v.* Three Packages of Distilled Spirits, Graf, claimant, (1905). Questions of law certified by United States circuit court of appeals to United States supreme court (1906).

forfeiture.[58] Where the wine and proof gallons had been reduced by age below the original gage, the mere addition of water is not a change of package requiring a wholesale liquor dealer's stamp to be placed thereon.[59] It is doubtful whether a regulation which permits the reduction of the proof of liquors by the addition of water after the stamps have been affixed is valid, but the government is estopped from claiming forfeiture for an act done in conformity therewith.[60]

c. Shipping Liquors Under False Brands. If spirits, fermented liquors, or wines are shipped under other than their proper names or brands, as known to the trade, they are forfeited to the government and the shipper is liable to a fine, whether they are shipped in small packages like bottles or jugs, or in boxes or barrels.[61] The penalty is incurred whether the offense is committed knowingly or unintentionally.[62] The purpose of the statute is to aid in preventing frauds on the revenue, and the fact that its enforcement may incidentally protect trade-marks and prevent private frauds does not affect its validity.[63] The statute being highly penal must be strictly construed.[64] The law does not forbid a shipment without any designation whatever.[65] The statute applies only to distillers, rectifiers, brewers, manufacturers of wine, and wholesale dealers in liquors or wines.[66]

d. Failure to Obliterate Stamps and Brands From Empty Packages. Failing to efface and obliterate marks, stamps, and brands on spirit casks when the spirits are drawn off is punishable by fine and imprisonment. It is not discretionary with the court to either fine or imprison. The offender must be both fined and imprisoned,[67] although the offense was committed without fraudulent intent or any purpose to violate the law.[68] The words "at the time of emptying such cask" do not require the effacing and obliterating of the stamp to be done *eo instanti* that the cask is emptied.[69] If the stamps, marks, and brands were being effaced and obliterated, at the time of seizure, the same were in contemplation of law effaced and obliterated.[70] A transportation company is liable for receiving empty stamped barrels which had contained spirits, and ignorance will not relieve the party from the penalty imposed.[71] It is unlawful to sell an empty barrel or package which has contained any article upon which internal revenue tax has been paid, without first destroying the stamp.[72]

58. Three Packages of Distilled Spirits, 14 Fed. 569.

59. Three Packages of Distilled Spirits *v.* U. S., 129 Fed. 329, 63 C. C. A. 263; U. S. *v.* Three Packages of Distilled Spirits, 125 Fed. 52; U. S. *v.* One Package of Distilled Spirits, 88 Fed. 856 (remark *obiter* as to addition of sugar); U. S. *v.* Fourteen Packages of Whisky, 66 Fed. 984, 14 C. C. A. 220; U. S. *v.* 64 Casks, etc., of Distilled Spirits, 51 Fed. 191; U. S. *v.* Bardenheier, 49 Fed. 846; U. S. *v.* Thirty-Two Barrels of Distilled Spirits, 5 Fed. 188 (the claimant had the right to reduce the proof by the addition of water; such addition does not constitute a change of package).

60. U. S. *v.* Three Packages of Distilled Spirits, 125 Fed. 52.

61. U. S. *v.* One Hundred and Thirty-Two Packages of Spirituous Liquors, 76 Fed. 364, 22 C. C. A. 228 [*reversing* 65 Fed. 980].

62. U. S. *v.* Twenty Boxes of Corn Liquor, 123 Fed. 135.

63. U. S. *v.* Campe, 89 Fed. 697; U. S. *v.* Loeb, 49 Fed. 636.

64. U. S. *v.* Twenty Boxes of Corn Whisky, 133 Fed. 910, 67 C. C. A. 214 [*affirming* 123 Fed. 135]; U. S. *v.* Stege, 87 Fed. 553.

65. U. S. *v.* Twenty Boxes of Corn Whisky, 133 Fed. 910, 67 C. C. A. 214 [*affirming* 123 Fed. 135] (bottled whisky shipped in boxes is not forfeited on account of being labeled "glass, this side up with care." That is merely a caution addressed to the carrier); U. S. *v.* Stege, 87 Fed. 553 (a keg of whisky packed inside a barrel not branded).

66. U. S. *v.* Twenty Boxes of Corn Liquor, 123 Fed. 135 [*affirmed* in 133 Fed. 910, 67 C. C. A. 214]. *Contra*, U. S. *v.* Campe, 89 Fed. 697, holding that the statute applies to all persons who ship, transport, or remove liquors or wines.

67. *In re* Quantity of Distilled Spirits, 20 Fed. Cas. No. 11,495, 3 Ben. 552, 11 Int. Rev. Rec. 3, 10 Int. Rev. Rec. 206.

68. Jones *v.* Townsend, 21 Fla. 431, 58 Am. Rep. 676; U. S. *v.* Bayaud, 16 Fed. 376, 21 Blatchf. 287; U. S. *v.* Adler, 24 Fed. Cas. No. 14,424, 21 Int. Rev. Rec. 316; U. S. *v.* Ulrici, 28 Fed. Cas. No. 16,594, 3 Dill. 532.

69. U. S. *v.* Buchanan, 9 Fed. 689, 4 Hughes 487, holding that the emptying of a cask without destroying the stamp by the wife of a retail liquor dealer, who acts for her husband, renders the latter liable for the penalty.

70. U. S. *v.* Ten Barrels And Three Kegs, 28 Fed. Cas. No. 16,444, 11 Int. Rev. Rec. 5.

71. U. S. *v.* Goodrich Transp. Co., 25 Fed. Cas. No. 15,228, 8 Biss. 224.

72. U. S. Rev. St. (1878) § 3455 [U. S. Comp. St. (1901) p. 2279]; U. S. *v.* Three Packages of Distilled Spirits, 125 Fed. 52.

e. Removing Stamps From Packages and Having in Possession Used Stamps. To have in possession stamps that have been removed from packages without, at the time of removal, having been defaced and destroyed is an offense, whether the packages contained domestic or imported spirits. In the offense of removal of stamps, without destroying them, fraudulent intent is not made an ingredient,[73] nor is it in the offense of having possession of stamps once used.[74]

XI. TAX ON FERMENTED LIQUORS, TOBACCO, SNUFF AND CIGARS, OLEOMARGARINE, AND OTHER ARTICLES.

A. Fermented Liquors — 1. Rate of Tax. The tax on beer, lager beer, ale, porter, and other similar fermented liquors is one dollar per barrel, containing not more than thirty-one gallons.[75] The word "gallon" means a wine gallon, the liquid measure containing two hundred and thirty-one cubic inches.[76] The tax must be paid by the brewer before removal from the brewery, and criminal liability incurred for not doing so does not depend upon actual intent to defraud.[77]

2. Brewer's Books. Books are required to be kept by the brewer which show or ought to show the actual production.[78] All malt liquor manufactured must be entered whether the brewer sells it to other brewers or to the public. The phrases "malt liquor" and "fermented liquor" are synonymous.[79] Materials purchased for the production of fermented liquor must also be entered. A book of general accounts kept by a brewer in conducting his business cannot be deemed such a book as the statute requires.[80]

3. Beer Stamps. Beer stamps are not articles of merchandise. They are merely evidence of payment of tax. The tax is paid when the brewer attaches the stamp to the barrels for the purpose of putting the produce upon the market.[81] A collector's duty is to keep on hand stamps equal to two months' sale thereof.

73. U. S. *v.* Bayaud, 16 Fed. 376, 21 Blatchf. 287.

74. Section 12, Act March 1, 1879; U. S. *v.* Spiegel, 116 U. S. 270, 6 S. Ct. 587, 29 L. ed. 664 (distinguishing between having in possession removed stamps, and having in possession used stamps); U. S. *v.* Ulrici, 28 Fed. Cas. No. 16,594, 3 Dill. 532.

75. **Acts imposing tax on fermented liquors and rates of tax.**— From September, 1862, to March 3, 1863 (Act July 1, 1862), one dollar per barrel. From March 3, 1863, to March 31, 1864 (Act March 3, 1863, which provided that the tax should be sixty cents per barrel to April 1, 1864. This tax expired by limitation April 1, 1864, and the tax of one dollar per barrel under the act of July 1, 1862, was again revived), sixty cents. From April 1, 1864, to June 13, 1898, one dollar. From June 14, 1898, to July 1, 1901 (Act June 13, 1898), two dollars. From July 1, 1901, to July 1, 1902 (Act March 2, 1901), one dollar and sixty cents. From July 1, 1902 (Act April 12, 1902, 32 U. S. St. at L. 96), one dollar. Under the act of July 1, 1862, a tax was laid of one dollar a barrel on beer "manufactured and sold, or removed for consumption and sale," after the first day of September in that year. Shaefer *v.* Ketchum, 21 Fed. Cas. No. 12,693, 6 Int. Rev. Rec. 4.

Maltina. — The manufacturer of a drink called "Maltina," similar to beer, lager beer, ale, and porter, made in part from one of those liquors and in part from another substance, is liable as a brewer. Davis *v.* Daugherty, 105 Fed. 769.

Lager beer is not "spirituous liquors." — Sarlls *v.* U. S., 152 U. S. 570, 14 S. Ct. 720, 38 L. ed. 556; *In re* McDonough, 49 Fed. 360.

76. Nichols *v.* Beard, 15 Fed. 435; 16 Op. Atty.-Gen. 359.

77. U. S. *v.* Torge, 28 Fed. Cas. No. 16,533, 15 Int. Rev. Rec. 11.

78. Dandelet *v.* Smith, 18 Wall. (U. S.) 642, 21 L. ed. 758.

Purpose of requirement. — The entries therein are intended for the mutual protection of the government and the manufacturer. The books are the best evidence to prove quantity of beer manufactured, and until it is shown that they cannot be produced, or that they do not contain the information required, resort cannot be had to the recollection of witnesses in a suit to recover taxes paid. Bergdoll *v.* Pollock, 95 U. S. 337, 24 L. ed. 512.

79. U. S. *v.* Dooley, 25 Fed. Cas. No. 14,984, 21 Int. Rev. Rec. 115.

80. U. S. *v.* Bellingstein, 24 Fed. Cas. No. 14,566, 16 Int. Rev. Rec. 92, entries in the German language.

81. Nunn *v.* William Gerst Brewing Co., 99 Fed. 939, 40 C. C. A. 190; Nassau Brewing Co. *v.* Moore, 97 Fed. 206; American Brewing Co. *v.* U. S., 33 Ct. Cl. 348.

Discount on stamps purchased.— Under the act of July 24, 1897, a brewer was required to pay the full face value of the stamps purchased, without deduction of the seven and one half per cent discount previously allowed. The act of June 13, 1898, increasing the tax to two dollars per barrel, restored the right

The law does not permit transactions for future delivery.[82] The stamps are the equivalent of money in the hands of the collector.[83] Stamps must be affixed upon a spigot-hole in the head of the package.[84]

4. PENALTIES AND FORFEITURES.[85] A brewer who neglects to keep the book required is liable to a penalty,[86] whether or not he intended to defraud.[87] False entries and fraudulent omissions are punishable by forfeiture, fine, and imprisonment.[88] Evading or attempting to evade the tax forfeits all the liquors made, and all the vessels, utensils, and apparatus used in making the same,[89] and renders the party liable to fine and imprisonment.[90]

B. Imitation Wines. A tax is imposed on imitation wine, but there is an exemption in case the article is made from grapes grown in the United States. If wine made from grapes grown in the United States is converted into an imitation or sparkling wine by the injection of carbonic acid gas it is not taxable.[91]

C. Tobacco, Snuff and Cigars — 1. TOBACCO — a. Tax. A tax of six cents per pound is imposed on all manufactured tobacco and snuff.[92] The law seeks to accomplish two objects: (1) The taxation of all forms of manufactured tobacco, including also the waste or scrap arising therefrom; and (2) the complete accounting by the manufacturer for all the product of his factory, including the waste.[93] This is an excise tax, and congress has the power to increase it, at least while the property is held for sale, and before it has passed into the hands of the consumer.[94] The rules and regulations prescribed by the commissioner relative to rebates on tobacco and snuff under the act of April 12, 1902, were authorized and were not unreasonable.[95] The tax is not payable until the tobacco is sold or removed for consumption or sale.[96]

to the discount. The right to the discount was repealed by Act March 2, 1901 (31 U. S. St. at L. 938). Nunn *v.* William Gerst Brewing Co., 99 Fed. 939, 40 C. C. A. 190; Nassau Brewing Co. *v.* Moore, 97 Fed. 206.

82. American Brewing Co. *v.* U. S., 33 Ct. Cl. 348.

83. Pond *v.* U. S., 111 Fed. 989, 49 C. C. A. 582.

84. U. S. *v.* McKechnie, 26 Fed. Cas. No. 15,682, 15 Int. Rev. Rec. 8.

85. For jurisdiction of proceedings to enforce penalties and forfeitures see *infra*, XV, D.

86. U. S. *v.* Bellingstein, 24 Fed. Cas. No. 14,566, 16 Int. Rev. Rec. 92.

87. U. S. *v.* Miller, 26 Fed. Cas. No. 15,775, 16 Int. Rev. Rec. 25.

Criminal intent is unnecessary. U. S. *v.* Foster, 25 Fed. Cas. No. 15,142, 2 Biss. 453, 19 Int. Rev. Rec. 5.

Prosecution should be by civil action and not by indictment. Fein *v.* U. S., 1 Wyo. 246. And see PENALTIES.

88. U. S. *v.* Obermeyer, 27 Fed. Cas. No. 15,907, 5 Ben. 541, 15 Int. Rev. Rec. 83.

89. U. S. *v.* Four Hundred and Sixty Barrels of Fermented Liquors, 25 Fed. Cas. No. 15,147, 11 Int. Rev. Rec. 11 (forfeiture for failure to stamp); U. S. *v.* Brewery Utensils, 24 Fed. Cas. No. 14,641, 13 Int. Rev. Rec. 95; U. S. *v.* Two Hundred and Fifty-Six Barrels of Beer, 28 Fed. Cas. No. 16,579, 2 Bond 395.

90. U. S. *v.* Schimer, 27 Fed. Cas. No. 16,229, 5 Biss. 195.

91. U. S. *v.* One Case, 27 Fed. Cas. No. 15,922, 6 Ben. 493, 17 Int. Rev. Rec. 181.

92. Act April 12, 1902 (32 U. S. St. at L. 96 [U. S. Comp. St. Suppl. (1905) p. 444]). The tax on manufactured tobacco and snuff was first required to be paid by stamps by Act July 20, 1868 (15 U. S. St. at L. 125). Where tobacco was stamped and removed in the forenoon of March 3, 1875, while the act of that date which increased the tax to twenty-four cents per pound was signed in the afternoon, the increase of tax did not apply. Burgess *v.* Salmon, 97 U. S. 381, 24 L. ed. 1104 [*affirming* 21 Fed. Cas. No. 12,262, 1 Hughes 356, 21 Int. Rev. Rec. 333].

Snuff is not granulated tobacco within the meaning of the act of June 6, 1872. Venable *v.* Richards, 105 U. S. 636, 26 L. ed. 1196 [*affirming* 28 Fed. Cas. No. 16,913, 1 Hughes 326, 22 Int. Rev. Rec. 299].

93. Seeberger *v.* Castro, 153 U. S. 32, 14 S. Ct. 766, 38 L. ed. 624; 17 Op. Atty.-Gen. 646.

94. Patton *v.* Brady, 184 U. S. 608, 22 S. Ct. 493, 46 L. ed. 713 (additional tax of three cents per pound on tobacco in the hands of dealers imposed by § 3, Act June 13, 1898); Gale *v.* Sauerwein, 9 Fed. Cas. No. 5,191, 1 Hughes 332 (increased duties under Act 1864, recovered back).

95. Powell *v.* U. S., 135 Fed. 881. Claim for rebate of tax on tobacco. Hyams *v.* U. S., 139 Fed. 997.

96. U. S. *v.* Quantity of Tobacco, 27 Fed. Cas. No. 16,106, 6 Ben. 68.

Removal from factory may be made constructively. Franks *v.* Robards Tobacco Co., 112 Fed. 784, 50 C. C. A. 527 [*affirming* 103 Fed. 276], where a manufacturer of tobacco, who had lawfully paid the tax thereon after April 14, 1898, and held the same for sale in his factory at the time of the passage of the

b. Bonds and Books of Tobacco Manufacturers. Tobacco manufacturers are required to give a bond before engaging in business. The sureties assume that the principal shall fulfil all the requirements of the statute.[97] Every manufacturer is required to keep a book in the form prescribed and to make entry therein of tobacco manufactured and removed. A manufacturer who transfers tobacco to a retail department where it is sold without making record thereof subjects himself to the penalty provided.[98]

c. Packages of Tobacco and Snuff. Tobacco and snuff must be put up by the manufacturer in prescribed packages.[99] Retail dealers in the course of their business can sell tobacco taken by them from wooden packages duly stamped, whether taken at or before the sale,[1] and can sell at retail to other retailers. The vendor is under no obligations to inform himself as to the purposes of a purchaser.[2]

d. Stamps. Stamps are a means of paying the tax when the manufacturer wishes to put his product on the market.[3] When stamps are destroyed in the hands of the manufacturer he is entitled to reimbursement by delivering other stamps, or by payment of the face value thereof in money.[4] The commissioner of internal revenue with the approval of the secretary of the treasury can change the form or style of any stamp or label under any provision of law relating to distilled spirits, tobacco, or cigars.[5] Where property required to have stamps placed thereon is sold by revenue officers upon distraint or forfeiture, the same not having been stamped as required, it is the duty of the officer selling to affix the stamps or cause them to be affixed.[6] Stamps when they are once attached to the tobacco and canceled can never be lawfully used again. They cease to have any separate and independent value, and that which they had previously becomes merged into that of the tobacco.[7]

e. Tobacco and Cigars For Export. Tobacco, snuff, and cigars may be removed for export to a foreign country without payment of tax, under regulations pre-

act of June 13, 1898, could not be required to pay an additional tax of six cents per pound thereon, instead of three cents, merely because the same had not been physically "removed" from his factory.

97. The liability does not cease at the expiration of license, i. e., special tax period. U. S. *v.* Truesdell, 28 Fed. Cas. No. 16,543, 2 Bond 78, 5 Int. Rev. Rec. 102; U. S. *v.* Barrowcliff, 24 Fed. Cas. No. 14,528, 3 Ben. 519.

98. U. S. *v.* Quantity of Tobacco, 27 Fed. Cas. No. 16,105, 5 Ben. 112, 3 Int. Rev. Rec. 158.

99. U. S. *v.* 288 Packages of Merry World Tobacco, 103 Fed. 453.

Packages containing articles other than those specified.— Congress has power to prescribe that a package of any article subject to tax, and upon which it requires the affixing of a stamp, shall contain only the article which is subject to tax. The law which prohibited packing in, attaching to, or connecting with packages of tobacco "any article or thing whatsoever," other than certain specified labels and stamps, was constitutional. Felsenheld *v.* U. S., 186 U. S. 126, 22 S. Ct. 740, 46 C. C. A. 1085 [*affirming* 103 Fed. 453]. The law as since amended provides that no packages of tobacco, snuff, cigars, or cigarettes, prescribed by law shall have packed in or attached to, or connected with them, nor affixed to, or printed upon them, any paper, or instrument purporting to be or represent a ticket, chance, share or interest in a lottery, nor any indecent or immoral picture, print, or words. Act July 1, 1902 (32 U. S. St. at L. 714 [U. S. Comp. St. Suppl. (1905). p. 430]).

1. U. S. *v.* Veazie, 6 Fed. 867.

2. U. S. *v.* Jenkinson, 15 Fed. 903.

3. American Tobacco Co. *v.* U. S., 32 Ct. Cl. 207.

4. U. S. *v.* American Tobacco Co., 166 U. S. 468, 17 S. Ct. 619, 41 L. ed. 1081 [*affirming* 32 Ct. Cl. 220], claim for reimbursement of stamps destroyed by fire. The effect of being reimbursed by insurance.

5. 17 Op. Atty.-Gen. 111; 16 Op. Atty.-Gen. 443; 15 Op. Atty.-Gen. 191. The portrait of living persons upon internal revenue stamps is not prohibited by U. S. Rev. St. (1878) § 3576 [U. S. Comp. St. (1901) p. 2392], but their exclusion therefrom is in consonance with its spirit. 14 Op. Atty.-Gen. 528.

6. 14 Op. Atty.-Gen. 370.

7. Jones *v.* Van Benthuysen, 103 U. S. 87, 26 L. ed. 477 [*affirmed* in 115 U. S. 464, 6 S. Ct. 128, 29 L. ed. 446].

Destruction of stamps.— When any stamped package containing tobacco or snuff is emptied the stamp must be destroyed. Quantity of Tobacco, 20 Fed. Cas. No. 11,500, 5 Ben. 407.

The possession of parts of stamps which have previously been used upon snuff jars does not constitute an offense within U. S. Rev. St. (1878) § 3376 [U. S. Comp. St. (1901) p. 2207]. U. S. *v.* Loup, 1 Fed. 696, 1 McCrary 168.

scribed.[8] The payment for the export stamp required to be affixed to packages was not the payment of a tax and the fee charged was not unconstitutional.[9]

f. Penalties and Forfeitures Relating to Tobacco. Penalties and forfeitures are imposed for removing manufactured tobacco from the factory without being put up in proper packages, and without having the proper stamps affixed thereon to indicate payment of the tax.[10] The absence of the proper stamp is *prima facie* evidence of non-payment of tax, and unstamped tobacco or snuff is subject to forfeiture.[11] If false brands are put on tobacco by a revenue officer without knowledge of the manufacturer, the criminality attaches to the officer and it is not a ground of forfeiture. The tobacco is forfeited for fraud of the manufacturer in the possession of an innocent purchaser.[12] One is liable to a penalty for having manufactured tobacco in his possession without being stamped, whether refuse or damaged or not, and irrespective of value.[13]

2. Cigars and Cigarettes — a. Regulations Authorized. Congress may prescribe any rule or regulation which is not in itself unreasonable, relative to the manufacture and handling of tobacco or cigars.[14] The commissioner has authority to prescribe regulations for the inspection of cigars and the collection of the tax thereon.[15] Cigars shall be put up in boxes properly stamped and branded with the number of the factory and number of the district and the state.[16] The place of manufacture of cigars should be kept separate and apart from the place of sale.[17] A manufacturer cannot retail cigars in his cigar factory.[18] There is no authority to permit the repacking of cigars in the same boxes without adding new stamps.[19] Cigars imported are required to pay the internal revenue tax in addition to the custom duty, and internal revenue stamps are required to be affixed to the boxes.[20] It is assumed that each manufacturer should produce at least one thousand cigars from each twenty-five pounds of unstemmed leaf tobacco used, and the commissioner is authorized to make assessments for

8. Ryan *v.* U. S., 19 Wall. (U. S.) 514, 22 L. ed. 172 (suit on transportation bond); U. S. *v.* Allen, 39 Fed. 100 (suit on export bond); U. S. *v.* Edwards, 25 Fed. Cas. No. 15,025, 17 Int. Rev. Rec. 126.

9. Turpin *v.* Burgess, 117 U. S. 504, 6 S. Ct. 835, 29 L. ed. 988; Pace *v.* Burgess, 92 U. S. 372, 23 L. ed. 657. Congress abolished all charge for the export stamp, by Act Aug. 8, 1882 (22 U. S. St. at L. 372 [U. S. Comp. St. (1901) p. 2212]). Manufactured tobacco shipped in bond from the manufactory and stored in an export bonded warehouse on June 14, 1872, was subject to the tax of thirty-two cents per pound prescribed by the act of July 20, 1868. Jones *v.* Blackwell, 100 U. S. 599, 25 L. ed. 752; 14 Op. Atty.-Gen. 110.

10. Lilienthal *v.* U. S., 97 U. S. 237, 24 L. ed. 901 (presumption of innocence, burden of proof); Boudinot *v.* U. S., 11 Wall. (U. S.) 616, 20 L. ed. 227; Quantity of Tobacco, 20 Fed. Cas. No. 11,500, 5 Ben. 407; U. S. *v.* Imsand, 26 Fed. Cas. No. 15,439, 1 Woods 581 (indictment for selling tobacco not stamped).

11. U. S. Rev. St. (1878) § 3373 [U. S. Comp. St. (1901) p. 2206]; *In re* Quantity of Tobacco, 20 Fed. Cas. No. 11,500, 5 Ben. 407; U. S. *v.* One Hundred and Seventeen Packages of Plug Tobacco, 27 Fed. Cas. No. 15,936, 10 Ben. 343.

12. U. S. *v.* Eight Hundred Caddies of Tobacco, 25 Fed. Cas. No. 15,036, 2 Bond 305.

13. U. S. *v.* Keyes, 10 Fed. 876.

14. Felsenheld *v.* U. S., 186 U. S. 126, 22 S. Ct. 740, 46 L. ed. 1085 [*affirming* 103 Fed. 453].

Cigarettes are held to be cigars. U. S. *v.* Sapinkow, 90 Fed. 654. All rolls of tobacco, or any substitute therefor, wrapped with tobacco, shall be classed as cigars, and all rolls or tobacco, or any substitute therefor, wrapped in paper or any substance other than tobacco, shall be classed as cigarettes. Section 10 of the Act of July 24, 1897.

"Jumbo cigars" or cigars of unusual size are to be classified as manufactured tobacco. — The fact that they could be smoked did not altogether determine their character. D'Estrinoz *v.* Gerker, 43 Fed. 285.

15. Ludloff *v.* U. S., 108 U. S. 176, 2 S. Ct. 475, 27 L. ed. 693.

16. Jackson *v.* U. S., 21 Fed. 35; U. S. *v.* Seventy-Six Thousand One Hundred and Twenty-five Cigars, 18 Fed. 147.

17. Ludloff *v.* U. S., 108 U. S. 176, 2 S. Ct. 475, 27 L. ed. 693; 16 Op. Atty.-Gen. 89; U. S. *v.* Neid, 27 Fed. Cas. No. 15,860, 13 Int. Rev. Rec. 28, 8 Phila. (Pa.) 169.

18. Crisp *v.* Proud, 6 Fed. Cas. No. 3,392, 4 Hughes 57, 24 Int. Rev. Rec. 340.

19. U. S. *v.* Four Thousand One Hundred and Seventy-Five Cigars, 25 Fed. Cas. No. 15,154, 25 Int. Rev. Rec. 132.

20. Nichols *v.* U. S., 106 Fed. 672, 46 C. C. A. 405; Slaight *v.* Hedden, 39 Fed. 103.

Cigars imported from the Philippines are not imported from a foreign country. 24 Op. Atty.-Gen. 120.

deficiencies on this basis, the presumption being that the cigars have been manufactured and removed, and not reported.[21]

b. Penalties and Forfeitures For Offenses Relating to Cigars.[22] Dealers, as well as manufacturers, are liable for selling or offering for sale cigars not properly boxed and stamped.[23] Affixing to a box containing domestic cigars a stamp in the similitude of a customs stamp is an indictable offense, and it is not necessary in the indictment to aver an intent to defraud the United States.[24] Every person who buys, receives, or has in possession cigars on which the tax to which they are liable has not been paid is liable to a penalty.[25] Cigars not properly marked and branded are forfeited wherever found,[26] even in the hands of innocent purchasers.[27] A cigar manufacturer who carries on the business unlawfully, in addition to other penalties, forfeits all materials, machinery, tools, etc., found in his possession, or used in his business, together with his estate or interest in the building and the tract of ground on which the factory was located.[28]

D. Oleomargarine — 1. Rate of Tax. Oleomargarine artificially colored is required to pay a tax of ten cents per pound; and oleomargarine free from artificial coloration that causes it to look like butter of any shade of yellow, one fourth of one cent per pound.[29] Oleomargarine colored yellow by a small amount of palm oil serving no purpose other than coloration is artificially colored and is subject to tax at the higher rate.[30] The law is intended to apply only to products made in conscious imitation of butter.[31]

2. Object and Constitutionality of the Law. The primary object of the law was to raise revenue, and the courts in construing it will not inquire into the

21. U. S. *v.* Appel, 24 Fed. Cas. No. 14,462, 22 Int. Rev. Rec. 169.

22. For jurisdiction of proceedings to enforce penalties and forfeitures see *infra*, XV, D.

23. U. S. *v.* Edwards, 25 Fed. Cas. No. 15,025, 17 Int. Rev. Rec. 126; U. S. *v.* Mena, 29 Int. Rev. Rec. 190.

24. U. S. *v.* Jacoby, 26 Fed. Cas. No. 15,462, 12 Blatchf. 491.

25. U. S. Rev. St. (1878) § 3397, amended by 20 U. S. St. at L. 348 [U. S. Comp. St. (1901) p. 2222]; Nichols *v.* U. S., 106 Fed. 672, 46 C. C. A. 405, where a passenger entering the United States can bring in free of duty, as personal effects, not exceeding fifty cigars; and one to whom the cigars have been given may retain the same in his possession unstamped, or give them away without being liable to the penalty.

A conviction can be had on proof alone of having unstamped cigars in possession. U. S. *v.* Millard, 26 Fed. Cas. No. 15,769, 13 Blatchf. 534.

26. Jackson *v.* U. S., 21 Fed. 35, 30 Int. Rev. Rec. 279 (cigars removed from factory without stamping into each box the number of the manufactory and the number of the district and state; the natural inference is that the cigars were removed from the factory in the condition in which they were found); U. S. *v.* Woolheim. 28 Fed. Cas. No. 16,761, 11 Int. Rev. Rec. 78.

Destruction of forfeited cigars.— When forfeited cigars, offered for sale, will not bring a price equal to the taxes due thereon, such goods shall not be sold for consumption in the United States, and the commissioner is authorized to order their destruction. The term "taxes," thus used, does not include import duties. U. S. *v.* Fifty-nine Demijohns Aguadiente and Four Barrels of Cigarettes, 39 Fed. 401.

27. U. S. *v.* Seventy-Six Thousand One Hundred and Twenty-Five Cigars, 18 Fed. 147, boxes of cigars upon which the number of the factory had not been impressed.

28. U. S. *v.* 246½ Pounds of Tobacco, 103 Fed. 791.

Mortgaged property.— The existence of a chattel mortgage on materials or other personal property in a cigar factory, remaining in the possession of the manufacturer and used by him in his business, will not prevent their forfeiture on account of the illegal acts of the manufacturer. U. S. *v.* 246½ Pounds of Tobacco, 103 Fed. 791.

Leased property.— Machines used in violation of law, although leased from a third person ignorant of such violation, are subject to forfeiture. The owner is held to have acted with the knowledge that the property would be subject to forfeiture if the business was unlawfully conducted, and to have taken the risk. U. S. *v.* Two Hundred and Twenty Patented Machines, 99 Fed. 559.

29. Act May 9, 1902 (32 U. S. St. at L. 193 [U. S. Comp. St. Suppl. (1905) p. 432]). If butter artificially colored is used as an ingredient, the product is taxable at ten cents per pound. McCray *v.* U. S., 195 U. S. 27, 24 S. Ct. 769, 49 L. ed. 78. Under the previous law oleomargarine was taxed at a uniform rate of two cents per pound. Act Aug. 2, 1886 (24 U. S. St. at L. 209 [U. S. Comp. St. (1901) p. 2228]).

30. Cliff *v.* U. S., 195 U. S. 159, 25 S. Ct. 1, 49 L. ed. 139.

31. Braun *v.* Coyne, 125 Fed. 331, holding that a food product known as "Fruit of the

motives which led to its enactment.[32] One of the purposes was to prevent the sale of oleomargarine as and for butter.[33] The law is not an infringement upon the police powers of the state and is constitutional,[34] although the effect may be to repress the manufacture of artificially colored oleomargarine.[35]

3. Regulations. The law authorizes the commissioner of internal revenue with the approval of the secretary to make regulations describing the marks, stamps, and brands to be used. This involves no unconstitutional delegation of power.[36] The authority given to the commissioner to make all needful regulations for carrying into effect the act does not authorize the imposition of a penalty by a regulation where congress imposed none in the act.[37]

4. Retail Dealers' Packages. Retail dealers must sell oleomargarine only from the original stamped packages, and pack it in suitable packages.[38]

5. Penalties and Forfeitures.[39] Selling oleomargarine in packages not marked in accordance with the regulations is an indictable offense.[40] Defrauding or attempting to defraud the United States of the tax forfeits the factory. The more drastic measures applicable to distilled spirits, passed prior to the oleomargarine law, do not apply.[41]

E. Renovated Butter. The law imposes a tax on renovated or process butter of one fourth of one cent per pound.[42] A regulation which prohibits a dealer receiving or handling such butter after it has been duly inspected, marked, and branded, and shipped from the factory, from obliterating the marks or brands thereon finds no warrant in the statute, and there is nothing in the law which will support an indictment or information for the violation of such a regulation.[43]

XII. TAX ON BANKS AND BANKERS.

A. Tax on Circulation. The tax on circulation of banks of one twelfth of one per cent each month, although not repealed, is practically obsolete except as

Meadow," composed of leaf lard and beef fat, bathed in salt ice water to take away the fat and lard odor, but not having any ingredient to give it a butter flavor, or coloring matter to give it a butter appearance, although put up and sold in pound packages, is not taxable as oleomargarine.

32. Prather *v.* U. S., 9 App. Cas. (D. C.) 82; *In re* Kollock, 165 U. S. 526, 17 S. Ct. 444, 41 L. ed. 813.

33. Cliff *v.* U. S., 195 U. S. 159, 25 S. Ct. 1, 49 L. ed. 139; 18 Op. Atty.-Gen. 489. It was not intended as a regulation of commerce. Plumley *v.* Com., 155 U. S. 461, 15 S. Ct. 154, 39 L. ed. 223.

34. *In re* Kollock, 165 U. S. 526, 17 S. Ct. 444, 41 L. ed. 813; Dougherty *v.* U. S., 108 Fed. 56, 47 C. C. A. 195 [*affirming* 101 Fed. 439].

35. McCray *v.* U. S., 195 U. S. 27, 24 S. Ct. 769, 49 L. ed. 78.

36. Prather *v.* U. S., 9 App. Cas. (D. C.) 82; *In re* Kollock, 165 U. S. 526, 17 S. Ct. 444, 41 L. ed. 813; Dougherty *v.* U. S., 108 Fed. 56, 47 C. C. A. 195, the regulations being matters of detail, the authority to make them can be conferred by congress upon the officers named. Wilkins *v.* U. S., 96 Fed. 837, 37 C. C. A. 588.

37. U. S. *v.* Eaton, 144 U. S. 677, 12 S. Ct. 764, 36 L. ed. 591; Com. *v.* Crane, 158 Mass. 218, 33 N. E. 388.

38. U. S. *v.* Dougherty, 101 Fed. 439, holding that a suitable package may be such as the dealer himself may reasonably find to be convenient and proper according to the usages and demands of his trade.

Removing the lid of an original package so that a prospective buyer may examine the contents is not such a breaking of the package as will destroy its original character. *In re* McAllister, 51 Fed. 282.

39. **For jurisdiction of proceedings to enforce penalties and forfeitures** see *infra*, XV, D.

40. Dougherty *v.* U. S., 108 Fed. 56, 47 C. C. A. 195 [*affirming* 101 Fed. 439]; U. S. *v.* Ford, 50 Fed. 467 [*distinguishing* U. S. *v.* Eaton, 144 U. S. 677, 12 S. Ct. 764, 36 L. ed. 591].

41. U. S. *v.* One Bay Horse and One Buggy, 128 Fed. 207. The oleomargarine act is a complete system by itself, and certain general sections of the internal revenue law were made to apply from which it has been inferred that those not mentioned were excluded under the rule, "*Expressio unius est exclusio alterius.*" *In re* Kearns, 64 Fed. 481.

42. Act May 9, 1902 (32 U. S. St. at L. 193 [U. S. Comp. St. Suppl. (1905) p. 432].

43. U. S. *v.* Bohl, 125 Fed. 625. *Contra*, U. S. *v.* Green, 137 Fed. 179, holding that the removal of stamps and caution notices attached to original packages of renovated butter which is the subject of interstate commerce constitutes an offense under the law.

to national banks, as the ten per cent tax on notes used for circulation is prohibitory and prevents circulation of other notes.[44]

B. Tax of Ten Per Cent on Notes Used For Circulation. Every person and corporation other than a national banking association is required to pay a tax of ten per cent on their own notes used for circulation and paid out by them, and every such person or corporation, and every national banking association is required to pay a tax of ten per cent on the notes of any town, city, or municipal corporation and of any person, firm, or corporation other than a national banking association, used for circulation and paid out by them.[45] This tax is not a direct tax and is not repugnant to the constitution. The tax is laid, not on the notes, but on their use as a circulating medium.[46] It is part of the system adopted by congress to provide a currency for the country, and to restrain the circulation of any notes not issued under its own authority.[47] The tax is limited to such negotiable promissory notes as carry title in their circulation from hand to hand. They must be payable in money.[48] The tax on state bank circulation applies only to promissory notes and not to other negotiable or quasi-negotiable paper. Cases of doubt should be resolved in favor of exemption.[49] If the maker of the note did not intend it to be used as a substitute for money he is not liable to the tax if others so use it without his approval.[50] Where notes circulate as money, and when redeemed are reissued, every issue of the notes is taxable.[51] Banks in the United States are liable for the tax on Canadian bank-notes paid out.[52]

C. Repealed Taxes — 1. Tax on Deposits. The tax on deposits and capital

44. U. S. Rev. St. (1878) § 3408. The tax on circulation of national banks is paid to the treasurer of the United States. U. S. Rev. St. (1878) § 5214 [U. S. Comp. St. (1901) p. 3500]. See also Twin City Bank *v.* Nebeker, 167 U. S. 196, 17 S. Ct. 766, 42 L. ed. 134.

45. U. S. Rev. St. (1878) §§ 3412, 3413, superseded by 18 U. S. St. at L. 311 [U. S. Comp. St. (1901) p. 2249]. All the notes of any person, state bank, or state banking association, used for circulation, paid out by a state bank, are subject to a tax of ten per cent. 14 Op. Atty.-Gen. 97.

46. Merchants Nat. Bank *v.* U. S., 101 U. S. 1, 25 L. ed. 979 (notes of the City of Little Rock, Ark., paid out by a national bank); Veazie Bank *v.* Fenno, 8 Wall. (U. S.) 533, 19 L. ed. 482; Deposit Sav. Assoc. *v.* Marks, 7 Fed. Cas. No. 3,812, 3 Woods 553, 23 Int. Rev. Rec. 241 (banks are required to pay the tax whether the notes paid out are their own issue or not).

47. Hollister *v.* Zion's Co-operative Mercantile Inst., 111 U. S. 62, 4 S. Ct. 263, 28 L. ed. 352; Merchants Nat. Bank *v.* U. S., 101 U. S. 1, 25 L. ed. 979. The tax of ten per cent on state bank circulation was designed to drive all such circulation out of existence. Remark *obiter* in Edye *v.* Robertson, 112 U. S. 580, 596, 5 S. Ct. 247, 28 L. ed. 798.

48. Hollister *v.* Zion's Co-operative Mercantile Inst., 111 U. S. 62, 4 S. Ct. 263, 28 L. ed. 352; U. S. *v.* White, 19 Fed. 723, 22 Blatchf. 82 (the tax is in lieu of the tax of one twelfth of one per cent on circulation imposed by U. S. Rev. St. (1878) § 3408): *In re* Aldrich, 16 Fed. 369; U. S. *v.* Wilson, 106 U. S. 620, 2 S. Ct. 85, 27 L. ed. 310 (certificates of indebtedness issued by a person or a corporation are not taxable as "circulation" unless intended to circulate as money).

Notes payable in merchandise are not taxable. Hollister *v.* Zion's Co-operative Mercantile Inst., 111 U. S. 62, 4 S. Ct. 263, 28 L. ed. 352; Willis *v.* Belleville Nail Co., 111 U. S. 62, 4 S. Ct. 265, 28 L. ed. 354; 21 Op. Atty.-Gen. 337, silver bullion.

49. 20 Op. Atty.-Gen. 681, clearing-house certificates are not notes on which the tax is imposed.

50. 19 Op. Atty.-Gen. 98, ice tickets not taxable.

Notes or certificates issued to employees by a railroad company on account of wages were not "used for a circulation," although used by those to whom they were issued to discharge their debts or to purchase subsistence. That fact did not affect their character. Philadelphia, etc., R. Co. *v.* Pollock, 19 Fed. 401.

Evidence of intent to use for circulation.— Although notes are not taxable as circulation unless the person issuing them intends them for circulation, his knowledge at the time he paid them out that they would be used for circulation is evidence from which an intent to pay them out for that purpose may be inferred. It was fairly left to the jury to determine whether the notes were used for circulation and were issued for that purpose. U. S. *v.* Warrick, 25 Fed. 138.

51. U. S. *v.* Warrick, 25 Fed. 138.

52. 21 Op. Atty.-Gen. 558; 20 Op. Atty.-Gen. 534. But not on those of the Dominion of Canada. 34 Int. Rev. Rec. 61, 77. Certificates issued by the state of Alabama not taxable. 12 Op. Atty.-Gen. 176 [*overruled* in Merchants Nat. Bank *v.* U. S., 101 U. S. 1, 25 L. ed. 979].

of banks under former acts[53] was repealed by the act of March 3, 1883.[54] The tax was a tax on the corporation.[55] Deposits belonging to a state and subject to drafts of the state were not exempted. The tax did not fall upon the state.[56] Savings banks were exempt from the tax on deposits in certain cases.[57]

2. TAX ON CAPITAL. Congress did not intend that the question of taxation upon capital employed in the business of banking should depend upon the mere name given to such business, either by those engaged in it or by others.[58] Capital invested in foreign countries was subject to tax.[59] Foreign banks doing business in the United States were required to pay taxes on capital employed.[60] The term "capital" had its ordinary signification. It was money or property appropriated to the purpose of the business analogous to the capital in a corporation denominated "capital stock."[61] The whole capital beyond the amount invested in United States bonds was assessable whether employed to its full extent in business or not.[62]

3. SPECIAL TAX ON BANKERS (WAR REVENUE ACT). A special tax was imposed on bankers by the act of June 13, 1898 (War Revenue Act).[63] The amount of tax was based on the capital employed and surplus was treated as capital. The word "surplus" was not restricted to the meaning given it in previous national bank legislation, as covering only so much of the surplus profits as the board of directors had set apart for a reserve capital, but was used in its ordinary sense and included undivided profits.[64]

XIII. INTERNAL REVENUE OFFICERS.[65]

A. Who Are Officers. Officers are appointed by the president, by and with the consent of the senate, or by a court of law or the head of a department, and

53. Act June 30, 1864 (13 U. S. St. at L. 277, § 110); Act July 13, 1866 (14 U. S. St. at L. 98, § 9); Act June 6, 1872 (17 U. S. St. at L. 233, § 37), embodied in U. S. Rev. St. (1878) § 3408; Metropolis Bank *v.* Weber, 41 Fed. 413; Clark *v.* Gilbert, 5 Fed. Cas. No. 2,822, 5 Blatchf. 330, 4 Int. Rev. Rec. 42.

54. 22 U. S. St. at L. 488 [U. S. Comp. St. (1901) p. 2247]; Selden *v.* Equitable Trust Co., 94 U. S. 419, 24 L. ed. 249 [*affirming* 8 Fed. Cas. No. 4,508] (definition of bankers); U. S. *v.* Farmers' L. & T. Co., 25 Fed. Cas. No. 15,070, 3 Int. Rev. Rec. 62 (loan and trust companies were subject to the tax).

55. Oulton *v.* German Sav., etc., Soc., 17 Wall. (U. S.) 109, 21 L. ed. 618; German Sav. Bank *v.* Archbold, 10 Fed. Cas. No. 5,364, 15 Blatchf. 398, 24 Int. Rev. Rec. 413.

56. Manhattan Co. *v.* Blake, 148 U. S. 412, 13 S. Ct. 640, 37 L. ed. 504.

57. German Sav. Bank *v.* Archbold, 104 U. S. 708, 26 L. ed. 901 [*reversing* 10 Fed. Cas. No. 5,364, 15 Blatchf. 398, 24 Int. Rev. Rec. 413]; Oulton *v.* German Sav., etc., Soc., 17 Wall. (U. S.) 109, 21 L. ed. 618 [*reversing* 10 Fed. Cas. No. 5,362, 1 Sawy. 695, 14 Int. Rev. Rec. 138] (an entry made in a depositor's pass-book of a deposit or payment is a "certificate of deposit," or "check or draft," within the law); New York Sav. Bank *v.* Field, 3 Wall. (U. S.) 495, 18 L. ed. 207; 15 Op. Atty.-Gen. 452.

Constitutionality of tax.—The fact that deposits in savings banks not exceeding two thousand dollars were exempt did not render the law unconstitutional on the ground that the tax was not uniform. German Sav. Bank *v.* Archbold, 10 Fed. Cas. No. 5,364, 15 Blatchf. 398, 24 Int. Rev. Rec. 413 [*reversed* on another point in 104 U. S. 708, 26 L. ed. 901].

58. Nevada Bank *v.* Sedgwick, 104 U. S. 111, 26 L. ed. 703.

59. U. S. *v.* Montreal Bank, 21 Fed. 236, the capital of a branch bank was the amount allotted to it.

60. Clark *v.* Bailey, 5 Fed. Cas. No. 2,814, 12 Blatchf. 156, 19 Int. Rev. Rec. 207.

61. Richmond *v.* Blake, 132 U. S. 592, 10 S. Ct. 204, 33 L. ed. 481. The term "capital" employed by a banker in the business of banking did not include money borrowed from time to time temporarily in the ordinary course of business. Bailey *v.* Clark, 21 Wall. (U. S.) 284, 22 L. ed. 651 [*affirming* 19 Fed. Cas. No. 2,814, 14 Blatchf. 156, 19 Int. Rev. Rec. 207]. It meant capital as fixed by the charter, and did not include the surplus earnings. Mechanics', etc., Bank *v.* Townsend, 16 Fed. Cas. No. 9,381, 5 Blatchf. 315, 3 Int. Rev. Rec. 143.

62. 15 Op. Atty.-Gen. 371; 15 Op. Atty.-Gen. 218 ("capital" and "capital employed" included such portion of the capital as is invested in a banking house); 16 Op. Atty.-Gen. 187 (capital invested in United States bonds).

Tax on dividends see *supra*, VI, A, 2, b.

63. Repealed on and after July 1, 1902. Act April 12, 1902 (32 U. S. St. at L. 96 [U. S. Comp. St. Suppl. (1905) p. 444]).

64. Leather Manufacturers' Nat. Bank *v.* Treat, 128 Fed. 262, 62 C. C. A. 644 [*affirming* 116 Fed. 774]. *Contra*, 23 Op. Atty.-Gen. 341; 22 Op. Atty.-Gen. 320.

65. See, generally, OFFICERS.

unless so appointed they are not strictly speaking officers of the United States.[66] Detectives employed by the commissioner of internal revenue are not officers.[67] A clerk of a supervisor of internal revenue is not an officer, within the meaning of the law requiring every person elected or appointed to any office, whether of honor or profit, to take a certain prescribed oath.[68]

B. Presumptions as to Appointment and Performance of Duty. The law presumes that persons acting in a public office have been duly appointed, and are acting with authority,[69] and that all public officers perform their proper official duties until the contrary appears.[70]

C. Holding Two Offices. One person may hold two offices or two separate employments, provided their duties are not incompatible, and he is entitled to receive compensation for both;[71] but a person holding one office whose pay is fixed by law or regulation cannot be allowed to receive additional pay or compensation for performing additional duties, or duties properly belonging to another office, unless authorized by law.[72] In construing statutes prohibiting dual or extra compensation courts have aimed to carry out the legislative intent by giving them sufficient flexibility not to injure the public service and sufficient rigidity to prevent executive abuse.[73]

D. Official Bonds in General. The giving of the bond is a mere ministerial act for the security of the government, and not a condition precedent to the authority of an officer whose appointment is complete to act in performance of the duties of the office.[74] The form of bonds is impliedly left to be fixed by the officers who are to approve them.[75] The validity of a bond, so far as it depends upon the capacity of the parties to make it, is to be governed by the law of the place where it is made.[76] Defective statutory bonds are sometimes sustained as common-law obligations. A bond is good at common law if entered into for a valuable consideration and not repugnant to any statute or the general policy of the law.[77] A bond executed by sureties with the date left blank authorizes the

66. U. S. *v.* Mouat, 124 U. S. 303, 8 S. Ct. 505, 31 L. ed. 463; U. S. *v.* Germaine, 99 U. S. 508, 25 L. ed. 482. Congress may use the word "officer" in a more popular sense, and the courts in construing an act of congress must ascertain its meaning. U. S. *v.* Hendee, 124 U. S. 309, 8 S. Ct. 507, 31 L. ed. 465.

67. 13 Op. Atty.-Gen. 228.

68. Hedrick *v.* U. S., 16 Ct. Cl. 88.

69. Lerch *v.* Snyder, 112 Pa. St. 161, 4 Atl. 336 (judicial notice will be taken of the official character and the official acts of the collector and his deputy); Keeley *v.* Sanders, 99 U. S. 441, 25 L. ed. 327.

70. *In re* Meador, 16 Fed. Cas. No. 9,375, 1 Abb. 317, 10 Int. Rev. Rec. 74; *In re* Twenty-Eight Cases of Wine, 24 Fed. Cas. No. 14,281, 2 Ben. 63, 7 Int. Rev. Rec. 4; U. S. *v.* Black, 24 Fed. Cas. No. 14,600, 11 Blatchf. 538, 19 Int. Rev. Rec. 116. The presumption that officers have done their duty is a legal presumption, but does not supply proof of substantial facts. U. S. *v.* Ross, 92 U. S. 281, 23 L. ed. 707.

71. U. S. *v.* Saunders, 120 U. S. 126, 7 S. Ct. 467, 30 L. ed. 594 [*affirming* 21 Ct. Cl. 408]; Hartson *v.* U. S., 21 Ct. Cl. 451 (there is nothing in the statutes to deprive a deputy collector of internal revenue of his salary because he holds the office of inspector of tobacco, compensated by fees from those employing him); Hedrick *v.* U. S., 16 Ct. Cl. 88 (the act of June 20, 1874, restricting officers to salary or compensation allowed by law, relates only to civil officers, and does not extend to the clerk of a supervisor of internal revenue); 24 Op. Atty.-Gen. 12; 16 Op. Atty.-Gen. 7; 10 Op. Atty.-Gen. 446 (collector of internal revenue and commissioner of police); 9 Op. Atty.-Gen. 507.

72. Hall *v.* U. S., 91 U. S. 559, 566, 23 L. ed. 446, 448; Stansbury *v.* U. S., 8 Wall. (U. S.) 33, 19 L. ed. 315 (an agreement by the secretary of the interior to pay a clerk in his department for services rendered to the government by labors abroad, the clerk still holding his place and drawing his pay as clerk, held void); Talbot *v.* U. S., 10 Ct. Cl. 426 (one can hold two offices but can receive salary for but one); 15 Op. Atty.-Gen. 308.

73. Landram *v.* U. S., 16 Ct. Cl. 74.

74. Pickering *v.* Day, 3 Houst. (Del.) 474, 95 Am. Dec. 291; Glavey *v.* U. S., 182 U. S. 595, 21 S. Ct. 891, 45 L. ed. 1247.

75. 18 Op. Atty.-Gen. 274.

76. U. S. *v.* Garlinghouse, 25 Fed. Cas. No. 15,189, 4 Ben. 194, 11 Int. Rev. Rec. 11. A bond taken under an act of congress is not governed by the local law, but is, in contemplation of law, given at the seat of the federal government. U. S. *v.* Stephenson, 27 Fed. Cas. No. 16,386, 1 McLean 462.

77. Jessup *v.* U. S., 106 U. S. 147, 1 S. Ct. 74, 27 L. ed. 85 (bond for stamps furnished match manufacturer); U. S. *v.* Rogers, 28 Fed. 607; Chadwick *v.* U. S., 3 Fed. 750;

principal to fill in the date, and is valid in the hands of the government.[78] Executive officers cannot make regulations which enlarge or restrict the liability of an officer on his bond.[79] Official bonds are to be renewed every four years, or oftener if deemed necessary.[80] The liability of the obligors in the bond of a federal officer is joint and several.[81]

E. Commissioner of Internal Revenue and His Duties— 1. In General. The commissioner of internal revenue has general superintendence of the collection of internal revenue taxes, and of the enforcement of internal revenue laws.[82] His acts in matters relating to the revenue are presumed to be the acts of the secretary of the treasury.[83] His duties as assessor are in their nature judicial,[84] also his functions, in respect to appeals and claims for refunding taxes.[85]

2. Authority to Make Regulations. It is fundamental that the law-making power is exclusively in congress and cannot be delegated to any other department;[86] but regulations made by an executive department in pursuance of authority delegated by congress have the force of law,[87] and are of as binding force as if incorporated in the body of the act.[88] Regulations made by the commissioner pursuant to law have the force of law, and the courts will take judicial notice of their existence and provisions.[89] The rules promulgated by the commissioner may be proved in like manner as the laws of foreign states are proved.[90] The commissioner is authorized to make regulations to carry out the law, or to make regulations which become necessary by reason of changes in the law.[91] Regulations in respect to the assessment and collection of internal revenue,[92] prohibiting collectors from producing official records in court in behalf of liti-

Greathouse *v.* Dunlap, 10 Fed. Cas. No. 5,742, 3 McLean 303 (a bond is good at common law if made without authority of a statute. Where the form is prescribed by statute a departure from its directions does not render it invalid).

78. U. S. *v.* Halsted, 26 Fed. Cas. No. 15,287, 6 Ben. 205. A bond was held valid against the sureties, notwithstanding their testimony that they signed on condition that another signature be obtained. *In re* Mayo, 16 Fed. Cas. No. 9,353, 4 Hughes 382. Where a printed form had been signed by sureties and the blanks filled out subsequently without express authority from them, and the same was accepted by the United States, the bond was held invalid as to the sureties. U. S. *v.* Nelson, 27 Fed. Cas. No. 15,862, 2 Brock. 64.

79. Meads *v.* U. S., 81 Fed. 684, 26 C. C. A. 229.

80. Act March 2, 1895 (28 U. S. St. at L. 764). Where an officer renews his bond during the same term of office, the new bond does not operate to release the sureties on the first bond from liability for future transactions, but the sureties on the old and new bonds are jointly and severally liable therefor. 5 Comp. Dec. 918.

Collector's bonds see *infra*, XIII, H.

81. Soule *v.* U. S., 100 U. S. 8, 25 L. ed. 536; Pond *v.* U. S., 111 Fed. 989, 49 C. C. A. 582.

82. U. S. Rev. St. (1878) § 321 [U. S. Comp. St. (1901) p. 186; 22 Op. Atty.-Gen. 568. He has the right to order seizures. Agnew *v.* Haymes, 141 Fed. 631.

83. Soule *v.* U. S., 100 U. S. 8, 25 L. ed. 536; *In re* Huttman, 70 Fed. 699.

84. Delaware R. Co. *v.* Prettyman, 7 Fed. Cas. No. 3,767, 17 Int. Rev. Rec. 99; U. S. *v.* Black, 24 Fed. Cas. No. 14,600, 11 Blatchf. 538, 19 Int. Rev. Rec. 116; U. S. *v.* Hodson, 26 Fed. Cas. No. 15,376, 14 Int. Rev. Rec. 100. Or quasi-judicial. Clinkenbeard *v.* U. S., 21 Wall. (U. S.) 65, 22 L. ed. 477.

85. Corning *v.* U. S., 34 Ct. Cl. 271.

86. Dunlap *v.* U. S., 33 Ct. Cl. 135.

87. *Ex p.* Reed, 100 U. S. 13, 25 L. ed. 538; U. S. *v.* Eliason, 16 Pet. (U. S.) 291, 10 L. ed. 968; Stotesbury *v.* U. S., 23 Ct. Cl. 285; Harvey *v.* U. S., 3 Ct. Cl. 38.

88. U. S. *v.* Barrows, 24 Fed. Cas. No. 14,529, 1 Abb. 351, 10 Int. Rev. Rec. 86. They have the force of law in a limited sense. Meads *v.* U. S., 81 Fed. 684, 26 C. C. A. 229.

89. *In re* Kollock, 165 U. S. 526, 17 S. Ct. 444, 41 L. ed. 813; Wilkins *v.* U. S., 96 Fed. 837, 37 C. C. A. 588. See also Prather *v.* U. S., 9 App. Cas. (D. C.) 82.

The courts take judicial notice of the regulations of the executive departments promulgated by authority of law. Peters *v.* U. S., 2 Okla. 116, 33 Pac. 1031; Caha *v.* U. S., 152 U. S. 211, 14 S. Ct. 513, 38 L. ed. 415; Sprinkle *v.* U. S., 141 Fed. 811; U. S. *v.* Zemel, 137 Fed. 989.

90. State *v.* Davis, 69 N. H. 350, 41 Atl. 267.

91. U. S. Rev. St. (1878) § 3447 [U. S. Comp. St. 1901) p. 2276]; U. S. *v.* Two Hundred Barrels of Whiskey, 95 U. S. 571, 24 L. ed. 491; Spreckels Sugar-Refining Co. *v.* McClain, 109 Fed. 76. The commissioner has power to make regulations requiring sureties to justify on Form 33. U. S. *v.* Hardison, 135 Fed. 419.

92. *In re* Huttman, 70 Fed. 699. But see U. S. *v.* Cole, 134 Fed. 697.

gants or furnishing copies for the use of third parties,[93] and regulations in regard to attaching, protecting, and canceling stamps and changing their form, style, and character have the force of law.[94] Nevertheless the commissioner cannot alone, or in connection with the secretary of the treasury, alter or amend the law. His regulations in aid of the execution of the law must be reasonable.[95] The commissioner cannot require an additional mark on a package of spirits so as to make its absence a forfeitable offense,[96] nor make an act or omission a criminal offense when the statute does not make it so.[97]

F. Collection Districts. The president is authorized to establish convenient collection districts, and to alter these districts as the interests of the service demand.[98] The courts take judicial notice that by law the territory of the United States is, for internal revenue purposes, divided into collection districts, with defined geographical boundaries.[99] The acts and decisions of the secretary of the treasury upon the question of boundaries of collection districts are not conclusive upon the courts unless made so by statute.[1]

G. Collectors, Their Duties and Compensation — 1. In General. Collectors of internal revenue are appointed by the president. There is no limitation by law to the term of office of collectors. It is their duty to collect taxes and to see that the laws are complied with; to seize property liable to seizure and to prosecute for recovery of sums forfeited by law.[2] They are the custodians of the revenue collected until it is paid into the proper depository.[3] They are authorized to investigate all accounts, lists, or returns made or required to be made to them by persons liable to pay taxes upon any property or business.[4] They are authorized in certain cases to sell property seized for violation of law,[5] and the purchaser at such sales acquires good title.[6] The power of sale by a collector of property seized is ministerial, not judicial.[7] The collector is a ministerial officer who must obey the mandate in his hands for the collection of the tax. The legality of his proceedings may be determined by the principles which apply to the case of an officer acting under a judgment and execution.[8]

2. Compensation of Collectors. The salary of collectors is adjusted on the basis of their annual collections, but cannot be less than two thousand dollars. The right of collectors to commissions on taxes collected by the sale of tax-paid-spirits stamps was not taken from them by the act of March 1, 1879, but the total

93. Boske *v.* Comingore, 177 U. S. 459, 20 S. Ct. 701, 44 L. ed. 846 [*affirming* 96 Fed. 552].

94. 15 Op. Atty.-Gen. 191.

95. Thacher *v.* U. S., 23 Fed. Cas. No. 13,851, 15 Blatchf. 15. Executive officers cannot make regulations which will have the effect to defeat the law (Campbell *v.* U. S., 107 U. S. 407, 2 S. Ct. 759, 27 L. ed. 592; Pascal *v.* Sullivan, 21 Fed. 496), or alter or amend its provisions (Morrill *v.* Jones, 106 U. S. 466, 1 S. Ct. 423, 27 L. ed. 267; U. S. *v.* Two Hundred Barrels of Whiskey, 95 U. S. 571, 24 L. ed. 491; 19 Op. Atty.-Gen. 177).

96. U. S. *v.* One Package of Distilled Spirits, 88 Fed. 856; U. S. *v.* Three Barrels of Whisky, 77 Fed. 963.

97. There are no common-law offenses against the United States. U. S. *v.* Eaton, 144 U. S. 677, 12 S. Ct. 764, 36 L. ed. 591; U. S. *v.* Sandefuhr, 145 Fed. 49. Violation of a requirement imposed only by a rule or regulation of an executive department is not an offense against the United States. U. S. *v.* Maid, 116 Fed. 650. The rules of the commissioner as to notice to deputy collectors respecting removal do not have the force and effect of law. Page *v.* Moffett, 85 Fed. 38.

As to regulations relating to "Distilled Spirits" and other subjects see *supra*, X, D.

98. U. S. Rev. St. (1878) § 3141, amended by 19 U. S. St. at L. 248 [U. S. Comp. St. (1901) p. 2040]; 14 Op. Atty.-Gen. 215; 12 Op. Atty.-Gen. 55; 10 Op. Atty.-Gen. 469. There are now in the United States sixty-six collection districts, existing since Sept. 1, 1902.

99. U. S. *v.* Jackson, 104 U. S. 41, 26 L. ed. 651.

1. U. S. *v.* McNelly, 28 Fed. 609.

2. Averill *v.* Smith, 17 Wall. (U. S.) 82, 21 L. ed. 613; 13 Op. Atty.-Gen. 228.

3. Wilkinson *v.* Babbitt, 29 Fed. Cas. No. 17,668, 4 Dill. 207.

4. U. S. *v.* Hodson, 26 Fed. Cas. No. 15,376, 14 Int. Rev. Rec. 100.

5. U. S. Rev. St. (1878) § 3460 [U. S. Comp. St. (1901) p. 2282].

6. Pilcher *v.* Faircloth, 135 Ala. 311, 33 So. 545.

7. Tracey *v.* Corse, 58 N. Y. 143.

8. Utica First Nat. Bank *v.* Waters, 7 Fed. 152, 19 Blatchf. 242.

net compensation of collectors cannot in any case exceed four thousand five hundred dollars per annum.[9] The salary begins from the date of taking the oath and entering on duty.[10] Questions of salary are questions of contract, and the government can be sued in the court of claims when it fails to pay a collector his salary.[11] Where the words of a statute fixing the compensation of a public officer are loose and obscure and admit of two meanings, they should be construed in favor of the officer.[12] An allowance made by the secretary of the treasury to a collector for extra compensation is conclusive.[13] He may fix the amount of an extra allowance of a collector in advance of the services rendered.[14]

H. Collectors' Bonds — 1. In General. Collectors of internal revenue are required to execute bonds for the faithful discharge of their duties and for the faithful accounting of all public moneys coming into their hands and to execute bonds also as disbursing agents.[15] The bond required from the collector as disbursing agent is separate from and additional to his bond as collector.[16] The bond of a collector is a contract for the indemnity of the United States alone, and not for the indemnity of private persons.[17] It is valid, although it does not state the district for which defendant was appointed.[18] The bond is liable for taxes collected,[19] even if past due and accruing beyond the period during which assessment can be made,[20] for money deposited as offers of compromise,[21] for gagers' fees collected,[22] and for public money or property in the collector's hands which he has failed to account for from whatever cause, unless it be the act of God or the public enemy.[23] If the money is embezzled or stolen without fault or negligence of the collector, the bondsmen are not released from their liability.[24] The bond is liable only for moneys received during the term for which the collector was appointed covered by the bond.[25] Accounts must be stated to show liability under each bond. Where an officer becomes his own successor he is as such successor to be governed by the same rules as if another person had been appointed.[26]

9. U. S. *v.* Landram, 118 U. S. 81, 6 S. Ct. 954, 30 L. ed. 58 [*affirming* 21 Ct. Cl. 128]. As to commissions under previous act see U. S. *v.* Wilcox, 95 U. S. 661, 24 L. ed. 536.

10. 10 Op. Atty.-Gen. 251. Or when the collector commences to perform services which the government accepts. U. S. *v.* Flanders, 112 U. S. 88, 5 S. Ct. 67, 28 L. ed. 630.

11. Patton *v.* U. S., 7 Ct. Cl. 362.

12. U. S. *v.* Morse, 27 Fed. Cas. No. 15,820, 3 Story 87; Moore *v.* U. S., 4 Ct. Cl. 139.

13. U. S. *v.* Kimball, 101 U. S. 726, 25 L. ed. 835. This is a matter of departmental discretion from which there can be no appeal to the courts. Hall *v.* U. S., 91 U. S. 559, 566, 23 L. ed. 446, 448 [*affirming* 26 Fed. Cas. No. 15,284, 2 Dill. 426].

14. U. S. *v.* Morgan, 131 U. S. appendix clxiv, 25 L. ed. 519.

15. U. S. Rev. St. (1878) § 3143, amended by 20 U. S. St. at L. 327 [U. S. Comp. St. (1901) p. 2042]; U. S. Rev. St. (1878) § 3144, amended by 20 U. S. St. at L. 328 [U. S. Comp. St. (1901) p. 2042]; U. S. *v.* Stone, 106 U. S. 525, 1 S. Ct. 287, 27 L. ed. 163; U. S. *v.* Hunt, 105 U. S. 183, 26 L. ed. 1037; U. S. *v.* Hough, 103 U. S. 71, 26 L. ed. 305; U. S. *v.* Kimball, 101 U. S. 726, 25 L. ed. 835; Soule *v.* U. S., 100 U. S. 8, 25 L. ed. 536; Hall *v.* U. S., 91 U. S. 559, 566, 23 L. ed. 446, 448; Chadwick *v.* U. S., 3 Fed. 750; U. S. *v.* McCartney, 1 Fed. 104. And see Pickering *v.* Day, 2 Del. Ch. 333.

16. Hall *v.* U. S., 17 Ct. Cl. 39.

17. Clark *v.* U. S., 60 Ga. 156.

18. U. S. *v.* Jackson, 104 U. S. 41, 26 L. ed. 651 [*affirming* 26 Fed. Cas. No. 15,456, 3 Hughes 231], holding the declaration demurrable and defective.

19. U. S. *v.* Chase, 25 Fed. Cas. No. 14,788, 22 Int. Rev. Rec. 10.

20. King *v.* U. S., 99 U. S. 229, 25 L. ed. 373.

21. Chadwick *v.* U. S., 3 Fed. 750.

22. Soule *v.* U. S., 100 U. S. 8, 25 L. ed. 536, 9 Rose Notes U. S. Rep. 775.

23. Pond *v.* U. S., 111 Fed. 989, 49 C. C. A. 582. Public officers liable for all moneys that come into their hands officially. U. S. *v.* Prescott, 3 How. (U. S.) 578, 11 L. ed. 734. Collector or receiver of public money is excused from paying if he is prevented by the act of God or the public enemy. U. S. *v.* Thomas, 15 Wall. (U. S.) 337, 21 L. ed. 89.

24. U. S. *v.* Bryan, 82 Fed. 290.

The payment of money to a deputy collector without receiving the stamps therefor was not a payment of the tax on the brandy; the money did not become public money in the hands of the collector, and the sureties were not liable for it. U. S. *v.* Hermance, 26 Fed. Cas. No. 15,355, 15 Blatchf. 6 [*affirming* 26 Fed. Cas. No. 15,356, 24 Int. Rev. Rec. 111].

25. U. S. *v.* Stone, 106 U. S. 525, 1 S. Ct. 287, 27 L. ed. 163, 10 Rose Notes U. S. Rep. 418.

26. U. S. *v.* Able, 24 Fed. Cas. No. 14,417, 15 Int. Rev. Rec. 41, 50.

2. Scope of Obligation. The obligations of sureties cannot be extended beyond what they have in terms assumed.[27] When the condition of the bond declares that the obligor "shall truly and faithfully discharge the duties of his office, according to law," the law referred to is any law then on the statute book or that may be passed during his term of office, regulating the powers and duties thereof.[28] If, after a bond has been executed, the nature of the office is changed by law, it ceases to be obligatory.[29] Sureties are liable for moneys collected under an act passed after the execution of the bond.[30] A bond conditional for the faithful performance of their duties by all deputies appointed by the collector is valid, although such a condition is not required by the statute. A change in the regulations subsequent to the execution of the bond, putting deputy collectors in the classified civil service, does not relieve the sureties.[31] And the death of a surety on the bond does not relieve his estate from liability for a breach of the conditions occurring subsequent to his death, but during the term of office for which the bond was given, where it binds the obligors and their several heirs, executors, and administrators.[32]

3. Cumulative or Strengthening Bonds. Substitute bonds discharge sureties on the old bonds from the time the new bond is accepted. Strengthening bonds do not have that effect.[33] The question whether an additional bond, executed by the collector at the request of the commissioner, is a substitute or strengthening bond should properly be left to the jury.[34] The direction of the commissioner to execute a new bond must be considered as the direction of the secretary of the treasury.[35]

4. Suits on Collector's Bond. The collector in a suit on his bond is entitled to credit for all uncollected taxes transferred to his successor, if due diligence was used to collect them;[36] and he is at liberty to show that by due diligence he could not collect the same before the expiration of his term of office.[37] Where no allowance was made for extra service by the accounting officer in the settlement of the collector's accounts, a set-off will not be allowed in a suit on the bond.[38] It is not a ground of defense by the sureties to an action for the recovery of the amount of defalcations of the collector that officers of the treasury department failed to notify the sureties of such defalcations until after the collector had become

27. U. S. *v.* Hough, 103 U. S. 71, 26 L. ed. 305, stamps delivered to the collector under the act of March 3, 1868. The liability of a surety is *stricti juris.* U. S. *v.* Adams, 24 Fed. 348, 11 Sawy. 103; U. S. *v.* Cheeseman, 25 Fed. Cas. No. 14,790, 3 Sawy. 424, 21 Int. Rev. Rec. 340. The undertaking is to receive a strict interpretation. Miller *v.* Stewart, 9 Wheat. (U. S.) 680, 6 L. ed. 189, action on bond of deputy collector of direct taxes.

28. Gaussen *v.* U. S., 97 U. S. 584, 24 L. ed. 1009 [*affirming* 25 Fed. Cas. No. 15,192, 2 Woods 92]; U. S. *v.* McCartney, 1 Fed. 104, where the duty of paying storekeepers from funds advanced by the government was imposed by a subsequent law, the bond of the collector of internal revenue was held liable for failure of duty of the collector in respect thereto. It has often been decided that the laws enacted by congress and in force at the time of the execution of the bond enter into and determine the obligations of the bond, as much as if incorporated by express reference to such law. Meads *v.* U. S., 81 Fed. 684, 26 C. C. A. 229.

29. Gaussen *v.* U. S., 97 U. S. 584, 24 L. ed. 1009.

30. Soule *v.* U. S., 100 U. S. 8, 25 L. ed. 536.

31. Laffan *v.* U. S., 122 Fed. 333, 58 C. C. A. 495.

Distiller's bonds see *supra,* X, D, 1.

32. Pond *v.* U. S., 111 Fed. 989, 49 C. C. A. 582.

33. Chadwick *v.* U. S., 3 Fed. 750. In order that a new bond shall have the effect to release sureties on a former bond given for the same term, such an intent must be expressed in the new bond, or must appear from the statute or by other sufficient proof; where such an intent does not appear, the new bond is cumulative. Throop Public Officers, par. 216.

34. Chadwick *v.* U. S., 3 Fed. 750.

35. Soule *v.* U. S., 100 U. S. 8, 25 L. ed. 536.

36. U. S. *v.* Kimball, 101 U. S. 726, 25 L. ed. 835.

37. U. S. *v.* Able, 24 Fed. Cas. No. 14,417, 15 Int. Rev. Rec. 41.

38. Hall *v.* U. S., 91 U. S. 559, 566, 23 L. ed. 446, 448 [*affirming* 26 Fed. Cas. No. 15,284, 2 Dill. 426]. The collector is entitled to have moneys paid for publishing advertisements required by law allowed as a set-off, although not allowed by the accounting officers. U. S. *v.* Flanders, 112 U. S. 88, 5 S. Ct. 67, 28 L. ed. 630.

insolvent.[39] Errors of computation are not vested rights in favor of sureties. It is competent for the accounting officers to correct mistakes and restate the balance in adjusting their accounts.[40] The bond is liable for loss occasioned by the collector's breach of duty in allowing spirits to be removed from a warehouse, upon insufficient bonds, and it is no defense that he did not act corruptly, but only negligently. The measure of damages is the loss sustained by reason of the taking of the worthless bonds.[41] A judgment against a defaulting collector does not bind a surety unless the surety was a party to the action; and no federal statute creates a lien on the property of a collector or of his sureties from the execution of his official bond, or from the date of any default thereon.[42] Real estate acquired by virtue of proceedings against a collector of internal revenue cannot be considered as acquired in payment of debts arising under the laws relating "to internal revenue."[43]

I. Deputy Collectors — 1. In General. Deputy collectors are appointed by collectors, and have like authority to collect taxes within their divisions and to make seizures.[44] A deputy collector is authorized to act as such when his commission has been signed and placed in the mail and he is notified thereof by telegraph.[45] The collector is responsible for the acts of his deputies.[46] Deputy collectors may be removed by the collector subject to such requirements as to notice as the commissioner of internal revenue may prescribe.[47] If a deputy collector converts public money to his own use, the government may hold him directly responsible in an action for money had and received, although it has another remedy against his principal.[48]

2. Compensation. Deputy collectors are compensated by allowances made by the secretary of the treasury upon the recommendation of the commissioner of internal revenue. An allowance for the salary of a deputy, unimpeached for fraud or mistake, is binding upon the courts.[49]

3. Bonds. The collector may require deputies to execute to him bonds for the faithful performance of their duties.[50] The undertaking of sureties on the bonds of a deputy collector must receive a strict interpretation, both as to time

39. Pond *v.* U. S., 111 Fed. 989, 49 C. C. A. 582. Sureties upon bonds of United States officials are not liable unless suit is instituted within five years after the statement of the account of the accounting officers of the treasury. Act Aug. 6, 1888 (25 U. S. St. at L. 387).

40. Soule *v.* U. S., 100 U. S. 8, 25 L. ed. 536.

41. U. S. *v.* Thorn, 28 Fed. Cas. No. 16,493, 9 Int. Rev. Rec. 65. Where the breach alleged was failure to account for or pay over a certain sum of money, dereliction of duty in not collecting said sum could not be shown in order to establish the breach. U. S. *v.* Glenn, 25 Fed. Cas. No. 15,217, 1 Woods 400. The bond was not liable for amounts paid informers by order of court from proceeds of forfeiture, when the law authorizing informers' shares was in force. U. S. *v.* Krum, 10 Fed. 823, 3 McCrary 381.

42. U. S. *v.* Ingate, 48 Fed. 251.

43. 16 Op. Atty.-Gen. 143.

44. U. S. *v.* Sykes, 58 Fed. 1000; Landram *v.* U. S., 16 Ct. Cl. 74; Schuster *v.* Weissman, 63 Mo. 552; Deskin *v.* Graham, 19 Iowa 553. Collectors have authority to appoint deputies. Tiffany *v.* Morrison, 3 Colo. 43. A deputy collector is not an officer. Landram *v.* U. S., *supra*; Herndon *v.* U. S., 15 Ct. Cl. 446; Hartson *v.* U. S., 21 Ct. Cl. 451. Deputy collectors have authority to administer oaths to sureties on distiller's bonds. U. S. *v.* Hardison, 135 Fed. 419.

45. U. S. *v.* Sykes, 58 Fed. 1000.

46. Chadwick *v.* U. S., 3 Fed. 750.

The deputy is not responsible to the government, or to individuals, for his own faithfulness, but to the collector. Pickering *v.* Day, 3 Houst. (Del.) 474, 95 Am. Dec. 291.

47. Page *v.* Moffett, 85 Fed. 38, bill against collector to restrain him from removing deputy collector.

48. Tiffany *v.* Morrison, 3 Colo. 43.

49. Ryan *v.* U. S., 17 Ct. Cl. 47. Prior to Act March 1, 1879 (20 U. S. St. at L. 329 [U. S. Comp. St. (1901) p. 2043]), deputy collectors were employees of the collector by whom they were compensated, and the government was not liable to them for their services. Herndon *v.* U. S., 15 Ct. Cl. 446.

Services as collector pending suspension of collector for fraud.— A statute precluding a deputy collector from receiving compensation as collector while the collector is entitled to compensation for his services does not preclude a deputy collector from receiving such compensation for acting as collector while the collector is suspended for fraud. U. S. *v.* Farden, 99 U. S. 10, 25 L. ed. 267.

50. Crawford *v.* Johnson, 6 Fed. Cas. No. 3,369, Deady 457, action on bond of a deputy

and terms.[51] This obligation may be enforced, although the instrument is not under seal.[52] The omission of a collector to remove a deputy collector after knowledge of default of the latter does not discharge the sureties of the deputy collector.[53] The consent of the collector to the use of the public money by his deputy in his private business, not being communicated and assented to by the sureties of the latter, will discharge them from their liability for a defalcation resulting therefrom.[54] An action by a collector against a deputy collector on his bond is a suit arising under the laws of the United States and may be removed from the state court to the federal court.[55]

J. Gagers and Storekeepers. Gagers are appointed by the secretary of the treasury and are assigned to duty at distilleries, rectifying houses, and wherever inspection and gaging of spirits is necessary. They are paid by fees determined by the quantity of spirits gaged, but their compensation cannot exceed five dollars per day. It is an offense for a gager to receive any compensation except as by law prescribed for the performance of his duty.[56] The commissioner of internal revenue has a right to make regulations concerning gaging and in relation to gagers, and these regulations are binding and obligatory. Neither the statutes nor the regulations authorize a gager to delegate his authority, or to have his duties performed for him.[57] A gager is an officer and cannot receive pay for other service rendered the government at the same time.[58] Every gager is required to give a bond conditioned for the faithful performance of his duties under the law. The right of action on the bond is reserved to the government, notwithstanding an indictment, conviction, and sentence unless there is an averment of satisfaction for the latter.[59] Storekeepers are appointed by the secretary of the treasury and have charge of distilleries and distillery warehouses and are required to keep account of the spirits manufactured and entered in warehouse and withdrawn therefrom, and are required to give bonds. They receive compensation only when rendering actual service.[60]

K. Authority of Officers to Enter Premises. Authority is given to any collector, deputy collector, or internal revenue agent, to enter, in the daytime, any building or place within his district, where any articles or objects subject to taxation are made, produced, or kept, so far as it may be necessary for the purpose of examining such objects or articles. A national bank is not exempt from this provision.[61] Officers must have free and peaceable egress as well as ingress, and the proprietors have no right to eject them.[62] The authority of officers to make examinations cannot be delegated to their clerks.[63]

L. Search Warrants. While unreasonable searches and seizures are for-

who collected moneys and converted the same to his own use. And see Fuller *v.* Calkins, 22 Iowa 301; Hall *v.* Williams, 13 Minn. 260, action on bond.

51. Halsey *v.* Paulison, 37 N. J. L. 205.

52. Schuster *v.* Weissman, 63 Mo. 552.

53. Pickering *v.* Day, 2 Del. Ch. 333.

54. Pickering *v.* Day, 2 Del. Ch. 333 [*affirmed* in 3 Houst. 474, 95 Am. Dec. 291].

55. Orner *v.* Saunders, 18 Fed. Cas. No. 10,584, 3 Dill. 284, 22 Int. Rev. Rec. 48.

56. U. S. Rev. St. (1878) § 3169 [U. S. Comp. St. (1901) p. 2059]; U. S. *v.* Brunjes, 36 Int. Rev. Rec. 47, receiving money from rectifiers for gaging spirits.

57. Thacher *v.* U. S., 103 U. S. 679, 26 L. ed. 535; U. S. *v.* Bittinger, 24 Fed. Cas. No. 14,599, 21 Int. Rev. Rec. 342, indictment for making false claims.

58. Hedrick *v.* U. S., 16 Ct. Cl. 88.

59. U. S. *v.* Cullerton, 25 Fed. Cas. No. 14,899, 8 Biss. 166, 24 Int. Rev. Rec. 68, effect of pardon of a gager of an offense under the internal revenue laws.

60. McNeil *v.* U. S., 23 Ct. Cl. 413; 18 Op. Atty.-Gen. 399.

61. U. S. *v.* Rhawn, 27 Fed. Cas. No. 16,150, 22 Int. Rev. Rec. 235, 11 Phila. (Pa.) 521. *Contra*, Visitorial powers are not conferred upon internal revenue officers whereby they would be authorized to examine the checks of a national bank. U. S. *v.* Parkhill, 27 Fed. Cas. No. 15,994, 22 Wkly. Notes Cas. (Pa.) 604 note.

Constitutionality of statutes.— The statute authorizing a supervisor of internal revenue to enter and examine premises in order to detect violations of revenue laws was constitutional. *In re* Meador, 16 Fed. Cas. No. 9,375, 1 Abb. 317, 10 Int. Rev. Rec. 74.

62. U. S. *v.* Mosely, 27 Fed. Cas. No. 15,823, 15 Int. Rev. Rec. 8.

63. U. S. *v.* Rhawn, 27 Fed. Cas. No.

bidden by the constitution,[64] the statutes provide a way for searching premises through the instrumentality of a search warrant, and such acts are constitutional.[65] It is the duty of United States commissioners to issue search warrants in internal revenue cases when properly applied for.[66]

M. Civil and Criminal Liability For Acts of Officers — 1. Civil Liability — a. In General. The law afford officers protection while properly performing their official duties,[67] and it is the duty of the government to defend them when sued for doing what the law requires.[68] They are not liable criminally, nor for damages in trespass unless their acts are tortious or unauthorized.[69] An officer is answerable in damages for an illegal trespass.[70] In addition to his liability for actual damages he is subject to exemplary or punitive damages, if he proceeds in malicious or wanton disregard of the citizen's rights.[71] The assessor is liable to the injured party for making an illegal assessment.[72] A suit can be brought against the collector for damages for making an illegal seizure and sale of property, notwithstanding the owner could have given a bond and taken the case into court for adjudication and failed to do so.[73] An appeal to the commissioner is not a condition precedent to an action against the collector for trespass.[74] Any mistake or irregularity on the part of an assessor will not make the collector a trespasser.[75] The collector in collecting taxes assessed is protected by the assessment, regular on its face, although it may be invalid. His duty in this respect is purely ministerial, and the assessment is his authority to proceed.[76] A gager in charge of a warehouse is bound to use ordinary care, and if whisky is lost through his gross negligence he is liable.[77]

b. Certificate of Probable Cause. If the court certifies that there was probable cause for the act, the officer is protected from personal liability and the government assumes the responsibility.[78] Such a certificate operates as a stay of execution and converts the claim practically into a claim against the government,

16,150, 22 Int. Rev. Rec. 235, 11 Phila. (Pa.) 521.

64. U. S. *v.* Fears, 25 Fed. Cas. No. 15,080, 3 Woods 510.

Searches are unreasonable when they are without authority of law. Paschal Annot. Const. (3d ed.) 257, note to art. 4, Amendm. Const.

65. U. S. Rev. St. (1878) § 3462 [U. S. Comp. St. (1901) p. 2283]; Kimball *v.* Weld, 14 Fed. Cas. No. 7,776, 14 Int. Rev. Rec. 180; Stockwell *v.* U. S., 23 Fed. Cas. No. 13,466, 3 Cliff. 284, 12 Int. Rev. Rec. 88.

66. 24 Op. Atty.-Gen. 685.

67. U. S. *v.* Deaver, 14 Fed. 595.

68. 9 Op. Atty.-Gen. 52.

69. U. S. *v.* Cummings, 130 U. S. 452, 9 S. Ct. 583, 32 L. ed. 1029 [*reversing* 22 Ct. Cl. 344]; Stacey *v.* Emery, 97 U. S. 642, 24 L. ed. 1035; Averill *v.* Smith, 17 Wall. (U. S.) 82, 21 L. ed. 613 [*reversing* 22 Fed. Cas. No. 13,007, 7 Blatchf. 29, 10 Int. Rev. Rec. 139, 156]; North Carolina *v.* Kirkpatrick, 42 Fed. 689; North Carolina *v.* Vanderford, 35 Fed. 282, indictment for a wanton and wilful injury to personal property in destroying illicit whisky.

70. Coblens *v.* Abel, 5 Fed. Cas. No. 2,926, 1 Woolw. 293.

If an officer neglects or refuses to do a ministerial act, he is liable for damages to the extent of the injury arising from such non-feasance or malfeasance. Amy *v.* Backholder, 11 Wall. (U. S.) 136, 20 L. ed. 101.

71. Crawford *v.* Eidman, 129 Fed. 992.

72. Gates *v.* Osborne, 9 Wall. 567, 19 L. ed. 748 (decided on question of jurisdiction); Cutting *v.* Gilbert, 6 Fed. Cas. No. 3,519, 5 Blatchf. 259, 2 Int. Rev. Rec. 94.

73. Cardinel *v.* Smith, 5 Fed. Cas. No. 2,395, Deady 197.

74. Erskine *v.* Hohnbach, 14 Wall. (U. S.) 613, 20 L. ed. 745.

75. Delaware R. Co. *v.* Prettyman, 7 Fed. Cas. No. 3,767, 17 Int. Rev. Rec. 99.

76. Harding *v.* Woodcock, 137 U. S. 43, 11 S. Ct. 6, 34 L. ed. 580; Haffin *v.* Mason, 15 Wall. (U. S.) 671, 21 L. ed. 196; Erskine *v.* Hohnbach, 14 Wall. (U. S.) 613, 20 L. ed. 745; Philadelphia, etc., R. Co. *v.* Kenney, 19 Fed. Cas. No. 11,088, 18 Int. Rev. Rec. 92, 9 Phila. (Pa.) 403, rule by which the liability of ministerial officers is to be determined. An assessment protects the collector, although no tax is due. Milan Distilling Co. *v.* Tillson, 17 Fed. Cas. No. 9,539, 26 Int. Rev. Rec. 5.

77. Rock Spring Distillery Co. *v.* Thurston, 39 S. W. 253, 19 Ky. L. Rep. 166.

78. New York Cent., etc., R. Co. *v.* U. S., 24 Ct. Cl. 23.

Where the government has had no notice of the proceedings prior to the judgment it is not concluded by the certificate. Dunnegan *v.* U. S., 17 Ct. Cl. 247.

Although the court fails to make the certificate of probable cause, in rendering judgment for the claimant in a proceeding for the seizure of property, proof of probable cause of seizure is a complete defense and may be

which is binding upon the accounting officers.[79] The officer making a seizure is entitled to a certificate if he acted in good faith and had reasonable grounds to suppose that the law had been violated,[80] or in case of doubt respecting the true interpretation of the law.[81] If officers act with probable cause they are not liable no matter what their motives may have been,[82] and notwithstanding that the seizure was malicious. The certificate need not recite the reason which justifies its issuance. The words "probable cause" and "reasonable cause" of seizure have the same meaning.[83] Where the court orders restitution of the property and denies a certificate of probable cause, it establishes the fact that the seizure was tortious and that the owner is entitled to damages.[84] The refusal of the district court to grant a certificate of reasonable cause is not a matter which can be reviewed in the circuit or supreme court.[85]

c. Laches or Torts of Officers. The government is not responsible for the laches or wrongful acts of its officers. It may be the loser by their negligence, but it never becomes bound to others for the consequences of such neglect, unless it be by express agreement to that effect.[86] It is an established principle that a government is not responsible for the tortious acts of its officers generally; in order to create any such liability there must have been either authorization or ratification.[87] The government is not bound by the act of its officers, making an unauthorized payment under misconstruction of the law.[88] Statements made by departmental officers to the effect that a claim would be allowed, or had been certified favorably to the auditing office, constitute no estoppel against the government.[89] The government does not undertake to guarantee to any person the fidelity of any of the officers or agents whom it employs.[90] If officers act illegally, they are per-

made in an action against the revenue officer for wrongful seizure. Agnew *v.* Haynes, 141 Fed. 631 [*reversing* 132 Fed. 525].

What is probable cause.— Where the proof shows that defendant made the seizure by direction of the commissioner of internal revenue, based on information received from his special agent, which justified his suspicion that plaintiff was violating the law, the court may charge the jury, as matter of law, that there was probable cause. Agnew *v.* Haynes, 141 Fed. 631 [*reversing* 132 Fed. 525].

79. U. S. *v.* Sherman, 98 U. S. 565, 25 L. ed. 235; Dunnegan *v.* U. S., 17 Ct. Cl. 247.

80. U. S. *v.* The Reindeer, 27 Fed. Cas. No. 16,145.

81. Averill *v.* Smith, 17 Wall. (U. S.) 82, 21 L. ed. 613 [*reversing* 22 Fed. Cas. No. 13,007, 7 Blatchf. 29, 10 Int. Rev. Rec. 139, 156].

82. Staunton *v.* Goshorn, 94 Fed. 52, 36 C. C. A. 75.

83. Stacey *v.* Emery, 97 U. S. 642, 24 L. ed. 1035; U. S. *v.* One Sorrel Horse, 27 Fed. Cas. No. 15,953, 22 Vt. 655.

84. Averill *v.* Smith, 17 Wall. (U. S.) 82, 21 L. ed. 613 [*reversing* 22 Fed. Cas. No. 13,007, 7 Blatchf. 29, 10 Int. Rev. Rec. 139, 156]. A collector was held not entitled to a certificate in Frerichs *v.* Coster, 22 Fed. 637, 23 Blatchf. 74.

A certificate was denied for want of jurisdiction in *In re* Ninety-Two Barrels of Spirits, 18 Fed. Cas. No. 10,275, 5 Ben. 323.

85. U. S. *v.* Frerichs, 106 U. S. 160, 27 L. ed. 128; Frerichs *v.* Coster, 22 Fed. 637, 23 Blatchf. 74. An order of the district court refusing a certificate of probable cause ought not to be reversed by the circuit court, except in a clear case. U. S. *v.* Frerichs, 25 Fed. Cas. No. 15,166, 16 Blatchf. 547, 25 Int. Rev. Rec. 319.

86. Hart *v.* U. S., 95 U. S. 316, 24 L. ed. 479 (negligence of an officer in permitting the removal of distilled spirits from a distillery warehouse before payment of taxes); Christie-Street Comm. Co. *v.* U. S., 129 Fed. 506. There is a long line of decisions to this effect. U. S. *v.* Lynah, 188 U. S. 445, 23 S. Ct. 349, 47 L. ed. 539; Schillinger *v.* U. S., 155 U. S. 163, 15 S. Ct. 85, 39 L. ed. 108; Hill *v.* U. S., 149 U. S. 593, 13 S. Ct. 1011, 37 L. ed. 862; Kings County Sav. Inst. *v.* Blair, 116 U. S. 200, 6 S. Ct. 353, 29 L. ed. 659; U. S. *v.* Pittsburgh Real Estate Sav. Bank, 104 U. S. 728, 26 L. ed. 908; Langford *v.* U. S., 101 U. S. 341, 25 L. ed. 1010; Gaussen *v.* U. S., 97 U. S. 584, 24 L. ed. 1009; Cheatham *v.* U. S., 92 U. S. 85, 23 L. ed. 561; Morgan *v.* U. S., 14 Wall. (U. S.) 531, 20 L. ed. 738; Gibbons *v.* U. S., 8 Wall. (U. S.) 269, 19 L. ed. 453; U. S. *v.* Adams, 54 Fed. 114; Maine *v.* U. S., 36 Ct. Cl. 531 (laches not imputed to the government).

87. Buron *v.* Denman, 2 Exch. 167; Washington L. & T. Co. *v.* U. S., 39 Ct. Cl. 152. It is a general principle applicable to all governments. Mann *v.* U. S., 32 Ct. Cl. 581.

88. Wisconsin Cent. R. Co. *v.* U. S., 164 U. S. 190, 17 S. Ct. 45, 41 L. ed. 399.

89. Christie Street Comm. Co. *v.* U. S., 129 Fed. 506.

90. Pond *v.* U. S., 111 Fed. 989, 49 C. C. A. 582, embezzlement by a deputy collector.

sonally liable in damages, not the government.[91] The laches of officers is no bar to the assertion of its rights.[92] Their carelessness does not relieve sureties on bonds.[93]

2. Criminal Liability.[94] The failure of an officer to report in writing to his next superior officer or to the commissioner of internal revenue violations of law of which he has knowledge is punishable.[95] So collectors are liable to prosecution for accepting fraudulent bonds, as well as liable on their official bonds for loss sustained by the government.[96] And any subordinate revenue officer who demands or accepts, or attempts to collect, directly or indirectly, as payment of gift, or otherwise, any sum of money, or other thing of value, for a compromise of the violation of the revenue laws, is guilty of a misdemeanor.[97]

N. Removal From Office. The courts have no jurisdiction to control an executive officer in the matter of making removals.[98] The power to regulate the subject of removals from office belongs to congress.[99]

XIV. Assessment, Collection, Refunding, and Recovery of Taxes Paid.[1]

A. Assessments — 1. In General. Assessments of taxes not payable by stamps are made by the commissioner of internal revenue on lists, monthly or special.[2] Any legal ascertainment of the tax is in fact its assessment.[3] The law fixes the tax and the revenue officer is simply the instrument or machinery provided for carrying it into effect.[4] The decisions of an assessor are of a quasi-judicial character, and cannot be questioned collaterally when made within the scope of his jurisdiction.[5]

2. Operation and Effect — a. In General. The assessment is *prima facie* evidence of the amount due. It is presumed to be valid and stands until shown by satisfactory proof to be illegal.[6] It is not conclusive, however, and in a suit

91. U. S. *v.* Cummings, 130 U. S. 452, 9 S. Ct. 583, 32 L. ed. 1029.

92. Gaussen *v.* U. S., 97 U. S. 584, 24 L. ed. 1009.

93. Ryan *v.* U. S., 19 Wall. (U. S.) 514, 22 L. ed. 172; U. S. *v.* Barrowcliff, 24 Fed. Cas. No. 14,528, 3 Ben. 519.

Distillers' bonds see *supra*, X, D.

94. For extortion by revenue officers see Extortion.

For oppression by revenue officers see Oppression.

95. U. S. *v.* Maguire, 26 Fed. Cas. No. 15,708, 22 Int. Rev. Rec. 146.

96. U. S. *v.* Callicott, 25 Fed. Cas. No. 14,710, 7 Int. Rev. Rec. 177, collector and deputy collector indicted jointly with others. A deputy collector who accepts a bond for the withdrawal of whisky from a warehouse knowing that the signatures have been forged, or knowing that they have been made by another, certifies that the persons whose names are signed thereto personally appeared before him and signed the same in his presence is guilty of executing or conniving in the execution of a document in fraud of the internal revenue laws. U. S. *v.* Allen, 24 Fed. Cas. No. 14,432, 7 Int. Rev. Rec. 163.

Suit on collector's bond see *supra*, XIII, H, 4.

97. U. S. *v.* Deaver, 14 Fed. 595.

98. White *v.* Berry, 171 U. S. 366, 18 S. Ct. 917, 43 L. ed. 199 [*reversing* 83 Fed. 578]; Page *v.* Moffett, 85 Fed. 38; Morgan *v.* Nunn, 84 Fed. 551; Taylor *v.* Kercheval, 82 Fed. 497.

99. U. S. *v.* Avery, 24 Fed. Cas. No. 14,481, Deady 204, information in the nature of a quo warranto to oust defendant from the office of assessor of internal revenue.

1. For collection of taxes under the act of 1861 and amendments see *supra*, V, C.

2. The office of assessor ceased to exist after July 1, 1873, and the power to assess taxes was vested in the commissioner of internal revenue. Act Dec. 24, 1872 (17 U. S. St. at L. 401); U. S. *v.* Myers, 27 Fed. Cas. No. 15,846, 3 Hughes 239, 24 Int. Rev. Rec. 44. An assessment may be made by designated officers or by the law itself. Dollar Sav. Bank *v.* U. S., 19 Wall. (U. S.) 227, 22 L. ed. 80.

3. 16 Op. Atty.-Gen. 634.

4. U. S. *v.* Hodson, 26 Fed. Cas. No. 15,376, 14 Int. Rev. Rec. 100.

5. Clinkenbeard *v.* U. S., 21 Wall. (U. S.) 65, 22 L. ed. 477. An assessor acts judicially in determining what persons and things are subject to taxation. Delaware R. Co. *v.* Prettyman, 7 Fed. Cas. No. 3,767, 17 Int. Rev. Rec. 99. In making an assessment officers act in a quasi-judicial capacity. The presumption is that they proceed regularly. Western Express Co. *v.* U. S., 141 Fed. 28. The presumption is that they do their duty. Schafer *v.* Craft, 144 Fed. 907.

6. Clinkenbeard *v.* U. S., 21 Wall. (U. S.) 65, 22 L. ed. 477; U. S. *v.* Cole, 134 Fed. 697; U. S. *v.* Bristow, 20 Fed. 378; Schmitt *v.* Trowbridge, 21 Fed. Cas. No. 12,468, 24 Int. Rev. Rec. 381; U. S. *v.* Black, 24 Fed.

to recover taxes assessed defendant can show that the tax was excessive or illegal, although he has not appealed therefrom to the commissioner.[7] When the presumption of law as to the validity of the assessment has been rebutted the burden of proof is shifted upon the government to establish its validity.[8] The collector has no authority to question the validity of assessments. The assessment lists constitute his warrant to collect.[9]

b. Illegal Assessments. If any indistinguishable or inseparable part or proportion of an entire assessment is illegal, the whole assessment is illegal.[10] If the assessment is illegal, all proceedings under it are void and the assessment may be attacked collaterally.[11]

3. Reassessment. In case of omission the commissioner of internal revenue may enter the names of the persons omitted and amount of tax on any monthly or special list within fifteen months from the time of the delivery of the list to the collector.[12] If the incompleteness results from any omission, understatement, or undervaluation, from whatever source it arose, or from whatever cause it happened, the power is given to correct.[13]

4. Returns. The statutes contemplate two methods of taxation — one requires a return containing a list of objects liable to tax, upon which an assessment is to be made, and the other requires payment of the tax by stamps affixed to the taxable articles.[14] The law authorizes the addition of fifty per cent to the tax in case of refusal or neglect to make return, not occasioned by sickness or absence; and one hundred per cent in case of a false or fraudulent return. This provision is constitutional.[15] The fifty per cent addition to the tax is a penalty and not a tax.[16] It does not accrue where the taxpayer discloses his liability to the collector or deputy collector within the calendar month.[17] The one hundred per cent penalty is incurred where the return is untrue, although not wilfully false.[18] The act of adjudging whether the one hundred per cent penalty is incurred is a quasi-judicial act, and the assessor should himself determine that the omission was false. The penalty must be added as the result of his own finding.[19] These penalties

Cas. No. 14,600, 11 Blatchf. 538, 19 Int. Rev. Rec. 116; U. S. *v.* Butler, 25 Fed Cas. No. 14,702, 18 Int. Rev. Rec. 164; U. S. *v.* Hodson, 26 Fed. Cas. No. 15,376, 14 Int. Rev. Rec. 100. The assessment of the commissioner of internal revenue is only *prima facie* evidence of the amount due as taxes upon the spirits distilled. It establishes a *prima facie* case of liability against the distiller, and nothing more. If not impeached, it is sufficient to justify a recovery; but every material fact upon which his liability was asserted is open to contestation. U. S. *v.* Rindskopf, 105 U. S. 418, 26 L. ed. 1131.

7. U. S. *v.* Bank of America, 15 Fed. 730; U. S. *v.* Myers, 27 Fed. Cas. No. 15,846, 3 Hughes 239, 24 Int. Rev. Rec. 44.

8. U. S. *v.* Rindskopf, 27 Fed. Cas. No. 16,166, 8 Biss. 507.

9. Haffin *v.* Mason, 15 Wall. (U. S.) 671, 21 L. ed. 196.

10. Hubbard *v.* Brainard, 35 Conn. 563.

11. Runkle *v.* Citizens' Ins. Co., 6 Fed. 143.

Assessments against distillers see *supra*, X, F.

12. U. S. *v.* O'Neill, 19 Fed. 567, 30 Int. Rev. Rec. 127; Doll *v.* Evans, 7 Fed. Cas. No. 3,969, 9 Phila. (Pa.) 364, 15 Int. Rev. Rec. 143.

13. Dandelet *v.* Smith, 18 Wall. (U. S.) 642, 21 L. ed. 758 (reassessment in case of a brewer, the commissioner is not required to make a separate specification of deficiency of each defective return); Barker *v.* White, 2 Fed. Cas. No. 996, 11 Blatchf. 445, 19 Int. Rev. Rec. 117.

14. *In re* Kinney, 102 Fed. 468. False and fraudulent returns. U. S. *v.* Mountjoy, 27 Fed. Cas. No. 15,829, 4 Int. Rev. Rec. 9 (fraudulent returns); U. S. *v.* Rumsey, 27 Fed. Cas. No. 16,207, 5 Int. Rev. Rec. 93 (indictment for false and fraudulent returns of manufactures).

15. Doll *v.* Evans, 7 Fed. Cas. No. 3,969, 9 Phila. (Pa.) 364, 15 Int. Rev. Rec. 143; 11 Op. Atty.-Gen. 280, one hundred per cent penalty.

16. 23 Op. Atty.-Gen. 398 (the secretary may remit the fifty per cent penalty imposed on a bank for failing to make return under the act of June 13, 1898); 17 Op. Atty.-Gen. 433. There is no warrant of law for the assessment of a fifty per cent penalty against a dealer in olemargarine for non-payment of special tax. Schafer *v.* Craft, 144 Fed. 907.

17. U. S. Rev. St. (1878) § 3173, amended by 20 U. S. St. at L. 330, 28 U. S. St. at L. 558 [U. S. Comp. St. (1901) p. 2065].

18. German Sav. Bank *v.* Archbold, 10 Fed. Cas. No. 5,364, 15 Blatchf. 398, 24 Int. Rev. Rec. 413 [*reversed* on other grounds in 105 U. S. 708, 26 L. ed. 901].

19. Michigan Cent. R. Co. *v.* Slack, 17 Fed. Cas. No. 9,527, Holmes 231.

relate to a monthly list and returns and are not imposed in case of a succession tax.[20]

5. Right of Collectors to Issue Summons. A collector of internal revenue is authorized for the purpose of ascertaining liability to tax to summon persons charged with the duty of making returns to produce their private or business books for examination and to testify under oath. This power was formerly conferred upon assessors.[21] It is conditional upon the failure or refusal to deliver a return of "objects subject to tax," or upon the delivery of a false or fraudulent return or one containing understatements or undervaluations.[22] The proceedings are civil in their nature and not an infringement of the constitutional provision against unreasonable searches.[23] The mere issuing of a summons is in itself only a ministerial act, but requiring persons to appear and testify under oath, produce books, etc., may be a judicial act taken in an extended sense.[24] Being an extraordinary inquisitorial power it ought to be strictly construed.[25] It should be strictly limited within the express terms of the law and cannot be extended by analogy.[26] There is no authority to require the production of books and papers for the purpose of ascertaining a person's liability to tax after the right of assessment has been lost.[27] The summons should state the cause of its being issued, and should be sufficiently explicit to enable the person summoned to decide whether he is bound to appear or not.[28] It should be limited to books and papers concerning the subject of investigation which should be mentioned with reasonable certainty.[29] The person summoned having appeared, he cannot refuse to exhibit the books, or refuse to testify concerning them.[30] Authority was formerly conferred upon supervisors of internal revenue to summon persons to appear and testify and to produce books and papers to aid in the investigation of frauds, This was a proceeding of a different character from the power to summon parties for the purpose of obtaining data for an assessment and was not unconstitutional either as an unreasonable search and seizure or as compelling a party to testify against himself.[31] When the office of supervisor was abolished these powers were vested in collectors of internal revenue.[32] If the parties summoned were satisfied

20. Wright *v.* Blakeslee, 101 U. S. 174, 25 L. ed. 1048; U. S. *v.* Brooklyn City, etc., R. Co., 14 Fed. 284, penalties for failure to make return and pay tax on earnings of railroads. Act June 30, 1864.

21. Sec. 14, Act June 30, 1864 (13 U. S. St. at L. 223); Bailey *v.* New York Cent., etc., R. Co., 22 Wall. (U. S.) 604, 22 L. ed. 840; *In re* Brown, 4 Fed. Cas. No. 1,977, 3 Int. Rev. Rec. 134; U. S. *v.* Hodson, 26 Fed. Cas. No. 15,376, 14 Int. Rev. Rec. 100.

22. *In re* Kinney, 102 Fed. 468; Wells *v.* Shook, 29 Fed. Cas. No. 17,406, 8 Blatchf. 254.

23. *In re* Strouse, 23 Fed. Cas. No. 13,548, 1 Sawy. 605, 11 Int. Rev. Rec. 182.

24. *In re* Meador, 16 Fed. Cas. No. 9,375, 1 Abb. 317, 10 Int. Rev. Rec. 74.

25. *In re* Brown, 4 Fed. Cas. No. 1,977, 3 Int. Rev. Rec. 134. *Compare In re* Strouse, 23 Fed. Cas. No. 13,548, 1 Sawy. 605, 11 Int. Rev. Rec. 182, holding that the statute, being remedial, should be construed liberally, so as to carry out the intention of the lawmakers.

26. *In re* Kinney, 102 Fed. 468 (a manufacturer of oleomargarine cannot be compelled to appear and testify to the correctness of returns made under the oleomargarine law); *In re* Kearns, 64 Fed. 481 (a wholesale dealer in oleomargarine cannot be required to produce his books for examination).

There is no authority to require the production of the books of a corporation to obtain data relative to the income of a shareholder. *In re* Chadwick, 5 Fed. Cas. No. 2,570, 1 Lowell 439, 11 Int. Rev. Rec. 126, 133.

27. *In re* Archer, 1 Fed. Cas. No. 506, 9 Ben. 427, 24 Int. Rev. Rec. 110.

28. *In re* Phillips, 19 Fed. Cas. No. 11,097, 10 Int. Rev. Rec. 107; Lee *v.* Chadwick, 5 Fed. Cas. No. 2,570, 1 Lowell 439, 11 Int. Rev. Rec. 126, 133.

29. *In re* Becker, 3 Fed. Cas. No. 1,208, 21 Int. Rev. Rec. 243, where the respondent does not appear, an adjournment of a hearing does not necessitate a new summons for the adjourned day.

30. *In re* Strouse, 23 Fed. Cas. No. 13,548, 1 Sawy. 605, 11 Int. Rev. Rec. 182.

31. U. S. Rev. St. (1878) § 3163, amended by 20 U. S. St. at L. 328 [U. S. Comp. St. (1901) p. 2056] (19 U. S. St. at L. 152); *In re* Becker, 3 Fed. Cas. No. 1,208, 21 Int. Rev. Rec. 243; *In re* Meador, 16 Fed. Cas. No. 9,375, 1 Abb. 317, 10 Int. Rev. Rec. 74; Perry *v.* Newsome, 19 Fed. Cas. No. 11,009, 10 Int. Rev. Rec. 20 (sufficiency of service of summons); Stanwood *v.* Green, 22 Fed. Cas. No. 13,301, 2 Abb. 184, 11 Int. Rev. Rec. 134.

32. Act Aug. 15, 1876 (19 U. S. St. at L.

that the demand was not authorized by law they had the right to refuse compliance until the question could be determined by the proper tribunal.[33] Where the order was oppressive the respondents were authorized to disregard it and were not in contempt for so doing.[34]

6. Failure to Obey Summons. Where a summons has been issued and duly served, and not complied with, a United States district judge may issue a writ of attachment as for contempt.[35] This power should not be exercised except in a case admitting of no doubt.[36] The application for a writ is a proceeding in a civil case and may be amended.[37] It is no defense that the answers of the person summoned would tend to criminate him, as no disclosures or admissions so made can be used against him in criminal proceedings.[38] One who in good faith questions the legality of the summons is entitled to consideration; and an order for an attachment will be with the provision that, should the witness in the meantime obey the process, such order will be discharged.[39]

7. Appeals From Assessments. The government has provided a complete system of corrective justice in regard to all taxes imposed, founded upon the idea of appeals within the executive departments.[40] An appeal is a condition precedent to an action for the recovery of taxes paid. An appeal may be taken by the purchaser of property upon which there is a lien for taxes.[41] It is too late after a party has exercised his rights under an appeal to object to an irregularity in the notice of the assessment.[42]

B. Collection — 1. In General. Payment must be made whether the tax is justly or unjustly levied, and redress for illegal action must be sought subsequently.[43] A collector has no authority to receive in payment of taxes anything but money. In accepting a draft he acts at his own risk and does not bind the United States.[44] In the absence of any express provision therefor a collector is not authorized to collect the stamp tax on instruments in any other manner than by the sale of stamps.[45]

2. Penalty and Interest on Non-Payment. If the person assessed does not pay the tax within ten days after notice, a penalty of five per centum additional is

152); Act March 1, 1879 (20 U. S. St. at L. 327), reënacted in U. S. Rev. St. (1878) § 3163, omitting that portion giving authority to issue summons. It is questioned whether or not the effect of this was to repeal those parts of section 3163 that were not reënacted, but it has not been judicially determined.

33. Stanwood *v.* Green, 22 Fed. Cas. No. 13,301, 2 Abb. 184, 11 Int. Rev. Rec. 134.

34. U. S. *v.* Fordyce, 25 Fed. Cas. No. 15,130, 13 Int. Rev. Rec. 77, where the order required the production of all the books and papers of a large banking house on the instant without saying where they were to be brought.

35. *In re* Archer, 1 Fed. Cas. No. 506, 9 Ben. 427, 24 Int. Rev. Rec. 110; *In re* Lippman, 15 Fed. Cas. No. 8,382, 3 Ben. 95, 9 Int. Rev. Rec. 1; *In re* Meador, 16 Fed. Cas. No. 9,375, 1 Abb. 317, 10 Int. Rev. Rec. 74; Stanwood *v.* Green, 22 Fed. Cas. No. 13,301, 2 Abb. 184, 11 Int. Rev. Rec. 134.

36. *Ex p.* Ives, 13 Fed. Cas. No. 7,114, 1 Int. Rev. Rec. 145.

37. *In re* Chadwick, 5 Fed. Cas. No. 2,570, 1 Lowell 439, 11 Int. Rev. Rec. 126, 133.

38. U. S. Rev. St. (1878) § 860 [U. S. Comp. St. (1901) p. 661]; *In re* Phillips, 19 Fed. Cas. No. 11,097, 10 Int. Rev. Rec. 107; *In re* Strouse, 23 Fed. Cas. No. 13,548, 1 Sawy. 605, 11 Int. Rev. Rec. 182; U. S. *v.* Brown, 24 Fed. Cas. No. 14,671, 1 Sawy. 531, 13 Int. Rev. Rec. 126. *Contra*, *In re* Lippman, 15 Fed. Cas. No. 8,382, 3 Ben. 95, 9 Int. Rev. Rec. 1, where a tobacco manufacturer summoned by the assessor to appear and produce books relating to his business failed to obey and an attachment was issued, it was held that he must produce the books, but when asked to exhibit any entry therein, if he says that he cannot do so without criminating himself, he is protected from exhibiting such entry and also from giving testimony in reply to any particular question.

39. *In re* Becker, 2 Fed. Cas. No. 1,208, 21 Int. Rev. Rec. 243.

40. Taylor *v.* Secor, 92 U. S. 575, 23 L. ed. 663; Cheatham *v.* Norvell, 92 U. S. 85, 23 L. ed. 561; U. S. *v.* Pacific R. Co., 27 Fed. Cas. No. 15,983, 4 Dill. 66.

41. Milan Distilling Co. *v.* Tillson, 17 Fed. Cas. No. 9,539, 26 Int. Rev. Rec. 5.

42. Bailey *v.* New York Cent., etc., R. Co., 22 Wall. (U. S.) 604, 22 L. ed. 840.

43. U. S. *v.* Black, 24 Fed. Cas. No. 14,600, 11 Blatchf. 538, 19 Int. Rev. Rec. 116.

44. Miltenberger *v.* Cooke, 18 Wall. (U. S.) 121, 21 L. ed. 864 (payment of tax on cotton); American Brewing Co. *v.* U. S., 33 Ct. Cl. 348.

45. McClain *v.* Fleshman, 106 Fed. 880, 46 C. C. A. 15 [*affirming* 105 Fed. 610].

incurred, and interest at the rate of one per centum a month.[46] Notice is necessary before the taxpayer can be charged with the penalty.[47] It is not necessary that resort should be had to a suit or prosecution in order to its recovery.[48] Penalties are never extended by implication and these do not apply when the law specially provides another penalty for the default.[49]

3. Lien For Taxes.[50] The law provides a lien upon property, real and personal, of the delinquent for taxes assessed, and a remedy by distraint to enforce it.[51] The lien which is created establishes itself not only upon property in possession but upon all rights to property,[52] belonging to the delinquent at the time of demand but not upon property which has been transferred to innocent purchasers prior to demand.[53] In order to support the lien all the prerequisites of the law must be strictly complied with.[54] An assessment, a notice that the tax is due, and a specific demand upon the individual taxpayer are necessary to create the lien. The demand should state the amount of tax as well as the time when it is due.[55] The matter of liens under the internal revenue laws is independent of state legislation, and a state law requiring liens to be recorded does not apply.[56]

4. Distraint and Sale.[57] Where a party refuses to pay taxes assessed a collector or his deputy, after notice and demand, may collect by distraint and sale of the delinquent's property.[58] The sale passes nothing more than the interest of the delinquent.[59] It conveys a good title to the purchaser, where the proceedings are regular.[60] Proceedings *in pais*, to divest title to real estate, must pursue the statute exactly; no presumption will be indulged in favor of their correctness.[61] Proceedings are void if the substantial requirements of the law have not been complied with.[62] Real estate may be seized under distraint without going upon

46. U. S. Rev. St. (1878) § 3184 [U. S. Comp. St. (1901) p. 2072]; Clay *v.* Swope, 38 Fed. 396 (if spirits are exported without payment of tax after it has been assessed, the distiller is not relieved from the five-per-cent penalty which had accrued); Francis *v.* Slack, 9 Fed. Cas. No. 5,041, 4 Cliff. 186, 16 Int. Rev. Rec. 134; U. S. *v.* Reed, 27 Fed. Cas. No. 16,135, 13 Int. Rev. Rec. 148 (judgment on distiller's bond). Interest at one per cent per month is recoverable as interest and not as penalty. U. S. *v.* Guest, 143 Fed. 456.

47. U. S. *v.* Bristow, 20 Fed. 378; U. S. *v.* Allen, 14 Fed. 263.

48. 21 Op. Atty.-Gen. 557.

49. Elliott *v.* East Pennsylvania R. Co., 99 U. S. 573, 25 L. ed. 292 [*reaffirming* ruling in Erskine *v.* Milwaukee, etc., R. Co., 94 U. S. 619, 24 L. ed. 133].

50. Lien for taxes on distilled spirits see *supra*, X, C, 3.

51. U. S. Rev. St. (1878) § 3186, amended by 20 U. S. St. at L. 331 [U. S. Comp. St. (1901) p. 2073]; State Nat. Bank *v.* Morrison, 22 Fed. Cas. No. 13,325, 1 McCrary 204; U. S. *v.* Pacific R. Co., 27 Fed. Cas. No. 15,984, 4 Dill. 71, 23 Int. Rev. Rec. 384.

52. U. S. *v.* Allen, 14 Fed. 263.

53. U. S. *v.* Pacific R. Co., 1 Fed. 97, 1 McCrary 1.

54. Peyrie *v.* Schreiber, 66 Mo. 38; U. S. *v.* Allen, 14 Fed. 263; U. S. *v.* Pacific R. Co., 27 Fed. Cas. No. 15,984, 4 Dill. 71, 23 Int. Rev. Rec. 384.

55. Brown *v.* Goodwin, 75 N. Y. 409; U. S. *v.* Bristow, 20 Fed. 378; U. S. *v.* Pacific R. Co., 1 Fed. 97, 1 McCrary 1; U. S. *v.* Pacific R. Co., 27 Fed. Cas. No. 15,984, 4 Dill. 71, 23 Int. Rev. Rec. 384.

To enforce the lien requires direct action upon the property itself, but the law does not make the amount of tax due payable from the proceeds of sale under execution upon a judgment in favor of another creditor. Bosset *v.* Miller, 2 Woodw. (Pa.) 40.

56. U. S. *v.* Snyder, 149 U. S. 210, 13 S. Ct. 846, 37 L. ed. 705.

Lien for taxes on distilled spirits see *supra*, X, C, 3.

57. For sale under act of 1861 and amendments see *supra*, V, C, 3, 4.

58. State Nat. Bank *v.* Morrison, 22 Fed. Cas. No. 13,325, 1 McCrary 204. The owner of the property is not thereby deprived of it without due process of law. State statutes as to sales for taxes do not apply. Springer *v.* U. S., 102 U. S. 586, 26 L. ed. 253.

59. Mansfield *v.* Excelsior Refinery Co., 135 U. S. 326, 10 S. Ct. 825, 34 L. ed. 162; Treat *v.* Staples, 24 Fed. Cas. No. 14,162, Holmes 1 (property mortgaged before the tax was assessed or due is not liable to distraint); U. S. *v.* Triplett, 28 Fed. Cas. No. 16,539, 22 Int. Rev. Rec. 207 (the same rule applies when the government is the purchaser).

60. Osterberg *v.* Union Trust Co., 93 U. S. 424, 23 L. ed. 964; De Roux *v.* Girard, 105 Fed. 798.

61. Schenck *v.* Peay, 21 Fed. Cas. No. 12,450, Woolw. 175, 10 Int. Rev. Rec. 54.

62. Stewart *v.* Pergusson, 133 N. C. 276, 45 S. E. 585; U. S. *v.* Allen, 14 Fed. 263.

Sale without notice.— Upon general principles a sale of land by a collector of taxes

the premises by indorsing a description of the same upon the writ.[63] The officer's certificate of sale given to the purchaser does not pass title, but is evidence only that the holder has a right to acquire title by deed, or to receive the money necessary to effect redemption.[64] Taxes can be collected by distraint and by suit on the bond at the same time.[65]

5. COLLECTOR'S DEED TO LAND SOLD. The collector's deed is *prima facie* evidence of the facts which by law are authorized or required to be stated in it, and operates as a conveyance of all the right, title, and interest which the party delinquent had in the land at the time the lien attached if the proceedings have been in accordance with law.[66] It is *prima facie* evidence of the name of the person for whose taxes the land was sold, of the name of the purchaser, of the real estate purchased, and of the price paid, but not as to other recitals.[67]

6. BILL IN EQUITY TO ENFORCE LIEN. The government can also resort to a bill in equity to enforce the lien, or to subject any real estate owned by the delinquent or in which he has any right, title, or interest, to the payment of the tax.[68] This is a cumulative remedy and does not preclude the government from enforcing its liens by other statutory methods.[69] It is only in cases where it is lawful and has become necessary to seize and sell real estate to satisfy the tax that a suit of this character can be sustained.[70]

7. COLLECTION OF TAXES BY SUIT. The government is not prohibited from adopting the action of debt or any other common-law remedy for collecting taxes due.[71] The government loses none of its remedies to collect its revenue unless there is an express repeal or abrogation of some existing remedy.[72] Suit for taxes can be brought at any time, whether or not they have been assessed, and whether or not they are assessable.[73] The fact that an assessment has been made and paid is no bar to a suit for the recovery of an additional amount found due.[74] The controlling question is not what has been assessed, but what is by law due.[75] When the United States appears as a suitor in court, it voluntarily submits to the law and places itself upon the same footing with other litigants; but this does not

without notice and without a strict and liberal compliance with the provisions of the statute for the protection of the citizen is invalid. Cahoon *v.* Coe, 57 N. H. 556.

A sale without an offering and adjudication of the land, made twenty-five miles from the place of distraint, is an absolute nullity. Johnson *v.* Dunbar, 26 La. Ann. 188.

63. U. S. *v.* Hess, 26 Fed. Cas. No. 15,358, 5 Sawy. 533, 25 Int. Rev. Rec. 201, 240, sale invalid.

64. Flemister *v.* Flemister, 83 Ga. 79, 9 S. E. 724.

65. Harding *v.* Woodcock, 137 U. S. 43, 11 S. Ct. 6, 34 L. ed. 580 (distiller's bond); U. S. *v.* Barrowcliff, 24 Fed. Cas. No. 14,528, 3 Ben. 519 (laches is not to be imputed to the government in such a case).

Laches or torts of officers see *supra*, XIII, M, 1, c.

66. Brown *v.* Goodwin, 75 N. Y. 409; Fox *v.* Stafford, 90 N. C. 296.

Failure to give notice.— Where it appears that in the case of land sold the twenty days' notice of sale required was not given, the collector's deed is void on its face. Dow *v.* Chandler, 85 Mo. 245.

67. Stewart *v.* Pergusson, 133 N. C. 276, 45 S. E. 585; Fox *v.* Stafford, 90 N. C. 296.

Tax titles.— Sharpleigh *v.* Surdam, 21 Fed. Cas. No. 12,711, 1 Flipp. 472.

68. U. S. Rev. St. (1878) § 3207 [U. S. Comp. St. (1901) p. 2081]; U. S. *v.* Mackoy, 26 Fed. Cas. No. 15,696, 2 Dill. 299; U. S. *v.* Rindskopf, 27 Fed. Cas. No. 16,166, 8 Biss. 507.

69. Alkan *v.* Bean, 1 Fed. Cas. No. 202, 8 Biss. 83, 23 Int. Rev. Rec. 351; Blacklock *v.* U. S., 41 Ct. Cl. ——.

70. U. S. *v.* Hodson, 26 Fed. Cas. No. 15,376, 14 Int. Rev. Rec. 100.

71. Dollar Sav. Bank *v.* U. S., 19 Wall. (U. S.) 227, 22 L. ed. 80; U. S. *v.* Pacific R. Co., 27 Fed. Cas. No. 15,983, 4 Dill. 66.

Assumpsit for taxes is a proper form of action. U. S. *v.* Washington Mills, 28 Fed. Cas. No. 16,647, 2 Cliff. 601, 6 Int. Rev. Rec. 146.

72. 18 Op. Atty.-Gen. 246.

73. King *v.* U. S., 99 U. S. 229, 25 L. ed. 373; Dollar Sav Bank *v.* U. S., 19 Wall. (U. S.) 227, 22 L. ed. 80 [*cited* and *approved* in U. S. *v.* Erie R. Co., 107 U. S. 1, 2 S. Ct. 83, 27 L. ed. 385]; U. S. *v.* Warrick, 25 Fed. 138; U. S. *v.* Little Miami, etc., R. Co., 1 Fed. 700; U. S. *v.* Halloran, 26 Fed. Cas. No. 15,286, 14 Blatchf. 1, 22 Int. Rev. Rec. 321; U. S. *v.* Tilden, 28 Fed. Cas. No. 16,519, 9 Ben. 368, 24 Int. Rev. Rec. 99.

74. U. S. *v.* Hazard, 26 Fed. Cas. No. 15,337, 22 Int. Rev. Rec. 309, action of debt to recover tax on income.

75. Clinkenbeard *v.* U. S., 21 Wall. (U. S.) 65, 22 L. ed. 477; Dollar Sav. Bank *v.* U. S., 19 Wall. (U. S.) 227, 22 L. ed. 80.

apply to such defenses as laches and the statute of limitations.[76] In an action brought by the United States for the recovery of taxes, defendant cannot plead a set-off, legal or equitable, growing out of independent claims;[77] although such claims are just and have been presented to the proper accounting officers and rejected.[78]

C. Refunding Taxes Erroneously Collected[79] — **1. Grounds For Refunding Taxes.** The commissioner is authorized to refund and pay back taxes unjustly assessed or excessive in amount or in any manner wrongfully collected,[80] but he cannot refund a tax which has been legally imposed.[81] The commissioner should refund in all cases of illegal collection except where the fault of the taxpayer, his waiver of his rights, his long acquiescence, or other sufficient circumstances discredit the claim.[82] Where a distiller loses his tax-paid stamps before they are affixed to the casks, and pays the tax again to procure other stamps, the duplicate payment may be refunded,[83] and if a stamp is destroyed the money paid for a second stamp may be refunded.[84] Refund may be made to a surety on a distiller's bond who has paid an assessment against his principal.[85]

2. No Protest Necessary To Authorize Refund. While an action cannot be maintained for the recovery back of money paid unless the payment was made under protest, that principle is held as too technical for application for the refund of taxes, and no proof of protest is required.[86]

3. Claims For Refund.[87] The regulations made by the secretary of the treasury prescribing the manner in which appeals for the refund of taxes shall be made are authorized by law,[88] and have the force of law.[89] The commissioner is not obliged to follow the secretary's advice.[90] Claims for refund of taxes must be filed within two years from the date of the payment of the tax.[91] If they are filed with the collector within that time it is a compliance with the terms of the statute.[92] An informal or defective application may be regarded as a claim, so far at least as to be a foundation for an amendment.[93] A valid claim cannot be defeated by irregularity in the matter of form.[94] The indorsement of a protest

76. Pond *v.* U. S., 111 Fed. 989, 49 C. C. A. 582; U. S. *v.* Ingate, 48 Fed. 251.

When the government acquiesces in an assessment for nearly twelve years, and then bring a suit to recover an additional sum, the presumption is that the assessment was correct and the burden is upon the government to show that the assessment was erroneous. U. S. *v.* Philadelphia, etc., R. Co., 123 U. S. 113, 8 S. Ct. 77, 31 L. ed. 138.

77. Western Union R. Co. *v.* U. S., 101 U. S. 543, 25 L. ed. 1068.

78. U. S. *v.* Pacific R. Co., 27 Fed. Cas. No. 15,983, 4 Dill. 66. The party sued is entitled to a deduction for overpayments even though there is no plea of offset. Missouri River, etc., R. Co. *v.* U. S., 19 Fed. 66.

79. For refund of taxes collected under the act of 1861, and amendments see *supra*, V, C, 8.

80. Edison Electric Illuminating Co. *v.* U. S., 38 Ct. Cl. 208.

81. Logan County *v.* U. S., 31 Ct. Cl. 23. The words "wrongfully collected" do not give jurisdiction for refunding further than the word "illegally." 16 Op. Atty.-Gen. 667.

82. 13 Op. Atty.-Gen. 439.

83. Woolner *v.* U. S., 13 Ct. Cl. 355.

84. 13 Op. Atty.-Gen. 574.

85. Shwarz *v.* U. S., 35 Ct. Cl. 303.

For abatements and refunding to distillers in cases of unavoidable accident or misunderstanding see *supra*, X, F, 3.

86. Real Estate Sav. Bank *v.* U. S., 16 Ct. Cl. 335.

87. Claims for refund are to be made on Form 46. Hicks *v.* James, 48 Fed. 542, 4 Hughes 470.

88. Real Estate Sav. Bank *v.* U. S., 16 Ct. Cl. 335.

89. Stotesbury *v.* U. S., 23 Ct. Cl. 285.

Claims involving an amount exceeding two hundred and fifty dollars are under the regulations transmitted by the commissioner to the secretary of the treasury for his consideration and advisement. Dupasseur *v.* U. S., 19 Ct. Cl. 1, the commissioner's decision is a decision *nisi*, although the certificate appended at the time of transmission states that the claim has been "examined and allowed."

90. Sybrandt *v.* U. S., 19 Ct. Cl. 461, three adverse decisions of successive secretaries of the treasury do not prevent the commissioner from taking up and allowing a claim.

91. Kings County Sav. Inst. *v.* Blair, 116 U. S. 200, 6 S. Ct. 353, 29 L. ed. 657.

92. U. S. *v.* Real Estate Sav. Bank, 104 U. S. 728, 26 L. ed. 908 [*affirming* 16 Ct. Cl. 335]. *Contra*, The appeal dates from the time the claim is filed with the commissioner and not from the time it is lodged with the collector. Cotton-Press Co. *v.* Collector, 6 Fed. Cas. No. 3,271, 1 Woods 296.

93. 14 Op. Atty.-Gen. 615.

94. Wayne *v.* U. S., 26 Ct. Cl. 274.

on the checks by which the taxes were paid, and a protest upon the return are not a claim such as is required by the law and regulations.[95]

4. Operation and Effect of Commissioner's Decision. An allowance by the commissioner for the refund of a tax is not the simple passing of an ordinary claim by an ordinary accounting officer, but an award which is conclusive, unless impeached for fraud or mistake.[96] His decisions are final within the scope of his authority and not subject to revision by the accounting officers;[97] nor can a court inquire as to the sufficiency of the evidence before him.[98] A mistake of judgment or discretion cannot be set up to impeach his action, but it may be impeached for want of jurisdiction.[99]

5. Evidence of Action of Commissioner. An official copy of the official entry in the record is the best evidence that a claim for refund has been rejected. A letter of the commissioner stating that the claim had been rejected was not received as evidence.[1]

6. Reopening Claims For Refund. Claims for refund come within the rule that a final decision, upon a knowledge of all the facts made by an officer authorized to act, is not to be reopened and reviewed by his successors in office unless the decision was founded on mistakes in matters of fact arising from errors in calculation or the absence of material testimony afterward discovered or produced.[2] The commissioner may reconsider and revoke an allowance made for refund at any time before payment, where suit has not been brought and there has been no change in the head of the bureau.[3] The award does not become final until it has passed out of his control. While it remains in his office it is subject to correction or revocation.[4]

7. Claims For Refund Under Special Acts. In auditing and paying a claim for a specific sum, for which appropriation has been made by congress, the functions of the government officers are only clerical.[5] If an act of congress directs certain sums of money to be refunded to certain persons named the United States cannot withhold portions of these sums.[6]

8. Refusal of Payment After Allowance of Claim. If the claim is allowed by the commissioner and payment refused by the accounting officer, a suit may be brought directly against the government in the court of claims.[7] If the commis-

95. Kings County Sav. Inst. *v.* Blair, 116 U. S. 200, 6 S. Ct. 353, 29 L. ed. 657.

96. U. S. *v.* Kaufman, 96 U. S. 567, 24 L. ed. 792 [*affirming* 11 Ct. Cl. 659]; Edison Electric Illuminating Co. *v.* U. S., 38 Ct. Cl. 208; Dugan *v.* U. S., 34 Ct. Cl. 458; Louisville *v.* U. S., 31 Ct. Cl. 1; Real Estate Sav. Bank *v.* U. S., 16 Ct. Cl. 335; Barnett *v.* U. S., 16 Ct. Cl. 515.

97. Greencastle First Nat. Bank *v.* U. S., 15 Ct. Cl. 225.

98. Sybrandt *v.* U. S., 19 Ct. Cl. 461; Woolner *v.* U. S., 13 Ct. Cl. 355.

99. Nixon *v.* U. S., 18 Ct. Cl. 448. When a particular authority is confided to a public officer, to be exercised by him in his discretion upon an examination of facts of which he is made the judge, his decision upon the facts is, in the absence of any controlling provision of law, absolutely conclusive as to the existence of those facts. Allen *v.* Blunt, 1 Fed. Cas. No. 216, 3 Story 742 [*cited* with approval in U. S. *v.* Wright, 11 Wall. (U. S.) 648, 20 L. ed. 188].

1. Hubbard *v.* Kelley, 8 W. Va. 46. Where an action is brought to recover back the tax, proof must be made of the commissioner's decision, and a mere certificate indorsed on the appeal "Examined and rejected," signed by one unknown to the court, with no evidence showing that the commissioner adopted such decision, is insufficient. Lauer *v.* U. S., 5 Ct. Cl. 447.

2. 14 Op. Atty.-Gen. 275.

3. Ridgway *v.* U. S., 18 Ct. Cl. 707.

4. Stotesbury *v.* U. S., 146 U. S. 196, 13 S. Ct. 1, 36 L. ed. 940 [*affirming* 23 Ct. Cl. 285].

5. U. S. *v.* Louisville Sinking Fund Com'rs, 169 U. S. 249, 18 S. Ct. 358, 42 L. ed. 735 [*affirming* 31 Ct. Cl. 1].

6. U. S. *v.* Jordan, 113 U. S. 418, 5 S. Ct. 585, 28 L. ed. 1013 [*affirming* 19 Ct. Cl. 108]. Act June 16, 1890, authorized the secretary of the treasury and the commissioner of internal revenue to audit and adjust the claim of the city of Louisville "for internal revenue taxes on dividends on shares of stock" owned by the city in the L. & N. R. Co. Louisville Sinking Fund Com'rs *v.* Buckner, 48 Fed. 533.

Act passed to remove the bar of the statute of limitation.— See Logan County Sinking Fund Com'rs *v.* U. S., 169 U. S. 255, 18 S. Ct. 361, 42 L. ed. 737.

7. U. S. *v.* Real Estate Sav. Bank, 104 U. S. 728, 26 L. ed. 908 [*affirming* 16 Ct. Cl. 335]; U. S. *v.* Kaufman, 96 U. S. 567, 24

sioner acts beyond his jurisdiction an allowance is without force or effect, and no action can be maintained thereon.[8] After a draft is issued in payment of a claim, the government holds the fund in the nature of a trust.[9]

D. Suits to Recover Taxes Paid[10] — **1. In General.** The remedy of a suit against collectors of internal revenue to recover back the tax after it has been paid is provided by statute.[11] An action for the recovery of taxes illegally exacted may also be brought against the United States.[12] These proceedings are exclusive of any other remedy.[13] Suits for taxes illegally collected are prohibited, unless the taxpayer shall have duly made an appeal to the commissioner of internal revenue in accordance with the provisions of the law, and until the appeal has been decided, unless the decision is postponed longer than six months.[14] Suits must be brought within two years after the cause of action accrued.[15] The right of action accrues at the expiration of six months after an appeal without action thereon and becomes barred in two years thereafter.[16] The running of the statute of limitations is not suspended during the pendency of the appeal before the commissioner.[17] If no appeal has been made, defendant may protect himself, by plea to that effect, in abatement of the action, or he may waive this defense, and then it becomes immaterial whether an appeal was made to the commissioner or not.[18] It is not necessary before bringing suit to make a claim for refund of

L. ed. 792 [*affirming* 11 Ct. Cl. 659]; Edison Electric Illuminating Co. *v.* U. S., 38 Ct. Cl. 208; Boehm *v.* U. S., 21 Ct. Cl. 290; Greencastle First Nat. Bank *v.* U. S., 15 Ct. Cl. 225; Woolner *v.* U. S., 13 Ct. Cl. 355.

8. Seat *v.* U. S., 18 Ct. Cl. 458, refund to a surety on a distiller's bond of a judgment recovered against him when the tax was not illegally assessed, and the claim for refund was founded on the allegation that the surety was not liable on his bond.

9. Ray *v.* U. S., 50 Fed. 166.

10. For jurisdiction of suits to recover taxes paid see *infra*, XV, D, 1.

11. U. S. *v.* Real Estate Sav. Bank, 104 U. S. 728, 26 L. ed. 908; Taylor *v.* Secor, 92 U. S. 575, 23 L. ed. 663; Brainard *v.* Hubbard, 12 Wall. (U. S.) 1, 20 L. ed. 272; Hornthall *v.* Keary, 9 Wall. (U. S.) 560, 19 L. ed. 560 (question of jurisdiction); Philadelphia *v.* Diehl, 5 Wall. (U. S.) 720, 18 L. ed. 614; U. S. *v.* Pacific R. Co., 27 Fed. Cas. No. 15,984, 4 Dill. 71, 23 Int. Rev. Rec. 384. Defendant is entitled to have a specific statement of the transactions on which the tax was collected. Haight, etc., Co. *v.* McCoach, 135 Fed. 894. A person cannot recover from a collector taxes paid which were in fact due from him, even though the manner of their assessment or collection was unauthorized. Schafer *v.* Craft, 144 Fed. 907.

Form of action.— Taxes legally exacted may be recovered back in an action of assumpsit against the collector. Kentucky Imp. Co. *v.* Slack, 100 U. S. 648, 25 L. ed. 609. A party who has made an involuntary payment under protest to a collector having no legal right to demand it can recover the money back irrespective of any statutory provisions. Moore *v.* Miller, 5 App. Cas. (D. C.) 413. *Compare* Louisville Sinking Fund Com'rs *v.* Buckner, 48 Fed. 533, holding that the action is not a common-law action for money had and received but regulated by statute.

12. Act March 3, 1887 (24 U. S. St. at L. 505). A claim to recover back taxes illegally exacted under the War Revenue Act is a claim founded upon a law of congress within the meaning of the act of March 3, 1887, and it may be enforced by an action directly against the United States after it has been presented to the commissioner, whether it has received his approval or not, and whether it is an action on a contract or an action sounding in tort. Christie-Street Comm. Co. *v.* U. S., 136 Fed. 326, 69 C. C. A. 326 [*affirming* 129 Fed. 506].

13. Snyder *v.* Marks, 109 U. S. 193, 3 S. Ct. 157, 27 L. ed. 901. Where a statute creates a right and provides a remedy, the remedy is generally exclusive. U. S. *v.* Trucks, 28 Fed. 846.

14. Hubbard *v.* Kelley, 8 W. Va. 46; Stuart *v.* Barnes, 43 Fed. 281; Francis *v.* Slack, 9 Fed. Cas. No. 5,041, 4 Cliff. 186, 16 Int. Rev. Rec. 134.

15. Kings County Sav. Inst. *v.* Blair, 116 U. S. 200, 6 S. Ct. 353, 26 L. ed. 657; Cheatham *v.* Norvell, 92 U. S. 85, 23 L. ed. 561; Christie-Street Comm. Co. *v.* U. S., 136 Fed. 326, 69 C. C. A. 326 [*affirming* 129 Fed. 506]; Louisville Sinking Fund Com'rs *v.* Buckner, 48 Fed. 533; Coblens *v.* Abel, 5 Fed. Cas. No. 2,926, Woolw. 293.

The words "cause of action" mean the right of action. James *v.* Hicks, 110 U. S. 272, 4 S. Ct. 6, 28 L. ed. 144 [*affirming* 48 Fed. 542, 4 Hughes 470] (as to claim pending before commissioner June 6, 1872); Wright *v.* Blakeslee, 101 U. S. 174, 25 L. ed. 1048.

16. Christie-Street Comm. Co. *v.* U. S., 126 Fed. 991 [*affirmed* in 129 Fed. 506].

17. Christie-Street Comm. Co. *v.* U. S., 129 Fed. 506.

18. Hendy *v.* Soule, 11 Fed. Cas. No. 6,359, 1 Deady 400.

Demurrer.— Where the complaint shows that more than two years have elapsed, and it is therefore barred, the defense of the statute of limitations may be raised by de-

an illegal tax if a claim for abatement of the assessment has been made and rejected.[19] When the government is the moving party, as upon an application for an order upon a receiver to pay an assessment, the defense may show that the assessment was erroneous, without regard to the lapse of time or to an appeal having been made to the commissioner of internal revenue.[20]

2. NECESSITY AND SUFFICIENCY OF PROTEST. In the absence of such duress as will render the payment involuntary, protest becomes necessary in order to show that the legality of the demand was not admitted when the payment was made. The recovery rests upon the fact that the payment was made to release property from detention or to prevent a seizure and sale of property and the protest saves the rights which grow out of that fact.[21] But under the internal revenue laws it is not necessary that the protest be reduced to writing. A verbal protest is sufficient to give notice that the legality of the demand is disputed.[22]

3. VOLUNTARY PAYMENT. The authorities are in general accord that taxes voluntarily paid cannot be recovered back. Every man is supposed to know the law, and if he voluntarily makes a payment which the law would not compel him to make he cannot invoke the aid of the courts to get his money back.[23] This is a rule of repose of general application founded on sound public policy, and thus far the law is clear, but it is not always easy to say what is a voluntary payment. Thus if the tax be paid under duress or compulsion of law,[24] or under protest,[25] or with notice that the taxpayer intends to bring suit to test the validity of the claim, he may recover it back, if the assessment was erroneous or illegal, in an action of assumpsit for money had and received.[26] Where the only alternative of the citizen is to submit to an illegal exaction or discontinue his business, money paid under such pressure can never be regarded as a voluntary act, within the meaning of the maxim, *volenti non fit injuria*.[27] So also the unwilling payment of an illegal tax to avoid the seizure and sale of property is not a voluntary payment. To render a payment involuntary it is not necessary that it should be exacted by actual violence or physical duress.[28] In other words, when taxes are paid on the demand of an officer having authority to collect them by distraint, there is sufficient duress of the property to make the payment involuntary.[29]

murrer. Louisville Sinking Fund Com'rs *v.* Buckner, 48 Fed. 533.

19. Scharzchild, etc., Co. *v.* Rucker, 143 Fed. 656; San Francisco Sav., etc., Soc. *v.* Cary, 21 Fed. Cas. No. 12,317, 2 Sawy. 333, 17 Int. Rev. Rec. 109.

20. U. S. *v.* Nebraska Distilling Co., 80 Fed. 285, 25 C. C. A. 418.

21. Chesebrough *v.* U. S., 192 U. S. 253, 24 S. Ct. 262, 48 L. ed. 432; Erskine *v.* Van Arsdale, 15 Wall. (U. S.) 75 note, 21 L. ed. 63; Brainard *v.* Hubbard, 12 Wall. (U. S.) 1, 20 L. ed. 272; Philadelphia *v.* Diehl, 5 Wall. (U. S.) 720, 18 L. ed. 614; Bend *v.* Hoyt, 13 Pet. (U. S.) 263, 10 L. ed. 154; Elliott *v.* Swartwout, 10 Pet. (U. S.) 137, 9 L. ed. 373.

22. Wright *v.* Blakeslee, 101 U. S. 174, 25 L. ed. 1048; Shaefer *v.* Ketchum, 21 Fed. Cas. No. 12,693, 6 Int. Rev. Rec. 4.

23. Chesebrough *v.* U. S., 192 U. S. 253, 24 S. Ct. 262, 48 L. ed. 432; Philadelphia *v.* Diehl, 5 Wall. (U. S.) 720, 18 L. ed. 614; Elliott *v.* Swartwout, 10 Pet. (U. S.) 137, 9 L. ed. 373.

24. Philadelphia *v.* Diehl, 5 Wall. (U. S.) 720, 18 L. ed. 614.

Payment of an illegal demand with full knowledge of the facts rendering it illegal, without an immediate and urgent necessity therefor, or unless to release or prevent immediate seizure of person or property, is a voluntary payment and not one under duress. U. S. *v.* New York, etc., Mail Steamship Co., 200 U. S. 488, 26 S. Ct. 327, — L. ed. —.

25. Philadelphia *v.* Diehl, 5 Wall. (U. S.) 720, 18 L. ed. 614; Nelson *v.* Carman, 17 Fed. Cas. No. 10,103, 5 Blatchf. 511, 6 Int. Rev. Rec. 181; Schmitt *v.* Trowbridge, 21 Fed. Cas. No. 12,468, 24 Int. Rev. Rec. 381; Schaefer *v.* Ketchum, 21 Fed. Cas. No. 12,693, 6 Int. Rev. Rec. 4.

26. Erskine *v.* Van Arsdale, 15 Wall. (U. S.) 75 note, 21 L. ed. 63; Philadelphia *v.* Diehl, 5 Wall. (U. S.) 720, 18 L. ed. 614; Nelson *v.* Carman, 17 Fed. Cas. No. 10,103, 5 Blatchf. 511, 6 Int. Rev. Rec. 181.

27. Swift, etc., Co. *v.* U. S., 111 U. S. 22, 4 S. Ct. 244, 28 L. ed. 341.

28. Hubbard *v.* Brainard, 35 Conn. 563; Swift, etc., Co. *v.* U. S., 111 U. S. 22, 4 S. Ct. 244, 28 L. ed. 341; Maxwell *v.* Griswold, 10 How. (U. S.) 242, 13 L. ed. 405. Payment of an illegal tax on property in order to acquire possession is an involuntary payment which may be recovered back. Simons *v.* U. S., 19 Ct. Cl. 601.

29. Hendy *v.* Soule, 11 Fed. Cas. No. 6,359, 1 Deady 400; Adams *v.* U. S., 1 Ct. Cl. 306.

4. Payment of Judgments Against Officers. Judgments against officers for taxes illegally collected and damages and costs recovered against them by reason of acts done in the performance of their duties are payable by the government. Claims for taxes recovered by judgments should be presented within two years after date of judgment.[30] The rejection of an application to refund a tax does not exhaust the authority of the commissioner, so that he cannot allow payment of a judgment against the collector in a suit brought to recover back the same tax.[31] Judgments may be paid to the judgment creditor or to the collector, although the court refused a certificate of probable cause. It should be paid to the judgment creditor if it has not been paid by the officer against whom it was recovered.[32] Costs will be allowed if under the practice in the state courts costs are allowed the prevailing party.[33]

E. Restraining Assessment or Collection by Injunction. The assessment or collection of an internal revenue tax cannot be restrained, although it be erroneous, irregular, or void, or the lien is to be enforced upon property in the hands of an innocent purchaser.[34] Neither a federal nor state court has any power to stay collection.[35] An injunction to restrain the collection of a tax is not the proper mode of inquiring into its unconstitutionality or invalidity.[36] Executive officers of the government cannot be interfered with in the exercise of their ordinary official duties, either by injunction or mandamus.[37] The national

30. Philadelphia *v.* Diehl, 5 Wall. (U. S.) 720, 18 L. ed. 614.

31. Nixon *v.* U. S., 18 Ct. Cl. 448.

32. U. S. *v.* Frerichs, 124 U. S. 315, 8 S. Ct. 514, 31 L. ed. 470 [*affirming* 21 Ct. Cl. 16].

33. De Bary *v.* Carter, 102 Fed. 130, 42 C. C. A. 209.

34. U. S. Rev. St. (1878) § 3224 [U. S. Comp. St. (1901) p. 2088]; Snyder *v.* Marks, 109 U. S. 189, 3 S. Ct. 157, 27 L. ed. 901; Keely *v.* Sanders, 99 U. S. 441, 23 L. ed. 327; Kensett *v.* Stivers, 10 Fed. 517, 18 Blatchf. 397; Alkan *v.* Bean, 1 Fed. Cas. No. 202, 8 Biss. 83, 23 Int. Rev. Rec. 351; Chicago, etc., R. Co. *v.* Page, 5 Fed. Cas. No. 2,668, 1 Biss. 461 (objection to right of court to interfere not pressed); Cutting *v.* Gilbert, 6 Fed. Cas. No. 3,519, 5 Blatchf. 259, 2 Int. Rev. Rec. 94 (bill for injunction dismissed for want of jurisdiction); Delaware R. Co. *v.* Prettyman, 7 Fed. Cas. No. 3,767, 17 Int. Rev. Rec. 99; Kissinger *v.* Bean, 14 Fed. Cas. No. 7,853, 7 Biss. 60; Magee *v.* Denton, 16 Fed. Cas. No. 8,943, 5 Blatchf. 130; Pullan *v.* Kinsinger, 20 Fed. Cas. No. 11,463, 2 Abb. 94; Roback *v.* Taylor, 20 Fed. Cas. No. 11,877, 2 Bond 36, 4 Int. Rev. Rec. 170; Robbins *v.* Freeland, 20 Fed. Cas. No. 11,883, 14 Int. Rev. Rec. 28; U. S. *v.* Hodson, 26 Fed. Cas. No. 15,376, 14 Int. Rev. Rec. 100. See 29 Cent. Dig. tit. "Internal Revenue," § 78. *Contra*, Clark *v.* Gilbert, 5 Fed. Cas. No. 2,822, 5 Blatchf. 330, 4 Int. Rev. Rec. 42, the assessor and collector were enjoined from levying and collecting broker's tax. This was before the act of March 2, 1867, prohibiting such suits was passed.

The prohibition applies to penalties for nonpayment of taxes assessed on real estate in the District of Columbia. Burgdorf *v.* District of Columbia, 7 App. Cas. (D. C.) 406.

What amounts to bill to restrain collection of taxes.— A bill for an injunction, requiring a collector to accept an export bond for spirits in a warehouse after the bonded period has expired, and allow their withdrawal for export without payment of the tax, is in effect a bill to restrain the collection of taxes, which is forbidden. Miles *v.* Johnson, 59 Fed. 38.

Constitutionality of statute.— The statute which prohibits injunctions against collectors to restrain collection of taxes is not unconstitutional. Pullan *v.* Kinsinger, 20 Fed. Cas. No. 11,463, 2 Abb. 94, 11 Int. Rev. Rec. 197. It is contrary to public policy to tie up the collection of taxes when the party injured has an adequate remedy at law. Nye *v.* Washburn, 125 Fed. 817.

35. 20 Op. Atty.-Gen. 257; Schulenberg-Boeckeler Lumber Co. *v.* Hayward, 20 Fed. 422. There are circumstances under which collectors may be enjoined from claiming moneys and levying for them as if for taxes. Frayser *v.* Russell, 9 Fed. Cas. No. 5,067, 3 Hughes 237.

36. Moore *v.* Miller, 5 App. Cas. (D. C.) 413; Allen *v.* Pullman's Palace Car Co., 139 U. S. 658, 11 S. Ct. 682, 35 L. ed. 303; Delaware R. Co. *v.* Prettyman, 7 Fed. Cas. No. 3,767, 17 Int. Rev. Rec. 99; Robbins *v.* Freeland, 20 Fed. Cas. No. 11,883, 14 Int. Rev. Rec. 28 [*approved* in Snyder *v.* Marks, 109 U. S. 189, 3 S. Ct. 157, 27 L. ed. 901]. Neither the mere illegality of a tax, nor its injustice nor irregularity give the right to an injunction in a court of equity. Taylor *v.* Secor, 92 U. S. 575, 23 L. ed. 663.

37. Moore *v.* Miller, 5 App. Cas. (D. C.) 413 (income tax case, injunction); U. S. *v.* Black, 128 U. S. 40, 9 S. Ct. 12, 32 L. ed. 354 (mandamus). The execution of a law will not be enjoined on the ground that the law is unconstitutional. Gaines *v.* Thompson, 7 Wall. (U. S.) 347, 19 L. ed. 62; Mississippi *v.* Johnson, 4 Wall. (U. S.) 475, 18 L. ed. 437.

courts cannot rightfully interfere with executive action in any case where an executive officer is authorized to exercise judgment or discretion in the performance of an official act.[38] The proper course for the aggrieved party to take in case of a tax unjustly enacted is to pay the tax demanded and appeal to the commissioner of internal revenue for a refund, and, if denied, to institute a suit to recover the amount paid.[39]

XV. VIOLATIONS OF THE REVENUE LAW AND JUDICIAL PROCEEDINGS IN RELATION THERETO.

A. Persons Liable[40] — **1. In General.** The failure of officers to perform their duties does not relieve the citizen from the consequences of a violation of law.[41]

2. Violation of Law by Partner. Any violation of the revenue law incurring a penalty committed by a partner in the course of partnership business is in legal contemplation the act of all the partners, and each one of them is liable to the penalty.[42] Where two persons composing a partnership make and sign, in their partnership name, a false return, they may be jointly indicted therefor.[43]

3. Violation of Law by Corporation. A corporation is responsible for acts done by its agent, whether *in contractu* or *in delicto*, in the course of its business, as an individual is responsible under similar circumstances,[44] and may be indicted for the acts of its officers or employees.[45] If the penalty be both fine and imprisonment, the statute is inoperative as to the imprisonment, as that part of the punishment cannot, from the nature of the offender, be carried out.[46]

4. Violations of Law by Agents or Employees. The illegal acts of agents or employees work forfeiture of property, although without the knowledge or procurement of the owner.[47] The principal is criminally responsible for the acts of an agent where they are done within the scope of his employment, and within the scope of his authority, but is not criminally liable for unauthorized acts.[48] A master, owing a certain duty to the public, who intrusts its performance to a servant, is responsible criminally for the failure of his servant to discharge that duty.[49] A principal is liable for failure of clerks or employees to make proper

38. Taylor *v.* Kercheval, 82 Fed. 497. It is only for ministerial acts, in the performance of which no exercise of judgment or discretion is required, that a rule will issue for a mandamus. U. S. *v.* Lamar, 116 U. S 423, 6 S. Ct. 424, 29 L. ed. 677.

39. U. S. *v.* Black, 24 Fed. Cas. No. 14,600, 11 Blatchf. 538, 19 Int. Rev. Rec. 116.

40. Persons liable for defrauding or attempting to defraud by illicit distilling see *supra*, X, I, 3.

Persons liable for fraudulently removing or concealing spirits see *supra*, X, I, 5.

Forfeiture of property by lessor for use for illicit distilling see *supra*, X, I, 3, d.

Criminal liability of officers see *supra*, XIII, M, 2.

41. U. S. *v.* Devlin, 24 Fed. Cas. No. 14,953, 6 Blatchf. 71, 7 Int. Rev. Rec. 94; U. S. *v.* Four Thousand One Hundred and Seventy-Five Cigars, 25 Fed. Cas. No. 15,154, 25 Int. Rev. Rec. 132, permission from the commissioner of internal revenue will not justify an unlawful act and is inoperative to protect the party committing it.

42. Stockwell *v.* U. S., 23 Fed. Cas. No. 13,466, 3 Cliff. 284, 12 Int. Rev. Rec. 88; U. S. *v.* Fenelon, 25 Fed. Cas. No. 15,085, 14 Int. Rev. Rec. 182; U. S. *v.* Thomasson, 28 Fed. Cas. No. 16,478, 4 Biss. 99. All participants in misdemeanors are liable as principals. U. S. *v.* Sykes, 58 Fed. 1000.

43. U. S. *v.* McGinnis, 26 Fed. Cas. No. 15,678, 1 Abb. 120, 3 Int. Rev. Rec. 83, 159 (although only sworn to by one of them); U. S. *v.* Mountjoy, 27 Fed. Cas. No. 15,829, 4 Int. Rev. Rec. 9.

44. Salt Lake City *v.* Hollister, 118 U. S. 256, 6 S. Ct. 1055, 30 L. ed. 176.

45. U. S. *v.* Adams Express Co., 119 Fed. 240; U. S. *v.* Baltimore, etc., R. Co., 24 Fed. Cas. No. 14,509, 8 Int. Rev. Rec. 148.

46. Com. *v.* Pulaski County Agricultural, etc., Assoc., 92 Ky. 197, 17 S. W. 442, 13 Ky. L. Rep. 468.

47. U. S. *v.* Stowell, 133 U. S. 1, 10 S. Ct. 244, 33 L. ed. 555; Bush *v.* U. S., 24 Fed. 917; U. S. *v.* Seven Barrels of Distilled Oil, 27 Fed. Cas. No. 16,253, 6 Blatchf. 174. If one is acting merely as the agent of another, it is his duty to ascertain whether the law has been complied with. U. S. *v.* Davis, 25 Fed. Cas. No. 14,928, 15 Int. Rev. Rec. 10.

48. U. S. *v.* White, 42 Fed. 138.

49. U. S. *v.* Buchanan, 9 Fed. 689, 4 Hughes 487; U. S. *v.* Adler, 24 Fed. Cas. No. 14,424, 21 Int. Rev. Rec. 316, a principal is liable for failure of employee to erase marks, stamps, and brands on packages of spirits at the time the same are emptied.

entries in books which they are required to keep,[50] or for selling in the usual and ordinary course of business oleomargarine not properly marked and branded.[51] Where a person with unlawful intent designs the commission of a criminal act, and to carry out that purpose another is employed to do the act, that act becomes the act of the principal, and he as well as the agent is criminally responsible.[52]

B. Intent as Element of Offense.[53] Where an offense against the law is shown to have been committed, the law raises the presumption of guilty intent.[54] Every man is presumed to intend the necessary legal or legitimate consequences of his acts.[55] In statutory offenses a guilty intent is not necessarily an ingredient.[55] But where the law contains the words "with intent to evade" the intent is material and of the essence of the offense.[57] In omission to pay taxes imposed by the revenue laws intention forms no part of the offense.[58] Intent to defraud need not be proven to convict a person of selling liquors without payment of special tax.[59] The word "wilfully," in the ordinary sense in which it is used in statutes, means not merely voluntarily, but with a bad purpose.[60] An act may be done knowingly and intentionally, whether it is the immediate act of the person charged or his authorized act through an employee.[61]

C. Effect of Violation of Law on Contracts. One who permits distilled spirits to be removed from his distillery and sold in fraud of the revenue cannot recover for the spirits thus sold.[62] A contract in which the consideration is illicit brandy is void as against public policy.[63] The neglect of a dealer to pay the special tax does not invalidate sales. The illegality consisted in not paying the tax but the sale is not unlawful on that account.[64] A sale of cigars at the factory before they are boxed or stamped is not invalid where the contract provides that they shall be stamped as the law requires before removal.[65]

D. Jurisdiction[66] **— 1. In General.** Suits for fines, penalties, and forfeitures must be brought in the United States circuit or district court for the district within which the fine, penalty, or forfeiture may have been incurred. Taxes may

50. U. S. *v.* Amann, 24 Fed. Cas. No. 14,438; U. S. *v.* Auja, 24 Fed. Cas. No. 14,478, 10 Int. Rev. Rec. 52; U. S. *v.* Fifty Barrels of Whiskey, 25 Fed. Cas. No. 15,091, 11 Int. Rev. Rec. 94.

51. Prather *v.* U. S., 9 App. Cas. (D. C.) 82.

52. U. S. *v.* Nunnemacher, 27 Fed. Cas. No. 15,092, 7 Biss. 111.

53. For intent as an element of various specific offenses against revenue laws see *supra*, X, I.

Necessity of intent or knowledge as basis of forfeiture of conveyances used for removing illicit goods see *infra*, XV, G, 2.

54. U. S. *v.* Smith, 27 Fed. 854 (when a criminal act is knowingly and wilfully committed, the law presumes a criminal intent); U S *v.* Brewery Utensils, 24 Fed. Cas. No. 14,641, 13 Int. Rev. Rec. 95 (intent to violate the law is presumed in the absence of any explanation of neglect to comply); U. S. *v.* Imsand, 26 Fed. Cas. No. 15,439, 1 Woods 581.

Forfeiture for intent to violate law.— A statute which would authorize the seizure and forfeiture of property on proof merely of an intent to violate the law in dealing with it in a certain manner at a future time, would be an unreasonable seizure and unconstitutional. U. S. *v.* Quantity of Tobacco, 27 Fed. Cas. No. 16,106, 6 Ben. 68.

55. U. S. *v.* Learned, 26 Fed. Cas. No. 15,580, 1 Abb. 483, 11 Int. Rev. Rec. 149.

The declarations of the accused made after the commission of the offense will not remove the presumption. U. S. *v.* Imsand, 26 Fed. Cas. No. 15,439, 1 Woods 581.

56. U. S. *v.* One Black Horse, 129 Fed. 167; U. S. *v.* Two Barrels of Whisky, 96 Fed. 479, 37 C. C. A. 518.

57. U. S. *v.* Buzzo, 18 Wall. (U. S.) 125, 21 L. ed. 812.

58. U. S. *v.* Rectifying Establishment, 27 Fed. Cas. No. 16,131, 11 Int. Rev. Rec. 46.

59. U. S. *v.* Barnhardt, 24 Fed. Cas. No. 14,526, 20 Int. Rev. Rec. 137.

60. Felton *v.* U. S., 96 U. S. 699, 24 L. ed. 875; *In re* Quantity of Distilled Spirits, 20 Fed. Cas. No. 11,495, 3 Ben. 552, 11 Int. Rev. Rec. 3, 10 Int. Rev. Rec. 206, meaning of the words "knowingly and wilfully."

61. Prather *v.* U. S., 9 App. Cas. (D. C.) 82.

62. Curran *v.* Downs, 7 Mo. App. 329.

63. Creekmore *v.* Chitwood, 7 Bush (Ky.) 317.

64. Larned *v.* Andrews, 106 Mass. 435, 8 Am. Rep. 346.

A lawyer who had not obtained a license under the act of 1862 is not entitled to recover for professional services. Hall *v.* Bishop, 3 Daly (N. Y.) 109.

65. Straus *v.* Minzesheimer, 78 Ill. 492; Combs *v.* Tuchelt, 24 Minn. 423.

66. For jurisdiction of state courts of offenses against internal revenue laws see Criminal Law, 12 Cyc. 206.

be sued for in any circuit or district court for the district within which the liability was incurred, or where the party from whom the tax is due resides at the time of the commencement of the action.[67] United States circuit courts have original jurisdiction when the right of either party depends on the validity of an act of congress.[68] They have jurisdiction of suits arising under the internal revenue laws.[69] An internal revenue case may be taken from the circuit court to the circuit court of appeals, and from there to the supreme court when its constitutionality is involved.[70] A suit to recover taxes alleged to have been illegally collected is cognizable in the United States circuit court without regard to the citizenship of the parties.[71]

2. Suits In Rem. The district courts have jurisdiction of suits *in rem* for forfeiture for violation of the internal revenue laws.[72] The circuit courts also have jurisdiction.[73] The court of the district where the *res* is seized has jurisdiction, although the violation of law occurred in another state.[74] Jurisdiction depends upon the possession of the property, actual or constructive.[75]

3. Conflict of Jurisdiction. Goods in the hands of the United States cannot

67. U. S. Rev. St. (1878) § 3213 [U. S. Comp. St. (1901) p. 2083]; Act March 3, 1887 (24 U. S. St. at L. 505 [U. S. Comp. St. (1901) p. 752]); Act Aug. 13, 1888 (25 U. S. St. at L. 433); U. S. *v.* Moore, 11 Fed. 248; U. S. *v.* New York, etc., R. Co., 27 Fed. Cas. No. 15,874, 10 Ben. 144, 24 Int. Rev. Rec. 341. In conspiracy to defraud, the parties may be tried in any district where the conspiracy is committed or an overt act done in pursuance of the illegal purpose. U. S. *v.* Rindskopf, 27 Fed. Cas. No. 16,165, 6 Biss. 259, 21 Int. Rev. Rec. 326.

Where a federal question is involved it is not essential to the jurisdiction of a federal court that diversity of citizenship between the parties should also appear. American Express Co. *v.* Maynard, 177 U. S. 404, 20 S. Ct. 695, 44 L. ed. 823; Dinsmore *v.* Southern Express Co., 92 Fed. 714, validity of action of railroad commission of Georgia in reference to stamp tax on bills of lading a federal question.

68. Patton *v.* Brady, 184 U. S. 608, 22 S. Ct. 493, 46 L. ed. 713.

69. Ames *v.* Hager, 36 Fed. 129, 13 Sawy. 473, 1 L. R. A. 377. The rejection by the commissioner of a claim for rebate on tax on tobacco under section 4, of the act of April 12, 1902, is reviewable by the United States circuit court under the Tucker Act. Hyams *v.* U. S., 139 Fed. 997.

70. Spreckels Sugar Refining Co. *v.* McClain, 192 U. S. 397, 24 S. Ct. 376, 48 L. ed. 496. A writ of error does not lie in behalf of the United States in a criminal case. U. S. *v.* Sanges, 144 U. S. 310, 12 S. Ct. 609, 36 L. ed. 445.

71. Spreckels Sugar Refining Co. *v.* McClain, 192 U. S. 397, 24 S. Ct. 376, 48 L. ed. 496; Christie-Street Comm. Co. *v.* U. S., 129 Fed. 506 [*affirming* 126 Fed. 991]; Louisville Sinking Fund Com'rs *v.* Buckner, 48 Fed. 533. *Contra*, it was formerly held that suits against collectors to recover taxes should be brought in a state court unless the parties were citizens of different states. Defendant had the right to have the cases removed to the United States circuit court. Williams *v.* Reynolds, 131 U. S. appendix cxi, 21 L. ed. 112; Brainard *v.* Hubbard, 12 Wall. (U. S.) 1, 20 L. ed. 272; Gates *v.* Osborne, 9 Wall. (U. S.) 567, 9 L. ed. 748; Hornthall *v.* Kearny, 9 Wall. (U. S.) 560, 19 L. ed. 560; Philadelphia *v.* Diehl, 5 Wall. (U. S.) 720, 18 L. ed. 614; Merchants' Ins. Co. *v.* Ritchie, 5 Wall. (U. S.) 541, 18 L. ed. 540; Cincinnati Brewing Co. *v.* Bettman, 102 Fed. 16. The court of claims has jurisdiction of a suit to reform a contract for printing internal revenue stamps and to recover damages for violation of contract so reformed. Milliken Imprinting Co. *v.* U. S., 40 Ct. Cl. 81. The supreme court on appeal concurred on question of jurisdiction but reversed judgment on the merits. U. S. *v.* Milliken Imprinting Co., 202 U. S. 168, 26 S. Ct. 572 — L. ed. —.

72. U. S. *v.* Seventeen Empty Barrels, 27 Fed. Cas. No. 16,255, 3 Dill. 285, 21 Int. Rev. Rec. 391.

73. U. S. *v.* Seven Barrels of Distilled Oil, 27 Fed. Cas. No. 16,253, 6 Blatchf. 174; U. S. *v.* Seven Barrels of Distilled Oil, 27 Fed. Cas. No. 16,253*a*, 8 Int. Rev. Rec. 162. In practice suits *in rem* for forfeitures are more frequently brought in the district courts, yet cases are to be found of such suits originally brought in the circuit courts, where jurisdiction was taken and was not questioned. Coffey *v.* U. S., 116 U. S. 427, 6 S. Ct. 432, 29 L. ed. 681; U. S. *v.* Five Hundred and Eight Barrels of Distilled Spirits, 25 Fed. Cas. No. 15,113, 5 Blatchf. 407, 5 Int. Rev. Rec. 190; U. S. *v.* One Still, 27 Fed. Cas. No. 15,954, 5 Blatchf. 403, 5 Int. Rev. Rec. 189; U. S. *v.* Six Barrels of Distilled Spirits, 27 Fed. Cas. No. 16,294, 5 Blatchf. 542, 6 Int. Rev. Rec. 187; U. S. *v.* Two Hundred Barrels of Whiskey, 28 Fed. Cas. No. 16,585, 2 Woods 54; U. S. *v.* Two Tons of Coal, 28 Fed. Cas. No. 16,590, 5 Blatchf. 386.

74. U. S. *v.* Three Hundred and Ninety-Six Barrels of Distilled Spirits, 28 Fed. Cas. No. 16,502, 3 Int. Rev. Rec. 114.

75. U. S. *v.* Ninety-Two Barrels of Rectified Spirits, 27 Fed. Cas. No. 15,892, 8 Blatchf. 480.

be attached by state officers.[76] A mechanic's lien on distillery premises cannot be enforced in a state court, after proceedings *in rem* have been commenced in a United States court.[77] Where property is seized under a state process and is in the custody of the sheriff awaiting the judgment of the court, the possession of the sheriff cannot be legally interfered with by internal revenue officers.[78] Property in the custody of the marshal is not liable to be proceeded against for the internal revenue tax while in his custody.[79]

4. Removal of Cases to United States Courts. Cases civil or criminal arising under the internal revenue laws, if commenced in a state court against an officer, appointed or acting under those laws, or against persons acting under such an officer may be removed on petition of defendant into the United States circuit court, irrespective of the citizenship of the parties.[80] A prosecution cannot be removed before an indictment has been found.[81] The statute is highly remedial and should receive a liberal construction,[82] but it should not be extended to give jurisdiction where jurisdiction does not appear to have been intended. Where the question of jurisdiction is doubtful the rule is to resolve that doubt against the jurisdiction of the federal courts.[83] A rule issued by a state court upon a collector to show why an attachment should not issue against him for contempt in refusing to permit the sheriff to enter a warehouse is removable to a federal court,[84] as is also a proceeding by a landlord to recover from a lessee possession of premises used as a bonded warehouse, to which proceeding the collector and storekeeper are made parties defendant.[85]

E. Arrests. No warrant of arrest for violation of the internal revenue law shall be issued upon the sworn complaint of a private citizen unless first approved in writing by a United States district attorney.[86]

F. Penalties[87] **— 1. In General.** A penalty given by statute is technically a debt. It does not, however, arise upon contract, but is imposed for a violation of law or the neglect or refusal to perform some duty enjoined by law.[88] Penalties must be plainly imposed or they cannot be exacted.[89] The penal sum of a bond is not a penalty.[90] If a statute provides that a fine shall not be less than a certain

76. Harris *v.* Dennie, 3 Pet. (U. S.) 292, 7 L. ed. 683; McCullough *v.* Large, 20 Fed. 309.

77. Heidritter *v.* Elizabeth Oil-Cloth Co., 6 Fed. 138.

78. Buck *v.* Colbath, 3 Wall. (U. S.) 334, 18 L. ed. 257; 14 Op. Atty.-Gen. 370.

79. The Victory, 28 Fed. Cas. No. 16,938, 2 Sprague 226.

80. U. S. Rev. St. (1878) § 643, amended by 28 U. S. St. at L. 36 [U. S. Comp. St. (1901) p. 521] (reënactment of Act March 2, 1833 (4 U. S. St. at L. 633 [U. S. Comp. St. (1901) p. 521], known as the "Force Act"); Philadelphia *v.* Diehl, 5 Wall. (U. S.) 720, 18 L. ed. 614; Cincinnati Brewing Co. *v.* Bettman, 102 Fed. 16. Act March 3, 1875 (18 U. S. St. at L. 470): "An act to determine the jurisdiction of circuit courts of the United States, and to regulate the removal of causes from State courts, and for other purposes," does not supersede this section. Venable *v.* Richards, 105 U. S. 636, 26 L. ed. 1196.

81. Virginia *v.* Paul, 148 U. S. 107, 13 S. Ct. 536, 37 L. ed. 386. *Contra*, the prosecution commences when warrant is issued and can then be removed. North Carolina *v.* Kirkpatrick, 42 Fed. 689; Georgia *v.* Bolton, 11 Fed. 217; Georgia *v.* Port, 3 Fed. 117, 4 Woods 513.

82. North Carolina *v.* Sullivan, 50 Fed. 593.

83. Johnson *v.* Wells, 98 Fed. 3.

84. McCullough *v.* Large, 20 Fed. 309.

85. Gallatin *v.* Sherman, 77 Fed. 337.

86. Act March 2, 1901 (31 U. S. St. at L. 950); *In re* Gilbert, 31 Fed. 277, 24 Blatchf. 325, the practice of encouraging prosecutions set on foot by "professional witnesses" strongly condemned.

A deputy marshal in Virginia may arrest without warrant one who has whisky in his possession for the purpose of selling the same without payment of the internal revenue tax. Carico *v.* Wilmore, 51 Fed. 196.

87. Penalties for violation of statutes regulating manufacture of fermented liquors see *supra*, XI, A, 4.

Penalties relating to tobacco see *supra*, XI, C, 1, f.

Penalties for offenses relating to oleomargarine see *supra*, XI, D, 5.

Penalties for offenses relating to cigars see *supra*, XI, C, 2, b.

88. U. S. *v.* Walsh, 28 Fed. Cas. No. 16,635, 1 Abb. 66, Deady 281, 6 Int. Rev. Rec. 212.

89. Elliott *v.* East Pennsylvania R. Co., 99 U. S. 573, 25 L. ed. 292.

90. Raymond *v.* U. S., 20 Fed. Cas. No. 11,596, 14 Blatchf. 51.

sum, nor exceeding a certain larger sum, a court has no more right to impose a less fine than the smaller amount than it has to impose any greater fine than the larger amount.[91]

2. Methods of Recovery.[92] Where the proceeding for enforcing a penalty is prescribed that mode is exclusive; but where no mode of proceeding is mentioned, the proceeding must be in any proper form of action, or by any appropriate form of proceeding.[93] Thus it is held that penalties may be recovered by indictment,[94] or by information.[95] Where the punishment prescribed is a fine or pecuniary penalty, and the act fixes the exact amount, it may be recovered by a civil action in the form of an action of debt.[96] In an action against several jointly judgment may be entered against some and in favor of others whose complicity is not proved, precisely as though the action were in form as well as in substance *ex delicto*.[97] If the penalty is a fine on conviction, or imprisonment, or both, at the discretion of the court, its provisions cannot be enforced by civil action.[98]

G. Forfeitures[99] **— 1. Forfeiture For Fraud Generally.** All taxable articles are forfeited when found in possession of any person for the purpose of being sold in fraud of the revenue; all raw materials in possession for the purpose of being manufactured into articles subject to tax and sold in fraud of the revenue; and all tools, implements, and personal property in the place or building, or within any yard or inclosure where such articles are found.[1] This provision applies to

91. State *v.* Lawry, 4 Nev. 161. Where the statute imposes "a penalty of five hundred dollars, or not less than double the amount of duties fraudulently attempted to be evaded," the penalty imposed must at least equal double the amount of duties sought to be evaded, and in no case be less than five hundred dollars. U. S. *v.* Smock, 27 Fed. Cas. No. 16,348, 4 Int. Rev. Rec. 202.

92. See, generally, Penalties.

93. U. S. *v.* Moore, 11 Fed. 248.

94. U. S. *v.* Craft, 43 Fed. 374; U. S. *v.* Abbott, 24 Fed. Cas. No. 14,416, 9 Int. Rev. Rec. 186 (penalty for not affixing stamps to a box of sardines); U. S. *v.* Chapel, 25 Fed. Cas. No. 14,781; U. S. *v.* Houghton, 26 Fed. Cas. No. 15,396, 14 Int. Rev. Rec. 126; U. S. *v.* Mattingly, 26 Fed. Cas. No. 15,743, 6 Int. Rev. Rec. 19 (evading payment of tax on distilled spirits).

Where the law uses the words "shall forfeit the sum of ——" an indictment is appropriate. U. S. *v.* Moore, 11 Fed. 248. It was the intent of congress that penalties for selling articles under schedule C unstamped should be recovered by indictment. It is scarcely more than a question of the form of action. U. S. *v.* Fenelon, 25 Fed. Cas. No. 15,085, 14 Int. Rev. Rec. 182.

95. U. S. *v.* Taylor, 11 Fed. 470, 3 McCrary 500 (for carrying on business as retail liquor dealer without payment of special tax); U. S. *v.* Maxwell, 26 Fed. Cas. No. 15,750, 3 Dill. 275, 21 Int. Rev. Rec. 148. *Contra*, U. S. *v.* Joe, 26 Fed. Cas. No. 15,478, 15 Int. Rev. Rec. 57, prosecution by criminal information in federal courts unauthorized.

96. Lees *v.* U. S., 150 U. S. 476, 14 S. Ct. 163, 37 L. ed. 1150; U. S. *v.* Brown, 24 Fed. Cas. No. 14,662, Deady 566; U. S. *v.* Ebner, 25 Fed. Cas. No. 15,020, 4 Biss. 117.

97. Chaffee *v.* U. S., 18 Wall. (U. S.) 516, 21 L. ed. 908.

98. U. S. *v.* Claflin, 97 U. S. 546, 553 note, 24 L. ed. 1082, 1085, customs case. Action for debt will not lie in such case. U. S. *v.* Ebner, 25 Fed. Cas. No. 15,020, 4 Biss. 117; U. S. *v.* Morin, 26 Fed. Cas. No. 15,810, 4 Biss. 93. *Contra*, U. S. *v.* Foster, 25 Fed. Cas. No. 15,142, 2 Biss. 453, 19 Int. Rev. Rec. 5, where the law provides that a person who neglects or refuses to affix and cancel a stamp shall be liable to pay a penalty of one hundred dollars in each case where such omission occurs, and shall be liable to imprisoument for not more than one year, an action of debt may be brought for the money penalty. It is discretionary whether the whole penalty shall be imposed.

99. For violation of statutes regulating the business of distilling see *supra*, X, I.

Forfeitures for violation of statutes regulating manufacture of fermented liquors see *supra*, XI, A, 4.

Forfeitures relating to tobacco see *supra*, XI, C, 1, f.

Forfeitures for offenses relating to cigars see *supra*, XI, C, 2, b.

Forfeitures for offenses relating to oleomargarine see *supra*, XI, D, 5.

1. U. S. Rev. St. (1878) § 3453 [U. S. Comp. St. (1901) p. 2278], reproduction of Act June 30, 1864 (13 U. S. St. at L. 223, § 48), amended by 14 U. S. St. at L. 98; U. S. *v.* Eighteen Barrels of High Wines, 25 Fed. Cas. No. 15,033, 8 Blatchf. 475; U. S. *v.* One Still, 27 Fed. Cas. No. 15,954, 5 Blatchf. 403, 5 Int. Rev. Rec. 189 (seizure of two stills and appurtenances and a dwelling-house and lager-beer saloon, and a brewery and appurtenances, the whole being in one inclosure); U. S. *v.* Quantity of Tobacco, 27 Fed. Cas. No. 16,106, 6 Ben. 68; U. S. *v.* Seventeen Empty Barrels, 27 Fed. Cas. No. 16,255, 3 Dill. 285, 21 Int. Rev. Rec. 391; U. S. *v.* Thirty-Six Barrels of High Wines, 28 Fed. Cas. No. 16,469, 7 Blatchf. 469, 12

distilled spirits notwithstanding the forfeiture of spirits is provided for in other sections of the law.[2] The ground for the seizure of taxable articles and raw materials is the fraudulent intent of the person who has them in possession or control.[3] The object is to enable the government to anticipate and prevent the sale or removal and to proceed to a forfeiture before the overt act of fraud is perpetrated.[4] This provision does not apply to oleomargarine frauds.[5] Forfeiture of the personal property is incurred irrespective of the question whether or not it is to be used in the illicit manufacture of taxable articles,[6] and without regard to the fraudulent intent or purpose of the person having possession or control thereof.[7] The onus is upon the claimant to make out to the satisfaction of the court and jury that the situation of the property is consistent with innocence.[8] Raw material intended for fraudulent manufacture may be seized for forfeiture wherever found.[9] Forfeiture does not depend on the material being seized in the possession of a person in whose possession forfeitable taxable articles are found.[10] It is necessary, as a ground of forfeiture, that the tools and implements should be found on the premises of the manufactory.[11] Fixtures are not included in the words "tools, implements and instruments."[12]

2. Forfeiture of Conveyances Used For Removal of Illicit Goods. In addition to the penalties imposed upon persons who remove or conceal goods upon which the tax has not been paid with intent to defraud, all conveyances and animals used in the accomplishment of this unlawful purpose are forfeitable.[13] Knowledge or intent on the part of the owner of a conveyance so used is not required to be shown.[14] The conveyances and animals are considered the offenders and liable without regard to the misconduct or responsibility of the owner. Innocent owners of property forfeited must obtain redress from those who were intrusted with the property and used it unlawfully,[15] or by application to the

Int. Rev. Rec. 41 (spirits in distillery warehouse); U. S. *v.* Whiskey, 28 Fed. Cas. No. 16,671, 7 Phila. (Pa.) 603, 11 Int. Rev. Rec. 109.

The expression "in fraud of the internal revenue laws" means in violation of the internal revenue laws. Quantity of Tobacco, 20 Fed. Cas. No. 11,500, 5 Ben. 407.

2. Harrington *v.* U. S., 11 Wall. (U. S.) 356, 20 L. ed. 167 [*affirming* 28 Fed. Cas. No. 16,580, 3 Cliff. 261, 10 Int. Rev. Rec. 164].

3. U. S. *v.* One Still, 27 Fed. Cas. No. 15,954, 5 Blatchf. 403, 5 Int. Rev. Rec. 189.

4. U. S. *v.* Thirty-Six Barrels of High Wines, 28 Fed. Cas. No. 16,468, 7 Blatchf. 459, 12 Int. Rev. Rec. 40.

5. U. S. *v.* One Bay Horse, 128 Fed. 207.

6. *In re* Quantity of Distilled Spirits, 20 Fed. Cas. No. 11,494, 3 Ben. 70, 9 Int. Rev. Rec. 9 (spirits in rectifying establishment forfeitable); U. S. *v.* Spring Valley Distillery, 25 Fed. Cas. No. 14,963, 11 Blatchf. 255, 18 Int. Rev. Rec. 59; U. S. *v.* Quantity of Tobacco, 27 Fed. Cas. No. 16,105, 5 Ben. 112, 3 Int. Rev. Rec. 158.

Personal property which has no connection with the illicit business is not forfeited, founded upon mere proximity in place. U. S. *v.* Thirty-Three Barrels of Spirits, 28 Fed. Cas. No. 16,470, 1 Abb. 311, 1 Lowell 239, 7 Int. Rev. Rec. 75. But see U. S. *v.* Sixteen Barrels of Distilled Spirits, 27 Fed. Cas. No. 16,300, 10 Ben. 484.

Knowledge of illicit business.— Personal property in the same inclosure with a building in which an illicit distillery is carried on is forfeited provided the owners have knowledge of the existence of the illicit still. U. S. *v.* Quantity of Rags, 27 Fed. Cas. No. 16,103, 7 Int. Rev. Rec. 123.

7. U. S. *v.* One Still, 27 Fed. Cas. No. 15,954, 5 Blatchf. 403, 5 Int. Rev. Rec. 189.

8. U. S. *v.* One Still, 27 Fed. Cas. No. 15,954, 5 Blatchf. 403, 5 Int. Rev. Rec. 189.

9. U. S. *v.* Sixteen Hogsheads of Tobacco, 27 Fed. Cas. No. 16,302, 2 Bond 137.

10. U. S. *v.* Quantity of Tobacco, 27 Fed. Cas. No. 16,106, 6 Ben. 68.

11. U. S. *v.* Sixteen Hogsheads of Tobacco, 27 Fed. Cas. No. 16,302, 2 Bond 137.

12. U. S. *v.* Spring Valley Distillery, 25 Fed. Cas. No. 14,963, 11 Blatchf. 255, 18 Int. Rev. Rec. 59. Machines are included but not a water wheel used for propelling machinery. U. S. *v.* Friction-Match Mach., 25 Fed. Cas. No. 15,167, 1 Hask. 32.

13. U. S. Rev. St. (1878) § 3450 [U. S. Comp. St. (1901) p. 2277]; The Kawailani, 128 Fed. 879, 63 C. C. A. 347; U. S. *v.* Two Barrels of Whisky, 96 Fed. 479, 37 C. C. A. 518.

14. U. S. *v.* Two Horses, 28 Fed. Cas. No. 16,578, 9 Ben. 529.

15. U. S. *v.* One Black Horse, 129 Fed. 167; U. S. *v.* Two Bay Mules, 36 Fed. 84.

If negligence is fairly attributable to the owner in putting his property at the service of those likely to violate the law it is forfeited. U. S. *v.* Two Horses, 28 Fed. Cas. No. 16,578, 9 Ben. 529, two horses and a truck used in conveying distilled spirits forfeited.

officers of the government who have been invested with authority to remit forfeitures.[16]

3. PROVISIONS FOR PENALTIES AND FORFEITURES WHEN NOT OTHERWISE PROVIDED. The law imposes a penalty and forfeiture in the case of distillers, rectifiers, wholesale liquor dealers, and manufacturers of tobacco or cigars, for omitting things required, and for doing things forbidden, where there is no specific penalty elsewhere imposed.[17] It was not intended by this provision to cumulate or increase punishment.[18] The spirits which are forfeited are those owned by the distiller, rectifier, or wholesale liquor dealer, or in which he has any interest as owner at the time of the discovery of his offense.[19] The phrase "all distilled spirits or liquors owned by him" shall be forfeited is to be construed to mean all distilled spirits and liquors. It was not intended to discriminate between distilled spirits and liquors.[20] To incur the penalties under this provision, the violator of the law must have a knowledge that he is doing or omitting to do the act forbidden or required, and intends so to do;[21] but fraudulent or criminal intent is not a necessary ingredient.[22]

4. WHEN FORFEITURE TAKES EFFECT. When an act has been done which works a forfeiture of property the forfeiture takes effect immediately upon the commission of the act. It relates back to the time the offense was committed, and operates at that time as a statutory transfer of the right of property to the government,[23] and avoids intermediate sales and alienations even to innocent purchasers.[24] The government's title to forfeited property is not perfected

Stolen property.— It is not the purpose of the law to forfeit the property of a party entirely innocent where reasonable diligence is exercised. If a team and wagon is stolen from the owner and used in the transportation of illicit spirits it would be unjust to forfeit it. U. S. *v.* Two Barrels Whisky, 96 Fed. 479, 37 C. C. A. 518.

16. U. S. *v.* One Black Horse, 129 Fed. 167.

17. U. S. Rev. St. (1878) § 3456, amended by 19 U. S. St. at L. 249 [U. S. Comp. St. (1901) p. 2280], reënacting § 96, Act July 20, 1868; U. S. *v.* Two Hundred Barrels of Whiskey, 95 U. S. 571, 24 L. ed. 491 [*affirming* 28 Fed. Cas. No. 16,585, 2 Woods 54]; *In re* Quantity of Distilled Spirits, 20 Fed. Cas. No. 11,495, 3 Ben. 552, 11 Int. Rev. Rec. 3, 10 Int. Rev. Rec. 206; U. S. *v.* Thirty-Four Barrels Distilled Spirits, 28 Fed. Cas. No. 16,461, 13 Int. Rev. Rec. 188; U. S. *v.* 288 Packages Merry World Tobacco, 103 Fed. 453.

18. U. S. *v.* Forty-Eight Hundred Gallons of Spirits, 25 Fed. Cas. No. 15,153, 4 Ben. 471, 13 Int. Rev. Rec. 52; U. S. *v.* One Thousand Four Hundred and Twelve Gallons Distilled Spirits, 27 Fed. Cas. No. 15,960, 10 Blatchf. 428, 17 Int. Rev. Rec. 86.

19. U. S. *v.* Two Hundred Barrels of Whiskey, 28 Fed. Cas. No. 16,585, 2 Woods 54 [*affirmed* in 95 U. S. 571, 24 L. ed. 491].

20. U. S. *v.* One Hundred and Thirty-three Casks of Distilled Spirits, 27 Fed. Cas. No. 15,940, 1 Sawy. 188, 11 Int. Rev. Rec. 191.

21. U. S. *v.* Three Barrels of Whiskey, 77 Fed. 963; U. S. *v.* Ninety-Five Barrels of Distilled Spirits, 27 Fed. Cas. No. 15,889, 12 Int. Rev. Rec. 123; U. S. *v.* One Rectifying Establishment, 27 Fed. Cas. No. 15,952, 11 Int. Rev. Rec. 45.

22. U. S. *v.* McKim, 26 Fed. Cas. No. 15,693, 10 Int. Rev. Rec. 74, a distiller who failed to construct his distillery according to the requirements.

23. Thacher *v.* U. S., 103 U. S. 679, 26 L. ed. 535; U. S. *v.* One Hundred Barrels Distilled Spirits, 14 Wall. (U. S.) 44, 17 L. ed. 815 [*reversing* 27 Fed. Cas. No. 15,948, 2 Abb. 305, 1 Dill. 49]; Heidritter *v.* Elizabeth Oil Cloth Co., 6 Fed. 138; U. S. *v.* J. C. McCoy's Distillery, 25 Fed. Cas. No. 14,964, 21 Int. Rev. Rec. 165; U. S. *v.* Forty-Six Casks of California Grape Brandy, 25 Fed. Cas. No. 15,135, 5 Int. Rev. Rec. 161; U. S. *v.* Fifty-Six Barrels of Whiskey, 25 Fed. Cas. No. 15,095, 1 Abb. 93, 4 Int. Rev. Rec. 106; U. S. *v.* One Water Cask, etc., 27 Fed. Cas. No. 15,996, 10 Int. Rev. Rec. 93; U. S. *v.* Twenty-One Barrels of High Wines, 28 Fed. Cas. No. 16,567, 6 Int. Rev. Rec. 213. *Contra*, U. S. *v.* Three Hundred and Ninety-Six Barrels of Distilled Spirits, 28 Fed. Cas. No. 16,504, 3 Int. Rev. Rec. 135, the settled rules of construction with regard to statutory forfeitures, make the forfeitures under § 68, Act June 30, 1864, operate only from the time of seizure. The forfeiture operates at the time of the seizure. U. S. *v.* Feigelstock, 25 Fed. Cas. No. 15,084, 14 Blatchf. 321 [*following* U. S. *v.* One Hundred Barrels of Spirits, 27 Fed. Cas. No. 15,948, 2 Abb. 305, 1 Dill. 49 (*reversed* in 14 Wall. 44, 20 L. ed. 815)].

24. U. S. *v.* Stowell, 133 U. S. 1, 10 S. Ct. 244, 33 L. ed. 555; U. S. *v.* Eight Hundred Caddies of Tobacco, 25 Fed. Cas. No. 15,036, 2 Bond 305 (tobacco in hands of innocent purchaser forfeited for fraud of manufacturer); 16 Op. Atty.-Gen. 41. The antecedent owner cannot defeat the title of the United States by a transfer of the property. U. S. *v.* One Hundred Barrels Distilled Spirits, 14 Wall. (U. S.) 44, 20 L. ed. 815 [*re-*

until judicial condemnation.[25] Property acquired by the person who committed the offense subsequent to the date of the offense and found in his possession is not forfeited.[26]

5. Operation of Forfeiture Against Innocent Persons. Forfeiture of property is not incurred on account of the misconduct of strangers over whom the owners could have no control, unless the law clearly so declares. It is necessary to ascertain the intention of the law-making power.[27] Statutes will not be understood to forfeit property except for the fault of the owner or his agents unless such a construction is unavoidable.[28] Cases often arise where property is forfeited on account of the fraud, neglect, or misconduct of those having possession without regard to ownership. This is frequently the case with distillery property.[29] The title of the government to property infected with fraud vests from the time of its commission and the taint of fraud inheres in it even in the possession of an innocent purchaser.[30] The conveyance of forfeited property passes no title as against the United States.[31] Owners who have in no way participated in the frauds which caused the forfeiture must seek redress from the wrong-doers, or they can apply to the officers of the government invested with the authority to remit forfeitures.[32]

6. Nature of Forfeiture Proceedings. A proceeding for forfeiture is not a criminal proceeding,[33] although of a quasi-criminal nature. It is civil in form, but in its nature criminal.[34] A forfeiture does not convict the claimants, but the property proceeded against is treated as the offender.[35] The thing is considered guilty without regard to the owner or his guilt.[36]

7. Information. Proceedings for forfeiture are begun by filing a libel of information in the judicial district in which the property is seized.[37] The property

versing 27 Fed. Cas. No. 15,948, 2 Abb. 305, 1 Dill. 49, 12 Int. Rev. Rec. 153].

Mortgage after forfeiture.— After property has been seized and forfeited, and is in the hands of the marshal, a mortgage executed thereon by the person owning the property at the time of seizure is void. Beattie *v.* Boyle, 2 Cinc. Super. Ct. 201.

Congress has the power to decide in what event a divestiture of title shall take place, and where the act declares without any election of remedies that forfeiture shall take place upon commission of the wrongful act, the court must carry the provision into effect, even against innocent purchasers, when the title is consummated by seizure, suit, judgment, and condemnation. U. S. *v.* Sixty-Four Barrels of Distilled Spirits, 27 Fed. Cas. No. 16,306, 3 Cliff. 308.

25. Wessels *v.* Beeman, 66 Mich. 343, 33 N. W. 510, 87 Mich. 481, 49 N. W. 483; Tracey *v.* Corse, 58 N. Y. 143; U. S. *v.* Stowell, 133 U. S. 1, 10 S. Ct. 244, 33 L. ed. 555.

26. U. S. *v.* One Water Cask, 27 Fed. Cas. No. 15,966, 10 Int. Rev. Rec. 93.

27. U. S. *v.* One Black Horse, 129 Fed. 167; U. S. *v.* Two Barrels of Whisky, 96 Fed. 479, 37 C. C. A. 518.

28. U. S. *v.* Thirty-Three Barrels of Spirits, 28 Fed. Cas. No. 16,470, 1 Abb. 311, 1 Lowell 239, 7 Int. Rev. Rec. 75. The intention of congress must be manifest. U. S. *v.* One Hundred Barrels of Spirits, 27 Fed. Cas. No. 15,948, 2 Abb. 305, 1 Dill. 49, 12 Int. Rev. Rec. 153.

29. Dobbins *v.* U. S., 96 U. S. 395, 24 L. ed. 637.

30. U. S. *v.* Eight Hundred Caddies of Tobacco, 25 Fed. Cas. No. 15,036, 2 Bond 305.

31. 16 Op. Atty.-Gen. 41.

32. U. S. *v.* Two Bay Mules, 36 Fed. 84. See *infra*, XV, M.

33. Snyder *v.* U. S., 112 U. S. 216, 5 S. Ct. 1118, 28 L. ed. 697; U. S. *v.* Three Hundred and Ninety-Six Barrels of Distilled Spirits, 27 Fed. Cas. No. 16,503, 3 Int. Rev. Rec. 123; U. S. *v.* Three Tons of Coal, 28 Fed. Cas. No. 16,515, 6 Biss. 379, 21 Int. Rev. Rec. 251.

34. Boyd *v.* U. S., 116 U. S. 616, 6 S. Ct. 524, 29 L. ed. 746; Three Packages of Distilled Spirits *v.* U. S., 129 Fed. 329, 63 C. C. A. 263. Informations for forfeiture are in the nature of criminal proceedings, so far as to come within the rule that a general verdict upon several counts must be upheld if one count be good. Friedenstein *v.* U. S., 125 U. S. 224, 8 S. Ct. 836, 31 L. ed. 736; Coffey *v.* U. S., 116 U. S. 427, 6 S. Ct. 432, 29 L. ed. 681; Snyder *v.* U. S., 112 U. S. 216, 5 S. Ct. 118, 28 L. ed. 697.

35. U. S. *v.* Belding, 24 Fed. Cas. No. 14,562, 12 Int. Rev. Rec. 39; U. S. *v.* Distillery No. 28, 25 Fed. Cas. No. 14,966, 6 Biss. 483, 21 Int. Rev. Rec. 366; U. S. *v.* Seven Barrels of Distilled Oil, 27 Fed. Cas. No. 16,253, 6 Blatchf. 174.

36. U. S. *v.* Three Copper Stills, 47 Fed. 495. In case of seizure it is the property and not the owner which offends. Agnew *v.* Haymes, 141 Fed. 631. *Compare* U. S. *v.* Two Barrels Whisky, 96 Fed. 479, 3 C. C. A. 518, in which it is said that property has no guilty character except as connected with persons who have charge of it.

37. Coffey *v.* U. S., 116 U. S. 427, 6 S. Ct. 432, 29 L. ed. 681, 117 U. S. 233, 6 S. Ct. 717, 29 L. ed. 890 (application for rehearing de-

proposed to be forfeited should be described with reasonable certainty.[38] The technical precision of an indictment is not necessary, yet the allegations must be sufficiently specific to enable the claimant to traverse them. A general averment that the statute has been violated is insufficient.[39] It is sufficient to follow the language of the statute.[40] Where fraudulent intent is alleged it is not necessary to set out facts from which such intent is inferred.[41] Where an information is vague the claimant is entitled to a bill of particulars.[42] If an article in an information is uncertain it should be construed most favorably for defendant and most strongly against the pleader.[43] When exceptions are filed to an information, the district attorney will be given leave to amend.[44]

H. Seizure in Proceedings to Condemn Property Forfeited — 1. In General. A seizure is necessary in proceedings to condemn property forfeited.[45] Any person may make the seizure, and its adoption by the government cures any defect in this respect.[46] If goods are seized irregularly or for an insufficient cause, it is immaterial if sufficient cause is alleged in the information and is established by the evidence.[47] It is the duty of a collector on seizing property forthwith to turn the case over to the proper law officer of the government.[48] The collector is authorized to sell property seized, instead of reporting it to the United States attorney for proceeding in court, when the value does not exceed

nied); U. S. *v.* Twenty-Five Barrels of Alcohol, 28 Fed. Cas. No. 16,562, 10 Int. Rev. Rec. 17 (rules of the supreme court relating to pleadings construed).

38. U. S. *v.* One Distillery, 27 Fed. Cas. No. 15,929, 4 Biss. 26 (an information should be as clear and certain as a declaration at common law); U. S. *v.* Two Hundred Barrels of Whiskey, 28 Fed. Cas. No. 16,585, 2 Woods 54 (information defective in not showing whether the property seized was owned by the distiller at the date of the discovery of the offense, or was subsequently acquired).

39. U. S. *v.* Three Hundred and Ninety-Six Barrels of Distilled Spirits, 28 Fed. Cas. No. 16,503, 3 Int. Rev. Rec. 123.

An information for the forfeiture of distilled spirits for absence of requisite marks and stamps need not aver that the stamps were not removed through accidental causes, as the statute imposing the forfeiture does not in terms contain any exemption. U. S. *v.* Nine Casks, etc., of Distilled Spirits, 51 Fed. 191.

40. U. S. *v.* Seventeen Empty Barrels, 27 Fed. Cas. No. 16,255, 3 Dill. 285, 21 Int. Rev. Rec. 391 [*affirming* 24 Fed. Cas. No. 14,424, 21 Int. Rev. Rec. 316], information under U. S. Rev. St. (1878) § 3455 [U. S. Comp. St. (1901) p. 2279]. Information for forfeiture of an oleomargarine plant see U. S. *v.* Manufacturing Apparatus, etc., 141 Fed. 475.

41. U. S. *v.* Sixteen Hogsheads of Tobacco, 27 Fed. Cas. No. 16,302, 2 Bond 137. Under U. S. Rev. St. (1878) § 3257 [U. S. Comp. St. (1901) p. 2112], it was not necessary to aver that the spirits seized on the claimant's distillery premises were distilled by him, or were the product of his distillery, or that the distillery was wrongfully used; because that section does not make these facts elements of the causes of forfeiture. Coffey *v.* U. S., 116 U. S. 427, 6 S. Ct. 432, 29 L. ed. 681.

42. U. S. *v.* Two Hundred Bushels of Corn, 28 Fed. Cas. No. 16,586, 9 Ben. 186.

43. U. S. *v.* Nine Casks, etc., of Distilled Spirits, 51 Fed. 191.

44. U. S. *v.* Rectifying Establishment, 27 Fed. Cas. No. 16,131, 11 Int. Rev. Rec. 46; U. S. *v.* Sixteen Hogsheads of Tobacco, 27 Fed. Cas. No. 16,302, 2 Bond 137; U. S. *v.* Three Hundred and Ninety-Six Barrels of Distilled Spirits, 28 Fed. Cas. No. 16,502, 3 Int. Rev. Rec. 114; U. S. *v.* Whiskey, 28 Fed. Cas. No. 16,671, 11 Int. Rev. Rec. 109.

Amendment stating new cause of action.— An amendment may be allowed, although it introduces a new cause of action, provided the amendment corresponds with the original count in character and might have been included in the original declaration. U. S. *v.* Seventy-Six Thousand One Hundred and Twenty-Five Cigars, 18 Fed. 147.

45. Dobbins *v.* U. S., 96 U. S. 395, 24 L. ed. 637; Pike *v.* Wassell, 94 U. S. 711, 24 L. ed. 307; The Silver Spring, 22 Fed. Cas. No. 12,858, 1 Sprague 551; U. S. *v.* Ninety-Two Barrels of Rectified Spirits, 27 Fed. Cas. No. 15,892, 8 Blatchf. 480.

Power of seizure strictly interpreted.— The power of summary seizure and forfeiture conferred upon revenue officials, to be exercised at their discretion, being an extraordinary power, in derogation of common right, must be strictly interpreted, and cannot be extended beyond what the language of the act imperatively requires. Crosby *v.* Brown, 60 Barb. (N. Y.) 548, seizure of team of peddler under § 74, Act June 30, 1864.

46. U. S. *v.* Five Hundred and Eight Barrels of Distilled Spirits, 25 Fed. Cas. No. 15,113, 5 Blatchf. 407, 5 Int. Rev. Rec. 190, 25 Fed. Cas. No. 15,114, 5 Int. Rev. Rec. 166; 13 Op. Atty.-Gen. 253. And see Taylor *v.* U. S., 3 How. (U. S.) 197, 11 L. ed. 559.

47. U. S. *v.* Whiskey, 28 Fed. Cas. No. 16,671, 11 Int. Rev. Rec. 109.

48. *In re* Fifteen Empty Barrels, 9 Fed. Cas. No. 4,778, 1 Ben. 125.

five hundred dollars.[49] An abandonment of the property by the seizing officer nullifies the seizure,[50] and the title remains in the original owner.[51] Perishable property may be sold and the proceeds paid into the registry of the court, in which event the proceeds represent the property seized.[52] The destruction of property seized is authorized in certain cases.[53] Property seized or distrained upon under the internal revenue laws is irrepleviable and action of replevin is taken away from persons claiming property so seized or distrained upon.[54]

2. Release on Bond. In ordinary cases where property can be released upon good security and without detriment to the public interests it is usual to grant an application to release on bond.[55] The court has this power independent of any statute.[56] The bond is treated as a substitute for the property itself.[57] Where the property is bonded and returned to the claimants, it is for all purposes their own as much as any property theretofore or thereafter acquired.[58] The property may be sold by the owner *bona fide*, and the purchaser acquires a good title.[59] Its release on bond does not divest the court of jurisdiction to go on with the condemnation proceedings. The court may reseize the property and order it to be sold, except where it will interfere with the rights of third persons, acquired after the release, and upon the faith of it.[60] It may be again seized for taxes due.[61] As the application to bond is one for a favor, terms may be imposed.[62]

I. Requisites of Indictments For Offenses Against Revenue Laws[63]—**1. In General.** When the crime is a statutory one the offense must be charged

49. Pilcher *v.* Faircloth, 135 Ala. 311, 33 So. 545; Cardinal *v.* Smith, 5 Fed. Cas. No. 2,395, Deady 197.

50. *In re* Ninety-Two Barrels of Spirits, 18 Fed. Cas. No. 10,275, 5 Ben. 323.

51. Tracey *v.* Corse, 58 N. Y. 143.

52. Averill *v.* Smith, 17 Wall. 82, 21 L. ed. 613.

53. North Carolina *v.* Vanderford, 35 Fed. 282.

54. Brice *v.* Elliot, 4 Fed. Cas. No. 1,854, 22 Int. Rev. Rec. 206; Treat *v.* Staples, 24 Fed. Cas. No. 14,162, Holmes 1.

55. Alkan *v.* Bean, 1 Fed. Cas. No. 202, 8 Biss. 83, 23 Int. Rev. Rec. 351; U. S. *v.* Eighteen Barrels of High Wines, 25 Fed. Cas. No. 15,033, 8 Blatchf. 475 (property bonded and returned to claimant); U. S. *v.* Seventeen Empty Barrels, 27 Fed. Cas. No. 16,255, 3 Dill. 285, 21 Int. Rev. Rec. 391 [*affirming* 24 Fed. Cas. No. 14,424, 21 Int. Rev. Rec. 316, 1 N. Y. Wkly. Dig. 182 (property bonded under U. S. Rev. St. (1878) § 3459 [U. S. Comp. St. (1901) p. 2281]); U. S. *v.* Two Tons of Coal, 28 Fed. Cas. No. 16,590, 5 Blatchf. 386 (reasons assigned for refusing the privilege of bonding).

Notice to surety.— When property seized for forfeiture was released on bond, and judgment was subsequently entered on the bond without actual notice to surety it was held that the absence of such notice did not affect the validity of the judgment, the notice served on the attorney for the obligor on the bond being sufficient notice to the surety, under the rules of court. U. S. *v.* 59,654 Cigars, 138 Fed. 166.

56. U. S. *v.* Three Hundred Barrels of Whiskey, 28 Fed. Cas. No. 16,510, 1 Ben. 15, 2 Int. Rev. Rec. 165.

57. U. S. *v.* Bergenthal, 29 Fed. 444 ("the object of the bond of the petitioner was the release of the property seized, and the substitution for it of the money secured"); U. S. *v.* Ninety-Two Barrels of Rectified Spirits, 27 Fed. Cas. No. 15,892, 8 Blatchf. 480.

58. U. S. *v.* Eighteen Barrels of High Wines, 25 Fed. Cas. No. 15,033, 8 Blatchf. 475. But see U. S. *v.* I. C. McCoy's Distillery, 25 Fed. Cas. No. 14,964, 21 Int. Rev. Rec. 165, holding that the title to property forfeited for fraudulent acts passes by the operation of law to the United States at the moment of the commission of the acts causing the forfeiture, and the acceptance of a bond to answer a judgment against the claimants to the property does not reinvest the title in them.

59. U. S. *v.* Mackoy, 27 Fed. Cas. No. 15,696, 2 Dill. 299.

60. U. S. *v.* Mackoy, 26 Fed. Cas. No. 15,696, 2 Dill. 299. Distillery property cannot be released on bond except in certain cases provided by statute. U. S. Rev. St. (1878) § 3331 [U. S. Comp. St. (1901) p. 2181].

61. U. S. *v.* Bergenthal, 29 Fed. 444; U. S. *v.* Eighteen Barrels of High Wines, 25 Fed. Cas. No. 15,033, 8 Blatchf. 475.

62. U. S. *v.* Lot of Leaf Tobacco, 26 Fed. Cas. No. 15,627, 2 Ben. 76, 6 Int. Rev. Rec. 222, where a tobacco factory and tobacco were released on bond, the portion of the appraised value representing the tax was required to be paid in money into the registry of the court.

A motion to bond may be denied where a rectifying establishment and a distillery were situated close together, and appliances existed by means of which spirits could easily be run into the rectifying establishment from the distillery in fraud of the revenue, and there was some evidence that that had been done. *In re* Quantity of Distilled Spirits, 20 Fed. Cas. No. 11,493, 2 Ben. 101, 7 Int. Rev. Rec. 29.

63. See, generally, Indictments.

with precision and certainty.[64] The general rule is that it is sufficient to charge the offense in the words of the statute.[65] It is not necessary that the exact words be followed if their equivalent is expressed,[66] but there are cases where more particularity is required.[67] Charging the offense in the language of the statute is not sufficient when the statute does not define the acts constituting the offense so as to give the offender information of the nature and cause of the accusation.[68] An indictment for a statutory misdemeanor need not charge the offense with the particularity of time, place, and circumstances required for a felony, or a common-law offense. Defendant has a remedy by application for a bill of particulars,[69] but a bill of particulars cannot cure the omission of a material averment.[70] It is not necessary to prove that the offense was committed on the day alleged unless a particular day be made material by the statute.[71] But the time charged should be consistent with the offense charged. To lay an impossible time or one beyond the statute of limitations would be bad.[72] It is not necessary to state the particular means employed to effect the commission of a statutory offense.[73] In an indictment for executing a fraudulent bond it is not necessary to set out the particulars in which the bond is fraudulent.[74] It is not necessary in an indictment for removing stamps from packages of spirits to set out the stamps removed verbatim.[75] Where knowledge or intent are not ingredients of the offense the indictment need not aver a criminal intent.[76]

2. Indictment For Failure to Pay Special Tax. Where the charge is that a certain business has been carried on without payment of special tax it is not essential to set out the particular acts which constitute the business.[77]

3. Indictment For Removing and Concealing Distilled Spirits. An indictment for removing and concealing distilled spirits on which the tax has not been paid, which charges the performance of that act at a particular time and place, and in the language of the statutes, is sufficiently certain.[78]

64. Ledbetter *v.* U. S., 170 U. S. 606, 18 S. Ct. 774, 42 L. ed. 1162.

65. U. S. *v.* Strickland, 25 Fed. 469 (affidavit should state the offense); U. S. *v.* Moore, 11 Fed. 248; U. S. *v.* Ballard, 24 Fed. Cas. No. 14,506, 13 Int. Rev. Rec. 195; U. S. *v.* Edwards, 25 Fed. Cas. No. 15,025, 17 Int. Rev. Rec. 126.

66. U. S. *v.* Howard, 26 Fed. Cas. No. 15,402, 1 Sawy. 507, 13 Int. Rev. Rec. 118; U. S. *v.* Nunnemacher, 27 Fed. Cas. No. 15,903, 7 Biss. 129.

67. U. S. *v.* Mann, 95 U. S. 580, 24 L. ed. 531.

68. U. S. *v.* Simmons, 96 U. S. 360, 24 L. ed. 819 (indictment following the language of the statute defective); Terry *v.* U. S., 120 Fed. 483, 56 C. C. A. 633 (indictment under U. S. Rev. St. (1878) § 3279 [U. S. Comp. St. (1901) p. 2126]); U. S. *v.* Ford, 34 Fed. 26 (not sufficient when the offense was an attempt to rescue property); U. S. *v.* Reed, 27 Fed. Cas. No. 16,136, 1 Lowell 232 (the doctrine of charging an offense in the words of the statute considered. Requisites of an indictment under U. S. Rev. St. (1878) § 3265 [U. S. Comp. St. (1901) p. 2119]); U. S. *v.* Staton, 27 Fed. Cas. No. 16,382, 2 Flipp. 319, 25 Int. Rev. Rec. 10.

69. U. S. *v.* Adams Express Co., 119 Fed. 240; U. S. *v.* Schimer, 27 Fed. Cas. No. 16,229, 5 Biss. 195, indictment for removing from brewery lager beer without affixing and canceling stamps.

70. U. S. *v.* Bayaud, 16 Fed. 376, 21 Blatchf. 287.

71. Ledbetter *v.* U. S., 170 U. S. 612, 18 S. Ct. 774, 42 L. ed. 1162. Unless the date is of the essence of the crime it need not be proved as alleged. U. S. *v.* Blaisdell, 23 Fed. Cas. No. 14,608, 3 Ben. 132, 9 Int. Rev. Rec. 82.

72. U. S. *v.* Fox, 25 Fed. Cas. No. 15,156, 1 Lowell 199.

73. U. S. *v.* Simmons, 96 U. S. 360, 24 L. ed. 819 (an indictment for carrying on business with intent to defraud); U. S. *v.* Ballard, 24 Fed. Cas. No. 14,506, 13 Int. Rev. Rec. 195; U. S. *v.* Fox, 25 Fed. Cas. No. 15,156, 1 Lowell 199.

Where the indictment charged that the distiller attempted to defraud the government some acts which constitute the attempt should be specified. U. S. *v.* Ulrici, 28 Fed. Cas. No. 16,594, 3 Dill. 532.

74. U. S. *v.* Henry, 26 Fed. Cas. No. 15,350, 3 Ben. 29.

75. U. S. *v.* Bayaud, 16 Fed. 376, 21 Blatchf. 287.

76. U. S. *v.* Bayaud, 16 Fed. 376, 21 Blatchf. 287 (failing to efface or obliterate stamps at the time of emptying a cask or package of spirits); U. S. *v.* Ulrici, 28 Fed. Cas. No. 16,594, 3 Dill. 532.

77. Kollock *v.* U. S., 9 App. Cas. (D. C.) 420; U. S. *v.* Fox, 25 Fed. Cas. No. 15,156, 1 Lowell 190; U. S. *v.* Howard, 26 Fed. Cas. No. 15,402, 1 Sawy. 507, 13 Int. Rev. Rec. 118; U. S. *v.* Page, 27 Fed. Cas. No. 15,988, 2 Sawy. 353, 17 Int. Rev. Rec. 158.

78. Pounds *v.* U. S., 171 U. S. 35, 18 S. Ct. 729, 43 L. ed. 62 (indictment under U. S.

4. Charges Which May Be Joined in One Indictment. Distinct offenses of the same class, although committed at different times, may be joined in one indictment in separate counts,[79] although some are designated as felonies and others not.[80] Each count, charging a separate and distinct offense, is in legal effect a separate indictment. The statute in permitting the joinder of different offenses in a single indictment by necessary implication authorizes a separate punishment for each offense proved.[81]

J. Evidence[82] **— 1. Privileged Communications, Documents, or Records.** The records of executive departments are quasi-confidential and must be classed as privileged communications whose production cannot be compelled by a court without express authority of law.[83] The papers upon which an assessment is made are privileged, and courts have no authority to require their production.[84] Official communications between officers of the government are privileged from disclosure on the ground of public policy.[85] In certain cases communications other than those of officials may be treated as confidential, and the department may, upon public consideration, decline to furnish copies of such communications on the order of a court.[86] A state court has no right to compel by subpœna a collector to produce the records of his office for use in trial of persons indicted for violating state laws. Regulations prohibiting collectors from producing the records of their offices or furnishing copies thereof for use as evidence in behalf of litigants in any court is a valid regulation.[87]

2. Testimony of Collectors and Deputy Collectors. Collectors and deputy collectors are not only prohibited from giving out copies from their records, but also from testifying orally, in cases not arising under the laws of the United States, as to facts that have come to their knowledge as the result of information contained in the records.[88]

Rev. St. (1878) § 3296 [U. S. Comp. St. (1901) p. 2136]); U. S. *v.* Nunnemacher, 27 Fed. Cas. No. 15,903, 7 Biss. 129 (motion to quash indictment for duplicity denied. The validity of indictments should not depend upon too great niceties of language).

79. Williams *v.* U. S., 168 U. S. 382, 18 S. Ct. 92, 42 L. ed. 509; Pointer *v.* U. S., 151 U. S. 396, 14 S. Ct. 410, 38 L. ed. 208; *Ex p.* Joyce, 13 Fed. Cas. No. 7,556, 23 Int. Rev. Rec. 297; U. S. *v.* Maguire, 26 Fed. Cas. No. 15,708, 22 Int. Rev. Rec. 146. Defendant is Charged: (1) With having carried on the business of a wholesale dealer without having taken out a license; (2) with having carried on the same business after September, 1866 (when the law requiring a new registration and the payment of a special tax took effect), without having paid the special tax; and (3) with having failed to keep the books which the law requires to be kept by wholesale dealers in liquors. U. S. *v.* Devlin, 25 Fed. Cas. No. 14,953, 6 Blatchf. 71, 7 Int. Rev. Rec. 94.

80. U. S. *v.* Jacoby, 26 Fed. Cas. No. 15,462, 12 Blatchf. 491.

A count for retailing liquor without payment of the special tax, and a count for dealing in manufactured tobacco without payment of the special tax, cannot be joined. U. S. *v.* Gaston, 28 Fed. 848.

81. U. S. *v.* Malone, 9 Fed. 897, 20 Blatchf. 137; U. S. *v.* Bennett, 24 Fed. Cas. No. 14,572, 17 Blatchf. 357, 26 Int. Rev. Rec. 45.

82. See, generally, Evidence.

83. 25 Op. Atty.-Gen. 326. Officers of the executive departments cannot be required to remove records or papers filed therein by subpœna duces tecum. 5 Lawrence Dec. 446. In a proceeding for forfeiture the government is not required, on motion of an intervening claimant, to produce reports containing evidence pertinent to the issues, nor to produce copies of the original measurements of the packages on file in the office of a collector outside the district where the proceeding is pending. U. S. *v.* 164 8/100 Proof Gallons of Distilled Spirits, 81 Fed. 614.

84. 16 Op. Atty.-Gen. 24.

85. Gardner *v.* Anderson, 9 Fed. Cas. No. 5,220, 22 Int. Rev. Rec. 41; 15 Op. Atty.-Gen. 378 (relative to correspondence between the commissioner of internal revenue and a district attorney); U. S. *v.* Six Lots of Ground, 27 Fed. Cas. No. 16,299, 1 Woods 234 (correspondence between a district attorney and the attorney-general).

86. 15 Op. Atty.-Gen. 415.

87. Boske *v.* Comingore, 177 U. S. 459, 20 S. Ct. 701, 44 L. ed. 846 [*affirming* 96 Fed. 552]; *In re* Huttman, 70 Fed. 699. A state has no right to federal instruments of purely federal character for proof, unless they are left within its reach. *In re* Weeks, 82 Fed. 729. *Contra, In re* Hirsch, 74 Fed. 928.

88. *In re* Lamberton, 124 Fed. 446. A collector cannot be compelled to disclose as a witness before a court or the grand jury the names of persons in whose places of business special tax stamps are posted, or the places in which the same are posted. *In re* Huttman, 70 Fed. 699.

3. Treasury Transcripts and Copies of Papers. Duly certified treasury transcripts of accounts are admissible as evidence when suit is brought in case of delinquency of a revenue officer or other person accountable for public money.[89] The proper mode of proving papers on file in the departments is by procuring certified copies.[90] A collector of internal revenue is not required to certify copies of reports on file in his office.[91]

4. Evidence in Forfeiture Proceedings. In proceedings to enforce forfeiture the proof must conform to the allegations.[92] The government must show affirmatively every fact which is an element of the act made penal.[93] A preponderance of evidence is sufficient. It is not like a criminal case, where defendant is entitled to a reasonable doubt of guilt.[94]

5. Evidence of Fraud or Fraudulent Intent. Fraud is not to be presumed. It must be established, but it may be established, indirectly, by circumstances, as well as by direct evidence.[95] The fact that spirits are purchased for less than the tax is sufficient evidence, in the absence of any explanatory circumstances, to show that the purchaser could not have believed that the tax was paid.[96] Proof of acts other than those in question can be admitted in forfeiture proceedings to show the animus of the parties in respect to intent to defraud. The range of inquiry is within the discretion of the court.[97] Previous fraudulent intent and previous fraudulent acts are admissible to show a fraudulent intent in a subse-

89. U. S. *v.* Stone, 106 U. S. 525, 1 S. Ct. 287, 27 L. ed. 163; U. S. *v.* Hunt, 105 U. S. 183, 26 L. ed. 1037; Soule *v.* U. S., 100 U. S. 8, 25 L. ed. 536; Laffan *v.* U. S., 122 Fed. 333, 58 C. C. A. 495; Chadwick *v.* U. S., 3 Fed. 750. Extracts may be given in evidence. U. S. *v.* Gaussen, 19 Wall. (U. S.) 198, 22 L. ed. 41.

Form of certificate.— The account of a delinquent revenue officer or other person accountable for public money, as finally adjusted by the proper officers of the treasury department, is not admissible as evidence under U. S. Rev. St. § 886, unless it be certified and authenticated to be a transcript from the books and proceedings of that department. A certificate therefore which states that the transcript, to which it is annexed, is a copy of the original on file is not sufficient, that being the form used in reference to mere copies of bonds, contracts, or other papers connected with the final adjustment. U. S. *v.* Morris, 102 U. S. 548, 26 L. ed. 226.

Seal.— The seal authenticates the transcript and not the signature of the secretary. Smith *v.* U. S., 5 Pet. (U. S.) 292, 8 L. ed. 130.

90. Barney *v.* Schmeider, 9 Wall. (U. S.) 248, 19 L. ed. 648.

The contents of letter from the collector to the commissioner can be proved by a copy of the same, duly certified from the treasury department. Chadwick *v.* U. S., 3 Fed. 750.

The printed regulations of the treasury, in the form of a circular, are admissible in evidence, when it is shown that a duplicate copy of the same was found in a book kept by the collector, in which a large number of treasury circulars from the commissioner were pasted. Chadwick *v.* U. S., 3 Fed. 750.

91. *In re* Comingore, 96 Fed. 552.

92. Three Packages of Distilled Spirits *v.* U. S., 129 Fed. 329, 63 C. C. A. 263.

93. Jackson *v.* U. S., 21 Fed. 35.

In proceedings for forfeiture of tobacco it is sufficient to prove the charge against one box unlawfully stamped to insure forfeiture of the whole lot held in the same store. U. S. *v.* One Hundred and Seventeen Packages of Plug Tobacco, 27 Fed. Cas. No. 15,936, 10 Ben. 343.

94. *In re* Quantity of Distilled Spirits, 20 Fed. Cas. No. 11,494, 3 Ben. 70, 9 Int. Rev. Rec. 9; U. S. *v.* Marshall, 26 Fed. Cas. No. 15,726.

95. U. S. *v.* Marshall, 26 Fed. Cas. No. 15,726; U. S. *v.* Thirty-Five Barrels of High Wines, 28 Fed. Cas. No. 16,460, 2 Biss. 88, 9 Int. Rev. Rec. 67. It is not competent for the government to prove as a fact from which fraud may be presumed that the pecuniary circumstances of a distiller were apparently improved while engaged in distilling during a period when such business was not profitable. U. S. *v.* Chaffee, 25 Fed. Cas. No. 14,772, 2 Bond 110. Proof that tubs were so placed in a distillery that they could be used contrary to law is not sufficient to warrant a finding that they have been so used. U. S. *v.* Forty-Eight Hundred Gallons of Spirits, 25 Fed. Cas. No. 15,153, 4 Ben. 471, 13 Int. Rev. Rec. 52.

96. *In re* Quantity of Distilled Spirits, 20 Fed. Cas. No. 11,494, 3 Ben. 70, 9 Int. Rev. Rec. 9.

97. U. S. *v.* Thirty-Six Barrels of High Wines, 28 Fed. Cas. No. 16,469, 7 Blatchf. 469, 12 Int. Rev. Rec. 41. This was a case where there had been a prior seizure of the property.

Verdict by default in a forfeiture proceeding against illicit spirits is competent evidence bearing on the question of intent in proceeding to forfeit conveyances used in transporting same, but not conclusive. U. S. *v.* Two Horses, 26 Fed. Cas. No. 16,578, 9 Ben. 529.

quent transaction.[98] The execution of worthless bonds as tobacco manufacturer is material evidence on the question of fraudulent intent in proceedings to forfeit the factory.[99] A record proving the forfeiture of spirits from the same distillery for alleged frauds by a decree of another court is admissible as a circumstance strengthening the presumption of fraud charged.[1] The question whether the facts proved warrant the inference of fraud charged is exclusively for the jury.[2]

6. Production of Books and Papers. The law authorizing the production of books and papers for the government in suits other than criminal applies to cases arising under the internal revenue law, and is constitutional.[3] Private books and papers are protected from unreasonable searches. The power to compel their production covers such documents only as would be, if produced, competent material evidence for the party applying therefor.[4] Where the order of court provides that the prosecution may have judgment where the books are not produced, the failure of the claimants to produce them, where unexplained, will entitle the United States to a forfeiture.[5] The claimants and their counsel have the right to be present at the examination of such books and papers. The same need not be more specifically described than as those used and kept in his business as distiller or rectifier between certain dates named.[6]

7. Burden of Proof — a. In Suits In Rem. In civil cases the burden of proof lies on the party who asserts the affirmative, and may shift during the progress of the trial. When a presumption of fact exists against a party in a case of seizure *in rem*, the burden is on the party to remove the presumption, and if he does not, the case must go against him.[7] In certain cases of seizure of spirits, the law places the burden of proof on the claimant to show that no fraud has been committed, and that the tax has been paid.[8] Where evidence is introduced tending to show that true entries and returns relative to the spirits have not been made, the burden

98. U. S. *v.* Quantity of Tobacco, 27 Fed. Cas. No. 16,105, 5 Ben. 112, 3 Int. Rev. Rec. 158; U. S. *v.* Quantity of Tobacco, 27 Fed. Cas. No. 16,106, 6 Ben. 68; U. S. *v.* Rumsey, 27 Fed. Cas. No. 16,207, 5 Int. Rev. Rec. 93 (indictment for making false and fraudulent returns); U. S. *v.* Thirty-Six Barrels of High Wines, 28 Fed. Cas. No. 16,469, 7 Blatchf. 469, 12 Int. Rev. Rec. 41.

99. U. S. *v.* Three Hundred and Eight Caddies of Tobacco, 28 Fed. Cas. No. 16,501, 10 Int. Rev. Rec. 126.

1. U. S. *v.* One Distillery, 27 Fed. Cas. No. 15,930, 2 Bond 399.

2. U. S. *v.* Grotenkemper, 26 Fed. Cas. No. 15,267, 2 Bond 140.

3. Act June 22, 1874; 18 U. S. St. at L. 187; U. S. *v.* Three Tons of Coal, 28 Fed. Cas. No. 16,515, 6 Biss. 379, 21 Int. Rev. Rec. 251.

4. U. S. *v.* Tilden, 28 Fed. Cas. No. 16,522, 10 Ben. 566, 25 Int. Rev. Rec. 352. A compulsory production of a man's private papers, to be used as evidence against him in a proceeding to forfeit his property for alleged fraud against the revenue laws, is an "unreasonable search and seizure" within the meaning of the fourth amendment of the constitution. Boyd *v.* U. S., 116 U. S. 616, 6 S. Ct. 524, 29 L. ed. 746.

5. U. S. *v.* Distillery No. 28, 25 Fed. Cas. No. 14,966, 6 Biss. 483, 21 Int. Rev. Rec. 366 (refusal to produce books is a confession of the libel); U. S. *v.* Four Hundred and Sixty-Nine Barrels of Spirits, 25 Fed. Cas. No. 15,148, 10 Int. Rev. Rec. 205 (notice to produce books on day of trial).

6. U. S. *v.* Three Tons of Coal, 28 Fed. Cas. No. 16,515, 6 Biss. 379, 21 Int. Rev. Rec. 251. The books, etc., are described with sufficient particularity when described substantially as certain day-books, journals, cash-books, ledgers, blotter books, blotters, invoices, dray tickets, etc., kept, received, and taken by the claimants in their business as distillers, rectifiers, and wholesale liquor dealers between certain dates named, and since the 22d of June, 1874, showing the amount of spirits produced, received, removed, and sold by them during the time named. U. S. *v.* Distillery No. 28, 25 Fed. Cas. No. 14,966, 6 Biss. 483, 21 Int. Rev. Rec. 366.

7. Lilienthal *v.* U. S., 97 U. S. 237, 24 L. ed. 901.

8. U. S. Rev. St. (1878) § 3333 [U. S. Comp. St. (1901) p. 2182]; Andre *v.* U. S., 94 U. S. 86, 24 L. ed. 57; U. S. *v.* Sykes, 58 Fed. 1000; Twenty-Six Barrels and Seventeen Tierces of Distilled Spirits, 24 Fed. Cas. No. 14,283, 11 Int. Rev. Rec. 78; U. S. *v.* Eight Casks of Whiskey, 25 Fed. Cas. No. 15,030, 7 Int. Rev. Rec. 4; U. S. *v.* Five Hundred and Eight Barrels of Distilled Spirits, 25 Fed. Cas. No. 15,113, 5 Blatchf. 407, 5 Int. Rev. Rec. 190; U. S. *v.* Six Barrels of Distilled Spirits, 27 Fed. Cas. No. 16,294, 5 Blatchf. 542, 6 Int. Rev. Rec. 187.

Constitutionality of statute.— The provision requiring affirmative proof by claimant is not unconstitutional. U. S. *v.* Seventy-

is thrown upon the claimant to prove regularity.[9] When spirits are found outside of a bonded warehouse not removed therefrom according to law, the burden is on the claimants to show that the requirements of the law have been complied with.[10] Where spirits seized are claimed by one who asserts that he purchased them in the open market, the fact that the barrels were branded to show regularity is not evidence that the taxes have been paid.[11]

b. Burden of Proof in Criminal Cases. The burden of proof in criminal cases is upon the state, and if there is a reasonable doubt as to any element necessary to constitute the offense charged, defendant should have the benefit of the doubt.[12] The burden of proof is on the prosecution throughout to establish defendant's guilt by the evidence.[13]

c. In Actions For Penalties. In an action for penalties for alleged frauds upon the revenue, the burden rests upon the government to make out its case beyond a reasonable doubt.[14]

K. Trial and Verdict[15] — **1. In General.** The claimants of property seized must have notice to appear and be heard upon the charges for which the forfeiture is claimed,[16] and have a constitutional right to a trial by jury.[17] Where the evidence on a question is all one way, the court is justified in not submitting the question as one of fact to the jury.[18] The verdict of a jury is conclusive upon a question of fact, unless plainly against the evidence. The same weight must be given to the finding of a court.[19] No question of fact involved in a general finding by the court in a case at law where a jury has been waived can be the subject of review.[20] Where the information in different counts avers several frauds, under different sections, a verdict of forfeiture will be sustained, if

Eight Barrels, 27 Fed. Cas. No. 16,257, 7 Int. Rev. Rec. 4.

9. U. S. *v.* Eighteen Barrels of High Wines, 25 Fed. Cas. No. 15,033, 8 Blatchf. 475.

10. U. S. *v.* Fifty Barrels of Whiskey, 25 Fed. Cas. No. 15,091, 11 Int. Rev. Rec. 94.

11. *In re* Quantity of Distilled Spirits, 20 Fed. Cas. No. 11,494, 3 Ben. 70, 9 Int. Rev. Rec. 9 (when a party is in possession of the means of clearing up a doubtful point but does not do it, every doubt is to be resolved most strongly against him); U. S. *v.* Seventy-Eight Barrels, 27 Fed. Cas. No. 16,257, 7 Int. Rev. Rec. 4.

Unstamped packages.— When spirits are found in packages of more than five gallons' capacity without stamps the burden of proof is on the claimant to show that they are tax-paid. U. S. *v.* Sykes, 58 Fed. 1000.

12. U. S. *v.* Wilson, 69 Fed. 144.

On the trial of an indictment for non-payment of special tax and for failure to keep books required by law, the burden of proof is on defendant to show that he had paid the tax and kept the books. U. S. *v.* Davis, 25 Fed. Cas. No. 14,928, 15 Int. Rev. Rec. 10; U. S. *v.* Devlin, 25 Fed. Cas. No. 14,953, 6 Blatchf. 71, 7 Int. Rev. Rec. 94. In an action against the collector to recover a special tax, the burden rests on plaintiff to show that he is not liable. Schafer *v.* Craft, 144 Fed. 907.

13. U. S. *v.* Babcock, 24 Fed. Cas. No. 14,487, 3 Dill. 581.

14. Chaffee *v.* U. S., 18 Wall. (U. S.) 516, 21 L. ed. 908 [*reversing* 25 Fed. Cas. No. 14,772, 2 Bond 110]. *Contra*, U. S. *v.* Brown, 24 Fed. Cas. No. 14,662, Deady 566. And see U. S. *v.* Damiani, 25 Fed. Cas. No. 14,915, 11 Int. Rev. Rec. 5, holding that in an action of debt for penalty for failure to keep the book as dealer in leaf tobacco, a *prima facie* case was established by proving sales, and that defendant had not kept a book, so far as was known to the assessor. The burden of proof was, by such *prima facie* case, shifted upon defendants to show that they had kept such book, and had made the proper entries therein.

15. See, generally, TRIAL.

16. Windsor *v.* McVeigh, 93 U. S. 274, 23 L. ed. 914. The rule requiring notice, actual or constructive, is fundamental. Tracey *v.* Corse, 58 N. Y. 143. A judgment is not conclusive against parties having no notice. Dean *v.* Chapin, 22 Mich. 275.

17. Garnhart *v.* U. S., 16 Wall. (U. S.) 162, 21 L. ed. 275; U. S. *v.* One Hundred and Thirty Barrels of Whiskey, 27 Fed. Cas. No. 15,938, 1 Bond 587.

Waiver of jury.— In the trial of petty criminal offenses, a jury may be waived. Shick *v.* U. S., 192 U. S. 65, 24 S. Ct. 826, 49 L. ed. 99, where parties were prosecuted by information under Act Aug. 2, 1886 (24 U. S. St. at L. 209, § 11 [U. S. Comp. St. (1901) p. 2232]), which reads: "That every person who knowingly purchases or receives for sale any oleomargarine which has not been branded or stamped according to law shall be liable to a penalty of fifty dollars for each such offense."

18. U. S. *v.* One Still, 27 Fed. Cas. No. 15,954, 5 Blatchf. 403, 5 Int. Rev. Rec. 189.

19. Cliff *v.* U. S., 195 U. S. 159, 25 S. Ct. 1, 49 L. ed. 139.

20. Distilling, etc., Co. *v.* Gottschalk Co., 66 Fed. 609, 13 C. C. A. 618.

there is one count setting forth a fraud, within the words of any one of the sections.[21]

2. Cumulative Punishment. No man can be twice lawfully punished for the same offense. There has never been any doubt of the complete protection of the party where a second punishment is proposed in the same court, on the same facts, for the same statutory offense.[22] But cumulative punishment may be imposed for distinct offenses.[23] Where offenses are punishable by a penalty in a civil action, and by fine and imprisonment in a criminal prosecution, the recovery of the penalty is not a bar to criminal proceedings.[24] Proceedings for forfeiture of property and for recovery of fine imposed upon the offender may both exist.[25] A suit on a distiller's bond does not bar or abate proceedings for forfeitures.[26]

3. Effect of Acquittal. An acquittal of the offending person is a bar to a proceeding *in rem* for the condemnation of property based upon the same state of facts. The facts once ascertained in the criminal proceedings cannot be again litigated as the basis of any statutory punishment denounced as a consequence of their existence.[27] But an acquittal does not estop the United States from proceeding against the party for tax, and a judgment in the one case cannot be pleaded in bar of the other.[28] The fact that an indictment has been quashed because of insufficient averments is no ground for quashing an information subsequently filed against the same person for the same offense.[29]

4. Effect of Conviction. A conviction for conspiring to defraud the United States by the unlawful removal of distilled spirits, without paying taxes, bars a subsequent civil suit to recover the penalty of double the amount of such taxes founded on the same acts.[30] If the government elects in case of a breach of duty of an officer to prosecute him by indictment instead of proceeding on his bond for damages, and obtains a conviction and satisfaction of the judgment, it would be barred from proceeding on the bond for the same delinquencies.[31] A conviction on the charge of illicit distilling is not a bar to proceedings *in rem* for forfeiture of the distillery. The question of being twice in jeopardy does not arise.[32]

21. Snyder *v.* U. S., 112 U. S. 216, 5 S. Ct. 118, 28 L. ed. 697; U. S. *v.* One Distillery, 27 Fed. Cas. No. 15,930, 2 Bond 399.

Construction of verdict.—In an action brought to forfeit, for violation of the internal revenue acts, a quantity of manufactured tobacco, and a quantity of raw materials, and certain tools and other property, the jury rendered a verdict "in favor of the United States, condemning the goods." On a motion to arrest judgment on the verdict it was held that the verdict was a verdict for the United States on each of the three issues presented to the jury. U. S. *v.* Quantity of Tobacco, 27 Fed. Cas. No. 16,106*a*, 5 Ben. 457, 16 Int. Rev. Rec. 132, 15 Int. Rev. Rec. 19.

22. *Ex p.* Lange, 18 Wall. (U. S.) 163, 21 L. ed. 872.

23. State *v.* O'Neil, 58 Vt. 140, 2 Atl. 586, 56 Am. Rep. 557.

24. U. S. *v.* Claflin, 97 U. S. 546, 553 note, 24 L. ed. 1082, 1085 (customs case); *In re* Leszynsky, 15 Fed. Cas. No. 8,279, 16 Blatchf. 9, 25 Int. Rev. Rec. 71 (distinction between cumulative penalties and those within the inhibition of the fifth amendment to the constitution). An action based on the internal revenue law (13 U. S. St. at L. 223) for a pecuniary penalty is not a bar to a criminal prosecution when the law provides for both. U. S. *v.* Trobe, 28 Fed. Cas. No. 16,541, 2 Int. Rev. Rec. 133.

25. U. S. *v.* Seven Barrels of Whisky, 131 Fed. 806, spirits not properly marked and stamped. Forfeiture proceedings are not a bar to an indictment. U. S. *v.* Olsen, 57 Fed. 579 [*distinguishing* Coffey *v.* U. S., 116 U. S. 436, 6 S. Ct. 437, 29 L. ed. 684; U. S. *v.* One Distillery, 43 Fed. 846; U. S. *v.* McKee, 26 Fed. Cas. No. 15,688, 4 Dill. 128, 23 Int. Rev. Rec. 338].

26. U. S. *v.* Three Hundred and Ninety-Six Barrels of Distilled Spirits, 28 Fed. Cas. No. 16,502, 3 Int. Rev. Rec. 114.

27. Coffey *v.* U. S., 116 U. S. 436, 6 S. Ct. 437, 29 L. ed. 684.

28. U. S. *v.* Schneider, 35 Fed. 107, 13 Sawy. 295.

29. U. S. *v.* Nagle, 27 Fed. Cas. No. 15,852, 17 Blatchf. 258.

30. U. S. *v.* McKee, 26 Fed. Cas. No. 15,688, 4 Dill. 128, 23 Int. Rev. Rec. 338.

31. U. S. *v.* Cullerton, 25 Fed. Cas. No. 14,899, 8 Biss. 166, 24 Int. Rev. Rec. 68.

32. U. S. *v.* Three Copper Stills, 47 Fed. 495 [*distinguishing* Coffey *v.* U. S., 116 U. S. 436, 6 S. Ct. 437, 29 L. ed. 684], one who has been fined and imprisoned for illicit distilling is estopped to claim as his own the distillery and spirits forfeited thereby. "Many cases exist, where there is both a forfeiture

After an officer and stock-holder of a corporation engaged in distilling has been convicted of violation of law, an action cannot be maintained to enforce forfeiture of the corporation's property for the same offense.[33] Where there was a separate verdict of guilty on several counts in an indictment, and the various offenses charged were connected with each other so as to substantially constitute but one offense, the court rendered but one judgment on the verdict.[34]

5. Opening Judgment and New Trial. There is no power to open a judgment of forfeiture after the term at which it was entered, but where a judgment is entered by mistake of the court the mistake may be corrected after almost any lapse of time if the rights of third parties have not intervened.[35] Errors in the proceedings not merely formal must be corrected by proceedings in the appellate tribunal.[36] A court has no power to open a judgment against the surety on a bond and grant a new trial, upon the ground that certain facts, existing when the case was tried, were not then put in evidence.[37] The weight of authority is that the court will not grant a new trial in an action for a forfeiture where the verdict is for defendant.[38]

6. Costs.[39] When judgment is rendered against defendant in a prosecution for a fine or forfeiture, he shall be subject to the payment of costs. The word "defendant" includes a claimant in an action *in rem* for forfeiture.[40] These costs consist of expenditures made by the government during the progress of the case,[41] expenses of clerks and officers sent away as witnesses;[42] expenses of watching property seized;[43] and premiums for insurance of property seized paid by the marshal.[44]

L. Compromises[45] — 1. In General. Cases arising under the internal revenue law may be compromised by the commissioner with the concurrent action of the secretary of the treasury, and if suit has been commenced, that of the attorney-

in rem and a personal penalty. But in neither class of cases has it ever been decided that the prosecutions were dependent upon each other. But the practice has been, and so this court understands the law to be, that the proceedings *in rem* stands independent of, and wholly unaffected by, any criminal proceeding *in personam*."

33. U. S. *v.* One Distillery, 43 Fed. 846 [*following* U. S. *v.* McKee, 26 Fed. Cas. No. 15,688, 4 Dill. 128, 23 Int. Rev. Rec. 338 (*affirmed* in 174 U. S. 149, 19 S. Ct. 624, 43 L. ed. 929, but not on this question, no proof being furnished to show that property was forfeitable)].

34. *Ex p.* Joyce, 13 Fed. Cas. No. 7,556, 23 Int. Rev. Rec. 297, defendant was convicted of a conspiracy to defraud the United States, and also was convicted under a separate count of having knowledge of a violation of internal revenue laws by others without reporting the same. U. S. Rev. St. (1878) § 3169 [U. S. Comp. St. (1901) p. 2059]. Where defendant pleaded guilty to five counts in an indictment under this section, charging him respectively with having knowledge of frauds upon the revenue, committed at different times by five different distillers, defendant was sentenced as for one offense, but the general power to render cumulative judgment was left open. U. S. *v.* Maguire, 26 Fed. Cas. No. 15,708, 22 Int. Rev. Rec. 146.

The tests as to whether a plea of former acquittal can be sustained are, whether defendants could, under the earlier indictment, have been convicted of the offense embraced in the later one, and whether the evidence necessary to support the later indictment was sufficient to produce a legal conviction on the earlier one. U. S. *v.* Flecke, 25 Fed. Cas. No. 15,120, 2 Ben. 456, 7 Int. Rev. Rec. 206.

35. U. S. *v.* Twenty Packages Distilled Spirits, 28 Fed. Cas. No. 16,569, 24 Int. Rev. Rec. 54.

36. U. S. *v.* One Hundred and Sixty-Three Barrels of Whiskey, 27 Fed. Cas. No. 15,937.

37. U. S. *v.* Carey, 110 U. S. 51, 3 S. Ct. 424, 28 L. ed. 67 (exception taken after trial no avail); U. S. *v.* Millinger, 7 Fed. 187, 19 Blatchf. 202.

38. U. S. *v.* One Hundred and Seventeen Packages of Plug Tobacco, 27 Fed. Cas. No. 15,936, 10 Ben. 343.

39. See, generally, Costs.

40. U. S. *v.* Seven Barrels Distilled Oil, 27 Fed. Cas. No. 16,253, 6 Blatchf. 174.

41. Sanborn *v.* U. S., 135 U. S. 271, 10 S. Ct. 812, 34 L. ed. 112.

42. U. S. *v.* Wolters, 51 Fed. 896; U. S. *v.* Cigars, 2 Fed. 494.

43. Fifteen Empty Barrels, 9 Fed. Cas. No. 4,778, 1 Ben. 125.

44. U. S. *v.* Three Hundred Barrels of Alcohol, 28 Fed. Cas. No. 16,509, 1 Ben. 72, 8 Int. Rev. Rec. 105, property seized may be insured by the marshal for its full value, and not merely for its value in bond before the tax is paid.

45. For criminal liability of officer for unlawful compromise see *supra*, XIII, M.

general.[46] The final authority rests with the commissioner. The functions of the secretary of the treasury and the attorney-general are advisory.[47] The right to compromise embraces the criminal as well as the civil liability of defendant, but ceases after final judgment.[48] The discontinuance of a case in court on payment of costs is a compromise requiring the concurrence of the three officers named.[49] The commissioner may direct an unconditional dismissal of a suit without the recommendation of the attorney-general.[50] The commissioner is not authorized to compromise offenses committed by internal revenue officers, nor suits brought by a taxpayer for recovery of taxes alleged to have been erroneously collected.[51]

2. COMPROMISE OF TAXES. Taxes legally due from a solvent taxpayer cannot be compromised.[52] Disputed claims for taxes can be compromised in the mode prescribed.[53]

3. MONEY DEPOSITED IN COMPROMISE. Money deposited with the collector to apply to a proposed compromise cannot be held or set off against taxes due; but where the collector applied it improperly to payment of a disputed tax the government may set up the tax by way of counter-claim in a suit brought to recover it.[54]

4. COMPROMISE OF CASES AFTER JUDGMENT. The secretary of the treasury has power to compromise claims and judgments in favor of the United States, in cases where collection is doubtful.[55] The power is strictly a fiscal one and to be exercised upon fiscal consideration alone.[56] The government's claim to real property cannot be compromised.[57]

5. EFFECT OF COMPROMISE. A compromise operates for the protection of the offender against subsequent proceedings as fully as a former conviction or acquittal, and is a bar to a suit on a bond to recover penalties based upon the same offense.[58]

M. Remission of Fines, Penalties, and Forfeitures — 1. IN GENERAL. The power of the secretary of the treasury to remit fines, penalties, and forfeitures applies to penalties under the internal revenue laws as well as under the customs laws.[59] The distinction between the power of the secretary to compromise and the power to remit fines, penalties, and forfeitures is that the former is strictly a

46. U. S. *v.* Chouteau, 102 U. S. 603, 26 L. ed. 246; 12 Op. Atty.-Gen. 213.

An agreement made with the United States district attorney in the nature of a compromise is not valid unless with the concurrence of the officers above named. U. S. *v.* Quantity of Distilled Spirits, 27 Fed. Cas. No. 16,099, 4 Ben. 349.

47. 12 Op. Atty.-Gen. 472.

48. 13 Op. Atty.-Gen. 479.

49. 12 Op. Atty.-Gen. 536.

50. 12 Op. Atty.-Gen. 552.

51. 14 Op. Atty.-Gen. 8; 23 Op. Atty.-Gen. 507.

52. 16 Op. Atty.-Gen. 248. The authority conferred by U. S. Rev. St. (1878) § 3229 [U. S. Comp. St. (1901) p. 2089] to compromise a case arising under the internal revenue laws does not permit the voluntary relinquishment of a part of a tax lawfully assessed upon and due from a solvent person or corporation. A compromise implies some mutuality of concession, some real doubt about the legality of the claim, or the ability to meet it. 16 Op. Atty.-Gen. 249. It is not competent for any officer of the government to donate or remit taxes due from the citizen under the law. Johnson *v.* U. S., 7 Wall. (U. S.) 166, 19 L. ed. 187; U. S. *v.* Roelle, 27 Fed. Cas. No. 16,186, 24 Int. Rev. Rec. 332. And see ACCORD AND SATISFACTION, 1 Cyc. 319 note 90.

53. 16 Op. Atty.-Gen. 249. An assessment against certain banks of ten per cent tax on notes of Canadian banks paid out was a case which could be compromised. 21 Op. Atty.-Gen. 565. The liability of obligors on an export bond can be compromised. 13 Op. Atty.-Gen. 115.

54. Boughton *v.* U. S., 12 Ct. Cl. 330 [*reaffirmed* in 13 Ct. Cl. 284].

55. 23 Op. Atty.-Gen. 18, 631; 21 Op. Atty.-Gen. 264; 16 Op. Atty.-Gen. 617.

56. 12 Op. Atty.-Gen. 543. The secretary may take into view general considerations of justice and equity and of public policy. 17 Op. Atty.-Gen. 213. Uncertainty whether the government can obtain a verdict, proper ground for compromise. 16 Op. Atty.-Gen. 259.

57. 16 Op. Atty.-Gen. 385.

58. U. S. *v.* Chouteau, 102 U. S. 603, 26 L. ed. 246.

59. U. S. *v.* Malone, 26 Fed. Cas. No. 15,713, 8 Ben. 574, 22 Int. Rev. Rec. 403; 23 Op. Atty.-Gen. 399.

fiscal one and the latter in the nature of a pardoning power.[60] The power to remit penalties is intrusted to the secretary of the treasury alone, and there is no appeal from his decision.[61]

2. PARDON. A pardon relieves the offender from the consequences of his offense; and when the forfeiture of his property is one of those consequences, it returns the property to him, unless the rights of other parties have vested.[62] It is a bar to a civil suit for penalties growing out of the same transaction,[63] but does not relieve a party from the payment of taxes which are due.[64] The pardon of an officer is a bar to an action on his official bond, assigning the same act as a breach.[65]

N. Rewards For Information — 1. IN GENERAL. The commissioner of internal revenue with the approval of the secretary of the treasury is authorized to offer rewards for information leading to the detection and punishment of persons violating the internal revenue laws.[66] The circular offering a reward expresses the contract between the informer and the government.[67] The offer may be withdrawn at any time, and unless prior to the withdrawal something has been done to establish a right under it, a claimant takes nothing by reason thereof.[68]

2. WHO IS AN INFORMER. The informer is he who first gives to some officer authorized to act upon it information which leads in fact to the seizure and forfeiture.[69] A special agent appointed to investigate a fraud is not an informer in respect to facts found in the ordinary and regular discharge of his duty.[70] Although as a general rule the payment of a reward to an officer for services within the scope of his official duties is contrary to public policy,[71] it has been held that a deputy marshal is entitled to receive a reward expressly authorized by competent legislative authority and sanctioned by the executive officer to whom the legislative power has delegated ample discretion to offer a reward.[72]

3. REPEAL OF STATUTES GIVING SHARES TO INFORMERS. The right of informers to moieties under former acts[73] was repealed in 1872.[74] The fact that a person

60. 23 Op. Atty.-Gen. 20.

61. Johnson *v.* U. S., 7 Wall. (U. S.) 166, 19 L. ed. 187 [*affirming* 2 Ct. Cl. 103].

62. Osborn *v.* U. S., 91 U. S. 474, 23 L. ed. 388. Nevertheless it has been held that a party sentenced for conspiracy may be pardoned, and yet the offender may be liable to have his property forfeited on account of other violations which do not constitute a conspiracy. *Ex p.* Weimer, 29 Fed. Cas. No. 17,362, 8 Biss. 321.

63. U. S. *v.* McKee, 26 Fed. Cas. No. 15,688, 4 Dill. 128, 23 Int. Rev. Rec. 338, in which case the court further said: "Whether it would be a good bar to an action for acts not included in that prosecution, but of the same character, we need not now decide, though I have personally a strong opinion that it would."

64. U. S. *v.* Roelle, 27 Fed. Cas. No. 16,186, 24 Int. Rev. Rec. 332.

65. U. S. *v.* Cullerton, 25 Fed. Cas. No. 14,899, 8 Biss. 166, 24 Int. Rev. Rec. 68.

66. Crane *v.* U. S., 23 Ct. Cl. 94 (right of commissioner and secretary to fix amount of reward); Briggs *v.* U. S., 15 Ct. Cl. 48; Williams *v.* U. S., 12 Ct. Cl. 192; 15 Op. Atty.-Gen. 133 (commissioner authorized to offer a reward for the recovery of taxes evaded); 15 Op. Atty.-Gen. 88 (construction of offer of reward).

67. Green *v.* U. S., 17 Ct. Cl. 238.

68. U. S. *v.* Connor, 138 U. S. 61, 11 S. Ct. 229, 34 L. ed. 860.

69. U. S. *v.* One Hundred Barrels of Distilled Spirits, 27 Fed. Cas. No. 15,946, 1 Lowell 244, 8 Int. Rev. Rec. 20. It is not the one who first gave the information upon which the seizure was made who was entitled, but the one who gave information of the causes which led to the condemnation of the property. One Hundred Barrels of Whiskey, 18 Fed. Cas. No. 10,526, 2 Ben. 14, 6 Int. Rev. Rec. 179.

70. U. S. *v.* Two Hundred and Seventy-Eight Barrels of Distilled Spirits, 28 Fed. Cas. No. 16,581.

71. Matthews *v.* U. S., 32 Ct. Cl. 123. And see OFFICERS.

72. U. S. *v.* Matthews, 173 U. S. 381, 19 S. Ct. 413, 43 L. ed. 738 [*affirming* 32 Ct. Cl. 123].

Effect of pardon. — A pardon defeats the informer's right to moiety. U. S. *v.* Thomasson, 28 Fed. Cas. No. 16,479, 4 Biss. 336.

73. Act June 30, 1864 (13 U. S. St. at L. 305, § 179), amended by Act July 13, 1866.

74. Act June 6, 1872 (17 U. S. St. at L. 256, § 39); U. S. *v.* Ramsey, 120 U. S. 214, 30 L. ed. 582 [*affirming* 21 Ct. Cl. 443]. "Sanforn contract" under Act May 8, 1872 (17 U. S. St. at L. 69) repealed June 22, 1874 (18 U. S. St. at L. 192).

obtained information while in the discharge of his official duty as a revenue officer did not debar him from claiming a share of the fine as informer.[75]

75. U. S. *v.* Chassell, 25 Fed. Cas. No. 14,789, 6 Blatchf. 421, 9 Int. Rev. Rec. 177; U. S. *v.* Thirty-Four Barrels of Whiskey, 28 Fed. Cas. No. 16,462, 9 Int. Rev. Rec. 169; 13 Op. Atty.-Gen. 228. An officer who obtained information through the examination of witnesses compelled to testify before the grand jury, or who acted on information furnished him as an officer, and intended by his informant to be given the government, and did not recover new facts by his own diligence, was not the informer. U. S. *v.* One Hundred Barrels of Distilled Spirits, 27 Fed. Cas. No. 15,946, 1 Lowell 244, 8 Int. Rev. Rec. 20.

Who is an informer.— Under the act of 1864, section 179, as amended by the act of July 13, 1866 [14 U. S. St. at L. 145], the informer is he who first gives to a person authorized to receive it the important information which in fact leads to the desired result. The offer is not necessarily confined to persons who shall expose the details of the fraud. Thus, if the government officers were already aware of the offense, but were unable to trace the goods, and the informer supplied the necessary facts; or if the informer without knowing precisely what fraud had been perpetrated knew of suspicious circumstances sufficient to justify a seizure; in these and similar cases, the person who gave the information by which the forfeiture was in fact decreed or imposed would be within the fair intent of the act. U. S. *v.* One Hundred Barrels of Distilled Spirits, 27 Fed. Cas. No. 15,946, 1 Lowell 244, 8 Int. Rev. Rec. 20.

It is not essential that an informer should act as prosecutor or be called as a witness; it is enough that the result is in fact reached primarily through his means. U. S. *v.* One Hundred Barrels of Distilled Spirits, 27 Fed. Cas. No. 15,946, 1 Lowell 244, 8 Int. Rev. Rec. 20. See also as sustaining this proposition Sawyer *v.* Steele, 21 Fed. Cas. No. 12,406, 3 Wash. 464; Besse *v.* Dyer, 9 Allen (Mass.) 151, 85 Am. Dec. 747; Crowshow *v.* Roxbury, 9 Gray (Mass.) 374; Smith *v.* Moore, 1 C. B. 438, 9 Jur. 352, 50 E. C. L. 438.

Necessity of statutory authority for allowance.— An informer of a violation of revenue laws, by virtue of which a seizure is made and condemnation of the property is obtained, can entitle himself to a reward or proportion of the property, only in cases provided for by some statute. Such services do not create a legal or equitable title to compensation. Robinson *v.* Hook, 20 Fed. Cas. No. 11,956, 4 Mason 139.

Necessity for recovery of judgment.— It is only when the amount of the penalty has been recovered by a judgment of the court that an informer is entitled to a moiety thereof. Thus if it was paid by a compromise or agreement before final judgment he is not entitled to any share therein, either under U. S. St. (1862) c. 119, § 31, or U. S. St. (1864) c. 173, § 41. Rice *v.* Thayer, 105 Mass. 258, 7 Am. Rep. 516; Lapham *v.* Almy, 13 Allen (Mass.) 301. And see U. S. *v.* Morris, 10 Wheat. (U. S.) 246, 6 L. ed. 314 [*affirming* 26 Fed. Cas. No. 15,816, 1 Paine 209]; U. S. *v.* Ninety-Five Barrels of Distilled Spirits, 27 Fed. Cas. No. 15,888, 8 Int. Rev. Rec. 105.

The right of the informer became fixed, on the receipt by the marshal of the money, to receive the amount to which, by the then existing regulation, he was entitled. *In re* Eight Barrels of Distilled Spirits, 8 Fed. Cas. No. 4,316, 1 Ben. 472, 10 Int. Rev. Rec. 157; U. S. *v.* Twenty-Five Thousand Segars, 28 Fed. Cas. No. 16,565, 5 Blatchf. 500.

Jurisdiction of suits by an informer against collector.— Where judgment is given for the amount of a penalty which was paid over to the collector as the representative of the United States, and the judgment does not pass upon the question of who was the informer, he might sue the collector for the moiety in any national or state court having jurisdiction of the parties. Rice *v.* Thayer, 105 Mass. 258, 7 Am. Rep. 516; Lapham *v.* Almy, 13 Allen (Mass.) 301. See also the following decisions of the federal courts as tending to sustain this view. Buel *v.* Van Ness, 8 Wheat. (U. S.) 312, 5 L. ed. 624; Van Ness *v.* Buel, 4 Wheat. (U. S.) 74, 4 L. ed. 516; Jones *v.* Shore, 1 Wheat. (U. S.) 462, 4 L. ed. 136; Sawyer *v.* Steele, 21 Fed. Cas. No. 12,406, 3 Wash. 464.

Deduction for costs.— The proviso in section 91 of the act of congress of March 2, 1799 (1 U. S. Rev. St. (1878) § 3089 [U. S. Comp. St. (1901) p. 2016]), that where the value of the property forfeited is less than two hundred and fifty dollars, the share of the United States is to be applied toward the costs of the prosecution is general in its application, and is applicable to forfeitures under the internal revenue laws. The share allotted to the informer is not subject to a proportionate deduction for costs and charges. *In re* One Large Water Tub, 18 Fed. Cas. No. 10,532, 3 Ben. 436, 10 Int. Rev. Rec. 139.

By what law governed.— A decree condemning liquor was entered by the consent of the claimant, but before a sale thereunder the decree and all proceedings thereon were vacated on claimant's motion, and he was allowed to come in and defend. After he filed his claim and answer, the cause was postponed for one term, and a final decree of condemnation was then rendered and carried into execution. It was held that the share of the informer in the proceeds was to be determined by the law in force at the time of such final decree. U. S. *v.* Twenty-Five Thousand Gallons of Distilled Spirits, 28 Fed. Cas. No. 16,564, 7 Int. Rev. Rec. 206 [*affirming* 24 Fed. Cas. No. 14,282, 1 Ben. 367]. And see U. S. *v.* Twenty-Five Thousand Segars, 28 Fed. Cas. No. 16,565, Blatchf. 500.

INTERNAL WATERS. Waters situate within the body of a country.[1] (See, generally, ADMIRALTY; COLLISION; NAVIGABLE WATERS; WATERS.)

INTERNATIONAL. A generic term, pertaining to the relation between nations, and when applied to business or to transactions of a private character it imports dealings of some sort in matters or with people of different nations, or which have some relation to them.[2] (International: Commerce, see INTERNATIONAL COMMERCE. Law, see INTERNATIONAL LAW.)

INTERNATIONAL COMMERCE. Commerce conducted between one state and another.[3] (See, generally, COMMERCE.)

1. The Garden City, 26 Fed. 766, 773.

2. Koehler *v.* Sanders, 122 N. Y. 65, 72, 73, 25 N. E. 235, 6 L. R. A. 576.

It is in common use, and in its nature it is descriptive and ordinarily characterizes the business to which it pertains, rather than its origin or proprietorship. As used in a partnership name, the "International Banking Company," it is apparently descriptive of a banking business, and indicates that it is in some sense international, and presumptively the name denotes the nature of the business. Koehler *v.* Sanders, 122 N. Y. 65, 72, 73, 25 N. E. 235, 9 L. R. A. 576.

3. Louisville, etc., R. Co. *v.* Tennessee R. Commission, 19 Fed. 679, 701.

INTERNATIONAL LAW

By David Josiah Brewer
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* Author of "The Treaty-Making Power of the United States," "Freedom of Private Property," etc.

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I. NATURE AND SOURCES.

A. Definition. International law has not, as yet, perhaps, been fully and accurately defined, or rather the specific matters to which it may extend and its scope have not been fully settled. It includes, however, the entire body of obligations which one nation owes to another with respect to its own conduct or the conduct of its citizens toward other nations or their citizens.[1] As defined by Wheaton, it consists "of those rules of conduct which reason deduces, as consonant to justice, from the nature of the society existing among independent nations; with such definitions and modifications as may be established by general consent."[2] International law is "divided into public and private: public, that which regulates the political intercourse of nations with each other; private, that which regulates the comity of States in giving effect in one State to the municipal laws of another relating to private persons, their contracts, etc."[3]

1. U. S. *v.* White, 27 Fed. 200, 201.

2. Wheaton Int. L. c. 1, § 14.

Other definitions are: "The rules of conduct regulating the intercourse of States." Halleck Int. L. & Laws of War, c. 2, § 1.

"That collection of rules, customary, conventional and judicial, which independent states appeal to for the purpose of determining their rights, prescribing their duties and regulating their intercourse, in peace and war." Kent Comm. Int. L. (Abdy ed.) p. 4.

"The sum of those rules which civilized mankind have agreed to hold as binding in the mutual relations of States." Rep. Am. Bar Assoc. (1896) p. 261 (address of Chief Justice Lord Russell of Kilowen before the American Bar Association).

"As commonly understood, that body of rules which governs generally the actions of modern civilized States in their intercourse with one another. Snow Manual Int. L. § 1.

"International law consists in certain rules of conduct which modern civilised states regard as being binding on them in their relations with one another with a force comparable in nature and degree to that binding the conscientious person to obey the laws of his country, and which they also regard as being enforceable by appropriate means in case of infringement." Hall Int. L. p. 1.

The law of nations is a system of rules which reason, morality, and custom have established among civilized nations as their public law. Heirn *v.* Bridault, 37 Miss. 209.

3. See 2 Bentham Morals and Legislation (1823), p. 56 [*cited* in Wheaton Int. L. pt. 1, c. 1, § 11]; 1 Oppenheim Int. L. p. 4.

The law of nations is the law for states and not for individuals, and as there can be

B. History, Legal Nature, and Scope. As a science international law is of comparatively recent origin. It did not exist in the modern comprehensive sense either in the ancient world or in the middle ages.[4] It is not proposed in this article to treat international law from the historical point of view,[5] but rather from the legal standpoint; that is to say, to endeavor to arrive at the principles which have been established, and which are now applied, in the relations of states between themselves or their citizens. Two views have been taken as to the legal nature of international law. There are those who regard it as absolute law which can be ascertained, applied, and enforced; and others who regard it as merely a body of ethical rules properly applicable as occasion arises, but which cannot be insisted upon or enforced. There are various theories in this respect, known as the Hobbes, Austin, and Bentham theories.[6] But international law will be treated in this article from the American standpoint, which is that the law of nations does exist, can be ascertained, and can be applied, and that there is a body of law which civilized nations have consented should form the rules of their conduct in their relations with each other.[7] It will therefore be assumed that there is actually a body of international law which is ascertainable and by which, when ascertained, international relations can be controlled and adjudicated as between nations when

no sovereign authority above a sovereign state, the law is between and not above the states, and this was the argument which induced Jeremy Bentham to define it as "international law." Roche *v.* Washington, 19 Ind. 53, 81 Am. Dec. 376. See also Snow Manual Int. L. § 2.

Difference between international and municipal law.— "The Law of Nations and the Municipal Law of the single States are essentially different from each other. They differ, first, as regards their sources. Sources of Municipal Law are custom grown up within the boundaries of the respective State and statutes enacted by the law-giving authority. Sources of International Law are custom grown up within the Family of Nations and law-making treaties concluded by the members of that family." 1 Oppenheim Int. L. § 20 [*citing* Holland Studies Int. L. (1898) pp. 176–200; Holtzendorff (1885–1889) pp. 49–53, 117–120; Kauffmann "Die Rechtskraft des Internationalen Rechts" (1899); 1 Nys le Droit Int. (1904) pp. 185–189; Taylor Int. Pub. L. (1901) § 103; Triepel "Völkerrecht und Landesrecht" (1899)].

4. Wheaton Hist. Mod. L. of N. p. 69.

"There is no precise time at which it may be said that the body of rules which regulate, under the title of international law, the intercourse of nations, came into being. As a science it assumed a definite form in the sixteenth and seventeenth centuries." 1 Moore Dig. Int. L. § 1.

5. Numerous text writers, such as Wheaton, Kent, Walker, and others, have published elaborate treatises on the history of the development of international law, most of them dividing it into two periods, one prior to Grotius, who published his work "De Jure Belli ac Pacis" in 1625, or prior to the Peace of Westphalia, in 1648, and the other or modern period, subsequent thereto. The pre-Grotian writers include Legnano, Belli, Brunus, Victoria, Ayala, Suarez, and Gentilis. The list of the great writers on international law of the seventeenth and eighteenth centuries includes Grotius, Gentilis, Bentham, Bynkershoek, Zouche, Pufendorf, Moser, von Martens, Wolff, and Vattel. Oppenheim gives the following list of authorities on international law as being the leading modern authorities in their respective countries:

Great Britain.— Manning, Polson, Wildman, Phillimore, Twiss, Amos, Creasy, Hall, Maine, Lorimer, Levi, Lawrence, Walker, Baker, Smith, and Westlake.

United States.— Kent, Wheaton, Woolsey, Halleck, Wharton, Davis, and Taylor.

France.— Funck-Brentano and Sorel, Pradier-Fodéré, Bonfils, Despagnet, Piedelièvre.

Germany.—Schmalz, Klüber, Saalfeld, Heffter, Oppenheim, Bluntschli, Hartmann, Holtzendorff, Bulmerincq, Gareis, Ullmann, von Liszt.

Italy.— Casanova, Fiore, Carnazza-Amari, del Bon, Sandona, Pertille, Pierantoni.

Spain and Spanish America.— Bello, de Pando, Riquelme, Calvo, Alcorta, de Olivart, Acosta, Cruchaga.

Miscellaneous.— Bornemann, von Martens, Ferguson, Rivier, Matzen, Nys.

See also 1 Moore Dig. Int. L. pp. ix–xxx appendix, which contains a complete list of authorities on the subject.

According to Wheaton, and his view has been generally followed, the Peace of Westphalia in 1648 may be chosen as the epoch from which dates the history of the modern science of international law. Wheaton Hist. L. of N. p. 69.

For the most recent résumè of the history and principles of international law see Moore Dig. Int. L. (Govt. Printing Office 1906) 8 vols. And see Oppenheim's work. 1 Oppenheim Int. L. (1905) § 43 *et seq.*

6. Discussed at length in the preliminary chapters of Wheaton, Oppenheim, Hall, and many other authors on international law.

7. See 5 Columbia L. Rev. p. 126 (article by Professor James Brown Scott on "The Legal Nature of International Law," discussing these various views).

they agree to submit controversies to properly organized tribunals, and by which also courts of law may determine the relations between parties over whom they have jurisdiction.[8] In fact the rule is in the United States that the fundamental principles of the law of nations form a part of the municipal jurisprudence of every country, and that it may be ascertained and administered by the courts of appropriate jurisdiction as often as rights depending upon it are duly presented for their determination.[9] Before the adoption of the constitution the proposition had been advanced that the law of nations was part of the common law of Great Britain.[10] Under the theory that the nation was only bound by those rules of international law to which it had consented it was held in 1876 that, although a rule might be one generally recognized by international law, it would not be binding upon Great Britian until that country had consented to it, and it was held in the Franconia case that such consent must be evidenced by an act of parliament.[11] In the United States the rule is different, as the existence of the law of

"The Government of the United States has on various occasions announced the principle that International law, as a system, is binding upon nations, not merely as something to which they may be tacitly assumed to have agreed, but also as a fundamental condition of their admission to full and equal participation in the intercourse of civilized states." 1 Moore Dig. Int. L. § 1 [p. 2].

8. The law of nations is not, however, always the same as the law of nature, nor is a rule of public morals, according to civilized notions, a rule of international law. For instance, the African slave trade was held to be contrary to the law of nature, but not prohibited by the positive law of nations. The Antelope, 10 Wheat. (U. S.) 66, 120 *et seq.*, 6 L. ed. 268 (per Marshall, C. J.); The Le Louis, 2 Dods. 210 (per Lord Stowell and Sir W. Scott). And see authorities collated in 1 Moore Dig. Int. L. § 1.

9. The Paquette Habana, 175 U. S. 670, 700, 20 S. Ct. 290, 44 L. ed. 320; U. S. *v.* La Jeune Eugenie, 26 Fed. Cas. No. 15,551, 2 Mason 409, 430, per Story, J. See also cases cited *infra*, note 14.

10. "The law of nations is part of the municipal law of Great Britain, and by her laws, all movable property of enemies, found within the kingdom, is considered as forfeited to the crown, as the head of the nation." Ware *v.* Hylton, 3 Dall. (U. S.) 199, 228, 1 L. ed. 568.

"The early English authorities accepted the law of nations as law in the concrete, and administered it in courts of justice and common law, whenever a case arose in a court necessarily involving a question of international law. The statement of Sir William Blackstone may be taken as summing up the view of the bench and bar in his day. In a passage of his Commentaries, not so well known as it should be, the learned expounder of the Laws of England says: 'The Law of Nations (whenever any question arises which is properly the object of its jurisdiction) is here [in England] adopted by its full extent by the common law, and is held to be a part of the law of the land (4 Blackstone Comm. 67).'" 5 Columbia L. Rev. 126 (article by Professor James Brown Scott on the "Legal Nature of International Law"), where it is also said: "The view thus expressed was not original with Blackstone. It was simply a digest of the various cases decided before and during his time in courts of justice." See Barbuit's Case, Cas. t. Talb. 281, 283, in which Lord Talbot held that the law of nations in its full extent was part of the law of England. To the same effect see Heathfield *v.* Chilton, 4 Burr. 2015 (per Lord Mansfield, C. J.); Triquet *v.* Bath, 3 Burr. 1478, 1 W. Bl. 471.

11. Reg. *v.* Keyn, 2 Ex. D. 63, 13 Cox C. C. 403, 46 L. J. M. C. 17. The question involved in that case was whether the jurisdiction of the state extended over the maritime belt of three marine miles from low-water mark, and the court held that, although the rule was generally recognized in international law, it had never been consented to by Great Britain, and refused to take jurisdiction to try a man indicted for manslaughter on a foreign vessel within three miles of the English coast on the ground that that territory was not within "the body of the county" within which the trial court had jurisdiction. This case was decided in the exchequer division by a divided court and has been frequently commented on and criticized. See 11 Am. L. Rev. 625 (article by Judge Dwight Foster on "Case of the Franconia"); 5 Columbia L. Rev. 126 (article by Professor James Brown Scott on "The Legal Nature of International Law"); Maine Int. L. (1888) p. 39; Rep. Am. Bar Assoc. (1896) p. 253 (address by Chief Justice Lord Russell of Kilowen before the American Bar Association). See also the declaratory act, 41 & 42 Vict. c. 73, passed about two years after the decision in the Franconia case, declaring the territorial waters to be within the dominions of Great Britain. "It is quite true that whatever has received the common consent of civilized nations must have received the assent of our country, and that to which we have assented along with other nations in general may properly be called international law, and as such will be acknowledged and applied by our municipal tribunals when legitimate occasion arises for those tribunals to decide questions to which doctrines of international law may be relevant." West Rand Cent. Gold Min. Co. *v.*

nations was recognized by the framers of the constitution, and congress was authorized to "define and punish Piracies and Felonies committed on the high Seas, and Offences against the Law of Nations." [12] In fact it had been recognized prior to the adoption of the constitution by the continental congress in the ordinances adopted Dec. 4, 1781.[13] Since the adoption of the constitution congress has frequently recognized the existence of the law of nations in enacting statutes relating to the adjustment of claims against foreign governments, defining the crime of piracy and in punishing the counterfeiting of securities of foreign governments, etc.[14] The courts of the United States have recognized the existence of international law in construing these statutes and also in determining the rights, under international law, of parties litigant, and in so doing have held that the law of nations "is no less binding upon congress than if the limitation were written in the Constitution." [15] In reaching this conclusion the courts have held that international law is part of the common law [16] and that it is "the law of all tribunals in the society of nations, and is supposed to be equally understood by all." [17] Cases arising under public international law may also be divided into

Rex, [1905] 2 K. B. 391, 406, per Lord Alverstone, C. J.

As to period necessary for consent see statement of Lord Stowell in the Young Jacob & Johanna, 1 C. Rob. 20 [*cited* with other authorities in 1 Moore Dig. Int. L. § 1], where it is said: "The period of a hundred years which has since elapsed is amply sufficient to have enabled what originally may have rested in custom, or comity, courtesy or concession, to grow, by the general assent of civilized nations, into a settled rule of international law."

12. U. S. Const. art. 1, § 8, cl. 10.

13. 8 Journ. Congr. 185.

14. Many instances of statutes of this character may be found in Butler's Treaty-Making Power, § 399, and by reference to the index to the United States Revised Statutes and the indexes to the United States Statutes at Large. For a few instances see the following acts of congress:

Act of April 19, 1860 (12 U. S. St. at L. 838), by which act the heirs of the Sieur de Bonne were authorized to present their claims to the district court of the United States for the district of Michigan and to support the same with evidence to be decided upon under the laws of nations, etc. See also U. S. *v.* Repentigny, 5 Wall. (U. S.) 211, 18 L. ed. 627, involving this statute.

Act of March 2, 1901 (31 U. S. St. at L. 877 [U. S. Comp. St. (1901) p. 2795]), creating the Spanish Treaty Claims Commission, for the purpose of adjudicating claims of the citizens of the United States against Spain, which were assumed by the treaty of peace with Spain. Section 1 of the act provides that the commission "shall adjudicate said claims according to the merits of the several cases, the principles of equity, and of international law."

Act of March 3, 1819 (U. S. Rev. St. (1878) § 4293 [U. S. Comp. St. (1901) p. 2950]), recognizing the law of nations in defining piracy.

Act of May 16, 1884 (23 U. S. St. at L. 22 [U. S. Comp. St. (1901) p. 3662]), recognizing the law of nations in punishing counterfeiting of securities of foreign governments.

International law as part of the law of the land: Of England see 1 Moore Dig. Int. L. § 1 [pp. 9–11] [*citing* Triquet *v.* Bath, 3 Burr. 1478, 1 W. Bl. 471; Emperor of Austria *v.* Day, 2 Giffard 628; Blackstone Comm. bk. 4, c. 5, p. 67; Coxe Jud. Power & Unconst. Legis.]. Of the United States and the states see 1 Moore Dig. Int. L. § 1 [pp. 9–11] [*citing* Respublica *v.* De Longchamps, 1 Dall. (Pa.) 111, 1 L. ed. 59; 5 Op. Atty.-Gen. 691; The Nereide, 9 Cranch (U. S.) 388, 423, 3 L. ed. 769; Mr. Jefferson to Mr. Genet Am. St. Pap. For. Rel. 150; Wait Am. St. Pap. 1, 30; Hamilton Letters of Camillus No. 20, Lodge's Hamilton, v. 89; Hamilton ed. VII, 349; Pelletier's case, Sen. Ex. Doc. 64, 49* Cong. 2d Sess.; 2 Moore Int. Arb. 1799].

15. Miller *v.* U. S., 11 Wall. (U. S.) 268, 316, 20 L. ed. 135.

16. The common law too recognizes and punishes piracy as an offense, not against its own municipal code, but as an offense against the law of nations (which is a part of the common law), as an offense against the universal law of society, a pirate being deemed an enemy of the human race. U. S. *v.* Smith, 5 Wheat. (U. S.) 153, 160, 163 note, 5 L. ed. 57.

17. Rose *v.* Himely, 4 Cranch (U. S.) 241, 277, 2 L. ed. 608, per Marshall, C. J. In the absence of any act of congress, the courts of the United States would have authority under the general law of nations to decree restitution of property captured in violation of the neutrality of the United States. The Estrella, 4 Wheat. (U. S.) 298, 4 L. ed. 574. For recognition of law of nations in prize case see The Alerta *v.* Blas Moran, 9 Cranch (U. S.) 359, 365, 3 L. ed. 758. A nation is bound by the law of nations in war and is responsible for violating it. Young *v.* U. S., 97 U. S. 39, 24 L. ed. 992. And see Don *v.* Johnson, 100 U. S. 158, 170, 25 L. ed. 632. The war powers of the government of the United States have no express limitations, except as subject to the law of nations. Miller *v.* U. S., 11 Wall. (U. S.) 268, 315, 20 L. ed. 135 [*citing* 1 Kent Comm. 1]. See also New

two classes: (1) Those in which one state asserts a claim against another state and which can only be settled by an international tribunal, as the courts of neither state would have jurisdiction over the other state;[18] and (2) cases in which an individual seeks some redress in the courts against a person over whom the courts have jurisdiction in a case where the principles of international law are involved.[19] The American studying international law will therefore find several distinct bodies of decisions that must be consulted: (1) The decisions of international tribunals, all of which, up to the present time, have been separate and independent of each other; (2) the decisions of American courts, which are binding as precedents, according to the authority of the court, on American courts, and in which those courts have determined what, in their respective opinions, the rules of international law involved were and how they should be applied in the particular case under consideration; and (3) similar decisions of municipal courts in other countries. When the courts of the United States determine what the rules of international law are and how they should be applied, their decisions (and this is true of the courts of other countries) are not necessarily binding upon the tribunals of other countries or upon international tribunals of arbitration.[20] No court of arbitration is necessarily bound by the doctrine of *stare decisis*; it will listen with respect and take into consideration and carefully weigh the decisions rendered by other tribunals, but it is in no wise bound thereby. That element of uniformity does not at present exist in the systems of having arbitrations *ad hoc* to settle each separate dispute. The tendency, however, on the part

Orleans *v.* New York Mail Steamship Co., 20 Wall. (U. S.) 387, 394, 22 L. ed. 354. "The law of nations, unlike foreign municipal laws, does not have to be proved as a fact." 1 Moore Dig. Int. L. § 1 [p. 11] [*citing* The New York, 175 U. S. 187, 20 S. Ct. 67, 44 L. ed. 126; Sears *v.* The Scotia, 14 Wall. (U. S.) 170, 20 L. ed. 822; Talbot *v.* Seeman, 1 Cranch (U. S.) 1, 2 L. ed. 15].

18. Snow Manual Int. L. § 1, where it is said: "International law differs from the municipal or national law of individual States in that it does not proceed from any authorized law making power and that it has no superior international tribunal whose functions it is to enforce the law in the case of its infraction. Nevertheless it is obeyed for the most part without question, and it is only upon exceptional occasions that resort is now had to war as a settlement of international disputes." See also U. S. *v.* The Active, 24 Fed. Cas. No. 14,420, 3 Wheel. Cr. (N. Y.) 263, where it is said: "[International law] is a law for the government of national communities as to their mutual relations, and not for the government of individuals of those communities in their relation towards one another — nor can it control the conduct of nations towards their own citizens, except in cases involving the rights of other nations."

These cases might either involve international claims where the state itself had sustained an injury and was seeking redress for the nation and not for any particular individual, or claims which the nation asserted on behalf of a particular citizen or particular class of citizens injured by a foreign state, and which would also have to be settled by an international tribunal.

19. For instance, in the case of "The Schooner Exchange," where an American sought to regain possession of a vessel formerly his property which had been seized by order, and passed into the possession, of a foreign sovereign who had transformed her into a vessel of war, it was decided, Chief Justice Marshall writing the opinion, that a sovereign cannot be sued in the courts of another country, the decision being based entirely upon the principles of international law, and not on any particular rules of the common law or the statutory law of this country. The Exchange *v.* McFaddon, 7 Cranch (U. S.) 116, 3 L. ed. 287. "The cases of Wolff *v.* Oxholm, 6 M. & S. 92, 18 Rev. Rep. 313, and Reg. *v.* Keyn, 2 Ex. D. 63, 13 Cox C. C. 403, 46 L. J. M. C. 17, are only illustrations of the same rule — namely, that questions of international law may arise, and may have to be considered in connection with the administration of municipal law." West Rand Cent. Gold Min. Co. *v.* Rex, [1905] 2 K. B. 391, 408.

Application to prize cases.— International law is limited to questions affecting the mutual relations of nations. Therefore, in its application to prize cases, it only determines under what circumstances prizes may be taken, and does not attempt to declare to whom the property shall go after it is taken — whether to the captors themselves, or to their government. These latter questions must be regulated exclusively by the municipal law of the captor's own country. U. S. *v.* The Active, 24 Fed. Cas. No. 14,420.

20. The United States condemned British vessels for pelagiac sealing in Bering sea, but subsequently the Paris tribunal held that the United States had no right to do so and the United States was obliged to indemnify the owners of the vessels which had been condemned. In like manner, the United States court condemned the Peterhoff as a prize during the Civil war after the capture of New

of all nations to submit matters to arbitration will probably result in greater uniformity of decision and greater weight being given to prior decisions in similar cases.[21] International law as administered by the laws of a country thereupon becomes part of the municipal law and theoretically ceases to be international law, as under the Bentham theory above referred to international law is a law between states and individuals cannot be parties to it nor can the courts of either nation determine what the law is.[22] Therefore the decisions of the courts of this country and of Great Britain which are cited in this article and the notes thereto are not, strictly speaking, international law cases, but cases involving the principles of international law, and the decisions of the respective courts are, so far as other states are concerned, only the utterances of those courts as to what, in their respective opinions, are the principles of international law involved in those cases. As to cases subsequently arising in the courts of the United States, however, the decisions of the courts of this country are authoritative and will be followed.

C. Codification and Sources. International law has never been codified,[23] either as it exists between states or as administered as a part of the municipal law by courts of the different countries. It corresponds more to the unwritten and customary law and the exact rule applicable to the case under consideration has to be determined by previous decisions, and what has been consented to and adopted by different nations; to ascertain this the court may refer not only to the statutes, treaties, and legislative acts and judicial decisions, but also to the customs and usages of civilized nations, to the works of jurists, and the opinions

Orleans and the claims commission under the treaty of 1871 with Great Britain held that the captnre was illegal and the United States was obliged to indemnify the owners of the vessel. See The Peterhoff *v.* U. S., 5 Wall. (U. S.) 28, 18 L. ed. 564. See also 4 Moore Int. Arb. 3838.

21. The institution of the permanent court of arbitration at The Hague for the peaceful settlement of international disputes provides a court, the decisions of which as they are rendered from time to time ought eventually to form a body of precedents similar to that of the unwritten common law of England and the United States; the decisions of this court should, and probably will, have the same force and effect as precedents for subsequent cases involving similar questions as the decisions of the courts in countries where the doctrine of *stare decisis* prevails. At present the court at The Hague has a large number of judicial members, appointed by the different governments signatory to the treaty, and the *personnel* of the actual court in the various cases submitted to the tribunal necessarily varies, as it is seldom that the same members of the court are chosen. It would be a great step forward if the number of judges were reduced so that the *personnel* of the court would be permanent. Under such circumstances the decisions would bave greater weight and would be more binding as precedents, as the court would of course follow its own decisions more closely, if rendered by the same judges in the same manner as in the great appellate courts of the United States and England. The same deference and respect is not paid to the judgments of a court where the judges are constantly changing, as no one of the judges feels that he is personally bound by the decisions of a court so constituted, nor does the same obligation to do so exist.

22. See *supra*, note 6.

23. Attempts have been made, from time to time, to codify certain parts of international law, and while they have never been adopted universally, they have a certain weight and authority, depending more or less upon the ability with which the codification has been made and the acceptance of the definitions and rules therein contained. Amongst these codifications are those of Prof. Francis Lieber, of Columbia University, in 1863, prepared under the directions of President Lincoln, and issued as General Order No. 100, entitled "Instructions for the Government of the Armies of the United States in the Field;" Bluntschli's Draft in 1868; Mancini's in 1872; David Dudley Field's in 1872; the code of the Institute of International Law of 1880; of Fiore, 1890; the codes of the Convention of the Peace Conference of The Hague of 1899. In 1900 the United States issued a body of rules entitled "The Laws and Usages of War at Sea" which was promulgated by the navy department, but was revoked by an order issued Feb. 4, 1904. See also 1 Oppenheim Int. L. § 30, where he refers to various attempts at codification.

"Codification has a tendency to arrest progress. It has been so found, even where branches or heads of municipal law have been codified, and it will at once be seen how much less favorable a field for such an enterprise international law presents, where so many questions are still indeterminate. . . . While agreeing, therefore, that indeterminate points should be determined and that we should aim at raising the ethical standard, I do not think we have yet reached the point at which codification is practicable, or if practicable, would

of commentators.[24] Every text writer has attempted to classify the sources of international law, that is, the places where its rules and principles may be obtained. They differ in various degrees, and attempts have been made to give a relative value to the different sources; but it is impossible to differentiate them in this manner, and the statement from Snow's Manual in the notes includes all the principal sources of modern international law.[25] And in the ascertainment of any fact of which they are bound to take judicial notice, as in the decision of matters of law which it is their office to know, judges may refresh their memories and inform their consciences from such sources as they deem most trustworthy.[26]

be a public good." Rep. Am. Bar Assoc. (1896) (address of Chief Justice Lord Russell of Kilowen before the American Bar Association).

24. The Paquette Habana, 175 U. S. 677, 700, 20 S. Ct. 290, 44 L. ed. 320. "What the law of nations . . . is, may be ascertained by consulting the works of jurists, writing professedly on public law; or by the general usage and practice of nations; or by judicial decisions recognizing and enforcing that law." Hilton *v.* Guyot, 159 U. S. 113, 163, 214; U. S. *v.* Smith, 5 Wheat. (U. S.) 153, 160, 5 L. ed. 57. In determining what the rules of international law are that apply to a given case the court will always endeavor to ascertain what the long established usages are of the nations of the world, as well as the written compacts affecting the particular cases. "These rules are the outgrowth of the customs arising from the intercourse of nations, of various international agreements, and of the acts of states which have in the lapse of time been accepted as of binding force by the various civilized States of the world. They may be considered as being based upon the moral and intelligent conviction of enlightened mankind." Snow Manual Int. L. § 1. The law of nations is the law of nature, rendered applicable to political societies, and modified, in progress of time, by the tacit or express consent, or by the long-established usages and written compact of nations. Johnson *v.* Twenty-One Bales, etc., 13 Fed. Cas. No. 7,417, 2 Paine 601, Van Ness Prize Cas. 5. The law of nations, having its origin in the necessities growing out of the commercial, diplomatic and social intercourse of civilized nations, and being founded on their express or implied assent, cannot be extended to those nations who have not so assented, and who are by nature and constitution incapable of civilized intercourse. Heirn *v.* Bridault, 37 Miss. 209.

25. "By the sources of international law is meant the places where its rulings and principles are obtained. The following may be given as the sources of modern international law: 1. The works of great publicists — the text writers of authority. These give both principles and usages. 2. The decisions and conclusions of prize courts, of official international conferences and of arbitral tribunals. 3. Treaties. 4. State papers of jurists, opinions of attorneys-general, confidentially and otherwise given to their respective governments. 5. Instructions, regulations and ordinances issued by the States for the guidance of their own citizens or subjects, officers, and tribunals. 6. History of wars, negotiations, and current events. 7. The proposed codes and formulated views of voluntary international associations of jurists. Though an attempt is made by the order of classification to give the relative value of these sources, still in practice with the different writers and different schools in existence, it is almost impossible to make a rigid distinction. International usage, however, may be considered as the touchstone which gives life and strength to the principles of international law. When rules, apparently sound, conflict, then usage, prevailing usage, should determine the rule to follow. Snow Manual Int. L. § 3.

26. The Paquette Habana, 175 U. S. 677, 20 S. Ct. 290, 44 L. ed. 320. "As to international affairs, such as the recognition of a foreign government, or of the diplomatic character of a person claiming to be its representative, they may inquire of the Foreign Office or the Department of State." Hilton *v.* Guyot, 159 U. S. 113, 16 S. Ct. 139, 40 L. ed. 95; Jones *v.* U. S., 137 U. S. 202, 216, 11 S. Ct. 80, 34 L. ed. 691 [*citing In re* Baiz, 135 U. S. 403, 10 S. Ct. 854, 34 L. ed. 222; *Ex p.* Hitz, 111 U. S. 766, 4 S. Ct. 698, 28 L. ed. 592; The Charkieh, L. R. 4 A. & E. 59, 42 L. J. Adm. 17, 28 L. T. Rep. N. S. 513; Taylor *v.* Barclay, 7 L. J. Ch. O. S. 65, 2 Sim. 213, 2 Eng. Ch. 213, 57 Eng. Reprint 769, 29 Rev. Rep. 82]. "The law of nations is the great source from which we derive those rules, respecting belligerent and neutral rights, which are recognized by all civilized and commercial states throughout Europe and America. This law is in part unwritten, and in part conventional. To ascertain that which is unwritten, we resort to the great principles of reason and justice: but as these principles will be differently understood by different nations, under different circumstances, we consider them as being, in some degree, fixed and rendered stable by a series of judicial decisions. The decisions of the courts of every country, so far as they are founded upon a law common to every country, will be received, not as authority, but with respect. The decisions of the courts of every country show how the law of nations, in the given case, is understood in that country, and will be considered in adopting the rule which is to prevail in this." Bentzon *v.* Boyle, 9 Cranch 191, 198, 3 L. ed. 701.

[I, C]

II. EXISTENCE AND IDENTITY OF STATES.

A. "States" Defined. States as Vattel[27] defines them "are bodies politic, societies of men united together for the promotion of their mutual safety and advantage by the joint efforts of their combined strength. Such a society has her affairs and her interests. She deliberates and takes resolutions in common, thus becoming a moral person who possesses an understanding and a will peculiar to herself and is susceptible of obligations and rights."

B. Kinds of States — 1. In General. International law recognizes a number of different kinds of states, and these states can deal with each other as soon as they are independent. Where states are independent they can deal with other states on an equal basis, for "no principle of general law is more universally acknowledged, than the perfect equality of nations. . . . It results from this equality, that no one can rightfully impose a rule on another."[28]

2. Sovereign States — a. In General. States, or international persons, as they are called in international law, are generally single sovereign states in which there is one central political authority representing the state within its borders as well as in its intercourse with other international persons.[29]

b. Composite International Person — (I) *Personal Union.* A composite international person exists where two or more independent states are in some way so united that they deal and are dealt with by other international persons as a unit. These unions may be real or personal. A personal union is where two international persons happen to have for the time being the same sovereign; the nations themselves are not necessarily amalgamated, but owing to the accidental fact that they have the same sovereign their international relations are conducted through him.[30]

(II) *Real Union.* A real union exists when two sovereign states are so united under the same monarch or government that they make thereafter one single international person as to the outside world.[31]

c. Confederated States. Confederated states are a number of fully sovereign states united for the maintenance of their independence by a compact or a treaty in a union for which a central government is organized with certain

27. Vattel L. of N. §§ 1, 2. This definition has been cited with approval by the supreme court of the United States. Keith *v.* Clark, 97 U. S. 454, 460, 24 L. ed. 1071.

Wheaton says that "Cicero and subsequent public jurists define a State to be a body political or society of men united together for the purpose of promoting their mutual safety and advantage by their combined strength." Wheaton Int. L. § 17 [*quoted* with approval in Keith *v.* Clark, 97 U. S. 454, 460, 24 L. ed. 1071].

"A sovereign state may be defined as a body politic, supreme over its members, subject to no external authority, which has attained a certain size, sufficiency of importance, and degree of civilization. Fixed in its own territory, with well defined boundaries, it must have provided for the continuity of its existence." Snow Manual Int. L. § 4. See also Texas *v.* White, 7 Wall. (U. S.) 700, 19 L. ed. 227; Yrisarri *v.* Clement, 3 Bing. 432, 11 E. C. L. 213, 2 C. & P. 223, 12 E. C. L. 538, 4 L. J. C. P. O. S. 128, 11 Moore C. P. 308.

States, their characteristics, and their classifications, form the subject-matter of 1 Moore Dig. Int. L. C. 2. The chapter treats at length of definitions, sovereignty, independence, classification, government, and rights and duties of states.

28. The Antelope, 10 Wheat. (U. S.) 66, 122, 6 L. ed. 268.

29. 1 Oppenheim Int. L. § 85.

The accepted definitions of state exclude corporations created by a state and existing under its authority whatever its purpose may be; that is, The East India Company; voluntary associations of robbers, pirates, or outlaws, although banded together for their own safety; unsettled hordes of wandering savages not yet formed into civil societies. The legal idea of state necessarily implies habitual obedience of the members to the persons in whom authority is vested, a fixed abode of, and definite territory belonging to the people thereof. 1 Moore Dig. Int. L. § 1 [p. 15].

30. 1 Oppenheim Int. L. § 85. Examples of this are Great Britain and Hanover from 1714 to 1837; Netherlands and Luxemburg from 1815 to 1890; and at present Belgium and the Congo Free State.

31. For instance, Austria and Hungary; and until a very recent period Norway and Sweden. 1 Oppenheim Int. L. § 85.

powers over the principal states which still retain their independence as to local government. Such a confederation does not create a new state or nation, except so far as other states or nations are concerned, and their international relations have to be conducted through the central government.[32]

d. Federal State. A federal state is a union of several sovereign states, the central government of which is invested with power not only over the federal states but which also, to the extent of the power delegated to it, exercises power over the citizens of the several states.[33]

3. States Not Full Sovereign. Besides full sovereign states,[34] which are international persons in the fullest sense of the word, there are other international persons which are not full sovereign but which are subject, in their international relations, to limitations imposed on them by reason of their relations with other states,[35] or their sovereignty may be complete in all respects except where it is expressly limited by some peculiar treaty.[36]

4. As Affecting Responsibility. Where a state is a single sovereign state, such for instance as France, there is no question about the liability of that state for any act occurring in its jurisdiction for which an international person is responsible to another international person. But questions of responsibility frequently arise in the case of federations and other unions as to how far the central government of the union is responsible for the acts of the member states. This is a question in which the United States is particularly interested. Questions have frequently arisen as to how far the federal government is responsible for acts for which the states themselves would be responsible if they were separate international persons and not members of the Union.[37]

C. "Family of Nations." It is a theory of international law that every part of the world has some government responsible for it to the other nations of the world, and the different states which are so responsible make up the family of

32. 1 Oppenheim Int. L. § 87. Examples are: The Netherlands from 1580 to 1795; the United States from 1778 to 1787; Germany from 1815 to 1866; and the present Republic of Central America. The Confederate States of America were organized on the basis of a confederation, with complete sovereignty to the states, as distinguished from the federal states with international existence in the central government.

33. 1 Oppenheim Int. L. § 88. Such a nation may be based either on treaty or a constitution. Examples are: The United States; Switzerland; Germany; Mexico; Argentina; Brazil; Venezuela.

For the dual relation of citizens of a confederation to the state and to the central government see U. S. *v.* Cruikshank, 92 U. S. 542, 550, 23 L. ed. 588.

34. See *supra*, II, B, 2.

35. These might be colonies, such as different states of the United States were prior to the Declaration of Independence, or they might be vassal states over which more powerful states exercise a suzerainty, or they may be protected states. 1 Oppenheim Int. L. § 89.

Sovereign — Half-sovereign.— In The Charkieh, L. R. 4 A. & E. 59, 1 Aspin. 581, 42 L. J. Adm. 17, 28 L. T. Rep. N. S. 513, Scott Cases Int. L. 48, the status of the khedive of Egypt was considered. The Charkieh was claimed to be a public vessel of the khedive and to be exempt from process as appertaining to the sovereignty of that ruler. It was held that the khedive was a subject of the Ottoman empire and not entitled to the privilege of a sovereign prince and that his property was not exempt from seizure.

36. Such for instance as Cuba, which is fully sovereign as to all the world in all respects except so far as it is affected by the provisions of the "Platt Amendment" and the treaty thereafter including the same. In this amendment and treaty Cuba's sovereign powers are limited, amongst other things, against incurring any debt the interest of which would exceed the revenues of the island. 1 Oppenheim Int. L. § 91. The Platt amendment so called because it was offered by Sen. O. H. Platt of Connecticut, then chairman of the senate committee on relations with Cuba, as an amendment to the pending bill for appropriations for the army and adopted as a "rider" to that bill is a part of c. 803, 31 U. S. St. at L. 895, 897 [U. S. Comp. St. (1901) p. 2799], approved March 2, 1901. The Platt amendment appears at length in 1 Butler Treaty-Making Power 175. And see pp. 173–190, for other congressional resolutions and decisions regarding Cuba and relations to United States prior to the withdrawal of troops of United States therefrom.

37. For discussion of this question and authorities bearing on same see *infra*, page 60. And see 1 Butler Treaty-Making Power, c. 3, where the question is discussed at length and instances cited in which the United States was involved.

nations. There are constant changes in this family as the result of annexation, conquest, union, or dissolution of unions.[38] The most recent classification by any expert authority on international law is by Oppenheim,[39] which can be accepted with the modification as to Sweden and Norway.[40]

D. Terminology. So far we have spoken of international persons as "states."[41] In describing and referring to them other terms are frequently used, such as "people," "nation," "sovereign," "union," etc.[42] As a general proposition of international law, states deal only with states, and the question of whether an

38. As to what states are included in the family of nations or international law see 2 Moore Dig. Int. L. c. 2; Oppenheim Int. L. § 26 [*citing* Bluntschli (1878), §§ 1–16; Bonfils Man. de Droit Int. Pub. (4th ed.) Nos. 40–45; Heffter (1888), § 7; Holtzendorff (1885–1889), pp. 13–18; Lawrence Essays, etc., Modern Int. L. (1884) § 44; 1 Martens, § 41; 1 Nys le Droit Int. (1904) pp. 116–132; Phillimore Comm. Int. L. (3d ed.) §§ 27–33; Rivier Principes du Droit des Gens (1896), § 1; Taylor Int. Pub. L. (1901) §§ 61–64; 1 Twiss L. Nat. (2d ed.) § 62; 1 Westlake Int. L. p. 40].

39. Oppenheim (1 Oppenheim Int. L. § 108) has classified all the nations and countries of the world according to their status as follows:

European.— *Great Powers.*— Austria-Hungary; France; Germany; Great Britain; Italy; Russia.

Smaller states. — Denmark; Greece; Holland; Montenegro; Portugal; Roumania; Servia; Spain; Sweden-Norway; Turkey.

Very small, but nevertheless full-sovereign states.— Lichenstein and Monaco.

Neutralized states.—Belgium; Luxemburg; Switzerland.

Half-sovereign states.— Andorra (under the protectorate of France and Spain); Bulgaria; Crete (under the suzerainty of Turkey); San Marino (under the protectorate of Italy).

Part-sovereign states.—(a) Member-States of Germany: Kingdoms — Bavaria; Prussia; Saxony; Würtemburg. Grand-Duchies — Baden; Hesse; Mecklenburg-Schwerin; Mecklenburg-Strelitz; Oldenburg. Dukedoms — Anhalt; Brunswick; Saxe-Altenburg; Saxe-Coburg-Gotha; Saxe-Meingen; Saxe-Weimar. Principalities — Lippe; Reuss Elder Line; Reuss Younger Line; Schaumburg-Sonderhausen; Waldeck. Free Towns — Bremen; Hamburg; Lubeck. (b) Member-States of Switzerland: Aargau; Appenzell; Basle; Berne; Fribourg; Geneva; Glarus; Grisons; Lucerne; Neuchatel; Schaffhausen; Soleure; St. Gall; Tessin; Thurgau; Unterwalden; Uri; Valais; Vaud; Zug.

North America.—United States of America; United States of Mexico.

Central America.— Major Republic of Central America (Honduras, Nicaragua, and San Salvador); Costa Rica; Cuba; Guatemala; Hayti; Panama; San Domingo.

South America.— Bolivia; Chili; Colombia; Ecuador; Paraguay; Peru; United States of Argentina; United States of Brazil; United States of Venezuela; Uruguay.

Africa.—*Full-sovereign.*—Congo Free State; Negro Republic of Liberia.

Half-sovereign.— Egypt; Tunis. Abyssinia and Morocco are full sovereign states, but for some parts only are included in the family of nations.

Asia.— Japan is the only full and real member of the family of nations. China, Korea, Persia, Siam, and Tibet are for some parts only within the family of nations.

For other instances of neutralized states; suzerain and subject; protected states and protectorates; and as to the status of the American Indians — domestic dependent nations; the Holy See and the status of states under military occupation see 1 Moore Dig. Int. L. c. 2.

40. Until recently in classifying the family of nations Sweden and Norway were classified as one international person, but since the severance of 1905 each state now stands as a separate international person.

41. See *supra, passim.*

42. For definitions of "states," "nation," "people," "sovereign," "dependency," "vassalage," "protectorate," "union," "unions both incorporate and federal"; the effect of internal changes resulting from civil war, revolutions, and other changes, see Halleck Int. L. c. 3; and the collection of authorities and citations under the different subdivisions. "In the 18th article of the treaty, the terms 'subjects,' 'people,' and 'inhabitants,' are indiscriminately used as synonymous, to designate the same persons in both countries." The Pizarro, 2 Wheat. (U. S.) 227, 245, 4 L. ed. 226.

"Colony" is defined in The Itata, 56 Fed. 505, 512, 5 C. C. A. 608. See also The Three Friends, 166 U. S. 1, 17 S. Ct. 495, 41 L. ed. 897.

"Dependency" was defined by the court in U. S. *v.* The Nancy, 27 Fed. Cas. No. 15,854, 3 Wash. 281, 286, to imply "some civil and political relation, which one country bears to another, as its superior, different from that of a mere possession." See Alpheus Henry Snow's recent work, "The Government of Dependencies."

"District" is defined in The Itata, 56 Fed. 505, 512, 5 C. C. A. 608. See also The Three Friends, 166 U. S. 1, 17 S. Ct. 495, 41 L. ed. 897.

"Nation." — "The word 'nation' as ordinarily used presupposes or implies an independence of any other sovereign power more or less absolute, an organized government, recognized officials, a system of laws, definite boundaries and the power to enter into negotiations with other nations." Montoya *v.* U. S., 180 U. S. 261, 265, 21 S. Ct. 358, 45

organization purporting or claiming to be a government is actually a state or body politic with which other states can deal, and against which the claims of citizens of the claimant's country can be pressed, is a political matter to be determined by the government of the country of which the claimant is a citizen, and that subject is elsewhere considered.[43]

III. RECOGNITION OF STATES AND RECOGNITION OF BELLIGERENCY.

A. Complete Recognition — 1. In General. After a state as a body politic has actually become one of the family of nations other states can deal with it. Questions frequently arise, however, where there is doubt as to the actual existence of a state and whether it is entitled to be dealt with as such by other states. This question most frequently arises now as the result of internal revolution by which either a part of a state is formed into a new state or the existing government is overturned and a new government installed in its place. The establishment of new states either by revolution or the institution of a new government is more a matter of history than of law,[44] although all of such changes necessarily give

L. ed. 521. The terms "nation" and "state" are frequently used interchangeably. "A nation by the laws of nations, is considered a moral being, and the principle which imposes moral restraints on the conduct of an individual, applies with greater force to the actions of a nation." Charge to Grand Jury, 30 Fed. Cas. No. 18,267, 5 McLean 306, 308, per McLean, J.

"People." — "This word is a comprehensive one, and is, of course, subject to many different meanings, depending always upon the connection in which it is used, and the subject-matter to which it relates. The definition given in Anderson L. Dict. is: 'Ordinarily, the entire body of the inhabitants of a state. In a political sense, that portion of the inhabitants who are intrusted with political power.'" The Itata, 56 Fed. 505, 511, 5 C. C. A. 608. In construing the act of March 3, 1817 [3 U. S. St. at L. 370], to prevent violations of the neutrality of the United States the supreme court said: "The word 'people,' when not used as the equivalent of state or nation, must apply to a body of persons less than a state or nation, and this meaning would be satisfied by considering it as applicable to any consolidated political body." The Three Friends, 166 U. S. 1, 58, 17 S. Ct. 495, 41 L. ed. 897. "People" is also defined in U. S. *v.* Quincy, 6 Pet. (U. S.) 445, 467, 8 L. ed. 458.

"State." — As to what is a state see discussions in opinions in Cherokee Nation *v.* Georgia, 5 Pet. (U. S.) 1, 8 L. ed. 25. See also Mexico *v.* De Arangoiz, 5 Duer (N. Y.) 634 [*quoting* Vattel's definition]. "A complete body of free persons united together for their common benefit, to enjoy peaceably what is their own, and to do justice to others. It is an artificial person. It has its affairs and its interests: it has its rules: it has its rights: and it has its obligations." Chisholm *v.* Georgia, 2 Dall. (U. S.) 419, 455, 1 L. ed. 440. "State" is also defined in U. S. *v.* Quincy, 6 Pet. (U. S.) 445, 467, 8 L. ed. 458; The Itata, 56 Fed. 505, 512, 5 C. C. A. 608. See also The Three Friends, 166 U. S. 1, 17 S. Ct. 495, 41 L. ed. 897.

Status of Indian nations see Worcester *v.* Georgia, 6 Pet. (U. S.) 515, 559, 4 L. ed. 483. I Moore Dig. Int. L. § 15. See also INDIANS.

43. See *infra*, III.

44. The fact of national independence may be deduced from history by courts exercising jurisdiction of international law. No explicit official recognition is necessary. Consul of Spain *v.* The Conception, 6 Fed. Cas. No. 3,137, Brunn. Col. Cas. 497, 2 Wheel. Cr. (N. Y.) 597 [*reversed* on other grounds in 6 Wheat. 235, 5 L. ed. 249].

Griffin's list of references. — In 1904, while the questions involved in the recognition of Panama were being considered in congress, Mr. A. P. C. Griffin, chief bibliographer of the library of congress, prepared for the use of congress a list of references, and diplomatic history comprising references, to treatises on international law, in which the theory and practice of recognition are discussed, and of essays on specific cases. It was preceded by a condensed statement as follows: "The method of procedure followed by the United States in recognizing new states is briefly set forth in Senate document No. 40 of the Fifty-fourth Congress, second session, in a report drawn up by the Chief of the Bureau of Rolls, Department of State. The diplomatic correspondence containing the recognition of States by this country from 1861 to the present time is contained in the series now published by the Department of State under the title 'Foreign relations,' previously under the title 'Diplomatic correspondence.' . . . For correspondence prior to 1861 there are the 'American State papers. Foreign relations.'"

As to the recognition of the United States by France in 1778 see Calvo's "Le droit international théorique et pratique," Doniol's "Histoire de la participation de la France à l'établissement des États-Unis d'Amérique," Paris, 1886, 5 vols.; Martens' "Causes célèbres du droit des gens," 2 éd.; Sparks' "Diplomatic Correspondence of the Revolution," and Wharton's "The Revolutionary Diplomatic Correspondence of the United States."

rise to many questions of law. When a body of persons get together and attempt to form a state either on territory not previously occupied, or on territory claimed by an existing state, or by overthrowing the government of

As to the recognition of the French Republic in 1793 by the United States see "American State Papers. Foreign relations," vol. 1; Jefferson's "Writings," vol. 3, pp. 489, 500, 522; Washington, 1853; Lyman's "The Diplomacy of the United States: being an account of the foreign relations of the country," 2d ed. vol. 1, pp. 288–297; and Senate Document No. 40, 54th Congress, 2d session.

As to the recognition of the Spanish-American colonies see Callahan's "Cuba and International Relations;" Calvo's "Le droit international théorique et pratique," vol. 1, pp. 242–243; Latané's "The Diplomatic Relations of the United States and Spanish America;" Canning's "Speeches," vol. 5, pp. 299–304; Sir James Mackintosh's speech in Parliament, June 15, 1824, contained in his "Miscellaneous Works," pp. 747–768; Paxton's "The independence of South American Republics;" President Monroe's Message, forming House Document No. 90, 17th Congress, 1st session; and in "Report from the Secretary of state relative to the intervention of foreign governments to induce Spain to acknowledge the independence of the South American governments," Feb. 1, 1826. See also the "Memoirs of John Quincy Adams," vol. 5, pp. 489, 491, 492; vol. 6, pp. 6, 283, 487, 544.

As to the recognition of Texas see "British and Foreign State Papers," vol. 25, pp. 1352–1411; Sir William Vernon Harcourt's "Letters by Historicus on Some Questions of International Law," containing a chapter on "The Texan precedent;" and "Message from President Jackson relative to the 'political, military, and civil condition of Texas,'" forming Senate document No. 20, 24th Congress, 2d session.

As to the recognition of the Confederate states by foreign governments see Bernard's "A Historical Account of the Neutrality of Great Britain During the American Civil War;" Bluntschli's "Opinion impartiale sur la question de l'Alabama et sur la manière de la résoudre;" Campbell's "Speech on Recognition of the Southern Confederacy"; Gibbs' "Recognition: a Chapter from the History of the North American and South American states"; Great Britain. Foreign office. "Correspondence with Mr. Mason Respecting Blockade and Recognition of the Confederate States"; Hall's "A Treatise on International Law," 5th ed. pp. 30–40; Sir William Vernon Harcourt's "Letters by Historicus on Some Questions of International Law"; Earl Russell's "Speech on Recognition of the Southern Confederacy," and Spence's "On the Recognition of the Southern Confederation." See also "Neutrality of Great Britain in the Civil War," forming Senate Document No. 18, 58th Congress, 1st session.

In regard to recognizing the French government in Mexico see Davis' "Joint resolution on Mexican affairs. A report and resolution addressed to the house of representatives;" and his "Foreign policy of the United States in regard to Mexican affairs. A speech in the House of Representatives;" Noll's "From Empire to Republic; the story of the struggle for constitutional government in Mexico;" and House report No. 129 of the 38th Congress, 1st session.

As to the recognition of the French Republic in 1870 see "Diplomatic Correspondence," issued by the state department, 1870, and Washburne's "Franco-German War and Insurrection of the Commune," pp. 64–67.

The correspondence with the agent employed to visit Hungary with a view to the consideration of recognizing the independence of Hungary is printed in Senate document No. 43 of the 31st Congress, 1st session. See also "Correspondence with the Chevalier Hülsemann," in Webster's "Works," vol. 6, pp. 488–506, Boston, 1851 (vol. 12, pp. 162–180, Boston, 1903).

As to the recognition of Panama see Cullom's "The Panama Situation," in "The Independent," vol. 55, Nov. 26, 1903, pp. 2787–2790; W. C. Dennis' "The Panama Situation in the Light of International Law," in "American Law Register," vol. 52, May, 1904, pp. 265–306; Senator Lodge's speech in the Senate of the United States, Jan. 5, 1904; Maxey's "Legal aspects of the Panama situation;" G. G. Phillimore's "Current notes on international law: the new state of Panama," in "Law Magazine Review," vol. 29, Feb., 1904, pp. 212–216; G. W. Scott's "Was the recognition of Panama a breach of international morality?" in "The Outlook," vol. 75, Dec. 19, 1903, pp. 947–950; and Woolsey's "The recognition of Panama and its results," in "Green Bag," vol. 16, Jan., 1904, pp. 6–12.

Recognition an executive function; see a report presented by Senator Hale, Jan. 11, 1897, forming Senate document No. 56, 54th Congress, 2d session, reciting the proceedings in connection with the recognition of the Spanish-American republics and Texas, to support the doctrine of the power of the executive to recognize new states.

The constitutional right of congress to recognize a foreign nation is asserted in Henry Winter Davis, report and resolution addressed to the house of representatives, June, 1874, printed in his "Speeches and Addresses," pp. 456–471. It contains a review of precedents in recognition of foreign governments by the United States.

The constitutional right of recognition is considered in the following: Curtis' "Constitutional History of the United States," vol. 1, p. 580; Pomeroy's "An Introduction to the Constitutional Law of the United States;" Rawle's "A View of the Constitution of the United States of America" (2d ed.) pp. 195–196; and Story's "Commentaries on the Constitution of the United States" (5th ed.) pp. 384–385.

an existing state they can only be admitted to the family of nations by the recognition of those states which are already in the family, and it is for each of these states to determine for itself what action it will promulgate in regard to such recognition.[45]

2. De Facto Government. During the interim between the first effort for the establishment of a new state and the recognition thereof by a sufficient number of already established states to admit it to the family of nations there may be a "*de facto* government" which may or may not continue.[46] A *de facto* government is one in possession of the supreme or sovereign power and has been called "a government of paramount force." As a general rule it is maintained by military force and directed by military authorities.[47]

3. The Act and Method of Recognition. Whenever an existing state sees fit to

The doctrine and practice of recognition in international law are considered in Block's "Reconnaissance internationale," in his "Dictionnaire général de la politique," nouvelle éd. vol. 2, pp. 772–773; Bluntschli's "Le droit international codifié," 5 éd. pp. 71–77; Bonfils' "Manuel de droit international public," 3 éd. pp. 107–115; Calvo's "Le droit international théoretique et pratique," 5e éd.; George B. Davis' "The Elements of International Law," pp. 42, 43, 278, 279; Féraud-Giraud's "De la reconnaissance de la qualité de belligérants dans les guerres civiles," in "Revue générale de droit international public," vol. 3, pp. 277–291; Hall's "A Treatise on International Law," 5th ed.; Halleck's "International Law; or Rules Regulating the Intercourse of States in Peace and War," vol. 1, pp. 72–74; Sir William Vernon Harcourt's "Letters by Historicus on some Questions of International Law"; Heffter's "Le droit international de l'Europe," pp. 58–63; von Holtzendorff's "Handbuch des Völkerrechts," vol. 2, pp. 23–33; "Kent's Commentary on International Law" (2d ed.) pp. 85–95; von Liszt's "Das Völkerrecht," p. 2; Auflage, pp. 37–39; Lorimer's "La doctrine de la reconnaissance, fondement du droit international," in "Revue de droit international," vol. 16, pp. 333–359; also his "The Institutes of the Law of Nations," and "Studies, National and International," pp. 144, 155, 160; Martens' "Causes célèbres du droit des gens," 2e éd. vol. 3, pp. 140–253; Marqués de Olivart's "Del reconocimiento de beligerancia y sus efectos inmediatos;" Sir Robert J. Phillimore's "Commentaries upon International Law," 2d ed. vol. 2, pp. 16–40; Pradier-Fodéré's "Traité de droit international public, Européen & Américain," vol. 1, pp. 235–243; Rivier's "Principes du droit des gens," vol. 1, pp. 57–61; J. B. Scott's "Cases on International Law Selected from Decisions of English and American Courts," pp. 37–45; Snow's "Cases and Opinions on International Law," p. 13; Vattel's "The Law of Nations," pp. 457–458; Wharton's "A Digest of the International Law of the United States," vol. 1, pp. 521–553; and Wherton's "Elements of International Law," pp. 34–38.

In connection with the discussion in congress as to recognizing Cuban independence, Senator Cullom presented a report on Dec. 21, 1896, forming Senate report No. 1160, of the 54th Congress, 2d session, in which he cites "the modern precedents of European insurrection and intervention, where independence was the issue involved."

Since Mr. Griffin's report was published Moore's Digest has been published, and §§ 27–79 of c. 3, vol. 1, which are devoted to the subject of states; their recognition and continuity contain numerous historical and legal references to the recognition of states.

45. "A State is not, by reason of its birth, a member of the Family of Nations. The formation of a new State is . . . a matter of fact, and not of law. It is through recognition, which is a matter of law, that such new State becomes a member of the Family of Nations and a subject of International Law. As soon as recognition is given, the new State's territory is recognised as the territory of a subject of International Law, and it matters not how this territory was acquired before the recognition." 1 Oppenheim Int. L. § 209.

Recognition is generally given by a written or oral declaration of the recognizing state; it matters little whether the recognized state coöperates in it or not. It is not necessarily express; it may be implied, as by sending or receiving diplomatic agents, but in order to be effective it must emanate from a government which is itself recognized. 1 Moore Dig. Int. L. § 27.

46. For instance, there was a *de facto* government established by the United States during the Revolution, which afterward was recognized in the states so established, and became a member of the family of nations. There was also a *de facto* government established by the Confederate States of America, which, after the failure of the rebellion, ceased to exist.

47. A classification is sometimes made of a *de facto* government, called a "government of paramount force." The distinguishing characteristics of this classification are that the government is maintained by active military force and are usually administered directly by military authorities. Such was the government of Castine, Maine, during the war of 1812, referred to in U. S. *v.* Rice, 4 Wheat. (U. S.) 253, 4 L. ed. 562. See also the case of Tampico, in the war with Mexico, referred to in Fleming *v.* Page, 9 How. (U. S.) 603, 614, 13 L. ed. 276. A *de facto* government is

grant to persons establishing or attempting to establish a new government the right of admission to the family of nations it "recognizes" its existence, and this act of recognition is a matter wholly within the power of the recognizing state, and no state is bound to recognize a new state because another existing state has already done so.[48] Each existing state determines for itself the method of recognition of a new state, and how far its judicial and political bodies are limited in the method of recognition depends upon its own internal constitutional and municipal law. So far as the United States is concerned it has been decided that recog-

one in possession of the supreme or sovereign power, but without right — a government by usurpation, founded perhaps in crime, and in violation of every principle of international or municipal law, and of right and justice; yet, while it is thus organized, and in the exercise and control of the sovereign authority, there can be no question of the lawfulness of the government under whose commission a capture has been made, between the insurer and the insured. Mauran *v.* Alliance Ins. Co., 6 Wall. (U. S.) 1, 18 L. ed. 836 [*citing* Nesbitt *v.* Lushington, 4 T. R. 783, 2 Rev. Rep. 519, where the clause of an insurance policy respecting the restraints of kings, people or princes and "the governing power of the country" and "the power of the country, whatever it may be" and the court described the character of the government contemplated, as not necessarily a lawful power or government, or one that had been adopted into the family of nations].

There are several degrees of what is called de facto government.—"Such a government, in its highest degree, assumes a character very closely resembling that of a lawful government. This is when the usurping government expels the regular authorities from their customary seats and functions, and establishes itself in their place, and so becomes the actual government of a country. The distinguishing characteristic of such a government is, that adherents to it in war against the government *de jure* do not incur the penalties of treason; and under certain limitations, obligations assumed by it in behalf of the country, or otherwise, will, in general, be respected by the government *de jure* when restored." Thorington *v.* Smith, 8 Wall. (U. S.) 1, 8, 19 L. ed. 361. But see Williams *v.* Bruffy, 96 U. S. 176, 185, 24 L. ed. 716. And as to the effect of unsuccessful rebellion see Williams *v.* Bruffy, *supra*, at page 186, and cases there cited.

De facto governments, their classification and the effects of their acts and the acts of other governments toward them, are treated at length in 1 Moore Dig. Int. L. § 20.

"Who is the sovereign, de jure or de facto, of a territory is not a judicial, but a political question, the determination of which by the legislative and executive departments of any government conclusively binds the judges, as well as all other officers, citizens and subjects of that government. This principle has always been upheld by this court, and has been affirmed under a great variety of circumstances. . . . It is equally well settled in England." Jones *v.* U. S., 137 U. S. 202, 212, 11 S. Ct. 80, 34 L. ed. 691 [*citing* U. S. *v.* Lynde, 11 Wall. (U. S.) 632, 20 L. ed. 230; U. S. *v.* Yorba, 1 Wall. (U. S.) 412, 17 L. ed. 635; Williams *v.* Suffolk Ins. Co., 13 Pet. (U. S.) 415, 10 L. ed. 226; Garcia *v.* Lee, 12 Pet. (U. S.) 511, 9 L. ed. 1176; Keene *v.* McDonough, 8 Pet. (U. S.) 308, 9 L. ed. 955; Foster *v.* Neilson, 2 Pet. (U. S.) 253, 7 L. ed. 415; The Divina Pastora, 4 Wheat. (U. S.) 52, 4 L. ed. 512; U. S. *v.* Palmer, 3 Wheat. (U. S.) 610, 4 L. ed. 471; Gelston *v.* Hoyt, 3 Wheat. (U. S.) 246, 4 L. ed. 381; Republic *v.* Peruvian Guano Co., 36 Ch. D. 489, 56 L. J. Ch. 1081, 57 L. T. Rep. N. S. 337, 36 Wkly. Rep. 217; Emperor of Austria *v.* Day, 3 De G. F. & J. 217, 221, 233, 7 Jur. N. S. 639, 30 L. J. Ch. 690, 4 L. T. Rep. N. S. 494, 9 Wkly. Rep. 712, 64 Eng. Ch. 171, 45 Eng. Reprint 861; The Pelican, Edw. Adm. appendix D; Taylor *v.* Barclay, 7 L. J. Ch. O. S. 65, 2 Sim. 213, 29 Rev. Rep. 82, 2 Eng. Ch. 213, 57 Eng. Reprint 769].

48. It will be seen by reference to a previous note (see *supra*, note 44), that the recognition granted to the South American provinces by the United States long preceded the recognition of those provinces by European powers.

The courts of the United States have no jurisdiction to examine into the sovereign acts or political transactions of a foreign government, or the acts of military officers in command of the armed forces of such government, whether *de jure* or *de facto*. Underhill *v.* Hernandez, 65 Fed. 577, 13 C. C. A. 51, 38 L. R. A. 405. Courts are bound, in deciding cases involving the status of contending forces for the control of the government of a foreign country, to take notice of the important facts of history, and the right to determine finally every question involved in the struggle for the control of the government belongs to the people of that country, and their decision must be accepted everywhere as conclusive. The Itata, 56 Fed. 505, 520, 5 C. C. A. 608.

"This is not a new question.— It came before the court in the case of Rose *v.* Himely, 4 Cranch (U. S.) 241, 272, 2 L. ed. 608, and again in Gelston *v.* Hoyt, 3 Wheat. (U. S.) 246, 324, 4 L. ed. 381. And in both of these cases, the court said, that it belongs exclusively to governments to recognize new states in the revolutions which may occur in the world; and until such recognition, either by our own government or the government to which the new state belonged, courts of justice are bound to consider the ancient state

nition is a political act,[49] but there is still a question as to whether it is exclusively executive or whether the recognition requires the action of both the executive

of things as remaining unaltered." Kennett *v.* Chambers, 14 How. (U. S.) 38, 51, 14 L. ed. 316.

When state becomes sovereign. — As respects its own government a nation becomes independent from the declaration thereof, but as regards other nations only when recognized by them. U. S. *v.* Hutchings, 26 Fed. Cas. No. 15,429, Brunn. Col. Cas. 489, 2 Wheel. Cr. (N. Y.) 543. "This opinion is predicated upon a principle which is believed to be undeniable, that the several states which composed this Union, so far at least as regarded their municipal regulations, became entitled, from the time when they declared themselves independent, to all the rights and powers of sovereign states, and that they did not derive them from concessions made by the British king. The treaty of peace contains a recognition of their independence, not a grant of it. From hence, it results that the laws of the several state governments were the laws of sovereign states, and as such were obligatory upon the people of such state, from the time they were enacted." McIlvaine *v.* Coxe, 4 Cranch (U. S.) 209, 212, 2 L. ed. 598. "The colony of St. Domingo, originally belonging to France, had broken the bond which connected her with the parent state, had declared herself independent, and was endeavoring to support that independence by arms. France still asserted her claim of sovereignty, and had employed a military force in support of that claim. A war *de facto*, then, unquestionably, existed between France and St. Domingo. It has been argued, that the colony, having declared itself a sovereign state, and having thus far maintained its sovereignty by arms, must be considered and treated by other nations, as sovereign in fact, and as being entitled to maintain the same intercourse with the world that is maintained by other belligerent nations. In support of this argument, the doctrines of Vattel have been particularly referred to. But the language of that writer is obviously addressed to sovereigns, not to courts. It is for governments to decide, whether they will consider St. Domingo as an independent nation, and until such decision shall be made, or France shall relinquish her claim, courts of justice must consider the ancient state of things as remaining unaltered, and the sovereign power of France over that colony as still subsisting." Rose *v.* Himely, 4 Cranch (U. S.) 241, 272, 2 L. ed. 608. In February, 1856, the Rivas-Walker government of Nicaragua, not then recognized by the United States, made a decree, revoking the charter of the Accessory Transit Company, which decree remained in force and was enforced in May, 1856, when the said government was recognized by the United States. It was held that, at any rate from the time of the recognition, this decree must be regarded as a valid act of the Nicaraguan government. Murray *v.* Vanderbilt, 39 Barb. (N. Y.) 140. "When citizens or subjects of one nation, in its name, and by its authority, or with its assent, take and hold actual, continuous and useful possession . . . of territory unoccupied by any other government or its citizens, the nation to which they belong may exercise such jurisdiction and for such period as it sees fit over territory so acquired." Jones *v.* U. S., 137 U. S. 202, 212, 11 S. Ct. 80, 34 L. ed. 691. And see also U. S. *v.* Arjona, 120 U. S. 479, 7 S. Ct. 628, 30 L. ed. 728.

49. Kennett *v.* Chambers, 14 How. (U. S.) 38, 50, 14 L. ed. 316; Gelston *v.* Hoyt, 3 Wheat. (U. S.) 246, 324, 4 L. ed. 381; Rose *v.* Himely, 4 Cranch (U. S.) 241, 272, 2 L. ed. 608. Recognition is a political act, and not one for courts. The Divina Pastora, 4 Wheat. (U. S.) 52, 63, 4 L. ed. 512 and note at page 65. See also cases cited *infra*, this and note 50. "Whether Texas had or had not at that time become an independent state, was a question for that department of our government exclusively which is charged with our foreign relations." Kennett *v.* Chambers, *supra*.

It belongs exclusively to the political department of the government to recognize or refuse to recognize a new government in a foreign country claiming to have displaced the old one, and until the political department so recognizes the independence of the new government, the courts are bound to consider the old order of things as existing. Kennett *v.* Chambers, 14 How. (U. S.) 38, 14 L. ed. 316 (the republic of Texas); Clark *v.* U. S., 5 Fed. Cas. No. 2,838, 3 Wash. 101 (San Domingo); The Hornet, 12 Fed. Cas. No. 6,705, 2 Abb. 35 (the republic of Cuba).

Conclusiveness of decision. — The decision of the political department of a government that no *de facto* government exists is conclusive upon its own citizens. The Jarvis Case, Venez. Arb. (1903) Ralston Rep. 145. See also Williams *v.* Suffolk Ins. Co., 13 Pet. (U. S.) 415, 10 L. ed. 226.

Judicial notice. — "All courts of justice are bound to take judicial notice of the territorial extent of the jurisdiction exercised by the government whose laws they administer, or of its recognition or denial of the sovereignty of a foreign power, as appearing from the public acts of the legislature and executive, although those acts are not formally put in evidence, nor in accord with the pleadings." Jones *v.* U. S., 137 U. S. 202, 214, 11 S. Ct. 80, 34 L. ed. 691 [*citing* State *v.* Wagner, 61 Me. 178; State *v.* Dunwell, 3 R. I. 127; Coffee *v.* Groover, 123 U. S. 1, 8 S. Ct. 1, 31 L. ed. 51; Hoyt *v.* Russell, 117 U. S. 401, 6 S. Ct. 881, 29 L. ed. 914; Kennett *v.* Chambers, 14 How. (U. S.) 38, 14 L. ed. 316; U. S. *v.* Reynes, 9 How. (U. S.) 127, 13 L. ed. 74; Emperor of Austria *v.* Day, 3 De G. F. & J. 217, 7 Jur. N. S. 639, 30 L. J. Ch. 690, 4 L. T. Rep. N. S. 494, 9 Wkly. Rep. 712, 64 Eng. Ch. 171, 45 Eng. Reprint 861; Taylor *v.*

and legislative branches of the government.[50] After revolutionists have actually succeeded in separating themselves from their former mother country or in completely overturning the existing government and substituting the new one, the recognition of it by other states cannot be regarded as an unfriendly act either by the state from which the territory has been separated or by the government which has been overturned; but the parent state or the one attempting to reëstablish its control against the revolutionists does frequently regard the recognition by other states of the revolutionist as an unfriendly act.[51] Each existing state, however, must be its own judge as to whether it will recognize a new government and as to how long a period it will permit to elapse after the establishment of the new government before recognition is granted it.[52]

4. Its Effect. The foregoing[53] relates to the complete recognition of a state as actually a member of the family of nations, and that recognition is complete and grants an equality to the new state with the already existing states, and after such recognition has been made diplomatic relations are established with the new state on the same basis as those already established with existing states.

B. Partial Recognition — Recognition of Belligerency — 1. In General. There may, however, be a partial recognition pending the attempt of an organized body to either establish a new government on territory belonging to another state, or to overthrow the existing government by force of arms which is called recognition of "belligerency."[54]

2. Its Effect. The effect of this partial recognition is not to recognize the revolutionists or belligerents as an actually existing state, but as an organized body which is entitled to carry on war under the rules of civilized warfare and entitled to the same rights of war as a regularly organized state.[55] This subject is more properly treated under "War," but some cases are here given as to the rights granted to revolutionists and belligerents whose belligerency has been recognized directly or indirectly by this government.[56] The rights of foreigners

Barclay, 7 L. J. Ch. O. S. 65, 2 Sim. 213, 2 Eng. Ch. 213, 57 Eng. Reprint 769, 29 Rev. Rep. 82; 1 Greenleaf Ev. § 6].

50. See 2 Butler Treaty-Making Power 357 *et seq.* And see Williams *v.* Suffolk Ins. Co., 13 Pet. (U. S.) 415, 10 L. ed. 226, where it is said that the executive department of the United States government having taken the position that the Falkland Islands are not part of the dominions of Buenos Ayres, and that the seal fisheries of those islands are not subject to legislation by the latter government, the courts of the United States are precluded from inquiring into that question; the determination of the executive branch of the government on political questions being conclusive on the judiciary.

Until the legislative and executive departments of the United States government recognize the existence of a new foreign government, the courts of the United States cannot do so. Gelston *v.* Hoyt, 1 Johns. Ch. (N. Y.) 543; U. S. *v.* Baker, 24 Fed. Cas. No. 14,501, 5 Blatchf. 6.

Method of recognition.— The blockade proclamation of the president in the Civil war was a recognition of the existence of a state of war. Prize Cases, 2 Black (U. S.) 635, 17 L. ed. 459. For a collection of authorities as to how foreign states should be recognized see The Ambrose Light, 25 Fed. 408, 418 *et seq.* See also U. S. *v.* Baker, 24 Fed. Cas. No. 14,501, 5 Blatchf. 6.

51. Frequent discussion of this subject can be found in the Foreign Relations Reports containing the correspondence between the United States and Spain regarding the recognition of the Cuban insurgents by the United States and also in the diplomatic correspondence during the Civil war with Great Britain, France, and other European countries regarding their recognition of the Confederate States of America.

52. See authorities cited *supra*, note 44, in regard to the recognition of Panama by the United States in 1904.

53. See *supra*, III, A, 1–3.

54. See *infra*, III, B, 2.

55. For instance, during the Civil war, the Confederate States of America were recognized as belligerents by states which did not recognize them as members of the family of nations. Lawrence Princ. Int. L. § 162, Rose *v* Himely, 4 Cranch (U. S.) 241, 272, 2 L. ed. 608.

56. See, generally, War.

Method of recognition of belligerency see cases cited *supra*, note 48 *et seq.* "Belligerency is recognized when a political struggle has attained a certain magnitude and affects the interests of the recognizing power; and in the instance of maritime operations recognition may be compelled, or the vessels of the insurgents, if molesting third parties, may be pursued as pirates. The Ambrose Light, 25 Fed. 408; 3 Wharton Dig. Int. L. par. 381, and authorities cited. But it belongs to the political department

whose property has been destroyed as the result of insurrection frequently depend upon whether the insurrection assume the proportions of actual war,

to determine when belligerency shall be recognized, and its action must be accepted according to the terms and intention expressed. The distinction between recognition of belligerency and recognition of a condition of political revolt, between recognition of the existence of war in a material sense and of war in a legal sense, is sharply illustrated by the case before us. For here the political department has not recognized the existence of a *de facto* belligerent power engaged in hostility with Spain, but has recognized the existence of insurrectionary warfare prevailing before, at the time and since this forfeiture is alleged to have been incurred." The Three Friends, 166 U. S. 1, 63, 17 S. Ct. 495, 41 L. ed. 897. "It is express when made by a proclamation of neutrality, as by the Queen of England's proclamation of May 13, 1861. It is implied in a declaration of blockade, as in that of President Lincoln of April 19, 1861. And when there is long acquiescence in belligerent acts affecting another nation's interests, without protest or objection, such as the blockade of ports, or the use of a nation's ports as a harbor for prizes, a tacit recognition of belligerent rights is to be reasonably inferred." The Ambrose Light, 25 Fed. 408, 443, citing numerous historical instances of recognition of belligerents by the United States and other powers.

Effect of recognition upon neutrality.— "The government of the United States has recognised the existence of a civil war between Spain and her colonies, and has avowed a determination to remain neutral between the parties, and to allow to each the same rights of asylum, and hospitality and intercourse. Each party is, therefore, deemed by us a belligerent nation, having, so far as concern us, the sovereign rights of war, and entitled to be respected in the exercise of those rights. We cannot interfere, to the prejudice of either belligerent, without making ourselves a party to the contest, and departing from the posture of neutrality. All captures made by each must be considered as having the same validity, and all the immunities which may be claimed by public ships in our ports, under the law of nations, must be considered as equally the right of each; and as such, must be recognised by our courts of justice, until Congress shall prescribe a different rule." The Santissima Trinidad, 7 Wheat. (U. S.) 283, 337, 5 L. ed. 454. To the same effect see Syllabus in The Neustra Senora de la Caridad, 4 Wheat. (U. S.) 479, 4 L. ed. 624. The admission by the United States of the existence of a civil war between two foreign powers entitles both belligerents to the sovereign rights of war, and to claim from it the obligations of neutrality, although it has not acknowledged the independence of one of them. Walley *v.* The Liberty, 12 La. 98, 32 Am. Dec. 114.

Effect of recognition on piracy.— In the case of a revolution, whether the acts of persons on the high seas, claiming to be commissioned by the revolutionists, are authorized acts of war or acts of piracy, depends, so far as the judiciary of the country is concerned, on whether or not the government has recognized its belligerency or independence. U. S. *v.* Palmer, 3 Wheat. (U. S.) 610, 4 L. ed. 471. "The liability of the vessel to seizure, as piratical, turns wholly upon the question whether the insurgents had or had not obtained any previous recognition of belligerent rights, either from their own government or from the political or executive department of any other nation; and that, in the absence of recognition by any government whatever, the tribunals of other nations must hold such expeditions as this to be technically piratical." The Itata, 56 Fed. 505, 5 C. C. A. 608; The Ambrose Light, 25 Fed. 408, 412. But while the insurgent expedition at its outset may be liable to be charged as being piratical, owing to the fact that the insurgents have not then been recognized, the subsequent recognition by the government of the United States of the insurgent forces as a government *de facto* and entitled to belligerent rights, may alter the status of the expedition and relieve those engaged therein from the technical charge of piracy. So held in The Ambrose Light, *supra*, at page 443. Even though the recognition of the belligerency of insurgents may be indirect and result from implication, the vessels of the insurgents are to be regarded as being engaged in belligerent and not in piratical expeditions. The Ambrose Light, *supra*, at page 447.

Recognition imposes rights and obligations of a state.— "Of course a political community whose independence has been recognized is a 'state' under the act; and, if a body embarked in a revolutionary political movement, whose independence has not been, but whose belligerency has been, recognized, is also embraced by that term, then the words 'colony, district or people,' instead of being limited to a political community which has been recognized as a belligerent, must necessarily be held applicable to a body of insurgents associated together in a common political enterprise and carrying on hostilities against the parent country, in the effort to achieve independence, although recognition of belligerency has not been accorded. And as agreeably to the principles of international law and the reason of the thing, the recognition of belligerency, while not conferring all the rights of an independent state, concedes to the Government recognized the rights, and imposes upon it the obligations, of an independent state in matters relating to the war being waged, no adequate ground is perceived for holding that acts in aid of such a Government are not in aid of a state in the sense of the statute." The Three Friends, 166 U. S. 1, 56, 17 S. Ct. 495, 41 L. ed. 897.

New government, how proved as to vessels. — The seal to the commission to a privateer

thus relieving the existing government from the responsibility which it would have in the case of mere riot which should be kept under its control.[57]

IV. SOVEREIGNTY.[58]

The greatest attribute which a state possesses is its sovereignty. It is the supreme power, is absolute, and is subject to no judge, Judge Story defined it in its largest sense, as the "supreme, absolute, uncontrollable power, the *jus summi imperii*; the absolute right to govern."[59] The rights of sovereignty extend to all persons and things that are within the territory; they extend to all persons therein whether citizens or strangers and to those whose residence is only transitory. All strangers who are in the territory of a sovereign owe him a temporary allegiance and are entitled to his protection.[60] By reason of its sovereignty a state can, through its government, perform many acts which cannot be questioned either in its own courts or in the courts of other states.[61]

of a new government, not acknowledged by the government of the United States, cannot be permitted to prove itself, but the fact that the privateer is employed by the government in question may be established by other testimony. The Estrella, 4 Wheat. (U. S.) 298, 4 L. ed. 574.

Revolution in Chili.— As to the facts in regard to the revolution in Chili in 1891 and the status as belligerents and a recognized government of the congressional party and the Balmaceda government see The Itata, 56 Fed. 505, 5 C. C. A. 608.

Spanish Treaty Claims Commission.— The methods of recognition, whether it is a political act which is to be evidenced by executive or legislative action or can be deduced from the facts, and what the effect of belligerency is upon foreign citizens suffering loss by acts of insurrectionists, and other questions of this nature are involved in the numerous cases now pending before the Spanish Treaty Claims Commission elsewhere referred to. See *infra*, p. 57, note 92.

Recognition of belligerency, its conditions and effects, and numerous specific instances are referred to in 1 Moore Dig. Int. L. § 59 *et seq.*

57. While this subject is more properly treated under WAR some authorities will be found under the head of "Claims against Governments," *infra*, p. 56. See also WAR.

58. Change of sovereignty see *infra*, VI, B.

59. Cherokee Nation *v.* Southern Kansas R. Co., 33 Fed. 900, 906.

Other definitions.— "Wheaton defines sovereignty, 'the supreme power by which any citizen is governed.' Hurd says: 'The supreme power in the state must necessarily be absolute, in being subject to no judge.' Jameson says: 'By the term "sovereignty" is meant the person or body of persons in a state to whom there is politically no superior.' Leiber has said: 'The necessary existence of the state, and that right and power which necessarily follow is sovereignty.' . . . This sovereign power in our government belongs to the people, and the government of the United States and the governments of the several states are but the machinery for expounding or expressing the will of the sovereign power." Cherokee Nation *v.* Southern Kansas R. Co., 33 Fed. 900, 906. See 1 Butler Treaty-Making Power, 16 *et seq.*, for definitions of "sovereignty" and "nationality" and collection of authorities and views of text writers and judicial decisions on the sovereignty and nationality of the United States. See also 1 Moore Dig. Int. L. § 4.

60. Wildman Inst. Int. L. p. 40 [*quoted* in Carlisle *v.* U. S., 16 Wall. (U. S.) 147, 154, 21 L. ed. 426.

61. See cases cited *infra* this note.

No state can claim jurisdiction as a matter of right within the territorial limits of another independent state. Papayanni *v.* Russian Steam Nav., etc., Co., 9 Jur. N. S. 1160, 33 L. J. Adm. 11, 9 L. T. Rep. N. S. 37, 2 Moore P. C. N. S. 161, 3 New Rep. 219, 12 Wkly. Rep. 90, 15 Eng. Reprint 862.

Waiver of exclusive territorial jurisdiction. — The perfect equality and absolute independence of sovereigns, and this common intercourse impelling them to mutual intercourse and an interchange of good offices with each other, have given rise to a class of cases in which every sovereign is understood to waive the exercise of a part of that complete, exclusive territorial jurisdiction which has been stated to be the attribute of every nation. (1) One of these is admitted to be the exemption of the person of the sovereign from arrest or detention within a foreign territory. (2) A second case, standing on the same principles with the first, is the immunity which all civilized nations allow to foreign ministers. (3) A third case in which a sovereign is understood to cede a portion of his territorial jurisdiction is, where he allows the troops of a foreign prince to pass through his dominions. The Schooner Exchange *v.* McFaddon, 7 Cranch (U. S.) 116, 137, 3 L. ed. 287, per Marshall, C. J. And see 1 Wharton Dig. Int. L. 50.

Proof of sovereignty.— A certificate from the foreign or colonial office, as the case may be, is conclusive as to the status of sovereignty. Mighell *v.* Johore, [1894] 1 Q. B. 149, 9 Reports 447, 58 J. P. 244, 63 L. J. Q. B. 593, 70 L. T. Rep. N. S. 64. *Compare* Yrisarri *v.* Clement, 3 Bing. 432, 11 E. C. L. 213, 2 C. & P. 223, 12 E. C. L. 538, 4 L. J.

Even its admittedly valid obligations and contracts cannot be enforced in any of its own courts or in those of any other country.[61a]

C. P. O. S. 128, 11 Moore C. P. 308. A court cannot take notice of a foreign government, not acknowledged by the government or country in which that court sits; and the fact of acknowledgment is matter of public notoriety. Berne *v.* Bank of England, 7 Ves. Jr. 347, 7 Rev. Rep. 218, 32 Eng. Reprint 636.

Exemption from jurisdiction.— A public armed vessel of a foreign state, at peace with the United States, is exempt from the jurisdiction of its local tribunals while enjoying in a friendly manner the hospitality of its waters. Walley *v.* The Liberty, 12 La. 98, 32 Am. Dec. 114; The Exchange *v.* McFaddon, 7 Cranch (U. S.) 116, 3 L. ed. 287. A vessel of war commissioned by the government of a foreign state, and engaged in the national service of her government, was stranded on the coast of England. She had a cargo of machinery on board her, alleged to belong to private individuals, of which her government had for public purposes charged itself with the care and protection. Important and efficient salvage services were rendered to the ship and her cargo. A suit was instituted on behalf of certain of the salvors against the ship and her cargo. The court refused to order a warrant to issue for the arrest of the ship or cargo, and held it had no jurisdiction to entertain the suit. The Constitution, 4 P. D. 39, 4 Aspin. 79, 48 L. J. P. & Adm. 13, 40 L. T. Rep. N. S. 219, 27 Wkly. Rep. 739. An unarmed mail-packet belonging to a foreign sovereign, and officered by him, cannot be proceeded against in the admiralty court, even by action *in rem*, although the vessel is employed in commerce by carrying passengers and goods for hire. As a consequence of the absolute independence of every sovereign authority, and of the international comity which induces every sovereign state to respect the independence of every other sovereign state, each state declines to exercise by means of any of its courts any of its territorial jurisdiction over the person of any sovereign or ambassador, or over the public property of any other state which is destined to its public use, or over the property of any ambassador, although such sovereign, ambassador, or property be within its territory, and therefore, but for the common agreement, subject to its jurisdiction. An action *in rem*, being an indirect method of impleading the owner, cannot be brought against the property of a foreign sovereign. The immunity of a public ship is not lost by her being used subordinately and partially for trading purposes. The Parlement Belge, 5 P. D. 197, 4 Aspin. 234, 42 L. T. Rep. N. S. 273, 28 Wkly. Rep. 642.

Property in hands of agent.— The court has jurisdiction in a suit by an English citizen against another English citizen, in whose hands a fund is placed subject to the sole control at law of a foreign ambassador or government, to restrain defendant from parting with the fund upon the order of such foreign ambassador or government. Gladstone *v.* Masurus Bey, 1 Hem. & M. 495, 9 Jur. N. S. 71, 32 L. J. Ch. 155, 7 L. T. Rep. N. S. 477, 1 New Rep. 178, 11 Wkly. Rep. 180. Although a foreign government cannot be sued in this country without its own consent, yet the agent of a foreign government may be restrained from transmitting to it securities which the bill alleges should be deposited in this country. Foreign Bondholders Corp. *v.* Pastor, 31 L. T. Rep. N. S. 567, 23 Wkly. Rep. 109. *Compare* Larivière *v.* Morgan, L. R. 7 Ch. 550, 41 L. J. Ch. 746, 26 L. T. Rep. N. S. 859, 20 Wkly. Rep. 731.

Grants of foreign sovereign.— The right of a foreign government to revoke a concession cannot be questioned in any legal proceedings in this country. National Bolivian Nav. Co. *v.* Wilson, 5 App. Cas. 176, 43 L. T. Rep. N. S. 60. The court has no jurisdiction to interfere with the sovereign acts of a foreign government. In the case of two inconsistent grants of the same subject-matter, by the same foreign sovereign authority, the court cannot aid parties claiming under the first grant, against claimants, although within the jurisdiction, acting under the second. Gladstone *v.* Ottoman Bank, 1 Hem. & M. 505, 9 Jur. N. S. 246, 32 L. J. Ch. 228, 8 L. T. Rep. N. S. 162, 1 New Rep. 512, 11 Wkly. Rep. 460.

Subsisting difference between oriental and christian nations.—In considering what power and jurisdiction is conceded to Great Britain within the territories of a foreign state, it must be borne in mind that in transactions, whether political or mercantile, a difference subsists between oriental and christian states. Papayanni *v.* Russian Steam Nav., etc., Co., 9 Jur. N. S. 1160, 33 L. J. Adm. 11, 9 L. T. Rep. N. S. 37, 2 Moore P. C. N. S. 161, 3 New Rep. 219, 12 Wkly. Rep. 90, 15 Eng. Reprint 862.

Passage of army through neutral territory. — No belligerent army has the right of passage through, or entry into, neutral territory without the consent of its sovereign. 1 Wharton Dig. Int. L. 41 [*citing* 7 Op. Atty.-Gen. 122 (Cushing) 1855].

Sovereign as party defendant.— Although a sovereign or a sovereign state, in its political capacity, cannot be sued in the courts of another state or nation to enforce a demand, yet a state or sovereign may be made a defendant in order to give an opportunity to appear, and thus enable the court to act more intelligently on demands sought to be enforced against other defendants. Manning *v.* Nicaragua, 14 How. Pr. (N. Y.) 517.

61a. Contracts of foreign sovereign.— The bond of a foreign government creates nothing but a debt of honor, and the promise contained in it cannot be enforced in the courts of this country against English agents of the government who have funds belonging to it in their hands, even though the government, after notice of an action by the bondholder against the agents, makes no claim to the

V. TERRITORIAL EXTENT AND JURISDICTION.[62]

A. In General. Each fully sovereign state has exclusive jurisdiction over its own territory and within that territory the state is absolute. It is subject to no limitation not imposed by itself, for, as was said by Chief Justice Marshall, "any restriction upon it, deriving validity from an external source, would imply a diminution of its sovereignty, to the extent of the restriction, and an investment of that sovereignty, to the same extent, in that power which could impose such restriction."[63] So far as territorial jurisdiction is concerned no question ever arises except as to the extent of the territory and what is the outside limit of the boundaries of the state.[64] It is conceded that the legislation of every country is terri-

funds. If such an action against the agent could be maintained, it would amount to an assumption of a jurisdiction over the foreign government. As the foreign government cannot be sued in the courts of this country, neither can its agents be sued in the absence of the principals. Twycross *v.* Drefus, 5 Ch. D. 605, 46 L. J. Ch. 510, 36 L. T. Rep. N. S. 752. By a convention between the government of Peru and a Peruvian company, all guano to be exported from Peru to Great Britain and Ireland was consigned to the company, and it was agreed that the company should sell the guano, and hold a portion of the proceeds at the disposal of the government. The Peruvian government afterward contracted a loan in England upon the terms that all the Peruvian guano to be imported into Great Britain and Ireland and Belgium should be hypothecated for the repayment of the loan, and that out of the proceeds of the guano a certain sum should be applied half-yearly in redemption of the loan. It was held, in a suit by the bondholders of the loan (to which the Peruvian government was made a defendant, but did not appear), that the court had no jurisdiction to compel the company or its agents to apply the proceeds of the guano in the hands of the agents in England to the redemption of the loan. Smith *v.* Weguelin, L. R. 8 Eq. 198, 38 L. J. Ch. 465, 20 L. T. Rep. N. S. 724, 17 Wkly. Rep. 904. When the government of a state contracts a loan in another country, the contract is governed by the law of the state whose government contracts the loan, and not by the law of the country in which the contract is made. Smith *v.* Weguelin, L. R. 8 Eq. 198, 38 L. J. Ch. 465, 20 L. T. Rep. N. S. 724, 17 Wkly. Rep. 904. An English court of equity has no jurisdiction to enforce the contracts of a foreign government against the property of such government in England. Smith *v.* Weguelin, L. R. 8 Eq. 198, 38 L. J. Ch. 465, 20 L. T. Rep. N. S. 724, 17 Wkly. Rep. 904. A foreign government contracting a loan in London agreed to apply a certain sum of money half-yearly in the redemption of the loan, to be made by payment off at par of bonds to be drawn by lot when the bonds should be above par, and by purchase at the market price when the bonds should be at or below par. It was held that the government complied with this contract by canceling half-yearly bonds, which had been given up to it in exchange for bonds of a subsequent loan, to the stipulated amount at the price at which the subsequent loan was contracted, being a higher price than the price of the bonds of the first loan as quoted on the London Stock Exchange. Smith *v.* Weguelin, L. R. 8 Eq. 198, 38 L. J. Ch. 465, 20 L. T. Rep. N. S. 724, 17 Wkly. Rep. 904.

2 Moore Dig. Int. L. c. 6, treats of national jurisdiction and its legal effects, including the supremacy of the territorial sovereign; territorial operation of laws; extraterritorial crime; jurisdiction over ports; inviolability of territory; duty to restrain injurious agencies; landing of submarine cables; international coöperation; marriage, c. 7, vol. 2, exemptions from territorial jurisdiction.

62. Judicial notice of territorial extent of jurisdiction see *supra*, note 48; *infra*, p. 36.

63. The Exchange *v.* McFadden, 7 Cranch (U. S.) 116, 137, 3 L. ed. 287, where it is also said: "This full and absolute territorial jurisdiction being alike the attribute of every sovereign, and being incapable of conferring extra-territorial power, would not seem to contemplate foreign sovereigns, nor their sovereign rights, as its objects. One sovereign being in no respect amenable to another; and being bound by obligations of the highest character not to degrade the dignity of his nation, by placing himself or its sovereign rights within the jurisdiction of another, can be supposed to enter a foreign territory only under an express license, or in the confidence that the immunities belonging to his independent sovereign station, though not expressly stipulated, are reserved by implication, and will be extended to him."

Exclusive jurisdiction in its own territory to establish courts.— Jay, C. J., in Glass *v.* The Betsey, 3 Dall. (U. S.) 6, 16, 1 L. ed. 485, said: "And the said supreme court being further of opinion, that no foreign power can, of right, institute or erect any court of judicature of any kind, within the jurisdiction of the United States, but such only as may be warranted by, and be in pursuance of treaties, it is, therefore, decreed and adjudged, that the admiralty jurisdiction which has been exercised in the United States by the consuls of France, not being so warranted, is not of right."

64. Where mountains or hills are the boundaries of states, in the absence of special

torial and that beyond its own territory it can only affect its own subjects and citizens.[65]

B. Boundary Waters— 1. "High Seas" and Maritime Belt. Questions most frequently arise as to the point on the high seas to which the territorial jurisdiction of the state extends; for, while it has always been maintained that every nation has exclusive jurisdiction over the waters adjacent to its shores to the extent of a cannon shot, or one marine league,[66] many questions arise as to what constitutes the maritime belt. This subject is more properly treated under "High Seas,"[67] but a few of the cases bearing upon it are noticed below.[68] It is now an

treaty "the boundary line runs on the mountain ridge along with the watershed." 1 Oppenheim Int. L. p. 255.

National jurisdiction and territorial limits of the United States see 1 Moore Dig. Int. L. c. 5.

65. Rose *v.* Himely, 4 Cranch (U. S.) 241, 279, 2 L. ed. 608, where it is said: "It is not easy to conceive a power to execute a municipal law, or to enforce obedience to that law, without the circle in which that law operates. A power to seize for the infraction of a law, is derived from the sovereign, and must be exercised, it would seem, within those limits, which circumscribe the sovereign power. As to law prohibiting United States citizens from engaging in pelagic sealing in Bering sea see La Ninfa, 49 Fed. 575, 75 Fed. 513, 21 C. C. A. 434.

"The laws of no nation can justly extend beyond its own territories, except so far as regards its own citizens. They can have no force to control the sovereignty or rights of any other nation, within its own jurisdiction." The Apollon, 9 Wheat. (U. S.) 362, 370, 6 L. ed. 111. An officer of the United States has no right, without express directions from his government, to enter the territorial jurisdiction of a country at peace with the United States and forcibly seize upon property found there and claimed by citizens of the United States. Davison *v.* Seal-skins, 7 Fed. Cas. No. 3,661, 2 Paine 324.

Seizure of vessel in another jurisdiction.— "The seizure of an American vessel, within the territorial jurisdiction of a foreign power, is certainly an offence against that power, which must be adjusted between the two governments. This court can take no cognizance of it." The Richmond *v.* U. S., 9 Cranch (U. S.) 102, 104, 3 L. ed. 670. If American owners, in cases of recapture, are allowed the benefit of the American law in the admiralty courts of France, French owners ought also to have the benefit of the American law in the ports of the United States. Falliage *v.* The Hope, 8 Fed. Cas. No. 4,626, Bee 385.

The seizure of The Itata in 1891 was held to be illegal by the Chilean and United States commission. The vessel was pursued and seized outside of the territorial jurisdiction. The Itata, 3 Moore Int. Arb. 3067.

Law of the sea.— "Undoubtedly, no single nation can change the law of the sea. That law is of universal obligation, and no statute of one or two nations can create obligations for the world. Like all the laws of nations, it rests upon the common consent of civilized communities. It is of force, not because it was prescribed by any superior power, but because it has been generally accepted as a rule of conduct." Sears *v.* The Scotia, 14 Wall. (U. S.) 170, 187, 20 L. ed. 822.

Violations of law on high seas left to executive.— Although the capture of an English vessel by a French vessel within the territorial jurisdiction of the United States is an offense against the United States as a neutral power, yet it is not one for which the courts can give redress to the British owners; the offense against this country being one which must be left to the executive department. Moxon *v.* The Fanny, 17 Fed. Cas. No. 9,895, 2 Pet. Adm. 309.

Subjection of a merchant vessel of one country visiting another for trade to the laws of the port see U. S. *v.* Diekelman, 92 U. S. 520, 23 L. ed. 742. And see Shipping.

66. The Ann, 1 Fed. Cas. No. 397, 1 Gall. 62.

Since Cal. Const. art. 21, § 1, and Pol. Code, § 33, extend the western boundary and jurisdiction of that state into the Pacific ocean three miles from the shore line, Code Civ. Proc. § 377, giving a right of action for death by the wrongful act of another, applies where the act complained of occurred on the high seas within the three-mile limit. *In re* Humboldt Lumber Manufacturers' Assoc., 60 Fed. 428.

67. **High seas** generally see Navigable Waters. See also High Seas, 21 Cyc. 436; 2 Moore Dig. Int. L. c. 8.

68. "Maritime belt is that part of the sea which, in contradistinction to the open sea, is under the sway of the riparian States." Mississippi *v.* Louisiana, 202 U. S. 1; 1 Oppenheim Int. L. § 185. "Three marine miles from the low-water mark may be considered as in practice the conventional extent of maritime jurisdiction. There are, however, many exceptions claimed and granted. One of the most common claims, though not generally admitted, is that the rule enunciated by Bynkershoek should be followed, viz: that the jurisdiction should be bounded by the range of arms and should accordingly be increased as the range of arms increases. For certain purposes, such as attack and defense of the coast, it is maintained that this is in fact the real limit of effective jurisdiction at the present time. For revenue purposes, for the protection of special industries, such as fishing, and for other reasons, various limits beyond the three mile line have been claimed and acknowledged from time to time." Int.

elementary proposition that the high seas are open to the commerce of the world and cannot be appropriated by any one state. Questions arise at times as to how far bays and other large bodies of water may be within the territory of the state

L. Situations (1904), p. 130 (Govt. Printing Office, 1905). See pp. 130–141 for discussions of the different claims of governments and citations of authorities, including Kent Int. L. (Abdy ed.) p. 112; Russian Prize Law, art. 21. The French position, set forth in the correspondence relative to the Alabama and Kearsarge. Davis Int. L. p. 58; 3 Wharton Dig. Int. L. 59.

High seas defined in commissions.— "The first instructions given by the President to the private armed vessels of the United States, define the high seas, . . . to extend to low-water mark, with the exception of the space of one league, or three miles, from the shore of countries at peace with Great Britain or the United States." The Joseph, 8 Cranch (U. S.) 451, 455, 3 L. ed. 621.

"The boundary line of the maritime belt is . . . uncertain, since no unanimity prevails with regard to the width of the belt. It is, however, certain that the boundary line runs not nearer to the shore than three miles, or one marine league, from the low-water mark." 1 Oppenheim Int. L. § 199. "The greatest distance to which any respectable assent among nations has been at any time given, has been the extent of the human sight, estimated at upwards of twenty miles, and the smallest distance, I believe, claimed by any nation whatever, is the utmost range of a cannon ball. . . . The character of our coast, remarkable in considerable parts of it for admitting no vessels of size to pass near the shores, would entitle us in reason to as broad a margin of protected navigation as any nation whatever." Mr. Jefferson to Mr. Genet, Nov. 8, 1793; MSS. Notes, For. Leg.: 1 Am. St. Pap. (For. Rel.) 183; 1 Wharton Dig. Int. L. 100.

Extent of jurisdiction on high seas.— "The jurisdiction of the French courts as to seizures is not confined to seizures made within two leagues of the coast. A seizure beyond the limits of the territorial jurisdiction, for breach of a municipal regulation is warranted by the law of nations." Hudson *v.* Guestier, 6 Cranch (U. S.) 281, 3 L. ed. 224, syllabus. "As this article authorizes a seizure of those vessels only which are 'sailing within the territorial extent of the island, found within less than two leagues of the coast,' it is deemed by the court to be sufficiently evident that the seizure and confiscation are made in consequence of a violation of municipal regulation, and not in right of war. It is true, that the revolt of the colony is the motive for this exercise of sovereign power. Still, it is an exercise of sovereign power, restricting itself within those limits which are the province of municipal law, not the exercise of a belligerent right." Rose *v.* Himely, 4 Cranch (U. S.) 241, 276, 2 L. ed. 608.

The "Headland Doctrine"— Bays.— For a discussion of the "Headland Doctrine" see Int. L. Situations (1904), pp. 138–140 [*citing* Inst. Int. L. (1894)], which adopted twelve miles as the width of the mouth of inclosed bays; Rivier, who considered the ten-mile line as a reasonable one for mouths of rivers and bays; the Convention of The Hague in 1882 which adopted ten miles; concluding with this summary: "The general drift of opinion has been toward the admission of a claim to jurisdiction over bays when the mouth is not over ten miles in width and also to three miles beyond the line drawn from headland to headland." "It cannot be asserted as a general rule that nations have an exclusive right of fishery over all adjacent waters to a distance of three marine miles beyond an imaginary line drawn from headland to headland. This doctrine of headlands is new, and has received a proper limit in the convention between France and Great Britain of the 2d of August, 1839, in which 'it is equally agreed that the distance of three miles fixed as the general limit for the exclusive right of fishery upon the coasts of the two countries shall, with respect to bays, the mouths of which do not exceed ten miles in width, be measured from a straight line drawn from headland to headland.'" 1 Wharton Dig. Int. L. 76 [*citing* Umpire London C, 1853, 212; 1 Halifax Award 152]. "The whole of the waters within the capes of the Delaware Bay is neutral territory when the United States is neutral. This neutrality depends not 'on any of the various distances claimed' on the sea 'by different nations possessing the neighboring shore,' but upon the fact that the United States are the proprietors of the lands on both sides of the Delaware, from its head to its entrance into the sea. But the law of nations and the Treaty of Paris of 1783 may justify the United States in attaching to their coasts 'an extent into the sea beyond the reach of cannon shot.'" 1 Wharton Dig. Int. L. 75 [*citing* 1 Op. Atty.-Gen. 32 (Randolph) 1793; 1 Am. St. Pap. (For. Rel.) 80; Mr. Jefferson to Mr. Morris, 1 Am. St. Pap. (For. Rel.) 167. In Direct U. S. Cable Co. *v.* Anglo-American Tel. Co., 2 App. Cas. 349, 46 L. J. P. C. 71, 36 L. T. Rep. N. S. 265, the house of lords decided that Conception bay in Newfoundland was territorial waters, although the headlands were twenty miles apart. Chesapeake bay, with headlands twelve miles apart, was held to be territorial waters. The Alleganean, 4 Moore Int. Arb. 4332.

Lakes connected with the sea.— "If the maritime water which bathes the coast is considered to belong to the riparian States, there is still greater reason that the waters which touch the sea should be the same, that is to say, if the lakes form in the immediate neighborhood of the sea. These lakes ought to be considered as belonging to the State or States in whose territory they lie, under the

or a part of the high seas.[69] For example questions have arisen between this

same conditions that the enclosed seas are all reputed as such, and as they are generally in communication with or connected with the sea they ought to be considered as under the same rules as international rivers." Fodéré Int. L. p. 202.

Nature of jurisdiction or sway.—"The open sea within this limit [not less than a marine league] is, of course, subject to the common right of navigation; and all governments, for the purpose of self-protection in time of war or for the prevention of frauds on its revenue, exercise an authority beyond this limit." Manchester *v.* Massachusetts, 139 U. S. 240, 258, 11 S. Ct. 559, 35 L. ed. 159 [*citing* Gould Waters, §§ 1–17; Neill *v.* Devonshire, 8 App. Cas. 135, 31 Wkly. Rep. 622; Reg. *v.* Cubitt, 22 Q. B. D. 622, 16 Cox C. C. 618, 53 J. P. 470, 58 L. J. M. C. 132, 60 L. T. Rep. N. S. 638, 37 Wkly. Rep. 492; Gammell *v.* Woods, etc., Co., 3 Macq. H. L. 419; Mowat *v.* McFee, 5 Can. Sup. Ct. 66]. "But no unanimity exists with regard to the nature of the sway of the riparian States. Many writers maintain that such sway is sovereignty, that the maritime belt is a part of the territory of the riparian State, and that the territorial supremacy of the latter extends over its coast waters. . . . On the other hand, many writers of great authority emphatically deny the territorial character of the maritime belt and concede to the riparian States, in the interest of the safety of the coast, only certain powers of control, jurisdiction, police, and the like, but not sovereignty." 1 Oppenheim Int. L. p. 239.

Territorial sea waters open to commerce.—"In all cases in which territorial waters are so placed that passage over them is either necessary or convenient for the navigation of open seas, as in that of marginal waters, or of an appropriated strait connecting unappropriated waters, they are subject to a right of innocent use by all mankind for the purposes of commercial navigation. The general consent of nations, which was seen to be wanting to the alleged right of navigation of rivers may fairly be said to have been given to that of the sea. . . . The right therefore must be considered to be established in the most complete manner." Hall Int. L. (4th ed.) § 42. But a government has the right to grant an exclusive right of towage in its territorial waters. The Mark Gray Case, Venez. Arb. (1903) Ralston Rep. 33.

Territorial sea waters not open to war vessels.—"This right of innocent passage does not extend to vessels of war. Its possession by them could not be explained upon the grounds by which commercial passage is justified. The interests of the whole world are concerned in the possession of the utmost liberty of navigation for the purposes of trade by the vessels of all States. But no general interests are necessarily or commonly involved in the possession by a State of a right to navigate the waters of other States with its ships of war. . . . A State has therefore always the right to refuse access to its territorial waters to the armed vessels of other States, if it wishes to do so." Hall Int. L. § 42.

"**The limits of the right of a nation to control the fisheries on its sea coasts,** and in the bays and arms of the sea within its territory, have never been placed at less than a marine league from the coast on the open sea; and bays wholly within the territory of a nation, the headlands of which are not more than two marine leagues, or six geographical miles apart, have always been regarded as a part of the territory of the nation in which they lie. Proceedings of the Halifax Commission of 1877, under the Treaty of Washington of May 8, 1871, Executive Document No. 89, 45th Congress, 2d Session, Ho. Reps. pp. 120, 121, 166." Manchester *v.* Massachusetts, 139 U. S. 240, 257, 11 S. Ct. 559, 35 L. ed. 159.

69. See Woolsey Int. L. § 60, where it is said: "What Grotius contended for in his 'Mare Liberum' against the exclusive claim of Portugal to the possession of original commerce, 'that everyone has, by the law of nations, free intercourse by sea with every one else,' is now for the most part admitted, and the pathways of commerce can no longer be obstructed." Citing also the remark of the lord chief justice of England in the Franconia case that "the claim to such sovereignty, at all times unfounded, has long since been abandoned." For discussions and state papers relative to the claims of Denmark of "Sound Dues" and other charges for the passage of vessels through the sound into the Baltic see 1 Wharton Dig. Int. L. 76–78. See also with reference to the claims of Turkey of control of the Dardenelles, pp. 79, 80.

"**In a narrow strait** separating the lands of two different States the boundary line runs either through the middle or through the mid-channel, unless special treaties make different arrangements." 1 Oppenheim Int. L. 255. See 3 Moore Dig. Int. L. c. 9, "Interoceanic communications"; 1 Moore Dig. Int. L. § 133 *et seq.*, "Straits."

Straits of Magellan.—"The government of the United States will not tolerate exclusive claims by any nation whatsoever to the Straits of Magellan, and will hold responsible any government that undertakes, no matter on what pretext, to lay any impost or check on United States commerce through those Straits." 1 Wharton Dig. Int. L. 80 [*citing* Mr. Evarts to Mr. Osborn, Jan. 18, 1879. MSS. Inst. Chile].

"**St. Mary's River** formed, at this period, the boundary between the United States and the Spanish territory, the boundary line, by the treaty of 1795, running through the middle thereof, in its whole course to the Atlantic Ocean. The only access from the ocean to the Spanish waters running into the St. Mary's, as well as to the adjacent Spanish ter-

country and Great Britain as to the status of the Bay of Fundy and bays in Alaska.[70]

2. Rivers, Lakes, Etc. As to boundary waters, the territory of the state includes as a part of its domain the lakes and rivers which lie within its limits, and these waters may be appropriated in part by one adjoining nation and in part by another, and when so divided the part belonging to each is as completely a part of its territory as though the whole lake or river were within its limits.[71] As to

ritories, was through this river. So, that, upon the general principles of the law of nations, the waters of the whole river must be considered as common to both nations, for all purposes of navigation, as a common highway, necessary for the advantageous use of its own territorial rights and possessions." The Apollon, 9 Wheat. (U. S.) 362, 369, 6 L. ed. 111.

The waters of the river Schoodiac and of the bay of Passamaquoddy, separating the United States from the British province of New Brunswick, are common to both parties for the purposes of navigation. The Atlantic, 2 Fed. Cas. No. 621, 1 Ware 121.

70. The Bay of Fundy, having one headland in the United States and the other in the British dominions and about seventy miles apart, is held to be public waters. The Washington, Convention with Great Britain, (1853) 4 Moore Int. Arb. 4342. See 2 Moore Dig. Int. L. §§ 136–157, "Territorial Limits."

71. People *v.* Tyler, 7 Mich. 161, 74 Am. Dec. 703.

"**Boundary lakes and land-locked seas** are such as separate the lands of two or more different States from each other. The boundary line runs through the middle of these lakes and seas, but as a rule special treaties portion off such lakes and seas between riparian States." 1 Oppenheim Int. L. § 199. "Theory and practice agree upon the rule that such lakes and land-locked seas as are entirely enclosed by the land of one and the same State are part of the territory of this State. . . . As regards, however, such lakes and land-locked seas as are surrounded by the territories of several States, no unanimity exists. The majority of writers consider these lakes and land-locked seas parts of the surrounding territories, but several dissent asserting that these lakes and seas do not belong to the riparian States, but are free like the Open Sea. The practice of the States seems to favor the opinion of the majority of writers." 1 Oppenheim Int. L. § 179. "Such lakes and land-locked seas as are surrounded by the territories of several States and are at the same time navigable from the Open Sea, are called 'international lakes and land-locked seas.' However, although some writers dissent, it must be emphasised that hitherto the Law of Nations has not yet recognized the principle of free navigation on such lakes and seas. The only case in which such free navigation is stipulated is that of the lakes within the Congo district." 1 Oppenheim Int. L. § 180 [dissenting writers referred to being Rivier, Calvo, Caratheodory and Holtzendorff].

The "Great Lakes."— "The right and title to the shores of the Great Lakes is in the several States, and not in the United States." 1 Wharton Dig. Int. L. 99 [*citing* 6 Op. Atty.-Gen. (Cushing) 172]. See 2 Moore Dig. Int. L. § 136 *et seq.*, "The Great Lakes."

"**Boundary rivers** are such rivers as separate two different States from each other. If such river is not navigable, the imaginary boundary line runs down the middle of the river, following all turnings of the border line of both banks of the river. On the other hand, in a navigable river the boundary line runs through the middle of the so-called *Thalweg*, that is, the mid-channel of the river. . . . And it must be remembered that, since a river sometimes changes more or less its course, the boundary line running through the middle of the *Thalweg* or along the border-line is thereby also altered." 1 Oppenheim Int. L. § 199. See doctrine of the *Thalweg* discussed and applied in Mississippi *v.* Louisiana, 202 U. S. 1, 58; Illinois *v.* Iowa, 202 U. S. 59.

"**When a great river** is the boundary between two nations or states, if the original property is in neither, and there be no convention respecting it, each holds to the middle of the stream. But when . . . one state is the original proprietor and grants the territory on one side only, it retains the river within its own domains, and the newly-created state extends to the river only." In such case the lower water mark is its boundary, whether the fluctuations in the stream result from tides or from an annual rise and fall. Handly *v.* Anthony, 5 Wheat. (U. S.) 374, 379, 5 L. ed. 113 syllabus [*quoted* in Alabama *v.* Georgia, 23 How. (U. S.) 505, 514, 16 L. ed. 556]. "Where two nations are possessed of territory on opposite sides of a bay or navigable river, the sovereignty of each presumptively extends to the middle of the water from any part of their respective shores;" and "where one nation first takes possession of the whole of the bay or navigable river, and exercises sovereignty thereon, the neighboring people shall nevertheless be 'lords of their particular ports, and so much of the sea or navigable river as the convenient access to the shore requires.'" 1 Wharton Dig. Int. L. 76 [*citing* 5 Op. Atty.-Gen. 412 (Crittenden) 1851].

"**River,**" "**banks,**" "**channel,**" "**flat,**" **and** "**shore**" defined in Alabama *v.* Georgia, 23 How. (U. S.) 505, 513, 16 L. ed. 556.

"**The bed** of the river is that portion of its soil which is alternately covered and left bare, as there may be an increase or diminution in the supply of water, and which is

what is wholly within its own territory a state has exclusive jurisdiction. There has been much discussion in this connection in regard to rivers, straits, canals, and lakes. Many of these matters have been settled by special treaties, in which case the treaty must of course control.[72] Others are held in common and where any question arises the rules of international law must be applied.[73] Questions

adequate to contain it at its average and mean stage during the entire year, without reference to the extraordinary freshets of the winter or spring, or the extreme droughts of the summer or autumn." Alabama *v.* Georgia, 23 How. (U. S.) 505, 515, 23 L. ed. 556.

Effect of accretion, decretion, and avulsion. — "Where a river is the boundary between two nations, it continues so notwithstanding accretion and decretion of its banks; but if it violently leave its bed, the latter remains the boundary." 1 Wharton Dig. Int. L. 96 [*citing* 8 Op. Atty.-Gen. 175 (Cushing) 1856]. And see *infra*, note 4.

See 2 Moore Dig. Int. L. c. 5, § 125 *et seq.*, "Rivers."

The rule for the control and navigation of rivers is thus stated in Field's International Code, § 55: "A nation, and its members, through the territories of which runs a navigable river, have the right to navigate the river to and from the high seas, even though passing through the territory of another nation, subject, however, to the right of the latter nation to make necessary or reasonable police regulations for its own peace and safety. Message of President Grant to the Congress of the United States, December, 1870, and treaties there cited." See the criticism of Sir R. Phillimore of the position taken by Great Britain regarding the navigation of the St. Lawrence, that, because "she possessed both banks of the St. Lawrence where it disembogued itself, she denied to the United States the right to navigation, though about one-half of the waters of Lakes Ontario, Erie, Huron and Superior, and the whole of Lake Michigan, through which the river flows, were the property of the United States." Phillimore Int. L. (3d ed.) 245.

"When the free navigation of a river is conceded, this carries with it the right to use the shores so far as necessary to the use of the river." 1 Wharton Dig. Int. L. 97 [*citing* Phillimore Int. L. (3d ed.) 225; Wheaton Hist. L. N. 510; Wharton Comm. Am. L. § 191].

Use of waters of boundary rivers.— "The unquestioned rule of the common law was that every riparian owner was entitled to the continued natural flow of the stream; but every State has the power, within its dominion, to change this rule, and permit the appropriation of the flowing waters for such purposes as it deems wise." U. S. *v.* Rio Grande Dam, etc., Co., 174 U. S. 690, 19 S. Ct. 770, 43 L. ed. 1136, syllabus.

72. Rivers.— The St. Lawrence river, by the treaty of 1871, is "forever" to remain free and open to the citizens of the United States, and the like privilege is extended to the subjects of Great Britain respecting the Yukon, Porcupine, and Stikine in Alaska. The pertinent parts of the treaty are found in 1 Wharton Dig. Int. L. 83, 84; see also 1 Wharton Dig. Int. L. 80–83, for interesting discussions and references to state papers which preceded the execution of the treaty. "By the Treaty of Versailles, of 1783, by which the independence of the United States was recognized, it was provided in article 8, that 'the navigation of the River Mississippi shall forever remain free and open to the subjects of Great Britain and the subjects of the United States.' But the United States having purchased Louisiana on April 30, 1803, from France, and Florida from Spain, on February 22, 1819, acquired possession of the banks on both sides of the Mississippi, and the Treaty of Ghent, on December 24, 1814, no doubt for this reason, omitted all reference to the rights of British subjects to the navigation of the River. Since then the exclusive control of the River by the United States, so far as concerns foreign States, has been conceded internationally; though subject to police supervision and the right to impose pilotage and quarantine regulations, the free navigation of this and of other navigable rivers within the United States is, by the law of nations accepted by the United States, open to all ships of foreign sovereigns." 1 Wharton Dig. Int. L. 96. The question of the conflicting rights of Spain and the United States, in 1804, to the Mississippi river and the discussions thereon will be found in 2 Am. St. Pap. (For. Rel.) 596 *et seq.*

The Suez canal was neutralized by the convention of Constantinople, Oct. 29, 1888, between the great powers of Europe.

The Panama or other canal to be constructed between the Atlantic and Pacific oceans was neutralized by the so-called Hay-Pauncefote Treaty, Nov. 18, 1901, and made applicable to all nations observing the rules embraced in the treaty. See 3 Moore Dig. Int. L. c. 9, "Interoceanic Communication."

73. Rivers.— As affecting the ownership and control of rivers and their waters, cases are now pending before the supreme court of the United States, amongst them that of Kansas *v.* Colorado, in which case the question to be determined is the ownership and control of the waters of the Arkansas river, it being claimed by Kansas that Colorado is monopolizing these waters in irrigation to the detriment of Kansas. In the case of Missouri *v.* Illinois, the former state complained of the pollution of the waters of the Mississippi river by the Chicago drainage canal. The court held that it had jurisdiction to prevent such pollution if proved, but that in this case it was not proved. Missouri *v.* Illinois, 200 U. S. 496. "The right to peacefully

of territorial extent and jurisdiction have arisen also with relation to waters in which the tides ebb and flow.[74]

C. Political Question. Questions as to boundary between nations are not for their courts. They are to be settled by the political departments of the government.[75]

VI. ACQUISITION OF TERRITORY.

A. Modes of Acquisition — 1. In General. A sovereign may increase its territory and extend its sovereignty in various ways.[76] Those recognized by international law, besides accretion[77] by the action of the elements, are as follows: Discovery and occupation,[78] conquest,[79] cession,[80] annexation,[81] and prescription.[82] The title of the present domain of the United States rests upon every different method of acquisition known to international law, but as to every portion thereof the title is clear and recognizable by that law as well as by our own laws, as they have been defined and construed by the supreme court.[83]

navigate the Amazon River belongs, in international law, to all maritime States." 1 Wharton Dig. Int. L. 85, Mr. Marcy to Mr. Trousdale, Aug. 8, 1853, MSS. Inst. Brazil.

"That canals are parts of the territories of the respective territorial States is obvious from the fact that they are artificially constructed waterways. And there ought to be no doubt that all the rules regarding rivers must analogously be applied to canals." 1 Oppenheim Int. L. § 182. "While a natural thoroughfare, although wholly within the dominion of a government, may be passed by commercial ships, of right, yet the nation which constructs an artificial channel may annex such conditions to its use as it pleases." 1 Wharton Dig. Int. L. 80 [*citing* The Avon, 18 Int. Rev. Rec. 165].

The right to close portions of the national territory to navigation is inherent in all governments. Orinoco Steamship Co.'s Case, Venez. Arb. (1903) Ralston Rep. 72. States through the territory of which navigable streams flow, although those streams rise in the territory of other states, have the right to close the rivers to navigation at their discretion and no appeal will lie therefrom. The Faber Case, Venez. Arb. (1903) Ralston Rep. 600.

74. See, generally, NAVIGABLE WATERS.

Floating property resting on land at low tide is on land.—"The pine timber having been floated into shallow water, where it was secured and in the custody of the owner of the ship, an American citizen, the court cannot perceive any solid distinction, so far as respects confiscation, between this property and other British property found on land at the commencement of hostilities." Brown *v.* U. S., 8 Cranch (U. S.) 110, 122, 3 L. ed. 504.

75. Foster *v.* Neilson, 2 Pet. (U. S.) 253, 7 L. ed. 415, per Marshall, C. J.

But as between the states forming the United States, it is a judicial question. U. S. *v.* Texas, 143 U. S. 621, 2 S. Ct. 488, 36 L. ed. 285; Louisiana *v.* Mississippi, 202 U. S. 1.

Questions of boundary between nations not for their courts.—"In a controversy between two nations, concerning national boundary, it is scarcely possible, that the courts of either should refuse to abide by the measures adopted by its own government. There being no common tribunal to decide between them, each determines for itself on its own rights, and if they cannot adjust their differences peaceably, the right remains with the strongest. The judiciary is not that department of the government, to which the assertion of its interests against foreign powers is confided; and its duty commonly is, to decide upon individual rights, according to those principles, which the political departments of the nation have established." Delassus *v.* U. S., 9 Pet. (U. S.) 117, 9 L. ed. 71; U. S. *v.* Arredondo, 6 Pet. (U. S.) 691, 711, 8 L. ed. 547; Foster *v.* Neilson, 2 Pet. (U. S.) 253, 307, 7 L. ed. 415.

Not a legislative function.—The act of Texas of Dec. 19, 1836, fixing the western boundary of the state at the Rio Grande, did not have the effect of making the province of New Mexico a part of Texas, since the republic could not acquire territory by merely fixing its boundary by statute, if the territory was in the actual possession of Mexico. De Baca *v.* U. S., 36 Ct. Cl. 407.

76. See Moore Dig. Int. L. § 80 *et seq.*, "The Acquisition and Loss of Territory." Oppenheim distinguishes five modes of acquiring territory, viz.: cession, occupation, accretion, subjugation, and prescription. 1 Oppenheim Int. L. p. 266.

77. See *infra*, VI, A, 6.

78. See *infra*, VI, A, 2.

79. See *infra*, VI, A, 3.

80. See *infra*, VI, A, 4.

81. See *infra*, VI, A, 5.

82. See *infra*, VI, A, 7.

83. Dorr *v.* U. S., 195 U. S. 138, 24 S. Ct. 808, 49 L. ed. 128; Jones *v.* U. S., 137 U. S. 202, 212, 11 S. Ct. 80, 34 L. ed. 691; Scott *v.* Sandford, 19 How. (U. S.) 612, 614, 15 L. ed. 691 (opinion of Curtis, J.); 1 Butler Treaty-Making Power, § 44 (containing a statement of all of the acquisitions of the United States up to 1901); Pomeroy Const. 494–498; Justice Miller's Lectures on the Constitution 35, 55; Senator O. H. Platt's speech in United States Senate, Dec. 19, 1898, Congr. Rec. 325; 1 Moore Dig. Int. L. c. 4.

2. Discovery and Occupation. The original title to all of North and South America is based upon this method of acquisition.[84] Occupation is the act of appropriation by a state through which it intentionally acquires sovereignty over such territory as is at the time not under the sovereignty of another state.[85] Occupation differs from subjugation as a mode of acquisition chiefly in so far as the conquered and afterward annexed territory has hitherto belonged to another state.[86] When a government acquires territory by discovery it must, in order to make its title and control thereof effective, establish a responsible government within a reasonable time.[87]

3. Conquest. The right of the victorious nation to retain the ownership of invaded and conquered territory is still recognized by international law.[88] The effect of conquest is to hold the territory by occupation, and the conquering state is subject to have it wrested from it by the state from which it was taken or may voluntarily surrender it at the end of the war.[89] And it only becomes an actual acquisition after the conqueror has established the conquest and formally annexed the territory.[90] After such conquest or annexation the enemy state either ceases to exist, if its entire territory has been conquered, or it ceases to exercise jurisdiction over that portion of the territory which has been conquered.[91] The effect of conquest on private property in the conquered territory is practically the same as when the territory is ceded and will be treated under that title.[92] Few recent titles rest exclusively on conquest, however, as it has practically

84. For a review of the rights of the aboriginal Indians in the United States and the rights acquired by the European countries based on discovery and occupation see Johnson *v.* McIntosh, 8 Wheat. (U. S.) 543, 5 L. ed. 681. See also 2 Butler Treaty-Making Power, c. 13, treating of this power as exercised with the Indian tribes. See also 1 Moore Dig. Int. L. § 15 *et seq.*

85. 1 Oppenheim Int. L. § 220 *et seq.*

86. Occupation after discovery differs from occupation after conquest in that the former relates to territory not previously under the dominion of any other government and the latter relates to territory which had previously belonged to another state. 1 Oppenheim Int. L. p. 275. And see Moore Dig. Int. L. § 80, "Occupation."

87. 1 Oppenheim Int. L. § 220 *et seq.*

The United States added the Oregon territory to its domain by the discovery of the mouth of the Columbia river by Captain Gray, the expedition of Lewis and Clarke, and the Astoria settlement. The title of the United States to the Guano and Midway Islands also rests upon discovery and occupation. 1 Butler Treaty-Making Power, § 44. "Only such territory can be the object of occupation as is no State's land, whether entirely uninhabited, as e. g. an island, or inhabited by natives whose community is not to be considered as a State. Even civilised individuals may live and have private property on a territory without any union by them into a State proper which exercises sovereignty over such territory." 1 Oppenheim Int. L. § 221. See also report of Charles E. Magoon, Law Officer, Bureau of Insular Affairs, senate Document 234, 56th Congress, 1st Session, on the legal aspects of the territorial possessions of the United States. This report and others prepared by Mr. Magoon were afterward republished by the war department under the title of "The Law of Civil Government under Military Occupation," Government Printing Office, 1902.

88. "As long as a Law of Nations has been in existence, the States as well as the vast majority of writers have recognised subjugation as a mode of acquiring territory. Its justification lies in the fact that war is a contention between States for the purpose of overpowering one another. States which go to war know beforehand that they risk more or less their very existence, and that it may be a necessity for the victor to annex the conquered enemy territory, be it in the interest of national unity or of safety against further attacks, or for other reasons." 1 Oppenheim Int. L. § 238; 1 Butler Treaty-Making Power, § 44.

89. Such was the case with some of the Mexican territory which the United States held during the Mexican war. Fleming *v.* Page, 9 How. (U. S.) 614, 13 L. ed. 276.

Territorial status while conquered by enemy.—Under the revenue laws, the port of Castine, Maine, held by the British during the War of 1812, was held to be foreign territory, and goods imported to that port not liable to duty. The subsequent evacuation by the British and resumption of authority by the United States did not change the character of the past transaction. U. S. *v.* Rice, 4 Wheat. (U. S.) 246, 4 L. ed. 562.

90. 1 Oppenheim Int. L. § 236.

91. Such was the case when Spain relinquished Cuba. Spain still continued to exist as a state but it ceased to exercise jurisdiction over that island. Subsequently, by treaty, it relinquished jurisdiction over Cuba as well as the Philippines and Porto Rico.

92. See *infra*, VI, B, 1, 2. The general rule is that the subjugator does not acquire the private property of the inhabitants of the annexed territory, although it may impose such

become a universal custom to settle ownership of territory and boundary lines after every war by a treaty; the conquering power generally, and properly, insists upon an unequivocal cession of the territory which it accepts as indemnity, or retains as conquered, so as to avoid all subsequent questions of ownership and sovereignty.[93]

4. Cession. Cession by one sovereign power to another is the method of acquisition of territory that has been most commonly employed during the past century. It is evidenced by a treaty,[94] or by legislation of the contracting countries.[95] A cession may be made either: (1) For a monetary consideration, without the element of conquest or coercion;[96] (2) by a friendly exchange of

laws upon it as it sees fit. 1 Oppenheim Int. L. § 240. See 1 Moore Dig. Int. L. § 92, "Effects of Change of Sovereignty."

93. For this reason it is sometimes difficult to determine whether territory so acquired is conquered or ceded; this applies to our Mexican territory acquired in 1848, as well as to our acquisitions from Spain in 1898. In both instances we held, and could have retained, them as conquered, but we obtained cessions thereof in the treaties of peace concluded on terminating the wars. 1 Butler Treaty-Making Power § 44.

94. "The only form in which a cession can be effected is an agreement embodied in a treaty between the ceding and the acquiring State. Such treaty may be the outcome of peaceable negotiations or of war, and the cession may be one with or without compensation." 1 Oppenheim Int. L. § 216. See 1 Moore Dig. Int. L. § 83 *et seq.*, "Cession."

95. "Cession of State territory is the transfer of sovereignty over State territory by the owner State to another State. There is no doubt whatever that such cession is possible according to the Law of Nations, and history presents innumerable examples of such transfer of sovereignty. The Constitutional Law of the different States may or may not lay down special rules for the transfer or acquisition of territory. Such rules can have no direct influence upon the rules of the Law of Nations concerning cession, since Municipal Law can neither abolish existing nor create new rules of International Law. But if such municipal rules contain constitutional restrictions of the Government with regard to cession of territory, these restrictions are so far important that such treaties of cession concluded by heads of States or Governments as violate these restrictions are not binding." 1 Oppenheim Int. L. § 213.

"The usage of the world is, if a nation be not entirely subdued, to consider the holding of conquered territory as a mere military occupation, until its fate shall be determined by the treaty of peace. If it be ceded by the treaty, the acquisition is confirmed, and the ceded territory becomes a part of the nation to which it is annexed; either on the terms stipulated in the treaty of cession, or on such as its new master shall impose. On such transfer of territory, it has never been held, that the relations of the inhabitants with each other undergo any change. Their relations with their former sovereign are dissolved, and new relations are created between them and the government which has acquired their territory. The same act which transfers their country transfers the allegiance of those who remain in it; and the law, which may be denominated political, is necessarily changed, although that which regulates the intercourse, and general conduct of individuals, remains in force, until altered by the newly created power of the state." American Ins. Co. *v.* Canter, 1 Pet. (U. S.) 511, 542, 7 L. ed. 242.

"The object of cession is sovereignty over such territory as has hitherto already belonged to another State. As far as the Law of Nations is concerned, every State as a rule can cede a part of its territory to another State, or by ceding the whole of its territory can even totally merge in another State. However, since certain parts of State territory, as for instance rivers and the maritime belt, are inalienable appurtenances of the land, they cannot be ceded without a piece of land." 1 Oppenheim Int. L. § 215.

"As a rule, no third Power has the right of veto with regard to a cession of territory. Exceptionally, however, such right may exist; it may be that a third Power has by a previous treaty acquired a right of pre-emption concerning the ceded territory, or that some early treaty has created another obstacle to the cession, as, for instance, in the case of permanently neutralised parts of a not-permanently neutralised State. And the Powers have certainly the right of veto in case a permanently neutralised State desires to increase its territory by acquiring land through cession from another State. But even where no right of veto exists, a third Power might intervene for political reasons. For there is no duty on the part of third States to acquiesce in such cessions of territory as endanger the balance of power or are otherwise of vital importance. And a strong State will practically always interfere in case a cession of such kind is agreed upon as menaces its vital interests." 1 Oppenheim Int. L. § 218, citing the case of Luxemburg which Holland proposed to sell to France in 1867 and which was neutralized upon the interposition of the North German Confederation.

96. As was the case when we purchased Louisiana from France in 1803, Florida from Spain in 1819, Arizona from Mexico in 1853, and Alaska from Russia in 1867.

territory;[97] (3) at the end of a war, partly for indemnity and partly for monetary or other considerations;[98] or (4) without any consideration except good-will.[99] There have been numerous transfers in other countries. The right of sovereign powers to cede territory to, and to acquire other territory from, other sovereign powers, with the accompanying transfer of sovereignty thereover, is one of the elementary principles of international law. It is essential, however, that the contracting powers should be fully sovereign in order to act either as transferrer or transferee. A government that is not fully sovereign has no right to extend its territorial possessions, and conversely one that cannot extend them does not possess the full measure of sovereignty. It is subject, by some limitation, to some other power, which must be superior to it in that aspect; when any government is in that condition, owing to any cause whatever, it must acknowledge that it lacks complete sovereignty, and that it cannot rank among the great and independent powers of the world.[1] The consent of inhabitants of territory, ceded by one sovereign power to another, is not required to validate the transfer, either of the territory or the sovereignty thereof; this is as well established as is the principle of municipal law, as it is generally administered, that the consent of a tenant is not necessary to enable the owner of the fee to dispose of it. Where such consent has been asked it has been the result of a policy adopted and not of any legal necessity.[2]

97. Which, to some extent, was an element of our purchase of Florida, when we ceded to Spain a part of Texas, which up to that time we had claimed was included in the Louisiana purchase.

98. As was the case when California and other Mexican territory was ceded in 1848, and the Philippines, Porto Rico, and Guam were transferred to us in 1898.

99. As was the case when Great Britain ceded Horse Shoe Reef in Lake Erie to the United States in 1850.

1. Such is the condition of every state of this Union. No one of them is completely sovereign, because the people have either delegated certain elements of sovereignty to the central government, viewing it from a federal standpoint, or viewing it from a national standpoint, they have vested the central government with certain elements of sovereignty to the exclusion of the states. One of the elements of sovereignty which the states do not possess is this right of acquisition of additional territory. No one of them can extend its borders without the consent of the central government. 1 Butler Treaty-Making Power, § 43. "Semi sovereign states do not possess all the essential rights of sovereignty, and therefore, can be regarded as subjects of international law only indirectly, or at least in a subordinate degree." 1 Halleck Int. L. (Baker 3d Eng. ed.) p. 74. See Hall Int. L. p. 31; Woolsey Int. L. p. 35; Glenn Int. L. p. 17 and citations collected in foot-note. "The general proposition of international law, therefore, is that by its proper, constituted authorities, whatever they may be,—king, president, legislature, people,—a nation may alienate to or acquire from another nation, territory or other things which are the objects of property. 'It is, moreover, of the last importance to remember that a nation which allows its ruler, either in his own person or through his minister, to enter into negotiation respecting the alienation of property with other nations, must be held to have consented to the act of the ruler; unless, indeed, it can be clearly proved that the other contracting party was aware at the time that the rule in so doing was transgressing the fundamental laws of this state.'" Pomeroy Int. L. (Woolsey ed.) pp. 132–134. And see for numerous instances of cessions 1 Halleck Int. L. (3d London ed.) pp. 153–157; Lawrence Princ. Int. L. pp. 156, 157; Woolsey Int. L. p. 62; Hall Int. L. p. 45; Glenn Int. L. p. 49; Phillimore Int. L. pars. 268, 269, 270, 275; Calvo Int. L. pars. 291–299.

2. The United States has never asked the inhabitants of any of its purchased territory to ratify the transfer. It has always acted on the basis that it had the right to acquire the territory if the other sovereign had the right to cede it. "This rule has been adopted not only by the United States, but the world over. There was no plebiscite in Alsace or Lorraine when the borderland Frenchmen became the subjects of Germany. The French colonists of Quebec could not speak English when by the treaty of 1763 they were transformed into British subjects. The Spanish and native population of Cuba and the Philippines were not consulted in 1762 or 1764." 1 Butler Treaty-Making Power, § 46; Hall Int. L. pp. 47–50; Halleck Int. L. (ed. 1861) p. 125; Woolsey Int. L. pp. 63–65. "As the object of cession is sovereignty over the ceded territory, all such individuals domiciled thereon as are subjects of the ceding State become *ipso facto* by the cession subjects of the acquiring State. The hardship involved in the fact that in all cases of cession the inhabitants of the territory lose their old citizenship and are handed over to a new Sovereign whether they like it or not, has created a movement in favor of the claim that no cession shall be valid before the inhabitants have by a plebiscite given their consent to the cession. And several treaties

5. Annexation. Acquisition of territory may be accomplished by annexation, as where two governments, by treaty stipulation, or reciprocal legislation, unite under the government of one or the other.[3]

6. Accretion. Accretion is the gradual accumulation by alluvial formation, and where a boundary river changes its course gradually the parties on either side hold by the same boundary — the center of the channel. Avulsion is the sudden and rapid change in the course and channel of a boundary river. It does not work any change in the boundary, which remains as it was in the center of the old channel, although no water may be flowing therein. These principles apply alike whether the rivers be boundaries between private property or between states and nations.[4]

7. Prescription. Some writers add to these methods of acquisition that of prescription, which is the acquisition of territory by continuous and undisputed exercise of sovereignty during a period long enough to create the conviction that that condition of things is in conformity with international law and order.[5] But no general rule can be laid down as to the length of time and other circumstances

of cession concluded during the nineteenth century stipulate that the cession shall only be valid provided the inhabitants consent to it through a plebiscite. But it is doubtful whether the Law of Nations will ever make it a condition of every cession that it must be ratified by a plebiscite. The necessities of international policy may now and then allow or even demand such a plebiscite, but in most cases they will not allow it." 1 Oppenheim Int. L. § 219. See 1 Rivier, p. 210, for collection of treaties providing for plebiscite before cession effective. See 1 Moore Dig. Int. L. § 80 *et seq.*, "Cession."

3. This method has been very frequently employed in South America, as well as on at least two occasions in the United States. This was the case when Texas was admitted to the Union as a state and surrendered her independent government for the conditions of statehood in 1845; and also when Hawaii became a part of the United States under congressional resolution in 1898. 1 Butler Treaty-Making Power, § 44. See 1 Moore Dig. Int. L. §§ 103, 108.

4. Missouri *v.* Nebraska, 196 U. S. 23, 25 S. Ct. 155, 49 L. ed. 372, syllabus. See also Nebraska *v.* Iowa, 143 U. S. 359, 12 S. Ct. 396, 36 L. ed. 186; Indiana *v.* Kentucky, 136 U. S. 479, 10 S. Ct. 1051, 34 L. ed. 329; Missouri *v.* Kentucky, 11 Wall. (U. S.) 395, 20 L. ed. 116; New Orleans *v.* U. S., 10 Pet. (U. S.) 662, 9 L. ed. 573. "Accretion is the name for the increase of land through new formations. . . . And it is a customary rule of the Law of Nations that enlargement of territory, if any, created through new formations, takes place *ipso facto* by the accretion, without the State concerned taking any special step for the purpose of extending its sovereignty. . . . New formations through accretions may be artificial or natural. . . Artificial formations are embankments, breakwaters, dykes, and the like, built along the river or the coast line of the sea. As such artificial new formations along the bank of a boundary river may more or less push the volume of water so far as to encroach upon the other bank of the river, and as no State is allowed to alter the natural condition of its own territory to the disadvantage of the natural conditions of a neighbouring State territory, a State cannot build embankments, and the like, of such kind without a previous agreement with the neighboring State. But every riparian State of the sea may construct such artificial formations as far into the sea beyond the low-water mark as it likes and thereby gain considerably in land and also in territory, since the extent of the at least three miles wide maritime belt is now to be measured from the extended shore." 1 Oppenheim Int. L. § 229.

"Alluvion is the name for an accession of land washed up on the sea-shore or on a river-bank by the waters. Such accession is as a rule produced by a slow and gradual process, but sometimes also through a sudden act of violence, the stream detaching a portion of the soil from one bank of a river, carrying it over to the other bank, and embedding it there so as to be immovable (*avulsio*). Through alluvions the land and also the territory of a State may be considerably enlarged." 1 Oppenheim Int. L. p. 284.

The same definitions are given in 1 Moore Dig. Int. L. § 82 [*citing* Hagan *v.* Campbell, 8 Port. (Ala.) 9, 33 Am. Dec. 267; Buttenuth *v.* St. Louis Bridge Co., 123 Ill. 535, 17 N. E. 439, 5 Am. St. Rep. 545; Hopkins Academy *v.* Dickinson, 9 Cush. (Mass.) 544; Murry *v.* Sermon, 8 N. C. 56; Missouri *v.* Nebraska, 196 U. S. 23, 25 S. Ct. 155, 49 L. ed. 372; Nebraska *v.* Iowa, 143 U. S. 359, 12 S. Ct. 396, 36 L. ed. 186; Indiana *v.* Kentucky, 136 U. S. 479, 10 S. Ct. 1051, 34 L. ed. 329; Missouri *v.* Kentucky, 11 Wall. (U. S.) 395, 20 L. ed. 116; New Orleans *v.* U. S., 10 Pet. (U. S.) 662, 717, 9 L. ed. 573; Angell Water Courses, § 60; Gould Waters, § 139].

5. 1 Oppenheim Int. L. § 242 *et seq.*, also discusses the differences of opinion among writers as to the existence of prescription in international law.

In the treaty between Great Britain and Venezuela in 1897 the period of prescription, applicable only to that case, was fixed at fifty years. 6 Moore Dig. Int. L. § 966.

necessary to create a title by prescription, and everything depends upon the merits of the individual case.[6]

B. Effect of Change of Sovereignty — 1. Governmental Control and Title to Public Property. When a government acquires territory from another country by treaty of cession or by conquest and subjugation it acquires the right of governmental control over the territory and also the title to the public property, the public domain, and ungranted lands.[7]

2. Rights of Inhabitants — a. In General. The rights of the inhabitants are frequently determined by the treaty itself. Each case must be determined by the facts relating to it. It depends upon the treaty whether or not the acquiring government assumes the obligations of the ceding government.[8] There have been numerous cases in the courts of this country arising from the constant acquisitions which have been made and the effect of change of sovereignty upon the inhabitants. The general rule is that the laws of the acquired territory continue in force until changed by legislation of the state acquiring it;[9] the relations of the inhabitants of the ceded or conquered territory to each other do not change; their allegiance and the laws which may be classed as political are changed, but those which regulate the intercourse and conduct of individuals remain unaltered by the change of sovereignty;[10] but in each case the special features of the law and its application under the new conditions must be considered.[11]

b. Property Rights. On the transfer of the sovereignty of a country, the inhabitants are protected in the possession of their private property. Such is the

6. 1 Oppenheim Int. L. § 242 *et seq.* The question of prescription was involved in the Alaska boundary arbitration between Great Britain and the United States. See papers in that case.

7. See 2 Butler Treaty-Making Power, c. 13, for authorities bearing on "treaties of cession involving change of sovereignty over the ceded territory and the effect thereof on the laws, persons and property."

8. 2 Butler Treaty-Making Power, § 394 note 3. And fully discussed in record of the peace commission in Paris giving the reasons of the United States commissioners for declining to assume any indebtedness of Spain. Sen. Doc. 52, 55th Cong. 3d Sess. Jan. 4, 1899.

9. Fowler *v.* Smith, 2 Cal. 39; Chew *v.* Calvert, Walk. (Miss.) 54; Leitensdorfer *v.* Webb, 1 N. M. 34 [*affirmed* in 20 How. (U. S.) 176, 15 L. ed. 891]; More *v.* Steinbach, 127 U. S. 70, 8 S. Ct. 1067, 32 L. ed. 51; Cross *v.* Harrison, 16 How. (U. S.) 164, 14 L. ed. 889; Mitchel *v.* U. S., 9 Pet. (U. S.) 711, 9 L. ed. 283; American Ins. Co. *v.* 356 Bales of Cotton, 1 Pet. (U. S.) 511, 7 L. ed. 242; Campbell *v.* Hall, 1 Cowp. 204, Lofft. 655; Blankard *v.* Galdy, 2 Salk. 411, Scott Cas. Int. L. 104.

The ancient laws of conquered or ceded countries remain unchanged until actually abrogated by the new government, and therefore the laws of Spain continued in force here [Mississippi] until after the territorial government was actually organized under the act of congress of April 7, 1798, which was not until the year 1799. Chew *v.* Calvert, Walk. (Miss.) 54. See also Ortega *v.* Lara, 202 U. S. 339, as to continuance of laws of Porto Rico after the cession of 1898.

But this principle is not universal and it may be deemed inapplicable to California, where the influx of American emigrants has been so great as to have abrogated the Mexican laws on the subject of usury and implied warranty in conveyances of land. Fowler *v.* Smith, 2 Cal. 39.

Exception in case of public domain.— The doctrine that the laws of a conquered or ceded country, except so far as affected by the political institutions of the new government, remain in force after conquest or cession, until changed by it, does not apply to laws authorizing the alienation of any portions of the public domain, or to officers charged under the former government with that power. No proceedings affecting the rights of the new government over public property could be taken, except in pursuance of its authority on the subject. More *v.* Steinbach, 127 U. S. 70, 8 S. Ct. 1067, 32 L. ed. 51.

10. American Ins. Co. *v.* 356 Bales of Cotton, 1 Pet. (U. S.) 511, 7 L. ed. 242. See also Leitensdorfer *v.* Webb, 1 N. M. 34 [*affirmed* in 20 How. (U. S.) 176, 15 L. ed. 891]; The Fama, 5 C. Rob. 106; 1 Kent Comm. 177.

Treaty of Guadalupe Hidalgo did not change the laws relating to the civil rights and relations of the inhabitants of New Mexico in force at the time of the reëstablishment of peace between Mexico and the United States. Such laws remained in force until thereafter duly altered according to law. Leitensdorfer *v.* Webb, 1 N. M. 34 [*affirmed* in 20 How. (U. S.) 176, 15 L. ed. 891]. The provision contained in the treaty of Guadalupe Hidalgo, by which Mexico ceded California to the United States, that the private rights and relations of the inhabitants should be protected, was merely a formal recognition of the pre-existing law of nations on the subject. U. S. *v.* Moreno, 1 Wall. (U. S.) 400, 17 L. ed. 633.

11. 2 Butler Treaty-Making Power, § 395*a*.

law of nations, even in cases of conquest.[12] The change of sovereignty does not divest any vested rights of property in individuals whether inchoate or consummated,[13] or whether contingent or absolute.[14] While under the accepted law of nations as it is administered in the United States and Great Britain as well as elsewhere, private rights of property in the ceded territory are not affected by the

12. Leese *v.* Clark, 20 Cal. 387; Teschemacher *v.* Thompson, 18 Cal. 11, 79 Am. Dec. 151; Ferris *v.* Coover, 10 Cal. 589; Kenton *v.* Pontalba, 1 Rob. (La.) 343; Seville *v.* Chretien, 5 Mart. (La.) 275; Cessna *v.* U. S., 169 U. S. 165, 18 S. Ct. 314, 42 L. ed. 702; Airhart *v.* Massieu, 98 U. S. 491, 25 L. ed. 213; Langdeau *v.* Hanes, 21 Wall. (U. S.) 521, 22 L. ed. 606; Jones *v.* McMasters, 20 How. (U. S.) 8, 15 L. ed. 805; U. S. *v.* Power, 11 How. (U. S.) 570, 13 L. ed. 817; Strother *v.* Lucas, 12 Pet. (U. S.) 410, 9 L. ed. 1137; U. S. *v.* Percheman, 7 Pet. (U. S.) 51, 8 L. ed. 604; Mutual Assur. Soc. *v.* Watts, 1 Wheat. (U. S.) 279, 4 L. ed. 91. In Mitchel *v.* U. S., 9 Pet. (U. S.) 711, 734, 9 L. ed. 283, the following rules are announced as being settled: "That by the law of nations, the inhabitants, citizens or subjects of a conquered or ceded country, territory, or province, retain all the rights of property which have not been taken from them by the orders of the conqueror, or the laws of the sovereign who acquires it by cession, and remain under their former laws, until they shall be changed. That a treaty of cession was a deed or grant by one sovereign to another, which transferred nothing to which he had no right of property, and only such right as he owned and could convey to the grantee." "This is the principle of the law of nations, as expounded by the highest authorities. In the case of The Fama, 5 C. Rob. 106, Sir William Scott declares it to be 'the settled principle of the law of nations, that the inhabitants of a conquered territory change their allegiance, and their relation to their former sovereign is dissolved; but their relations to each other, and their rights of property not taken from them by the orders of the conqueror, remain undisturbed.' So, too, it is laid down by Vattel, Book 3d, cap. 13, sec. 200, that 'the conqueror lays his hands on the possessions of the State, whilst private persons are permitted to retain theirs; they suffer but indirectly by the war, and to them the result is, that they only change masters.' In the case of U. S. *v.* Percheman, 7 Pet. (U. S.) 51, 86, 87, 8 L. ed. 604, this court has said: 'It may be not unworthy of remark, that it is very unusual, even in cases of conquest, for the conqueror to do more than to displace the sovereign, and assume dominion over the country. The modern usage of nations, which has become law, would be violated, and that sense of justice and right which is acknowledged and felt by the whole civilized world would be outraged, if private property should be generally confiscated and private rights annulled. The people change their allegiance; their relation to their sovereign is dissolved; but their relations to each other, and their rights of property, remain undisturbed." Leitensdorfer *v.* Webb, 20 How. (U. S.) 176, 177, 15 L. ed. 891.

"Independent of treaty stipulation, this right [property] would be held sacred. The sovereign who acquires an inhabited territory, acquires full dominion over it; but this dominion is never supposed to divest the vested rights of individuals to property. . . . The people change their sovereign; their right to property remains unaffected by this change." Delassus *v.* U. S., 9 Pet. (U. S.) 117, 133, 9 L. ed. 71; U. S. *v.* Percheman, 7 Pet. (U. S.) 51, 86, 8 L. ed. 604. The cession of California to the United States "did not impair the rights of private property. They were consecrated by the law of nations, and protected by the treaty. The treaty stipulation was but a formal recognition of the preëxisting sanction in the law of nations." U. S. *v.* Moreno, 1 Wall. (U. S.) 400, 404, 17 L. ed. 633. See also Leese *v.* Clark, 20 Cal. 387; U. S. *v.* Repentigny, 5 Wall. (U. S.) 211, 18 L. ed. 627. See 1 Moore Dig. Int. L. § 92 *et seq.*, "Effect of Change of Sovereignty."

13. Delassus *v.* U. S., 9 Pet. (U. S.) 117, 9 L. ed. 71.

14. Jackson *v.* Lunn, 3 Johns. Cas. (N. Y.) 109; Kelly *v.* Harrison, 2 Johns. Cas. (N. Y.) 29, 1 Am. Dec. 154.

Revolt and restoration.— Upon the suppression of a rebellion, the restored legitimate government is entitled, as of right, to all moneys, goods and treasure which were public property of the government at the time of the outbreak; such right being in no way affected by the wrongful seizure of the property by the usurping government. But with respect to property which has been voluntarily contributed to, or acquired by, the insurrectionary government in the exercise of its usurped authority, and has been impressed in its hands with the character of public property, the legitimate government is not, on its restoration, entitled by title paramount, but as successor only (and to that extent recognizing the authority) of the displaced usurping government; and in seeking to recover such property from an agent of the displaced government can only do so to the same extent and subject to the same rights and obligations as if that government had not been displaced, and was itself proceeding against the agent. U. S. *v.* McRae, L. R. 8 Eq. 69, 38 L. J. Ch. 406, 20 L. T. Rep. N. S. 476, 17 Wkly. Rep. 764. Cotton which was the property of the Confederate states as a *de facto* government became the property of the United States upon the fall of the *de facto* government. U. S. *v.* Priolean, 2 Hem. & M. 559, 11 Jur. N. S. 792, 35 L. J. Ch. 7, 13 L. T. Rep. N. S. 92, 13 Wkly. Rep. 1062.

cession, these rights can only be determined and administered after the cession by the courts of, and in accordance with the law of the country to, which the cession was made.[15]

c. Personal Rights and Citizenship. Personal rights and citizenship where no property rights are involved have a somewhat different standing and, except so far as they are protected by constitutional guarantees, they remain wholly under governmental control.[16] As a general rule the treaty of peace provides for the effect on the citizenship and allegiance of the inhabitants of the ceded territory.[17] In many instances the treaties ceding territory to the United States have provided for the effect of the cession on the citizenship of the inhabitants, and in others it has been left to the general rules of law.[18] When a country becomes a province of, or in any way merged into, another country, it loses its identity and diplomatic relations with it cease or are carried on through the country into which it has been merged.[19]

15. It would be entirely beyond the jurisdiction of the courts of the ceding country to attempt to determine these rights, and it is doubtful even if the political department of the ceding country could take any action in regard thereto, as the ceded territory would have passed wholly beyond the jurisdiction of the original owner. "It is no answer to say that by the ordinary principles of international law private property is respected by the sovereign which accepts the cession and assumes the duties and legal obligations of the former sovereign with respect to such private property within the ceded territory. All that can be properly meant by such a proposition is, that according to the well understood rules of international law, a change of sovereignty by cession ought not to affect private property, but no municipal tribunal has authority to enforce such an obligation. And if there is either an express or a well understood bargain between the ceding potentate and the Government to which the cession is made, that private property shall be respected, that is only a bargain which can be enforced by sovereign against sovereign, in the ordinary course of diplomatic pressure." Cook *v.* Sprigg, 68 L. J. P. C. 144, 147, per the Earl of Halsbury, Lord Chancellor. Stipulations for the protection of private rights may be found in many treaties by which the United States has acquired territory. They are held by the courts to be merely declaratory of the law of nations. 1 Moore Dig. Int. L. § 99.

16. 2 Butler Treaty-Making Power, § 395*b*; American Ins. Co. *v.* 356 Bales of Cotton, 1 Pet. (U. S.) 511, 7 L. ed. 242.

Laws regulating the immigration of foreigners and aliens, and placing them under peculiar disabilities on account of some supposed inconvenience which may result to the state, are political in their nature, so that, on the annexation to the United States of territory which was formerly subject to an alien power, these laws change with the change of governments. People *v.* Folsom, 5 Cal. 373.

Redress of wrongs committed by ceding state.—It is the duty of a nation receiving a cession of territory to respect all rights of property recognized by the nation making the cession, but not to right wrongs which the grantor nation may have theretofore committed against individuals, except perhaps in cases where the wrong was so recently committed that the individual may not have had time to appeal to the courts or other authorities of the grantor nation for redress. Cessna *v.* U. S., 169 U. S. 165, 18 S. Ct. 314, 42 L. ed. 702.

17. See, generally, ALIENS, 1 Cyc. 81 *et seq.*; CITIZENS, 7 Cyc. 132 *et seq.*

As to the effect of change of sovereignty by conquest or cession on the citizenship and allegiance of the inhabitants of the conquered or ceded territory this is a matter that is now invariably fixed by treaty. 1 Oppenheim Int. L. p. 291; 2 Baker Halleck Int. L. p. 476; Bentzon *v.* Boyle, 9 Cranch (U. S.) 191, 3 L. ed. 701.

18. Under the treaty of peace with Spain all Spanish subjects residing in the ceded territories retained all rights of property but lost their citizenship and allegiance to the mother country unless within a year a declaration was made and filed of their decision to remain Spanish subjects. And all such Spanish subjects were made subject to the laws of the country where they reside. Articles 9, 11.

19. "The provision of the act of congress of May 1, 1810, fixing a salary to the consul at Algiers and assigning to him certain duties, treating that place as belonging to a Mohammedan power, ceased to be operative when the country, of which it was the principal city, became a province of France." Mahoney *v.* U. S., 10 Wall. (U. S.) 62, 19 L. ed. 864. In the case of Tobin *v.* Walkinshaw, 23 Fed. Cas. No. 14,070, McAllister 186, the question arose as to the citizenship of a native of Great Britain who had become a citizen of Mexico by naturalization and who resided in California before the treaty of Guadalupe-Hidalgo. The court held that by the principles of international law, on a transfer of territory by one nation to another, the political relations between the inhabitants of the ceded country and the former government are changed, and new ones arise between them and the new government. The

VII. EXTRATERRITORIALITY.

A. Rule Stated — "Comity of Nations." As a general proposition, both of international and municipal law, the laws of one country have in themselves no extraterritorial force, and whatever force they are permitted to have in foreign countries depends upon the comity of nations, regulated by a sense of their own interests and public convenience.[20] And whatever may be the municipal law under which a tribunal acts, if it exercises a jurisdiction which its sovereign is not allowed by the laws of nations to confer, its decrees must be disregarded out of the dominions of the sovereign.[21] Whether or not the principle of extraterritoriality is an absolute and well defined rule of law or only founded on courtesy, comity or deference between nations has been questioned.[22]

B. Limitations of Rule — 1. In General. There are instances, however, in which the municipal institutions of a state may operate beyond its territorial jurisdiction.[23]

2. In Case of Vessels — a. In Port. Unless treaty stipulations provide otherwise, a merchant vessel of one country, visiting the ports of another for the pur-

manner in which this is to be effected is ordinarily the subject of treaty. The contracting parties have the right to contract, to transfer, and to receive, respectively, the allegiance of all native-born citizens; but the naturalized citizens, who owe allegiance purely statutory, when released therefrom, are remitted to their original status.

20. 1 Wharton Dig. Int. L. 32, 33 [*citing* Le Roy *v.* Crowninshield, 15 Fed. Cas. No. 8,269, 2 Mason 151]; The Nereide, 9 Cranch (U. S.) 388, 3 L. ed. 769; Miller *v.* The Resolution, 2 Dall. (U. S.) 1, 1 L. ed. 263. For a number of instances of extraterritorial crimes and incidents and diplomatic correspondence relating thereto see 2 Moore Dig. Int. L. § 200.

Mr. Justice Story considers that the phrase, "Comity of nations," is most appropriate as indicating the foundations and extent of the obligation of the laws of one nation within the territories of another. The extraterritorial influence of laws is derived from the voluntary consent of the nation within which its application is proposed; and they are tacitly adopted *jure gentium*, in the absence of any positive rule, affirming, denying, or restraining their operation; unless they are repugnant to local policy or prejudicial to local interests. It is not the comity of courts, but the comity of nations, which authorizes the administration of foreign laws within the limits of another sovereignty — and subject to the limitations we have mentioned, the courts can exercise no discretion on the subject. Hanrick *v.* Andrews, 9 Port. (Ala.) 9.

21. Rose *v.* Himely, 4 Cranch (U. S.) 241, 2 L. ed. 608. "A power to seize for a violation of the laws of the country is an attribute of sovereignty, and is to be exercised within the limits which circumscribe the sovereign power from which it is derived. And while the rights of war may be exercised on the high seas, a seizure beyond the limits of territorial jurisdiction for a breach of a municipal regulation is not warranted by international law." 1 Wharton Dig. Int. L. 33 [*citing* Rose *v.* Himely, *supra*].

Comity cannot prevail in cases where it violates the law of our own country, or the law of nature, or the law of God. Kerwin *v.* Doran, 29 Mo. App. 397.

22. The Tribunal of Arbitration at Geneva held that "the privilege of exterritoriality, accorded to vessels of war, had been admitted into the law of nations, not as an absolute right, but solely as a proceeding founded on the principle of courtesy and mutual deference between nations." 4 Pap. Rel. Tr. Washington 50.

23. Some of these which relate to the person of the sovereign or the person of an ambassador of the sovereign or the right of a foreign army or fleet to march or sail through the territory of another country have been discussed *supra*, pp. 20–22. See also under AMBASSADORS AND CONSULS; NEUTRALITY LAWS; TREATIES; WAR. And see 2 Moore Dig. Int. L. c. 6, "Exemptions from Territorial Jurisdiction."

Wheaton, in enumerating the instances in which the municipal institutions of a state may operate beyond the limits of its territorial jurisdiction, specifies: "(1) person of the sovereign; (2) the person of the ambassador and his residence; (3) the foreign army or fleet marching through, sailing over or stationed in the territory of another State, and in the absence of any express prohibition the ports of a friendly State are considered as open to the public, armed and commissioned ships belonging to another nation with whom that State is at peace. Such ships are exempt from the jurisdiction of the local tribunals and authorities, whether they enter the ports under the license implied from the absence of any prohibition or under an express permission stipulated by treaty." Wheaton Int. L. (Dana 8th ed. 1866) pt. 2, § 95, p. 153. In elaborating upon this, he says: "If there shall be no prohibition, the ports of a friendly nation are considered as open to the public ships of all

pose of trade, is, so long as she remains, subject to the laws which govern those ports.[24]

b. On High Seas. Ordinarily the authority of a nation cannot extend beyond her boundaries; but, where the boundary is the high seas, the right of a nation to prevent evasion of its laws is not so restricted. It may watch its coast and seize ships approaching with intent to violate its laws, provided such right is exercised at a reasonable distance only.[25] Crimes committed on the high seas, whether on board ships of war or merchantmen, are considered as committed in the territory of the state to which the ship belongs, because only the laws of the latter are infringed, and consequently only the jurisdiction of the same is called upon to adjudicate, whether the accused be of the nationality of the ship or a foreigner, and whether the crime was committed against a fellow countryman or between foreign passengers.[26]

c. Distinctions in Regard to Kind of Vessel. There are certain distinctions in regard to the extent of extraterritoriality of a nation's laws in regard to its merchant ships and its ships of war.[27] As to immunity from seizure of a foreign ship of war see the opinion of Attorney-General Cushing [28] and the opinion of Chief

powers with whom it is at peace, and they are supposed to enter such ports and remain in them, while allowed to remain, under the protection of the Government of the place." Wheaton Int. L. § 100, p. 159.

24. U. S. *v.* Diekelman, 92 U. S. 520, 23 L. ed. 742. See, however, People *v.* Marine Ct., 6 Hun (N. Y.) 214, where it was held otherwise under the provisions of the treaty with Germany. A vessel on the high seas in a time of peace and on a lawful voyage is under the exclusive jurisdiction of her home state, and, if forced by unavoidable accident into a friendly port, she loses none of the rights which she had on the high seas; but she and her cargo, and the persons on board, with their property rights and personal relations, as settled by the laws of the state to which they belong, are placed temporarily under the protection extended by the law of nations to those so circumstanced, and although the vessel and her master, crew, and owners may be subject to the law of the place for any infractions thereof committed while so situated, yet the local law does not supersede the law of the country to which the vessel belongs, so far as relates to the rights, duties, and obligations of those on board. McCargo *v.* New Orleans Ins. Co., 10 Rob. (La.) 202, 43 Am. Dec. 180.

Rights of consuls over vessels of their country in the ports to which they are accredited see AMBASSADORS AND CONSULS; SHIPPING; and TREATIES.

25. Cucullu *v.* Louisiana Ins. Co., 5 Mart. N. S. (La.) 464, 16 Am. Dec. 199. But a seizure for the breach of the municipal laws of one nation cannot be made within the territory of another. The Apollon, 9 Wheat. (U. S.) 362, 6 L. ed. 111. For jurisdiction over ports and application of local laws as generally applied by international law and in special instances by treaties see 1 Moore Dig. Int. L. § 207 *et seq.*

26. Riquelme Int. L. tom. 1, p. 243 [*quoted* in 8 Op. Atty.-Gen. 79]. See also CRIMINAL LAW, 12 Cyc. 214 *et seq.*

27. Mali *v.* Common Jail Keeper, 120 U. S. 1, 7 S. Ct. 385, 30 L. ed. 565. "When the crime is not committed on the high seas, but while the ship is in territorial waters, then it is necessary to distinguish between ships of war and merchantmen. In the first case the principle of exterritoriality covers the ship from all foreign intervention or investigation. . . . In the second case, when the crime has been committed on board a merchantman in a foreign port, the resolution is different because the condition of a merchantman in a foreign port is different from that of a man of war. The rule in these cases, in default of treaties or inducements of reciprocity determining it, is, that if the offence affect only the interior discipline of the ship, without disturbing nor compromitting the tranquillity of the port, the local authority ought to declare itself incompetent unless its assistance is requested, because the true regulator of these questions, in which the local authority has no interest, is the consul." Riquelma, Int. L. tom. 1, p. 244; 8 Op. Atty.-Gen. 73 (Cushing).

Extraterritorial jurisdiction extends to merchant vessels on high seas and all on board of them. Wilson *v.* McNamee, 102 U. S. 572, 26 L. ed. 234. See Reg. *v.* Anderson, L. R. 1 C. C. 161, 11 Cox C. C. 198, 38 L. J. M. C. 12, 19 L. T. Rep. N. S. 400, 17 Wkly. Rep. 208, which was the case of an American citizen, a seaman on a British merchant vessel, who committed a crime in a French port.

Exemption of public ship see The Constitution, 4 P. D. 39, 4 Aspin. 79, 48 L. J. P. & Adm. 13, 40 L. T. Rep. N. S. 219, 27 Wkly. Rep. 739, Sir Robert Phillimore. The exemption extends to a mail packet as well as to armed vessels. The Parlement Belge, 5 P. D. 197, 4 Aspin. 234, 42 L. T. Rep. N. S. 273, 28 Wkly. Rep. 642.

28. A foreign ship of war or any prize of hers in command of a public officer possesses, in the ports of the United States, the rights of extraterritoriality and is not subject to local jurisdiction. And a prisoner on board such vessels cannot be released on habeas corpus issuing from either the courts of the

Justice Marshall in "The Schooner Exchange" in which a vessel of war belonging to the French government was released from seizure.[29]

3. CONSULAR COURTS. There is another respect in which the laws of one country are sometimes administered in the territory of another, and that is by the consular courts which have been established in ports of Eastern countries.[30] This jurisdiction rests wholly on treaty stipulations and no government has the right to establish its courts within the territory of another government without the latter's consent.[31] The right of the United States to try Americans in consular courts has been established by the supreme court of the United States.[32]

VIII. RELATIONS BETWEEN STATES.

A. In General. A state is bound to treat every other state with equity and fairness according to the rules of international law, and the proper rules applicable to the situation are to be determined according to the circumstances.[33]

B. Under Treaties. The relations of one state to another state may, however, be affected and determined by treaties existing either between the individual nations or general treaties to which many nations are parties.[34]

IX. CLAIMS OF CITIZENS AGAINST FOREIGN STATES IN GENERAL.

A. "Interposition." This assertion of a claim for its citizen against a foreign government is known as "interposition."[35]

B. Claims Founded on a Tort. Claims of a private citizen against a foreign government are in their nature either contractual or tortious. Where the claim is founded on a tort committed by a foreign government, if the wrong committed is grievous in its nature, and especially if it is the result of animosity against the injured party on account of his nationality, the government of the injured party

United States or of a particular state. 7 Op. Atty.-Gen. 122.

29. The Exchange, 7 Cranch (U. S.) 116, 3 L. ed. 287.

30. See AMBASSADORS AND CONSULS, 2 Cyc. 274 *et seq.*

31. See AMBASSADORS AND CONSULS, 2 Cyc. 275. The United States has on numerous occasions established consular courts. Sometimes these courts have been exclusively presided over by United States officials and their jurisdiction limited to citizens of the United States; in other cases they have been joint tribunals established by the United States and other powers.

32. Ross *v.* McIntyre, 140 U. S. 453, 11 S. Ct. 897, 35 L. ed. 581. See also Dainese *v.* Hale, 91 U. S. 13, 23 L. ed. 190; Steamer Spark *v.* Lee Choi Chum, 1 Sawy. (U. S.) 713. The subject of consular courts and extraterritoriality is extensively treated in the Notes of Davis and Haswell contained in Treaties and Conventions of the United States (ed. 1889), pp. 1279–1285, 1289. See also 2 Butler Treaty-Making Power, §§ 448–452, where these notes are published in full and the authorities are collated and discussed. See also AMBASSADORS AND CONSULS, 2 Cyc. 274 *et seq.*; 12 U. S. St. at L. 72 [U. S. Comp. St. (1901) p. 2768 *et seq.*]. Extraterritorial jurisdiction is the subject of 2 Moore Dig. Int. L. § 259 *et seq.*

33. "The law of nations requires every national government to use 'due diligence' to prevent a wrong being done within its own dominion to another nation with which it is at peace, or to the people thereof; and because of this obligation of one nation to punish those who within its own jurisdiction counterfeit the money of another nation has long been recognized." U. S. *v.* Arjona, 120 U. S. 479, 484, 7 S. Ct. 628, 30 L. ed. 728 [*citing* Vattel L. of N. (ed. 1758) par. 108; Phillimore (ed. 1876), bk. 1, c. 10, pp. 46, 47].

34. See TREATIES. And see 4 Moore Dig. Int. L. c. 15, "Intercourse of States."

For the relations of a state to other states with which it is at peace but which are at war with each other see NEUTRALITY.

35. "Interposition is the diplomatic presentation by a nation of the claim of a subject against a foreign government with a view to induce by means of negotiation or arbitration a settlement of the claim. It differs from intervention in that it is confined to entirely peaceful remedies. When nations resort to reprisal, retorsion, 'pacific' blockade or war in order to force a settlement of the pecuniary claims of their subjects, they may be said to have intervened — they have committed a hostile act. On principle, neither interposition nor intervention should be allowed by international law in the case of a foreigner, who has been denied the standard of protection and justice to which he is entitled, until he has exhausted in vain the remedies provided by the national law." Annals Am. Acad. Pol. & Soc. Sci. (1903) p. 74, Geo. Winfield Scott.

"Whether the remedy of interposition will avail the foreigner anything in a particular

is morally bound to assert the rights of its citizen and demand indemnity from the other government. The highest duty which a government owes to its citizens is to protect them against injuries inflicted on account of their nationality.[36]

C. Claims Founded on Contract. It is different, however, with claims founded on contract, for, while the government of the injured citizen may endeavor to obtain redress for its citizen in such case, the same moral obligation does not exist as in case of tort, because the elements of national honor are not involved to such a great extent, and the citizen is merely sustaining the same loss in a business risk that he might have sustained had he embarked his capital in a private enterprise and suffered loss as the result of individual delinquency or ordinary mercantile misfortune. While this cannot be laid down as a hard-and-fast rule in regard to the assertion and enforcement of claims against foreign governments by the government of the aggrieved citizen founded on contract such has been the policy of the United States and Great Britain.[37] Some of the modern writers on international law, especially Calvo and Drago, have advanced the theory that no government should use force to collect claims of its citizens

case depends upon the standard of protection and justice which he is entitled to enjoy by the rules of international law, regardless of and apart from the national or municipal law of the nation which denies the civil responsibility. This standard can only be determined by the principles governing the actual occasion in which interposition has been successful." Annals Am. Acad. Pol. & Soc. Sci. (1903) p. 74, Geo. Winfield Scott.

36. One of the strongest declarations of the policy of Great Britain in protecting its subjects against injuries in foreign countries was made by Lord Palmerston in his speech in the house of commons in 1850 in defense of his policy regarding the celebrated "Don Pacifico" claim. The claimant was a British subject of Jewish extraction and claimed to have lost household property, jewels, papers, etc., of the value of some thirty-two thousand pounds sterling at the hands of a mob in Athens, where he was domiciled; the claim was subsequently settled for about one-thirtieth of the amount demanded. An interesting account of this celebrated incident is to be found in 2 McCarthy Hist. of Our Own Times, c. 19.

General information regarding alien claims and many of the cases which have been the subject of such claims before international tribunals will be found in the following: History and Digest of International Arbitrations, by John Bassett Moore. Washington, Government Printing Office (1898). 7 Moore Dig. Int. L. c. 21 *et seq.*, Government Printing Office (1906). The Law of Claims against Governments, including the Mode of Adjusting Them and the Procedure Adopted in their Investigation, H. R. Report No. 134, 43d Congress, 2d Session, by Wm. Lawrence. Washington, Government Printing Office (1875). Venezuelan Arbitrations of 1903, by Jackson H. Ralston. Washington, Government Printing Office (1904). The Venezuelan Arbitration before The Hague Tribunal (1903). Report of William L. Penfield. Washington, Government Printing Office (1905). The Treaty-Making Power of the United States, by Charles Henry Butler. The Banks Law Publishing Co., New York (1902), c. 15, §§ 442–445. Report of Robert C. Morris, Agent of United States, United States and Venezuelan Claims Commission (1903), Government Printing Office (1904). Senate Document 231, 56th Congress, 2d Session (1901). A compilation of reports of the Senate Committee on Foreign Relations from 1789 to 1901. This report consists of eight volumes, the first three of which contain reports of the Committee on, and the history of, a large number of claims of citizens of the United States against foreign countries.

37. The policy of Great Britain in regard to money claims was laid down by Lord Palmerston in 1848, in a circular addressed to the representatives of that country in foreign states, as follows: "Her Majesty's Government have frequently had occasion to instruct her Majesty's representatives in various foreign States to make earnest and friendly, but not authoritative representations in support of the unsatisfied claims of British subjects who are holders of public bonds and money securities of those states. As some misconception appears to exist in some of those states with regard to the just right of her Majesty's government to interfere authoritatively, if it should think fit to do so, in support of those claims, I have to inform you as the representative of her Majesty in one of the states against which British subjects have such claims, that it is for the British government entirely a question of discretion, and by no means a question of international right, whether they should or should not make this matter the subject of diplomatic negotiation. If the question is to be considered simply in its bearing on international right, there can be no doubt whatever of the perfect right which the government of every country possesses to take up, as a matter of diplomatic negotiation, any well-founded complaint which any of its subjects may prefer against the government of another country, or any wrong which from such foreign government those subjects may have sustained. . . . It has hitherto

against foreign governments, especially if founded on contract.[37a] It has been a matter of discussion whether or not the term "claim against foreign government," when used generally, does not refer exclusively to a claim founded upon tort.[38]

D. Claims May Be Either National or Individual. As between themselves, the claims of one government against another are always national, but as between the government asserting the claim and its own injured citizen, the claim might

been thought by the successive governments of Great Britain undesirable that British subjects should invest their capital in loans to foreign governments instead of employing it in profitable undertakings at home; and with a view to discourage hazardous loans to foreign governments, who may be either unable or unwilling to pay the stipulated interest thereupon, the British government has hitherto thought it the best policy to abstain from taking up as international questions the complaints made by British subjects against foreign governments which have failed to make good their engagements in regard to such pecuniary transactions. For the British government has considered that the losses of imprudent men, who have placed mistaken confidence in the good faith of foreign governments, would prove a salutary warning to others, and would prevent any other foreign loans from being raised in Great Britain, except by governments of known good faith and ascertained solvency. But nevertheless it might happen that the loss occasioned to British subjects by the nonpayment of interest upon loans made by them to foreign governments might become so great that it would be too high a price for the nation to pay for such a warning as to the future, and in such a state of things it might become the duty of the British government to make these matters the subject of diplomatic negotiation." See Hall Int. L. (4th ed.) pp. 294, 295, where in commenting on this circular, the author says: "A short time previously Lord Palmerston, in answer to a question in the House of Commons, indicated that under certain circumstances he might be prepared to go the length of using force. The doctrine and the principles of policy laid down in Lord Palmerston's circular were more lately reaffirmed by Lord Salisbury. See the "London Times" of Jan. 7, 1880.

37a. See Dr. Drago's original note of Dec. 29, 1902, to the minister of the Argentine Republic to the United States (U. S. For. Rel. (1903) p. 1); Secretary Hay's note to the United States minister to Argentine, inclosing a memorandum upon the subject of Dr. Drago's note (U. S. For. Rel. (1903) p. 5); "Calvo and the Calvo Doctrine," 18 Green Bag (July, 1906, No. 7), p. 377 *et seq*). Proceedings of the Pan-American Conference at Rio de Janeiro of 1906 will refer to this doctrine. On April 17, 1903, Calvo, who was at that time envoy extraordinary and minister plenipotentiary to France and to the pope, from the Argentine Republic, wrote a circular letter soliciting the opinions of a number of specialists on international law upon Dr. Drago's note. The replies of a number of these correspondents are printed in the "Revue de droit international, et de legislation comparée," for 1903, and with other material bearing on the question may be found in a pamphlet entitled "La Doctrine de Monroe," Paris, 1903, 28 pages, 8°, by Eymeoud. The chargé d'affaires of the Argentine Republic in Russia has published a pamphlet containing an article by F. De Martens entitled "Par la justice vers la paix," and Dr. Drago's original note and certain other matters as an appendix.

The Calvo doctrine is predicated upon the fact that contracts made with a foreign nation should be construed in the courts of that nation.

The Drago doctrine presupposes the Calvo clause and carries the matter a step further, namely, that judgment had in those courts should be executed according to the same law.

If carried to their fullest extent the Calvo and Drago doctrines preclude diplomatic construction of contract debts as well as diplomatic enforcement or execution of adjudged indebtedness on contract claims.

38. There are conflicting views as to whether "claims" includes bonds — confers jurisdiction by the use of that term to entertain a claim based upon government bonds. In the Columbian Bond case (Convention with Columbia (1864), it was held by Sir Frederick Bruce, as umpire, that there was no jurisdiction in the tribunal to entertain the claim. He refers to the fact that the United States, like Great Britain, has never seen fit to give a citizen who holds an interest in the debt of a foreign country the same support that it would where he had suffered from a direct act of violence or injustice and says: "It is easy to see that many reasons of policy exist which would deter a government from insisting on a preferential payment of a part only of the public creditors of a foreign state." And he therefore concluded that "the term 'claims' in the convention must be construed so as to confine it to demands which have been made the subject of international controversy, or which are of such a nature as, according to received international principles, would entitle them on presentation to the official support of the government of the complainant." 4 Moore Int. Arb. 3612, 3615. See also Du Pont *v.* Mexico, No. 440, Convention of 1868, 4 Moore Int. Arb. 3616. But in the Venezuelan Bond Cases, No. 18, United States and Venezuelan Claims Commission, Convention of 1885, it was held in elaborate opinions that bonds were the subject of claims. 4 Moore Int. Arb. 3616. Claims based on contracts with a government are frequently the subject of international arbitration. The questions of international law

be either national or individual.[39] There are many different views, however, on this division of claims into national and individual.[40] After the treaty of Washington of 1871, the question arose as to whether the tribunal that was to sit at Geneva and determine the amount, if any, due from Great Britain to the United States, should take cognizance of the national claims which might have amounted to many hundreds of millions of dollars. The tribunal itself decided that its jurisdiction extended only to the specified claims for individual loss.

E. Duty of Government to Present and Press Claims — 1. A Matter of Discretion. It is always a matter of discretion whether or not a government will present the claim of its injured citizen against a foreign government committing, or responsible for, an injury. Its relations with the foreign government may not, at the time, be in a condition which would justify any further strain upon them

arising are usually those of citizenship and right to the protection of the government intervening. See also Aliens; Neutrality Laws. See 4 Moore Int. Arb. 3425–3590, for cases based on contract. Under the protocol with Venezuela of 1893, the term "all claims" includes an equitable demand. Boulton's Case, Venez. Arb. (1903) Ralston Rep. 26.

39. For instance, the claims of the United States against Great Britain for the damages occasioned by the Alabama and other Confederate cruisers were, as against Great Britain, wholly national, but they could be separated into two divisions: "National," representing the general loss to the shipping industry of the United States, driving its merchant flag off the sea; and "Individual," as to those claims in which the individual ship-owners lost their vessels and the owners of the cargoes lost their cargoes. The following extract throws a great deal of light on the terms "national" and "individual" when applied to claims against foreign governments "The word 'national' has been largely used in argument in allusion to the different kinds of claims at different periods brought into the discussion, and is a convenient word if clearly understood in the connection in which it is used. All claims are 'national' in the sense of the *jus gentium*, for no nation deals as to questions of tort with an alien individual; the rights of that individual are against his Government, and not until that Government has undertaken to urge his claim — not until that Government has approved it as at least *prima facie* valid — does it become a matter of international contention; then, by adoption, it is the claim of the nation, and as such only is it regarded by the other country. The name of the individual claimant may be used as a convenient designation of the particular discussion, but as between the nations it is never his individual claim, but the claim of his Government founded upon injury to its citizen. Nations negotiate and settle with nations; individuals have relations only with their own Governments. Other claims, sometimes the subject of argument, rest upon injury to the state as a whole; of these an apt illustration is found in the so-called 'indirect' claims against Great Britain, disposed of in the arbitration of 1872, and in the claims advanced by France for injury caused by non-compliance with the treaties of 1778. Thus, while all claims urged by one nation upon another are, technically speaking, 'national,' it is convenient to use, colloquially the words 'national' and 'individual' as distinguishing claims founded upon injury to the whole people from those founded upon injury to particular citizens. Using the words in this sense, it appears that in the negotiations prior to the treaty of 1800, and in effect in the instrument itself, national claims were advanced by France against individual claims advanced by the United States. France urged that she had been wronged as a nation; we urged that our citizens' rights had been invaded. If 'national' claims had been used against 'national' claims, and the one class had been set off against the other in the compromise, of course the agreement would have been final in every way, as the surrender and the consideration therefor would have been national, and no rights between the individual and his own Government could have complicated the situation. But in the negotiation of 1800 we used 'individual' claims against 'national' claims, and the set-off was of French national claims against American individual claims. That any Government has the right to do this, as it has the right to refuse war in protection of a wronged citizen, or to take other action, which, at the expense of the individual, is most beneficial to the whole people, is too clear for discussion. Nevertheless, the citizen whose property is thus sacrificed for the safety and welfare of his country has his claim against that country; he has a right to compensation, which exists even if no remedy in the courts or elsewhere be given him. A right often exists where there is no remedy, and a most frequent illustration of this is found in the relation of the subject to his sovereign, the citizen to his government." Gray *v.* U. S., 21 Ct. Cl. 340, 391, per Davis, J., in one of the leading French Spoliation cases.

40. One test which is frequently although not always applied to ascertain whether claims are individual or national is the disposition of the indemnity received. Any money received by the United States for indemnity for a national claim must of course eventually find its way into the treasury of

and it might be inexpedient to press an individual matter.[41] How far governments should and will assert the claims of their citizens for bonds of defaulting governments has been discussed both academically and practically. There is no law, either municipal or international, by which a citizen can compel his own government to assert his claim against a foreign government. Whether or not a government which thus refuses to press a claim of its citizen against a foreign government becomes liable to its citizen for its failure to press the claim is a matter which must be determined by the municipal or national law of that government, and a claim of a citizen against his own government for refusing to present his claim against a foreign government can be determined only in such forum as that government clothes with jurisdiction of the case.

2. Failure to Press, or Relinquishment of Claim — a. Right of Government to Relinquish. It is a principle of international law that claims of individuals against a foreign government are the property of the government of the aggrieved citizen and that that government has the absolute right to relinquish the claim, to settle it, or to accept an indemnity therefor and after such adjustment the claim cannot ever be pressed again by the citizen against the foreign government.[42]

b. Indemnity to Citizen. In the United States it has generally been acknowledged, as an abstract principle of law, that where the government either refuses to press the just claim of a citizen against a foreign government or settles with the foreign government in such manner that the claim cannot be pressed, the government is bound to indemnify the citizen.[43] This results from a principle somewhat similar to that of eminent domain. The claim itself is private prop-

the United States, whence it can only be withdrawn under some congressional authority. On the other hand indemnities for individual claims are always paid to the United States, but they are as a general rule received by the executive department of the government, and paid over by it directly to the parties entitled thereto.

41. Where a citizen applies to his government to press his claim against a foreign power, he does so subject to the wise and judicious discretion which a nation has a right to exercise in determining his duty to itself, the citizen, and the foreign power. U. S. *v.* La Abra Silver Min. Co., 29 Ct. Cl. 432. "A citizen of one nation wronged by the conduct of another nation, must seek redress through his own government. His sovereign must assume the responsibility of presenting his claim, or it need not be considered. If this responsibility is assumed, the claim may be prosecuted as one nation proceeds against another, not by suit in the courts, as of right, but by diplomacy, or, if need be, by war. It rests with the sovereign against whom the demand is made to determine for himself what he will do in respect to it. He may pay or reject it; he may submit to arbitration, open his own courts to suit, or consent to be tried in the courts of another nation. All depends upon himself." U. S. *v.* Diekelman, 92 U. S. 520, 524, 23 L. ed. 742. A claim of an individual against a government does not become international in character until demand has been made on the government debtor. The Del Rio Case, Venez. Arb. (1903) Ralston Rep. 879.

The secretary of state must decide, according to his own discretion, whether he will press the claim of a citizen of the United States upon the attention of a foreign government. 9 Op. Atty.-Gen. 338 (Black). See *infra*, IX, F.

42. It is a part of the sovereign right of a government, if, at any time before the consummation of a transaction relating to the claim of a citizen against a foreign government, it becomes satisfied of the falsity or injustice of the claim, to abandon all further action on behalf of the claimant. U. S. *v.* La Abra Silver Min. Co., 29 Ct. Cl. 432. "The government may take private property for public use by the terms of a treaty, and may release the choses in action of American citizens to a foreign government." Meade's Case, 2 Ct. Cl. 224, 225. See also *infra*, IX, E, 2, b, text and note 45.

43. "That Congress had the power to sacrifice the rights and interests of private citizens to secure the safety or prosperity of the public, I have no doubt; but the immutable principles of justice; the public faith of the states, that confiscated and received British debts, pledged to the debtors; and the rights of the debtors violated by the treaty; all combine to prove, that ample compensation ought to be made to all the debtors who have been injured by the treaty for the benefit of the public. This principle is recognized by the Constitution, which declares, 'that private property shall not be taken for public use without just compensation.' See Vattel. lib. 1, c. 20, f. 244. . . . "It is not to be supposed, that those whose duty it may be to make the compensation, will make the rights of our citizens to be sacrificed to a public object, without the fullest indemnity." Ware *v.* Hylton, 3 Dall. (U. S.) 199, 245, 1 L. ed. 568. In Gray *v.* U. S., 21 Ct. Cl. 340, 390, Davis, J., says: "The judiciary

erty, but it may be necessary to sacrifice it for the public good, and the owner of the claim should be compensated for his property so taken.[44] It has been decided by the supreme court of the United States that claims of citizens of the United States are private property as between the government of the United States and its citizen, and the citizen whose claim is asserted by the government, and which, so far as the foreign government is concerned, are national property of the United States.[45] No court, however, exists which has jurisdiction over the United

has seldom occasion to deal with the abstract right of the citizen against his Government; for in a case raising such a question the individual is without remedy other than that granted him by the legislature. The question of right, therefore, is usually passed upon by the political branch of the Government, leaving to the courts the power only to construe the amount and nature of the remedy given. Still judicial authority is not wanting in support of the position that by the agreement with France the United States became liable over to their individual citizens. Lord Truro laid down in the House of Lords as admitted law — 'That if the subject of a country is spoliated by a foreign Government he is entitled to redress through the means of his own Government. But if from weakness, timidity, or any other cause on the part of his own Government no redress is obtained from the foreign one, then he has a claim against his own country' (De Bode *v.* Reg., 3 H. L. Cas. 449, 464). The same position is sustained by that eminent writer upon the public law, Vattel, who held that while the sovereign may dispose of either the person or the property of a subject by treaty with a foreign power, still, 'as it is for the public advantage that he thus disposes of them, the state is bound to indemnify the citizens who are sufferers by the transaction.'" See also extract from Grotius, cited in 2 Wharton Dig. Int. L. p. 709, § 248: "But we must also observe this, that a king may, two ways, deprive his subjects of their rights, either by way of punishment or by virtue of his eminent domain. But if he do it the last way it must be for some public advantage, and then the subject ought to receive, if possible, a just compensation for the loss he suffers out of the common stock (Grotius War and Peace 333, f. 2, ch. 14, § 7)."

"A settlement by the governments of the ground of international controversy between them, *ipso facto* settles any claims of individuals arising under such controversies against the government of the other country, unless they especially excepted; as each government by so doing assumes, as principal, the adjustment of the claims of its own citizens, and becomes, itself, solely responsible to them." McLeod's Case, Treaty of 1853 with Great Britain, 3 Moore Int. Arb. 2419, 2422. See also umpire's decision, p. 2424. And see the case of Houard, 3 Moore Int. Arb. 2428, No. 107 Span. Com. 1871.

44. Wheaton (Wheaton Int. L. (Boyd 3d ed.) p. 623, says: "The power of making treaties of peace, like that of making other treaties with foreign states, is, or may be, limited in extent by the national Constitution. We have already seen that a general authority to make treaties of peace necessarily implies a power to stipulate the conditions of peace. . . . The duty of making compensation to individuals whose private property is thus sacrificed to the general welfare is inculcated by jurists as correlative of the sovereign right of alienating the things which are included in the eminent domain." Halleck, quoting both Wheaton and Kent, says that the treaty-making power is bound by the fundamental law of the constitution of the state, and the only exception made by Halleck, Wheaton, or Kent as to compensation to individuals is when a state is obliged for purposes of peace to cede territory they are not necessarily obliged to indemnify the persons whose territory is so ceded. It can easily be seen that this is not the same as a sacrifice of property, as it is simply a transfer of sovereignty, the ownership of the property not being affected, whereas in the case of claims the property right itself is not simply relegated for adjudication to courts of another country, but is absolutely destroyed. The United States, however, indemnified the owners of property which passed from under its sovereignty to that of Great Britain by the Webster-Ashburton treaty of 1842.

"A release by the United States to a foreign government (in part consideration of a cession of territory) of an indebtedness to an American citizen, acknowledged to be valid, is a taking of private property for public use." Meade *v.* U. S., 2 Ct. Cl. 224, 225.

"A debt due to an American citizen from a foreign Government is as much property as houses and lands, and when taken for public use is to be paid for in the same manner." Meade *v.* U. S., 2 Ct. Cl. 224, 225.

45. This right of indemnity against the acts of a foreign government was held, in Comegys *v.* Vasse, 1 Pet. (U. S.) 193, 215, 7 L. ed. 108, to be real and tangible enough to pass by general assignment by an insolvent, and it was held by the court, per Story, J., that "the right to indemnity for an unjust capture, whether against the captors or the sovereign; whether remediable in his own courts, or by his own extraordinary interposition and grants, upon private petition, or upon public negotiation, is a right attached to the ownership of the property itself, and passes by cession to the use of the ultimate sufferer." This decision has been followed in numerous cases. See Leonard *v.* Nye, 125 Mass. 455; Delafield *v.* Colden, 1 Paige Ch. (N. Y.) 139; Williams *v.* Heard, 149 U. S.

States to compel it to indemnify its citizen for refusing to press or for relinquishing a claim against a foreign government. The United States has relinquished claims against foreign governments and established courts having jurisdiction to determine the amounts due to and the rights of the citizens whose claims have been so relinquished.[46]

3. Where Remedy Exists in Courts of Offending Country. As a general rule claims will not be asserted by a government in behalf of its citizen where a remedy exists in the courts of the offending country until every judicial remedy is exhausted which is open to the claimant.[47] And if the claim is not allowed by the courts, the government of the aggrieved citizen will not interfere unless there has been a substantial denial of justice, or such that makes it apparent that the judgment was influenced by the nationality of or prejudice against the citizen aggrieved.[48] Many contracts and concessions with governments, particularly with

529, 11 S. Ct. 885, 35 L. ed. 550; Phelps *v.* McDonald, 99 U. S. 298, 25 L. ed. 473; Lewis *v.* Bell, 17 How. (U. S.) 616, 15 L. ed. 203; Clark *v.* Clark, 17 How. (U. S.) 315, 15 L. ed. 77.

"The decisions and awards of the Court of Commissioners of Alabama Claims, under the statutes of the United States, were conclusive as to the amount to be paid upon each claim adjudged to be valid, but not as to the party entitled to receive it. A claim decided by that court to be a valid claim against the United States is property which passes to the assignee of a bankrupt under an assignment made prior to the decision." Williams *v.* Heard, 140 U. S. 529, 11 S. Ct. 885, 35 L. ed. 550 [*affirming* and *applying* Comegys *v.* Vasse, 1 Pet. (U. S.) 193, 7 L. ed. 108].

46. Such was the case with Spain in 1898 and the subsequent establishment of the Spanish Treaty Claims Commission. For decisions recognizing the right of the state to sacrifice the vested rights of its citizens for national purposes see U. S. *v.* The Peggy, 1 Cranch (U. S.) 103, 110, 2 L. ed. 49; Ware *v.* Hylton, 3 Dall. (U. S.) 199, 245, 1 L. ed. 568.

47. "If claimant meditated any demand against the government of the country where he resided he should have sought redress through the tribunals of justice. . . . There is nothing to show that a denial of justice was meditated or likely to ensue to the claimant, and only in such event could he have claimed from the government of Mexico indemnity for the loss he sustained." Baldwin's Case, Treaty with Mexico, 1848, Act of March 3, 1849, 3 Moore Int. Arb. 3126.

Local remedies must be exhausted, as a rule, but need not be where justice is wanting; where they have been superseded or are insufficient, and unjust judgments are not internationally binding. 7 Moore Dig. Int. L. § 987 *et seq.*

Law of domicile governs as to the class of claims for damages to a decedent which survive to his estate. Under the law of Venezuela his heirs may recover for bodily injuries but not for damages to feelings or reputation. The Metzger Case, Venez. Arb. (1903) Ralston Rep. 578.

48. Justice may be as much denied when it would be absurd to seek it by judicial process as if denied after being sought. Triunfo Co.'s Case, For. Rel. U. S. (1902) 871. Where it is apparent that appeal to the municipal courts would be useless, resort need not be had to them before appealing to the government of the citizen for redress. Triunfo Co.'s Case, For. Rel. U. S. (1902) 871. In the Moses' Case, 3 Moore Int. Arb. 3127, the claim was retained against the objection that the claimant had not pursued his remedy in the courts. The umpire, Dr. Lieber, adverted to the fact that there was no dispute about the justice of the claim but an apparent anxiety to get it out of that tribunal. There was an allegation in the petition that the courts were so corrupt that he would be denied justice. For other cases of denial of justice see 3 Moore Int. Arb. 3073 *et seq.* For other cases where claims were dismissed or allowed, according to the circumstances of each case on the ground that the ordinary judicial remedies were not or need not have been pursued see 3 Moore Int. Arb. 3126–3160. See also pp. 3160–3234, for cases where the final decrees of national tribunals have been opened and awards made, resting on fraud, insufficient evidence, gross irregularities, etc., amounting to denial of justice.

A claimant illegally imprisoned and subjected to inhuman treatment is not required to seek redress for his wrongs by a civil action in the local courts. He may have recourse to his own government and that government has the right to intervene in his behalf. The Davy Case, Venez. Arb. (1903) Ralston Rep. 410.

Convention with Chile, 1892.— Under the terms of the contract the North and South American Construction Company (a Kentucky corporation) renounced any right it might have to the protection of the United States government. The contract also provided for the submission of disputes to an arbitration tribunal. This tribunal was afterward suppressed by the Chilean government. Upon filing the claim with the commission, the Chilean government demurred on the ground that the claimant had by contract deprived itself of the right and also on the ground that it had not attempted to secure its rights by the aid of the constituted authorities of Chile. The majority of the commission held that by suppressing the tribunal of arbitra-

the South American republics, contain stipulations to the effect that all disputes concerning the contract shall be determined by the courts of the country granting the concession or making the contract, and that the subject-matter of the contract shall never become the subject of an international claim. There has been some conflict regarding the effect of these stipulations, but the opinion now is that they do not bind the government of the citizen aggrieved.[49]

F. Submission of Claim to State Department. When a citizen of the United States has a claim against a foreign government which must be asserted through the medium of the government of the United States it must be first submitted to and passed upon by the state department in accordance with the rules of practice which that department has established.[50]

tion the Chilean government had revived the right which the claimant had to invoke the intervention of the United States, and, under the terms of the convention, the claimant was not bound to exhaust the remedies afforded by the Chilean authorities. Case of North and South American Construction Co., No. 7, United States and Chilean Claims Commission, Convention of 1892; Shield Rep. 54; 3 Moore Int. Arb. p. 2318.

Convention with Costa Rica, 1860.— The contentions of claimants were the subject of litigation before claim was made. "Only a formal denial of justice, the dishonesty or *prevaricatio* of a judge legally proved, 'the case of torture, the denial of the means of defense at the trial, or gross injustice, *in re minime dubia*' (see opinion of Phillimore in the controversy between Great Britain and Paraguay) may justify a government in extending further its protection." Bertinatti, Commissioner, Case of Medina, Convention with Costa Rica, 1860, MSS. Opinions; 3 Moore Int. Arb. 2317.

Treaty 1853 Great Britain.— Claim was made as next of kin, etc., to property in hands of the crown. "No instance can be found of the interference of government with the question of ordinary heirship and succession of estates in other jurisdictions. They are ever left to local action and jurisdiction of the courts of the countries where situated." Cook's Case, Upham, Commissioner, Senatorial Executive Document 103, 34th Congressional Session, 166–169; 3 Moore Int. Arb. 2315. See also Anderson's Case, No. 333, Convention with Mexico, 1868, 3 Moore Int. Arb. 2317.

49. The agreement of one of its citizens with another nation that all disputes and controversies shall be submitted to private arbitration or be subject to the jurisdiction of the local courts exclusively and not be the subject of an international claim does not bind the United States, and it may intervene in behalf of its citizen. The Rudloff Case, Venez. Arb. (1903) Ralston Rep. 182. A provision in a contract with a nation that all doubts and controversies arising concerning it shall be referred to the local courts of that country and shall never be the subject of an international claim is binding upon the parties to the contract. It does not bind the government of the citizen who is the party to the contract, however, and it may intervene, particularly if there is a denial of justice. The Woodruff Case, Venez. Arb. (1903) Ralston Rep. 151. The right of the sovereign power to submit all claims of its citizens to a mixed commission is superior to any attempt on the part of a subject or citizen to contract away such right in advance. The commission is, as between Venezuela and Italy, substituted for all national forums which, with or without contract, might have had jurisdiction over the subject-matter. The Martini Case, Venez. Arb. (1903) Ralston Rep. 819. A clause contained in a contract that "doubts and controversies that may arise in consequence of this contract shall be settled by the Courts of the Republic in conformity with its laws, does not preclude the claimant from demanding damages from the government for breach of a collateral promise. The American Electric Co. Case, Venez. Arb. (1903) Ralston Rep. 246. In order that a party to a contract containing a clause that "any questions or controversies that may arise out of this contract shall be decided in conformity with the laws of the Republic (Venezuela) and by the competent tribunals of the Republic" may make a claim before an international tribunal for damages for its breach, he must first go before the local courts and obtain a judgment that this breach of the contract took place. No damages can be recovered for breach of a second contract made on the assumption that the first one is illegal without having been so adjudged by a competent court. Turnbull, etc., Co.'s Case, Venez. Arb. (1903) Ralston Rep. 200. A stipulation in a concession from a government that all doubts and controversies arising as to the interpretation and execution of the agreement shall be submitted to the local tribunals, and shall never be made the subject of international intervention, bars the concessionary from the right to seek redress from any other tribunals. Orinoco Steamship Co.'s Case, Venez. Arb. (1903) Ralston Rep. 72.

50. Circular of department of state in regard to claims against foreign governments, issued March 6, 1901, and in force at present time — July, 1906 (The latest edition of this circular can be obtained on application to the department of state, Washington, D. C.) is as follows: "Citizens of the United States having claims against foreign governments, not founded on contract, in the prosecution of which they may desire the assistance of the Department of State, should forward to the

G. Methods of Enforcement and Collection — 1. In General. When a government has taken up the claim of its citizen it may assert it in such manner

Department statements of the same, under oath, accompanied by the proper proof. The following rules, which are substantially those which have been adopted by commissions organized under conventions between the United States and foreign governments, for the adjustment of claims are published for the information of citizens of the United States having claims against foreign governments of the character indicated in the above notification; and they are advised to conform as nearly as possible to these rules in preparing and forwarding their papers to the Department of State. Each claimant should file a memorial, properly dated, setting forth minutely and particularly the facts and circumstances from which the right to prefer such claim is derived by the claimant. This memorial should be verified by his or her oath or affirmation. The memorial and all the accompanying papers should have a margin of at least one inch on each side of the page, so as to admit of their being bound in volumes for preservation and convenient reference; and the pages should succeed each other, like those of a book, and be readable without inverting them. When any of the papers mentioned in rule 11 are known to have been already furnished to the Department by other claimants, it will be unnecessary to repeat them in a subsequent memorial. A particular description, with a reference to the date under which they were previously transmitted, is sufficient. Nor is it necessary, when it is alleged that several vessels have been captured by the same cruiser, to repeat in each memorial the circumstances in respect to the equipment, arming, manning, flag, etc., of such cruiser, which are relied upon as the evidence of the responsibility of a foreign government for its alleged tortious acts. A simple reference to and adoption of one memorial in which such facts have been fully stated will suffice. It is proper that the interposition of this Government with the foreign government against which the claim is presented should be requested in express terms, to avoid a possible objection to the jurisdiction of a future commission on the ground of the generality of the claim. Claims of citizens against the Government of the United States are not generally under the cognizance of this Department. They are usually subjects for the consideration of some other Department, or of the Court of Claims, or for an appeal to Congress."

"In every memorial should be set forth —

"1. The amount of the claim; the time when and place where it arose; the kind or kinds and amount of property lost or injured; the facts and circumstances attending the loss or injury out of which the claim arises; the principles and causes which lie at the foundation of the claim.

"2. For and in behalf of whom the claim is preferred, giving Christian and surname of each in full.

"3. Whether the claimant is now a citizen of the United States, and, if so, whether he is a native or naturalized citizen and where is now his domicile; and, if he claims in his own right, then whether he was a citizen when the claim had its origin and where was then his domicile; and, if he claims in the right of another, then whether such other was a citizen when the claim had its origin and where was then and where is now his domicile; and if, in either case, the domicile of the claimant at the time the claim had its origin was in any foreign country, then whether such claimant was then a subject of the government of such country or had taken any oath of allegiance thereto.

"4. Whether the entire amount of the claim does now, and did at the time when it had its origin, belong solely and absolutely to the claimant; and, if any other person is or has been interested therein, or in any part thereof, then who is such other person and what is or was the nature and extent of his interest; and how, when, and by what means and for what considerations the transfer of rights or interests, if any such was made, took place between the parties.

"5. Whether the claimant, or any other who may at any time have been entitled to the amount claimed, or any part thereof, has ever received any, and, if any, what, sum of money or other equivalent or indemnification for the whole or any part of the loss or injury upon which the claim is founded; and, if so, when and from whom the same was received.

"6. All testimony should be in writing, and upon oath or affirmation, duly administered according to the laws of the place where the same is taken, by a magistrate or other person competent by such laws to take depositions, having no interest in the claim to which the testimony relates and not being the agent or attorney of any person having such interest, and it must be certified by him that such is the case. The credibility of the affiant or deponent, if known to such magistrate or other person authorized to take such testimony, should be certified by him; and, if not known, should be certified on the same paper upon oath by some other person known to such magistrate, having no interest in such claim and not being the agent or attorney of any person having such interest, whose credibility must be certified by such magistrate. The deposition should be reduced to writing by the person taking the same, or by some person in his presence having no interest, and not being the agent or attorney of any person having an interest in the claim, and should be carefully read to the deponent by the magistrate before being signed by him, and this should be certified.

"7. Depositions taken in any city, port, or place without the limits of the United States may be taken before any consul or other public civil officer of the United States resident

as it sees fit; it may withdraw it, or it may assert it by threatening or employing force to collect it.[51]

2. By Suit. The great difficulty in the law of claims against governments is that every government protects itself by the right of the sovereign not to be sued.[52] As a general proposition of law a sovereign power is exempt from claims, demands, process, and jurisdiction,[53] and cannot be reached for the assertion of any claim except through its legislative or executive departments; indemnity for claims against it of all kinds is thus a matter of grace and not the result of judicial decree.[54] Many governments, however, have waived this exemption of sovereignty

in such city, port, or place, having no interest, and not being agent or attorney of any person having an interest, in the claim to which the testimony so taken relates. In all other cases, whether in the United States or in any foreign place, the right of the person taking the deposition to administer oaths by the laws of the place must be verified.

"8. Every affiant or deponent should state in his deposition his age, place of birth, residence, and occupation, and where was his residence and what was his occupation at the time the events took place in regard to which he deposes; and must also state if he have any, and, if any, what, interest in the claim to support which his testimony is taken; and, if he have any contingent interest in the same, to what extent, and upon the happening of what event, he will be entitled to receive any part of the sum which may be awarded. He should also state whether he be the agent or attorney of the claimant or of any person having an interest in the claim.

"9. Original papers exhibited in proof should be verified as originals by the oath of a witness, whose credibility must be certified as required in the sixth of these rules; but, when the fact is within the exclusive knowledge of the claimant, it may be verified by his own oath or affirmation. Papers in the handwriting of anyone who is deceased or whose residence is unknown to the claimant may be verified by proof of such handwriting and of the death of the party or his removal to places unknown.

"10. All testimony taken in any foreign language and all papers and documents in any foreign language which may be exhibited in proof should be accompanied by a translation of the same into the English language.

"11. When the claim arises from the seizure or loss of any ship or vessel, or the cargo of any ship or vessel, a certified copy of the enrollment or registry of such ship or vessel should be produced, together with the original clearance, manifests, and all other papers and documents required by the laws of the United States which she possessed on her last voyage from the United States, when the same are in the possession of the claimant or can be obtained by him; and, when not, certified copies of the same should be produced, together with his oath or affirmation that the originals are not in his possession and can not be obtained by him.

"12. In all cases where property of any description for the seizure or loss of which a claim has been presented was insured at the time of such seizure or loss, the original policy of insurance, or a certified copy thereof, should be produced.

"13. If the claimant be a naturalized citizen of the United States, a copy of the record of his naturalization, duly certified, should be produced.

"14. Documentary proof should be authenticated by proper certificates or by the oath of a witness.

"15. If the claimant shall have employed counsel, the name of such counsel should, with his address, be signed to the memorial and entered upon the record, so that all necessary notices may be addressed to such counsel or agent respecting the case."

In Lawrence's Report on Alien Claims will be found a compilation of the rules of a member of foreign countries for the presentation of claims against them, as such rules existed in 1875.

51. See 2 Butler Treaty-Making Power, § 443 *et seq.*, notes on the status of international claims against foreign governments.

For different modes of redress, negotiation, good offices and mediation, arbitration, and non-amicable, short of war, see 7 Moore Dig. Int. L. c. 22.

52. "The action of a former Congress, however, in requiring (Act of July 27, 1868, U. S. Rev. St. (1878) § 1068 [U. S. Comp. St. (1901) p. 740]) that aliens should not maintain certain suits here unless their own governments accord a corresponding right to citizens of the United States, has revealed the fact that the legal redress given to a citizen of the United States against the United States is less than he can have against almost any government in Christendom. The laws of other nations have been produced and proved in this court, and the mortifying fact is judicially established that the government of the United States holds itself, of nearly all governments, the least amenable to the law." Brown *v.* U. S., 6 Ct. Cl. 171, 192, decided prior to passage of Tucker Act.

53. Although a foreign government is not liable to suit in our courts, yet, when it submits to the jurisdiction by asking the aid of the courts of this country to enforce its claims, claims against it may be set off against its demands. Rowan *v.* Sharps' Rifle Mfg. Co., 29 Conn. 282, 31 Conn. 1.

54. "It is within the constitutional power of Congress to determine whether claims upon the public treasury are founded upon moral and honorable obligations, and upon

to the extent of clothing certain of their courts with jurisdiction as to certain specified classes of cases, and if a case falls within one of these specified classes it can be asserted in the court having jurisdiction thereof.[55] Wherever this right to sue has been granted, as it is a waiver of sovereignty, it is always presumed that the waiver is as limited as possible and is not to be extended.[56] This right to sue in a specified case inures, as a general rule, to the benefit of citizens of that country only, and an alien has no right to avail himself of the privilege unless it is expressly granted.[57] So far as we have been able to find, no country has waived its exemption and established a tribunal in which a citizen of another country can assert a claim founded on a tort. In this country a citizen may assert a claim founded on contract in the court of claims, but no citizen of a foreign country can assert his claim in this court, unless the government of which he is a subject gives the same right to a citizen of the United States.[58] Some governments allow aliens to sue them in their own courts when the claims are founded on contract, and when a citizen of one of these countries has a claim against the United States

principles of right and justice; and having decided such questions in the affirmative, and having appropriated public money for the payment of such claims, its decision can rarely, if ever, be the subject of review by the judicial branch of the Government." U. S. *v.* Realty Co., 163 U. S. 427, 16 S. Ct. 1120, 41 L. ed. 215.

55. Such is the case in the United States where the court of claims has jurisdiction of certain classes of claims against the government. See *infra*, note 58.

56. An act of congress referring a claim against the government to an officer of one of the executive departments to examine and adjust does not, even though the claimant and the government act under the statute, and the account is examined and adjusted, make the case one of arbitrament and award, in the technical sense of these words, so as to bind either party as by submission to award. Hence a subsequent act, repealing the one making the reference, the claim not yet being paid, impairs no right and is valid. Blackfeather *v.* U. S., 190 U. S. 368, 23 S. Ct. 772, 47 L. ed. 1099; Gordon *v.* U. S., 7 Wall. (U. S.) 188, 19 L. ed. 35.

57. In U. S. *v.* O'Keefe, 11 Wall. (U. S.) 178, 20 L. ed. 131, the claimant, O'Keefe, was a subject of Great Britain and the question for decision was whether any reciprocal right was accorded to citizens of the United States in Great Britain. It was found that an alien had the right to file a "petition of right" in great Britain in common with the subjects of that country; that this right had become a part of the common law and that the practice was regulated by statute. This procedure, it was decided, was within the terms of the statute and that O'Keefe had the right to bring his action in the court of claims. "The only question presented by this case is whether, under the Italian law, an American citizen may maintain an action against the government of Italy. As we have before found, the perfected justice of the civil law made the government, in matters of ordinary obligation, subject to the suit of the citizen, in the ordinary tribunals of the country. We have found this right to be preserved under modern codes in Prussia, Hanover, and Bavaria, Brown *v.* U. S., 5 Ct. Cl. 571; in the Republic of Switzerland, Lobsiger *v.* U. S., 5 Ct. Cl. 687; in Holland, The Netherlands, The Hanseatic Provinces and the free city of Hamburg, Brown *v.* U. S., 6 Ct. Cl. 193; in France, Dauphin *v.* U. S., 6 Ct. Cl. 221; in Spain, Molina *v.* U. S., 6 Ct. Cl. 269, and in Belgium, De Give *v.* U. S., 7 Ct. Cl. 517. It was also shown in Brown *v.* U. S., *supra*, by a distinguished historical writer who was examined as a witness, Mr. Frederick Kapp, that this liability of a government under the civil law is not a device of modern civilization, but has been deemed inherent in the system, and has been so long established that, to use the phrase of the common law, the memory of man runneth not to the contrary. Therefore, it is to be expected that in Italy, the seat and fountain of the civil law, this same liability of government is to be found existing. The 'Civil Code of the Kingdom of Italy' of 1866 recognizes, rather than establishes, the fundamental principle of liability; but it expressly provides (article 10) that, 'in suits pending before the judicial authority, between private persons and the public administration, the proceedings shall always take place formally at the regular session.' It is also established, by the third article of the same code, that 'the alien is admitted to enjoy all the civil rights granted to citizens.' These provisions establish the right of an Italian citizen to maintain his action in this court within the meaning of the Act of July 27, 1868 (U. S. Rev. St. (1878) § 1068 [U. S. Comp. St. (1901) p. 740]), which prohibits the subject of a foreign government from maintaining a suit for captured property, unless 'the right to prosecute claims against such government in its courts' is reciprocal, and extends to citizens of the United States." Fichera *v.* U. S., 9 Ct. Cl. 254, 256.

58. See note on the jurisdiction of the United States court of claims, in 2 Butler Treaty-Making Power 299, which contains a summary of most of the statutes in regard thereto. And see U. S. Rev. St. (1878) § 1068 [U. S. Comp. St. (1901) p. 740]; Hijo *v.* U. S., 194 U. S. 315, 24 S. Ct. 727, 48 L. ed. 994; 6 Moore Dig. Int. L. § 970.

Where a special mode is provided for ob-

founded on contract he can have it adjudicated in the court of claims. If a citizen of the United States has a claim against a foreign government, whether founded on tort or on contract, where no court exists having jurisdiction of claims of aliens, he has no redress except through the assertion of his claim by this government against the foreign country, and when once his government takes up the claim and asserts it, it assumes all control thereover.[59]

3. By Diplomacy and Arbitration. Claims have been collected from foreign governments by the United States and by other nations by diplomatic correspondence where there has been no breach of pleasant relations, and sometimes by diplomatic negotiations followed by arbitration, sometimes with and sometimes without friction.[60] All claims on behalf of its citizens against a foreign government should be, and, generally speaking, can be, settled by the government either diplomatically or by an arbitration tribunal specially created or by reference to the permanent court now existing at The Hague. The tendency is to endow The Hague court with ampler jurisdiction and to provide by general arbitration treaties for the submission of all disputes involving only questions of law and pecuniary claims as they arise. In 1902 the Pan-American Conference at the City of Mexico adopted such an arbitration agreement which was ratified January

taining compensation, such as by statute or by treaty, or where the power of assessing or deciding on the questions is given to a special tribunal, the remedies thus specially provided can alone be pursued, and consequently no action in the premises can be maintained in the court of claims. Meade *v.* U. S., 2 Ct. Cl. 224 [*affirmed* in 9 Wall. (U. S.) 691, 19 L. ed. 687].

59. Against a foreign nation our country is bound to assert the claims of her citizens, for she alone can meet such an antagonist on equal terms. The Brig Armstrong *v.* U. S., Dev. Ct. Cl. 38, 39.

60. The best collection of authorities on this subject will be found in Moore's History of International Arbitrations which contains, in volumes one and two, a summary of all the arbitrations to which the United States had been a party up to the time of the publication of that work; also at the end of volume five, appendix 3, will be found a summary of arbitrations between countries other than the United States and in which the United States was not concerned in any manner. At the end of volume two there is a summary of arbitrations in which the president or other officer of the United States was umpire. In nearly all of them claims against foreign governments or the United States or both were involved, but a few of them related to boundaries. Some of these arbitrations are as follows, the references being to Moore's Arbitrations:

Great Britain.— Commission 1794 London (I, 299–349); Commission 1794 Philadelphia (I, 271–298); Arbitrator 1818 St. Petersburg (I, 350–363); 1822 Commission Washington (I, 363–382); 1853 London Commission (I, 391–425); 1863 Washington Commission (I, 237–270); 1871 Geneva Commission (I, 495–682); 1871 Washington Commission (I, 683–702); 1892 Paris Commission (I, 755–961); 1896 Victoria Commission (II, 2123–2131).

France.— 1880 Washington Commission (II, 1133–1184).

Spain.— 1795 Philadelphia Commission (II, 991–1005); 1870 New York Commission (II, 1007–1018); 1885 Madrid Arbitrator (II, 1055–1069).

Portugal.—1851 Paris Arbitrator (II, 1071–1132); 1891 Berne Commission (II, 1865–1899).

Denmark.— 1888 Athens Arbitrator (II, 1185–1207).

Germany.— 1899 Stockholm Arbitrator.

Mexico.— 1839 Washington Commission (II, 1209–1286); 1868 Washington Commission (II, 1287–1359); 1902 Hague Commission.

New Granada.— 1857 Washington Commission (II, 1361–1396).

Colombia.— 1864 Washington Commission (II, 1396–1420); 1874 Bogota Commission (II, 1420–1447).

Chile.— 1858 Brussels Arbitrator (II, 1449–1468); 1892 Washington Commission (II, 1469–1484).

Peru.— 1862 Brussels Arbitrator (II, 1593–1614); 1863 Lima Commission (II, 1615–1657).

Paraguay.— 1859 Washington Commission (II, 1485–1545).

Brazil.— 1870 Washington Arbitrator (II, 1733–1747).

Venezuela.— 1866 Caracas Commission (II, 1659–1674); 1888 Washington Commission (II, 1674–1692); 1892 Washington Commission (II, 1693–1732). Protocol 1903, Ralston Rep. 1.

Ecuador.— 1862 Guayaquil Commission (II, 1569–1577); 1893 Callao Arbitrator (II, 1579–1592).

Costa Rica.— 1860 Washington Commission (II, 1551–1568).

Hayti.— 1884 Washington Arbitrator (II, 1749–1805); 1885 Port au Prince Commission (II, 1859–1862); 1888 Washington Arbitrator (II, 1807–1853).

Salvador.— 1864 Guatemala Commission (II, 1855–1857).

China.— 1884 Swatow Commission (II, 1857–1859).

11, 1905, by the senate of the United States. At the present time arbitration treaties exist between many countries, some of which are limited to special cases and others are almost general in their terms.[61]

4. By Threats and Force. Claims may also be collected from foreign governments by threats of war and by the actual employment of force.[62] In fact one of the causes stated in the ultimatum of the United States to Spain was the immense amount of unpaid claims of citizens of the United States against the

Siam.— 1897 Chiengmai Commission (II, 1862–1864); 1898 Singapore Arbitrator (II, 1899–1908).

John Bassett Moore's elaborate international law digest published June, 1906 (Government Printing Office), in eight volumes, contains references to many other international adjustments of claims. See Moore Dig. Int. L. c. 22.

61. The Hague Tribunal was established under what is known as The Hague Arbitration Convention of 1899 for the peaceful settlement of international differences. The powers signatory to the original treaty, other than the United States, are Germany, Austria, Belgium, China, Denmark, Spain, France, Great Britain, Greece, Italy, Japan, Luxemburg, Montenegro, The Netherlands, Persia, Portugal, Roumania, Russia, Servia, Siam, Sweden, Norway, Turkey, and Bulgaria. The treaty was executed at The Hague July 29, 1899, as the result of the first peace conference held in that year at the invitation of the Czar of Russia and to which delegates from all of the above mentioned powers were present and it contains provisions, in articles 59 and 60 for other powers becoming parties to it. The treaty is divided into four titles: the first relates to the maintenance of general peace; the second, articles 2–8, to good offices and mediation under which the powers agree to allow such good offices from friendly powers; third, to international commissions of inquiry, articles 9–14, which are to be constituted by special agreements between the parties, and the reports of such commissions are to be limited to a statement of the facts and shall in no way have the character of an arbitral award. (In the case of the North sea incident between Russia and Great Britain, a commission of inquiry was organized on the lines of The Hague treaty, but the commission was given fuller powers than those provided for in The Hague treaty.) Fourth, international arbitration, articles 15–57, which in its turn is divided into: chapter 1, articles 15–19, on arbitral justice, and chapter 2, articles 20–29, on the Permanent Court of Arbitration, providing for its organization and jurisdiction, and, chapter 2, articles 30–57, on arbitral procedure which provides the rules of practice applicable to cases referred to the court unless the parties agree upon different regulations. The treaty concludes with general provisions, articles 58–61, as to the ratification of the treaty and the adhesion of other powers thereto. This treaty was ratified by the senate Feb. 7, 1900 (32 U. S. St. at L. 1779) and thereafter President McKinley appointed as members of the court, representing the United States, the Hon. Melville W. Fuller, chief justice of the United States, Hon. Benjamin Harrison, former president of the United States, Hon. John W. Griggs of New Jersey, then attorney-general of the United States, Hon. George Gray, of Delaware, former senator of the United States, member of the peace conference between the United States and Spain and judge of the circuit court of the United States for the third circuit. After the death of ex-President Harrison, Hon. Oscar S. Straus, of New York, former minister from the United States to Turkey, was appointed to succeed him. The first matter referred to the tribunal was the controversy between Mexico and the United States in regard to the liability of the Mexican government to certain charitable institutions in California, known as the "Pious Fund Case." The next case was that arising out of the blockade of Venezuelan ports by Great Britain, Germany, and Italy. Mexico, Spain, France, Belgium, Sweden, and Norway and the United States held claims against Venezuela, but no forceful measures were employed by them. All of the claims were subsequently sent to various arbitration commissions for adjustment and Venezuela agreed to set apart thirty per cent of its customs revenues to be divided between the claimants according to the awards to be made under these arbitrations. The blockading powers having claimed a preference, the question as to whether they were entitled to preferential treatment was submitted to The Hague Tribunal which decided that they had a preference. For a full report of this case see Penfield's Report of the Venezuelan Arbitration of 1903, Washington, Government Printing Office (1905). For a full account of the proceedings of the various claims commissions see Ralston's Report of the Venezuela Arbitrations of 1903, protocols, opinions and summary of awards; Washington, Government Printing Office (1904). For other details of The Hague Tribunal see 2 Butler Treaty-Making Power 376; The Peace Conference at The Hague, by F. W. Holls; and Arbitration and The Hague Court (1904), by John W. Foster; 7 Moore Dig. Int. L. § 1068.

62. From Japan, in the case of The Wyoming. See Report No. 120, 57th Cong., 2d Sess., July 7, 1882, Doc. 231, p. 440.

Non-amicable methods are classified in 7 Moore Dig. Int. L. § 1089 *et seq.* as follows: Withdrawal of diplomatic relations; retorsion or retaliation; display of force; use of force, with special authority and without special authority; gain of preference in payment; reprisals; pacific blockade; embargo; non-intercourse.

Spanish government.[63] No rule can be laid down as to how far one government should resort to force for the purpose of indemnifying its citizens who have suffered loss from the tortious acts of another government. That is a matter that each government must decide as occasion arises, and a government which would not protect its citizens from bodily harm and loss of property from violence due to the tortious acts of a foreign government or for which it was responsible for failure to prevent would be failing in its chief duty — the protection of the rights of its citizens at home and abroad.[64] How far a government should go in attempting to collect the claims of its citizens against a foreign government for violations of contracts is a different matter, and it is the general opinion that a different rule prevails as to the extent to which force should be used or threatened.[65]

H. Payment or Distribution to Citizen Claimants — 1. Claims Collected Under Decree of Arbitration Tribunal. When the government collects a claim for one of its citizens from a foreign government by settlement or a decree of an arbitration tribunal, there is seldom any difficulty about the claimant receiving the award. In such cases, in the United States, the award is generally paid over by the state department without the intervention of any act of congress, the money being paid to the secretary of state as trustee for the citizen. There have been instances where the award has been paid when there has been more than one claimant, and the apportionment between the parties thereto has been made by the state department.[66]

2. After Relinquishment of Claims of Many Citizens and Settlement Between the Two States — a. In General. Where, however, the United States has given up and relinquished the claims of a large number of its citizens against a foreign government and the money has been paid to the United States by the foreign government, either in a lump sum[67] or by the adjustment of accounts,[68] or by the cession of territory,[69] the money or its equivalent in land and credit is paid or transferred to the United States as a creditor nation and while it is also a trustee for its citizens whose claims it has thus relinquished, the manner of distribution

63. See diplomatic correspondence with Spain prior to 1898. For. Rel. Rep. (1898).

64. The policy of the United States has always been to protect its citizens from the tortious acts of foreign governments to the utmost. If a citizen be spoliated by a foreign government, he is entitled to obtain redress from the foreign government through the means of his own government. The Brig Armstrong *v.* U. S., Dev. Ct. Cl. 38. In fact the statute requires the president to take immediate action in behalf of citizens wrongfully imprisoned. "Whenever it shall be made known to the President that any citizen of the United States has been unjustly deprived of his liberty by or under the authority of any foreign government, it shall be the duty of the President forthwith to demand of that government the reasons for such imprisonment, and if it appears to be wrongful and in violation of the rights of American citizenship, the President shall forthwith demand the release of such citizen, and if the release so demanded is unreasonably delayed or refused, it shall be the duty of the President to use such means, not amounting to acts of war, as he may think necessary and proper to obtain or effectuate such release, and all the facts and proceedings relative thereto shall as soon as practicable be communicated by the President to Congress." U. S. Rev. St. (1878) § 2001 [U. S. Comp. St. (1901) p. 1270].

65. See *supra*, note 37*a*.

66. Such was the case in regard to both the indemnity paid by Spain for the Virginius outrage (U. S. For. Rel. Rep. (1875) pt. 2, p. 1250); and that paid by Great Britain for the loss sustained by American fishermen by excluding them from the Newfoundland fisheries in 1878 (U. S. For. Rel. Rep. (1881) p. 590).

Where money is due from the government to the heirs of one deceased, and there is a dispute as to the legal descent, the latter question should be decided by the courts rather than by the executive officers. 5 Op. Atty.-Gen. 670 (Crittenden); Comegys *v.* Vasse, 1 Pet. (U. S.) 193, 7 L. ed. 108.

67. As was the case in the Geneva Award in 1873. Act of congress creating the Alabama Claims Commission. Act of June 23, 1874, 18 U. S. St. at L. 245, § 12. See The Winged Racer, 4 Moore Int. Arb. 4242, where is also an exhaustive collection of the authorities on damages as affecting the ship, outfits, provisions, loss of goods, freights and practically the whole subject of damages as applicable to the loss of a common carrier and cargo at sea. See further The Highlander and The Jabez Snow, 4 Moore Int. Arb. 4272.

68. As was the case of the French Spoliation Claim in 1800. 8 U. S. St. at L. 178.

69. As was the case in the adjustment of claims against Spain settled by the cession of Florida in 1819, and of Porto Rico and the Philippines in 1898.

is wholly a matter within the legislative control, and the citizen whose claim has been surrendered has no way of ascertaining or collecting from the government his share of the indemnity, except such as congress shall provide.[70]

b. Manner of Distribution. This may be done either by directing payment to be made to the parties entitled thereto, by granting jurisdiction to the court of claims,[71] or by appointing special tribunals to determine the claims and what parties are entitled to share in the award.[72] In case the awards are made by the court of claims or special tribunals their judgments can still only be satisfied and discharged after an appropriation under an act of congress.[73]

c. Amount Payable. Where the United States has secured indemnity either in cash or territory from a foreign government for claims due to citizens of the United States and a tribunal has been appointed to determine what citizens are entitled and to what extent to participate in the indemnity, the claim of the citizen is adjudicated on principles of international law, and the United States is only bound to pay to its citizens prosecuting their claims in that court whatever those citizens could have recovered against the foreign government under the principles of international law, had the claims been presented and adjudicated by an international tribunal of arbitration.[74]

I. Who May Assert Claim — 1. In General. The United States government never asserts a claim against a foreign government except in behalf of its own citizens or of persons who are under its protection, and in this respect the government determines for itself whom it will protect, and it has the right, as between itself and the foreign government, to take under its protection and assert the rights of such persons within its jurisdiction as it shall see fit.[75]

70. See 2 Butler Treaty-Making Power, §§ 443 *et seq.*, notes on the status of international claims against foreign governments. "The sum awarded by the Tribunal of Arbitration at Geneva, when paid, constituted a national fund, in which no individual claimant had any rights legal or equitable, and which Congress could distribute as it pleased." Williams *v.* Heard, 140 U. S. 529, 11 S. Ct. 885, 35 L. ed. 550.

71. As was done in the case of the Chinese indemnity in 1878 and in many of the French spoliation cases. 20 U. S. St. at L. 171, the Chinese Indemnity Act. For cases bearing on disputed rights of claimants for awards of arbitration tribunals or indemnity paid for claims of citizens see 2 Butler Treaty-Making Power, § 443, note 4, and cases there collected.

72. As was done in the case of the claims against Spain in 1819 and the present existing Spanish treaty claims commission for the settlement of 1898.

A list of tribunals to adjudicate claims against certain nations has been given in Moore's Arbitration as follows (the references being to the volume and page of that work): Against Great Britain — 1826 (I, 382–390); 1871 (V, 4639–4685). Against France — 1800 (V, 4396–4432); 1803 (V, 4432–4446); 1831 (V, 4447–4485). Against Spain — 1821 (V, 4487–4518); 1821 (V, 4519–4531); 1901 (Act of March 2, 31 U. S. St. at L. 877). Against Denmark — 1830 (V, 4549–4573). Against Naples — 1832 (V, 4575–4589). Against Peru — 1841 (V, 4591–4607). Against Brazil — 1849 (V, 4609–4626). Against China — 1858 (V, 4627–4637). Against Mexico — 1849 (II, 1244–1286).

73. As a general rule these appropriations are made within a year after the judgments are rendered, but there have been instances, especially in the French spoliation claims, where congress has not appropriated for the judgments of the court of claims. And in case congress fails to appropriate there is no way to compel it to do so or to otherwise enforce the judgment.

74. That is to say, the United States stands in the place of the foreign government and is not liable to pay any more than what the foreign government would have been obliged to pay. The act creating the Spanish Treaty Claims Commission is a recent example. 31 U. S. St. at L. 877. See The Paquette Habana, 175 U. S. 677, 700, 20 S. Ct. 290, 44 L. ed. 320.

75. For instance the United States may and has asserted claims against foreign governments for the wrongful killing of sailors on United States vessels, although such sailors were not citizens of the United States, except so far as the United States will grant rights of citizenship and protection to its sailors and also for the wrongful killing of foreign persons in the consular service of the United States. In January, 1861, Mr. Huesken, the interpreter to the Japanese legation, was assaulted and killed; the United States at once demanded punishment of the offenders, an apology for the offense and an indemnity for the widowed mother of Mr. Huesken, all of which was accorded, and the sum of ten thousand dollars was paid by the Japanese government and transmitted to Mrs. Huesken, a citizen of The Netherlands. See Messages and Diplomatic Correspondence for 1862, pp. 804–807. Indemnity was paid to

2. Native-Born or Naturalized Citizens. For the purpose of asserting their claims, citizens may be native-born or naturalized, and under the doctrine of expatriation as adopted by the United States government the naturalized citizen has the same rights as the native-born citizen so far as the assertion of claims against foreign governments is concerned.[76] The United States may, if it sees fit, assert the claim of one who intends to become naturalized, although the naturalization has not been entirely perfected.[77] Native-born and naturalized citizens may retain their citizenship even though absent for a long period, and the presumption *animus revertendi* can be maintained and the United States will protect them; but this rule is not as strong in regard to a naturalized citizen who returns to his native country, and in that case the presumption of the continuance of the *animus revertendi* is not so strong.[78] There is a growing tendency to regard with disfavor the assertion of the claims of a naturalized citizen against his former country after he has returned to that country and has remained there for any period of time and has engaged in business there.[79] The decision of the state department to present a claim on behalf of one alleging citizenship is not always conclusive, as the treaty appointing the commission for the adjustment of the claims of citizens might give the commission power to determine whether or not the claimant was a citizen and entitled to have his claim adjudicated.[80]

Mrs. Ryan, widow of Captain Ryan of the Virginius, although he was a Canadian. And see Ross *v.* McIntyre, 140 U. S. 453, 11 S. Ct. 897, 35 L. ed. 581, as to protection of seamen.

76. "All naturalized citizens of the United States, while in foreign countries, are entitled to and shall receive from this Government the same protection of persons and property which is accorded to native-born citizens." U. S. Rev. St. (1878) § 2000 [U. S. Comp. St. (1901) p. 1270].

77. This was the rule laid down in the famous Martin Koszta case in 1853, in which Mr. Marey, secretary of state, denied the right of Austria to question the citizenship of Koszta, who had merely declared his intention to become a citizen and had not yet received his final papers. Sen. Ex. Doc. No. 1, 33d Cong.; Wheaton Int. L. (Dana ed.) p. 146 note.

78. See Citizens, 7 Cyc. 144.

Renunciation of allegiance.—"When citizens of the United States voluntarily leave their own country and enter into the service of another, they thereby voluntarily renounce their allegiance, and with it relinquish their right to the protection of the government under which they were born." Dimond's Case, 3 Moore Int. Arb. 2386; Treaty of 1848 with Mexico; Act of March 3, 1849.

79. Mr. Olney, secretary of state, in a despatch to Consul-General Lee, Feb. 23, 1897, concerning the Ruiz case, said: "You are wholly mistaken in thinking a person is necessarily entitled to United States protection because of having taken out naturalization papers. Even native-born citizens may forfeit such protection by long-continued residence abroad and evasion of citizenship duties. Much more does a naturalized citizen incur such forfeiture when naturalization papers are the beginning and end of the citizenship, and he abides permanently in his native country."

Mr. Blaine, secretary of state, March 31, 1881, wrote to Mr. Kasson: "A naturalized citizen of the United States who returns to his country of origin and there marries, settles, and remains twenty years is not entitled to a passport as a citizen of the United States."

Mr. Fish, secretary of state, Oct. 14, 1869, wrote to Mr. Motley: "Cautious scrutiny is enjoined in such cases, because evidence has been accumulating in this Department for some years that many aliens seek naturalization in the United States without any design of subjecting themselves, by permanent residence, to the duties and burdens of citizenship, and solely for the purpose of returning to their native country and fixing their domicile and pursuing business therein, relying on such naturalization to evade the obligations of citizenship to the country of their native allegiance and actual habitation. To allow such pretensions would be to tolerate a fraud upon both Governments, enabling a man to enjoy the choice of two nationalities and to escape the duties and burdens of each." Mr. Fish also wrote to Mr. Wing, Dec. 15, 1870: "An eminent predecessor of mine in this Department, in an instruction to a minister of the United States in a foreign country, expressed the opinion that 'it can be admitted of no doubt that the naturalization laws of the United States contemplate residence in the country and of the naturalized citizens, unless they shall go abroad in the public service or for temporary purposes.'"

3 Moore Dig. Int. L. cc. 10, 11, 12, 13, exhaustively cover the subjects of nationality; citizenship; naturalization; expatriation; national protection; domicile; passports; aliens; expulsion and exclusion.

80. This question should more properly be treated under Citizens and Aliens, but a few cases bearing on the subject are here given. In The Texan Star (Pike *v.* U. S.), No. 736, Davis Rep. 89, 3 Moore Int. Arb. 2360, after an elaborate review of the authorities it was held, per Rayner, J., that the

3. Corporations. It has been held that the citizenship of the corporation and not that of its stock-holders determines the jurisdiction of an international tribunal

simulated transfer of the "Texan Star" to a British subject did not estop the real owners from making claim.

International tribunals are usually limited to jurisdiction over claims of their respective citizens and which had their inception in favor of such citizens. But this rule may be modified by treaty. Orinoco Steamship Co.'s Case, Venez. Arb. (1903) Ralston Rep. 72. An international tribunal is not bound, in determining its jurisdiction, by the recitals in a certificate of naturalization, and may determine for itself the citizenship of the claimant. Flutie Cases, Venez. Arb. (1903) Ralston Rep. 38; Ruiz *v.* U. S., No. 112, Spanish Treaty Claims Commission.

In cases of double citizenship, an international commission can only accord damages to a citizen or subject of the claimant country — not to the country itself, and taking no account of offenses to a nation as such. The Miliani Case, Venez. Arb. (1903) Ralston Rep. 754.

Partnership claimant.—Rodocanochi *v.* U. S., No. 1883, 3 Moore Int. Arb. 2359. The property destroyed was Italian property, the domicile of the firm being in Italy (The Cheshire *v.* U. S., 3 Wall. (U. S.) 231, 18 L. ed. 175); the members of the firm were all foreigners, one of them being a naturalized British subject. The certificate of naturalization excepted "any rights or capacities of a natural born British subject out of and beyond the dominions of the British Crown and the limits thereof." It was held that "the requirement that a person must be entitled to the protection of the United States is satisfied by a firm's being so entitled, even though a partner might not be." It was also held that under the terms of the certificate of naturalization the claimant might fairly be considered a foreigner of Great Britain. See also Schreiner *v.* U. S., 6 Ct. Cl. 359. In Lord *v.* U. S., No. 233, 3 Moore Int. Arb. 2359, the claim was allowed for one half of the total amount on the ground that Munn, being a native of Ireland and a subject of Great Britain, could not recover. In Levois *v.* U. S., No. 158, Davis Rep. 15, 3 Moore Int. Arb. 2357, it appeared that the claimant was the surviving partner of a firm, composed of himself, a citizen and resident of France, and a citizen of the United States, residing at New Orleans, who was disloyal to the government of the United States. The claim was allowed.

Person entitled to protection of flag.— The cases of Worth *v.* U. S., No. 91, Davis Rep. 35, 3 Moore Int. Arb. 2350, and Schreiber *v.* U. S., No. 740, Davis Rep. 35, 3 Moore Int. Arb. 2350, settled the important principles that this clause entitled every person whether native born, naturalized, or foreigner, to share in the award, provided he was entitled to the protection of the flag, either as a citizen, as seaman, or as the owner or shipper of goods in a ship of United States registry — except only subjects of Great Britain. The second Alabama claims court departed from the rule laid down by the first court in the cases of Worth and Schreiber, *supra*, and allowed a subject of Great Britain who was entitled to the protection of the flag of the United States to recover. Cassidy *v.* U. S., No. 144, 3 Moore Int. Arb. 2380.

Proof that claimant was born in the United States is not sufficient where it appears that his parents were aliens. U. S. *v.* Wong Kim Ark, 169 U. S. 649, 18 S. Ct. 456, 42 L. ed. 890; Suarez *v.* U. S., No. 716, Treaty with Mexico (1868); Del Barco *v.* U. S., No. 748, Treaty with Mexico (1868), 3 Moore Int. Arb. 2449.

Under the law of Mexico, the children of a foreigner, although born in Mexico, follow the nationality of their father, until they arrive at majority. Schreck *v.* Mexico, No. 768, Convention of 1868, 3 Moore Int. Arb. 2450.

In case of conflict of law as to nationality, the law of the domicile is the law which governs as to citizenship. The Mathison Case, Venez. Arb. (1903), Ralston Rep. 429. See also The Brignone Case, Venez. Arb. (1903) Ralston Rep. 710; The Stevenson Case, Venez. Arb. (1903) Ralston Rep. 438.

The United States statute prohibiting assignments of claims does not apply to the claims of foreigners coming before an international tribunal to which the United States is a party. Camy's Case, No. 656, Convention with France of 1880, 3 Moore Int. Arb. 2398.

Claims dismissed.— *Convention of 1858 with China.*— Declaration of intention to become citizen not sufficient to support claim of citizenship when not followed by residence in United States. "The imperfect citizenship which the claimant had acquired by his simple declaration of intention had wholly lapsed by his removal out of the territory of the United States and establishing himself in business in a foreign jurisdiction." Ryder's Case, 3 Moore Int. Arb. 2332. See Wheaton, pt. 4, c. 1, § 17.

Convention with Costa Rica, 1860.— Naturalized citizens returning to native country and engaging in business are subject to the *lex loci.* Medina's Case, 3 Moore Int. Arb. 2316.

Under the treaty with France of 1880, the claims of all persons, who were citizens of France at the time they accrued, but who subsequently became citizens of the United States, were rejected. Perche's Case, 3 Moore Int. Arb. 2401, 2418.

Treaty with Mexico of 1848 — Act of March 3, 1849.—The treaty provided for the assumption by the United States of all claims of its citizens. The claim in question arose from a loan by a citizen of the United States to the Mexican government, but the bills of exchange which evidenced the loan were afterward transferred to a Mexican citizen and the claim was presented by him. The Commissioners held: "It matters not that the claim was American in origin. It had

in a case involving a claim by a corporation.[81] But there have been instances where governments have intervened in behalf of stock-holders and bondholders, although the corporations themselves were of other countries.[82]

J. Forfeiture of Right to Assert Claim. Where a citizen alleging a grievance has taken part in local politics[83] or given aid or comfort to the enemies or

ceased to be American at the date of the treaty, and the holder of it could not invoke the interposition of our government for his protection." Jarrero's Case, 3 Moore Int. Arb. 2324. Claimants were passengers on an American schooner and were captured by a Mexican vessel of war in 1837; claimants were at that time citizens of Texas but filed claims on the ground that by the annexation of Texas they had become citizens of the United States. The claims were rejected on the ground that the claimants were not citizens of the United States at the time of the injury complained of. The Champion, 3 Moore Int. Arb. 2322. See also Sandoval's Case, 3 Moore Int. Arb. 2323. Claim was allowed as to interest of American partner, but was disallowed as to interest of German partner. See Hargous' Case, 3 Moore Int. Arb. 2327. Partner with aliens can claim only for individual interest — not for entire property of firm. Claimant must be citizen at the time of the injury complained of. Not affected by fact that claimant became surviving partner by death of alien partner. "The principle of the common law has no application to this case. The right of the claimant must be tested by the law of nations and not by the municipal law." Morrison's Case, 3 Moore Int. Arb. 2325.

Convention with Spain, 1871.— Claim was made by a native of Cuba claiming to be a resident and citizen of the United States for damages for an embargo laid in 1869. Claimant declared his intention to become a citizen of the United States in 1870. The umpire, Baron Lederer, held that the claimant "not being a citizen of the United States, within the meaning of the Constitution and laws thereof," could not be "regarded as such citizen according to said agreement" (the convention of 1871). De Rojas' Case, No. 70, Spanish Com. (1871), 3 Moore Int. Arb. 2337, No. 126, 3 Moore Int. Arb. 2341. Similar claims dismissed see Prieto's Case, No. 54, Span. Com. 1871, 3 Moore Int. Arb. 2339; Yzquierdo's Case, No. 7, Span. Com. 1871, 3 Moore Int. Arb. 2340. Spain laid an embargo upon the interest of the Spanish member of a firm partly Spanish and partly American and such interest was sold. The American members of the firm claimed that their interests were damaged by such act. It was held that Spain had a right to lay such embargo and the loss to the American members of the firm was *damnum absque injuria*. Casanova's Case, No. 28, Span. Com. 1871. 3 Moore Int. Arb. 2337. Claimant was a native of Cuba and claimed damages for an embargo laid in 1869 and also for refusal of Spanish officials to raise the embargo after the decree revoking it and after claimant became a naturalized citizen of the United States (1873). The umpire held that "as the claimant was not a citizen of the United States of America when the authorities of the Island of Cuba placed an embargo upon his property" the case should be dismissed. Carrillo y O'Farrell's Case, No. 113, Span. Com. 1871, 3 Moore Int. Arb. 2337.

Treaty with Venezuela of 1885.— Claim was made for damages based on transaction in 1863 and 1864 at which time claimant was a subject of Italy; he became an American citizen in 1868, the claim was dismissed for want of jurisdiction, Little, commissioner, holding: "This is the key — subject of course to treaty terms — for the determination of such jurisdictional questions: Was the plaintiff State injured? It was not, where the person wronged was at the time a citizen of another State, although afterwards becoming its own citizen. The injury there was to the other State. Naturalization transfers allegiance but not existing state obligations." Abbiatti's Case, No. 34, U. S. and Venez. Cl. Com. (1885), 3 Moore Int. Arb. 2347 [*followed* in Loehr's Case, No. 44, Bettiker's Case, No. 6, and Finn's Case, No. 24, 3 Moore Int. Arb. 2348].

81. The jurisdiction of an international claims commission over the claims of a corporation is controlled by the nationality of the corporation and not by the nationality of the stock-holders. The Baash & Römer Case, Venez. Arb. (1903) Ralston Rep. 906. While the right of stock-holders to make claims for their equitable proportions of the losses sustained by a defunct corporation exists, this right is subject to the claims of creditors of the corporation, and in the absence of proof of the amount of the liabilities of the corporation, the extent of the interests of the stock-holders is not ascertainable and the claims were dismissed. Kunhardt's Case, Venez. Arb. (1903) Ralston Rep. 63.

82. The United States and Great Britain intervened in behalf of its citizens who were stock-holders and bondholders in a Portuguese corporation whose concession was wrongfully annulled by that government. The Delagoa Bay R. Co.'s Case, 2 Moore Int. Arb. 1865. See the final award, For. Rel. U. S. (1900) 903. The United States has intervened in behalf of its citizen stock-holders owning shares in a San Salvador corporation, for wrongs committed by that country against the corporation. Triunfo Co.'s Case, For. Rel. U. S. (1902) 871. Under the terms of the protocol between Venezuela and Belgium, jurisdiction was entertained of a claim of a Belgian corporation, although some of the stock-holders were not Belgians. The Compagnie Générale des Eaux Case, Venez. Arb. (1903) Ralston Rep. 271.

83. Loss of protection by taking part in politics.— The claim was resisted on the ground that the claimant had actively par-

insurrectionists[84] he loses the right to the protection of his government so far as his claims are concerned against the government whose enemies he has assisted.

K. Classification of Claims Which Have Been Asserted. It is impossible to collate all the decisions in which claims have been allowed or disallowed against governments in the numerous arbitrations which have taken place. They can be classified in general terms somewhat as follows: For taking private property without compensation;[85] for the acts of agents and public officials;[86] for the improper

ticipated in the political movements of the Imperialists during the time of the French intervention. It was found that "the claimant did not preserve that neutral character which was to be expected of him as a foreigner, and failing which his government was not bound to support him." Tripler's Case, No. 144, 3 Moore Int. Arb. 2823.

84. **Having given aid and comfort to the enemy.**— Objection was made to the claims of W. R. Grace & Co. on the ground that they had furnished coal and other supplies directly to the Peruvian navy and army during the war with Chile and therefore were excepted by the treaty as being with the class who had given aid and comfort to the enemy. Objections sustained and claims dismissed. Grace *v.* Chile, No. 28, 3 Moore Int. Arb. 2781; Treaty with Chile (1892).

Trading with the enemy.— A claim was made under the act of March 3, 1849, Treaty with Mexico (1848). Objection was made to the claim on the ground that the claimant or his representative had engaged in trade with the enemy. The objection was sustained and the claim dismissed. The vessel was American and the acts complained of were trade with Spanish subjects, Mexico being then at war with Spain. It was held that there was a violation of neutrality and a forfeiture of protection. The Felix, 3 Moore Int. Arb. 2800. Granting permission to others, while refusing it to claimant, to run steamers during the closure of the Orinoco river does not give rise to the right to make any claim, when the government had good grounds to believe that claimant was in sympathy with the revolutionary movement, although this was not the fact. Orinoco Steamship Co.'s Case, Venez. Arb. (1903) Ralston Rep. 72.

Allegiance and right of protection as affecting awards under the Geneva Arbitration.— The act of June 23, 1874, contained the following provision: "Section 12. . . . And no claim shall be admissible or allowed by said court arising in favor of any person not entitled, at the time of his loss, to the protection of the United States in the premises, nor arising in favor of any person who did not at all times during the late rebellion bear true allegiance to the United States."

Convention with Mexico, 1868.— Claim was made for the loss of goods owned by Americans which were destroyed by the Mexican troops after having been captured while under French escort in the war with France. It was held that such trade was "illicit and hostile, and all engaged in it were enemies of the opposing belligerents." The claim was dismissed. Torre's Case, No. 749, 3 Moore Int. Arb. 2816.

85. Taking private property must be compensated for. The Upton Case, Venez. Arb. (1903) Ralston Rep. 172.

86. Governments are responsible for the acts of their agents, whether such acts be directed or only ratified by silence or acquiescence. Asphalt Co.'s Case, Venez. Arb. (1903) Ralston Rep. 331. A claim founded upon a supposed wrongful act attributed to minor public officials should be clear and definite in its statements and proof and show unavailing appeal to superior authority to justify recovery against a state. The De Zeo Case, Venez. Arb. (1903) Ralston Rep. 693. To hold a government responsible for the seizure of goods or property, the seizure must have been made by the government itself, through its proper authorities or by those who had a right to act in its name or behalf. The Henriquez Case, Venez. Arb. (1903) Ralston Rep. 896. If citizens of one nation commit depredations against another, and are not punished by their own government, or given up to the injured government for punishment, the nation to whom they owe allegiance becomes a party to their wrong under the principles of international law. *In re* Charge to Grand Jury, 30 Fed. Cas. No. 18,267, 5 McLean 306.

Wanton acts.— Governments are liable for the wanton acts of their officials. The Cesarino Case, Venez. Arb. (1903) Ralston Rep. 770.

Unofficered troops.— A government will not be held responsible for the reckless acts of unofficered troops. The Henriquez Case, Venez. Arb. (1903) Ralston Rep. 896, at page 910.

In case of the commission of a crime in the territory of a state, the state is bound, without being requested to prosecute the criminals before the proper local authorities, and in case of its failure so to do it will be held liable in damages to those who have suffered. The Bovallins Case, Venez. Arb. (1903) Ralston Rep. 952.

Revolutionists are not the agents of the government and a natural responsibility does not exist, and where they are beyond the control of the government it cannot be held responsible for the acts of those who have escaped its restraint. The Sambiaggio Case, Venez. Arb. (1903) Ralston Rep. 666. Under the terms of the French-Venezuelan protocols, a claim was allowed for damages resulting from acts of the revolutionists. The Acquatella Case, Venez. Arb. (1903) Ralston Rep. 487 [*following* Kummerow's Case, Ralston Rep. 526]. A state is responsible for damages committed by revolutionists where it subsequently appoints the participants and leaders of the revolution to office, thereby

annulment of concessions;[87] for duties improperly exacted;[88] for taxes collected by *de facto* revolutionary governments;[89] for forced loans;[90] for payment of bonds;[91] for damages done to person or property by revolutionists, insurrectionists, belligerents, or government officials, during periods of riot and insurrection.[92]

tacitly approving their conduct. The Bovallins Case, Venez. Arb. (1903) Ralston Rep. 952.

Private trespassers.— The United States government is not responsible for the acts of private trespassers. 4 Op. Atty.-Gen. (Nelson) 332.

The national government of Venezuela cannot disclaim responsibility for the acts of officials of the states and municipalities created by its authority. Circumstances of formation of these state governments are distinguished from those in the United States. The Davy Case, Venez. Arb. (1903) Ralston Rep. 410.

87. Where money is spent on the faith of a permit granted, the claimant is entitled to indemnity when the permit is withdrawn. The Paquet Case (Concession), Venez. Arb. (1903) Ralston Rep. 267. Damages for the taking away of a concession indirectly by expulsion of the concessionary may be recovered. The Oliva Case, Venez. Arb. (1903) Ralston Rep. 771. Where an enterprise is undertaken on the strength of assurances by the department of state of protection of the United States, a claim arises, when the claims of this country are abandoned and the protection withdrawn. See 3 Moore Int. Arb. 2390–2396, where the Peruvian guano claims are referred to.

Provision against assignment.— A stipulation in a concession by a government that it shall not be assigned to third parties without giving notice to the government is obligatory on the concessionary, otherwise any assignment of the rights and privileges under the concession is absolutely void as against such government. Orinoco Steamship Co.'s Case, Venez. Arb. (1903) Ralston Rep. 72.

Ultra vires concession.— A claim based upon the payment of a sum of money to the government for rights which the government could not concede, and which rights the claimant was prevented from enjoying by the government, will be allowed for the sum so paid, with interest from the date of payment. Turnbull, etc., Co.'s Case, Venez. Arb. (1903) Ralston Rep. 200.

88. Claims for refund of duties paid and for confiscations and arrests under the revenue laws have been frequently made and allowed. 3 Moore Int. Arb. 3361–3407. Damages were allowed because of unjustified refusal of customs officials to clear ship from Venezuelan port. The Lalanne Case, Venez. Arb. (1903) Ralston Rep. 501; The Ballistini Case, Venez. Arb. (1903) Ralston Rep. 503.

A consul who assumes to collect duties in the territory of another country on goods to be entered in the country of the consul, commits an act of sovereignty which is an offense against the country where the duties are collected. Asphalt Co.'s Case, Venez. Arb. (1903) Ralston Rep. 331. A consul resident abroad has no right to demand of the captain of a vessel that he procure passports as a condition precedent to the clearing of his ship and no national law on this subject can affect the case. It is governed by international law. Asphalt Co.'s Case, Venez. Arb. (1903) Ralston Rep. 331.

Outrages in the form of arrest, imprisonment, and detention under the forms of law are the frequent subject of international claims. For numerous illustrations of this class of claims see 4 Moore Int. Arb. 3225 *et seq.* And see Moore Dig. Int. L. c. 21.

89. Taxes collected by a *de facto* revolutionary government cannot be again enforced by the titular government. The Guastini Case, Venez. Arb. (1903) Ralston Rep. 730.

The titular government has no right to collect taxes on property which have already been paid to a revolutionary government which had gained control over the portion of the national territory where the property is situated. Taxes so collected must be returned. The Santa Clara Estates Case, Venez. Arb. (1903) Ralston Rep. 397.

90. "A forced loan is a loan levied in accordance with law. It is equally distributed amongst all the inhabitants of the country, whether native or foreign. . . . As long as the foreigner is placed upon the same footing as the native he cannot complain. But if there be unfairness in the distributing of the loan or in its repayment, and if any preference be shown to the native, the foreigner has good cause for complaint." Rose's Case, Treaty with Mexico (1848), act of 1849; 4 Moore Int. Arb. 3421. See also Cole's Case, p. 3422, and many others cited in 4 Moore Int. Arb. 3409–3421.

The central government was held liable for a forced loan by one of the constituent states, the proceeds of which were used for the defense of the nation. The Beckman Case, Venez. Arb. (1903) Ralston Rep. 598.

91. Claim for failure of government to pay bonds was allowed. Payment at par was enforced and evidence was not allowed to show that bonds were delivered at forty per cent of nominal value where the contract of transfer stated that they were issued at par. The Compagnie Générale des Eaux Case, Venez. Arb. (1903) Ralston Rep. 271. But it was held to be a principle of public international law that the internal debt of a state, classified as a public debt, which is subject to speculations current amongst that sort of values which are acquired freely and spontaneously at very different rates of quotations which mark great fluctuations of their rise and fall, can never be the subject of international claims in order to obtain their immediate payment in cash. . . . To establish such a principle would put a premium on stock jobbing. The Ballastini Case, Venez. Arb. (1903) Ralston Rep. 503.

92. **Revolutionists.**— One class of claims

The right of the state to expel or to exclude foreigners cannot now be

frequently arising and involving many questions of law are those for damages for loss of property occasioned by acts of war by revolutionists. There are now pending over one hundred cases before the Spanish Treaty Claims Commission to adjust the claims of American citizens who suffered loss during the insurrection in Cuba. These cases involve all of the questions as to the liability of a government for the acts of its own officers and for the acts of belligerents. Numerous briefs have been submitted on both sides of the questions and from time to time decisions bearing on these points are being made by the commission and they should be consulted. See 3 Moore Int. Arb. 2978–2981, for other cases where the claims were not allowed, under the treaty with Mexico of 1868, on the ground that the depredations were committed by revolutionists. A similar case arose under the Spanish commission of 1871, for depredations by the Cuban insurrectionists. 3 Moore Int. Arb. 2981. Damages may be recovered for the seizure of property by a government which appropriates it to its own use during a revolution for military purposes, and which is damaged while in its possession. American Electric, etc., Co.'s Case, Venez. Arb. (1903) Ralston Rep. 35. A government will not be held liable for acts of revolutionists unless negligence is clearly proven. The Revesno Case, Venez. Arb. (1903) Ralston Rep. 753. The central government ultimately receiving property taken by revolutionists equitably should pay therefor. The Mazzei Case, Venez. Arb. (1903) Ralston Rep. 693. Under the admissions in the protocols, the umpire in the German cases held that Venezuela was liable for all injuries to property by revolutionists during the recent civil war. These admissions were held not to extend to persons and not to injuries to property at any other times. Claims for these injuries were to be determined by the general principles of international law. The Kummerow Case, Venez. Arb. (1903) Ralston Rep. 526. The Spanish commission held that Venezuela could not invoke the defense that under the rules of international law the titular government is not liable for the acts of revolutionists. The Padron Case, Venez. Arb. (1903) Ralston Rep. 923; The Mena Case, Venez. Arb. (1903) Ralston Rep. 931. Damages will not be allowed for injuries to persons or property committed by troops of unsuccessful revolutionists where there is no proof of any fault or lack of diligence on the part of the central government. The Aroa Mines Case, Venez. Arb. (1903) Ralston Rep. 344.

Successful revolutionists.— The government established by a successful revolution is responsible for the acts of that revolution from the time that it began. Bolivar R. Co.'s Case, Venez. Arb. (1903) Ralston Rep. 388. The acts of a revolution becoming successful are to be regarded as the acts of a *de facto* government. Dix Case, Venez. Arb. (1903) Ralston Rep. 7. The taking of neutral property by successful revolutionists gives rise to a claim against such government. Dix Case, Venez. Arb. (1903) Ralston Rep. 7. Claim for indemnity for killing of her husband, an American citizen, by an armed force of revolutionists, was allowed. Hughes *v.* Mexico, Treaty of 1848, Act of March 3, 1849, 3 Moore Int. Arb. 2972.

Sudden and unsuccessful uprising.— For case where claim not allowed see Pope's case 1849, 3 Moore Int. Arb. 2972.

Belligerents.— Neutral property destroyed by soldiers of belligerent with authorization, or in the presence of their officers, gives a right to compensation whenever the fact can be proven that said superiors had the means of preventing the outrage and did not make use of them. Kunhardt's Case, Venez. Arb. (1903) Ralston Rep. 63. The rule of international law is well established that a foreigner who resides in the country of a belligerent can claim no indemnity for losses of property occasioned by acts of war of the other belligerent. Perrin's Case, 4 Ct. Cl. 543, 12 Op. Atty.-Gen. (Stanberry) 21. The United States was held not liable for the acts of the Confederates during the Civil war. This question was not affected by the fact that the claimant was a Mexican citizen and that Mexico had not recognized the Confederacy as a belligerent. Prats *v.* U. S., No. 748, Convention with Mexico, 1868, 3 Moore Int. Arb. 2886.

Ordinary course of war.— A government is not liable for damages suffered by property which is situated in the track of war. Puerto Cabello R. Co.'s Case, Venez. Arb. (1903) Ralston Rep. 455. A person assumes all risks as well as advantages of his residence abroad and neither he nor his property can be exempted from the evils incident to a state of war. The Upton Case, Venez. Arb. (1903) Ralston Rep. 172. No claim can be allowed for property of neutrals accidentally destroyed in the course of war. The Volkmar Case, Venez. Arb. (1903) Ralston Rep. 258. Damages cannot be recovered as the result of a bombardment as a necessary act of war. American Electric, etc., Co.'s Case, Venez. Arb. (1903) Ralston Rep. 35. Damages will not be allowed for interruption to business in the territory where war exists, since it is an inevitable result of a state of war. Heny's Case, Venez. Arb. (1903) Ralston Rep. 14. Claim was made for burning of goods in the attack on Zacualtipan by the Miramon forces. It was held that the claim was an ordinary loss of war and also that it resulted from an attack of the Miramon forces which were not the *de facto* government. Schultz *v.* Mexico, Convention of 1868, 3 Moore Int. Arb. 2973. An agreement between the government and a railroad to the effect that if the railroad will carry the troops and munitions of war the government will see that the railroad is indemnified for all damages resulting therefrom is absolutely void as against public policy and because the railroad is bound as a public corporation to

questioned.[93] So far as the United States is concerned the decisions of the supreme

carry persons and freight as presented. No damages can be allowed to a railroad for suspension of traffic during period of active war operations. The Great Venezuelan Railroad Case, Venez. Arb. (1903) Ralston Rep. 632. For further discussion of claims against governments arising out of or during war, both as to claims of its own citizens and citizens of other countries, see NEUTRALITY LAWS; WAR.

De facto government.— The Claim of Cuculla (3 Moore Int. Arb. 2873) for loans to the Zuloaga government in Mexico was not allowed, it being held that the movement never amounted to a *de facto* government. See a collection of a large number of these claims in 3 Moore Int. Arb. 2881–2886.

De facto officers.— The goods of the claimant were seized and he was imprisoned by a revolutionary body at the time in the control of the department. The rebellion was afterward suppressed; objection was made to the claim on the ground that the parties committing the depredations were private individuals. The claim was allowed. Dr. Baldwin's Tehuantepec Claim, Convention with Mexico, 1839, 3 Moore Int. Arb. 2859.

The military commander at Matamoras, Mexico, promulgated certain tariff regulations during the period of three years and collected the duties to aid in the suppression of a rebellion in that quarter. Claimant imported his goods and paid duties during this period. When these duties were abrogated by a decree of the federal government the goods were seized by it with a view to confiscation as having been illegally imported. The claim was allowed. Speyers' Claim, 3 Moore Int. Arb. 2868.

Bonds of Confederate state.— Claim was made by a British subject based on a "cotton-bond loan," alleging that the United States had seized the cotton hypothecated for the loan. The claim was dismissed. Barrett *v.* U. S., 3 Moore Int. Arb. 2900.

Breach of a promise to do an illegal act cannot be made the basis of a claim, and the promise of a government to annul an existing contract containing the clause that "doubts and controversies that may arise in consequence of this contract shall be settled by the courts of the Republic and in conformity with its laws" is a promise to do an illegal act. American Electric Co.'s Case, Venez. Arb. (1903) Ralston Rep. 246.

Claim for mob violence was not allowed. Lagueruene's Case, 3 Moore Int. Arb. 3027. See also Derbec's Case, 3 Moore Int. Arb. 3029.

Claims against Mexico based upon acts of the Maximilian authorities were rejected by the commission under the convention of 1868 with Mexico. Jansen *v.* Mexico, 3 Moore Int. Arb. 2902.

Claims are not usually allowed for arrests under military authority or for detentions occasioned thereby, except where it is apparent that the action was wanton or unnecessary, or, particularly, if directed against the nationality of the claimant. 3 Moore Int. Arb. 3265–3332.

Claims arising out of breaches of the neutrality laws see NEUTRALITY LAWS.

Claim for loss of cotton destroyed by Confederates in Louisiana and Mississippi was dismissed upon demurrer. Hanna *v.* U. S., Treaty with Great Britain (1871), 3 Moore Int. Arb. 2982.

Damages for unlawful killing was allowed. The Di Caro Case, Venez. Arb. (1903) Ralston Rep. 769.

For frauds and denial of justice by judicial officers claimants were allowed to recover. The Rebecca and other cases, 3 Moore Int. Arb. 3008 *et seq.*

Pillage and violence by soldiers under command of officers is an act of the government for which it is liable. The Roberts Case, Venez. Arb. (1903) Ralston Rep. 142.

Plundering soldiery not under command of officer.— The claim was disallowed on the ground that it was not shown to which party of the two contending forces the pillagers belonged — whether to the government or the revolutionists; it also appeared that the soldiers were mere marauders, not under the command of any officer and that they could not be restrained owing to a fight going on in another part of the town. Vesseron's Case, Convention with Mexico (1868), 3 Moore Int. Arb. 2975.

Where doubt existed as to identity of pillagers the claim was allowed. The case was distinguished from that of a loss resulting from a territorial or Civil war carried on by two parties acknowledging each other as belligerents. The depredation appears to have been committed by a military chief afterward affiliated with the existing government. Miller *v.* Mexico, Convention of 1868, 3 Moore Int. Arb. 2974.

For cases based on acts of governors, customs officials, pilots, etc., see 3 Moore Int. Arb. 3018–3027.

Prize cases.— For illegal seizures of vessels see WAR.

93. Right of expulsion recognized.— The Maal Case, Venez. Arb. (1903) Ralston Rep. 914; The Paquet Case, Venez. Arb. (1903) Ralston Rep. 265.

"By the law of nations, whenever a war breaks out between two countries, the persons and property of one of them found within the dominions of the other are liable to detention and capture. . . . This absolute right, however, has not been very rigorously insisted upon in modern times. . . . But however absolute this right may be, all writers on public law agree that it may be modified and regulated by treaty." While as a general rule the breaking out of war abrogates treaties, this is not true where it is apparent that the treaty contemplated an intervening war. In such case the obligation of the treaty is the stronger, the occasion having arisen for its enforcement. Therefore, claims for expulsion, in time of war, must be considered with reference to the rules of international law and with reference to treaty obligations. 3 Moore Int. Arb. 3333–3359.

court are conclusive on that point.[94] But the expulsion must be in accordance with law[95] and not in violation of any treaty;[96] and the government of the person expelled is entitled to know the reasons for such action, and if such explanations are refused the action is to be considered arbitrary and indemnity must be paid to those expelled or prevented from entering.[97]

X. CLAIM AGAINST CENTRAL GOVERNMENT OF A FEDERAL UNION.

How far the central government of a federal union is responsible for the acts of the constituent states depends very largely upon the nature of the union. The union might be so close that there would be but one government, and on the other hand the constituent members might be so loosely bound together that each would retain its rights and responsibilities so that foreign governments could deal with them and collect claims from them.[98] Claims have been allowed against the central government where the offense was committed or the debt was due by one of the constituent members, and on the other hand responsibility has been repudiated by central governments.[99]

XI. INTERNATIONAL TRIBUNALS.

A. Exist Only by Treaty. No international tribunal exists or ever has existed except by virtue of a treaty creating it.[1]

B. Procedure — 1. In General. The procedure of the court is determined by the treaty creating it, or, in the absence of definite rules of procedure prescribed in the treaty itself, it must formulate its own.[2] But as a general rule international tribunals are not bound as strictly as municipal courts are by the rules of evidence,[3] and they are their own judges as to the methods of presentation of claims.[4]

94. Fong Yue Ting *v.* U. S., 149 U. S. 698, 13 S. Ct. 1016, 37 L. ed. 905; Nishimura Ekiu *v.* U. S., 142 U. S. 651, 12 S. Ct. 336, 35 L. ed. 1146; Yick Wo *v.* Hopkins, 118 U. S. 356, 6 S. Ct. 1064, 30 L. ed. 220. See 2 Butler Treaty-Making Power, § 381, for collection of authorities and review of the Chinese exclusion cases.

95. Expulsion under circumstances of contumely and upon mere suspicion will sustain a claim. The Oliva Case, Venez. Arb. (1903) Ralston Rep. 771.

96. 3 Moore Int. Arb. 3333–3359. See 4 Moore Dig. Int. L. § 550 *et seq.*; 7 Moore Dig. Int. L. § 1018.

97. The Paquet Case, Venez. Arb. (1903) Ralston Rep. 265. See also the Boffolo Case, Venez. Arb. (1903) Ralston Rep. 696; The Maal Case, Venez. Arb. (1903) Ralston Rep. 914.

98. The Montijo Case, 2 Moore Int. Arb. 1421; The Beckman Case, Venez. Arb. (1903) Ralston Rep. 598.

A claim against a municipality is not a claim against the central government. Thomson-Houston Co.'s Case, Venez. Arb. (1903) Ralston Rep. 168.

Claim for breach of contract by municipal corporation was not allowed in La Guaira Electric Light, etc., Co.'s Case, Venez. Arb. (1903) Ralston Rep. 178.

99. The Montijo Case, 2 Moore Int. Arb. 1421. This question is discussed at length in 1 Butler Treaty-Making Power 141 *et seq.*, in which the position of the United States on this question is fully set forth. In the Montijo Case, *supra*, the United States asserted a claim against the Republic of Colombia for an obligation of the state of Panama. The matter was submitted to arbitration and the umpire, Mr. Bunch, British Minister at Bogota, awarded in favor of the United States.

1. No court can be created except by a sovereignty having jurisdiction to establish one and there is no sovereignty which has jurisdiction over the other party to the controversy which itself is a sovereignty not having jurisdiction over the other party.

2. **In the case of The Hague court** the procedure is to some extent directed by the treaty itself.

The treaty of 1871 with Great Britain for the adjustment of the Alabama claims and other differences prescribed certain rules of evidence and certain rules of procedure. 17 U. S. St. at L. 863.

3. Frelinghuysen *v.* Key, 110 U. S. 63, 3 S. Ct. 462, 28 L. ed. 71. In the absence of an express provision to the contrary, an international tribunal has the right to adopt whatever means it determines upon to obtain evidence. The Franqui Case, Venez. Arb. (1903) Ralston Rep. 934.

International mixed tribunals are not bound by the strict rules of evidence. The Caldera Case, 15 Ct. Cl. 546; The Meade Case, 2 Ct. Cl. 224; The Faber Case, Venez. Arb. (1903) Ralston Rep. 600.

4. A "claim" must at least be sufficient to inform the respondent of the right claimed or the wrong inflicted. Reception of Evidence and Claims, Venez. Arb. (1903) Ralston Rep. 651.

On questions of pleading see Williams *v.* U. S., No. 45, Davis' Report 30, 3 Moore Int. Arb. 2349; Rhind *v.* U. S., No. 242, Davis Report 33, 3 Moore Int. Arb. 2350.

And likewise international tribunals are the sole judges of the extent of their jurisdiction.[5]

2. DAMAGES. The rules for ascertaining damages in international tribunals in cases of contract are generally the same as those prevailing in municipal courts.[6] The facts of each case must of course largely govern. The conventions for the settlement of these international claims sometimes contain restrictions as to the damages or rules to be applied in their consideration, and these control.

3. INTEREST. How far interest shall be allowed is generally a question for the tribunal to determine although it is frequently governed by the treaty.[7] As a

5. See the Alabama Arbitration, 1 Moore Int. Arb. 495 *et seq.*; The Venezuelan Arbitrations before The Hague Tribunal (1903), Penfield Rep. See also 1 Moore Int. Arb. p. 324; 2 Moore Int. Arb. p. 1141, 1143; 3 Moore Int. Arb. p. 2277.

The "most-favored-nation" clause contained in a treaty between the governments parties to the protocols does not oblige the commission to follow, in favor of the subjects of the claimant nation, the interpretations made by other commissions of their protocols. The Sambiaggio Case, Venez. Arb. (1903) Ralston Rep. 666.

The following rules of interpretation were adopted by the umpire in the Italian-Venezuelan Commission of 1903: "If two meanings are admissible, that is to be preferred which is least for the advantage of the party for whose benefit the clause is inserted; the sense which the acceptor of conditions attaches to them ought rather to be followed than that of the offerer; two meanings being admissible, preference is given to that which the party proposing the clause knew at the time was held by the party accepting it; doubtful stipulations should be interpreted in the least onerous sense for the party obligated; conditions not express cannot be invoked by the party who should have clearly expressed them." "Treaties are to be interpreted generally *mutatis mutandis* as statutes and, in the absence of express language, are not given a retroactive effect." The Sambiaggio Case, Venez. Arb. (1903) Ralston Rep. 666. See this case for a full discussion of the rules of interpretation and a compilation of the authorities.

6. **Damages** generally see DAMAGES.

Proximate and remote damages.— Governments, like individuals, are responsible only for the proximate consequences of their acts. Dix Case, Venez. Arb. (1903) Ralston Rep. 7. Remote and consequential damages not recoverable. 6 Op. Atty.-Gen. 530 (Cushing). By the Geneva tribunal the distinction between immediate and remote (or consequential) damages was maintained: the latter being held not to be properly chargeable. 2 Wharton Dig. Int. L. 707.

Profits may be recovered where they are not uncertain or remote. The Martini Case, Venez. Arb. (1903) Ralston Rep. 819. Probable future profits cannot be allowed. Triunfo Co.'s Case, For. Rel. U. S. (1902) 872. Speculative and conjectural profits cannot be recovered. The Oliva Case, Venez. Arb. (1903) Ralston Rep. 771.

In cases arising in tort, as in the municipal law, the rule for the allowance of damages is more liberal. Punitive damages are awarded where the facts warrant it. Van Bokkelan *v.* Hayti, Protocol of 1888, 2 Moore Int. Arb. 1807. In this case the claimant was imprisoned without legal authority for about fifteen months. An award of sixty thousand dollars was made. Where the wrongful acts are wholly without justification or excuse, damages may be awarded in excess of those directly the result of such acts. Roberts' Case, Venez. Arb. (1903) Ralston Rep. 142, where five thousand dollars was allowed in addition to about three thousand dollars actual damages. Actual but not punitive damages may be allowed for an arrest by mistake where apology is promptly made. The Torrey Case, Venez. Arb. (1903) Ralston Rep. 162.

7. See cases and authorities cited *infra*, this note.

Interest not allowed on a claim if not demanded in the claim itself. The Postal Claim, Venez. Arb. (1903) Ralston Rep. 270.

Interest will only be allowed against a government from the time of the demand for compensation, unless the delay in presenting the claim is satisfactorily explained. De Garmendia's Case, Venez. Arb. (1903) Ralston Rep. 10; Cervetti Case, Venez. Arb. (1903) Ralston Rep. 658.

In the Italian cases in the Venezuelan Arbitrations the umpire held regarding interest: Interest on claims can only be allowed from date of presentation to the government or to the commission in the absence of direct contractual relations with the government. Unless otherwise agreed by contract, interest will be allowed at three per cent from such presentation to Dec. 31, 1903. Under the protocols no interest can be allowed on awards. The Cervetti Case, Venez. Arb. (1903) Ralston Rep. 658.

The umpire in the German-Venezuelan Arbitration made the following rulings regarding interest: No interest *eo nomine* will be allowed on claims based solely upon injuries to the person. Claims based upon contracts in which a certain rate of interest is stipulated shall carry interest at that rate from the date of breach. In all other contractual claims interest will be computed at the rate of three per cent from the date of the demand for payment of damages for the breach. Claims for wrongful seizures of or injuries to property shall bear interest only from the date of demand for payment of

general rule the United States does not pay interest on any debts of the government, except in case of stipulation to that effect or where it is given by act of congress; acts of congress authorizing the settlement of claims according to "equity" or "equity and justice" do not give interest.[8]

4. Attorney's Fees and Costs. The commission of arbitration may allow attorney's fees and costs and damages occasioned by bringing of an unfounded action by the government.[9]

5. Prescription and Laches. Claims may be barred by prescription for failure to present them,[10] but not necessarily when there have been no laches.[11]

C. Fraudulent Claims. There have been instances where fraudulent claims have been asserted and carried to a successful termination before an international tribunal, and in such a case it is proper for the government which receives the award to either reopen the case or return that portion of the award which has not been distributed.[12]

damages, and at the rate of three per cent per annum. Whenever interest is allowed it shall be computed to and including Dec. 31, 1903, the date of the probable final awards. Under the protocols the commission had no power to allow interest on awards. The Christina Case, Venez. Arb. (1903) Ralston Rep. 520.

The umpire in the Swedish arbitration allowed interest at five per cent "from the date that the claimants were proved to have been in their right." The Christina Case, Venez. Arb. (1903) Ralston Rep. 99.

Under the terms of the protocol between Great Britain and Venezuela, interest was not allowed on the awards from the date thereof until paid. The Motion for Interest, Venez. Arb. (1903) Ralston Rep. 413.

8. 7 Op. Atty.-Gen. 523 (Cushing). In general, the government, which is always to be presumed to be ready and willing to discharge its obligations, pays no interest; yet, from considerations of state policy, it has sometimes, as in the case of claims under the act of 1814 (6 U. S. St. at L. 139) allowed it. 5 Op. Atty.-Gen. 105 (Johnson); 5 Op. Atty.-Gen. 138 (Johnson).

9. The Monnot Case, Venez. Arb. (1903) Ralston Rep. 170; The Triunfo Co.'s Case, For. Rel. U. S. (1902) 872.

Claims for consul fees in the prosecution of a claim are not allowed. Orinoco S. S. Co.'s Case, Venez. Arb. (1903) Ralston Rep. 72.

Expenses of translation in preparation of claim allowed. Asphalt Co's Case, Venez. Arb. (1903) Ralston Rep. 331.

Fee agreements.— A commission constituted in pursuance of a treaty to adjust disputed claims is a quasi-court, and a fee agreement to prosecute a claim for a fixed compensation, or for a reasonable percentage of the amount recovered is not illegal, immoral, or against public policy. Wright *v.* Tebbitts, 91 U. S. 252, 23 L. ed. 320. An agreement to pay twenty-five per cent of a claim, made before the treaty of Washington of 1871, was not affected by section 18 of the act of June 23, 1874, creating the court of commissioners of Alabama claims, creating restrictions on fee agreements. Bachman *v.* Lawson, 109 U. S. 659, 3 S. Ct. 479, 27 L. ed. 1067.

10. Claims may be barred by failure to present within a reasonable time. The peculiar circumstances of each case govern. See the very elaborate opinion in Williams *v.* Venezuela, No. 36, United States and Venezuelan Commission, Convention of 1885, 4 Moore Int. Arb. 4181, 4199. Claim was disallowed when presented forty-three years after its inception. The Spader Case, Venez. Arb. (1903) Ralston Rep. 161.

Local laws of prescription cannot be invoked to defeat an international claim. Nevertheless the principle of preseription will be recognized internationally. The Gentini Case, Venez. Arb. (1903) Ralston Rep. 720. See The Tagliaferro Case, Venez. Arb. (1903) Ralston Rep. 764, where a claim thirty-one years old was held not barred, the government having had knowledge of it. To same effect is The Giocopini Case, Venez. Arb. (1903) Ralston Rep. 765.

Prescription must be pleaded. The Daniel Case, Venez. Arb. (1903) Ralston Rep. 507.

11. An international claim is not barred by preseription when it appears that there have been no laches on the part of claimant or his government in its presentation. The Stevenson Case, Venez. Arb. (1903) Ralston Rep. 327. In this case the claim arose in 1869.

12. See the Gardner Case (under the Mexican Claims Commission in 1849), 2 Moore Int. Arb. 1255; the Venezuela Commission of 1868–1869, 2 Moore Int. Arb. 1659. And see the cases of the La Abra Mining Co. and Weil awards. La Abra Silver Min. Co. *v.* U. S., 175 U. S. 423, 20 S. Ct. 168, 44 L. ed. 223 [*affirming* 29 Ct. Cl. 432]; U. S. *v.* Blaine, 139 U. S. 306, 11 S. Ct. 607, 39 L. ed. 183; Frelinghuysen *v.* Key, 110 U. S. 63, 3 S. Ct. 462, 28 L. ed. 71. These four cases grew out of the La Abra and Weil awards under the Mexican claims treaty of 1868. The various points decided in each of the cases appear in the syllabus. The general point maintained was that the United States would have the right to set aside awards, made by a commission and decided by an umpire in favor of the claimants and against the foreign nations, and return the money to the government against which the award was made, where there was clear proof that the testimony on which the claims were supported was false and had been fraudulently manufactured and obtained.

INTERNATIONAL OFFENSE. An offense against the law of nations.[1] (See INTERNATIONAL; and, generally, INTERNATIONAL LAW.)

1. Winspear *v.* Holman Dist. Tp., 37 Iowa 542, 544 [*citing* Bouvier L. Dict.]; Cook *v.* Portland, 20 Oreg. 580, 583, 27 Pac. 263, 13 L. R. A. 533.

Includes counterfeiting the securities or treasury notes of a foreign nation. U. S. *v.* White, 27 Fed. 200, 202. See COUNTERFEITING.